**A Constitutional Appeal for the Implementation of the *Respect for Marriage Act* of 2009**

*Recommendation: Repeal the Defense of Marriage Act and replace it with the Respect for Marriage Act.*

**Background**

As previously stated in part one of this briefing paper, opinions of same-sex marriage have changed since the *Defense of Marriage Act* (DOMA) was passed by Congress in 1996. Popular and legal opinions have shifted since 1996 towards repealing DOMA. While support for DOMA remains, opposition to this discriminatory law is growing stronger. According to a Gallup poll in 2008, 49% of Americans favored a constitutional amendment that would define marriage as a union between one man and one woman, compared to 48% who opposed such legislation with 2% undecided. Five U.S. states and the District of Columbia (D.C.) currently allow same-sex marriage and four of those five states (Connecticut, Iowa, Massachusetts and Vermont) began allowing same-sex marriages as a result of court cases (Human Rights Campaign 2010). New Hampshire and D.C. both legalized same-sex marriage through popular vote (Human Rights Campaign 2010). Eleven other U.S. states allow civil unions or recognize some other type of legal union for same-sex relationships (Human Rights Campaign 2010). All of the aforementioned changes have happened since the 1996 implementation of DOMA. The earliest recognition of same-sex unions began in 1997 with same-sex marriage being recognized as early as 2004 (Human Rights Campaign 2010). Because of the shift in legislation, legal interpretation and popular opinion, I recommend, in accordance with part one of this briefing paper that DOMA be replaced by the *Respect for Marriage Act of 2009*.[[1]](#footnote-1)

**Constitutional Issues**

Since 1996, the constitutionality of DOMA has been questioned numerous times by not only the courts, but by the general public as well. Numerous parts of the Constitution have been used to challenge DOMA and other restrictions on marriage including: the Full Faith and Credit Clause, the Tenth Amendment and the Fifth and Fourteen Amendments’ Equal Protection clauses. This paper will discuss the constitutionality of DOMA and the *Respect for Marriage Act* in regards to the Full Faith and Credit Clause, the Tenth Amendment and Supreme Court Interpretations of the Fourteenth Amendment’s Equal Protection clause.

**Full Faith and Credit Clause of the U.S. Constitution**

Article IV, Section 1 of the U.S. Constitution, also known as the Full Faith and Credit Clause reads, “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial proceedings of every other State.” Because marriage is a public act and marriage licenses are filed as a public record, marriage falls under the protection of the Full Faith and Credit Clause. Proponents of same-sex marriage argue: without the protections of DOMA, the Full Faith and Credit Clause, as currently interpreted, suggests that states which do not allow same-sex marriage would be required to recognize same-sex marriages or civil unions from other states. Kramer, in an article published in the Yale Law Journal, claims, “A state that chooses to promote even legitimate objectives […] between its policy and that of another state […] is so directly at odds with the primary objective of the Full Faith and Credit Clause, a state that uses it will have its discriminatory law subjected to heightened constitutional scrutiny” (1997, 1984). While this interpretation of discriminatory marriage laws specifically refers to laws at the state level, DOMA is also subject to the stricter scrutiny mentioned.

**The Tenth Amendment to the U.S. Constitution**

The Tenth Amendment of the U.S. Constitution states, “The powers not delegated to the United Sates by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Since marriage is not directly discussed in the Constitution, it can be and has been inferred that marriage laws and regulations are reserved for the states to decide, but must be recognized in accordance with the Full Faith and Credit Clause as previously stated. Earlier this year a judge ruled, “that a state law allowing same-sex marriage in Massachusetts should take precedence over a federal definition of marriage,” arguing the Tenth Amendment leaves marriages to the states (Johnson 2010). Recently, far right movements such as the Tea Party have used the Tenth Amendment to call for less control on the part of the federal government. The far right is commonly a strong opponent of same-sex marriage and a vehement supporter of DOMA. However, as a result of the aforementioned ruling, “factions and fault lines among groups working to bolster states’ rights” have emerged (Johnson 2010). This ruling by a Massachusetts judge hinges on the concept of allowing states to regulate marriages, as the Constitution mandates. Federal laws prohibiting same-sex marriage in states, particularly DOMA, according to this judicial ruling, are unconstitutional and should be overturned.

**The Supreme Court Rulings**

The Supreme Court has heard very few cases regarding homosexual individuals. Two of the cases concerned sodomy laws in Georgia and then Texas, Bowers v. Hardwick (1986) and Lawrence v. Texas (2003), respectively. The other, *Romer v. Evans* (1996), challenged the constitutionality of a Colorado referendum called Amendment 2 which stated no city or other government entity could classify homosexuals as a protected class of people. Amendment 2 was ruled unconstitutional in a 5-4 decision because it failed the test of Rational-Basis Scrutiny, the most lax of all scrutiny tests established by the Supreme Court. Rational-Basis Scrutiny states that a government law must be rationally related to a legitimate government interest and that the legitimate government interest does not have to be the government’s actual interest regarding the law. According to the majority opinion in *Romer v. Evans* (1996), “Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. […] A state cannot deem a class of persons a stranger to its laws.” Because Rational-Basis Scrutiny is the only test that has been applied to homosexuals as a class of persons, it is the only test by which laws regarding homosexuals can be interpreted, until the Supreme Court rules otherwise. As such, laws restricting marriage and prohibiting homosexuals from marrying are subject to Rational-Basis Scrutiny. In 2003, when *Lawrence v. Texas* overturned *Bowers v. Hardwick* (1986) using Rational-Basis Scrutiny, Justice Scalia in his dissent wrote that he doubted denying same-sex marriage at any level of government would be ruled Constitutional by the same test.

**Discussion**

Due to the interpretations of the Full Faith and Credit Clause, the Tenth Amendment and the Equal Protection clause of the Fourteenth Amendment, I recommend repealing DOMA. All three of the aforementioned aspects of the Constitution have been interpreted as protecting the rights of same-sex individuals to marry. A federal law mandating marriage remain between one man and one woman directly violates the Tenth Amendment and the Fourteenth Amendment, while the section of DOMA which notes that states are not required to recognize same-sex marriages from other states, infringes on rights guaranteed by the Full Faith and Credit Clause. Civil rights and liberties as defined and guaranteed by the U.S. Constitution and its twenty-seven amendments are not to be trampled on. Repealing DOMA and replacing it with the *Respect for Marriage Act* of 2009 would reflect the interpretations above while allowing same-sex couples the same federal rights as opposite-sex couples. In regards to the Full Faith and Credit Clause, the *Respect for Marriage Act* would still allow states to refuse to recognize same-sex marriage but also protect the legitimacy of same-sex marriages which occurred in states or countries that do recognize same-sex marriage. The Tenth Amendment would be strengthened by *the Respect for Marriage Act* in that it would allow states to determine both whether or not to perform same-sex marriages and whether or not to recognize same-sex marriages without trampling on the rights of homosexual individuals. Additionally, the *Respect for Marriage Act* would move marriage closer to providing equal protection as outlined by the Fourteenth Amendment. With all of these impacts in consideration, I recommend repealing DOMA and replacing it with the *Respect for Marriage Act* of 2009 in order to preserve the civil rights and liberties guaranteed by the Constitution of the United States.

**Bibliography**

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On my honor as an Aggie, I have neither given nor received any information regarding this assignment that would compromise that honor.

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1. For a complete overview and argument in favor of the *Respect for Marriage Act* of 2009, please see part one of this briefing paper. The primary goal of the *Respect for Marriage Act* of 2009 is to give federal recognition to marriages which take place in states or countries that allow same-sex marriage or unions regardless of the state in which the couple currently resides. [↑](#footnote-ref-1)