

The 14th Amendment and Same-Sex Marriage

Do laws and constitutions that prohibit same-sex marriage violate the 14th Amendment?

Marriage is more than just a union between two people who love each other and have made a commitment to spend the rest of their lives together. “Married” is a legal status that allows couples to receive many benefits both from the federal government and state governments that single individuals do not. Therefore the debate over same-sex marriage is not only a moral debate but a political debate over whether same-sex married couples should have the same legal status as opposite-sex married couples. Some of the benefits that opposite-sex married couples receive include income tax deductions, the ability to file joint taxes, the ability to receive a spouse’s inheritance upon death, family visitation rights, the right to hospital visitation and the next-of-kin right to make medical decisions during an emergency. In addition, one’s marital status influences custody arrangements and immigration laws. There are also extensive benefits given to the spouses of federal government employees and military veterans including health care, job placement assistance, survivor benefits, and the right to the continuation of certain benefits if one’s spouse dies or the couple divorces.

The Defense of Marriage Act (DoMA), passed by Congress in 1996, defined marriage for the first time under federal law as a union between a man and a woman. This means that only married heterosexual couples are eligible to receive the federal benefits designated for married people. Supporters of this legislation hoped not only to dissuade states from passing laws allowing same-sex marriage, but also hoped to eliminate the requirement that states recognize same-sex marriages made in other states. President Clinton signed DoMA into law after it was approved overwhelmingly in Congress.

While DoMA prevents same-sex couples from receiving *federal* benefits, it does not and cannot dictate which *state* benefits are given to married couples, how individual states define marriage, and/or what state laws are made concerning other aspects of the daily lives of married couples. This feature of the US federal system of government has resulted in a wide range of state laws dealing with what constitutes marriage and what rights married people receive.

As of September 1, 2009, same-sex marriage is legal in a handful of states: Massachusetts, Connecticut, Iowa, and Vermont. Most recently, in November of 2009, voters in Maine elected to repeal the state law that legalized same-sex marriage. Conversely, same-sex marriage will be legal in New Hampshire in early 2010. In New York and the District of Columbia, same sex marriages performed in other states or nations are recognized, but are not performed. Several other states deliberating laws that would allow same-sex couples to be married. Other states allow same-sex couples to enter into a partnership (which is often called a “domestic partnership”) that allows them to have some, but not all, of the state benefits that opposite-sex couples have.

Still other states allow same-sex couples to have a “civil union.” The main difference between a civil union and marriage is that a civil union limits a couple’s benefits to the state benefits that married couples receive, not the federal ones. Secondly, because not all states recognize civil unions (as opposed to marriages), if a same-sex couple has a civil union in one state and then moves to another state that doesn’t recognize civil unions, the couple would no longer

receive benefits from the new state. A third difference between civil union and marriage involves the cultural and social acceptance of the term “marriage,” and both sides argue vehemently about who deserves the status associated with the term.¹

While there is no case before the United States Supreme Court about same-sex marriage at this time, in 2005 legal commentator Jeffrey Tobin predicted that the Court would soon take up the issue. According to Tobin:

The Supreme Court last considered a gay-rights issue in 2003, in *Lawrence v. Texas*, when the Justices ruled, six to three, that the state could not criminalize sodomy between two consenting males. The Justices then issued dueling prophecies about the meaning of their decision. Justice Anthony Kennedy’s opinion for the majority amounted to a sustained plea for equal rights for homosexuals, who “are entitled to respect for their private lives.” But Kennedy asserted that his opinion addressed only the issue before the Court, and did not, for example, presage an endorsement of gay marriage. This disclaimer drew a characteristically biting rejoinder from Scalia in his dissent: “Do not believe it.” Rather, Scalia insisted, “Today’s opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda.” When the Supreme Court reconvenes, in October, presumably with a Justice Roberts in the junior seat, the Court will return to the “homosexual agenda.”²

Same-sex marriage advocates are also trying to fight against DoMA by pushing state legislatures to pass laws legalizing same-sex marriages and/or same-sex civil unions and to recognize same-sex marriages performed in other states, thereby weakening the influence of DoMA.

In this lesson, we will deliberate the question: **Do laws and constitutions that prohibit same-sex marriage violate the 14th Amendment?**

The Fourteenth Amendment to the United States Constitution (excerpted) (ratified July 9, 1868)

Section 1. 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 wherein 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 to any person within its jurisdiction the equal protection of the laws.**

Due Process/Right to Privacy

The due process clause of the 14th Amendment states *"nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."* This means that a state has to use fair procedures whenever it is going to take away a person’s life,

¹ www.factcheck.org

² August 1, 2005 issue of the New Yorker, article by Jeffrey Tobin.

freedom, or possessions. The Court has also interpreted the due process clause to mean that some “liberty rights” are so fundamental they may not be taken away by states or the federal government, no matter how fair the process. This is known as “substantive due process.” Several rights that are not explicitly found in the Constitution have been deemed so important that they are fundamental. The Court in *Griswold v. Connecticut* (1965) and *Eisenstadt v. Baird* (1972), found that couples had a right to privacy and autonomy in their decision to use contraceptives that the state could not deny. In *Roe v. Wade* (1973) and *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) the Court ruled that a woman’s right to decide whether to have an abortion was also governed by a substantive due process right to privacy. In cases where a state law or state action violates a fundamental right, the Court applies a “strict scrutiny” test. Under this test the state must prove that there is “compelling state interest” in the law or action and that this interest cannot be satisfied in another, less invasive, way.

Equal Protection

The equal protection clause of the 14th Amendment of the U.S. Constitution prohibits states and the federal government from denying any person equal protection of the law. States must make laws that apply equally to all people who are in similar situations unless the State has a very good reason. Questions of equal protection usually arise when a state denies a particular class of people the right to do something that it allows other individuals to do. When courts are deciding whether or not a state has violated the equal protection clause of the Fourteenth Amendment, they apply a particular test to the case depending on what classification the state has made. In most instances, the Court permits laws that do not treat people equally if they have a “rational basis” and a “legitimate purpose.” In certain cases the Court has applied a higher standard. For example, on issues of racial equality, the Court uses the “strict scrutiny” test. States with a law or practice that uses a race-based classification must show the Court that their classification serves a compelling or very important interest.

Constitutional Issues to Deliberate

1. Do laws prohibiting same-sex marriage infringe on a fundamental right?
2. Do classifications on the basis of sexual orientation violate the principle of equal protection?

As background, consider that the Supreme Court has decided three significant cases in the recent past that have dealt with sexual orientation.

1. In 1986, the Supreme Court issued a 5 to 4 opinion in *Bowers v. Hardwick*, finding a state sodomy statute to be constitutional. In this case, two men were found violating Georgia state law criminalizing all sodomy. The Court found that nothing in the Constitution “would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots.” Moreover, the Court said that a state legislature’s judgment about immoral conduct is a sufficient basis for such a law.

2. In 1995 the Supreme Court ruled 6-3 in the case of *Romer v. Evans* that Colorado’s 2nd Amendment violated the Constitution’s 14th Amendment’s equal protection clause and was therefore unconstitutional. The amendment would have invalidated all state or local laws that provided protection from discrimination based on sexual orientation and prevented any such future laws in the state. Justice Kennedy wrote, “If the constitutional conception of ‘equal protection of

the laws' means anything, it must at the very least mean that a bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." The Court did not go further and decide whether gay, lesbian, and bisexual people were a protected class, warranting a higher standard than rational basis.

3. In *Lawrence v. Texas* (2003), the Court voted 6 to 3 to overturn a Texas law that criminalized same-sex sodomy as well as its earlier precedent (*Bowers*). The Court found support for Lawrence's due process argument in earlier privacy rights cases dealing with contraception and abortion.

Writing for the majority, Justice Anthony Kennedy said, "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter... [This case does not involve minors or people paying for sex but rather] two adults who with full and mutual consent ...engaged in sexual practices common to a homosexual lifestyle. [They] are entitled to respect for their private lives. The state cannot demean their existence ... by making their private sexual conduct a crime." Four other justices signed on to Justice Kennedy's opinion. Justice O'Connor agreed with the outcome but wrote in her concurrence that it was their equal protection rather than due process rights that had been violated.

The dissenting justices and other critics of the decision argued that this decision takes away a state's traditional authority to pass laws that set moral standards and reflect the values and views of its citizens. From this perspective, outlawing such behavior is a logical outcome of democracy, not an example of discrimination. Critics also argued that the decision opens the door to gay marriage, undermines family values, and makes the military's ban on openly homosexual behavior harder to defend.ⁱ

**NO: Laws and constitutions that prohibit same-sex marriage
DO NOT violate the 14th Amendment.**

1. One of the tests for whether an asserted right should receive constitutional protection is whether it is "deeply rooted in the Nation's history and tradition" (*Moore v. East Cleveland* (1977)). This statement is certainly true of opposite-sex marriage; it is manifestly not true of same sex-marriage. Because same-sex marriage is not "rooted in the Nation's history and tradition," the Courts should not expand substantive due process rights to include same-sex marriage.

2. Historically, the very concept of marriage has meant a union between a man and a woman. This definition of the concept continues to be widely accepted today in the United States and in the vast majority of other nations.

3. Classifications based on race trigger heightened scrutiny under the Equal Protection clause, but the Supreme Court has never ruled on the issue of classifications based on sexuality (see *Loving*). Because sexuality is not a classification for which the Supreme Court has demanded such heightened scrutiny, the decision to let opposite-sex couples marry and to deny the same opportunity to same-sex couples falls under the traditional powers of government to enact economic and social regulation—the so-called "police powers." These powers go beyond economic and social regulation. States are traditionally understood to have the authority to make

laws to protect the health, safety, welfare, *and morals* of their communities. This means that states can justify their actions by stating that they decline to endorse or provide encouragement to forms of behavior—in this case homosexual intimacy—which the community considers immoral. As long as rational basis scrutiny is being applied, states can justify their actions perfectly well by stating that they decline to endorse and provide encouragement to forms of behavior—in this case, homosexual intimacy—which the community considers immoral.

4. If same-sex marriage is a fundamental right, then it will be extremely difficult to forbid other types of marriage that are clearly detrimental to society—such as polygamy (where one man has more than one wife).

5. Equal protection can be secured without granting a “right to marry.” This argument states that even if we concede all the equal protection-related points made by supporters of same-sex marriage, those arguments do not actually imply a constitutional requirement to allow same-sex couples to marry; they only imply a constitutional requirement that same-sex couples and their children receive the same legal prerogatives and benefits as opposite-sex couples. That is, if the children of same-sex couples have the benefits of stability and support that result from their parents having certain legal prerogatives, then by all means let’s give those parents those prerogatives, but nothing in the Constitution requires that we call it “marriage.” This is the argument used by states that grant same-sex couples domestic partner benefits, or that legally recognize civil unions. In these cases same-sex couples are legally recognized as partners with particular rights but are not considered married.

6. This is a political rather than a constitutional question—and belongs to the political branches (that is, in the legislative and executive branches) not in the courts.

**YES: Laws and constitutions that prohibit same-sex marriage
DO violate the 14th Amendment.**

1. Marriage is an individual right. This is different than viewing marriage as a right given to a couple. When States argue that marriage is simply defined as an institution between a man and a woman they overlook the fact that the State by its actions is denying *individuals* the right to marry the person of their choice. Many of the arguments presented by States today on the question of same-sex marriage are very similar to those raised in defense of a ban on interracial marriages. In *Loving v. Virginia* Justice Warren wrote: “Marriage is one of the basic civil rights of man ... To deny this fundamental freedom on so unsupportable a basis as [these] racial classifications is surely to deprive all the State’s citizens without due process of law.” The State’s refusal to recognize same-sex marriage denies that right to homosexuals.

2. States do not need to recognize marriage at all, nor do they need to give certain benefits to married couples. However, if a State decides to go into the benefit-granting business it has to distribute those benefits in a way that respects constitutional mandates of equal protection and guarantees of substantive rights. In the case of same-sex marriage, the argument is that none of the asserted state interests justify giving same-sex couples and their children fewer benefits and protections than are provided to opposite-sex couples.

3. Moral disapproval should not apply to categories of people. States and communities are allowed to make laws regulating certain moral behavior, but there is a great difference between permitting states to express their moral disapproval of certain practices and permitting a state to express their moral disapproval of categories of people. This would allow states to express the sentiment “we don’t like your kind.”

4. Marriage has important consequences for children. Opponents of same-sex marriage often argue that the state should only promote opposite-sex marriage because 1) marriage is fundamentally about raising children, and 2) children will not do well with same-sex parents. The first point does not hold up to scrutiny because the state recognizes the marriages of infertile couples, couples who choose not to have children, and elderly couples who are past child bearing years. On point two: Children are usually better off when they have stable relationships with caring adults. If children are unaffected by the gender of their caregivers, then the state would do well to encourage same-sex marriage for the good of children. If children are, in fact, harmed in some way by same-sex parenting, other forms of imperfect parenting also harm them. The idea that the State would single out same-sex couples - and nothing else - as problematic parenting does not deserve support.

5. Allowing the option of marriage for same-sex couples encourages people to have strong family values and give up high-risk sexual lifestyles. Much of the stigma surrounding homosexuality arose during the early 1980s when HIV/AIDS was considered to be a homosexual disease, which promiscuous gay men were passing to each other at rapid rates because of their alleged “wild” sexuality. While HIV/AIDS has been shown to not be a disease that plagues only homosexuals, many people still hold on to the notion that many homosexuals have high-risk sexual lives. Permitting gay marriage would promote monogamous relationships among homosexual couples as it does among heterosexual couples.

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