Constitutional Reasons to Support Gay Marriage in the United States

The Supreme Court has taken up the question of gay marriage; something that has come as a response to the 2008 Proposition 8 controversy which stopped gay marriages from happening in California. There are some questions regarding the timing of this case: has enough time passed since the legalization of gay marriage in several states to know enough about its costs and benefits? How are the children raised by gay couples affected? What is the rate of divorce for gay marriages? How important is the absence of traditional procreation in gay marriages? Justice Samuel A. Alito Jr. pointed out the difficulty in assessing something that is "newer than cell phones and/or the internet" (Barnes & Morello, 2013). Justice Anthony M. Kennedy wondered whether it was too soon to take up the question: "We have five years of information to pose against two thousand years of history" (Barnes & Morello, 2013). The case, which will be known in the history books as *Hollingsworth v. Perry*, will determine whether gay marriage is constitutional or not; and it is the aim of this article to look at the constitutional reasons the Supreme Court may use to uphold gay marriage.

The first reason has to do with free agency. People are free to choose their intimate associations for themselves, regardless of the virtue or popularity of the practice they choose, so long as they do no harm to others. As the Supreme Court has evolved, its decisions have sought to remain neutral on questions of morality, attempting to bracket controversial moral questions in a way that assures individual choice. Citizens have been found to have the right to choose their preferred sexual lifestyles. *Loving v. Virginia* in 1967 addressed interracial marriage on comparable grounds and made a similar distinction. It is difficult to argue that homosexual relationships are distinctly different from the heterosexual relationships the Constitution currently protects in that both reflect the choices of autonomous individuals.

The second reason has to do with privacy. Not only do people have the right to choose their relationships; they are not required to explain what happens in the bedroom either. The passage of *Lawrence v. Texas* in 2003 expanded the 14th Amendment's equal protection clause to include sexual conduct by consenting individuals regardless of gender. It was determined that the Constitution conferred a fundamental right upon homosexuals wishing to engage in sodomy. Such behaviour was within the bounds of liberty, and not criminally punishable. Sexuality is a private affair.

The third reason involves values, and since heterosexual and homosexual relationships resemble one another, that which is present in one is also present in the other. Like heterosexual marriage, homosexual marriage may be intimate to the degree of "being sacred…a harmony of living…a bilateral loyalty…and an association for a noble purpose" (*Griswold v. Connecticut*, 1965). Love exists in these relationships too, and is deserving of protection from those who disagree that this is so.

Some of the Supreme Court justices may find these arguments convincing and within the purview of the U.S. Constitution. Others will not. Information coming out of the Court suggests that the decision will likely be close, with one vote deciding the outcome. There may be a number of dissents. Two will be addressed here.

The first dissent could be that heterosexual marriage is uniquely different from gay marriages, and so gay unions do not qualify as 'marriages' in the same sense heterosexual marriages do. This is true from a few aspects: gay couples cannot procreate

on their own and there is a perception that little information is available regarding the success of gay parenting. However, the ability to procreate does not necessarily inform a marriage partnership. When a traditional marriage takes place it is "for better or worse, until death do us part," which is a covenant independent of procreation. Many married couples discover they are incapable of producing a child. This does not nullify their marriage. The second argument that gay parents are unfit may similarly be spurious. If doubt existed as to the capability of gay parents to provide a healthy environment for children, why would states grant them adoptions to begin with? The American Academy of Pediatrics came out in March in support of gay marriage citing four decades of research confirming the view that "children raised by gay or lesbian parents fare as well in emotional, cognitive and social functioning as peers raised by heterosexuals" (Saint Louis, 21).

The second dissent is less practical than the first and involves disagreement regarding personal values. One of the primary reasons Proposition 8 succeeded in stopping gay marriage in California was due to opposition by religious groups. The Mormon Church (The Church of Jesus Christ of Latter-day Saints) in particular used its organizational clout to raise money and organize its members in favour of the Proposition. In retribution, Mormon meeting houses were vandalized. Since then Proposition 8 has been overturned at the state level where preference of heterosexual marriages over homosexual marriages was seen as discriminatory:

> Proposition 8 fails to advance any rational basis in singling out gay men and lesbians for denial of a marriage license. Indeed, the evidence shows Proposition 8 does nothing more than enshrine in the California Constitution the notion that opposite sex couples are superior to same-sex couples. Because California has no interest in discriminating against gay men and lesbians, and because Proposition 8 prevents California from fulfilling its constitutional obligation to provide marriages on an equal basis, the court concludes that Proposition 8 is unconstitutional (ABC 4 News, 2010).

The official response from the Mormon Church highlights the nature of their opposition and the potential reason for a constitutional dissent by the U.S. Supreme Court:

> The Church of Jesus Christ of Latter-day Saints regrets today's decision. California voters have twice been given the opportunity to vote on the definition of marriage in their state and both times have determined that marriage should be recognized as only between a man and a woman. We agree. Marriage between a man and woman is the bedrock of society (ABC 4 News, 2010).

As a final point, it is important to recognize the strong public opinions which are supporting the legitimacy of gay marriage. In 2003, only 37 percent of Americans found gay marriage acceptable. In a March 2013 *Washington Post*-ABC poll, 58 percent of Americans believe it should be legal for gay couples to marry (Cohen, 2013). While members of the court do not necessarily base constitutional decisions on popular opinion they certainly are aware of it. Whatever the decision, the issue of gay marriage will continue to ignite controversy and debate well into the future.

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