Same-Sex Marriage: A Legal Overview

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Summary

Same-sex marriage has engendered heated debate throughout the country. There is no federal same-sex marriage prohibition after the Supreme Court's decision in *United States v. Windsor*, which struck down the portion of the Defense of Marriage Act that defined marriage as a union between a man and a woman. However, many states have passed statutes or constitutional amendments that prohibit same-sex couples from marrying, and that deny recognition of same-sex marriages that were legally formed in other states. These state same-sex marriage bans may impact gay individuals' rights and claims to state and federal benefits. For example, such restrictions may affect tax liabilities and entitlements to Social Security.

Until recently, state same-sex marriage bans were seemingly insulated from Fourteenth Amendment challenges in federal courts because of a 1972 Supreme Court decision, *Baker v. Nelson*, wherein the Court summarily dismissed such a challenge for lack of a substantial federal question. However, in recent years, some courts have held that Supreme Court decisions subsequent to *Baker*—namely, *Romer v. Evans*, *Lawrence v. Texas*, and *Windsor*—have rendered *Baker* non-binding. These courts have thus considered whether state same-sex marriage bans violate the Fourteenth Amendment.

Under the Fourteenth Amendment's Equal Protection Clause, state action that classifies groups of individuals may be subject to heightened levels of judicial scrutiny, depending on the type of classification involved. State same-sex marriage bans have faced equal protection challenges because they classify individuals based on sexual orientation. Additionally, under the Fourteenth Amendment's substantive due process guarantees, state action that infringes upon a fundamental right—such as the right to marry—is subject to a high level of judicial scrutiny. State same-sex marriage bans have been challenged on the basis that they infringe upon the fundamental right to marry, which, it has been argued, incorporates the right to same-sex marriage.

Circuit courts are currently split regarding whether *Baker* precludes them from considering the constitutionality of state same-sex marriage bans, and whether such bans violate the Fourteenth Amendment. The Fourth, Seventh, Ninth, and Tenth Circuits have struck down state same-sex marriage bans after finding that Supreme Court decisions subsequent to *Baker* render that decision non-binding. In doing so, they have generally, though not uniformly, subjected state same-sex marriage bans to heightened levels of judicial scrutiny after finding that governmental classifications based on sexual orientation warrant increased scrutiny or finding that the fundamental right to marry includes the right to same-sex marriage.

The Sixth Circuit, on the other hand, held that *Baker* remains binding precedent that precluded its review of Fourteenth Amendment challenges to state same-sex marriage bans. The Sixth Circuit then went on to find that even if it could consider the constitutionality of such bans, it would subject them to the lowest level of judicial scrutiny and uphold them as constitutional. On January 16, 2015, the Supreme Court granted review of cases from the Sixth Circuit involving Fourteenth Amendment challenges to state same-sex marriage bans, with oral arguments scheduled for April 28, 2015. The Court seems poised not only to resolve the existing circuit split, but also to settle key questions about rights for gay people.

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Same-sex marriage has engendered heated debate throughout the country. Many states have passed statutes or constitutional amendments that prohibit same-sex couples from marrying, and that deny recognition of same-sex marriages that were legally formed in other states.[1] These same-sex marriage bans may impact gay individuals' rights and claims to state and federal benefits. For example, they may affect tax liabilities and entitlements to Social Security benefits.

Until recently, state same-sex marriage bans were seemingly insulated from Fourteenth Amendment equal protection and due process challenges to their validity because of a 1972 Supreme Court case, *Baker v. Nelson*.[2] There, the Supreme Court dismissed equal protection and due process challenges to a state statute that defined marriage in terms of a man and a woman, finding that the issues involved in the case did not present a substantial federal question.[3]

After *Baker*, state same-sex marriage bans went largely uncontested in federal courts until the Supreme Court relied, in part, on equal protection and due process principles to invalidate a portion of the federal Defense of Marriage Act (DOMA) in *United States v. Windsor*.[4] *Windsor* cast doubt upon whether the Supreme Court finds that equal protection and due process challenges to state same-sex marriage bans still pose no substantial federal questions in accordance with *Baker*. Additionally, though a federal statute was at issue in *Windsor*, that case raised questions regarding the validity of state same-sex marriage bans under the Constitution's equal protection and due process guarantees. Lower courts were left to grapple with these questions, resulting in a circuit split that the Supreme Court appears poised to resolve this term.

This report provides background on, and analysis of, significant legal issues surrounding the same-sex marriage debate. It begins by providing background on the constitutional principles that are often invoked in attempting to invalidate same-sex marriage bans—namely, equal protection and due process guarantees. Then, it discusses key cases that led to the existing circuit split on the constitutionality of state same-sex marriage bans. Finally, this report explains the central issues in the circuit split and analyzes how the Supreme Court might resolve them on appeal.

General Constitutional Principles

Equal Protection

Under the Fourteenth Amendment's Equal Protection Clause, "[n]o State shall … deny to any person within its jurisdiction the equal protection of the laws."[5] Though there is no parallel constitutional provision expressly prohibiting the federal government from denying equal protection of the law, the Supreme Court has held that equal protection principles similarly apply

[1] *See, e.g.*, Mich. Const. art. I, §25 (Michigan constitutional amendment defining marriage as "the union of one man and one woman" and denying recognition of same-sex marriages performed in other states); Ky. Const. §233A (Kentucky constitutional amendment defining marriage as "between one man and one woman" and denying recognition of same-sex marriages performed in other states).

[2] 409 U.S. 810 (1972). See *infra* notes 37-56 and accompanying text.

[3] *Baker*, 409 U.S. at 810.

[4] 133 S. Ct. 2675 (2013).

[5] U.S. Const. amend. XIV, §1.

to the federal government.[6] Under the Constitution's equal protection guarantees, when courts review governmental action that distinguishes between classes of people, they apply different levels of scrutiny depending on the classification involved. The more suspect the government's classification, or the more likely that the government's classification was motivated by discrimination, the higher the level of scrutiny that courts will utilize in evaluating the government's action.[7] Generally speaking, there are three such levels of scrutiny: (1) strict scrutiny; (2) intermediate scrutiny; and (3) rational basis review.

Strict scrutiny is the most searching form of judicial review. The Supreme Court has observed that strict scrutiny applies to governmental classifications that are constitutionally "suspect," or that interfere with fundamental rights.[8] In determining whether a classification is suspect, courts consider whether the classified group: (1) has historically been subject to discrimination; (2) is a minority group exhibiting an unchangeable characteristic that establishes the group as distinct; or (3) is inadequately protected by the political process.[9] There are generally three governmental classifications that are suspect—those based on race, national origin, and alienage.[10] When applying strict scrutiny to governmental action, reviewing courts consider whether the governmental action is *narrowly tailored* to a *compelling* governmental interest.[11] The government bears the burden of proving the constitutional validity of its action under strict scrutiny and, in doing so, must generally show that it cannot meet its goals via less discriminatory means.[12]

Intermediate scrutiny is less searching than strict scrutiny, though it subjects governmental action to more stringent inspection than rational basis review. Intermediate scrutiny applies to "quasi-suspect" classifications, such as classifications based on gender[13] or illegitimacy.[14] When reviewing courts apply intermediate scrutiny to governmental action, they determine whether the action is *substantially related* to achieving an *important* government interest.[15] As with strict scrutiny, the government bears the burden of establishing the constitutional validity of its actions under intermediate scrutiny.[16]

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[6] *See* Bolling v. Sharpe, 347 U.S. 497 (1954). More specifically, the Court has held that the Fifth Amendment's guarantee of "due process of the law," applicable to the federal government, incorporates equal protection guarantees. *See id.* at 500.

[7] *Compare* City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (holding that mental disability is not a "quasi-suspect" classification, and thus is entitled to rational basis review) *with* Graham v. Richardson, 403 U.S. 365 (1971) (holding that classifications based on alienage are "inherently suspect," and are subject to strict scrutiny).

[8] *See* Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976); *see also* Heller v. Doe, 509 U.S. 312, 319 (1993).

[9] *See* Lyng v. Castillo, 477 U.S. 635, 638 (1986); *see also* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n. 4 (1938).

[10] Graham, 403 U.S. at 371-72 ("… the Court's decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny.").

[11] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007).

[12] *See* Fisher v. University of Tex. at Austin, 133 S. Ct. 2411, 2420 (2014).

[13] United States v. Virginia, 518 U.S. 515, 533 (1996); *see* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).

[14] Clark v. Jeter, 486 U.S. 456, 461 (1988) ("Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.").

[15] *See* Craig v. Boren, 429 U.S. 190, 198 (1976); *see also Clark*, 486 U.S. at 461.

[16] *Virginia*, 518 U.S. at 533; *see Miss. Univ. for Women*, 458 U.S. at 724.

Rational basis review is the least searching form of judicial scrutiny and generally applies to all classifications that are not subject to heightened levels of scrutiny.[17] For governmental action to survive rational basis review, it must be *rationally* related to a *legitimate* government interest.[18] When evaluating governmental action under rational basis review, courts consider the legitimacy of any possible governmental purpose behind the action.[19] That is, courts are not limited to considering the actual purposes behind the government's action.[20] Additionally, the governmental action needs only be a reasonable way of achieving a legitimate government purpose to survive rational basis review; it does not need to be the most reasonable way of doing so, or even more reasonable than alternatives.[21] Accordingly, rational basis review is deferential to the government, and courts generally presume that governmental action that is subject to such review is constitutionally valid.[22] Parties challenging governmental actions bear the burden of establishing their invalidity under rational basis review.[23]

Parties seeking to invalidate same-sex marriage bans have often argued that such bans violate the Constitution's equal protection principles by suggesting that governmental classifications based on sexual orientation are suspect or quasi-suspect, and thus are subject to heightened scrutiny. Conversely, others have argued that such bans are only subject to rational basis review. As discussed below, there is a circuit split as to whether state same-sex marriage bans violate the Constitution's equal protection principles. A similar disagreement exists over whether or not such bans violate the Constitution's substantive due process principles.

Substantive Due Process

The U.S. Constitution's due process guarantees are contained within two separate clauses; one can be found in the Fifth Amendment, and the other resides in the Fourteenth Amendment. Each clause provides that the government shall not deprive a person of "life, liberty, or property, without due process of law."[24] However, the Fifth Amendment applies to action by the federal government, whereas the Fourteenth Amendment applies to state action.[25]

The Constitution's due process language makes clear that the government cannot deprive individuals of life, liberty, or property without observing certain procedural requirements. The Supreme Court has interpreted this language to also include substantive guarantees that prohibit

[17] *See Cleburne Living Center*, 473 U.S at 440-42; *see also* Schweiker v. Wilson, 450 U.S. 221, 230 (1981).

[18] *See City of Cleburne*, 473 U.S. at 440.

[19] *See* Nordlinger v. Hahn, 505 U.S. 1, 15 (1992); *see also Heller*, 509 U.S. at 320.

[20] *See Nordlinger*, 505 U.S. at 15; *see also Heller*, 509 U.S. at 320.

[21] *See Schweiker*, 450 U.S. 221, 235 (1981) (observing that, under rational basis review, "[a]s long as the classificatory scheme chosen by Congress rationally advances a reasonable and identifiable governmental objective, we must disregard the existence of other methods of allocation that we, as individuals, perhaps would have preferred."); *see also Heller*, 509 U.S. at 320 (observing that under rational basis review, "a classification 'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'") (quoting F.C.C. v. Beach Commc'ns,, Inc., 508 U.S. 307, 312 (1993)).

[22] *See Beach Commc'ns, Inc.,* 508 U.S. at 315; *see also Murgia*, 427 U.S. at 315.

[23] *Heller*, 509 U.S. at 320 (noting that, when reviewing a governmental classification under rational basis review, a governmental action is "presumed constitutional" and the burden lies on the party attacking the governmental action to establish the action's unconstitutionality.).

[24] U.S. Const. amend. XIV, §1; U.S. Const. amend. V.

[25] *See* U.S. Const. amend. XIV, §1; U.S. Const. amend. V.

the government from taking action that unduly burdens certain liberty interests.[26] More specifically, substantive due process protects against undue governmental infringement upon fundamental rights.[27] To this end, the Supreme Court has held that governmental action infringing upon fundamental rights is subject to strict scrutiny,[28] and thus must be *narrowly tailored* to a *compelling* governmental interest.[29]

Under strict scrutiny, the government must generally show that it has a "substantial" and "legitimate" need for its action to be in furtherance of a compelling government interest.[30] If the government successfully establishes a compelling interest, its action cannot encumber fundamental rights any more than is necessary to achieve the government's need.[31] Additionally, the government could not have possibly taken alternative action that would similarly further its interest while being less burdensome on fundamental rights.[32] Otherwise, the government's action is not narrowly tailored to the government's interest.[33]

The Supreme Court has recognized a number of rights as fundamental, including the right to have children,[34] use contraception,[35] and marry.[36] Generally, when parties have sought the invalidation of same-sex marriage bans under the Constitution's substantive due process guarantees, they have argued that prohibiting same-sex couples from marrying infringes upon the fundamental right to marry. The circuit courts have split regarding whether state same-sex marriage bans violate the Fourteenth Amendment's guarantees, and in doing so, they have interpreted Supreme Court precedent in differing ways.

The Supreme Court Precedent Contributing to the Circuit Split

Until recently, state same-sex marriage bans were seemingly insulated from Fourteenth Amendment equal protection and due process challenges by the Supreme Court's decision in *Baker v. Nelson*.[37] In *Baker*, a same-sex couple challenged a Minnesota statute before the Minnesota Supreme Court, arguing that the statute, which referred to marriage as between a

[26] *See* Washington v. Glucksberg, 512 U.S. 702, 719-720 (1997).

[27] *See id*.

[28] *See* Reno v. Flores, 507 U.S. 292, 301-02 (1993).

[29] *Id* (observing that a line of Supreme Court cases interprets the Fifth and Fourteenth Amendment's due process principles to "forbid[] the government to infringe certain 'fundamental' liberty interests *at all* … unless the infringement is narrowly tailored to serve a compelling state interest.").

[30] San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 98 (1973).

[31] *See* Dunn v. Blumstein, 405 U.S. 330, 343 (1972).

[32] *Id* ("if there are other, reasonable ways to achieve [government interests] with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'") (quoting Shelton v. Tucker, 364 U.S. 479, 488 (1960)).

[33] *See id*.

[34] Skinner v. Okla., 316 U.S. 535 (1942).

[35] Griswold v. Connecticut, 381 U.S. 479 (1965).

[36] Loving v. Virginia, 388 U.S. 1 (1967).

[37] 409 U.S. 810 (1972).

"husband and wife," violated the Constitution's due process and equal protection principles.[38] More specifically, the plaintiffs argued that substantive due process's protection of the fundamental right to marry applied equally to opposite-sex and same-sex couples, and that prohibiting same-sex marriages denies those in same-sex relationships equal protection of the law.[39] The Minnesota Supreme Court rejected both of these arguments. According to the court, the fundamental right to marry did not include the right of same-sex couples to marry,[40] and Minnesota's classification of persons who are authorized to marry did not offend the Constitution's equal protection principles.[41] The court seemingly utilized rational basis review, and rested its conclusion on the fact that Minnesota did not classify those authorized to marry with any "irrational or invidious discrimination."[42]

The plaintiffs in *Baker* then appealed to the U.S. Supreme Court, which was required to grant review under a now-defunct statute mandating that the Court accept appeals of state supreme court cases wherein state statutes face constitutional challenges.[43] The plaintiffs' appeal asked the Supreme Court to consider whether Minnesota's refusal to recognize their marriage: (1) deprived them of due process of the law under the Fourteenth Amendment; (2) violated their rights under the Fourteenth Amendment's Equal Protection Clause; or (3) deprived them of their right to privacy under the Ninth and Fourteenth Amendments.[44] The Supreme Court summarily dismissed the appeal, that is, dismissed it without an opinion "for want of [a] substantial federal question."[45]

A summary dismissal is considered a decision on a case's merits, and is thus binding on lower courts.[46] That is, a summary dismissal rejects the specific issues challenging an appealed decision, and this dismissal creates precedent that lower federal courts must then follow when considering the same issues.[47] Therefore, in the immediate wake of the Supreme Court's summary dismissal in *Baker*, it appeared as though lower federal courts had to dismiss challenges to state same-sex marriage bans that were based on the Constitution's equal protection and due process principles. However, the Supreme Court has also held that summary dismissals are no longer binding precedent when doctrinal developments show that the Court now views the issues summarily decided as raising "substantial federal question[s]."[48]

The circuit courts that have considered equal protection and due process challenges to state same-sex marriage bans are split regarding whether *Baker* requires them to dismiss such claims. The U.S. Court of Appeals for the Sixth Circuit (Sixth Circuit) has held that *Baker* precludes it from evaluating equal protection and due process challenges to state same-sex marriages.[49] Conversely, the U.S. Courts of Appeals for the Fourth,[50] Seventh,[51] Ninth,[52] and Tenth[53] Circuits have all held

[38] *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971).

[39] *Id.* at 186.

[40] *Id*. at 187.

[41] *Id*.

[42] *Id*.

[43] 28 U.S.C. §1257 (1970).

[44] Jurisdictional Statement of Appellants at 3, Baker v. Nelson, 409 U.S. 810 (1972).

[45] *Baker*, 409 U.S. at 810.

[46] Hicks v. Miranda, 422 U.S. 332, 344 (1975).

[47] *See* Mandel v. Bradley, 432 U.S. 173, 176 (1977).

[48] *See Hicks*, 422 U.S. at 344-45.

[49] DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014).

[50] Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014).

that doctrinal developments since *Baker*—more specifically, the Supreme Court's decisions in *Romer v. Evans*,[54] *Lawrence v. Texas*,[55] and *United States v. Windsor*[56]—indicate that the Court now views the issues summarily decided in *Baker* as raising substantial federal questions. Accordingly, these circuit courts have held that *Baker* does not preclude their review of equal protection and due process challenges to state same-sex marriage bans.

Romer v. Evans

In *Romer v. Evans* (1996), the Supreme Court was tasked with determining whether a Colorado constitutional amendment, which prohibited all legislative, executive, or judicial action designed to protect gay people from discrimination, violated the Fourteenth Amendment's Equal Protection Clause. The Court observed that governmental action that does not burden a fundamental right or target a suspect class receives rational basis review, and thus must be upheld so long as the government's classification is rationally related to a legitimate government interest.[57] Though the Court did not state that gay individuals are not a suspect class or that the Colorado amendment at issue did not burden a fundamental right, it may have implicitly declared as much by seemingly using a form of rational basis review when evaluating the amendment.[58] According to the Court, the requirement that governmental classifications be rationally related to a legitimate governmental interest ensures that governmental classifications are not intended to disadvantage a particular group.[59]

Colorado argued that its constitutional amendment did nothing more than deny special protections to individuals who are gay, and thereby put them in the same position as all other people.[60] The Court disagreed, observing that the amendment imposed a "broad and undifferentiated" disability on gay people, the breadth of which was incongruent with the state's proffered rationale of denying special rights to such individuals.[61] According to the Court, the Colorado constitutional amendment could only have been enacted out of animus toward individuals who are gay, and thus was not rationally related to a legitimate state interest.[62] As such, the Court invalidated the amendment.[63]

(...continued)

[51] Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014).

[52] Latta v. Otter, 771 F.3d 456 (9th Cir. 2014).

[53] Bishop v. Smith, 760 F.3d 1070 (10th Cir. 2014); Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014).

[54] 517 U.S. 620 (1996).

[55] 539 U.S. 558 (2003).

[56] 133 S.Ct. 2675 (2013).

[57] *Romer*, 517 U.S. at 631.

[58] *Id*.

[59] *Id*. at 633.

[60] *Id*. at 626.

[61] *Id*. at 632.

[62] *Id*.

[63] *Id*.

Lawrence v. Texas

The Supreme Court seemingly expanded the rights of gay people under substantive due process principles in *Lawrence v. Texas* (2003). At issue in *Lawrence* was a Texas statute that criminalized same-sex sexual contact.[64] The plaintiffs were two gay men who were arrested and convicted of violating the statute.[65] The Court considered whether the Texas statute violated the Fourteenth Amendment's substantive due process protections. Previously, in *Bowers v. Hardwick*[66] (1986), the Supreme Court had held that a similar state statute did not violate substantive due process principles after finding that the fundamental right to privacy does not extend to homosexual sodomy.[67] Because it found no fundamental right at issue, the Court in *Bowers* then applied rational basis review in upholding the statute.[68] In doing so, the Court seemingly found that states can have a legitimate interest in upholding majority notions of morality, and that the sodomy statute at issue was rationally related to this interest.[69]

Justice Kennedy's majority opinion in *Lawrence* explicitly overruled *Bowers*.[70] In so doing, the Court stated that liberty protections arising from substantive due process extend to private sexual relationships between two consenting adults, including individuals who are gay.[71] As such, the Court held that gay people have the "full right" to engage in private, consensual sexual conduct.[72] However, the Court did not clarify the proper level of scrutiny to be used when considering laws that prohibit consensual sexual activity between such individuals. At no point in the opinion did the Court determine whether the right of gay people to engage in sexual activity is a fundamental right, nor did it mention strict scrutiny or rational basis review. The closest the Court came to doing so appears toward the end of the majority opinion, when the Court stated, "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individuals."[73]

This language suggests that the Court may have applied a version of rational basis review, which requires a showing that the statute is rationally related to a legitimate government interest. Even so, *Lawrence* marks an advancement in the rights of gay individuals as it was the first time that the Court recognized that the Constitution's substantive due process protections can extend to same-sex sexual activity.

United States v. Windsor

In *United States v. Windsor* (2013), the Supreme Court struck down Section 3 of the federal Defense of Marriage Act (DOMA), which required marriage to be defined as the union of one

[64] *Lawrence*, 539 U.S. at 563.

[65] *Id*. at 563.

[66] 478 U.S. 186 (1986).

[67] *Id.* at 190.

[68] *Id.* at 196.

[69] *See id*.

[70] *Lawrence,* 539 U.S. at 525 ("*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.").

[71] *Id.* at 578.

[72] *Id.* at 578.

[73] *Id.*

man and one woman for purposes of federal laws and regulations.[74] In doing so, the Court relied on equal protection and due process considerations, along with the federalism-based rationale that marriage is an area historically left to state regulation.

The plaintiff in *Windsor* and her late spouse were New York residents whose same-sex marriage was legally recognized in New York, though they were married elsewhere.[75] The deceased spouse left her entire estate to the plaintiff.[76] However, because of DOMA, the deceased spouse's estate could not claim the marital exemption from the federal estate tax and paid $363,053 in taxes, leading the plaintiff to seek a tax refund.[77] The Internal Revenue Service denied the refund, determining that the plaintiff was not a "surviving spouse" under DOMA.[78] The plaintiff subsequently filed suit, claiming that DOMA violated the Fifth Amendment's Equal Protection Clause.[79]

In finding Section 3 of DOMA unconstitutional, Justice Kennedy's majority opinion raised principles of federalism by examining the historical relationship between the federal and state governments concerning domestic relations. The Court observed that marriage was traditionally regulated by the states, and that states had "historic and essential" authority to define marital relations, subject to the limits of constitutional guarantees.[80] The Court then seemingly took issue with the fact that DOMA departs from this historical practice of relying on state definitions of marriage.[81]

The Court also considered equal protection and due process principles in invalidating Section 3. The Court observed that the Fifth Amendment prohibits congressional action that subjects a politically unpopular group to disparate treatment for the purpose of harming that group.[82] The purpose of DOMA, the Court found, was to disadvantage and stigmatize same-sex marriages, as evidenced by the statute's legislative history, text, and primary effect.[83] By attempting to injure same-sex married couples, which New York sought to protect, the Court determined that DOMA "violate[d] basic due process and equal protection principles applicable to the Federal Government."[84]

While the Court resolved the question of the constitutionality of a federal definition of marriage that excludes same-sex couples in *Windsor*, it left a number of unanswered questions. Though it is clear that federalism played a role in the Court's decision, it is unclear just how determinative it was toward the outcome. For example, Justice Roberts, dissenting in *Windsor*, seemingly suggests that federalism played a key role in the majority's opinion, observing that the state's traditional power to define marital relations was of "central relevance" to the majority's decision

[74] P.L. 104-199, §3, 110 Stat. 2419, 2419 (1996).

[75] *Windsor*, 133 S. Ct. at 2683.

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.* at 2692.

[81] *See id.*

[82] *Id.* at 2393.

[83] *See id.* at 2393-94.

[84] *Id.* at 2393.

to invalidate DOMA.[85] Conversely, Justice Scalia, dissenting in *Windsor*, seemingly suggests that federalism played a smaller role in the majority's opinion, noting that the majority opinion "formally disclaim[s] reliance upon principles of federalism" at one point.[86] This apparent ambiguity has contributed to differing outcomes when lower courts have considered state same-sex marriage bans, as discussed in more depth below, because such state bans lack the federalism implications of a federal statute like DOMA. Additionally, the Court did not address whether same-sex couples have a fundamental right to marry, or whether sexual orientation classifications warrant heightened scrutiny. In *Windsor*'s wake, lower courts were left to grapple with these issues.

Current Circuit Split

In the wake of *Windsor*, a number of challenges to state same-sex marriage bans made their way into federal courts. These courts have generally been tasked with determining whether, as an initial matter, *Baker* precludes their review of state same-sex marriage bans, or whether doctrinal developments after that case—namely, *Romer*, *Lawrence*, and *Windsor*—render it non-binding. These courts have also considered the appropriate level of scrutiny for classifications based on sexual orientation required under the Constitution's equal protection principles, and whether the fundamental right to marry under the Constitution's due process principles incorporates same-sex marriage. In resolving these questions, a circuit split developed.

Four Circuits Strike Down State Same-Sex Marriage Bans

The U.S. Courts of Appeals for the Fourth, Seventh, Ninth, and Tenth Circuits have all invalidated state same-sex marriage bans. In doing so, they have each determined that doctrinal developments subsequent to *Baker* render that decision non-binding.[87] More specifically, they have held that doctrinal developments after *Baker*—primarily the Supreme Court's decisions in *Romer*, *Lawrence*, and *Windsor*—make clear that the issue of whether state same-sex marriage bans violate the Fourteenth Amendment's equal protection and due process principles does, in fact, raise a substantial federal question.[88]

For example, the U.S. Court of Appeals for the Fourth Circuit (Fourth Circuit) in *Bostic v. Schaefer* found the Supreme Court's development of its equal protection and due process jurisprudence after *Baker* demonstrates that *Baker* is no longer binding precedent.[89] Regarding

[85] *Id.* at 2697 (Roberts, J., dissenting).

[86] *Id.* at 2705 (Scalia, J., dissenting).

[87] Bostic v. Schaefer, 760 F.3d 352, 375 (4th Cir. 2014) ("In light of the Supreme Court's apparent abandonment of *Baker* and the significant doctrinal developments that occurred after the Court issued its summary dismissal in that case, we decline to view *Baker* as binding precedent …"); Baskin v. Bogan, 766 F.3d 648, 660 (7th Cir. 2014) (observing that *Romer*, *Lawrence*, and *Windsor* "make clear that *Baker* is no longer authoritative); Latta v. Otter, 771 F.3d 456, 466 (9th Cir. 2014); Bishop v. Smith, 760 F.3d 1070, 1080 (10th Cir. 2014); Kitchen v. Herbert, 755 F.3d 1193, 1208 (10th Cir. 2014) ("Although reasonable judges may disagree on the merits of the same-sex marriage question, we think it is clear that doctrinal developments foreclose the conclusion that the issue is, as *Baker* determined, wholly insubstantial.").

[88] *See, e.g., Bishop*, 760 F.3d at 1080 (in holding *Baker* non-binding while considering the constitutionality of a state same-sex marriage ban, noting that "[a]s any observer of the Supreme Court cannot help but realize, this case and others like it present not only substantial but pressing federal questions.").

[89] *Bostic*, 760 F.3d at 374.

due process, the Fourth Circuit observed that *Lawrence* and *Windsor* "firmly position same-sex relationships within the ambit of the Due Process Clauses' protection," contrary to *Baker*.[90] The Fourth Circuit similarly found that Supreme Court equal protection cases, including *Romer* and *Windsor*, show that the court has substantially changed the way it considers sex and sexual orientation in the equal protection context.[91]

After concluding that they are not bound by *Baker*, the Fourth, Seventh, Ninth, and Tenth Circuits then turned to the question of whether state same-sex marriage bans violate the Fourteenth Amendment's equal protection or due process principles. On the one hand, the Fourth, Ninth, and Tenth Circuits have all subjected state same-sex marriage bans to heightened levels of scrutiny after finding that such bans infringe upon fundamental rights or create suspect classifications. The Seventh Circuit, on the other hand, used rational basis review when invalidating state same-sex marriage bans.

In *Bostic*, the Fourth Circuit held that the fundamental right to marry includes the right of same-sex couples to marry.[92] According to the Fourth Circuit, the right to marry belongs to each individual and is not restricted by the characteristics of the individual seeking to utilize it.[93] This result, the Fourth Circuit suggested, is supported by Supreme Court precedent. For example, the Fourth Circuit observed that in *Lawrence*, the Supreme Court did not determine that the right at issue was the right of gay people to engage in sodomy, but rather the right of all people, including individuals who are gay, to make decisions regarding their sexual relationships.[94] After determining that the fundamental right to marriage includes same-sex marriage and observing that state same-sex marriage bans significantly infringe upon this right, the Fourth Circuit applied strict scrutiny and invalidated such bans.[95]

In invalidating state same-sex marriage bans, the U.S. Court of Appeals for the Tenth Circuit (Tenth Circuit) similarly relied on the fundamental right to marry in *Kitchen v. Herbert* and *Bishop v. Smith*. In *Kitchen*, the Tenth Circuit held that the fundamental right to marry is properly considered broadly as the right of the individual to marry, rather than narrowly as the right of opposite-sex couples to marry.[96] The Tenth Circuit followed *Kitchen*'s holding in *Bishop*.[97] As such, it applied strict scrutiny in both cases.[98] In both cases, the Tenth Circuit held that state same-sex marriage bans were not narrowly tailored to compelling government interests, and thus invalidated such bans.[99]

In *Latta v. Otter*, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit), like the Fourth and Tenth Circuits, subjected state same-sex marriage bans to heightened scrutiny. However, the Ninth Circuit's majority opinion in *Latta* differed from the Fourth and Tenth Circuit opinions as it

[90] *See id.*

[91] *See id.* at 374-75.

[92] *Id*. at at 376.

[93] *See id.* at 376-77.

[94] *See id.* at 377.

[95] *Id.* at 378, 384.

[96] *See Kitchen*, 755 F.3d at 1209.

[97] *See Bishop*, 760 F.3d at 1080.

[98] *Kitchen*, 755 F.3d at 1218; *Bishop*, 760 F.3d at 1079.

[99] *Kitchen*. 755 F.3d at 1229-30; *Bishop*, 760 F.3d at 1081-82.

relied on equal protection principles. The Ninth Circuit observed that equal protection guarantees require classifications based on sexual orientation to be subject to heightened scrutiny, but did not consider whether the fundamental right to marriage includes the right to same-sex marriage.[100]

The U.S. Court of Appeals for the Seventh Circuit (Seventh Circuit)—unlike the Fourth, Ninth, and Tenth Circuits—did not apply heightened scrutiny in striking down state same-sex marriage bans in *Baskin v. Bogan*. The Seventh Circuit held that state same-sex marriage bans cannot survive rational basis review as "[t]he discrimination against same-sex couples is irrational, and therefore unconstitutional even if the discrimination is not subjected to heightened scrutiny...."[101] The Seventh Circuit observed that because such bans cannot pass constitutional muster under equal protection principles, it had no reason to reach the question of whether or not the fundamental right to marriage includes the right to same-sex marriage for purposes of the due process clause.[102]

The Sixth Circuit Upholds State Same-Sex Marriage Bans

Unlike the Fourth, Seventh, Ninth, and Tenth Circuits, when tasked with evaluating the constitutionality of four state same-sex marriage bans, the U.S. Court of Appeals for the Sixth Circuit (Sixth Circuit) upheld such bans in *DeBoer v. Snyder*.[103] As an initial matter, the Sixth Circuit considered whether *Baker* prevented it from determining whether state same-sex marriage bans violate the Fourteenth Amendment. The plaintiffs argued that *Windsor* limited *Baker*'s applicability, and thus that the Sixth Circuit was not bound by *Baker*.[104] The Sixth Circuit disagreed.[105] According to the Sixth Circuit, the outcomes and rationales of *Baker* and *Windsor* are not inconsistent.[106] More specifically, the Sixth Circuit reasoned that in invalidating Section 3 of DOMA, *Windsor* turned on the fact that DOMA, as a federal law, infringed on state authority over marital relations, while *Baker* upheld the right of a state's people to define marriage.[107]

The plaintiffs then argued that, if *Windsor* did not overrule *Baker*, doctrinal developments since *Baker* (including *Romer*, *Lawrence*, and *Windsor*) render that case non-binding.[108] According to the Sixth Circuit, it can only disregard summary dismissals in two circumstances: (1) when a Supreme Court decision overrules the summary dismissal by name; and (2) when the Supreme Court overrules the summary dismissal by outcome.[109] The Sixth Circuit held that neither circumstance had occurred, finding that nothing in *Romer*, *Lawrence*, or *Windsor* expressly overruled *Baker*, nor was any of the three inconsistent with *Baker*'s outcome.[110] Though the Sixth

[100] *See Latta*, 771 F.3d at 468. In concurrence, one judge wrote separately to say that he would also have held that the fundamental right to marry includes the right to same-sex marriage. *Id.* at 477 (Reinhardt, J., concurring).

[101] *Baskin*, 766 F.3d at 656.

[102] *Id.* at 657.

[103] 772 F.3d 388 (6th Cir. 2014).

[104] *Id*. at 400.

[105] *Id*.

[106] *Id*.

[107] *See id*.

[108] *Id.* at 401.

[109] *Id*.

[110] *See id.* at 401-02.

Circuit observed that it was bound by *Baker*, it did discuss whether state same-sex marriage bans violate the Fourteenth Amendment's equal protection and due process guarantees.

The Sixth Circuit determined that state same-sex marriage bans are subject to rational basis review when analyzed under either equal protection or substantive due process guarantees of the Fourteenth Amendment. Regarding equal protection, the Sixth Circuit observed that the Supreme Court has never held that classifications based on sexual orientation are suspect or entitled to heightened review.[111] The Sixth Circuit also noted that its precedents have held that classifications based on sexual orientation receive rational basis review.[112] Regarding substantive due process, the Sixth Circuit determined that the fundamental right to marry does not include the right to same-sex marriage.[113]

In applying rational basis review to state same-sex marriage bans, the Sixth Circuit observed that the standard is highly deferential to the government.[114] However, the Sixth Circuit did observe that governmental action motivated by animus toward a particular group of people cannot pass rational basis review.[115] The state same-sex marriage bans at issue in the case, the Sixth Circuit observed, were constitutional amendments voted on by the citizens of each respective state.[116] The Sixth Circuit reasoned that it could not attribute one motivation—animus—to all of the voters in each state that wished to pass same-sex marriage bans, and thus found no animus present.[117] The Sixth Circuit determined that state same-sex marriage bans are rationally related to two legitimate state interests: (1) incentivizing people who procreate to stay together during child rearing; and (2) the desire to "wait and see" before changing marriage norms that have existed for centuries.[118] Accordingly, the Sixth Circuit found that such bans survive rational basis review.[119]

Supreme Court Appears Poised to Resolve the Circuit Split

On January 16, 2015, the Supreme Court announced that it was consolidating and granting review of the four state same-sex marriage ban cases that the Sixth Circuit decided in *DeBoer v. Snyder*.[120] Oral arguments are scheduled for April 28, 2015. On appeal, the Court will be considering two questions:

1. Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?

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[111] *Id*. at 413.

[112] *Id*.

[113] *Id*. at 411-12.

[114] *Id*. at 405 ("So long as judges can conceive of some 'plausible' reason for the law—*any* plausible reason, even one that did not motivate the legislators who enacted it—the law must stand, no matter how unfair, unjust, or unwise the judges may consider it to citizens.") (emphasis in original).

[115] *Id*. at 408.

[116] *Id*. at 409.

[117] *Id*. at 409-10.

[118] *Id.* at 405-6.

[119] *See id.* at 406.

[120] Certiorari Granted, Nos. 14-556, 14-562, 14-571, 14-574, *available at* http://www.supremecourt.gov/orders/courtorders/011615zr_f2q3.pdf.

2. Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?

Commentators have remarked on the likelihood that a final ruling on these two questions will result in a split vote, with Justice Kennedy's vote determinative.[121] In answering these two questions, the Court could reach one of multiple conclusions. These possibilities are outlined below.

The Court Could Arguably Uphold State Same-Sex Marriage Bans

The Court could, for example, potentially decide that the Fourteenth Amendment does not require states to permit same-sex marriages nor to recognize same-sex marriages that were lawfully licensed and performed out-of-state. If the Court were to reach this conclusion, it could arguably do so by finding that state same-sex marriage bans neither create suspect or quasi-suspect classifications, nor infringe upon fundamental rights, and thus are not subject to heightened scrutiny under the Fourteenth Amendment's equal protection and due process guarantees, just as the Sixth Circuit did in *DeBoer*. In line with *DeBoer*, the Court might find that because the state same-sex marriage bans at issue were enacted through majority vote of state citizens, who presumably had varying motivations, the bans were not driven by animus toward gay individuals. The Court might then, as in *DeBoer*, find that state statutes and constitutional amendments that prohibit same-sex marriages and deny recognition of same-sex marriages legally formed in other states are rationally related to legitimate state interests. If the Court were to reach this outcome, states with same-sex marriage bans—including those whose bans had been struck down by lower federal courts—could potentially prohibit same-sex couples from marrying and refuse to recognize same-sex marriages legally formed in other states.

The Court Could Arguably Invalidate State Same-Sex Marriage Bans

In the alternative, the Court could potentially hold that the Fourteenth Amendment requires states to permit same-sex marriages and to recognize same-sex marriages legally performed in other states. The immediate effect of such a ruling would be that same-sex marriages would be legal in all states. However, the Court's rationale in reaching such a result would arguably be significant: the Court could reach its conclusion in a way that has implications for the constitutional guarantees for gay people outside of the marriage context, or it could limit its decision to only expand the rights of such individuals within the marriage context.

For example, the Court might follow the approach of the Ninth Circuit and determine that classifications based on sexual orientation are subject to heightened scrutiny. Such a holding would arguably be broad, and would seem to subject *all* laws classifying individuals based on sexual orientation—not only those pertaining to the ability of same-sex couples to marry—to heightened constitutional scrutiny. Accordingly, such an approach seemingly could increase the constitutional rights of gay people not just with regard to marriage, but in other areas as well.

[121] *See, e.g.*, Ashby Jones, *In Same-Sex Cases, Justice Kennedy Likely to Cast Swing Vote*, WALL STREET J., January 16, 2015, http://blogs.wsj.com/law/2015/01/16/in-same-sex-cases-eyes-likely-to-swing-to-justice-kennedy/; Richard Wolf, *Supreme Court Agrees to Rule on Gay Marriage*, USA TODAY, January 16, 2015, http://www.usatoday.com/story/news/nation/2015/01/16/supreme-court-gay-marriage/21867355/.

On the other hand, the Court might conclude that the Fourteenth Amendment requires states to permit same-sex marriages and recognize same-sex marriages legally formed in other states on narrower grounds, which could limit its holding. For example, the Court might hold, as the Fourth and Tenth Circuits have ruled, that the fundamental right to marry includes the right to same-sex marriage. Such a finding would appear only to expand the rights of gay people within the marriage context.

A further alternative might find the Court subjecting state same-sex marriage bans to rational basis review, but concluding that they do not meet the requirements of this test, as the Seventh Circuit has. In invalidating state same-sex marriage bans under rational basis review, the Court might find that such bans are motivated by animus, similar to the state constitutional amendment at issue in *Romer*, and thus potentially find that states lacked a legitimate interest in enacting them. Such an approach could be perceived, particularly when considered with *Romer*, as a signal that the Court may apply a less deferential version of rational basis review when considering governmental action that harms individuals who are gay. However, such a finding could also just be illustrative of the fact that the Court arguably finds state same-sex marriage bans and the law at issue in *Romer* irrational.

The Court Could Resolve Each Question Differently

As a final alternative, the Court could hold that states are not required to permit same-sex marriages to be formed in the states, but must recognize same-sex marriages lawfully formed in other states. Under this analysis, the Court might, for example, invoke principles of federalism, just as it did in *Windsor*, to essentially say that states have autonomy in defining who can get married within their borders, but cannot disregard other states' decisions to allow same-sex marriages.

Conclusion

The Supreme Court appears poised to resolve the question of the constitutionality of state same-sex marriage bans. On the one hand, if the Court were to uphold state same-sex marriage bans, then same-sex couples could not get married in states with such bans enacted. Such a decision could also invalidate the marriages of same-sex couples who were married in response to lower courts striking down their states' same-sex marriage bans. On the other hand, if the Court were to find that state same-sex marriage bans are unconstitutional, it would seemingly broaden the rights of gay individuals by permitting same-sex marriages in all states. Such a result could extend certain state and federal benefits that accompany marriage to same-sex couples that currently lack access to them.

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