

## WHEN MAY A PRESIDENT REFUSE TO DEFEND A STATUTE? THE OBAMA ADMINISTRATION AND DOMA

Carlos A. Ball\*

Presidents sometimes make the controversial decision not to defend a federal statute they believe is unconstitutional.<sup>1</sup> It may be tempting, when assessing the appropriateness of these decisions, to adopt one of two categorical positions: either that the President should never refuse to defend a law based on his view that it is unconstitutional, or that the President has unlimited constitutional authority to refuse to defend laws on that basis.<sup>2</sup>

I do not believe that either of these categorical approaches is warranted.<sup>3</sup> The former view insufficiently accounts for the fact that the

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\* Professor of Law and Judge Frederick Lacey Scholar, Rutgers University School of Law (Newark). On April 15, 2011, I testified before a subcommittee of the U.S. House of Representatives on the appropriateness of President Obama's decision not to defend the constitutionality of the Defense of Marriage Act. See *Hearing on "Defending Marriage," Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. (2011) (testimony of Carlos A. Ball), available at <http://judiciary.house.gov/hearings/pdf/Ball04152011.pdf> (link).

<sup>1</sup> Every recent administration has refused to defend some laws that it believed were unconstitutional. President Ronald Reagan, for instance, successfully challenged (rather than merely refused to defend) a statute that allowed either House of Congress to invalidate an administrative decision made by the Executive Branch. Seth P. Waxman, *Defending Congress*, 79 N.C. L. REV. 1073, 1084 (2001) (link). President George H. W. Bush refused to defend the constitutionality of provisions in the Cable Television Act of 1992 that required cable companies to carry certain content. *Id.* at 1084. The Department of Justice under President Bill Clinton refused to defend the constitutionality of a law that sought to limit rights under the Supreme Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966) (link). Waxman, *supra*, at 1087–88. In 2004, the Department of Justice under President George W. Bush refused to defend a federal law prohibiting the placement of marijuana reform ads on public transportation systems. Letter from Paul Clement, Solicitor Gen., U.S. Dep't of Justice, to Patricia Mack Bryant, Senate Legal Counsel, U.S. Senate (Dec. 23, 2004) (link); see also Letter from Andrew Fois, Assistant Att'y Gen., U.S. Dep't of Justice, to Senator Orrin G. Hatch, Chairman, Comm. on the Judiciary 8 (March 22, 1996) (compiling a list showing forty-five instances between 1975 and 1993 in which the Department of Justice communicated to Congress that it was declining to defend or enforce a statute) (link).

<sup>2</sup> See Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7, 9–10 (2000) (discussing “two prevailing approaches to presidential non-enforcement found in the academic literature[,]” one which holds that the President must always enforce statutes “regardless of [his] constitutional views[,]” and “[t]he competing view [that] recognizes presidential authority to refuse to enforce any and all laws the President believes are unconstitutional”) (link).

<sup>3</sup> See *id.* at 10 (“[T]he Constitution is best interpreted not as providing a unitary answer across contexts, but as requiring the President to make sometimes difficult evaluations that depend on the specific statutory provision and the circumstances surrounding its enactment.”).

Executive Branch, as a co-equal branch of government, has an independent duty to “interpret and implement the Constitution.”<sup>4</sup> As Professor Dawn Johnsen has explained, “Congress and the President . . . are obligated to uphold, and thus by necessity to interpret, the Constitution, and the process of constitutional interpretation benefits from the thoughtful participation of the elected representatives of the people in the public dialogue about the meaning of the Constitution.”<sup>5</sup>

At the same time, an expansive understanding of executive power in this area insufficiently accounts for the authority of the other two branches to also make independent constitutional judgments. As Seth Waxman has noted, “[v]igorously defending congressional legislation serves the institutional interests and constitutional judgments of all three branches. It ensures that proper respect is given to Congress’s policy choices. It preserves for the courts their historic function of judicial review.”<sup>6</sup>

In determining whether to defend a statute, the President and his advisers should reject categorical positions about his constitutional authority in this area and instead pursue a context-driven approach that looks at several different factors. In this Essay, I identify four factors that should be taken into account.<sup>7</sup> Although I do not mean for these factors to

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<sup>4</sup> H. Jefferson Powell, *Reasoning About the Irrational: The Roberts Court and the Future of Constitutional Law*, 86 WASH. L. REV. 217, 241 (2011) (link). Professor Powell explains that “[f]rom the beginning, the almost universal acceptance by Americans of judicial review has gone hand-in-hand with a widespread understanding that other governmental officials have a duty to govern themselves by the Constitution and not merely to avoid constitutional entanglements with the courts.” *Id.* at 242. As Professor Cornelia Pillard has noted, “the Constitution’s grant of executive power, together with the duty faithfully to execute the laws, means that the Executive and Congress acting in their own spheres must interpret and apply the Constitution.” Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 687 (2005) (footnote omitted) (link).

The President’s authority to reach independent assessments about the constitutionality of statutes “is reflected in the Take Care Clause and in the President’s oath of office.” Memorandum from Walter Dellinger, Assistant Att’y Gen., to Abner J. Mikva, Counsel to the President, Presidential Authority to Decline to Execute Unconstitutional Statutes (Nov. 2, 1994), available at <http://www.justice.gov/olc/nonexecut.htm> (link). The President’s authority to interpret and implement the Constitution has been recognized, at least implicitly, by the other two branches of government. The Supreme Court in *Myers v. United States*, 272 U.S. 52 (1926) (link), “sustained the President’s view that the statute at issue was unconstitutional without any member of the Court suggesting that the President had acted improperly in refusing to abide by the statute.” Presidential Authority to Decline to Execute Unconstitutional Statutes, *supra*. For its part, Congress has enacted a statute requiring that the Executive Branch notify Congress whenever it decides to refrain from enforcing or defending any provision of federal law. 21st Century Department of Justice Appropriations Authorization Act, Pub. L. 107–273, § 202, 116 Stat. 1758, 1771 (2002) (codified at 28 U.S.C. § 530D (2010)) (link).

<sup>5</sup> Johnsen, *supra* note 2, at 11–12.

<sup>6</sup> Waxman, *supra* note 1, at 1078.

<sup>7</sup> My thinking on these issues has been influenced by Professor Johnsen’s thoughtful article on presidential nonenforcement of statutes. See Johnsen, *supra* note 2. It bears emphasizing, however, that Professor Johnsen’s article, like most of the literature in this area, addresses the President’s authority to refuse to enforce (as opposed to the authority to refuse to *defend*) a federal statute. See, e.g., David Barron, *Constitutionalism in the Shadow of Doctrine: The President’s Non-Enforcement Power*, 63 LAW

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be exhaustive,<sup>8</sup> I believe their application can go a long way in helping us assess the appropriateness of a President's decision not to defend a particular statute based on his constitutional views.

The four factors, which I elaborate on in Part I, are whether (1) there are binding judicial precedents on the relevant constitutional issues; (2) those issues raise significant normative and policy questions; (3) Congress considered the constitutional issues during the enactment process; and (4) it is likely that the President's decision will preclude judicial review.

President Obama's recent decision<sup>9</sup> to no longer defend<sup>10</sup> the constitutionality of § 3 of the Defense of Marriage Act of 1996 (DOMA)<sup>11</sup> has been criticized by some as unjustified and improper.<sup>12</sup> I disagree with

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& CONTEMP. PROBS. 61 (2000) (link); Saikrishna Bangalore Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613 (2008) (link). An administration's decision not to defend a law while continuing to enforce it is a more limited exercise of Executive Branch authority than is a decision not to enforce the statute. If a President has the constitutional authority to refuse to enforce a law, then it would seem that he also has the authority to take the more limited step of refusing to defend the statute while continuing to enforce it.

<sup>8</sup> Some have reasonably claimed, for example, that the President has greater authority to decline to defend a statute when it encroaches on the constitutional authority of the Presidency. See, e.g., Waxman, *supra* note 1, at 1084–85; Presidential Authority to Decline to Execute Unconstitutional Statutes, *supra* note 4.

<sup>9</sup> Letter from Eric H. Holder, Jr., Att'y Gen., U.S. Dep't of Justice, to the Honorable John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011) [hereinafter Letter to Speaker] (link). It bears noting that the Obama Administration continues to enforce DOMA despite its refusal to defend it in court. *Id.* at 5. For some of the differences between a refusal to enforce and one to defend, see *supra* note 7 and *infra* notes 32–33 and accompanying text.

<sup>10</sup> Prior to President Obama's decision, his Department of Justice had been defending DOMA in the courts. See, e.g., Gill v. Off. of Pers. Mgmt., 699 F. Supp. 2d 374 (D. Mass. 2010) (link).

<sup>11</sup> The section states as follows:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.

Defense of Marriage Act, Pub. L. 104–199, § 3, 110 Stat. 2419, 2419 (1996) (codified at 1 U.S.C. § 7 (2010)) (link). Another section of DOMA, not implicated by the Administration's decision, seeks to exempt states from any obligation to recognize same-sex marriages entered into in other jurisdictions. *Id.* § 2 (codified at 28 U.S.C. § 1738C (2010)) (link). Unless otherwise noted, my references to DOMA in this Essay are limited to § 3 of that statute.

<sup>12</sup> See, e.g., *Hearing on "Defending Marriage" Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. (2011) (statement of Edward Whelan, President, Ethics and Public Policy Center) (link); Theodore H. Frank, *Obama's Dangerous Divorce from DOMA: The Executive Can't Pick and Choose Which Laws to Defend*, N.Y. DAILY NEWS, Feb. 24, 2011, [http://www.nydailynews.com/opinions/2011/02/24/2011-02-24\\_obamas\\_dangerous\\_divorce\\_from\\_doma\\_the\\_executive\\_cant\\_pick\\_and\\_choose\\_which\\_laws.html](http://www.nydailynews.com/opinions/2011/02/24/2011-02-24_obamas_dangerous_divorce_from_doma_the_executive_cant_pick_and_choose_which_laws.html) (link).

that criticism in this Essay. After applying the four factors in Part II, I conclude that President Obama's decision was appropriate.

Our constitutional system based on separation-of-powers principles works best when a President's exercise of his authority not to defend a statute is used sparingly.<sup>13</sup> There should be a strong presumption that the Executive Branch will defend laws duly enacted by Congress.<sup>14</sup> On rare occasions, however, it is appropriate for the Executive Branch to refuse to defend a law that the President believes is unconstitutional. President Obama's decision not to defend DOMA is one of those instances.

### I. ASSESSING A PRESIDENT'S DECISION NOT TO DEFEND A LAW

In formulating a list of factors pertinent to evaluating a President's decision not to defend a particular statute, I have been guided by separation-of-powers considerations and the constitutional authority of the other two branches of government. In particular, the four factors discussed below are intended to be consistent with the principle that although all three branches have a role to play in interpreting and applying the Constitution, the Judiciary should be the final arbiter on the constitutionality of our laws.

I do not mean for any of the factors discussed here to be dispositive. Instead, they should be considered together as part of a contextual and case-specific assessment of a President's decision not to defend a particular law based on his constitutional views.

#### A. *Are There Binding Legal Precedents?*

If the courts have decided the constitutional question at issue, but Congress nonetheless enacts a statute in apparent disregard of those rulings, then the President may refuse to defend the statute.<sup>15</sup> Similarly, if the courts have decided constitutional issues in ways that make it clear that they would uphold the constitutionality of a given statute, the President should not refuse to defend it on the ground that he disagrees with the courts'

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<sup>13</sup> See Johnsen, *supra* note 2, at 12 ("When . . . the subject of the President's constitutional interpretation is whether to enforce the clear dictates of a statute, the constitutional structure dictates not independence but restraint.").

<sup>14</sup> See *id.* ("If Presidents were to disregard laws routinely based solely on their own constitutional views, they would deprive Congress of the ability to enact effective legislation premised on its considered constitutional views to the contrary . . .").

<sup>15</sup> See *id.* at 10 ("The President . . . promotes implementation of the Supreme Court's pronouncements by declining to enforce laws that are indistinguishable from those the Court has held unconstitutional . . .").

constitutional views.<sup>16</sup> It may be that those prior rulings should be reconsidered, but that is a decision for the Judiciary to make.<sup>17</sup>

At the same time, the absence of binding precedents gives the President greater leeway in asserting his constitutional views.<sup>18</sup> As already noted, the President, as the leader of a co-equal branch of government, has an independent duty to interpret and apply the Constitution.<sup>19</sup> The absence of binding legal precedents is one factor that allows a President to meet that obligation without unduly interfering with the Judiciary's role in constitutional interpretation.

*B. What Is the Nature of the Constitutional Issues?*

Constitutional questions come in all sizes and dimensions. Generally, the President should have greater leeway to make an independent constitutional judgment to refuse to defend a law when his objection to the statute involves constitutional issues that raise significant normative and policy questions. In contrast, if his constitutional objection is based on a relatively narrow point of law that does not implicate significant normative and policy considerations, or that calls for a fact-specific constitutional analysis, the Executive Branch should usually defend the law despite the President's constitutional views.

This distinction is relevant because the narrower and more technical the constitutional issues, the less necessary it is for the President to take the

<sup>16</sup> Presidential Authority to Decline to Execute Unconstitutional Statutes, *supra* note 4 (“As a general matter, if the President believes that the Court would sustain a particular provision as constitutional, the President should execute the statute, notwithstanding his own beliefs about the constitutional issue.”).

<sup>17</sup> Waxman, *supra* note 1, at 1085–86 (“[U]nder *Marbury v. Madison*, the Supreme Court has the final word on the meaning of the Constitution. The Solicitor General has an obligation to honor the important doctrine of stare decisis and a duty to respect the rulings of the Court.” (footnotes omitted)). Admittedly, there are those who call for a considerably more robust understanding of executive power in this area by contending that the President is free to disregard judicial interpretations of the Constitution with which he disagrees. Professor Michael Stokes Paulsen, for example, believes that:

The Supreme Court's interpretations of treaties, federal statutes, or the Constitution do not bind the President any more than the President's or Congress's interpretations bind the courts. Rather, the President possesses the power of full 'legal review' of the actions of the other branches . . . in any matter that falls within the sphere of his governing powers as President.

Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 221 (1994).

<sup>18</sup> It will not always be clear, of course, whether the relevant court precedents are sufficiently on point to be binding. The President and his legal advisers will therefore have to make judgments on the applicability of prior judicial rulings. Those judgments should be made while operating under the presumption that the Executive Branch should defend the law. See *supra* notes 12–13 and accompanying text.

<sup>19</sup> See *supra* note 4 and accompanying text.

extraordinary step of refusing to defend a statute. On the other hand, if the particular constitutional questions implicate “big picture” issues that go to fundamental disagreements about our national values and who we are as a people, that should give the President greater leeway to exercise his independent authority to interpret the Constitution.<sup>20</sup>

I will offer a few examples to explain what I mean by this factor. Consider the question of whether corporations have First Amendment rights that limit Congress’s authority to restrict their ability to advocate for the election or defeat of particular candidates. This issue raises significant normative and policy questions about the role of corporations in our society and how our electoral rules can best promote a robust exchange of ideas and perspectives.<sup>21</sup> Accordingly, this is the kind of significant constitutional question<sup>22</sup> that has sufficient normative and policy implications to warrant giving the President greater leeway in deciding whether to rely on his constitutional views to refuse to defend a law.

There are other constitutional issues that do not raise the same kind of normative and policy questions, calling instead for a narrower and fact-specific analysis. For example, consider the question of what type of conduct is sufficiently expressive to be protected by the First Amendment. This issue does not seem to carry the same degree of significant policy implications as the question of whether corporations have First Amendment rights that are comparable to those of individuals.<sup>23</sup> The former constitutional issue also seems to call for a more fact-specific analysis that seeks to determine what kind of conduct is sufficiently expressive to be constitutionally protected.<sup>24</sup> The scope of corporations’ First Amendment rights, on the other hand, is a considerably less factual and more normative question.

One may object that considerations of judicial primacy in constitutional interpretation counsel in favor of granting the President *less* rather than *more* discretion to defend a statute when it implicates significant normative and policy considerations. It might seem, in other words, that the interference with judicial primacy in constitutional interpretation is greater

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<sup>20</sup> On the President’s authority, see *supra* note 4 and accompanying text. See also Johnsen, *supra* note 2, at 27 (“As the head of a coordinate branch of the government, the President, no less than the courts, possesses the implicit constitutional authority and responsibility to interpret the Constitution in carrying out his assigned functions.”).

<sup>21</sup> See generally *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (link).

<sup>22</sup> The Supreme Court, of course, has already decided this issue. See *id.* This means that there is a binding legal precedent that limits the President’s authority to refuse to defend a law based on his different understanding of the First Amendment rights of corporations. See *supra* note 16 and accompanying text.

<sup>23</sup> Compare *Citizens United*, 130 S. Ct. at 899–907 (considering whether corporate entities have First Amendment rights), with *United States v. O’Brien*, 391 U.S. 367, 376–77 (1968) (considering when conduct constitutes “speech” for purposes of the First Amendment) (link).

<sup>24</sup> See *O’Brien*, 391 U.S. at 376–77.

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when constitutional questions are “bigger” than when they are “smaller.” But nothing that I say in this Essay is meant to question the Judiciary’s role as the final arbiter of a statute’s constitutionality. That is one of the reasons why I believe other factors, such as the absence of binding legal precedents,<sup>25</sup> and the likelihood of judicial review following a President’s decision not to defend a statute,<sup>26</sup> must also be taken into account in assessing the appropriateness of that decision.

So the question, in my view, is not one of judicial primacy in constitutional interpretation. Instead, the issue is one of executive prudence—that is, of the President being circumspect in taking the extraordinary step of refusing to defend a law based on his constitutional views. It seems to me that the narrower the constitutional issue, the stronger the argument in favor of not exercising executive authority out of deference to the other two branches of government. In contrast, the broader (or more important or more significant) the constitutional issue, the more reasonable it is for the President, as the leader of a co-equal branch of government that has a shared responsibility to interpret the Constitution,<sup>27</sup> to assert his constitutional views by refusing to defend the statute in question.

Obviously, there is no clear line separating the two categories of cases. As is true of the application of the other factors I explore in this Essay, the President and his advisers would have to bring good judgment and common sense to bear in distinguishing between broad, normative constitutional questions and narrow, fact-specific ones.

The actions of prior presidents may provide some guidance. The fact that presidents have previously addressed the normative and policy implications of the issues raised by the statute at issue may suggest that the constitutional questions are sufficiently broad and important to justify the President’s assertion of his constitutional views by taking the extraordinary step of refusing to defend a federal law. In contrast, if the statute raises normative and policy issues which prior presidents have rarely addressed, that suggests that the constitutional questions are sufficiently narrow and fact-based so as to counsel against the President refusing to defend the law based on his understanding of the Constitution.

### *C. Did Congress Consider the Constitutional Issues?*

The Supreme Court has recognized that when Congress enacts legislation, “it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution.”<sup>28</sup> When a President refuses to defend a statute based on an understanding of the

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<sup>25</sup> See *supra* notes 15–19 and accompanying text.

<sup>26</sup> See *infra* notes 31–33 and accompanying text.

<sup>27</sup> See *supra* note 4 and accompanying text.

<sup>28</sup> *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997) (link). The Court added that “[w]ere it otherwise, we would not afford Congress the presumption of validity its enactments now enjoy.” *Id.*

Constitution that Congress has considered and rejected, there is a greater danger that he impermissibly tramples on the Legislative Branch's authority under Article I of the Constitution.<sup>29</sup> At the same time, when Congress fails to address the relevant constitutional issues during the enactment process, that omission warrants giving the President more leeway to rely on his constitutional views to refuse to defend the statute.

The extent to which Congress accounts for constitutional issues likely varies by legislation. Returning to earlier examples, Congress may be more likely to pay attention to First Amendment issues when it considers election reform bills than when it restricts conduct that some may consider expressive (and therefore constitutionally protected). A review of committee reports and floor debates may provide helpful guidance in determining whether congressional consideration of the relevant constitutional issues (or its absence) counsels in favor or against a President's decision to refuse to defend the law in question.<sup>30</sup>

#### *D. Is Judicial Review Nonetheless Likely?*

As I have already suggested, a President's decision not to defend a law should be viewed from the perspective of judicial primacy in matters of constitutional interpretation.<sup>31</sup> It is therefore important for the President to consider whether a decision not to defend a statute makes it unlikely that the courts will have an opportunity to serve as the final arbiters of its constitutionality.

When a President decides not to *enforce* a law, he may render it non-justiciable because no individual may have standing to challenge a law that the government is not enforcing.<sup>32</sup> A President's refusal to *defend* a law raises a different but related concern, that is, not whether there will be a party able to *challenge* the law, but instead whether there will be a party willing and able to *defend* it.

It would seem that Congress should be entitled to defend the constitutionality of one of its laws if the Executive Branch refuses to do so.<sup>33</sup> So the issue in these cases is not primarily one of standing. Instead, the issue is one of willingness to defend. It may be, for example, that a later

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<sup>29</sup> See Johnsen, *supra* note 2, at 34–35 (arguing that “preservation of the lawmaking process as prescribed by Article I . . . precludes routine presidential non-enforcement” of federal statutes).

<sup>30</sup> *Id.* at 35 (“[E]vidence often will exist as to whether Congress or some of its members held a competing constitutional view, or even identified and considered the constitutional issue, and the President should view such evidence as relevant to his enforcement decision.”).

<sup>31</sup> See *supra* note 17 and accompanying text.

<sup>32</sup> Johnsen, *supra* note 2, at 35 (“[I]f a President were to disregard a law he viewed as violative of individual rights, he might avoid any legally cognizable injury and thus eliminate the possibility that anyone with standing could litigate the constitutionality of the law.”).

<sup>33</sup> See generally Note, *Executive Discretion and the Congressional Defense of Statutes*, 92 *YALE L.J.* 970 (1983).

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Congress will be unwilling to defend a law enacted by an earlier Congress (perhaps because control of the body shifted from one political party to the other). If no other litigant with the requisite standing seems willing to defend the law, then that might preclude judicial review. This possibility counsels against a presidential decision not to defend the statute in question.

On the other hand, Congress (or some other party with the requisite standing) may be willing to take over the responsibility of defending the statute in court from the administration. If this is likely to occur, the President should have greater leeway to refuse to defend the law at issue based on his constitutional views.

### II. PRESIDENT OBAMA'S DOMA DECISION IN CONTEXT

I proceed in this Section to apply the four factors explored above to President Obama's decision not to defend DOMA in the courts. As I explain, all four factors support the view that President Obama acted appropriately when he declined to further defend the statute's constitutionality.

#### A. *Are There Binding Legal Precedents?*

The Obama Administration's decision not to defend DOMA's constitutionality came in response to two lawsuits challenging the statute filed in district courts in the Second Circuit.<sup>34</sup> The venue is important because plaintiffs in DOMA cases contend that sexual orientation classifications merit heightened scrutiny,<sup>35</sup> an issue that the Second Circuit has never addressed.<sup>36</sup> As a result, the Department of Justice in the two Second Circuit cases was directly confronted with the question of what degree of deference courts owe to legislative enactments that classify individuals on the basis of sexual orientation in a jurisdiction whose courts have never considered the issue.<sup>37</sup>

Some critics of the Administration's decision have claimed that it is settled law that only rational basis review applies to sexual orientation

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<sup>34</sup> Complaint for Declaratory and Injunctive Relief, *Pedersen v. Office of Personnel Management*, No. 310 CV 1750 VLB (D. Conn. Nov. 9, 2010), 2010 WL 4483820; Complaint, *Windsor v. United States*, No. 10 CV 8435 (S.D.N.Y. Nov. 9, 2010), 2010 WL 5647015.

<sup>35</sup> See, e.g., Memorandum of Law in Opposition to Defendants' Motion to Dismiss and in Support of Plaintiffs' Motion for Summary Judgment at 22–26, *Gill v. Off. of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010) (No. 1:09-cv-10309 JLT), 2009 WL 5803679 (link).

<sup>36</sup> As I explain below, the Supreme Court has also never addressed the question of what level of review is appropriate for sexual orientation classifications. See *infra* notes 40–42 and accompanying text.

<sup>37</sup> Letter to Speaker, *supra* note 9, at 2 (“These new lawsuits . . . will require the Department [of Justice] to take an affirmative position on the level of scrutiny that should be applied to DOMA Section 3 in a circuit without binding precedent on the issue.”).

classifications.<sup>38</sup> According to these critics, the Department of Justice can defend DOMA simply by offering courts a rational justification for its enactment. But the crucial threshold question that the Administration faced in the Second Circuit litigation was not whether there was a rational reason to support DOMA; instead, it was whether a rational reason was sufficient to defend the statute's constitutionality.<sup>39</sup> And, despite the contention of some of the Administration's critics, the level of judicial review that should be applied in lawsuits alleging unconstitutional discrimination on the basis of sexual orientation is not well-settled.

There are two main reasons for the uncertainty regarding the proper level of judicial scrutiny in cases alleging unconstitutional discrimination on the basis of sexual orientation. First, the Supreme Court has never addressed the question. Although lower courts sometimes claim that *Romer v. Evans*<sup>40</sup> decided this issue,<sup>41</sup> the Court in fact never reached that question. In *Romer*, the Court decided only that the Colorado constitutional provision at issue could not survive even the lowest level of scrutiny.<sup>42</sup>

Second, even though some federal circuits (although notably not the Second Circuit) held in the 1980s and 1990s that sexual orientation classifications did not warrant heightened scrutiny, those courts did so largely on the ground that if the government could criminalize consensual same-sex activity—as the Court held it could in *Bowers v. Hardwick*<sup>43</sup>—then sexual orientation should not be awarded heightened scrutiny. For example, the Court of Appeals for the District of Columbia, the first federal appellate court to address the issue of heightened scrutiny in sexual orientation cases following *Hardwick*, reasoned that:

If the [*Hardwick*] Court was unwilling to object to state laws that criminalize the behavior that defines the class, it

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<sup>38</sup> See, e.g., Whelan, *supra* note 12, at 9; Ben Philpott, *Texas AG Responds to President's DOMA Decision*, KUT NEWS, Feb. 25, 2011, <http://kutnews.org/post/texas-ag-responds-presidents-doma-decision> (link).

<sup>39</sup> See *supra* note 37 and accompanying text.

<sup>40</sup> 517 U.S. 620 (1996) (link).

<sup>41</sup> See, e.g., *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 950–51 (7th Cir. 2002) (link); *Equal Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 294 (6th Cir. 1997) (link).

<sup>42</sup> See Arthur S. Leonard, *Exorcising the Ghosts of Bowers v. Hardwick: Uprooting Invalid Precedents*, 84 CHI.-KENT L. REV. 519, 534–35 (2009) (“[The *Romer* Court] did not discuss whether sexual orientation should be considered a ‘suspect classification’ or whether gay people should be considered a ‘suspect class,’ or whether it was appropriate to subject Amendment 2 to ‘strict scrutiny’ or ‘heightened scrutiny’ . . .”). It bears noting that the Court in *Romer* did not engage in the traditional analysis of whether the classification in question should be subject to heightened scrutiny. Specifically, the Court did not inquire whether there had been a long history of discrimination against lesbians and gay men or whether the sexual orientation of individuals affects their ability to perform in and contribute to society. See *infra* notes 52–53 and accompanying text (discussing the criteria consistently used by the Court to determine whether heightened scrutiny should be applied).

<sup>43</sup> 478 U.S. 186 (1986) (link).

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is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.<sup>44</sup>

In the years that followed, several other federal circuits adopted this reasoning.<sup>45</sup>

Even when *Hardwick* remained good law, it was possible to question the view that the absence of a due process right should definitively preclude heightened scrutiny for sexual orientation classifications under the Equal Protection Clause.<sup>46</sup> Relying on *Hardwick* to categorically preclude heightened scrutiny, however, clearly became unsustainable after the Supreme Court resoundingly overruled it in *Lawrence v. Texas*.<sup>47</sup> The *Lawrence* Court recognized that gay people, like straight ones, have a constitutionally protected right to make decisions about consensual sexual intimacy and partners without state interference.<sup>48</sup> The Court also explicitly recognized the link between due process rights and equal protection ones. As the Court put it: “Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.”<sup>49</sup> In emphasizing this connection, the Court pointed to the ways in which sodomy laws, like the one at issue in *Lawrence*, had been used to discriminate against lesbians and gay men in both the private and public spheres.<sup>50</sup>

Now that the Supreme Court has made it clear that the state cannot criminalize consensual and private same-sex sexual conduct, it is necessary to look anew at the question of what level of judicial scrutiny is required of sexual orientation classifications under equal protection principles. Yet, surprisingly, some federal appellate courts have continued to improperly rely on the pre-*Lawrence* cases to conclude, in cursory fashion, that

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<sup>44</sup> Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987) (link).

<sup>45</sup> See Thomasson v. Perry, 80 F.3d 915, 928 (4th Cir. 1996) (en banc) (link); Richenberg v. Perry, 97 F.3d 256, 260 (8th Cir. 1996) (link); Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 54 F.3d 261, 267–68 (6th Cir. 1995), vacated, 518 U.S. 1001 (1996) (link); High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990) (link); Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989) (link); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (link).

<sup>46</sup> See, e.g., Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1164–70 (1988) (arguing that *Hardwick* did not preclude successful equal protection challenges to laws that discriminate on the basis of sexual orientation) (link).

<sup>47</sup> 539 U.S. 558 (2003) (link).

<sup>48</sup> *Id.* at 574.

<sup>49</sup> *Id.* at 575.

<sup>50</sup> *Id.*

heightened scrutiny is not appropriate.<sup>51</sup> In fact, I have been unable to find any post-*Lawrence* opinion issued by a federal appellate court that has bothered to apply the factors that the Supreme Court has consistently applied to determine whether classifications aimed at a particular group require heightened judicial scrutiny. These factors are whether the group in question has suffered a long history of invidious discrimination<sup>52</sup> and whether the trait at issue affects the ability of individuals to perform in or contribute to society.<sup>53</sup> Recent federal appellate decisions that have addressed the heightened scrutiny issue in the context of sexual orientation have failed to ask either of those questions.<sup>54</sup> Several state supreme courts, on the other hand, have recently held that sexual orientation classifications

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<sup>51</sup> See, e.g., *Scarborough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006) (link); *Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 358 F.3d 804, 818 & n.16 (11th Cir. 2004) (link).

<sup>52</sup> See, e.g., *United States v. Virginia*, 518 U.S. 515, 531–32 (1996) (link); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (link).

<sup>53</sup> See, e.g., *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440–41 (1985) (link); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion) (link). On some occasions, the Court has also discussed whether the characteristic in question is immutable and whether the group in question has the necessary political power to protect itself through the political process. See, e.g., *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987) (link); *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (link). However, it is clear that neither of these factors is dispositive of the heightened scrutiny issue. There are some traits that call for heightened scrutiny despite the fact that they are mutable. See, e.g., *Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977) (holding that alienage classifications are subject to heightened scrutiny despite the ability of some non-citizens to naturalize) (link). In addition, racial minorities and women have successfully attained increased political power over the last few decades, and yet both race and gender classifications are still subject to heightened scrutiny. See *Leonard*, *supra* note 42, at 528–29. Furthermore, although it cannot be claimed that either whites or men lack political power, they are still afforded the protections of heightened scrutiny. See *Kerrigan v. Comm. of Pub. Health*, 957 A.2d 407, 441 (Conn. 2008) (“[H]eightedened scrutiny is applied to statutes that discriminate against men and against Caucasians.”) (citation omitted) (link). For an extended discussion of the limitations and inconsistencies that accompany the use of political power as a criterion in making the heightened scrutiny determination in the context of sexual orientation, see Jane S. Schacter, *Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate*, 109 MICH. L. REV. 1363, 1378–90 (2011) (link).

<sup>54</sup> The two post-*Lawrence* federal circuit court opinions involving sexual orientation classifications that provide a little more than a cursory discussion of the heightened scrutiny issue are *Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008) (link), and *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 865–68 (8th Cir. 2006) (link). Neither of these opinions, however, looked to the factors that the Supreme Court has consistently applied, see *supra* notes 52–53 and accompanying text, to determine whether heightened scrutiny was appropriate. Instead, the *Cook* court refused to apply heightened scrutiny after concluding, without much analysis, that neither *Lawrence* nor *Romer* required it. *Cook*, 528 F.3d at 61. As for the *Bruning* court, it also failed to apply the factors that the Supreme Court has consistently relied on and instead seems to have concluded that heightened scrutiny was not appropriate because the government, in a challenge to a constitutional provision approved by voters banning same-sex marriage, could rationally conclude that the inability of same-sex couples to reproduce accidentally justified their exclusion from marriage. *Bruning*, 455 F.3d at 865–68. This analysis is, to say the least, unsatisfactory because whether the government can rationally justify a particular provision does not address the antecedent question of whether the government should be required to provide more than a rational justification for the law at issue.

must survive heightened scrutiny.<sup>55</sup> In interpreting their state constitutions, these courts have generally followed the analysis called for by the Supreme Court to determine what constitutes a suspect or quasi-suspect class under the federal Constitution.<sup>56</sup>

It is by no means clear, therefore, that rational basis review is the proper form of scrutiny to apply to sexual orientation classifications. This is especially true in a circuit, like the Second Circuit, that has not previously addressed the issue. The absence of binding precedents weighs in favor of the appropriateness of the Obama Administration's decision to independently assess the question of whether sexual orientation classifications warrant the application of heightened scrutiny.

### B. *What Is the Nature of the Constitutional Issues?*

As already noted, the Court, in determining whether a particular classification is generally valid or is instead constitutionally suspect,<sup>57</sup> has consistently looked to whether the group in question has suffered a long history of invidious discrimination,<sup>58</sup> and to whether the trait at issue affects the ability of individuals to perform in or contribute to society.<sup>59</sup> It seems to me that these issues raise the kind of broad normative and policy questions that should give Presidents greater leeway in exercising their authority to make independent constitutional assessments.<sup>60</sup> What constitutes impermissible discrimination, and which traits are relevant in assessing individuals' performance in and contributions to society, raise fundamental questions about who we are as a people and what our values are as a country. These are not the kinds of narrow and somewhat technical constitutional questions that should limit the discretion of a President to refuse to defend a particular statute.<sup>61</sup>

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<sup>55</sup> See, e.g., *Kerrigan*, 957 A.2d at 432; *Varnum v. Brien*, 763 N.W.2d 862, 896 (Iowa 2009) (link). But see *Conaway v. Deane*, 932 A.2d 571, 608 (Md. 2007) (“[S]exual orientation has not come of age as a suspect or quasi-suspect classification.”) (link); *Andersen v. King Cnty.*, 138 P.3d 963, 974–75 (Wash. 2006) (“[G]ay and lesbian persons do not constitute a suspect class.”) (link).

<sup>56</sup> See, e.g., *Kerrigan*, 957 A.2d at 426–28; *Varnum*, 763 N.W.2d at 886–89.

<sup>57</sup> “The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.” *Cleburne*, 473 U.S. at 440 (citations omitted). But when a legislative classification relies on race, alienage, or national origin, which are so-called suspect classifications, the Court applies strict scrutiny, requiring that it be “suitably tailored to serve a compelling state interest.” *Id.* (citations omitted). And when a classification is based on gender or illegitimacy, which are so-called quasi-suspect classifications, the Court has called for an intermediate form of scrutiny—one that requires a substantial connection to an important governmental interest. *Id.* at 440–41.

<sup>58</sup> See *supra* note 52 and accompanying text.

<sup>59</sup> See *supra* note 53 and accompanying text. In *supra* note 52 I also briefly discuss immutability and political power as possible criteria in determining whether heightened scrutiny is appropriate.

<sup>60</sup> See *supra* notes 20–26 and accompanying text.

<sup>61</sup> See *supra* notes 20–26 and accompanying text.

The normative and policy importance of the constitutional issues at play in determining whether to apply heightened scrutiny in equal protection cases is reflected in the fact that prior Presidents have frequently taken specific stands on them. Recent Republican presidents, for example, have defended a color-blind understanding of the Constitution, one that is skeptical of affirmative action and other efforts to remedy past discrimination by taking race into account in the distribution of jobs, educational opportunities, and other government benefits.<sup>62</sup>

Indeed, the Obama Administration is not the first to conclude that a particular federal law is unconstitutional based on its independent judgment regarding the type of judicial scrutiny that is appropriate under equal protection principles. In a 1990 case called *Metro Broadcasting, Inc. v. FCC*,<sup>63</sup> then Acting Solicitor General (and now Chief Justice) John Roberts,<sup>64</sup> representing the George H. W. Bush Administration, filed an amicus brief urging the Court to apply heightened scrutiny to strike down a government policy—approved by Congress<sup>65</sup>—that accounted for racial minority ownership as one factor in awarding broadcast licenses.<sup>66</sup> As with the Obama Administration and DOMA, the Bush Administration in *Metro Broadcasting* was confronted with the normatively crucial question of when to presume that the government acts improperly when it treats individuals differently because of their traits.<sup>67</sup>

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<sup>62</sup> See Stephen Plass, *Exploring the Limits of Executive Civil Rights Policymaking*, 61 OKLA. L. REV. 155, 174–80 (2008) (link).

<sup>63</sup> 497 U.S. 547 (1990) (link), *overruled by* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (link).

<sup>64</sup> John Roberts served as the acting Solicitor General in the *Metro Broadcasting* litigation because Solicitor General Kenneth Starr had a conflict of interest and recused himself from the case. See Marty Lederman, *John Roberts and the SG's Refusal to Defend Federal Statutes in Metro Broadcasting v. FCC*, BALKINIZATION, Sept. 8, 2005, <http://balkin.blogspot.com/2005/09/john-roberts-and-sgs-refusal-to-defend.html> (link).

<sup>65</sup> In 1978, the Federal Communications Commission (FCC) adopted a policy that “consider[ed] minority ownership as one factor” in awarding new broadcast licenses. *Metro Broadcasting*, 497 U.S. at 556. At the time, “minorities owned less than 1 percent of the Nation’s radio and television stations.” *Id.* at 553. During the 1980s, Congress on several occasions enacted legislation approving the use of preferences for minority owners in awarding broadcast licenses. For a review of Congress’s role in mandating policies aimed at helping underrepresented groups get federal contracts and licenses in the years leading up to the *Metro Broadcasting* litigation, see *id.* at 572–79.

<sup>66</sup> Brief for the United States as Amicus Curiae Supporting Petitioner at 8–17, *Metro Broadcasting*, 497 U.S. 547 (No. 89–453), 1989 WL 1126975, at \*8–17 (link). Although the Office of the Solicitor General urged the Court to strike down the FCC policy, it permitted that agency to defend its policy in the courts. *Id.* at \*1 n.2.

<sup>67</sup> It would seem that there was less uncertainty regarding the appropriate level of judicial review in affirmative action cases at the time of *Metro Broadcasting* than there was when the Obama Administration decided to cease defending DOMA’s constitutionality. Unlike the latter question, which the Supreme Court has *never* addressed, see *supra* notes 40–42 and accompanying text, the Court prior to *Metro Broadcasting* grappled with the issue of whether government-sponsored affirmative-action programs should be subject to strict scrutiny. In 1980, it answered that question in the negative.

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The Bush Administration's brief in *Metro Broadcasting* took the position that strict scrutiny should apply whenever the government uses race to allocate rights and benefits.<sup>68</sup> It urged the Justices to deploy the most rigorous form of judicial scrutiny possible—one that requires the governmental action in question to be narrowly tailored to achieve a compelling state interest—in order to strike down the FCC policy aimed at increasing minority representation among the country's television and radio station owners.<sup>69</sup>

There are many, of course, who take issue with this color-blind understanding of the Constitution, in the same way that some take issue with the question of whether lesbians and gay men are entitled to heightened scrutiny under equal protection principles. These are questions, in other words, that reasonable people may disagree on. But it would seem difficult to disagree that what constitutes impermissible discrimination in matters such as race and sexuality raises broad and important questions rather than narrow and fact-specific ones. This factor weighs in favor of permitting a President to rely on his constitutional views on these matters to make the decision not to defend a statute that makes distinctions based on those traits.

### C. *Did Congress Consider the Constitutional Issues?*

The impetus behind DOMA's enactment was the Hawaii Supreme Court's ruling in *Baehr v. Lewin*.<sup>70</sup> The court in that case held that the state's ban on same-sex marriage was a sex classification that required the government, under the state constitution, to show the existence of a compelling interest.<sup>71</sup> When Congress was considering DOMA, the statute's congressional supporters argued that the prospect of having same-

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Fullilove v. Klutznick, 448 U.S. 448 (1980), *overruled by Adarand*, 515 U.S. at 235 (1995) (link). Even though there was not a majority opinion in *Fullilove*, six justices rejected the application of strict scrutiny in a challenge to a federal program that took race into account in awarding construction contracts. Instead, three justices inquired “whether the limited use of racial and ethnic criteria . . . is a constitutionally permissible *means* for achieving the congressional objectives[.]” *id.* at 473 (plurality opinion), while three others would have upheld affirmative action programs mandated by Congress that “serve important governmental objectives and are substantially related to achievement of those objectives.” *Id.* at 519 (Marshall, J., concurring).

<sup>68</sup> Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 66, at 8–17.

<sup>69</sup> *Id.* The Court in *Metro Broadcasting* eventually upheld the FCC policy at issue, rejecting the Administration's position that congressionally-mandated racial classifications aimed at addressing discrimination should be subject to strict scrutiny. *Metro Broadcasting*, 497 U.S. at 564–65. Five years later, however, the Court overruled *Metro Broadcasting* by holding that strict scrutiny applies to all racial classifications regardless of whether they are adopted at the federal, state, or local level. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

<sup>70</sup> 852 P.2d 44 (Haw. 1993) (link).

<sup>71</sup> *Id.* at 64–67. For an exploration of the background and impact of *Baehr*, see CARLOS A. BALL, FROM THE CLOSET TO THE COURTROOM: FIVE LGBT RIGHTS LAWSUITS THAT HAVE CHANGED OUR NATION 151–98 (2010).

sex marriages recognized in Hawaii raised “the complicated issue of whether [other states] are . . . obligated under the Full Faith and Credit Clause to give binding legal effect to such unions.”<sup>72</sup> This made it necessary, in their view, to enact a federal statute addressing the issue.<sup>73</sup> To bolster their position, DOMA supporters emphasized that Article IV of the Constitution authorizes Congress to give “effect” to full faith and credit principles.<sup>74</sup>

In contrast, congressional opponents of DOMA contended that Congress could not, through a statute, interfere with the constitutional authority of states to recognize marriages sanctioned in other states.<sup>75</sup> Opponents also noted that it was settled law that states could refuse to recognize marriages entered into in other states if those marriages violated their public policies.<sup>76</sup>

A review of DOMA’s legislative history leaves little doubt that Congress gave extensive consideration to the constitutional issues surrounding the Full Faith and Credit Clause and the recognition of same-sex marriages.<sup>77</sup> Since Congress considered the full faith and credit issues at great length when enacting DOMA, that would have counseled against President Obama relying on his constitutional views on those issues to refuse to defend the statute.<sup>78</sup>

But President Obama’s refusal to defend DOMA was not based on his understanding of the Full Faith and Credit Clause. Instead, his objections were based entirely on equal protection grounds.<sup>79</sup> And Congress, while considering DOMA, paid almost no attention to equal protection issues.<sup>80</sup>

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<sup>72</sup> H.R. REP. NO. 104-664, at 2 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906.

<sup>73</sup> *See, e.g., id.* (“H.R. 3396 anticipates these complicated questions by laying down clear rules to guide their resolution, and it does so in a manner that preserves each State’s ability to decide the underlying policy issue however it chooses.”).

<sup>74</sup> *See, e.g., id.* at 26 (“[T]his much is clear: The Effects Clause is an express grant of authority to Congress to enact legislation to ‘prescribe’ the ‘effect’ that ‘public acts, records, and proceedings’ from one State shall have in sister States.” (quoting U.S. CONST. art. IV, § 1 (link))).

<sup>75</sup> *See, e.g., id.* at 37 (“[W]hatever powers states have to reject a decision by another state to legalize same sex marriage, and to refuse to recognize such marriages within its own borders, derives directly from the Constitution and nothing Congress can do by statute either adds to or detracts from that power.”).

<sup>76</sup> *See, e.g., id.* at 38 (“Those states which desire to avoid the general rule favoring application of the law where the marriage was celebrated will rely on an enumerated public policy exception to the rule . . .”).

<sup>77</sup> *See supra* notes 72–76 and accompanying text.

<sup>78</sup> The full faith and credit issues are relevant in assessing the constitutionality of § 2 of DOMA. *See* Defense of Marriage Act, Pub. L. 104–199, § 2, 110 Stat. 2419, 2419 (1996) (codified at 28 U.S.C. § 1738C (2010)) (link). President Obama’s decision not to defend was limited to § 3 of the statute. Letter to Speaker, *supra* note 9, at 1.

<sup>79</sup> *See* Letter to Speaker, *supra* note 9.

<sup>80</sup> The only reference to the equal protection rights of lesbians and gay men that I have been able to find in DOMA’s legislative history is a brief discussion in the House Committee Report on the

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This was the case even though the statute (1) targets gay people and no others<sup>81</sup> and (2) requires the federal government to treat some couples (i.e., same-sex ones) who are married under their states' laws differently from other married couples.<sup>82</sup>

Indeed, DOMA's legislative history strongly suggests that many members of Congress were especially blind to their role in violating the equal protection rights of lesbians and gay men. That history is laced with disparaging remarks about gay people and the extent to which their aspirations to have their relationships recognized as marital constituted a threat to the institution of marriage,<sup>83</sup> to American families,<sup>84</sup> and even to the "moral and spiritual survival of this Nation."<sup>85</sup> As a federal court noted recently in striking down the statute on equal protection grounds:

In the floor debate, members of Congress repeatedly voiced their disapproval of homosexuality, calling it "immoral," "depraved," "unnatural," "based on perversion" and "an attack upon God's principles." They argued that marriage by gays and lesbians would "demean" and "trivialize" heterosexual marriage and might indeed be "the final blow to the American family."<sup>86</sup>

It is clear that Congress failed to consider the equal protection issues raised by its actions and statements in enacting DOMA. As the head of a co-equal branch of government who takes an oath to uphold the

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applicability to DOMA of the Supreme Court's ruling, issued a few weeks before, in *Romer v. Evans*, 517 U.S. 620 (1996) (link). H.R. REP. NO. 104-664, at 31-33 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2935-37.

<sup>81</sup> It could be argued that DOMA does not classify individuals on the basis of sexual orientation because the statute, on its face, is sexual orientation neutral. This argument, however, need not detain us long because the clear purpose of the statute is to withhold recognition of *lesbian and gay* marriages. *See infra* notes 83-86 and accompanying text. Indeed, to my knowledge, no court has ever held that DOMA (or a state ban against same-sex marriage) fails to classify individuals on the basis of sexual orientation.

<sup>82</sup> *See* Defense of Marriage Act § 3 (codified at 1 U.S.C. § 7 (2010)) (link).

<sup>83</sup> *See, e.g.*, 142 CONG. REC. H7275 (daily ed. July 11, 1996) (statement of Rep. Barr) (referring to marriage as "an institution basic to not only this country's foundation and to its survival but to every Western civilization, [one that is] under direct assault by homosexual extremists all across the country, not just in Hawaii.") (link).

<sup>84</sup> *See, e.g.*, 142 CONG. REC. H7276 (daily ed. July 11, 1996) (statement of Rep. Largent) ("Destroying the exclusive territory of marriage to achieve a political end will not provide homosexuals with the real benefits of marriage, but it may eventually be the final blow to the American family.") (link).

<sup>85</sup> 142 CONG. REC. S10,068 (daily ed. Sept. 9, 1996) (statement of Sen. Helms) (link); *see also* 142 CONG. REC. H7495 (daily ed. July 12, 1996) (statement of Rep. Lipinski) ("Allowing for gay marriages would be the final straw, it would devalue the love between a man and a woman and weaken us as a Nation.") (link).

<sup>86</sup> *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 378-79 (D. Mass. 2010) (footnotes omitted).

Constitution, the President should be permitted to take into account Congress's failure to consider the equality implications of its enactments when determining how the nation's laws can best provide equal protection to a minority group of Americans.

#### D. *Is Judicial Review Nonetheless Likely?*

President Obama's decision not to defend DOMA did not mean that the statute would go undefended. At the time the President made his decision, it was quite likely that the U.S. House of Representatives, under the firm control of conservative Republicans, would step forward to defend DOMA. Indeed, a few days after the President's decision, the House Republican leadership announced it would defend the statute in the courts.<sup>87</sup> And a few weeks after that, the leadership hired former Solicitor General Paul Clement to defend DOMA's constitutionality.<sup>88</sup> In the months since, Mr. Clement has filed several motions vigorously defending the statute.<sup>89</sup>

As a result, President Obama's decision will not deprive the courts of the opportunity to fully review DOMA's constitutionality. And this is as it should be; at the end of the day, it should be the Judiciary that determines whether sexual orientation classifications warrant heightened scrutiny and whether DOMA passes constitutional muster.

#### CONCLUSION

Although the Executive Branch should defend laws from court challenges in most instances, I have identified in this Essay four factors that a President should consider in determining whether to take the extraordinary step of refusing to defend the constitutionality of a federal law. If (1) there are no binding judicial precedents on the relevant constitutional issues; (2) those issues are sufficiently broad to raise fundamental normative and policy questions; (3) Congress failed to consider the relevant constitutional issues when it enacted the law; and (4)

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<sup>87</sup> Jennifer Steinhauer, *House Republicans Move to Uphold Marriage Act*, N.Y. TIMES, Mar. 4, 2011, <http://www.nytimes.com/2011/03/05/us/politics/05marriage.html> (link).

<sup>88</sup> Steven Osborne, *House of Representatives Hires Paul Clement to Represent DOMA*, CHRISTIAN L. J., Apr. 21, 2011, <http://www.christianlawjournal.com/featured-articles/house-of-representatives-hires-paul-clement-to-represent-doma> (link). John Boehner, the Speaker of the U.S. House of Representatives, created the Bipartisan Legal Advisory Group, whose membership consists of three Republicans and two Democrats, to consider defending DOMA. Steinhauer, *supra* note 87. Only the Republican members voted to defend DOMA in court. Chris Geidner, *House Republicans Vote to Defend DOMA in Court on Party Line 3-2 Vote*, METROWEEKLY, Mar. 9, 2011, <http://www.metroweekly.com/poliglot/2011/03/house-republicans-vote-to-defe.html> (link).

<sup>89</sup> See, e.g., Intervenor–Defendant's Motion to Dismiss, *Pedersen v. Office of Pers. Mgmt.*, No. 3:10–cv–1750 (VLB) (D. Conn. Aug. 15, 2011) (link); Memorandum of Law of Intervenor–Defendant the Bipartisan Legal Advisory Group of the United States House of Representatives in Support of Its Motion to Dismiss, *Windsor v. United States*, No. 1:10–CV–8435 (BSJ)(JCF) (S.D.N.Y. Aug. 1, 2011) (link).

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it is unlikely that the President's decision will preclude judicial review, then he is on firm ground in refusing to defend the statute in question. President Obama's decision not to defend DOMA's constitutionality was appropriate because it satisfied all of these criteria.