

## OBERGEFELL V. HODGES: HOW THE SUPREME COURT SHOULD HAVE DECIDED THE CASE

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In *Obergefell, et al. v. Hodges*, Justice Kennedy’s majority opinion legalizing same-sex marriage was based on “the mystical aphorisms of a fortune cookie,”<sup>1</sup> and “indefensible as a matter of constitutional law.”<sup>2</sup> Kennedy’s opinion was comprised largely of philosophical ramblings about liberty that have neither a constitutional foundation nor any conceptual limitation. The fictional opinion below arrives at the same conclusion, but the reasoning is based on equal protection rather than due process principles. The majority opinion holds that same-sex marriage bans violate the Equal Protection Clause because they: (1) discriminate on the basis of gender; (2) promote gender-based stereotypes; and (3) reflect animus toward same-sex couples. This approach roots the right to same-sex marriage more firmly in the Constitution’s text and reflects judicial restraint.

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1. *Obergefell, et al. v. Hodges*, 135 S. Ct. 2584, 2630 n.22 (2015) (June 26, 2015) (Scalia, J., dissenting).

2. *Id.* at 2616 (Roberts, C.J., dissenting).

## SUPREME COURT OF THE UNIFIED STATES

*Obergefell v. Hodges*

Justice Equality delivered the opinion of the Court, which was joined by Justices Gender Equality, Gender Stereotyping, Fairness, Freedom, Anti-Animus, and Anti-Discrimination.

Justice Liberty concurred in the result.

Chief Justice Restraint filed a dissenting opinion.

The cases involve challenges to same-sex marriage bans nationwide. The petitioners claim that such bans violate the fundamental right to marriage under the Fourteenth Amendment. The Court of Appeals rejected petitioners' claim. We granted certiorari, and now reverse.

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The role of a judge is "to persuade . . . not pontificate." Justice Ruth Bader Ginsburg, Speaking in a Judicial Voice, 67 N.Y.U. L. Rev. 1185, 1186 (1992).

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person . . . the equal protection of the laws." Amend. XIV, §1. Our jurisprudence has conditioned the level of scrutiny we apply to laws implicating equal protection guarantees on the nature of the right infringed.

As a general matter, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 440 (1985); *see also* *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 174-175 (1980).

However, laws drawing classifications on the basis of "race, alienage, or national origin," *City of Cleburne, supra* at 440, or infringing on fundamental rights will pass constitutional muster only if they are "suitably tailored to serve a compelling state interest." *Ibid.* at 440; *see also* *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

The Equal Protection Clause also applies to laws discriminating on the basis of gender. *See Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (what differentiates sex from . . . non-suspect statuses as intelligence or physical disability . . . is that the sex characteristic frequently bears no relation to ability to perform or contribute to society"). Indeed "different statutory treatment . . . solely

on account of the sex of the similarly situated individuals . . . is patently inconsistent with the promise of equal protection of the laws.” *Nguyen v. INS*, 533 U.S. 53, 86 (2001); *see also Reed v. Reed*, 404 U.S. 71, 77 (1971) (“By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause”). As the United States Supreme Court has stated, “[r]ather than resting on meaningful considerations, statutes distributing benefits and burdens between the sexes in different ways very likely reflect outmoded notions of the relative capabilities of men and women.” *City of Cleburne, supra*, at 441. Accordingly, a gender-based classification “generally provides no sensible ground for differential treatment.” *Ibid.* at 440. Laws discriminating based on gender are subject to intermediate scrutiny, which requires the State to demonstrate that the classification is substantially related to an important governmental interest. *See ibid.* at 441; *see also Craig v. Boren*, 429 U.S. 190 (1976); *cf. Harris v. Forklift Systems, Inc.* 510 U.S. 17 (1993) (going so far as to say that “it remains an open question whether ‘classifications based upon gender are inherently suspect’”).

Additionally, states may not enact laws carrying with them “the baggage of sexual stereotypes,” *Orr v. Orr*, 440 U.S. 268, 283 (1979). Such laws will be invalidated absent the showing of an “exceedingly persuasive” justification. *United States v. Virginia*, 518 U.S. 515, 533 (1996); *see also J.E.B v. Alabama*, 511 U.S. 127, 139 n.11 (1994) (“We have made abundantly clear in past cases that gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization”); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (“We are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group”); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975) (invalidating a stereotype-based classification even though the underlying generalization was “not entirely without empirical support”). Thus, a state is prohibited from “excluding qualified individuals based on ‘fixed notions concerning the roles and abilities of males and females.’” *Ibid.* (emphasis added) (*quoting* *Mississippi University for Women v. Hogan*, 458 U.S. 718, 725 (1982)). Put differently, states may not enact laws that rely on “overbroad generalizations about the different talents, capacities, or preferences of males and females.” *United States v. Virginia*, 518 U.S. 515, 541 (1996). These rules apply with particular force when the State controls the “gates to opportunity,” *Virginia, supra* at 533 (internal

citation omitted).

The United States Supreme Court cases involving sex-based classifications, rooted in gender stereotypes, are instructive. In *Nguyen*, the Court invalidated 8 U.S.C. § 10409(a)(4), which made it more difficult for a child born out of wedlock to claim citizenship to a United States parent who was a father. 533 U.S. at 56-57. Justice O'Connor issued a concurring opinion, in which she argued that the State's asserted interest in achieving "the goal of a 'real, practical relationship,'" *ibid.* at 88 (quoting *Miller v. Albright*, 523 U.S. 420, 482-483 (1998)) (Breyer, J., dissenting), between the child and a biological parent "finds support not in biological differences but instead in a stereotype—i.e., 'the generalization that mothers are significantly more likely than fathers . . . to develop caring relationships with their children.'" *Nguyen, supra*, at 88-89 (quoting *Miller, supra*, at 482-483 (Breyer, J., dissenting)).

Justice O'Connor observed that the statute at issue in *Nguyen* "relie[d] on 'the very stereotype the law condemns,'" *ibid.* at 89 (quoting *J.E.B., supra* at 138) (brackets added) (internal quotation marks omitted), "lends credibility," *Mississippi Univ. for Women, supra* at 730, to the generalization that women are better parents than men, and helps to convert that belief into "a self-fulfilling prophecy." *Ibid.* Justice O'Connor also recognized that the "hallmark of a stereotypical sex-based classification under this Court's precedents is not whether the classification is insulting, but whether it "relie[s] upon the simplistic, outdated assumption that gender could be used as a 'proxy for other, more germane bases of classification.'" *Nguyen, supra* at 90 (O'Connor, J., concurring) (quoting *Mississippi Univ. for Women, supra* at 730) (quoting *Craig, supra*, at 198); see also *J.E.B., supra* at 138 ("[w]hen state actors exercise peremptory challenges in reliance on gender stereotypes, they ratify and reinforce prejudicial views of the relative abilities of men and women").

These principles were expressed in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), which involved an allegation of sex discrimination under Title VII between two males. In *Oncale*, the Court held that nothing in Title VII necessarily "bars a claim of discrimination 'because of sex' merely because the plaintiff and the defendant . . . are of the same sex." *Ibid.* at 79 (internal citation omitted); accord *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682 (discrimination "because of . . . sex" protects men and women). Similarly, in *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864 (9th Cir. 2001), the plaintiff brought a Title VII claim against his male co-workers for a number of allegedly demeaning statements,

including that he carried his serving tray “like a woman,” and that he was a “faggot” and a “fucking female whore.” *Ibid.* at 870. The Ninth Circuit held that these statements created an “objectively and subjectively hostile” work environment in violation of Title VII. *Ibid.* at 871 (*quoting* Faragher v. City of Boca Raton, 524 U.S. 775, 787 (1998)). The Ninth Circuit noted that Title VII discrimination applies “with equal force to a man who is discriminated against for acting too feminine.” *Nichols, supra* at 874. Underlying *Oncale* and *Nichols* was an implicit recognition that the State may not enact laws that have the sole or primary purpose to re-enforce assumptions about how each gender does or should behave.

In addition, the Equal Protection Clause prohibits states from enacting laws that are motivated by animus against a particular group. *See Loving v. Virginia*, 388 U.S. 1 (1967) (holding that bans on interracial marriage violated the Equal Protection Clause). The *Loving* Court held that such bans rested “solely upon distinctions drawn according to race,” *ibid.* at 11, a distinction that was “odious to a free people whose institutions are founded upon the doctrine of equality.” *Ibid.* (*quoting* Hirabayashi v. United States, 320 U.S. 81, 100 (1943)). Furthermore, the “fact that Virginia prohibits only interracial marriages involving white persons,” *ibid.* at 11, revealed that the statute codified animus against African-Americans.

These cases embrace three equal protection principles. First, states may not discriminate on the basis of sex absent a showing that the law in question substantially relates to an important governmental interest. Second, sex-based classifications that are predicated on stereotypical presuppositions of men and women will only be sustained if the state comes forth with an “exceedingly persuasive” justification. *See Virginia, supra* at 533; *accord Miller, supra* at 482-83. Third, a law may not have as its sole or primary motivating factor animus against a particular group. Because same-sex marriage bans fail on all three fronts, we deem it unnecessary to entertain the question of whether laws drawing classifications on the basis of sexual orientation warrant strict, intermediate, or rational basis review.

First, same-sex marriage bans facially discriminate on the basis of gender. As Chief Justice Rehnquist stated at oral argument, “If Sue loves Joe and Tom loves Joe, Sue can marry Joe but Tom cannot.” Transcript of Oral Argument. Such laws “have all the formal structure of discrimination on the basis of sex in that, but for a gay person’s sex, his or her treatment by the law would be different.” Mary Anne Case, *The Very Stereotype the Law Condemns: Constitutional Sex Discrimination*

*Law As a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1486 (2000); see also *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (same-sex marriage bans constitute impermissible gender-based discrimination and thus violate the Equal Protection Clause). Furthermore, same-sex marriage bans have a “subordinating taint, in that among their normative premises are that women should not be free of men and that men should not behave sexually as women do.” Case, *supra*, at 1488. In this way, same-sex marriage bans harm both genders equally and provide no basis upon which to immunize such bans from equal protection guarantees. See *Loving*, 388 U.S. at 8 (the mere ‘equal application’ of a statute does not mean that it passes muster under the Equal protection Clause).

The State fares no better with respect gender stereotyping. To begin with, “by restricting marriage to different sex couples, a state is presuming—or insisting—that men and women perform different roles in marriage and that the different roles are rooted in their maleness and femaleness.” Suzanne B. Goldberg, *Risky Arguments in Social Justice Litigation: The Case of Sex Discrimination and Marriage Equality*, 114 COLUM. L. REV. 2087, 2100 (2014); see also *New York in Trigg v. New York City Transit Authority*, No. 99-CV-4730 (ILG), 2001 WL 868336 (E.D.N.Y. July 26, 2001) (holding that discrimination on the basis of gender stereotyping is the equivalent of discrimination on the basis of sexual orientation). Simply put, same-sex marriage bans are predicated “on fixed notions concerning the roles and abilities of men and women.” *Mississippi Univ. for Women*, 458 U.S. at 725. Furthermore, “to the extent that sexuality is sex-based and lesbian women and gay men are prohibited from entering into their chosen marriages by a same-sex marriage prohibition, these laws discriminate against lesbian women and gay men both as individuals and as members of their sex group on the basis of sex.” *Virginia*, *supra*, at 542.

These propositions breathe life into an important principle: same-sex marriage promotes *inequality* on the basis of gender, *regardless* of sexual orientation. Underlying same-sex marriage bans is an assumption—rooted in gender stereotyping—that men and women have specific roles that limit their ability to freely associate and make intimate personal choices. See, e.g., Whitney Woodington, *The Cognitive Foundations of Formal Equality: Incorporating Gender Schema Theory to Eliminate Sex-Discrimination Toward Women in the Legal Profession*, 34 LAW & PSYCHOL. REV. 135, 142 (2010) (“[g]ender role stereotypes adversely affect both sexes. Just as women are dissociated from the agentic qualities attributed to traditionally masculine roles, men are likewise—and often more strongly—discouraged from exhibiting

communal traits”).

Additionally, gender stereotypes disparately impact women, for they reinforce outdated views of women as *subordinate* to, or merely *complimentary of*, their male counterparts. See *Orr*, *supra* at 279-80 (“allocation of family responsibilities under which the wife plays a dependent role” could not “justify a statute that discriminates on the basis of gender”). One commentator explains:

Even if legislative history does not explicitly demonstrate that same-sex marriage prohibitions were enacted to subordinate women, the state’s reliance on concepts such as gender complementarity, as well as the hierarchy and asymmetry it implies, indicates that these laws are grounded in prohibited sex-role stereotyping. Justin Reinheimer, *What Lawrence Should Have Said*, 96 CAL L. REV. 505, 543 (2008).

In this way, same-sex marriage bans do not only place same-sex couples on unequal footing, they undermine the rights of members of both genders to fully and freely express their marital preference “because of . . . sex,” *Newport News Shipbuilding & Dry Dock Co.* *supra* at 682, and they disparately impact women by indirectly re-enforcing a stereotype about the role of women in society. As such, same-sex marriage bans carry with them the “baggage of sexual stereotypes,” *Orr*, *supra* at 283, and exclude “qualified individuals [from marriage] based on ‘fixed notions concerning the roles and abilities of males and females.’” *Virginia*, *supra* at 541, (quoting *Mississippi Univ. for Women*, *supra* at 725). Indeed, “[r]ather than resting on meaningful considerations, statutes distributing benefits and burdens between the sexes in different ways,” *City of Cleburne*, *supra*, at 441, as is the case here, “reflect outmoded notions of the relative capabilities of men and women.” *Ibid.*

Furthermore, the harm resulting from same-sex marriage bans underscores the inequality they occasion and the animus they embody. By limiting marriage to opposite-sex couples, same-sex couples are deprived of numerous federal and state benefits including, but not limited to, “estate tax, Social Security, housing, taxes, criminal sanctions, copyright, and veterans’ benefits.” *United States v. Windsor*, 133 S. Ct. 2675, 2694 (June 26, 2013). In this respect, same-sex marriage bans harm both same-sex couples *and* their children by making them unequal in the eyes of the law based on both the sexual orientation *and* gender.

In the fact of such harms, the State has no adduced evidence demonstrating that same-sex marriage bans serve an important

governmental interest, or that they are supported by an “exceedingly persuasive” justification. The State’s assertion that limiting marriage to opposite-sex couples is justified by the interests in procreation and childrearing cannot withstand even a cursory analysis of the practical realities about marriage. Many opposite-sex couples choose not to have children, and the State does not condition marriage licenses upon a showing of procreative intent or sterility. *See Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014). Furthermore, the State’s interest in promoting a stable home for children counsel in favor of *permitting* same-sex marriages, both for the commitment that marriage reflects and the federal and state benefits it engenders. The only conclusion that can be drawn from this is that same-sex marriage bans are motivated by “moral disapproval of a group.” *Lawrence*, 539 U.S. at 583 (O’Connor, J., concurring), precisely the type of animus that the Equal Protection Clause prohibits, and the Supreme Court’s jurisprudence forbids.

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In his concurring opinion, Justice Liberty argues that same-sex marriage bans violate the fundamental right to marriage under the Fourteenth Amendment, including the associated rights to personal autonomy, privacy, intimate association, to define one’s identity, and to “equal dignity” under the law. *See United States v. Windsor*, 133 S. Ct. 2675 (2013) (holding that a portion of the Defense of marriage Act defining marriage as the union of opposite-sex couples violated respondents’ rights to equal dignity); *Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating a ban on sodomy between same-sex couples); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (reaffirming the central holding in *Roe v. Wade*, 410 U.S. 113, and holding that states may not place an undue burden on a woman’s right to an abortion); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that a ban on contraception violated the right to marital privacy).

Whatever the merits of this position, we find it unnecessary to premise our holding on such broad prescriptions. *See ante* at 2593-94 (Liberty, J., concurring) (same sex couples have a fundamental right to “define and express their identity,” and to “find a life that could not be found alone, for a marriage becomes greater than just the two persons”).<sup>3</sup> Prudence and restraint counsel in favor of going no further than necessary to remedy the harm at issue, lest we inadvertently lay the groundwork for the recognition of unforeseen and unintended new rights, or invite uncertainty regarding the scope and application of this

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3. *Obergefell*, 135 S.Ct. at 2593-2594 (citing to Justice Kennedy’s majority opinion).

holding. See *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (expressing reluctance “to expand the concept of substantive due process because guideposts for responsible decision making in this uncharted area are scarce and open-ended”). As the Supreme Court held in *Glucksberg*, establishing “guideposts for responsible decision making,” *Glucksberg*, *supra* at 721, is intended to “direct and restrain our exposition of the Due Process Clause,” *ibid.*, and requires “a ‘careful description’ of the asserted fundamental liberty interest.” This approach ensures that courts “exercise the utmost care whenever we are asked to break new ground in this field.” *Ibid.* at 720 (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)); *Moore v. East Cleveland*, 431 U.S. 494, 502 (1977)).

Justice Liberty’s concurrence disregards the principles, employing language that makes it more, not less, likely that our decision would have unanticipated effects. Of course, it may be true that marriage “offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other,” *ante* at 2593<sup>4</sup>, or that “choices about marriage shape an individual’s destiny,” *ante* at 2599<sup>5</sup>, but as a matter of constitutional law, these statements are of no significance. It is also unclear whether the concept of “equal dignity,” relied on by Justice Liberty in *Windsor* and *Lawrence*, can be applied in a manner that is workable, restrained, and respectful of the democratic process. That, in a nutshell, is the point. Justice Liberty’s concurrence creates ambiguity, not clarity, engenders confusion, not guidance, and invites discord, not harmony, among lower courts.

For example, one can imagine, in the not-too-distant future, that members of polygamist marriages will claim that the right to “intimate association” and “equal dignity” under the law bestow upon them a fundamental right to marriage. Chief Justice Restraint captured this sentiment in his dissent:

Although the concurrence randomly inserts the adjective “two” in various places, it offers no reason at all why the two-person element of the core definition of marriage may be preserved while the man-woman element may not. Indeed, from the standpoint of history and tradition, a leap from opposite-sex marriage to same-sex marriage is much greater than one from a two-person union to plural unions, which have deep roots in some cultures around the world. If the majority is willing to take the big leap, it is hard to see how it can say no to the

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4. *Id.* at 2593.

5. *Id.* at 2599.

shorter one. *Ante* at 2621 (Restraint, C.J., dissenting).

Without entertaining the merits of such a claim, the fact that Justice Liberty’s holding could—and likely would—have additional implications outside of the same-sex marriage context *ipso facto* counsels in favor of a narrower holding. This is true, *a fortiori*, when there exists a narrower textual basis—the Equal Protection Clause—upon which to invalidate same-sex marriage bans. *See Lawrence*, 539 U.S. at 583 (O’Connor, J., concurring) (“[m]oral disapproval of a group cannot be a legitimate state interest under the Equal Protection Clause because legal classifications must not be ‘drawn for the purpose of disadvantaging the group burdened by the law.’”) (internal citation omitted).

It was perhaps for these reasons that the *Baehr* Court specifically rejected the proposition that “a right to same-sex marriage is so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions.” *Baehr*, *supra* at 57. The court also rejected the argument that “a right to same-sex marriage is implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed.” *Ibid*. It is for the same reasons that we eschew a holding of such breadth that its contours would be as elusive as its conceptual limitations would be uncertain.

For these reasons, we believe it prudent to frame the right to same-sex marriage in language necessary for, but not more extensive than, that needed to ensure its protection. We also believe that today’s decision standard for the important principle that gender equality, not merely marriage equality, is the foundation upon which the guarantees of autonomy, personal liberty, and self-determination rest.

For the foregoing reasons, laws banning same-sex marriage violate the Equal Protection Clause of the Fourteenth Amendment. The judgment of the Court of Appeals is hereby reversed.