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Verdict

July 26, 2011

Joanna L. Grossman

"Respect" or "Defend" Marriage? The Senate Considers a Bill to Repeal the Defense of Marriage Act of 1996 (DOMA): Part One in a Two-Part Series of Columns



Last week, the Senate Judiciary Committee held hearings on the impact the federal Defense of Marriage Act (DOMA)—through which, in 1996, Congress took a staunch stand against same-sex marriage—has had on gay and lesbian families. The hearings were held as part of the consideration of a new bill, the Respect for Marriage Act of 2011 (S.B. 398), which is currently pending in the Senate.

The new bill would reverse some of the effects of DOMA; for this reason, it should be passed into law. The federal DOMA, which started out as an ill-thought-out statement of principle, has now spawned a legal and bureaucratic mess. The time has thus come for DOMA to go.

The Defense of Marriage Act (DOMA) and Its Origins

Congress enacted DOMA in 1996, after very brief deliberation and hearings. DOMA passed both houses of Congress by a wide margin—342-67 in the House and 85-14 in the Senate. And somewhat surprisingly, a Democratic president, Bill Clinton, signed it swiftly into law.

DOMA does two things. Section Two of the Act purports to give states the right to refuse recognition to same-sex marriages that have been celebrated in other states. And, Section Three provides that, for any federal-law purpose, the word “marriage” means only a legal union between one man and one woman, and a “spouse” refers only to someone of the opposite sex.

DOMA was a reactionary response to the first real possibility of legal same-sex marriage in the United States. In 1996, Hawaii was on the verge of legalizing same-sex marriage. It never actually did, but it would have been, at that point in time, the first state to do so. The state’s highest court had ruled, in *Baehr v. Lewin* (<http://law.justia.com/cases/hawaii/supreme-court/1996/18905-2.html>) (2003), that banning same-sex marriage is a form of sex discrimination—for men were allowed to marry women, but women were not allowed to marry women—that merited the highest level of judicial scrutiny. And it was clear to observers that the application of such a strict form of scrutiny was likely to mean that the same-sex marriage ban would be held unconstitutional under the Hawaii constitution.

Hawaii loomed large in the growing national controversy over same-sex marriage. Prior to 1996, there was very little in the way of law on same-sex marriage anywhere in the United States. No state explicitly allowed same-sex marriage, but very few explicitly banned it either. Most state marriage laws were silent on the gender of the parties.

A handful of court challenges in the 1970s had gone nowhere, producing a set of court opinions that merely relied on the dictionary definition of marriage to restrict it to heterosexuals, and refused to seriously engage with the possibility of a constitutional problem.

And in the 1980s, the focus was on other gay rights issues, as well as efforts to pass local domestic partnership ordinances, open to same-sex couples, that would carry with them more limited rights than marriage would have offered.

But the 1990s saw a second round of same-sex marriage court challenges, including the one in Hawaii. These challenges were carefully aimed at *state* constitutions in order to prevent an adverse ruling from the U.S. Supreme Court that would affect every state. But unlike in the 1970s, there was now growing support for gay rights and the firm entrenchment of a constitutional right to marry. And these developments made success in the court challenges more likely (and thus made those challenges more threatening).

Indeed, the litigation in Hawaii thrust the key normative question into the national spotlight: Should same-sex couples be allowed to marry? And it also raised a follow-up question: If Hawaii were to allow same-sex marriage, would that effectively mean that such marriages would be thrust upon every state?

Both opponents and proponents of same-sex marriage made the same assumption about the role Hawaii would play in the national landscape. Evan Wolfson, a strong proponent, argued that many same-sex couples “in and out of Hawaii” would take advantage of such a “landmark victory”; and the “great majority of those who travel to Hawaii to marry will return to their homes in the rest of the country expecting full legal nationwide recognition of their marriage unions.” Opponents, especially those in Congress, envisioned the same set of events. Senator Trent Lott argued that Hawaii could be left alone if “such a decision affected only Hawaii.” But it wouldn’t, he argued: “[A] court decision . . . would raise threatening possibilities in other States.”

DOMA was thus an effort to “defend” traditional marriage against potential legalization of same-sex marriage in Hawaii, and in any other state that might see fit to legalize it. The defense was two-fold: (1) DOMA allowed states to avoid compelled recognition of same-sex marriages celebrated in other states; and (2) DOMA allowed the federal government to ignore same-sex marriages celebrated in any American state, or anywhere abroad.

The Practical Implications of DOMA: Why They Did Not Take Effect Until 2004

For several years after DOMA was passed, it had no meaning whatsoever. Hawaii never did legalize same-sex marriage; while *Baehr* was pending on remand, Hawaii voters amended the state constitution by referendum to give the legislature the power to ban same-sex marriage. The legislature did just that. So DOMA, at this time in history, was just background noise—“defending” marriage against an attack that was still a threat, not a reality.

DOMA became at least tangentially relevant in the United States in 2001, when the first same-sex marriages were legally celebrated in foreign jurisdictions like Canada. (Eventually, several countries, including Canada, Belgium, the Netherlands, South Africa, Argentina, and Spain would legalize same-sex marriage.) Normally, a marriage in the foreign country would be recognized in an American state as long as it was valid where celebrated. But despite the potential for a conflict with DOMA, there were no court cases at this stage challenging any state’s refusal—or the federal government’s refusal—to give effect to same-sex marriages legally celebrated in a foreign jurisdiction.

DOMA only became relevant—and problematic—when the first same-sex marriages were celebrated in the U.S. By virtue of a 2003 ruling of the state’s highest court, in *Goodridge v. Department of Public Health* (<http://law.justia.com/cases/massachusetts/supreme-court/volumes/440/440mass309.html>), Massachusetts began issuing marriage licenses to same-sex couples in May, 2004.

Section Two of DOMA: Why It Had No Real Effect

Section Two of DOMA was ineffectual. It ostensibly granted states the right to refuse recognition to each other's same-sex marriages. Technically, this provision of DOMA **amended** (<http://law.justia.com/codes/us/title28/28usc1738c.html>) the federal **Full Faith and Credit Act** (<http://law.justia.com/codes/us/title28/28usc1738.html>) to provide that states need not grant "full faith and credit" to same-sex marriages. And, four-fifths of the states acted accordingly and passed so-called mini-DOMAs—statutes or constitutional amendments banning both the celebration and recognition of same-sex marriages.

But full faith and credit has never been understood to compel interstate marriage recognition. Instead, the "exacting" obligations of full faith and credit have been reserved for final judgments in judicial proceedings—including divorce. And marriage is not the product of a court judgment; it is merely the application of a state law, which requires only that other states meet "certain minimum requirements" of full faith and credit. States can still prefer their own law—including their law denying same-sex marriage—over the competing choice of another state—one allowing same-sex marriage—as long as the choice is "neither arbitrary nor fundamentally unfair."

The law of interstate marriage recognition—which is completely independent from the law of marriage celebration, as I have explained in **a prior column** (<http://writ.news.findlaw.com/grossman/20080206.html>)—has always left room for states to refuse recognition to marriages to which it strenuously objected.

Marriages are generally valid everywhere if they were valid where celebrated. But the general rule had exceptions for marriages that violated "natural law" or violated positive law (such as a statute expressly denying recognition for a certain type of marriage). States that prohibited interracial marriage, for example, sometimes refused to recognize such marriages if they had been celebrated elsewhere, even if they were validly celebrated there. Thus, Section Two of DOMA did not grant the states any right they did not already seem to have.

Unless and until the Supreme Court decides that the right to marry a person of the same sex is fundamental, and thus deserving of protection within the federal constitutional right of privacy; or the Court decides that sexual orientation classifications are inherently suspect and deserving of heightened scrutiny under the Equal Protection Clause, states do, and will continue to have discretion to deny recognition to same-sex marriages—and they still would have that same discretion, even if DOMA were repealed.

Conversely, if denying recognition to same-sex marriages were to be held by the Court to rise to the level of a federal constitutional violation, then states would also have to honor such marriages—even if DOMA were to stay on the books.

But the same cannot be said for Section Three of DOMA. The provision stating that same-sex marriages cannot be recognized for any federal law purpose brings with it unnecessary hardships for gay and lesbian married couples, as well as a wide variety of practical and bureaucratic hassles.

The second of this two-part series will consider the impact of Section Three, legal challenges to its validity, the changing national landscape that has made it increasingly troubling, and the current effort to repeal it.



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