Should Same-Sex Marriage Be an Issue for the Ballot Box or the Courtroom? Sixth Circuit Decision Tees Up Issue for Supreme Court Review

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A panel of the U.S. Court of Appeals for the Sixth Circuit recently upheld bans on same-sex marriage in Michigan, Ohio, Tennessee and Kentucky. District courts in each of these states had ruled that same-sex marriage bans were unconstitutional. The decision is a departure from the overwhelming majority of federal courts that have struck down such bans as unconstitutional.

In a 2-1 opinion written by Judge Sutton and joined by Judge Cook, the Sixth Circuit becomes the first appeals court in the country to uphold state same-sex marriage bans since the U.S. Supreme Court struck down part of the federal Defense of Marriage Act in 2013 in the *U.S. v. Windsor* decision. The Supreme Court's ruling did not address the issue of whether the states themselves could ban or refuse to recognize same-sex marriages.

Throughout the opinion, Judge Sutton emphasizes the principle of democratic action, arguing that same-sex marriage is an issue that should be settled through the democratic process, not the judicial one.

"When the courts do not let the people resolve new social issues like this one, they perpetuate the idea that the heroes in these change events are judges and lawyers," Sutton wrote. "Better in this instance, we think, to allow change through the customary political processes, in which the people, gay and straight alike, become the heroes of their own stories by meeting each other not as adversaries in a court system but as fellow citizens seeking to resolve a new social issue in a fair-minded way."

Judge Sutton also relied on federalism in support of his opinion, writing, "There are many ways, as [the] lower court decisions confirm, to look at this question: originalism; rational basis review; animus; fundamental rights; suspect classifications; evolving meaning. The parties in one way or another have invoked them all. Not one of the

plaintiffs' theories, however, makes the case for constitutionalizing the definition of marriage and for removing the issue from the place it has been since the founding: in the hands of state voters."

Senior Judge Daughtrey wrote in dissent that the majority opinion "would make an engrossing TED Talk or, possibly, an introductory lecture in Political Philosophy." However, she asserted that federal judges are required to protect the constitutional rights of the minority. "If we in the judiciary do not have the authority, and indeed the responsibility, to right fundamental wrongs left excused by a majority of the electorate, our whole intricate, constitutional system of checks and balances, as well as the oaths to which we swore, prove to be nothing but shams."

The Supreme Court began its term in October by denying seven cert petitions from five states seeking review of Fourth, Seventh and Tenth Circuit rulings striking down same-sex marriage bans. Now that there is a circuit split, it is likely that the Supreme Court will settle the controversy. If the process moves quickly, the case may be heard this term.

Is this an issue to be decided by the courts or the people? Now that a circuit split has occurred, we likely won't have to wait that long for an answer.