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Constitutionality of Same Sex Marriage in the United StatesMatthew

BrighamLegal Direct StudyThe proposed legalization of same-sex marriage is one of the most significant issues in contemporary American family law.

Presently, it is one of the most vigorously advocated reforms discussed in law reviews, one of the most explosive political questions facing lawmakers, and one of the most provocative issues emerging before American courts. If same-sex marriage is legalized, it could be one of the most revolutionary policy decisions in the history of American family law. The potential consequences, positive or negative, for children, parents, same-sex couples, families, social structure, public health, and the status of women are huge. Given the importance of the issue, the value of broad debate of the reasons for and against legalizing same-sex marriage should be obvious. Marriage is much more than merely a commitment to love one another. Aside from public and religious beliefs, marriage entails legally imposed financial responsibility and legally authorized financial benefits.

Marriage provides automatic legal protections for the spouse, including medical visitation, succession of a deceased spouse's property, as well as pension and other rights. When two adults desire to "contract" in the eyes of the law, as well a perhaps promise in the eyes of the Lord and their friends and family, to be responsible for the obligations of marriage as well as to enjoy its benefits, should the law prohibit their request merely because they are of the same gender? I intend to prove that because of Article IV of the United States Constitution, there is no reason why the federal government nor any state government should restrict marriage to a predefined heterosexual relationship. Marriage has changed throughout the years. In <https://assignbuster.com/constitutionality-financial-responsibility-and-legally-authorized-financial/>

Western law, wives are now equal rather than subordinate partners; interracial marriage is now widely accepted, both in law and in society; and marital failure itself, rather than the fault of one partner, may be grounds for a divorce.

Societal change have been felt in marriages over the past 25 years as divorce rates have increased and have been integrated into even upper class families. Proposals to legalize same-sex marriage or to enact broad domestic partnership laws are currently being promoted by gay and lesbian activists, especially in Europe and North America. The trend in western European nations during the past decade has been to increase legal aid to homosexual relations and has included marriage benefits to some same-sex couples.

For example, within the past six years, three Scandinavian countries have enacted domestic partnership laws allowing same-sex couples in which at least one partner is a citizen of the specified country therefore allowing many benefits that heterosexual marriages are given. In the Netherlands, the Parliament is considering domestic partnership status for same-sex couples, all major political parties favor recognizing same-sex relations, and more than a dozen towns have already done so. Finland provides governmental social benefits to same-sex partners. Belgium allows gay prisoners the right to have conjugal visits from same-sex partners. An overwhelming majority of European nations have granted partial legal status to homosexual relationships.

The European Parliament also has passed a resolution calling for equal rights for gays and lesbians. In the United States, efforts to legalize same-sex

domestic partnership have had some, limited success. The Lambda Legal Defense and Education Fund, Inc. reported that by mid-1995, thirty-six municipalities, eight counties, three states, five state agencies, and two federal agencies extended some benefits to, or registered for some official purposes, same-sex domestic partnerships. In 1994, the California legislature passed a domestic partnership bill that provided official state registration of same-sex couples and provided limited marital rights and privileges relating to hospital visitation, wills and estates, and powers of attorney. While at the time California's Governor Wilson eventually vetoed the bill, its passage by the legislature represented a notable political achievement for advocates of same-sex marriage.

The most significant prospects for legalizing same-sex marriage in the near future are in Hawaii, where advocates of same-sex marriage have won a major judicial victory that could lead to the judicial legalization of same-sex marriage or to legislation authorizing same-sex domestic partnership in that state. In 1993, the Hawaii Supreme Court, in *Baehr v. Lewin*, vacated a state circuit court judgment dismissing same-sex marriage claims and ruled that Hawaii's marriage law allowing heterosexual, but not homosexual, couples to obtain marriage licenses constitutes sex discrimination under the state constitution's Equal Protection Clause and Equal Rights Amendment. The case began in 1991 when three same-sex couples who had been denied marriage licenses by the Hawaii Department of Health brought suit in state court against the director of the department. Hawaii law required couples wishing to marry to obtain a marriage license. While the marriage license law

did not explicitly prohibit same-sex marriage at that time, it used terms of gender that clearly indicated that only heterosexual couples could marry.

The couple sought a judicial decision that the Hawaii marriage license law is unconstitutional, as it prohibits same-sex marriage and allows state officials to deny marriage licenses to same-sex couples on account of the heterosexuality requirement. Baehr and her attorney sought their objectives entirely through state law, not only by filing in state rather than federal court, but also by alleging exclusively violations of state law—the Hawaii Constitution. The state moved for judgment on the pleadings and for dismissal of the complaint for failure to state a claim; the state’s motion was granted in October, 1991.

Because of this the circuit court upheld the heterosexuality marriage requirement as a matter of law and dismissed the plaintiffs’ challenges to it. During the recent years the Circuit Court of Hawaii decided that Hawaii had violated Baehr and her partner’s constitutional rights by the fourteenth amendment and that they could be recognized as a marriage. The court found that the state of Hawaii’s constitution expressly discriminated against homosexuals and that because of Hawaii’s anti-discrimination law they must re evaluate the situation. After the ruling the state immediately asked for a stay of judgment, until the appeal had been convened, therefore putting off any marriage between Baehr and her partner for at least a year. By far Baehr is the most positive step toward actual marriage rights for gay and lesbian people.

Currently there is a high tolerance for homosexuals throughout the United States and currently in Hawaii. Judges do not need the popularity of the people on the Federal or circuit court level to make new precedent. There is no clear majority that homosexuals should have marriage rights in the general public, and yet the courts voted for Baehr. The judiciary has its own mind on how to interpret the constitution, which is obviously very different than most of American popular belief. This is the principal reason that these judges are not elected by the people, so they do not have to obey to pressure caused by the American people. The constitutional rights argument for same-sex marriage affirms that there is a fundamental constitutional right to marry, or a broader right of privacy or of intimate association. The essence of this right is the private, intimate association of consenting adults who want to share their lives and commitment with each other and that same-sex couples have just as much intimacy and need for marital privacy as heterosexual couples; and that laws allowing heterosexual, but not same-sex, couples to marry infringe upon and discriminate against this fundamental right. Just as the Supreme Court compelled states to allow interracial marriage by recognizing the claimed right as part of the fundamental constitutional right to marry, of privacy and of intimate association so should states be compelled now to recognize the fundamental right of homosexuals to do the same.

If Baehr ultimately leads to the legalization of same-sex marriage or broad, marriage like domestic partnership in Hawaii, the impact of that legalization will be felt widely. Marriage recognition principles derived from choice-of-law and full-faith-and-credit rules probably would be invoked to recognize same-

sex Hawaiian marriages as valid in other states. The impact of Hawaii's decision will immediately impact marriage laws in all of the United States. The full faith and credit clause of the U. S. Constitution provides that full faith and credit shall be given to the " public acts, records, and judicial proceedings of every other state." Marriage qualifies for recognition under each section: 1) creation of marriage is " public act" because it occurs pursuant to a statutory scheme and is performed by a legally designated official, and because a marriage is an act by the state; 2) a marriage certificate is a " record" with a outlined legal effect, showing that a marriage has been validly contracted, that the spouses meet the qualifications of the marriage statutes, and they have duly entered matrimony. Public records of lesser consequence, such as birth certificates and automobile titles have been accorded full faith and credit; 3) celebrating a marriage is a " judicial proceeding" where judges, court clerks, or justices of the peace perform the act of marriage.

It would seem evident that if heterosexual couples use Article IV as a safety net and guarantee for their wedlock then that same right should be given to homosexual couples. This Article has often been cited as a reference point for interracial marriages in the south when those states do not want to recognize the legitimacy of that union by another state. As this is used for that lifestyle, there is no logical reason it should be denied to perhaps millions of homosexuals that want the opportunity to get married. The obstacles being out in front of homosexual couples are in the name of the " normal" people that actively seek to define their definition to all. It is these " normal" people that are the definition of surplus repression and social

domination. Yet as they cling to the Constitution for their freedoms they deny those same freedoms to not “ normal” people because they would lose their social domination and could be changed.

Therefore it would seem they are afraid to change, and have not accepted that the world does change. Unfortunately the full faith and credit clause has rarely been used as anything more than an excuse to get a quick divorce. A man wants a divorce yet his wife does not or will not void their marriage. He then goes to Reno, Nevada, buys a house and gets a job for six weeks. After that six weeks when he can declare himself a legal resident he applies for a singular marriage void and because Nevada law allows one side to void their marriage if they are a resident of Nevada their marriage is now void.

The man now moves back to his home state, and upon doing so this state must now recognize the legitimacy that Nevada has voided out the marriage. Even if the wife does not consent, the new state cannot do anything about it. That is what usually full faith and credit is used under. The ‘ full faith and credit’ clause has been prominent in the national controversy over gay marriage. The fear that the Hawaii Supreme Court would grant gay men and lesbians the right to marry and that the full-faith clause would compel other states to honor legal gay unions led to the passage of the federal Defense of Marriage Act and action in 17 state legislatures banning the recognition of gay marriage. The full-faith clause was also recently invoked in a North Carolina lesbian custody battle in which a child’s biological mother fought to overturn an adoption ruling granted by the state of Washington to her one-time female partner. The mother’s attorney, noting the state’s prohibition against gay marriage, argued the adoption should be declared invalid in <https://assignbuster.com/constitutionality-financial-responsibility-and-legally-authorized-financial/>

North Carolina because it violates “ a decided policy against protecting homosexual families” in the state.

Defense attorneys argued that since the adoption of the couple’s child was conducted and finalized in Washington, the state of North Carolina is bound by the full-faith clause of the Constitution to abide by it. The judge eventually sided with the defense. Legislation enacted by President Clinton from Senator Don Nickles of Oklahoma called the Defense of Marriage Act (DOMA) has allowed individual states to react differently to any intrusion of marriage that they feel is not proper. DOMA states “ marriage means only a legal union between one man and one woman as husband and wife.” “ Supporters of DOMA also claim clear constitutional warrant, and that Congress is exercising its own authority under Article IV to prescribe the manner in which the public acts, records, and judicial proceedings of every other state, shall be proved.” However it would seem that by allowing individual states to alter and change what the meaning of marriage is, it could create a disaster if even heterosexuals want to wed. The underlying principle in DOMA is that states now have the right to redefine what they feel is or is not appropriate behavior and shall be allowed or illegal in their state. It is also apparent that the signing of DOMA by President Clinton was more of a presidential campaign gesture than an actual change in policy.

While he has shifted considerably from his platform in 1992 this move was specifically designed to change his image among more conservative voters. It is also apparent that this move did not work because a majority of conservative Americans still voted for Bob Dole in the 1996 Presidential election. Clinton, now that he has been re elected, partially under the front of <https://assignbuster.com/constitutionality-financial-responsibility-and-legally-authorized-financial/>

a more moderate administration, should seriously rethink its policy on social change and whether he wants to go out as the President that denied hundred of thousands of people the opportunity for equal rights. In 1967 the Supreme Court announced that “ marriage is one of the most basic civil rights of man.

...essential to the pursuit of happiness.” Having the highest court on the land make such a profound statement about something that current politicians think they can regulate like cell phones or TVs is something short of appalling.

Who is to say what happiness can be created from wedlock but the people that are in the act itself, per couple, household and gender. The Uniform Marriage and Divorce Act proclaim that “ All marriages contracted.... outside this State that were valid at the time of the contract or subsequently validated by the laws of the place in which they were contracted...

are valid in this State”. This Act has been enacted in seventeen states and could be the foundation for full faith and credit if marriages were to take place in other states. However as much as the right wing conservatives wish to pursue an aggressive anti-gay/lifestyle agenda the DOMA act has been widely criticized as intensely unconstitutional. It is bias and discriminatory toward homosexuals and there fore against the United States Constitution and once again the fourteenth amendment proclaiming all citizens equal. Fearing that the state may have to recognize same-sex marriages from Hawaii, because of the controversy over DOMA the state legislatures of Arizona, South Dakota, Utah, Oklahoma, Kansas, Idaho, and Georgia, have

made preemptive strikes and enacted state legislation which bars recognition of same-sex marriages. Several other state legislatures, including Alabama, Arkansas, California, Delaware, Louisiana, New Mexico, Kentucky, Maine, South Carolina and Wisconsin, have attempted to enact similar legislation, but failed.

After Hawaiian marriages are brought to these states for enforcement, these laws will lead each state into a potential separate constitutional challenge of its same-sex marriage ban. Those cases could be the new foundation for a sweeping change in popular American politics and thought and will perhaps pave the road for increased awareness of this human rights issue. MASS LAW PRESIDENTIAL CANDIDATES Conclusion Works Cited " Gay marriages should be allowed, state judge rules," The Wall Street Journal, Dec. 4, 1996, 1996 "Hawaii judge ends gay marriage ban," New York Times, Dec. 4, 1996 "Hawaii ruling lifts ban on marriage of same-sex couples" Los Angeles Times, Page 1A, 1996 Dec. 4, 1996 "Announcing same-sex unions," The Boston Globe, Page 15A, Dec. 2, 1996 Bonauto, " Advising non-traditional families: A general introduction," OCT B. B.

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