

## ARE WE THERE YET?—VAWA 2013: SAME-SEX LEGAL ACCEPTANCE

*Ashley LeBrun\**

I.	INTRODUCTION.....	102
II.	BACKGROUND.....	104
	A. History of VAWA.....	104
	B. Text of Reauthorization of 2013.....	106
	C. Domestic Violence Among Same-Sex Couples.....	107
III.	CONGRESSIONAL DEBATE.....	108
	A. Reasons to Support Same-Sex Protections.....	109
	1. Legal Realism.....	109
	2. Human Rights.....	109
	3. Anti-Discrimination.....	110
	B. Reasons to Oppose Same-Sex Protections.....	111
	1. Politics.....	111
	2. Already Gender-Neutral.....	111
	3. Unspoken Reasons “Off the Record”.....	113
IV.	THE POTENTIAL FOR VAWA 2013 AND THE DEMISE OF SUCH HOPES.....	113
	A. The Trajectory.....	113
	B. The Demise.....	119
V.	CONCLUSION: VAWA WILL LEAD TO IMPROVED LEGAL IDENTITIES . . . EVENTUALLY.....	120
	A. Bloc-Buster Approach.....	120
	B. Piece-Meal Approach.....	121
	C. Overarching Approach.....	123
	D. Conclusion.....	124

---

\* J.D. Candidate 2015 at Seton Hall University School of Law; B.A. Political Science and Women & Gender Studies, Rutgers University, 2012. Special thanks to Professor/Assistant Dean Jessica Miles of Seton Hall University School of Law for her guidance, time, and support in writing this Note; Sharon Stapel, Executive Director of the New York City Anti-Violence Project, for her time and knowledge; and Rebecca Henry, J.D. 1999 from New York University School of Law, admitted in New York (2000) and Maine (2000), and advocate for domestic violence survivors for fifteen years, for her wealth of information and time. As always, thank you to my husband, Bobby, for his constant support, encouragement, and belief in my abilities.

## I. INTRODUCTION

Congress first enacted the Violence Against Women Act (“VAWA”) in 1994.<sup>1</sup> VAWA provides tools for enforcement, services to victims, preventative measures, employment assistance, protection for immigrant victims and American Indian women, funding and assistance for safe homes, funding for evidence backlogs, funding for trafficking problems, and other funding and measures to aid in the prevention of domestic violence on many levels.<sup>2</sup> Every five years, Congress must reauthorize VAWA or it will expire.<sup>3</sup> Prior reauthorization “has always been” perpetuated through bipartisan efforts.<sup>4</sup> However, in 2011, VAWA expired, leaving any remaining funding-grants to run out.<sup>5</sup> Instead of immediately renewing the grants, Congress left victims without a reauthorization bill until March 2013, when it enacted the Violence Against Women Reauthorization Act of 2013 (“VAWA 2013”).<sup>6</sup>

There are many reasons why Congress held up VAWA 2013 for that nearly two-year span.<sup>7</sup> Throughout that time period, members of Congress mostly debated immigrant, American Indian, and same-sex protections, including protections that extended existing civil remedies and ensured federally funded services for same-sex domestic violence victims.<sup>8</sup> Grassroots activists saw all three provisions as non-negotiable.<sup>9</sup>

---

<sup>1</sup> Violence Against Women Act, Pub. L. No. 103-322, §§ 40001–40703, 108 Stat. 1902 (1994) (enrolled from H.R. 3355) (codified as amended by scattered sections of 18 and 42 U.S.C.), available at <http://www.gpo.gov/fdsys/pkg/BILLS-103hr3355enr/pdf/BILLS-103hr3355enr.pdf>.

<sup>2</sup> Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, §§ 1–1264, 127 Stat. 54 (codified as amended in scattered sections of 18 and 42 U.S.C.), available at <http://www.gpo.gov/fdsys/pkg/PLAW-113publ4/pdf/PLAW-113publ4.pdf>.

<sup>3</sup> See Violence Against Women Act § 40121 (amending sections 2101(18) and 1910A(c) to extend appropriations only until the year 2000), available at <http://www.gpo.gov/fdsys/pkg/BILLS-103hr3355enr/pdf/BILLS-103hr3355enr.pdf>.

<sup>4</sup> 158 CONG. REC. S2305, 2307 (daily ed. Apr. 16, 2012) (statement of Sen. Leahy) (“We should do what we have always done ever since the first VAWA years ago and pass it with strong bipartisan support.”).

<sup>5</sup> Violence Against Women Reauthorization Act of 2013 §§ 1–1264; 158 CONG. REC. S2305, 2763 (daily ed. Apr. 16, 2012) (statement of Sen. Grassley) (explaining that the bill expired “last October”—meaning of 2011).

<sup>6</sup> Violence Against Women Reauthorization Act of 2013 §§ 1–1264.

<sup>7</sup> 158 CONG. REC. H2705, 2707 (daily ed. May 15, 2012) (statement of Rep. Edwards).

<sup>8</sup> *Id.*

<sup>9</sup> Telephone Interview with Rebecca Henry, J.D. 1999 from New York University School of Law, admitted in New York (2000) and Maine (2000), and advocate for domestic violence survivors for fifteen years (Sept. 20, 2013) (hereinafter “Rebecca Henry”).

Congress constantly discussed the inclusion of same-sex couples over the two-year debate period and advanced arguments for why same-sex couples should be included or excluded.<sup>10</sup> This Note will explore and analyze both sides.<sup>11</sup> Ultimately, VAWA 2013 extended protections to same-sex couples.<sup>12</sup> Although this extension reflects a historic moment in American law for same-sex couples, a note of caution is warranted.<sup>13</sup> In the end, the debate existed because of the powerful social implications for same-sex couples' statuses in American society and the possible drive for change beyond the availability of domestic violence services.<sup>14</sup> Unfortunately, the passage occurred, however, not because of a sea change in the way representatives view and define same-sex identity. Instead, it occurred because of the specific tactics used to push through the legislation.<sup>15</sup> Nonetheless, future drafters can learn from the VAWA 2013 debate and incorporate those lessons into tactics for achieving future success in gaining protections and privileges for same-sex individuals.

The protections VAWA 2013 offers to same-sex couples are beneficial for our society within the domestic violence reform context and, more broadly, for same-sex inclusion within the law.<sup>16</sup> Evidence of these benefits comes from the legislative debate regarding VAWA 2013, where representatives provided key arguments to move the parties towards consensus with respect to same-sex rights.<sup>17</sup> VAWA 2013 is the first piece of legislation to specifically mention same-sex couples after multiple failed attempts to include the group in other protective legislation.<sup>18</sup> The dramatic overruling of the Defense of Marriage Act's definition of marriage also contributed to the momentum of the historic VAWA 2013 passing.<sup>19</sup> Nonetheless, recent developments, or lack thereof, have caused the momentum to die out.<sup>20</sup>

---

<sup>10</sup> See *infra* Part III.

<sup>11</sup> See *infra* Part III.

<sup>12</sup> Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 3(a)(18), 127 Stat. 54 (codified as amended in scattered sections of 18 and 42 U.S.C.).

<sup>13</sup> See *id.* §§ 1–1264.

<sup>14</sup> See *infra* Part IV.

<sup>15</sup> See Rebecca Henry, *supra* note 9 (stating that groups of immigrant women, American Indian women, and same-sex couples joined forces and required all be included before supporting any provision that benefitted one of them).

<sup>16</sup> See Violence Against Women Reauthorization Act of 2013 §§ 1–1264.

<sup>17</sup> See *infra* Part IV.

<sup>18</sup> Violence Against Women Reauthorization Act of 2013 §§ 1–1264.

<sup>19</sup> See *infra* Part IV.

<sup>20</sup> See discussion of the Employment Non-Discrimination Act *infra* Part IV.

Part II of this Note will provide an overview of the history of VAWA with respect to the definition of “victim,” while also outlining the relevant portion of VAWA 2013 regarding same-sex couples. Part III will analyze the congressional floor debate to illustrate the different arguments for and against extending protections to same-sex couples and where America stands in terms of progress, recognition, and treatment of same-sex individuals. Part IV will analyze the relationship of VAWA 2013 to other same-sex legal protections with respect to the success and potential benefits to same-sex legal identity. Part V will conclude that the protections VAWA 2013 extended have been a step in the right direction for American attitudes towards same-sex couples’ social and legal progression.

VAWA 2013 is not, however, the turning point in terms of Americans and their representatives fully accepting the equality of same-sex couples and their need for heightened protections. Congress did not act on a key piece of legislation that would have continued the momentum of VAWA 2013.<sup>21</sup> Thus, Part V will also provide strategic recommendations for future pieces of legislation to succeed, garnering lessons from the VAWA 2013 debate, and for same-sex inclusion at the federal level.<sup>22</sup>

## II. BACKGROUND

The history of VAWA, with respect to the victims and relationships Congress sought to cover, is critical to understanding what VAWA 2013 accomplished. Additionally, the existence of same-sex domestic violence is essential to understanding the importance of VAWA 2013.

### A. History of VAWA

Congress first passed the VAWA in 1994.<sup>23</sup> In describing the types of relationships covered, Congress defined domestic violence as violence:

committed by a current or former spouse of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, by a

---

<sup>21</sup> See discussion of the Employment Non-Discrimination Act *infra* Part IV.

<sup>22</sup> See *infra* Part II.B.

<sup>23</sup> Violence Against Women Act, Pub. L. No. 103-322, §§ 40001–40703, 108 Stat. 1902 (1994) (enrolled from H.R. 3355) (amended by scattered sections of 18 and 42 U.S.C.), available at <http://thomas.loc.gov/cgi-bin/query/z?c103:H.R.3355>.

person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other adult person against a victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction receiving grant monies.<sup>24</sup>

Similarly, the Victims of Trafficking and Violence Protection Act of 2000, reauthorizing VAWA ("VAWA 2000") defined the relationships covered as: a "spouse or intimate partner," "a spouse or former spouse . . . a person who shares a child . . . and a person who cohabits or has cohabitated as a spouse."<sup>25</sup> Contrarily, VAWA 2000 added dating violence to its definition.<sup>26</sup> Congress defined dating violence as:

violence committed by a person— (A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and (B) where the existence of such a relationship shall be determined based on a consideration of the following factors: (i) the length of the relationship; (ii) the type of relationship and (iii) the frequency of interaction between the persons involved in the relationship.<sup>27</sup>

An additional section in VAWA 2000 includes "person[s] similarly situated to a spouse," who are already protected by state laws.<sup>28</sup> Hawaii, for example, provided protections following the State Supreme Court's opinions and the State's Commission on Sexual Orientation and the Law's report.<sup>29</sup> The Hawaii Legislature extended domestic violence protections to same-sex couples by enacting the Reciprocal Beneficiaries Act, which "create[d] legal recourse from domestic violence for 'reciprocal beneficiaries' and 'former reciprocal beneficiaries.'"<sup>30</sup> As a result, in 2000, if a state's laws were adequately inclusive, same-sex couples received VAWA's protections and services under state law definitions.<sup>31</sup> By 2011, only six states in addition to Hawaii had

---

<sup>24</sup> *Id.* at § 40121(a)(3) (amending section 2003 definitions of Part T of Title I of the Omnibus Crime Control and Safe Streets Act of 1968).

<sup>25</sup> Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No.106-386, § 1107, 114 Stat. 1464, 1499–1500 (reauthorizing Violence Against Women Act of 1994), available at <http://www.gpo.gov/fdsys/pkg/PLAW-106publ386/pdf/PLAW-106publ386.pdf>.

<sup>26</sup> Adeola Olagunju & Christine Reynolds, Eds., *Thirteenth Annual Gender and Sexuality Law: Annual Review Article: Domestic Violence*, 13 GEO. J. GENDER & L. 203, 217 (2012).

<sup>27</sup> Victims of Trafficking and Violence Protection Act of 2000 § 1109.

<sup>28</sup> *Id.* at § 2266(7)(B).

<sup>29</sup> Ruth Colker, *Marriage Mimicry: The Law of Domestic Violence*, 47 WM. & MARY L. REV. 1841, 1871–72 (2006).

<sup>30</sup> *Id.* at 1872 (quoting and referencing Reciprocal Beneficiaries Act, §§ 1–5, 64, 70, 1997 HAW. SESS. LAWS 383).

<sup>31</sup> Rebecca Henry, *supra* note 9.

sufficiently inclusive language, thus demonstrating the need for federal clarification.<sup>32</sup>

The Violence Against Women Act of 2005 (“VAWA 2005”) did not help same-sex couples.<sup>33</sup> Instead, VAWA 2005 continued to permit the disparity in services across state lines with respect to same-sex couples because it failed to even acknowledge the issue at all.<sup>34</sup> Congress even made technical corrections to the provisions of VAWA 2005 as to the applicability of other underprivileged groups, such as immigrants and American Indian women, but did not demonstrate any effort to clarify the inclusion of same-sex couples, despite the clear disparity of protections and services across state lines.<sup>35</sup> In 2010, VAWA was up for reauthorization again, but Congress did not pass any VAWA legislation until 2013.<sup>36</sup> Now, VAWA 2013 significantly contributes to the definition of “victim.”<sup>37</sup>

#### *B. Text of Reauthorization of 2013*

The important provisions of VAWA 2013 for same-sex couples are the “underserved populations” definition and the “non-discrimination” provision under the “grants conditions” amendments.<sup>38</sup> “Underserved populations” are “populations who face barriers in accessing and using victim services, and includes populations underserved because of . . . sexual orientation, [and] gender identity.”<sup>39</sup> The “non-discrimination” provision states:

[n]o person in the United States shall, on the basis of . . . gender identity [or] sexual orientation . . . be excluded from participation in,

---

<sup>32</sup> ABA, *Domestic Violence Civil Protection Orders by State* (July 2011), [http://www.americanbar.org/groups/domestic\\_violence/resources/statutory\\_summary\\_charts.html](http://www.americanbar.org/groups/domestic_violence/resources/statutory_summary_charts.html) (outlining that the following states and the District of Columbia had specific statutes providing the civil protection remedy for same-sex partners: California, Kentucky, Maine, New Jersey, Ohio, and Pennsylvania).

<sup>33</sup> Olagunju & Reynolds, *supra* note 26, at 253.

<sup>34</sup> Nat’l Network to End Domestic Violence, *The Violence Against Women Act of 2005: Summary of Provisions*, [nnev.org/downloads/Policy/VAWA2005FactSheet.pdf](http://nnev.org/downloads/Policy/VAWA2005FactSheet.pdf) (last visited Oct. 17, 2013).

<sup>35</sup> *Id.*

<sup>36</sup> Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, §§ 1–1264, 127 Stat. 54 (codified as amended in scattered sections of 18 and 42 U.S.C.); 158 CONG. REC. S2305, 2763 (daily ed. Apr. 16, 2012) (statement of Sen. Grassley) (explaining that the bill expired “last October,” meaning October of 2011).

<sup>37</sup> *Id.* at § 3(a)(18).

<sup>38</sup> *Id.* at §§ 3(a)(18), 3(b)(4).

<sup>39</sup> *Id.* at § 3(a)(18).

be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under the Violence Against Women Act of 1994 . . . of 2000 . . . of 2005 . . . of 2013.<sup>40</sup>

These provisions illustrate that same-sex couples are included, despite any exclusion on the basis of state determinations, where services are provided under VAWA.

### C. Domestic Violence Among Same-Sex Couples

Undoubtedly, domestic violence exists among same-sex couples.<sup>41</sup> Various scholars have argued that same-sex domestic violence is more prevalent or equally as prevalent as heterosexual violence.<sup>42</sup> In *Victims of Abuse and Discrimination: Protecting Battered Homosexuals Under Domestic Violence Legislation*, Pamela M. Jablow argued that same-sex domestic violence “is estimated to occur at the same rate,” as heterosexual domestic violence and that “it is probable that the frequency of homosexual abuse is greatly underestimated because homosexual abuse is marked by a greater failure to report than heterosexual abuse.”<sup>43</sup> In recent years, especially before VAWA 2013, academics conducted additional studies to determine if there is greater awareness of same-sex domestic violence. In 2005, John R. Blosnich and Robert M. Bossarte found equal prevalence in domestic violence among same-sex and opposite-sex individuals.<sup>44</sup> The health risks involved were reasonably equivalent as well.<sup>45</sup> A 2007–2008 study found a “higher prevalence of IPV [intimate partner violence] in gay men and bisexual women.”<sup>46</sup> In 2013, the Federal Government released a 2010 study on victims of

---

<sup>40</sup> *Id.* at § 3(b)(4).

<sup>41</sup> ABA Comm. on Domestic & Sexual Violence, *Survey of Recent Statistics*, DOMESTIC VIOLENCE STATISTICS, [http://www.americanbar.org/groups/domestic\\_violence/resources/statistics.html#same-sex](http://www.americanbar.org/groups/domestic_violence/resources/statistics.html#same-sex) (last visited Sept. 19, 2013).

<sup>42</sup> *See, e.g., id.*

<sup>43</sup> Pamela M. Jablow, Note, *Victims of Abuse and Discrimination: Protecting Battered Homosexuals Under Domestic Violence Legislation*, 28 HOFSTRA L. REV. 1095, 1105 (2000).

<sup>44</sup> John R. Blosnich & Robert M. Bossarte, *Comparisons of Intimate Partner Violence Among Partners in Same-Sex and Opposite-Sex Relationships in the United States*, 99 AM. J. PUB. HEALTH 2117, 2183 (2009).

<sup>45</sup> *Id.* at 2183–84.

<sup>46</sup> Naomi G. Goldberg & Illan H. Meyer, *Sexual Orientation Disparities in History of Intimate Partner Violence: Results from the California Health Interview Survey*, 20 J. INTERPERSONAL VIOLENCE 1, 7 (2012).

domestic violence that found same-sex domestic violence occurs as much as, if not more than, opposite-sex domestic violence.<sup>47</sup> Regardless of the actual rate or the reasons for under-reporting, same-sex domestic violence occurs. The mere existence of same-sex domestic violence is sufficient cause to grant equal protections to same-sex victims as opposite-sex domestic violence victims.<sup>48</sup>

### III. CONGRESSIONAL DEBATE

The congressional record is replete with justifications for and against extending protections to same-sex couples.<sup>49</sup> While VAWA languished in Congress from 2011 to 2013, senators and representatives had many opportunities to debate the pros and cons of the issue.<sup>50</sup> This Note's analysis will start with the Senate's debate because the final VAWA 2013 originated in Senate Bill 47.<sup>51</sup> The Senate put forth various bills beginning in 2011, all of which explicitly extended protections to same-sex couples.<sup>52</sup> Both the reasons given for and against extending protections are broken down into categories to clarify the ultimate issues that burden other pieces of legislation moving forward.<sup>53</sup>

Senator Leahy, a Democrat, introduced the bill that eventually became VAWA 2013.<sup>54</sup> A group of Republicans stalled VAWA 2013 when they "insisted on removing provisions [of the Senate bill] that would provide expanded protections for gay and lesbian individuals and

---

<sup>47</sup> Mikel L. Walters, et al., *National Intimate Partner and Sexual Violence Survey: 2010 Findings on Victimization by Sexual Orientation*, NAT'L CTR. INJURY PREVENTION & CONTROL, 10–11 (2013) (finding that 13.1% lesbians, 46.1% bisexual women, and 17.4% heterosexual women "have been raped in their lifetime" and 40.2% gay men, 47.4% bisexual men, and 20.8% heterosexual men "have experienced sexual violence other than rape at some point in their lives").

<sup>48</sup> See *infra* Part III.A for a more thorough argument that the existence of such violence is reason enough to extend protections.

<sup>49</sup> See *infra* Part III.

<sup>50</sup> See discussion *infra* Part III.A–B.

<sup>51</sup> *Bill Summary & Status 113<sup>th</sup> Congress (2013–2014) S.47*, THE LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d113:SN00047:@@L&summ2=m&>, (last visited Sept. 15, 2013).

<sup>52</sup> See, e.g., H.R. 812, 113th Cong. (2013); H.R. 393, 113th Cong. (2013); H.R. 354, 113th Cong. (2013); S. 129, 113th Cong. (2013); S. 128, 113th Cong. (2013); S. 80, 113th Cong. (2013); H.R. 83, 113th Cong. (2013); H.R. 11, 113th Cong. (2013).

<sup>53</sup> See *infra* Part IV.

<sup>54</sup> S. 47, 113th Cong. (2013) (becoming the Violence Against Women Reauthorization of 2013 Act), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d113:S.47:>.

2015]

*ARE WE THERE YET?*

109

undocumented immigrants who are the victims of domestic abuse.”<sup>55</sup> Instead, Republicans provided their own version for VAWA Reauthorization that “fail[ed] to guarantee that services [would] actually reach those victims who have in the past been unable to access them because of their sexual orientation or gender identity.”<sup>56</sup> Additionally, Senator Hutchinson offered an amendment which “remove[d] these key provisions [providing same-sex couples protections] and would allow the denial of VAWA assistance to victims solely because of their LGBT status.”<sup>57</sup>

*A. Reasons to Support Same-Sex Protections**i. Legal Realism*

The first argument in favor of extending same-sex protections falls within legal realism. Black’s Law Dictionary defines legal realism as a “theory of law that is based . . . on judicial decisions that should derive from social interests and public policy.”<sup>58</sup> Gay people are not some sort of special group that is “immune to this kind of [domestic] violence.”<sup>59</sup> Realism would acknowledge the problem of domestic violence among heterosexual couples.<sup>60</sup> It would also conclude that same-sex couples experience domestic violence, regardless of legal recognition, or lack thereof, because of the similarities their relationships share with those of heterosexual couples.<sup>61</sup> Accordingly, realism would suggest the law take into account this real problem for the sake of public policy, by supporting legislation that extends protections available to heterosexual couples in relationships affected by domestic violence to same-sex couples in similar circumstances.<sup>62</sup>

*ii. Human Rights*

The second justification for same-sex protections in VAWA is humanitarian based. Same-sex couples are “just as deserving of our [Congress’s] support as any other survivor of domestic violence,” and

---

<sup>55</sup> 159 CONG. REC. S497, 504 (daily ed. Feb. 7, 2013) (statement of Sen. Feinstein).

<sup>56</sup> 159 CONG. REC. S497, 498 (daily ed. Feb. 7, 2013) (statement of Sen. Leahy).

<sup>57</sup> 158 CONG. REC. S2761, 2776 (daily ed. Apr. 26, 2012) (statement of Sen. Coons).

<sup>58</sup> BLACK’S LAW DICTIONARY 712 (9th ed. 2009).

<sup>59</sup> 158 CONG. REC. S2305, 2308 (daily ed. Apr. 16, 2012) (statement of Sen. Leahy).

<sup>60</sup> *See id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

“those in LGBT relationships actually experience higher rates of violence than heterosexual couples.”<sup>63</sup> Because domestic violence can lead to death, some have equated not supporting “lifesaving services” as “unconscionable.”<sup>64</sup> The rhetoric is emotional. Extending protections to same-sex couples is “the right thing to do.”<sup>65</sup>

Related to the humanism argument is an indirect concern for the children of same-sex victims. Eventually, these children will also suffer if Congress does not provide their parents with necessary services and address the domestic violence in their homes.<sup>66</sup> The belief that children who grow up in a home with domestic violence will either be abused as a child, perpetuating the victimization, or will become domestic violence perpetrators themselves, supports that theory.<sup>67</sup> In response, VAWA 2005 extends resources to help these children.<sup>68</sup> However, such help is tied to the status of the child’s parent as a victim under VAWA; if a parent does not meet the definitions of VAWA, then the children do not receive help. Therefore, by denying VAWA resources to same-sex couples, children of same-sex couples are also indirectly being denied resources.<sup>69</sup>

### iii. Anti-Discrimination

The third argument in favor of VAWA 2013 is a legal concern that “these [same-sex] individuals face discrimination as they attempt to access victims services.”<sup>70</sup> This argument ties into a broader notion of individual rights.<sup>71</sup> Arguments in favor of equal rights for same-sex individuals and their partners have been made before, under Fourteenth Amendment principles.<sup>72</sup> Another aspect of this constitutional argument is the concern of discrimination in practice or in the administration of the law.<sup>73</sup> The Senate debate revealed, “[n]early half of LGBTQ victims are

---

<sup>63</sup> 159 CONG. REC. S480, 481 (daily ed. Feb. 7, 2013) (statement of Sen. Shaheen).

<sup>64</sup> 158 CONG. REC. S2761, 2762 (daily ed. Apr. 26, 2012) (statement of Sen. Blumenthal).

<sup>65</sup> 158 CONG. REC. S3160, 3160 (daily ed. May 15, 2012) (statement of Sen. Menendez).

<sup>66</sup> 158 CONG. REC. H2705, 2710 (daily ed. May 15, 2012) (statement of Rep. Welch).

<sup>67</sup> *Behind Closed Doors: The Impact of Domestic Violence on Children*, UNICEF, at 7, [www.unicef.org/protection/files/BehindClosedDoors.pdf](http://www.unicef.org/protection/files/BehindClosedDoors.pdf) (last visited Oct. 17, 2013).

<sup>68</sup> Nat’l Network to End Domestic Violence, *supra* note 34.

<sup>69</sup> *Compare* 158 CONG. REC. H2705, 2710 (daily ed. May 15, 2012) (statement of Rep. Welch), *with* Nat’l Network to End Domestic Violence, *supra* note 34.

<sup>70</sup> 158 CONG. REC. S2761, 2761–62 (daily ed. Apr. 26, 2012) (statement of Sen. Blumenthal).

<sup>71</sup> 158 CONG. REC. H2705, 2708 (daily ed. May 15, 2012) (statement of Rep. Farr).

<sup>72</sup> Jablow, *supra* note 43, at 1117–18.

<sup>73</sup> Rebecca Henry, *supra* note 9; *see infra* Part III.B.2–3.

turned away from domestic violence shelters, and a quarter are often unjustly arrested as if they were the perpetrators.”<sup>74</sup> The VAWA 2013 bill remedies this kind of discrimination on the basis of sexual orientation.<sup>75</sup> Accordingly, services to victims will not differ in quality or accessibility.

*B. Reasons to Oppose Same-Sex Protections*

i. Politics

Republicans stated that the language covering same-sex couples was polarizing, especially in an election year.<sup>76</sup> This statement allows one to infer that Republicans would vote otherwise if it were not an election year. That inference is unlikely because the Republican Party platform opposes same-sex marriage equality.<sup>77</sup> Further, party politics are involved because of the three debated groups (immigrant, American Indian, and same-sex).<sup>78</sup> The House “refused to listen to countless law enforcement and women’s groups” when it decided not to support the VAWA 2013 bill.<sup>79</sup> Senator Murray speculated that the lack of support for same-sex protections resulted from “House Republican leadership . . . appeas[ing] those on the far right of their caucus.”<sup>80</sup> Thus, those following agendas may disregard same-sex individual rights to further party politics.

ii. Already Gender-Neutral

Opponents of the VAWA 2013 bill argued that prior versions of VAWA were already gender-neutral.<sup>81</sup> Representative Nugent argued:

I have heard a number of my colleagues talk about what isn’t in this bill. They say, for example, it doesn’t include “sexual orientation” as one of the protected classes. The Violence Against Women Act is and always has been gender-neutral. That’s the beauty of this piece of

---

<sup>74</sup> 158 CONG. REC. H2726, 2734 (daily ed. May 16, 2012) (statement of Rep. DeLauro) (“In 2010, nearly half of lesbian and gay survivors were turned away . . . or denied services because of their sexual orientation.”); 158 CONG. REC. S2761, 2776 (daily ed. Apr. 26, 2012) (statement of Sen. Coons).

<sup>75</sup> 159 CONG. REC. H707, 708 (daily ed. Feb. 28, 2013) (statement of Rep. Larsen).

<sup>76</sup> 158 CONG. REC. H2726, 2732 (daily ed. May 16, 2012) (statement of Rep. DeGette).

<sup>77</sup> Associated Press, *GOP Oks Platform Barring Abortions, Gay Marriage*, FOX NEWS (Aug. 28, 2012), <http://www.foxnews.com/politics/2012/08/28/gop-oks-platform-barring-abortions-gay-marriage/>.

<sup>78</sup> See *supra* Part II.

<sup>79</sup> 159 CONG. REC. S480, 481 (daily ed. Feb. 7, 2013) (statement of Sen. Murray).

<sup>80</sup> *Id.*

<sup>81</sup> 158 CONG. REC. H2726, 2734 (daily ed. May 16, 2012) (statement of Rep. Nugent).

legislation. It's gender-neutral.<sup>82</sup>

Due to this argument, Republicans claimed the protections were unnecessary. If Representative Nugent's argument was the reason for Republicans not wanting to include same-sex couples, then the specific inclusion would not have caused such a contentious debate. In other words, if same-sex couples were already protected under the gender-neutral language, then the specific inclusion of these couples would be an easy point to agree upon because it is a protection the law already provides. Proponents of the VAWA 2013 argued that the specific inclusion of same-sex couples would "clarify the law to reflect what everyone knows about modern society . . . ."<sup>83</sup> Republicans, in essence, offered no response to the clarification argument, but instead, continued to oppose the inclusion of same-sex protections.<sup>84</sup> Furthermore, Republicans demonstrated their staunch objections to the same-sex protections by holding the bill hostage until 2013.<sup>85</sup>

VAWA has always been explicitly gender-neutral, despite its title including the word "women;" however, some grant-receiving institutions have interpreted VAWA to include only heterosexual victims.<sup>86</sup> Therefore, these institutions discriminatorily administered VAWA services only for heterosexual women.<sup>87</sup> Conservative state administrations, specifically, permitted local service providers to deny assistance to same-sex victims of domestic violence without accounting for the Department of Justice's statements regarding the intended meaning of VAWA.<sup>88</sup> Thus, although House Republicans stated their opposition to be based on the fact that the language was redundant, language was needed because of the various discriminatory actions around the country.<sup>89</sup>

---

<sup>82</sup> *Id.*

<sup>83</sup> 158 CONG. REC. H2726, 2739 (daily ed. May 16, 2012) (statement of Rep. Biggert).

<sup>84</sup> *See* 158 CONG. REC. H2726, 2734 (daily ed. May 16, 2012) (statement of Rep. Nugent).

<sup>85</sup> *See* Violence Against Women Act, Pub. L. No. 103-322, § 40121, 108 Stat. 1902 (1994) (enrolled from H.R. 3355) (amending sections 2101(18) and 1910A(c) to extend appropriations only until the year 2000), *available at* <http://thomas.loc.gov/cgi-bin/query/z?c103:H.R.3355>.

<sup>86</sup> Rebecca Henry, *supra* note 9.

<sup>87</sup> Rebecca Henry, *supra* note 9.

<sup>88</sup> Rebecca Henry, *supra* note 9.

<sup>89</sup> Rebecca Henry, *supra* note 9; *see supra* Part III.B.

2015]

ARE WE THERE YET?

113

iii. Unspoken Reasons “Off the Record”

Another possible reason for some to oppose same-sex protections in VAWA is the debate over the Defense of Marriage Act (“DOMA”) and litigation regarding the Act.<sup>90</sup> DOMA defined “marriage” as 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.”<sup>91</sup> Although Congress passed DOMA in 1996, citizens increasingly challenged the Act’s validity in the years leading up to 2013, especially starting in 2011.<sup>92</sup> Accordingly, some House Republicans were likely concerned that expressly including same-sex couples in the VAWA 2013 legislation would lead to the “slippery slope” of including same-sex couples in other pieces of legislation, and potentially lead to a direct challenge to the limitations in DOMA on the ability to get married.<sup>93</sup>

#### IV. THE POTENTIAL FOR VAWA 2013 AND THE DEMISE OF SUCH HOPES

VAWA 2013 began a path towards more expansive protections for same-sex couples. However, Congress recently halted this path by failing to act on an important piece of legislation.

##### A. *The Trajectory*

Previously, it was not clear whether the term “victims” in VAWA included same-sex couples without the benefit of binding precedent in a particular jurisdiction.<sup>94</sup> Now, it is clear that same-sex couples are included in VAWA because of the specific statutory inclusion.<sup>95</sup> Similarly, the legislators and courts must also clarify basic words in the American vernacular to acknowledge same-sex couples. Continuing along the trajectory of inclusion, the Supreme Court ruled in favor of inclusion in *United States v. Windsor*, 133 S. Ct. 2675 (2013).<sup>96</sup> Because

---

<sup>90</sup> Defense of Marriage Act, 1 U.S.C. § 7, 28 U.S.C. § 1738C (1996); Rebecca Henry, *supra* note 9.

<sup>91</sup> Defense of Marriage Act § 7.

<sup>92</sup> Ruth Tam, *Timeline: DOMA and Prop. 8 Through the Years*, WASH. POST (June 26, 2013, 2:16PM), <http://www.washingtonpost.com/blogs/post-politics/wp/2013/06/26/timeline-doma-and-prop-8-through-the-years/>.

<sup>93</sup> Rebecca Henry, *supra* note 9.

<sup>94</sup> Jablow, *supra* note 43, at 1100.

<sup>95</sup> Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, §§ 1–1264, 127 Stat. 54 (codified as amended in scattered sections of 18 and 42 U.S.C.).

<sup>96</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013).

of the heightened attention same-sex marriage received in 2013, it is appropriate to analyze another legal definition besides that of “victim”— “spouse.”<sup>97</sup> As of October 2014, thirty-two states and the District of Columbia permit same-sex marriage, twenty-three of which permitted marriage beginning in March 2013 after Congress passed VAWA 2013.<sup>98</sup> Similar to pre-2013 VAWA, same-sex marriage laws employ a state-by-state approach, and are supported by an overarching federal statute, DOMA, which outlines federal stances and benefits on same-sex marriage pursuant to state laws.<sup>99</sup>

In *Windsor*, a same-sex female couple from New York married in Canada.<sup>100</sup> They returned to New York after their marriage ceremony.<sup>101</sup> Two years later, one of the spouses died, leaving “her entire estate” to her spouse.<sup>102</sup> Unfortunately, the surviving spouse could not obtain an estate tax exemption because of DOMA’s definition of spouse.<sup>103</sup> DOMA defined marriage as “a legal union between one man and one woman as husband and wife,” and spouse as “a person of the opposite sex who is a husband or a wife.”<sup>104</sup> Ultimately, the Supreme Court ruled that DOMA’s definition was unconstitutional on Equal Protection and Due Process grounds.<sup>105</sup> The Court reasoned that because marriage is usually regulated

---

<sup>97</sup> *United States v. Windsor*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/windsor-v-united-states-2/> (last visited Oct. 21, 2013); see *Windsor*, 133 S. Ct. at 2675.

<sup>98</sup> *Same-Sex Marriage Fast Facts*, CNN (Oct. 18, 2014, 4:10 PM), [www.cnn.com/2013/05/28/us/same-sex-marriage-fast-facts/index.html](http://www.cnn.com/2013/05/28/us/same-sex-marriage-fast-facts/index.html) (listing the following states permitting same-sex marriage after March 2013: Alaska, Arizona, California after the *Windsor* decision, Colorado, Delaware, Hawaii, Idaho, Illinois, Indiana, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, Utah, Virginia, West Virginia, Wisconsin, and Wyoming).

<sup>99</sup> Each state has domestic violence acts, and Congress enacted a federal statute, outlining federal protections and services. See U.S. Attorney’s Office for Northern District of Ga., *Federal Domestic Violence Laws*, [www.justice.gov/usao/gan/documents/federallaws.pdf](http://www.justice.gov/usao/gan/documents/federallaws.pdf) (last visited Oct. 17, 2013). Likewise, each state has statutes defining and regulating marriage, and not until recently has the federal government also created a statute that substantively defined marriage. See Daniel R. Pinello, *Location, Location, Location: Same-Sex Relationship Rights by State*, L. TRENDS & NEWS PRACTICE AREA NEWSLETTER, [https://www.americanbar.org/newsletter/publications/law\\_trends\\_news\\_practice\\_area\\_e\\_newsletter\\_home/bl\\_feat5.html](https://www.americanbar.org/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/bl_feat5.html) (last visited Sept. 19, 2014).

<sup>100</sup> *Windsor*, 133 S. Ct. at 2682.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 2683 (quoting 1 U.S.C. § 7 of DOMA).

<sup>105</sup> See *id.* at 2693. Explanation of these grounds are beyond the focus of this Note.

by states, the purposeful creation of a federal definition excluding same-sex couples is “strong evidence of a law having the purpose and effect of disapproval of that class.”<sup>106</sup>

The Court also analyzed the House Report of DOMA to determine the reason for the law’s creation.<sup>107</sup> Rejecting the House’s proposed reasons for enacting DOMA, the Court instead found that the House was morally disapproving of homosexuality.<sup>108</sup> Likewise, the Court found that the purposeful exclusion imposed a stigma or a “disability” upon same-sex couples.<sup>109</sup> In so ruling, the Supreme Court understood the possible motivations that underlie congressional legislation specifically excluding same-sex couples. The relationship of VAWA to this case, months after DOMA, is not necessarily causal. With a close temporal relationship, VAWA began a new path that the Court paved, but that changed in the fall of 2013 with congressional inaction.<sup>110</sup>

Arguably, VAWA 2013 greatly influenced the possibility of greater inclusion and recognition of same-sex identity. *Windsor* was argued before the Supreme Court of the United States on March 27, 2013, just twenty days after VAWA 2013 became law.<sup>111</sup> The Supreme Court delivered its opinion on June 26, 2013.<sup>112</sup> The close timing between the passing of VAWA 2013, and the decision in *Windsor* reveals the possible role VAWA 2013 and its supporting arguments may have played in the public’s improved understanding and acceptance of same-sex identity and protections. Further, the drafters had no intention of making this express inclusion of same-sex protections so that the definition in DOMA would be overturned.<sup>113</sup> In terms of influencing new legislation, however, the prospects seemed hopeful that VAWA 2013 and its debate would influence Congress to continue the momentum.

Prior to VAWA 2013, no piece of federal legislation protected or provided rights to same-sex couples.<sup>114</sup> This is not to say that no federal

---

<sup>106</sup> *Windsor*, 133 S. Ct. at 2693.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 2696.

<sup>110</sup> See The Demise *infra* Part IV.B.

<sup>111</sup> *United States v. Windsor*, *supra* note 97.

<sup>112</sup> *United States v. Windsor*, *supra* note 97.

<sup>113</sup> Rebecca Henry, *supra* note 9.

<sup>114</sup> Search on Lexis Advance, LEXIS ADVANCE, <http://advance.lexis.com> (Search for “same-sex” or “homosexual!;” apply Statutes & Legislation category Filter; apply Federal jurisdiction filter; apply Public Laws/ALS category filter) (last visited Sept. 18, 2014).

legislation included the term “same-sex,” as many pieces did. However, this means that where “same-sex” couples are expressly mentioned, such legislation intended to deprive them of some sort of benefit. For example, any employee who makes “remarks [] during personal time in opposition to policies . . . of the Department [of Agriculture] . . . regarding homosexuals” will not be peremptorily removed without a hearing.<sup>115</sup> Essentially, this law ensures that employees who make derogatory remarks about homosexuals will be given an opportunity to explain their comments. Both an education and public health code ensure federal funds will not be used to encourage “sexual activity, whether homosexual or heterosexual.”<sup>116</sup> Sex offenses have also been defined to include homosexual rapes and assaults.<sup>117</sup> Although the statutes serve logistical purposes, the specific language is not meant to extend protection or confer rights to same-sex couples.

Not surprisingly, there have been bills introduced in Congress that included the term “same-sex,” but failed to get passed or signed into law. One example is the Domestic Partnership Benefits and Obligations Act of 2010, which was intended to provide federal domestic partnership employees the same benefits as those in marriages.<sup>118</sup> This bill died in the House, was reintroduced in 2012, and died again in the House.<sup>119</sup> Another example, the Family and Medical Leave Inclusion Act, was proposed by Congress to include same-sex spouses and domestic partners in the category of individuals in which an employee can take a leave to care for.<sup>120</sup> This bill has been proposed and subsequently rejected every year since 2007.<sup>121</sup>

These are just two examples of legislation proposed but not signed into law that include specific protections for same-sex individuals and couples. It appears that any bill that specifically included sexual orientation as a protected class was subject to an insurmountable hurdle.

---

<sup>115</sup> 7 U.S.C. § 2231(b) (2012).

<sup>116</sup> 20 U.S.C. § 7906(a)(1) (2012); 42 U.S.C. §§ 300dd–32(e)(3), 300ee(c), 300ff–67(1), 300ff–84 (2012).

<sup>117</sup> 42 U.S.C. § 9511(e) (2012).

<sup>118</sup> S. REP. NO. 111-376, at 1 (2010).

<sup>119</sup> S. 1102 (111<sup>th</sup>): *Domestic Partnership Benefits and Obligations Act of 2009*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/111/s1102> (last visited Sept. 19, 2013); S. 1910 (112<sup>th</sup>): *Domestic Partnership Benefits and Obligations Act of 2012*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/112/s1910> (last visited Sept. 19, 2013).

<sup>120</sup> S. 857, 113th Cong. §§ 1–3 (2013).

<sup>121</sup> See S. 1283, 112th Cong. §§ 1–3 (2012); S. 3680, 111th Cong. §§ 1–3 (2010); H.R. 2132, 111th Cong. §§ 1–3 (2009); H.R. 2792, 110th Cong. §§ 1–3 (2007).

2015]

## ARE WE THERE YET?

117

Congress was incapable of passing a similar bill before VAWA 2013. VAWA 2013 is the first bill of its kind—this is the first time in American congressional history that the federal government has specifically protected and given rights to same-sex couples.

The drafters did not necessarily intend to extend protection to same-sex individuals and couples.<sup>122</sup> Those involved in the drafting and lobbying stages of this bill believed that same-sex couples were already included in the bill, but not expressly included in VAWA.<sup>123</sup> When President Obama took office, supporters of same-sex couple inclusion saw an opportunity to extend protections to same-sex couples and individuals.<sup>124</sup> Nonetheless, drafters and lobbyists did not plan for a specific same-sex provision to be included for consideration, let alone passed.<sup>125</sup> Instead, they planned to discuss express protections and to draw attention to same-sex couple issues within this context.<sup>126</sup> Eventually, however, those who drafted original versions of the bill and lobbied for various issues knew that obtaining an express provision would result in a bigger achievement than previously contemplated.<sup>127</sup>

Instead of entirely omitting the mention of same-sex couples, some statutes have specifically excluded same-sex couples. A prime example is the Don't Ask, Don't Tell policy of 1993, which was valid law.<sup>128</sup> This law was an "attempt" to strengthen same-sex legal identity, but it still did not specifically provide for same-sex protections.<sup>129</sup> This "compromise" permitted homosexuals to serve on the military, as long as they did not disclose their sexual orientation.<sup>130</sup> Don't Ask, Don't Tell was enacted in response to the policies of President Truman, in 1950, and President Reagan, in 1982, which specifically prohibited homosexuality in the military and made sexual orientation grounds for discharge.<sup>131</sup> Former

---

<sup>122</sup> Rebecca Henry, *supra* note 9.

<sup>123</sup> Rebecca Henry, *supra* note 9.

<sup>124</sup> Telephone Interview with Sharon Stapel, Exec. Dir., N.Y.C. Anti-Violence Project, Nat'l Coal. of Anti-Violence Projects (Oct. 3, 2013).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> Rebecca Henry, *supra* note 9.

<sup>128</sup> Don't Ask, Don't Tell, 10 U.S.C. § 654 (1993), *repealed* by Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010).

<sup>129</sup> *Id.*

<sup>130</sup> *A History of "Don't Ask, Don't Tell,"* WASH. POST, <http://www.washingtonpost.com/wp-srv/special/politics/dont-ask-dont-tell-timeline/> (last visited Sept. 19, 2013).

<sup>131</sup> *Id.*

President Clinton urged for this “compromise” to be repealed in 2003.<sup>132</sup> Interestingly, VAWA 2000 did not include same-sex couples specifically, but added dating violence.<sup>133</sup> In 2006, the Supreme Court of the United States upheld the policy of Don’t Ask, Don’t Tell, even though it conflicted with certain universities’ non-discrimination policies.<sup>134</sup> Around this same time, VAWA 2005 still did not clarify that same-sex couples were to be included in the protections offered by VAWA to heterosexual victims of domestic violence.<sup>135</sup> From 1993 to 2006, public recognition of same-sex identity did not gain any traction.<sup>136</sup> VAWA 2000 may have offered some hope with the expansion of its definition of “victim,” but hope for same-sex identity acceptance decreased with the 2006 Supreme Court decision upholding the Don’t Ask, Don’t Tell policy, mandating that same-sex individuals not express their identity as such.<sup>137</sup>

The close temporal relationship between Don’t Ask, Don’t Tell and VAWA reveals the attitude of the American public and the level of acceptance of same-sex identity and relationships. Further, it is symbolic of the legal status of these individuals and couples. In 2010, Congress repealed Don’t Ask, Don’t Tell.<sup>138</sup> Yet, Congress debated VAWA from 2011 until 2013.<sup>139</sup> The debate demonstrates that the Don’t Ask, Don’t Tell Repeal Act of 2010 was not pivotal, but instead a “baby step” in the right direction of greater legal acceptance of gays and lesbians in society. It was not enough to move congressional members dealing with VAWA in 2010 to believe that same-sex couples deserved protections. Ultimately, 2013 was the moment when a piece of legislation pointed in the right direction to change everything in terms of legal protections for the civilian public of America.<sup>140</sup>

---

<sup>132</sup> *Id.*

<sup>133</sup> *See supra* Part II.

<sup>134</sup> *See* Rebecca Henry, *supra* note 9.

<sup>135</sup> *See supra* Part II.

<sup>136</sup> *See A History of “Don’t Ask, Don’t Tell,” supra* note 130.

<sup>137</sup> *A History of “Don’t Ask, Don’t Tell,” supra* note 130.

<sup>138</sup> *A History of “Don’t Ask, Don’t Tell,” supra* note 130.

<sup>139</sup> *See* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, §§ 1–1264, 127 Stat. 54 (codified as amended in scattered sections of 18 and 42 U.S.C.).

<sup>140</sup> *Id.* at §§ 1–1264.

*B. The Demise*

In addition to the Domestic Partnership Benefits and Obligations Act of 2010 and the Family and Medical Leave Inclusion Act, the Employment Non-Discrimination Act (“ENDA”) is a third example of proposed legislation that included same-sex protections, but failed countless times in the past. ENDA would have prohibited “employment discrimination on the basis of sexual orientation.”<sup>141</sup> It has failed in Congress since 1975, in various forms, in every year except the ninety-fifth Congress because it was not introduced.<sup>142</sup> The bill died in 2007, but was reintroduced in 2009 only to fail again.<sup>143</sup> In April 2013, Congress introduced the bill again, and on November 7, 2013, the Senate passed ENDA.<sup>144</sup> This was another monumental moment not only for Congress, but also for the entire legal field.<sup>145</sup> Many urged for the House to continue this momentum from VAWA 2013, *Windsor*, and the Senate’s passing.<sup>146</sup> Unfortunately, Speaker John Boehner promised to bury it in the House Committee.<sup>147</sup> Indeed, Speaker Boehner did, and the House left the bill to languish.<sup>148</sup> Similar arguments from VAWA 2013 are currently being made against ENDA, including that the law is already sexual orientation neutral.<sup>149</sup> Thus, some members of Congress are still putting forth the same reasons against VAWA 2013 when it comes to other pieces of legislation that extend protections and benefits to same-sex couples.

---

<sup>141</sup> S. 815, 113th Cong. (2013) (reported in Senate); *H.R. 3685 (110<sup>th</sup>): Employment Non-Discrimination Act of 2007*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/110/hr3685> (last visited Sept. 19, 2013).

<sup>142</sup> H.R. REP. NO. 110-406, at 2 (2007).

<sup>143</sup> *H.R. 3685 (110<sup>th</sup>): Employment Non-Discrimination Act of 2007*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/110/hr3685> (last visited Sept. 19, 2013).

<sup>144</sup> S. 815, 113th Cong. (2013) (reported in Senate).

<sup>145</sup> Emma Margolin, “*Let the Bells of Freedom Ring*”—Senate Passes ENDA, MSNBC.COM (Nov. 7, 2013, 2:00 PM), <http://www.msnbc.com/news-nation/let-the-bells-freedom-ring#>.

<sup>146</sup> *See id.*

<sup>147</sup> Philip Bump, *The Senate Passes ENDA, Clarifying America’s Gay-Friendliest States*, THEWIRE (Nov. 7, 2013, 3:31 PM), <http://www.thewire.com/politics/2013/11/senate-passes-enda-clarifying-americas-gay-friendliest-states/71372>; Margolin, *supra* note 145.

<sup>148</sup> S. 815, 113th Cong. (2013) (reported in Senate).

<sup>149</sup> Bump, *supra* note 147.

## V. CONCLUSION: VAWA WILL LEAD TO IMPROVED LEGAL IDENTITIES . . . EVENTUALLY

The VAWA 2013 debate and its successful passing will lead to improved legal identities for same-sex couples, but legislators have to utilize specific tactics to push other pieces of legislation in the same direction. Although VAWA is a move in the right direction in terms of legal protections for same-sex couples, it is not enough. Domestic violence is only one aspect of a person's life or relationships, if at all. Marriage, employment, insurance, social security, and other government benefits and privileges are also important. Given the Supreme Court's reluctance to extend full suspect classification to homosexual status, as per *Windsor*, same-sex couples and homosexuals, in general, need more legal protections through other legislation.<sup>150</sup> This Note proposes three strategies to garner protections for same-sex couples. The first approach takes an underlying lesson from the VAWA debates and will be called the "bloc-buster" approach. The second approach is the "piece-meal" approach and seems to be the approach Congress has already started using. The last approach is an idealistic, but comprehensive, "overriding" approach.

### A. Bloc-Buster Approach

This approach requires that voting blocs, voting citizens that are usually grouped together in terms of similar interests, stand together. The blocs must have similar interests otherwise, they will jeopardize their ability to gain benefits for the other blocs. Usually, the group of blocs must include a "weak" bloc, which means a low amount of power and ability to voice and obtain their desired legislative goals. Once this group of blocs coalesces, their power is much greater than the strongest bloc and dissenting legislators are under more pressure to include the goals of the weaker blocs to appease the stronger ones as well. The best example of this comes directly from VAWA 2013.

VAWA was a bipartisan bill for decades that suddenly found itself in a hotly contested debate.<sup>151</sup> Those in support of the bill admittedly turned the debate into a "War on Women" to obtain media attention, as

---

<sup>150</sup> The Court has not classified homosexuality as a suspect classification and therefore, the Court does not apply strict scrutiny when reviewing the classifications based on sexual orientation. Rather, the Court has provided quasi-classification in *United States v. Windsor*, 133 S. Ct. 2675 (2013).

<sup>151</sup> See *supra* Part II.

the female bloc is a strong one.<sup>152</sup> Further, people in the background were aware of their grouped-together demands from various blocs.<sup>153</sup> Using the female bloc, drafters generally tied together immigrant women, American Indian women, and same-sex couples as a larger bloc to bust through the arguments against same-sex protections. Without being inclusive of all blocs, Congress could not overcome the pressure these larger blocs created.

### B. Piece-Meal Approach

The piece-meal approach tackles the problem by amending or introducing legislation by topic every so often, as Congress has repeatedly done. For example, women's rights, in general, have followed a similar piecemeal approach, starting with gaining political rights through suffrage in 1919, obtaining the Equal Pay Act in 1963 to help employment rights, and the Pregnancy Discrimination Act in 1978.<sup>154</sup> First, Congress passed legislation about domestic violence; Congress next tackled legislation about employment discrimination.<sup>155</sup> The lessons drawn from VAWA 2013 can be incorporated into a set of recommendations for legislators in drafting bills and in amending existing bills for each legislative topic they choose to tackle:

Explicitly define the population the legislation is targeting and in doing so, be explicit in whether this specifically includes or excludes populations based on gender identity. However, legislators should be careful when they initially want to exclude a specific group.

If exclusion is chosen, the next question to ask is what is the reason for exclusion? It would be beneficial to outline reasons for exclusion. Moreover, outline the reasons why this bill may need to include same-sex couples. Being proactive in listing the disadvantages of exclusion will help answer the following question: Would exclusion perpetuate a real problem that cuts across a sexuality, discrimination, or human rights violation? Answering in the affirmative to this question and similar questions should lead legislators to engage in a debate as to whether exclusion is appropriate.

---

<sup>152</sup> Erika Eichelberger, *Blocking VAWA, The GOP Keeps Up the War on Women*, THE NATION (Jan. 2, 2013), <http://www.thenation.com/article/171977/gop-blocks-ava>.

<sup>153</sup> Rebecca Henry, *supra* note 9.

<sup>154</sup> S. Mintz & S. McNeil, *Timeline for Women's Rights*, DIGITAL HISTORY, <http://www.digitalhistory.uh.edu/timelines/timelinetopics.cfm?topicid=3> (last visited Jan. 22, 2014).

<sup>155</sup> *But see supra* Part IV.

There must be a real, good faith debate, which took place while passing VAWA 2013. The debate should not be about one side “winning,” but instead it should be about determining how the issue is to be best resolved as a compromise. It became evident in the VAWA 2013 debate that although some legislators believed there were reasons beyond animus to exclude protections, the debate revealed no such substantive arguments. The purpose of the debate should be to determine whether the arguments advanced to exclude protections really have any merit or whether underlying biases fuel the arguments.

If the legislature is called upon to amend any legislation, the legislature should take up an analysis similar to that for initial pieces of legislation, to ensure that the bill they are amending is reaching the appropriate populations. Examples of attempts to amend already existing bills to extend same-sex protections include the Employment Non-Discrimination Act, Domestic Partnership Benefits and Obligations Act of 2010, and Family and Medical Leave Inclusion Act.<sup>156</sup>

Utilizing the same examples from Part III, amending legislation may be easier since VAWA 2013 has been codified. However, a disadvantage may be that Congress will engage in the same or similar debates and arguments as they did during the VAWA 2013 debate. The Family and Medical Leave Inclusion Act Bill states it will include the phrase “domestic partner” and add to the definition of “spouse,” “a same-sex spouse as determined under applicable state law before the period.”<sup>157</sup> This is similar to the problem encountered with pre-2013 VAWA, in that it appears to be gender-neutral and sexual orientation neutral; yet, conservative state administrations may allow discriminatory practices to continue by ensuring that same-sex couples do not obtain a right to marry or any other rights.<sup>158</sup> Luckily, the bill also ensures that the term “domestic partner” includes those who are denied these rights by broadly defining it as: “in a committed, intimate relationship with the employee, is not a domestic partner to any other person, and who is designated to the employer by such employee as that employee’s domestic partner.”<sup>159</sup> Accordingly, this statute does a great job, similar to VAWA 2013, in outlining why same-sex couples should not be excluded since there is no basis for exclusion. This may be model language for future amendments

---

<sup>156</sup> See *supra* Part IV.

<sup>157</sup> H.R. 2792, 110th Cong. §§ 2(a)(1)–(3) (2007).

<sup>158</sup> See Rebecca Henry, *supra* note 9.

<sup>159</sup> H.R. 2792 § 2(a)(3)(B).

2015]

*ARE WE THERE YET?*

123

to bills.

The Employment Non-Discrimination Act provides a definition for “gender identity:” “the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual’s designated sex at birth.”<sup>160</sup> “Sexual Orientation” is defined as “homosexuality, heterosexuality, or bisexuality.”<sup>161</sup> Section 4 prohibits discrimination on the basis of a litany of factors, including gender identity and sexual orientation.<sup>162</sup> This discrimination is in the context of employer and employment agency practices, labor union practices, training programs, associations, preferential treatment, and quotas.<sup>163</sup> Unfortunately, ENDA has only passed the Senate with this sort of language and the House committee has not yet reviewed it and likely will not pass it.<sup>164</sup>

### *C. Overarching Approach*

In 2014, it seems unclear why there is not just a basic definition of “person(s).” As Congress attempted to make a universal definition of marriage and spouse under DOMA to be applicable to all existing and future federal legislation, there should be a basic, universal definition of “person(s).”<sup>165</sup> “Person” encompasses federal legislation that targets “citizen(s)” because the term usually is defined in reference to “person(s).” Understandably, there may be reasons legislators wish to target certain populations within the broad understanding of every person in the United States. However, there are certain criteria that Congress could outline as stated above as to why any future legislation could draw lines. Further, Congress could grandfather in certain legislation it already deems fair in targeting specific populations, such as women.

A basic definition of “person(s)” should start as follows: “any human being, regardless of race, color of skin, nationality, gender, gender identity, sexual orientation . . . .” This definition should list the traits that do not define a person because unfortunately, people still think that immutable traits define a person. Another option within this approach is to adopt an overarching non-discrimination act. Similar to the structure

---

<sup>160</sup> S. 815, 113th Cong. § 3(a)(7) (2013) (reported in Senate).

<sup>161</sup> S. 815 § 3(a)(10).

<sup>162</sup> S. 815 § 4.

<sup>163</sup> S. 815.

<sup>164</sup> Bump, *supra* note 147.

<sup>165</sup> Defense of Marriage Act, 1 U.S.C. § 7, 28 U.S.C. § 1738C (1996).

of the VAWA 2013 anti-discrimination provision, or even more encompassing, New Jersey's Law Against Discrimination, Congress could adopt an overarching piece of legislation that provides the characteristics that it is illegal to discriminate and in what areas such discrimination is unlawful.<sup>166</sup> For example, New Jersey's Law Against Discrimination bars discrimination in employment, housing, public assistance and public accommodations.<sup>167</sup> This law is comprehensive and desirable because it affects multiple areas of the law in just one piece of legislation. Congress could and should produce something similar.

#### *D. Conclusion*

This Note recommends an approach that combines an overarching approach and a bloc-busting approach. By collectively creating a piece of legislation, there will be multiple blocs that have a stake in the legislation and will hopefully coalesce because of their similar interests and positions in fostering a government where discrimination is not allowed because of one trait or characteristic that does not necessarily define the person as a whole. VAWA 2013 provides the debate that America will hear over and over, as the arguments for and against will be used again. Although VAWA 2013 and its debate provide great insight as to where American's legal acceptance has progressed, in terms of helping same-sex identity, it is not enough and there must be more comprehensive protections. We are not there yet, but we are not far.

---

<sup>166</sup> Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 3(b)(4), 127 Stat. 54 (codified as amended in scattered sections of 18 and 42 U.S.C.); N.J. STAT. ANN. § 10:5-1-42 (West 2013).

<sup>167</sup> N.J. STAT. ANN. § 10:5-2 (West 2013).