Abstracts of Papers for
Symposium on:
DOMA and the Inter-Jurisdiction Horizontal and Vertical Exportation of Marriage
California Western School of Law in San Diego, California
March 19-20, 2009
(1/20/2010)
How Section 3 of DOMA Violates the Equal Protection Clause
(ascribed title)

Mary Bonauto
Civil Rights Project Director
Gay and Lesbian Advocates & Defenders

I plan to talk about how 1 U.S.C. sec. 7 is unconstitutional in an as-applied equal protection challenge under the federal constitution and the Gill v. OPM litigation (D. Mass.) making that as-applied claim.
DOMA and the PKPA  
(ascribed title)  
Barbara J. Cox  
Clara Shortridge Foltz Professor of Law  
California Western School of Law  

My paper explores the results that may occur if Section 2 of the Defense of Marriage Act were to be interpreted as excluding parental relationships between married or legally recognized same-sex couples from the protections provided by the Parental Kidnapping Prevention Act. Parties in litigation in Vermont/Virginia and California/Alabama have argued that DOMA trumps the PKPA, thus changing the settled law on the application of the PKPA and on recognizing judgments by sister States. Using that litigation as a starting point, this article discusses the broader implications for future PKPA-litigation and for judgment recognition in the U.S. and other countries that may occur if DOMA is interpreted as eliminating PKPA protections for LGBT parents.
Although a lot has been written in the area, I remain convinced that important issues remain to be sorted out. For example, several recent cases have refused to dissolve same-sex relationships on the ground of inconsistency with forum law, e.g., Chambers v. Ormiston, 935 A.2d 956 (Rhode Island, 2007); compare C.M. v. C.C., 21 Misc.3d 926, 867 N.Y.S.2d 884 (N.Y. Sup. 2008) (divorce allowed); (3) O'Darling v. O'Darling, 188 P.3d 137 (Okla.,2008); and In re Marriage of Gara Ranzy and Larissa Chism (Marion County Indiana Superior Court, Sept. 4, 2009). I believe the Hughes v. Fetter, 341 U.S. 609 (1951) and the DOMA speak to these issues and plan to explore them in this paper.
DOMA, Romer, and Rationality

Andrew Koppelman
John Paul Stevens Professor of Law
Northwestern University School of Law

It has been objected by many that the Defense of Marriage Act lacks a rational basis because it reflects a bare desire to harm a politically unpopular group. The increasing success of the argument, which has persuaded two prominent federal judges, reveals the hidden normative premises of rational basis analysis, at least whenever that analysis is used to invalidate a statute. Since 1996, when DOMA was passed by overwhelming margins in both houses of Congress, the country’s attitudes toward gay people have evolved rapidly, to the point where this kind of mindless lashing out at gays looks a lot less attractive. In 1996, otherwise reasonable people thought it a pointless waste of taxpayer dollars to look after the basic needs of gay couples and their families. That callousness no longer looks so rational, and increasing numbers are ready to recognize gay relationships. The burden of proof now lies on those who want to defend this discrimination, and it is very hard to articulate a basis for this discrimination that makes sense. The shift is really one of normative priorities. The invocation of “rationality” masks the processes that are actually at work.
Conflicts Over Same-Sex Relationships and Equality: A New Argument for Same-Sex Marriage (In Some Places)

Hillel Y. Levin

Assistant Professor, University of Georgia School of Law

Until recently, lawsuits advocating for same-sex marriage were brought only in states that offered little or no recognition to same-sex couples—states like Hawaii, Vermont, New York, and Massachusetts. Lately, however, the story has become more varied as lawsuits demanding recognition of same-sex marriage have been brought in states that offer marriage-like alternatives such as civil unions and domestic partnerships. Although this difference seems slight, it actually has important implications once we take conflicts into account. Specifically, how states with marriage-like alternatives deal with interstate conflicts issues may present a new equality-based argument in favor of same-sex marriage. Indeed, the conflicts issue may be dispositive on whether the court should require the state to recognize same-sex marriage. As more states legislatures choose to adopt marriage-like alternatives, the conflicts question will therefore take on new significance.
Inter-Institutional Constitutional Dialogue:
The Example of DOMA
Professor Mark D. Rosen
Chicago-Kent College of Law

The Supreme Court in Lawrence v. Texas pointedly left undecided the question of whether substantive due process renders bans of same-sex marriage unconstitutional. That case accordingly left decisionmaking concerning same-sex marriages to other societal institutions. My talk will assess DOMA in light of the latitude that non-judicial institutions have, following Lawrence, to stake out and act upon their own views as to what, if anything, the Constitution requires in relation to same-sex marriage.

States were Lawrence’s most obvious institutional beneficiaries. There have been heated debates, and states have gone in very different directions. Five states now grant marriage license to same-sex couples, five others (as well as the District of Columbia) provide virtually equivalent state-level spousal rights to same-sex couples, and four states offer varying degrees of statewide spousal rights. On the other hand, forty states have constitutions or statutes that prohibit same-sex marriage.

Congress and the President also benefited from Lawrence. First, a counterfactual: If Congress thought due process or equal protection mandated the availability of same-sex marriage, Congress almost certainly could legislatively act pursuant to Section 5 of the Fourteenth Amendment to require States to do so. Now to actuality: The Congress that did not believe that the Constitution required same-sex marriage -- but instead thought that federalism means that each State should be able to resolve the controversial yet non-constitutional issue of same-sex marriage as it sees fit -- had power to actualize that vision as well. Congress has plenary power to determine the “effects” of other states’ judgments and laws. This extends to authorizing states to disregard laws and judgments from states that recognize same-sex marriage to the extent that giving effect to those laws and judgments would interfere with ability of the states opposing same-sex marriage to realize their vision of the public good.

As to the President: he could conclude that DOMA is unconstitutional under his best understanding of what due process (or equal protection) demands and accordingly choose not to enforce DOMA. Alternatively, he could decide that DOMA is constitutional. The important point for present purposes simply is that Lawrence leaves a space within which the President can assert his own constitutional understanding as to the Constitution’s implications in respect of DOMA in particular and same-sex marriage more generally.

For this reason, the Obama administration’s recent statements that it was obligated to defend DOMA’s constitutionality in court – and that signing a bill was the only way the Administration could opposed DOMA – is untrue. While the President appropriately gives deference to Congress’s judgments that underlie DOMA, Lawrence provides room for the President to register, and act upon, his independent understanding of DOMA’s constitutionality.
WHY THE DEFENSE OF MARRIAGE ACT CANNOT SURVIVE ANOTHER TEN YEARS (OR SO)

By

W. Sherman Rogers

Howard University School of Law

Ten years from now, maybe longer (we’ll have to wait and see), young people will marvel that same sex couples were denied the same rights as heterosexual couples. The issue of equal rights for same sex couples will be remembered as a historical oddity much like the debunked proposition that the earth is flat or the idea that the earth is the center of the universe. Notable controversies of the past that are today viewed as out of step with notions of fundamental fairness include the fervent defense of slavery and segregation and the widespread acceptance of gender discrimination. And one day, future generations will laugh at the former importance of newspapers and television as the primary way to obtain information and shake their heads in amazement at the former prevalence of CDs, printed books, GPS systems not connected to a mobile phone, and vehicles that operate on fossil fuels. See generally, Ylan Q. Mui, E-Books Holiday Charge: As Sales Soar, Digital Works Face Season’s Crucial Test, WASH. POST, November 5, 2009, at A1; Rob Pegoraro, Google Continues to Map the Way, WASH. POST, November 1, 2009, at G1.

My thesis is that the Defense of Marriage Act and similar state laws are vulnerable, in the long run, on several grounds: (1) an irreversible change in American attitudes towards same sex relationships by the younger generation; (2) the isolation of the American view in the international community among developed nations in Europe which the United States considers to be peer nations; (3) constitutional challenges under the Full Faith and Credit Clause, the Due Process Clause, the Equal Protection Clause, and the Establishment Clause of the First Amendment; and (4) a growing awareness by Americans that “civil marriage” is a secular, non-religious bestowal of property rights on two people who agree to legalize their relationships.
Direct Democracy, Interstate Recognition of Marriage, and Clear Statements of Public Policy

Michael E. Solimine
Donald P. Klekamp Professor of Law
University of Cincinnati College of Law

Abstract: Since the passage of the Defense of Marriage Act, most states have enacted statutes or approved amendments to their constitutions which declare same sex marriages (SSM) illegal. Many, though not all, of these provisions also purport to forbid the enforceability of SSM celebrated in other states which permit such marriages. The failure of an appreciable number of these provisions to mention SSM from other states raises issues of interpretation which have been neglected in the literature. Should these provisions be considered an expression of a state’s policy against enforcing SSM from other states, if they make no mention of foreign marriages? The case law on this question with regard to marriages in general is not clear, and this article revisits the issue in light of the fact that many of the constitutional amendments were passed by citizen initiatives, not by legislative action. Some election law scholars have argued that initiatives should be subjected to greater and more skeptical scrutiny than legislative enactments. Drawing on that literature, this article argues that the interpretation of little DOMAs should be informed by their juridical origin, against the backdrop of the long-standing practice of states leaving most choice of law issues to common law resolution by judges, not by legislative or constitutional determination.
The Defense of Marriage Act (DOMA) is constitutionally vulnerable and the President has expressed support for its repeal. This article addresses some of the likely effects and non-effects of DOMA’s repeal or invalidation. The legal landscape without DOMA would be far preferable to the legal landscape with it. Nonetheless, even without DOMA, there are a variety of ways in which LGBT families would have far to go before their families would be afforded the same kinds of protections that many families simply take for granted.
Religion, Same-Sex Marriage, and the Defense of Marriage Act

Gary J. Simson
Joseph C. Hostetler - Baker & Hostetler Professor
Case Western Reserve School of Law

Many opponents of legalizing same-sex marriage have made no secret of the fact that their opposition is rooted in the belief that their religion prohibits it. This religion-based opposition takes two basic forms. One form focuses on the same-sex couple and declares that intimate same-sex relationships are inherently unnatural and sinful and that the legalization of same-sex marriage wrongly and irresponsibly condones and even encourages such relationships. A second form focuses on the impact of legalizing same-sex marriage on religious individuals and institutions and maintains that legalization is incompatible with respect for such individuals' and institutions' religious liberty.

This paper considers these basic forms of opposition from the perspective of the Religion Clauses of the First Amendment. The first form invites Establishment Clause challenges to both state refusals to legalize same-sex marriage and the federal government's enactment of DOMA to limit the repercussions of any state legalizations. The second form places in question whether same-sex marriage can carry with it all the usual incidents of marriage without overstepping the bounds of the Free Exercise Clause.
Marriage, Fundamental Premises, and the Constitutionality of DOMA

Monte Neil Stewart
Belnap Law PLLC
Boise, Idaho

Does DOMA violate federal constitutional norms, particularly norms of equality? Those arguing in the affirmative rely in important part on state-court interpretations of guarantees of equality embedded in state constitutions. Particularly important opinions are those recently handed down by the highest courts in California, Connecticut, and Iowa. Those opinions held that the norm of equality embedded in their respective state constitutions requires the redefinition of marriage from “the union of a man and a woman” to “the union of any two persons.”

The argument leading to that holding, however, like all arguments, proceeds from premises that the argument does not prove but which serve as the starting point for reasoning. Those premises range from the nature of contemporary American marriage, to the equivalence of the pre- and post-redefinition marriage institutions, to the social costs, if any, resulting from redefinition, to marriage’s relationship with other social institutions such as law and religion.

This Article critically examines the common fundamental premises underlying the California, Connecticut, and Iowa opinions. That critical examination leads to serious questions regarding those premises validity. Indeed, that examination demonstrates their falsity. At the same time, it clarifies their materiality; that is, it shows that, but for the cases’ fundamental premises, no line of judicial reasoning can lead to their holding.

Hence, this irony: the California, Connecticut, and Iowa opinions – because of both the falsity and the materiality of their fundamental premises – illuminate quite clearly DOMA’s validity under the federal constitution.
My paper first will critically analyze whether the federal Defense of Marriage Act (DOMA) reflects and respects principles of federalism in both its horizontal (§2) and vertical (§3) marriage recognition sections, and in the overall architectural structure of the Act. It will review the claims that the Defense of Marriage Act (DOMA) changed vertical and horizontal marriage recognition rules in the USA. It will demonstrate that those claims have only limited, peripheral credibility, which are exaggerated, and which are substantially invalid. DOMA was adopted to preserve marriage recognition choice of law principles in the face of an attempt to force states to change their choice of law rules to require them to recognize same-sex marriage. Comparing principles governing marriage recognition under the American Law Institute’s Restatement of the Law, Conflict of Laws (First and Second versions) with the principles governing marriage recognition incorporated in Section Three of DOMA governing interstate marriage recognition underscores the importance of and reflection of established, mainstream choice of law principles.

Finally, the paper will compare examine principles governing marriage recognition in the United States with marriage recognition rules and principles governing international marriage recognition. It will show that in substantially all respects DOMA embodies well-respected, widely-followed principles.
DOMA and Interstate Recognition of Parent-Child Relationships

Rhonda Wasserman
Professor of Law
University of Pittsburgh School of Law

I intend to analyze the risk that the federal Defense of Marriage Act (“DOMA”) undermines the security of the parent-child relationship when a gay or lesbian parent and her child travel interstate. This issue can arise in a variety of circumstances:

• A same-sex couple jointly adopts a child and then seeks recognition of the parent-child relationship in another state that does not permit same-sex couples to adopt.

• In a second-parent adoption, a gay man or lesbian adopts the child of his or her partner and seeks recognition of the parent-child relationship in another state that does not permit second-parent adoption.

• A gay or lesbian couple marries; one spouse has a biological child (with the assistance of artificial insemination, a surrogate, etc.), which is treated as the child of the other spouse under the law of the state in which they married. The non-biological parent then seeks recognition of the parent-child relationship in another state that does not permit or recognize same-sex marriage.

• A gay or lesbian couple enters into a civil union or domestic partnership in one state; one partner has a biological child, which is treated as the other partner’s child under the law of the state in which the civil union or domestic partnership was registered. The non-biological parent then seeks recognition of the parent-child relationship in another state that does not permit or recognize civil unions or domestic partnerships.

Whether the interstate recognition issue arises in the context of an intact family’s move to another state or a child custody dispute between former partners now living in different states, one must address the threat that DOMA poses to the security of the parent-child relationship. DOMA’s threat will be assessed against the backdrop of state choice-of-law law; federal constitutional law, including interpretations of the Full Faith and Credit and Due Process Clauses; and state DOMAs.