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*de•novo*

DEFENSE OF MARRIAGE ACT,  
WILL YOU PLEASE GO NOW!

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*The time has come.  
The time has come.  
The time is now.  
Just go.  
Go.  
GO!  
I don't care how.  
You can go by foot.  
You can go by cow.  
Marvin K. Mooney, will you please go now!*

INTRODUCTION

These are the opening lines of *Marvin K. Mooney Will You Please Go Now!*, a Dr. Seuss book that my three sons and I have read literally hundreds of times. It has all the usual appeal of a Dr. Seuss book – euphonious rhymes, made-up words and objects, fantastical creatures. But it has something else, too. An air of mystery. The entire book revolves around trying to get rid of Marvin K. Mooney, a typical Dr. Seuss character who is some cross between a bear and a small child. The text alternates between increasingly emphatic requests to leave and suggestions for the best ways to exit.

*You can go on skates.  
You can go on skis.  
You can go in a hat.  
But please go.  
Please!*

*I don't care.  
 You can go by bike.  
 You can go on a Zike-Bike  
 If you like.*

*If you like  
 You can go  
 in an old blue shoe.  
 Just go, go, GO!  
 Please do, do, DO!*

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*You can go on stilts.  
 You can go by fish.  
 You can go in a Crunk-Car if you wish*

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*Marvin K. Mooney!  
 Don't you know  
 the time has come  
 to go, GO, GO!*

Missing from the story, though, is even a vague hint as to what Marvin K. Mooney might have done to warrant exile, or where he might be headed. That he needs to leave is apparently beyond dispute. The same could be said for the Defense of Marriage Act (DOMA). It has so obviously outlived any purpose it might have once had that it just needs to go. Now.

This essay will briefly explore the origins of DOMA; its messy and often devastating impact in a world in which some states have legalized same-sex marriage; and the potential ways it might go the way of Marvin K. Mooney.

## I. THE PASSAGE OF DOMA

Congress enacted DOMA in 1996, after very brief deliberation and hearings.<sup>1</sup> DOMA passed both houses of Congress by a wide margin – 342-to-67 in the House<sup>2</sup> and 85-to-14 in the Senate.<sup>3</sup> And somewhat surprisingly, a Democratic president, Bill Clinton, signed it

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<sup>1</sup> Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419.

<sup>2</sup> See 142 Cong. Rec. H7480 (daily ed. July 12, 1996).

<sup>3</sup> 142 Cong. Rec. S10129 (daily ed. Sept. 10, 1996).

swiftly into law, although he did try to do it quietly, in the middle of the night.<sup>4</sup> The frenzy with which Congress took up and ultimately passed DOMA was fueled by the looming possibility that one state might actually legalize same-sex marriage.

Hawaii loomed large in the growing national controversy over same-sex marriage. Prior to 1996, there was very little in the way of law on same-sex marriage anywhere in the U.S. No state explicitly allowed same-sex marriage, but very few explicitly banned it either. Most state marriage laws were silent on the gender of the parties. A handful of court challenges in the 1970s had gone nowhere, producing a set of court opinions that merely relied on the dictionary definition of marriage to restrict it to heterosexuals, and refused to seriously engage with the possibility of a constitutional problem.<sup>5</sup>

The 1990s played host to a renewed effort to gain marriage equality through the courts. This second round of challenges, including the one in Hawaii, were carefully aimed at state constitutions in order to prevent an adverse ruling from the U.S. Supreme Court that would affect every state. But unlike in the 1970s, there was now growing support for gay rights and the firm entrenchment of a constitutional right to marry.<sup>6</sup> The possibility of gaining access to marriage was more promising, and thus more threatening to opponents.

Hawaii, a state around which very few national controversies revolve, was on the brink. Same-sex marriage advocates had filed similar cases in several different states alleging that statutory bans (mostly implied, rather than explicit) violated the respective state constitutions. The Hawaii case reached a pivotal point first. The state's highest court ruled in *Baehr v. Lewin* that a ban on same-sex marriage was a form of sex discrimination, which, under the Hawaii constitution, was entitled to strict scrutiny.<sup>7</sup> As *Baehr* proceeded on remand, it was widely expected that the government would fail to satisfy the high burden the court had imposed and that same-sex marriage would soon be legal there.

Hawaii never did legalize same-sex marriage, although it did adopt a civil union law eighteen years later.<sup>8</sup> But the damage was done: the litigation in Hawaii thrust same-sex marriage into the national

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<sup>4</sup> See Peter Baker, *President Quietly Signs Law Aimed at Gay Marriages*, WASH. POST, Sept. 22, 1996 (noting that President Clinton “waited until the dead of night” to sign DOMA, “timing his action to minimize public attention and contain any political damage”).

<sup>5</sup> See, e.g., *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct. App. 1973); *Singer v. Hara*, 11 Wash. App. 247 (1974). A comprehensive history of the same-sex marriage controversy in the United States can be found in JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20<sup>TH</sup> CENTURY AMERICA* 142-55 (2011).

<sup>6</sup> See *Loving v. Virginia*, 388 U.S. 1 (1967); *Zablocki v. Redhail*, 434 U.S. 374 (1978).

<sup>7</sup> 852 P.2d 44, 66 (Haw. 1993).

<sup>8</sup> Haw. S.B. 232, 26<sup>th</sup> Leg., Reg. Sess. (Haw. 2011).

spotlight and catalyzed a widespread, hasty, and largely ill-thought-out response at both the state and federal level. Both opponents and proponents of same-sex marriage assumed that gay marriage in Hawaii would mean gay marriage everywhere because other states and the federal government would be forced to recognize Hawaii marriages.

Senator Trent Lott warned Congress that a court decision in Hawaii “would not be limited to just one State.” It would “raise threatening possibilities in other States” because of the Full Faith and Credit Clause.<sup>9</sup> Republicans thus abandoned their usual pleas for federalism and insisted instead that the federal government take control of the same-sex marriage issue away from the states, at least in part. Proponents did nothing to dispel Republican fear of same-sex marriage spreading like wildfire. Evan Wolfson, a strong proponent, argued that many same-sex couples “in and out of Hawaii” would take advantage of such a “landmark victory;” and 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 nationwide recognition of their marriage unions.”<sup>10</sup>

DOMA was crafted to cabin same-sex marriage to the horizontal and vertical borders of any state that authorized it. Toward that end, DOMA does two things: To protect states from each other, Section 2 of the Act purports to create an exemption to the Full Faith and Credit Act in order to grant states the right to refuse recognition to same-sex marriages that have been celebrated in other states.<sup>11</sup> To protect the federal government from states that might allow same-sex marriage, Section 3 provides that, for any federal-law purpose, the word “marriage” means only a legal union between one man and one woman, and a “spouse” refers only to someone of the opposite sex.<sup>12</sup>

DOMA thus proposed to “defend” traditional marriage by making it difficult, and in some aspects impossible, for gay marriage to be given equal weight. But because same-sex marriage never materialized in Hawaii – the voters amended the constitution to allow the legislature to ban it – DOMA lay more or less dormant for many years. There were certainly those who argued that it was unconstitutional, but without an actual same-sex marriage to test its

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<sup>9</sup> See 142 CONG. REC. S10100 (1996) (Statement of Sen. Lott).

<sup>10</sup> Evan Wolfson, *Fighting to Win and Keep the Freedom to Marry: The Legal, Political, and Cultural Challenges Ahead*, NAT'L J. SEXUAL ORIENTATION L. 259, 262 (1995).

<sup>11</sup> Defense of Marriage Act § 3(a) (codified at 1 U.S.C. § 7 (2011)) (“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.”).

<sup>12</sup> Defense of Marriage Act § 2(a) (codified at 28 U.S.C. § 1738C (2011)) (“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.”).

validity, courts did not have the opportunity to speak to the issue. So DOMA, at this time in history, was just background noise – “defending” marriage against an attack that was still a threat, not a reality.

## II. THE IMPACT OF DOMA

The same-sex marriage landscape changed dramatically in the decade that followed DOMA’s enactment. From a virtual blank slate, the landscape became distinctly checkered. A handful of foreign jurisdictions went first – with some of them legalizing same-sex marriage as early as 2001. (Eventually, several countries, including Belgium, the Netherlands, South Africa, Argentina, and Spain would legalize same-sex marriage.) In the United States, Massachusetts was the first to allow same-sex marriage pursuant to a 2003 ruling of the state’s highest court in *Goodridge v. Department of Public Health*.<sup>13</sup> The court ruled that denying same-sex couples the right to marry was unconstitutional, and, in a separate advisory opinion to the state senate, that civil unions were not sufficient to cure the constitutional violation.<sup>14</sup> Eventually, seven other states and the District of Columbia followed suit.<sup>15</sup> With New York’s passage of a same-sex marriage law in 2011,<sup>16</sup> the number of people living in gay marriage states more than doubled. Meanwhile, civil unions were invented in Vermont in 2000 and popularized as a sort-of conservative alternative to full marriage equality.<sup>17</sup> Today, four states offer this status to same-sex couples,<sup>18</sup> while four more allow robust domestic partnership with rights and obligations almost equivalent to marriage.<sup>19</sup> Thus, same-sex couples can marry or enter marriage-equivalent statuses in almost a third of the states.

What makes the landscape checkered, however, are the opposing developments. More than forty states have erected substantial obstacles to the celebration and recognition of same-sex marriages. Twenty-nine states have amended their constitutions to prohibit same-sex marriages, nineteen of which used language to explicitly deny recognition to civil unions, domestic partnerships, or any other

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<sup>13</sup> 798 N.E.2d 941 (Mass. 2003)

<sup>14</sup> See Opinion of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004).

<sup>15</sup> These states include: Connecticut, Iowa, Maryland (effective 2013), New Hampshire, New York, Vermont, and Washington.

<sup>16</sup> See Marriage Equality Act, N.Y. A.B. 8354 (enacted June 24, 2011).

<sup>17</sup> See An Act Relating to Civil Unions, H.B. 847, 1999 Gen. Assem., Adjourned Sess. (Vt. 1999), codified as VT. STAT. ANN. tit. 15, § 1204 *et seq.* (2011).

<sup>18</sup> Delaware, Hawaii, New Jersey and Illinois. Vermont continues to give effect to civil unions established before it passed a full marriage equality law in 2008, but no longer issues new civil union licenses.

<sup>19</sup> California, Nevada, Oregon, and Washington all offer this type of status.

marriage-equivalent status as well.<sup>20</sup> Some of those twenty-nine and at least a dozen others have enacted so-called mini-DOMAs, statutes modeled after the federal DOMA designed to ward off same-sex marriages from other states.

While the anti-same-sex-marriage laws began to appear in the mid-1990s, DOMA had no relevance until there was at least one jurisdiction that did allow same-sex marriage. But because Hawaii fueled the spread of anti-gay-marriage laws without ever actually legalizing gay marriage, DOMA and its state analogs lay dormant for several years before they had any official “warding off” to do. DOMA became potentially relevant in 2001, when the first same-sex marriages were legally celebrated in foreign jurisdictions like Canada. (Eventually, several countries, including Belgium, the Netherlands, South Africa, Argentina, and Spain would legalize same-sex marriage.) Normally, a marriage in the foreign country would be recognized in an American state as long as it was valid where celebrated. But despite the potential for a conflict with DOMA, there were no court cases at this stage challenging any state’s refusal – or the federal government’s refusal -- to give effect to same-sex marriages legally celebrated in a foreign jurisdiction.

DOMA only became relevant – and problematic – when the first same-sex marriages were celebrated in the U.S. Pursuant to the *Goodridge* ruling, Massachusetts began issuing marriage licenses to same-sex couples in May, 2004. Then, the recognition questions became ripe: Could these marriages cross state lines? Could they cross the line between state and federal law?

*a. Section 2: Smoke and Mirrors*

Section 2 of DOMA,<sup>21</sup> which purportedly granted states the right to deny recognition to same-sex marriages from sister states, was irrelevant from the beginning. Technically, this provision of DOMA amended the federal Full Faith and Credit Act to provide that states need not grant “full faith and credit” to same-sex marriages. And, as we have seen, four-fifths of the states acted accordingly and passed so-

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<sup>20</sup> For a more detailed summary of these developments, see Joanna L. Grossman & Edward Stein, *The State of the Same-Sex Union: Part Two in a Three-Part Series*, FINDLAW’S WRIT (July 21, 2009), <http://writ.news.findlaw.com/grossman/20090721.html>. Current maps showing both pro- and anti-same-sex-marriage laws are made available by the National Gay and Lesbian Task Force. See Relationship Recognition for Same-Sex Couples in the U.S. (June 28, 2011), [http://www.thetaskforce.org/downloads/reports/issue\\_maps/rel\\_recog\\_6\\_28\\_11\\_color.pdf](http://www.thetaskforce.org/downloads/reports/issue_maps/rel_recog_6_28_11_color.pdf); State Laws Prohibiting Recognition of Same-Sex Relationships (June 30, 2009), [http://www.thetaskforce.org/downloads/reports/issue\\_maps/samesex\\_relationships\\_7\\_09.pdf](http://www.thetaskforce.org/downloads/reports/issue_maps/samesex_relationships_7_09.pdf).

<sup>21</sup> See *supra* note 11.

called mini-DOMAs – statutes or constitutional amendments banning both the celebration and recognition of same-sex marriages.<sup>22</sup>

But full faith and credit has never been understood to compel interstate marriage recognition.<sup>23</sup> Instead, the “exacting” obligations of full faith and credit have been reserved for final judgments in judicial proceedings – including divorce.<sup>24</sup> And marriage is not the product of a court judgment; it is merely the application of a state law, which requires only that other states meet “certain minimum requirements” of full faith and credit.<sup>25</sup> States can still prefer their own law – including their law denying same-sex marriage – over the competing choice of another state – one allowing same-sex marriage – as long as the choice is “neither arbitrary nor fundamentally unfair.”<sup>26</sup>

The rules of marriage differ from state to state. Although today there is relatively little variation, states historically had longstanding disagreements about who should be permitted to marry, and under what circumstances. At various points in history, states disagreed about the permissibility of marriage by minors, interracial marriage, marriage by those carrying communicable diseases, marriage between cousins or in-laws, and common-law marriage.<sup>27</sup>

Amid these disagreements, states developed a set of principles to guide interstate conflicts that arose when a couple legally married in one state, but then moved to or traveled through another. These rules of interstate marriage recognition were not dictated by constitutional mandates, but grew, instead, out of the common law principle of comity – respect for the actions of sister states.<sup>28</sup> Comity dictates that states should at least sometimes give effect to marriages celebrated in other states that they themselves would not have allowed. Under the “place of celebration” rule, which every state follows, marriages are generally valid everywhere if they were valid where celebrated.

Despite this general rule of recognition, the law of interstate marriage recognition – which is completely independent from the law of marriage celebration – has always left room for states to refuse recognition to marriages to which it strenuously objected. Under the

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<sup>22</sup> See *supra* note 20.

<sup>23</sup> See generally Joanna L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 OR. L. REV. 433 (2005); Joanna L. Grossman, *Fear and Loathing in Massachusetts: Same-Sex Marriage and Some Lessons from the History of Marriage and Divorce*, 14 B.U. PUB. INT. L. J. 87 (2004).

<sup>24</sup> See, e.g., *Baker v. General Motors Corp.*, 522 U.S. 222, 233 (1998); *Williams v. North Carolina*, 317 U.S. 287 (1942).

<sup>25</sup> *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 516 (1953).

<sup>26</sup> *Phillips Petroleum v. Shutts*, 472 U.S. 797, 818 (1985) (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981)).

<sup>27</sup> For a more complete discussion of variations among state marriage laws, see GROSSMAN & FRIEDMAN, *supra* note 5, at 27-50.

<sup>28</sup> The roots of this doctrine are discussed in Grossman, *Resurrecting Comity*, *supra* note 23, at 452-56 & 460-61.

“natural law” exception, courts tended to refuse recognition to marriages that were considered universally abhorrent - polygamous unions or incestuous ones between close relatives. In an early New York case, the court articulated this exception as permitting non-recognition for marriages that are “offensive to the public sense of morality to a degree regarded generally with abhorrence.”<sup>29</sup> Under the “positive law” exception, courts refused recognition to marriages when the legislature had not only prohibited celebration of a particular marriage, but had specifically provided that marriages of that type should not be given extraterritorial effect.<sup>30</sup> For the most part, state marriage bans did not extend this far. Some states had so-called “marriage evasion” laws that refused recognition to marriages by their own residents who left the state for the express purpose of evading a marriage restriction. But very few other marriage bans prohibited recognition, as well as celebration, of marriages.

Because of the exceptions to the general rule, and the flexibility states have in deciding whether to apply them, Section 2 of DOMA did not grant the states any right they did not already seem to have. Unless and until the Supreme Court decides that the right to marry a person of the same sex is fundamental, and thus deserving of protection within the federal constitutional right of privacy; or the Court decides that sexual orientation classifications are inherently suspect and deserving of heightened scrutiny under the Equal Protection Clause, states do, and will continue to have discretion to deny recognition to same-sex marriages. In *Perry v. Schwarzenegger*, a federal district judge in Northern California ruled that California’s Proposition 8, which bans same-sex marriage, violates the federal constitution.<sup>31</sup> But these issues have not yet reached the U.S. Supreme Court.

Because the right to refuse recognition to out-of-state marriages is not related to the Full Faith and Credit Act, states would retain it even if DOMA – which misleadingly purports to grant the right in the first instance – were repealed. Conversely, if denying recognition to same-sex marriages were to be held by the Supreme Court to rise to the level of a federal constitutional violation, then states would also have to honor such marriages -- even if DOMA were to stay on the books. Section 2 does reinforce a harmful message of second-class citizenship and invites states to categorically refuse to recognize a particular type of marriage, an historically unprecedented approach to marriage recognition. But, legally speaking, this provision of DOMA was, is, and will remain meaningless.

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<sup>29</sup> *In re Estate of May*, 114 N.E.2d 4 (N.Y. 1953).

<sup>30</sup> See Grossman, *Resurrecting Comity*, *supra* note 23, at 463-67.

<sup>31</sup> 704 F. Supp. 2d 921 (N.D. Cal. 2010).



*b. Section 3: Harm and Foul*

Section 3 of DOMA, however, is a different story altogether. This provision, which states that same-sex marriages cannot be recognized for any federal law purpose, deprives legally married same-sex couples of significant substantive rights, as well as creates a wide (and growing) variety of practical and bureaucratic hassles. It is this provision that the Obama administration has stopped defending in litigation and that has been the subject of a proposed repeal in Congress.<sup>32</sup>

When those first marriage licenses were issued to same-sex couples in Massachusetts in 2004, the federal-law provision of DOMA began to matter. Couples who married in Massachusetts were, in essence, only married while in Massachusetts. On the state-law front, virtually every other state refused to give effect to those marriages, as discussed above. Even some states without a mini-DOMA refused to give effect to same-sex marriages in some contexts.<sup>33</sup> New York was the only state that applied the traditional rules of interstate marriage recognition to give effect to same-sex marriages from places like Massachusetts and Canada.<sup>34</sup>

Moreover, because of DOMA, the Massachusetts (and foreign) marriages were ignored for all federal-law purposes as well. Legally-married same-sex couples could not file joint federal tax returns. A non-citizen same-sex spouse could not petition for citizenship based on marriage to a citizen. A same-sex spouse who received insurance benefits from the other spouse's employer had to pay federal income taxes on them, whereas an opposite-sex spouse would not have to pay any such taxes. Same-sex spouses have no automatic survivorship rights to any pension governed by ERISA. Same-sex spouses could not take advantage of the marital estate-tax exemption, or collect Social Security survivor's benefits (a particularly cruel result, as it affected the bereaved and, often, the elderly).

This provision of DOMA sometimes hurts the government as well. To take just one example, a same-sex spouse's assets need not be considered when the federal government was determining an individual's eligibility for Medicaid or other poverty-relief programs.

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<sup>32</sup> Specific repeal and non-enforcement efforts are detailed in Section III, *infra*.

<sup>33</sup> See, e.g., *Chambers v. Ormiston*, 935 A.2d 956 (R.I. 2007) (refusing to grant divorce to same-sex couple married in Massachusetts because Rhode Island divorce court had jurisdiction only over "marriages" as defined by the legislature at the time the statute was enacted).

<sup>34</sup> See, e.g., *Godfrey v. Spano*, 920 N.E.2d 328 (N.Y. 2009); *Martinez v. County of Monroe*, 50 A.D.3d 189 (N.Y. 2008); *Lewis v. N.Y. State Dep't of Civil Serv.*, 60 A.D.3d 216 (N.Y. 2009). New York eventually adopted its own marriage equality law, which mooted future questions of recognition of same-sex marriages. See Marriage Equality Act, N.Y. A.B. 8354 (enacted June 24, 2011).

And, as discussed in a recent New York Times blog post, children with same-sex parents sometimes get more federal financial aid because the federal government treats the parents as divorced to avoid giving effect to the same-sex marriage.<sup>35</sup> Thus, the government might end up paying benefits because of the insistence on ignoring the existence of a marriage.

What's most notable about Section 3 of DOMA is how unusual it is for the federal government to use its own definition of marriage – or of any family relationship, for that matter -- rather than borrowing such definitions from the states. Aside from a Nineteenth Century federal law criminalizing polygamy,<sup>36</sup> government is generally not in the business of defining marriage or restricting its validity. To the contrary, the many federal laws that turn on marital status simply defer to each state on the question of whether any particular couple is legally married or not. This is true even though the result is that, sometimes, couples in different states might be similarly situated but treated differently under federal law because of variations in state marriage law. Thus, for example, whether a surviving opposite-sex spouse is entitled to Social Security benefits when the wage earner dies depends on whether the couple was legally married in the state in which the wage earner was domiciled.

Federal law generally relies on state definitions of parent-child relationships as well. Whether a child conceived after the death of her biological father is entitled to collect Social Security child's insurance benefits when he dies turns on state law definitions of a legal parent.<sup>37</sup> Even though the benefits are governed by federal law, the law defers to each state to define the relevant relationship. Thus children in different states have different access to these federal law benefits.

Section 3 of DOMA, which categorically refuses to recognize any marriage that deviates from a federal-law definition, thus represents an unusual power grab by the federal government. And it is an ironic rebuke of federalism for the conservative sponsors who championed the bill, and who would champion federalism – styled as “states’ rights” – in virtually any other context. Moreover, to the extent was DOMA was designed to deter states from rushing into same-sex marriage, it has failed.

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<sup>35</sup> See Tara Siegel Bernard, *How to File for Financial Aid if Your Parents are Gay*, N.Y. TIMES BUCKS: MAKING THE MOST OF YOUR MONEY, (Oct. 14, 2011, 2:04 PM), <http://bucks.blogs.nytimes.com/2011/10/14/how-to-file-for-financial-aid-if-your-parents-are-gay/?pagemode=print>.

<sup>36</sup> See Anti-Polygamy Acts, 37 Cong. Ch. 126, 12 Stat. 501 (1862)(repealed 1910).

<sup>37</sup> For a summary of recent cases on this issue, see Joanna L. Grossman, *A Growing Debate Over the Rights of Posthumously Conceived Children*, JUSTIA'S VERDICT (Sept. 6, 2011), <http://verdict.justia.com/2011/09/06/a-growing-debate-over-the-rights-of-posthumously-conceived-children>.

*Goodridge* made DOMA matter. But the post-*Goodridge* developments have made it matter more. Although Massachusetts was alone for several years in issuing marriage licenses to same-sex couples, it is now joined by five other states and the District of Columbia. As noted earlier, when New York legalized same-sex marriage in June, 2011,<sup>38</sup> the number of people living in marriage equality states doubled. In addition, as discussed earlier, a growing number of states now offer marriage-equivalent statuses like the civil union or a robust form of domestic partnership. By the end of 2011, same-sex couples will be able to avail themselves of all the benefits of marriage in more than one-quarter of the states. The combination of marriage equality and marriage equivalent states means that almost half of America's population lives in one of the states where such unions can be formally recognized. And because marriage is available to non-residents, anyone with the ability to travel can enter into a same-sex marriage. The sheer number of gay marriages that exist, and will predictably continue to be entered into in the years to come, makes a federal law that refuses to acknowledge them even less defensible than it already was.<sup>39</sup>

### III. THE END OF DOMA?: CHALLENGES, LIMITATIONS, AND EFFORTS TO REPEAL

The complications of DOMA have begun to reveal themselves in earnest as the same-sex marriage and its equivalents have spread across the country. Not surprisingly, this has prompted numerous lawsuits challenging the law's validity, as well as efforts to minimize or repeal it. Those developments will be discussed in this section.

There are lawsuits now pending in several jurisdictions that challenge the validity of DOMA's Section 3. Last summer, a federal district judge in Massachusetts issued rulings in two companion cases, *Commonwealth of Massachusetts v. HHS*<sup>40</sup> and *Gill v. Office of Personnel Management*,<sup>41</sup> in which he invalidated this provision.<sup>41</sup> In these rulings, the court concluded that Congress had overstepped its bounds on a variety of grounds. Regulating marriage is a "core attribute

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<sup>38</sup> On the gay marriage developments in New York, see Joanna L. Grossman, *Same-Sex Marriage is Legal in New York: The In-State and National Ramifications*, JUSTIA'S VERDICT (June 27, 2011), <http://verdict.justia.com/2011/06/27/same-sex-marriage-is-legal-in-new-york-the-in-state-and-national-ramifications>.

<sup>39</sup> The Williams Institute estimates based on 2010 Census data that there are 132,000 same-sex married couples living in the U.S. at the moment. See The Williams Institute, United States Census Snapshot: 2010, available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot-US-v2.pdf>.

<sup>40</sup> *Commonwealth v. U.S. Dep't Health and Human Services*, 698 F. Supp. 2d 234 (D. Mass. 2010).

<sup>41</sup> *Gill v. Office of Personnel Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010).

of state sovereignty,” the court wrote, and is best left to the states. These rulings are currently on appeal. A similar case, *Pedersen v. OPM*, which challenges the validity of applying Section 3 to plaintiffs who were married in Connecticut, Vermont, and New Hampshire, is pending in federal court as well.

The New York Attorney General, Eric Schneiderman, has filed a brief in a DOMA challenge that is currently pending in the Southern District of New York. In that case, *Windsor v. United States*, the widow of a same-sex spouse, married in Canada, is seeking a refund of estate taxes that would not have been owed had the federal government given effect to the couple’s marriage. Because New York now allows same-sex couples to marry, it has a greater stake in the federal government’s mandate of non-recognition via DOMA than it previously did. Schneiderman’s brief argues not only, as the plaintiff’s does, that Section 3 violates the Equal Protection Clause of the federal constitution, but also that Section 3 violates the Tenth Amendment’s protection for state sovereignty. Lawsuits making these types of arguments about the (in)validity of Section 3 are only going to multiply in number as same-sex marriage expands to a greater portion of the population.

Meanwhile, DOMA’s survival became more precarious by an announcement of the Obama Administration that it no longer planned to defend Section 3 in litigation. The Attorney General, Eric Holder, first issued a general statement that, pursuant to instructions of the President, the Department of Justice would no longer defend the constitutionality of Section 3 of DOMA in court.<sup>42</sup> The statement noted that the “President opposes DOMA and believes it should be repealed,” but that in the past defense of the law’s constitutionality (as opposed to its wisdom) could be justified because its validity had only been litigated in jurisdictions in which federal appellate courts had ruled that sexual orientation classifications were not entitled to heightened scrutiny.<sup>43</sup> Under the rational basis standard, “reasonable arguments” could be made in defense of Section 3.

But the constitutionality of Section 3 is now at issue in the Second Circuit, in which there is “no established or binding standard for how laws concerning sexual orientation should be treated.”<sup>44</sup> The Attorney General is thus forced to argue for a particular standard of review. Because the President believes that such classifications warrant heightened scrutiny, and that Section 3 would fail such heightened scrutiny if applied, it cannot be defended by the executive branch.

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<sup>42</sup> *Statement of the Attorney General in Litigation Involving the Defense of Marriage Act*, Office of Public Affairs, Department of Justice (Feb. 23, 2011), <http://www.justice.gov/opa/pr/2011/February/11-ag-222.html>.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

Thus, the statement concluded that no defense of Section 3 would be offered in *Pedersen* and *Windsor*, two of the pending cases mentioned above. In conclusion, the Attorney General's statement notes, correctly, that "[m]uch of the legal landscape has changed in the 15 years since Congress passed DOMA. The Supreme Court has ruled that laws criminalizing homosexual conduct are unconstitutional. Congress has repealed the military's Don't Ask, Don't Tell policy. Several lower courts have ruled DOMA itself to be unconstitutional."<sup>45</sup> It would be ironic indeed for the federal government to continue refusing recognition to validly celebrated same-sex marriages given all these developments.

On the same day the Attorney General publicly announced the Department of Justice revised position on DOMA, he also sent a letter to leaders in Congress, informing them of the decision not to defend the constitutionality of Section 3 in the Second Circuit, or other jurisdictions in which there is no binding precedent dictating rational basis review for sexual orientation classifications.<sup>46</sup> The letter laid out the legal basis for the conclusion that heightened scrutiny is appropriate and that Section 3 could not survive such a close look. Among other weaknesses in such a defense is the "legislative record underlying DOMA's passage," which "contains numerous expressions reflecting moral disapproval of gays and lesbians and their intimate and family relationships – precisely the kind of stereotype-based thinking and animus the Equal Protection Clause is designed to guard against."<sup>47</sup>

Despite the Obama Administration's decision to stop defending Section 3 in litigation, at least in some jurisdictions, it continues to enforce the provision at the agency level because doing so does not require asserting its constitutionality. Thus, according to Holder's memo,

the President has instructed Executive agencies to continue to comply with Section 3 of DOMA, consistent with the Executive's obligation to take care that the laws be faithfully executed, unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law's constitutionality. This course of action respects the actions of the prior Congress that enacted DOMA, and it recognizes the judiciary as the final arbiter of the constitutional claims raised.<sup>48</sup>

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<sup>45</sup> *Id.*

<sup>46</sup> See *Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act*, Office of Public Affairs, Dep't of Justice (Feb. 23, 2011), <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

While the Administration put forth a reasonable justification for continuing to enforce Section 3 at the agency level while refusing to defend its validity in court, the Holder Memo in some ways makes the problem worse. It is the agency actions – tax rulings, immigration decisions, social security benefits analyses, and so on – that complicate people’s lives. Our legal system has relied for a long time on the assumption that marital status is determined at the state level.<sup>49</sup> There thus is no precedent for dealing with marriages that are recognized at the state level, but ignored at the federal level. Forms cannot be filled out without alteration. Benefits are granted or denied without any rational policy justification. Time is wasted doing things like filling out a dummy joint federal tax return just to get a number required by the state joint tax form. And then when important substantive rights are denied, through a straightforward application of DOMA, same-sex married couples sometimes sue; which provokes more expensive litigation over the validity of DOMA, which the Attorney General, in turn, will not defend. So the Holder Memo, while it increases the likelihood that Section 3 will be declared unconstitutional by a federal court, is not a permanent solution to the substantive and procedural hardships imposed by DOMA.

The better course of action would be to repeal Section 3 altogether. This past summer, the Senate Judiciary Committee held hearings on DOMA’s impact. The hearings were held as part of the consideration of a new bill, the Respect for Marriage Act of 2011 (S.B. 5398), which was introduced by Senator Dianne Feinstein is currently pending in the Senate.<sup>50</sup> (A similar bill has been introduced in the House of Representatives.)<sup>51</sup> The new bill would reverse Section 3 and restore the usual rule that federal law relies on state definitions of marriage unless a particular statute provides otherwise. There would no longer be, in other words, a federal definition of “marriage.”

The federal government has taken other steps to reduce the impact of DOMA, as well. For example, the State Department recently began allowing foreign-service employees to add same-sex partners to their orders.<sup>52</sup> And the Department of Homeland Security acceded to the request of a Venezuelan man, who was legally married to another man in Connecticut, to cancel his deportation order. The man had been

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<sup>49</sup> State laws regulating marriage are subject to federal constitutional constraints. States, for example, cannot ban interracial marriage. *See Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>50</sup> Respect for Marriage Act, S. 598, 112<sup>th</sup> Cong (2011). *available at* <http://www.govtrack.us/congress/bills/112/s598/text>.

<sup>51</sup> Respect for Marriage Act, H. 116, 112<sup>th</sup> Cong. (2011), *available at* <http://www.govtrack.us/congress/bills/112/hr1116/text>.

<sup>52</sup> *See Adding Spouses of Same-Sex Domestic Partners to Orders*, U.S. DEP’T OF STATE, <http://www.state.gov/m/dghr/flo/c23168.htm>.

denied legal residency as a spouse because of DOMA.<sup>53</sup> The cancellation signaled the possibility that the government may be backing away from strict enforcement of DOMA in the immigration context.

Taking its refusal-to-defend stance one step further, the Department of Justice filed a brief in *Golinski v. Office of Personnel Management*,<sup>54</sup> in which it argued affirmatively that Section 3 is unconstitutional. In that case, Karen Golinski, a staff attorney for the Ninth Circuit, tried to add her wife to her health insurance plan as a spouse. The administrative office refused, citing Section 3 of DOMA. Although she initially challenged the refusal as a violation of an employment dispute resolution agreement, which prohibits sexual orientation discrimination, she later added a constitutional challenge. Because of the Holder Memo, DOJ refused to defend the constitutionality of Section 3 in this case. The Bipartisan Legal Advisory Group of the House of Representatives (BLAG) has been defending it instead. DOJ did not just abstain, however; it filed a brief in favor of Golinski, in which it argued that there is no justification for differential treatment of same-sex couples and that the legislative history of DOMA “evidences the kind of animus and stereotype-based thinking that the Equal Protection Clause is designed to guard against.” A federal district court just ruled in favor of Karen Golinski – that Section 3 is unconstitutional as applied to the judiciary’s refusal to treat her wife as a spouse for health insurance purposes.<sup>55</sup> It ruled that statutory classifications on the basis of sexual orientation merit heightened scrutiny under the Equal Protection Clause and that Section 3 of DOMA could not survive such scrutiny.

In addition, President Obama has come out in favor of the Respect for Marriage Act. According to an official statement on The White House Blog, the President “has long called for a legislative repeal of the so-called Defense of Marriage Act (DOMA), which continues to have a real impact on the lives of real people – our families, friends and neighbors.”<sup>56</sup> Repealing Section 3 would “uphold the principle that the

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<sup>53</sup> On this case, see Kirk Semple, *U.S. Drops Deportation Proceedings Against Immigrant in Same-Sex Marriage*, N.Y. TIMES, June 30, 2011, at A16.

<sup>54</sup> Defendant’s Brief in Opposition to Motion to Dismiss, *Golinski v. U.S. Office of Personnel Mgmt.*, 2012 WL 569685, (N.D. Cal. Feb. 22, 2012) (No. 3:10-cv-00257-JSW), available at <http://metroweekly.com/poliglot/DOJ-OppToBLAGMtD.pdf>.

<sup>55</sup> *Golinski v. U.S. Office of Personnel Mgmt.*, ---F. Supp. 2d---, 2012 WL 569685, (N.D. Cal. Feb. 22, 2012); see also Joanna L. Grossman, *Is the Defense of Marriage Act (DOMA) Indefensible? A Federal Court Says Yes*, in *Golinski v. OPM*, JUSTIA’S VERDICT (Mar. 6, 2012), <http://verdict.justia.com/2012/03/06/is-the-defense-of-marriage-act-doma-indefensible>.

<sup>56</sup> Colleen Curtis, *President Obama Supports the Respect for Marriage Act*, THE WHITE HOUSE BLOG (July 19, 2011 6:43 PM), <http://www.whitehouse.gov/blog/2011/07/19/president-obama-supports-respect-marriage-act>.

federal government should not deny gay and lesbian couples the same rights and legal protections as straight couples.”

All of these developments combine to make Section 3 of DOMA ripe for repeal. Through DOMA, Congress declared its opposition to same-sex marriage. But Congress’ efforts to “defend” marriage not only were misguided, but also failed even to accomplish the purposes the statute’s drafters thought they would, thus failing even on its own (discriminatory and objectionable) terms. DOMA did spur states to raise roadblocks to the celebration and recognition of same-sex marriages. But it did not deter the more than a dozen states who now recognize marriage or marriage-like rights for gay and lesbian couples. And now it is itself a source of both tangible and intangible harm, with no conceivable benefit. As with Marvin K. Mooney, DOMA should expect exhortations to exit without the necessity for any explanation.

It’s now high time for Congress to accept defeat, and to restore the tranquility of a system in which only one sovereign determines whether a marriage is valid or not. Any other system is unworkable and should be discarded.

*The time has come  
The time is now  
Defense of Marriage Act  
Will you please go now!*

*You can go by eel.  
You can go by repeal.*

*You can go by non-defense  
through the Holder me-mo  
The time has come  
To go, GO, GO!*

#### EPILOGUE

After I wrote the first draft of this piece, I became curious whether anyone else had wondered about Marvin K. Mooney’s transgressions – or destination. I found nothing in the way of literary analysis of the book. Readers on various book-buying sites offered their own interpretations like, for example, that Marvin was a metaphor for the inevitable march of time towards death. But nothing shed any light on the mysterious predicate for the story.

I did discover, however, that I was not the first to use the story to frame a political argument. Thanks to the wonders of Google, I



stumbled across an old column published by Art Buchwald in the *Washington Post* in 1974, two years after *Marvin K. Mooney* was published. In the column, Buchwald reports that

[m]y good friend Dr. Seuss wrote a book a few years ago titled “Marvin K. Mooney Will You Please Go Now?” He sent me a copy the other day and crossed out “Marvin K. Mooney” and replaced it with “Richard M. Nixon.” It sounded like fun so I asked him if I could reprint it. Please read it aloud.<sup>57</sup>

The column then reprints the entire text of the story, substituting “Richard M. Nixon” for every “Marvin K. Mooney.”

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<sup>57</sup> Art Buchwald, *Richard M. Nixon Will You Please Go Now!*, WASH. POST, July 30, 1974.