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## Foreward

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**SYMPOSIUM**

**DEFENSE OF MARRIAGE ACT:  
LAW, POLICY, AND THE FUTURE OF MARRIAGE**

**FOREWORD**

*Joseph Landau\**

On March 30, 2012, the *Fordham Law Review* held a daylong conference on the federal Defense of Marriage Act<sup>1</sup> (DOMA), a statute enacted in 1996 with large majorities in both the House and Senate and signed into law by President Clinton.<sup>2</sup> The Symposium could not have come at a better time: there have been extraordinary changes in the political dynamics surrounding relationship rights since DOMA's enactment in 1996, when same-sex couples could not marry in any U.S. or foreign jurisdiction. Currently, same-sex couples can legally marry in six U.S. states<sup>3</sup> and the District of Columbia.<sup>4</sup> Nine additional states have broad domestic

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\* Associate Professor, Fordham Law School. I would like to thank the following individuals for their helpful comments and suggestions: Liz Cooper, Alphonso David, Howard Erichson, James Esseks, Ray Fisher, Dawn Johnsen, J. Jennings Moss, Melissa O'Leary, Joanna Rosenberg, Jonathan Ross, Jacob Sayward, Paul Smith, Robert Wintemute, Tobias Barrington Wolff, Evan Wolfson, and Ben Zipursky.

1. Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2006) and 28 U.S.C. § 1783C (2006)).

2. DOMA passed by a vote of 342–67 in the House and 85–14 in the Senate. 142 CONG. REC. 17,068–95 (House vote), 22,437–63, 22,467 (Senate vote) (1996).

3. The six states are Connecticut, Iowa, Massachusetts, New Hampshire, New York, and Vermont. *States*, FREEDOMTOMARRY.ORG (May 9, 2012), <http://www.freedomtomarry.org/states/>. At least two Native American tribes—the Coquille in Oregon and the Suquamish in Washington—allow same-sex couples to marry. COQUILLE INDIAN TRIBAL CODE § 740.010(3)(b) (2008), *available at* <http://www.coquilletribe.org/documents/740MarriageandDomesticPartnership.pdf>; William Yardley, *A Washington State Indian Tribe Approves Same-Sex Marriage*, N.Y. TIMES, Aug. 12, 2011, at A12; *see also International Progress Toward the Freedom to Marry*, FREEDOMTOMARRY.ORG (July 2012), <http://www.freedomtomarry.org/pages/international-progress-toward-the-freedom-to-marry>.

4. More than 18,000 same-sex couples married in California between June 16, 2008 (after the state supreme court invalidated a statute denying same-sex couples the freedom to marry, *see In re Marriage Cases*, 183 P.3d 384 (Cal. 2008)), and November 5, 2008 (after the passage of Proposition 8, an amendment to the California Constitution that limited marriages to different-sex couples, *see* CAL. CONST. art. I, § 7.5). *See* Jesse McKinley, *Same-Sex Married Couples in California Await Court's Ruling*, N.Y. TIMES, May 26, 2009, at A10. On May 26, 2009, the California Supreme Court upheld Proposition 8 against a state constitutional challenge. *See* *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009). The court held that

partnership or civil union laws,<sup>5</sup> and another four provide more limited forms of domestic partnership benefits.<sup>6</sup> Moreover, three other states that do not allow same-sex couples to marry will honor out-of-state marriages between gay and lesbian couples.<sup>7</sup> Eleven foreign jurisdictions permit marriage between same-sex couples as well.<sup>8</sup>

### I.

When DOMA was enacted in 1996, there was no state-level relationship recognition of any kind for same-sex couples. Yet Congress took action after the Hawaii Supreme Court ruled that denying same-sex couples the

Proposition 8 did not invalidate marriages of same-sex couples performed before its enactment. *See id.* at 119–22; *see also infra* note 37.

5. Those states are California, Delaware, Hawaii, Illinois, Nevada, New Jersey, Oregon, Rhode Island, and Washington. CAL. FAM. CODE § 297.5 (West 2004); DEL. CODE ANN. tit. 13, § 200-17 (West 2012); HAW. REV. STAT. § 572B-A (2012); 750 ILL. COMP. STAT. ANN. 75 / 20 (West 2012); NEV. REV. STAT. ANN. § 122A.010 (West 2010); N.J. STAT. ANN. § 26:8A-1 (West 2012); OR. REV. STAT. ANN. § 106.300 (West 2012); R.I. GEN. LAWS § 15-3.1-1 (2012); 2009 Wash. Legis. Serv. 1 (West).

6. Those states are Colorado, Maine, Wisconsin, and Maryland. COLO. REV. STAT. ANN. § 15-22-101 (West 2012); ME. REV. STAT. tit. 22, § 2710 (2012); WIS. STAT. § 770.001–18 (2012); S.B. 597, 425th Leg., 2008 Reg. Sess. (Md. 2008); S.B. 566, 425th Leg., 2008 Reg. Sess. (Md. 2008).

7. Attorneys general in Rhode Island, Maryland, and New Mexico have issued opinions indicating that those states will recognize out-of-state same-sex marriages as a matter of comity. *See* Marriage—Whether Out-of-State Same-Sex Marriage That Is Valid in the State of Celebration May Be Recognized in Md., 95 Op. Md. Att’y Gen. 3 (2010), *available at* <http://www.oag.state.md.us/Opinions/2010/95oag3.pdf>; Are Same-Sex Marriages Performed in Other Jurisdictions Valid in N.M.?, Op. N.M. Att’y Gen. 11-01 (2011), *available at* <http://97.65.186.35/pdf/4%20Jan%2011-Rep.%20A1%20Park-Opinion%2011-01%5B1%5D.pdf>; Letter from Patrick Lynch, R.I. Att’y Gen., to Jack R. Warner, Comm’r, R.I. Bd. of Governors for Higher Educ. (Feb. 20, 2007), *available at* <http://www.glad.org/uploads/docs/cases/cote-whitacre-et-al-v-dept-public-health/ri-ag-statement.pdf>.

8. Those eleven countries are Argentina, Belgium, Canada, Denmark, Iceland, the Netherlands, Norway, Portugal, South Africa, Spain, and Sweden. *See* CÓDIGO CIVIL [CÓD. CIV.] [CIVIL CODE] art. 26.618 (Arg.); CODE CIVIL [C.CIV.] art. 143 (Belg.); Civil Marriage Act, S.C. 2005, c. 33 (Can.); Hjúskaparlögum [Marriage Code], no. 31/1993 (as amended in 138th Congress, Law no. 65 (June 22, 2010)) (Ice.); Wet Openstelling Huwelijk (Act on the Opening Up of Marriage), Stb. 2001, p. 9 (Neth.); CIV. CODE § 33 (enacted June 27, 2008) (Nor.); Assembleia da República, n. 9/2010 (May 31, 2010) (Port.); C.C., art. 44 (as amended by law 13/2005, July 1, 2005) (Spain); ÅKTENSKAPSBALK [ÅKTBJ][MARRIAGE CODE] 2009:260 (Swed.); *Minister of Home Affairs v. Fourie* 2005 (1) SA 524 (CC) at 56–62 paras. 90–98 (S. Afr.).

In addition, same-sex couples can legally marry in the federal district of Mexico, and the Supreme Court of Mexico has held that these marriages must be recognized throughout Mexico. Código Civil Para el Distrito Federal [Civil Code for the Federal District], *as amended*, Lib. Primero De Las Personas, tit. 5, cap. II, art. 146 (Mex.); David Agren, *Court Says All Mexican States Must Honor Gay Marriages*, N.Y. TIMES, Aug. 11, 2010, at A6. In Brazil, the Supreme Federal Court voted to grant same-sex couples the same legal rights as married couples, and couples with civil unions may petition a judge to convert their union into a marriage. Bradley Brooks, *Brazil Judge OKs Country’s First Gay Marriage*, MIAMI HERALD, June 28, 2011, <http://miamiherald.typepad.com/gaysouthflorida/2011/06/brazil-judge-oks-countrys-first-gay-marriage.html>; John Lyons, *Brazil Top Court Grants Equal Rights to Same-Sex Unions*, WALL ST. J., May 7, 2011, at A9.

right to marry might constitute sex discrimination in violation of the state constitution's equal protection guarantee.<sup>9</sup> After the case was returned to the lower court, the State was unable to persuade that court that it could demonstrate a compelling interest to justify barring marriages between individuals of the same sex.<sup>10</sup> Yet same-sex couples never married in Hawaii: the decision was mooted through an amendment to the Hawaii Constitution empowering the state legislature to reserve marriage to different-sex couples.<sup>11</sup> But federal legislators did not wait for that outcome, arguing that if Hawaii, or another state, legalized marriages between individuals of the same sex, other states might be compelled to recognize those marriages under the Full Faith and Credit Clause of the U.S. Constitution.<sup>12</sup> Section 2 of DOMA allows states to refuse to honor the validity of lawful out-of-state marriages between same-sex couples.<sup>13</sup> Section 3 defines marriage for federal purposes as exclusively between different-sex couples.<sup>14</sup>

It is noteworthy that a statute that passed relatively recently with overwhelming majorities in the House and Senate<sup>15</sup> could find itself so severely weakened in such a short period. Since January of 2012, two federal appellate courts and a number of federal district courts have declared section 3 unconstitutional.<sup>16</sup> Bankruptcy courts have struck down

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9. *Baehr v. Miike*, 910 P.2d 112, 115–16 (Haw. 1996).

10. *Baehr v. Miike*, Civ. No. 91-1394, 1996 WL 694235, at \*21 (Haw. Cir. Ct. Dec. 3, 1996).

11. The amendment was approved by a vote of 69.2–28.6 percent. Joshua K. Baker, *Status, Substance, and Structure: An Interpretive Framework for Understanding the State Marriage Amendments*, 17 REGENT U. L. REV. 221, 242 (2005).

12. U.S. CONST. art. IV, § 1.

13. Defense of Marriage Act § 2(a), 28 U.S.C. § 1738(C) (2006) (“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.”).

14. Defense of Marriage Act § 3(a), 1 U.S.C. § 7 (2006) (“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.”).

15. See *supra* note 2 and accompanying text.

16. *Windsor v. United States*, Nos. 12-2335-cv(L), 12-2435(Con.), 2012 WL 4937310 (2d Cir. Oct. 18, 2012), *aff’g* 833 F. Supp. 2d 394 (S.D.N.Y. 2012), *petition for cert. before judgment filed*, No. 12-63 (U.S. July 16, 2012), *petition for cert. before judgment filed*, No. 12-307 (U.S. Sept. 11, 2012); *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012), *aff’g* *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010), *and Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010), *petitions for cert. filed*, Nos. 12-13 (U.S. June 29, 2012), 12-15 (U.S. July 3, 2012), *and* 12-97 (U.S. July 20, 2012); *Pedersen v. Office of Pers. Mgmt.*, No. 3:10-cv-1750 (D. Conn. July 31, 2012), *appeal filed*, No. 12-3273 (2d Cir. Aug. 17, 2012), *petition for cert. before judgment filed*, No. 12-231 (U.S. Aug. 21, 2012), *petition for cert. before judgment filed*, No. 12-302 (U.S. Sept. 11, 2012); *Dragovich v. U.S. Dep’t of the Treasury*, No. C 10-1564 CW, 2012 WL 1909603 (N.D. Cal. May 24, 2012), *appeal filed*, No. 12-16461 (9th Cir. June 26, 2012), *and* No. 12-16628 (9th Cir. July 23, 2012); *Golinski v.*

section 3 as well.<sup>17</sup> The Obama Administration has determined that section 3 is unconstitutional and is refusing to defend the statute in the pending federal litigation.<sup>18</sup> Increasing numbers in Congress support legislation to repeal it.<sup>19</sup>

## II.

Reviewing the history around the passage of DOMA provides a window into a society deeply divided on the subject of marriage rights for same-sex couples. Congressman Bob Barr introduced the legislation to address a “direct assault by homosexual extremists all across this country.”<sup>20</sup> Henry Hyde, then-Chairman of the House Judiciary Committee, described the issue of marriage rights for same-sex couples as a “miserable, uncomfortable, queasy issue.”<sup>21</sup> He noted that “most people do not approve of homosexual conduct . . . and they express their disapprobation through the law.”<sup>22</sup> Other members of Congress railed against homosexuality as “immoral,”<sup>23</sup> “depraved,”<sup>24</sup> “unnatural,”<sup>25</sup> and “based on perversion.”<sup>26</sup>

Equally telling is a contemporaneous interview of then-President Clinton featured in *The Advocate* (a magazine devoted to LGBT issues) in 1996.<sup>27</sup> The author of the article, J. Jennings Moss, expressed dismay with Clinton’s overall record on gay rights issues, criticizing the President for failing to “follow[] through on his promise to open the military’s doors to gays and lesbians”<sup>28</sup> and for staying on the sidelines in the landmark case of

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Office of Pers. Mgmt., 824 F. Supp. 2d 968 (N.D. Cal. 2012), *appeal filed*, No. 12-15388 (9th Cir. Feb. 24, 2012), and No. 12-15409 (9th Cir. Feb. 28, 2012), *petition for cert. before judgment filed*, No. 12-16 (U.S. July 3, 2012). *But see* In Chambers Order re Defendants’ Partial Motion to Dismiss; Intervenor’s Motion to Dismiss, *Lui v. Holder*, No. 2:11-cv-01267-SVW-JCG (C.D. Cal. Sept. 28, 2011), ECF No. 38 (upholding DOMA); In Chambers Order re Defendants’ Motion to Dismiss, *Torres-Barragan v. Holder*, No. 2:09-cv-08564-RGK-MLG (C.D. Cal. Apr. 30, 2010), ECF No. 24 (upholding DOMA).

17. *In re Balas*, 449 B.R. 567, 568 (Bankr. C.D. Cal. 2011); *In re Somers*, 448 B.R. 677, 677 (Bankr. S.D.N.Y. 2011). DOMA has also been struck down on due process grounds by a Ninth Circuit judge reviewing an administrative complaint by an employee of the judicial branch who was prohibited from making his same-sex spouse a beneficiary for spousal employment benefits. *See In re Levenson*, 560 F.3d 1145, 1149–51 (9th Cir. 2009); *In re Levenson*, 587 F.3d 925, 931–33 (9th Cir. 2009).

18. *See* Letter from Eric H. Holder, Jr., Att’y Gen., to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011), *available at* <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

19. *See infra* notes 51–52 and accompanying text.

20. 142 CONG. REC. 16,798 (1996) (statement of Rep. Robert Barr).

21. SAME-SEX MARRIAGE: PRO AND CON 225–26 (Andrew Sullivan ed., 1997).

22. 142 CONG. REC. 17,089 (statement of Rep. Henry Hyde).

23. *See* 142 CONG. REC. 16,972 (statement of Rep. Thomas Coburn); 142 CONG. REC. 17,082 (statement of Rep. Lamar Smith).

24. *See* 142 CONG. REC. 17,074 (statement of Rep. Stephen Buyer).

25. 142 CONG. REC. 17,082 (statement of Rep. Lamar Smith).

26. *See* 142 CONG. REC. 16,972 (statement of Rep. Thomas Coburn).

27. J. Jennings Moss, *Bill Clinton: The Advocate Interview*, *ADVOCATE*, June 25, 1996, at 44.

28. *See id.*

*Romer v. Evans*.<sup>29</sup> Still, he praised the Clinton Administration for doing “more than any other [president] to help gay and lesbian Americans,”<sup>30</sup> crediting the Administration for appointing openly gay men and lesbians to various positions within the executive branch;<sup>31</sup> prohibiting antigay discrimination within the federal bureaucracy;<sup>32</sup> and, “more significant[ly],” ending “the practice of denying federal employees security clearances just because they are gay or lesbian.”<sup>33</sup> While Moss noted that the President planned to sign DOMA into law,<sup>34</sup> he credited the Clinton Administration for supporting federal legislation barring sexual-orientation-based discrimination in private employment<sup>35</sup>—something that still awaits enactment by Congress.

### III.

It is striking how far the ground has shifted in only sixteen years. A strategy to do what had once seemed unattainable—persuading officials within the political branches to embrace marriage rights for same-sex couples—has proven successful. When the New York legislature passed a marriage law in 2011, it more than doubled the percentage of Americans living in states with egalitarian marriage laws;<sup>36</sup> that percentage will double again if the federal challenge to California’s Proposition 8,<sup>37</sup> a statewide referendum that invalidated a state supreme court ruling upholding the freedom to marry for same-sex couples, is successful. Recently, in *Perry v. Brown*,<sup>38</sup> a Ninth Circuit panel narrowly upheld a district court decision striking down Proposition 8.<sup>39</sup> The full court refused to grant en banc review,<sup>40</sup> and a petition for certiorari has been filed in the U.S. Supreme Court.<sup>41</sup> And while opponents of marriage equality have been extremely effective in using statewide referenda to prevent or reverse gains made by same-sex couples in state legislatures and state courts, advocates for the freedom to marry have put an initiative on the ballot in Maine for the

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29. 517 U.S. 620 (1996); see Moss, *supra* note 27, at 46.

30. Moss, *supra* note 27, at 46.

31. *See id.*

32. *See* Exec. Order No. 13,087, 63 Fed. Reg. 30,097 (May 28, 1998).

33. Moss, *supra* note 27, at 46; see Exec. Order No. 12,968, 60 Fed. Reg. 40,245 (Aug. 2, 1995).

34. Moss, *supra* note 27, at 46. President Clinton has since disavowed DOMA and has argued that it is unconstitutional. See Robert Barnes, *U.S. Law on Gay Unions Rejected*, WASH. POST, June 1, 2012, at A1.

35. Moss, *supra* note 27, at 46.

36. Thomas Kaplan, *After Long Wait, Same-Sex Couples Marry in New York*, N.Y. TIMES, July 24, 2011, at A1.

37. CAL. CONST. art. I, § 7.5; see *supra* note 4.

38. *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *aff’g* *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *petition for cert. filed*, No. 12-144 (U.S. July 30, 2012).

39. *Id.*

40. *See Perry v. Brown*, 681 F.3d 1065 (9th Cir. 2012).

41. *Petition for Writ of Certiorari, Hollingsworth v. Perry*, No. 12-144 (U.S. July 30, 2012).

upcoming 2012 election and are optimistic it will succeed.<sup>42</sup> Among other things, advocates point to recent polling data showing majority support for equal marriage for same-sex couples.<sup>43</sup>

Of course, these changes have not been one-sided. In 2012, the legislatures in three states—Maryland, New Jersey, and Washington—passed legislation ending discrimination in marriage.<sup>44</sup> New Jersey's governor vetoed the bill,<sup>45</sup> and the other two will not take effect unless they can overcome statewide referenda in the November 2012 elections.<sup>46</sup> On May 8, 2012, North Carolina became the thirtieth state to approve by referendum a constitutional amendment restricting marriage to different-sex couples.<sup>47</sup>

#### IV.

The litigation challenging DOMA section 3 is a centerpiece of this Symposium. The First and Second Circuits have invalidated section 3 of DOMA,<sup>48</sup> and district courts in California, Connecticut, Massachusetts, and New York have struck down section 3 as well.<sup>49</sup> At present, certiorari

42. Katharine Q. Seelye, *Second Time Around, Hope for Gay Marriage in Maine*, N.Y. TIMES, June 25, 2012, at A9.

43. Nate Silver, *Support for Gay Marriage Outweighs Opposition in Polls*, FIVETHIRTYEIGHT (May 9, 2012), <http://fivethirtyeight.blogs.nytimes.com/2012/05/09/support-for-gay-marriage-outweighs-opposition-in-polls/>.

44. See H.B. 430-438 Leg. Sess., 2012 Md. Laws 9; S. 215-1, 1st Sess. (N.J. 2012); 2012 Wash. Legis. Serv. 13 (West).

45. Kate Zernike, *Christie Keeps His Promise to Veto Gay Marriage Bill*, N.Y. TIMES, Feb. 18, 2012, at A19.

46. Maryland's bill does not come into effect until January 1, 2013, and only then if it survives a November statewide referendum. See Ian Duncan, *Gay Marriage Law Is Signed in Maryland*, L.A. TIMES, Mar. 2, 2012, at A8. Washington's bill will also be put up for referendum in November. See Tracy Simmons, *Can Conservatives Overcome Washington's Secular Bent to Ban Gay Marriage?*, WASH. POST (June 19, 2012, 11:28 AM), [http://www.washingtonpost.com/national/on-faith/can-conservatives-overcome-washingtons-secular-bent-to-ban-gay-marriage/2012/06/15/gJQAE7uVfV\\_story.html](http://www.washingtonpost.com/national/on-faith/can-conservatives-overcome-washingtons-secular-bent-to-ban-gay-marriage/2012/06/15/gJQAE7uVfV_story.html). The outcome of these referenda will not be known until after this Foreword goes to print.

47. Campbell Robertson, *Ban on Gay Marriage Passes in North Carolina*, N.Y. TIMES, May 9, 2012, at A15.

48. *Windsor v. United States*, Nos. 12-2335-cv(L), 12-2435(Con.), 2012 WL 4937310 (2d Cir. Oct. 18, 2012), *aff'g* 833 F. Supp. 2d 394 (S.D.N.Y. 2012), *petition for cert. before judgment filed*, No. 12-63 (U.S. July 16, 2012), *petition for cert. before judgment filed*, No. 12-307 (U.S. Sept. 11, 2012); *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012), *aff'g* *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010), *and Massachusetts v. U.S. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010), *petitions for cert. filed*, Nos. 12-13 (U.S. June 29, 2012), 12-15 (U.S. July 3, 2012), *and* 12-97 (U.S. July 20, 2012).

49. *Pedersen v. Office of Pers. Mgmt.*, No. 3:10-cv-1750 (D. Conn. July 31, 2012), *appeal filed*, No. 12-3273 (2d Cir. Aug. 17, 2012), *petition for cert. before judgment filed*, No. 12-231 (U.S. Aug. 21, 2012), *petition for cert. before judgment filed*, No. 12-302 (U.S. Sept. 11, 2012); *Windsor v. United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012), *aff'd*, Nos. 12-2335-cv(L), 12-2435(Con.), 2012 WL 4937310 (2d Cir. Oct. 18, 2012), *petition for cert. before judgment filed*, No. 12-63 (U.S. July 16, 2012), *petition for cert. before judgment filed*, No. 12-307 (U.S. Sept. 11, 2012); *Dragovich v. U.S. Dep't of the Treasury*, No. C 10-1564 CW, 2012 WL 1909603 (N.D. Cal. May 24, 2012), *appeal filed*, No. 12-16461 (9th

petitions have been filed in a number of these cases (as well as in *Perry*).<sup>50</sup> Beyond the courts, Congress could repeal DOMA through a bill, the Respect for Marriage Act, which at the time of this writing has 157 House cosponsors,<sup>51</sup> 32 Senate cosponsors,<sup>52</sup> and the backing of President Barack Obama.<sup>53</sup> Moreover, 133 House members—some of whom voted for DOMA—signed onto an amicus brief calling upon the federal courts to strike it down.<sup>54</sup> Former Congressman Barr, who introduced the legislation, today argues vociferously against DOMA and in favor of the freedom of same-sex couples to marry, noting that DOMA “is neither meeting the principles of federalism it was supposed to, nor is its impact limited to federal law. In effect, DOMA[] . . . has become a de facto club used to limit, if not thwart, the ability of a state to choose to recognize same-sex unions.”<sup>55</sup>

## V.

The Obama Administration assumed a lead role in these events when it announced on February 23, 2011, that it would not defend the constitutionality of section 3 in court.<sup>56</sup> The Administration’s nondefense of DOMA has been paired with a forceful challenge to the statute based on the argument that courts should apply heightened judicial scrutiny to all laws (including DOMA) that discriminate on the basis of sexual orientation<sup>57</sup>—a constitutional position that, if accepted by the Supreme Court,<sup>58</sup> would likely require the invalidation of virtually every remaining

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Cir. June 26, 2012), and No. 12-16628 (9th Cir. July 23, 2012); Golinski v. Office of Pers. Mgmt., 824 F. Supp. 2d 968 (N.D. Cal. 2012), *appeal filed*, No. 12-15388 (9th Cir. Feb. 24, 2012), and No. 12-15409 (9th Cir. Feb. 28, 2012), *petition for cert. before judgment filed*, No. 12-16 (U.S. July 3, 2012); Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374 (D. Mass. 2010), *aff’d sub nom.* Massachusetts v. U.S. Dep’t of Health & Human Servs., 682 F.3d 1 (1st Cir. 2012). *But see* In Chambers Order re Defendants’ Partial Motion to Dismiss; Intervenor’s Motion to Dismiss, Lui v. Holder, No: 2:11-cv-01267-SVW-JCG (C.D. Cal. Sept. 28, 2011), ECF No. 38 (upholding DOMA); In Chambers Order re Defendants’ Motion to Dismiss, Torres-Barragan v. Holder, No. 2:09-cv-08564-RGK-MLG (C.D. Cal. Apr. 30, 2010), ECF No. 24 (upholding DOMA).

50. See *supra* notes 16, 41, 48, 49.

51. H.R. 1116, 112th Cong. (2011).

52. S. 598, 112th Cong. (2011).

53. David Nakamura, *Obama Backs Repeal of Marriage Law*, WASH. POST, July 20, 2011, at A3.

54. Brief of Members of the U.S. House of Representatives—Including Objecting Members of the Bipartisan Legal Advisory Group, Representatives Nancy Pelosi and Steny H. Hoyer—As *Amici Curiae* in Support of Plaintiffs-Appellees and Urging Affirmance, Massachusetts v. U.S. Dep’t of Health & Human Servs., 682 F.3d 1 (1st Cir. 2012) (Nos. 10-2204, 10-2207, and 10-2214).

55. Bob Barr, *Wedding Blues*, L.A. TIMES, Jan. 5, 2009, at A13.

56. See Letter from Eric H. Holder, Jr., *supra* note 18.

57. See, e.g., Defendants’ Brief in Opposition to Motion to Dismiss, Golinski v. Office of Pers. Mgmt., 824 F. Supp. 2d 968 (N.D. Cal. 2012) (No. C 3:10-00257-JSW); see also Combined Reply Brief & Response Brief for the Federal Defendants, *Massachusetts*, 682 F.3d 1 (Nos. 10-2204, 10-2207, and 10-2214).

58. On October 18, 2012, the Second Circuit became the first federal appellate court to apply heightened judicial scrutiny in the context of LGBT rights, invalidating DOMA



law that mandates discrimination on grounds of sexual orientation in education, employment, and family law.<sup>59</sup> In the months that elapsed between the Symposium and the publication of this volume, the President announced his support for the right of same-sex couples to marry as well.<sup>60</sup>

Executive branch officers at the state level have also played an active part in these developments. Both the governor and the attorney general of California refused to defend Proposition 8 in *Perry*, leaving private intervenors as its primary champions in the litigation.<sup>61</sup> State executive officials in Illinois have refused to defend the constitutionality of an Illinois law denying marriage rights to same-sex couples.<sup>62</sup> State executive officials in Massachusetts have challenged DOMA directly in litigation, arguing that section 3 violates the Spending Clause and the Tenth Amendment.<sup>63</sup> Finally, although Rhode Island, Maryland,<sup>64</sup> and New Mexico do not currently recognize the freedom of same-sex couples to marry, attorneys general in all three states have issued opinions indicating that those states will recognize out-of-state same-sex marriages as a matter of comity.<sup>65</sup>

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section 3 because it was not substantially related to an important government interest. See *Windsor v. United States*, Nos. 12-2335-cv(L), 12-2435(Con.), 2012 WL 4937310, \*10–13 (2d Cir. Oct. 18, 2012) (2d Cir. Oct. 18, 2012), *aff'g* 833 F. Supp. 2d 394 (S.D.N.Y. 2012), *petition for cert. before judgment filed*, No. 12-63 (U.S. July 16, 2012), *petition for cert. before judgment filed*, No. 12-307 (U.S. Sept. 11, 2012).

59. For a discussion of the likely impact that heightened scrutiny would have on numerous state laws impacting the rights of LGBT persons, see Joseph Landau, *The DOMA Ripple Effect*, NEW REPUBLIC (Mar. 11, 2011, 12:00 AM), <http://www.tnr.com/article/politics/85085/obama-doma-gay-marriage-law?page=0,1>.

60. Jackie Calmes & Peter Baker, *Obama Endorses Same-Sex Marriage, Taking Stand on Charged Social Issue*, N.Y. TIMES, May 10, 2012, at A1.

61. Maura Dolan, *Prop. 8 Sponsors Are Legally Entitled to Defend Measure, Court Rules*, L.A. TIMES (Nov. 17, 2011, 10:03 AM), <http://latimesblogs.latimes.com/lanow/2011/11/proposition-8-california-supreme-court.html>. In *Perry v. Brown*, 265 P.3d 1002 (Cal. 2011), the California Supreme Court held that California law vested the proponents of Proposition 8 standing to represent the State's interest in the litigation. Subsequently, the Ninth Circuit held that the proponents had Article III standing to appeal the district court's order striking down Proposition 8. *Perry v. Brown*, 671 F.3d 1052, 1070–75 (9th Cir. 2012), *petition for cert. filed*, No. 12-144 (U.S. July 30, 2012).

62. Rex Huppke & Stacy St. Clair, *State's Gay Marriage Ban Unlawful, Alvarez Says*, CHI. TRIB., June 15, 2012, [http://articles.chicagotribune.com/2012-06-15/news/ct-met-gay-marriage-lawsuit-20120615a\\_1\\_gay-marriage-camilla-taylor-marriage-laws](http://articles.chicagotribune.com/2012-06-15/news/ct-met-gay-marriage-lawsuit-20120615a_1_gay-marriage-camilla-taylor-marriage-laws).

63. *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010), *aff'd*, 682 F.3d 1 (1st Cir. 2012).

64. *But cf. supra* notes 44–46 and accompanying text.

65. See *supra* note 7 and accompanying text. Florida officials took related action in the context of adoption by gay and lesbian individuals. After a 2010 decision by an intermediate appellate court striking down that Florida's ban on adoption by gays and lesbians, Fla. Dep't of Children & Families v. Adoption of X.X.G. & N.R.G., 45 So. 3d 79, 92 (Fla. Dist. Ct. App. 2010), Governor Charlie Crist refused to appeal the ruling, leaving the appellate decision in place as the final judicial resolution of that issue. See *Florida Ends Ban on Gay, Lesbian Adoptions*, CNN (Oct. 22, 2010), [http://articles.cnn.com/2010-10-22/us/florida.gay.adoptions\\_1\\_frnk-martin-gill-lesbian-adoptions-adoptions-by-gay-men?s=PM:US](http://articles.cnn.com/2010-10-22/us/florida.gay.adoptions_1_frnk-martin-gill-lesbian-adoptions-adoptions-by-gay-men?s=PM:US).

## VI.

The articles contained within this Symposium collection reflect the vast array of complex legal questions that intersect with DOMA today. In his transcribed remarks, Professor Charles Fried, who served as Solicitor General of the United States from 1985 to 1989, argues that the Obama Administration's nondefense of DOMA section 3 in the federal courts is in tension with the practice and traditions of the office of the Solicitor General.<sup>66</sup> Professor Sai Prakash's Article observes that the Obama Administration's argument for heightened judicial scrutiny for sexual-orientation-based classifications, if accepted by the Supreme Court, would likely require the invalidation of all state statutes, including state constitutional amendments, proscribing same-sex marriage.<sup>67</sup> For Prakash, the Obama Administration's litigation stance contradicts, and renders hollow, the President's public stance that the issue of marriage rights for same-sex couples should be decided on a state-by-state basis. Professor Abner Greene argues in his Article that, to the extent the President's hybrid enforce-but-not-defend policy is intended to preserve judicial review over DOMA's constitutionality, such measures should not be necessary.<sup>68</sup> For Greene, Congress should be deemed to have independent Article III standing to sue the President when he stops enforcing congressional acts he finds unconstitutional. Professor and former Acting Assistant Attorney General heading the Office of Legal Counsel Dawn Johnsen argues in her Article that President Obama's determination that heightened judicial scrutiny should apply in cases of sexual orientation discrimination, a standard the President believes DOMA clearly cannot satisfy, provides an appropriate context for a rare deviation from the traditional executive branch practice of defending congressional acts.<sup>69</sup> Next, my Article details how the Obama Administration has interpreted statutes other than DOMA to provide benefits to same-sex couples (in certain circumstances) and protect them from harm (in other circumstances) based on a legally relevant relationship status other than marriage.<sup>70</sup> These policies reflect the Administration's effort to balance its dual constitutional obligations to equal protection and the faithful execution of the laws, including compliance with DOMA.

Professor Douglas NeJaime's Article takes us inside the executive branch to challenge the conventional dichotomy between "cause lawyers" who work for the public interest and government attorneys who represent the

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66. Charles Fried, *The Solicitor General's Office, Tradition, and Conviction*, 81 FORDHAM L. REV. 549 (2012).

67. Saikrishna Bangalore Prakash, *Missing Links in the President's Evolution on Same-Sex Marriage*, 81 FORDHAM L. REV. 553 (2012).

68. Abner S. Greene, *Interpretive Schizophrenia: How Congressional Standing Can Solve the Enforce-but-Not-Defend Problem*, 81 FORDHAM L. REV. 577 (2012).

69. Dawn Johnsen, *The Obama Administration's Decision to Defend Constitutional Equality Rather Than the Defense of Marriage Act*, 81 FORDHAM L. REV. 599 (2012).

70. Joseph Landau, *DOMA and Presidential Discretion: Interpreting and Enforcing Federal Law*, 81 FORDHAM L. REV. 619 (2012).

interests of the institutions they serve.<sup>71</sup> His article considers the role of former LGBT movement lawyers within the Department of Justice, exploring the different types of roles that cause lawyers can serve from within the state. Professor David Luban's Article, responding to Professor NeJaime, offers a number of important distinctions between different kinds of causes and varieties of cause lawyering. He tentatively suggests that reformists, not radicals, are more likely to be more successful pursuing their causes within government institutions.<sup>72</sup>

Another group of commentators considers, and critiques, the primacy of marriage within the broader movement for LGBT equality. In his Article, Professor Bennett Capers argues against the claim, made by some, that securing the freedom to marry will resolve other vexing issues such as suicide rates among LGBT youth, hate crimes committed against those perceived to be gay or transgender, and discrimination in employment.<sup>73</sup> Professor Nancy Polikoff argues that LGBT advocates have mistakenly failed to recognize the alignment of interests between different-sex couples who do not wish to marry and those within the LGBT community who feel the same way.<sup>74</sup> As Polikoff sees it, the movement has, in failing to champion the rights of different-sex couples in cases involving domestic partnership benefits, sent the incorrect message that there is only one preferred form of LGBT family. Professor Robin Lenhardt's Article also contends that the LGBT movement would do well to promote not just marriage, but intimate choices more generally.<sup>75</sup> For Lenhardt, such an approach would bring other groups more solidly into the struggle for LGBT equality.

Professor Lynn Wardle's Article opposes a universal right of same-sex couples to marry and cautions against "the prospect of unwelcome importation" of laws from jurisdictions that permit same-sex relationships into jurisdictions that do not.<sup>76</sup> Finally, in his transcribed remarks, Professor Tobias Barrington Wolff, partially in response to Professor Wardle and more generally in response to other scholars who employ natural law theory to oppose marriage rights for same-sex couples, questions whether the implicit and explicit arguments made by these natural law scholars about the lives, loves, and dignity of LGBT persons deserve

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71. Douglas NeJaime, *Cause Lawyers Inside the State*, 81 FORDHAM L. REV. 649 (2012).

72. David Luban, *The Moral Complexity of Cause Lawyers Within the State*, 81 FORDHAM L. REV. 709 (2012).

73. I. Bennett Capers, *Enron, DOMA, and Spousal Privileges: Rethinking the Marriage Plot*, 81 FORDHAM L. REV. 719 (2012).

74. Nancy D. Polikoff, "Two Parts of the Landscape of Family in America": *Maintaining Both Spousal and Domestic Partner Employee Benefits for Both Same-Sex and Different-Sex Couples*, 81 FORDHAM L. REV. 739 (2012).

75. R.A. Lenhardt, *Integrating Equal Marriage*, 81 FORDHAM L. REV. 765 (2012).

76. Lynn D. Wardle, *Involuntary Imports: Williams, Lutwak, the Defense of Marriage Act, Federalism, and "Thick" and "Thin" Conceptions of Marriage*, 81 FORDHAM L. REV. 775 (2012).

today to be treated with the collegiality that ordinarily pervades the world of scholarship and ideas.<sup>77</sup>

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The contributions on offer in this Symposium are as varied as they are rich, and I hope you enjoy reading these careful and considered explorations of so many important and timely issues.

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77. Tobias Barrington Wolff, *Collegiality and Individual Dignity*, 81 FORDHAM L. REV. 837 (2012).