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Verdict

October 21, 2013

[Joanna L. Grossman](#)

Same-Sex Weddings at the Jersey Shore



As of today, gay and lesbian couples can get legally married in New Jersey. This development arises from a series of events, most importantly the refusal of the state's highest court to delay enforcement of a lower-court ruling that said the state's ban on same-sex marriage is unconstitutional. But in refusing to delay enforcement, the New Jersey Supreme Court has signaled its views on the underlying question: Can New Jersey constitutionally restrict same-sex couples to civil unions now that the federal government gives effect only to full marriages? Its answer seems to be "no."

The Road to Same-Sex Marriage in New Jersey: Many Steps

At the front end, New Jersey was quick to accept the idea of formal relationship recognition for same-sex couples. In 2004, it adopted a domestic partnership law (discussed [here](http://writ.news.findlaw.com/grossman/20040113.html) (<http://writ.news.findlaw.com/grossman/20040113.html>)), which allowed same-sex couples to register for a status that came with some, but not all, the benefits of marriage. (It was amended once to expand, but not equalize those rights.) But its early start was not prophetic. In fits and stops, the state has moved along the spectrum toward greater relationship rights for same-sex couples, but has lagged behind its northeastern neighbors, most of which went from no formal rights to full marriage equality with few stops along the way.

As in many other states, same-sex couples filed a lawsuit in New Jersey in the early 2000s, claiming that the state's ban on same-sex marriage violated the state constitution's guarantees of equal protection and due process. The plaintiff-couples in that case, *Lewis v. Harris* (<http://law.justia.com/cases/new-jersey/supreme-court/2006/a-68-05-doc.html>), achieved a limited victory. In a 2006 ruling (which I have written about [here](http://writ.lp.findlaw.com/commentary/20061031_mcclain.html) (http://writ.lp.findlaw.com/commentary/20061031_mcclain.html)), the New Jersey Supreme Court held that it was a violation of equal protection for the legislature to deny same-sex couples the rights and benefits of marriage.

Note that the violation identified by the court was the denial of "rights and benefits" rather than the denial of "marriage" per se. It was this type of distinction that led the Vermont legislature, in the wake of a similar ruling, to enact the first civil union law in 2000. The New Jersey legislature followed Vermont's example and passed a law in 2006 to create a new status in the state—the civil union—reserved for same-sex couples and heterosexual couples over age 62 who did not want to risk losing federal benefits derived from a prior marriage that ended in divorce or death.

The civil union law trumped the domestic partnership law. Existing domestic partnerships were still recognized, but only civil union was available to couples not yet registered. For most couples, the civil union was an improvement, offering a broader array of benefits, as well as mutual obligations.

Civil unions proved popular, but problematic. The New Jersey Civil Union Review Commission, established by the legislature in 2006, **released a report** (<http://www.nj.gov/lps/dcr/downloads/CURC-Final-Report-.pdf>) in 2009 concluding that civil unions were simply not as good as marriages. Rather, the report concluded, because the civil union alternative “invites and encourages unequal treatment of same-sex couples and their children,” the legislature and governor should change the law to permit same-sex couples to marry. Moreover, the Commission implored the state to act “expeditiously because any delay in marriage equality will harm all the people of New Jersey.” The report focused on a variety of problems—the stigmatizing effects of a law premised on “separate but equal”; the inability of civil unions to capture the intangible benefits of a status like marriage that is “universally understood” and has “powerful meaning;” and the detriment to children of same-sex couples whose parents have been consigned to lesser status.

Meanwhile, public support for same-sex marriage grew and grew. As early as 2006, sixty percent of New Jersey voters supported recognition of same-sex couples, and forty-four percent supported full marriage equality; those numbers have only grown since then.

United States v. Windsor: Federal Recognition for Same-Sex Marriage

In June 2013, the U.S. Supreme Court handed down its ruling 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 was unconstitutional to the extent it precluded recognition of same-sex marriages by the federal government. The same day, it issued an opinion in ***Hollingsworth v. Perry*** (<http://supreme.justia.com/cases/federal/us/570/12-144/>), in which it could have ruled, but did not, that states cannot constitutionally ban same-sex marriage at all. Instead, the Court indirectly brought same-sex marriage to California by holding that the group trying to defend the state referendum (Prop. 8) banning it did not have standing to appeal the lower court’s ruling, which had held that Prop. 8 was unconstitutional.

While the effects of *Perry* are quite limited, the potential effects of *Windsor* are quite broad. The ruling in *Windsor* was rooted in the idea that Congress’s decision to refuse effect to same-sex marriages while deferring to state marriage law in virtually all other circumstances could be explained only by animus. And this, under the Court’s earlier ruling in ***Romer v. Evans*** (<http://supreme.justia.com/cases/federal/us/517/620/>), was a violation of the Equal Protection Clause of the Fourteenth Amendment.

The most immediate effect of the ruling in *Windsor* was that federal agencies had to begin giving effect to same-sex marriages. It was not clear, however, whether the ruling was limited to marriages celebrated in or recognized by one’s state of residence, or to any marriage as long as it was valid where celebrated. As it turns out, federal agencies had not been uniform in their treatment of marital status, with some following a place-of-domicile rule and others following a place-of-celebration rule. The bureaucratic fallout of *Windsor* is still playing itself out, although several agencies, including the IRS, have announced that they will recognize all same-sex marriages whether or not recognized by the couple’s home state. (The IRS ruling and other developments are discussed **here** (<http://verdict.justia.com/2013/09/03/falling-dominoes-same-sex-spouses-gain-more-recognition-rights>)).

The Effect of Windsor on New Jersey: Garden State Equality v. Dow

In the *Lewis* ruling, discussed above, the New Jersey Supreme Court held that as long as the state provided the same rights and benefits to same-sex couples, it could withhold the label “marriage.” This ruling was premised in part on the existence of DOMA. If the federal government refused to recognize same-sex marriages (which it did under Section Three of DOMA), then the state could effectively create an identical status under state law. Marriage, in other words, could never lead to federal benefits, so as long as the state parceled out the same benefits to married couples and civil union partners, it was granting a kind of equality sufficient for state constitutional purposes.

When DOMA fell, however, the parity between civil unions and marriages fell with it. Couples with the benefit of a full marriage can now benefit from a wide variety of federal rights, including those related to income and estate taxes, immigration, and social security. But at least in some cases, those benefits will be restricted to those whose state of residence recognizes their same-sex marriage as lawful. And the federal agencies that have spoken so far have made clear that they will not extend marital benefits to those in alternative statuses like civil unions. Thus, the parity the New Jersey legislature tried to create after *Lewis* is no longer possible. Civil union partners have state-level benefits and obligations only, while married couples have state and federal rights and obligations.

It is this inequality that ultimately led to the issuance of marriage licenses in New Jersey. A gay rights advocacy group, Garden State Equality, filed a lawsuit in 2011, in which it alleged that civil unions are constitutionally unequal to marriages. Although this case might seem to be redundant of the questions litigated in *Lewis*, the decision in *Windsor* created new questions. After *Windsor*, the plaintiffs in *Garden State Equality* moved for summary judgment, on the grounds that civil union couples are now being denied federal benefits that their married counterparts receive. In an order issued on September 27, 2013, a New Jersey trial court judge ruled in their favor, ordering that state officials begin issuing marriage licenses to eligible same-sex couples on October 21, 2013.

The New Jersey Supreme Court Declares *Windsor* a Game-Changer

The state's attorney general, working in the administration of Chris Christie, a vocal opponent of same-sex marriage, sought a stay from the state's supreme court to prevent the issuance of marriage licenses until the trial court's ruling could be considered on appeal. On October 18, 2013, the New Jersey Supreme Court unanimously **denied the stay** (<http://www.motherjones.com/documents/808136-supreme-court-opinion-on-stay-motion>).

A primary consideration in whether to grant a stay is whether the moving party—in this case, the state of New Jersey—has a reasonable probability of succeeding on the merits. In other words, when the appeal is fully briefed and considered, will the state's highest court continue to allow the legislature to restrict same-sex couples to civil unions? Of course, it is the state's highest court that is then in the position of predicting what the state's highest court will do at a future stage of the litigation. And what it predicted about itself is that the civil union versus marriage distinction will be viewed as unconstitutional now that federal benefits turn on the label marriage, not the qualitative aspects of the status.

The court in the recent ruling noted the reasoning of the (same) court in *Lewis*. The domestic partnership law in place at the time “failed to bridge the inequality gap” between same-sex and opposite-sex couples, and the state offered no legitimate need to offering an “unequal legal scheme of benefits and privileges that disadvantage[d] committed same-sex couples.” It thus ordered the state to provide to same-sex couples “on equal terms, the full rights and benefits enjoyed by heterosexual married couples.” Only because it could control the parity between the two statuses—without the complication of federal benefits—was the legislature given a choice between lifting the restriction on civil marriage or creating an alternative, identical status with a different name. Now, the court reasoned, it is the label “civil union” that results in the denial of federal benefits and thus results in an inequality between the two statuses. In the court's words, the “state's statutory scheme effectively denies committed same-sex partners in New Jersey the ability to receive federal benefits now afforded to married partners.”

Conclusion

Although the court's ruling in *Garden State Equality* is only on whether the lower-court ruling can be implemented immediately or must be put on hold pending an appeal, the court's reasoning for denying the stay strongly supports the lower court's ruling on the merits. The court concluded by noting that it will hold additional arguments on the merits in January 2014, but unless there is another game-changer, the most likely outcome is that the court will hold that the civil union law violates the state constitution. Such a ruling would leave only one option for the New Jersey legislature: open civil marriage to same-sex couples.

There was much talk in the media in the last few days of political splits in the New Jersey legislature, and the

vote changes that would be necessary not only to pass a same-sex marriage bill, but also to override a promised veto by Governor Chris Christie. None of this would have mattered if the court went on to hold the current system unconstitutional in a full decision on the merits. Only an amendment to the state constitution could negate such a ruling, and, given the strong support among New Jersey voters for same-sex marriage, that would be an unlikely occurrence. But all this is now moot as Governor Christie decided, hours after the first weddings took place, to drop the state's appeal.

Weddings will begin today in New Jersey and are here to stay.



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