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The Constitutionality of Same Sex Marriage

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Marriage is recognized as a fundamental right by the Supreme Court and is one of the most important institutions in society today. Marriage is seen by society as a way to show the most devoted relationships and thus holds great emotional and societal implications. Through the years the Supreme Court has struck down many legislative attempts to limit citizens freedom to marry whomever they chose. Specifically, the Court has used the 14th Amendment's Due Process Clause and Equal Protections Clause along with other portions of the Constitution to recognize the fundamental right of citizens to marry. Yet in today's society there is one group of citizens that are still being denied this basic right – same sex couples.

Same sex marriage is a very controversial issue with large support networks existing for both sides of the debate. Society has evolved a great deal since the founding of this country. Today homosexuality is recognized and there is a much higher acceptance for homosexuals and bisexuals than there has been in the past. 50 years ago television shows such as Queer as Folk and Queer Eye for the Straight Guy would not have even been considered but today such a thing is pretty common place on both local television stations as well as cable. Today there are groups such as The Human Rights Campaign, FLAGG, and many high schools even contain a chapter of the Gay/Straight Student Alliance. Groups such as these spread information about the gay lifestyle and homosexuals to dispel negative myths that exist about gay citizens. Many states even have statues that make discrimination based on sexual orientation illegal much like discrimination based upon sex or race.

Homosexual couples, just like heterosexual couples, interracial couples and other groups that the Supreme Court has recognized, should have a fundamental right to

marry. Under the Constitution their right to get married and receive the benefits (emotional, societal, and economical) of marriage should be established. Marriage has been declared a fundamental right in the United States and for the government to deny marriage benefits to same sex couples who wish to be married is a violation of the Constitution. I will use constitutional evidence as well as decisions of state courts and the work of legal scholars to prove same sex marriage should be a constitutional right.

State Supreme Court Decisions

Two separate supreme courts dealt with the question of same sex marriage in November of 2003. These courts came to drastically different conclusions based on interpretations of their state constitutions. On November 5th the New Jersey Supreme Court held that same sex marriage was not a right guaranteed to citizens.¹ The court said that marriage was not specifically defined in their constitution as existing solely between a man and a woman but that omission does not mean the right should apply to same sex couples. The New Jersey Supreme Court took a legislative intent approach to interpreting their constitution. They cite that back when the legislature made the laws regarding marriage, homosexuality was not even a consideration so naturally the legislature did not intend for the law to apply to same sex couples.² The court stated the restraintist view that courts exist to interpret laws as the legislature intended.

To back up their view they stated that the United States Supreme Court recognized marriage as a fundamental right more than 60 years ago when marriage was understood to existing between a man and woman. The US Supreme Court has never

¹ *Lewis v. Harris*. Superior Court of New Jersey. (2003).

² *ibid*.

extended these rights to same sex couples.³ This was challenged in the case *Dean v. District of Columbia* where a ban on same sex marriage was challenged under the federal constitution on due process grounds. The US Supreme Court refused to hear the case after a lower court found that same sex marriage was not a fundamental right.⁴ The New Jersey Supreme Court included in their decision an evaluation of other state's laws and stated the fact that most other states also have same sex marriage bans either through statute or a constitutional amendment. The court pointed out that no state had yet to recognize the right of same sex couples to wed.⁵

This assertion was ironic when just days later on November 18th the Massachusetts Supreme Court recognized same sex marriage as a right under their state constitution. This court took a more activist stand than the New Jersey Supreme Court. This court asserted that marriage is a very important institution that makes society more stable as well as bringing benefits and obligations to both the couples and their children.⁶ The Massachusetts State Constitution says that all citizens should keep dignity and equality and it forbids treating a group as second class citizens. The Supreme Court says anything less than full and equal marriage rights for same sex couples would be doing just that. Thus making this a direct violation of the constitution. The court declared that banning same sex marriage has no rational reasoning and the state has no legitimate interest and therefore cannot deny the group of citizens a recognized fundamental right.⁷

³ *Lewis v. Harris.*

⁴ *ibid.*

⁵ *ibid.*

⁶ *Goodridge v. Department of Public Health.* Massachusetts Supreme Court. (2003).

⁷ *ibid.*

The court also placed a lot of emphasis on the discussion of the children of same sex couples and concluded that these children should not be denied social and economic benefits because of their parent's sexual orientation. When the court dealt with the question of the procreation argument it found that marriage in society today has many other functions besides simply procreation. It found that the purpose of marriage is for partners to commit themselves to each other and this function goes beyond simply producing offspring.⁸ The Massachusetts Supreme Court further stated that allowing same sex couples to marry does not devalue traditional marriages because same sex couples are willing to support and commit themselves to each other as heterosexual couples are. The court concluded that the fundamental right to marry carries little meaning if citizens are not allowed to marry whom ever they desire, regardless of gender. At the conclusion of the case the term civil marriage was redefined as "the voluntary union of two person as spouses, to the exclusion of all others."⁹ This definition was more consistent with the emphasis on equality that is found in the Massachusetts State Constitution.

The Massachusetts Supreme Court case received a great deal of attention because its decision was the first of its kind in the United States. Numerous groups submitted amicus curiae briefs in favor of both sides of the argument. The briefs submitted in favor of same sex marriage had many similarities in their arguments that address the reasoning used by opponents of same sex marriage.¹⁰ They argue that since marriage was recognized as a fundamental right the right has been expanded to include groups of citizens rather than to exclude them. Examples of this are seen by the

⁸ *ibid.*

⁹ *ibid.*

Supreme Court decision that expanded the marriage right to include interracial couples and the changing of laws that prevented a woman who gets married from losing her rights and her identity. At the time these rights were given the views were not necessarily popular with a majority of the citizens.¹¹

Additionally the amicus briefs claimed that a 'civil union' or other special category given to same sex couples who wish to marry is not enough to satisfy the constitutional standards. Among other things this special category would give the impression that same sex couples are not legally or socially equal to heterosexual couples who get married. The Massachusetts Supreme Court, in their opinion, used this same line of reasoning as an argument in favor of equal marriage rights for same sex couples.¹² The briefs also addressed the procreation line of reasoning. They stated that if procreation were the only purpose in a marriage people who are infertile or past the child bearing age would not be allowed to marry either. An unwillingness of a spouse to have sexual intercourse with his or her partner is also not a legitimate ground for divorce today and if procreation were the only goal in marriage then this would surely constitute a reason to divorce and seek another partner.¹³ With the advances in modern technology and the availability of adoption, same sex couples are still able to have their own children or raise children they have adopted. However, if a second class status is placed on the same sex couples themselves their children are going to carry the

¹⁰ Massachusetts Lesbian & Gay Bar Association. *MLGBA Legal Briefs*. Nov/Dec 2002.

¹¹ *MLGBA Legal Briefs*.

¹² *ibid.*

¹³ *ibid.*

same status and burden throughout their lives. This could have great psychological impact on the children. ¹⁴

The *Dean* case cited by the New Jersey Supreme Court was originally decided in January of 1995 by the District of Columbia Court Of Appeals. The majority also used much of the reasoning used by the New Jersey Supreme Court in this case to rule against same sex marriage as a fundamental right. ¹⁵ The District of Columbia Court stated that the fact homosexuals were omitted from the Marriage and Divorce Act should be interpreted to mean that they were excluded rather than included. The intention of the legislature at the passing of this law was for one man to marry one woman and if a change to that traditional way of thinking is made it should come from the legislature rather than the courts. ¹⁶ This is an example of the legislative intent approach and the restraintist approach that the New Jersey Supreme Court used. The courts also both use the line of reasoning that other jurisdictions have consistently denied same sex couples the right to marry in the past. However, the recent decision by the Massachusetts Supreme Court makes that line of reasoning more difficult to use though a majority of the states have still yet to recognize same sex marriage as a right. Had the Massachusetts case been decided prior to *Dean* and the New Jersey case it is possible that some importance would have been placed upon that decision and a ruling more favorable to homosexual couples would have been reached.

State Constitutional Differences

In November of 2003, the Massachusetts Supreme Court and the Superior Court of New Jersey both dealt with cases involving the constitutionality of same sex

¹⁴ *ibid.*

¹⁵ *Dean v. District of Columbia*. District of Columbia Court of Appeals. (1995).

marriage. These courts reached vastly different decisions. On November 5th the Superior Court of New Jersey found that same sex marriage was not a protected right. Days later on November 18th the Massachusetts Supreme Court held that under their state constitution same sex marriage is a protected right and any laws which prohibit such are unconstitutional. While the difference in approaches taken by these courts account for some of the differences in their opinions, the state constitutions that they were interpreting also played a role.

Under the Massachusetts Constitution, equality plays a large role. The word ‘equality’ is used 5 times in different portions of the constitution.¹⁷ The one hundred and sixth Article of Amendment adopted in 1973 and 1975 by the legislature and ratified in 1976 by the people states that “Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.”¹⁸ Consistent with this portion of the constitution was the Supreme Court’s declaration that creating a second class status for a group of individuals is forbidden. The Court went on to say that denial of equal marriage rights for same sex couples could be creating such a second class status. It held that marriage is a fundamental right that the legislature has no rational reason infringe upon.

On the other hand, the New Jersey State Constitution makes no mention of the word equality. While it does state that citizens have “certain natural rights,” it contains no clause that states equality under the law like the Massachusetts Constitution does.¹⁹ The current New Jersey Constitution was adopted in 1947 however many amendments

¹⁶ *ibid.*

¹⁷ Constitution of the Commonwealth of Massachusetts. September 23, 2004.
<http://www.mass.gov/legis/const.htm>

¹⁸ *ibid.*

have been since that time. The differences in these constitutions may be subtle but even such a difference could account for the variation in these case decisions. Another thing we can determine from these differences is the attitudes held by the legislatures and people of the states. Massachusetts is a more open-minded state whereas New Jersey tends to be more traditional and reluctant to vary from the status quo.

To determine whether a decision similar to that made by New Jersey or similar to that made by Massachusetts would be reached if same sex marriage rights were applied to the federal constitution one must determine which state constitution is more similar to the United States Constitution. Nowhere within the New Jersey Constitution is the word equality found and initially it was not found in the United States Constitution either. Throughout the history of the US, the national constitution has only been amended twenty seven times and one of those amendments was the 14th Amendment that guaranteed 'equal protection of the laws' to all US citizens.²⁰

Supreme Court interpretations are also a judge of the existence of 'equality' within the US Constitution. Although some court opinions vary through time based upon who serves on the court, the general trend of expanding rights to different groups has continued. For example, in *Brown* the Supreme Court granted equal access to African Americans.²¹ Even the right to marry has been expanded to include interracial couples²² and to prevent a woman from losing her identity and property when she weds. The meaning of certain parts of the constitution have also been modernized and liberalized to ensure more freedoms to citizens. The "Freedom of Speech" guaranteed

¹⁹ New Jersey State Constitution. October 03, 2004.

<http://www.njleg.state.nj.us/lawsconstitution/constitution.asp>

²⁰ United States Constitution. Fourteenth Amendment. 1868.

²¹ *Brown v. Board of Education*.

in the constitution has been interpreted over time to mean “Freedom of Expression” and also covers actions to express an opinion such as wearing black arm bands to protest a war or burning an American flag in political protest.²³

Historical evidence is also a factor used to determine interpretations of the constitution. When the colonies decided to break apart from Great Britain the Declaration of Independence was written. The first line of the second paragraph and one of the most memorable portions of the declaration states “We hold these truths to be self-evident, that all men are created equal...”.²⁴ King George III was treating the colonists different from the citizens of Great Britain by such actions as charging them overly high taxes and quartering soldiers in their homes. They resented these differences in treatment and desired to break apart from the empire.

Of course at the time “all men” referred to all white males to exclude African Americans and women. However that was a testament to the times and since then women and African Americans have come to be regarded in popular society as citizens also worthy of recognition. The basic premise of a dislike for differing treatment of individuals based upon such immaterial factors such as where one lives and how one chooses to worship is still true today despite the advancements society has made. Why should sexual orientation be any less trivial a factor to deny one’s rights than location or religious preference?

While the United States Constitution may not be written with the same unambiguous wording that the Massachusetts State Constitution is written, the rights

²² *Loving v. Virginia*.

²³ *Tinkler v. Des Moines*. 393 U.S. 505. (1969).

²⁴ The Declaration of Independence of the Thirteen Colonies. September 12, 2004.
<http://www.law.indiana.edu/uslawdocs/declaration.html>

ensured by the constitution have expanded and evolved to where freedom and equality are understood even beyond what is directly stated. The constitution should not be used to discriminate against individuals or to deny rights because powerful groups deem an act unsavory. While the US was founded on a basis of democracy and majority rules the rights of minority groups should be respected and ensured to further freedom.

Responses to Goodridge

The Goodridge decision was the first of its kind and thus had a wide variety of responses by other states and the federal government. Since this issue has a strong controversy of course there were right wing responses such as the Ohio state ban on same marriage as well as any other alternatives which could be made that would give same sex couples rights similar to those enjoyed by heterosexual couples.²⁵ However, the decision also prompted many opposite movements at the state level. A San Francisco mayor was so moved by the decision that he began marrying same sex couple despite the state law forbidding the practice. Many other mayors across the United States, including Chicago and New York, have also spoken out in favor of same sex marriage.²⁶

On the federal level, in response to the Massachusetts decision, President Bush endorsed and began to call for an amendment to the United States Constitution that would define marriage as existing between a man and woman and end the same sex marriage debate.²⁷ Surely the negative attention that was given to the issue and the negative responses did harm the effort for same sex marriage. Though it also caused a

²⁵ Crane, Jonah. *Recent Development: Legislative and Constitutional Responses to Goodridge v. Department of Public Health*. New York University School of Law Journal of Legislation and Public Policy. 2003/2004.

²⁶ *ibid.*

great deal of public attention to be paid to the issue in general and the decision itself was a positive message to many interest groups which promote gay rights such as the Human Rights Campaign.²⁸

The State's Interest in Marriage

In the cases that have been presented the state has made many arguments in favor of banning same sex marriage. The procreation argument has been a popular one and suggests that a primary function of marriage is the creation of new life and the ensuring the survival of the human race. While this argument is not without merit, it has many shortcomings.²⁹ As stated in Goodridge this cannot be the case because there are many heterosexual relationships where children are not possible or not desired. Citizens who are sterile are not prevented from getting married despite the fact they can never produce offspring with their partner. There is also the availability of adoption or sperm donation where same sex couples can still raise children and thus help for the survival of the human race.³⁰

There is also the argument and the belief in the minds of many people that children who are raised by same sex parents will not be as well off as children raised by heterosexual parents. However, a 2003 study conducted by the American Academy of Pediatrics found that children who are raised by homosexual parents do just as well emotionally, cognitively, and socially as children who are raised by heterosexual parents. The AAP concluded that the fact that determines how well a child will develop

²⁷ *ibid.*

²⁸ *ibid.*

²⁹ Duncan, William., *Law and Culture: The State's Interest in Marriage.* Ave Maria Law Review. 2004.

³⁰ *ibid.*

relies upon the quality of the parenting rather than the sex of the parents.³¹ Allowing same sex marriage will create more stable same sex relationships and would thus only improve the quality of the parenting that same sex parents are able to give to their children.

Many states also make the interstate uniformity claim. According to this claim, if a few states legalize same sex marriage then the law will be contrary to that which most states hold and thus there will not be uniformity within the state laws.³² Again, a valid argument since there are positive aspects to having uniform laws which reduces confusion and lets citizens know what to expect. However there are two counter arguments to this claim which invalidate this claim. In a federal system like here in the United States where power is divided between the federal government and individual state governments, there are going to be laws that are not the same throughout all 50 states. For example, prostitution is legal in Nevada but not in any other state. Missouri also recently passed a concealed weapons law which is inconsistent with the laws in neighboring Illinois where carrying a concealed weapon is a crime.

Another reason that this claim is not a compelling reason to limit same sex marriage is the fact that making same sex marriage a federally agreed upon right would make that right applicable to all state governments. Thus all 50 states would be recognizing same sex marriage and the laws would be consistent. If this were to happen the rights of a minority would be upheld, consistent with the beliefs of the United States, and the laws would still be uniform. So this claim does not constitute a compelling state interest significant enough to discriminate against a growing group of

³¹ Thio, Alex. *Sociology a Brief Introduction*. Boston: Pearson. 2005. page 289

³² *Law and Culture: The State's Interest in Marriage*

citizens because there is another way that the laws could be uniform that does not require discrimination. Therefore eliminating same sex marriage altogether in the name of consistency is not the least restrictive means necessary.

A third popular argument against the legalization of same sex marriage is the claim that marriage holds such a large value in society that allowing gay couples to marry will create instability and cause the downfall of the system.³³ The recent events in Massachusetts should prove this argument to be false. The state of Massachusetts has been marrying same sex couples for months now and our system of marriage has not fallen. Heterosexual couples are not now cheating at higher rates or devaluing their own marriages as a result of these events. Society has had to endure many vast changes to the traditional way of doing things in the history of this country and nothing has caused society to become too unstable or collapse yet. If the end to slavery and the right to vote being extended to women and African Americans didn't destroy society it seems very unlikely that allowing same sex couples to marry is going to do so.

These types of arguments have caused some scholars to believe in the presence of a "heterosexual agenda." This agenda is based on facts that many of the institutions in the United States including the government itself are trying to deny rights to homosexuals and thus keep them down.³⁴ This runs contrary to the long believed "homosexual agenda" in which homosexual people are wanting acceptance and to be given rights that are equal to that of their heterosexual counterparts. The heterosexual agenda believes that, in an attempt to prevent same sex couples from attaining marriage rights, groups are trying to connect homosexuality with behaviors that are seem as

³³ *Law and Culture: The State's Interest in Marriage*

³⁴ Culhane, John. Symposium: The Right to Marry: Making The Case To Go Forward: The Heterosexual

undesirable or deviant to society such as adultery and promiscuity. Arguments such as procreation are being used in opposition to same sex marriage as “a stand-in for an anti-gay viewpoint.”³⁵

Implications of Same Sex Marriage for State Governments

While President Bush is pushing for an amendment to the United States Constitution that would ban same sex marriage such an amendment would be difficult to pass and would likely take years to accomplish. Until this time, state legislatures and governors are going to be given discretion to pass laws addressing the same sex marriage issue and state supreme courts are going to be given discretion to determine the constitutionality of these laws based on individual constitutional standards. This issue is an important one for many reasons. Homosexuality is becoming more open and tolerated in society today thus more openly gay couples are emerging. These couples are being denied the right to legally recognize their relationship and thus finding it much more difficult to function as a couple in society than their heterosexual counterparts.

They argue this as a violation of equal rights. Religious groups are also arguing that marriage is a sacred institution that exists between a man and a woman. They see same sex relationships as going against nature and fear the implications that same sex marriage would have on traditional heterosexual marriages. Both sides of this debate are adamant and have valid arguments. This has the potential to cause a great deal of pressure to be placed upon state governments from both perspectives.

Agenda, Widener Law Journal. 2004.

³⁵ *ibid.*

Same sex marriage should be declared a constitutional right and should be recognized by all states. Having laws that differ between states creates a number of problems for same sex couples in today's mobile society. Jobs, family, and a number of other factors could bring the need for relocation to another state. Forcing married same sex couples to choose between these obligations and the rights they enjoy as a married couple is a violation of the very notions of equality and fairness that is valued in the United States. The New Jersey Supreme Court in *Lewis v. Harris* decided against declaring same sex marriage a constitutional right based upon their states constitution. Additional reasons that were cited include precedent and legislative intent. While there is value in using precedence to keep laws consistent and predictable, there are times when a variation from this norm to further rights and liberties to a minority group is justified. Had no deviation from the traditional norms and standards of society occurred, women today would still not be allowed to vote, African Americans would still be kept as slaves, and young children would be working long hours in factories instead of going to school. Additionally the argument used by some religious institutions that marriage is a sacred institution has little merit as marriage is a legal institution and government dictates its rights. The fear of same sex marriages devaluing heterosexual marriages has also been proven without merit since same sex marriages are being performed in Massachusetts and the institution of marriage still exists as it did prior to these events.

Society today is changing rapidly and evolving to include things the founding fathers could have never dreamed possible. Thus the laws and constitutional interpretations must also evolve to ensure equality and fairness for all groups in society.

However, this subject is controversial and extreme opposition that exists. Because of this fact, that it is unlikely same sex marriage will be declared a constitutional right anytime in the near future. In light of this fact there is a compromise that can exist where states that do not recognize same sex couples as being married can still provide them with the same rights and benefits through some type of a civil union. In this compromise the couples are still able to have rights but the state can still protect the sanctity of the term 'marriage' by reserving it for heterosexual couples.

Many problems exist with this situation including the establishment of a second class status to same sex couples as was stated by the Massachusetts Supreme Court. This situation would, however, be a step in the direction of equality. As we have learned from history sometimes change, both legal and social can take time; but that change must start somewhere. While the Massachusetts Supreme Court ruled that civil unions are unconstitutional the possibility still exists for other states that wish to grant some rights to homosexual couples.

Supreme Court Decisions

The Supreme Court has never dealt directly with the case of same sex marriage though recent interest and controversy surrounding the topic could lead the Supreme Court to review a case and provide a final constitutional interpretation. In that decision they would probably also determine the constitutionality of the Defense of Marriage Act which in direct conflict with the rights of homosexuals to get married.

The Court has dealt with the issue of marriage in general in several cases. One that is most typically related to the same sex marriage debate is *Loving v. Virginia*³⁶ in 1967 which also deals with the marriage of two people who's relationship was not

widely accepted. In *Loving* an interracial couple challenged Virginia's Miscegenation Law which forbids interracial marriage on the grounds that the races should not mix. The Supreme Court said that while Congress does have a power to regulate marriage it couldn't do so just on the ground of race. The Court said that using race to determine whether or not a marriage was allowable is discrimination that is a violation of the 14th Amendment. The Court recognized marriage as a fundamental right that is necessary for society and to deny the right to marriage is to deny personal liberty to a citizen. If race is not a factor that can be used to determine the legality of a marriage, sex must not be a factor either both are characteristics which a person has no control over and does not radically make them different from other citizens. Discrimination based on race as well as discrimination based on sex are a part of our country's history and extra steps are taken today to make sure that both of these classifications are not used by the government to judge people or the legality of their actions.³⁷

It has been argued that a literal interpretation of the Constitution should be taken and that since the constitution does not protect same sex marriages, justices should not 'rewrite' the constitution even to bring it into line with modern society. The court has done this in many other cases. The constitution was written so that it can change with society and not become an obsolete document. In the case *Katz v. United States*³⁸ the Supreme Court classified government eavesdropping by use of an electronic phone tap as a search that is subjected to the 4th Amendment's limitations on unreasonable search and seizure. The Court's decision in that case illustrated how Constitutional interpretations must change and evolve as society and technology evolve because there

³⁶ *Loving v. Virginia*.

³⁷ *ibid.*

are many elements today that could not have possibly been foreseen by the founders in the 1700's.³⁹

When the Constitution was written society was a lot different than in recent years. Slavery was a common practice whereas today blacks are given as many rights and liberties as all people, something few founders could have possibly foreseen. The Supreme Court has also made decisions regarding homosexuals that they have altered to make for a more accepting and less condemning approach to homosexuality. In *Bowers v. Hardwick*⁴⁰, the Supreme Court ruled that statutes which forbid sodomy are constitutional. In this case the law applied to both homosexuals and heterosexuals even though homosexuals were the group primarily affected by the law. The majority opinion expressed that citizens do not have a fundamental right to engage in homosexuality and pointed out that the original thirteen colonies forbid homosexuality. However, there were dissents in the case by both Justice Blackmun and Justice Stevens which stated that citizens have the right to engage in whatever types of relationships they desire and to deny them this right is to deny the protection of the right to privacy in the Constitution.⁴¹

In 2003, the Supreme Court ruled in *Lawrence v. Texas*⁴² that the sodomy statutes of Texas which only forbid homosexual sodomy were not constitutional. Justice Kennedy, writing for the majority, held that states do not have a legitimate interest to prevent homosexuality and laws such as these are unconstitutional because they tend to condemn homosexuality itself. He expressed that this is a violation of due process rights

³⁸ *Katz v. United States*. 389 U.S. 347. (1967).

³⁹ *ibid.*

⁴⁰ *Bowers v. Hardwick*. 478 U.S. 186. (1986).

⁴¹ *ibid.*

and overturned the *Bowers* case. Thus making what consenting homosexuals do in their bedrooms just as legal as what consenting heterosexual couples do in their bedrooms.⁴³ While this situation is different from recognition of marriage because *Bower* involved a statute that citizens could be jailed for violating, it still marks a victory for homosexuals because now it is not illegal for them to physically express their love.

Constitutional Arguments

Many constitutional arguments exist in favor of same sex marriage. One of the most widely used is section one of the 14th Amendment. This clause declares that no state can “deny as person within its jurisdiction the equal protection of the laws.”⁴⁴ To deny a same sex couple the benefits (economical, legal, social, or otherwise) that a heterosexual couple can enjoy is to deny equal protection of the laws to a specific group. Most laws that deny equal protection to a specific group that is a suspect class has been deemed discrimination and the government must meet high standards to justify these laws. The government does allow certain discriminations such as citizens must be 21 to purchase alcohol, 16 to get a driver’s license, and 18 to vote in an election. However the government does have a rational basis to discriminate in these cases. The government has a legitimate government interest to protect lives so it requires that citizens be 16 years old to obtain a license to drive. This ensures that they are more mature and better able to handle the responsibility. This differs from not allowing same sex couples to marry because the government does not have a legitimate interest that would be harmed by such. The government does have a legitimate interest in

⁴² *Lawrence v. Texas*. 2003 U.S. Lexis 5013. (2003).

⁴³ *ibid.*

⁴⁴ United States Constitution. *Fourteenth Amendment*. 1868.

promoting families for a healthier raising of youth, however same sex marriage would actually create more families to further this purpose rather than destroy them.

The 14th Amendment also contains the due process clause, which was determined to be comprised of two principles, procedural due process and substantive due process.⁴⁵ Under substantive due process the fairness of a law is in question. Since laws which ban same sex marriage do so based on the innate characteristic of one's gender there is a chance that it might be a violation of substantive due process and thus unconstitutional.

The 9th Amendment states that just because certain rights are mentioned in the constitution there are other rights, which the people have as citizens.⁴⁶ In *Griswold v. Connecticut* the Supreme Court determined privacy to be one of those rights retained by the people. Who citizens chose to have a relationship with was included in that right to privacy and banning same sex marriage is a way of telling citizens whom they can have a recognized relationship with.⁴⁷ If a same sex couples presents themselves as a couple to the public then they will be recognized as a couple by society, like it or not, and that relationship should be recognized legally and respected as that couple's private choice. To deny legal recognition is not going to shield society from what some could deem morally harmful. The morals of citizens are going to differ and some people still do not thin interracial couples are moral and should be allowed. The government should not cater to the bigoted beliefs of some citizens and deny the rights and protections to other citizens.

⁴⁵ *ibid*

⁴⁶ United States Constitution. *Ninth Amendment*. 1791.

⁴⁷ *Griswold v. Connecticut*.

The United States was designed to be a place where citizens should live as they want to live without persecution. The first sentence of the 1st Amendment in the Bill of Rights states that Congress cannot tell people what religion to practice or how to believe.⁴⁸ Thus the government cannot push its beliefs and morals on its citizens. People are free to believe what they want to believe regardless of what society thinks about their religion or thoughts in general. Thoughts are a protected form of speech and the government cannot punish a person for his or her thoughts. Just as the government is prohibited from forcing people to conform to its own popular moral principles in the area of religion, it should not be allowed to push its own popular moral principles on its citizens through prohibiting same sex marriage. The prohibition of same sex marriage on the grounds that it is religiously offensive could itself be unconstitutional and a recognition of one religion over others. The Christian faith believes that homosexuality is against the wishes of God and that it is wrong and a hell worthy offense. When the government tends to endorse this belief by denying basic rights to homosexuals it is emphasizing this opinion.

The Founding Fathers could not have possibly included every possible situation so basic principles were instilled upon which to make future judgments. Beyond just the principles listed in the Constitution, the Declaration of Independence from Great Britain also stated that governments should respect certain rights of the citizens. Among those are that “all men are created equal” and they have the right to “life, liberty, and the pursuit of happiness.”⁴⁹ Same sex marriage is in line with these basic principles because to discriminate against homosexual couples is not treating all men

⁴⁸ United States Constitution. *First Amendment*. 1791.

⁴⁹ *The Declaration of Independence of the Thirteen Colonies*. July 4, 1776.

(or people) equally. While the United States government has still recognized that some inequalities are acceptable, such as giving more governmental protections to black people and woman because of the history of discrimination, these inequalities are made with the purpose of assisting a disadvantaged group, not causing further discrimination. If a person chooses to live his or her life loving a person of the same sex (which makes both people happy), then it would be a direct violation of those principles to deny a person that right. The denial of marriage rights to same sex couples goes against just what the constitution stands for but also against some of the basic principles upon which the founding fathers broke away from England and founded the United States of America.

Defense of Marriage Act

In 1996, President Clinton signed the Defense of Marriage Act⁵⁰ making it a federal law. The Act did several basic things to restrict same sex marriages nationwide. First, it declared that states are not obligated to recognize same sex marriages that are conducted in other states or territories. It also said that these individuals would not be guaranteed any rights that would come with the status of marriage. It also provided a definition of ‘marriage.’ Under the Act, a marriage is a “legal union between one man and one woman as husband as wife.” Section 3 of the Defense of Marriage Act also went on to define a ‘spouse’ as “a person of the opposite sex who is a husband or a wife.”⁵¹

⁵⁰ *Defense of Marriage Act*. 110 Stat. 2419. (1996).

⁵¹ *ibid*

This law has received many inquiries into its constitutionality. A main constitutional argument against the Defense of Marriage Act is based on Article Four, Section One. This is known as the 'Full Faith and Credit Clause' and it states that

“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial proceedings of every other state.”⁵²

Normally this would mean that marriages that are performed in one state are honored by all other states. However, opponents of same sex marriage do not want one or two states to pass statutes which recognize same sex marriages and then other states which do not recognize same sex marriages themselves have to honor those marriages. The Defense of Marriage Act was passed in response to the belief that Hawaii was going to be the first state in the US to recognize same sex marriages.

However, the government has rationalized this as constitutional under the second portion of that article which states that Congress can make laws to determine how states comply with the Full Faith and Credit Clause and the effect that such compliance will have on the states. However opponents of the law still argue that Congress has gone beyond these powers by completely nullifying a category of legal proceedings.⁵³ Many opponents suggest that the power to create such a law is not held by Congress and could only be accomplished through a Constitutional Amendment. This law has also been deemed discriminatory and a direct violation of the Equal Protections Clause since the prevention of same sex marriage is not a legitimate

⁵² United States Constitution. *Full Faith and Credit Clause*.

⁵³ “Defense of Marriage Act.” 2004. *Wikipedia*. May 31, 2004.
http://en.wikipedia.org/wiki/Defense_of_Marriage_Act

governmental interest but rather an attempt to discriminate against an ostracized minority group.⁵⁴

An additional argument is that the Defense of Marriage Act is a violation of the fundamental right to marry that was recognized by the Supreme Court in conjunction with the due process clause.⁵⁵ In response the government claimed that the right to marry, while fundamental, is not unlimited. On a few occasions the Supreme Court has allowed legislative intervention in marriage in areas such as polygamy. However these cases are much more rare than cases where the Supreme Court strikes down legislative limitations on a citizens ability to marry such as when the Supreme Court struck down the miscegenation laws in *Loving v. Virginia*.⁵⁶

Federal Marriage Amendment

In response to the large number of challenges to the constitutionality of the Defense of Marriage Act⁵⁷ by activist groups, a Federal Marriage Amendment to the United States Constitution has been suggested. If passed, it would be the 28th Amendment to the United States Constitution and the first Amendment in more than ten years. This amendment was first proposed in the House of Representatives in May of 2002 and again in May of 2003 but without a vote.⁵⁸ In February of 2004, President George W. Bush stated that he would favor such an amendment. If an amendment similar to this were to pass it would completely nullify the Full Faith and Credit argument, in relation to same sex marriage, as well as preventing states from allowing

⁵⁴ *ibid.*

⁵⁵ United States Constitution. *Due Process Clause*.

⁵⁶ *Loving v. Virginia*. 1967 U.S. LEXIS 1082. (1967).

⁵⁷ *Defense of Marriage Act*.

⁵⁸ "Federal Marriage Amendment." 2004. *Wikipedia*. February 23, 2004.
http://en.wikipedia.org/wiki/Federal_Marriage_Amendment

same sex marriages in their own territory. The Supreme Court must abide by the Constitution so the only way to get around this amendment would be to pass another amendment, which would recognize same sex marriages.⁵⁹

This amendment would place a large barrier on the freedoms enjoyed by homosexual couples in comparison to those freedoms enjoyed by heterosexual couples. While the United States is generally a system of majority rule, the rights of minority groups should be respected. Not only would the Federal Marriage Amendment prevent homosexual couples from marrying but it would also place a very negative stigma on homosexuality in general. The passing of this potential amendment would be seen by many homosexual and bisexual individuals as direct government condemnation. Making a minority group feel inferior because of government legislation was dealt with in *Brown v. Board of Education* where sending black and white children to separate schools was deemed unconstitutional and a violation of equal protection.⁶⁰ The Supreme Court stated that it makes it more difficult for black children to live up to their full potential when they are made to feel inferior by being separated from the white children who constituted the majority. This amendment could have similar negative effects on homosexuals.⁶¹

Suspect Class

However, African Americans have been determined to be a suspect class by the Supreme Court, thus any statutes which discriminate against them must face a large scrutiny before being deemed constitutional. The Supreme Court determines groups to

⁵⁹ *ibid*

⁶⁰ *Brown v. Board of Education (I)*, 347 U.S. 483. (1954).

⁶¹ *ibid*.

be suspect class based on a history of discrimination against the particular group. Based on the condition of servitude many African Americans were subjected to and discriminatory laws such as the Jim Crow laws, the Supreme Court has determined that group to be a suspect class. Women have similarly been deemed a suspect class based on factors such as being denied the vote until the 1920s. Many people do not consider homosexuals to be a suspect class and the Supreme Court has never ruled otherwise.

Nonetheless, there is a history of discrimination against homosexuals. The Supreme Court acknowledged this history and contributed itself in *Bowers v. Hardwick* where a statute that forbid sodomy was ruled to be constitutional. The opinion of the court mentioned how the original 13 colonies all had laws that forbid homosexuality.⁶² Homosexuals, like women and African Americans, have also had a history of societal discrimination. They have faced ridicule, been the victims of hate crimes, and been denied services. Perhaps they have not been as discriminated against as groups such as African Americans but the past discriminations are still present and extra measures need to be taken to prevent future discrimination against homosexuals.

Civil Unions

Many people once thought that no state would ever grant homosexual couples the right to marriage. In 1993, a plurality of the Hawaii Supreme Court ruled that to deny same sex couples marriage rights denied them their equal protection guaranteed by the state constitution. However, in 1998, the Hawaii Constitution was amended through referendum so the decision made by the Supreme Court was no longer the law.⁶³ Hawaii was the first state to make such a claim and no other state dealt with same sex

⁶² *Bowers v. Hardwick*.

⁶³ Strasser, Mark. 2002. *On Same Sex Marriage, Civil Unions, and the Rule of Law*.

marriage until 2000 when the governor of Vermont sign a 'civil union statute' making it law. Under this law, same sex couples who were united in a civil union were given the same rights and privileges that heterosexual couples who were united in marriage received. This law produced mixed feelings in Vermont.⁶⁴ While some gay rights supporters were thrilled with the decision, others felt defeated and angry because same sex couples had not been given the same rights to a 'marriage' that heterosexual couples received. Citizens opposed to homosexuality were, naturally, unhappy with the decision and felt that the state should not legally recognize any relationship between homosexual individuals.⁶⁵

The decision of the legislature to give same sex couples a civil union that carries with it rights and privileges, was in response to the state Supreme Court decision in *Baker v. State*⁶⁶. In this case, the Vermont Supreme Court ruled that under their state's constitution same sex couples are entitled to the same benefits and protections that heterosexual couples were entitled to have. There is a clause in the Vermont Constitution called the Common Benefits Clause⁶⁷. This clause states that the government is supposed to look out for the 'common benefit' of its citizens and not try to advantage one group over another. This is the section of the Vermont Constitution upon which the decision in *Baker* was reached. Additional rights are endowed to the people of Vermont through this clause beyond the rights that are given to them by the US Constitution. When the decision in *Baker* was reached, the judgment was

⁶⁴ *ibid.*

⁶⁵ Strasser.

⁶⁶ *Baker v. State*. 744 A. 2d 864. (Vt. 1999).

⁶⁷ "Common Benefits Clause." *Vermont State Constitution*. Chapter I, Article 7. 1777.

suspended to give the Vermont Legislature time to pass a law that would fulfill the requirements set by the court.⁶⁸

The legislature could have passed a law which made same sex marriage legal in the state but chose instead to pass the civil union statute that would give the same rights and privileges to same sex couples but not the name of marriage. However, there is some question as to whether this statute meets the requirements that were set down by the Vermont Supreme Court. One of the main areas in which equal rights and benefits might not exist is in the area of travel to other states. Under the Defense of Marriage Act⁶⁹, no other state is required to recognize same sex unions from other states. This greatly prohibits the ability of couples joined in a civil union to leave the state of Vermont; couples would be forced to chose between their fundamental right to relocate and their rights as a couple.⁷⁰ This limitation on the ability of citizens to travel between the states might not be constitutional, based on the Supreme Court's decision in *Saenz v. Roe*. In *Roe*, the right to travel was recognized as a fundamental right of citizens. Since it is a fundamental right, states have a higher standard to meet when making laws that limit this ability. The Supreme Court used the 14th Amendment's Privileges and Immunities Clause to recognize travel as fundamental right.⁷¹ Forcing citizens to chose between their ability to relocate and their ability to marry is a choice between two rights which have been deemed fundamental and of the utmost importance. Jobs many times call for a person to relocate and a homosexual couple would have to chose between losing their status as a married couple and the rights that

⁶⁸ Strasser.

⁶⁹ *Defense of Marriage Act*

⁷⁰ Strasser.

⁷¹ *Saenz v. Roe*.

come with and a spouse losing his or her job which could be their only form of income. These two rights are not as trivial as many other rights that must be given up when moving such as moving from Missouri to Illinois and losing your right to carry a concealed weapon.

Civil unions might also be unconstitutional because they constitute a 'separate but equal' scenario. That is to say that homosexual couples can have equal benefits but must do so under a separate title. The Supreme Court established in *Brown v. Board of Education* that separate is 'inherently unequal' in regards to having black children attend different schools from white children.⁷² Separate schools were usually determined not to be equal and that is also the case with civil unions since the availability of travel is greatly limited by a civil union. If a same sex couple is legally married in Massachusetts and travels to Utah and one of them gets into an accident their marriage would not be recognized and thus there is the possibility for difficulties involving visitation and even payment.

Recent Events in Same Sex Marriage

In November of 2003 the Massachusetts Supreme Court handed down a landmark decision which ruled that under their state constitution same sex couples have a right to marry. The Massachusetts Supreme Court went even farther than that in emphasizing the rights of same sex couples in February of 2004. In an opinion issued in response to their November decision, the Massachusetts Supreme Court said that civil unions are not enough and the use of civil unions for same sex couples rather than marriage is a violation of the state constitution. Massachusetts has not been the only locale in America where landmark events have taken place recently in the area of same

sex marriage. A national trend started in San Francisco when officials began issuing marriage licenses and authorizing marriages for same sex couples. Couples lined up for the rare opportunity. This trend continued in places such as New York and Oregon where officials there were also granting marriage licenses and presiding over ceremonies for same sex couples. Many of the officials who are performing the marriages are doing so against state law and are facing possible fines and jail time. These officials are going with their belief that to deny same sex couples the right to get married is unconstitutional. Many other officials are also letting their similar ideas be known such as the mayor of New York who has said he feels that same sex couples should get the same rights and benefits as heterosexual couples enjoy.

Same Sex Marriage in the 2004 Presidential Election

When the Massachusetts Supreme Court made their decision in November President George W. Bush stood firmly against it, and in light of recent events has been a strong supporter of an amendment to the United States Constitution which would ban same sex marriages. An amendment to the United States Constitution would be a very long drawn out process and could also take years to accomplish. President Bush was up for reelection in November of 2004 and the same sex marriage issue could have been a big deciding factor for a number of voters.⁷³ Bush's opponent in the election, Democrat Party nominee John Kerry personally opposed same sex marriages but said that he would grant the same federal benefits that married heterosexuals receive to same sex couples that have a marriage, civil union, or whatever their state recognizes. This is the

⁷² *Brown v. Board of Education.*

first time that a presidential nominee has ever made such a statement that would give equal rights and protections to same sex couples. This decision has caused a great deal of debate and there is some question of whether this position could be upheld since it is in direct conflict with provisions of the Defense of Marriage Act.⁷⁴

The election of John Kerry in 2004 could have potentially been a stepping stone for same sex marriages and obtaining equal rights and protections in all areas of the law and society. Bush used the same sex marriage issue to his advantage in the election and based his campaign around good American values and moral ways. This campaign strategy was successful and exit poll results showed that the factor people ranked as most important in their decision for president was centered on moral values.

80% of those who said they voted based on moral values voted for Bush.⁷⁵ The Bush campaign and many others presented same sex marriage and homosexuality in general in a negative light and made the public view it as morally unclean. This strategy worked especially for the religious right who were firm supporters of Bush. The moral values issue was even ranked higher in voting decision importance than the war in Iraq where 73 percent of those who voted based on that factor voted for Kerry.⁷⁶ Regardless, these recent events have reopened the topic for discussion and possible intervention by the United States Supreme Court to finally decide on the constitutionality of the Defense of Marriage Act. The fact that support was seen all

⁷³ "Bush to Endorse Amendment Banning Gay Marriage." *Yahoo News*. February 24, 2004. http://story.news.yahoo.com/news?tmpl=story&cid=578&u=/nm/20040224/pl_nm/bush_gays_d

⁷⁴ Nieves, Evelyn and Jim VandeHei. 2004. "Kerry Backs Benefits for Legally United Gays." *Washington Post*. March 04, 2004. <http://www.washingtonpost.com/wp-dyn/articles/A28566-2004Mar3.html>

⁷⁵ CNN.com America Votes 2004. *Exit Poll Results*. December 10, 2004. <http://www.cnn.com/ELECTION/2004/pages/results/states/US/P/00/epolls.0.html>

⁷⁶ *ibid.*

across the country proves that there is a large portion of society who would favor same sex marriages and that support could be essential to the future of same sex marriage.

The recent marriage of several hundred same sex couples across the nations has also helped disprove a belief of opponents to same sex marriage. One argument made is that to allow same sex couples to marry will destroy the institution of marriage. Yet, even after these same sex couples were allowed to be joined in marriage, heterosexual couples continued to get married everyday and the divorce rate did not drastically increase. Allowing same sex partners to enjoy the benefits of marriage is not nearly as likely to destroy the institution of marriage as allowing married couples to get divorced and remarried.

The Future of Same Sex Marriage

The issue of same sex marriage is not likely to be an issue that will disappear as the years pass. Since same sex marriage was declared a fundamental right by the Massachusetts Supreme Court, challenges to it have failed and the rights have only been expanding. Same sex couples are going to become more numerous rather than going away and their desire for equal rights such as the right to marry their partners is going to increase as time passes. Arguments have been made that allowing homosexual couples to marry is going to increase problems such as adultery however these arguments are lacking merit and same sex marriage would lead to more stable lasting relationships among homosexuals. It is for these reasons as well as others that same sex marriage is inevitable and will happen sometime in the future, even if not in the near future. ⁷⁷

⁷⁷ Van Ness, Gretchen. *Symposium Transcript: The Inevitability of Same Sex Marriage*. New England Law Review. 2004.

There are numerous ways in which marriage could be declared a right that is guaranteed. An amendment to the federal constitution, a Supreme Court decision, individual state constitutional amendments, and individual state supreme court decisions are four ways this could take place. Through what medium the issue is decided can have major implications on the how the law is enforced as well as how applicable and transferable the rights are in relation to interstate travel. ⁷⁸ A decision that is made at the federal level, either via constitutional amendment or US Supreme Court decision, would have the most wide impact since it would affect all 50 states.

However there is also the question of validity and how credible the decision will be to others. The Supreme Court made a landmark decision in *Brown v. Board of Education* that was not seen as valid to many southern states so they chose to ignore the decision and continue with their process of segregation in school systems. There is a chance the same type of effect could happen if the US Supreme Court declares same sex marriage a fundamental right. In an ideal world the best solution would be individual state constitutional amendments. An amendment would be seen as more democratic than a Supreme Court decision made by a small group of people who are unelected in some states and at the federal level. States would then be less likely to ignore the decision or to question its validity if they made the rules themselves. ⁷⁹ An Amendment to the US Constitution would also be a good solution as the states would have some input and the decision would be applicable in all 50 states rather than having 50 individual states make amendments to their constitutions.

⁷⁸ Worthen, Kevin. *Who Decides and What Difference Does It Make?: Defining Marriage in "Our Democratic, Federal Republic."* BYU Journal of Public Law. 2004.

⁷⁹ *Who Decides and What Difference Does It Make?: Defining Marriage in "Our Democratic, Federal Republic."*

Conclusion

Marriage is an important institution for both legal and social reasons in society today. Same sex couples are becoming more prominent and more willing to let the rest of the world know about their relationship, thus they would like to get married and receive all of these benefits associated with marriage. For many constitutional reasons, such as the Equal Protections Clause and the Due Process of the 14th Amendment, the denial of marriage rights to same sex individuals goes against the fundamental principles that this country stands for. The Supreme Court has recognized a fundamental right to marry and has shown a low tolerance for discriminatory statutes. This country has seen discrimination against many groups including women and African Americans. Today discrimination for these groups is greatly limited because of changes in both the law and society to limit discrimination against homosexuals are apparent in this day and the law should recognize same sex marriages as an important way to recognize the rights that homosexuals have in this country. Based on the Constitution and many of the Supreme Court's own Constitutional interpretations, to deny this fundamental right is to deny the protections of the constitution.

WORKS CITED

“Amendment I.” *United States Constitution*. 1776.

“Amendment XIV, Section 1.” *United States Constitution*. 1776.

“Article IV, Section I.” *United States Constitution*. 1776.

Baker v. State. 744 A. 2d 864. (Vt. 1999).

Bowers v. Hardwick. 478 U.S. 186. (1986).

Brown v. Board of Education (I). 347 U.S. 483. (1954).

“Bush to Endorse Amendment Banning Gay Marriage.” *Yahoo News*. February 24, 2004. http://story.news.yahoo.com/news?tmpl=story&cid=578&u=/nm/20040224/pl_bush_gays_dc4

Callumachi, Rukmini. 2004. “Oregon Issues Gay Marriage Licenses.” *Associated Press*. March 03, 2004.
http://story.news.yahoo.com/news?tmpl=story&cid=514&e=2&u=/ap/20040303p_on_re_us/gay_marriage_17

CNN.com America Votes 2004. *Exit Poll Results*. December 10, 2004.
<http://www.cnn.com/ELECTION/2004/pages/results/states/US/P/00/epolls.0.html>

“Common Benefits Clause.” *Vermont State Constitution*. Chapter I, Article 7. 1777.

Constitution of the Commonwealth of Massachusetts. September 23, 2004.
<http://www.mass.gov/legis/const.htm>

Crane, Jonah. *Recent Development: Legislative and Constitutional Responses to Goodridge v. Department of Public Health*. *New York University School of Law Journal of Legislation and Public Policy*. 2003/2004.

Culhane, John. *Symposium: The Right to Marry: Making The Case To Go Forward: The Heterosexual Agenda*. *Widener Law Journal*. 2004.

Dean v. District of Columbia. 1995 D.C. App. LEXIS 8 (1995).

The Declaration of Independence of the Thirteen Colonies. July 4, 1776.
<http://www.law.indiana.edu/uslawdocs/declaration.html>

Defense of Marriage Act. 110 Stat. 2419. (1996).

Duncan, William,. *Law and Culture: The State's Interest in Marriage*. Ave Maria Law Review. 2004.

"Federal Marriage Amendment." 2004. *Wikipedia*. February 23, 2004.
http://en.wikipedia.org/wiki/Federal_Marriage_Amendment

Goodridge v. Department of Public Health. Massachusetts Supreme Court. (2003).

Griswold v. Connecticut. 381 U.S. 479. (1965).

Katz v. United States. 389 U.S. 347. (1967).

Lawrence v. Texas. 2003 U.S. Lexis 5013. (2003).

Lewis v. Harris. Superior Court of New Jersey. (2003).

Loving v. Virginia. 1967 U.S. LEXIS 1082. (1967).

Massachusetts Lesbian & Gay Bar Association. *MLGBA Legal Briefs*. Nov/Dec 2002.

Neilan, Terence. 2004. "Gays Have Full Marriage Rights, Massachusetts Court Says." *New York Times*. February 04, 2004.
<http://www.nytimes.com/2004/02/04/national/04CNDMASS.html?ex=10784620&en=4bfecaf64efc22b6&ei=5070>

Nieves, Evelyn and Jim VandeHei. 2004. "Kerry Backs Benefits for Legally United Gays." *Washington Post*. March 04, 2004.
<http://www.washingtonpost.com/wp-dyn/articles/A28566-2004Mar3.html>

New Jersey State Constitution. October 03, 2004.
<http://www.njleg.state.nj.us/lawsconstitution/constitution.asp>

Saenz v. Roe. 526 U.S. 489. (1999).

Strasser, Mark. 2002. *On Same Sex Marriage, Civil Unions, and the Rule of Law*. USA: Praeger Publishers.

Thio, Alex. Sociology a Brief Introduction. Boston: Pearson. 2005.

Tinkler v. DesMoines. 393 U.S. 505. (1969).

Van Ness, Gretchen. *Symposium Transcript: The Inevitability of Same Sex Marriage*. New England Law Review. 2004.

Worthen, Kevin. *Who Decides and What Difference Does It Make?: Defining Marriage* in "Our Democratic, Federal Republic." *BYU Journal of Public Law*. 2004.