

HOW THE CASE *UNITED STATES V. WINDSOR* PAVED THE WAY FOR SAME-SEX MARRIAGE LEGALIZATION IN THE UNITED STATES

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ABSTRACT
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This thesis looks at how the United States Supreme Court came to decide upon the issue of same-sex marriage. Starting in the lower courts and moving to the Supreme Court in 2013 and how the decision handed down by the court changed the law of the land. As well as how this decision has allowed for future changes in the law. Furthermore, how the new land has led individual states to overturn laws restricting marriage equality and how the Fourteenth Amendment can be used as a vehicle to legalize same-sex marriage across the states using the Courts decisions in *United States v. Windsor* and *Loving v. Virginia*. Also, where the law is headed in the near future and how the idea of percolation affects the direction of future legal decisions.

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LIST OF ABBREVIATIONS

B.L.A.G. Bipartisan Legal Advisory Group of the U.S. House of Representatives

D.O.M.A. The Defense of Marriage Act

F.E.H.B. Federal Employees Health Benefits insurance plan

I.R.S. Internal Revenue Service

L.G.B.T. Lesbian, Gay, Bisexual, Transgender

N.H.R.S. New Hampshire Retirement Services

O.P.M. Office of Personnel Management

U.S.D. United States Department

1 INTRODUCTION:

The United States Supreme Court was laid out in the Constitution as one of the three branches of the United States government. The Supreme Court is the highest court in the land and they have discretion over which cases they hear. The Supreme Court gets thousands of petitions a year for the writ of certiorari, however, the Court only hears oral arguments on a very small few of those cases. In choosing which cases to hear the Court takes different things into account. In order for the Court to have jurisdiction in a case there must first be a problem on which two parties disagree, which in recent cases has been difficult to prove. Since the Supreme Court is the highest appellate court in the country many of the cases they decide to hear involve discrepancies amongst the 11 circuit courts and the federal circuit court in Washington, D.C. The Court also decides on cases based on judicial review, which is at their discretion to decide laws across the country as constitutional or unconstitutional. This discretion is what led to the Court hearing cases concerning same-sex marriage in 2013.

In March of 2013 the Supreme Court of the United States heard the oral arguments of two cases regarding same-sex marriage. These cases came from two very different states, California and New York. The cases, *Hollingsworth v. Perry* and *United States v. Windsor*, covered issues regarding Proposition 8 in California and the Defense of Marriage Act. *United States v. Windsor*, the case that addressed the Defense of Marriage Act, was widely covered by the media across the country. *United States v. Windsor* specifically questioned the legality of Section 3 of the Defense of Marriage Act

as it pertains to states in which same-sex marriage is legal. The Court heard Edith Windsor's case on the 27th of March in 2013. This case in its broad scope left room for the Supreme Court of the United States to rule on a serious issue, not only as it pertained to New York, but also the nation as a whole. Though this thesis takes a more in depth look into the decision of the Court in *United States v. Windsor*, the *Hollingsworth v. Perry* case is important in order to understand the Court's opinions on the issue of same-sex marriage.

The *Hollingsworth* case began in 2008 when the California Supreme Court found that the state of California could not prevent marriages between homosexual couples because it violated the California Constitution. After the decision a group in California worked to get an initiative on the ballot of the state that would add to the California Constitution a provision defining marriage as between one man and one woman. In 2008 the majority of the state voted in favor of Proposition 8 and therefore amending the Constitution of California. Same-sex couples in the state were upset and sought to take the issue to court. Couples in the state filed suit asking if Proposition 8 violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Officials in the state of California refused to defend the law and at the lowest court they court found in favor of the same-sex couples in the case. The state refused to appeal the decision, but a group of Proposition 8 supporters filed for appeal. The state of California found that this group did indeed have standing to appeal the decision, yet they still found in favor of the same-sex couples, as did the Ninth Circuit. After failing at every level the group petitioned for the writ of certiorari before the Supreme Court, who granted certiorari and heard oral argument in March of 2013. In their opinion the Court refused to recognize the

petitioning party as valid and vacated the Ninth Circuit's ruling and asked that the lower appellate court deny the request of appeal, in essence leaving valid the decision made by the state supreme court. The Court did not even answer the question about the violation of the Fourteenth Amendment, rather refused to decide based upon a lack of standing on the part of the petitioners. At the conclusion of this thesis there will be further discussion on this case and the Court's decision.

Like *United States v. Windsor* there are many more cases that question the definition of marriage at the national level, especially as it is laid out in the Defense of Marriage Act. There were eight cases that the court did not hear on the issue. *Windsor v. United States*, *Bipartisan Legal Advisory Group of the United States House of Representatives v. Windsor and the United States of America*, *Bipartisan Legal Advisory Group of the United States House of Representatives v. Gill*, *Department of Health and Human Services v. Massachusetts*, *Massachusetts v. Department of Health and Human Services*, *Office of Personnel Management v. Golinski*, *Pederson v. Office of Personnel Management*, and *Office of Personnel Management v. Pederson* all asked similar questions about section 3 of the Defense of Marriage Act (D.O.M.A.). These cases each stemmed from one of four original cases from the 1st and 2nd circuit courts or from courts in California or Connecticut. The four original cases were *Massachusetts v. United States Department of Health and Human Services*, *Pederson v. Office of Personnel Management v. Bipartisan Legal Advisory Group of the United States House of Representatives*, *Windsor v. United States and Bipartisan Legal Advisory Group of the United States House of Representatives*, and *Golinski v. Office of Personnel Management and John Berry*.

With nine cases in total the court had a varied background from which to choose. Many petitions discussed the Fifth Amendment. Since the Fourteenth Amendment was ratified after the Civil War it and the Fifth Amendment have been linked. The same-sex marriage issue has been commonly compared to the Court's decision in 1967 in *Loving v. Virginia*, which legalized interracial marriage in the United States. These comparisons give way to the idea that the Fourteenth Amendment, which is at issue in the *Loving* case, might be used as a vehicle to legalize same-sex marriage in the United States. Some of the cases brought different questions to the court based on different parts of the Constitution. Some were from states in which same-sex marriage was legal and some were from states in which it was not. While the cases all originated from the same four cases, the court petitions were different and requested different answers from the justices. All nine cases questioned the Constitutionality of the Defense of Marriage Act as passed by Congress. Many of the cases had similarities, but the Court chose one that just posed one question for the Court.

The decision made by the Supreme Court in *United States v. Windsor* made way for changes across the country in terms of same-sex marriage law. These changes have mimicked a drastic shift in public opinion. Not only are more people across the country beginning to favor the legalization of same-sex marriage but also more people are beginning to believe that this change is inevitable. While various states in the United States and Washington, D.C. had legalized same-sex marriage before the Supreme Court even took up the issue, many had yet to make way on the issue in one direction or the other. Some states have specific laws, like the Defense of Marriage Act, in place that specifically defines marriage as a relationship between heterosexual couples.

The Supreme Court made a narrow decision in this case and the dissenting opinions mentioned that from this case would come many future questions. This is ideal for the Court and something they have done in the past. An example of this percolation happened between two cases recently involving the issue of the right to keep and bear arms. The cases began in 2008 with the case *District of Columbia v. Heller* and the Court further heard the issue in 2010 in *McDonald v. Chicago*. Scalia, who wrote the majority opinion in *Heller* he summed up the idea of percolation “But since this case represents this Court’s first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field.... our first in-depth Free Exercise case, left that area in a state of utter certainty. And there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.”¹ In *D.C. v. Heller* the Court was asked if D.C.’s ban on guns in the home violate the Second Amendment. The Court did not apply the Second Amendment to the states in *Heller* rather their decision was limited to the federal government. Similarly the Court found D.O.M.A. unconstitutional as far as restrictions are concerned on the federal level. Two years later the Court took up another case on the issue of gun ownership. In the Court’s decision in *McDonald v. Chicago* they applied the Second Amendment to the states using the Fourteenth Amendment. This process of percolation allows for decisions to be made across circuits and districts from which, if the Court chooses, they can pick from in order to make a broader and more lasting opinion on the issue. The Supreme

¹ Scalia, Antonin. The Supreme Court of the United States. *District of Columbia v. Heller*. 26 June 2008.
http://www2.bloomberglaw.com/public/desktop/document/Dist_of_Columbia_v_Heller_554_US_570_128_S.Ct_2783_171_L_Ed_2d_63.

Court allows lower courts to make decisions on issues and allow courts to find the important issues and questions and then the Court selects from those.

The remainder of this thesis proceeds as follows; first an in-depth look into the language of the Defense of Marriage Act and the history behind the law. Next a discussion of how the third section of the Defense of Marriage Act became a question in the court system and then how the question went from courts of original jurisdiction to the Supreme Court of the United States. Once at the Supreme Court level we will look into the decision made by the Court and how that changed the law of the land as well as why the minority did not support the decision made by the majority. While looking at the decision of the Supreme Court we will see how the opinion of the public regarding same-sex marriage has changed since 2003. Along with these changes in public opinion there have also been many changes in the law since the decision, leading to cases at the state level as well as in the circuit courts. All of the questions raised by these different courts lead to how the courts can approach the issue in the future based on the Supreme Court decision in *United States v. Windsor* as well as the *Loving v. Virginia* marriage equality case from 1967. With all of these facts in mind and knowing how the Supreme Court functions the future of the law will then be discussed along with how the states can legalize same-sex marriage across the entire United States.

2 THE DEFENSE OF MARRIAGE ACT:

In 1991 six citizens in the state of Hawaii filed suit against the government arguing that the marriage laws in Hawaii that prevented same-sex marriages in the state were discriminatory. The plaintiffs Ninia Baehr, Genora Dancel, Tammy Radrigues, Antoinette Pregil, Pat Lagon, and Joseph Melilio specifically had issue with the Hawaii Marriage Law that prohibited couples of the same-sex from being granted marriage licenses based solely on the fact that the couple is of the same-sex². These six individual were three separate couples that, in 1990, applied for marriage licenses in the state of Hawaii and while they met the requirements for the licenses they were all denied based on the fact that they were couples of the same sex. The Department of Health was following Hawaii law when it denied the licenses. The couples complained citing article 1 sections 5 and 6 of the Hawaiian constitution, stating that citizens in Hawaii have the right to privacy and due process of law and that they have equal protection of the laws³. The Department of Health Director, John Lewin, was the defendant in the case and he argued that not only was the Department of Health working inside the law in denying the licenses to the couples but also that in denying them the right to marry they were in no

² Levinson, Steven. Hawaii Supreme Court. *Baehr v. Lewin*. 5 May 1993. <http://moritzlaw.osu.edu/library/documents/HIBaehr.pdf>. 45, 48-49.

³ *Ibid.* 50.

way infringing upon their personal relationships⁴. The trial court soon dismissed the case, which led the plaintiffs to appeal to the Supreme Court of Hawaii.

In the case the couples were asking that the court prohibit the state from furthering this practice. The couples' main arguments for the case were that they were denied their right to privacy, due process of law, and equal protection under the law⁵. The Supreme Court of Hawaii remanded the case to the trial court and put the burden on Lewin to show that the state was not violating the constitution in not allowing those of the same sex to marry in the state⁶. In order to prove his side Lewin would have to show that the state had a compelling interest in preventing such marriages. In response to the issue the state sought to officially leave marriage to couples of the opposite sex and did so through legislation. The state legislature also created a commission that would help give insight into the benefits of extending the same legal rights to couples of the same sex. In late 1995 the commission issued its report stating that the majority of commission found that it was in the states interest to extend marriage rights to couples of the same sex. They also cite the *Loving v. Virginia* case and explained that their findings were based on their belief "in the equality and equal rights of all people."⁷ Even with the findings by the commission the state of Hawaii still made same-sex marriage illegal in their state. The case *Baehr v. Lewin* was heard again by the Court as *Baehr v. Miike* and

⁴ *Ibid.* 50.

⁵ *Ibid.* 50.

⁶ *Ibid.* 68.

⁷ Gill, T. P., Britt, M., Gomes, L. K., Hochber, L.J. Jr., Kridman, N. Sheldon, M.A., Stauffer, B. *Report of the Commission on Sexual Orientation and the Law*. The Commission on Sexual Orientation and the Law. 8 Dec. 1995. <http://www.unmarriedamerica.org/Archives/1994-1999-Hawaii-Legislative-Actions/1995-Hawaii-Commission-Report.pdf>. 43.

the Supreme Court found that with the Hawaii Constitution not protecting same-sex couples that the state was not required to recognize these marriages.

This progression in the state of Hawaii is what led the United States House of Representatives to create the Defense of Marriage Act to define marriage across the states. Republican Representative Bob Barr from Georgia's 7th district sponsored the bill. The purpose behind the bill was to define marriage as between one man and one woman but also to make it where states and Native American tribes did not have to recognize marriages of couples from the same sex even if their marriage was legal where they were married.

President Bill Clinton signed this act into law in 1996. The act itself is short, created solely to define the institution of marriage in the eyes of the national government and prevent states from legalizing same-sex marriage in their individual states. This act, however, does not explicitly outlaw the states from legalizing same-sex marriage. This creates a somewhat grey area for the states meaning that their laws could conflict with the national government. Section 3 is widely questioned because it is what directly defines marriage between one man and one woman. This particular section of the act creates a unique situation for those same-sex couples legally married in the United States. While those couples may have the same freedoms as heterosexual couples within their state the federal government continues to classify them as single and therefore denies benefits to them from the national government. This has been a problem since 2003 when Massachusetts became the first state to recognize same-sex couples as legally married, however, with time and shift in public opinion it seems that 2013 was the year for this issue to be brought to the highest court in the land.

3 FOUR ORIGINAL CASES:

In 2013 there were nine petitions for the writ of certiorari before the United States Supreme Court all regarding the 3rd Section of the Defense of Marriage Act. Those nine cases all originated from four cases that were heard at lower courts. Two of the original cases are from Circuit courts, the 1st and 2nd Circuits, and the other two cases originated in District courts in California and Connecticut. The 1st Circuit case originated in Massachusetts and the 2nd Circuit case originated in New York; both of these states had legalized same-sex marriage prior to these cases being brought to the court. The case from the District Court in Connecticut also originated in a state where marriage was already legal between couples of the same sex. The issue then became the disparity between the definition at the national level and the state level. Oddly, at the time that the petitions were filed the state of California did not have legalized marriage officially. The state had also petitioned another case before the court, *Hollingsworth v. Perry* that questioned the constitutionality of Proposition 8, the referendum issue in California that outlawed same-sex marriage after it had previously been legalized. The four cases, while from different states, raise similar questions to their respective states and then the petitions that stemmed from them would ask similar questions of the Supreme Court.

3.1 *Massachusetts v. United States Department of Health and Human Services:*

From this case came the petitions for *Bipartisan Legal Advisory Group of the United States House of Representatives v Gill*, *Massachusetts v. United States Department of Health and Human Services*, and *United States Department of Health and Human Services v. Massachusetts*. This case came to the Court from the 1st Circuit Court of Appeals, which includes the states of Maine, Massachusetts, New Hampshire, and Rhode Island. The Plaintiffs in this case were Dean Hara, Nancy Gill, and Keith Toney. Circuit Judge Michael Boudin writes in his opinion that “these appeals present constitutional challenges to section of the Defense of Marriage Act (“D.O.M.A.”), 1 U.S.C. § 7, which denies federal economic and other benefits to same-sex couples lawfully married in Massachusetts and to surviving spouses from couples thus married.”⁸ Furthermore he goes on to explain that the appeal does not challenge the right of states to create their own definitions of marriage, but rather the right of Congress to undermine choices of same-sex couples and the laws of individual states.⁹ The lower case *Gill v. Office of Personnel Management* involved seven same-sex couples who were legally married in Massachusetts and three surviving spouses from legal marriages. They brought their case against federal agencies because they were being denied benefits from the federal government. The State of Massachusetts also brought a case alongside the *Gill* case, *Massachusetts v. Department of Health and Human Services*, which question the revocation of federal funding for programs that could be tied to D.O.M.A.’s marriage

⁸ Boudin, Michael. United States Court of Appeals, First Circuit. *Commonwealth of Massachusetts v. United States Department of Health and Human Services*. 31 May 2012. http://www2.bloomberglaw.com/public/desktop/document/Massachusetts_v_US_Dept_of_Health_Human_Servs_682_F3d_1_115_FEP_.

⁹ *Ibid.*

definition.¹⁰ These programs, which were being denied funds, included the state Medicaid program as well as veterans' cemeteries in the state.¹¹

A large basis for the original case was the denial of the Office of Personnel Management to allow Dean Hara to receive benefits after the death of his husband.¹² The district court below ruled D.O.M.A. as unconstitutional and the First Circuit Court affirmed the lower court opinion.¹³ In the end of his opinion Judge Boudin explains that he believes it is highly likely that this case will be petitioned before the Supreme Court, if not in this case then D.O.M.A. will be challenged by another case before the court soon.¹⁴

3.2 Pederson v. Office of Personnel Management v. Bipartisan Legal Advisory Group of the United States House of Representatives:

The case from the District Court of Connecticut, *Pederson v. Office of Personnel Management v. Bipartisan Legal Advisory Group of the United States House of Representatives*, led to two petitions for the writ of certiorari to the Supreme Court. The two petitions were for the cases *Office of Personnel Management v. Pederson* and *Pederson v. Office of Personnel Management*. The Plaintiffs in this case were married legally in Connecticut, Vermont, and New Hampshire.¹⁵ The Plaintiffs were Joanne Pederson, Ann Meitzen, Gerald V. Passaro II, Thomas Buckholz, Raquel Ardin, Lynda DeForge, Janet Geller, Joanna Marquis, Suzanne Artis, Geraldine Artis, Bradley

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ Bryant, Vanessa L. United States District Court, District of Connecticut. *Pederson v. Office of Personnel Management v. Bipartisan Legal Advisory Group of the United States House of Representatives*. 31 July 2012. http://www2.bloomberglaw.com/public/desktop/document/Pedersen_v_Office_of_Personnel_Mgmt_No_310cv01750VLB_2012_BL_1941.

Kleinerman, James Gehre, Damon Savoy, and John Weiss. The case brought up Section 3 of the Defense of Marriage Act citing that it was a “violation of the Fifth Amendment’s guarantee of Equal Protection.”¹⁶

The case came from eight different same-sex couples. Pederson and Meitzen were married in 2008 in Connecticut.¹⁷ This case is another case of benefits being denied by the federal government on the basis of sexual orientation. Pederson was enrolled in the Federal Employees Health Benefits (FEHB) insurance plan due to her retired status from the Office of Naval Intelligence.¹⁸ Her wife was not allowed to enroll in the plan due to her being the same-sex. Passaro and Buckholz, the second couple in the case, had an issue with the Social Security Administration. The Social Security Administration denied benefits to Passaro after the death of his husband based on Section 3 of the Defense of Marriage Act.¹⁹ Another couple in the case, Ardin and DeForge, was denied medical leave under the Family Medical Leave Act because the United States Postal Service did not consider the women married.²⁰ This couple also dealt with a problem similar to Pederson and Meitzen. Ardin and DeForge were also denied family enrollment in the F.E.H.B. insurance plan on the basis of the same-sex marriage.²¹ Joanna Marquis, who was a retired schoolteacher, applied to get a cost supplement through the New Hampshire Retirement System (NHRS) that would pay for her Medicare Part B, but the NHRS denied her request.²² Suzanne and Geraldine Artis, not being able to file their taxes

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

jointly, requested a refund for what they would have saved if they had been allowed to, however, they were denied by the IRS because “for federal tax purposes, a marriage means only a legal union between a man and a woman as husband and wife.”²³ Bradley Kleinerman and James Gehre had a very similar situation and when they requested the refund with the IRS they were also denied and were required to file separate customs forms when they returned from an international trip.²⁴ The final couple, Damon Savoy and John Weiss, had problems with the Federal Employees Health Benefits, similarly being denied when trying to enroll a spouse of the same sex.²⁵ All of these couples, while they did not all have the exact same situation, filed suit citing that their Fifth Amendment rights were violated by various government agencies.

3.3 Windsor v. United States and Bipartisan Legal Advisory Group of the United States House of Representatives:

This original case led to the petitions in the unheard cases of *Bipartisan Legal Advisory Group of the United States House of Representatives v. Windsor*, and *Windsor v. United States*. Also from this case came the petition of *United States v. Windsor*, which is the case that the United States Supreme Court chose to hear on the issue of the Defense of Marriage Act. The case came about after the death of the spouse of Edith Windsor in 2009. The women had been married legally in 2007 on a trip to Canada. The legal question arose after Edith Windsor was not allowed the spousal deduction in the federal estate tax.²⁶ This occurred because the Defense of Marriage Act did not define Edith

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ Jacobs, Dennis. United States Court of Appeals, Second Circuit. *Windsor v. United States of America and Bipartisan Legal Advisory Group of the United States House of*

Windsor and her spouse a married couple. Windsor's deduction should have amounted to over \$300,000 dollars²⁷. The fact that she was denied this federal protection purely on the basis of her and her spouse's sexual orientation was the issue at hand. Specifically, the case called into question the third section of D.O.M.A. because it was the section that prevented the couple from being defined as married in the eyes of the federal government.

3.4 *Golinski v. Office of Personnel Management and John Berry*:

This case, *Golinski v. Office of Personnel Management and John Berry*, which originated in California, only led to one petition in front of the Supreme Court, *Office of Personnel Management v. Golinski*. The Plaintiff Karen Golinski married her wife, Amy Cunninghis, in 2008 in the state of California.²⁸ Their marriage was legal in the state of California. The case began Ms. Golinski attempted to enroll her wife on her health insurance through Blue Cross Blue Shield.²⁹ Ms. Golinski was a Staff Attorney in the United States Court of Appeals for the Ninth Circuit, a federal employee. When Ms. Golinski sought to enroll her wife her request was denied, she quickly filed a complaint with the Ninth Circuit's Employment Dispute Resolution Plan.³⁰ Her argument was that in denying her wife enrollment in her insurance they were in violation of the plan's

Representatives. 18 Oct. 2012.

http://www2.bloomberglaw.com/public/desktop/document/Windsor_v_United_States_No_122335cv_and_122435_2012_BL_274317_2d_.

²⁷ *Ibid.*

²⁸ White, Jeffrey S. United States District Court, Northern District of California. *Golinski v. Office of Personnel Management and John Berry*. 22 Feb. 2012.

http://www2.bloomberglaw.com/public/desktop/document/Golinski_v_US_Office_of_Personnel_Mgmt_No_C_1000257_JSW_2012_BL_4.

²⁹ *Ibid.*

³⁰ *Ibid.*

provision preventing discrimination because the Employment Dispute Resolution Plan prohibits any discrimination on the basis of gender or sexual orientation.³¹ Chief Judge Alex Kozinski sided with Ms. Golinski and agreed that she had been discriminated against. He ordered the Administrative Office to grant her wife the benefits in which she had attempted to enroll.³² While the Administrative Office followed the order made by the judge the Office of Personnel Management kept the insurance agency from complying with the order.³³ For nearly three years the Judge, the Office of Personnel Management and Ms. Golinski went back and forth. In 2011 the Bipartisan Legal Advisory Group of the United States House of Representatives intervened in order to defend the Defense of Marriage Act's Section 3.³⁴ The question presented to the District court is the constitutionality of the 3rd Section of DOMA. The District Court found that the Section of DOMA in question is discriminatory and therefore unconstitutional.³⁵ The District Court ordered that the Office of Personnel Management and the director of the Office of Personnel Management, John Berry, to no longer intervene in the case of Ms. Golinski and allow her to enroll her wife in the insurance.³⁶

³¹ *Ibid.*

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

4 CASES NOT HEARD BY THE SUPREME COURT:

The four cases heard at different levels of the United States justice system left a lot of questions for the federal government to answer. No matter the decision made by each court it was necessary for the highest court to weigh in on a matter of national law. While many of these states had already legalized marriage for homosexual couples the fact that they were still considered unmarried in the eyes of the national government made it necessary for the Supreme Court to rule on the matter. With many states changing their laws the discrepancy between state laws and the national one was growing. The following eight cases are cases that petitioned the Court but that the Court did not grant the writ of certiorari.

4.1 Bipartisan Legal Advisory Group of the United States House of Representatives v. Gill:

This petition presented by the Bipartisan Legal Advisory Group of the United States House of Representatives raises several questions for the court. The questions presented are “(1) Whether Section 3 of the Defense of Marriage Act violates the equal protection component of the Due Process Clause of the Fifth Amendment; and (2) Whether the court below erred by inventing and applying to Section 3 of the Defense of Marriage Act a previously unknown standard of equal protection review”.³⁷ For the first

³⁷ Clement, Paul D. The United States Supreme Court. *Bipartisan Legal Advisory Group of the United States House of Representatives v. Gill Petition for the Writ of Certiorari.*

question the petition cites Section 3 of the Defense of Marriage Act and the definitions laid out within that section. The second question is presented based on the decision below made by the court of appeals. They held that “Section 3 is not subject to either ‘heightened’ or ‘intermediate’ scrutiny and that Section 3 passes ‘conventional’ rational basis review. But it struck down Section 3 nonetheless based on a new form of review (which it viewed as outcome determinative) said to entail ‘intensified scrutiny,’ ‘closer than usual review,’ and ‘diminish[ed]’ deference to Congress. The court based its new standard of review on a fusion of ‘equal protection and federalism concerns’.”³⁸ The lower court opinion cited in this petition is the opinion of the First Circuit Court of Appeals in the Case of *Massachusetts v. United States Department of Health and Human Services and the Office of Personnel Management* (which has also been appealed to the court).

In response to the petition for the writ of certiorari filed by the Bipartisan Legal Advisory Group of the United States House of Representatives, the Commonwealth of Massachusetts filed in support of the court granting certiorari. In their response the Commonwealth presented two more questions for the Supreme Court on the issue. The first additional question, which they posed, was “whether Section 3 of DOMA violates the Tenth Amendment” and the second question is “whether Section 3 of DOMA violates the Spending Clause, U.S. Const. art. I, § 8, cl. 1.”³⁹ The Commonwealth of

29 June 2012. <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/08/12-13-House-Cert-Petition.pdf>.

³⁸ *Ibid.* 14-15.

³⁹ Coakley, Martha. The United States Supreme Court. *Bipartisan Legal Advisory Group of the House of Representatives v Gill. And United States Department of Health and Human Services v. Commonwealth of Massachusetts, Response of the Commonwealth of Massachusetts in Support of Certiorari*. July 2012. <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/08/12-13-12-15-BLAG-v-Gill-HHS-v-Massachusetts-Cert-Response-July-2012.pdf>. i.

Massachusetts argues that defining marriage should be left to the states and that in defining it the United States government is making laws that interfere with an area that is only of state concern.⁴⁰ The Commonwealth also argues that through D.O.M.A. the United States government is forcing the same discriminatory practices on the state of Massachusetts in order to gain federal funding which is against the Spending Clause laid out in the Constitution.⁴¹ Furthermore, Massachusetts states that in limiting funding the federal government is also violating the protections of the Spending Clause because the issue at hand is not related to “federal interest in national programs or projects”.⁴²

4.2 *United States Department of Health and Human Services v. Massachusetts:*

The question presented by the Department of Health and Human Services in this case also deals with the Section 3 and whether that section “violates the Fifth Amendment’s guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their State”.⁴³ This case is directly linked to the case of *Office of Personnel Management v. Gill*. This is the only question presented by the Petitioners in this case.

In opposition to the petition presented by the Department of Health and Human Services, the Bipartisan Legal Advisory Group of the United States House of Representatives poses two questions, the question of the due process clause of the Fifth

⁴⁰ *Ibid.* 1.

⁴¹ *Ibid.* 2.

⁴² *Ibid.* 2.

⁴³ Verilli, Donald B., Jr. The United States Supreme Court. *United States Department of Health and Human Services v. Commonwealth of Massachusetts And Office of Personnel Management v. Gill, Petition for a Writ of Certiorari*. July 2012. <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/08/12-15-Mass-Gill-Petition-final.pdf>. I.

Amendment, which the petitioner also presents, and they state “petitioners are federal agencies and officers who do not have general responsibility for administering DOMA, but merely oversee a limited number of its applications. When such agencies or officers argue that a federal statute is unconstitutional and prevail in the lower courts, and where the House of Representatives has intervened to defend the statute, do the agencies and officers have prudential standing to seek this Court’s review of the judgment they requested?” and “does Section 3 of DOMA violate the equal protection component of the Due Process Clause of the Fifth Amendment?”⁴⁴

The courts below in this case held that “Section 3 violates the Fifth Amendment’s equal protection guarantee”.⁴⁵ Another opinion held that Section 3 also goes against the Spending Clause “because it impermissibly ‘induce[s] the States to engage in activities that would themselves be unconstitutional’ by conditioning federal funds on the denial of marriage-based benefits to legally married same-sex couples without a rational basis for the differential treatment (*South Dakota v. Dole*)”.⁴⁶ The petition seeks to be granted the writ of certiorari as a way to decide whether or not DOMA is constitutional. The

⁴⁴ Clement, Paul D. The United States Supreme Court. *United States Department of Health and Human Services v. Commonwealth of Massachusetts and The Bipartisan Legal Advisory Group of the United States House of Representatives And Office of Personnel Management v. Gill and Bipartisan Legal Advisory Group of the United States House of Representatives, Brief in Opposition*. 31 Aug. 2012. <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/09/12-15-Brief-in-Opp-OK-TO-PRINT-8-31-12.pdf>.

⁴⁵ Verilli, Donald B., Jr. The United States Supreme Court. *United States Department of Health and Human Services v. Commonwealth of Massachusetts And Office of Personnel Management v. Gill, Petition for a Writ of Certiorari*. July 2012. <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/08/12-15-Mass-Gill-Petition-final.pdf>. 5.

⁴⁶ *Ibid.* 5.

petitioners cite confusion amongst the branches, the Executive Branch and Legislative Branch, on the constitutionality of the law and the means of enforcement.⁴⁷

The Commonwealth of Massachusetts responded in this case in the same way that they responded to the *Gill*. They added two more questions for the court to respond to, the question of the Tenth Amendment and the Spending Clause citing the same problems with each in the case.⁴⁸ Again, they were supporting that the court grant certiorari in this case.

4.3 *Massachusetts v. United States Department of Health and Human Services:*

The Commonwealth of Massachusetts is the petitioner in this case against the cross-respondents United States Department of Health and Human Services, et al. and Bipartisan Legal Advisory Group of the United States House of Representatives. Through this petition there are two questions presented “1. Whether Section 3 of the Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (1996) (Codified at 1 U.S.C. § 7), violates the Tenth Amendment. 2. Whether Section 3 of DOMA violates the Spending Clause, U.S. Const. art. I, § 8, cl. 1.”⁴⁹ This case is a companion case to *Gill v. the Office of Personnel Management* and is a cross-petition which the petitioners feel

⁴⁷ *Ibid.* 7.

⁴⁸ Coakley, Martha. The United States Supreme Court. *Bipartisan Legal Advisory Group of the United States House of Representatives v Gill And United States Department of Health and Human Services v. Commonwealth of Massachusetts, Response of the Commonwealth of Massachusetts in Support of Certiorari*. July 2012. <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/08/12-13-12-15-BLAG-v-Gill-HHS-v-Massachusetts-Cert-Response-July-2012.pdf>. i.

⁴⁹ Coakley, Martha. The United States Supreme Court. *Commonwealth of Massachusetts v. United States Department of Health and Human Services and Bipartisan Legal Advisory Group of the United States House of Representatives, Conditional Cross-Petition for a Writ of Certiorari*. July 2012. <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/09/12-97-DOMA-Mass.-cross-petition-7-20-121.pdf>. i.

should be granted the writ of certiorari if the cases of *Department of Health and Human Services v. Massachusetts* and *Bipartisan Legal Advisory Group of the U.S. House of Representatives v. Gill*. The petitioners have two reasons as to why the United States Supreme Court should grant the writ of certiorari in this case, “I. Reviewing DOMA’s Constitutionality, this court should also consider whether DOMA violates the Tenth Amendment and the Spending Clause” and “II. DOMA violates the Tenth Amendment and the Spending Clause”.⁵⁰ This conditional cross-petition is necessary in order to broaden the scope of the questions of DOMA to the Tenth Amendment as well as the Spending Clause.

The Bipartisan Legal Advisory Group of the United States House of Representatives filed the Brief in Opposition to the petition for conditional cross-petition. Their brief also presents two questions, “(1) Does the Tenth Amendment to the Constitution prohibit Congress from defining the words ‘marriage’ and ‘spouse’ when it uses them in federal law, and instead require that each state define what federal law means by these words within the state’s borders? (2) Does Congress’ constitutional power to spend ‘for the general welfare’ prohibit Congress from defining the beneficiaries of federally-funded and state-administered programs, if a state believes that including additional beneficiaries would also promote the general welfare?”⁵¹ While the respondents in this case are asking the Court to deny the cross-petition they still ask very interesting questions in their brief.

⁵⁰ *Ibid.* i.

⁵¹ Clement, Paul D. The United States Supreme Court. *Commonwealth of Massachusetts v. United States Department of Health and Human Services and Bipartisan Legal Advisory group of the United States House of Representatives, Brief in Opposition*. <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/09/12-97-Brief-in-Opp-OK-TO-PRINT-8-23-12.pdf>.

4.4 Pederson v. Office of Personnel Management and Bipartisan Legal Advisory Group of the United States House of Representatives:

Joanne Pederson is the petitioner in this case and it presents a similar question as the other cases, “whether Section 3 of the Defense of Marriage Act (“DOMA”), 1 U.S.C. § 7, violates the equal protection guarantee of the Fifth Amendment to the U.S. Constitution as applied to legally married same-sex couples.”⁵² As part of the question presented the petition presents the fact that due to the third section of DOMA “more than 1,100 federal statutes, lawfully married same-sex couples are denied the benefits and responsibilities accorded to lawfully married opposite-sex couples”.⁵³ The case states multiple reasons for granting the writ in this case, “I. This case raises questions of national importance that are ripe for review” because the lower court invalidated a Congressional act holding it unconstitutional and “II. The exceptional importance of the question presented and the circumstances of this particular case warrant granting certiorari before judgment”.⁵⁴ The case also cites several anecdotes of federal employees who have been denied benefits from the government due to sexual orientation. In their brief, the respondents, Office of Personnel Management present the same question as the petitioners in this case.

⁵² Buseck, G.D. The United States Supreme Court. *Pederson v. Office of Personnel Management and Bipartisan Legal Advisory Group of the United States House of Representatives, Petition for Writ of Certiorari Before Judgment*. 21 Aug. 2012. <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/11/12-231-Pedersen-petition-8-21-12.pdf>.

⁵³ *Ibid.* 24.

⁵⁴ *Ibid.* 24, 27.

4.5 Office of Personnel Management v. Pederson:

The petitioner in this case is the Office of Personnel Management. The question they present in their petition for the writ of certiorari “Whether Section 3 of DOMA violates the Fifth Amendment’s guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their state”.⁵⁵ The question presented in this case is the same as the question presented in the *Golinski* case. According to the petition, certiorari should only be granted in this case if it is not granted in either the *Golinski* case or *Massachusetts* case because the question is the same.⁵⁶

The Bipartisan Legal Advisory Group of the United States filed a brief in opposition to the petition of the Office of Personnel Management. The first question they present is the same as the question presented by the petitioner. Again, the second question they present is the same question they presented in the *United States Department of Health and Human Services v. Massachusetts* stating that “Petitioners are federal agencies and officers who do not have general responsibility for administering DOMA, but merely oversee a limited number of its applications. When such agencies or officers argue that a federal statute is unconstitutional and prevail in the lower courts, and where the House of Representatives has intervened to defend the statute, do the agencies and

⁵⁵ Verilli, Donald B., Jr. The United States Supreme Court. *Office of Personnel Management v. Pederson, Petition for the Writ of Certiorari Before Judgment*. Sept. 2012. <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/10/12-302-Petition-US.pdf>. I.

⁵⁶ *Ibid.* 13.

officers have prudential standing to seek this Court’s review of the judgment they requested?”⁵⁷

4.6 *Bipartisan Legal Advisory Group of the United States House of Representatives v. Windsor*:

Edith Windsor is also involved in the next case that the court is currently holding, *Bipartisan Legal Advisory Group of the U.S. House of Representatives v. Windsor and the United States of America*. This case came about after the decision of the 2nd Circuit Court made its decision. The petitioners, the Bipartisan Legal Advisory Group of the U.S. House of Representatives, present the question “Whether Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, violates the equal protection component of the Due Process Clause of the Fifth Amendment”.⁵⁸ The Bipartisan Legal Advisory Group of the U.S. House of Representatives submitted this petition because it felt that the previous petition was not a good enough question to get to the direct constitutionality of the Defense of Marriage Act. They feel that their petition presents a better question and therefore a better vehicle for the court to decide on the matter.⁵⁹ They specifically state in their petition that they will be defending the constitutionality of DOMA as a piece of legislation passed by Congress.⁶⁰ In response to this petition Edith Windsor filed a brief in opposition.

⁵⁷ Clement, Paul D. The United States Supreme Court. *Office of Personnel Management v. Pederson and Bipartisan Legal Advisory Group of the United States House of Representatives, Brief in Opposition*. 19 Oct. 2012. <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/10/12-302-BIO-Pedersen-SCOTUS.pdf>.

⁵⁸ Clement, Paul D. The United States Supreme Court. *Bipartisan Legal Advisory Group of the United States House of Representatives v. Windsor and the United States, Petition for the Writ of Certiorari*. 28 Dec. 2012. <http://sblog.s3.amazonaws.com/wp-content/uploads/2013/01/12-27-12-Cert-Pet.pdf>.

⁵⁹ *Ibid.* 11.

⁶⁰ *Ibid.* 10.

Windsor's brief opposes the court granting certiorari in this case because at the time the court had already granted the writ of certiorari for the case *United States v. Windsor*.⁶¹

4.7 *Windsor v. United States:*

Edith Windsor is the petitioner in this particular case and is also the respondent in the case *United States v. Windsor* that the court heard in March of 2013. According to her petition the question she raises is, "Does Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, which defines the term "marriage" for all purposes under federal law as "only a legal union between one man and one woman as husband and wife," deprive same-sex couples who are lawfully married under the laws of their states (such as New York) of the equal protection of the laws, as guaranteed by the Fifth Amendment to the Constitution of the United States?"⁶²

As popularly reported, Edith Windsor brought this case to the court because she was denied full rights over her spouse's estate even though they were legally married. The case was heard in New York in June of 2012. The Southern District Court of New York decided that Section 3 of the Defense of Marriage Act is not constitutional because it denied the Plaintiff (Edith Windsor) her rights as a legally married woman in the state

⁶¹ Kaplan, Roberta A. The United States Supreme Court. *Bipartisan Legal Advisory Group of the United States House of Representatives v. Windsor*. 13 March 2013. <http://sblog.s3.amazonaws.com/wp-content/uploads/2013/03/12-785-BIO-Final.pdf.1>.

⁶² Kaplan, Roberta A. The United States Supreme Court. *Windsor v. United States and Bipartisan Legal Advisory Group of the United States House of Representatives, Petition for the Writ of Certiorari Before Judgment*. 16 July 2012. [http://sblog.s3.amazonaws.com/wp-content/uploads/2012/08/12-63-Windsor-Cert-Petition.pdf. i](http://sblog.s3.amazonaws.com/wp-content/uploads/2012/08/12-63-Windsor-Cert-Petition.pdf.i).

of New York.⁶³ The case was then appealed to the 2nd District Court who found that Edith Windsor did have standing because the state of New York classified her as a surviving spouse based on her legal marriage, which took place legally in Canada in 2007.⁶⁴ The case was then taken to the United States Supreme Court and presented four reasons why the court should grant certiorari in this matter. The reasons laid out in the petition are “I. This case presents a Constitutional question of exceptional importance”, “II. The Lower Federal Courts are in significant disarray over the Constitutionality of DOMA”, “III. The case presents an excellent vehicle for resolving the Constitutionality of DOMA”, and “IV. Certiorari before judgment in the Court of Appeals is appropriate in this case” (the 2nd District Court of Appeals had not yet reached a decision on this case when the petition for the writ of certiorari was submitted to the Supreme Court).⁶⁵

4.8 Office of Personnel Management v. Golinski:

The petitioners in this case are the Office of Personnel Management; they are also involved in several other cases at the national level regarding same sex marriage and D.O.M.A. The question presented is, “Whether Section 3 of DOMA violates the Fifth Amendment’s guarantee of equal protection of the laws as applied to persons of the same

⁶³ Jones, Barbara S. United States District Court, Southern District of New York. *Windsor v. United States*. 6 June 2012. http://www2.bloomberglaw.com/public/desktop/document/Windsor_v_United_States_No_122335cv_and_122435_2012_BL_274317_2d_.

⁶⁴ *Ibid.*

⁶⁵ Kaplan, Roberta A. The United States Supreme Court. *Windsor v. United States and Bipartisan Legal Advisory Group of the United States House of Representatives, Petition for the Writ of Certiorari*. 16 July 2012. <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/08/12-63-Windsor-Cert-Petition.pdf>. 12, 15, 18, 20.

sex who are legally married under the laws of their state”.⁶⁶ The case began when Ms. Golinski, who is federally employed, applied to have her wife added to her family in order for her to receive spousal benefits through her job.⁶⁷ The government denied her request because the third section of D.O.M.A. defines marriage as only for heterosexual couples, meaning in the eyes of the government the two were not legally married. The lower court found in favor Ms. Golinski stating that she had the right to enroll her wife as part of a family for benefits.⁶⁸ The district court also found D.O.M.A. to be unconstitutional for its cause of discrimination against same-sex couples.⁶⁹

Though there are eight cases that the Court did not grant certiorari, those eight cases only pose variations of three questions about three sections of the Constitution. Almost every case raises the question whether or not the Defense of Marriage Act violates the Equal Protection component of the Fifth Amendment’s Due Process Clause that states, “No person shall...be deprived of life, liberty, or property, without due process of law”. The Fifth Amendment was incorporated and applied to the states once

⁶⁶ Verilli, Donald B., Jr. The United States Supreme Court. *Office of Personnel Management v. Golinski, Petition for a Writ of Certiorari Before Judgment*. July 2012. <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/08/12-16-Golinski-Petition-final.pdf>. I.

⁶⁷ Davidson, Jon W. The United States Supreme Court. *Office of Personnel Management v. Golinski, Brief of the Respondent in Support of Petition for Certiorari Before Judgment*. 23 July 2012. <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/08/12-16-Golinski-Petition-final.pdf>. 1.

⁶⁸ Verilli, Donald B., Jr. The United States Supreme Court. *Office of Personnel Management v. Golinski, Petition for a Writ of Certiorari Before Judgment*. July 2012 <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/08/12-16-Golinski-Petition-final.pdf>. 8-9.

⁶⁹ White, Jeffrey S. United States District Court, Northern District of California. *Golinski v. United States Office of Personnel Management*. 22 Feb. 2012. http://www2.bloomberglaw.com/public/desktop/document/Golinski_v_US_Office_of_Personnel_Mgmt_No_C_1000257_JSW_2012_BL_4.

the Fourteenth Amendment was ratified after the Civil War, which expressly discusses the equal protection of the laws as they apply to the states. The Supreme Court has therefore interpreted the Fifth Amendment's due process clause to also include the Equal Protection of the law. This question asks whether or not the federal government denying the same privileges to legally married homosexual couples and heterosexual couples is a violation of the guarantee of the equal protection under the law.

In a few of the cases the Tenth Amendment is also at question "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." These cases bring to the Court's attention that the Supreme Court has allowed marriage to be a state issue in many instances and considered marriage a state issue rather than a federal issue. This leads to whether or not the federal government can even create laws that impose restrictions on marriage because it is not considered a federal issue in the Constitution. While the Court did not grant a petition that brought this issue to light, they did refer to this inconsistency in their opinions, concurring and dissenting.

Finally, the Commonwealth of Massachusetts also focuses on the Spending Clause of the Constitution. The Spending Clause is part of the eighth section of the Constitution stating, "The Congress shall have Power to levy and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States". While the Court did not rule on this question, it was an interesting question to raise. When D.O.M.A. was created in 1996 it would not have had any conflict with this section of the Constitution, but after states began to legalize same-

sex marriage in 2003. The issue here is that federal government did not consider couples, even those legally married, to be married couples and therefore they were not allowed the same tax benefits as other married couples in the United States. Since this provision of the Constitution requires that laws regarding taxes, duties, imposts, and excises must be uniform across all fifty states, however, they were not considered uniform across states that had both legal same-sex and opposite-sex couples.

5 CASE HEARD BY THE SUPREME COURT:

Though the Court had many petitions to choose from on the issue of the Defense of Marriage Act's Section 3, the Supreme Court only decided to hear one. While many of the other petitions filed with the Court asked very different questions and even cited other violations of the Constitution the Court granted the writ of certiorari in the case *United States v. Windsor*. The case was argued in March of 2013 along with California's Proposition 8 case, *Hollingsworth v. Perry*. The Court did not hand down decisions in either of the cases until late June of 2013, the very end of their term.

In this case the United States is the Petitioner and Edith Windsor is the respondent. This case stems from the original case from New York concerning Edith Windsor. The Petition filed by the United States simply asks "whether Section 3 of DOMA violates the Fifth Amendment's guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their State."⁷⁰ This question is similar to many of those asked by other petitions that were filed with the Supreme Court. Yet, this case, which the Court chose to hear, simply asks one question, unlike many of the other petitions, which asked several. Though the petition states that review need not be granted in this case if it is either granted in *United States Department of Health and Human Services v. Massachusetts, Office of Personnel Management v. Pederson*, or *Office of Personnel Management v. Golinski*, it states that if

⁷⁰ Verilli, Donald B., Jr. The United States Supreme Court. *United States v. Windsor, Petition for a Writ of Certiorari Before Judgment*. Sept. 2012. <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/10/12-307-Petition.pdf>. I.

review is not granted in either of those cases that this case should be granted in order to give a timely ruling on the third section of the Defense of Marriage Act.⁷¹ The Solicitor General in his petition cites why the Court should grant certiorari in this case rather than in Windsor's petition for certiorari. He notes that if the court grants *Windsor v. United States* that there could be two problems with that decision "(1) whether plaintiff, who obtained a district court judgment and decision entirely in her favor, has appellate standing to seek certiorari before judgment, and (2) whether New York law recognized her Canadian marriage at the time of Thea Spyer's (her spouse) death."⁷² The Court, in their decision to grant review in this case rather than the case petitioned by Windsor, avoided these potential issues.

In her response to the petition filed by the Solicitor General, Edith Windsor's attorneys argue that not only does Ms. Windsor have standing to challenge D.O.M.A. but that "this case provides a vehicle for the Court to determine the appropriate level of scrutiny for sexual orientation discrimination" and "this case presents an excellent vehicle for the review of Section 3 of DOMA".⁷³

5.1 Decision Made by the Court in *United States v. Windsor*:

On June 26, 2013 The United States Supreme Court handed down its decision in the case *United States v. Windsor*. Justice Kennedy of the five-person majority wrote the opinion in the case, Justices Ginsburg, Breyer, Sotomayor, and Kagan all joined. Prior to

⁷¹ *Ibid.* 10.

⁷² *Ibid.* 11.

⁷³ Kaplan, Roberta A. The United States Supreme Court. *United States v. Windsor, Response in Support of Writ of Certiorari Before Judgment*. 10 Oct. 2012. http://sblog.s3.amazonaws.com/wp-content/uploads/2012/10/12-307-Windsor-BIO-8141712_14.pdf. 7, 9.

the case being heard President Obama had stated that the Executive Branch would continue to enforce Section 3 of D.O.M.A. but he also asked the Department of Justice not to defend it.⁷⁴ With these statements from the president along with eight other cases petitioned before the Court it was clear that the Court would have to rule on the constitutionality of Section 3. In this case both the United States District Court in New York and the Second Circuit United States Circuit Court of Appeals had found in favor of Windsor and in June the Supreme Court also found in her favor.

First, Justice Kennedy lays out the Court's rationale in allowing this case to come before the Court in terms of the standing of the parties that brought the dispute to the Court. The majority asserts that even though the Executive Branch agreed with Windsor in her claims and had requested that the Department of Justice not defend future cases, that there was still a disagreement between the two parties.⁷⁵ While the situation is odd, because the United States agreed that Edith Windsor had been denied a right in violation of the Constitution, the Court found that in B.L.A.G.'s argument in favor of the constitutionality of D.O.M.A. gave enough dispute to appeal the case before the Supreme Court.⁷⁶ Though the Court agreed this practice was rare and a practice they did not encourage they quoted the decision made in *Marbury v. Madison*, which defined the Court's power of judicial review, which they believe was needed in this case.⁷⁷

⁷⁴ Kennedy, Anthony. The United States Supreme Court. *United States v. Windsor*. 26 June 2013.
http://www2.bloomberglaw.com/public/desktop/document/United_States_v_Windsor_No_12307_2013_BL_168683_US_June_26_2013_C/1.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

Following his argument in favor of the Court's ability to even decide in this case, Kennedy moved to discussing the Constitutionality of D.O.M.A. In his explanation, Kennedy points out that the federal government has been able to make statutes that regarded marriage, however, these statutes were limited to those that involved the efficiency of the federal government. Later he mentions *Loving v. Virginia* in stating that laws regarding marriage in the states have to abide by those persons constitutional rights, but that the "regulation of domestic relations" is "an area that has long been regarded as virtually exclusive province of the States." *Sosna v. Iowa*.⁷⁸ While he does not directly bring up the Tenth Amendment in this argument it seems to go along with the Tenth Amendment arguments petitioned before the Court in several of the other cases.

In his written opinion Justice Kennedy wrote, "DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government" he goes on to say that "DOMA writes inequality into the entire United States Code."⁷⁹ In his opinion Justice Kennedy was clear that D.O.M.A. violated the equal protection and due process guarantees because it made marriages that were legal in certain states unequal. In his opinion he limits the Fifth Amendment argument to the discrepancy between the federal government and state governments. Justice Kennedy explains that it is the fact that D.O.M.A. demeans "those persons who are in a lawful same-sex marriage" that violates the Fifth Amendment.⁸⁰ He also states that it is the equal protection clause of the Fourteenth Amendment that allows for the Fifth Amendment to be specific and

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

understood in this way.⁸¹ This mention of the Fourteenth Amendment in his decision could easily lead to the Fourteenth Amendment being used as a vehicle to legalize same-sex marriage in the future. Since the Court decided that D.O.M.A. did violate the Fifth Amendment, however, the Equal Protection of the Fifth Amendment is really something assumed to be there due to its connection to the Fourteenth Amendment when it began to apply to the states.

This opinion left the decision of same-sex marriage up to the states removing a federal definition of marriage from the equation. This opinion did not legalize same-sex marriage outright but did prohibit government oversight in state matters involving same-sex marriages. In this case the minority filed several dissenting opinions to the majority.

5.2 Dissenting Opinions in *United States v. Windsor*:

Chief Justice John Roberts and Justices Scalia and Alito filed dissenting opinions. Chief Justice Roberts and Justice Scalia argue that the Supreme Court lacked jurisdiction in the case and that in passing the Defense of Marriage Act Congress had acted Constitutionally.⁸² Scalia argues that since the Solicitor General asked that the Court the affirm the lower court's decision, which found against the United States, that the Court had no reason to hear the case since the lower court had fixed the injury to Ms. Windsor.⁸³ In this aspect Scalia argues that the majority's opinion was incorrect in

⁸¹ *Ibid.*

⁸² Roberts, John. The United States Supreme Court. *United States v. Windsor*. 26 June 2013. http://www2.bloomberglaw.com/public/desktop/document/United_States_v_Windsor_No_12307_2013_BL_168683_US_June_26_2013_C/1.

⁸³ Scalia, Antonin. The United States Supreme Court. *United States v. Windsor*. 26 June 2013.

arguing that the Supreme Court had the jurisdiction to even hear the case, nonetheless, decide on it. However, Scalia's issues with the majority opinion do not end with the jurisdictional questions. Scalia argues that the majority simply attributed their decision to a federal versus states matter as a formality.⁸⁴ While the question presented to the Court in the petition for the writ of certiorari was very specific in asking if D.O.M.A. violated the Fifth Amendment in its application across all states, with legalized same-sex marriage and without, Scalia argues that the real question is whether all laws restricting marriage to heterosexual relationships violate the Equal Protection Clause (he does not specify whether he is discussing the Fifth Amendment's Equal Protection Clause or that of the Fourteenth Amendment).⁸⁵ He does later make clear that he does not believe that the Constitution requires the government to not enforce "traditional moral and sexual norms", though the Court did find differently in *Lawrence v. Texas*.⁸⁶ Most interestingly, Scalia does mention that the Equal Protection Clause "technically applies only against the States." In this he is discussing the Fourteenth Amendment, arguing that the Fifth Amendment does not include an Equal Protection Clause, which in its text is true.⁸⁷

In his dissenting opinion, Chief Justice Roberts, agrees with many of Scalia's points in his dissenting opinion. Chief Justice John Roberts admits that the Supreme Court has, in the past, left definitions of marriage to the states but he argues that those variations amongst the states has not involved something assumed by the public to be

http://www2.bloomberglaw.com/public/desktop/document/United_States_v_Windsor_No_12307_2013_BL_168683_US_June_26_2013_C/1.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

crucial to the definition and function of marriage.⁸⁸ He also points out that the judgment made was limited in that it does not rule that the states cannot continue with their current definitions, but rather the decision leaves it up to individual states how they would like to define marriage.⁸⁹ His dissenting opinion is much more tame. He does not argue that the Court was specifically wrong in their ruling, but rather that they should not have been able to reach a verdict due to jurisdictional issues.

Justice Alito also believed that the Court did not have the right to hear the case because similarly to Scalia's argument, the Solicitor General does not ask for the Court to overturn the lower court's decision.⁹⁰ Like Scalia, Alito's issues with the judgment do not end with the question of jurisdiction. He also states "The Constitution does not guarantee the right to enter into a same-sex marriage. Indeed, no provision of the Constitution speaks to the issue."⁹¹ Alito also attacks the majority's use of the Fourteenth Amendment. In all Justice Alito makes it clear in his dissenting opinion that not only should the Court not hand down a decision in this case but also that the Defense of Marriage Act did not violate the Fifth Amendment in its depriving same-sex couples certain federal benefits and protections.

⁸⁸ Roberts, John. The United States Supreme Court. *United States v. Windsor*. 26 June 2013. http://www2.bloomberglaw.com/public/desktop/document/United_States_v_Windsor_or_No_12307_2013_BL_168683_US_June_26_2013_C/1.

⁸⁹ *Ibid.*

⁹⁰ Alito, Samuel. The United States Supreme Court. *United States v. Windsor*. 26 June 2013. http://www2.bloomberglaw.com/public/desktop/document/United_States_v_Windsor_or_No_12307_2013_BL_168683_US_June_26_2013_C/1.

⁹¹ *Ibid.*

6 PUBLIC OPINION AND SAME-SEX MARRIAGE:

In 2003 Massachusetts became the first state in the United States to recognize marriages between people of the same sex. In the case *Goodridge v. Department of Health* the Supreme Judicial Court of Massachusetts found that preventing persons to marry based alone on the fact that they choose to marry someone of the same sex was against the Constitution of the state of Massachusetts.⁹² This court was ahead of all others in its decision and even stated that they felt that at some points the Massachusetts Constitution protected its citizens further than the Constitution of the United States. It would not be until 2008 that other states followed the lead of Massachusetts and would legalize marriage for homosexual couples.

Today 17 states and the District of Columbia have legalized same-sex marriage and there are other states where courts have made similar rulings and are currently waiting for further appeals on the issue. In most states in the United States marriages between same-sex couples are currently legal or being debated. After the Supreme Court's ruling in 2013 it is not surprising that many states have been asked the question by their citizenry. When Justice Anthony Kennedy left the decision up to the states people across the nation began to bring the question to state courts. Since the court made the decision multiple states have changed their laws and others have ruled to do so.

⁹² Marshall. Supreme Judicial Court of Massachusetts, Suffolk. *Goodridge v. Department of Public Health*. 18 Nov. 2003.
http://www2.law.columbia.edu/faculty_franke/Gay_Marriage/Goodridge%20Decision%20edited%20Fundamental%20Right.pdf.

It took five years after Massachusetts legalized same-sex marriage for any other state to do the same. Now, in 2014, the Supreme Court has ruled on the issue and states across the country are dealing with the question. Public opinion has shifted greatly in the United States since 2003 in terms of support for same-sex couples and from March-May in 2013, before the court even reached its decision in the *United States v. Windsor* case 50% of Americans favored allowing gays and lesbians to marry legally.⁹³ In 2003 when the same question was asked of Americans only 32% of Americans favored the legalization of same-sex marriage.⁹⁴ This shift in public opinion across the country coordinates with states across the country changing their laws on same-sex marriage. While a majority of the states in the country do not have laws which extend marriage benefits to both same-sex and opposite-sex couples, a majority of the country favors the legalization and recognition of same-sex marriage.

Currently most states without bans on same-sex marriage are located in the Northeast and West. More recently some states in the Midwest have been legalizing same-sex marriage. Not surprisingly these areas are also the areas in which most people favor marriage equality. From 2003 to 2013 favor for the legalization of same-sex marriage went from 40% to 69%.⁹⁵ During this time, between three surveys in 2003 and two surveys in 2013 six states and Washington, D.C. legalized same-sex marriages. All of these states are located in the Northeast (though in 2008 same-sex marriage was legalized in California for a short time). To this day states in both the West and Midwest

⁹³ Pew Research Center. "In Gay Marriage Debate, Both Supporters and Oponents See Legal Recognition as 'Inevitable'". *People & the Press*. 6 June 2013. <http://www.people-press.org/files/legacy-pdf/06-0613%20LGBT%20General%20Public%20Release.pdf>.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

have legalized same-sex marriage, following that the public opinion in those regions increased in favor of legalization of same-sex marriage. In the West favor has risen from 40% in 2003 to 55% in 2013 and in the Midwest it has risen from 30% to 49% in those ten years.⁹⁶ The South started at only 25% in 2003 but has risen to 41% in favor, the lowest of all of the regions of the United States.⁹⁷ The South is also the only region that has not legalized same-sex marriage (Pew Research Center considers the South to include Florida, Georgia, North Carolina, South Carolina, Virginia, West Virginia, Alabama, Arkansas, Kentucky, Louisiana, Mississippi, Oklahoma, Tennessee, and Texas). The shift in public opinion is important for how future cases will be decided. How the public reacts to an issue also has a role in the Supreme Court's decision to hear cases as part of the idea of percolation.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

7 CHANGES IN STATES AFTER THE DECISION:

Prior to the Court's decision Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, Washington, D.C., New York, Washington, Maryland, Maine, Rhode Island, and Delaware all allowed same-sex marriage in their states. Massachusetts was the first state to legalize same-sex marriage at the state level with the Massachusetts Supreme Judicial Court decision in *Goodridge v. Department of Public Health*. In the case the Court found that Massachusetts could not deny couples of the same-sex the right to marry. They found that in doing so Massachusetts would be "barring an individual from the protection, benefits, and obligations of civil marriage."⁹⁸ The next state to follow Massachusetts was Connecticut with their Supreme Court decision in *Kerrigan v. Commissioner of Public Health*. The majority opinion admitted that marriage is a basic civil right and that preventing same-sex couples from being able to marry would mean that one set of Constitutional protections would apply to same-sex couples and another to opposite-sex couples, which does not allow for equal protection under the law.⁹⁹ In 2009 the Iowa Supreme Court became the third state to legalize marriage in a unanimous decision in *Varnum v. Brien*. Their decision also argues that equal protection cannot be

⁹⁸ Marshall. Supreme Judicial Court of Massachusetts, Suffolk. *Goodridge v. Department of Public Health*. 18 Nov. 2003.
http://www2.law.columbia.edu/faculty_franke/Gay_Marriage/Goodridge%20Decision%20edited%20Fundamental%20Right.pdf. 948.

⁹⁹ Palmer. Supreme Court of Connecticut. *Kerrigan v. Commissioner of Public Health*. 28 Oct. 2008.
http://scholar.google.com/scholar_case?case=7630518520881548185&hl=en&as_sdt=6&as_vis=1&oi=scholar.

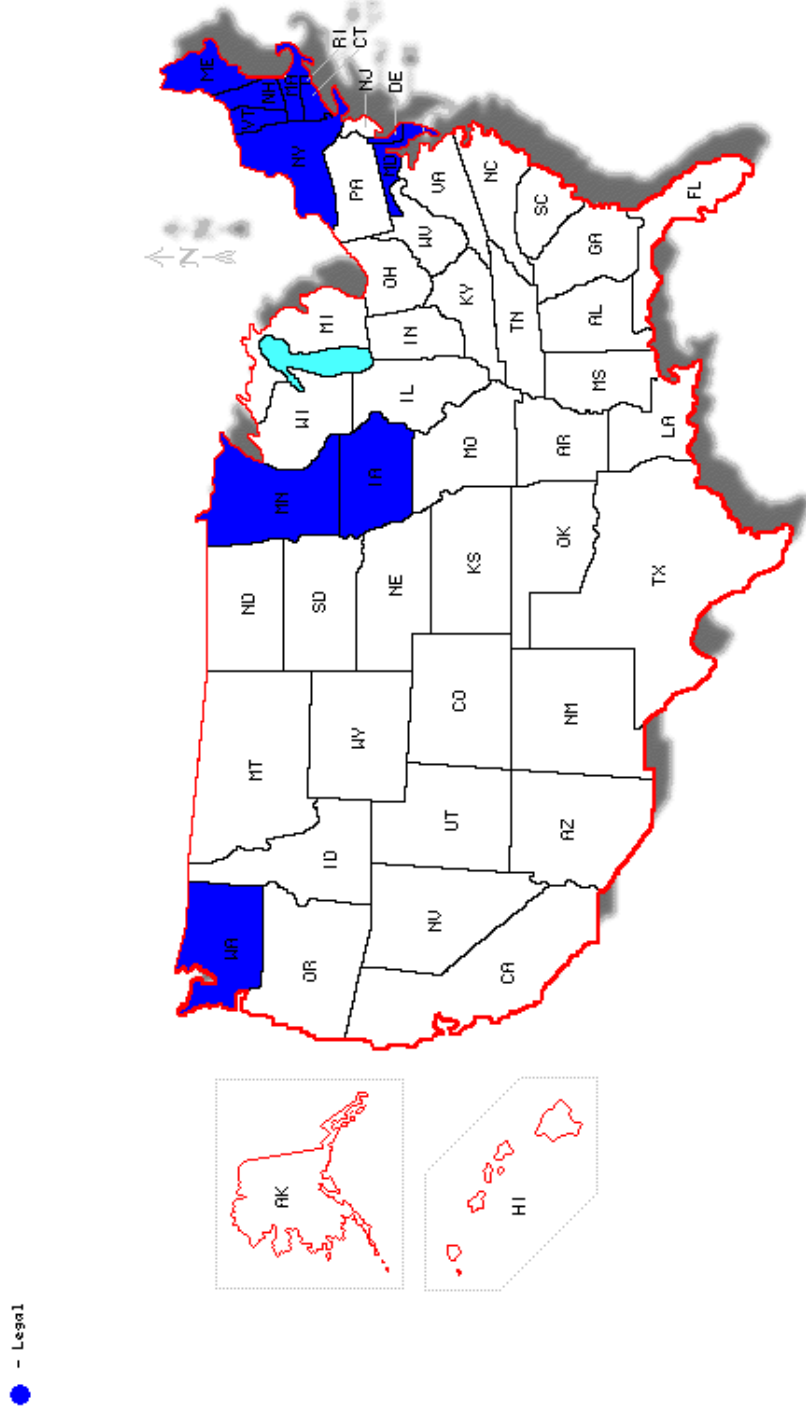
ensured if couples of different sexual orientations do not have the same rights.¹⁰⁰

Vermont overrode a Governor veto on a bill that legalized same-sex marriage. Also in 2009, New Hampshire's Governor John Lynch signed bill into law that legalized marriages for same-sex couples. A few months later the Mayor of Washington, D.C. followed suit. In 2011 New York passed legislation, which extended marriage rights to homosexual couples. On November 6, 2012, Election Day, Maryland, Maine, and Washington voted in favor to legalize same-sex marriage in their respective states. In May of 2013 Rhode Island legislature voted to end marriage discrimination. The last state to legalize gay marriage before the Supreme Court made the decision in *United States v. Windsor* was Delaware with a piece of legislation, which officially became law four days after the decision. Figure 7-1 on the next page shows what states had legalized same-sex marriage before the decision of the Supreme Court in *United States v. Windsor*. Since the decision in *United States v. Windsor* several states began to change their laws regarding same-sex couples. One particular case in New Jersey cited the recent decision made by the Supreme Court in their decision on same-sex marriage. From an earlier case, *Lewis v. Harris*, the New Jersey Supreme Court had decided that same-sex couples in New Jersey were entitled to the same rights as opposite-sex couples. This decision required that the state either legalize same-sex marriage or create a structure that allows for same-sex couples to have the same rights as heterosexual couples.¹⁰¹

¹⁰⁰ Cady. The Supreme Court of Iowa. *Varnum v. Brien*. 3 April 2009. [http://www.iowacourts.gov/wfData/files/Varnum/07-1499\(1\).pdf](http://www.iowacourts.gov/wfData/files/Varnum/07-1499(1).pdf).

¹⁰¹ Jacobson. The New Jersey Supreme Court. *Garden State Equality v Dow*. 27 Sept. 2013. http://scholar.google.com/scholar_case?case=11667356974169883621&hl=en&as_sdt=6&as_vis=1&oi=scholar.

Figure 7-1: States With Legalized Same-Sex Marriage Before June 26, 2013



102 "U.S. DIY Mapping Utility". *DIYMaps.net*. April 2014. http://diymaps.net/us_12.htm.

In the case decided in 2013, *Garden State Equality v. Dow*, the Supreme Court of New Jersey decided that since the United States Supreme Court “several federal agencies have acted to extend marital benefits to same-sex married couples” but that “the majority of those agencies have not extended eligibility for those benefits to civil union couples.”¹⁰³ Since those agencies had not extended their benefits to those couples who were together under civil unions, which was how same-sex couples were united in New Jersey, therefore, same-sex couples in New Jersey were not allowed the same rights as opposite-sex couples.¹⁰⁴ This fact led the court to legalizing same-sex marriages in the state so that all couples could not only enjoy the rights afforded to them by the state of New Jersey but also the rights they are guaranteed by the federal government. This case is of particular importance because it was the first case to use *United States v. Windsor* as a vehicle for legalizing same-sex marriage at the state level.

In December of 2013, the Supreme Court of New Mexico decided on a same-sex marriage case in which they decided that same-gender couples can choose to marry in the states and will be afforded the same rights as couples of the opposite sex.¹⁰⁵ The decision the court handed down mentioned the decision made in *Loving v. Virginia* in 1967 making a parallel to the issues in that case with the ones that were before the court.¹⁰⁶ In his mention of *Loving* Justice Chávez quotes the section of that decision which reads, “[R]estricting the freedom to marry solely because of racial classifications violates the

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ Chávez, Edward L. The New Mexico Supreme Court. *Griego v. Oliver and New Mexico*. 19 Dec. 2013. <http://www.nmcompcomm.us/nmcases/nmsc/slips/SC34,306.pdf>.

¹⁰⁶ *Ibid.*

central meaning of the Equal Protection Clause.”¹⁰⁷ In the *Loving* decision the Equal Protection Clause referenced is that of the Fourteenth Amendment. Though New Mexico simply limited their decision to whether or not preventing the marriages of same-sex couples violated the Constitution of New Mexico, the parallel between their question and the *Loving* case does again connect the question of same-sex marriage and the Fourteenth Amendment.

Interestingly, California same-sex marriage became legal, for the second time, on the same day that the Supreme Court handed down its decision in *Windsor*. The Supreme Court had also heard the case *Hollingsworth v. Perry* regarding Proposition 8 and the decision of the Supreme Court in California. The Supreme Court of California had originally, in 2008, decided that it was unconstitutional for the state of California to limit marriage to opposite-sex couples in the same year a ballot measure to amend the California constitution, Proposition 8, was voted upon by California voters, which passed.¹⁰⁸ This new law sparked a case within California regarding the constitutionality of Proposition 8. When the state Supreme Court did not find in favor of same-sex couples it was then appealed to the District Court, which found in favor of the same-sex couples.¹⁰⁹ Upon appeal, the Governor, Attorney General, and other California ranking officials refused to defend Proposition 8, similar to what the federal government did with the Defense of Marriage Act.¹¹⁰ Eventually, the case was argued before the Ninth Circuit

¹⁰⁷ *Ibid.*

¹⁰⁸ Roberts, John. The United States Supreme Court. *Hollingsworth v. Perry*. 26 June 2013.

http://www2.bloomberglaw.com/public/desktop/document/Hollingsworth_v_Perry_No_12144_2013_BL_169619_118_FEP_Cases_1446_

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

Court of Appeals, who affirmed the decision in favor of same-sex couples made by the lower court.¹¹¹ The Supreme Court found that without ranking state officials defending their own state law, there was no disagreement and therefore it should not have been appealed to the Ninth Circuit or the Supreme Court.¹¹² This decision left the decision to what the District Court of California had decided. Many people questioned whether or not the Supreme Court's decision would truly legalize same-sex marriage within California, but since the government refused to defend Proposition 8 the decision made by the District Court stands and marriages between homosexual couples resumed in 2013.

Not all of the states that have legalized same-sex marriage since the Supreme Court ruled in June 2013 have done so by using the justice system. Illinois, Minnesota, and Hawaii all passed bills through their legislatures that legalized same-sex marriage within those states. In November of 2013 the Illinois House of Representatives and Senate passed SB0010, which was an act that created marriage fairness in the state. The Act reads, "This Act shall...provide same-sex and different-sex couples and their children equal access to the status, benefits, protections, rights, and responsibilities of civil marriage."¹¹³ In Minnesota the Legislature passed HF 1054, which changed their standing law regarding marriage to be more inclusive.¹¹⁴ Technically, this bill was passed in May of 2013 while the Supreme Court was still deciding on the *United States v.*

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ Illinois General Assembly. *Religious Freedom and Marriage Fairness Act*. 20 Nov. 2013. <http://ilga.gov/legislation/98/SB/PDF/09800SB0010lv.pdf>.

¹¹⁴ Eighty-Eighth Minnesota State Legislature. 2013.

https://www.revisor.mn.gov/bills/text.php?number=HF1054&version=2&session=ls88&session_year=2013&session_number=0.

Windsor case, however, it became effective on August 1st. Finally, Hawaii, the state that sparked the creation of the Defense of Marriage Act in 1996, passed legislation to permit marriage equality within its borders. The bill specifically credits *United States v. Windsor* for its creation and like New Jersey; this bill is passed because the civil unions performed in the state will not have the same benefits at the federal level as they do within the state of Hawaii.¹¹⁵ The bill was titled Hawaii Marriage Equality Act of 2013 and was passed by the Hawaii legislature and became effective on December 2, 2013.¹¹⁶ These three states, while not using the justice system, did ensure that their citizens received equal protection of the law.

7.1 Current Circuit Court Cases on Same-Sex Marriage:

While these states have changed their laws regarding same-sex marriage, others have attempted to do the same and their cases are waiting on appeal from different Circuit Courts in the U.S. States waiting for appeal in their cases are Kentucky, Michigan, Nevada, Ohio, Oklahoma, Tennessee, Texas, Utah, and Virginia. In February a Kentucky District Judge heard the case *Bourke v. Beshear* (now *Love v. Beshear*). District Judge John Heyburn, II found in favor of the four homosexual couples that had brought the question to the court. Kentucky had both state constitutional and statutory prohibition on same-sex marriages within the state. The statute in Kentucky not only defined marriage between one man and woman and prohibited same-sex marriage in the state but also went as far as to say even same-sex marriages created legally outside of the

¹¹⁵ Twenty-Seventh Legislature State of Hawaii. *Hawaii Marriage Equality Act of 2013*. 2013. http://www.capitol.hawaii.gov/splsession2013b/SB1_HD1_.pdf.

¹¹⁶ *Ibid.*

state of Kentucky would not be viewed as legitimate by the state.¹¹⁷ The four couples had all been legally married elsewhere and were attempting to gain recognition as married couples in the state of Kentucky.¹¹⁸ Throughout his opinion, Heyburn, cites the *Loving* case arguing that through that case the Supreme Court found that marriage is a fundamental right.¹¹⁹ This inclusion backs up the judge's main claim that Kentucky's statute and constitution do violate the Fourteenth Amendment of the United States. Unlike other cases since the decision made in *United States v. Windsor* this case does not focus on the state constitution and its Bill of Rights but rather that of the entire country. Oklahoma also has a case in their state courts relating to same-sex marriage equality, *Kentucky Equality Federation v. Beshear*.

The Michigan court's decision was handed down in late March and is also being appealed to the United States Sixth Circuit Court of Appeals. The judgment in this case is very similar to the one decided in Kentucky because it also is based on the Fourteenth Amendment of the United States Constitution. The couples in this case brought to the court the question whether or not the "Michigan Marriage Amendment" violated their rights of due process and equal protection under the law.¹²⁰ This case did involve the children of the two plaintiffs, which is what the Court cites in its decision. The Court

¹¹⁷ Kentucky Legislature. 402.02. *Other Prohibited Marriages*.
<http://www.lrc.ky.gov/Statutes/statute.aspx?id=36466>.

¹¹⁸ Heyburn, John G., II. United States District Court, Western District Kentucky. *Bourke v. Beshear*. 12 Feb. 2014.
http://scholar.google.com/scholar_case?case=15203616851299402467&hl=en&as_sdt=6&as_vis=1&oi=scholar.

¹¹⁹ *Ibid*.

¹²⁰ Friedman, Bernard A. United States District Court, Eastern District of Michigan, Southern Division. *DeBoer v. Snyder*. 21 March 2014.
http://scholar.google.com/scholar_case?case=403997648235087664&q=DeBoer+v.+Snyder&hl=en&as_sdt=6,25.

found that the “Michigan Marriage Amendment” did violate the Fourteenth Amendment of the Constitution but also they argued that the children should be able to grow up “to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives”, which is a quote coming directly from Justice Kennedy’s opinion in *United States v. Windsor*.¹²¹ The Nevada case is different in that it was decided on in 2012 and the Judge did not find in favor of the same-sex couples. The case is now headed to the Ninth Circuit Court of Appeals.

The next case awaiting appeal at the circuit court level is *Obergefell v. Himes* (previously *Obergefell v. Wymyslo*) from Ohio. This case deals with recognizing legally married same-sex couples on death certificates in the state of Ohio.¹²² This recognition was denied due to the constitution and statutory elements of Ohio law, which prohibit the recognition of same-sex marriages even when those marriages were performed and entered into legally.¹²³ Judge Black also cites *Loving* as defining marriage a fundamental right, which he then extends to “the right to remain married” in his finding that the Ohio law does indeed violate the due process clause of the Fourteenth Amendment of the United States Constitution.¹²⁴

The Oklahoma case is another case now making its way to the circuit court level, *Bishop v. Smith* (formerly *Bishop v. United States*). The case was originally heard in 2006 and in 2014 the District Court for the Northern District of Oklahoma handed down its

¹²¹ *Ibid.*

¹²² Black, Timothy S. United States District Court of Southern District of Ohio, Western Division. *Obergefell v. Wymyslo*. 23 Dec. 2013.
http://scholar.google.com/scholar_case?case=12839958848055482717&hl=en&as_sdt=6&as_vis=1&oi=scholar.

¹²³ *Ibid.*

¹²⁴ *Ibid.*

opinion on the case.¹²⁵ The case challenged both D.O.M.A. and constitutional amendments to the Oklahoma constitution, which define marriage and voided those same-sex marriages performed legally out of state.¹²⁶ The decision made by Judge Kern depends heavily on the Supreme Court's decision made in *Windsor* in that he states "Supreme Court law now prohibit states from passing laws that are born of animosity against homosexuals, extends constitutional protection to the moral and sexual choices of homosexuals and prohibits the federal government from treating opposite-sex marriages and same-sex marriages differently."¹²⁷ The judge further explains that the portion of the Oklahoma constitution that limits the benefits granted to same-sex couples does violate the Fourteenth Amendment without justification.¹²⁸

The state of Tennessee has also appealed to the Sixth Circuit Court of Appeals in the case *Tanco v. Haslam* which Judge Aleta Trauger, as of March 14, allowed the plaintiffs in the case an injunction which will prohibit the state from enforcing Tennessee's Anti-Recognition Laws against the plaintiffs, which is the decision being appealed.¹²⁹ Judge Trauger stated in her judgment on the injunction that the plaintiffs were likely to win on the merits in this case.¹³⁰

¹²⁵ Kern, Terence C. United States District Court for the Northern District of Oklahoma. *Bishop v. United States*. 14 Jan. 2014. <http://www.clearinghouse.net/chDocs/public/PB-OK-0001-0012.pdf>. 3.

¹²⁶ *Ibid.* 5.

¹²⁷ *Ibid.* 25.

¹²⁸ *Ibid.* 25.

¹²⁹ Trauger, Aleta A. United States District Court, Middle District of Tennessee, Nashville Division. *Tanco v. Haslam*. 14 March 2014. <http://www.tn.gov/attorneygeneral/cases/tanco/tancomemorandum-3-14-2014.pdf>. 19.

¹³⁰ *Ibid.* 11.

Another Southern state also has a case going to the circuit courts, *DeLeon v. Perry*. The case brought before the Texas court sought an injunction against the Defendants, the state, who has enforced Section 32 of the Texas Constitution and statutory sections that are similar.¹³¹ The Plaintiffs in the case argued that these sections of the constitution and code of Texas violate their Fourteenth Amendment rights of equal protection and due process.¹³² The District Court found in favor of the plaintiffs that these sections of Texas law do in fact violate their rights to equal protection and due process as explained by the Fourteenth Amendment.¹³³ Like several other cases the decision made by Judge Garcia depended not on the constitution of Texas but rather the U.S. Constitution. Texas continues to hear the state cases *McNosky v. Perry*, *Zahrn v. Perry*, *J.B. v. Dallas County*, and *Texas v. Naylor*.

Kitchen v. Herbert, Utah's same-sex marriage case is also on its way to be appealed before the Tenth Circuit Court of Appeals. The decision here also hinged on the Fourteenth Amendment's protections of due process and equal protection of the law. Plaintiffs in this case filed suit arguing that Amendment 3 of the Utah Constitution denied them their Fourteenth Amendment rights because the state of Utah refused to issue a marriage license to the couple.¹³⁴ Again, the court cited *Loving v. Virginia* in its opinion.

¹³¹ Garcia, Orlando L. United States District Court for the Western District of Texas, San Antonio Division. *DeLeon v. Perry*. 26 Feb. 2014.

http://www.stanford.edu/~mrosenfe/US_DeLeon_v_Perry.pdf. 1.

¹³² *Ibid.* 2

¹³³ *Ibid.* 47

¹³⁴ Shelby, Robert J. United States District Court, District of Utah, Central Division. *Kitchen v. Herbert*. 20 Dec. 2013.

http://scholar.google.com/scholar_case?case=14405943336551332299&hl=en&as_sdt=6&as_vis=1&oi=scholar.

Here the State of Utah had argued similarly to the State of Virginia in 1966.¹³⁵ The Supreme Court found that these arguments were not enough in *Loving* and the Utah court found the same in this case when it did decide that Amendment 3 of the Utah Constitution was not constitutional.

The Virginia Court also relied heavily on the Fourteenth Amendment in their decision in *Bostic v. Schaefer* (formerly *Bostic v. McDonnell* and *Bostic v. Rainey*). This case heard before the United States District Court of the Eastern District of Virginia brought into question the marriage laws in Virginia which prohibited the state from allowing same-sex couples to marry as well as recognizing marriages from out of state homosexual couples.¹³⁶ Above the opinion in this case a quote from Mildred Loving, of *Loving v. Virginia*, is written. This quote came in a speech Mrs. Loving made in 2007 celebrating the fortieth anniversary of the decision in her case. This quote makes it easy to see which way the court decided in this case, which was in favor of the plaintiffs. The court found that the laws in Virginia violated the plaintiff's Fourteenth Amendment rights.¹³⁷ Currently this case is waiting appeal in the United States Fourth Circuit Court of Appeals.

These nine cases from different states all raise questions of provisions of constitutions and statutes in their respective states with respect to their connection to same-sex marriage. Of these nine cases, seven cases use the Fourteenth in their defense of same-sex marriage and in those cases the judge writing the opinion has found that laws

¹³⁵ *Ibid.*

¹³⁶ Allen, Arenda L. Wright. United States District Court, Eastern District Virginia, Norfolk Division. *Bostic v. Rainey*. 13 Feb. 2014.
http://www.stanford.edu/~mrosenfe/US_Bostic_v_Rainey.pdf 2.

¹³⁷ *Ibid.* 1.

within those states violate the Constitution of the United States. Many of these cases use parallels between the predicament of legalizing same-sex marriage and legalizing interracial marriage in 1967. These comparisons are mainly found in the arguments using the Fourteenth Amendment as a way to ensure the right to marry to all couples, rather than just heterosexual couples. States have found success in legalizing same-sex marriage by relying on their own Bill of Rights in their own constitutions, however, using the Fourteenth Amendment as a vehicle to legalize same-sex marriage in the states could lead to it becoming a national vehicle for marriage equality.

7.2 Current State Cases Regarding Same-Sex Marriage:

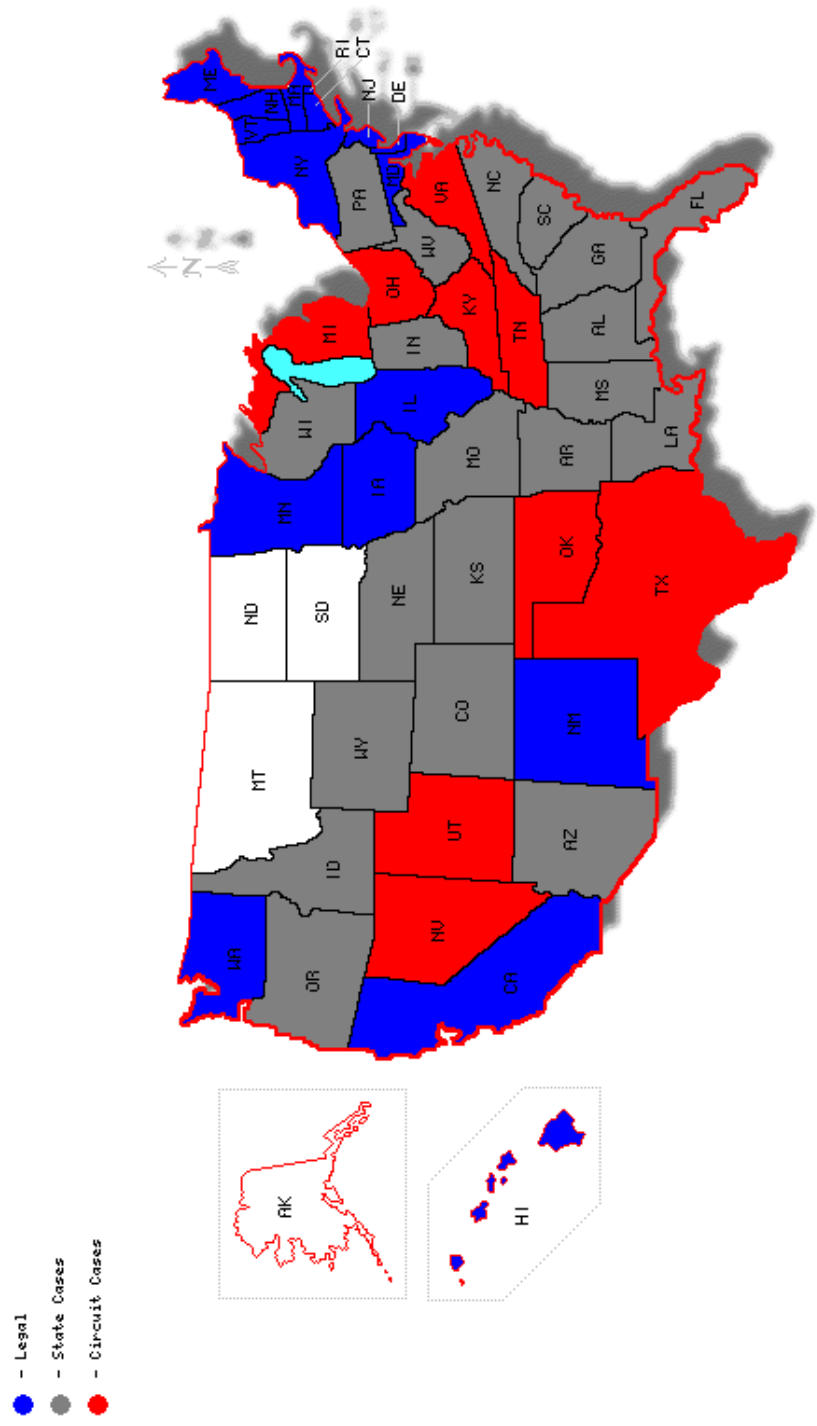
Many states, though they may not have cases at the circuit level, have cases making their way through the lower courts. Alabama, Arizona, Arkansas, Colorado, Florida, Idaho, Indiana, Kansas, Louisiana, Mississippi, Missouri, Nebraska, North Carolina, Oregon, Pennsylvania, South Carolina, West Virginia, Wisconsin, and Wyoming are all states with one or more cases arguing marriage equality. These eighteen states along with the nine that have cases in circuit courts means that same-sex marriage has become a legal question in more than half of the states since the *Windsor* decision in June 2013. All of these states paired with those that had already legalized same-sex marriage prior to the Court's decision means that in very few states, only five, same-sex marriage is not legal or being argued.

Currently in Alabama there are two cases making their way through the court system. Paul Hard filed the first case in March of 2013. *Hard v. Bentley* brings into question the portions of Alabama law that limit marriage to only opposite-sex couples.

Another case, *Richmond and Richmond v. Madison County Circuit Clerk*, is another case that requests the recognition of same-sex marriages performed out of state. Like Alabama, Arizona also has two pending cases in their courts. *Majors v. Horne* asks the question of whether or not the laws in Arizona that prohibit same-sex marriage violate the Fourteenth Amendment. The second case, *Connolly v. Roche*, also questions the constitutionality of the Arizona law that prohibits and denies recognition of same-sex marriages. Arkansas also has two cases, *Jernigan v. Crane* and *Wright v. Arkansas*, both attempting to overturn the current law banning same-sex marriage in the state. Colorado is also handling two cases regarding the same issue, *McDaniel-Miccio v. Hickenlooper* and *Brinkman v. Long*. Florida has much more on its hands, with five cases, *Shaw v. Shaw*, *Pareto v. Ruvin*, *Huntsman v. Hearlin*, *Brenner v. Scott*, *Grimsley & Albu v. Scott*. These cases regard marriage recognition within the state and allow same-sex marriages to be legally performed in Florida. *Latta v. Otter* a case in Idaho was filed on behalf of several couples requesting the freedom to marry in Idaho and recognition for legal marriages performed outside of Idaho. Like Florida, Indiana has five different cases requesting changes to the Indiana laws on marriage. The cases in Indiana are *Bowling v. Pence*, *Officer Pamela Lee v. Pence*, *Midori Fujii v. Indiana Governor*, *Baskin v. Bogan*, and *Love v. Pence*. Kansas only has one case currently questioning the marriage laws in the state, *Nelson v. Kansas Department of Revenue*. Louisiana is currently handling two cases, *Forum for Equality Louisiana v. Barfield* and *In Re Constanza and Brewer*, arguing the states laws banning same-sex marriage and its recognition within the state. In Mississippi plaintiffs in the case *Czekala-Chatham v. Melancon* are looking to appeal their case after a judge denied their original petition. Missouri is also dealing with the

case *Barrier v. Vasterling* filed by multiple couples whose marriages are not recognized by the state. Nebraska, in *Nichols v. Nichols*, is being asked to recognize same-sex marriages performed legally out of state so that their same-sex marriage can be dissolved. In North Carolina *Fisher-Borne v. Smith* is making its way through the different courts to try and gain the freedom to marry so that they can have officially recognized parental relationships with their significant others' adopted children. The courts are also hearing *Cowger & Wesley v. Kasich*. Oregon currently has two cases within the state fighting for marriage equality, *Geiger v. Kitzhaber* and *Rummel & West v. Kitzhaber*. Pennsylvania, the only state in the Third Circuit Court of Appeals that does not recognize same-sex marriages, has five cases on its books arguing the issue, *Whitewood v. Wolf*, *Palladino v. Corbett*, *Pennsylvania Department of Health v. Hanes*, *Ballen v. Corbett*, and *Baus v. Gibbs*. In South Carolina plaintiffs are awaiting response from the state in the case *Bradacs v. Haley*. West Virginia's law banning same-sex marriage is also being questioned in *McGee v. Cole*. In Wisconsin's *Wolf v. Walker* is similar to *McGee v. Cole* in that it requests the state allow the freedom to marry. Wyoming couples are pressing the state to recognize their out of state marriages in the case *Courage v. Wyoming*. Most recently, a suit was filed in Georgia, *Inniss v. Aberhold*, in late April. All of these states are hearing cases on the issue of same-sex marriage and while the background for each case is unique they are all working to legalize same-sex marriage in their states. Figure 7-2 on the following page gives an illustration of the current status of same-sex marriage legalization across all fifty states.

Figure 7-2: Current State of Same-Sex Marriage in the United States



Source: diymaps.net (c)

138 "U.S. DIY Mapping Utility". *DIYMaps.net*. April 2014. http://diymaps.net/us_12.htm.

8 VEHICLES FOR LEGALIZING SAME-SEX MARRIAGE IN THE UNITED STATES:

In 1967 the United States Supreme Court heard the case *Loving v. Virginia*. In 1958 an African American woman and a white man married in the District of Columbia, they came home and were indicted in Virginia for violating the state's ban on interracial marriage.¹³⁹ The case presented the question of whether or not "a statutory scheme adopted by the State of Virginia to prevent marriages between persons solely on the basis of racial classifications violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment."¹⁴⁰ In his opinion Earl Warren wrote, "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."¹⁴¹ This decision cemented into law marriage as a right that, in accordance with the Fourteenth Amendment, should be extended to all citizens.

This case is incredibly similar to many of the cases across the country involving same-sex marriage and has been mentioned in many decisions for these similarities. As with the cases petitioned before the Supreme Court, which they did not grant certiorari, along with the state and circuit cases all present a question of whether or not it is constitutional to prevent marriages between two people based solely on their sexual orientation. The Supreme Court, in an attempt to leave this issue one for the individual states, heard a case asking only a question about the Fifth Amendment, though the

¹³⁹ Warren, Earl. The United States Supreme Court. *Loving v. Virginia*. 12 June 1967. <http://supreme.justia.com/cases/federal/us/388/1/case.html>.

¹⁴⁰ *Ibid.*

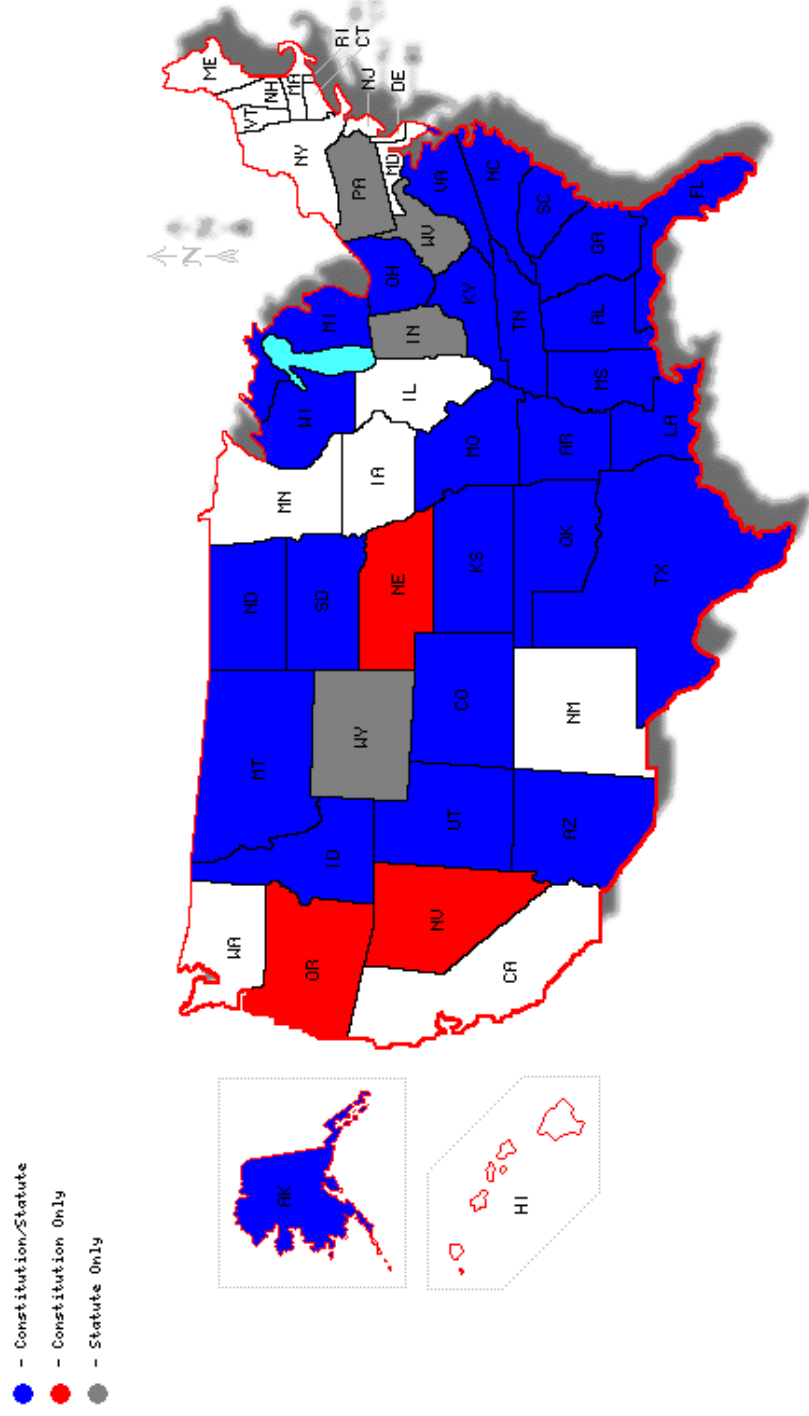
¹⁴¹ *Ibid.*

Fourteenth and Fifth Amendments are linked in many cases. Since that decision the cases have been within the states, many of which have cited the Fourteenth Amendment as a reason for legalizing same sex marriage in the states.

The Fourteenth Amendment came into law in 1868, after the American Civil War. Immediately cases being brought before the Supreme Court attempted to use the new amendment as a way to incorporate the Fifth Amendment, the amendment used for the decision in *Windsor*. This connection in law comes from the similarity in the language of the two amendments. For these cases the similarity comes from the Fifth Amendment's "No person shall be...deprived of life, liberty, or property without due process of law" and the Fourteenth Amendment's "No State shall...deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." The Fifth Amendment does not expressly include an Equal Protection clause but due to its connection and similarities to the Fifth Amendment the Court has cited the Equal Protection clause of the Fifth Amendment in cases it has decided.

Currently thirty-three states in the United States have either a provision in their constitution or have statutes that prevent same-sex marriage from being performed legally within those states, and some states have both. On the next page Figure 8-1 illustrates which states have constitutional elements, statutory elements, and both. Though many of these states currently have debates going on over their legal provisions preventing same-sex marriage, currently the laws in these states are still in effect. Specifically, the six states that currently have cases headed to the federal circuit courts

Figure 8-1: State Laws Prohibiting Same-Sex Marriage



Source: diymaps.net (c)

can use the loving decision and the Fourteenth Amendment as a means to legalize same-sex marriage nationally. These six cases have the best chance because they are already making their cases through the different levels of appeals and could in turn petition the Supreme Court for the writ of certiorari. In his opinion, Justice Anthony Kennedy, while careful to limit his decision of legalizing same-sex marriage issue a state issue, he did mention the Fourteenth Amendment. The opinion in the case was based on inequality among the states. The argument made was based on the Fifth Amendment, which has always applied to the federal government. The issue in why the Defense of Marriage Act was found unconstitutional involved certain federal benefits that were extended to opposite-sex married couples and not same-sex married couples. Using the Fourteenth Amendment, which specifically extends the due process clause and equal protection clause to the states, states can argue that the state is creating equality amongst different groups as well. Since states are not extending state benefits to same-sex couples that they are extending to opposite-sex couples then the precedent by the Court in both *Windsor* and *Loving* the Supreme Court should find that these laws within individual states are violating peoples' rights as described by the Fourteenth Amendment.

While the Supreme Court refused to decide on the Defense of Marriage Act in terms of nationally legalizing same-sex marriage, the Fourteenth Amendment speaks directly about the states which, if the courts granted certiorari, would require the Supreme Court to answer the Fourteenth Amendment question as it applies to all of the states. The Fourteenth Amendment provides an ideal vehicle for states to use in order to legalize same-sex marriage in the states and potentially for the Supreme Court to legalize same-sex marriage across all of the states.

9 CONCLUSION:

The same-sex marriage landscape in the United States is rapidly changing. Since 2003, when same-sex marriage was originally legalized in Massachusetts, the country's opinions and laws involving same-sex marriage and same-sex couples have changed. Generally, citizens of the United States have become more accepting of same-sex marriage. In turn many states have begun to change their laws and recognize same-sex marriages as legitimate. The changes between 2003 and 2013 in public opinion were drastic; more and more people surveyed have admitted that they support the legalization of same-sex marriage. Also in that time eight states and the District of Columbia legalized same-sex marriage.

The Supreme Court's decision in *United States v. Windsor* opened up the possibility for states to change their laws in regards to same-sex couples. While the Supreme Court decision relied on the Fifth Amendment the states are using the Fourteenth Amendment to change their laws. Since the Fifth Amendment and the Fourteenth Amendment have been connected since the Fourteenth Amendment was used to incorporate the Fifth Amendment to the individual states, it follows that the Fifth Amendment would be used to change federal same-sex marriage laws and the Fourteenth Amendment would be used to change the laws of the individual states. Many people have compared the Civil Rights movement, including the legalization of interracial marriage, to the current gay rights movement in the United States. *Loving v. Virginia* and its

connection to the Fourteenth Amendment can also be compared to the current Fourteenth Amendment questions presented in many states on the issue of same-sex marriage legalization.

Seeing these connections, states in the U.S. should be utilizing the Due Process and Equal Protection Clauses of the Fourteenth Amendment as the basis for arguments in favor of courts legalizing same-sex marriage. The Fifth Amendment of the United States as part of the Bill of Rights originally protected citizens only in terms of the federal government. The Fourteenth Amendment guaranteed the same types of protections for people, but in this case from the states. With these protections in mind it should be the Fourteenth Amendment that changes the country's opinions on same-sex marriage. If the Fifth Amendment prevents the federal government from making marriages of same-sex couples and opposite-sex couples unequal on the national scale, the Fourteenth Amendment should ensure the same protection for people in the states.

While the Fourteenth Amendment could be used as a vehicle to legalize same-sex marriage across the nation, the best way to do this would be through another decision made by the Supreme Court. In Justice Kennedy's opinion in *United States v. Windsor* he was very careful not to fully legalize same-sex marriage across all jurisdictions. While the case was a large victory for the lesbian, gay, bisexual, and transgender (L.G.B.T.) community, it made legalizing same-sex marriage a states' rights issue rather than a national one. This has been demonstrated since the opinion was handed down and many states have changed their laws. Currently only five states are not hearing issues on this matter, North Dakota, South Dakota, Montana, Georgia, and Alaska, meaning that same-sex marriage is either legal or being debated in forty-five of the fifty states. With these

changes across the country in law and public opinion it is much more likely that same-sex marriage will be legalized. Currently it is up to individual states to change their laws and extend marriage equality to all of their citizens.

Windsor did not drastically change the law in the land, but rather allowed for the issue of same-sex marriage to be on a national platform. Prior to the case being heard the Court allowed the issue to percolate across the districts and circuits, nine petitions from four cases from across the country. The Court also heard the *Hollingsworth* case, which they dismissed in their opinion, again not making any concrete and sweeping decision in the area of same-sex marriage. Since the decision many cases have cropped up across the U.S. in many areas. Courts across the country are now deciding these cases, which is precisely what the Supreme Court expects. Like with previous percolated cases the Court is aware that there will be many other questions to come from their decision and they will decide on them as they make their way to the Court.

The real question of legalizing same-sex marriage across all fifty states is whether or not the Supreme Court will take up the issue once again in order to make a broader decision that crosses all jurisdictions. In the process the court will receive petitions raising questions on the legalization of same-sex marriage generally as well as the second section of D.O.M.A. the next step will be for the court to vote on whether or not they will grant the writ of certiorari in the cases. In cases which are questionable some justices will say they will join three, meaning that if three other justices vote to grant certiorari then they will join to be the fourth vote needed. The court receives thousands of petitions each year, yet they only hear oral argument in a few, around 70 or 80. It only requires four votes in order to grant certiorari in a case. After the case is granted the writ the case

moves to oral argument, which is really a way for the justices to question the counsel for each party about the constitutional ramifications of their potential decision. It has been proven that Justice Kennedy will write any decision in favor of same-sex couples from the Court, as he wrote the decision in *Windsor* as well as the decision in *Lawrence v. Texas*. Kennedy, on most issues, is in the middle of the Court as far as ideologies. Kennedy, being in the middle, is typically the swing-vote.

With the jurisdictional issues the Supreme Court faced with the *Windsor* case it is unlikely that the Court will be willing to take up the issue again. Of the six cases making their way to the circuit courts several of the state attorneys general have refused to defend their laws that prevent same-sex marriage within their states. A similar issue occurred with the *Windsor* case, which was a major part of the minority's dissent. Currently the states are reacting to the Supreme Court's decision on a state-by-state basis. The decision, being so narrow in scope, does not leave much room for various interpretations by the circuits. The most likely way in which the Supreme Court would be willing to hear the issue again would require states to use the Fourteenth Amendment in their argument. Discrepancies across the circuits would also increase the likelihood that the Court will hear the issue once again. Several of the circuits are currently hearing arguments from lower courts, which have all found in favor of same-sex couples and against laws preventing marriage equality, making it less likely for the circuits to overturn. However, one of the cases making its way to the circuits came from Texas, which means the Fifth Circuit Court of Appeals will hear it. The Fifth Circuit is made up of Texas, Mississippi, and Louisiana. These three states are some of the most conservative states in the country, and it is very unlikely that this Circuit will find in favor of same-sex marriage

legalization. Another circuit preparing to hear the issue is the Ninth Circuit, which found in favor of same-sex couples in the *Hollingsworth* case. Therefore, the Ninth Circuit is very likely to again find in favor of same-sex couples as they have in the past. This will create a disharmony, which could lead to the Court answering questions about same-sex marriage. However, this type of disharmony is not necessarily required for the Court to be interested in the issue. Potentially, the Court could be asked a question about Section 2 of the Defense of Marriage Act, which was not part of the *Windsor* case. Section 2, which allows states to not recognize same-sex marriages performed legally in other states. This would be a good compromise between legalizing same-sex marriage across all fifty states and leaving it up to the states to legalize. This question would again be based on the Fourteenth Amendment and would ask if states do not have to recognize legal marriages but they are recognized in some states, again a question of equal protection. Without the Supreme Court hearing another case involving same-sex marriage laws across the states, it will be state-by-state issue, taking years to fully legalize same-sex marriage. However, with the increase in current state laws along with public opinion, same-sex marriage will eventually be legalized in the United States.

LIST OF CASES:

Baehr v. Lewin.

852 P.2d 44. (Hawaii 1993).

Bishop v. United States

2014 WL 116013 (N.D. OK).

Bostic v. Rainey

2:13-CV-395 (E.D. VA 2014).

Bourke v. Beshear

3: 13-CV-750-H (W.D. Kentucky 2014).

Commonwealth of Massachusetts v. U.S. Department of Health and Human Services

682 F.3d 1. (1st Cir. Ct. App. 2012).

DeBoer v. Snyder

12-CV-10285 (E.D. Michigan 2014).

DeLeon v. Perry

2014 WL 715741 (W.D. TX).

District of Columbia v. Heller

128 S. Ct. 2783 (S. Ct. 2008).

Garden State Equality v. Dow

79 A.3d 479 (N.J. Super. 2013).

Golinski v. Office of Personnel Management

823 F. Supp. 2d 968. (N.D. Cal. 2012).

Goodridge v. Department of Health and Human Services

798 N.E.2d 941 (Mass. 2003).

Griego v. Oliver

2014-NMSC-003 (N.M. S. Ct.)

Hollingsworth v. Perry

133 S. Ct. 2652, 186 L. Ed. 2d 768 (S. Ct. 2013).

Kerrigan v. Commissioner of Health

957 A.2d 407 (Conn. 2008).

- Kitchen v. Herbert*
2:13-CV-217 (D. Utah 2013).
- Loving v. Virginia*
388 U.S. 1 (S. Ct. 1967).
- McDonald v. City of Chicago*
130 S. Ct. 3020 (S. Ct. 2010).
- Obergefell v. Wymyslo*
1:13-CV-501 (S.D. Ohio 2013).
- Pederson v. Office of Personnel Management v. B.L.A.G.*
881 F. Supp. 2d 294. (D. Conn. 2012).
- Tanco v. Haslam*
3:13-CV-01159 (M.D. Tenn. 2014).
- United States v. Windsor*
133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013).
- Varnum v. Brien*
763 N.W.2d 862 (S. Ct. Iowa 2009).
- Windsor v. United States*
599 F.3d 169. (2nd Cir. Ct. App. 2012).

LIST OF REFERENCES:

- Alito, Samuel. The United States Supreme Court. *United States v. Windsor*. 26 June 2013. http://www2.bloomberglaw.com/public/desktop/document/United_States_v_Windsor_No_12307_2013_BL_168683_US_June_26_2013_C/1.
- Buseck, G.D. The United States Supreme Court. *Pederson v. Office of Personnel Management and Bipartisan Legal Advisory Group of the United States House of Representatives, Petition for Writ of Certiorari Before Judgment*. 21 Aug. 2012. <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/11/12-231-Pedersen-petition-8-21-12.pdf>.
- Clement, Paul D. The Supreme Court of the United States. *Bipartisan Legal Advisory Group of the United States House of Representatives v. Gill, Petition for the Writ of Certiorari*. 29 June 2012. <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/08/12-13-House-Cert-Petition.pdf>.
- Clement, Paul D. The United States Supreme Court. *Bipartisan Legal Advisory Group of the United States House of Representatives v. Windsor and the United States, Petition for the Writ of Certiorari*. 28 Dec. 2012. <http://sblog.s3.amazonaws.com/wp-content/uploads/2013/01/12-27-12-Cert-Pet.pdf>.
- Clement, Paul D. The United States Supreme Court. *Commonwealth of Massachusetts v. United States Department of Health and Human Services and Bipartisan Legal Advisory group of the United States House of Representatives, Brief in Opposition*. 23 Aug. 2012. <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/09/12-97-Brief-in-Opp-OK-TO-PRINT-8-23-12.pdf>.
- Clement, Paul D. The United States Supreme Court. *Office of Personnel Management v. Pederson and Bipartisan Legal Advisory Group of the United States House of Representatives, Brief in Opposition*. 19 Oct. 2012. <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/10/12-302-BIO-Pedersen-SCOTUS.pdf>.
- Clement, Paul D. The United States Supreme Court. *United States Department of Health and Human Services v. Commonwealth of Massachusetts and The Bipartisan Legal Advisory Group of the United States House of Representatives And Office of Personnel Management v. Gill and Bipartisan Legal Advisory Group of the United States House of Representatives, Brief in Opposition*. 31 Aug. 2012. <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/09/12-15-Brief-in-Opp-OK-TO-PRINT-8-31-12.pdf>.
- Coakley, Martha. The Supreme Court of the United States. *Bipartisan Legal Advisory Group of the House of Representatives v Gill. And United States Department of Health and Human Services v. Commonwealth of Massachusetts, Response of the*

Commonwealth of Massachusetts in Support of Certiorari. July 2012.
<http://sblog.s3.amazonaws.com/wp-content/uploads/2012/08/12-13-12-15-BLAG-v-Gill-HHS-v-Massachusetts-Cert-Response-July-2012.pdf>.

Coakley, Martha. The United States Supreme Court. *Commonwealth of Massachusetts v. United States Department of Health and Human Services and Bipartisan Legal Advisory Group of the United States House of Representatives, Conditional Cross-Petition for a Writ of Certiorari*. July 2012.
<http://sblog.s3.amazonaws.com/wp-content/uploads/2012/09/12-97-DOMA-Mass.-cross-petition-7-20-121.pdf>.

Davidson, Jon W. The Supreme Court of the United States. *Office of Personnel Management v. Golinski, Brief of the Respondent in Support of Petition for Certiorari Before Judgment*. 23 July 2012.
<http://sblog.s3.amazonaws.com/wp-content/uploads/2012/08/12-16-Golinski-Petition-final.pdf>.

Eighty-Eighth Minnesota State Legislature. 2013.
https://www.revisor.mn.gov/bills/text.php?number=HF1054&version=2&session=ls88&session_year=2013&session_number=0.

Gill, T. P., Britt, M., Gomes, L. K., Hochber, L.J. Jr., Kridman, N. Sheldon, M.A., Stauffer, B. *Report of the Commission on Sexual Orientation and the Law*. The Commission on Sexual Orientation and the Law. 8 Dec. 1995.
<http://www.unmarriedamerica.org/Archives/1994-1999-Hawaii-Legislative-Actions/1995-Hawaii-Commission-Report.pdf>.

Illinois General Assembly. *Religious Freedom and Marriage Fairness Act*. 20 Nov. 2013. <http://ilga.gov/legislation/98/SB/PDF/09800SB0010lv.pdf>.

Kaplan, Roberta A. The United States Supreme Court. *Bipartisan Legal Advisory Group of the United States House of Representatives v. Windsor, Brief in Opposition for Respondent Edith Shlain Windsor*. 13 March 2013.
<http://sblog.s3.amazonaws.com/wp-content/uploads/2013/03/12-785-BIO-Final.pdf>.

Kaplan, Roberta A. The United States Supreme Court. *United States v. Windsor, Response in Support of Writ of Certiorari Before Judgment*. 10 Oct. 2012.
http://sblog.s3.amazonaws.com/wp-content/uploads/2012/10/12-307-Windsor-BIO-8141712_14.pdf.

Kaplan, Roberta A. The United States Supreme Court. *Windsor v. United States and Bipartisan Legal Advisory Group of the United States House of Representatives, Petition for the Writ of Certiorari Before Judgment*. 16 July 2012.
<http://sblog.s3.amazonaws.com/wp-content/uploads/2012/08/12-63-Windsor-Cert-Petition.pdf>.

- Kennedy, Anthony. The United States Supreme Court. *United States v. Windsor*. 26 June 2013. http://www2.bloomberglaw.com/public/desktop/document/United_States_v_Windsor_No_12307_2013_BL_168683_US_June_26_2013_C/1.
- Kentucky Legislature. *402.02. Other Prohibited Marriages*. <http://www.lrc.ky.gov/Statutes/statute.aspx?id=36466>.
- One Hundred Fourth Congress of the United States of America. *The Defense of Marriage Act*. 3 Jan. 1996. Web. <http://beta.congress.gov/bill/104th-congress/house-bill/3396/text>.
- Pew Research Center. "In Gay Marriage Debate, Both Supporters and Oponents See Legal Recognition as 'Inevitable'". *People & the Press*. 6 June 2013. <http://www.people-press.org/files/legacy-pdf/06-0613%20LGBT%20General%20Public%20Release.pdf>
- Roberts, John. The United States Supreme Court. *United States v. Windsor*. 26 June 2013. http://www2.bloomberglaw.com/public/desktop/document/United_States_v_Windsor_No_12307_2013_BL_168683_US_June_26_2013_C/1.
- Scalia, Antonin. The United States Supreme Court. *United States v. Windsor*. 26 June 2013. http://www2.bloomberglaw.com/public/desktop/document/United_States_v_Windsor_No_12307_2013_BL_168683_US_June_26_2013_C/1.
- Twenty-Seventh Legislature State of Hawaii. *Hawaii Marriage Equality Act of 2013*. 2013. http://www.capitol.hawaii.gov/splsession2013b/SB1_HD1_.pdf.
- "U.S. DIY Mapping Utility". *DIYMaps.net*. April 2014. http://diymaps.net/us_12.htm.
- Verilli, Donald B., Jr. The United States Supreme Court. *Office of Personnel Management v. Golinski, Petition for a Writ of Certiorari Before Judgment*. 3 July 2012. <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/08/12-16-Golinski-Petition-final.pdf>.
- Verilli, Donald B., Jr. The United States Supreme Court. *Office of Personnel Management v. Pederson, Petition for the Writ of Certiorari Before Judgment*. Sept. 2012. <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/10/12-302-Petition-US.pdf>.
- Verilli, Donald B., Jr. The Supreme Court of the United States. *United States Department of Health and Human Services v. Commonwealth of Massachusetts And Office of Personnel Management v. Gill, Petition for a Writ of Certiorari*. July 2012. <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/08/12-15-Mass-Gill-Petition-final.pdf>.

Verilli, Donald B., Jr. The United States Supreme Court. *United States v. Windsor, Petition for a Writ of Certiorari Before Judgment*. Sept. 2012.
<http://sblog.s3.amazonaws.com/wp-content/uploads/2012/10/12-307-Petition.pdf>.

White, Jeffrey S. United States District Court, Northern District of California. *Golinski v. United States Office of Personnel Management and John Berry*. 22 Feb. 2012.
http://www2.bloomberglaw.com/public/desktop/document/Golinski_v_US_Office_of_Personnel_Mgmt_No_C_1000257_JSW_2012_BL_4

**APPENDIX A
THE DEFENSE OF MARRIAGE ACT**

An Act

To define and protect the institution of marriage.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Defense of Marriage Act”.

SEC. 2. POWERS RESERVED TO THE STATES.

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

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

“No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.”.

(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.’’.

SEC. 3. DEFINITION OF MARRIAGE.

(a) IN GENERAL.—Chapter 1 of title 1, United States Code, is amended by adding at the end the following:

“§ 7. Definition of ‘marriage’ and ‘spouse’

“In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United 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.’’.

H. R. 3396—2

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 1 of title 1, United States Code, is amended by inserting after the item relating to section 6 the following new item:

“7. Definition of ‘marriage’ and ‘spouse’.”¹⁴³

¹⁴³ One Hundred Fourth Congress of the United States of America. *The Defense of Marriage Act*. 3 Jan. 1996. <http://beta.congress.gov/bill/104th-congress/house-bill/3396/text>.

APPENDIX B PEW RESEARCH DATA

Table B-1: Pew Research Data on Same-Sex Marriage Favorability

Do you strongly favor, favor, oppose, or strongly oppose allowing gays and lesbians to marry legally?

	2003				March-May 2013			
	Favor %	Oppose %	DK/Ref %	2003 N	Favor %	Oppose %	DK/Ref %	2013 N
TOTAL	32	59	9	3181	50	43	8	3005
SEX								
Men	28	63	9	1543	46	46	8	1451
Women	36	55	9	1638	53	39	7	1554
AGE								
18-49	40	52	9	1773	58	35	7	1283
50+	22	68	10	1361	39	52	9	1673
DETAILED AGE								
18-29	51	42	7	577	68	28	4	494
30-49	34	57	9	1196	51	40	9	789
50-64	27	64	9	823	41	51	7	885
65+	14	75	11	538	36	53	11	788
SEX BY AGE								
Men 18-49	35	56	9	891	56	37	7	688
Men 50+	19	72	9	639	32	58	10	742
Women 18-49	45	47	8	882	61	33	7	595
Women 50+	25	65	10	722	45	47	8	931
RACE								
White, non-Hispanic	32	59	9	2483	50	43	6	2114
Black, non-Hispanic	28	63	9	277	38	51	10	306
Hispanic	--	--	--	92	54	32	13	320
EDUCATION								
College grad+	44	48	8	1137	61	33	6	1115
Some college	34	57	9	776	51	43	6	866
High school or less	26	65	9	1257	41	49	10	999
FAMILY INCOME								
\$75,000+	39	54	7	716	55	37	7	866
\$30,000-\$74,999	33	59	8	1185	51	44	6	911
Less than \$30,000	31	59	10	849	47	44	10	848
DETAILED INCOME								
\$100,000+	40	51	9	386	58	36	7	547
\$75,000-\$99,000	38	57	5	330	52	39	9	319
\$50,000-\$74,990	33	58	9	514	53	44	3	415
\$30,000-\$49,999	34	59	7	671	49	44	7	496
Less than \$30,000	31	59	10	849	47	44	10	848
REGION								
Northeast	40	49	11	609	61	32	7	539
Midwest	30	59	10	816	49	45	6	675
South	25	67	8	1149	41	49	10	1076
West	40	51	8	607	55	38	8	715

Data shown represent averages of multiple Pew Research Center surveys that asked about same-sex marriage. This includes three surveys from 2003 and two surveys from 2013, including the most recent May 2013 survey. Whites and blacks are non-Hispanic only; Hispanics are of any race. Hispanic figures are based only on surveys where bilingual interviews were used. Figures are not shown when too few interviews are available.

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¹⁴⁴ Pew Research Center. "In Gay Marriage Debate, Both Supporters and Oponents See Legal Recognition as 'Inevitable'". *People & the Press*. 6 June 2013. <http://www.people-press.org/files/legacy-pdf/06-0613%20LGBT%20General%20Public%20Release.pdf>.

**APPENDIX B (CONT.)
PEW RESEARCH DATA**

Table B-2: Pew Research Data on Same-Sex Marriage Favorability (Cont.)

Pew Research Center
Do you strongly favor, favor, oppose, or strongly oppose allowing gays and lesbians to marry legally?

	2003			2003 N	March-May 2013			2013 N
	Favor %	Oppose %	DK/Ref %		Favor %	Oppose %	DK/Ref %	
AMONG WHITES								
Men	28	64	9	1206	46	47	7	1021
Women	36	55	9	1277	54	40	6	1093
18-49	40	51	9	1266	61	34	5	754
18-29	52	40	8	354	71	26	3	261
30-49	35	56	9	912	54	40	6	493
50+	22	69	10	1190	41	51	8	1332
50-64	28	62	9	703	43	51	6	676
65+	13	77	10	487	38	52	10	656
College grad+	44	48	8	946	63	31	6	860
Some college or less	27	64	9	1530	45	48	7	1246
Male college grad+	39	53	8	478	58	35	7	440
Female college grad+	48	42	9	468	68	28	4	420
Male some college or less	23	68	9	724	41	52	7	577
Female some college or less	31	60	9	806	48	45	6	669
\$75,000+	39	54	7	599	55	39	7	700
\$30,000-\$74,999	32	60	8	950	51	43	6	656
Less than \$30,000	31	59	11	592	47	47	6	488
Republican*	21	72	7	490	28	65	7	718
Democrat*	47	42	10	328	70	26	4	554
Independent*	41	46	12	404	57	35	7	748
Northeast	41	47	12	490	63	31	6	385
Midwest	30	60	10	713	49	45	6	547
South	24	68	8	861	40	52	8	712
West	38	54	8	419	58	37	6	470
AMONG BLACKS								
Men	22	69	9	125	35	57	9	137
Women	32	59	9	152	41	47	11	169
18-49	30	63	7	197	43	48	9	167
18-29	--	--	--	85	--	--	--	76
30-49	27	66	7	112	--	--	--	91
50+	--	--	--	77	30	58	12	137
College grad+	--	--	--	63	--	--	--	87
Some college or less	27	64	9	214	37	53	10	217
AMONG HISPANICS								
Men	--	--	--	57	50	36	14	152
Women	--	--	--	35	58	30	12	168
18-49	--	--	--	69	61	26	13	225
18-29	--	--	--	30	74	20	7	104
30-49	--	--	--	39	51	32	17	121
50+	--	--	--	20	--	--	--	93
College grad+	--	--	--	18	--	--	--	59
Some college or less	--	--	--	74	53	34	13	258

* Figures by party affiliation for 2003 are based on two surveys rather than three surveys as shown for other subgroups. The omitted survey asked party affiliation only of registered voters.

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¹⁴⁵ Pew Research Center. "In Gay Marriage Debate, Both Supporters and Opponents See Legal Recognition as 'Inevitable'". *People & the Press*. 6 June 2013. <http://www.people-press.org/files/legacy-pdf/06-0613%20LGBT%20General%20Public%20Release.pdf>.

TABLE C-1

State	Legal/ Illegal	Constitution/Statute	Current Cases	Past Cases
Alabama	Illegal	Constitution & Statute	<i>Hard v. Bentley</i> <i>Richmond & Richmond v. Madison</i> <i>County Clerk</i>	None
Alaska	Illegal	Constitution & Statute	None	None
Arizona	Illegal	Constitution & Statute	<i>Majors v. Horne</i> <i>Connolly v. Roche</i>	None
Arkansas	Illegal	Constitution & Statute	<i>Jernigan v. Crane</i> <i>Wright v. Arkansas</i>	None
California	Legal	None	None	<i>Hollingsworth v. Perry</i> <i>Golinski v. O.P.M.</i>
Colorado	Illegal	Constitution & Statute	<i>McDaniel-Miccio v Hickenlooper</i> <i>Brinkman v. Long</i>	None
Connecticut	Legal	None	None	<i>Kerrigan v. Commissioner of Public Health</i> <i>Pederson v. O.P.M.</i>
Delaware	Legal	None	None	None
Florida	Illegal	Constitution & Statute	<i>Shaw v. Shaw</i> <i>Pareto v. Ruvin</i> <i>Huntsman v. Hearlin</i> <i>Brenner v. Scott</i> <i>Grimsley & Ablu v. Scott</i>	None
Georgia	Illegal	Constitution & Statute	<i>Inniss v. Aderhold</i>	None
Hawaii	Legal	None	None	<i>Jackson v. Abercrombie</i> <i>Baehr v. Lewin</i>

				<i>Baehr v. Muike</i>
Idaho	Illegal	Constitution & Statute	<i>Latta v. Otter</i>	None
Illinois	Legal	None	None	<i>Darby v. Orr</i> <i>Lazaro v. Orr</i>
Indiana	Illegal	Statute	<i>Bowling v. Pence</i> <i>Love v. Pence</i> <i>Baskin v. Bogan</i> <i>Midori Fuji v. Governor</i> <i>Officer Pamela Lee v. Pence</i>	None
Iowa	Legal	None	None	<i>Varnum v. Brien</i>
Kansas	Illegal	Constitution & Statute	<i>Nelson v. Kansas Dept. of Revenue</i>	None
Kentucky	Illegal	Constitution & Statute	<i>Kentucky Equality Federation v. Beshear</i>	<i>Jones v. Hallahan</i>
Louisiana	Illegal	Constitution & Statute	<i>In Re Constanza & Brewer</i> <i>Forum for Equality v. Barfield</i>	None
Maine	Legal	None	None	None
Maryland	Legal	None	None	<i>Conaway v. Deane & Polyak</i> <i>Port v. Cowan</i>
Massachusetts	Legal	None	None	<i>Goodridge v. Dept. of Public Health</i> <i>MA v. U.S. Dept. of Health and Human Services</i>
Michigan	Illegal	Constitution & Statute	None	None
Minnesota	Legal	None	None	<i>Baker v. Nelson</i>
Mississippi	Illegal	Constitution & Statute	<i>Czekala-Chatham v. Melancon</i>	None
Missouri	Illegal	Constitution & Statute	<i>Barrier v. Vasterling</i>	None

Montana	Illegal	Constitution & Statute	None	None
Nebraska	Illegal	Constitution	<i>Nichols v. Nichols</i>	<i>Citizens for Equal Protection v. Bruning</i>
Nevada	Illegal	Constitution	None	None
New Hampshire	Legal	None	None	None
New Jersey	Legal	None	None	<i>Garden State Equality v. Dow</i>
New Mexico	Legal	None	None	<i>NM Association of Counties v. Mallott</i> <i>Griego v. Oliver</i> <i>Hanna v. Salazar</i> <i>Stark v. Martinez</i> <i>Newton v. Stover</i> <i>Gering v. Garbagni</i> <i>Sharer v. Ellins</i>
New York	Legal	None	None	<i>Windsor v. United States</i> <i>Hernandez v. Robles</i>
North Carolina	Illegal	Constitution & Statute	<i>Fisher-Borne v. Smith</i> <i>Gerber & Berlin v. Cooper</i>	None
North Dakota	Illegal	Constitution & Statute	None	None
Ohio	Illegal	Constitution & Statute	<i>Henry v. Himes</i> <i>Cowger & Wesley v. Kasich</i>	None
Oklahoma	Illegal	Constitution & Statute	None	None
Oregon	Illegal	Constitution	<i>Geiger v. Kitzhaber</i> <i>Rummel & West v. Kitzhaber</i>	<i>Li & Kennedy v. Oregon</i>
Pennsylvania	Illegal	Statute	<i>Whitewood v. Wolf</i>	None

			<i>Palladino v. Corbett</i> <i>PA Health Dept. v. Hanes</i> <i>Ballen v. Corbett</i> <i>Baus v. Gibbs</i>	
Rhode Island	Legal	None	None	None
South Carolina	Illegal	Constitution & Statute	<i>Bradacs v. Haley</i>	None
South Dakota	Illegal	Constitution & Statute	None	None
Tennessee	Illegal	Constitution & Statute	None	None
Texas	Illegal	Constitution & Statute	<i>McNosky v. Perry</i> <i>Zahrn v. Perry</i> <i>J.B. v. Dallas County</i> <i>Texas v. Naylor</i>	None
Utah	Illegal	Constitution & Statute	<i>Evans v. Utah</i>	None
Vermont	Legal	None	None	<i>Baker v. Vermont</i>
Virginia	Illegal	Constitution & Statute	<i>Harris v. Rainey</i>	None
Washington	Legal	None	None	<i>Singer v. Hara</i> <i>Anderson v. Sims</i> <i>Castle v. State</i> <i>Anderson v. King County</i>
West Virginia	Illegal	Statute	<i>McGee v. Cole</i>	None
Wisconsin	Illegal	Constitution & Statute	<i>Wolf v. Walker</i>	<i>McConkey v. VanHollen</i>
Wyoming	Illegal	Statute	<i>Courage v. Wyoming</i>	None
Washington D.C.	Legal	None	None	<i>Dean v. District of Columbia</i>

TABLE D-1

Circuit	States Legal in Circuit	Current Cases	Past Cases
1 st Circuit (ME, NH, MA, RI)	4/4 States	None	<i>MA v. Dept. of Health and Human Services</i> (MA)
2 nd Circuit (NY, VT, CT)	3/3 States	None	<i>Windsor v. United States</i> (NY)
3 rd Circuit (PA, NJ, DE)	2/3 States	None	None
4 th Circuit (WV, VA, MD, NC, SC)	1/5 States	<i>Bostic v. Shaefer</i> (VA)	None
5 th Circuit (TX, LA, MS)	0/3 States	<i>DeLeon v. Perry</i> (TX)	None
6 th Circuit (MI, OH, KY, TN)	0/4 States	<i>Love v. Beshear</i> (KY) <i>DeBoer v. Snyder</i> (MI) <i>Obergefell v. Himes</i> (OH) <i>Tanco v. Haslam</i> (TN)	None
7 th Circuit (WI, IL, IN)	1/3 States	None	None
8 th Circuit (MN, ND, SD, NE, IA, MO, AR)	2/7 States	None	None
9 th Circuit (WA, MT, ID, OR, CA, NV, AZ, AK, HI)	3/9 States	<i>Sevcik v. Sandoval</i> (NV)	None
10 th Circuit (WY, UT, CO, NM, KS, OK)	1/6 States	<i>Bishop v. Smith</i> (OK) <i>Kitchen v. Herbert</i> (UT)	None
11 th Circuit (AL, GA, FL)	0/3 States	None	None
Washington, D.C. Circuit	1/1 State	None	None