

WebMemo



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Winning DOMA on the Merits of Marriage

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If Olympic medals were handed out for hubris, the Human Rights Campaign (HRC), a gay activist group, would be the clear favorite for the gold. Its ruthless effort to deprive the Defense of Marriage Act (DOMA) a top-notch defense in federal court has collapsed at the starting block. But this effort highlights the fact that the fight for traditional marriage is a fight for a popular institution that the nation urgently needs to preserve.

A Campaign of Intimidation. HRC's campaign at first appeared to succeed when the law firm King and Spalding announced on April 25 that it would no longer defend DOMA, the 1996 act of Congress that defines marriage as the union of a man and a woman and allows each state to protect its definition from the acts of other states. But that triumph proved short-lived when King and Spalding partner Paul Clement, a former solicitor general of the United States and the counsel of record for the House on DOMA, immediately resigned from the firm to continue DOMA's defense.

This development, however, was combined with news HRC surely did not expect: a near-unanimous condemnation of its tactics, and the ethics of King and Spalding, from across the political and legal spectrum. Even gay-marriage advocate Ted Olson and Supreme Court Justice Elena Kagan pointed to the poor precedent that would have been set if political intimidation had prevailed in this instance.¹ Many observers commented on the injustice that could occur in other situations where a law firm was pressured not to continue represent-

ing other “unpopular” clients, such as prisoners of war at Guantanamo Bay.

The point is well taken. Only a truly adversarial legal system has any claim of integrity. But much more is involved here than a single ethical lapse or public relations misstep.

The HRC's interference with a legal opponent's counsel is part of a larger campaign to silence opposition to the radical redefinition of marriage. This campaign is designed to intimidate advocates of traditional values and deny them a range of fundamental freedoms, including speech, religion, and conscience. In this strategy, portraying traditional marriage as “unpopular” facilitates aggressive political action to punish—personally and professionally—those who disagree with the radical activists.²

But the HRC's campaign commits yet another offense that too many in elite media and political circles reflexively pass along: It is a gross misrepresentation of reality. Such tactics are ugly when they are used against a minority. They are no prettier when used against the significant majority of Americans who, as the radicals might put it, “cling” to traditional ideas about the marital union.

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The Benefits of Marriage for Children and Society. Americans stand by marriage with good reason. Marriage is a pre-political institution based on the cooperation of the two sexes. Marriage is the very definition of a “popular” institution—it is *the one that makes a populace*. It is not surprising, therefore, that nearly all of the efforts by activist organizations to remake the definition of marriage have failed in the most populist institutions: the state and federal legislatures. It is likewise unsurprising that 63.6 percent of voters in 31 states have cast their ballots to preserve marriage’s timeless character. In an environment of intimidation, support for traditional marriage in the privacy of the voting booth is very likely to be higher than is reflected in more public forums like opinion polls.

An unelected judiciary has remained the alternative of choice for activist groups, because it is there that novel legal theories can be tested, driven by activist judges who believe—often mistakenly, as in Iowa last November—that they are beyond matters so trivial as the wisdom of the electorate. Even in the nation’s courtrooms, however, advocates for changing the definition of marriage have more often lost than won.³

The goods that marriage uniquely delivers merit it unique protection:

- Marriage captivates and orients the most elemental of human passions and orders them to something beyond the self. It attaches men and

women to one another and to their children and helps all of them to learn the tasks of nurturing and provision—the work of self-government that makes community possible and limits the need for the costly and never-complete repair work of government when families fracture.⁴

- Marriage recognizes that children fare best when they are raised by their biological mothers and fathers. This truth is upheld and reflected in public policies that encourage the contributions of both men and women to the raising of their own children. Free societies have devised numerous ways to support when families dissolve or fail to form—but none of these forms of assistance justifies the abandonment of the special character of marriage or the pretense that substitutes for it have been available for centuries, just waiting to be discovered. Few would genuinely dispute that the love of a mother and father for each other and any children they make is a cornerstone of human happiness.
- Children from intact families carry with them as adults a yearning to understand their heritage and connect with their ancestors. The most poignant family stories of our time are those involving children who have been unilaterally deprived of access to their own past.⁵

For Posterity’s Sake. Americans are a tolerant people desirous of living with their fellow citizens in concord and without unreasonable demands,

1. David Stout, “Kagan Lauds Clement for Integrity in DOMA Controversy,” *Main Justice*, May 2, 2011, at <http://www.mainjustice.com/2011/05/02/kagan-lauds-clement-for-integrity-in-doma-controversy/> (May 4, 2011). Kagan reportedly made the remarks praising Clement’s “integrity, professionalism, and honor” at a private reception and subsequently confirmed the accuracy of the recounted comments to a reporter at *The Washington Post*.
2. Thomas M. Messner, “From Culture Wars to Conscience Wars: Emerging Threats to Conscience,” *Heritage Foundation Backgrounder* No. 2543, April 13, 2011, at <http://www.heritage.org/Research/Reports/2011/04/From-Culture-Wars-to-Conscience-Wars-Emerging-Threats-to-Conscience>.
3. See Alliance Defense Fund, “The Alliance Defense Fund Helps Win More Than 4 of 5 Marriage Cases in America,” at <http://oldsite.alliancedefensefund.org/userdocs/Marriage%20Map.pdf> (May 4, 2011).
4. See Jennifer Roback Morse, “The Limited-Government Case for Marriage,” in “Indivisible: Social and Economic Foundations of American Liberty,” *The Heritage Foundation*, 2010, at http://thf_media.s3.amazonaws.com/2010/pdf/Ind.Ch9.Brooks.Currie.pdf (May 4, 2011).
5. See, for example, the Anonymous Us Project, which describes itself as “a safety zone for real and honest opinions about reproductive technologies and family fragmentation. We aim to share the experiences of voluntary and involuntary participants in these technologies, while preserving the dignity and privacy for story-tellers and their loved ones.” See also Elizabeth Marquardt, Norval D. Glenn, and Karen Clark, “My Daddy’s Name Is Donor,” *Commission on Parenthood’s Future*, May 31, 2010, at <http://familyscholars.org/my-daddys-name-is-donor-2/> (May 4, 2011).

public or private. But the public institution of marriage is one request that champions of the family make with the best reason of all: Millions of children are born each year in the United States without the benefits that married parents can uniquely confer on them. As the nation seeks to regain its economic and social footing, it is time not to blur

the meaning of marriage further but to rebuild it for the good of future generations.

This is the popular cause that DOMA, among other urgent measures, is needed to serve.

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