

The Defense of Marriage Act, Implications of California Proposition 8 and the Discriminatory Tax Code in Regards to Inheritance Rights of Same Sex Couples

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Defense of Marriage Act

The Defense of Marriage Act (DOMA) was enacted by Congress and signed into law by President Bill Clinton effective September 21, 1996 (Wikipedia, various) restricting marriage for federal purposes between one man and one woman, it denies certain Social Security benefits, tax benefits as well as other rights granted to married straight couples (Dwyer, 2011). San Francisco, New York State and many other cities, states and other countries have passed laws allowing people of the same sex to marry and gave benefits to couples within state boundaries. (United States of America v. Edith Schlain Windsor, 2013). Edith Schlain Windsor inherited her lesbian partner's (40+ years) entire estate and was forced to pay federal estate tax of over \$363,000 (United States of America v. Edith Schlain Windsor, 2013). Windsor unsuccessfully argued in United States Tax Court that since she was married in New York State and was a U.S. Citizen and by living in New York State she had a right to exclusion of the inheritance tax for married individuals (United States of America v. Edith Schlain Windsor, 2013).

Edith Schlain Windsor who legally married Thea Spyer while in Canada and again in New York State in 2007 had lived together since 1963 in New York State. In 1993 the couple registered in New York City as domestic partners. Upon Thea's death in 2009 Edith was named as executor of Spyer's estate. (Donald B. Verrilli, 2012) Edith filed an estate return for Thea and forwarded in excess of \$363,000 in federal estate taxes. Afterward Edith filed a claim for refund citing 26 U.S.C. 2056(a) which allows property of a decedent to flow to a surviving spouse free of any estate tax. In determination to the fitness of the claim for refund the Internal Revenue Service denied the claim citing the Defense of Marriage Act section 3 (United States of America

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v. Edith Schlain Windsor, 2013) denying her the status of spouse and therefore not eligible to be treated as a “surviving spouse”.

Edith Windsor responded by filing suit in the United States District Court for the Southern District of New York claiming the IRS decision violated the Fifth Amendment of the United States Constitution equal protection clause. (Wikipedia, various) After this complaint was filed Eric H. Holder, Jr. then Attorney General of the United States sent a letter (February 23, 2011) to John A. Boehner, Speaker of the House of Representatives explaining that although the Department of Justice in the past has defended Section 3 of the Defense of Marriage Act upon examination of two cases and conferring with President Barack H. Obama section 3 of DOMA warrants application of heightened scrutiny rather than rational basis review as afforded under the Fifth Amendment due process clause in the Constitution of the United States and would not enforce DOMA. (Donald B. Verrilli, 2012) The letter further explained Attorney General with President Barack Obama will not enforce DOMA until either the present Congress repeals section 3 or the judicial branch renders a decision as the judiciary is the final arbitrator of constitutional claims. Attorney General Eric Holder opinion is that laws that treat homosexuals differently should receive a heightened form of legal scrutiny and was confident the law will be found unconstitutional (Dwyer, 2011). After the Justice Department lawyers stepped aside the Bipartisan Legal Advisory Group of the United States House of Representatives agreed to present arguments in defense of Section 3 of the Defense of Marriage Act before the Supreme Court and asks for a motion of dismissal. John Boehner announced “this action by the house will ensure that this law’s constitutionality is decided by the courts rather than the president unilaterally” (Dwyer, 2011). The Attorney General’s office agreed to participate in order to

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establish that the court had Section 3 jurisdiction, the court granted to hear the motion on June 2, 2011 (Donald B. Verrilli, 2012). The lower court later denied the motion to dismiss granting summary judgment in favor of the plaintiff Edith Windsor, granting her summary judgment that Section 3 of the Defense of Marriage Act in fact violates the Fifth Amendment equal protection guarantee. This court explained that the New York Statue defines marriage for federal purposes. (Marriage Equality Act, 2011 N.Y. Sess. Laws ch 95) It was further explained by the court that laws that attempt to harm a politically unpopular group receive a more searching form then rational basis review. (Donald B. Verrilli, 2012)

The Constitution of the United States (COTUS) granted life, liberty, and justice to citizens of the United States (US), over time several amendments have been added. (United States Senate, 1787). Equality was never granted in this document, later some amendments gave some form of equality, namely woman's rights, and freedom of slaves (United States Senate, 1787). Equality is one aspect that due to religious, moral, social and business interests, total equality has been difficult to achieve in the US. In recent years homosexual and lesbian rights have been debated with some progress of a national consensus (California Proposition 8 Appeals, 2012). Edith Schlain Windsor has taken her fight to the U.S. Supreme Court over taxes demanded by the government that would not be collected if the U.S. government recognized her marriage (DOMA) (United States of America v. Edith Schlain Windsor, 2013). Edith Windsor when asked about DOMA states, "The law effectively imposes a tax on being gay" (Dwyer, 2011). In one month the U.S. Supreme court heard arguments involving DOMA, California's Proposition 8 and Edith Schlain Windsor's tax appeal. Issues brought up in these three cases that

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should either allow or deny the same rights to homosexuals and lesbian couples that married heterosexual couples currently enjoy.

Discrimination in the United States can be rooted in the many distinctions of her citizens and used as grounds to discriminate against other Americans. Religion, race, sex, and age are perhaps the most common of forms of discrimination in our society; however a deep rooted discrimination has been sexuality (Wofson, 1983). Many people form emotional convictions as to what is “natural and even “moral” sexual conduct to the exclusion of all others. Society has formed a division putting people as either non gay majority or the gay minority. Gay individuals have been alienated and tagged as immoral and in some cases dangerous, violating fundamental religious beliefs. John Boswell, a leading historian of sexual practices of ancient and medieval worlds notes that “majorities...Create minorities in one very real sense, by deciding to categorize them” (Wofson, 1983). The present focus on sex and psychological needs in gay sexuality conforms to the basic tenant of marriage. Many heterosexual couples are unable to procreate offspring and are still allowed the same rights granted to couples that are able to bear children. Gay individuals are refused access to marriage and blamed and stigmatized for not having marriage like relationships and values.

In this case Windsor must prove three things to grant standing in the court. First, that the plaintiff suffered an injury, the fact that her inheritance was taxed gives ground to this point. Another standing requires that the item at hand “likely” will be redressed favorably rather than speculative. The third prong which is being debated, the plaintiff must present a “casual connection between the injury and the conduct of the complained of” (Donald B. Verrilli, 2012). The Bipartisan Legal Advisory Group (BLAG) arguing on behalf of the United States questions

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this last standing claiming her New York marriage was not recognized under New York law citing a 2006 case *Hernandez v. Robles* declaring the New York Constitution does not compel recognition of same sex marriages. The lower court found that since New York had since executed a state action in 2007 recognizing gay marriage BLAG has not proven their argument and will allow the case to be heard by Supreme Court of the United States (Donald B. Verrilli, 2012).

Many of the arguments of the right surround the assumption that the institution of marriage is a responsibility of the state. That it is in the best interest of the state to promote procreation to ensure the safety of the state continuing with the birth of more citizens and stability of the family unit (CBS News, 2013). During a Face the Nation episode Tony Perkins stated that if DOMA was repealed it would put his party in the minority (republican) and going as far as saying polls don't count votes do, when presented with the statistics that 58% of citizens support gay marriage and 80% of young people do (CBS News, 2013). Evan Wolfson another guest on the program commented DOMA should not be voted on, they are rights. Wolfson went on to state "marriage is not defined by who is denied. It is defined by love, caring....Allowing a gay couple to marry will not change your marriage" (CBS News, 2013). David Frum had commented by upholding DOMA you would maximize the number of children in a stable family when another guest cited 1/3 to 1/2 of all children in the United States are raised in a one person environment (CBS News, 2013).

Despite the implication of the name Bipartisan Legal Advisory Group of the United States House of Representatives (BLAG) representing the opposing side in Windsor's case it is mainly comprised of republican sponsors and puts the republicans in a difficult, if not

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hypocritical position. Paul Clement who is leading in the defense of DOMA before the Supreme Court is arguing essentially to approve an estate tax on a married couple, being contrary to what John Boehner, Republican Speaker of the House has publicly stated, “it is fundamentally wrong for Americans who are taxed almost every waking moment to also be taxed upon their death” (Dwyer, 2011). Edith Windsor further explained “The Federal government taxed what I inherited from Thea as though we were strangers rather than spouses” (Dwyer, 2011).

California’s Proposition 8

In 2008 a statewide proposition in California was put to the voters and approved. The Yes vote for the proposition was to eliminate same sex marriage in the State of California by constitutional amendment. 52.3% to 47.7% voted yes (Sullivan, 2013). The most liberal state in the nation went against liberal ideology. How could this happen in a state as liberal as California? The overwhelming reasons were race and religion (Sullivan, 2013). African American churches as well as Catholic churches (mainly Hispanic) told parishioners that their faith precluded them from supporting same sex marriage. 70% of black voters supported Prop 8 along with 53% of the Hispanic Catholics (Sullivan, 2013).

After this election a suit was filed in US District Court and heard by Judge Walker on August 4, 2010. Judge Walker sided with the opponents of the Proposition 8. Judge Walker in his opinion found that there was a fundamental right to homosexuals right to marry and cited over 80 enforceable findings including same sex love has been documented throughout history and religious beliefs harm homosexuals (ProCon.org, 2013). This lead to the case being referred to a skeptical Supreme Court.

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The case before the Supreme Court is formally titled *Hollingsworth v. Perry* before the Supreme Court both sides arguing that allowing same sex marriage is or is not detrimental to the a child's development with no admissible evidence for either party to submit (Killoran, 2013).

Justice Kennedy did mention in oral arguments that there is a Red Brief claiming 40,000 children in California reside in same sex parent households.

Charles Cooper took the defense advocating the law in California should not change, keeping marriage between one man and one woman. Ted Olson represented two couples, one lesbian and another gay that desire to be married in their home state of California (Parnass, 2013). During oral arguments before the Supreme Court Justice Kennedy asked Cooper if marriage could be considered a "gender-based classification". His reply was "although virtually every court that has considered this question has agreed it is not...but I guess it is" (Parnass, 2013). Cooper's argument includes that it was in the state's interest to grant marriage rights for the benefit of procreation. Justice Kagan put forth the question, "If you are over the age of 55, you don't help serve the government's interest in regulating procreation through marriage. So why is that different" Cooper tried to explain that couples over 55 could with Kagan interrupting "I can assure you, if both the woman and the man are over age 55 there are not a lot of children coming out of that marriage" (Parnass, 2013). Justice Kennedy hinted that the case might have been improperly granted. Should this opinion prevail he would need four other justices to agree and the justices would not have to explain why it was dismissed. (Parnass, 2013) Although arguments in the *Windsor* case appear favorable to Edith's cause based on comments during the hearing it is not as clear in this case. Justice Alito presented both sides with the following question, "You want [the Supreme Court] to step in and render a decision based on an

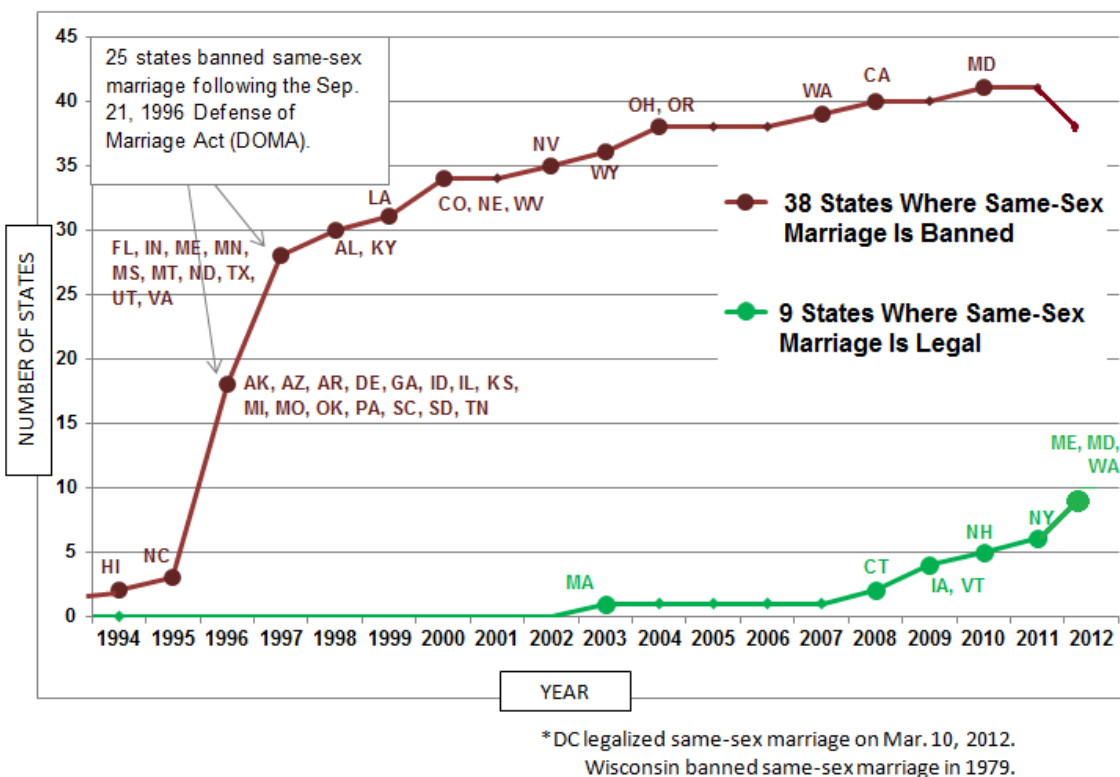
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assessment of the effects of this institution [gay marriage] which is newer than cell phones or the Internet? I mean, we do not have the ability to see the future. On a question like that, of such fundamental importance, why should it not be left for the people...to decide?" (Killoran, 2013)

Although the court must write an opinion it is not likely they will order a mandate.

Conclusions:

Timeline of Same-Sex Marriage Bans and Legalizations by Effective Date of Laws



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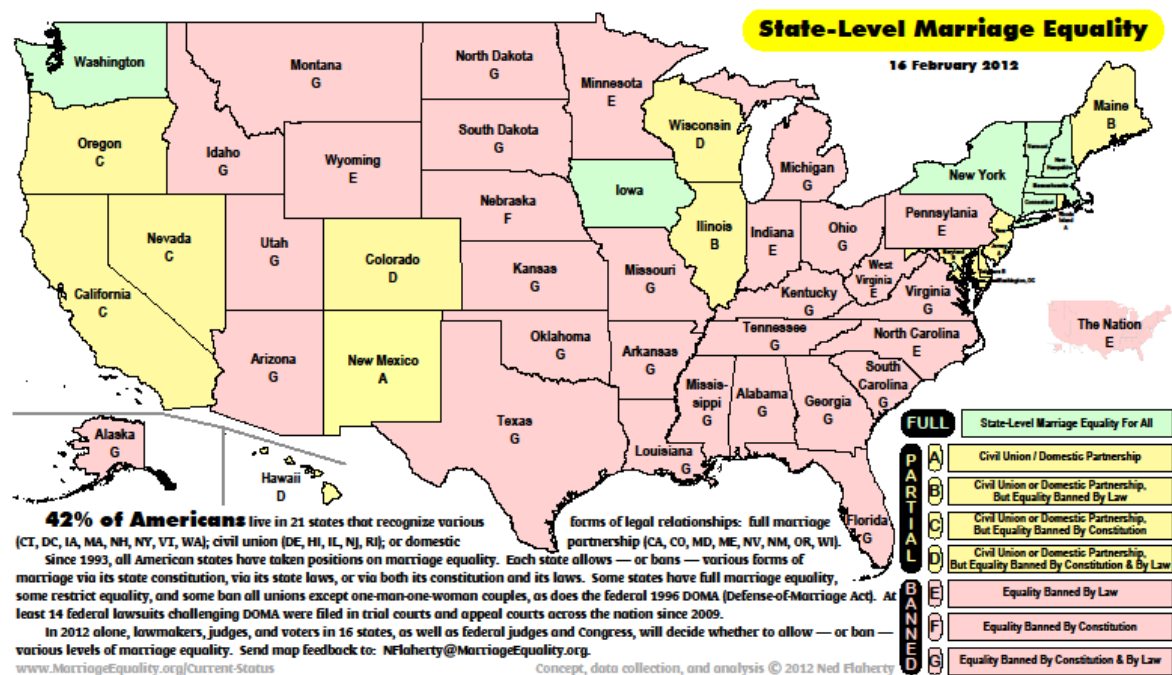
The United States was formed with the signing of the Declaration of Independence on July 4, 1776 granting freedom, life and liberty from what was considered tyrannical rule, imposing unfair taxation and representation to the people of the colonies (Continental Congress, 1776). In composing of this document "we the people" were granted unalienable rights (Continental Congress, 1776) and there has been great debate over who deserves what rights since the signing of this document. The United States is a melting pot of race, morals, religious views, and ideas creating difficulty in creating consensus on many hot button topics.

Eleven countries allow same sex couples to marry; The Netherlands (2000), Belgium (2003), Canada (2005), Spain (2005), South Africa (2006), Norway (2009), Sweden (2009), Argentina (2010), Iceland (2010), Portugal (2010), and Denmark,(2012) (ProCon.org, 2013), France has in the past few days also legalized marriage between same sex partners. As of November 2012 nine states in the US have legalized gay marriage as well as the District of Columbia. (ProCon.org, 2013), with Rhode Island's General Assembly authorizing same sex marriage this week. (The Associated Press, 2013) Delaware, New Jersey, Oregon, Minnesota and Illinois are all in the process of legalizing marriage between same sex partners (The Associated Press, 2013).

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Gay Rights pivotal moment in the United States began on the early morning of June 28, 1969, during a time when police raids were prevalent upon gay bars and homosexual sex was illegal in all states with the exception of Illinois (ProCon.org, 2013). Following this typical raid, patrons fought back and several days of riots in the streets of New York ensued (ProCon.org, 2013).

Thrusting the gay marriage debate on the national stage occurred May 5, 1993 when Hawaii’s Supreme Court ruled that state could not ban same sex marriage without a “compelling reason” (ProCon.org, 2013). Residents of Hawaii passed a constitutional amendment before the case was finalized (ProCon.org, 2013). Once the amendment was passed 40 other states promptly passed similar amendments to their constitutions’ during the course of the next decade, including the Federal government passing and signing of DOMA.



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The Church of Jesus Christ of Latter-Day Saints publicly claims “Marriage between a man and a woman is the bedrock of society.” (ProCon.org, 2013). This group often ex-communicates and even sends to rehabilitation members that do not adhere to their edicts. The American Bar Association’s House of Delegates voted to support gay marriage. (ProCon.org, 2013) Imagine all the divorce business that could be created? For one I see this as reason to not support the sanctity of gay marriage, however allow rights to committed partners. The American Psychological Association supports gay marriage and in usual fashion of most religious based organizations Pope Benedict XVI in a September 2010 speech declared his opposition (ProCon.org, 2013).

Briefly the procon.org website lists the following arguments for and against the legalization of marriage.

Pro:

- It is no one else’s business if same sex couples want to marry. If two people love each other they should be allowed to publicly celebrate
- Traditional marriage is a misnomer, historically family arrangements have been based on polygamy, communal child-rearing, concubines and mistresses and commonality of prostitution could consider heterosexual monogamy as “unnatural” in evolutionary terms.
- The Supreme Court in the 1974 case *Cleveland Board of Education v. LeFleur* states “freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause”
- Gay marriage will ease the adoption process. In the US 100,000 children are waiting to be adopted. Reports found that children of lesbian mothers have less social problems and

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rated higher in social and academic competence of heterosexual parents (American Academy of Pediatrics, 2010).

- Marriage benefits physical and psychological health, and denying marriage to same sex couples causes harmful psychological effects and allowing marriage would grant the health and psychological benefits enjoyed by heterosexual unions. (Amacus Brief-by Natalie Gilfoyle, American Psychological Association, 2007).
- The Executive Board of the American Anthropological Association after reviewing more than a century of data found that there is “no support whatsoever for the view that either civilization or viable social orders depend upon marriage as an exclusively heterosexual institution. Rather, anthropological research supports the conclusion that a vast array of family types, including families built upon same sex partnerships can contribute to stable and humane societies” (ProCon.org, 2013).
- Marriage in the United States has transformed over the years, namely Inter-racial marriages were forbidden in many states until a 1967 Supreme Court decision. (ProCon.org, 2013)
- Marriage is not about procreation. If it was then all infertile couples would be barred from the possibility of marriage. Never has fertility been a pre-requisite to marriage. Five married presidents of the United States never had children. The declared “father of our country” George Washington never fathered children with his wife Martha. (ProCon.org, 2013)

Con:

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- Marriage is as old as the book of Genesis, in 1971 the Minnesota Supreme Court found “The institution of marriage as a union of one man and one woman, uniquely involving the procreation and rearing of children within a family” (ProCon.org, 2013)
- Gay marriage is incompatible with the following churches; The Catholic Church, Presbyterian Church, Islam, United Methodist Church, Southern Baptist Convention, Church of Jesus Christ of Latter Day Saints, National Association of Evangelicals, and the American Baptist Churches USA. This could lead to the forcing of churches to perform ceremonies they find offensive and leading to school education that same sex marriage is the same as heterosexual marriage (ProCon.org, 2013).
- The Congressional Budget Office estimates extending benefits to same sex partners would cost \$898 billion between 2010 and 2019 (Congressional Budget Office, 2009)
- Gay marriage will further entwine gay culture into the fabric of American lives. (ProCon.org, 2013)
- Gay marriage would only entice adult gratification (ProCon.org, 2013)
- Same sex marriage is not a civil right according to Matthew D. Staver, JC Dean of Liberty University School of Law. He further explains that “Sexual orientation does not meet any of the three objective criteria shared by the historically protected civil rights categories. His reasoning is based on his opinion that the Civil Rights Act of 1964 requires there to be (a) a history of longstanding, widespread discrimination, (b) economic disadvantage, and (c) immutable (ProCon.org, 2013)

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It appears that the comments against gay marriage are based on personal and religious beliefs and ignore the human dignity being denied to homosexuals. Staver's comment on no economic disadvantage is disproved by the relevant facts concerning Edith Windsor.

Recommendations: Treat all people with the unalienable rights that the founding fathers along with revolutionary fighters risked their lives for in creating our great society as One Nation, Under God, regardless of what your God tells you, indivisible, regardless of your differences with justice for all.

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