

# Six Imminent Marriage Moments: A Policymaker's Guide



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President Obama's announcement in May that he supports marriage for gay couples ignited a media firestorm, causing many policymakers to be questioned about their positions with new urgency. Some echoed the President's support, with several speaking about their views for the first time, while others kept their heads down. But over the next year, an avoidance strategy will become increasingly difficult to sustain.

Beginning this weekend, for the first time in American history, the platform committee of a major political party will hold public hearings to consider the inclusion of a plank that supports marriage for gay couples. And between now and the end of 2013, there will be a number of other decisive, high-profile events that will highlight the issue of marriage. These events will occur on the heels of huge shifts in public opinion, with support for marriage doubling since the passage of the *Defense of Marriage Act* (DOMA)—now surpassing the majority mark—and the number of Americans living in places with some kind of relationship recognition for gay couples skyrocketing from 5% then to 48% today.<sup>1</sup> Change is happening rapidly, and the next year promises to bring yet another growth spurt.

Each of these pivot points will spur more questions, from the media and from constituents, towards elected officials who have kept a low profile on repealing DOMA or allowing gay couples to marry in the past. We know this issue is not an easy one, but for those who are ready to seize the opportunity these events offer to announce a change in their view, see our memo on "How to Change Your Public Position on Marriage," for advice about navigating that transition and making the change into a strength, not a weakness.<sup>2</sup>

In short, these coming “marriage moments” will provide a unique opportunity for fence-sitters to re-examine their positions and catch up with the wave of history moving steadily across America.

## **Marriage Moment #1**

For the first time in history, the Democratic Platform will likely support marriage for gay couples. Now that the President has voiced his support for marriage, the major obstacle to including marriage support in the Democratic Party platform has been removed. Earlier this year, Convention Chair and Mayor of Los Angeles Antonio Villaraigosa made clear that he believed there should be a marriage plank in the platform. DNC Chairwoman and Florida Congresswoman Debbie Wasserman Schultz recently announced that she agreed, saying incontrovertibly, “Yes, I think that we will have a plank in the platform that reflects the president's position on marriage equality.”<sup>3</sup> Five of the 15 members of the platform drafting committee have already said publicly that they believe marriage should be in the platform, as have the Democratic leaders in both the House and the Senate and countless other Democrats in Congress.<sup>4</sup>

Indeed, including support for marriage in the party platform would reflect the solidifying view of Democrats nationwide—a recent Gallup poll showed 65% of Democrats support marriage for gay couples,<sup>5</sup> and Pew found that this support has grown nearly ten points since the last platform was drafted in 2008.<sup>6</sup> That means that more Democrats now favor marriage than consider themselves pro-choice.<sup>7</sup> If the Party does choose to embrace marriage in the platform language, Democrats across the country who have avoided the issue up to this point will undoubtedly be asked whether they agree with the plank.

## **Marriage Moment #2**

The Supreme Court will likely agree to hear at least one case involving marriage and DOMA.

In the last few months, federal courts have been striking

down the *Defense of Marriage Act* (DOMA) as unconstitutional left and right. In May, the First Circuit Court of Appeals became the first federal appellate court to say that denying the federal protections of marriage to gay couples who are legally wed in their states was a violation of the Constitution's guarantee of Equal Protection under the law.

Now, the House of Representatives (which has been defending DOMA since President Obama's Department of Justice decided it no longer believed the law to be defensible) has appealed that First Circuit case to the Supreme Court. This fall, the Justices will determine whether to hear the appeal—but legal observers agree that the Court will almost certainly take the case. That means that on the eve of the November election, the Supreme Court will likely announce it will be considering a challenge to DOMA this coming term.

In addition to the First Circuit case, there are several other DOMA-related cases that the Court could consider, as well as an appeal in a separate case in which the Ninth Circuit Court struck down California's marriage ban, Proposition 8, as unconstitutional. While no one can know exactly what the Supreme Court will do with these cases, it is nearly inevitable that they will make the decision to consider at least one—if not more—immediately prior to the 2012 election, creating yet another reason for policymakers to be asked about their position on marriage and DOMA.

## **Marriage Moment #3**

Four states will vote on marriage at the ballot box, and for the first time, marriage may win. 2012 will be the biggest year for marriage at the ballot box since 2006, although likely with markedly different results. Then, 7 states passed anti-marriage constitutional amendments. Now, voters in 2 states will decide whether to uphold marriage for gay couples as passed by their state legislatures, in another state advocates are affirmatively going back to the ballot to try to win marriage by popular vote, and one state faces a 2006-esque constitutional amendment banning marriage for gay couples. Polls show that voters in Maryland, Washington State, Maine,

and Minnesota are split or even leaning towards marriage for gay couples in several of these contests. If one or more of these states sees a victory for marriage in November, it will mark the first time that voters have supported marriage for gay couples at the ballot.

Thinking back to 2008, the Proposition 8 debate in California nearly rivaled the press coverage of the general election—especially in the aftermath. If Marylanders, Washingtonians, Mainers, or Minnesotans vote in favor of marriage this year, it will not only end a bruising string of defeats at the ballot box, it will also inspire a frenzy of discussion about just how far the politics have shifted on this issue—a conversation which will undoubtedly include urging policymakers who haven't yet voiced their support for marriage and DOMA repeal to do so.

## **Marriage Moment #4**

The Supreme Court could hear oral arguments on marriage and DOMA. Once the Court announces that it will consider one or more of the marriage and DOMA cases, it will schedule those cases for oral argument—likely in the spring of 2013. As we saw with the health care and immigration cases this past term, these arguments will provide yet another flashpoint for both the press and the country to contemplate marriage for gay couples and mull over the constitutionality of a law that separates legally married couples into two classes, giving one group federal protections while it denies the same to the other.

These oral arguments will unquestionably generate further inquiries on the issue to policymakers in Washington, D.C., and beyond—especially given that the House of Representatives is a key player in the Supreme Court drama. Not only would the House be the one defending the law in front of the Supreme Court, it would be doing so over the formal objection of at least 130 of its Members who have repeatedly filed briefs asking federal courts to strike it down.

## **Marriage Moment #5**

More state legislatures may pass marriage for gay couples. Several more states may consider adding themselves to the list of places where gay couples can marry next spring during the coming state legislative sessions. Policymakers in places like Rhode Island, New Jersey, and Illinois have already voiced their intentions to champion the issue in the near term, and if marriage wins at the ballot in November, these efforts could have the wind at their backs. For those who have not taken a position on marriage in these states, legislative debates will undoubtedly spur questions as they did to state and federal lawmakers in Washington State and Maryland in 2011. And those in nearby states may be questioned about the efforts as well, especially if all of these moving pieces come together to paint a picture of a building national consensus in favor of marriage and DOMA repeal.

## **Marriage Moment #6**

The Supreme Court may strike down the Defense of Marriage Act as unconstitutional. Less than 1 year from now, the highest court in the land could very well invalidate the section of DOMA that denies federal protections to gay couples who are married in the states that allow it.

This would be a game-changer, and given the increasing number of federal judges— Republican and Democratic nominees alike—who are striking down DOMA in courtrooms across the country, it is becoming more and more plausible that the Supreme Court would follow. Although a majority of the current Justices are conservatives, there are conservative principles on which to invalidate DOMA—namely, a state's right to make its own marriage laws and the federal government's lack of power and rationale to discard a state's determination on that front. Justice Kennedy, so often the swing member of the court on hot-button issues, has written the Court's last two decisions in favor of gay people, and he and other Republican-nominated Justices could strike down DOMA using a conservative legal analysis similar to the one used by the First Circuit decision's author, Judge Michael Boudin, another Republican appointee.

If the Supreme Court strikes down DOMA as unconstitutional, it would change the landscape of marriage efforts across the country. For those who live in states that already allow gay couples to wed, those couples would be treated as any other married couple by the federal government for purposes of important protections like social security, tax, military benefits, and immigration, to name a few. For those who are still attempting to pass marriage in their states, this would up the ante—because once marriage advocates persuade their state to allow gay couples to wed, those couples would be on par with all other committed married couples for federal purposes. And certainly, if the highest court in the land invalidates DOMA, marriage will yet again be thrust into the political spotlight, and elected officials from coast to coast will be asked whether they agree with the Justices’ decision.

## Conclusion

Over the next year, marriage for gay couples will arise at least half a dozen times in a way that will spur questions to policymakers. For those whose position on marriage and DOMA repeal have changed, or are changing, these events will provide opportunities to talk about that evolution in a way that helps Americans continue their own journey on the issue. Within the span of 12 months, we may see an entirely new landscape emerge—one that invites more and more moderate policymakers to add themselves to the ever-growing list of Americans who support allowing committed gay couples to make the promise of marriage in our country. One thing is certain—avoiding the issue would be a herculean task.

### TOPICS

LGBT EQUALITY 84

### END NOTES

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