Judgments, Precedents, Federalism and Same-Sex Marriage:
A Well-Known, but Often Forgotten, Secret of the Judicial System Revealed
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Lawyers know many things. More importantly, lawyers know that many things non-lawyers believe, or assume, about the judicial system, “just ain’t so.”¹ I was reminded of this by a few casual conversations that I recently had with non-lawyer friends about the decision of the United States District Court for the District of Nebraska in Citizens for Equal Protection, Inc. v. Bruning.²

In Bruning, the court held Article I, Section 29, of the Nebraska Constitution (Section 29) unconstitutional on several grounds. (The specific grounds and their correctness or incorrectness are irrelevant here.) Section 29, adopted by referendum in 2000, provides: “Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.”³

¹ “It ain’t what you don’t know that gets you into trouble. It’s what you know for sure that just ain’t so.” — Mark Twain

My non-lawyer friends assume that the district court’s decision has settled the constitutionality of Section 29 unless and until it is reversed by a higher court (the case now being on appeal). Although not conversant with any technical rules governing the effect of federal and state judgments, the effect of lower federal court decisions as precedents in state courts on federal issues, or the relationships between the federal and state courts in general, they assume everyone has to “obey” the Bruning decision until a higher court reviews it. This, however, just ain’t so.

What lawyers understand that laymen do not is the difference between the binding effect of a judgment and the effect of a decision as precedent.

When a judgment is rendered in a civil action, the judgment has two kinds of effects on the parties. One kind of effect is called “claim preclusion.” Without being unduly technical, this means that the claim asserted in the action cannot be raised again in a future action. If the plaintiff has lost the first action, the plaintiff is barred from bringing a subsequent action on the same claim or any part thereof. If the plaintiff has won the action, as in Bruning, the defendant must obey the judgment unless and until it is overturned by a higher court. If the plaintiff wins a judgment for money and the defendant refuses to pay the judgment, the defendant’s assets may be seized under the authority of the judgment to satisfy the debt. If the plaintiff has obtained some other sort of judgment — in Bruning a judgment for a declaration of unconstitutionality and an injunction against certain Nebraska officials — those judgments can also be enforced by appropriate process or future relief against a recalcitrant defendant.

The second kind of effect on the parties is called “issue preclusion.” This simply means that any issues of fact or law decided in the case cannot be relitigated by the losing party in any future case. The loser must appeal to a higher court to obtain relief from any perceived error in deciding the issues. The bottom line is that the claim and issue preclusive, or res judicata, effect of the judgment is to render the judgment enforceable in one way or another against the parties to an action, wholly apart from the effect that the judgment has as a precedent on the points of law it decides in other courts in cases between other parties. (There are several other preclusion doctrines that affect parties, but these are irrelevant to the discussion here.)

What lawyers understand that laymen do not is the difference between the binding effect of a judgment (i.e., the res judicata effect of the decision) and the effect of a decision as precedent — the latter usually being referred to as the stare decisis effect of a decision. Lawyers also understand many valuable things about the structure of the judicial system, including the matters concerning the constitutional and statutory relationships existing between the state and federal courts. These things that lawyers understand allow them to know that while Bruning is binding on the parties to the case as a matter of res judicata (the effect of the judgment as claim and issue preclusive), it is not binding on non-parties or on the Nebraska state courts in future cases unrelated to Bruning.

In Citizens for Equal Protection, Inc. v. Bruning, the plaintiffs, certain non-profit corporations whose stated mission is to eliminate discrimination based on sexual orientation, challenged the federal constitutionality of Article I, § 29 of the Nebraska Constitution, which provides that: “[o]nly marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.” In response to the plaintiffs action, the United States District Court for the District of Nebraska declared Section 29 to be unconstitutional on several grounds and permanently enjoined the attorney general and governor of Nebraska from enforcing the provision. The case is on appeal with the Eighth Circuit Court of Appeals.
As stated previously, the effect of a judgment as precedent is usually called the *stare decisis* effect. Broadly speaking, the effect of a judgment as precedent can either be a binding effect or an effect as "persuasive authority."

When the precedent has a binding effect, it must be followed in all future cases that are not significantly different. When the precedent has an effect as persuasive authority, it can be followed by other courts, but need not be; its force depends entirely on the degree to which other courts find it convincing on the point of law it decides.

Thus, if the United States Supreme Court decides an issue of federal law in a case, every other court in the judicial system is bound to follow the decision in indistinguishable cases. If the Nebraska Supreme Court decides an issue of Nebraska law in a case, every other court dealing with the same point of Nebraska law is obligated to follow the decision as binding authority. However, if the Nebraska Supreme Court decides an issue of federal law, that decision will bind lower state courts in Nebraska as a matter of precedent, but will not be binding authority in the federal courts in Nebraska or anywhere else. It will be only persuasive authority in the federal courts.

This last point deserves some further explanation. It might be thought that because Article VI of the U.S. Constitution makes federal law supreme and binding on the state courts, those courts would be bound to follow lower federal court decisions on the meaning of that law rather than consider those decisions merely persuasive authority. This, however, does not follow. There is a difference between the obligation of a state court to consider federal law supreme and the process of determining what the content of federal law is.

At the Constitutional Convention in 1787, some delegates wanted to mandate that there be both a federal Supreme Court and lower federal courts. Others wanted only a Supreme Court with cases arising under federal law to originate in the state courts. James Madison suggested the compromise that was eventually embodied in Article III of the Constitution: Article III mandates
that there be a Supreme Court, but leaves it to Congress to decide whether to create lower federal courts and what their structure should be.

The Constitution thus assumes that Congress may leave issues of federal law to be litigated originally in the state courts, and it follows that the state courts must have authority (at least if Congress does not take it away from them) to determine for themselves the meaning and content of federal law, including federal constitutional law, until the U.S. Supreme Court tells them they are wrong. True, it is that Congress arguably has the constitutional power to grant review of state decisions on federal matters to the lower federal courts, or to make federal lower court decisions absolutely binding on state courts, but it has never done so and is not likely to do so in the future. Nor, for reasons explained below, can the lower federal courts, except in extremely rare cases, force the state courts to abide by their view of federal law.

To clarify the previous points, we may consider a simple example of a case that might arise in Nebraska state court involving the constitutionality of Section 29, but in which the doctrines of claim and issue preclusion would not operate.

Assume that S-1 and S-2 are same-sex partners living in Massachusetts, where same-sex marriage is legal. S-1 and S-2 enter into a valid marriage in Massachusetts and later move to Nebraska, where S-2 tragically dies intestate. S-1 seeks to probate S-2's estate in Nebraska state court and claims intestate inheritance rights under Nebraska law as the surviving spouse of S-1. The relatives of S-2 who would inherit if S-2 is not married challenge this claim, asserting that the Massachusetts marriage is invalid in Nebraska under Section 29. S-1 replies that Section 29 is unconstitutional, citing Bruning (which we will assume has not yet been affirmed or reversed on appeal). Note first that Bruning can have no claim
or issue preclusion effect on this case because neither the claim nor the parties are the same in the state proceeding.

Furthermore, under the existing structure of the judicial system, the Nebraska state courts are not bound to follow *Bruning*, though they may do so if they find it persuasive. They may, in other words, find Section 29 constitutional and refuse to recognize the Massachusetts marriage.

The same would be true if the Eighth Circuit Court of Appeals has reviewed and affirmed the judgment in *Bruning*, but the case has not yet been reviewed by the Supreme Court. The Eighth Circuit, although an exceedingly distinguished court, is still a lower federal court, and it is, therefore, not the final authority on the meaning and content of federal law. Thus, only the U.S. Supreme Court can authoritatively tell the Nebraska courts that their view of the federal constitutional issues concerning Section 29 is wrong.

Note also that the hypothetical situation described is not a fit case for federal subject-matter jurisdiction, so that it could not originally be brought in U.S. District Court or removed to that court. The mere fact that an issue of federal law is present in a case does not make the case a proper “federal question” case. When the presence of federal law is the basis of federal subject-matter jurisdiction, the federal law must (in one of a couple of ways) contribute to the plaintiff’s claim. The plaintiff’s claim is a state claim asserted in a probate proceeding. Nor can the case be removed to federal court on the basis of diversity of citizenship of the parties, even should S-1 and the relatives of S-2 be citizens of different states. There is an exception to the federal diversity jurisdiction in probate cases that prohibits such cases from being brought originally in or removed to federal court. Likewise, S-1 cannot bring a federal action to enjoin the state proceeding or otherwise force the state courts to follow *Bruning*. Federal actions to enjoin state court proceedings are possible only under rare circumstances. The rules governing equitable relief against pending state actions require that the plaintiff show unconstitutional action (normally on the part of state officials, who are not parties here) taken in bad faith or for purposes of harassment, or show that some other unusual circumstances are present. These equitable rules are not satisfied simply because a party or state court takes a different view of the content of federal law than a lower federal court has taken in an unrelated action.

In summary, under the rules regulating the effect of judgments and precedent, the Nebraska courts are free in the hypothetical situation described, as well as many others that might be described, to adopt a view of the U.S. Constitution different from the one taken by the U.S. District Court for the District of Nebraska.

Of course, it is also true that to the extent that the U.S. District Court engaged in interpretations of Section 29 for the purposes of making its decision, the Nebraska courts are free also to disagree with those interpretations. Should the Nebraska Supreme Court interpret Section 29 in a manner different from the U.S. District Court, the latter court and all other courts considering the meaning of Section 29 would be bound to follow the Nebraska decision, because the Nebraska Supreme Court is the highest and final authority on the meaning and interpretation of Nebraska law.

This last point might be important if the interpretation that the federal court placed on Section 29 was erroneous in a manner that affected the court’s application of the federal constitution. Under such circumstances, a different interpretation by the Nebraska Supreme Court might render Section 29 constitutional.

Recently, the Nebraska Supreme Court had occasion to acknowledge these principles in two cases decided on June 24, 2005.

In *Strong v. Omaha Construction Industry*
Pension Plan,\(^4\) the court confronted an issue under the Employee Retirement Income Security Act of 1974 (ERISA)\(^5\) upon which the lower federal courts are divided and the Supreme Court of the United States has not spoken. The court acknowledged that some of its earlier decisions had stated that lower federal court decisions on issues of federal law were binding on Nebraska courts, but observed that those decisions had been rejected by later cases. The court further noted that in the absence of a U.S. Supreme Court decision on a matter of federal law, it was not bound to follow lower federal court decisions on the issue.\(^6\)

In *State of Nebraska v. Senters*,\(^7\) a case decided the same day as *Strong*, the court further observed that while it was not bound to follow the decisions of the Eighth Circuit Court of Appeals, it would do so in the case before it because it found those decisions persuasive on the federal issue involved in the case.\(^8\)

As both *Strong* and *Senters* illustrate, today, more than 200 years after the U.S. Constitution was framed and ratified, the “Madisonian Compromise” continues to govern relations between state and federal courts.

This is one of many things that lawyers know that non-lawyers do not.\(^9\)

\(^6\) See *Strong*, 270 Neb. at 9. In a common sense observation, the court also observed that it could not realistically follow lower federal court decisions on the issue in the case, because the lower federal courts were split on the issue.
\(^7\) 270 Neb. 19 (2005).
\(^8\) Id. at 25.
\(^9\) The reader may think that my tone here is insincere, and that I do not really believe that lawyers fully understand the things I have spelled out here. True, it is that with the miracle of electronic research, one can find a decision saying literally anything on any point. I myself have found a couple of state decisions in which the state courts state that they are bound to follow the decisions of the lower federal courts covering the geographical area encompassed by the state on matters of federal law. These decisions are wrong. A state court can voluntarily adopt the view that it is bound by lower federal decisions on federal law, but it is not compelled to do so by the United States Constitution. Notwithstanding these decisions, I assure the reader my remarks about lawyers in this essay are completely sincere. Of course, everyone occasionally needs instruction, or reinstruction, in the obvious.

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