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MISSING LINKS IN THE PRESIDENT'S EVOLUTION ON SAME-SEX MARRIAGE

*Saikrishna Bangalore Prakash**

INTRODUCTION

Pity the constitutional law professor turned President. We expect a level of incoherence and confusion from Presidents who are untutored in the Constitution's mysteries. Constitutional law can be baffling with its layers of vague text, uncertain structure, contested history, and mystifying judicial doctrines. Yet when a President has not only studied the subject but also taught constitutional law in a former life,¹ many demand more of that President.

President Barack Obama has dashed such expectations, at least when it comes to his evolution on same-sex marriage. Fine-tunes and shifts in constitutional thought are appropriate, particularly for espousers of an evolving Constitution. But the President's public evolution has a few missing links, places where he shrinks from the implications of his legal arguments on the constitutional status of homosexuals.

Like all evolutions, the President's has gone through several stages. After entering office, he continued his predecessor's practice of enforcing and defending the Defense of Marriage Act² (DOMA), even as he sought its repeal.³ Enforcing the Act required his administration to read federal statutory references to marriage as excluding same-sex married couples. Defending it entailed arguing that the Act was constitutional when plaintiffs asserted otherwise in court.

In early 2011, the President underwent a metamorphosis. In his February letter to the Speaker of the House, Attorney General Eric Holder reported

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1. See Jodi Kantor, *Teaching Law, Testing Ideas, Obama Stood Slightly Apart*, N.Y. TIMES, July 30, 2008, at A1 (noting that Obama taught a class on equal protection and due process).

2. 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006).

3. Press Release, The White House, Statement by the President on the *Smelt v. United States* Brief (Aug. 17, 2009), available at <http://www.indianaequality.org/2009/08/17/presidential-statement-on-doma/>.

that the President had judged DOMA to be unconstitutional.⁴ First, the President concluded that DOMA should be subject to heightened (intermediate) scrutiny under the equal protection component of the Fifth Amendment.⁵ Second, he determined that the statute's failure to recognize same-sex marriages was indefensible under this heightened standard, because no important justification supported DOMA's refusal to recognize such marriages.⁶ In fact, the Administration concluded that DOMA's legislative history suggested that federal legislators sought to harm a politically unpopular group, an impermissible motive under equal protection jurisprudence.⁷ In sum, the Obama Administration deemed DOMA unconstitutional due to its impermissible and unimportant justification for its bar on federal recognition of same-sex marriages.⁸

In May of 2012, the President had another transformation. He now favored same-sex marriage, a policy he had not previously expressed either as a presidential candidate or as President.⁹ However, in reiterating his opposition to a federal constitutional amendment banning same-sex marriage, he insisted that the issue should be decided on a state-by-state basis and not be "federalized."¹⁰ He also rejected the suggestion that he ought to direct the Department of Justice (DOJ) to file briefs against state anti-same-sex marriage laws: "[T]his is an issue that is gonna be worked out at the local level, because historically, this has not been a federal issue . . ."¹¹ Further, the President explained: "I think it is a mistake to—try to make what has traditionally been a state issue into a national issue."¹² He

4. Letter from Eric H. Holder, Jr., Att'y Gen., to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011) [hereinafter 2011 Holder Letter], available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html> (discussing litigation involving the Defense of Marriage Act).

5. See *id.* In *Bolling v. Sharpe*, 347 U.S. 497 (1954), the Supreme Court held that the Fifth Amendment's due process clause had an equal protection component that applied to federal laws and actions. *Id.* at 500. After some early decisions to the contrary, modern case law has made clear that the equal protection component of the Fifth Amendment has the same contours as the Equal Protection Clause of the Fourteenth Amendment. See *Adarand v. Peña*, 515 U.S. 200, 201 (1995) (declaring that equal protection analysis is the same in the Fifth and Fourteenth Amendment contexts).

6. See 2011 Holder Letter, *supra* note 4.

7. See *id.*

8. *Id.*

9. The President may have favored gay marriage as a policy matter as a candidate for state office in Illinois. See Charles Krauthammer, *Obama's Same-Sex Marriage Contradiction*, NAT'L REV. (May 17, 2012, 8:00 PM), www.nationalreview.com/articles/300338/obama-s-same-sex-marriage-contradiction-charles-krauthammer.

10. Transcript: Robin Roberts ABC News Interview With President Obama, ABC NEWS (May 9, 2012), http://abcnews.go.com/Politics/transcript-robin-roberts-abc-news-interview-with-President-obama/story?id=16316043#UEy_laPUSuk (interview transcript).

11. *Id.*; see also Lyle Denniston, *Obama on Gay Marriage: The Fine Print*, SCOTUSBLOG (May 10, 2012, 7:15 PM), <http://www.scotusblog.com/2012/05/obama-on-gay-marriage-the-fine-print>.

12. Transcript: Robin Roberts ABC News Interview With President Obama, *supra* note 10.

evidently favored local decisions about whether to recognize same-sex marriages.

The President is correct that marriage historically has been the province of the states.¹³ But that fact hardly insulates state marriage laws from equal protection challenges, as *Loving v. Virginia*¹⁴ makes clear.¹⁵ And that makes sense, for the Fourteenth Amendment reaches all state laws, regardless of their subject matters.¹⁶ Specifically, modern judicial doctrine “federalize[s]” and makes “a national issue” of the question of same-sex marriage, at least insofar as it subjects all state laws to some level of equal protection scrutiny.¹⁷

This fact about modern constitutional doctrine leaves the constitutional law professor-turned-President on the horns of a dilemma. He cannot simultaneously conclude that DOMA is unconstitutional under existing equal protection doctrine and yet also imagine that the states may constitutionally refuse to permit or recognize same-sex marriage. If federal laws should be subject to heightened scrutiny when they treat same-sex marriage differently from heterosexual marriage, then so must state laws that deny recognition for, or bar, same-sex marriages. Moreover, it is almost certain that the heightened scrutiny the President favors would lead to the wholesale invalidation of those state laws. In other words, the Obama Administration’s argument against DOMA, if applied to state laws, should generate nationwide uniformity. Each and every state will have to recognize same-sex marriages, at least so long as they recognize opposite-sex marriages.

One suspects that President Obama’s divergent stances do not reflect a failure to grasp either equal protection doctrine or his argument’s implications for state laws. He and his lawyers are too smart. His incompatible stances more likely result from political calculation, the kind all Presidents engage in, even ones who formerly taught constitutional law. The President wants federal statutes to treat gay married couples as they treat heterosexual married couples. He partly accomplishes that goal by failing to defend section 3 of DOMA and by explaining to the courts why he believes it to be unconstitutional, with the hope that the courts will agree and relieve him of any obligation to abide by DOMA. But the President does not want to declare that he believes all state laws banning same-sex marriage are unconstitutional, because he is unprepared to take that bolder stance. That particular evolution will have to wait for a more politically expeditious moment. The President’s peculiar posture allows him to make a constitutional argument against DOMA, express a personal preference in

13. *See, e.g.,* *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) (declaring that “[i]nsofar as marriage is within temporal control, the States lay on the guiding hand”).

14. 388 U.S. 1 (1967).

15. *Id.*

16. *See* U.S. CONST. amend. XIV.

17. *See, e.g.,* *Loving*, 388 U.S. 1.

favor of same-sex marriage, and yet still permit state diversity on same-sex marriage. His justifications for these incongruous stances are not as edifying as his constitutional law classes at the University of Chicago must have been.

The President's constitutional contortions cast doubt on the wisdom of a scheme where the Chief Executive may make independent constitutional determinations and act upon them, including declining to defend the constitutionality of certain federal laws. If the President can raise constitutional concerns at times and then ignore them as it suits him, it raises misgivings about his role as a constitutional guardian. He becomes less someone who can be expected to "preserve, protect and defend the Constitution"¹⁸ and more an opportunistic pol who uses constitutional arguments in insincere ways to advance an electoral agenda.

However much this critique may be true as applied to President Obama and same-sex marriage, one should not expect perfection from Presidents. Chief Executives, because they are human, always can be expected to advance legal arguments in an opportunistic way. Of course, they are no worse than any other institution. The Supreme Court got *Marbury v. Madison*¹⁹ and *Dred Scott v. Sandford*²⁰ wrong in multiple ways. Moreover, federal courts occasionally issue opinions that are inconsistent with existing case law.²¹ Finally, judges are hardly above using the Constitution to advance their personal preferences in insincere and inconsistent ways. Most do not condemn judges as legal interpreters merely because judges occasionally act inconsistently or insincerely. If the President, as constitutional defender, is occasionally unprincipled or inconsistent, he has the best of company. This is not to excuse the President's same-sex marriage contortions. It is only meant to suggest that when it comes to constitutional interpretation, each of us lives in a glass house.

However imperfect any particular President might be, the institutional design question is whether the system of constitutional defense works best with the presidency actively defending the Constitution. If the system is better with active presidential involvement, as a supplement to judicial review and other protective mechanisms, it does not matter much that presidential defense measures, by themselves, are imperfect. In other words, even as we lament a President's sacrifice of constitutional principle at the altar of political expediency, we may have reason to endorse a system where the President serves as a constitutional protector.

18. U.S. CONST. art. II, § 1, cl. 7.

19. 5 U.S. (1 Cranch) 137 (1803).

20. 60 U.S. (19 How.) 393 (1856), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

21. See, e.g., Steven G. Calabresi, *Text vs. Precedent in Constitutional Law*, 31 HARV. J.L. & PUB. POL'Y 947, 951-55 (2008) (documenting cases where the Supreme Court has explicitly and implicitly jettisoned precedent).

I. OBAMA, DOMA, AND THE FEDERAL GOVERNMENT

As noted, after entering office, the President decided that while he would seek the repeal of DOMA, he would continue to enforce and defend it.²² This meant that his administration would interpret federal law references to marriage as including only marriages between a man and a woman. In practice, this policy ensured that whatever benefits and burdens federal law assigned to married individuals went to opposite-sex married couples only. Furthermore, whenever plaintiffs argued that DOMA was unconstitutional, the Administration would defend its constitutionality on both equal protection and substantive due process grounds.

That approach changed in February 2011, when the Attorney General and the President concluded that DOMA was unconstitutional because it discriminated against homosexuals.²³ Implicit in the Attorney General's letter to the Speaker of the House was the (widely-held) assumption that DOMA contains a sexual orientation classification. Holder must have thought that because DOMA defends traditional, opposite-sex marriage by denying federal recognition to same-sex marriages, it classifies on the basis of sexual orientation.²⁴

Having asserted that DOMA contains a sexual orientation classification, the Attorney General argued that heightened scrutiny ought to apply.²⁵ Heightened scrutiny was appropriate, said Holder, because of the history of discrimination against homosexuals and their status as a discrete, politically

22. See *supra* note 3 and accompanying text.

23. See 2011 Holder Letter, *supra* note 4.

24. In fact, DOMA contains no express sexual orientation classification. DOMA does not say that the federal government will not recognize marriages entered into by homosexuals. Nor does it single out homosexuals and only deny them recognition of their same-sex marriages. Rather, homosexuals who marry, no less than heterosexuals who do, are considered married under federal law, so long as they are married to someone of the opposite sex. Indeed, some have argued that DOMA does not facially discriminate against homosexuals but instead facially discriminates on the basis of gender. Males can only marry females and females can only marry males, and in this way each sex faces different legal constraints. See generally Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994).

But even as DOMA lacks a facial sexual orientation classification, it excludes the very type of marriage that gays are far more likely to consummate (same-sex marriage). So even though heterosexuals theoretically might choose to marry someone of the same sex in states that permit same-sex marriage (perhaps to obtain the beneficial treatment accorded to married individuals) and thus be negatively impacted by DOMA, homosexuals appear the targets of DOMA in purpose and effect. Put another way, despite its lack of an explicit sexual orientation classification, DOMA implicitly targets homosexuals, who are far more likely to enter into a same-sex marriage.

Neither the Attorney General's letter nor the DOJ's filings in court acknowledge the more complicated relationship between DOMA and sexual orientation or what that might mean for its constitutionality. Instead, both assume that DOMA contains a sexual orientation classification. See 2011 Holder Letter, *supra* note 4; see also *infra* note 31.

25. See 2011 Holder Letter, *supra* note 4.

weak section of society.²⁶ The application of heightened scrutiny meant that federal classifications based on sexual orientation must be “substantially related to an important government objective.”²⁷ Moreover, the objective must be one that actually motivated the entity making the classification.²⁸

Applying these tests, the Attorney General concluded that the actual legislative justifications for DOMA were unimportant and thus failed to satisfy the standard.²⁹ He claimed that the congressional debate contained “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.”³⁰ In other words, Attorney General Holder believed that the governmental objective was moral disapproval, an unimportant objective.³¹ Hence DOMA was unconstitutional, at least under heightened scrutiny.

That was the sum and substance of the letter’s legal analysis. Its more practical facet was its announcement that the Administration would not defend DOMA.³² Notwithstanding that decision, the Administration would

26. The Attorney General never discussed why strict scrutiny was not the correct standard. Instead, he merely asserted that the more forgiving intermediate scrutiny was proper. *See id.*

27. *Id.* (quoting *Clark v. Jeter*, 486 U.S. 456, 461 (1988)).

28. *Id.*

29. *See id.*

30. *Id.*

31. In its briefs, the DOJ also has argued that even if DOMA’s objectives are important, DOMA does not substantially advance them. *See Combined Reply Brief and Response Brief for the Federal Defendants at 9–13, Massachusetts v. U.S. Dep’t of Health & Human Servs.*, Nos. 10-2204, 10-2207, 10-2214 (1st Cir. Dec. 1, 2011). *See generally* Federal Defendants’ Opposition to Plaintiffs’ Motion for Summary Judgment; Notice of Cross Motion and Cross Motion for Summary Judgment, *Dragovich v. U.S. Dep’t of the Treasury*, No. 4:10-CV-01564 (N.D. Cal. Feb. 21, 2012); Response of Defendants United States of America and Eric H. Holder, Jr. to Intervenor BLAG’s Cross-Motion for Summary Judgment., *Bishop v. United States*, No. 4:04-CV-00848-TCK-TLW (N.D. Okla. Nov. 18, 2011).

32. In fact, the Administration’s legal posture was more complicated. The President had determined that DOMA was unconstitutional under heightened scrutiny. Going forward, the Administration would argue that such scrutiny was appropriate. But where courts had already determined that DOMA was subject to rational basis review, the Administration would continue to defend DOMA because of its view that DOMA satisfied rational basis review. *See* 2011 Holder Letter, *supra* note 4. In turn, the Administration’s actual stance was to defend DOMA in those circuits that previously had held that homosexual classifications were only subject to rational basis review. In other circuits, the Administration would argue that heightened scrutiny was appropriate and attack DOMA as unconstitutional for failure to satisfy that scrutiny. This stance reflected a misguided faith in the Duty to Defend. Quite rightly, the Obama Administration abandoned this strange stance before the First Circuit in April of 2012. The Administration said it would no longer defend DOMA under any standard of review. *See* Chris Geidner, *Federal Appeals Judges Consider Whether DOMA Is Constitutional in Historic Hearing in Boston*, METROWEEKLY (Apr. 4, 2012, 2:30 PM), <http://www.metroweekly.com/poliglot/2012/04/federal-appeals-judges-consider-whether-doma-is.html>. The First Circuit later struck down DOMA under a rational basis with bite approach. *See Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1, 16–17 (1st Cir. 2012); *see also* Joe Palazzolo, *First Circuit Shoots Down DOMA*,

still continue to enforce DOMA, thereby guaranteeing a live controversy to ensure that the courts (rather than the President) would be the final arbiters of its constitutionality.³³ To assist the courts in this task, the executive branch would file briefs explaining why DOMA was unconstitutional.³⁴ Congress, if it chose, could appoint its own counsel to defend DOMA's constitutionality.³⁵

In a 2012 letter to the Speaker of the House, the Attorney General extended his constitutional argument to other federal laws.³⁶ Discussing the case filed by current and former members of the Armed Forces, *McLaughlin v. Panetta*,³⁷ the Attorney General declared that Title 38's definitional provisions,³⁸ insofar as they affect same-sex couples, are unconstitutional as well.³⁹ Those provisions, like DOMA, define "spouse" as a "person of the opposite sex," thereby excluding same-sex married couples from the veterans' benefits dispensed under Title 38.⁴⁰ Holder argued that the exclusion of same-sex married couples "cannot survive heightened scrutiny because [the exclusions] are not 'substantially related to an important governmental objective.'"⁴¹ The justifications "must describe actual state purposes, not rationalizations for actions in fact differently grounded."⁴² He quickly concluded, without elaboration, that the actual legislative record "contains no rationale for" excluding same-sex spouses from veterans' benefits.⁴³ Further, neither the Department of Defense nor the Department of Veterans Affairs could justify Title 38's same-sex marriage exclusion.⁴⁴

The second Holder letter makes clear that DOMA was not uniquely problematic.⁴⁵ Unlike DOMA, Title 38's opposite-sex definitions of spouse⁴⁶ were enacted in an era when there was no animus towards same-sex marriage. In this case, the opposite-sex definition modified a gender-

WSJL BLOG (May 31, 2012, 11:37 AM), blogs.wsj.com/law/2012/05/31/first-circuit-shoots-down-doma.

33. 2011 Holder Letter, *supra* note 4.

34. *Id.*

35. *Id.*

36. Letter from Eric H. Holder, Jr., Att'y Gen., to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 17, 2012) [hereinafter 2012 Holder Letter], *available at* <http://www.justice.gov/ag/boehner02-17-12.pdf> (discussing litigation involving the Defense of Marriage Act).

37. No. 11-11905 (D. Mass. Oct. 27, 2011).

38. 38 U.S.C. § 101 (2006).

39. *See* 2012 Holder Letter, *supra* note 36.

40. § 101(3), (31).

41. 2012 Holder Letter, *supra* note 36.

42. *Id.*

43. *Id.*

44. *Id.* As with DOMA, Title 38 lacks a facial sexual orientation classification. Again, anyone who marries someone of the opposite sex is considered married under Title 38, whether heterosexual or not. Nonetheless, its effect is disproportionately felt by homosexuals who are far more likely to want to enter into a same-sex marriage.

45. *See id.*

46. *See* 38 U.S.C. § 101 (2006).

specific statute that assumed that only females would collect benefits as a result of being married to male spouses in the military. The provision was meant to eliminate an assumption that men would not be married to female soldiers and sailors.⁴⁷ Legislation cannot be motivated by animus against a practice if the practice is relatively unknown or, as of yet, relatively inconceivable. There likely was no thought to the resulting exclusion of same-sex marriages because few had conceived of the possibility in 1975.⁴⁸

Yet because Holder had concluded that sexual orientation classifications were entitled to heightened scrutiny, no matter their provenance, what mattered to Holder was whether there was an important governmental purpose behind the supposed classification. Of course, there could be no such purpose when those who enacted the relevant sections in Title 38 likely did not fathom the possibility of same-sex marriage. Ironically, the fact that Title 38's definitional sections were enacted in an era oblivious to questions of same-sex marriage made those sections more susceptible to invalidation, at least under the Attorney General's argument.⁴⁹

The two Holder letters are exclusively about the equal protection doctrine. Neither asserted that DOMA is unconstitutional on the grounds that individuals have a constitutional right, via substantive due process, to marry someone of the same sex. In briefs filed before courts, the Administration has rejected substantive due process claims against DOMA.⁵⁰ The Administration has avoided saying whether there is a

47. S. REP. NO. 94-568, at 1, 19–20 (1975).

48. At least one set of plaintiffs had sought a right to marry someone of the same sex. See *Baker v. Nelson*, 409 U.S. 810 (1972). The case was dismissed for lack of a substantial federal question, a disposition that suggests that few thought the claims had any legal merit. Michael C. Dorf and Sidney Tarrow claim that the issue was off the radar screen through the 1980s. See Michael C. Dorf & Sidney Tarrow, *How the Right Helped Launch Same-Sex Marriage Movement*, CNN OPINION (May 14, 2012, 5:46 PM), <http://www.cnn.com/2012/05/14/opinion/dorf-tarrow-same-sex-marriage/index.html>.

49. In the February 2012 letter, the Obama Administration implicitly concluded that heightened scrutiny applies to suspect classifications even when legislators were almost certainly unaware that their law contained the classification in question. To my knowledge, the Supreme Court has never confronted the question, much less held that unconscious classifications should be subject to heightened scrutiny. The absence of relevant doctrine suggests the possibility that Title 38 should not be subject to heightened scrutiny. Instead, one might suppose that laws classifying people via a trait that normally triggers heightened scrutiny should receive rational basis instead when those laws hail from an era where people would not have understood the underlying laws as containing any such classification. While this approach has its merits, I doubt that the Obama Administration will be moved to modify its approach. If one supposes that the Obama Administration seeks to break down barriers to the recognition of same-sex marriage, then it will disfavor any argument that suggests that rational basis review applies to such laws. Moreover, the Obama Administration's case for heightened scrutiny arguably rests at least in part on the desire to protect a certain class, regardless of the motivations or awareness of the legislature. In other words, that legislators or voters were unaware that they were denying benefits to a particular group may be thought irrelevant.

50. See Combined Reply Brief and Response Brief for the Federal Defendants at 9–13, *Massachusetts v. U.S. Dep't of Health & Human Servs.*, Nos. 10-2204, 10-2207, 10-2214 (1st Cir. Dec. 1, 2011); Federal Defendants' Opposition to Plaintiffs' Motion for Summary

constitutional right to marry or whether, if there is such a right, it applies to people who wish to marry someone of the same-sex. Instead, it has argued that even if there is a substantive due process right to marry, there is no substantive due process right to government subsidies for the married.⁵¹

As it stands now, the Obama Administration's litigation strategy has the political virtue of pushing for the judicial nullification of DOMA without also declaring that same-sex marriage is a constitutional right. It also has the advantage of saying nothing about the constitutionality of state laws that limit marriage to heterosexual couples. At a time where there are some thirty states that have passed anti-same-sex marriage laws, silence on the issue may prove golden.⁵² The President, with the help of his Attorney General, seems to have threaded the needle.

II. OBAMA, SAME-SEX MARRIAGE, AND THE STATES

Yet cool politicians who thread political needles can expect to be criticized by the ardent. Same-sex marriage supporters believed that the President went far, but not far enough. When he came out in favor of same-sex marriages in his May 2012 interview with ABC's Robin Roberts,⁵³ the President also ought to have declared that same-sex marriage was a civil right, said these gentle critics. Because same-sex marriage is a civil right, it is not a matter to be left to the states, like whether to have a state income tax or what the state's motto ought to be. Critics of the President on the right, including some supporters of same-sex marriage, chastised his supposed inconsistency.⁵⁴ If DOMA is unconstitutional because homosexuals have a right to marry, then all state laws forbidding same-sex marriage or refusing to recognize such marriages must be unconstitutional as well, they argued.

Both sets of critics misread the President. While supporters of same-sex marriage may believe that there is a constitutional right to such marriages,

Judgment; Notice of Cross Motion and Cross Motion for Summary Judgment, *Dragovich v. U.S. Dep't of the Treasury*, No. 4:10-CV-01564 (N.D. Cal. Feb. 21, 2012); Response of Defendants United States of America and Eric H. Holder, Jr. to Intervenor BLAG's Cross-Motion for Summary Judgment., *Bishop v. United States*, No. 4:04-CV-00848-TCK-TLW (N.D. Okla. Nov. 18, 2011).

51. See Combined Reply Brief and Response Brief for the Federal Defendants at 9–13, *Massachusetts*, Nos. 10-2204, 10-2207, 10-2214; Federal Defendants' Opposition to Plaintiffs' Motion for Summary Judgment; Notice of Cross Motion and Cross Motion for Summary Judgment, *Dragovich*, No. 4:10-CV-01564; Response of Defendants United States of America and Eric H. Holder, Jr. to Intervenor BLAG's Cross-Motion for Summary Judgment., *Bishop*, No. 4:04-CV-00848-TCK-TLW.

52. *North Carolina Passes Same-Sex Marriage Ban*, *CNN Projects*, CNN (May 11, 2012, 11:04 AM), <http://www.cnn.com/2012/05/08/politics/north-carolina-marriage/index.html>. Thirty-one states, including North Carolina, have voted for constitutional amendments banning same-sex marriage.

53. *Transcript: Robin Roberts ABC News Interview with President Obama*, *supra* note 10.

54. See Krauthammer, *supra* note 9; Jacob Sullum, *Obama's Gay Marriage Contradiction*, REASON.COM (June 13, 2012), <http://reason.com/archives/2012/06/13/obamas-gay-marriage-contradiction>.

the President never claimed as much. In his May interview, he expressed a policy preference of the sort that has no constitutional implications.⁵⁵ Just as a member of Congress may favor a balanced budget without believing that deficit spending is unconstitutional, so too may a President support same-sex marriage without simultaneously reading the Constitution as containing a right to same-sex marriage.

For much the same reason, some critics on the right also misconstrued the President. Again, the President has never said that federal law must recognize same-sex marriages. Rather, the President has concluded that under equal protection doctrine, federal law cannot distinguish between same-sex and opposite-sex marriages absent some important governmental justification. If federal statutes never contained marriage-based classifications, there obviously could be no argument against those laws on the grounds that they unconstitutionally distinguished some marriages from others. Further, nothing in equal protection doctrine requires federal law to benefit marriages as opposed to other relationships, like neighbors or business partners.

Having said all this, the President's arguments that DOMA violates the equal protection component of the Fifth Amendment have unmistakable implications for existing state laws. First, the Holder letters declare that gays and lesbians are entitled to heightened scrutiny,⁵⁶ a standard that would necessarily apply to state laws distributing benefits and burdens in a manner that excludes gays. Second, the application of heightened scrutiny means that any state statute that draws a distinction on the basis of sexual orientation must be justified by an important governmental interest.⁵⁷ Third, that interest must be the one that actually motivated the relevant lawmakers, not a post hoc justification. Fourth, the presence of arguments in the legislative history about the immorality of gay sex or same-sex marriage will tend to make it difficult, if not impossible, to claim that denial of a same-sex marriage right was motivated by an important governmental interest. Finally, any law supposedly supported by an important interest must also substantially advance that interest. If we apply the standards advanced in the 2011 and 2012 Holder letters (i.e., the five factors above) as Holder applied them, states that fail to permit same-sex marriage or fail to recognize such marriages have violated the Equal Protection Clause of the Fourteenth Amendment.

To be sure, there are differences between DOMA and the state anti-same-sex marriage laws. Significantly, the latter typically regulate who may get married, while the former says nothing about that subject. Because states have long regulated who may get married and which marriages they will recognize, the states might be thought to have a stronger interest in barring

55. See generally *Transcript: Robin Roberts ABC News Interview With President Obama*, *supra* note 10.

56. See 2011 Holder Letter, *supra* note 4; 2012 Holder Letter, *supra* note 36.

57. See, e.g., *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

same-sex marriages than the federal government does in not recognizing them. Further, state laws regulating same-sex marriages may appear more likely to further whatever interests the states are said to be pursuing because states are directly regulating same-sex marriage, while the federal government is merely influencing such marriages indirectly, via its decision not to recognize such marriages.⁵⁸ Still, these differences will not matter. More precisely, under the standards announced in the Holder letter and in DOJ DOMA filings, these considerations will be irrelevant.

To see why the President's anti-DOMA argument spells doom for state anti-same-sex marriages laws, we must focus on state laws. It will prove helpful to divide all state laws, both statutes and constitutional amendments, into two categories. The first set consists of laws enacted when same-sex marriage was very much in the minds of legislators and voters. For lack of a better phrase, call this the "Conscious Era" because state legislators would have discussed (or at least been aware of) the issue of same-sex marriage as they tinkered with their marriage laws. In contrast, the previous period reflects an obliviousness of the possibility of same-sex marriage, because the prospect was unknown or so obscure that state legislators would never have thought of the idea as they passed marriage laws. Call this the "Oblivious Era."

When the Conscious Era began (and thus when the Oblivious Era ended) is uncertain. The Conscious Era likely began after 1993, when Hawaii's Supreme Court concluded that barring same-sex marriage might violate the state's equal protection clause.⁵⁹ It certainly began well after 1972, when the Supreme Court dismissed a federal appeal seeking a right to same-sex marriage by declaring that the case failed to present a substantial federal question.⁶⁰ If the Supreme Court could dismiss the case so curtly, it suggests that the claims were far outside the era's legal mainstream. Those versed in the political history of same-sex marriage can better speculate

58. The Obama Administration believes that federal laws that refuse to recognize same-sex marriages do not substantially advance any governmental interest because such laws do not directly regulate the underlying marriage relationship. *See, e.g.*, Combined Reply Brief and Response Brief for the Federal Defendants at 9–13, *Massachusetts v. U.S. Dep't of Health & Human Servs.*, Nos. 10-2204, 10-2207, 10-2214 (1st Cir. Dec. 1, 2011); Federal Defendants' Opposition to Plaintiffs' Motion for Summary Judgment; Notice of Cross Motion and Cross Motion for Summary Judgment, *Dragovich v. U.S. Dep't of the Treasury*, No. 4:10-CV-01564 (N.D. Cal. Feb. 21, 2012); Response of Defendants United States of America and Eric H. Holder, Jr. to Intervenor BLAG's Cross-Motion for Summary Judgment., *Bishop v. United States*, No. 4:04-CV-00848-TCK-TLW (N.D. Okla. Nov. 18, 2011). This logic suggests that the Obama Administration might believe that state anti-same-sex marriage laws are more likely to directly and substantially further state interests, whatever they may be. The difference is one of degree, with federal influence on marriage being more attenuated and the state regulation being more direct and therefore more likely substantial.

59. *Baehr v. Lewin*, 852 P.2d 44, 68 (Haw. 1993).

60. *Baker v. Nelson*, 409 U.S. 810, 810 (1972).

when the Conscious Era began.⁶¹ What is clear, however, is that the Oblivious Era covers most of our nation's history.

Many, if not all, state laws from the Conscious Era were likely motivated by the same concerns that propelled DOMA—a desire to endorse traditional marriage and discourage homosexuality. If these concerns were impermissible at the federal level, as Attorney General Holder argued,⁶² those interests are equally so in the states. Indeed, in the course of using the lowest standard of review, the Supreme Court has said such justifications are inadequate for state constitutional provisions that make it more difficult for supporters of gay rights to enact localized protections for gays and lesbians.⁶³ If one applies heightened scrutiny, it almost certainly means that state laws from the Conscious Era that discriminate against same-sex marriages are unconstitutional.

Theoretically, it is possible for a law to be upheld even if one justification is impermissible, so long as one of its other justifications meets the applicable standard. In its DOMA filings, the DOJ highlights the impermissible motivations before going on to consider whether there nevertheless was an important public interest motivating federal legislators. The secondary inquiry would have been pointless if the mere presence of animus necessarily invalidated otherwise acceptable motivations.⁶⁴

The theoretical possibility that acceptable motivations will overcome a finding of animus proves elusive in practice. When applying a form of heightened scrutiny, the discovery of an improper purpose arouses the suspicion that it was likely the dominant, if not sole, objective and that this actual and forbidden motive ought to trump all else. Justice Kennedy's *Romer v. Evans*⁶⁵ opinion illustrates this tendency, to an extreme. Applying rational basis review, that opinion failed to credit Colorado's otherwise legitimate purposes for instituting a ban on state or local antidiscrimination provisions benefiting homosexuals.⁶⁶ Colorado claimed the amendment conserved antidiscrimination resources for other classes of persons and fostered freedom of association.⁶⁷ Justice Kennedy said that these purposes could not be credited because the amendment was so broad.⁶⁸ But the breadth of the amendment was irrelevant to the question of whether the interests identified were legitimate. At most, amendment 2's breadth was

61. See, e.g., Dorf & Tarrow, *supra* note 48.

62. See 2011 Holder Letter, *supra* note 4.

63. See *Romer v. Evans*, 517 U.S. 620, 633–35 (1996).

64. Justice Kennedy's *Romer v. Evans* opinion applies rational basis review to Colorado's Amendment 2, despite first identifying animus as a possible motivation before considering other purposes that would have been legitimate had they been creditable. See 517 U.S. at 632–35.

65. 517 U.S. 620 (1996).

66. See *id.* at 634–35.

67. See *id.* at 635.

68. See *id.*

germane to whether the amendment was rationally related to the interests Colorado identified.

Counterfactually, had the Court believed that the pool of Colorado voters was dominated by libertarians bent on fostering the freedom of association or by groups seeking to conserve scarce antidiscrimination resources, perhaps there would have been no animus found and the Court would have upheld the law. But because the majority identified animus as an actual motivating factor, other legitimate potential bases were crowded out and belittled. Because the Court essentially ignored legitimate governmental interests in a case subject only to rational basis review, it seems quite likely that the Court also would give short shrift to legitimate governmental interests in a case where heightened scrutiny applies. That is to say, the conclusion that there is animosity lurking behind a law often will overwhelm and render irrelevant the presence of legitimate interests.⁶⁹

Still, it is worth considering the possible interests that might be sufficient to justify upholding state laws prohibiting same-sex marriages. In the context of DOMA, the DOJ has not explicitly declared that defending traditional marriage and promoting responsible procreation and child rearing are impermissible or unimportant interests. Because of this ambiguity, we cannot say for certain that the Administration would reject these interests in the context of challenges to state laws that ban, or refuse to recognize, same-sex marriages.⁷⁰

But the Obama Administration's discussion of whether DOMA is substantially related to those interests does shed light on what its position ought to be on the same question vis-à-vis state laws. The DOJ claimed that DOMA was not substantially related to the defense of traditional marriage because DOMA neither prevented same-sex marriages nor denied them legal protection.⁷¹

In the case of state laws banning same-sex marriage or refusing to recognize that institution, they too seem unrelated to defending traditional marriage, albeit for different reasons. State laws banning, or refusing to

69. While the Court has declared that a law may be upheld even when there are improper motivations behind it (because the law would have been enacted anyway for entirely appropriate reasons), *see* *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 n.21 (1977), the Court apparently has yet to uphold such a law in practice.

70. To judge the constitutionality of state anti-same-sex marriage laws under heightened scrutiny, a court would have to examine the actual motivations of state legislators. Because I do not wish to canvas these actual interests across dozens of laws, I use the federal interests at issue in DOMA on the assumption that the interests are largely the same.

71. *See generally* Combined Reply Brief and Response Brief for the Federal Defendants at 9–13, *Massachusetts v. U.S. Dep't of Health & Human Servs.*, Nos. 10-2204, 10-2207, 10-2214 (1st Cir. Dec. 1, 2011); Federal Defendants' Opposition to Plaintiffs' Motion for Summary Judgment; Notice of Cross Motion and Cross Motion for Summary Judgment, *Dragovich v. U.S. Dep't of the Treasury*, No. 4:10-CV-01564 (N.D. Cal. Feb. 21, 2012); Response of Defendants United States of America and Eric H. Holder, Jr. to Intervenor BLAG's Cross-Motion for Summary Judgment., *Bishop v. United States*, No. 4:04-CV-00848-TCK-TLW (N.D. Okla. Nov. 18, 2011).

recognize, same-sex marriage do nothing to shore up traditional marriage. In particular, they do not make such marriages more stable or more meaningful, as marriage counseling or a subsidy might. Instead, state anti-same-sex marriage laws merely deny legal recognition to those who consummate such marriages. Given the President's position on DOMA, he likely will not conclude that state anti-same-sex marriage laws are substantially related to a defense of traditional marriage. Rather, he likely would find the two largely unrelated, in the same way that the failure to allocate funds towards shoring up the Brooklyn Bridge would not, by itself, buttress the Lincoln Tunnel.

To be sure, anti-same-sex marriage laws do have the effect of defending the traditional conception of marriage, but that is but a defense of a definition. If anti-same-sex marriage laws merely defend the traditional sense of the word "marriage," as opposed to the marriages that exist in the real world, that hardly seems consequential. Indeed, one might say that defending the traditional denotation of a word or phrase is never important. In any event, the Obama Administration almost certainly does not believe that defending the traditional sense of an institution is a substantial interest.

So the Obama Administration might concede that defending actual marriage of the traditional sort is an important interest. But it is quite likely to insist that state anti-same-sex marriage laws do not substantially advance that interest but instead deny equal protection to those who seek state recognition of their same-sex marriages.

Anti-same-sex marriage laws do not substantially advance responsible procreation and childrearing justifications either. No state limits procreation to heterosexuals, much less married heterosexuals. Homosexuals may continue to procreate, via sperm or egg donations, whether or not states ban same-sex marriages. Anti-same-sex marriage laws only affect decisions to procreate at the margin, when a homosexual decides not to procreate because he or she cannot marry another homosexual. This means that anti-same-sex marriage laws do not substantially advance responsible procreation.

Similarly, homosexuals can continue to rear children, whether or not the states recognize same-sex marriages. Homosexual childrearing is unlikely to decrease in any substantial way merely because states refuse to recognize or permit same-sex marriage. Moreover, with respect to childrearing, the DOJ has rejected the notion that gays and lesbians cannot be, or are less likely to be, responsible parents.⁷² Again, while responsible childrearing may be an important governmental interest, the Obama Administration will deny that anti-same-sex marriage laws substantially advance that interest.

72. See Superseding Brief for the United States Department of Health & Human Services, et al. at 49–51, *Gill v. Office of Pers. Mgmt.*, No. 10-2204 (D. Mass. Sept. 22, 2011).

In sum, the state laws passed during the Conscious Era are likely to have the same flaws that the DOJ has identified in DOMA. First, they are presumably motivated, at least in part, by moral disapproval or a bare desire to harm an unpopular group, neither of which constitute “important governmental interests.” Second, alternative justifications will likely either fail that standard or be insufficiently related to the state law, and thus not “substantially related” to the important governmental purpose.

Of course, not all state laws that plaintiffs will challenge are from the Conscious Era. Some were passed during the Oblivious Era. As noted, this second category of state laws reflects ignorance of the possibility of same-sex marriage (rather than disapproval of it) because these laws were passed before people had conceived of that possibility. During this period, it would not have occurred to legislators that limiting marriage to opposite sex couples might constrain anyone, except those who wished to have a plural marriage. More precisely, most state legislators would not have been aware that there were people (constituents, friends, or relatives) who wished to marry someone of the same sex. Steeped in conventional sexual mores, the idea of same-sex marriage did not exist in the minds of those legislators.⁷³ The Oblivious Era covers much of the nation’s history and has an uncertain terminus because it is hard to identify precisely when an issue becomes sufficiently salient that legislators would have considered the matter in their deliberations.

While marriage laws from the Oblivious Era cannot reflect animus towards gays and lesbians because no one would have thought of same-sex marriage when they were adopted, the absence of animus does not automatically insulate them from attack. If one believes, as the Obama Administration does, that all laws employing a sexual orientation classification are subject to heightened scrutiny, then laws from the Oblivious Era likewise should be subject to that standard, even if legislators were unaware of the possibility of same-sex marriage. As noted earlier, the Obama Administration seems to have concluded that all laws classifying by sexual orientation must be subject to heightened scrutiny, even if no legislator at the time recognized that the proposed law contained a sexual orientation classification.⁷⁴ Under the Obama Administration’s argument, a law from the 1960s or even the 1860s that explicitly or implicitly limits

73. It may be hard for some to believe that there was a time when people were unaware of gay marriage. To better grasp the obliviousness of such an era, consider a law that explicitly bans plural marriages, passed in an era where legislatures were focused solely on polygyny and wholly unaware of the possibility of polyandry. Such a law obviously would have effects on polyandrous marriages as people sought to enter into such marriages. Yet no one would say that the ban on plural marriages reflected an animus towards polyandrous marriages. We may well live in such an era, for when people think of plural marriages, the image that arises is a single man marrying multiple women. In fact, there are polyandrous societies, most notably Keralite society, in South India. The further idea that multiple women might marry multiple men (polyamory) is, for many, wholly unfathomable, something found only in the pages of science fiction.

74. See *supra* notes 45–49 and accompanying text (discussing 2012 Holder Letter).

marriage to a man and a woman contains a sexual orientation distinction, regardless of whether the actual legislators consciously intended as much.

As we saw in the federal context, applying the heightened, intermediate scrutiny standard to laws from the Oblivious Era leads to an interesting result. Such laws are obviously unconstitutional because they lack an important justification for their discrimination against same-sex marriages. After all, legislators or voters cannot have an important justification for a legal classification that they were wholly unaware of when enacting the underlying law. In other words, if one does not know that one has excluded a class of people from some government recognition or benefit, one can hardly have an important justification for the exclusion. Again, somewhat ironically, ignorance of the possibility of same-sex marriage leads to the invalidation of state laws that were passed in an era before same-sex marriage leapt into the national consciousness, at least if heightened scrutiny applies as the Obama Administration contends.

The Administration's conclusion that Title 38 contains a sexual orientation classification is suggestive of its general approach to federal laws from the Oblivious Era. Congress passed the relevant provisions in Title 38 in 1975 as a means of making the veterans' laws gender-neutral.⁷⁵ Paying no heed to this context, Attorney General Holder declared that "[t]he legislative record of these provisions contains no rationale for providing veterans' benefits to opposite-sex spouses of veterans but not to same-sex spouses of veterans."⁷⁶

Given its treatment of Title 38, the Administration presumably would apply heightened scrutiny to all federal laws that draw distinctions based on sexual orientation, regardless of the eras in which they were enacted. And if it applied such scrutiny to all such federal laws, it also must believe that such scrutiny properly applies to state laws that hail from the Oblivious Era. Like Title 38, all such laws would be unconstitutional because "the legislative record[s]" of all these laws would contain "no rationale" for not recognizing same-sex marriages.⁷⁷

In sum, the Obama Administration has to believe that heightened scrutiny applies to all state laws that draw classifications based on sexual orientation, whatever their vintage. Moreover, it must regard both state and federal laws, whenever enacted, either as lacking important interests or as insufficiently related to any important interests that might exist. Taken together, these arguments suggest that it is inconceivable that DOMA would be unconstitutional because it lacked an important justification or was poorly tailored to advance those important interests, but that similar state laws are somehow constitutional. While state anti-same-sex marriage laws certainly differ from DOMA, those differences are constitutionally

75. See *supra* text accompanying notes 46–48.

76. 2012 Holder Letter, *supra* note 36, at 2.

77. See *id.*

irrelevant. More precisely, using the logic of the Obama Administration's legal arguments, those differences are immaterial.

This takes us back to the President's stated desire to leave the issue of same-sex marriage to the states and his rejection of attempts to federalize it. Having publicly concluded that sexual orientation classifications are subject to heightened scrutiny and that DOMA fails to satisfy that standard, the President cannot simultaneously conclude that states may bar or refuse to recognize same-sex marriages. If DOMA is unconstitutional because it violates equal protection, the same must be said of state anti-same-sex marriage laws. The President's arguments against DOMA federalize the same-sex marriage question. He has hoisted himself on his own equal protection petard.

III. THE CONSTITUTIONAL PROTECTOR IN THE DOCK

What does this inconsistency say about the Presidency's capacity as a constitutional guardian? The Chief Executive must "preserve, protect and defend the Constitution."⁷⁸ At a minimum, this duty forbids him from violating the Constitution. Elsewhere, I have argued that this duty to avoid violations bars the President from implementing the unconstitutional schemes of others, even when they take the form of laws.⁷⁹ If the President believes a law is unconstitutional, he should not enforce it, much less defend its constitutionality. Instead, a President faced with a statute that he believes to be unconstitutional must treat it as void and ignore it. In other words, he has a duty to disregard unconstitutional federal laws, lest he serve as an instrument of the Constitution's violation. In this respect, Presidents should emulate Thomas Jefferson, who refused to enforce the Sedition Act because he thought it unconstitutional.⁸⁰ As Jefferson put it, he had no more obligation to enforce it than he did a law requiring prostration before a golden image.⁸¹ Going further, he argued that the Constitution forbade him from enforcing a law that he believed was unconstitutional.⁸²

How is the President to decide whether a federal law is unconstitutional, and must he accept judicial opinions as the final word on such matters? Because the Constitution never demands that he obey anyone else's interpretation of it, the President need not adopt judicial understandings, tests, and formulas.⁸³ Instead, the President may decide for himself what the Constitution demands or permits, just as the courts may decide for themselves. That is to say, he should act on his own constitutional

78. U.S. CONST. art. II, § 1, cl. 7.

79. See generally Saikrishna Bangalore Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613 (2008).

80. See *id.* at 1664–69.

81. See Letter from Thomas Jefferson to Abigail Adams (July 22, 1804), in 1 THE ADAMS-JEFFERSON LETTERS 274, 275 (Lester J. Cappon ed., 1959).

82. *Id.* at 276.

83. See John Harrison, *The Constitutional Origins and Implications of Judicial Review*, 84 VA. L. REV. 333 (1998).

conclusions as he goes about preserving and protecting the Constitution, including disregarding statutes he believes are unconstitutional.

President Obama's stance towards DOMA fails this standard and instead reflects the muddled, unsatisfactory nature of modern executive practice. The President has split the difference in a way that ensures that the courts will ultimately decide the constitutionality of DOMA. He no longer defends the law's constitutionality and in fact attacks it on that score. As Neal Devins and I have argued, the decision to attack DOMA is not only sensible, it is constitutionally required.⁸⁴ The Constitution does not permit the President to defend laws he regards as unconstitutional, for such defenses are inconsistent with his duty to defend the Constitution. Moreover, his duty to defend the Constitution obliges him to speak out against those laws he believes are unconstitutional.

But the President's decision to continue to enforce DOMA⁸⁵ is a mistake born of institutional incentives and a misunderstanding of the Supreme Court's role in the Constitution's defense.⁸⁶ To focus on the second point, the Administration believes that the Supreme Court plays a special, privileged role in constitutional defense, so special that the Administration embraces the risk that the Supreme Court might rule DOMA constitutional.⁸⁷ The Constitution never says as much; it instead singles out the President as a constitutional defender.⁸⁸ In any event, given the President's stated policy of enforcing DOMA, he obviously will continue to enforce it should the Court eventually uphold it. Again, this is not defending the Constitution as much as participating in and furthering a continuing assault upon it.

The President's ill-advised DOMA enforcement policy is compounded by his mistaken constitutional apathy towards state anti-same-sex marriage laws. The President's oath does not merely require that he not perpetrate or participate in constitutional wrongs. It goes further, obliging him to defend it against the attacks of others—the duty is to preserve, protect, and defend, without any limitation on the class of assailants, foreign or domestic.⁸⁹

One set of potential constitutional aggressors sits in the chambers of state legislatures. No less than White House staff, and members of Congress, state legislators may breach the Constitution. For instance, they may pass *ex post facto* laws or enact measures inconsistent with republican government. Or they may deny due process of law, in violation of the Fourteenth Amendment.

84. See generally Saikrishna Prakash & Neal Devins, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507 (2012).

85. See 2011 Holder Letter, *supra* note 4 (discussing the role of the Supreme Court).

86. See generally Prakash & Devins, *supra* note 84.

87. See 2011 Holder Letter, *supra* note 4 (declaring the judiciary the "final arbiter" of constitutional claims).

88. See U.S. CONST. art. II, § 1.

89. See U.S. CONST. art. I, § 1.

In the case of state laws, presidential disregard will accomplish nothing because state executives enforce such laws. If the President is to satisfy his oath with respect to state legal infringements, more than passivity is necessary. When confronted with aggressions against the Constitution from state legislators in the form of state laws, the President, at a minimum, should denounce those laws as unconstitutional.⁹⁰ He or his administration ought to speak out against state laws that deny due process or abridge the obligations of contracts.

At least, he ought to do this when he is aware of such violations and has time to speak out in the midst of his numerous other responsibilities. Although the Constitution requires the President to serve as its protector, it imposes other high obligations on him. He must faithfully execute those federal laws that are constitutional, meaning that he cannot simply focus on whether a law is constitutional. He also must faithfully execute the office of the President and hence must steward foreign relations, superintend the military, defend the nation, decide which laws to veto on policy grounds, and propose new laws. Because the President has so many duties and functions, he cannot obsess, in the manner of a constitutional law professor, on the Constitution.⁹¹ The existence of many other duties and the need to allocate limited resources means that the President (and his administration) will be unable to mount a perfect defense of the Constitution.

Because Presidents are quite busy, fulfilling a number of duties and exercising a number of discretionary powers, a President's failure to comment on the constitutionality of state laws will ordinarily be quite excusable. Yet I believe that President Obama has no excuse for his silence. A President who has already done the heavy constitutional lifting and concluded that federal laws discriminating on the basis of sexual orientation are unconstitutional has a constitutional duty to say something about state laws that draw the same distinctions. His DOJ already has penned briefs detailing why it believes heightened scrutiny is appropriate and why DOMA is unconstitutional under such scrutiny. Each of these briefs follows the same outline: argue at great length that sexual orientation is a suspect class and then contend that the DOMA fails heightened scrutiny.⁹² Reproducing these briefs with a few minor modifications and filing them in federal and state courts hearing challenges to state anti-same-

90. In at least one instance, President Obama has actually filed suit against state laws that he believes are unconstitutional. *See Arizona v. United States*, 132 S. Ct. 2492 (2012).

91. *See Prakash*, *supra* note 79, at 1676.

92. *See, e.g.*, Combined Reply Brief and Response Brief for the Federal Defendants at 9–13, *Massachusetts v. U.S. Dep't of Health & Human Servs.*, Nos. 10-2204, 10-2207, 10-2214 (1st Cir. Dec. 1, 2011); Federal Defendants' Opposition to Plaintiffs' Motion for Summary Judgment; Notice of Cross Motion and Cross Motion for Summary Judgment, *Dragovich v. U.S. Dep't of the Treasury*, No. 4:10-CV-01564 (N.D. Cal. Feb. 21, 2012); Response of Defendants United States of America and Eric H. Holder, Jr. to Intervenor BLAG's Cross-Motion for Summary Judgment., *Bishop v. United States*, No. 4:04-CV-00848-TCK-TLW (N.D. Okla. Nov. 18, 2011).

sex marriage laws hardly entails much new work. The most difficult part might be addressing whether the relevant state laws enjoy important justifications. But having decided previously that certain justifications are unimportant, that analysis should not be too arduous.

At a minimum, the Administration should declare that state-based sexual orientation classifications are subject to heightened scrutiny, perhaps saying nothing about how that test should apply to particular state laws. This would involve, at most, a few hours work for Justice Department lawyers because they have already made all these arguments. As noted earlier, when it comes to equal protection, judicial doctrine generally makes no distinctions between federal and state laws.⁹³ Indeed, the cases cited in government DOMA briefs about heightened scrutiny are typically federal cases applying the equal protection standard to state laws, most prominently *United States v. Virginia*.⁹⁴

The failure to file any such brief in the myriad challenges to state laws that prohibit same-sex marriage or that discriminate against such marriages could reflect a “go-slow” legal strategy designed to vindicate the constitutional right in increments. The fear is that the courts might not see eye-to-eye with a broader reading of equal protection that the executive branch might sketch. In other words, a go-slow approach might be defensible if the President believed that the strategy would lead the courts to ultimately agree with him that state anti-same-sex marriage laws are subject to heightened scrutiny and therefore unconstitutional. Consider this a somewhat counterintuitive but plausible argument for passivity in executive branch constitutional defense.⁹⁵

But in the context of the world as it exists today, there is no sound case for executive passivity. Courts currently are judging the constitutionality of state laws that discriminate against same-sex marriages. They will decide these cases, with or without the benefit of the executive branch’s constitutional wisdom. In this context, the go-slow strategy makes no sense because the horse is already out of the barn, so to speak. The executive must weigh in, lest the courts reject its sense of the Constitution. At least, it must do so if it supposes that arguments matter and that its good arguments may sway the courts.

Given that courts will decide the matter whether or not the executive is passive, the executive branch’s silence in challenges to state anti-same-sex marriage laws likely has little to do with any sort of legal strategy. Instead, it almost certainly reflects a political calculation. In an election year, the President likely does not want to declare that all state laws barring same-sex marriage or discriminating against such marriages are unconstitutional

93. See *supra* note 5.

94. 518 U.S. 515 (1996).

95. For a discussion of passivity in the context of the judicial branch, see generally Alexander M. Bickel, *The Supreme Court 1960 Term, Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

infringements of the Equal Protection Clause. It also seems quite likely that the President, for political reasons, wishes to avoid taking the more limited step of declaring that heightened scrutiny applies to state laws that contain sexual orientation classifications. Doing so would come too close to saying that such laws are unconstitutional.

If election year politics explains why the Obama Administration has refused to declare whether state laws constraining or forbidding same-sex marriage are unconstitutional, then we have a case of the President acting sincerely in one context and insincerely in another. Such behavior gives credence to those who would deny the President any right to act upon his constitutional beliefs out of a fear that the executive would come to dominate constitutional interpretation and execute this undertaking unfaithfully. In other words, some might fret that in a world where the President is a significant constitutional interpreter, constitutional law will become unprincipled.

This concern has some merit. If Presidents raise constitutional arguments only when it suits their political agenda and ignore such concerns when doing so would be politically inexpedient, perhaps Presidents ought to be denied a role in constitutional defense. Maybe Presidents should do no more than is typically done now (i.e., veto and pardon based on their own constitutional readings). Going further, maybe they ought to be barred from even playing that limited constitutional role.

Yet even as this concern has merit, it is also rather overblown. To begin with, the concern about presidential suitability in constitutional interpretation must necessarily be a comparative one. That is to say, we must not only compare the courts with the President and consider which is a better constitutional defender; we also must ask whether the system as a whole is superior if both defend the Constitution simultaneously, in their own ways. Thus framed, the presidency's vigorous participation in constitutional interpretation and defense fares better.

To begin with, all federal institutions look bad when considered in isolation, because it is easy to recall episodes where each has fared poorly. Consider the heroes of the modern era: the courts. Judges are not above acting on the basis of political reasons; they have done so many times, with cases like *Marbury* and *Dred Scott* serving as notorious examples. Other times, judicial decisions are not so much political as they are driven by considerations of sound policy, on the theory that the Constitution permits invocation of policy concerns in constitutional interpretation. Given that judges are not immune from the temptation to leaven judicial interpretation with policy preferences, politics, and personal morality, it would be wrong to harshly judge Presidents who might trim here and there when applying their constitutional views. In any event, we must recognize that inconsistency and partiality are inevitable features of human institutions and hence there will never be a perfect constitutional defender.

Moreover, we have reason to suspect that Presidents who only dabble in constitutional interpretation and defense are less likely to fully embrace

those roles and fulfill them faithfully. Perhaps if Presidents more routinely declined to enforce laws that they believed were unconstitutional, they also would consider what their arguments meant for identical or similar state laws and then say something about those laws. In other words, a more thorough internalization of the constitutional protector model may eventually generate more consistency and coherence on the part of Presidents and their administrations.

Finally, we should be wary of assuming that what President Obama has done here reflects what Presidents have done more generally. We have very few samples of presidential defenses of the Constitution, most of which have not been studied that well. For a better sense of how Presidents would fare under a more robust system of constitutional defense, we need far more episodes of presidential intervention and more attention lavished upon them. We also need to know more about the President's sense of the Constitution and whether that sense is being applied consistently across state and federal law. Whether those episodes come, whether the President's constitutional vision becomes more readily accessible or perceptible, or whether the presidency remains a relatively passive constitutional defender is unknown. Stay tuned to see if we get more aggressive defenses of the President's reading of the Constitution. Only then will we have a more informed sense of whether the presidency is a systematically insincere or opportunistic defender of the Constitution.

CONCLUSION

Incrementalism and federalism are good things. But both must give way when constitutional rights are at stake. If DOMA is subject to intermediate scrutiny, then that same analysis necessarily applies to state laws that also contain sexual orientation classifications. Moreover, if morality and defending traditional marriage are unimportant governmental interests in the context of DOMA, the same conclusions must be true when such interests are cited in defenses of state anti-same-sex marriage laws. Finally, if one believes that DOMA's refusal to recognize same-sex marriages does not substantially advance any important interest, one almost certainly has to believe that state laws that bar same-sex marriages likewise do little to advance important interests.

In her interview with the President, Robin Roberts seemed to sense as much. Perhaps that is one reason why she pressed the President on the question of states and same-sex marriage. The President evaded the seeming inconsistency, as all smart interviewees do. But his dodging will not last forever. There will be a time when the missing links in the President's evolution will be found. At some point, almost certainly after the 2012 presidential election, Barack Obama will declare that he believes states must recognize and permit same-sex marriages, at least as long as they recognize and permit opposite-sex marriages. If he declares as much as President, the former constitutional law professor will then order the DOJ to file briefs laying out the argument—briefs that will look rather

similar to the ones DOJ lawyers are filing today in DOMA cases. If he loses the election, our retired President will speak out against what he perceives to be a constitutional violation. Either way, evolution is coming, as it always does.