# Constitutionality of the Defense of Marriage Act


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## Introduction

The Defense of Marriage Act (DOMA),[1] as its name states, aims to defend and protect marriage. It does so by preserving the historical, traditional definition of marriage in federal law and allowing each state to define the term individually. DOMA *does not* prohibit any state from recognizing homosexual "marriages."

Contrary to widespread distortions, DOMA is not partisan legislation. Congress passed it with overwhelmingly bi-partisan votes of 342-67 in the House and 85-14 in the Senate. It was then signed into law by liberal Democrat President Bill Clinton on September 21, 1996.

## Text of the Act

There are two essential parts to DOMA:

> **Section 3. Definition of marriage**
>
> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

And,

> **Section 2. Powers reserved to the states**
>
> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

## Constitutional Challenges

Every state that has allowed people to vote on the issue of marriage has elected to protect marriage as we have always known it: the union between one man and one woman. Yet homosexual activists have been successful in getting judicial activists or extremely liberal legislatures to impose homosexual "marriage" in a few states, despite clear legal precedent and the lack of public support.

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[1] Pub.L. 104-199, 110 Stat. 2419, 1 U.S.C. § 7 and 28 U.S.C. § 1738C.

Homosexual "marriages" were first legally recognized in Massachusetts in 2004, following the *Goodridge v. Dep't of Pub. Health*[2] decision. They are currently also permitted in Vermont, New Hampshire, Connecticut, Iowa, the District of Columbia, and New York.

On the other hand, forty-one states have constitutional amendments or statutes protecting marriage as the union between one man and one woman.

The end goal of those seeking to impose homosexual "marriage" is to make it legal all over the country and to squelch any public opposition. To that end, they have attacked DOMA in two primary ways. First, after marrying in a state that allows for homosexual "marriages," they apply for federal benefits for their homosexual "spouse" in order to challenge federal law once denied. Second, they seek recognition of that "marriage" by another state that upholds the traditional definition of marriage and does not want to recognize homosexual "marriages."

Their challenges are based on the Equal Protection Clause and the Due Process clause of the Constitution.

## Standard of Review

A big part of the constitutional analysis always goes to the standard of review that will be applied. The courts use three standards (high, intermediate, low) when deciding a constitutional question.

## **Strict scrutiny** (High)

Under strict scrutiny, the law in question must be narrowly tailored to achieve a compelling state interest in order to survive a constitutional challenge. Homosexual activists, of course, push for the courts to apply this level of scrutiny, as it would give them the best chance to succeed in their challenges.

But this test applies only to fundamental rights, under the Equal Protection Clause, or to what is known as a "suspect class" under the Due Process Clause.[3] There is no fundamental right to same-sex "marriage," and homosexuals are not a "suspect class" under the law (only "race, alienage, [and] national origin"[4] have been recognized), so strict scrutiny should never apply to this analysis.

## **Intermediate scrutiny** (Intermediate)

In order to survive a constitutional challenge at this level, the law must be substantially related to an important governmental interest.[5] Having failed the first test, homosexual activists wish to push the court to at least apply this test. Again, they fail to meet the standard.

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[2] *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).
[3] *Massachusets Board of Retirement v. Murgia*, 427 U.S. 307, 312 (1976).
[4] *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985).
[5] *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985).

Intermediate scrutiny in this context only applies to what are known as "quasi-suspect" classes. And there are only two of these: classifications based on gender or illegitimacy.

Neither applies in the case of DOMA.

## **Rational basis** (Low)

Under the rational basis standard, a law should survive constitutional challenges as long as it is rationally related to a legitimate government interest.[6] "This standard is a paradigm of judicial restraint."[7] Meaning, a law challenged under this test should survive unless there is no rational argument for it. The law has "a strong presumption of validity." [8]

This is the test that should be applied in any challenge to DOMA, and it is a high burden to overcome for those wishing to challenge it.

When defending DOMA and other laws to protect the traditional definition of marriage, this low bar is easily surpassed.

## Analysis

As an act of Congress, DOMA is legally entitled to a strong presumption of constitutionality. The Supreme Court has said that judging the constitutionality of an act of Congress is "the gravest and most delicate duty that this Court is called on to perform." [9] Having established that, all legal precedent and the evidence available to us suggests a judge would have to purposely ignore or radically distort the legal precedent to conclude DOMA is unconstitutional.

## Homosexual marriage is not a fundamental right

Fundamental rights are those that "are objectively, 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered Liberty.'"[10] It would be laughable to argue that homosexual "marriage" meets these criteria. A right to homosexual "marriage" has never been recognized in our history. Even the proponents of this right rely on what they claim is a long history of discrimination.

Only the traditional definition of marriage is "deeply rooted" in our nation's history.

The Supreme Court has already recognized this, holding that two men have no constitutional right to marry each other.[11] The Court *rejected* the argument "that the right to marry without

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[6] *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 457 (1988).
[7] *F.C.C. v. Beach Commnc'ns, Inc.*, 508 U.S. 307, 314 (1993).
[8] *Id.* at 314.
[9] *Blodgett v. Holden*, 275 U.S. 142, 147-48 (1927) (Holmes, J., concurring).
[10] *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977)(plurality), and *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)) (citations omitted).
[11] *Baker v. Nelson*, 409 U.S. 810 (1972).

regard to the sex of the parties is a fundamental right" or that "restricting marriage to only couples of the opposite sex is irrational and invidiously discriminatory."[12]

Homosexual "marriage" as a fundamental right would be "an astonishing conclusion, given the lack of any authority supporting it; *no* appellate court applying a federal constitutional analysis has reached this result"[13] (emphasis in original).

## "Sexual orientation" is not a suspect class

As discussed above, the recognized suspect classes under the law are "race, alienage, [and] national origin."[14] Classifications based on gender or illegitimacy are considered "quasi-suspect" classes.[15] Again, the evidence does not support classifying "sexual orientation" as a suspect or quasi-suspect class. In fact, every circuit that has addressed this question has refused to do so.

To make this determination, the courts look at the history of discrimination, whether the classification relates to one's ability to contribute to society, whether it is an immutable characteristic, and whether the class is politically powerless.[16]

Concerned Women for America's (CWA) excellent *amicus* brief[17] in recent cases addresses the fallacy of a "politically powerless" homosexual movement. The assertion, as most reasonable people can see, does not pass the smell test. It is evident that they are gaining much ground through their political influence, which includes a very sympathetic Senate and a president who is fully on board with their agenda. The fact that President Obama and U.S. Attorney General Eric Holder have unilaterally decided to stop defending DOMA and actively oppose it in policy and in court cases is proof enough of the extent of the movement's political influence.

As for homosexuality being an immutable characteristic, there is simply no compelling evidence for it. The homosexual elite love to compare this issue to the issue of race, but their efforts to prove this leave much to be desired. For years they tried to find a "gay gene," and after millions of dollars in research — some of it funded with our tax dollars — what emerged was a profound disappointment for them. The public testimony of ex-"gays" is another element that always stands out when considering this question.

The history of discrimination and ability to contribute to society are also fail to convince. Homosexual activists themselves are proud of the "profound contributions" their community has made throughout history. In fact, California's new Fair, Accurate, Inclusive and Respectful

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[12] *Id*.
[13] *Andersen v. King County*, 138 P.3d 963, 979 (Wash. 2006).
[14] *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985),
[15] *Id.*
[16] *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973); *Lyng v. Castillo*, 477 U.S. 635, 638 (1986).
[17] Brief of *Amicus Curiae*, Concerned Women for America, in Support of Defendants-Appellants and in Support of Reversal, *Massachusetts v. U.S. Department of Health and Human Services*, Case Nos. 10-2204, 10-2207 and 10-2214 (1st Cir. 2011), available at http://www.cwfa.org/images/content/CWA-Amicus-Brief-DOMA-Cases.pdf.

(FAIR) Education Act amends the education code to make sure every classroom celebrates lesbian, gay, bisexual and transgender (LGBT) achievement.

Involving no fundamental right and lacking any suspect class, challenges to DOMA must be conducted under rational basis test.

That test should compel any court to answer just one question when it comes to constitutional challenges to DOMA: whether or not defining marriage as the union between one man and one woman is rationally related to a legitimate government interest. There can be no question that it is.

Our government's interest in children and families certainly meets that criterion. Not only that, but it would meet the highest level of scrutiny, as it is also an extremely compelling interest. The future of our nation lies on the shoulders of new generations, and the state has a reasonable compelling interest in that relationship which has the potential to produce those generations, namely the sexual relationship between one man and one woman.

> At bottom, civil society has an interest in maintaining and protecting the institution of heterosexual marriage because it has a deep and abiding interest in encouraging responsible procreation and child-rearing. Simply put, government has an interest in marriage because it has an interest in children…
>
> And from this nexus between marriage and children springs the true source of society's interest in safeguarding the institution of marriage:
>
> > Simply defined, marriage is a relationship within which the community socially approves and encourages sexual intercourse and the birth of children. It is society's way of signaling to would-be parents that their long-term relationship is socially important — a public concern, not simply a private affair.
>
> That, then, is why we have marriage laws. Were it not for the possibility of begetting children inherent in heterosexual unions, society would have no particular interest in encouraging citizens to come together in a committed relationship. But because America, like nearly every known human society, is concerned about its children, our government has a special obligation to ensure that we preserve and protect the institution of marriage.[18]

The social sciences confirm that the optimal environment for children is to grow in a traditional marriage household. After analyzing the social data, Dr. Janice Crouse, Ph.D., Senior Fellow of CWA's Beverly LaHaye Institute, reached this conclusion in her book *Children at Risk:*

[18] 104 H. Rpt. 664, 13-14, Defense of Marriage Act (H.R. 3396) Report with Dissenting Views (1996).

> [N]o other household structure comes close to the married-couple family where the father and mother work together to ensure their children's well-being. The natural, traditional family produces the best outcome for children.[19]

Our common experiences have shown us that. And it is only reasonable to think that it is more likely that a biological parent would feel such a strong attachment to his or her children, so as to sacrifice much for their well-being.

We have seen that the results of the breakdown of the family lead to higher risks of children living in poverty, serious health issues, attempted suicide, problems with alcohol or illegal drugs, and even crime.[20]

There can be no doubt that the state has an extremely compelling interest when it defines marriage as the union between one man and one woman.

## Full Faith and Credit

A last-resort argument against DOMA by homosexual activists argues section 2 of the Act violates Article IV, Section 1 of the U.S. Constitutions, known as the "Full Faith and Credit Clause." It states:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

The argument does not hold water. Legal precedent tells us, "a marriage valid where celebrated is valid everywhere … [except] marriages deemed contrary to the laws of nature [and] marriages positively forbidden by statute because [they are] contrary to local public policy."[21] Again, "A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state…"[22]

In DOMA, Congress has exercised its right, as expressed in Article IV itself, to "prescribe the Manner in which" marriage is to be treated.

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[19] Janice Shaw Crouse, *Children at Risk*, p. 22 (Transaction 2010).
[20] *Id.* See also: Patrick Fagan, "The Inversion of Heterosexual Sex," in *Same-Sex Matters: The Challenge of Homosexuality*, edited by Christopher Wolfe (Dallas: Spence Publishing Company, 2000), p. 34; The Heritage Foundation, *Marriage: America's No.1 Weapon Against Childhood Poverty* (2010), available at http://www.heritage.org/research/projects/marriage-poverty/marriage-and-poverty-in-the-us; Margaret Whitehead & Paula Holland, "What Puts Children of Lone Parents at a Health Disadvantage?", *The Lancet*, Jan. 25, 2003.
[21] *Toler v. Oakwood*, 4 S.E.2d 364, 366(Va. 1939).
[22] *Restatement (Second) of Conflicts of Law* § 283(2) (1971).

The House Report on DOMA explains that Section 2 of the act was intended "to protect the right of the States to formulate their own public policy regarding the legal recognition of same-sex unions, free from any federal constitutional implications that might attend the recognition by one State of the right for homosexual couples to acquire marriage licenses."[23]

This challenge, therefore, also falls flat on its face.

## Conclusion

There are no constitutional problems with the Defense of Marriage Act. The act falls well within the constitutional authority of Congress. Barring a judicial activist court's distorting the law, we fully expect all challenges to its constitutionality to fail, as they have in the past.

A more serious challenge has been launched through a legislative measure inconspicuously – and cynically – called the "Respect for Marriage Act," which seeks to overturn DOMA. As a matter of policy, this measure should be opposed by all Americans and their legislators, as it would impose a seriously wrongheaded policy on our nation. But procedurally, new legislation is the proper way of to challenge DOMA, as opposed to asking a judicial tyrant to overstep her constitutional mandate to declare it unconstitutional.

[23] 104 H. Rpt. 664, at 2.