

Teaching about Same-Sex Marriage as a Policy and Constitutional Issue

Diana Hess

Whether same-sex marriage should be legally recognized in the United States is a highly controversial and divisive issue. A range of “hot button” questions related to same-sex marriage are being decided in Congress, state legislatures, federal and state courts, and at the ballot box. A recent opinion poll shows that while 57 percent of the U.S. public supports legalizing civil unions for same-sex couples, only 39 percent approve granting these couples full marriage rights.¹ These national statistics, though, hide the wide variance from state to state. Consider that in Rhode Island, 53 percent of the public supports legalizing same-sex marriage, while in Alabama only 23 percent does.²

Polls also show that young people are much more likely to support legalizing same-sex marriage than are older people. In a recent Gallup Poll, almost 60 percent of 18-29 year olds reported favoring the legalization of same-sex marriage—the only age group for which there is majority support.³ This age-cohort difference helps explain why political scientists Patrick Egan and Nathaniel Persily predict that “If current trends continue, a majority of Americans will support same-sex marriage by the year 2014.”⁴

Regardless of whether their prediction is borne out, it is surely the case that the debate over same-sex marriage will continue to spark heated and difficult conversations over what the concept of marriage should mean, who should have access to the many legal benefits attached to marriage, and whether such decisions should be made at the local, state, or fed-

eral levels, in the courts, by legislatures, or by the people directly. In this column, I will argue that the issues need to be talked about in classrooms. The time is ripe to engage secondary students in thoughtful, rigorous, well-facilitated deliberations about controversial policy and constitutional questions regarding same-sex marriage. As one high school student told me, “Gay marriage is a new issue that is coming up. It is going to be around for a while... it is probably going to affect the way we are citizens for the rest of our life. So if it is relevant to us, I think we should talk about it.”⁵

Of course, some teachers already engage their students in this issue. In ongoing research of controversial issue discussions in high school social studies, I have seen a number of high-quality lessons about same-sex marriage. But these are probably the exceptions. It’s likely that in the vast majority of social studies

classes same-sex marriage is not part of the explicit curriculum. Some teachers have told me that they avoid the issue intentionally, fearing that a class discussion would generate more heat than light. A number of teachers have told me that they don’t know how to protect students in their classes who are gay or who have gay family members or friends from what other students might say. I’ve heard from teachers who worry about students whose religious views strongly influence their ideas on the matter. I also hear from teachers who fear that parents may object to a lesson about same-sex marriage because they believe that including the issue in the curriculum is tantamount to endorsing a particular point of view.

These are very real concerns from teachers who do not want to harm students or offend parents. But avoiding the issue deprives students of the opportunity to prepare to participate in the national debate over one of the most significant civil rights issues of our time. Classroom deliberations on this topic can teach students essential content and skills that should be at the core of a democratic education curriculum. Including this issue also sends the message that everyone “counts” as a member of society—that issues of particular importance to the gay community are a legitimate part

People with opposing viewpoints on Proposition 8 demonstrate outside the California Supreme Court in San Francisco, March 5, 2009. California's Supreme Court ruled in May to uphold the state constitutional amendment passed by voters in November banning gay marriage.

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of school study.⁶ To be sure, this is an issue that needs to be handled well and with intention, but if teachers come to the discussion well-informed and with a clear focus they can avoid these dangers and allow students to discuss this issue in ways that are not likely to happen outside of the classroom. Schools tend to be more ideologically diverse than other spaces that young people inhabit, so they may hear a range of perspectives that they probably won't encounter elsewhere.⁷

Policy or Constitutional, Federal or State?

In order to foster a fair discussion of controversial issues, it is important to be clear about what type of issue is being discussed. Part of the debate over same-sex marriage concerns framing: whether it should be dealt with as a federal or state-level issue, or as a constitutional or policy issue. Here I will focus on teaching about same-sex marriage in two ways, as a *federal* policy and as a *federal* constitutional issue. My aim is two-fold: to clarify distinctions between policy and

constitutional issues that apply to same-sex marriage (and to many other issues as well), and to explain the similarities and differences in what students would learn in a policy discussion compared to one that focused on constitutional issues.

Though much of the policy and constitutional activity surrounding same-sex marriage occurs on the state level, I will use two federal examples to illustrate how the topic of same-sex marriage could be taught as a policy or a constitutional issue. The first is a proposed federal law—thus a policy issue: Should the *Respect for Marriage Act of 2009* become law? The second is a federal constitutional question found in at least two legal cases currently in the lower federal courts: Do laws and constitutions that prohibit same-sex marriage violate the 14th Amendment of the United States Constitution? Both of these issues are legitimately and productively open for debate.

Policy and constitutional issues are open questions, meaning there are multiple and competing answers that are legitimate—even though people often have

strongly held and well reasoned opinions about which answer they prefer. This is an especially critical point with respect to same-sex marriage issues. There are people on both sides of same-sex marriage issues who argue they should be treated as “closed questions”—questions for which there are right answers that teachers should want students to give and believe. Although “closing an issue” may sound odd on its face, we know that many questions are presented in the curriculum in this fashion, for good reasons and to good effect. For example, my sense from talking to teachers is that questions related to interracial marriage are typically taught as closed issues now—that *Loving v. Virginia*, the 1967 United States Supreme Court case that ruled state bans on interracial marriage unconstitutional—was correctly decided and should be lauded. By presenting the same-sex marriage issue as a policy and constitutional question, I am advocating that for the time being social studies teachers should treat these questions as open, even though I recognize that this

pedagogical stand is itself a matter of controversy.⁸ Why treat the same-sex marriage issue as open? First, in the world outside of school, this issue is functionally open and as a general rule, I think it is more authentic to position issues similarly to the way they are treated outside of school. The second reason is more pragmatic: I think it is more likely that administrators, parents, and other community members will support the inclusion of this topic in schools if it is treated as a matter for deliberation. That is, as teachers we should argue: that this is an important enough public issue to receive curricular time; that it can result in significant learning about law (especially the 14th Amendment), federalism, and separation of powers; and that we want students to engage in a rigorous and fair analysis of multiple points of view.

Same-Sex Marriage as a Federal Political Issue

When Congress passed *The Defense of Marriage Act* (DoMA) in 1996, it defined marriage for the first time under federal law as a union between a man and a woman. This means that only married heterosexual couples are eligible to receive any of the estimated 1,138 federal benefits designated for married people.⁹ Supporters of this legislation hoped to dissuade states from passing laws allowing same-sex marriage and to eliminate the requirement that states recognize same-sex marriages made in other states. President Clinton signed DoMA into law after it was approved overwhelmingly in Congress. Some of the federal benefits that opposite-sex married couples receive include income tax deductions, the ability to file joint taxes, and the ability to receive a spouse's inheritance upon death. There are also extensive benefits given to the spouses of federal government employees and military veterans including health care, job placement assistance, survivor benefits, and the right to the continuation of certain benefits if one's spouse dies or the couple divorces.

While DoMA prevents same-sex couples from receiving *federal* benefits, it does not and cannot dictate which *state* benefits are given to married couples, how individual states define marriage, or what state laws are made concerning other facets of the daily lives of married couples. This feature of the U.S. federal system of government has resulted in a wide range of state laws dealing with what constitutes marriage and what rights married people receive. Same-sex marriage advocates are trying to fight against DoMA by pushing state legislatures to pass laws legalizing same-sex marriages and/or same-sex civil unions and to recognize same-sex marriages performed in other states, thereby weakening the influence of DoMA.

On September 15, 2009, the *Respect for Marriage Act of 2009* was introduced in the House of Representatives, and currently has more than 90 sponsors and co-sponsors.¹⁰ Its primary intent is to repeal DoMA. While it would not require states that prohibit same-sex marriage to recognize the marriage of same-sex couples from other states, it would require the federal government to provide federal benefits to same-sex couples who have been married in a state or another country that has legalized same-sex marriage. Specifically, the bill states:

For the purposes of any Federal law in which marital status is a factor, an individual shall be considered married if that individual's marriage is valid in the State where the marriage was entered into or, in the case of a marriage entered into outside any State, if the marriage is valid in the place where entered into and the marriage could have been entered into in a State.

The bill is currently in the House Judiciary Committee. President Obama has supported repealing DoMA, but the White House has not indicated whether it will support this particular bill. Moreover, Representative Barney Frank, one of the most prominent gay members

of Congress, is not supporting the bill at this time because he believes there are other important items that should be on the legislative agenda first—such as fighting to repeal the military's "don't ask, don't tell" policy.

What Students Learn from Policy Issue Discussions

Let's imagine a lesson about whether this bill should become law. There are many types of activities that students could engage in to learn about this issue: a mock congressional hearing, a mock legislative debate, a Structured Academic Controversy, a public issues discussion, or a debate.¹¹ While these lesson structures have important differences—their overarching similarity is a focus on discourse among students about the issue at hand.¹² The discourse should focus on core questions. For example, "Is there a problem that needs a solution, and if so, what is it?" "Is this policy a fair solution to the problem?" And, "Will it work?" In such a discussion, one would expect to hear many different types of arguments and evidence used: ethical, moral, economic, historical, personal experience, sociological, and, in this case, constitutional or legal. The discussion should focus also on the history and nature of the particular problem the policy is designed to address, as well as the goal the policy will work toward. In the case of the *Respect for Marriage Act of 2009*, one would also expect to hear discussion about issues related to federalism—that is, under what circumstances should the federal government get involved in regulating marriage given that, before DoMA, marriage was largely in the province of the states? Policy-focused discussions will also center on what the desired end goal of an issue should be and whether or not a particular policy will accomplish it. If a discussion of a policy issue is effective, students should build a deeper and broader understanding of the causes and nature of the particular problem(s) that the policy issue is about; the origin(s) and history of the policy; what makes

the policy controversial; who supports it and who does not; and arguments in favor of and against the policy that are based on a variety of different types of evidence and analyses (e.g., economic, historical, etc.). Many teachers hope that as a consequence of policy discussions, students will become more motivated to act politically. In this instance, teachers may want to ensure that students who are interested in advocating for or against the *Respect for Marriage Act of 2009* know how to do so.

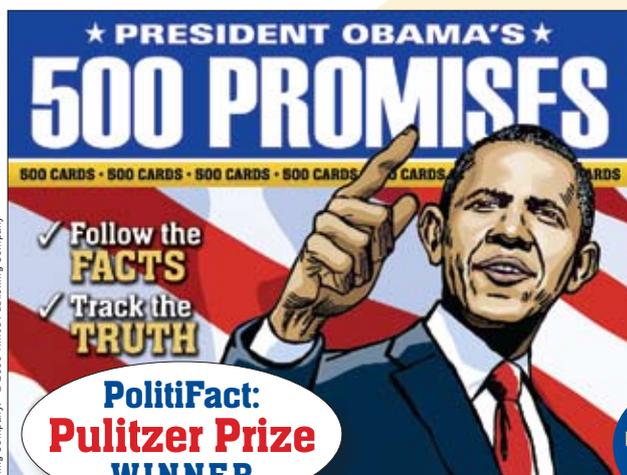
Same-Sex Marriage as a Federal Constitutional Issue

Constitutional issues are questions about the meaning of the Constitution that spark significant disagreement. Such issues are heard in state and federal courts. They require courts to consider whether or not an existing government policy or action is constitutional. That is, can the government exercise power in a particular way

without violating the Constitution? Or, in some cases, *must* the government act in a certain way because the Constitution requires it? For example, the question of whether or not the U.S. Constitution should be interpreted to prohibit the state and federal governments from banning same-sex marriage is currently an example of the first type of question. The question before the federal courts is whether bans on same-sex marriage violate the 14th Amendment. In other words, are the federal and state governments that have policies or constitutional provisions that ban same-sex marriage in compliance with the federal Constitution? If a federal court ruled that there was a right to same-sex marriage under the federal Constitution, then one can imagine subsequent cases that focused on what the government was required to do because of the right (for example, to extend the benefits that currently go to heterosexual couples to same-sex couples). Conversely,

if a federal court ruled that there was no right to same-sex marriage, then states and the federal government could grant such a right through court cases (in state systems) or state or federal legislation, but would not be required to do so. That is because the federal courts establish a constitutional floor, not the ceiling. This is a critical aspect of constitutionalism in the United States that needs to be explicitly taught because it is so often misunderstood. States can and often do extend rights to their citizens that go beyond what is required by the federal Constitution. What they cannot do is refuse to extend rights to people who are entitled to protection by the federal Constitution. There are at least two federal court cases about same-sex marriage that are currently in play—and it is possible that the Supreme Court will grant *certiorari* in either one of these cases, or another that may arise in the future.¹³

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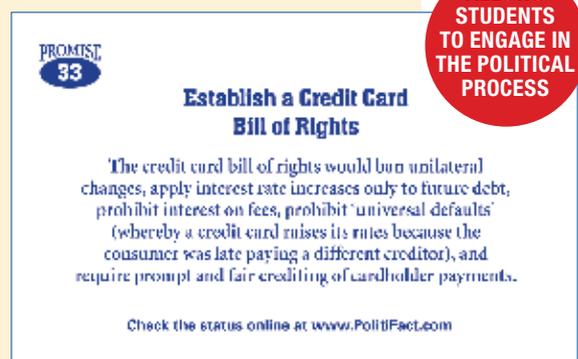
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What Students Learn from Constitutional Issues Discussions

Because of the core difference between constitutional and public policy issues, the types of arguments and the evidence used to discuss each should differ. A constitutional discussion should focus on the actual text of the Constitution and should explore competing interpretations of what a particular part of the Constitution means (or should mean) relative to a particular government policy and significant case precedents. In the case of the same-sex marriage question, attention would need to focus on the 14th Amendment. Recall, this amendment forbids the states (and by court interpretation, the federal government as well) from *depriving any person of life, liberty, or property, without due process of law or denying to any person within its jurisdiction the equal protection of the laws*. Students will also need to study previous Supreme Court decisions such

as: *Zablocki v. Redhail* (1978), which established heterosexual marriage as a fundamental right; *Loving v. Virginia* (1967), which established that laws prohibiting interracial marriage violated the equal protection clause; and *Lawrence v. Texas* (2003), which established that same-sex sexual activity is a fundamental right, but also said that the ruling would not provide a precedent for same-sex marriage advocates. If a discussion of a constitutional issue is effective, students should achieve a variety of important educational goals, including: building a deeper and broader understanding of the meaning of the particular part of the Constitution; recognizing that meaning is socially constructed and changes over time; understanding the important precedents for the issue and various interpretations of how they apply to the issue at hand; knowing the facts of a case; and understanding the process used by courts (and other branches of government) to make decisions about the issue.

This distinction between what is being decided with controversial political issues compared to constitutional issues is a crucial one that if misunderstood, can lead to both bad teaching and bad government. For example, I frequently encounter teachers who use constitutional cases as the only preparation for engaging students in policy decisions—which is problematic because, as noted above, effective policy discussions should draw on a much broader range of sources. Moreover, it makes it difficult for students to understand that just because something *can* be done, that does not necessarily mean it *should* be done.

I strongly encourage teachers to include both types of issues in their classes—and to link them when possible while still maintaining critical distinctions. It may be that there simply is not enough time to include both policy and constitutional issues related to same-sex marriage in a course. If that is the case, then one criterion to use to determine whether to teach the topic as a policy or constitutional issue is curricular fit. For example, in a history course that focuses on civil rights legislation, a teacher may want to include the federal policy issue as a contemporary example. Or in a government or law course it may work well to include the federal constitutional issue as a recent case within a larger treatment of the 14th Amendment.

It is important to note that there are learning outcomes to be achieved in either a policy or constitutional issues discussion. Most significantly, either issue would help students build their skills as participants in a discussion of a topic that often generates a lot of controversy. To build these skills, we would want them: to listen with respect, to ask questions of their classmates, to articulate their own views and the reasons supporting them, to have their views examined and to be courageous enough to examine the opinions of others. In short, we want students to aspire to the best examples of public discourse.

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We should not be aiming to “change their minds” but to broaden and deepen what is in their minds. We want them to know more coming out than they did going in—about the content needed to understand the issue, their own views, and those of others. As one student said after participating in a discussion of same-sex marriage in her high school government course: “When it comes to issues like gay marriage or abortion, people always have different ideas and I felt that in this class too.” Although students sometimes reported changing their opinions on highly controversial issues as a result of discussing them in class, more typically students said that learning about the issue caused them to better understand the reasons supporting their positions. Students reported gaining the confidence to discuss important issues—not to be afraid of them. Democracies cannot function well if we fear public discourse about our most challenging issues. If we can help students become less afraid of talking about difficult public issues, then we have achieved one of our most important goals as teachers. 📖

Notes

1. See poll results from Pew at people-press.org/report/553/same-sex-marriage.
2. J. Lax, and J. Phillips (forthcoming), “Gay Rights in the States: Public Opinion and Policy Responsiveness,” *American Political Science Review* 103, no. 3 (2009).
3. Thirty to 49 year olds oppose same-sex marriage by 57 percent, 50 to 64 year olds by 61 percent, and for those over 65, 66 percent oppose it. See Gallup Poll results at www.gallup.com/poll/118378/majority-americans-continue-oppose-gay-marriage.aspx.
4. For Egan and Persily article, see www.pollingreport.com/penp0908.htm.
5. This quote (and the one on p. 349) came from interviews with high school students participating in the *Discussing Controversial Issues Study* for which the author is the principal investigator—for information about the study, contact the author at dhess@wisc.edu.
6. S.J. Thornton, “Silence on Gays and Lesbians in Social Studies Curriculum,” in *Social Studies Today: Research and Practice*, ed. W.C. Parker (New York: Routledge, 2009), 87-94.
7. For discussion about ideological diversity in high school social studies classes, see D.H. Hess, *Controversy in the Classroom: The Democratic Power of Discussion* (New York: Routledge, 2009) Chapter 6.
8. For discussion about “closed” versus “open” issues, see Hess, *Controversy in the Classroom*, Chapter 7.
9. See the letter to Senator Frist from the Government Accounting Office, available at www.gao.gov/new.items/d04353r.pdf.

10. For information about this bill, go to www.govtrack.us/congress/bill.xpd?bill=h111-3567.
11. For an explanation of these and other lesson structures that work well with controversial political and constitutional issues, see Larson & Keiper, *Instructional Strategies in Middle and High School Classrooms* (New York: Routledge, 2007).
12. W.C. Parker, “Public Discourses in Schools: Purposes, Problems, Possibilities,” *Educational Researcher* 35, no. 8 (2006), 11-18.
13. For information and a lesson plan about what causes the U.S. Supreme Court to grant certiorari in a case, go to www.streetlaw.org/en/Page.sclessons.aspx. For information about one of the federal court cases

dealing with same-sex marriage that has attracted a lot of attention, go to www.nytimes.com/2009/05/28/us/28marriage.html.

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