



Ending Discrimination against Same-Sex Couples: Marriage and Relationship Recognition in Federal Law

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Our Position

Passed in 1996, the so-called Defense of Marriage Act (DOMA) defines marriage under federal law as “only a legal union between one man and one woman as husband and wife.” This targets gays and lesbians for discrimination by requiring that legally married same-sex couples be denied all of the federal benefits and protections that every other married couple enjoys. DOMA also provides that states, which routinely recognize marriages from other states, may nevertheless make an exception for same-sex couples married in another state. Although there are some actions that can and should be taken to expand benefits and protections for same-sex couples, only the full repeal of DOMA will allow federal and interstate recognition of their legal marriages and give those couples equal rights under the law.

Talking Points

DOMA is unconstitutional. It violates the Equal Protection guarantee of the Fifth Amendment by withholding the more than 1,300 federal benefits and protections of marriage based solely on lawmakers’ animus against gays and lesbians. DOMA bears no rational relationship to any of the phony justifications made up to disguise the fact that this was a law designed to hurt an unpopular minority. It violates the Full Faith and Credit Clause, which requires states to recognize the official acts of other states, by allowing one state to simply ignore legal marriages performed in another. DOMA forces married same-sex couples into an untenable situation whereby the legal status of their marriage – and all the rights that go along with it – change whenever they cross state lines.

The courts agree. In July 2010, a federal court in Massachusetts ruled unconstitutional Section 3 of DOMA, which is the section limiting marriage to opposite-sex couples for purposes of federal law. Judge Joseph Tauro, a Nixon nominee, ruled in two separate cases that Section 3 violates the [Equal Protection Clause](#), as well as the [Tenth Amendment](#) and the Spending Clause of the Constitution. Both decisions lay out very clear arguments that should provide a reasonable path for success as the cases likely move to the United States Court of Appeals for the First Circuit and ultimately to the Supreme Court. Both are under appeal. As it stands, they apply only within Massachusetts.

So do President Obama and the Attorney General. In February 2011, the [Department of Justice \(DOJ\)](#) announced that it would stop defending Section 3 of DOMA in courts, per instructions from President Obama, because that part of the statute is unconstitutional. In addition, Attorney General Eric Holder and the President have said that any law that discriminates based on sexual orientation, including DOMA, must be considered under

“heightened scrutiny,” where the discrimination must be “substantially” related to an “important” government interest, rather than a “rational basis” test, which merely requires a “rational” relationship to a “legitimate” government interest. This is the first recognition by the United States government that gays and lesbians have suffered a long history of discrimination so bad that it makes constitutionally suspect any laws that treat people differently based on sexual orientation.

Even DOMA’s original supporters agree that repeal is necessary. President Clinton, who signed DOMA into law, believes that “the fabric of our country has changed, and so should this policy.” Former Representative Bob Barr (R-GA7), DOMA’s champion in Congress, emphasizes that repeal would “remove the federal government from involving itself in matters of defining ‘marriage,’ which historically and according to principles of federalism, are properly state matters and not federal.”

The freedom to marry is a family value. With recognition of their marriages, same-sex couples and their children can live their lives secure in the knowledge that they have the same legal benefits and protections that every other family enjoys. But without the right to civil marriage, families are put at severe risk. If there is a medical emergency, couples are at the mercy of doctors, nurses, and security guards if they wish to visit in the hospital and make decisions for each other. Without marriage, all of a family’s financial planning and savings could be wiped out to pay inheritance taxes upon the untimely death of one partner. Without marriage, couples live in a state of legal limbo that exacts a significant emotional and financial toll on them and their children. For gay and lesbian Americans, the security of marriage is replaced by the fear that at the moments they are most vulnerable, afraid, and alone, the federal or state government will step in and take everything away from them, just because they cannot be joined in civil marriage. Adding to the damage, government denial of marriage sends children the unmistakable – and unacceptable – message that their families are outsiders within our society.

Ending the denial of marriage and protecting religious liberty are not mutually exclusive. Recognizing the difference between civil and religious law is an American ideal that goes back to our nation’s founding. Each of our religions has always been free to define marriage for religious purposes as it so chooses, and that will never change. No religious institution will ever be required to solemnize a marriage in violation of its faith, because we do not allow civil law to mandate faithful beliefs. Just as importantly, we should not allow the teachings of a religion to dictate the *civil* law under which *all* of us must live. Some religions do not recognize divorce and subsequent remarriage. Some religions do not recognize a marriage unless it is performed in the name of Jesus; others don’t recognize a marriage that *is* performed in the name of Jesus. Some clergy will not perform or recognize marriages between people of different faiths. But civil law is rightly blind to our rich diversity of often-conflicting religious doctrines. Civil law, unlike religious law, applies to everyone regardless of faith. That is why we do not allow the many different religious definitions marriage to determine the definition of civil marriage.

If marriage is just a legal institution, then why aren’t civil unions enough? Marriage is a state institution recognized in every state and at the federal level. Civil unions are exclusively state-based. Like domestic partnerships, they provide some state benefits, but they are not portable from state-to-state, and they receive no federal recognition. In

addition, the separate status of “civil unions” stigmatizes lesbian and gay families as unworthy of perhaps the most basic foundation of our society.

Benefits and protections are important when the door is shut to marriage. Americans support inclusion of same-sex couples. A [December 2008 Newsweek/Princeton Survey Research Associates International poll](#) showed majority support for a wide range of benefits and protections. 74% for inheritance rights. 73% for employer-provided benefits including health insurance. 67% for Social Security benefits. 86% for [hospital visitation rights](#). These numbers grew from the previous 2004 poll in every area that had been surveyed previously.

America’s largest and most successful corporations, along with many state and local governments, recognize same-sex relationships. Nearly 60% of Fortune 500 companies provide domestic partner benefits to their employees. Among the Fortune 100, that number jumps to 83%. Many state and local governments grant benefits to partners of public employees and have some form of [relationship recognition](#) for same-sex couples.

Legislation

Following the February 2011 announcement that the [Department of Justice \(DOJ\)](#) would stop defending Section 3 of DOMA in courts, [Representative Jerrold Nadler \(D-NY8\) \(H.R. 1116\)](#) and [Senator Dianne Feinstein \(D-CA\) \(S. 598\)](#) introduced the Respect for Marriage Act. It would repeal DOMA and thus provide married same-sex couples with the full range of federal benefits and protections that the law already provides to married opposite-sex couples. It would allow states to define marriage for themselves. As before DOMA, and consistent with the Constitution, states would retain the ability to decide which out-of-state marriages to recognize.

The Respect for Marriage Act was the subject of a [Senate hearing](#) in July 2011 and [passed out of Committee](#) in November 2011.

The Domestic Partnership Benefits and Obligations Act (DPBO) ([H.R. 3485/S. 1910](#)) falls short of marriage but attempts to address the benefits and protections issue for federal employees. It would treat same-sex spouses and domestic partners the same as opposite-sex spouses in matters like federal health insurance programs, federal employee pension and retirement benefits, and family and medical leave for federal employees.

The Obama Administration has sought additional changes for federal employees through its regulatory authority. Beginning in [June 2009](#), agencies reviewed their existing benefits structures to see where existing law might permit them to recognize same-sex domestic partnerships. In June 2010, a [Presidential Memorandum](#) was issued that detailed their findings and directed the extension of benefits. The Office of Personnel Management (OPM) is overseeing implementation. Areas covered include day care, travel and relocation expenses, credit union memberships, and career counseling.

Additional administrative action addresses inclusion of lesbian couples in the work of the Department of Justice’s Violence Against Women Office, and inclusion of housing

discrimination against same-sex couples in the work of the Department of Housing and Urban Development.

Additionally, the Tax Equity for Health Plan Beneficiaries Act (111th: [H.R. 2625/S. 1153](#)) would allow individuals not qualifying as “dependents” (such as domestic partners) to deduct their insurance premiums and benefits from their income; the Family and Medical Leave Inclusion Act ([H.R. 2364/S. 1283](#)) would add to the existing Family and Medical Leave Act and federal civil service law coverage of domestic partners and same-sex spouses (and their families); and the Ending LGBT Health Disparities Act (111th: [H.R. 3001](#)) would address a broad range of issues related to healthcare, including relationship recognition concerns.

Action

Contact your [Representatives](#) and [Senators](#) and tell them you want the federal government to recognize marriages regardless of sexual orientation. Let them know that supporting legislation such as the Domestic Partnership Benefits and Obligations Act (DPBO) will help restore justice in our country. But also urge them to pass legislation such as the Respect for Marriage Act and repeal DOMA so that this discriminatory blemish can be fully removed from federal law. Write a letter to the editor of your local newspaper to explain how repealing DOMA will protect fairness and equality for all Americans.

Further Reading

[American Civil Liberties Union](#)
[Center for American Progress](#)
[Courage Campaign](#)
[Freedom to Marry](#)
[Gay & Lesbian Advocates & Defenders](#)
[Human Rights Campaign](#)
[National Center for Lesbian Rights](#)
[National Gay and Lesbian Task Force](#)
[Third Way](#)
[Williams Institute](#)