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Joanna L. Grossman
Maurice A. Deane School of Law at Hofstra University

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Verdict

March 4, 2014
Joanna L. Grossman

The Red State Scare: Federal Court in Texas Invalidates Ban on Marriages by Same-Sex Couples

There was a time in the not too distant past when the authorization of same-sex marriage was squarely a blue-state phenomenon. The 2012 **presidential election map (http://www.270towin.com/)** looked pretty similar to the same-sex marriage map—with all 17 authorizing states colored blue. But the color palette is changing, as first Utah, then Oklahoma, then Kentucky, and now Texas, in ***De Leon v. Perry*** **(http://sblog.s3.amazonaws.com/wp-content/uploads/2014/02/Texas-marriage-ruling-2-26-141.pdf)**, have seen at least some aspects their anti-same-sex marriage rules invalidated by federal courts. The red states are unlikely to fall in as rapid succession as the blue states did, but, still, crossing the color line suggests the inevitability of change on this issue—and only in one direction.

The Impact of *Windsor*

These recent rulings are fueled by the Supreme Court's ruling last June in ***United States v. Windsor (http://supreme.justia.com/cases/federal/us/570/12-307/)***, in which it held that the federal Defense of Marriage Act (DOMA)'s refusal to recognize valid same-sex marriages for federal-law purposes was unconstitutional. In a nutshell, the Court held that DOMA was invalid because it marked a stark deviation from a long history and tradition of the federal government's deferring to state-law determinations of marital status. As a discrimination of "an unusual character," DOMA merited "careful consideration" and raised a strong inference that Congress was motivated by "bare animus" in passing the law.

Indeed, the text, structure, and history of the law made clear that its "avowed purpose and practical effect" was "to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States." And, as the Court concluded, "no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity." Congress does not have the power to "identify a subset of state-sanctioned marriages and make them unequal," nor to tell "those couples, and all the world, that their otherwise valid marriages are unworthy of . . . recognition."

In an angry dissent, conservative Justice Antonin Scalia warned as follows:

> In my opinion, however, the view that this Court will take of state prohibition of same-sex marriage

> is indicated beyond mistaking by today's opinion. As I have said, the real rationale of today's opinion . . . is that DOMA is motivated by "bare . . . desire to harm" couples in same-sex marriages. How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status.

Not only does Justice Scalia appear to be right, but, ironically, his own words have been invoked in the recent rulings as *authority* for the proper interpretation of *Windsor*.

Post-*Windsor* Rulings

The question raised in most of these post-*Windsor* cases is the same: Do states, any more than Congress, have the power to single out a particular type of marriage for unequal treatment? The resounding answer, in shades of blue and red, has been "No". Indeed, every court to consider a *Windsor* challenge to a state law banning either the celebration or recognition of same-sex marriage (or both) has ruled in favor of the plaintiffs—and against the constitutionality of such laws.

In *Obergefell v. Wymyslo*, a federal district court, this time in a blue state, Ohio, held that it was unconstitutional under *Windsor* to refuse to give effect to an out-of-state marriage by a same-sex couple for purposes of issuing a death certificate (which includes, among other information, marital status). The court looked at Ohio's history of recognizing marriages from out of state that it would have prohibited in the first instance. While Ohio, like other states, had traditionally applied the "place of celebration" rule when determining the validity of marriages, it had adopted by statute and constitutional amendment a blanket prohibition on the recognition of same-sex marriages. As with DOMA, this deviation was deemed unusual enough in character to raise a red flag, and the state's insufficient justifications for the non-recognition rule meant that it could not survive *Windsor*'s "careful consideration."

In *Bourke v. Beshear*, which I discuss in greater detail **here (http://verdict.justia.com/2014/02/18/kentucky-become-second-paradise-sex-married-couples)** , a federal district court in (red state) Kentucky ruled that the state's non-recognition rules, embodied in a statute and state constitutional provision, were invalid under *Windsor*. This ruling is similar to *Obergefell* in terms of the analysis, but broader in scope. Its import is that Kentucky cannot refuse to give effect to a marriage between people of the same sex for any state-law purpose.

In *Kitchen v. Herbert*, a federal district court in (red state) Utah held that the state's constitutional and statutory ban on same-sex marriage were unconstitutional on equal protection and due process grounds. The court was asked to rule on the constitutionality of the non-recognition aspects of Utah's laws, but because it invalidated the underlying ban, the question of interstate marriage recognition was moot.

In *Bishop v. United States*, a federal district court in (red state) Oklahoma concluded that an amendment to the state's constitution banning the celebration of same-sex marriages was unconstitutional under *Windsor*, as well as other precedents. The court concluded that the ban on same-sex marriage served no rational purpose. Morality, under the Supreme Court's ruling in ***Lawrence v. Texas* (http://supreme.justia.com/us/539/558/case.html)** , is not a valid justification for a law that infringes on the right to privacy. And while other reasons that the state offered may be legitimate state interests—encouraging responsible procreation, promoting optimal childrearing, and protecting marriage—none was rationally related to a ban on marriage by same-sex couples. Indeed, the state's asserted interests were "so attenuated" from the law being challenged that they could not save the law even under the most deferential form of review.

De Leon v. Perry: The Texas Shoe Drops

Amid the national fervor against marriage by same-sex couples, Texas declared its policy in triplicate. In 1997, the legislature enacted a provision to prohibit any clerk from issuing a marriage license to persons of the same gender. In 2003, it added another provision, this time to make clear that marriages between persons of the same sex, and all civil unions, would be considered void in Texas and given no effect. Finally, in 2005, the Texas constitution was amended to provide that "marriage" consists only of a union between a man and a woman, and neither the state nor a political subdivision of it can "create or recognize any legal status identical or similar to

marriage."

The complaint in *De Leon* mirrors those in the other cases. Two same-sex couples sued, one that wanted to marry but couldn't because of Texas's ban on the celebration of marriages by same-sex couples, and one that had married elsewhere, but was denied recognition in Texas because of the state ban on giving effect to such marriages. The case thus raises constitutional questions about both the underlying ban and the rule of non-recognition.

The motion prompting the ruling in *De Leon* was for a preliminary injunction—an order preventing Texas from continuing to enforce its bans on celebration and recognition of same-sex marriage pending a decision on the underlying claims. Such an order must be premised, among other things, on the court's conclusion that the plaintiff has shown a high likelihood of success on the merits. The judge concluded that the plaintiffs had met that burden not just on one theory or claim, but on every theory and claim they presented.

Before reaching these claims, however, the court had to dispense with a "preliminary matter"—the precedential value of the U.S. Supreme Court's 1972 ruling in *Baker v. Nelson*, in which it summarily dismissed a similar lawsuit brought by two men seeking to marry in Minnesota. Although the Court initially agreed to review the case, it then dismissed the appeal "for want of substantial federal question." *Baker* has been a stumbling block in this new round of lawsuits over the constitutionality of state laws banning same-sex marriage. If the Supreme Court said that case did not raise a "federal question"—meaning that it did not raise a meaningful claim under a federal statute or the federal question—then does that bar lower federal courts from ruling these laws unconstitutional?

The answer from the *DeLeon* court (and from some of the other courts discussed above) is no. Although summary dismissals do have precedential value (meaning that they have to be followed), they lose that force "when doctrinal developments indicate otherwise," as the Court held in ***Hicks v. Miranda*** ***(http://supreme.justia.com/cases/federal/us/422/332/case.html)*** (1975). It might be hard to find a situation with more doctrinal developments than this one. At the time of *Baker*, there wasn't a single favorable decision from the Supreme Court on the issue of gay rights. The right of privacy, into which most rights related to family, marriage, and intimate relationships falls, had barely emerged. The Court had not yet, for example, decided landmark cases like *Roe v. Wade*. Nor had it recognized a constitutional right against gender discrimination.

As the Texas court in *De Leon* noted, the world has changed mightily since then. The Court decided cases granting a plethora of rights under the due process clause, relating to abortion, contraception, marriage, and parenting. And most relevant to the claims in this case, it ruled in ***Lawrence v. Texas*** ***(http://supreme.justia.com/us/539/558/case.html)*** (2003) that Texas could not criminalize same-sex sodomy without infringing the right to privacy. The Court also decided many cases under the Equal Protection Clause that make it substantially more difficult for states to discriminate on the basis of gender or sexual orientation. Gender-based classifications merit heightened scrutiny and are often struck down. And, in ***Romer v. Evans*** ***(http://supreme.justia.com/cases/federal/us/517/620/)*** (1996), the Court invalidated a law discriminating against gays and lesbians because it was rooted in bare animus—a justification that was insufficient under even the most deferential standard of review.

These cases supported the *De Leon* court's conclusion that "while state bans on same-sex marriage may have been deemed an 'unsubstantial' question in 1972, the issue is now a 'substantial' federal question. . . ."

This cleared the path for the court to consider the constitutional challenges at the heart of the lawsuit: that it violates the federal constitutional guarantees of equal protection and due process both to ban the creation of same-sex marriages in Texas and to ban recognition of those validly created elsewhere.

First, the court held that the celebration ban violates the Equal Protection Clause. It was sympathetic towards the plaintiffs' argument that sexual-orientation classifications merit heightened scrutiny, but ultimately demurred on the question. It concluded, instead, that the ban could not survive even the lowest level of review, rational basis review. According to the court, there is no rational reason to ban marriages by same-sex couples. Although the state proffered some legitimate interests—protecting the welfare of children, for example—it could not show any

connection between the end and the means. To the contrary, the court found that "far from encouraging a stable environment for childrearing, [the ban] denies children of same-sex parents the protections and stability they would enjoy if their parents could marry." And to the extent that the state was relying on "tradition" to defend its laws, the Supreme Court has made clear that moral disapproval, dressed up as tradition, cannot justify a discriminatory law.

Second, the court concluded that the ban infringed the right to marry for same-sex couples. While states have the power to regulate marriage, they must do so in a way that conforms to constitutional mandates. The right to marry is strongly protected under the Fourteenth Amendment, and, what plaintiffs seek is not a "new right" of same-sex marriage, but simply the ability to exercise an already-established right. Just as the claim for interracial marriage in *Loving v. Virginia* did not require creation of a new right, the claim for same-sex marriage does not either. Laws that infringe upon fundamental rights are reviewed with the closest lens, strict scrutiny, and the state of Texas was able to identify no interest compelling enough to justify the infringement here.

Third, the court concluded that the state ban on recognition of same-sex marriages from other states was unconstitutional on both equal protection and due process grounds. (The Ohio and Kentucky courts discussed above reached the same conclusion.) A state's refusal to recognize a marriage can have far-reaching consequences affecting everything from taxes to hospital visitation. In a case I have **written about elsewhere (http://writ.lp.findlaw.com/grossman/20100913.html)** , an appellate court upheld a trial court's refusal to grant a divorce to a same-sex couple who had married in Massachusetts while residing there and then moved to Texas. In the court's view, it would have to first "give effect" to the marriage in order to dissolve it, and this was not permitted under the non-recognition provisions discussed above. That couple was thus legally stuck unless and until they established residency in a state recognizing marriages by same-sex couples—or the Texas law was invalidated. This is just one example of the many problems associated with the categorical rule of non-recognition that has been adopted in Texas and many other states.

Like most states, Texas historically gave effect to most out-of-state marriages that could not have been celebrated in Texas in the first instance. It followed the place of celebration rule and routinely recognized unions of which it disapproved for reasons of comity, stability, and tolerance. The departure from this long history rendered this ban an unusual sort of discrimination that both raises an inference of animus and requires "careful consideration" of the state's motives. Without any legitimate reason to justify the rule of non-recognition, the state could not win this battle. The non-recognition rule violates the Equal Protection Clause. The court also concluded that it violated the Due Process Clause to strip a validly married couple of its marriage simply because they had the audacity to set foot in Texas.

Although the plaintiffs won across the board, nothing will happen immediately. The district court stayed its ruling pending appeal to the Fifth Circuit Court of Appeals.

Conclusion

The *De Leon* ruling ended with a reassurance that the decision "is not made in defiance of the great people of Texas or the Texas legislature." Rather, it is simply a ruling that brings Texas law into compliance with the federal constitution and its guarantee of "equal treatment of all individuals under the law." This principle, the court wrote, is "at the heart of our legal system and is essential for the existence of a free society."

The cascade of opinions, all reaching similar conclusions, on these issues are strongly suggestive of an inevitable path. There will be no firm answer on the scope or meaning of *Windsor* until the Supreme Court considers one of these cases, but that is likely to happen soon. And perhaps if Justice Scalia writes another angry dissent, this time he will forego the part where he explains just how powerful the majority's ruling can be.

Joanna L. Grossman, a Justia columnist, is the Sidney and Walter Siben Distinguished Professor of

Family law at Hofstra University. She is the coauthor of Inside the Castle: Law and the Family in 20th Century America (Princeton University Press 2011), co-winner of the 2011 David J. Langum, Sr. Prize for Best Book in American Legal History, and the coeditor of Gender Equality: Dimensions of Women's Equal Citizenship (Cambridge University Press 2009). Her columns focus on family law, trusts and estates, and sex discrimination.

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