



Written by [Jack Kenny](#) on July 9, 2010

## Court Rules Defense of Marriage Act Unconstitutional

In what might be considered a bitter irony for conservatives, a U.S. District Court judge in Massachusetts used a state's rights argument in one of two cases yesterday in which he ruled the federal Defense of Marriage Act is unconstitutional.



The DOMA legislation, passed by Congress and signed by President Bill Clinton in 1996, defines marriage in federal law as a union between one man and one woman. In states like Massachusetts that have granted legal equality to same-sex marriages, the federal law denies benefits like Social Security survivors' payments and the right to joint filing of income taxes to partners in same-sex marriages. It also denies a partner in a same-sex marriage the right under federal law to have leave time from work to care for a sick spouse.

In a case brought by Massachusetts Attorney General Martha Coakley, Judge Joseph Tauro ruled the federal law requires Massachusetts to discriminate against its citizens in order to receive federal funds for some programs. More than 15,000 same-sex couples have been married in the Bay State since the state's legislature enacted a same-sex marriage law in 2004, following a ruling by the state's Supreme Court the previous year that the state's constitution requires a legal equality between same-sex and heterosexual marriages.

"This court has determined that it is clearly within the authority of the commonwealth to recognize same-sex marriages among its residents, and to afford those individuals in same-sex marriages any benefits, rights and privileges to which they are entitled by virtue of their marital status," Judge Tauro wrote.

In a separate ruling on a suit brought by the Gay and Lesbian Advocates and Defenders, Tauro ruled the denial of federal benefits to same-sex couples violated the equal protection clause in the 14th Amendment to the U.S. Constitution. The amendment, passed after the Civil War to protect former slaves and other African-Americans, stipulates that no state "shall deny to any person within its jurisdiction the equal protection of the law." Nearly a century later, it was the basis for the U.S. Supreme Court's 1954 finding that racially segregated schools are unconstitutional. Nothing in the history or the language of the amendment indicates it was intended to grant equality to same-sex marriage, something no state had legalized prior to the 21st century.

"Today the court simply affirmed that our country won't tolerate second-class marriages," said attorney Mary Bonauto, who argued the case for the Gay and Lesbian Advocates and Defenders. "This ruling will make a real difference for countless families in Massachusetts."



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Same-sex marriage has legal equality with heterosexual marriage in five states: Massachusetts, Connecticut, Iowa, Vermont, and New Hampshire. Maine had adopted a same-sex marriage law in May of 2009, but voters repealed it by referendum in November of the same year. In a referendum in California in 2008, voters adopted a ban on same-sex marriage, but a lawsuit is pending on the constitutionality of that law. Neither of the cases decided by Judge Tauro's ruling on Thursday involved challenges to the provision of the Defense of Marriage Act that absolves states from recognizing marriages performed in other states.

The U.S. Department of Justice argued in defense of DOMA when the Massachusetts cases were heard in May, even though President Obama had called for the law's repeal as a candidate for President in 2008. "This presidential administration disagrees with DOMA as a matter of policy," DOJ attorney Scott Simpson said at the time. "But that does not affect its constitutionality." But the Justice Department did not say whether it would appeal Thursday's decisions to the First Circuit Court of Appeals, which also has jurisdiction over New Hampshire, Maine, and Rhode Island. The department is reviewing the judge's decision, a spokesman said.

Yale Law Professor Jack Balkin told the *New York Times* he was certain Judge Tauro's rulings would be overturned if appealed. There is, he said, a longstanding federal involvement in issues relating to marriage in tax policy, welfare, Social Security, and other matters. And the two decisions contradicted each other, he said, since in the one case, the judge held that marriage was wholly a matter of state jurisdiction, while in the other he based his ruling on the federal Constitution.

"These two opinions are at war with themselves," Balkin said. By citing the 10th Amendment, which reserves to the states and to the people all powers not delegated to the national government, Judge Tauro was trying to hoist conservatives on their own petard, the professor said.

"You like the 10th Amendment? I'll give you the 10th Amendment. I'll strike down DOMA," said Balkin parodying the judge's decision. But Erwin Chemerinsky, the dean of the University of California, Irvine, School of Law, told the *Times* the two decisions worked together to ban discrimination against same-sex couples.

"The key issue in this case, and in all litigation about marriage equality for gays and lesbians, is, 'Does the government have a rational basis for treating same-sex couples differently from heterosexual couples?'" Chemerinsky said. "Here, the court says there is no rational basis for treating same-sex couples differently from heterosexual couples. Therefore, DOMA is unconstitutional, and conditioning federal funding on compliance with DOMA is unconstitutional."

Conservative opponents of same-sex marriage argue that the rational basis for regarding marriage as a union between a man and woman is well established in both legal tradition and human history. "The idea that a court can say that this definition of marriage that's been around forever is irrational is mind-boggling," said Chris Gacek, a senior fellow at the Family Research Council. "It's a bad decision."



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