



AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 11: The Contemporary Era – Separation of Powers

OXFORD
UNIVERSITY PRESS

Eric Holder, Non-Defense of the Defense of Marriage Act (2011)

In 1996, a Republican Congress overwhelmingly approved and President Bill Clinton signed the Defense of Marriage Act (DOMA). DOMA was a federal legislative response to the early decisions by some state courts to mandate the recognition of same-sex marriages within those states. DOMA was designed both to define marriage as heterosexual marriage for purposes of interpreting federal statutes, but more importantly to free states from any obligation to recognize same-sex marriages formalized in other states. Many states passed their own “mini-DOMAs” that putatively blocked the recognition of same-sex marriages within their states. The full faith and credit clause of Article IV of the U.S. Constitution potentially required all states to recognize same-sex marriages performed in any state.

By 2011, President Barack Obama was calling for the repeal of the federal DOMA, and a number of states had adopted same-sex marriage or civil union policies. Several lawsuits were filed challenging the constitutionality of the federal DOMA, but the federal courts had generally upheld the law. In February 2011, Attorney General Eric Holder informed Speaker of the House John Boehner that the Department of Justice would no longer defend the constitutionality of DOMA in court. The administration argued that its decision turned on the correct standard of review for evaluating DOMA. Once the courts were willing to evaluate DOMA under a heightened standard of review (which the administration agreed that they should), then the administration no longer thought the law could be reasonably upheld. The administration would enforce DOMA until it was struck down or repealed, but it would not defend it. In response, the House made plans to hire a separate legal team to defend the constitutionality of the act as cases made their way through the judicial system. What duties does the Department of Justice owe to Congress? Is there an important difference between non-defense of a statute and non-enforcement?

Dear Mr. Speaker:

After careful consideration, including review of a recommendation from me, the President of the United States has made the determination that Section 3 of the Defense of Marriage Act (“DOMA”), as applied to same-sex couples who are legally married under state law, violates the equal protection component of the Fifth Amendment. . . .

While the Department has previously defended DOMA against legal challenges involving legally married same-sex couples, recent lawsuits that challenge the constitutionality of DOMA Section 3 have caused the President and the Department to conduct a new examination of the defense of this provision. . . .

These new lawsuits . . . will require the Department to take an affirmative position on the level of scrutiny that should be applied to DOMA Section 3 in a circuit without binding precedent on the issue. As described more fully below, the President and I have concluded that classifications based on sexual orientation warrant heightened scrutiny and that, as applied to same-sex couples legally married under state law, Section 3 of DOMA is unconstitutional.

Standard of Review

The Supreme Court has yet to rule on the appropriate level of scrutiny for classifications based on sexual orientation. It has, however, rendered a number of decisions that set forth the criteria that should inform this and any other judgment as to whether heightened scrutiny applies: (1) whether the group in



question has suffered a history of discrimination; (2) whether individuals “exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group”; (3) whether the group is a minority or is politically powerless; and (4) whether the characteristics distinguishing the group have little relation to legitimate policy objectives or to an individual’s “ability to perform or contribute to society.” See *Bowen v. Gilliard* (1987); *City of Cleburne v. Cleburne Living Ctr.* (1985).

Each of these factors counsels in favor of being suspicious of classifications based on sexual orientation. First and most importantly, there is, regrettably, a significant history of purposeful discrimination against gay and lesbian people, by governmental as well as private entities, based on prejudice and stereotypes that continue to have ramifications today. Indeed, until very recently, states have “demean[ed] the[] existence” of gays and lesbians “by making their private sexual conduct a crime.” *Lawrence v. Texas* (2003).

Second, while sexual orientation carries no visible badge, a growing scientific consensus accepts that sexual orientation is a characteristic that is immutable

Third, the adoption of laws like those at issue in . . . *Lawrence*, the longstanding ban on gays and lesbians in the military, and the absence of federal protection for employment discrimination on the basis of sexual orientation show the group to have limited political power and “ability to attract the [favorable] attention of the lawmakers.” And while the enactment of the Matthew Shepard Act and pending repeal of Don’t Ask, Don’t Tell indicate that the political process is not closed *entirely* to gay and lesbian people, that is not the standard by which the Court has judged “political powerlessness.” Indeed, when the Court ruled that gender-based classifications were subject to heightened scrutiny, women already had won major political victories such as the Nineteenth Amendment (right to vote) and protection under Title VII (employment discrimination).

Finally, there is a growing acknowledgment that sexual orientation “bears no relation to ability to perform or contribute to society.” . . . Recent evolutions in legislation . . . , in community practices and attitudes, in case law. . . , and in social science regarding sexual orientation all make clear that sexual orientation is not a characteristic that generally bears on legitimate policy objectives. . . .

To be sure, there is substantial circuit court authority applying rational basis review to sexual-orientation classifications. We have carefully examined each of those decisions. Many of them reason only that if consensual same-sex sodomy may be criminalized under *Bowers v. Hardwick* (1986), then it follows that no heightened review is appropriate – a line of reasoning that does not survive the overruling of *Bowers* in *Lawrence v. Texas* (2003). . . .

Application to Section 3 of DOMA

In reviewing a legislative classification under heightened scrutiny, the government must establish that the classification is “substantially related to an important government objective.” Under heightened scrutiny, “a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded.” “The justification must be genuine, not hypothesized or invented post hoc in response to litigation.” *United States v. Virginia* (1996).

In other words, under heightened scrutiny, the United States cannot defend Section 3 by advancing hypothetical rationales, independent of the legislative record, as it has done in circuits where precedent mandates application of rational basis review. Instead, the United States can defend Section 3 only by invoking Congress’ actual justifications for the law.

Moreover, the legislative record underlying DOMA’s passage contains discussion and debate that undermines any defense under heightened scrutiny. The record 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.

Application to Second Circuit Cases

After careful consideration, including a review of my recommendation, the President has concluded that given a number of factors, including a documented history of discrimination,



classifications based on sexual orientation should be subject to a heightened standard of scrutiny. The President has also concluded that Section 3 of DOMA, as applied to legally married same-sex couples, fails to meet that standard and is therefore unconstitutional. Given that conclusion, the President has instructed the Department not to defend the statute. . . . I concur in this determination.

Notwithstanding this determination, the President has informed me that Section 3 will continue to be enforced by the Executive Branch. To that end, 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.

As you know, the Department has a longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense, a practice that accords the respect appropriately due to a coequal branch of government. However, the Department in the past has declined to defend statutes despite the availability of professionally responsible arguments, in part because the Department does not consider every plausible argument to be a "reasonable" one. . . .

....

Furthermore, pursuant to the President's instructions, and upon further notification to Congress, I will instruct Department attorneys to advise courts in other pending DOMA litigation of the President's and my conclusions that a heightened standard should apply, that Section 3 is unconstitutional under that standard and that the Department will cease defense of Section 3.

....