



Education Department Resource

## The Same Sex Marriage Debate

Some Guidelines for Discussing the Issues With Students

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In a landmark decision, the Vermont Supreme Court ruled on December 20, 1999 in favor of three same sex couples who challenged the constitutionality of Vermont's marriage laws. Writing for the court, Justice Amestoy declared, "The extension of the common benefits clause to acknowledge plaintiffs as Vermonters who seek nothing more, nor less, than legal protection and security for their avowed commitment to an intimate and lasting human relationship is simply, when all is said and done, a recognition of our common humanity."

The court concluded that the benefits and protections of marriage must be extended to same sex couples. The court directed the legislature to remedy the discrimination, making Vermont the first state in the union to extend the legal rights of marriage to same sex couples.

Students and families will surely bring their feelings and questions about the Vermont decision into the classroom, presenting educators with an opportunity to deepen students' thinking about issues that are of great legal, economic, social and moral importance. It is hoped that the following summary and talking points help educators to present accurate information to students, and encourage open and honest classroom dialogue.

### What exactly was the Vermont case about?

In July 1997, three plaintiff couples sued the Vermont state health department for denying them marriage licenses. The case, known as *Baker v. Vermont*, was

reluctantly dismissed in December 1997 by a trial court that found many of the state's justifications for marriage discrimination "invalid." The court found that the state was justified in using marriage to promote procreation, despite the fact that marriage licenses are still issued to couples who cannot or do not procreate. The plaintiffs appealed to the Vermont Supreme Court. During argument before the Court in November 1998, some justices appeared skeptical about the procreation defense. Another justice, skeptical of the government's concern that no state has yet to extend the freedom to marry to lesbian and gay couples, remarked, "Doesn't someone have to be first?" The Vermont Supreme Court answered this question with a resounding "yes" on December 20 by boldly ruling that the state constitution's equal benefits clause prohibits that state government from conferring a whole range of benefits and protections through marriage, but excluding some people based on the sex of her or his partner. The state must now provide to lesbian and gay couples all the benefits and protections accorded to non-gay couples through marriage. The state legislature will determine whether such benefits will come through formal marriage or a separate but equal system of domestic partnerships.

### What are other significant cases and legislation related to same sex marriage?

**Baehr v. Anderson (Hawaii):** The Vermont ruling comes 11 days after the Hawaii

Supreme Court stopped short of recognizing the freedom to marry of lesbians and gay men in *Baehr v. Anderson*, the case credited with sparking the national discussion about same sex marriage. As in Vermont, the Hawaii case began when three same sex couples were denied a marriage license. In 1993, the Hawaii Supreme Court ruled that the state's marriage policy violated the state Constitution's prohibition against sex-based discrimination, and ordered a trial for the Health Department to produce a compelling state interest in limiting marriage licenses only to mixed-sex couples. Noting the state's failure to show a single good reason for discriminating, the Court ruled in 1996 that it was unconstitutional for the Health Department to continue denying the freedom to marry to lesbian and gay couples. The judge, however, also stayed his decision to allow the state to appeal to the Hawaii Supreme Court. In 1998, anti-gay groups succeeded in passing a state constitutional amendment to grant the legislature a new power to "reserve marriage" to different-sex couples only. On December 9, 1999, the Hawaii Supreme Court decided that the case is now "moot" because of last year's change in the state constitution. The Court held that the 1998 constitutional amendment "[took] the statute out of the ambit of the equal protection clause of the Hawaii Constitution" at least as regards marriage licenses.

**Brause & Dugan v. State (Alaska):** In March 1998, a state trial court judge ruled in a case brought by a male couple that have been together for over 20 years that the choice of a marital partner is fundamental and cannot be interfered with by the State without a compelling reason. The Court went on to add that being denied the right to marry because of your partner's sex is sex discrimination. The case never reached the point at which the state would have been required to set out its reasons for discrimination. Instead, in November 1998, the Alaska electorate approved a state constitutional amendment requiring that all marriages be "between one man and one

woman." There may now be a new case claiming that the constitutional amendment violates other basic constitutional guarantees of equality and fairness.

**The Defense of Marriage Act (DOMA):**

The Federal Defense of Marriage Act, signed into law in 1996, is the most far-reaching anti-marriage law, but it only deals with the federal government. It defines marriages, for the purposes of federal laws and programs, as between one man and one woman, thereby excluding the lawful marriages (now in Vermont) of same sex couples from the protection of at least 1049 federal laws, that encompass areas including taxes, inheritance, transfer of property, and burial rights. It also gives states the option of not recognizing lawful marriages licensed by other states, thereby setting up a situation in which people will be married in one state, but not the next.

**The Knight Initiative (California):** State Senator Pete Knight has placed an initiative on the March 7<sup>th</sup>, 2000 statewide ballot that reads, "Only marriage between a man and a woman is valid or recognized in California." California now recognizes all marriages that are contracted legally in every other state of the union. The reason for that is quite simple: if each state decided to pick and choose which marriages it would accept, couples would be married and unmarried as they drove across state lines. Until recently, states have concluded that this would be a ridiculous and harmful state of affairs. In recent years, many legislators have abandoned this policy in an effort to prevent recognition of same sex marriages within their states. California has so far rejected attempts to block recognition of same sex marriage five times.

**How does the Vermont decision impact the rest of the country?**

The Full Faith and Credit clause of the Constitution requires that official acts and proceedings of each state be recognized by sister states. Simply put, this means that a driver's license issued in Maine is also valid in Montana, Michigan and all 47 other

states. Until recently, it also meant that marriages recognized in one state were valid in all others. Since *Baehr v. Anderson* brought into question the right of same sex couples to marry in Hawaii in 1993, however, many states have passed legislation that would block recognition of same sex marriages performed legally in other states. Many people believe these laws to be unconstitutional. Now that Vermont has become the first state to make the possibility of same sex marriage a legal reality, it remains to be seen whether or not anti-marriage legislation in other states will hold up against the challenges that are sure to be mounted. Currently 29 states have adopted anti-marriage measures and 4 more have measures pending. Whether the Vermont State Legislature decides to allow same sex couples to marry or to adopt a separate, but equal domestic partnership system, it is likely that same sex couples from around the nation will establish residency in Vermont in order to marry or register. If and when these couples return to their home states, there are likely to be cases petitioning these states for recognition of the full marriage benefits and protections afforded by the State of Vermont. Many years of legislative battles lie ahead before any national consensus on same sex marriage will be reached.

**Is the United States the first country to afford marriage benefits and protections to same sex couples?**

No country in the world yet allows same-sex couples the freedom to marry, and none provides gay and lesbian people the full range of protections, responsibilities, and benefits that come with civil marriage. Within the last decade, several countries have moved to create a new marital status -- registered partnership: Denmark (1989), Norway (1993), Greenland (1994), Sweden (1995), Iceland (1996), the Netherlands (1998), and France (1999). While short of full equality, registered partnership recognizes the marital nature of lesbian and gay committed relationships and offers most, but not all, of the benefits and protections of civil marriage. Generally,

registered partnership differs from marriage in that: registered partnership is not marriage itself, and thus can be viewed as separate or unequal; registered partners cannot adopt non-related children, or even each other's children; registered partners cannot have an "official" church wedding in the country's established national church; one of the two registered partners must be a citizen of the country in which the partnership is contracted; and registered partnerships are not recognized outside of the country in which the partnership is contracted. Several other countries are considering similar legislation at the national level: Belgium, the Czech Republic, Finland, Germany, Luxembourg, Portugal, Spain, and Switzerland. At least one country, the Netherlands, is considering legislation that would open civil marriage equally to same-sex and different-sex couples. In 1995, the Scandinavian countries signed a treaty to honor each other's registered partnerships. Recognition throughout Europe and beyond will develop over time. Other countries provide some family recognition and protections at the national level, such as Australia, Canada, and Israel. In recent years, there have been several international legal victories in which courts have recognized the marital nature of committed gay and lesbian relationships, including, for example, in Canada, Colombia, Hungary, Israel, Namibia, and South Africa. In May 1999, the Canadian Supreme Court ruled 8-1 that where protections are provided to "spouses," they must be available to same-sex couples.

**How will this decision affect marriages sanctioned or limited by religious groups?**

The debate over the freedom to marry is about the right to enter into the state-created institution of civil marriage only. Civil and religious marriage are not the same thing. Many faiths already recognize marriages between same sex couples, even though such unions are not recognized by the government. Individual congregations of Reform Jews, American Baptists, Buddhists, Episcopalians,

Presbyterians, Unitarian Universalists, Methodists, the Society of Friends, and members of the United Church of Christ have performed marriages for same sex couples. Even though the Vermont decision affords the benefits and protections of marriage to same sex couples within the state of Vermont, local religious institutions retain their rights to decide for themselves whether to perform or recognize any marriage, just as they already do. No court decision can change the basic tenets of a religious faith. For example, some religions will not marry someone who has been divorced or two people of different faiths, although they may marry civilly.

**Why do same sex couples need or want to get married anyway?**

Most same-sex couples already take on many of the same responsibilities as married couples, but have none of the legal protections or benefits that accompany civil marriage. In fact, despite taking responsibility for their partner's well being, both economically and emotionally, same-sex couples are legally treated as nothing more than roommates! As a result, one partner is often denied visitation and involvement when the other is in the hospital; couples are refused "family " health coverage, taxation, and inheritance rights; and are denied protection in case the relationship ends -- sometimes even resulting in a partner's children being taken away. A short list of some of the over 1,000 rights and responsibilities associated with marriage includes:

Spousal Support	Support Following Divorce
Medical Treatment	Hospital Visitation
Tax Benefits	Inheritance
Government Benefits	Immigration Rights

In addition, same-sex couples are denied the social and emotional security marriage provides for so many. Marriage was traditionally defined as a union of two people of the same religion or the same race, or one in which wives were the

property of their husbands. Those "traditional" elements of marriage changed to reflect the equality of individuals. Today, we recognize that the choice of a marriage partner belongs to each person, not to the state. Marriage is not always about procreation -- many people marry who cannot or choose not to have children. Many lesbians and gay men do have children, but are denied the right to raise those children within a marital relationship. Marriage is best understood as a relationship of emotional and financial interdependence between two people in love who make a legal and public commitment to each other.

**How should I approach this topic with my students?**

Students will benefit from an accurate presentation of the facts and the opportunity to discuss important issues in a safe space. Since students are routinely bombarded with all sorts of information from television, the Internet, friends, and schoolmates, it is an outdated and false notion that keeping controversial issues out of the classroom will somehow protect and preserve students' "innocence." On the contrary, students are harmed more when they have no place in which to make sense of complex issues, work past stereotypes and misconceptions, and to develop a strong sense of personal ethics and morals. It is therefore both appropriate and important that issues such as same sex marriage be discussed and debated in class. As you discuss the Vermont case and its ramifications with your students, bear in mind the following ideas:

**Child Support**  
**Bereavement Leave**  
**Divorce**  
**Funeral/Burial Rights**

**Same sex families already exist:** Same sex unions have existed around the world for thousands of years. Despite social and legal obstacles, same sex partners have always found ways to demonstrate their love and commitment for one another, and to create a sense of family for themselves. This is an important concept for students to understand. Some opponents of same sex marriage feel that legally permitting such unions will somehow diminish the

institution of marriage and contribute to a moral decay within society. The fact is, however, that—legally sanctioned or not—same sex marriages already exist. It is impossible to legislate the expression of love or the coupling behavior of individuals. Legalizing same sex marriage will change little socially and will have no impact on heterosexual marriage or family life. The only people directly impacted will be the same sex couples and families who are currently denied the legal and economic benefits that many of their heterosexual counterparts enjoy.

Many students have had experiences with same sex couples: Don't assume that your students have no experience or knowledge about same sex relationships. Growing numbers of children today are being raised in same sex headed families. Many others have friends, neighbors, and relatives that are in committed, same sex relationships. Draw upon your students' experiences to enrich the conversation and try to acknowledge the many different family constellations from which they likely come. Discussions based on personal understandings will have more meaning for students than those that are abstract or removed from the real lives of community members.

Same sex couples are as fit to raise children as mixed sex couples: Though many married couples cannot or choose not to have children, for young students, notions of marriage and parenting are inseparably intertwined. Students may therefore question the ability of same sex partners to be good parents. It is important to stress that the best parents are those who provide love, support, and a caring home for their children. Sexual orientation and gender identity should be de-emphasized as criteria for evaluating child-rearing ability. There is no existing research to support the bigoted claim that same sex parents rear children with greater emotional or identity conflicts than heterosexual parents.

**Marriage is a basic human right:** By discussing same sex marriage within the context of human rights, you can help your

students to steer clear of moral judgments. For the issue at hand is not the rightness or wrongness of same sex coupling, but the inherent injustice of a government that denies social, legal and economic benefits and protections to one segment of the population while affording them to all others. Marriage should be understood as a basic human right and an individual personal choice.

**This is not just a "gay" issue:** Same sex marriage is an issue about which many citizens—both gay and straight—are concerned. Non-gay people are affected, among other ways, by attempts to use anti-marriage laws to strip away domestic partnership laws and protections. Laws that are discriminatory and unjust pave the way for future limits on our freedom, and this affects us all. Students should be encouraged to take an interest in matters that may not affect them directly, but threaten the integrity of other individuals and our society in general. It may interest them to know that, among others, Melanie Griffith and Antonio Banderas, Helen Hunt, John Leguizamo, and Coretta Scott King have all expressed their support for the right of same sex couples to marry.

**Students may be directly impacted:** Marriage legislation affects not only the couples, but the families that they support as well. By denying same sex couples the right to marry, the government may also be denying students eligibility for financial aid and scholarships, which is often affected by marital status. Committed, same sex couples still in school may also be denied student housing and the ability to move easily from state to state for study and work.

**This is not the first instance of government interference with people's freedom to marry:** Less than 30 years ago, interracial couples were prohibited from legally marrying. Today, very similar discriminatory arguments are being used to prohibit same sex couples from marrying. A Virginia judge ruled in 1958 that

"Almighty God created the races...and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for [interracial] marriages. The fact that he separated the races shows that he did not intend for the races to mix." Americans today recognize the inherent prejudice in this statement, and the right of each individual to marry the person she or he loves, regardless of race, class, religion and the like. Examined against the backdrop of interracial marriage bans, it becomes difficult to make a rational case for same sex marriage prohibitions. Students should understand both the historical parallels to same sex marriage prohibitions as well as the similarities among racism, homophobia, and all other oppressions.

#### Further Investigation

##### Books

- R.M. Baird & S.E. Rosenbaum, "*Same-Sex Marriage: the moral and legal debate*," Prometheus Books (1997)
- John Boswell, "*Same-Sex Unions in Premodern Europe*", Villard, New York, NY (1994)
- Graff, EJ, "*What is Marriage For? The Strange Social History of Our Most Intimate Institution*," Beacon Press (1999)
- Mark Strasser, "*Legally wed: same-sex marriage and the Constitution*," Cornell University Press (1998)
- Sullivan & J. Landau, "*Same-sex marriage: Pro and Con*," Vintage Books (1997)
- Michael Willhoite, "*Daddy's Wedding*", Alyson Publishers (1996). This is a book for young people, ages 4 - 10.

##### Web Sites

- Gay and Lesbian Advocates and Defenders: [www.glad.org](http://www.glad.org)
- Lambda Legal Defense and Education Fund: [www.lambdalegal.org](http://www.lambdalegal.org)
- National Freedom to Marry Coalition: [www.ftm.org](http://www.ftm.org)
- No On Knight Campaign: [www.noonknight.org](http://www.noonknight.org)
- Student Alliance for Fairness and Equality (SAFE): [www.fairandequal.com](http://www.fairandequal.com)
- Vermont Freedom to Marry Coalition: [www.vtfreetomarry.org](http://www.vtfreetomarry.org)