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In Defense of the Defense of Marriage Act

DOMA leaves the issue of gay marriage to the states, which is exactly where it belongs.

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The Obama administration has taken the extraordinary step of informing Congress that it will no longer defend the constitutionality of the Defense of Marriage Act, which defines marriage for federal purposes as "the legal union between one man and one woman."

DOMA effectively bars recognition of same-sex marriages at the national level, and Attorney General Eric Holder has said that the administration believes that this violates the Constitution's equal protection principles. Whatever the motivation behind this decision—and wherever one stands on the debate over gay marriage—the administration's refusal to defend this law in court is not justified.

Congress passed DOMA in 1996, when Hawaii appeared to become the first state to recognize same-sex marriages. Had Hawaii done so, it would have immediately raised two fundamental issues. First, would other states be required to recognize gay marriages performed in Hawaii under the Constitution's "Full Faith and Credit" clause? Second, if gay marriage was permitted in some states, would the federal government also be required to recognize same-sex unions—especially in light of the scores of federal laws that grant or withhold some benefit based upon marital status?

Congress answered these questions with a federalist solution. DOMA posits that the definition and regulation of marriage has always been a state issue; it is one of those fundamental "police power" prerogatives the Constitution reserves to the states alone. States have adopted widely differing rules governing who can marry who (first cousins, for example, can marry in Connecticut but not in West Virginia), at what age (most states permit the marriage of 16-year-olds but impose very particular requirements on the young couple), and under what conditions. DOMA preserves this diversity.

The Obama administration is now claiming that classifications based on sexual orientation should, for equal protection purposes, be treated the same as those involving race and should be subject to "strict scrutiny" by the courts. This is tantamount to arguing that DOMA must be invalidated, since in most cases application of "strict scrutiny" results in the challenged law being held unconstitutional. "Strict scrutiny," as lawyers and judges often say, is "strict in theory, fatal in fact."



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Although the Supreme Court has considered a number of laws that affect gay and lesbian rights, it has never suggested that strict scrutiny should be applied in such cases. In its most recent rulings on such questions, the court applied a "rational basis" test, under which a measure must simply be rationally related to serving a legitimate government interest. DOMA clearly passes muster under rational basis analysis.

Marriage is unlike any other governmental benefit. License to marry carries with it far more than mere permission, as in obtaining a license to drive or practice a profession. The reason that gay-rights supporters are so determined to achieve equal

status for same-sex unions, and the reason that so many others vigorously oppose that recognition, is that marriage is an affirmative statement of societal approval.

Congress took account of this fact in enacting DOMA, and of the fact that large majorities of Americans still oppose recognition of same-sex marriages. Significantly, most Americans do not oppose some other form of legal recognition for same-sex couples that isn't called marriage.

DOMA recognizes and protects the unique constitutional role of the states in deciding these issues. It is through the democratic process within the states that a genuine and lasting resolution to the question of same-sex marriage can and should be found. Today, five states and the District of Columbia permit same-sex marriage. Another four states recognize gay marriages performed in other jurisdictions, and 41 states do not recognize such unions. DOMA protects both legal regimes.

It's true that on the federal level DOMA clearly establishes a preference for traditional marriage. But it does not purport to define marriage for any purpose other than federal programs, which can be expanded to same-sex couples on a program by program basis, as President Obama has already done in many areas.

Inviting a comprehensive judicial resolution of the issues surrounding same-sex marriage, which is what the administration has done by announcing that it will no longer defend the law, is the worst of all possible solutions. There is a political process taking place that has secured, and doubtless will continue to secure, the ability of same-sex couples to marry in many states. Shutting down that process through a judicial ruling will end all possibility of compromise. And like *Roe v. Wade's* effort to finally "solve" the abortion debate, it will divide our society on this issue for decades to come.

President Obama took an oath to uphold the Constitution, and one aspect of that responsibility is to defend the laws Congress enacts against constitutional attack if there is any reasonable defense to be made. There is such a defense to be made for DOMA.

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