

THE INSTITUTION OF MARRIAGE AND OTHER DOMESTIC RELATIONS

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Introduction: The Global Movement to Give Domestic Relationship Status Equal to Same-Sex Unions

There is a global movement to legalise same-sex unions as a new form of legal domestic relationship. It is manifest in five different legal developments. First, as Appendix I shows, in the past dozen years nine nations have legalised same-sex marriage. Second, about a dozen other nations have created a new domestic relationship (called by various names including 'Civil Unions' and '*Pactes Civiles*') which confers a new legal adult intimate relational status on same-sex couples—and in some jurisdictions heterosexual couples—who properly register or otherwise enter such relationship, and allows them to enjoy all or nearly all of the same legal rights, duties, incidents and benefits extended to married heterosexual couples. Third, a few other jurisdictions provide a limited legal relationship status with fewer, more focused legal incidents, rights and benefits not equivalent to the status and incidents of legal marriage but constituting a more narrowly-tailored domestic status and package of benefits for same-sex couples. Fourth, many jurisdictions do not provide any formal public legal domestic relational status or benefits for same-sex couples but allow the private creation of legitimate same-sex relationships with private ordering of the relationships by the parties to such relationships (by informal or formal private arrangements, contracts, wills, cohabitation agreements, powers of attorney, etc.). Fifth, in some nations same-sex relationships have no legitimate legal domestic relationship status or benefits and remain criminally prohibited. Thus, there are currently five main legal models that address the questions whether and (if so) how to give legal domestic relationship status to same-sex couples, ranging from criminal prohibition to recognition of same-sex relationships as a new form of legal marriage.

The two polar positions are the most problematic. On one extreme, the criminal prohibition of private non-commercial same-sex relations among consenting adults has proven to be particularly inequitable, difficult to enforce, invasive of privacy, and susceptible to abusive and manipulative enforcement.¹

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¹ See generally *Lawrence v. Texas*, 539 U.S. 558 (2003) (one interpretation of *Lawrence* is that it was a reaction to the problems and abuses of criminal prohibition of homosexual relations); European Court of Human Rights, *Dudgeon v. United Kingdom*, Application Number 7527/76 (22 October 1981) (invalidating Northern Ireland's criminal proscription of sodomy). See further

This paper focuses on opposite polar position of redefining legal marriage to treat same-sex relationships as marriages. It suggests that, compared to other alternatives, legalisation of same-sex marriage (like its polar opposite policy of criminal prohibition) is particularly inequitable and inappropriate. That is because it entails unnecessary and detrimental devaluation and weakening of the critical social institution of marriage with no offsetting compensatory benefits for same-sex couples or society in general that could not be obtained without impairing the institution of marriage (via one of the other options). Viewed from an institutional perspective, legalising same-sex marriage is an over-reaction to awkward historical problems of how to properly recognise and regulate same-sex relationships, jeopardising the basic unit of society with the transformative power of inclusion.

I. Social Institution of Marriage and Legal Construction of Marriage²

Marriage uniting man and woman is a ubiquitous and naturally-existing social institution that has been present in some form in all known societies.³ Marriage as a gender-integrating union associated with important sexual-channelling, procreative, child-rearing, and dependent-protecting functions is a pre-legal, pre-state institution; it existed prior to the existence of states and legal systems.⁴

That reality has long been recognised in international law. For example, the 1948 Universal Declaration of Human Rights, the foundational document of modern international human rights law, calls the family “the natural and fundamental group unit of society,”⁵ and expressly protects the gender equality of ‘men and women’ in forming the institution of marriage (and within it), as a core and essential universal value of human rights in modern (at least western) legal systems.⁶ Similarly, the Cairo Declaration on Human Rights in Islam, adopted in 1990 by the 45 nations belonging to the Organisation of the Islamic Conference—who are uncomfortable with some aspects of the western-culture-dominated Universal Declaration—provides that: “The family is the foundation of society, and marriage is the basis of its formation. Men and

H.F. Fradella, ‘Legal, Moral, and Social Reasons for Decriminalizing Sodomy’, *Journal of Contemporary Criminal Justice* 2002, p. 289.

² Portions of this part have been published as L.D. Wardle, ‘Matrimonio Entre Personas Del Mismo Sexo ¿Un Rabo O Una Pata?’, in: *Cuadernos de Derecho de Familia* (October 2010), pp. 13-15.

³ G.R. Quale, *A History of Marriage Systems* 2 (1988) (“[m]arriage, as the socially recognized linking of a specific man to a specific woman and her offspring, can be found in all societies”), cited in W.C. Duncan, ‘Marriage on Trial’, *Journal of Gender, Race & Justice* 2009, paras. 493 & 494, n. 1.

⁴ Duncan, *supra* note 3, para. 494 n. 1, citing N.D. Glenn, ‘Why Marriage Matters: Twenty-One Conclusions from the Social Sciences’, *American Experiment Quarterly* 2002 (Spring), p. 34 and 37 (“[a]t least since the beginning of recorded history, in all the flourishing varieties of human cultures documented by anthropologists, marriage has been a universal human institution”).

⁵ Universal Declaration of Human Rights, G.A. Res. 217A, para. 71, U.N. GAOR, 3d Sess, 1st plen. mtg., U.N. Doc A/810 (December 12, 1948), art. 16(3).

⁶ *Idem*, art. 16(1) (“Men and women of full age (...) have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.”).

women have the right to marriage (...)"⁷ Nearly three dozen international treaties, compacts or conventions provide such description of and protection for the institution of marriage and/or family.⁸

These widely respected principles of international law acknowledge and establish two important facts that bear upon the subject of this paper. First, they recognise the essentiality of marriage and family, that marriage and marital family are foundational social institutions. They are not mere creations of the state. The state, the law, does not 'create' marriage any more than it 'creates' children, or air, or land. Rather, it recognises such pre-existing social institutions or realities and regulates them in ways that are intended to preserve and protect the basic institutional resources and serve the public interest.

Second, these principles of international human rights law recognise that men and women are different from each other, and recognise that both genders, male and female, make essential (and complementary) contributions to the crucial social institutions of marriage and to the family.⁹ Article 2's emphatic statement of the anti-discrimination principle underlines the principle of universality. "Everyone" in the Declaration means everyone, "without distinction of any kind."¹⁰ Moreover, the singling out of marriage for special protection in Article 16 "went far beyond most national legislation of the day with its affirmation of the principle of equal rights between spouses. The idea that the family 'is entitled to protection by society and the State,' on the other hand, was familiar in many countries as legislative policy, had already appeared in several constitutions, and would shortly appear in many others."¹¹

As Appendix II.2. notes many national constitutions declare family, marriage and motherhood to be entitled to special protection of the state. The very notion of equality of men and women in marriage under international human rights law assumes and responds to differences between the genders that

⁷ *Cairo Declaration of Human Rights in Islam*, August 5, 1990, Art. 5, in Annex to G.A. Res. No. 49/19-P in A/Conf.157/PC/62/Add.18 (9 June 1993); See also *ibid.* Art. 6 (equality).

⁸ See L. D. Wardle, 'Federal Constitutional Protection for Marriage: Why and How', *Brigham Young University Journal of Public Law* 2006, p. 439 & 483, at App. II (listing international documents protecting marriage and/or family).

⁹ For example, 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." Universal Declaration of Human Rights, Art. 16 (3), *supra* note 6. Professor Don Browning noted, that language comes from a proposal made by the Lebanese philosopher and statesman Charles Malik and based upon persistent natural law notions of gender-uniting, generally procreative, kin altruism traceable to Greek philosophers. D. Browning, 'The Meaning of Family in the Universal Declaration of Human Rights', 1 *The Family in the New Millennium* 38, 39-45 (2007). The Charter of the United Nations also recognizes gender differences, while articulating commitment to equality under law of all persons despite such differences. U.N. Charter, art. 55 (Oct. 24, 1945), available at: <http://treaties.un.org/doc/Publication/CTC/uncharter.pdf> (2 May 2011).

¹⁰ Mary Ann Glendon, 'Knowing the Universal Declaration of Human Rights' 73 *Notre Dame L. Rev.* (1998), pp. 1153, 1165.

¹¹ *Idem.*, p. 1166.

historically have been the basis for treating one gender (women) as legally unequal (and usually inferior). In one important sense, the historic, nearly universal requirement of a man and a woman makes dual-gender, gender-integrative marriage (especially monogamy) the oldest 'equality' social institution that has been recognized in the law.

Just as men and women are inherently and categorically different in profound and complementary ways (equal but different), the union of a man and a woman is also fundamentally different from the union of two persons of the same sex. Because men and women are fundamentally different, marriage, a heterosexual, dual-gender, gender-integrating union is fundamentally different from unions of persons of the same gender.

Marriage is unique. No other companionate relationship provides the same great potential for benefitting individuals and society as the life-time covenant union of a man and a woman. That is why only committed heterosexual unions are given the legal status of marriage. It is not the marriage certificate, label, or legal status that makes the heterosexual marital relationship uniquely beneficial to individuals and society, but it is the nature of the relationships itself that is so valuable. That is why such unions are given the preferred legal status (and label) of *marriage*. The public purposes for which marriage has been created are best achieved by dual-gender, integrative unions. Same-sex unions do not match the contributions to society that are made by heterosexual marriages.

This does not devalue or denigrate unions of persons of the same-gender. Supportive non-marital relationships (including friendships, etc.) have long been honoured, celebrated and respected (since at least the days of Socrates, Plato, and Aristotle) without being called 'marriages'.¹² While the state could do more to regulate non-marital friendship, it is fair to question whether it would be good for society, or for such relationships, if the state were to regulate friendship.¹³ Legally recognising and preserving in law the uniqueness of the conjugal marriage relationship of man and woman does not prevent the law from also respecting and recognising and giving legal status and benefits to other kinds of relationships. It is not a 'zero-sum' game. If two persons love each other, wish to commit to share themselves exclusively with each other, to assume responsibility for each other, to live together, support each other, own property together, and leave property to each other, the state can create legal regimes to protect those relationships, without altering or redefining the unique institution of marriage. The existence of 'civil unions', or '*pactes civiles*', or 'domestic partnerships' and similar domestic relationships in many nations is

¹² E.J. Leib, 'Friendship and the Law', *U.C.L.A. Law Review* 2007, pp. 631 & 647 (reviewing Aristotle on friendship and noting Socrates, Plato, Montaigne, Emerson and others).

¹³ Compare *idem.*, pp. 653-684 (advocating that the law should do more to recognise and promote friendships), with R. Stith, 'Keep Friendship Unregulated', *Notre Dame Journal of Law, Ethics & Public Policy* 2004, p. 263 (state regulation of friendships would be detrimental to them).

proof that states can recognise both marriage and same-sex relationships without conflating or confusing them.

Today, however, some assert that the state can and should redefine marriage to include same-sex unions. An essential basis for this claim is the legal positivist argument that since the state 'creates' legal marriage, it can also redefine marriage as it wishes. Such relativistic arguments for same-sex marriage are self-alienating.¹⁴ They are based on the assumption of relational equivalence—a simplistic notion that fails to recognise that the whole contribution of dual-gender marital relationships is greater than the mere sum of the deconstructed parts, that "something more complex is going on than can be explained" by saying "my sexual preference is as good as your sexual preference."¹⁵

Arguments for same-sex marriage ignore the conceptual limits of legal positivism. They are, as Anna Christensen put it, trapped in a Kelsenian dream, where they erroneously believe that they can create social order out of moral chaos by merely enacting positive laws.¹⁶ That positivist approach to law and legal institutions underlies the legalization of same-sex marriage. "It hides the fact that the central elements of a legal order cannot be invented by a law-maker, but must be rooted in a normative practice."¹⁷

The notion that the state can transform air into land by calling it 'land', or fire into water by calling it 'water', or pet dogs into children by calling them 'children' is curiously flawed. So is the notion that the state, by mere positivist legal decree can transform same-sex relationships into 'marriages' by calling them marriages. Such alchemy-by-definition resembles the pretences of medieval alchemists who claimed to be able to transform base metals into gold by their magic. It confuses legal constructs with social institutions, to the damage of the latter.¹⁸

Advocates of same-sex marriage make the fatal flaw of believing that if they can get the label of 'marriage' for their gay and lesbian relationships, they will automatically acquire the socially and individually beneficial characteristics

¹⁴ J. Waldron (Review Essay), 'On the Objectivity of Morals: Thoughts on Gilbert's Democratic Individuality', *California Law Review* 1992, pp. 1361 & 1376 (Moral relativism is self-alienating; a moral relativist is a person who could not take his own side in an argument).

¹⁵ See generally *idem* para. 1381. The relativistic thesis offers no solution for a world of multiple cultures. *Ibid.* See also Blumenson, *supra* note 6, p. 550 ("[T]he relativist idea of local truth makes little theoretical or practical sense. The practical problem is that the relativist alternative lacks the resources to provide anything more than the baseless choice of procedural dogmas.").

¹⁶ A. Christensen, 'Polycentricity and Normative Patterns', in: H. Petersen & H. Zahle (eds.), *Legal Polycentricity: Consequences of Pluralism in Law*, Aldershot: Dartmouth 1995, pp. 235 & 239.

¹⁷ *Idem*, p. 236. Shared normative values are the basic element in what we call society.

¹⁸ Of course, legal institutions, including marriage, are constantly changing in many incidental, minor ways, reflecting changes in social mores, practices, technologies, ideologies, fads, fashions, and fancies. But fundamental changes in such basic institutions as marriage involving such core elements as dual-gender-integration are historically rare and revolutionary – for better or worse.

associated with marriage for millennia.¹⁹ That is very strange thinking. Abraham Lincoln once lampooned the flaw of this thinking with a homespun story. He asked how many legs a dog would have if you counted a tail as a leg. To the response ‘five legs’, Lincoln said “No, calling a tail a leg doesn’t make it a leg.”²⁰

So the same-sex marriage question boils down to whether a tail can be transformed into a leg by merely calling it a leg; whether calling same-sex unions ‘marriages’ will succeed in turning them into real marriages, with the enormously important social attributes associated with this term. If it is not a mere legal-definition restriction that limits marriage to heterosexual unions, but the gender-integrating, complementary union of a man and a woman is a core, constitutive part of the very nature and reality of marriage, merely changing the label will not transform the reality. Rather, such attempted alchemy may irreparably harm society if marriage and family really (not just rhetorically) are essential, foundational institutions of society.²¹

II. Male-Female Marriage and Marital Families Are Essential Social Institutions

That marriage is understood globally to be a gender-integrating (male-female), essential social institution is evident from the constitutions of many nations. As Appendix II notes approximately 150 of the 192 sovereign nations in the world today have written constitutions containing provisions that explicitly protect family as the basic unit of society.²² Many national constitutions have language expressing such belief as a basic principle of the nation and its legal system. For instance, various national constitutions declare that the family is “the fundamental pillar of the society,”²³ “the natural and fundamental cell of society,”²⁴ “the fundamental nucleus of society,”²⁵ “the foundation of

¹⁹ Marriage as a uniquely gender-integrating institution (rather than a gender-apartheid institution), marriage as an institution recognizing the equal (and equally important) contributions of both men and women to families, marriage as a union with actual and/or symbolic procreative potential, and marriage as the institution providing optimal family environment for child-rearing with both mother and father (who raise children in subtly-but-importantly different ways), are just some of the important characteristics of marriage that are altered and diminished or lost by the legalization of same-sex marriage. See generally L. D. Wardle, ‘Multiply and Replenish: Considering Same-Sex Marriage in Light of State Interests in Marital Procreation’, 24 *Harvard Journal of Law & Public Policy* (2001); L. D. Wardle, ‘Gender Neutrality and the Jurisprudence of Marriage’ in S. FitzGibbon, L.D. Wardle & A. Scott Loveless (eds.) *The jurisprudence of marriage and other intimate relationships* (N.Y.: William S. Hein & Co 2010), pp. 37-65

²⁰ See generally Col. A.K. McClure, *Lincoln’s Yarns and Stories* (Grand Rapids: Bengal Press 1980), p. 323; John Bartlett, *Familiar Quotations*, (Boston: Little Brown, 13th ed., 1955), at para. 542b; Carl Sandburg, *Abraham Lincoln: The War Years* (N.Y.: Harcourt, Brace & Co., 1939) vol. 1, p. 570.

²¹ See *supra* note 19, and accompanying text.

²² See also *supra* note 9.

²³ Afghanistan Constitution Article 54.

²⁴ Armenia Constitution Articles 32 and 35. See also Moldova Constitution Article 48 (‘natural and fundamental constituent of society’).

²⁵ Bolivia Constitution Article 32. See also Cuba Constitution Article 35.

society,”²⁶ “the natural primary and fundament unit group of society,”²⁷ “the natural and moral base of society,”²⁸ “the cornerstone of the preservation and the advancement of the Nation,”²⁹ “the fundamental unit of society and the main centre for the growth and edification of human beings,”³⁰ “the basis of society and the State,”³¹ and “a natural association founded on marriage.”³² Many national constitutions also contain provisions that guarantee state protection to the family.³³

Many national constitutions single out marriage for special protection. Some declare that marriage is “the foundation of the family”³⁴, “the legal basis of the family,”³⁵ and that “[t]he family is founded on the freely consented marriage of the spouses. (...)”³⁶ Many of these national constitutions expressly guarantee state protection to marriage.³⁷ Moreover, as Appendix II also shows, at least forty-three national constitutions, covering more than 22 percent of the sovereign nations on earth, have explicit constitutional provisions that define or protect marriage as a gender-integrating union of man and woman. For example, the Constitution of Colombia declares that the family “is constituted (...) through the free decision of a man and woman to contract matrimony (...)”³⁸ Japan’s Constitution declares that: “Marriage shall be based only on the mutual consent of both sexes (...)”³⁹ Poland’s Constitution declares that: “Marriage, being a union of a man and a woman (...) shall be placed under the protection and care of the Republic of Poland.”⁴⁰ The Constitution of Ukraine explicitly provides: “Marriage is based on the free consent of a woman and a

²⁶ Brazil Constituição Federal [C.F.] [Constitution] Article 226. See also Haiti Constitution Article 259.

²⁷ Ireland Constitution (2002), Article 41. See also Madagascar Constitution Article 20 (“the natural basis of society”).

²⁸ Chad Constitution Articles 36, 37 & 38. See also Niger Constitution Article 180 (“the natural and moral foundation of the human community”).

²⁹ Greece 1975 Syntagma [Syn.] [Constitution] Article 21.

³⁰ Islamic Republic of Iran, *Islahat Va Taqyirati Va Tatmimah Qanuni Assassi* [Amendment to the Constitution] 1368 [1989] preamble.

³¹ Lithuania Constitution Article 38.

³² Italy Articles 29, 30, 31, 36 & 37 Costituzione [Constitution].

³³ See, e.g., Albania Constitution Article 53 (protecting marriage and family); Germany Basic Law 1949, Amended to 2009, Article 6 (“Marriage and the family are under the special protection of the State.”); Latvia Constitution Article 110 (“the state shall support and protect marriage”); Lithuania Constitution Article 38 (“family under protection and care of the state”); Vietnam Constitution Article 64 (“the state protects marriage and family”).

³⁴ Philippines Constitution, Article 2, para. 2.

³⁵ Panama Constitution, Article 57.

³⁶ Romania Constitution, Article 48.

³⁷ See, e.g., Albania Constitution, Article 53 (protecting marriage and family); Angola Constitution, Article 29 (the state shall protect the family); Germany Basic Law 1949, Amended to 2009, Article 6 (“Marriage and the family are under the special protection of the State.”); Ireland Constitution (2002), Article 41 (state to protect the family); Latvia Constitution Article 110 (the state shall support and protect marriage); Vietnam Constitution, Article 64 (the state protects marriage and family).

³⁸ Constitución Política de Colombia [C.P.], Article 42.

³⁹ Japan *Nihonkoku Kenpō* [Kenpō] [Constitution], Article 24, para. 1.

⁴⁰ Poland Constitution, Article 18.

man.”⁴¹ Thus, as a matter of strong consensus of the global societies and as a matter of explicit constitutional principle in a growing number of nations around the world, marriage is a gender-integrating union of man and woman.

These national charters recognise marriage as a foundation of the family and recognise family as the core, essential, fundamental group unit of society. There is a strong consensus regarding the essential nature of these social institutions, and their interconnected linkage. As goes marriage, so goes the family, and as goes the family, so goes the nation.

III. Capturing Marriage by Redefining Marriage in Law

Marriage is a core social institution protected by law. Marriage laws communicate our shared understandings and clarify our expectations of persons in the communities and relationships that are prescribed by law.⁴² The state’s legal power over and ability to regulate marriage gives it the power to redefine the legal status and legal incidents of marriage. Such power is not insignificant; it can profoundly influence the shared understandings that shape the social institution of marriage. The law can be used as a ‘social bulldozer’ to deconstruct and reconstruct social understanding of social institutions, including marriage. Marriage law has been a favourite playground of social engineers for centuries. Political and social movements often have attempted to ‘capture’ marriage, to change marriage laws for the purpose of promoting their particular social and ideological agendas.

One example of the harm that can come by impressing the institution of marriage into the cause of social and political agendas comes from the tragic experience of the United States of America with anti-miscegenation laws. Laws prohibiting inter-racial marriage were positive law creations. They originally were confined primarily to some (not all) of the southern states which allowed slavery.⁴³ However, with the rise of social Darwinism after the American Civil War, the philosophy of racial eugenics—the notion that some races are superior and others are inferior and that the law should protect the purity of the superior races—spread throughout the nation.⁴⁴ By the 1930s, racial

⁴¹ Ukraine Constitution, Article 51.

⁴² See generally W.C. Duncan, ‘Marriage and the Utopian Temptation’, *Rutgers Law Review* 2007, pp. 266–270 (discussing institutional realities of marriage); M.N. Stewart, ‘Genderless Marriage, Institutional Realities, and Judicial Elision’, *Duke Journal of Constitutional Law & Public Policy* 2006-1, pp. 7–27 (discussing the role of marriage as an institution); M.N. Stewart & W.C. Duncan, ‘Marriage and the Betrayal of Perez and Loving’, *Brigham Young University Journal of Public Law* 2005, p. 555 & 560–567 (marriage is a social institution and attempts to redefine marriage undermine a basic social institution).

⁴³ J.E. Hasday, ‘Federalism and the Family Reconstructed’, *UCLA Law Review* 1998, p. 1297 & 1345. (Before the Civil War, Alabama, Georgia, Mississippi, and South Carolina had no anti-miscegenation statutes, but during Reconstruction, each of these states prohibited interracial marriage).

⁴⁴ While some individual states prohibited inter-racial marriage before the Civil War, see W. Wadlington, ‘The Loving Case: Virginia’s Anti-Miscegenation Statute in Historical Perspective’, *Virginia Law Review* 1966, p. 1189. The national spread of anti-miscegenation laws occurred after the Civil War and lasted until the Supreme Court ruled in 1967 in *Loving* that such laws

eugenicists succeeded in ‘capturing’ marriage in most American states. By redefining marriage to prohibit inter-racial marriage, they were able to embed into the American laws of marriage the principles of racial hierarchy that perpetuated and spread their racist ideology throughout the nation.⁴⁵

The movement to redefine marriage to include same-sex couples is just the latest example of the old tactic of a social movement capturing marriage for the purpose of reconstructing society. When marriage is redefined in law, those values become embedded deeply in the fabric of society, strengthening the ideology, giving it longer life, and making it harder to change and move on. America’s long, tragic national experience with eugenic-based anti-miscegenation laws, which took a full century and a major Supreme Court decision to correct and eradicate, is evidence of the scope of the problem of redefining marriage to promote social policies and ideologies that crystallise socially-constructed extraneous social values that distort and reshape the social perception of the institution marriage into law.⁴⁶

IV. ‘Free Riders’ and the Transformative Power of Inclusion

Strong social institutions such as marriage can accommodate some ‘free riders’—those who do not accept responsibility for the core purposes and social contributions of the institution—without posing a serious threat to the institution itself. However, when the quality or quantity of those deviations is so significant, so wide, and the nature of the changes alters the very core of the institutional structure, the ‘free-riders’ no longer merely mildly burden the institution; instead, they threaten to weaken and transform the institution itself, and that undermines the society that rests upon it.

The transformation in the social understanding is accomplished by redefining the core constitutive qualities and meaning of the institution of marriage. The inclusion of persons with different visions of their roles within the institution transforms the shared social understanding and accepted functions of the institution, and the expectations of the participants in it. While gender-integrated unions will still do the work of marriage, they will be marginalised and diminished in social value and legal recognition. The social reconstruction of marriage to include same-sex marriage will not affect the reality of the qualities and contributions of dual-gender unions, but it will profoundly alter social perceptions, remove or reduce legal incentives to responsible marriage behaviours, and impose comparative disincentives for responsible marital conduct.

were unconstitutional. L.D. Wardle & L.C. Oliphant, ‘In Praise of Loving: Reflections on the “Loving Analogy” for Same-Sex Marriage’, *Howard Law Journal* 2007, p. 117.

⁴⁵ P.A. Lombardo, ‘Miscegenation, Eugenics, and Racism: Historical Footnotes to Loving v. Virginia’, *U.C. Davis Law Review* 1988, p. 421 (reviewing racial and eugenic policies embodied in anti-miscegenation laws). See generally L.D. Wardle, ‘Tyranny, Federalism, and the Federal Marriage Amendment’, *Yale Journal of Law & Feminism* 2005, p. 221, 255-258.

⁴⁶ *Loving v. Virginia*, 388 U.S. 1 (1967).

Legalising same-sex marriage “will transform our shared, public meaning of the word ‘marriage.’ It will disconnect marriage from any further relationships with (...) making the next generation, and connecting those children to both their mothers and fathers (...)”⁴⁷ By redefining marriage to include same-sex couples, the transformative power of inclusion will reshape what marriage is, what it means, and what it requires of family members.⁴⁸ It will impact upon how others must act and interact in the levelling of the institution of marriage. The legalisation of same-sex marriage will transform the meaning of *marriage, spouse, husband, wife, parent* and *child* in the law. That redefinition will profoundly influence the meaning of public education, school curriculum, civil rights, family, inheritance, intimacy, relations, public behaviour, privacy, disclosures, security, accommodation, filings, custody, guardianship, visitation, reasonable conduct, medical treatment, preferences, privileges, rights, duties, etc.

Conjugal marriage is the principal social institution designed to channel human sexual expression into responsible, socially constructive outlets.⁴⁹ It provides the optimal setting in which children can be conceived, born, nurtured, and raised.⁵⁰ Marriage between man and woman links, integrates, and reinforces these important social purposes of marriage. The transformation of marriage

⁴⁷ M. Gallagher, ‘(How) Will Gay Marriage Weaken Marriage As A Social Institution: A Reply to Andrew Koppelman’, *University of Saint Thomas Law Journal* 2004-33, p. 69.

⁴⁸ See Lynn D. Wardle, ‘The Morality of Marriage and the Transformative Power of Inclusion’, in: Lynn D. Wardle (ed), *What’s the Harm? Does Legalizing Same-Sex Marriage Really Harm Individuals, Families or Society?*, University Press of America 2008, p. 207, 226. The author states: “Redefining marriage to include gay and lesbian couples will have a profound impact upon sexual morality in society. Sexual standards will change as homosexual relations will be instantly normalized and equated with marital relations. (...) Legalizing same-sex marriage will instantly transform the meaning of *marriage, spouse, husband, wife, parent, [and] child* in the law.” *Idem*,; see also *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 980-982 (Mass. 2003) (Sosman, J., dissenting). Justice Sosman argues: The Legislature (...) may, as the creator of the institution of civil marriage, wish to see the proof before making a fundamental alteration to that institution. (...) [I]t is rational for the Legislature to postpone any redefinition of marriage that would include same-sex couples until such time as it is certain that that redefinition will not have unintended and undesirable social consequences. “More macroscopically, construction of a family through marriage also formalizes the bonds between people in an ordered and institutional manner, thereby facilitating a foundation of interconnectedness and interdependency on which more intricate stabilizing social structures might be built. (...) It is difficult to imagine a State purpose more important and legitimate than ensuring, promoting, and supporting an optimal social structure within which to bear and raise children. At the very least, the marriage statute [at issue in *Goodridge*] continues to serve this important State purpose.” *Idem*, paras. 980, 982; see also *idem*. paras. 987, 990, 996-97, 1003 (Cordy, J., dissenting). Justice Cordy acknowledges. *Idem*, para. 996-997 (citation omitted).

⁴⁹ *Poe v. Ullman*, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting). Justice Harlan states: “Adultery, homosexuality and the like are sexual intimacies which the State forbids (...), but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected”. *Poe v. Ullman*, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting). Justice Harlan states *Idem*, paras. 996-997 (citation omitted). *Idem*, See generally L.D. Wardle, *supra*, note 48, p. 221 (describing how the “behavior norms and moral standards” of conjugal marriage and those of homosexual relationships are diametrically opposed).

⁵⁰ *Idem*

by redefining it to include same-sex couples will alter these important functions, linkages, and contributions of dual-gender marriage and will profoundly impact all of society, not just particular couples, families or groups.

Conclusion: Legalisation of Same-Sex Marriage Is Ill-Considered and Unnecessary

U.S. President Barack Obama has identified the fallacy at the core of the movement to redefine marriage to include same-sex couples. He wrote: "If everyone is family, then no one is family."⁵¹ The over-extension of the label, the legal construct, devalues and weakens the real, essential social institution.

The legalisation of same-sex marriage is discordant with basic principles and foundational documents of most national constitutions and widely-accepted provisions and principles of international human rights law. The clear global trend is to protect marriage as a dual-gender institution, and to protect marital families. Viewed from an institutional perspective, legalising same-sex marriage is an over-reaction to problems of how to properly recognise and regulate same-sex relationships prioritising social construction over (and at the expense of) the protection of basic social institutions. It entails allowing a social movement to capture marriage by redefining it to promote its particular ideology and social reconstruction agenda. History shows that such uses of marriage law are deeply problematic and create long-term and very difficult social problems.

Three more reasonable legal construction alternatives exist that render the redefinition of marriage to include same-sex couples unnecessary to protect the legitimate interests and rights of sexual minorities. They include the creation of separate domestic relationship legal structures with all of the same rights as marriage, the creation of specifically-tailored domestic relationship status with more selective, customised rights and benefits, and the protection of the right of private ordering by the parties to same-sex relationships. These should be preferred over the legalisation of same-sex marriage.

⁵¹ Barack Obama, *Dreams from My Father: A Story of Race and Inheritance*, N.Y.:Three Rivers Press 2004, p. 347.

Appendix I Legal Allowance of Same-Sex Unions Globally (of 192 Sovereign Nations)

1. Same-sex marriage is permitted in nine (9) nations:

Argentina,⁵² Belgium,⁵³ Canada,⁵⁴ Iceland,⁵⁵ The Netherlands,⁵⁶ Norway,⁵⁷ Portugal,⁵⁸ Spain,⁵⁹ and Sweden.⁶⁰

2. Same-sex unions equivalent to marriage are allowed in twelve (12) other nations:⁶¹

Andorra,⁶² Austria,⁶³ Denmark,⁶⁴ Finland,⁶⁵ France,⁶⁶ Germany,⁶⁷ Luxembourg,⁶⁸ New Zealand,⁶⁹ Slovenia,⁷⁰ South Africa,⁷¹ Switzerland,⁷² and UK.⁷³

⁵² Ley No. 26.618, July 22, 2010 [CXVIII] B.O. 31.949 (Argentina), at:

<http://www.infobae.com/download/55/0345567.pdf> (11 August 2010).

⁵³ I. Curry-Sumner, 'Interstate Recognition of Same-Sex Relationships in Europe', *Journal of Gender Race & Justice* 2009, p. 59, 61, n. 10 (citing Loi Instaurant la Cohabitation légale [Act Establishing Legal Cohabitation], No. 170 (1999) (Belgium), at: <http://www.dofi.fgov.be/fr/reglementering/belgische/overige/wet/23111998.pdf>).

⁵⁴ Civil Marriage Act, 2005 S.C., ch. 33 (Canada).; see also *Halpern v. Canada*, [2002] 215 D.L.R. 223 (Canada).

⁵⁵ Curry-Sumner, *supra* note 53, para. 61, n.18 (citing Act on Registered Partnership No. 87 (1996), amended by Act No. 52/2000 (2000) (Iceland)).

⁵⁶ Law of 21 Dec 2000 in *Staatsblad* 2001 no. 9 (permitting Dutch citizens of the same gender to marry and extending the rights granted under the law of July 5, 1997, *Staatsblad* 1977 No. 324); See N.G. Maxwell, 'Opening Civil Marriage to Same-Gender Couples: A Netherlands-United States Comparison', *Arizona Journal of International and Comparative Law* 2001, p. 141.

⁵⁷ Curry-Sumner, *supra* note 53, para. 62, n.21 (citing Lov nr. 40 of 30-04-1993 [Law No. 40] (1993), amended by Lov nr. 104 of 21-12-2000 [Law No. 104] (2000) and Lov nr. 36 of 15-06-2001 [Law No. 36] (2001) (Norway)).

⁵⁸ Lei Nº 7/2001 de 11 de Maio - Adopta Medidas de Protecção das Uniões de Facto (2000) available at <http://www.apav.pt/portal/pdf/NRAU.pdf> (11 August 2010);

⁵⁹ Curry-Sumner, *supra* note 53, para. 62, n.23; Ley 13 of 1 Jul 2005 in *Boletín oficial* 2 Jul 2005.

⁶⁰ Curry-Sumner, *supra* note 53, para. 62 n.24 (citing Lag om Registrera Partnerskap [Registered Partnership Act] (1994:1117), amended by Ändring [Amendment] (1995:1245), Ändring [Amendment] (2000:374) and Ändring [Amendment] (2002:603) (Sweden)).

⁶¹ See generally K. Boele-Woelki, 'The Legal Recognition of Same-Sex Relationships Within the European Union', *Tulane Law Review* 2008, p. 1949, 1955-1959; L. D. Wardle, 'A Response to the "Conservative Case" for Same-Sex Marriage: Same-Sex Marriage and "The Tragedy of the Commons,"' *Brigham Young University Journal of Public Law* 2008, p. 441, 443-445, nn. 4-6; A.X. Fellmeth, 'State Regulation of Sexuality in International Human Rights Law and Theory', *William and Mary Law Review* 2008, p. 797; ILGA Europe, *Country-by-Country*, http://www.ilga-europe.org/home/guide/country_by_country (11 August 2010).

⁶² Qualificada de les unions estables de parella, [Termed Stable Marriage Unions] 17 BOPA No. 25 (Law 4/ 2005) (Andorra), at: <http://www.ciec1.org/Legislationpdf/Andorre-L.UnionsEstables21f-02-2005-EnVigueur24mars2005.pdf> (2 May 2011).

⁶³ Eingetragene Partnerschaft-Gesetz (EPG) Act of 30 December 2009, at: http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2009_I_135/BGBLA_2009_I_135.html (11 August 2010).

⁶⁴ Curry-Sumner, *supra* note 53, para. 61, n.12 (citing Lov nr. 372 of 07-06-1989 [Law No. 372] (1989) (Law on Registered Partnerships), amended by Lov nr. 821 of 19-12-1989 [Law No. 821] (1989), Lov nr. 360 of 02-06-1999 [Law No. 360] (1999), Ministerial Orders nr. 929/2001 and nr. 198/2002 (Denmark)).

⁶⁵ Lag 950 of 28 Sept. 2001 [Fin.], Amended by Lag 59 of 4 Feb 2005. See also Boele-Woelki, *supra* note 61, paras. 1955-56.

3. Same-sex unions registry & limited benefits are provided in at least seven (7) other nations:

Columbia,⁷⁴ Croatia,⁷⁵ Czech Republic,⁷⁶ Ecuador,⁷⁷ Hungary,⁷⁸ Israel,⁷⁹ and Uruguay.⁸⁰

4. Same-sex marriage recognised in five (5) USA states:

⁶⁶ Loi relative au pacte civil de solidarité [Law on the Civil Solidarity Act] No. 99-944 (1999) (France), at: <http://www.droit.org/jo/19991116/JUSX9803236L.html> (11 Aug. 2010).

⁶⁷ Curry-Sumner, *supra* note 53, para. 61, n. 15 (citing Gesetz zur Beendigung der Diskriminierung Gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften [Act to End Discrimination Against Same-Sex Unions: Civil Partnerships], 2001 BGBl. No. 9 S. 266 (2001), as amended by Gesetz zur Überarbeitung des Lebenspartnerschaftsrechts [Law on the Revision of Civil Partnership Law], 2004 BGBl. No. 29 S. 3996 (2004) (Federal Republic of Germany)).

⁶⁸ Curry-Sumner, *supra* note 53, para. 62, n. 19 (citing Loi relative aux effets légaux de certains partenariats [Act on the Legal Affects of Certain Partnerships] No. 4946 (2004) (Luxembourg)).

⁶⁹ Civil Union Act 2004, 2004 S.N.Z. No. 102.

⁷⁰ Curry-Sumner, *supra* note 53, para. 62, n. 22 (citing Zakon o registraciji istospolne partnerske skupnosti [Act on Registered Partnerships] No. 55/2009 (2009) (Slovenia)).

⁷¹ *Minister of Home Affairs v. Fourie* 2006 (1) SA 524 (CC) (South Africa), Civil Union Act 17 of 2006. See generally B.S. Smith & J.A. Robinson, 'The South African Civil Union Act 17 of 2006: A Good Example of the Dangers of Rushing the Legislative Process', *Brigham Young University Journal of Public Law* 2008, p. 419.

⁷² Curry-Sumner, *supra* note 53, para. 62, n.25 (citing *Loi fédérale sur le partenariat enregistré entre personnes du même sexe* [LSP] [Federal Law on registered partnerships between persons of the same sex] June 29, 2004, Nbr. 210, art. 95 (Switzerland)).

⁷³ Civil Partnership Act, 2004, c. 33, para. 3135 (England), at:

http://www.opsi.gov.uk/acts/acts2004/ukpga_20040033_en_1 (11 August 2010);

⁷⁴ Regimen Patrimonial de Companeros Permanentes-Parejas homosexual/Parejas Homosexuales y Union Marital de Hecho, at:

http://www.google.com/url?sa=t&source=web&cd=1&ved=0CBiQFjAA&url=http%3A%2F%2Fdejjusticia.org%2Fadmin%2Ffile.php%3Ftable%3Ddocumentos_litigios%26field%3Darchivo%26id%3D32&ei=3G1gTNegM432tgOJkIWqCw&usq=AFQjCNGmzvTr1-6q3vKkhnwfdOMtN_fAKQ&sig2=2SgY8htARSfixA74iXM04Q; see also Corte Constitucional [C.C.] [Constitutional Court], febrero 7, 2007, Sentencia C-075/07, Colombia Constitutional Court, (Colombia).

⁷⁵ Law of 14 Jul 2003 (civil partnerships and same sex unions) in *Narodne novine* (official gazette) 2003 no. 116, item 1, 586.

⁷⁶ Zakon 115 of 26 Feb 2006 o Registrovaném partnerství a o změni nekterých souvisejících zákonů (registered (family) partners) in *Sbirka zákonů* (session laws) 2006 no. 38. See also ILGA-Europe, *supra* note 61.

⁷⁷ I Constitución de Ecuador 2008 art. 68 (constitutionally allowing same-sex civil unions); See also Pedro Dutour, *Ecuador's Labyrinth of Nebulous Ambiguity*, Oct. 9, 2008, at: http://www.mercatornet.com/articles/view/ecuadors_labyrinth_of_nebulous_ambiguity/ (2 May 2011). See generally Wardle, 'The Conservative Case', *supra* note 61, para. 445, n. 9; see also ILGA-Europe, *supra* note 61.

⁷⁸ Law of Dec 2007 (act on registered, i.e., same sex, different sex, partnership). See also ILGA-Europe, *supra* note 61.

⁷⁹ HCJ 3045/05 *Yossi Ben-Ari v. Comm'r of Population Registry, Ministry of the Interior*, [2006], 1725. See also Family Courts Law, 1995, S.H. 393, para. 1 ('reputed spouses'), and HCJ 7052/03 *El Al Israel Airlines Ltd. v. Danielowitz*, [1994] IsrSC 48(5) 749 (discussing employment benefits in Israel).

⁸⁰ Ley N° 18.246, *Union concubinaria*. Publicada D.O. 10 ene/008 - N° 27402, at: <http://www.parlamento.gub.uy/leyes/ AccesoTextoLey.asp?Ley=18246&Anchor> (seen 2 May 2011).

- Connecticut,⁸¹ Iowa,⁸² Massachusetts,⁸³ New Hampshire,⁸⁴ Vermont⁸⁵, plus the District of Columbia.⁸⁶
5. Same-sex unions equivalent to marriage recognised in seven (7) USA states: California,⁸⁷ Hawaii, Illinois,⁸⁸ Nevada,⁸⁹ New Jersey,⁹⁰ Oregon,⁹¹ and Washington.⁹²
6. Same-sex couple registry & limited benefits in four (4) US states⁹³
Colorado,⁹⁴ Maryland,⁹⁵ Maine,⁹⁶ Wisconsin.⁹⁷

⁸¹ Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Connecticut 2008).

⁸² Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

⁸³ Goodridge v. Dep't of Pub. Health, 798 N.E.2d 943 (Massachusetts 2003).

⁸⁴ N.H. Rev. Stat. Ann. para. 457:1-a (2009).

⁸⁵ Vt. Stat. Ann. tit. 15, para. 8 (2009).

⁸⁶ D.C. Code para. 46-401(a) (2010); J. Bushyhead, 'The Coquille Indian Tribe, Same-Sex Marriage and Spousal Benefits: A Practical Guide', *Arizona Journal of International & Comparative Law* 2009, p. 509. ("The Coquille Tribe, located in Oregon, is the first and only Indian tribe to codify the definition of marriage as a fundamental right regardless of the biological sex of the parties."). See also M.P. Strasser, 'Tribal Marriages, Same-Sex Unions, and an Interstate Recognition Conundrum', *Boston College Third World Law Journal* 2010, p. 207, 233 (noting Coquille legislation and an incidental Cherokee marriage).

⁸⁷ California Family Code para. 297 (West 2005).

⁸⁸ Illinois Religious Freedom Protection and Civil Union Act, SB 1716, Illinois 96th General Assembly, enacted December 17, 2010; signed by Governor, February 1, 2011.

⁸⁹ Nev. Rev. Stat. paras. 122A.010-122A.510 (2009).

⁹⁰ N.J. Stat. Ann. para. 37:1-28 (West 2007).

⁹¹ Or. Rev. Stat. paras. 106.300-106.340 (2008).

⁹² Wash. Rev. Code para. 26.60.010 (2007).

⁹³ This only includes general relationship recognition with some couple benefits; specific narrow particular benefits (such as state employee benefits for same-sex partners) is not included. See generally Human Rights Campaign, 'Marriage & Relationship Recognition', http://www.hrc.org/issues/marriage/marriage_laws.asp (27 July 2010). Several other states offer state employee partner benefits. See, e.g., R.I. Gen. Laws paras. 28-48-1, 36-12-1, et seq. (2006); N.M. Exec. Order No. 2003-010 (April 9, 2003), cited in Lambda Legal, Examples of States that Provide Benefits to Same-Sex Partners of State Employees (Oct. 2008), <http://data.lambdalegal.org/pdf/legal/statedp102007rt.pdf> (seen 2 May 2011).; Ariz. Admin. Code para. 2-5-101(2008); Snetsinger v. Mont. Univ. Sys., 104 P.3d 445 (Mont. 2004); Ala. Civil Liberties Union v. State, 122 P.3d 781, 788-89 (Alaska 2005) (finding that state programs giving employment benefits to 'spouses,' but not to same-sex partners of employees who cannot marry, violates the equal protection clause of the state constitution); Alaska Admin. Code tit. 2, paras. 38.010, et seq. (2008). See also Lambda Legal, 'Examples of States that Provide Benefits to Same-Sex Partners of State Employees' (October 2008), <http://data.lambdalegal.org/pdf/legal/statedp102007rt.pdf> (seen 2 May 2011).

⁹⁴ Colo. Rev. Stat. para. 15-22-105, 24-50-603 (2009).

⁹⁵ Md. Code Annot. Paras. 1-101, 2-315, 5-501, 5-509, 5-605, 5-612, 10-807, 12-101, 19-310, and 19-344 (2008) (Health Care Facility Visitation and Medical Visitation Decisions, Recordation and Transfer Taxes, and Domestic Partnerships).

⁹⁶ Me. Rev. Stat. Ann. tit. 22, paras. 2710, et seq. (2008).

⁹⁷ Wis. Stat. paras. 765, 770.01, et seq. (2010).

Appendix II. Legal Rejection of Same-Sex Marriage Globally

1. Forty-three (43) of 192 sovereign nations (22 percent) have *constitutional* provisions defining marriage as union of man and woman (thus disallowing same-sex marriage constitutionally).⁹⁸

Armenia, Azerbaijan, Belarus, Bolivia, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, China, Columbia, Cuba, Democratic Republic of Congo, Ecuador, Eritrea, Ethiopia, Gambia, Honduras, Japan, Latvia, Lithuania, Malawi, Moldova, Mongolia, Montenegro, Namibia, Namibia, Nicaragua, Panama, Paraguay, Peru, Poland, Romania, Rwanda, Serbia, Seychelles, Sudan, Suriname, Swaziland, Tajikistan, Turkmenistan, Uganda, Ukraine, Venezuela, and Vietnam.

2. At least eighty-three (83) nations have substantive constitutional provisions protecting ‘marriage’, and at least one hundred forty-five (145) nations have constitutional provisions protecting ‘family,’ many with special protection for motherhood and/or childhood.⁹⁹

⁹⁸ See Constitutions of Armenia (Article 32), Azerbaijan (Article 34), Belarus (Article 32), Brazil (Article 226), Bulgaria (Article 46), Burkina Faso (Article 23), Cambodia (Article 45), Burundi (Article 29), Cameroon (Article 16), China (Article 49), Columbia (Article 42), Cuba (Article 43), Democratic Republic of Congo (Article 40), Ecuador (Article 33), Eritrea (Article 22), Ethiopia (Article 34), Gambia (Article 27), Honduras (Article 112), Japan (Article 24), Latvia (Article 110 - December 2005), Lithuania (Article 31), Malawi (Article 22), Moldova (Article 48), Mongolia (Article 16), Montenegro (Article 71), Namibia (Article 14), Namibia (Article 14), Nicaragua (Article 72), Panama (Article 58), Paraguay (Articles 49, 51 and 52), Peru (Article 5), Poland (Article 18), Romania (Article 44), Rwanda (Article 26), Serbia (Article 62), Seychelles (Article 32), Somalia (Article 2.7), Sudan (Article 15), Suriname (Article 35), Swaziland Constitution (Article 27), Tajikistan (Article 33), Turkmenistan (Article 25), Uganda (Article 31), Ukraine (Article 51), Venezuela (Article 77), Vietnam (Article 64). See also Hong Kong Bill of Rights of 1991 (Article 19); Spain (Article 32, disregarded or possibly overturned by legislation).

⁹⁹ See Lynn D. Wardle, ‘Lessons from the Bill of Rights About Constitution Protections for Marriage’, *Loyola University Chicago Law Journal* 2007, p. 277, 320-322 App. (providing a list of 136 national constitutional provisions). To that list now should be added nine additional national constitutions (for a total of 145): Bhutan Constitution, Article 19; Central African Republic Constitution, Article 6; Gambia Constitution, Article 27; Kosova Constitution, Article 36; Latvia Constitution, Article 110; Montenegro Constitution, Articles 40, 71-73; Swaziland Constitution, Articles 14 and 27; Switzerland Constitution, Articles 13, 14, 41 and 116; United Arab Emirates Constitution, Article 15. Dozens of national constitutions declare that the family and/or marriage is entitled to special protection by the state, and motherhood also is given special protection in many constitutions. See *generally* Afghanistan Constitution, art. 54 (2004) (special protection of “child and mother”); Armenia Constitution, art. 32 (1995, as amended to 2005) (“Family, motherhood, and childhood are placed under the care and protection of society and the state.”); China Constitution, art. 49 (1982 as amended to 2004) (marriage, family, motherhood and childhood protected); Congo (Republic) Constitution, art. 31 (2002) (rights of mother and child guaranteed); Cuba Constitution, art. 36 (1976, amended to 2002) (“The state protects the family, motherhood and matrimony.”); Germany Basic Law, art. 6 (1949, as amended to 2009) (marriage and motherhood given special protection); Greece (Hellenic Republic) Constitution, art. 21 (1975 as amended to 2008) (marriage, motherhood and childhood under special protection); Iraq Constitution, art. 25 (2005) (motherhood and childhood under special protection); etc.

3. One hundred eighty-three (183) nations do not allow same-sex marriage.¹⁰⁰
4. One hundred seventy-one (171) nations do not allow same-sex marriage-equivalent unions.¹⁰¹
5. Thirty (30) USA states prohibit same-sex marriage by state constitutional amendment, including nineteen (19) USA states* where same-sex civil unions are prohibited:
- *Alabama,¹⁰² Alaska,¹⁰³ Arizona,¹⁰⁴ *Arkansas,¹⁰⁵ California,¹⁰⁶ Colorado,¹⁰⁷ *Florida,¹⁰⁸ *Georgia,¹⁰⁹ Hawaii,¹¹⁰ *Idaho,¹¹¹ *Kansas,¹¹² *Kentucky,¹¹³ *Louisiana,¹¹⁴ *Michigan,¹¹⁵ Mississippi,¹¹⁶ Missouri,¹¹⁷ Montana,¹¹⁸ *Nebraska,¹¹⁹ Nevada,¹²⁰ *North Dakota,¹²¹ *Ohio,¹²² *Oklahoma,¹²³ Oregon,¹²⁴ *South Carolina,¹²⁵ *South Dakota,¹²⁶ Tennessee,¹²⁷ *Texas,¹²⁸ *Utah,¹²⁹ *Virginia,¹³⁰ and *Wisconsin.¹³¹

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¹⁰⁰ The only nine of 192 sovereign nations that allow same-sex marriage are listed in Appendix I.

¹⁰¹ The additional twelve of 192 sovereign nations that allow same-sex marriage-equivalent unions are listed in Appendix I.

¹⁰² Alabama Constitution Article I, para. 36.03.

¹⁰³ Alaska Constitution Article 1, para. 25.

¹⁰⁴ Arizona Constitution Article. 30, para. 1, added by Proposition 102.

¹⁰⁵ Arkansas Constitution amendment 83, para. 1.

¹⁰⁶ California Constitution Article 1, para. 7.5., added by Proposition 8 para. 2.

¹⁰⁷ Colorado Constitution Article 2, para. 31.

¹⁰⁸ Florida Constitution Article 1, para. 27.

¹⁰⁹ Georgia Constitution Article 1, paras. 4(a), par. 1.

¹¹⁰ Hawai'i Constitution Article 1, para.23.

¹¹¹ Idaho Constitution Article III, para. 28.

¹¹² Kansas Constitution Article 15, para. 16(a).

¹¹³ Kentucky Constitution, para. 233A.

¹¹⁴ Louisiana Constitution Article 12, para. 15.

¹¹⁵ Michigan Constitution Article 1, para. 25.

¹¹⁶ Mississippi Constitution Article 14, para. 263A.

¹¹⁷ Missouri Constitution Article I, para. 33.

¹¹⁸ Montana Constitution Article 13, para. 7.

¹¹⁹ Nebraska Constitution Article I, para. 29.

¹²⁰ Nevada Constitution Article I, para. 21.

¹²¹ North Dakota Constitution Article XI, para. 28.

¹²² Ohio Constitution Article XV, para. 11.

¹²³ Oklahoma Constitution Article 2, para. 35.

¹²⁴ Oregon Constitution Article XV, para. 5a.

¹²⁵ South Carolina Constitution Article XVII, para. 15.

¹²⁶ South Dakota Constitution Article 21, para. 9.

¹²⁷ Tennessee Constitution Article 11, para. 18.

¹²⁸ Texas Constitution Article 1, para. 32(a).

¹²⁹ Utah Constitution Article I, para. 29(1).

¹³⁰ Virginia Constitution Article 1, para. 15-A.

¹³¹ Wisconsin Constitution Article XIII, para. 13.