US federal appeals court upholds state bans on same-sex marriages

By John Andrews
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Last Thursday, a three-judge panel from the US Sixth Circuit Court of Appeals, which reviews the decisions of federal courts in Michigan, Ohio, Kentucky and Tennessee, reversed six separate lower court judgments nullifying bans on same-sex marriages in each of the four states.

The 2-1 ruling marks the first major legal defeat for same-sex marriage following the United States Supreme Court's ruling that struck down the Defense of Marriage Act in 2013.

The Fourth, Seventh, Ninth and Tenth Circuits have subsequently declared laws that prohibit same-sex marriage discriminatory and therefore in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

Last month, the US Supreme Court surprised many by declining to review seven separate petitions arising from those cases. Associate Justice Ruth Bader Ginsburg, who recently officiated at a same-sex wedding, suggested in a law school talk that high court review would be unlikely unless a conflict emerged among the circuits.

The right to marry whomever one chooses, and thereby to have access to the legal and social benefits that derive from marriage, a legal and civil institution, is a basic democratic right. Nevertheless, the rapidly expanding recognition of same-sex marriages does not mark any fundamental shift toward the protection of civil liberties, as the drive to dismantle personal privacy laws and disable civil rights claims against law enforcement agencies continues to accelerate.

While there now appears to be a conflict among the circuits, the Sixth Circuit's ruling in *DeBoer v. Snyder* is not yet final. The fifteen active circuit judges may be asked to reconsider the consolidated cases *en banc*. Regardless, the losers will petition for Supreme Court review.

Moreover, there are other same-sex marriage cases working their way through the remaining circuit courts of appeal. The next one will be argued the week of January 5, 2015 in the very conservative Fifth Circuit, which covers Texas, Louisiana and Mississippi.

Several federal trials, including one in Michigan reversed by *DeBoer*, have established that opponents of same-sex marriages cannot advance any coherent rationale for restricting marriage to opposite-sex couples, and that their opposition is fueled by religious bigotry and homophobia.

The *DeBoer* majority opinion reflects that bigotry. Its author, Jeffrey Sutton, appointed at age 40 by George W. Bush, is considered a rising intellectual star among the right-wing federal judiciary. He clerked for reactionary Supreme Court Associate Justice Antonin Scalia, and then rose to partner in the Columbus, Ohio office of Jones Day, the same law firm that spearheaded the Detroit bankruptcy, among other attacks on the working class.

Sutton's meandering 25-page decision reads more like a newspaper opinion editorial than a judicial decision. Repeating conservative shibboleths, Sutton starts with marriage as "a social institution defined by relationships between men and women," a tradition "measured in millennia, not centuries or decades," and "adopted by all governments and major religions of the world."

During those millennia and among those governments, however, marriage has shifted countless times in practice and purpose. The idea that there has been an immutable "traditional" marriage is itself a right-wing, religious fantasy.

Sutton then segues into "the institution of traditional marriage" as "an incentive for two people who

procreate together to stay together for purposes of rearing offspring" due to 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."

Sutton continues: "Governments got into the business of defining marriage, and remain in the business of defining marriage, not to regulate love but to regulate sex, most especially the intended and unintended effects of male-female intercourse."

"Imagine a society without marriage," Sutton proposes. "It does not take long to envision problems that might result from an absence of rules about how to handle the natural effects of male-female intercourse: children. May men and women follow their procreative urges wherever they take them? Who is responsible for the children that result? How many mates may an individual have? How does one decide which set of mates is responsible for which set of children?"

According to Sutton's convoluted logic, because intercourse between a male and female may produce a child, a state can validly deny marriage to same-sex couples to steer biological parents into monogamous, "procreative" matrimony.

Many people, of course, procreate outside marriage. Many opposite-sex, married couples either cannot or choose not to have children, and many same-sex couples parent children through adoption, surrogacy or prior heterosexual relationships. Sutton's reactionary and religious-based prejudices would deny children being raised by same-sex couples the benefits he touts for children raised by both biological parents in wedlock.

Judge Martha Craig Daughtrey wrote a lengthy dissent, ridiculing Sutton's opinion as "an engrossing TED Talk or, possibly, introductory lecture in Political Philosophy" that "wholly fails to grapple with the relevant constitutional question in this appeal: whether a state's constitutional prohibition of same-sex marriage violates equal protection under the Fourteenth Amendment."
