The Federal Government and Gay Marriage

In the United States, civil marriage is governed by state law. Each state is free to set the conditions for a valid marriage, subject to limits set by the state's own constitution and the U.S. Constitution. In fact, "[T]he State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved."

Traditionally, a marriage was considered valid if the requirements of the marriage law of the state where the marriage took place were fulfilled. However, a state can refuse to recognize a marriage if the marriage violates a strong public policy of the state, even if the marriage was legal in the state where it was performed. States historically exercised this "public policy exception" by refusing to recognize out-of-state polygamous marriages, underage marriages, incestuous marriages, and interracial marriages.

In 1990, gay couples in Hawaii applied for a marriage license that helped start the national debate on same-sex marriage, and led to the creation of the Defense of Marriage Act.

In the 1993 case *Baehr v. Lewin*, the Hawaii State Supreme Court ruled that the state must show a compelling interest in prohibiting same-sex marriage, thus ruling in favor of same-sex marriage. But same-sex marriage was left in legal gray area in the aftermath of the case. Five years later, in 1998, the state legislature passed a constitutional amendment that took jurisdiction from the courts and gave it to the legislature, which then banned same-sex marriage.

While this issue was being discussed between the legislative and judicial branches in the state of Hawaii, though, concerns were raised by opponents of same-sex marriage that eventually other states might recognize same-sex marriages.

Despite the fact that no states permitted gay marriage in the mid-1990s, and according to Gallup, 68% of Americans were against it, Congress still felt it needed extra protection from what might be coming.

In 1996, as a reaction to Hawaii’s judicial ruling three years earlier, Congress passed the Defense of Marriage Act (DOMA), which defined marriage for the first time under federal law as a legal union of one man and one woman.

Its Congressional sponsors stated, "[T]he bill amends the U.S. Code to make explicit what has been understood under federal law for over 200 years; that a marriage is the legal union of a man and a woman as husband and wife, and a spouse is a husband or wife of the opposite sex."
Under DOMA, which was signed into law by President Clinton, the Federal government does not recognize same-sex marriages or civil unions, even if those unions are recognized by state law. For example, members of a same-sex couple legally married in Massachusetts cannot file joint Federal income tax returns even if they file joint state income tax returns.

DOMA meant that only heterosexual couples are eligible to receive any of the estimated 1,138 federal benefits designed for married people. Some of the federal benefits that opposite-sex married couples receive include income tax deductions, the ability to file joint taxes, and the ability to receive a spouse’s inheritance upon death. There are also extensive benefits given to the spouses of federal government employees and military veterans including health care, job placement assistance, survivor benefits, and the right to continuation of certain benefits if one’s spouse dies or the couple divorces.

While DOMA prevented same-sex couples from receiving federal benefits, it did not and could not dictate which state benefits were given to married couples, how individual states defined marriage, or what state laws were made concerning other facets of the daily lives of married couples.

The Defense of Marriage Act was designed specifically to "quarantine" same-sex marriage and allow states to refuse to recognize same-sex marriages performed in other states and prohibit federal recognition of same-sex marriage, the latter thus prevented gay couples from filing joint tax returns or gaining access to spousal benefits under Social Security and other federal programs.

Critics of DOMA argued that the law was unconstitutional on several grounds including:

- Congress over-reached its authority under Article IV of the Constitution, known as the Full Faith and Credit Clause
- the law illegally discriminated and violated the Equal Protection Clause of the 14th Amendment
- the law violated the fundamental right to marriage (including same-sex marriage) under the due process clause

**A Federal Amendment?**

In 2004, US President George W Bush formally called for an amendment to the US Constitution to ban gay marriages.

He said the unusual step was necessary to stop judges from changing the definition of the “most enduring human institution”.

His comments came after more than 3,000 gay and lesbian couples were allowed to wed in San Francisco while elsewhere – notably Massachusetts – authorities were deciding whether homosexual couples should be allowed to enter “civil unions” or full marriages.
An amendment would require two-thirds support in the House and Senate. It would then be sent to the individual states for ratification, and would need to be approved by three-fourths of them.

The Federal Marriage Amendment (FMA) (also known as the Marriage Protection Amendment) is the official name of the proposed amendment to the United States Constitution which would define marriage in the United States as a union of one man and one woman, thus permanently denying marriage to same-sex couples. The FMA also would prevent judicial extension of marriage rights to same-sex or other unmarried couples, as well as preventing people from having multiple spouses.

Bush said: "Ages of experience have taught us that the commitment of a husband and a wife to love and to serve one another promotes the welfare of children and the stability of society."

"An amendment to the constitution is necessary because activist courts have left our nation with no other choice," Pres. Bush said.


The original Federal Marriage Amendment, written by the Alliance for Marriage, was first introduced in Congress in 2002 in the House of Representatives by Democratic Representative Ronnie Shows (D-MS). It consisted of two sentences:

“Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.”

When the 2003 version of the FMA failed to advance in the legislature, Senator Wayne Allard (R-CO) re-introduced the Amendment in May 2004 with a revised second sentence. The 2004 version of the Federal Marriage Amendment stated:

“Marriage in the United States shall consist solely of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.”

The measure was defeated in 2004, was brought up again by Pres. Bush in 2006, but the US Senate rejected a constitutional amendment to ban gay marriage then, too.

Although a majority of Americans oppose same sex marriage, most want individual states to make their own decisions about the issue.

President Obama and DOMA
In June 2009, President Barack Obama signed a memorandum to grant some benefits to the same-sex partners of federal employees.

The memorandum does not grant health and retirement benefits to same-sex partners, as that was prohibited under the Defense of Marriage Act. But it does extend some benefits, such as visitation or dependent-care rights, to the same-sex partners of gay federal employees.

For instance, employees' domestic partners can be added to a government insurance program that pays for long-term conditions, such as Alzheimer's disease. They also can take sick leave to care for a sick partner or non-biological child.

But full health care benefits — the ultimate goal for many gay activists — remain forbidden as they would acquire an act of Congress.

"It will absolutely be seen as something good -- but I think, for example, it not including full health insurance -- that is going to put a real microscope on that question. You know, why not?"

Then in October 2009, President Obama publicly called on Congress to repeal DOMA in a speech.

The Respect for Marriage Act of 2009 was introduced in the House of Representatives in September 2009. Its primary intent was to repeal DOMA, but the bill never garnered enough votes to become law.

But in an even bolder move, President Obama in February 2011 instructed the Justice Department to no longer defend the constitutionality of the Defense of Marriage Act. Attorney General Eric Holder said that the department would stop defending the policy.

The legal shift, however, did not overturn DOMA — rather, it signaled a potential end to its enforcement.

"After careful consideration, including a review of my recommendation, the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a more heightened standard of scrutiny," Holder said. "The President has also concluded that Section 3 of DOMA, as applied to legally married same-sex couples, fails to meet that standard and is therefore unconstitutional."

Section 3 -- the section spotlighted by Holder -- prevented married same-sex couples in Massachusetts and other states from filing joint federal tax returns, among other federal spousal benefits.

"Much of the legal landscape has changed in the 15 years since Congress passed DOMA," Holder concluded in Feb. 2011. "The Supreme Court has ruled that laws
criminalizing homosexual conduct are unconstitutional. Congress has repealed the military's Don't Ask, Don't Tell policy. Several lower courts have ruled DOMA itself to be unconstitutional. Section 3 of DOMA will continue to remain in effect unless Congress repeals it or there is a final judicial finding that strikes it down, and the President has informed me that the Executive Branch will continue to enforce the law.”

Two U.S. appeals courts struck down DOMA as unconstitutional in 2012, with a Boston court (1st Circuit Court of Appeals) unanimously ruling against it in May 2012 and a New York court (2nd Circuit Court of Appeals) ruled against it in October 2012.

The New York ruling came in a case brought by Edith Windsor, an 80-year-old woman who sued the government in 2010 after being told to pay $363,053 in federal estate tax after her wife died. She and her wife Thea Spyer had been partners for 44 years and had married in Canada in 2007. New York had a law that recognized same-sex marriages from other states and countries, and therefore their marriage was recognized as legal in the state of New York.

Thea died in 2009 of complications from multiple sclerosis, leaving their shared estate to Windsor. Upon Spyer’s death, Windsor was served with a bill of $363,053 in estate taxes on property that Spyer had left her. Spouses are exempt from the estate tax, so Windsor filed for a refund from the IRS. It was denied. Because of DOMA, the couple's legal same-sex marriage didn’t qualify them for any federal protections, including the estate-tax exemption for surviving spouses.


In her 2010 suit in New York, Windsor argued that DOMA violated the constitutional right to equal protection. The momentum was with her. In 2011—for the first time in history, according to Gallup—a majority of Americans supported legalizing gay marriage. In 2012, the U.S. Second Circuit Court of Appeals ruled in Windsor’s favor.

In the 2012 majority opinion, written by Judge Dennis Jacobs, said that DOMA's "classification of same-sex spouses was not substantially related to an important government interest" and therefore violated the equal protection clause of the US Constitution.

In May 2012, President Obama took the next step, publically supporting same-sex marriage. In a televised interview, President Obama said, "At a certain point I've just concluded that for me, personally, it is important for me to go ahead and affirm that I think same-sex couples should be able to get married.” In doing so, President Obama became the first U.S. president in history to endorse same-sex marriage.

Joe Solmonese, president of the Human Rights Campaign, said: "His presidency has shown that our nation can move beyond its shameful history of discrimination and injustice. In him, millions of young Americans have seen that their futures will not be limited by what makes them different."
"In supporting marriage equality, President Obama extends that message of hope to a
generation of young lesbian, gay, bisexual and transgender Americans, helping them
understand that they too can be who they are and flourish as part of the American
community."

At his 2nd inaugural address in January 2013, President Obama went so far as to include
gay Americans in his speech: “Our journey is not complete until our gay brothers and
sisters are treated like anyone else under the law, for if we are truly created equal, then
surely the love we commit to one another must be equal, as well.”

Meanwhile, the US Supreme Court decided to take up the matter of the constitutionality
of DOMA in March 2013 with the case of Edith Windsor (Windsor v. United States) as
only it can rule if Congress' laws are constitutional.

In an unprecedented move, President Obama made the bold decision to file an *amicus
curiae* ("friend of the court") brief in support for the repeal of DOMA in the case. In late
February 2013, before the Supreme Court’s hearing began, the Justice Department
submitted an *amicus brief* to the court, outlining the executive branch's positions.

"Moral opposition to homosexuality, though it may reflect deeply held personal views, is
not a legitimate policy objective that can justify unequal treatment of gay and lesbian
people” contained in the DOMA law, Solicitor General Donald Verrilli said in the Justice
Department's legal brief.

In June 2013, the Supreme Court announced its verdict on DOMA in the *Windsor v.
United States* case, ruling DOMA unconstitutional. In a landmark 5-4 decision, the
justices ruled that DOMA was an unconstitutional violation of the 5th Amendment.

The Court specifically struck down Section 3 of the Act, which stated that “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 Court found Section 3 to be a violation of equal protection and, therefore,
unconstitutional.

Justice Anthony Kennedy cited the contradictions between state and federal statutes as
among the reasons for striking down the measure:

“By creating two contradictory marriage regimes within the same State,
DOMA forces same-sex couples to live as married for the purpose of state law but
unmarried for the purpose of federal law. DOMA undermines both the public and
private significance of state sanctioned same-sex marriages; for it tells those
couples, and all the world, that their otherwise valid marriages are unworthy of
federal recognition. This places same-sex couples in an unstable position of being
in a second-tier marriage. The differentiation demeans the couple, whose moral
and sexual choices the Constitution protects … and whose relationship the State
has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples."

"DOMA writes inequality into the entire United States Code. Under DOMA, same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways," the decision added.

"DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal."

Kennedy continued:

“DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others,” Kennedy wrote. “The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.”

In the end, the Supreme Court struck down a 1996 federal law that is considered one of the most odious, discriminatory federal laws in existence. It's rare for the court to invalidate a federal law, and even rarer when the law was passed by wide majorities at a time when most of the country would not have thought twice about the law's impact.

Four of the Justices disagreed with Justice Kennedy and dissented.

This was a huge victory for same-sex couples in the states where same-sex marriage is legal. With DOMA gone, the legal marriages of same-sex couples in those states will now receive federal recognition. With the decision, more than 100,000 legally married gay and lesbian couples across the country will now enjoy the same recognition as opposite-sex partners.

Married same-sex couples are now entitled to the federal benefits and protections they were denied under DOMA. After the Supreme Court decision, gay couples could file joint tax returns, get access to veterans’ and Social Security benefits, hold on to their homes when their spouses died and get spousal health insurance benefits.

Same-sex married couples are therefore also now eligible for green cards or immigration visas – ensuring that the estimated 36,000 same-sex couples in the US where one partner is not a legal resident can now apply for green cards for their spouses.

"The highest court in the land has properly thrown on the trash heap of history a discriminatory law that denies rights to Americans based on who they love," Representative Peter Welch said. "With this uplifting decision, the court is sending a clear message to our country: The days of denying rights to same-sex couples are numbered."
President Obama called the DOMA ruling a "historic step forward for marriage equality" and said he had ordered government departments to implement it as quickly as possible.

The decision was "not simply a victory for the LGBT community," he said. "I think it was a victory for American democracy."

"Regardless of race, regardless of religion, regardless of gender, regardless of sexual orientation ... people should be treated equally, and that's a principle that I think applies universally," Obama said after hearing about the historic ruling.
Here, two commentators on either side of the divide give their views on whether a Constitutional amendment is necessary:

**Yes**

*Rev. Rob Schenck, president of the National Clergy Council, says the model of heterosexual marriage works, and should be protected:*

A constitutional amendment to protect traditional heterosexual marriage is the right way to end this contentious issue. While some may legitimately criticize any attempt to tamper with the Constitution, a runaway and recklessly activist judiciary has left no option.

President Bush is right in urging Congress to act on such an amendment and to do so quickly. This is a delicate matter because it is fraught with possible misunderstandings as to motive and outcomes.

Some wrongly say that the president’s motive is political. Nothing could be further from the truth. Taking on a social controversy of this magnitude could not be better than leaving it alone. The fact is that social conservatives have nowhere else to go than to Mr Bush.

I believe the president’s actions stem from his sincere concern over the dangers of abandoning the tried and true configuration of one-man one-woman monogamous family unit.

Others say that granting a special constitutional protection of marriage leaves any sort of state sanctioned civil unions in a “different,” even inferior second-class status. (The Massachusetts Supreme Court among them.)

The reality is, though, that such “civil unions” are very different than marriage. It is the complement of male and female – physically, bio-chemically, psycho-socially – that makes marriage unique. These elements cannot be duplicated in same-sex relationships.

The two-parent family has never responded well to experimentation. We have had plural marriage in America and the result was unquestionably problematic for everyone involved. We have had government subsidies of single-mother households and the results have been catastrophic.

What will it take for us to get the message? The model of

**No**

*Kevin Cathcart, executive director at Lambda Legal which works for legal rights for lesbian and gay people in the US, says the Constitution should be for all Americans:*

A proposed amendment to the US Constitution that President George W Bush announced his support for this week would take away critical rights and protections from hundreds of thousands of families nationwide.

It would even block them from seeking such protections through the nation’s centuries-old democratic process.

Same-sex families pose no threat to this country or to other couples.

The threat to families is a proposed amendment, which would actively add discrimination into the Constitution for the first time ever.

Our Constitution belongs to every American, and we need to keep it that way.

There is no moderate way to amend the Constitution to discriminate against a group of Americans.

Amending our Constitution would have a very real impact on real people’s lives – people like Lydia Ramos in California.

Lydia’s partner of 14 years died in a car accident, setting off a legal and emotional nightmare.

The coroner refused to turn Lydia’s late partner’s body over to her, and the daughter they raised together was taken away by her late partner’s relatives after the funeral.

The two were kept apart for months – in a time where they most needed each other.

“Amending the federal Constitution would cement this discrimination and put thousands of mothers and daughters in the nightmare we faced,” Lydia says.
heterosexual marriage works; in fact, it works superbly.

Judges and justices ill-informed and perhaps even entertained by social experimentation should not be allowed to meddle with something so important to social stability, child development and the continuance of a species.

Billions of billions of human beings over millennia of time and in virtually every culture couldn’t be all wrong. We need this amendment to protect the sanctity of marriage and we need it now.

As President Bush said, “Ages of experience have taught us that the commitment of a husband and a wife to love and to serve one another promotes the welfare of children and the stability of society.”

Rev. Penny Banuchi of the New York Christian Coalition, also makes an interesting point, “If same-sex marriage became a reality, I think you would see different people taking advantage of that, and not only would we have same-sex marriage, but we’d have fathers saying that they’d want to marry their daughters, brothers and sisters marrying, people marrying their dogs…there would be lawlessness.”

A legal marriage is accompanied with a vast amount of legal advantages, including tax advantages, next-of-kin status (which gives one partner of a relationship the right to visit the other partner in hospitals), rights of inheritance in the absence of a will, and retirement benefits.

A “spouse” can visit a dying partner in a hospital. A “husband” is legally the beneficiary of an estate. A “wife” can receive medical benefits from her husband’s work benefits. A “partner” is guaranteed none of these same rights.

Nick Vannello of Cleveland, Ohio, said, “While I can have the appropriate legal documents drawn to designate my partner as the beneficiary of my will, my family could contest that will and be awarded the benefits that would otherwise go to my partner.

If I was dying in the hospital, my family could see me, but not necessarily my partner.”

Evan Wolfson, an attorney, has said, “There are over 1,049 federal protections, benefits, and responsibilities connected to marriage alone, not to mention state law and city law.”

The kind of amendment President Bush supports would put families all across America in jeopardy.

The president is supposed to be the leader of our entire nation, but he is turning his back on that duty by supporting an attempt at such extreme discrimination.

Young gay people listening to him will wonder if they can be part of the American dream when marrying the person they love might never be part of their future.

We want “marriage rights” so that we can be protected by the same laws as every straight person in America.

Strait or gay, this is deeply troubling for a lot of people, and we’re going to stand with them and fight this attempt to silence and discriminate against our families.

Attorney Evan Wolfson said, “The United States is lagging far behind Canada and the Netherlands in providing protection for gay couples. And until we end this discrimination, the U.S. will not be in the forefront of civil rights protections for all its citizens.”