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Commentary on Marriage Grants: Article III & Same-Sex Marriage

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CONTENT**

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SCOTUS for law students (sponsored by Bloomberg Law): When Justices express regrets – *Stephen Wermiel*

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Neal Devins and Tara Grove *Guest*

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Commentary on marriage grants: Article III & same-sex marriage

The blog is pleased to have commentary and analysis of Friday's grants in the marriage cases from supporters of both sides. This post has reactions from Neal Devins and Tara Grove, both Professors of Law at William and Mary.

When granting certiorari in the Defense of Marriage Act (DOMA) and Proposition 8 cases, the Justices rightly called into question whether certain petitioners were proper parties before the Court. In this post, we argue that the House Bipartisan Legal Advisory Group (BLAG) is not a proper party to defend DOMA. Likewise, we doubt that the proponents of Proposition 8 have standing to defend California's voter-approved ban on same-sex marriage. At the same time, we suspect that the Court will rule on the merits of both cases – something it can still do if it rules against the BLAG; something it cannot do if it finds the Proposition 8 proponents are without standing.

We start with DOMA. In February 2011, the Obama administration announced that it would enforce but not defend DOMA – leaving the act without an advocate to defend it in court. In March 2011, the House BLAG (which consists of five individuals – the Speaker, the majority and minority leaders, and the majority and minority whips) voted three to two to intervene in the case. The three Republican members of the BLAG, including House Speaker John Boehner, voted to defend DOMA; the BLAG's two Democrats, including minority leader and former Speaker Nancy Pelosi, opposed intervention. For its part, the Senate never considered participating in the DOMA litigation.

The DOMA example highlights two constitutional problems with the BLAG's role in defending federal statutes. First, the BLAG at best speaks for only one house of Congress. But when Congress acts, it must act in a bicameral way. The Constitution does not establish a single unified “Congress;” instead, it vests legislative powers in a Congress “which shall consist of a Senate and House of Representatives.” The two chambers of Congress are constitutionally designed to be in constant tension and competition with each other, so that they can serve as checks on one another (and/or on the President).

And while the House and Senate have evolved over the years, the two chambers still maintain distinct institutional cultures. The House is largely controlled by the majority party leadership, while the Senate (due to procedures like the filibuster) can generally take action only with bipartisan support. The BLAG reflects the norms of the House. Thus, the House majority leadership voted to defend DOMA over the vocal objection of minority leaders. Indeed, 132 House Democrats filed a July 2012 *amicus* brief arguing both that the DOMA is unconstitutional and that “the Bipartisan Legal Advisory Group . . . does not speak for a unanimous House on this issue.” The BLAG's own filings likewise acknowledge that it represents the views of the majority party, stating that although it “seeks consensus whenever possible, it functions on a majoritarian basis, like the institution it represents. The Senate, by contrast, enters litigation only when there is broad and bipartisan support within that chamber. Accordingly, whether the House BLAG represents only the majority party or the entire House, the BLAG cannot purport to speak for a “Congress” that acts bicamerally.

The BLAG's defense of statutes is constitutionally problematic for another reason. The Constitution carefully separates the executive and legislative functions to protect against the concentration of power in any one branch. Litigation over the meaning and constitutionality of a federal statute is a crucial part of the execution of federal law. After all, if a court invalidates a statute, the government can no longer enforce that law against future violators. Because the defense of federal statutes is an executive function, the House BLAG – an agent of Congress – cannot perform that function.

None of this is to say that the executive branch is required to defend every federal statute. We do not assert that the Obama administration – simply because it is enforcing DOMA – must defend it in court. One of us (Neal Devins along with Sai Prakash of the University of Virginia Law School) argues in a forthcoming *University of Chicago Law Review* essay that federal courts are without authority to order the executive (or any other party) to make arguments that they disagree with. Instead, federal courts should appoint *amici* to make arguments that the parties are unwilling to make. This practice is fairly routine. For example, earlier this week, the Supreme Court [appointed](#) an *amicus* to make arguments that the Department of Justice was no longer willing to make in a Federal Torts Claim Act case involving a prison sexual assault.

Notably, in the DOMA case (*United States v. Windsor*), the Justices can reject the BLAG's status as defendant-intervenor and still rule on the merits. There is an Article III case or controversy between the executive branch and Edith Windsor. Although the executive is not defending DOMA, it is enforcing the law; in this case, the executive mandated that Windsor pay a federal tax on the estate she inherited from her same-sex spouse. (If the federal government recognized Windsor's marriage, she would have been entitled to a spousal deduction.) The executive thereby injured Windsor and, in so doing, set the stage for a constitutional challenge. The Court therefore, in our view, properly granted the Solicitor General's certiorari petition and can resolve the concrete dispute between the executive and Windsor.

The Proposition 8 (*Hollingsworth v. Perry*) case bears certain similarities to the DOMA litigation. California Attorney General Kamala Harris (like her predecessor Jerry Brown) thinks the initiative unconstitutional and is unwilling to defend it in court. Moreover, just as the Obama Justice Department is urging that DOMA be invalidated, Harris is leading a nationwide effort of state attorneys general to draft a Supreme Court brief in support of same-sex marriage. And just as DOMA supporters in Congress are seeking to fill the void by intervening on behalf of the federal statute, proponents of the initiative likewise intervened to defend the measure against constitutional attack.

There is another similarity – namely, proponents of Proposition 8 may be without authority to defend the initiative in court. It is unclear what personalized injury the ballot sponsors suffer (that distinguishes them from other Californians who disapprove of same-sex marriage). Furthermore, in *Arizonaans for Official English v. Arizona* (1997), the Supreme Court questioned the Article III standing of initiative proponents. Specifically, although the Court did not rule on this issue, the Justices doubted that initiative proponents “have a quasi-legislative interest in defending the measure they successfully sponsored.”

Nevertheless, the issue here seems less clear than it is with the House BLAG. The California Supreme Court held that state law authorized the Proposition 8 proponents to defend the initiative, and (in the decision below) the Ninth Circuit held that such authorization was sufficient for Article III standing purposes. Although we have considerable doubts about whether such state authorization should be decisive for Article III standing, we recognize that there is room for debate on this issue.

In any event, we do not think that the Court will find that the Proposition 8 proponents lack standing. Unlike the DOMA litigation, such a ruling would deprive the Court of jurisdiction over the case. Indeed, such a ruling would also require the Court to vacate the Ninth Circuit’s narrow ruling against the initiative (because it would mean that the proponents lacked standing to appeal to that court), leaving in place the (far broader) district court decision holding that there is a constitutional right to same-sex marriage. More than that, it is unclear whether U.S. District Judge Vaughn Walker’s initial ruling against Proposition 8 would have statewide effects or, instead, might be binding only on the parties to that case (thus setting in motion new litigation challenging Proposition 8). Such a decision would be anything but heroic or historic; it would be a mess.

Windsor and *Perry* are likely to be two of the most important constitutional decisions in our lifetimes. If (as we suspect), the Court reaches the merits of each case, we believe it will advance the cause of same-sex marriage by invalidating both DOMA and Proposition 8. But, in our view, the Court’s jurisdictional rulings – on the power of a single chamber of Congress and private sponsors of ballot initiatives to defend federal and state measures – will also have important implications, informing the scope of the constitutional separation of powers at both the federal and state level.

Neal Devins is the Goodrich Professor of Law at William and Mary Law School; Tara Leigh Grove is a Visiting Associate Professor at Northwestern University School of Law & Associate Professor at William and Mary Law School. Professors Devins and Grove are working together on an article in which they contend that Congress lacks the power to defend federal statutes in court.

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