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THE OBAMA ADMINISTRATION'S DECISION TO DEFEND CONSTITUTIONAL EQUALITY RATHER THAN THE DEFENSE OF MARRIAGE ACT

*Dawn Johnsen**

When President Barack Obama announced his view that the Defense of Marriage Act¹ (DOMA) violated the Fifth Amendment's guarantee of equal protection,² he joined a storied line of Presidents who have acted upon their own constitutional determinations in the absence of, and on rare occasion contrary to, those of the U.S. Supreme Court. How best to proceed in the face of a federal statute the President considers unconstitutional can involve complex judgments, as was true of the difficult decision to enforce but not defend DOMA. Ordinarily the Department of Justice should adhere to its tradition of defending statutes against constitutional challenge, but I believe that DOMA constituted a rare exception. To defend DOMA's discrimination would have required making arguments that the Obama Administration did not consider reasonable and that in their very making would have exacerbated the constitutional harm to the equality and dignity of Americans on the basis of sexual orientation. President Obama and Attorney General Eric Holder acted appropriately and admirably in choosing instead to present their actual views on sexual orientation discrimination, just as their predecessors did on racial segregation, thereby leaving DOMA's defense to Congress and the ultimate resolution to the courts.

Judicial review plays a familiar and central role in constitutional interpretation: Supreme Court pronouncements on the constitutionality of statutes dominate constitutional law as traditionally taught and understood. But presidential review of legislation also can raise weighty questions. In a prominent early example, President George Washington called upon his

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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. Letter from Eric H. Holder, Jr., Att'y Gen., to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011) [hereinafter Attorney General Letter], *available at* <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html> (explaining the decision not to defend DOMA).

cabinet for advice on the constitutionality of a bill to establish a United States bank.³ He ultimately signed the bill on the advice of Secretary of the Treasury Alexander Hamilton and contrary to the views of Attorney General Edmund Randolph and Secretary of State Thomas Jefferson. The Supreme Court upheld the law's constitutionality in 1819,⁴ but a decade later, President Andrew Jackson, disagreeing with both President Washington and the Supreme Court, vetoed a bill to reauthorize the bank on the grounds that he believed it was unconstitutional.⁵ In another example of great consequence, President Jefferson suspended prosecutions and pardoned those convicted under the Sedition Act of 1798 because he believed the law violated the First Amendment, a position that may have helped him to defeat incumbent President John Adams and his political party to gain control of Congress.⁶

Then-congressional candidate Abraham Lincoln debated Stephen Douglas on the extent to which an elected official should feel bound to follow *Dred Scott v. Sandford's*⁷ determination that the Missouri Compromise was unconstitutional. After his election as President, Lincoln and his Attorney General, as well as the Congress, did not consider themselves bound to follow *Dred Scott*.⁸ President Andrew Johnson was impeached by the House of Representatives (though acquitted by the Senate) when he fired and replaced his Secretary of War without complying with the requirements of a federal statute that he believed encroached impermissibly upon his executive authority.⁹ Fifty years later, President Johnson was vindicated. When President Woodrow Wilson similarly

3. See Daniel A. Farber, *The Story of McCulloch: Banking on National Power*, in CONSTITUTIONAL LAW STORIES 33 (Michael Dorf 2d ed. 2009).

4. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

5. See Farber, *supra* note 3, at 63.

6. Congress also declared its view that the law was unconstitutional and repaid all fines paid under it. See GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 33–76 (2004) (discussing the Sedition Act's enforcement and the debate over its constitutionality). More than a century later, the Supreme Court wrote, "Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964).

7. 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

8. See DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 575 (1978). President Lincoln also controversially suspended the writ of habeas corpus at the outset of the Civil War when Congress was out of session, supported by his Attorney General's opinion that he possessed that power, and even more controversially, refused to comply with Supreme Court Justice Taney's order (acting as a Circuit judge) that the government present a particular prisoner at a habeas hearing. See *Ex parte Merryman*, 17 F. Cas. 144, 146 (C.C.D. Md. 1861); H. JEFFERSON POWELL, *THE CONSTITUTION AND THE ATTORNEYS GENERAL* 169–97 (1999) (reprinting and commenting upon relevant Attorney General opinions); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 997–1009 (2008).

9. TRIAL OF ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES, BEFORE THE SENATE OF THE UNITED STATES, ON IMPEACHMENT BY THE HOUSE OF REPRESENTATIVES FOR HIGH CRIMES AND MISDEMEANORS 6 (Da Capo Press 1970) (1868).

refused to comply with statutory restrictions on his removal authority and his Department of Justice argued against that statute's constitutionality, the Supreme Court agreed with the constitutional views of Presidents Wilson and Johnson and held that such restrictions are unconstitutional.¹⁰

More recently, Presidents Ronald Reagan and George Herbert Walker Bush both vigorously promoted their Administrations' views on a range of constitutional issues, including through litigation on behalf of the United States and their judicial appointments.¹¹ In one example especially relevant to DOMA, President Bush's acting Solicitor General, now-Chief Justice John Roberts, refused to defend federal statutes that provided for the consideration of race in order to benefit underrepresented minorities seeking broadcast licenses.¹² The Court rejected the Bush Administration's view and upheld the statute by a five-four vote, but after Bush-appointee Clarence Thomas replaced Thurgood Marshall, the Court reversed its view, also by a five-four vote.¹³ President George W. Bush elevated the issue of executive power in the public eye by asserting the authority, in presidential signing statements and once-secret opinions, to act contrary to statutory limitations or to interpret them in sometimes questionable ways to avoid alleged constitutional problems.¹⁴ Most (in)famously, President Bush's Office of Legal Counsel (OLC) advised him that he could authorize torture despite a federal statutory ban because, in OLC's since-discredited view, the statute unconstitutionally infringed on his Commander-in-Chief authority in some circumstances.¹⁵ After the OLC opinion leaked, President Bush dismissed that portion of the advice as unnecessary dicta, but with regard to literally hundreds of other statutory provisions, his Administration maintained that the President possessed the authority to disregard or reinterpret statutes that conflicted with presidential authority,

10. See *Myers v. United States*, 272 U.S. 52 (1926). Presidents Jefferson, Jackson, and Lincoln all offered strong statements in support of the President's independent interpretive authority, and President Johnson's counsel in defending him before the Senate on the articles of impeachment described the President's authority to refuse to comply with laws he viewed as unconstitutional in terms very similar to those adopted by modern Presidents and their legal advisors. See Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7, 19–21 (2000).

11. See OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL, *THE CONSTITUTION IN THE YEAR 2000: CHOICES AHEAD IN CONSTITUTIONAL INTERPRETATION* (1988) [hereinafter *CONSTITUTION IN 2000*].

12. See Marty Lederman, *John Roberts and the SG's Refusal to Defend Federal Statutes in Metro Broadcasting v. FCC*, BALKINIZATION (Sep. 8, 2005, 12:11 AM), <http://balkin.blogspot.com/2005/09/john-roberts-and-sgs-refusal-to-defend.html>.

13. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 600 (1990), *overruled by* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

14. See generally Dawn E. Johnsen, *What's a President to Do? Interpreting the Constitution in the Wake of the Bush Administration's Abuses*, 88 B.U. L. REV. 395 (2008).

15. Memorandum from Office of Legal Counsel, U.S. Dep't of Justice, Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A, to Alberto R. Gonzalez, Counsel to the President (Aug. 1, 2002), available at <http://www.justice.gov/olc/docs/memo-gonzales-aug2002.pdf>.

including the Foreign Intelligence Surveillance Act's warrant requirement.¹⁶

Examples at this level of historic importance and controversy are unusual, but the general issue of the proper scope of presidential interpretive authority pervades government. When I served at OLC during President Bill Clinton's Administration, we often faced constitutionally objectionable provisions in federal legislation. We were called upon both before and after enactment in contexts that ranged from assisting in the drafting of legislation and advising the President whether to veto a bill, to interpreting legislation for a signing statement or implementing regulations, to assessing the legality and propriety of refusing to enforce or defend an unconstitutional provision. The view that typically has informed executive branch practice across administrations, and that also prevails in academia, regards the President's interpretive authority as highly dependent on context, including the particular power the President is exercising and the positions of Congress and the Supreme Court.

To summarize, and at the risk of oversimplification, the President's responsibility to "take Care that the Laws be faithfully executed"¹⁷ extends to the Constitution, the "supreme Law of the Land,"¹⁸ as well as statutes. But that does not resolve whose constitutional views should prevail when the three branches do not all agree. The Supreme Court's interpretive role is "supreme" but not exclusive; the Court is not infallible (consider *Dred Scott* and *Plessy v. Ferguson*¹⁹), but its constitutional interpretations merit special regard from Congress and the President. Congress's enactments are presumptively constitutional and deserving of respect from the President and the courts. Presidents generally should act on constitutional objections to legislation *before* passage by working with Congress to cure defects or by exercising the veto power the Constitution specially confers on the President. After enactment, Presidents ordinarily should enforce constitutionally objectionable laws. They may continue to act upon their constitutional concerns through the exercise of other authorities, including by seeking legislative repeal, vetoing future bills, issuing pardons, or using the presidential bully pulpit, even on the basis of constitutional views at odds with those of the Court or Congress.

Neither past practice nor theory clearly answers whether President Obama and his Attorney General Eric Holder made the optimal choice, or even an appropriate one, once they reached the view that DOMA violated the constitutional guarantee of equal protection. I believe the question is close, but that President Obama made the correct choice in deciding to continue to comply with DOMA but not to defend it against constitutional

16. See Charlie Savage, *Bush Challenges Hundreds of Laws; President Cites Powers of His Office*, BOS. GLOBE, Apr. 30, 2006, at A1.

17. See U.S. CONST. art. II, § 3.

18. See U.S. CONST. art. VI, § 2.

19. 163 U.S. 537 (1896).

challenge, thereby requiring Congress to secure its own counsel if it desired to defend the law.²⁰ In changing course, he put his Administration on the right side of history by refusing to fashion arguments that he and his top legal advisors did not believe to be true in favor of discrimination against persons based on their sexual orientation and against heightened judicial scrutiny of such discrimination. To defend the federal statute and argue for ordinary rational/reasonableness review in this extraordinary case would have contributed to the continued exclusion from full and equal standing under the law a category of persons who historically have been severely disadvantaged on the basis of prejudice and stereotype. A President who so views the case need not, indeed should not, urge the perpetuation of the constitutional harm.

Of President Obama's critics, Professor Daniel Meltzer has made the strongest argument that Obama made the wrong choice.²¹ Professor Meltzer served as President Obama's principal deputy counsel and advised on these very issues for some of the period during which the Department of Justice defended DOMA and the "Don't Ask, Don't Tell" statute that excluded openly gay individuals from military service. I agree with much of his analysis in support of a strong presumption in favor of defending statutes, which generally is consistent with my previous writings and experience, but not with his conclusion.

In 1994, while I worked at OLC, the Counsel to the President requested an analysis of the principles that should govern the nonenforcement of statutes on constitutional grounds. We endorsed and elaborated upon the tradition of executive enforcement of constitutionally objectionable statutes with only limited exceptions for statutes that are clearly unconstitutional or that infringe on executive authority.²² On the distinct but related issue of the defense of laws against constitutional challenge, the executive branch typically follows roughly the same standard. Ordinarily the Department of Justice defends even statutes its lawyers believe are unconstitutional, except

20. More specifically, the letter stated that the Department of Justice would argue that heightened scrutiny should apply and DOMA cannot survive that close review, but if asked, the Department would continue to argue that the law would satisfy rational basis review. Attorney General Letter, *supra* note 2.

21. See Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183 (2012). Of my fellow panelists at this Symposium, my views are closest to Professor Meltzer's. See also Carlos A. Ball, *When May a President Refuse to Defend a Statute? The Obama Administration and DOMA*, 106 NW. U. L. REV. COLLOQUY 77 (2011), <http://www.law.northwestern.edu/lawreview/colloquy/2011/21/> (providing an excellent discussion of the factors that should inform decisions whether to defend statutes, as applied to DOMA). Another member of our panel, Professor and former Solicitor General Charles Fried, criticizes the decision in far stronger terms. See, e.g., Adam Liptak, *The President's Courthouse*, N.Y. TIMES, Feb. 27, 2011, at WK5 (noting that Fried found the decision "unseemly, . . . pernicious," and "'an unbecoming, not to mention totally unconvincing, use of excessive ingenuity in squirming out of an unpleasant duty'").

22. Presidential Auth. to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 201 (1994); see also Att'y Gen.'s Duty to Defend the Constitutionality of Statutes, 5 Op. O.L.C. 25, 25 (1981).

in two circumstances: a law that is so clearly unconstitutional that no “reasonable argument” can be made in its defense, or a law that encroaches on the President’s authorities. These seem to me the correct general standards, appropriately respectful of both Congress’s lawmaking authority and the judiciary’s special role in constitutional interpretation while allowing for valuable executive participation in the debate about constitutional meaning, typically through other mechanisms.²³ The Obama Administration’s approach to DOMA does not fit neatly into either of these traditional exceptions. The law does not infringe upon executive authority and reasonable arguments would seem available to defend its constitutionality, though upon closer inspection and as discussed below, a variation of the exception regarding reasonable arguments arguably applies to this case.

Professor Saikrishna Prakash supports President Obama’s decision not to defend, but on a very different theory that does not see this as an extraordinary, close case, and that would have the President unilaterally decline to enforce as well as defend DOMA—or any statute the President believes is unconstitutional.²⁴ Professor Prakash’s approach comports with a well-developed minority view among academics who equate presidential review of statutes with judicial review under a theory sometimes described as departmentalism. Under a strong version of departmentalism, Presidents are constitutionally *obligated*, not simply permitted, to decline to defend *and enforce* any and all statutes they believe are unconstitutional.²⁵ A vital question generally left unaddressed is at what point and under what circumstances should (or must) Presidents and their lawyers undertake independent assessments of the constitutionality of statutes, in order to determine when they are duty-bound to refuse to enforce or defend laws? Also, at what point does the executive branch hold a sufficiently firm view of a law’s constitutional infirmity to trigger the duties? Upon an OLC determination reached in reviewing pending legislation that later passes? A Solicitor General determination reached in the course of litigation? Or with constitutional concerns voiced by the President in a signing statement? If inadequate alone, do such concerns trigger a duty to elevate the question to a full presidential review and ultimate presidential determination, regardless of competing demands on the President’s time?

23. See generally Johnsen, *supra* note 10.

24. Professor Prakash, writing with Professor Neal Devins, argues that “there simply is no duty to defend federal statutes the President believes are unconstitutional. . . . [T]here likewise is no duty to enforce such laws. Given President Obama’s belief that the DOMA is unconstitutional, he should neither enforce nor defend it.” Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 509 (2012) (citation omitted); see also Saikrishna Bangalore Prakash, *The Executive’s Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613 (2008).

25. See, e.g., Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994).

I believe a strong departmentalist view is inconsistent with the constitutional structure and allocation of power, especially its “single, finely wrought and exhaustively considered procedure” for enacting laws, which gives the President authority to veto a law he views as unconstitutional, but Congress the authority to override a presidential veto.²⁶ Routine unilateral presidential nonenforcement would undermine Congress’s core power and constitutionally preferred mechanisms for Presidents to promote their constitutional views. Nor would this approach best serve the development of constitutional meaning.²⁷ Indeed, routine presidential nonenforcement would be flatly inconsistent with governmental practice and our constitutional tradition. So too would be an approach advocated at the other extreme by some scholars and members of Congress—mandatory enforcement and defense of all statutory provisions—which would condemn virtually any presidential decision not to enforce or defend a law as a usurpation of judicial or congressional authority. In an early influential article entitled *Presidential Review*, Professor Frank Easterbrook described an example of a clearly permissible nonenforcement that is particularly relevant to the DOMA debate.²⁸ Late in the 1970s, while Easterbrook worked in the Solicitor General’s office, the Attorney General decided no longer to enforce laws that discriminated on the basis of sex, because the Court had made clear that similar laws violated the guarantee of equal protection.²⁹ Executive practice includes another generally accepted circumstance for nonenforcement: federal statutes that encroach on executive authority but would not be justiciable if the executive branch invariably complied. Inflexible, mandatory enforcement and defense of constitutionally objectionable laws thus also proves unworkable and counter to practice and theory.

My previous writings address an intermediate approach I call “functional departmentalism” and articulate guiding principles and a basis in constitutional theory for what in the main actually has constituted governmental practice.³⁰ Presidents should act upon their independent

26. *INS v. Chadha*, 462 U.S. 919, 951 (1983).

27. Johnsen, *supra* note 10, at 16–18, 25–29.

28. Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 913 (1990).

29. *See id.*

30. For a more thorough discussion of the principles and practices summarized in this Essay, see Johnsen, *supra* note 10 (focusing on the Clinton Administration); Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 LAW & CONTEMP. PROBS. 105 (2004); Johnsen, *supra* note 14 (focusing on the George W. Bush Administration). President George W. Bush was an outlier in this regard, but even his extraordinary aggressiveness occurred in the context of what he viewed as congressional encroachments on executive power, traditionally viewed by Presidents as an area of enhanced authority. See Barron & Lederman, *supra* note 8, at 1095–98; Dawn Johnsen, “*The Essence of a Free Society*”: *The Executive Powers Legacy of Justice Stevens and the Future of Foreign Affairs Deference*, 106 NW. U. L. REV. 467, 501–25 (2012). Other Presidents and their lawyers occasionally have used sweeping language to

constitutional views only to the extent consistent with the constitutional functions of Congress and the courts and only to the extent consistent with the discernment and development of constitutional meaning (distinct from simply the advancement of the President's own views). Presidential review thus requires respect for the constitutional functions and views of Congress and the Court and careful attention to processes of executive interpretation that will encourage principled, not inappropriately political and outcome-driven, legal interpretation.³¹ Constitutional concerns about nonenforcement are significantly heightened when a President's failure to comply with a statute is not transparent even to Congress (as was true of several post-9/11 instances) or when by not enforcing or complying with a statute, the President renders a challenge to the law nonjusticiable, making his own interpretation difficult to challenge. I previously have focused on a functional analysis of presidential nonenforcement, but similar factors should inform the less drastic response of nondefense. Professor Meltzer helpfully elaborates on the functional concerns and values that support the current presumption in favor of defending statutes: the protection of Congress's interests, institutional continuity, the relative competencies of the branches of government, the relationships among the branches, and the relationship within the executive branch between career lawyers and political appointees.³²

A functional, context-dependent analysis to my mind is correct as a matter of theory, consistent with historical practice, and vital as a practical matter. It can lead, however, to situations where the government takes inconsistent positions with regard to the same legislation over time, and even undermines its own litigating position. Professor Meltzer describes an interesting example from the litigation of the "Don't Ask, Don't Tell" statute excluding gay individuals from military service under specified circumstances.³³ President Obama publicly stated his belief that the statute "weakens our national security" and worked for its repeal on that basis, all clearly within his authority.³⁴ At the same time, his Department of Justice defended the law against constitutional challenge, including on the grounds

describe the scope of presidential interpretive authority, but their actions were more restrained.

31. See Memorandum from David J. Barron, Acting Assistant Att'y Gen., Office of Legal Counsel, to Att'ys of the Office of Legal Counsel, Re: Best Practices for OLC Legal Advice and Written Opinions (July 16, 2010), available at <http://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf>; WALTER E. DELLINGER, DAWN JOHNSEN ET AL., PRINCIPLES TO GUIDE THE OFFICE OF LEGAL COUNSEL (2004), reprinted in Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559 app. 2 (2007).

32. Meltzer, *supra* note 21, at 1208–27; see also Drew S. Days III, *In Search of the Solicitor General's Clients: A Drama with Many Characters*, 83 KY. L.J. 485, 498–503 (1995) (describing the reasons for defense policy and Congress's expanded capacity to litigate on its own behalf since enactment of the Ethics in Government Act of 1978).

33. Meltzer, *supra* note 21, at 1233–34.

34. *Id.* at 1233.

that Congress believed it strengthened national security, which led a district court judge to insist that the government lawyers disavow one of the seemingly inconsistent positions.³⁵ I agree with Professor Meltzer that the judge acted inappropriately here. Courts should accommodate the fact that the different branches of government sometimes hold different constitutional views and that in the context of defending a statute, the Department of Justice typically will present not its best reading of the Constitution, but all reasonable constitutional interpretations that support the statute.

The Solicitor General has employed a few different approaches to this dilemma, which is heightened in those rare cases in which the President has personally determined and publicly announced that he believes a statutory provision is unconstitutional. In the seminal campaign finance case *Buckley v. Valeo*,³⁶ Solicitor General Robert Bork filed two separate briefs, one offering the best available defense of the law on behalf of the government, and the other a more forthright expression of the views of the Attorney General submitted as an amicus curiae.³⁷ *Oregon v. Mitchell*³⁸ is the only case of which I am aware in which the Department of Justice defended a statute after a sitting President publicly declared his view that it was unconstitutional. There, Solicitor General Erwin Griswold defended a law lowering the voting age to eighteen, because he believed reasonable arguments could be made in its defense.³⁹ At oral argument, however, Griswold informed the Court that he and President Nixon believed the law was unconstitutional, as Nixon had stated in his signing statement. In *Metro Broadcasting, Inc. v. FCC*, President Bush's acting Solicitor General John Roberts argued that federal affirmative action policies mandated by statute violated the guarantee of equal protection (notwithstanding the existence of more-than-reasonable arguments to the contrary, which in fact the Court adopted), but it allowed the Federal Communications Commission to defend the policies.⁴⁰

35. *See id.*

36. 424 U.S. 1 (1976).

37. Seth P. Waxman, *Defending Congress*, 79 N.C. L. REV. 1073, 1082–83 (2001). Robert Bork suggested that the Obama Administration should have considered this same approach to DOMA and that the decision not to defend the law was an “outrage,” that reveals the “utter cynicism and frivolity of the Obama administration.” Robert H. Bork, *Offense to the Constitution Act*, NAT’L REV. (Mar. 21, 2011), available at http://www.hudson.org/index.cfm?fuseaction=publication_details&id=7821.

38. 400 U.S. 112 (1970).

39. *See* Waxman, *supra* note 37, at 1081–82. *See generally* Letter from Andrew Fois, Assistant Att’y Gen., U.S. Dep’t of Justice, to Senator Orrin G. Hatch, Chairman, Comm. on the Judiciary (Mar. 22, 1996) (listing instances in which the government enforced, but did not defend, laws that the President viewed as unconstitutional).

40. 497 U.S. 547 (1990), *overruled by* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). Professor Marty Lederman notes the unusual fact in this case that Presidents Reagan and Bush had signed into law the minority preferences at issue without noting constitutional objections to these provisions. Nor did they later publicly declare their view that the provisions were unconstitutional. *See* Lederman, *supra* note 12. Professor Lederman

When I served at OLC, occasionally another executive branch lawyer would ask our office to tone down objections in a draft bill comment to Congress, fearing that if the bill nevertheless passed, the Administration's public objections would make defense of the law more difficult. The bill might even be one that the Administration strongly supported on policy grounds, but that had been poorly drafted. OLC generally opposed minimizing or omitting constitutional objections which might increase the chance of the enactment of what we considered an unconstitutional provision, in order to improve the Department of Justice's ability later to defend an unconstitutional provision that should not have been enacted in the first place.⁴¹ The government's objective is not simply to prevail in court. As an inscription on the wall outside the Attorney General's office reads, "The United States wins its point whenever justice is done its citizens in the courts."⁴²

The precedent most relevant to DOMA from my time at OLC involved a 1996 bill that directed the President to discharge any member of the military who tested HIV positive, regardless of the service member's actual ability to serve.⁴³ President Clinton, on the advice of his lawyers and military advisors, personally determined that this provision was unconstitutional and that it was motivated by prejudice against HIV-positive individuals.⁴⁴ Supporting the President's belief were highly offensive statements by the provision's sponsor and the fact that Congress had not engaged in any genuine consideration of this specific provision.⁴⁵ The veto power seems an obvious potential safeguard but, as often can be the case, the HIV-discharge provision comprised just one part of legislation with numerous provisions—in this case a particularly important omnibus bill, the National Defense Authorization Act of 1996 (NDAA).⁴⁶

correctly views a presidential determination as appropriate in such cases. *See id.* Although it was not express in the case of *Metro Broadcasting*, it almost certainly existed, because opposition to affirmative action was a central component of the "Reagan revolution." *See* CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT 90 (1991).

41. Best practices can be complicated, as, for example, when Congress enacts provisions that the Court essentially has declared unconstitutional in reviewing similar statutes. One prominent example involves Congress's continued inclusion of "legislative vetoes" in some multiprovision bills, which the Supreme Court declared unconstitutional in *INS v. Chadha*, 462 U.S. 919 (1983), and which Presidents therefore routinely assert the authority to disregard (as Congress expects they will).

42. *E.g.*, Memorandum from David W. Ogden, Deputy Att'y Gen., to Dep't Prosecutors (Jan. 4, 2010), available at <http://www.justice.gov/dag/dag-memo.html>.

43. *See* National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 567, 110 Stat. 186, repealed by Act of Apr. 26, 1996, Pub. L. No. 104-134, tit. II, § 2707(a)(1), 110 Stat. 1321, 1321-30 (codified as amended at 10 U.S.C. § 1177 (Supp. IV 1998)); *see also* *United States v. Lovett*, 328 U.S. 303 (1946).

44. Statement on Signing the National Defense Authorization Act for Fiscal Year 1996, 1 PUB. PAPERS 226, 227 (1996) [hereinafter Statement on Signing], available at <http://www.presidency.ucsb.edu/ws/index.php?pid=52387>.

45. Johnsen, *supra* note 10, at 57.

46. *See* National Defense Authorization Act for Fiscal Year 1996 § 567.

Nonetheless, President Clinton did veto the bill, citing concerns about the HIV-discharge provision (though not expressed in constitutional terms) and several other provisions.⁴⁷ Congress then passed a version of the NDAA that addressed some of his concerns but retained the HIV-discharge provision.⁴⁸ President Clinton felt that he could not afford a second veto because the larger defense bill served vital and pressing needs.⁴⁹ After a careful and extensive review by his legal and military experts, the President personally determined that justice would best be served by urging Congress to repeal the provision and notifying Congress that his Administration would enforce but not defend it in litigation.⁵⁰ In the end, under the pressure of having to defend the provision itself, Congress repealed it before its effective date.⁵¹

To my mind, the HIV-discharge provision presented a rare example of an appropriate deviation from practice, where the President acted within his authority in enforcing but not defending a law he personally thought unconstitutional even though the provision did not fall within one of the traditional exceptions.⁵² Several important factors supported this deviation from the norm, which essentially relate to the value the President could bring to the Court's ultimate constitutional analysis: the President's strongly held and carefully deliberated constitutional view informed by military and legal experts; the President's special role as Commander in Chief; the likelihood that courts otherwise would underenforce the equal protection norms at stake under a deferential rational basis review; the potential devastating harm to those individuals affected; the fact that Congress had not considered the provision's constitutionality; and the impermissible motivation behind the law as evidenced by the sponsor's offensive statements. Even more than for DOMA, the HIV-discharge provision would have provided strong precedent if the Obama Administration had elected to enforce, but not defend, the "Don't Ask, Don't Tell" exclusion from military service based on sexual orientation, which it instead defended while successfully working with Congress for its December 2010 repeal. Thus, with regard to both the HIV-discharge and the "Don't Ask, Don't Tell" provisions, Presidents succeeded in achieving

47. See Veto Message, H.R. DOC. NO. 104-155 (1995), reprinted in 142 CONG. REC. H12 (daily ed. Jan. 3, 1996).

48. See Statement on Signing, *supra* note 44.

49. *Id.*

50. *Id.*

51. Act of Apr. 26, 1996, Pub. L. No. 104-134, tit. II § 2707(a)(1), 110 Stat. 1321-30.

52. Johnsen, *supra* note 10, at 13-14, 52-60. I identified and applied to the HIV-discharge example six factors to assist in making nonenforcement and nondefense decisions: the clarity of the constitutional defect; the relative interpretive competencies of the three branches; whether Congress actually considered the constitutional issue; the effect nonenforcement might have on the likelihood of judicial review; the severity of the constitutional harm; and the possibility of legislative repeal as an effective alternative to nonenforcement.

the constitutionally superior course of persuading Congress to repeal laws the Presidents had determined were unconstitutional.

Where repeal is not feasible—or while repeal efforts are underway, as in the case of DOMA and the HIV-discharge provision—nondefense ordinarily is preferable to nonenforcement as a constitutional matter. A decision not to defend a law raises vital questions of judgment, but not of potential constitutional transgression. Some of President Obama’s critics confuse and conflate the two. Newt Gingrich and Glenn Beck, for example, falsely attacked President Obama for refusing to *enforce* DOMA, with Gingrich even raising the possibility of impeachment.⁵³ House Speaker John Boehner similarly objected, stating that “[t]he constitutionality of this law should be determined by the courts—not by the president unilaterally.”⁵⁴ Speaker Boehner’s complaint would have had merit if President Obama actually had “unilaterally” refused to enforce DOMA; if he had provided the plaintiffs the benefits they sought, he might have effectively ended the litigation and the judiciary’s opportunity to resolve the constitutional question.⁵⁵ Instead, President Obama chose to enforce the law and present his constitutional views in litigation, which allows the

53. See Jim Meyers & Ashley Martella, *Gingrich: If Palin Took Obama Actions, There Would Be Calls for Impeachment*, NEWSMAX (July 17, 2012, 4:43 PM), <http://www.newsmax.com/Headline/Gingrich-Obama-Constitutional-Crisis/2011/02/25/id/387455/> (noting that Gingrich stated that it is the President’s job to “enforce the rule of law” and that if Sarah Palin had refused to enforce the laws of the United States that there would have been calls for her impeachment); *Beck Falsely Claims Obama Won’t Enforce Law on DOMA; Adds, “He Has Made Congress Irrelevant”* [sic], MEDIA MATTERS (Feb. 25, 2011), <http://www.mediamatters.org/video/2011/02/25/beck-falsely-claims-obama-wont-enforce-law-on-d/176907> (providing recording of Beck stating that “[President Obama] says that he is not going to enforce [DOMA]”).

54. Press Release, John Boehner, Speaker, House of Representatives, Statement by House Speaker John Boehner (R-OH) Regarding the Defense of Marriage Act (Mar. 4, 2011), available at <http://www.speaker.gov/press-release/statement-house-speaker-john-boehner-r-oh-regarding-defense-marriage-act>.

55. A federal district court already had found the law unconstitutional, so the Obama Administration would not have been entirely without judicial support. See *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010); *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010). Several other district courts since then have declared DOMA unconstitutional, as have the First and Second Circuits. See *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), *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, 2012 WL 3113883, at *1, (D. Conn. July 31, 2012), *appeal docketed*, No. 12-3273 (2d Cir. filed Aug. 17, 2012), *petition for cert. before judgment pending*, No. 12-231 (U.S. Aug. 21, 2012), *petition for cert. before judgment pending*, 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 docketed*, No. 12-16461 (9th 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 docketed*, No. 12-15388 (9th Cir. Feb. 24, 2012), and No. 12-15409 (9th Cir. Feb. 28, 2012), *petition for cert. before judgment pending*, No. 12-16 (U.S. July 3, 2012).

courts, not the President, to decide DOMA's fate. Another significant distinction is the transparency inherent in the nature of nondefense, which unlike nonenforcement does not allow Presidents to act secretly. The Department of Justice, Congress, and the parties to the litigation all may present their competing arguments in open court with public resolution in the form of a judicial opinion.⁵⁶

Attorney General Holder's letter properly frames the decision not to defend DOMA as a "rare" exception to the traditional presumption.⁵⁷ The letter conveys that the President and the Attorney General appreciate the difficulty and gravity of their decision, and that far more is at stake than whether a reasonable argument can be made in defense of one particular statute.

The litigation compelled the Department of Justice—and given the fundamental nature and political prominence of the issue, President Obama himself—to formulate a position on how courts generally should evaluate claims of unconstitutional discrimination on the basis of sexual orientation. As the letter explains, the litigation previously had occurred only in jurisdictions where circuit courts already had adopted rational basis review, allowing the Department to apply that standard without evaluating or endorsing it. That approach, however, became untenable when plaintiffs filed suit challenging DOMA's constitutionality in a circuit that had not previously adopted a standard of review.

Far from a technical doctrinal question, the standard of review the Supreme Court ultimately settles upon for sexual orientation discrimination may have far-reaching implications for numerous statutes and other discriminatory actions at all levels of government. The Court has chosen to approach claims of equal protection violations by putting great, usually dispositive, emphasis on the standard of review. Rational basis review typically means the government is free to use a characteristic as it wishes, even to the great detriment of those adversely affected, while heightened scrutiny lifts the usual veil of deference in favor of close judicial review of the proffered justifications for the discrimination.

The standard of review profoundly affects how the defense of a statute may proceed. The Administration had been defending the law based on hypothetical justifications, as rational basis review permits but as heightened scrutiny would not allow. Heightened scrutiny would require the government to rest its defense solely on the actual purposes behind the statute. The Department of Justice already had abandoned defending DOMA based on its actual purposes because they reflected impermissible

56. See generally Amanda Frost, *Congress in Court*, 59 UCLA L. REV. 914 (2012) (arguing that Congress should take a more active role in litigation including in defense of its statutes).

57. Attorney General Letter, *supra* note 2. During his confirmation hearing, Holder put it well in stating that overcoming the presumption requires a "very compelling reason." Liptak, *supra* note 21.

prejudice, including the since-discredited view that children who are raised by gay and lesbian parents suffer harm as a result.

On the merits, the Attorney General's letter argues, in my view convincingly, that heightened scrutiny is the appropriate standard, and that DOMA's "legislative record . . . undermines any defense under heightened scrutiny."⁵⁸ But as the letter acknowledges, the traditional policy calls for defense on a low threshold, whenever reasonable arguments are available. The Attorney General makes essentially two brief points in a single paragraph to support its determination that "[t]his is the rare case where the proper course is to forgo the defense of this statute."⁵⁹ One point simply notes the applicability of former Solicitor General Seth Waxman's observation that the Department previously has declined to defend statutes "in cases in which it is manifest that the President has concluded that the statute is unconstitutional."⁶⁰ The more complicated point in support draws a distinction between "professionally responsible" arguments and "reasonable" arguments, which, though cryptic, raises the possibility that DOMA falls within a variation of the traditional no-reasonable-argument exception.⁶¹ With regard to the actual purposes behind DOMA's 1996 enactment, the Administration persuasively argues that they reflect impermissible prejudice that should not be proffered as reasonable arguments in 2011 and beyond. While 1996 is quite recent, since then our nation's understanding of sexual orientation discrimination and what passes as a reasonable justification has changed significantly. If the correct standard of review is heightened scrutiny, then the Department seems justified in declining to defend DOMA based on arguments from actual purposes that it does not find reasonable.⁶²

58. Attorney General Letter, *supra* note 2.

59. *Id.*

60. *Id.* An extended version of the quote is helpful: "[E]ven when neither exception applies, the Department of Justice has occasionally declined to make professionally respectable arguments, even when available, to defend a statute—typically, in cases in which it is manifest that the President has concluded that the statute is unconstitutional." Waxman, *supra* note 37, at 1083.

61. Attorney General Letter, *supra* note 2 ("[T]he Department has a longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense However, the Department in the past has declined to defend statutes despite the availability of professionally responsible arguments, in part because the Department does not consider every plausible argument to be a 'reasonable' one.").

62. This would seem true as well under the heightened form of rational basis review the Court occasionally has applied where it determines the actual purpose behind a statute was "a bare . . . desire to harm a politically unpopular group." U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973); *see also* Romer v. Evans, 517 U.S. 620 (1996); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985). The First Circuit relied on these cases and this reasoning to find DOMA unconstitutional. Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1, 10–12 (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). The Attorney General's

The more difficult question is whether the Department of Justice can (and must) make reasonable arguments that sexual orientation discrimination should not be subject to heightened judicial review (and therefore DOMA need not be justified by the law's actual purposes). The letter suggests that although professionally responsible arguments could be crafted, the Department does not consider the arguments, which the President affirmatively has rejected, to be reasonable.⁶³ Thus, the question at hand is whether the Department must make plausible arguments against heightened scrutiny that it views as unreasonable, perhaps even offensive, and that the President personally has determined are wrong, or whether it may instead present the courts with what the President and the Attorney General believe to be the proper constitutional analysis.

One important factor, which the letter does not address other than to label the case "rare," is how broad a precedent the decision not to defend DOMA sets. For example, if a President has publicly stated his belief that the Affordable Care Act is beyond Congress's authority to enact, does the DOMA example suggest the Department of Justice should not defend the Act? What if a President has declared his view that statutory restrictions on the purchase of guns violate the Second Amendment? Deserving of special consideration among Professor Meltzer's concerns is the risk that the DOMA decision, far from remaining "rare," will presage a practice of Presidents and their Attorneys General declining to defend controversial statutes and an inappropriate politicization of constitutional interpretation, with Presidents regularly lobbied to take constitutional positions and impose them on the Department of Justice.⁶⁴

History provides some reassurance. The Department of Justice has declined to defend statutes on a number of occasions, especially when Presidents have concluded the statutes are unconstitutional. With the notable exception of *Oregon v. Mitchell*,⁶⁵ it seems that Presidents typically have presented their actual views to courts whenever they felt sufficiently strongly about an issue. And yet the traditional presumption in favor of

letter does not directly address this possibility, but it does cite *Cleburne* for the general factors that guide the Court's determination whether heightened scrutiny is appropriate. Attorney General Letter, *supra* note 2.

63. See Attorney General Letter, *supra* note 2.

64. See Meltzer, *supra* note 21, at 1227–32. This is not to suggest a simplistic view that politics should, or could, play no role, or that lobbying is improper. Professor Jeff Powell has written an enlightening essay on the inherent complexities for public lawyers seeking to maintain "loyalty to the law" given that "[p]olitics is inseparable from public lawyering," but "public lawyering is not simply politics." H. Jefferson Powell, *Loyalty to the Law: Politics in the Practice of Public Lawyering in the United States*, 72 NOTRE DAME L. REV. 78, 86 (1996). To the extent that "politics" and lobbying played a role in the Obama Administration's position on DOMA, those influences are complex and not necessarily inappropriate. Social movements in the United States have informed and enriched constitutional understanding, especially regarding the meaning of equal protection. See, e.g., Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 307–16 (2001).

65. 400 U.S. 112 (1970).

defense remains strong. The high-profile DOMA example nonetheless might encourage a weakening of the tradition and nondefense decisions lacking in legal integrity. Vigilance and care are warranted in order properly to cabin the DOMA precedent's meaning and reach, beyond the brief explanation provided by the Attorney General.

One safeguard would be to consider a presidential determination of the constitutional question a necessary condition for nondefense in all but the clearest of cases. Although extremely helpful, a presidential finding seems to me insufficient alone to justify deviation from the traditional presumption in favor of defense of statutes. Nor should Presidents undertake an independent review of challenged statutes as a matter of course; the practice of presuming the constitutionality of statutes and leaving their defense to the Department of Justice should continue.

In any event, the Obama Administration's nondefense of DOMA should not be interpreted as precedent for Presidents to decline to defend wholly dissimilar laws, such as the Affordable Care Act or gun restrictions.⁶⁶ Rather, the nondefense of DOMA is consistent with executive branch precedent in a discrete category of historic cases involving the fundamental meaning of the constitutional guarantee of equal protection. It can be viewed as supporting only cases in which the President personally believes a statute invidiously discriminates on the basis of a characteristic that warrants heightened judicial protection, and additionally where any professionally responsible argument in the law's defense is unreasonable and objectionable on the very grounds that the law's discrimination is objectionable. Here, the President and the Attorney General concluded that, in light of the factors the Supreme Court has identified as informing the appropriate standard of review, the professionally responsible arguments purportedly available were not in fact "reasonable." Indeed, if made, they might contribute to the very constitutional violation alleged.

As detailed in the Attorney General's letter, the arguments in favor of rational basis review, and against heightened scrutiny, would have to include the following: the history of discrimination on the basis of sexual orientation is inadequate to justify judicial protection; sexual orientation is not immutable; the LGBT community possesses adequate political power not to need judicial protection; or sexual orientation discrimination is legitimately related to societal objectives.⁶⁷ In fact, the President and the Attorney General have determined based on these very factors that sexual orientation discrimination historically has operated to deny persons the equal protection of the laws. To argue to the contrary in support of DOMA

66. The proper response would depend upon whether a compelling reason existed for overcoming the strong presumption to the contrary, including by weighing what the President might contribute to the debate against the considerable functional costs of going beyond the two traditional exceptions.

67. See Attorney General Letter, *supra* note 2.

would perpetuate that exclusion from equal legal standing and full citizenship.

More fundamentally, and framing the Obama Administration's response to DOMA slightly more broadly, I believe that a President may instead choose to tell the public and the courts what he actually believes to be true about the constitutional status of sexual orientation discrimination, one of the great defining civil rights issues of our day. A President may contribute to what he views as a rare and historic moment of advancement in the Court's understanding of constitutional equality for a disadvantaged group rather than defend a particular instance of discrimination against that group. The President, as the single nationally elected representative, is a particularly valuable participant in this historic constitutional debate about the meaning of equality in the United States—in a sense, about who constitutes "We the People."

Former Solicitor General Seth Waxman's description of the special role played by the Solicitor General in the protection of civil rights provides strong historical support for a narrow civil rights rationale in favor of the President's decision not to defend DOMA.⁶⁸ Waxman traces this special role back to the creation of the Solicitor General's office in 1870.⁶⁹ In his article entitled *Twins at Birth: Civil Rights and the Role of the Solicitor General*, he writes of "the undeniable civil rights subtext for creation of the office, the consequent special responsibility many Solicitors General have felt for civil rights litigation, and the contribution they have made to the development of this unique area of law."⁷⁰ Most famously, the Solicitor General argued for the overruling of *Plessy v. Ferguson* in *Brown v. Board of Education*⁷¹ and even earlier argued against the constitutionality of racial discrimination and segregation.⁷² The Solicitor General took this position even though it jeopardized the chances the Court would uphold a federal law segregating the schools in the District of Columbia.⁷³ In fact, the Court relied on *Brown* to invalidate that federal law in *Bolling v. Sharpe* under what it described as the equal protection component of the Fifth Amendment's guarantee of Due Process, an outcome to which the Department of Justice directly contributed.⁷⁴ Later, the Department

68. See Seth P. Waxman, *Twins at Birth: Civil Rights and the Role of the Solicitor General*, 75 IND. L.J. 1297 (2000).

69. *Id.* at 1297.

70. *Id.* at 1313.

71. 347 U.S. 483 (1954).

72. See *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Okla. State Regents for Higher Ed.*, 339 U.S. 637 (1950); *Shelley v. Kraemer*, 334 U.S. 1 (1948); see also RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1975) (discussing the Department of Justice's role in *Brown* and its predecessors).

73. Waxman, *supra* note 68, at 1307–09.

74. *Bolling v. Sharpe*, 347 U.S. 497 (1954). The Department of Justice argued that if the relevant statute were interpreted to require segregation in the District of Columbia's public schools, "a grave and difficult question under the Fifth Amendment would arise," and

declined to defend—and intervened to challenge—the constitutionality of a statute that provided federal funding to hospitals that discriminated on the basis of race, notwithstanding the availability of an argument that the discrimination was not the result of state action.⁷⁵ The Bush Administration's attack on the constitutionality of affirmative action statutes also can be seen as precedent for a special role for the executive branch in participating in the debate over the meaning of equal protection—although, to my mind, in pursuit of an erroneous interpretation.⁷⁶

Six decades ago, the Solicitor General chose to play a leading role in urging the Court to declare race discrimination constitutionally suspect. Two decades later, another civil rights issue emerged: whether heightened judicial scrutiny should protect women from sex discrimination. Presidents Richard Nixon and Gerald Ford and their Solicitors General did not play the same seminal role in the development of constitutional protection against sex discrimination. Supreme Court Justice Ruth Bader Ginsburg at the time served as an attorney for the American Civil Liberties Union, and she later noted that the Solicitor General unintentionally provided her with a “treasure trove” for future litigation: a long list of discriminatory statutes appended to a petition for certiorari by which the government sought to demonstrate the high stakes if the Court did not take the case and uphold the discriminatory law at issue.⁷⁷

The Department of Justice's initial strenuous opposition to meaningful constitutional protection for women's equality wavered after the Court in 1971 began rejecting the Department's defense of discriminatory federal benefit laws⁷⁸ and particularly after a four-Justice plurality in 1973 endorsed heightened scrutiny for sex discrimination⁷⁹ (a majority adopted intermediate scrutiny in 1976).⁸⁰ Solicitor General Robert Bork filed an amicus curiae brief in 1973 stating, “It is now settled that the Equal Protection Clause of the Fourteenth Amendment (like the Due Process Clause of the Fifth) does not tolerate discrimination on the basis of sex.”⁸¹ The brief went further and argued that exclusion from employment on the basis of pregnancy constitutes sex discrimination prohibited by the equal

therefore the law should be interpreted to avoid that constitutional problem. Brief for the United States as Amicus Curiae at 16, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (Nos. 8, 101, 191, 413, and 448).

75. See *Simkins v. Moses H. Cone Mem'l Hosp.*, 323 F.2d 959 (4th Cir. 1963).

76. See *supra* note 40.

77. Ruth Bader Ginsburg, *Remarks for the Celebration of 75 Years of Women's Enrollment at Columbia Law School*, 102 COLUM. L. REV. 1441, 1442 (2002) (discussing Appendix E to the Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Tenth Circuit, *Comm'r of Internal Revenue v. Moritz*, 469 F.2d. 466 (1972)).

78. See *Reed v. Reed*, 404 U.S. 71 (1971).

79. *Frontiero v. Richardson*, 411 U.S. 677 (1973).

80. *Craig v. Boren*, 429 U.S. 190 (1976).

81. Memorandum for the United States as Amicus Curiae at 8, *Cleveland Bd. of Educ. v. La Fleur*, 414 U.S. 632 (1974) (No. 72-777) and *Cohen v. Chesterfield Cnty. Sch. Bd.*, 411 U.S. 947 (1973) (No. 72-1129).

protection clause⁸²—a position that the Court would reject the next year and still has not accepted.⁸³ In 1975, however, Solicitor General Bork returned to the full-throated defense of a federal law that denied equal benefits to men, a defense the Court unanimously rejected in *Weinberger v. Wiesenfeld*.⁸⁴ Professor Cary Franklin writes convincingly that “[o]ne of the chief obstacles Ginsburg confronted in [*Weinberger*] was the incredulity and discomfort Wiesenfeld’s desire for ‘mother’s benefits’ aroused in the government’s lawyers,”⁸⁵ who sought to impugn his masculinity and his motives for wanting to stay home and care for his baby after his wife died in childbirth.⁸⁶

One can imagine a counterfactual history in which in 1975 the President together with his Attorney General and Solicitor General had been persuaded by ACLU attorney Ginsburg’s arguments and judicial victories that sex discrimination should trigger heightened scrutiny. The precedent of executive branch leadership against race discrimination would have supported a decision to enforce but not to defend the decades-old discriminatory laws that reflected and perpetuated stereotypes about women’s proper place being in the home and not in the workplace, and men not belonging in the home caring for their young children.⁸⁷ In 1995, the Department of Justice did choose to take a leadership role and urged the Court to increase the constitutional protection afforded to women by applying strict rather than intermediate scrutiny, in a case involving the exclusion of women from the Virginia Military Institute,⁸⁸ even though strict judicial scrutiny would make more difficult the future defense of discriminatory federal laws.⁸⁹

Race discrimination and sex discrimination provide the proper analogies for the DOMA decision. Today, a central civil rights question is the

82. *See id.* at 16.

83. *See Geduldig v. Aiello*, 417 U.S. 484, 494–97 (1974).

84. 420 U.S. 636 (1975).

85. Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 133 (2010).

86. *Id.* at 132–42. Professor Franklin describes how Ginsburg effectively turned around the case and “cited [Solicitor General] Bork’s conjectures about her client as a prime example of how sex stereotyping worked.” *Id.* at 135.

87. On the other hand, a 2012 Supreme Court decision illustrates that the Solicitor General should take care that it does not too easily abandon defense of a statute that advances equality. In that case, the Solicitor General declined to defend a provision of the Family and Medical Leave Act that four dissenting justices ultimately voted to uphold as within Congress’s authority under Section 5 of the Fourteenth Amendment to deter and remedy sex discrimination. *See Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327 (2012).

88. Brief for the Petitioner at 36, *United States v. Virginia*, 518 U.S. 515 (1995) (No. 94-1941).

89. *See, e.g., Nguyen v. Immigration & Naturalization Serv.*, 533 U.S. 53 (2001) (upholding a federal statute, defended by the Department of Justice, that afforded a child citizenship in a manner that discriminated based on whether the citizen parent was the child’s mother or father).

judiciary's role in protecting against discrimination based on sexual orientation, a characteristic that the government historically has used to disadvantage and stigmatize individuals in their public and private lives—from military service, to custody of their own children, to sexual intimacy and marriage to their chosen life partner. President Obama properly and admirably has chosen to take part in this historic constitutional debate, thereby providing a valuable perspective while leaving the resolution of the dispute over DOMA's constitutionality to the Supreme Court.

President Obama's decision not to defend DOMA is based on a narrow and fundamental ground. The level of judicial scrutiny appropriate for discrimination against a historically disadvantaged group is an issue of cross-cutting importance about which the President need not make arguments that he finds unreasonable and offensive, arguments that themselves would exacerbate constitutionally cognizable harm. Instead, President Obama and his Department of Justice should tell the Court what they actually believe is the nation's correct path forward, toward true equal protection of the laws and an end to stigmatization and exclusion based on sexual orientation.