

# THE DISSENT THAT PAVED THE WAY TO EQUAL DIGNITY: CHIEF JUDGE JUDITH S. KAYE’S DISSENT IN *HERNANDEZ*

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## INTRODUCTION

In her dissent in the case of *Hernandez v. Robles*, in which a plurality of the New York Court of Appeals upheld New York’s prohibition on marriages between gay couples under the New York State Constitution, Chief Judge Judith S. Kaye solemnly predicted that she was “confident that future generations will look back on today’s decision as an unfortunate misstep.”<sup>1</sup> With respect to this forecast, Chief Judge Kaye was uncharacteristically inaccurate—it did not take “generations,” or even one generation; it only took seven years. On June 26, 2013, the United States Supreme Court struck down Section 3 of the federal Defense of Marriage Act (DOMA), which defined “marriage” for all federal rights and benefits as “a legal union between one man and one woman as husband and wife,”<sup>2</sup> as unconstitutional under the Equal Protection Clause.<sup>3</sup> Two years later to the day, the Supreme

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<sup>1</sup> 855 N.E.2d 1, 34 (N.Y. 2006) (Kaye, C.J., dissenting).

<sup>2</sup> 1 U.S.C. § 7 (2012).

<sup>3</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2695–96 (2013).

Court held that state laws prohibiting marriage between gay and lesbian couples were unconstitutional under both the Equal Protection and Due Process Clauses, bringing marriage equality to every state.<sup>4</sup>

Chief Judge Kaye's *Hernandez* dissent belongs in the proud tradition of prophetic dissents,<sup>5</sup> like that of Justice Harlan in *Plessy v. Ferguson*,<sup>6</sup> that "reach beyond their moment to capture the prevailing ethos or attitude of some later moment," by "point[ing] out different, possibly better, approaches to pressing issues."<sup>7</sup> While many, if not most, judicial dissents are soon forgotten given that they do not carry the weight of the rule of law, certain dissents remain potent through their "persuasive appeal[ ]."<sup>8</sup> Chief Judge Kaye's dissent in *Hernandez* surely belongs in this category, representing perhaps the textbook example of a dissenting opinion eventually being adopted as the widespread majority view.

As is true with most things in life, timing is everything. It is easy today to assume that the current consensus in favor of the equality of gay people under the law has existed for a long time, but that is decidedly not the reality. Chief Judge Kaye's *Hernandez* dissent was not only one of the first ringing judicial declarations in favor of lesbian, gay, bisexual, and transgender (LGBT) liberty and equality, but it came at a critical point in time when the country was still deeply divided over the issue of marriage equality. In 2006, the Supreme Judicial Court of Massachusetts was the only appellate court in the country to have ruled that gay and lesbian couples were permitted to marry,<sup>9</sup> although the New Jersey Supreme Court opened the door to civil unions after finding their state's marriage laws violated state constitutional rights.<sup>10</sup> In November 2004, voters in eleven states passed amendments to their state constitutions banning same-sex marriage, and in most of those states, civil unions and similar legal protections for same-sex couples as well.<sup>11</sup> In 2005, Kansas passed its own state

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<sup>4</sup> Obergefell v. Hodges, 135 S. Ct. 2584, 2607–08 (2015).

<sup>5</sup> See ALAN BARTH, PROPHETS WITH HONOR: GREAT DISSENTS AND GREAT DISSENTERS IN THE SUPREME COURT 3 (1974) ("Judicial dissent . . . is, at its best, a form of prophecy . . . . Like a seer, the dissenter sometimes peers into the future. [She] will be accounted wise or foolish as the unfolding of events proves [her] right or wrong.").

<sup>6</sup> 163 U.S. 537, 552–64 (Harlan, J., dissenting).

<sup>7</sup> Allen P. Mendenhall, *The Power of Dissent*, 77 ALA. LAW. 170, 170 (2016) (book review).

<sup>8</sup> *Id.* at 171.

<sup>9</sup> See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) ("We construe civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others.").

<sup>10</sup> *Lewis v. Harris*, 908 A.2d 196, 220–21 (N.J. 2006).

<sup>11</sup> See *Same-Sex Marriage Bans Winning on State Ballots*, CNN (Nov. 3, 2004, 3:22 PM), <http://www.cnn.com/2004/ALLPOLITICS/11/02/ballot.samesex.marriage>.

constitutional amendment.<sup>12</sup> And in 2006, not only did seven additional states pass anti-marriage equality constitutional amendments,<sup>13</sup> but President George W. Bush renewed his call for passage of the Federal Marriage Amendment, which would have banned same-sex marriage nationwide and arguably would have even denied states the ability to recognize civil unions or domestic partnerships.<sup>14</sup>

## I

### *HERNANDEZ V. ROBLES*

In 2004 and 2005, following a whirlwind of marriage activity by gay and lesbian couples in San Francisco led by then-Mayor Gavin Newsom,<sup>15</sup> couples across New York State filed lawsuits in state court, each challenging the constitutionality of New York Domestic Relations Law (DRL) provisions that did not permit gay and lesbian couples to marry. The plaintiffs argued that New York's restrictive DRL violated their due process and equal protection rights under the New York Constitution.<sup>16</sup> On February 4, 2005, Judge Doris Ling-Cohan of the New York Supreme Court (the trial court in New York State) granted summary judgment on behalf of the gay and lesbian couples in *Hernandez*.<sup>17</sup> The court held that New York's exclusion of gay and lesbian couples from marriage violated the plaintiffs' due process and equal protection rights.<sup>18</sup> Defendant appealed that decision to the Appellate Division, First Department, where Justice Milton Williams, writing for a three-to-two majority, overturned the lower court's decision, finding that New York had a rational basis to exclude

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<sup>12</sup> See Christine Lagorio, *Kansas Backs Gay Marriage Ban*, CBS NEWS (Apr. 5, 2005, 10:48 PM), <http://www.cbsnews.com/news/kansas-backs-gay-marriage-ban>.

<sup>13</sup> See Chris L. Jenkins, *Ban on Same-Sex Unions Added to Va. Constitution*, WASH. POST (Nov. 8, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/07/AR2006110701648.html> ("Virginia was one of eight states to have constitutional amendments banning same-sex marriage on ballots yesterday, and voters approved them in Colorado, Idaho, South Carolina, South Dakota, Tennessee and Wisconsin.").

<sup>14</sup> See *Bush Urges Federal Marriage Amendment*, NBC NEWS, <http://www.nbcnews.com/id/11442710/ns/politics/t/bush-urges-federal-marriage-amendment/#.WGRfD1MrJhF> (last updated June 5, 2006, 8:22 PM) (explaining how the Amendment "would prohibit states from recognizing same-sex unions").

<sup>15</sup> See *Mayor Defends Same-Sex Marriages*, CNN (Feb. 22, 2004), <http://www.cnn.com/2004/LAW/02/22/same.sex> (explaining how Mayor Newsom "unleashed a political and legal tempest" by ordering the San Francisco city clerk to issue marriage licenses to same-sex couples at a time when California law defined marriage as between one man and one woman).

<sup>16</sup> See *Hernandez v. Robles*, 794 N.Y.S.2d 579, 583–84 (Sup. Ct. 2005).

<sup>17</sup> *Id.* at 610.

<sup>18</sup> *Id.* at 604–05.

gay couples from marriage.<sup>19</sup> Plaintiffs sought leave to appeal to the New York Court of Appeals.

Similarly, on April 7, 2004, the ACLU, together with the law firm of Paul, Weiss, Rifkind, Wharton & Garrison LLP,<sup>20</sup> filed a lawsuit in Albany, New York, on behalf of thirteen couples from throughout New York who wished to marry.<sup>21</sup> Like the New York City plaintiffs, the plaintiffs in Albany asked the court to strike down New York marriage laws because they violated the state constitutional guarantees of equal protection and due process. On December 7, 2004, the Supreme Court of Albany County declared that the DRL provisions being cited to deny marriage licenses to same-sex couples were not unconstitutional.<sup>22</sup> On February 16, 2006, the Appellate Division, Third Department affirmed the lower court's decision.<sup>23</sup> Plaintiffs appealed to the New York Court of Appeals.

The New York City and Albany appeals were then consolidated along with two other related cases, and on July 6, 2006, New York's highest court upheld the legislature's denial of marriage licenses to gay and lesbian couples.<sup>24</sup> In a four-to-two decision, a plurality of the New York Court of Appeals found that the DRL provisions restricting marriage to straight couples were rationally related to legitimate societal goals.<sup>25</sup> Judge S. Robert Smith based his opinion on two principal justifications—first, that the New York Legislature “could rationally decide that, for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships.”<sup>26</sup> Second, Judge Smith concluded that

[t]he Legislature could rationally believe that it is better . . . for children to grow up with both a mother and a father. Intuition and experience suggest that a child benefits from having before his or

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<sup>19</sup> *Hernandez v. Robles*, 805 N.Y.S.2d 354, 360–61 (App. Div. 2005).

<sup>20</sup> I served as lead attorney at Paul, Weiss in this case and argued it (unsuccessfully) at the New York Court of Appeals.

<sup>21</sup> *Samuels v. N.Y. State Dep't of Health*, 811 N.Y.S.2d 136 (App. Div. 2006).

<sup>22</sup> *Samuels v. N.Y. State Dep't of Health*, No. 1967-04 (Sup. Ct. Albany Cty., Dec. 7, 2004); see Press Release, N.Y.C. Law Dep't Office of Corp. Counsel, “Legal Primer” on the Same-Sex Marriage Case (July 6, 2006), <http://www.nyc.gov/html/law/downloads/pdf/pr070606.pdf>; *Samuels et al. v. N.Y. State Dep't of Health (Challenging Interpretation of State Law to Prohibit Same-Sex Marriage)*, N.Y.C.L. UNION, <https://www.nyclu.org/en/cases/samuels-et-al-v-new-york-state-department-health-challenging-interpretation-state-law-prohibit> (last visited Feb. 23, 2017) (summarizing holding of December 7, 2004 opinion).

<sup>23</sup> *Samuels*, 811 N.Y.S.2d at 147.

<sup>24</sup> *Hernandez v. Robles*, 855 N.E.2d 1, 12 (N.Y. 2006), *abrogated by Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>25</sup> *Id.* at 7.

<sup>26</sup> *Id.*

her eyes, every day, living models of what both a man and a woman are like.<sup>27</sup>

## II

### CHIEF JUDGE KAYE'S DISSENT IN *HERNANDEZ*

In her dissent in *Hernandez*, Chief Judge Kaye efficiently and eloquently debunked these arguments, as well as others that had been advanced to exclude gay and lesbian couples from marriage. The one element that always animated Chief Judge Kaye's jurisprudence is that she never lost sight of the lives behind each case.<sup>28</sup> Chief Judge Kaye demonstrated

an ever-present awareness that cases involve human beings and that the role of the courts is to balance a respect for abstract principles with an appreciation for the fact that in the real world, there is no such thing as an abstract principle since the application of a rule or precedent in any particular situation necessarily has an impact on peoples' lives.<sup>29</sup>

She herself characterized this as the marriage between "head and heart,"<sup>30</sup> and it perfectly describes her approach in *Hernandez*.<sup>31</sup>

In metered prose, the very first sentences of Chief Judge Kaye's dissent introduce the plaintiffs themselves, bringing to life the everyday reality of the gay and lesbian couples who sued in order to be able to marry:

They include a doctor, a police officer, a public school teacher, a nurse, an artist and a state legislator. Ranging in age from under 30 to 68, plaintiffs reflect a diversity of races, religions and ethnicities.

<sup>27</sup> *Id.*

<sup>28</sup> Roberta A. Kaplan, *Tribute to Judith S. Kaye*, 70 ALB. L. REV. 799, 801 (2007).

<sup>29</sup> *Id.*

<sup>30</sup> Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 2 (1995).

<sup>31</sup> This commitment to the real people behind each case is not unique to Chief Judge Kaye's dissent in *Hernandez*. In *Alison D. v. Virginia M.*, the New York Court of Appeals held that under New York's DRL, a nonbiological mother who had helped to raise her ten-year-old son since birth did not have standing to seek joint custody or even visitation with him after separating from the boy's biological mother, regardless of the bond that had formed between the nonbiological mother and her son, or how much he would suffer as a result. There was, however, one voice on the Court in *Alison D.* that presciently warned that the majority's decision was not only doctrinally mistaken, but would have a practical "impact far beyond this particular controversy, one that may affect a wide spectrum of relationships." 572 N.E.2d 27, 30 (N.Y. 1991) (Kaye, J., dissenting). Flash-forward to 2016, and the Court yet again followed Chief Judge Kaye's earlier logic, and the decision of *Alison D.* was overturned. See Alan Feuer, *New York's Highest Court Expands Definition of Parenthood*, N.Y. TIMES (Aug. 30, 2016), <http://www.nytimes.com/2016/08/31/nyregion/new-york-court-parental-rights.html>; see also Roberta A. Kaplan, *Kaye and 'Matter of Jacob'*, N.Y. L.J. ONLINE (Apr. 6, 2016), <http://www.newyorklawjournal.com/id=1202754144279/Kaye-and-Matter-of-Jacob?slreturn=20161129121103>.

They come from upstate and down, from rural, urban and suburban settings. Many have been together in committed relationships for decades, and many are raising children—from toddlers to teenagers. Many are active in their communities, serving on their local school board, for example, or their cooperative apartment building board. In short, plaintiffs represent a cross-section of New Yorkers who want only to live full lives, raise their children, better their communities and be good neighbors.<sup>32</sup>

Justice Kennedy employed a similar strategy in *United States v. Windsor*.<sup>33</sup> As he wrote: “Under DOMA, same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways. By its great reach, DOMA touches many aspects of married and family life, from the mundane to the profound.”<sup>34</sup>

Chief Judge Kaye next addressed the due process interests implicated by New York’s marriage ban, concluding that because marriage is a fundamental right, and because same-sex marriage is marriage, New York’s marriage ban violated the due process clause of the New York Constitution.<sup>35</sup> In her equal protection analysis, Chief Judge Kaye reasoned that heightened scrutiny should apply to classifications which excluded gay men and lesbians.<sup>36</sup> Although she found that New York’s exclusion of gay and lesbian couples from marriage constituted impermissible sexual orientation discrimination, Chief Judge Kaye also concluded that the marriage statute discriminated on the basis of sex.<sup>37</sup> Chief Judge Kaye then confronted the four interests advanced by the State in defense of the statute, finding that none were rationally furthered by the exclusion of gay and lesbian couples from marriage. Excluding same-sex couples from marriage, as Chief Judge Kaye reasoned, (1) did not further the State’s interests in encouraging opposite-sex couples to marry before having children or in encouraging married couples to procreate; and could not be justified by (2) “mere desire to preference another group,” (3) on the basis of “tradition,” or (4) out of a desire to maintain uniformity with other states.<sup>38</sup> Chief Judge Kaye concluded her equal protection analysis by noting the symbiotic relationship between plaintiffs’ due process and equal protection claims,<sup>39</sup> foreshadowing Justice Kennedy’s jurispru-

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<sup>32</sup> *Hernandez v. Robles*, 855 N.E.2d 1, 22 (N.Y. 2006) (Kaye, C.J., dissenting).

<sup>33</sup> 133 S. Ct. 2675 (2013).

<sup>34</sup> *Id.* at 2694.

<sup>35</sup> *Hernandez*, 855 N.E.2d at 22–26 (Kaye, C.J., dissenting).

<sup>36</sup> *Id.* at 28.

<sup>37</sup> *Id.* at 29.

<sup>38</sup> *Id.* at 30–34.

<sup>39</sup> *Id.* at 30 (discussing denial of a fundamental right as a violation of equal protection).

dence of “equal dignity” that would follow in *Windsor* and *Obergefell*.<sup>40</sup>

There can be no question that Chief Judge Kaye’s *Hernandez* dissent had a significant impact in paving the way towards marriage equality.<sup>41</sup> To date, Chief Judge Kaye’s dissent has been cited at least 116 times, in sixteen cases and 150 law review articles.<sup>42</sup> It was cited explicitly in at least seven state court decisions (California,<sup>43</sup> Connecticut,<sup>44</sup> Maryland,<sup>45</sup> New York,<sup>46</sup> New Jersey,<sup>47</sup> Iowa,<sup>48</sup> and Montana<sup>49</sup>), and two federal marriage equality decisions in the Ninth<sup>50</sup> and Tenth<sup>51</sup> Circuits. As discussed below, echoes of Chief Judge Kaye’s *Hernandez* dissent can be heard in most of the major cases leading up to, and including, *Windsor* and *Obergefell*.<sup>52</sup>

<sup>40</sup> See, e.g., Douglas NeJaime, *Windsor’s Right to Marry*, 123 YALE L.J. ONLINE 219, 230 (2013).

<sup>41</sup> See, e.g., Mark Strasser, *Let Me Count the Ways: The Unconstitutionality of Same-Sex Marriage Bans*, 27 B.Y.U. J. PUB. L. 301, 314 (2013) (“As Chief Judge Kaye pointed out in her dissent in *Hernandez v. Robles*, the ‘relevant question here is whether there exists a rational basis for excluding same-sex couples from marriage.’ Different sex couples will continue to get married and stay married even if same-sex couples are also permitted to marry.”); Benjamin Pomerance, *When Dad Reached Across the Aisle: How Mario Cuomo Created a Bipartisan Court of Appeals*, 77 ALB. L. REV. 185, 217–18 (2014) (“As a judge, Kaye enjoyed one of the longest and most admired tenures in the history of the Court of Appeals . . . . Kaye authored a twenty-seven page dissent [in *Hernandez*], calling the state’s ban on same-sex marriage ‘an unfortunate misstep’ by the court’s majority.”).

<sup>42</sup> WestlawNext.com (click the “Advanced” link next to the search bar; search “(hernandez /7 robles) & kaye /s dissent! (8);” click “Cases” to view the citing cases; and click “Secondary Sources,” then click the checkbox next to “Law Reviews & Journals,” and click “Apply Filters” to view the citing law review articles) (as of Feb. 23, 2017).

<sup>43</sup> *In re Marriage Cases*, 183 P.3d 384, 451 (Cal. 2008) (“As Chief Judge Kaye of the New York Court of Appeals succinctly observed in her dissenting opinion in *Hernandez v. Robles* . . . : ‘There are enough marriage licenses to go around for everyone.’”).

<sup>44</sup> *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 450–51 (Conn. 2008) (“We therefore agree with Chief Judge Judith S. Kaye of the New York Court of Appeals that ‘[s]uch measures acknowledge—rather than mark the end of—a history of purposeful discrimination.’” (quoting *Hernandez*, 855 N.E.2d at 28 (Kaye, C.J., dissenting))).

<sup>45</sup> *Conaway v. Deane*, 932 A.2d 571, 694 (Md. 2007) (Bell, J., dissenting), *opinion extended after remand* (Md. Cir. Ct. Jan. 7, 2008).

<sup>46</sup> *B.S. v. F.B.*, 883 N.Y.S.2d 458, 465 n.10 (Sup. Ct. 2009) (discussing Chief Judge Kaye’s treatment of *Loving v. Virginia* and equal protection).

<sup>47</sup> *Lewis v. Harris*, 908 A.2d 196, 228 (N.J. 2006) (Portiz, J., dissenting).

<sup>48</sup> *Varnum v. Brien*, 763 N.W.2d 862, 898 (Iowa 2009) (Ferren, J., dissenting).

<sup>49</sup> *Donaldson v. State*, 292 P.3d 364, 406 (Mont. 2012) (Nelson, J., dissenting).

<sup>50</sup> *Perry v. Brown*, 671 F.3d 1052, 1066 (9th Cir. 2012), *vacated sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), *remanded to* 725 F.3d 1140 (9th Cir. 2013).

<sup>51</sup> *Kitchen v. Herbert*, 755 F.3d 1193, 1216 (10th Cir. 2014).

<sup>52</sup> See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012); *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014).

### A. *Marriage as a Fundamental Right*

Justice Kennedy wrote in *Obergefell v. Hodges*:

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.<sup>53</sup>

This approach is a remarkably similar approach to that of Chief Judge Kaye's dissent in *Hernandez*, in which she noted that "[a]n asserted liberty interest is not to be characterized so narrowly as to make inevitable the conclusion that the claimed right could not be fundamental because historically it has been denied to those who now seek to exercise it."<sup>54</sup>

Both Justice Kennedy and Chief Judge Kaye challenged the idea that an asserted liberty interest must be understood in a constricted manner. Instead of framing the right as the right to same-sex marriage, they instead framed the plaintiffs' claim as a fundamental right to marry. Both Justice Kennedy and Chief Judge Kaye relied heavily on Justice Kennedy's own prior reasoning in *Lawrence v. Texas*,<sup>55</sup> discussing how the opinion in *Bowers v. Hardwick* erroneously framed the liberty claim at stake as a "fundamental right upon homosexuals to engage in sodomy,"<sup>56</sup> as opposed to the right to engage in private consensual sexual conduct.<sup>57</sup>

Indeed, Chief Judge Kaye honed in on what was really at stake with respect to the fundamental due process right as follows:

For most of us, leading a full life includes establishing a family. Indeed, most New Yorkers can look back on, or forward to, their wedding as among the most significant events of their lives. They, like plaintiffs, grew up hoping to find that one person with whom they would share their future, eager to express their mutual lifetime pledge through civil marriage. Solely because of their sexual orien-

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<sup>53</sup> *Obergefell*, 135 S. Ct. at 2598 (2015).

<sup>54</sup> *Hernandez v. Robles*, 855 N.E.2d 1, 23–24 (N.Y. 2006) (Kaye, C.J., dissenting).

<sup>55</sup> 539 U.S. 558 (2003).

<sup>56</sup> 478 U.S. 186, 190 (1986).

<sup>57</sup> Compare *Obergefell*, 135 S. Ct. at 2606 (noting that ruling against same-sex couples would, like *Bowers*, deny a fundamental right and not be justified under the Fourteenth Amendment), with *Hernandez*, 855 N.E.2d at 23–24 (2006) (Kaye, C.J., dissenting) (warning against defining a liberty interest so narrowly that it becomes a foregone conclusion to deny its fundamental nature).

tation, however—that is, because of who they love—plaintiffs are denied the rights and responsibilities of civil marriage.<sup>58</sup>

Justice Kennedy made an analogous observation in *Obergefell* almost a decade later when he wrote: “Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.”<sup>59</sup>

Essentially, both Justice Kennedy and Chief Judge Kaye refused to deny individuals a fundamental right based upon a narrow reading of history. Chief Judge Kaye reasoned that even though this country has had a long and shameful history of prohibiting interracial marriage, “the Supreme Court determined that interracial couples could not be deprived of their fundamental right to marry.”<sup>60</sup> In other words, “[s]imply put, fundamental rights are fundamental rights. They are not defined in terms of who is entitled to exercise them.”<sup>61</sup> While Justice Kennedy wrote that “[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries” or “allow[ ] the past alone to rule the present,”<sup>62</sup> Chief Judge Kaye similarly explained that “[t]he long duration of a constitutional wrong cannot justify its perpetuation, no matter how strongly tradition or public sentiment might support it.”<sup>63</sup>

Chief Judge Kaye’s due process reasoning reverberated through federal and state court decisions leading up to *Obergefell*. In the Tenth Circuit decision finding a due process right to marriage equality, for example, the Court of Appeals relied on Chief Judge Kaye’s dissent: “[I]n describing the liberty interest at stake, it is impermissible to focus on the identity or class-membership of the individual exercising the right. ‘Simply put, fundamental rights are fundamental rights. They are not defined in terms of who is entitled to exercise them.’”<sup>64</sup> This same reasoning can be found in the Fourth Circuit marriage equality case, in which the court declined “the Proponents’ invitation to characterize the right at issue in this case as the right to same-sex marriage rather than simply the right to marry.”<sup>65</sup>

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<sup>58</sup> *Hernandez*, 855 N.E.2d at 22.

<sup>59</sup> *Obergefell*, 135 S. Ct. at 2600.

<sup>60</sup> *Hernandez*, 855 N.E.2d at 25.

<sup>61</sup> *Id.* at 24.

<sup>62</sup> *Obergefell*, 135 S. Ct. at 2598 (internal citation omitted).

<sup>63</sup> *Hernandez*, 855 N.E.2d at 26.

<sup>64</sup> *Kitchen v. Herbert*, 755 F.3d 1193, 1215–16 (10th Cir. 2014) (internal citation omitted) (citing *Hernandez*, 855 N.E.2d at 24 (Kaye, C.J., dissenting)).

<sup>65</sup> *Bostic v. Schaefer*, 760 F.3d 352, 377 (4th Cir. 2014).

### B. Heightened Scrutiny in the Equal Protection Context

Chief Judge Kaye found that New York's ban on same-sex marriage required heightened scrutiny under the Equal Protection Clause for two reasons: Sexual orientation is a suspect class and excluding same-sex couples from marriage constitutes sex discrimination. Both arguments were taken up by numerous federal and state marriage equality decisions in the next several years.

In determining that sexual orientation constitutes a suspect class, Chief Judge Kaye looked at the history of discrimination, whether the class characteristic bears any relation to the ability to perform or participate in society, and the group's relative political powerlessness. With respect to the history of discrimination, for example, Chief Judge Kaye concluded that "[h]omosexuals plainly have been [subjected to purposeful discrimination], as the Legislature expressly found when it recently enacted the Sexual Orientation Non-Discrimination Act (SONDA)."<sup>66</sup> She further concluded that "[o]bviously, sexual orientation is irrelevant to one's ability to perform or contribute."<sup>67</sup> Regarding the "political power" of gay men and lesbians, Chief Judge Kaye remarked, "[t]he simple fact is that New York has not enacted anything approaching comprehensive statewide domestic partnership protections for same-sex couples, much less marriage or even civil unions."<sup>68</sup>

Although Justice Kennedy in *Windsor* did not explicitly articulate the level of scrutiny the Supreme Court applied to the equal protection claim at issue, the Second Circuit surely did in what was then an unprecedented step for a federal circuit court in a claim of sexual orientation discrimination. As Judge Jacobs observed: "There are some distinguishing characteristics, such as age or mental handicap, that may arguably inhibit an individual's ability to contribute to society, at least in some respect. But homosexuality is not one of them. The aversion homosexuals experience has nothing to do with aptitude or performance."<sup>69</sup> In looking to what the Supreme Court actually did in *Windsor*, Judge Reinhardt of the Ninth Circuit found that "[i]n its words and its deed, *Windsor* established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review. In other words, *Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual

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<sup>66</sup> *Hernandez*, 855 N.E.2d at 28.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Windsor v. United States*, 699 F.3d 169, 182–83 (2d Cir. 2012).

orientation.”<sup>70</sup> Similarly, although Justice Kennedy in *Obergefell* refused to explicitly apply heightened scrutiny, the opinion discussed the four factors of the suspect class doctrine as applied to gay and lesbian couples.<sup>71</sup> At the state level, the Supreme Courts in California,<sup>72</sup> Connecticut,<sup>73</sup> and Iowa<sup>74</sup> have all employed a heightened form of scrutiny in striking laws limiting marriage to opposite-sex couples.

Chief Judge Kaye also found that the exclusion of same-sex couples from marriage discriminates on the basis of sex. The analysis here is rooted in common sense: “[A] woman who seeks to marry another woman is prevented from doing so on account of her sex—that is, because she is not a man. If she were, she would be given a marriage license to marry that woman.”<sup>75</sup> This argument reappeared eight years later in Judge Berzon’s concurrence in the Ninth Circuit opinion recognizing the rights of gay and lesbian couples to marry.<sup>76</sup> In nearly the same terms as Chief Judge Kaye, Judge Berzon wrote:

Idaho and Nevada’s same-sex marriage prohibitions facially classify on the basis of sex. Only women may marry men, and only men may marry women. Susan Latta may not marry her partner Traci Ehlers for the sole reason that Latta is a woman; Latta could marry Ehlers if Latta were a man.<sup>77</sup>

Legal scholars Ilya Somin and Andrew Koppelman submitted an amicus brief on behalf of themselves and other academics highlighting how marriage restrictions for gay and lesbian couples discriminated on the basis of sex.<sup>78</sup> In fact, although it apparently did not persuade him to join Justice Kennedy’s majority opinion, during oral argument in *Obergefell*, Chief Justice Roberts himself remarked: “I’m not sure it’s

<sup>70</sup> *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2014).

<sup>71</sup> See, e.g., Autumn L. Bernhardt, *The Profound and Intimate Power of the Obergefell Decision: Equal Dignity as a Suspect Class*, 25 TUL. J.L. & SEXUALITY 1, 22–41 (2016) (analyzing *Obergefell*’s discussion of these four factors).

<sup>72</sup> See *In re Marriage Cases*, 183 P.3d 384, 441–43, 453 (Cal. 2008) (holding sexual orientation a suspect classification under California’s equal protection clause and finding California’s limitation on marriage to only opposite-sex couples is subject to strict scrutiny as a result).

<sup>73</sup> See *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 481 (Conn. 2008) (holding a statutory ban on same-sex marriage unconstitutional on equal protection grounds).

<sup>74</sup> See *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (holding a state statute defining marriage as between only a man and a woman in violation of the equal protection provision of the Iowa Constitution).

<sup>75</sup> *Hernandez v. Robles*, 855 N.E.2d 1, 29 (N.Y. 2006) (Kaye, C.J., dissenting).

<sup>76</sup> See *Latta v. Otter*, 771 F.3d 456, 479 (9th Cir. 2014) (Berzon, J., concurring).

<sup>77</sup> *Id.* at 480.

<sup>78</sup> Brief Amici Curiae of Legal Scholars Stephen Clark, Andrew Koppelman, Sanford Levinson, Irina Manta, Erin Sheley & Ilya Somin, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571 & 14-574), 2015 WL 1048436.

necessary to get into sexual orientation to resolve this case. I mean, if Sue loves Joe and Tom loves Joe, Sue can marry him and Tom can't. And the difference is based upon their different sex. Why isn't that a straightforward question of sexual discrimination?"<sup>79</sup>

*C. The Irrationality of the State's Purported  
Justifications for Marriage Inequality*

In her *Hernandez* dissent, Chief Judge Kaye convincingly demonstrated how the exclusion of lesbian and gay couples from marriage could not survive rational-basis review. Like the plaintiffs at the trial of California's antimarriage bill, Proposition 8,<sup>80</sup> she systematically debunked each and every rationale provided by the State for marriage exclusion, at a time when few judges had the courage to point out the hypocrisy of so many of the arguments on the other side.

First, Chief Judge Kaye considered whether promoting an interest in procreation within marriage provides a rational basis for excluding gay and lesbian couples. In her own inimitable way, she confronted this issue head on: "[W]hile encouraging opposite-sex couples to marry before they have children is certainly a legitimate interest of the State, the exclusion of gay men and lesbians from marriage in no way furthers this interest. There are enough marriage licenses to go around for everyone."<sup>81</sup> With respect to "the State's legitimate interest in encouraging heterosexual married couples to procreate,"<sup>82</sup> Chief Judge Kaye noted that "[p]lainly, the ability or desire to procreate is not a prerequisite for marriage. The elderly are permitted to marry, and many same-sex couples do indeed have children."<sup>83</sup> This reasoning showed up in nearly all the state and federal opinions striking down marriage bans,<sup>84</sup> including in Judge Posner's decision for the Seventh Circuit where he asked:

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<sup>79</sup> Adam Liptak, *Gender Bias Issue Could Tip Chief Justice Roberts into Ruling for Gay Marriage*, N.Y. TIMES (Apr. 29, 2015), [http://www.nytimes.com/2015/04/30/us/gender-bias-could-tip-chief-justice-roberts-into-ruling-for-gay-marriage.html?\\_r=0](http://www.nytimes.com/2015/04/30/us/gender-bias-could-tip-chief-justice-roberts-into-ruling-for-gay-marriage.html?_r=0).

<sup>80</sup> See KENJI YOSHINO, *SPEAK NOW: MARRIAGE EQUALITY ON TRIAL: THE STORY OF HOLLINGSWORTH V. PERRY* 155–86 (2015).

<sup>81</sup> *Hernandez v. Robles*, 855 N.E.2d 1, 30 (N.Y. 2006) (Kaye, C.J., dissenting).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> See, e.g., *Bostic v. Schaefer*, 760 F.3d 352, 381 (4th Cir. 2014) ("Because same-sex couples and infertile opposite-sex couples are similarly situated, the Equal Protection Clause counsels against treating these groups differently."); *Latta v. Otter*, 771 F.3d 456, 472 (9th Cir. 2014) ("[Idaho and Nevada] give marriage licenses to many opposite-sex couples who cannot or will not reproduce—as Justice Scalia put it, in dissent, 'the sterile and the elderly are allowed to marry,'—but not to same-sex couples who already have children or are in the process of having or adopting them." (internal citation omitted)).

But then how to explain Indiana's decision to carve an exception to its prohibition against marriage of close relatives for first cousins 65 or older—a population guaranteed to be infertile because women can't conceive at that age? If the state's only interest in allowing marriage is to protect children, why has it gone out of its way to permit marriage of first cousins *only after* they are provably infertile? The state must think marriage valuable for something other than just procreation—that even non-procreative couples benefit from marriage.<sup>85</sup>

Chief Judge Kaye next considered whether excluding gay and lesbian couples from marriage promoted any child's welfare. She explained that

marriage provides tangible legal protections and economic benefits to married couples and their children, and tens of thousands of children are currently being raised by same-sex couples in New York. Depriving these children of the benefits and protections available to the children of opposite-sex couples is antithetical to their welfare.<sup>86</sup>

As a result, she concluded that while “[t]he State plainly has a legitimate interest in the welfare of children, . . . excluding same-sex couples from marriage in no way furthers this interest. In fact, it undermines it.”<sup>87</sup> Again, Judge Posner, writing for the Seventh Circuit, struck down the marriage bans in Indiana and other states for analogous reasons, explaining as follows:

Consider now the emotional comfort that having married parents is likely to provide to children adopted by same-sex couples. Suppose such a child comes home from school one day and reports to his parents that all his classmates have a mom and a dad, while he has two moms (or two dads, as the case may be). Children, being natural conformists, tend to be upset upon discovering that they're not in step with their peers. If a child's same-sex parents are married, however, the parents can tell the child truthfully that an adult is permitted to marry a person of the opposite sex, or if the adult prefers as some do a person of his or her own sex, but that either way the parents are married and therefore the child can feel secure in being the child of a married couple. Conversely, imagine the parents having to tell their child that same-sex couples can't marry, and so the child is not the child of a married couple, unlike his classmates.<sup>88</sup>

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<sup>85</sup> *Baskin v. Bogan*, 766 F.3d 648, 662 (7th Cir. 2014). “Indeed, even the *Lawrence* dissenters observed that ‘encouragement of procreation’ could not ‘possibly’ be a justification for denying marriage to gay and lesbian couples, ‘since the sterile and the elderly are allowed to marry.’” *Hernandez*, 855 N.E.2d at 31 (Kaye, C.J., dissenting).

<sup>86</sup> *Hernandez*, 855 N.E.2d at 32 (Kaye, C.J., dissenting).

<sup>87</sup> *Id.*

<sup>88</sup> *Baskin*, 766 F.3d at 663–64.

Not surprisingly, Justice Kennedy's opinions in *Windsor* and *Obergefell* make this same point as well: Children are harmed by the exclusion of their parents from the institution of marriage.<sup>89</sup> He explained in *Windsor* that the Defense of Marriage Act "humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives."<sup>90</sup> In fact, Justice Kennedy found that protecting children is one of the main reasons why the Court *should* embrace marriage equality, noting that a "basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education."<sup>91</sup>

On the State's supposed justification of "uniformity"—namely, that New York had an interest in having laws that were consistent with the then-majority of states that did not allow gay couples to marry,<sup>92</sup> Chief Judge Kaye explained that justifying the exclusion of gay men and lesbians from civil marriage "because 'others do it too' is no more a justification for the discriminatory classification than the contention that the discrimination is rational because it has existed for a long time. As history has well taught us, separate is inherently unequal."<sup>93</sup> A version of this "uniformity" argument figured prominently in the *Windsor* case six years later when Second Circuit Judge Dennis Jacobs responded to a similar "uniformity" argument as follows: "DOMA's sweep arguably creates more discord and anomaly than uniformity. . . . Because DOMA defined only a single aspect of domestic relations law, it left standing all other inconsistencies in the laws of the states, such as minimum age, consanguinity, divorce, and paternity."<sup>94</sup>

#### D. Synergy Between Equal Protection and Due Process Guarantees

Taking a step back from evaluating Chief Judge Kaye's dissent argument-by-argument, one of the most profound aspects of her dissenting opinion is how it recognized the synergy between the equal protection and due process guarantees. It would be easy to take this for granted, living at a time when Justice Kennedy's jurisprudence in

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<sup>89</sup> See, e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) ("[DOMA] humiliates tens of thousands of children now being raised by same sex couples."); *id.* at 2695 ("DOMA also brings financial harm to children of same-sex couples.").

<sup>90</sup> *Id.*

<sup>91</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015).

<sup>92</sup> *Hernandez*, 855 N.E.2d at 33–34.

<sup>93</sup> *Id.* at 34 (Kaye, C.J., dissenting).

<sup>94</sup> *Windsor v. United States*, 699 F.3d 169, 186 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013).

this area is defined by what Laurence Tribe has characterized as the “legal double helix” of a “substantive due process-equal protection synthesis,”<sup>95</sup> or what Kenji Yoshino has called “the intertwined nature of liberty and equality.”<sup>96</sup> However, Chief Judge Kaye wrote her opinion years before the Supreme Court carefully acknowledged the links between liberty and equality in constitutional decision making.<sup>97</sup>

Quoting Justice Kennedy in *Lawrence*, Chief Judge Kaye noted that “[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.”<sup>98</sup> In *Obergefell*, Justice Kennedy wrote that the Equal Protection and Due Process Clauses connect “in a profound way,” despite asserting independent principles: “Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other.”<sup>99</sup>

This shift to a more nuanced understanding of the intrinsic relationship between equal protection and liberty, which Chief Judge Kaye embraced early on, is difficult to overstate. It is this framework that Justice Kennedy relied on in *Windsor*, where he used the word “dignity” nine times in the Court’s twenty-six page opinion.<sup>100</sup> According to the dictionary, the word “dignity” means “[t]he state or quality of being worthy of honor or respect.”<sup>101</sup> Chief Judge Kaye recognized, in order for an individual to have the quality of being worthy of honor or respect, he or she must also have equal protection of the law. As Justice Kennedy put it in *Obergefell* in 2015: “It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. . . . They ask for *equal dignity* in the eyes of the law.”<sup>102</sup>

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<sup>95</sup> Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898, 1902 (2004).

<sup>96</sup> Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 148 (2015).

<sup>97</sup> See Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 749–50 (2011) (describing the Court’s move toward constitutional equality and liberty claims that are intertwined).

<sup>98</sup> *Hernandez*, 855 N.E.2d 1, 30 (N.Y. 2006) (Kaye, C.J., dissenting) (quoting *Lawrence v. Texas*, 539 U.S. 558, 575 (2003)).

<sup>99</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015).

<sup>100</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2689, 2692–94, 2696 (2013).

<sup>101</sup> *Dignity*, OXFORD ENG. DICTIONARY, [http://www.oxforddictionaries.com/us/definition/american\\_english/dignity](http://www.oxforddictionaries.com/us/definition/american_english/dignity) (last visited Feb. 23, 2016).

<sup>102</sup> *Obergefell*, 135 S. Ct. at 2608 (emphasis added).

### E. Separation of Powers and the Role of the Court

Finally, Chief Judge Kaye concluded her dissent by addressing the plurality's determination that the issue of marriage equality should be addressed by the Legislature. As Chief Judge Kaye passionately wrote: "[T]his Court cannot avoid its obligation to remedy constitutional violations in the hope that the Legislature might some day render the question presented academic. . . . It is uniquely the function of the Judicial branch to safeguard individual liberties guaranteed by the New York State Constitution."<sup>103</sup> Flash-forward to 2015, where Justice Kennedy observed in *Obergefell* that "[t]he dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. . . . An individual can invoke a right to constitutional protection when he or she is harmed . . . even if the legislature refuses to act."<sup>104</sup> Chief Judge Kaye's dissent is emblematic of her jurisprudence, recognizing "real people, with real problems, living real lives."<sup>105</sup>

### CONCLUSION

In recent years, the phrase "love is love" has become a rallying cry for the marriage equality movement, intended to demonstrate that what gay and lesbian couples are seeking is the same dignity as straight couples. While she did not use these exact words, like the fearless Jewish heroine after whom she was named, Chief Judge Kaye bravely stood out ahead of her time to pronounce that "love is love."<sup>106</sup> Sadly, Chief Judge Kaye passed away on January 7, 2016,<sup>107</sup> after a long and valiant battle with cancer. Among the traditional honorifics for the deceased in Judaism, there are several which are used when speaking of the deceased. For someone who was righteous, the honorific is "*zekher tzadik livrakha*,"— or "may the memory of the righteous be a blessing."<sup>108</sup> Because of her legacy, Chief Judge Kaye's memory will forever be a blessing for LGBT people everywhere. And, as her former law clerk, one thing I know for sure is that she would be very, very proud of that.

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<sup>103</sup> *Hernandez*, 855 N.E.2d at 34 (Kaye, C.J., dissenting).

<sup>104</sup> *Obergefell*, 135 S. Ct. at 2605.

<sup>105</sup> Kaplan, *Tribute to Judith S. Kaye*, *supra* note 28, at 800–01.

<sup>106</sup> See *Book of Judith*, NEW WORLD ENCYCLOPEDIA, [http://www.newworldencyclopedia.org/entry/Book\\_of\\_Judith](http://www.newworldencyclopedia.org/entry/Book_of_Judith) (last modified Dec. 19, 2016).

<sup>107</sup> Sam Roberts, *Judith S. Kaye, First Woman to Serve as New York's Chief Judge, Dies at 77*, N.Y. TIMES (Jan. 7, 2016), <http://www.nytimes.com/2016/01/08/nyregion/judith-s-kaye-first-woman-to-serve-as-new-yorks-chief-judge-dies-at-77.html>.

<sup>108</sup> See *Proverbs* 10:7 ("The memory of the righteous is a blessing . . .").