NATIONAL WOMEN'S LAW CENTER
EXPANDING THE POSSIBILITIES

JUDGES & THE COURTS

FACT SHEET

Obergefell v. Hodges, DeBoer v. Snyder, Bourke v. Beshear, and Tanco v. Haslam: The Supreme Court Should Presume Laws Discriminating on the Basis of Sexual Orientation are Unconstitutional

March 2015

This term, the Supreme Court agreed to hear four cases on the right of same-sex couples to marry.[1] The cases are from four states—Kentucky, Michigan, Ohio, and Tennessee—and raise two historic constitutional questions: whether states have the power to ban marriages between same-sex couples and whether states can refuse to recognize such marriages performed lawfully in another state.

The Challenges to the Marriage Ban in the District Courts

Bourke v. Beshear. In 1998, the Kentucky legislature enacted a number of statutes to ensure that only marriages between a man and a woman would be recognized in Kentucky.[2] In 2004, by ballot, Kentucky's constitution was amended to include that only opposite-sex couple marriages are valid or recognized in Kentucky.[3] Plaintiffs, who were nCot married but sought to obtain marriage licenses from Kentucky to marry their same-sex partner, argued that the marriage ban denied them both their fundamental right to marry and unconstitutionally discriminated against them in violation of the Equal Protection Clause. The district court concluded sexual orientation was a "quasi-suspect class" and that laws discriminating based on sexual orientation should be subject to "intermediate scrutiny," and invalidated the ban as a violation of the Equal Protection Clause.[4] In so doing, it stated that "Kentucky laws banning same-sex marriage cannot withstand constitutional review regardless of the standard."[5]

DeBoer v. Snyder. In 1996, the Michigan legislature enacted laws that defined marriage as a relationship between a man and a woman. (Prior to 1996, Michigan law defined eligibility to marry without reference to gender.[6]) In 2004, a ballot initiative in Michigan amended the state constitution to deny same-sex couples the right to marry and preclude recognition of such marriages performed outside of the state.[7] Same-sex couples challenged the statutes and constitutional provision on both due process and equal protection grounds.[8] After a nine-day trial, the district court found that the marriage ban violated equal protection because it was not rationally related to "any conceivable legitimate government purpose."[9] The court did not reach the question of whether the provisions burdened the exercise of a fundamental right under the Due Process Clause.

The Challenges to the Recognition Bans in the District Courts

Bourke v. Beshear. Couples lawfully married outside of Kentucky sought recognition of their marriage by the Commonwealth of Kentucky.[10] The district court granted summary judgment to the plaintiffs, concluding that "Kentucky's denial of recognition for valid same-sex marriage violates the United States Constitution's guarantee of equal protection under the law, even under the most deferential standard of review."[11]

Obergefell v. Hodges. In 2004, Ohio voters and the state legislature voted to prohibit same-sex couples from marrying in Ohio and to prohibit the state from

recognizing those same-sex marriages legally performed in other jurisdictions.[12] On July 19, 2013, John Arthur and James Obergefell, who were married in Maryland, filed a motion for an emergency order seeking legal recognition of their marriage in Ohio. John was dying of ALS and the couple wanted to have their marriage recognized so that the marriage could appear on James's death certificate. Two days later, the judge granted the plaintiffs' motion.[13] On December 23, 2013, the court issued a ruling declaring that the state of Ohio must recognize marriages between same-sex couples on death certificates issued by the state. In the order, the court concluded that "the right to remain married is properly recognized as a fundamental liberty interest protected by the Due Process Clause of the United States Constitution."[14] The district court also determined that heightened scrutiny should apply to the plaintiffs' equal protection claims, but that the refusal to recognize same-sex marriage failed under even rational basis review.[15]

Tanco v. Haslam. In 1996, Tennessee enacted legislation that denied recognition to marriages between same-sex couples, including those validly entered into in other states.[16] In 2006, Tennessee amended its constitution to preclude recognition of marriage between same-sex couples.[17] Married same-sex couples who moved to Tennessee challenged Tennesee's law and constitutional provision that prohibited recognizing marriages of same-sex couples.[18] The plaintiffs argued that Tennessee's refusal to recognize their marriages impermissibly infringed their fundamental right to marry and burdened their liberty interests in their existing marriages, violated their fundamental right to interstate travel, and impermissibly discriminated against them based on sexual orientation and sex. The district court held that, because the plaintiffs were likely to succeed in their lawsuit, state officials must respect the marriages of the plaintiffs while their lawsuit was pending.

The Sixth Circuit's Decision

The defendants appealed to the Federal Court of Appeals for the Sixth Circuit, which consolidated the cases. On November 6, 2014, a divided panel of the Sixth Circuit reversed the district courts,[19] becoming the first—and only—federal court of appeals to find marriage bans and marriage recognition bans constitutional after the Supreme Court's 2013 decision striking down the federal ban on recognition of marriages between same-sex couples.[20] In concluding that same sex couples should not look to the courts to protect their individual rights, but to the "state democratic processes," the Sixth Circuit's opinion "wholly fail[ed] to grapple with the relevant constitutional question."[21]

Laws that discriminate on the basis of sexual orientation must be subject to very close scrutiny under the Constitution's equal protection guarantee, as are laws that discriminate on the basis of race or sex.

- A law that discriminates on the basis of race or sex is presumed unconstitutional. In the case of sex discrimination, it will only pass constitutional muster if the government shows an "exceedingly persuasive" justification for the law, including demonstrating "at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives," without "rely[ing] on overbroad generalizations about the different talents, capacities, or preferences of males and females."[22] This is called "heightened scrutiny."

- One of many important reasons why heightened scrutiny should apply to sexual orientation discrimination is the close connection between laws that treat men and women differently based on gender stereotypes and laws that treat people of different sexual orientations differently on the basis of stereotyped assumptions about appropriate intimate relationships for men and women. "[S]ame-sex marriage prohibitions seek to preserve an outmoded, sex-role-based vision of the marriage institution, and in that sense . . . Raise the very concerns that gave rise to the contemporary constitutional approach to sex discrimination."[23] In both contexts, the Constitution must provide strong protection against government efforts to perpetuate traditional, stereotyped gender roles.

In applying heightened scrutiny to laws that discriminate on the basis of sex, the Supreme Court has recognized the harm done by laws enforcing gender stereotypes.

- Over the past forty years, the Supreme Court has

repeatedly emphasized that laws that classify based on gender stereotypes violate the federal Constitution's equal protection principle. In particular, the government may not assume and enforce gender-specific rules based on stereotypes about roles that women and men perform within the family, whether as caregivers, heads of households, or parents.[24]

- In adopting heightened scrutiny for laws discriminating on the basis of sex, the Supreme Court recognized these laws "employ[ed] gender as an inaccurate proxy for other, more germane bases of classification."[25] It determined that imprecise, overbroad stereotypes were "incapable of supporting . . . statutory schemes . . . premised on their accuracy."[26]
- Such laws violate the Constitution because they fail to recognize that many men and women either do not wish to or are unable to conform to gender stereotypes. When the law enforces "assumptions about the proper roles of men and women," it closes opportunity, depriving individuals of their essential liberty to depart from gendered expectations.[27]

Historically, the law of marriage has reflected and enforced gender stereotypes.

- For most of modern history, laws related to marriage required and assumed separate roles for men and women, based on gender stereotypes of the husband as breadwinner and decision-maker, and the wife as economically dependent homemaker and mother.
- For centuries, under the doctrine of coverture, "the husband and wife [were] one person in law: . . . the very being or legal existence of the woman [was] suspended."[28] For example, coverture prohibited wives from independently contracting or disposing of their own assets without their husbands' cooperation[29] and allowed a husband to sexually abuse his wife.[30]
- Federal and state laws continued to apply sex-specific rules relating to marriage well into the second half of the twentieth century. For example, state laws prohibited married women from administering the estates of those who died without wills, limited married women's right to engage in independent business, and required the domiciles of married women to follow their husbands' domiciles.[31] Across a variety of programs, federal law provided benefits to wives on the assumption that they were financially dependent on their husbands, but denied benefits to husbands altogether or unless they could prove financial dependence on their wives.[32]
- Courts applying heightened scrutiny have played a key role in dismantling the legal machinery enforcing separate gender roles within marriage, based on the principle that these roles do not properly reflect individuals' actual "ability to perform or to contribute to society" and thus violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility."[33]
- As a result, the law of marriage no longer explicitly enforces separate roles for husband and wife. Under law, men and women entering marriage today can decide for themselves the responsibilities each will shoulder as parents or wage earners or family decision-makers, regardless of whether these responsibilities conform to or depart from traditional arrangements.

Like sex discrimination, discrimination on the basis of sexual orientation often rests on stereotypes that should be subjected to close constitutional scrutiny.

- Like discrimination on the basis of sex, discrimination on the basis of sexual orientation often rests on stereotypes about supposedly "natural," "moral," or "traditional" behavior for women and men. Both sex discrimination and sexual orientation discrimination often take the form of punishing or burdening individuals who fail to conform to gender stereotypes. For this reason, federal courts have noted the difficulty of distinguishing "between sexual orientation discrimination and discrimination 'because of sex.'"[34]
- For example, in Centola v. Potter, a case about a male postal worker who was tormented by his colleagues for being effeminate and subjected to anti-gay slurs even though he never disclosed his sexual orientation at work, the court observed that "[s]ex stereotyping"—"making assumptions about an individual because of that person's gender . . . that may or may not be true"—"is central" both to discrimination based on sex and to discrimination based on sexual orientation.[35] It continued: "Sexual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms."[36]

- Laws prohibiting marriage between same-sex couples embody similar stereotyped gender norms: that a woman should be attracted to a man, and that a man should be attracted to a woman; that a woman's role is to form a household and a family with a man, and that a man's role is to form a household and a family with a woman; that women should not enter intimate relationships with each other; and that men should not enter intimate relationships with each other.
- Laws specifying that women can be wives only to men and that men can be husbands only to women—and that marriage requires one of each—assume that men and women must fill separate and complementary roles within marriage. The bans "constitute gender discrimination both facially and when recognized, in their historical context, both as resting on sex stereotyping and as a vestige of the sex-based legal rules once imbedded in the institution of marriage."[37]

The Supreme Court has repeatedly struck down laws that classify on the basis of gender and laws enforcing overbroad gender stereotypes. Such laws arbitrarily limit individuals' most personal choices about their own lives. The marriage bans and marriage recognition bans before the Court should be subjected to heightened scrutiny under the Equal Protection Clause and struck down as unconstitutional.

---

[1] *DeBoer v. Snyder,* __S.Ct.__ (No. 14-571) (U.S. Jan. 16, 2015); *Bourke v. Beshear* __S.Ct.__ (No. 14-574) (U.S. Jan. 16, 2015); *Obergefell v. Hodges*, __S.Ct.__ (No. 14-556) (U.S. Jan. 16, 2015); *Tanco v. Haslam,* __S.Ct. __, No. 14-562 (U.S. Jan. 16, 2015).
[2] *See* KRS §§ 402.005, 402.021(1)(d), 402.040(2), and 402.045.
[3] KY. CONST. §233A.
[4] *Id.* at 547.
[5] *Id.*
[6] Mich. Comp. Laws §§ 551.1-.4.
[7] MICH. CONST. 1963, art. 1, § 25.
[8] *DeBoer v. Snyder,* 973 F, Supp. 2d 757 (E.D. Mich. 2014).
[9] *Id.* at 768 (E.D. Mich. 2014).
[10] *Bourke v. Beshear,* 996 F. Supp. 2d 542, 543 (W.D. Ky. 2014).
[11] *Id.* at 553.
[12] *See* OHIO CONST. art. XV, § 11; Ohio Rev. Code §3101.02(C)(2).
[13] *Obergefell v. Kasich*, No. 1:13-cv-501, 2014 WL 3814262 (S.D. Ohio 2013).
[14] *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 978 (S.D. Ohio 2013).
[15] *Id.* at 991.
[16] Tenn. Code Ann. §36-3-113.
[17] *Tanco v. Haslam*, 7 F. Supp. 3d 759 (M.D. Tenn. 2014).
[18] *See* TENN. CONST. art. XI.
[19] *DeBoer v. Snyder,* 772 F.3d 388, 421 (6th Cir. 2014).
[20] *United States v. Windsor,* 133 S.Ct. 2675, 2695 (2013).
[21] *DeBoer,* 772 F.3d at 421 (Daughtrey, J., dissenting).
[22] *United States v. Virginia* (VMI), 518 U.S. 515, 533 (1996).
[23] *Latta v. Otter*, 771 F.3d 456, 487 (9th Cir. 2014) (Berzon, J., concurring).
[24] *See, e.g., J.E.B. v. Alabama ex rel*. T.B., 511 U.S. 127, 135 (1994); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975); *Frontiero v. Richardson,* 411 U.S. 677, 685 (1973) (plurality opinion).
[25] *Craig v. Boren*, 419 U.S. 190, 198 (1976).
[26] *Id.* at 199.
[27] *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982).
[28] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 442-445 (1765); *see also* NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 11 (2000).
[29] BLACKSTONE, *supra* note 24, at 442-445; COTT, *supra* note 24, at 11.
[30] SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 629 (1736).
[31] App. to Appellant's Br., *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4) (collecting state laws in each area).
[32] *See, e.g., Frontiero*, 411 U.S. at 677 (military spousal benefits); *Wiesenfeld,* 420 U.S. at 643 (Social Security survivor benefits); *Califano v. Goldfarb*, 430 U.S. 199 (1997) (same); *Califano v. Coffin*, 430 U.S. 924 (1977) (Social Security spousal benefits); *Kalina v. R.R. Ret. Bd.*, 541 F.2d 1204, 1209 (6th Cir. 1976), *aff'd*, 431 U.S. 909 (1977) (Railroad Retirement Act spousal benefits).
[33] *Frontiero*, 411 U.S. at 686 (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)).
[34] *Prowel v. Wise Bus. Forms., Inc.*, 579 F.3d 285, 291 (3d Cir. 2009) (reversing summary judgment grant for the employer where a gay male employee presented evidence that fellow employees harassed him because his appearance, behavior, and demeanor did not accord with what was regarded as typical male behavior at the factory where he worked); *see also Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864, 874-75 (9th Cir. 2001) (holding that harassment for failing to act "as a man should act," including being derided for not having sex with a female colleague, constituted actionable sex discrimination because plaintiff was discriminated against for violating gender stereotypes).
[35] 183 F. Supp. 2d 403, 406-410 (D. Mass. 2002).
[36] *Id. at* 410.
[37] *Latta,* 771 F.3d at 490 (Berzon, J., concurring).