



ISSUE BRIEF

DOMA 101: AN INTRODUCTION TO SAME-SEX “MARRIAGE,” THE DEFENSE OF MARRIAGE ACT, AND THE FULL FAITH AND CREDIT CLAUSE

by Christopher M. Gacek

In the mid-1990s, it appeared that Hawaii would become the first state to enact same-sex marriage. This seemed likely after the state’s highest court indicated in May 1993 that limiting marriage to male-female couples was probably unconstitutional under Hawaiian law. This led to concern that if one state legalized same-sex “marriage,” other states would also be required to recognize those “marriages” under the U.S. Constitution’s “Full Faith and Credit” clause.

“Full Faith and Credit”

In 1787 when representatives of the States assembled in Philadelphia to draft a replacement for the Articles of Confederation, relations among the States were not ideal. One problem lay in the perception that citizens of one state who pursued legal action in another would not be treated fairly. In particular, there was concern that judicial decisions and judgments rendered in one state would not be honored by courts and officials in other states.

To help rectify this problem, the ratified Constitution contained a provision, known as the “Full Faith and Credit Clause” (Article IV, sec. 1), which states 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.¹

During the ratification debates, James Madison discussed this provision of the Constitution in an essay addressed “To the People of the State of New York” (Federalist 42). He noted that the new provision constituted “an evident and

valuable improvement on the clause relating to this subject” over its treatment in the Articles. Madison observed that the Articles’ clause was “extremely indeterminate” and could only “be of little importance under any interpretation which it will bear.”

In 1790 the Congress acted pursuant to the enhanced powers granted by the Constitution’s Full Faith and Credit Clause by passing legislation stating that “the records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every Court within the United States, as they have by law or usage in the Courts of the state from whence the said records are or shall be taken.” This law is often referred to as the “Full Faith and Credit Statute.”²

The Defense of Marriage Act

Eventually, Hawaii’s traditional definition of marriage was saved in November 1998 when a state constitutional amendment was approved by referendum. The amendment stated, “The legislature shall have the power to reserve marriage to opposite-sex couples.”³ However, before the passage of the Hawaiian amendment, the U.S. Congress enacted and President Bill Clinton signed the “Defense of Marriage Act” (“DOMA”).⁴ The Defense of Marriage Act was intended to help defend traditional marriage from efforts to redefine it – like the one in Hawaii. The Defense of Marriage Act worked toward that goal by including sections that: 1) defined marriage traditionally in *federal* law; and, 2) enabled states – even in the face of claims made pursuant to the Full Faith and Credit Clause – to decline to recognize same-sex marriages from other states.

DOMA’s Provisions

The Defense of Marriage Act defines marriage in federal law as follows:

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.⁵

The Defense of Marriage Act also affirms the power of each state to make its own decision as to whether it will accept or reject same-sex marriages created in other jurisdictions. It was enacted pursuant to the power granted to Congress in the

second sentence of Article IV, Section 1. The Full Faith and Credit Statute was amended to include this provision:

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.⁶

State Action and DOMA

Even though Massachusetts (2003) and California (2008) courts have mandated same-sex marriage in those two states there is a strong national movement to protect traditional marriage. A total of 44 states have instituted protections for traditional marriage either through state constitutional amendments or by statutes. Twenty-six states have enacted constitutional amendments restricting marriage to one man and one woman, and eighteen states have done so by statutory change only without constitutional amendment.⁷

In November 2008 California and Florida voters will have the opportunity to pass state constitutional amendments that will define marriage as existing only between one man and one woman.

DOMA Facts and Resources

- President Bill Clinton signed the Defense of Marriage Act (September 21, 1996);
- Senator John McCain voted for the Defense of Marriage Act;
- Senator Barack Obama has advocated the complete repeal of the Defense of Marriage Act.⁸
- LINK: <http://www.domawatch.org/index.php>
- LINK: <http://www.heritage.org/Research/Family/Marriage50/>

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¹ U.S. National Archives and Records Administration, U.S. Constitution. Wikipedia also has a useful entry on the Full Faith and Credit Clause (LINK: < http://en.wikipedia.org/wiki/Full_Faith_and_Credit_Clause >).

² *Id.* at n.10. The current version of the statute, amended in 1948 to give state statutes analogous interstate effect, may now be found at 28 U.S.C. § 1738.

³ Hawaii State Constitution. Art. I, § 23. Marriage.

⁴ DOMA was passed by Congress on September 21, 1996, as Public Law No. 104-199, 110 Stat. 2419. President Bill Clinton signed DoMA into law on that date. The vote in the U.S. Senate was 85-14; in the U.S. House of Representatives it was 342-67.

⁵ 1 U.S.C. § 7 (Pub. L. 104-199, sec. 1, 100 Stat. 2419 (Sep. 21, 1996)).

⁶ 28 U.S.C. § 1738C (Pub. L. 104-199 sec. 2, 100 Stat. 2419 (Sep. 21, 1996)).

⁷ California's successful attempt to protect marriage (Proposition 22) was overturned by its highest court on May 15, 2008. Proposition 22 was adopted by California voters on March 7, 2000, by a margin of 61.4% to 38.6%. For a listing of the states that have acted either constitutionally or statutorily, see the Human Rights Campaign's map of same-sex marriage prohibitions (LINK: < http://www.hrc.org/documents/marriage_prohibitions.pdf >).

⁸ Letter, Senator Barack Obama to Alice B. Toklas LGBT Democratic Club, San Francisco, California (June 29, 2008) (read at the group's annual Pride Breakfast) (LINK: < <http://www.alicebtoklas.org/abt/index.asp> >).