DOES PROHIBITION OF SAME-SEX MARRIAGE VIOLATE FOURTEENTH AMENDMENT?

By

Kairat Assauov

Submitted to

Central European University

Department of Gender Studies

In partial fulfillment for the degree of Master of Arts in Gender Studies.

Supervisor: Professor Judit Sandor

Budapest, Hungary

2008

Abstract

There are many debates about if the US government should grant gay couples the right to marry under the provisions of the country's Constitution. Such legal theorists as David Richards and Mark Strasser refer to the Fourteenth Amendment of the Constitution as the grounds for claiming that marriage is a fundamental right to which all the citizens of the States should have access irrespective of their sexual orientation. Generally, this amendment was designed to ensure that all the citizens share the same rights and privileges and have the same legal protection before the law. These legal theorists state that not granting non-heterosexual couples the right to marry is a violation of the Fourteenth Amendment's provisions which guarantee equal treatment of all the American citizens. My thesis will prove that marriage is one of these rights via the analysis of legal cases of *Goodridge v. Department of Health* and the Defense of Marriage Act (DOMA). The first analysis is about the first successful case that extended the institution of marriage to homosexual people based on the Equal Protection Clause of the State and Federal Constitutions. This case occurred in the state of Massachusetts. Additionally, the state of California except Massachusetts succeeded in providing homosexual couples with the right to marry so far. However, only the state of Massachusetts appealed to the Equal Protection Clause extensively as the basic argument for accepting gay marriage. Moreover, it eloquently displays why marriage is a fundamental right that every citizen should be able to claim. The second analysis explains why the federal government fails to provide homosexual people with the right to marry nevertheless. The analysis of *the DOMA* proves that the Act itself is contradictory to the Constitution of the USA.

Table of Contents

I. Introduction.

Many societies have established marriage as a social institution that distributes such privileges as the right of inheritance, adoption of children and tax reductions. However, marriage as this institution is often available exclusively to heterosexual people. Some scholars such as David Richards, Mark Strasser and Andrew Koppelman claim that the unavailability of marriage to gay people is discriminatory within the framework of the equal opportunity concept (Richards 1998, Strasser 1997 and Koppelman 1988). Each country has its own legal provisions which address this concept. In the US, the concept is related to the Fourteenth Amendment of the American Constitution.

My thesis considers how the US disregards its equal opportunity concept and conducts discrimination against homosexual people via the discourse of gay marriage. This topic is important because the institution of marriage seems to be the most vivid location where the government institutionally marginalizes LGBTQI (Lesbian, Gay, Bisexual, Transgender, Queer and Intersex people). In my thesis, I argue that gay marriage is important in achieving legal equality that the American Constitution should guarantee to the citizens of the country.

I prove my argument by discussing the Fourteenth Amendment of the Constitution of the United States. I describe the evolution of this amendment, and how it is considered to be the cornerstone of the whole Constitution nowadays. I establish that the Amendment is an integral part of non-discrimination laws and policies in the country. I describe how the Fourteenth Amendment combated discrimination in the past in order to create and promote legal equality of all the American citizens. I cite comparative examples from the legal history of the country to prove why this Amendment should provide American citizens with homosexual marriage.

Further, I commence to describe what marriage as an institution means to the citizens of the United States. I argue that its meaning has not only cultural but also legal implications for American people. I, consequently, discuss what role marriage plays in creating social and legal equality and how the institution of non-heterosexual marriage is an indispensable part of it.

I continue my thesis with describing the current situation in which gay marriage is in contemporary America. Currently, there are only two states, Massachusetts and California that have legalized gay marriage in the USA. Other states like Vermont, Hawaii and the city of New York have adopted alternative versions of marriage such as a civil union, social institution that grants the same or almost the same privileges to homosexual people that marriage grants to heterosexuals. I analyze arguments for and against this institution with the aim to prove that arguments for homosexual marriage seem to justify its existence. Hence, I support my arguments and the arguments of other scholars, e.g. Andrew Koppelman, that evidence against gay marriage is not solid and does not have any rational basis in the contemporary society of the USA. My main focus is on the concept of equality. I argue that both the culture and legal history of the country have established this concept as the foundation of the US itself. However, the current unavailability of marriage to gay people creates inequality and discrimination, thus undermining the foundation of the country and evoking social and legal division.

According to Richards, homosexual people commenced to raise their concerns of how they become discriminated because of the unavailability of marriage as a social institution to them with the case *Baehr v. Lewin* (Richards 1998). The court in this case ruled that a barrier to marriage is discriminatory. Thus, it was the beginning of the movement for legalizing gay marriage in the state of Hawaii and later in the country. This was a landmark in questioning the constitutionality of the social opposition to gay marriage.

The Supreme Court of the United States also established that homosexuality is a normal condition and should not be criminalized in the country in the case *Lawrence v. Texas,* arguing that the society should treat homosexual and heterosexual people equally when it comes to respecting personal liberties. Nonetheless, the federal government produced the law "Defense of Marriage Act (DOMA)," which defines on the federal level that only heterosexual couples have access to marriage, thus restricting the rights of homosexual people. Thus, *the DOMA* has become the federal opposition to gay marriage.

My research question then is "Why does the federal government still discriminate against homosexual people via *the DOMA* if it federally acknowledges that gay people are equal to heterosexual people and that they have the same rights?" I argue that the non-discrimination law in the United States of America does not operate efficiently when it tackles the issues of gay marriage. I intend to explore the reasons why the law fails to protect the interests of homosexual people in the institution of marriage.

I discuss how the Defense of Marriage Act produced additional discrimination of homosexual people via the federal opposition. Namely, I cite how *the DOMA* brings social division to the American society. I explain how the federal opposition of marriage triggered a huge debate. Some supported homosexual marriage as an institution; others rejected it based on different reasons. These reasons include but are not limited to the fact that the exclusivity of heterosexual marriage preserves "the genuine" American culture. Proponents of this view are usually people with conservative views such as religious groups. Some queer theorists such as Michael Warner, Carl Wittman, etc. argued that marriage itself is discriminatory. They proposed that instead of legalizing gay marriage, one could abolish it as an institution completely and invent new forms of distributing social privileges (Warner 1999, Wittman 1969). Therefore, they argue that not only LGBTQI people but also other social groups such as single mothers, polyamorous people, etc. will be liberated from marginalization. The

government will distribute social privileges via different means not limited to the institution of marriage according to them.

I position my thesis to support the arguments of those who endorse gay marriage as an institution. I argue that currently, it is more beneficial to expand the institution to homosexual couples in order to avoid discrimination than to eradicate gay marriage completely. In fact, no valid and realistic alternatives to the institution of marriage exist today.

After establishing how important marriage is to all the citizens of the United States, I discuss how the judicial system of the country has failed to address the discourse of gay marriage justly. I return to the arguments which I produced earlier about the Fourteenth Amendment as the non-discrimination law that is also an integral part of the whole country's culture. I argue that not granting homosexual couples the right to marry is indicative of how this amendment fails to protect gay people that undermines trust in the Constitution and stability of the whole country as a result.

1. Constitutional Dimensions of Fourteenth Amendment as Non-Discrimination Law in United States of America

I provide this chapter to give a reader an insight into what law I use in order to support the thesis argument and research question. I describe this law as detailed as it is necessary to understand in subsequent chapters how and why gay marriage should be protected from the Defense of Marriage Act (*DOMA*, 1 U.S.C. Paragraph 7 and 28 U.S.C. Paragraph 1738C) and states' statutory acts against this type of marriage. I claim this law guarantees equal legal protection of American citizens' fundamental rights, for instance marriage that includes gay marriage.

The Fourteenth Amendment is the cornerstone of the non-discrimination law that exists in the United States. It was designed to guarantee and protect the equal rights of the American citizens. Legislatures of several states proposed it by the 39th Congress on the 13th of June, 1866, and the Secretary of State declared it ratified on the 28th of July, 1868 (World Almanac and Book of Facts 2005). According to the first section of the Amendment, it defines the American citizens as "all persons born or naturalized in the United States, and subject to the jurisdiction thereof" (Legal Information Institute of the Cornell University Law School). Therefore, the Fourteenth Amendment equally protects all the people who fit the description of its first section.

It arguably extends its protection to the ones who are simple residents of the USA. That means that the government of the US treats all the people who are on the territory of the country almost the same way it treats the American citizens within the framework of the International Bill of Human Rights. However, the government guarantees non-citizens only the Basic Rights, the ones that the Universal Declaration of Human Rights determines as essential to all the humans. These main rights include "the right to life, liberty and security"

(Fact Sheet #2, the International Bill of Human Rights, Office of High Commissioner for Human Rights). It does not guarantee all the rights and protections that it guarantees to American citizens. These rights and protections include the right to vote, the right to obtain Social Security and medical benefits.

There were many problems and issues related to who had the status of being an American citizen at the time before the Fourteenth Amendment was introduced. Many nationals including the Native Americans, who lived on the territory of the States, were not conventionally Americans. As a result, they experienced different kinds of mistreatment that made them unequal to the white population of the country. This mistreatment included racial segregation (black people's children were educated in separate buildings than those of whites, which resulted in poorer quality of education) and employment discrimination (certain jobs, e.g. management positions were not available to people of non-Caucasian race such as Asians). It was obvious that those people who experienced these kinds of discrimination were not equal to the white population of the United States of America in that they did not share the same rights which the Constitution of the country guaranteed to its citizens.

To combat this injustice, the government of the United States introduced the Fourteenth Amendment. Since the black population of the country was the one that required much attention, the US initially introduced the Fourteenth Amendment in order to declare that black people, who were formerly slaves in the country, are equal to the white population and that they are American citizens as well. It became a landmark in defining whom the government can consider as citizens.

Other problems related to citizenship status followed, but the Fourteenth Amendment required more time to develop fully and grant equal protection of its citizens' rights. There was a problematic case with the Native American, John Elk who demanded the American citizenship under the protection of the Fourteenth Amendment. Dr. John Eastman, the Dean

and Donald P. Kennedy Chair in Law at Chapman University School of Law, claims that "Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign states 'they were alien nations, distinct political communities'" (Eastman 2006). This is what the government of the USA considered everyone who belonged to Native American tribes. Hence, Native Americans were not the country's citizens even though they were born on its territory. The Supreme Court of the country, as a result, denied Elk the right to claim the American citizenship (*Elk v. Wilkins*). The Supreme Court had to hear many similar cases such as *United States v. Wong Kim Ark, INS v. Rios-Pineda and Plyler v. Doe* before it granted the full protection of equal rights to all of its citizens nowadays. This opens up a possibility to question the Fourteenth Amendment of who else and how can enjoy the equal rights that the Amendment guarantees under the Constitution. The fact the Amendment did not function properly immediately after the government introduced it proves that it may still be imperfect and that the government needs to improve it.

Fifty American states have their own legislative, executive and judicial bodies in order to recognize the diversity of the country and the nationalities which each state represents. Nevertheless, there can be a problem with these diverse legislative, executive and judicial systems. Since the systems can technically be independent, there is no guarantee that they can ensure equal rights to all the citizens of the country. They may even contradict each other's legislatures, which can result in more difficulties to secure the American citizens' equal rights.

This is another reason why the Fourteenth Amendment was introduced. The Amendment ensures that the rights and privileges are the same throughout the whole American territory. The Fourteenth Amendment protects what it defines as "the privileges or immunities" of each citizen (Rights Guaranteed, Privileges and Immunities of Citizenship, Due Process and Equal Protection, Fourteenth Amendment). This way, an individual state

cannot create a law that would discriminate against an American citizen. The Supreme Court would immediately annul a state's potential discriminatory law as soon as it contradicts the provisions of the Fourteenth Amendment.

Professor Akhil Reed Amar expressed the same expectations about the Fourteenth Amendment in his work "the Bill of Rights and the Fourteenth Amendment." Moreover, he defined what could be the determining document that guarantees the equal protection of the American citizens' "privileges and immunities" (Amar 1992, 1193). He proposed that the document could be the Bill of Rights against which the Fourteenth Amendment would check if the citizens are fully and equally protected.

The Bill of Rights of the United States of America is a document that guarantees the democratic development of the country in that it promotes equal protection of the American citizens. According to the Library of Congress, it was the first Federal Congress of the United States that proposed it to state legislatures on September 25, 1789 (Primary Documents in American History, Library of Congress). However, the Bill of Rights is still not the determining document for the Amendment.

The second and third sections of the Fourteenth Amendment guarantee that there is an equal treatment in appointing Representatives to the Congress. The Fourth Section determines which damages the United States will or will not pay to the victims of unequal institutional mistreatment that they experienced. The fifth Section defines that it is the Congress that will enforce the provisions of the Fourteenth Amendment in a legislative manner.

The Fourteenth Amendment operates on two main clauses, the Equal Protection Clause and Due Process Clause which I will discuss later in the chapter. These Clauses are the determining documents that define what the equal protection of the American citizens' rights is, how the government should protect it, etc. These Clauses assisted the black

community to liberate themselves from unequal treatment that included racial segregation. They also assisted the Asian Americans in obtaining the full protection of their rights via granting them equal treatment in the employment practices which had discriminated against them before in the country. Nowadays, the government forbids employers to discriminate against the non-white population while selecting potential employees.

1.1 Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment guarantees that no states accept a law or any other legislative tool that would discriminate against a citizen of the United States of America. Its central focus is that the laws that exist in the country protect all the citizens equally. "In other words, the laws of a state must treat an individual in the same manner as others in similar conditions and circumstances" (Legal Information Institute of the Cornell University Law School). Even though the focus of this Clause is that the laws which a state accepts guarantee equal protection, it is important to take into consideration that it does not necessarily guarantee social equality among the citizens. It is because the Equal Protection Clause aims at regulating governmental (not private) bodies that deal with issuing laws.

Nevertheless, one can claim that the Clause has a substantial advantage over other laws, e.g. the Bill of Rights which had existed before the Equal Protection Clause was introduced. The Bill of Rights protected American citizens' individual rights only from the mistreatment that the federal government could exert. This Clause, on the other hand, protects American citizens from state leaders.

The Congress of the United States, the legislative organ of the country introduced the Fourteenth Amendment to grant equality to the black population of the country as I have

already mentioned in the first part of the chapter. Moreover, the Congress introduced the Civil Rights Act of 1866 that states "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color…shall have the same right, in every State and Territory in the United States…to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens" (Chapter XXXI: an act to protect all persons in the United States in their Civil Rights, and furnish the means of their vindication, Thirty-Ninth Congress). The content of this act, thus, guarantees that all the people born in the States irrespective of their race not only blacks share the same rights and privileges as the white population. The Southern states of the country were not content with this Act though. They even commenced to question if the Congress could pass such a law under the provisions of the Constitution that existed at that time. To overcome any debates and lack of clarity that the then-existing Constitution had, the Congress of the USA designed and implemented the Equal Protection Clause.

The first example of how this Clause was successful is the case *Strauder v. West Virginia* in 1879. A black man whose name was Strauder was convicted of a murder by a jury that exclusively consisted of white people. That man appealed their decision claiming that it was not just based mainly on the fact that those who judged him were all white. The majority of the jury who dealt with his appeal agreed in the face of Justice William Strong that it is discriminatory not to allow black people to become juries in court trials similar to the one that Strauder underwent. The right to be a jury is a civil right and even an obligation that every American citizen despite his/her race should have. This Clause, consequently, secured one of the fundamental rights of an American citizen for people of non-Caucasian background the right to be a jury.

Another important case that the Equal Protection Clause assisted in bringing equality

and social justice to the US was *Brown v. Board of Education* 1954. There were separate educational facilities for white and non-white students until 1954 in America. This separation followed the logic of the case *Plessy v. Ferguson*, in which the Supreme Court decided that it is not discriminatory to have separate facilities for the white and non-white population of the country. According to the outcome of the hearing of this case, the Court supported the concept "separate but equal" that has been in the country's legal system for many years.

The case *Brown v. Board of Education* overruled the Supreme Court's decision of *Plessy v. Ferguson*. The Chief Justice Earl Warren ruled on behalf of the majority in this hearing that public education should not adhere to the concept "separate but equal" and that separate educational facilities are unequal by default. Justice Warren argued that "to separate [students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." The Court availed itself of the Equal Protection Clause to make that conclusion because the feeling of inferiority creates inequality by itself and that laws which either promote or enforce such inequality are discriminatory, against which this Clause was created to struggle.

Under the Equal Protection Clause, the Supreme Court has three approaches at its disposal when it has to decide if a certain law is unconstitutional. Professor Mark Strasser defines these approaches as "Strict Scrutiny," "Heightened Scrutiny" and "the Rational Basis Test" (Strasser 1997). The Strict Scrutiny approach deals with such areas of interest as race or national origin and can determine that a law is unconstitutional if it does not serve the government's interests in a compelling way or that the means it chooses is not sufficiently "narrowly tailored" (Strasser 1991). The Heightened Scrutiny, according to Strasser, uses an intermediate test. This test deals with the area of sex/gender and can determine that a law is unconstitutional if it is not important to the government's interests and if the means that the

law chooses to achieve its legislative power is not substantially related to these interests. The Rational Basis Test is the least rigorous out of three approaches, and it deals with other issues than the ones with which the first two approaches deal. The law will be held as constitutional as long as it is reasonably related to the government's interests.

There are certain suspect classes that also help the Supreme Court to determine which approaches it needs to consider when tackling a certain law to test if it is unconstitutional. The status of being in the suspect class guarantees that the Supreme Court will avail itself of higher and more careful judicial scrutiny. According to Strasser, "A suspect class is a group of individuals whom the Court recognizes as deserving special protection from our majoritarian political process because the group has a history of having been subjected to purposeful, unjustified discrimination, and also has a history of political powerlessness " (Strasser 1997). It, therefore, technically guarantees more opportunities to gain equality before the law. Traditionally, the suspect classes are limited to women and racial minorities in America. Other minorities such as disabled and homosexual people are not considered to form their own suspect classes.

Some legal and social theorists have attempted to include handicapped people and LGBTQI into suspect classes. Andrew Koppelman, for example, argues that the Supreme Court may include sexual orientation into the category of sex (Koppelman 1994). He asserts that if the Supreme Court recognizes sexual orientation as the category of sex, it will consider cases related to sexual orientation discrimination under the Intermediate Test approach. It will increase gay men's chances to struggle against institutionalized discrimination such as the most of the states' institutional bans on gay marriage.

However, it is important to understand the difference between social equality and legal equality when one discusses the Clause. As mentioned at the outset, the Equal Protection Clause's function is not to ensure that there is social equality. Its main focus only

is to ensure that a law treats all the citizens equally. The focus of this Clause is not equal outcomes but rather equal opportunities. The Clause is not concerned with discrimination itself that a certain law may create. Rather, the Equal Protection Clause is concerned with the intent a legislative organ of a state has when it creates this law. The Supreme Court will announce the law unconstitutional if a state's intent was to conduct discrimination against a certain group of people in the American society.

Since the function of this Clause was not to create social equality itself but rather to guarantee equal treatment before the law, President John F. Kennedy introduced the additional legislative tool, affirmative action (Infoplease Article). "'Affirmative Action' means positive steps taken to increase the representation of women and minorities in areas of employment, education and business from which they have been historically excluded" according to the Stanford Encyclopedia of Philosophy (Fullinwider). These steps often include some kind of preferential treatment in American schools' admission processes or employment opportunities, for instance, to create justice via social equality. Some legal theorists and scholars such as Professor Peter Schuck and Justice Clarence Thomas claim that affirmative action can be against this Equal Protection Clause ultimately (Schuck). Whether it is true remains an ongoing debate, and I will not pursue further discussion on this matter because my thesis does not deal with affirmative action policies. I mention affirmative action only to cite an example of a legislative tool that tends to associate with the Equal Protection Clause in order to gain justice.

1.2 Due Process Clause

The Due Process Clause, also known as the Due Process of Law, is a part of the Fourteenth Amendment that protects individual citizens of the States from unjust treatment that the government may exert on them. This Clause establishes that the government must respect all the person's rights. In fact, it is the only legal tool that American citizens can avail themselves in case they feel that the government violates their rights. This Clause, similarly to the Equal Protection Clause, does not protect a citizen from violation of his/her rights from private members of the American society though.

The word combination "due process" existed long before the Constitution of the USA incorporated it. They used this word combination interchangeably with the phrase "law of the land" that meant to secure territorial property, e.g. a house or a land of an individual. New York was one of the first states that enacted a statutory bill of rights in 1787 where it used the word combination closely to what it means today in the Constitution (Laws of State of New York). It even demanded the Congress to incorporate it into the Constitution of the US. Nevertheless, it was James Madison, the American President who drafted the first version of what is now known as the Due Process Clause, "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence; nor shall be compelled to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without a just compensation" (House of Representatives, Amendments to the Constitution, Bill of Rights, the Founders' Constitution). The developers of this Clause took into account Madison's regulation as its basis. Starting from 1789, the Constitution began to use the provisions of the Clause more substantially.

The Fifth Amendment of the Constitution of the United States of America protects the

citizens only from potentially unjust actions that the federal government can impose on them. It guarantees no protection from legislative, executive or judicial discrimination that individual states may impose on their residents. The Due Process Clause of the Fourteenth Amendment fixes this problem in that it expressly indicates that it protects American citizens from the inequality that certain state laws may create. According to Justice Felix Frankfurter, it protects the citizens from the legal inequality of individual states' laws in the same way the Fifth Amendment protects from legal inequality that the federal government can create (*Malinski v. New York*).

When the government impairs a citizen's life, liberty or property, the Due Process Clause requires the government to follow certain procedures before it justifies the government's actions if at all. The Supreme Court examines the Constitution first in order to investigate if this impairment is justifiable (*Murray v. Hoboken Land*). This Clause requires the restoration of the personal liberty or property if the Constitution of the United States cannot justify the impairment.

Moreover, the Due Process Clause limits a state's substantive power in dealing with certain areas of a citizen's life. It is due to the long history of much contradiction to the Constitution of the country that many states made when they limited an individual's liberty. The Supreme Court decided in 1967 that "we [the Supreme Court] cannot leave to the States the formulation of the authoritative laws, rules and remedies designed to protect people from infractions by the States of federally guaranteed rights" (*Chapman v. California*). The logic of the Court was that liberty of an individual person is the first concern of the Due Process Clause. When a state violates a citizen's liberty, the state can no longer be considered an impartial agent creating social justice. Thus, the Supreme Court cannot allow an individual state to elaborate on when and how the Constitution of the States can abridge the individual right to liberty.

The Due Process Clause can be procedural and substantive. The procedural due process focuses on the notion of justice that the Constitution guarantees as fundamental rights to the citizens of the USA. The Supreme Court normally uses the Procedural Due Process in ensuring that citizens whom judicial branches of the power convict in a crime have their fundamental rights unimpaired.

The Constitution of the US does not list all the fundamental rights of the citizens. However, it does not mean that the Supreme Court should protect only those fundamental rights that the Constitution cites. As Mr. Justice Cardozo claims, some fundamental rights are "implicit in the concept of ordered liberty" (*Palko v. State of Connecticut*). It is not the Supreme Court's job though to find all the possible fundamental rights of the American citizens (Hawkins 2006, 410).

Nevertheless, what the Supreme Court's job under the substantive due process is to hear the cases about what can be considered a fundamental right of a person and make a decision if this right is fundamental. Since the Lochner era, for example, many rights such as freedoms of speech, religion and conscience that the American society considers fundamental these days were the ones that the Supreme Court had to hear before announcing them fundamental and encouraging the Congress to establish laws that protect them. The Lochner era is the period in American legal history between 1890 and 1937 when the Supreme Court regulated such economic phenomena in the United States of America as conditions of wages and working hours. This era reinforced the individual right to contract under the Substantive Due Process.

One of the rights the substantive due process helped achieve is the right to privacy, which is important for my thesis since I will base my arguments for further chapters on this right. The Supreme Court availed itself of the substantive due process to protect this right in the case *Griswold v. Connecticut*. Mr. Justice Douglas delivered the opinion of the Court by

stating that "the First Amendment has a penumbra where privacy is protected from governmental intrusion." The Constitution itself though does not name or explicitly protect the right to privacy. The Supreme Court had to investigate this issue and make conclusions that Justice Douglas delivered. Nowadays, the Supreme Court relies on the Ninth Amendment to protect the right to privacy that addresses unenumerated rights.

The Substantive Due Process also assisted in achieving the right to marry a person of a different race. The famous case for this was *Loving v. Virginia*. Before this case, the anti-miscegenation, also known as miscegenation laws existed in the United States. These laws forbade people of different races to get married. Mr. Chief Justice Warren delivered the opinion of the Supreme Court in that

"marriage is one of the 'basic civil rights of man,' fundamental to existence and survival. To deny this fundamental freedom on [the] basis [of] racial classifications… directly subversive of the principle of equality of the Fourteenth Amendment is… to deprive all the State's citizens of liberty without due process of law. Under [the] Constitution, the freedom to marry… resides with the individual and cannot be infringed by the State" (*Loving v. Virginia*).

Such theorists as Andrew Koppelman and Mark Strasser have attempted to apply the Substantive Due Process to the issue of gay marriage based on almost the same arguments that the Supreme Court used in the case *Loving v. Virginia*. I support their position in my thesis. I will address their arguments in the following chapters arguing that the right to marry stems directly from the right to privacy and autonomy, which in its turn, stems from the Bill of Rights that the Substantive Due Process can support if the Supreme Court applies it to decide the fate of gay marriage.

The Substantive Due Process, however, is often criticized. The opponents of this process argue that the policies and laws are the realm of the legislators. They argue that the

Supreme Court should not judge laws at all. Justice Byron White, for example, argues that the Substantive Due Process provides the Supreme Court with too much freedom in questioning laws and the branch of power that the country designated to produce these laws. He, moreover, claims that the Substantive Due Process can potentially create a backlash in a sense that more citizens would appeal to this process seeking more forms of rights that would result in overburdening the Supreme Court itself (*Bowers v. Hardwick*).

It is the responsibility of the Constitution though to guarantee that American citizens are fully protected and that there is nothing that hinders these citizens from pursuing happiness, one of the fundamental rights for which the first Presidents of the country created the Constitution. The Constitution should keep this responsibility even if it results in creating an additional burden to work that the Supreme Court of the United States of America already has. As a part of the Constitution, the Fourteenth Amendment and its components exist to ensure that an American citizen has the opportunity to pursue happiness via equal legal protection that it provides. The equal legal protection, additionally, tends to benefit the citizen in that it results in social, economic and political protection. The following chapters will discuss how the Fourteenth Amendment can and should ensure one of the fundamental rights which American citizens have in their pursuit of happiness, the right to marriage.

2. Marriage as Institution in United States

Every society has a form of recognizing intimate personal relationships. The most common regulating form is the institution of marriage (Gallagher 2002). According to the Columbia Encyclopedia, "marriage [is a] socially sanctioned union that reproduces the family" (Columbia Encyclopedia). Many societies regulate this institution because they believe that it is an important component of their biological, cultural and political reproduction. The American society is one of them.

In the US, the institution of marriage has traditionally been the exclusive realm of an individual state. A particular state decides what a marriage is, how the state should regulate it and what benefits it should receive from the state government. The federal government does not normally deal with issues related to marriage. Recently, though more social activists and private members of the American society commenced to question the authority of the state in regulating this institution (Gallagher 2002). Americans began to question why their states have certain policies and what purposes these policies serve. They also wonder what methods a particular state chooses to regulate the institution and if they are satisfied with the methods their states choose.

Traditionally, American marriage is a monogamous union between one man and one woman. The American population names this type of marriage heterosexual marriage. The American government regulates the institution of marriage via providing certain benefits and privileges that I will discuss further in this thesis chapter. However, homosexual marriage, marriage between partners of the same sex, does not possess any benefits and even tends to be forbidden. Moreover, a state typically announces marriages which are non-heterosexual void and sometimes declares couples involved in these types of marriages as cohabitants or does not recognize them as relative to each other in any ways at all. According to Dr. Anne-Marie Ambert, cohabitation is a less institutionalized "sexual and emotional relationship

within the context of living together" (Ambert 2005). Cohabitation is normally a civil union and does not have the same legal implications as marriage does. Some of the citizens of the United States of America who support non-heterosexual marriage question why the benefits are available only to those who are involved in heterosexual marriage.

In view of all these debates, some suggest that the American society should find other ways of distributing social privileges. There are different approaches as to how to make such a distribution. Harry D. Krause, a famous family law scholar gives a suggestion on how to treat other forms of marriage than heterosexual marriage claiming that "married and unmarried couples who are in the same *factual* positions should be treated alike" (Krause 2000). He suggests that the state provide couples who consider themselves to be in a position similar to marriage with the same benefits it gives to whom it determines as a married couple. Other suggestions, e.g. eradicating the institution of marriage completely exist as well (Warner 1999).

Nevertheless, the institution of marriage still exists and does not seem to be abolished in the near future. Marriage has two social components in the United States: religious and civil. The religious component includes the traditional ceremonial declaration of the intent to marry. It has certain traditional procedures, for example involving a clergy to announce a couple married. The civil component deals with official papers that prove the validity of marriage before the legal system of the country. Many American families culturally combine both components in one wedding ceremony. It is, therefore, enough for the couple to have their wedding ceremony to make the state recognize them legally married.

2.1 Situation with Gay Marriage in America

There are many names for the concept of gay marriage. Some call this marriage "homosexual marriage," others call it "same-sex marriage." Nevertheless, they all refer to the same legal and civil union of two partners of the same-sex. Unfortunately, the institution of gay marriage does not exist in the United States of America except in the states of Massachusetts and California. In this chapter of my thesis, I argue that gay marriage is unjustly banned in the country because this banning is unconstitutional.

The whole debate about gay marriage commenced with the state of Hawaii that granted its residents the right to marry in 1993 irrespective of their sex until it reversed its decision later in 1998. Many social activists such as LGBTQI supporters and feminists have supported the movement of non-heterosexual people's right to marry since then. Feminists in the face of the National Organization for Women argue that granting same-sex couples the right to marry has a broad implication (National Organization for Women). They call the homosexual marriage equal marriage. They believe that this marriage has a potential to reverse gender roles assumed in the traditional (heterosexual) institution of marriage. Therefore, they claim that homosexual marriage can liberate women from unequal treatment in their marriage with men.

Gay marriage, though, has broader implications than granting women more equal treatment. The issue of granting the right to gay marriage is something that the Constitution of the United States should protect. As I indicated in the first chapter of the thesis, the American Constitution has the Fourteenth Amendment as the non-discrimination law that guarantees that all the American citizens should be treated equally before the legal system of the country. Marriage should be available to gay people because it is a part of the legal system that distributes rights and privileges. Therefore, proponents of gay marriage feel uncomfortable about the country's resistance to grant the same-sex couples this right

(Lambda Legal). They claim that not granting the same-sex couples the right to marry is an indication that the country's Constitution does not protect its citizens the way it should. This lack of protection results in the insecurity that citizens can experience.

Massachusetts and California are the only states that recognize gay marriage currently. The Supreme Court of Massachusetts made the decision in the case *Goodridge v. Department of Health* that all the residents of the state who have been ones for more than a year have the right to marry under the "Common Benefits" Clause of the state Constitution. Under the state law, same-sex couples are entitled to such benefits as the right to inheritance and a common insurance coverage of a married same-sex couple. However, same-sex couples in Massachusetts cannot claim the benefits that the federal government guarantees to its citizens such as the right to file a joint income tax return or claim Social Security benefits as a dependent spouse. This is due to the Defense of Marriage Act that Bill Clinton passed during his presidency (*DOMA*, 1 U.S.C. Paragraph 7 and 28 U.S.C. Paragraph 1738C). I will discuss the privileges and benefits of which *the DOMA* deprives gay citizens of the United States later in the next sub-chapter. I argue that the number of rights and privileges that homosexual couples unjustly lack is substantial.

Other states such as Main, Vermont, Connecticut, New Hampshire and New Jersey offer equivalent versions of the institution of marriage, for example civil unions or domestic partnerships. However, the National Organization for Women is not satisfied with such a marital substitution (National Organization for Women). According to them, this substitution does not even live up to the retarded and extremely old-fashioned logic of "separate but equal" that I mentioned earlier in the first chapter of my work (*Plessy v. Ferguson*). It is even worse: "separate and unequal." This is due to the fact that civil unions and alternative versions of marriage that are lower in social and legal status create second-class citizens because they do not grant the same legal and social benefits. These alternative versions of

marriage marginalize homosexual couples as a result.

Additionally, according to the National Conference of State Legislatures, many states such as Texas, Wisconsin, etc. not only do not grant its homosexual residents similar versions of the marital institution but also limit the institution to heterosexual couples only (National Conference of State Legislatures). Twenty seven states define in their constitutions what marriage is for them. The state of New York though has a very unique approach to the institution of marriage. While it bans same-sex marriage in its state, it recognizes same-sex marriages united outside of the state on the same level as it recognizes heterosexual marriage. It even extends such a privilege as health state benefit. In his 2 February 2008 *New York Times* article "State Court Recognizes Marriages from Elsewhere," Robert McFadden, commented on the law that the Supreme Court of New York passed on the first of February, 2008 in Rochester, "an employer's denial of health benefits had discriminated against the couple on the basis of their sexual orientation." He mentions a case where an employer denied these benefits to a homosexual couple who got married in Canada in 2004. This law, consequently, defined that not granting married same-sex couples the same state privileges which married heterosexual couples have is discrimination that the state prohibits.

Nevertheless, all the attempts of such states as Massachusetts and California to provide equal treatment to the American citizens before the law becomes less efficient by the growing opposition that the federal government exerts on gay people's marriage. The Defense of Marriage Act explicitly increases the legal inequality that exists in the country. It defines marriage as "the legal union between one man and one woman" (*DOMA*, 1 U.S.C. Paragraph 7 and 28 U.S.C. Paragraph 1738C). As a result, it deprives homosexual people of their right to pursue happiness that is guaranteed by the Constitution of the country. Professor Mark Strasser argues that the right to marriage is a fundamental right that the Constitution guarantees (Strasser 1997). Marriage is a couple's private issue that no one should be able to

deprive. Strasser asserts that this private issue a part of the right to pursue happiness that is the cornerstone of the Constitution of the States.

2.2 Defense of Marriage Act (DOMA)

Defense of Marriage Act (DOMA) is a federal law that defines what the federal government recognizes as marriage. Historically, marriage is the exclusive realm of individual states' legislatures. The federal government, nevertheless, introduced this law to limit this institution only to heterosexual couples. The DOMA violates the fundamental rights of the American homosexual couples as a result.

The American Congress passed the bill by the voting process in the House of Representatives on the 12th of July in 1996 (House of Representatives) and in the Senate on the 10th of September in 1996 (Senate of United States of America). President Clinton signed the bill on the 21st of September, 1996. Professor Strasser indicates that this bill has two effects,

- "prevent[s] states from being forced by the Full Faith and Credit Clause to recognize same-sex marriages validly celebrated in other states and
- Define[s] marriages for federal purposes as the union of one man and one woman" (Strasser 1997, 127).

The Full Faith and Credit Clause is a part of the Constitution of the United States that indicates that "public acts, records and judicial rulings" of one state should be recognized in another state (Constitution of USA). Marriage including the gay version of it is a public act, record and has a judicial ruling of Massachusetts that legalizes homosexual marriage as equal to heterosexual one. Technically, all the states of the country should respect the decision of

Massachusetts and must recognize marriage celebrated in this state as a result unless gay marriage violates a strong public opinion of a particular state. The Defense of Marriage Act though encourages the states not to recognize homosexual marriage which is contrary to the Full Faith and Credit Clause.

Before, the federal government used to recognize marriages as defined by individual states even though those marriages were not always recognized in other states. For instance, even at the time when interracial marriages were not recognized by all the states, the federal government recognized them simply because it was enough for one individual state to recognize them due to the fact that it was an individual state's not the federal government's business to decide what is a marriage for an American citizen living in a particular state (*Loving v. Virginia*). *The DOMA*, nonetheless, makes it useless for others states to accept homosexual marriage under the Full Faith and Credit Clause because gay marriage will still not have the same privileges that heterosexual marriage has.

Strasser mentions the second effect of the DOMA that is indicative that the government restricts the institution to only heterosexual couples for federal purposes. According to Professor David Richards, these federal purposes include granting American citizens their entitled rights to "employee insurance coverage," "spousal rights under the laws of will," "immigration laws" or "the law of veteran benefits" (Richards 1998, 440). The right to "employee insurance coverage" guarantees that a family of a member who has the insurance coverage can benefit from it. The right to "spousal rights under the laws of will" ensures that a spouse of a diseased person can inherit his/her property. The right to "immigration laws" guarantees that a foreign spouse of an American citizen can settle in the States as a permanent resident with the purpose of unification with his/her marital partner. Moreover, the immigration laws grant citizenship to that foreign spouse if the spouse would like to claim it. The right to "the law of veteran benefits" extends to dependents (spouses

included) the rights and privileges that their veteran-family members have.

All these rights and privileges become inaccessible to married gay couples because the government either does not recognize their union as marriage or simply does not give them the right to marry. The Supreme Court of the USA reasoned that depriving homosexual people of the rights that others enjoy is discriminatory (*Romer v. Evans*). Prohibiting homosexual people to marry is discriminatory and, consequently, unconstitutional because others, for example heterosexual couples, have this right.

It is also noticeable that the Republican representatives of the Congress cited some religious examples as the ones which potentially justify *the DOMA*. According to them, "the U.S. Supreme Court spoke of 'the union for life of one man and one woman in the holy estate of matrimony'" (Lectric Law Library's Stacks). This kind of reasoning to support the Defense of Marriage Act should not influence the legal status of any laws because they jeopardize the equality of diverse social groups that exist in America today. This reasoning bases itself on the Conservative Christian understanding of what a marriage is. It excludes other religious and non-religious outlooks on the matter as a result.

Moreover, there are politicians trying to expand the influence of the *DOMA* by accepting laws that will force other states to declare all homosexual marriages void in the country. One such law is the Federal Marriage Amendment. The National Organization for Women claims "the Federal Marriage Amendment, introduced in the House of Representatives and the Senate, and supported by President George W. Bush, is an attempt to write discrimination and bigotry into our Constitution and to overrule any state action on behalf of equal marriage rights" (National Organization for Women). They claim that what the federal government does at present is unconstitutional because it makes homosexual couples unequal to heterosexual ones thus creating discrimination. They also argue that the federal government should not involve itself into such issues as marriage that is arguably the

exclusive legal realm of an individual state. The only reason why it should be able to involve itself into marriage debate is only to support gay marriage based on the non-discrimination law that exists in the States.

According to the US Government Accountability Office, there are over 1,138 rights and protections that the federal government provides to married citizens of the country (Government Accountability Office). They include Social Security and veteran and health insurance benefits. They also influence such areas as family leave and immigration law. These are the laws that are offered exclusively to heterosexual married couples. The benefits that the states which recognize same-sex marriage provide cannot substitute for the benefits that the federal government offers. This is clearly discriminatory since the government should provide these benefits to any married American citizen. If the government makes these benefits available only to heterosexual couples, then it discriminates against homosexual ones. This is unconstitutional since the Constitution of the United States of America forbids discrimination except the positive one. The Substantive Due Process Clause of the Fourteenth Amendment, as I argued in the first chapter of the thesis, guarantees that the rights with which the government provides one person, cannot be denied to another.

2.3 Failure of Non-Discrimination Law to Protect Gay Citizens via Gay Marriage Discourse

Since marriage persists to be the only institution that distributes rights and privileges, it should be available to every American citizen. The actual fact is that it is not available to all of them though, and the Supreme Court of the US has repeatedly rejected considering the case of abolishing the Defense of Marriage Act. Thus, I argue that the non-discrimination law in the United States of America does not operate efficiently when it tackles the issues of gay marriage.

The concept of non-discrimination law of the United States, the Fourteenth Amendment is about treating all the citizens equally. Creating a separation between who can marry and who cannot marry based on their immutable features is discrimination that the Amendment is supposed to struggle against. Professor Christopher McCrudden provides one of the interpretations of what can be discrimination. According to him, discrimination can be "treating a person with a particular characteristic less favorably than others because of [prejudice] towards persons with that characteristic" (McCrudden 1991). Heterosexual couples seem to become superior in their access to the privileges which marriage provides and homosexual couples become inferior under the provision of *the DOMA*. One can argue that *the DOMA* discriminates against and "treats less favorably" gay men based on their characteristic of being homosexual. It deprives them of their right to marry entitled to them by the Constitution (Strasser 1997, 51, 76). However, the federal government not only neglects the key concept of its Constitution that it created to promote equality in the country but also reinforces discrimination against homosexual people via creating laws (*the DOMA*) that restrict gay people's freedom in obtaining legal recognition of their relationships and claiming the benefits that they deserve as the citizens of the States.

Many religious activists, e.g. Baptists, claim that granting same-sex couples the right to marry can lead to encouraging and later legalizing other forms of relationships which they consider deviant such as polygamy, polyamory, animalism and pedophilia even though these categories are on a different level than homosexuality. They appeal to the Due Process Clause claiming that even though the law does not explicitly forbid homosexuality as an act, the government should not encourage it via granting gay marriage. They claim that the extension of marriage to homosexual couples will lead to the extension of this institution to persons engaged in "deviant" relationships. According to them, it is in the interests of the citizens consequently that the government does not legalize gay marriage.

Nonetheless, gay marriage does not necessarily encourage such forms of human relationships as polygamy or polyamory. Moreover, according to Professor William N. Eskridge, Jr., gay defense of marriage in the United States of America promotes monogamy rather than polygamy (Eskridge 1996). It promotes monogamy than polyamory because homosexual couples involved in marriage have traditional and cultural understanding of what a family is as a social unit via the institution of marriage. The American society traditionally recognizes only a monogamous union as a social unit called a family. Moreover, gay marriage advocates tend to conform to some of the traditional components of this institution such as holding a wedding ceremony and using the institution to raise children. Homosexual marriage can be an imitation of heterosexual marriage as a result except that a couple consists of same-sex partners and gender hierarchy is more equal or does not even exist.

The modern American institution of marriage though remains to be exclusively heterosexual and as such discriminatory against gay people. As Iris Marion Young claims, "Modern political theory asserted the equal moral worth of all persons [that imply] the inclusion of all persons in full citizenship status under the equal protection of the law" (Young 1989). Marriage as a legal tool that distributes citizenship privileges excludes and harms gay people. By that, it discriminates against homosexual people even though the law recognizes them as the same citizens as heterosexual ones. It becomes similar to racial discrimination that also excludes certain marginalized groups from accessing the social privileges based on their immutable traits. According to the Equal Protection Clause, this is discriminatory and against the principles of the Fourteenth Amendment and consequently against the Constitution of the States.

Social privileges that marriage grants are important because they shape the fundamental rights of American citizens. The immigration law is a good example of how these benefits shape these rights. According to the US Census conducted in 2000

investigating household make-up, an "estimated thirty five thousand, eight hundred and twenty [binational] same-sex couples lived together in the States" (Human Rights Watch). If a homosexual American man decides to marry a foreign man, they do not have the right to claim anything because the federal laws do not recognize their marriage as valid. This unrecognition leads to the homosexual couple's separation because the Department of Homeland Security of the USA forces the foreign spouse to leave the territory of the country as soon as his visa expires.

Social activists like Peggy Pascoe compare the discourse of gay marriage to racial discourse where they consider it to experience the same problems. They claim that similarly to exclusionary practices such as racial separation cases, sexual separation creates inequality. "We deserve the same rights as anyone else," says Wilfred Labiosa, 32 a gay man in a homosexual relationship with John Barter, 36 (Moats 2004, 28). Drawing a distinction between the heterosexuals who have the right to marry and the homosexuals who do not possess such a right is a sexual separation. Hence, depriving homosexual couples of the right to marry is a discriminatory practice that both the Due Process Clause and the Equal Protection Clause may establish after careful scrutiny.

The Supreme Court of Massachusetts considered similar points made by the social activists in the case *Goodridge v. Department of Public Health.* The court compared not granting gay couples the right to marry to not granting the couples of different races the same right. The Court elaborated on the fact that there was a law that used to prohibit couples of different races to wed. It produced examples to support this claim based on the cases *Perez v. Sharp* and *Loving v. Virginia*. In the first case, the Supreme Court of California established that restricting interracial marriages is a direct violation of the Constitution according to the Fourteenth Amendment. The Supreme Court of the United States of America supported the arguments of the Supreme Court of California nineteen years later in the second case and

prohibited racial discrimination based on the interracial couples' depravation of their right to marry. Thus, the court established on the federal level that the couples may marry whomever they want irrespective of their racial belonging.

In both cases, marriage was a social institution that guaranteed its citizens the right to get married with the persons they chose. The core argument based itself on the notion of choice, one of the founding concepts of democracy and equal opportunity. Therefore, one can extend the interpretation of the Fourteenth Amendment's purposes to provide the American citizens with the marital choice based not only on racial freedom but also on sexual freedom. Andrew Koppelman writes that "sex discrimination is wrong for the same reasons that race discrimination is wrong" (Koppelman 1996). However, he argues that there is a difference. The difference is that gay people are asking only for their recognition in a society and do not claim anything more than they deserve. In the discourse of gay marriage, all they want is to obtain the same rights and privileges which heterosexual couples have. Gay people do not demand any positive discrimination against heterosexual couples in this case. By obtaining the right to marry, they do not deprive the heterosexual couples of any of their fundamental Human Rights.

Koppelman claims that granting the same-sex couples the right to marry may entail further expansion of the discourse of social justice and equality. However, unlike the religious activists mentioned earlier, he focuses his attention on such issues as freedom of speech, freedom of association and freedom of religion. He does not compare the discourse of gay marriage with that of expanding certain privileges to pedophiles, animalists and necrophiles because these are different social categories. To add and reverse in some sense what Koppelman commented about the Equal Protection Clause, one can assert that some legislative laws mistakenly put dissimilar categories into similar ones to conduct discrimination.

It is evident that *the DOMA* as an act is discriminatory. It does create second-class citizens via making a distinction of who can access the social privileges that the federal government provides and who cannot. In fact, there was a homosexual couple who sued the government asserting that *the DOMA* itself is discriminatory and unconstitutional (*Smelt v. Country of Orange*). The couple did not win the case for various reasons such as lack of evidence, standing to sue, etc. This, nevertheless, became one of the first cases that challenged the constitutionality of the Defense of the Marriage Act based on the non-discrimination law with which the Fourteenth Amendment provides the citizens of the United States of America.

The DOMA itself also encouraged the opponents of gay marriage to accept additional acts protecting the exclusivity of heterosexual marriage. They proposed to conduct a democratic process of voting in which citizens would decide if gay marriage should be legal in a state of the country or in the country in general. The proponents of homosexual marriage argue that this kind of democratic voting is not fair based on the fact that proponents of gay marriage are mainly minorities and the opponents are basically a social majority. Thus, hegemonic majority cannot guarantee a democratic decision of the case. If the Supreme Court of the country had relied solely on the viewpoints of the hegemonic majority, interracial marriages would still have been a taboo in the country. The proponents, as a result, demand that the case of gay marriage be considered from the exclusive provision of the non-discrimination law.

The way the government is trying to sustain *the DOMA* is also very controversial. Since 2003, the Congress has introduced "a court-stripping" provision that prevents all federal courts from hearing claims asserting that the Defense of the Marriage Act is unconstitutional. Various observers such as Jason J. Salvo, Maxim O. Mayer-Cesiano, etc. consequently raised their concerns if the way the government is sustaining *the DOMA* is

constitutional itself.

Certainly, marriage as the institution granting certain social, political and economic privileges can be discriminatory against other groups such as single parents, intersex people, etc. even if they legalize homosexual marriage (Warner 1999). Professor Warner, as a result, argues that the government may need to eradicate marriage as the social institution itself so that the government would distribute privileges in different ways. One needs to admit, though, that as long as the institution exists, gay marriage should be legalized to reduce stigmatization and marginalization that marriage creates. It is unconstitutional not to grant same-sex couples the right to marry in the framework of equal opportunity that the Fourteenth Amendment provides for the American citizens. The actual fact though is that both state and federal governments of the USA oppose gay marriage continuing to marginalize homosexual citizens of the country before its legal system. American gay citizens do not have opportunities equal to heterosexual ones. One can claim, consequently, that the non-discrimination law does not operate efficiently in the country when it concerns the issues of homosexual marriage.

3. Methodology

I will apply the case study method to the judicial decision of the case *Goodridge v. Department of Health* and the legislative act "the Defense of Marriage Act," also known as *the DOMA*. The case study method is the best method to tackle the judicial decision of the Supreme Court of Massachusetts and legislative act "the Defense of Marriage Act." This method is the best approach to research this case and the legislative act since Massachusetts is the first state that legalized gay marriage and the federal government's legislative act is the first one in history to explicitly forbid homosexual marriage. As such, it is important to study them from as many angles as possible. I argue in this chapter of the thesis that case study is the optimal method to conduct such a research in-breadth.

There are several definitions to what a case study method is. I use Siegfried Lamnek's definition that it is "a research approach situated between concrete data taking techniques and methodologic paradigms" that involves an in-depth, longitudinal examination of a single instance or event: a case (Lamnek 2005). The case study method is unique because it allows a researcher to conduct focused work while letting him/her avail him/herself of several other methodological tools at the same time. This proves beneficial because it makes the work of a researcher more flexible in terms of analyzing data. Flexibility is important, for there are circumstances when a researcher unexpectedly faces new challenges, new paradigms of the investigated phenomenon or a case.

The main focus of case studies is not a restricted way of analyzing a data but a researched case itself. Its purpose is to locate a case and conduct various types of data collecting and analyzing in order to produce as much knowledge about it as possible. If the case involves deviating from a chosen pattern of conducting the research, the case study method allows this deviation to happen as long as it produces beneficial results. Hence, the case study method becomes not a specific method itself but an inventory of methods oriented

to analyze and produce knowledge about a specific phenomenon or a case.

According to Robert E. Stake, there are three types of case study: intrinsic, instrumental and collective. “An intrinsic case study…is undertaken because, first and last, the researcher wants better understanding of this particular case. This case itself is of interest” (Denzin and Yvonna 2003). The researcher is not interested in particular theories, hypotheses or pre-determined arguments in this kind of case study. All these theories, hypotheses and arguments emerge from studying the case itself. Usually but not always, there is not much knowledge about the case in this situation: the case is *terra incognito*. My research on gay marriage is not one of the areas where social scientists did not conduct previous academic investigation at all. Nevertheless, this area is definitely a new scientific terrain that needs more scientific insights, hypotheses and an investigation. Collected knowledge about this issue is scattered that needs more unification. The application of the method to *Goodridge v. Department of Health* and the Defense of Marriage Act can provide such a unification of knowledge.

The second type of case studies is an instrumental case study. This method occurs “if a particular case is examined mainly to provide insight into an issue or to redraw a generalization. The case is of secondary interest, it plays a supportive role, and it facilitates our understanding of something else” (Denzin and Yvonna 2003). By something else, Stake refers to but does not limit himself to theories, hypotheses and pre-determined arguments. Thus, there is a specific theory that a researcher needs to prove. She/he does so by various methods which may include case studies. A case becomes a piece of evidence to support an argument or a theory or a hypothesis. Thus, I will avail myself of the case study method not only for the sake of studying the judicial case of *Goodridge v. Department of Health* and the act *DOMA* themselves but also to prove my hypothesis that the Fourteenth Amendment of the States should guarantee homosexual people the right to marriage under the Equal Protection

and Due Process Clauses.

The third kind of case studies is a collective case study. I do not intend to adhere to the collective case study in my research. Therefore, I will not address it further in this chapter. Instead, I would like to emphasize that I intend to apply legal method as a part of the inventory of case study in analyzing the judicial case and legislative act.

The case study method is a guiding methodology that leads me in my research. This method allows a researcher to conduct a highly concentrated project while keeping him/her aware of endless possibilities of collecting and analyzing data. This awareness, in its turn, provides a researcher with opportunities not to limit her/himself to her/his methods' agendas but to constantly seek more knowledge in the area of interest. I hope that that the traits of the described methodology which I will apply to my research are convincing enough that it is indispensable for me in my work.

The following sub-chapters will display actual analyses. The first sub-chapter shows how I apply the legal method to support my argument that the Fourteenth Amendment should guarantee homosexual people the right to marry. The second sub-chapter proves that the Defense of Marriage Act makes marriage unequal.

3.1 Goodridge v. Department of Health

The following is a case study of Massachusetts Supreme Court decision on availability of the institution of marriage to gay couples. The case will display what logic this court followed in recognizing gay marriage legally. Unless otherwise noted, all the arguments produced in Chapter 3.1 derive from the participants of this case. I will apply additional arguments to the ones that the court produced where necessary. I derive additional arguments from the previous chapters based on my own insight or the mentioned scholars' works,

statements and arguments. I will structure the analysis of this case study in such a way that I will indicate one argument against gay marriage that a participant in the case produced followed by arguments that pro-homosexual marriage participants produced applying the additional arguments where necessary. The argument of this chapter is to prove that the state of Massachusetts should allow gay marriage in order to avoid stigmatization and marginalization of homosexual couples. The source of the case' text is FindLaw that provides the most comprehensive set of legal resources on the Internet (FindLaw).

The whole case commenced on the 11th of April in 2001 in the Superior Court of Massachusetts. There were fourteen plaintiffs from Massachusetts who sued the Department of Health for not granting them the right to marry. The case is named after one of the plaintiffs, Hillary Goodridge and the Department of Public Health. These plaintiffs sued this department because it is responsible for enforcing laws related to issuing marriage licenses and keeping the records pertinent to these licenses. When these plaintiffs attempted to obtain their marriage licenses, town and city clerks and registers who acted on behalf of the Commissioner of Public Health, the head of the Department of Public Health in Massachusetts, refused to issue them their licenses claiming that gay marriage is illegal. The Superior Court ruled in favor of the Department of Public Health asserting that the department was right in that it was not obliged to issue these licenses. Moreover, the Court ruled that there were no legal provisions in the Constitution of Massachusetts that guaranteed homosexual couples the right to marry.

The Superior Court made its decision against gay marriage because it viewed marriage as a legal instrument that promoted procreation. It acknowledged that there were heterosexual couples who were unable to procreate and were still able to be legally married. However, it stated that such couples were normally an exception to the rule that heterosexual couples can "theoretically" procreate. It claimed that heterosexual couples inherently

possessed such traits which guaranteed them the ability to procreate without any external assistance. The Court considered that gay couples, on the other hand, did not biologically reproduce when they made a couple. Thus, it ruled that marriage needed to be the exclusive privilege of heterosexual couples.

The Appeals Court objected to the argument that procreation was an important requirement to enter the institution of marriage. According to this Court, there are no formal documents that require a couple to prove that it is interested in producing children. Moreover, the state has a long history of all kinds of heterosexual couples who did not have children in marriage. There were couples sometimes one of whose partners were so diseased that he or she would die with no time and ability to reproduce. The Court also reasoned that a heterosexual person's inability to procreate never resulted in an immediate divorce unless one of the partners requested to get divorced based on that. Even then, the Appeals Court reasoned that the partner's inability to reproduce was not necessarily a sufficient basis for dismissing marriage.

The Department of Public Health produced an additional argument against gay marriage. It claimed that marriage was an important optimal setting to raise children. This Department argued that gay marriage could not guarantee such a setting.

The Appeals Court did not seem to address the Department of Public Health's argument directly. It considered children's issues from another perspective. To address the first argument, it is helpful to take into consideration the fact that there are many reports of how heterosexual families sometimes fail to provide such optimal settings to raise their children. According to the Administration on Children and Families, "in 1998 there were an estimated 2,806,000 referrals of child abuse or neglect to relevant state or local agencies. Of all forms of abuse, about three quarters of the perpetrators were parents" (Almanac of Policy Issues). It is evident from this report that heterosexual households do not necessarily

guarantee an optimal setting to raise children. Nonetheless, I cited this report not to claim that heterosexual families are dangerous to children, but rather to display that an optimal setting depends on individual households, parents' outlooks and upbringing. As the Appeals Court asserts, it has nothing to do with a parent's sexual orientation or marital status.

The Appeals Court argued that a modern American family is very ambiguous. There are families where children are raised by single parents. Sometimes, grandparents bring up children. Gay couples raise children as well even if they are not married. This Court argued that all these households have arguably provided optimal settings successfully.

One of the participating judges, Spina dissented from the decision that the Appeals Court reached. Spina argued that the Supreme Court should not even have heard the case related to gay marriage. The judge reasoned that marriage is the exclusive realm of the legislative not judicial organ in Massachusetts. Spina considered that the Appeals Court had gone too far in making such a decision as to legalize gay marriage. Moreover, courts have rights to deal with rights which the Constitution and history supports. They do not have the right to create new laws, for example to legalize homosexual marriage according to the judge.

The Appeals Court addressed this dissent directly as to explain why it considers that the Court has the right to legalize gay marriage. It reasoned that marriage is a legal contract between three parties, two spouses and the state. Therefore, all of these parties should involve themselves into this issue. The Supreme Court of Massachusetts is a part of the state. As such, the Appeals Court has the right to make judicial rulings related to gay marriage by the extension of its belonging to the Supreme Court.

The Court has agreed that the Legislature should be the main contact institution that resolves and regulates issues related to marriage. It also argued though that it is the Court's direct responsibility to ensure that the Legislature meets certain criteria of operation and does not violate its own limits in regulating issues such as homosexual marriage. The Appeals

Court of Massachusetts reasoned that the Legislature had not met the proper criteria in regulating the issues related to gay marriage. The Court justified its intervention thus.

Spina continued to dissent from the Appeals Court's decision claiming that the right to marry someone of the same-sex is not a fundamental right. The judge argued that the Court wrongly applied the rational basis review in its decision recognizing gay marriage as a constitutional right. Moreover, Spina dissented that the Nation and the Commonwealth of Massachusetts had a deeply rooted public opinion about marriage as a social institution. The public opinion was that only couples of the opposite sex could join each other to enter the union granted by marriage. The judge supported the Department of Public Health's claim that the exclusive availability of marriage to heterosexual couples is rightly justified by a rational State interest.

The Appeals Court though was not convinced by the Department of Public Health that denying same-sex couples the right to marry pursued a rational State interest. The denial did not even meet the minimum requirements for rationality. Moreover, the Court reasoned that Massachusetts Constitution is more protective of individual liberties and equality than the Constitution of the United States of America. It asserted that the state's Constitution demanded broader applications of laws to protect these liberties. Nevertheless, the Appeals Court reasoned that even the Constitution of the country should guarantee the institution of marriage to homosexual couples based on that marriage was considered a civil right throughout the history of the United States. The Court cited the case *Loving v. Virginia* ("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men"). It created an analogy between the fundamental right of an American citizen to pursue happiness and the right to marry. It reasoned that the right to marry was a part of pursuing happiness. As such, marriage became

not only one of the civil rights but also a fundamental right.

Spina continued to argue that the Appeals Court of Massachusetts breached one of the regulations that it was trying to remedy, the government's non-intrusion policy into private life. The judge reasoned that by extending the institution of marriage to heterosexual couples, the Court intruded into the private life of people. However, I agree with the Appeals Court on the decision it made in that the Court did not intrude into the plaintiffs' private lives because the plaintiffs requested its attention to resolve an issue that they could not resolve in private. Moreover, it is the Court's duty to resolve issues which plaintiffs cannot resolve in their private lives. The decision that the Appeals Court reached did not impose any governmental intrusions into the lives of other gay people forcing them to marry. The decision simply made the institution of marriage available to more social classes.

The Judge Cordy also dissented from the decision of the Appeals Court claiming that previous modifications to the institution of marriage occurred because none of these modifications had challenged procreation as an essential component to marriage. Therefore, the judge argued that the Court could not use examples from the legal history of the United States when the institution of marriage became more flexible to accommodate the needs that were contemporary for the period. The Appeals Court recognized that previous modifications of marriage did not challenge reproduction as an exclusive ability of heterosexual people. The Court did not find it convincing, nevertheless, that tradition should play such an important role in retaining the institution of marriage exclusively to heterosexual couples. It reasoned that the Legislature had its own legitimate purposes when it adopted the institution of marriage as the exclusive privilege of heterosexuals. The same purposes are not necessarily legitimate in contemporary society.

Cordy continued to prove that the Appeals Court should not have granted homosexual couples the right to marry. According to the judge, the absence of gay marriage did not

deprive gay couples of their chance to create a family via the institution of child adoption. The Judge argued that a parent's sexual orientation was not a reason to deny child custody. The Court produced many counter-arguments on this matter, but I would like to emphasize once more what the Appeals Court had reasoned earlier before citing the Court's counter-arguments. Marriage does not always entail the consequence to have children. Couples who enter the union of marriage may have a substantial number of reasons except the desire to have a child.

The Appeals Court cited the following benefits which the institution of marriage makes available to married couples: "joint Massachusetts income tax filing, tenancy by the entirety (a form of ownership that provides certain protections against creditors and allows for the automatic descent of property to the surviving spouse without probate) and entitlement to wages owed to a deceased employee." These and other benefits would have been unavailable to homosexual couples if they had not been given the right to marry. The Court also reasoned that the unavailability of marriage to gay couples makes their household lower in social status creating "the second-class citizens" as a result. Consequently, children (who may grow up as heterosexual) of homosexual couples experience marginalization, too. They experience marginalization on two levels: social and institutional. On the social level, they are stigmatized as outcasts partly because American society does not consider them to be legitimate enough since they do not have "a legal family" technically. They do not immediately receive the same benefits from the government as the children of heterosexual couples, for instance, shared family medical policy.

3.2 Defense of Marriage Act (DOMA)

My analysis of the Defense of Marriage Act derives from the archives of the Library of Congress "Thomas" (Bills, Resolutions, Library of Congress "Thomas"). In this study, I argue that *the DOMA* is unconstitutional and discriminatory against married homosexual people in the US. I plan to prove my argument via discussing unfair implications that this act has and how these implications are unconstitutional.

The Defense of Marriage Act consists of three sections: a short title, powers reserved to the states and the definition of marriage. The first section gives the official name for *the DOMA* as the Defense of Marriage Act. The name itself becomes problematic because it immediately begs the question "Against whom is there this defense?" Since the act addresses only gay couples in its text, it displays that the federal government defends the institution of marriage against homosexual couples. When one normally avails oneself of the word combination "defend against," one usually implies that the defender is a positive figure and the people against whom this figure defends are negative. Additionally, there are sometimes figures on whose behalf the defender arguably acts in order to protect them. I have applied the word "arguably" because those figures, whom the defender claims to protect, do not always need or sometimes oppose the defender or the ways that he uses to protect them. The federal government of the United States of America is a positive figure, "a hero" and homosexual people are negative in the context of *the DOMA*. This context also places heterosexual people via the discourse of marriage as the ones whom the government needs to protect and homosexual people as the ones against whom the federal government should act. Therefore, t*he DOMA* context implies that heterosexual people and homosexual people are unequal in the discourse of marriage and legal benefits that the institution of marriage grants. As a result, the Defense of Marriage Act creates legal difference between heterosexual and

homosexual people. The Fourteenth Amendment of the American Constitution forbids creating legal difference among the citizens of the country. The name of this Act itself is unconstitutional as a result.

According to the US Marriage Laws (US Marriage Laws), an individual state of the country determines what a marriage is. Once a certain state decides that a certain coupled is married, the Full Faith and Credit Clause requires that all the states in the United States of America recognize their marriage. The second section of the Defense of Marriage Act contradicts the Full Faith and Credit Clause of the United States' Constitution in that it defines the following,

"No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship" (Bills, Resolutions, Library of Congress "Thomas").

The act itself does not forbid the states from recognizing gay marriage. What it does though is that it disables the Full Faith and Credit Clause from forcing all the states to recognize homosexual marriage that was celebrated in a particular state. If it comes to the heterosexual marriage, the clause forces all the states to recognize it unless this marriage is incestuous, polygamous or violates a strong public policy. The Defense of Marriage Act, consequently, creates legal separation between gay and heterosexual people via the institution of marriage.

There are several things which a state is traditionally interested in securing in the institution of marriage. According to Mark Strasser, "The state has an interest in protecting the predictability of marriages and the security and stability in marriages" (Strasser 1997, 129). The Full Faith and Credit Clause also exists to ensure that there is stability in laws which each state accepts because it guarantees the unity of the country. Since *the DOMA*

allows each state to avoid the provisions of the Full Faith and Credit Clause of the USA Constitution, it disrupts both stability in state laws and the unity of the country. This disruption is dangerous because it makes states' laws capricious and ambiguous, for it makes couples involved in homosexual marriage insecure about their status. A state can announce a certain homosexual marriage void because of the legal capriciousness of a state as Strasser argues (Strasser 1997, 130). It is quite possible that a state may announce a certain couple's marriage void immediately when they enter the domiciliary state after the couple celebrates its marriage in a state recognizing gay marriage. The state may, alternatively, announce it much later that the couple's marriage is not legally valid when it adopts its own DOMA. Either way, homosexual couples cannot feel secure about their legal status as married people.

The third section of the act defines what the federal government recognizes as marriage. This section is important because the federal government distributes certain privileges and benefits based on a couple's belonging to the institution of marriage. The section states,

"In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word `marriage' means only a legal union between one man and one woman as husband and wife, and the word `spouse' refers only to a person of the opposite sex who is a husband or a wife" (Bills, Resolutions, Library of Congress "Thomas").

It is evident from the third section that the federal government recognizes only heterosexual marriages for its purposes. There are different interpretations of why the federal government supports only heterosexual marriages via *the DOMA*. The proponents of the act who voted for it argue that the Defense of Marriage Act does nothing more than simply clarifying of how the federal government understood what marriage is for over 200 years (Lectric Law Library's Stacks). They cite *Murphy v. Ramsey* in their analyses. That case defined marriage

as "[a] union for life of one man and one woman in the holy estate of matrimony."

I believe that the federal government cited such a conservative and religious quote from the case *Murphy v. Ramsey* because of certain interpretations of why one would oppose homosexual marriage at all. These interpretations stem from the ideas of David Richards and Susan Moller Okin for example. "Democratic equality in homosexual intimate life threatens the core of traditional gender roles and the hierarchy central to such roles" (Richards 1998, 448). These authors believe that traditional heterosexual marriage ensures that women are subject to men in their assumed responsibilities and duties in the institution of marriage. They argue that gay marriage can potentially destroy the hierarchy that creates this gender inequality. Hence, they sometimes call homosexual marriage equal marriage because this type of marriage reforms the whole hierarchal roles that spouses have with regard to each other. They even destroy the hierarchy in fact making marriage equal. I believe that the federal government is patriarchal and is interested in maintaining gender inequality that traditional marriage grants. The Defense of Marriage Act and arguments which the proponents of this act cite support my statement.

Such scholars as Richards, Strasser and Koppelman rightly argue that the right to marry is a fundamental right. There are three provisions which can prove that this right is fundamental. One is a consequence of another. The first provision is that marriage is a part of an intimate life. The legal history of the US has had many cases displaying that a person's intimate and private life is protected from the intrusion of the government. Thus, the federal government does not arguably have the right to intrude into people's lives and deprive them of their right to intimacy and privacy.

The second provision is that marriage is a part of pursuing happiness. The concept of pursuing happiness is a core concept in the formation and sustainability of the country's Constitution. The American Constitution would not exist without ensuring that pursuit of

happiness is not abridged by anyone.

The third provision is that previous precedents related to marriage issues displayed that marriage is a fundamental right. The most outstanding example of this precedent is the case *Loving v. Virginia.* This case proved that the government should view the right to marry as a fundamental right. Therefore, *the DOMA* is unconstitutional because it violates all of these provisions.

The analyses of *Goodridge v. Department of Health* and *the DOMA,* therefore, display that the right to marry is a fundamental right that should not depend on a sexual orientation of a citizen. Since homosexuality is no longer legally criminalized, the state should consider homosexual couples as equal to heterosexual ones and treat them respectfully. Denying homosexual couples the same liberties, rights and privileges that heterosexual couples have is a vivid discrimination against gay people for the reasons indicated earlier.

II. Conclusion

Marriage remains to be the institution that distributes social and legal privileges to the citizens of the United States of America. Whether marriage itself as a legal and social tool is discriminatory against non-married citizens remains arguable. What is certain though is that prohibiting gay people to marry is discriminatory. The Fourteenth Amendment of the Constitution of the country does not seem to justify this discrimination if one applies it to the discourse of gay marriage both under the Equal Protection Clause and the Due Process Clause. Generally, the former clause prohibits discrimination because forbidding non-heterosexual people to marry makes them unequal before the US law. The latter prohibits this discrimination because the unavailability of marriage to homosexual people creates harmful social effects on them.

Nevertheless, the federal government attempts to encourage discrimination against non-heterosexual people via the Defense of Marriage Act. My thesis research displays that the American government tries to ban gay marriage because this prohibition stems from its patriarchal and conservative ideology of what marriage is. The legislative system of the country tends to support this ideology despite the implicit provisions of the country's Constitution that any kind of legal and arguably social discrimination except the positive one is prohibited both on the legal and social levels.

Even though legal deliberations should arguably be as objective and neutral as possible, subjective attitudes towards non-heterosexual marriage via such legislative acts as *the DOMA* continue to oppress homosexual people. This act disregards the vital provision (legal equality) of the foundation of the country, the Constitution of the USA. The government should allow gay people to marry under this provision of the Constitution from a neutral perspective.

Louis Althusser's conception of ideology may provide an insight into why the federal

government remains subjective towards non-heterosexual marriage. According to this philosopher, ideology is a phenomenon that influences and guides every member of a society whether the member is a governmental official or an ordinary citizen (Althusser 1971). Therefore, it is impossible to remain neutral and objective if there is a pervasive patriarchal and conservative ideology that forces how people should view marriage. Proving this argument requires additional methodologies such as interviews and critical ethnography to the one that I used in my thesis. My thesis does not avail itself of these methodologies due to the time constraint. Using them in future work, however, will display how the representatives of the US judicial and legislative systems remain biased. It will also assist to determine how this ideology is evolving and predict where non-heterosexual marriage's place is and will be in the American society.

III. Reference List

Act Concerning Rights of Citizens of This State. Chapter 1, Session 10. Laws of State of New York. http://www.courts.state.ny.us/history/pdf/Library/New%20York%20Bill%20of%20Rights.pdf (accessed May 8, 2008)

Almanac of Policy Issues. "Child Abuse." *Administration on Children and Families*. http://www.policyalmanac.org/social_welfare/child_abuse.shtml (accessed June 9, 2008)

Althusser, Louis, ed. 1971. *Ideology and Ideological State Apparatuses: Lenin and Philosophy and Other Essays.* New York: London: Monthly Review Press.

Amar, Akhil Reed. 1992. Bill of Rights and Fourteenth Amendment. *Yale Law Journal*: 1194–1284.

Ambert, Anne-Marie. 2005. *Cohabitation and Marriage: How are They Related?* Ottawa, Ontario, Canada: Contemporary Family Trends, Vanier Institute of Family.

Berger, Arthur. 1991. *Media Research Techniques.* Newbury Park: Sage.

Bill of Rights, the Founders' Constitution. http://press-pubs.uchicago.edu/founders/documents/bill_of_rightss11.html (accessed June 9, 2008)

Senate of United States of America. U.S. Senate Roll Call Votes. 104th Congress – 2nd Session.

http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=104&session=2&vote=00280 (accessed June 9, 2008)

Constitution of USA, Article 4, Section 1.

Constitution of the United States. The World Almanac and Book of Facts 2005. World Almanac Books. 2005. eLibrary. Proquest CSA. US DEPARTMENT OF STATE-OFF OF POLICY/EVALUATION. 06 May 2008. <http://elibrary.bigchalk.com>.

Denzin, Norman and Yvonna Lincoln, eds. 2003. *Case Studies: Strategies of Qualitative Inquiry*. London: Sage.

Eastman, John. 2006. From Feudalism to Consent: Rethinking Birthright Citizenship. *Legal Memorandum*, no. 18 (March 30), http://www.heritage.org/research/legalissues/lm18.cfm (accessed May 6, 2008)

Eskridge, William. 1996. *Case for Same-Sex Marriage*. New York: Free Press.

FindLaw. Hillary GOODRIDGE & Others vs. DEPARTMENT OF HEALTH & another. *Westlaw*, Reporter of Decisions. fl1.findlaw.com/.../cnn/docs/conlaw/goodridge111803opn.pdf (accessed May 25, 2008)

Fourteenth Amendment. http://www.gpoaccess.gov/constitution/pdf2002/032.pdf (accessed June 9, 2008)

Fullinwider, Robert. "Stanford Encyclopedia of Philosophy (Spring 2005 Edition)." *Affirmative Action.* http://plato.stanford.edu/entries/affirmative-action/ (accessed June 9, 2008)

Gallagher, Maggie. 2002. What is Marriage for? The public purposes of marriage law. *Louisiana Law Review* 62: 1-37.

Government Accountability Office. GAO-04-353R Defense of Marriage Act. United States General Accounting Office. 2004. *Defense of Marriage Act: Update to Prior Report*, by Dayna Shah. Washington, DC: United States General Accounting Office. http://www.gao.gov/new.items/d04353r.pdf (accessed June 9, 2008)

Hawkins, Bryan. 2006. The Glucksberg Renaissance: Substantive Due Process since Lawrence v. Texas. *Michigan Law Review* 105: 410-43

House of Representatives. Final Vote Results for Roll Call 316: Defense of Marriage Act. On Passage. http://clerk.house.gov/evs/1996/roll316.xml (accessed June 9, 2008)

Human Rights Watch. Family, Unvalued Discrimination, Denial and Fate of Binational Same-Sex Couples under U.S. Law. May 2006. http://hrw.org/reports/2006/us0506/ (accessed June 9, 2008)

"Infoplease Article." Infoplease. © 2000–2007 Pearson Education, publishing as Infoplease. 14 May. 2008 http://www.infoplease.com/spot/affirmative1.html (accessed June 9, 2008)

Koppelman, Andrew. 1996. *Antidiscrimination Law and Social Equality*. New Haven: London: Yale Univ. Press.

Koppelman, Andrew. 1988. The Miscegenation Analogy: Sodomy Laws as Sex Discrimination. *Yale Law Journal* 98: 145.

Koppelman, Andrew. 1994. Why Discrimination against Lesbians and Gay Men is Sex Discrimination. *N.Y.U. L. Rev.* 69: 197

Krause, Harry. 2000. Marriage for the new millennium: Heterosexual, Same Sex or Not at All? *Family Law Quarterly* 34: 271, 276.

Lambda Legal. "Marriage Resolution." *Marriage Project of Lambda Legal Defense and Education Fund*. http://www.lambdalegal.org/ (accessed June 9, 2008)

Lamnek, Siegfried. 2005. *Qualitative Sozialforschung.* Weihnhein: Basel.

Lectric Law Library's Stacks. Defense of Marriage Act: 5/96 H.R. 3396 Summary/Analysis. http://www.lectlaw.com/files/leg23.htm (accessed June 9, 2008)

Legal Information Institute of Cornell University Law School. United States Constitution. Amendment XIV. Cornell University Law School. http://www.law.cornell.edu/constitution/constitution.amendmentxiv.html (accessed June 9, 2008)

Library of Congress. http://www.loc.gov/rr/program/bib/ourdocs/billofrights.html (accessed June 9, 2008)

Library of Congress "Thomas." http://thomas.loc.gov/cgi-bin/bdquery/z?d104:h.r.03396: (accessed June 9, 2008)

"Marriage." The Columbia Encyclopedia. The Columbia University Press, 2000. 24701. General OneFile. Gale. US State Department. 10 May 2008

McCrudden, Christopher, ed. 1991. *Introduction: Anti-Discrimination Law.* Dartmouth: Aldershot.

McFadden, Robert. 2008. State Court Recognizes Gay Marriages from Elsewhere. *New York Times*, February 2.

Moats, David. 2004. Tipping Point: beginning May 17 in Massachusetts, gay and lesbian couples will be able to obtain fully legal marriage licenses for the first time in U.S. history. What does this mean for gay equality? (Marriage). *The Advocate (The national gay & lesbian newsmagazine)* 5: No Page.

National Conference of State Legislatures. "Same Sex Marriage." *Same Sex Marriage, Civil Union and Domestic Partnerships*. http://www.ncsl.org/programs/cyf/samesex.htm (accessed June 9, 2008)

National Organization for Women. "Same-Sex Marriage is Feminist Issue."

http://www.now.org/issues/lgbi/marr-rep.html (accessed June 9, 2008)

Office of High Commissioner for Human Rights. http://www.unhchr.ch/html/menu6/2/fs2.htm (accessed June 9, 2008)

Rich, Adrienne. 1994. *Compulsory Heterosexuality and Lesbian Existence: Blood, Bread and Poetry*. New York: Norton Paperback.

Richards, David. 1998. *Women, Gays and Constitution: the grounds for feminism and gay rights in culture and law.* Chicago: London: Univ. of Chicago Press.

Schuck, Peter H. "University of Michigan Affirmative Action Admissions Cases." *Reflections on Grutter*. http://jurist.law.pitt.edu/forum/symposium-aa/schuck-printer.php (accessed June 9, 2008)

Strasser, Mark. 1997. *Legally Wed: same-sex marriage and the Constitution.* Ithaca: Cornell Univ. Press.

Strasser, Mark. 1991. Suspect Classes and Suspect Classifications: On Discriminating, Unwittingly or Otherwise. *Temple L. Rev.* 64: 937, 941

U.S. Congress. House. Century of Lawmaking for New Nation: U. S. Congressional Documents and Debates, 1774-1875. 1866. *Chapter XXXI: an act to protect all persons in the United States in their Civil Rights, and furnish the means of their vindication*. 39th Cong., 1st sess., April 9

US Marriage Laws. Marriage Laws. United States: Marriage Law Requirements. http://usmarriagelaws.com/search/united_states/index.shtml (accessed June 9, 2008)

Warner, Michael. 1999. Normal and Normaller: Beyond Gay Marriage. *GLQ: a journal of lesbian and gay studies* 5: 119-71.

Wittman, Carl. 1969. *Gay Manifesto*, ed. Joseph McCaffrey, 157-71. Englewood Cliffs, NJ: Prentice-Hall.

Young, Iris Marion. 1989. Polity and Group Difference. *Ethics* 99: 250-274.

Legal Cases

Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

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

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

Chapman v. California, 386 U.S. 18 (1967).

Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (Sept. 21, 1996).

Elk v. Wilkins, 112 U.S. 94 (1884).

Goodridge v. Department of Health, 798 N.E.2d 941 (Mass. 2003).

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

INS v. Rios-Pineda, 471 U.S. 444 (1985).

Lawrence v. Texas, 539 U.S. 558 (2003).

Loving v. Virginia, 388 U.S. 1 (1967).

Malinski v. New York, 324 U.S. 401, 415 (1945).

Murphy v. Ramsey, 114 U.S. 15, 45 (1985).

Murray v. Hoboken Land, 59 U.S. 272 (1855).

Palko v. State of Connecticut, 302 U.S. 319 (1937).

Perez v. Sharp, 2 Cal. 2d 711, 198 P. 2d 17 (Cal. 1948).

Plessy v. Ferguson, 163 U.S. 537 (1896).

Plyler v. Doe, 457 U.S. 202 (1982).

Romer v. Evans, 517 U.S. 620 (1996).

Smelt v. County of Orange, 374 F. Supp. 2d 861 (C.D. Cal., 2005).

Strauder v. West Virginia, 100 U.S. 303 (1880).

United States v. Wong Kim Ark, 169 U.S. 649 (1898).