Latta, et al. v. Otter, et al. Nos. 14-35420 & 14-35421

Sevcik, et al. v. Sandoval, et al. No. 12-17688

REINHARDT, Circuit Judge, concurring:

I, of course, concur without reservation in the opinion of the Court. I write separately only to add that I would also hold that the fundamental right to marriage, repeatedly recognized by the Supreme Court, in cases such as *Loving v. Virginia*, 388 U.S. 1 (1967), *Zablocki v. Redhail*, 434 U.S. 374 (1978), and *Turner v. Safley*, 482 U.S. 78 (1987), is properly understood as including the right to marry an individual of one's choice. That right applies to same-sex marriage just as it does to opposite-sex marriage. As a result, I would hold that heightened scrutiny is appropriate for an additional reason: laws abridging fundamental rights are subject to strict scrutiny, and are invalid unless there is a "compelling state interest" which they are "narrowly tailored" to serve. *United States v. Juvenile Male*, 670 F.3d 999, 1012 (9th Cir. 2012) (citing *Reno v. Flores*, 507 U.S. 292, 302 (1993)), *cert. denied*, 133 S. Ct. 234 (2012)). Because the inadequacy of the states' justifications has been thoroughly addressed, I write only to explain my view that the same-sex marriage bans invalidated here also implicate plaintiffs' substantive due process rights.

Like all fundamental rights claims, this one turns on how we describe the right. Plaintiffs and defendants agree that there is a fundamental right to marry, but defendants insist that this right consists only of the right to marry an individual of the opposite sex. In *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997), the Supreme Court explained "that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition." Our articulation of such fundamental rights must, we are told, be "carefully formulat[ed]." *Id.* at 722 (citations and quotation marks omitted).

However, "careful" does not mean "cramped." Our task is to determine the scope of the fundamental right to marry as inferred from the principles set forth by the Supreme Court in its prior cases. *Turner* held that prisoners who had no children and no conjugal visits during which to conceive them—people who could not be biological parents—had a due process right to marry. 482 U.S. at 94–97. *Zablocki* held that fathers with outstanding child support obligations—people who were, at least according to adjudications in family court, unable to adequately provide for existing children—had a due process right to marry. 434 U.S. at 383–87.

In each case, the Supreme Court referred to—and considered the historical roots of—the general right of people to marry, rather than a narrower right defined in terms of those who sought the ability to exercise it. These cases rejected status-based restrictions on marriage not by considering whether to recognize a new, narrow fundamental right (i.e., the right of prisoners to marry or the right of fathers with unpaid child support obligations to marry) or determining whether the class of people at issue enjoyed the right as it had previously been defined, but rather by deciding whether there existed a sufficiently compelling justification for depriving plaintiffs of the right they, as people, possessed.[1] *See id.* at 384 ("[D]ecisions of this Court confirm that the right to marry is of fundamental importance for all individuals.").

The third and oldest case in the fundamental right to marry trilogy, *Loving*, is also the most directly on point. That case held that Virginia's anti-miscegenation laws, which prohibited and penalized interracial marriages, violated the Fourteenth Amendment's Equal Protection and Due Process Clauses. 388 U.S. at 2–6. In a

[1] *Turner* and *Zablocki* illustrate another important point, pertinent to the adequacy of defendants' justifications for curtailing the right. The first of these cases involved plaintiffs whom the state was entitled to prevent from procreating, and the second involved those who were unable to support existing offspring financially. If the fundamental right to marry extends to them, it certainly cannot be limited only to those who can procreate or to those who, in the eyes of the state, would form part of an ideal parenting unit.

rhetorical stroke as uncomprehending as it is unavailing, defendants contend that lesbians and gays are not denied the freedom to marry by virtue of the denial of their right to marry individuals of the same sex, as they are still free to marry individuals of the opposite sex. Defendants assert that their same-sex marriage bans are unlike the laws in *Turner* and *Zablocki* because they do not categorically bar people with a particular characteristic from marrying, but rather limit whom lesbians and gays, and all other persons, may marry. However, *Loving* itself squarely rebuts this argument. Mildred Jeter and Richard Loving were not barred from marriage altogether. Jeter was perfectly free to marry a black person, and Loving was perfectly free to marry a white person. They were each denied the freedom, however, to marry the person whom they chose—the other. The case of lesbians and gays is indistinguishable. A limitation on the right to marry another person, whether on account of race or for any other reason, is a limitation on the right to marry.[2]

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[2]Defendants are apparently concerned that if we recognize a fundamental right to marry the person of one's choice, this conclusion will necessarily lead to the invalidation of bans on incest, polygamy, and child marriage. However, fundamental rights may sometimes permissibly be abridged: when the laws at issue further compelling state interests, to which they are narrowly tailored. Although such claims are not before us, it is not difficult to envision that states could proffer substantially more compelling justifications for such laws than have been put forward in support of the same-sex marriage bans at issue here.

Defendants urge that "man-woman" and "genderless" marriage are mutually exclusive, and that permitting the latter will "likely destroy[]" the former. Quite the opposite is true. *Loving* teaches that Virginia's anti-miscegenation laws did not simply "deprive the Lovings of liberty without due process of law." 388 U.S. at 12. They did far worse; as the Court declared, the laws also "surely . . . deprive[d] *all the State's citizens* of liberty without due process of law." *Id.* (emphasis added). When Virginia told Virginians that they were not free to marry the one they loved if that person was of a different race, it so grievously constrained their "freedom of choice to marry" that it violated the constitutional rights even of those citizens who did not themselves wish to enter interracial marriages or who were already married to a person of the same race. *Id.* When Idaho tells Idahoans or Nevada tells Nevadans that they are not free to marry the one they love if that person is of the same sex, it interferes with the universal right of *all the State's citizens*—whatever their sexual orientation—to "control their destiny." *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

To define the right to marry narrowly, as the right to marry someone of the opposite sex, would be to make the same error committed by the majority in *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986), which considered whether there was a "fundamental right to engage in homosexual sodomy." This description of

the right at issue "fail[ed] to appreciate the extent of the liberty at stake," the Court stated in *Lawrence*, 539 U.S. at 567. *Lawrence* rejected as wrongheaded the question whether "homosexuals" have certain fundamental rights; "persons"—of whatever orientation—are rights-holders. *See id.* Fundamental rights defined with respect to the subset of people who hold them are fundamental rights misdefined. The question before us is not whether lesbians and gays have a fundamental right to marry a person of the same sex; it is whether a person has a fundamental right to marry, to enter into "the most important relation in life," *Maynard v. Hill*, 125 U.S. 190, 205 (1888), with the one he or she loves. Once the question is properly defined, the answer follows ineluctably: yes.

Historically, societies have strictly regulated intimacy and thereby oppressed those whose personal associations, such as committed same-sex relationships, were, though harmful to no one, disfavored. Human intimacy, like "liberty[,] [has] manifold possibilities." *Lawrence*, 539 U.S. at 578. Although "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress[,] [a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." *Id.* at 578-79.

We, as judges, deal so often with laws that confine and constrain. Yet our core legal instrument comprehends the rights of all people, regardless of sexual orientation, to love and to marry the individuals they choose. It demands not merely toleration; when a state is in the business of marriage, it must affirm the love and commitment of same-sex couples in equal measure. Recognizing that right dignifies them; in so doing, we dignify our Constitution.