Toby's Home

Ramblings on the Law, Parenting, Equality, and other stuff

How can same-sex marriage not be gender-based classification?

Posted: April 9, 2013 | **Author:** tobyiceblueeyes | **Filed under:** Legal Eagle | **Tags:** Anthony Kennedy, California Proposition 8, California Supreme Court, Defense of Marriage Act, Equal Protection Clause, Intermediate scrutiny, Prop 8, Supreme Court | **Modify:** |14 Comments

Justice Kennedy… you know, that Justice who is known to be the swing vote on whose shoulders seems to rest most social justice issues that make it to the Supreme Court? Well, he asked a very pertinent question in the **Perry oral arguments** (on page 13):

JUSTICE KENNEDY: "Do you believe this can be treated as a gender-based classification?…It's a difficult question that I've been trying to wrestle with it."

It's a not-so-difficult but very important question I've been trying to wrestle with, too. Mostly I've been wrestling to get anyone to listen to my arguments.

In a **legal paper I wrote** I stated that gender-based discrimination is the best way to argue against **DOMA** & **Prop 8** since 1) all **Equal Protection** claims must be decided under either **heightened scrutiny** or **rational basis**, 2) gender-based classifications already receive heightened scrutiny, and 3) banning same-sex marriage is gender-based discrimination which is unconstitutional when decided under heightened scrutiny. But I argued my case by comparing bisexual people in same-sex and different-sex marriages. Apparently this confused all the gay and straight people.

To explain the legal argument in a little bit more depth:
1) Equal Protection claims are decided under either heightened (strict or intermediate) scrutiny or rational basis. Decisions based on heightened scrutiny are most likely to find a law unconstitutional. Decisions under rational basis are least likely find a law unconstitutional.
2) Gender-based classifications already receive intermediate scrutiny, unlike sexual-orientation classifications which are either undecided or rational basis depending on who you talk to. No decision needs to be made about what level of scrutiny to apply if decided as gender-based discrimination, and under intermediate scrutiny DOMA and Prop 8 are more likely to be found unconstitutional than under rational basis.
3) By comparing bisexual people in same-sex marriages to bisexuals in different-sex marriages it is easy to show that DOMA or Prop 8 "treats persons in similar situations differently on the basis of sex," not on the basis of sexual orientation. Treating people in similar situations differently on the basis of a

classification is the legal measure of violating "equal protection" of the laws.

Ok, so maybe it IS a difficult question to wrestle with. There are a few things to explain and a few connections to make. But it doesn't seem so difficult to answer. The answer, by the way, is YES. Defining civil marriage in the CA or US Constitution as "one man and one woman" is gender-based classification. And Justice Kennedy wouldn't have asked the question if he didn't think that the answer might be "yes".

So what did Cooper, the attorney for the Prop 8 proponents, have to say in response to Kennedy's question?

MR. COOPER: "We do not think it is properly viewed as a gender-based classification. Virtually every appellate court, State and Federal, with one exception, Hawaii, in a superseded opinion, has agreed that it is not a gender-based classification, but I guess it is gender-based in the sense that marriage itself is a gendered institution, a gendered term, and so in the same way that fatherhood is gendered [or] motherhood is gendered, it's gendered in that sense."

So… is Cooper saying it is gender-based or it isn't?

First, the Hawaii case Cooper cites is *Baehr*. *Baehr* was the first successful marriage case and the only case in which a state supreme court found an anti-same-sex marriage statute unconstitutional **on the basis of sex discrimination**. *Baehr* is the reason Congress created DOMA."Oh no! The gays are marrying! Run for your lives!"

It's a good thing Cooper said "virtually" or I would have been screaming out loud at him in the Starbucks in which I listened to the oral arguments… more than I already was. In Iowa's *Varnum* case the District Court also held **on the basis of sex discrimination**, but the Iowa state supreme court rejected that argument and found the statute unconstitutional on the basis of sexual orientation. Ok, so in *Varnum* it wasn't an appellate court, it was a District Court, I know. But still… Any excuse to rail at Cooper a little bit and make a fool of myself in Starbucks.

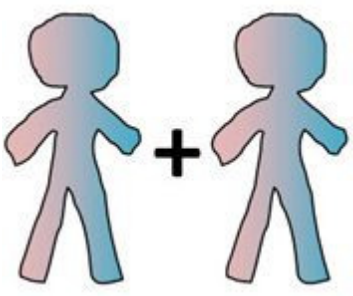
So Cooper admits marriage is gendered, and therefore Prop 8 is gendered, but says virtually every court has agreed that disallowing same-sex marriage is not gender-based classification. Every court, that is, except the highest court in the land – the "one ring to rule them all" – the court with the right to overrule all the others: The Supreme Court. Deciding Perry ("the Prop 8 case") and Windsor ("the DOMA case") as I write this. …I really hope one of them reads this. If there is a God, someone will forward this blog to one of Kennedy's clerks, and that clerk will be someone who understands what a bisexual is, and therefore why this argument makes sense.

The argument which starts with a bedtime story…

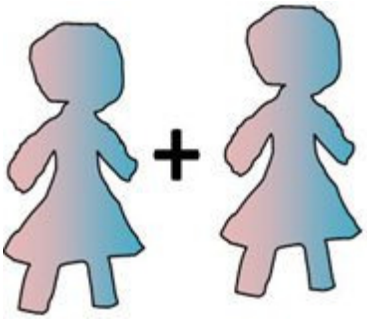
THE STORY –

Once upon a time there were four couples, similar in every way but one. They were all raising children, but none of the children were the biological offspring of both parents. They all had the same sexual-orientation. They all lived in and were legally married in California. Two of the couples consisted of spouses of different sexes, and those couples were treated as married by the federal government. The other two couples consisted of spouses of the same sex, and those couples were denied the rights and responsibilities of marriage by the federal government under the Defense of Marriage Act (DOMA).

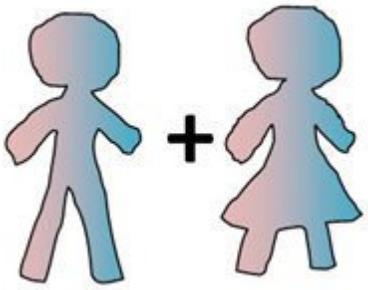
Chris and Ted are both male and both bisexual. They have one child, a son who is the biological offspring of Ted via a gestational surrogate and a separate egg donor. Both fathers were put on their



son's birth certificate at the hospital. The two were legally married in California prior to Prop 8 being passed. Chris and Ted have no federal marriage rights under DOMA.



Toby and Jean are both female and both bisexual. They have one child, a daughter who is the biological offspring of Toby, via a known donor. Jean adopted their daughter as soon as California's RDP stepparent adoption laws went into effect. The couple was married in California on July 19, 2008. Toby and Jean have no federal marriage rights.



Bryan and Kathleen are a male bisexual and a female bisexual. They were married on Dec 31st 2002. They received a full year of federal tax benefits for the one day in 2002 that they were married. They are raising Kathleen's niece and nephew as kinship guardians. They are not interested in procreating together. Both are politically active in the bisexual community. Bryan and Kathleen are able to take advantage of over 1,100 federal benefits of their California marriage.

Thomas and Gunilla are a male bisexual and a female bisexual, married in the state of California. They are raising two teenage daughters, both the biological offspring of Gunilla from a prior marriage. They are not interested in procreating together. Both are highly visible bisexual activists. They have been discriminated against as bisexuals in custody determinations. In spite of their very visible sexual orientation they are able to get full federal marriage rights.

THE ARGUMENT –

"Bisexual marriage" is perfect for advancing a sex discrimination argument because it allows us to compare persons of identical sexual orientation and see that the marriage laws are unconstitutional because they treat persons in similar situations differently on the basis of sex. This allows the argument to focus on sex discrimination rather than sexual orientation discrimination.

There are three primary ways the courts have addressed the marriage issue: strict scrutiny under a substantive due process fundamental right, some form of heightened scrutiny under equal protection based on sexual orientation, and the rational basis test.**[1]** The due process fundamental right to marriage argument is based on the tenet that "the right to marry means little if it does not include the right to marry the person of one's choice."**[2]** Some courts, however, have held that there is no fundamental right to "gay marriage," which they see as a completely different institution from "marriage". Fundamental rights tend to be found if grounded in history,**[3]** and although there is historical support for a right to marriage, there is no such history for same-sex marriage. Equal protection, on the other hand, tends to allow for rights which have historically been denied,**[4]** and is therefore a more winnable claim. The problem with arguing equal protection based on sexual orientation is that the Supreme Court has yet to settle on a level of scrutiny.**[5]** So far the Supreme Court has only been willing to apply rational basis to anti-gay laws. The problem with relying on rational basis is that it is a test that is so easy to pass that the state interest must be something as irrational as "animus" in order to fail.**[6]** It's not worth the risk.

Arguing equal protection based on sex discrimination is best because our jurisprudence has already clearly established that if a law treats persons in similar situations differently on the basis of sex, that law cannot pass constitutional muster unless it passes intermediate scrutiny.**[7]** Sex is a quasi-suspect

classification under existing law.**[8]** Stripping away the differences in sexual orientation and focusing on DOMA (or Prop 8, or any other "mini-DOMA") strengthens the sex discrimination argument. This allows the Court to avoid deciding whether sexual orientation is suspect and focus simply on whether the law treats persons in similar situations differently on the basis of sex, and whether that classification is substantially related to an important government interest.**[9]** This is an argument that is more inclusive of bisexuals and also much more likely to result in a win for marriage equality.

For more on this topic, read my paper: **"Bisexual Marriage": A Sex Discrimination Argument for Heightened Scrutiny of Same-Sex Marriage Bans** …particularly if you want to find out more details about how the *Loving v. Virginia* interracial marriage decision addresses the fact that DOMA affects men and women equally, **why LGBT groups don't want us to use the gender-based classification argument**, and how Justice Scalia's dissent in *Lawrence v. Texas* made the case for arguing a sex discrimination claim against DOMA and other marriage bans (topics on which I might write additional blog posts).

Footnotes:

[1] LGBT related cases have occasionally been decided on other bases, such as a First Amendment right to free speech, association, or religion. See Rowland v. Mad River Local School District, 470 U.S. 1009 (1985) (school district suspended guidance counselor after she made declarations of her bisexuality).

[2] "[T]he essence of the right to marry is freedom to join in marriage with the person of one's choice". Perez v. Sharp, 198 P.2d 17, 21 (Cal. 1948). See also Goodridge v. Dept of Public Health, 798 N.E.2d 941, 958 (Mass. 2003); Loving v. Virginia, 388 U.S. 1, 12 (1967).

[3] "The Due Process Clause looks backward and considers relevant whether an existing or time-honored convention… is violated by the practice in question." Justin Reinheimer, Same-Sex Marriage Through the Equal Protection Clause: A Gender-Conscious Analysis, 21 Berkeley J. Gender L. & Just. 213, 227-228 (2006).

[4] "However, the Equal Protection Clause looks forward, serving to invalidate practices that were [once] widespread… The two clauses there operate along different tracks … [the Equal Protection Clause] does not safeguard traditions; it protects against traditions, however long-standing and deeply rooted." Id.

[5] "[N]either [Iowa] nor the United States Supreme Court has decided which level of scrutiny applies to legislative classifications based on sexual orientation." Varnum, 763 N.W.2d at 885-886.

[6] See City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 441 (1985). See also Romer v. Evans, 517 U.S. 620 (1996).

[7] United States v. Virginia, 518 U.S. 515, 519 (1996).

[8] Id.

[9] The government interests argued in creating DOMA included: (1) advancing the interests of defending and nurturing the institution of traditional heterosexual marriage, (2) defending traditional

notions of morality, (3) protecting state sovereignty and democratic self governance, and (4) preserving scarce government resources. House Report on DOMA, 1 U.S.C. § 7, H.R. Rep. No.104-664. H.R. 3396; cited in Complaint in Gill v. Office of Pers. Mgmt., March 3, 2009.

14 Comments on "How can same-sex marriage not be gender-based classification?"

1. *Carol* says:
   April 9, 2013 at 8:22 pm (Edit)
   Go, Cuz, go!

   Reply
2. *Michelle Hoppe* says:
   April 11, 2013 at 8:48 pm (Edit)
   Frankly, I have never understood how Prop 8 can NOT be considered unconstitutional under California law. The California constitution prohibits discrimination on the basis of sex. If John (a male) can marry Jane (a female), but Jill (a female) cannot marry Jane (a female), then Jill's rights to marry has been denied her on the basis that she, unlike John, is not male. Ergo, sex discrimination. As you pointed out in your bisexual example, this law has nothing to do with sexual orientation and everything to do with sex (the biology, not the act). It does not matter whether John, Jane and Jill are straight, gay, bi or whatever. It only matters whether the parties' plumbing is on the inside or outside. I'm a little less clear on how it shakes out under DOMA since sex discrimination is, sadly, not prohibited by the American constitution.

   Reply
   - *tobyiceblueeyes* says:
     April 11, 2013 at 9:00 pm (Edit)
     But sex discrimination IS prohibited under the Equal Protection clause of the US Constitution. Ever since US v. Virginia (VMI) (1996) gender classification is considered "quasi-suspect" (not as bad as race classification but pretty bad). In gender based discrimination cases the state "must show that the discriminatory means used is substantially related to the achievement of important government objectives."

     Reply
   - *Renee* says:
     April 12, 2013 at 6:27 am (Edit)
     Prop 8 was specifically a constitution amendment, changing California law at the deepest level.

     Earlier that summer, the California supreme court had ruled that banning same-sex marriage was in violation of the state constitution (on equal protection grounds, I believe), and there were a few wonderful months where same-sex marriage was legal and actively performed. Seeing a terrifying threat to their entrenched bigotry, the Prop 8 proponents realized that the only way to undo that