
ARTICLE

PRESIDENTIAL CONSTITUTIONALISM AND MARRIAGE
EQUALITY

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INTRODUCTION

Administrative constitutionalism, broadly understood, entails normative efforts by executive officials to apply the law in light of (1) its public-regarding purposes, liberally applied to advance the common good; (2) the Large “C”

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Constitution, as interpreted purposively by the executive officials; and (3) the nation's small "c" constitutional culture of historical, foundational commitments.¹ As Professor Sophia Lee has explained, the engines of administrative constitutionalism have normally been agencies and their officials.² But some of the greatest examples of administrative constitutionalism have been led by American Presidents and the White House and not by agency heads and administrators.

Presidential constitutionalism has a distinctive origin in the duties of the President laid out in the Constitution. First, the President has a specified duty to "take Care that the Laws be faithfully executed . . ."³ For super-statutes, congressional measures seeking to transform the status quo, the President's charge is to implement the statute in a manner that advances the big goals set forth in the law. Second, the President's oath of office commits her or him to "preserve, protect and defend the Constitution of the United States."⁴ This entails the President's obligation to enforce constitutional values and limits, including limits on the President's authority. That obligation, in turn, requires the White House to deliberate about the meaning of the Constitution. Third, like other public officials, the President ought to act to "promote the general Welfare, and secure the Blessings of Liberty" for all citizens, goals laid out in the Constitution's Preamble.⁵

Even this general description of presidential constitutionalism suggests its complexity. Is the President bound by constitutional rulings from the Supreme Court with which she or he disagrees? Should the President vigorously apply super-statutes that she or he thinks misguided? How does the President gauge the "general Welfare" and balance competing "Liberty" interests? However these issues are resolved by different administrations, the concept of presidential constitutionalism is a powerful and pervasive one. The modern Presidency has expanded opportunities for Large "C" as well as small "c" constitutional leadership by the officeholder. The President and Vice

¹ WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 31-34 (2010); Olatunde Johnson, *The Last Plank: Rethinking Public and Private Power to Advance Fair Housing*, 13 U. PA. J. CONST. L. 1191, 1193-94 (2011); Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1897-98 (2013); Professor Sophia Z. Lee, Introductory Remarks at the 2018 University of Pennsylvania Law Review Symposium on The History, Theory, and Practice of Administrative Constitutionalism (Oct. 19, 2018). For a narrower articulation, see, for example, Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799, 801 (2010) (defining "administrative constitutionalism" as "regulatory agencies' interpretation and implementation of constitutional law" (emphasis omitted)).

² See generally Sophia Z. Lee, *Our Administered Constitution: Administrative Constitutionalism from the Founding to the Present*, 167 U. PA. L. REV. 1699 (2019).

³ U.S. CONST. art. II, § 3.

⁴ *Id.* art. II, § 1, cl. 8; see also *id.* art. VI, cl. 3.

⁵ *Id.* pmb.

President are the only officials elected by the entire country, and Presidents take their elections as popular mandates for big normative moves. As the head of a political party and armed with a veto authority, the President enjoys a great deal of legislative power. As the person who appoints federal judges, the President influences the judiciary as well. Not least important, everything the President says and does commands media attention and public comment. The bully pulpit of the office invites big policy and moral initiatives.

This article will consider a particularly powerful example of presidential constitutionalism: the Obama Administration's leadership on the issue of marriage equality for lesbian, gay, bisexual, transgender, queer, and similar (LGBTQ+) persons. Presidential constitutionalism was effective because the chief executive articulated a robust principle (equal citizenship for sexual and gender minorities), application of that principle to the marriage issue was deeply deliberative within the executive branch and invited involvement by the judicial and legislative branches, and the process allowed the electorate to express its views. The combination of a robust principle, institutional deliberation, and popular feedback created conditions for immediate and powerful entrenchment of new rights for sexual and gender minorities.

I. BARACK OBAMA: EVOLVING CANDIDATE AND HIS ADMINISTRATION

A former professor of constitutional law, Senator Barack Obama was, like his opponent Senator Hillary Clinton, opposed to the Defense of Marriage Act of 1996 (DOMA), which excluded married same-sex couples from any federal law or rule relating to marriage or spousehood.⁶ Starting with an HRC/LOGO-sponsored candidates' forum in August 2007, Senator Obama consistently favored equal rights and benefits for lesbian and gay couples (i.e., civil unions), but maintained that "we should try to disentangle what has historically been the issue of the word '*marriage*,' which has religious connotations to some people, from the civil rights that are given to couples"⁷

⁶ See *Open Letter from Barack Obama to the LGBT Community*, BILERICO PROJECT (Feb. 28, 2008, 9:38 AM), http://bilerico.lgbtqnation.com/2008/02/open_letter_from_barack_obama_to_the_lgb.php [https://perma.cc/47TW-7HEV](supporting "complete repeal" of DOMA).

⁷ Lynn Sweet, *The Scoop from Washington*, CHICAGO-SUN TIMES (Aug. 9, 2007), https://web.archive.org/web/20071014062914/http://blogs.suntimes.com/sweet/2007/08/sweet_dem_gay_forum_special_pa.html [https://perma.cc/8XAC-43LG] (emphasis added) (transcript of forum). On Obama's "evolving" views on marriage, see David Garrow, RISING STAR: THE MAKING OF BARACK OBAMA 846, 865, 993, 1030 (2017)(chronicling Barack Obama's views on same-sex marriage at various points in time); Tracy Baim, *Obama Changed Views on Gay Marriage*, WINDY CITY TIMES, Jan. 14, 2009, at 6 ("During his presidential campaign, he has remained consistent

At a presidential candidates' forum hosted on August 16 by Reverend Rick Warren at the Saddleback Church in California, Senators McCain and Obama were both asked, "Define marriage."⁸ Although Tobias Wolff (the LGBTQ+ policy adviser to the campaign) had implored the handlers to ask the candidate not to throw over gay couples entirely, Senator Obama answered: "I believe that marriage is the union between a man and a woman. Now, for me as a Christian," he said as the audience applauded enthusiastically, "it's also a sacred union. God's in the mix."⁹ Senator Obama's opposition to marriage equality vexed his LGBTQ+ supporters.

Longtime Chicago friend, ally, and adviser Valerie Jarrett maintains that Barack Obama was genuinely committed to completely equal treatment of gay persons in all matters civil, but that his religious faith told him that the sacred understanding of conjugal marriage required the exclusion of non-procreating same-sex couples from the institution, as a matter of definition.¹⁰ This is why he was attracted to civil unions, which gave LGBTQ+ couples exactly the same legal rights and benefits straight couples could secure by getting married—non-discrimination as a matter of legal rights—while respecting the "sacred" space marriage occupied in our society.¹¹ If you frame marriage equality as a civil rights issue, akin to employment bars, you are likely to consider the marriage exclusion "discriminatory." But if you frame it as a family or religious issue, you are likely to consider the marriage exclusion "definitional" and not discriminatory. Jarrett did not share her friend's devout Christianity and supported marriage equality, but she respected his faith-based reasons for civil unions rather than marriage.¹² Obama himself says he did not see the definition of "marriage" as discrimination in the same way that the military exclusion was discrimination. He felt that civil unions were "a sufficient way of squaring the circle" in 2008.¹³

David Axelrod, Senator Obama's campaign manager in 2008, says that the candidate was not being completely candid. "Opposition to gay marriage was

with his 2004 position, but clearly he has moved away from the 1996 statement of 'I favor legalizing same-sex marriages.'").

⁸ *Forum on Civil Leadership and Compassion*, C-SPAN (Aug. 16, 2008), <https://www.c-span.org/video/?280492-1/forum-civil-leadership-compassion> [<https://perma.cc/XDM8-9ZPR>] (transcript and video).

⁹ *Id.*; Interview with Tobias Wolff, Professor, Univ. of Pa. Law Sch., in Phila., Pa. (Sept. 25, 2018).

¹⁰ Telephone Interview with Valerie Jarrett, former Senior Adviser to the President (April 7, 2017).

¹¹ *Id.*

¹² *Id.*

¹³ Ben Smith, *Interview with President Barack Obama*, BUZZFEED, (Feb. 11, 2015, 12:13 AM), <https://www.buzzfeednews.com/article/buzzfeednews/full-transcript-of-buzzfeed-news-interview-with-president> [<https://perma.cc/58SY-JFWZ>]; accord, BARACK OBAMA, *THE AUDACITY OF HOPE* 222-23 (2006).

particularly strong in the black church, and as he ran for higher office, he grudgingly accepted the counsel of the more pragmatic folks like me, and modified his position to support civil unions rather than marriage, which he would term a ‘sacred union.’”¹⁴ Axelrod’s account resonates with the literature penned by freedom-to-marry activists, who claim credit for President Obama’s coming out of the closet on the marriage issue. Lawyer-blogger Kerry Eleveld and marriage advocates such as Marc Solomon and Evan Wolfson provide a roadmap for the President’s “evolution” that closely tracks pressure placed on the administration by activists.¹⁵ Their assumption was that the President was their ally all along but needed constant nudging and occasional left-of-center outrage to do the right thing.¹⁶

Based on conversations with his supporters and fundraisers, my view is that Senator Obama was strongly and sincerely committed to the antidiscrimination norm, but also believed that it would have been difficult for any candidate who openly supported marriage equality to have been nominated by the Democratic Party or to have been elected President in 2008. There was a strategic feature to the Senator’s support for civil unions, rather than marriage, but there was also an underlying commitment to a constitutional process that the candidate believed would lead to marriage equality. I have dubbed such a process *equality practice*: advance equal treatment of an unfairly disparaged minority step by step, with opportunity for the public and the government to observe the consequences; there will be a learning curve that can be the basis for further deliberation and, possibly, reform.¹⁷

Senator Obama’s view was that the most urgent federal gay rights issues were hate crimes legislation and repeal of the Clinton-era statute barring “homosexual” and “bisexual” persons from serving in the armed forces. Leave the marriage issue to the states for the time being. Massachusetts was issuing marriage licenses, and five states had created civil unions or domestic partnerships with all or most of the rights afforded married couples: California, New Hampshire, Oregon, Vermont, and Washington. Other

¹⁴ DAVID AXELROD, *BELIEVER: MY FORTY YEARS IN POLITICS* 447 (2015); *see also* RANDALL KENNEDY, *THE PERSISTENCE OF THE COLOR LINE: RACIAL POLITICS IN THE OBAMA PRESIDENCY* 22-28 (2012) (criticizing the President’s timid approach to marriage equality).

¹⁵ *See* KERRY ELEVELD, *DON’T TELL ME TO WAIT: HOW THE FIGHT FOR GAY RIGHTS CHANGED AMERICA AND TRANSFORMED OBAMA’S PRESIDENCY* 65-94 (2015); The Freedom to Marry Oral History Project, Oral History of Evan Wolfson, Sixth Interview, April 14, 2016, at 213, http://digitalassets.lib.berkeley.edu/roho/ucb/text/wolfson_ewan_2017.pdf [https://perma.cc/L7AK-4KJN].

¹⁶ *See, e.g.*, MARC SOLOMON, *WINNING MARRIAGE: THE INSIDE STORY OF HOW SAME-SEX COUPLES TOOK ON THE POLITICIANS AND PUNDITS—AND WON* 284-85 (2014) (describing the pressure placed on President Obama to “complete his evolution” on same-sex marriage).

¹⁷ WILLIAM N. ESKRIDGE JR., *EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS* 153-156 (2002).

states, such as Hawaii, Maine, Maryland, and New Jersey, offered some marital benefits to same-sex couples. Just as civil rights advocates had fought state-by-state to eliminate bars to different-race marriage after World War II, marriage equality advocates sought to achieve more advances at the state level before aiming for a Supreme Court pronouncement following *Loving v. Virginia*.¹⁸

Senator Obama was elected President in November 2008. Between 2009 and 2012, both the President and the country moved from civil unions to marriage. The Obama Administration played an important role in that shift. It did so by pervasively normalizing lesbian and gay relationships and by leading successful campaigns to overturn two problematic legacies from the Clinton presidency, namely, the no-gays-in-the-military statute and DOMA. Between 2013 and 2015, the administration would play a critical role in the Supreme Court's decisions to invalidate DOMA and to require the states to issue marriage licenses to same-sex couples.

II. MARRIAGE EQUALITY AND THE NEW ADMINISTRATION

In 2009, President Obama surrounded himself with an array of legal and policy advisers who were strong, dyed-in-the-wool egalitarians on issues of sexuality, gender, and the law. They included Vice President Joe Biden; Presidential Adviser Valerie Jarrett; White House Counsel (WHC) Greg Craig and Associate Counsel Alison Nathan; Director of the Office of Public Engagement Tina Tchen and her deputy, Brian Bond; Attorney General Eric Holder, Deputy Attorney General David Ogden and his Chief of Staff Stuart Delery, and Assistant Attorneys General Tony West and Tom Perez; David Barron and Marty Lederman in the Office of Legal Counsel; and Solicitor General Elena Kagan. Nathan, Delery, and Bond were openly lesbian or gay, as were many staff in the White House and Department of Justice (DOJ). Openly straight, Greg Craig had been counsel to the 1993 campaign to support gays in the military. When Elena Kagan was Dean of the Harvard Law School, she had led her faculty to oppose the Bush-Cheney Administration's successful efforts to bully law schools into welcoming gay-excluding military recruiters onto campus.¹⁹

Nonetheless, LGBTQ+ issues were not a top priority when Barack Obama took the oath of office in January 2009. The financial crisis and then the campaign for health care reform occupied most of the administration's

¹⁸ 388 U.S. 1, 2 (1967) (striking down the remaining bars to different-race marriage based upon equal protection and the fundamental right to marry).

¹⁹ See Brief for Professors William Alford et al. as Amici Curiae Supporting Respondents, *Rumsfeld v. Forum for Acad. & Institutional Rights*, 547 U.S. 47 (2006) (No. 04-1152), 2005 WL 2367595 (Harvard professors' brief).

attention. With regard to gay rights issues, the administration's priorities were hate crimes legislation and a repeal of the armed forces exclusion.²⁰ The marriage issue could not be completely ignored, however. A week before the inauguration, Ninth Circuit Chief Judge Alex Kozinski interpreted a federal employee healthcare law to cover same-sex spouses, DOMA notwithstanding.²¹ And soon after the inauguration, Mary Bonauto met with Alison Nathan to give her a heads-up that Gay & Lesbian Advocates & Defenders (GLAD, which had brought marriage equality to Massachusetts) was filing a massive federal lawsuit challenging the application of DOMA to deny federal benefits and rights to legitimately married lesbian and gay couples in Massachusetts. On March 3, 2009, GLAD filed *Gill v. Office of Personnel Management*.²²

In the next several months, the legislatures in Vermont, Connecticut, New Hampshire, and Maine passed marriage equality statutes, and the Iowa Supreme Court required marriage equality under its state constitution. The Obama Administration caught sharp criticism from the gay blogosphere because there was little discernible progress on the armed forces ban and because it had not properly celebrated the new marriage victories in those five states.²³ Behind the scenes, however, the administration was already focusing on this issue.

On May 18, 2009, for example, the *New York Times* ran the story of Janice Langbehn and Lisa Pond, longtime partners who had been enjoying a Rosie O'Donnell Cruise with their three children when Pond collapsed from a brain aneurysm.²⁴ The Miami hospital that received Pond refused Langbehn access to her dying partner, even after she produced medical power of attorney documents.²⁵ Chief of Staff Rahm Emanuel and the President were outraged by the article. Danielle Gray, Associate Counsel to the President, worked with Deputy White House Counsel Daniel Meltzer to develop a proposal that family visitation, broadly defined, could be required of all hospitals receiving federal Medicare/Medicaid funds. Secretary Kathleen Sebelius of the

²⁰ David A. Graham, *Robert Gates, America's Unlikely Gay-Rights Hero*, THE ATLANTIC (July 28, 2015), <https://www.theatlantic.com/politics/archive/2015/07/robert-gates-boy-scouts-gay-leaders/399716/> [<https://perma.cc/ZMH4-CZMG>].

²¹ *In re Golinski*, 587 F.3d 901, 904 (9th Cir. 2009).

²² See Complaint at 1, *Gill v. Office of Pers. Mgmt.*, 699 F. Supp.2d 374 (D. Mass. 2010) (No. 1:09-CV-10309).

²³ See, e.g., ELEVELD, *supra* note 15, at 65-71; Andrew Sullivan, *Barack Obama's Gay Marriage Evolution*, NEWSWEEK (May 13, 2009), <https://www.newsweek.com/andrew-sullivan-barack-obamas-gay-marriage-evolution-65067> [<https://perma.cc/YH3N-RNCR>].

²⁴ See Tara Parker-Pope, *Kept from a Dying Partner's Bedside*, N.Y. TIMES (May 18, 2009), <https://www.nytimes.com/2009/05/19/health/19well.html> [<https://perma.cc/8B4N-RHR9>]. My account of the administration's reaction is taken from conversations with White House personnel.

²⁵ *Id.*

Department of Health and Human Services strongly endorsed such a proposal—though the White House held off from implementing the idea until the Affordable Care Act was passed in March 2010. A White House memorandum was issued the next month.²⁶

III. SMELTDOWN 2009: MARRIAGE CANNOT BE IGNORED

In early 2009, the DOJ recalibrated its litigation approach in cases challenging armed forces and civil service discriminations against gay persons and couples. Tony West, the new head of the Civil Division, personally reviewed briefs to make sure that they presented only arguments that did not disparage LGBTQ+ persons and their relationships.²⁷ Responding to a DOMA challenge brought by Arthur Smelt and Christopher Hammer, DOJ attorneys drafted a comprehensive memorandum supporting a motion to dismiss. In Part IV, the draft memorandum argued that states do not have to recognize marriages contrary to their public policy and cited cases where states declined to recognize incestuous or child marriages; West left this discussion alone.²⁸ In Part V, the draft argued that DOMA was consistent with equal protection, because of the rational policy of encouraging responsible procreation and the discretion Congress has to adopt a “wait-and-see” attitude toward innovations in state marriage law.²⁹ By maintaining a policy of “neutrality”—neither banning same-sex marriages nor subsidizing them—DOMA respected state autonomy and self-governance and preserved scarce enforcement resources.³⁰ West eliminated the responsible procreation argument, and the Department filed its memorandum and motion on June 11, 2009.

Pushback from the LGBTQ+ community was immediate and hard. On the AMERICAblog, an influential progressive blog established in 2004, John Aravosis objected that the Obama Administration was making the same objectionable arguments that the Bush Administration had been making.³¹

²⁶ See Memorandum on Respecting the Rights of Hospital Patients to Receive Visitors and to Designate Surrogate Decision Makers for Medical Emergencies, 75 Fed. Reg. 20,511 (April 15, 2010); see also Telephone Interview with Brian Bond, former Deputy Director, White House Office of Pub. Engagement (April 30, 2017); Telephone Interview with Marty Lederman, former Deputy Assistant Legal Counsel, Office of Legal Counsel, Dep’t of Justice (June 30, 2019).

²⁷ See Telephone Interview with Tony West, former Assistant Attorney General, Civil Div., Dep’t of Justice (May 8, 2017). The discussion in this paragraph is taken from this interview.

²⁸ See Memorandum in Support of Motion to Dismiss at 21-22, *Smelt v. United States*, No. SACV09-0286 DOC (C.D. Cal. Aug. 24, 2009), 2009 WL 1683906.

²⁹ See *id.* at 23.

³⁰ See *id.* at 33-37.

³¹ See John Aravosis, *Obama DOJ Lies to Politico in Defending Hate Brief Against Gays*, AMERICABLOG (June 12, 2009, 1:26 PM), <http://americablog.com/2009/06/obama-doj-lies-to-politico-in-defending-hate-brief-against-gays.html>, [https://perma.cc/ZZ69-WXC3]; see also

Aravosis argued that the administration could have chosen to raise purely procedural objections, but instead, “what Obama did was throw the legal kitchen sink at us in a brief that could have been written by Antonin Scalia” (a comparison that both Obama and Scalia would find offensive).³² “Where in the law does it say that Obama was required to compare gay marriage to incest?”³³ The bloggers were casting all the responsibility on the President, who of course had not read the brief, though others in the White House and in the campaign team had seen it.³⁴ Valerie Jarrett met with some of the bloggers and assured them that the White House was listening.³⁵ Increasingly, she turned to Brian Bond to help her spot flashpoints like this. After June 11, every DOJ filing in a gay rights case was reviewed by the White House Counsel, where Ali Nathan, Kate Shaw, and Ian Bassin could spot sensitive statements and arguments. This greatly expanded the office’s workload—and generated what the lawyers and Brian Bond would call “Team Gay,” the White House officials who specialized in delivering on the administration’s promise to promote equal rights for LGBTQ+ Americans. Meeting regularly, Team Gay started researching the constitutionality of DOMA and Don’t Ask, Don’t Tell, as well as the administration’s duties to defend those measures (or not) in court.³⁶

Later in June, Tony West, Elena Kagan, and other DOJ attorneys met privately with representatives of LGBTQ+ rights organizations, both to reassure those representatives and to educate their own attorneys that the administration would not file litigation documents disparaging lesbian and gay relationships and marriages.³⁷

Meanwhile, Team Gay was working hard on *deliverables*—tangible recognition and benefits for lesbian and gay families within existing statutory directives and mechanisms for implementing new regulatory policies. Thanks to the efforts of Team Gay, John Berry and the Office of Personnel Management (OPM), and Hillary Clinton and Harold Koh at the State

NATHANIEL FRANK, *AWAKENING: HOW GAYS AND LESBIANS BROUGHT MARRIAGE EQUALITY TO AMERICA 199-201* (2017) (discussing the frustration felt by LGBTQ+ advocates at the Obama Administration’s reticence on gay issues).

³² Aravosis, *supra* note 31.

³³ *Id.*

³⁴ The White House sent Professor Wolff a copy of the *Smelt* brief the night before it was filed. See Wolff Interview, *supra* note 9. I was also told that the White House Counsel’s office reviewed a copy of the brief. That office and Wolff made suggestions that were not implemented, assertedly because of time pressure.

³⁵ See FRANK, *AWAKENING*, *supra* note 31, at 199-201.

³⁶ See Telephone Interview with Brian Bond, former Deputy Director, White House Office of Pub. Engagement (April 13, 2017); see also ELEVELD, *supra* note 15, at 86-88 (describing post-*Smelt* coordination on LGBTQ+ issues).

³⁷ See Bond Interview, *supra* note 36.

Department, the White House on June 17 issued a memorandum on “Federal Benefits and Non-Discrimination.”³⁸ Although the administration was “not authorized by Federal law to extend a number of available Federal benefits to the same-sex partners of Federal employees,” the memorandum “identified areas in which statutory authority exists to achieve greater equality for the Federal workforce through extension to same-sex domestic partners of benefits currently available to married people of the opposite sex.”³⁹

Secretary Clinton extended relocation and other benefits to same-sex partners the next day.⁴⁰ After considering overwhelmingly supportive public comments, OPM expanded bereavement and other leave policies to include same-sex domestic partners as “family members,” though it ultimately concluded that spousal insurance benefits to such partners and other matters were beyond the scope of its mandate.⁴¹ The June 17 memorandum directed all other executive departments and agencies to work with OPM to determine whether they could extend same-sex domestic partnership benefits to federal employees affected by their statutory mandates.⁴²

On June 29, Barack and Michelle Obama hosted a reception in the East Room of the White House to celebrate Gay Pride Month. The President recognized the impatience of many in the room but observed that progress had been made, and promised that greater progress was to come.⁴³ The next week, the President called a meeting in the Roosevelt Room, the large West Wing conference room dominated by two large portraits of Teddy and Franklin Roosevelt, aggressive chief executives who wielded the presidential bully pulpit for progressive causes.⁴⁴ Attendees included President Obama (who was not present for the entire meeting) and his senior advisers Valerie Jarrett, Rahm Emmanuel, David Axelrod, and Jim Messina; Joe Biden and Ron Klain (Biden’s chief of staff); Tina Tchen and Brian Bond; Greg Craig and Alison Nathan; and several DOJ lawyers, but not Tony West, who excused himself from this meeting for reasons of DOJ independence.

³⁸ See Memorandum on Federal Benefits and Non-Discrimination, 74 Fed. Reg. 29,393 (June 17, 2009).

³⁹ *Id.* at 29,393.

⁴⁰ See Press Release, Hillary Rodham Clinton, Secretary of State, Benefits for Same-Sex Domestic Partners of Foreign Service Employees (June 18, 2009), <https://2009-2017.state.gov/secretary/20092013clinton/rm/2009a/06/125083.htm> [<https://perma.cc/7TU4-Q658>].

⁴¹ Absence and Leave; Definition of Family Member, Immediate Relative, and Related Terms, 75 Fed. Reg. 33,491, 33,495 (June 14, 2010) (to be codified at 5 C.F.R. pt. 630).

⁴² See Memorandum on Federal Benefits and Non-Discrimination, *supra* note 38, at 29,393.

⁴³ For a video of the President’s remarks, see *Gay Pride Month Reception*, C-SPAN (June 29, 2009), <https://www.c-span.org/video/?287350-2/gay-pride-month-reception> [<https://perma.cc/NL7S-H97M>].

⁴⁴ My account of the July 2009 Roosevelt Room meeting is drawn from conversations with several attendees. See also ELEVELD, *supra* note 15, at 87-88.

There was a consensus that the administration was committed to equal rights for LGBTQ+ Americans, but there was not unanimity as to how to prioritize that commitment. Team Gay (represented by Nathan) was gung-ho for equality, but the political team (Emanuel, Axelrod, Messina) was reluctant to sacrifice other priorities. Floating above the strategic differences, the Commander-in-Chief issued some marching orders. Attendees recalled the President's saying something like this: "I am not going to act like the previous administration; we are going to follow the law. What I want you to do is find me a legal path to advance the rights of gay and lesbian families. I am willing to take hits in the political arena," a statement that made Axelrod and Emanuel cringe, "but I am not willing to violate the law." Craig and Nathan nodded in agreement. The immediate mandate was to coordinate more deliverables for the benefit of LGBTQ+ families.⁴⁵

On August 24, 2009, the government filed its reply brief in *Smelt*. It opened with a statement that:

[T]his Administration does not support DOMA as a matter of policy, believes that it is discriminatory, and supports its repeal. Consistent with the rule of law, however, the Department of Justice has long followed the practice of defending federal statutes as long as reasonable arguments can be made in support of their constitutionality, even if the Department disagrees with a particular statute as a policy matter, as it does here.⁴⁶

On August 24, 2009, the judge dismissed the *Smelt* case on one of the procedural grounds advanced by the government.⁴⁷

On September 18, 2009, when the government moved to dismiss the equal protection claims in *Gill* (the GLAD challenge to DOMA), it explicitly abjured the responsible procreation and optimal parenting arguments.⁴⁸ Under First Circuit precedent, the government only had to justify DOMA's sexual orientation discrimination by demonstrating a rational basis. The memorandum tepidly rested its case on administrative convenience. "Given the evolving nature of this issue," Congress foresaw that the meaning of federal rights based upon marriage "would vary dramatically from State to State. Congress could reasonably have concluded that there is a legitimate

⁴⁵ The account in this paragraph and the quotation in text are paraphrases from an April 13 interview with Brian Bond. See Bond Interview, *supra* note 36.

⁴⁶ Reply Memorandum in Support of Defendant's Motion to Dismiss at 2, *Smelt v. United States*, No. SACV09-00286 DOC (C.D. Cal. Aug. 24, 2009), 2009 WL 2610458.

⁴⁷ *Smelt v. United States*, No. SACV09-00286 DOC, 2009 WL 10674308, at *4 (C.D. Cal. Aug. 24, 2009).

⁴⁸ Memorandum of Law in Support of Defendants' Motion To Dismiss at 19 n.10, *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010) (No. 1:09-CV-10309), 2009 WL 5803678.

government interest in maintaining the status quo and preserving nationwide consistency in the distribution of marriage-based federal benefits.”⁴⁹

IV. EQUAL CITIZENSHIP FOR LGBTQ+ AMERICANS

Like racial minorities and women, sexual and gender minorities had been subjected to a long history of unfair state discrimination. At the June 29 White House Pride celebration, the President pledged his support for an ambitious overhaul of federal law to implement a regime of completely equal treatment of sexual and gender minorities. The proposed overhaul included the repeal of DOMA. The administration’s efforts coincided with the increasing success of the marriage equality movement at the state level and in national opinion polls.

A. *Gender Identity and Sexual Orientation as Suspect Classifications?*

Supreme Court precedent suggested that a classification required heightened equal protection scrutiny if (1) the burdened group had suffered an unfair history of arbitrary discrimination (2) based on an immutable trait (3) that was generally irrelevant to proper public policy, and (4) they were politically unable to remedy the discrimination through the normal political process.⁵⁰ Early on, the Obama Administration signaled that discrimination because of gender identity was flat-out sex discrimination and, therefore, presumptively unconstitutional.⁵¹

On September 10, 2009, lawyers from GLAD, Lambda Legal, the ACLU, the National Center for Lesbian Rights, and the Human Rights Campaign came to the White House to discuss the marriage issue with DOJ and White House lawyers, including Tony West and Ali Nathan. In a detailed memorandum, the movement lawyers urged the administration to concede that sexual orientation is a suspect or quasi-suspect classification because it met the foregoing requirements developed by the Supreme Court to treat race and sex as suspect classifications.⁵² They also queried: Why was the Obama Administration still defending DOMA, which was a statute saturated

⁴⁹ *Id.* at 16-18; cf. Lynn Wardle, *Section Three of the Defense of Marriage Act: Deciding, Democracy, and the Constitution*, 58 DRAKE L. REV. 951, 970 (2010) (arguing that the memorandum did not present a “high quality or serious defense” of DOMA).

⁵⁰ *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440-42 (1985) (setting forth the four criteria for heightened scrutiny).

⁵¹ The Obama Administration did not seek an appeal of *Schroer v. Billington*, 577 F. Supp. 2d 293, 306 (D.D.C. 2008) (finding that gender identity discrimination against transgender employees is “discrimination ‘because of . . . sex’”).

⁵² Memorandum from ACLU, GLAD, HRC, Lambda Legal, Nat’l Ctr. for Lesbian Rights to Tony West, Assistant Attorney General, Civil Div. Dep’t of Justice 1-2 (Sept. 9, 2009) (on file with author).

with anti-gay animus of the sort that *Romer* and *Lawrence* condemned?⁵³ In a subsequent memorandum, the lawyers strongly urged DOJ to “disavow morality as a justification for DOMA Section 3” and to “disavow conservation of resources” as well.⁵⁴

Within the Obama White House, Team Gay strongly agreed even before the September 10 meeting: it made no more sense to exclude gay people from marriage equality than it did to exclude people of color.⁵⁵ The DOJ’s Civil Division, headed by West, was responsible for defending against constitutional challenges to federal statutes—including the military exclusion as well as DOMA—and for institutional reasons was more reluctant to accept the LGBTQ+ stance on constitutional scrutiny.

If the executive branch concluded that DOMA was unconstitutional, what should its officials actually do? Based upon the President’s oath of office and duty to faithfully execute the law (including the Constitution), some academics have maintained that the President has a duty *not* to apply statutes he or she considers unconstitutional.⁵⁶ Other academics and most appellate lawyers, however, believe that the President should continue to apply unconstitutional laws until there is an authoritative judicial declaration of their invalidity, because the rule of law depends upon each branch’s deferring to the Supreme Court as the decider of constitutional issues.⁵⁷ The Office of the Solicitor General has long considered this its gospel, and it has sometimes defended statutes that its Presidents believed unconstitutional.⁵⁸

The White House lawyers were particularly impressed by the practical wisdom found within the Office of Legal Counsel (OLC). The Solicitor General had traditionally recognized, as an exception to the duty to defend, statutes that reflected congressional aggrandizement at the expense of the

⁵³ *Id.* at 5-6.

⁵⁴ Memorandum from ACLU, GLAD, HRC, Lambda Legal, & Nat’l Ctr. for Lesbian Rights to Tony West, Assistant Attorney General, Civil Div., Dep’t of Justice 1, 3 (Sept. 11, 2009) (on file with author).

⁵⁵ Our account of Team Gay’s thinking is based upon numerous personal interviews and emails from internal White House sources. See Bond Interview *supra* note 36.

⁵⁶ *E.g.*, Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 509 (2012); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power To Say What the Law Is*, 83 GEO. L.J. 217, 228-62 (1994). For analysis of state practice, see generally Katherine Shaw, *Constitutional Nondefense in the States*, 114 COLUM. L. REV. 213 (2014).

⁵⁷ See, *e.g.*, Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1362 (1997).

⁵⁸ See, *e.g.*, Oral Argument, *Oregon v. Mitchell*, 400 U.S. 112 (1970) (Nos. 43, 44, 46, 47), <https://www.oyez.org/cases/1970/43-orig> [<https://perma.cc/WMV8-CXTX>] (audio of the Solicitor General’s argument for the constitutionality of the Voting Rights Act Amendments of 1970, notwithstanding President Nixon’s view that the lower voting age required a constitutional amendment).

executive branch, a practice inapplicable to DOMA.⁵⁹ An additional but controversial exception was the decision of Acting Solicitor General John Roberts refusing to defend the FCC's policy favoring race diversity in programming.⁶⁰ Most persuasive to the White House Counsel, the Clinton Administration's OLC opined that a 1995 congressional bar to military service by HIV-positive persons was unconstitutional and recommended that the executive branch implement the discriminatory provision but not defend its constitutionality. The courts never reached that issue, because Congress repealed the HIV ban before it took effect.⁶¹

White House Counsel found OLC's "Don't Defend, Do Enforce" approach to DOMA most persuasive. There was pushback from Daniel Meltzer, Deputy White House Counsel. In the modern era, the executive branch has abandoned statutes where there was no colorable constitutional argument and where Congress was usurping presidential or executive branch authority. Meltzer rejected a third group of cases, including Roberts's refusal to defend the FCC diversity policy. This category should be vanishingly small because presidential objections are best expressed through the veto power or efforts to repeal offensive legislation, like the HIV ban.⁶² Looking ahead to future government actors, any departure from this baseline threatens to politicize the enforcement of statutes, a highly undesirable state of affairs. If the current administration felt DOMA was just too wretched to defend, what would prevent the next administration from abandoning the Affordable Care Act (ACA)? White House attorneys dubbed this the "Sarah Palin argument": If the duty to defend norm were weakened now, what would stand in the way of a Palin Administration declining to defend the ACA and other regulatory statutes?

⁵⁹ See Presidential Auth. to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 201 (1994) ("The President has enhanced responsibility to resist unconstitutional provisions that encroach upon the constitutional powers of the Presidency.").

⁶⁰ See Brief for the United States as Amicus Curiae Supporting Petitioner, Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990) (No. 89-453), 1989 WL 1126975.

⁶¹ See Dawn E. Johnsen, *The Obama Administration's Decision to Defend Constitutional Equality Rather Than the Defense of Marriage Act*, 81 FORDHAM L. REV. 599, 608-10 (2012) (setting forth the history of the HIV ban and the Clinton Administration's response); see also Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 7 (presenting a detailed defense of executive branch duty to enforce questionable laws, with more discretion not to defend them).

⁶² See Daniel Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1221-24 (2012). My off-the-record interviews with White House and Department of Justice personnel establish that Meltzer made the same arguments against a Don't Defend, Do Enforce approach to DOMA.

B. *Administrative Recognition of Lesbian and Gay Unions*

White House Counsel's primary agenda was still to figure out and develop agency deliverables for lesbian and gay couples. Between July 2009 and July 2011, Team Gay helped coordinate three different kinds of actions that assured new benefits and rights for many families: (1) liberal interpretation of broad statutory terms and provisions to include same-sex couples and their families; (2) promulgation of new rules, such as the hospital visitation rule, that created new regulatory categories to include LGBTQ+ families; and (3) exercising discretion not to apply existing law harshly against such families. On April 27, 2010, for example, the Department of Justice interpreted the Violence Against Women Act (VAWA) to include gender-motivated violence against persons of the same sex.⁶³ Because of DOMA, VAWA's protection of "spouses" could not protect lesbian and gay couples, but the law also protected "intimate partners" and "persons," which OLC interpreted to protect same-sex partners.⁶⁴ On June 22, 2010, the Department of Labor interpreted the Family and Medical Leave Act to assure mandatory leave for same-sex couples caring for children and one another.⁶⁵

On June 2, 2010, the President directed all agencies to work with OPM to extend benefits to same-sex domestic partners and their families wherever possible consistent with the law.⁶⁶ Specifically, the memorandum directed OPM and the General Services Administration to make sure that children raised in lesbian and gay households qualify as "child" for federal child care subsidies, federal employee assistance programs include "domestic partners," federal retirement programs shall award annuities on the death of retirees to their same-sex partners, that LGBT families receive appropriate relocation expenses, and that lesbian and gay federal employees can receive unpaid leave to care for their families.⁶⁷ "In the future, all agencies that provide new benefits to the spouses of Federal employees and their children should, to the extent permitted by law, also provide them to the same-sex domestic partners of their employees and those same-sex domestic partners' children."⁶⁸

Many of the persons harmed by DOMA were binational couples, where an American citizen was married to a partner of the same sex who was not a

⁶³ See generally *Whether the Criminal Provisions of the Violence Against Women Act Apply to Otherwise Covered Conduct When the Offender and Victim Are the Same Sex*, 34 Op. O.L.C. 1 (2010).

⁶⁴ See *id.* at 1.

⁶⁵ See U.S. Dep't of Labor, Wage & Hour Div., Administrator Interpretation (June 22, 2010), at 2-3.

⁶⁶ See Memorandum on Extension of Benefits to Same-Sex Domestic Partners of Federal Employees, 75 Fed. Reg. 32,247, 32,248 (June 2, 2010).

⁶⁷ *Id.* at 32,247-48.

⁶⁸ *Id.* at 32,248.

citizen.⁶⁹ Immigration law threw up all sorts of barriers to such relationships, but the Obama Department of Homeland Security exercised its enforcement discretion in a number of cases involving undocumented LGBT persons or families.⁷⁰ That discretion included policies where border agents failed to exclude such persons or families from entering the country, police or prosecutors delayed or failed to initiate removal proceedings against undocumented spouses and partners, and officials declined to enforce removal orders or decisions regarding detention or parole.⁷¹

C. Legislation Against LGBTQ+ Discrimination

The Obama Administration made hate crime legislation a priority in the 111th Congress (2009-11). The Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act of 2010 was attached as a rider to the National Defense Authorization Act.⁷² With bipartisan support, the bill survived a Senate filibuster and breezed through both chambers. The President signed it into law on October 28, 2009. The statute expanded the 1969 federal hate crime law to enhance the penalties for crimes motivated by a victim's actual or perceived *gender, sexual orientation, gender identity, or disability*.⁷³

In his second State of the Union Address, President Obama highlighted his proposal to repeal the armed forces exclusion of gay and bisexual persons,⁷⁴ and in March the Department of Defense set in motion a study group to investigate the wisdom of opening the armed forces to openly gay, lesbian, and bisexual persons.⁷⁵ On October 12, 2010, District Judge Virginia Phillips ruled that the 1993 statutory exclusion of gay soldiers violated the First Amendment rights of gay people who wanted to serve in the armed forces.⁷⁶

⁶⁹ See Joseph Landau, *DOMA and Presidential Discretion: Interpreting and Enforcing Federal Law*, 81 *FORDHAM L. REV.* 619, 629 (2012).

⁷⁰ *Id.* at 642-43.

⁷¹ See *id.* at 632-42 (providing many examples of discretionary non-enforcement of immigration bars and commands).

⁷² Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act of 2009, 18 U.S.C. § 249 (2012).

⁷³ *Id.* at § 249(2).

⁷⁴ President Barack Obama, State of the Union Address (Jan. 27, 2010) (transcript available at <https://obamawhitehouse.archives.gov/the-press-office/remarks-president-state-union-address> [<https://perma.cc/5KTB-DBR9>]).

⁷⁵ U.S. DEP'T OF DEFENSE, REPORT OF THE COMPREHENSIVE REVIEW OF THE ISSUES ASSOCIATED WITH THE REPEAL OF "DON'T ASK, DON'T TELL" 1-2 (2010) (describing the Department's research on these issues between March 2 and November 30, 2010).

⁷⁶ See *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 888 (C.D. Cal. 2010); see also Tobias Barrington Wolff, *Political Representation and Accountability Under Don't Ask, Don't Tell*, 89 *IOWA L. REV.* 1633, 1638 (2004) (arguing that Don't Ask, Don't Tell offends First Amendment values such as "the ability of citizens to communicate effectively with their political representatives, and

Judge Phillips's ruling was a wake-up call. Did the armed forces want to manage the transition itself or suffer under a judicially supervised transition? On November 30, 2010, the Defense Department released its exhaustive study concluding that soldiers were ready for openly gay and lesbian colleagues.⁷⁷ Although the Democrats had just taken a shellacking in the midterm elections and legislators wanted to let the issue lapse, the President insisted on pressing for repeal legislation in the lame duck session of the 111th Congress. Three days before Christmas 2010, the President signed the Don't Ask, Don't Tell Repeal Act of 2010, which set in motion an administrative process that ended the exclusion on September 21, 2011.⁷⁸

The repeal of the military exclusion was a momentous symbolic recognition of the equal citizenship of lesbian, gay, and bisexual Americans. Much as the end of racial segregation in the armed forces helped prepare the way for the end of racial segregation in marriage, the opening up of the military to gay people helped prepare the way for opening up marriage as well. Consider Chief Justice Taney's infamous opinion in *Dred Scott v. Sandford*, which denied basic citizenship to free black people based in part on laws criminalizing interracial marriage.⁷⁹ Taney also relied on state and federal laws barring freed black persons from serving in the militia. "Nothing could more strongly mark the entire repudiation of the African race. . . . [H]e is not, by the institutions and laws of the State, numbered among its people. He forms no part of the sovereignty of the State, and is not therefore called on to uphold and defend it."⁸⁰ Although the Reconstruction Amendments overrode the precise holdings of *Dred Scott*, it was not until 1948 that America rejected its premises about military service and not until 1967 that America renounced its assumptions about marriage. Just as Ken Karst has argued that military service has been an important gateway to full citizenship for Americans of color, women, and gay people,⁸¹ even more fundamental has been progress in eliminating discriminatory treatment of racial minorities, women, and gay people in American family law.

The repeal of Don't Ask, Don't Tell undercut DOMA in some very specific ways as well. During the Defense Department's Working Group deliberations, Colonel James Clapsaddle argued that once gays were "our men

the imperative that a democratic system of government be responsive to criticism and calls for political change").

⁷⁷ See U.S. DEP'T OF DEFENSE, *supra* note 75, at 3.

⁷⁸ See Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (Dec. 22, 2010).

⁷⁹ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 416 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

⁸⁰ *Id.* at 415, 420.

⁸¹ See Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 545-81 (1991) (drawing on the history of desegregation in the armed forces to discuss the exclusion of gay men and lesbians from the armed forces).

and women,” DOMA had to go.⁸² The top brass wanted all soldiers to enjoy the same rights and responsibilities of citizenship. Additionally, the military exclusion was an occasion for an astounding show of GOP support for gay rights. Ken Mehlman (former Chairman of the Republican National Committee) came out as gay and worked hard for the repeal, after which he put the Gill Action Fund into contact with several GOP mega-donors for the marriage cause.⁸³ Eight Republican senators (all lobbied by Mehlman) voted for the Don’t Ask, Don’t Tell repeal.⁸⁴

The repeal of the military exclusion also undermined the credibility of the Pandora’s box argument against marriage equality: if you redefine marriage, you will unleash untold demons and evil consequences. Pandora’s box was the only argument left against repealing Don’t Ask, Don’t Tell. In March 2009, a statement ultimately signed by 1,167 retired generals and admirals predicted that gays in the military would “break” the all-volunteer armed forces by crippling recruitment, retention, and cohesion.⁸⁵ Yet when the President pronounced the final demise of the exclusion on September 21, 2011, few even noticed. Two verifiable resignations (chaplains) resulted from the new policy, and the most thorough study of the effects found zero impact on military recruitment and retention and no net change in perceived unit cohesion.⁸⁶ In 1993, Pandora’s box fears had been pervasive: the mere presence of the open homosexual might frighten away recruits, render young soldiers hysterical, and destabilize the barracks.⁸⁷ In 2011, Pandora actually opened the box, and nothing came out. This was a big moment in the normalization of gay people, much as President Truman’s racial desegregation of the armed forces helped integrate people of color into the body politic.

V. ATTORNEY GENERAL HOLDER’S LETTER OF FEB. 23, 2011

Lawsuits by the LGBTQ+ movement groups forced the Obama Administration to take public actions informed by the equal citizenship precept that had driven the repeal of the military exclusion. Throughout 2010,

⁸² Wolff Interview, *supra* note 9.

⁸³ Telephone Interview with Ken Mehlman, former Chair, Republican National Committee (March 8, 2019).

⁸⁴ See Final Vote Results for Roll Call 281, CONGRESS.GOV, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=2&vote=00281 [<https://perma.cc/4NTR-2EJD>].

⁸⁵ See Aaron Belkin et al., *Readiness and DADT Repeal: Has the New Policy of Open Service Undermined the Military?*, 39 ARMED FORCES & SOC’Y 587, 588 n.3 (2013).

⁸⁶ See AARON BELKIN ET AL., PALM CENTER, ONE YEAR OUT: AN ASSESSMENT OF DADT REPEAL’S IMPACT ON MILITARY READINESS 4-5 (2012).

⁸⁷ P.W. SINGER, BROOKINGS INSTITUTE, HOW *THE REAL WORLD* ENDED DON’T ASK, DON’T TELL 4-5, 8-10 (2008), https://www.brookings.edu/wp-content/uploads/2016/06/o8_military_singer.pdf [<https://perma.cc/2DUN-T3KG>].

White House Counsel Bob Bauer almost on a daily basis briefed the President on legal issues, including the status of the DOMA lawsuits, his and DOJ's thoughts on the level of scrutiny that ought to be applied, and the suggestion that the executive branch ought to enforce but refuse to defend DOMA.⁸⁸ President Obama, the former professor of constitutional law, understood all the arguments and said nothing to discourage counsel from the course being developed by the White House Counsel and DOJ.

On July 8, 2010, District Judge Joseph Tauro issued twin rulings that DOMA's denial of federal marriage or spousal rights violated both the Fifth Amendment's equality guarantees and the federalism limitations on Congress's authority to regulate.⁸⁹ Because its federalism holding threatened other congressional programs and laws, the government would definitely appeal the latter ruling. Whether to appeal Judge Tauro's decision in *Gill* (the GLAD challenge) was a more contentious matter. Normally, the Solicitor General makes such a decision, but this was a matter on which other divisions of the department weighed in as well.⁹⁰

Viewing *Gill* through the prism of human rights and equal citizenship, the Civil Rights Division argued against taking an appeal in *Gill* or (if an appeal were taken) supporting strict scrutiny for sexual orientation-based exclusions. They argued that there was an exception to the duty to defend where federal law disrespected and treated an honorable minority as outcasts (what might be called a *Dred Scott* exception). As the only federal official with a national mandate and an accountability to all the people, the President not only was free to abandon class-based laws, but ought to do so.⁹¹ The Office of the Solicitor General took the opposite point of view, namely, a strong duty to defend—essentially the “Sarah Palin argument.” They also did not want to expand heightened scrutiny, even for a good cause. Only once in recent history had DOJ argued for courts to upgrade scrutiny from rational basis to heightened scrutiny, and that was John Roberts' brief for the United States in *Metro Broadcasting*, not a precedent they wanted to build on. The Civil Division was internally divided, but most of its lawyers believed that strict scrutiny would not be appropriate in the First Circuit, where precedent tied the judges to the position that discrimination against gay people only

⁸⁸ Interview with Bob Bauer, former White House Counsel, in Washington, D.C. (May 18, 2017).

⁸⁹ *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 377 (D. Mass. 2010); *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234, 249-251 (D. Mass. 2010). The decisions were consolidated for purposes of appeal and both affirmed in *Massachusetts v. United States Department of Health & Human Services*, 682 F.3d 1, 17 (1st Cir. 2012).

⁹⁰ The account that follows is based upon my off-the-record interviews with Department of Justice officials.

⁹¹ See Johnsen, *The Obama Administration's Decision to Defend Marriage Equality Rather than the Defense of Marriage Act*, *supra* note 61, at 608-09.

required a rational basis. For that reason, and perhaps others, Attorney General Eric Holder authorized an appeal in *Gill* as well as in the DOMA case brought by Massachusetts.

On January 13, 2011, the Department filed its appellate brief in its appeal of Judge Tauro's DOMA rulings. The Department argued that Congress could rationally have concluded that DOMA (1) preserved a national status quo at the federal level, while states engage in a period of experimentation, (2) created a consistent and easy-to-administer statutory interpretation rule, and (3) respected the authority of each state to choose its own course.⁹² These justifications all boiled down to "administrative convenience"—an interest everyone realized would not meet any kind of heightened scrutiny.⁹³

On November 9, 2010, two new DOMA challenges were filed in the Second Circuit, where the level of scrutiny question was still open. Robbie Kaplan, working with the ACLU, filed *Windsor v. United States* in New York federal court; Mary Bonauto and GLAD filed *Pedersen v. Office of Personnel Management* in Connecticut federal court.⁹⁴ By then, White House Counsel Bob Bauer (based on Team Gay's research) was telling the President that sexual orientation ought to be a suspect classification, that DOMA was unconstitutional, and that the administration should enforce DOMA until the Supreme Court ruled it unconstitutional. Bob Bauer was also meeting weekly with Eric Holder, so DOJ was aware that White House Counsel and, probably, the President were prepared to abandon DOMA in the Second Circuit. In the fall of 2010, the President met with gay bloggers who took him to task for opposing marriage equality; Obama responded, "Attitudes evolve, including mine."⁹⁵

After the filing of the Second Circuit lawsuits, the Attorney General asked the relevant divisions what stance the Department should take in a circuit that had not determined whether sexual orientation discrimination merited heightened scrutiny. The Civil Rights Division weighed in with a detailed memorandum arguing that sexual orientation easily met the criteria for heightened scrutiny. OLC strongly supported Don't Defend, Do Enforce. In a conference call with Tony West, attorneys in the Civil Division reached a rough consensus that the Constitution required heightened scrutiny of

⁹² Brief for Appellants, *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012)(No. 10-2204), quoted in Joe Siegel, *DOJ Files Opening Brief in DOMA Lawsuit*, RAINBOW TIMES (Jan. 19, 2011) <http://www.therainbowtimesmass.com/doj-files-opening-brief-in-doma-lawsuit/> [<https://perma.cc/DE4Z-5PY6>].

⁹³ Interview with Stuart Delery, former Assistant Attorney Gen., Civil Div., Dep't of Justice, in Washington, D.C. (Sept. 2, 2016).

⁹⁴ See Complaint at 1, *Windsor v. United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2011) (No. 1:10CV08435), 2010 WL 5647015; Complaint at 1, *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294 (D. Conn. 2012) (No. 3:10CV01750), 2010 WL 4483820.

⁹⁵ FRANK, AWAKENING, *supra* note 31, at 257.

sexual orientation discriminations. Acting Solicitor General Neal Katyal and Deputy Edwin Kneedler carried the flag for the Meltzer position and stood virtually alone against the emergent consensus against defending DOMA. Although the Attorney General hosted a conference call with the various divisions and offices in late January 2011, the result was all but predetermined: Don't Defend, Do Enforce. As Holder knew, the White House was in agreement.

On February 23, 2011, Attorney General Holder delivered a letter to House Speaker John Boehner. The letter informed Congress that *Windsor* and *Pedersen* required the Department to litigate in a circuit that had no precedent requiring only rational basis scrutiny for discriminations based on sexual orientation. "After careful consideration, including review of my recommendation, the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny." Accordingly, "the President has also concluded that Section 3 of DOMA, as applied to legally married same-sex couples, fails to meet that standard and is therefore unconstitutional."⁹⁶ For this reason, the Department was not going to defend DOMA, but agencies would "continue to comply with Section 3 of DOMA, consistent with the Executive's obligation to take care that the laws be faithfully executed, unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law's constitutionality."⁹⁷ There was some partisan objection, but there was much more support or acquiescence than opposition. For the first time in its polling on the issue, the Gallup Poll found in early 2011 that a majority of Americans supported marriage equality, 53% to 45%.⁹⁸

On April 9, 2011, the House of Representatives' Bipartisan Legislative Advisory Group (BLAG) voted along party lines (three Republicans versus two Democrats) to defend DOMA. BLAG retained former Solicitor General Paul Clement to defend DOMA. Intervening in the First, Second, and Ninth Circuit cases, BLAG opposed heightened scrutiny and argued that DOMA was a rational response to problems of statutory administration in the face of changing state law and could also be justified as encouragement of responsible

⁹⁶ Letter from the Eric Holder, Attorney General to John A. Boehner, Speaker, House of Representatives 3 (Feb. 23, 2011), <https://www.justice.gov/opa/pr/letter-attorney-general-congress-litigation-involving-defense-marriage-act> [<https://perma.cc/KP39-HNH6>].

⁹⁷ *Id.* at 4.

⁹⁸ Frank Newport, *For First Time, Majority of Americans Favor Legal Gay Marriage*, GALLUP (May 20, 2011), <https://news.gallup.com/poll/147662/first-time-majority-americans-favor-legal-gay-marriage.aspx> [<https://perma.cc/7NBK-HKGQ>].

procreation.⁹⁹ On February 22, 2012, Judge Jeffrey White rejected those arguments in *Golinski v. United States Office of Personnel Management*.¹⁰⁰

VI. THE PRESIDENT COMES OUT FOR MARRIAGE EQUALITY

In the wake of the Holder Letter, progressives stepped up the pressure on President Obama to complete his “evolution” from civil unions to full marriage equality. Indeed, now that the President had officially adopted the position that discrimination against lesbian, gay, and bisexual persons and couples ought to be subject to strict scrutiny and had applied that reasoning to DOMA, how could he deny that state junior-DOMAs, many of which were more sweeping in their anti-gay discrimination, were unconstitutional? In my view, the die was cast after the Holder Letter became public—but the campaign team insisted that the President not complete his evolution until after the election.

On July 27, 2011, Joel Benenson, the Obama campaign’s lead pollster, and Jan van Lohuizen, the lead pollster for George W. Bush, discussed the polls showing the majority of Americans supporting marriage equality with the media at the National Press Club.¹⁰¹ The pollsters had never seen such a rapid volte-face on this kind of divisive social issue. They pointed out that this boom reflected across-the-board increases in support from every age group, religion, party, and income category.¹⁰² Also, “supporters of marriage for gay couples feel as strongly about the issue as opponents do, something that was not the case in the recent past.”¹⁰³ The rise in the poll numbers would very probably continue, “[a]s Americans currently under the age of 40 make up a greater percentage of the electorate.”¹⁰⁴

⁹⁹ *E.g.*, Brief of Intervenor-Appellant Bipartisan Advisory Group, U.S. House of Representatives at 39-53, *Massachusetts v. U.S. Department of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012) (Nos. 10-2204, 10-2207, 10-2214), 2011 WL 4539095 (BLAG’s administrative and responsible procreation arguments, developed in detail).

¹⁰⁰ *See* 824 F. Supp. 2d 968, 990-95 (N.D. Cal. 2012) (rejecting the administrative convenience and responsible procreation justifications advanced in the Superseding Opposition of the U.S. House of Representatives to Plaintiffs’ Motion for Summary Judgment, at 20-25, *Golinski*, 824 F. Supp. 2d 968 (No. C 10-00257 JSW), 2011 WL 5119769).

¹⁰¹ *See* Memorandum from Joel Benenson & Jan van Lohuizen to Interested Parties (July 27, 2011) (on file with *University of Pennsylvania Law Review*) (describing polls reflecting increased support for marriage equality). For accounts of the briefing, see Ruth Marcus, *Same-Sex Unions, a Political Plus*, WASH. POST, Dec. 9, 2011, at A25; Marc Solomon, *Secrets of Obama’s Evolution: The Inside Story of How the President Backed Gay Marriage*, SALON (Nov. 28, 2014), https://www.salon.com/2014/11/28/secrets_of_obamas_evolution_the_inside_story_of_how_the_president_backed_gay_marriage/ [<https://perma.cc/4VRX-AU89>].

¹⁰² *See* Benenson & Lohuizen Memorandum, *supra* note 101, at 3.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

The nineteen red or blue states in Figure 1, where same-sex relationships were recognized in some way, were states where President Obama was strongly favored to win in his 2012 reelection effort—but those states would not be enough to prevail in the Electoral College. The President needed to win states like Pennsylvania and Michigan, whose electorate remained intensely divided on the marriage issue. Campaign Manager Jim Messina and other political advisers strongly preferred that any presidential conversion on the marriage issue come after the election. In February, acting on an idea hatched by its political director Marc Solomon, Freedom to Marry launched a “Democrats: Say I Do” campaign.¹⁰⁶ House Minority Leader Nancy Pelosi was among the first to take the pledge: “We support the full inclusion of all families in the life of our nation, with equal respect, responsibilities, and protections under the law, including the freedom to marry”¹⁰⁷ The White House was okay with a platform that went further than the President was willing to go but was sticking with the timeline suggested by the political team.¹⁰⁸

On Friday May 4, 2012, Vice President Joe Biden taped a segment of *Meet the Press* that would air the following Sunday. Although his preparation had focused almost exclusively on the economy, gay families were on his mind. In April 2012, he had appeared at a Los Angeles fundraiser held at the home of a gay couple raising two children, ages four and seven.¹⁰⁹ “I wish everybody could see this,” the Vice President gushed to the donors.¹¹⁰ “All you got to do is look in the eyes of those kids. And no one can wonder, no one can wonder whether or not they are cared for and nurtured and loved and reinforced.”¹¹¹ He continued: “Things are changing so rapidly, it’s going to become a political liability in the near term for an individual to say, ‘I oppose gay marriage.’ Mark my words.”¹¹²

Nonetheless, the Vice President’s staff were caught entirely off guard when he launched into a discussion of marriage during his *Meet the Press* taping. As Biden put it, marriage was very simple: “Who do you love? And will you be loyal to the person you love? [That is] what all marriages, at their root, are about. Whether they’re marriages of lesbians or gay men or heterosexuals.”¹¹³ Host David Gregory followed up: “And you’re comfortable

¹⁰⁶ Solomon, *supra* note 101.

¹⁰⁷ *Id.*; ELEVELD, *supra* note 15, at 241-43.

¹⁰⁸ The judgment in text is based upon off-the-record conversations with the Vice-President’s staff and with White House officials.

¹⁰⁹ JO BECKER, *FORCING THE SPRING: INSIDE THE FIGHT FOR MARRIAGE EQUALITY* 285 (2014).

¹¹⁰ *Id.* at 286.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Meet the Press* (NBC television broadcast May 6, 2012); *see also* *May 6: Joe Biden, Kelly Ayotte, Diane Swonk, Tom Brokaw, Chuck Todd*, TRANSCRIPTS ON MEET THE PRESS (May 6, 2012, 12:57

with same-sex marriage now?”¹¹⁴ The Vice President opined: “I am absolutely comfortable with the fact that men marrying men, women marrying women, and heterosexual men and women marrying one another are entitled to the same exact rights, all the civil rights, all the civil liberties.”¹¹⁵ After a bit of rambling, Biden closed with the joy he felt in Los Angeles. “I wish every American could see the look of love those kids had in their eyes for [their two dads]. And they wouldn’t have any doubt about what this is about.”¹¹⁶

The standard story line is that this was another example of Joe Biden’s lovable-but-aggravating spontaneity,¹¹⁷ but sources close to the Vice President believe that Biden’s remarks were far from a goofy gaffe.¹¹⁸ Instead, this was the Vice President’s sincere expression of a long-considered public policy position and a gambit calculated to turn up the heat on the President. The most politically experienced person in the Obama Administration, Joe Biden was certain that the marriage issue would energize the President’s base of support, with negative reactions confined to voters who would not have voted for him in the first place. Although the presidential campaign team did not see matters that way, the DNC politely informed them that there was no walking back the Vice President’s confession. Apparently, Barack Obama reacted more mildly than his protective campaign officials. He joshed that Joe had “gotten ahead of his skis” on this issue but also seemed relieved. The White House arranged a television interview with Robin Roberts, the charismatic host of *Good Morning America*, for Wednesday, May 9, 2012.¹¹⁹

Barack Obama offered his own journey story. “I had hesitated on gay marriage, in part, because I thought civil unions would be sufficient. . . . I was sensitive to the fact that, for a lot of people . . . the word marriage was something that evokes very powerful traditions, religious beliefs, and so

PM), http://www.nbcnews.com/id/47311900/ns/meet_the_press-transcripts/t/may-joe-biden-kelly-ayotte-diane-swonk-tom-brokaw-chuck-todd/#.XL9JsqfMywQ [https://perma.cc/4T9K-QM66] [hereinafter Meet the Press Transcript].

¹¹⁴ Meet the Press Transcript, *supra* note 113.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ See Chris Cillizza, *The Amazing Honesty of Joe Biden*, WASH. POST (Sept. 10, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/09/10/the-amazing-honesty-of-joe-biden/?noredirect=on&utm_term=.3ffiac4dfe4 [https://perma.cc/9FL7-PS8F] (depicting Biden as honest and “spontaneous,” but sometimes prone to gaffes).

¹¹⁸ The account in text is taken from the author’s off-the-record interviews with several Biden aides.

¹¹⁹ The interview closely followed the suggestions made in an email from Bush’s 2004 Campaign Manager Ken Mehlman to Obama’s 2012 Campaign Manager David Plouffe, Nov. 10, 2011. See Email from Ken Mehlman to William Eskridge (July 9, 2019, 3:25 PM) (on file with author).

forth.”¹²⁰ But this was not a stable belief. Over several years, Obama discussed the issue with friends, family, and coworkers, some raising children within their relationships or marriages.¹²¹ He contemplated the gay soldiers, laying down their lives for their country, yet “constrained” by the fact that they could not get married like everyone else.¹²² “At a certain point, I’ve just concluded that, for me personally, it is important for me to go ahead and affirm that I think same-sex couples should be able to get married.”¹²³ The President emphasized the influence of his wife Michelle and his daughters Malia and Sasha. “You know, Malia and Sasha, they’ve got friends whose parents are same-sex couples. . . . [T]here have been times where Michelle and I have been sitting around the dinner table. And we’ve been talking about their friends and their parents. And Malia and Sasha, it wouldn’t dawn on them that somehow their friends’ parents would be treated differently.”¹²⁴

After the President’s compelling narrative, the Vice President was vindicated. Young and progressive voters were energized by the President’s support for marriage equality, and LGBTQ+ contributions poured into the campaign coffers.¹²⁵ The Republicans nominated Mitt Romney, who chose not to make marriage a major issue in the campaign. In November, not only did President Obama win a decisive reelection, but Ken Mehlman’s political analysts estimated that his support for marriage equality netted him 233,000 extra votes in the “battleground” states that he carried by just over 500,000 votes overall.¹²⁶ And, to the surprise of pundits, marriage equality advocates won popular votes in Maine, Minnesota, Maryland, and Washington.¹²⁷ The 2012 vote did not end deep differences of opinion about marriage equality, but it was a quasi-referendum on the issue that suggested majority endorsement or acquiescence at both the national and state levels (not all states, of course).

¹²⁰ Transcript: Robin Roberts ABC News Interview with President Obama, ABC NEWS (May 9, 2012), <https://abcnews.go.com/Politics/transcript-robin-roberts-abc-news-interview-president-obama/story?id=16316043> [<https://perma.cc/T899-36TK>].

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ CENTER FOR AMERICAN PROGRESS, ANALYSIS OF THE 2012 MARRIAGE CAMPAIGNS (2014).

¹²⁶ Memorandum from Alicia Downs & Alex Lundry, Target Point Consulting, to Project Right Side, 10 Key Data Points on Marriage Equality (Nov. 7, 2010) (analyzing marriage issue for Obama’s reelection).

¹²⁷ See CENTER FOR AMERICAN PROGRESS, *supra* note 125.

VII. UNITED STATES V. WINDSOR

The 2012 election gave a big boost to the Holder Letter advocating heightened scrutiny for and invalidation of DOMA's section 3. By then, there were appellate decisions in the First and Second Circuits invalidating section 3.¹²⁸ The Second Circuit decision in *United States v. Windsor* followed the Holder Letter to hold that sexual orientation classifications required heightened scrutiny, and then held that none of BLAG's justifications met that standard.¹²⁹ Both the United States and BLAG filed petitions for Supreme Court review in *Windsor* and the other cases.¹³⁰ The Court granted review for two questions in *Windsor*: Did the United States and/or BLAG have constitutional standing to seek review? Did DOMA violate the Fifth Amendment?¹³¹ On the same day, the Court granted review for *Hollingsworth v. Perry* and posed two similar issues: Did the initiative proponents have standing to appeal the lower court judgments invalidating Proposition 8? Did Proposition 8 violate the Fourteenth Amendment?¹³²

Committed to the principles and the doctrinal analysis embraced by the President, Solicitor General Don Verrilli, his deputy Sri Srinivasan, and Assistant Attorney General Stuart Delery (who worked with the Solicitor General on this issue) faced several puzzles. First, they would have to argue that the United States was harmed by the Second Circuit's judgment, even though it had closely followed the government's brief. Was it enough to say that the government was harmed because it would have to refund Edie Windsor's estate tax payment? Second, should the government hedge its bets on the merits by arguing that, even if the Supreme Court did not create a new (quasi-)suspect classification, the "more searching scrutiny" required by *Romer v. Evans* (1996) would also be fatal to DOMA, which was saturated with the same kind of anti-gay "animus" that was found in the Colorado initiative invalidated in *Romer*? The centerpiece of the Solicitor General's brief was the case for heightened scrutiny, but it also made the *Romer*

¹²⁸ *United States v. Windsor*, 699 F.3d 169, 188 (2d Cir. 2012); *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 15 (1st Cir. 2012).

¹²⁹ *Windsor*, 699 F.3d at 185-88.

¹³⁰ Petition for Writ of Certiorari Before Judgment, *Office of Pers. Mgmt. v. Pedersen*, 570 U.S. 932 (2013) (No. 12-302), 2012 WL 3991479; Petition for Writ of Certiorari Before Judgment, *Office of Pers. Mgmt. v. Golinski*, 570 U.S. 931 (2013) (No. 12-16), 2012 WL 2586938; Petition for Writ of Certiorari, *U.S. Dep't of Health & Human Servs. v. Massachusetts*, 570 U.S. 931 (2013) (No. 12-15), 2012 WL 2586937; Petition for Writ of Certiorari Before Judgment, *United States v. Windsor*, 568 U.S. 1066 (2012) (No. 12-63), 2012 WL 2904038. *See also* Brief for the United States, *Windsor*, 586 U.S. 1066 (No. 12-63), 2012 WL 3838138 (urging the Court to take review in the First and Ninth Circuit cases and to hold the Second Circuit cases).

¹³¹ *Windsor*, 568 U.S. at 1066.

¹³² *Hollingsworth v. Perry*, 568 U.S. 1066 (2012).

argument, the first time the federal government had recognized “rational basis with bite” at the Supreme Court.¹³³

The thorniest puzzle was whether to file an amicus brief in *Perry*. Heightened scrutiny for marriage exclusions under the Fifth Amendment (*Windsor*) would automatically carry over to the Fourteenth Amendment (*Perry*), which would be fatal for all the remaining state DOMAs. But a *fifty-state solution* for *Perry* might undermine the government’s chances for sweeping away DOMA in *Windsor*. The government was doubtful that the Court would be willing to require nationwide marriage equality in 2013. Hence, their amicus brief in *Perry* argued for an *eight-state solution*: Under heightened scrutiny, the eight states (like California) that gave all or most marital benefits to same-sex couples through comprehensive civil union or domestic partnership laws were in an especially weak position, because they were endorsing gay relationships as a policy matter but formally giving them second-class status.¹³⁴ If the Court reached the merits in *Perry*, it could write a narrow opinion.

As the foregoing discussion reflects, presidential constitutionalism not only includes strategic considerations, but it will be subject to the institutional preferences of the other branches of government. At oral argument and in conference for the two cases, the Justices showed little interest in recognizing a new (quasi-)suspect classification. The Chief Justice had his way in *Perry*, where he cobbled together an odd majority (Scalia, Ginsburg, Breyer, and Kagan) for an opinion dismissing the appeal for lack of Article III standing for the Proposition 8 proponents.¹³⁵ In *Windsor*, the Chief Justice lost his Article III majority, and the government’s alternative argument, grounded upon *Romer*, prevailed. Justice Kennedy’s opinion for a 5-4 Court found that the United States had constitutional standing and that DOMA’s section 3 violated the Fifth Amendment.¹³⁶ At oral argument, Verrilli had maintained that DOMA was generated by “moral disapproval” of homosexuality, to quote the June 1996 House Judiciary Committee’s report, as well as floor statements by the sponsors.¹³⁷ “This is discrimination in its most very basic aspect,” deeply inconsistent with the equal treatment of the

¹³³ Brief for the United States on the Merits Question at 51-53, *United States v. Windsor*, 570 U.S. 744 (2013) (No. 12-307), 2013 WL 683048.

¹³⁴ Brief of the United States as Amicus Curiae in Support of Respondents at 9-12, *Hollingsworth v. Perry*, 570 U.S. 693 (2013) (No. 12-144), 2013 WL 769326.

¹³⁵ *Perry*, 570 U.S. at 700-01; see also Brief of Walter Dellinger as Amicus Curiae in Support of Respondents on the Issue of Standing at 2-3, *Hollingsworth*, 570 U.S. 693 (No. 12-144), 2013 WL 768643.

¹³⁶ *Windsor*, 570 U.S. at 763, 775.

¹³⁷ Oral Argument at 1:31:42, *United States v. Windsor*, 570 U.S. 744 (2013) (No. 12-307), https://www.oyez.org/cases/2012/12-307?TB_iframe=true&width=914.4&height=921.6 [<https://perma.cc/MD67-KVHN>].

law guaranteed by the Constitution.¹³⁸ With a lot of detours (such as an extended ode to family law federalism) and broad rhetoric, Kennedy's opinion pretty much rested upon this logic.¹³⁹

Under the supervision of Assistant Attorney General Delery, the Obama Administration implemented *Windsor* with a careful agency-by-agency process of incorporating same-sex marriages into statutory schemes.¹⁴⁰ In the process, Delery's team made important policy decisions, such as including marriages valid in the state of their celebration even if the couple lived in a non-recognition state. One decision had an immediate ripple effect on state marriage campaigns: the administration declined to treat civil unions or comprehensive domestic partnerships as marriages for purposes of *Windsor*, which meant that the seven remaining separate-but-equal state regimes were far from equal. (California converted to marriage equality immediately after *Perry*.) Like dominoes, all seven states converted to marriage within a year of *Windsor*—three by constitutional court decisions¹⁴¹ and four by statute.¹⁴² By means of the plan for implementing *Windsor*, the Obama Administration, with the support of LGBTQ+ litigators and lobbyists, secured the result that its *Perry* amicus brief had advocated: any state that considered lesbian and gay unions entitled to the legal benefits of marriage had to give them the name as well.

VIII. OBERGEFELL V. HODGES

Justice Scalia dramatically advanced the cause of marriage equality, for he provided the fifth vote to dismiss the appeal in *Perry* (which left the trial court's marriage equality mandate in place) and wrote a *Windsor* dissenting opinion carefully demonstrating that the majority's reasoning for striking down DOMA was, with minimal editing, easily applied to strike down state marriage exclusions everywhere.¹⁴³ "By formally declaring anyone opposed to same-sex marriage an enemy of human decency, the majority arms well every challenger to a state law restricting marriage to its traditional definition."¹⁴⁴

¹³⁸ *Id.* at 1:33:24.

¹³⁹ *Windsor*, 570 U.S. at 768 (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996)); *id.* at 770-71.

¹⁴⁰ See Delery Interview, *supra* note 93.

¹⁴¹ See *Burns v. Hickenlooper*, No. 14-CV-0187, 2014 WL 3634834 (D. Colo. July 23, 2014) (first licenses issued July 10, 2014); *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128 (D. Or. 2014) (first licenses issued May 19, 2014); *Garden State Equality v. Dow*, 82 A.3d 336 (N.J. Super. Ct. Law Div.), *stay denied*, 79 A.3d 1036 (N.J. 2013) (first licenses issued October 21, 2013).

¹⁴² Civil Marriage Equality and Religious Freedom Act of 2013 § 1, 79 Del. Laws 19 (first licenses issued July 1, 2014); Hawaii Marriage Equality Act of 2013 § 2, 2014 Haw. Sess. Laws 1 (2013) (first licenses issued December 2, 2013); Religious Freedom and Marriage Fairness Act, Pub. Act 98-597, Ill. Laws 7141 (2013); (first licenses issued June 1, 2014); Act of May 2, 2013, ch. 5 § 1, 2013 R.I. Pub. Laws 15 (first licenses issued August 1, 2013).

¹⁴³ See *Windsor*, 570 U.S. at 799-800 (Scalia, J., dissenting).

¹⁴⁴ *Id.* at 800.

In January 2015, the Court did take review of the first post-*Windsor* court of appeals decision rejecting marriage equality claims. Although almost everyone expected the Court to require nationwide marriage equality in *Obergefell*, the oral argument on April 28, 2015 gave the Obama Administration one more star turn. At the conclusion of Mary Bonauto's oral argument for the challengers, a man with crazy white hair stood up and bellowed, "If you support gay marriage, you will burn in hell!" Even after he was removed from the courtroom, you could hear his screams of damnation from the marbled hallway.¹⁴⁸

Unfazed by the homophobic outburst and by Justice Scalia's crack that it was "refreshing," Solicitor General Verrilli calmly answered the primary argument raised by the states, that the redefinition of marriage should be left to the political process.¹⁴⁹ Inspired by a conversation he had with the President in the Oval Office, Verrilli advised that if the Court ruled that the constitutional claims should be left to the political process, it was saying that gay people's second-class citizenship was consistent with the equal protection of the law. "That is not a wait-and-see. That is a validation."¹⁵⁰ The Court had rejected the same wait-and-see argument in *Lawrence*, which was "an important catalyst that has brought us to where we are today. And I think what *Lawrence* did was provide an assurance that gay and lesbian couples could live openly in society as free people and start families and raise families and participate fully in their communities without fear."¹⁵¹ Many of us in the courtroom felt like standing and applauding. Given the fate of the man with the crazy white hair, no one did that, but you could hear snuffles and sobs throughout the courtroom.

On June 26, 2015, a 5-4 Supreme Court ruled that the four state marriage exclusions (and implicitly those of the other states) violated the Fourteenth Amendment.¹⁵²

IX. THE POWER AND LIMITS OF PRESIDENTIAL CONSTITUTIONALISM

One lesson of the foregoing account is the interconnection among the various forms of administrative constitutionalism outlined at the beginning

¹⁴⁸ See Oral Argument at 27:09, *Obergefell*, 135 S. Ct. 2584 (No. 14-556), <https://www.oyez.org/cases/2014/14-556> [<https://perma.cc/7MLP-HNLH>]. The author attended the *Obergefell* oral argument and sat a few rows in front of the man with the crazy white hair.

¹⁴⁹ *Id.* at 28:28.

¹⁵⁰ *Id.* at 28:51.

¹⁵¹ *Id.* at 30:22.

¹⁵² *Obergefell*, 135 S.Ct. at 2602-08.

of this article. Throughout President Obama's tenure—Team Gay's deliverables, the DOJ and White House deliberations, and Delery's implementation of *Windsor*—the executive department was integrating its small “c” constitutional vision of step-by-step equal citizenship for sexual and gender minorities with the Large “C” Constitutional arguments suggested by established doctrine and with the text and purposes of the great federal statutory schemes, including social security, the tax code, veterans benefits, and federal employment law. In my view, this is typical of administrative constitutionalism generally: executive officials normally approach big questions framed by their understandings of the nation's fundamental commitments, the duties imposed by the Constitution, and the grand purposes of the relevant statutes (and super-statutes).

Another lesson is the interaction of substance and procedure. The Obama Administration had a substantive theory of sexuality, gender, and equality but believed that the country was not ready for the full ramifications of that theory in 2009. The process by which the administration pressed the theory—a trial balloon here, a reinterpretation there, a new philosophy for DOJ briefs in the military and marriage exclusion cases—was important because it generated judicial, political, and popular feedback. LGBTQ+ leaders felt the administration was moving too slowly, and congressional Republicans felt it was moving too quickly, but the President wisely believed that the best process was one where he provided some extra push for the social movement and, importantly, created conditions for examination and falsification of the anti-gay stereotypes that held back support for equal rights. That is why Obama was wise to seek an end to the military ban first, for the reality of valorous gay soldiers demonstrated that LGBTQ+ people were contributing to society and the lack of negative consequences refuted beliefs that the sky would fall if “the gays” were promoted to equal citizenship.

The marriage narrative illustrates the potential power of presidential constitutionalism. It is most likely to be influential and robust under the following circumstances:

- The President articulates a principled constitutional vision that is well-grounded in a widely shared norm (equal treatment for all citizens) and produces interim and long-term consequences that are on the whole admirable (and far from the Pandora's box concerns raised by opponents).
- The administration uses its first-mover advantage to proceed deliberatively and cautiously, not pressing its ideas too far or too fast. Little experiments or trial balloons are useful strategies. Don't make a bold final move if it is likely to be successfully blocked.

- Using the bully pulpit and media advantages of the presidency, the executive branch seeks to persuade other institutions to follow its lead and citizens to consider its arguments and the consequences of its actions.

Conversely, presidential constitutionalism faces certain limits:

- If the small “c” constitutional principle is rotten or inconsistent with the nation’s traditions or imposes discernible and significant costs on society or ordinary Americans, it will be divisive and may engender bad reactions.
- Presidents cycle out of office after one or two terms (4–8 years), and the successor usually has a different set of priorities, sometimes vastly different. So there is plenty of room for presidential constitutionalism to cycle: the new President can unravel the policies of his/her/their predecessor. But when a presidential initiative becomes rapidly entrenched, subsequent occupants of the White House will not be inclined or successful in dislodging it. Still, they can use their own bully pulpit to cabin the consequences of the earlier innovation.
- Other branches of the federal government or the states might strongly resist, either immediately or after the next election. The debate engendered by resistance can sometimes help entrench the President’s initiatives, but if resistance finds resonance in people’s experience and values, it can prevail. As before, it makes a big difference whether the presidential initiative imposes immediate and significant costs on society.

Although President Obama’s successor could not have had more different values, constitutional and otherwise, it is notable that gays in the military and marriage equality are legacies that his successor has not tried to dislodge or even criticize. Unlike the Obama Administration’s immigration, environmental, and health care measures, which have been significantly rolled back, marriage equality has become entrenched, in part because it has helped a lot of families and seems to have harmed few if any Americans. On the other hand, the Trump Administration, through judicial appointments, executive orders, and agency actions, is carving out religious-based exceptions to the marriage equality principle. Even when successful in entrenching a public norm, presidential constitutionalism assures dynamic interpretation (including limiting precepts) for that norm across different administrations.

The fruits of presidential constitutionalism usually constitute the primary legacies of presidential administrations. Overall, the Obama White House was wise to choose marriage equality as one of its signature initiatives, because (1) there was a large and growing number of Americans, widely

dispersed throughout the country, who personally benefitted from recognition of LGBTQ+ marital families; (2) recognition of those marriages was not expected to be tangibly harmful to other Americans or costly to society; and (3) an impressive and well-funded collection of institutions and organizations were prepared to oppose significant curtailments like tigers protecting their cubs.

* * * * *