The Meaning of Equal: Does the Constitution Prohibit Discrimination on the Basis of Gender and Sexual Orientation?

The Constitution at a Crossroads

Introduction

"Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn't. Nobody ever thought that that's what it meant. Nobody ever voted for that. If the current society wants to outlaw discrimination by sex, hey we have things called legislatures, and they enact things called laws."[1]

Justice Antonin Scalia

"What [the framers of the 14th Amendment] were getting at, basically, and you will find this popping up again and again in the legislative record, they were against caste. They did not want the United States to have any classes or castes that would identify people by their birth status."[2]

Justice Ruth Bader Ginsburg

As these two recent statements by sitting Justices indicate, the Supreme Court is bitterly divided along ideological lines over the meaning of the Fourteenth Amendment's guarantee to all persons of the "equal protection of the laws." Conservatives, most notably Justice Antonin Scalia, view the Equal Protection Clause as mainly, if not exclusively, about eliminating discrimination on the basis of race;[3] hence, they often vote to permit other forms of discrimination. The Court's liberal Justices, frequently led by Justice Ruth Bader Ginsburg, view the Clause as more broadly prohibiting all forms of invidious discrimination that has the effect of creating favored or disfavored classes or castes. This disagreement about the meaning of the Equal Protection Clause has resulted in sharply divided rulings over whether the Equal Protection Clause limits state-sponsored discrimination on the basis of sex and sexual orientation. In these cases, Justice Anthony Kennedy has often, but not always, sided with the Court's liberal wing, providing a viable but somewhat uncertain foundation for protection against discrimination on the basis of sex and sexual orientation.

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[1] *See The Originalist*, California Lawyer (January 2011) (available at http://www.callawyer.com/clstory.cfm?pubdt=NaN&eid=913358&evid=1).

[2] See Nicole Flatow, *Justice Ginsburg's Take on Originalism* (Nov. 22, 2011) (available at http://www.acslaw.org/acsblog/justice-ginsburg%E2%80%99s-take-on-originalism).

[3] *See* Chapter 5 ("*Brown v. Brown*").

This area of the law has been surprisingly quiet in the last decade, but is now getting very heated very quickly, as cases raising questions of marriage equality for gay men and lesbians race through the lower federal courts. This past February, Ted Olson and David Boies convinced a divided panel of the U.S. Court of Appeals for the Ninth Circuit in *Perry v. Brown*[4] that Proposition 8, which amended the California Constitution to deny gay men and lesbians the right to marry the person of their choice, violated the Equal Protection Clause because it stripped them of a right based on animus and prejudice and was not rationally related to any legitimate governmental interest. "Proposition 8," the Ninth Circuit concluded, "serves no purpose, and has no effect, other than to lessen the status and dignity of gays and lesbians in California, and to officially reclassify their relationships and families as inferior to those of opposite-sex couples."[5]

On May 31, 2012, in the companion cases of *Gill v. Office of Personnel Management* and *Massachusetts v. United States Dep't of Health & Human Services*, the First Circuit unanimously held that the provisions of the federal Defense of Marriage Act ("DOMA") that deny federal marriage benefits to married same-sex couples violate the "equal protection" component implied in the Due Process Clause of the Fifth Amendment. The panel's opinion, authored by well-respected conservative jurist Michael Boudin, applied what might be called rational basis review with bite, following a long line of equal protection cases that have focused on the "case-specific nature of the discrepant treatment, the burden imposed, and the infirmity of the justification."[6] Rather than invoke a higher tier of judicial scrutiny, as urged by the Obama Justice Department, Judge Boudin explained that equal protection principles prohibit federal and state governments from discriminating against a "historically disadvantaged or unpopular" group for reasons that are "thin, unsupported or impermissible." [7]

With *Perry*'s challenge to Proposition 8 and *Gill*'s challenge to the federal provisions of DOMA closer than ever to Supreme Court review, and with the Justices deeply divided about the meaning of the equal protection guarantee, the Constitution's promise of equality for all persons is at a crossroads.

The Text and History of the Equal Protection Clause

Proposed in 1866 and ratified in 1868, the Equal Protection Clause prohibits a state from "denying to any person within its jurisdiction the equal protection of the laws." This broad protection of equality was no accident. The Framers of the Fourteenth Amendment wrote the Equal Protection Clause to bring the Constitution back in line with the fundamental principle of equality set out in the Declaration of Independence, which had been perverted by the institution of slavery.[8] While protecting the newly freed slaves was certainly a priority, the Joint Committee of Congress that drafted the Fourteenth Amendment rejected numerous proposals that would have limited the Fourteenth

[4] 671 F.3d 1052 (9th Cir. 2012).
[5] *Id.* at 1063.
[6] *Massachusetts v. United States Dep't of Health & Human Servs.,* Nos. 10-2204, 2207, 2214, slip op. at 17 (1st Cir. May 31, 2012).
[7] *Id.* at 16.
[8] Cong. Globe, 39th Cong., 1st Sess. 2961 (1866) (arguing that the guarantees of due process and equal protection "were essentially declared in the Declaration of Independence").

Amendment's equality guarantee to a prohibition on laws that discriminated on account of race, preferring a universal guarantee of equality that protected all persons residing in the United States.[9] Indeed, the Reconstruction Framers insisted on this universal coverage because states were flagrantly violating the equal rights not only of the newly freed slaves, but also white Union sympathizers in the South and Chinese immigrants in the West. From the very beginning, the Equal Protection Clause was understood as a universal guarantee of equality that "abolishes all class legislation," "does away with the injustice of subjecting one caste of persons to a code not applicable to another," and "establishes equality before the law."[10]

While the Framers of the Fourteenth Amendment clearly and deliberately wrote the broadest possible textual protection of equality into our Constitution, they themselves were not entirely willing to live up to this soaring promise of equal protection for all. In fact, Section 2 of the Fourteenth Amendment put an imprimatur of sorts on sex discrimination, imposing a penalty of reduced congressional representation only on states that denied the right to vote to any of its male citizens. The clear implication of this constitutional language was that states were free to deny the vote to women.

Taking advantage of this textual schizophrenia, the Reconstruction-era Supreme Court interpreted the Fourteenth Amendment's guarantee of equal protection to be primarily – if not exclusively – concerned with racial discrimination. Just a few short years after the ratification of the Fourteenth Amendment, a narrow majority of the Supreme Court observed that "the one pervading purpose" of the Fourteenth Amendment was "the protection of the newly made freeman citizen from the oppressions of those who formerly exercised unlimited dominion over him," and "doubt[ed] very much whether any action of the State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of [the Equal Protection Clause]."[11] In 1880, in *Strauder v. West Virginia*,[12] the Justices struck down efforts to exclude African American men from the right to serve on a jury, calling their exclusion "practically a brand on them, affixed by law, an assertion of their inferiority," but suggested in dicta that states may "confine the selection [of jurors] to males . . . ."[13]

Of course, the constitutional struggle for equality for all persons did not end in 1868. In later Amendments, including the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments, the American people strengthened the Constitution's protection of equality. Most important, the Nineteenth Amendment, ratified in 1920, gave women the right to vote and thereby effectively repealed the portions of the Fourteenth Amendment that permitted discrimination against women in voting rights.[14] In approving the Nineteenth Amendment, the nation decisively rejected "the old conception of

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[9] *See* BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 46, 50, 83 (1914).

[10] Cong. Globe, 39th Cong., 1st Sess. 2766 (1866). The discussion in this paragraph draws on DAVID GANS, PERFECTING THE DECLARATION: THE TEXT AND HISTORY OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT (2011).

[11] *Slaughter-House Cases*, 83 U.S. 36, 71, 81 (1873).

[12] 100 U.S. 303 (1880).

[13] *Id.* at 308, 310.

[14] *See* PERFECTING THE DECLARATION, *supra*, at 33-34, 36; *see also* Stephen G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 Tex. L. Rev. 1, 66-96 (2011); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002).

the place of woman," concluding that a woman was no longer to be "ruled by a male head" and have "her place in the world . . . determined by the place held by this head . . . ."[15] With the ratification of the Nineteenth Amendment, the sweeping text of the Equal Protection Clause stands alone, free from the stain created by Section 2 of the Fourteenth Amendment.

The arc of our constitutional progress towards greater equality makes it difficult to argue that the Equal Protection Clause does not protect women and other historically disadvantaged persons from state-sponsored discrimination. Indeed, even Justice Scalia tried to disavow his remarks about sex discrimination when pressed by Senator Dianne Feinstein at a recent Senate Judiciary Committee hearing.[16] The more pressing, and persistently divisive, question is what level of protection is afforded by the Clause outside of the context of discrimination on the basis of race.

In the 1970s and 1980s, the Supreme Court, led by Justice William Brennan, established the now-familiar three tiers of equal protection scrutiny under which laws that discriminate on account of race, national origin, and alienage are subject to strict scrutiny,[17] laws that discriminate on account of gender and "illegitimacy" are subject to intermediate scrutiny,[18] and the vast bulk of social and economic legislation, as well as laws that discriminate on account of age and disability,[19] are subject to rational basis review.

Justice Brennan's tiered model for equal protection analysis met with two very distinct challenges. On the left, Justice John Paul Stevens argued that too much focus on the tiers of scrutiny obscured the text of the Equal Protection Clause's protection of equality for all persons. As he observed, "[t]here is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases."[20] On the right, then-Justice William Rehnquist argued that there was no basis in text, history, or precedent to justify heightened scrutiny outside the context of racial discrimination and that the Court's new framework was so "diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation."[21] Nevertheless, the three tiers of equal protection scrutiny have survived and, today, are deeply embedded in the Court's cases.

While this three-tiered approach remains a starting point for equal protection analysis, the Court's current membership rarely agrees on how to apply this framework. Led by Justice Ruth Bader Ginsburg, the Court's liberal wing has pushed for a demanding review of legislation that discriminates on the basis of gender, requiring the government to establish an "exceedingly persuasive justification" for laws that deny equal rights to men and women. The Court's conservative wing, led by Justice Scalia, has

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[15] 56 Cong. Rec. 788 (1918).

[16] *See* David H. Gans, *Justice Scalia's Flip-Flop* (Oct. 7, 2011) (available at http://theusconstitution.org/text-history/3189).

[17] *See Graham v. Richardson*, 403 U.S. 365, 371-72 (1971); *Sugarman*, 413 U.S. at 642.

[18] *See Craig v. Boren*, 429 U.S. 190, 197 (1976); *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

[19] *See Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976); *City of Cleburne, Tex v. Cleburne Living Center, Inc.,*473 U.S. 432, 442-47 (1985).

[20] *Craig*, 429 U.S. at 211-12 (Stevens, J., concurring).

[21] *Id.* at 221 (Rehnquist, J., dissenting).

insisted that societal traditions and views on morality are sufficient justification for many gender-based distinctions and just about any distinction based on sexual orientation. At the Court's center, Justice Kennedy has started to stake out something of a third way in cases involving sexual orientation, focusing less on the three tiers of scrutiny and more on the broad protection of equality for all persons in the constitutional text. In this respect, Justice Kennedy's approach owes much to Justice Stevens' "one Equal Protection Clause" analysis.

Equal Protection Jurisprudence and Discrimination on the Basis of Gender

The story of the Court's recent jurisprudence on equal protection and gender begins with the 1994 case, *J.E.B. v. Alabama ex rel. T.B.*,[22] in which the Court ruled by a vote of 6-3 that Alabama prosecutors violated the Equal Protection Clause when they exercised their peremptory challenges to remove a number of jurors based on their gender, concluding that "gender, like race, is an unconstitutional proxy for juror competence and impartiality."[23] Justice Harry Blackmun's opinion for the Court concluded that the Alabama prosecutors had failed to offer an "exceptionally persuasive justification" for their use of gender-based challenges, finding that they had done no more than rely on the "same stereotypes that justified the wholesale exclusion of women from juries and the ballot box."[24]

Writing for the three dissenters, Justice Scalia argued that the majority had badly erred by limiting a litigant's established right to use a peremptory challenge, thereby "imperil[ing] a practice that has been considered an essential part of fair jury trial since the dawn of the common law. The Constitution neither requires nor permits this vandalizing of our people's traditions."[25] In a separate dissent, Chief Justice Rehnquist echoed the Reconstruction-era Court, arguing that the Constitution treats gender-based peremptory strikes differently from race-based ones because "race lies at the core of the commands of the Fourteenth Amendment" and "there are sufficient differences between race and gender discrimination."[26] The Chief Justice explained that "[t]he two sexes differ, both biologically and, to a diminishing extent, in experience. It is not merely 'stereotyping' to say that these differences may produce a difference in outlook . . . . [U]se of peremptory challenges on the basis of sex is generally not the sort of derogatory and invidious act which peremptory challenges directed at black jurors may be."[27]

In 1996, in *United States v. Virginia*,[28] the Court's majority and Justice Scalia continued to go toe-to-toe on the meaning of the equal protection guarantee. There, in an opinion by Justice Ginsburg, the Court held by a vote of 7-1 that the exclusion of women from the Virginia Military Institute violated the Equal Protection Clause.[29] While the Court recognized that "[p]hysical differences between men and

[22] 511 U.S. 127 (1994).
[23] *Id.* at 129.
[24] *Id.* at 137, 139.
[25] *Id.* at 163 (Scalia, J., dissenting).
[26] *Id.* at 155, 154 (Rehnquist, C.J., dissenting).
[27] *Id.* at 156 (Rehnquist, C.J., dissenting).
[28] 518 U.S. 515 (1996).
[29] Justice Thomas recused himself from participation in the case.

women . . . are enduring," it held that "'[i]nherent differences between men and women . . . remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity."[30] Applying the same, demanding version of intermediate scrutiny as the Court had applied in *J.E.B.*, Justice Ginsburg's opinion found that Virginia failed to offer an "exceedingly persuasive justification" for excluding women from VMI,[31] explaining that "[h]owever 'liberally' [Virginia's] plan serves the State's sons, it makes no provision for her daughters. That is not *equal* protection."[32]

Justice Scalia dissented, arguing that the Court had no warrant in the Constitution to "shut[] down an institution that has served the people of the Commonwealth of Virginia with pride and distinction for over a century and a half."[33] Criticizing the Court for setting aside "the long tradition, enduring down to the present, of men's military colleges," Justice Scalia urged that "the function of the Court is to *preserve* our society's values regarding . . . equal protection, not to *revise* them . . . . [W]hatever abstract tests we may choose to devise, they cannot supersede – and indeed ought to be crafted to reflect – those constant and unbroken national traditions that embody the people's understanding of ambiguous constitutional texts."[34] In displacing these longstanding traditions, Justice Scalia charged, the Court had insisted on a new, super-strict version of intermediate scrutiny when the proper standard should really be rational basis review.[35]

Since *Virginia*, the Justices have only tinkered around the edges of gender discrimination doctrine. In 2001, in *Nguyen v. INS*,[36] the Justices voted 5-4 to uphold a federal statute that discriminated against U.S. citizen fathers, making it harder for them to transmit their citizenship to a nonmarital child born outside the United States. In an opinion by Justice Kennedy, the Court held that the statute survived heightened scrutiny. Observing that "[f]athers and mothers are not similarly situated with regard to proof of biological parenthood," Justice Kennedy reasoned that the statute's requirements were permissible efforts "to ensure an acceptable documentation of paternity" and thus "establish the blood link between the father and child required as a predicate to the child's acquisition of citizenship."[37] Justice Kennedy explained that it was "not a stereotype" to "recogni[ze] that [at] the moment of birth . . . the mother's knowledge of the child and the fact of parenthood have been established in a way not guaranteed in the case of the unwed father."[38]

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[30] *Id.* at 533.
[31] *Id.* at 534.
[32] *Id.* at 540.
[33] *Id.* at 566 (Scalia, J., dissenting).
[34] *Id.* at 566, 568 (Scalia, J., dissenting).
[35] *Id.* at 574-75 (Scalia, J., dissenting) (arguing that "if the question of the applicable standard of review for sex-based classifications were to be regarded as an appropriate subject for reconsideration, the stronger argument would be not for elevating the standard to strict scrutiny, but for reducing it to rational-basis review").
[36] 533 U.S. 33 (2001). The Court had reviewed the constitutionality of the statute for the first time in *Miller v. Albright*, 523 U.S. 420 (1998), but a majority of the Court failed to resolve the issue.
[37] *Nguyen*, 533 U.S. at 63.
[38] *Id.* at 68.

Justice Sandra Day O'Connor authored a dissenting opinion, joined by Justice Ginsburg, Justice Stephen Breyer and Justice David Souter. She argued that the majority had diluted intermediate scrutiny, calling the ruling a "deviation from the line of cases in which we have vigilantly applied heightened scrutiny to determine whether a constitutional violation has occurred."[39] The dissenters would have invalidated the statute because, first, the interests served by the statute could have been readily achieved by gender-neutral means, and, second, because the statute was "paradigmatic of a historic regime that left women with responsibility, and freed men from responsibility, for nonmarital children."[40] In the dissenters' view, the majority had seriously departed from settled equal protection principles by ignoring "the stereotypical notion that mothers must care for these children," thereby "condon[ing] 'the very stereotype the law condemns.'"[41]

Last Term, the Court considered *Flores-Villar v. United States*,[42] an appeal from a Ninth Circuit ruling upholding the constitutionality of a related provision of the federal citizenship statute at issue in *Nguyen,* which imposed a discriminatory residency requirement on unmarried U.S. citizen fathers seeking to pass their citizenship on to their children born outside the United States. Affirming the Ninth Circuit's decision by a vote of 4-4 without a formal opinion—Justice Elena Kagan did not participate—the ruling demonstrates that the Roberts Court remains deeply divided over the meaning of the equal protection guarantee. Although the summary affirmance does not disclose how the Justices voted, most Court watchers believe that Justice Kennedy, the author of the *Nguyen* opinion, sided with the Court's liberal wing in *Flores-Villar*, indicating that in gender discrimination law, like many other areas, as Justice Kennedy goes, so goes the Court.

Equal Protection Doctrine and Discrimination on the Basis of Sexual Orientation

Justice Kennedy not only wields the deciding vote on the Supreme Court in equal protection cases, he also seems intent to move the Court away from the "tiers of scrutiny" framework toward a more focused examination of whether laws improperly discriminate against individual Americans. Justice Kennedy began articulating these views in *J.E.B,* in which he wrote an important concurring opinion, emphasizing that constitutional text and history supported the Court's holding. Justice Kennedy observed that the Framers of the Fourteenth Amendment rejected an equality guarantee that proscribed only racial discrimination in favor of a broad guarantee written in "more comprehensive terms,"[43] extending the guarantee of the equal protection of the laws to all individuals, both women and men. "The neutral phrasing of the Equal Protection Clause," Justice Kennedy explained, "extending its guarantee to 'any person,' reveals its concern with rights of individuals . . . . 'At the heart of the

[39] *Id.* at 74, 97 (O'Connor, J., dissenting).
[40] *Id.* at 92 (O'Connor, J., dissenting).
[41] *Id.* (quoting *J.E.B.*, 511 U.S. at 138).
[42] 131 S. Ct. 2312 (2011).
[43] *J.E.B v. Alabama ex rel. T.B.*, 511 U.S. 127, 151 (1994) (Kennedy, J., concurring).

Constitution's guarantee of equal protection lies the simple command that the government must treat citizens as individuals, not as simply components of a racial [or] sexual . . . class.'"[44]

Two years later, in *Romer v. Evans*,[45] Justice Kennedy authored the Court's 6-3 ruling holding that Colorado's Amendment 2, which prohibited state or local government action to protect gay men and lesbians from discrimination, violated the Equal Protection Clause. Calling Amendment 2's discrimination against gay men and lesbians a broad "disqualification of a class of persons from the right to seek the protection of the law,"[46] Justice Kennedy explained that Equal Protection Clause requires "the law's neutrality where the rights of persons are at stake" and forbids the government from discriminating against individuals out of "animosity toward the class of persons affected."[47] Applying these first principles, the Court concluded that Amendment 2 was a patent denial of equal protection, "a status-based enactment" that denies equal rights under the law to gay men and lesbians "to make them unequal to everyone else."[48]

Importantly in *Romer*, Justice Kennedy's opinion for the Court did not hold that discrimination on account of sexual orientation is a constitutionally suspect classification requiring strict scrutiny (as in race discrimination cases) or intermediate scrutiny (as in gender discrimination cases). The Court in fact has never articulated the standard of review applicable to laws that discriminate on account of sexual orientation, and Justice Kennedy sidestepped the question in *Romer*. Instead, Justice Kennedy's majority opinion held that Amendment 2 could not survive rational basis review, making consideration of a higher level of scrutiny unnecessary. While rational basis scrutiny is deferential, Justice Kennedy concluded that even the most minimal level of equal protection scrutiny does not permit "'indiscriminate imposition of inequalities' . . . born of animosity to the class of persons affected."[49] In striking the law under rational basis review, Justice Kennedy took a page from the playbook of John Paul Stevens, who had long argued that the focus should be on the meaning of equal rather than on expanding the judicially-created tiers of scrutiny.

Justice Scalia again wrote for the dissenters. In an opinion joined by Justice Clarence Thomas and Chief Justice Rehnquist, Justice Scalia argued that Amendment 2 did not violate the Equal Protection Clause because the government has a legitimate interest in "preserv[ing] traditional sexual mores against the efforts of a politically powerful minority to revise those mores . . . ."[50] The Court, he argued, was wrong to treat Amendment 2 as a form of invidious discrimination designed to harm gay men and lesbians. Except to "those who think the Constitution changes to suit current fashions," Scalia argued, Amendment 2 was a constitutionally permissible effort to "prevent piecemeal deterioration of the sexual morality favored by a majority of Coloradoans," in line with our "centuries-old" history of "moral

[44] *Id.* at 152-53 (Kennedy, J., concurring) (quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting).
[45] 517 U.S. 620 (1996).
[46] *Id.* at 633.
[47] *Id.* at 623, 633-34.
[48] *Id.* at 635.
[49] *Id.* at 633, 634 (quoting *Sweatt v. Painter*, 339 U.S. 629, 635 (1950)).
[50] *Id.* at 636 (Scalia, J., dissenting).

disapproval of homosexual conduct."[51] In short, Justice Scalia argued, "[s]ince the Constitution says nothing about this subject, it is left to be resolved by normal democratic means, including the democratic adoption of provisions of state constitutions."[52] In his view, "[n]o principle set forth in the Constitution, nor even any imagined by this Court in the past 200 years, prohibits what Colorado has done here."[53]

In his dissent, Justice Scalia likened the efforts of Coloradoans to respond to the growing political power of gay men and lesbians to 19th Century state constitutional amendments that banned polygamy "in order to preserve . . . sexual morality . . . against the efforts of a geographically concentrated and politically powerful minority to undermine it."[54] In Justice Scalia's view, state governments had no less broad authority to express moral outrage at homosexuality.

Possible Developments in the Future

As this review makes clear, the Justices of the Supreme Court have been deeply divided over the meaning of the equal protection guarantee in cases involving discrimination on account of sex and sexual orientation. A majority of the Court in *J.E.B.*, *Virginia*, and *Romer* has held that the text of the Equal Protection Clause means what it says: it is a broad guarantee of equality covering every person residing in the United States, prohibiting states from denying women and gay men and lesbians equal rights and opportunities and treating them as second-class persons, whether based on stereotypical thinking, prejudice, or animus. Each of these opinions was authored or joined by Justice Kennedy, who today holds the balance of power on the Court in cases presenting these issues. Dissenting in each of these cases, Justice Scalia argued that the Equal Protection Clause should be read to preserve longstanding practices of the American people and preserve "traditional" notions of morality. Outside the context of race, Justice Scalia argued, the Equal Protection Clause protects traditional practices of the states, even those that discriminate on the basis of gender and sexual orientation. These cases, of course, were decided fifteen or more years ago, but there is no reason to think these fault lines have disappeared. Indeed, as *Flores-Villar* indicates, the Justices still remain deeply polarized about the meaning of the constitutional guarantee of equality.

Against this backdrop, the Court is poised in the coming years to weigh in on the most important equality fight of this generation, the struggle by gay men and lesbians for marriage equality. Two huge cases are waiting in the wings: (1) *Perry v. Brown*, the challenge to California's Proposition 8, led by the powerhouse team of Olson and Boies; and (2) the companion cases of *Gill v. Office of Personnel Management* and *Massachusetts v. United States Dep't of Health & Human Services*, challenging the provisions of DOMA that deny federal marriage benefits to married same-sex couples. In these cases, the federal courts of appeal tracked Justice Kennedy's "third way" in striking down the discriminatory marriage laws, concluding that these enactments denied gay men and lesbians the equal protection of the laws by denying them equal rights without any legitimate reason. The panel opinions – written

[51] *Id.* at 640-41, 653, 644 (Scalia, J., dissenting).
[52] *Id.* at 636 (Scalia, J., dissenting).
[53] *Id.* at 644 (Scalia, J., dissenting).
[54] *Id.* at 648 (Scalia, J., dissenting).

respectively by liberal lion Stephen Reinhardt and conservative jurist Michael Boudin – closely followed Justice Kennedy's approach, engaging in a focused examination of whether the particular laws improperly discriminate against individual Americans, and struck the laws under rational basis review, rather than announce a tougher standard of review for state-sponsored discrimination on the basis of sexual orientation. The question now is whether Justice Kennedy would view these rulings as appropriately following from *Romer*, should either case reach the Court.

There is good reason to think that he would. The logic of Justice Kennedy's opinions in *J.E.B.* and *Romer* point in the direction of a holding striking down Proposition 8 and the federal portion of DOMA as a violation of the constitutional guarantee of equality under the law and equality of rights. In *J.E.B.*, as discussed above, Justice Kennedy affirmed the text's broad protection of equality, noting that the Framers of the Fourteenth Amendment rejected an equality guarantee that proscribed only racial discrimination in favor of a broad guarantee written in "more comprehensive terms" applying to all persons.[55] "The neutral phrasing of the Equal Protection Clause," he explained, "reveals its concern with the rights of individuals," requiring the government to obey "the simple command" to "'treat citizens as individuals, not as simply components of a racial [or] sexual . . . class.'"[56] In *Romer*, Justice Kennedy affirmed that, under the text, "the Constitution 'neither knows nor tolerates classes among citizens,'" requiring "the law's neutrality where the rights of persons are at stake."[57] He recognized that, under the Equal Protection Clause, states may not deny to gay men and lesbians rights basic to "ordinary civic life in a free society," in order "to make them unequal to everyone else."[58] If Justice Kennedy is guided by these precepts, he may well end up authoring a sharply divided opinion affirming either the First Circuit's opinion in *Gill* or the Ninth Circuit's opinion in *Perry* and possibly going further and recognizing marriage equality as a matter of fundamental constitutional right.

To be sure, other opinions authored by Justice Kennedy are more equivocal. His opinion in *Nguyen,* discussed above, indicates his willingness to side with the Court's conservative wing in equal protection cases and uphold certain distinctions on the basis of gender. Perhaps even more important, in terms of *Perry,* Justice Kennedy's opinion for the Court in *Lawrence v. Texas*,[59] which struck down a Texas criminal sodomy statute under the Due Process Clause of the Fourteenth Amendment, expressly reserved the question of marriage equality, observing that the case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."[60]

However Justice Kennedy reconciles his own opinions in *J.E.B.*, *Romer*, *Nguyen*, and *Lawrence*, he will have to contend with arguments, likely to be made by Justice Scalia, that the Constitution says nothing about same-sex marriage. Based on his past dissenting opinions, Justice Scalia is likely to take the view that a ruling striking down state discriminatory marriage laws has no basis in the Constitution

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[55] *J.E.B.*, 511 U.S. at 151 (Kennedy, J., concurring).
[56] *Id.* at 153 (Kennedy, J., concurring) (quoting *Metro Broadcasting, Inc v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting).
[57] *Romer*, 517 U.S. at 623 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).
[58] *Id.* at 631, 635.
[59] 539 U.S. 558 (2003).
[60] *Id.* at 578.

and would be inconsistent with the long-established understanding of the Equal Protection Clause and badly out of harmony with the established understanding of marriage and morality going back centuries.

In short, the stakes in these cases could not be higher, raising the fundamental question whether the Constitution, in fact, protects the equality of all persons or permits state-sponsored discrimination against gay and lesbian persons. In landmark equal protection cases decided over the last 60 years, the Supreme Court has held that the Constitution broadly guarantees equality to all persons and prohibits states from treating African Americans, women, and gay men and lesbians as inferior persons. The question now, with *Perry* and *Gill* getting closer to the Supreme Court, is whether the Justices will follow these basic equal protection principles or make an exception to them.