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Digest: In re Marriage Cases

Ryan D. Chavez

Opinion by George, C.J., with Kennard, J., Werdegar, J., and Moreno, J. Concurring Opinion by Kennard, J. Concurring and Dissenting Opinion by Baxter, J., with Chin, J. Concurring and Dissenting Opinion by Corrigan, J.

Issue

Does California law reserving the union of marriage to opposite-sex couples and designating same-sex unions as 'domestic partnerships' violate the California Constitution?

Facts

On February 10, 2004, the Mayor of San Francisco directed city officials to adjust marriage licenses so that they could be issued to couples regardless of their sexual orientation.¹ By February 12, 2004, the city began issuing marriage licenses to same-sex couples.² Several legal actions followed. Two separate actions were filed in San Francisco Superior Court seeking an immediate stay and a writ prohibiting the issuance of marriage licenses to same-sex couples.³ The court denied the stay.⁴ The Attorney General and California taxpayers filed two petitions for an original writ of mandate by the California Supreme Court.⁵ On March 11, the Court issued an Order to Show Cause on the original writ proceedings and directed the city to stop the issuance of marriage licenses while these proceedings were pending.⁶ Shortly thereafter, the City of San Francisco filed a writ petition and complaint in superior court, seeking declaratory relief under the theory that California statutes that limited marriage to opposite-sex couples

¹ *In re Marriage Cases*, 183 P.3d 384, 402 (Cal. 2008). This case is the result of six consolidated appeals: *City & County of San Francisco v. State of Cal.*, No. CGC-04-429539, A110449 (S.F. City & County Super. Ct.); *Tyler v. State of Cal.*, No. BS-088506, A110450 (L.A. County Super Ct.); *Woo v. Lockyer*, No. CGC-04-504038, A110451 (S.F. City & County Super. Ct.); *Clinton v. State of Cal.*, No. CGC-04-429548, A110463 (S.F. City & County Super. Ct.); *Prop. 22 Legal Def. & Educ. Fund v. City & County of San Francisco*, No. CPF-04-503943, A110651 (S.F. City & County Super. Ct.); *Campaign for Cal. Families v. Newsom*, No. CGC-04428794, A110652 (S.F. City & County Super. Ct.).

² *In re Marriage Cases*, 183 P.3d at 402.

³ *Id.*

⁴ *Id.*

⁵ *Id.* (citing *Lockyer v. City & County of San Francisco*, S122923, 2004 WL 473257; *Lewis v. Alfaro*, S122865, 2004 WL 473258).

⁶ *Id.*

violated the California Constitution.⁷ In addition, two similar actions were filed in superior court by several same-sex couples.⁸ Several of these actions were eventually consolidated into a single proceeding, titled *In re Marriage Cases*.⁹ While these cases were being consolidated, the California Supreme Court held, in *Lockyer v. City and County of San Francisco*,¹⁰ that San Francisco officials had exceeded their power in issuing same-sex marriage licenses.¹¹ The Court issued a writ of mandate compelling officials to comply with the current statutory limitations and declared all same-sex marriage licenses already issued to be void.¹²

In *In re Marriage Cases*, the superior court held that California's current laws that limit marriage to opposite-sex couples violated the state's Equal Protection Clause.¹³ The superior court evaluated these laws under strict scrutiny because they found that they infringed on a suspect class's (sex) fundamental right (to marry).¹⁴ The court of appeal disagreed with the superior court's use of strict scrutiny.¹⁵ The court of appeal found that: (1) the fundamental right to marry is limited to the right to marry a person of the opposite sex; (2) the suspect classification of sex was not at issue here; and (3) the classification of sexual orientation was not a suspect classification.¹⁶ Under rational basis review, the court reversed the superior court's decision and found California's marriage laws constitutional.¹⁷

Analysis

The Court considered: (1) which California laws limit marriage to opposite-sex couples;¹⁸ (2) whether these laws violated a same-sex couple's fundamental right to marry;¹⁹ (3) whether California's Domestic Partnership Act provided a similar and equal right to same-sex couples;²⁰ (4) whether California's Equal Protection Clause applied to these laws, and, if so, what scrutiny should be applied;²¹ and, (5) under such scrutiny, whether California's laws regarding marriage were unconstitutional.²²

7 *Id.* at 402-03.

8 *Id.* at 403.

9 *Id.*

10 95 P.3d 459 (Cal. 2004).

11 *In re Marriage Cases*, 183 P.3d at 403.

12 *Id.*

13 *Id.* at 403-04.

14 *Id.* at 404.

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.* at 407-19.

19 *Id.* at 419-34.

20 *Id.* at 434-35.

21 *Id.* at 435-46.

22 *Id.* at 446-53.

1. Sections 300 and 308.5 of California's Family Code

The Court considered whether Sections 300 and 308.5 of California's Family Code should be reviewed. The Court concluded that, "in light of its language and legislative history," Section 300 must be reviewed because it limited marriages performed in California to opposite-sex couples.²³ The Court also concluded that Section 308.5 must be reviewed.²⁴ Plaintiffs asserted that the language of Section 308.5 was ambiguous and related only to out-of-state same-sex marriages.²⁵ The Court disagreed and found that the language "reasonably must be interpreted to apply both to marriages performed in California and those performed in other jurisdictions."²⁶

2. All Individuals Have a Fundamental Right to Marry

The Court concluded that the "California Constitution properly must be interpreted to guaranty [the right to marry] to *all* individuals and couples, without regard to their sexual orientation."²⁷ The court of appeal had defined the right to marry under California's Constitution as a narrow right that gave opposite-sex couples the right to marry.²⁸ Applying California interracial marriage decisions, the Court disagreed and found that the right to marry should be viewed broadly as an individual right to "join in marriage *with the person of one's choice*."²⁹ Although marriage plays an important role for society in many ways, the Court found the right to marry to be "a basic, *constitutionally protected* civil right," "protected from abrogation or elimination by the state."³⁰

In concluding that the right to marry applied to all individuals regardless of sexual orientation, the Court disagreed with the argument that California's traditional definition of marriage supported a limited view of the right to marry.³¹ The Court emphasized that tradition alone is not enough to limit an individual's basic fundamental rights.³² Similarly, the Court disagreed with the argument that the right to marry is directly linked to family unions that procreate, stating that the "right to marry never has been viewed as the sole preserve of individuals who are physically capable of having children."³³

²³ *Id.* at 409–10.

²⁴ *Id.* at 410.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 427.

²⁸ *Id.* at 429–30.

²⁹ *In re Marriage Cases*, 183 P.3d at 420–21 (citing *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948)).

³⁰ *Id.* at 425–26 (citing *Perez*, 198 P.2d 17).

³¹ *Id.* at 427–28, 452.

³² *Id.* at 427–28.

³³ *Id.* at 431.

3. California's Domestic Partnership Act Provides Substantial Rights to Opposite-Sex Couples but it is not Equivalent to Marriage

The Attorney General of California argued that, even though the Court concluded that the right to marry extends to same-sex couples, the current marriage statutes in California do not violate a same-sex couple's rights because California provides same-sex couples the same "personal and dignity interests" as opposite-sex couples via the Domestic Partnership Act.³⁴ Earlier in its opinion, the Court acknowledged that the Domestic Partnership Act "generally afford[s] same-sex couples the opportunity to enter into a domestic partnership and thereby obtain virtually all of the benefits and responsibilities afford by California law to married opposite-sex couples."³⁵ However, the Court found that the difference in names for opposite-sex and same-sex unions "pose a serious risk of denying the official family relationship of same-sex couples the equal dignity and respect that is a core element of the constitutional right to marry."³⁶ Therefore, the name difference alone is "potentially impinging upon the state constitutional right of same-sex couples to marry."³⁷

4. California's Marriage Laws Should be Reviewed under the State's Equal Protection Clause Using a Strict Scrutiny Standard

Without much elaboration, the Court agreed with the plaintiffs that California's marriage statutes deny same-sex couples equal protection of the laws and therefore must be reviewed under the Equal Protection Clause of the California Constitution.³⁸ The Court next reviewed whether it should apply a strict scrutiny or rational basis standard.

Plaintiffs argued that the Court should apply a strict scrutiny standard of review under an equal protection analysis because the statutes (1) discriminate on the basis of gender (which is a strict scrutiny standard in California); (2) discriminate on the basis of sexual orientation; and (3) impinge on a fundamental right.³⁹ The Court reviewed all three of plaintiffs' arguments. First, the Court found that the statutes did not discriminate based on gender.⁴⁰ The Court emphasized that the statutes treat people of gender equally by not allowing either gender to marry a person of the same-sex.⁴¹ Second, the Court agreed that the statutes discriminate based on sexual orientation.⁴² In this area of first impression, the Court held that sexual orientation is a suspect class that requires a strict

³⁴ *Id.* at 434.

³⁵ *Id.* at 417-18.

³⁶ *Id.* at 434-35.

³⁷ *Id.* at 435.

³⁸ *Id.*

³⁹ *Id.* at 436.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 439-41.

scrutiny standard of review under an Equal Protection Clause challenge.⁴³ The Court disagreed with the court of appeal's conclusion, which was based on a three-prong test that California has generally used to identify a suspect class, stating that "immutability" is not a required trait of a suspect class.⁴⁴ Third, the Court agreed that the statutes "significantly impinge upon the fundamental interests of same-sex couples, and accordingly provide a further reason requiring that the statutory provisions properly be evaluated under the strict scrutiny standard of review."⁴⁵

The Attorney General argued that the Court should consider using an intermediate scrutiny standard for classifications based on sexual orientation.⁴⁶ The Court summarily disagreed, stating that "past California cases have not applied an intermediate scrutiny standard of review to classification involving any suspect (or quasi-suspect) characteristic."⁴⁷ Unlike federal courts, California applies a strict scrutiny standard to classifications based on gender or sex.⁴⁸

5. Under a Strict Scrutiny Standard, California's Marriage Laws are Unconstitutional

The Court concluded that California's marriage statutes did not pass a strict scrutiny standard of review.⁴⁹ Applying the standard, the Court found that the state did not have a compelling interest for such classification and that the statute was not necessary to further any of the state's interests. The Court emphasized that limiting marriage to opposite-sex couples "clearly is not necessary to preserve the rights and benefits of marriage currently enjoyed by opposite-sex couples," "permitting same-sex couples access [to marriage] will not alter the substantive nature of the legal institution of marriage," and permitting such access "will not impinge upon the religious freedom of any religious organization, official, or any other person"⁵⁰ The Court went so far as to re-emphasize the "real and appreciable harm upon same-sex couples and their children" when finding this classification failed the strict scrutiny standard of an equal protection challenge.⁵¹

Holding

The Court held that Sections 300 and 308.5 of California's Family Code were "unconstitutional to the extent each statute reserves the designation of marriage exclusively to opposite-sex couples and denies

⁴³ *Id.* at 441–44.

⁴⁴ *Id.* at 442–43.

⁴⁵ *Id.* at 446.

⁴⁶ *Id.* at 443–44.

⁴⁷ *Id.* at 444.

⁴⁸ *Id.*

⁴⁹ *Id.* at 452.

⁵⁰ *Id.* at 451–52.

⁵¹ *Id.* at 452.

same-sex couples" designation of their unions as marriage.⁵² To effectuate this holding, the Court struck the language in Section 300 that allowed marriage only "between a man and a woman" and voided Section 308.5.⁵³

Concurrence

Justice Kennard filed a separate concurrence to "explain how the court's decision [] is consistent with *Lockyer v. City and County of San Francisco*[⁵⁴]. . . ."⁵⁵ He emphasized that this case, by holding that same-sex couples are deprived of their state constitutional equal protection guarantee, was just a "continuation of *Lockyer*," which had "made a legal determination that depriving same-sex couples of the right to marry was unconstitutional."⁵⁶ Justice Kennard explained that, although on its face, the two decisions appear "inconsistent," *Lockyer* had not determined whether the California Constitution guaranteed a right of marriage to same-sex couples.⁵⁷ Rather, *Lockyer* had only "decided [] that local officials lacked authority to decide the constitutional validity of the state marriage statutes."⁵⁸ Justice Kennard also noted that the constitutionality of denying same-sex marriage was not a "matter to be decided by the executive or legislative branch . . . but is instead an issue of constitutional law for resolution by the judicial branch The court today discharges its constitutional obligation by resolving that issue."⁵⁹

Dissents

Justice Baxter filed a separate concurring and dissenting opinion, joined by Justice Chin.⁶⁰ He dissented regarding the majority's substantive holding on the basis that the "majority violates the separation of powers."⁶¹ He reasoned that only one other state, Massachusetts, recognizes same-sex marriages; that California through the legislative process has already recognized same-sex unions and granted them the same substantive rights as opposite-sex marriages; and that, "[i]f there is to be a further sea change in the social and legal understanding of marriage itself, that evolution should occur by similar democratic means."⁶² He said: "The majority forecloses this ordinary democratic process, and, in doing so, oversteps its authority."⁶³

⁵² *Id.*

⁵³ *Id.* at 453 (quoting CAL. FAM. CODE § 300 (West 2008).

⁵⁴ 95 P.3d 459 (Cal. 2004).

⁵⁵ *In re Marriage Cases*, 183 P.3d at 453.

⁵⁶ *Id.* (citing *Lockyer*, 95 P.3d 459).

⁵⁷ *Id.* at 454 (citing *Lockyer*, 95 P.3d 459).

⁵⁸ *Id.*

⁵⁹ *Id.* at 455.

⁶⁰ *Id.* at 456.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

Justice Corrigan also filed a separate concurring and dissenting opinion.⁶⁴ He dissented regarding the majority's substantive decision on the basis that the Court "can overrule a vote of the people only if the Constitution compels [it] to do so. [In this case], the Constitution does not [compel the Court to do so]."⁶⁵ He reasoned that the California Domestic Partner Rights and Responsibilities Act of 2003 provides same-sex couples with the same legal standing as opposite couples in their unions, and that such "parity does not violate the Constitution, it is in keeping with it."⁶⁶ Because all couples enjoy the same substantive rights, he said, the "traditional definition of marriage is [not] unconstitutional" and its review is not a matter of equal protection.⁶⁷

Legal Significance

The Court's decision made California the second state to recognize same-sex marriages. However, such recognition did not last for long. The California voters passed, by a fifty-two to forty-eight percent vote count, Proposition 8 during the November 2008 elections.⁶⁸ Proposition 8 amended the California Constitution to define marriage as solely between a man and a woman. For better or worse, the legal battle over this charged issue continues: legal groups in favor of same-sex marriages have already filed lawsuits challenging the validity of Proposition 8. The ongoing legal maneuvering by both sides will continue, and such use of the process may affect, or at least spur lively debate over, the role of courts, legislatures, and the people in the political process.⁶⁹

⁶⁴ *Id.* at 468.

⁶⁵ *Id.*

⁶⁶ *Id.* at 469.

⁶⁷ *Id.* at 468.

⁶⁸ For the latest vote count, see <http://vote.sos.ca.gov>Returns/props/map190000000008.htm>.

⁶⁹ Chapman University's *Journal of Law and Public Policy* will discuss many of these issues during its February 2009 Symposium. For more information, see <http://www.lawschoolblog.org/blog/2008/nov/04/after-effects-proposition-8-and-other-judicial-legislation-issues/>.