UNIVERZITA KARLOVA V PRAZE

FAKULTA SOCIÁLNÍCH VĚD

Institut mezinárodních studií

Jakub Sochacký

The Changing Legal and Social Status of the LGBT people in the U.S. Since 1990

Diplomová práce

Praha 2015

Autor práce: **Jakub Sochacký**

Vedoucí práce: **Prof. Norma Hervey, PhD.**

Rok obhajoby: **2015**

Bibliografický záznam

SOCHACKÝ, Jakub. *The Changing Legal and Social Status of the LGBT People in the U.S. Since 1990.* Praha, 2015. 49 s. Diplomová práce (Mgr.) Univerzita Karlova, Fakulta sociálních věd, Institut mezinárodních studií. Katedra amerických studií. Vedoucí diplomové práce Prof. Norma Hervey, PhD.

Abstrakt

Práce se zabývá rolí amerických soudů a jejich rozhodnutími týkajícími se práv a postavení LGBT osob, tedy leseb, gayů, bisexuálů a transsexuálů. Hlavním poznatkem je, že soudní rozhodnutí ve prospěch LGBT osob situaci těmto lidem ještě více ztíží, jelikož autority v daných státech se často snaží obejít takováto rozhodnutí pomocí legislativních nástrojů. Avšak v dlouhodobém horizontu se soudům daří rozvířit debaty na tato témata, která je pak společnost nucena brát v úvahu, a zdá se, že v těchto debatách vítězí rozum nad předsudky a pověrami. Jednou z nich po dlouhou dobu ve Spojených státech bylo, že soužití dítěte s homosexuálem v jedné domácnosti vede k tomu, že se dítě homosexuálem samo stane. Práce také nalézá analogii mezi současnými snahami LGBT osob o zrovnoprávnění a poskytnutí antidiskriminačních ochran a americkými černochy, jelikož obě tyto skupiny čelily a stále čelí zacházení, které působí, jako kdyby byly občany druhé kategorie. Jedním z takovýchto projevů je i odepírání sňatků osobám stejného pohlaví s odůvodněním, že by instituci manželství degradovali či jinak pošpinili. Některé státy v rámci USA se snaží vytvořit alternativní instituce typu registrované partnerství, které často zahrnují stejné protekce a benefity, jako heterosexuální manželství. Takovéto instituce ovšem mohou evokovat *separate but equal* doktrínu, která měla zajistit stejnou úroveň postavení jak černým, tak bílým, ovšem realita byla jiná.

Abstract

This paper deals with the role of American courts, specifically their decisions, regarding the rights and social status of LGBT people, which is an acronym standing for lesbians, gay, bisexual and transgender persons. The main finding is that court decisions in favor of LGBTs

make lives of such people even more difficult, because authorities in states where such decisions are taken often try to circumvent these decisions using legislative powers. However, in the long term, it seems that courts manage to initiate debates about LGBT-related topics with various arguments that the American society is forced to consider. It appears that in such debates common sense prevails over prejudices and myths. One such myth that was widely accepted by society was that when a child lives with a homosexual in a common household, such child was going to become homosexual him- or herself. This paper also explores an analogy between current efforts of LGBT people to reach full equality and secure anti-discrimination measures for themselves and the struggle for civil rights of African-Americans. Both these groups have faced treatment which suggested that they are second-class citizens. One of the ways society expresses this second-class citizenry is by denying LGBTs access to the institution of marriage arguing it would be degraded or denigrated by letting same-sex couples in. Some states of the U.S. have tried to establish alternative institutions for same-sex couples such as registered partnership which usually offer the same benefits and protections different-sex couples have in marriage. Such institutions could, however, evoke the *separate but equal* doctrine which was allegedly designed to secure the same status for both whites and blacks, but of course, the reality was different.

Klíčová slova

LGBT, homosexualita, Spojené státy, právo, společenské postavení

Keywords

LGBT, homosexuality, United States, law, social status

Rozsah práce: 92 152 znaků

Prohlášení

1. Prohlašuji, že jsem předkládanou práci zpracoval/a samostatně a použil/a jen uvedené prameny a literaturu.
2. Prohlašuji, že práce nebyla využita k získání jiného titulu.
3. Souhlasím s tím, aby práce byla zpřístupněna pro studijní a výzkumné účely.

V Praze dne 5.1.2015 Jakub Sochacký

TEZE Diplomové práce

Jméno:
Jakub Sochacký

E-mail:
jakub.sochacky@gmail.com

Semestr:
summer

Akademický rok:
2012/2013

Název práce:
The Changing Legal and Social Status of the LGBT People in the U.S. Since 1990

Předpokládaný termín ukončení (semestr, školní rok):
winter, 2014/2015

Vedoucí diplomového semináře:
PhDr. et Mgr. Kryštof Kozák, Ph.D.

Vedoucí práce:
Prof. Norma Hervey, PhD

V čem se oproti původními zadání změnil cíl práce?
The aim of the diploma thesis has changed in a way that it will be more focused on specific court cases demonstrating the improving status of LGBT people in the U.S. rather than theoretic disputation based on the idea of human rights.

Jaké změny nastaly v časovém, teritoriálním a věcném vymezení tématu?
There have been no changes in terms of the time period examined, it is still intended to cover the years 1990-2012. Although regional differences will be discussed, the thesis is focused on the U.S. as a whole.

Jak se proměnila struktura práce (vyjádřete stručným obsahem)?
The structure of the thesis is going to present turning points for the LGBT community from various areas such as ground-breaking court cases, changes of public opinion etc.

Jakým vývojem prošla metodologická koncepce práce?
The sources used in the thesis will be analyzed in terms of content. It is going to be a a historical analysis and analytical description. Specific examples will be used to prove the assumptions presented at the beginning of the text.

Které nové prameny a sekundární literatura byly zpracovány a jak tato skutečnost ovlivnila celek práce?
A few new materials that I have worked with appeared along the way. These new sources have made me constantly re-think the structure of the thesis as well as the content. It is quite probable that there will be other sources in the final version of the text and some of those selected in the thesis project may be omitted.

Charakterizujte základní proměny práce v době od zadání projektu do odevzdání tezí a pokuste se vyhodnotit, jaký pokrok na práci jste během semestru zaznamenali (v bodech):
I have begun reading the sources that I was going to use which made me re-think the whole structure of the thesis. Since I have learnt during the semester that I will spend the winter semester of the 2013/2014 academic year studying in the U.S., I will be submitting the thesis a semester later than originally intended. I am going to use my time in the U.S. to gather more sources and discuss the topic with academics there which I hope will affect the thesis in a positive way.

Podpis studenta a datum:
7.6.2013

Schváleno:	**Datum**	**Podpis**
Vedoucí práce		
Vedoucí diplomového semináře		

Content

Introduction

Why is it even necessary to deal with the issue of gay rights? If we reduced the answer to this question only to the quantitative aspect we could argue that almost 9 million people in the United States identify themselves as LGBT[1] with 600,000 of them living in some sort of same-sex relationships.[2] In addition, 20 per cent of these couples raise about 250,000 children altogether.[3] I have chosen this topic because it seems that despite the fact that the LGBT issues have been increasingly debated in the media and opinion polls indicate greater acceptability of sexual minorities, not many people are aware of what initiated this trend. Therefore, I have decided to seek the causes by focusing on a particular element which is the role of courts and their verdicts in this process.

The underlying idea which threads the following thesis examines the role courts play in the United States in changing the legal and social status of the LGBT people. The presumption is that LGBTs have been able to reach greater acceptability by the heterosexual majority since 1990 as a result of litigations brought before judges by members of this minority group. Without ground-breaking cases, first involving sex and gender, followed by those concerning sexual orientation with relation to marriage and child rearing by same-sex couples, American society would still deny LGBTs right which they have achieved through court decisions.

The thesis attempts to establish a parallel between African Americans' struggle for civil rights and a struggle of sexual minorities living in the United States for legal and social equality. The legal aspect and the ultimate goal is often seen in reaching same-sex marriage to be recognized on both state and federal level. It will be examined why some same-sex couples are not satisfied with being recognized as domestic or registered partners, even when such a status provides the same protections and benefits that entail heterosexual marriage. The assumption laid here is that establishing such separate institutions evokes the *separate but equal doctrine* under which African Americans were promised to reach equality, but which was not the case. Although the analogy may seem to be stretching a bit too far because Africans Americans, as we know, were not provided with the same standards as whites when

[1] "How many people are lesbian, gay, bisexual and transgender?," Williams Institute, accessed September 14, 2014, http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographicsstudies/how-many-people-are-lesbian-gay-bisexual-and-transgender.
[2] "United States - Census Snapshot 2010," Williams Institute, accessed September 14, 2014, http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/us-census-snapshot-2010/.
[3] "The impact of expanding FMLA rights to care for children of same-sex partners," Williams Institute, accessed September 14, 2014, http://williamsinstitute.law.ucla.edu/research/marriage-and-couples-rights/the-impact-of-expanding-fmla-rights-to-care-for-children-of-same-sex-partners-2/.

they were separated, some still may see it there. While domestic or registered partners are sometimes truly given exact same rights which heterosexuals have, being omitted from marriage, because it is considered to be something holy and unimaginable to alter, still seems degrading to people who would like to be included in it.

Just as suspicious treatment of racial minorities in the United States triggers much closer and rigorous examination of such behavior by courts, the case made here is that sexual minorities should be also included in the so-called suspect or quasi-suspect group triggering such examinations to enhance their protection against unfair treatment. This would discourage others from discriminating against LGBTs and make it much easier to prove that harm has been done to them in courts.

The other aspect this thesis deals with is public opinion regarding LGBTs, because it is directly linked to court decisions. The presumption is that the overall reaction of public to court decisions extending rights for LGBTs is negative. It is based on the fact that judges are not elected by popular vote and their actions are seen as overstepping their competences and encroaching on the role state legislatures play. Difficulties related to a lack of legal recognition are also presented in the thesis to clarify why same-sex couples seek legal recognition in the first place. Only then it will be understandable why LGBTs seek help at courts and why even the Supreme Court decides to respond to calls for review of laws and state constitution amendments that impact such minorities.

The slow pace of legal recognition for same-sex couples will be examined with regard to adoptions. I presume that opponents of rights of LGBTs have feared that same-sex marriage, which they would be willing to accept if the demands stopped at this point, inevitably leads to demands for gaining the right to adoptions. Not adoptions that would result in the other partner getting legal recognition to the one who already has legal relations with a child, but adoptions where LGBTs become parents to a child at the same time, e.g. when a child is taken from an orphanage. I presume that stressing the linkage between same-sex marriage and adoptions by same-sex couples in courtrooms caused that the expansion of rights of LGBTs has been slowed as a result.

The time period examined here begins in 1990 and ends in 2012. It has been framed so because in 1990 the World Health Organization removed homosexuality from its International Classification of Diseases list (ICD).[4] 2012 was significant because President Obama publicly

[4] "European Parliament: World Health Organization must stop treating transgender people as mentally ill," The European Parliament's Intergroup on LGBT Rights, accessed September 3, 2014, http://www.lgbt-ep.eu/press-releases/who-must-stop-treating-transgender-people-as-mentally-ill/.

endorsed same-sex marriage becoming the first U.S. President to do so.[5]

Evaluation of Sources

Two articles which take rather negative stance towards issues regarding LGBTs have been used as sources for this thesis. The first one comes from a religiously-oriented journal called *The National Catholic Bioethics Quarterly*. The other is a study done by a university professor Loren D. Marks who is a Co-Director of the *American Families of Faith Project* and is involved with LDS Church, also known as the Mormon Church or The Church of Jesus Christ of Latter-day Saints.[6] It is important to note that these two articles have been found by pure chance during the process of gathering sources. It would be false to claim that these have been selected using the method of cherry-picking to intentionally support the stereotypical notion that believers always express themselves negatively towards sexual minorities. There should not be any doubt that some people who hold deeply-rooted religious believes may have positive attitudes towards LGBTs. On the other hand, the attitude of believers towards homosexuality discussed on the following pages suggests that, at least in general, smaller amount of acceptance of not-traditional relationships can be observed among such people.

An article that was of a great help was *Between a Rock and a Hard Place* written by a J.D., the Juris Doctor, candidate Alexander Bondarenko and published in Brooklyn Law Review. The article laid ground for the examination of levels of legal analysis courts apply on cases involving sexual orientation and what the implications are for LGBTs, especially affirmative action. This article proves that even students who hold only a BA degree are able to produce fantastic pieces of work that amaze readers by their complexity, depth and insight.

Ronald Bayer, whose article served as a foundation for the part of the thesis that deals with whether public expression of negative attitudes towards homosexuality is protected by the right to free speech, has been dealing with homosexuality at least since the beginning of the 1980s. His is particularly interested in the issue of AIDS in the gay community.[7] Ilan H. Meyer, the co-author of this article, has been involved in examining the relationship between sexual and racial minorities and effects of their awareness of belonging to a minority on their health. These include their responses to stress, prejudice and discrimination. It is also important to note that Mayer has provided expert testimony in civil right cases involving gay

[5] "Obama endorses gay marriage, says same-sex couples should have right to wed," Washington Post, accessed September 5, 2014, http://www.washingtonpost.com/politics/2012/05/09/gIQAivsWDU_story.html.
[6] "About Us," Brigham Young University, accessed October 23, 2014, https://americanfamiliesoffaith.byu.edu/Pages/About-Us.aspx.
[7] "Ronald Bayer, Ph.D. - Bio Sketch," Columbia University, accessed October 23, 2014, http://www.columbia.edu/itc/hs/medical/bioethics/egir/cv/Bayer.pdf.

rights. His expertise also includes how meritocratic ideology impacts health of African Americans.[8]

There are a few secondary sources which this thesis used more frequently than the others. The first one is Carlos A. Ball's *From the Closet to the Courtroom: Five LGBT Rights Lawsuits That Have Changed Our Nation*. This booked proves that Ball is highly knowledgeable about the LGBT topics. In the book, he presents five court cases from both state and federal levels. These dealt with discrimination, family matters, sexual conduct, harassment and same-sex marriage. His main argument is that court decisions have not helped LGBTs by their verdicts, but it is the attention these minorities receive from public as a result of these litigations that make them more visible and make Americans to think about the difficulties they face.

Ball's other book, *The Right To Be Parents: LGBT Families and the Transformation of Parenthood,* confirms that the author is pro-LGBT oriented. He presents arguments in support of giving LGBT's parental rights of the same extent heterosexual parents have in contrast with arguments against this. Although he always tries to present multiple points of view about the issues, it is apparent what side he supports. It has to be taken into account, however, that most of the arguments against LGBT parenting in the past have proven unfounded so a reader may be naturally inclined to disregard those that still seem to make sense as likely to be disproved by future studies.

The other important secondary source for this thesis is Jason Pierceson's *Courts, Liberalism and Rights: Gay Law and Politics in the United States and Canada.* Despite being published almost 10 years ago, it is useful for several reasons. As the title suggest, the book contrasts the status of LGBTs in the United States with the one sexual minorities have in Canada. The book is very critical of both courts and legislatures for their prejudice towards LGBTs. Nonetheless, the book expresses optimism about the possibilities for a change in the future. It also provides detailed analysis of distinct situations in individual states, which have prerogative to deal with family laws to the federal government, although he also takes into consideration the issue on the federal level. He sees the role of courts as central to the promotion of LGBT causes and as an open liberal he encourages greater judicial activism in this regard. This approach is related to the part if the book on Canada where he observes that courts in that country have accepted and used a broader form of liberalism to help LGBTs achieve equality. I believe that Pierceson fail to address or acknowledge other factors

[8] "Ilan H. Meyer – Biography Page," University of California, accessed October 17, 2014, http://law.ucla.edu/faculty/faculty-profiles/ilan--h-meyer/.

contributing to the fact that LGBTs have been gaining more rights, which are argued in this thesis.

The LGBT Casebook, edited by Petros Levounis, Jack Drescher, and Mary Barber, contributed to this thesis by its insight into the health issues connected with LGBTs who often suffer mentally from being ostracized by society. The book presents a total of twenty case studies. Despite being written for readers interested in clinical aspect of being a member of the LGBT group and, therefore, not really useful for development of arguments in this thesis, LGBT Casebook provides the human aspect and an intimate insight of the ordeals LGBTs face in their daily lives. However, the first part of the book contains chapters on LGBT parenting and others that helped me to familiarize myself with basic terminology related to LGBT issues, i.e. "to come out of the closet."

Don Haider-Markel, the co-author of *Beliefs About the Origins of Homosexuality and Support for Gay Rights*, proves that he is one of the best experts in the field of LGBT rights. Although not in this particular article used in this thesis, he stresses the similarities between the struggle for civil rights of LGBTs' and those of other marginalized groups, such as women, Africans Americans and Hispanics. He does so in his book *Out and Running: Gay and Lesbian Candidates, Elections, and Policy Representation.*

1 Historical and Theoretical Background

This introductory chapter focuses on the history and vocabulary necessary to grasp the developing legal and social implications and realities of gay rights in the post 1990 United States. What follows is rather descriptive.

1.1 United States Courts and LGBTs

As this thesis deals with many court cases concerning decisions related to sexual identity in the United States, it is necessary to understand the meaning of "judicial review". *The Encyclopedia Britannica* defines it as the authority of the courts to examine legal actions of any branch of government of states within the Union and the federal government to determine if their actions are constitutional. Constitutional refers to actions guaranteed or prohibited by any constitution, whether that of an individual state within the U.S. or the federal constitution.[9]

Courts use three different tests to determine the legal status of a law or a provision. The first level is called "a rational basis review" which requires that the challenged law needs to be rationally related to a legitimate government interest to be defended. This is the mildest of the three.[10] In *U.S. Department of Agriculture v. Moreno* (1973) based on rational basis, the Court concluded that "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[11]

The second test "intermediate scrutiny" requires that "the challenged law must further an important government interest by means that are substantially related to that interest."[12] Intermediate scrutiny is sometimes called "heightened scrutiny" and includes gender which is considered to fall within a category designated as a "quasi-suspect classification".[13]

In 2012, the Second Circuit Court of Appeals determined that gays and lesbians constitute a quasi-suspect group. Thereafter, sexual-orientation based cases have been scrutinized at this level.[14] The criteria for determining whether a case belongs to this class are:

---

[9] "Judicial Review (law)," Encyclopedia Britannica, accessed October 14, 2014, http://www.britannica.com/EBchecked/topic/307542/judicial-review.
[10] Alexander Bondarenko, "Between a Rock and a Hard Place," *Brooklyn Law Review* 79 (2014): 1714.
[11] Ibid., 1714-1715.
[12] "Intermediate Scrutiny - Wex Legal Dictionary," Cornell University Law School, accessed October 14, 2014, http://www.law.cornell.edu/wex/intermediate_scrutiny.
[13] Bondarenko, "Between a Rock and a Hard Place," 1714.
[14] Ibid, 1725.

> *A) whether the class has been historically subjected to discrimination; B) whether the class has a defining characteristic that frequently bears [a] relation to ability to perform or contribute to society; C) whether the class exhibits obvious immutable, or distinguishing characteristics that define them as a discrete group; D) whether the class is a minority or politically powerless.*[15]

The highest level of judicial review is "strict scrutiny" which must prove that "the legislature must have passed the law to further a 'compelling governmental interest,' and must have narrowly tailored the law to achieve that interest."[16] Strict scrutiny applies when there are provisions that impact religion, alienage, racial, national origin or poverty known as 'suspect classification' or suspect classes.[17] Compelling interest means that

> *...if a law may reasonably be deemed to promote public welfare and the means selected bear a reasonable relationship to the legitimate public interest, then the law has met the due process standard. If the law seeks to regulate a fundamental right, such as the right to travel or the right to vote, then this enactment must meet a stricter judicial scrutiny, known as the compelling interest test.*[18]

There are several reasons why lesbians, gays, bisexual and transgender people, hereafter known as LGBT, are not included in the *suspect class* rather than the *quasi-suspect*. One of them is that some courts have claimed that in order to belong to this category a group must prove that their identity is immutable, a fact not accepted by many. Some courts have concluded that being homosexual is a matter of choice. However, religion is obviously not an immutable trait yet religion is included in this classification.[19]

An unofficial fourth category, "rational basis with a bite," is an approach that makes it possible for courts to repeal laws despite the fact that there is no suspect or quasi-suspect group involved.[20]

---

[15] Bondarenko, "Between a Rock and a Hard Place," 1725-1726.
[16] "Strict Scrutiny - Wex Legal Dictionary," Cornell University Law School, accessed October 14, 2014, http://www.law.cornell.edu/wex/strict_scrutiny.
[17] Ibid.
[18] "Due Process (law)," Encyclopedia Britannica, accessed October 14, 2014, http://www.britannica.com/EBchecked/topic/173057/due-process.
[19] Carlos A. Ball, *From the Closet to the Courtroom: Five LGBT Rights Lawsuits That Have Changed Our Nation* (Boston: Beacon Press, 2010), 118-119.
[20] Bondarenko, "Between a Rock and a Hard Place," 1714-1715.

1.2 Morality and Homosexuality

The concept of compelling state interest is, for instance, interpreted by those seeking a ban on same-sex marriage demands that laws must reflect the moral values of the people, as was illustrated in the court case *Baehr v. Miike* in Hawaii in 1999. The claim argued that marriage reserved only for opposite-sex is too embedded in the American society to be declared unconstitutional. The opponents of same-sex marriage pointed out that it is as immoral as polygamy which the society does not permit. The plaintiffs in this case reminded the court that the same type of claims based on morality was used in cases regarding anti-miscegenation laws in the past.[21]

As Robert George sees it, Abraham Lincoln is an example of morality politics because Lincoln allegedly thought that it did not make any sense to claim the moral right to vote about the legality of slavery which was itself immoral. George sees the parallel here with the LGBTs when he says that if the same-sex practices are deemed to be immoral, then it is not moral to claim the right to engage in them.[22]

However, Jason Pierceson argues that Lincoln's understanding of morality was not based on its biblical interpretation as George implies, but on the secular faith in the Declaration of Independence which speaks about equality for all and about the right of self-improvement. The ability to develop fully as a person, therefore, must include the right to engage in intimate practices with consenting individuals.[23]

When the Supreme Court dealt with constitutionality of Defense of Marriage Act (DOMA), it examined the legislative basis on which it was enacted. After finding that moral disapproval of homosexuality formed its basis, it rejected its legitimacy referring to previous decisions in *Romer v. Evans* (1996) and *Lawrence v. Texas* (2003) where, legitimate governmental purposes based on morality was ruled to be unacceptable.[24]

An appeal to "moral values" was a concept used quite successfully during the 2004 presidential election by George W. Bush who won voters who were convinced that allowing marriage of people of the same-sex would seriously undermine their values.[25] Obviously, morality has always played an important role in American politics and is central in the debates about rights of sexual minorities.

---

[21] Ball, *From the Closet to the Courtroom*, 182.

[22] Jason Pierceson, *Courts, Liberalism, and Rights: Gay Law and Politics in the United States and Canada* (Philadelphia: Temple University Press, 2005), 50.

[23] Ibid., 50.

[24] Bondarenko, "Between a Rock and a Hard Place", 1722.

[25] Michelle A. Marzullo and Gilbert Herdt, "Marriage Rights and LGBTQ Youth: The Present and Future Impact of Sexuality Policy Changes," *Ethos* 39 (2011): 530.

1.3 Terminology Connected with LGBTs

Collocations, such as "being in the closet" and "coming out of the closet," used on the following pages may be easily understood for native speakers of English, but people whose primary language is not English could be puzzled by them. Being in the closet refers to homosexuals who hide their identity from everybody or only to certain people, perhaps friends or family members or employers. Coming out of the closet refers to the act of revealing one's identity, again to everyone or to specific groups of people.[26] Openly gay men began returning to their closets in mid-1980s as AIDS, Acquired Immune Deficiency Syndrome, infected an unprecedented number of people stigmatizing them in the eyes of the heterosexual majority. In fact, AIDS was the primary cause of death in the age group twenty-five to forty-four in the United States at that time.[27]

The HIV-stigma attached to gay people is best demonstrated in a court case from the late 1980s. A dissenting judge of the Ohio Supreme Court expressed his fears of a child adopted by a HIV-negative gay man could be infected by HIV just by living in such a household. According to the judge, all gay men represent a great risk of AIDS.[28]

Even though gay, lesbian and bisexual are terms understood by most people, the last letter of the acronym LGBT, transgender, may be confusing. A transgender person is someone whose gender identity or gender expression does not match his or her actual sex. To put it simply, transgender is a male soul in anatomically female body or the reverse. These people often seek medical help involving hormones and plastic surgery to change their bodies to match their gender identity, i.e. their inner selves. The matter might be even harder to comprehend when we take into account that transgender people can be heterosexual, homosexual or bisexual.[29]

1.4 The Right of Privacy

The right to freedom, usually component to the right to privacy, which falls under the due process clause of the 14th Amendment was recognized in *Lawrence v. Texas* in 2003

[26] Jack Drescher, "What's In Your Closet?," in *LGBT Casebook*, eds. Petros Levounis, Jack Drescher and Mary Barber (Arlington: American Psychiatric Publishing, 2012), 3.
[27] Ball, *From the Closet to the Courtroom*, 32-33.
[28] Carlos A. Ball, *Right to Be Parents: LGBT Families and the Transformation of Parenthood* (New York: New York University Press, 2012) 155.
[29] Shane S. Spicer and Laura Erickson-Schroth, "Occupational Problem: The Case of Iris: Occupational Problems in the LGBT Community," in *LGBT Casebook*, eds. Petros Levounis, Jack Drescher and Mary Barber (Arlington: American Psychiatric Publishing, 2012), 240.

when the Supreme Court repealed anti-sodomy laws.[30] The majority opinion written by Justice Kennedy said that people's privacy must be respected as long as their conduct is not harmful to others or themselves and that this applies to everyone, including LGBT persons.[31] It also provided protection against dismissal from work, restricting student speech and organizing and denying parental custody of their own children based on the charge of sodomy.[32] "For LGBT rights activists, sodomy laws became problematic not so much because of their actual enforcement against consensual sex in private but because of the ways in which they were used to justify laws and policies that discriminated against LGBT people."[33]

The right to privacy, however, continues to be a delicate issue because of the cases in which it was recognized. These cases constitute a dividing line between conservatives and liberals. In *Griswold v. Connecticut*, 1965, the Supreme Court struck down a law that prohibited the use of contraceptives by married couples, later extending it to unmarried couples in *Eisenstadt v. Baird* in 1972. Undoubtedly, the most controversial case that invoked the right to privacy was *Roe v. Wade* granting women the right to abortions.[34]

The problem with these three decisions was that all of them concerned heterosexual or procreative sex which the anti-gay movement argued did not apply to intercourse between persons of the same sex which is non-procreative. This argument seemed illogical to many considering the fact that contraceptives are used exactly to make sex non-procreative. If non-procreative vaginal sex is protected under the right to privacy then other forms of such sex - oral and anal - must be protected as well. Therefore, why were heterosexuals granted the right to engage in them and homosexuals not?[35]

Unfortunately for the LGBT community, this exact reasoning regarding the non-procreativity of homosexual sex prevailed among the judges on the Supreme Court in 1986 in *Bowers v. Hardwick* when Michael Hardwick's argument was rejected. He believed that consensual oral sex in which he was engaged with another man when police entered his home was worthy of constitutional protection just as is in cases involving heterosexual sex. The Court disagreed and said that the cases where the right to privacy was established cannot be used as precedents because all of these previous decisions involved marriage, family and

[30] Bondarenko, "Between a Rock and a Hard Place," 1714-1715.
[31] Ball, *From the Closet to the Courtroom*, 233.
[32] Jennifer C. Pizer, "From Outlaws to In-laws: Legal Standing of LGBT Americans' Family Relationships," in *LGBT Casebook*, eds. Petros Levounis, Jack Drescher and Mary Barber (Arlington: American Psychiatric Publishing, 2012), 39.
[33] Ball, *From the Closet to the Courtroom*, 209.
[34] Ibid., 209-210.
[35] Ibid., 210.

procreation.[36]

Despite defeats in the highest federal court, the sodomy laws began to be struck down by the state courts as they were unconstitutional according to the constitutions of individual states. This process started in Kentucky in 1986, just three months after the *Hardwick* decision, when a state trial judge concluded that these laws violate the due process clause, which is the one including the right to privacy. This ruling indicated that despite the unsuccessful challenges to the anti-sodomy laws on the federal level these efforts might be successful at the state level.[37]

1.5 History of Sodomy Laws

Although today's understanding of the word sodomy is most frequently connected with anal sex between two men, the evolving meaning of the word needs to be addressed in the historical context. Only then will reader be able to see how the illegality of such conduct was narrowed to target sexual minorities.

The first laws regarding sodomy, introduced in England in 1533, were transferred to the American colonies. The British Parliament approved laws which supported the goals of religious organizations. Originally these laws barred men from having anal sex with other men, but also with women, children and animals as it was behavior that could not lead to procreation.[38] By 1830 sodomy was illegal in all the states of the Union.[39]

At the end of the nineteenth century, banning of non-procreative sex was expanded to include oral intercourse regardless of the participant's sexes. It was only in the first half of the 20th century that the public perceived sodomy exclusively in connection with homosexual intercourse.[40] The turn of the century marked unprecedented growth of large cities, magnets for homosexuals.[41]

The Second World War made it possible for gays and lesbians to establish bonds with one another as homosexual people from rural areas, who otherwise would hardly encounter persons with the same sexual preferences served in the military. This resulted in a growing presence of LGBTs especially in port cities.[42] In the 1950s, all fifty states had statutes criminalizing consensual sex between persons of the same sex and all but two regarded

[36] Ibid., 211.
[37] Ibid., 211.
[38] Ibid., 206-207.
[39] Pierceson, *Courts, Liberalism, and Rights,* 63.
[40] Ball, *From the Closet to the Courtroom*, 206-207.
[41] Pierceson, *Courts, Liberalism and Rights*, 64.
[42] Ibid., 63-64.

sodomy to be a felony.[43] The first sodomy statute was repealed by the state of Illinois in 1961 following the recommendations of the American Law Institute (ALI), an organization whose purpose is simplification and clarification of American law and adjusting to changes in society. This effort was met with success as 19 other states repealed their anti-sodomy laws by the end of the 1970s. This effort of ALI was one component of the attempt to write *The Model Penal Code* to reform criminal laws in the entire United States.[44]

Unfortunately for the LGBT community, Kansas changed its legal code to decriminalize different-sex sodomy and criminalized this kind of intercourse between persons of the same sex. Many other states passed such laws. Texas redefined its sodomy statute and changed its name to Homosexual Conduct Law in 1973. This marked the moment when sodomy became officially connected with same-sex intimacy despite the fact that it had been understood to mean precisely this by the majority preceding the introduction of this law.[45]

In the 1970s, the first challenges to constitutionality of anti-sodomy laws were brought to courts in attempts to repeal both anti-sodomy laws applying to the opposite-sex as well as same-sex relationships. Most charges for breaking the anti-sodomy laws, however, resulted from arrests for such behavior in public. Very rarely were such charges made when anal or oral intercourse was restricted to private homes.[46]

The proponents of LGBT rights envisioned the end of legislatures approving anti-sodomy laws and responded through litigations. The anti-sodomy laws also complicated other legal matters, such as gaining a custody of a child for LGBTs, because courts did not approve giving custody to a sodomite.[47]

In addition to sodomy, homophobia carries additional negative meanings to be clarified. The first, external homophobia, is defined as fear and hatred that heterosexuals feel toward homosexuals, the other is, internal homophobia which signifies hatred homosexuals feel toward themselves for who they are.[48]

[43] Ibid., 62.
[44] Ball, *From the Closet to the Courtroom*, 207-208.
[45] Ibid., 207-208.
[46] Ibid., 208-209.
[47] Ibid., 208-209.
[48] Drescher, "What's In Your Closet?," 4.

2 An Analogy Between LGBTs and African Americans' Struggle for Civil Rights

An analogy between LGBTs and African-Americans is sometimes drawn because the white majority of the society claims to have accepted equal rights for Africans-Americans in a gradual fashion and the trend of advancing acceptance seems to be similar for LGBTs. Even some LGBTs claim that they should not demand full equality immediately and they should accept change gradually.[49] For example, domestic partnership seems to be more acceptable than same-sex marriage not unlike patience the African American leader and educator Booker T. Washington urged black people to have when he established the Tuskegee Institute that educated its attendees in practical skills rather than providing education whites had.

Court cases such as *Brown v. Board of Education* helped to focus the issue of the unequal treatment of people of color on the national level and initiated debate about it which resulted in greater acceptance of Africans-Americans. Similarly, the *Baehr v. Miike* of 1999 regarding the constitutionality of same-sex marriage in Hawaii, although eventually dismissed, initiated a national debate on the issue.[50] Therefore, the primary focus of this chapter is that the courts can in fact promote social changes through their findings, but they can also reverse them. These findings are reflected afterwards by legislatures that either approve laws that comply with court decisions or pursue enacting amendments to their state constitutions to avoid obeying the court. Whichever path they choose, the trend seems to be to follow the former rather than the latter in the long term as will be demonstrated in this chapter. Although many states amended their constitutions, they often void them later if the courts do not repeal some of their provisions. We should not expect, however, that once LGBTs achieve their goals, they will not need to worry about their rights being taken away from them. Africans Americans who have also celebrated victories regarding their improving legal and social status in society have been witnessing efforts trying to ostracize them during the last several years, i.e. by impeding their right to vote in some states by complicating the registration processes.

The political backlash that followed the Supreme Court decision in *Brown* shared similarities with the backlash that followed the initial, although later reversed, *Baehr* decision. In both these cases concerning civil rights, the legislatures reacted in a way that sought a

[49] Pierceson, *Courts, Liberalism, and Rights*, 51.
[50] Ball, *From the Closet to the Courtroom*, 196-197.

means to avoid the full effect of the judicial decisions. In the former case the southern legislatures reacted by passing laws preventing racial integration of schools and in the former one they passed constitutional amendments banning same-sex marriages, which are sometimes called mini-DOMAs. Such groundbreaking decisions, which completely overhaul the way a majority must begin treating a minority group, prove that disappointing backlashes usually follow controversial judicial decisions that are connected with thrilling expectations by those oppressed.[51] This is one of the weakness of the theory that says that court decisions eventually lead to positive outcomes regarding LGBT community.

Establishing alternative institutions or legal provisions to avoid full inclusion to the institution of marriage evokes the *separate but equal* doctrine under which African Americans were denied rights by being isolated from the majority. This was happened as a result of both state laws and court rulings. In addition to courts' decisions denying marriage or creating separate categories providing the same rights and benefits is in violation of the equal protection of law, some states also enacted anti-discrimination laws.

2.1 Why Alternative Institutions Do Not Suffice

Dan Foley, the attorney of the same-sex plaintiffs who sought to gain the right to get married in *Baehr v. Miike* by a Hawaiian court in the 1990s, argued that domestic partnership was not enough because it did not provide full equality to his clients even if such an arrangement would contain all the benefits married couples have at the state level. In addition, domestic partnership couples would not be eligible for the federal protection and benefits and their status would not be easily transferable to other states.[52]

Marion C. Willetts expect the only currently viable national policy regarding legal recognition of same-sex couples will be either domestic partnership or civil unions given the fact American society is still divided on the issue of same-sex marriage.[53] Registered partnership, which is available to same-sex as well as different-sex partners in most states unlike exclusively same-sex civil unions, offers the same state-level benefits married couples have in states such as California, Oregon, Nevada and Washington.[54] Republican Judith Livingston of Vermont, where the Supreme Court ordered the legislature to provide same-sex couples with a form of legal partnership at the turn of the new millennium, stressed the

[51] Ball, *From the Closet to the Courtroom*, 191.
[52] Ibid., 179.
[53] Marion C. Willetts, "Registered Domestic Partnerships, Same-Sex Marriage, and the Pursuit of Equality in California," *Family Relations* 60 (2011): 146.
[54] Ibid., 136.

importance to secure secular civil union status for all, leaving religions to determine what "marriage" is.[55]

2.2 Anti-Discrimination Measures

A study conducted in 2011 suggests that states which have implemented anti-discrimination laws provide greater earnings advantages to partnered homosexual men and women compared with those living in states that do not have such laws. In addition, male homosexual couples experience smaller penalties regarding earnings when compared to heterosexual married men, both living in states with anti-discrimination laws.[56] The earnings gap of gay men and married heterosexual men narrows to 2.6 per cent in states with such laws.[57] In accordance with an underlying presumption of this thesis, the anti-discrimination laws do improve the lives of LGBT persons, at least in terms of earnings. When data from the U.S. Censuses of 1990 and 2000 were compared, researchers found that anti-discrimination laws had almost no effect on earnings of LGBTs in 1990 but became noticeable in 2000. Baumle and Dudley attribute the dissimilarity to "differences in the 2000 data classification system compared to 1990, the use of multilevel modeling rather than disaggregating contextual characteristics to the individuals . . . and/or to the increasing acceptance of homosexuality between 1990 and 2000."[58] Interestingly enough, lesbians in the United States earn more money than heterosexual women so they are less likely to use anti-discrimination laws to gain benefits.[59] The reason for this phenomenon is elaborated on and explained in chapter 7.3.

The positive effect of anti-discrimination policies regarding homosexuals can also be observed on a much smaller scale. Wherever such policy is implemented in the workplace, there is a greater probability that the employees will reveal their sexual identity.[60] One consequence is that anti-discrimination measures contribute to a more relaxed state of mind because LGBTs do not have to waste their energy on pretending to be who they are not or to avoid answering questions about their private lives.

In 2011, András Tilcsik sought to discover if employers in the United States really disadvantage gays based on their sexual orientation during the hiring processes. His findings

---

[55] Pierceson, *Courts, Liberalism, and Rights*, 137.
[56] Amanda K. Baumle and Dudley L. Poston Jr., "The Economic Cost of Homosexuality: Multilevel Analyses," *Social Forces* 89 (2011): 1010.
[57] Ibid., 1020.
[58] Ibid., 1022.
[59] Ibid., 1023-1024.
[60] Ibid., 1024.

indicate that gay men who are open about their sexuality on their job application are 40 % less likely to be invited for an interview. The numerical difference is almost the same as the gap between white and black job seekers invited for an interview in a 2004 study conducted among Boston and Chicago employers.[61] As the author of the study points out, it is difficult to successfully pursue anti-discriminatory laws in hiring in comparison with issues that occur during employment such as promotions, wage increases or firing because it is not easy to prove acts of discrimination at the initial stage.[62]

At the federal level, the Employment Non-Discrimination Act, ENDA, has been introduced in Congress almost every year since 1994 but never passed due the concern that it would enforce implementation of affirmative-action programs for homosexual men and women.[63] Although ENDA was passed by the Senate on November 7, 2013, the Republican-controlled House of Representatives is most likely to reject it.[64] There are obvious regional differences. States where employers tend to be more discriminatory include Texas, Florida and Ohio. States with smaller levels of discrimination are New York, Pennsylvania and California.[65]

2.3 Affirmative Action for LGBTs?

The risk connected with anti-discrimination measures is that some perceive them to be preferential treatment or affirmative action.[66] That is what happened with Amendment 2 to the Colorado State Constitution, approved by a majority of voters in a referendum in 1992. It outlawed anti-discrimination protections based on sexual orientation in reaction to certain counties that had introduced them. The Amendment was eventually declared unconstitutional by the United States Supreme Court in *Romer v. Evans* of 1996 as the finding of the Court indicated that it did not serve any state interest and was aimed exclusively against sexual minorities.[67] Interestingly enough, the referendum was the result of a conservative group called *Colorado for Family Values*, which succeeded in creating a catchy slogan, "equal rights — not special rights," which took roots with voters and which the opponents were unable to

[61] András Tilcsik, "Pride and Prejudice: Employment Discrimination against Openly Gay Men in the United States," *American Journal of Sociology* 117 (2011): 614.
[62] Ibid., 615.
[63] Bondarenko, "Between a Rock and a Hard Place," 1706.
[64] Ibid., 1710.
[65] Tilcsik, "Pride and Prejudice: Employment Discrimination against Openly Gay Men in the United States," 614.
[66] Ball, *From the Closet to the Courtroom*, 103-104.
[67] "Romer v. Evans 517 U.S. 620 (1996)," Justia U.S. Supreme Court Centre, accessed September 8, 2014, https://supreme.justia.com/cases/federal/us/517/620/case.html.

counter.[68]

To explore these issues it is necessary to look at the bigger picture which also relates to the analogy between LGBTs' and African Americans' struggle for civil rights explained in chapter two. Supreme Court cases regarding affirmative action of the last twenty to thirty years became known as "white rights". Cases brought by white people argued that affirmative action programs were discriminatory to them on the basis of race. This also meant that strict scrutiny, previously triggered by efforts suspected to be targeting racial minorities now extend to affirmative action programs as these were perceived to be racist themselves.[69] The analogy between racial and sexual discrimination through these programs is very easy to draw.

The most prominent Supreme Court case to deal with affirmative action was *City of Richmond v. J.A. Croson Co.* of 1989. Although not LGBT-related, this case involving racial minorities demonstrates that the Court refuses to remedy past and present discrimination because they declare such injustice is simply immeasurable. This case was about *Minority Business Utilization Plan* in Richmond, VA, which required that the city construction contractors subcontract 30 per cent and more of contracts' value to "Minority Business Enterprises" (MBEs), in other words, to non-white subcontractors. The Court held that remedying past discrimination can be applied only as a result of specific instances of discrimination because doing so based on our general awareness of what we know was happening to African Americans is unjustifiable as "an amorphous concept of injury that may be ageless in its reach into the past."[70] The Court stated that it does not rule out using affirmative action completely, but the city of Richmond failed to supply the Court with specific evidence of discrimination against racial-minority subcontractors from the past that could be rectified by implementing an affirmative-action program.[71]

2.3.1 Affirmative Action in Education

Despite public's perception, affirmative action at schools does not always result in "preferential" treatment during the admission process. It also includes post-admission programs of students. One of these can be setting up so-called gay-straight alliances (GSA), the first of which was established in Boston in 1980s. It developed into "National GSA" in

[68] Ball, *From the Closet to the Courtroom*, 104-105.
[69] Bondarenko, "Between a Rock and a Hard Place," 1728-1729.
[70] "Regents of Univ. of California v. Bakke 438 U.S. 265 (1978)," Justia U.S. Supreme Court Centre, accessed September 15, 2014, https://supreme.justia.com/cases/federal/us/438/265/case.html.
[71] Bondarenko, "Between a Rock and a Hard Place," 1729-1730.

1998. The aim of the organization is to reduce harassment, violence and discrimination of LGBTs through various activities such as sponsoring social events that promote inclusion or promoting school policies that condemn anti-LGBT behavior. The people targeted by these initiatives include school staff and students.[72]

Some state legislatures addressed the question of promoting tolerance and denouncing intolerance in education. For example, the California legislature passed the *FAIR Education Act* (Fair, Accurate, Inclusive, and Respectful) in 2011 that required educational materials in the state to include information about contributions of LGBT persons to the development of the state as well as the entire country. These laws basically restricted the right to free speech of the teachers and students, protected by the 1st Amendment of the US Constitution. Sometimes the teachers and students have beliefs conflicting with those promoted by GSA or the *FAIR Education Act.* They put themselves at risk by expressing them publicly. Moreover, parents are often against the fact that their children are exposed to what they call "indoctrination." They do not wish their children to be "raised" by the school staff to be pro-gay rights.[73]

Critiques of affirmative action for LGBTs include:

> *(1) the acceptability of LGBT-inclusive formal and informal curricula, such as California's FAIR Education Act and GSAs, respectively (the GSA is a student club and not a part of formal school curricula); (2) student speech expressing anti-LGBT views, which may range from opposition to LGBT rights or school endorsed efforts to reduce homophobia to antipathy toward LGBTQ individuals; and (3) school personnel speech and, related to this, the rights of counselors and therapists to practice their profession in a manner consistent with their anti-LGBT, purportedly religious beliefs even if these go against professional standards of practice and ethics.*[74]

Opponents of affirmative action for racial minorities argue that government should be color-blind, i.e. neutral. However, what they do not take into account is that neutrality can in fact promote inequality because it ignores socioeconomic and historical factors that created it

[72] Ilan H. Meyer and Ronald Bayer, "School-Based Gay-Affirmative Interventions: First Amendment and Ethical Concerns," *American Journal of Public Health* 103 (2013): 1765.
[73] Ibid., 1765-1766.
[74] Ibid., 1766.

initially.[75] The same analogy can be applied to LGBTs.

3 Judicial Activism

The U.S. courts serve multiple roles in acceptance of LGBTs' acceptance by the heterosexual majority, while decisions do not always support LGBT cause. It appears that even decisions against extending rights to sexual minorities have had a positive impact in terms of increasing awareness of these issues. Without the lawsuits, constantly presented and debated in the media, public would not be aware of the issues.

Today, charges are often made against American courts, saying that they overstep their authority because state *legislatures,* not courts, should be responsible for making laws. Courts across the country have long been blamed for ruling against the will of majority of society. But courts are charged to determine whether or not laws are unconstitutional. For example, when the Supreme Court of California ruled in 1948 in *Perez v. Sharp* that anti-miscegenation laws violated the Constitution, the majority of Americans approved of such laws. In fact, comparable laws existed in thirty states in which the majority of African Americans lived. Moreover, previous legal challenges to these laws failed as the courts responded that it was an issue for state legislations and that anti-miscegenation laws were an inseparable aspect of the nation's history. However, after the *Perez* ruling was issued, legislatures of many states repealed their laws. By the time the Supreme Court handed down its decision, declaring anti-miscegenation laws to be unconstitutional, there were only sixteen states with such laws. Interestingly, resistance against this decision was almost non-existent. A parallel can be drawn here between *Perez* and the initial groundbreaking decision of the Hawaiian Supreme Court in *Baehr v. Miike* that denying same-sex couples the right to marry violates the equal protection clause of the Hawaiian Constitution. Yet this initial decision initiated a series of court battles that have often been successful leading many state legislations to repeal such laws.[76]

Ball says that *Baehr* and subsequent court cases brought the issue of the rights of same-sex couples before the American public and that, without these cases, there would not have been even discussion of legal rights or any rights.[77]

However, some African Americans reject any parallel between anti-miscegenation laws and the ban on same-sex marriage. A group of black California pastors claim that

[75] Pierceson, *Courts, Liberalism, and Rights*, 61.

[76] Ball, *From the Closet to the Courtroom*, 194-195.
[77] Ibid., 193.

> *. . .hetero-exclusivist marriage laws are 'rationally' grounded in the 'natural biology' of male/female relationship, whereas anti-miscegenation laws were anchored in irrational and racist 'pseudoscience'. So science, illegitimately used against communities of color, is rightly applied to the biologically gendered institution of marriage. Racial analogies to sexual orientation are framed as not simply misguided but deeply offensive to African Americans.*[78]

The roots of LGBTs seeking help in courts date to the late 1970s when legislatures failed to abolish of sodomy laws. As LGBT activists perceived these laws to be the greatest hurdle in their way to achieve equality, they turned to courts.[79] Although *Baehr v. Miike*, the Hawaiian state court case initiated in 1990, did not legalize same-sex marriages, it had major consequences for the LGBT community. The publicity of this case shed light on them and their legal problems making the American heterosexual majority aware of these issues. Fourteen states enacted laws that prohibited discrimination based on sexual orientation joining the seven with such laws in place. Furthermore, thirty states passed laws protecting sexual minorities against hate crimes.[80]

Ball claims that the reason why sodomy laws were repealed by the Supreme Court in 2003 in *Lawrence v. Texas* was that the Justices were aware of the cases in lower courts after the Court's decision in *Bowers v. Hardwick* of 1986 upholding sodomy laws. Later lower-courts cases demonstrated that LGBTs were committed to each other creating strong relationships which shattered the stereotypical thinking about them.[81]

Paradoxically, the term "judicial activism" that is today used by conservatives to criticize courts perceived to be too liberal was coined by Arthur Schlesinger in 1947 to describe conservative judges who opposed governmental reforms during the Progressive and New Deal eras. Today's understanding of the term has its roots in the late 1960s when the Warren Court rulings were attacked as being too liberal. In the 1990s conservatives successfully learned how to mobilize their supporters to react to court decisions expanding individual rights, using judicial activism.[82] An argument against such courts is that appointed judges present themselves as moral philosophers and impose their judgement onto elected

[78] Nancy D. Wadsworth, "Intersectionality in California's Same-Sex Marriage Battles: A Complex Proposition," *Political Research Quarterly* 64 (2011): 209-210.
[79] Ball, *From the Closet to the Courtroom*, 208-209.
[80] Ibid., 196.
[81] Ibid., 225.
[82] Ibid., 188.

representatives.[83]

The term judicial activism is being used with increasing frequency, especially during the latter part of the twentieth century. “Judicial activism” or “judicial activist” appeared 3,815 times in law review and journal articles in 1990s. During the first four years of the twenty-first century, the number was 1,817.[84]

The opposite of judicial activism is called judicial minimalism. Judicial minimalism is best illustrated in the example of Vermont’s Supreme Court in 1999 in their ruling, that the legislature cannot prohibit same-sex couples from being recognized and ordered it either to allow same-sex marriages or to create another legal form that would be equivalent in terms of rights. The court stressed that if the legislature does not act, then it would enforce the ruling on its own. This approach made it possible to include legislators in the process of dealing with the issue. The court’s ruling may have been to avoid a backlash from the opponents which happened when the Supreme Court of Hawaii issued a similar decision without inclusion of the legislative branch in the 1990s.[85]

Pierceson claims that appeals of homosexuals to public opinion or legislators is not effective unless it is supported by litigation. In other words, arguing that same-sex couples should be given the right to get married, because they recognize the institution and want to be included in it, not to destroy it, persuades neither public nor legislators. The legislators must be, according to Pierceson, forced to take action by a court decision, as happened in Vermont in *Baker v. Vermont* in 1999. Only then do they consider the personal, often heartbreaking, stories of same-sex couples denied legal commitments.[86]

Despite the opposition of Vermonters and Americans in general, to establishing civil unions for same-sex couples at the time the Vermont law was passed, within five years the majority approved of such laws. That indicates how quickly public opinion in this area can change.[87] In 2009, the Vermont legislature became the first in the United States to pass a law allowing same-sex marriage without any court case.[88]

Judicial reluctance in late 20th century to deal with cases involving homosexuality, or unfavorable decisions for gays and lesbians stem from several causes. The first is that federal judges often bring with them their own political biases as well as supporting for the agendas

[83] Pierceson, *Courts, Liberalism, and Rights*, 10.
[84] Dave Tell and Eric Carl Miller, "Rhetoric, Rationality, and Judicial Activism: The Case of Hillary Goodridge v. Department of Public Health," *Advances In The History Of Rhetoric* 15 (2012): 190.
[85] Pierceson, *Courts, Liberalism, and Rights*, 134.
[86] Ibid., 131-132.
[87] Ball, *From the Closet to the Courtroom*, 193.
[88] Ibid., 192-193.

of those who appoint them. Since 1968, mostly conservative Presidents appointed federal judges. Judges are also known for reflecting society's views and the societal homophobia of this era is undeniable.[89]

It is doubtful that conservatives will be able to rely on the Supreme Court's conservative majority to sustain a ban on same-sex marriage in the future. The Chief Justice John Roberts, born in 1955, is likely to serve for several decades. It is not likely that he will reverse his own court decisions while public opinion supports non-discrimination and equality for LGBTs.[90]

4 Americans' Perception of LGBTs

The growing acceptance of LGBTs by Americans is well documented. The number of people who believe that same-sex couples should have the right to get married more than doubled between 1988 and 1996 from 12 % to 27 %. The number of people who opposed it decreased from 73 per cent to 65 during the same period. Ten years later, in 2006, the number of supporters has grown to 39 per cent and the number of opponents fell to 51. Ball explains this trend by the *Baehr* and other court cases that initiated a national debate about the LGBT rights.[91] ABC News in cooperation with the *Washington Post* took a poll in 2009 the result of which was that 49 per cent of Americans expressed their approval of gay and lesbian marriages. Moreover, the number was 66 % in the age group 18-29.[92, 93]

Brewer and Wilcox attribute a temporary drop of support for same-sex marriage, calling it a "backlash", to other court decisions *Lawrence v. Texas* of 2003 which decriminalized sodomy and *Goodridge v. Department of Public Health* of 2003 which legalized same-sex marriages in Massachusetts.[94] So, courts do not always make lives of LGBTs easier, despite verdicts favorable to them.

[89] Pierceson, *Courts, Liberalism, and Rights*, 6.
[90] Bondarenko, "Between a Rock and a Hard Place," 1743.
[91] Ball, *From the Closet to the Courtroom*, 195-196.
[92] Marzullo and Herdt, "Marriage Rights and LGBTQ Youth," 530.
[93] See the supplement number 1 at the end of the thesis.
[94] Paul R. Brewer and Clyde Wilcox, "THE POLLS - TRENDS: Same-Sex Marriage and Civil Unions," *Public Opinion Quarterly* 69 (2005): 603.

Gregory B. Lewis's research collected data of people who personally know LGBs[95] and he found the following:

> *. . . only 14 percent of those born before 1910 know LGBs, compared with 45 percent of those born in the 1940s and 56 percent of those born in the 1980s. In the combined logit, each decade from 1910 to 1940 raises the probability of knowing LGBs by about 12 percentage points, but those born in the 1980s are only a statistically insignificant 6 percentage points more likely than similar individuals born in the 1940s to know LGBs.*[96]

He goes on to explain that in 1983, 25% of Americans knew someone who was homosexual. The number grew from two thirds to 75% as of 2010. Moreover, 50% have a homosexual family member or a close friend. When we take into account that knowing LGBTs increases the probability of supporting gay rights by 10-20 points, as research suggests, that number transfers to a 5-10 per cent of overall support for LGBT rights in society.[97]

Available polls indicate that Americans who personally know some LGBTs support gay rights and accept homosexuality more than Americans who have not have no personal experience with homosexuals.[98] Numerically, there is a 12.7 percentage gap of gay-support between those two groups including those who are demographically and politically similar.[99] Even conservatives and evangelical Protestants are about 0.25 per cent more likely to support gay rights when they have personal contact with them.[100] As for religious people in general, weekly church-goers or those who claim that religion is an important part of their lives say that only 4 per cent likely to know LGBs.[101]

Heterosexuals, who have a close personal friend who is gay are more likely to support same-sex marriage, adoption and employment rights for LGBTs as they think that their friends did not choose their sexual orientation.[102] The amount of support for same-sex marriage rises significantly among heterosexuals who have a gay or lesbian family member.[103] It is true, however, that LGBTs are more likely to come out to people who are

[95] The research did not examine transgender people, that is why the acronym used here is LGB, not LGBT
[96] Gregory B. Lewis, "The Friends and Family Plan: Contact with Gays and Support for Gay Rights," *The Policy Studies Journal* 39 (2011): 225.
[97] Ibid., 236.
[98] Ibid., 217
[99] Ibid., 228.
[100] Ibid., 236.
[101] Ibid., 225.
[102] Ibid., 228.
[103] Ibid., 228.

most likely accept them.[104]

The results of a study conducted by Haider-Markel and Joslyn show that people who believe homosexuality is an identity persons are born with, rather than a deliberate choice, tend to be more accepting of gays. They accept the unchangeability of their sexuality. People who believe that homosexuality is a choice tend to oppose gay rights for homosexuals.[105] The study also says that the first group usually consists of liberals and the other of conservatives and religious persons.[106]

Persons who went through a process called "normalizing" during their childhoods, whose parents spoke positively about LGBTs, were much more likely to recognize expressions of prejudice or heterosexism against LGBTs as negative than those lacking childhood opportunities. They often responded negatively to gay rights, but they had to use cognitive resources as they confronted confusion and an inner conflict. In other words, it required longer time to identify why they reacted as they did.[107] Some learn through being exposed to negatives towards gays. People who have witnessed picketers at funerals of gay men report having greater understanding of the challenges sexual minorities face.[108]

According to Lewis, there is a correlation between knowing gays and levels of education. Every year of additional education increases the possibility of knowing a LGB person by 3.4 per cent. For example, 63 per cent of people with graduate degrees know LGBs compared with 30 per cent of high school dropouts.[109]

Although it is not surprising that people respond to their personal relationships with homosexuals, it is interesting to note that this also has an effect on legislators. When the Vermont House Judiciary Committee, was drafting a bill establishing same-sex legal status in the late 1990s, the members projected their own lives into the draft. Six of them were in long-term heterosexual relationships, two were in a long-term unmarried relationships, one gay man was in a seven-year relationship and one was a single mother. Not all of the members lived in traditional marriages. The single mother felt strongly opposed the notion that a traditional nuclear family was best for a child's upbringing.[110]

---

[104] Ibid., 235.
[105] Donald P. Haider-Markel and Mark R. Joslyn, "Beliefs about the Origins of Homosexuality And Support For Gay Rights," *Public Opinion Quarterly* 72 (2008): 306.
[106] Ibid., 307.
[107] Rebecca Stotzer, "Straight Allies: Supportive Attitudes Toward Lesbians, Gay Men, and Bisexuals in a College Sample," *Sex Roles* 60 (2009): 77.
[108] Ibid., 76.
[109] Lewis, "The Friends and Family Plan," 224.
[110] Pierceson, *Courts, Liberalism, and Rights*, 138.

Researchers seem to agree on three basic reasons explaining why young Americans are more supportive of same-sex marriage today:

> *(1) the social lessons learned through the HIV/AIDS epidemic (2) the increased media and political attention to the marriage movement, including more frequent appearances of "LGB" characters or personalities in popular media (3) increasing access to information about sexuality and gender found on the internet*[111]

4.1 How do LGBTs perceive themselves?

In 2006, a series of studies among 528 young, self-identified LGB persons age 15-19 was conducted to examine their attitudes toward same-sex marriage, long-term relationships and parenting. It is important to note that all of the participants actively participated in various organizations for LBG youth. Moreover, it could be claimed that they did not represent the LGB community geographically because the participants were from the New York City region. 78 per cent of girls and 61 per cent of boys reported that they would seriously consider getting married if same-sex couples were allowed to do so.[112]

Girls generally reported higher level of interest in long-term relationships, marriage and raising children, but both sexes favored monogamous relationship. Eighty per cent of lesbians and bisexual girls and 66 per cent of gays and bisexual males assessed long-time relationships to be very important or important. Only 2 girls and 21% of boys rejected the idea of marriage for themselves if LGB unions were legal. Regarding monogamous relationships, 82 per cent of girls and 60 per cent of boys expected to be in such relationships within 5 years. 82% of boys and 92% of girls expected to be in such relationships before the age of thirty and 75 per cent hoped to live with their partners. The majority of those who supported the idea of same-sex marriage were previously involved in a same-sex relationship, although these did not always involved sexual acts. The young people who came out of the closet to their families were also more likely to support the idea of marriage for themselves. In comparison with previous generations of LGBT youth, the 1990s and later generations reject more vehemently the perception of homosexuality as a deviance or a mental illness, an idea that contributed to loneliness and isolation for previous generations. This is probably caused by the greater possibility of access to media information about gay issues. Although the polled youth reported various sources of information, the most prevalent was the Internet.[113] It is

[111] Marzullo and Herdt, "Marriage Rights and LGBTQ Youth," 539.
[112] Ibid., 540.
[113] Ibid.," 540-541.

comprehensible when we take into account the region in which these studies were conducted, i.e. New York City and surroundings.

4.2 What Affects Americans' Perception of LGBTs

Some of the participants, even those had not known any LGBTs, empathised with them after they experienced hatred towards them that seemed unfounded and which they perceived to be based on ignorance. One of the participants reported that her positive attitude toward LGBTs was solidified not by knowing somebody who was LGBT, but after some people came to her school to protest against a play they were rehearsing about killing Matthew Shepard, a young homosexual who was murdered for being open about his sexuality in Laramie, Wyoming in 1998. These protesters shouted that everyone involved with preparation of the play would go to hell. Some reported being witnesses to hate crimes and other forms of violence. For example, one person was beaten because his mother was a gay-rights supporter.[114]

People who were members of minority groups whether, religious, racial or ethnic, reported being more likely to support LGBTs. For example, one biracial participant said that he would not be happy if people were saying "oh, that is so Chinese" referring to a saying "that is so gay" implying something like weak, weird or despicable. This study did not require that participants had any LGBT friends. Similar attitudes could also be seen among other types of participants, such as people who had been bullied.[115]

4.2.1 Beliefs in Biological Causes of Homosexuality

The scientific community does not unanimously declare that homosexuality is biological. There are many experts who question this, although genetics is seen as more likely to be the cause with each new decade.[116]

Even if the genetic explanation is eventually accepted by all scientists, there is a risk of seeking specific genes leading to some intervention in order to "cure" LGBTs.[117] The question remains if being born homosexual is a handicap of the same seriousness as, for instance, being born deaf. Just as most people would probably support curing a person unable to hear in order to provide him or her with the same opportunities that people who can hear enjoy, could not homosexuality be seen in this way? One could argue that a homosexual

[114] Stotzer, "Straight Allies," 75.
[115] Ibid.
[116] Haider-Markel and Joslyn, "Beliefs about the Origins of Homosexuality And Support For Gay Rights," 308.
[117] Ibid.

person should be given the right to reproduce himself or herself without any restrictions such as the need to seek a surrogate mother.

Martinez, Wald and Craig suggest an interesting connection between blacks and gays based on the belief that gayness is chosen, not innate. There is a so-called threat hypothesis which presumes that people who fear a specific group of people believe there are greater numbers in the size of that population. This hypothesis applies, for instance, to the estimates of black population size by whites who feel threatened by blacks as one stereotypical perception of blacks remains a negative one. Interestingly, people who dislike gays and feel threatened by them estimated lower numbers of homosexual population. According to the study, the reason for these low estimates is that many people who are anti-gay do not believe homosexuality is innate.[118]

It is necessary to prove that homosexuality is innate because, as Haider-Markel and Joslyn claim:

> . . .even as fewer Americans attribute biological causes to the lower socio-economic status of blacks and fewer Americans support bans on interracial marriages, individual beliefs that blacks have native learning disabilities strongly correlate with support for bans on interracial marriage. Conversely, the percentage of Americans believing that homosexuality is innate has steadily increased, as has support for legal recognition of same-sex marriage. And, as was the case for blacks, the biologically based attribution is strongly correlated with opinion on gay marriage.[119]

Based on data from a 2006 Gallup national survey, establishing a biological attribution increases the probability that people will support same-sex relations by 37 % and a belief that homosexuality is morally acceptable increases it by 40 percent.[120]

---

[118] Michael D. Martinez, Kenneth D. Wald and Stephen C. Craig, "Homophobic Innumeracy? Estimating the Size of the Gay and Lesbian Population," *Public Opinion Quarterly* 72 (2008): 764-765.
[119] Donald P. Haider-Markel and Mark R. Joslyn, "Attributions and the Regulation of Marriage: Considering the Parallels Between Race and Homosexuality," *Political Science & Politics* 38 (2005): 237-238.
[120] Haider-Markel and Joslyn, "Beliefs about the Origins of Homosexuality And Support For Gay Rights," 301-302.

However, even in the medical community there seem to be disagreement about why a person is homosexual. American Association of Pediatricians (AAP) stated in 2008 that:

> *There is no consensus among scientists about the exact reasons that an individual develops a heterosexual, bisexual, gay, or lesbian orientation. Although much research has examined the possible genetic, hormonal, developmental, social, and cultural influences on sexual orientation, no findings have emerged that permit scientists to conclude that sexual orientation is determined by any particular factor or factors.*[121]

4.3 Differences Between Men and Women in Perception of LGBTs

Men in general are less likely to have positive attitudes to LGBTs than women, It is still unclear why, but a possible reason is that homosexuals usually come out to their female friends in high school while they come out to their male friends in college.[122] Another possibility is that men had less time to adapt when the polling was done.

Men reported fewer media sources as factors determining their attitudes towards LGBTs than women. It remains unclear whether men are less likely to search or read them or whether they do not consider them to be important sources.[123]

4.4 Condemning Homosexuality Based on Religious Beliefs

Religious freedom advocates argue that they should be allowed to express their deeply-held beliefs regarding homosexuality, including those that say that homosexuality is a sin. Mayer and Bayer address this issue by saying that: "Religious freedom is a freedom to practice one's religion, not the freedom to insist that others abide by it."[124] A court case often mentioned when schools seem to be interfering with religious beliefs or free speech protections on school grounds is *Harper v. Poway* of 2006. The case dealt with a 15-year old boy who wore a T-Shirt that said that gays and lesbians were shameful and that they are condemned by God. After he was asked to remove it, a series of court battles was initiated with the boy arguing that his free speech and religious expression rights were abridged. But

---

[121] "Answers to Your Questions for a Better Understanding of Sexual Orientation and Homosexuality," American Psychological Association,
accessed September 26, 2014, http://www.apa.org/topics/lgbt/orientation.aspx.

[122] Stotzer, "Straight Allies: Supportive Attitudes Toward Lesbians, Gay Men, and Bisexuals in a College Sample," 77.

[123] Ibid.

[124] Meyer and Bayer, "School-Based Gay-Affirmative Interventions," 1769.

the courts opined that all students have a right to learn in peace and to be sheltered from attacks on inseparable aspects of their personalities that have a potential of harming them psychologically. Disagreement is allowed, but it has to be expressed in a civil way that does not disrupts the school mission of peaceful educating.[125]

Mayer and Bayer assert that:

> *Speech restrictions can be applied to protect the school environment from violence and disruption, but what defines violence and disruption is not without debate. In fact, not only physical attacks and threatening behavior may be prohibited but also verbal or physical activity placing someone in fear of being physically attacked, and verbal or physical activity that can reasonably be foreseen to lead to substantial disruption or interference with the rights of others on school grounds. In such cases, school officials can, and, indeed, are expected to, take steps to restrict bullying and other potentially harmful behavior.*[126]

In addition, any interventions that seek greater inclusion of LGBT persons in society contribute to its diversity by preparing both LGBT and non-LGBT students to live and work in such an environment.[127] Studies have also proved that colleges where gay-straight alliances operate reduce the suicidal rate of sexual minorities in comparison with the heterosexual minority.[128]

4.5 Campaigning for LGBT causes

A shining example of a badly-led campaign by pro-LGBT activists that may have caused a loss of public support followed by a loss of equality, expressed in a short-lived legality of same-sex marriage, was California's Proposition 8. Proposition 8 was approved by 52 per cent of those who voted and it reversed a five-month-old decision of California's high court to allow same-sex marriage.[129] Before voting on this issue took place, the pro-gay campaigners united in a "Equality for All" organization, creating a website to support their cause. The problem was that the website depicted mainly white supporters. An organization opposing same-sex marriage and supporting Proposition 8 called "Protect Marriage" placed two out of

[125] Ibid., 1767-1768.
[126] Ibid., 1766.
[127] Ibid., 1766.
[128] Ibid., 1765.
[129] Wadsworth, "Intersectionality in California's Same-Sex Marriage Battles," 201.

three rolling home-page banner images and three of four heading banners depicting families of color. While "Protect Marriage" was offering various types of documents including downloadable brochures and posters on their websites in 15 languages, "Equality for All" offered only several documents in Spanish, the majority in English. Regarding commercials, Protect Marriage aired three out of nine ads featuring people of color as well as some ads in Spanish, while Equality for All featured only two commercials with non-white celebrities.[130]

5 LGBTs and Parenting

The history of gay persons trying to adopt children in the U.S. is a long one of difficulties. Sometimes the courts' reasoning is beyond believing just to prevent gay couples from adopting. Even though the following case lies outside the time scope of this thesis, the illogical ruling of an Ohio court from the late 1980s clearly demonstrates that the courts cannot be relied to promote social progress. Lee Balser, a psychological counselor, tried to adopt a four-year old boy named Charlie who he was treating as a result of the child's abuse. This ill-treatment led to Charlie's many developmental difficulties.[131] The Ohio Court of Appeals that dealt with this case argued that adoption is unavailable to homosexuals because they do not have the ability to procreate. This reasoning is, of course, ridiculous because many heterosexual couples also adopt children exactly because they have not been able to conceive a child. A judge at a lower court in an earlier ruling also demonstrated an inability of courts to understand the situation when he asked if Lee Balser was going to turn Charlie into a homosexual.[132]

Similarly, before same-sex marriage was legalized by the Supreme Court of Vermont, in *Baker v. Vermont* in 1999, a judge in a lower trial court dealing with this case accepted the argument of the state's legislature that marriage had to be for different-sex spouses only to preserve procreation and raising children. This argument, in the judge's opinion, sufficed to meet the rational basis test, which is the lowest of courts' options. Logically, the Supreme Court of Vermont latter dismissed this claim, providing the same argumentation about heterosexuals who sometimes lack the possibility to procreate, yet nobody denies their right to marriage or adoptions. [133]

The second part of this lower court's reasoning was that adoption has to provide a possibility for any child to fit into society without everyone knowing that he or she had been

[130] Ibid., 210.
[131] Ball, *Right to Be Parents*, 151.
[132] Ibid., 153.
[133] Pierceson, *Courts, Liberalism, and Rights*, 132.

adopted. This is not possible when it is obvious to everyone that a child raised by a same-sex could not have been conceived naturally.[134] Ball says that the court concluded this argumentation by saying that "a fundamental rationale for adoption is to provide a child with the closest approximation to a birth family that is available."[135] This argument also rests on unstable grounds. The very same Ohio Court ruled, in 1974, that a white couple could adopt an African American child and it also ruled in 1962 that a white man and his Asian wife could adopt a Latino child. The argument of "blending", therefore, is unjustifiable.[136]

Ball points out that courts today treat gender very differently in cases involving heterosexuals and homosexuals, ignoring issues focused on the former. For example, courts used to presume that children would be better cared for by mothers than fathers after a divorce. Similarly, fathers were required to pay alimony after a marriage failed, but not mothers. This way of thinking, suggesting that one gender is naturally superior in certain aspects of family life, is history today for heterosexuals. But, when there are cases involving adoption by same-sex couples, many courts still decide against it arguing that adopted children need to experience the different roles of men and women in a family.[137] This is the reality of today despite the Supreme Court's ruling in *United States v. Virginia* of 1996 that law cannot tolerate "overbroad generalizations about the different talents, capacities, or preferences of males and females."[138]

Carlos Ball suggest that we should start thinking about the words "mother" and "father" as verbs rather than nouns. When we do that, only then we will realize that the category that really matters is that of a "parent" because "mothering" and "fathering" does not necessarily correspond with the gender of the parent doing one or the other. Moreover, the law should not rely on mere assumptions about sex-based capabilities of individuals to raise children.[139]

5.1 Adoptions to Same-Sex Partners

Parental rights for same-sex couples have also evolved gradually rather than precipitously. Before 1990, it was very rare to secure parental rights for same-sex couples. Gays and lesbians were only able to obtain parental rights as individuals. But, since 1990,

[134] Ball, *Right to Be Parents*, 154.
[135] Ibid.
[136] Ibid.
[137] Ball, *Right to Be Parents*, 192.
[138] "United States v. Virginia 518 U.S. 515 (1996)," Justia U.S. Supreme Court Centre, accessed September 28, 2014, https://supreme.justia.com/cases/federal/us/518/515/case.html.
[139] Ball, *Right to Be Parents*, 192-193.

there has been a substantial growth of so-called joint adoptions, allowing two individuals to become parents of a child at the same time.[140]

Although the concept of *presumption,* in terms of unequal protection and the relation to the Full Faith and Credit Clause, is elaborated further in chapter 7.1, it is necessary to clarify the connections to adoption. Only then will people understand the pain of both same-sex and heterosexual families when they relocate.

When a child is born to a heterosexual couple, such a couple is automatically given all parental rights. It is presumed they are the actual parents in spite of the possibility that the women conceived the child through intercourse with another man or a second man donated his genetic material.[141]

If a same-sex couple from a state where such marriages are allowed moves to another one where such institutions do not exist or are prohibited, there is a great risk that the parents will lose their parental rights as it is illegal for a child to have two mothers or two fathers in such states. In such cases, it is advisable to secure court judgements of parenting rights for both because the states must respect these judgements even when they go against their own laws.[142]

5.2 Do Children Raised by Homosexuals Differ?

Critics of studies that allegedly prove that children raised in homosexual families are no different from those raised by heterosexuals claim that participants in such studies are, maybe deliberately, improperly sampled therefore, the samples are not representative. A brief published in 2005 by American Academy of Pediatrics (AAP) which is often used as evidence that parents' sex does not matter was attacked by Loren Marks in her 2012 article published in *Social Science Research*. According to her, the brief is flawed with regard to sampling. Thomas Finn summarizes Mark's findings:

> *Hearing that there is no evidence indicating that children of lesbian women or gay men are different from children of heterosexual parents leads to the assumption that children of lesbian women or gay men have been compared to children raised by their married biological mothers and fathers. Same-sex parenting studies, however, frequently have not used married heterosexual couples as their main comparison group. Instead, most comparisons have been made to single mothers, which were described by the term "heterosexual parents." Marks points out that of the fifty-*

[140] Ibid., 156.
[141] Pizer, "From Outlaws to In-laws," 45.
[142] Ibid., 46.

> *nine studies used in the APA brief, only thirty-three used any comparison group at all. In these thirty-three, the comparison groups were not clearly specified, and only several utilized "married couples." Clearly, a broad comparison of children raised by two-parent same-sex couples with children raised by two-parent heterosexual couples has not been conducted.*[143]

Furthermore, Marks criticizes that the AAP does not look into late adolescence or adulthood of the people who are scrutinized, which is the time when social difficulties begin to manifest themselves.[144]

Mark Regnerus addresses these issues. His sample consisted of 2,988 adults raised in both traditional families, i.e. married heterosexual couples, and non-traditional ones such as single-parent families, cohabiting or remarried couples or gay and lesbian families. Lesbian mothers and gay fathers were represented by 248 people in that sample, 175 and 73 respectively.[145]

> *Regnerus found that differences in a number of outcomes existed between adults in the intact biological families group compared to those from the same-sex parenting groups. While not a complete list, adults raised by lesbian mothers, for example, were observed to more frequently cohabitate, use public assistance, be unemployed or under-employed, have affairs, experience forced sex, and to have more sexually transmitted infections. They were also more likely to experience depression, use marijuana, and be arrested. They were less likely to identify as entirely heterosexual. Adults raised by gay fathers, when compared to those from the intact biological families group, were observed to more frequently be on welfare as a child, have more sexually transmitted infections, experience depression, have considered suicide, smoke cigarettes, and be arrested. They were also less likely to identify as entirely heterosexual and more likely to have been forced to have sex against their will.*[146]

Regnerus avoided blaming parents of such adults for these occurrences, but he says that this groups shows "statistically significant distinctions", therefore, AAP's assertion "that psychosocial development among children of lesbian women or gay men is compromised

---

[143] Thomas Finn, "Social Science and Same-Sex Parenting," *National Catholic Bioethics Quarterly* 13 (2013): 440.
[144] Ibid., 440.
[145] Mark Regnerus, "How Different Are the Adult Children of Parents Who Have Same-Sex Relationships? Findings from the New Family Structures Study," *Social Science Research* 41 (2012): 755.
[146] Finn, "Social Science and Same-Sex Parenting," 442.

relative to that among offspring of heterosexual parents" is not valid.[147]

Regnerus' study was criticized for choosing only families from broken homes for his study. The people representing same-sex parents were rather persons who have not been in long-term relationships or married. They were either without a partner or their relationships were brief.[148]

There are people who do not oppose same-sex marriage altogether, but who would like to see this issue to be solved later, once science proves beyond the shadow of a doubt that such marriages do not negatively affect child rearing. As demonstrated above, the argument is that there are still studies conducted today which highlight the negative aspects of being raised by same-sex couples.[149] However, this argument seems a bit specious given the fact that in social sciences, one can always question the correctness of a study for either its microscopic focus, the results of which cannot be applied generally at issues in question, or for its wide scope that overlooks details and important nuances. In other words, there will be evidence produced against allowing same-sex marriages as long as there are be people wishing to oppose it. Society is unlikely to reach a unanimous opinion on this issue, just as it has not able to do so in racial matters, as evidenced by the disproportionate prosecution and imprisonment of Africans Americans.

6 Other Complications Stemming from a Lack of Full Legal Recognition

Proponents of traditional heterosexual marriage often claim that the same rights for same-sex couples may be achieved through legal documents. Although this assertion is not completely false, it does not take into account the fact that same-sex couples cannot fully pre-determine situations in which they may find themselves. Moreover, as one really wants to confront the possibilities of breakup, death or serious illness, it is likely that same-sex couples will postpone dealing with such potential problems. Without planning, they may face problems that should have been anticipated. Persons who are allowed to marry do not confront massive, sometimes expensive work related to these issues so their lives are considerably less stressful. There are legalities, however, that cannot be processed through private contracts, e. g. taxation or tort liability.[150]

[147] Ibid., 442.
[148] Ibid., 443.
[149] Tell and Miller, "Rhetoric, Rationality, and Judicial Activism," 196-197.
[150] Pizer, "From Outlaws to In-laws," 49.

Responding to the *Baehr* case, the Hawaiian legislature enacted a *Reciprocal Beneficiaries Law* that gave many rights to couples of the same-sex who could not marry but, granted them rights previously reserved for marriage of opposite-sex couples.[151] This is another evidence to Dan Foley's claim about the lack of full equality for LGBTs that manifests itself by creating institutions resembling *separate but equal* doctrine, overturned in *Brown v. Board of Education*.

To sum up the argument about insecurity and vulnerability that same-sex couples confront when they travel because of differences in laws between states, it is necessary to realize that, despite regional differences, Americans perceive the United States to be one country. In a globalized society where companies operate on national and international levels, employers' efforts to relocate workers can be met with reluctance or resistance when the homosexual employees know they would face legal problems if they relocate their families. It is not unusual for heterosexuals to take their families for vacations from Maine to California or to move the family across a state border for better job opportunities. It does matter to homosexual families.[152]

As far as transsexuals are concerned, the lack of legislation regarding them has significantly negative impact on their family affairs in terms of legality. For example, when there is a married heterosexual couple and one of the partners decides to surgically change his or her gender, the marriage is usually voided as has happened in Kansas, Texas and Florida following court decisions. These people lose parental rights and tort or inheritance claims. This is a clear example of legal inequalities because, in comparison, anything that happens in heterosexual marriage that would prevent a person to enter in it if such thing happened before marrying, e.g. loss of competence by one of the future spouses, the marriage remains legal.[153]

Furthermore, Ball explains that:

> *. . .transsexuality inevitably leads to the recognition of some types of same-sex marriages. In a jurisdiction like Texas, in which sex, for marriage purposes, is defined according to the biological sex at birth, a genetic male (for example) who has had sex reassignment surgery and who has many of the physical attributes of a woman will be permitted to marry a woman. The state's same-sex marriage ban will not apply to this marriage even if most people are likely to perceive both spouses as being female. And in a jurisdiction like New Jersey, in which sex, for marriage purposes, is defined when the psychological sex matches the anatomical one, a postoperative*

[151] Ball, *From the Closet to the Courtroom,* 180.
[152] Pizer, "From Outlaws to In-laws," 40.
[153] Ibid., 51.

> *male-to-female transsexual (for example) who identifies as a female will be permitted to marry a man. The state's ban against same-sex marriage will not apply even though the two spouses have male chromosomes.*[154]

6.1 Problematic Transferability of Same-Sex Marriages Among States

A question that is often raised about same-sex marriage is why the states do not recognize same-sex marriages performed in other states when they accept heterosexual marriages and other states' laws not related to marriage. The reasoning is that the *Full Faith and Credit Clause*, part of the Article IV, Section 1 of the *United States Constitution*, applies only to court *judgments*, not to legal statutes.[155] The issuance of marriage licenses is an administrative/legal matter, not a judicial one.[156] Moreover, "if a state can demonstrate public policy exceptions to the recognition of other states' laws, they are not legally bound to honor such laws."[157]

Neither presumption can be transferred from one state to another. One example of presumption is when a married couple becomes a child's parents although a third person donated genetic material. In their home state, such a couple is considered to have parental rights to the child automatically through presumption, but this loses force if this family moves to a different state.[158] There is only a handful of states which recognize same-sex marriages performed in other states. New York started recognizing them in 2008, Maryland and the District of Columbia in 2010, California does so for the marriages contracted between June 16, 2008 and November 4, 2008 for reasons related to court battles in that state over-same sex marriage.[159]

Since the issue of whether states are or are not obliged to recognize same-sex marriage is now clarified, it becomes more understandable why the United States Court of Appeals for the First Circuit rejected in *Gill et al. v. Office of Personnel Management*, 2012, the argument of DOMA's defendants that the law "allowed Congress to put a temporary 'freeze' on the situation of legalization of gay marriage in one state bleeding into others, giving itself time to

[154] Ball, *Right to Be Parents*, 203.
[155] Pizer, "From Outlaws to In-laws," 46.
[156] Ball, *From the Closet to the Courtroom*, 189.
[157] Pierceson, *Gay Law and Politics in the United States and Canada*, 115.
[158] Spicer and Erickson-Schroth, "Occupational Problem," 56-57.
[159] Willetts, "Registered Domestic Partnerships, Same-Sex Marriage, and the Pursuit of Equality in California," 135.

reflect on the issue."[160] In Bodarenko's words, the court stated that "Congress had neither framed the statute as such nor written an expiration date into the law."[161]

The discussion over the right to be able to marry a person of the same sex has been widely discussed, but people sometimes forget about gay divorce. When a married same-sex couple seeks divorce in a state that does not recognize such marriages, the state cannot terminate their marriages either as it would acknowledge recognition of such. Heterosexual marriages in general can be performed in states other than the home state, but divorces cannot.[162]

6.2 Health Care and LGBTs

Same-sex partners often use *power of attorney* documents to deal with potential problems regarding health-care. Partners usually have them written in order to guarantee visitations in health-care facilities or to give each other a right to make medical decisions.[163] Although the federal government under President Obama uses the power of the federal purse to make the facilities receiving Medicare and Medicaid accept patients' wishes regarding visitations and decisions, medical staffs are not obliged to respect same-sex relationships in facilities in states where such relationships are illegal. It remains safer to produce private documents in order to receive the same rights as heterosexual couples.[164]

6.3 Financial Complications of same-sex couples

Financially, a multilevel analysis of the earnings penalties between partnered gay men and married heterosexual men of 2011 based on the 2000 U.S. Census, show that gay partners are disadvantaged by 12.5 per cent. When partnered gay men were compared with unmarried heterosexual couples, the difference in earnings was negligible, only 0.15 per cent. The explanation for this significant difference lies in the marital status.[165]

Strangely enough, lesbian women experience earnings advantages over heterosexual married women. The authors of this analysis claim that this advantage may be caused by the perception of employers who believe that such women have greater commitment to their work so they reward them for that. This idea stems from the notion that lesbians are more like men,

[160] Bondarenko, "Between a Rock and a Hard Place," 1722.
[161] Ibid., 1722.
[162] Pizer, "From Outlaws to In-laws," 52.
[163] Ibid., 44.
[164] Ibid., 48.
[165] Baumle and Poston, "The Economic Cost of Homosexuality," 1022.

i.e. unlikely to go on maternity leave.[166]

7 The Defense of Marriage Act and Its Implications

1996 represents a milestone in American history, because the federal government, for the first time ever, passed laws regulating marriage. Until then, it had been authority belonging to the states. The so-called Defense of Marriage Act (DOMA) ensured the states were not obliged to recognize marital status of same-sex couples who entered into marriage in another state.[167] Additionally, same-sex couples were not eligible to receive the same federal benefits as heterosexual spouses.[168] There were about 1,100 federal benefits and protections reserved exclusively for married couples as of 2004.[169]

Paradoxically, there were no legally married same-sex couples in the United States, not even in the world, when DOMA was enacted. Therefore, its passage did not actually represent any significant legal threat to anyone. Unfortunately, the years that followed DOMA created major hurdle standing in the way of receiving federal benefits such as joint federal tax returns, recognition for Social Security purposes and federal taxation of estates. Registered domestic partnership and civil unions lack in federal laws which makes the whole issue even more complicated.[170]

Section 3 of DOMA was struck down by the Supreme Court with the reasoning that the "avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States."[171] It remains unclear, however, what level of scrutiny the Supreme Court used when it struck down the Section 3 of DOMA. It neither dismissed nor endorsed the heightened scrutiny which had been used, for the first time, by the Second Circuit Court of Appeals and left the issue to be resolved by lower federal courts in the future.[172]

---

[166] Ibid., 1023.
[167] Marzullo and Herdt, "Marriage Rights and LGBTQ Youth," 529.
[168] Ball, *From the Closet to the Courtroom*, 227.
[169] "Defense of Marriage Act: Update to Prior Report," U.S. Government Publishing Office, accessed November 9, 2014, http://www.gpo.gov/fdsys/pkg/GAOREPORTS-GAO-04-353R/html/GAOREPORTS-GAO-04-353R.htm.
[170] Pizer, "From Outlaws to In-laws," 46-47.
[171] "United States v. Windsor 570 U.S. (2013)," Justia U.S. Supreme Court Centre, accessed October 25, 2014, https://supreme.justia.com/cases/federal/us/570/12-307/.
[172] Bondarenko, "Between a Rock and a Hard Place," 1727-1728.

Conclusion

The presumption laid in the introductory part of the thesis says that court decisions extending the rights of LGBTs provoke backlashes as courts are seen as overstepping their scope of authority. This assertion was based on antipathy Americans feel toward directives sent in the top-down direction as well as distaste felt for judges as they are not popularly elected. Although this assumption proved to be correct, it failed to take into account a long-term implication which is greater awareness of issues connected with LGBTs. This awareness comes as a result of debates in media and in public where opposing opinions clash. This helps people to consider all the pros and cons and to make up their minds about the issue. Such deliberations usually lead to more open-minded or positive thinking about LGBTs.

It has been found that it is often necessary for a brave court to bring in a ground-breaking verdict that causes other courts in different parts of the country to reach similar conclusions. Therefore, the irreplaceable role of courts in promoting major social changes in the United States has been proved. However, the role of courts in changing the legal and social status as examined here cannot be equivocally concluded as helping the LGBT cause or going against in. The bravery of a single court that decides in an unprecedented way led to changes in the long run, but one cannot claim that it is the most important factor. The findings in this thesis suggest that not only impulses that come from top down, i.e. court decisions, are initiators of changes. Impulses leading to change, in perception at least, also come up from the "bottom". This has been found by examining reactions of heterosexuals or other than sexual minority groups, such as racial, to witnessing negative behavior towards LGBTs. It often led the former to reconsider reservations they had about the latter group as it made them thinking about difficulties such people face in life. On the other hand, one could argue that any court decisions are always initiated from the bottom as cases pass through the court system until they reach the highest courts. They pronounce their verdicts, seemingly from the top, but such verdicts actually just made their way through the upward system.

Although the presumption, expressed in Introduction, was that LGBTs would benefit from being included in the quasi-suspect or suspect group which trigger heightened and strict scrutiny respectively, this does not turn out to be the case. The reason for it is that when there are affirmative action programs implemented to increase the participation of sexual minorities in a given field, these can be attacked as preferential treatment based on sexual orientation. Although it remains unclear what level of judicial scrutiny should be used by courts to deal with cases involving sexual orientation following the unclear usage of it in United States v.

Windsor, 2013, some are worried that including LGBTs to either of those groups would lead to such consequences.

It should also be clear at this point that the argument defending marriage as heterosexually-exclusive for the purpose of procreation does not stand as there are many heterosexual couples who choose not to have children and are still allowed to marry. This line of argumentation has found understanding in courtrooms as virtually no court today would dare to accept such an argument, unlike courts in the past.

The assumption presented at the onset of this thesis that anti-LGBT activists were highlighting the demands of LGBTs to adopt children to thwart their progress towards same-sex marriage, as adoptions were even more controversial than the issue of marriage itself, proved to be false. Although it is true that this argument was used by opponents of LGBTs virtually every time courts dealt with the question of their legal status, it would be wrong to claim that this argument had impact more powerful on courts than any other. Courts reasoned their verdicts using various arguments supplied by anti-LGBT activists.

Also, the presumption that some people have been trying to prevent legalization of same-sex marriage because they fear that establishing it would lead to adoptions by same-sex couples has not been proved. It seems that most of those who are against same-sex marriage are against the institution itself because they perceive it as a threat or unacceptable alternation of the one existing for different-sex couples.

As obvious as it may seem, it is important to stress that LGBTs did not deliberately choose their sexual orientation just as heterosexuals did not choose theirs. Why then should LGBTs be punished by not being able to marry if they did not have anything to do with becoming who they are? Just because Mother Nature or God created them this way, why should they feel as second-class citizens?

All the above suggests that there are two ways of looking at the issue of recognizing same-sex marriage. The first one is a civil rights view which asserts that it is unfair to select a specific group of the society and to deny it common rights. The other takes into account the economic benefits connected with being a member of a family, such as inheritance protection or pension rights.[173] Willets suggests that in order to win public support for same-sex marriage, its proponents have to frame it as either a civil rights issue, establishing a connection between this and other civil rights issues from the past, or as a human rights issue. Both of these stand in opposition to thinking about marriage s as a moral or religious issue.

[173] Marzullo and Herdt, "Marriage Rights and LGBTQ Youth," 529-530.

There are many people in the middle who do not side with any group and framing it the way suggested above could widen the support for same-sex marriage.[174]

Further research should be conducted to find why voices of LGBTs calling for rights and full equality did not begin to be heard earlier and why the amount of public support for their cause has been on the rise for only the last few decades. Why did not we see protesters marching the streets demanding to be respected during the time, or even before, Africans Americans were doing so? Is it because it is easy to hide your sexual orientation and very difficult to hide having African American blood, even when it is not always apparent? Or is it the effect of mass media transforming the American society by increasing the presence of people of less frequent sexual orientation in its content?

I would suggest that more studies need to be done to examine the role of, for example, mass media on the way public perceives minorities after they are mediated to it, sometimes even for the first time in such an extent. It goes without saying that the amount of homosexual characters on television has been on the rise during the last two or three decades.

Souhrn

Tato diplomová práce zkoumá, jaké důvody stojí za zvyšující se mírou tolerance mezi americkými heterosexuály vůči sexuálním menšinám, které se často označují jako LGBT, tedy lesbian, gay, bisexual a transgender. Tato tolerance se projevuje různými způsoby, mezi něž patří otevřenost homosexuálů ohledně své orientace před svými rodinnými příslušníky, přáteli či kolegy z práce bez negativních následků, kterým takovíto lide čelili v minulosti. Těmito následky se myslí zavržení ze stany rodiny, propuštění ze zaměstnání nebo omezování styku LGBT osob s dětmi s odůvodněním, že se jedná o jejich ochranu před sexuálním zneužíváním nebo před tím, aby se takovéto dítě samo stalo homosexuálem. Práce nejprve představuje konkrétní vypovídající data ohledně zvyšující se tolerance ze strany heterosexuální společnosti, a dále rozebírá roli soudů a jejich rozhodnutí na právní a sociální postavení sexuálních menšin ve Spojených státech. Jsou soudní rozhodnutí, která často ruší zákony a nařízení znevýhodňující LGBT osoby, hnacím motorem také změn ve vnímání těchto menšin? Obešly by se LGBT lidé bez soudní pomoci? Dosáhli by stejných úspěchů, kdyby se soudy jejich případy zabývaly v menší míře nebo pokud by se tyto případy nedostaly na vědomí veřejnosti? Práce přikládá velkou váhu soudům, jakožto důležitým faktorům probíhajících změn, všímá si však také dalších možných vysvětlení prezentovaných jevů.

[174] Willetts, "Registered Domestic Partnerships, Same-Sex Marriage, and the Pursuit of Equality in California," 147.

Soudy očividně hrají důležitou roli ve smyslu, že svými často kontroverzními rozhodnutími podněcují veřejné debaty na daná témata a přispívají do nich svými právně vytříbenými argumenty. Text také prezentuje možnou analogii mezi bojem za práva amerických černochů, která také probíhala v soudních síních, a současným bojem LGBT osob za své zrovnoprávnění. Nosnou ideou zde je, že sexuální menšiny, stejně jako američtí černoši, jsou historicky utlačovanou skupinou osob, která je teprve na cestě k plnému zrovnoprávnění a může se stát, že se jej nikdy nedočká, byť tomu současné trendy nenasvědčují. Hlavním poznatkem práce je, že přelomová soudní rozhodnutí pomáhají rozvířit debaty na tato témata, které pak ovlivňují způsob, jakým heterosexuálové přemýšlí o LGBT lidech.

Sources

American Psychological Association. “Answers to Your Questions for a Better Understanding of Sexual Orientation and Homosexuality.” Accessed September 26, 2014. http://www.apa.org/topics/lgbt/orientation.aspx.

Ball, Carlos A. *Right to Be Parents: LGBT Families and the Transformation of Parenthood*. New York: New York University Press, 2012.

Ball, Carlos A. *From the Closet to the Courtroom: Five LGBT Rights Lawsuits That Have Changed Our Nation*. Boston: Beacon Press, 2010.

Baumle, Amanda K. and Dudley L. Poston Jr. "The Economic Cost of Homosexuality: Multilevel Analyses." *Social Forces* 89 (2011): 1005-1031.

Bondarenko, Alexander. "Between a Rock and a Hard Place." *Brooklyn Law Review* 79 (2014): 1703-1743.

Brewer, Paul R. and Clyde Wilcox. "THE POLLS - TRENDS: Same-Sex Marriage and Civil Unions." *Public Opinion Quarterly* 69 (2005): 599-616.

Brigham Young University. “About Us.” Accessed October 23, 2014. https://americanfamiliesoffaith.byu.edu/Pages/About-Us.aspx.

CNN. “Same-sex marriage in the United States.” Accessed November 17, 2014. http://edition.cnn.com/interactive/us/map-same-sex-marriage/.

Columbia University. “Ronald Bayer, Ph.D. - Bio Sketch.” Accessed October 23, 2014. http://www.columbia.edu/itc/hs/medical/bioethics/egir/cv/Bayer.pdf.

Cornell University Law School. “Intermediate Scrutiny - Wex Legal Dictionary.” Accessed October 14, 2014. http://www.law.cornell.edu/wex/intermediate_scrutiny.

Cornell University Law School. “Strict Scrutiny - Wex Legal Dictionary.” Accessed October 14, 2014. http://www.law.cornell.edu/wex/strict_scrutiny.

Drescher, Jack. “What’s In Your Closet?.” In *LGBT Casebook*, eds. Petros Levounis, Jack

Drescher and Mary Barber, 3-16. Arlington: American Psychiatric Publishing, 2012.

Encyclopedia Britannica. “Due Process (law).” Accessed October 14, 2014. http://www.britannica.com/EBchecked/topic/173057/due-process.

Encyclopedia Britannica. "Judicial Review (law)." Accessed October 14, 2014. http://www.britannica.com/EBchecked/topic/307542/judicial-review.

Finn, Thomas. "Social Science and Same-Sex Parenting." *National Catholic Bioethics Quarterly* 13 (2013): 437-444.

Gregory B. Lewis. “The Friends and Family Plan: Contact with Gays and Support for Gay Rights.” *The Policy Studies Journal* 39 (2011): 217-238.

Haider-Markel, Donald P. and Mark R. Joslyn. "Attributions and the Regulation of Marriage: Considering the Parallels Between Race and Homosexuality." *Political Science & Politics* 38 (2005): 233-239.

Haider-Markel, Donald P. and Mark R. Joslyn. "Beliefs about the Origins of Homosexuality And Support For Gay Rights." *Public Opinion Quarterly* 72 (2008): 291-310.

Justia U.S. Supreme Court Centre. “Regents of Univ. of California v. Bakke 438 U.S. 265 (1978).” Accessed September 15, 2014, https://supreme.justia.com/cases/federal/us/438/265/case.html.

Justia U.S. Supreme Court Centre. “Romer v. Evans 517 U.S. 620 (1996).” Accessed September 8, 2014, https://supreme.justia.com/cases/federal/us/517/620/case.html.

Justia U.S. Supreme Court Centre. “United States v. Virginia 518 U.S. 515 (1996).” Accessed September 28, 2014. https://supreme.justia.com/cases/federal/us/518/515/case.html.

Justia U.S. Supreme Court Centre. “United States v. Windsor 570 U.S. (2013).” Accessed October 25, 2014. https://supreme.justia.com/cases/federal/us/570/12-307/.

Martinez, Michael D., Kenneth D. Wald and Stephen C. Craig. "Homophobic Innumeracy? Estimating the Size of the Gay and Lesbian Population." *Public Opinion Quarterly* 72 (2008): 753-767.

Meyer, Ilan H. and Ronald Bayer. “School-Based Gay-Affirmative Interventions: First Amendment and Ethical Concerns.” *American Journal of Public Health* 103 (2013): 1764-1771.

Marzullo, Michelle A. and Gilbert Herdt. “Marriage Rights and LGBTQ Youth: The Present and Future Impact of Sexuality Policy Changes.” *Ethos* 39 (2011): 526-552.

Organization must stop treating transgender people as mentally ill.“ Accessed September 3, 2014. http://www.lgbt-ep.eu/press-releases/who-must-stop-treating-transgender-people-as-mentally-ill/.

Pierceson, Jason. *Courts, Liberalism, and Rights: Gay Law and Politics in the United States and Canada*. Philadelphia: Temple University Press, 2005.

Pizer, Jennifer C. “From Outlaws to In-laws: Legal Standing of LGBT Americans’ Family Relationships.” In *LGBT Casebook*, eds. Petros Levounis, Jack Drescher and Mary Barber, 35-58. Arlington: American Psychiatric Publishing, 2012.

Regnerus, Mark. “How Different Are the Adult Children of Parents Who Have Same-Sex Relationships? Findings from the New Family Structures Study.” *Social Science Research* 41 (2012): 752–770.

Spicer, Shane S. and Laura Erickson-Schroth. “Occupational Problem: The Case of Iris: Occupational Problems in the LGBT Community.” In *LGBT Casebook*, eds. Petros Levounis, Jack Drescher and Mary Barber, 239-254. Arlington: American Psychiatric Publishing, 2012.

Stotzer, Rebecca. "Straight Allies: Supportive Attitudes Toward Lesbians, Gay Men, and Bisexuals in a College Sample." *Sex Roles* 60 (2009): 67-80.

Tell, Dave and Eric Carl Miller. "Rhetoric, Rationality, and Judicial Activism: The Case of Hillary Goodridge v. Department of Public Health." *Advances In The History Of Rhetoric* 15 (2012): 185-203.

The European Parliament's Intergroup on LGBT Rights. “European Parliament: World Health Organization must stop treating transgender people as mentally ill.“ Accessed September 3, 2014. http://www.lgbt-ep.eu/press-releases/who-must-stop-treating-transgender-people-as-mentally-ill/.

Tilcsik, András. "Pride and Prejudice: Employment Discrimination against Openly Gay Men in the United States." *American Journal of Sociology* 117 (2011): 586-686.

University of California. “Ilan H. Meyer – Biography Page.” Accessed October 17, 2014. http://law.ucla.edu/faculty/faculty-profiles/ilan--h-meyer/.

U.S. Government Publishing Office. “Defense of Marriage Act: Update to Prior Report” Accessed November 9, 2014. http://www.gpo.gov/fdsys/pkg/GAOREPORTS-GAO-04-353R/html/GAOREPORTS-GAO-04-353R.htm.

Wadsworth, Nancy D. “Intersectionality in California's Same-Sex Marriage Battles: A Complex Proposition.” *Political Research Quarterly* 64 (2011): 200-216.

Washington Post. “Obama endorses gay marriage, says same-sex couples should have right to wed.“ Accessed September 5, 2014. http://www.washingtonpost.com/politics/2012/05/09/gIQAivsWDU_story.html.

Willetts, Marion C. “Registered Domestic Partnerships, Same-Sex Marriage, and the Pursuit of Equality in California.” *Family Relations* 60 (2011): 135-149.

Williams Institute. “How many people are lesbian, gay, bisexual and transgender?.” Accessed September 14, 2014. http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographicsstudies/how-many-people-are-lesbian-gay-bisexual-and-transgender.

Williams Institute. “The impact of expanding FMLA rights to care for children of same-sex partners.” Accessed September 14, 2014. http://williamsinstitute.law.ucla.edu/research/marriage-and-couples-rights/the-impact-of-expanding-fmla-rights-to-care-for-children-of-same-sex-partners-2/.

Williams Institute. “United States - Census Snapshot 2010.” Accessed September 14, 2014. http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/us-census-snapshot-2010/.

List of Supplements

Supplement no. 1: Support for Marriage Equality 1989-2009 (graph)

Supplement no. 2: Map of Same-Sex Marriage Legal Status in the United States as of November 17, 2014 (map)

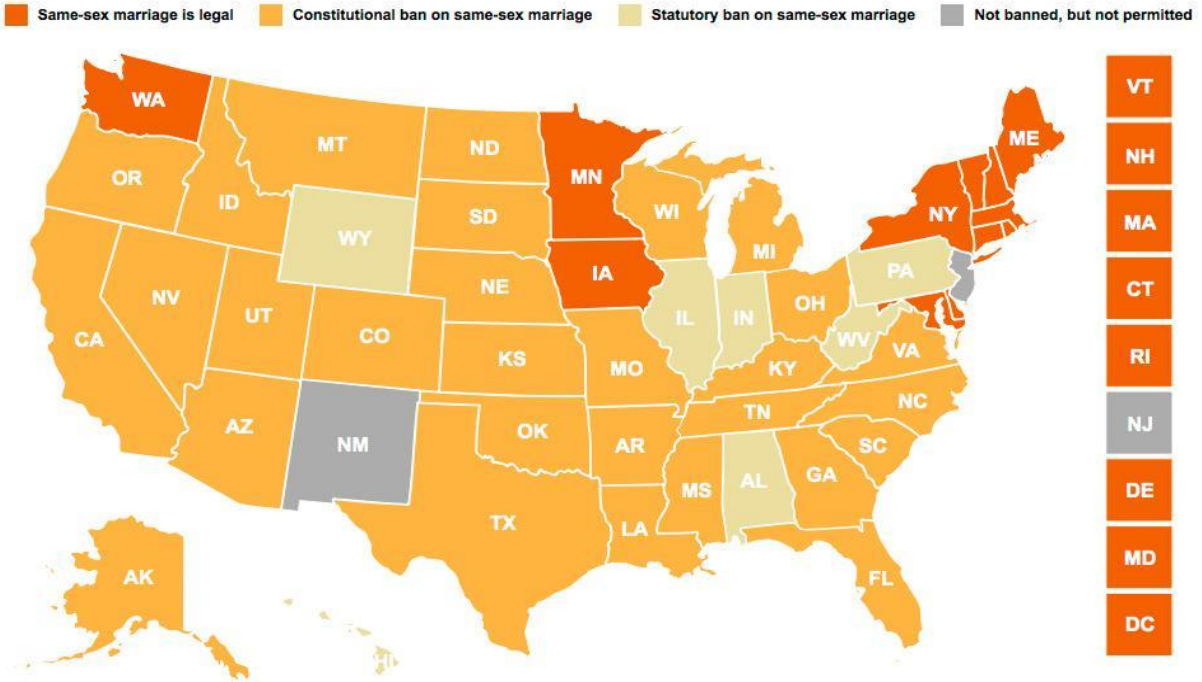
Supplements

Supplement no. 1: Support for Marriage Equality 1989-2009 (graph)

Figure 1. Support for marriage equality from 104 public opinion polls conducted between 1989–2009. Solid lines highlight vacillating support for marriage equality during the Defense of Marriage Act debate in 1996 and in subsequent national election year cycles 2004, 2006, and 2008.

Source: Michelle A. Marzullo and Gilbert Herdt, "Marriage Rights and LGBTQ Youth: The Present and Future Impact of Sexuality Policy Changes," *Ethos* 39 (2011): 532.

Supplement no. 2: Map of Same-Sex Marriage Legal Status in the United States as of November 17, 2014 (map)



Source: "Same-sex marriage in the United States," CNN, accessed September 15, 2014, http://edition.cnn.com/interactive/us/map-same-sex-marriage/.