FOLLOWING THE NORTHERN TRAIL: HOW CANADA BLAZED THE PATH FOR AMERICAN MARRIAGE EQUALITY

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I. INTRODUCTION

The United States and Canada have a unique kinship. The countries share the world's closest trade relationship,[1] colonial heritage,[2] cultural similarities,[3] and a relatively open border.[4] Like siblings, however, their similarities are accented by their differences. Canada's population is around 10% of the United States'[5] and is predominately concentrated within 200 kilometers (about 125 miles) of the U.S. border.[6] The two countries' governments differ greatly in structure,[7] party

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1. U.S. DEP'T OF STATE, BUREAU OF WESTERN HEMISPHERE AFFAIRS, U.S. RELATIONS WITH CANADA: FACT SHEET (Aug. 23, 2013), http://www.state.gov/r/pa/ei/bgn/2089.htm ("The United States and Canada share the world's largest and most comprehensive trading relationship . . . .").

2. *See generally* RICHARD MIDDLETON & ANN LOMBARD, COLONIAL AMERICA: A HISTORY TO 1763 (4th ed. 2011); ROGER RIENDEAU, A BRIEF HISTORY OF CANADA 29–81 (2000).

3. *See* EDWARD GRABB, REGIONS APART: THE FOUR SOCIETIES OF CANADA AND THE UNITED STATES 140–65 (2005) (finding significant similarities between English Canada and Northern United States, while Southern United States and French Canada demonstrate fewer cultural ties); Basil Waugh, *Canadians and Americans are More Similar than Assumed*, 57 UBC Rep. No. 7 (July 7, 2011), http://www.publicaffairs.ubc.ca/2011/07/07/canadians-and-americans-are-more-similar-than-assumed/ (reporting that perceived cultural distinctions are either diminishing or not at all present in research data).

4. *See* DEP'T OF STATE, *supra* note 1 (describing extensive U.S.-Canada trade agreements, border initiatives, and environmental agreements).

5. *See* U.S. CENSUS BUREAU, USA QUICK FACTS (Sept. 18, 2012), http://quickfacts.census.gov/qfd/states/00000.html (reporting a 2010 U.S. population of 308, 745, 538); *Canada's Population Estimates: First Quarter 2010*, STATISTICS CAN. (July 7, 2011), http://www.statcan.gc.ca/daily-quotidien/100628/dq100628a-eng.htm (reporting an estimate 2010 population of 34,019,000). Based on this census data, Canada's population equaled 11% of the U.S. population in 2010.

6. NATURAL RES. CAN.: ATLAS CANADA, POPULATION DENSITY 2006 (Sept. 3, 2009), http://atlas.nrcan.gc.ca/site/english/maps/population.html (suggesting that in 2006, most of Canada's population lived within 200 kilometers of the United States).

7. While Canada and the United States each have bicameral legislatures and a separate judiciary, the executive branches of each country are quite different. The United States uses a Presidential executive system. *See, e.g.,* CAL JILLSON, AMERICAN GOVERNMENT 39 (6th ed.

participation,[8] and power centralization.[9]

One particularly interesting difference between the two sister nations is the evolution of marriage and the laws governing access to it in today's political climate. From a strikingly similar legal framework of equal rights and antidiscrimination, the two countries have taken remarkably different paths on marriage policy. In both countries, the national foundational documents forbid discrimination by the government.[10] Both American states and Canadian provinces have their own constitutions[11] and wield legislative authority over family law, subject to federal provisions.[12] However, as of January 2013, only nine American states allow same-sex marriage,[13] while the Canadian federal government declared national same-sex marriage equality in 2005.[14]

Given the societal and cultural similarities between Canada and the United States, this Comment aims to predict whether the United States is poised to follow Canada down the path towards national recognition of same-sex marriage equality. Section I lays out the social, political, and judicial events that led to national marriage equality in Canada. Section II then details the United States' history of marriage equality, setting the foundation for today's marriage debate describing the current status of state laws, the progress of challenges to the federal Defense of Marriage Act (DOMA),[15] and the status of *Hollingsworth v. Perry*,[16] a case

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2011). Canada, a Democratic Constitutional Monarchy, has a Parliamentary system with Queen Elizabeth II of the United Kingdom serving as the ultimate executive through her representative, the Governor General. In practice, however, the Prime Minister wields more political power than the Queen and the Governor General. *See, e.g.,* PATRICK MALCOMSON & RICHARD MYERS, THE CANADIAN REGIME: AN INTRODUCTION TO PARLIAMENTARY GOVERNMENT IN CANADA 103–10 (5th ed. 2011).

8. Canada has four major political parties that are capable of forming coalition governments, while the United States has only two major parties in the legislature. *See, e.g.,* MALCOMSON & MYERS, *supra* note 7, at 183–86 (describing the relationships between Canada's four major political parties: Conservatives, Liberals, New Democrats, and the Bloc Québécois); *see also* JILLSON, *supra* note 7, at 192–93 (describing the dominance of the two major American political parties, the Republicans and the Democrats).

9. *See generally* GRABB, *supra* note 3 (describing the trends of power centralization in the United States and power decentralization in Canada).

10. *See generally* U.S. CONST. amend. XIV, § 1; Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

11. MALCOMSON & MYERS, *supra* note 7, at 38; JILLSON, *supra* note 7, at 28–29.

12. LYNN WARDLE & LAWRENCE NOLAN, FAMILY LAW IN THE U.S.A. 34 (2011); *see also* MALCOM KRONBY, *Preface* to CANADIAN FAMILY LAW, at vi–vii (2009) (explaining that, while the federal *Divorce Act* governs all Canadian divorces, the terms and enforcement of divorces are subject to provincial laws and regulations).

13. See *infra* Section III.A. for a detailed discussion of state policy on marriage equality in the United States.

14. Civil Marriage Act, S.C. 2005, c. 33 (Can.).

15. *See* Defense of Marriage Act (DOMA), 1 U.S.C. § 7 (2012) (limiting marriage to opposite-sex partners for purposes of federal law and federal agencies); *see also infra* Section III.B. (discussing DOMA's terms and effects in more detail).

16. Perry v. Schwarzenegger, 704 F. Supp.2d 921, 927 (N.D. Cal. 2010), *affirmed sub nom.* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *appeal docketed sub nom*, Hollingsworth v. Perry,

challenging a state constitutional amendment that bans same-sex marriage. *Perry*, a case out of California currently pending before the U.S. Supreme Court,[17] offers a microcosm of the U.S. national debate, complete with geographic concentrations of both strongly conservative and strongly liberal voters within California.[18] Finally, Section IV explains why the sister nations have taken such drastically different paths in marriage equality and how the DOMA and *Hollingsworth* decisions are likely to affect the American path. Considering the current U.S. law and political climate, this Comment predicts that the DOMA and *Perry* decisions will favor marriage equality, albeit in limited ways, and that such decisions would likely accelerate the American movement to mirror that of Canada.

II. WHAT HAPPENED IN CANADA

A. Background: Canada's Constitutional Protections

Canada does not have a formative constitution like the United States and other countries born of revolution.[19] Instead, the Canadian government is based on pieces of British legislation, supplemented with Canadian legislation,[20] which were consolidated in the Constitution Act of 1982.[21] The Constitution Act of 1982 includes the Charter of Rights and Freedoms (Charter), which provides for basic human rights that may not be impinged upon by the government.[22] The Charter cements the individual freedoms of speech, movement, privacy, religion, language,[23] and equal protection under the law.[24] While the Charter's list of enumerated protections is not exhaustive—sexual orientation is not among the

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No. 12-144 (U.S. Aug. 1, 2012). Because the case name has changed throughout the proceedings and to avoid confusion, this Comment will use only the Supreme Court docket case name, Hollingsworth v. Perry, in the main text.

17. Arguments will be heard on March 26, 2013 and the expected date of decision has not yet been announced. SUPREME COURT OF THE UNITED STATES, DOCKET NO. 12-144: HOLLINGSWORTH V. PERRY (2013), http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12-144.htm.

18. Eric McGhee & Daniel Krimm, *California's Political Geography*, PUB. POLICY INST. OF CAL. (Feb., 2012), http://www.ppic.org/main/publication_quick.asp?i=1007.

19. CAN. DEP'T OF JUSTICE, CANADA'S SYSTEM OF JUSTICE: THE CANADIAN CONSTITUTION, http://www.justice.gc.ca/eng/dept-min/pub/just/05.html (last updated Apr. 30, 2013).

20. *Id.*; *see also* Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.), *reprinted in* R.S.C. 1985, app. II, no. 44 (Can.).

21. *See* Constitution Act, 1867, 30 & 31 Vict, c. 3 (U.K.), Part VII.52(2) (incorporating thirty pieces of British legislation related to Canada, including the legislation to create the Canadian Parliament and the legislation to add new provinces and territories to Canada).

22. Canadian Charter of Rights and Freedoms, *supra* note 10, § 15.

23. Unlike the United States, Canada mandates equal treatment of two languages in federal government: English and French. *Id.* at Part I, §§ 16–20 (allowing any individual to proceed in either English or French in federal proceedings and requiring the federal government to provide all publications in both languages).

24. *See id.* § 15.

protected classes—the Charter's language is open, allowing expansion of its protections.[25] It reads:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[26]

These protections, however, are subject to the limitations found in the very first section of the Charter: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[27] This provision allows the courts to balance government interests against individual liberties.[28]

B. Marriage Equality Movement in the Courts

In 1995, *Egan v. Canada* challenged the constitutionality of a federal benefits law that limited spousal benefits to opposite-sex couples.[29] While the Charter did not specifically prohibit discrimination based on sexual orientation,[30] the Supreme Court of Canada unanimously held that sexual orientation is an "analogous ground" under the Charter and is therefore a prohibited ground of discrimination.[31] In 1996, sexual orientation became a protected class under the Canadian Human Rights Act.[32] In the 1999 decision, *M. v. H.*, the Canadian Supreme Court again expanded the rights of same-sex couples to include many of the financial and legal benefits commonly associated with marriage, including alimony and division of common property upon separation.[33] Although the Court took the opportunity to

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25. *See id.* Inclusion of sexual orientation in the Charter was debated and ultimately rejected at Parliament, but the open language, advocated by Member of Parliament Svend Robinson, served as a compromise. R. Douglas Elliot, *The Canadian Earthquake: Same-Sex Marriage in Canada*, 38 NEW ENG. L. REV. 591, 606–07 (2004). Only six years after the Charter passed, Svend Robinson came out as the first openly homosexual M.P. *See* SVEND ROBINSON – ABOUT SVEND, http://www.svendrobinson.ca/ (last visited Feb. 27, 2014).

26. Canadian Charter of Rights and Freedoms, *supra* note 10, § 15.

27. *See id.*

28. *See, e.g.*, Egan v. Canada, [1995] 2 S.C.R. 513, 533 (Can.) (explaining that, after determination of whether or not a law is discriminatory, the Court must determine whether the discrimination is justified by the fundamental values underlying the law).

29. *Id.* at 513–14.

30. *See* Elliot, *supra* note 25, at 607–14 (providing information on the exclusion of sexual orientation from the Charter's enumerated protections).

31. *Egan*, 2 S.C.R. at 514, 528, 565–66, 576 (recognizing sexual orientation as an "analogous ground" requiring Charter protections in all of the four major opinions issued in the case).

32. Canadian Human Rights Act, R.S.C. 1985, c. H-6, § 2; Jay Makarenko, *The Canadian Human Rights Act: Introduction to Canada's Federal Human Rights Legislation*, MAPLE LEAF WEB (Nov. 18, 2008), http://www.mapleleafweb.com/features/canadian-human-rights-act-introduction-canada-s-federal-human-rights-legislation ("In 1996 . . . the Act was amended to include sexual orientation as an enumerated ground of discrimination.").

33. M. v. H., [1999] 2 S.C.R. 3, para. 7 (Can.) (holding that divorce laws that exclude same-

expound upon the social and familial similarities between same-sex and opposite-sex couples,[34] the Court stopped short of recognizing a right to full marital status for same-sex couples.[35]

Following and expanding upon these Supreme Court holdings, the appellate courts of the three most populated[36] and politically powerful[37] provinces—Ontario, Quebec, and British Columbia—held that continued denial of marital status to same-sex couples violated equal protection rights under Section 15 of the Charter.[38] While Canadian family law is primarily controlled by the provinces,[39] the power to define "marriage" rests only with the Parliament.[40] Thus, the provincial decisions called upon Parliament to change the law,[41] and nearly every other province echoes this call in the following year.[42]

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sex divorcées from support unconstitutionally discriminate based on sexual orientation).

34. *See id.* paras. 58–64 (finding that "[c]ertainly same-sex couples will often form long, lasting, loving and intimate relationships," substantially consistent with the common-law marriage requirement of "conjugal relationship" representation); *see also id.* paras. 110–16 (finding that spousal support laws that exclude same-sex couples based on child support policy are discriminatory under the Charter because they arbitrarily include opposite-sex couples without children and arbitrarily exclude same-sex couples with children because no proof of substantive differences in parenting could be found).

35. *Id.* paras. 73–74, 152 (limiting the decision to the definition of "spouse" in laws governing the separation of common-law couples, without mention of same-sex civil marriages).

36. Nearly half of all Canadians live in the three major urban centers: Vancouver in British Columbia, Montreal in Quebec, and the Golden Horseshoe area surrounding Toronto in Ontario, giving these three provinces the highest populations in the country. *Portrait of the Canadian Population in 2006: Subprovincial Population Dynamics,* STATISTICS CAN., http://www12.statcan.gc.ca/census-recensement/2006/as-sa/97-550/p14-eng.cfm (last updated Sept. 22, 2009).

37. In the Canadian House of Commons, Ontario holds 106 seats, Quebec holds 75, and British Columbia holds 36. *Distribution of House of Commons Seats at General Elections (Elections Results 2011)*, STATISTICS CAN., http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/govt10a-eng.htm (last updated Sept. 11, 2009).

38. *See* Halpern v. Canada (Att'y Gen.), [2003] O.J. No. 2268, para. 142 (Can.) (holding that provincial laws barring religiously married same-sex couples from registering for civil marriage violated The Charter); *see also* Barbeau v. British Columbia, [2003] B.C.C.A. 251, paras. 7, 180 (Can.) (finding that the common law definition of marriage as a union between "one man and one woman" violated the equal rights of same-sex couples under the Charter); Hendricks v. Quebec, [2002] R.J.Q. 2506, para. 184 (Can.) (holding that the exclusion of same-sex couples from marriage violated The Charter despite the availability of civil unions).

39. KRONBY, *supra* note 12, at vi–vii.

40. Reference re: Same-Sex Marriage, [2003] 3 S.C.R. 698 (Can.) (holding that, under s. 91(26) of the Constitution Act of 1867, Parliament alone has legislative power regarding "solemnization of marriage"); Peter W. Hogg, *Canada: The Constitution and Same-Sex Marriage*, 4 INT'L J. CONST. L. 712, 714–15 (2006).

41. *Barbeau*, B.C.C.A. 251 paras. 7, 180. See *supra* note 38 for a brief description of the issues and holdings in each case; *Halpern*, O.J. No. 2268, at para. 142; *Hendricks*, R.J.Q. 2506, para. 184.

42. *Bound by law: Canada Moves Towards Fully Legalizing Same-Sex Marriage*, ECONOMIST, Nov. 11, 2004 (reporting the spread of legalized same-sex marriage throughout Canada, except in Alberta, the most socially conservative province), *available at* http://www.economist.com/node/3383008.

C. Marriage Movement in the Parliament

As recently as 1999, Parliament voted 216 to 55 in favor of upholding the traditional definition of marriage,[43] a definition that was again reaffirmed in a federal benefits bill in 2000.[44] When the appellate decisions from Ontario, Quebec, and British Columbia—*Halpern v. Canada*, *Hendricks v. Quebec*, and *Barbeau v. British Columbia*, respectively—came down in 2002 and 2003,[45] the government—controlled by the Liberal Party—chose not to appeal the cases to the Supreme Court.[46] Instead, on July 17, 2003, the government drafted a bill, later known as Bill C-38, which read in pertinent part: "Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others."[47]

Parliament postponed presentation of the controversial Bill C-38 because it first desired a reference, or a legal review of the proposed legislation by the Supreme Court of Canada.[48] In this reference, the government asked the Court to determine whether the Parliament had the power to extend marriage rights to same-sex couples and whether such extension was consistent with the Charter.[49]

Parliament submitted the request for this reference in July 2003 and the Court released a reply in late 2004.[50] While the government's motivation in requesting the reference has been questioned,[51] the effect of the reference and the

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43. *House of Commons Debates*, 36th Parl., 1st Sess., Vol. 240, No. 548 (June 8, 1990) (Can.), *available at* http://www.parl.gc.ca/HousePublications/Publication.aspx?Pub=Hansard&Mee=240 &Language=E&Parl=36&Ses=1&DocId=2329429&File=0 ("That, in the opinion of this House, it is necessary, in light of public debate around recent court decisions, to state that marriage is and should remain the union of one man and one woman to the exclusion of all others, and that Parliament will take all necessary steps within the jurisdiction of the Parliament of Canada to preserve this definition of marriage in Canada.").

44. Modernization of Benefits and Obligations Act, S.C. 2000, c. 12 (Can.) (granting same-sex couples the same benefits as opposite-sex couples, but reaffirming the definition of marriage as "the lawful union of one man and one woman to the exclusion of all others").

45. *Barbeau*, B.C.C.A. 251; *Halpern*, O.J. No. 2268; *Hendricks*, R.J.Q. 2506.

46. Hogg, *supra* note 40, at 715; MARY C. HURLEY, LIBRARY OF PARLIAMENT, BILL C-38: THE CIVIL MARRIAGE ACT LEGISLATIVE SUMMARY LS-502E 9 (2005), *available at* http://www.parl.gc.ca/Content/LOP/LegislativeSummaries/38/1/c38-e.pdf.

47. Civil Marriage Act, 2005 S.C., c. 33(2) (including amendments to other marriage-related statutes and assurance that the legal definition of marriage does not affect religious marriage); HURLEY, *supra* note 46, at 9.

48. Supreme Court Act, R.S.C. 1985, c. S-26, s. 53 (Can.) (allowing the Governor-in-Council to refer legal issues to the Supreme Court of Canada); *The Canadian Judicial System*, SUPREME COURT OF CANADA (Apr. 7, 2012), http://www.scc-csc.gc.ca/court-cour/sys-eng.aspx (generally describing the reference procedure); HURLEY, *supra* note 46, at 9; Reference, *supra* note 40, at 698.

49. Reference, *supra* note 40, at 699. This reference also considered whether the "Charter of Rights and Freedoms protect[s] religious officials from being compelled to perform marriage between two persons of the same sex that is contrary to their religious beliefs," and the Court declined to answer a fourth question about the specifics of the Quebec Civil Code. *Id.*

50. *Id.* at 698.

51. After an election in late 2003 and a government corruption scandal in 2004, the government added the fourth reference question regarding the effect of same-sex marriage within

accompanying delay was to allow public opinion to continue to grow in favor of legalizing same-sex marriage.[52] In 2005, Bill C-38 passed in the House of Commons with a vote of 158 to 133,[53] passed in the Senate with 47 to 21,[54] and received Royal Assent on July 20, 2005.[55]

D. Canadian Society With Marriage Equality

Since the enactment of the Civil Marriage Act in 2005, over 21,000 same-sex couples have walked down the aisle in Canada.[56] Generally, Canadian society or family infrastructures have not felt sweeping changes,[57] and a majority of Canadians support legalized same-sex marriage.[58]

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the Quebec Civil Code, delaying the Supreme Court's opinion another six months. This delay, and the government's refusal to move forward without Supreme Court backing, was criticized at the time. *See Martinizing Marriage - Part II: Using the Supreme Court as a tool for election*, EQUAL MARRIAGE FOR SAME-SEX COUPLES (Jan. 28, 2004), http://www.samesexmarriage.ca/legal/martinizing.htm.

52. *See* MARK WARREN LEHMAN, AFFECT CHANGE: THE INCREASED INFLUENCE OF ATTITUDINAL FACTORS ON CANADIANS' SUPPORT FOR LEGAL SAME-SEX MARRIAGE 11 (2006) (graphing and discussing the drastic public opinion shift towards support of same-sex marriage in Canada, beginning in 1997 progressing to the end of 2005), *available at* http://www.samesexmarriage.ca/docs/Lehman2.pdf.

53. *House Government Bill, 38th Parliament, 1st Session, C-38: An Act respecting certain aspects of legal capacity for marriage for civil purposes*, PARLIAMENT OF CAN. (Feb. 24, 2014), http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Bill=C38&Language=E&Mode=1&Parl=38&Ses=1&billId=1585203&View=5 [hereinafter PARLIAMENT, *C-38: An Act*]; *see also Canada Approves Gay Marriage*, GUARDIAN (June 29, 2005), http://www.guardian.co.uk/world/2005/jun/29/gayrights.

54. *Debates of the Senate*, 38th Parl., 1st Sess., Vol. 142, Iss. 84 (July 19, 2005) (Can.), http://www.parl.gc.ca/Content/SEN/Chamber/381/Debates/084db_2005-07-19-E.htm?Language=E&Parl=38&Ses=1#43.

55. PARLIAMENT, *C-38: An Act*, *supra* note 53. Canada is a constitutional monarchy under Queen Elizabeth II, so legislation requires royal approval—similar to the President's approval of American legislation—before becoming law. *Constitutional Duties*, THE GOVERNOR GENERAL OF CANADA, HIS EXCELLENCY THE RIGHT HONOURABLE DAVID JOHNSTON (Jan. 11, 2013), http://www.gg.ca/events.aspx?sc=1&lan=eng. In Canada, the Queen acts through the Governor General, an apolitical appointee. *Id.*

56. Althia Raj, *Same Sex Marriage Canada Census 2011: Census Shows New Picture Of Couples' Unions*, HUFFINGTON POST (Sept. 19, 2012), http://www.huffingtonpost.ca/2012/09/19/canada-marriage-census-2011_n_1896155.html (reporting that the rate of same-sex civil marriage has passed the rate of opposite-sex marriage, while most couples overall are choosing common-law relationships).

57. Naomi Lakritz, *Six Years of Gay Marriage and Canada hasn't Crumbled*, CALGARY HERALD (July 13, 2011), http://www.calgaryherald.com/life/years+marriage+canada+hasn+crumbled/5091972/story.html.

58. FORUM RESEARCH INC., ONE TWENTIETH OF CANADIANS CLAIM TO BE LGBT 1 (2012), *available at* http://www.forumresearch.com/forms/News%20Archives/News%20Releases/67741_Canada-wide_-_Federal_LGBT_%28Forum_Research%29_%2820120628%29.pdf (reporting that, of the 33% of Canadians who disapprove of same-sex marriage, many are older, male, politically conservative, lower income, and living in the conservative providence of Alberta).

Some clashes over the new law have been felt where individual public servants refuse to participate in same-sex marriage licensure and where private entities discriminate against same-sex marriage arrangements.[59] Although the law does allow religious entities to refrain from same-sex marriage performance,[60] religious critics of same-sex marriage continue to take issue with the civil practice.[61]

Nevertheless, Canadians approve of same-sex marriage[62] and have adapted to the "new normal" as same-sex marriage rates rapidly increase.[63]

III. WHAT IS HAPPENING IN THE UNITED STATES

To better understand the depth and breadth of the equal marriage movement in the United States, it is important to consider the issue holistically by looking at constitutional and statutory issues at both the state and federal levels. This Section will attempt to provide a glimpse of the U.S. same-sex marriage movement by laying out (1) the variety of policies and legal barriers present amongst the states; second, the current challenges to federal statutory barriers to marriage equality; and third, the federal constitutional issue governing state constitutional bans on same-sex marriage.

A. State Survey

On November 13, 2003, Massachusetts became the first state to extend marriage rights to same-sex couples.[64] Since then, eight more states,[65] the District of Columbia,[66] and two Native American tribes[67] have done the same. The first

59. *See* Bradley Miller, *Same-Sex Marriage Ten Years On: Lessons from Canada*, THE WITHERSPOON INSTITUTE: PUBLIC DISCOURSE (Nov. 5, 2012), http://www.thepublicdiscourse.com/2012/11/6758/#return-note-6758-2.

60. Civil Marriage Act, 2005 S.C., c. 33(3).

61. Sasha Aslanian, *Marriage Amendment Supporters Look to Canada's Experience*, MINNESOTA PUBLIC RADIO (Oct. 8, 2012), http://www.mprnews.org/story/2012/10/08/politics/marriage-amendment-canada (reporting on a presentation by Canadian religious officials and parents who oppose same-sex marriage equality and the subsequent Canadian policies enforcing anti-discrimination).

62. FORUM RESEARCH INC., *supra* note 58, at 1 (reporting that 66.4% of Canadians approve of legalized same-sex civil marriage).

63. *Swell of Same-Sex Families Ushering in the "New Normal"*, CBC NEWS (Nov. 9, 2012), http://www.cbc.ca/news/canada/montreal/story/2012/11/07/montreal-same-sex-families-on-the-rise-census.html.

64. *Same Sex Couples Ready to Make History in Massachusetts*, CNN (May 17, 2004), http://articles.cnn.com/2004-05-17/justice/mass.gay.marriage_1_lesbian-couples-marriage-law-federal-constitutional-amendment?_s=PM:LAW.

65. NAT'L CONFERENCE OF STATE LEGISLATURES, DEFINING MARRIAGE: STATE DEFENSE OF MARRIAGE ACTS AND SAME-SEX MARRIAGE LAWS (2012), http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx (laying out the current status of states regarding same-sex marriage laws).

66. Religious Freedom and Civil Marriage Equality Amendment Act, D.C. CODE § 46-401 (2010); *see also* Keith L. Alexander & Ann E. Marimow, *D.C. Begins Licensing Same-sex*

states to legalize same-sex marriage did so through state supreme court rulings under state constitutions,[68] though the more recent changes have come about through legislation[69] and voter referenda.[70] As of January 13, 2013, Rhode Island,[71] Illinois,[72] and New Jersey[73] are moving towards legalization, and California, *infra*, is locked in a judicial battle to retain legal same-sex marriage.[74]

On the other side of the issue, thirty-seven states limit marriage to opposite-

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Marriages, WASH. POST, Mar. 4, 2010, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/03/03/AR2010030300654_pf.html.

67. *See* Nicole Brodeur, *Suquamish Land: Where Gay Marriage is Welcome*, SEATTLE TIMES, Aug. 4, 2011, *available at* http://seattletimes.com/html/nicolebrodeur/2015823526_nicole 05m.html (reporting on the first same-sex marriage under Suquamish trial laws); Bill Graves, *Coquille Same-Sex Marriage Law Takes Effect,* OREGONIAN, May 21, 2009, http://www.oregonlive.com/news/index.ssf/2009/05/coquille_samesex_marriage_law.html (reporting on the first same-sex marriage under the Coquille tribal laws).

68. *See* Kerrigan v. Comm'r of Pub. Health, 289 Conn. 135, 262–63 (2007) (holding that. denial of marriage rights to same-sex couples violated the Connecticut Constitution's equal protection clause); Varnum v. Brien, 763 N.W.2d 862, 872 (Iowa 2009) (holding that the heterosexual definition of marriage violated the equal protection clause of the Iowa Constitution); Goodridge v. Dep't of Pub. Health*,* 440 Mass. 309, 312 (2003) (holding that the denial of marriage license to same-sex couples violated the Massachusetts Constitution).

69. *See* Nicolas Confessore & Michael Barbaro, *New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law*, N.Y. TIMES, June 25, 2011, at A1 ("Lawmakers voted late Friday to legalize same-sex marriage . . . ."), *available at* http://www.nytimes.com/2011/06/25/ nyregion/gay-marriage-approved-by-new-york-senate.html?pagewanted=all; Abby Goodnough, *New Hampshire Legalizes Same-Sex Marriage*, N.Y. TIMES, June 4, 2009, at A14 ("The New Hampshire legislature approved revisions to a same-sex marriage bill on Wednesday, and Gov. John Lynch promptly signed the legislation . . . ."), *available at* http://www.nytimes.com/2009/ 06/04/us/04marriage.html.

70. *See* Erik Eckholm, *In Maine and Maryland, Victories at the Ballot Box for Same-Sex Marriage*, N.Y. TIMES, Nov. 7, 2012, at P14 (reporting referendum victories for same-sex marriage proponents), *available at* http://www.nytimes.com/2012/11/07/us/politics/same-sex-marriage-voting-election.html; Elizabeth Hartfield, *Washington Approves Same-Sex Marriage, Marking Shift in Nation's Views*, ABC NEWS (Nov. 9, 2012), http://abcnews.go.com/blogs/ politics/2012/11/washington-approves-same-sex-marriage-marking-shift-in-nations-views/ (reporting the results of Washington's voter referendum favoring legalized same-sex marriage).

71. Associated Press, *Rhode Island House Easily Passes Gay Marriage Bill,* FOX NEWS (Jan. 24, 2013), http://www.foxnews.com/politics/2013/01/24/rhode-island-house-begins-gay-marriage-debate/ (reporting on success in the House with an uncertain future in the Rhode Island Senate).

72. Bridget Doyle et al., *New Vote Sought for Illinois Gay Marriage Law*, CHI. TRIB. (Jan. 3, 2013), http://articles.chicagotribune.com/2013-01-03/news/chi-illinois-gay-marriage-sponsor-looks-at-thurs-vote-20130102_1_gay-marriage-chicago-media-mogul-legislation (describing the procedural battle to push same-sex marriage legislation in the Illinois House).

73. Susan K. Livio, *N.J. Lawmaker Introduces Bill Asking Voters to Decide Gay Marriage Rights*, NJ.COM (Dec. 10, 2012), http://www.nj.com/politics/index.ssf/2012/12/nj_assemblyman_ introduces_bill.html (reporting on the same-sex marriage bill introduced in the New Jersey Assembly).

74. See *infra* Section III.C. for a full discussion of California's same-sex marriage laws and pending litigation.

sex couples.[75] Twenty-nine of those states have constitutional clauses limiting marriage to opposite-sex couples.[76] The remaining nine states have statutory definitions of marriage that exclude same-sex couples.[77] One state, New Mexico, has no statutory or constitutional provision limiting or allowing same-sex marriage, though same-sex marriage licenses are not issued, and definitive action is not expected in the near future.[78]

B. DOMA Cases

In 1996, the U.S. Congress overwhelmingly passed, and President Bill Clinton signed into law, the Defense of Marriage Act.[79] Section 3 of the Act—the section challenged by the cases below—reads:

> 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.[80]

The Act also amended the full faith and credit requirement amongst the states,[81] reading:

> 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.[82]

The Act was motivated[83] by the Hawaii Supreme Court decision in *Baehr v. Lewin*,[84] which found that same-sex marriage *could* be legal under that state's

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75. NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 65 (mapping states by same-sex marriage policies).

76. *Id.*

77. *Id.*

78. *See* Steve Terrell, *New Mexicans Say Legalized Gay Marriage Unlikely Anytime Soon*, NEW MEXICAN, May 9, 2012, http://archive.is/xEsF (explaining state reactions to presidential support of same-sex marriage, noting the New Mexico Governor's opposition).

79. Defense of Marriage Act (DOMA), 1 U.S.C. § 7 (1996); Christopher Gacek, *Basic Facts About the Defense of Marriage Act*, FAMILY RESEARCH COUNCIL, http://www.frc.org/one pagers/basic-facts-about-the-defense-of-marriage-act.

80. DOMA § 3.

81. U.S. CONST. art. IV, § 1 (requiring all states to respect the "public acts, records, and judicial proceedings of every other state"); 28 U.S.C. § 1738 (1948).

82. 28 U.S.C. § 1738C (1996).

83. H.R. Rep. No. 104-664 at 2–3 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906-07 (characterizing DOMA as a response to the beginning of an "orchestrated legal assault . . . against traditional heterosexual marriage").

84. Baehr v. Lewin, 852 P. 2d 44 (Haw. 1993).

constitution.[85] At the time of its passage, DOMA met little resistance from executive officials[86] and underwent little scrutiny in Congressional committees and debates.[87] Although the Act received little political attention at its passage,[88] it has become a major tool for same-sex marriage opposition[89] and thus a target for equality proponents in the courts[90] and the legislature.[91]

Of the federal cases filed against the constitutionality of DOMA,[92] three are pending before the U.S. Supreme Court: *Bipartisan Legal Advisory Group of the U.S. House of Representatives v. Gill*;[93] *Office of Personnel Management v. Golinski*;[94] and *Windsor v. United States*.[95] The analysis of these cases will begin

85. *Id.* at 557 (holding that, while same-sex couples do not have a fundamental right to marry, the Hawaii Constitution does not preclude an equal protection claim to enforce same-sex marriages). On remand, the trial court found that the statute limiting marriage to opposite-sex couples was unconstitutional under the equal protection clause of the Hawaii Constitution. Baehr v. Miike, No. 91-1394, 1996 WL 694235, at *22 (Cir. Ct. Haw. Dec. 3, 1996). In 1998, Hawaiians voted to amend the Hawaii Constitution, giving the legislature the power to limit marriage to opposite-sex couples. HAW. CONST., art. I, § 23 ("The legislature shall have the power to reserve marriage to opposite-sex couples."); *Hawaii Gives Legislature Power to Ban Same-Sex Marriage*, CNN (Nov. 4, 1998), http://www.cnn.com/ALLPOLITICS/stories/1998/11/04/same.sex.ballot/.

86. Chris Geidner, *Marriage Wars*, METRO WEEKLY, July 14, 2011, *available at* http://www.metroweekly.com/news/?ak=6427 (reporting that White House Counsel, Presidential Senior Advisor, and White House gay and lesbian liaison advised President Clinton to enact DOMA upon Congressional approval).

87. Golinski v. U.S. Office of Pers. Mgmt., 824 F. Supp. 2d 968, 979–80 (N.D. Cal. 2012) (finding that Congress did not consider reports or hear testimony from federal agency heads, historians, economists, or specialists in family and child welfare on the scope and effects of DOMA on federal law).

88. *See* Geidner, *supra* note 86 (reporting the lack of controversy at the time of DOMA's passage).

89. *See, e.g.*, *Christian Coalition Supporters are Urged to Defend the Defense of Marriage Act,* CHRISTIAN COALITION OF AMERICA, http://cc.org/actionalert/christian_coalition_supporters_are_urged_defend_defense_marriage_act (last visited Apr. 24, 2014); Michelle A. Vu, *DOMA Repeal Bills and Holes in the Gay Rights Argument*, THE CHRISTIAN POST (Mar. 17, 2011), http://www.christianpost.com/news/doma-repeal-bills-and-holes-in-the-gay-rights-argument-49470/.

90. See *supra* text accompanying notes 79–89 and *infra* text accompanying notes 91–110 for a detailed discussion of the current state of DOMA challenges in the courts.

91. Respect for Marriage Act, S. 598, 112th Cong. (2011). The proposed act would repeal DOMA's full faith and credit limitations and redefine marriage for federal statutes as any marriage valid in its state of creation. *Id*. §§ 2–3.

92. *See, e.g.*, Pedersen v. Office of Pers. Mgmt., No. 3:10-cv-1750 (VLB), 2012 WL 3113883 (D. Conn. July 31, 2012) (granting summary judgment in favor of same-sex couples married under the laws of Connecticut, Vermont, and New Hampshire, who challenged DOMA after rejection of federal benefits and federal income tax status based on marriage definition).

93. Massachusetts v. U.S. Dep't of Health and Human Servs., 682 F.3d 1 (1st Cir. 2012), *appeal docketed sub nom*. Bipartisan Legal Advisory Group of the U.S. House of Representatives v. Gill, No. 12-13 (U.S. July 3, 2012).

94. Golinski v. U.S. Office of Pers. Mgmt., 824 F. Supp. 2d 968 (N.D. Cal. 2012), *appeal docketed sub nom.* Office of Pers. Mgmt. v. Golinski, No. 12-16 (U.S. July 3, 2012).

with a brief overview of the factual issues of each case followed by a more detailed description of the arguments presented, the legal standards applied, and the holdings issued by the lower courts.

In each of these cases, the Department of Justice, led by the Obama Administration, withdrew from the cases and refused to defend the constitutionality of DOMA based on a belief that the law was indeed unconstitutional.[96] After the withdrawal, the Bipartisan Legal Advisory Group of the U.S. House of Representatives (BLAG)[97] took up the defense in each case.[98]

In *Gill*, seven same-sex couples married in Massachusetts, and three surviving spouses of Massachusetts's same-sex marriages brought suit to enjoin federal agencies from enforcing DOMA.[99] Massachusetts then brought a companion case to enjoin federal agencies from revoking funding from state benefits programs[100] based on the conflict between the Massachusetts definition of marriage[101] and that of DOMA.[102]

In *Golinski*, a staff attorney for the Ninth Circuit married her partner under California law and then sought to enroll her wife in her existing family health insurance plan.[103] The Office of Personnel Management (OPM) intervened and directed the insurance provider not to process Ms. Golinski's request, despite a judicial order to do so, based on an executive duty to enforce DOMA.[104] Ms. Golinski then challenged the constitutionality of DOMA itself.[105]

In *Windsor*, a surviving same-sex spouse was denied the spousal deduction to the federal estate tax,[106] costing her over $360,000 in taxes upon her wife's

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95. Windsor v. U.S., 669 F.3d 169 (2d Cir. 2012), *appeal docketed*, No. 12-63 (U.S. July 17, 2012).

96. *Massachusetts*, 682 F.3d at 7; *Golinski*, 824 F. Supp. 2d at 976; *Windsor*, 699 F.3d at 176.

97. BLAG is a five-member committee composed of three Republican and two Democratic leaders. *See* Molly K. Hopper, *House Leaders Vote to Intervene in DOMA Defense*, THE HILL (Mar. 9, 2011), http://thehill.com/blogs/blog-briefing-room/news/148521-house-leaders-vote-to-intervene-in-doma-defense (explaining the make-up of BLAG).

98. *Massachusetts*, 682 F.3d at 7; *Golinski*, 824 F. Supp. 2d at 977; *Windsor*, 699 F.3d at 176.

99. *Massachusetts*, 682 F.3d at 6–7.

100. Massachusetts law combines the income of same-sex spouses for Medicaid reasons, giving the Department of Health and Human Services the ability to rescind Medicaid funding based on Massachusetts' noncompliance with DOMA. *Id.* at 7. Similarly, Massachusetts veterans' cemeteries lose veteran status when same-sex spouses are buried together, giving the Department of Veterans' Affairs discretion to recapture all federal funding for the cemeteries. *Id.*

101. In *Goodridge v. Dep't of Pub. Health*, the Massachusetts Supreme Court described marriage as "[t]he exclusive commitment of two individuals to each other [that] nurtures love and mutual support; it brings stability to our society." 440 Mass. 309, 312 (2003).

102. *Massachusetts*, 682 F. 3d at 7.

103. *Golinski*, 824 F. Supp. 2d at 974.

104. *Id.* at 975–76.

105. *Id.*

106. 26 U.S.C. § 2056(A); *see also* Windsor v. U.S., 699 F.3d 169, 175–76 (2d Cir. 2012)

death.[107] After determining that New York State recognized the plaintiff's marriage at the time of her wife's death,[108] the Second Circuit considered whether DOMA's treatment of Ms. Windsor was unconstitutional.[109]

In analyzing these cases, the circuit courts applied three different standards of review: heightened scrutiny; rigorous rational basis; and rational basis. First, in both *Windsor* and *Golinski*, the courts determined that "heightened scrutiny" applied to the equal protection claim.[110] Heightened scrutiny is typically applied to sex-based discrimination claims[111] and requires the government to prove that a suspect classification furthers an *important* interest in a way that is *substantially* related to that interest.[112] In applying heightened scrutiny, the courts found that homosexuals constitute a "suspect class" because homosexuals (a) are historically subject to discrimination; (b) are classified by a characteristic that does not relate to their ability to contribute to society; (c) that such trait is immutable;[113] and (d) that homosexuals are relatively[114] politically powerless.[115] Under the heightened

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(explaining that the plaintiff's $363,053 tax burden is based on DOMA's interpretation of "marriage" in federal law).

107. *Windsor*, 699 F.3d at 176.

108. *Id.* at 177–78.

109. In the Second Circuit's consideration of whether DOMA's treatment of Ms. Windsor was unconstitutional, the court explained that homosexuals, particularly those who chose to marry, are (1) historically subject to discrimination; (2) defined by a characteristic that does not relate to ability to contribute to society; (3) that such trait is immutable; and (4) that homosexuals are relatively politically powerless. *Id.* at 181–85.

110. In *Golinski v. U.S. Office of Pers. Mgmt.*, the Ninth Circuit overturned previous case law limiting sexual-orientation discrimination cases to rational basis analysis in light of subsequent Supreme Court holdings. 824 F. Supp. 2d 968, 983–90 (N.D. Cal. 2012) (disagreeing with High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990) and holding that homosexuals did not constitute a suspect or quasi-suspect class for constitutional analysis).

111. *See, e.g.*, Miss. Univ. for Women v. Hogan, 458 U.S. 718, 723–24 (1982) (finding that sex-based discrimination, even against males, is subject to intermediate scrutiny).

112. *Id.* at 724 (holding that the defendant must show "at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'"). This requirement falls between the rational basis approach, discussed at *infra* notes 119–122 and accompanying text, and the strict scrutiny approach, which requires the discriminatory practice to be the least restrictive means of supporting a compelling government interest. Roe v. Wade, 410 U.S. 113, 155–56 (1973) ("Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.") (internal citations omitted).

113. Despite BLAG's assertions that sexuality is somewhat fluid, *Golinski*, 824 F. Supp. 2d at 986–87, it is still considered immutable because a person's sexual orientation is "so fundamental to one's identity that a person should not be required to abandon [it]" in order to avoid discrimination. *Id.* (quoting Hernandez Montiel v. Immigration and Naturalization Serv., 225 F.3d 1084, 1093 (9th Cir. 2000)).

114. *See Golinkski*, 824 F. Supp. 2d at 988–89 (explaining that recent judicial successes does not equate to political power in the legislature); *Windsor*, 699 F.3d at 184–85 (finding that, despite recent advances in society, "homosexuals are not in a position to adequately protect

standard, the courts discarded BLAG's arguments[116] that DOMA supports uniformity in the law, limitation of government benefits, preservation of traditional marriage, encouragement of responsible procreation,[117] defense of traditional morality, and Congressional caution in political turmoil.[118]

Second, in *Gill*, the First Circuit used a rigorous rational basis analysis[119] to avoid recognizing homosexuals as a suspect class[120] while still providing a meaningful review of DOMA's constitutionality.[121] Under this test, the court looked for any legitimate government purpose to justify the disparate classification of same-sex couples.[122] BLAG argued that DOMA preserved government

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themselves from the discriminatory wishes of the majoritarian public.").

115. *Golinski*, 824 F. Supp. 2d at 985–90; *Windsor*, 699 F.3d at 181–85.

116. Besides government interest to justify the classification of homosexuals, BLAG asserted that Supreme Court precedent upholding state-asserted traditional marriage definitions "compels the inference that Congress may prohibit same-sex marriage in the same way [as the states] under federal law without offending the Equal Protection Clause." *Windsor*, 699 F.3d at 178. However, that argument has been summarily rejected. *See id.* at 179 (holding that "manifold changes to the Supreme Court's equal protection jurisprudence" since *Baker* have rendered its holding unsubstantial); *Massachusetts*, 682 F.3d at 8 (interpreting *Baker* to limit equal protection review to questions that do not "rest on a constitutional right to same-sex marriage"); Pedersen v. Office of Pers. Mgmt., No. 3:10-cv-1750 (VLB), 2012 WL 3113883, at *11 (D. Conn. July 31, 2012) ("The failure of the federal government to recognize Ms. Golinski's marriage and to provide benefits does not alter the fact that she is married under state law.").

117. *Windsor*, 699 F.3d at 185–88.

118. *Golinski*, 824 F. Supp. 2d at 999–1001 ("Congress cannot, like an ostrich, merely bury its head in the sand and wait for danger to pass, especially at the risk of permitting continued constitutional injury upon legally married couples.").

119. The U.S. Supreme Court applies different levels of scrutiny to different constitutional issues, depending upon the severity of the discrimination and the utility of classification for legitimate government interests. *See* U.S. v. Virginia, 518 U.S. 515, 567–68 (1996) (Scalia, J., dissenting) (explaining general application of the levels of scrutiny to certain situations). The rational basis test is the most lenient level of scrutiny, allowing judicial deference to legislative purposes and requiring only that the constitutional infringement be rationally based on a legitimate government purpose, and is typically applied to technical government functions. Nordlinger v. Hahn, 505 U.S. 1, 11 (1992); *see also* Lyle Denniston, *Another DOMA Challenge*, SCOTUSBLOG (July 16, 2012, 4:18 PM) [hereinafter Denniston, *Another DOMA Challenge*], http://www.scotusblog.com/2012/07/another-doma-challenge/ (describing the rational basis scrutiny as the "most lenient constitutional test"). In Gill, the court applied an "intensified scrutiny of purported justifications" because homosexuals have a history of discrimination and the federal intervention within state jurisdiction warrants special clarity. *Massachusetts*, 682 F.3d at 10.

120. *Massachusetts*, 682 F.3d at 9–10 ("[T]o create such a new suspect classification for same-sex relationships would have far-reaching implications—in particular, by implying the overruling of *Baker*, which we are neither empowered to do nor willing to predict.").

121. *Id.* at 10 (citing U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973) (involving unconventional mixed families)) (describing the Supreme Court's application of rigorous rational basis review where there existed concerns of discrimination and thin government justification without recognition of a new suspect class); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (involving mentally disabled individuals); Romer v. Evans, 517 U.S. 620 (1996) (involving sexual-orientation discrimination protections)).

122. *Massachusetts*, 682 F.3d at 10 (explaining the rigorous rational basis approach as

resources by creating a uniform definition of marriage amongst the various states,[123] that DOMA encouraged healthy childrearing,[124] and that DOMA was a congressional "freeze" in marriage law to allow time for political reflection.[125] The First Circuit found that those justifications were not *legitimate* government purposes,[126] holding that "Congress' denial of federal benefits to same-sex couples lawfully married in Massachusetts has not been adequately supported by any permissible federal interest."[127]

Third, after applying the heightened scrutiny test in *Golinksi*, the court further found that BLAG could not satisfy the lowest form of constitutional scrutiny: the rational basis test.[128] Seeking only a rational—not substantial—connection between DOMA's discriminatory classification and a legitimate government interest, the court found none.[129]

Despite the mounting judicial and political opposition to DOMA, House Republicans are poised to spend up to three million dollars on DOMA's legal defense before the Supreme Court in 2013.[130]

Given the factual variety of plaintiffs' claims—from major tax costs to state benefits programs to agency interference with judicial orders—this line-up offers the U.S. Supreme Court a unique opportunity to consider the broad scope of DOMA and its effects. However, the Court may avoid the analysis of DOMA's constitutionality under the equal protection clause by focusing on the Court's jurisdiction under Article III.[131] The Court has requested a briefing on "[w]hether the Executive Branch's agreement with the court below—that DOMA is

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applied by the Supreme Court in *Romer*).

123. *Id.* at 14.

124. *Id.* at 14–15.

125. *Id.* at 15.

126. *Id.* at 14–16 (finding that administrative convenience does not justify violation of Constitutional rights, that no factual proof supports arguments of ideal childrearing, and that DOMA was not framed as a temporary "freeze" in law to better accommodate Congressional response).

127. *Id.* at 16.

128. *Massachusetts*, 682 F.3d at 996–1002; *see also* Denniston, *Another DOMA Challenge*, *supra* note 119 (describing the rational basis scrutiny as the "most lenient constitutional test").

129. *Massachusetts*, 682 F.3d at 1002. See *supra* notes 121–123 and accompanying text for a discussion of the government interests presented by BLAG to justify DOMA.

130. Jennifer Brendery, *DOMA: House Republicans Poised to Spend $3 Million on Legal Defense,* THE HUFFINGTON POST (Jan. 15, 2013), http://www.huffingtonpost.com/2013/01/15/doma-republicans_n_2479666.html.

131. Lyle Denniston, *On Same-sex Marriage, Options Open*, SCOTUSBLOG (Dec. 7, 2012, 5:46 PM), http://www.scotusblog.com/2012/12/on-same-sex-marriage-options-open/ (reporting that, upon consideration of *Windsor*, the Court asked attorneys to prepare argument on why DOMA defenders should have "standing," or a right to be in court); Marty Lederman, *Understanding Standing: The Court's Article III Questions in the Same-sex Marriage Cases (I)*, SCOTUSBLOG (Jan. 17, 2013, 11:05 AM), http://www.scotusblog.com/2013/01/understanding-standing-the-courts-article-iii-questions-in-the-same-sex-marriage-cases-i/ ("Resolution of these Article III questions . . . could potentially prevent a majority of the Court from reaching or resolving the merits in either or both [same-sex marriage] cases.").

unconstitutional—deprives this Court of jurisdiction to decide this case, and whether [BLAG] has Article III standing in this case."[132]

While the questions of jurisdiction and standing may prove to be formidable hurdles, the Court's schedule may reveal some hints as to the Court's intention. As of early 2013, only *Windsor* has been granted certiorari and is scheduled for argument,[133] despite being the last of the three cases to petition the Supreme Court.[134] Two factors of this decision indicate that the Supreme Court may strike down DOMA in the coming months. First, Justice Elena Kagan, who served as U.S. Solicitor General before her Supreme Court appointment in 2010,[135] was not involved in the early litigation of *Windsor*.[136] In contrast, Justice Kagan had some contact with *Gill* as Solicitor General and, therefore, would recuse herself from any consideration of *Gill*.[137] Justice Kagan, an Obama appointee and reputed liberal,[138] may tip the scale towards invalidating DOMA through *Windsor*.[139] Second, the current Solicitor General has endorsed the Second Circuit's articulate opinion in *Windsor*, stating that the opinion "materially strengthens this case as a vehicle for resolving DOMA's constitutionality."[140] Specifically, the circuit court ruled on issues of standing, jurisdiction, and state law, clearing the way for a decision on DOMA's merits.[141] The accommodation of Justice Kagan and the selection of a clearly constitutional case suggest that the Court is at least willing to consider DOMA's constitutionality, despite the procedural pitfalls of standing and

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132. Lederman, *supra* note 131 (explaining the legal issues and possible questions surrounding standing in *Hollingsworth v. Perry* and *U.S. v. Windsor*).

133. *See* Docket, United States v. Windsor, No. 12-307, *available at* http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12-307.htm (indicating petition for certiorari filed on September 11, 2012, and certiorari granted on December 7, 2012).

134. *See* Docket, Office of Pers. Mgmt., No 12-16, *available at* http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12-16.htm (indicating petition for certiorari filed on July 3, 2012, but not yet granted); Docket, Bipartisan Legal Advisory Group of the U.S. House of Representatives v. Gill, No. 12-13, *available at* http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12-13.htm (indicating petition for writ of certiorari filed on June 29, 2012, but not yet granted).

135. *Biographies of the Current Justices of the Supreme Court*, SUPREME COURT OF THE UNITED STATES (Feb. 15, 2013), http://www.supremecourt.gov/about/biographies.aspx [hereinafter *Biographies*].

136. Lyle Denniston, *U.S. Picks a DOMA Case*, SCOTUSBLOG (Oct. 26, 2012, 1:44 PM) [hereinafter Denniston*, U.S.Picks a DOMA Case*], http://www.scotusblog.com/2012/10/u-s-picks-a-doma-case/ (noting that *Windsor* developed after Justice Kagan left her position as Solicitor General to take the Supreme Court bench).

137. *Id.*

138. *Biographies*, *supra* note 135.

139. Bill Mears, *High Court Contender Kagan Brings Reputation for Consensus-Building*, CNN (May 10, 2010), http://www.cnn.com/2010/POLITICS/05/04/scotus.contenders.kagan/ (noting that, while "[h]er heart beats on the left," Kagan carries a reputation for building bipartisan consensus).

140. Denniston, *U.S. Picks a DOMA Case*, *supra* note 136 (quoting a brief by the Solicitor General before the Supreme Court).

141. *Id.*

jurisdiction. Because DOMA has been struck down by the courts below, this willingness to reach the merits with all liberal Justices in tow further suggests that the Court may affirm the decision.

Unlike federal power under Canadian law, in the United States, the determination of who may marry "has always been uniquely the province of state law."[142] Because the provisions of DOMA control only the interpretation of federal law,[143] a decision striking down the definition of marriage would not create marriage equality in the thirty-seven states that currently prohibit same-sex marriage.[144] It would, however, remove federal barriers to same-sex couples who have been married in those states that allow it.[145] Such barriers include lower family allowance for same-sex spouses of U.S. Armed Forces members,[146] estate tax burdens for surviving same-sex spouses,[147] and a lack of spousal insurance benefits for government employees.[148] In order to achieve holistic marriage equality in the United States under DOMA, the political and legal battles must progress state by state.

C. Hollingsworth v. Perry

While marriage equality proponents have enjoyed some success in state judiciaries under state constitutions,[149] *Perry* now challenges a state constitutional amendment under the federal constitution.[150] Beyond its federal novelty, *Perry* is a recent example of how state statutes and constitutional clauses have and will continue to be challenged as the marriage equality movement progresses in the United States. As such, it is important to take a close look at the evidence presented at trial and the factual determinations made by the trial court. Furthermore, the Ninth Circuit's approach to *Perry's* appeal—reshaping the argument to narrow the issue[151]—is illustrative of the political hesitancy and

142. Golinski v. U.S. Office of Pers. Mgmt., 824 F. Supp. 2d 968, 979 (N.D. Cal. 2012) (explaining Congressional acknowledgement of state power when drafting DOMA and limiting its scope to interpretation of federal laws).

143. See *supra* notes 79–82 and accompanying text for the content and scope of DOMA.

144. *See* NAT'L CONVENTION OF STATE LEGISLATURES, *supra* note 65 (reporting the number of states that currently do not allow same-sex marriage).

145. Or, as is the case in *Windsor v. United States*, couples who were married in Canada and returned to the United States. 699 F.3d 169, 177–78 (2d Cir. 2012).

146. David Crary & Michael Miesecker, *DOMA a Roadblock for Same-sex Military Couples,* MARINE CORPS TIMES (Jan. 20, 2013), http://www.marinecorpstimes.com/news/2013/01/ap-doma-roadblock-same-sex-military-couples-012013/.

147. *See Windsor*, 699 F.3d at 176 (describing the adverse tax effects of DOMA's marriage definition on same-sex spouses).

148. *See* Golinski v. U.S. Office of Pers. Mgmt., 824 F. Supp. 2d 968, 974 (N.D. Cal. 2012) (describing a federal agency's refusal to provide spousal health insurance benefits for same-sex spouses under DOMA).

149. See *supra* note 64 for examples of state court rulings in favor of same-sex marriage.

150. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 927 (N.D. Cal. 2010).

151. See *infra* Section III.C.3 for a detailed discussion of the Ninth Circuit's analysis and its implications on the national marriage equality movement.

incremental nature of America's progression. Finally, the Supreme Court orders leading up to *Perry*'s argument may foreshadow the issues to be confronted and the outcomes of those arguments.

1. Background

California has long been a battleground in the fight for marriage equality. In 1999, California enacted domestic partnership legislation, allowing same-sex cohabitating adults to register for a legal status similar to that of married couples.[152] In 2004, the City of San Francisco began issuing marriage licenses to same-sex couples.[153] When the California Supreme Court found that same-sex marriage violated California family laws,[154] marriage equality proponents challenged the constitutionality of those laws.[155]

In May 2008, the California Supreme Court found that laws creating different marital statuses based on sexual orientation violated California's fundamental right to marry and the California Constitution's equal protection clause.[156] In so finding, the court held that California's right to marry was not limited by historical interpretations of the meaning of "marriage,"[157] that homosexual couples constitute a suspect class,[158] that differentiation of the designation "marriage" versus "domestic partnership" created an inferior institution,[159] and that the purported

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152. *See In re* Marriage Cases, 183 P.3d 384, 414–18 (Cal. 2008) (citing Stats. 1999, ch. 588 § 2 [adding Fam. Code, §§ 297-299.6]) (describing the legislative process behind California's domestic partnership act and its expansion). The original legislation allowed only limited partnership benefits, such as hospital visitation rights and state employee benefits. *Id.* Further legislation in 2003, 2005, and 2006 expanded domestic partnership rights to eliminate disparities between domestic partners and married couples in all but the designation "married." *Id.*

153. Locker v. City & Cnty. of San Francisco, 95 P. 3d 459, 464–66 (Cal. 2004).

154. *Id*. at 1113.

155. *See In re Marriage Cases*, 183 P.3d at 397–99 (considering the question of whether differential family statuses—domestic partnership versus civil marriage—based on sexual orientation is unconstitutional under the California Constitution).

156. *Id*. at 452.

157. When interpreting "marriage," the court relied heavily on *Perez v. Sharp*, 198 P.2d 17 (1948), *sub nom*. *Perez v. Lippold*, 198 P.2d 17 (1948) in which the California Supreme Court found anti-miscegenation laws unconstitutional because they violate a fundamental right to marry that is nested in the right to privacy. *See In re Marriage Cases*, 183 P.3d at 420–22.

158. California law defines "suspect class" as a group of people with a shared characteristic that (1) is based upon an immutable trait, (2) bears no relation to an individual's ability to contribute to society, and (3) is associated with a historical "stigma of inferiority and second class citizenship." *In re Marriage Cases*, 183 P.3d at 442. The court here found that sexual orientation is "immutable" because it is "so integral an aspect of one's identity," analogous to religion, that one should not be required to change the trait to avoid discrimination. *Id.* at 442–43.

159. *Id.* at 434–35, 445–46. Interestingly, California quoted the Canadian Supreme Court on this point, including, in pertinent part: "It is logical to conclude that, in most cases, further differential treatment will contribute to perpetuation or promotion of [same-sex couples'] unfair social characterization, and will have a more severe impact upon them, since they are already vulnerable." *Id.* at 445 (quoting M. v. H., [1999] 2 S.C.R. 3, 54–55 (S.C.C.)).

state interests of promoting reproduction[160] and respecting legislative decisions[161] did not justify the disparate treatment under the strict scrutiny analysis.[162] Ultimately, the decision mandated a change in California family laws to permit valid marriage licenses for same-sex couples.[163] In the months following this decision, approximately 18,000 same-sex couples were married in California.[164]

After the May 2008 holding, opponents of same-sex marriage campaigned for and passed a California constitutional amendment, called Proposition 8.[165] Proposition 8 stated simply: "Only marriage between a man and a woman is valid or recognized in California."[166] An attempt to nullify Proposition 8 on state procedural complications failed,[167] and same-sex marriage proponents turned their attention to the federal courts.

2. District Court Case

In May of 2009, after the enactment of Proposition 8, same-sex couples who were denied marriage licenses filed suit seeking a declaration of the unconstitutionality of Proposition 8 and an injunction against its enforcement.[168] The original defendants of the suit—the two county clerks and four state officers, including the Governor and Attorney General[169]—refused to defend the Proposition's constitutionality.[170] Consequently, the court allowed the official

160. *In re Marriage Cases*, 183 P.3d at 430, 446–47. Throughout the analysis, the Court cites California's domestic partnership laws as official recognition of the capacity of same-sex couples to maintain stable, committed relationships like that of opposite-sex couples, thus dispelling arguments that same-sex couples do not provide ideal child-rearing households. See *supra* note 152 for the creation and expansion of California's domestic partnership rights. However, the court asserts that domestic partnership legislation should not be a prerequisite to a same-sex marriage analysis. *In re Marriage Cases*, 183 P.3d at 428–29.

161. *In re Marriage Cases*, 183 P.3d at 447–48.

162. *Id.* at 471. California has no intermediate scrutiny analysis, like that of the federal courts. *Id.* at 443–44. See *supra* note 119 for an overview of the different levels of scrutiny applied by the federal courts.

163. *In re Marriage Cases*, 183 P.3d at 453 (striking the portion of the statute that designated a marriage to be a union between a man and a woman to be unconstitutional).

164. *See* Strauss v. Horton, 207 P.3d 48, 59 (2009) (noting that approximately 18,000 same-sex marriages were performed between the holding in *In re Marriage Cases* and the adoption of Proposition 8).

165. *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 927–28, 931 (N.D. Cal. 2010) (describing the passage of Proposition 8 and after the broadcast of a multitude of campaign advertisements).

166. *See Strauss*, 207 P.3d at 59 (adding a new section to the California Constitution, Proposition 8 provides that only a marriage between a man and a woman is valid or recognized in California).

167. *Id.* at 122 (holding that none of the constitutional challenges to the procedural adoption of Proposition 8 have merit and that any change must be made at the ballot box).

168. *See Schwarzenegger*, 704 F. Supp. 2d at 928 (raising constitutional challenges under the Fourteenth Amendment for the first time).

169. *Id.*

170. *Id.*

proponents of Proposition 8, a group entitled ProtectMarriage.com-Yes on 8, A Project of California Renewal (Protect Marriage), to intervene on behalf of defendants.[171] The court also allowed the City of San Francisco to intervene on the plaintiffs' side so that the City could present economic and societal evidence about the Proposition's effects.[172]

Plaintiffs in *Perry* asserted that Proposition 8 unconstitutionally deprives same-sex couples of the fundamental right to marry, guaranteed by the Due Process Clause, while allowing opposite-sex couples to enjoy that state-sponsored status, in violation of the Equal Protection Clause of the U.S. Constitution.[173]

Defendant, Protect Marriage, created the information that was distributed during the campaign for Proposition 8.[174] The court chose to summarize Protect Marriage's position by quoting its material:

> Proposition 8 is simple and straightforward. . . . Proposition 8 is about preserving marriage; *it's not an attack on the gay lifestyle. . . . It protects our children* from being taught in public schools that "same-sex marriage" is the same as traditional marriage. . . . While death, divorce, or other circumstances may prevent the ideal, the best situation for a child is to be raised by a married mother and father. . . . If the gay marriage ruling [of the California Supreme Court] is not overturned, TEACHERS COULD BE REQUIRED to teach young children there is *no difference* between gay marriage and traditional marriage.
>
> We should not accept a court decision that may result in public schools teaching our own kids that gay marriage is ok. . . . [W]hile gays have the right to their private lives, *they do not have the right to redefine marriage* for everyone else.[175]

Protect Marriage used television, radio, and internet-based campaigns to convey the message that "same-sex relationships are inferior to opposite-sex relationships and dangerous to children."[176] While conveying this message, the group reiterated its tolerance for the private practice of same-sex relationships, so long as those relationships do not "pervert" the meaning of "marriage."[177]

Upon arrival in court, however, the defense changed its position to a secular theory, consistent with the enforcement powers of the government.[178] Protect Marriage instead asserted that Proposition 8 reflected the will of Californians to maintain a traditional definition of marriage, which promotes "statistically

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171. *Id.* at 930.

172. *Id*. at 928–29.

173. *Id.* at 929.

174. *Schwarzenegger*, 704 F. Supp. 2d at 930.

175. *Id.* (quoting California Voter Information Guide, California General Election, Tuesday, November 4, 2008) (emphasis in original).

176. *Id.*

177. *See id.* (noting that the group states it does not attack the gay lifestyle but only opposes the label to protect children from harm).

178. *Id.* at 391.

optimal" child-rearing households.[179] The defense then argued that the government has a significant interest in promoting procreation, thus justifying the denial of marital status to same-sex couples who cannot naturally procreate.[180] However, Protect Marriage produced little direct evidence in support of its assertions,[181] relying instead on cross-examination of the plaintiffs' witnesses.[182] While the defense did present one expert witness, David Blankenhorn, his testimony was later excluded when the court found that his opinions lacked expert qualification and proper methodology.[183]

Plaintiffs produced many expert witnesses, including scholars on the history of marriage,[184] the societal benefits of promoting marriage,[185] the health benefits of marriage for individuals,[186] and the economic benefits of same-sex marriage.[187] The plaintiffs themselves also testified to the personal difficulties and discrimination they experienced due to the state's denial of same-sex marriage rights and the insinuations made during the Proposition 8 campaign.[188]

In an opinion issued on August 4, 2010, Chief Judge Walker made eighty specific findings of fact based on the testimony[189] and concluded in rather sweeping terms that:

> [T]he evidence shows Proposition 8 does nothing more than enshrine in the California Constitution the notion that opposite-sex couples are superior to same-sex couples. Because California has no interest in discriminating against gay men and lesbians, and because Proposition 8 prevents California from fulfilling its constitutional obligation to provide marriages on an equal basis, the court concludes that Proposition 8 is

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179. *Id.*

180. *See Schwarzenegger*, 704 F. Supp. 2d at 932 (arguing that the state has an interest in promoting all opposite-sex sexual activity within a stable marriage but not same-sex sexual activity because the later does not lead to procreation).

181. *Id.* at 931 ("While proponents vigorously defended the constitutionality of Proposition 8, they did so based on legal conclusions and cross-examinations of some of plaintiffs' witnesses, eschewing all but a rather limited factual presentation.").

182. *Id.*

183. *See id.* at 946 ("The court now determines that Blankenhorn's testimony constitutes inadmissible opinion testimony that should be given essentially no weight.").

184. *See id.* at 933–35 (including historian Nancy Cott). Cott explained that marriage is "a couple's choice to live with each other, to remain committed to one another, and to form a household based on their own feelings about one another, and their agreement to join in an economic partnership and support one another in terms of the material needs of life." *Id.*

185. *Schwarzenegger*, 704 F. Supp. 2d at 934 (explaining that same-sex marriage would be another source for stability and social order).

186. *Id.* (arguing that recognizing same-sex marriage would reduce discrimination against gays and lesbians).

187. *Id.* ("Psychologist Letitia Anne Peplau testified that couples benefit both physically and economically when they are married.").

188. *Id.* at 932–33 (recounting testimony about the daily struggles of couples relegated to "partnership" status when they desire to be "married" and testimony about the love that same-sex partners share for one another).

189. *See generally id.* at 953–91.

unconstitutional.[190]

3. The Ninth Circuit Decision

The Ninth Circuit affirmed the district court decision[191] but dramatically altered the scope of the issue and the analysis of the law by, first, focusing on the revocation of a previous right to marriage and, second, raising the question of standing.

The court went beyond Judge Walker's evidentiary review of suspect status and government interests, holding instead that:

> Proposition 8 singles out same-sex couples for unequal treatment by *taking away* from them alone the right to marry, and this action amounts to a distinct constitutional violation because the Equal Protection Clause protects minority groups from being targeted for the deprivation of an existing right without a legitimate reason.[192]

The court repeatedly emphasized that its analysis was limited to the removal of a previously held right,[193] a limitation that was not mentioned in the district court holding.[194]

Indeed, the Ninth Circuit included language that could further narrow its holding to situations in which states "had already extended to committed same-sex couples both the incidents of marriage and the official designation of 'marriage,'"[195] a situation that is exceedingly rare.[196] Indeed, while many states do provide for domestic partnerships[197]—thus providing the "incidents of marriage" for same-sex couples[198]—California is the only state that has revoked the "official

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190. *Id.* at 1003 (stating also that Proposition 8 fails to advance any rational basis).

191. Perry v. Brown, 671 F. 3d 1052, 1096 (9th Cir. 2012), *vacated sub nom.* Hollingsworth v. Perry, 133 S. Ct. 2652 (U.S. 2013), *remanded to* Perry v. Brown, 725 F.3d 1140 (9th Cir. 2013).

192. *Id.* at 1076 (emphasis in original) (citing Romer v. Evans, 517 U.S. 620 (1996) (holding that a Colorado statute barring discrimination claims based on sexual orientation was unconstitutional)).

193. *See, e.g.*, *id.* at 1063 ("[Proposition 8] *stripped* same-sex couples of the ability they *previously possessed* . . . .") (emphasis added). The court also stated that, "[b]efore considering the constitutional question of the validity of Proposition 8's *elimination* of the rights of same-sex couples to marry, we first decide that the official sponsors of Proposition 8 are entitled to appeal the decision below, which declared the measure unconstitutional and enjoined its enforcement." *Id.* at 1063.

194. *See Schwarzenegger*, 704 F. Supp. 2d at 1003 (holding that Proposition 8 enforces the superiority of opposite-sex couples, without mention of the revocation of previously-held same-sex rights).

195. *See Brown*, 671 F.3d at 1064 (declining to answer the broader question of same-sex rights when the facts presented are framed by California's prior same-sex marriage laws).

196. California and Hawaii have revoked an official recognition of same-sex marriage. See *supra* notes 156–64 and accompanying text for an overview of California's brief recognition of same-sex marriage and *supra* note 85 for that of Hawaii.

197. *See* NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 65 (reporting the number of states that provide domestic partnership status for registered cohabitating adults).

198. *See Brown*, 671 F.3d at 1076–77 (explaining the significance of the designation

designation of 'marriage.'"[199]

The court devoted a poetic portion of the opinion to the recognition that the official designation of marriage is more than the sum of its legal parts; it is a declaration of love and commitment that is primarily celebrated in society and merely reflected in our governmental programs.[200] "We do not celebrate when two people merge their bank accounts; we celebrate when a couple marries."[201] In so doing, the court emphasized the discrimination inherent in segregating the official recognition and status of families based on the sexual orientation of the couple.[202] "A rose by any other name may smell as sweet, but to the couple desiring to enter into a committed lifelong relationship, a marriage by the name of 'registered domestic partnership' does not."[203]

While such rhetoric is inspiring, it is double-edged in this instance. By recognizing the status and dignity of "marriage" for same-sex couples, the Ninth Circuit limited its holding to states which have already recognized the same and previously extended the right to the designation of marriage.[204]

The second issue raised was one of standing, that is, whether the California Constitution gave the proponents of Proposition 8 the legal right to defend the Proposition's validity.[205] Standing is a significant issue for the future of the marriage equality movement because it determines what—if any—state discrimination issues may be raised in federal court and who may bring or defend such actions.[206] Without delving into the procedural details,[207] the Ninth Circuit

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"marriage," independent from the legal characteristics of marriage and domestic partnership); *In re Marriage Cases*, 183 P.3d at 444–46 (explaining that the California domestic partnership laws provided equal legal status for same-sex couples as marriage laws did for opposite-couples, with an unconstitutional differentiation in name).

199. *Brown*, 671 F.3d at 1078. *See* NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 65 (indicating that California is the only state with contested marriage status, without indication of such status in the domestic partnership states).

200. *See Brown*, 671 F.3d at 1077–80 (recounting the societal and family significance of "marriage" as opposed to the relatively novel and formal status of "domestic partner").

201. *Id.* at 1079.

202. *See id.* at 1079 n.12 ("[D]rawing a distinction between the name assigned to the family relationship available to opposite-sex couples and the name assigned to the family relationship available to same-sex couples, and . . . reserving the historic and highly respected designation of marriage exclusively to opposite-sex couples while offering same-sex couples only the new and unfamiliar designation of domestic partnership[,] pose[s] a serious risk of denying the official family relationship of same-sex couples the equal dignity and respect that is a core elements of the constitutional right to marry.") (quoting *In re Marriage Cases*, 183 P.3d at 434–35).

203. *Id.* at 1078.

204. *Id*. at 1079.

205. *Brown*, 671 F.3d at 1070 (certifying the question to the California Supreme Court for a determination of California constitutional law).

206. *See, e.g.*, Lederman, *supra* note 131 (explaining the law of Article III standing and the implications of standing on the Supreme Court's consideration of *Perry* and *Windsor*).

207. For the sake of brevity and concision, this Comment focuses on the merits of the American marriage equality movement and how the movement compares to that of Canada.

found that standing was satisfied in this instance.[208]

The Ninth Circuit's framing of the issue, with its limited scope and consideration of standing, should not be construed to minimize the effect of *Perry* or the momentum of the American marriage equality movement. Instead, when taken in consideration with current judicial politics and Supreme Court precedent, the circuit decision is a spoonful of sugar to sweeten a pro-marriage-equality decision for the Supreme Court.[209]

With its narrowed scope, the circuit court wed *Perry* to previous Supreme Court precedent.[210] Specifically, the circuit court aligned *Perry* with a conservative interpretation of *Romer v. Evans*, [211] in which the Supreme Court struck down a law that explicitly revoked anti-discrimination protection from those discriminated against based on sexual orientation.[212] By narrowly construing *Romer* as a revocation of rights case—rather than a lack of legitimate government interest case—and narrowly framing *Perry* to match that precedent, the Ninth Circuit has given the Supreme Court a political out that favors marriage equality. That is, instead of calling for a dramatic step forward, *Perry* now asks only that the Supreme Court stand by its previous ruling in *Romer*.

IV. ANALYSIS

A. The United States is Poised to Follow Canada's Path

1. Federal Judiciary

The Canadian marriage equality movement was jump-started by a Supreme Court ruling that affirmed the equality of same-sex couples without affirmatively addressing the issue of marital status.[213] Once the provincial courts filled in the gaps to call for a change in the marriage definition, the Supreme Court of Canada

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208. *Brown*, 671 F.3d at 1075.

209. *See* William N. Eskridge Jr., *The Ninth Circuit's Perry Decision and the Constitutional Politics of Marriage Equality*, 64 STAN. L. REV. ONLINE 93 (Feb. 22, 2012), http://www.stanfordlawreview.org/sites/default/files/online/articles/64-SLRO-93.pdf (explaining how, by limiting the *Perry* issue to revocation of a right, the Ninth Circuit decision requires affirmation under current Supreme Court precedent, where a broader holding may have left the decision vulnerable to reversal).

210. *See Brown*, 671 F. 3d at 1080–85 (interpreting Romer v. Evans, 517 U.S. 620 (1996) as the unconstitutional revocation of previously held discrimination protections based on sexual orientation).

211. Romer v. Evans, 517 U.S. 620, 635 (1996) (holding that a state statute expressly excluding sexual orientation from the bases of discrimination protection was unconstitutionally discriminatory).

212. *See id.* at 624–25, 635–36 (describing the statute at issue and concluding that it is unconstitutional based—not merely on revocation of a right—but on the lack of legitimate government interest to justify the categorization).

213. See *supra* notes 33–42 for a discussion of how the ruling in *M. v. H.* lead to marriage equality decisions in the provincial high courts.

was denied the opportunity to rule on the facts of marriage cases. Unlike BLAG and Protect Marriage in the U.S. cases, no intermediary stepped in to appeal the same-sex cases when the Canadian government refused to push the defense. The Supreme Court of Canada, however, had its final word when the government requested a reference to support pending legislation.

Thus, the role of the Canadian Supreme Court began as a catalyst with *M. v. H.*,[214] and then flipped; it became a stalling mechanism of the government while public support caught up with the pending—though by no means guaranteed—legality of same-sex marriage in Canada. Ultimately, the Supreme Court's ruling in favor of same-sex marriage was not binding, but merely advisory.

In the United States, no leading Supreme Court opinion inspired the actions of the Massachusetts, Iowa, and Connecticut Supreme Courts, although Supreme Court rulings regarding anti-miscegenation[215] and anti-discrimination[216] laws did lend support. Instead of pushing states forward, as discussed below, a Supreme Court affirmation in *Hollingsworth v. Perry*[217] would create a backstop for the states, ensuring that states who have taken a step forward into marriage equality do not about-face to repeal that right. Such a ruling would lend power to the judiciary by protecting their marriage equality rulings from reversal by the legislature or voter referendum.

Perry also bears the potential of becoming an *M. v. H.* catalyst because it presents integral marriage equality findings within a narrow holding that is relatively easy to swallow, even for a cautious court. Specifically, the Ninth Circuit based its limitation—revocation of a previously provided designation of marriage—on the very premise that the designation of marriage is inherently different than its incidental legal trappings, even when those trappings are provided to same-sex couples through domestic partnership. Indeed, by spinning such eloquent verses on the societal significance of tying the knot, Judge Reinhardt has provided very quotable material for future courts to draw upon in the advancement of marriage equality.

Similarly, a decision invalidating DOMA's definition of marriage could spur the marriage movement forward by symbolizing a drastic shift in policy. While the legal consequences would be limited to federal programs, the creation of a same-sex definition of "marriage" would certainly encourage change on the state level. Furthermore, a successful challenge to DOMA's marriage definition may invite further challenge to DOMA's limitation of the full faith and credit clause.[218]

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214. [1999] 2 S.C.R. 3 (Can.).

215. *See* Virginia v. Loving, 388 U.S. 1, 11–12 (1967) (holding that statutes banning interracial marriage did not support a legitimate government interest and were thus a violation of the Constitution's equal protection clause).

216. *See Romer*, 517 U.S. at 635–36 (striking down a law that would deprive homosexuals of the discrimination protections they previously enjoyed).

217. 669 F. 3d 169 (2d Cir. 2012), *appeal docketed*, No. 12-63 (U.S. July 17, 2012).

218. See *supra* notes 81–82 and accompanying text for a discussion of DOMA's effect on the full faith and credit that states may give to same-sex marriage licenses issued by other states.

2. Legislative and Executive Actions

Like the Liberal Government of Canada in 2003, the Obama Administration has taken an affirmative step towards encouraging marriage equality and challenging the status quo. Indeed, during the inaugural speech in January 2013, President Obama became the first President in U.S. history to use the word "gay" in addressing the nation and to pledge his assistance in reforming sexual-orientation and marriage equality.[219]

It is still unclear what effect the Obama Administration's refusal to defend DOMA will render on the current DOMA challenges. The Supreme Court has requested briefing and argument on this question in the coming *Windsor v. United States*[220] proceedings.[221]

It is clear, however, that President Obama's power to effectuate change in marriage law is substantially more limited than that of the Canadian government in the years leading up to the Civil Marriage Act. In Canada, the government is inherently supported by a majority in Parliament, thereby eliminating much of the political gridlock that can hamper social change through policy and legislation. President Obama, on the other hand, may only promote policy and support legislation, without any actual voting power within the congressional halls. Furthermore, the Democratic President faces much opposition from the Republican-controlled House—the very same Republican House that produced and continues to fund the BLAG defense of DOMA. Finally, as discussed below, the ultimate power to enact marriage equality rests outside the President's reach: within the control of the states.

3. State and Provincial Progression

Like the provincial court rulings in Ontario, Quebec, and British Columbia, the American state courts of Massachusetts, Iowa, and Connecticut were the first in the nation to call for full legalization of same-sex marriage. As mentioned above, the states have since diverged from the provinces in that same-sex policy is now passed more frequently by the vote than by the gavel.

While the state trends towards legislation and referenda clearly reflect increased acceptance of same-sex marriage among American voters, it is important to consider the geography of the current marriage-equality states. Of the nine states currently performing same-sex marriages, seven are in the northeast,[222] a region

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219. *Beyond Selma-to-Stonewall*, N.Y. TIMES, Jan. 27, 2013, *available at* http://www.nytimes.com/2013/01/28/opinion/beyond-mr-obamas-inaugural-message-on-gay-rights.html?_r=0; Kevin Robillard, *First inaugural use of the word 'gay'*, POLITICO, Jan. 21, 2013, *available at* http://www.politico.com/story/2013/01/first-inaugural-use-of-the-word-gay-86499.html.

220. 669 F. 3d 169 (2d Cir. 2012), *appeal docketed*, No. 12-63 (U.S. July 17, 2012).

221. Lederman, *supra* note 131 (explaining the legal issues and possible questions surrounding *Perry* and *Windsor*).

222. *See Geography*, MERRIAM-WEBSTER'S ATLAS, http://www.merriam-webster.com/cgi-bin/nytmaps.pl?united_states (last visited Mar. 24, 2014) (showing northeasterly location of Massachusetts, Connecticut, Vermont, New Hampshire, New York, Main, and Maryland).

that has voted liberal in the past.[223] The others are Washington, in the liberal northwest,[224] and Iowa, which celebrates a history of equal-rights advancements.[225] Five of these states—Washington, New York, Vermont, New Hampshire, and Maine—share a border with Canada,[226] while another border-state, Minnesota, voted down a constitutional ban on same-sex marriage in 2012.[227] Of the states to consider same-sex marriage shortly, New Jersey and Rhode Island are in the northeast, while Illinois shares the Great Lakes with Canada.

In order to achieve national marriage equality in the United States, the states with more—shall we say—traditional policies must also embrace legalized same-sex marriage. States like Arizona and New Mexico, which have recently expressed firm opposition to same-sex marriage, may require particularly persuasive or authoritative precedent to shift towards marriage equality.

B. The U.S. Road to Marriage Equality is Much Longer

1. Sheer Size

Canada's marriage equality movement progressed from solid Parliamentary support for traditional marriage in 2000 to national legal same-sex marriage in 2005. The public approval of same-sex marriage skyrocketed from 45% around 2000 to 65% in 2006.[228] The Civil Marriage Act remained in Parliament for only two and a half years before passage, even with a lengthy delay for the Supreme Court reference.

Ten years after Massachusetts became the first state to perform same-sex marriages, the United States has only nine states with marriage equality. While progress is still being made, it is apparent that the meteoric rise of same-sex marriage in Canada will not be matched in the United States. This reality should not be discouraging, however, because it seems only natural that a larger country—ten times the Canadian population spread out over five times the number of states—has more resting inertia to overcome in moving forward with marriage reform.

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223. *See, e.g.*, *2012 Political Map Center*, PBS NEWSHOUR, http://www.pbs.org/newshour/vote2012/map/electoral_college.html (last visited Mar. 24, 2014) (showing northeastern election results largely in favor of Democrats since 1992).

224. *Id.* (showing Washington election results that have favored Democrats since 1988).

225. *See* Varnum v. Brien, 763 N.W.2d 862, 877–78 (Iowa 2009) (recalling Iowa's early anti-slavery laws, anti-segregation rulings, and steps toward women's equality).

226. *See Geography*, *supra* note 222.

227. Ashley Fetters, *Same-sex Marriage Wins on the Ballot for the First Time in American History*, THE ATLANTIC, Nov. 7, 2012, *available at* http://www.theatlantic.com/sexes/archive/2012/11/same-sex-marriage-wins-on-the-ballot-for-the-first-time-in-american-history/264704/.

228. *See* Lehman, *supra* note 52, at 11 (graphing the progression of public opinion regarding same-sex marriage).

2. No One-Stop-Shop in U.S. Marriage Law

Unlike Canada's federal power to define marriage, the United States does not have a one-stop-shop for achieving marriage equality. The power to define U.S. marriage rests squarely within the purview of each individual state. Should DOMA be struck down or repealed, the individual states would still bear the brunt of the work in legalizing same-sex marriage. While a Supreme Court affirmation of *Perry* may promote that progress and ensure that the movement's work is not undone, the individual states must still take the first step. Because the power to define family law is secured for the states by the U.S. Constitution, federal meddling and mandating is severely limited. Thus, there will be no federal Civil Marriage Act in the United States unless and until every one of the fifty states legalizes same-sex marriage.

V. CONCLUSION

While the cases currently before the U.S. Supreme Court do not hold the same power or promise as Canada's Civil Marriage Act, they will likely serve as important catalysts in the U.S. path towards marriage equality. The removal of federal DOMA barriers and the denouncement of referendums that encroach on individual rights by the U.S. Supreme Court would serve as invaluable tools in policy making—tools taken from the hands of those who would limit equality and given to those looking to inspire social change. With legal ammunition, political power, and surging social support, the movement for U.S. marriage equality is poised to follow our northern neighbors to national same-sex marriage recognition through federal backing of state-by-state reform.

AFTERWORD

Since the drafting of the above Comment in January 2013, the United States has indeed witnessed the advancement of marriage equality in leaps and bounds. First, the Supreme Court struck down DOMA in a decision that resembles Canada's instrumental ruling in *M. v. H.*[229] Second, the Court dismissed *Hollingsworth v. Perry*[230] on procedural grounds that limit who can oppose marriage equality in the courts. Finally, with the Supreme Court decisions adding coal to the fire, the United States has a total of eighteen states recognizing marriage equality with two more following suit, in much the same fashion as Canada's Provinces.

The Judiciary as a Catalyst in the DOMA Decision

In *United States v. Windsor*, the Court sent a clear message that marriage equality is strongly preferable, but that each individual state must reach the preferable definition on its own.[231] Justice Kennedy describes the marriage of same-sex couples much like Justice Roberts's prose,[232] yet, he goes out of the way to avoid condemning non-equality definitions of marriage by characterizing same-sex marriage as a "new perspective, a new insight" on a traditional concept.[233] Turning to DOMA, the Court expounds upon the sanctity of a state's power to define marriage and validates a state's ability to create marriage equality.[234] Against that backdrop, DOMA not only overreaches the state's power by imposing an alternative definition of marriage,[235] DOMA is actually "designed to injure the same class the State seeks to protect."[236] Beyond violating principles of federalism, the Court also found that DOMA's "interference with the equal dignity of same-sex marriages, a dignity conferred by the States . . . was more than an incidental effect of the federal statute. It was its essence."[237] As did the Circuit Judges in *Windsor v. United States*, *Golinski v. U.S. Office of Personnel Management*, and *Massachusetts v. U.S. Department of Health and Human Services* before them, the Supreme Court Justices rejected BLAG's arguments about government interests,

229. [1999] 2 S.C.R. 3 (Can.).

230. 133 S.Ct. 2652 (2013).

231. 133 S.Ct. 2675, 2689–91 (2013).

232. *See, e.g.*, *id*. at 2689 ("same sex couples . . . wanted to affirm their commitment to one another before their children, their family, their friends, and their community … the right to marry and so live with pride in themselves and their union and in a status of equality with all other married persons.").

233. *Id.* ("It seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage.").

234. *Id.* at 2689–90.

235. *Id.* at 2692.

236. *Windsor*, 133 S.Ct. at 2692.

237. *Id.* at 2693.

finding instead that DOMA's "principal purpose is to impose inequality," rendering the law unconstitutional.[238]

The Supreme Court's decision in *Windsor* closely resembles the decision in Canada's *M. v. H.* in two important ways: First, both decisions fell short of creating marriage equality in the courts, or even calling for equality legislation in the states and provinces. Second, both decisions espoused the virtues of marriage equality, officially characterizing marriage as a positive exercise in public commitment and social pride. And in the United States now, as was in Canada then, the response to the decision has been a positive surge towards marriage equality in a number of states,[239] demonstrating the role of the judiciary as an encouraging social catalyst.

Punting on Perry Upholds Equality While Limiting Future Battles

The Supreme Court decided *Perry* on procedural grounds, without reaching the merits.[240] Indeed, the decision emphasized the necessity to rely upon judicial rules, rather than allowing the Court to "engage in policymaking properly left to elected representatives."[241] Nevertheless, the decision advances the marriage equality movement by limiting who may oppose marriage equality proponents in courts.

To briefly summarize the procedural issues, the Court found that the controversy in *Perry* was between the Plaintiffs and the State of California.[242] Proposition 8 was allowed to intervene on the State's behalf only after the State refused to defend the law.[243] When the State chose not to appeal the District Court ruling, the controversy at the heart of the case was over.[244] Because the District Court ruling did not actually injure Proposition 8, the group lacked standing before both the Ninth Circuit and the Supreme Court.[245] Thus, the District Court ruling serves as the final word on marriage equality in California.[246]

This decision does more than uphold marriage equality in California; it limits marriage equality opponents from defending laws that the states themselves deem to be indefensible.[247] In so doing, the *Perry* decision makes the judiciary a more

238. *Compare id.* at 2694–95 *with* Windsor v. U.S., 669 F.3d 169 (2d Cir. 2012) *and* Golinski v. U.S. Office of Pers. Mgmt., 824 F. Supp. 2d 968 (N.D. Cal. 2012) *and* Massachusetts v. U.S. Dep't of Health and Human Servs., 682 F.3d 1 (1st Cir. 2012).

239. See *infra* notes 249–54 for a discussion of states that have already achieved marriage equality and states that are expected to join the ranks.

240. "Because we find that petitioners do not have standing, we have no authority to decide this case on the merits, and neither did the Ninth Circuit." Hollingsworth v. Perry, 133 S. Ct. 2652, 2659 (2013).

241. *Id.*

242. *Id.*

243. *Id.* at 2663.

244. *Id.*

245. *Id.*

246. *Perry*, 133 S. Ct. at 2663.

247. "We have repeatedly held that such a generalized grievance, no matter how sincere, is

viable option for the state-by-state equality movement by ensuring that only state officials—with all the responsibilities and political pressures of the office—can oppose equality in court.

The impact of the *Perry* decision has already been felt in New Jersey. When the New Jersey governor decided to drop opposition to marriage equality in a state court proceeding, same-sex New Jersey couples could rest easy knowing that *Perry* forbade private interests from picking up where the state left off.[248]

The Steady March of the States

Within the span of a year, six states have achieved marriage equality: Maryland, Delaware, Minnesota, Rhode Island, New Jersey, Hawaii, Illinois, and New Mexico.[249] California returned to marriage equality,[250] bringing the current count to eighteen states that allow same-sex marriage. In 2014, Nevada and Utah are expected to join the ranks[251] and proceedings are gaining steam in other states, as well.[252]

As public opinion continues to grow in favor of marriage equality,[253] it is likely that more states will continue to join the marriage equality movement. While the issue is far from decided,[254] the United States finds itself moving farther and farther down a trail blazed by its Northern neighbors—an incremental path towards national marriage equality.

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insufficient to confer standing. A litigant raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Id.* at 2662 (quotations omitted).

248. *See* Michael Deak, *Couples exchange vows as New Jersey becomes 14th state to allow same-sex marriage*, GARDEN STATE EQUALITY (Oct. 21, 2013), http://www.gardenstateequality.org/2013/10/gov-christie-drops-appeal/.

249. Richard Gonzales, *Number of States Allowing Gay Marriage Expected to Grow*, NAT'L PUBLIC RADIO (Dec. 25, 2013), http://www.npr.org/2013/12/25/257019750/number-of-states-allowing-gay-marriage-expected-to-grow.

250. See *supra* notes 240–47 for a discussion on the Supreme Court decision in *Perry* that reinstated marriage equality in California.

251. Gonzales, *supra* note 249.

252. *See* Nico Lang, *Next Five States to Legalize Marriage Equality*, ROLLING STONE, Nov. 27, 2013, *available at* http://www.rollingstone.com/politics/news/the-next-five-states-to-legalize-marriage-equality-20131127 (discussing marriage equality efforts in Virginia, Oregon, and Michigan, among others already mentioned).

253. Lydia Saad, *In U.S., 52% Back Law to Legalize Gay Marriage in 50 States*, GALLUP (July 29, 2013), http://www.gallup.com/poll/163730/back-law-legalize-gay-marriage-states.aspx.

254. *See* Eyder Peralta, *Supreme Court Halts Gay Marriage In Utah*, WIS. PUBLIC RADIO (Jan. 6, 2014), http://www.npr.org/blogs/thetwo-way/2014/01/06/260156223/supreme-court-halts-gay-marriages-in-utah (describing the injunction status of an ongoing marriage equality case in Utah, currently awaiting hearing in the Tenth Circuit).