

*Obergefell v. Hodges*

## Same-Sex Marriage and the Law

Michael C. Dorf

- Not whether but how
- Possibilities included:
- Conventional Equal Protection
- Fundamental Right to Marriage
- Animus Theory
- Sex Discrimination

Nos. 14-556, 14-562, 14-571 & 14-574

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IN THE  
**Supreme Court of the United States**

JAMES OBERGEBELL, ET AL., AND BRITTANI HENRY, ET AL.,  
PETITIONERS,  
v.  
RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF  
HEALTH, ET AL., RESPONDENTS.  
VALERIA TANCO, ET AL., PETITIONERS,  
v.  
WILLIAM EDWARD "BILL" HASLAM, GOVERNOR OF  
TENNESSEE, ET AL., RESPONDENTS.  
APRIL DEBOER, ET AL., PETITIONERS,  
v.  
RICK SNYDER, GOVERNOR OF MICHIGAN, ET AL., RESPONDENTS.  
GREGORY BOURKE, ET AL., AND TIMOTHY LOVE, ET AL.,  
PETITIONERS,  
v.  
STEVE BESHEAR, GOVERNOR OF KENTUCKY, ET AL.,  
RESPONDENTS.

**On Writs of Certiorari to the United States Court of  
Appeals for the Sixth Circuit**

BRIEF OF CONSTITUTIONAL LAW SCHOLARS  
ASHUTOSH BHAGWAT, LEE BOLLINGER, ERWIN  
CHEMERINSKY, WALTER DELLINGER, MICHAEL  
C. DORF, LEE EPSTEIN, DANIEL FARBER, BARRY  
FRIEDMAN, JOHN C. JEFFRIES, JR., LAWRENCE  
LESSIG, WILLIAM MARSHALL, FRANK MICHELMAN,  
JANE S. SCHACTER, SUZANNA SHERRY, GEOFFREY  
R. STONE, DAVID STRAUSS, LAURENCE TRIBE,  
AND WILLIAM VAN ALSTYNE AS *AMICI CURIAE*  
IN SUPPORT OF PETITIONERS

Nos. 14-556, 14-562, 14-571 & 14-574

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HEALTH, ET AL.,  
*Respondents.*

[Additional Case Captions Listed On Inside Front Cover]

**On Writs Of Certiorari To The United States  
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BRIEF OF *AMICI CURIAE* PROFESSORS  
LAURENCE H. TRIBE AND MICHAEL C. DORF  
IN SUPPORT OF PETITIONERS

## From the Oral Argument

CHIEF JUSTICE ROBERTS: Counsel . . . I'm not sure it's necessary to get into sexual orientation to resolve the case. I mean if Sue loves Joe and Tom loves Joe, Sue can marry him but Tom can't. And the difference is based upon their different sex. Why isn't that a straightforward question of sexual discrimination?

Meanwhile: EEOC ruling in mid-July that sexual orientation discrimination is sex discrimination under Title VII of the 1964 Civil Rights Act.

## The Ruling: Fundamental Right to Marry . . . with a soupcon of equality

Justice Kennedy for the Court: "If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians."

### Dissenters (Roberts, Scalia, Thomas, and Alito) Worry the Sky is Falling

- Roberts: *Lochner, Lochner, Lochner, Lochner, Lochner, Lochner, Lochner, Lochner, Lochner, Lochner, Lochner, Lochner, Lochner, Lochner, Lochner, Lochner, Lochner* (16 times)
- Scalia: If, even as the price to be paid for a fifth vote, I ever joined an opinion for the Court that began [as the majority opinion begins] I would hide my head in a bag. The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie.

### The Dissenters' Other Issue

- How to distinguish polygamy and incest?
- Less serious burden on liberty
- No immutable characteristic
- Administrative issues (at least with polygamy)
- Most important from the external perspective: No social movements . . . yet
- Compare Guns and Second Amendment

### Law and Social Movements



### Autopoieisis (Luhmann)



### Hollow Hope (Rosenberg)



### Conventional View (Feedback)



### Triangular Relations (Dorf & Tarrow)

