SIXTH CIRCUIT REVIEW

DeBoer, *Baker*, and Summary Dispositions: In Defense of Appellate Court Restraint

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Commenting on *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014).

[T]he earlier and vast precedential jurisprudence arising out of pre-1988 summary dispositions of appeals . . . remains in effect. Perhaps the passage of time will cause those enigmatic precedents to fade. But their continuing existence can haunt both lower courts and the bar.[1]

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I. INTRODUCTION

On November 6, 2014, a divided panel of the United States Court of Appeals for the Sixth Circuit handed down one of the most consequential circuit court decisions in recent memory, *DeBoer v. Snyder*.[2] Though critics and defenders have seized on the better-known aspects of the majority's analysis, little attention has been paid to the majority's treatment of an important issue: the role of a lower federal court when addressing a binding Supreme Court summary disposition that appears to rest on questionable legal foundations. After contrasting

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[1] EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 310 (9th ed. 2007).

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

the majority's approach with two notable and thoughtful dissents, this Comment concludes that the majority's summary disposition methodology comports with Court teachings and preserves the proper role of lower courts in our hierarchical federal court system.

II. SUMMARY DISPOSITIONS: A HISTORICAL OVERVIEW AND DOCTRINAL FRAMEWORK

To understand why the Sixth Circuit split so dramatically on the summary disposition question, a brief description of the Supreme Court's jurisdiction is in order. When a party seeks to obtain Supreme Court review, it must rely on either: (1) the Court's discretionary [or certiorari] jurisdiction;[3] or (2) mandatory [or appellate] jurisdiction.[4] As its name implies, the latter category allows parties to seek—and requires the Court to grant—review of certain types of lower court decisions.

Prior to 1988, the Court's docket was dominated by cases that arose out of its mandatory jurisdiction.[5] Overburdened,[6] the Court responded by ramping up its use of summary dispositions, which are a frequently invoked device by which the Court disposes of cases without oral argument or full briefing.[7] Unfortunately, summary dispositions usually contain little to no legal reasoning, leaving lower courts perplexed[8] and critics seething.[9] After the Court acknowledged that summary dispositions do not bind it to the same extent as a full opinion on the merits,[10] these lower courts and critics began to wonder whether lower courts had similar leeway.

In *Hicks v. Miranda*, the Court answered this question with an emphatic "no," chastising a recalcitrant district court for refusing to apply a summary disposition.[11] Rejecting the argument that summary dispositions bind lower courts with less force than full opinions, the

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[3] *See* GRESSMAN ET AL., *supra* note 1, at 234–98.

[4] *Id.* at 298–310.

[5] *Id.* at 298.

[6] *See* Letter from Justices of the United States Supreme Court to Congressman Robert W. Kastenmeier (June 17, 1982), *in* H.R. REP. NO. 100-660, at 27–29 (1988) [hereinafter Burger Letter].

[7] *See* GRESSMAN ET AL., *supra* note 1, at 298–99 (detailing summary disposition statistics).

[8] Burger Letter, *supra* note 6, at 28.

[9] *E.g.*, David W. Brown, Note, *Summary Disposition of Supreme Court Appeals: The Significance of Limited Discretion and a Theory of Limited Precedent*, 52 B.U. L. REV. 373, 381–91, 411–12 (1972).

[10] *See, e.g.*, Edelman v. Jordan, 415 U.S. 651, 670–71 (1974).

[11] Hicks v. Miranda, 422 U.S. 332, 343–44 (1975).

Court wrote, "[the lower court] was not free to disregard [the summary disposition]," which it made clear was a decision "on the merits of [a] case."[12] The Court, however, hedged a bit in its conclusion, writing "unless and until [we] should instruct otherwise, inferior federal courts had best adhere to the view that if [we have] branded a question as unsubstantial, it remains so *except when doctrinal developments indicate otherwise*."[13]

It is this "doctrinal developments" language that sharply divides the majority and dissent in *DeBoer* over their authority to adjudicate the same-sex marriage issue. To be sure, it is not unreasonable to read the language as permitting a lower court to disregard a summary disposition that is inconsistent with more recent (and broader) principles the Court has articulated. Such a reading, however, would threaten to eviscerate *Hicks* itself, casting doubt on the innumerable summary dispositions that have not been expressly overruled. Especially in light of the Roberts Court's busy summary docket,[14] lower courts need a disciplined approach to addressing summary dispositions. The *DeBoer* majority's approach—which comports with Court teachings and preserves the proper role of lower courts in our hierarchical federal court system—is the proper approach.

III. THREE DIVERGENT APPROACHES TO *BAKER*

A. DeBoer *Majority:* Baker *Controls*

More than forty years ago, in *Baker v. Nelson*, a gay couple relied on the Equal Protection and Due Process Clauses to challenge a same-sex marriage ban, but was unsuccessful in state court.[15] Invoking the Court's mandatory appellate jurisdiction, the couple appealed, and the Court issued a twelve-word summary disposition rejecting the claim for

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[12] *Id.* at 344 (citations omitted).

[13] *Id.* (emphasis added) (citations omitted). Since *Hicks*, the Court has reaffirmed the view that summary dispositions prevent lower courts from reaching opposite conclusions on the "precise issues presented and necessarily decided by those actions." Anderson v. Celebrezze, 460 U.S. 780, 785–86 n.5 (1983); Ill. Elections Bd. v. Socialist Workers Party, 440 U.S. 173, 182–83 (1979) (citations omitted). The leading Supreme Court practice treatise has noted the Court's "repeated admonition that these summary rulings were decisions on the merits that lower courts were bound to respect and follow as binding precedents." GRESSMAN ET AL., *supra* note 1, at 310.

[14] *E.g.*, Kevin Russell, *An Increase in the Court's Summary Docket*, SCOTUSBLOG (Feb. 16, 2010, 11:03 AM), http://www.scotusblog.com/2010/02/an-increase-in-the-court%E2%80%99s-summary-docket [http://perma.cc/85YD-ZYB4].

[15] Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971).

lack of a "substantial federal question."[16] As developed through later precedent,[17] the Court's disposition signified that neither the Equal Protection nor Due Process Clause required states to recognize the couple's marriage as valid.

In *DeBoer*, plaintiffs claimed that the Equal Protection and Due Process Clauses of the Fourteenth Amendment required the states to recognize their marriages.[18] Writing for the two-judge majority, Judge Jeffrey Sutton began his analysis by invoking the perspective of an intermediate court, which required considering "what the Supreme Court's precedents require on the topic at hand."[19] After discussing the lower court's reasoning in *Baker*, the majority noted that the *Baker* Court rejected the precise Fourteenth Amendment claim raised by the plaintiffs.[20] Deeming itself bound by the Court's summary decisions "until such time as the Court informs [us] that [we] [are] not," the majority concluded that *Baker* stands for the proposition that the gay marriage bans violate neither the Equal Protection Clause nor Due Process Clause.[21]

The majority then turned to the dissent's principal claim: that "subsequent doctrinal developments"—specifically *United States v. Windsor*,[22] *Lawrence v. Texas*,[23] and *Romer v. Evans*[24]—indicate that *Baker* no longer binds lower courts.[25] After distinguishing each case, the majority arrives at the heart of the summary disposition issue: whether the "doctrinal developments" language in *Hicks* is capacious enough to encompass subsequent decisions that—while arguably distinguishable—nevertheless suggest that the Court's reasoning on the issue may have changed.

Per the *DeBoer* majority, *Agostini v. Felton*[26] tells a lower court that if Supreme Court precedent "has direct application in a case, yet

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[16] Baker v. Nelson, 409 U.S. 810, 810 (1972).

[17] Mandel v. Bradley, 432 U.S. 173, 176 (1977) (per curiam) (explaining that summary dispositions bind lower courts on the "precise issues presented and necessarily decided" by the lower court opinion).

[18] DeBoer v. Snyder, 772 F.3d 388, 396 (6th Cir. 2014). After brief consideration, the majority disposed of certain plaintiffs' constitutional right to travel challenges. *See id.* at 420.

[19] *Id.* at 399.

[20] *Id.* at 400.

[21] *Id.* (alteration in original) (quoting Hicks v. Miranda, 422 U.S. 332, 345 (1975)).

[22] United States v. Windsor, 133 S. Ct. 2675 (2013).

[23] Lawrence v. Texas, 539 U.S. 558 (2003).

[24] Romer v. Evans, 517 U.S. 620 (1996).

[25] *DeBoer*, 772 F.3d at 400–02.

[26] Agostini v. Felton, 521 U.S. 203, 237 (1997).

appears to rest on reasons rejected in some other line of decisions," an appellate court "should follow the case which directly controls, leaving to [the Supreme Court] the prerogative of overruling its own decisions."[27] Synthesizing its understanding of the Court's summary disposition jurisprudence, the *DeBoer* majority articulates its rule on summary dispositions: lower courts are free to disregard otherwise-binding Court precedent only where the Court has overruled the disposition (1) by name[28] or (2) by outcome.[29]

To illustrate its understanding of the second category, the Sixth Circuit employed a hypothetical. If the Supreme Court had held in *Hollingsworth v. Perry*[30] that California's gay marriage ban violated either the Due Process Clause or Equal Protection Clause, but *neglected* to mention *Baker*, lower courts would be free to disregard *Baker* and could instead apply *Hollingsworth*. In other words, the majority construes "by outcome" narrowly, suggesting only a direct overruling on the precise legal issue presented would suffice. After determining this condition is not met, the majority concludes its treatment of the *Baker* issue.[31]

A substantial argument exists that the majority's approach is stricter than *Hicks* and its progeny require.[32] Nevertheless, especially when contrasted with the dissenting approaches, three reasons suggest that the majority approach should be retained. First, such a reading is consistent with the *Agostini* principle, which reminds lower courts to refrain from overruling Court precedent, directly or otherwise. Second, it adequately accounts for the fact that innumerable summary dispositions remain on the books,[33] and allowing them to be uprooted by a mere shift in the doctrinal winds risks aggrandizing the circuits at the Court's expense. Third, given the recent uptick in summary dispositions, the majority's approach ensures that lower courts are not left "upstream without a paddle" as they attempt to contrast the rationales underlying more recent opinions with necessarily-rationale-lacking summary

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[27] *DeBoer*, 772 F.3d at 401 (quoting Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989)).

[28] *See, e.g.*, *Lawrence*, 539 U.S. at 578, *overruling* Bowers v. Hardwick, 478 U.S. 186 (1986).

[29] *DeBoer*, 772 F.3d at 401.

[30] Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (dismissing for lack of standing plaintiff's Fourteenth Amendment challenge to California's gay marriage ban).

[31] Two other circuit judges have concluded the same. Kitchen v. Herbert, 755 F.3d 1193, 1231–34 (10th Cir. 2014) (Kelly, J., concurring in part and dissenting in part); Bostic v. Schaefer, 760 F.3d 352, 385–98 (4th Cir. 2014) (Niemeyer, J., dissenting).

[32] *See infra* notes 50–58 and accompanying text.

[33] *See* GRESSMAN ET AL., *supra* note 1, at 310.

dispositions. A comparison with two opposing views highlights why the majority's approach should be retained.

B. DeBoer *Dissent:* Baker *"Lacks Only a Stake Through Its Heart"*

Like most federal courts to address the issue post-*Windsor*, Judge Daughtrey views *Baker* as irrelevant to the constitutional status of the same-sex marriage bans. The thread that unites the dissent and other courts distinguishing Baker is reliance on the "doctrinal developments indicate otherwise" language in *Hicks*.

Applying the doctrinal developments exception to *Baker*, the dissent notes that when *Baker* was decided, most states still had active "anti-sodomy" laws, a crucial factual distinction that the dissent argues removes much of *Baker*'s force.[34] Next, the dissent points out that *Romer*, *Lawrence*, and *Windsor*—all post-*Baker* gay rights jurisprudence—fail to mention *Baker*, an omission that suggests the Court itself regards *Baker* as dead letter.[35] The dissent concludes by referring to the Court's October 6, 2014 orders denying *certiorari* in a trio of cases striking down state gay marriage bans.[36] If it were truly error to refuse to apply *Baker*, so the argument goes, would not the Court have intervened?

At first glance, this argument has considerable force, especially insofar as it relies on precedent that scholars believe the Court will extend in holding that the Constitution prevents states from denying gay couples marriage equality.[37] The problem with the dissent's approach is that it conflates—or at least does not properly account for—the task of lower courts versus the Supreme Court when addressing otherwise-binding Court precedent that appears to have been subsequently indirectly undermined.

The dissent provides little support for the proposition that the *Hicks* dicta—espoused in a case where the Court admonished and reversed a lower court's attempt to circumvent a summary disposition—was meant to create a free-standing exception to the rule that lower courts are bound by summary dispositions "until such time as the Court informs [them] that [they] are not."[38] Indeed, post-*Hicks* guidance indicates

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[34] *DeBoer*, 772 F.3d at 430 (Daughtrey, J., dissenting).

[35] *Id.* at 431.

[36] *Id.*

[37] *See, e.g.*, Erwin Chemerinsky, *Law Review Symposium 2014—Keynote by Erwin Chemerinsky*, 48 U.C. DAVIS L. REV. 447, 450–451 (2014).

[38] Hicks v. Miranda, 422 U.S. 332, 345 (1975) (alteration in original) (citation omitted).

otherwise.[39] Absent some clearer limiting principle, the dissent's approach creates an exception to *Hicks* that threatens to swallow the rule. Especially given the perceived recent uptick in summary dispositions and the thousands that remain good law, such a departure threatens the predictability and stability that has been a hallmark of our hierarchical federal court system for decades.[40]

C. *Judge Posner: An Alternative Approach to Distinguishing* Baker

The Seventh Circuit's majority opinion deserves attention insofar as it (1) was written by a highly-regarded federal judge and (2) adopts a slightly different (but potentially important) approach to the *Baker* issue.[41] Before striking down state gay marriage bans, Judge Richard Posner cited[42] two circuit cases, the first of which declined to find that a doctrinal development indicated otherwise, instead invoking (1) the *Hicks* principle and (2) the distinction between lower courts and federal courts when considering summary dispositions.

Far more important (for purposes of this Comment) is the second opinion the *Baskin v. Bogan* majority cites*: Soto-Lopez v. New York City*.[43] Though Judge Posner does not discuss *Soto-Lopez*, he appears to cite it for the proposition that a circuit court has applied the *Hicks* dicta to free itself from the strictures of an otherwise-binding summary disposition.[44]

Although not without merit, the Seventh Circuit's use of *Soto-Lopez* would require the case to carry more weight than it seems capable of bearing. Though one circuit's one-time use of the "doctrinal developments indicate otherwise" language is not irrelevant to determining its scope, it confronts a formidable line of Court precedent holding that summary dispositions are binding decisions on the merits and should be accorded proper respect. *Without more*, the court's opinion in *Soto-Lopez* is better viewed as an aberration in precedent than a novel departure from the rule of *Hicks* and its progeny.

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[39] Anderson v. Celebrezze, 460 U.S. 780, 785–86 n.5 (1983); Ill. Elections Bd. v. Socialist Workers Party, 440 U.S. 173, 182–83 (1979); Mandel v. Bradley, 432 U.S. 173, 176 (1977) (per curiam).

[40] *See, e.g.*, Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 818–26, 839–56 (1994).

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

[42] *Id.* at 659–60 (citing United States v. Blaine Cnty., 363 F.3d 897, 904 (9th Cir. 2004)).

[43] Soto-Lopez v. N.Y.C. Civil Serv. Comm'n, 755 F.2d 266 (2d Cir. 1985).

[44] *Baskin*, 766 F.3d at 659–60.

But is there more? Though the impact of *Soto-Lopez* on *Hicks* has never been discussed at length, a review of the Second Circuit's opinion and, especially, the Supreme Court's subsequent affirmance, suggests that *Hicks* itself has been weakened. *Soto-Lopez* involved a constitutional challenge to a New York statute that provided preferential employment treatment to veterans who resided in New York before joining the military, but not veterans who moved to New York *after* doing so.[45]

As the district court recognized, the Court had rejected—in a summary disposition—an identical constitutional challenge to the identical New York veterans benefit scheme only eleven years prior.[46] Though it agreed that the summary disposition was "on all fours with the present case," the Second Circuit nonetheless read an intervening Court precedent—which found an equal protection violation in an Alaska statute that distributed income from the State's natural resources on the basis of length of residency[47]—as "undermin[ing]" the summary disposition.[48] After concluding that the summary disposition could "no longer be deemed to reflect the Supreme Court's view," the Second Circuit deemed itself "free to examine [the New York statute] with a fresh eye . . . ."[49]

Though the Second Circuit's approach is a jarring departure from *Hicks*—which New York repeatedly emphasized in its brief[50]—the Supreme Court did not seem to mind. Far from admonishing the lower court for "implicitly overrul[ing]" the summary disposition in contravention of *Hicks*, the Court adopted much of the Second Circuit's approach[51] and overruled the summary disposition in a footnote.[52] In doing so, it favorably cited[53] the Second Circuit for recognizing that the Court's overruling "*may be inferred*" from the intervening precedents.[54]

Properly understood, then, *Soto-Lopez* appears to stand for the precise proposition the *DeBoer* majority rejects: a lower court's authority to effectively overrule binding summary dispositions extends

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[45] *Soto-Lopez*, 755 F.2d at 268–69.

[46] August v. Bronstein, 417 U.S. 901, 901 (1974).

[47] Zobel v. Williams, 457 U.S. 55, 65 (1982).

[48] *Soto-Lopez*, 755 F.2d at 274.

[49] *Id.*

[50] Brief of Appellant at 17–20, New York v. Soto-Lopez, 476 U.S. 898 (1986) (No. 84-1803) ("A more direct indication of a doctrinal change by this Court must exist, however, before a lower court departs from a clearly established precedent of this Court.").

[51] *Soto-Lopez*, 476 U.S. at 907–12.

[52] *Id.* at 912 n.9.

[53] *Id.* at 909.

[54] *Id.* at 908 (emphasis added).

beyond instances where intervening Court precedent has overruled the decision by name or by outcome.[55] However—while a full consideration of the issue is beyond the scope of this case comment—four reasons suggest that *Soto-Lopez* should not be read so broadly.

First, such a reading seems inconsistent with the subsequent *Agostini* principle. Second, the Supreme Court has never explicitly acknowledged *Soto-Lopez*'s effect on the *Hicks* principle, and caution suggests that such a cataclysmic shift in summary disposition jurisprudence should come from the Court directly, rather than via implication. Third, given the recent increase in summary dispositions, weakening their binding effect could leave lower courts "upstream without a paddle" in the manner described above. Finally, recent decisions—without mentioning *Soto-Lopez*—have affirmed the status of summary dispositions as binding adjudications on the merits. Accordingly, this alternative way to understand the Court's summary disposition jurisprudence suffers from notable shortcomings, and the *DeBoer* majority's approach charts the better course.

IV. CONCLUDING REMARKS

As the reader is undoubtedly aware, the *DeBoer* plaintiffs successfully petitioned for certiorari. When the Court delivers its much-anticipated decision, it should relegate *Baker* to its proper place in American constitutional history: a footnote, as a relic of an era long-since passed.[56] For many of the reasons outlined in the *DeBoer* dissent, the Court should breeze past the enigmatic *Baker*—which has "haunt[ed]"[57] lower courts and gay couples alike—en route to concluding that the Fourteenth Amendment requires states to recognize same sex marriages.[58] Though its result is to the contrary, the *DeBoer* majority should be lauded for its faithful application of binding Court

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[55] DeBoer v. Snyder, 772 F.3d 388, 400–02 (6th Cir. 2014).

[56] *See, e.g.*, *Soto-Lopez*, 476 U.S. at 901, 912 n.9 (1986) (overruling a previous summary disposition in a footnote).

[57] See GRESSMAN ET AL., *supra* note 1, at 310.

[58] On what grounds? Though comprehensive analysis is (well) beyond this Comment's scope, the author would hold that straightforward equal protection analysis requires that discrimination on the basis of sexual orientation survive "intermediate" scrutiny, specifically that it be "substantially related" to "important governmental objectives." Clark v. Jeter, 486 U.S. 456, 461 (1988). Though the states have yet to file their respective briefs in the pending case, the interests asserted in *DeBoer*—(1) some formulation of *vox populi* and (2) channeling opposite sex couples' unique procreative power in a way that benefits society—would fall well short of this standard.

precedent and proper understanding of its own role in our federal court system.