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Same-Sex Marriage: A Fundamental Right

Stefen Smith
University of Central Florida



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SAME-SEX MARRIAGE: A FUNDAMENTAL RIGHT

by

STEFEN S. SMITH

A thesis submitted in partial fulfillment of the requirements
for the Honors in the Major Program in Legal Studies
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Thesis Chair: Dr. Gina Naccarato-Fromang

ABSTRACT

Same-sex marriage is a subject that has been heavily discussed and argued since the concept of marriage came into existence. Marriage is a relationship that most American citizens are entitled to although it is not yet a fundamental right. As of a very recent court decision, Strawser v. Strange, Civil Action No. 14-0424-CG-C¹ finalized on February 9, 2015, Alabama has legalized same-sex marriage; furthermore, thirty-seven states now recognize the legality of same-sex marriage. Marriage, whether it is between a heterosexual or a homosexual couple, should be a fundamental right enjoyed by all.

This thesis will explain why same-sex marriage should be a fundamental right. The research presented in this thesis will be scrutinized and thoroughly examined showing the obstacles that same-sex couples face when wanting to legally marry. The United States Constitution, the Due Process Clause, and the Equal Protection Clause will be analyzed and discussed to prove that all fifty states should allow same-sex couples to wed.

Citizens view what constitutes a marriage differently depending on their upbringing and residence. This thesis will illustrate why same-sex marriage has been such a widely discussed topic, and it will investigate the influence of religion and the church. Historically, the tradition of marriage has always been between one man and one woman. By examining how the tradition of marriage is changing and using case law decisions, an argument can be formed that marriage should be a fundamental right for all people.

¹ Strawser v. Strange, Civil Action No. 14-0424-CG-C

DEDICATION

For those fighting for equal human rights

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INTRODUCTION

In 2003, Merriam-Webster changed its definition of marriage to include same-sex couples. Same-sex marriage is a marriage of partners between two people of the same sex. Currently, thirty-seven states including the District of Columbia recognize same-sex marriage as a legal marriage. Heavy debates have arisen in the past few months, where some citizens are fighting for the legalization of same-sex marriage, while others are fighting to keep it from becoming legalized in the remaining states. Both Alabama and Florida recently made the decision to legalize same-sex marriage. The United States of America is not the only country in the world that has argued over the legalization of same-sex marriage. Several countries around the world allow and accept same-sex marriage as legal, including Luxembourg, Scotland, England and Wales, France, New Zealand, and Uruguay. There are also several countries where same-sex marriage is legal, in just some of their jurisdictions, such as Mexico.²

Florida is a state where same-sex marriage has been at the forefront of debate over the past few years. On January 6, 2015, same-sex marriage was finally legalized in Florida in the case of Brenner v. Scott, 999 F. Supp. 2d 1278.³ It was an extremely long, strenuous, and stressful process to legalize gay marriage in the state of Florida because much of the southern part of the state is democratic while the northern part of the state is republican.

Because of its constant controversial nature, the process of legalizing same-sex marriage is changing ever so frequently. Court decisions and judges' rulings are creating unrest in our

² PewResearch Center Religion & Public Life Project

³ Brenner v. Scott, 999 F. Supp. 2d 1278

country, where a large percentage of the population is pitted against those who oppose same-sex marriage. Many people disagree with same-sex marriage becoming legalized because they feel that it opposes the traditional notion of a man-woman union that many believe is founded on our nation's religious roots.

Significance

The study of same-sex marriage is extremely significant to the world that we live in today. Homosexuality is undoubtedly a controversial topic, where the laws are changing almost daily. The United States Supreme Court has heard cases from all over the country on the subject of whether same-sex marriage should be legalized or not in certain states.⁴ Hundreds of thousands of people in the United States identify themselves as homosexual. In order for a person to marry another it should not depend on their sexual orientation but on the means that the couple will unite as one in bliss.

In modern society, it is important to understand the concept of same-sex marriage and how it affects our nation. By not allowing same-sex marriage to become fully legalized, the evolution of American is being held back.⁵ Due to the fact that every state has not yet legalized same-sex marriage, thousands of couples are being discriminated against because they are not endowed the right to marriage. Discrimination not only affects the homosexual community but also America as an integral unit. We sometimes forget that "America's deepest tradition is the

⁴ NPR

⁵ Huffington Post Politics

protection and expansion of individual rights and freedoms with a goal of liberty and justice for all.”⁶ This seems to be lost in translation when discussing the topic of same-sex marriage.

Homosexual individuals experience life very differently than heterosexual individuals. Although many children are the targets of bullying by other children, data shows that children who identify as homosexual are more subject to extreme bullying. Many homosexual youths fear going to school, because they are expecting to be bullied and discriminated against simply for liking others of the same gender. It is unfortunate that “federal civil rights laws do not cover harassment based on sexual orientation. Often, bullying towards LGBT youth targets their non-conformity to gender norms.”⁷

This bullying usually begins at a young age, where homosexual or flamboyant children are especially teased. Bullying can, and has often, progressed to physical harm to homosexuals. There have been instances where homosexuals have been physically shoved, threatened and verbally abused. When an individual, especially one of adolescence, is constantly bullied, teased, and discriminated against, his or her self-esteem plummets and depression begins to settle in. Many times this trajectory eventually leads to suicide. Suicide is a serious problem that many homosexual humans face. Many homosexual men and women turn to suicide as an escape because they feel as though they will never succeed in life or be of any use to the world. Tyler Clementi, Jadin Bell, and Jamey Rodemeyer are just three examples of teens who committed suicide due to bullying, harassment and discrimination against their will because of their sexual orientation. It can be argued that many of these problems can be directly linked to the lack of

⁶ Huffington Post Politics

⁷ Bullying and LGBT Youth

legalization of same-sex marriage. It is tragic to know that someone would take their life only because of their sexual orientation. “LGB youths are four times more likely...to attempt suicide as their straight peers.”⁸ If our society were more open and welcoming to the idea of the gay lifestyle, then fewer youths would be afraid to reveal their true identity. As same-sex marriage becomes legalized throughout the United States, our country may finally start to see signs of a more unified nation; as a result, it can be argued that the number of homosexuals suffering from depression and suicide may in turn begin to decrease.

It is important that all American citizens become aware of the significance of same-sex marriage. Informing more people of sound rationale that same-sex marriage should be legalized will give hope that the hatred and discrimination against homosexuals will cease. It is with deep interest that this thesis explains the reasons of why marriage should be a fundamental right to all people—whether heterosexual or homosexual.

Research Methodology

Same-sex marriage is a topic that is heavily scrutinized because of its deep connection to religion and humankind. American citizens in recent years have been hearing about same-sex marriage in the news, magazines, journal articles and discussion boards. In order to complete this thesis and prove the argument that same-sex marriage should be a fundamental right, the proper research will be conducted. This thesis will include studies on past and present case law, sections of the United States Constitution focusing heavily on the Fourteenth Amendment including the

⁸ The Trevor Project; Facts About Suicide

Equal Protection Clause and the Due Process Clause, along with experience from same-sex couples. This thesis will help answer the following questions:

- Why is same-sex marriage still illegal in so many places in the United States?
- Why is marriage not a fundamental right?
- Does same-sex marriage really break the tradition of marriage?
- How does society feel as a whole about same-sex marriage?
- How has the legalization of same-sex marriage changed over the past decade?
- Is same-sex marriage protected under the fourteenth amendment?
- If same-sex marriage becomes legal in all fifty states will the stereotypes of gay men and lesbian women change?

BACKGROUND AND HISTORY

Although the topic of gay marriage saturates the news of today, it is only within the past few decades that this topic has made headlines. The argument began in the early to mid-1990's with the state of Hawaii. The first public debate on the controversial topic began in 1993 when the case, Baehr v. Lewin, 74 Haw. 645, 852 P.2d 44 (1993), was filed.⁹ Three same-sex couples sued the state of Hawaii to obtain marriage licenses. The couples felt that they were being discriminated against, because they were not legally allowed to marry. As a result, the couples believed that Hawaii's laws were violating the United States Constitution.¹⁰

In 1996 Congress enacted the Defense of Marriage Act, (DOMA.) The law was enacted during the Bill Clinton administration. The Defense of Marriage Act, (DOMA), provides the right to legally deny a same-sex marriage to homosexual couples based on laws enacted in other states. "Under DOMA, married same-sex couples are denied a long list of important protections and responsibilities, including Social Security survivor benefits, immigration rights, family and medical leave, and the ability to pool resources as a family without unfair taxation."¹¹ Since the law was enacted, thousands of same-sex marriage supporters have been fighting to have DOMA overturned, because they believe it is unconstitutional and discriminatory; furthermore, this act violates the fourteenth amendment of the United States Constitution.

President Barack Obama's views on the Defense of Marriage Act has shifted dramatically from when he was first elected into office until present day. Barack Obama was elected into the

⁹ Baehr v. Lewin, 74 Haw. 645, 852 P.2d 44 (1993)

¹⁰ Westlaw Next

¹¹ Freedom to Marry; The Defense of Marriage Act

presidential office in 2009 where the Defense of Marriage Act was currently enacted and being followed by many of the states. In 2009 Obama granted some benefits to same-sex couples, but not nearly enough to guarantee them a happy life together. There were no health benefits granted and no pension benefits afforded to these couples. Gay rights activists, supporters, and homosexuals strongly disagreed with this act for obvious reasons. Many thought that Obama would repeal the act and make it illegal, but instead the Obama Administration defended it. The Human Rights Campaign, Lambda Legal, the ACLU and other groups wrote the following statement when it became known that Obama defended the act:

We are very surprised and deeply disappointed in the manner in which the Obama administration has defended the so-called Defense of Marriage Act... The administration is using many of the same flawed legal arguments that the Bush administration used. These arguments rightly have been rejected by several state supreme courts as legally unsound and obviously discriminatory¹²

Much of the country thought that Obama was going to no longer allow the Defense of Marriage Act to remain in place. When they heard the news that he was going to keep DOMA in place many citizens were outraged and insulted.

It was not until 2011 that the Obama administration changed its position on the Defense of Marriage Act. Obama said that the law would still be followed but not in the court of law. Same-sex couples could now have the potential opportunity to legally marry in the states that they reside.

¹² CBS News Gay Rights Groups Irate After Obama Administration Lauds Defense Of Marriage Act

Although the Baehr case did not fully legalize gay marriage in the state of Hawaii, it did give hope to homosexual couples that one day same-sex marriage could potentially be legal, not only in Hawaii but in the remaining forty-nine states as well. In the later years of the 1990's and the early 2000's, groups of homosexual supporters appealed to congress and the state Supreme Courts arguing that banning gay marriage is unconstitutional. In December of 1999, the Vermont Supreme Court admitted that same-sex marriage is indeed unconstitutional after hearing the case Baker v. Vermont, 744 A.2d 864 (Vt. 1999).¹³ Unfortunately, this was not enough to fully legalize same-sex marriage, but that would soon change.

The year 2004 was a fundamental stepping-stone in forwarding the battle for legalization of same-sex marriage in this country. Not long after President George W. Bush announced that he would like to place a federal ban on same-sex marriage in the United States¹⁴, Massachusetts became the first state to fully legalize same-sex marriage on May 17, 2004. This was a stunning accomplishment for the fight for legalization of same-sex marriage. This upset a handful of groups in the country, and in November of 2004 eleven states passed a series of amendments to change their definition of marriage to be a relationship between one man and one woman.¹⁵ Throughout the next few years several states, like Washington and California, were trying to legalize same-sex marriage. Simultaneously, in contrast, states such as Oregon and Texas, were doing everything in their power to nullify any same-sex marriage licenses that had been previously issued and to keep the existing ban on same-sex marriage in effect. Many states were

¹³ Baker v. Vermont, 744 A.2d 864 (Vt. 1999)

¹⁴ CNN News; Same-Sex Marriage Fast Facts

¹⁵ CNN News; Same-Sex Marriage Fast Facts

in conflict with each other over this issue. Some states were attempting to pass laws to legalize civil unions, while others states were strongly trying to ban the adoption of amendments that would legalize same-sex marriage.¹⁶

It was not for another four and a half years, after Massachusetts legalized same-sex marriage, that another state would do the same. On November 12, 2008, Connecticut became the second state to legalize same-sex marriage. “A majority of Connecticut voters (55%) agree with the current freedom to marry policy in the state, and only 32% want it to be illegal again. 70% of respondents said that marriage between same-sex couples has had no impact on their life.”¹⁷ It is evident that most residents of Connecticut do not care if same-sex marriage is legalized or not. Connecticut, a more democratic state, has had an increase of gay marriage support since they legalized it in 2008.¹⁸ On April 3, 2009, Iowa became the third state to legalize same-sex marriage. Later that year on September 1, 2009, Vermont became the fourth state to legalize same-sex marriage. Vermont was the first out of eight states to legalize same-sex marriage based on state legislature.¹⁹ The District of Columbia recognized same-sex marriage on December 18, 2009, and issued marriage licenses in March of 2010.²⁰ On January 1, 2010, New Hampshire became the fifth state to legalize same-sex marriage and the second to do so by state legislature.²¹

¹⁶ CNN News; Same-Sex Marriage Fast Facts

¹⁷ Freedom to Marry; Connecticut

¹⁸ Freedom to Marry; Connecticut

¹⁹ CNN News; Same-Sex Marriage Fast Facts

²⁰ CNN News; Same-Sex Marriage Fast Facts

²¹ Gay Marriage; Pros and Cons

New York finally recognized same-sex marriage on July 24, 2011, making it the sixth state to do so and the third state to recognize it by state legislature.²² In September of 2011, same-sex marriage and the military began to join hand in hand. “The U.S. Department of Defense issues new guidelines allowing military chaplains to perform same-sex ceremonies.”²³ In December of 2012 both the state of Washington, on the sixth day, and Maine, on the twenty-ninth day, both legally recognized same-sex marriage by popular vote.²⁴

The year 2013 began with a great start as Maryland, the ninth state, legalized same-sex marriage by popular vote on January 1, 2013.²⁵ California finally became the tenth state to recognize same-sex marriage on June 28, 2013, after much debate and bill making.²⁶ Just a few days later on July 1, 2013, Delaware recognized same-sex marriage making it, the eleventh state and fourth state to do so by state legislature.²⁷ Both Minnesota and Rhode Island legalized same-sex marriage on August 1, 2013 by popular vote.²⁸ The fourteenth state to legalize same-sex marriage was New Jersey on October 21, 2013, followed by Hawaii, which legalized same-sex marriage on December 2 of 2013 by state legislature.²⁹ New Mexico legalized same-sex marriage on December 19, 2013 making it the sixteenth state for homosexual couples to enjoy their lives together.³⁰ In the year 2013 eight states legalized same-sex marriage. The United States was

²² Gay Marriage; Pros and Cons

²³ CNN News; Same-Sex Marriage Fast Facts

²⁴ CNN News; Same-Sex Marriage Fast Facts

²⁵ CNN News; Same-Sex Marriage Fast Facts

²⁶ CNN News; Same-Sex Marriage Fast Facts

²⁷ CNN News; Same-Sex Marriage Fast Facts

²⁸ Gay Marriage; Pros and Cons

²⁹ Gay Marriage; Pros and Cons

³⁰ CNN News; Same-Sex Marriage Fast Facts

beginning to demonstrate equality for all individuals and proving that they wanted to see a major change in our society.

On May 19, 2014, Oregon became the seventeenth state to recognize same-sex marriage. Just one day later, the state of Pennsylvania also legalized same-sex marriage. Illinois was the next state to recognize homosexual couples to be legally married on June 1 of 2014 by state legislature.³¹ October 6, 2014, was another victory for homosexual couples because Oklahoma, Utah, Virginia and Wisconsin all recognized same-sex marriage. Indiana and Colorado soon followed making same-sex marriage legal on October 7, 2014.³² As of October 7, 2014 twenty-five states recognized same-sex marriage.

October 9, 2014, Nevada and West Virginia solidified their recognition of same-sex marriage with North Carolina legalizing it on the following day.³³ Idaho, Alaska, Arizona, and Wyoming all recognized same-sex marriage within October of 2014. In the following month, November of 2014, three more states legalized same-sex marriage: Kansas, Montana and South Carolina, respectively.³⁴ By the end of 2014, thirty-five states recognized homosexual and heterosexual marriages the same way.

In 2015, two more states have recognized the legality of same-sex marriage. On January 6, 2015, the state of Florida allowed same-sex couples to marry.³⁵ It is impressive that same-sex marriage is now legal in Florida because the state is so divided in their religious and personal

³¹ CNN News; Same-Sex Marriage Fast Facts

³² Gay Marriage; Pros and Cons

³³ CNN News; Same-Sex Marriage Fast Facts

³⁴ CNN News; Same-Sex Marriage Fast Facts

³⁵ CNN News; Same-Sex Marriage Fast Facts

beliefs. Alabama is the most recent state to legalize same-sex marriage; this took effect on February 9, 2015. As of today, thirty-seven states legally allow same-sex couples to marry.³⁶ It is obvious that a majority of the citizens of the United States support same-sex marriage. With how rapidly states have been legalizing same-sex marriage it may not be too long before our entire country is unified and all couples of all types will be able to legally marry.

Table 1.1

| State: | Date of legalization: | How it was legalized: |
|---------------|-----------------------|-----------------------|
| Massachusetts | May 17, 2004 | Court Decision |
| Connecticut | November 12, 2008 | Court Decision |
| Iowa | April 3, 2009 | Court Decision |
| Vermont | September 1, 2009 | State Legislature |
| New Hampshire | January 1, 2010 | State Legislature |
| New York | July 24, 2011 | State Legislature |
| Washington | December 6, 2012 | Popular Vote |
| Maine | December 29, 2012 | Popular Vote |
| Maryland | January 1, 2013 | Popular Vote |
| California | June 28, 2013 | Court Decision |
| Delaware | July 1, 2013 | State Legislature |
| Minnesota | August 1, 2013 | State Legislature |
| Rhode Island | August 1, 2013 | State Legislature |

³⁶ CNN News; Same-Sex Marriage Fast Facts

| | | |
|----------------|-------------------|-------------------|
| New Jersey | October 21, 2013 | Court Decision |
| Hawaii | December 2, 2013 | State Legislature |
| New Mexico | December 19, 2013 | Court Decision |
| Oregon | May 19, 2014 | Court Decision |
| Pennsylvania | May 20, 2014 | Court Decision |
| Illinois | June 1, 2014 | State Legislature |
| Indiana | October 6, 2014 | Court Decision |
| Oklahoma | October 6, 2014 | Court Decision |
| Utah | October 6, 2014 | Court Decision |
| Virginia | October 6, 2014 | Court Decision |
| Wisconsin | October 6, 2014 | Court Decision |
| Colorado | October 7, 2014 | Court Decision |
| Nevada | October 9, 2014 | Court Decision |
| West Virginia | October 9, 2014 | Court Decision |
| North Carolina | October 10, 2014 | Court Decision |
| Idaho | October 13, 2014 | Court Decision |
| Alaska | October 17, 2014 | Court Decision |
| Arizona | October 17, 2014 | Court Decision |
| Wyoming | October 21, 2014 | Court Decision |
| Kansas | November 12, 2014 | Court Decision |
| Montana | November 19, 2014 | Court Decision |

| | | |
|----------------|-------------------|----------------|
| South Carolina | November 20, 2014 | Court Decision |
| Florida | January 6, 2015 | Court Decision |
| Alabama | February 9, 2015 | Court Decision |

SAME-SEX MARRIAGE

The Fourteenth Amendment is crucial in understanding the legality of same-sex marriage. The Fourteenth Amendment, part of the United States Constitution, was ratified on July 9, 1968. This Amendment states,

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.³⁷

This Amendment was intended to not only protect all American citizens, but to also make all people equal. This Amendment was adopted and enforced shortly after the end of the Civil War to ensure that all Americans were being treated equally with a major focus on African-Americans, specifically those who were enslaved.³⁸ The Fourteenth Amendment is one of the most powerful written amendments in the United States Constitution; furthermore, it has been used as the deciding factor in numerous court cases. The Fourteenth Amendment consists of several clauses, two of which are vital to the argument in this thesis: The Equal Protection Clause and the Due Process Clause.

³⁷ The United States Constitution; Amendment 14; Section 1

³⁸ The Library of Congress

The Equal Protection Clause

The Equal Protection Clause, part of the Fourteenth Amendment, states that a state cannot deny any person within its jurisdiction the equal protection of laws. Although this clause is part of the United States Constitution, the federal government gives the states the power and authority to make sure that no person is deprived of their equal protection of the law. When this clause was first introduced it helped to end discrimination and racial harm in the South where the African-American slaves were located. The Equal Protection Clause becomes applicable with the Supreme Court when it is believed that a state may have ruled incorrectly on a court decision. According to the Cornell University Law School website, “the equal protection clause is not intended to provide ‘equality’ among individuals or classes but only ‘equal application’ of the laws.”³⁹

Our current President, Barack Obama, fully believes same-sex couples in all 50 states should be allowed to marry under the Equal Protection Clause of the Constitution.⁴⁰ Because the decision of legalizing same-sex marriage is not up to the President himself, the decision lies with each state individually. Although the Equal Protection Clause is important to helping the states legalize same-sex marriage it is not the only tool used. The Supreme Court will follow three tests under the Equal Protection Clause, which will allow them to find out if the court made the correct ruling. The first test is known as the Rational Basis Test; this test has the lowest level of scrutiny. The next test is called the Intermediate Scrutiny Test, and the last test is called the Strict Scrutiny Test. The Strict Scrutiny Test is *usually* the test that is applied when looking at a same-

³⁹ Cornell University Law School

⁴⁰ Huffington Post Politics; Obama

sex marriage case.⁴¹ The Equal Protection Clause is an important part of the Fourteenth Amendment because it helps to explain why states and the Supreme Court make certain decisions. This thesis will use the Equal Protection Clause to help defend the argument that same-sex marriage should be a legalized fundamental right.

The Due Process Clause

The Due Process Clause is part of the Fourteenth Amendment, and it reads “...nor shall any state deprive any person of life, liberty, or property, without due process of law.”⁴² Although the Equal Protection Clause is important, it is the Due Process Clause that will help the United States of America fully legalize same-sex marriage. Due Process can be looked at in two ways: procedural and substantive due process. Procedural due process is vital to all American citizens because it equally protects everyone, including criminals, from unreasonable searches and seizures, only issuing a warrant when there is probable cause, right to a fair trial, right to privacy and freedom of the press. These are fundamental rights that all American citizens are given without question or reasoning. More importantly, substantive due process is where the issue of same-sex marriage is discussed. Substantive due process provides that both the Fifth and the Fourteenth amendment “...requires all governmental intrusions into fundamental rights and liberties be fair and reasonable and in furtherance of a legitimate governmental interest.”⁴³

According to the American Foundation for Equal Rights, “Fourteen times since 1888, the United

⁴¹ Find Law; Challenging Laws: 3 Levels of Scrutiny Explained

⁴² The United States Constitution; Amendment 14; Section 1

⁴³ Cornell University Law School

States Supreme Court has stated that marriage is a fundamental right of all individuals.”⁴⁴

Fourteen court cases that have been settled by the Supreme Court all held that marriage is a fundamental right; some of these will be utilized in this thesis. The cases are Griswold v. Connecticut, 381 U.S. 479 (1965),⁴⁵ and Lawrence v. Texas, 539 U.S. 558 (2003).⁴⁶ If same-sex couples are not allowed to be legally married, the Due Process Clause may be violated.

Neither states, nor the federal government, are allowed to interfere with people’s fundamental rights as addressed in the United States Constitution. If a state finds that they have a compelling interest, it can overturn and ban the court’s ruling as it sees necessary. Same-sex couples should advocate that they should have the same right to marry just as heterosexual couples. It is critical that same-sex couples and homosexual individuals vocalize advocacy for the rights that should be given to them. Since so many states have already legalized same-sex marriage, there may be a time in the near future where states can no longer have a compelling interest against same-sex marriage because too many same-sex couples in America have been legally married.⁴⁷

⁴⁴ American Foundation for Equal Rights; Supreme Court Ruling on Marriage

⁴⁵ Griswold v. Connecticut, 381 U.S. 479 (1965)

⁴⁶ Lawrence v. Texas, 539 U.S. 558 (2003)

⁴⁷ Washington Post

CASE REVIEW

Case law, both prior and present, will help determine if same-sex marriage will eventually become legal in all fifty states. The cases that are incorporated into this thesis will help to prove that same-sex marriage should be legalized and that it should be considered a fundamental right. The following court cases are based upon Due Process of law, the Equal Protection Clause, the Right to Privacy, and illegal discrimination.

The first case, Meyer v. Nebraska, 262 U.S. 390 (1923), involves a Nebraska law that violated the Due Process Clause in the Fourteenth Amendment. In the 1920's, when this case was filed, Nebraska had a rule in place that forbade teachers to teach their students any type of foreign language, if the student had not currently completed middle school, eighth grade. The plaintiff, Meyer, was convicted when they found him to be teaching German to his middle school students.⁴⁸

The issue before the court was, does the outlaw of teaching foreign languages to students who have not yet completed the eight grade violate the Fourteenth Amendment and the Due Process Clause?⁴⁹ The court found that the Nebraska statute was unconstitutional. The court held that banning teachers from teaching foreign languages to younger aged students inflicts with individuals liberty. The United States Constitution extends itself to people who not only speak English but other languages as well. Nebraska argued this because they felt as though English should be the only language that young children speak to ensure that it stays native here in

⁴⁸ Meyer v. Nebraska, 262 U.S. 390 (1923)

⁴⁹ Meyer v. Nebraska, 262 U.S. 390 (1923)

America; this violates the Due Process Clause. The Due Process Clause states that “...nor shall any state deprive any person of life, liberty or property without due process of law.”⁵⁰ This case is why the Nebraska law was outlawed and deemed unconstitutional. By teaching a foreign language to middle school students, such as German, puts no one in harms way of danger and therefore is constitutional.

This case can draw a comparison to the issue of same-sex marriage: both focus on fighting for equality with the Fourteenth Amendment’s Due Process Clause. Nebraska teachers were not allowed to only teach English to their students because it violated the Equal Protection Clause. The issue of fighting for same-sex marriage takes on these same arguments—does the Due Process Clause violate the right for same-sex couples to marry? If heterosexual couples can marry legally anywhere in the United States, then same-sex couples should have the same right. Many will argue that by allowing same-sex couples to marry our country is put into potential harm. It is up to the same-sex couples and gay rights supporters and activists to inform society that the United States will not be put in harm’s way if same-sex marriage is legalized.

The next case, United States v. Windsor, 570 U.S. ____ (2013) (Docket No.12-307)⁵¹, one of the most recent cases handling same-sex marriage also extends to the Due Process Clause and the Defense of Marriage Act (DOMA). Edith Windsor and Thea Spyer were a couple that were legally married in Ontario, Canada in 2007. The couple soon moved to the state of New York, but unfortunately in 2009 Spyer passed away leaving Windsor her whole estate. The marriage was legally recognized by New York. When Windsor went to claim her estate, that she

⁵⁰ Due Process Clause

⁵¹ United States v. Windsor, 570 U.S. ____ (2013)

was left, she was denied her federal estate tax reduction by a surviving spouse. The United States government tried to charge Windsor over \$300,000 in taxes.⁵²

This did not sit well with Windsor, and on November 9, 2010 she filed a lawsuit deeming that the Defense of Marriage Act was in fact unconstitutional. At this time the Defense of Marriage Act was in full effect; as a result, Windsor would still have to pay the taxes. On February 23, 2011, United States Attorney General along with the President of the United States came out and said that they would no longer support and defend the Defense of Marriage Act. A few months' later groups like the Bipartisan Legal Advisory Group of the House of Representatives tried to defend the Defense of Marriage Act, but that motion was dismissed by the district court.⁵³ The issue before the court was, does Section 3 of the Defense of Marriage Act violate the Equal Protection Clause in the United States Constitution if a same-sex couple is legally married?

The court held that Section 3 of the Defense of Marriage Act is indeed unconstitutional because it violates the Equal Protection Clause in the Fifth Amendment. Due to the fact that their marriage was legally recognized by the state of New York it is unjust to deny Windsor her surviving spousal rights. It is unconstitutional for the court to treat heterosexual marriages that are legally recognized by a state differently from same-sex marriages that are also legally recognized by the same state. By denying a legally married same-sex couple certain rights they

⁵² United States v. Windsor, 570 U.S. ____ (2013) (Docket No.12-307)

⁵³ United States v. Windsor, 570 U.S. ____ (2013) (Docket No.12-307)

are depriving American citizens from their liberty—this is illegal because the Constitution states that no one shall be deprived of their life, liberty or property without due process of law.⁵⁴

The Windsor case was a step forward for same-sex couples. By allowing same-sex couples to be treated equally as heterosexual couples equality is within reach for all humankind. With section 3 of the Defense of Marriage Act being deemed unconstitutional more same-sex couples will be allowed to legally marry. Windsor helped to change the lives of thousands of homosexual couples fighting for their basic human rights.

Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. 2003), was a state appellate court case also focusing on same-sex marriage in the state of Massachusetts, and the Equal Protection Clause in the Fourteenth Amendment. Gay and Lesbian Advocates and Defenders, GLAD, sued the Department of Health in the state of Massachusetts because they failed to issue marriage licenses to homosexual couples that were already married. GLAD was suing on the behalf of seven same-sex couples. Many of the same-sex couples were raising children, and so it was vital that they received their marriage licenses to ensure that their children were taken care of if some unforeseen circumstance occurred with one of the partners. The GLAD organization felt that this was awfully unfair and illegal; as a result, they sued under the Equal Protection Clause saying that it was in violation. On the condition that same-sex couples were not issued their marriage licenses, they were being deprived of certain legal rights that they should be entitled to such as adoption rights, property rights, and tax rights.⁵⁵

⁵⁴ United States v. Windsor, 570 U.S. ____ (2013) (Docket No.12-307)

⁵⁵ Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. 2003)

The state of Massachusetts listened to the case and argued with the Department of health.

The judge stated,

Recognizing that procreation is marriage's central purpose, it is rational for the legislature to limit marriage to opposite sex couples who, theoretically are capable of procreation. Moreover, because same-sex couples are unable to procreate on their own and therefore must rely on inherently more cumbersome means of having children, it is also rational to assume that same-sex couples are less likely to have children or, at least, to have as many children as opposite sex couples.⁵⁶

The state also argued that by issuing marriage licenses to same-sex couples it would cause more inconveniences to our country and marital system. The issue before the court was, does denying marital licenses to same-sex couples violate the Equal Protection Clause?

By a decision of four to three the court held that this does indeed violate the Equal Protection Clause because same-sex couples have the legal right to marry in the state of Massachusetts. In addition, the court held that adoption and fertilization techniques could be used to help procreate and reproduce, and so the judge's ruling was not a sufficient answer.⁵⁷ The Equal Protection Clause restricts individuals to be denied basic marital rights, and so the Department of Public Health lost the case.

The decision of this case helped thousands of same-sex couples reach their goal of receiving the basic rights that should be given to all American citizens. This case helped

⁵⁶ Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. 2003)

⁵⁷ Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. 2003)

maintain some equality within our states, and legal system. Moreover, it additionally impacted our country's beliefs on what constitutes a true marriage.

Brown v. Board of Education, 347 U.S. 483 (1954), is a case that violates the Equal Protection Clause. This is a unique case when looking at the topic of same-sex marriage. Although it focuses on the topic of separate but equal, it indirectly links to same-sex marriage. This case explains how black children and families were unfairly treated and discriminated against, which relates to our modern day problem of how same-sex individuals are constantly being tormented, discriminated against and bullied.

This case arose because black children were being denied access to schools that white children were allowed to attend due to segregation laws. These laws stated that only white children were allowed to enroll in these schools. The black families felt this violated the Equal Protection Clause under the Fourteenth Amendment, and so they filed a lawsuit against the board of education.⁵⁸ The issue before the court was, is the racial segregation in the school system against black students constitutional and legal?⁵⁹

Chief Justice Earl Warren held that this does violate the Equal Protection Clause under the Fourteenth Amendment. Other cases that were filed, after this case was settled, used the same ruling that Chief Justice Earl Warren used in this case. It is unlawful to not allow black children to attend the same schools as white children solely based on their skin color. This violates several sections of the United States Constitution. The idea of same-sex marriage juxtaposes

⁵⁸ Brown v. Board of Education, 347 U.S. 483 (1954)

⁵⁹ Brown v. Board of Education, 347 U.S. 483 (1954)

separate but equal because by denying homosexual couples the same rights as heterosexual couples there is a split in the division of all humans being equal.

Brenner v. Scott, 999 F. Supp. 2d 1278, is one of the more recent court cases to focus on same-sex marriage violating both of the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. Brenner v. Scott is an appropriately relevant case to the topic of same-sex marriage because it is the case that helped to end Florida's ban on same-sex marriage. This case was originally filed on behalf of same-sex couples that were legally married in other states and Canada. One of the couples, Jim Brenner and Chuck Jones who recently moved from Canada to Tallahassee, wanted their marriage to be legally recognized in the state where they currently reside: Florida. The couple was baffled because in the State of Florida they were unable to designate ownership of property to one another or have rights to certain retirement benefits and child rights even though they were legally married.⁶⁰ A second homosexual couple was later added to the case by the names of Stephen Schlariet and Ozzie Russ. Schlariet and Russ tried to obtain a same-sex marriage license in Florida, but were denied, and so they joined the Brenner case.

Judge Robert L Hinkle found that the ban on same-sex marriage in the state of Florida was indeed unconstitutional. Hinkle stated, "this order holds that marriage is a fundamental right as that term is used in cases arising under the Fourteenth Amendment's Due Process and Equal Protection Clauses, that Florida's same-sex marriage provisions thus must be reviewed under

⁶⁰ Brenner v. Scott, 999 F. Supp. 2d 1278

strict scrutiny, and that, when so reviewed, the provisions are unconstitutional.”⁶¹ In the next few months’ heavy debate continued with regards to the case. The court held that same-sex marriage was to be legally recognized on January 6, 2015 as a result of the Due Process Clause and the Equal Protection Clause.

It is discouraging that same-sex marriage was opposed in Florida for so many years. When the decision was held that same-sex marriage would become legalized in Florida our country has proved that equality is needed for all citizens. It is a basic human right that no individual should be deprived of at any point during his or her lifetime. Florida has recognized that a marriage is not about gender but about the love that is shared between two people.

Griswold v. Connecticut, 381 U.S. 479 (1965), Bowers v. Hardwick, 478 U.S. 186 (1986), Planned Parenthood v. Casey, 505 U.S. 833 (1992), and Lawrence v. Texas, 539 U.S. 558 (2003), all involve the idea of a right to privacy. Although all of these cases incorporate a right to privacy, some of them have a focus on homosexual relationships while some entail abortion control laws. All of these cases signify that a right to privacy was violated, which is against the United States Constitution.

Griswold, the Executive Director of the Planned Parenthood League of Connecticut and Buxton, the Medical Director at a center in New Haven were both arrested. Griswold and Buxton were also charged one hundred dollars for giving out information along with medical advice to married couples on birth control and ways to prevent contraception. Both Appellants were arrested under a law specific for the state of Connecticut that forbade giving medical advice and

⁶¹ Brenner v. Scott, 999 F. Supp. 2d 1278

helping married couples with counseling and methods to prevent contraception. The Appellants sued on behalf of violations with the United States Constitution's Fourteenth Amendment.⁶²

The issue before the court was, does the United States Constitution provide a right to privacy for married couples?⁶³ The court held that it violated the Due Process Clause as well as the Fourteenth Amendment, which is illegal. The court found that the United States Constitution does provide a right to privacy for married couples. The different amendments in the Bill of Rights indeed create a right to privacy.⁶⁴ Considering that a marriage is a sacred commitment, a couple is entitled to a right to privacy regarding decisions that are made together. The law in Connecticut that once made it illegal to give married couples advice and counseling on methods to prevent contraception now ceases to exist.

This case should be reviewed when discussing the legal arguments of same-sex marriage. A couple, no matter if they are heterosexual or homosexual, should have an exclusive right to privacy because it is a basic privilege. Justice Douglas said that in a marriage different zones of privacy start to exist. The zones all incorporate different categories that married couples have right to privacy with. Deep in those zones is the right to decide if a couple wants to use a contractive or not.⁶⁵ This case can draw a comparison to the issue of same-sex marriage: a right to privacy is needed for all individuals because it is a basic necessity of life. If heterosexual

⁶² Griswold v. Connecticut, 381 U.S. 479 (1965)

⁶³ Griswold v. Connecticut, 381 U.S. 479 (1965)

⁶⁴ Griswold v. Connecticut, 381 U.S. 479 (1965)

⁶⁵ The Constitutional Dimensions of the Same-Sex Marriage Debate: 2008

married couples are entitled to privacy within their own lives and personal decisions, same-sex married couples need to be granted the same rights. The foundation of a person is based on personal choices that are made; this extends to both homosexual and heterosexual people.

Bowers v. Hardwick is relevant to this thesis because it directly focuses on the issue of homosexuals in the law. Michael Hardwick and another man were engaging in consensual sexual acts, in Hardwick's home, when he was arrested by a Georgia police officer for being involved in homosexual sodomy. The officer originally came to Hardwick's home because he failed to show up to court for a previous issue, and so the judge issued a warrant for his arrest. Hardwick's roommate led the police officer to his bedroom in which he saw the two homosexual men engaging in sexual acts with one another. Hardwick was convicted upon a Georgia law that criminalized sodomy; he then challenged that statute in the Federal District Court.⁶⁶ Hardwick decided to sue Michael Bowers who was Georgia's Attorney General.

Hardwick felt it was wrongful of the court to charge him with an act of sodomy when it took place in the quarters of his own house. The issues before the court was, does the United States Constitution protect the act of consensual homosexual sodomy, and do homosexual couples have the same right to privacy as heterosexual couples? In the end, the court ruled in favor of Bowers holding that there is no protection from the Constitution for consensual acts of sodomy.⁶⁷ It is noted that the United States Supreme Court does not generally use this case when comparing and discussing other past case law that focuses on a right to privacy. This is because the Supreme Court has tended to rule quite differently in other cases regarding a right to privacy

⁶⁶ Bowers v. Hardwick, 478 U.S. 186 (1986)

⁶⁷ Bowers v. Hardwick, 478 U.S. 186 (1986)

in one's own home. This is not limited to other consensual acts of sodomy but also possession and the use of illegal drugs.

This case was officially decided in June of 1986. Homosexuals were looked at very differently in the year of 1986 versus today, 2015. In 1986 a majority of the world was quite against the homosexual lifestyle and not one of the fifty states, in America, had recognized same-sex marriage. The topic of homosexuals was not widely discussed like it is today, and so that played a significant role in why Michael Hardwick lost this case. It was found that this case was actually overruled by two cases: Romer v. Evans 517 U.S. 620 (1996)⁶⁸ and Lawrence v. Texas, 539 U.S. 558 (2003)⁶⁹—the later one will soon be discussed in this thesis.⁷⁰

Planned Parenthood v. Casey looks at the issue of a right to privacy which connects to same-sex marriage. During the year 1988 and 1989 Pennsylvania changed its abortion control laws. The new law stated that minors who wanted to receive an abortion must receive consent from at least one parent or guardian, while a married woman, of age, was required to have notified her husband that she was planning on getting an abortion and then wait twenty-four hours before the procedure would take place, excluding medical emergencies. Many officials in the state agreed in favor of these new rules, but many abortion clinics and physicians did not agree with these new laws set in place, and so they filed a lawsuit.⁷¹

⁶⁸ Romer v. Evans 517 U.S. 620 (1996)

⁶⁹ Lawrence v. Texas, 539 U.S. 558 (2003)

⁷⁰ June 26, 2003: Court Overturns Bowers v. Hardwick

⁷¹ Planned Parenthood v. Casey, 505 U.S. 833 (1992)

The issue before the court was, does making a woman receive consent from her husband that he approves of her getting an abortion violate the United States Constitution? The court held that the husband must receive notification from his wife, but the husband does not have to consent because that violates the Fourteenth Amendment of the United States Constitution. The issue in this case also looks at the case of Roe v. Wade, 410 U.S. 113 (1973) to verify that the holding in this case was not violated.⁷² The decision that the court made reaffirmed the Wade case and upheld the decision that was made in this case.⁷³

This case does not focus on the concept of same-sex marriage, but it does abide by the same law: a right to privacy. When a couple is together they should have to discuss personal matters that take place between the two partners. This rule extends to both homosexual couples and heterosexual couples. By including your spouse and giving them notification of important decisions and life matters it helps to strengthen marital relationships. This is vitally important to homosexual couples. There is a stigma surrounding homosexual couples because much of society does not approve of their lifestyle; as a result, the couple must share a strong bond with one another in order to maintain a healthy relationship.

Lawrence v. Texas directly looks at the issue of same-sex relationships and the rights that homosexual individuals have.⁷⁴ This case takes place in Houston, Texas and involves two men who were engaging in homosexual acts in the privacy of their own home. Local police officers responded to a call at a personal home where there was a report of a weapon disturbance. The

⁷² Roe v. Wade, 410 U.S. 113 (1973)

⁷³ Planned Parenthood v. Casey, 505 U.S. 833 (1992)

⁷⁴ Lawrence v. Texas, 539 U.S. 558 (2003)

police officers entered the premise and private residence of John Lawrence where they saw Lawrence and another man by the name of Tyron Garner engaging in homosexual sexual acts. Both of the men were arrested and charged under a Texas statute, which makes it illegal for two individuals of the same sex to engage in certain sexual acts.⁷⁵ The statute states:

‘A person commits an offense if he engaged in deviate sexual intercourse with another individual of the same sex and goes on to define deviate sexual intercourse as follows: any contact between any part of the genitals of one person and the mouth or anus of another person or the penetration of the genitals or the anus of another person with an object.’⁷⁶

The issue before the court asks if this Texas statute, which states that two people of the same sex cannot engage in certain sexual acts, violates the Due Process Clause in the Fourteenth Amendment?

By a vote of six to three Lawrence and Garner won the case. The court held that the Texas statute does in fact violate the Due Process Clause. Sexual conduct and acts between individuals is a legal liberty that is protected under the Due Process Clause.⁷⁷ The charges were dropped from both of the men and the courts reversed their decisions.⁷⁸ There is no law or section of the Due Process Clause that separates homosexual couples from heterosexual couples when engaging in sexual acts. Due to the fact that both Lawrence and Garner are adult American

⁷⁵ Lawrence v. Texas, 539 U.S. 558 (2003)

⁷⁶ Lawrence v. Texas, 539 U.S. 558 (2003)

⁷⁷ Lawrence v. Texas, 539 U.S. 558 (2003)

⁷⁸ Lawrence v. Texas, 539 U.S. 558 (2003)

citizens they are entitled to the right to privacy in their own homes and are legally allowed to engage in sexual acts with one another.

The outcome of this court case signified that same-sex couples are just as much human as heterosexual couples. The courts holding has assured homosexuals that they can freely engage in sexual acts with one another in the privacy of their own homes without having the constant fear that they will be arrested, convicted and charged. This landmark case also helped to overturn the case Bowers v. Hardwick, 478 U.S. 186 (1986), which was earlier discussed in this thesis.

In the case of Boy Scouts of America v. Dale, 530 U.S. 640 (2000), anti-gay discrimination is addressed and discussed when New Jersey banned homosexuals from serving as troop leaders.⁷⁹ Dale was a Boy Scout who had been involved with the organization for most of his life. One of the assistant Scoutmasters in the state of New Jersey found out that Dale was not only a gay rights supporter and activist but also a homosexual himself. When this information was revealed, Dale's Eagle Scout membership was revoked; as a result, he filed a lawsuit under the state of New Jersey. Dale said that it is a violation of his human rights to be discriminated against due to his sexual orientation.⁸⁰ The Boy Scouts organization's values do not align with homosexual values, and so they felt that they needed to revoke Dale's membership. The issue before the court was, can an organization, such as the Boy Scouts of

⁷⁹ Boy Scouts of America v. Dale, 530 U.S. 640 (2000)

⁸⁰ Boy Scouts of America v. Dale, 530 U.S. 640 (2000)

America, reject or revoke a membership if the values and beliefs of the individual go against the values and beliefs of the organization?⁸¹

The court held that a private organization can indeed limit and reject members due to their beliefs under the rights of the First Amendment; furthermore, James Dale lost the case.⁸² The First Amendment's right of expressive association is legally why the Boy Scouts organization does not have to accept Dale.⁸³ Under this right of expressive association a group can refuse membership to an individual without reason or desire. The Boy Scouts are notoriously known for their discrimination against gays and their refusal to accept them.

Although this case does hinge on the topic of homosexuality, it does not directly focus on same-sex marriage, yet a comparison can still be made. This case proves the hardships and difficulties that homosexual men and women go through everyday in order to live a *normal* life. Ideally no person should be discriminated against because of his or her sexual orientation. In recent years the Boy Scouts organization have slowly begun to let homosexuals into their organization. On the Boy Scouts of America webpage they released a statement saying, "No youth may be denied membership in the Boy Scouts of America on the basis of sexual orientation or preference alone."⁸⁴ They have also added in the word "homosexuality" in many of their statuses on the Membership Resolution Points of Clarification page which can also be found on their website. Same-sex marriage may still not be fully supported by the Boy Scouts, but the organization has furthered themselves in the same direction with a majority of society.

⁸¹ Boy Scouts of America v. Dale, 530 U.S. 640 (2000)

⁸² Boy Scouts of America v. Dale, 530 U.S. 640 (2000)

⁸³ Does The First Amendment Protect The Freedom Of Association

⁸⁴ Membership Resolution Points of Clarification—Boys Scouts of America

Finally in Baehr v. Lewin, also known as Baehr v. Miike, 74 Haw. 645, 852 P.2d 44 (1993), a case of discrimination is addressed, in this landmark case, where same-sex couples in the state of Hawaii said that the act of banning same-sex marriage in Hawaii violates the United States Constitution. The couple's felt that this was unfair and a violation of their rights that are addressed in the United States Constitution. John Lewin, the Defendant, was a state health director. In 1993, it was only constitutional for heterosexual couples to receive legal marriage licenses and therefore only heterosexual marriages were considered a legal right.⁸⁵ The couples filed the lawsuit to try to have this deemed unconstitutional.

The issue before the court, asks if marriage should be a fundamental right for same-sex couples as well as heterosexual couples? The lower court in Hawaii held that same-sex marriage was not a fundamental right because it broke tradition and was not seen as a *true* marriage. In the State of Hawaii it is illegal to be discriminated because of ones sex. The Hawaii State Supreme Court then took the case over for appeal. Since it is illegal to be discriminated in Hawaii because of ones sex they believed that the lower court ruling was not justifiable. Although the Hawaii State Supreme Court never actually granted the marriage licenses and made same-sex marriage a legal fundamental right they did not deny it either.⁸⁶

In 1993 no state recognized a same-sex marriage as a legal marriage. When the state of Hawaii did not legalize same-sex marriage it was justifiable because no other state had recognized it as a legal marriage either. Although Hawaii did not recognize same-sex marriage, it did not deny the idea of same-sex marriage as being fundamentally correct. This was one of the

⁸⁵ Baehr v. Lewin 74 Haw. 645, 852 P.2d 44 (1993)

⁸⁶ Baehr v. Lewin 74 Haw. 645, 852 P.2d 44 (1993)

first cases in which same-sex couples saw a future for themselves with their love life potentially being recognized. Homosexuals' voices could finally be heard in court; outcomes of cases were beginning to have positive results.

SUMMARY OF COURT CASES

The cases discussed in the previous sections all signify how the legalization of same-sex marriage and gay rights has changed over time. Homosexuals have been fighting for the rights that they deserve for decades now, but it was not until the year of 2004 that the United States finally began to legalize same-sex marriage. Throughout the past fifty years both homosexual and heterosexual individuals expressing their concerns about equality have filed lawsuits on the state level and the federal level. Some of the cases have had positive rulings for the plaintiffs, while others have had disappointing results.

It is deeply disheartening to know that the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment have been violated many times through the years. Although all of the cases discussed in this thesis do not directly relate to same-sex marriage, the cases all discuss the topic of equality and human rights, which then relates back to same-sex marriage and gay rights. The United States of America has been through years of social imbalance and unjust times. Many cases have been filed in this country on all levels of social injustice and violations of human rights. This can be seen in cases like United States v. Windsor, 570 U.S. ____ (2013) (Docket No.12-307), where a homosexual widow was not able to receive all of the benefits of her partner's estate because of the Defense of Marriage Act. If the widow had been in a heterosexual relationship she would have never encountered these problems. In the case of Bowers v. Hardwick, 478 U.S. 186 (1986), two men were arrested for engaging in homosexual sodomy in the privacy of their own home. Once again, if a man and a woman were engaging in sexual intercourse in the privacy of their own home they would have never been arrested and charged. The same issue occurred in the case of Lawrence v. Texas, 539 U.S. 558

(2003), where two men who were engaging in sexual activities were both arrested and charged. Not all of the cases brought to court directly focus on sexual intercourse between two men, but topics such as separate but equal, a right to privacy and ownership and representation of property.

The court cases in this thesis explain all of those concepts and how homosexuals have a more difficult time handling legal issues than heterosexuals. Separate but equal is looked at in the case of Brown v. Board of Education, 347 U.S. 483 (1954), where black children were not allowed to attend the same schools as white children. A right to privacy is a large topic that is important to most American citizens; most everyone feels that they deserve their own right to privacy. A great example of this can be found in the case of Griswold v. Connecticut, 381 U.S. 479 (1965), where appellants were arrested and charged under a Connecticut law that forbade them to provide advice and counseling to married couples on ways to prevent contraception. This was also overturned because it violated the Due Process Clause of the Fourteenth Amendment. Seeing that so many cases regarding the legalization of same-sex marriage are coming out with a positive result for homosexuals, it may not be too long before our country starts to recognize same-sex marriage in every state. Case law will decide the future of same-sex marriage in our country.

ARGUMENTS IN FAVOR OF AND AGAINST SAME-SEX MARRIAGE

As in any argument, there are always multiple perspectives. Many American citizens strongly support same-sex marriage and believe in equality for all individuals, while on the other hand, many strongly disagree with equality for all and believe that same-sex marriage should be illegal. A large percentage of our country feels as though homosexual individuals should not be entitled to the same basic rights as heterosexual individuals. There are several arguments to be heard on both ends of the spectrum.

Historically speaking, a traditional marriage has always been between one man and one woman. Before a few decades ago it was almost unheard of a marriage to be between two women or two men, but that has since changed dramatically. The tradition of marriage is no longer about the idea that marriage is between one man and one woman. It is now defined by the values and morals that the couple shares together.⁸⁷ The tradition of marriage also has been changed by polygamous relationships. Some people find that they want to be with more than one person at the same time, and so same-sex marriage is not the only type of marriage that has affected the tradition of marriage.

Many people argue that same-sex couples should not be allowed to raise children because a child needs both a mother and a father. “Girls who are raised apart from their fathers are reportedly at higher risk for early sexual activity and teenage pregnancy... [and] Children without a mother are deprived of the emotional security and unique advice that mothers

⁸⁷ Gay Marriage Pros and Cons

provide.⁸⁸ This theory is not only believed by heterosexual individuals but by homosexual individuals as well. Doug Mainwaring is an openly gay man, who said,

It became increasingly apparent to me, even if I found somebody else exactly like me, who loved my kids as much as I do, there would still be a gaping hole in their lives because they need a mom... I don't want to see children being engineered for same-sex couples where there is either a mom missing or a dad missing.⁸⁹

Although a number of citizens are against same-sex couples raising children, there are hundreds of same-sex couples who raise children in caring, loving and protective environments. An example is the famous actor Neil Patrick Harris and his husband David Burtka who are currently raising two children under the age of five: Harper Grace Burtka-Harris and Gideon Scott Burtka-Harris. In June of 2014, a study by the University of Melbourne was published stating “children raised by same-sex parents score about six percent higher than the general population on measures of general health and family cohesion.”⁹⁰ Other studies done in America in the past few years indicate that children of gay and lesbian parents had fewer social problems, and have had higher academic standings than children raised by heterosexual parents.⁹¹ Same-sex couples are just as capable of raising a well-natured child as a heterosexual couple according to Washington Post columnist Ezra Klein. He stated that, “We should be begging gay couples to adopt children. We should see this as a great boon that gay marriage could bring to kids who need nothing more

⁸⁸ Does Father Absence Place Daughters at Special Risk for Early Sexual Activity and Teenage Pregnancy? Gay Marriage Pros and Cons

⁸⁹ Kids Need Both Mom and Dad, Says Gay Man Opposed to Gay Marriage

⁹⁰ Children of Same-Sex Couples Are Happier and Healthier than Peers, Research Shows

⁹¹ US National Longitudinal Lesbian Family Study: Psychological Adjustment of 17-Year-Old Adolescents

than two loving parents.”⁹² This assertion confirms that a child raised by a same-sex couple can grow up to become just as good of a person as a child raised by a mother and a father.

Another popular argument concerns religion and same-sex marriage. Much of the controversy about same-sex marriage stems from religion and the beliefs and values that they hold. The church is known to have very biased views on same-sex marriage. The church does not support homosexual relationships because they feel that it is not what God intended for marriage. Many feel that it is unnatural, immoral, and inconsistent. So much of the hatred that is placed upon homosexuals is related back to the Bible. Many Catholic groups strongly disagree with same-sex marriage along with other religions such as Orthodox Jews, and Islamic groups.⁹³ Many religious groups do not recognize same-sex marriage because they do not feel that it is right to marry two men or two women. If same-sex marriage became legalized everywhere many religious figures would have to go against their will and marry homosexual couples.

Some businesses today are able to refuse services to gay people if it goes against their religious views. This is occurring in states that have a high republican standing, such as Indiana and Arkansas, versus states that are more democratic.⁹⁴ It is clear that religion and political affiliation affect society member’s views on life and morality. Some religions such as Reform and Conservative Jews actually support same-sex marriage and fight for them to have equal rights. Buddhism does not officially have a position on same-sex marriage, and therefore they do

⁹² There’s No Evidence That Gay Parents Aren’t Great Parents

⁹³ Religious Groups' Official Positions on Same-Sex Marriage

⁹⁴ States Weigh Legislation to Let Businesses Refuse to Serve Gay Couples

not officially accept or deny it.⁹⁵ One day the people of America may begin to realize that religion and sexual orientation is not what defines a person, but until then same-sex couples must continue to fight for their rights and equality because they to are living human beings.

Another major argument regarding same-sex marriage is the topic of discrimination and whether homosexual individuals actually have a civil and fundamental right to marry. According to fourteen court cases dating back to 1888, the United States Supreme Court held that all individuals are entitled to a fundamental right to marry.⁹⁶ Many people do not believe that marriage should be a fundamental right for homosexual people; as a result, they are discriminated against and treated differently.

The United States Supreme Court case Loving v. Virginia, 388 U.S. 1 (1967), stated that interracial couples could now legally marry one another. The court held that marriage is a civil right for all—this case has been used in other same-sex marriage court cases to help make the bans on same-sex marriage unconstitutional.⁹⁷ In contrast, many believe that gay rights should not be treated as civil rights. Bishop Gilbert Thompson who is African-American said ‘I was born black...I was born male. Homosexuals are not born, they're made. They don't qualify.’⁹⁸ This quote illustrates that there is a true separation in our society. Even groups of people that were once discriminated against, and still are, have such a strong hatred for others. Homosexuals are discriminated against everyday and will continue to be until they are granted the same rights

⁹⁵ Religious Groups' Official Positions on Same-Sex Marriage

⁹⁶ American Foundation for Equal Rights

⁹⁷ Loving v. Virginia, 388 U.S. 1 (1967)

⁹⁸ Are Gay Rights Civil Rights?

at heterosexuals. Until generations fade out, and religious views begin to change there will always be controversy when discussing the arguments in favor of and against same-sex marriage.

CONCLUSION

Same-sex marriage has been a controversial topic that has been at the forefront of debate for several decades. Homosexuals have fought for equality and freedom for years, and our country is finally beginning to see the fruits of these efforts. Thirty-seven states currently recognize same-sex marriage and many states are working on child adoption laws, property rights, and spousal rights for homosexual couples. In the United States marriage is slowly becoming a fundamental right for all individuals. The Due Process Clause and The Equal Protection Clause of the Fourteenth Amendment in the United States Constitution, has greatly helped to legalize same-sex marriage in many of the states. Many laws have been changed because they were in violation of the United States Constitution. With how rapidly states are currently legalizing same-sex marriage, it may not be long before the entire country recognizes same-sex marriage and equality is given to all citizens.

It is apparent that much of this country believes that same-sex marriage should be legalized nationally, but factors such as religion, the tradition of marriage, and political parties is preventing that from happening. Those factors are slowly changing and more organizations and groups are starting to accept homosexuals and same-sex marriage. In the United States of America, the majority's social norms have a significant effect on people and their decisions. Many individuals who identify themselves as homosexual are terrified to reveal their true identity to the world because they fear disapproval and disappointment from their family and friends.

At present, hundreds of celebrities have come out and formally announced that they live a homosexual lifestyle. Many of these celebrities live happily married lives with their partners such as Elton John and David Furnish, Ellen DeGeneres and Portia de Rossi, Lance Bass and Michael Turchin and Rosie O'Donnell and Michelle Rounds.⁹⁹ Not only homosexual celebrities support gay rights. Heterosexual celebrities such as Lady Gaga, Cyndi Lauper, Pink, Demi Lovato, Jennifer Lopez, Brad Pitt, and Jennifer Hudson all are a part of the Human Rights Campaign who constantly vocalize their beliefs of equality for all.¹⁰⁰ They talk about their support for gay rights and same-sex marriage at public events like their concerts, television talk shows, and media events. By doing so this impacts society and allows all to know that same-sex marriage is okay; being gay is okay; being a lesbian is okay; being transgender is okay; heterosexual is not the only normal way of life. With the amount of influence and recognition celebrities have, they have the power to influence people that gay rights are normal rights.

The future of same-sex marriage is changing nearly on a day-to-day basis. In the year of 2015, the Supreme Court of the United States will be hearing and reviewing cases on whether states should legalize same-sex marriage or not. Thousands of homosexuals and homosexual rights advocates are patiently waiting on the outcome of these cases in hopes that these states will finally legalize same-sex marriage. Kentucky, Michigan, Ohio, and Tennessee, will all have hearings later this year regarding the legality of same-sex marriage.¹⁰¹ According to the article on freedom to marry "In the past year alone, there have been 65 rulings in favor of marriage for

⁹⁹ Same-Sex Couples Say "I Do"

¹⁰⁰ Celebrity Supporters

¹⁰¹ The Freedom to Marry at the United States Supreme Court

same-sex couples - clearly demonstrating that the country is ready and that the age-old arguments against the freedom to marry simply don't survive judicial review."¹⁰² The United States of America may still follow historical guidelines and principles, but the foundation of marriage is changing for the betterment of our nation.

As of early 2015, same-sex marriage has not been deemed a fundamental right. In a thirty-two page ruling U.S. District Judge Martin L.C. Feldman wrote, 'There is simply no fundamental right, historically or traditionally, to same-sex marriage.'¹⁰³ Although same-sex marriage is not technically considered a fundamental right in our country, "a February 2015 poll from CNN/ORC found that 63% of Americans believe that same-sex couples have a constitutional freedom to marry."¹⁰⁴ This statistic includes people who are both over sixty-five and under, both democrats and republicans and people from all over the United States in every state.¹⁰⁵ With how rapidly our country is recognizing same-sex marriage, and how many people are in favor of it becoming legalized it may not be long before same-sex marriage is considered a fundamental right.

Taking into consideration all of the information presented in this thesis, it can be concluded that same-sex marriage has progressed with many positive results throughout the years. The Supreme Court has heard and will continue to hear numerous cases regarding same-sex marriage and the fight for it to become legalized. A fundamental right to marriage at this time is not guaranteed, but it is a work in progress. In the near future, with new cases arising

¹⁰² The Freedom to Marry at the United States Supreme Court

¹⁰³ Reagan-appointed judge: There's 'no fundamental right...to same-sex marriage'

¹⁰⁴ The Freedom to Marry at the United States Supreme Court

¹⁰⁵ The Freedom to Marry at the United States Supreme Court

almost daily, this could become a reality. What was the tradition of marriage years ago has been redesigned and newly shaped to include all citizens: straight, gay, lesbian, bisexual, and transgender. Everyone is human, and all humans deserve to have access to the same rights.

REFERENCES

- Anderson, Curt. "Federal Judge Rules Florida Gay Marriage Ban Unconstitutional." *NBC 6 News*. NBCUniversal Media, LLC., 21 Aug. 2014. Web. 1 Nov. 2014.
- Baehr v. Lewin*, 74 Haw. 645, 852 P.2d 44 (1993).
- Baker v. Vermont*, 744 A.2d 864 (Vt. 1999).
- Bever, Lindsey. "Children of Same-Sex Couples Are Happier and Healthier than Peers, Research Shows," *washingtonpost.com*, July 7, 2014.
- Bohrer, Becky. "Same-Sex Marriage Ban Violates 'Fundamental Right,' Alaska Attorneys Say." *Huffington Post Politics*. TheHuffingtonPost.com, Inc., 5 Oct. 2014. Web. 16 Feb. 2015.
- Bowers v. Hardwick*, 478 U.S. 186 (1986).
- Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).
- Brenner v. Scott*, 999 F. Supp. 2d 1278.
- Brown v. Board of Education*, 347 U.S. 483 (1954).
- "Bullying and LGBT Youth." *Stopbullying.gov*. U.S. Department of Health & Human Services, 1 Apr. 2012. Web. 18 Feb. 2015.
- "Celebrity Supporters." *Human Rights Campaign*. The Human Rights Campaign, 5 Mar. 2015. Web. 24 Mar. 2015.

Corning, Hannah. *Same-Sex Marriage: A Constitutional and Social Debate*. Waco, Texas: Baylor U, 2013. 111. Print.

Deason, Claire. *An Argument for Same Sex Marriage*. Political Science Department at DigitalCommons@Macalester College, 2006. 71. Print.

"Dictionary Makes New 'Marriage' Definition." *CBN News*. The Christian Broadcasting Network, 20 Mar. 2009. Web. 20 Oct. 2014.

Dinan, Stephen. "Why Gay Marriage Is Important for All Americans." *The Huffington Post Politics*. TheHuffingtonPost.com, Inc, 6 June 2009. Web. 3 Feb. 2015.

"Due Process." *Cornell University Law School*. Cornell University. Web. 6 Nov. 2014.

Ellis, Bruce. "Does Father Absence Place Daughters at Special Risk for Early Sexual Activity and Teenage Pregnancy?" *Child Development*, May 2003.

"Equal Protection." *Cornell University Law School*. Cornell University. Web. 6 Nov. 2014.

"Florida." *Freedom To Marry*. Freedom to Marry, Inc. and Freedom to Marry Action, Inc., 1 Aug. 2014. Web. 1 Nov. 2014.

Fausset, Richard, and Alan Blinder. "States Weigh Legislation to Let Businesses Refuse to Serve Gay Couples." *The New York Times*. The New York Times Company, 5 Mar. 2015. Web. 8 Mar. 2015.

Gartrell, Nanette. MD, and Henny Bos, PhD, "US National Longitudinal Lesbian Family Study:

Psychological Adjustment of 17-Year-Old Adolescents," *Pediatrics*, July 7, 2010.

"Gay Marriage Arguments, For and Against." *Conlaw Elements*. Web. 1 Nov. 2014.

"Gay Marriage Around the World." *PewResearch Religion & Public Life Project*. Pew Research Center, 2 Sept. 2014. Web. 18 Oct. 2014.

Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. 2003).

Griswold v. Connecticut, 381 U.S. 479 (1965).

"Hawaii." *Freedom to Marry*. Freedom to Marry, Inc. and Freedom to Marry Action, Inc., 1 Jan. 2013. Web. 18 Feb. 2015.

"History and Debate of Gay Marriage." *Debate.org*. Debate.org, 1 Jan. 2011. Web. 16 Feb. 2015.

Johnson, Ben. "Reagan-appointed Judge: There's 'no Fundamental Right...to Same-sex Marriage'." *Life Site News*. Life Site News, 4 Sept. 2014. Web. 24 Mar. 2015.

Karimi, Faith, and Michael Pearson. "The 13 States That Still Ban Same-sex Marriage." *CNN Library*. Cable News Network. Turner Broadcasting System, Inc., 13 Feb. 2015. Web. 15 Feb. 2015.

Klein, Ezra. "Sorry, Justice Scalia: There's No Evidence That Gay Parents Aren't Great Parents," *WashingtonPost.com*, Mar. 27, 2013.

Lavender, Paige. "Obama: 'I Think The Equal Protection Clause Does Guarantee Same-Sex

Marriage' In All States." *The Huffington Post Politics*. TheHuffingtonPost.com, Inc., 20 Oct. 2014. Web. 3 Feb. 2015.

Lawrence v. Texas, 539 U.S. 558 (2003).

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

Mccullagh, Declan. "Gay Rights Groups Irate After Obama Administration Lauds Defense Of Marriage Act." *CBS News*. CBS Interactive Inc., 12 June 2009. Web. 26 Feb. 2015.

"Membership Resolution Points of Clarification." *Boy Scouts of America*. Boy Scouts of America. Web. 24 Mar. 2015.

Meyer v. Nebraska, 262 U.S. 390 (1923).

Michaelson, Jay. "Gay Marriage Chaos Begins." *The Daily Beast*. The Daily Beast Company LLC, 11 Nov. 2014. Web. 18 Nov. 2014.

Moen, Bob. "Wyoming Becomes Latest to Legalize Gay Marriage, Joining Wave Supreme Court Decision Started." *U.S. News & World Report*. U.S. News & World Report LP., 21 Oct. 2014. Web. 26 Oct. 2014.

Nazworth, Napp. "Kids Need Both Mom and Dad, Says Gay Man Opposed to Gay Marriage," christianpost.com, Jan. 28, 2013.

Osunsami, Steve. "Are Gay Rights Civil Rights?" *ABC News*. ABC News Internet Ventures, 13

Mar. 2014. Web. 10 Feb. 2015.

Peralta, Eyder. "Federal Judge Orders Ala. Official To Issue Marriage Licenses To Gay Couples." *NPR*. NPR, 12 Feb. 2015. Web. 8 Feb. 2015.

Pew Research Center, "Religious Groups' Official Positions on Same-Sex Marriage,"
pewforum.org, Dec. 7, 2012

Planned Parenthood V. Casey, 505 U.S. 833 (1992).

Pusey, Allen. "June 26, 2003: Court Overturns *Bowers v. Hardwick*." *ABA Journal*. American Bar Association, 1 June 2012. Web. 15 Feb. 2015.

Robinson, Eugene. "We've Reached the Inevitable Tipping Point on Gay Marriage." *The Washington Post*. The Washington Post, 6 Oct. 2014. Web. 31 Oct. 2014.

"Same-Sex Marriage Fast Facts." *CNN Library*. Cable News Network. Turner Broadcasting System, Inc., 10 Mar. 2015. Web. 15 Feb. 2015.

"Same-Sex Marriage Law & Legal Definition." *USLEGAL*. USLEGAL, 1 Jan. 2001. Web. 18 Oct. 2014.

"Same-Sex Marriage Laws." *National Conference of State Legislatures*. National Conference of State Legislatures, 9 Feb. 2015. Web. 27 Feb. 2015.

Same-Sex Marriage Laws." *National Conference of State Legislatures*. National Conference of State Legislatures, 13 Nov. 2014. Web. 14 Nov. 2014.

"Should Gay Marriage Be Legal?" *Gay Marriage Pros and Cons*. ProCon.org, 12 Nov. 2014. Web. 14 Nov. 2014.

Snider, Brett. "Challenging Laws: 3 Levels of Scrutiny Explained." *FindLaw*. FindLaw, a Thomson Reuters Business, 7 Jan. 2014. Web. 18 Oct. 2014.

"States." *Freedom to Marry*. Reedom to Marry, Inc. and Freedom to Marry Action, Inc., 9 Feb. 2015. Web. 18 Feb. 2015.

Strawser v. Strange, Civil Action No. 14-0424-CG-C

"Suicide Prevention Resources Facts About Suicide." *The Trevor Project*. The Trevor Project, 1 Jan. 2011. Web. 5 Feb. 2015.

"The Constitutional Dimensions of the Same-Sex Marriage Debate: 2008." *Pew Research Center Religion & Public Life*. Pew Research Center, 21 Nov. 2008. Web. 1 Feb. 2015.

"The Defense of Marriage Act." *Freedom to Marry*. Reedom to Marry, Inc. and Freedom to Marry Action, Inc., 1 July 2013. Web. 18 Feb. 2015.

"The Freedom to Marry at the United States Supreme Court." *Freedom to Marry*. Freedom to Marry Action, Inc., 5 Mar. 2015. Web. 24 Mar. 2015.

U.S. Const. Amendment. XIV.

United States v. Windsor, 570 U.S. ____ (2013) (Docket No.12-307).

Vance, Laurence. "Does The First Amendment Protect The Freedom Of Association." *The*

Future of Freedom Foundation. The Future of Freedom Foundation, 9 May 2012. Web.
24 Mar. 2015.

Whitney, Alyse. "Same-Sex Celebrity Couples Say "I Do"" *PopSugar*. 21 Sept. 2014. Web. 24

Mar. 2015.

"14th Amendment to the U.S. Constitution." *The Library of Congress*. The Library of Congress.

Web. 18 Oct. 2014.

14 Supreme Court Cases: Marriage Is a Fundamental Right. American Foundation for Equal

Rights, 19 Jan. 2012. Web. 18 Oct. 2014.

"37 States with Legal Gay Marriage and 13 States with Same-Sex Marriage Bans." *Gay*

Marriage Pros and Cons. ProCon.org, a 501(c)(3) Nonprofit, 9 Feb. 2015. Web. 15 Feb.
2015.