2016

Opinion of Justice Katherine Franke in Obergefell v. Hodges

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SUPREME COURT OF THE UNITED STATES

Nos. 14–556, 14-562, 14-571 and 14–574

JAMES OBERGEFELL, ET AL., PETITIONERS 14–556 *v.*
RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL.;

VALERIA TANCO, ET AL., PETITIONERS 14–562 *v.* BILL HASLAM, GOVERNOR OF TENNESSEE, ET AL.;

APRIL DEBOER, ET AL., PETITIONERS 14–571 *v.*
RICK SNYDER, GOVERNOR OF MICHIGAN, ET AL.; AND

GREGORY BOURKE, ET AL., PETITIONERS 14–574 *v.* STEVE BESHEAR, GOVERNOR OF KENTUCKY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 26, 2015]

FRANKE, J., CONCURRING IN THE JUDGMENT

I join parts I through VI of Court's opinion, concurring in the judgment. I agree that the decision of the court below should be reversed, and therefore I concur in the Court's judgment, but write separately to clarify that this matter should not be decided on fundamental rights grounds. Further, I believe that the Court should provide more specific instructions to the court below with respect to the appropriate remedy that should be awarded in light of the equal protection remedy we find herein: the only remedy that would be equality-enhancing overall would be one that disestablished the institution of civil marriage altogether. It would then be left to the states to devise a more equitable means by which to secure the economic and legal interests of its citizens; one that does not rest on status hierarchies that run afoul of fundamental values of equality and democracy.

We are urged by the petitioners in this case to usher in the next step in the modernization of the institution of civil marriage. The petitioners, sixteen people making up eight couples, contend that any distinction between their partnerships and those now deemed eligible to marry in the states in which they reside, turns on the consideration of factors rendered constitutionally illegitimate for the purpose of public law-making. This argument takes two principal forms: one based in the Equal Protection

Clause, and another that suggests a substantive due process right to civil marriage as a fundamental right.

I.

As a preliminary matter, I note that the relief sought by the petitioners herein is neither radical nor sweeping, notwithstanding the alarm bells rung by some *amici*. The claimants merely plea that their unions should be legitimized through the grant of a civil marriage license on the same terms as that afforded to different-sex couples. They insist that the same level of commitment, decency, and stability reasonably characterizes their partnerships as do the partnerships of different-sex couples that are granted state licensure. Indeed, the facts alleged by the couples in the petitioner class suggest a greater degree of commitment and stability than the majority of different-sex couples who are not barred from a civil license for their union. In important respects, the success of the petitioners in this case will subsidize the underlying values of marriage more generally, insofar as the petitioner-couples have embraced values of monogamy, financial interdependence, loving and responsible parenthood, and dignity that make up the very fabric of traditional notions of marriage. To the ways in which dignity underwrites the celebrated status that marriage enjoys I shall return. The petitioners herein have no aspirations to upend the institution of marriage, but rather seek to prove their entitlement to the blessings, rights, and responsibilities conferred by civil marriage on its current terms.

II.

The Court's and the nation's evolving sense of justice, protected in many cases through a constitutional commitment to equality, has assigned particular legal and social opprobrium to public policies or laws that manifest or perpetuate ideologies of superiority and attendant inferiority. As the CHIEF JUSTICE rightly notes, "Legislation must promote the public interest, and may not be used merely to promote or disparage the private interests of some group."[1] A mere desire to stigmatize or humiliate a particular group cannot serve as a legitimate public justification for lawmaking or public policy. See *Windsor v. United States*, 133 S.Ct. 2675 (2013); *United States v. Virginia,* 518 U.S. 515 (1996); *Romer v. Evans*, 517 U.S. 620 (1996); *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (concurring opinions); *Department of Agriculture v. Moreno,* 413 U. S. 528, 534 (1973).

[1] Opinion for the Court at p. 2.

This Court has a rich jurisprudence elaborating more than one way of framing the guarantee of equality. One approach, preferred by the CHIEF JUSTICE, analogizes the instant case to *Plessy v. Ferguson*, 163 U.S. 537, 559 (Harlan, J., dissenting) and *United States v. Carolene Products*, 304 U.S. 144, 152 & n.4 (1938), and sets out to determining whether sexual orientation-based discrimination should be granted suspect class status akin to race. Some scholars have described this as an "anticlassification" approach and have critiqued it for the way in which it distracts the equality analysis from underlying causes or effects of status hierarchies by focusing attention instead on the wrong of legislative classification as a failure of instrumental rationality. Reva Siegel, *Equality Talk: Antisubordination And Anticlassification Values In Constitutional Struggles Over Brown*, 117 Harv. L. Rev. 1470, 1503 (2004).

Yet another account interprets the values underlying the Fourteenth Amendment's equality guarantee as hostile to status hierarchies. This perspective toward constitutional equality seeks to isolate and excise from the domain of legitimate public action those "laws and practices that aggravate [or perpetuate] the subordinate position of a specially disadvantaged group." Owen Fiss, Groups and the Equal Protection Clause, 5 Phil. & Pub. Aff. 107, 108, 157 (1976). This approach, often described as a "group disadvantaging" principle, is vulnerable, however, to a critique that it relies too heavily on social facts of disadvantage and their aggravation, rather than the exposure of the logic underlying the regulation, a logic with a basic structure of inferiority and superiority.

A separate line of cases treats the constitutional promise of equality as something more ambitious and more substantive. In these cases the Court has accepted the invitation to identify and then dismantle the ideologies or forms of thinking that maintain status hierarchies. The Court's infelicitous evaluation of laws that single out a kind of status for negative legal treatment has roots outside the context of the Equal Protection Clause. For instance, in *Robinson v. California*, 370 U.S. 660 (1962), we held that rights secured by the Fourteenth Amendment are in jeopardy when a mere status, drug addition in that context, forms the basis of criminal punishment:

> It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. A State might determine that the general health and welfare require that the victims of these and other human afflictions be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration. But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be

> an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.
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> 370 U.S. at 666.

In cases raising sex discrimination claims under the Equal Protection Clause brought to this Court in the last 40 years, we have repudiated the embrace from an earlier era of the sex-based status hierarchy that lay at the core of the separate spheres doctrine endorsed by the Court in *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872). See *Reed v. Reed,* 404 US 71 (1971); *Frontiero v Richardson*, 411 U.S. 677 (1973); *Craig v. Boren*, 429 U.S. 190 (1976).

In the context of race-based equality the Court most unequivocally adopted the antisubordination principle, calling out forms of power that created and reinforced the formation of caste when it was mobilized through invidious classification. For instance, in *Loving v. Virginia*, 388 U.S. 1, 11 (1967), the Court invalidated laws that prohibited white persons from marrying non-white persons because, *inter alia*, such laws were "measures designed to maintain White Supremacy." Similarly, an ideology of racial supremacy underwrote the essential wrong of laws segregating people on the basis of their race in the context of public transportation, employment, housing, or access to lunch counters. See e.g. *Beckett v. School Bd. of City of Norfolk*, 308 F.Supp. 1274, 1304 (E.D. Va. 1969) *rev'd on other grounds*, 434 F.2d 408 (4th Cir. 1970)(attributing some forms of housing segregation "as measures designed to maintain White Supremacy."). This approach embodied the most effective repudiation of Chief Justice TANEY's endorsement of racial caste in *Dred Scott v. Sanford*:

> They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.

Dred Scott v. Sandford, 60 U.S. (19 How) 343, 407 (1857).

This approach runs far deeper than a mere condemnation of racial classifications, irrationality in the making of public policy, or violations of a formalistic commitment to color-blindness. Rather, our constitution's commitment to equality should, and does, take aim at a particular form of mischief beyond mere classification. A commitment to the equal protection of the laws entails a suspicion with regard to the *work* that classification does and the ways it *collaborates* with ideologies of supremacy through the notions

of inferiority it puts into action. In this regard, the principle of inequality that animates some of the Court's modern equality jurisprudence concerns itself especially with state policies and practices that create or legitimize a badge of inferiority born by racial and other minorities. This badge operates invidiously as a kind of warrant permitting, if not inviting, exclusion of, derision toward, and second-class treatment of those subjects so insigned. Under this account, when applied to the context of racial equality, the Fourteenth Amendment embodies "a broad principle of practical equality for the Negro race, inconsistent with any device that in fact relegates the Negro race to a position of inferiority." Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 Yale L.J. 421, 429-30 (1960).

The commitment underlying the equal protection clause in the racial context, one that aims to invalidate public policies that enact or perpetuate ideologies of inferiority, is equally salient in the case before us now. The segregation of same-sex couples from the domain of civil marriage offends fundamental principles of equality because these laws express and implement an ideology of disgust, disdain, and antipathy towards lesbian and gay people that renders same-sex partnerships categorically undeserving of the recognition conferred on different-sex couples as a class. The N.A.A.C.P. Legal Defense and Education Fund made a similar argument to this Court in their briefing of the *Loving v. Virginia* case: "Actually, the laws against interracial marriage grew out of the system of slavery and were based on race prejudices and notions of Negro inferiority used to justify slavery, and later segregation … [These laws] intrude a racist dogma into the private and personal relationship of marriage." Brief of N.A.A.C.P. Legal Defense and Educational Fund, Inc. as Amicus Curiae, *Loving v. Commonwealth of Virginia*, 1967 WL 113929 at 13, 14-15.

With particular relevance to the instant case, in a series of decisions the Court has drawn sexual orientation-based discrimination within the protective pickets of the Equal Protection Clause by framing the claimants' equality claims as status-based injuries. Starting with *Romer v. Evens*, 517 U.S. 620 (1996), the Court has developed a jurisprudence of equality for lesbian and gay people that identifies a status-based harm as the gravamen of the constitutional wrong. "[Amendment 2] is a status-based classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." 517 U.S. 620 at 635. "Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Id.* at 633. At stake in this reading of the Equal Protection Clause is the notion that status hierarchies undermine, indeed are anathema

to, the very essence of democracy. "A State cannot so deem a class of persons a stranger to its laws," clarified Justice KENNEDY. *Id*. at 635. See also Jack Balkin, *The Constitution of Status*, 106 Yale L.J. 2313 (1997).

The Court continued this line of reasoning in *United States v. Windsor*, 570 U.S. __ , 133 S.Ct. 2675 (2013), wherein we invalidated a statute that denied federal legal recognition to valid marriages between persons of the same-sex by anchoring our Equal Protection analysis in the observation that, "The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States." 133 S.Ct. at 2693.

Overall, this line of cases can be understood to embrace something more than an anticlassification principle of equality, preferring instead a stance that can be understood as antisubordination in nature. See Siegal, *supra*, at 1505. Given that the Court's prior lesbian and gay equality cases drew from an antisubordination account of equality I expect us to continue that line of reasoning in the case before us now.

The antisubordination approach affords the Court the opportunity, or better yet, requires that the Court unearth and expose the social meanings expressed by the prohibition, and obliges the Court to describe "the status relations enforced, and the status harms inflicted, by the prohibition" in question." Siegal, *supra*, at 1503. I prefer to approach the wrong raised by the petitioners herein by recognizing how laws that ban civil licensure to otherwise qualified same-sex couples convey a badge of inferiority toward those couples on account of their homosexuality. In so doing, those laws reinforce the caste supremacy of heterosexuality over homosexuality.

The ban on same-sex marriage is best understood as a measure designed to maintain heterosexual supremacy and to inflict a badge of inferiority on sexual minorities generally, and lesbians and gay men particularly. This argument can be found in judicial findings and briefs as the cause of marriage equality has moved its way toward us in lower courts, likening the invidious wrong underlying the exclusion of same-sex couples from the institution of civil marriage to the kind of ideological wrong named by this Court in *Loving*. See e.g.: *Conaway v. Deane*, 401 Md. 219, 268 (Ct.App.Md. 2007); *In Re Marriage Cases*, 43 Cal.4th 757, 834 (Cal. S.Ct. 2008). The plaintiffs in the 2001 Massachusetts challenge to the state's ban on same-sex civil marriage argued in the trial court: the ban on same-sex marriage "reinforces a caste supremacy of heterosexuality over homosexuality just as laws banning marriages across the color line exhibited and reinforced white supremacy." Memorandum in Support of Plaintiffs'

Motion for Summary Judgment, *Goodridge v. Dep't of Public Health*, No. 01–1647-A, Massachusetts Superior Court, Aug. 20, 2001. Similarly, Judge Vaughn Walker, ruling in the case challenging California's ban on same-sex marriage enacted in Proposition 8, found that the marriage ban "conveys a message of inferiority." *Perry v. Schwarzenegger*, Pretrial Proceedings and Trial Evidence Credibility Determinations Findings of Fact Conclusions of Law Order, 704 F.Supp.2d 921, 974, 980 (N.D.Cal. 2010).

To be clear, the ideology of inferiority that underwrites the laws under challenge in this action is not reserved for same-sex couples that seek to marry. Rather, it enunciates a kind of hatred or disgust of lesbian and gay men generally, whether or not they are in intimate partnerships or seek to have those partnerships licensed by law. The ban on marriage for same-sex couples is simply one institutional setting in which that ideology of disdain gains the state's endorsement. As our prior jurisprudence makes clear, the embrace of this kind of subordinating dogma cannot serve as a legitimate public justification for lawmaking or public policy. See *Windsor v. United States*, 133 S.Ct. 2675 (2013); *United States v. Virginia,* 518 U.S. 515 (1996); *Romer v. Evans*, 517 U.S. 620 (1996); *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (concurring opinions).

I concur in the CHIEF JUSTICE's conclusion that laws categorically barring otherwise qualified same-sex couples from eligibility for civil marriage licenses are invalid under the Equal Protection Clause of the Fourteenth Amendment, but I do not join his reasoning in so finding. I see no need to examine the question of whether sexual-orientation based classifications should receive the same elevated level of constitutional scrutiny as classifications based on race, sex or other suspect or quasi-suspect classes. Rather, in this case we can conclude that same-sex couples can successfully challenge on equal protection grounds laws that categorically bar them from civil marriage because such laws find their origin in and perpetuate notions of heterosexual supremacy, designs that cannot form the basis of a legitimate public purpose.

II.

As the CHIEF JUSTICE notes in Part VII of his opinion, petitioners also argue that a ban on same-sex marriage violates a fundamental right to marry, secured by the Due Process Clause. I do not join in the Court's fundamental rights analysis, first because I regard it as *dicta* given that the Court had found sufficient grounds to invalidate the challenged laws on equal protection grounds. Second, I part company with what I regard as slippage in the CHIEF JUSTICE's reasoning with respect to the fundamental nature of civil marriage. Noting first that "we need not decide whether the states have

a constitutional duty to create a special legal status called marriage"[2] the CHIEF JUSTICE then goes on to treat civil marriage "as if" it were fundamental, building on stilts an argument with no foundation. The CHIEF JUSTICE begins with a premise that transforms a contingent fact, "[a]ll of the states have created such a status," into a necessary one, all states must do so because "[w]e therefore treat it as a fundamental interest." The question before us is not whether marriage is fundamental in a religious, cultural, or historical sense but only whether the state's civil licensure of marriage is fundamental in a sense that is constitutional in nature. Without denying the clear fact that many people consider marriage to be a distinctly meaningful, if not sacred, form of intimate association that may entail the blessings of clergy, family, and community, this Court has never held that the constitution's due process protections require that the state set up a civil marriage regime to license those otherwise private vows.[3]

As this Court has acknowledged, "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life," *Lawrence v. Texas*, 539 U.S. 558, 573-74 (2003), but this important constitutional principle imagines that liberty flourishes in the absence of, not because of, state regulation, and does not require the state's involvement in sanctioning or licensing the forms that a good, meaningful or sacred life might take.[4] Unlike political rights such as voting, many of which require the state's facilitation in order for them to be meaningful, state facilitation is in no way essential to the revered nature of private, intimate vows of love and commitment. As is the case generally with the U.S.

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[2] Opinion for the Court at p. 10.

[3] Cases cited by the petitioners and amici advancing the proposition that there is a Due Process right to civil marriage are less conclusive than they claim. *Turner v. Safely*, 482 U.S. 78 (1987); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Loving v. Virginia*, 388 U.S. 1 (1967). These cases, taken as a whole, do not establish a substantive due process right to civil licensure of marriage in the absence of the illegitimate exclusion of one class of persons therefrom.

[4] This is not to say that there aren't other contexts where state facilitation is essential to the fundamental right at issue. In *Maher v. Roe*, 432 U.S. 464 (1977), the Court rejected the claim of indigent women that the meaningful exercise of fundamental rights secured in *Roe v. Wade*, 410 U.S. 113 (1973), entailed assess to public funding that would render those rights accessible for poor women. I believe that *Maher* was wrongly decided, yet my view in this case does not contract my position in *Maher*. In the case of poor women's access to abortion, facilitation by the state in the form of public funding is the only way to render the right secured in *Roe* meaningful. In the absence of public funding, the right secured in *Roe* would be completely meaningless for many poor or low income women. With marriage, by contrast, state facilitation or licensure is incidental to a vow of love and commitment that is essentially private in nature.

Constitution, civil liberties and rights tend to be negative in nature, proscribing certain discriminatory or oppressive terms and conditions imposed by the state on its citizens. It might be a better constitution if it contained an array of positive in addition to negative rights but it would be a markedly different one from the one we have.[5]

To be sure, once the state gets into the marriage business it must do so on terms that conform to the requirements of the constitution, but this strong imperative does not entail a constitutional duty placed on the state to license marriages at all.[6] For this reason, I would resist using this case as an opportunity expand the substantive reach of the Due Process Clause to include a fundamental right to marry.

III.

Finally, while I join the Court's finding that the Equal Protection Clause is offended by laws that limit the issuance of civil marriage licenses to different-sex couples, I write separately to clarify our instructions to lower courts on remand with respect to the remedy entailed by the constitutional violation we find today.

Given that I would ground the Court's holding in an equal protection injury that focuses on the way the law reinforces the caste-based supremacy of heterosexuality, the appropriate remedy for such a violation must pay heed to the larger rights and interests of the full class of persons so harmed. As such, the real parties in interest in this matter include homosexuals more generally, not merely homosexuals who seek to marry, or same-sex couples who seek to marry. Reverse engineering the ban on same-sex civil marriage leads one back to a blueprint for homophobia more generally, and the marriage ban is merely one element of that originary design.

The interests of this larger class of persons should inform our consideration of the appropriate remedy in this case. Justice would not be

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[5] See Pamela S. Karlan, *Let's Call The Whole Thing Off: Can States Abolish The Institution Of Marriage?,* 98 Cal. L. Rev. 697, 700 (2010).

[6] "The 'right to marry,' is different from rights deemed 'fundamental' for equal protection and due process purposes because the State could, in theory, abolish all civil marriage while it cannot, for example, abolish all private property rights." *Goodridge v. Department of Public Health*, 440 Mass. 309, 325 n. 14 (Mass SJC 2003)(citations omitted). See also: Cass Sunstein, *The Right to Marry,* 26 Cardozo L.Rev. 2081, 2083–2084, (the right to marry "comprises a right of access to the expressive and material benefits that the state affords to the institution of marriage ... [and that] states may abolish marriage without offending the Constitution.") (italics omitted).

done, nor would the spirit of the Equal Protection Clause be honored, if in dismantling one status hierarchy we inextricably fortified another. Yet we would do just that were we to simply order a remedy that same-sex couples be permitted to gain civil marriage licenses on the same terms and conditions as different-sex couples. This remedy would simultaneously dissolve one status hierarchy within the gay community while assembling another, privileging married gay people over unmarried gay people, and would reinforce the supremacy of married people as a class.[7]

As society evolves in such a way as to recognize the claims of lesbians and gay men to equality and dignity, marriage has persisted as the social, legal and moral container for legitimacy and respectability. Surely the Court is correct in finding that the statutory exclusion of same-sex couples from civil marriage creates the kind of stigmatic harm that the Equal Protection Clause was designed to prohibit. But in so finding we should be loath to reinforce the legacy of laws and public values that disparage sexual relations outside of marriage. The dignity enjoyed by same-sex couples who are now eligible to marry should not be gained by reinforcing the stigma suffered by adults who cannot or do not marry, or by children born to married parents.[8] The cause of advancing the equal protection rights of same-sex couples should not be bought at the expense of an equality norm that condemns marital status discrimination. As one commentator has rightly noted, "[i]n a world in which marriage is both a privileged status and a status of the privileged, marriage equality that rests upon non-marriage's ignominy risks reinforcing the many other status inequalities that taint the legacy of marital supremacy." Serena Mayeri, *Marital Supremacy And The Constitution Of The Nonmarital Family*, 103 Cal. L. Rev. 1277, 1283 (2015).

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[7] We have witnessed the amplification of this status hierarchy in several states that have extended marriage rights to same-sex couples legislatively, through state court litigation, or through popular referendum. In Massachusetts, Connecticut, Delaware, New Hampshire, Rhode Island and Vermont, extending civil marriage rights to same-sex couples was accompanied by the statutory dissolution of other forms of family recognition such as domestic partnerships or civil unions. See National Center for Lesbian Rights, *Summary of Laws Regarding Recognition of Relationships of Same-Sex Couples*, December 10, 2015, available at: http://www.nclrights.org/wp-content/uploads/2013/07/Relationship_Recognition_State_Laws_Summary.pdf. In these states marriage is granted a monopoly on licensing largely out of concerns for distributional efficiency.

[8] See e.g. Solangel Maldonado, *Illegitimate Harm: Law, Stigma, And Discrimination Against Nonmarital Children*, 63 Fla. L. Rev. 345 (2011).

For these reasons, the appropriate remedy for the Equal Protection injury in this case would be the disestablishment of civil marriage altogether.

This remedy may strike some as a radical cure for the ill of excluding same-sex couples from civil marriage. To be sure, the disestablishment of civil marriage could impose its own equal protection injury if doing so were motivated by a desire to deny same-sex couples a right to marry, just as closing public schools created an equal protection injury when done to avoid this Court's command to end *de jure* racial segregation in *Brown v. Board of Education*, 347 U.S. 483 (1954): "[w]hatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional." *Griffin v. County Sch. Bd. of Educ.*, 377 U.S. 218, 231 (1964). But if the abolition of marriage were undertaken, as I urge here, in sympathy with the equal protection rights of same-sex couples no constitutional infirmity of the sort of the kind confronted by the Court in *Griffin* would occur. Rather than a subterfuge to avoid compliance with the constitution, the abolition of marriage would assure greater fidelity to the constitution's promises of equal treatment and dignity under law for all gay men and lesbians.[9]

IV.

For these reasons, I concur in the Court's conclusion that the laws at issue here violate the Equal Protection Clause, but I do so for reasons other than those marshaled by the CHIEF JUSTICE. Laws barring same-sex couples from eligibility for licensure as civil marriages find their origin in and perpetuate notions of heterosexual supremacy, and have the aim and effect of imposing a badge of inferiority on gay men and lesbians more generally. Furthermore, I seek to clarify the nature of the remedy that ought to be ordered on remand. Given that the real parties in interest in this action include all gay men and lesbians, the underlying values of equal protection can only be served if the Court were to avoid a remedy that ameliorated one form of inequality while simultaneously exacerbating yet another. For this

[9] Constitutional scholars have described the cynical elimination of public benefits or rights that is motivated by a larger interest in rights-avoidance as a kind of "leveling-down," whereas the remedy demanded by the petitioners herein requires a kind of "leveling up," the provision of a benefit to a previously excluded group. See Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 Mich. L. Rev. 2001, 2027-29 (1998). The remedy I suggest herein does not amount to a form of "leveling down" insofar as the remedy seeks to advance the equal protection rights of all members of the larger class with interests in this matter: gay men and lesbians who suffer a status injury regardless of their marital status or desire to formalize an intimate relationship.

reason, the only remedy that would be equality-enhancing overall would be one that disestablished the institution of civil marriage altogether. It would then be left to the states to devise a more equitable means by which to secure the economic and legal interests of its citizens; one that does not rest on status hierarchies that run afoul of fundamental values of equality and democracy.

Comments on *Obergefell* Opinion

Katherine Franke

I joined Chief Justice Balkin's opinion because I, like he, believe that state laws that bar otherwise eligible same-sex couples from receiving civil marriage licenses violate equal protection principles. But I chose to describe the equality injury somewhat differently than he did.

Of course, the road to gaining marriage equality for same-sex couples could have been achieve via a number of different routes. The Supreme Court's approach in *Obergefell* frames the issue as one that primarily implicates the liberty interests of the petitioner-couples. In *Lawrence*, *Windsor*, and now *Obergefell* Justice Kennedy has been the primary architect of a jurisprudence of liberty for lesbian and gay people. While I am usually a big fan of liberty, Justice Kennedy's version of liberty is too, well, liturgical for my taste. The way in which he weaves a concept of liberty in these cases into a larger theology of human dignity often times troubles me. It is the dignity of the bourgeois, monogamous, respectable couple (a counterfactual premise in *Lawrence*, to be sure) that has been unfairly humiliated by the state in *Windsor* and seeks the state's blessing with a civil marriage license in *Obergefell*.

By leveraging the "sweet mysteries of life" language of *Planned Parenthood v. Casey* ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[1]), Justice Kennedy announced an autonomy/liberty right of lesbian and gay people in *Lawrence* to be free from criminal sanction (for sex that is between adults, consented to, and in private); in *Windsor* to have their valid civil marriages recognized by the federal government; and in *Obergefell* to enjoy the nobility, dignity and/or unique fulfillment of entering a marriage, a universal human good arising from the most basic human needs and essential to our most profound hopes and aspirations.[2]

Liberty got the job done of securing a constitutional norm protecting the rights of (some) lesbian and gay people, but it did so in a way that lodged that norm in the value of individual freedom. Thus the wrong that was remedied in these cases was one of irrational, or even unfair, constraint on human action and agency. Necessary to Kennedy's reasoning was a celebration of the normative worlds from which lesbian and gay people had been shut out: the dignified couple (*Lawrence*), preferential economic and

[1] *Lawrence*, 539 U.S. at 574 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

[2] These notions began Justice Kennedy's analysis of the constitutional question in *Obergefell v. Hodges*, 135 S.Ct. 2584, 2594 (2015).

legal status (*Windsor*), and the transcendent dignity and security of having the state license one's marriage.

Lost in the liberty analysis, however, is a sustained analysis of the origins of the legal prohibitions or penalties challenged in these cases. I have always admired the reasoning in *Loving v. Virginia* for Chief Justice Warren's and Justice Stewart's willingness to call out Virginia's anti-miscegenation law as "obviously an endorsement of the doctrine of White Supremacy."[3] Not a problem of mere classification, not a problem of "not treating like things alike," not a failure of "color-blindness," but an endorsement of the doctrine of White Supremacy. Bam!

Only the use of a substantive equal protection analysis in *Obergefell* could isolate, name, and condemn the underlying ideology of supremacy that barred same-sex couples from civil marriage. This kind of constitutional inquiry would gain the right to marry for the plaintiffs in this case, but would do so in a way that would deliver a more generalizable rule that could be exported to other contexts where heterosexual supremacy, or heterosexism, does its nasty work, and may indeed benefit future racial and sexual equality cases. The gay rights movement has made good use of the jurisprudence of racial and sexual equality as it fought for marriage equality, and I aimed to devise a rule in *Obergefell* that would return the favor – strengthening the Court's equal protection reasoning in such a way that would be useful in other settings. Marriage is merely one context where heterosexual supremacy is sutured into law and culture, and I felt strongly that a win in *Obergefell* should not be on terms that cabined it in that particular context.

For this reason I turned to an antisubordination equality principle in my opinion. Reva Siegel has elegantly parsed the differences between anticlassification and antisubordination approaches to the Equal Protection Clause,[4] and this distinction characterizes my motivation to write separately from Chief Justice Balkin in this case.

The additional virtues of an antisubordination approach, one that invests in an anti-caste principle that aims to dismantle a status hierarchy, is that it avoids any particular investment in the institution of civil marriage. When the Supreme Court found that the City of Greenville, South Carolina's law mandating the racial segregation of

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[3] *Loving v. Virginia*, 388 U.S. 1, 7 (1967). Justice Stewart's concurrence echoed the Chief Justice, "The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy." *Id*. at 11.

[4] Reva Siegel, *Equality Talk: Antisubordination And Anticlassification Values In Constitutional Struggles Over Brown*, 117 Harv. L. Rev. 1470, 1472-73 (2004).

lunch counters[5] violated the Equal Protection Clause of the Fourteenth Amendment, it found no need to discuss the importance of lunch counters in the nation's culinary traditions or history. Rather, the Court focused on the racism that was entrenched in local law.[6]

Given that I maintain a rather critical posture toward the institution of marriage itself, and toward a gay rights movement strategy that elevated marriage rights to the top of a civil rights agenda,[7] I wanted to craft an opinion in *Obergefell* that would be more about the evils of homophobic or heterosexism than it was about virtues of marriage. I aimed to do that in three ways. First, as already discussed, I relied on an antisubordination approach to equality. Second, I framed the stakes in the case as implicating not just same-sex couples who sought to marry, but all lesbian and gay people, a class that can be understood as the objects and negative beneficiaries of laws and cultural norms that embrace heterosexual supremacy. Third, I affirmatively rejected any finding that there was a substantive due process right to marriage or that marriage was, by implication, a fundamental right.

Throughout all of the opinion I was careful to avoid arguments favored by Justice Kennedy (and deployed to a lesser degree by Chief Justice Balkin) that celebrate the dignity of the married couple. These arguments, in my view, purchase inclusion of same-sex couples in the institution of marriage by disparaging life on marriage's outside or outside the conjugal couple, and have had the unfortunate effect of off-loading stigma previously associated with gay families onto other non-normative families. It was important to me to find a path for the plaintiffs to win that avoided an investment in marriage itself.

Finally, my opinion sought to make clear that this case was about the civil licensure of marriages, not the institution of marriage itself. Justice Kennedy's opinion for the Court in *Obergefell* collapsed these two notions of marriage, and did so to great doctrinal and political expense. The institution of marriage as a religious bond, or one that bound kinship units together through contract for daughters/wives preexisted the state getting into the game by issuing civil marriage licenses. Mary Anne Case reminds us that when the Crown first began to license marriages, "a marriage license could be

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[5] "It shall be unlawful for any person owning, managing or controlling any hotel, restaurant, cafe, eating house, boarding-house or similar establishment to furnish meals to white persons and colored persons in the same room, or at the same table, or at the same counter." Code of Greenville, 1953, as amended in 1958, § 31-8.

[6] *Peterson v. City of Greenville*, 373 U.S. 244 (1963).

[7] These critiques are elaborated in Wedlocked: The Perils of Marriage Equality (NYU Press 2015); *Longing for Loving*, 76 Ford. L.Rev. 2685 (2008); T*he Politics of Same-Sex Marriage Politics*, 15 Colum. J. Gender & L. 236 (2006) and *The Domesticated Liberty of Lawrence v. Texas*, 104 Colum.L.Rev. (2004).

seen to have functioned [] in ways loosely analogous to a modern dog license, as something like a certificate of ownership of the wife, entitling the husband to her property, her body and its products, including the labor she engaged in for wages and the labor that produced offspring."[8] As such, the state's entry into the marriage licensing business is relatively recent, and its motivations for doing so were rather questionable from the perspective of equality.

On balance, there is no good reason, to my mind, why the state is so deeply involved in sanctioning certain kinship or conjugal partnerships and not others. In *Obergefell* Justice Kennedy regrettably reaffirmed rather noxious language from *Maynard v. Hill*, "Marriage, the *Maynard* Court said, has long been "'a great public institution, giving character to our whole civil polity.'" *Obergefell v. Hodges*, 135 S.Ct. at 2601, quoting *Maynard v. Hill*, 125 U. S. 190, 213 (1888). He then concluded, citing historian Nancy Cott, that "[m]arriage remains a building block of our national community." *Id.* If this is true, it is so not as a matter of natural fact but as a consequence of the legal and economic privilege we grant to the institution itself. I see no justification, based in equality or otherwise, why the gay rights movement should collaborate in the normalization of the unfortunate social reality that grants married people a kind of status-based privilege not enjoyed by others who form partnerships or family outside marriage or whose lives don't take a marital or couple form at all.

For these reasons my opinion concludes by making a plea for the disestablishment of the institution of marriage altogether. It strikes me as tragic that the constitutional legibility of lesbians and gay men would be accomplished within a frame that not only takes for granted, but actually fortifies, another form of status hierarchy, one that privileges married people over unmarried people. Particularly given that I identify the larger class of all gay men and lesbians as the real parties in interest in this case, I lament a resolution of the case that "levels up" the plaintiff class (couples who would be eligible for civil licensure but for the "same-sex" nature of their union) and confers on them the privileges of membership in a superior class while leaving members of the lesbian and gay community who do not desire or are ineligible for such status without the benefits of these newly-gained constitutional protections.

[8] Mary Anne Case, *Marriage Licenses*, 89 Minn. L. Rev. 1758, 1767-68 (2005).