

DOMA Is Unconstitutional: An Authoritative Opinion

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Lawyer and Writer Brenda Feigen takes a close look at the federal Defense of Marriage Act ... and doesn't like what she sees.

Even though I live in California, last week's federal court decision on the constitutionality of the federal Defense of Marriage Act, known as DOMA, could forever change not only my life and that of my spouse, Joanne (to whom I was married two years ago, after being together for 16 years, when California allowed lesbians and gays the right to marry during a five-month window), but the lives of countless lesbians and gays throughout the nation. That horrific statute defined "marriage" as only the 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 wife." It is truly one of the worst pieces of legislation ever, not to mention that President Clinton, despite his courting of the gay and lesbian vote during his campaign, did not veto it, which he could have. If the case is appealed and upheld on appeal, we will be treated, as will all the same-sex marriages in this country, the same way a heterosexual marriage couple is – which we so are not now. My constitutional expertise was honed when I directed the Women's Rights Project of the ACLU with (now Justice) Ruth Bader Ginsburg, and everything I fought for – against gender discrimination – is now coming into play with same-sex marriage and discrimination against lesbians and gays, in general.

Judge Joseph Tauro, in a case brought by seven same-sex couples and three survivors of same-sex spouses all married in Massachusetts, ruled that their marriages must be recognized by the U.S. government. Each of the couples had a different reason for wanting that recognition, ranging from the social security benefits to which they would be entitled if they were heterosexual couples to the right to file a joint federal tax return to the right to be awarded federal health and widowers' benefits. In fact, as of 2004, there were 1,138 federal laws that tied benefits, protections, rights or responsibilities to marital status, none of which apply to same-sex married couples.

The first wonderful passage in the opinion was Judge Tauro's recounting of the legislative history surrounding the passage of DOMA: "In the floor debate members of Congress repeatedly voiced their disapproval of homosexuality, calling it 'immoral,' 'depraved,' 'unnatural,' 'based on perversion' and 'an attack upon God's principles.' They argued that marriage by gays and lesbians would 'demean' and 'trivialize' heterosexual marriage and might indeed be 'the final blow to the American family.'" Indeed, one Representative Lipinski declared that "allowing for gay marriages would be the final straw, it would devalue the love between a man and a woman and weaken us as a Nation." Not to be outdone, Sen. Jesse Helms added that "[Those opposed to DOMA] are demanding that homosexuality be considered just another lifestyle – these are people who seek to force their agenda upon the vast majority of Americans who reject the homosexual lifestyle."

A brief primer on constitutional law and equal protection was given to us near the end of his decision, as Judge Tauro explains: "In an attempt to reconcile the promise of equal protection with

the reality of lawmaking, courts apply strict scrutiny ... only to those laws that burden a fundamental right or target a suspect class." But, said Judge Tauro, the court need not go there "because DOMA fails to pass constitutional muster even under the [less exacting] ... rational basis test ... [T]here exists no fairly conceivable set of facts that could ground a rational relationship between DOMA and a legitimate government objective."

Judge Tauro then goes through the various "reasons" proffered by the defendants, i.e., the federal government, as to why DOMA must stand: Denying federal recognition of same-sex marriages might encourage responsible procreation. But, says the judge, medical, psychological and social welfare communities have all come to the consensus that children raised by gay and lesbian parents are just as likely to be well-adjusted as those raised by heterosexual parents.

On a related issue, he states that the "ability to procreate is not now, nor has it ever been, a precondition to marriage in any state." Furthermore, "this court cannot discern a means by which the federal government's denial of benefits to same-sex spouses might encourage homosexual people to marry members of the opposite sex." He concludes this line of analysis by noting the possibility that congress sought to deny recognition to same-sex marriages in order to make heterosexual marriage appear more valuable or desirable, but he adds that to the extent that this was the goal, Congress has achieved it "]only by punishing same-sex couples who exercise their rights under state law. And this the Constitution does not permit."

We finally get to my favorite paragraphs in the opinion: "In sum, the court is soundly convinced ... that the government's proffered rationales ... are without 'footing in the realities of the subject addressed by [DOMA].' And 'when the proffered rationales for a law are clearly and manifestly implausible, a reviewing court may infer that [bold]animus[bold] [emphasis mine] is the only explicable basis. [Because] animus alone cannot constitute a legitimate government interest, this court finds that DOMA lacks a rational basis to support it.

"Indeed Congress undertook this classification [passing DOMA] for the one purpose that lies entirely outside of legislative bounds, to disadvantage a group of which it disapproves. And such a classification, the Constitution clearly will not permit.

"As irrational prejudice plainly never constitutes a legitimate government interest, this court must hold that Section 3 of DOMA as applied to Plaintiffs violates the equal protection principles embodied in the Fifth Amendment to the United States Constitution."

(The court did not address the part of DOMA that allows states to ignore the marital status of gays and lesbians from other states for complicated reasons beyond the scope of this article. Family law issues and regulations like age when one can marry, etc., are solely the province of the states.)

I am bursting with excitement now to see how the Obama administration handles an appeal of this decision to the First Circuit Court of Appeals. It has 60 days to appeal. Of course, if it does and that court upholds this decision (we can fairly assume that we'll win again in that liberal circuit), the

government will no doubt appeal next (and last) to the U.S. Supreme Court. On that subject, I've opined before that I don't see how Justice Kennedy can vote with the reactionaries when it was he who wrote the majority opinion in "Lawrence v. Texas", upholding the right of gays and lesbians to engage in same-sex sex without punishment.

Furthermore, Judge Vaughn Walker in California's federal district court in San Francisco is about to render a decision on the constitutionality of Prop 8 under the federal constitution. Might he have been waiting to see what the court in Massachusetts had to say about DOMA? These cases don't present the same issues; the Prop 8 case goes to whether a (slim) majority of voters, via an initiative amending the state constitution, can constitutionally deprive gays and lesbians of the right to marry. Nonetheless, Judge Tauro has handed California's Judge Walker a strong basis for giving gay and lesbian couples married in the states that have legalized same-sex marriage and, of course, those that will follow, a much-deserved victory.

Editor's Note: Brenda Feigen is Principal in her firm, Feigen Law Group, where she practices anti-discrimination and civil rights, family, environmental, and intellectual property law. A graduate of Harvard Law School, she co-founded Ms. Magazine with Gloria Steinem and directed with (now Justice) Ruth Bader Ginsburg the Women's Rights Project of the ACLU. Her memoir, *Not One of the Boys: Living Life as a Feminist*, was published by Alfred A. Knopf in 2000. She moved from Manhattan to Los Angeles to produce her first feature film and currently lives there with Joanne Parrent, her longtime partner and spouse.

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