



Marriage Equality

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INTRODUCTION

The Defense of Marriage Act was passed by the United States Congress in 1996 and defines marriage for the purposes of federal law. Specifically it states, “the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite-sex who is a husband or a wife.” The act also dictates that states are not required to recognize the marriage of same-sex couples from another state where same-sex marriage is recognized. In certain states, same-sex marriage is deemed legal. In other states, same-sex couples have state level rights, but only a portion of those that married couples enjoy. In yet another group of states, out of state same-sex marriages are recognized but not performed and finally, in many states, same-sex marriage is not recognized at all or even banned. The discrepancies between the rights couples receive at state level and the federal level—and even among states—are exorbitant and make life difficult for those who have to keep track of them in order to go about their daily lives.

States that recognize same-sex marriage have generally had a judiciary case brought to the state Supreme Court claiming discrimination under the respective state’s equal protection clause or unconstitutional deprivation of rights that same-sex couples experience followed by a court ruling that directs legislative action in favor of same-sex couples. We propose that same sex marriage be recognized in the entire United States and all subdivisions of government and that all rights associated with it are equally extended. This can be done by passing a federal law or enacting a constitutional amendment.

REASONING

Equal Protection of the Law

It is often argued that civil unions or domestic partnerships should be enough to satiate the same-sex marriage movement. What often goes unnoticed is that, due to these couples being designated as “civil partners” instead of a “married couple”, many rights given to married opposite-sex couples are still not given to same-sex couples. Ultimately, the summation of these denied rights can be viewed as denial of privileges and immunities protected by the Fourteenth Amendment of the US Constitution.

This denial of rights is found on all levels of government: federal, state, and local.

In terms of federal rights, same-sex couples cannot collect Social Security Survivor’s payments under the current definition of marriage set forth by DOMA. Since DOMA states that “marriage” is constituted by “one man and one woman,” this leads to the conclusion that “spouse” must then mean a partner of the opposite sex. Hence, even in phrases that could be cursorily read as gender-neutral on the Social Security Survivor Planner site (“if your spouse...dies,” “benefits can be paid to your...spouse” etc.), an opposite-sex couple is the antecedent. As a result, if the bread-winning partner dies in a “civil union,” the surviving partner cannot collect Social Security benefits that would be unimpeachably due to the surviving partner in an opposite-sex marriage.

In 1997, the United States General Accounting Office (GAO) published a report that lists the “federal laws in which benefits, rights, and privileges are contingent upon marital status”. The report organized these benefits, rights, and privileges into 13 categories: Social Security and Related Programs, Housing, and Food Stamps; Veterans’ Benefits, Taxation; Federal Civilian and Military Service Benefits; Employment Benefits and Related Laws; Immigration, Naturalization, and Aliens; Indians; Trade, Commerce, and Intellectual Property; Financial Disclosure and Conflict of Interest; Crimes and Family Violence; Crimes and Family Violence; Loans, Guarantees, and Payments in Agriculture; Federal Natural Resources and Related Laws; Miscellaneous Laws.

For example, one example in the Taxation category is that “marital status figures in federal tax law in provisions as basic as those giving married taxpayers the option to file joint or separate income tax returns”. One example in the “Federal Civilian and Military Service Benefits” category, the report states that “federal civil service employees are entitled to unpaid leave in order to care for a spouse with a serious health problem, and an employee disabled by work-related injuries receives augmented compensation if he or she is married”. One example in the “Loans, Guarantees, and Payments in Agriculture” category is that “a spouse's income, business interests, or assets are taken into account for purposes of determining a person's eligibility to participate in the [federal income] program”. In total, the report found that 1049 federal laws classified to the United States Code are contingent upon marital status. *(For a more complete list, see Figure 1.)*

Since marriage is not designated in the Constitution as a federal right, it is therefore deemed to be a right of the states. Given this distinction, there are further rights denied to same-sex couples on the state level. Many poignant examples of this denial surround same-sex couples' families. Even in cases where a sperm donor or a surrogate mother is employed to have a child and therefore the child is recognized legally, this recognition only extends to one parent in a civil union, since only the parent whose DNA was handed down to the child is seen as the child's immediate family according to state law. This distinction can be accommodated in many cases, but in the case of the legally recognized parent's passing, child custody laws create a potentially traumatic situation. Since the child's genealogically unrelated parent is not recognized as a parent by the state, he/she cannot legally be the parent, who is in all other ways the child's parent, to take custody of his or her child. Even if the more "natural" option to start a family seems prohibitive for same-sex couples, in many states same-sex couples are not permitted even to adopt children (as in Utah, for example).

And finally, on all three levels of government (federal, state, and local), taxation becomes an issue because many filing designations are denied to same-sex couples. Take the situation of a newlywed lesbian couple filing their taxes for the first time: On March 14, 2012, The Huffington Post reported, "The U.S. government does not recognize their marriage. By law they must file their federal income tax returns individually" (New). A problem arises here with the legality of individual filing. Since the couple believes themselves to be married, and "Americans sign their tax returns as a pledge that the documentation is truthful, honest, and an accurate

representation of their life and finances” (Milstein), their filing individually could be viewed as tax fraud. It follows then that the denial of the joint filing designation for same-sex couples creates unnecessary complications for both the couple and the governments under which they live.

As a result of the rights denied to same-sex couples by the government, many quotidian conventions taken for granted by the opposite-married majority become problematic for same-sex couples. In March 2012, York Daily Record in Pennsylvania ran an article bearing the headline, “Same-sex couple denied family discount at West Manchester swimming pool” (Landauer). Although the pool’s manager, seeing the family’s situation, amended the pool’s policy (Boeckel), this local headline reveals that the most minor of conveniences afforded to opposite-sex couples are routinely denied to same-sex couples merely on the basis of their “union” in lieu of “marriage.”

However, not all of these everyday matters are minor. Safeguards, implicitly taken for granted by opposite-sex married couples but rarely thought of explicitly, are denied to same-sex couples when they cannot be married. Health and life insurance coverage and benefits that can be extended to an opposite-sex spouse are often not granted to same-sex partners as they legally cannot be spouses. In North Carolina in March 2012, it was not until after an executive order from the Oval Office wherein “...the President of the United States...made the determination that Section 3 of the Defense of Marriage Act (“DOMA”), 1 U.S.C. § 7, as applied to same-sex couples who are legally married under state law, violates the equal protection component of the Fifth Amendment” that the lesbian couple were able to file for

health insurance benefits on the same plan (Festa). But even then, “the [Federal Office of Personnel Management] cautioned that the ruling [was] limited only to the specific couple and “has no effect on enrollments requested by other same-sex spouses” without any substantive reason given (Festa).

In conclusion, the list of these governmental rights extended by marriage and denied to same-sex couples because they cannot marry (and, as follows, their private repercussions) constitutes a violation of the Equal Protection Clause of the Fourteenth Amendment. As outlined in the Section 1, “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States” (“14th Amendment”). Hence, these privileges and immunities are considered to be civil (or “fundamental” rights). Since the set of fundamental rights includes “various rights of privacy (such as marriage and contraception)” then it must follow that the denial of Social Security Survivor’s payments and joint tax filing (as predicated by a spousal relationship) as well as the inability to adopt of a child are essentially violations of civil rights.

Fig 1. List of rights given to married couples as cited by The United States General Accounting Office (GAO):

<p>Social Security and Related Programs (i.e. Housing and Food-stamps)</p>	<ul style="list-style-type: none"> ▶ “Whether one is eligible for Social Security payments, and if so how much one receives, are both dependent on marital status...if certain conditions are met, then a spouse or a divorced spouse (as well as a widow or widower) has a right to payments based on the marriage, rather than on his or her own earnings” ▶ “National Affordable Housing Program
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	<p>assists 'First-time homebuyers,' but "First-time homebuyer' is defined, in part, as an individual 'and his or her spouse' who have not owned a home during the preceding 3 years"</p>
<p>Veterans' Benefits</p>	<ul style="list-style-type: none"> ▶ "A surviving spouse or child of a veteran is entitled to receive monthly dependency and indemnity compensation payments when the veteran's death was service-connected, and to receive a monthly pension when the veteran's death was not service-connected" ▶ "The spouses of certain veterans are entitled to medical care provided by the government. In determining, based on income and assets, whether a veteran has the ability to defray necessary home care and medical expenses, the property of the spouse of the veteran is included as an asset of the veteran. Spouses of veterans may be beneficiaries of National Service Life Insurance, and are also eligible for interment in national cemeteries if the veteran is eligible. The surviving spouse of a veteran who died of a service-connected disability is entitled to educational assistance for up to 45 months, and to job counseling, training, and placement services. Spouses and widows or widowers of certain veterans also enjoy preferences in federal employment"
<p>Taxation</p>	<ul style="list-style-type: none"> ▶ "Marital status figures in federal tax law in provisions as basic as those giving married taxpayers the option to file joint or separate income tax returns" ▶ "For estate tax purposes, property transferred to one spouse as the result of the death of another is deductible for purposes of determining the value of the decedent's estate. Gifts from one spouse to another are deductible for purposes of the gift tax"
<p>Federal Civilian and Military Service Benefits</p>	<ul style="list-style-type: none"> ▶ "Federal civil service employees are entitled to unpaid leave in order to care for a spouse with a serious health problem, and an employee disabled by work-related injuries receives augmented compensation if he or she is married" ▶ "For estate tax purposes, property transferred to one spouse as the result of the death of another is deductible for purposes of determining the value of the

	decedent's estate. Gifts from one spouse to another are deductible for purposes of the gift tax”
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Employment Benefits and Related Laws	<ul style="list-style-type: none"> ▶ “According to the National Labor Relations Act, “If the only regular employees of a business are the owner and his or her spouse, then the business is not subject to regulation of wages and hours under the Fair Labor Standards Act of 1938 (FLSA)”
Immigration, Naturalization, and Aliens	<ul style="list-style-type: none"> ▶ “The spouses of aliens who come to the United States on a temporary basis (to work as registered nurses, seasonal agricultural workers, or in certain specialty occupations), and who meet other criteria, are not subject to the worldwide numerical limitations on levels of immigration.” ▶ “Spouses of aliens granted asylum can be given the same status if they accompany or join their spouses”
Indians	<ul style="list-style-type: none"> ▶ “Right of a surviving spouse who is neither an Indian nor a member of the deceased spouse's tribe to elect a life estate in property that he or she is occupying at the time of the death of the other spouse” ▶ “Health services can also be made available to otherwise ineligible spouses of an eligible Indian if all such spouses are made eligible by an appropriate resolution of the governing body of the tribe”
Trade, Commerce, and Intellectual Property	<ul style="list-style-type: none"> ▶ “Permits spouses to file jointly for bankruptcy protection” ▶ “The Copyright Act gives renewal rights and termination rights, in some circumstances, to the widow or widower of the creator of a copyrighted work”
Crimes and Family Violence	<ul style="list-style-type: none"> ▶ “Attempting to influence a United States official through threats directed at a spouse is a federal crime, as are killing, or attempting to kill, foreign officials or their spouses, or threatening to kill certain persons protected by the Secret Service, such as major presidential candidates and their spouses”
Loans, Guarantees, and Payments in Agriculture	<ul style="list-style-type: none"> ▶ “A spouse's income, business interests, or assets are taken into account for purposes of determining a person's eligibility to participate in the [federal income] program”

	<ul style="list-style-type: none"> ▶ “Under the federal family education loan program, the income and assets of an independent student's spouse are attributed to the student for purposes of determining whether the student is eligible for a loan and, if so, the amount” ▶ “Eligibility for assistance in borrowing for housing extends to the surviving spouses of veterans who die from a service- connected disability, and to the spouses of certain veterans who, for more than 90 days, have been missing in action, captured by hostile forces, or forcibly detained by a foreign government”
Federal Natural Resources and Related Laws	<ul style="list-style-type: none"> ▶ “When the government purchases land for national battlefields, monuments, seashores, or parks, the law commonly allows those from whom the land is purchased and their spouses to continue to use and occupy it during their lifetimes”

Economic Impact

Same-sex marriage recognition will benefit not only the same sex couples it directly impacts, but also the economy in which they reside. According to the Comptroller’s Office in New York City, about \$142 million would be added to the city’s economy as a result of same-sex marriage recognition. This amount includes the expenses related to marriages planned and executed within the City. New York City will also gain about \$8 million in tax revenue and \$100 million in outlays on healthcare. These preliminary estimates do not incorporate the additional impacts of legalizing same-sex marriage. One example may include the purchase of homes, which would lead to more tax revenue (“Love Counts...”).

The Williams Institute did a similar study for the state of New Jersey. It reports that same-sex marriage recognition in New Jersey could increase state and local government revenues by \$19 million. Of this \$19 million, \$17.3 million would be from local sales tax and occupancy fees while \$1.6 million would comprise of marriage license fees. Several other potential revenues may include motor fuels tax, property tax revenues and increased earnings taxes, but these cannot be easily quantified and as a result are not included in the \$19 million estimate above. Tourism and wedding expenditures would also increase by an estimated \$248 million and have the potential to create and sustain over 800 new jobs (“The Legal...”). We realize that the economic benefit of tourism and wedding expenditure can only be temporary and will decrease as more states recognize and perform same-sex marriages, thus lowering the number of wedding tourists. The benefit will dissipate as soon as same-sex marriage is recognized and performed throughout the entire United States. For example, the Williams Institute study assumes that about a third of the couples that will get married in New Jersey over the next three years will be from New York. Once New York legalizes same-sex marriage, the revenues from these marriages will benefit New York’s economy. The economy of any area that recognizes same-sex marriage will be enhanced as a result.

THE ROUTE TO RECOGNITION

Equal Protection under State Law

Of the few states that do recognize same-sex marriage, they all followed a similar path to get to that point. The set precedent begins at a legal case brought to a

state's Supreme Court by citizens of said state who claim some type of discriminatory purpose in denying them and their same-sex partner the right to marry. From there, the court makes their judicial decision and orders the state legislature to act accordingly. These actions then result in a statewide method for the recognition of same-sex marriages.

Vermont was the first state to offer civil unions. In 1999, three same-sex couples in Vermont were denied state marriage licenses. Each couple sued both their town and the state of Vermont, claiming that by refusing them a marriage license, they were also being denied the rights offered to all citizens by the Vermont Constitution. Defending their actions, the state posed three main arguments in opposition to the recognition of same-sex relationships. They claimed that same-sex marriage would weaken the relationship between marriage and raising children, would destroy interstate relationships and unity with surrounding states that do not recognize, and would compromise the traditional institution of marriage between one man and one woman. The Vermont Supreme Court rejected all three of these arguments on 1) the proven history that children are not developmentally affected by same-sex rearing, 2) Vermont had already gone against other states by legalizing the marriage between first-cousins, and 3) that pragmatism on the institution of marriage does not justify denying individuals their constitutional rights. The court unanimously determined that the current prohibitions of same-sex marriage were a direct violation of the rights guaranteed by the Vermont Constitution.

The court's judgment instructed the Vermont legislature to enact a law to either grant full marriages to same-sex couples or create an alternative method that

would provide equal rights. Under pressure from outside sources as well as Democratic Governor Howard Dean, the legislature opted to create a new program called "civil unions." The parameters were outlined in H.B. 847 in April 2000 and placed into full effect during July of 2000. This made Vermont the third state, following Hawaii and California, who termed "domestic partnerships" to provide legal recognition on the state level to same-sex couples. Vermont, however, was the first to allow "civil unions," which extended rights comparably equal to those associated with marriage.

Years later, in 2007, Democratic house and senate leaders decided that civil unions were not, in fact, equivalent to marriage. As a result, a committee was created to explore the issue of same-sex marriage and led to the introduction of a bill legalizing same-sex marriage in 2009. The bill was passed in both the house and senate, vetoed by Republican Governor Jim Douglas, and then the veto was overridden to ultimately pass the bill into law. Same-sex marriage has been recognized in Vermont as of September 2009.

In 2005, the Connecticut legislature made a decision to be the first state to recognize civil unions without following a court order. They also became the second state to provide same-sex couples with the rights associated with marriage through civil unions. Moderate Republican Governor Jodi Rell signed the enacting bill into effect in October 2005. However, the state government was criticized and challenged by same-sex activist groups on their decision to recognize civil unions instead of full-fledged marriage.

In 2007, the Connecticut Supreme Court heard *Kerrigan and Mock vs. Connecticut Department of Public Health*, an appeal of a 2006 case in which eight same-sex couples, represented by “Gay and Lesbian Advocates and Defenders,” sued Connecticut, arguing that not allowing them to marry was discriminatory and violated the equality and liberty provisions of the state constitution. The Court originally ruled against the couples stating that withholding the right to marry does not violate the state constitution because, “Civil union and marriage in Connecticut now share the same benefits, protections and responsibilities under law. The Connecticut Constitution requires that there be equal protection and due process of law, not that there be equivalent nomenclature for such protection and process.”

By 2008, however, the Connecticut Supreme Court overturned the original decision, declaring that denying same-sex couples the right to marry does, in fact, disagree with the equality and liberty provisions of the Constitution. They also decided that it would be unconstitutional to provide same-sex couples with a lesser status than full marriage by forcing them into civil unions.

In accordance with the ruling of the Court, all relevant governmental entities began issuing marriage licenses to same-sex couples in November 2008. By October 2010, all current civil unions were automatically changed to marriages after both the house and senate voted to replace old marriage laws with gender-neutral terms.

Right around the same time as the transition in Connecticut, New Jersey was undergoing some changes of its own. In October 2006, the New Jersey Supreme Court ruled, 4-3, that the rights denied to same-sex couples because they cannot legally be married can no longer be permitted under the state constitution. The

court's judgment did not prescribe the method to be used to afford all couples with equal rights. Instead, it left it up to the legislature who enacted the "Civil Union Act" in February 2007.

In 2008, however, the NJ Civil Unions Review Commissions conducted an investigation into the executed equality between marriage and civil unions. Their report determined that civil unions were not providing the same rights as marriage. A variety of reasons were cited for the inequities ranging from withholding of employee benefits to a strong lack of societal recognition. The Review Commissions recommended making all laws gender-neutral and therefore, affording marriage to all couples. Both the state house and senate passed a same-sex marriage bill in February 2012; Republican Governor Chris Christie vetoed the bill and is in favor of a constitutional amendment against same-sex marriage.

Hurdles: Public Policy

While a few states have taken steps to ensure that all citizens enjoy the equal protection of the law despite their sexual orientation, other states have moved to fortify the denial of rights by openly limiting marriage to opposite-sex couples. As previously seen, in almost every state that eventually recognized same-sex marriage, the struggle for equality began in the judiciary. In order to avoid State Supreme Courts to rule in favor of recognizing same-sex marriage, and therefore leave legislatures no other choice but to pass laws doing so, state governments began passing constitutional amendments deeming same-sex marriage

unconstitutional. The idea was to avoid citizen lawsuits against the state claiming that the denial of marital rights was unconstitutional.

Currently, 40 states have enacted their own “DOMA”s and will not recognize same-sex couples or provide them with marriage benefits. Ohio’s Constitution, for example, states that, “Any marriage between persons of the same sex is against the strong public policy of this state. Any marriage between persons of the same sex shall have no legal force or effect in this state and, if attempted to be entered into in this state, is void ab initio and shall not be recognized by this state.”

By preventing courts from ruling on same-sex marriage, states also avoid the sanctions made by the Full Faith and Credit Clause, which states, “Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.”

This clause is only related to ‘judicial proceedings,’ or court judgments that entitle them to something in other states, not laws initiated and enacted by legislation. For example, money owed on an insurance claim or custodial arrangements with children would all fall into the judgment category. However, the recognition of marriage is not a judgment, and therefore states have always viewed them as an issue of public policy. States have denied recognition of polygamous, ancestral, and international marriages in the past and following precedent, never needed DOMA to deny the recognition of any type of marriage, including same-sex. If

DOMA was completely repealed tomorrow, states would still have the same power to reject the recognition of same-sex marriages based on the grounds of public policy. Therefore, DOMA is not unconstitutional under the Full Faith and Credit Clause of the US Constitution because “Public Policy exceptions” already provide the precedent to deny marriage recognition.

DOMA does, however, give states permission to disregard judgments made by other states’ courts if they are based on the relationship of a same-sex couple. If an insurance company is ordered to pay a claim on a policy, or a reckless driver is ordered to pay a damages award, or a court issues a ruling on custody or support, DOMA provides hostile states with the power to ignore those out-of-state directions altogether.

TOWARDS MARRIAGE EQUALITY

Step One: Repeal the Defense of Marriage Act

As previously stated, DOMA is a bill that was passed in 1996 stating that same-sex marriages will not be recognized on a federal level, and defines marriage as “a legal union between one man and one woman” (DOMA1). We deem the Defense of Marriage to be unconstitutional under the 14th Amendment’s Due Process and Equal Protection Clause and argue for its immediate repeal. Once DOMA is repealed, there will be a clearer path toward federal *and* state recognition of same-sex marriage and all rights associated with marriage. It will also provide clear

support among the legislature and set judicial precedent stating discrimination of benefits to couples in same-sex marriages is unconstitutional.

Currently, a new bill authored by Senator Dianne Feinstein (D-Calif.), Respect for Marriage Act, S. 598 is the most recent push against the Defense of Marriage Act. RFMA proposes that the U.S. federal government extends the same rights to married same-sex couples if their marriage is recognized in their respective state. However, the bill does not force states to recognize the rights or extend marriage rights to couples in a same-sex marriage if same-sex marriage is not yet legal in their state. The passing of this bill would also repeal DOMA's "one man, one woman" definition of marriage, but again only for the purpose of federal law.

The original text of Respect for Marriage Act, H.R. 1116, S. 598:

"(a) For the purposes of any Federal law in which marital status is a factor, an individual shall be considered married if that individual's marriage is valid in the state where the marriage was entered into or, in the case of a marriage entered into outside any State, if the marriage is valid in the place where entered into and the marriage could have been entered into a State. (b) In this section, the term 'State' means a State, the District of Columbia, the Commonwealth of Puerto Rico, or any other territory or possession of the United States."

Although this bill is a step in the right direction and shows evidence of support within Congress and a national agenda for marriage equality, RFMA delegates defining power back to the states in choosing whether to recognize same-sex marriages or not. This bill only addresses federal provisions and recognition of

same-sex marriages. RFMA lacks a finite definition of marriage, allowing the bill to be open in terms of who (which governmental entity) should decide what marriage is. We believe it is unconstitutional to allow the states to continue to discriminate against their citizens, who are also citizens of the United States, based on their sexual orientation. However, if the court does rule DOMA constitutional to restrict and withhold benefits to married homosexual citizens, we do believe all states should be compelled to uniformity under the Constitution.

Currently in the US Senate, the Respect for Marriage Act is running its way through Congress in attempt to propose a legislative solution to full same-sex marriage recognition for the purpose of federal law and policy. This bill, if passed, would repeal DOMA, which ran its course through the legislature 16 years ago. In just over 15 years, the legislation passed is already being changed and possibly repealed altogether based on national interest, current senate assemblies, and varying political seasons.

RFMA could meet the same fate if the political climate changes once more. Although a federal act could be the quickest solution, it will also be a less finite solution. If the repeal of DOMA makes its way to the Supreme Court it may take multiple years to be decided, but it will be final. Finality is more important than speed and public support for the repeal of DOMA will be a useful gauge for the ease of legislation in the political waters following the repeal.

The Defense of Marriage Act is unconstitutional under the 14th Amendment, Section 1, Due Process, as well as under Equal Protection. At present, U.S. citizens cannot expect the same treatment under the laws of different states and the federal

government. The 14th Amendment, Due Process clause explicitly states that the U.S. Government “may not deprive persons of life, *liberty*, or property without the due process of law.” In the past 100 years, the Supreme Court has been enumerating the exact liberties protected under this section of the amendment. Marriage has even made an appearance on that list, notably in *Loving v. Virginia* (1967) when the Court decided state bans on interracial marriages were unconstitutional on the basis that “the freedom to marry, or not marry a person of another race resides with the individual and cannot be infringed by the state.” (*Loving v. Virginia*- 388 U.S.).

Chief Justice Earl Warren wrote in regard to the case:

“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by freemen.... to deny this fundamental freedom on so unsupportable a basis as racial qualifications was directly subversive of the principle of equality at the heart of the Fourteenth Amendment. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.”

While we realize that the ban on interracial marriages prior to *Loving* comes from a much longer, more overt and painful history of oppression, we believe similar logic can be applied to the recognition of same-sex marriage today. It has already been argued that the inclusion of an ‘unqualified’ right to decide whom to marry is a liberty guaranteed under the due process clause, expediting the judicial and legislative process more efficiently than any case or federal act (Shmoop). Marriage is one of the most intimate decisions that a person, heterosexual or

homosexual, can make. Following the *Lawrence v. Texas* (2003) ruling that affirmed that the State could find no “legitimate state interest” in restricting the benefits to a subset of people (thus nullifying Texas’ ‘Homosexual Conduct’ law), Justice Anthony Kennedy wrote:

“Choices central to personal dignity and autonomy are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the state.”

Although Equal Protection has been argued and won in Iowa, Massachusetts, and Connecticut, due process may be the most effective route to federal and state recognition because of the previous precedents in the government’s ability to define intimate social topics, including but not limited to marriage, contraception, relationships, procreation, and childhood education (Shmoop).

Along with Due Process litigation and arguments, several cases against the constitutionality of DOMA are making their way through circuit and appeals courts in the U.S. under the Equal Protection clause. In February 2012, U.S. District Court Judge Jeffrey S. White ruled DOMA unconstitutional holding that it denied the Constitution’s guarantee of equality. In the ruling, U.S. District Judge Joseph Tauro stated:

“This court has determined that it is clearly within the authority of the Commonwealth to recognize same-sex marriages among its residents, and to afford those individuals in same-sex marriages any benefits, rights, and

privileges to which they are entitled by virtue of their marital status. The federal government, by enacting and enforcing DOMA, plainly encroaches upon the firmly entrenched province of the state, and, in doing so, offends the Tenth Amendment. For that reason, the statute is invalid."

A similar ruling in Massachusetts deemed DOMA unconstitutional in a separate case in the 1st Circuit Court as well. Both cases are currently waiting in the appellate courts.

The rulings came shortly after U.S. Attorney General Eric Holder expressed to House Speaker John Boehner in a letter that the Department of Justice will not defend DOMA Section 3 (the definition of marriage) in lawsuits because "classifications based on sexual orientation warrant heightened scrutiny," and under that standard, Section 3 cannot be "applied to same-sex couples [who are] legally married under state law (APA)."

Precedent involving sexual orientation can also back up DOMA's discriminatory nature. The Civil Service Reform Act prohibits discrimination based on "conduct", which includes sexual orientation-related behaviors. Executive Order 13087 (1998) also prohibits the discrimination "in employment... because of sexual orientation through a continuing affirmative program. This policy of equal employment opportunity applies to and must be an integral part of every aspect of personnel policy and practice in the employment, development, advancement, and treatment of civilian employees of the Federal Government, to the extent permitted by law (EO 13087)." Therefore, any case involving withholding the stated benefits of any civilian employee whether it is healthcare, tax benefits or other provisions

allotted to heterosexual married couples. The lack of recognition for same-sex marriages is discriminatory in nature based on the potential benefits other heterosexual, married hard-working American citizens are earning at no cost or hardship.

Under the Privileges and Immunities clause found in Article IV of the U.S. Constitution and the Fourteenth Amendment, provides that “The Citizens of each State shall be entitled to all Privileges and Immunities in the several states”. One of the key components of this clause is that each citizen has the right to “receive the same tax treatment as that of the citizens of the taxing state (Leg. Dict.)” Under DOMA, married same-sex couples would not receive the same tax treatment as a homosexual citizen versus a married heterosexual citizen. Most commonly, any law possibly in violation of the Privileges and Immunities clause is referred to the Equal Protection Clause under the 5th or 14th Amendment (depending on federal or state jurisdiction). The courts will typically veer away from expanding the power of the federal government in respect to Article IV, historically it was designed to give former slaves equality—not increase the rights of the general population.

Although the case that DOMA is rendered unconstitutional under the Privileges and Immunities clause is unlikely, the discrimination is explicitly in conflict with its intended and implied text.

Similarly, the Defense of Marriage Act is unconstitutional under the Full Faith and Credit Clause, also in Article IV, Section 1 of the U.S. Constitution. It reads that States within the United States must respect the “public acts, records, and judicial

proceedings of every other State.” In the past, however, the federal government has been reluctant to “force a state to enforce the pronouncements of another state in contravention of its own public policy.” As explained earlier, states have argued that the recognition of same-sex marriages does in fact clash with their current public policy. However, *Loving v. Virginia (1967)* as mentioned previously, was the first case to apply the clause to marriage. It was used to prohibit states from creating legislation banning interracial marriages. In 2004 President Bush said he was alarmed that the recognition of gay marriage would have the ability to spread throughout the U.S. under the Full Faith and Credit Clause; however, there isn’t much of a precedent for that. During the Civil Rights Movement, there was a “patchwork” of states in the political landscape that complied to allow interracial couples to marry until 48 eventually agreed—it was solely Virginia and Alabama that were forced to comply through the ruling of *Loving v. Virginia (1967)*. A similar outcome could arise in today’s political landscape. With a growing public consensus for the recognition of same-sex marriages, public policy shifts may expedite the legislative and judicial process—a similar comparison from the 1967 ruling. Although, the federal government did have a difficult time enforcing the ruling: Alabama was the last state in 2000 to remove its miscegenation statute from the state constitution (Sengupta).

For the first time in America’s history, a majority of Americans favor legal same-sex marriage, according to a 2011 Gallup poll. 53% of Americans surveyed said they were in support of ‘legalizing gay marriage’. Since 1996, American approval has increased 26%, skyrocketing in the last four years by 13%. Still

however, the country remains divided. Of those surveyed, 69% of democrats agreed same-sex marriages should be recognized, versus only 28% of republicans (a stagnant 0% increase from the previous year). Both Democrat and Independent proportions collectively shot up 23% since 2010.

The study also reports young people; ages 18-34 are 1.7 times more likely to support legal same-sex marriage than adults over 55 years of age. This, along with the steady increase in national sentiment, hints that as the younger generations begin to take power, Americans may be more in favor of legalization down the road. Perhaps instead of the courts having to set a precedent against strong opposition, they may be able to take a function of affirmation for a boiling public consensus on the topic.

Step Two: Federal Recognition

The repeal of the Defense of Marriage Act will mark a tremendous step in the right direction for marriage equality. However, solely removing the “one man, one woman” definition of marriage from US Code and leaving it to the states is not enough when pertaining to such fundamental rights, which we believe are primarily protected under the 14th Amendment Equal Protection Clause. Equally, it will not be enough for the Supreme Court to find DOMA unconstitutional; however such ruling will provide the basis for further action pertaining to the federal and state recognition of same-sex marriage.

We are fully aware that the current political landscape, as well as judicial precedent in federal courts, may prove current obstacles of federal recognition of

same sex marriage (including the assurance that all states will equally allow and recognize same sex marriage). However, recent developments and rulings have almost unanimously attested to the unnecessary distinction between opposite-sex couples and same-sex couples when it comes to the rights associated with marriage. As shown above, multiple states have found the withholding of marital status and thus rights from same-sex couples to be unconstitutional. The reasoning has always been under the respective state's constitution's equal protection and/or due process clause. It is only reasonable to assume that other states' constitutions as well as the United States constitution would find the same to be true, as we have already discussed in the repeal of DOMA. We have seen federal implications in the rulings of district courts also acknowledging 14th Amendment rights but with the distinction that they would still leave it to the States to decide on matters of marriage.

We believe that at the end of *this process*, there must be federal recognition of same sex marriage for the purpose of all laws of the land. There must be a guarantee that no entity of government in the United States can deny the rights associated with marriage and the status of marriage itself to any of its citizens based on their sexual orientation/the sex of their partner.

We see two options in order to ensure marriage equality throughout the United States and we will detail the advantages and drawbacks of each option below. After careful consideration, we will propose the best course of action based on our evaluation of both options and historical context of the interpretation of the 14th Amendment.

Our initial thought was to ensure marriage equality for the long run; in that case, a constitutional amendment would be the safest option. While definitely final and solid because it is nigh impossible to repeal, a constitutional amendment's ratification process presents an incredible challenge. In order to be added to the Constitution, our proposed amendment would have to gain Congressional approval and then be ratified by 38 of all 50 States (3/4th). The ratification process must be completed within seven years of Congressional approval or that approval is revoked. Given that all states regardless of population have an equal say in the process we deem it unlikely that the process can be completed in time. However, if realized, the Amendment would eliminate all problems of federalism discussed earlier. Through approval of the federal government through Congress and the ratification by the States, all relevant entities acknowledge that the rights associated with marriage are 1) fundamental rights worth protecting in the Constitution and 2) that marriage is no longer public policy of the States but an issue that has to be addressed equally across the nation.

A federal law to amend the United States Code, passed by Congress is the other option. Once support for the Equality of Marriage Act can be solidified, it would move through the same process just as any law. It is much more likely that due to the proportional representation of the States' populations in the House of Representatives and the overall support for the recognition of same-sex marriage within the population as mentioned before, the law will pass the House. It then depends on the current composition of the Senate whether the bill becomes a law, but through tradeoffs and the constant advancement of the reach of marriage

equality activists it cannot take too long for such support to be present in the Senate. The current support for the Respect for Marriage Act is also a good indicator for the Senators' state of mind. While the Act is not what we envision as the final law, the support for it is encouraging for future progress. As much as a federal law is easier to achieve it is just as easily repealed when compared to a constitutional amendment. However, groundbreaking civil rights legislation has proven to last much longer than laws that deny certain rights to any group of people. The Supreme Court has also held that once a right is extended to citizens or group thereof Congress cannot revert to denying or limiting that right.

CONCLUDING RECOMMENDATION

Taking the advantages and disadvantages of both options as well as the legal precedent into consideration, we have come to the conclusion that a federal law is more feasible and a Constitutional Amendment is in fact unnecessary in extending the rights of couples in heterosexual marriages to the couples in same-sex marriages. Considering federal anti-discrimination policies and executive orders as well as state and federal court precedent and ensuing legislation it can be concluded that the rights associated with marriage fall under the 14th Amendment and thus no additional amendment is necessary but a clarification of the rights should be added to the US Code. Below we detail the reasoning for such decision as well as placing it into context of interpreting the 14th Amendment, especially the Equal Protection Clause.

Over the course of history, this nation has made many mistakes in its assessment of who deserves the right to be protected under the Fourteenth Amendment and which rights the 14th Amendment protects. Women had to establish that they were citizens in the first place and then had to fight for every individual right to be considered part of the privileges and immunities safeguarded by the 14th Amendment. The most prominent privilege here certainly is women suffrage. It seems hard to imagine today that women were once denied the right to vote because it was understood that the Equal Protection Clause did not apply to the right to vote—in a democracy. While issues of discrimination and inequality still exist, for the purpose of the Constitution and all laws of the United States and its subsidiaries, women are equal.

African Americans were ascribed a de jure equal status one hundred years before de facto equality was achieved and again that is not to say that all problems were miraculously solved overnight. But, no government, neither local, nor state nor federal can in its laws discriminate against its citizens based on race. The Voting Rights Act of 1965 represents the pinnacle to ensure that in no way can a state or local government not only deny but abridge and thus dilute the vote of a minority, which at the time of the passing of the VRA was intended to protect equal rights of African Americans.

The point is not to say that same-sex couples 1) face the same extent of discrimination as women and African Americans did in the past or 2) that achieving the status of citizenship is equal to the rights associated with marriage. We do believe however, that the rights associated with marriage, as demonstrated above,

are so expansive and sometimes existential that they can have no lesser value than the right to vote and thus they justify federal intervention. The liberty of a citizen to choose who represents him/her in the various entities of government can be of no lesser value than the liberty to choose one's partner in life. Especially when the law provides a special place and a multitude of rights for such relationships, but only if recognized as such. Knowing that sexual orientation is no choice, how can any entity of government deny a citizen the one person who among a multitude of other decisions, may ultimately be required to make a life or death decision for them when they are incapacitated, for no other reason than their sexual orientation?

We have heard much about public policy interest of the States and Supreme Court precedent regarding compelling State interest. It should be clear by now that no such thing exists when the rights of same-sex, committed couples are limited in all areas of life by denying them the right to marry. Additionally, the states would have a compelling interest in recognizing same sex marriage for the economic benefit as explained before. How can a state argue that it cannot allow for marriage equality when in fact it does not present harm to any other state interest (protection of children, relation with other states) and only bring financial benefit?

We are fully aware of the moral opposition that some parts of society hold but the same was true in 1919 and in 1965. That did not stop the Supreme Court and Congress to eventually realize that the Equal Protection Clause applies to more privileges and immunities than initially interpreted. Times do change and so does the interpretation of the constitution– it just takes a while. Being fully convinced that the rights associated with the legal status of marriage are protected under the

14th Amendment of the United States Constitution we propose that Congress enact the Marriage Equality Act to define the extent of the 14th Amendment and deny any entity of government within the United States the ability to deny the rights extended by marriage to any of its citizens based on sexual orientation. The Act will read as follows:

An Act to ensure that no citizen is deprived of the legal status of marriage based on his/her sexual orientation.

Section 1. SHORT TITLE

This Act may be cited as the Marriage Equality Act

SEC. 2. DENIAL OF MARRIAGE BASED ON SEXUAL ORIENTATION

(a) IN GENERAL- Chapter 115 of title 28, United States Code, is amended by adding after section 1738B the following:

‘Sec. 1738C. Certain acts, records and proceedings and the effect thereof

‘No state, territory or possession of the United States or Indian Tribe shall make any law denying any two citizens of the United States the legal recognition of marriage and all privileges and immunities extended therewith based on sexual orientation. No State, territory, or possession of the United States, or Indian Tribe shall make any law requiring religious establishments to recognize or perform marriages contrary to their beliefs’

(b) CLERICAL AMENDMENT- The table of sections at the beginning of chapter 115 of title 28, United States Code, is amended by inserting after the item relating to section 1738B the following new item:

‘1738C. Certain acts, records, and proceedings and the effect thereof.

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