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Kentucky to Become a "Second Paradise" for Same-Sex Married Couples

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Daniel Boone was determined to bring his family "as soon as possible to live in Kentucky, which I esteemed a second paradise, at the risk of my life and fortune." With a **recent ruling (http://sblog.s3.amazonaws.com/wp-content/uploads/2014/02/Kentucky-marriage-recognitioin-ruling-2-12-141.pdf)** by a federal judge that Kentucky is constitutionally required to give effect to same-sex marriages from other states, this determination may be shared by gay and lesbian couples seeking a refuge anywhere south of the Mason Dixon line.

The court's ruling in *Bourke v. Beshear* concludes that whether or not a state has the power to refuse to authorize same-sex marriages on its own turf, it does not have the constitutional power to refuse to recognize those that are validly celebrated elsewhere. *Bourke* joins a growing number of cases in which recognition issues are at the forefront, a trend ignited by the Supreme Court's ruling last year in ***United States v. Windsor (http://supreme.justia.com/cases/federal/us/570/12-307/)*** , which found fault in the federal government's decision to single out same-sex marriages for non-recognition.

The Claim in *Bourke* and Kentucky Law on Same-Sex Marriage

This lawsuit was brought by four same-sex couples—married, respectively, in Canada, Iowa, California, and Connecticut. Two of the four couples are raising children, and one has been together for 44 years. They are, in the court's estimation, "average, stable American families."

Although each couple was validly married in another jurisdiction, none is entitled to have their unions recognized under Kentucky law. Kentucky, like more than forty other states, got swept up in the anti-same-sex-marriage backlash to the possibility, in the early 1990s, that Hawaii might imminently legalize same-sex marriage. (Hawaii did ultimately legalize same-sex marriage, but not for 20 more years and not until many other states had already done so.)

In 1998, Kentucky adopted a new law that prohibited same-sex marriages from celebration in Kentucky, declared same-sex marriage contrary to public policy, and declared same-sex marriages from other jurisdictions void and unenforceable in Kentucky. Then, in 2004, Kentucky voters ratified an amendment to the state's constitution, which provided that "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." Thus, both the Kentucky Code and the Kentucky Constitution categorically deny recognition to same-sex marriages (and civil unions or other marriage alternatives) that were validly celebrated in other states.

The plaintiff-couples argued—successfully, it turns out—that Kentucky's legal framework denies them rights and benefits enjoyed by other married couples in violation of the federal Constitution. Marriage, as the fight over same-sex marriage has made clear, is the determinant of innumerable tangible benefits, involving issues such as taxes, inheritance, wrongful death suits, family leave, and Social Security. It is also, in the plaintiffs' words, a source of "dignity and status of immense import," the denial of which is both stigmatizing and destabilizing.

Marriage Recognition Law

It's important when thinking about same-sex marriage to distinguish between (1) the law governing the celebration of marriage—that is, the law that determines whether a particular state will let couples within its borders marry, and (2) the recognition of marriage—that is, whether a particular state will give effect to a marriage that it would not itself have permitted, but that was validly celebrated in another jurisdiction. These might seem like closely related areas of law, but, historically, they have developed differently.

Marriage has always been regulated largely at the state level, and states have not always agreed about who should be allowed to marry and when. In our federal system, with ever-increasing mobility, these disagreements gave rise to conflicts about the portability of marital status. Are people still married if they move to, travel through, or return home to a state that would not have allowed them to marry in the first instance?

The traditional answer to that question was typically "Yes," with some exceptions. Every state followed some version of the "place of celebration" rule, which provides that marriages that are valid where celebrated are valid everywhere and, conversely, marriages void where celebrated are void everywhere. The general rule was subject to exceptions for marriages that were considered "universally abhorrent" or in violation of natural law, as well as for marriages that are in violation of some positive law deeming them void. The first exception was typically applied only to marriages that were bigamous or closely incestuous; the second was applied most commonly to evasive marriages—ones where a couple leaves their home state to evade its marriage laws and then returns expecting recognition of their marriage—if the state legislature had adopted an anti-evasion law.

Under the traditional rules, most states have given effect to common-law marriages, underage marriages, and first-cousin marriages even if their own laws do not permit such marriages to be celebrated. The deference to the marriages of sister states has been granted as a matter of comity, or respect, rather than being due to a constitutional mandate of full faith and credit.

If we were simply to apply the conventional interstate recognition rules to same-sex marriage, we would see a strong likelihood of recognition in states that do not permit same-sex marriage, at least for non-evasive same-sex marriages. What we saw, instead, was the erection of an entirely new, unprecedented set of rules that was specifically designed to fend off same-sex marriages from other jurisdictions—and designed to remove the question of recognition from courts. Kentucky's law is an example of this unprecedented approach.

DOMA and *United States v. Windsor*

The federal Defense of Marriage Act (DOMA) is also an example of a categorical non-recognition law, which refused recognition for all federal-law purposes to valid same-sex marriages. The Supreme Court's invalidation of DOMA on constitutional grounds in June 2013 (which I have written about in more detail **here (http://verdict.justia.com/2013/06/26/doma-is-dead)** and **here (http://verdict.justia.com/2013/09/03/falling-dominoes-same-sex-spouses-gain-more-recognition-rights)**) fuels cases like *Bourke*.

In *Windsor*, the Court struck down DOMA on equal protection grounds. Although Justice Kennedy noted that Congress has the power to make determinations of marital rights and privileges, as it does, for example, in immigration law, it has traditionally deferred to state-law determinations of marital status for purposes of implementing almost every federal law.

The problem with DOMA is not that it chose not to defer to the states, but that it chose to single out a single type of marriage for a broad-based set of disabilities. As the Court had held in ***Romer v. Evans*** ***(http://supreme.justia.com/cases/federal/us/517/620/case.html)***, "[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." In other words, the federal government's departure from the longstanding tradition of deference to state regulation of marriage makes it suspect, and suggestive of the inference that it reflected bare animus against a politically-unpopular group. DOMA, in the Court's view, worked a variety of harms on legally-married couples, including the diminishment of "the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect;" the undermining of "the public and private significance of state-sanctioned marriages;" and the humiliation of "tens of thousands of children now being raised by same-sex couples."

The Ruling in *Bourke v. Beshear*

The question in *Bourke* is whether, in the wake of *Windsor*, states can retain their own categorical rules of non-recognition with regard to out-of-state marriages, particularly if they otherwise give effect to prohibited marriages from out of state. In one recent case, ***Obergefell v. Wymyslo*** ***(http://docs.justia.com/cases/federal/district-courts/ohio/ohsdce/1:2013cv00501/164617/65)***, a federal judge in Ohio held that the state could not enforce its non-recognition rule against same-sex marriages for purposes of issuing a death certificate for a man who was legally married in another state. That case is currently pending on appeal.

Bourke raises a broader version of that question: Can Kentucky deny marriage recognition for any purpose under state law? The court ruled that Kentucky's non-recognition law violates the Equal Protection Clause of the Fourteenth Amendment.

To reach that conclusion, the court first discussed the appropriate standard of review. Although it seemed convinced that heightened scrutiny is appropriate both because of the importance of the right at stake and because of the historical disadvantage of the group affected, the court felt constrained by the failure of either the Sixth Circuit Court of Appeals or the United States Supreme Court (its superiors, judicially) to articulate a heightened standard of review in sexual-orientation discrimination or same-sex marriage cases. It thus applied the lowest level of review, asking only whether Kentucky had a rational reason to deny recognition to same-sex marriages.

But the court applied rational basis review in the spirit of ***Romer v. Evans*** ***(http://supreme.justia.com/cases/federal/us/517/620/)***, the 1996 case in which the Supreme Court struck down—under an ostensibly deferential standard of review—a Colorado referendum that specifically disadvantaged only gays and lesbians. This means that the search for a rational relationship ensures that "classifications are not drawn for the purpose of disadvantaging the group burdened by the law."

The judge in *Bourke* was most influenced, however, by the majority opinion in *Windsor*, the principles of which,it said, "strongly suggest the result here."

Like DOMA, the judge noted, Kentucky's non-recognition law's "principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency."

Moreover, the court noted, the Kentucky law mimics DOMA by demeaning "one group by depriving them of rights provided for others."

Moreover, the harms caused by DOMA apply with even greater force at the state level, where marital status is the determinant of an even greater number of rights and benefits. As the *Bourke* judge observed, "Justice Kennedy's analysis [in *Windsor*] would seem to command that a law refusing to recognize valid out-of-state same-sex marriages has only one effect: to impose inequality."

Although the court could have stopped with its discussion of *Windsor* and its conclusion that the mere desire to harm is insufficient to sustain a state law, it continued on with a discussionsof the right to marry (not just the right to have a marriage recognized by a sister state) and offered a series of answers to the questions and concerns

that might arise from a ruling that "clashes with many accepted norms in Kentucky—both in society and in faith."

First, the court acknowledged the Kentuckian belief in traditional marriage, one that is heavily, if not exclusively, informed by religious teachings on marriage. But while those religious beliefs are "vital to the fabric of society," the law must operate "outside that protected sphere." The law cannot, the court declared, "impose a traditional or faith-based limitation upon a public right without a sufficient justification for it."

Second, the court answered likely questions about religious freedom. For example, would churches be required to marry same-sex couples? The court reassures Kentuckians that whether the state could constitutionally prohibit same-sex marriages from being celebrated in Kentucky was not before the court (although the court's analysis wades into that territory). And even if the state ban is struck down in a future case, "no court can require churches or other religious institutions to marry same-sex couples or any other couple . . . [as] part of our constitutional guarantee of freedom of religion."

Third, the court noted that some might question the power of a single judge to override the laws resulting from a democratic process. But while states once had "wide latitude to codify their traditional and moral values into law," the Fourteenth Amendment clearly curtails that power. And [the tenet] that judges have final say on the meaning of the constitution and the individual rights it guarantees "is the way of our Constitution."

Finally, the court anticipated critics who might accuse judges of creating new rights, a change that appears to be "happening so suddenly." For those critics, the judge offered reassurance that our understanding of the Constitution has always been an evolving one. And while the changes in the realm of same-sex marriage might seem sudden, the jurisprudence that led to them has been developing for almost half a century since the Supreme Court's invalidation of interracial marriage bans in *Loving v. Virginia* (1967) (discussed in more detail **here (http://writ.lp.findlaw.com/grossman/20070530.html)**). It took the Supreme Court 46 years to get from *Loving* to *Romer* to *Lawrence v. Texas* to *Windsor*, and each of these small steps leads to the result in *Bourke*.

Conclusion

Although there have been many watershed moments in the battle over same-sex marriage, the Court's ruling in *Windsor* may turn out to be the most significant of all. If *Windsor* means, as two federal courts have now said, that states cannot deny recognition to same-sex marriages from elsewhere consistent with equal protection principles, then the battle over same-sex marriage is all but over. By long tradition, states do not require residency for marriage (although they do for divorce), so residents of any state can legally marry in any other state. And if those marriages must be recognized when couples return home, move, or travel through an anti-same-sex marriage state, then the refusal of some states to allow the celebration of same-sex marriage in the first instance has little practical consequence.

And the end of the controversy may be hastened still by rulings like the one in Virginia just last week. A federal judge, in *Bostic v. Rainey*, concluded that the state's statutory and constitutional bans on the celebration and recognition of same-sex marriage are unconstitutional under federal due process and equal protection principles. If that ruling survives appeal, Virginia must not only give effect to out-of-state same-sex marriages, as is true in Kentucky, but must allow them to be celebrated in the first instance.

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