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Breaking Unanimous String of Victories, Federal Judge Rules Against Marriage Equality in Louisiana

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BY ARTHUR S. LEONARD | Parting company from every federal district court judge since last summer's Supreme Court ruling in the Defense of Marriage Act case, US District Judge Martin L. C. Feldman, rejected a challenge to Louisiana's state constitutional and statutory ban on same-sex marriage.

Appointed to the federal bench by President Ronald Reagan in 1983, Feldman, in a September 3 decision, insisted that existing precedents preserve Louisiana's right to treat the issue as a political question to be resolved by its voters and elected legislators.

Feldman concluded that no fundamental right was at stake -- unlike some other federal judges who have relied on a theory about the fundamental right to marry -- and he said that the policy of barring same-sex couples from marrying need not be subjected to heightened judicial scrutiny, which would have made it difficult for Louisiana to defend.

Instead, he found that the ban had a rational justification in "linking children to an intact family formed by their biological parents" and "of even more consequence" because Louisiana has "a legitimate state interest in safeguarding that fundamental social change, in this instance, is better cultivated through democratic consensus."

Feldman's opinion is essentially a lengthy salute to federalism, which, he proclaims, is "not dead" -- and gives Louisiana the authority to establish its own marriage policy. He relies, among other things, on the part of Supreme Court Justice Anthony Kennedy's DOMA opinion that focused on the historical role of the state in defining and controlling the institution of marriage.

"The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens," Kennedy wrote. "The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the 'protection of offspring, property interests, and the enforcement of marital responsibilities.'"



US District Judge Martin L.C. Feldman.

This logic was key to Kennedy's conclusion that a federal law refusing to recognize state-approved marriages was an unusual intrusion by the federal government into a role traditionally reserved to the states.

To bolster his reliance on Kennedy, Feldman cited Chief Justice John Roberts' concurring opinion in DOMA, which argued that the case was essentially a federalism case that had nothing to say about whether states were required to allow or recognize same-sex marriages.

Feldman pointed out that the Supreme Court has notably refrained from finding that sexual orientation discrimination merits strict scrutiny review by the courts, and that existing precedents in the Fifth Circuit, which has jurisdiction over Louisiana, apply a standard of review that is deferential to existing law.

Unlike those judges -- including the majority in the Fourth and 10th Circuit Courts of Appeals, ruling in the Virginia, Utah, and Oklahoma lawsuits -- Feldman concluded that the case was not about a fundamental right to marry but rather about a new claim to the right of "same-sex marriage," which he found was not deeply rooted in history or tradition.

Feldman also rejected the plaintiffs' argument that the case involved sex discrimination, which would have required heightened judicial scrutiny.

In the 1967 *Loving v. Virginia* interracial marriage ruling, the Supreme Court, applying heightened scrutiny, rejected the assertion that miscegenation laws were not discriminatory since members of all races were forbidden from marrying outside their race. Feldman would not apply the same analysis here, writing, "Even ignoring the obvious difference between this case and *Loving*, no analogy can defeat the plain reality that Louisiana's laws apply evenhandedly to both genders -- whether between two men or two women."

On the question of whether the marriage ban had a rational basis to survive the deferential standard of review he applied, Feldman treated the question of same-sex couples' suitability as parents relative to different-sex couples essentially as a jump ball and rejected the idea that a policy approved by Louisiana voters "could only be inspired by hate and intolerance."

"Even the fact that the state's precepts work to one group's disadvantage does not mandate that they serve no rational basis," he wrote. "The Court is persuaded that a meaning of what is marriage that has endured in history for thousands of years, and prevails in a majority of states today, is not universally irrational on the constitutional grid."

Feldman clearly was not to be stampeded into ruling for the plaintiffs based on the long string of marriage equality victories that preceded his ruling.

"This Court has arduously studied the volley of nationally orchestrated court rulings against states whose voters chose in free and open elections, whose legislatures, after a robust, even fractious debate and exchange of competing, vigorously differing views, listened to their citizens regarding the harshly divisive and passionate issue of same-sex marriage," he wrote. "The federal court decisions thus far exemplify a pageant of empathy; decisions impelled by a response of innate pathos."

Those courts erred, in Feldman's view, by stepping outside their appropriate role and apparently assuming "the mantle of a legislative body."

Plaintiffs, represented by private attorneys led by Richard Gerard Perque of New Orleans, will likely appeal this case to the Fifth Circuit, which recently received an appeal by the State of Texas from a pro-marriage equality ruling there. If the plaintiffs move quickly, it is possible their appeal could be consolidated with that case.

Meanwhile, rulings are anticipated from the US Courts of Appeals for the Sixth and Seventh Circuits, both of which heard arguments in marriage equality cases during August. Most legal observers expect the Seventh Circuit to rule for the plaintiff couples -- as did the Fourth and 10th Circuits -- and anticipate that the Sixth Circuit may rule against them, based on the oral arguments and the three judges who sat on the panel.

On September 8, the Ninth Circuit Court of Appeals will hear arguments in marriage cases from Idaho, Nevada, and Hawaii (that last case surviving the enactment of marriage equality there). Given that the Ninth Circuit now has precedent applying heightened scrutiny in sexual orientation discrimination cases, it's likely that a favorable decision will result.

And in the 11th Circuit, the State of Florida will appeal a federal pro-marriage equality ruling there (which came on top of a string of state court victories for same-sex couples).

The Supreme Court holds its first conference of the new term on September 29, when it will begin to decide which appeals to hear. Petitions are pending by Utah, Oklahoma, and Virginia seeking review of appellate rulings from 10th and Fourth Circuits in favor of marriage equality. The high court could move quickly on one or more of those petitions or wait to see what develops in other circuits. If an appeal is not accepted until November or December, it is likely that a decision would drag out until the end of the term next June.