

Farzad Family Law Scholarship 2014

Should the right to marry for same-sex couples become a federal constitutional right by amendment to the United States Constitution or remain a State issue?

The United States government and its constituent States tackle the topical and controversial issue of same-sex marriage. In the United States, marriage is governed by the States; individual States have regulatory power over the institution of marriage by determining who is permitted or prohibited to marry. To date, thirty-five states and the District of Columbia have legalized same-sex marriage. However, this current practice of allowing individual states to use their own discretion in determining the legality of same-sex marriage is questionable; should the right to marry for same sex couples become a federal constitutional right by amendment to the United States Constitution or remain a State issue?

In order to make this determination, critical thinking is applied to examine the issue from a traditional, religious, social, moral, psychological, and legal perspective. Traditionally, marriage has been viewed as the legal union between a man and a woman. Marriage is an institution that provides emotional, moral, and economic stability; and many believe the main purpose of marriage is procreation. However, during the course of history, as social attitudes change, the traditional institute of marriage has also been altered. This is evidenced by many factors. For example, married women are no longer subordinate to their husbands; married women now have legal equality. The legalization of contraceptives, such as birth control, has also altered marriage by allowing couples to choose if and how many children to have. In addition, married couples can divorce; and interracial couples have the right to marry. Ironically, opponents to same-sex marriage believe that same-sex marriage undermines traditional marriage. However, as witnessed above, long before the same-sex movement, the traditional views of marriage have been changed.

In the United States, same-sex movement is gaining momentum; homosexuality is gradually becoming an accepted way of life. This is evidenced by the fact that over half of the States in this country now allow gays and lesbians to marry. The movement for same-sex marriage also gained acceptance when the United States Supreme Court rejected the Defense of Marriage Act (DOMA). This act attempted to federally define marriage as “only a legal union between one man and one woman as husband and wife”. In *United States v. Windsor*, the U.S. Supreme Court found the DOMA to be unconstitutional; the United States federal government must now recognize same-sex marriage. In 2008, the state of California also tried to ban same-sex marriage by initiating Proposition 8; this proposed that “only marriage between a man and a woman is valid or recognized in California”. Proposition 8 was also found to be unconstitutional; the Court stated that, “Proposition 8 serves no purpose and has no effect other than to lessen the status of human dignity of gay men and lesbians in California”. These strides towards same-sex marriage prove that marriage should not be defined by discrimination and prejudice.

It is also important to briefly note that from a religious standpoint, people may feel obligated to oppose same-sex marriage. Their religious faith causes opposition because these groups of individuals believe that marriage is a holy, sacred institution solely between a man and woman. However, in this country, constitutional rights will supersede over religious beliefs. In the United States of America, law and church are separate entities.

When we address the topic of gay marriage from a social perspective, it is important to list the reasons why certain States have placed bans on same-sex marriage. These same-sex bans may exist to strength the traditional family values in our society, to prevent a slippery slope in the legality of marriage (examples may include a human marrying an animal or a husband having multiple wives), to reinforce gender roles, and/or to promote procreation. However, bans on

same-sex marriage may be actually hindering society by increasing political identity; these bans may be creating more social division and tensions between various identities because they provide protection/rights to selected groups of people. When same-sex marriage bans are placed, people in society will increasingly relate to each other as competing classes/groups based on identifying characteristics, such as sexual identity. Ultimately, bans on same-sex marriage are problematic because they do not promote equality; same-sex couples are legally unequal to heterosexual partners.

Attention also needs to be placed on the moral issues associated with same-sex marriage. Opponents to gay marriage argue that it is morally wrong. However, in today's society, many people are uneducated about homosexuality; opposition of same-sex marriage is based on a misunderstanding of homosexuality. This is evidenced by the fact that some people are under the assumption that gay people have a choice in being homosexual; they believe that homosexuals can be heterosexual if they choose. However, it is strongly evidenced that there is a biological link to being gay or lesbian. Legalizing same-sex marriage in all states would be morally correct because it's a positive step towards reducing discrimination, prejudice, and unequal treatment against gays and lesbians. It would be in the best interest of humanity to allow homosexuals the same life choice as heterosexuals; the right to marry the person of their choice.

From a moral standpoint, it is also important to understand the reasons why homosexuals want to marry. A marriage certificate gives same-sex couples social recognition and many legal rights/protections. Some of the legal protections/benefits include spousal support, Social Security benefits, access to a partner's health insurance, joint tax filings, hospital visitation rights, and the ability to make medical decisions for each other. Other legal benefits that same-sex marriage provides are inheritance rights and equitable division of property when divorced. In addition,

marriage equality for same-sex couples provides more stability, security, and legal protection for their children. In today's society, legalizing same-sex marriage would reduce the stigma and prejudice that families of homosexual couples face. Marriage equality would be in the best interest of children being raised by gay couples. Ultimately, it is detrimental to deny homosexual couples the same legal and social benefits of heterosexual couples.

Another argument about same-sex marriage is based on the fact that it is morally wrong because the main purpose of marriage is procreation. Because homosexuals are unable to procreate, some people believe that gays and lesbians should be banned from same-sex marriage. However, this argument is only partially true; lesbians are able to procreate through artificial insemination. In regards to gay men, the fact remains that they cannot reproduce; however, they can adopt. This would benefit society because, as an increase in the rate of adoptions occurs, more and more homeless children will be given a home with a family consisting of loving parents and extended families. If procreation is a reason to ban same-sex marriage, why are sterile/infertile couples allowed to marry? Procreation as a reason to ban same-sex marriage is invalid.

Another aspect of this research focuses on the psychological effects of banning same-sex marriage. Research has shown that the banning of same-sex marriage produces a negative effect on the psychological well-being of homosexuals; research supports the fact that bans on same-sex marriage are linked to low self-esteem, higher stress levels, and mental issues. In States that ban same-sex marriage, there have been higher rates of depression, alcohol, and drug abuse. As a matter of fact, due to these statistics, the American Psychological Association is supportive of same-sex marriage. In States that ban same-sex marriage, homosexuals are denied marriage equality; hence, they are devalued and discriminated against. Stereotypical views about gay

relationships exist. The belief is that gays and lesbians are promiscuous and are less capable of commitment; hence, homosexuals aren't as stable as heterosexual partners. Ultimately, when compared to heterosexual couples, gay couples are viewed as being inferior. Research reiterates the fact that if same-sex relationships were valued in the same legal and social manner as heterosexual couples; gays and lesbian would have a greater sense of psychological well-being. This is evidenced by the fact that the lives of homosexual couples have improved in States that have legalized same-sex marriage.

From a legal standpoint, it is important to examine the role of the Federal verse State government. Historically, laws governing marriage have been regulated by State law. The reason why marriage is left to individual States to determine is primarily based on the fact that marriage is not established; marriage is not defined or even mentioned in the U.S. Constitution. In accordance to the 10th Amendment of the Constitution, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people".

However, the U. S. Constitution also states in the 14th amendment that, "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State within they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws". According to the Constitution, States that ban same-sex marriage are denying lesbians and gays equal protections of the laws.

Homosexuals are human citizens; they are being denied their fundamental and equal civil rights.

Historically, marriage has not been a federal issue. However, there have been times in which the U.S. Supreme Court has intervened when a State law has infringed upon the rights of individuals granted in the Federal Constitution; the Federal government has stepped in when violations to the U.S. Constitution have been found. This is evidenced in the U.S. Supreme Court case, *Loving v. Virginia*. In 1966, the Virginia Supreme Court upheld the State's decision to ban interracial marriage. However, in 1967, the U.S. Supreme Court unanimously found that State bans on interracial marriage violated the 14th amendment of the U.S. Constitution. The Court stated that, "Marriage is one of the basic civil rights of man". The United States government guaranteed the right for interracial marriages, and our government should also guarantee the right for same-sex marriages. The Court found that no citizens should be discriminated against because of their race. This decision should also be granted to same-sex couples; no citizen should be discriminated against because of their sexual preference.

In regards to same-sex marriage, some argue that the United States Constitution is being interpreted differently from the intent of its original founding fathers. However, the Constitution is a living document which has and should continue to evolve with society. This is evidenced by the fact that the U.S. Supreme Court has found laws on certain marriage issues to be unconstitutional. This is further evidenced by the fact that people who were once denied the privilege to marry the person of their choice are now allowed to marry. For example, in today's society, women, people of color, and homosexuals (in certain States) are allowed to marry the partners of their choice. The main purpose of the United States Constitution is to provide equal rights for all people no matter gender, race, or sexual preference.

When legally addressing the issue of same-sex marriage, opponents of gay marriage believe that domestic partnerships and civil unions offer the same legal rights as a marriage

certificate; therefore, gays and lesbians don't need to marry. However, this is not true; domestic partnerships and civil unions give limited State rights to same-sex couples. In addition, these types of partnerships are not usually recognized outside of the State in which they were granted; therefore, domestic partnership and civil union couples may experience issues when traveling internationally or inter-state. In addition, domestic partnerships and civil unions may actually foster discrimination against homosexuals by downgrading the status of same-sex relationships to an inferior class status.

The freedom of choice to marry or not marry, a person of the same sex, cannot be restricted by the States. As stated above, even though the 10th Amendment of the Constitution states that, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people", the federal government should not allow States to ban same-sex marriage because it is a violation of the 14th amendment of the Constitution. The legality of same-sex marriage should be decided once and for all by the federal government. How can the banning of gay marriage be in violation of one's fundamental human rights in one State, but not be a violation of a person's rights in another State? An end to recognition of same sex marriages across state lines can be reached by an amendment to the U.S. Constitution; this amendment would give the people the right to same-sex marriage in every state.

In conclusion, the answer to the question as to whether the United States should legalize gay marriage in every state by making an amendment to the U.S. Constitution is yes. From a traditional, religious, social, moral, psychological and legal perspective, this research found that same-sex marriage should not be left to individual State discretion; the United States of America should legalize gay marriage in every state by making an amendment to the United States

Constitution. As stated above, the United States Constitution is a living document and it should evolve with society. Marriage is a basic civil right for citizens and the freedom of choice to marry should not be restricted by sexual preference; discriminating against same-sex couples is unconstitutional. States should not be able to decide for themselves when basic civil rights are violated; homosexuals are human citizens with equal protection and due process rights. As Martin Luther King Jr once stated, “When any society says that I cannot marry a certain person, that society has cut off a segment of my freedom”.