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# Verdict

July 8, 2014

[Joanna L. Grossman](#)

## Federal Appellate Court Rules Utah's Ban on Marriage by Same-Sex Couples Unconstitutional



While all eyes have been on the end of the U.S. Supreme Court's term, as it issued important rulings on, among other things, Obamacare's contraceptive mandate, other courts have been busy as well. At the end of June, the U.S. Court of Appeals for the Tenth Circuit held that Utah's ban on marriages by same-sex couples violates the federal Constitution's guarantees of equal protection and due process.

Although there have been many rulings in the last year with similar effect—rulings fueled by the Supreme Court's decision in *United States v. Windsor* invalidating Section 3 of the Defense of Marriage Act in June 2013—this is the first post-*Windsor* ruling from a federal appellate court, which brings the issue of state bans one necessary step closer to the U.S. Supreme Court. Moreover, this effectively invalidates not only Utah's ban on same-sex marriage in that state, but also similar bans in other states falling within the Tenth Circuit, including Colorado, Oklahoma, Wyoming, and Kansas.

Before describing and analyzing the ruling, let me first disclose that I wrote and filed an amicus brief on behalf of the plaintiffs in this case. That brief, filed on behalf of family law and conflict of laws scholars, argued that even if the underlying ban on marriages by same-sex couples was upheld, the state's refusal to give effect to same-sex marriages validly celebrated elsewhere was independently unconstitutional under the Supreme Court's rulings in *Romer v. Evans* (<http://supreme.justia.com/cases/federal/us/517/620/>) and *United States v. Windsor* because Utah's singling out of this type of marriage for non-recognition constitutes a discrimination “of an unusual character” that is strongly suggestive of legislative animosity and illegitimacy. Because the Tenth Circuit ruling invalidated the ban on the celebration of marriages by same-sex couples, it did not need to reach this question directly, and the ruling neither accepts nor rejects this particular argument.

### The Steps Leading to the Tenth Circuit's Ruling

In the past year, there have been sixteen trial court rulings on the validity of bans on the celebration and/or recognition of marriages by same-sex couples. The plaintiffs have prevailed in every one of these cases. (There are more than 70 similar cases at various stages in thirty states across the country.)

These recent rulings—and the unbroken winning streak—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. The Court did not rule that Congress lacked the power to regulate marriage, but it did hold 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.

Upon further analysis, the Court concluded that 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." In the Court's words, "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 dissent, Justice Scalia predicted that the Court's ruling, although it purported to express no opinion on the validity of state bans on marriages by same-sex couples, was a death knell for all such laws. If a "bare . . . desire to harm" is all that is needed to declare a law invalid, "[h]ow easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status."

If the 16-0 score is any indication, lower federal courts agree with his take on the breadth and meaning of *Windsor*. (Many, in fact, have cited Scalia's dissent as authority for their readings of *Windsor*.) This ruling has been facilitated by the fact that these states went to great lengths to make their contempt for gay marriage known, often passing not just a single statute, but multiple statutes followed by a reinforcing constitutional ban.

The 70 pending cases raise essentially the same question: can states single out a particular type of marriage for unequal treatment? The answer from every court thus far has been no. The Ohio ban on the recognition of same-sex marriages was among the first to fall, but it has been followed by the invalidation of bans on either celebration or recognition of marriages by same-sex couples in states such as Tennessee, Kentucky (discussed [here \(http://verdict.justia.com/2014/02/18/kentucky-become-second-paradise-sex-married-couples\)](http://verdict.justia.com/2014/02/18/kentucky-become-second-paradise-sex-married-couples)), Texas (discussed [here \(http://verdict.justia.com/2014/03/04/red-state-scare-federal-court-texas-invalidates-ban-marriages-sex-couples\)](http://verdict.justia.com/2014/03/04/red-state-scare-federal-court-texas-invalidates-ban-marriages-sex-couples)), Oklahoma, Pennsylvania, and Idaho. The courts have been uniform in their poetic denunciation of these bans, but also uniform in their conclusion that the constitution permits no other result.

### **The Ruling in *Kitchen v. Herbert***

The opinion in *Kitchen v. Herbert* (<http://law.justia.com/cases/federal/appellate-courts/ca10/13-4178/13-4178-2014-06-25.html>) was written by Judge Lucero, a Clinton appointee, and joined by Judge Homes, an appointee of George W. Bush. Judge Kelly, appointed by George H.W. Bush, dissented on the key aspects of the ruling. The recent rulings have all been poetically written, by judges trying to remain on the right side of history. This one is no different, beginning with the grand observation that: "Our commitment as Americans to the principles of liberty, due process of law, and equal protection of the laws is made live by our adherence to the Constitution of the United States of America." It is "those very principles," the opinion continues, at stake in the controversy over marriages by same-sex couples. And those same principles are the ones that led the Court to conclude that a state may not "constitutionally deny a citizen the benefit or protection of the laws of the State based solely upon the sex of the person that citizen chooses to marry." The court went on to "hold that the Fourteenth Amendment protects the fundamental right to marry, establish a family, raise children, and enjoy the full protection of a state's marital laws. A state may not deny the issuance of a marriage license to two persons, or refuse to recognize their marriage, based solely upon the sex of the persons in the marriage union."

The Tenth Circuit ruling follows a similar pattern to many of the recent district court rulings. Before reaching the question on the merits, it had to dispense first with issues of standing—did the parties who were defending the law have the legal right to do so? It held that they did and moved on to the second thorny question about 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, if only a small one, in this new round of lawsuits over the constitutionality of state laws banning same-sex marriage. It was not relevant to the dozens of cases that preceded *Windsor* because almost all of those were litigated under state constitutions rather than the federal constitution, and the U.S. Supreme Court’s opinion about those constitutions is irrelevant. But its opinion about the meaning of the U.S. Constitution is binding on all federal courts, and, 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 Constitution—then does that bar lower federal courts from ruling these laws unconstitutional? The answer from the *Kitchen* court was no: due to significant doctrinal developments since the ruling in *Baker*, that case no longer can be said to preclude a court from invalidating a state ban on same-sex marriage on federal constitutional grounds. *Baker* was decided when the right of same-sex couples to marry presented only the seed of a question; that seed has now flowered and must be considered anew. Every federal court in the last year to consider the relevance of *Baker* has reached the same conclusion.

The *Kitchen* court then reached the merits: are Utah’s statutory and constitutional bans on marriages (celebration and recognition) by same-sex couples unconstitutional? As in many other states, Utah’s anti-same-sex-marriage laws date to the mid-1990s, when Utah was caught up with other states in a national fervor to stop gay marriages from entering their borders. The bans were followed by a separate code provision announcing that the refusal to recognize same-sex marriages from other states follows from the “policy of the state” and that the ban also applies to “any law creating any legal status, rights, benefits, or duties that are substantially equivalent to those provided under Utah law to a man and a woman because they are married.” The ban was also enshrined into the Utah Constitution in a 2004 amendment designed to preclude not only judicial consideration as to the validity of a particular marriage, but also judicial consideration of the validity of the non-recognition rule itself. (In the Tenth Circuit ruling, the statutory and constitutional bans in Utah are collectively referred to as “Amendment 3.”)

The court began its analysis with a discussion of whether the fundamental right to marry—recognized by the Supreme Court in a series of cases beginning with *Loving v. Virginia*—includes the right to marry a person of the same sex. It drew on Supreme Court precedents noting that marriage “is the most important relation in life” and that the right to marry is “of fundamental importance of all individuals.” The Tenth Circuit focused on the level of generality at which the right to marry is typically discussed. It is not about the right to any particular type of marriage, but the right to marry in general. *Loving v. Virginia* (<http://supreme.justia.com/cases/federal/us/388/1/>), for example, in which the Court struck down Virginia’s ban on interracial marriage, was not about the right of a black person to marry a white person or vice versa, but the right all people to marry a person of their choosing. The logic of this reasoning means that the choice to marry might also include the right to marry a person of the same sex.

The fact that until recently a gay marriage would have been unthinkable does not mean it cannot now be recognized as within the fundamental right to marry. Indeed, the Supreme Court, in *Lawrence v. Texas*, said, of *Loving*, that “neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.” Nor can they save a law prohibiting marriages by same-sex couples.

Having concluded that the right to marry is fundamental and includes the right to marry a person of the same sex, the Tenth Circuit proceeded to the next step of constitutional analysis—a review of the fit between the state’s asserted goals and the means chosen to reach them. Here, the state failed to show a sufficient relation between the means and the ends. Three of its four goals related to the ostensible attempt by the state to tie marriage to procreation. But its own laws, the Tenth Circuit reasoned, belie the importance of that goal to the state. First cousins, for example, are permitted to marry in Utah only if they first establish their inability to procreate. Moreover, Utahans, like others, have the constitutional right to choose not to procreate—and Utah has made no attempt to screen out couples from marriage based on their intent or exercise of that right. Nor could Utah convince the court that biological procreation deserves special privilege given the state’s support for adoption by married couples.

## Conclusion

In the end, the Tenth Circuit's ruling joins many others—but ups the ante merely by coming from an appellate court. The court stayed its ruling pending a request for rehearing *en banc* (by the full circuit) or a petition to the U.S. Supreme Court to review the ruling. The Supreme Court may wait to weigh in, but review by the High Court on the issue is inevitable in the near future. There are similar cases pending on appeal in the Fourth, Fifth, Sixth, and Ninth Circuits. The federal courts so far have spoken with one voice, captured in the Tenth Circuit's observation that gay and lesbian couples “desire not to redefine the institution [of marriage] but to participate in it.” Increasingly, they are earning that right.



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