On DOMA, Real-World Arguments Could Sway the Supreme Court

By Ben W. Heineman Jr.

Eighty-three year old Edith Windsor stands outside a New York court of appeals in September. *United States v. Windsor* will be argued at the Supreme Court next week. (Reuters)

After the Supreme Court hears oral argument in the two same-sex marriage cases next week, it could issue a momentous ruling that gay marriage is a constitutional right in all 50 states -- or that it is not. But, the Court has left itself numerous more modest options to avoid such a sweeping ruling when it decides whether the California can outlaw same-sex marriage through a voter initiative or whether Congress can define "marriage" for all federal programs as "only a legal union between one man and one woman."

A good summary of the major legal choices available to the Court in the Proposition 8 and DOMA cases can be found at the venerable SCOTUSblog. So is a listing of the more than 50 friend of the court (amicus) briefs filed in the cases. In major cases like, the justices or their law clerks will often read these briefs from reputable amici -- many of whom can write at length on issues the main parties may be able to argue in just a few pages.
The analysis contained in some of these *amicus* briefs -- about federal programs historically using state law in defining marriage and about the adverse impact that same-sex marriage bans have in the military and in the workplace -- could play an important role in shaping a "moderate," compromise decision in support of gay marriage.

One plausible moderate outcome is that a 5-4 Court -- with Justice Anthony Kennedy, of course, as the swing vote -- would disallow the California gay marriage ban on narrow state-specific grounds, as did the federal appeals court below it. Or it could disallow the ban on technical, jurisdictional grounds (the Court asked for special briefing here), eschewing a broad ruling and leaving it up to the other states to determine the status of same-sex marriage.

And the Court could declare DOMA's federal definition of marriage unconstitutional, as federal courts have held and as the Obama Administration has argued. This moderate outcome would "nudge" constitutional law towards voiding bans on same-sex marriage *in certain settings* for now. But it would still leave lots of play in the political joints for states to continue debates about the definition of "marriage" under state law, as public opinion today trends towards acceptance of gay marriage. It would also leave the Court free to return to broader issues of constitutional right in the future, if necessary, as attitudes and laws (and the justices) change.

If it were to strike down DOMA, the Court (i.e., Justice Kennedy) could be influenced by discussions about the real world, including critical points emphasized in the amicus court briefs. Here are some key points from *amici* that could influence the justices toward a pro-same-sex marriage compromise.

### - Federal law has historically looked to state law for definitions of "marriage" in federal programs.

A brief filed by senior executive branch officials responsible for administering federal programs argues that DOMA unconstitutionally singles out same sex couples for separate treatment under federal programs that have, over the past century, deferred to state law definitions of "marriage." (Disclosure: I am one of the officials.) This is in keeping with our nation's long tradition of defining and regulating marriage at the state level.

The brief of ex-officials rebuts the contention of DOMA's proponents that the law promotes national uniformity. It notes that, with respect to marriage between men and women, state laws have great variation, which is reflected in the administration of federal laws. It also demonstrates that DOMA does not, as proponents claim, ease the Federal administrative burden, because departments and agencies are long accustomed to dealing with such variation. Having yet another classification for certain types of married couples would make matters more, not less, complicated.

This brief is important because, in striking down DOMA, the Federal Court of Appeals for the First Circuit held -- citing recent Supreme Court decisions -- that when a law intrudes into an area where state law has traditionally governed and discriminates against groups historically disadvantaged, then careful review of government interests is warranted.

Without getting into all the complexities of constitutional doctrine, this approach establishes the longstanding state role, the historical discrimination against gays, and DOMAs' quick passage with little legislative discussion of rationale -- all of which may well give Justice Kennedy a way to deal with this case. In doing so, he may be able to show his sympathies for same-sex marriage without adopting the most stringent constitutional review -- "strict scrutiny" -- which would invalidate virtually all state
restrictions on same-sex marriage.

- **DOMA undermines the core of the U.S. military's mission and culture, which is founded on family support for military personnel.** A brief filed by former Secretaries of Defense, other senior national security officials, and military commanders makes a powerful argument: The military’s leadership long ago concluded that supporting service members’ families is central to tactical effectiveness and strategic strength.

Following the repeal of "Don't Ask, Don't Tell," says the brief, "if the military is unable to give effect to marriages that are legal under state law, it will undermine the military's morale, readiness, cohesion, and effectiveness. It will also undermine the military’s significant efforts, particularly since the repeal of DADT, to recruit and retain gay and lesbian individuals to ensure that service members are drawn from the full pool of the best and brightest candidates."

By denying married same-sex partners numerous benefits, including healthcare, equal pay, educational assistance, and survivorship benefits, DOMA’s discrimination is, the brief argues, at odds with the core morale and mission of the military.

This brief is important because it presents the Court with a powerful national security argument: A Congressional Act that vitiates, without justification, long-standing military principles and military practices through discrimination against those lawfully married under state law should be declared unconstitutional.

- **DOMA injures core interests of employers and employees.** Briefs from more than 275 major businesses, business associations, and professional entities, and from organized labor, argue that DOMA injures business and labor and has no justification in states that recognize same-sex marriages.

For a conservative Court, the employer brief -- with its large number of prominent corporate signatories such as Apple, Aetna, Cisco, Citigroup, Exelon, Morgan Stanley, Pfizer, and Walt Disney -- may carry weight. It argues that DOMA’s effect in states with lawful gay marriage undercuts the fundamental tenet of workplace fairness: It imposes a compliance burden that doesn't achieve a social good like clean air but instead advances unfair discrimination. It impairs employer-employee relationships for key workers. And, ultimately, it requires actions that are contrary to the central corporate mission of attracting, retaining, and promoting the most talented work force possible.

The brief gives specific examples of how this disparate treatment of lawfully married employees who suffer discrimination under DOMA creates confusion and complexity for companies that are trying to integrate corporate, state, and federal human resources policies and laws.

Just as it is difficult to predict a Supreme Court result from oral argument, so it is difficult to say that friend of the court briefs will have any influence. But on an issue as hotly contested as same-sex marriage, it is certainly possible that this Supreme Court (that Justice Kennedy) will not wish to issue a decision that is binding in all cases (constitutional right or no constitutional right) -- a decision that either takes decisions away from the democratically elected branches at state and federal level or leaves the issue of same-sex marriage totally with them, curtailing judicial review of their actions.

The Court may well, with Justice Kennedy’s deciding vote, try instead, as noted, to find a middle, moderate ground. If so, the detailed, substantive positions of friends of the court could have real impact.
on a decision which rejects the anti-gay definition of marriage contained in DOMA.

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