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Obama's Unreasonable Abandonment of DOMA

by Gerard V. Bradley
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President Obama has dropped the defense of marriage out of political convenience rather than reasonable opposition.

Attorney General Eric Holder announced last Wednesday that President Obama has concluded that the Defense of Marriage Act (DOMA) is unconstitutional and that therefore the Administration will no longer defend DOMA in court. The key section of that law (and the precise part of it which was the subject of Holder's announcement) says that every time the word "marriage" appears in federal law, it means the union of "one man and one woman," and that every time the word "spouse" appears in federal law, it means "only a person of the opposite sex who is a husband or a wife." One or the other of these words appears a couple thousand times in federal law. DOMA's definitional provisions are why, for example, "married, filing jointly" on April 15 is a category limited to a man and his wife, even in one of the six states where same-sex marriages are sanctioned by state law.

Holder's announcement was greeted as breaking news. In one important sense, though, it was not news at all. Despite President Obama's oft-repeated view that he "opposes" same-sex marriage, his Administration has been steadily advancing toward last week's announcement since Obama was inaugurated. Administration lawyers have never defended DOMA in any convincing way; in fact, their fallacious arguments in "defense" of DOMA have done more to undermine its constitutionality than to buttress it. All along the Administration has unmistakably signaled that it held the conclusion that it finally forthrightly articulated last Wednesday.

The announcement is nonetheless a bit startling. The Attorney General himself admitted that the Justice Department "has a longstanding practice of defending the constitutionality of duly enacted statutes." No one suggests otherwise about the enactment of DOMA. Congress passed it in conscious response to the first wave of legalized same-sex marriage, which came from Hawaii's courts in the mid-1990's. That effort failed. But to make sure that no state or the federal government would be conscripted into recognizing an aberrant form of marriage, the Senate voted 85-14 and the House 342-67 to enact DOMA. President Bill Clinton signed it into law on September 21, 1996. It settled what "marriage" means in federal law. DOMA also protected states from having to recognize the "marriages" of same-sex couples contracted in other jurisdictions (such as Massachusetts, which became the first state to recognize same-sex marriage, in 2004).

The Department's practice has been—we were informed last week—conditional: it was predicated upon the availability of "reasonable arguments" which could "be made in" a statute's "defense." "Reasonable defenses" of DOMA are not the same things, however, as what the Attorney General called "professionally responsible arguments." *These*, Holder conceded, are indeed "available." (I have even offered some myself.) The Attorney General declared that none of these "responsible"

defenses is "reasonable." And so (Holder wrote in his letter to House Speaker Boehner) DOMA is the "rare case where the proper course is to forgo the defense of" a duly enacted statute.

The Department is nonetheless determined, Holder added, to continue "enforc[ing]" DOMA, notwithstanding its "unconstitutionality." I guess this means that, come this April 15, same-sex couples may not check the "married, filing jointly" box on their Form 1040s. But this dodge puts all the relevant federal enforcement employees in a real bind. For their bosses would now have them treat same-sex couples arbitrarily, discriminating among "married" couples who wish to "file jointly" according to an unconstitutional law, a law which their bosses say has no basis in reason.

The immediate practical effect of Wednesday's announcement appears to be limited to pending DOMA litigation in New York Federal court. Now Congress itself will have to intervene if DOMA is to be defended at all. The further effects may be considerably larger. Some judges and legislators—both state and federal—may be emboldened to embrace the position announced by the Administration. The Administration's switch could, possibly, contribute to the decision of a Supreme Court Justice who is deeply concerned about discrimination against homosexuals and lesbians, but who is also traditional-minded when it comes to the institution of marriage. Such a Justice would be racked by ambivalence when he is called upon to confront squarely the question about same-sex marriage and the Constitution. Such a Justice would be named Anthony Kennedy.

Supporters of same-sex marriage have been toasting the President and each other for several days now. They are confidently predicting tidal waves of change in the wake of Holder's announcement. Do not believe it. Talking that way is part of their script. Theirs is the tale often told of inevitable "progress," the story in which same-sex marriage has an undeniable rendezvous with destiny. Theirs is the most Whiggish of Whig views of history. The reverse side of this view is, of course, that traditionalists are on the "wrong" side of history, and that the sooner they recognize the futility of resisting the irresistible the better off we shall all be. So *The New York Times* rushed to tell us last Friday that Republicans and conservatives more generally have largely reacted with a shrug. Evidently, we should all take our whuppin' with similar equanimity.

The Justice Department's proffered defense of abandoning DOMA is on a par with its previous "defenses" of DOMA—superficial, question-begging, fallacious. In his letter to House Speaker Boehner, Holder carried on at considerable length about changed circumstances which have "caused the President and the Department to conduct a new examination of the defense" of DOMA. Do not believe a word of it. It is all blather. It is all transparent pabulum which utterly fails to conceal the political *ukase* which Eric Holder was sent to publish last Wednesday.

Most tellingly, the Attorney General advanced no argument—"professionally responsible" or otherwise—for the Department's rejection of (what he called) "procreational responsibility" as a justification for traditional marriage. He said curtly that "the Department has disavowed already" this justification as "unreasonable." Maybe so. But to "disavow" an argument is not to refute it. And no one in the Obama Administration (or anywhere else, for that matter) has successfully refuted the claim that marriage is intrinsically connected to procreation, such that *only* opposite-sex couples may marry.

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