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[Defense of Marriage Act, ObamaCare and Kagan](#)

Posted by [Curt Levey \(Profile\)](#)

Wednesday, February 23rd at 8:37PM EST

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President Obama's decision today to abandon the Defense of Marriage Act (DOMA) is both outrageous—as a matter of Justice Department policy and constitutional law—and a miscalculation that will decrease the chances of ObamaCare being implemented, while potentially increasing calls for Supreme Court Justice Kagan to recuse herself from certain gay rights cases.

The President's refusal to defend DOMA, a federal statute enacted by overwhelming margins in the Senate (85 - 14) and House (342 - 67) and signed into law by President Clinton, flies in the face of Justice Department policy and principles of democratic government. It has long been the Department's policy to defend any challenged federal statute unless no plausible argument can be made in its defense. By ignoring that policy, President Obama is engaging in a disturbing power grab that, if taken to its logical conclusion, would allow him to undermine any duly enacted federal law that he doesn't personally agree with.

But that's not the worst of this power grab. In announcing the President's decision, Attorney General Holder informed the nation that "the president has concluded that ... sexual orientation should be subject to a more heightened standard of [constitutional] scrutiny." In layman's terms, that means that President Obama has decided that the Fourteenth Amendment's Equal Protection Clause prohibits distinctions based on sexual orientation in the same way that it prohibits racial discrimination.

Of course, the authors of the Fourteenth Amendment would be quite surprised to learn that they had made same-sex marriage a constitutional imperative. However, even putting originalism and strict construction aside, it was heretofore accepted that only the judicial branch—particularly the Supreme Court—has the authority to determine the appropriate level of Fourteenth Amendment scrutiny and whether a particular piece of legislation meets that level of scrutiny.

Apparently, President Obama has now taken that authority upon himself. And this from an Administration that was outraged that Congressmen were even discussing the proper interpretation of the Fourteenth Amendment provision dealing with birthright citizenship.

This is not the first time that President Obama has shown he is willing to do an end run around the other branches of government in pursuit of his political agenda. His use of White House czars to circumvent the Senate confirmation process and of the EPA to circumvent legislative resistance to cap and trade should have forewarned us that he would attempt today's end run around the judicial system.

Even if today's end run succeeds, President Obama may come to regret it should he fail to win reelection. In that case, it will be up to a Republican president to defend ObamaCare against current and future constitutional challenges. Obama has just handed his successor a perfect excuse to effectively repeal or cripple ObamaCare by refusing to defend it in court.

Even in the short term, the President has strengthened the hand of ObamaCare opponents, particularly the many states that question its constitutionality and plan to resist its implementation. After abandoning DOMA, Obama has no moral authority to argue that, because ObamaCare is the law of the land, all government officials must enforce it unless and until the Supreme Court decides it's unconstitutional.

Finally, even the President's critics will concede that his conclusion about the proper level of constitutional scrutiny for sexual orientation—whether right or wrong—must have been based on legal research and analysis rather than just a sudden political whim. If so, Obama and Holder surely consulted the nation's Solicitor General—the government's top

constitutional attorney—when conducting this important legal analysis. As a result, the Administration will be called upon to disclose whether Elena Kagan was still Solicitor General when this consultation began.

If the answer is yes and Kagan was involved in determining the federal government's official position on the proper scrutiny for sexual orientation, it opens up an ethical can of worms for her concerning Supreme Court cases in which that standard is at issue. It's a can of worms that Obama may come to regret.

Cross-posted at the [Committee for Justice blog](#).

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Mad Mag on Penn. Ave.

[tenndon](#) Wednesday, February 23rd at 9:25PM EST ([link](#))

Alfred E. Neuman is president? Tell me it ain't so.

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GOProud Supports the Repeal of DOMA, or How is that Truce working Mitch

[kipling](#) Wednesday, February 23rd at 9:56PM EST ([link](#))

The following is a link to the GOProud blog which they posted on Feb. 23rd, the same day Mr. Obama and the Justice Department announced their decision to abandon the DOMA.

<http://www.goproud.org/goprouds-position-on-doma/>

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Questioning the language of "orientation"

[mycroft_2010](#) Wednesday, February 23rd at 10:14PM EST ([link](#))

So Obama has simply declared that "orientation" is a class equivalent to race.

It's time to boldly confront the central, root issues here:

1. Evolutionary theory tells us all nature desires to pass along its genes. How can homosexuality be an "orientation" then? Why would nature "orient" something to its own genetic extinction? Genetics, not just religion, would label homosexuality an aberration.

Doesn't the fundamental predicate of evolutionary theory render homosexuality an aberration not by religious standards but scientific ones?

2. If homosexuality is an "orientation" are all other forms of sexual desire as well? Are pedophilia, necrophilia, or the whole spectrum of other paraphilias "orientations" as well? Why or why not? What separates out one form of sexual desire from another; what makes one an "orientation" and the other not?

(Note: This question is about the nature of sexual desire. It is not to say that a homosexual, a child, a dead person, or an