



Legal Analysis of the Department of Justice's Brief in *United States v. Windsor*

The Department of Justice argues that the federal Defense of Marriage Act (“DOMA”) is unconstitutional, but only under heightened constitutional scrutiny. The Department of Justice does not challenge DOMA under traditional rational-basis analysis, which is the appropriate constitutional standard and the standard that the Court applied in *Romer v. Evans* (an equal-protection challenge based on “sexual orientation”). Thus, the Department of Justice effectively concedes that DOMA is constitutional. That is the only reasonable conclusion under rational-basis review, for opposite-sex couples generally further the State’s procreative purposes for marriage while same-sex couples do not.

The Department of Justice’s argument that DOMA is unconstitutional ignores that laws like DOMA, which affirm marriage as the union of one man and one woman, rationally distinguish between same-sex couples and opposite-sex couples, and that this biologically-based distinction is rooted in the reality that only opposite-sex couples naturally procreate. DOMA is constitutional for this reason because the Constitution requires only that the government treat similarly situated persons similarly. The government is not required to engage in gestures of superficial equality or otherwise pretend that different things are the same.

The Department of Justice asserts that “sexual orientation” should be treated as a suspect classification, like race or sex, thus triggering what is known as heightened constitutional scrutiny of DOMA. The Department of Justice specifically claims that “sexual orientation” is “an immutable or distinguishing characteristic,” and that “gay and lesbian people are a minority group with limited political power.” Yet “sexual orientation” is not an immutable or well-defined characteristic, as admitted even by scholars of that issue who support redefining marriage. Moreover, gays and lesbians wield tremendous political power, as is abundantly apparent by, among several other things, this brief filed by the Department of Justice and the most recent elections where a majority of citizens in Maine, Maryland, and Washington voted to redefine marriage. Plainly, then, gays and lesbians are more than capable of winning political battles for themselves and do not need special protection from the judiciary.

The Department of Justice also argues that DOMA violates heightened constitutional scrutiny because the government interests supporting DOMA—such as promoting responsible procreation, providing national uniformity over federal marriage-benefits for same-sex couples, and proceeding with caution on the issue of marriage—are not important governmental objectives that are substantially furthered by DOMA. But marriage between one man and one woman is a unique social institution designed to achieve the government’s important interest in responsible procreation, and it is closely connected to advancing this vital interest. DOMA thus survives even heightened scrutiny.

2/26/2013