

THE FATE OF THE MARITAL UNION: IS DOMA APPROACHING ITS LAST DAY?

*Lisa Alexander**

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* J.D., Albany Law School 2011; B.A., Political Science, Allegheny College 2008.

This article was previously published on the *Albany Government Law Review Fireplace* on April 10, 2011. See Lisa Alexander, *The Fate of the Marital Union: Is DOMA Approaching Its Last Day?*, ALB. GOV'T L. REV. FIREPLACE (Apr. 10, 2011), <http://aglr.wordpress.com/2011/04/10/the-fate-of-the-marital-union-is-dom-a-approaching-its-last-day/>.

INTRODUCTION

The Defense of Marriage Act's (DOMA) days might be numbered. U.S. Attorney General Eric Holder recently announced that the Department of Justice (DOJ) will no longer defend the constitutionality of DOMA in court.¹ While the DOJ will continue to appear in litigation and "represent the interests of the United States,"² it will no longer argue that section 3 of DOMA is constitutional as applied to same-sex couples.³ This decision has sparked heated debate and a flurry of proposed legislation. Though riddled with controversy, the facts support that the executive made an appropriate, and arguably necessary, decision.

I. A BRIEF HISTORY OF DOMA

The Defense of Marriage Act was enacted in 1996. The crux of the current controversy is section 3, which defines 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."⁴ DOMA was enacted, at least in part, as a response to Hawaii's Supreme Court decision *Baehr v. Lewin*.⁵ In *Baehr*, the court found that while the applicant same-sex couples did not have a fundamental right to marry pursuant to the right to privacy, they could argue their equal protection theory on remand.⁶ The possibility that homosexual men and women might attain a marriage license in Hawaii and that their home states would have to recognize the unions' legality under the Full Faith and Credit Clause was too much for Congress to bear. DOMA easily passed through both the House and Senate and was signed into law by President Bill Clinton.⁷

The legislative record illustrates Congress' judgments about the definition of marriage and the morality behind it. Some

¹ Press Release, U.S. Attorney General Eric Holder, Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), <http://www.justice.gov/opa/pr/2011/February/11-ag-222.html>.

² *Id.*

³ *Id.*

⁴ 1 U.S.C. § 7 (2006).

⁵ Jerry Simon Chasen, *Is DOMA Doomed?*, 25-FEB PROB. & PROP. 22, 23 (2011).

⁶ *Baehr v. Lewin*, 852 P.2d 44, 57 (Haw. 1993).

⁷ Chasen, *supra* note 5, at 23.

members of Congress firmly believed that marriage could only be between a man and a woman. For instance, Representative Barr remarked that “marriage throughout the entire history of not only our civilization but Western civilization has meant the legal union between one man and one woman.”⁸ Others emphasized that the homosexual marriage question was a moral one, and that such marriages were morally wrong. Representative Hoke remarked:

One of the things that was said during the debate that I think is probably the most preposterous . . . is that Congress has no business legislating morality The fact is that we legislate morality on a daily basis. It is through the law that we as a nation express the morals and the moral sensibilities of the United States, and what is morality except to decide what is right and what is wrong? That is what morality is all about.⁹

It is this very sentiment that the administration used to help support its decision to cease defending DOMA’s constitutionality.¹⁰

II. DEFENDING THE DENIAL OF DOMA’S CONSTITUTIONALITY

While the Obama administration now refuses to defend DOMA’s constitutionality, this is a fairly recent position. The Justice Department defended DOMA in 2009, arguing that the homosexual plaintiffs were not “constitutionally entitled to acknowledgment of their union by states that do not recognize same sex marriage” or entitled to certain benefits.¹¹ In 2010, the Obama administration considered appealing a U.S. District Court case to defend DOMA,¹² and the DOJ stated it would continue to

⁸ Jane S. Schacter, *Skepticism, Culture and the Gay Civil Rights Debate in a Post-Civil Rights Era*, 110 HARV. L. REV. 684, 690 n.17 (quoting CONG. REC. H7275 (daily ed. July 11, 1996)).

⁹ CONG. REC. H7277 (daily ed. July 11, 1996).

¹⁰ See Letter from Eric Holder, Att’y Gen., to Hon. John A. Boehner, (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

¹¹ See James Tapper, *Obama Justice Department Defends Defense of Marriage Act—That Candidate Obama Opposed*, POLITICAL PUNCH (June 12, 2009), <http://blogs.abcnews.com/politicalpunch/2009/06/obama-justice-department-defends-defense-of-marriage-act-that-candidate-obama-opposed.html>.

¹² James Tapper, *Judge Rules Defense of Marriage Act is Unconstitutional; Will President Obama’s Justice Department Appeal?*, POLITICAL PUNCH (July 8, 2010), <http://blogs.abcnews.com/politicalpunch/2010/07/judge-rules-defense-of-marriage-act-is-unconstitutional-will-president-obamas-justice-department-app.html>.

defend against DOMA challenges as recently as January 2011.¹³ However, things changed when the due dates for the government's response to briefs filed in *Pedersen v. Office of Personnel Management*¹⁴ and *Windsor v. United States*¹⁵ drew near.

Pedersen “challenges the federal government’s denial of marriage-related protections” in a number of areas, including “federal laws for private pension plans . . . [and] federal income taxation”¹⁶ Plaintiffs, who are citizens of Connecticut, Vermont, and New Hampshire, argue that DOMA violates the Fifth Amendment’s Equal Protection Clause by classifying married partners as either homosexual and heterosexual, then only denying homosexual couples “the protections otherwise typically available to married couples.”¹⁷ Similarly, *Windsor* involves federal tax law under DOMA. When Edie Windsor’s partner of forty-four years, Thea Spyer, passed away in 2009, the “federal government refused to recognize their marriage and taxed [Ms. Windsor’s] inheritance from [Ms. Spyer] as though they were strangers.”¹⁸ The plaintiff argues “it is a denial of the equal protection principles of the Fifth Amendment to the U.S. Constitution for the federal government to pick and choose which marriages it will recognize for federal purposes” Though neither the *Pedersen* nor *Windsor* brief argued for legalizing same-sex marriage, both argued that the definition of marriage under DOMA is unconstitutional.

Unfortunately—or perhaps fortunately—for the Obama administration, both *Pedersen* and *Windsor* required that the executive branch reevaluate its position on DOMA. The Second Circuit has no binding precedent on the standard of review to use

¹³ Jerry Markon & Sandhya Somashekhar, *In Gay Rights Victory, Obama Administration Won't Defend Defense of Marriage Act*, WASH. POST, Feb. 23, 2011.

¹⁴ Complaint, *Pedersen v. Office of Personnel Mgmt.*, No. 3:10-cv-1750 (D. Conn.) (Nov. 9, 2011).

¹⁵ Complaint, *Windsor v. United States.*, No. 1:10-cv-8435 (S.D.N.Y.) (2010).

¹⁶ *Frequently Asked Questions: Pedersen et al. v. Office of Personnel Management et al.*, GLAD, <http://www.glad.org/doma/faq-pedersen/> (last visited Mar. 17, 2011).

¹⁷ *Id.*

¹⁸ *Windsor v. United States - Frequently Asked Questions*, AMERICAN CIVIL LIBERTIES UNION, <http://www.aclu.org/lgbt-rights/windsor-v-united-states-frequently-asked-questions-faq> (last visited Mar. 17, 2011).

when evaluating classifications based on sexual orientation.¹⁹ Thus, the government could not rely on a predetermined rational basis standard as it had in other circuits. After analyzing the criteria used to determine standards of review, the Obama administration concluded that a heightened standard was appropriate.

In his letter to House Speaker Boehner, Attorney General Holder explained the four-step inquiry used to conclude that sexual orientation is subject to heightened scrutiny.²⁰ He noted that the Supreme Court has indicated heightened scrutiny might apply if the group has suffered a history of discrimination; if the group has a visible or immutable trait that defines it; if the group “is a minority or is politically powerless;” and if the distinguishing characteristics of the group have little to no bearing on an individual’s “ability to perform or contribute to society.”²¹ Holder noted that homosexual individuals have experienced a “significant history of purposeful discrimination . . . based on prejudice and stereotypes.”²² Although sexual orientation is not necessarily a visible characteristic, “a growing scientific consensus accepts that sexual orientation is a characteristic that is immutable.”²³ Holder emphasized that though gays and lesbians are not entirely shutout of the political process, a total shutout is not necessary to fulfill the third factor. Finally, he noted “there is a growing acknowledgment that sexual orientation ‘bears no relation to ability to perform or contribute to society.’”²⁴ If heightened scrutiny does apply, the justification for sexual orientation classification must reflect actual state purposes, and may not be made up after litigation commences.²⁵

Under this reasoning, DOMA must be defended using Congress’ actual purpose, a purpose laced with animus, moral disapproval, and stereotypes.²⁶ Because these justifications are insufficient under heightened scrutiny, the administration

¹⁹ Letter from Eric Holder, Att’y Gen., to Hon. John A. Boehner, *supra* note 10.

²⁰ *Id.*

²¹ *Id.* (citing *Bowen v. Gilliard*, 483 U.S. 587, 602–03 (1987)); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441–42 (1985).

²² Letter from Eric Holder, Att’y Gen., to Hon. John A. Boehner, *supra* note 10.

²³ *Id.*

²⁴ *Id.* (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality)).

²⁵ *Id.* (quoting *United States v. Virginia*, 518 U.S. 515, 535–36, 533 (1996)).

²⁶ *Id.*; see also *supra* Part I.

determined that “[s]ection 3 of DOMA may not be constitutionally applied to same-sex couples whose marriages are legally recognized under state law,” if a court finds that heightened scrutiny applies.²⁷ However, should the Second Circuit determine the appropriate standard is rational basis, the DOJ will state that a reasonable argument can be made in support of section 3’s constitutionality. Additionally, the United States will remain party to the cases, will represent the interests of the United States, and will allow Congress to participate in the litigation.²⁸

III. REACTIONS TO THE DETERMINATION ABOUT DOMA

How rational is raising the standard from rational basis and ceasing to defend DOMA? It depends on whom you ask. Gay rights advocates are lauding the decision. Executive Director of the ACLU Anthony Romero stated “[t]he President did the right thing and just propelled gay rights into the 21st century, where it belongs.”²⁹ A recent poll conducted by Greenberg Quinlan Rosner Research and the Human Rights Campaign indicates that the American public may also support the decision. According to the poll, “51 percent of voters oppose DOMA while 34 percent favor it” and “when presented with the actual benefits from which married same-sex couples are excluded, voters overwhelmingly support extending those benefits [to same-sex couples].”³⁰ However, not everyone has been supportive of the administration’s position change.

President Obama and the DOJ are facing sharp criticism from a number of sources. Some conservatives have accused Obama of using DOMA to divert attention from “spending cuts to social causes.”³¹ Others, such as Representative Lamar Smith and

²⁷ Letter from Eric Holder, Att’y Gen., to Hon. John A. Boehner, *supra* note 10.

²⁸ *Id.*

²⁹ Press Release, ACLU, President Obama Says Discriminatory “Defense of Marriage Act” is Unconstitutional, (Feb. 23, 2011), *available at* <http://www.aclu.org/lgbt-rights/president-obama-says-discriminatory-defense-marriage-act-unconstitutional>.

³⁰ Human Rights Campaign, *DOMA Poll 2011: Poll Snapshot*, <http://www.hrc.org/DOMApoll2011/> (last visited Mar. 19, 2011). For a copy of the questionnaire used, see Human Rights Campaign, Frequency Questionnaire, *available at* http://www.hrc.org/DOMApoll2011/files/HRC-DOMA-poll_GQRR-questionnaire.pdf (last visited Mar. 19, 2011).

³¹ Charlie Savage & Sheryl Gay Stolberg, *In Turnabout, U.S. Says Marriage*

Senator Charles E. Grassley (both Republican), have argued that the administration's decision to stop defending DOMA was purely political.³² Robert George, a political science professor at Princeton University who is against same-sex marriage, noted that the administration's prior defense of DOMA was "so inadequate as to raise suspicion that the Justice Department was deliberately throwing the case" and speculated that DOMA will still receive a "robust defense."³³ House Speaker Boehner commented that he would be "very surprised if the House didn't decide that they were going to defend the law."³⁴

House Speaker Boehner need not be surprised. On March 3, 2011, Representative Vicky Hartzler sponsored a concurrent resolution condemning the administration's decision to stop defending DOMA, and demanding that the DOJ defend DOMA in all instances.³⁵ Representative Louie Gohmert sponsored a resolution "[d]irecting the Speaker, or his designee, to take any and all actions necessary to assert the standing of the House to defend" DOMA in all federal litigation.³⁶ Additionally, on March 2, 2011, Representative Dan Burton introduced the Marriage Protection Act of 2011, which prohibits courts created by an Act of Congress from hearing or deciding challenges to the validity or interpretation of DOMA.³⁷

In response, Representative Jerrold Nadler introduced the Respect for Marriage Act on March 16, 2011, which has 108 co-sponsors. The bill repeals the bulk of DOMA and states that "[f]or the purposes of any Federal law in which marital status is a

Act Blocks Gay Rights, N.Y. TIMES, Feb. 24, 2011, at A1.

³² *Id.*

³³ Markon & Somashekhar, *supra* note 13.

³⁴ David Morgan & Jeremy Pelofsky, *John Boehner: DOMA Likely to be Defended by House*, HUFFINGTON POST, Feb. 28, 2011, http://www.huffingtonpost.com/2011/02/28/john-boehner-doma-likely-_n_829159.html.

³⁵ H.R. Con. Res. 25, 112th Cong. (2011). The concurrent resolution has ninety-eight co-sponsors and has been referred to the House Committee on the Judiciary. THOMAS, Bill Summary and Status: H.R. Con. Res. 25, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:h.con.res.00025> (last visited Mar. 19, 2011).

³⁶ H.R. Res. 143, 112th Cong. (2011). The resolution has twenty-seven co-sponsors and has been referred to the House Committee on Rules. THOMAS, Bill Summary and Status: H.R. Res. 143, <http://thomas.loc.gov/cgi-bin/bdquery/D?d112:4:./temp/~bdQ7cV:./home/LegislativeData.php> (last visited Mar. 19, 2011).

³⁷ Marriage Protection Act of 2011, H.R. 875, 112th Cong. § 2(a) (2011). It also eliminates the Supreme Court's appellate jurisdiction for these issues. *Id.*

factor, an individual shall be considered married if that individual's marriage is valid in the State where the marriage was entered into"³⁸ A similar bill has been introduced in the Senate.³⁹

IV. WHY THE LEFT WAS RIGHT

The Obama administration's decision to stop defending DOMA was the right one. There is substantial evidence to support that sexual orientation classifications are entitled to heightened scrutiny,⁴⁰ and that section 3 of DOMA is unconstitutional under any standard of review higher than rational basis. Furthermore, while the president does have a duty to "faithfully execute the office of President [including the laws of the U.S.]," he also has a duty to "preserve, protect and defend the Constitution of the United States."⁴¹ If DOMA does violate a constitutional provision such as the Fifth Amendment's Equal Protection Clause, as many argue it does, continued enforcement of an unconstitutional law would seemingly violate the President's latter duty.

Moreover, presidents may, under special circumstances, "determine that a law is unconstitutional and decline to comply with it."⁴² Presidents may also appeal a decision while simultaneously instructing the DOJ to tell courts that "the executive branch believes the law is unconstitutional."⁴³ This seems to be the route the Obama administration is taking, as the government will remain a party to the litigation and represent the interests of the United States, and allow members of Congress to participate in the litigation. This approach is not novel. For instance, in 1943, the solicitor general requested that the Supreme Court review a decision regarding payment of salaries, but told the court it agreed with the ruling.⁴⁴ In 1996, President Clinton simultaneously complied with "a law requiring the military to discharge service members who had H.I.V." and

³⁸ Respect for Marriage Act, H.R. 1166, 112th Cong. §§ 2–3 (2011).

³⁹ Respect for Marriage Act of 2011, S. 598, 112th Cong. (2011).

⁴⁰ See Letter from Eric Holder, Att'y Gen., to Hon. John A. Boehner, *supra* note 10; see generally *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁴¹ U.S. CONST. art. 2 § 1.

⁴² Walter Dellinger, Op-Ed, *How to Really End 'Don't Ask, Don't Tell,'* N.Y. TIMES, Oct. 20, 2010.

⁴³ *Id.*

⁴⁴ *Id.*

told courts he believed the law was unconstitutional.⁴⁵ Though this approach is rare, it may be utilized legally.

Thanks to *Pedersen* and *Windsor*, the executive branch had the opportunity to review sexual orientation classifications, and found that rational basis was no longer an appropriate classification for DOMA. It remains to be seen whether the Supreme Court will finally articulate a clear standard of review for sexual orientation classifications, or whether marriage will be defended or respected in Congress. DOMA is outdated, unfair, and unconstitutional. Hopefully the other two governmental branches will soon recognize this and take appropriate action.

⁴⁵ *Id.*