

## Genderless Marriage Policy:

*A Literature Review of the Same-Sex Marriage Dilemma in the United States*

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## Abstract

This literature review provides an in-depth look at one of the most heated political and social issues of our time. The project delves into the issues surrounding the legalization of same-sex marriage in the United States. It provides a review of relevant literature, court cases, facts, data and statistics on this topic. A wide variety of sources were sought out and included in the analysis of this issue. The literature includes both historical and current information and theories. The paper also provides a review of laws, amendments and propositions and other potential resolutions that attempt to mediate the disputes. Various arguments and opinions for and against genderless marriage policies are presented and analyzed. The two sides are in opposition based on issues concerning sexual orientation, equality, morality, civil rights, religion, family, and the separation of church and state, so these issues are also reviewed in this project. Each of the following topics is examined and reviewed by theme: the Social, Political and Legal Context of Marriage, Historical Court Cases, Global and Historical Instances of Genderless Marriage, The Arguments Against and Supporting Genderless Marriage, Changing Attitudes towards Genderless Marriage and Homosexuals, and The Separation of Church and State. In conclusion, policy recommendations are given, involving the separation of church and state, proposing civil genderless partnerships that are separate from religious practices and ideas, and are afforded to all citizens regardless of sexual orientation.

*Keywords:* same-sex marriage, gay marriage, genderless marriage, civil unions, homosexual rights, civil rights, separate but equal, separation of church and state.

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## Introduction

Same-sex marriage is one of the most talked about political and social issues, not only in the United States, but around the world. As Michael Mello points out, “like abortion and capital punishment, same-sex marriage sits on the cultural faultline of morality, religion, and law” (2004, p. 1). Because of the nature of the issue, it has become one of the most heated social discussions since the civil rights movement.

Individuals and scholars usually find themselves on one end of the spectrum or the other. They are either strongly opposed to the idea of two men or two women having the legal right to marry, or they are appalled that homosexuals are not already afforded the exact same rights as heterosexuals. The issue of same-sex marriage is usually either viewed as a human rights issue, by those who support it, or it is regarded as a moral issue by those who are opposed. Those on the right end of the political spectrum tend to oppose it, often for religious reasons, while those on the left often support the rights of homosexuals pertaining to marriage and family as a basic civil right. The literature reviewed displays these stances.

### *Background on the Literature*

A wide selection of literature is available on the topic, and the literature usually either supports or attacks gay marriage based on the aforementioned ideals. In recent years, there has been a progressively increased amount of public support for same-sex marriages (Newman, 2010). Several states within the U.S. and nations around the world have developed propositions and laws equate same-sex marriages as legal equivalents to man-woman marriages. This increase in support in social and political spheres is

mirrored by the literature that is available on the topic, as much of the recent writings on the topic lean in favor of liberal marriage policies. Thus, the content reviewed in this piece is slightly skewed towards supporters of gay marriage.

Most of the literature reviewed in this project was published in the past decade, as the discussion on genderless marriage has definitely heated up during this time. However, the review does include literature from the 1980's and 1990's, as well. The earliest piece of literature included was actually first published in 1937, and the latest, in 2010. So, this study indeed includes both historical and current information, as even some of the more current literature contains historical facts and data. All of the sources included in the review were completed by scholars, professionals or subject experts. This study contains a variety of books, journals, research studies, articles, and other professional sources that were found using various libraries and databases, including Google Scholar, the Torrance Public Library and the Library at California State University, Dominguez Hills. The key terms that were used as points of research were: marriage, same-sex marriage, gay marriage, civil unions, homosexual rights, civil rights, separate but equal, separation of church and state, and genderless marriage.

### *Genderless Marriage*

Following the general increase in support for same-sex marriage, there has been a movement towards what Monte Neil Stewart calls "genderless marriage" policies (2008, p. 323). The term "genderless marriage" is used in this project to refer to policies that include and recognize all couples under the law, equally and regardless of sexual

orientation. Many scholars prefer this term over “same-sex” or “gay” marriage because it emphasizes the continued inclusion of traditional “man-woman” marriages.

### *The Main Thesis*

While some states and countries have indeed legalized same-sex marriages, there is still a heated argument for equal rights regardless of sexual orientation. This project will review the important literature regarding genderless marriage policy, as more states within the nation begin to recognize the marriages of all couples, regardless of sexual orientation. Overall, the trends in literature on the subject suggest that the United States may be soon approaching a day where genderless marriage is a reality.

### *Overview*

This review is divided into eight sections based on relevant themes: The Social, Political and Legal Context of Marriage, which gives an important overview of marriage law in the United States; Historical Court Cases, which provides legal cases relating directly to same-sex and genderless marriage, Global and Historical Instances of Genderless Marriage, which examines worldwide approaches from the past and present, Arguments Against Genderless Marriage, Arguments Supporting Genderless Marriage, Changing Attitudes Towards Genderless Marriage, which highlights the recent trends on the issue, Separation of Church and State, and the Conclusion, which provides a brief policy recommendation at its culmination.

## The Social, Political and Legal Context of Marriage

In order to properly investigate the discussion on genderless marriage, it is important to first review literature on the context of marriage in general. The institution of marriage has been around for many centuries as a part of normal human life. According to Frederick Hertz and Emily Doskow, “social anthropologists describe marriage as a recurring cluster of human behaviors, social norms, and legal rules that have developed over time, as a way to enable couples to manage their primary interpersonal relationships” (2009, p. 50).

In the United States, marriage is civil in nature, and is treated as a legal status given to a couple. It is not treated as a contractual relationship, which is a key difference between marriage and a business partnership. A marriage license must be obtained from a county clerk, but the “legal” ceremony can take place in any religious or secular location. Many of the current marriage policies in this country derive from Roman law. For example, the idea of marriage as a civil institution instead of simply a religious practice, has roots directly in Roman Society, and that notion has been passed down to the States through Western culture (Hertz & Doskow, 2009, p. 52).

### *Overview of Relevant Marriage Law in the United States*

There are a variety of laws surrounding matrimony in the United States, both at the Federal level and at the state and local levels. According to Distinguished Service Professor of Law and Ethics at the University of Chicago, Martha Nussbaum:

Marriage is both ubiquitous and central. All across our country, in every region, every social class, every race and ethnicity, every religion or nonreligion, people

get married. For many if not most people, moreover, marriage is not a trivial matter. It is a key to the pursuit of happiness, something people aspire to—and keep aspiring to, again and again, even when their experience has been far from happy. To be told “You cannot get married” is thus to be excluded from one of the defining rituals of the American life cycle. (2009, p. 43)

Thus, many marriage policies are quite liberal. In California, for example, almost any couple, as long as it is a heterosexual, male-female couple over the age of 18, can marry. Even relatives as close as first cousins have a legal right to marry. In California, some of the lone restrictions on marriage, (other than sexual orientation), pertain to mental capacity, obvious intoxication, physical capacity to have sexual relations, and prior marriages (Sherman & Cameron, 2005).

However, homosexuals are not the first group of Americans to be denied the right to marry. In the early colonial days, of course, African slaves were not allowed to marry, as they were not even counted as human at the time. Subsequently, in 1705, Virginia law effectively banned all marriages between whites and non-whites (Wallenstein, 2002, p. 18). Since the early days of the union, there have been heated debates over the subject of inter-racial marriages. Many laws and policies prohibited miscegenation throughout American history. Many American couples of multi-racial backgrounds were told by the courts and by society that their love would not be recognized legally. Not until 1967 did interracial couples gain the right to marry, and the fight did not end there. In fact the last ban on interracial marriage, which remained part of Alabama legislation, was not officially removed by voters until November 2000 (Wallenstein, 2002, p. 6).



Marriage is far from perfect, especially in the United States. As Vermont Law School Professor, Michael Mello states, “one-half of marriages end in divorce; one-third of children are born out of wedlock; marriage rates are declining; domestic violence and child sexual abuse remain all too common” (2004, p. 28). Fewer couples are getting married, as sex outside of marriage has become socially acceptable; divorce rates, conversely have inclined, as divorce laws have become far more liberal (Polikoff, 2008, p. 31). Because of the shortcomings marriage, Americans are always looking for ways to improve it.

The disputes surrounding homosexual’s rights to marry are clearly not the first disagreements about marriage. Not until the 1950’s did women begin to gain equal rights in marriages (Hertz & Doskow, 2009, p. 53). In addition, the courts often overlooked issues of abuse and domestic violence within marriage, including incidents of spousal rape, which is now considered a violent crime (Sherman & Cameron, 2005, p. 244-245). And, as previously discussed interracial couples only gained equal rights over the last 50 years.

The changes throughout the history of marriage reinforces the fact that although marriage has been maintained as a rather constant institution for many centuries, policymakers are constantly playing with the rights and duties of married couples, adding new laws, and changing old laws to keep up with societal changes. (Sherman & Cameron, 2005, p. 15). Perhaps the next natural step is to provide equal rights to homosexuals. Or perhaps, such legislation is too progressive and liberal for this society. Only the courts have the ultimate power to settle this issue, and past court cases have been central to the battle surrounding genderless marriage policy.

## Historical Court Cases Regarding Genderless Marriage

Perhaps the first important court case in regards to same-sex marriage was one that did not relate directly to homosexual couples at all. The Supreme Court case of *Loving v. Virginia* was a landmark case regarding interracial marriages. The 1967 case ended in a unanimous decision that laws prohibiting such marriages were unconstitutional. Chief Justice Earl Warren asserted in writing that the Fourteenth Amendment “required that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State” (Wallenstein, 2002, p. 224). In the final decision, the court declared that “Marriage is one of the ‘basic civil rights of man,’” an argument that has been subsequently used to support genderless marriage policies (Johnson, 2009, p. 1).

The modern push towards genderless marriage recognition did not truly begin in America until the late 1960’s. Before this time, “getting married was of little interest to most lesbians or gay men- either legally or personally...This was a time when most homosexuals lived deep in the closet, and coming out at all could jeopardize one’s physical safety, never mind one’s social standing or economic security” (Hertz & Doskow, 2009, pg. 6). Despite the fact that homosexuality was still seen as taboo by most of the public, the first reported appellate decision in the United States regarding same-sex marriages opened the door to the discussion of the constitutionality of gay marriage in 1971. The case was *Baker v. Nelson*, which took place in the Minnesota Supreme Court, and ended in a decision that upheld the denial of a marriage license to two homosexual males, Jack Baker and Mike McConnell (Mello, 2004, p. 30). Though

the case did not result in any favorable legislation for gay couples, the case opened the door for other legal action that would take place over the next several decades.

The next landmark case took place nearly a quarter of a century later, in Hawaii in 1996. The *Baehr v. Miike* case was based on the complaints of three gay couples who argued that the state's refusal to issue them marriage licenses was in direct violation of Hawaii's Equal Rights Amendment. The trial judge ruled in favor of the plaintiffs, but, concurrently, the voters passed a policy that banned all same-sex marriages. The state made a compromise, passing the "reciprocal beneficiaries" law, which was groundbreaking at the time, as it marked the first statewide domestic partnership law in the U.S. Following this decision, many states, as well as the Federal Government acted in the defense of traditional man-women marriages by passing "Defense of Marriage" acts, or DOMA (Curry, Clifford & Hertz, 2004, p. 1.11-1.12). An earlier case in Hawaii in 1993, and a later one in Alaska in 1998 also brought small victories for same-sex marriage, but both rulings were also erased by the popular votes on amendments to each of the state constitutions (Mello, 2004, p. 12).

Coincidentally, another "Baker" case turned the tables for gay marriage rights several decades later. In *Baker v. State*, the Vermont Supreme Court ruled that same-sex couples should receive the same rights and privileges and protections that are afforded to heterosexual couples. The December 20, 1999 decision gave birth to "civil unions," and at the time was the most progressive and comprehensive approach to same-sex relationships, not only in the U.S., but in the world. Vermont called this approach the "third way," as it provided homosexuals with all the same rights and responsibilities of marriage, without using the term "marriage" (Mello, 2004, p. 12).

The next important case occurred outside the country in neighboring Canada in 2003. On June 11 of that year, an Appellate Court in Toronto declared that the laws outlawing same-sex marriages in the country violated Canada's Charter of Rights and Freedoms. The Canadian government embraced the new law. Many American couples crossed the boarder to get married, and due to the proximity to the United States, this case was very significant (Mello, 2004, p. 2). Another victory for homosexuals came on June 26 of the same year, when the U.S. Supreme Court struck down all states laws that banned sodomy, on the grounds that it violated citizens' constitutional rights to privacy (Cahill, 2004, p. 2).

Later in 2003, The Massachusetts case, *Goodridge v. Department of Public Health*, ended in the New England state becoming the first in the union to legalize same-sex marriage. The landmark decision was presented on November 18 upon the State Supreme Court's declaration that marriage should be a civil right to all citizens, including gays and lesbians. The majority stated that "limiting the protections, benefits, and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution" (Cahill, 2004, p. 4). A February 2004 decision by the courts upheld the decision and expanded by stating that the option of offering civil unions to same-sex couples would not be acceptable under the law (Cahill, 2004, p. 5). Couples in Massachusetts began receiving marriage licenses in 2004; and in 2008, a law which limited out-of-state same-sex couples from getting married was also struck down (Hertz & Doskow, 2009, p. 36).

Since then, several states have been battling back and forth in the same-sex marriage debate. Currently five states allow marriage equality, regardless of gender:

Massachusetts, Connecticut, Iowa, New Hampshire and Vermont. In March 2010, Washington D.C. became the sixth jurisdiction to currently support genderless marriage policy (Edwards, 2010). Other states, including California, Nevada, New Jersey, Oregon, and Washington have instituted civil unions or domestic partnerships which serve as marriage equivalents for same-sex couples (Hertz & Doskow, 2009, p. 35). In those states, as well as others, talks of marriage equality are at the forefront of the political and social dialogue, and court cases continue in many of these states. However, the majority of the states, 45 in total, do not allow same-sex marriages, and many of those do not provide marriage equivalents, such as civil unions and domestic partnerships.

### *The Legal Battle in California*

The legal battle in California exemplifies the fight for and against gay marriage in this country. The fight in California began in 2004, after President George W. Bush's remarks against gay marriage. Following the State of the Union address, San Francisco Mayor, Gavin Newsom, ordered the city to release marriage licenses to all couples, regardless of gender. Next, the courts ordered a stoppage to Newsom's order (Hertz & Doskow, 2009, p. 20). Then, the 2008 passage of Proposition 8 in California outlawed gay marriage in the state, after the courts had ruled that a ban was unconstitutional. Advocates of equal marriage rights in the state have vowed to fight for the passage of new legislation that would reverse the popular vote of 2008 (Hertz & Doskow, 2009, p. 36). To some degree, the fight in California has actually been mirrored around the world for quite some time.

## Global and Historical Instances of Genderless Marriage

One of the earliest incidents of same-sex marriage on record took place in Rome in 1578. At this time, several male couples were actually married inside a Catholic Church in the Italian city. Although 11 of the men were actually burned to death as heretics, the fact that the ceremony actually took place was perhaps foreshadowed the European continents' relative openness to the idea (Hertz & Doskow, 2009, p. 22). Another early account of same-sex, male-male marriages took place in Fukien in the early 1600's, which "was said to be a center of homosexuality in China, and such marriages were said to be fairly common" (McGough, 1981, p. 27). In addition, anthropological evidence suggests that some cultures in distinct countries in Africa, including Nigeria, Sudan, and South Africa actually practiced woman-woman marriages as late as the early 1900's (Herskovits, 2004, p. 32).

In many ways, Europe has typically been more open to ideas of genderless marriage than all other continents. The first modern same-sex marriages were performed in the Netherlands in 2001. The Netherlands is known to be one of the most liberal countries in the world, and the nation previously had limited recognition of homosexual relationships. Belgium became the second European country to legalize same-sex marriage in 2003, and it was followed by Spain, often considered to be a very conservative country due to the strong presence of the Catholic Church. The fact that such a seemingly unlikely location for genderless marriage passed such equality laws is another testament to the openness of that continent to gay marriage. As Hertz and Doskow opionate, "Europeans seem less concerned about the 'morality' of same-sex marriage than Americans generally" (2009, p. 26). As of 2009, Norway and Sweden are

the other two nations in Europe that have legalized gay marriage (Hertz and Doskow, 2009, p. 29).

South Africa became the only African nation to legalize same-sex marriage, as part of the country's initiative to provide equal rights to all citizens following the dark history of apartheid law. Canada is the only other nation that currently recognizes same sex marriages. Unlike the European nations, Canada and South Africa hold no residency requirements, and allow foreign couples to visit their countries and legalize their bonds (Hertz and Doskow, 2009, p. 29).

As is the case in America, same-sex marriage has garnered much more support in recent years than it ever has in history throughout the world. In addition to the countries that offer same-sex marriage as an option, gay couples can register as legal partners in at least 14 other countries worldwide (Polikoff, 2008, p.110). However, Hertz and Doskow argue that "other than in Australia, where marriage is a real possibility in the coming decade, legal marriage--- or any marriage-equivalent relationship--- is probably a long way off for same-sex couples on the other continents, especially in South America, Africa and Asia" (Hertz and Doskow, 2009, p. 31).

A deep analysis of human history reveals that the current laws legalizing gay marriage over the past 10 years do not mark the first time that societies have performed same-sex marriages. The same is true in the United States. A piece of history from Walter Williams' *A Normal Man*, reveals that one of the earliest Spanish explorers in current-day Florida wrote of Native American practices of same-sex marriages (Williams, 1986, p. 35). Perhaps a move toward Federal legalization of genderless

marriage policies is simply a completion of the cycle that was put in motion hundreds of years ago, and this is simply a case of history repeating itself. However, there are many who oppose such policies, and have developed strong arguments against them.

### The Arguments Against Genderless Marriage

Arguments against genderless marriage have existed ever since ideas of genderless marriage were brought into the public eye. As the literature reflects, many churches have joined the fight to attempt to “save marriage” from being re-defined to include homosexual couples (Suarez, 2006, p. 99). In addition, U.S. government entities have generally supported these arguments, as evidenced by the Defense of Marriage Act (DOMA) of 1996, which legal defined marriage at the federal level, as a union between one woman and one man (Stewart, 2001, p. 179). The act passed by major majorities in both the House of Representatives (342 to 67) and in the Senate (84 to 14). President Bill Clinton signed the act on September 21, 1996 (Duncan, 2009, p.917). It was clear at that time the arguments against gay marriage were popular and mainstream. In addition to the many individual state DOMA laws that protect marriage at the state level, the Federal DOMA act also still stands today. So, genderless marriage is not a reality on the national level, even for marriages that take place in states where it is legal.

Even in spite of increasingly liberal attitudes and legislation towards genderless marriage, the Federal government has been quite resistant. In fact, the U.S. Office of Personnel Management “reportedly decided not to extend benefits to the same-sex



spouses of two federal employees in the judicial branch despite federal court orders to do so.” This decision was also made in spite of President Barack Obama’s strong support for equal benefits (Ginsberg, 2010, p. 19). Those who oppose genderless marriage are strong in their beliefs, and are still the majority in most states, as well as at the Federal level.

### *Traditional Family Arguments*

Individuals who oppose genderless marriage laws often oppose on the grounds of issues pertaining to family and children. In terms of the effect on families, President George W. Bush argued the following:

The union of a man and a woman in marriage is the most enduring and important human institution. For ages, in every culture, human beings have understood that marriage is critical to the well-being of families. And because families pass along values and shape character, marriage is also critical to the health of society. Our policies should aim to strengthen families, not undermine them. And changing the definition of marriage would undermine the family structure. (Duncan, 2009, p. 928)

Many supporters of the traditional, heterosexual definition of marriage do so based on the premise that this definition has served societies for thousands of years, and that these are “normal” and “natural” relationships, whereas homosexual practices are abnormal and should not be supported or encouraged. Rory McVeigh and D. Diaz Maria-Elena argue that “individuals who adhere to traditional sex roles typically develop

a stake in maintaining the status quo,” and for that reason for much opposition to genderless marriage policy (2009, p. 893).

Another argument against genderless marriages is due to the potential effect that same-sex households could have on children in such households. William C. Duncan argues that the idea of gay marriages “regards children as instrumental to fulfilling adults’ desires by giving adults the ‘right’ to create or acquire children who will necessarily be either motherless or fatherless” (2009, p. 930). Opponents of same-sex marriage contend that children of same-sex parents will miss out on a well-rounded and balanced parenting situation. A related argument is that marriage was designed for procreation, and since male-male and female-female partnerships cannot produce children, they should not be allowed the right to marry (Wolfson, 2004, p. 75).

### *The Morality Arguments*

Other opponents to gay marriage are against such policy changes on the grounds that homosexual actions are immoral and “wrong.” This argument is one that rages against homosexuality in general more than it rages against genderless marriage. Many individuals feel that same-sex romantic partnerships and relationships “defy the laws of nature and the laws of God” (McVeigh & Maria-Elena, 2009). As David Moats describes, during the legal push for same-sex marriages, “conservative politicians continued to show that they believed it was wrong at a fundamental level to sanction any form of homosexual behavior” (2004, p. 269). In addition to the Biblical teachings against homosexual behavior, many embrace arguments that characterize homosexuals with promiscuity, sexually transmitted diseases, low commitment rates,

and low standards of overall decency (Sullivan, 1995). These opponents, who often come from religious backgrounds, feel that expanding the laws to support same-sex marriages is an attack on the morality of American society.

From a legal prospective, others oppose gay marriage because they feel that it could cause a “slippery slope” in marriage policy, allowing room for the legalization of other forms of immorality. In response to the debate of same-sex marriage, Rabbi Chaim Schwartz of the Orthodox Jewish advocacy coalition Agudath Israel of New England asks “What’s next? Bestiality? Marrying a dog? Marrying your cat?” (Wolfson, 2004, p. 107). Others also argue that legalizing gay marriage would open up a Pandora’s box of acceptance and support for sexual immorality. William Bennett, for example, argued that gay marriage would open the laws of marriage to polygamist marriages between multiple individuals and incestuous marriages between close relatives (Bennett, 1996, p. 275).

### *Homosexuals Who Oppose Genderless Marriage*

Some homosexuals also oppose the ideas of same-sex marriages, but not for the same reasons as other opponents, since they are generally supporters of gay rights. They argue that homosexual lifestyles are by nature separate from the mainstream, and that genderless marriage would force assimilation rather than celebrating differences. Paula Ettlbrick argued that gays and lesbians should be fighting to make their lifestyles more acceptable by society as a whole: “We will be liberated only when we are respected and accepted for our differences and the diversity we provide to this society. Marriage is not a path to that liberation” (Ettlbrick, 1989, p. 128). This is an interesting

perspective, since it is vastly different from most of the arguments against genderless marriage policies. Most homosexuals obviously tend to support same-sex marriage.

### The Arguments Supporting Genderless Marriage

In spite of the strong arguments against genderless marriage, there are perhaps even more arguments in support of such policy. Recent literature on the subject has been saturated with arguments supporting same-sex marriage.

#### *Civil Rights and “Separate But Equal” Arguments*

Many of the arguments supporting genderless marriage are based on America’s history of support for human civil rights. Supporters argue that the gay rights struggle is similar to the battle fought by African Americans in the 1960’s against “separate but equal” attitudes. Activist Angela Watrous argues “LGBT people spend more than \$500 billion a year. We pay taxes. We die defending our country. We contribute in umpteen ways to our society. Yet we’re denied the same legal rights enjoyed by our straight counterparts. Where’s the liberty and justice for us?” (Maran & Watrous, 2005, p. 77). Many argue that although “the United States has always prided itself on its commitment to liberty and equality... our country has sometimes fallen short in its fulfillment of these human rights” (Wolfson, 2004, p. 161). They argue further that the denial of marriage rights to gays and lesbians is one of those shortfalls.

Many supporters of same-sex marriage argue that the domestic partnership laws and civil union policies do not offer equal rights to gay and lesbian couples. This

argument is supported by a case, in Florida, in July 2001. In this incident, a 17-year veteran of the Tampa Police Department, Mickie Mashburn, was denied legal rights to her partner of 11 years' pension, after her partner was killed trying to stop a bank robbery (Cahill, 2004, p. 103). Many argue that the alternatives to marriage that have been offered to homosexuals are, in effect, leading to these couples being treated as second-class citizens. Even prisoners are treated as higher class citizens in this respect, as incarcerated inmates are still afforded the right to marry (O'Connor, 2004, p. 95). The contention is that civil unions are an instance of "separate but equal", and thus the only true solution is to offer marriage licenses to all couples.

#### *No Negative Externalities*

Additionally, many assert that the implementation of genderless marriage policies will have no real effect on society outside of the homosexual population. This is in response to opponents who feel that same-sex marriage will somehow negatively affect opposite-sex marriages and traditional families. Laura Langbein and Mark A. Yost assert that marriage is a non-scarce right. That is, one couple's right to marry, or even the marriage itself has no effect on another couple's right to marry, relationship, or well-being. These proponents argue that there are no negative external costs to the society at large (2009, p. 292).

In his book *Why Marriage Matters*, Evan Wolfson expounds on that argument, stating the following:

The couples seeking the freedom to marry are not asking to change the *definition* of marriage, its responsibilities, or its legal consequences. Rather they seek to

remove a government restriction on the choice of *whom* they can marry with the same commitment and legal meaning, just as America has changed other restrictions in the past. (2004, p. 144)

The ensuing argument is that since genderless marriage policy doesn't affect heterosexual couples, they should not be allowed to block homosexuals from participating in the same matrimonial practices.

### *Arguments Responding to Critics of Genderless Marriage*

Many of the arguments in support of gay marriage are those created in response to the arguments against gay marriage. For example, the argument in response to the procreation shortcomings of same-sex couples is that many heterosexual couples never procreate during marriage. Often, they do not even have the intentions or even the ability to procreate; however, they are not denied the right to marry (Wolfson, 2004, p.80). In response to the argument regarding traditional heterosexual couples essential for raising children and healthy families, the facts are that "married heterosexual couples with children comprise less than one-quarter of American households, according to the 2000 U.S. Census" (Cahill, 2004, p. 43). Furthermore, studies have shown that "parental sexual orientation was not associated with differences in the quality of parent-child relationships when children's data were analyzed" (Tasker, 2010, p.36). Supporters argue that surely any household with two parents, even same-sex parents is better than a one-parent household. The dynamics and nature of families is changing, and with it the laws regarding marriage should also change.

In response to opposition that suggests that same-sex marriages would lead to “slippery slope” situation, supporters of genderless marriage have this response: “The same panic occurred when interracial marriage became constitutional... The truth is, marriage has changed many, many times over the centuries. Each change should be judged on its own terms, not as part of some seamless process of alleged disintegration” (Sullivan, 2004, p. 280).

### *State Revenue Arguments*

Other supports of genderless marriage policy argue that the inclusion of homosexuals under marriage law would increase state revenues. A study completed by the University of California, Los Angeles shows that the same-sex marriage amendment in New Jersey will actually increase state revenue in the first three years following the implementation of the law. Table 1, shown below, provides a detailed breakdown.

*Table 1: New Jersey State Revenues from Same-Sex Marriage*

| Revenue Source  | Fiscal Effect (in millions) |
|---|-----------------------------|
| State and Local Tax Revenues from Weddings of Resident Same-Sex Couples                 | \$5.8                       |
| State and Local Tax Revenues from Weddings and Tourism of Out of State Same-Sex Couples | \$6.9                       |
| State and Local Tax Revenues from Wedding Guests of Resident Same-Sex Couples           | \$1.2                       |
| Marriage License Fees from Resident Same-Sex Couples                                    | \$0.3                       |
| Marriage License Fees from Out-of-State Same-Sex Couples                                | \$1.0                       |
| <b>Total First Three Years</b>  | <b>\$15.1</b>               |

(Sears, Badgett and Ramos, 2009)

These compelling financial figures have assisted in the general increased tolerance towards genderless marriage and homosexuals in the U.S.

## Changing Attitudes Towards Genderless Marriage and Homosexuals

Recent literature on the subject is clear in its assertion that Americans are becoming more tolerant to homosexual behavior in general. “According to General Social Survey data, as recently as 1990 over 75 percent of Americans believed that sexual relations between two adults of the same sex are ‘always wrong.’ By 2004, the percentage expressing that belief dropped to 57.6” (McVeigh & Maria-Elena, 2009). Table 2, shown below, displays the effect of such changing attitudes on a political level in regards to the decrease in percentage of voters who have supported same-sex marriage bans from 1998 to 2008. 61 percent of Californians, for example, supported a ban in 2000, compared to just 52 percent, only 8 years later.

*Table 2: Popular Vote in Support of Same-Sex Marriage Bans by State and Year*

| State        | Year | Percent | State          | Year | Percent |
|--------------|------|---------|----------------|------|---------|
| Alaska       | 1998 | 68.1    | Oregon         | 2004 | 56.6    |
| Hawaii       | 1998 | 69.2    | Utah           | 2004 | 65.9    |
| California   | 2000 | 61.4    | Kansas         | 2005 | 69.9    |
| Nebraska     | 2000 | 70.1    | Texas          | 2005 | 76.3    |
| Nevada       | 2000 | 69.6    | Alabama        | 2006 | 81.2    |
| Nevada       | 2002 | 67.2    | Arizona        | 2006 | 48.2    |
| Arkansas     | 2004 | 75.0    | Colorado       | 2006 | 55.0    |
| Georgia      | 2004 | 76.2    | Idaho          | 2006 | 63.3    |
| Kentucky     | 2004 | 74.5    | South Carolina | 2006 | 78.0    |
| Louisiana    | 2004 | 77.8    | South Dakota   | 2006 | 51.8    |
| Michigan     | 2004 | 58.6    | Tennessee      | 2006 | 81.3    |
| Mississippi  | 2004 | 85.6    | Virginia       | 2006 | 57.0    |
| Missouri     | 2004 | 70.6    | Wisconsin      | 2006 | 59.4    |
| Montana      | 2004 | 66.6    | Arizona        | 2008 | 56.2    |
| North Dakota | 2004 | 73.2    | California     | 2008 | 52.3    |
| Ohio         | 2004 | 61.7    | Florida        | 2008 | 61.9    |
| Oklahoma     | 2004 | 75.6    |                |      |         |

(McVeigh & Maria-Elena, 2009)



Because attitudes towards interracial marriages were once similar to current attitudes towards gay marriage, many scholars have drawn parallels between same-sex marriages and interracial marriages. And, once attitudes towards interracial marriage began to change, the laws began to follow. Although some argue that there is no parallel between race and sexual orientation, Professor Geoffrey Stone states:

It is inevitable that the Supreme Court will hold the ban on same-sex marriage unconstitutional. We are at a moment in history that is analogous to the period between 1948, when Justice Roger Traynor, speaking for the California Supreme Court, held a state law against miscegenation unconstitutional, and 1967, when the U.S. Supreme Court finally embraced that view for the nation as a whole. Morally, legally, historically, and perhaps most importantly, constitutionally, it is right, good, and inevitable that the Supreme Court will similarly invalidate the ban on same-sex marriage. (2009, p. 1)

Changing attitudes towards genderless marriage are also evidenced by the increase in rights afforded to homosexual couples. For example, “On June 17, 2009, President Barack Obama issued a memorandum directing executive agencies to extend benefits to federal employees in same-sex domestic partnerships or same-sex marriages within the authority of existing law” (Ginsberg, 2010, p. 2). In general, Americans are becoming more tolerant and accepting of the homosexual lifestyle. Because of this trend, same-sex couples have been afforded more rights than ever before, evidenced by civil unions, domestic partnerships and the six jurisdictions that do allow same-sex marriage. It appears that the changing attitudes have the country inching closer to separating religion from the state, in support of same-sex marriage.

## The Separation of Church and State

Due to the general increase in support for genderless marriage, the ideals of separation of church and state have been brought to the forefront of the literary discussion. This has led many researchers to ask the question: Is the genderless marriage debate simply an issue of separation of church and state?

It is no secret that the Judeo-Christian background of America has played a large role in the debate on same-sex marriages. Generally these religious institutions are in firm disagreement that homosexuals should marry. Frederick Hertz and Emily Doskow present an interesting argument proposing how this is an issue of church verses state:

Marriage laws are entirely civil in nature, meaning they are governed by the laws made by an elected legislature. Couples obtain a license to marry from the county clerk, but they have the option to become legally married in a church, synagogue, mosque, or other symbolic location. While not of any real legal significance, this cultural practice has led many to blur the lines between religious and civil marriage--- severely hampering efforts to remove the legal prohibition on same-sex couples enjoying the benefits of civil marriage. (2009, p. 32)

According to a Supreme Court declaration in 1947, “the First Amendment has erected a wall between church and state. That wall must be kept high and impregnable” (Barton, 1989, p. 11) However, David Barton points out that many of the founding fathers believed that religion was central to the success of the union. The unions first President, George Washington argued that “true religion affords to government its surest support” (1989, p. 246). Therefore, Barton argues that the so-called “separation

of church and state” is a myth. President George W. Bush supported this idea that the two should not be separated, arguing that “marriage cannot be severed from its cultural, religious and natural roots without weakening the good influence of society. Government, by recognizing and protecting marriage, serves the interests of all” (Suarez, 2006, pg. 93). So, perhaps there is no “separation” in actuality.

Many experts argue that a true separation of church and state would effectively sever ties of morality from civil government (Hamburger, 2002, p. 19). But is there no sense of morals and ethics outside of religion? Surely that is inaccurate. In fact there are many separate religions and belief systems that share basic ideas of morality. Basic human logic and feeling tells us, for example that actions such as murder, rape and theft are inherently wrong and unacceptable. The trick is to separate individual religions from government without separating morality from civic practices.

In his book, *The Holy Vote*, Ray Suarez brought up an interesting point when he asked why the issue of genderless marriage belongs in the church more than an issue such as school construction bonds or road taxes (Suarez, 2006, p. 99). Many submit that perhaps the civil institution of marriage should be separated from the church, since the opposition of genderless marriage is deeply rooted in religion. The bottom line is that the religious ideals in this country are keeping homosexuals from enjoying the same civil rights that other Americans are able to enjoy.

## Conclusion

This review of literature has displayed that it is apparent that support for genderless marriage policy in America is on the rise. Socially and legally, the country is becoming increasingly liberal with regards to homosexual rights, including the right to have their relationships recognized at the same level as heterosexuals. There is a lack of new and compelling arguments that support a ban on genderless marriage policies.

While it is clear that many groups and individuals still vehemently oppose any ideas surrounding same-sex marriage, there has been a growing trend of increased marriage rights over the past decade. Even though some of the more conservative states will not likely legalize genderless marriage in the near future, it is almost inevitable that more states will pass amendments legalizing same-sex marriages. The debate and discussion will undoubtedly continue; but in spite of the moral, religious and social opposition that does remain, the U.S. may be approaching a time when any two consenting adults, regardless of gender, will be able to marry in any state in the union.

### *Policy Recommendation*

The literature review has led to the following recommendation: Policymakers and politicians should push for genderless marriage laws, advocating for the separation of church and state with regards to the institution of marriage. In closing, perhaps a fitting proposal is a Federal genderless marriage policy that provides equal rights to couples regardless of sexual orientation, throughout the country and across state lines. This policy would allow for the same basic civil rights for all couples, while also giving opportunities for individual religions, sects, denominations, churches and belief systems to allow or disallow same-sex marriages on their own terms.

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