

Same-Sex Marriage: Capitol Hill in Retreat

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In the November 2012 elections, voters in Maryland and Washington approved laws recognizing same-sex marriage. They joined seven other states-Maine, New Hampshire, Vermont, Massachusetts, Connecticut, New York and Iowa, as well as the District of Columbia- which allow same-sex unions. These jurisdictions are part of what appears to be a growing sea-change in American attitudes about gay marriage. But they only comprise one-sixth of the country's population. Today, thirty-eight states including California still expressly require marriage to be between a man and a woman.[1]

An even bigger challenge to same-sex marriage originates in Capitol Hill, in the form of the federal Defense of Marriage Act (DOMA).[2] It impacts every gay marriage in the country, regardless of locale.

Today, DOMA and California's Proposition 8–one of the majority "one-man, one woman" marriage laws across the nation–are at the center of an accelerating conflict between changing social values and governmental attempts, federal and state, to restrain the definition of marriage.

DOMA: DOMA was signed into law in 1996 by President Clinton after being approved by substantial margins in both houses of Congress. Its origins were both fiscal and moral—it was not explicitly intended to replace each state's autonomy over domestic relations matters. DOMA was spurred by *Baehr v. Lewin*,[3] a 1993 case in which the Hawaii Supreme Court determined that Hawaii's statutory prohibition against same-sex marriages violated the state's constitution. The reaction in Washington DC to the developments in Hawaii was captured in the House Report on DOMA, which worried that, if homosexuals were permitted to marry, they might become "eligible for a whole range of federal rights and benefits."[4] The House Report justified DOMA as advancing government interests in: "(1) defending and nurturing the institution of traditional, heterosexual marriage; (2) defending traditional notions of morality; (3) protecting state sovereignty and democratic self-governance; and (4) preserving scarce government resources."[5]

Reflecting concerns that liberal marital policies of individual states would wreak havoc on the national budget, Section 3 of DOMA included the unambiguous declaration that, for purposes of Federal law, "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."[6]

Because same-sex unions had no legitimacy for Federal purposes under DOMA, the law also provided that no state, territory, possession or Indian tribe was required to recognize same-sex marriages from any other jurisdiction.[7] And under Section 3 of DOMA, same-sex marriages were excluded from a wide range of privileges accorded heterosexual unions. The US General Accounting Office (GAO) produced a compilation in 1997 which identified 1,049 separate categories of benefits, rights and privileges which are contingent on marital status; by 2004, when the GAO updated its report, the number had grown to 1,138 categories.[8] These include insurance benefits for government employees, the ability to file joint tax returns, survivors' benefits under Social Security and many more

One lawsuit has particularly illuminated DOMA's punishing consequences for same-sex unions. Edith Windsor and her partner, Thea Spyer, lived together as a committed couple for more than 40 years. They registered as domestic partners in New York City in 1993 as soon as that option became available and were married in Canada in 2007. New York state law would have recognized the Canadian marriage under principles of comity. Windsor was the sole beneficiary under Spyer's will. When Spyer died in 2009, DOMA prevented Windsor from claiming the estate tax marital deduction available to surviving spouses in opposite-sex marriages. The IRS required that she pay $363,053 in inheritance taxes. Because New York state inheritance tax is based on federal tax status, she would also owe another $275,000 in state tax.

Windsor brought suit in federal district court, contending that DOMA's denial of the inheritance deduction violated her Equal Protection rights. Three months later, in a move highlighting the growing conflict about marital strictures around the country, Attorney General Eric Holder announced that the Justice Department would no longer defend DOMA's constitutionality. Speaking for the Executive branch including President Obama, Holder stated that his review of recent precedent confirmed that a heightened standard of scrutiny should apply to classifications based on sexual orientation, and that section 3 of DOMA could not meet that test. Given that the Executive Branch declined to enforce DOMA, a five-member Bipartisan Legal Advisory Group of the U.S. House of Representatives including three Republicans (BLAG) intervened to defend the constitutionality of DOMA. The United States remained active in the litigation, switching sides to advocate that DOMA

be ruled unconstitutional.

Windsor moved for summary judgment. She argued that the restraints imposed by DOMA should be subject to strict scrutiny because homosexuals are a suspect class; therefore BLAG would have to demonstrate that DOMA had been narrowly tailored to serve a "compelling government interest." BLAG defended DOMA on the grounds that same-sex partners were not a suspect class and the statute required only rational basis review; under that standard, unequal treatment of homosexual partners merely needed to support a "legitimate" governmental interest.

In *Windsor v. United States*, 833 F.Supp.2d 394 (2012), the Southern District of New York did not find that same-sex couples, or homosexuals as a group, were a "suspect class" warranting strict scrutiny. The court noted that Windsor was seeking "to distinguish the precedent in eleven Courts of Appeals that have applied the rational basis test to legislation that classifies on the basis of sexual orientation."[9] Furthermore, the Supreme Court had " 'conspicuously' not designated homosexuals as a suspect class, even though it had . . . . the opportunity to do so."[10]

However, that was not the end of Edith Windsor's day in court, because the Southern District could not discern in DOMA enough to survive even a rational basis inquiry. The statute did not promote an alleged governmental interest in "traditional" marriage, or in childrearing and procreation. Nor could DOMA be justified as the federal government's attempt to avoid unfairness where people in different states had differing eligibility for federal benefits depending on the states' marriage laws. The court challenged DOMA's role in trying to ensure such uniformity among the states, saying that it "does not square with our federalist system of government, which places matters at the 'core' of the domestic relations law exclusively within the province of the states."[11] Finally, the Government's goal of conserving federal funds, however laudable, could not be premised on discriminating against a particular group of people, even under the guise of a rational basis.

The district court granted Windsor's motion for summary judgment and awarded her the $363,053 she had paid in inheritance taxes, plus interest and costs.

BLAG appealed to the Second Circuit, reiterating that rational basis was the applicable standard of review and arguing that DOMA met the threshold. The Circuit Court's analysis was groundbreaking. While it agreed with BLAG that DOMA did in fact have a rational basis, the Second Circuit held that homosexuals were at least a "quasi-suspect" class and required increased scrutiny, beyond mere rationality. Reviewing the Supreme Court precedents that established four parameters for this higher level of scrutiny, the Second Circuit found that "In this case, all four factors justify heightened scrutiny: A) homosexuals as a group have historically endured persecution and discrimination; B) homosexuality has no relation to aptitude or ability to contribute to society; C) homosexuals are a discernible group with non-obvious distinguishing characteristics, especially in the subset of those who enter same-sex marriages; and D) the class remains a politically weakened minority."[12]

As a "quasi-suspect" class, same-sex marital partners warranted "intermediate scrutiny." Statutes based on that classification had to be "substantially related" to an "important government interest." Using that test, a majority of the Second Circuit found that the Government's asserted interests--to maintain a consistent definition of marriage, to save federal funds and to promote "responsible procreation"--were insufficient. It found that Section 3 of DOMA violated the Fifth Amendment's Equal Protection clause and was unconstitutional. Affirming the Southern District's decision, it saved Edith Windsor $363,053 in federal tax and denied the IRS that amount.

Even before the Second Circuit decision was rendered, the United States had petitioned for certiorari. It was granted on December 7, 2012. The primary question presented in *United States v. Windsor* (No. 12-307) is whether Section 3 of DOMA violates the equal protection component of the Due Process clause of the Fifth Amendment.[13] The case was argued on March 27, with a decision expected by June 2013.

California and Proposition 8. Litigation against DOMA has not occurred in a vacuum. State marriage definitions are also being challenged across the country. "Proposition 8" moved California into the national stage. California voters had originally approved a "one-man, one-woman" marriage definition in 2000, but that law was struck down in June 2008 by the California Supreme Court as violating the state Constitution. In November 2008, after some 18,000 gay marriages were performed in the state over the preceding five months, California voters again spoke, adding a new Section 7.5 to Article I of the California Constitution: "Only a marriage between a man and a woman is valid or recognized in California."[14]

Not surprisingly, Prop 8 was overwhelmingly defeated in most of California's Pacific Coast counties, where lifestyle freedom has long been embraced. But inland, virtually every county in the State opted for the "one man-one woman" marital configuration, buoyed by support from the Catholic Church, the Mormon Church, a host of then-Republican presidential candidates and a significant majority of African-American voters.

Litigation commenced against Proposition 8 in 2009. The California Supreme Court upheld its constitutionality.[15] A case was then brought in Federal District Court in San Francisco by two same sex couples, Kristin Perry and Sandra Stier and Paul Katami and Jeffrey Zarillo, after they were denied marriage certificates. They claimed that the California one-man, one-woman marriage law violated their Due Process and Equal Protection rights under the Fourteenth Amendment, preventing them from exercising their fundamental right to marry.[16] As in DOMA's case, the executive branch--California's attorney general and Governor--refused to defend the law and the sponsors of Proposition 8 intervened. Famed litigators David Boies and Theodore Olson joined forces to represent the gay couples.

The court agreed with the plaintiffs. In *Perry v. Schwarzenegger,* 704 F.Supp.2d 921 (N.D. Ca. 2010), U.S. District Chief Judge Vaughn Walker[17] overturned Proposition 8. He found that marriage is a fundamental right. Because Proposition 8 limited that right, it was subject to strict scrutiny; California had to establish that the law

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was narrowly tailored to protect a compelling state interest. In this case, Prop 8 did not even sustain a rational basis challenge, because it did not advance any of the state's purported goals–to promote childrearing by biological parents, encourage procreation, be cautious of social change, protect religious liberty, or control children's education. The court found that the people of California, by using their initiative power to target a minority group and withdraw the right to marry which that minority group had once possessed under the California State Constitution, violated the federal Constitution. "An initiative measure adopted by the voters deserves great respect... When challenged, however, the voters' determinations must find at least some support in evidence. This is especially so when those determinations enact into law classifications of persons. Conjecture, speculation and fears are not enough. Still less will the moral disapprobation of a group or class of citizens suffice, no matter how large the majority that shares that view. The evidence demonstrated beyond serious reckoning that Proposition 8 finds support only in such disapproval."[18]

The court evaluated and debunked a large number of maxims proffered by Proposition 8 proponents. These include the belief that same-sex couples do not provide the same level of parenting as heterosexual couples; that homosexuals do not remain in long-term, committed relationships; that children exposed to same-sex couples will become homosexual, and the like. The opinion concluded that Proposition 8 had no purpose other than to impose the majority's private disapproval of gays, lesbians, and their relationships and to take away from them the designation of marriage and its recognized societal status.

The district court result did not restore marriage rights to gay couples in the Golden State. The decision was stayed pending appeal, preventing same-sex marriages from being performed in California. In February 2012, proponents requested to have to the case reviewed en banc by the Ninth Circuit Court of Appeals. The Circuit Court refused to rehear the case, looking to resolution at the Supreme Court. On December 7, 2012, the Supreme Court granted certiorari. *Perry v. Hollingsworth* was heard on March 26, 2013, the day before the court heard DOMA arguments.

Windsor and *Perry* reflect an almost unimaginably rapid shift in public sentiment. Whereas only one-third of the nation accepted same-sex marriage a decade ago, today a majority hold that view. In addition to President Obama, former Presidents Clinton and H.W. Bush support the right to same-sex marriage, as do a growing number of Republican politicians and conservative thought leaders.[19] On March 15, Senator Rob Portman of Ohio became the most prominent Republican lawmaker to back gay rights when he reversed his opposition to same-sex marriage because his son is gay.[20]

Around the country, other cases are being delayed in light of the Supreme Court's expected guidance on the issue.[21] The summer of 2013 looms as a watershed in the annals of American domestic relations.

NOTES

1. The National Conference of State Legislatures points out that twenty-nine states have added such language to their constitutions, usually by popular vote; a further nine states have simply adopted statutes with similar wording. http://www.ncsl.org/issues-research/human-services/state-doma-laws.aspx (last accessed March 3, 2013).
2. 28 U.S.C. §1738C (1996)
3. Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44 (1993).
4. H.R. Rep. No. 104-664, at 10 (1996).
5. *Id.*, at 12.
6. 28 U.S.C. §1738C (1996) states: "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 a wife."
7. *Id.* "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."
8. http://www.gpo.gov/fdsys/pkg/GAOREPORTS-GAO-04-353R/pdf/GAOREPORTS-GAO-04-353R.pdf (last accessed March 3, 2013)
9. Windsor v. U.S., 833 F.Supp.2d 394, 402 (2012).
10. *See* Massachusetts v. HHS, 682F.3d 1, 15 (2012) (noting that "[n]othing indicates that the Supreme Court is about to adopt this new suspect classification when it conspicuously failed to do so in *Romer*").
11. *Windsor, supra*, at 406.
12. Windsor v. U.S., 699 F.3d 169, 182 (2d Cir. 2012).
13. The Court also requested argument on whether it has jurisdiction to hear the case given the Executive Branch's agreement with the Circuit Court that DOMA is unconstitutional and whether BLAG has standing to bring the case.
14. Ca. Const. art I, § 7.5.
15. Strauss v. Horton, 207 P.3d 48 (2009).
16. Perry v. Schwarzenegger, 704 F.Supp.2d 921 (N.D. Ca. 2010).
17. Chief Judge Vaughn is gay, a factor which detractors attempted to use when attacking the legitimacy of the *Perry* result.
18. *Perry, supra* at 938.
19. http://www.nytimes.com/2013/02/26/us/politics/prominent-republicans-sign-brief-in-support-of-gay-marriage.html (last accessed March 8, 2013).
20. http://www.reuters.com/article/2013/03/15/us-usa-portman-gaymarriage-idUSBRE92E0G020130315 (last accessed March 19, 2013).
21. In Michigan, for example, a federal judge is delaying his decision in a case challenging Michigan's law which currently prevents same-sex parents from adopting one-another's children http://www.freep.com/article/20130307/NEWS06/303070097/Judge-to-hear-challenge-to-Michigan-ban-on-same-sex-marriage-today (last accessed March 10, 2013).