
**“Bisexual Marriage”: A Sex Discrimination Argument
for Heightened Scrutiny of Same-Sex Marriage Bans**

By Toby Adams, 3E
McGeorge School of Law

For Professor Levine
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INTRODUCTION

The purpose of this paper is to propose a winning strategy to gain marriage equality throughout the United States. The strategy proposed is to argue that same-sex marriage bans are unconstitutional under equal protection on the basis of sex discrimination, not sexual orientation, when applied to bisexuals. By including this argument there is a better chance of winning marriage equality in more states in the short term and eventually winning a federal case for full marriage equality.

As a bisexual woman I have always seen the denial of marriage to same-sex couples as a sex discrimination issue first and foremost, because it was the sex of the particular person I ended up choosing to spend my life with that kept us from gaining equal rights. If I had chosen to marry the person I was dating previously, we would have had full rights. My orientation didn't change; only the sex of my partner was different. This paper proposes an approach which is not only winnable but also inclusive of bisexuals and other marginalized minorities.

I attended a workshop by Evan Wolfson at Creating Change many years ago in Oakland titled The 2020 Vision.¹ This was his long term plan to get to a “tipping point” of winning marriage or “marriage light” in enough states in order to win marriage equality nationwide by the year 2020. I believe in this plan, and am convinced that the winning argument to gain additional states and eventually nationwide equality is a sex discrimination argument for heightened scrutiny based on comparing same-sex couples consisting of bisexuals with different sex couples consisting of bisexuals. The couples I use for example, all with legal state marriages, are treated

¹ Creating Change conference 2005, Reclaiming Moral Values: A Lesbian, Gay, Bisexual and Transgender Agenda for 2006, http://www.thetaskforce.org/events/creating_change_archive/creating_change05. A recent video of Evan Wolfson's speech 2020 Vision: Winning the Freedom to Marry This Decade is available at <http://www.apa.org/news/press/evan-wolfson-video.aspx>.

differently by the Federal Government under Defense of Marriage Act (DOMA)² based on their sex alone.

When the legal battle for marriage equality reaches the Supreme Court³ it must be a fight that is won in favor of equality. This paper will discuss the issue of bisexual marriage and the sex discrimination argument for heightened scrutiny of same-sex marriage bans in the following order: Part I - why “bisexual marriage” is the right vehicle for advancing the sex discrimination argument, Part II - the history of the use of sex discrimination claims and bisexuality in analyzing same-sex marriage bans, and Part III - why the sex discrimination argument for heightened scrutiny of same-sex marriage bans is the best argument to use.

DOMA will be used as the statutory example; however the argument applies as well to the states’ “mini-DOMAs,” a term used to refer to the various state statutes or constitutional amendments forbidding same-sex marriage. The term “LGB” (for lesbian, gay, or bisexual) will be used to refer to the class of persons of non-heterosexual orientation. A “bisexual” is a person with “the capacity for emotional, romantic, and/or physical attraction to more than one sex or gender [with] the potential for, but not requirement of, involvement with more than one sex/gender.”⁴ “Sex” will be used to refer to the legal sex/gender of a person in his or her home state, addressing only two sexes: male and female.⁵

² 1 U.S.C. § 7. Enacted 1996.

³ “The United States Supreme Court has not resolved the broad question of whether an absolute ban of marriages between persons of the same sex violates the Federal Equal Protection Clause. See Lawrence v. Texas, 539 U.S. 558, 578 (2003). (noting that case does not decide ‘whether the government must give formal recognition to any relationship that homosexual persons seek to enter’).” Varnum v. Brien, 763 N.W.2d 862, 879 (Iowa 2009). The issue has not yet made it to the Supreme Court, except for an appeal in 1972 dismissed without opinion “for want of a substantial federal question.” Baker v. Nelson, 409 U.S. 810 (1972).

⁴ SF HRC Bisexual Invisibility: Impacts and Recommendations 2011.

⁵ This paper will not delve into the differences between sex and gender or the large and very important issues of the falsity of the gender-binary social construct and how marriage discrimination and differences in how states define legal sex affect transgender and intersex persons. See my next paper, to be released August 2011.

ANALYSIS

First, “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.

Second, the history of the use of the sex discrimination argument started with Baehr, which is the model for this argument. Baehr was the first successful marriage case, beginning the current marriage equality debate, and the only case in which a state supreme court found the statute unconstitutional on the basis of sex discrimination. Later cases, including California’s In Re Marriage Cases in which the court rejected the sex discrimination argument, and Iowa’s Varnum case in which the District Court held on the basis of sex discrimination but the state supreme court rejected that argument in great detail, will be discussed for the sake of comparison.

Finally, 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.⁶ 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.”⁷ Some courts, however, have held that there is no fundamental right to “gay marriage,” which they see as a completely

⁶ 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).

⁷ “[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).

different institution from “marriage”. Fundamental rights tend to be found if grounded in history,⁸ 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,⁹ 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.¹⁰ 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.¹¹ 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.¹² Sex is a quasi-suspect classification under existing law.¹³ Koppelman, Stein, and others raise arguments for and against the sex discrimination argument. This paper proposes that stripping away the differences in sexual orientation and focusing on 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

⁸ “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).

⁹ “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.

¹⁰ “[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.

¹¹ See City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 441 (1985). See also Romer v. Evans, 517 U.S. 620 (1996).

¹² United States v. Virginia, 518 U.S. 515, 519 (1996).

¹³ Id.

interest.¹⁴ That is an argument that is also more inclusive of bisexuals but also much more likely to result in a win for marriage equality. The point of this paper is to propose a winnable argument against DOMA.

I. Analyzing DOMA as sex discrimination based on “bisexual marriage”

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).¹⁵

Equal protection requires “that the law must treat all similarly situated people the same. [This requirement] has created a narrow threshold test.”¹⁶ Under this threshold test plaintiffs must show that they are similarly situated to the comparable persons who are receiving rights they are being denied, or courts will not consider “whether their different treatment under a statute is permitted under the equal protection clause.”¹⁷ The two same-sex couples (plaintiffs) are treated differently from the two different-sex couples. In order to remove any question of whether plaintiffs are similarly situated, particularly in the areas of sexual orientation, child

¹⁴ 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.

¹⁵ 1 U.S.C. § 7.

¹⁶ Varnum, 763 N.W.2d at 882.

¹⁷ Id.

rearing,¹⁸ and procreation¹⁹ which so plague the marriage equality movement, I offer these four couples²⁰ for comparison in determining equal protection. Analyzing DOMA as sex discrimination should be based on “bisexual marriage” because it focuses the spotlight on sex. This paper will use “bisexual marriage” to address the unconstitutionality of the federal same-sex marriage ban under the Equal Protection Clause and the expedience of arguing that they should be subject to heightened scrutiny based on sex discrimination.²¹

A. A case study of four couples: two same-sex and two different-sex

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, as the law in California allows for children born to Registered Domestic Partners (RDPs).²² To ensure his parental rights could travel out of state, Chris had to adopt their son via the stepparent adoption process.²³ The two were legally married in California during the short period of time after In Re Marriages²⁴ was decided and prior to Proposition 8 being passed. Chris and Ted have no federal marriage rights under DOMA.

¹⁸ “[S]ome states have tried to defend [DOMAs] by arguing that marriage is related to childrearing (and that ... lesbians and gay men are bad parents compared to heterosexuals).” Koppelman, Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein, 49 UCLA L. Rev. 519, 524 (2001).

¹⁹ “In response to the point that marriage is about procreation, it is often observed that sterile couples, or those who do not wish to have children, are not excluded from the institution.” John G. Culhane, Uprooting the Arguments Against Same-Sex Marriage, 20 Cardozo L. Rev. 1119 (1999).

²⁰ The four couples are similar in that none of them has procreated together as a couple, and none of them plan to procreate together as a couple, although all four couples are raising children. This strengthens the equal protection challenge using these particular couples.

²¹ The focus will be primarily on DOMA but the state statutes could be attacked under a similar argument.

²² The rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses.” Cal. Fam. Code 297.5 (d). “Under the Uniform Parentage Act’s parental presumptions a man is the father of a child born during the marriage.” 43 Cal. W. L. Rev. 235, 239.

²³ “Stepparent adoption” means an adoption of a child by a stepparent where one birth parent retains custody and control of the child. Cal Fam. Code 8548. Stepparent adoption applies to registered domestic partners under Cal. Fam. Code 297.5 (d).

²⁴ In Re Marriage Cases, 183 P.3d 384 (Cal. 2008).

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 adoption²⁵ laws went into effect. The couple was married in Massachusetts in October 2004 and again in California on July 19, 2008. They would never move to a state that did not recognize their marriage or work someplace that did not offer benefits for the stay-at-home spouse. Toby and Jean have no federal marriage rights.

Chris, Ted, Jean, and Toby may have standing to sue in federal court based on unequal treatment under DOMA. The following two couples have no standing, but are provided for comparison.

Bryan and Kathleen are a male bisexual and a female bisexual. After years of receiving domestic partner health insurance benefits as a different-sex unmarried couple from employers, 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, as well as the promise of health insurance regardless of whether their employers offered domestic partner benefits to different-sex unmarried couples. They are raising Kathleen's niece and nephew as kinship guardians. They are not interested in procreating together. Both are active in the bisexual community. Bryan and Kathleen are able to take advantage of over 1,100 federal benefits of their California marriage.²⁶

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

²⁵ Cal. Fam. Code 297.5 (d). Cal Fam. Code 8548.

²⁶ According to the United States Government Accountability Office (GAO), there are 1,138 Federal marriage rights and responsibilities which are outlined in Defense of Marriage Act: Update to Prior Report, January 23, 2004. <http://www.gao.gov/new.items/d04353r.pdf>

bisexual activists.²⁷ They have been discriminated against as bisexuals in custody determinations.²⁸ In spite of their very visible sexual orientation they are able to get full federal marriage rights.

B. Bisexual Marriage: a spotlight on sex discrimination

What's in a name? In the beginning there was "Gay Marriage." This misnomer was used not only in the media, the legislature, and the courts, but also in the internal and external communications of the marriage equality movement organizations.²⁹ Only gays and lesbians were ever discussed, never transgender or intersex or bisexual people.³⁰ Although the nomenclature has progressed to the more inclusive "same-sex marriage" and "marriage equality" terms, the use of "gay marriage" remains common. However as the Supreme Court of Hawaii has noted, just as not all opposite-sex marriages are between heterosexuals, not all same-sex marriages would necessarily be between homosexuals.³¹

The term "Bisexual Marriage" is used in the title of this paper as a way of poking fun at the common use of the term "gay marriage". In truth only a person can be said to have a sexual orientation such as gay or bisexual; a marriage cannot. The story involving the four couples is provided as a vehicle to raise the equal protection challenge in a scenario in which sexual

²⁷ Both spouses have been on the Board of South Bay Bisexual Organizers and Activists (SoBOA) and volunteered for many different bisexual organizations. Thomas was co-chair of the Santa Cruz GLBT Alliance and chair of the National Lavender Greens Caucus.

²⁸ A court order prohibits them from bringing the girls to any event where sexual orientation might be a primary topic of conversation. This effectively prohibits the family from attending Pride celebrations, SoBOA or GLBT Alliance meetings, or any event where queerness might be a significant element such as protests, demonstrations, discussion panels, artistic exhibitions, dramatic performances, or movies.

²⁹ For example former MEUSA Executive Director Davina Kotulski, published [Why You Should Give a Damn About Gay Marriage](#) in 2004. At the time MEUSA (then MECA, which later merged with EQCA and then split off becoming MEUSA) used the terms "gay marriage" and "gays and lesbians" almost exclusively. Likewise national group HRC was still using "gay marriage" frequently in its media releases in 2005, for example http://www.hrc.org/issues/int_rights_immigration/1957.htm.

³⁰ The fully inclusive acronym is LGBTQQIA which stands for Lesbian, Gay, Bisexual, Transgender, Queer, Questioning, Intersex, and Allies.

³¹ [Baehr v. Lewin](#), 852 P.2d 44, 51 n.11 (Haw.1993).

orientation is not the defining factor because all the people involved have the same sexual orientation, thereby focusing the spotlight on sex discrimination. The two couples with standing (Toby/Jean and Chris/Ted) each consist of two bisexual persons. The couples used for comparison (Bryan/Kathleen and Thomas/Gunilla) each consist of two bisexual persons. The only difference between the couples with standing and the couples used for comparison is that the couples with standing each consist of two persons of the same sex, while the couples used for comparison each consist of two persons of different sexes. The couples with standing are subject to DOMA and receive no federal marriage rights in spite of their legal California marriages; the couples used for comparison receive full federal marriage rights based on their legal California marriages. This paper proposes that the same-sex bisexual couples sue in federal court to challenge the constitutionality of DOMA under equal protection, charging they are treated unequally from the different-sex bisexual couples.

In order to argue for inclusion of bisexuals in an equal protection claim of sex discrimination under same-sex marriage bans, it must first be understood the extent to which bisexuals have been excluded up to this point. Bisexuals have been largely invisible in the marriage equality movement and in the law in general.³² Bi-visibility is one of the chief goals of the bisexual community³³ and bisexual erasure one of its chief concerns. Greenesmith defines bisexual erasure as “the tendency to ignore, remove, falsify, or reexplain evidence of bisexuality

³² “Bisexuality is legally invisible: a court will treat someone as heterosexual or homosexual, based on his presentation, his self-identification, his conduct, or the affirmative statements of others until he indicates otherwise. Bisexuality is never the presumption. That being said, once bisexuality has been acknowledged, there appear to be two distinct types of bisexuality. [Identity or “Status” bisexuality] is indicated by an affirmative identification by an individual as being “bisexual.” “Conduct bisexuality,” on the other hand, is contextual, implied from the individual’s sexual or romantic activities.” Heron Greenesmith, Drawing Bisexuality Back Into the Picture: How Bisexuality Fits Into LGBT Legal Strategy Ten Years After Bisexual Erasure, 17 *Cardozo J.L. & Gender* 65, 69 (2010).

³³ The mission statement of BiNet USA, the oldest national bisexual entity in the United States, is to “facilitate the development of a cohesive network of bisexual communities, **promote bisexual visibility**, and collect and distribute educational information regarding bisexuality.” <http://www.binetusa.org/category/binetusa/about-binet-usa>.

in history, academia, the news media, and other primary sources. In its most extreme form, bisexual erasure can include denying that bisexuality exists.”³⁴ A statute can be found in violation of equal protection based on discrimination against the class of persons affected only if the class of persons is perceived to exist. Bisexual erasure stands in the way of a sexual orientation discrimination claim by bisexuals, but a sex discrimination claim is unimpeded.

The status and conduct models also impact bisexual inclusion. Courts have tended to address sexual orientation law in terms of either conduct (what a person does) or status (who a person is).³⁵ Halley discusses the shift from conduct to status in sexual orientation law.³⁶ Because of this shift bisexual inclusion is more appropriate now than it was in the past. Under the older conduct model a bisexual person was defined by his or her actions. A difficulty with this model was the conduct based assumptions that the bisexual person is gay/lesbian when coupled with someone of the same sex, straight when coupled with someone of a different sex, and only truly bisexual when having sex with both a man and a woman simultaneously.³⁷ The first two assumptions create bisexual erasure. The third assumption leads to discussions of polyamory³⁸ which are counterproductive. This lack of understanding of bisexuality improves with increased use of the status model.

³⁴ Greenesmith, supra note 32, at 65.

³⁵ Id. at 69.

³⁶ Janet E. Halley, Reasoning About Sodomy: Act and Identity In and After Bowers v. Hardwick, 79 Va. L. Rev. 1721 (1993).

³⁷ “What does it mean to be bisexual? The common stereotype is that one always has one male and one female sexual partner. This stereotype arises out of the assumption that gay men, lesbians, and bisexual people are purely sexual creatures -- at all moments being involved with all eligible sexual partners. Society seems to have trouble imagining a celibate or monogamous gay, lesbian, or bisexual person.” Rachel Haynes, Bisexual Jurisprudence: A Tripolar Approach to Law and Society, 7 Yale J.L. & Human. 163, 174 (1995).

³⁸ Polyamory (from Greek “poly”, meaning many, and Latin “amor”, meaning love) is the practice, desire, or acceptance of having more than one intimate relationship at a time with the knowledge and consent of everyone involved. <http://en.wikipedia.org/wiki/Polyamory>.

The Court language of Romer included the more modern status model, although avoiding any mention of bisexual status.³⁹ Under the status model a bisexual person is defined by his or her attractions, not by his or her actions, and is a self-identification model. This is a better model for providing full inclusion of bisexuals in the marriage equality movement. A married monogamous bisexual person will generally only be identified as bisexual by status, not by conduct, because she is only involved with one person of one sex (whether the same or different sex). In this scenario the sex of the plaintiff in relation to the sex of the person to whom the plaintiff is married (or wishing to marry) is the defining characteristic. Therefore the argument for sex discrimination is especially appropriate under the more modern status model.

II. A brief history of sex discrimination and bisexuality in same-sex marriage

This section will give an overview of the history of same-sex marriage, focusing on court cases and their inclusion or lack of inclusion of sex discrimination claims and bisexuality in analyzing an equal protection right to marriage. Following the 1967 Loving⁴⁰ decision which held all state statutes disallowing interracial marriage to be unconstitutional race discrimination under the Equal Protection clause⁴¹ and denial of a substantive Due Process⁴² fundamental right to marriage, some early cases were brought unsuccessfully in the 1970's to attempt to secure the right to marriage for same-sex couples.⁴³ The real marriage equality campaign started in the 1990's.

³⁹ Romer found Colorado Amendment 2 in violation of Equal Protection of the class of persons they referred to as "homosexual persons" or "gays and lesbians" ignoring the statutory inclusion of "bisexual orientation" in the language of the opinion. Romer v. Evans, 517 U.S. 620 (1996).

⁴⁰ Loving, 388 U.S. 1.

⁴¹ "No State shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." USCS Const. Amend. 14, § 1.

⁴² Id.

⁴³ Attempts in Minnesota and in 1971 and Kentucky in 1973 both failed. Baker v. Nelson, 291 Minn. 310 (1971); appeal dismissed in Baker v. Nelson, 409 U.S. 810 (1972). Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973).

A. Baehr v. Lewin – sex discrimination, strict scrutiny

In 1991 a group of same-sex couples, not mentioning their sexual orientation in their briefs,⁴⁴ filed suit against the state of Hawaii claiming that the state's regulation of access to the status of married persons, on the basis of the applicants' sex, raised a question as to whether they were being denied the equal protection of the laws in violation of article I, section 5 of the Hawaii Constitution.⁴⁵ Although the state “sought to place the question of homosexuality in issue” the court did not succumb,⁴⁶ finding the question of what level of scrutiny should be afforded to sexual orientation discrimination immaterial. The court held that the statute was sex discrimination and failed the strict scrutiny applied under Hawaii’s Equal Protection Clause. The reasoning in Baehr was the plain fact that an individual's right to marry a person of the same sex is prohibited solely on the basis of sex⁴⁷ combined with the argument that equal application of the law to men and women is still sex discrimination based on Loving.⁴⁸

It seems clear that three very important points allowed this to be won as a sex discrimination case: first, it was one of the very first marriage-equality cases tried and so the “gay-marriage” and “gay rights” nomenclature had not yet taken hold, second, the Hawaii state constitution specifically stated that “[n]o person shall be ... denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of ... sex,”⁴⁹ and finally, Hawaii precedent held that sex was a "suspect category" for purposes of equal protection analysis and therefore subject to the "strict scrutiny" test.

⁴⁴ “[A]ssuming the plaintiffs are homosexuals (a fact not pleaded in the plaintiffs' complaint), they ‘are neither a suspect nor a quasi-suspect class and do not require heightened judicial solicitude.’” Baehr, 852 P.2d 44 (internal citation omitted).

⁴⁵ Haw. Const. Art. I, § 5.

⁴⁶ Baehr, 852 P.2d 44.

⁴⁷ Reinheimer, supra note 8, at 233.

⁴⁸ Loving, 388 U.S. 1.

⁴⁹ Haw. Const. Art. I, § 23.

In 1993 the Hawaii Supreme Court issued its landmark decision in Baehr v. Lewin,⁵⁰ finding a constitutional right to marriage for same-sex couples under the state’s Equal Protection doctrine, finding the denial to be sex discrimination. Congress reacted by enacting DOMA in 1996. In 1998, a constitutional amendment giving the Hawaii Legislature the authority to define marriage was approved by a public vote, and the Legislature subsequently enacted a law that defined marriage as between one man and one woman, voiding the effect of Baehr.⁵¹ Further action was taken in other states to exclude same-sex couples from marriage.

B. *Goodridge v. Dept of Public Health – sexual orientation, rational basis*

Following additional losses⁵² and a 1999 win in Vermont leading to the first same-sex civil unions in the nation,⁵³ the Massachusetts Supreme Court declared the denial of marriage unconstitutional in the 2003 Goodridge case.⁵⁴ Like the Hawaii Constitution, the Massachusetts Constitution provides that “[e]quality under the law shall not be denied or abridged because of sex.”⁵⁵ Unlike the Baehr court, however, the Goodridge court analyzed the statute under Equal Protection and Due Process and held the plaintiffs had a fundamental right to marriage and liberty of which they were deprived because of a single trait: sexual orientation.⁵⁶ They held this

⁵⁰ Baehr, 852 P.2d 44.

⁵¹ Haw. Const. Art. I, § 23. On Feb 23, 2011 the Governor of Hawaii signed the Civil Unions bill which goes into effect 1/1/2012. <http://www.equalityhawaii.org/>

⁵² Marriage cases were lost in the courts of D.C. in 1995 and New York in 1996. Dean v. District of Columbia, 653 A.2d 307 (D.C. 1995); Abrogated as stated in Jackson v. D.C. Bd. of Elections & Ethics, 999 A.2d 89, 116 (D.C. 2010); Superseded by statute as stated in Jackson, 999 A.2d 89, at 118. Storrs v. Holcomb, 168 Misc. 2d 898 (N.Y. Sup. Ct. 1996). Alaska courts found same-sex marriage involved a fundamental interest; however the state constitution was amended by voter initiative and mooted the case in 2001 before hearings were completed. Reinheimer, *supra* note 8, at 218-219. Brause v. Bureau of Vital Statistics, 1998 WL 88743 (Alaska Super. Ct. 1998). Brause v. State, 21 P.3d 357 (Alaska 2001).

⁵³ Baker v. State, 744 A.2d 864 (Vt. 1999).

⁵⁴ Goodridge, 798 N.E.2d 941.

⁵⁵ Article 1, as amended by art. 106 of the Amendments to the Massachusetts Constitution.

⁵⁶ Goodridge, 798 N.E.2d 941.

to be invidious discrimination which failed the test some refer to as “rational basis with bite,”⁵⁷ and so declined to reach the question of whether strict scrutiny should apply.⁵⁸

The first legal same-sex marriages in the United States began on May 17, 2004. The Washington Post reported the first couple married in Brookline, Massachusetts in an article subtitled “Lesbian Pair Wed After 7 Years Together.”⁵⁹ The couple, Robyn Ochs and Peg Preble, is not lesbian, but a well known bisexual activist and her wife.⁶⁰ The history of inclusion of bisexuality in same-sex marriage jurisprudence and even the media is that there is no inclusion.

C. In Re Marriage Cases - sexual orientation a suspect class

Following several more losses in state courts⁶¹ there were wins in New Jersey⁶² and Connecticut⁶³ on the basis of equal protection under the classification of sexual orientation. Then in 2008 the California Supreme Court held the state’s anti-gay marriage laws did not serve a compelling state interest and, therefore, were unconstitutional under strict scrutiny which must be applied because plaintiffs had a fundamental right to marry, fundamental privacy interests, and because sexual orientation was a suspect classification.⁶⁴

Although the plaintiffs in California argued the statute “discriminate[d] on the basis of gender, a suspect classification” the court disagreed because by “drawing a distinction between opposite-sex couples and same-sex couples, the challenged marriage statutes do not treat men and women differently. Persons of either gender are treated equally and are permitted to marry

⁵⁷ William N. Eskridge, Jr. and Nan D. Hunter, Sexuality, Gender, and the Law, Abridged Edition, pg. 55.

⁵⁸ Goodridge reasserted the Loving and Perez notion that “the right to marry means little if it does not include the right to marry the person of one’s choice.” Goodridge, 798 N.E.2d at 958. See Perez v. Sharp, 198 P.2d 17, 21 (Cal. 1948). See also Loving, 388 U.S. at 12.

⁵⁹ “A Carefully Considered Rush to the Altar. Lesbian Pair Wed After 7 Years Together” Tamara Jones, Washington Post, May 18, 2004. <http://www.washingtonpost.com/wp-dyn/articles/A34665-2004May17.html>.

⁶⁰ See <http://www.robynochs.com/>.

⁶¹ Arizona in 2004, Oregon in 2004, and Indiana in 2005. Standhardt v. Superior Court of Ariz., 206 Ariz. 276 (2004). Li v. State, 110 P.3d 91 (Or. 2004). Morrison v. Sadler, 821 N.E.2d 15 (In. 2005).

⁶² Lewis v. Harris 188 N.J. 415 (2006).

⁶³ Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (2008), holding sexual orientation a suspect class.

⁶⁴ In Re Marriage Cases, 183 P.3d 384.

only a person of the opposite gender.”⁶⁵ The court rejected the Loving⁶⁶ argument that “antimiscegenation statutes... discriminated on the basis of race, even though the statutes prohibited White persons from marrying Black persons and Black persons from marrying White persons.”⁶⁷ The court contrasted Loving because those statutes only forbid other races from marrying whites, therefore the racial discrimination was against the other races, not against white persons. The willingness to analogize to Loving seems to be a big deciding factor in differentiating between jurisdictions that find sex discrimination and those that don’t.⁶⁸

The court also contended that the statute proscribing “discrimination on the basis of ‘sex,’ did not contemplate discrimination against homosexuals.”⁶⁹ Additionally the court claimed precedent upheld that “a statute or policy that treats same-sex couples differently from opposite-sex couples... does not treat an individual man or an individual woman differently because of his or her gender but rather accords differential treatment because of the individual's sexual orientation.”⁷⁰ This line of reasoning falls apart when the statute is applied to bisexual same-sex couples compared with bisexual different-sex couples. In that scenario the statute does in fact treat an individual man or an individual woman differently because of his or her sex rather than because of the individual's sexual orientation.

Couples began marrying in California on June 16, 2008 and continued to do so until November 5, 2008 when the people passed Proposition 8 adding a Constitutional amendment⁷¹ which stated marriage could only consist of “a man and a woman.” During the No on 8 campaign

⁶⁵ Id. at 436.

⁶⁶ Loving, 388 U.S. 1.

⁶⁷ In Re Marriage Cases, 183 P.3d at 436.

⁶⁸ See Brause v. Bureau of Vital Statistics, 1998 WL 88743 (Alaska Super. Ct. 1998), finding that same-sex marriage prohibitions deny a fundamental right on the basis of sex under the Alaska Constitution. (Case mooted by enactment of mini-DOMA). See also concurring opinion in Baker v. State, 744 A.2d 864 (Vt. 1999). Reinheimer, supra note 8, at 218-219.

⁶⁹ In Re Marriage Cases, 183 P.3d at 437. Gay Law Students, 24 Cal.3d at p. 490 & fn. 18.

⁷⁰ In Re Marriage Cases, 183 P.3d at 437.

⁷¹ Cal Const, Art. I § 7.5

the message was focused on sexual orientation rather than sex discrimination and bisexual staff members were told not to mention their orientation for fear it would confuse the public.⁷² In 2009 the California courts upheld the constitutionality of this amendment, while ensuring that it was not retroactive and therefore the 18,000 same-sex marriages that had occurred prior to the passage of Proposition 8 were still valid, including those of the two same-sex bisexual couples discussed in this paper.⁷³

D. *Varnum v. Brien* – state district court finds sex discrimination

Then in 2009 the Iowa Supreme Court held that state’s marriage statute violated the equal protection clause of the Iowa Constitution.⁷⁴ The plaintiffs in this case claimed a fundamental right to marriage, privacy, and association as well as discrimination on the basis of sex and sexual orientation. Although the district court in Varnum held the statute classified according to sex,⁷⁵ the Iowa Supreme Court held it classified on the basis of sexual orientation, must be subject to heightened scrutiny, and found the statute unconstitutional.⁷⁶ The Varnum court’s reasoning that the statute was sexual orientation rather than sex discrimination was:

“[A]lthough it is true the marriage statute does not expressly prohibit gay and lesbian persons from marrying; it does, however, require that if they marry, it must be to someone of the opposite sex. Viewed in the complete context of marriage, including intimacy, civil marriage with a person of the opposite sex is as unappealing to a gay or lesbian person as civil marriage with a person of the same sex is to a heterosexual. Thus, the right of a gay or lesbian person under the marriage statute to enter into a civil marriage only with a person of the opposite sex is no right at all.”⁷⁷

⁷² Findings from a study were said to show that it would help if people didn’t “think it was a choice” while singling out the bisexual staff members in presenting this mandate (anonymous source).

⁷³ Strauss v. Horton, 46 Cal. 4th 364 (2009).

⁷⁴ Varnum, 763 N.W.2d 862.

⁷⁵ On August 30, 2007, Judge Robert B. Hanson of the Fifth Judicial District of Iowa invalidated Iowa Code section 595.2(1), the Iowa Defense of Marriage Act, on the basis that “couples, such as Plaintiffs, who are otherwise qualified to marry one another may not be denied licenses to marry or certificates of marriage or in any other way prevented from entering into a civil marriage pursuant to Iowa Code Chapter 595 by reason of the fact that both persons comprising such a couple are of the same sex.” Varnum v. Brien, No. CV5965, 2007 WL 2468667 (D. Iowa Aug. 30, 2007).

⁷⁶ Varnum, 763 N.W.2d 862.

⁷⁷ Id. at 885.

As in other cases the analysis assumed only two possible orientations: homosexual or heterosexual. Applying this same analysis to bisexual persons the outcome is very different. The right to marry a person of a different sex is very much a right to a bisexual person, and one which is a benefit to many happily married bisexuals such as Thomas and Gunilla, and Bryan and Kathleen. Unfortunately it's a right that does no good to Robyn and Peg, Toby and Jean, or Chris and Ted, unless they wish to trade in their happy marriages and choose someone else of a different sex. Being forced to do this in order to receive federal benefits is sex discrimination. The anti-marriage forces have yet to overturn Varnum with a constitutional amendment; however they did manage to have three of the State Supreme Court Judges involved in the decision removed from office.⁷⁸

E. How far we have come

In addition to the judicial wins, several states have won marriage or some lesser relationship recognition via the legislature.⁷⁹ Currently same-sex couples can marry in six jurisdictions: Massachusetts, Connecticut, Iowa, New Hampshire, Vermont and D.C. Additionally 18,000 same-sex couples were married in California and those marriages remain valid. Another fifteen states have some kind of “marriage-light” or possible recognition of out-of-state marriages or soon will: California, Delaware, Hawaii, Illinois, Nevada, New Jersey, Oregon, Washington, Colorado, Maine, Maryland, New York, New Mexico, Rhode Island, and

⁷⁸ Three justices — Marsha K. Ternus, the chief justice; Michael J. Streit; and David L. Baker — who took part in the unanimous decision in Varnum lost their bids for re-election in 2010 following heavy campaigning against them by anti-gay groups. A. G. Sulzberger, Ouster of Iowa Judges Sends Signal to Bench, New York Times, November 3, 2010. <http://www.nytimes.com/2010/11/04/us/politics/04judges.html>

⁷⁹ New Hampshire replaced its civil unions with same-sex marriage via statute in 2009. Delaware just became the eighth state to create same-sex civil unions via the legislature. Hawaii and Illinois passed similar legislation this year, and Colorado is considering civil unions as well. Legislative efforts to pass full marriage are somewhat less successful, as they are attempted this year in Rhode Island and New York.

Wisconsin.⁸⁰ These changes are happening so fast that these numbers had to be updated during the writing of this paper as new bills were passed. All in all twenty-one states are leaning the country toward the “tipping point” needed to get equality in a majority of states and eventually win marriage equality nationwide under Evan Wolfson’s “2020 Vision” plan. Building on these successes this paper proposes to identify additional states in which the sex discrimination argument has the strongest chance and as well as applying the sex discrimination argument in Federal court.

Although cases up to now have been confined to state courts, there are currently several cases in progress addressing marriage equality in Federal courts on both coasts. Perry v. Schwarzenegger⁸¹ provided a district court win in a claim against California’s Proposition 8.⁸² In Dragovich v. US Dep’t of the Treasury⁸³ a California district court denied the government’s motion to dismiss, holding plaintiffs stated a valid Equal Protection claim for sexual orientation discrimination against DOMA Section 3.⁸⁴ Additional challenges against DOMA Section 3 are working their way through the federal courts in Massachusetts⁸⁵ and Connecticut.⁸⁶ None of these cases focus on a sex discrimination argument nor do they mention bisexuals, which is a

⁸⁰ See http://www.hrc.org/documents/Relationship_Recognition_Laws_Map.pdf.

⁸¹ Perry v. Schwarzenegger, 2009 U.S. Dist. LEXIS 55594 (2009).

⁸² A question on whether parties have standing to appeal has been submitted by the Ninth Circuit Court of Appeals to the California Supreme Court. <http://www.csmonitor.com/USA/Justice/2011/0216/Prop.-8-delay-California-court-will-decide-if-gay-marriage-foes-can-appeal>. Elizabeth Fuller, Prop. 8 delay: California court will decide if gay-marriage foes can appeal, The Christian Science Monitor, February 16, 2011.

⁸³ Dragovich v. United States Dep’t of the Treasury, 2011 U.S. Dist. LEXIS 4859 (N.D. Cal. 2011).

⁸⁴ 1 U.S.C. § 7. Court held plaintiffs had a claim under the rational basis standard and the question of suspect classification need not be resolved. Plaintiffs also held to have a claim against section 7702B(f) of the Internal Revenue Code (I.R.C.), 26 U.S.C. § 7702B(f).

⁸⁵ Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374 (US Dist. Mass. 2010); now on appeal in the First Circuit Court of Appeals in Boston. See also <http://www.glad.org/doma/faq-gill/>.

⁸⁶ Pedersen v. Office of Personnel Management addresses basically the same issues as in Gill, only with regards to plaintiffs in Connecticut, Vermont, and New Hampshire. See First Amended Complaint For Declaratory And Injunctive Relief, Meitzen v. Office of Personnel Management, 2010 U.S. Dist. Ct. Pleadings 1750 (January 14, 2011). See also <http://www.glad.org/doma/faq-pedersen/>.

huge oversight. However restricting the claims to DOMA Section 3 is a smart move in terms of working on incremental wins and using the state sovereignty argument in favor of equality.

III. Why the sex discrimination argument for heightened scrutiny of same-sex marriage bans is the winning argument

In comparing the equal protection sex discrimination argument to the other Fourteenth Amendment arguments for overturning DOMA, this section will address Koppelman and Stein's debate and an alternate intersectional approach proposed. These writings address how to argue against all anti-gay laws in general and none provide for inclusion of bisexuals. Hunter does focus primarily on marriage, but also fails to consider bisexuality.⁸⁷ This paper argues specifically for sex discrimination as a winning argument against DOMA and other marriage bans by bisexual plaintiffs, rather than a general all purpose argument against all anti-gay laws by gay and lesbian plaintiffs.

A. Three standard arguments used in analyzing LGBT discriminatory laws.

There are three standard arguments used in analyzing LGBT discriminatory laws: a fundamental due process right, equal protection based on sexual orientation, and failing even rational basis when the purpose is animus. Laws alleged to violate substantive due process or equal protection are subject to one of three levels of scrutiny: strict, intermediate, or rational basis.⁸⁸ Heightened scrutiny (something other than rational basis) must be applied when a fundamental right is denied or the classification is suspect or quasi-suspect.⁸⁹ Even if the rational basis test is applied the statute must be found unconstitutional when the real purpose of the

⁸⁷ Nan Hunter, The Sex Discrimination Argument in Gay Rights Cases, 9 J.L. & Pol'y 397 (2001).

⁸⁸ Wygant v. Jackson Bd. of Education, 476 U.S. 267 (1986).

⁸⁹ Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 422 (2008).

statute is animus.⁹⁰ There are three arguments commonly used in analyzing laws that discriminate against LGBT people under the 14th Amendment: a fundamental due process right, equal protection based on sexual orientation, and failing even rational basis when the purpose is animus.⁹¹ This section addresses the risks and failings of the three standard arguments. The fourth option, equal protection based on sex discrimination, will be addressed in the next section.

The first argument is that anti-marriage statutes should be subject to strict scrutiny based on a due process fundamental right to marry or some other fundamental right such as a liberty or privacy interest. This is a good argument and should be made. However it may fail due to arguments that the right to marriage does not include a right to “same-sex marriage”⁹² and fundamental rights arguments primarily address historically existing rights.⁹³

The enlargement of the scope of the constitutional right to marriage, however, is supported by precedent. The right to create family structures in a manner consistent with one’s individual beliefs and needs has been clarified and enlarged many times over the years by the U.S. Supreme Court.⁹⁴ “Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change.”⁹⁵ The protection of family rights, beginning with Skinner⁹⁶ in 1942 and building through the years to Lawrence⁹⁷ in 2003, is a linear progression which should

⁹⁰ Romer v. Evans, 517 U.S. 620 (1996).... (need cite).

⁹¹ Some cases also argue under a 1st Amendment right of Association; however these are less common. Need Cite! See cite above...

⁹² “[T]he right to enter a same-sex marriage is not a fundamental liberty interest protected by due process.” Standhardt v. Superior Court of Ariz., 206 Ariz. 276, 285 (Ariz. Ct. App. 2003).

⁹³ Reinheimer, supra note 8, at 227-228.

⁹⁴ Skinner v. Oklahoma, 316 U.S. 535 (1942) (right to have offspring); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to contraception for married people); Loving v. Virginia, 388 U.S. 1 (1967) (right to marry the person of one’s choice regardless of race); Levy v. Louisiana, 391 U.S. 68 (1968) (rights of illegitimate children); Eisenstadt v. Baird, 405 U.S. 438 (1972) (right to contraception for unmarried people); Stanley v. Illinois, 405 U.S. 645(1972) (right of a father to raise his illegitimate children); Lawrence v. Texas, 539 U.S. 558 (2003) (right of same-sex partners to privacy in their own home).

⁹⁵ Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 669 (1966) (comparing Plessy v. Ferguson, 163 U.S. 537, 559 (1896) with Brown v. Board of Education, 347 U.S. 483 (1952)).

⁹⁶ Skinner v. Oklahoma, 316 U.S. 535 (1942).

⁹⁷ Lawrence, 539 U.S. 558.

be followed by the courts in overturning anti-marriage laws. This due process argument is not inconsistent with the sex discrimination argument for an equal protection claim argued here, and should be argued alongside the equal protection claim, however it should not be relied on as the sole argument.

The second argument, that the statute denies equal protection based on sexual orientation, may or may not be inconsistent with a sex discrimination claim. Under the sexual orientation argument the Court should apply heightened scrutiny, because LGB people meet the factors for quasi-suspect or suspect classification.⁹⁸ Even in those state courts which have not defined LGB people as a suspect class, some have held they are a quasi-suspect class based on these factors.⁹⁹ Unfortunately many states have held sexual orientation neither suspect nor quasi-suspect, and the US Supreme court has yet to apply anything higher than rational basis.

Stein argues that the sexual orientation discrimination argument must be applied because the sex discrimination argument “mischaracterizes the core wrong” and does not reach all anti-gay laws, among other complaints. The argument this paper makes focuses on winning a case against same-sex marriage bans, which are facially discriminatory as to sex and therefore reached by a sex discrimination claim, not on fighting anti-gay sentiment in the abstract or securing strict scrutiny for future cases against other anti-gay laws.

Koppelman disagrees with Stein, arguing that the sex discrimination argument is valid and important because it makes the prima facie case for heightened scrutiny. Koppelman has written extensively on the sex discrimination argument, and his basic premise is that “the taboo

⁹⁸ Recognition as a quasi-suspect class is based on two required factors: (1) history of invidious discrimination; and (2) distinguishing characteristics bear no relation to ability to perform or contribute to society. U.S. v. Virginia, 518 U.S. at 531-32; Cleburne, 473 U.S. at 441. Two additional considerations are: (3) immutability; and (4) the group is a minority or politically powerless. Kerrigan, 957 A.2d at 425-26. These additional considerations, not required for quasi-suspect; do support strict scrutiny.

⁹⁹ Kerrigan, 957 A.2d at 411.

against homosexuality reinforces the inequality of the sexes, and that is, at least in large part, why the taboo exists”.¹⁰⁰ I do not disagree with Koppelman on any level, but from a bisexual perspective I would simplify the argument to showing that the only determining factor in denying marriage rights under DOMA is the sex of each plaintiff spouse.

Another possibility raised is the intersectional approach which, finding separate claims for sex discrimination and sexual orientation discrimination incompatible, argues for “a postmodern argument for how various biases can and do intersect”¹⁰¹ Again this seems unnecessarily complex in the instant case. All of these debates are discussing the application of an equal protection claim to anti-gay laws across the board which burden gay and lesbian plaintiffs. The distinction this paper makes is that as applied to DOMA and bisexual plaintiffs, sex discrimination is the best argument.

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.¹⁰² 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.¹⁰³ Although the U.S. Supreme Court affirmed the judgment under rational basis, it never specifically disaffirmed the applicability of strict scrutiny.¹⁰⁴ Additionally, the US Attorney

¹⁰⁰ Koppelman, Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination, 69 N.Y.U.L. Rev. 197, 284 (1994).

¹⁰¹ Williams, 14 Colum. J. Gender & L. 131, 133.

¹⁰² 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).

¹⁰³ Louis Michael Seidman, Romer's Radicalism: The Unexpected Revival of Warren Court Activism, 1996 SUP. CT. REV. 67 (1996).

¹⁰⁴ 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,

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.¹⁰⁵

The problem with arguing sexual orientation discrimination 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 LGB cases under rational basis. The same risk exists in any state Supreme Court that has not yet decided what level of scrutiny to apply. Sex discrimination is the safer argument.

The answer of level of scrutiny for sex discrimination, however, is well settled law¹⁰⁶ 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.

Finally, 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 LGB 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.¹⁰⁷ Some laws are so irrational or absurd on

indeed defies, **even** this conventional inquiry,” referring to the easiest test, that of rational basis. Romer, 517 U.S. at 632 (emphasis added).

¹⁰⁵ 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>

¹⁰⁶ United States v. Virginia, 518 U.S. at 519.

¹⁰⁷ Romer 517 U.S. at 631.

their face it is clear they can be motivated by nothing other than animus or prejudice against a group.¹⁰⁸ The danger of relying on a rational basis test is self evident: it is too easy to find some rational basis supporting a statute. In the case of marriage laws there are so many factors other than animus, such as sincerely held beliefs that procreation is the purpose of marriage,¹⁰⁹ and only one of the factors need be found a rationally related legitimate interest to allow the law to stand.

B. Why equal protection based on sex discrimination is a better argument.

The fourth option, sex discrimination under the Equal Protection Clause, is a better argument against DOMA because sex is the determinative factor in the plain language of the law and there is precedent supporting heightened scrutiny of laws that discriminate on the basis of sex. Many scholars have made and expanded on this argument. None that I've seen have made the suggestion that comparing bisexual same-sex couples to bisexual different-sex couples clarifies and focuses the sex discrimination argument against DOMA.

DOMA denies equal protection under intermediate scrutiny, which should be applied because the statute is facially discriminatory as to sex. The statute is facially discriminatory as to sex, even though it applies equally to men and women, and sex is a quasi-suspect classification.¹¹⁰ Where legislation negatively affects a quasi-suspect class intermediate scrutiny controls and the classification is deemed valid only if it is "substantially related to a sufficiently important governmental interest."¹¹¹ Marriage Bans are facially discriminatory as to sex, so they must be held to at least Intermediate Scrutiny.

¹⁰⁸ Romer, 517 U.S. at 632; Cleburne 473 U.S. at 448-49.

¹⁰⁹ 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.")

¹¹⁰ Loving, 388 U.S. at 8; U.S. v. Virginia, 518 U.S. at 519.

¹¹¹ Equality Found. v. City of Cincinnati, 128 F.3d 289, 293 (6th Cir. 1997); Cleburne, 473 U.S. 441.

Unfortunately equal protection based on sex discrimination hasn't been applied by a state Supreme Court since Baehr. The purpose of the prohibition against sex discrimination is thought to be one (or both) of two possibilities: "to prevent the imposition of gender classifications" or "to end the subordination of women".¹¹² In analyzing on this basis Koppelman was addressing anti-gay laws in general and talking only about their effect on gays and lesbians.

The premise of this paper is that when applied to the two same-sex bisexual couples' hypothetical claim that DOMA is unconstitutional there is no need to work through the fascinating sociological and historical connections between sexism and the homosexuality taboo.¹¹³ A bisexual person is not homosexual. A bisexual person can legally marry without necessarily offending her own sexual orientation. The law does not discriminate against the bisexual person on the basis of her sexual orientation, per se. It discriminates on the basis of her sex in relation to the sex of her partner.

Koppelman is right in saying that the sex discrimination claim must and does match up with the purpose of the doctrine. In discriminating on the basis of her sex in relation to the sex of her partner DOMA imposes a gender classification on the bisexual woman by requiring that as a woman she must couple with a man, if at all, because that is what women do. It also perpetuates the subordination of women by assuming that if a bisexual man marries a man he is putting himself in a subordinate position, like a woman.¹¹⁴

¹¹² "If the purpose of this doctrine is to prevent the imposition of gender classifications on people's life choices, then the argument is over. This is just what the formal argument shows that antigay discrimination does. If, however, one thinks that it exists in order to end the subordination of women... sexism [is] an important wellspring of antigay animus, and... the homosexuality taboo functions to strengthen gender hierarchy." Koppelman, supra note 18, at 528 (2001).

¹¹³ Koppelman, supra note 102, at 234 (1994).

¹¹⁴ "The central outrage of male sodomy is that a man is reduced to the status of a woman, which is understood to be degrading." Id. at 235.

Reinheimer claims that the sex discrimination argument supports same-sex marriage because “the Equal Protection Clause protects gender non-conformity and same-sex marriage is fundamentally gender transgressive.”¹¹⁵ Koppelman also goes in a slightly different direction, saying the laws “reinforce the hierarchy of males over females”.¹¹⁶ I find the gender non-conformity and female-subordination arguments equally valid, but both more convoluted than necessary. A law that classifies based on sex, on its face, implies sex discrimination. Period.

Koppelman notes seven valid claims against the government with regard to anti-gay laws.¹¹⁷ Critique of the sex discrimination argument is often based on the fact that it leaves the other arguments out.¹¹⁸ The point of this paper is not to argue that other arguments should be left out of a case against the government for the unconstitutionality of DOMA, it is to argue why sex discrimination is the best of all the valid claims that should be made because it is winnable and because it is inclusive of bisexuals and other marginalized minorities.

It doesn't necessarily matter that a win on sex discrimination doesn't set a precedent for sexual orientation as a suspect class. LGBT discrimination¹¹⁹ in housing, jobs, parenting, etc. could be held to strict scrutiny, intermediate scrutiny, or rational basis depending on whether or not the Court eventually holds sexual orientation to be a suspect class, a quasi-suspect class, or neither. However some of these laws could also benefit from sex discrimination claims. “Any law that discriminates against gays as such must be predicated on some procedure for determining who is gay... [T]o determine a person's sexual orientation, one needs to know the

¹¹⁵ Reinheimer, *supra* note 8, at 214.

¹¹⁶ Koppelman, *supra* note 102, at 198 (1994).

¹¹⁷ The seven claims are: intrusion on privacy, enforcement of beliefs about sexual morality, support of specific religious doctrines on a non-neutral, interference in family matters that are not the government's business or area of expertise, oppression of a long-suffering minority, cruelty and hypocrisy in enforcement, and last but not least discrimination on the basis of sex. Koppelman, *supra* note 18, at 519-520 (2001).

¹¹⁸ *Id.* at 520.

¹¹⁹ “Drawing on ... Eskridge, Stein observes that the sex discrimination argument does not reach all antigay laws...[S]ex classifications are found neither in laws that explicitly discriminate on the basis of sexual orientation... nor in laws that do not facially discriminate but have discriminatory effects on gays.” *Id.* at 526.

person's sex and the sex of the people to whom he or she is primarily sexually attracted."¹²⁰

Therefore the lack of help the sex discrimination argument provides in these cases is not a reasonable argument for not pursuing the sex discrimination claim against DOMA.

Scalia's dissent in Lawrence v. Texas, makes a strong case for arguing a sex discrimination claim against DOMA and other marriage bans. Addressing O'Connor's concurrence in which she applied equal protection, Scalia said:

[In an] equal-protection challenge ... [the Texas sodomy statute] does distinguish between the sexes insofar as concerns the partner with whom the sexual acts are performed: men can violate the law only with other men, and women only with other women. ... [I]t is precisely the same distinction regarding partner that is drawn in state laws prohibiting marriage with someone of the same sex while permitting marriage with someone of the opposite sex.¹²¹

Scalia uses this rationale to argue that the sodomy law found unconstitutional in Lawrence cannot itself be a violation of equal protection on the basis of sex,¹²² because same sex couples cannot get married and *that* is not a violation of equal protection on the basis of sex. However a sex discrimination based challenge to an anti-marriage statute under equal protection has not yet been brought to the Supreme Court. If one is brought, Scalia's argument could potentially be turned on its head. Unfortunately the majority opinion in Lawrence was not based on equal protection but rather on a fundamental right to privacy.

Of course there are arguments against the sex discrimination argument. Marriage Bans are only applicable to LGBT persons. Heightened scrutiny of sex classifications is based on historical treatment of women, not gays. Getting to heightened scrutiny of LGBT gets us so much more by providing precedent for overturning laws where discrimination is based strictly on sexual orientation. Koppelman says that the "critique of the sex discrimination argument for gay

¹²⁰ Id. at 527. (Internal quotes deleted).

¹²¹ Lawrence, 539 U.S. at 600 (Scalia, J., dissenting).

¹²² Id.

rights is concerned about what the argument leaves out. I do not want to leave them out, either. But that is not a reason to neglect the wrongs specifically revealed by the sex discrimination argument.”¹²³ This paper does not suggest avoidance of the commonly used claims; rather it proposes a focus on a primary claim for sex discrimination based on a facially discriminatory statute.

Koppelman says that of all the arguments against it the only persuasive one is that which claims “that the sex discrimination argument ignores, and may render invisible, a central moral wrong of [sexual orientation] discrimination... It is, however, a difficulty that is present in almost any legal argument, and ... cannot be an objection against any particular argument.”¹²⁴ The solution is not to leave out the sexual orientation discrimination claim against DOMA, but to argue it alongside a vigorous and winnable claim for sex discrimination.

The statute is facially discriminatory on the basis of sex/gender because it uses the words “of the same gender” in the language of the statute. Even if the court does not see fit to put this statute to the test of strict scrutiny based on fundamental right, the statute discriminates on the basis of the quasi-suspect classification of gender; therefore, the law is subject to intermediate scrutiny, a test which it also fails.¹²⁵ An intermediate level of scrutiny between rational basis review and strict scrutiny is typically used to review laws that employ quasi-suspect classifications such as gender.¹²⁶ Discrimination based on gender has long been held to a heightened level of scrutiny.¹²⁷ The statute is facially discriminatory on the basis of gender:

Following the Hawaii Supreme Court opinion that denial of the right to marriage was unconstitutional under the Hawaii Constitution a majority of US states passed amendments or

¹²³ Koppelman, *supra* note 18, at 520 (2001).

¹²⁴ *Id.* at 521.

¹²⁵ *Equality Found.*, 128 F.3d at 293; *Cleburne*, 473 U.S. at 440-41.

¹²⁶ *Kerrigan*, 957 A.2d at 423.

¹²⁷ *U.S. v. Virginia*, 518 U.S. at 519.

revisions to their state constitutions specifically denying marriage right to same-sex couples. These “mini-DOMAs” foreclose any state supreme court’s ability to legalize same-sex marriage. Of the thirty states which have added amendments or revisions to their state constitutions since the Baehr case, not a single one refers explicitly to sexual orientation. Eighteen states use the phrase “one man and one woman,”¹²⁸ nine say “a man and a woman,”¹²⁹ one “a male and female person,”¹³⁰ one “man and woman,”¹³¹ and only the first, Hawaii, uses the term “opposite-sex couples.”¹³² Several of those states also include language which specifically excludes recognition of marriages or other relationships of “same sex” or “same gender” couples.¹³³ In reaction to the Hawaii decision Congress passed DOMA to exclude same-sex marriages from federal benefits and from the full faith and credit clause which requires states to recognize all other marriages performed in other states. DOMA defines statutory language as follows:

Definition of "marriage" and "spouse"
 In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.¹³⁴

If Toby were a man who had married Jean, rather than a woman, the government would not have discriminated and would have granted full federal marriage benefits. Because the word

¹²⁸ Alaska Const. Art. I, § 25; A.R.S. Const. Art. XXX, § 1; Colo. Const. Art. II, § 31; Mont. Const. Art. XIII, § 7; Or. Const. Art. XV, § 5a; Ark. Const. Amend. 83, §§ 1-3; Fla. Const. Art. I, § 27; Kan. Const. Art. XV, § 16; Ky. Const. § 233A; La. Const. Art. XII, § 15; Mich. Const. Art. I, § 25; Ohio Const. Art. XV, § 11; S.C. Const. Art. XVII, § 15; Tenn. Const. Art. XI, § 18; Tex. Const. Art. I, § 32; Va. Const. Art. I, § 15-A; Wis. Const. Art. XIII, § 13; and Okla. Const. Art. II, § 35.

¹²⁹ Cal Const. Art. I § 7.5; Mo. Const. Art. I, § 33; Idaho Const. Art. III, § 28; N.D. Const. Art. XI, § 28; S.D. Const. Art. XXI, § 9; Utah Const. Art. I, § 29; Miss. Const. Art. XIV, § 263A; Ala. Const. Art. I, § 36.03; Neb. Const. Art. I, § 29.

¹³⁰ Nev. Const. Art. I, § 21.

¹³¹ Ga. Const. Art. I, § 4, ¶ I.

¹³² Haw. Const. Art. I, § 23.

¹³³ Miss. Const. Art. XIV, § 263A; Ala. Const. Art. I, § 36.03; Neb. Const. Art. I, § 29; Ga. Const. Art. I, § 4, ¶ I; and Okla. Const. Art. II, § 35.

¹³⁴ “Defense of Marriage Act” (DOMA). 1 U.S.C. § 7.

“sex” is used in the statute, and because if Toby’s sex had been male instead of female she would not have faced this discrimination, the statute discriminates against a quasi-suspect class based on sex and should be subject to the heightened intermediate scrutiny test.¹³⁵ Likewise, if Chris were a woman who had married Ted, rather than a man, the government would not have discriminated and would have granted full federal marriage benefits.

The statute is discriminatory on the basis of sex even though it applies equally to males and females. A statute which applies to two classes equally can still be class based discrimination.¹³⁶ Whether male or female, persons in same-sex couples, by virtue of their sex, cannot marry under the statute. This is unconstitutional discrimination on the basis of sex, and is therefore subject to heightened scrutiny.

C. The Loving argument: analogy to racial discrimination in marriage

All of the scholarly writings and opinions applying the sex discrimination argument to same-sex marriage bans depend in some way on the Loving analogy that if a statute that applies equally to blacks and whites can be found to be race discrimination, than a statute that applies equally to men and women can be found to be sex discrimination. Hunter explains that “the fact of equal application does not immunize the statute... [B]y analogy, Loving stands for the proposition that but for the partner's sex, the individual could marry.”¹³⁷

Koppelman says “[t]he big problem with [Stein’s] sociological objection is that it implies that Loving was wrong to talk about white supremacy. The same objection could have been raised in that case: Miscegenation laws primarily harmed, not blacks as such, but interracial heterosexual couples (a group that, by definition, included equal numbers of blacks and whites).

¹³⁵ U.S. v. Virginia, 518 U.S. at 519.

¹³⁶ Loving, 388 U.S. at 8.

¹³⁷ Nan Hunter, The Sex Discrimination Argument in Gay Rights Cases, 9 J.L. & Pol’y 397, 402 (2001).

While the harm to blacks was recognized even by the most obtuse judges as a ‘stigma, of the deepest degradation ... fixed upon the whole [black] race,’ it would be callous not to notice that the persons who were most severely harmed by those laws were the ones whose marriages were voided and who were, in many cases, sent to prison. If the harm to blacks counts against the miscegenation laws, then for the same reasons, the harm to women should count against antigay laws.”¹³⁸

Eskridge’s¹³⁹ argument for strict scrutiny is based on an elaborate analogy to racial discrimination throughout history. This is, however, only an analogy, while the argument for intermediate scrutiny of sex discrimination is based on actual precedent that has been around a long time.¹⁴⁰ An analogy¹⁴¹ is not quite the same as a metaphor,¹⁴² however Eskridge’s analogy could lead to use of the racial discrimination argument as metaphor for LGBT discrimination which might box the marriage equality movement into a corner. As Cardozo said, “[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.”¹⁴³

¹³⁸ Koppelman, 49 UCLA L. Rev. 519, 529.

¹³⁹ From presentation Professor William Eskridge made in class.

¹⁴⁰ U.S. v. Virginia, 518 U.S. at 519.

¹⁴¹ “Analogy - a similarity between like features of two things, on which a comparison may be based; similarity or comparability; Logic: a form of reasoning in which one thing is inferred to be similar to another thing in a certain respect, on the basis of the known similarity between the things in other respects.”
<http://dictionary.reference.com/browse/analogy>

¹⁴² “Metaphor - A figure of speech in which a term or phrase is applied to something to which it is not literally applicable in order to suggest a resemblance, as in ‘A mighty fortress is our god.’; something used, or regarded as being used, to represent something else; emblem; symbol.”
<http://dictionary.reference.com/browse/metaphor>

¹⁴³ Berkey v. Third A. R. Co., 244 N.Y. 84, 94 (1926).

D. The “2020 Vision” and how this helps us get there

In 2005 I attended “The 2020 Vision” workshop at the Creating Change conference¹⁴⁴ in Oakland, led by Evan Wolfson who was one of the attorneys for the plaintiffs in Baehr. This was a plan to win full marriage equality nationwide by the year 2020, and consisted of reaching a “tipping point” with enough states offering full marriage equality or some form of marriage light to support a Supreme Court win. At the time only one state allowed same-sex marriages, and the year 2020 seemed very, very far away. The goal was to have somewhere around a third of the states allowing same-sex marriage and another third allowing some sort of what we called “marriage light” (Civil Unions, Registered Domestic Partnerships, etc.) prior to attempting a case in the Supreme Court that would overturn all the remaining same-sex marriage bans the way Loving overturned the remaining antimiscegenation statutes in 1967. Of course there was also DOMA to consider, and as we can see with the Gill¹⁴⁵ and Pedersen¹⁴⁶ cases that can be attacked piecemeal, as well as being potentially overturned by Congress.¹⁴⁷

I’ve stated above that the sex discrimination argument gets us to Intermediate scrutiny in the US Supreme Court. In order to win in the US Supreme Court I agree with Evan Wolfson that we first need to reach a tipping point in the states. Some states are winning marriage equality or marriage light via the legislatures, some via the courts. Some of these wins are being taken away via the ballot box. To reach the tipping point the marriage equality movement needs to focus resources on the most winnable states and include the sex discrimination argument.

¹⁴⁴ Creating Change 2005, Reclaiming Moral Values: A Lesbian, Gay, Bisexual and Transgender Agenda for 2006, http://www.thetaskforce.org/events/creating_change_archive/creating_change05

¹⁴⁵ Challenge to the constitutionality of Section 3 of the Defense of Marriage Act, Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 376 (D. Mass. 2010).

¹⁴⁶ Pedersen, 2010 U.S. Dist. Ct. Pleadings 1750 (January 14, 2011); *supra* note 88.

¹⁴⁷ Respect for Marriage Act (RMA), H.R.1116 and S.598, 112th Congress (2011 - 2012).

The benefit in states like Hawaii is that Hawaii's constitution specifically protects against sex discrimination and its courts hold sex as a suspect classification. In spite of gaining support in the polls, marriage equality has yet to win a voter initiative. The difference between states like Massachusetts and ones like California is that it is a lot harder to pass a referendum in Massachusetts due to their laws around voter propositions. This allows a judicial win in a state like Massachusetts to remain the law.

CONCLUSION

I propose that in the short term we focus this particular strategy on states in which we can more easily win marriage under a sex discrimination claim and in which that win can less easily be taken away at the ballot in order to reach the tipping point. Meanwhile cases addressing DOMA piece by piece should be duplicated with a case against DOMA in Federal Court claiming sex discrimination brought by plaintiffs who are bisexual couples legally married in their state. In the long term we should include bisexual couples and a strong argument that denial of same-sex marriage is sex discrimination in a federal case against the remaining states which deny marriage equality.

In summary, including bisexual couples in marriage equality cases clears away the complications inherent in the gender non-conformity and female-subordination arguments and allows judges to clearly see sex discrimination, as well as being inclusive of a marginalized group which makes up more than half of the LGBT population. In order to get to sex discrimination it is necessary for the court to accept the Loving argument that equal application does not immunize a statute. In any case in which a court agrees that a same-sex marriage ban is sex discrimination it must apply at least intermediate scrutiny. A guarantee of heightened scrutiny based on sex discrimination is a safer bet than hoping that sexual orientation would be

held suspect or quasi-suspect. Applying heightened scrutiny to the statute is more likely to result in a win. We need a lot more wins in the states, and a big win in the Supreme Court, to see the vision of full marriage equality by 2020.