The Defense of Marriage Act and the Ongoing Struggle for the Recognition of Same Sex Marriage

WHAT IS THE DEFENSE OF MARRIAGE ACT?

On May 7, 1996, House Bill 3396 was introduced in Congress, reading in part: '[n]o State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same-sex that is treated as a marriage ...' Virulent debate followed on what familiarly became known as the Defense of Marriage Act. Ultimately, the law was passed by an overwhelming majority (Senate: 85 for 14 against. House: 342 for 67 against) and signed into law by President Clinton in the middle of the night on Saturday, September 21, 1996.

The Defense of Marriage Act (DOMA) is in two parts. Section 2 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."

Thus, for the purposes of recognizing out of state same-sex marriages, DOMA suspends the full faith and credit clause of the US Constitution. Section 3 states:

> "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."

Thus, all agencies of the federal government, by congressional law, will only recognize opposite sex marriages for the purpose of social security spousal benefits, income tax returns, family medical leave act, etc...

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WHY WAS THE DEFENSE OF MARRIAGE ACT PASSED?

At the Hawaii Department of Health on December 17, 1990, three couples filed marriage license applications. Each of their applications met all of the state's marriage license requirements except that the applicants were same-sex couples. Pursuant to an opinion of the State Attorney General, in April of the following year, the Hawaii Department of Health denied these applications. The case, known as Baehr vs. Lewin, was doggedly pursued in the courts, and on May 5, 1993, the Hawaii Supreme Court

found that the state's denial of the rights and incidents of marriage to same-sex couples represented a denial of equal protection.

Although the petitioners' right to privacy argument failed, the court found sex was a 'suspect' classification under the equal protection clause of the Hawaii Constitution. In applying a strict scrutiny test to the state's marriage laws, the court held that the state failed to display a compelling interest for the state's sex-based classification. The court listed 'a multiplicity of rights and benefits' that accompany a marriage license, including 'the benefit of the exemption of real property from attachment or execution...' The case was remanded to a trial court, affording the state an opportunity to justify the denial by a compelling state interest. This was the first time the highest level appellate court in a state questioned the constitutionality of the denial of marriage to same-sex couples. Although some people still believe that same-sex marriages are legal in Hawaii that is not the holding of Baehr. The Baehr court merely required the state to justify the denial of marriage licenses to same-sex couples by a compelling interest.

In the wake of the Baehr decision, the fear across America was of same-sex couples flocking to Hawaii, obtaining marriage licenses, and populating the country. States would be forced to recognize these unions under the full faith and credit clause of the U.S. Constitution. ("Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other state.") Resistance came from several fronts. The House Report in support of the Defense of Marriage Act states the original bill was "inspired...by the implications that lawsuit [Baehr v. Lewin] threatens to have on the other States and on federal law." The ultimate fear is stated within the same Report: "Many same-sex couples in and out of Hawaii are likely to take advantage of what would be a landmark victory. The great majority of those who travel to Hawaii to marry will return to their homes in the rest of the country expecting full legal recognition of their unions."

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WHAT WAS THE REPSONE TO THE DEFENSE OF MARRIAGE ACT?

The reaction in Hawaii, the state whose highest court kicked off the DOMA movement, was a microcosm for the reaction in the rest of the US. In Hawaii's November 1998 election, an overwhelming majority of voters, in a referendum previously passed by the state legislature, accepted the following amendment to the Hawaii Constitution: '[t]he legislature shall have the power to reserve marriage to opposite-sex couples.' Thus, the legislature and a majority of the citizens of Hawaii, foreclosed any future for Baehr v. Lewin, and the rights of same-sex Hawaiians to marry. A vast majority of states have passed similar laws and constitutional amendments, either through legislation or public referendum. Colloquially, they are termed "mini-DOMAs."

Traditionally, these state laws all accomplish the same goal: refusal to recognize same-sex marriages entered into in other states. There are different variations. So, for example, the Alabama Constitution was amended in 2006 to read:

"Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting this unique relationship in order to promote, among other goals, the stability and welfare of society and its children. A marriage contracted between individuals of the same sex is invalid in this state."

The state of Washington passed a statute that states: "Marriage is a civil contract between a male and a female who have each attained the age of eighteen years, and who are otherwise capable."

As of 2009, there are 41 states which have passed or enacted mini-DOMAs similar to those recited above.

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IS THERE ANY PLACE WHERE A SAME-SEX COUPLE GET MARRIED IN THE UNITED STATES?

Same-sex couples have enjoyed victories in this conflict with increasing frequency, particularly in the last ten years. In 1999 the Vermont Supreme Court, in the case Baker v. State, held the denial of marriage benefits to same-sex persons violated the state's common benefits clause (similar to the federal equal protection clause). The Vermont legislature narrowly passed a bill allowing same-sex couples to form civil unions with all of the rights of a married couple in Vermont as of 2000. Of course, a Vermont civil union is not recognized by federal law because of DOMA or in the multitude of states that ban same-sex marriage. Notwithstanding the intolerance in much of the United States, a Vermont civil union represented the first state-wide relationship which equated to marriage between same-sex couples in all but name.

Additional states have since recognized same-sex marriages. In 2004, Massachusetts, became the first state to allow members of the same-sex to marry (as a result of the case Goodridge v. Department of Public Health). Notably, Massachusetts broke down the barrier which prevented same-sex couples to enter into a "marriage" in the United States as opposed to an alternately named relationship with all of the rights of marriage—a huge symbolic victory. Connecticut, in the 2008 case Kerrigan v. Commissioner, ruled denial of same-sex marriage violated the equal protection clause of the state constitution. (Formerly, in 2005, the Connecticut legislature passed a civil union law, similar to that passed in Vermont.) As a result of the Kerrigan case, Connecticut became the second state to allow same-sex couples to marry. On April 27, 2009, Iowa became the third US state to recognize same-sex marriage. The Iowa Supreme Court in Varnum v. Brien declared the state's Defense of Marriage Act violated the equal protection clause of the state constitution. Significantly, the Iowa decision is the first where a state's mini-DOMA was declared unconstitutional. Whether this is the beginning of a trend remains to be seen.

The Vermont legislature recently legalized same-sex marriage, effective as of September 2009, thus eliminating the second class status of civil unions. On May 6, 2009, the governor of Maine signed a new law recognizing same-sex marriage. The Maine law allows any two people to enter into a marriage regardless of gender, thus overturning prior legislation banning same-sex marriage. (Note: The voters of Maine will have the opportunity to veto this law in the November, 2009 election). Civil Unions have been recognized in New Hampshire since 2007. Based on recent legislation, as of January 1, 2010, same sex couples can enter into marriage in New Hampshire. Thus, there are six states that allow same-sex couples to enter into marriages today.

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WHAT IS THE AFFECT OF THE DEFENSE OF MARRIAGE ACT ON SAME-SEX MARRIAGES TODAY?

Although there are same-sex couples married in the United States, with marriages solemnized in Massachusetts, Connecticut, Iowa, Vermont, Maine and New Hampshire, these marriages are not recognized by any state with a mini-DOMA (41 states to date) or the federal government pursuant to Section 3 of DOMA.

Besides the 41 states that define marriage as between a man and woman, and the six states that recognize same-sex marriage, there are a few "limbo states." Some of these states recognize out of state same-sex marriages but do not allow the formation of same-sex marriages within the state. Rhode Island recognizes Massachusetts same-sex marriages, under full faith and credit, pursuant to an attorney general opinion letter issued on February 20, 2007. New York recognizes out of state same-sex marriages pursuant to a governor's directive issued in May, 2008. Most recently, on May 5, 2009, the City Council of the District of Columbia voted to recognize out of state same-sex marriages. It appears the federal DOMA is now on a collision course with the actions of the D.C. city council and the full faith and credit clause of the U.S. Constitution.

MORE ON NEW YORK and DC??????? HOW ABOUT CALIFORNIA??????

DOES THE UNITED STATES CONSTITUTION PROTECT ME?

Article Four Section 1 of the United States Constitution, called the full faith and credit clause, reads as follows:

> "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 full faith and credit clause is applied, for example, to driver's licenses and marriages licenses from sister states. Historically, even a marriage that could not be created in one

state, such as a marriage between first cousins, could be solemnized in a different state and then recognized by all other states. There is an old common law rule (judicial rule created by case law) in New York which recognizes out of state marriages valid in the state of origin, regardless of their validity in New York. So, for example, a small minority of states recognize couples as married if they live together and hold themselves out as married. This concept is called common law marriage and it cannot be entered into in New York. However, a common law marriage entered into in a sister-state is recognized in New York even though the same parties could not have validly married in New York.

The Defense of Marriage Act overrules the full faith and credit clause by allowing states to ignore same sex marriages entered into in sister states. This is contrary to some of the most fundamental principles of Constitutional law. The long accepted rule recognized in the United States as early as the decision of Marbury v. Madison in 1803 is that the US Constitution (e.g. the full faith and credit clause) is supreme and trumps ordinary legislation (e.g. the Defense of Marriage Act); this concept is called the supremacy clause.

HOW CAN THE DEFENSE OF MARRIAGE ACT OVERRULE THE FULL FAITH AND CREDIT CLAUSE?

There are several justifications. An exception to the full faith and credit clause allows states to disregard laws or decisions from sister states which are "abhorrent" or against public policy....

WHAT DOES THE US SUPREME COURT THINK?

WHAT IF I ENTER INTO A SAME SEX MARRIAGE IN MASSACHUSETTS AND MOVE TO NEW YORK? WHAT ARE MY RIGHTS?

CAN I GET DIVORCED?

WHAT IF I ENTER INTO A SAME SEX MARRIAGE IN MASSACHUSETTS AND MOVE TO ALABAMA?