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Equality Principles as Asserted Justifications for Mandating the Legalization of Same-Sex Marriage in American and Intercountry-Comparative Constitutional Law

Lynn D. Wardle

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*Symposium on Whether
Legalization of Same-Sex Marriage
Is Constitutionally Required—2012*

III.

INTERNATIONAL AND
COMPARATIVE PERSPECTIVES ON
CONSTITUTIONAL MANDATES FOR
SAME-SEX MARRIAGE

Contributing Authors

CARMEN GARCIMARTÍN
AUGUSTO ZIMMERMANN
LYNN D. WARDLE
URSULA BASSET

Equality Principles as Asserted Justifications for Mandating the Legalization of Same-Sex Marriage in American and Intercountry-Comparative Constitutional Law

Lynn D. Wardle*

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* Bruce C. Hafen Professor of Law, J. Reuben Clark Law School, Brigham Young University. This paper was presented at the *Symposium on Whether the Legalization of Same-Sex Marriage Is Constitutionally Required* at the J. Reuben Clark Law School at Brigham Young University, Provo, Utah, November 2, 2012. I gratefully acknowledge the valuable research assistance provided by Stephanie Christensen, Stefanie Franc, Travis Robertson, and Michael Worley.

“Constitution[al] principle[s] are too unrefined, standing alone,” to resolve issues that matter most.

—Professor Steven D. Smith¹

“[T]he ideals of neutrality and equality [are] incapable of supporting a viable liberal community.”

—Professor Steven D. Smith²

I. INTRODUCTION: OF EQUALITY AND CONSTITUTIONALISM

The two most prominent constitutional and jurisprudential principles that have been invoked in support of claims for legalization of same-sex marriage may be claims of “right” and claims of “equality.” The “rights” claims assert that there is a basic, recognized legal right to marry a person of the same-sex. The “equality” claims are based on notions of equivalence, tolerance, respect, fairness, and pluralism. Of those, the most effective and successful claims for same-sex marriage have been based on equality principles emphasizing equivalence, tolerance, and fairness.

This paper examines the extent to which equality claims have been used to require the legalization of same-sex marriage in American state and federal legal doctrine, as a matter of comparative interstate constitutional law. It also examines whether and how equality principles have been used to require the legalization of same-sex marriage in other nations, an exercise of comparative intercountry constitutional law. It then considers whether equality principles justify requiring the legalization of same-sex marriage as a matter of general jurisprudential principles.

The paper begins in Part II, by describing the status of same-sex marriage in the United States of America and in the world. It also reviews the text of state and national constitutional provisions regarding same-sex marriage and the controlling judicial opinions in search of the jurisprudential theories that underlie the constitutional legalization or rejection of same-sex marriage.

Part III considers whether equality principles require the legalization of same-sex marriage as a matter of U.S. constitutional doctrine and human rights doctrines. The prevailing and most coherent answer

1. STEVEN D. SMITH, *GETTING OVER EQUALITY* 2 (2001) (internal quotation mark omitted).

2. Steven D. Smith, *The Restoration of Tolerance*, 78 CALIF. L. REV. 305, 307 (1990).

to the doctrinal question is that in most legal systems in this country and in the world, equality principles are not interpreted to require legalization of same-sex marriage as a matter of constitutional or fundamental human rights doctrines, but that in only very few legal systems have equality doctrines been interpreted to require legalization of same-sex marriage. Judicial imposition of same-sex marriage by means of creative interpretation and extension of equality principles of constitutional law is illegitimate.

Likewise, Part IV shows that as a matter of general moral philosophy or jurisprudence, equality principles provide little support for claims to legalize same-sex marriage. However, liberty provides a solution to the conundrum of equality and tolerance, and upon that basis the equality principles might support legal recognition of some recognition of same-sex unions with benefits, privileges, and responsibilities.

In conclusion, Part V summarizes that in both practice and theory, equality principles provide little support for legalization of same-sex marriage in U.S. constitutional doctrine, comparative international constitutional law, or as a matter of the general jurisprudential, or human rights principles.

It is apparent that in politics, law, and jurisprudential principles “equality” has many different dimensions and many varied meanings. For example, the notion of *equality* in one sense can mean *equivalence*; in another aspect it can mean *tolerance*; it can also mean *nondiscrimination*; in another usage, it can mean *neutrality*; in another perspective it can mean *pluralism*; and in another dimension, *equality* can mean *respect* or *dignity*. Each of these equality principles provides stronger or weaker support for the claim for legalization of same-sex marriage than others. Whether equality requires legalization of same-sex marriage depends in part on which definition or dimension of equality is used.

It also appears that which meaning or dimension of equality is used and how it is interpreted and applied depends in part on who is using and applying it. The structural context is very important; “who decides” (i.e., which branch, agency, level or process of government makes the decision) profoundly influences which meaning of equality will be used and how it will be interpreted. In the United States, the method used to decide the issue has been driven by the substance of the policy, and the method and decision-maker have largely controlled the outcome. When democratic, grass-roots-based methods are used to settle the issue, the outcome is likely to be a prohibition of same-sex marriage. In contrast, the more non-democratic and elitist or insulated the method and decision-making body, the more likely it is that the

outcome will be the legalization of same-sex marriage. The closer the decision-making gets to the people (through direct democratic process or electorally-accountable processes and branches), the more likely the decision is to reject same-sex marriage and the claim that equality requires legalizing same-sex marriage. However, the further removed from the people (especially when remotely accountable or life-tenured judges are making the decision), the more likely it is that the decision will conclude that equality principles require legalizing same-sex marriage.

Additionally, there appears to be a strong social-cultural influence upon which meaning or aspect of equality will be used and how it will be interpreted in determining whether equality requires legalization of same-sex marriage. For example, in the United States, the social and cultural values generally tend to reflect conservative notions of equality and to favor application of limited or conservative interpretations of equality. Thus, in forty-one³ of fifty states, conservative notions of equality prevail, and those 82% of the states do not permit same-sex marriage. In over 90% of the states (thirty-one out of thirty-four states to date) where the issue of legalizing same-sex marriage had come before voters, same-sex marriage has been rejected soundly. All thirty-one states⁴ where same-sex marriage has been constitutionally barred have accomplished that by democratic processes; no court in America has construed a state (or federal) constitution as forbidding the legalization of same-sex marriage. On the other hand, in half of the American states where same-sex marriage ever has been or now is allowed, the legalization of same-sex marriage was decreed or initiated by judicial interpretation of a constitutional provision.⁵ Interestingly, by con-

3. See *infra* Appendix I.A.

4. See *infra* Appendix II.

5. See *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008) (holding that California statutes limiting marriage to opposite-sex couples was unconstitutional and violated the state's equal-protection clause for same-sex couples—a ruling that was overturned by California voters less than five months later when they approved Proposition 8); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008) (holding that Connecticut laws restricting marriage to heterosexual couples violated same-sex couples' equal-protection rights); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (holding that statutes limiting civil marriage to heterosexual unions violated the equal-protection rights of same-sex couples seeking marriage licenses, and thus statutory language should be interpreted and applied in a manner allowing gay and lesbian couples full access to civil marriages); *In re* Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004) (holding that civil unions are not equal to marriages and, thus, allowing same-sex marriages in Massachusetts); *Goodridge v. Mass. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (holding that the

trast, outside of the United States, same-sex marriage has been legalized by democratic processes mostly; in nine of the eleven nations⁶ that have legalized same-sex marriage, including all eight European nations where same-sex marriage is legal, plus in Argentina, same-sex marriage was legalized by legislative processes, and in only two of those nations (Canada and South Africa) was that policy initiated by judicial shove or nudge. So the democratic values of the society and culture are reflected in whether constitutional equality provisions are deemed to require legalization of same-sex marriage.

Nearly all nations in the world today are “democratic” in some sense; but “democracy” (like “equality”) has many meanings, and there are different degrees of commitment to and implementation of democratic principles of government. The circumvention of citizens in the processes of deciding highly controversial policy issues, such as whether to legalize same-sex marriage in a jurisdiction,⁷ may be a good measure of the degree of commitment to, and the functional validity of, democratic processes in a particular jurisdiction. So the way in which the political battles over same-sex marriage are decided may implicate democratic constitutionalism in some very profound ways that may have deeper significance for political society than the marriage policy preference itself.

II. THE STATUS OF MARRIAGE AND OTHER DOMESTIC RELATIONSHIPS IN THE LAW

A. Same-Sex Marriage and Equivalent Civil Unions

1. Same-sex unions have marriage-like status in very few jurisdictions

In the United States of America there has been a vigorous, determined movement to legalize same-sex marriage for nearly twenty years.⁸ As Appendix I.A. shows, since 2004, same-sex marriage has

state of Massachusetts may not deny the protections, benefits, and obligations of marriage to same-sex unions); *see also* VT. STAT. ANN. tit. 15, § 8 (2010); *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999); 2009 Vt. Acts & Resolves 33.

6. *See infra* Appendix I.B.

7. *See* DOMINIQUE LUDVIGSON, CIRCUMVENTING CITIZENS ON MARRIAGE: A SURVEY 3 (The Heritage Foundation 2012) (“Largely unable to redefine marriage through democratic processes, advocates have resorted to the courts to do so.”).

8. Kevin G. Clarkson, David Orgon Coolidge & William C. Duncan, *The Alaska Marriage Amendment: The People’s Choice on the Last Frontier*, 16 ALASKA L. REV. 213 (1999); David Orgon Coolidge, *Same-Sex Marriage? Baehr v. Miike and the Meaning of Marriage*, 38 S. TEX. L.

been legalized in nine⁹ of the fifty United States of America, as well as in the District of Columbia and in two (of 564) American Indian Tribes.¹⁰ Also, same-sex unions with legal status and benefits equivalent to marriage (herein “civil unions”) have been created in eight other U.S. states.¹¹ Thus, seventeen U.S. states give same-sex relations marital or marriage-equivalent legal status and benefits. Additionally, two other states now allow some form of same-sex partnership registration with limited, selected benefits—less than the total bundle of benefits extended to marriages or civil unions.¹²

Globally, as Appendix I.B. shows, same-sex marriage has been legalized in ten or eleven nations of 193 sovereign nations recognized by the United Nations (depending on whether South Africa’s ambiguous law is counted as creating same-sex marriages or civil unions), all since the year 2000 when the Netherlands became the first jurisdiction in the world to allow same-sex marriage.¹³ Additionally, same-sex unions

REV. 1, 11 (1997); David Orgon Coolidge, *The Hawaii Marriage Amendment: Its Origins, Meaning and Constitutionality*, 22 HAW. L. REV. 19 (2000); David Orgon Coolidge, *Same-Sex Marriage: As Hawaii Goes*, FIRST THINGS, Apr. 1997, at 33.

9. The number of states increased from six to nine as a result of November 2012 ballot initiatives in Maine, Maryland, and Washington. Chelsea J. Carter & Allison Brennan, *Maryland, Maine, Washington Approve Same-Sex Marriage; 2 States Legalize Pot*, CNN POLITICS (Nov. 7, 2012), <http://www.cnn.com/2012/11/01/politics/ballot-initiatives>.

10. See *infra* Appendix I (including in the list states that voted to legalize same-sex marriage in 2012, regardless of when those new laws go into effect). Additionally, California legalized same-sex marriage by judicial decree briefly in 2008, but the voters quickly overturned that by passing Proposition 8 in November 2008. Lower-court rulings by state courts in Hawaii and (non-finally) in Alaska also legalized or ruled in favor of same-sex marriage, but before those rulings became effective, voters in each state adopted amendments to the state constitutions to prohibit same-sex marriage. Charles M. Cannizzaro, *Marriage in California: Is the Federal Lawsuit Against Proposition 8 About Applying the Fourteenth Amendment or Preserving Federalism?*, 38 PEPP. L. REV. 161, 162–66 (2010).

11. The term “civil unions” is an inexact term, generally used (and used herein) to refer to formal same-sex legal relationships that enjoy all, or substantially all, of the benefits, privileges, and duties of marriage. However, such relationships are denominated “domestic partnerships” in some states, including California and Nevada. CAL. FAM. CODE § 297 (West 2005); NEV. REV. STAT. §§ 122A.010–122A.510 (2009). By the same token, formally-created and legally-recognized same-sex legal relationships that are afforded less than identical, or substantially-identical, legal rights, duties and benefits are generally called “domestic partnerships,” but could just as well be called “civil unions.” See also Lynn D. Wardle, *Counting the Costs of Civil Unions: Some Potential Detrimental Effects on Family Law*, 11 WIDENER J. PUB. L. 401 (2002).

12. See *infra* Appendix I.A.

13. One of these eleven nations, South Africa, enacted a “Civil Union Act” in 2006 that allows same-sex couples to enter that new status by using a marriage ceremony or civil partnership registration, allows the relationship to be called a marriage or civil partnership, and grants most of the same rights to such relationships as are enjoyed by marriages. But despite the use of the label and formation ceremony of “marriage,” the legal status created is technically a “civil

equivalent to marriage have been created in seventeen or sixteen additional nations (again depending on whether South Africa is counted in the same-sex marriage list). Moreover, same-sex registrations with some limited benefits are provided in at least five other nations.¹⁴

Thus, from no nations or American states allowing same-sex marriage in 2000 (and throughout all prior legal history), there now are ten (or arguably eleven) nations and nine U.S. states with same-sex marriage at the beginning of 2013; and from only three nations and no U.S. states with marriage-equivalent civil unions in 1995, there are seventeen (or arguably sixteen) nations and eight American states with such unions at the dawn of 2013. Additionally, another half-dozen nations and two states provide limited recognition and specific benefits for same-sex couples. In summary, today about one-seventh of all sovereign nations and one-third of the American states now offer marriage or marriage-equivalent legal status and benefits to same-sex couples.

2. Same-sex unions lack marriage-like status in most jurisdictions

The other side of the foregoing statistics is that in forty-one of the fifty U.S. states and in 183 of the 193 sovereign nations in the world (or, arguably, 182—depending on how South Africa’s law is classified), same-sex marriage is prohibited or not generally permitted. Additionally, the “backlash” grassroots movement rejecting same-sex marriage has turned out to be quite substantial in America and internationally. In the past decade thirty-one states (62% of all American states) have passed state-constitutional amendments defining marriage as the union of husband and wife.¹⁵ In May 2012, a state marriage amendment

union.” So even though South Africa usually is counted with the nations that have legalized “same-sex marriage,” as a matter of legal analysis, it probably does not belong there but should be listed with the nations that have legalized “civil unions.” Civil Union Act 29441 of 2006 (S. Afr.), available at <http://www.info.gov.za/view/DownloadFileAction?id=67843>.

¹⁴ See *infra* Appendix I.B. A few subordinate jurisdictions (such as individual cities or counties or provinces) have also recognized or created same-sex marriage, but most such inferior jurisdictions lack the governance authority to regulate marriage and similar domestic relationships.

¹⁵ See *infra* Appendix II.A; see also ALA. CONST., amend. 774; ALASKA CONST., art. I, § 25; ARIZ. CONST., art. 30, § 1 (Prop. 102); ARK. CONST., amend. 83; CAL. CONST. art. I, § 7.5 (Prop. 8); COLO. CONST., art. II, § 31; FLA. CONST. art. 1, § 27; GA. CONST., art. I, § 4, para. 1; IDAHO CONST., art. III, § 28; KAN. CONST. art. XV, § 16; KY. CONST., § 233A; LA. CONST., art. XII, § 15; MICH. CONST., art. I, § 25; MISS. CONST., § 263-A; MO. CONST., art. I, § 33; MONT. CONST., art. XIII, § 7; NEB. CONST., art. I, § 29; NEV. CONST., art. I, § 21; N.D. CONST., art. XI, § 28; OHIO CONST., art. XV, § 11; OKLA. CONST., art. II, § 35; OR. CONST., art. XV, § 5a; S.C. CONST., art. XVII, § XV; S.D. CONST., XXI, § 9; TENN. CONST., art. XI, § 18; TEX.

was approved by voters in North Carolina with over 61% of the vote.¹⁶ But in November 2012, voters in Minnesota became the first voters in thirty-two states to decline to pass a state marriage amendment, with nearly 52.6% of the voters there rejecting it.¹⁷ In all 32 states in which same-sex marriage had been on the ballot before November 2012 (including Maine where in 2009 a new law allowing same-sex marriage was rejected by the “people’s veto”) the people had decisively rejected same-sex marriage. Now there are forty-one states (including thirty-one with constitutional amendments on point) rejecting same-sex marriage, and nine states allowing same-sex marriage. Overall, adding together all the votes, the total vote against same-sex marriage in the thirty-four states where voters have voted on state marriage amendments is over sixty percent (62%).¹⁸

Twenty of the existing state constitutional amendments also prohibit the creation of marriage-equivalent same-sex civil unions, regardless of what it is called.¹⁹ At least forty-one states have passed their own “defense of marriage” policies by statute, constitutional amendment, or both. Such defense-of-marriage policies effectively prohibit courts in those states from recognizing same-sex marriages performed in other jurisdictions, and also express strong public policy in the states barring same-sex marriage recognition.²⁰ Nearly two-thirds of Amer-

CONST., art. I, § 32; UTAH CONST., art. I, § 29; VA. CONST., art. I, § 15-A; WIS. CONST., art. XIII, § 13.

16. *North Carolina Same-Sex Marriage, Amendment 1 (May 2012)*, BALLOTPEDIA.ORG, http://ballotpedia.org/wiki/index.php/North_Carolina_Same-Sex_Marriage,_Amendment_1_%28May_2012%29 (last visited Mar. 29, 2013).

17. *Minnesota Same-Sex Marriage Amendment, Amendment 1 (2012)*, BALLOTPEDIA.ORG, http://ballotpedia.org/wiki/index.php/Minnesota_Same-Sex_Marriage_Amendment,_Amendment_1_%282012%29 (last visited Mar. 29, 2013).

18. See Lynn D. Wardle, *Involuntary Imports: Williams, Lutwak, the Defense of Marriage Act, Federalism, and “Thick” and “Thin” Conceptions of Marriage*, 81 FORDHAM L. REV. 771, app. at 826 (2012) (recognizing that those figures must be adjusted by the 2012 votes in North Carolina, Maine, Maryland, and Washington).

19. See *infra* Appendix II.B.

20. This includes the thirty substantive marriage amendment states, see *infra* Appendix II.A., plus the following states which have adopted statutory same-sex marriage non-recognition acts but no constitutional provision. ARIZ. REV. STAT. ANN. § 25-101 (2007); CAL. FAM. CODE § 308.5 (West 2004); DEL. CODE ANN. tit. 13, § 101 (West 2006); FLA. STAT. ANN. § 741.212 (West 2010); HAW. REV. STAT. § 572-3 (1999); 750 ILL. COMP. STAT. ANN. § 5/212 (West 1999); IND. CODE ANN. § 31-11-1-1 (2007); IOWA CODE § 595.2 (2002); MINN. STAT. ANN. § 517.01 (West, 2006); N.C. GEN. STAT. § 51-1.2 (2011); 23 PA. CONS. STAT. ANN. § 1704 (West 2010). W. VA. CODE § 48-2-603 (2002).

ican states (thirty-three states) clearly reject and prohibit *either* marriage or *any* marriage-like legal status or marital benefits for same-sex couples.²¹ Currently, forty-one American states (82%) recognize only dual-gender marriage—defining marriage as a union between a man and a woman only.

Internationally, the legal rejection of same-sex marriage is the dominant and growing rule of national constitutional law. Forty-seven nations—twenty-four percent (24%) of the 193 sovereign nations recognized by the United Nations—have constitutional provisions that expressly define or by gendered terms clearly refer to marriage as a conjugal union of a man and a woman.²² All but one of these constitutional provisions has been adopted since 1970.²³ By contrast, *no* national constitution expressly protects or requires same-sex marriage.²⁴

21. See Lynn D. Wardle, *A Response to the “Conservative Case” for Same-Sex Marriage: Same-Sex Marriage and “the Tragedy of the Commons,”* 22 *BYU J. PUB. L.* 441 (2008).

22. See the constitutions of The Republic of Armenia, May 7, 1995, art. 32; The Republic of Azerbaijan, Nov. 12, 1995, art. 34; The Republic of Belarus, 1994, art. 32; The Federative Republic of Brazil, 1988, art. 226; The Republic of Bulgaria, July 13, 1991, art. 46; Burkina Faso, Jun. 2, 1991, art. 23; The Kingdom of Cambodia, Sept. 21, 1993, art. 45; The People’s Republic of China, 1982, art. 49; Colombia, 1991, art. 42; The Republic of Cuba, 1976, art. 36; The Republic of Ecuador, Oct. 20, 2008, art. 38; Eritrea, May 23, 1997, art. 22; The Federal Democratic Republic of Ethiopia, Dec. 8, 1994, art. 34; The Second Republic of The Gambia, Aug. 8, 1996, art. 27; The Republic of Honduras, Jan. 11, 1982, art. 112; Japan, May 3, 1947, art. 24; The Republic of Latvia, Feb. 15, 1922, art. 110; The Republic of Lithuania, Oct. 25, 1992, art. 38; The Republic of Malawi, May 18, 1994, art. 22; The Republic of Moldova, July 29, 1994, art. 48; The Republic of Montenegro, Oct. 19, 2007, art. 71; The Republic of Namibia, 1990, art. 14; The Republic of Nicaragua, Nov. 19, 1986, art. 72; The Republic of Paraguay, June 20, 1992, arts. 49–52; The Republic of Peru, Oct. 31, 1993, art. 5; The Republic of Poland, Apr. 2, 1997, art. 18; The Republic of Serbia, art. 62; The Republic of Suriname, Oct. 30, 1987, art. 35; The Kingdom of Swaziland, 2005, art. 27; The Republic of Tajikistan, Nov. 6, 1994, art. 33; Turkmenistan, Aug. 15, 2003, art. 25; The Republic of Uganda, 1995, art. 31; Ukraine, June 28, 1996, art. 51; The Bolivarian Republic of Venezuela, 1999, art. 77; The Socialist Republic of Vietnam, Apr. 18, 1992, art. 64.

23. The Constitution of Japan, which was adopted in 1947, is the only such constitution adopted before 1970 that limits marriage to male-female couples. CONSTITUTION OF JAPAN, *supra* note 22.

24. But by creative judicial interpretation of equality provisions, not marriage provisions, courts in Canada and South Africa have distilled a requirement for legal recognition of same-sex marriage. See *Harrison v. Canada*, [2005] NBQB 232, 290 N.B.R.2d 70 (Can.); *Minister of Foreign Affairs v. Fourie* 2005 (1) SA 524 (CC) at para. 12 (S. Afr.). It also is reported that a court in Nepal has ruled that same-sex couples should be able to marry or have some similar status, but that ruling has not had any legal effect yet. *Nepal Lesbian Wedding: U.S. Couple Weds in Nation’s First Public Same-Sex Ceremony*, HUFF POST WORLD (June 20, 2011), http://www.huffingtonpost.com/2011/06/20/nepal-lesbian-wedding-us-couple-weds-ceremony-_n_880315.html#s294953 (explaining that two women from Denver wed in Nepal, but “[s]ame-sex marriages are not legal in Nepal The laws are being drafted . . .”).

Additionally, same-sex marriage is prohibited either by statute, common law, or binding legal custom in all nations that do not explicitly forbid or allow same-sex marriage in their constitutions.

Internationally, the constitutional language of many of the forty-seven²⁵ nations that appear to bar same-sex marriage appears to constitutionalize custom—the custom of marriage being the gender-integrative union of man and women. The language in those constitutional provisions suggests that the drafters of the constitution may not have specifically or extensively considered whether the constitution should prohibit same-sex marriage, but only decided that the established custom of marriage as a dual-gender legal relationship should receive particular constitutional protection. Whether these constitutional provisions will be interpreted as reserving the legal status of marriage *exclusively* for (only) male-female couples or merely *inclusively* (including at least male-female couples) when/if political pressures for same-sex marriage arise in those nations is a political question the answer to which is uncertain. Since the textual implication in most cases is that a unique constitutional protection was intended to be given to the unique, historical institution of dual-gender integrative marriages, it is likely that most of those constitutional provisions will be interpreted *exclusively* as reserving the particular status of “marriage” for male-female unions. However, such interpretation does not necessarily bar the creation of some other domestic status, and perhaps may even allow granting an equivalent legal status with equivalent legal rights and benefits. Yet, given the special interest politics of same-sex marriage, it is

25. See The Constitutions of The Republic of Armenia, May 7, 1995, art. 32; The Republic of Azerbaijan, Nov. 12, 1995, art. 34; The Republic of Belarus, 1994, art. 32; The Federative Republic of Brazil, 1988, art. 226; The Republic of Bulgaria, July 13, 1991, art. 46; Burkina Faso, Jun. 2, 1991, art. 23; The Kingdom of Cambodia, Sept. 21, 1993, art. 45; The People's Republic of China, 1982, art. 49; Colombia, 1991, art. 42; The Republic of Cuba, 1976, art. 36; The Republic of Ecuador, Oct. 20, 2008, art. 38; Eritrea, May 23, 1997, art. 22; The Federal Democratic Republic of Ethiopia, Dec. 8, 1994, art. 34; The Second Republic of The Gambia, Aug. 8, 1996, art. 27; The Republic of Honduras, Jan. 11, 1982, art. 112; Japan, May 3, 1947, art. 24; The Republic of Latvia, Feb. 15, 1922, art. 110; The Republic of Lithuania, Oct. 25, 1992, art. 38; The Republic of Malawi, May 18, 1994, art. 22; The Republic of Moldova, July 29, 1994, art. 48; The Republic of Montenegro, Oct. 19, 2007, art. 71; The Republic of Namibia, 1990, art. 14; The Republic of Nicaragua, Nov. 19, 1986, art. 72; The Republic of Paraguay, June 20, 1992, arts. 49, 50, 51, 52; The Republic of Peru, Oct. 31, 1993, art. 5; The Republic of Poland, Apr. 2, 1997, art. 18; The Republic of Serbia, art. 62; The Republic of Suriname, Oct. 30, 1987, art. 35; The Kingdom of Swaziland, 2005, art. 27; The Republic of Tajikistan, Nov. 6, 1994, art. 33; Turkmenistan, Aug. 15, 2003, art. 25; The Republic of Uganda, 1995, art. 31; Ukraine, June 28, 1996, art. 51; The Bolivarian Republic of Venezuela, 1999 art. 77; The Socialist Republic of Vietnam, Apr. 18, 1992, art. 64.

not likely that a few of those provisions may be interpreted *inclusively* as not disallowing same-sex marriage.

In a few nations the language²⁶ or the history of the drafting²⁷ of the constitutional provision makes it clear that it was intended specifically to ban same-sex marriage. However, whether such clear intent and constitutional language will be respected is not certain. The proper enactment by the citizens of a modern liberal democracy of a constitutional amendment or provision that specifically and unequivocally is intended to and does explicitly ban same-sex marriage is no guarantee that other government officers (especially judges) will not disregard, dismiss, and disobey that constitutional language—as the federal district and appellate court rulings that, if upheld, will invalidate and overturn Proposition 8²⁸ clearly show.²⁹

Less than one-seventh of sovereign nations and just one-third of the American states allow same-sex couples to marry or offer them another domestic relations legal status with marriage-equivalent legal benefits. Eighty-three percent (83%) of the nations and sixty-two percent (62%) of the states in this country give no legal domestic relationship status or benefits to same-sex couples.

III. WHETHER THE CONSTITUTIONAL DOCTRINE OF EQUALITY SUPPORTS CONSTITUTIONAL CLAIMS FOR SAME-SEX MARRIAGE

Principles of equality, including tolerance and pluralism, have two dimensions of relevance to the same-sex marriage debates. The first is the dimension of equality as a doctrine of constitutional law. The second is equality as a general principle of jurisprudence, philosophy, and legal theory. Both provide little support for the constitutional claims for same-sex marriage. This part examines the doctrinal equality

26. See, e.g., THE TRANSITIONAL CONSTITUTION OF THE REPUBLIC OF SOUTH SUDAN, 2011, Jul. 9, 2011, art. 15, available at <http://bit.ly/ZBghaz> (“Every person of marriageable age shall have the *right to marry a person of the opposite sex and to found a family . . .*”); see also CONSTITUTION OF LATVIA, CONSTITUTION OF UGANDA *infra* note 22.

27. See, e.g., THE FUNDAMENTAL LAW OF HUNGARY [CONSTITUTION] Apr. 25, 2011, art. L; CONSTITUTION OF LATVIA, Feb. 22, 1922, ch. VIII, art. 110; see also Pablo Gorondi, *Hungary Passes New Conservative Constitution*, STAR TRIBUNE (Apr. 18, 2011, 11:55 AM), <http://www.star-tribune.com/printarticle/?id=120060264>.

28. Proposition 8 was the 2008 California constitutional amendment banning same-sex marriage.

29. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd sub nom.*, *Perry v. Brown*, 671 F.3d 1052 (9th Cir.), *cert. granted sub nom.*, *Hollingsworth v. Perry*, 133 S. Ct. 786 (2012).

claims.

A. Equality Claims for Same-Sex Marriage in State Constitutional Law

All thirty-one of the state marriage amendments barring same-sex marriage clearly and emphatically reject the concept that same-sex unions are the same as, or equal to, or equivalent to dual-gendered institution of “marriage.” Indeed, the common, main purposes of all these state marriage amendments are (1) to constitutionally confirm that marriage between a man and a woman is a *unique* relationship, a uniquely valuable *kind* of domestic relationship, (2) to constitutionally limit the legal status of marriage to male-female couples only, and (3) to constitutionally prohibit giving the legal status of “marriage” to same-sex relationships. By confining the specific legal institution and status of “marriage” exclusively to gender-integrating male-female unions, the core, inescapable message of all of these state marriage amendments is that marriage is a unique and uniquely important legal and social institution, and that an indispensable element of the value of marriage as an institution to society is that it unites a man and a woman. Thus, in a significant majority (62%) of the American states, the people—the ultimate source and ultimate authority on the meaning of constitutional rights and duties—have rejected the proposal that same-sex couples and male-female couples are equal in terms of the purposes and qualities of marriage.

These popularly-enacted constitutional provisions are not merely significant politically, but they also are very significant for state constitutional law doctrine. The 2008-09 scenario in California illustrates this point. After the California Supreme Court in May 2008 interpreted the state constitution as mandating the legalization of same-sex marriage (based in part on its interpretation of an equality principle),³⁰ the people of California in November 2008 voted to amend their state constitution by adopting Proposition 8 that defined marriage as the union of a man and a woman.³¹ When that amendment was attacked by advocates of same-sex marriage, the state supreme court rejected that challenge, respected the constitutional will of the people, and upheld the state marriage amendment.³² Thus, as a matter of clearly-expressed state constitutional law in nearly two-thirds of the states, the

30. *In re Marriage Cases*, 183 P.3d 384, 419, 428 (Cal. 2008).

31. CAL. CONST. art. I, § 7.5.

32. *Strauss v. Horton*, 207 P.3d 48 (2009).

constitutional equality claim to same-sex marriage has been decisively rejected.

Twenty of those thirty-one state marriage amendments contain words like “equivalent” or “similar” or other words describing comparability to prohibit not only same-sex marriage but also forbid creating or legally recognizing domestic relationships for same-sex couples (and in some states also other couples) that are or present themselves as being “equivalent” or substantially “similar” to dual-gendered marriage in status or substance.³³ These amendments put an exclamation point after their rejection of the equality claim for same-sex unions—repudiating not only the claim for same-sex unions as legally entitled to institutional marriage status—but also rejecting the claim of equivalence in eligibility for the same or similar bundles of benefits and privileges. These twenty marriage amendments express one or both of two equality value positions: (1) that same-sex (and in some states, other non-marital) domestic relationships do not merit (deserve or justify or need) the same or equivalent of legal status, benefits, privileges, rights and responsibilities as are provided to male-female marital unions; or (2) that conferring equal or equivalent-to-marital legal packages of benefits, duties and responsibilities upon same-sex (and, usually, other non-marital) domestic relations creates inequality that could harm and undermine or endanger the more important gender-integrating social institution of marriage or would harm or endanger society or particular vulnerable members of society. Both potential positions of these amendments clearly reject the claim of the equality and equivalence of same-sex unions to marriage.³⁴

However, more than one-third of these thirty-one state marriage amendments (eleven of them) do not bar the granting of equivalent legal rights and benefits to same-sex (and other) couples under another legal status, such as “civil unions.” This suggests that those eleven states and the eight states that have civil unions³⁵ reject the claim that

33. See *infra* Appendix II.A (listing the twenty states that bar civil unions equivalent to marriage). The “equality” being forbidden in these twenty state marriage amendments is between marriage and other domestic relationships. The words “equal” or “equality” do not appear in any of the thirty-one state marriage amendments.

34. That is, they express the view that the relationship contributions to society of such alternative unions are not equal or equivalent value to society as those of male-female marriages.

35. The term “civil union” describes a legal domestic-relationship status that provides all or most of the (and functionally equivalent) benefits, privileges, rights, and duties of marriage to same-sex (and sometimes other) couples who are not eligible to marry. The states that have created “civil unions” but call them by some other label, such as “domestic partnerships,” include

same-sex unions are the same as, or are fully equal or equivalent to marriage as a comprehensive legal status or legal institution. These eleven states do not necessarily reject the claim that same-sex couples who want to make a life-long legal commitment to each other should be able to receive legal benefits, privileges, rights, and responsibilities that are generally equivalent to, comparable to, similar to, or the same as those available to a married male-female couple. Nor do they accept as a matter of constitutional certainty the claim that the contributions to society of same-sex unions are equal or equivalent to those of male-female marital unions in terms of their meriting the conferral of equal or equivalent non-marital domestic relationships status, benefits, duties, and responsibilities. They do not accept as a matter of constitutional certainty the claim that conferring equal or equivalent non-marital domestic relationships status, benefits, duties, and responsibilities upon same-sex couples would *not* harm, undermine or endanger the important gender-integrating social institution of marriage, or that to do so would not harm society and particular (vulnerable) members of society. Instead, they presumably believe that such claims and arguments should be considered and decided by the normal legislative processes, or they simply do not believe such blanket, absolute, non-equivalence claims regarding extension of marriage-like benefits, privileges, and duties to same-sex and other non-marital couples.

As a largely unmentioned collateral effect, all thirty-one of the state marriage amendments clearly define marriage as a monogamous relationship only. By defining marriage as the union of “*one* man and *one* woman,” or the union of “*a* man and *a* woman” they clearly, constitutionally exclude polygamous and other polyamorous unions from eligibility for “marital” status. They further directly prohibit recognition of polygamous and polyamorous relationships as “marriages.” Since the growing Islamic faith allows polygamy,³⁶ and since there recently has been some additional, unrelated interest in and promotion

California, Oregon, Colorado, Nevada, and Wisconsin. See sources cited *supra* note 11 and accompanying text. Thus, 38% of the states constitutionally ban same-sex marriage, while eight other states have created “civil unions.”

36. See Napp Nazworth, *Religion Census: Increase in Evangelicals, Mormons, Muslims; Decrease in Catholics, Mainline Protestants*, CHRISTIAN POST (May 2, 2012, 6:08 AM), <http://bit.ly/Z3AQ0p> (“A decennial census of U.S. religions in Americans was released Tuesday by the Association of Statisticians of American Religious Bodies . . . The results show a dramatic increase in the number of . . . Muslims. . . . Muslims saw the greatest growth rate among the five main religious groups studied. Their numbers increased by 66.7 percent in the 2010 census from a decade earlier.”).

of polyamory,³⁷ this aspect of the state marriage amendments may settle an emerging marriage issue constitutionally at the state level before it emerges as a full-blown social issue. One wonders if the implications of the marriage amendments for polyamory, today so noncontroversial and neglected, in thirty or forty years might become the most controversial and significant.

B. Equality Claims for Same-Sex Marriage in U.S. Constitutional Law

The constitutional doctrine of Equal Protection in American jurisprudence recognizes that it is not a violation of constitutional equality to treat different things differently. “The Constitution [of the United States] does not require things which are different in fact . . . to be treated in law as though they were the same.”³⁸ Equal protection doctrine “embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly.”³⁹ The U.S. Supreme Court has long recognized that “[d]ifferences in circumstances beget appropriate differences in law. The Equal Protection Clause was not designed to compel uniformity in the face of difference.”⁴⁰ Accordingly, “discrimination with respect to things that are different” does not violate the Equal Protection clause.⁴¹

Professor Philip B. Kurland distinguished two ways in which the equal protection clause has been used to restrain the power of the state to treat people differently.

In its more general, less meaningful, and most used formulation, the

37. “[P]ost-modern polygamy has moved from being a utopian dream or an interesting thought experiment, to being a real, albeit fringe, American social practice.” Maura I. Strassberg, *The Challenge of Post-Modern Polygamy: Considering Polyamory*, 31 *CAP. U. L. REV.* 439, 442 (2003); see 3 *THE LESBIAN POLYAMORY READER: OPEN RELATIONSHIPS, NON-MONO GAMY, AND CASUAL SEX* (Marcia Munson & Judith P. Stelboum eds., 1999); Elizabeth F. Emens, *Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence*, 29 *N.Y.U. REV. L. & SOC. CHANGE* 277 (2004); Lynne Marie Kohm, *Moral Realism and the Adoption of Children by Homosexuals*, 38 *NEW ENG. L. REV.* 643, 660 (2004) (“[T]he same-sex marriage debate is quickly moving toward polyamory . . .”); Ann E. Tweedy, *Polyamory as a Sexual Orientation*, 79 *U. CIN. L. REV.* 1461 (2011); Marisa Black, Note, *Beyond Child Bride Polygamy: Polyamory, Unique Familial Constructions, and the Law*, 8 *J.L. & FAM. STUD.* 497 (2006); Stanley Kurtz, *Beyond Gay Marriage: The Road to Polyamory*, *WKLY. STANDARD*, Aug. 4, 2003, <http://bit.ly/YxCg6U>.

38. *Rinaldi v. Yeager*, 384 U.S. 305, 308–09 (1966) (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940)); *Carey v. Brown*, 447 U.S. 445, 481–82 (1980) (Rehnquist, J. dissenting).

39. *Vacco v. Quill*, 521 U.S. 793, 799 (1997) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)).

40. *Whitney v. State Tax Comm’n of N.Y.*, 309 U.S. 530, 542 (1940).

41. *Puget Sound Power & Light Co. v. Seattle*, 291 U.S. 619, 624 (1934).

Court has held that all persons within a class must be similarly treated by the state. That leaves unresolved the hard issues of how the class may be defined and how much leeway is left to the relevant government body in defining the class. Thus: “[W]hat the equal protection of the law requires is equality of burdens upon those in like situation or condition.”⁴²

Insofar as gender has any meaning whatever, it inherently establishes that men and women belong to different gender classes. Thus, this branch of equality jurisprudence does not compel same-sex marriage.

A second utilization of the [equal protection] clause in terms of the power of the state to classify is meaningful, definite, and usually ignored. Here the proposition is that there are certain factors that a state is precluded from taking into consideration in establishing classes. Mr. Justice Jackson called these “neutral facts” and thereby, unknowingly, damned the standard to purgatory or worse. Concurring in *Edwards v. California*, he said: “The mere state of being without funds is a neutral fact—constitutionally an irrelevance, like race, creed, or color.” Mr. Justice Harlan I, in his dissent in *Plessy v. Ferguson*, thought that color was a neutral fact and could not form the basis for imposing a burden or failing to grant a benefit. “Our Constitution,” he said, “is color-blind” It has been suggested that religion is a neutral fact on the basis of which the state may not classify either to grant or deny benefits or to impose or relieve from burdens. To date, however, the “neutral facts” notion has been utilized by the Court only to prevent unfavorable discrimination by the state.⁴³

Marriage is not only intimately and extensively involved with state regulation and channeling of procreation and child-rearing, but also to the formation of families that entail learning to live intimately with persons of the other gender. Thus, with the social interest in sustaining the core social institution in which men and women unite to complement and enhance the strengths and weaknesses of the other gender,⁴⁴ it is irrational and unrealistic to insist that gender is a “neutral fact”

42. Philip B. Kurland, *Foreword: Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government*, 78 HARV. L. REV. 143, 146 (1964) (quoting *S.C. ex rel. Phoenix Mut. Life Ins. Co. v. McMaster*, 237 U.S. 63, 72–73 (1915)).

43. Kurland, *supra* note 42 at 146–47 (footnote omitted).

44. Lynn D. Wardle, “Multiply and Replenish”: *Considering Same-Sex Marriage in Light of States Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL’Y 771, 779–80 (2001) (listing eight social interests in and legal purposes of marriage).

regarding the social interests in marriage.

Nor does eliminating gender-integration in marriage further equality-as-tolerance. William Eskridge has linked the gay rights constitutional jurisprudence of the U.S. Supreme Court to the principle of tolerance:

The jurisprudence of tolerance is a conservative theory of judicial review, and it is the theory that best justifies, and perhaps inspires, the positions taken by the Court in *Lawrence* and other recent gay rights cases. Ironically, it is a theory that justifies a fair amount of activist judicial review—not just the invalidation of consensual sodomy laws in *Lawrence*, but also the Court’s ruling that a sexual-orientation antidiscrimination law could not constitutionally be applied to require the Boy Scouts to retain an openly gay scoutmaster. [*Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).] What the cases share is the Court’s commitment to lowering the stakes of identity politics. The LGBT social movement wants to persuade America that gay is good, while the traditional family values (TFV) countermovement wants to persuade America that many gay rights would undermine the family, marriage, and other cherished institutions. This is a fine debate for America to have. The Court is simply insisting that the players not hit below the belt and turn a fair fight into a brawl.⁴⁵

The principle of “equality-as-tolerance” has been promoted to support same-sex marriage.⁴⁶ Interestingly, as Professor Bruce Hafen noted many years ago, the law can regulate relationships in three ways: prohibit, tolerate, or prefer them. Historically, same-sex relationships were prohibited by the law. On the other hand, marriage is the classic example of a relationship that historically was, and today still is, preferred in law.⁴⁷ In the past few decades, the laws in many jurisdictions

45. William N. Eskridge, Jr., *Lawrence’s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1025 (2004); see also Linda C. McClain, *Toleration, Autonomy, and Governmental Promotion of Good Lives: Beyond “Empty” Toleration to Toleration as Respect*, 59 OHIO ST. L.J. 19, 22–23 (1998) (arguing that equality-as-tolerance is too narrow and equality-as-respect would justify same-sex marriage).

46. *Id.*; see also James D. Wilets, *International Human Rights Law and Sexual Orientation*, 18 HASTINGS INT’L & COMP. L. REV. 1, 72 (1994) (quoting Kurt Krickler, Report on ILGA’s Participation in the CSCE Implementation Meeting on Human Dimension Issues Warsaw, 27 Sept.–14 Oct. 1993, EURO-LETTER (Int’l Lesbian and Gay Ass’n), Nov. 21, 1993) (“Tolerance plays also an important part in the attitude of the state towards persons of different sexual belonging.”).

47. Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 546–47 (1983) (“The law creates a natural spectrum with protected activity on one extreme, prohibited activity on the other extreme, and a broad range of permitted activity in the middle.”); see also Smith, *supra* note 2, at

have moved to tolerate (neither prohibit nor privilege) same-sex relationships. Advocates of same-sex marriage seek to move the law further. However, because marriage is a highly preferred, privileged legal relationship, the claim for same-sex marriage is not merely a claim for tolerance, but a claim for special privilege and special preference.

Likewise, equality-as-respect fails to mandate legalization of same-sex marriage. It is important to respect persons in same-sex relations as individuals with full civil rights. But marriage should not be taken hostage to prove respect. Giving marriage licenses to people is not necessary to respect people; our marriage laws deny marriage licenses to many people whose relationships are incompatible with the special purposes of marriage such as siblings and other closely-related persons, under-age persons, and already-married persons.⁴⁸

The crux of the constitutional dispute is whether gender-integration is important for the achievement of significant state interests concerning the regulation of marriage. Assuming for the sake of argument that a heightened (at least intermediate) standard of review may be applied, establishment of the equality claim for same-sex marriage requires the establishment of at least one of two critical propositions: (1) that there are no significant differences between men and women, or (2) that any gender differences that do exist are irrelevant to (or do not significantly advance) the important purposes the state has for regulating marriage.

The first (androgyny or gender-neutrality) proposition not only flies in the face of common experience and common sense,⁴⁹ but also contradicts a legion of gender-equality cases. These cases recognize not only that men and women are different in profound ways, but acknowledge that those gender differences make different and distinctly valuable contributions to society in innumerable ways that enrich society

308–12; Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 61 (1996) (“Legalizing same-sex marriage would ignore the distinction between tolerance and preference by extending the highest legal preferences to relationships which our society historically has condemned and which, even now, the most sympathetic states have chosen only to tolerate. The confusion comes when proponents of same-sex marriage assert that because homosexual relations are tolerated they are entitled to a state-endorsed preferred status.” (footnote omitted)).

48. See LYNN D. WARDLE, CHRISTOPHER L. BLAKESLEY & JACQUELINE Y. PARKER, 1 CONTEMPORARY FAMILY LAW, chps. 2–3 (1988) (describing numerous marital restrictions and formalities in state laws).

49. Jennifer Thieme, *The Freedom to Marry: A Liberal Value that Conservatives Should Shun*, DAILY CALLER (Oct. 12, 2012, 12:57 PM), <http://bit.ly/12ixFZu>.

by including both men and women in virtually all of the major institutions and sectors of our society. A long line of cases acknowledges that gender differences make different and distinctly valuable contributions to society in innumerable ways that enrich society by the inclusion of both men and women in virtually all of the major institutions and sectors of our society.⁵⁰ It is too late in the history of our constitutional jurisprudence to deny that the law recognizes the fact that men and women are different in innumerable, profound, and socially significant ways. Likewise, it is futile to deny that an intimate domestic union of two men or of two women creates a different kind of domestic relationship with importantly different qualities and characteristics than the marital union of a man and a woman. That those differences do not justify many forms of legal discrimination (such as in difference-irrelevant kinds of employment and eligibility for difference-neutral government benefits) simply underscores that there are very real gender differences.

The second (marital essentials) proposition also fails as a matter of constitutional doctrine. The appendices *overwhelmingly* show that in U.S. interstate comparative constitutional law, the integration of male and female is considered to go to the essence of marital relations and is the core and fundamental element of the social institution of marriage. As a matter of global principles and comparative international constitutional law, respect for the importance of integrating genders in marriage is even greater. If gender-integration is not a ubiquitous requirement for marriage in the nations of the earth, it is undeniably the pervasively prevailing, and nearly-ubiquitous requirement of marriage in the world today. And until just a dozen years ago it was historically the constant, unexcepted, ubiquitous marriage requirement in all societies through all history.⁵¹ Thus, the application of the equality

50. See *Califano v. Westcott*, 443 U.S. 76 (1979); *Orr v. Orr*, 440 U.S. 268 (1979); *Craig v. Boren*, 429 U.S. 190 (1976); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971); Taunya Lovell Banks, *Thurgood Marshall, the Race Man, and Gender Equality in the Courts*, 18 VA. J. Soc. POL'Y & L. 15, 19–20 (2010) (“According to one study, between 1971, when the Court in *Reed v. Reed* invalidated on equal protection grounds a state law preferring men over women as administrators for estates, and 2002, the Supreme Court decided forty-one cases involving gender employment discrimination claims.” (citation omitted)); Justin Driver, *The Constitutional Conservatism of the Warren Court*, 100 CALIF. L. REV. 1101, 1116 (2012).

51. See WARDLE, BLAKESLEY & PARKER, *supra* note 48, §§ 2:46–2:48 (discussing physical requirements for marriage including dual-gender union); Robert P. George, *What's Sex Got to Do With It? Marriage, Morality, and Rationality*, 49 AM. J. JURIS. 63, 73 (2004); Sherif Girgis, Robert P. George & Ryan T. Anderson, *What Is Marriage?*, 34 HARV. J.L. & PUB. POL'Y 245, 247 (2010).

principle in U.S. constitutional law should justify (and usually has justified) the limiting of legal marriage to dual-gender couples.⁵²

Moreover, judicially interpreting equal protection provisions of the Constitution in a way that mandated legalization of same-sex marriage would contradict and undermine core principles of American constitutionalism. The Founders of the U.S. Constitution, and the eighteenth-century Republican political theory upon which they drew in drafting the Constitution, emphasized the importance of democratic processes and recognized the simultaneous need for and risks of “parchment” protections of fundamental, inalienable human rights.

The Founders were very leery of relying for protection from abuses of government tyranny on mere “parchment barriers”—mere words put down on some revered “parchment.”⁵³ They preferred to rely instead upon the solid protection of structure.⁵⁴ That is one of the principal reasons for the Founders’ objection to and rejection of any listing of a “Bill of Rights” in the original Constitution of 1787.⁵⁵

52. See *McCConnell v. United States*, 188 Fed. App’x 540, 542 (8th Cir. 2006); *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 870–71 (8th Cir. 2006) (stating there was a good reason for the restraint displayed in *Baker*); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1304–05 (M.D. Fla. 2005) (holding that *Baker* constitutes binding precedent requiring dismissal of case); *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980) (stating that *Baker* was controlling, but that court would reach same conclusion de novo); *Lockyer v. San Francisco*, 95 P.3d 459, 504 (Cal. 2004) (stating that *Baker* sets forth federal constitutional law with respect to same-sex marriage, and not undermined by *Lawrence*); *Morrison v. Sadler*, 821 N.E.2d 15, 19–20 (Ind. App. 2005) (stating that *Baker* shows the Court did not think *Loving* supported argument by same-sex couples); *Hernandez v. Robles*, 855 N.E.2d 1, 17 n.4 (N.Y. 2006); *Langan v. St. Vincent’s Hosp.*, 802 N.Y.S.2d 476, 478 (App. Div. 2005) (finding *Baker* binding precedent on equal protection issue); *Andersen v. King Cnty.*, 138 P.3d 963, 999 (Wash. 2006) (following *Baker* in rejecting claim of constitutional right to same-sex marriage). See also Dale M. Schowengerdt, *Defending Marriage: A Litigation Strategy to Oppose Same-Sex “Marriage,”* 14 REGENT U. L. REV. 487 (2002) (reviewing court decisions holding that prohibiting same-sex marriage does not violate Equal Protection); Lynn D. Wardle & Lincoln C. Oliphant, *In Praise of Loving: Reflections on the “Loving Analogy” for Same-Sex Marriage*, 51 HOW. L.J. 117, 139 (2007) (analyzing *Loving*’s analogy to racial anti-miscegenation laws).

53. This memorable phrase was the language of James Madison. See John C. Eastman, *Philosopher King Courts: Is the Exercise of Higher Law Authority Without a Higher Law Foundation Legitimate?*, 54 DRAKE L. REV. 831, 832 (2006) (citing Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 5 THE WRITINGS OF JAMES MADISON 271–72 (G. Hunt ed., 1964)).

54. See Alexander Hamilton, *The Federalist No. 84*, in THE ESSENTIAL FEDERALIST AND ANTI-FEDERALIST PAPERS 301 (David Wootton ed., 2003).

55. See Eastman, *supra* note 53, at 832; Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 666–67 (2011); Richard G. Wilkins, *The Structural Role of the Bill of Rights*, 6 BYU J. PUB. L. 525, 531–32 (1992).

James Madison expressed those concerns most famously in *The Federalist* No. 10,⁵⁶ where he explained the need to divide governmental power to structurally set power against power to prevent tyranny by any branch of government.⁵⁷

Madison doubted that constitutional rights could do much to prevent political majorities or other powerful factions from having their way. Rights that protected the politically weak against the politically strong would be unenforceable; they would simply be disregarded or overridden. Justifying to Jefferson his opposition to a bill of rights, Madison argued that “experience proves the inefficacy of a bill of rights on those occasions when its controul is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State.”⁵⁸

Fellow Virginian James Randolph likewise declared, “I have no faith in parchment.”⁵⁹ Another delegate to the Virginia Constitutional Convention, Abel Upshur, likewise declared that no “paper guarantee was ever yet worth any thing, unless the whole, or at least a majority of the community, were interested in maintaining it.”⁶⁰ Roger Sherman, the Connecticut delegate to the Philadelphia Convention of 1787 explained: “No bill of rights ever yet bound the supreme power longer than the honeymoon of a new married couple, unless the rulers were interested in preserving the rights”⁶¹ Other Founders shared and expressed similar views.⁶²

One of the grave objections to including a bill of rights in the Constitution was that “the enumeration might unwittingly expand the power of the federal government. In Hamilton’s words, a bill of rights

56. James Madison, *The Federalist No. 10*, in *THE ESSENTIAL FEDERALIST AND ANTI-FEDERALIST PAPERS* 167 (David Wootton ed., 2003).

57. *Id.*; see also Eastman, *supra* note 53, at 833.

58. Levinson, *Parchment and Politics*, *supra* note 55, at 666–67 (quoting Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in JACK N. RAKOVE, *DECLARING RIGHTS* 160, 161 (1998)).

59. Daryl J. Levinson, *Rights and Votes*, 121 *YALE L.J.* 1286, 1299 (2012) (citing 42 *ANNALS OF CONG.* 2361 (1824)).

60. Levinson, *Rights and Votes*, *supra* note 59, at n.40 (citing JESSE T. CARPENTER, *THE SOUTH AS A CONSCIOUS MINORITY, 1789–1861: A STUDY IN POLITICAL THOUGHT* 141 (1990)).

61. Levinson, *Parchment and Politics*, *supra* note 55, at 721 (citing ROGER SHERMAN, *A Countryman, II*, *NEW HAVEN GAZETTE* (Nov. 22, 1787), reprinted in *ESSAYS ON THE CONSTITUTION OF THE UNITED STATES* 218, 219 (Paul Leicester Ford ed., 1892)) (emphases omitted).

62. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, 376–82 (1969) (citing Noah Webster); see also Levinson, *Parchment and Politics*, *supra* note 55, at 666–68.

containing ‘various exceptions to powers not granted’ might ‘afford a colorable pretext to claim more than were granted.’”⁶³ In fact—in ways not fully foreseen or explicitly considered by the Founders—the Bill of Rights, and some other constitutional provisions, including the Equal Protection Clause of the Fourteenth Amendment, have afforded courts enormous policy-making powers to legislate and make policy decisions (under the cloak of interpreting those provisions) that the Founders intended to be made by the people and their elected representatives.

Many constitutional scholars agree. Professor John Hart Ely is joined by many others who share the Madisonian perspective that the truly essential, and lasting, part of the Constitution “is a design of government with powers to act and a structure arranged to make it act wisely and responsibly. It is in that design, not in its preamble or its epilogue, that the security of American civil and political liberty lies.”⁶⁴ As Professor Eastman has explained:

In the end, Madison and other opponents of a bill of rights agreed to propose amendments once the new Constitution was ratified, and they proceeded to honor that pledge in the First Congress. But Madison drafted the new amendments with great care so as not to create the implication that they were merely “abridgements of prerogative in favor of privilege” or “stipulations between kings and their subjects.” Rights were not *granted* by the Bill of Rights but *recognized*, echoing back to the Declaration’s claim of inalienable rights.⁶⁵

Application of the “equal protection” provision has proven to be susceptible to the same kinds of abuses that led to such reticence to adopt and care in defining the Bill of Rights. Similar prudence and care is needed in interpreting the equal protection provision lest it become a tool for the illegitimate judicial imposition of same-sex marriage upon reluctant citizens.

C. Equality Claims as Justifications for Legalizing Same-Sex Marriage in Other Countries

While the equality claims for same-sex marriage in the United

63. Wilkins, *supra* note 55 (citing THE FEDERALIST, No.84 (Alexander Hamilton)).

64. HERBERT J. STORING, *The Constitution and the Bill of Rights*, in TOWARD A MORE PERFECT UNION 108, 128 (Joseph M. Bessette ed., 1995); *see also* Levinson, *Parchment and Politics*, *supra* note 55, at 667 n.18; Wilkins, *supra* note 55, at 530–33.

65. Eastman, *supra* note 53, at 833 (emphasis in original).

States have emphasized equality-as-equal/equivalent or equality-as-respect, in Europe the equality claims have primarily emphasized equality-as-tolerance. For example, the first nation to legalize same-sex marriage was the Netherlands, which has a long, proud, prominent tradition of tolerance. “From the very beginning, tolerance as a cultural concept was relevant to how officials were supposed to relate to morally ambivalent questions. [For example,] [i]n the sixteenth and seventeenth centuries, tolerance meant that those in power accepted the *existence* of religious views that were not compatible with official doctrine.”⁶⁶ Perhaps the condition of the country (i.e., small, below sea level, religiously pluralistic, a trading nation, etc.) nurtured the development of tolerance as a core principle of the Dutch.⁶⁷ Even today, the Dutch are leaders in social and legal tolerance of many behaviors that are strictly prohibited in most other nations because of their unique understanding of “tolerance.” Legally, in the Netherlands,

[T]olerance refers to policies of nonprosecution of things forbidden in the Criminal Code or other codes. *Gedogen* is the current Dutch word This form of tolerance is not necessarily the same as “indifference.” Nor is it necessarily “turning a blind eye.” Ordinarily it means that administrative or punitive reactions are postponed if the perpetrator agrees to act according to precise instructions.⁶⁸

Some commentators suggest that the Dutch generally are uninterested in moral analysis, which they associate with religion, because they view themselves as nonreligious⁶⁹—the Dutch way of dealing with moral questions is to not ask questions, instead taking a “live and let live” attitude.⁷⁰ Thus, clearly Dutch legalization of same-sex marriage connotes no endorsement, acceptance, or embracing of same-sex marriage, but expresses a recognition of the value of setting aside differences in order to promote a common end for the good of the political

66. Ybo Buruma, *Dutch Tolerance: On Drugs, Prostitution, and Euthanasia*, 35 CRIME & JUST. 73, 76 (2007) (emphasis added); see also Isaak Kisch, *The Netherlands: Caution and Confidence in a Democratic Society*, 54 COLUM. L. REV. 830, 834 (1954).

67. Buruma, *supra* note 66, at 78 (“[T]olerance was forced on people who were living together. Much of the land is below sea level. It had to be reclaimed from the sea by hardworking people from all religions. They had to work together—even if they considered one another heretics or heathens.”).

68. *Id.* at 85.

69. See Kisch, *supra* note 66, at 833–34; see also Herbert Hendin, *The Dutch Experience*, 17 ISSUES L. & MED. 223, 243–44 (2002).

70. Raphael Cohen-Almagor, *Why the Netherlands?*, 30 J.L. MED. & ETHICS 95, 100 (2002).

community.⁷¹

The Universal Declaration of Human Rights recognizes that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”⁷² Similar statements about the foundational importance and specially-protected role of families are found in dozens of other international conventions, compacts, and instruments.⁷³ Some examples include the International Covenant on Civil and Political Rights,⁷⁴ the International Covenant on Economic, Social and Cultural Rights,⁷⁵ the Convention on the Elimination of All Forms of Discrimination Against Women,⁷⁶ the Hague Convention on the Civil Aspects of International Child Abduction,⁷⁷ and the Convention on the Rights of the Child.⁷⁸

Advocates of same-sex marriage have long argued that these documents should be interpreted to provide a right to same-sex marriage. Those claims have been notably unsuccessful. These human rights charters have not been interpreted as requiring member states to re-define marriage to include same-sex couples. For example, in 2002 in *Joslin v. New Zealand*,⁷⁹ the United Nation’s Human Rights Committee affirmed that the internationally recognized civil right of marriage

71. Buruma, *supra* note 66,66 at 80–81.

72. Universal Declaration of Human Rights art. 16(3), G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). See Jane Adolphe, *The Holy See and the Universal Declaration of Human Rights: Working Toward a Legal Anthropology of Human Rights and the Family*, 4 AVE MARIA L. REV. 343 (2006); Don Browning, *The Meaning of Family in the Universal Declaration of Human Rights*, in 1 THE FAMILY IN THE NEW MILLENNIUM 38 (A. Scott Loveless & Thomas B. Holman eds., 2007); Mary Ann Glendon, *Knowing the Universal Declaration of Human Rights*, 73 NOTRE DAME L. REV. 1153 (1998).

73. See Lynn D. Wardle, *Federal Constitutional Protection for Marriage: Why and How*, 20 BYU J. PUB. L. 439 app. II, at 483 (2006) (listing 35 international treaties, charters, conventions, and other instruments with provisions acknowledging the importance of families or marriage).

74. International Covenant on Civil and Political Rights, art. 23, Dec. 19, 1966, 999 U.N.T.S. 171.

75. International Covenant on Economic, Social and Cultural Rights, art. 10 § 1, Dec. 16, 1966, 993 U.N.T.S. 3.

76. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Dec. 18, 1979, 1249 U.N.T.S. 13.

77. The Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, available at http://www.hcch.net/index_en.php?act=conventions.text&cid=24. The Convention became enforceable on Dec. 1, 1983. 28: *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, HCCCH.NET, http://www.hcch.net/index_en.php?act=conventions.statusprint&cid=24 (last visited Mar. 29, 2013).

78. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

79. *Joslin v. New Zealand*, Commc’n No. 902/1999, Human Rights Committee, 75th

created by the International Covenant on Civil and Political Rights confers the obligation on states “to recognize as marriage only the union between a man and a woman wishing to marry each other.”⁸⁰ This became the touchstone of understanding these human rights documents, and the various member states have been left to determine for themselves what recognition will be given other domestic relationships. Similarly, in *Rees v. United Kingdom*,⁸¹ the European Court of Human Rights held that the right to marry, as protected by the European Convention on Human Rights,⁸² applies only to “traditional marriage,” leaving the individual states free to individually determine the nature and degree of recognition to extend to other relationships.⁸³

In 2010 in *Schalk v. Austria*,⁸⁴ the European Court of Human Rights held definitively that the European Convention on Human Rights does not require member countries to legalize or even recognize same-sex marriages. Upholding the Austrian government denial of the two gay petitioners’ request to legally contract a marriage, and agreeing with the Austrian court’s holding that disallowance of same-sex marriage did not violate the Convention, the European Court held that the Convention did not confer or protect any right to same-sex marriage:

The Court observes that, looked at in isolation, the wording of Article 12 might be interpreted so as not to exclude the marriage between two men or two women. However, in contrast, all other substantive Articles of the Convention grant rights and freedoms to “everyone” or state that “no one” is to be subjected to certain types of prohibited treatment. The choice of wording in Article 12 must thus be regarded as deliberate. Moreover, regard must be had to the historical context in which the Convention was adopted. In the 1950s marriage was clearly understood in the traditional sense of being a union between partners of different sex.⁸⁵

Sess., July 8–26, 2002, CCPR/C/75/D/902/1999 (July 30, 2002).

80. *Id.* at 11 para. 8.2.

81. *Rees v. United Kingdom*, 106 Eur. Ct. H.R. (ser. A) (1986).

82. European Convention on Human Rights, Sept. 3, 1953, ETS No. 5, available at <http://www.echr.coe.int/ECHR/EN/Header/Basic+Texts/The+Convention+and+additional+protocols/The+European+Convention+on+Human+Rights/>.

83. *Rees*, 106 Eur. Ct. H.R. at para. 49.

84. *Schalk v. Austria*, Eur. Ct. H.R., HUDOC (24 June 2010), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-99605>.

85. *Id.* at para. 54–55.

Similarly, the Court ruled that the Convention's non-discrimination article,⁸⁶ "Article 14[,] taken in conjunction with Article 8, a provision of more general purpose and scope, cannot be interpreted as imposing such an obligation [to legalize same-sex marriage] either."⁸⁷ Petitioners claimed also that Article 14 was violated because even though they now could register their partnership in Austria, they were "discriminated against as a same sex-couple on account of certain differences conferred by the status of marriage on the one hand and registered partnership on the other."⁸⁸ The Court of Human Rights rejected that claim noting the margin of appreciation accorded states, and the lack of consensus within Europe on the point, that registered partnerships in Austria were "a legal status equal or similar to marriage in many respects" with "only slight differences in respect of material consequences, [but] some substantial differences . . . in respect of parental rights."⁸⁹ However, it was important to the Court to note that the scheme "corresponds on the whole to the trend in other member States [in Europe]."⁹⁰ Therefore, the Court concluded that there was "no violation of Article 14 of the Convention taken in conjunction with Article 8."⁹¹

Just this year, that interpretation of the Convention was reaffirmed. In March 2012, the European Court of Human Rights declared in *Gas v. France*⁹² that "Article 12 of the Convention does not impose an obligation on the governments of the Contracting States to grant same-sex couples access to marriage."⁹³ While it is to be expected that some pro-same-sex union developments will come in the future—given the political nature of the issue—the consistent, overwhelming

86. Article 14 must be considered the equality provision of the European Convention; it is a non-discrimination provision barring discrimination in the enjoyment of the rights and freedoms secured by the Convention. "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." European Convention on Human Rights, *supra* note 82, at art. 14.

87. *Schalk*, Eur. Ct. H.R., HUDOC, at para.101.

88. *Id.* at para. 107.

89. *Id.* at para. 109.

90. *Id.*

91. *Id.* at para. 110.

92. *Gas v. France*, Euro. Ct. H.R., HUDOC (15 March 2012), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109571>.

93. *Id.* at para. 66; see also Donna Bowater, *Gay Marriage is not a Human Right, According to European Ruling*, TELEGRAPH (Mar. 21, 2012), <http://bit.ly/14PKRWt>.

rejection of the claim for same-sex marriage in the global arena to this point is noteworthy.

Thus, as a matter of comparative constitutional law and international law, the trend to legalize same-sex marriage seems to have stalled (though it is inching forward—in a total of ten nations in the past twelve years). The trend now seems to be *against* same-sex marriage, with the sole regional exception of a few jurisdictions in Western Europe and a few former European colonies in North America and elsewhere. The global norm is not to recognize same-sex marriage, but to protect as a matter of international human rights the ability of each nation to settle that policy issue for itself.

IV. WHY THE GENERAL JURISPRUDENTIAL THEORY OF EQUALITY SUPPORTS THE CONSTITUTIONAL CLAIMS FOR SAME-SEX MARRIAGE

Equality can be said to include and be designed to achieve (protect) *tolerance*.⁹⁴ As the roots of the word suggest, *tolerance* includes the notion of reciprocity—a reciprocal “bear[ing] with” someone or something undesired, and a mutual self-restraint regarding the tolerated activity, condition, or situation.⁹⁵ The dilemma of *equality* and *tolerance* as legal principles in modern liberal democracies is that there must be some positive value, some virtue, that motivates and justifies the tolerance and equal protection of ideas and practices that others conclude are wrong, dangerous, bad, and harmful. History is filled with too many examples that show that relying on the personal virtue, self-control, and endurance of individuals, their ability to “put up” with and co-exist with wrongs and those who advocate and practice them, is not sufficient to produce genuine, let alone long-lasting, tolerance or equality.

Toleration, as Bernard Williams once remarked, is an “impossible

94. In this regard, I modestly diverge from Professor Steven D. Smith’s otherwise excellent analysis and critique of equality. He sees equality as a value distinctly different from and competing against tolerance, and calls for a revival of tolerance. See SMITH, *supra* note 1; Smith, *supra* note 2. I see equality as having both equality-as-tolerance dimensions and equality-as-neutrality distortions.

95. See Anthony Esolen, *Tolerance and Reciprocity*, PUB. DISCOURSE (Sept. 21, 2012), <http://www.thepublicdiscourse.com/2012/09/6452> (“The Latin *tol-* is related to a group of words having to do with carrying a burden: German *dulden*, to be patient, to endure; Old English *tholian*, to suffer; Latin *tuli*, I have borne. When we tolerate we *bear with* someone or something; we *bear* the existence of a wrong . . . because . . . to protest would invite a greater wrong”).

virtue.” It is impossible because it involves accepting, and abiding or accommodating views that one rejects. It calls us to live in cognitive dissonance and presents contradiction as a sought after goal. We are obliged to “bear” what in fact we find unbearable. Of course, if we did not find this, that, or the other word or deed objectionable, there would be no call to tolerate them. . . . Viewed from one perspective then, tolerance is indeed a virtue so demanding as to be “impossible” of realization, perhaps even logically untenable, involving us in the laws of contradiction.

. . . [T]olerance is far from being a sufficient virtue. . . . Tolerance, with its historical associations of suffering the presence of what is detestable . . . is too feeble a thing to promote.⁹⁶

Reliance upon the “grin-and-bear-it” virtue of citizens and government officials produces only temporary and unstable tolerance and shallow and limited equality. Thus, Professor Steven Smith has described two flaws with the neutral-equality ideal in modern liberalism:

First, without an accepted set of substantive values—an orthodoxy—the ideals of neutrality and equality are incapable of guiding or constraining public policy. Thus, public neutrality toward substantive values can never be achieved. Second, even if such neutrality could be achieved, a regime committed to value-free neutrality or equality would be incapable of commanding the respect and loyalty of its citizens. In short, substantive neutrality is impossible; and even if it were possible, it would be morally insupportable.⁹⁷

96. Adam B. Seligman, *Tolerance, Tradition and Modernity*, 24 *CARDOZO L. REV.* 1645, 1646 (2003) (footnote omitted) (citing BERNARD WILLIAMS, *TOLERATION: AN IMPOSSIBLE VIRTUE* 18–28 (David Heyd ed., 1996)).

97. Smith, *supra* note 2, at 313. Professor Smith posits that modern equality jurisprudence developed in three stages, beginning with adoption of the principles of tolerance (most notably and influentially expressed by John Locke in his 1689 work, *A Letter Concerning Toleration*), but that liberal thinkers later substituted equality for tolerance in order to provide broader protection for unpopular minorities (most notably and influentially James Madison in his writings protecting religious liberty). That focus on equality led to the adoption of neutrality-as-equality, the attitude of state neutrality and the official adoption of a policy of ‘equality’ towards all competing groups. “In the eyes of the state, or of the law, all groups and individuals are entitled to ‘equal concern and respect’ regardless of their political ideology, religious faith, or moral commitments.” Smith, *supra* note 2, at 311; *see also* SMITH, *supra* note 1, at 11–20.

Without disputing his first and third points, Smith’s second point might be contested. That is, it is possible to read Madison as suggesting that full equality is a defining element of toleration, and not as substituting equality for toleration. Thus, it is possible to reconcile toleration and equality as two sides of the same coin rather than cast them as different, competing values. In this interpretation, the only real and significant conceptual change occurred when the notion of tolerance-as-equality morphed into the notion of equality-as-substantive-neutrality.

That probably is why many wise philosophers from Greek to modern times have taught “that without a shared conception of justice, genuine political community is impossible.”⁹⁸

But commitment by the *polis* to any shared substantive value or principle as the basis for equality or tolerance creates a conundrum, for it would exclude tolerating and giving equal protection to the ideas and persons that reject the underlying substantive value. What principle can provide the “shared value” that can sustain tolerance and equality?⁹⁹ Liberty provides the solution to the conundrum of equality and tolerance. Liberty is at least a procedural principle, protecting as a matter of recognizing the separate and independent jurisdiction, the sovereignty of other individuals under the rule of law in the political community, to decide for themselves important matters. Liberty justifies tolerance because it commands respect for the sovereign dignity of all members of the community—for us, as well as all others. Protection of our own liberty is linked to and dependent upon equal protection of the liberty of all other members of the *polis*. Thus, because we honor liberty, we tolerate bad ideas and practices that others are at liberty to live and advocate; because our own valued liberty is implicated, we equally protect the liberty of others to make choices that we believe are bad, wrong, and even harmful.

But liberty does not mean the right of any individual to do whatever he or she wants, whenever and however and to whomever he or she wants. The founders of the American republic were very interested in protecting individual liberties as well as protecting society, and they described some clear boundaries of individual liberty; they defined them in terms of protecting the political community. Later, John Stuart Mill articulated his classic modern liberal definition of the limits of individual liberty in terms of not harming others.¹⁰⁰

A. The Distortions of “Equality”

While equality has been a core, distinguishing characteristic and ideal of the American republic since its earliest days, the dangers of

98. Smith, *supra* note 2, at 327 (citing A. MACINTYRE, *AFTER VIRTUE* 244 (2d ed. 1984)); *see also id.* at 328 (“[A] healthy political community must stand for something. If it does not, then it becomes a mere aggregation of jarring individual atoms; politics and government become a battleground, and law, to those who lack the power to dictate its content, will be mere coercion.”).

99. *See* SMITH, *supra* note 1, at 143 (suggesting that genuine mutual respect is the necessary common value for sustaining equality-as-tolerance).

100. *See* JOHN STUART MILL, *ON LIBERTY* 9 (Hackett Publishing Co. 1978) (1859).

distorting the ideal of equality have been apparent from the beginning of our constitutional democracy. Alexis de Tocqueville famously reported in *Democracy in America*¹⁰¹ that Americans enjoyed an unprecedented “equality of condition”¹⁰² in their new nation, but noted the underlying tension between the principles of liberty and equality.¹⁰³ De Tocqueville celebrated that the ideal democratic nation is one in which the citizens “will be perfectly free, because they will all be entirely equal, and they will all be perfectly equal because they will be entirely free.”¹⁰⁴ But, he warned that their passion for equality would overcome their passion for liberty: “[T]hey call for equality in freedom; and if they cannot obtain that, they still call for equality in slavery.”¹⁰⁵

More recently, Professor Peter Western explained that equality is an “empty” idea lacking substantive content;¹⁰⁶ it is a formal concept only and thus useless for deciding any significant issue.¹⁰⁷

Equality simply means that like cases should be treated alike—a proposition with which no one really disagrees. What people *do* disagree about is whether some particular case really *is* like some other case in relevant respects. But the notion of equality does nothing to help resolve that sort of disagreement.¹⁰⁸

Equality justification actually obfuscates the substantive contest and masks the true basis for the resolution of the issue.¹⁰⁹ As Professor Steven D. Smith puts it: “If we see controversial issues being debated

101. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Henry Reeve, trans., Phillips Bradley, ed., Alfred A. Knopf, 11th ed. 1972) (1835).

102. *Id.* at 3.

103. 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 96 (Henry Reeve, trans., Phillips Bradley, ed., Alfred A. Knopf, 11th ed. 1972) (1840).

104. *Id.* at 94.

105. *Id.* at 97; see also *Alexis de Tocqueville Quotes*, GOODREADS, http://www.goodreads.com/author/quotes/465.Alexis_de_Tocqueville (last visited Mar. 30, 2013) (“Americans are so enamored of equality, they would rather be equal in slavery than unequal in freedom.”); (“[I]t every day renders the exercise of the free agency of man less useful and less frequent; it circumscribes the will within a narrower range and gradually robs a man of all the uses of himself. The principle of equality has prepared men for these things; it has predisposed men to endure them and often to look on them as benefits.”); (“[T]here are no surer guarantees of equality among men than poverty and misfortune.”).

106. Peter Western, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

107. See *id.* at, 566–67.

108. SMITH, *supra* note 1, at 13.

109. See *id.* at 13–14.

mainly in terms of what ‘equality requires,’ in short, we will have reason to suspect in advance that some kind of cheating—or deception, or self-deception—is going on.”¹¹⁰

Thus, as a matter of jurisprudential principles, the principle of equality only masks the real reasons for resolving, one way or another, the controversy over legalizing same-sex marriage. What is needed is a discussion of the values, virtues, moral goods and purposes, and social interest in marriage. As Michael Sandel argues, whether same-sex marriage should or should not be legalized requires “recourse to controversial conceptions of the purpose of marriage and the goods it honors.”¹¹¹ As a matter of moral analysis, the question turns on the nature and purposes of the social institution of legal marriage and on the qualities and characteristics of same-sex and opposite-sex couples. As Professor Sandel asserts: “The debate over same-sex marriage is fundamentally a debate about whether gay and lesbian unions are worthy of the honor and recognition that, in our society, state-sanctioned marriage confers. So the underlying moral question is unavoidable.”¹¹² Since equality analysis only masks and obscures those underlying social and moral questions, it impedes rather than facilitates the intelligent, coherent resolution of the same-sex marriage issue.

Finally, the cost of establishing an equality claim for same-sex marriage is the destruction of the very institution of marriage that the equality claim seeks to make accessible to same-sex couples. Only by devaluing and diminishing marriage, only by neutralizing and abandoning the core, historic (still nearly-ubiquitous globally) *dual-gender* value component of the institution of marriage might those equality principles provide meaningful support for same-sex marriage claims.¹¹³ Yet, “[a]s Alexander Bickel explained: ‘. . . valueless institutions are shameful and shameless and, what is more, man’s nature is

110. *Id.* at 14.

111. MICHAEL J. SANDEL, *JUSTICE: WHAT’S THE RIGHT THING TO DO?* 253 (2009); *see also* Russell Muirhead, *Minerva’s Owl” The Tradition of Western Political Thought. By Jeffrey Abramson*, 89 TEX. L. REV. 671, 683–85 (2011) (reviewing, *inter alia*, MICHAEL J. SANDEL, *JUSTICE: WHAT’S THE RIGHT THING TO DO?* (2009)), Linda C. McClain & James E. Fleming, *Respecting Freedom and Cultivating Virtues in Justifying Constitutional Rights*, 91 B.U. L. REV. 1311, 1321–27 (2011); Jeffrey Abramson, *Book Reviews, Justice Takes a Stand*, 89 TEX. L. REV. 653, 655–662 (2011) (reviewing SANDEL).

112. SANDEL, *supra* note 111, at 254.

113. *See* Thieme, *supra* note 49.

such that he finds them, and life with and under them, insupportable.”¹¹⁴

V. CONCLUSION

This paper has revealed that in most legal systems, including most American states and most federal constitutional jurisprudence, as well as in the law and jurisprudence in most other nations, equality principles do not require legalization of same-sex marriage as a matter of constitutional or fundamental human rights doctrines. Rather, only in a few legal systems, equality doctrines have been interpreted to require legalization of same-sex marriage.

Equal protection and tolerance, based on respect for individual liberty in our constitutional system might require some legal recognition or protection of some status and benefits for same-sex couples who otherwise satisfy the commitments and other essential requirements of unions that contribute significantly to the social good. But equal protection and tolerance do not require disregarding the importance of the core, essential value of gender-integration in marriage.

The risk of equality jurisprudence is its tendency to obfuscate the real issues, and to make real, competing interests. Whether equality notions require legalization of same-sex marriage ultimately depends upon identifying and understanding the nature and goods of the institution of marriage, and upon our best assessment of how well same-sex couples contribute to the nature and goods of the institution of marriage, especially as compared to male-female couples. Those matters should be examined and discussed openly and transparently, not behind the veil of equality that obscures the issues and not through the surrogate language of equality notions.

Likewise, the equality-as-tolerance claim for same-sex marriage depends upon liberty and the limits of liberty (whether liberty should include the liberty to marry a same-sex partner). The limits of liberty are set by a determination of the harmful impacts of its exercise upon other persons and institutions in society (e.g., whether same-sex marriage will harm or weaken the institution of marriage or persons in society). Again, open, transparent, full, respectful discussion is needed to make that assessment.

These are difficult and delicate questions on which reasonable persons may hold very strong and differing viewpoints. Because the issues

114. Smith, *supra* note 2, at 328.

matter deeply and differently to different people, there is a constant temptation to resort to strident rhetoric that is accusatory, including charging those who disagree with being judgmental or motivated by ulterior motives (including animus or ideological blindness). That kind of rhetoric certainly chills and discourages the important civic dialogue that needs to occur in order for us to reach a responsible decision. As Judge Thomas B. Griffith put it:

Disagreement is critical to the well-being of our nation. But we must carry on our arguments with the realization that those with whom we disagree are not our enemies; rather, they are our colleagues in a great enterprise. When we respect each other enough to respond carefully to argument, we are filling roles necessary in a republic.¹¹⁵

Open, full, serious, vigorous, respectful dialogue about these difficult and sensitive issues is essential not only to answering rightly the question whether equality requires legalization of same-sex marriage, but also whether process is an essential component of equality itself.

It would be a misuse and abuse of the equal protection guarantee for judges to interpret it as constitutionally mandating the legalization of same-sex marriage. Determinations about what marriage means and which of many different forms and styles of adult relationships and living arrangements properly merit the legal status of marriage under our Constitution are for the people to decide, either by their elected representatives or directly.

The structural dimension of equal protection protects the right of all citizens to have an equal opportunity to influence and equal power to determine public policy on such fundamental issues as whether to redefine marriage to include same-sex couples. The 2012 elections have shown that the issue can be fairly and properly decided through democratic processes. Judicial interpretation of the equal protection clause—a provision that was intended to protect the rights of persons from unjust discrimination—deprives the people of the right to protect their marriages and to preserve the social institution of marriage as the gender-integrating institution it has been for millennia. This deprivation would be a distortion of the equal protection provision and would be profoundly and harmfully ironic.

115. Thomas B. Griffith, *The Work of Civility*, BYU MAG., Fall 2012, available at <http://magazine.byu.edu/?act=view&a=3076>.

APPENDIX I: THE LEGAL ACCEPTANCE OF SAME-SEX MARRIAGE
AND UNIONS IN THE UNITED STATES AND GLOBALLY

Legal Status—31 December 2012¹¹⁶

A. Legal Allowance of Same-Sex Unions in the United States

**Same-Sex Marriage Is Legal in Nine U.S. States (18%), the
District of Columbia, and Two Indian Tribes**

Connecticut	New York
Iowa	Washington ¹¹⁷
Maine	Vermont
Maryland	District of Columbia
Massachusetts	Coquille Tribe
New Hampshire	Suquamish Tribe ¹¹⁸

116. See *Recognition of Same-Sex Couples Worldwide*, *Recognition of Same-Sex Couples in the United States*, LAMBDA LEGAL, http://data.lambdalegal.org/publications/downloads/fs_recognition-of-same-sex-couples-worldwide.pdf (last updated Mar. 29, 2011), *Status of Same-Sex Relationships Nationwide*, LAMBDA LEGAL, <http://www.lambdalegal.org/publications/articles/nationwide-status-same-sex-relationships.html> (last modified June 8, 2012), Bea Verschraegen, *The Impact of European Family Law on National Legal Systems*, in 2 CENTRAL AND EUROPEAN COUNTRIES AFTER AND BEFORE THE ACCESSION 63, 63–65 (2011); cf. JENNIFER C. PIZER & SHEILA JAMES KUEHL, THE WILLIAMS INSTITUTE, SAME-SEX COUPLES AND MARRIAGE (Aug. 2012), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Pizer-Kuehl-Model-Marriage-Report.pdf>.

117. The question of whether to legalize same-sex marriage was decided by voters in Maine, Maryland, and Washington in November, 2012, and voters in Minnesota decided whether to adopt a constitutional amendment barring same-sex marriage.

118. Two of 564 U.S. Indian tribes allow same-sex marriage while six have banned it. Trista Wilson, Comment, *Changed Embraces, Changes Embraced? Renouncing the Heterosexist Majority in Favor of a Return to Traditional Two-Spirit Culture*, 36 AM. INDIAN L. REV. 161, 177–78 (2012) (“The two largest Native American tribes, the Cherokees and the Navajos, both passed legislation prohibiting same-sex marriage. . . . Four other tribes passed legislation limiting marriages to those between a man and a woman: the Sault Tribe of Chippewa Indians, located in Michigan; and the Muscogee (Creek) Nation, Iowa Tribe, and Chickasaw Nation, all located in Oklahoma. . . . [But i]n 2008, the Coquille Tribe of Oregon became what is believed to be the first tribe to extend marriage rights to same-sex couples, so long as one of the partners is a tribal member. In August 2011, the Suquamish Tribe, located in Washington, also extended full marital rights to same-sex couples.”).

Same-Sex Unions Equivalent to Marriage (“Civil Unions”) Are Legal in Eight U.S. States (20%) and the District of Columbia.

California ¹¹⁹	Hawaii
Nevada	Delaware
New Jersey	Rhode Island
Oregon	District of Columbia ¹²⁰
Illinois	

Same-Sex-Union Registry and Specific, Limited Benefits in Two More U.S. Jurisdictions.

Colorado	Wisconsin
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119. California formerly had same-sex marriage by judicial decree for about four-and-one-half months in 2008 before the voters passed Proposition 8, rejecting same-sex marriage.

120. Some civil unions may be superseded by legislation legalizing same-sex marriage if it is approved. California and Nevada call them “domestic partnerships” but in substance they are marriage-equivalent civil unions. *See supra* notes 11, 35. Hawaii, Illinois, Nevada, and the District of Columbia also allow heterosexual couples to contract civil unions, but same-sex marriage may eventually replace civil unions.

*B. Legal Allowance of Same-Sex Unions Globally***Same-Sex Marriage Is Permitted in Ten (or Eleven) Nations.¹²¹**

The Netherlands	Sweden
Belgium	Portugal
Canada	Iceland
Spain	Argentina
Norway	Denmark
	<i>(and arguably South Africa)</i>

Same-Sex Unions Equivalent to Marriage Are Allowed in Seventeen or Sixteen Other Nations (9%).¹²²

Ecuador	Brazil
Finland	Switzerland
France	United Kingdom
Germany	Uruguay
Luxembourg	New Zealand
<i>South Africa</i>	Austria
Slovenia	Ireland
Andorra	Liechtenstein
	and (most of) Australia ¹²³

Same-Sex Partnerships (Formal but Not Equal to Marriage) Are Allowed in Five or More Nations.

Columbia	Hungary
Croatia	Israel
Czech Republic	

121. A civil union has most or all of the same legal qualities of marriage but is called something else. *E.g.*, South Africa had legalized same-sex “civil unions,” which can be created by way of “marriage” and can be called “marriages,” but the Marriage Act was unamended to only allow male-female marriage. *See* Civil Union Act 29441 of 2006 (S. Afr.), *available at* <http://www.info.gov.za/view/DownloadFileAction?id=67843>; *see also* Lynn D. Wardle, *The Proposed Minnesota Marriage Amendment in Comparative Constitutional Law: Substance and Procedure*, HAMLIN J. PUB. L. & POL’Y (forthcoming Spring 2013). Same-sex marriage also is allowed in sub-jurisdictions of some nations (e.g., the USA (certain states), Mexico (City) and by specific-case court decisions in others (Brazil)). Some nations recognize foreign same-sex marriages but do not allow same-sex marriages to be contracted domestically.

122. *See supra* note 13 (re South Africa).

123. Same-sex cohabitation is recognized in all Australian states and territories, and registration of such civil unions is permitted in most states and territories of Australia. Civil unions also are allowed in several states in the United States, and in some other sub-jurisdictions, like Greenland

APPENDIX II: THE LEGAL REJECTION OF SAME-SEX MARRIAGE
AND UNIONS IN THE UNITED STATES AND GLOBALLY

Legal Status—31 December 2012¹²⁴

A. Legal Rejection of Same-Sex Unions in the United States

Thirty-one States (62%) and Six Indian Tribes Prohibit Same-Sex Marriage by Constitutional Amendment. Twenty States (40%)* Also Ban Civil Unions.			
Alaska	Kentucky*	Ohio*	Cherokee Tribe
Alabama*	Louisiana*	Oklahoma*	Navajo Tribe
Arkansas*	Michigan*	Oregon	Sault Tribe
Arizona	Mississippi	South Carolina*	Muscogee Tribe
California	Missouri	South Dakota*	Iowa Tribe
Colorado	Montana	Tennessee	Chickasaw Tribe
Florida*	Nebraska*	Texas*	
Georgia*	Nevada	Utah*	
Hawaii	North Carolina*	Virginia*	
Idaho*	North Dakota*	Wisconsin* ¹²⁵	
Kansas*			

124. See *Recognition of Same-Sex Couples Worldwide, Recognition of Same-Sex Couples in the United States*, LAMBDA LEGAL, <http://bit.ly/10yiHcV> (last updated Sept. 12, 2011), *Status of Same-Sex Relationships Nationwide*, LAMBDA LEGAL, <http://bit.ly/Za6ulQ> (last modified June 8, 2012), Bea Verschraegen, *The Impact of European Family Law on National Legal Systems*, in 2 CENTRAL AND EUROPEAN COUNTRIES AFTER AND BEFORE THE ACCESSION 63, 63–65 (2011); cf. Jennifer C. Pizer & Sheila James Kuehl, *Same-Sex Couples and Marriage*, THE WILLIAMS INSTITUTE (Aug. 2012), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Pizer-Kuehl-Model-Marriage-Report.pdf>.

125. The asterisk (*) indicates that civil unions are also banned. The pound symbol (#) means that the amendment is structural. In addition to the states that have adopted marriage amendments, in Maine in 2009 the “People’s Veto” vote overturned a law allowing same-sex marriage before the law took effect. Ben Brumfield, *Voters Approve Same-Sex Marriage for the First Time*, CNN POLITICS (Nov. 7, 2012, 2:24 PM), <http://www.cnn.com/2012/11/07/politics/pol-same-sex-marriage/index.html>. But, in November 2012, Maine voters narrowly legalized same-sex marriage. *Id.* In May 2012, a state marriage amendment passed in North Carolina with over 61% of the vote. *North Carolina Passes Same-Sex Marriage Ban*, CNN Projects, CNN POLITICS (May 11, 2012), <http://www.cnn.com/2012/05/08/politics/north-carolina-marriage/index.html>.

*B. Legal Rejection of Same-Sex Marriage Globally***At Least 47 of 193 Sovereign Nations (24%) Have Constitutional Provisions Defining Marriage As a Union of Man and Woman.¹²⁶**

Armenia (art. 32)	Mongolia (art. 16)
Azerbaijan (art. 34)	Montenegro (art. 71)
Belarus (art. 32)	Namibia (art. 14)
Bolivia (art. 63)	Nicaragua (art. 72)
Brazil (art. 226)	Panama (art. 58)
Bulgaria (art. 46)	Paraguay (arts. 49, 51, 52)
Burkina Faso (art. 23)	Peru (art. 5)
Burundi (art. 29)	Poland (art. 18)
Cambodia (art. 45)	Romania (art. 48)
China (art. 49)	Rwanda (art. 26)
Columbia (art. 42)	Serbia (art. 62)
Cuba (art. 43)	Seychelles (art. 32)
Democratic Republic of Congo (art. 40)	Somalia (art. 28)
Ecuador (art. 38)	South Sudan (art. 15)
Eritrea (art. 22)	Spain (art. 32, disregarded or overturned by legislation)
Ethiopia (art. 34)	Sudan (art. 15)
Gambia (art. 27)	Suriname (art. 35)
Honduras (art. 112)	Swaziland (art. 27)
Hungary (art. M - April 2011)	Tajikistan (art. 33)
Japan (art. 24)	Turkmenistan (art. 25)
Latvia (art. 110 - Dec. 2005)	Uganda (art. 31)
Lithuania (art. 31)	Ukraine (ark. 51)
Malawi (art. 22)	Venezuela (art. 77)
Moldova (art. 48)	Vietnam (art. 64) ¹²⁷

126. See Hong Kong Bill of Rights Ordinance (1997) Cap. 383, 7, § 8, art. 19 (H.K.), available at <http://bit.ly/X810ng>. The Spanish law allowing same-sex marriage—in facial violation of the constitution—was upheld by the country's highest court. See Carmen Garcimartín, *The Spanish Law on Same-Sex Marriage: Constitutional Arguments*, 27 *BYU J. PUB. L.* 399 (2013) (this symposium); Iciar Reinlein & Sarah Morris, *Same-Sex Marriage Upheld by Spain's Highest Court*, *REUTERS* (Mar. 29, 2012), <http://reut.rs/YtDylo>.

127. Constitutions, *supra* notes 21, 24-26; Political Constitution of the State 2009, art. 63 (Bolivia); Constitution of the Republic of Burundi Mar. 18, 2005, art. 29; Constitution of the Democratic Republic of the Congo Feb. 18, 2006, art. 40; The Constitution of Mongolia Jan. 13, 1992, art. 16(11); Political Constitution of the Republic of Panama Oct. 11, 1972, art. 58; Constitution of Romania Oct. 29, 2003, art. 48; Constitution of the Republic of Rwanda Jun. 4, 2003, art. 26; Constitution of the Republic of Seychelles Jun. 21, 1993, art. 32; Harmonized Draft

Constitution for the Republic of Somalia Jun. 12, 2012, art. 28; Spanish Constitution Dec. 27, 1978, art. 32; Interim Nat'l Constitution of the Republic of the Sudan Jul. 6, 2005, art. 15; *see* Political Constitution of Colombia, art. 42 (the family “is formed . . . by the free *decision of a man and woman* to contract matrimony” (emphasis added)); Constitution of Japan, art. 24 (“Marriage shall be based only on the mutual consent of *both sexes* and it shall be maintained through mutual cooperation with the equal rights of *husband and wife* as a basis.” (emphasis added)); “. . .” Constitution of Latvia, Feb. 15, 1922, ch. VIII, art. 110 (“The State shall protect and support marriage—*a union between a man and a woman*[.] . . .” (emphasis added)); Constitution of the Republic of Uganda, Oct. 8, 1995, art. 31 (“Marriage between persons of the *same sex is prohibited*.” (emphasis added)).