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Faulty reasoning in ruling on gay marriage ban

Elizabeth Wydra

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Marking a stark departure from the previously unbroken line of court of appeals rulings recognizing that gay and lesbian couples have a constitutional right to marry, the U.S. Court of Appeals for the Sixth Circuit upheld Kentucky's marriage restrictions, as well as those in Michigan, Ohio and Tennessee. Divided 2-1, the Sixth Circuit upheld these bans in large part based on a traditional definition of marriage as between men and women that the court claims "is measured in millennia."

This is a fundamentally flawed basis for denying same-sex couples their rights to equality. No "tradition" — no matter how old — can trump the text and history of our Constitution.

The Fourteenth Amendment states plainly that no state shall deny "to any person" due process and "the equal protection of the laws." When the Amendment was enacted in the wake of the Civil War, it was specifically intended to uproot established "traditions" of denying to African Americans and other disfavored groups equal treatment under the law.

The Supreme Court has repeatedly emphasized that the historical persistence of bias and discrimination cannot save such practices from being struck down as unconstitutional. If a "tradition" of discrimination could carve out an exemption from the Constitution's guarantee of equality, we'd still have segregated schools and swimming pools.

Writing for the Sixth Circuit's majority, Judge Jeffrey Sutton tries to avoid the Constitution's mandate by claiming that the people who adopted the Fourteenth Amendment did not understand it to require states to establish marriage equality. But that's not how constitutional analysis works. Judges must start with the actual words of the Constitution.

The drafters of the Fourteenth Amendment may not have been specifically thinking of gay and lesbian couples when they spoke of the need to ensure that the basic civil right of marriage was equally available to all. But the actual *text* of the Fourteenth Amendment's guarantee of the "equal protection of the laws" is sweeping and universal. It protects all persons.

The Supreme Court has already dealt with the relationship between "tradition" and equality in the context of racial discrimination and marriage. For many years in this country, states prohibited marriages between persons of different races, but the Supreme Court held in Loving v. Virginia that such a "traditional" concept of marriage violated the Fourteenth Amendment because "restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause."

Judge Sutton would have been wise to have heeded the lessons of the Loving case in another way as well. In 1967, when Mildred and Richard Loving asked the Supreme Court to strike down Virginia's ban on interracial marriage, you could have said there was "momentum" toward greater equality, given that 14 states had repealed similar laws over the previous 15 years. Even so, 16 states still had laws on the books that prohibited interracial couples from marrying. When the case came before the Supreme Court, the justices did not shrug off their duty to enforce constitutional protections and hope that the voters in those states would decide on their own to respect the Fourteenth Amendment — the Court struck down Virginia's discriminatory marriage law, taking the other 15 state bans with it.

Judge Sutton noted that the country seems to be rapidly moving in the direction of marriage equality. He wrote, "[f]rom 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." That question, his opinion concludes, is for the voters to answer, not judges. Our Constitution requires a different answer, and its words guarantee that gay men and lesbians enjoy an equal right to marry the person they love. With the Sixth Circuit's ruling, it seems as if the Supreme Court will finally have to weigh in once and for all.

Elizabeth B. Wydra is chief counsel of Constitutional Accountability Center, which filed "friend of the court" briefs at the Sixth Circuit defending marriage equality together with the Cato Institute.