

SIXTH CIRCUIT DENIES CONSTITUTIONAL RIGHTS FOR SAME-SEX COUPLES AND SAYS VOTERS SHOULD DEFINE MARRIAGE

“From the vantage point of 2014, it would now seem, the question is not whether American law will allow gay couples to marry; it is when and how that will happen.”¹ In 2015, the Supreme Court of the United States will address this question. In *Deboer v. Snyder*, the United States Court of Appeals for the Sixth Circuit held that states have the right to define marriage as they see fit, and this holding will be reviewed by the Supreme Court.

Thirty-six states and Washington, D.C., have expanded their definition of marriage to include same-sex couples.² Others, such as Michigan, have yet to do so.³ While it has traditionally been up to each state to define marriage as it sees fit, there have been an increasing number of cases challenging states’ anti-gay marriage laws.⁴ Through various methods, the same challenge has been made: when a state defines marriage to be between a man and a woman, it violates the protections afforded to the people by the Fourteenth Amendment.⁵

Each state in the Sixth Circuit, through common law, statutes, or constitutional provisions, defines marriage as a relationship between a man and a woman.⁶ Sixteen same-sex couples challenged anti-gay marriage laws in Michigan, Ohio, Kentucky, and Tennessee, arguing that excluding same-sex couples from the definition of marriage violates their Fourteenth Amendment rights.⁷ While the circumstances that brought each couple in front of the courts vary, the Sixth Circuit consolidated the cases in *Deboer v. Snyder*.⁸ In a 2-1

1. *DeBoer v. Snyder*, 772 F.3d 388, 395 (6th Cir. 2014), *cert. granted*, No. 14-571, 2015 WL 213650 (U.S. Jan. 16, 2015).

2. *See Same-Sex Marriage Laws*, NAT’L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/research/human-services/same-sex-marriage-laws.aspx> (last updated Jan. 19, 2015).

3. *See id.*

4. *See* ALISON M. SMITH, CONG. RESEARCH SERV., R43481, SAME-SEX MARRIAGE: A LEGAL BACKGROUND AFTER *UNITED STATES V. WINDSOR* 5–6 (2014), available at <http://www.fas.org/sgp/crs/misc/R43481.pdf>.

5. *DeBoer*, 772 F.3d at 396.

6. *Id.*

7. *Id.*

8. *Id.*

decision that has created a circuit split, the Sixth Circuit upheld the anti-gay marriage laws in these states.⁹ The court held that by defining marriage as a relationship between a man and a woman, the states did not violate the protections afforded to these couples by the Fourteenth Amendment.¹⁰

The Equal Protection and Due Process clauses of the Fourteenth Amendment have been consistently addressed in challenges to anti-gay marriage laws. The Due Process Clause acts as a safeguard against the arbitrary denial of life, liberty, or property.¹¹ The Equal Protection Clause guarantees the people equal protection of the laws and has been the basis for many decisions rejecting discrimination against people belonging to various groups.¹² In analyzing these two clauses in same-sex-marriage cases, “the [Supreme] Court has intertwined both theories.”¹³ Essentially, these cases involve liberty rights.¹⁴ When analyzing these rights, courts take principles from either or both due process and equal protection to decide whether a law violates the Fourteenth Amendment.¹⁵

In deciding *DeBoer v. Snyder*, the Sixth Circuit had to reconcile potentially conflicting Supreme Court precedent.¹⁶ In *Baker v. Nelson*,¹⁷ the Minnesota Supreme Court rejected claims that failing to recognize same-sex marriage violates the Fourteenth Amendment.¹⁸ The U.S. Supreme Court dismissed the appeal for want of a substantial federal question.¹⁹ In doing so, the Court suggested that the marriage-equality question had no constitutional dimension. In

9. *See id.* (holding that states may limit marriage to one man and one woman).

10. *See id.* at 414 (stating that states may define marriage without imposing disadvantages on gay couples).

11. *See* Daniel J. Crooks III, *Toward “Liberty”: How the Marriage of Substantive Due Process and Equal Protection in Lawrence and Windsor Sets the Stage for the Inevitable Loving of Our Time*, 8 CHARLESTON L. REV. 223, 248 (2014).

12. *See id.* at 281–82 (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

13. *Id.* at 225.

14. *See DeBoer*, 772 F.3d at 411.

15. *Cf.* Crooks, *supra* note 11, at 225–26 (noting a shift “from group-based civil rights to universal human rights” via the liberty analysis).

16. *DeBoer*, 772 F.3d at 411 (arguing that *Loving* references “the procreative definition of marriage”).

17. 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972).

18. *Id.* at 186 (stating that marriage involves deeply rooted concepts of procreation and that identifying those authorized to marry does not create irrational discrimination).

19. *Baker v. Nelson*, 409 U.S. 810 (1972).

contrast, in *United States v. Windsor*,²⁰ the Court ruled that part of the Defense of Marriage Act of 1996,²¹ which refused to recognize same-sex marriages authorized by state law for purposes of federal statutory benefits, violated both the Due Process and Equal Protection clauses of the Fifth Amendment.²² The Sixth Circuit rejected *Windsor* and chose to follow *Baker*.²³ The majority reasoned that the *Windsor* Court invalidated a federal law that refused to respect state laws permitting gay marriage, while the *Baker* Court upheld a state's right to define marriage.²⁴ Thus, the result was the same: each state has a right to create its own laws on marriage.²⁵

The Sixth Circuit stated, "On October 6, 2014, the Supreme Court denied the petitions for writs of certiorari in 1,575 cases, seven of which arose from challenges to decisions of the Fourth, Seventh, and Tenth Circuits that recognized a constitutional right to same-sex marriage."²⁶ Since the Supreme Court decided not to accept these appeals, there is no way to tell its stance on whether the definition of marriage should be left to the states, be changed through legislative or voter action, or be changed through court decision.²⁷ Although four other circuits have recognized a constitutional right to same-sex marriage, they have all done so for varying reasons.²⁸ The *DeBoer* majority considered each of these reasons in their opinion.

The *DeBoer* majority considered what the original meaning of the Fourteenth Amendment's Due Process Clause was when it was ratified.²⁹ The majority reasoned that the people who adopted the Fourteenth Amendment never understood it to require states to change their definition of marriage.³⁰ From the founding of the country up until 2003, marriage has been traditionally defined as a relationship between a man and a woman.³¹ Therefore, the

20. 133 S. Ct. 2675 (2013).

21. 1 U.S.C.A. § 7 (Westlaw 2015).

22. *Windsor*, 133 S. Ct. at 2695.

23. *Cf. DeBoer v. Snyder*, 772 F.3d 388, 401 (6th Cir. 2014) (reasoning that *Windsor* does not overrule *Baker*), *cert. granted*, No. 14-571, 2015 WL 213650 (U.S. Jan. 16, 2015).

24. *Id.* at 400.

25. *See id.*

26. *Id.* at 402 (internal quotation marks omitted).

27. *Id.*

28. *Id.*

29. *See id.* at 403.

30. *Id.*

31. *Id.* at 404.

Fourteenth Amendment allows for marriage to be defined this way, even if it does not require this definition.³² Further, the majority viewed marriage as a “social institution defined by relationships between a man and a woman.”³³ The Constitution was intended to cement the limitations on government and, like a contract, is not to be changed “unless and until the people, like contracting parties, choose to change the contract through the agreed-upon mechanisms for doing so.”³⁴ So the majority concluded that it is the people that must make changes to their states’ laws to adapt to new social norms, and such a change should not be made by judicial decree.³⁵

In rejecting the majority’s analysis of original meaning, the dissent made two arguments. First, the dissent points out that when the Fourteenth Amendment was adopted, people did not anticipate same-sex marriage, just as they did not anticipate school desegregation or the end of miscegenation laws.³⁶ Further, the Fourteenth Amendment has been frequently litigated in the years that followed its ratification.³⁷ This extensive litigation was necessary to analyze race-based constitutional protections.³⁸ In fact, the meaning of the Fourteenth Amendment has historically been changed through “judicial decree, not by the democratic election process . . . which the majority suggests.”³⁹ And the majority failed to address the real issue: “whether a state’s constitutional prohibition of same-sex marriage violates equal protection under the Fourteenth Amendment.”⁴⁰ Instead, the majority provided a lengthy discussion about who should decide, and in turn they “view[ed] the plaintiffs as social activists who have somehow stumbled into federal court, inadvisably, when they should be out campaigning to win the ‘hearts and minds’ of Michigan, Ohio, Kentucky, and Tennessee voters.”⁴¹ But this “wait and see” approach fails to consider what is at stake for the sixteen couples and their children.⁴²

32. *Id.*

33. *Id.* at 395.

34. *Id.* at 403.

35. *Id.*

36. *Id.* at 431 (Daughtrey, J., dissenting) (citing *Loving v. Virginia*, 388 U.S. 1 (1967)).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 421.

41. *Id.*

42. *Id.*

Second, the dissent addressed the majority's view of marriage.⁴³ As the dissent points out, "there is not now and never has been a universally accepted definition of marriage."⁴⁴ Marriage is viewed differently around the world and has evolved over time.⁴⁵ "In early Judeo-Christian law and throughout the West in the Middle Ages, marriage was a religious obligation, not a civil status."⁴⁶ Historically, marriages were viewed as economic arrangements rather than unions based on love.⁴⁷ Women did not have any rights in marriage and were the property of their husbands.⁴⁸ For example, women were unable to enter into contracts on behalf of themselves or their husbands and were unable to hold an interest in property.⁴⁹ In marriage, a woman gained the support of the man, while the man gained the woman's property and labor.⁵⁰ Further, at common law a married woman became the "sexual property of her husband," meaning that "she had a duty to have intercourse with [her husband]."⁵¹ In fact, at common law, a husband could not be prosecuted for raping his wife because marriage was viewed as a blanket of consent.⁵²

Until the end of the Civil War in 1865, slaves were prohibited from entering into legal marriages.⁵³ This led to the tradition of "jumping the broomstick" to demonstrate a slave couple's commitment.⁵⁴ And this tradition "originated in England, where civil marriages were not available until the enactment of the Marriage Act of 1837."⁵⁵ Thus, the majority's view of traditional marriage "seems misplaced, if not naïve."⁵⁶ "The legal status of marriage has been through so many reforms that the marriage of same-sex couples merely constitutes the latest wave in a vast sea of change."⁵⁷

43. *Id.* at 431.

44. *Id.*

45. *Id.* at 431–32.

46. *Id.* at 431.

47. *Id.* at 432.

48. *Id.* at 432–33.

49. *Id.*

50. *Id.*

51. *Id.* at 432.

52. *Id.* at 433.

53. *Id.*

54. *Id.*

55. *Id.* at 434.

56. *Id.*

57. *Id.*

Having decided that the Fourteenth Amendment did not embody a fundamental right of same-sex marriage, the majority ruled that rational-basis review should apply. This standard is low, requiring that the law need only be rationally related to a legitimate government interest.⁵⁸ The reasoning behind rational-basis review is that “governments will not be placed in the dock for doing too much or for doing too little in addressing a policy question.”⁵⁹ According to the majority, the rational basis for defining marriage as a relationship between a man and a woman was not to regulate love but to regulate sex: more specifically, raising children.⁶⁰ The states create a status, marriage, and then create benefits for people who are given that status so that they will be encouraged to take responsibility for the children they create.⁶¹ This does not make the states irrational, only aware “of the biological reality that couples of the same sex do not have children in the same way as couples of opposite sexes and that couples of the same sex do not run the risk of unintended offspring.”⁶²

But the majority failed to acknowledge that extending state benefits and subsidies to same-sex couples would further the state’s interest in encouraging marriage status for child-rearing purposes. In fact, “[t]wo million [gay, lesbian, and bisexual] people have expressed an interest” in adoption.⁶³ As the director of both the Child Advocacy Law Clinic and the Child Welfare Appellate Clinic at the University of Michigan Law School testified in the *DeBoer* trial, “[J]ust under 14,000 foster children reside in Michigan, with approximately 3,500 of those being legal orphans.”⁶⁴ Further, “same-sex couples in Michigan are almost three times more likely than opposite-sex couples to be raising an adoptive child and twice as likely to be fostering a child.”⁶⁵ “Michigan would save money by moving children from foster care or state care into adoptive families . . .”⁶⁶ But since same-sex couples are deprived of the marriage

58. *See id.* at 404 (majority opinion).

59. *Id.* at 405.

60. *See id.* at 404.

61. *Id.* at 405.

62. *Id.*

63. *15 Facts About LGBT Parents*, RAISEACHILD.US, <https://www.raiseachild.us/press-relations/15-facts-about-lgbt-parents/> (last visited Jan. 22, 2015).

64. *DeBoer*, 772 F.3d at 424 (Daughtrey, J., dissenting).

65. *Id.* at 425.

66. *Id.*

status, they are unable to adopt as a couple—creating a risk that if something were to happen to the adoptive parent, the child would be without a legal guardian. They are also deprived of other rights, such as spousal or parental hospital visitation.⁶⁷ It is irrational to create a status, such as marriage, and then deny this status to a class of people when allowing that class to claim the status would equally advance the state's policy interests.⁶⁸

Finally, the majority addressed the question of animus. Under the Equal Protection Clause, the Supreme Court has consistently ruled that a bare desire to harm a politically unpopular group is never a legitimate government interest.⁶⁹ Under rational-basis review, the Supreme Court has “taken a more objective approach to the classification at issue, rather than a subjective one.”⁷⁰ Thus, a court need not find individual malicious intent to find unconstitutional animus.⁷¹ Unconstitutional animus exists if a law relies on a problematic classification.⁷² Courts consider the following questions in deciding whether to treat a legislative classification as suspect and presumptively unconstitutional: “What class is being harmed by the legislation and has it been subjected to a tradition of disfavor by our laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment?”⁷³ The country has a long history of discrimination based on sexual orientation.⁷⁴ The laws being challenged in this case unjustifiably discriminate against same-sex couples.⁷⁵

Overall, the majority concluded that although this is a major issue, it was one that should be decided by the people through a

67. Compare *id.* at 407–08 (majority opinion), with *id.* at 425 (Daughtrey, J., dissenting).

68. See *id.* at 425.

69. See Susannah W. Pollvogt, *Unconstitutional Animus*, 81 *FORDHAM L. REV.* 887, 889 (2012).

70. *DeBoer*, 772 F.3d at 436.

71. *Id.*

72. See Pollvogt, *supra* note 69, at 895.

73. See *DeBoer*, 772 F.3d at 436 (quoting *City of Cleburne v. Cleburne Learning Ctr.*, 437 U.S. 432, 453 (1985) (Stevens, J., concurring) (footnotes and internal quotation marks omitted)).

74. See Craig J. Konnoth, Note, *Created in Its Image: The Race Analogy, Gay Identity, and Gay Litigation in the 1950s–1970s*, 119 *YALE L.J.* 316, 352–55 (2009).

75. See *DeBoer*, 772 F.3d at 436.

legislative process and not through a court decision.⁷⁶ The dissent argued that the majority failed to address the real issue at hand: whether there has been a violation of the Fourteenth Amendment.⁷⁷ Instead, the majority only addressed who should decide the issue.⁷⁸ Further, the dissent argued that the majority failed to recognize “the plaintiffs as persons, suffering actual harm as a result of being denied the right to marry where they reside or the right to have their valid marriages recognized there.”⁷⁹

The Sixth Circuit decision in *DeBoer* has created a circuit split, and the Supreme Court has taken up the issue—likely ending the split when the case is finally decided.⁸⁰ As the Sixth Circuit stated, the issue of same-sex marriage is not a question of whether, it is a question of when and how.⁸¹ When the Supreme Court decides this issue, it should take into account various opinions, facts, and overall social issues—most of which the dissent in *DeBoer* addressed. The Court should consider the impact that ruling against same-sex marriage will have on the children of same-sex couples. The Court’s decision should protect a class based on sexual orientation, thus making it unconstitutional for a state to define marriage as a union only afforded to a man and a woman. Even more, the Court should still consider that the United States is a leader in the world. Only 17 countries worldwide have laws allowing same-sex marriage, and there is still rampant discrimination against homosexuals.⁸² Thus, the decisions that the United States makes set the trend for the rest of the world, making it important for the Supreme Court to rule in a way that protects these individual rights.

CANDIS NAJOR

CONTRIBUTIONS MADE BY PROFESSOR DEVIN SCHINDLER

76. *See id.* at 421 (majority opinion).

77. *See id.* (Daughtrey, J., dissenting).

78. *See id.*

79. *Id.*

80. *See id.* at 428–31.

81. *See id.* at 395 (majority opinion).

82. *See Same-Sex Marriage Fast Facts*, CNN, <http://www.cnn.com/2013/05/28/us/same-sex-marriage-fast-facts/> (last updated Jan. 30, 2015).