

Spring 5-6-2012

Tying the Knot: Determining the Legality of Same-Sex Marriage and the Courts' Responsibilities in Defining the Right

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Determining the Legality of Same-Sex Marriage and the Courts' Responsibilities in Defining the
Right

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Abstract:

Ambiguous terms and phrases in the United States Bill of Rights have caused a great deal of controversy throughout United States history over what rights truly exist and which branch of government should be responsible for determining those rights. These questions are currently being debated in states throughout the country concerning the right to same-sex marriage. In current literature, authors argue that a legal right to same-sex marriage exists through either the Equal Protection Clause of the Fourteenth Amendment or the right to privacy. Authors disagree over which section of the Constitution provides more stable legal footing for the legality of same-sex marriage. Authors also disagree over whether the courts or the legislatures should be responsible for defining the right. This thesis answers these questions of legality and responsibility concerning the right to same-sex marriage. The thesis uses case law of the doctrinal development of the Equal Protection Clause and the right to privacy to suggest that the Equal Protection Clause provides the soundest legal precedent for the existence of the right to same-sex marriage because the government is not able to pass the rational basis test. Case studies of the legalization of same-sex marriage in Massachusetts, New York, and California are used to test Ronald Dworkin's theory that the right should be developed by the courts rather than the legislatures. The thesis provides the theoretical groundwork that advocates of this right should focus on litigation rather than legislation to implement social change.

Introduction to Thesis

Although the rights established in the United States Constitution were created over two hundred years ago, there still is a great deal of controversy over the development of rights today. Several states throughout the country are currently debating whether or not the Constitution creates a right to same-sex marriage. Legal and political scholars disagree about which section of the Constitution establishes the right to same-sex marriage. Several authors argue that the right can be found in the Equal Protection Clause of the Fourteenth Amendment (see Gerstmann, Hiller, Schmidtke, Strasser and Schaff). Fewer authors, including William Hohengarten and Brenda Feigen, argue that the right exists under the right to privacy. Also, authors who argue that the Equal Protection Clause establishes the right disagree about the way it establishes the right. Some scholars argue that there should be no classification system under the Equal Protection Clause that gives certain minority groups greater levels of protection than others (see Gerstmann and Schmidtke). Other scholars argue that minority groups of sexual orientation should receive increased protections against discrimination from the government (see Hiller, Strasser and Schaff).

In addition to the arguments over where the right can be found in the Constitution, the topic of who in the government should be responsible for defining and determining rights has been explored by many well respected political and legal scholars. There is a general disagreement between scholars over which branch of government should determine the existence of rights. One of the most influential rights scholars, Ronald Dworkin, argues that the courts should be responsible for the creation and development of constitutional rights because they are more likely to recognize the rights of minorities. Stuart Scheingold and Gerald Rosenberg challenge Dworkin's argument and claim that the courts are unable to produce true social change

and therefore, the legislatures should develop constitutional rights. These unsettled questions of who should be responsible for the development of rights, and where the right to same-sex marriage exists, leaves room for further research and investigation concerning the advancement of rights.

In this thesis, I answer the questions of whether a constitutional right to same-sex marriage exists and which branch of the government, the legislatures or the courts, should be responsible for defining and developing the right. For the first question, I use case law to compare the doctrinal development of the Equal Protection Clause and the right to privacy. The comparison determines whether either of these sections of the Constitution provides the legal precedent for recognizing a right to same-sex marriage. The cases *Loving v. Virginia*, 388 U.S. 1 (1967) and *Romer v. Evans*, 517 U.S. 620 (1996) are used to explain the Equal Protection Clause claim. The cases *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Lawrence v. Texas*, 539 U.S. 558 (2003) are used to explain the right to privacy claim. I hypothesize that these analyses will show that a right to same-sex marriage exists under the Equal Protection Clause. Once the analysis of the doctrinal development has been completed, extra-legal evidence, such as the research findings from sociological, medical and psychological organizations, are utilized to demonstrate how the government's justification for prohibiting same-sex marriage does not pass the rational basis test and, thus, violates the Equal Protection Clause.

To answer the question of which branch of government should be responsible for defining the right, I rely on Ronald Dworkin's theory that the courts should be responsible because they are insulated from the majority which allows them to fairly recognize minority rights. Currently, eight states and Washington D.C. have legalized same-sex marriage. In 2003, Massachusetts was the first state to fully legalize same-sex marriage and start issuing marriage

licenses. Prior to legalization in Massachusetts both the Hawaii Supreme Court and the Vermont Supreme Court had made rulings that their states' denial of same-sex marriage violated their state constitutions. However, neither of these rulings resulted in the legalization of same-sex marriage. Instead, Hawaiian residents allowed the Hawaii Legislature to pass legislation defining marriage between a man and a woman. In Vermont, the State Supreme Court allowed the Vermont Legislature to merely pass legislation creating domestic partnerships rather than full recognition of same-sex marriage. Following the Massachusetts Supreme Court decision legalizing same-sex marriage, Connecticut, Iowa, Vermont, New Hampshire, Washington D.C., New York, Washington and Maryland have all legalized same-sex marriage. To test Dworkin's theory, I employ case studies of three states that have legalized, or temporarily had legalized, same-sex marriage: Massachusetts, New York, and California. I use public opinion polling data on support for an amendment defining marriage between a man and a woman to test whether the court's can find such a right despite what majority opinion may have to say regarding it. In the end the data show that courts are more likely to recognize minority rights and therefore, Dworkin's theory is most applicable to the right to same-sex marriage.

Significance of Thesis

Obtaining clear answers for whether there is a legal right to same-sex marriage and which branch of the government should define the right is important for several reasons. This thesis challenges and adds to two major arguments that exist in literature concerning law and social change. The argument over whether the legislatures or the courts should define rights pertains to the political duties of the branches of government. This thesis shows that Dworkin's theory that the courts should define individual rights is more applicable for defining the right to marriage

than the alternative hypothesis that the legislatures should define rights. This is significant because it suggests that Dworkin's theory applies to a contemporary issue that it has not been greatly tested on. It is also important to resolve which branch of government is responsible for determining rights because it clarifies the proper roles that each branch plays in the government. Furthermore, determining which branch should be responsible for the development of rights provides the theoretical groundwork for those advocating for this right to use the courts, rather than the legislatures to instigate social change.

Determining that the government is violating the Equal Protection Clause by denying same-sex couples' right to marriage will put to rest the question of the constitutionality of same-sex marriage, which is still widely debated today. Having a clear legal argument will help supporters of same-sex marriage persuade courts to legalize the right. In existing literature, authors generally make one of two arguments to support the claim that the right to same-sex marriage exists under the Equal Protection Clause. The first argument is that as a minority class, sexual orientation should be given a greater level of protection against government laws. These authors argue that if sexual orientation is given a greater level of protection, the government would not be justified in prohibiting same-sex marriage. The second argument is that all minority groups should be given the same level of protections against government laws and that if sexual orientation was given the same protections as religious and racial minorities, the government could not legally prohibit same-sex marriage. This thesis does not rely on either of these arguments. Instead, it provides a unique and significant contribution to the study of the Equal Protection Clause because it argues that even with sexual orientation classified under the lowest level of protection, the government does not provide a legitimate interest in prohibiting same-sex marriage, and therefore, is violating the Equal Protection Clause.

Thus, this thesis is significant because it adds to and tests existing political rights theory. It also suggests the proper roles and responsibilities of the branches of government. It provides theoretical groundwork for advocates of same-sex marriage to use the courts rather than legislatures to legalize the right. Finally, it provides unique constitutional reasoning for why same-sex marriage should be legalized.

Literature Review

The issue of legalization of same-sex marriage in the United States is highly controversial due to the American public's varying moral, religious and political views. Aside from these personal views, the legalization of same-sex marriage is a vastly contested legal issue in academia. Among legal and political scholars, there exist varying theories about whether there is a constitutional right to gay and lesbian marriages and whether the legislatures or the courts should be responsible for determining and developing the right. For the first question, most existing literature argues that a right to same-sex marriage exists through the Equal Protection Clause (see Gerstmann, Hiller, Schaff, Schmidtke and Strasser). Although authors also focus on the right to privacy, there is greater support among scholars for using the Equal Protection Clause as the pathway to legalization. There are two common arguments made by the existing literature concerning the Equal Protection Clause. The first of these arguments claims that the Supreme Court's should abolish its classification system for determining discrimination and instead, all minority groups should receive the same protection across the board. Currently, the Supreme Court has not held sexual orientation as a "suspect class" which would afford this minority group the greatest amount of protection from government discrimination (Strasser 24). Authors like Evan Gerstmann and Eric Schmidtke make the case that all minority groups should

be given the same level of protection against government legislation under the Equal Protection Clause. Gerstmann comments on this when he writes, “The Court has failed to give any rational justification for treating the rights of different groups differently, and the explanations it has put forward are incoherent” (7). These authors argue that if sexual orientation received the same protection as all other minority groups, including race and religion, the government’s arguments against legalizing same-sex marriage would not be sufficient enough to justify the inequitable treatment that gay and lesbian couples receive (Schmidtke 227). Therefore, much of the existing literature is dedicated to the idea that the Equal Protection Clause needs to be revised to give all minorities the same protection from discrimination under the law.

The second argument that is made concerning the Equal Protection Clause is not that the classification system should be done away with, but that sexual orientation should be moved to a class that entails stricter review of discriminating government legislation. This is the argument Strasser makes when he writes, “The class of lesbians, gays, and bisexuals, although not yet recognized as suspect or quasi-suspect, deserves to be so recognized because it already meets the relevant standards” (30). The standards that he provides are that the minority group must be unable to control the characteristic that makes them a minority, they must have experienced prolonged discrimination and unequal treatment and they must have been unable to protect their interests due to majoritarian politics (Strasser 26). He uses these criteria to suggest that gay and lesbian couples meet the characteristics of a suspect class. This argument is also made by Kory Schaff when he writes, “While sexual orientation is neither a suspect classification like race, nor a quasi classification like gender, there are strong reasons why it should trigger heightened scrutiny of legislation” (133).

Like Strasser, Schaff goes on to explain criteria for determining if a minority falls under the classification of suspect class and comes to the conclusion that sexual orientation meets the criteria. Jonathan Goldberg-Hiller also makes the argument that the Court has not given significant consideration to the level of protection that sexual minorities should receive. Referring to the Equal Protection Clause he writes, “Indeed nearly commensurate with the creation of the doctrine was a judicial unwillingness to expand suspect or quasi-suspect class status...to other groups demanding protection” (Hiller 20). Similarly to Gerstmann and Schmidtke, these authors claim that if the proper amount of scrutiny were applied to legislation involving discrimination against sexual orientation, it would not be possible for the government to deny same-sex couples the right to marry.

Therefore, existing literature argues for the use of the Equal Protection Clause to establish the right to same-sex marriage in two different ways. However, these authors all arrive at the conclusion that if sexual orientation was given a proper classification, there would be no way that the government could justify prohibiting same-sex marriage. Although these arguments appear correct, existing literature does not greatly examine if the government’s interest in prohibiting same-sex marriage is justified based on the lowest level of scrutiny, which is the level in which sexual orientation is currently classified. My thesis argues that even under sexual orientation’s current classification, the government does not pass the lowest level of scrutiny for prohibiting same-sex marriage. I examine the common reasons given for barring same-sex marriage including the state’s interest in promoting procreation, childrearing and stable family life. I argue that these are not sufficient reasons for prohibiting same-sex marriage due to scientific and social data collected from several respected scholars and organizations.

Most authors advocate the use of the Equal Protection Clause to establish a right to same-sex marriage. However, due to past Supreme Court cases that have involved the right to privacy and gay rights or marriage rights, some authors believe the right of privacy establishes a right to gay marriage. These authors argue that the Court has recognized that marriage is a fundamental right and that certain aspects of marriage are protected under the constitutional right to privacy (see Feigen and Hohengarten). William Hohengarten comments on this idea when he writes: “The right of privacy prevents the state from taking over the lives of individual citizens by making basic familial decisions for them” (1523). He argues that the familial decision of whether or not a couple should get married should be left to the couple, not the state (Hohengarten 1523). Therefore, he finds that the state should not discriminate based on the gender or sex of a couple that wants to get married. He writes that the state has “the obligation to create a legal framework for marriage and to open it equally to adult couples regardless of gender” (Hohengarten 1523). Brenda Feigen uses past legal decisions to argue that the right to privacy creates a right to same-sex marriage. She cites *Lawrence v. Texas* (2003) and argues that since the Court found a personal right for same-sex couples to engage in private sexual conduct, it is the next logical step for the Court to recognize that same-sex couples are entitled to make private decisions about who they wish to marry. Feigen writes, “Since intimate conduct is, indeed, but one element in an enduring personal bond, it certainly seems as though the state's sanctioning that bond through marriage would be a next step, as was taken in *Goodridge*” (350). Feign and Hohengarten argue that the right to privacy includes the right to make certain family decisions without the direct interference or judgment of the government, including the decision of marriage.

Although there is existing literature that argues that the right to same-sex marriage exists through the right to privacy, there are scholars who oppose this view. Authors like Jonathan

Rauch and Charles Mauney Jr. contend that marriage is a public institution, and therefore, the right to privacy does not apply to same-sex marriage. Rauch specifically examines the Supreme Court ruling of *Lawrence v. Texas* (2003). He states that the *Lawrence* decision upheld same-sex couples' right to engage in private consensual sexual relations because sex is private conduct (Rauch 2003). He maintains that since marriage is a public institution, the state has an interest in it and therefore, the right to privacy does not establish a right to same-sex marriage (Rauch 2003). Charles Mauney Jr. makes a similar argument about *Lawrence*. Like Rauch, he claims that marriage is part of public society and therefore, *Lawrence* does not apply to same-sex marriage. He also notes that the Supreme Court's written decision in *Lawrence* stressed that the government could make certain restrictions in the private realm (Mauney 158). Therefore, these authors claim that the right to privacy cannot be used to justify a right to same-sex marriage because marriage is public, not private.

Clearly, there are differing views on whether the right to privacy establishes a right to same-sex marriage. The argument that appears more convincing is Rauch and Mauney's argument that the right to privacy does not apply to same-sex marriage. Particularly, the wording in the decision for *Lawrence* suggests that the Court does not want to extend the right to privacy to include the right for same-sex couples to marry. In my thesis, I analyze the written decision for *Lawrence* and I suggest that the better route for supporters of same-sex marriage to take for legalization is through the use of the Equal Protection Clause, which provides sound legal reasoning.

Assuming that there is a Constitutional right to same-sex marriage, authors of existing literature disagree over which branch of the government should be responsible for developing the right. The two competing ideologies are that the courts should develop constitutional rights and

that the legislatures should develop these rights. The Executive is rarely considered in this argument because it is not responsible for interpreting constitutional laws. Several authors believe that the courts should determine right because they are not easily influenced by the political majority and are more likely to recognize the rights guaranteed to minorities through the Constitution (see Dworkin, Hiller, Schmidtke and Nussbaum). The second school of thought argues that the legislatures should develop rights because the courts are ineffective and their decisions are only enforced with the help of outside factors such as the support of legislatures, economic support or approval through public opinion (see Rosenberg and Scheingold). Unlike the argument of whether the Equal Protection Clause or the right to privacy establishes a right to same-sex marriage, there is greater disagreement among existing literature over which of these two schools of thought is correct.

The first argument in support of the courts is made by several authors who take a more positive view of the courts' abilities to instigate social and political change. Ronald Dworkin argues that the courts are more suited to recognize rights because they are insulated from the political majority, which historically has been unwilling to recognize the rights of minorities (130). Dworkin expands on this idea when he writes, "The Constitution, and particularly the Bill of Rights, is designed to protect individual citizens and groups against certain decisions that a majority of citizens might want to make" (133). He argues that the majority of American citizens do not encourage the legislatures to recognize minority rights because of their own personal prejudices. He believes that because many judges on courts are not elected by American citizens; they will be less influenced by the desires of the majority and more willing to recognize minority rights (Dworkin 133). He writes that "to make the majority judge in its own cause seems inconsistent and unjust" (Dworkin 142). Therefore, he believes that to ensure a fair recognition

of rights, the courts must be responsible for defining them. Since he wrote his book in the 1970s, he does not directly address the issue of same-sex marriage. However, I plan to test Dworkin's theory to suggest that his ideas still apply over thirty years later to the contemporary issue of same-sex marriage.

Other authors have agreed with Dworkin and believe that the right to same-sex marriage must be determined by the courts. Jonathan Goldberg-Hiller writes, "Equal Protection law has one of its justifications in 'representational reinforcement,' or the constitutional imperative to protect minorities who would otherwise remain at the mercy of political majorities" (20). Here, Hiller argues that the courts have always been responsible for protecting minority rights from majoritarian politics. Additionally, Eric Schmidtke makes the argument that state legislatures have already greatly limited the right to same-sex marriage (219). He believes that the actions of these legislatures have been incorrect and that the Supreme Court is the only avenue to correct this injustice (Schmidtke 236). Martha Nussbaum makes a very similar argument that minorities' right to marriage has historically not been protected by the states and that these rights must be recognized by the courts. She argues that the Supreme Court was responsible for recognizing the right to interracial marriage in *Loving v. Virginia* (1967), and therefore, it is the Court's duty to extend the right of marriage to same-sex couples (Nussbaum 48). The general agreement among these authors is that courts should be responsible for determining the right to same-sex marriage because they are more likely to identify rights of minorities than the legislatures.

The other argument that is often made in existing literature is that the legislatures should develop rights. This argument is made by Gerald Rosenberg in his book, *The Hollow Hope: Can Courts Bring About Social Change?*, and a law review article, "Saul Alinsky and the Litigation Campaign to Win the Right to Same-Sex Marriage." He claims that the courts are generally

ineffective unless certain constraints are overcome through the support of the legislatures, the market economy or public support. In his book, he argues that the courts have had an impact on the legalization of same-sex marriage in certain ways. However, he points to the massive backlash by states against court rulings as evidence that the courts are ineffective at implementing real social change (Rosenberg *Hollow Hope* 361). Unlike Dworkin, Rosenberg directly addresses the issue of same-sex marriage in his book. However, his book is even somewhat outdated since several states have legalized same-sex marriage since its publication. In an article he published after his book, he addresses some of the changes that have occurred over time. Despite some progress, he still sees the courts as ineffective and does not believe that nationwide legalization will happen anytime soon (Rosenberg "Sal Alinsky" 662). He believes that the litigation movement acted too quickly, ignoring that public support and political support for same-sex marriage was lacking (Rosenberg "Saul Alinsky" 667). When these factors of support are missing, he believes that litigation cannot be successful.

Stuart Scheingold makes a similar argument to Rosenberg by claiming that there is a "myth of rights." He defines this myth as "the assumption that litigation can evoke a declaration of rights from courts; that it can, further, be used to assure the realization of these rights; and finally, that realization is tantamount to meaningful change" (5). He provides the case of *Brown v. Board of Education* (1954) as an example of the Court's ineffectiveness when he writes, "There is no need to look further than school desegregation problems to realize that the declaration of rights does not purge political conflict of its power dimensions" (Scheingold 85). Therefore, he argues that the only redeeming quality of judicial decisions is their ability to spark a certain amount of political mobilization (Scheingold 136). The argument made by Scheingold

and Rosenberg suggests that the courts are ineffective and those seeking change should look elsewhere in government for results.

In my thesis, I test Dworkin's theory to see if the courts truly are more likely to recognize minority rights than legislatures. I use case studies of how same-sex marriage was legalized in Massachusetts, New York and California. I look at public opinion polls to see if states that legalized through their state supreme courts recognized the minority right despite a lack of public opinion support. I also analyze whether states that legalized through their state legislatures were more likely to do so because of public opinion support for same-sex marriage.

Overall, existing literature on the issue of same-sex marriage suggests that a constitutional right to same-sex marriage exists and can be found in the Equal Protection Clause of the Fourteenth Amendment. However, there are differences in opinion on whether a classification system should exist or whether sexual orientation should merely be classified in a different group. Once a right to same-sex marriage is established, existing literature argues that either the courts or the legislatures should be responsible for developing the right. Overall, there is greater amount of disagreement between authors writing about the second question than the first. This leaves room for my thesis to determine which of the two theories applies more realistically to the issue of same-sex marriage.

Methods and Case Selection

To answer the questions I propose in this thesis, I use case law of the doctrinal development of the Equal Protection Clause and the right to privacy, and case study of three states that have legalized, or temporarily legalized same-sex marriage. I use case law to answer the question of where the right is found in the U.S. Constitution. Particularly, I use Supreme

Court cases that have addressed a violation of the Equal Protection Clause or the right to privacy since scholars use these two sections of the Constitution most often to establish a right to same-sex marriage. I examine the written decisions and oral arguments of these cases to determine if the legal rationale behind the development of these constitutional doctrines applies to and establishes a right to same-sex marriage.

The Equal Protection Clause is located in the Fourteenth Amendment of the United States Constitution and asserts that no person shall be denied equal protection of the laws (U.S. Const, amend XIV). This means that all Americans need to be treated in the same way in similar circumstances. The Supreme Court has created a classification system for determining if minority groups are unequally discriminated against by certain government laws (Strasser 24). Based on this classification system, there are three tests that the Court uses to determine if a minority group's rights have been violated by the government. The first is the lowest level of government responsibility, or the rational basis test. Under this test, the government needs only to prove that it a legitimate interest in the law and that the law is rationally related to that interest (Strasser 24). This is the test that is used to determine if a law violates the Equal Protection Clause rights of sexual minorities. Therefore, I selected Court cases that have dealt with a violation of the Equal Protection Clause and resulted in the Court striking down government laws discriminating against minority groups. In the first case, *Loving v. Virginia*, 388 U.S. 1 (1967), the Court ruled that laws prohibiting interracial marriage violated the Equal Protection Clause (at 13). This case applies to my thesis because it directly deals with the freedom of choice of whom to marry. However, it also highlights the differences in classification that minority groups receive since racial minorities are given greater protections than sexual minorities.

The second case I use is *Romer v. Evans*, 517 U.S. 620 (1996). In this case, the Court ruled that a Colorado law violated the Equal Protection Clause by prohibiting protections from being given to gay, lesbian and bisexual people against discrimination (at 635). This case applies to my thesis because it deals with gay rights and a government law that failed to meet the rational basis test under the Equal Protection Clause. I examine the written decisions of both these cases and argue that legal precedent exists for using the Equal Protection Clause to establish a right to same-sex marriage.

I also use cases that have dealt with the right to privacy, but I argue that there is insufficient doctrinal precedent for using the right to privacy to establish a right to same-sex marriage. The right to privacy is not explicitly stated in the Constitution. Instead, the Court ruled that a right to privacy exists based on the wording in several Amendments to the Constitution (*Griswold v. Connecticut* 1965, at 484). Since this right is not clearly stated in the Constitution, there is a great deal of controversy over whether the right should be recognized or even exists. Nevertheless, some scholars (see Feigen and Hohengarten) argue that the right to same-sex marriage can be found in the precedent created by the right to privacy. I examine the written decision in the case *Griswold v. Connecticut*, 381 U.S. 479 (1965), which established that a right to privacy exists between married couples (at 485). I use the written decision of this case to argue that it applies to the private practices of married couples, and therefore, does not apply to same-sex marriage since marriage is a public institution. The other case I have selected is *Lawrence v. Texas*, 539 U.S. 558 (2003) , in which the Supreme Court ruled that laws criminalizing intimate sexual relations between same-sex couples violated their right to privacy (at 578). I use this decision to argue that although the right to privacy was used to establish a right between people of the same-sex, the right was a personal right, unlike marriage which is a public government

institution. I use the written decisions of these cases to argue that the right to privacy does not apply to the issue of same-sex marriage.

In addition to the use of case law, I argue that not only does the right to same-sex marriage exist under the Equal Protection Clause, but that the government fails to meet the rational basis test for prohibiting same-sex marriage. I rely on scientific and sociological data to refute the government's most common arguments for prohibiting same-sex marriage including the promotion of procreation, child rearing and stable family life. By illustrating how the government has no rational basis for prohibiting same-sex marriage, I show how there is an undeniable right to same-sex marriage under the Equal Protection Clause.

To make the argument that the courts should be responsible for the development of the right, I use a case study of three states that have already legalized same-sex marriage. Currently, in America eight states and Washington D.C. have legalized same-sex marriage ("State By State"). More of these states have legalized same-sex marriage through state legislatures than state courts. It is important to look at the process of legalization because it will reveal any interaction that has occurred between the courts and legislatures, and their attempts to be the final arbiter on the existence of the right. The actions taken by each of the branches to try to settle the issue will reveal which branch has been more successful in determining the existence of the right. Since it would be too extensive to detail how same-sex marriage became legalized in the eight states and D.C., I compress the analysis to three states.

Massachusetts serves as a representation of the states that have legalized same-sex marriage through the use of state supreme courts. Massachusetts is appropriate because it was the first state to legalize the right through the courts in 2003 and then begin to issue marriage licenses to same-sex couples. Although there was backlash from the Massachusetts Legislature,

it proved ineffective and Massachusetts continues to issue marriage licenses today. I consider public opinion polls from 2003 on support for a constitutional amendment defining marriage between a man and a woman from the Associated Press and CNN/Gallup/USA Today to see if Dworkin's theory explains why Massachusetts passed same-sex marriage.

New York will serve as a representation of the states and D.C. that have legalized same-sex marriage through state legislatures. New York legalized same-sex marriage in 2011. I consider public opinion polls from 2011 from the Associated Press/National Constitution Center/GfK and Quinnipiac University to test Dworkin's theory. Since New York legalized gay marriage through its legislature, Dworkin's theory would only stand if public opinion support had declined for a constitutional amendment defining marriage between a man and women. If this is true, it would support Dworkin's idea that legislatures are more likely to recognize minority rights when a majority of Americans support it. New York is a case that suggests that there are instances in which legislatures have been responsible for the development of the right to same-sex marriage.

Lastly, California provides an example of a state in which the two branches are currently disputing over who should determine the existence of the right. Originally, the California Supreme Court ruled that the state must legally allow same-sex marriage (*In re Marriage Cases* 2008, at 96). However, Proposition 8 was passed by California voters in 2008 and amended the California Constitution to define marriage between one man and one woman (Cal Const). Today, Proposition 8 is being challenged in the court case *Perry v. Brown* (2012) and has already been ruled as violating the United States Constitution by Chief District Court Judge Vaughn R Walker (*Perry v. Schwarzenegger* 2010, at 121). I examine the public opinion data around the time the court decisions were made and Proposition 8 was passed to see if Dworkin's theory is correct

that legislatures follow majority opinion while courts are more likely to recognize minority rights.

To make sure that the findings in this thesis are valid, it is necessary to give an explanation of the proper and improper ways to conduct public opinion polls. Public opinion polls are a way to measure Americans' attitudes on controversial and prominent political issues. Polls can be seen as a tool of democracy because citizens are allowed to directly voice their opinions on issues that policymakers are considering. In *Polling and the Public: What Every Citizen Should Know*, Herbert Asher explains, "Advocates of polls emphasize that polling is an opportunity for citizens to participate in a democracy and that it permits quick and repeated assessments of the opinions of the public" (14). Polls have also been said to influence the actions of policymakers and other political leaders. However, Asher notes that "there is mixed empirical evidence on the extent to which popular preferences are actually translated into public policy" (21). Although evidence has shown that elected representatives are not consistently making decisions based on polling data, some significant studies have revealed that a relationship exists between policymakers' decisions and public opinion (Asher 21). Asher writes that "some empirical studies have found substantial congruence between the attitudes of the public and the actions of government on certain issues (Page and Shapiro 1983, 1992; Erikson 1976)" (21). So, it seems that public opinion data can be one factor that influences the way that elected officials make decisions.

Although public opinion polls can be effective democratic tools and can be used to better understand the actions of legislatures, they must also be viewed with a certain degree of caution. When using polling data, it is important to understand the potential impact that the type of poll, wording, sample size and response categories can have on the results that are generated. The type

of poll that is conducted can influence the way that poll respondents answer questions. For example, polls that are commissioned by a particular organization can be worded to influence the poll taker to be more favorable to a political stance that the organization supports (Asher 5). Asher notes that commissioned polls are normally conducted by biased political organizations and are not normally used by media and news organizations (5). Since this thesis only uses public opinion polls from news organizations and highly respected polling institutions, the chance of biases resulting from commissioned polls is relatively low.

Asher calls polls that are unrepresentative and deceptive “pseudo-polls” (12). He explains that “because of loaded and unfair question wording, self-selection biases in the respondents, outright efforts to stack the results, or other deficiencies, pseudo-polls are poor ways to ascertain public opinion” (Asher 14). Some examples of pseudo-polls include polls in which respondents voluntarily select themselves to participate and polls that members of Congress send to people in their districts (Asher 14). One acceptable type of poll that helps to prevent pseudo-polls is telephone interviews. Telephone interviews use random digit dialing to create a sample of participants that reflect the greater population (Asher 66). Some positive aspects of phone interviews are that they are able to measure quickly changing issues, they are cheap and they are not as intrusive for respondents (Asher 66). Additionally, it is important for polls to collect a significant number of responses to ensure validity. The accepted polling size is at least 1,000 respondents (Asher 15). All of the polls that are used for this thesis used random digit dialing telephone interviews, so there is no chance that the respondents selected themselves. Also, most of the polls used have over 1,000 respondents and those that do not are highly criticized.

One of the trickiest aspects of achieving a valid representative poll is making sure that the wording and selection choices do not greatly influence the respondents. When using multiple

polls, it is important to select ones with questions that have very similar wording. Asher explains that by changing words in a question, respondents can be influenced to believe that they are answering a different question than the original question (43). This thesis does use questions from multiple polls to track opinions overtime. However, the polls were selected carefully so that the questions contain wording that is as close to the same as possible. Asher also stressed the importance of using questions that do not contain double negatives or ambiguity (44). For this thesis, none of the questions contain double negatives and they are not ambiguous. All questions ask whether the respondent favor or oppose legalizing same-sex marriage. The changes in wording should not be significant enough to produce results that cannot be compared.

In addition, Asher explains that it is important to provide a middle answer for respondents so that polls do not measure “nonattitudes.” He writes that polls produce nonattitudes “if the topic is so remote from citizens’ concerns that they don’t hold a real view” (Asher 26). If pollsters do not provide a middle choice or a “don’t know” category, respondents might feel pressured to select an answer even though they have no true opinion on the question’s topic. If this occurs, the results of the poll can be skewed toward one answer that might not represent real public opinion. All of the poll questions that are used in this thesis include a “don’t know” or “no opinion” choice. Therefore, there is less of a chance that the polls in this thesis measured nonattitudes.

Overall, there are several types of polls and polling procedures that need to be avoided for polls to be representative and accurate reflections of public opinion. Types of polls that should be viewed with caution include commissioned polls, pseudo-polls, polls with small sample sizes and self-selected polls. The polls used in this thesis avoid these pitfalls by being conducted by media and news groups and using random digit dialing telephone interviews. It is

also important for polls to use clear wording and provide a “don’t know” option for respondents. The poll questions used in this thesis have similar wording and all provide an option to prevent collecting nonattitudes. Although polls should be viewed with caution the ones used in this thesis were conducted properly. Therefore, these polls can be used to evaluate the impact of the majority’s opinion on legislatures’ choices of whether to legalize same-sex marriage.

Overall I use case law of the doctrinal development of the Equal Protection Clause and right to privacy to determine where the constitutional right to same-sex marriage can be found. I will use case studies of three states to test Dworkin’s theory that the courts should be responsible for recognizing rights. The next section provides a brief history of the Equal Protection Clause and the levels of scrutiny the Court has created to review cases dealing with possible Equal Protection Clause violations.

Introduction to the Equal Protection Clause

Since the Fourteenth Amendment was ratified in 1868, the protections guaranteed by the Equal Protection Clause have been applied in varying degrees by the Supreme Court. David O’Brien explains in *Constitutional Law and Politics: Civil Rights and Civil Liberties*, that after the Equal Protection Clause was initiated into the Constitution, “Over a half century lapsed before the Supreme Court began enforcing it as a serious barrier to racial segregation and other kinds of nonracial discrimination as well” (1325). O’Brien explains the Court has had to determine what level of scrutiny should be given to laws discriminating against various minority groups (1325). The Court originally used heightened scrutiny, or strict review of government legislation, to judge cases pertaining to economic legislation. In *United States v. Carolene Products Co.*, 304 US 144 (1938), Justice Harlan Stone created the foundation for the differing

levels of protections under the Equal Protection Clause when he ruled that economic legislation would no longer receive heightened scrutiny, but instead would need to serve some rational basis (at 155). He suggested that heightened scrutiny of laws should be reserved for legislation that impacted the fundamental rights of certain minority groups (*United States v. Carolene Products Co.* 1938, 155). Justice Stone's analysis of the Equal Protection Clause led to the classification system in which laws dealing with "suspect classifications" receive heightened scrutiny while the government must merely show a rational basis for other laws (*United States v. Carolene Products Co.* 1938, 155).

The strict scrutiny test was not applied to a court opinion until the case *Korematsu v. United States* (1944) in which Justice Hugo Black used the strict scrutiny test to uphold the internment of Japanese-Americans (at 224). In the opinion, Justice Black explains that legislation that limits the rights of a racial group should receive the highest level of review. However, he found that under the strict scrutiny test the government had a compelling interest in the internment of Japanese-Americans and that it was the narrowest way to implement that interest (at 224). Therefore, although generally the government is unable to pass the strict scrutiny test, in this first case, the government's legislation was found to be valid law.

From 1953-1969, the Warren Court continued to develop Justice Stone's original groundwork for analyzing the Equal Protection Clause. The Warren Court focused on a two level test to determine if legislation was constitutional (O'Brien 1328). According to O'Brien, the Warren Court decided that "when reviewing economic legislation, the Court gives *minimal scrutiny* and applies the *rational basis test*, asking simply whether legislation is reasonable and has a rational, conceivable basis" (1328). However, when the Court reviewed cases that dealt with "suspect classifications" such as race and religion, strict scrutiny was applied (O'Brien

1329). It is much more difficult for the government to pass the strict scrutiny test because it must demonstrate a compelling state interest in the law and that the law is narrowly tailored to achieving that state interest. The Burger Court, which lasted from 1969 to 1986, added a third standard that lies between strict scrutiny and the rational basis test to the Warren Court's original two tiered test (O'Brien 1332). Under this intermediate test, the government must show an important interest in the law and that the law is substantially related to that interest. This middle standard applies to gender minority groups (O'Brien 1332). Therefore, the Equal Protection Clause has evolved to be analyzed by the Court according to these three tests, based on what minority group's rights are in question and whether a fundamental constitutional right is being violated.

When the Court has faced cases concerning the violation of the rights of sexual minorities, it has historically used the rational basis test to determine whether a government law is constitutional. Therefore, sexual minorities receive the lowest level of protection from government laws that infringe on their rights. This means that when looking at the government's prohibition of same-sex marriage, the government must merely prove that there is a legitimate interest in not allowing same-sex couples to marry and that laws prohibiting gay marriage are rationally related that interest. The following sections consider two cases in which the Court has ruled respective state governmental laws have violated the Equal Protection Clause. The doctrinal development, as illustrated in these cases, demonstrates how the right to same-sex marriage exists under the Equal Protection Clause of the Fourteenth Amendment.

Analysis of *Loving v. Virginia* (1967)

The case that is most often cited as legal precedent for the existence of a right to same-sex marriage is the 1967 Supreme Court decision *Loving v. Virginia*. In *Loving*, the Supreme Court found that a Virginia law prohibiting interracial marriages violated interracial couples' rights under the Equal Protection Clause (at 13). The connections between this case and the argument for same-sex marriage are obvious. Both *Loving* and the legal arguments for same-sex marriage deal with the government denying an established fundamental right to a minority group. These connections lead legal scholars and same-sex marriage activists to cite *Loving* as precedent for a right to gay marriage. In *Loving*, Mildred Jeter, a black woman, and Richard Loving, a white man, argued that Virginia's antimiscegenation statute violated the Constitution. Mildred Loving has made connections between her particular legal battle and the battle over same-sex marriage. She issued a statement in 2007 saying, "I believe all Americans, no matter their race, no matter their sex, no matter their sexual orientation, should have that same freedom to marry" (Nussbaum 48)¹. Although the connections between *Loving* and same-sex marriage appear clear, there are certain distinctions between the two issues. In particular, race is a suspect classification under the Equal Protection Clause and receives a greater level of protection from government laws than minorities of sexual orientation. Therefore, analysis of the written decision and oral arguments of this case show how the legal reasoning used in *Loving* creates a definitive legal argument for same-sex marriage.

In the unanimous decision, the Court ruled that Virginia's law prohibiting interracial marriage violated the Equal Protection Clause. In the written opinion of the Court, Chief Justice Earl Warren writes, "There can be no doubt that restricting the freedom to marry solely because

¹ Richard Loving was killed in 1975 by a drunk driver. Therefore, he was not included in this statement that Mildred made in 2007 (Sullivan).

of racial classifications violates the central meaning of the Equal Protection Clause” (*Loving v. Virginia* 1967, at 13). In the case, the state attempted to argue that because the law applied equally to white and black participants in an interracial marriage, there was no Equal Protection Clause violation. Summarizing Virginia’s argument Chief Justice Warren writes, “The State contends that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications, do not constitute an invidious discrimination based upon race” (*Loving v. Virginia* 1967, at 9). The state rested this argument on the Virginia Supreme Court case *Naim v. Naim* (1965). In the case, it was ruled that a Virginia couple’s interracial marriage violated Virginia’s antimiscegenation laws and that the laws served a legitimate state interest. The Virginia Supreme Court cited “preserving the racial integrity of its citizens, preventing the corruption of blood and the obliteration of racial pride” as legitimate reasons for the prohibition of interracial marriages (*Loving v. Virginia* 1967, at 8). In *Loving*, Virginia cited these arguments as rationale for why the laws could be upheld under the Equal Protection Clause.

The Supreme Court did not find these arguments to be sufficient justification for the law’s infringement on a suspect class’s fundamental right to marry. Chief Justice Warren’s decision makes it clear that race is given the highest level of scrutiny and that Virginia’s argument that the law punishes races equally is not an adequate argument when dealing with the Equal Protection Clause. He writes that in *Loving* “we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification...required of state statutes drawn according to race” (at 10). In the opinion, the Court does not support Virginia’s use of *Naim* as legal precedent. Chief Justice Warren writes that the government interests that the *Naim* decision gives for prohibiting

interracial marriages are “obviously an endorsement of the doctrine of White Supremacy” (*Loving v. Virginia* 1967, at 8). He goes on to write that the Court has historically established that marriage is one of the most basic fundamental rights and that the denial of interracial marriage infringes upon that fundamental right for no legitimate reason. He writes, “Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival” (*Loving v. Virginia* 1967, at 13). Therefore, the Court concludes that the Virginia law violates the Equal Protection Clause and that states must allow interracial marriages.

The written opinion in this case connects to the legal reasoning often given for the existence of a right to same-sex marriage. Although sexual orientation does not receive heightened scrutiny, other connections exist between the written opinion and the right to same-sex marriage. Specifically, states often claim that prohibition of same-sex marriage does not violate the Equal Protection Clause because it applies equally to both genders. In essence the argument is that men cannot marry men and women cannot marry women. However, Chief Justice Warren makes it clear in his opinion that the equal protection requirement is not met merely because each race, or in this case each gender, is punished equally. This legal precedent suggests that Equal Protection Clause violations can still exist even when laws apply to groups of citizens equally.

Also, connections can be made to Justice Warren’s explanation that marriage is a fundamental right. Fundamental rights are given a greater level of protection under the Equal Protection Clause. Therefore, it would seem that when considering the right to same-sex marriage, the courts must be willing to use stricter scrutiny. Evan Gerstmann makes the argument that because marriage is a historically established fundamental right, it is improper of the courts to allow the legislatures to deny minority groups this right. He explains, “The Supreme

Court has consistently recognized the right to marry as a fundamental right. So this right should be applied equally among all people” (Gerstmann 26). Therefore, although the Court relied on heightened scrutiny in this case and sexual minorities do not receive heightened scrutiny, there are several elements of the legal reasoning used by the Court to find an Equal Protection Clause violation that relate to same-sex marriage.

Similarities can also be found between the oral arguments of *Loving* and the arguments made to support same-sex marriage. Particularly, the references to the rights and protections that are denied to interracial couples mirror the rights and protections that are denied to same-sex couples. By prohibiting certain groups of people from marrying, the government is unequally allowing and disallowing certain citizens’ access to the rights that stem from marriage. When arguing the case for the Lovings, attorney Philip Hirschkop explains that if the Lovings were to live in Virginia where their marriage is not recognized “they themselves would lose their rights for insurance and social security” (*Loving v. Virginia* “Oral Arguments”). He explains that by not allowing interracial couples to seek the benefits of marriage, Virginia is holding them in an inferior economic position to couples of the same race. Referring to the antimiscegenation laws he says, “And that’s what they’re meant to do. To hold the Negro class in a lower position. A lower social position, a lower economic position” (*Loving v. Virginia* “Oral Arguments”). The same argument can be made for couples of the same-sex who wish to get married but are unable to because the government does not allow them to. Kory Schaff makes this point when he writes, “State and federal legislation that defines marriage in heterosexual terms precludes certain individuals from participating in an institution that imparts legal benefits and burdens” (139). In “The Case For Gay Marriage” Richard Mohr points out several of the rights that same-sex couples are being denied including income tax advantages, rights of inheritance, right to bring a

wrongful death suit, right to receive survivor's benefits, right to obtain residency status for a noncitizen partner, and the right to unemployment benefits if one partner quits and they have to move to a new location (228). Similarly to how the denial of interracial marriages prohibited interracial couples from receiving these rights, the prohibition of same-sex marriage prevents same-sex couples from receiving the full spectrum of rights they should be fundamentally allowed to obtain.

Lastly, in the oral arguments of *Loving*, attorney R.D. McIlwaine argues for Virginia that the antimiscegenation laws serve a legitimate government purpose. In his argument he cites scientific evidence by Albert I. Gordon that claims that interracial marriages create greater amounts of stress on the partners and on the children of interracial marriages. Talking about Albert Gordon's theories McIlwaine says, "His view as a social scientist is that interracial marriages are definitely undesirable, that they hold no promise for a bright and happy future for mankind" (*Loving v. Virginia* "Oral Arguments"). McIlwaine argues that people who enter into interracial marriages are "people who have a rebellious attitude toward society, self hatred, neurotic tendencies, immaturity and other detrimental psychological factors," (*Loving v. Virginia* "Oral Arguments"). Therefore, he claims that Virginia has an interest in preventing the inevitable decline in society that would result from interracial marriages.

A similar argument is made today concerning same-sex marriage. However, the most recent scientific evidence suggests that same-sex couples provide just as a stable family life as opposite-sex couples. For example, the American Psychological Association cites research conducted by University of Virginia Professor Charlotte J. Patterson, PhD, and co-authors UVA Doctoral Student Rachel H. Farr and Stephen L. Forssell, PhD, of George Washington University. Their study of children in same-sex and opposite-sex households found that "the

children of gays and lesbians were virtually indistinguishable from children of heterosexual parents” (Munsey “Adopted Children Thrive”). Additionally, the American Medical Association, the American Academy of Pediatrics, the American Academy of Family Physicians, the American Psychoanalytical Association and the National Association of Social Workers all support same-sex marriage due to scientific research their organizations have conducted. The question of whether same-sex marriage is detrimental to stable family life and the welfare of children will be addressed further in this thesis in the section challenging the government’s ability to pass the rational basis test for prohibiting same-sex marriage. However, for now, it is clear that connections exist between the arguments used for the government’s interest in prohibiting interracial marriages and same-sex marriages. So far, there are clear connections between the legal reasoning behind the Court’s decision in *Loving* concerning the violation of the Equal Protection Clause and the arguments made for the legalization of same-sex marriage. Now, this thesis analyzes another Equal Protection Clause case, *Romer v. Evans*, 517 U.S. 620 (1996).

Analysis of *Romer v. Evans* (1996)

The 1996 case *Romer v. Evans* dealt with an amendment to the Colorado State Constitution and its potential violation of the minority rights of homosexual, lesbian and bisexual Colorado residents under the Equal Protection Clause (at 624). The amendment, known as Amendment 2, forbid any level of Colorado Government from taking actions designed to protect Colorado citizens of homosexual, lesbian or bisexual orientation from discrimination based on their sexual orientation, conduct, or relationships (*Romer v. Evans* 1996, at 627). The constitutionality of Amendment 2 was challenged. The Supreme Court ruled in a 6-3 decision

that Amendment 2 violated the Equal Protection Clause rights of sexual minorities because it served no legitimate government purpose (*Romer v. Evans* 1996, at 626). *Romer* connects to the issue of same-sex marriage because it provides a case in which a government law that discriminated against sexual minorities did not pass the rational basis test. Although the case does not deal directly with the right to marriage, it provides an example of the legal reasoning used to show that the government can violate the constitutional rights of sexual minorities.

Justice Anthony Kennedy wrote the opinion for the Court. In his decision, he explains that Colorado defends Amendment 2 by claiming that it places sexual minorities on the same level as all other Colorado residents by making sure that people of homosexual, lesbian and bisexual orientation do not receive special treatment from the state (*Romer v. Evans* 1996, at 626). However, he writes, “This reading of the amendment's language is implausible” (*Romer v. Evans* 1996, at 626). Justice Kennedy points out that the law unfairly denies sexual minorities the ability to seek a remedy for discrimination they experience in the state. He comments on this when he writes, “The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies” (*Romer v. Evans* 1996, at 627). He expresses the Court’s concern at the breadth of the language of Amendment 2. He explains that Amendment 2 repeals laws set in place against discrimination in government positions and in state colleges (*Romer v. Evans* 1996, at 627). He also does not agree with Colorado’s suggestion that the state is simply denying same-sex couples “special rights” when he writes, “To the contrary, the amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint” (*Romer v. Evans* 1996, at 631). Here, he notes that any other minority group has the ability to seek protection against discrimination but Amendment 2 prevents only

gay Coloradans from seeking protections. This, the Court believes is in violation of the Equal Protection Clause.

The Court concludes that Colorado can provide no legitimate government interest for Amendment 2 and thus, it violates the Equal Protection Clause. Justice Kennedy explains, “We will uphold the legislative classification so long as it bears a rational relation to some legitimate end. Amendment 2 fails, indeed defies, even this conventional inquiry” (*Romer v. Evans* 1996, at 632). He goes on to say that Amendment 2 is an attempt to discriminate against sexual minorities. In the closing arguments of *Romer*, Justice Kennedy writes, “We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do” (at 635). Therefore, this case provides a clear legal example of a situation in which the government lacks a legitimate state interest in regulating the ability of sexual minorities to seek protection from discrimination.

This legal argument connects directly to the argument for the existence of a right to same-sex marriage. Many proponents of same-sex marriage argue that the government’s prohibition of the right only serves the purpose of treating same-sex couples as unequal to opposite-sex couples. Richard Mohr makes this argument when he claims that the courts need to recognize that the definition of marriage has evolved. He writes that “The law, if it aims at promoting justice, will have to be attentive to the ways couples actually live their lives rather than, as at present, preemptively and ignorantly determining which relationships are to be acknowledged and even created by it” (Mohr 218). Therefore, connections exist between the argument in *Romer* that the government cannot unequally deny sexual minorities’ access to government protections and the government’s unequal denial of marriage to sexual minorities.

Not all the Supreme Court Justices agreed with the decision in *Romer*. Justice Scalia wrote a dissenting opinion which Chief Justice Rehnquist and Justice Thomas joined. In his dissent, Justice Scalia explains that he believes that Colorado had a legitimate interest in creating Amendment 2 to prevent sexual minorities from receiving any form of special treatment from the state (*Romer v. Evans* 1996, at 638). He goes on to say that moral disapproval can be a legitimate reason for the law. He writes that Amendment 2 merely shows “moral disapproval of homosexual conduct, the same sort of moral disapproval that produced the centuries old criminal laws that we held constitutional in *Bowers*” (*Romer v. Evans* 1996, at 644). Ten years earlier in *Bowers v. Hardwick* (1986), the Court upheld states’ right to outlaw homosexual sodomy (at 196). Justice Scalia explains that because homosexual sodomy can be outlawed according to the *Bowers* decision, he does not see why a law “disfavoring” sexual minorities would be unconstitutional (*Romer v. Evans* 1996, at 644).

Justice Scalia also states that Amendment 2 was passed because several cities in Colorado with large gay populations passed ordinances that placed discrimination based on sexual orientation on the same grounds as religious and racial discrimination (*Romer v. Evans* 1996, at 646). In the oral arguments for *Romer* Scalia even addressed this as a legitimate interest when the attorney for Colorado was asked what the interest of the state was. Justice Scalia says, “State... State subdivisions giving preferences which the majority of the people in the State did not think desirable for social reasons, isn't that the problem that was seen?” (*Romer v. Evans* “Oral Arguments”). Here, Justice Scalia helps make the argument for the attorney for the state. Justice Scalia saw Amendment 2 as a protection against the advancement of minority rights that the majority in Colorado did not support. Therefore, Justice Scalia, along with Chief Justice Rehnquist and Justice Thomas, did not support the *Romer* ruling.

Interestingly, Justice Scalia's argument that Colorado needed to pass Amendment 2 to ensure the will of the majority supports Ronald Dworkin's theory. Justice Scalia states that a majority of Colorado residents did not support sexual minorities passing legislation that ensured their rights against discrimination. Therefore, the majority took its own legislative route to deny gay, lesbian and bisexual individuals their rights. Then, through the *Romer* decision, the Court recognized and protected the minority rights. According to Dworkin, this is the exact process that results from a majority of citizens being unwilling to recognize the rights of minorities. Although Justice Scalia might see precedent for allowing legislation to be passed on moral grounds, Amendment 2 was completely unprecedented in the way that it removed from a whole group of citizens the basic right to be free from discrimination. Therefore, the Court fulfilled its duty to protect minority rights and found that the law did not pass the lowest level of scrutiny. There are several parallels between *Romer* and the case for same-sex marriage including the government's denial of the protections and rights it gives to other citizens and the government's inability to provide a legitimate interest in the law other than moral disapproval.

Conclusion to the Equal Protection Clause

Overall, there seems to be sound legal footing in the doctrinal development of the Equal Protection Clause that relates closely to the legal arguments made for same-sex marriage. Although there are distinct differences between the levels of scrutiny used when concerning racial minorities and sexual minorities, *Loving* still provides clear legal connections to the existence of a right to same-sex marriage. These connections include the lack of support for many states' argument that laws pass the Equal Protection Clause if they punish those within a group equally. A connection also exists between the way interracial couples once were unequally

denied the benefits received from marriage and the way same-sex couples are currently denied those benefits. Lastly, there is a connection between the lack of support for the government's arguments that an interest exists in prohibiting interracial and same-sex marriages. There are also connections between the use of the Equal Protection Clause in *Romer* and the argument made for the legalization of same-sex marriage. Specifically, in *Romer* the Court made clear that if the government does not have a legitimate interest in a law concerning the rights of sexual minorities; it violates the Equal Protection Clause. The reluctance of Americans to accept same-sex marriage because of a disapproval of the minority group connects to Amendment 2's unequal treatment of people of homosexual, lesbian and bisexual orientation because of homophobia. Therefore, legal connections exist between the development of the Equal Protection Clause and the argument for same-sex marriage.

Introduction to the Right to Privacy

The right to privacy is a controversial legal doctrine because unlike most established legal rights, it is not explicitly stated in the Constitution. Since the right to privacy was not openly written into the Constitution, many lawyers, legal scholars, politicians and judges have questioned the right's very existence. Nevertheless, today scholars argue that the right to same-sex marriage is established under the constitutional right to privacy. However, in order to understand the inaccuracy of this argument, it is necessary to detail the history of the right to privacy and its doctrinal development. Once the controversy of this right is better understood, it is easier to make the argument that same-sex marriage is a right that is founded in the Equal Protection Clause of the Constitution rather than the right to privacy.

Since a right to privacy is not clearly written in the Constitution, it took time for the right to be recognized by the Supreme Court. The two attorneys who have been accredited most often for conceptualizing the right to privacy are Samuel Warren and Louis Brandeis. In 1890, Warren and Brandeis wrote “The Right to Privacy” which was published in the Harvard Law Review (Warren 193). In the article, Warren and Brandeis explain that initially, the law only recognized a physical right from intrusion by the government in matters of life and property (193). They outline that previous legal cases involving publication of literary and photographic works have been decided based on the right to property. However, they write that “although the courts have asserted that they rested their decisions on the narrow grounds of protection to property...there are recognitions of a more liberal doctrine” (204). They go on to explain that the more liberal doctrine is the right to privacy. They note that as society evolves, the law regarding privacy should also evolve to protect the ways that people enjoy their personal lives. They write, “The design of the law must be to protect those persons with whose affairs the community has no legitimate concern, from being dragged into an undesirable and undesired publicity...” (214). Thus, Warren and Brandeis believed that the right to life and property extended to a “man’s spiritual nature” and that the right to privacy had naturally evolved due to the evolution of legal doctrine (194).

Brandeis went on to become a Supreme Court Justice and wrote a dissenting opinion in the case *Olmstead v. United States*, 277 U.S. 438 (1928). In his dissent, he made it clear that he opposed the decision by the Court to uphold the United States Government’s use of wiretapped private conversations as evidence without the consent of the person being wiretapped (at 488). Justice Brandeis saw this as a violation of privacy and an unnecessary government intrusion. Therefore, during his time on the Supreme Court, Brandeis continued to outline the evolution of

a right to privacy. Through “The Right to Privacy” and Brandeis’s work on the Supreme Court, the two men outlined the intellectual reasoning for a right to privacy.

It was not until *Griswold v. Connecticut*, 381 U.S. 479 (1965), that the Supreme Court fully recognized a constitutional right to privacy. Justice William Douglas wrote the majority opinion which explained that the right to privacy can be found in the “penumbras” of the Bill of Rights (*Griswold v. Connecticut* 1965, 484). Therefore, the Court decided that the First, Third, Fourth, Fifth, Ninth and Fourteenth Amendments imply that there exists a fundamental right to privacy between married couples that the states cannot violate (*Griswold v. Connecticut* 1965, 484). Particularly, the Due Process Clause found in the Fifth and Fourteenth Amendments requires that no citizen be denied life, liberty or property without due process of the law (U.S. Const, amend XIV). The Founding Fathers’ use of the word liberty is often used to make the case that they had sought to guarantee a right to privacy. However, Justice Black and Justice Stewart both wrote dissenting opinions in *Griswold* in which they chastised the Court for creating a right that they believed did not exist (at 508). Since this case, justices have disagreed over whether a right to privacy truly exists in the Constitution. Nevertheless, the right to privacy was extended in *Roe v. Wade* (1973), in which the Court ruled that the right of a woman to choose to have an abortion based on her trimester falls under the realm of privacy (at 165-166). Continuing the controversy of this right, in *Roe* Justices White and Rehnquist both wrote dissenting opinions in which they stated that the right to privacy does not exist because it is not written in the Constitution.

The right to privacy and what it entails has been debated throughout much of the past one hundred years of Supreme Court history. Despite its controversy, some legal scholars claim that the right to same-sex marriage exists under the right to privacy. These authors claim that the

choice of whom to marry is a private domestic matter that the United States Government does not have the right to invade. Two common cases that are cited as legal precedent for the right to same-sex marriage include the previously mentioned case, *Griswold v. Connecticut* (1965), and the Supreme Court case *Lawrence v. Texas*, 539 U.S. 558 (2003). *Griswold* lays the foundation for a fundamental right to privacy between married couples which could possibly also apply to the choice of who a person wishes to marry. *Lawrence* directly deals with the right to privacy between people of gay or lesbian orientation. Although the right to privacy might appear to be a legal pathway to establish a right to same-sex marriage, this thesis argues that this argument is riddled with legal problems that make the Equal Protection Clause the legal doctrine that most accurately establishes a right to same-sex marriage.

Analysis of *Griswold v. Connecticut* (1965)

Griswold v. Connecticut was a 1965 Supreme Court case that directly dealt with a married couple's right to make private decisions about procreation and family life without the unnecessary interference of the Connecticut Government. Prior to the case, Estelle Griswold, the director of a Connecticut Planned Parenthood Clinic, and Dr. Buxton, the physician of the clinic, provided married women with advice and encouragement on how to use birth control. According to a Connecticut law at the time, it was illegal for anyone to use birth control and for anyone to encourage or advise someone to commit a crime (*Griswold v. Connecticut* 1965, at 480). Therefore, since Griswold and Buxton had advised women to commit the crime of using birth control, they were found guilty of counseling someone to commit a crime (*Griswold v. Connecticut* 1965, at 480). Griswold appealed claiming that the laws violated the Fourteenth Amendment.

In its majority opinion, the Court ruled for *Griswold*. The opinion was written by Justice Douglas and it contains much of the legal reasoning behind the Court's recognition of a right to privacy. In the *Griswold* opinion, Justice Douglas quickly notes that although the case concerns the Fourteenth Amendment Due Process Clause it is not closely related to previous cases that have dealt with economic liberty because the Connecticut law "operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation" (at 482). Instead of looking towards meanings of liberty based on economics and property, Justice Douglas explains that First Amendment cases such as *Pierce v. Society of Sisters* (1925), *Meyer v. Nebraska* (1923) and *NAACP v. Alabama* (1958) have established a "penumbra" where privacy is protected (*Griswold v. Connecticut* 1965, at 483). In *Griswold* he writes, "The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance" (at 484). He explains that the penumbras of the Third, Fourth, Fifth, Ninth and Fourteenth Amendment "create sanctity of man's home and privacy" (*Griswold v. Connecticut* 1965, at 484). Thus, through the use of several constitutional guarantees, Justice Douglas outlines the Court's legal doctrine of the right to privacy.

An argument can be made that the guarantee to marital privacy established in *Griswold* should also apply to the choice of whom a person wishes to marry. William Hohengarten explains, "The right of privacy prevents the state from taking over the lives of individual citizens by making basic familial decisions for them" (1523). Based on this idea, the case could be made that same-sex couples have a right to privacy in determining who they wish to bond their lives with through marriage and who they want to make members of their family. In Justice Douglas's opinion, he explains that family choices are one of the deepest matters of privacy that a man can

have. He passionately outlines this idea when he writes, “Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship” (*Griswold v. Connecticut* 1965, at 485-486). According to this line of thought, it can be argued that same-sex couples deserve that same sacred quality of marriage that opposite-sex couples so freely enjoy.

However, other than the quote above by Justice Douglas, there is little evidence in the majority opinion that the marital right to privacy should extend to the choice of who to marry. In fact, there is more evidence proving the contrary in the concurring opinion by Justice Goldberg. In his concurring opinion he writes that there are certain circumstances in which states can regulate marriages. He writes, “Finally, it should be said of the Court's holding today that it in no way interferes with a State's proper regulation of sexual promiscuity or misconduct” (*Griswold v. Connecticut* 1965, at 499-500). To make his argument he cites the previous Supreme Court ruling dealing with the Connecticut contraception laws that *Griswold* overturned, *Poe v. Ullman* (1961). When referring to the *Poe* case he quotes Justice Harlan's dissent which says, “Adultery, homosexuality and the like are sexual intimacies which the State forbids . . . , but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage...” (*Griswold v. Connecticut* 1966, at 500). Therefore, by citing Justice Harlan's dissent, Justice Goldberg suggests that the state does have the complete right to regulate marriage in particular situations, including same-sex marriage. The majority opinion does not state that the right to privacy created in *Griswold* protects couples from government intrusion into the choice of whom to marry. Also, Justice Goldberg makes clear that he believes that the state has every right to regulate marriage, including when the couple that wishes to marry is a gay couple. The dissenting opinions for *Griswold*, written by Justice Black and Justice Stewart,

claim that the right to privacy does not exist under the Constitution. Clearly, if no right to privacy exists, then these Justices would not support the legal reasoning that the right to privacy creates a right to same-sex marriage.

In his dissent, Justice Black objects to what he believes is the Court's eagerness to prevent the state from passing any laws that might deny privacy in necessary situations. He comments on this when he writes that "The Court talks about a constitutional 'right of privacy' as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the 'privacy' of individuals. But there is not" (*Griswold v. Connecticut* 1966, at 508). He explains that since no constitutional provision exists that even mentions a right to privacy, the government has every constitutional right to intrude into the lives of Americans (*Griswold v. Connecticut* 1966, at 510). Without question this includes the right to have the discretion in determining who may and may not get married. Justice Stewart also writes that he does not believe that a right to privacy exists. He makes this obvious when he writes, "With all deference, I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court" (*Griswold v. Connecticut* 1966, at 530). Clearly, Justice Stewart believes that because no language in the Constitution describes a right to privacy, there is no right to privacy.

The lack of support in the majority opinion for extending the right to privacy to include the right to same-sex marriage is not surprising considering that the *Griswold* case was decided in the 1960s. In addition, the concurring opinion demonstrates that Justice Goldberg believed that the state had every right intrude into certain realms of privacy including the realm of who can marry. In the oral arguments of the case, Attorney for the State of Connecticut Joseph Clark makes this argument as well. In oral arguments Justice Stewart questions Mr. Clark about

whether the State of Connecticut could prevent marriage. In response Mr. Clark says, “I think the State of Connecticut could prevent marriage in certain people, certain groups, yes” (*Griswold v. Connecticut Oyez*). Although he does not specifically mention gay couples, Mr. Clark’s argument is supported by Justice Goldberg’s concurring opinion. Thus, it seems that certain Justices were not convinced that the state should be completely restricted in the private realm of marriage. Also, the dissenting opinions in the case reveal that the right to privacy is a highly controversial right that many Justices throughout Supreme Court history have not believed exists. Due to all these factors, it is fairly risky to make the claim that the legal doctrine of the right to privacy created in *Griswold* provides the legal foundation for a right to same-sex marriage.

Analysis of *Lawrence v. Texas* (2003)

Thirty-eight years after *Griswold*, the Supreme Court case *Lawrence v. Texas* (2003) furthered the doctrinal development of the right to privacy. Some legal scholars (see Feigen and Hohengarten) argue that the ruling in *Lawrence* provides the constitutional foundation for a right to same-sex marriage. This argument is greatly advanced by the fact that in Justice Scalia’s dissent he claims that if the legal theory in the written opinion in *Lawrence* is accepted, then the legality of same-sex marriage must also be accepted. However, most existing literature on the subject argues that although certain parallels can be drawn between the right to privacy in this case and the right to same-sex marriage, the written opinion makes clear distinctions between private and public conduct. These authors argue that because marriage is publicly created and maintained by the government, the right to privacy does not extend to same-sex marriage. Analysis of the written opinion, the concurring opinion, the dissent and the oral arguments in

Lawrence show that marriage does not hold enough parallels with private consensual sexual conduct to establish a right to same-sex marriage.

In the case of *Lawrence*, two men had been found in a bedroom of a home engaging in consensual sexual conduct. The men's actions violated a Texas statute which criminalized two people of the same-sex engaging in "deviate" sexual intercourse (*Lawrence v. Texas* 2003, at 563). The two men challenged the law claiming that it violated the Due Process Clause of the Fourteenth Amendment (*Lawrence v. Texas* 2003, at 558). Prior to *Lawrence* the Supreme Court had decided a comparable case, *Bowers v. Hardwick* (1986). In *Bowers*, Michael Hardwick was arrested for violating a Georgia law criminalizing sodomy between people of the same sex. The Supreme Court upheld the Georgia law claiming that there is a longstanding history of criminalizing sexual conduct between people of the same-sex and that a right to privacy does not extend to homosexual sodomy (*Bowers v. Hardwick* 1986, at 191). Therefore, when the Supreme Court decided *Lawrence* there was clear legal precedent that did not identify a private right to sexual conduct between homosexuals. Nevertheless, through *Lawrence* the Court voted to overturn *Bowers* and to identify a right to privacy for people of the same sex to engage in consensual sexual conduct.

Justice Anthony Kennedy wrote the opinion for the Court. In the written opinion he states that the law violates the Due Process Clause and that *Bowers* is overturned. He explains that the personal choice of engaging in consensual sexual acts is one of the most private matters of human life. He comments on this when he writes about the Georgia law in *Bowers* and the Texas law saying:

Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not

entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals. (*Lawrence v. Texas* 2003, at 567).

This quote demonstrates that when deciding this case, the majority of the Court believed that Americans should be able to engage in sexual intimacy within the home and retain their pride outside of their home no matter their sexual orientation. Justice Kennedy goes on to explain that the Texas law seems to merely be a moral judgment that the majority in Texas wishes to impose on a sexual minority. In the *Lawrence* opinion he writes about gay men and lesbian women that “the State cannot demean their existence or control their destiny by making their private sexual conduct a crime” (at 578). Therefore, the Court made its decision based on the idea that the Constitution protects the liberty of citizens to engage in private consensual sexual activity no matter their sexual orientation.

In his opinion, Justice Kennedy also addressed why the Court overturned *Bowers*. Particularly, he explained that the *Bowers* decision had been made based on a false idea that America has had a longstanding tradition of criminalizing homosexual sodomy. In *Bowers*, the Court states that there are “ancient roots” in prohibiting sexual conduct between people of the same sex (*Bowers v. Hardwick* 1986, at 191). Justice Kennedy points to amicus briefs which contain academic writings that question that accuracy of the historical account that is given in the majority opinion in *Bowers* (*Lawrence v. Texas* 2003, at 567). He explains that the history of laws concerning homosexual sodomy is not as extensive as the majority in *Bowers* suggested. Instead, he claims that “American laws targeting same-sex couples did not develop until the last third of the 20th century” (*Lawrence v. Texas* 2003, at 570). In *Lawrence* he also notes that the number of states that criminalized homosexual sodomy had almost been cut in half since the *Bowers* decision (at 570). Justice Kennedy suggests in his writing that homosexuality was becoming more accepted in American society and that because of that, certain laws that were

once thought necessary “serve only to oppress” (*Lawrence v. Texas* 2003, at 579). Although the Court often relies heavily on its decisions from previous cases, in this particular case, the Court believed *Bowers* was bad precedent and overturned it.

One member of the Court, Justice Sandra Day O’Connor, voted with the majority but wrote a concurring opinion in which she agreed with the outcome of the case but did not agree with the reasoning. In her opinion, Justice O’Connor states that she does not believe that *Bowers* should be overturned or that *Lawrence* should have been decided based on the question of whether the Texas statute violated the Due Process Clause. Instead, she believes that the law violates the Equal Protection Clause (*Lawrence v. Texas* 2003, at 579). She explains this when she writes, “The Texas statute makes homosexuals unequal in the eyes of the law by making particular conduct-and only that conduct-subject to criminal sanction” (*Lawrence v. Texas* 2003, at 581). Therefore, she sees the law as unfairly applying a criminal law to a minority of the population. Justice O’Connor writes that the only interest that Texas has given for prohibiting certain sexual acts between people of the same sex is an interest in the morality of its citizens. However, she does not believe morality is a legitimate state interest in this case. She makes this clear when she writes, “Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause” (*Lawrence v. Texas* 2003, at 582). Therefore, although Justice O’Connor agrees that the law is unconstitutional, she believes that it violates the Equal Protection Clause because it signals out a minority group without a legitimate interest in doing so.

Some legal scholars might argue that Justice O’Connor’s concurring opinion naturally connects to the argument to legalize same-sex marriage. It seems that if Justice O’Connor believes that the government cannot create laws merely based on morality claims, then she could

not agree with at least a portion of the government's argument for prohibiting same-sex marriage. However, these scholars would be mistaken. In her concurring opinion, Justice O'Connor clearly states that her legal argument in *Lawrence* does not pave the way for the legalization of same-sex marriage. She writes:

That this law as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations-the asserted state interest in this case-other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group. (*Lawrence v. Texas* 2003, at 585).

Therefore, Justice O'Connor clearly believes that the government has a legitimate interest in regulating marriage and she made a point to write this in her opinion.

Justice Antonin Scalia wrote a dissent for *Lawrence* which Chief Justice William Rehnquist and Justice Clarence Thomas joined. In his dissent, Justice Scalia disagreed with both the written opinion and Justice O'Connor's concurring opinion. Concerning the majority opinion, Justice Scalia believes that numerous cases throughout America's history have upheld morality as a legitimate reason to regulate conduct, including sexual conduct (*Lawrence v. Texas* 2003, at 589). He goes on to write that he believes that the majority decision is especially dangerous because it strikes down several laws regulating certain conduct that are based on a moral interest. Conduct that he believes is prohibited based on a moral reason include "state laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity" (*Lawrence v. Texas* 2003, at 590). Of particular interest to this thesis is Justice Scalia's claim that the *Lawrence* decision creates the foundation for the legalization of same-sex marriage. Referring to law regulating the conduct listed above he writes, "If, as the Court asserts, the promotion of majoritarian sexual morality is not even a *legitimate* state

interest, none of the above-mentioned laws can survive rational-basis review” (*Lawrence v. Texas* 2003, at 599). Thus, in his dissenting opinion Justice Scalia states that he believes that the majority opinion suggests that moral laws must be abolished and therefore, laws prohibiting same-sex marriage should be abolished.

Justice Scalia also believes that Justice O’Connor’s concurring opinion provides legal reasoning for allowing same-sex marriage. He believes that the preservation of morality is a legitimate government interest to prevent same-sex marriage. However, he states that since Justice O’Connor does not believe that morality is a legitimate interest, she must conclude that same-sex marriage should be legal. He explains that under her form of rational basis review any statute that harms a politically unpopular group violates the Equal Protection Clause (*Lawrence v. Texas* 2003, at 601). He goes on to criticize her idea that there is a legitimate interest in prohibiting same-sex marriage based on traditional notion of marriage. He writes that “‘preserving the traditional institution of marriage’ is just a kinder way of describing the State’s *moral disapproval* of same-sex couples” (*Lawrence v. Texas* 2003, at 601). Therefore, he sees her argument as allowing for the government’s moral disapproval under the circumstance of same-sex marriage but not under the circumstance of homosexual sodomy. He concludes that the majority opinion and the concurring opinion leave a dangerous amount of freedom for the legalization of same-sex marriage.

Although Justice Scalia saw clear connections between *Lawrence* and the legalization of same-sex marriage, a majority of legal scholars have dismissed this argument. The main reason is that the majority opinion clearly explains that sexual conduct is one of the most private matters for Americans. However, it is difficult to say the same for marriage. Marriage has historically been regulated and recognized by the United States Government. Therefore, there are some very

public aspects of marriage that make it fall outside the same zone of privacy as sexual intimacy. In “Same-Sex Marriage and the Right of Privacy” William Hohengarten makes this very argument. Although Hohengarten ultimately concludes in his writing that a right to same-sex marriage exists under the right to privacy, he plays devil’s advocate when he explains that marriage is closely connected to the government. Hohengarten writes, “The right to marry is not entirely unproblematic. It differs from other rights protected under the rubric of ‘privacy,’ such as procreation, abortion, or child rearing, because marriage is not something that exists apart from the law or the state” (1496).

Similarly to Hohengarten, Jonathan Rauch comments on the public nature of marriage in “The Supreme Court Ruled For Privacy--Not For Gay Marriage.” He writes, “The whole point of *Lawrence* is to curtail an unwarranted state intrusion into private conduct. You don't need a blood test and a government license to have sex at home. By contrast, the whole point of state-sanctioned marriage is that it is public” (Rauch). In the oral arguments for *Lawrence*, the attorney fighting against the Texas law, Paul Smith also claimed that there could be legitimate reasons for the government to regulate marriage, unlike homosexual sodomy. Smith says:

Now, bigamy involves protection of an institution that the State creates for its own purposes and there are all sorts of potential justifications about the need to protect the institution of marriage that are different in kind from the justifications that could be offered here involving merely a criminal statute that says we're going to regulate these peoples behaviors. (*Lawrence v. Texas* “Oral Arguments”).

In oral arguments, Smith was trying to convince the Court that there was a private right to engage in sexual conduct but he did not believe that the same legal reasoning applied to marriage. Therefore, because marriage is a more public institution, it does not seem like *Lawrence* adequately applies to the issue of same-sex marriage.

In “Comment: Landmark Decision or Limited Precedent?” Charles Mauney Jr. makes a similar argument to Hohengarten and Rauch and also expands upon it. He explains that the majority opinion in *Lawrence* “explicitly limited” its holding by constantly making reference to the private nature of the sexual conduct (Mauney 162). He also makes a couple other distinctions between the ruling in *Lawrence* and same-sex marriage. Mauney explains that Texas criminalized homosexual sodomy but same-sex marriage is not criminalized (162). He believes that this distinction is important because criminalizing an action carries much greater penalties within the legal system and outside a society compared to a law that does not criminalize an action. Therefore, he suggests that a law is more egregious if it criminalizes “private conduct in violation of constitutional principles” (Mauney 162).

Mauney also explains that there is no lack of historical precedent in denying a right to same-sex marriage (Mauney 167). Mauney writes, “In *Lawrence*, the Court set forth a number of reasons for overruling *Bowers v. Hardwick*. An examination of traditional limitations of marriage to opposite-sex couples, however, reveals a nearly complete absence of reasons similar to those upon which *Lawrence* relied in overruling *Bowers*” (162). This same argument was made by Justice Scalia in the oral arguments for *Lawrence*. He says that “...before we find a substantive due process right, a fundamental liberty, we have to assure ourselves that that liberty was objectively deeply rooted in this Nation's history and tradition” (*Lawrence v. Texas* “Oral Arguments”). Although Justice Scalia is referring to the right to homosexual sodomy, the quote also applies to the right to same-sex marriage. Mauney believes that there is no historical precedent for a right to same-sex marriage just like how Scalia sees no precedent for a right to homosexual sodomy. Therefore, Hohengarten, Rauch and Mauney all recognize that there are too many gaps in the argument that the *Lawrence* decision created a right to same-sex marriage.

Conclusion to the Right to Privacy

Lawrence might have given hope to same-sex marriage advocates that it could provide the foundation for the legalization of same-sex marriage. However, there are several key distinctions that make it difficult to claim that a right to same-sex marriage can be found in the right to privacy. The fact that marriage is not as private as sexual conduct suggests that the government does not have as great a duty to protect it as a part of liberty. The historical precedent of not allowing same-sex marriage is different than the historical precedent used to legalize homosexual sodomy. Therefore, neither *Lawrence* nor *Griswold* are the proper legal precedent to establish a right to same-sex marriage. Instead, based on the evidence collected in this thesis, the best legal precedent for a right to same-sex marriage lies in the Equal Protection Clause.

Equal Protection Clause Rational Basis Test Analysis

The examination of the doctrinal development of the Equal Protection Clause and the right to privacy in this thesis reveals that the right to same-sex marriage exists under the Equal Protection Clause of the Fourteenth Amendment. Political scholars have recognized that the Equal Protection Clause provides the best legal groundwork for the creation of the right to same-sex marriage (see Gerstmann, Hiller, Schaff, Schmidtke and Strasser). However, these scholars disagree how the Supreme Court should address the government's violation of Equal Protection Clause through its denial of same-sex marriage.

As already stated in this thesis, sexual minorities are given the lowest level of protection from government laws under the rational basis test. Some political and legal authors (see Gerstmann and Schmidtke) argue that the Court never should have created differing tests for

different minorities. Instead, they believe that sexual minorities and all other minority classifications, including race and religion, should be given the same level of protection against discriminatory laws. These authors argue that if sexual minorities received the same protection as racial and religious minorities then the government would not be able to prove a compelling reason for prohibiting same-sex marriage. Other authors (see Strasser, Schaff and Hiller) argue that the classification system should remain intact but that laws discriminating against sexual minorities should have to pass the strict scrutiny test instead of the rational basis test. According to these authors, if the prohibition of same-sex marriage had to face the strict scrutiny test, the government would not be able to provide a compelling interest to satisfy the test. Therefore, both of these arguments generally focus on sexual minorities receiving a greater level of protection against discrimination than they currently receive.

This thesis argues that even under the lowest level of scrutiny, the rational basis test, the government does not have a legitimate reason for prohibiting same-sex marriage. The government and opponents of same-sex marriage have often given specific reasons for why they believe that same-sex marriage should not be legalized. These reasons include the argument that the purpose of marriage is the procreation of children, the argument that children of gay parents will experience gender confusion, the argument that the tradition of marriage must be preserved and lastly the argument that same-sex parents are not as good at parenting as opposite-sex parents. David Masci summarizes the government's most common arguments for the prevention of same-sex marriage when he writes:

Social conservatives and others who oppose same-sex unions assert that marriage between a man and a woman is the bedrock of a healthy society because it leads to stable families and, ultimately, to children who grow up to be productive adults. Allowing gay and lesbian couples to wed, they argue, will radically redefine marriage and further weaken it at a time when the institution is already in deep trouble due to high divorce rates and the significant number of out-of-wedlock births. (Masci).

However, after the analysis of these arguments is complete, it is clear that these interests in preventing same-sex marriage are fundamentally flawed and do not pass the rational basis test.

The first argument that is sometimes made against allowing same-sex marriage is that marriage is an institution meant for the procreation of children. The government and opponents of same-sex marriage argue that because it is not possible for same-sex couples to biologically produce children, they do not meet the most basic component of marriage. One group that makes this argument is the American Family Association (AFA). According to its website, the American Family Association is a nonprofit organization that promotes traditional family values based on the Christian faith. The AFA strongly opposes same-sex marriage and explains that procreation is a necessary possibility of all marriages. The AFA cites Hadley Arkes, Professor of Jurisprudence and American Institutions at Amherst College, to explain that the biology of creating a child is a necessity to marriage. According to the AFA, Arkes says, “It becomes impossible finally to discuss this matter of marriage and sexuality without using the N-word: nature. The question must return to that sexuality stamped in our natures...namely, the inescapable fact that only two people, not three, only a man and a woman, can beget a child” (Vitagliano).

An organization that agrees with the AFA is the National Organization for Marriage (NOM) which is a nonprofit organization created to protect traditional marriage. Like the AFA, the NOM makes the argument that because same-sex couples cannot reproduce through sexual intercourse, they should not be allowed to marry. The NOM notes the necessity of having parents from each gender for the well-being of the children of married couples. The NOM writes, “Every man and woman who marries is capable of giving any child they create (or adopt) a mother and a father. No same-sex couple can do this” (“Marriage Talking Points”). These two organizations

believe that because same-sex couples cannot produce children in the way that nature intends, they are not entitled to marriage from a biological and evolutionary standpoint.

It is true that same-sex couples are not biologically able to have children. However, it is not logical to claim that because they cannot reproduce like opposite-sex couples, they are unfit to marry. The main problem with the reproduction argument is that the government currently allows opposite-sex couples to marry even though they are not capable of procreation. For example, states do not have an age limit for marriage. Opposite-sex couples who are over sixty are allowed to marry if they wish. However, women over sixty have gone through menopause and are not biologically able to become pregnant. The lack of an age limit for marriage suggests that the government is not concerned that opposite-sex couples enter marriages despite being unable to reproduce. Due to this, it is illogical to suggest that same-sex couples should not be able to marry because they will never reproduce children. In “A Right to Marry?” Martha Nussbaum makes this point when she writes, “It is very difficult, in terms of the state’s interest in procreation, to explain why the marriage of two heterosexual seventy-year-olds should be permitted and the marriage of two men or two women should be forbidden—all the more because so many same-sex couples have and raise children” (49). As Nussbaum notes there is a clear disconnect between the argument that the government must prevent same-sex couples from marrying because they cannot reproduce and the reality that older opposite-sex couples are allowed to marry even though they cannot reproduce.

Not only are older opposite-sex couples allowed to marry despite their inability to procreate, but many younger couples are allowed to marry even though biological conditions make them unable to reproduce. Both men and women at all different ages suffer from infertility. According to the Centers for Disease Control and Prevention “about 10 percent of women in the

United States ages 15-44 have difficulty getting pregnant or staying pregnant” (“Infertility Facts Sheet”). Infertility in women is most often caused by problems with ovulation. Infertility also occurs in men, most often due to problems with the number or movement of sperm (“Infertility Facts Sheet”). These biological problems result in an inability to reproduce children without medical help. Commonly, couples who are infertile seek to become pregnant through artificial insemination in which the woman is injected with specially prepared sperm or through assisted reproductive technology (“Infertility Facts Sheet”). Although it is very difficult for couples who are infertile to reproduce, the government does not prohibit them from marrying.

The fact that the government allows infertile couples to marry, does not logically follow its argument that the purpose of marriage is the creation of children. Also the denial of marriage to same-sex couples because they cannot have children does not recognize the reality that many same-sex couples do have children. In fact, same-sex couples often have children through the same procedures that infertile couples use. Richard Mohr comments on this when he writes, “The assumption that childrearing is a function uniquely tethered to the institution of heterosexual marriage also collides with an important but little acknowledged social reality. Many lesbian and gay couples already are raising families in which children are the blessings of adoption, artificial insemination, surrogacy, or prior marriages” (224). The government allows infertile couples to marry despite their inability to fulfill what the government claims is one of the most basic components of marriage. It is illogical that the government wishes to prohibit sexual minorities from marrying because they cannot reproduce but does not wish to apply this same standard to opposite-sex couples who cannot reproduce.

The argument made by the government and opponents of same-sex marriage that gay and lesbian couples cannot marry because they cannot reproduce holds no logical ground. The fact

that opposite-sex couples can marry despite being too old to become pregnant or infertile shows that the government is not being consistent in its argument. Instead, the government specifically discriminates against sexual minorities. Therefore, the argument that the government has a legitimate interest in keeping procreation in marriages does not pass the rational basis test.

Another argument that is sometimes used to justify the exclusion of same-sex marriage is that it will result in an increase in gender and sexuality confusion in children. The argument is that since children of same-sex parents lack the presence of either a man or a woman in their household, they will be more likely to be confused about their own gender and sexual identity. Stephanie Pappas writes in the Huffington Post that “On Jan. 6, Republican presidential hopeful Rick Santorum told a New Hampshire audience that children are better off with a father in prison than being raised in a home with lesbian parents and no father at all” (Pappas). Many opponents of same-sex marriage agree with Rick Santorum’s argument that children that lack either a male or female parent will be negatively affected by it. Therefore, a legitimate concern for the government might be the identity development of children.

The argument that children of gay parents become confused about their gender and sexual identities is widely refuted by scientific data. The American Academy of Pediatrics (AAP) conducted a study of the development of children with same-sex parents. The study found that “The gender identity of preadolescent children raised by lesbian mothers has been found consistently to be in line with their biological gender. None of the 500 children studied have shown evidence of gender-identity confusion, wished to be the other gender, or consistently engaged in cross-gender behavior” (Pawelski 360). Sociologist Judith Stacey from New York University and Associate Professor of Sociology Tim Biblarz from University of Southern California found very similar results to the AAP in 2010 when they reviewed almost every study

that had been conducted about same-sex parenting. Judith Stacey says, “There's no doubt whatsoever from the research that children with two lesbian parents are growing up to be just as well-adjusted and successful as children with a male and a female parent” (Pappas). Both the American Academy of Pediatrics and Judith Stacey noted that there is almost no research that exists that evaluates the parenting skills of gay men. However, Stacey speculates that gay men are even better parents than lesbians because there is no possible way that they could accidentally become pregnant even though they did not want to have the children. Instead, she explains that if a male gay couple wants to have children the men must be very committed because they must willingly seek adoption or a surrogate (Pappas). Therefore, it appears that confusion about gender identity is not a true concern for gay parents.

Similarly to gender confusion, data also shows that children of same-sex parents are not generally confused about their sexuality. In an article written for the AAP, J.G. Pawelski writes, “The American Academy of Child and Adolescent Psychiatry states ‘It has long been established that a homosexual orientation is not related to psychopathology, and there is no basis on which to assume that a parental homosexual orientation will increase likelihood of or induce a homosexual orientation in the child’” (362). Therefore, sexual confusion or the changing of sexual orientation is not generally found to be a problem for children with same-sex parents. Also, they have not been found to be any more sexually active than children raised by opposite-sex parents. The AAP writes that “using data from a national sample of adolescents, no difference was found on the basis of whether the parents were the same or different genders in the proportion of adolescents who reported having had sexual intercourse, nor was a difference found in the number who reported having a ‘romantic relationship’ within the past 18 months”

(Pawelski 360). Therefore, the claim that children of gay parents will be confused sexually is not correct according to the leading organizations responsible for child development.

The government does have a legitimate interest in the healthy development of children. However, scientific and sociological research shows that children of same-sex parents develop in the same way that children of opposite-sex parents develop. Leading child development and health organizations like the American Academy of Pediatrics and the American Academy of Child and Adolescent Psychiatry claim that children of same-sex couples develop in a healthy and normal way. Contrary to what opponents of same-sex marriage claim, children of same-sex partners are not more likely to experience gender or sexual confusion. Therefore, the interest in the healthy development of children is not an adequate reason for preventing same-sex marriage and does not pass the rational basis test.

Another reason that is often given for the government's prohibition of same-sex marriage is that marriage is an institution with deep rooted history. It is argued that since the definition of marriage has remained constant throughout most of history, the definition should not be altered to include gay marriage. The American Family Association (AFA) believes that marriage is a hallowed institution that should not be changed. The AFA writes, "Homosexual activists, however, have hammered tirelessly against the doors of heterosexual marriage, demanding to be allowed into the sacred halls beyond" (Vitagliano). Like the AFA, The Mormon Church has declared that same-sex marriages "undermine the divinely created institution of family" (Ryan 25). Opponents of same-sex marriage also argue that if the definition of marriage were changed, the institution of marriage would deteriorate. The National Organization for Marriage (NOM) makes this argument when it writes that "high rates of divorce are one more reason we should be strengthening marriage, not conducting radical social experiments on it" ("Marriage Talking

Points”). The NOM argues that changing the definition of marriage would make it more susceptible to higher rates of divorce and instability. Therefore, the government might have an interest in promoting the stability of an institution deeply rooted in American history.

The idea that the definition of marriage has remained unchanged throughout American history is flawed. Several aspects of traditional marriage have been abandoned as culture has evolved. In “The Case for Gay Marriage” Richard Mohr explains that “there used to be major gender-based legal differences in marriage, but these have all been found to be unjust and have gradually been eliminated through either legislative or judicial means” (222). One gender-based difference that has been rejected is the idea that wives are the property of their husbands and are required to obediently serve them. In “Here’s Your Traditional Marriage” Patrick Ryan writes that “traditional families hardly exist today in the United States or any other industrial society...not because we've lost our moral bearings but because we have rejected the ethics of a traditional master-servant world” (25). Historically, women held a legal status called “coverture” in which a wife was legally and economically owned by her husband (Ryan 26). Additionally, throughout a great deal of history, marriage was based on property laws. The ownership of property determined if a man was desirable and when a marriage would occur (Ryan 26). Therefore traditionally, marriage was not based on love or companionship, but rather on property ownership.

The modern definition of marriage, has largely abandoned these traditions of property rights and servitude. The creation of the modern definition of American marriage was largely a result of industrial development in the 19th Century. Patrick Ryan writes:

As family law was transformed into modern terms throughout the 19th century, market societies consolidated wealth through the rise of corporations, factories, and mills, and this progressively put the small householder out of business...Women gained rights to property; dowry and coverture were abandoned. No longer were all mothers, children,

and laborers the property of a master. In line with the new economy, marriage emerged as a contractual state between consenting adults. (26-27).

Ryan explains that today, the traditional roles of husband and wife have been replaced by a modern reciprocal relationship. Therefore, the claim that marriage has held a consistent definition throughout history is greatly refuted by the fact that marriage has evolved over time to liberate wives and husbands from archaic cultural views. The changes in gender-based differences in marriages show that marriage is not a static institution that cannot evolve to align with the development of society.

Another example of how marriage has changed over time is that couples of different races were once unable to marry. Prior to the Supreme Court case *Loving v. Virginia* (1967), couples of different races were prohibited from marrying each other in several states. Opponents of biracial marriage made very similar claims to those that are being made against same-sex marriage today. They claimed that biracial couples would cause the disintegration of marriage and would sully the tradition of marriage. In the oral arguments of the case, the attorney for the state, R.D. McIlwaine makes this argument when he says that “this statute serves a legitimate legislative objective of preventing the sociological, psychological evils which attend interracial marriages” (*Loving v. Virginia* “Oral Arguments”). Throughout the oral arguments he portrays interracial marriages as an evil that would negatively impact the well-being of society. Similarly to opponents of same-sex marriage today, opponents of interracial marriage claimed that science suggested that interracial marriage would threaten the tradition of family. Mr. McIlwaine claims that the “problems which a child of interracial marriage faces are those which no child can come through without damage to himself” (*Loving v. Virginia* “Oral Arguments”).

However, throughout the oral arguments of the case, Justice Hugo Black is not convinced that there is any compelling interest. Instead, he believes that the sole purpose of the statute is to

keep blacks inferior to whites. He asks Mr. McIlwaine “aside from all questions from the genetics, psychology, psychiatry, sociology...is there any doubt in your mind that the object of this statute, the basic premise on which they rest, is that the white people are superiors of the colored people and should not be permitted to marry?” (*Loving v. Virginia* “Oral Arguments”). Mr. McIlwaine admits that the intent of the legislature who enacted the statute might have been the repression of blacks. Therefore, perhaps the legislature really did believe that it enacted this statute for the preservation of marriage, however, that belief was based on racial prejudices rather than truth and the law was found unconstitutional. This shows that the Supreme Court can be responsible for changing the definition of marriage to produce greater equality and that the government cannot regulate marriage unfairly. Also, it is important to note that when opponents of same-sex marriage talk about the tradition of marriage, it is a tradition that only extends back forty-five years because the definition of marriage was changed in 1967 to encompass a broader range of freedom in choosing a marriage partner.

There is also a flaw in the claim that the tradition of marriage must be preserved because it is a sacred union between one man and one woman. This claim is often based on the religious coupling of Adam and Eve in the Bible. However, the Bible contains several references to the acceptance of polygamy. Therefore, it is not correct that the tradition of marriage between one man and one woman extends all the way back to biblical times. In “A Right to Marry?” Martha Nussbaum explains that “people who base their ethical norms on the Bible too rarely take note of the fact that the society depicted in the Old Testament is polygamous” (46). For example the Bible states that “King Solomon had 700 wives and 300 concubines” (Holy Bible, 1 Kings. 11.3). The acceptance of polygamy is also mentioned in Exodus 21:10, 2 Samuel 5:13, and Deuteronomy 21:15. Polygamy has never been allowed in the United States. Therefore, the

current label of traditional marriage is in conflict with the tradition of marriage in the Bible. This discrepancy between the religious tradition of marriage and the American tradition of marriage shows that marriage has varied in its definition across time and place.

Lastly, the idea that same-sex marriage will result in the instability and deterioration of marriage is based on an assumption that same-sex couples are less committed to each other than heterosexual couples. This assumption is incorrect. Same-sex couples have not been found to be any more likely to divorce than opposite-sex couples. John Gottman conducted a twelve year study to determine the similarities and differences between heterosexual relationships and gay and lesbian relationships. Gottman is a Ph.D. psychologist and is a leading researcher of relationships in America. Gottman studied forty couples and used three methods including self-reports of participants, observed interactions of participants and the participant's physiology (Gottman 25). He researched whether same-sex couples were more likely to split up and whether they were more likely to experience volatile relationships than heterosexual couples. Prior to explaining the results for his own study, Gottman explains that "longitudinal research on gay, lesbian and heterosexual married couples by Kurdek and his associates (e.g., Kurdek, 1998) has generally concluded that gay and lesbian relationships operate on essentially the same principles as heterosexual relationships" (24). Therefore, although research on homosexual relationships is new to the field of relationship studies, Lawrence Kurdek found initial research that same-sex couples did not significantly differ from opposite-sex couples.

Gottman's own research supports Kurdek's previous study. Gottman found that all relationships function based on rewards and costs. He writes, "Our results were consistent with Kurdek and Rusbult's investment, or cost-benefit model, which suggested that relationship satisfaction is associated with low costs and high rewards" (Gottman 40). Gottman explains that

in his study relationships were more likely to continue if partners felt like they were getting a lot of rewards from the relationship and less likely to continue if partners felt burdened by the relationship. He found this to be true regardless of whether the couple was heterosexual or of the same-sex. In essence, what mattered most in relationships was the cost-rewards ratio and same-sex couples were not more likely to leave relationships than opposite-sex couples. Therefore, his research does not support the idea that same-sex couples are more likely to split up than opposite-sex couples.

A study which was conducted by another Ph.D. psychologist, Kimberly Balsam, supports Gottman's and Kurdek's research. In her study, Balsam followed 65 male and 138 female same-sex couples who had civil unions in Vermont, 23 male and 61 female same-sex couples who did not have civil unions and 55 heterosexual couples (102). She collected self-reports from her participants for three years. Balsam found that there were no differences between same-sex couples in civil unions and heterosexual married couples. However, she did find that "same-sex couples not in civil unions were more likely to have ended their relationships than same-sex couples in civil unions or heterosexual married couples. This implies that civil unions may indeed have an impact on relationships over time" (Balsam 112). The study suggests that legal recognition of a marriage might increase the likelihood that couples remain together. Interestingly, Balsam also found that same-sex couples reported superior satisfaction in their relationships compared to heterosexual couples. She writes that compared to heterosexual couples "...both types of same-sex couples reported greater relationship quality, compatibility, and intimacy, and lower levels of conflict" (Balsam 102). Therefore, Balsam concludes that not only are same-sex couples not more likely to divorce, but they might have more happy and stable relationships than heterosexual couples. By claiming that same-sex marriage will result in greater rates of divorce and the corrosion of marriage, opponents of same-sex marriage are judging

same-sex couples without knowing anything about their true character. Therefore, this argument is made based on personal prejudices against homosexuals and lesbians rather than any evidence of its validity.

Since the government oversees the contractual aspects of the institution of marriage, it is logical to believe that it has an interest in its stability and tradition. However, marriage has changed as culture and societies have changed. Marriage was once based on property rights and women were reduced to being property of their husbands. This traditional definition of marriage has long been abandoned. Marriage was once forbidden between people of different races. This traditional definition of marriage has also been abandoned. The Bible historically depicts polygamous marriages. Today, the definition of marriage is anything but traditional. Therefore, the government does not have a legitimate interest in keeping same-sex couples from marrying for the preservation of a tradition of marriage that does not exist.

Another argument against same-sex marriage is that same-sex couples are not as good of parents as opposite-sex couples because they cannot provide their children with the balance of a male and female parent. The claim is that same-sex parents cannot be good parents because children's development relies on the skills and roles that they learn from both a female and male parent. One organization that makes this claim is the Catholic Education Resource Center which is an online database of essays, journal articles, and other texts that convey Catholic teachings. The Catholic Education Resource Center states that "according to science, there are hundreds of nuances about men and women that even newborn infants can readily distinguish and that make a difference in the way the child develops" (Brinkmann). The Catholic Education Resource Center cites researcher Henry Biller to explain that mothers and fathers have different verbal styles and different ways of showing love for a child (Brinkmann). Therefore, opponents of

same-sex marriage believe that children who grow up in same-sex parent households are less healthy psychologically and socially than children who grow up in opposite-sex parent households. Some opponents of same-sex marriage also believe that gays and lesbians are less likely to remain in committed relationships which results in a less stable environment for their children. On its website the Catholic Education Resource Center explains a “concern for the stability of the relationship” of gay and lesbian partners (Brinkmann). These arguments suggest that the government has a legitimate interest in prohibiting same-sex marriage so that children grow up with adequate parenting from both a female and a male parent.

The claim that gay parents are insufficient parents is not supported by several respected psychological, pediatric and sociological organizations. Within the past couple of decades, same-sex couples have increasingly had children through adoption, surrogate pregnancies and in vitro fertilization procedures. Due to the increase in children with same-sex parents, a greater amount of medical and psychological studies have been performed to determine if children really do suffer from having same-sex parents. Overwhelmingly, the results of these studies have shown that children of same-sex couples do not suffer a worse social, psychological or medical fate than children of opposite-sex couples. Instead, the studies show that the most important factor for the healthy development of a child is the love from two parents, regardless of the gender or sexual identity of the parents.

The American Medical Association (AMA) is one organization that supports the legalization of same-sex marriage because of the medical benefits that it would bestow upon same-sex couples and their children. The AMA is an organization meant to unite physicians to promote the betterment of public health (“About the AMA”). The AMA has adopted specific policies concerning gay and lesbian medical issues. The AMA supports partner co-adoption by

same-sex couples. According to its policy the AMA “will support legislative and other efforts to allow the adoption of a child by the same-sex partner, or opposite sex non-married partner, who functions as a second parent or co-parent to that child” (“AMA Policies on GLBT Issues”). In addition to its support for adoption, the AMA wholeheartedly supports same-sex marriage. It sees the denial of same-sex marriage as a medical burden on same-sex families. In its policy the AMA writes:

Our American Medical Association: (1) recognizes that denying civil marriage based on sexual orientation is discriminatory and imposes harmful stigma on gay and lesbian individuals and couples and their families; (2) recognizes that exclusion from civil marriage contributes to health care disparities affecting same-sex households; (3) will work to reduce health care disparities among members of same-sex households including minor children; and (4) will support measures providing same-sex households with the same rights and privileges to health care, health insurance, and survivor benefits, as afforded opposite-sex households. (“AMA Policies on GLBT Issues”).

The AMA believes that denying same-sex marriage causes an inequality in health care procedures which negatively impacts not only same-sex couples, but their children as well. Therefore, the American Medical Association does not agree with the argument that same-sex parents have a negative impact on the health of their children.

Another medical organization that believes that children of same-sex couples are negatively impacted by the denial of gay marriage is the American Academy of Pediatrics (AAP). The AAP seeks to “attain optimal physical, mental, and social health and well-being for all infants, children, adolescents and young adults” (“AAP Facts”). The AAP believes that children deserve for their parents’ relationships to be legally recognized for their own emotional and psychological well-being. According to J.G. Pawelski, who writes for the AAP, “children of same-gender parents often experience economic, legal and familial insecurity as a result of the absence of legal recognition of their bonds to their nonbiological parents” (352). Therefore, the AAP believes that the lack of legal recognition given to same-sex parents actually has negative

effects on their children. The AAP also addresses the argument that children of same-sex parents are socially awkward. The AAP does not see evidence that supports this argument. Instead, it has found that “in general, children whose parents are gay or lesbian have been found to have normal relationships with childhood peers and to maintain social relationships appropriate for their developmental levels” (Pawelski 359). In fact, the AAP has found that children of same-sex partners are sometimes more likely to interact in positive ways with other children. For example, children of same-sex couples have been found to be more accepting of children who are different than themselves (Pawelski 359). The AAP has also found that children with gay or lesbian parents are more nurturing to children younger than themselves (Pawelski 35). Therefore, the American Academy of Pediatrics argues that the denial of same-sex marriage places an unnecessary strain on the children of same-sex couples.

Like the AAP, the American Psychological Association (APA) supports the legalization of same-sex marriage. In fact, in 2011, the APA’s policymaking board supported same-sex marriage by a vote of 157-0 (Gilbert). The APA notes research that shows that there is very little difference between same-sex parents and opposite-sex parents. For example, the APA cites Letitia Anne Peplau, PhD, UCLA, who administered surveys and found that “75 percent of lesbians and more than half of gay men were in a relationship with one person” (Munsey “Psychology’s Case”). She also found that “many lesbians and gay men date in their 20s, settle down into a relationship in their 30s and maintain it long-term” (Munsey “Psychology’s Case”). Therefore, the APA does not conclude that children of same-sex parents experience greater instability than children of heterosexual parents.

In addition to the AMA, APA and AAP there are other medical and sociological organizations that do not believe that the legalization of same-sex marriage would have a

negative impact on the development of children. The American Academy of Family Physicians (AAFP) is a medical organization and its mission is to “to preserve and promote the science and art of Family Medicine and to ensure high-quality, cost-effective health care for patients of all ages” (“AAFP About Us”). Like the American Academy of Pediatrics, the AAFP believes that same-sex couples should be guaranteed the same legal rights as heterosexual married couples. The AAFP has established that it wants to secure the psychological and legal security of all children regardless of their parents’ sexual orientation (Pawleski 362). The American Psychoanalytical Association’s position on this issue states that “gay and lesbian individuals and couples are capable of meeting the best interest of the child and should be afforded the same rights and should accept the same responsibilities as heterosexual parents” (Pawleski 362). Lastly, the National Association of Social Workers believes that same-sex couples should have the same rights to adoption, inheritance and child custody as heterosexual couples (Pawleski 362). The numerous organizations that believe that the legalization of same-sex marriage would be beneficial for children reveals that gay and lesbian parents are not worse parents than heterosexual parents.

The overwhelming support from many medical and psychological organizations for the legalization same-sex marriage calls into question the argument that gay parents are bad parents. These organizations are entrusted with the promotion of the health and well-being of children throughout America and they believe that the denial of same-sex marriage is actually hurting children. In fact, many of these organizations believe that having same-sex parents can be beneficial for the character development of young children. It has also been found that same-sex partners are not more likely to break up than heterosexual couples. Therefore, the argument that children of same-sex parents are more likely to experience an unstable family life is not correct.

The government does have a duty to protect the health and development of children. However, a vast array of medical and psychological organizations believe that children of same-sex couples develop into just as healthy adults as children of heterosexual couples. Therefore, the government does not have a legitimate interest in preventing same-sex marriage to protect the well-being of children.

Rational Basis Test Analysis Conclusion

Overall, the interests that have most commonly been used to justify the government's prohibition of same-sex marriage are not truly legitimate interests because they are not supported by fact or reality. The argument that the government has a legitimate interest in promoting procreation through marriage is contradicted by the fact that there is no age limit to marriage and infertile couples are allowed to marry. The idea that the government has a legitimate interest to prevent gender and sexual confusion in children is refuted by the research of the American Academy of Pediatrics and the American Academy of Child and Adolescent Psychiatry. The argument that the government has an interest in the preservation of traditional marriage is challenged by the fact that the definition of marriage has changed throughout much of history. Lastly, the argument that the government has a legitimate interest in prohibiting same-sex marriage for the well-being of children is contested by numerous medical and psychological organizations whose sole purpose is the betterment of the health and well-being of children. The inability of the government to present one true legitimate interest in denying same-sex marriage proves that the government cannot pass the rational basis test and therefore, is violating the Equal Protection Clause of the Constitution.

Courts v. Legislatures: Determining the Right

The results of the previous sections of this thesis reveal that there is a constitutional right to same-sex marriage. Although the right exists under the United States Constitution, many state governments and the Federal Government have been slow to recognize the right. The Federal Government's reluctance to recognize same-sex marriage is demonstrated by the Congress's passage of the Defense of Marriage Act (DOMA) in 1996, which defines marriage as being between one man and one woman, and also permits states to refuse to recognize same-sex marriages performed in other states (U.S. Congress "DOMA"). Following the enactment of DOMA, an overwhelming majority of state legislatures passed bills that adopted DOMA at the state level (Rosenberg *Hollow Hope* 368). These actions by state governments and the United States Government have led certain political science and law scholars to believe that it is the responsibility of the courts in this country to recognize the right to same-sex marriage (see Dworkin, Hiller, Schmidtke and Nussbaum). In particular, Ronald Dworkin argues that because legislatures rely on the political agenda of the majority, they are less likely to be willing to recognize the rights of minority groups. The following sections of this thesis use case studies of three states which have legalized same-sex marriage to prove that Dworkin's theory is validated by the legalization of same-sex marriage in Massachusetts, New York and California.

In *Taking Rights Seriously*, Ronald Dworkin argues that it is the responsibility of the courts to recognize the rights of minority citizens and to shield them from the prejudices of the political and social majority. He explains that members of legislatures rely on the will of the majority of citizens in their districts to become reelected. Due to the personal motivation to become reelected, legislators are more likely to follow the will of the majority than to recognize the rights of those in the minority (Dworkin 133). He notes that historically, the majority of

citizens have been slow or unwilling to extend basic rights to citizens who constitute minority groups when he writes, “It has been typical of these disputes that the interests of those in political control of the various institutions of the government have been both homogeneous and hostile” (Dworkin 143). This means that if legislators are motivated by the desires of the majority, they are less likely to pass legislation that goes against those desires. In contrast, Supreme Court Justices are not elected by the people and do not face reelection (Rosenberg *Hollow Hope* 22). Even Gerald Rosenberg, who believes that the courts are rarely able to produce social change, contends in *The Hollow Hope* that “Elected and appointed officials, fearful of political repercussions, are seldom willing to fight for unpopular causes and protect the rights of disliked minorities. Courts, free of such electoral accountability, are not so constrained” (22). Due to this separation of the courts from the will of the majority, Dworkin believes that they are in a better position to recognize minority rights (133).

Not only does Dworkin believe that the courts are the most appropriate branch of government to determine minority rights, but he also believes that it is their duty. He sees the courts as having their own responsibilities separate from the legislatures. He does not agree with the notion that the courts are merely responsible for reviewing laws passed by the legislatures. He writes that “...judges neither should be nor are deputy legislators, and the familiar assumption, that when they go beyond political decisions already made by someone else they are legislating, is misleading” (Dworkin 82). He explains that they can go beyond political decisions that have already been made by legislatures because it is their responsibility to interpret vague parts of the Constitution. Dworkin argues that the Founding Fathers left sections of the Constitution vague so that the courts could handle situations that they could not foresee (136).

Thus, Dworkin believes that the courts have a duty to determine controversial cases involving minority rights.

Since Ronald Dworkin wrote *Taking Rights Seriously* in 1977, he never applied his theory to the issue of same-sex marriage. His theory suggests that for same-sex marriage, the courts should be more likely to recognize the right when public support for it is low. On the other hand, legislatures should be less likely to legalize same-sex marriage until a majority of citizens support it. By analyzing public opinion polls from the Gallup Organization, Quinnipiac University, CBS and the Associated Press, Dworkin's theory will be tested to see if the process of legalization of same-sex marriage in Massachusetts, New York and California support his theory. Each poll asks whether citizens would favor a constitutional amendment banning same-sex marriage. High levels of support for a constitutional amendment would suggest that the courts are more likely to legalize same-sex marriage than the legislatures. Less than fifty percent support for the amendment would suggest that the legislatures might be more likely to recognize a right to same-sex marriage.

Massachusetts's Supreme Court legalized same-sex marriage in 2003 ("Same-Sex Marriage"). According to Dworkin's theory, public support for a constitutional amendment banning same-sex marriage in 2003 should have been higher than fifty percent, which led the courts to intervene in the issue. California's State Supreme Court legalized same-sex marriage in May 2008 but was then challenged by a constitutional amendment that was passed that banned same-sex marriage in later 2008 ("Same-Sex Marriage"). Based on Dworkin's theory, support for a constitutional amendment banning same-sex marriage should have been high in 2008 which resulted in the courts taking action. Also, the passage of the constitutional amendment in California suggests that public support for the constitutional amendment should have been high.

Lastly, the New York Legislature passed a bill legalizing same-sex marriage in 2011 (“Same-Sex Marriage”). Dworkin’s theory suggests that support for a constitutional amendment banning same-sex marriage should have decreased to lower than fifty percent, persuading the legislature to recognize the minority right. Examining public opposition to same-sex marriage at the times it was legalized in these states will reveal that Dworkin’s theory is applicable to the legalization of same-sex in these three states.

As previously mentioned in the methods section of this thesis, there are important procedures that need to be followed to get a valid public opinion poll. The type of the poll that is used is an indicator of whether the poll’s findings truly represent the opinions of the general public. Telephone interviews are widely used because the respondents are generally an accurate representation of the whole population (Asher 66). Polls in which respondents self-select themselves are to be viewed with caution because people who purposely decide to answer a poll might have stronger feelings about its subject matter than the general population (Asher 14). When comparing polls overtime, the wording of the polls should be as similar as possible so that respondents are answering the same question throughout different periods of time (Asher 43). Changing the wording of a poll can cause respondents to believe they are being asked a different question than originally intended by the maker of the poll (Asher 44). To avoid collecting nonattitudes, polls should also contain a middle choice that respondents can select if they do not have an opinion or do not understand the question (Asher 26). Polls that are conducted by news organizations are generally the most accepted because news organizations are not supposed to have a political agenda that influences poll respondents (Asher 5).

The polls used in this thesis avoid nonattitudes by providing middle choices. They were conducted by news organizations and polling organizations so that there should be little presence

of political bias in the questions. All of the polls were conducted through telephone interviews and have a respondent sample size of around 1,000, which is believed to be the correct sample size to get the most accurate reflection of the general population (Asher 15). Therefore, the polls used in this thesis avoid the pitfalls of bad polling. The polls give insight into public opinion against same-sex marriage and reveal whether Dworkin's theory is an accurate theory concerning the right to same-sex marriage in the United States.

An explanation of the history of same-sex marriage in the United States is necessary to understand the context of its legalization, or temporary legalization, in Massachusetts, New York and California. There are two different paths that states have taken to legalize same-sex marriage. Some states have legalized the right through State Supreme Court rulings. Other states have legalized same-sex marriage through legislation passed by state legislatures. Hawaii was the first state to legalize same-sex marriage and it did so through the courts. In *Baehr v. Lewin* (1993) the Hawaiian Supreme Court ruled that the state's denial of same-sex marriage violated the equal protection clause of the Hawaiian Constitution because it denied rights based on sex (at 67). The Hawaiian Supreme Court then directed the trial court to review the case to determine if the state government could give a compelling interest for prohibiting same-sex marriage (*Baehr v. Lewin* 1993, at 68). In *Baehr v. Miike* (1996), the trial court concluded that the state had not provided a compelling interest and that the state could not prohibit same-sex marriages (at 116). However, the Hawaiian public was unwilling to accept the decision. After this decision, the Hawaiian voters passed an amendment to the Hawaii Constitution which reserved power for the Hawaii Legislature to pass legislation banning same-sex marriage (Tanner). The Hawaii Legislature then passed a law banning same-sex marriage (Tanner). Today, Hawaii allows civil unions but not same-sex marriage.

The next state to attempt to legalize same-sex marriage was Vermont. The Vermont Supreme Court ruled in *Baker v. Vermont* (1999) that Vermont's prohibition of same-sex marriage violated the state's constitution because same-sex couples were being denied benefits that opposite-sex couples received (at 868). However, the ruling did not result in the legalization of same-sex marriage, but instead the legalization of civil unions (*Baker v. Vermont* 1999, at 886). Following Vermont's attempt to legalize, Massachusetts was the first state to fully legalize same-sex marriage through the Massachusetts Supreme Court case *Goodridge v. Department of Health* (2003). Although attempts were made to amend the Massachusetts's Constitution to define marriage as between a man and a woman, the attempts failed and same-sex marriage remains legal in Massachusetts today.

California was the next state to legalize same-sex marriage through the courts. In *In re Marriage Cases* (2008), the California Supreme Court ruled that the state's prohibition of same-sex marriage violated equal protection guaranteed by the California Constitution (at 757). However, in later 2008, voters passed Proposition 8, an amendment to the California Constitution defining marriage between a man and a woman (Cal. Const. art. 1). In response, U.S. District Judge Vaughn Walker ruled that Proposition 8 violates the United States Constitution in the case *Perry v. Schwarzenegger* (2010) (at 136). In February 2012 a panel of the U.S. Ninth Circuit Court of Appeals found that Proposition 8 violates the equal protection clause of the Constitution (*Perry v. Brown* 2012, at 1644). It is expected that *Perry* will be appealed to the United States Supreme Court. Today, however, same-sex marriage remains prohibited in California.

Connecticut's Supreme Court swiftly followed California and also legalized same-sex marriage in 2008. The Connecticut Supreme Court ruled in *Kerrigan v. State Commissioner of*

Public Health (2008) that the state's prohibition of same-sex marriage violated the Connecticut Constitution (at 67). Then, in April, in the case *Varnum v. Brien* (2009), the Iowa Supreme Court struck down the Iowa state law prohibiting same-sex marriage as unconstitutional (at 904). In total, there have been six states whose courts have ruled that prohibiting same-sex marriage violates their constitutions. However, only three of those states have fully legalized same-sex marriage. Massachusetts, Connecticut and Iowa were all able to overcome backlash from their legislatures and implement their Supreme Court rulings that legalized same-sex marriage.

The second path that states have used to legalize same-sex marriage is through their state legislatures. Vermont fell just short of legalizing same-sex marriage in 1999 when it implemented civil unions. Ten years later in 2009, the Vermont Legislature passed legislation legalizing same-sex marriage and overrode the governor's veto of the legislation (Richburg). In May of 2009, Maine's Legislature passed a bill legalizing same-sex marriage and the governor signed it into law (Sacchetti). However, voters in Maine overturned the legislation and same-sex marriage is not recognized in Maine today (Sacchetti). In June 2009, the New Hampshire Legislature passed a bill legalizing same-sex marriage (Moskowitz).

In 2010, the Washington D.C. Council legalized same-sex marriage (Gorman). Then in 2011, the New York Legislature passed a bill legalizing same-sex marriage (Barbaro). Additionally, on February 13, 2012, the Washington State Legislature adopted legislation legalizing same-sex marriage (Murphy). Most recently, the Maryland Legislature passed a bill legalizing same-sex marriage on March 1, 2012 (Breitenbach). In total, six states and Washington D.C. have passed legislation legalizing same-sex marriage. However, Maine's Legislature experienced backlash from its residents and therefore, today only five states and Washington D.C. have fully legalized same-sex marriage through legislative action.

At the date of this thesis, same-sex marriage is legal in eight states and Washington D.C. This brief history of the legalization of same-sex marriage reveals that both the courts and legislatures at the state level have made various attempts to define the right to same-sex marriage. While the question still remains as to which branch of government should be responsible for the development of this right, the analyses of the legalization of same-sex marriage in Massachusetts, New York, and California as seen in the following sections provide the answer. For a summary of the states that have legalized same-sex marriage, refer to the table below.

Table 1: States That Have Legalized Same-Sex Marriage

State	Year of Legalization	Method
Massachusetts	2003	Court
Connecticut	2008	Court
Iowa	2009	Court
Vermont	2009	Legislature
New Hampshire	2009	Legislature
Washington D.C.	2010	D.C. Council
New York	2011	Legislature
Washington	2012	Legislature
Maryland	2012	Legislature

Case Study of Massachusetts

Massachusetts was the first state to legally and successfully start issuing marriage licenses to same-sex couples after the Massachusetts Supreme Court decision *Goodridge v. Department of Health* (2003). If Ronald Dworkin's theory is valid, the Massachusetts Supreme Court recognized the minority right because the social and political majorities in the state were not willing to recognize it themselves. In the written decision for *Goodridge* Justice C. J. Marshall confirms the logic behind Dworkin's theory when he explains that the courts have the distinct job of determining issues of a constitutional nature and are responsible for being the great equalizer among citizens (*Goodridge v. Department of Health* 2003, at 312). He writes that:

The Massachusetts Constitution requires that legislation meet certain criteria and not extend beyond certain limits. It is the function of courts to determine whether these criteria are met and whether these limits are exceeded. In most instances, these limits are defined by whether a rational basis exists to conclude that legislation will bring about a rational result...To label the court's role as usurping that of the Legislature, see, e.g., *post* at 394-395 (Cordy, J., dissenting), is to misunderstand the nature and purpose of judicial review. We owe great deference to the Legislature to decide social and policy issues, but it is the traditional and settled role of courts to decide constitutional issues. (*Goodridge v. Department of Health* 2003, at 338-339).

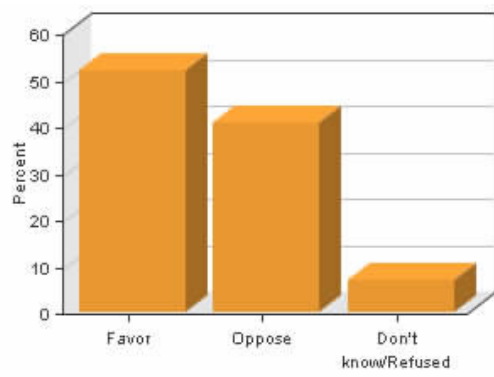
This shows that a majority of the justices on the Massachusetts Supreme Court believed that it was their duty to fully defend the rights of minority groups guaranteed by the Massachusetts Constitution.

In order to determine if the court was really acting in spite of a lack of support from the majority, public opinion polls must be analyzed. Public opinion polls that sampled only the opinions of the citizens of Massachusetts in 2003 are rare and the ones that exist lack an adequate sample size. Therefore, the public opinion polls that are used in this thesis have samples taken from the American adult population who own telephones. Since the *Goodridge* decision was made in 2003, the public opinion polls that are used were conducted in 2003, but

prior to the *Goodridge* decision. The Associated Press poll from 2003 collected responses from 1,028 telephone interviews and asked “Would you favor or oppose a law that would ban gay marriage, requiring that marriage should be between a man and a woman?” (Associated Press Poll 2003). Of the people interviewed, 52% said that they would favor a ban on same-sex marriage, 41% said they would oppose a ban and 7% said they did not know or refused to answer the question (Associated Press Poll 2003). Table 2 displays a graph of the results of the poll.

Table 2: Associated Press Poll, Aug, 2003

Would you favor or oppose a law that would ban gay marriage, requiring that marriage should be between a man and a woman?



52% Favor

41% Oppose

7% Don't know/Refused

Associated Press Poll, August 2003. Retrieved Nov-27-2011 from the iPOLL Databank, The Roper Center for Public Opinion Research, University of Connecticut.
http://www.ropercenter.uconn.edu/data_access/ipoll/ipoll.html

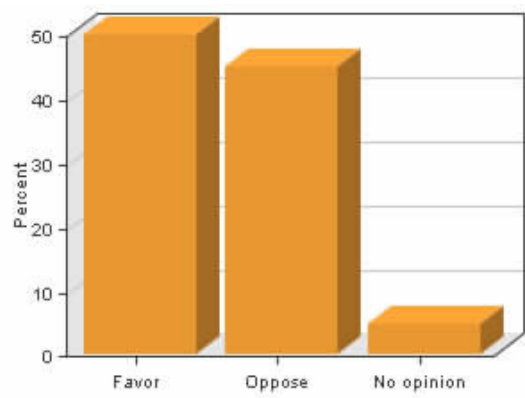
Therefore, this poll suggests that a majority of Americans supported a ban on same-sex marriage rather than its legalization.

A second poll was conducted by the news organizations CNN and USA Today in cooperation with the polling organization Gallup. Similarly to the Associated Press poll, this poll

used 1,003 telephone interviews. The poll asked respondents “Would you favor or oppose a constitutional amendment that would define marriage as being between a man and a woman, thus barring marriages between gay or lesbian couples?” (CNN/Gallup/USA Today Poll 2003). Of the people interviewed, 50% said they would favor barring marriages between same-sex couples, 45% said they would oppose an amendment banning it and 5% said they had no opinion on the issue (CNN/Gallup/USA Today Poll 2003). Table 3 shows a graph of the results of the poll.

Table 3: CNN/Gallup/USA Today Poll, July, 2003

Would you favor or oppose a constitutional amendment that would define marriage as being between a man and a woman, thus barring marriages between gay or lesbian couples?



50% Favor

45% Oppose

5% No Opinion

CNN/Gallup/USA Today Poll, July 2003. Retrieved Nov 27, 2011 from the iPOLL Databank, The Roper Center for Public Opinion Research, University of Connecticut.

http://www.ropercenter.uconn.edu/data_access/ipoll/ipoll.html

Although not quite as high as the Associated Press poll, the CNN/Gallup/USA Today poll also reveals that a majority of citizens at the time favored banning same-sex marriage rather than legalizing it.

The process of the legalization of same-sex marriage in Massachusetts appears to support Dworkin's theory. According to the polling data, the social majority did not believe that same-sex marriage should be a recognized right. Instead, they believed that legislation should be passed to prohibit same-sex marriage. Since the Massachusetts Legislature and the majority of American citizens did not support same-sex marriage, the Massachusetts Supreme Court legalized it because of its duty to recognize constitutional rights and to protect the rights of minority groups. However, not every member of the Massachusetts Supreme Court believed that the courts have an obligation to determine the issue of same-sex marriage. In his dissenting opinion in *Goodridge*, Justice Cordy states that he believes that the Massachusetts Legislature should be given control over determining if same-sex marriage should be legalized. He writes, "There is no reason to believe that legislative processes are inadequate to effectuate legal changes in response to evolving evidence, social values, and views of fairness on the subject of same-sex relationships" (*Goodridge v Department of Health* 2003, at 393-394). In the dissent, Justice Cordy explains that the courts should accept that the legislatures might consider reasons for prohibiting same-sex marriage that the courts are unable to fully understand (385). Therefore, he believes that the issue of same-sex marriage should be left to legislatures, rather than the courts, to decide.

However, Justice Cordy's reasoning seems out of line with the doctrine of judicial review, which allows for the courts to determine if laws passed by the legislature are unconstitutional. The courts are designed to recognize legislation that discriminates against the rights of minorities. Justice Cordy's argument broadly asserts that courts should be excessively lenient in evaluating if legislatures have a legitimate interest in creating a law that specifically affects minority groups. This broad claim does not follow years of Supreme Court opinions in

which minority groups receive fairly high levels of protection from government legislation. The majority of the justices on the Massachusetts Supreme Court believed that the Massachusetts Legislature lacked an adequate reason for prohibiting same-sex marriage. Therefore, although Justice Cordy might believe that legislatures should be given the responsibility of recognizing a minority right at their own pace, he was outnumbered by his fellow justices and Supreme Court precedent.

In addition to the polling data, actions which were taken by the people of Massachusetts and the Massachusetts legislature further support Dworkin's theory that the legislatures are influenced by the will of the majority. The *Goodridge* decision referenced the inequality that results from heterosexual couples receiving benefits from marriage that same-sex couples are denied (at 323). Due to this, the Massachusetts Senate attempted to rectify the inequality by asking the Massachusetts Supreme Court if it could implement civil unions in the same way that Vermont had (Peter 5A). This was an attempt by the legislature to avoid having to fully legalize same-sex marriage. The Massachusetts Supreme Court responded that civil unions were not an adequate remedy and that the legislature had to change the law to legalize same-sex marriage (Peter 5A). Following this, opponents of same-sex marriage inside and outside of the Massachusetts Legislature made several attempts to pass an amendment to the Massachusetts Constitution defining marriage as being between one man and one woman. The legislature originally tried to pass a constitutional amendment barring same-sex marriage but was not able to overcome the requirement of approval from two successive sessions of the legislature sitting together in a Constitutional Convention ("Massachusetts Lawmakers Recess"). Then hundreds of thousands of signatures were collected by Massachusetts residents to have an amendment placed on the ballot in 2008 (McDonald). However, this amendment was once again defeated in a

Constitutional Convention (McDonald). It seems that in this particular case, not enough of the legislature was willing to fight against the court's decision to alter the Massachusetts Constitution. However, it is still noteworthy that the attempts were made and were in-line with public support for an amendment banning same-sex marriage.

Today, same-sex marriage in Massachusetts remains fairly secure. No recent attempts have been made to alter the Massachusetts Constitution to define marriage as between only a man and a woman. Although the public opinion polling data and the actions taken by the people of Massachusetts suggest that Dworkin's theory is correct, it must be taken with a grain of salt. First, the polls interviewed citizens from all across America, reflecting a wide range of political and moral opinions of the American people. There was a poll conducted by the *Boston Globe* and WBZ-TV, following *Goodridge* which was only administered to Massachusetts residents (Phillips; see also Rosenberg 350). When asked "Would you support or oppose an amendment to the state constitution that would establish marriage solely as the union of a man and a woman, effectively banning gay marriage?" only 36% said they would support an amendment while 53% said they would oppose an amendment (Phillips; see also Rosenberg 350). Table 4 shows a graph of the results of the poll.

Table 4: Boston Globe and WBZ-TV Poll, 2003

Would you support or oppose an amendment to the state constitution that would establish marriage solely as the union of a man and a woman, effectively banning gay marriage?

Answer	%
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Support	36
Oppose	53
Don't Know/ Refused	11

Phillips, Frank, and Rick Klein. "50% in Poll Back SJC Ruling on Gay Marriage." *The Boston Globe* 23 Nov. 2003. Boston.Com News, 23 Nov. 2003. Web. 24 Mar. 2012. < http://www.boston.com/news/daily/23/gay_marriage_poll.htm/>.

This data shows that residents of Massachusetts might have viewed same-sex marriage more favorably in 2003 than other more conservative areas of the country. However, the poll taken by the Boston Globe and WBZ-TV only had 400 respondents (Phillips; see also Rosenberg 350). The problem is that the most commonly used and accepted sample size for polls is 1,000 respondents. Therefore, this poll must be viewed critically since its sample size is less than half the normal poll size. The small sample size of this poll makes it difficult to know if the social majority in Massachusetts truly was supportive of same-sex marriage. All that can definitely be concluded is that Dworkin's theory appears to be correct that the Massachusetts Supreme Court recognized a minority right when the majority of American citizens were unwilling to do so.

There might also be certain other factors that contribute to how a state legalizes same-sex marriage. Rosenberg explains that there are certain factors that help the courts take on controversial constitutional issues and implement change. He writes that "when political, social, and economic conditions have become supportive of change, courts can effectively produce significant social reform" (Rosenberg *Hollow Hope* 31). Rosenberg concludes that because Massachusetts is one of the most liberal states in the country, it is likely that same-sex marriage received support from the political elite and the public in Massachusetts (*Hollow Hope* 350). He argues that most of the elite politicians in the state supported same-sex marriage with the exception of Governor Mitt Romney (Rosenberg *Hollow Hope* 350). Due to this support, he

believes that the Massachusetts Supreme Court was able to legalize same-sex marriage without resulting in legislative backlash overriding its decision. Without these outside factors, Rosenberg concludes that the courts are virtually powerless to make constitutional decisions and implement them.

Although Rosenberg makes some logical points, the process of legalization in Massachusetts does not necessarily support his conclusion. Rosenberg points to the public opinion poll taken by the Boston Globe as evidence that a majority of residents in Massachusetts supported the decision. However, the validity of this poll has already been seriously questioned due to its small sample size. As a result, it is not possible to say that residents of Massachusetts were more accepting of same-sex marriage in 2003 than the rest of the country. Additionally, although Massachusetts is a very liberal state, there were a considerable number of legislators who were seeking a constitutional amendment defining marriage between a man and a woman. Rosenberg himself explains that in 2004, the first Constitutional Convention passed the amendment by a vote of 105-92 (*Hollow Hope* 348). However the second Constitutional Convention voted against the amendment because during the 2004 Massachusetts elections, legislators who had supported the amendment were replaced by legislators who did not (*Hollow Hope* 349). As previously mentioned, the second attempt to alter the Massachusetts Constitution also passed the first Constitutional Convention but failed the second (McDonald). Also, Governor Mitt Romney expressed his own disapproval of same-sex marriage. The fact that the legislature made attempts to overturn the *Goodridge* decision with the support of the governor suggests that there were a good number of political elites who did not support the legalization of same-sex marriage. The unreliable polling data specifically from Massachusetts and the attempts by the public and legislators to amend the Massachusetts Constitution reveal that the

Massachusetts Supreme Court was most likely not greatly helped by the factors that Rosenberg points to for the *Goodridge* decision's success.

Case Study of New York

While Massachusetts is a clear example of a state taking a judicial path to legalize same-sex marriage, New York is a clear example of a state taking a legislative path. The New York Legislature passed a bill legalizing same-sex marriage on June 24th, 2011 and Governor Andrew Cuomo gave his approval by signing the bill that same day (Wockner 6). Prior to its legalization in 2011, the lower house of New York's government had passed legislation legalizing same-sex marriage in 2007 and 2009 (Dye). However, the bills from 2007 and 2009 died in the New York Senate (Dye). The 2011 bill passed the New York Senate by a vote of 33-29 receiving the needed bipartisan support to become law (Wockner 6).

The divide between supporters and opponents of the bill was along party lines. All but one Democrat in the Senate voted for the legislation, while all but four Republicans voted against it (Wockner 6). In order to gain the support of Republicans, Democrats in the New York Senate offered a concession to conservatives. According to *Reuters* news journalist Jessica Dye, "legislators agreed on language allowing religious organizations to refuse to perform services or lend space for same-sex weddings" (Dye). This concession helped to motivate the four Republicans to break ranks with their party and vote for legalization. One Republican Senator who voted for legalization, Mark J. Grisanti, had run for office opposing same-sex marriage (Barbaro). He explained why he changed his mind in a statement saying, "I apologize for those who feel offended. I cannot deny a person, a human being, a taxpayer, a worker, the people of my district and across this state, the State of New York, and those people who make it the great

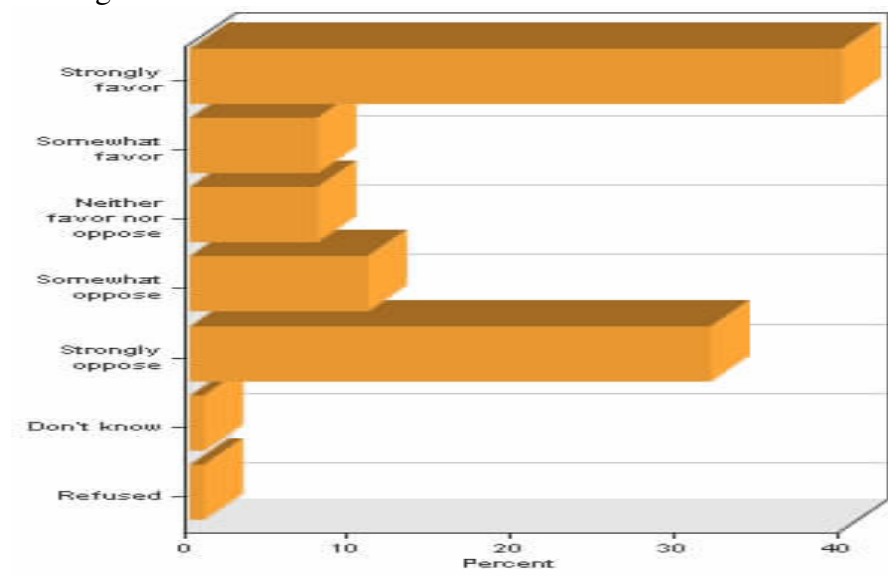
state that it is the same rights that I have with my wife” (Barbaro). The actions of Senator Grisanti and the other Republican Senators who voted for legalization are particularly interesting because their votes against Republican Party wishes could cost them reelection. Also noteworthy is the fact that the New York Senate was controlled by Republicans by a small margin (Barbaro). Therefore, New York shows that in certain circumstances, members of legislatures can be motivated to vote by factors other than their political party.

The actions of the New York Legislature represent the growing number of states which have legalized same-sex marriage outside of the courts. According to Ronald Dworkin’s theory, courts need to take action to protect minority rights when political and social majorities are unwilling to recognize those rights. However, when support for a minority right reaches a fifty percent majority, the legislatures are more likely to start recognizing the right. Therefore, if Dworkin’s theory is correct, states that take the legislative path to legalize same-sex marriage did so because a majority of citizens support same-sex marriage. Analysis of public opinion polls in 2011 will reveal whether the New York Legislature’s legalization of same-sex marriage supports Dworkin’s theory.

In 2011 the Associated Press conducted a public opinion poll by interviewing 1,000 American citizens by telephone. One of the questions that the poll asked respondents was “Would you favor, oppose or neither favor nor oppose a constitutional amendment defining marriage as between a man and a woman?” (Associated Press/National Constitution Center/GfK Poll 2011). The results of the poll showed that 48% of respondents favored a constitutional amendment banning same-sex marriage while 43% opposed such an amendment (Associated Press/National Constitution Center/GfK Poll 2011). Table 5 shows a graph of the results of the poll.

Table 5: Associated Press/National Constitution Center/GfK Poll, Aug, 2011

Would you favor, oppose or neither favor nor oppose a constitutional amendment defining marriage as between a man and a woman?



40% Strongly Favor

8% Somewhat Favor

8% Neither Favor Nor Oppose

11% Somewhat oppose

32% Strongly oppose

1% Don't know

1% Refused

Associated Press/National Constitution Center/GfK Poll, August 2011. Retrieved Mar-25-2012 from the iPOLL Databank, The Roper Center for Public Opinion Research, University of Connecticut. http://www.ropercenter.uconn.edu/data_access/ipoll/ipoll.html

Compared to the Associated Press poll in 2003, opposition to same-sex marriage in 2011 had declined by 2%. In 2011, less than a majority of Americans supported an amendment barring same-sex marriage. This poll reveals that opposition to same-sex marriage has decreased, although not by a wide margin. Since less than a majority of Americans polled in 2011 supported

an amendment defining marriage between a man and a woman, Dworkin's theory is supported by New York's legalization of same-sex marriage.

Since New York legalized same-sex marriage recently, it was easier to obtain public opinion polls that specifically surveyed residents of the state than it was to obtain similar polls for Massachusetts. In June 2011, Quinnipiac University polled 1,317 New York registered voters through telephone interviews (Quinnipiac Poll 2011). The polls asked "Would you support or oppose a law that would allow same-sex couples to get married?" (Quinnipiac Poll 2011). The poll also provided a middle "don't know" choice for respondents. The results of the poll revealed that 54% of New Yorkers supported the legalization of same-sex marriage while 40% opposed it (Quinnipiac Poll 2011). Table 6 shows the results of the poll and is broken down by political party affiliation, gender and race.

Table 6: Quinnipiac Poll, June, 2011

Would you support or oppose a law that would allow same-sex couples to get married?

Answer	Total %	Republican	Democrat	Independent	Men	Women	White	Black
Support	54	30	67	56	53	55	55	42
Oppose	40	63	28	39	42	39	40	50
Don't Know	5	7	4	4	5	6	5	9

Quinnipiac Poll, June 2011. Retrieved March 26 2011 from Quinnipiac University.

<http://www.quinnipiac.edu/institutes-and-centers/polling-institute/new-york-state/release-detail?ReleaseID=1618>

The poll also revealed that there was a divide along party lines with 67% of Democrats supporting same-sex marriage and 63% of Republicans opposing it (Quinnipiac Poll 2011). This poll was conducted about a month prior to the New York Legislature's legalization of same-sex marriage. Unlike the poll taken of only Massachusetts residents in 2003, this poll has an adequate sample size of residents of New York. Therefore, this poll does not need to be viewed with the same degree of caution as the Massachusetts poll. The responses to this poll show that much more than a majority of New Yorkers supported same-sex marriage at the time it was legalized in the state. The poll provides ample evidence that supports Dworkin's theory. Since the majority of New Yorkers supported legalization, the courts were not needed to take action to protect the rights of sexual minorities in the same way that they were needed in Massachusetts in 2003. Social support for same-sex marriage in New York allowed for the state to take a legislative path to legalize same-sex marriage.

The national data polling data shows less than a majority of Americans in support for an amendment defining marriage between a man and a woman in 2011. The New York polling data reveals that greater than 50% of New Yorkers supported the legalization of same-sex marriage in 2011. This data supports Dworkin's theory that as support for minority rights surpasses a majority, legislatures will become more willing to recognize those rights. However, there are some other factors that could have contributed to New York's legalization of same-sex marriage. First, the governor of New York, Andrew Cuomo, made it known that he wanted to legalize same-sex marriage in New York. *The New York Times* writers Michael Barbaro and Nicholas Confessore describe Governor Cuomo's efforts to legalize same-sex marriage when they write that:

Mr. Cuomo made same-sex marriage one of his top priorities for the year and deployed his top aide to coordinate the efforts of a half-dozen local gay-rights organizations whose

feuding and disorganization had in part been blamed for the defeat two years ago. The new coalition of same-sex marriage supporters brought in one of Mr. Cuomo's trusted campaign operatives to supervise a \$3 million television and radio campaign aimed at persuading several Republican and Democratic senators to drop their opposition. (Barbaro).

Governor Cuomo's efforts to legalize same-sex marriage might have persuaded those four Republicans in the New York Senate to vote against their party in favor of the legislation that legalized same-sex marriage. As previously mentioned in the Massachusetts case study, Gerald Rosenberg believes that legislatures are more likely to pass bills legalizing same-sex marriage if they receive support from the political elite and social majorities (*Hollow Hope* 350). In 2011, same-sex marriage received support from political elites, including Governor Cuomo, and the majority of New Yorkers. This is in direct contrast to Massachusetts in 2003 when the Massachusetts Supreme Court took action to legalize same-sex marriage. Therefore, it is difficult to say to what extent Governor Cuomo's actions resulted in motivating the New York Legislature to legalize same-sex marriage compared to the extent that public opinion support impacted its legalization.

Another factor to consider is the fact that New York is one of the most prominent states that has supported the rights of sexual minorities throughout history (Wockner 6). New York City is known to have a generally large gay population compared to other metropolitan areas throughout the country (Venugopal). The 2010 Census recorded 32,972 same-sex couple households in New York which is a 27% increase since the 2000 Census (Venugopal). Also according to the Census, the greatest number of same-sex couples in that live in New York live in the New York City area (Venugopal). Due to its large gay population, the gay rights movement originated in New York in the 1960s at the Stonewall Inn (Rosenfeld). The Stonewall Inn in Greenwich Village was known to be a safe and accepting place for gay men and women in

the 1960s (Rosenfeld). In 1969, the Stonewall Inn was raided and closed because of homophobic sentiments (Rosenfeld). Its closing sparked massive protests and rallies in support of gay rights and initiated the LGBT movement that lives on today (Rosenfeld). Therefore, New York's unique history as being the birthplace of the gay rights movement might have had an impact on the legalization of same-sex marriage in the state. After New York passed same-sex marriage, the Gay and Lesbian Task Force Executive Director, Rea Carey, said that the legalization was a natural progression for a state whose history is immersed in advancements for sexual minorities (Wockner 6). It is not easy to measure the impact of New York's liberalism toward gay rights on the New York Legislature's decision to pass gay marriage. However, it is possible that New York's history was one factor that played into the legalization of same-sex marriage.

Case Study of California

So far, this thesis has examined the legalization of same-sex marriage in states that took a single path toward legalization. The Massachusetts Supreme Court issued a ruling legalizing same-sex marriage while the New York Legislature passed a bill legalizing the right. Both of the case studies of these states have supported Ronald Dworkin's theory. However, the temporary legalization of same-sex marriage in California, and the subsequent events following the temporary legalization pose a much more diverse explanation of how a state can come to legalize same-sex marriage. California's Supreme Court legalized same-sex marriage in 2008 through the case *In re Marriage Cases* and public officials in California began issuing marriage licenses to same-sex couples (*Perry v. Schwarzenegger* 2010, at 2). Then in November 2008, California voters passed Proposition 8, an amendment to the California Constitution defining marriage between one man and one woman (Schmidtke 216). Two same-sex couples then filed a lawsuit,

Perry v. Schwarzenegger, claiming that Proposition 8 violated their constitutional rights. The lawsuit has made its way through a U.S. District Court and a U.S. Circuit Court of Appeals and is expected to be appealed to the U.S. Supreme Court (Schmidtke 237). California represents a state in which both the California Supreme Court and the California Legislature have made attempts to determine the right to same-sex marriage. This struggle between the two branches of California Government for the power of determining the right supports Ronald Dworkin's theory.

After the *Goodridge* decision in Massachusetts, officials in San Francisco began giving same-sex couples in the area marriage licenses (*In re Marriage Cases* 2008, at 1). In *Lockyer v. City and County of San Francisco* (2004) the California Supreme Court ruled that the officials in San Francisco had acted unlawfully because there had been no judicial decision in California concerning the constitutionality of the state's same-sex marriage statute (at 230). After the *Lockyer* decision, six same-sex couples filed cases claiming that California's prohibition of same-sex marriage violated their constitutional rights (*In re Marriage Cases* 2008, at 2). These six cases were combined to form the case *In re Marriage Cases* (2008) which eventually was heard by the California Supreme Court (at at 2). Prior to the case, the California Legislature had legalized domestic partnerships in the state (*In re Marriage Cases* 2008, at 2). Due to the existence of domestic partnerships in the state, the California Supreme Court had to decide whether the California Constitution required the designation of "marriage" to be extended to same-sex couples rather than just the benefits (*In re Marriage Cases* 2008, at 4).

The California Supreme Court found that denying the name of marriage to same-sex couples' relationships violated their rights to due process and equal protection under the

California Constitution (*In re Marriage Cases* 2008, at 7-11). The written opinion for the case states that:

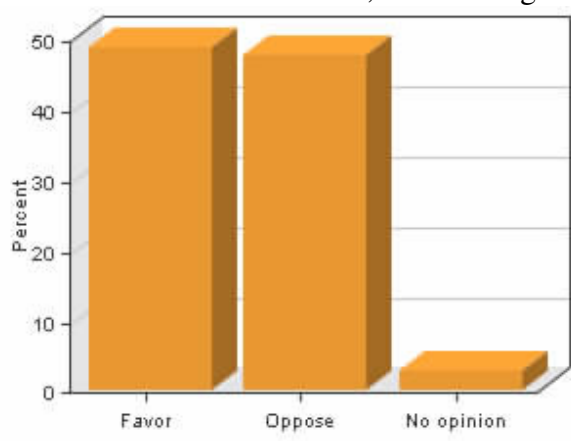
The constitutionally based right to marry properly must be understood to encompass the core set of basic substantive legal rights and attributes traditionally associated with marriage that are so integral to an individual's liberty and personal autonomy that they may not be eliminated or abrogated by the Legislature or by the electorate through the statutory initiative process. (*In re Marriage Cases* 2008, at 6).

The California Supreme Court found that domestic partnerships created a stigma against same-sex relationships that marriage did not create for opposite-sex couples (*In re Marriage Cases* 2008, at 96-97). Through this case, California recognized a constitutional right to same-sex marriage and the state began issuing marriage licenses to gay and lesbian couples.

The decision in *In re Marriage Cases* is an example of a court recognizing a minority right that it believes to be guaranteed by the state constitution. Ronald Dworkin's theory suggests that the California Supreme Court determined the right to same-sex marriage because of its duty to protect the rights of minorities against the oppression of the political and social majority. This means that if Dworkin's theory is correct, support for an amendment banning same-sex marriage should have been at least 50% when the *In res Marriage Cases* decision was made in 2008. One national public opinion poll was conducted in May 2008, which was the same month that the California Supreme Court made its ruling. The poll consisted of 1,017 telephone interviews that were conducted by Gallup, a highly respected polling organization (Gallup Poll 2008). The poll asked "Would you favor or oppose a constitutional amendment that would define marriage as being between a man and a woman, thus barring marriages between gay or lesbian couples?" (Gallup Poll 2008). According to the poll results, 49% of respondents favored an amendment, 48% opposed an amendment and 3% had not opinion on the issue (Gallup Poll 2008). Table 7 shows a graph of the results of the poll.

Table 7: Gallup Poll, May, 2008

Would you favor or oppose a constitutional amendment that would define marriage as being between a man and a woman, thus barring marriages between gay or lesbian couples?



49% Favor

48% Oppose

3% No Opinion

Gallup Poll, May 2008. Retrieved Nov-27-2011 from the iPOLL Databank, The Roper Center for Public Opinion Research, University of Connecticut.

http://www.ropercenter.uconn.edu/data_access/ipoll/ipoll.html

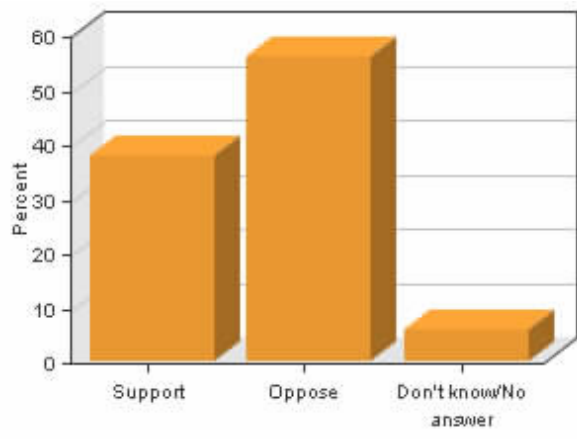
This poll reveals that at the time that the California Supreme Court made its decision, less than a majority of the sampled Americans favored a constitutional amendment banning same-sex marriage. The results show that citizens almost equally supported and opposed an amendment prohibiting same-sex marriage in May 2008.

Since the number of those who supported banning same-sex marriage was less than 50%, it cannot be concluded that the social majority disapproved of same-sex marriage. Instead, it can only be concluded that there was not enough respondents who felt one way or the other about same-sex marriage to constitute a majority opinion. Therefore, the results of this poll do not support Dworkin's theory. Although the number of respondents who supported an amendment banning same-sex marriage was very close to a majority, it was not a majority.

A second national poll was taken in 2008 and shows even less support for Dworkin's theory. A Quinnipiac Poll was conducted in which 1,783 respondents were interviewed by telephone (Quinnipiac Poll 2008). The poll asked "Would you support or oppose amending the United States Constitution to ban same sex-marriage?" (Quinnipiac Poll 2008). The results of the poll showed that only 38% of respondents said they would support an amendment, 56% said they would oppose such an amendment and 6% said they did not know (Quinnipiac Poll 2008). Table 8 shows a graph of the results of the poll.

Table 8: Quinnipiac University Poll, July, 2008

Would you support or oppose amending the United States Constitution to ban same sex-marriage?



38% Support

56% Oppose

6% Don't know/No answer

Quinnipiac Poll, July 2008. Retrieved Nov-27-2011 from the iPOLL Databank, The Roper Center for Public Opinion Research, University of Connecticut.
http://www.ropercenter.uconn.edu/data_access/ipoll/ipoll.html

Clearly, this poll shows a difference in responses than the poll conducted by the Gallup Organization in the same year. Although the Gallup Poll showed less than a majority supporting an amendment banning same-sex marriage, the number who supported it in the poll was much closer to a majority than the results of the Quinnipiac Poll. However, both polls refute Dworkin's theory. Both polls show less than a majority opposing same-sex marriage. According to Dworkin, the courts take action to protect minority rights when they are not yet recognized by the social and political majority. The California Supreme Court took action to recognize same-sex marriage despite the fact that a majority of Americans did not oppose same-sex marriage. This does not support Dworkin's theory.

Although the national public opinion data does not support Dworkin's theory, it is possible that Dworkin's theory might still be supported by the case study of California. At the time of the decision of *In re Marriage Cases*, California residents might have been more supportive of a constitutional amendment banning same-sex marriage than the sample of citizens represented in the Quinnipiac and Gallup Polls. Although data is not readily available on the public opinion of solely California residents in May 2008, the actions taken by the people of California after the Supreme Court decision reveal that there was greater support among Californians for a constitutional amendment banning same-sex marriage. This support is demonstrated through the backlash against the California Supreme Court decision that resulted in California voters passing an amendment to the California Constitution prohibiting same-sex marriage.

The *In re Marriage Cases* decision sparked major backlash from opponents of same-sex marriage. The backlash was so great that opponents were able to get an amendment to the California Constitution on the ballot for the California elections in November, 2008 ("California

Gay Marriage Banned”). If passed, the ballot measure, Proposition 8, would amend the California Constitution to define marriage as between one man and one woman (“Proposition 8: Amending the Constitution” 1). In the California Legislature Senate and Assembly Committees on Judiciary Joint Informational Hearing “Proposition 8: Amending the Constitution to Eliminate the Right of Same-Sex Couples to Marry,” supporters and proponents of Proposition 8 were allowed to speak. At the hearing Professor Goodwin Liu from U.C. Berkeley Boalt School of Law provided perspective on some of the legal aspects of the California Supreme Court decision and Proposition 8. In the hearing transcript he explains that although many residents of California see the *In re Marriage Cases* decision as judicial activism, he legally believes that it is the court’s responsibility to determine constitutional issues (“Proposition 8: Amending the Constitution” 21). Professor Liu goes on to say:

I think that the term, judicial activism, is simply shorthand that people use for any decision that they don’t like. And so, I don’t think it’s a particularly illuminating phrase, because conservatives use it against liberals, liberals use it against conservative, and largely it simply reflects people’s disagreement with the results of a particular decision. (“Proposition 8: Amending the Constitution” 21).

Professor Liu does provide one criticism of the California Supreme Court, stating that it “innovated” on the traditional levels of scrutiny used in Equal Protection Clause cases (“Proposition 8: Amending the Constitution” 21). However, he concludes that Proposition 8, if passed, would unconstitutionally label same-sex couples as second class citizens when he says, “At the same time, Prop. 8 would maintain a separate but equal regime of marriage for opposite sex couples and domestic partnership for same-sex couples” (“Proposition 8: Amending the Constitution” 10).

Dr. Jennifer Roback Morse from The Ruth Institute spoke on behalf of Proposition 8 at the hearing. In the hearing transcript she explains that Proposition 8 would ensure that children

are properly raised by both their biological parents and that married couples procreate (Proposition 8: Amending the Constitution” 39). However, her argument is strongly questioned by the committee assembly members. Assemblymember Jones explains the contradiction he sees in Dr. Morse’s argument when he says:

Okay, so just let me sum up. You wouldn’t ban infertility centers, even though the children there won’t know who their biological parents are. You don’t agree with banning adoption even though in those circumstances children are not being necessarily raised by their biological parents. You’re okay with the adoption of children by gays and lesbians. You don’t believe in banning divorce, even though by your own arguments there’s been all sorts of analyses and studies that indicate divorce is very, very harmful on children. It’s hard for me not conclude that this isn’t really about protecting children. (“Proposition 8: Amending the Constitution” 40).

After the assemblymembers question Dr. Morse, residents of California were allowed to speak about Proposition 8. The hearing transcript shows that those residents at the hearing who supported Proposition 8 believed that the assemblymembers’ questioning of Dr. Morse was biased and one-sided (“Proposition 8: Amending the Constitution” 48). The contrast between the social majority’s opinion about Proposition 8 and Professor Liu’s legal opinion about it is evident in this hearing. The divide in the hearing realistically represented the divide between the social majority’s refusal to recognize a right to same-sex marriage and the California Supreme Court’s willingness to recognize it.

In the end, Proposition 8 passed with slightly over 52% of Californians who participated in the voter referendum supporting it (Schmidtke 216). The number of residents who voted on the measure exceeded 13 million (Schmidtke 216). The percentage of voters who voted for Proposition 8 is the most direct display of public opinion that can be conducted. The results from the Proposition 8 vote show that a majority of Californians supported an amendment to the California Constitution banning same-sex marriage. In this case since it was put to a vote, there is no question that a majority of Californians did not support same-sex marriage in November,

2008. Proposition 8 passed and the California Constitution was amended to prohibit same-sex marriage in the state. The passage of Proposition 8 supports Dworkin's theory. According to Dworkin's theory about the development of rights, the courts have a responsibility to take actions to protect minority rights when the majority does not wish to extend their own rights to minority groups. In 2008, the California Supreme Court did step in to remedy the constitutional violations against sexual minorities' rights. However, the social majority did not agree with the decision and revealed their clear opposition to same-sex marriage by passing Proposition 8. Although the national public opinion polls show that the general public in America would not have supported an amendment banning same-sex marriage, Californians felt differently.

The attempts to determine the right to same-sex marriage in California did not end with Proposition 8. Two same-sex couples in California challenged the constitutionality of Proposition 8 in the case *Perry v. Schwarzenegger* (2010). The same-sex couples had tried to receive marriage licenses in California but they were denied the licenses because Proposition 8 prohibited it (*Perry v. Schwarzenegger* 2010, at 1). They claimed that Proposition 8 violated their rights to due process and equal protection (*Perry v. Schwarzenegger* 2010, at 1). The Attorney General of California, Jerry Brown, and the Governor of California, Arnold Schwarzenegger, refused to defend Proposition 8 in court (*Perry v. Schwarzenegger* 2010, at 3). However, the courts found that proponents of Proposition 8 including, ProtectMarraige.Com, were allowed to become the defendants in the case as "defendant-intervenors" (*Perry v. Schwarzenegger* 2010, at 3). The case was brought to the United States District Court for Northern California (*Perry v. Schwarzenegger* 2010, at 3). In the written decision for *Perry v. Schwarzenegger* (2010), Chief U.S. District Judge Vaughn Walker ruled that Proposition 8 violated the Due Process Clause and the Equal Protection Clause of the United States

Constitution (at 135). Judge Walker's decision found Proposition 8 to be unconstitutional and overturned the ban on same-sex marriage.

In his written opinion, Judge Vaughn Walker establishes that marriage is a fundamental right guaranteed by the Due Process Clause of the U.S. Constitution when he writes, "That the majority of California voters supported Proposition 8 is irrelevant, as 'fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.' *West Virginia State Board of Education v. Barnette*, 319 US 624, 638 (1943)" (then *Perry v. Schwarzenegger* 2010, at 113). Judge Walker goes on to explain that Proposition 8 violates the Equal Protection Clause of the U.S. Constitution because domestic partnerships do not provide same-sex couples with the same social meaning that marriage provides opposite-sex couples (then *Perry v. Schwarzenegger* 2010, at 115). He finds that the only reason that Proposition 8 passed was moral disapproval and that is not a legitimate reason for denying same-sex partners' marriage rights (then *Perry v. Schwarzenegger* 2010, at 135).

In 2011, Judge Walker resigned and announced that he was gay and had held a relationship with another man for the past ten years (now *Perry v. Brown* 2012, at 78). Supporters of Proposition 8 claimed that Judge Walker should have recused himself from the case or disclosed that he was gay (now *Perry v. Brown* 2012, at 78). However, the courts of California found that Judge Walker was not required to recuse himself or to disclose his sexual orientation because judges are capable of making impartial decisions even though the decisions might affect themselves (now *Perry v. Brown* 2012, at 78). Since the case was appealed, Judge Walker's decision was stayed, meaning that it would not be carried out due to the appeal (now *Perry v. Brown* 2012, at 21).

By ruling Proposition 8 unconstitutional, Judge Walker once again demonstrated that the courts are able to take action to protect minority rights. The people of California voted for Proposition 8, revealing that a majority of Californians approved of a constitutional amendment banning same-sex marriage. Since the social majority in California was unwilling to extend marriage rights to same-sex couples, the U.S. District Court took action to recognize the rights. This supports Dworkin's theory that when the social majority refuses to acknowledge the constitutional rights of minority groups, the courts have a duty to protect those minority groups. Since *Perry v. Schwarzenegger* (2010) was filed in reaction to the California voters passing Proposition 8, the case demonstrates a situation in which the majority suppresses the rights of minorities and the courts protect those rights. The ruling in *Perry v. Schwarzenegger* (2010) supports Dworkin's theory because Californians were unwilling to acknowledge same-sex couples' constitutional right to marriage.

Following Judge Walker's decision, supporters of Proposition 8 appealed to the U.S. Ninth Circuit Court of Appeals. A panel of judges on the Ninth Circuit had to determine whether Proposition 8 violated the Fourteenth Amendment of the United States Constitution (*Perry v. Brown* 2012 at 4). In the written decision of *Perry v. Brown* (2012) the majority of judges found that Proposition 8 did violate the Equal Protection Clause of the U.S. Constitution (at 4). However, the judges gave a reason for the violation that was specific to California which could not be broadly applied to all states. In the written decision Judge Stephen Reinhardt writes, "Proposition 8 singles out same-sex couples for unequal treatment by *taking away* from them alone the right to marry, and this action amounts to a distinct constitutional violation because the Equal Protection Clause protect minority groups from being targeted for the deprivation of an existing right without a legitimate reason" (*Perry v. Brown* 2012, at 34). Therefore, the judges on

the panel distinctly explained that Proposition 8 violated the Equal Protection Clause because California had already given the right of marriage to same-sex couples. This ruling is fairly narrow. The decision relies on the constitutional idea that rights that are already given to minority groups should not be easily taken away. Unlike California, most states have not given the right of marriage to same-sex couples and then taken that right away. Therefore, the ruling of the Ninth Circuit Court of Appeals does not apply broadly to other states. Ultimately though in California, Judge Walker's original decision was upheld through the Ninth Circuit Court of Appeals.

The Ninth Circuit Court ruling provides further evidence of the courts' attempt to recognize same-sex marriage. The ruling was made in early 2012 when national public opinion support for same-sex marriage was at an all time high. In March 2012 NBC News and the Wall Street Journal surveyed 800 people through telephone interviews (NBC/Wall Street Journal Poll 2012). They asked respondents "Do you favor or oppose allowing gay and lesbian couples to enter into same-sex marriages?" (NBC/Wall Street Journal Poll 2012). 49% of respondents said they favored same-sex marriages while 40% said they opposed them (NBC/Wall Street Journal Poll 2012). Table 9 shows the results of the poll when it was asked in 2012.

Table 9: NBC/Wall Street Journal Poll, March, 2012

Do you favor or oppose allowing gay and lesbian couples to enter into same-sex marriages?

Answer	%
Favor Allowing Same-Sex Marriages	49
Strongly Favor	32
Somewhat Favor	17
Oppose Allowing Same-Sex Marriages	40
Somewhat Oppose	9
Strongly Oppose	31
Depends	3
Not Sure	8

NBC/Wall Street Journal Poll, March 2012. Retrieved March 31, 2012. Human Rights Campaign. “NBC/WSJ Poll Shows Country Continues to Move Toward Marriage Equality.” <http://www.hrc.org/press-releases/entry/nbc-wsj-poll-shows-country-continues-to-move-toward-marriage-equality>

These numbers were reversed when the same question was asked by the news organizations in October 2009 (NBC/Wall Street Journal Poll 2012). Therefore, there has been a clear move toward acceptance of same-sex marriage by the nation. However, according to this poll, support for same-sex marriage still lacks a majority. There was also a Field Poll conducted in February 2012 that specifically questioned California residents. The telephone interview poll was comprised of 1,003 registered voters in California (Field Poll 2012). The poll asked “Do you approve or disapprove of California allowing homosexuals to marry members of their own sex and have regular marriage laws apply to them?” (Field Poll 2012). According to the poll, 59% of Californians approved of same-sex marriage while 34% disapproved and 7% had no opinion (Field Poll 2012). Table 10 shows the results of the poll broken down by the year.

Table 10: Field Poll, February, 2012

Do you approve or disapprove of California allowing homosexuals to marry members of their own sex and have regular marriage laws apply to them?

Answer	%
Approve	59
Disapprove	34
No Opinion	7

Field Poll, February 2012. Retrieved March 31, 2011 from The Field Poll Research Corporation. <http://field.com/fieldpollonline/subscribers/RIs2406.pdf>

This poll shows that in 2012, a majority of Californians supported same-sex marriage.

The California Supreme Court's original decision occurred at a time when support for same-sex marriage was below a majority. The will of the majority was then recognized through the passage of Proposition 8 in 2008. Directly following its passage, Proposition 8 was challenged through the courts because of the courts' ability to make constitutional decision independent from social support. Since the claim against Proposition 8 originated in the courts, it will continue to progress through the courts by appeal until it most likely reaches the United States Supreme Court. Although support for same-sex marriage has reached a majority in California, the courts will continue to make decisions regarding the right to same-sex marriage because of the natural process that cases go through in the judiciary. If the courts in California had never intervened in the issues, Dworkin's theory would suggest that since support for same-sex marriage exceeds a majority, the California Legislature should be influenced to recognize the right. However, the events that have transpired in the California Supreme Court, the U.S. District Court and the U.S. Ninth Circuit Court of Appeals have placed same-sex marriage on a pathway that Dworkin's theory suggests must ultimately lead to a decision by the United States Supreme Court.

Case Studies Conclusion

Overall, the case studies of Massachusetts, New York and California support Dworkin's theory of the determination of rights. The national polling data and the actions of the political and social majority in Massachusetts in 2003 support Dworkin's theory that the courts determine the constitutional rights of minority groups when there is a lack of support from the majority. Polling data from the national level and the state level in New York supports Dworkin's theory that as the social majority becomes more accepting of minority rights, legislatures are more likely to recognize those rights. Lastly, although California's process of legalization has been much more complex than Massachusetts and New York, it also generally supports Dworkin's theory.

These three case studies provide evidence that Dworkin's theory, which he wrote in the 1970s, is applicable to a contemporary issue. Although legalization has occurred in several states, a vast majority of states still do not recognize same-sex marriage and even have constitutional amendments defining marriage as being between a man and a woman. Therefore, the nation as a whole is still reluctant to recognize the right. In his book, Dworkin eventually concludes that controversial constitutional issues should be determined on the federal level by the United States Supreme Court (Dworkin 134). Interestingly, it appears that this portion of Dworkin's theory might soon be supported by the progression of the case *Perry v. Brown* (2012).

Thesis Conclusion

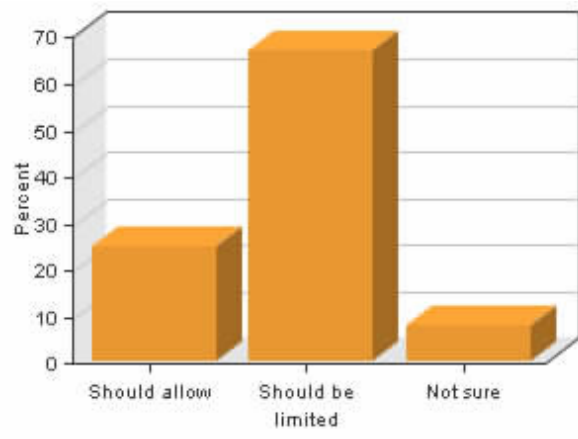
In *Taking Rights Seriously* Ronald Dworkin explains that the Founding Fathers intentionally left parts of the Constitution ambiguous so that they could be interpreted by the

Supreme Court to ensure that rights evolved with the progression of American culture (136). He writes, “If those who enacted the broad clauses had meant to lay down particular conceptions, they would have found the sort of language conventionally used to do this, that is, they would have offered particular theories of the concepts in question” (Dworkin 136). According to Dworkin, the United States Supreme Court should be responsible for determining those broad clauses and controversial rights (137). Therefore, based on Dworkin’s theory, the constitutional issue of same-sex marriage should ultimately be decided by the Supreme Court because issues that deal with the Bill of Rights can be more fairly decided by the Court than by Congress (142). Similarly to the state level, Dworkin suggests that the Supreme Court is the proper government institution to determine rights because it is more likely to protect and ensure the rights of minorities compared to Congress, which is influenced by the opinion of the political and social elite (142).

His theory is supported by the enactment of the Defense of Marriage Act (DOMA), which was passed by Congress in 1996 (U.S. Congress “DOMA”). DOMA defines marriage on the federal level as being between one man and one woman (U.S. Congress “DOMA”). The act also says that states do not have to legally recognize same-sex marriages performed in other states (U.S. Congress “DOMA”). A NBC News/Wall Street Journal Poll conducted 2,004 telephone interviews in 1996 asked respondents “Do you think marriage between two people of the same sex should be allowed, or do you think marriage should be limited only to the union of a man and a woman?” (NBC News/Wall Street Journal Poll 1996). The poll found that 67% said that they did not think same-sex marriage should be allowed and only 25% said they believed it should be allowed (NBC News/Wall Street Journal Poll 1996). Table 11 shows a graph of the results of the poll.

Table 11: NBC News/Wall Street Journal Poll, September, 1996

Do you think marriage between two people of the same sex should be allowed, or do you think marriage should be limited only to the union of a man and a woman?



25% Should Allow

67% Should be Limited

8% Not Sure

NBC News/Wall Street Journal Poll, September, 1996. Retrieved Apr-2-2012 from the iPOLL Databank, The Roper Center for Public Opinion Research, University of Connecticut. http://www.ropercenter.uconn.edu/data_access/ipoll/ipoll.html

This means that at the time DOMA was passed, a clear majority opposed same-sex marriage.

Dworkin would argue that DOMA was passed as a reflection of the public's unwillingness to recognize a right of sexual minorities and that the courts have a duty to challenge it. Currently, the constitutionality of DOMA is being challenged in a court case that is headed for a federal appeals court in Massachusetts ("Battle Over Federal Defense of Marriage Act"). The case is advancing after a federal judge in Massachusetts in 2010 ruled that the law illegally infringes on a state's right to determine the entitlement to marriage and denies married same-sex couples a plethora of federal rights ("Battle Over Federal Defense of Marriage Act").

Previous sections of this thesis have established that the right to same-sex marriage is a right guaranteed by the Fourteenth Amendment of the United States Constitution. Since Congress has been unwilling to recognize this right, it is the responsibility of the Supreme Court to recognize it. It appears that in reality, the California case *Perry v. Brown* (2012) will be appealed to the United States Supreme Court. According to Dworkin, the decision that results from the Court should be the legal recognition of a right to same-sex marriage. However, there are certain other factors that might influence the decision of the Supreme Court. The political ideology of the Supreme Court Justices could have a major impact on any same-sex marriage decision. Currently, there are more Supreme Court Justices on the bench who were nominated by Republican Presidents than Democrat Presidents (“Biographies of Current Justices”). Therefore, if the Justices were to make their decision based on their political ideologies, there would be a greater chance that they would not find a constitutional right to same-sex marriage.

In addition to their personal ideology, the Justices could be influenced by their personal beliefs of whether the courts or the legislatures should decide the issue. In almost every case mentioned in this thesis a member of the court wrote a dissenting opinion stating that the courts should leave it up to the legislatures to decide the policy on same-sex marriage. For example, Justice Scalia dissented in both *Lawrence v. Texas* (2003) and *Romer v. Evans* (1996) claiming that the Supreme Court was overstepping its authority and should have upheld the legislative decisions that the cases were based on. Therefore, Justice Scalia would likely vote against the legalization of same-sex marriage if *Perry v. Brown* (2012) makes it to the Supreme Court. If other Supreme Court Justices hold similar beliefs about the role and responsibility of the Court, same-sex marriage might not be recognized.

Perry will most likely be appealed to the Supreme Court. Not only has Dworkin's theory been generally supported by the three case studies, but also, by the likelihood of the issue reaching the Supreme Court. However, the decision of the Court will most likely not be based solely on whether a minority right is being suppressed by the will of the majority. The Justices' political ideology and the personal beliefs about the duties of the branches of government will also most likely have an impact on the decision. Therefore, only time will tell whether the Dworkin's theory that the Supreme Court has a duty to step in and protect minority rights is supported or refuted by this issue.

The first section of this thesis has analyzed the doctrinal development of the Equal Protection Clause of the Fourteenth Amendment and the right to privacy. The Equal Protection Clause analysis included the examination of the decisions in the Supreme Court cases *Loving v. Virginia* (1967) and *Romer v. Evans* (1996). The right to privacy cases included *Griswold v. CT* (1965) and *Lawrence v. Texas* (2003). The results of this analysis reveal that a right to same-sex marriage exists under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The arguments that the government gives for prohibiting same-sex marriage do not pass even the lowest level of scrutiny under the Equal Protection Clause, the rational basis test. Therefore, this thesis establishes that there is a constitutional right to same-sex marriage.

The second section of this thesis has established that Ronald Dworkin's theory of the determination of rights is supported by the legalization of same-sex marriage in three case studies. Although Dworkin's theory is supported by the process of legalization in the three states used in this thesis, it is possible that factors other than majority support have influenced the legalization of same-sex marriage in the eight states and Washington D.C. Additional factors might include the influence of governors and the political elite, the political ideology of the

legislatures and courts, the history of gay rights in the state and the ability of the state to overcome backlash by political and moral organizations. This thesis only investigated Dworkin's theory that constitutional rights issues should be decided by the courts because of their isolation from the opinion of the social majority. However, further research could be done to determine the impact of these other variables on the legalization of same-sex marriage.

Ronald Dworkin ultimately concludes that constitutional issues need to be decided by the United States Supreme Court. If *Perry v. Brown* (2012) is appealed to the Supreme Court or the case against DOMA eventually reaches the Supreme Court, Dworkin's theory will either be refuted or supported. According to the results of this thesis, if one of the cases does make it to the Supreme Court, the Court has a duty to recognize that same-sex marriage is a constitutional right under the Equal Protection Clause of the Fourteenth Amendment. This thesis shows that Gerald Rosenberg's theory that the courts are weak and ineffective is not always supported by the legalization of same-sex marriage in the states. In "Saul Alinsky and the Litigation Campaign to Win the Right to Same-Sex Marriage" Rosenberg claims that the litigation campaign to legalize same-sex marriage acted too quickly ignoring that public support was lacking (667). However, Dworkin's theory demonstrates that the courts are the most effective pathway for the legalization of minority rights when public support is missing. Supporters of same-sex marriage took the necessary steps to legalize the right by going through the courts. Rosenberg would suggest that proponents of same-sex marriage should have waited indefinitely until support from the public and political elite reached a majority. If proponents in Massachusetts had followed this path, marriage would not have been legalized in 2003 and it would not have been legalized in California in 2008. Contrary to Rosenberg's claim, the litigation campaign did not ignore the lack of support for same-sex marriage. Instead, the campaign realized that the Judiciary was the

only branch of government that would fairly recognize a right to same-sex marriage when public support was lacking. Therefore, this thesis suggests that Rosenberg's theory on the development of rights does not apply to the legalization of same-sex marriage in certain states.

In *The Hollow Hope* Rosenberg describes situations in which the courts have made rulings and been unable to enforce those rulings. Therefore, he concludes that the courts are ineffective at implementing social change. The legalization of same-sex marriage in Massachusetts refutes this theory. Although the California Supreme court decision was challenged through Proposition 8, the courts in California have continued to determine the right through *Perry v. Brown* (2012). Therefore, legalization in California also refutes his theory. Despite Rosenberg's belief in the Court's ineffectiveness, it will most likely be the final arbitrator on this issue. According to Dworkin, it is the proper role of the Supreme Court to determine this constitutional issue and his theory has been supported by legalization at the state level. Proponents of same-sex marriage could not stand idly by and wait for Congress or the American people to legitimize the constitutional right to same-sex marriage as Rosenberg would suggest. This is especially true since so many states have adopted legislation defining marriage between a man and a woman. The history of the legalization of same-sex marriage has made it clear that the legislatures and the courts have been playing a tug of war game for the responsibility of determining the right. Ultimately, the responsibility must go to the Supreme Court of the United States.

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