
COURT OF APPEALS OF NEW YORK

Hernandez v. Robles¹
(decided July 6, 2006)

Introduction

Forty-four same-sex couples were denied marriage licenses and unsuccessfully commenced the instant four actions against various licensing agencies, the State Department of Health, and the State of New York.² In three instances, the Supreme Court granted summary judgment in favor of the defendants; the Appellate Division, Third Department, affirmed.³ In one case, the New York County Supreme Court granted summary judgment in favor of the plaintiffs; the appellate division reversed.⁴ The Appellate Division, First Department, unanimously rejected the plaintiffs' contention that articles two and three of the New York Domestic Relations Law⁵ ("NY DRL") violates the Due Process Clause⁶ and the Equal Protection Clause⁷ of the New York Constitution by limiting marriage to members of the opposite-sex.⁸ The New York Court of

¹ 855 N.E.2d 1 (N.Y. 2006).

² *Id.* at 5.

³ *Id.*; see *Seymour v. Holcomb*, 811 N.Y.S.2d 134 (App. Div. 3d Dep't 2006); *In re Kane v. Marsolais*, 808 N.Y.S.2d 566 (App. Div. 3d Dep't 2006); *Samuels v. N.Y. State Dep't of Health*, 811 N.Y.S.2d 136 (App. Div. 3d Dep't 2006).

⁴ *Hernandez v. Robles*, 805 N.Y.S.2d 354 (App. Div. 1st Dep't 2005).

⁵ N.Y. DOM. REL. LAW art. 2, 3 (2006).

⁶ N.Y. CONST. art. I, § 6 provides in pertinent part: "No person shall be deprived of life, liberty or property without due process of law."

⁷ N.Y. CONST. art. I, § 11 provides in pertinent part: "No person shall be denied the equal protection of the laws of this state or any subdivision thereof."

⁸ *Hernandez*, 855 N.E.2d at 5.

Appeals, in a plurality opinion, affirmed the orders of the appellate divisions and deferred to the legislature, holding that the New York Constitution does not compel recognition of same-sex marriages.⁹

Preliminarily, the court rejected the arguments set forth by various *amici* that the constitutional issues were moot because the statutory language can be read to permit same-sex marriage.¹⁰ The court reasoned that various provisions of the NY DRL indicate that the legislature intended to “limit[] marriage to opposite-sex couples,”¹¹ and thus found that, even absent an explicit statutory prohibition, the permissive gender-neutral reading was untenable.¹²

Next, the court set forth two reasons,¹³ both of which focus on the welfare of children, as the grounds for: (1) adopting rational basis as the appropriate standard of review;¹⁴ (2) holding that the NY DRL comports with the Due Process Clause of the New York Constitution;¹⁵ and (3) holding that the NY DRL comports with the Equal Protection Clause of the New York Constitution.¹⁶ These findings are respectively discussed herein.

⁹ *Id.*

¹⁰ *Id.* at 5-6.

¹¹ *Id.* at 6 (explaining that N.Y. DOM. REL. LAW § 15(1)(a) refers to “the groom” and “the bride” and section 12 provides that “the parties must solemnly declare . . . that they take each other as husband and wife”).

¹² *Id.*

¹³ *Hernandez*, 855 N.E.2d at 7.

¹⁴ *Id.* at 9.

¹⁵ *Id.*

¹⁶ *Id.*

Rational Basis

In *Hernandez*, the court set forth two grounds upon which it rested the entire ensuing opinion: (1) that “the Legislature could rationally decide that, for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex [relationships] than in same-sex relationships,”¹⁷ and (2) that the Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father.”¹⁸

As to the first reason, the court explained that because heterosexual intercourse can lead to childbirth, the Legislature could “choose to offer an inducement—in the form of marriage and its attendant benefits—to opposite-sex couples”¹⁹ to promote long-term commitments with respect to relationships that would otherwise be casual or temporary. Further, the court explained that a rational legislature could find that homosexual couples do not need such an inducement, to wit, marriage, because “the vast majority of children are born as a result of a sexual relationship between a man and a woman”²⁰ As for the second reason, the court’s rationale was that a child may benefit “from having before his or her eyes, every day, living models of what both a man and a woman are like.”²¹ Accordingly, the court concluded that NY DRL withstands rational basis scrutiny.

¹⁷ *Id.* at 7.

¹⁸ *Hernandez*, 855 N.E.2d at 7.

¹⁹ *Id.*

²⁰ *Id.* at 7.

²¹ *Id.*

Due Process

As a case of first impression, the *Hernandez* court considered precedent of the United States Supreme Court and the New York Court of Appeals for general discussions pertaining to marriage in general, fundamental rights, and Fourteenth Amendment jurisprudence, because the constitutionality of same-sex marriage was yet to be considered by either court.

A substantive due process challenge requires a determination of whether a “fundamental right[] found to be deeply rooted in our legal tradition”²² has been implicated. It follows that this threshold determination mandates its own threshold determination: the successful assertion of a fundamental right. Therefore, the dispositive factor in *Hernandez* turns on the manner in which the critical issue was framed; was the fundamental right at issue the right to marry or the right to marry the person of one’s choice?²³

In determining statutory validity under the Due Process Clause, the failure to assert a fundamental right renders the statute presumptively constitutional so long as “it is rationally related to legitimate government interests.”²⁴ Applying this standard of review, the *Hernandez* court cited the aforementioned reasons, namely the inducement of stability and the preference of having a mother and a father, as support for the limitation of marriage to opposite-sex

²² See *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997).

²³ See *Hernandez*, 855 N.E.2d at 27 (Kaye, C.J., dissenting). In her dissenting opinion, Chief Judge Judith Kaye posited that “[c]orrectly framed, the question before us is not whether the marriage statutes properly benefit those they are intended to benefit--any discriminatory classification does that--but whether there exists any legitimate basis for excluding those who are not covered by the law.” *Id.*

²⁴ *Id.* at 10 (majority opinion).

couples because “protecting the welfare of children is a legitimate government interest.”²⁵

Fittingly, the majority opinion in *Hernandez* first considered the landmark case of *Loving v. Virginia*,²⁶ where the United States Supreme Court held that Virginia’s miscegenation statutes violated the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment.²⁷ The appellants in *Loving* were “Mildred Jeter, a Negro woman, and Richard Loving, a white man, [who] were married in the District of Columbia”²⁸ and subsequently moved to Virginia where they were convicted of “violating Virginia’s ban on interracial marriages.”²⁹ In addressing appellants’ due process claims, the Supreme Court reinforced the recognition of marriage as a fundamental right, explaining that “[t]he Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations.”³⁰

*Washington v. Glucksberg*³¹ is the most palpable illustration of how critical the framing of an issue can be. The United States Supreme Court distinguished the “right to refuse lifesaving hydration and nutrition”³² from the “right commit suicide.”³³ In *Glucksberg*, three terminally ill patients, four physicians, and a nonprofit

²⁵ *Id.*

²⁶ 388 U.S. 1 (1967).

²⁷ *Id.* at 2.

²⁸ *Id.*

²⁹ *Id.* at 3.

³⁰ *Id.* at 12.

³¹ *Glucksberg*, 521 U.S. 702.

³² *Id.* at 723 (quoting *Cruzan v. Dir. Mo. Dep’t of Health*, 497 U.S. 261, 279 (1990)).

³³ *Id.*

organization, challenged the constitutionality of Washington's statutory prohibition³⁴ against causing or assisting suicide under the Due Process Clause of the United States Constitution.³⁵ The Court rejected plaintiffs' broad interpretation of *Cruzan v. Director, Mo. Dep't of Health*³⁶ as standing for the expansive fundamental right to die.³⁷ Rather, the *Glucksberg* Court reasoned that the fundamental right at issue in *Cruzan* afforded a mere "liberty interest [under the Due Process Clause] in refusing unwanted medical treatment,"³⁸ and not the right to commit or assist suicide.³⁹

Conversely, in *Lawrence v. Texas*,⁴⁰ the United States Supreme Court overruled its decision in *Bowers v. Hardwick*,⁴¹ criticizing the narrow manner in which the *Bowers* Court framed the issue before it. In *Lawrence*, the Supreme Court invalidated a Texas statute⁴² that criminalized consensual sexual conduct between adults of the same sex.⁴³ Petitioners John Geddes Lawrence and Tyron Garner were convicted of "engaging in a sexual act"⁴⁴ in violation of said statute.⁴⁵ The *Lawrence* Court explained that the *Bowers* Court

³⁴ WASH. REV. CODE § 9A.36.060(1) (2006) provides: "A person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide."

³⁵ *Glucksberg*, 521 U.S. at 705-06.

³⁶ *Cruzan*, 497 U.S. 261.

³⁷ *Glucksberg*, 521 U.S. at 725-26.

³⁸ *Cruzan*, 497 U.S. at 278.

³⁹ *Glucksberg*, 521 U.S. at 722-23.

⁴⁰ 539 U.S. 558 (2003).

⁴¹ 478 U.S. 186 (1986).

⁴² TEX. PENAL CODE ANN. § 21.06(a) (2006), *invalidated by* *Lawrence v. Texas*, 539 U.S. 558 (2003), provided: "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex."

⁴³ *Lawrence*, 539 U.S. at 578 ("State[s] cannot demean their existence or control their destiny by making their private sexual conduct a crime").

⁴⁴ *Id.* at 563.

⁴⁵ *Id.* at 562-63.

“misapprehended the claim of liberty”⁴⁶ and improperly framed the issue before it as “a fundamental right to engage in consensual sodomy.”⁴⁷ However clear its repudiation of *Bowers* was, the *Lawrence* Court was still reluctant to recognize a fundamental right to engage in homosexual sodomy, but broadly reasoned that the petitioners were afforded a right to privacy pursuant the “right to liberty under the Due Process Clause”⁴⁸

Comparably, twenty-three years before *Lawrence*, in *People v. Onofre*,⁴⁹ the New York Court of Appeals struck down a similar anti-sodomy statute⁵⁰ holding that it violated the plaintiffs’ “right of privacy and the right to equal protection of the laws guaranteed them by the United States Constitution.”⁵¹ The defendants in *Onofre* were convicted of violating the prohibition on unmarried deviate sexual intercourse.⁵² The *Onofre* court reasoned that the right to privacy was not “the right to maintain secrecy with respect to one’s affairs or personal behavior; rather, it is a right of independence in making certain kinds of important decisions, with a concomitant right to conduct oneself in accordance with those decisions, undeterred by a governmental restraint”⁵³ Further, the *Onofre* court supported the right to privacy by citing a plethora of United States Supreme

⁴⁶ *Id.* at 567.

⁴⁷ *Id.*

⁴⁸ *Lawrence*, 539 U.S. at 578.

⁴⁹ 415 N.E.2d 936 (N.Y. 1980).

⁵⁰ N.Y. PENAL LAW § 130.38 (2006), *invalidated by Onofre*, 415 N.E.2d 936.

⁵¹ *Onofre*, 415 N.E.2d at 938-39.

⁵² *Id.* at 937-38. The defendants were two homosexual males in one instance, and a heterosexual male and female in the other. *Id.*

⁵³ *Id.* at 939.

Court precedent, all of which illustrate the “penumbras of the Bill of Rights . . . [and the broad definitions and applications of] liberty guaranteed by the due process clause of the fourteenth amendment.”⁵⁴

The majority opinion in *Hernandez* read *Loving* as restricting the right to marry to opposite-sex couples, reasoning that however fundamental the right to marry is, it is distinguishable from “[t]he right to marry someone of the same sex” because the latter is not “deeply rooted.”⁵⁵ In her dissent, Chief Judge Judith Kaye berated the distinction, pointing out that “[s]adly, many of the arguments then raised in support of the anti-miscegenation laws were identical to those made today in opposition to same-sex marriage”⁵⁶

Moreover, the majority in *Hernandez* found *Glucksberg* more analogous to the matter before it than *Lawrence*, reasoning that the distinction between the way in which the fundamental right was framed in *Glucksberg* was “based on rational line-drawing”⁵⁷ while the distinction in *Lawrence* was “essentially arbitrary.”⁵⁸ In other words, the *Hernandez* majority read *Lawrence* as merely affording access of an already established right (the right to privacy), and read *Glucksberg* as the refusal to create a new right (the right to commit suicide). The concurring opinion attempted to harmonize *Onofre* and *Lawrence* with *Hernandez* by distinguishing the statutory provisions in question, explaining that the statutes in *Lawrence* and *Onofre* were penal in nature, and that the NY DRL is not, and neither does it

⁵⁴ *Id.*

⁵⁵ *Hernandez*, 855 N.E.2d at 9.

⁵⁶ *Id.* at 24-25 (Kaye, C.J., dissenting).

⁵⁷ *Id.* at 10 (majority opinion).

⁵⁸ *Id.*

attempt “to regulate plaintiffs private sexual conduct.”⁵⁹

Equal Protection

The *Hernandez* court rejected plaintiffs’ equal protection argument that strict scrutiny was the appropriate level of scrutiny for want of a successful assertion of a fundamental right as above-mentioned. In the alternative, plaintiffs offered two grounds under which “intermediate or heightened scrutiny”⁶⁰ should be applied, the first being on the basis of sex, and the second being on the basis of sexual preference; the majority found both contentions deficient of merit.⁶¹ As a result of finding the plaintiffs’ arguments for strict scrutiny or intermediate/heightened scrutiny meritless, the *Hernandez* court “conclude[d] that rational basis scrutiny was appropriate.”⁶² The court then rejected plaintiffs’ contentions that the NY DRL failed rational basis because the statute was underinclusive and overinclusive.⁶³

First, the *Hernandez* court relied on *Loving* to refute the basis of sex as a means by which to invoke intermediate/heightened scrutiny.⁶⁴ Whereas the statute in *Loving* gave “one class a benefit

⁵⁹ *Id.* at 18 (Grafteo, J., concurring).

⁶⁰ *Hernandez*, 855 N.E.2d at 10 (majority opinion).

⁶¹ *Id.* The court rejected “both [] arguments, [] hold[ing] that the restriction of marriage to opposite-sex couples is subject only to rational basis scrutiny.” *Id.*

⁶² *Id.* at 11.

⁶³ *Id.* at 11-12.

⁶⁴ *Id.* at 11. The court distinguishing *Hernandez* from *Loving* by stating that “[t]his is not the kind of sham equality that the Supreme Court confronted in *Loving*.” *Id.*

not given to the other,”⁶⁵ the *Hernandez* court reasoned that NY DRL does not violate equal protection because “[w]omen and men are treated alike—they are permitted to marry people of the opposite sex, but not of their own sex.”⁶⁶ The concurrence read *Loving* not as standing for the right to marry the spouse of one’s choice, but rather for the “freedom of choice to marry not be restricted by invidious racial discriminations.”⁶⁷

Next, the *Hernandez* court predicated its rejection of the sexual orientation basis on *Cleburne v. Cleburne*⁶⁸ and *Under 21 v. New York*.⁶⁹ In *Cleburne*, the United States Supreme Court held that a municipal zoning ordinance that restricted the use of private property by mentally retarded persons was unconstitutional under the Equal Protection Clause.⁷⁰ The Court’s rationale was that “legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose.”⁷¹ Further, the Court stated that the “[s]tate may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.”⁷² The *Hernandez* court dismissed *Cleburne*’s applicability by reasoning that the classification in *Cleburne*’s statute, upon which citizens were

⁶⁵ *Hernandez*, 855 N.E.2d at 10.

⁶⁶ *Id.* at 10-11.

⁶⁷ *Id.* at 16 (Graffeo, J., concurring) (citing *Loving*, 388 U.S. at 12).

⁶⁸ 473 U.S. 432 (1985).

⁶⁹ 482 N.E.2d 1 (N.Y. 1985).

⁷⁰ *Cleburne*, 473 U.S. at 447.

⁷¹ *Id.* at 446.

⁷² *Id.*

distinguished, did not further a legitimate state interest, and thus concluded that “[a] person’s preference for the sort of sexual activity that cannot lead to the birth of children is relevant to the State’s interest in fostering relationships that will serve the children best.”⁷³

In comparison, in *Under 21 v. New York*,⁷⁴ the New York Court of Appeals “left open the question of whether some level of heightened scrutiny would be applied”⁷⁵ to legislation affecting persons on the basis of sexual preference. The *Hernandez* court answered the question in the negative, reasoning that *Cleburne* is controlling because of the State’s interest in “governing marriage and family relationships,”⁷⁶ thereby eliminating sexual orientation as a legitimate grounds upon which heightened or intermediate scrutiny may be invoked.

Finally, the plaintiffs’ argued that NY DRL failed rational basis because it was underinclusive because both “same-sex couples, as well as opposite-sex couples, may have children”⁷⁷ and overinclusive because “many opposite-sex couples cannot have or do not want to have children.”⁷⁸ The court heeded no credence to either argument.⁷⁹ In rejecting the underinclusive argument, the court reiterated that it was plausible that the legislature could rationally have chosen to limit marriage to opposite sex couples for the above-

⁷³ *Hernandez*, 855 N.E.2d at 11.

⁷⁴ 482 N.E.2d 1 (N.Y. 1985).

⁷⁵ *Hernandez*, 855 N.E.2d at 11 (quotations omitted).

⁷⁶ *Id.*

⁷⁷ *Id.* at 11.

⁷⁸ *Id.*

⁷⁹ *Id.* at 11-12.

mentioned reasons regarding the welfare of children.⁸⁰ Likewise, the court rejected the overinclusive argument by reasoning that while same-sex couples and opposite-sex couples are easily distinguished, distinguishing between couples that are likely to have children from those which are not would require “grossly intrusive inquiries, and arbitrary and unreliable line-drawing.”⁸¹

Conclusion

Hernandez v. Robles is an illustrative example of the United States Constitution not only setting the floor, but also the ceiling of whom is afforded what rights under the New York State Constitution. In the absence of direct federal precedent, the New York Court of Appeals has found that the NY DRL survives strict scrutiny, heightened scrutiny, rational basis review, equal protection analysis, and due process analysis on all grounds under the New York Constitution.

Inevitably, the United States Supreme Court will decide whether its resounding *fiat* of the liberty interest in *Lawrence* will serve to support or defeat same-sex marriage. Until such time, the inter-state dissonance prompted by *Lawrence* is certain to continue, as has been the effect thus far.⁸² Henceforth, any prospective recourse is necessarily left for legislative beseechment, or New York

⁸⁰ *Hernandez*, 855 N.E.2d at 11-12; *see supra* notes 17-20.

⁸¹ *Id.*

⁸² *See, e.g.*, *Goodridge v. Dep't of Health*, 798 N.E.2d 941 (Mass. 2003) (holding that exclusion of same-sex couples from marriage violates the Massachusetts Constitution); *Baker v. State*, 744 A.2d 864 (Vt. 1999) (holding that denying same-sex couples the benefits of marriage violates the Vermont Constitution).

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will be entirely deaf to remonstrance.

Gennaro Savastano