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

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Recently, the Senate Judiciary Committee held hearings on the impact that the federal Defense of Marriage Act (DOMA)—through which 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 was introduced by Senator Dianne Feinstein (D-CA) and is currently pending in the Senate. A similar bill has been introduced in the House of Representatives.

As I discussed in Part One of this two-part series (http://verdict.justia.com/2011/07/26/respect-or-defend-marriage-the-senate-considers-a-bill-to-repeal-the-defense-of-marriage-act-of-1996-doma/) of columns for Justia’s Verdict, the new bill would reverse DOMA to the extent that DOMA defines marriage, for federal law purposes, as a union between one man and one woman. This provision of DOMA, Section Three (codified as 1 U.S.C. § 7 (http://www.law.cornell.edu/uscode/1/7.html)), has imposed unfair disadvantages on legally married gay couples, and has created a bureaucratic nightmare.

In this Part of the series, I will discuss the complications created by Section Three, court challenges to its validity, and the changing national landscape that has made Section Three increasingly troubling. Regardless of whether this current repeal effort succeeds, there is no question that Section Three has survived too long.

In Contrast to Section Two of DOMA, Section Three Has True Importance and Influence

In Part One of this two-part series of columns, I discussed why Section Two of DOMA, which gave the states the right to refuse recognition to same-sex marriages from other states, is essentially irrelevant: States already had that right under standard principles of marriage recognition law. Only a Supreme Court ruling—to the effect that the refusal to recognize same-sex marriages violates the federal constitution—could alter that common-law right.

Section Two is nonetheless symbolically troubling, because it reinforces a message of second-class citizenship and invites states to categorically refuse to recognize a particular type of marriage, an historically unprecedented
Section Three of DOMA, however, has real meaning and effect—and thus needs to be reckoned with. This is the provision that would be repealed by the proposed Respect for Marriage Act of 2011.

The Concrete Ways in Which Section Three of DOMA Matters—and Causes Harm

When those first marriage licenses were issued to same-sex couples in Massachusetts in 2004, the federal-law provision of DOMA began to matter. Couples who married in Massachusetts were, in essence, married only while in Massachusetts. On the state-law front, virtually every other state refused to give effect to those marriages, as discussed above.

Moreover, because of DOMA, the Massachusetts marriages were ignored for all federal-law purposes as well. Legally married same-sex couples could not file joint federal tax returns. A non-citizen same-sex spouse could not petition for citizenship based on marriage to a citizen. A same-sex spouse who received insurance benefits from the other spouse’s employer had to pay federal income taxes on them, whereas an opposite-sex spouse would not have to pay any such taxes. Same-sex spouses could not take advantage of the marital estate-tax exemption, or collect Social Security survivor’s benefits (a particularly cruel result, as it affected the bereaved and, often, the elderly).

This provision of DOMA sometimes hurts the government as well. To take just one example, a same-sex spouse’s assets need not be considered when the federal government was determining an individual’s eligibility for Medicaid or other poverty-relief programs. Thus, the government might end up paying benefits because of the insistence on ignoring the existence of a marriage.

Usually, the Federal Government Relies on State Definitions of Marriage—but Not in Section Three of DOMA

What’s most notable about Section Three of DOMA is how unusual it is for the federal government to use its own definition of marriage—or of any family relationship, for that matter—rather than borrowing such definitions from the states. Aside from a nineteenth-century federal law criminalizing polygamy (which I discussed in a prior column (http://writ.news.findlaw.com/grossman/20101004.html)), the federal government is generally not in the business of defining marriage or restricting its validity.

To the contrary, the many federal laws that turn on marital status simply defer to each state on the question of whether any particular couple is legally married. This is true even though the result is that, sometimes, couples in different states might be similarly situated but treated differently under federal law because of variations in state marriage law. (First cousins, for example, can legally marry in about half the states, and would be treated as married under federal law as long as they solemnized their union in one of those states.)

Section Three of DOMA, which categorically refuses to recognize any marriage that deviates from a federal-law definition, thus represents an unusual power grab by the federal government. And it is an ironic rebuke of federalism for the conservative sponsors who championed the bill, and who would champion federalism—styled as “states’ rights”—in virtually any other context.

The Problem of DOMA’s Continued Existence in a New Legal World of Great Acceptance of Same-Sex Marriage

The legalization of same-sex marriage by just one state—Massachusetts—made DOMA real; it gave the federal law “teeth.” But it is the many same-sex marriage developments that have followed that have truly made DOMA seem silly and impractical.

Although Massachusetts was alone for several years in issuing marriage licenses to same-sex couples, it is now joined by five other states and the District of Columbia. The most recent addition was New York, which saw its first same-sex weddings celebrated on July 24, 2011. (I chronicled the legislative battle that brought a marriage
In addition, a growing number of states now offer marriage-equivalent statuses like the civil union or a robust form of domestic partnership. By the end of 2011, same-sex couples will be able to avail themselves of all the benefits of marriage in more than one-quarter of the states.

Moreover, because same-sex marriage or an equivalent is available in some of the most populous states in the Union, it is now the case that almost half of America’s population lives in one of the states where such unions can be formally recognized. And because marriage is available to non-residents, anyone with the ability to travel can enter into a same-sex marriage. The sheer number of same-sex marriages that exist, and will predictably continue to be entered into in the years to come, makes a federal law that refuses to acknowledge them even less defensible than it already was.

The Lawsuits Challenging Section Three of DOMA

There are lawsuits now pending in several jurisdictions that challenge the validity of DOMA’s Section Three. Last summer, a federal district judge in Massachusetts issued rulings in two companion cases, Commonwealth of Massachusetts v. HHS and Gill v. Office of Personnel Management, in which he invalidated this provision. In these rulings—which I analyzed in prior columns that are available here and here—the court concluded that Congress had overstepped its bounds on a variety of grounds. Regulating marriage is a “core attribute of state sovereignty,” the court wrote, and is best left to the states. These rulings are currently on appeal.

A similar case, Pedersen v. OPM—which challenges the validity of applying Section Three to plaintiffs who were married in Connecticut, Vermont, and New Hampshire—is pending in federal court as well. The New York Attorney General, Eric Schneiderman, has filed a brief in a DOMA challenge that is currently pending in the Southern District of New York. In that case, Windsor v. United States, the widow of a same-sex spouse, married in Canada, is seeking a refund of estate taxes that would not have been owed had the federal government given effect to the couple’s marriage.

Because New York now allows same-sex couples to marry, it has a greater stake in the federal government’s mandate of non-recognition via DOMA than it previously did. Schneiderman’s brief argues not only, as the plaintiff’s does, that Section Three violates the Equal Protection Clause of the federal constitution, but also that Section Three violates the Tenth Amendment’s protection for state sovereignty.

Lawsuits making these types of arguments about the (in)validity of Section Three are only going to multiply in number as same-sex marriage expands to a greater portion of the population.

The Obama Administration Has Decided to No Longer Defend Section Three of DOMA in Court, And Has Taken Action to Reduce DOMA’s Impact

Further complicating matters, the Obama Administration declared in February 2011 that it will no longer defend Section Three of DOMA—at least in those jurisdictions in which there is no binding precedent regarding the level of scrutiny that is appropriate for laws including sexual-orientation classifications. The Administration’s position is that such classifications are entitled to heightened scrutiny and, further, that this provision of DOMA cannot survive such scrutiny.

The federal government has taken other steps to reduce the impact of DOMA, as well. For example, the State Department recently began allowing foreign-service employees to

add same-sex partners to their orders. And the Department of Homeland Security acceded to the request of a Venezuelan man, who legally married to another man in Connecticut, to cancel his deportation order. The man had been denied legal residency as a spouse because of DOMA. The cancellation signaled the possibility that the government may be backing away from strict enforcement of DOMA in the immigration context.

Taking its refusal-to-defend stance one step further, the Department of Justice has filed a brief in \textit{Golinski v. Office of Personnel Management}, in which it argues affirmatively that Section Three is unconstitutional. The brief argues that there is no justification for differential treatment of same-sex couples and that the legislative history of DOMA “evidences the kind of animus and stereotype-based thinking that the Equal Protection Clause is designed to guard against.”

In addition, President Obama has come out in favor of the Respect for Marriage Act. According to an official statement (http://www.whitehouse.gov/blog/2011/07/19/president-obama-supports-respect-marriage-act) on The White House Blog, the President “has long called for a legislative repeal of the so-called Defense of Marriage Act (DOMA), which continues to have a real impact on the lives of real people – our families, friends and neighbors.” Repealing Section Three would “uphold the principle that the federal government should not deny gay and lesbian couples the same rights and legal protections as straight couples.”

All of these developments combine to make Section Three of DOMA ripe for repeal. Through DOMA, Congress declared its opposition to same-sex marriage. But Congress’s efforts to “defend” marriage not only were misguided, but also failed even to accomplish the purposes the statute’s drafters thought they would, thus failing even on its own (discriminatory and objectionable) terms.

It’s now high time for Congress to accept defeat, and to restore the tranquility of a system in which only one sovereign determines whether a marriage is valid or not. Any other system is unworkable and should be discarded.