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The Constitutional Case for Marriage Equality

By: Ilya Shapiro and Doug Kendall – February 28, 2013

The Cato Institute and Constitutional Accountability Center don't always agree politically, but we both pride ourselves in following where the Constitution leads. Several years ago, that led us to argue together for the enforcement of the right to keep and bear arms against state laws. It leads us this week to file joint briefs in the landmark Supreme Court cases on marriage equality. For us, these cases aren't a matter of politics or ideology; they are a fight for the true meaning of one of America's most sacred constitutional rights. The constitutional case for marriage equality begins with the sweeping and universal text of the Fourteenth Amendment's Equal Protection Clause, which guarantees "equal protection of the laws" to "any person." Drafted in 1866 and ratified in 1868, the Clause wrote into the Constitution the ideal of equality first laid out in the Declaration of Independence. The text protects all persons from arbitrary and invidious class-based discrimination, whether black or white, man or woman, gay or straight, native-born or immigrant. It gives to all persons, as individuals, the guarantee of the equal protection of the laws.

Constitutional history shows that the breadth of the Equal Protection Clause was no accident. It is clear from the drafting history of the Clause that the framers were determined to strike out against more than simply discrimination on the basis of race. The framers wrote the constitutional guarantee broadly to ensure, for example, that white supporters of the Union in the South as well as Asian immigrants in the West were protected from arbitrary and invidious discrimination. As a result, the framers repeatedly rejected proposals that would have prohibited racial discrimination, and nothing else.

The Fourteenth Amendment's framers also recognized the right to marry the person of one's choosing as a crucial component of freedom and liberty--a right that had long been denied under the institution of slavery. Slaves did not have the right to marry, and slaves in loving relationships outside the protection of the law were time and again separated when one slave was sold to a distant part of the South. As Senator Jacob Howard - the leading sponsor of the Amendment in the Senate -- explained, a slave "had not the right to become a husband or father in the eye of the law, he had no child, he was not at liberty to indulge the natural affections of the human heart for children, for wife, or even for friend."

The Fourteenth Amendment remedied this horrible wrong. In writing into the Fourteenth Amendment a requirement of equality under the law and equality of basic rights for all persons, which included the right to marry, the Amendment's framers ensured that discriminatory state laws would not stand in the way of Americans exercising their right to marry. Laws that discriminate and deny to members of certain groups the right to marry the person of their choosing thus contravene the original meaning of the Fourteenth Amendment.

Neither California's Proposition 8, which forbids gay men and lesbians from marrying the person of their choice, nor the federal Defense of Marriage Act (DOMA), a sweeping mandate of federal discrimination against legally-married same-sex couples, complies with the Constitution's guarantee of equal protection. By forbidding committed same-sex couples from participating in what the Supreme Court has long recognized to be "the most important relation in life," and the "foundation of the family in our society," Proposition 8 contravenes the Equal Protection Clause's central command of equality under the law. It establishes a class-based badge of inferiority that infringes upon the personal dignity and liberty of gay men and lesbians and their families.

DOMA, an equally sweeping violation of equality under law, establishes an across-the-board rule - applicable to more than 1,000 federal legal protections - that denies legally-married same-sex couples federal rights and benefits that exist to support committed, loving couples who form enduring, life long bonds. The federal government simply doesn't have the power to discriminate against individual Americans or refuse to honor the Constitution's prohibition against treating them as inferior, second-class persons.

In *Romer v. Evans* -- the first case in which the Supreme Court held that discrimination on the basis of sexual orientation violates the Equal Protection Clause -- Justice Kennedy began his opinion for the Court with the majestic words of Justice John Marshall Harlan, who, in dissent in*Plessy v. Ferguson*, declared that the Constitution "neither knows nor tolerates classes among citizens." Unheeded then, these words now are understood to state an unshakeable American commitment to the law's neutrality where individual rights are at stake. The Constitution demands marriage equality.