



Defense of Marriage Act (DOMA)

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The Defense of Marriage Act, also known as DOMA, was signed into law by President Bill Clinton on September 21, 1996, after having been passed by a vote of 342-67 in the House of Representatives and a vote of 84-14 in the Senate. A key Section of DOMA was struck down as unconstitutional by the United States Supreme Court on June 26, 2013. Other sections of the Act remain in force.

DOMA relieves states and other jurisdictions of the obligation to recognize same-sex marriages and marriage-like relationships authorized by other jurisdictions: "No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship."

The Section that was struck down by the Supreme Court defined marriage as a union of one man and one woman for the purposes of federal law: "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or wife."

The law, thus, does not prohibit same-sex marriage, but it authorizes states and territories to refuse to recognize same-sex marriages or domestic partnerships or civil unions that have been performed in other states and territories.

In addition, until nullified by the Supreme Court in 2013, Section 3 required that federal bureaus and agencies recognize only opposite-sex marriages. Hence, same-sex couples who had been legally married in jurisdictions that permit same-sex marriage were not recognized as married by the federal government and were thus not eligible for the myriad benefits showered on married couples by the federal government, including those related to taxes, Social Security, federal health insurance, employment benefits, immigration, survivorship, and inheritance, among many others.

Background

The Defense of Marriage Act was authored by Georgia Representative Bob Barr, who introduced the bill on May 7, 1996. The bill was prompted by the Hawaii Supreme Court's ruling in the 1993 case *Baehr v. Lewin* that the state must show a compelling interest in prohibiting same-sex marriage. The fear was that should Hawaii or another state legalize same-sex marriage then other states and the federal government would be forced to recognize marriages that take place in those jurisdictions.

Under the full faith and credit clause of the United States Constitution, which requires states to recognize the "acts, records, and proceedings" of other states, a marriage performed in one state has traditionally



Bob Barr, the author of the Defense of Marriage Act, has since repudiated it.

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been recognized in all other states even if the participants would not be eligible to marry in all other states. DOMA was passed in order to circumvent the obligation imposed on states by the full faith and credit clause.

All Republicans in Congress, except for Representative Steven Gunderson of Wisconsin, who had been outed on the floor of the House of Representatives by homophobic Congressman Bob Dornan of California in 1994, either voted for passage of DOMA or abstained. All 67 representatives who opposed the bill were Democrats except for Representative Bernie Sanders of Vermont, an Independent.

All 14 senators who voted against the bill were Democrats, and included both senators from California (Boxer and Feinstein), Hawaii (Akaka and Inouye), Illinois (Mosely-Braun and Simon), and Massachusetts (Kennedy and Kerry), as well as Senators Feingold (Wisconsin), Kerrey (Nebraska), Moynihan (New York), Pell (Rhode Island), Robb (Virginia), and Wyden (Oregon).

In tandem with passing DOMA, the Senate considered the Employment Nondiscrimination Act (ENDA), which would have prohibited discrimination against gay men and lesbians in the workplace and which failed by a single vote. The strategy apparently was to use ENDA as a means of granting cover to Democrats who wanted to go on record as opposed to discrimination even as most of them voted in favor of DOMA.

Some Democrats also claimed that they voted for DOMA as a means of forestalling the introduction of a Constitutional Amendment that would have prohibited same-sex marriage throughout the country. (Notwithstanding the passage of DOMA, Republicans introduced the Federal Marriage Amendment, also known as the Marriage Protection Amendment, to ban same-sex marriage in 2003, 2004, 2005, and 2006; it was endorsed by President George W. Bush in 2004, but nevertheless failed to receive the required 2/3 vote of both Houses of Congress in order to be submitted to the states for ratification.)

When President Clinton signed DOMA into law at midnight on September 20, 1996, he issued a statement affirming his opposition to discrimination and urged the next Congress to pass ENDA.

He added, "I also want to make clear to all that the enactment of this legislation should not, despite the fierce and at times divisive rhetoric surrounding it, be understood to provide an excuse for discrimination, violence or intimidation against any person on the basis of sexual orientation. Discrimination, violence and intimidation for that reason, as well as others, violate the principle of equal protection under the law and have no place in American society."

Subsequent Developments

After he left Congress, Bob Barr, the author and chief sponsor of DOMA, changed parties and ran for President of the United States on the Libertarian banner. Prior to accepting the Libertarian Party's nomination, he announced that he had come to believe that DOMA should be repealed.

However, he continued to defend his part in the law's adoption on grounds of federalism, claiming in an op-ed published in the *Los Angeles Times* in 2009 that "Contrary to the wishes of a number of my Republican colleagues, I crafted the legislation so it wasn't a hammer the federal government could use to force states to recognize only unions between a man and a woman."

Although during his re-election campaign in 1996, he touted his having signed DOMA into law in Southern states, President Clinton also changed his mind about the efficacy of DOMA. In 2009, he announced that he is now in favor of same-sex marriage and of repealing the Defense of Marriage Act. "I personally support people doing what they want to do."

In their campaigns for the Democratic nomination for President in 2008, most of the candidates, including Senators Hillary Clinton and Barack Obama, announced their opposition to same-sex marriage, but their support for the repeal of DOMA.

In September 2009, Representatives Jerrold Nadler, Tammy Baldwin, and Jared Polis introduced the "Respect for Marriage Act," which would repeal DOMA. The bill had 91 co-sponsors when it was introduced, and currently has more than 100, but was never brought to the floor for a vote during the first two years of the Obama administration, when Democrats controlled large majorities in both houses of Congress.

Conspicuously absent from the list of original co-sponsors was the senior openly gay member of Congress, Representative Barney Frank of Massachusetts, who said that there was not sufficient support in Congress for the bill to be adopted. He suggested that the repeal of DOMA could be accomplished most efficiently through judicial rulings rather than legislatively.

Judicial Rulings on DOMA

DOMA has been challenged in federal court with mixed success. In 2004 a bankruptcy court upheld the constitutionality of the law in a case entitled *In Re Kandu*, involving a lesbian couple who had married in Canada and then wished to declare a joint bankruptcy.

In 2005, a Florida federal district court in *Wilson v. Ake* similarly rejected the claims of a lesbian couple who had married in Massachusetts and sought to require Florida to recognize their marriage under the full faith and credit clause of the Constitution.

Since then, however, courts have been more amenable to attacks on the constitutionality of DOMA and in 2013 the Supreme Court of the United States in a landmark ruling finally declared Section 3, which requires that the federal government recognize only marriages between one man and one woman, unconstitutional.

In two employment discrimination rulings issued in 2009, *In the Matter of Karen Golinski* and *In the Matter of Brad Levenson*, two separate Judges of the United States Court of Appeals for the Ninth Circuit, found DOMA constitutionally suspect.

Ruling on grievances filed by attorneys who work for the federal court system in the Ninth Circuit and who attempted to add their same-sex spouses to their federal health insurance policies only to be told that DOMA made that impossible, the Judges ordered that their employees' spouses be granted federal benefits, with Judge Stephen Reinhardt declaring DOMA unconstitutional and Chief Judge Alex Kosinski saying that DOMA was irrelevant to the issue of employment benefits.

Because they work for the federal government, the employees--staff attorney Karen Golinski and deputy federal public defender Brad Levenson--are prohibited from suing their employers in federal court, hence these cases were heard at employment dispute resolution tribunals rather than at full-fledged trials and may have limited precedential value.

However, the refusal of the Office of Personnel Management to accept the decision of the judges in these cases set the stage for an important showdown with the federal government. The eventual resolution of these particular cases may involve the separation of powers between the judicial and executive branches of government as much as it does the constitutionality of DOMA, which may be finessed rather than clarified in the resolution of these cases.

Following the refusal of the Office of Personnel Management to accept the result of the grievance ruling, Golinski received permission to file suit in federal court.

The Massachusetts Cases

Two significant decisions from Massachusetts, handed down in July 2010, raised issues that figured prominently in the decision by the United States Supreme Court invalidating section 3 of DOMA in another case.

The two cases were tried together: *Gill et al. v. Office of Personnel Management* and *Commonwealth of Massachusetts v. United States Department of Health and Human Services et al.*, brought respectively by Gay & Lesbian Advocates & Defenders (GLAD) on behalf of individual plaintiffs (among them Dean Hara, widower of former Congressman Gerry Studds) who had suffered loss of benefits because of DOMA and by the Office of the Attorney General of the Commonwealth of Massachusetts on behalf of the state. In ruling on the companion cases, Judge Joseph L. Tauro, a well-respected federal district judge who has served on the bench since 1972, declared Section 3 of the Defense of Marriage Act unconstitutional.

Judge Tauro, relying heavily on such Supreme Court rulings as *Romer v. Evans* and *Lawrence v. Texas*, ruled that this Section violated the Fifth Amendment's equal protection principles and the Tenth Amendment's reservation of unenumerated powers to the states.

In his opinion in the *Commonwealth* case, Judge Tauro pointed out that the federal government had never before not accepted a state's definition of marriage. He concluded, "This court has determined that it is clearly within the authority of the Commonwealth to recognize same-sex marriages among its residents, and to afford those individuals in same-sex marriages any benefits, rights, and privileges to which they are entitled by virtue of their marital status. The federal government, by enacting and enforcing DOMA, plainly encroaches upon the firmly entrenched province of the state, and, in doing so, offends the Tenth Amendment. For that reason, the statute is invalid."

In the *Gill* case, Judge Tauro found that DOMA was enacted with discriminatory intent. He concluded that even under a deferential "rational standard" review the act could not pass constitutional muster. There is, the judge wrote, "no fairly conceivable set of facts that could ground a rational relationship between DOMA" and a legitimate government interest.

He declared, "where, as here, 'there is no reason to believe that the disadvantaged class is different, in relevant respects' from a similarly situated class, this court may conclude that it is only irrational prejudice that motivates the challenged classification. As irrational prejudice plainly never constitutes a legitimate government interest, this court must hold that Section 3 of DOMA as applied to Plaintiffs violates the equal protection principles embodied in the Fifth Amendment to the United States Constitution."

In the two opinions, Judge Tauro addressed every argument in favor of DOMA advanced by Congress in 1996 and by the Department of Justice in 2009 and found them all implausible and irrational.

Judge Tauro issued a stay of his rulings pending an appeal by the government to the United States Court of Appeals for the First Circuit.

Marriage equality advocate Evan Wolfson hailed the decisions by Judge Tauro in a press release the day the ruling was announced: "Today's ruling affirms what we have long known: federal discrimination enacted under DOMA is unconstitutional. The decision will be appealed and litigation will continue. But what we witnessed in the courtroom cannot be erased: federal marriage discrimination harms committed same-sex couples and their families for no good reason."

Other Cases

On November 9, 2010, GLAD filed another lawsuit challenging section 3 of DOMA, *Pederson v. Office of*

Personnel Management. The plaintiffs are five couples and a widower from Connecticut, Vermont, and New Hampshire, who, solely because of DOMA Section 3, have been denied legal protections for which they are currently eligible and for which they have applied.

As it did in the *Gill* case, GLAD argued that DOMA violates the equal protection clause of the Fifth Amendment.

Also on November 9, 2010, the ACLU LGBT Project filed a lawsuit, *Windsor v. United States*, on behalf of Edith Windsor that sought to declare DOMA unconstitutional on equal protection grounds. Windsor and her late spouse Thea Spyer lived together for 44 years. They were married in Canada in 2007. Because the federal government refused to recognize their marriage, Windsor was forced to pay more than \$350,000 in federal estate taxes when Spyer died in 2009. Had their marriage been recognized, Spyer's estate would have passed to Windsor without any tax.

Another suit challenging DOMA in federal court was *Dragovich v. U. S. Department of the Treasury*, which involves California state employees who were barred because of DOMA from enrolling their same-sex spouses in the state's long-term care program, which is regulated by federal tax law. In a ruling released on January 18, 2011, federal district Judge Claudia Wilken permitted their suit to proceed over objections from the Justice Department and in doing so expressed strong doubts about the constitutionality of DOMA.

Responding to the Justice Department's contention that DOMA simply attempted to preserve the status quo as states resolve the issue of same-sex marriage, Judge Wilken pointed out that "Section three of the DOMA . . . alters the status quo because it impairs the states' authority to define marriage, by robbing states of the power to allow same-sex civil marriages that will be recognized under federal law."

She concluded that adopting a federal definition of marriage was a departure from the status quo, not its preservation; and that the inability of California to extend eligibility for its long-term care insurance program is an example of the disruption to customary practice caused by DOMA.

Reversal at the Justice Department

In a major development, Attorney General Eric Holder announced on February 23, 2011, a reversal of its position that it was bound to defend the constitutionality of DOMA.

The Attorney General announced that on instructions from the President, the Justice Department would no longer defend the constitutionality of Section 3 of the Defense of Marriage Act as applied to same-sex married couples. The Executive Branch will continue to enforce the law unless Congress repeals it or there is a final judicial ruling striking it down, but the Administration would no longer assert its constitutionality in court.

The Attorney General concluded, "After careful consideration, including a review of my recommendation, the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a more heightened standard of scrutiny. The President has also concluded that Section 3 of DOMA, as applied to legally married same-sex couples, fails to meet that standard and is therefore unconstitutional. Given that conclusion, the President has instructed the Department not to defend the statute in such cases. I fully concur with the President's determination."

In addition, the Attorney General pledged to advise courts of the conclusions that the Justice Department has made relative to the constitutionality of the Defense of Marriage Act and of the need for heightened scrutiny in reviewing cases related to sexual orientation discrimination.

Republican Speaker of the House John Boehner quickly arranged for the Bipartisan Legal Advisory Group of

the United States House of Representatives (BLAG) to defend the statute.

In the first case to be decided after the Justice Department announced that it would no longer defend DOMA, the law was again declared unconstitutional.

In a sweeping decision released on June 14, 2011, the Los Angeles-based United States Bankruptcy Court for the Central District of California ruled that DOMA violates the principle of equal protection. In a case known as *In re: Gene Douglas Balas and Carlos A. Morales, Joint Debtors*, involving a married couple whose attempt to file jointly for bankruptcy protection was opposed by the United States Trustee on the grounds that they were both males, the Bankruptcy Court ruled that DOMA violates the U. S. Constitution's Fifth Amendment guarantee of equal protection under the law.

The decision, signed by 20 of the 24 judges of the Court, held that "This court cannot conclude from the evidence or the record . . . that any valid governmental interest is advanced by DOMA as applied to the Debtors. . . . In the court's final analysis, the government's only basis for supporting DOMA comes down to an apparent belief that the moral views of the majority may properly be enacted as the law of the land in regard to state-sanctioned same-sex marriage in disregard of the personal status and living conditions of a significant segment of our pluralistic society. Such a view is not consistent with the evidence or the law as embodied in the Fifth Amendment with respect to the thoughts expressed in this decision. The court has no doubt about its conclusion: the Debtors have made their case persuasively that DOMA deprives them of the equal protection of the law to which they are entitled."

***Golinski* Decision**

On February 22, 2012, the U.S. District Court for the Northern District of California issued a ruling declaring Section 3 of the Defense of Marriage Act (DOMA) unconstitutional. The decision in *Golinski v. Office of Personnel Management* was the third federal court ruling finding the discriminatory statute unconstitutional.

In *Golinski*, Judge Jeffrey S. White, who was appointed to the bench in 2002 by President George W. Bush, declared "that neither Congress' claimed legislative justifications nor any of the proposed reasons proffered by [the Bipartisan Legal Advisory Group of the United States House of Representatives] constitute bases rationally related to any of the alleged governmental interests. Further, after concluding that neither the law nor the record can sustain any of the interests suggested, the Court, having tried on its own, cannot conceive of any additional interests that DOMA might further."

Judge White ruled that the stated goals of DOMA could not pass muster under either a so-called "heightened scrutiny" test or even a lower "rational basis" threshold. He concluded that the appropriate level of scrutiny when reviewing statutory classification based on sexual orientation is heightened scrutiny and noted that "Basing legislation on moral disapproval of same-sex couples does not pass any level of scrutiny."

"The imposition of subjective moral beliefs of a majority upon a minority cannot provide a justification for the legislation. The obligation of the Court is 'to define the liberty of all, not to mandate our own moral code,'" White wrote. He added that tradition cannot itself justify a law. "Instead, the government must have an interest separate and apart from the fact of tradition itself."

After detailing how DOMA fails under both a heightened scrutiny test and a "rational basis" test, Judge White found that DOMA unconstitutionally discriminates against same-sex married couples.

Judge White concluded his 43-page decision: "In this matter, the Court finds that DOMA, as applied to Ms. Golinski, violates her right to equal protection of the law under the Fifth Amendment to the United States Constitution by, without substantial justification or rational basis, refusing to recognize her lawful marriage to prevent provision of health insurance coverage to her spouse."

Dragovich Decision

Dragovich v. U. S. Department of the Treasury went to trial in 2011, and on May 24, 2012, Judge Wilken issued a decision in which she ruled DOMA unconstitutional. She found that Section 3 of DOMA--the federal definition of "marriage" and "spouse"--"violates the equal protection rights of Plaintiff same-sex spouses" and that subparagraph (C) of Section 7702B(f) of the Internal Revenue Code "violates the equal protection rights of Plaintiff registered domestic partners."

She ruled that "both provisions are constitutionally invalid to the extent that they exclude Plaintiff same-sex spouses and registered domestic partners from enrollment in the CalPERS long-term care plan."

She ordered CalPERS not to use DOMA or the relevant tax provision to deny enrollment to same-sex spouses and registered domestic partners in the state. She also ordered that the federal government not disqualify CalPERS's plan from the beneficial tax treatment for following the court order. Finally, Wilken ruled that the decision would be stayed, or put on hold, during an appeal of her decision if one is sought.

DOMA Ruled Unconstitutional by Court of Appeals

On May 31, 2012, a unanimous three-judge panel of the U.S. Court of Appeals for the First Circuit declared Section 3 of the Defense of Marriage Act (DOMA) unconstitutional in the combined cases *Gill v. Office of Personnel Management* and *Massachusetts v. United States*.

The decision, authored by Judge Michael Boudin, who was appointed to the bench by President George H. W. Bush, marked the first time DOMA was declared unconstitutional by a federal appellate court. Chief Judge Sandra Lynch, who was appointed by President Bill Clinton, and Judge Juan Torruella, who was appointed by President Ronald Reagan, joined in Boudin's decision.

The decision upheld the opinion of U.S. District Court Judge Joseph Tauro, issued on July 8, 2010, that the federal law defining marriage as consisting of only one man and one woman violates the equal protection clause of the Fifth Amendment. The Court rejected Judge Tauro's holding that DOMA violated the Tenth Amendment, but it evoked the principles of federalism in reaching its decision.

The Court declined to apply "heightened scrutiny" in testing the legislation, but it relied on recent Supreme Court decisions, such as *Romer v. Evans*, that acknowledged "the historic patterns of disadvantage suffered by the group adversely affected." In those decisions, the Supreme Court, Boudin wrote, "did not adopt some new category of suspect classification or employ rational basis review in its minimalist form; instead, the Court rested on the case-specific nature of the discrepant treatment, the burden imposed, and the infirmities of the justifications offered."

Applying this standard, which is sometimes described as "rational basis with teeth," the Court concluded: "[M]any Americans believe that marriage is the union of a man and a woman, and most Americans live in states where that is the law today. One virtue of federalism is that it permits this diversity of governance based on local choice, but this applies as well to the states that have chosen to legalize same-sex marriage. Under current Supreme Court authority, Congress' denial of federal benefits to same-sex couples lawfully married in Massachusetts has not been adequately supported by any permissible federal interest."

The decision paid far greater credence than deserved to the argument that Congress was not motivated by hostility to homosexuals when it passed DOMA. It did, however, find that "Several of the reasons given [to justify the rational basis of the legislation] do not match the statute and several others are diminished by specific holdings in Supreme Court decisions more or less directly on point. If we are right in thinking that disparate impact on minority interests and federalism concerns both require somewhat more in this case than almost automatic deference to Congress' will, this statute fails that test."

Acknowledging that "Supreme Court review of DOMA is highly likely," the Court stayed the implementation of its decision pending a likely appeal.

Pedersen and Windsor Decisions

Meanwhile the *Pedersen* and *Windsor* cases advanced through the courts, now with the support of the Justice Department rather than with its opposition as in the earlier cases.

On June 6, 2012, New York District Court Judge Barbara S. Jones found Section 3 unconstitutional in the case of *Windsor v. U.S.*. In a 26-page opinion, she declared that DOMA is unconstitutional insofar as it forced Edie Windsor to pay estate taxes after the death of her wife, Thea Spyer, that would not have been owed had she been married to a man.

Judge Jones found DOMA unconstitutional under the lowest level of judicial scrutiny, "rational basis." She declared that Section 3 violated both equal protection and federalist principles and therefore "does not pass constitutional muster."

She awarded judgment in the amount of \$353,053, plus interest and costs allowed by law.

Even though the Department of Justice agreed with the ruling, it filed notice of appeal to the Second Circuit Court of Appeals to facilitate an appeal by BLAG so that the case could subsequently be considered for possible appeal to the United States Supreme Court.

Soon afterwards, on July 31, 2012, in Connecticut, U.S. District Judge Vanessa Bryant also found Section 3 of DOMA unconstitutional in the *Pedersen* case. Ruling for the plaintiffs, she rejected all the purportedly "rational" bases offered by Congress and the Bipartisan Legal Affairs Group as implausible.

The *Windsor* case was heard by a three-judge panel of the Second Circuit on September 28, 2012. On October 18, the Court issued its ruling. Applying "heightened" or "intermediate" scrutiny, a two-judge majority found that DOMA violates the Fifth Amendment's equal protection guarantee. One member of the three-judge panel dissented from the ruling, arguing that the law would be constitutional if reviewed under the "rational basis" standard.

The Second Circuit majority (Chief Judge Dennis Jacobs, a very conservative George H. W. Bush appointee; and Judge Christopher F. Droney, a Barack Obama appointee) wrote that homosexuals satisfy the criteria for being a group to which heightened scrutiny should be applied in considering laws that may discriminate. They conclude that "DOMA's classification of same-sex spouses was not substantially related to an important government interest. Accordingly, we hold that Section 3 of DOMA violates equal protection and is therefore unconstitutional."

With DOMA having been declared unconstitutional by Courts of Appeal of the First, Second, and Ninth Circuits, it was widely believed that the Supreme Court of the United States would rule on the law's constitutionality. The real question was which case would it take. On December 7, 2012, the Court announced that it would review *Windsor*.

DOMA at the Supreme Court

In a 5-4 decision released on June 26, 2013, the last day of its term, the Supreme Court of the United States struck down Section 3 of DOMA in the *Windsor* case. The Court ruled that Section 3 is unconstitutional under equal protection principles.

Written by Justice Anthony Kennedy, the decision finesses the question of whether the law should be reviewed under strict scrutiny. The Court instead declares it will use a "careful" review of laws that are suspicious, thus inching close toward placing sexual orientation classifications in a "suspect class."

The decision declares that DOMA was enacted simply to injure same-sex couples. "DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of that class. The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States."

The Court cites the House of Representatives' Report on the law as proof of Congress' desire to harm gays and lesbians. Kennedy adds pointedly, "Were there any doubt of this far-reaching purpose, the title of the Act confirms it: The Defense of Marriage."

The decision describes DOMA's principal effect as "to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality. . . ."

The law, the majority declares, "undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, . . . and whose relationship the State has sought to dignify.

Moreover, Justice Kennedy adds, DOMA also "humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives."

Echoing the opinion he wrote in the landmark *Romer v. Evans* case in 1996, Justice Kennedy writes, "The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment."

Although the opinion is a narrow one from a bitterly divided Court, it will have immediate beneficial consequences. Legally married same-sex couples are now eligible to obtain a wide range of federal benefits and recognitions that had previously been withheld.

Litigation challenging Section 2 of DOMA, which allows states to refuse to recognize same-sex marriages performed in other states, will no doubt be forthcoming. Given the forthright language used in the *Windsor* opinion, it is difficult to see how any section of DOMA can be deemed constitutional.

State Defense of Marriage Acts

Currently, 29 states have amendments to their constitutions that prohibit same-sex marriage and several others have statutes that prohibit same-sex marriage.

Some of these state amendments and statutes were adopted in the wake of the Hawaii case, as was the federal DOMA, but most of them were placed on state ballots by Republican strategists in the presidential election years of 2000, 2004, and 2008 in a cynical attempt to use same-sex marriage as a "wedge issue" to

motivate their conservative base.

What is especially disturbing about these state constitutional amendments is that many of them ban not only same-sex marriage, but all forms of state recognition of same-sex couples. The Michigan amendment, for example, was interpreted by the Michigan Attorney General to mean that municipalities may not extend domestic partnership health care benefits to same-sex couples, an interpretation upheld by the state's conservative Supreme Court but which is currently under challenge in federal court.

Perhaps the most disappointing defeat in challenging constitutional amendments banning same-sex marriage came in 2012 when, by a margin of 61% to 39%, voters in North Carolina overwhelmingly approved Amendment One, which bans not only same-sex marriage but recognition of any "domestic relation" other than a marriage between a man and a woman. It will likely end domestic partner benefits for unmarried couples in the state and may end recognition of "common-law" relationships between unmarried heterosexual couples.

Although defeating Amendment One was always thought to be a long shot, many believed that it could be done. Polls showed that while 60% of the state's voters were opposed to same-sex marriage, almost 60% were in favor of either same-sex marriage, civil unions, or domestic partnerships. It was believed that Amendment One could be defeated if the electorate were educated to the fact that it banned not only same-sex marriage but also civil unions and domestic partnerships and that it may also wreak other "collateral damage."

Hence, the Protect All NC Families organization, which managed the campaign against Amendment One made the strategic decision to emphasize the collateral damage and relegate the question of same-sex marriage (and gay and lesbian people) to the sidelines.

The campaign issued a number of well-made videos that emphasized the generalized harm that Amendment One would cause. Most of these videos barely mentioned gay and lesbian people. Others in effect endorsed a ban on same-sex marriage but said Amendment One "goes too far."

The strategy was fatally flawed. It conceded too much and it gave the impression that our own campaign was ashamed of gay and lesbian people. It suggested that the collateral damage done to unmarried heterosexual couples was a greater affront than the ban on same-sex marriage itself.

The message was inauthentic from the beginning. Our mobilizing against Amendment One in reality had little or nothing to do with the collateral damage and everything to do with the ban on same-sex marriage.

In contrast to our obfuscation, our opposition defined the question clearly: for them Amendment One was about homosexuality and it was intended to punish gay men and lesbians and to devalue their relationships.

Indeed, for our opponents, the entire campaign was about sin. They unleashed a campaign that can be described only as disgusting. It was utterly unrestrained by any sense of decency. They made no pretense of conducting a civil campaign about policy issues. For them, it was an expression of religious belief. A vote for Amendment One was a vote for Jesus.

Unfortunately, our official campaign was too timid to respond vigorously to the opposition's frank bigotry. Besides, to do so would be "off message," since our side continued the pretense that the campaign was not about homosexuality.

We should have forthrightly defended same-sex marriage. We should have said that same-sex marriage was itself good, good both for same-sex couples and good for the institution of marriage. We should have insisted that it was unfair and unAmerican to deny citizens equal rights.

Marriage equality advocates have had scant success in challenging state DOMAs in state courts. However, the blatant animus and the clear religious tenor of the campaign for Amendment One in North Carolina may offer an opportunity to challenge its constitutionality.

In addition, as the November 2012 election proved, the tide may have turned in terms of popular acceptance of same-sex marriage. In the November 2012 election, not only did two states--Washington and Maryland--ratify marriage equality laws that had passed state legislatures, but one state--Maine--adopted same-sex marriage as the result of a referendum. In addition, Minnesota voters repealed a constitutional ban on same-sex marriage. (Not surprisingly, in the legislative session following the November 2012 election, the Minnesota legislature passed a marriage equality law.)

Moreover, the resounding decision declaring the federal DOMA unconstitutional in the *Windsor* case should offer powerful ammunition to challenge the constitutionality of state DOMAs in both state and federal courts.

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