

3-25-2003

# Does Discrimination Against Gay Men and Lesbians Count as Sex Discrimination? The Supreme Court May Soon Give An Answer

Joanna Grossman

*Maurice A. Deane School of Law at Hofstra University*

Follow this and additional works at: [http://scholarlycommons.law.hofstra.edu/faculty\\_scholarship](http://scholarlycommons.law.hofstra.edu/faculty_scholarship)

---

## Recommended Citation

Joanna Grossman, *Does Discrimination Against Gay Men and Lesbians Count as Sex Discrimination? The Supreme Court May Soon Give An Answer* FINDLAW'S WRIT (2003)

Available at: [http://scholarlycommons.law.hofstra.edu/faculty\\_scholarship/819](http://scholarlycommons.law.hofstra.edu/faculty_scholarship/819)

This Article is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Faculty Scholarship by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact [lawcls@hofstra.edu](mailto:lawcls@hofstra.edu).



<http://writ.news.findlaw.com/grossman/20030325.html>



## Does Discrimination Against Gay Men and Lesbians Count As Sex Discrimination?

The Supreme Court May Soon Give An Answer

By [JOANNA GROSSMAN AND BRIAN LEHMAN](#)

Tuesday, Mar. 25, 2003

Tomorrow, March 26, the United States Supreme Court will hear oral arguments in *Lawrence v. Texas*, a case based on the criminal conviction of two men who engaged in homosexual conduct (each was fined \$200). They appealed their convictions, arguing that the Texas anti-sodomy law violated the Due Process and Equal Protection Clauses of the U.S. and Texas Constitutions.

The media coverage of *Lawrence* has been intense - second only to the upcoming case on affirmative action. But this coverage has both over- and underestimated *Lawrence's* significance to gay rights, by only stressing the Due Process challenge to the law, the resolution of which will ultimately have limited practical impact.

At the same time, the media has largely ignored the much more significant Equal Protection challenge. If the Supreme Court addresses this argument, *Lawrence* stands to be one of the most important civil rights cases of the modern era.

In other words, what has been largely portrayed in the media as a case about privacy, could actually turn out to be a far-reaching advance--or setback--for equality.

### The Due Process Challenge

The Due Process challenge in *Lawrence* falls into the realm of "substantive due process," a constitutional doctrine that declares some rights to be so fundamental that courts will subject them to a heightened "means-end scrutiny."

In the most general of terms, laws affecting such "fundamental rights" are presumed unconstitutional and the government must prove that the law is necessary to further some very important goal to survive the Due Process challenge.

[Carey v. Population Services International](#) is just one of many examples showing how this heightened scrutiny works. In *Carey*, the Court held unconstitutional a law banning nonpharmacists from selling contraceptives. The law triggered heightened scrutiny because it encroached on the fundamental right to decide whether "to beget or bear a child."

In [Bowers v. Hardwick](#), a previous case challenging the constitutionality of a state's criminal sodomy law, a 5-4 majority of the Supreme Court held that there is no fundamental right to engage in homosexual sodomy.

Thus, heightened scrutiny was not triggered and the Court only subjected the law to a "rational basis" review - the type of review that courts apply to all other laws that aren't subjected to heightened scrutiny. Under this test, courts presume the law is constitutional and will uphold it if they can find that it is a rational means of advancing any legitimate state interest.

*Bowers*, having disposed of the fundamental right argument, held that criminalizing homosexual sodomy was constitutional under the Due Process Clause, as a rational method for preserving the public morality. Public morality, the Supreme Court has repeatedly held, is a government interest that is legitimate enough to satisfy rational basis review, but not "compelling" enough to be asserted by the government under a test of heightened scrutiny.

The Court has the opportunity in *Lawrence* to overrule *Bowers* by holding that consenting adults have a fundamental right to engage in intimate relationships even if it involves two people of the same sex. Because no one thinks that the law will survive heightened scrutiny, this is the issue on which the whole Due Process challenge turns. If the men in *Lawrence* had a fundamental right to engage in sexual relationships with each other, the law will not be able to survive a Due Process Clause challenge.

But such a ruling would have only a rather modest impact on the daily lives of gay men and lesbians. Only [a handful of states](#) (Kansas, Missouri, Oklahoma, and Texas) currently have anti-homosexual sodomy laws on the books, while fewer than a dozen other states have anti-sodomy laws that apply to both heterosexuals and homosexuals.

Moreover, states rarely prosecute gay men and women for their violation of these laws. Indeed, the petition for certiorari in *Lawrence* asserted only that anti-homosexual-sodomy laws impose harms on the two petitioners "[and thousands of others.](#)"

In this respect, the media has greatly overestimated the importance of this *Lawrence* to gay men and women by focusing on whether the court will overturn *Bowers*. Of course, any due process ruling will have a great symbolic effect, but it will do little to change the day-to-day lives of gay men and women, as few laws turn on whether individuals are engaging in sodomy.

### **A Different Route: An Equal Protection Challenge**

In contrast to a Due Process challenge, an Equal Protection challenge looks to whether laws that treat different classes of people differently have a good enough reason for doing so.

While these two rights -- the right to substantive due process and equal protection of the laws-- trigger similar tests, they are nonetheless quite different. As Chicago Law Professor Cass Sunstein pointed out more than a decade ago, the Due Process Clause operates to protect rights that were traditionally considered --at an appropriate level of generality --fundamental. By contrast, the Equal Protection Clause operates to invalidate laws that were once, or even always, thought to be permissible. Thus, a governmental action may be constitutional under one principle, but unconstitutional under the other.

This description explains why the Court could uphold *Bowers* and yet still find Texas' law to be a violation of the Equal Protection Clause, and therefore, unconstitutional. (The majority in *Bowers* explicitly refrained from deciding any issues relating to the Equal Protection Clause.) And equal protection might be a better weapon against the Texas statute than the Due Process Clause given the lack of a strong tradition of protecting homosexual sexual conduct.

While the petition for certiorari explicitly raises this issue, and the Supreme Court may well address it, most - but [not all](#) - commentators have ignored it.

### **The Equal Protection Argument, As Considered by the Texas Courts**

Before considering how the Court may decide the Equal Protection argument, it's worth examining the different ways in which the lower courts addressed it, since their reasoning shows the potential impact of this case.

When the statute was first challenged in state court, a divided three-judge panel of the Texas Court of Appeals in *Lawrence* struck down the law though under the Texas Constitution's, not the U.S. Constitution's, Equal Protection Clause. (Both were used as bases for challenging the statute.)

"The simple fact is," Justice Anderson wrote for [the majority](#), "the same behavior is criminal for some but not for others, based solely on the sex of the individuals who engage in the behavior. In other words, the sex of the individual is the sole determinant of the criminality of the conduct."

Upon this logic, the panel concluded that the statute turned on a sex-based classification of the defendants. As Professor Andrew Koppelman has forcefully argued for well over a decade, discrimination against gay men and lesbians is sex discrimination.

Accordingly, the Texas court applied a heightened scrutiny, and concluded that because the state had failed to show that the statute promoted any compelling state interests, it was unlawful under the Texas Constitution. In fact, the same reasoning would have called for heightened scrutiny under the U.S. Constitution, but the court found it unnecessary to use that basis because it had found that the law violated the state's constitution.

The en banc panel's majority held that the law did not constitute sex discrimination. Instead, it held that the law,

at most, discriminated on the basis of sexual orientation, and went on to apply the lowest standard of review - the rational basis test - under the U.S. and Texas Constitutions.

The en banc panel upheld the statute on the ground that the law furthered the state's legitimate interest in preserving "public morals," akin to laws prohibiting child endangerment and the sale of obscene materials. The statute, it held, represented a legitimate effort by the state of Texas to protect the public's morality.

No reasonable person thinks this law can survive heightened scrutiny - for the simple reason that the government has not offered "compelling" reasons for the law. Again, public morality is a legitimate but non-compelling interest, so it only helps the state if the rational basis test applies.

Resolution of the equal protection challenge thus turns on whether the Court finds that the statute discriminates against gay men and women because of their sex, thus warranting heightened scrutiny.

### **Different Ways the Court May Approach the Sex Discrimination Theory**

How the Supreme Court decides this issue depends on which of two very different tacks it takes. This is one instance where the way the question is phrased really may determine the outcome.

The Court might ask: How does the statute apply to men and women as groups? Or, in the alternative, the Court might ask: Does the statute apply to the individual challenging it in a way that turns on that person's sex?

Lower courts that have asked the first question have rejected the idea that discrimination against gay men and women is sex discrimination. For example, the en banc court in *Lawrence* reasoned that the statute left men and women, as groups, equal to each other. Men are prohibited from having sex with men, and women are prohibited from having sex with women. Thus, heightened scrutiny was not warranted.

By contrast, lower courts that have asked the second question - focusing on the individual's sex - have tended to see an Equal Protection violation. Consider the logic of the *Lawrence* en banc dissenters:

In this example, the dissenters explained: "While the acts were exactly the same, the gender of the actors was different, and it was this difference alone that determined the criminal nature of the conduct."

Put another way, but for the fact that Cathy is a woman, she would not have committed a crime. Such discrimination triggers heightened scrutiny under which the Texas law cannot survive.

The "but for" approach - concentrating on how individuals' fate under the law may be determined by their gender - has also led to other court rulings deeming sexual orientation discrimination to count as sex discrimination, too.

For instance, some courts have used this approach to subject laws penalizing same-sex relationships to a heightened scrutiny - such as a law prohibiting the issuance of a marriage license to two people of the same sex. (The most famous of decisions to use this reasoning was the Hawaiian Supreme Court in a same-sex marriage case.)

Moreover, in interpreting Title VII - not the Constitution - the Court has repeatedly endorsed the "but for" approach. In [Newport News Shipbuilding & Dry Dock Co. v. EEOC](#), the Court held that sex discrimination occurs whenever an employee is treated "in a manner which but for that person's sex would be different." The Court has made similar holdings in [Price Waterhouse v. Hopkins](#), [UAW v. Johnson Controls](#), and [City of Los Angeles v. Manhart](#).

Of course, Title VII is different from the Constitution. The former is a statute that prohibits all sex discrimination when it substantially affects someone's job. The latter only subjects the government's discrimination to a heightened scrutiny. Nevertheless, these cases support the proposition that Court should take the "but for" approach when determining whether some action discriminates on the basis of sex.

There is also a strong basis in the Supreme Court's own constitutional precedents for thinking it will choose the individual "but for" approach in deciding whether the sodomy law discriminates on the basis of sex.

First, as a basic starting point in equal protection cases, the Court has asked whether an individual is being discriminated against, as opposed to asking whether men and women as groups are treated similarly.

Consider, for instance, [Shelley v. Kraemer](#), an early case invalidating racially restrictive covenants on real estate deeds. There, the Court stated that the rights guaranteed by the Fourteenth Amendment were "guaranteed to the individual." (Emphasis added.)

Courts that have adopted the sex discrimination argument have found further support in the Supreme Court's equal protection jurisprudence involving race. The Court's opinion in [Loving v. Virginia](#), which invalidated anti-miscegenation statutes on grounds of equal protection, is frequently cited.

In *Loving*, the Court held that a law prohibiting interracial marriage could not survive heightened scrutiny. The state had argued that the law should be reviewed under the rational basis test because it applied to blacks and whites equally. After all, whites could only marry whites and blacks could only marry blacks. But the Court in *Loving* looked instead to the individuals who were denied the ability to marry whom they chose and found that the statute rested "upon distinctions drawn according to race."

[Palmore v. Sidoti](#), however, is even more compelling. There, the Supreme Court invalidated a state court's decision to award custody of a child to the father based in part on the fact that the child's white mother had remarried a black man.

Like the intermarriage ban in *Loving*, the state court's decision in *Palmore* at least arguably treated both groups (here, both races) the same - favoring, for both, a "same race" custody award. Nevertheless, the Court struck down the decision as unjustifiable race discrimination, taking an individual view - patently, the child's mother faced discrimination, when it came to a custody decision, based on her race in relationship to the race of the person she chose to marry.

That provides strong support for the equal protection argument in *Lawrence*. In *Palmore*, the mother suffered because she was white, and chose to marry a black man, not a white man. Had she been black, the court would not have punished her by taking custody away - and there was no compelling reason for such government action.

Similarly, in *Lawrence*, the two gay men suffered because they were men who chose to engage in sex with other men, not women. Had they been women who chose to engage in sex with men, they wouldn't have faced a criminal conviction.

In both cases, then, an individual's characteristic - race for the mother in *Palmore* and sex for the two men in *Lawrence* - determines how the government will treat them. If this characteristic were to be reversed, the government would treat them differently. Some compelling reason for such discrimination is therefore needed.

### **The Impact of the Equal Protection Argument**

Unlike the potentially narrow application of a ruling rooted in due process, a ruling that the Texas law violates the Equal Protection Clause will affect every federal and state action that discriminates against gay men and women - from employment to education to the military to marriage and adoption laws.

Whereas a win under the Due Process Clause in *Lawrence* would be largely rhetorical, a victory under the Equal Protection Clause would bring some very concrete benefits to gays and lesbians, and dramatically expand their legal rights. For this reason, most people are significantly underestimating how important *Lawrence* could be to gay rights in this country.

---

*Joanna Grossman, a FindLaw columnist, is an associate professor of law at Hofstra University, where she teaches Sex Discrimination, among other subjects. Grossman's other articles on issues including sex discrimination may be found in the archive of her columns on this site.*

*Brian Lehman received his J.D. from the University of Chicago Law School in 2000. He has published two articles on issues related to sex discrimination and equal protection: [The Equal Protection Problem in Sexual Harassment Doctrine](#), 10 Colum. J. of Gender & L. 125, and [Why Title VII Should Prohibit All Workplace Sexual Harassment](#), 12 Yale J.L. & Fem. 225.*

[Company](#) | [Privacy Policy](#) | [Disclaimer](#)

Copyright © 1994-2015 FindLaw