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Whose Common Good? Anti-Gender Backlash and the Constitutional Contest over Trans Recognition in Taiwan

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Abstract

The transnational anti-gender movement has learned to speak the language of constitutionalism. Organized backlash against transgender rights no longer relies solely on religious conviction or moral disgust; it increasingly frames itself as a defence of the family, the child, and the "common good," drawing on a political vocabulary that overlaps with the natural-law vocabulary that also animates contemporary common good constitutionalism (CGC). This paper asks who is entitled to define the common good—a question with three dimensions: whose interests the common good comprises, who has authority to specify it, and through what public procedures it is specified and contested. It argues that the anti-gender use of that vocabulary in Taiwan presents a contestable institutional specification (a *determinatio,* the natural-law term for the concrete specification of a general principle in positive law) of family and gender as though it were a non-negotiable precept of the common good, and thereby bypasses the burden of justification that the natural-law tradition itself attaches to *determinationes*. Focusing on Taiwan as a single, deeply documented case and using a theory-guided interpretive case analysis rather than a causal process-tracing design, the paper examines four distinct arenas—the 2018 referendums, the legislative settlement that followed Judicial Yuan Interpretation No. 748, administrative regulation and litigation over legal gender recognition (most visibly the 2021 Xiao E judgment and the case law that followed it), and "parental rights" rhetoric in curriculum politics—and shows that different mechanisms, rather than a single backlash, shaped the outcome in each. Against the backlash's exclusionary reading, the paper develops a gender-responsive account of the common good. Using Kimberlé Crenshaw's intersectionality as an analytical tool for identifying disadvantages that single-axis legal categories miss, and Martha Fineman's vulnerability theory as the normative bridge to the state's institutional responsibilities, it argues that a common good understood, with Aquinas and Finnis, as the good of the whole community and the set of conditions enabling each member's flourishing cannot coherently be specified by excluding trans persons from

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recognition and protection. The paper concludes by distinguishing what existing Taiwanese doctrine already holds, what can be defensibly argued as an extension of it, and what remains a legislative proposal, and sketches three pathways: a dignity-centered reading of Interpretation No. 748 that respects the decision's stated limits, a staged Gender Recognition Act that also reaches non-citizen residents, and a GRCGC argumentative strategy that supplements, rather than replaces, equality, personality-rights and proportionality arguments.

Keywords: anti-gender movement, common good constitutionalism, transgender legal recognition, Taiwan constitutional law, vulnerability and intersectionality, *determinatio*

1. Introduction

Taiwan is routinely described, both by its own officials and by outside observers, as the vanguard of LGBTQ rights in Asia: the first jurisdiction on the continent to recognize same-sex marriage, following Judicial Yuan Interpretation No. 748, issued in 2017 by the Justices of the Constitutional Court (then the Council of Grand Justices), and the subsequent Act for Implementation of J.Y. Interpretation No. 748 in 2019 (Judicial Yuan, 2017; Act for Implementation of J.Y. Interpretation No. 748, 2019). That narrative is accurate as far as it goes, but it obscures a second, less celebrated story that unfolded alongside the first: a sustained, tactically sophisticated backlash that used direct democracy, curriculum politics, and administrative gatekeeping to contain the scope of what the courts and the legislature had recognized. In November 2018, Taiwanese voters approved three referendum initiatives: one restricting Civil Code marriage to one man and one woman, one opposing *tongzhi* education (同志教育) in elementary and junior high schools as specified in the Enforcement Rules of the Gender Equality Education Act then in force,[1] and one favoring protection of same-sex couples through a form other than Civil Code marriage, while two competing pro-equality initiatives failed by wide margins (Central Election Commission, 2018b; Chang & Tang, 2026). The 2019

[1]The Chinese term 同志教育 (*tongzhi jiaoyu*) appeared in Article 13 of the Enforcement Rules of the Gender Equality Education Act as in force in 2018, which provided that gender equality education courses should cover affective education, sex education, and *tongzhi* education, and it was carried into the wording of Referendums 11 and 15. *Tongzhi* (literally "comrade") is a self-designation of sexual and gender minority communities in Chinese-speaking societies. Neither the Act nor the Rules defined the term, and it does not correspond precisely to the English expression "LGBT education"; this paper therefore retains the romanized term when referring to the 2018 regulatory and referendum language. After Referendum 11, the Ministry of Education amended Article 13 on April 2, 2019, replacing *tongzhi* education with education on understanding and respecting different genders, sex characteristics, gender traits, gender identities, and sexual orientations, together with education on the prevention of sexual assault, sexual harassment, and sexual bullying (Enforcement Rules of the Gender Equality Education Act, as amended 2019; Ministry of Education, 2019). The term *tongzhi* education thus no longer appears in the current regulatory text (see Section 4.5).

Enforcement Act that eventually delivered marriage rights did so through a separate statute rather than an amendment to the Civil Code itself. Same-sex couples register their unions as marriages with the household registration authorities under that statute, so that what differs is the statutory basis of the marriage rather than its legal status as a marriage. That choice of form has been read as shaped by the referendum outcome (Ho, 2019). And as of this writing, transgender Taiwanese still lack a dedicated Gender Recognition Act; legal gender change remains governed by a 2008 Ministry of the Interior administrative order that requires proof of gender-affirming surgery as a precondition for changing the sex marker on one's household registration. Since 2021, administrative courts have repeatedly declined to apply that requirement in individual cases, but the order itself has not been amended (Ministry of the Interior, 2008; Taipei High Administrative Court, 2021; Lin, 2025).

This paper takes Taiwan's experience as a single, richly documented case through which to examine a broader phenomenon: the appropriation, by organized opponents of gender-identity recognition, of the vocabulary of the "common good." Groups such as the Coalition for the Happiness of Our Next Generation (下一代幸福聯盟) did not present themselves in 2018 as defenders of private prejudice or as advocates of a sectarian religious position. They presented themselves as defenders of the family, the child, and the social order—as spokespeople, in other words, for a good shared by the whole political community, one that same-sex marriage and LGBTQ-inclusive education were said to threaten (Inquirer News, 2018). This rhetorical move deserves to be taken seriously rather than dismissed as mere pretext, because it overlaps with a vocabulary that is also central to a resurgent strand of constitutional theory: common good constitutionalism (CGC), most prominently associated with Adrian Vermeule's (2022) argument that constitutional interpretation should be oriented not toward the maximization of individual autonomy but toward classical goods such as justice, peace, and sound morals, understood as genuinely common rather than merely aggregated from private preferences. It is important to be precise about the claim being made. The paper does not contend that the Coalition or its allies adopted, cited, or were influenced by CGC as a jurisprudential theory; no evidence examined here establishes such a traceable intellectual link. The claim is narrower: the Taiwanese backlash used the common good as a political vocabulary and mobilizing frame whose conceptual structure—the family as a pre-political institution, the child as a ward of the community, social order as a shared good—resembles the premises of CGC closely enough that CGC's own theoretical resources can be used to evaluate it. Section 3 distinguishes these levels explicitly.

The central claim of this paper is that the anti-gender movement's use of common-good language in Taiwan rests on what this paper calls a category error—more precisely, the presentation of a contestable *determinatio* (in the Thomistic natural-law tradition, a concrete specification of a general principle in positive law, which admits more than one reasonable form; see Section 2.1) of family and gender as though it were an exceptionless precept of the common good—and that constitutional theory—properly reconstructed—can expose that error rather than simply oppose it from the outside with the vocabulary of liberal autonomy. Autonomy-based arguments for trans recognition have real force, and nothing in this paper suggests abandoning them. But the 2018 campaign is at least consistent with the view that appeals to family, children, and social order resonated with a broad electorate: Chang and Tang (2026), using post-referendum survey data, attribute part of the opposition to same-sex marriage to gender-role stereotypes, the value attached to reproduction and lineage, and perceived threats to social order. As Section 4.2 emphasizes, however, the referendum results alone cannot isolate the persuasive effect of any particular frame. If backlash actors can occupy the common-good register unopposed, trans-rights advocates are left arguing autonomy against community, individual against collective—a framing under which, in Taiwan's 2018 referendums at least, they were heavily outvoted. The more promising path, this paper argues, is to contest the content of the common good itself: to show that a common good rightly understood, and corrected by the internal resources of vulnerability theory and intersectionality, requires rather than forbids the inclusion of transgender persons. The argument is offered as an internal critique. It does not deny that natural-law traditions contain reasonable disagreement about marriage and family (Section 2.2); it holds that such disagreement must be conducted as argument about *determinationes*, subject to evidence and to public justification, rather than settled by appeal to the vocabulary of the common good itself.

Methodologically, the paper adopts a single-jurisdiction case study rather than a cross-national comparison. An earlier version of this paper described its method as process tracing. That label promised more than the available evidence can deliver, and the design is more accurately described as a theory-guided interpretive case analysis that uses process-tracing techniques only in a limited, descriptive sense (Collier, 2011; Beach & Pedersen, 2019): the careful reconstruction of sequences, actors, and institutional venues, without claiming to establish a single causal mechanism running from backlash rhetoric to legal outcomes. Taiwan offers a well-documented sequence of episodes within one constitutional order—a constitutional interpretation, a set of citizen-initiated referendums, a legislative settlement, a

growing body of administrative case law on legal gender recognition, and a continuing contest over curriculum—but these episodes involve different actors, rights claims, institutional venues, and mechanisms. Section 4 therefore treats them as distinct arenas (direct democracy, legislation, administrative regulation and adjudication, and education policy) rather than as stages of one causal chain, and Table 1 sets out, for each, the actors, the mechanism that most plausibly shaped the outcome, the evidence relied upon, and the limits of what that evidence can show. What unifies the episodes for the purposes of this paper is not a common cause but a recurring justificatory claim—that the family, the child, and social order, understood in a particular way, are common goods threatened by gender and sexual-minority recognition—whose structure the paper then evaluates normatively in Sections 5 to 7. The cost of this choice is generalizability: nothing in this paper claims that the patterns identified in Taiwan operate identically elsewhere, though the transnational literature reviewed in Section 3 suggests the underlying rhetorical strategy travels across very different legal systems. A second cost is that the paper's empirical claims are deliberately modest. Where the evidence permits only an observation of discursive similarity or temporal sequence, the paper says so, and its central normative claim is not made to depend on contested causal inferences about voter persuasion.

The paper proceeds in seven further parts. Section 2 sets out the vocabulary of common good constitutionalism and its natural-law lineage, distinguishes three levels at which common-good claims operate (basic principle, institutional *determinatio*, and evaluative judgment about a particular institution), and situates CGC in relation to political liberalism, republicanism, and deliberative democracy, with particular attention to the question of who has authority to define the common good. Section 3 describes how the transnational anti-gender movement has adapted this vocabulary into a portable rhetorical package, and distinguishes the common good as political vocabulary from CGC as a constitutional theory. Section 4 turns to Taiwan, examining a constitutional baseline (Interpretation No. 748) and four arenas: the 2018 referendums, the 2019 Enforcement Act, administrative regulation and litigation over legal gender recognition, and the ongoing "parental rights" framing of curriculum politics. Section 5 diagnoses the structure of the backlash's common-good claim and responds to rival natural-law readings. Section 6 develops a gender-responsive common good constitutionalism (GRCGC), specifying the distinct functions of Martha Fineman's (2008, 2010) vulnerability theory and Kimberlé Crenshaw's (1989, 1991) intersectionality and the route by which they enter CGC. Section 7 draws out doctrinal and legislative implications for Taiwan, separating

existing doctrine, doctrinal extension, and legislative proposal, and asking what GRCGC adds to existing equality, personality-rights, and proportionality analysis. Section 8 concludes.

2. Common Good Constitutionalism and the Grammar of the Common Good

2.1 The Classical Vocabulary

Common good constitutionalism, in its contemporary form, is a revival of a much older claim: that political and legal authority exists to secure goods that are genuinely shared by a community, not merely the sum of what its members individually happen to want. The lineage runs back through Thomistic natural law, in which law is defined as an ordinance of reason for the common good, made by the one who has care of the community (Aquinas, ca. 1265-1274/2006), through nineteenth-century *Staatslehre* and Lorenz von Stein's account of the state as the institutional expression of a social whole irreducible to its parts, to Vermeule's (2022) recent restatement of the tradition as a program for constitutional adjudication. On this account, constitutional texts should be read, where their language permits, in light of classical objective goods—including justice, peace, sound morals, and the protection of the vulnerable—rather than being cabined by an assumption that the state's only legitimate purpose is to maximize the sphere of individual choice.

Two features of this vocabulary matter for the present argument. First, it is explicitly teleological: it asks not only what individuals are free to do, but what ends a political community should pursue and what human flourishing actually consists in. Second, and consequently, it is a vocabulary that treats family, children, and social order as paradigm instances of common goods—goods that cannot simply be traded off against individual preference because they are constitutive of a community's capacity to reproduce itself across generations. It is precisely this second feature that makes the common-good register hospitable to conservative appropriation, since "family" and "children" are also the terms in which anti-gender movements have long framed their opposition to LGBTQ recognition (Ho, 2020).

Vermeule's (2022) own presentation of CGC is explicit that the approach is meant to displace what he characterizes as the "libertarian" and "originalist" orthodoxies that have dominated American constitutional theory, on the ground that both, in different ways, treat the maximization of individual liberty—whether current or as originally understood—as the master value against which all other goods must be justified. In place of that orthodoxy, Vermeule proposes that judges and officials should read constitutional text, structure, and history in light of substantive moral principles that conduce to the common good, which in his

programmatic statement include “respect for the authority of rule and of rulers,” “respect for the hierarchies needed for society to function,” “solidarity within and among families,” and “a candid willingness to ’legislate morality’” (Vermeule, 2020; see also Vermeule, 2022). Crucially for the present analysis, the family appears in this account not merely as one association among others but as a privileged site of the common good that the law should favor (Vermeule, 2020, 2022). It is this last element—the specification of the family as a privileged site of the common good—that supplies the conceptual bridge to anti-gender backlash argument, and that the present paper’s category-error diagnosis in Section 5 will target directly.

It is important, however, not to concede the field before the argument begins. Nothing in the classical natural-law tradition, properly read, entails that the common good is defined by whichever arrangement of family and gender roles happens to be historically dominant at a given moment. Aquinas’s own account of law distinguishes between the primary precepts of natural law, which are exceptionless, and the *determinatio* of those precepts into positive law, which requires prudential judgment responsive to changing social circumstance (Aquinas, ca. 1265-1274/2006; Vermeule, 2022). This distinction between primary precept and *determinatio* is not a minor technicality; it is the hinge on which the entire dispute between the backlash’s use of common-good language and the reconstruction offered in this paper turns. A primary precept—that political communities should secure justice, that children should be cared for, that vulnerable persons should be protected—binds across all times and circumstances precisely because it is stated at a level of generality that leaves open how it is to be institutionally realized. A *determinatio*—this particular marriage law, this particular curriculum requirement, this particular administrative rule governing gender markers on identity documents—binds only provisionally, as the prudentially best available specification of the underlying precept given present social, medical, and institutional knowledge. When backlash advocates argue that same-sex marriage or transgender legal recognition offends the common good, they are, whether or not they present the argument in these terms, making a *determinatio*-level claim: that this particular positive-law specification of family and gender is the uniquely correct realization of the underlying precept of family flourishing. That is a claim that can be right or wrong, and that has to be defended by evidence and argument about what actually serves family flourishing and child welfare under present conditions—not simply asserted by invoking the vocabulary of the common good as though the vocabulary itself settled the *determinatio* question. The content of the common good is therefore not self-evidently conservative; it is a site of argument, not a settled deposit that backlash movements can simply

invoke by name. This is the opening the present paper seeks to exploit: if the common good is genuinely about human flourishing, then whether the exclusion of transgender persons from legal recognition serves or undermines that flourishing is a question that has to be argued, not assumed. Sections 5 and 6 take up that argument directly. Section 3 first shows how the anti-gender movement has, in practice, avoided having to make it.

2.2 Three Levels: Principle, Determinatio, and Evaluation

The *determinatio* distinction can be sharpened into three levels at which a common-good claim may operate, and the argument of this paper depends on keeping them apart. The first is the level of basic principle: that political authority exists for the good of the whole community, that children are to be cared for and educated, that the vulnerable are to be protected. The second is the level of institutional specification, or *determinatio*: the particular rules of marriage, filiation, household registration, and curriculum through which a given legal order realizes those principles (Aquinas, ca. 1265-1274/2006, I-II, q. 95, a. 2; Finnis, 2011). The third is the level of evaluative judgment about a particular institution: the claim that this specification, here and now, realizes the underlying principle better than its alternatives. Claims at the first level are, within the tradition, close to uncontroversial. Claims at the second level are by nature plural, since more than one specification may be reasonable. Claims at the third level are contestable judgments that require reasons and evidence about how institutions actually function.

This three-level distinction also clarifies what the paper does and does not claim against its opponents. Natural-law thinkers disagree about family and sexuality, and some of that disagreement is principled rather than merely historical. The "new natural law" account associated with John Finnis and Robert George, for example, holds that marriage is a distinctive conjugal union whose comprehensive and procreative structure is intrinsic to the good it realizes, so that its opposite-sex character is not merely one *determinatio* among others (Finnis, 1994; Girgis et al., 2012). The paper does not claim that such a position is conceptually confused or unavailable within the tradition. Its claim, developed in Section 5, is more limited: when a contested third-level judgment of this kind is presented in public argument as though it were simply the first-level principle—so that disagreement with a particular institutional arrangement is cast as opposition to the family or to children as such—the move skips the justificatory step that the tradition itself requires for *determinationes*. A natural-law argument for a particular marriage or gender-registration rule must still be made at the level at which it operates, by showing why that rule better serves the shared goods in question for the whole

community, including those whom it burdens. In a constitutional order marked by reasonable pluralism, that argument must moreover be conducted in terms that can be publicly assessed, a point developed in Section 2.3.

2.3 Which Liberalism, Whose Authority? CGC among Rival Traditions

Framing the debate as one between "the common good" and "liberal autonomy" risks a false dichotomy, and it is necessary to say which liberalism this paper has in view. Liberalism is not without an idea of the common good. Rawls's political liberalism conceives of society as a fair system of cooperation among free and equal citizens, and the institutions that secure equal basic liberties, fair terms of cooperation, and the social bases of self-respect can themselves be understood as goods common to all citizens (Rawls, 2005). The target of this paper's critique is therefore not liberalism as such, but a narrower pattern in Taiwanese advocacy and public argument: reliance on autonomy and privacy as self-standing trumps, presented without an account of why the institutions at stake matter for the community as a whole. Taiwan's existing constitutional doctrines—equality under Article 7, personality and dignity under Article 22, and the proportionality principle under Article 23—remain indispensable, and Section 7.2 asks directly what, if anything, GRCGC adds to them.

A second and more serious gap concerns authority. Vermeule's CGC is not only an account of the content of the common good; it is also an account of political authority, one that counsels respect for rulers and a generous understanding of the state's power to pursue the common good (Vermeule, 2020, 2022). A reconstruction that changes the content of the common good while leaving this conception of authority untouched would be unstable. If the state may act on its own understanding of the common good, then whenever officials and the persons affected disagree about what the common good requires, the official view prevails, and a gender-responsive content offers no protection against a future government that specifies the common good differently. The title question—whose common good?—must therefore be split into three: whose interests are counted in the common good (content); who has authority to specify it (authority); and through what procedures that specification is made and can be contested (procedure). The earlier version of this paper addressed mainly the first.

Two traditions are especially useful for the second and third questions. Pettit's republicanism understands freedom as non-domination, the absence of exposure to another's capacity for arbitrary interference; on this view, power exercised in the name of the common good is legitimate only if it is forced to track the interests and ideas of those affected and is

subject to effective contestation (Pettit, 1997, 2012). Rawls's idea of public reason and Habermas's discourse theory, in turn, address how collective decisions acquire legitimacy under reasonable disagreement about the good life. For Rawls, fundamental political questions should be settled on grounds that all citizens can reasonably be expected to endorse (Rawls, 1997, 2005); for Habermas, the legitimacy of law depends on discursive procedures in which those affected can participate as both authors and addressees of the law, so that private and public autonomy are co-original (Habermas, 1996). GRCGC accordingly adopts three procedural commitments alongside its substantive ones. First, common-good claims made by the state, and by private actors seeking state action, must be stated as *determinationes* and supported by reasons and evidence about institutional function that are open to public assessment. Second, those burdened by a specification—here, transgender and sexual-minority persons—must have effective avenues of contestation, of which judicial review is one and participation in legislative and administrative processes is another. Third, a minority's basic standing cannot itself be made the object of a majoritarian *determinatio*, which is why direct-democratic votes on the scope of a minority's constitutional rights raise distinctive problems (Section 4.2). These commitments do not abandon the teleological structure of CGC, but they discipline its conception of authority by the requirement of non-domination. Whether this disciplined version remains Vermeulean is debatable; the paper claims only that it remains within the broader classical tradition, which has always tied the legitimacy of law to its being an ordinance of reason for the common good rather than a mere act of will (Aquinas, ca. 1265-1274/2006, I-II, q. 90, a. 1).

3. The Anti-Gender Movement's Appropriation of Common-Good Language

The transnational anti-gender movement is by now a well-documented phenomenon, with parallel formations across Europe, Latin America, North America, and Asia that share tactics, funding networks, and, increasingly, a common rhetorical repertoire (Ho, 2020). What distinguishes the contemporary iteration of this movement from earlier, more explicitly religious forms of opposition to LGBTQ rights is precisely its adoption of secular-sounding, communitarian argument. Rather than arguing that homosexuality or gender nonconformity is sinful, contemporary anti-gender campaigns argue that recognizing same-sex marriage, permitting gender-identity education, or allowing legal gender change threatens the family as the basic unit of society, confuses children about a stable and universal category of sex, and imposes a minority "ideology" on an unwilling majority (Ho, 2020). Each of these claims is framed as a claim about a good shared by the whole community—the family, the child, social

cohesion—rather than as a claim about the private moral convictions of the movement's own members.

This reframing performs at least three strategic functions. First, it broadens the movement's potential coalition beyond religious conservatives to include voters who may not share the underlying theological commitments but who respond to appeals about children's welfare or parental authority. Second, it allows the movement to contest LGBTQ recognition on ostensibly neutral, even constitutional, terrain—as a question of what the state owes to families and children—rather than conceding that it is asking the state to enforce a sectarian moral view, which would sit uneasily with liberal-constitutional commitments to religious neutrality. Third, and most relevant to this paper's argument, it positions the movement as the authentic voice of the "common good" against what it characterizes as a narrowly individualist, autonomy-obsessed rights discourse associated with LGBTQ advocacy—a framing that puts trans-rights advocates in the position of having to defend individual autonomy against an entire community's asserted interest, a contest in which, in Taiwan's 2018 referendums, autonomy-centered arguments fared poorly (Chang & Tang, 2026).

The appropriation is not merely rhetorical opportunism; it reflects a conceptual affinity between the anti-gender movement's communitarian self-presentation and the natural-law vocabulary that also underlies common good constitutionalism. Both traditions treat the family as a natural, pre-political institution with a claim on legal protection; both are skeptical of purely autonomy-based justifications for social arrangements; both invoke the language of human flourishing rather than mere preference-satisfaction. It is this affinity that makes the appropriation dangerous for CGC as a project, since it risks CGC becoming, in practice if not in principle, indistinguishable from the anti-gender movement's own program. It is also, however, what makes the appropriation vulnerable to internal critique: because the two traditions share a vocabulary, a mistake made within that vocabulary—rather than an argument mounted from outside it—can be identified and corrected. Section 5 develops this critique in general terms; Section 4 first grounds the discussion in the specific record of how the appropriation operated in Taiwan.

That affinity must not, however, be mistaken for identity. The expression "common good" can operate on at least three levels: as a general political value invoked across ideological lines; as a discursive strategy for mobilizing voters and framing policy disputes; and as a jurisprudential theory with specific normative premises, such as CGC. A political actor who invokes family values or children's welfare is not thereby committed to CGC, and evidence of

rhetorical similarity is not evidence of intellectual borrowing. The relation between the Taiwanese backlash and CGC could in principle be of three kinds: conceptual similarity (shared premises, independently arrived at), rhetorical borrowing (the deliberate adoption of a vocabulary from another source), or a traceable intellectual link (documented transmission of ideas from CGC or its natural-law antecedents to the movement). The primary record examined in Section 4—in particular the proponents' statements of reasons published in the official referendum gazette—is instructive on this point. Those statements do appeal to goods of the whole community: they describe the family as "the root of the state" (家為國之根本) and marriage as an institution under constitutional "institutional guarantee" (制度性保障), invoke "social harmony," and claim for their proposals a "high degree of public interest" (高度的公益性) and, in the case of Referendum 11, a "major public interest in protecting the physical and mental health of children and adolescents" (保護兒少身心健康之重大公共利益), defended through an explicit proportionality analysis under Article 23 of the Constitution (Central Election Commission, 2018a, pp. 2-3). The idiom, however, is that of Taiwanese constitutional doctrine—public interest, institutional guarantee, proportionality—rather than that of natural law or of CGC. The relation to CGC is therefore best described as conceptual similarity. The rhetorical borrowing that the evidence does show runs from domestic constitutional doctrine and from the transnational anti-gender repertoire documented by Ho (2020), not from CGC, and no evidence examined here establishes a traceable link between the Taiwanese movement and CGC as such, which in any case acquired its present prominence only after 2018. This paper's use of CGC is accordingly analytical rather than genealogical: it asks whether the backlash's justificatory claims would survive scrutiny on the terms of the tradition whose structure they echo. The finding that those claims were framed as public-interest claims under Article 23 also matters for Section 7.2, because it locates them at precisely the stage of constitutional review at which GRCGC claims to add something.

4. Taiwan's Constitutional Contest over Trans and Sexual-Minority Recognition

This section reconstructs a constitutional baseline and four arenas in which the scope of gender and sexual-minority recognition was contested in Taiwan between 2017 and 2026. Table 1 summarizes the actors, mechanisms, and evidence for each, and states what the evidence can and cannot establish. The arenas are treated as analytically distinct: an outcome in one arena is not assumed to have been produced by the same mechanism as an outcome in another.

Table 1

Arenas, Mechanisms, and Evidence in the Taiwanese Case

Arena (period)	**Principal actors and venue**	**Rights claim at stake**	**Mechanism most plausibly shaping the outcome**	**Principal evidence**	**What the evidence can and cannot show**
Constitutional baseline (2017)	Justices of the Constitutional Court; petitions by Chi Chia-wei and the Taipei City Government	Freedom of marriage and equality for same-sex couples	Constitutional review with a two-year legislative deadline	J.Y. Interpretation No. 748	Fixes the constitutional baseline; by its own terms does not extend to other matters, including legal gender recognition
Direct democracy (2018)	Coalition for the Happiness of Our Next Generation and allied groups; pro-equality proponents; Central Election Commission; electorate	Definition of Civil Code marriage; *tongzhi* education in schools	Citizen-initiated referendums under the thresholds lowered in 2017; organized mobilization; votes held with local elections	Referendum gazette (questions and statements of reasons); official results; post-referendum survey analysis (Chang & Tang, 2026)	Shows what was proposed, how it was publicly justified, and how many voted; cannot by itself isolate the persuasive effect of any frame on voters
Legislation (2019; amended 2023)	Executive Yuan; Legislative Yuan caucuses	Form and content of legal recognition of same-sex couples	Bargaining between a constitutional deadline and a referendum result; choice of a separate statute	Executive Yuan bill and competing caucus bills (2019); Enforcement Act and its amendment; Ho (2019)	Shows the form chosen, its timing, and the justifications stated in the bills; floor debates are not analyzed, so inferences about legislators' motives remain interpretive
Administrative regulation and litigation (2008-2026)	Ministry of the Interior; household registration offices; administrative courts; Constitutional Court; Control Yuan; TAPCPR	Legal gender recognition without surgery	Persistence of an administrative order; case-by-case judicial non-application; absence of legislation	2008 order; judgments of 2021, 2023, 2024; Constitutional Court ruling of 2023; reports of the Control Yuan investigation (2025)	Shows administrative persistence and individualized judicial relief; does not show that organized backlash caused the persistence
Education policy (2018-)	Ministry of Education; schools; parents' and religious groups	Content of gender equality education	Administrative implementation of Referendum 11, including the 2019 revision of the Enforcement Rules; "parental rights" framing	Referendum 11; 2019 amendment of the Enforcement Rules and its explanatory statement; Taipei City guidelines (2019); movement statements (Ho, 2020)	Documents the framing used and the regulatory response to Referendum 11; the paper does not trace its effect on classroom practice

Note. Compiled by the author from the sources cited in Section 4.

4.1 Interpretation No. 748 and the Emergence of Organized Backlash

On May 24, 2017, the Justices of the Constitutional Court (then the Council of Grand Justices) held in Judicial Yuan Interpretation No. 748 that the Civil Code's failure to permit same-sex couples to marry violated both the freedom of marriage and the guarantee of equality under Articles 22 and 7 of the Constitution, and gave the legislature two years to bring the law into conformity, after which the constitutional guarantee would take direct effect (Judicial Yuan, 2017). The decision was celebrated internationally as a landmark for LGBTQ rights in Asia, but it also functioned, domestically, as the catalytic event for an organized backlash that had not previously mobilized at scale. Chang and Tang (2026) argue that Interpretation No. 748, rather than settling public attitudes, agitated religious conservatives and precipitated a series of counter-mobilizations by anti-LGBT groups that had comparatively little prior political salience. A legislative reform in December 2017 that lowered the threshold for placing citizen initiatives on the ballot—requiring only that "yes" votes exceed "no" votes and constitute at least one-quarter of the eligible electorate—gave this newly mobilized coalition an unusually powerful and, as it turned out, well-timed instrument (Referendum Act, as amended 2017; Chang & Tang, 2026). Two cautions are needed. First, the interpretation expressly limited itself: its reasons state that it addresses only whether the Civil Code's failure to allow two persons of the same sex to form a permanent union of intimate and exclusive nature violates the freedom of marriage and the right to equality, and that it "does not extend to other matters" (Judicial Yuan, 2017, Reasons, para. 18). It established no standard for legal gender recognition. Second, the observation that organized backlash followed the interpretation is a claim about sequence; the paper relies on Chang and Tang (2026) and Ho (2019, 2020) for the stronger claim that the interpretation catalyzed mobilization, and does not independently test it.

The organizational vehicle for this backlash was the Coalition for the Happiness of Our Next Generation, which in 2018 proposed three referendum questions: to define marriage in the Civil Code as exclusively between one man and one woman, to protect same-sex partnerships through a law separate from the Civil Code rather than through marriage itself, and that the Ministry of Education and schools should not implement, at the elementary and junior high school levels, the *tongzhi* education (同志教育) then specified in the Enforcement Rules of the Gender Equality Education Act (Central Election Commission, 2018a; Chang & Tang, 2026). Each of these three proposals was framed publicly not as an assertion of a private religious conviction but as a defense of "family values" and of children's welfare—the

Coalition itself, celebrating its victory, described the results as "a victory of all people who treasure family values" (Inquirer News, 2018). This self-description previews the argumentative structure examined throughout this paper: the translation of a countermovement rooted largely in religious networks (Ho, 2020) into the register of a common good shared by "all people," positioned against a minority seeking what the movement characterized as special, individualized accommodation. The proponents' statements of reasons, published in the official referendum gazette, are consistent with this reading: they warned that Taiwan's "marriage and family culture" would suffer a major impact if the definition of marriage were changed, that *tongzhi* education in elementary and junior high schools would confuse the development of pupils' gender identity and sexual orientation, and that retaining the Civil Code definition while protecting same-sex couples through a separate law would minimize social costs (Central Election Commission, 2018a, pp. 2-3). What these statements invoke is a set of goods attributed to the community as a whole; what they do not do is argue why a particular institutional definition is required to secure those goods—the gap that Section 5 analyzes.

4.2 The 2018 Referendums: Direct Democracy as a Backlash Instrument

The referendums were held alongside Taiwan's nine-in-one local elections on November 24, 2018, a scheduling decision that turned the vote into what one scholarly account calls a "referendum war" fought across ten separate ballot questions (Chang & Tang, 2026). In response to the Coalition's three initiatives, pro-equality groups placed two competing questions on the same ballot: one asking whether the Civil Code itself should be amended to permit same-sex marriage directly, and another asking whether gender equality education—including content on gender diversity, sexual orientation, and emotional and sex education—should be included in the compulsory curriculum (Central Election Commission, 2018a).

The results were decisive. According to the Central Election Commission's official results, Referendum 10 (restricting Civil Code marriage to one man and one woman) passed with 7,658,008 votes in favor and 2,907,429 against; Referendum 11 (opposing *tongzhi* education in elementary and junior high schools) with 7,083,379 in favor and 3,419,624 against; and Referendum 12 (protecting same-sex couples through a form other than Civil Code marriage) with 6,401,748 in favor and 4,072,471 against. The two pro-equality initiatives failed: Referendum 14 (protecting same-sex marriage through the Civil Code) received 3,382,286 votes in favor and 6,949,697 against, and Referendum 15 (mandating gender equality education, including *tongzhi* education, at all stages of compulsory education) received 3,507,665 in favor and 6,805,171 against (Central Election Commission, 2018b). With 19,757,067 eligible voters,

the votes in favor of Referenda 10 to 12 amounted to roughly 38.8, 35.9, and 32.4 percent of the electorate, while those in favor of Referenda 14 and 15 amounted to roughly 17.1 and 17.8 percent.

Two features of this episode are of particular importance for the argument of this paper, and both require careful statement. First, the referendum questions were framed and publicly defended in the vocabulary of family and children rather than in the vocabulary of religious conviction: proponents argued that recognizing same-sex marriage under the existing Civil Code definition of marriage would alter the nature of the institution for everyone, and that teaching gender-identity content to elementary and middle-school children was developmentally inappropriate and usurped parental authority over moral formation (Central Election Commission, 2018a; M.-H. Chen, 2019). Second, the pro-equality initiatives received far fewer votes than the initiatives framed in terms of family and children. It is tempting to read this asymmetry as evidence that the family-and-children frame was more persuasive than the frame of rights and equality, and an earlier version of this paper drew that inference too quickly. The vote totals alone cannot support it. Voters' choices were plausibly shaped by religious identity, partisan mobilization around the concurrent local elections, views on education policy, broader social values, and the wording and sequencing of the questions themselves; the proponents' organizational resources and the logistics of a ten-question ballot are further confounders. Chang and Tang (2026) offer the most direct evidence on mechanism, arguing on the basis of post-referendum survey data that gender-role stereotypes, the importance attached to reproduction and lineage, and perceived threats to social order help explain opposition to same-sex marriage, including among some supporters of the governing party. That finding is consistent with the importance this paper attaches to the family-and-children register, but it concerns attitudes toward same-sex marriage rather than the comparative persuasiveness of competing frames. This paper therefore makes a weaker claim: in 2018 the family-and-children register was the principal public justification offered for restriction, it was left largely uncontested on its own terms, and the side relying on it prevailed. Whether contesting that register would have changed the outcome is a question the evidence does not answer.

It is worth noting, as contemporaneous commentary observed, that the referendum questions arguably exceeded what Taiwan's Constitution permits a majority to decide by direct vote at all: fundamental rights recognized by the Constitutional Court, including the freedom of marriage and equal protection under Interpretation No. 748, are not on their face subject to reversal by a subsequent popular vote, and the Central Election Commission's decision to place

the anti-LGBTQ questions on the ballot without reviewing their substantive constitutionality was itself criticized as an abdication (M.-H. Chen, 2019). The government subsequently and consistently maintained that the referendum results, however large, could not undo the Court's constitutional ruling (Inquirer News, 2018)—a position that shaped the compromise embodied in the 2019 Enforcement Act discussed next. From the perspective developed in Section 2.3, the episode also illustrates the procedural dimension of the title question: a direct vote by the majority on the scope of a minority's recognized constitutional rights is a procedure in which those burdened cannot effectively contest the specification adopted, which is precisely the configuration that a non-domination constraint on common-good authority is meant to prevent.

4.3 The Act for Implementation of J.Y. Interpretation No. 748: Settlement through a Separate Statute

Facing the May 24, 2019 deadline set by Interpretation No. 748 and a referendum result that made a direct Civil Code amendment politically untenable, the Legislative Yuan enacted the Act for Implementation of J.Y. Interpretation No. 748, which it passed on May 17, 2019 (Ho, 2019). The Enforcement Act provides that two persons of the same sex may form a "permanent union of intimate and exclusive nature" (具有親密性及排他性之永久結合關係) (art. 2), requires the parties to effect it by marriage registration (結婚登記) with the household registration authorities (art. 4), and applies to it, *mutatis mutandis*, the provisions of the Civil Code and of other laws concerning spouses and marriage (art. 24). It thereby grants same-sex couples virtually all of the substantive rights available to opposite-sex married couples under the Civil Code, with the significant exception, at the time of enactment, of joint adoption rights for children unrelated to either partner and, under the choice-of-law rules then applied, of marriage to foreign nationals whose home jurisdictions did not themselves recognize same-sex marriage (Act for Implementation of J.Y. Interpretation No. 748, 2019; Ho, 2019). Full joint adoption rights were extended only later, in 2023 (Act for Implementation of J.Y. Interpretation No. 748, as amended 2023).

The structure of the Enforcement Act—a freestanding statute rather than an amendment to the Civil Code's own marriage provisions—can plausibly be read as a negotiated settlement responsive to the referendum outcome: it satisfied the Constitutional Court's substantive requirement that same-sex couples receive equal treatment while formally honoring the referendum majority's stated objection to redefining "marriage" as such within the Civil Code (Ho, 2019). This is, in one sense, a genuine achievement, and it is the achievement for which

Taiwan is internationally celebrated. But it also suggests how the 2018 referendum result—itself justified in the vocabulary of family—may have shaped the form of the legal outcome even where it could not determine its substance: the anti-gender coalition did not prevent equal substantive rights, and it did not keep same-sex unions outside the legal category of marriage, since they are registered and recognized as marriages. What it secured was that the Civil Code's own definition of marriage remained unchanged, so that same-sex marriages rest on a separate statutory basis. The resulting distinction is one of legal form rather than of marital status; its significance is largely symbolic, and it tracks the coalition's stated concern about the meaning of marriage in the Civil Code. The settlement thus illustrates a pattern that may recur in the Taiwanese case: actors who lose on substance can still shape the form in which recognition is ultimately delivered. The bill documents support this reading more directly than the public debate alone. The Executive Yuan's draft, submitted on February 21, 2019, stated that it was designed both to implement Interpretation No. 748 and to conform to Referendum 12, citing the Referendum Act's requirement that the Executive Yuan submit a bill within three months of an approved legislative-principle initiative (Legislative Yuan, 2019a). Competing caucus bills went further. One, titled the "Enforcement Act for Referendum Case 12," would have created a non-marital "same-sex household member" status, on the ground that the social order built on long-established opposite-sex marriage "should not be lightly disturbed" (Legislative Yuan, 2019b); another invoked Referenda 10 and 12 as having established the governing legislative principles and confined the new status to the two partners, excluding changes to kinship and parent-child relations so as not to alter "the social order and ethics constructed by existing opposite-sex marriage" (Legislative Yuan, 2019c). The vocabulary of social order and family ethics thus entered the legislative arena directly. The mechanism, however, remained legislative bargaining under a constitutional deadline and a referendum result rather than public persuasion, and because the paper does not analyze the floor debates, inferences about why particular provisions of the final Act were adopted remain interpretive.

4.4 Legal Gender Recognition and the Unfinished Case of Xiao E

If the marriage-equality narrative shows backlash contained but not defeated, Taiwan's parallel struggle over legal gender recognition shows a still more incomplete picture, and one in which the anti-gender movement has been largely absent from the public record—displaced instead by administrative inertia. Since 2008, Taiwan's Ministry of the Interior has required transgender applicants seeking to change the sex marker on their household registration to submit a diagnosis of gender dysphoria from two psychiatrists and documentary proof of

gender-affirming surgery, including removal of the original genital organs (Ministry of the Interior, 2008; Taipei High Administrative Court, 2021). This administrative requirement was never enacted as primary legislation; it rests on an administrative order of the Ministry (內授中戶字第 0970066240 號令) rather than on any provision of the Household Registration Act, a fact that became legally significant when a transgender woman known publicly as Xiao E (小 E), supported by the Taiwan Alliance to Promote Civil Partnership Rights (TAPCPR)—the same organization behind the litigation that produced Interpretation No. 748—challenged the refusal of the Daxi District Household Registration Office in Taoyuan to change her legal sex marker without proof of surgery (Taipei High Administrative Court, 2021; Haime, 2021).

On September 23, 2021, the Taipei High Administrative Court ruled in Xiao E's favor (Judgment 109-Su-275). The court held that a person's legal sex is not permanently fixed by the external sex characteristics observed at birth; that the Ministry's 2008 order, insofar as it required surgery, imposed a condition not provided by statute and therefore violated the principle of statutory reservation (法律保留); that the surgery requirement also violated the principles of proportionality and equality; and that the court was accordingly not bound by the order. Applying the Constitution directly to the Household Registration Act, which provides for changes of registered sex without specifying the conditions, the court relied on psychiatric evaluation reports from two medical institutions and other evidence to find that Xiao E's female gender identity was longstanding, consistently expressed, and stable, and it ordered the registration office to record the change (Taipei High Administrative Court, 2021). Two features of the reasoning deserve emphasis. The court did not dispense with evidentiary requirements: it required, and found, a stable gender identity supported by expert evaluation. And it expressly stated that uniform standards for changes of registered sex should be set by the legislature, the court having applied constitutional requirements directly only because no such legislation existed. The office did not appeal, and Xiao E's legal sex was changed on November 18, 2021, making her the first transgender woman in Taiwan to change her legal gender without proof of surgery (Taiwan Alliance to Promote Civil Partnership Rights [TAPCPR], 2021).

Yet the ruling's effect was confined to Xiao E's individual case. The 2008 order was not withdrawn, and subsequent applicants have had to litigate individually. In February 2023, the Constitutional Court declined to rule on a referral from the Taipei High Administrative Court challenging the order and the relevant provisions of the Household Registration Act, reasoning, among other things, that judges are not bound by administrative orders they consider

unconstitutional and may simply decline to apply them (Constitutional Court, 2023). In September 2023, the Supreme Administrative Court held that the surgery requirement lacked a statutory basis, while indicating that registration offices may require evidence—such as more than one expert evaluation or diagnosis, persistence over a substantial period, and ongoing hormone therapy—that the applicant's gender identity is stable (Supreme Administrative Court, 2023). Following that approach, the Taipei High Administrative Court ruled in May 2024 that a transgender man, Nemo, could change his legal gender without surgery (Taipei High Administrative Court, 2024). In November 2025 the Control Yuan adopted an investigation report calling on the Ministry to review the order; the report noted that, as of April 30, 2025, registration offices had lost six of the seven cases decided (Lin, 2025); by July 2026, advocates counted twelve final judgments permitting surgery-free changes, with at least thirteen further cases pending in administrative appeal or litigation, while the order itself remained unamended (K.-H. Chen & Chiu, 2026). The judicial standard that has emerged is thus what may be described as a "soft" medical model—no surgery, but expert evidence of a stable gender identity—rather than self-determination. TAPCPR has pressed for legislation that would set standard and reasonable requirements for gender-marker change and end compulsory surgery and psychiatric evaluation (Haime, 2021), a proposal that as of this writing has not been enacted.

What is notable about this episode, now in its sixth year, in contrast to the marriage-equality fight, is that the obstacle to trans legal recognition in Taiwan has been less a single organized backlash coalition on the model of the Coalition for the Happiness of Our Next Generation than an administrative status quo defended by bureaucratic inertia, contested public opinion data, and an emergent gender-critical advocacy network. That contest over the empirical premise itself illustrates how central the common-good register has become even in a fight that lacks a unified movement organization. In 2024, a study published in a peer-reviewed journal reported that a large majority of a self-selected online sample opposed gender self-identification, and the finding was widely circulated by gender-critical and anti-gender movement actors (Chao et al., 2024). A subsequent investigation by a Taiwanese news magazine reported that the survey had been administered by an anti-gender advocacy association, distributed through convenience sampling primarily among networks sympathetic to that movement, and mistranslated in the published article in ways that concealed the wording of the original questions (Y.-L. Chen, 2024). The more methodologically defensible source is the Executive Yuan's annual random-sample telephone survey on gender-equality attitudes. Its 2024 wave (conducted by computer-assisted telephone interviewing of adults aged 20 and over

between April 19 and 23, 2024; n = 1,076) found that 47.4 percent of respondents agreed that transgender persons should be able to change the sex on their identity cards without undergoing genital-removal surgery, and that 28.2 percent of those who initially disagreed would agree if conditions such as a medical certificate were added (Department of Gender Equality, Executive Yuan, 2024). Y.-L. Chen (2024) reports that approximately 61.7 percent supported surgery-free change where psychological or other medical evidence is required, a figure consistent with combining the two responses. The 2025 wave (n = 1,077), however, found that only 40.6 percent agreed that transgender persons should be able to change the sex on their identity cards without removal of their sex organs, and the survey's sponsor noted that agreement with this item had remained below 50 percent in each of the three most recent waves (Department of Gender Equality, Executive Yuan, 2025). These figures must be read with care. They measure support for removing the surgery requirement—in the second case, conditional on medical evidence—and do not measure support for a registration system based on self-declaration alone, which is a different policy. They are thus evidence of support for something close to the soft medical model the courts have adopted, not for the self-determination model discussed in Section 7.3. This episode is instructive in its own right: it shows anti-gender actors extending their rhetoric of family and women's safety into the vocabulary of social-scientific authority, and it suggests that, once examined on representative terms, Taiwanese public opinion is more open to surgery-free recognition, at least where medical evidence is required, than the backlash's preferred framing implies—though unconditional support has not reached a majority, and there is no evidence of majority support for full self-determination. This bears on the theoretical argument developed in Section 6: it suggests that where trans recognition has not yet been captured by an unrepresentative backlash narrative, there remains real room for a gender-responsive common-good argument—and for accurate empirical argument—to shape both public attitudes and administrative policy before the terrain hardens into the adversarial posture that characterized the 2018 referendums.

4.5 "Parental Rights" and the Ideology Frame in Curriculum Politics after 2018

The 2018 referendum outcome on gender equality education did not end the curriculum dispute; it relocated it into the ongoing implementation of the Gender Equality Education Act and the broader 12-Year Basic Education curriculum guidelines. Backlash organizations continued to press two connected claims in the years following the referendum: first, that content addressing gender diversity, sexual orientation, or transgender identity constitutes a contested "ideology" rather than settled knowledge appropriate for compulsory schooling, and

second, that decisions about exposing children to such content belong to parents rather than to the state or to educators acting on the state's behalf (Ho, 2020). Both claims are recognizable variants of arguments that have recurred across the transnational anti-gender movement described in Section 3, and both continue to be framed in explicitly common-good terms: the claim is not that any individual parent objects to a particular lesson, but that the integrity of parental authority as an institution—itself said to be foundational to a healthy society—is at stake whenever the state mandates gender-identity content without an opt-out. As Table 1 indicates, the paper documents this framing but does not trace its effect on specific curriculum decisions.

The most concrete institutional response to Referendum 11 came through administrative implementation rather than legislation. To give effect to the referendum, the Ministry of Education amended Article 13 of the Enforcement Rules on April 2, 2019, deleting the term *tongzhi* education and providing instead that gender equality education should cover affective education, sex education, education on understanding and respecting different genders, sex characteristics, gender traits, gender identities, and sexual orientations, and education on the prevention of sexual assault, sexual harassment, and sexual bullying (Enforcement Rules of the Gender Equality Education Act, as amended 2019). The Ministry's explanatory statement justified the amendment partly by quoting the statement of reasons for Referendum 11 itself, which had argued that abolishing *tongzhi* education at the elementary and junior high levels would not prevent schools from respecting differences in gender identity and sexual orientation under Article 12 of the Gender Equality Education Act (Ministry of Education, 2019). The revision thus gave effect to the referendum by removing a contested label while retaining much of the content to which the label had referred. At the local level, guidelines issued by the Taipei City Government Department of Education in 2019 require schools to publish their annual gender equality education plans on their websites at the start of each term so that parents can understand them, and advise schools that invite outside instructors or groups to arrange for parents and teachers to observe such lessons (Taipei City Government Department of Education, 2019). Procedural accommodations of this kind are the most visible institutional trace of the "parental rights" frame; whether they have altered what is actually taught is a question this paper does not examine.

The "parental rights" frame is rhetorically effective for reasons closely related to those discussed in Section 4.2: it allows opponents of inclusive education to argue for restriction without having to defend a substantive claim that transgender or same-sex identities are morally

deficient, resting instead on a procedural claim about who has authority over children's moral formation. Yet this framing itself imports a strong, contestable claim about the content of the common good—namely, that the common good is better served by parental control over children's moral formation than by a curriculum in which the state, on behalf of the whole community including LGBTQ children, ensures that gender-diverse and same-sex-attracted students are represented and protected. As Section 6 argues, a gender-responsive account of the common good must reckon directly with this competing claim about educational authority, rather than treating it as a matter that can be settled by appeal to autonomy or privacy alone, precisely because "parental rights" and "family values" are themselves common-good arguments—and a persuasive response to them, in Taiwan's political culture, is more likely to succeed by contesting their content than by declining to engage the register in which they are made.

5. The Category Error Reconsidered: Diagnosing the Backlash's Use of the Common Good

The Taiwanese record set out in Section 4 shows a consistent pattern: backlash actors invoke the family, the child, and social cohesion as common goods threatened by trans and sexual-minority recognition, and this framing was the principal public justification offered by the side that prevailed in the 2018 referendums. This section argues that the pattern rests on what this paper terms a category error: the presentation of a third-level judgment about a particular institution (Section 2.2) as though it were a first-level principle of the common good. The term requires qualification. The error identified is not that traditionalist views of marriage and family are unavailable within natural-law thought—Section 2.2 acknowledged principled disagreement within the tradition—nor that those who hold them are insincere. It is an error in the structure of public argument: by treating disagreement about a *determinatio* as opposition to the family or the child as such, the argument relieves itself of the burden of showing why its preferred specification better serves those goods for the whole community. The diagnosis is thus a claim about the burden of justification, and it leaves open the possibility that a traditionalist position, properly argued at the right level, could be defended on its merits.

The error operates in four connected steps. First, the backlash argument treats "the family" as a single, static, natural-law-sanctioned institution whose current sociological form—specifically, an opposite-sex conjugal couple raising biologically related children—is itself the common good to be protected, rather than treating the family as an institution whose value lies

in the functions it performs (mutual care, the raising of children, provision against vulnerability) and which can, on the classical account's own terms, take more than one determinate form depending on prudential judgment about social circumstance (Aquinas, ca. 1265-1274/2006; Vermeule, 2022). This is precisely the *determinatio* move discussed in Section 2: the common good specifies exceptionless ends (the flourishing of family life, the protection of children, social solidarity) but leaves open, as a matter of prudential judgment responsive to circumstance, which positive institutional arrangements best serve those ends. Treating one historically dominant arrangement as itself the exceptionless precept, rather than one *determinatio* among possible others, is, on the tradition's own terms, a confusion of levels—unless it can be shown, by argument the backlash has not supplied in Taiwanese public debate, that the arrangement in question is uniquely required by the precept. Even on the new natural law account, which defends the conjugal conception of marriage as principled (Girgis, Anderson, & George, 2012), the question of legal gender recognition is a separate one: whether, and on what evidence, the state records a change of a person's registered sex is a further *determinatio* question, on which the conjugal account of marriage is not by itself decisive.

Second, the backlash argument treats trans and sexual-minority recognition as necessarily zero-sum with respect to family and child welfare—as though extending marriage, curricular inclusion, or legal gender recognition to a minority necessarily subtracts from the goods available to the majority family. But nothing in the substance of Interpretation No. 748, the Enforcement Act, gender-equality curriculum content, or a prospective Gender Recognition Act removes any protection, resource, or recognition from opposite-sex families; the claimed injury is almost entirely symbolic or definitional—a claim that the meaning of "marriage" or "family" is diluted by extension to others, not that any concrete good is redistributed away from existing families. Symbolic and definitional claims are not trivial—the public meaning of institutions matters within the classical tradition—but they must then be argued as such, and weighed against the concrete burdens that exclusion imposes. A common good genuinely oriented toward the flourishing of families in general, rather than toward the protection of one family's exclusive claim on legal vocabulary, has no obvious stake in withholding recognition from other families that perform the same functions of mutual care and child-rearing.

Third, a related move deserves separate treatment because of how prominently it features in Taiwan's post-2018 curriculum politics discussed in Section 4.5: the characterization of gender-identity content as "ideology" rather than as knowledge. This move performs important rhetorical work for the backlash, because it recasts a contested factual and pedagogical

question—what do educators know, and what should students be taught, about the diversity of gender identity and sexual orientation—as though it were instead a contest between two competing value systems of equal epistemic standing, one traditional and one imposed. Not every question about gender-diversity education is empirical. What content is age-appropriate, how parents are informed, and how the curriculum treats contested normative questions are genuine *determinatio* questions on which reasonable people may disagree. The point is narrower. The claim that gender diversity is well-documented human variation, rather than a doctrine competing with an equally well-supported alternative, is not itself a value judgment external to the common good; it is a predicate empirical and clinical judgment on which any coherent account of children's welfare—including the backlash's own stated concern for children—must depend. Labeling accurate information "ideology" does not neutralize this predicate judgment; it merely obscures the fact that the backlash's own preferred curriculum rests on a *contrary* empirical claim—that gender diversity is not a stable, well-evidenced feature of the population—without defending that contrary claim on its merits. A common good genuinely oriented toward children's flourishing cannot be indifferent to whether the empirical premises of its educational curriculum are true; treating the question as a matter of competing ideologies rather than a matter to be settled by the best available evidence is itself a *determinatio* error of the kind identified above, dressed in the vocabulary of epistemic humility rather than of family protection.

Fourth, and most consequentially, the backlash argument systematically excludes transgender and sexual-minority persons themselves from the community whose good is being defined. When the Coalition for the Happiness of Our Next Generation described its 2018 victory as belonging to "all people who treasure family values" (Inquirer News, 2018), the rhetorical move was to constitute "the people" as a community from which LGBTQ Taiwanese—who plainly also treasure family, and many of whom are themselves parents, children, and family members—were implicitly excluded from the reckoning of whose interests counted. This is not incidental to the argument; it is the argument's load-bearing premise. A common good, properly understood, must be common to the whole political community, including its most vulnerable and marginalized members—a requirement that is not an alien liberal import into natural-law theory but is arguably demanded by the tradition's own commitment to the common good as the good of the whole, not of a faction (Aquinas, ca. 1265-1274/2006, I-II, q. 90, a. 2; Finnis, 2011). A conception of the common good that is defined by, and available only to, a demographic or religious majority is not a common good

in the relevant sense at all; it is a majoritarian preference dressed in common-good vocabulary. Diagnosing this substitution is the first task of a gender-responsive common good constitutionalism; supplying the theoretical resources to correct it is the second, taken up in Section 6. This step also connects the substantive and procedural dimensions distinguished in Section 2.3: a conception of the common good that excludes some members from the reckoning will typically also exclude them from the process by which that good is specified.

6. Toward a Gender-Responsive Common Good Constitutionalism

6.1 Fineman's Vulnerability Theory as an Internal Corrective

Martha Fineman's vulnerability theory begins from the observation that the liberal legal subject—autonomous, self-sufficient, defined by capacity for independent choice—misdescribes the human condition, which is instead characterized by constant and universal susceptibility to harm, dependency, and change across the life course (Fineman, 2008). Because vulnerability is universal rather than confined to specifically disadvantaged groups, Fineman argues that the state's central task is not merely to guarantee formal equality of treatment among presumptively autonomous individuals, but to build and maintain the social institutions—families, schools, healthcare systems, workplaces—through which vulnerable subjects are given resilience: the ability to withstand and recover from the harms to which their vulnerability exposes them (Fineman, 2010). On this account, the state's obligations run not to an abstract autonomous chooser but to an embodied, relational, and vulnerable subject embedded in webs of dependency.

Vulnerability theory offers a natural corrective to common good constitutionalism precisely because both traditions share a rejection of thin, autonomy-only liberalism and a corresponding emphasis on the state's affirmative responsibility to secure the conditions of flourishing rather than merely to police non-interference. Where CGC in its unreconstructed form risks defaulting to a single privileged site of resilience-building—the traditional opposite-sex family—vulnerability theory redirects attention to the actual distribution of resilience and vulnerability across the population, asking which institutional arrangements in fact provide resilience to which persons, rather than assuming that a single family form performs this function for everyone. Applied to Taiwan's transgender population, this reframing is particularly illuminating. Transgender Taiwanese who cannot obtain legal gender recognition without undergoing surgery they may not want, cannot afford, or for which they are medically ineligible are left, by the state's own administrative design, in a condition of heightened and

state-produced vulnerability: mismatched identity documents expose them to discrimination in employment, healthcare, housing, and routine encounters with public administration (Amnesty International UK, 2021). Far from being a threat to social resilience, the extension of accessible legal gender recognition that does not require unwanted surgery is precisely the kind of resilience-conferring institutional response that vulnerability theory identifies as a core function of the state—and, by extension, a core requirement of the common good properly understood, since a common good indifferent to the resilience of some of its most exposed members fails on vulnerability theory's own terms to be common at all.

Vulnerability theory also supplies a more precise reply to the "parental rights" argument discussed in Section 4.5. If all children—not only the children of parents who object to gender-diverse curriculum content—are vulnerable subjects whose resilience the educational system has a responsibility to build, then an educational policy that withholds accurate information about gender diversity does not protect children's vulnerability in the abstract; it selectively withdraws resilience-building resources from LGBTQ children and children with LGBTQ family members, while treating the comfort of a subset of parents as the relevant common good. A gender-responsive account asks whose vulnerability the curriculum decision actually addresses, and finds that an exclusionary curriculum answers that question in favor of an already-advantaged majority.

Vulnerability theory's function in this argument should be stated precisely. It is a normative theory of state responsibility: it supplies a reason why the state must attend to the institutions through which resilience is distributed. It does not by itself identify which persons are disadvantaged by which institutions, or how; because it begins from a universal rather than a group-based conception of vulnerability, Fineman (2008) deliberately moves away from identity categories. That gap is what intersectionality, in the next subsection, is used to fill.

6.2 Crenshaw's Intersectionality as an Internal Corrective

Kimberlé Crenshaw's intersectionality, developed initially to describe how antidiscrimination law's single-axis frameworks erased the compounded and distinct injuries experienced by Black women—injuries not reducible to either race discrimination or sex discrimination taken separately—supplies a second, complementary corrective (Crenshaw, 1989, 1991). Intersectionality, in Crenshaw's sense, is not the additive claim that a person holds several identities at once. Its point is structural: legal and institutional categories built around a single axis of disadvantage can fail to register harms produced by the interaction of several

systems of power, so that the person most exposed falls between the categories meant to protect her (Crenshaw, 1989). Crenshaw (1991) further distinguished structural intersectionality, concerning how institutions combine to shape experience, from political intersectionality, concerning how political strategies organized around one axis can marginalize those at the intersection. In this paper intersectionality is used in that structural sense, as an analytical tool for identifying institutional configurations that existing legal categories fail to see. Applied to the anti-gender backlash examined in this paper, it performs two functions.

First, it exposes the false homogeneity of the "community" whose common good the backlash claims to represent. The Coalition for the Happiness of Our Next Generation's framing of the 2018 referendum results as a victory belonging to "all people who treasure family values" (Inquirer News, 2018) treats "the people" as an undifferentiated whole, obscuring that Taiwanese society includes transgender parents, gender-diverse children of religious families, indigenous and immigrant communities with their own kinship structures, and LGBTQ persons who are simultaneously members of the very families the backlash claims to be protecting. A common good defined without attention to how gender identity intersects with religion, class, ethnicity, migration status, and family role will systematically misdescribe whose interests it actually serves; it will describe the interests of a majority located at the intersection of cisgender identity and conventional family structure as though they were the interests of the whole.

Second, intersectionality corrects a parallel risk internal to trans-rights advocacy itself: the risk of treating "transgender Taiwanese" as a single undifferentiated category whose needs are adequately captured by a single legal reform such as marriage equality or a Gender Recognition Act. The point can be made concrete by considering a transgender woman employed in Taiwan as a migrant worker under the Employment Service Act. Such a worker does not merely "have two identities"; she stands at the junction of several institutions, each organized around a different classification. First, the line of case law that began with Xiao E operates through the household registration system, which applies to nationals with household registration. Taiwan-issued identification for foreign nationals follows the gender marker in the holder's passport—so closely that a foreign passport holder with an "X" marker can have it reflected on Taiwanese documents, an option unavailable to citizens (Quinan & Chen-Dedman, 2023)—and that marker is controlled by her state of nationality. The domestic route to legal recognition is therefore structurally unavailable to her, however favorable the case law becomes. Second, her lawful residence is tied to authorized employment, and the Employment

Service Act sharply restricts a migrant worker's ability to change employers (Employment Service Act, arts. 53, 59), so that challenging an employer's treatment risks the loss of both work and residence. Third, migrant workers in manufacturing, construction, and institutional care commonly live in accommodation arranged by employers under a living-care service plan that employers must prepare under the Regulations on the Permission and Administration of the Employment of Foreign Workers. The Ministry of Labor's standards for that plan calculate the required toilet provision separately for male and female residents and require sanitary facilities to be separated by sex (Ministry of Labor, 2026, pt. 2(1), App. 1, II.4); in such settings the sex recorded on her documents can determine which facilities she may use and, in practice, where she is housed. The resulting disadvantage cannot be reduced to discrimination "because she is transgender" or "because she is a migrant." It is produced by the interaction of a nationality-based registration system, an employment-tied residence regime, and sex-segregated institutional housing, and it would survive even an ideal Gender Recognition Act drafted, as current proposals implicitly are, around citizens with household registration. A parallel analysis applies to non-binary persons, for whom the obstacle is the binary structure of the household registration sex field itself rather than the evidentiary requirements for moving between its two values. A gender-responsive common good constitutionalism must therefore resist collapsing "trans inclusion" into a single doctrinal fix, and must instead ask, at each point of decision, which specific configuration of institutions is actually before the court, the legislature, or the administrative agency—a methodological commitment that intersectionality supplies and that unreconstructed CGC, oriented toward broad categorical goods such as "the family" or "the child," does not naturally provide on its own.

Together, but performing different functions, Fineman's vulnerability theory and Crenshaw's intersectionality correct common good constitutionalism from within rather than displacing it: they retain CGC's core commitment to objective, shared goods and to the state's affirmative responsibility for human flourishing, while supplying the resources—attention to the actual distribution of vulnerability and resilience, and attention to the compounded, non-homogeneous character of any political community—that expose the backlash's majoritarian, exclusionary account of the common good as a *determinatio* error rather than a faithful application of the tradition. Section 6.4 explains how the two are integrated, and why their complementarity does not by itself amount to integration.

6.3 Trans Inclusion as Constitutive of, Not a Threat to, the Common Good

Bringing Sections 6.1 and 6.2 together yields the paper's central theoretical claim: a common good genuinely responsive to vulnerability and attentive to the intersecting composition of the political community cannot be secured by excluding transgender persons from legal recognition and protection, because their inclusion is part of what constitutes that good rather than a cost to be weighed against it. Three connected reasons support this claim; its normative basis within the tradition is set out in Section 6.4.

First, on vulnerability theory's own terms, the resilience of the whole community is enhanced, not diminished, when its institutions extend recognition and protection to vulnerable members rather than concentrating resilience-building resources on an already-resilient majority. A society in which transgender citizens can obtain accurate identity documents, marry the partners of their choice, and receive accurate education about gender diversity is, *ceteris paribus*, a more resilient society—one with fewer members exposed to the compounding harms of legal invisibility, family rejection, employment discrimination, and health disparities that follow from non-recognition (Amnesty International UK, 2021).

Second, on intersectionality's terms, transgender Taiwanese are not external to the family, the community, or the nation whose good is in question; they are its members, its children, its parents, and its citizens. Excluding them from legal recognition does not protect "the family" as an institution; it degrades the actual, existing families of which transgender persons are already a part, and it teaches every family—including families with no transgender members at present—that recognition and protection under the common good are conditional and revocable rather than secure. A common good that can be withdrawn from any of a community's constituent groups is, for that reason, a fragile and untrustworthy good even for those who currently hold its protections.

A further implication follows from reading Sections 6.1 and 6.2 together rather than in isolation. Vulnerability theory alone might be satisfied by a paternalistic state that protects transgender persons as an undifferentiated vulnerable class without attending to how that vulnerability is compounded by religion, class, migration status, or family role; intersectionality alone might generate an accurate map of compounded disadvantage without supplying the affirmative, teleological account of why the state owes resilience-building institutions to vulnerable subjects in the first place. It is the combination—a teleological commitment to human flourishing, corrected by attention to the actual, non-uniform

distribution of vulnerability across intersecting social positions—that yields a genuinely gender-responsive common good constitutionalism, and that distinguishes GRCGC both from an unreconstructed CGC vulnerable to backlash appropriation and from a purely autonomy-based liberal rights framework that, as the Taiwanese record surveyed in Section 4 suggests, has not proven fully adequate to the task of persuading a communitarian political culture. GRCGC is, in this sense, not a rejection of common good constitutionalism but its most internally consistent version: a CGC that takes its own commitment to the common good of the whole community seriously enough to ask, empirically and doctrinally, who that whole community actually contains.

Third, and returning to the *determinatio* point of Section 5, extending recognition to transgender persons does not require abandoning the classical common-good tradition's commitment to the family, to children, and to social order; it requires only abandoning the contestable, sociologically contingent claim that these goods are secured exclusively through one historically dominant family form. A *determinatio* of family law that recognizes diverse family structures, that grounds legal gender recognition in a person's stable gender identity rather than in surgical proof, and that ensures children receive accurate education about gender diversity, can be defended as a better—not merely a more permissive—specification of the underlying common goods of family flourishing, child welfare, and social solidarity than the backlash's exclusionary alternative. This is the sense in which the paper's title question—whose common good?—receives its answer: not the common good of a demographic or religious majority alone, but a common good reconstructed, through vulnerability theory and intersectionality, to be common to the whole political community, transgender members included.

6.4 From Analysis to Norm: How the Two Correctives Enter CGC

Complementarity between two theories does not by itself establish that they can be integrated into a third, and the earlier version of this paper moved too quickly from the former to the latter. The integration proposed here proceeds in three steps, corresponding to three distinct functions. (1) Intersectionality functions as an analytical tool. It identifies institutional configurations—such as the interaction of household registration, residence, and housing described in Section 6.2—that produce disadvantages invisible to single-axis legal categories. By itself it is descriptive and diagnostic: it tells us where to look, not what the state must do. (2) Vulnerability theory functions as a normative bridge. It supplies the premise that the state bears responsibility for the institutions through which resilience is distributed, so that a

disadvantage produced by state-designed institutions is a matter of state responsibility rather than private misfortune. (3) The common-good framework, and specifically the *determinatio* structure set out in Section 2.2, functions as the evaluative standard. Each institution identified in step (1) is a *determinatio* of some shared good—an accurate civil status, secure residence, safe housing, education—and the question is whether that *determinatio* realizes the good for the whole community, including those whom it burdens.

This structure also supplies the normative basis for the claim, in Section 6.3, that the inclusion of transgender persons is constitutive of the common good rather than merely one interest to be weighed in pursuing it. The claim is not imported from outside the tradition. For Aquinas, law is ordered to the common good of the whole community (Aquinas, ca. 1265-1274/2006, I-II, q. 90, a. 2), and Finnis defines the common good of a political community as the set of conditions that enables its members to attain for themselves the reasonable objectives for the sake of which they collaborate (Finnis, 2011). On either formulation, the common good is not an aggregate of the interests of a majority but a set of conditions held in common; a specification of those conditions that systematically denies some members the basic conditions of participation—an accurate civil status, secure standing in public institutions—is, to that extent, not a specification of the common good. That is the precise sense in which inclusion is "constitutive": it is a condition on what can count as the common good, not a further good to be traded against it. The claim concerns scope, not policy detail. It does not entail that any particular reform, such as registration by self-declaration, is required; how inclusion is institutionally realized remains a *determinatio* question.

Finally, GRCGC does not propose a new standard of constitutional review. Intersectional and vulnerability analysis enters adjudication through existing doctrine. When the state defends a restriction by appeal to a common good—the stability of civil status, the protection of children, the integrity of an institution—a GRCGC analysis asks, at the legitimate-aim and necessity stages of proportionality review and in equality review, whether that claim is stated as a *determinatio*, whether there is evidence that the restriction actually serves the asserted good, and whether the assessment of burdens has attended to the persons at the intersections where those burdens fall most heavily. Section 7.2 considers whether this adds anything to existing doctrine.

7. Constitutional and Doctrinal Implications for Taiwan

7.1 Existing Doctrine, Doctrinal Extension, and Legislative Proposal

Three kinds of claim must be distinguished: what existing Taiwanese doctrine already holds; what can be argued as an extension of established constitutional principles; and what is a proposal for future legislation. The earlier version of this paper did not always keep them apart.

Existing doctrine. Interpretation No. 748 grounded the freedom of marriage in the protection of personality development and human dignity under Article 22, read together with the equality guarantee of Article 7 (Judicial Yuan, 2017). But it expressly limited its holding to whether the Civil Code's failure to permit two persons of the same sex to form a permanent union violates those guarantees, and stated that it does not extend to other matters (Judicial Yuan, 2017, Reasons, para. 18). It therefore did not establish any standard for legal gender recognition. The administrative case law on legal gender recognition is a separate body of doctrine. The Xiao E judgment held that the surgery requirement in the 2008 order lacked a statutory basis and violated proportionality and equality, but it granted relief on the basis of expert evidence of a stable gender identity in an individual case, and it stated that uniform standards should be set by the legislature (Taipei High Administrative Court, 2021). The Supreme Administrative Court's 2023 judgment and the 2024 Nemo judgment likewise rejected compulsory surgery while accepting that registration offices may require evidence of a stable gender identity (Supreme Administrative Court, 2023; Taipei High Administrative Court, 2024). What existing doctrine supports, then, is the removal of compulsory surgery, not a self-determination model.

Doctrinal extension. The principles relied on in these decisions—dignity and personality under Article 22, equality under Article 7, statutory reservation and proportionality under Article 23—can support further arguments: for example, that the evidentiary requirements now applied should themselves be proportionate, or that the continued formal validity of the 2008 order after repeated judicial non-application is difficult to reconcile with statutory reservation. These are arguments the paper advances, not holdings the courts have made. A GRCGC reading contributes to them by treating the state's defense of the current regime as a *determinatio* claim that must be justified by evidence about what the regime actually secures—for instance, the reliability of civil status—and by attending to persons, such as non-citizen residents and non-binary persons, whom the current case law does not reach.

Legislative proposal. A self-determination model, and the extension of recognition to non-citizen residents and non-binary persons, cannot be derived from existing doctrine; they are proposals for legislation, defended in Section 7.3 on common-good grounds. Future litigation, including pending cases, may make the common-good register explicit, but it should do so as a supplement to, not a substitute for, the established doctrinal grounds.

7.2 What Does GRCGC Add to Existing Doctrine?

If GRCGC merely restated existing rights in a different vocabulary, its claim to novelty would be weak, and it should be acknowledged that at the level of adjudicating individual claims the overlap is considerable: the Xiao E line of cases was decided, correctly, on statutory reservation, proportionality, and equality, and nothing in this paper suggests that those grounds were insufficient for the cases decided. The contribution of GRCGC lies at three other points. First, it addresses the justificatory structure of the state's side of the balance. Proportionality review tends to accept the legitimacy of an asserted aim once it is stated; where the aim is framed as the protection of the family or of children, GRCGC requires that it be stated as a *determinatio* and supported by evidence that the chosen specification serves that good, which disciplines the aim without dismissing it. The concern is not hypothetical: as Section 3 showed, the statement of reasons for Referendum 11 itself argued that excluding *tongzhi* education served a "major public interest" and satisfied the proportionality principle of Article 23 (Central Election Commission, 2018a, p. 3). Second, it grounds affirmative institutional duties. Rights-based analysis in the Xiao E line is largely defensive: it removes an unlawful condition. The questions that remain—what procedure the state should build, for whom, and with what supports—are questions of institutional design that vulnerability theory frames as matters of state responsibility and that common-good reasoning is equipped to address. Third, it operates in a register of public justification available to legislators and to public argument, not only to courts. As Section 2.3 noted, Rawlsian public reason can play a similar role; GRCGC's distinctive claim is only that, in a debate already conducted in the language of family and the common good, an argument that answers that language on its own terms may be more responsive than one that declines to engage it. Whether it is in fact more persuasive is an empirical question this paper does not settle.

7.3 A Legislative Pathway: A Staged Gender Recognition Act

The most immediate legislative task is the enactment of a dedicated Gender Recognition Act to replace the current administrative-order regime, as the Taipei High Administrative Court

itself suggested (Taipei High Administrative Court, 2021). This is a legislative proposal, and two options should be distinguished. The first would codify the soft medical model the courts have developed: no surgery, but evidence of a stable gender identity from qualified professionals (Supreme Administrative Court, 2023). The second would adopt a self-determination model, under which registration rests on the applicant's own declaration through a simple administrative procedure, as TAPCPR's advocacy envisages (Haime, 2021). The evidence on public opinion discussed in Section 4.4 supports the first more clearly than the second, and a study commissioned by the Executive Yuan has been reported to recommend the first as a short-term measure and the second as a longer-term goal (Lin, 2025). This paper argues for a staged approach on common-good grounds: codification of the soft medical model now, to end case-by-case litigation and the continued formal validity of an unlawful requirement, coupled with a legislated review leading toward self-determination, the case for which rests on the burdens that medical gatekeeping itself places on vulnerable applicants. Framing such legislation in explicitly common-good terms—as an institutional mechanism for building the resilience of vulnerable citizens and residents and thereby strengthening rather than weakening the social fabric—offers a complement to the autonomy-centered framing that has so far dominated Taiwanese advocacy, and directly answers the "family values" framing relied on by backlash actors in 2018. Complementary reforms—extending anti-discrimination protections explicitly to gender identity in employment and public accommodation, clarifying non-binary and intersex recognition options, and providing a route by which non-citizen residents can have their documents in Taiwan reflect a recognized gender identity—should proceed on the same footing, addressing the intersectional gaps identified in Section 6.2 rather than treating "transgender recognition" as satisfied by a single reform targeted at the median case.

7.4 A Judicial and Advocacy Strategy: Deploying GRCGC in Litigation and Public Argument

Beyond specific doctrinal and legislative reforms, this paper's diagnosis carries a strategic implication for how trans-rights advocacy is conducted in Taiwan's public sphere. The 2018 referendums cannot isolate the effect of competing frames (Section 4.2), but they at least show that autonomy-based claims alone did not carry the public argument, however doctrinally sound those claims may be within constitutional litigation. Advocacy organizations, litigators, and legislators seeking to advance trans recognition in Taiwan should therefore contest the content of the common good directly—arguing, as Sections 5 and 6 do, that family flourishing,

child welfare, and social solidarity are better served by inclusion than by exclusion—rather than ceding that vocabulary to opponents and relying exclusively on the register of individual rights. This does not mean abandoning rights-based argument, which remains doctrinally necessary and constitutionally grounded in Article 22 and Article 7; it means supplementing it with an affirmative account of why trans inclusion serves goods the whole community, including its non-transgender majority, has reason to value.

7.5 Limitations and Objections

Four objections to the argument developed above deserve acknowledgment, even if a full answer to each exceeds what this paper can undertake. The first is a concern from within trans-rights advocacy itself: that engaging the common-good vocabulary at all risks legitimating a framework that has historically been hostile to LGBTQ recognition, and that the safer course is to continue relying on autonomy and equal-protection argument exclusively, leaving natural-law vocabulary to its traditional users. This paper's answer, developed across Sections 5 and 6, is that the vocabulary is already contested terrain in Taiwan's constitutional politics whether or not trans-rights advocates engage it, and that leaving it uncontested cedes the terms of public justification to one side. Reclamation is a strategic as well as a theoretical choice, and it need not replace rights-based argument; Section 7.4 treats it as a supplement.

The second objection comes from within common good constitutionalism, and holds that the "family" specified in Vermeule's (2022) account is not merely one *determinatio* among others but is itself close to a primary precept—that the historical and cross-cultural prevalence of opposite-sex, biologically reproductive family structures reflects something closer to natural necessity than social convention, and that GRCGC's *determinatio* argument in Section 5 therefore proves less than it claims. A full response to this objection would require engaging directly with the empirical and theological literature on the historical diversity of family and kinship forms, which lies outside this paper's scope. Sections 2.2 and 5 have, however, narrowed the paper's claim so as to meet this objection in part: the paper does not argue that the conjugal view is conceptually confused, only that it must be argued as a *determinatio*. What can be said within that scope is that Taiwan's own constitutional practice—specifically, the Constitutional Court's own willingness in Interpretation No. 748 to recognize a family form outside the traditional model as constitutionally protected—supplies at least a partial domestic answer: whatever its status in natural-law theory, the conjugal conception of marriage is no longer the constitutional *determinatio* in Taiwan, although Interpretation No. 748 itself, by its own terms, says nothing about legal gender recognition.

The third objection is empirical rather than theoretical: that the 2024 survey controversy discussed in Section 4.4, while it discredits one specific study, does not by itself establish that Taiwanese public opinion is in fact more favorable to trans recognition than the anti-gender movement claims, and that this paper may be substituting one contested empirical narrative for another. This is a fair caution. The Executive Yuan's 2024 randomized survey (Department of Gender Equality, Executive Yuan, 2024) is more methodologically defensible than the convenience-sample study it corrects, and, as noted, it measures support for surgery-free recognition rather than for self-determination; but public opinion on gender identity issues in Taiwan, as elsewhere, remains genuinely contested and likely to shift with the framing of any given question. The paper's central claim does not, in the end, depend on a particular empirical reading of current opinion; it depends on the doctrinal and theoretical argument, developed in Sections 5 and 6, that a correctly specified common good requires trans inclusion regardless of how popular that conclusion currently is. Public opinion evidence is offered in Section 4.4 to illustrate the stakes of the rhetorical contest, not as the ultimate ground of the paper's normative claim.

The fourth objection concerns authority. If the common good is to be specified by the state, a gender-responsive content offers no protection against a future government, or a future referendum majority, that specifies it differently; reclaiming the vocabulary may thus strengthen a form of argument that can be turned against minorities. The objection is serious, and it is the reason this paper has supplemented the substantive reconstruction with the procedural commitments set out in Section 2.3: common-good claims must be publicly justified as *determinationes*, those burdened must have effective avenues of contestation, and a minority's basic standing cannot be made the object of a majoritarian *determinatio*. These commitments reduce but do not eliminate the risk. A theory that invests the state with responsibility for the common good cannot guarantee that the state will exercise it well; it can only insist on the conditions—non-domination, public reason, and judicial review—under which misuse can be identified and contested.

8. Conclusion: Reclaiming the Common Good

Taiwan's record over the past decade offers both a warning and an opportunity. The warning is that the language of common good, family, and children is not the exclusive property of any political orientation, and that when constitutional advocates for LGBTQ recognition decline to engage that language, opponents will occupy it—and, in the 2018 referendums, the

side that did so prevailed. The opportunity is that this same vocabulary, examined closely and corrected by the internal resources of vulnerability theory and intersectionality, does not in fact support the exclusionary conclusions the anti-gender movement has drawn from it. The episodes examined in Section 4 do not form a single story, and this paper has not treated them as one. The 2018 referendum results were the product of organized political mobilization; the form of the 2019 Enforcement Act, which delivered marriage through a separate statute rather than through the Civil Code, reflects legislative bargaining under a constitutional deadline and a referendum result; the persistence of the surgery requirement for legal gender recognition, still unresolved since Xiao E's litigation in 2021, reflects administrative inertia and the absence of legislation more than any organized campaign; and curriculum politics after 2018 has operated largely through the administrative implementation of Referendum 11 and the "parental rights" frame. None of these outcomes is evidence that the common good requires trans exclusion. What recurs across them is not a common cause but, where exclusion or differentiation has been publicly defended in common-good terms, a common form of justification: the unargued elevation of one *determinatio* of family and gender into the common good itself—a category error in the structure of public argument that has gone largely unanswered on its own terms.

This paper has argued that Taiwanese constitutional lawyers, litigators, and legislators should not cede natural-law and common-good vocabulary to the anti-gender movement, but should instead reclaim and reconstruct it—through a gender-responsive common good constitutionalism that integrates Fineman's vulnerability theory and Crenshaw's intersectionality as correctives internal to the tradition itself, and that disciplines the tradition's conception of authority by the requirements of non-domination and public justification. Doing so offers a register capable of speaking to a Taiwanese public and to courts whose jurisprudence, from Interpretation No. 748 through the administrative case law on legal gender recognition, has already grounded LGBTQ recognition in the language of dignity and human flourishing rather than in autonomy alone. The unfinished business that remains—a comprehensive Gender Recognition Act that also reaches non-citizen residents, full non-discrimination protections, and a public argument capable of contesting rather than conceding the meaning of family—is precisely the work to which a reconstructed common good constitutionalism should now turn.

More broadly, the Taiwanese case suggests a lesson of potential relevance beyond any single jurisdiction, even though this paper has deliberately confined its evidentiary claims to Taiwan alone. Constitutional orders elsewhere that are grappling with organized anti-gender

backlash face a structurally similar choice: to contest the backlash's claim to speak for the common good, or to leave that claim uncontested and rely exclusively on the vocabulary of individual rights. Taiwan's 2018 referendums cannot show what would have happened had the backlash's claim been contested, but they caution against assuming that the second course will suffice, at least in political cultures where communitarian and family-centered argument carries independent persuasive weight. Whether the same asymmetry holds in other constitutional democracies is an empirical question this single-jurisdiction study cannot answer, but it is a question worth asking precisely because the anti-gender movement, as Section 3 observed, has already learned to ask it—and to answer it—on its own, exclusionary terms. Reconstructing the common good so that it is genuinely common, rather than conceding it to those who would define it by exclusion, remains, on the argument of this paper, both the more faithful reading of the natural-law tradition and the more promising path for trans recognition within it.

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誰的共同善？反性別反撲與臺灣跨性別承認的憲法爭議

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摘要

跨國反性別運動已逐漸學會運用憲政主義的語言。針對跨性別權利的組織性反撲，不再僅訴諸宗教信念或道德厭惡，而是日益將自身論述建構為對家庭、兒童與「共同善」（common good）的捍衛，並援用與當代「共同善憲政主義」（Common Good Constitutionalism, CGC）所依據之自然法語彙相互重疊的政治語言。本文由此追問：究竟誰有權界定共同善？此一問題包含三個面向：共同善涵蓋誰的利益、誰有權具體化共同善，以及共同善透過何種公共程序形成並接受異議。本文主張，臺灣反性別運動對共同善語彙的運用，將有關家庭與性別的特定制度安排（即「具體化」，*determinatio*）呈現為不容爭議的共同善基本原則，從而規避了自然法傳統本身對具體化所要求的論證責任。本文所稱之「範疇錯誤」（category error），即指此一論證層次的混淆，而非否認自然法傳統內部對婚姻與家庭存在合理分歧。

本文以臺灣作為單一且深入分析的個案，採取理論引導的詮釋性個案分析，而非嚴格的因果過程追蹤，分別考察四個性質不同的場域：2018 年公民投票、《司法院釋字第 748 號解釋施行法》的立法折衷、法律性別承認之行政規則與行政訴訟（以 2021 年臺北高等行政法院「小 E 案」判決及其後判決為代表），以及課程政策中的「父母權利」（parental rights）論述，並指出各場域的結果係由不同機制所形塑，未必可歸因於單一的反撲機制。

有別於反性別反撲所採取的排除性共同善理解，本文試圖建構一種具性別回應性的共同善觀（gender-responsive account of the common good）。本文以 Kimberlé Crenshaw 的「交織性」（intersectionality）作為辨識單一法律分類所無法察覺之制度性不利益的分析工具，以 Martha Fineman 的「脆弱性理論」（vulnerability theory）作為連結國家制度責任的規範橋樑，並以具體化結構作為評價標準。本文主張：若依阿奎那與 Finnis 的理解，共同善乃整體共同體之善，以及使每一成員得以追求其蓬勃發展的條件，則將跨性別者排除於法律承認與保障之外的制度安排，即無法被正當地界定為共同善的具體化。

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本文最後區分既有司法見解、由既有憲法原則延伸的學理論證，以及立法建議三個層次，並提出：在尊重釋字第 748 號解釋自我設定之射程的前提下，以人性尊嚴為核心理解該號解釋；分階段制定《性別承認法》（Gender Recognition Act），並使其及於非本國籍居民；以及將性別回應式共同善憲政主義（Gender-Responsive Common Good Constitutionalism, GRCGC）作為補充（而非取代）平等權、人格權與比例原則論證的公共論證策略。

關鍵字：反性別運動、共同善憲政主義、跨性別法律承認、臺灣憲法、脆弱性與交織性、具體化（*determinatio*）