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If I Marry a Man in New York, Could I Marry a Woman in Kentucky?: The Problem of the Fundamental Right to (Straight) Marriage

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If I Marry a Man in New York, Could I Marry a Woman in Kentucky?: The Problem of the Fundamental Right to (Straight) Marriage

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**IF I MARRY A MAN IN NEW YORK,
COULD I MARRY A WOMAN IN KENTUCKY?:
THE PROBLEM OF THE FUNDAMENTAL
RIGHT TO (STRAIGHT) MARRIAGE**

Philip R. Hsiao†

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INTRODUCTION

The Supreme Court's rulings in *Hollingsworth v. Perry*¹ and *United States v. Windsor*² have had profound effects on the lives of same-sex couples and their families. That is, in California and in other states (including the District of Columbia) where marriage between two people of the same sex is legal, citizens now enjoy a very different legal landscape for their family planning. In my own life, the federal government can no longer treat my same-sex marriage as less of a marriage than an opposite-sex marriage. Now, my husband and I can enjoy the panoply of rights—state and federal—that stem from legal marriage. However, these cases had no effect on those individuals in U.S. jurisdictions whose laws hold as void any marriage contracted between parties of the same sex.

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¹ 133 S. Ct. 2652 (2013).

² 133 S. Ct. 2675 (2013).

The unique status of marriage as a legal institution in the United States allows for state governments to limit recognition of marriages performed outside their jurisdictions despite the Full Faith and Credit Clause.³ Though the typical rules of comity demand that most marriages be recognized as legally valid in a jurisdiction where some marriages would not be valid so long as they were lawful where they were celebrated,⁴ a long-standing exception has existed for marriages that violate the fundamental public policy of a state being asked to recognize the foreign marriage.⁵ Some thirty states have even codified their fundamental public policy opposition to same-sex marriage as amendments to their state constitutions.⁶ My home state of Kentucky, for example, incorporated the following language into its constitution in 2004: “Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.”⁷

Of all the interesting questions that *Hollingsworth* and *Windsor* left unanswered about my marriage, then, the principal one to me is: What would my being married to a man in New York mean if I ever returned to Kentucky? The easy answer seems to be that my marriage would be meaningless; in Kentucky, it would be as though I were not married at all because I am not married to a woman. This apparently easy answer led me to think of a bizarre question: Does that mean I would have the right to be legally married to a woman in Kentucky? This question, though it may seem silly at first blush, is by no means new.⁸ However, the question has not yet been critically analyzed. With recent decisions that implicate the rights of marriage in America—and that bring directly

³ Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143, 2146–47 (2005). See also U.S. CONST. art. IV, § 1.

⁴ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971).

⁵ *Id.* § 283(2); *Beddow v. Beddow*, 257 S.W.2d 45, 47–48 (Ky. Ct. App. 1952).

⁶ See *Windsor v. United States*, 699 F.3d 169, 203–04 (2d Cir. 2012) (Straub, J., dissenting in part and concurring in part).

⁷ KY. CONST. § 233A.

⁸ See, e.g., Richard Cook, Comment, *Kansas’s Defense of Marriage Amendment: The Problematic Consequences of a Blanket Nonrecognition Rule on Kansas Law*, 54 U. KAN. L. REV. 1165 (2006) (suggesting problems that could occur if Kansas did not recognize foreign marriages between same-sex partners); Michael J. Kanotz, Comment, *For Better or for Worse: A Critical Analysis of Florida’s Defense of Marriage Act*, 25 FLA. ST. U. L. REV. 439 (1998) (analyzing what same-sex marriages, which were expected to begin occurring in Hawaii after *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), would mean under Florida law).

into question whether and to what extent any marriage must be recognized under the Constitution—we are in a critical historical moment where figuring out what it means to be queer in America not only implicates navigating the socio-legal structure that binds queer lives and identities, but also requires that conscientious work be done in determining the limits of that structure. After all, what takes precedence—opposite-sex marriage, with its status as a fundamental right, or my skim-milk marriage to a man?⁹

In this Note, I will examine what might happen to me if I were to move back to Lexington, Kentucky—the city of my birth—and apply for a marriage license with a woman. Would I be turned away for being currently married to a man? Would what I seek to do be criminal under Kentucky law? If so, would I have the right to compel the issuance of such a marriage license, despite the validity of my marriage in New York, or to stop criminal proceedings on constitutional grounds? These questions may seem silly, but the principles behind them have a very real importance for what it means to be married in America, where fundamentally irreconcilable state laws control our legal status.

I. NON-RECOGNITION OF MARITAL STATUS: IS MY INVALID SAME-SEX MARRIAGE AN IMPEDIMENT TO OPPOSITE-SEX MARRIAGE?

Kentucky law prohibits many types of marriages.¹⁰ Amid these, the law specifically states that marriage is “prohibited and void . . . [w]here there is a husband or wife living, from whom the person marrying has not been divorced.”¹¹ Kentucky’s law, finicky though one might expect it to be about such dickered terms, is surprisingly silent as to what a *husband* or a *wife* is. But *Black’s Law Dictionary* tells

⁹ See Oral Argument at 71:15–16, *United States v. Windsor*, 133 S. Ct. 2675 (No. 12-307), available at http://www.supremecourt.gov/oral_arguments/argument_audio_detail.aspx?argument=12-307&TY=2012 (audio of Justice Ginsburg’s comment to attorney Paul Clement, who defended the Defense of Marriage Act before the Supreme Court, in which she rhetorically referred to same-sex marriage as “skim-milk marriage”).

¹⁰ See, e.g., KY. REV. STAT. ANN. § 402.010 (West, WestlawNext through the end of the 2013 regular session and the 2013 extraordinary session) (prohibiting and voiding marriages between any people with a half- or whole-blood relationship of closer than second cousins); *id.* § 402.020 (prohibiting and voiding marriages where one of the parties has been declared mentally disabled by a court, when not solemnized or contracted in the presence of an authorized solemnizing person or body, between members of the same sex, between more than two persons, and—with certain exceptions—with a person under sixteen years of age).

¹¹ *Id.* § 402.020(1)(b).

us that *husband* means a married man and *wife* a married woman.¹² Thus, to determine if I could get married to a woman in Kentucky despite my being married to a man, I would need to determine if I have a *husband* as that term is used in Kentucky law. For this I turn to Kentucky's legal definition of marriage to determine if my husband, or I, qualify as married.

Luckily, for the definition of *marriage*, Kentucky has a statute on point:

As used and recognized in the law of the Commonwealth, "marriage" refers only to the civil status, condition, or relation of one (1) man and one (1) woman united in law for life, for the discharge to each other and the community of the duties legally incumbent upon those whose association is founded on the distinction of sex.¹³

This definition is essentially adopted from case law in which Kentucky's highest court upheld a county clerk's determination denying two women a marriage license, not because a statute forbade it—or even defined marriage at all—but because the union they were seeking as members of the same sex did not meet the common dictionary definition of marriage.¹⁴ For this reason, my husband and I, under Kentucky law, fail to meet the legal standard for *married*. Our civil status as married is not predicated on being one man and one woman. Our association is therefore not even founded on the distinction of sex,¹⁵ a basic requirement of the civil status of *married* in Kentucky. As expected, my marriage in New York does not meet the definition of marriage in Kentucky.

The Commonwealth's Office of the Attorney General gives further guidance on the issue. In a 2007 opinion essentially forbidding the public university system from giving domestic partner benefits to same-sex partners on constitutional grounds, the Office stated: "We believe a substantially correct statement of the [law relating to status] is that the law of the state where the marriage is consummated establishes the 'relationship' of one to the other as

¹² BLACK'S LAW DICTIONARY 637 (9th ed. 2009) (defining "husband"); *id.* at 1370 (defining "wife").

¹³ KY. REV. STAT. ANN. § 402.005 (West, WestlawNext through the end of the 2013 regular session and the 2013 extraordinary session).

¹⁴ *Jones v. Hallahan*, 501 S.W.2d 588, 589–90 (Ky. 1973). Now that the state constitution and statutes explicitly adopt the *Black's Law* definition cited in *Jones*, a court may find itself hard-pressed to deviate from this precedent. The *Black's Law* definition of *marriage*, for its part, has been updated to "[t]he legal union of a couple as spouses." BLACK'S LAW DICTIONARY 1059 (9th ed. 2009).

¹⁵ For purposes of this Note, we can at least assume that Kentucky intended "distinction of sex" to mean a gender binary of male as distinguished from female.

husband and wife . . . which is universally recognized”¹⁶ Does this imply that Kentucky recognizes my husband’s status as my husband by grace of our New York marriage, though Kentucky attaches no rights to his status since it otherwise considers our marriage void? It seems not, because the Office goes on to state that, under Kentucky’s constitutional marriage amendment, “only marriage as defined in Kentucky law . . . shall be valid or recognized as a legal status.”¹⁷ Therefore, the existence of our marital relationship, in New York, is probably not cognizable as a legal status for the purpose of Kentucky law.

Further examination of Kentucky’s marriage laws supports this conclusion. A statute provides that marriages between members of the same sex are against Kentucky public policy;¹⁸ such a marriage occurring in another jurisdiction is void in Kentucky, and “[a]ny rights granted by virtue of the marriage . . . shall be unenforceable in Kentucky courts.”¹⁹ To the question of whether I am a married man for the purposes of Kentucky law, there can be little doubt: the answer is no.

However, in order to prevent my marriage to a woman, Kentucky may be able to recognize my husband and my status as married via a legal fiction. In a recent child custody case, the Court of Appeals overturned a family court’s decision to use the legal fiction that a same-sex couple was married for the purposes of naming one member of the couple a legal stepparent.²⁰ The Court of Appeals found this to be an inappropriate derogation from the very clear meaning of Kentucky’s bans on same-sex marriage.²¹ The court reasoned that a legal fiction so blatantly at odds with the express words of the General Assembly and the Constitution would only have been appropriate if it were necessary to stop an “absurd and unworkable” result from occurring that would be directly at odds with Kentucky public policy.²² No precedent exists to give an idea of whether having a legal marriage in Kentucky while also having a

¹⁶ Op. Att’y Gen. Ky. on State Health Insurance Coverage for Domestic Partners, OAG 07-004, 3 (2007), *available at* <http://ag.ky.gov/civil/opinions/2007/oag0704.doc> (analyzing whether a state university’s offering of health insurance coverage for “domestic partners” to its employees violates Section 233A of the Kentucky Constitution).

¹⁷ *Id.* at 5.

¹⁸ KY. REV. STAT. ANN. § 402.040(2) (West, WestlawNext through the end of the 2013 regular session and the 2013 extraordinary session).

¹⁹ *Id.* § 402.045(1)–(2).

²⁰ S.J.L.S. v. T.L.S., 265 S.W.3d 804, 816 (Ky. Ct. App. 2008).

²¹ *Id.* at 818.

²² *Id.*

void marriage there that is valid in another state qualifies as an absurd and unworkable result for the purposes of Kentucky's domestic relations law. As such, it is unclear whether a court would allow a legal fiction to be used to recognize my husband and I as married for the purposes of preventing me from having two active marriages, even though one would be void in Kentucky.

Assuming I am not (at least fictionally) a married man under Kentucky law, then I am not anyone's husband there. If I am not anyone's husband, then neither is my husband—his being a married man is conditional on his being married to me, after all. Therefore, under Kentucky's law, I must not have a husband living. So long as the woman I would marry is no more closely related to me than a second cousin,²³ has not been adjudged mentally disabled,²⁴ is over eighteen years of age,²⁵ and—of course—is not married (to a man) herself,²⁶ we should be legally entitled to a Kentucky marriage license.

Applying for a marriage license in Kentucky requires applicants to appear at the relevant county clerk's office,²⁷ pay a fee,²⁸ and fill out a form that includes, among other things, information about the applicant's marital status.²⁹ The form requires the parties to certify that the information they provide on the form is true.³⁰ Were I to fill out this form, I would note that I am currently married in New York to a man. Considering the criminal penalties, including the loss of office, that can be assessed against a county clerk who knowingly issues a license forbidden by Kentucky law,³¹ a county clerk would most likely resolve the doubt in her favor and deny my application for a marriage license in light of the fact that I am a party to another, even if void, marriage. However, presuming a county clerk did issue the license to me, and my marriage were

²³ KY. REV. STAT. ANN. § 402.010(1) (West, WestlawNext through the end of the 2013 regular session and the 2013 extraordinary session).

²⁴ *Id.* § 402.020(1)(a).

²⁵ *Id.* § 402.020(1)(f).

²⁶ *Id.* § 402.020(1)(b).

²⁷ *Id.* § 402.080 (granting power to a county clerk to issue marriage license).

²⁸ KY. REV. STAT. ANN. § 64.012(19) (West, WestlawNext through the end of the 2013 regular session and the 2013 extraordinary session) (setting the fee for processing a marriage license).

²⁹ *Id.* § 402.100(1)(b) (requiring each county clerk to use a uniform form that requires the parties' vital information, including marital condition).

³⁰ Commonwealth of Kentucky Marriage License, Meade Cnty. Clerk, *available at* http://countyclerk.meadecounty.ky.gov/NR/rdonlyres/34E65687-7BE5-405D-8A4F-636E01AACA16/0/Marriage_License.pdf.

³¹ KY. REV. STAT. ANN. § 402.990(6)–(8) (West, WestlawNext through the end of the 2013 regular session and the 2013 extraordinary session).

solemnized properly,³² would my legal problems end there?

II. BIGAMY: IS MY PROHIBITED AND VOID MARRIAGE THE BASIS FOR A FELONY?³³

In Kentucky, bigamy is the felony of marrying someone while knowing that one already has a husband or wife.³⁴ The current definition of this crime is most likely an adaptation of the corresponding section of the Model Penal Code.³⁵ An essential element of bigamy, which Kentucky must prove beyond a reasonable doubt, is that the defendant was validly married when the second marriage occurred.³⁶ While some commenters take for granted that this burden to prove a valid predicate marriage would prevent a state with a marriage-defining amendment such as Kentucky's from convicting a bigamist whose first marriage was to a same-sex partner in another state,³⁷ that proposition is not supported by the law.

The logically correct answer is that *husband or wife* as used in the criminal definition of bigamy must be controlled by the same meaning of *marriage* that would control for the invalidity of my New York marriage. How could it be that, if marriage were defined in Kentucky's Constitution and statutes as only a marriage between a man and a woman, the criminal law could recognize an out-of-state same-sex marriage as a valid marriage?

Kentucky criminal law is subject to the canon of construction that its provisions be liberally construed according to "the fair import of their terms . . . and to effect the objects of the law."³⁸ Thus, a court would have an easier time relying on a legal fiction of my New York marriage, of the type discussed above, to contradict the plain meaning of the Kentucky Constitution and statutory regime. However, a court may not even need to fictionalize my marriage, as it would also have a long history of common law rules that support

³² *Id.* § 402.010(1)(c).

³³ Throughout, I use the words *bigamy* or *polygamy* to refer only to crimes so titled by law.

³⁴ KY. REV. STAT. ANN. § 530.010(1)(a).

³⁵ See MODEL PENAL CODE § 230.1 (1962). Kentucky overhauled its criminal law in light of the Model Penal Code effective in 1975. See Paul H. Robinson & Markus Dirk Dubber, An Introduction to the Model Penal Code 5 (Mar. 12, 1999), <https://www.law.upenn.edu/fac/phrobins/intromodpencode.pdf>. Kentucky's current definition of bigamy became effective on January 1, 1975. See KY. REV. STAT. ANN. § 530.010.

³⁶ *Tharp v. Commonwealth*, 45 S.W.2d 480, 482 (Ky. 1932).

³⁷ *Cook*, *supra* note 8, at 1187–88; *Kanotz*, *supra* note 8, at 461.

³⁸ KY. REV. STAT. ANN. § 500.030 (West, WestlawNext through the end of the 2013 regular session and the 2013 extraordinary session).

the notion that establishing the validity of a predicate out-of-state marriage is an issue of fact and not an issue of law.

If the predicate marriage for a bigamy prosecution occurred outside the state of prosecution, the validity of the marriage is an issue of fact: All that need be proved is that the marriage in fact took place and that such a marriage is in fact valid under the foreign law.³⁹ While this rule is old, it is still regarded as the valid common law rule by authoritative treatises.⁴⁰ If Kentucky courts adhere to the canon of construction that they are meant to give full effect to the objects of the law, adhering to a well-established doctrine that a foreign marriage need only to have been a valid marriage in the place where it was celebrated would foreclose the defense that the Kentucky Constitution precludes recognition of my same-sex marriage for any purpose, even in a criminal case for bigamy.

However, Kentucky's criminal bigamy statute contains a defense to the charge: the defendant believed he was legally eligible to remarry.⁴¹ This defense specifically includes the belief that the predicate marriage was void.⁴² At common law, this defense was not possible, as it was considered an impermissible mistake of law defense.⁴³ How this defense would work in Kentucky in light of its statutory and constitutional limitations on the definitions of marriage is unclear.⁴⁴

³⁹ *People v. Lambert*, 5 Mich. 349, 363 (1858). Also relevant is *Apkins v. Commonwealth*, 147 S.W. 376, 378 (Ky. 1912), where Kentucky's highest court opined that proof that the predicate Illinois marriage was void under the laws of that state would have been a sufficient defense to an indictment for contracting a bigamous marriage in Kentucky. However, if a valid foreign marriage would be void because the parties were married in the foreign jurisdiction to evade the marriage laws of their domicile, then that marriage could not be the predicate marriage for a bigamy prosecution. *State v. Fenn*, 92 P. 417, 417-19 (Wash. 1907).

⁴⁰ See, e.g., 11 AM. JUR. 2D Bigamy § 4 (2013); 2 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 232 (15th ed. 2013).

⁴¹ KY. REV. STAT. ANN. § 530.010(2) (West, WestlawNext through the end of the 2013 regular session and the 2013 extraordinary session).

⁴² See *id.*, Ky. Crime Comm'n cmt.

⁴³ See *Staley v. State*, 131 N.W. 1028, 1029-30 (Neb. 1911). In *Staley*, the defendant entered into a marriage that was valid in Iowa. He then returned to Nebraska and, after consultation with several lawyers who made him believe that his Iowa marriage would be void in Nebraska, remarried there. His belief that his Iowa marriage was void in Nebraska was no defense to a charge of bigamy, as this was merely a mistake of law defense.

⁴⁴ The most recent reported case noting a bigamy prosecution in Kentucky is *Hollingsworth v. Commonwealth*, No. 2005-CA-001217-MR, 2007 WL 1207118 (Ky. Ct. App. Apr. 20, 2007). Before that, the most recent case was *Carroll v. Commonwealth*, 202 S.W.2d 404 (Ky. 1947), which predates the adoption of this defense to bigamy and it deals with issues surrounding burdens of proof.

III. THE FUNDAMENTAL RIGHT TO OPPOSITE-SEX MARRIAGE:
HOW MUCH CAN KENTUCKY INTERFERE?

Whether I were denied or granted a marriage license to a woman, I might run into legal problems giving rise to a constitutional claim. Could I have a court compel the county clerk to issue me the license? (The denial of a marriage license, at least theoretically, gives rise to a claim for injunctive relief of that nature.⁴⁵) Could I have a court enjoin Kentucky from prosecuting me under its bigamy laws for exercising my fundamental right to marry a woman in these circumstances? At first, it seems these questions would arise under different constitutional theories, but the history of the right to marriage as a constitutional question shows the analysis is much more unified.

Loving v. Virginia,⁴⁶ in which the Supreme Court established the fundamental right to enter into opposite-sex marriages,⁴⁷ was a challenge to the constitutionality of Virginia's criminal prohibitions against its residents entering into interracial marriages in other states.⁴⁸ The Court recognized, as did the Supreme Court of Appeals of Virginia in upholding the law, the white-supremacist policies behind these criminal "evasion" laws for interracial couples were the same as those that held such marriages void for civil purposes.⁴⁹ Of course, *Loving* did not just invalidate criminal marriage evasion statutes as applied to interracial couples: it invalidated the civil prohibitions on interracial marriage that were premised on the same policies and similarly interfered with the fundamental right to enter into opposite-sex marriage. Given this precedent, either the denial of a marriage license or a prosecution for bigamy may be analyzed under the same standard.

Under the Kentucky Constitution, no government official may exercise "arbitrary power" over the "lives, liberty and property of freemen."⁵⁰ The constitution equally guarantees that "no grant of

⁴⁵ This was, after all, the remedy sought in *Jones v. Hallahan*. See 501 S.W.2d 588, 589 (Ky. 1973).

⁴⁶ 388 U.S. 1 (1967).

⁴⁷ *Id.* at 12.

⁴⁸ See *id.* at 2-7.

⁴⁹ The *Loving* Court cites to *Naim v. Naim*, 87 S.E.2d 749 (Va. 1955), where the Supreme Court of Appeals of Virginia held that denying the validity of the North Carolina marriage of a white man and a woman whom the court describes only as "a Chinese" for its miscegenetic character did not violate federal constitutional guarantees of equal protection or due process. *Loving*, 388 U.S. at 7.

⁵⁰ KY. CONST. § 2. See also *Kentucky Milk Marketing & Antimonopoly Comm'n v. Kroger Co.*, 691 S.W.2d 893, 899 (Ky. 1985) (explaining that Article 2's restriction of exercises of arbitrary power binds all public officials exercising their political powers,

exclusive, separate public emoluments or privileges shall be made to any man or set of men.”⁵¹ While these are guarantees of equal protection and due process generally, they also represent substantive rights that go beyond what the federal Constitution recognizes: in fact, Kentucky courts have often been at the forefront of recognizing substantive rights and stopping the Commonwealth from interfering with the lives of its citizens.⁵²

However, in recent years, the Kentucky Supreme Court has held that, in reviewing Kentucky laws for their constitutionality under Kentucky’s equal protection guarantees for denials of a fundamental right, the same rules of constitutional scrutiny that would apply under the relevant federal constitutional law apply in Kentucky.⁵³ In any event, the Kentucky Constitution can guarantee no fewer rights than the federal Constitution.⁵⁴ While all states have a nearly plenary power to determine marital status within their borders, these regulations of marriage must comport with the federal Constitution.⁵⁵

It is axiomatic that the Fourteenth Amendment to the federal Constitution contains a fundamental and individual right to marry one person of the opposite sex.⁵⁶ This right is both a substantive due process right and an associational right under the First Amendment incorporated via the Fourteenth, though the standard of review under either theory is, apparently, the same.⁵⁷ In reviewing a state’s interference with the right to marry one opposite-sex partner under the Fourteenth Amendment, a court must determine whether the interference is a “direct and substantial burden”

and that this provision encompasses a guarantee of due process and equal protection of law).

⁵¹ KY. CONST. § 3. See also *Elk Horn Coal Corp. v. Cheyenne Res, Inc.*, 163 S.W.3d 408, 418–19 (Ky. 2005) (noting that Kentucky’s guarantees of equal protection can require higher scrutiny than similar federal standards because of the breadth of Section 3 and its support in other sections of the Kentucky Constitution).

⁵² For a glowing review of Kentucky’s track record on this issue, see the majority opinion in *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992) (holding that laws outlawing deviate sexual intercourse were a violation of Kentuckians’ rights against arbitrary power and to equal protection of laws, even if the federal Constitution did not embrace that right).

⁵³ *Commonwealth v. Howard*, 969 S.W.2d 700, 703 (Ky. 1998).

⁵⁴ *Wasson*, 842 S.W.2d, at 492. See also *Maxwell’s Pic-Pac, Inc. v. Dehner*, 887 F. Supp. 2d 733, 752 (W.D. Ky. 2012) (holding that a law that violates the federal Equal Protection Clause would fail Kentucky’s standards for equal protection in Article 3 of the Kentucky Constitution).

⁵⁵ *Windsor*, 133 S. Ct. at 2691.

⁵⁶ *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (characterizing marriage as one of the basic civil rights of man and a “fundamental freedom”).

⁵⁷ *Montgomery v. Carr*, 101 F.3d 1117, 1124 (6th Cir. 1996).

on that right to marry.⁵⁸ If the state's interference rises to this level, a reviewing court will presume the interference is unconstitutional "unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."⁵⁹ If the interference does not rise to that level, the interference will only be held unconstitutional if it cannot survive rational basis review.⁶⁰

The Sixth Circuit's conception of a "direct and substantial burden" on the right to marriage is an absolute bar to marriage based on a suspect classification (such as the criminal statute struck down in *Loving*) or where the state places such a financial or legal burden on individuals who wish to marry that they will probably never be able to get married, even if they theoretically could.⁶¹ Thus, mere economic disincentives to marry a particular person or financial burdens incident to being married, such as disqualifications for social welfare or for public employment based on being in or entering into a marital relationship, do not rise to the level of "direct and substantial" burden.⁶²

In my case, the county clerk would have refused to issue my marriage license or I would have been prosecuted for bigamy based on my marital status under New York law. Assuming I were living in Kentucky with my husband and my opposite-sex fiancée, I would not have a right to get a divorce in New York⁶³ or to have my New York marriage dissolved or invalidated by a Kentucky court.⁶⁴

⁵⁸ *Id.* (citing *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978)). In *Zablocki*, Wisconsin forbade anyone who owed money under a child support judgment from being remarried unless the debtor both paid the amount owed and had a court clear the impediment by order. 434 U.S. at 375. The Supreme Court found that restriction interfered directly and substantially with the right to marry. *Id.* at 388–391.

⁵⁹ *Montgomery*, 101 F.3d at 1124. See also *Zablocki*, 434 U.S. at 388.

⁶⁰ *Montgomery*, 101 F.3d at 1124.

⁶¹ *Id.* at 1124–25.

⁶² *Id.* at 1125–26.

⁶³ New York law requires at least a year of continuous residency for one of the parties prior to the commencement of a divorce action of a New York marriage. N.Y. DOM. REL. LAW § 230 (McKinney, WestlawNext through L. 2014, ch. 1 to 2).

⁶⁴ Courts in Kentucky may only grant divorces to married couples. KY. REV. STAT. ANN. § 403.140(1) (West, WestlawNext through the end of the 2013 regular session and the 2013 extraordinary session). The statute provides that a Kentucky circuit court may declare a marriage invalid, or grant an annulment, where "[t]he marriage is prohibited." *Id.* § 403.120(1)(c). While the language of the statute is ambiguous as to whether that includes marriages that are void and prohibited (like a marriage where both parties are of the same sex), the statute is construed to reach such marriages. *Ferguson v. Ferguson*, 610 S.W.2d 925, 927 (Ky. Ct. App. 1980). However, it is not clear whether Kentucky's constitutional and statutory definition of marriage as extending only to relationships where the parties are opposite-sex would control in the applicability of the word *marriage* as used in this jurisdictional statute to exclude my marriage as eligible for this invalidation. Would a court apply the law of New York

Just as in *Zablocki*, where the plaintiffs could only theoretically have cleared the impediment to marriage by paying back money and obtaining a court order, the process of changing my marital status in New York would be so burdensome as to be nearly impossible. My husband and I would have to move to a jurisdiction that recognizes our New York marriage as a marriage for the purposes of obtaining the divorce. We would need to reside there long enough to establish the required residency and to see through the divorce proceedings. This process would require the entire uprooting of our lives in Kentucky and starting new (though perhaps temporary) lives in another state. This process could feasibly take years, and at unknowable costs.

The criminal and civil interferences with my right to marry in Kentucky would be, practically speaking, unavoidable. Unlike economic disincentives to marry a particular person, my case would present a situation where my same-sex marriage, void in the state I am living in and to which no state rights attach, would be all but irreversible, depriving me of the fundamental right to enter into an opposite-sex marriage or attaching severe criminal penalties to my exercise of that right. While it is true that any Kentucky man seeking to marry a woman while he is still legally married to a woman in another state would be expected to get a divorce, I would have no practicable access to divorce as a means to exercise my right to marry a woman like any other Kentucky man can. Thus, *Zablocki* would require that Kentucky's denial of my new marriage license or prosecution of me for bigamy be presumed to violate my constitutional right to opposite-sex marriage, unless Kentucky

to govern the definition of marriage for the limited purpose of granting us an annulment effective in Kentucky? Especially since Kentucky courts are forbidden to give *any* of the rights arising out of marriage "or its termination" to same-sex couples, the answer is even more muddled. *Cf.* KY. REV. STAT. ANN. § 402.045(1). This problem is not limited to Kentucky; several states' provisions limiting the definition of valid marriages to opposite-sex parties may have the effect of keeping same-sex couples, married in another state, from changing their legal status at all. *See generally* Elisabeth Oppenheimer, *No Exit: The Problem of Same-Sex Divorce*, 90 N.C. L. REV. 73 (2011); Colleen McNichols Ramais, Note, *'Til Death Do You Part . . . and This Time We Mean It: Denial of Access to Divorce for Same-Sex Couples*, 2010 U. ILL. L. REV. 1013 (2010). At any rate, Kentucky's circuit court jurisdiction for the invalidation of a marriage made prohibited and void by Kentucky law extends only to the parties to the marriage and is limited in time to within a year of the filing party's having learned of the impediment. KY. REV. STAT. ANN. § 403.120(2)(b). Though I have no citation for it, my husband and I learned of each other's being male much longer than a year ago. As such, it seems that we would not be entitled to an annulment in Kentucky regardless of the question of the meaning of *marriage* in the jurisdictional statute.

could show the interference protected sufficiently important state interests and is closely tailored to protect only those interests.

A. *Kentucky's Potential Interests in Preventing an Opposite-Sex Marriage*

As in all heightened constitutional scrutiny analyses, Kentucky would be required to offer reasons for its interference with my right to opposite-sex marriage based on my void-and-unavoidable same-sex marital status.⁶⁵ The Commonwealth would likely offer different arguments from those that same-sex marriage opponents would offer.⁶⁶ After all, I would be trying to marry a woman, not a man. Instead, the Commonwealth's reasons would likely be the arguments that are used to justify the prohibitions on plural marriage as a restriction in opposite-sex marriage.

In recent cases, state and federal courts have reviewed prohibitions on plural marriage for their constitutionality under various theories.⁶⁷ All of these cases start from the premise that the Supreme Court has ruled, and regularly affirmed, that Congress's prohibition of plural marriage in the territories of the United

⁶⁵ See Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 359 (2006).

⁶⁶ Such arguments are well known, and they seem to mostly focus on the protection of the definition of marriage and promotion of procreation. See, e.g., *Conaway v. Deane*, 932 A.2d 571, 630 (Md. 2007); *Hernandez v. Robles*, 855 N.E.2d 1, 16–17 (N.Y. 2006); *Andersen v. King Co.* 138 P.3d 963, 981–83 (Wash. 2006); *Morrison v. Sadler*, 821 N.E.2d 15, 22–25 (Ind. Ct. App. 2005); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003); *Lewis v. Harris*, 908 A.2d 196, 221 (N.J. 2006).

⁶⁷ *Bronson v. Swensen*, 500 F.3d 1099, 1110–13 (10th Cir. 2007) (holding that parties seeking to compel the issuance of a marriage license for a plural marriage did not have standing to challenge Utah's criminal bigamy statute because they could not establish the license would insulate them from prosecution); *Potter v. Murray City*, 760 F.2d 1065, 1070 (10th Cir. 1985) (finding a "network" of Utah laws based on monogamy and the deep tradition of monogamy in American society as compelling state interests to limit plural marriage); *State v. Holm*, 137 P.3d 726, 742–45 (Utah 2006), *cert. denied*, 549 U.S. 1252 (2007) (holding that Utah's criminalization of leading a plural-married life while only being legally married to one spouse was supported by compelling interests); *State v. Green*, 99 P.3d 820, 829–30 (Utah 2004) (refusing to review Utah's bans on plural marriage under strict scrutiny because those claims were not properly pleaded, but upholding those bans under rational basis review); *State v. Fischer*, 199 P.3d 663, 666–70 (Ariz. Ct. App. 2008) (holding that a defendant was not denied constitutional rights when he had not been entitled to the spousal defense in a proceeding for statutory rape on the theory that the girl he had had sex with was his celestial wife based on their plural marriage); *but see* *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1217–25 (D. Utah 2013) (holding that Utah's prohibition on merely purporting to be married to multiple people was a facial violation of the Free Exercise Clause and the substantive due process right described in *Lawrence v. Texas*). These cases show state-interest reasoning that flows from both the First and Fourteenth Amendments.

States was not violative of the federal Constitution.⁶⁸ Even in the *Zablocki* opinion, the Court tends to agree that a state can legitimately outlaw plural marriages.⁶⁹

The various reasons the Supreme Court gives to prohibit plural marriage in *Reynolds v. United States* include that this restriction vindicates a longstanding tradition in Anglo-American law against permitting plural marriage, that plural marriage causes patriarchal despotism incompatible with American civil society, and that plural marriage is more suited to “African” and “Asiatic” life.⁷⁰ In *State v. Green*, the Supreme Court of Utah analyzed and approved the state’s putatively compelling reasons for outlawing plural marriage: the vast network of legal rights premised on monogamous marriage,⁷¹ preventing marital fraud and misuse of state benefits associated with marriage,⁷² and protecting “vulnerable individuals” (women and children) from “[c]rimes not unusually attendant to

⁶⁸ *Reynolds v. United States*, 98 U.S. 145, 166 (1878); see also *Potter*, 760 F.2d at 1069–70 (showing how frequently the Court has affirmed *Reynolds*). Congress would proceed not only to criminalize plural marriages in the territories, but would go on to enact laws that stripped the Church of Latter-Day Saints of its corporate status and seized its property. See *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 66 (1890) (upholding the statute). After the Church abandoned plural marriage as a tenet of the faith, Congress returned the property it had seized to the Church. See S. REP. NO. 95-1275, at 2 (1978). The federal bans on plural marriage were repealed in 1978. Act of Nov. 2, 1978, Pub. L. No. 95-584, 92 Stat. 2483. Congress repealed its criminal bans on plural marriage as part of repealing the law that allowed for seizures from churches in the territories because, as the sponsors of the repeal argued, those laws were “antiquated and constitutionally suspect.” 124 CONG. REC. 23816, 23895 (1978) (statement of Sen. Dennis DeConcini). The Office of the Solicitor for the Department of the Interior even opined that the Supreme Court might find these laws unconstitutional because Congress had clearly put them forward only to harm Mormons and had stopped enforcing the law since the Church disavowed plural marriage. S. REP. NO. 95-1275, at 6–7 (1978). However, the Committee on Energy and National Resources clarified in approving the repeal of the laws criminalizing plural marriage federally that it did not intend to express a lack of support for such bans generally. *Id.* at 3. Concordantly, regulations from the Bureau of Indian Affairs still prohibit and void any marriages that are celebrated before the dissolution of either party’s former marriage. 25 C.F.R. § 11.603(1)(a) (2013). However, tribes may use their powers to regulate domestic relations to permit marriages made void by this regulation. Law and Order on Indian Reservations, 58 Fed. Reg. 54406, 54409 (Oct. 21, 1993).

⁶⁹ “Surely, for example, a State may legitimately say that no one can marry his or her sibling, that no one can marry who is not at least 14 years old, that no one can marry without first passing an examination for venereal disease, or that no one can marry who has a living husband or wife.” *Zablocki*, 434 U.S. at 392 (Stewart, J., concurring). However, on the same page, Justice Stewart disagreed with the majority that there was a constitutional right to marriage, calling it a privilege. *Id.*

⁷⁰ *Reynolds*, 98 U.S. at 164–66.

⁷¹ 99 P.3d at 830.

⁷² *Id.*

the practice of polygamy,” including incest, sexual assault, statutory rape, and failure to pay child support.⁷³ Two years later, the same court, in light of *Lawrence v. Texas*,⁷⁴ upheld Utah’s criminal ban on living as though married to multiple partners, citing the compelling interest of protecting minors from exploitation and protecting the public institution of marriage from private behavior that would harm it.⁷⁵

Courts have moved away from the bare assertions in *Reynolds* that plural marriage’s African, Asiatic, and despotic characteristics were enough to justify banning it, advancing toward a less moralistic—and more compelling—analysis focused on protecting women, children, and marriage itself.⁷⁶ But does this shift represent a genuine change in policy and reasoning behind these bans?

This change in analysis occurs, maybe coincidentally, after the establishment of the constitutional principle that a mere moral aversion or a simple desire to cause harm to a group are no longer recognized as valid state interests.⁷⁷ Dictum from the *Windsor* case even implies that protecting the definition of marriage itself is not a legitimate governmental interest, because it manifests a bare desire to harm a particular group based on moral aversion.⁷⁸ Recent

⁷³ *Id.* Here, the court cites to Richard A. Vazquez, *The Practice of Polygamy: Legitimate Free Exercise of Religion or Legitimate Public Menace? Revisiting Reynolds in Light of Modern Constitutional Jurisprudence*, 5 N.Y.U.J. LEGIS. & PUB. POL’Y 225, 239–45 (2001). Mr. Vazquez takes the position that courts have done an “unsatisfactory job” of establishing that the state has a compelling interest in limiting plural marriage and should move away from moralistic arguments toward arguments about protecting women and children. *Id.* at 253.

⁷⁴ 539 U.S. 558 (2003).

⁷⁵ *State v. Holm*, 137 P.3d 726, 742–45 (Utah 2006). The Utah Supreme Court noted that these were two legitimate interests in limiting consensual sexual behavior specifically recognized by the U.S. Supreme Court in *Lawrence*.

⁷⁶ *See cf. Vazquez, supra* note 73.

⁷⁷ This principle, established in *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), can be generally stated as a “bare congressional desire to harm” a particular group in exercising its rights is not a legitimate governmental interest, even under the low standards of rational basis review. *Id.* at 534–35. This doctrine has been applied to strike down laws that rest on “irrational” prejudices. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (invalidating a zoning ordinance that was suspected of resting on a bare desire to harm and exclude people with intellectual disabilities). The doctrine protects against state statutes that single out a particular minority group for broad legal disabilities. *Romer v. Evans*, 517 U.S. 620, 632 (1996). It has been extended to insulate private, consensual sexual relationships between adults from criminal laws founded only on moral disapproval of those relationships and the people most likely to engage in them. *Lawrence*, 539 U.S. at 583. It now also applies where Congress’s intent in passing a law is to harm a group based on moral disapproval of the exercise of one of its rights under state law. *Windsor*, 133 S. Ct. at 2693–94.

⁷⁸ *Windsor* uses evidence that the House of Representatives’ legislative intent in-

scholarship, even when it argues contra plural marriage recognition and decriminalization, details a history demonstrating that American prohibitions on plural marriage were strengthened, or even adopted, in order to express moral opposition to plural marriage and harm groups who practiced it.⁷⁹ In fact, much like the climate of suppressing same-sex marriages behind the Defense of Marriage Act a century later,⁸⁰ Congress's 19th-century assertion of its right to regulate some aspects of the family, despite the traditional state-law character of that body of law, was explicitly borne of the desire to eradicate the Mormon practice of plural marriage to safeguard the institution of marriage and an amorphous concept of national virtue.⁸¹

To no small extent, this idea of national virtue revolved around protecting what a moral American (i.e., white and Christian) life looks like from the perceived threat of multiculturalism.⁸² In refusing to recognize a validly celebrated out-of-state miscegenetic marriage, when such a marriage would be void under its law, the Tennessee Supreme Court famously ruled that to do otherwise could leave Tennessee in a situation where "[t]he Turk or Mohamadan, with his numerous wives, may establish his harem at the doors of the capitol," calling such a situation "revolting" and "un-

cluded the protection of traditional marriage from "homosexual couples" and their efforts to redefine marriage to sustain the Court's proposition that the Defense of Marriage Act's definition of marriage was adopted with inimical intent to harm same-sex couples who were validly married under state law. 133 S. Ct. at 2693.

⁷⁹ See Catherine Blake, Case Note, *I Pronounce You Husband and Wife and Wife and Wife: The Utah Supreme Court's Re-Affirmation of Anti-Polygamy Laws in Utah v. Green*, 7 J.L. & FAM. STUD. 405, 412-13 (2005); Cassiah M. Ward, Note, *I Now Pronounce You Husband and Wives: Lawrence v. Texas and the Practice of Polygamy in Modern America*, 11 WM. & MARY J. WOMEN & L. 131, 135-38 (2004); see also Vazquez, *supra* note 73, at 227-32.

⁸⁰ The parallels between, and the possibility of distinguishing, the moral disapproval of same-sex marriage and plural marriage led to much ado at the time of the passage of the Defense of Marriage Act. David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53, 55-60 (1997).

⁸¹ Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297, 1357-65 (1998).

⁸² *Reynolds* itself corroborates this with its focus on the "African and Asiatic" nature of plural marriage, which was a practice "odious" to countries in Europe's north and west, in holding that Mormon plural marriage was a major deviation from the well-established norms of Anglo-American society not worth protecting constitutionally as a religious practice. 98 U.S. at 164-65. Congress seemed to agree when it passed its ban on plural marriage in the territories in 1862, arguing just two years earlier that the Framers of the Constitution "surely . . . never intended that the wild vagaries of the Hindoo or the ridiculous mummeries of the Hottentot should be ennobled" by the protection of the constitutional guarantee of freedom of religion. H.R. REP. NO. 83, at 2 (1860).

natural.”⁸³ Plural marriage “was natural for people of color, but unnatural for White Americans of Northern European descent” being white and plurally married was to become non-white.⁸⁴

By contrast, state and federal governments as a matter of course recognized plural marriages as valid for both state and federal law purposes when they were validly contracted among Native Americans on their tribal lands in accordance with tribal customs, even when they would not recognize plural marriages occurring in other nations among those who later took up residence in the United States.⁸⁵ Courts also found ways to deal with the rights emanating from validly contracted plural marriages—so long as no one had to suffer the affront of normalized non-monogamous cohabitation.⁸⁶ Thus, while states and the federal government railed against recognizing plural marriages, they found ways to handle the occasional plural marriage and accorded rights to all the parties to it, so long as it was properly confined and could not pose a threat to public morals by seeming, for lack of a better word, normal.

The *Reynolds* Court found that criminalization and restriction of plural marriage in America vindicated the Anglo-American moral tradition preexisting the adoption of the federal Bill of Rights.⁸⁷ The European history of the criminalization of bigamy, which flipped between a civil (i.e., criminal) and ecclesiastical offense, gives insight into the original moralizing function of those laws.⁸⁸ Bigamy became a civil offense in England and the United

⁸³ *State v. Bell*, 66 Tenn. 9, 11 (1872). (To be fair, the court was characterizing plural marriage as revolting and unnatural along with interracial and incestuous marriage.) Whether the court conceived of “Turks” and “Mohammedans” as white is difficult to say. John Tehranian, *Compulsory Whiteness: Towards a Middle-Eastern Legal Scholarship*, 82 IND. L.J. 1, 3 (2007), discusses the “catch-22” of the simultaneous whiteness and racial othering that characterizes the Middle-Eastern and Arab experience in America much better than I ever could.

⁸⁴ Martha M. Ertman, *Race Treason: The Untold Story of America’s Ban on Polygamy*, 19 COLUM. J. GENDER & L. 287, 289 (2010).

⁸⁵ See Mark P. Strasser, *Tribal Marriages, Same-Sex Unions, and an Interstate Recognition Conundrum*, 30 B.C. THIRD WORLD L.J. 207, 207–29 (2010).

⁸⁶ Common law courts all over the world, even in the United States, recognized that so long as the plurally married foreigner (who is assumed to be non-white) were merely passing through, and the public policy of the state were not burdened by the prolonged cohabitation of the members of the multiparty marriage, or so long as the marriage’s validity were limited to rights like succession, then there should be no reason to hold the marriage invalid. See the discussion in *In re Dalip Singh Bir’s Estate*, 188 P.2d 499, 500–02 (Cal. Dist. Ct. App. 1948).

⁸⁷ *Reynolds v. United States*, 98 U.S. 145, 164–65 (1878).

⁸⁸ The Supreme Court offered a lengthy and detailed discussion of the history of bigamy and polygamy as criminal offenses in medieval Spain and the Spanish possessions that would later become Louisiana in *Gaines v. Hennen*, 65 U.S. 553 (1860), which shows the political tensions inherent in morphing bigamy and polygamy from

States after long having been converted into only an ecclesiastic offense.⁸⁹

A similar history of an ecclesiastic offense becoming civil was relied on by the Supreme Court in its 1986 decision upholding Georgia's criminal law against sodomy, *Bowers v. Hardwick*.⁹⁰ In overturning *Bowers*, the Supreme Court called into doubt that long-standing history as it related to restricting only sex among queer people, and stated that, even if the historical reality were as the *Bowers* opinion described, a long history did not make sodomy bans constitutional as applied to consensual queer sex between adults.⁹¹ In doing so, Justice Kennedy quoted the Supreme Court's decision in a case protecting the right to abortion: "Our obligation is to define the liberty of all, not to mandate our own moral code."⁹²

Tellingly, since the fervor of 19th-century anti-Mormonism has waned, so have prosecutions for living in plural marriage, with government officials focusing on fighting the other crimes stereotypically associated with communities where plural marriage is common.⁹³ The Senate Judiciary Committee recently reviewed evidence of the crimes "not unusually attendant to the practice of" plural marriage in the American West cited by the *Green* court as a valid reason to limit marital rights, yet no one suggested the family form itself, rather than the isolation inherent to certain fundamentalist Mormon communities, is responsible for their supposed criminality.⁹⁴

In short, there seems to be little justification to keep one person from having multiple marriages other than to protect monogamous marriage by expressing moral disapproval of other family

canonical heresies (tried by the Inquisition along with such abominable acts as sorcery, Judaism, and Mahomedanism) to civil crimes. *Id.* at 580–88.

⁸⁹ *Reynolds*, 98 U.S. at 164–65. In fact, the English statute transforming bigamy into a civil crime, referred to in *Reynolds* as adopted in 1788 by the legislature of Virginia, may have been Kentucky's original law on bigamy, given that when Kentucky became independent of Virginia in 1792, it adopted all general Virginia laws that were not inconsistent with its new constitution. See An Act Concerning the Erection of the District of Kentucky into an Independent State (Approved Dec. 18, 1789), *Compact with Virginia*, KY. CONST. art. VIII § 6 (1792).

⁹⁰ See 478 U.S. 186, 196–97 (1986) (Burger, C.J., concurring).

⁹¹ *Lawrence v. Texas*, 539 U.S. 558, 567–73 (2003).

⁹² *Id.* at 571; *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 850 (1992) (plurality opinion).

⁹³ Jaime M. Gher, *Polygamy and Same-Sex Marriage - Allies or Adversaries Within the Same-Sex Marriage Movement*, 14 WM. & MARY J. WOMEN & L. 559, 578–80 (2008).

⁹⁴ See *Crimes Associated with Polygamy: The Need for a Coordinated State and Federal Response: Hearing on S. 3313 Before S. Comm. on the Judiciary*, 110th Cong. 5–8 (2008) (statement of Sen. Harry Reid) (quoting *State v. Green*, 99 P.3d 820, 830 (Utah 2004)).

types.⁹⁵ Given the history of barring plural marriage as both an impediment to marriage and a crime to express moral disapproval for non-monogamy, to restrain specific religious practices, and to promote a majoritarian view of what constitutes proper civilized culture, a state might have difficulty in sustaining, under a purely legal analysis, that it has any bona fide, constitutionally permissible interests in maintaining restraints on plural marriage.⁹⁶

However, as the Utah cases demonstrate, courts—for whatever reason—have not yet been receptive to that analysis. The principles in *Windsor* expand language in *Lawrence* about the illegitimacy of moral disapproval as a government interest by applying it directly to marriage. Despite this fact, it seems unlikely that a court would find that there is not some sufficiently important governmental interest stemming from the prohibition on plural marriage to keep me from exercising my right to marry a woman. As such, Kentucky might be able to clear this hurdle.

B. The Relationship Between Kentucky's Interests and Its Interference

Though Kentucky might be found to have a sufficiently important interest in protecting against plural marriages to sustain its ban on that practice generally, denying marriage licenses to those who are in marriages void under Kentucky law, or prosecuting them for bigamy, would have to be closely tailored to give effect to only those interests. Tactically, because I am only looking for the narrow relief of ensuring that I have a right to marry a woman and not seeking to invalidate bans on plural marriage totally, I would focus on challenging the state's actions as applied to my case.⁹⁷ In *State v. Green*, the Utah Supreme Court was eager to point out how Utah's interests in preventing the "crimes not unusually attendant to" the practice of plural marriage were vindicated in prosecuting the defendant. The court noted that Green's conviction for bigamy

⁹⁵ Maura Strassberg, *The Crime of Polygamy*, 12 TEMP. POL. & CIV. RTS. L. REV. 353, 429–31 (2003).

⁹⁶ See Stephanie Forbes, Comment, "Why Just Have One?": An Evaluation of the Anti-Polygamy Laws Under the Establishment Clause, 39 HOUS. L. REV. 1517, 1540–47 (2003); James Askew, Note, *The Slippery Slope: The Vitality of Reynolds v. U.S. after Romer and Lawrence*, 12 CARDOZO J.L. & GENDER 627, 647–51 (2006).

⁹⁷ As-applied challenges allow courts to give narrow relief, which may be better suited to a strange case about the right to marry in an environment dominated by the Roberts Court's perceived preference for a limited role for the judiciary. See Gillian E. Metzger, *Facial and As-Applied Challenges Under the Roberts Court*, 36 FORDHAM URB. L.J. 773, 796–98 (2009); see generally Nathaniel Persily & Jennifer S. Rosenberg, *Defacing Democracy?: The Changing Nature and Rising Importance of As-Applied Challenges in the Supreme Court's Recent Election Law Decisions*, 93 MINN. L. REV. 1644 (2009).

accompanied convictions for rape of a child and nonpayment of child support.⁹⁸ The court further noted the levels of incest present in Green's marriages.⁹⁹ To keep Green from having the constitutional right to be married to multiple women, in his case, clearly vindicated Utah's interests in limiting plural marriage in the first place by protecting women and children from criminalities the court posited are associated with plural marriage.

However, no such facts would exist in my case. I would not be asking for the right to have multiple, concurrent marriages recognized as valid in Kentucky. I would not be seeking to live on a separatist compound with multiple, consanguineous wives under the age of consent. The only right I would be asking for is to have one marriage to a woman under Kentucky law, like any other Kentucky man whom the state deems unmarried has a right to have. There is no rational relationship, much less a closely tailored relationship, to vindicating a state's interest in preventing the exploitation of women and minors in such a situation.

My case also lacks any concern about wasting state benefits or implicating a state's potentially compelling interest in maintaining a vast network of laws predicated on monogamy.¹⁰⁰ Kentucky would not have to accord any rights to my New York marriage to my husband; the only rights and obligations arising from marriage would be from my Kentucky marriage to a woman. I would not be able to defraud the state from benefits or abuse state rights stemming from multiple marriages as the Utah court presumed that Green might.¹⁰¹ Kentucky's interests in keeping any wide swath of benefits it might suppose only belong to monogamous couples would not be threatened by my asking to have access to those benefits for only one marriage.

The only perhaps sufficiently important interest to be vindicated by denying me a marriage is to protect the traditional meaning of marriage as a monogamous institution. Even that reason would fail in this case, however, because I would not be validly married to two people. Under Kentucky law, I would only be validly married to one woman. Especially since I am not arguing that Kentucky must recognize both marriages, but only that it must recognize the type of marriage I am entitled to contract under Kentucky law and which is recognized under federal constitutional law as a

⁹⁸ *Green*, 99 P.3d at 830 n.14.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 830.

¹⁰¹ *Id.*

fundamental right, Kentucky does not advance its interests in defending traditional, opposite-sex, monogamous marriage by refusing to allow me to enter into one. While the state may want to keep me from having concurrent marital relationships as a means of protecting traditional morality about what marriage looks like, *Windsor* promotes the argument that the government has no legitimate interest in protecting and promoting one definition of marriage for only that reason.¹⁰² Denying me a marriage license to enter into, or punishing me for entering into, an opposite-sex, monogamous marriage does not advance the types of interests that, based on prior cases, Kentucky is likely to put forth in interfering with my fundamental right to opposite-sex marriage.

CONCLUSION: WHY DO THESE QUESTIONS MATTER?

Despite the weight of the legal analysis, I cannot say with confidence that any court would go along with my plan to marry a woman in Kentucky. Even with all the law on my side, a court would probably find a way to allow Kentucky to interfere with my fundamental right to marry a woman based on a marriage to a man that it would otherwise refuse to recognize. Such was the state of the fundamental right to marry when *Windsor* was handed down.¹⁰³

¹⁰² Cf. *United States v. Windsor*, 133 S. Ct. 2675, 2693–96 (2013).

¹⁰³ Of course, in the time since I wrote this Note on conflict of laws on marital status in July 2013, a lot has happened in the world of same-sex marriage recognition. Federal courts in Illinois, Ohio, Virginia, Oklahoma, and Utah have all decided, citing to *Windsor*, that state refusals to recognize or grant same-sex marriages are unconstitutional. See *Bostic v. Rainey*, No. 13cv395, 2014 WL 561978 (E.D. Va. Feb. 13, 2014) (applying facially to any Virginia law, the Commonwealth's constitution included, which bars granting or recognizing same-sex marriages); *Bishop v. United States ex rel. Holder*, No. 04-CV-848-TCK-TLW, 2014 WL 116013 (N.D. Okla. Jan. 14, 2014) (applying to all enforcement of the Oklahoma Constitution's same-sex marriage amendment, which limited marriages to opposite-sex couples); *Obergefell v. Wymyslo*, No. 13-CV-501, 2013 WL 6726688 (S.D. Ohio Dec. 23, 2013) (as applied to Ohio's refusal to recognize valid out-of-state marriages between same-sex couples on state death certificates); *Kitchen v. Herbert*, No. 13-CV-217, 2013 WL 6697874 (D. Utah Dec. 20, 2013), *judgment stayed pending appeal*, *Herbert v. Kitchen*, 134 S. Ct. 893 (Jan. 6, 2014) (striking down Utah's Amendment 3, which prohibits same-sex marriage); *Lee v. Orr*, No. 13-CV-8719, 2013 WL 6490577 (N.D. Ill. Dec. 10, 2013) (allowing class of terminally ill patients to marry their same-sex partners earlier than the effective date of the statute permitting same-sex marriage by issuing preliminary injunctive relief); *Gray v. Orr*, No. 13 C 8449, 2013 WL 6355918 (N.D. Ill. Dec. 5, 2013) (same as *Lee*, but as applied to only one same-sex couple where one partner was terminally ill); *Obergefell v. Kasich*, No. 13-CV-501, 2013 WL 3814262 (S.D. Ohio July 22, 2013) (as applied to the state's refusal to recognize legal same-sex marriages from other states to denote a surviving spouse's marital status on a death certificate). Yes, even Kentucky's restrictions on marriage have been invalidated by a federal court in a way that could, if the case is upheld on appeal, completely render this Note meaningless much sooner than

Nevertheless, analogy shows that it is critical that we as legal technicians interrogate and flesh out these seemingly silly questions about the limits of our fundamental rights. Determining the “essentials” of the sport of golf for the purposes of accommodating people with disabilities seemed “silly” to Justice Scalia.¹⁰⁴ His dissent in that case has been characterized as outraged at the fact that the Supreme Court was being asked to figure out how to accommodate people with disabilities in a competitive sport under the Americans with Disabilities Act.¹⁰⁵ Justice Scalia’s opinion reflects a deep, ableist privilege: it is silly for people who can play golf without accommodation to reflect on how to include those who need it.

Straight married couples all over the United States have centuries of case law, endless statutes and regulations, and a wealth of cultural and historical knowledge that map out exactly what their marriages, celebrated in one state, mean in another state. Of all the privileges that inhere to living a straight life, one of them is knowing that moving to another state does not put one’s legal rights into limbo. Queers do not share that privilege. While the questions covered in this analysis might seem silly, figuring out what the limits of our fundamental rights are, as they are in a state of flux, has never been more important.

I had hoped. *See Bourke v. Beshear*, No. 3:13-CV-750-H, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014) (deciding, just in time for Valentine’s Day, that Kentucky’s refusal to recognize valid out-of-state same-sex marriages—such as mine—violates the Fourteenth Amendment). *See also* David S. Cohen & Dahlia Lithwick, *It’s Over: Gay Marriage Can’t Lose in the Courts*, SLATE (Feb. 14, 2014, 10:43 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/02/virginia_vs_gay_marriage_ban_ruled_unconstitutional_a_perfect_record_for_single.html (providing an accessible run-down of the changes *Windsor* has brought to the constitutional discussion in case law of same-sex marriage in America). As Judge John G. Heyburn II pointed out: “[S]ometime in the next few years at least one other Supreme Court opinion will likely complete this judicial journey.” *Bourke*, 2014 WL 556729, at *12. However, we can be certain that questions of marital status, marriage recognition, and the legal doctrines surrounding the family will continue to evolve long past the time when I am considered married in Kentucky.

¹⁰⁴ *See* *PGA Tour v. Martin*, 532 U.S. 661, 700 (2001) (Scalia, J., dissenting).

¹⁰⁵ Aviam Soifer, *Disabling the ADA: Essences, Better Angels, and Unprincipled Neutrality Claims*, 44 WM. & MARY L. REV. 1285, 13005 (2003).