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Joanna L. Grossman

Maurice A. Deane School of Law at Hofstra University

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Verdict

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[Joanna L. Grossman](#)

Two More Nails in DOMA's Coffin: Courts Invalidate Federal Law's Rejection of Same-Sex Marriage



In the last two weeks, two federal courts have invalidated Section Three of DOMA, which defines marriage for all federal-law purposes as a union between a man and a woman.

In *Commonwealth v. U.S. Department of Health and Human Services*

(<http://law.justia.com/cases/federal/appellate-courts/ca1/10-2214/10-2214-2012-05-31.html>), the U.S. Court of Appeals for the First Circuit held that the provision runs afoul of the federal constitution's guarantee of equal protection of the law. In *Windsor v. U.S.*, a federal district court in New York did the same. In both cases, the court noted the utter lack of any connection between any legitimate federal interest and a law that singles out same-sex married couples for special, adverse treatment.

These courts have joined a growing chorus of opinion—expressed, now, by constituents of all three branches of government—that DOMA has run its course. From which branch will the final nail in DOMA's coffin come?

The Hastily-Enacted Defense of Marriage Act of 1996 (DOMA)

As I have described in more detail in [a previous column \(http://verdict.justia.com/2011/07/26/respect-or-defend-marriage-the-senate-considers-a-bill-to-repeal-the-defense-of-marriage-act-of-1996-doma\)](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), DOMA was enacted in 1996 in a misguided, and ultimately unsuccessful, attempt to ward off same-sex marriage in the United States. It seemed likely at the time that Hawaii might legalize same-sex marriage due to an opinion of the state's supreme court, *Baehr v. Lewin*, holding that a ban on same-sex marriage was a form of sex discrimination that merited the highest form of judicial scrutiny.

Opponents of same-sex marriage feared that legalization in one state would effectively mean legalization nationwide, because other states would be forced to give effect to Hawaii's same-sex marriages under the federal Constitution's Full Faith and Credit Clause. The premise underlying this fear was false—the Full Faith and Credit Clause's guarantee has never been understood to apply to marriages, and states have always had, and have at times exercised, the discretion to withhold their recognition of out-of-state marriages of which they strongly disapproved. Still, Congress was undeterred.

After only a single day of hearings, and no findings of fact, Congress passed DOMA by a wide margin—342-67 in the House and 85-14 in the Senate. Then-President Bill Clinton signed DOMA 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, as noted above, that federal law will treat only heterosexual unions as marriages for any federal-law purpose.

Unless and until the U.S. Supreme Court rules that all bans on same-sex marriage violate the federal Constitution, states are free to refuse recognition to same-sex marriages from other jurisdictions. Indeed, the vast majority of states have adopted statutory provisions and/or constitutional amendments to adopt a categorical rule of non-recognition. There has thus been no litigation over the validity of Section Two of DOMA, since states could refuse recognition to other states' same-sex marriages even without it.

Section Three of DOMA, however, is a different story. Once same-sex marriage became a reality in the U.S. and neighboring jurisdictions, the U.S. government was forced to contend with the tens of thousands of same-sex married couples who (rightfully) want full recognition of their unions. But Section Three prevents that from happening, with complicated and unfair results. The two recent opinions on which I'll focus in this column showcase just some of the difficulties of a system in which a marriage is valid at one level of government, but not another, as well as the irrationality of this provision of DOMA.

The Claims in the *Gill* and *Commonwealth v. DHHS* Cases

The First Circuit's recent ruling in *DHHS* is actually a consolidated appeal from two separate cases, which present the same constitutional challenge to Section Three of DOMA.

In the first case, *Gill v. Office of Personnel Management*, a group of same-sex couples who were legally married in Massachusetts, sued because they were each denied some marriage-based entitlement by the federal government. Among the entitlements denied were spousal health benefits for federal employees, retirement and survivor benefits under the Social Security system, and joint filing status with the IRS. In each instance, the married couple presented satisfactory proof of their marriage to the federal agency in question—and in each instance, they were told, nevertheless, that Section Three of DOMA prevents the federal government from giving effect to the marriage.

The various agencies at issue were no doubt applying Section Three of DOMA exactly as Congress wrote and intended it. Under DOMA, these same-sex marriages were to be ignored under federal law, even though each of the applicable federal statutes otherwise defers to state law in determining marital status. (This deference is a common feature of federal statutes, which routinely rely on state law to supply definitions or substantive content. This means, in turn, that residents of different states do not necessarily have the same entitlements under federal law.)

The Social Security laws, for example, grant survivors' benefits to dependent children when a wage-earning parent dies if and only if the state in which the wage-earner lived would itself recognize a parent-child relationship. Thus, to take one unusual example, a child conceived after the death of either parent (through the use of frozen sperm, eggs, or embryos) may or may not be entitled to federal Social Security benefits as a surviving child of the deceased parent, depending on the state in which the wage-earner resided. In a very recent opinion, *Astrue v. Capato* (<http://supreme.justia.com/cases/federal/us/566/11-159/>), the Supreme Court affirmed that benefits in this situation are governed primarily by state inheritance law. (I have written about this opinion [here](http://verdict.justia.com/2012/05/29/the-supreme-court-on-the-social-security-rights-of-posthumously-conceived-children) (<http://verdict.justia.com/2012/05/29/the-supreme-court-on-the-social-security-rights-of-posthumously-conceived-children>).

In the second case, *Commonwealth v. HHS*, Massachusetts sued to protect its right to honor its own marriages without risking the loss of federal funding. In administering several of its state programs, Massachusetts, like other states, relies on federal funding. With respect to several of these programs, Massachusetts was put in the position of having to refuse recognition to its own marriages (specifically, same-sex marriages legally contracted in Massachusetts) as a condition of continuing to receive that federal funding.

For example, Massachusetts maintains two cemeteries that are used for veterans and their families. But because DOMA says that a “spouse” is only a party to an opposite-sex marriage, a same-sex spouse cannot be buried there—even if he or she was legally married to the veteran in Massachusetts. In response to an inquiry from Massachusetts’ veterans’ affairs office, the federal government explained that it would be entitled to “recapture” millions of dollars in federal funding for the cemeteries if Massachusetts were to allow same-sex spouses of veterans to be buried there (without the spouses’ having independent eligibility, such as would derive, for instance, from their being veterans themselves).

Likewise, Massachusetts’ Medicaid program, which provides health care to the poor, is not permitted to consider same-sex marital status when determining eligibility for Medicaid services. Normally, a married couple is assessed as a unit, and the spouses’ incomes are combined when Medicaid makes a ruling about eligibility. But for a same-sex married couple, DOMA forces the state to consider each person as a single individual, even though that approach sometimes leads to different results than would have followed had the couple been, instead, an opposite-sex couple. (The results vary in both directions—leading in different cases to either eligibility or exclusion, depending on the proportion and amount of income earned by each spouse.) Again, when the Commonwealth of Massachusetts asked the federal government about how to handle these eligibility programs, the State was told that it did not have the discretion to recognize same-sex marriages when implementing its Medicaid program.

The Lower Court Opinions in *Gill* and *DHHS*

Both of these cases were heard by the same federal district court judge and decided on similar grounds.

In *Gill*, Judge Tauro ruled for the plaintiffs by holding that DOMA was invalid under equal protection principles as applied to them. He concluded that the law did not pass even the most deferential form of judicial review: the rational-basis test. Even if Congress’s stated objectives for the law were legitimate, none were served by this provision of DOMA, he reasoned. He also invoked the long history of state control over marriage to call the federal government’s attempted foray into question.

In *Commonwealth v. DHHS*, the Commonwealth of Massachusetts objected to being forced to distinguish between opposite-sex and same-sex marriages, when both types of marriage had been legally contracted under Massachusetts law, in the course of administering various federal programs. Massachusetts challenged the constitutionality of Section Three of DOMA on two grounds—first, as a violation of U.S. Constitution’s Tenth Amendment, on the ground that it was usurping powers reserved to the states; and, second, on the ground that it was a violation of the U.S. Constitution’s Spending Clause, because it placed an unconstitutional condition on the state’s right to receive and retain federal funds.

Judge Tauro ruled in favor of the Commonwealth on both counts, considering them together as “two sides of the same coin.” In ruling on the Tenth Amendment claim, the judge relied heavily on marriage-law history, which reflects all-but exclusive control over marriage by the states. The Tenth Amendment reserves all non-enumerated powers to the states, and, in Judge Tauro’s view, Section Three violates the Tenth Amendment by usurping this “core attribute of state sovereignty.” Judge Tauro also ruled that Section Three violates the spending power because, under the principles articulated in *Gill*, it induces the states to act in an unconstitutional manner by denying equal protection to same-sex married couples. (A more complete analysis of Judge Tauro’s rulings is available [here \(http://writ.news.findlaw.com/grossman/20100719.html\)](http://writ.news.findlaw.com/grossman/20100719.html) and [here \(http://writ.news.findlaw.com/grossman/20100720.html\)](http://writ.news.findlaw.com/grossman/20100720.html).)

The First Circuit’s Ruling in *DHHS*

In the recent ruling, the U.S. Court of Appeals for the First Circuit consolidated *Gill* and *DHHS* into a single appeal, which produced a single ruling. It also consolidated its analysis, rooting its invalidation of Section Three in one concept: equal protection. (Because DOMA is a federal, rather than a state, enactment, the relevant principles come from the Fifth Amendment’s Due Process Clause, which has been interpreted to guarantee equal protection as well, rather than from the Fourteenth Amendment’s Equal Protection Clause.)

In its unanimous ruling, the First Circuit held that Section Three of DOMA is unconstitutional. It did not, as the two sets of plaintiffs had urged, apply heightened scrutiny because the law involves a sexual-orientation classification. The Justice Department, the agency normally charged with defending the validity of federal laws, argued in favor of heightened scrutiny—and against the validity of DOMA.

In February 2011, the Attorney General, Eric Holder, issued a statement that the Justice Department would no longer defend the constitutionality of Section Three of DOMA in litigation and, in jurisdictions without binding precedent to the contrary, it would argue for heightened judicial scrutiny to be applied in cases involving Section Three. (The so-called Holder Memo is available [here \(http://www.justice.gov/opa/pr/2011/February/11-ag-222.html\)](http://www.justice.gov/opa/pr/2011/February/11-ag-222.html), and my detailed analysis of it is [here \(http://www.cardozolawreview.com/content/denovo/Grossman.DOMA.2012.Final.PDF\)](http://www.cardozolawreview.com/content/denovo/Grossman.DOMA.2012.Final.PDF).)

The justification for the non-defense of DOMA that was set forth in the Holder Memo was rooted in the “legislative record underlying DOMA’s passage,” which “contains numerous expressions reflecting moral disapproval of gays and lesbians and their intimate and family relationships—precisely the kind of stereotype-based thinking and animus the Equal Protection Clause is designed to guard against.”

A bipartisan group of Congressional representatives, BLAG, has intervened in these and other cases to defend DOMA’s constitutionality. (More recently, in a noteworthy development, President Obama has stated his personal belief that same-sex couples should be allowed to marry.)

In its recent ruling, the First Circuit refused to apply heightened scrutiny, given that the Supreme Court has not yet taken that step, even in cases, like *Romer v. Evans* and *Lawrence v. Texas*, in which it struck down laws that singled out homosexuals for adverse treatment. The *DHHS* court saw no indication “that the Supreme Court is about to adopt this new suspect classification when it conspicuously failed to do so in *Romer*—a case that could readily have been disposed by such a demarche.”

Also despite the plaintiffs’ urging, the First Circuit declined to recognize a constitutional right to same-sex marriage. Here, the court felt inhibited by *Baker v. Nelson*, a 1972 case in which the Supreme Court was first asked to invalidate a state ban on same-sex marriage as a violation of the Equal Protection and Due Process Clauses. The Supreme Court agreed to review the case, but then dismissed it “for want of a substantial federal question.”

What is the import of such a dismissal? BLAG argued that it is dispositive as against all constitutional challenges to anti-same-sex-marriage laws. The First Circuit stopped short of that position, but did conclude that *Baker* limits “the arguments to ones that do not presume or rest on a constitutional right to same-sex marriage.”

The First Circuit focused on three precedents in which the Supreme Court has applied the lowest form of scrutiny and yet has invalidated a governmental enactment on equal protection grounds. These cases include *U.S.D.A. v. Moreno*, in which the Court invalidated a food-stamp program that excluded households comprised of unrelated people; *City of Cleburne v. Cleburne Living Center*, in which the Court invalidated a local ordinance that resulted in the denial of a permit for a group home for the mentally-disabled; and *Romer v. Evans*, in which the Court struck down a referendum provision of the Colorado constitution that prohibited legislation to protect homosexuals from discrimination.

In these three cases, the Supreme Court did not rely on suspect classifications, but, instead, applied “both intensified scrutiny of purported justifications where minorities are subject to discrepant treatment and have limited the permissible justifications.” And in areas traditionally left to the states, the Supreme Court has required “that the federal government interest in intervention be shown with special clarity.” According to the First Circuit, these rulings provide a method of closely analyzing certain types of enactments without resort to heightened scrutiny. That method, the First Circuit reasoned, examines the “case-specific nature of the discrepant treatment, the burden imposed, and the infirmities of the justifications offered.”

When subjected to such a review, Section Three fails miserably. As with the groups that were affected in the three cases cited above, gay couples have been subjected to “historic patterns of disadvantage.” The burdens of

Section Three are potentially great, affecting everything from tax status, to Social Security eligibility, to access to medical care, to immigration. The First Circuit thus concluded that the “extreme deference accorded to ordinary economic legislation” would not be appropriate in evaluating Section Three.

Rather, the First Circuit reasoned, the court should “scrutinize with care the purported bases for the legislation” and provide special consideration to the implications for federalism. The federal government does have “an interest in who counts as married,” particularly for purposes of federal programs, and the fact that it typically relies on state law for family status determinations does not mean it must always do so as a rule. The First Circuit did not find an independent violation, as Judge Tauro did in the rulings below, of the Tenth Amendment or the Spending Clause. It did, however, find that DOMA’s broad intrusion into an area that has been traditionally controlled by the states supports “a closer examination” of DOMA’s validity under equal protection principles.

What were Congress’s justifications for enacting DOMA? In its haste, Congress did not bother to include the usual niceties in a preamble about the purpose of, or need for, the law. A report of the House of Representatives identifies four interests that the federal government sought to advance through DOMA: (1) the interest in encouraging responsible procreation and childrearing; (2) the interest in defending and nurturing the institution of traditional heterosexual marriage; (3) the interest in defending traditional notions of morality; and (4) the interest in preserving scarce resources.

The First Circuit evaluated each of these purported interests unfavorably. On the problem of scarce resources, the court noted, first, that recent reports suggest that Section Three may actually cost the federal government more money than it saves. Some couples under DOMA will pay fewer taxes; some will be eligible for government subsidies only because other household income is excluded. But even if Section Three offered a net financial gain for the government, the First Circuit made clear that saving money is not an adequate justification for harming an historically-disadvantaged group.

Regarding the claimed interest in responsible procreation and of childrearing, the court noted the controversy about the effects of gay parenting on children (although the weight of the evidence does not find any harm to children), but concluded that the evidence was irrelevant, given the lack of connection between the federal government’s recognition of same-sex marriage and any increase or decrease in the likelihood that children would be raised by two mothers or two fathers. Parentage law is separate, and is controlled by the states. There is thus, the First Circuit reasoned, a “lack of any demonstrated connection between DOMA’s treatment of same-sex couples and its asserted goal of strengthening the bonds and benefits to society of heterosexual marriage.”

As to moral disapproval of homosexuality, *Lawrence v. Texas* makes it hard to rest on such a ground. Although moral disapproval has been traditionally understood as “an adequate basis for legislation,” the majority in *Lawrence* held that moral disapproval cannot be the sole basis for discriminatory legislation.

Finally, although Congress may have wanted both to “preserve traditional marriage” and exercise “caution” while taking stock of the brave new world of gay marriage, Section Three does not further these interests, the First Circuit observed. The federal government does not issue marriage licenses or take them away; Section Three just downgrades the status of marriages couples that states have seen fit to allow. Nor does DOMA seem framed as an exercise in caution—it categorically refuses recognition of gay marriages, indefinitely, regardless of state law, and without a thought as to the bureaucratic nightmare it creates.

The First Circuit thus concluded that the rationales offered for Section Three do not provide adequate support to allow it to withstand any level of equal protection analysis. It concluded by noting that although many people believe marriage should be restricted to heterosexuals, and most states have codified that view into law, some people and some states have taken a broader approach. And the court added that one “virtue of federalism is that it permits this diversity of governance based on local choice.” But that diversity among the states, it continued, includes those states that have “chosen to legalize same-sex marriage.” In sum, the First Circuit concluded, Section Three’s denial of federal benefits (and burdens) to lawfully married same-sex couples “have not been adequately supported by any permissible federal interest.”

The court noted that invalidating a federal statute is an “unwelcome responsibility for federal judges,” and that the Supreme Court is very likely to review this or a similar case and provide its own take on DOMA’s validity. (Because of that likelihood, the First Circuit stayed its mandate pending a petition for review.)

In Brief: The Ruling in *Windsor v. U.S.*

A week after the First Circuit’s ruling was issued, a federal district court in New York issued a very similar ruling in *Windsor v. U.S.*, invalidating the application of DOMA to an estate tax return. In *Windsor*, the widow of a same-sex spouse, who had been married in Canada, sought (and won) a refund of estate taxes that would not have been owed had the federal government given effect to the couple’s same-sex marriage.

The New York Attorney General, Eric Schneiderman, filed a brief in *Windsor* arguing that because New York now allows same-sex couples to marry (a development I analyze [here \(http://verdict.justia.com/2011/06/27/same-sex-marriage-is-legal-in-new-york-the-in-state-and-national-ramifications\)](http://verdict.justia.com/2011/06/27/same-sex-marriage-is-legal-in-new-york-the-in-state-and-national-ramifications)), it has a greater stake in the federal government’s mandate of non-recognition via DOMA than it previously did. Schneiderman’s brief argued not only 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.

In her ruling, Judge Barbara Jones of the United States District Court for the Southern District of New York cited the week-old ruling in *Commonwealth v. DHHS* and applied a similar type of reasoning. She did not find *Baker v. Nelson* dispositive, given the many developments in Supreme Court jurisprudence since *Baker* and the lack of identical issues. She also declined to adopt heightened scrutiny for sexual-orientation classifications, but did, based on precedents like *Romer* and *Lawrence*, look for more than the bare assertions of legitimacy that are typically found sufficient under rational basis review. Upon looking for a connection between Congress’s asserted rationales and the statute it enacted, Judge Jones ruled that Section Three “does not pass constitutional muster.” She ordered, without a stay of the judgment, that the Internal Revenue Service refund over \$350,000 to the decedent spouse’s estate.

Courts Are Correct to Increasingly Reject DOMA’s Application

Section Three of DOMA is under attack from many angles. The Executive Branch has refused to defend its validity in court and has, in isolated cases, refused to apply it in administrative proceedings as well. Congressional Democrats have introduced and pushed the Respect for Marriage Act, which would repeal it outright. And now, three federal courts have held that it is unconstitutional. (The first such ruling, *Golinski v. OPM*, is analyzed [here \(http://verdict.justia.com/2012/03/06/is-the-defense-of-marriage-act-doma-indefensible\)](http://verdict.justia.com/2012/03/06/is-the-defense-of-marriage-act-doma-indefensible); the other two were discussed above.) As same-sex marriage gains traction—it is now legal in eight states and the District of Columbia, as well as in numerous foreign jurisdictions—the federal government cannot continue to refuse recognition unless it abandons a bureaucratic infrastructure in which the federal government chooses to defer to state law on virtually all family-status determinations, including marriage. And the federal government surely should not maintain a law that arises purely from animus against a politically unpopular group. In sum, *DHHS* and *Windsor* are two more steps in the direction of righting the wrong that is DOMA.



Joanna L. Grossman, a Justia columnist, is the Sidney and Walter Siben Distinguished Professor of Family law at Hofstra University. She is the coauthor of [Inside the Castle: Law and the Family in 20th Century America](#) (Princeton University Press 2011), co-winner of the 2011 David J. Langum, Sr. Prize for Best Book in American Legal History, and the coeditor of [Gender Equality: Dimensions of Women's Equal Citizenship](#) (Cambridge University Press 2009). Her columns focus on family law, trusts and estates, and sex discrimination.

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