# Toby's Home

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

# Why LGBT groups prefer DOMA be held Sexual Orientation (not Gender) Discrimination

**Posted:** April 22, 2013 | **Author:** tobyiceblueeyes | **Filed under:** Legal Eagle | **Tags:** Defense of Marriage Act, Discrimination, DOMA, Law, LGBT, Rational basis review, Same-sex marriage, Supreme Court, United States Supreme Court | **Modify:** |4 Comments

In my first legal blog post "**How can same-sex marriage not be gender-based classification?**" I explained why I believe the Supreme Court should hold that **DOMA** is gender-based discrimination (rather than discrimination on the basis of sexual-orientation) and therefore unconstitutional. If you made it to the end of that article (I know some of you lay-persons gave up on the legalese and nodded off) you will have seen that I promised to continue this discussion by addressing why **LGBT** groups don't want lawyers and judges to use the gender-based classification argument in challenging DOMA.

One of the great advantages, and also the great tragedies, of graduating from law school is that I gained the ability to really and truly argue two opposing sides of the same argument. Ok, maybe some of you were on the high school debate team and got the same ability without accumulating mounds of student loan debt. I wasn't on a high school debate team. I've always been very opinionated, and could only argue MY side of an argument. I'm still opinionated, but if it's logical and can be supported by the facts and the law, I can argue the other side.

MY side of the argument, let's be clear, is that the Supreme Court should hold that DOMA is gender-based discrimination. It's logical. It's winnable. It's supported by existing precedent.

But very smart and ethical people in the LGBT community, even some of the people who I used in the bedtime story about the four bisexual couples in my **other blog on the subject**, feel very strongly that **Marriage Equality** should be fought and won as discrimination on the basis of sexual-orientation. **My paper** argues specifically for sex discrimination as a winning argument against DOMA and other marriage bans, rather than a general all purpose argument against all anti-gay laws.

My argument has a BIG flaw that I will freely admit: it does NOTHING to help pass protections like **ENDA** and address other discrimination that truly is discrimination ONLY on the basis of sexual orientation. Such as: "you are gay, so you are fired." Here is why:

**LEVEL OF SCRUTINY –**


As of today, April 2013, the US Supreme Court has not decided whether discrimination on the basis of sexual orientation should get ANY kind of heightened scrutiny. Level of scrutiny is about how closely the court looks at the law in deciding if it is constitutional.

All laws discriminate. If you are poor, for instance, you pay lower taxes than if you are rich. That is a because of federal law that discriminates on the basis of wealth. Wealth is a "non-protected status" (as opposed to race, which is "suspect" and gender which is "quasi-suspect"). When a law discriminates against someone on the basis of a non-protected status it is analyzed under "**rational basis scrutiny**". Under rational basis, a law only has to be **rationally related** to a **legitimate** governmental purpose in order to be constitutional.

What usually fails the rational basis test? Animus. In ***City of Cleburne v. Cleburne Living Center*** the Supreme Court held that a law that discriminated against persons on the basis of their membership in a class of persons based on developmental disability, a non-protected status, was nonetheless unconstitutional because it was based solely on irrational prejudice against the "mentally retarded" (an offensive term but the one in use at the time). The Supreme Court made a similar ruling in *Romer v. Evans*, holding that the sole purpose of Colorado's Amendment 2 was irrational prejudice against gays and lesbians (and bisexuals, but the court didn't include us in the ruling, even though the law did include us in the discrimination).

So far the Supreme Court has never decided that discrimination on the basis of sexual orientation requires "heightened scrutiny" or that lesbians, gays, and bisexuals (LGB) are a "suspect" or "**quasi-suspect class**". The hope is that the marriage cases will be the time for that to change.

There is hope for the sexual orientation argument in the trend in state supreme court cases towards defining LGB people as a suspect class, or at least applying heightened scrutiny to discrimination against them in spite of not being a traditionally suspect class such as race.**[1]** A broad reading of ***Romer*** shows the Colorado Supreme Court held sexual orientation must be subject to strict scrutiny under the equal protection clause, a test the amendment failed.**[2]** In *Evans v. Romer* (the state case that became ***Romer v. Evans*** when taken to the US Supreme Court) the Colorado Supreme Court held state constitutional amendment to remove all protections for lesbian, gay, and bisexual people must be subject to strict scrutiny.

Although the U.S. Supreme Court affirmed the judgment in *Romer* under rational basis, it never specifically disaffirmed the applicability of strict scrutiny, saying the amendment "fails, indeed defies, even this conventional inquiry," referring to the easiest test, that of rational basis.**[3]** This implied, to me and some other scholars, that Amendment 2 might have been decided under a higher level of scrutiny, but the court didn't have to go as far as setting a higher level of scrutiny because the law failed even under the lowest level. Additionally, the US Attorney General recently stated "that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a more heightened standard of scrutiny" than mere rational basis.**[4]**

**MARRIAGE IS ALL ABOUT US; ORIENTATION IS ALL ABOUT ME –**

My argument for holding DOMA as sex discrimination is based on my understanding, as a bisexual, that I am not being discriminated against based on my orientation. There are no check boxes on the marriage application for "gay," "bisexual," or "straight." I could legally marry a man. It does not demean my existence as a bisexual person to marry a man. Marriage, however, is not about just ME. It is about US. My wife and I. Two women in love. My gender classification, in relation to her gender classification, is where the discrimination lies.

But that is not the end of the story. Arguing for the other side of the debate team: it DOES demean me as a bisexual to not give me the choice to legally marry a man or a woman. "The essence of the right to marry is freedom to join in marriage with the person of one's choice." (**Perez**) And so DOMA IS discrimination on the basis of my sexual orientation. It is even more clearly discrimination on the basis of sexual orientation to people who ONLY want to marry a person of the same sex: gay men and lesbian women (the only people who the courts or the marriage equality organizations ever talk about, by the way). But DOMA is also demeaning to bisexual, transgender, and **intersex people** because it takes away our freedom of choice. It is discriminatory on the basis of sex AND gender AND orientation.

**THE RISK –**

The problem with arguing sexual orientation discrimination against DOMA in the **Windsor case** currently before the Court is that we still have no idea what level of scrutiny the US Supreme Court will settle on, and up to this point it has only been willing to decide sexual orientation cases under rational basis. The same risk exists in any state Supreme Court that has not yet decided what level of scrutiny to apply.

The answer of level of scrutiny for sex discrimination, however, is well settled law**[5]** and combined with the determination in *Loving* that statutes punishing a person of one race for marrying a person of a different race are in fact race discrimination, it follows that punishing a person of one sex for marrying a person of the same sex is in fact sex discrimination. Therefore the question of "what is the standard of review" for statutes burdening marriage between members of the same sex should be easy to answer. The standard of review in Federal Court is intermediate scrutiny based on sex discrimination.

Even if we lose the gamble shooting for a higher level of scrutiny, there is the fallback argument that a statute fails even rational basis because it is not rationally related to any legitimate government end and thus fails to meet even the rational basis test, because the real interest served by the statute is animus against LGBT people. All laws not determined to be infringing on a fundamental right or classifying based on a suspect or quasi-suspect group are subject to rational basis review.**[6]** Some laws are so irrational or absurd on their face it is clear they can be motivated by nothing other than animus or prejudice against a group.**[7]** The danger of relying on a rational basis test is that it is too easy to find some rational basis supporting a statute. In the case of marriage laws there are factors other than animus, such as sincerely held beliefs that procreation is the purpose of marriage,**[8]** and only one factor need be found a rationally related legitimate interest to allow the law to stand.

**THE BIG WIN –**


However, if the Court DOES decide that LGBT people are a group that has been subjected to a history of invidious discrimination and therefore laws that classify on the basis of sexual orientation should be subjected to heightened (intermediate or strict) scrutiny, that is a VERY BIG WIN. Because the next time a case comes up where a person is discriminated against on the basis of sexual orientation (i.e. "you are gay so you are fired") the previously decided case will be precedent supporting finding the act or statute unlawful.

So what's the best thing to do? Hope for both. Hope the court finds gender-based discrimination (because it is winnable) and orientation-based discrimination (because it is a bigger win for LGBT people), and wait and see what happens.

What do I think the court will decide?

Seriously? This is not a fortune telling column. I have no idea.


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 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]** In Re Marriage Cases, 183 P.3d at 440 (California Supreme Court held discrimination on the basis of sexual orientation subject to strict scrutiny when invalidating law disallowing same-sex marriage as violating equal protection under state constitution); Evans v. Romer, 854 P.2d 1270 (Colo. 1993) (Colorado Supreme Court held state constitutional amendment to remove all protections for LGB people subject to strict scrutiny).

**[2]** Louis Michael Seidman, Romer's Radicalism: The Unexpected Revival of Warren Court Activism, 1996 Sup. Ct. Rev. 67 (1996).

**[3]** Although the U.S. Supreme Court affirmed the judgment on different rationale than that of the state supreme court, it never specifically disaffirmed the applicability of strict scrutiny, saying the amendment "fails, indeed defies, **even** this conventional inquiry," referring to the easiest test, that of rational basis.

Romer, 517 U.S. at 632 (emphasis added).

**[4]** Statement of the Attorney General on Litigation Involving the Defense of Marriage Act, Department of Justice, Office of Public Affairs, (February 23, 2011) **http://www.justice.gov/opa/pr/2011/February/11-ag-222.html**

**[5]** United States v. Virginia, 518 U.S. at 519.

**[6]** Romer 517 U.S. at 631.

**[7]** Romer, 517 U.S. at 632; Cleburne 473 U.S. at 448-49.

**[8]** For instance see Standhardt v. Superior Court of Ariz., 206 Ariz. 276, 287 (Ariz. Ct. App. 2003) (holding "the reasonableness of the link between opposite-sex marriage, procreation, and child-rearing.")

Related articles

- **How can same-sex marriage not be gender-based classification?** (tobyshome.wordpress.com)



## 4 Comments on "Why LGBT groups prefer DOMA be held Sexual Orientation (not Gender) Discrimination"

1. *Catherine Adams* says:
   **April 23, 2013 at 3:03 am (Edit)**
   This is very lawyerly, but I hope it doesn't loose the non lawyer type readers, because the last paragraph is awesome! And once again, I love the graphics

   **Reply**
2. *How can same-sex marriage not be gender-based classification? | Toby's Home* says:
   **April 26, 2013 at 6:37 pm (Edit)**
   […] 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 […]

   **Reply**
3. *Supreme Court Ruling on Marriage – It Could Be Today | Toby's Home* says:
   **June 20, 2013 at 1:14 pm (Edit)**
   […] Why LGBT groups prefer DOMA be held Sexual Orientation (not Gender) Discrimination […]

   **Reply**
4. *M* says:
   **July 7, 2013 at 2:04 am (Edit)**
   Hi Toby, I've been mystified by how marriage restriction can possibly be considered NOT sex discrimination. It clearly seems to be such. Even when I've tried to talk about the issue, it is hard to

state because having 2 people of same sex so clearly involves their sex…… How can I point to their SAME sex without it involving each person's sex? Confusing Ah well. I like your examples in the bedtime story.
I think you would enjoy seeing this: **http://www.rolereboot.org/culture-and-politics/details/2013-06-gay-marriage-are-we-all-missing-the-point**
Just thot you'd like to see someone else's writing that is vaguely related.

You may want to consider including an email address to contact you, if you have not already considered it. I'd write something more personal if I were writing in email…..

**Reply**

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