The Radicalization of the Marriage Debate and the Argentine Experience
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The harsh disputes concerning the definition of marriage have been recurrent for more than ten years now. It is sad to have to acknowledge that as time went by, positions concerning this issue became irreconcilable. Both parties claim the prize of marriage for themselves, and, by doing so; they present different definitions of it to society. Both parties believe that their position is the most consistent with a human rights approach. However, whilst the same sex marriage advocates stress the rights of individuals to marry; those who defend heterosexuality as a key matter to marriage stress probably more the rights of children, society as a whole or a determined idea of the family than individual rights. In any case, this is mostly a matter of nuances, because very often their positions have been defended even with the same arguments. This radicalization of the debate induces an increasing fracture in societies. For and against, turns brethren against each other. In fact, it is about brethren competing for the same institution, to see which vision of marriage will prevail. Who will succeed in colonizing the laconic institution of marriage, which remains in a disturbing silence about which view is preferable. What is the answer to this unsolvable dilemma as political and social fracture deepens? In our paper we propose to examine the problem posed by the same sex marriage debate from an anthropologic point of view, from a juridical one, to finally discuss this very problem from the viewpoint of the Argentine experience.

The presentation will end in an attempt of showing the juridical scope of the question and its probable prognosis.
“The Pursuit of Happiness” Comes Home to Roost:
Same-Sex Marriage, the *Summum Bonum*, and Equality
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All men, says John Locke, “must be allowed to pursue their happiness, nay, cannot be hindered.” The Lockean notion of a right to the *pursuit of happiness* is familiar from the opening clauses of the *Declaration of Independence*, in some respects this nation’s founding document. Locke’s notion involved a thoroughgoing rejection of the Greco-Catholic understanding of a human *summum bonum*. The argument that there is a natural right, deserving of juridical protection, to be free to enter same-sex marriage enjoys the support of much of the philosophy that brought the nation into existence and has, ever since, shaped its cultural and juridical commitments. As Pierre Manent has written, “we continue to feel the consequences of the solemn decisions taken three centuries ago.” Argument against a right to same-sex marriage involves advancing philosophical and theological judgments that reject the Lockean worldview in favor of the older, Greco-Catholic view. On the one hand, the particular cultural circumstances that obtain today, after centuries of widely-assumed Lockeanism, render the likelihood of success of such argument doubtful. On the other hand, it is time to reckon with the current futility of public political philosophy. A compounding casualty in the current climate is the lack of a shared basis of belief that, as the *Declaration* also declares, “all men are created equal.” Anxiety about fundamental human equality further unsettles the possibility of stable morals legislation.

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“You Have the Right to Remain Silent”:
Some Thoughts About Equal Citizenship and Compelled Affirmation
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The political and legal campaign for “marriage equality” rests on the proposition that the United States Constitution requires *communal* recognition of “committed”, same-sex relationships. The text and the structure of the Constitution, however, support precisely the opposite conclusion: *i.e.*, that neither the United States, nor any State, may compel *any* community, association, or individual either to affirm (by word or deed) the hotly-disputed propositions about human sexuality that lie at the core of the debate, or to remain discreetly silent about one’s contrary beliefs lest dissent be taken as evidence of intolerance, lack of social sophistication, or of “homophobia.”

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This paper undertakes four ambitious projects. First, it proposes a broad and unusual account of equality. Second, it maintains that, in a well-functioning country, equality is sustained and promoted most thoroughly by the social order. Third, it proposes that an important undertaking, incumbent upon government and the law, is that of sustaining and promoting the practices and understandings of equality instantiated in the social order. Finally, it proposes that the Equal Protection Clause of the United States Constitution requires that government and the law promote equality in this way.

This paper presents its conclusions in the form of a myth. This narrative – the Myth of Isopolis – describes a country which has achieved equality (in the sense of that term proposed in this paper). It describes a country which sustains equality through its social order. (Deliberately, this social order is portrayed as quite eccentric). The narrative proceeds to describe how government and law in Isopolis promote and enhance Isopolitan equality. The Equal Protection Clause of the Isopolitan Constitution is understood to require this.

The Supreme Court of Isopolis has developed an Equal Protection jurisprudence which fosters Isopolitan equality. One major branch of Isopolitan constitutional doctrine endorses certain social forms and organizations as constitutionally protected to a high degree. These forms – they are called “Isokoinones” – include certain closely bonded guilds, charitable associations, and companies, and the term also encompasses the Isopolitan family. These organizations are singled out for special constitutional favor because they operate on terms of equality and promote Isopolitan social equality (in the sense of the term “equality” here endorsed).

The Equal Protection jurisprudence of Isopolis applies strict scrutiny to any legislative and administrative initiative which interferes with Isokoinones. For example, when by administrative decree a government agency attempted to alter the self-regulatory practices of the Guild of Isopolitan Hospitalers, requiring them to cease providing hospice care to illegal immigrants, the decree was held to violate the Equal Protection Clause – not on the grounds (at least, not only on the grounds) that it discriminated against the immigrants, but (also) on the grounds that the Hospitilalers were an Isokoinikon whose self governance and traditions were components of Isopolitan equality. Similarly, if a statute were to purport to alter the membership criteria for Isopolitan families, adding or subtracting members or categories of members in ways inconsistent with the self-definitions of families recognized by Isopolitan families themselves and by Isopolitan society, that statute would be strictly scrutinized and likely held to be unconstitutional.

In its final section this paper looks critically at Isopolitan equality jurisprudence, taking up what may be the four most telling lines of criticism or limitation. First, it looks critically at the (unusual) Isopolitan concept of equality, asking whether it is truly equality properly understood at all and inquiring into the basic goods which it (or any meritorious) concept of equality furthers. Second, this paper reflects on the possibility that Isopolis has erred in making its social order the central locus of equality, rather than understanding the engines and guardians of
equality to be comprised principally by government and law. (Here this paper also considers whether the Isopolitan approach commits it to rigid traditionalism, arguing that it does not). Finally, this paper considers the possibility that the Isopolitan model, whatever its abstract merits, is inconsistent with equal protection principles as understood in the constitutional law of the United States.

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The Spanish Law on Same-Sex Marriage: Constitutional Arguments
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The Spanish Parliament approved, in 2005, a Law that changed the regulation of marriage, allowing same sex partners to enter into this relationship. This Law, quite simply, added a paragraph to the article that recognizes men and women the right to marry. The new addition stated that marriage must meet the same requirements and will have identical effects whether both partners are the same or different sex. According to the statement issued by the Government, it conveyed a recognition of homosexuals’ rights that had been denied until then.

In compliance with the general procedure, the Council of State delivered a Report on the proposed Bill. Other institutions, like the General Council of the Judiciary and the Royal Academy of Law and Jurisprudence, prepared statements or reports regarding the constitutionality of the Bill. Of course, numerous comments from scholars, judges, and the like, were published before and after the Bill was passed. The Law is currently pending of a decision from the Constitutional Court.

The paper will analyze the arguments and reasons from the reports and comments, in order to find out whether this modification of the Civil Code is consistent with the Spanish Constitution.

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The Forgotten Founding Document
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Positive law is necessarily guided by a background idea of moral philosophy or deontology in order that law may pursue and advance what are considered worthwhile ends in human society. With so many modern competing versions of what is morally right or wrong competing for public attention and acceptance, it is perhaps time to consider explicitly the moral foundations of the United States Constitution as its framers intended, as is most clearly reflected in the Declaration of Independence, the “Forgotten Founding Document.” It is necessary to understand the founders’ deontology, i.e. “natural law,” together with its effects, so that alternatives to it, and their likely consequences, can be properly compared, analyzed, and evaluated before they are arbitrarily adopted into guiding principles of our law. Natural law carries with its original grant of “inalienable rights” the self-limiting restriction of an obligation
not to exercise one’s rights in derogation of the rights and interests of others, both immediately and in the long term. Thus, rights are balanced by the requirement of exercising those rights responsibly. Alleged “rights” unhinged from this “moral” requirement thus run the danger of creating positive law that is socially irresponsible and hence, unjust and eventually dangerous. The implications of these principles for marriage, specifically, and family policy, generally, are discussed.

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Same-Sex Marriage and the Establishment Clause
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There has been much discussion about the constitutionality of laws that prohibit same-sex marriage. Most of the focus of this discussion has been on substantive due process (right to marry) and equal protection arguments. Another argument that seems to be attracting attention recently is that bans on same-sex marriage violate the Establishment Clause. According to this position, bans on same-sex marriage can only be explained by the “religious” view that marriage is inherently heterosexual and that it violates the Establishment Clause for these “religious” views to be embodied in legislation.

This paper considers this Establishment Clause argument. I contend that this argument ought to be rejected. The argument lacks support in the Establishment Clause doctrine and is inconsistent with the long history of permitting “religious” convictions to play a role in policymaking.

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Fear of the Queer Child
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For many years, opponents of LGBT rights have argued that permitting same-sex couples to marry will cause more children to develop homosexual desires, engage in homosexual acts, and identify as lesbian, gay, or bisexual. For just as many years, LGBT advocates have replied that this claim is untrue. In this paper, I will argue that the truth or falsity of this claim doesn't matter, because the government has no legitimate interest in encouraging children to be heterosexual or discouraging them from being lesbian, gay, or bisexual. Under the Equal Protection Clause, the Free Speech Clause, and the Due Process Clause, the government must maintain a neutral stance vis-a-vis children's homosexual status, homosexual speech, or homosexual conduct. As a result, the objection that children will be taught about same-sex marriage in school is no objection at all.

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The Constitutionality of Marriage: Finding the Facts and Eliding the Facts
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Our generation’s marriage issue is whether constitutional norms of equality, liberty, dignity, etc. require the law to redefine marriage from the union of a man and a woman to the union of any two persons. In that contest, the relevant facts of marriage are hotly contested exactly because it is the marriage facts chosen by a court that determine which side wins.

Whenever in litigation the facts matter, burdens of proof and forms of proof matter. Rational-basis review puts the burden on the plaintiff (as the party attacking the laws that reinforce marriage’s man-woman meaning) to negative every reasonably conceivable set of facts that sustain the rationality of those laws. Rational-basis review doctrine is not clear whether the plaintiff, in meeting that burden, is required or allowed to present admissible evidence (particularly expert testimony) to supplement the use of “legislative” facts and/or “constitutional” facts. That doctrine is clear, however, that the defendant may set forth the requisite rational bases without use of admissible evidence or courtroom factfinding; it is sufficient for the defendant to point to material or even argument of the kind on which reasonable people ordinarily rely. With a heightened level of scrutiny, the burden of proof appears to shift to the defendant, but the law seems uncertain on the forms of proof allowed or required to meet that shifted burden. I will initially address this cluster of “proof” issues.

The courts that have applied rational-basis review and still found the man-woman meaning unconstitutional have done so because (i) the defendant failed or refused to present adequate rational bases (and the court, as it is entitled (required?) to do, did not articulate any on its own) and/or (ii) the court elided, distorted, or otherwise ignored the marriage facts sustaining a number of powerful rational bases. I will also address this phenomenon.

I will conclude with observations regarding practical aspects of a defendant’s task of presenting proof of the marriage facts under a heightened level of judicial scrutiny. That seems important because genderless marriage advocates continue to urge courts to adopt a heightened level of scrutiny and because a full account of the marriage facts, if those facts are both presentable and presented in an acceptable form, demonstrates that society has compelling interests in perpetuating the man-woman marriage institution.

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Let Me Count the Ways
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When discussing whether same-sex marriage bans pass muster under the United States Constitution, a number of issues should be considered. One question is whether federal equal protection and due process guarantees permit a particular state to refuse to afford legal recognition to same-sex marriages celebrated within the state, while a different question involves the conditions, if any, under which a state can refuse to recognize such marriages when they have
been validly celebrated elsewhere. The analysis here requires examining a number of different constitutional protections including those included within the 14th Amendment as well as those provided by full faith and credit guarantees.

This article’s equal protection analysis discusses the constitutionality of same-sex marriage bans in light of the differing tiers of scrutiny that might be employed by the Court. The due process analysis discusses how the societal and individual interests served by marriage are promoted whether the couple is composed of individuals of the same sex or of different sexes. The privileges and immunities discussion focuses on some of the respects in which states are precluded from refusing to recognize the rights of same-sex couples, congressional authorization to discriminate notwithstanding. Finally, the article discusses existing full faith and credit guarantees, and their implications both for the Federal Defense of Marriage Act (DOMA) and for state mini-domas. The article concludes that numerous federal constitutional guarantees are violated by the system of same-sex marriage bans that is currently in place.

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**Rights, Equality, Principles and Process:**
Same-Sex Marriage in American and Comparative Constitutional Law
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This paper will begin by describing the status of SSM in the USA and in the world.

It will then review the texts of constitutional provisions in the USA and in the other nations of the world that appear to address whether same-sex marriage must/must not or may be legalized.

It will then review the major core constitutional doctrines or principles that appear to address whether same-sex marriage must/must not or may be legalized.

It will then describe how those constitutional doctrines or principles have been addressed by the federal courts in the United States of America in cases regarding whether same-sex marriage must/must not or may be legalized. It will compare those federal courts’ analysis with the analysis of key constitutional bodies of selected other nations. It will then analyze anew the claims for same-sex marriage under those the major core constitutional doctrines or principles of the Constitution of the United States.

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The Prop 8 Trial as “Truth Commission”
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I will be discussing the trial challenging the constitutionality of Prop 8 that occurred over twelve days in January 2010. I will first argue that that the trial functioned as a “truth commission” (to borrow a phrase from GLAD’s Mary Bonauto) for the issue of same-sex marriage. The trial functioned in this manner for several reasons: (1) its human dimension; (2) its rigor; (3) its civility; (4) its secular baseline; and (5) its comprehensive treatment of the legal issues. I also defend the proceedings from the various challenges that have been leveled against it.

The trial established that the legalization of same-sex marriage is constitutionally required by examining both the rights invoked by the plaintiffs and the rationales for Prop 8 forwarded by the Proponents. The trial rested on two separate constitutional claims—the right to marry under the Due Process Clause and the right to fair treatment under the Equal Protection Clause. With regard to the right to marry, the crucial question is whether advocates of same-sex marriage are seeking the recognition of a new right or access to an existing right. I endorse the plaintiffs’ contention that they were no more seeking a new right of “same-sex marriage” than the plaintiffs in Loving v. Virginia sought a new right of “inter-racial marriage” or the plaintiffs in Turner v. Safley sought the right of “inmate marriage.” With regard to the right to equal treatment, I canvas three different theories, all of which I find persuasive: (1) the theory that sexual orientation classifications should draw heightened scrutiny; (2) the theory that restrictions on same-sex marriage constitute sex discrimination, which already draws heightened scrutiny; and (3) the theory that sexual orientation classifications, at a minimum, draw “rational basis with bite.”

Regardless of the level of scrutiny the courts apply to restrictions on same-sex marriage, they must explore the rationales supporting such restrictions. I therefore examine the various rationales forwarded by the Proponents and how they fared at trial. These rationales include the arguments that restrictions on same-sex marriage (1) contribute to the optimal environment for childrearing; (2) prevent the “deinstitutionalization” of marriage; and (3) limit “irresponsible procreation” by individuals of the opposite sex.

In terms of rights, rationales, and remedies, the Prop 8 trial produced a model dialogue on the issue of same-sex marriage. Regardless of what the Supreme Court does with the case this Term, this trial deserves wide dissemination.

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The issue involving the constitutionality of same-sex marriage in Australia is about which level of government can legislate on this matter under the distribution of legislative powers provided by the Constitution. The country has an express provision in the Constitution granting federal Parliament the power to pass laws on the subject of marriage. As such, a federal legislation has been enacted that defines marriage as a union between a man and a woman to the exclusion of all others. However, both federal and state laws have recently provided equality of benefits for both heterosexual and same-sex couples. First, this paper discusses the constitutionality of laws on the subject of marriage in Australia. Second, this paper analyses whether the country’s federal Parliament has the power to ban not only same-sex marriage, but also to ban any law providing civil unions for same-sex couples that are clearly designed to mimic marriage, even if they do not bear the label ‘marriage’.