The Rhetoric of Law and Love: Legally (Re)Defining "Marriage"

by

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This thesis was prepared under the direction of the candidate's thesis advisor, Dr. Becky Mulvaney, School of Communication and Multimedia Studies, and has been approved by the members of her supervisory committee. It was submitted to the faculty of the Dorothy F. Schmidt College of Arts & Letters and was accepted in partial fulfillment of the requirements for the degree of Master of Arts.

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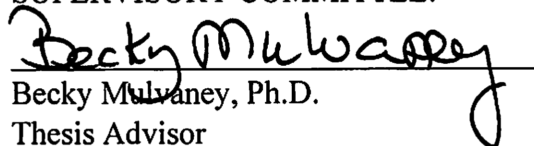

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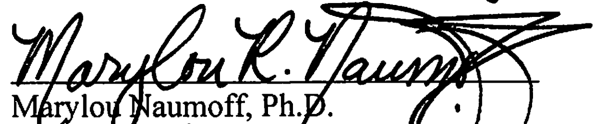

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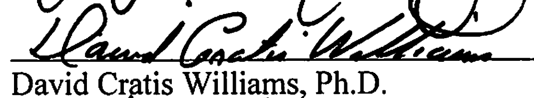

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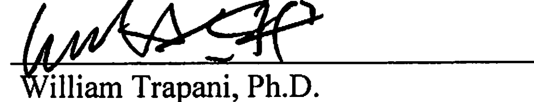

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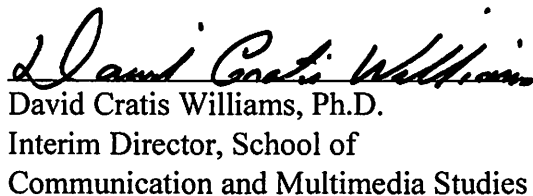

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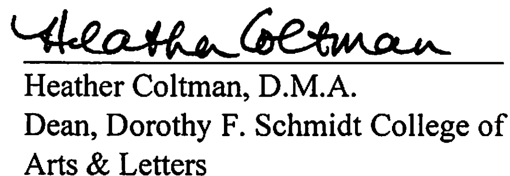

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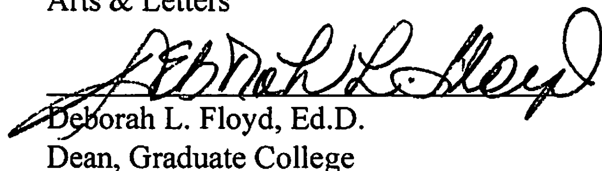

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Abstract

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In just over one year since *United States v. Windsor*— the case invalidating sections of the Defense of Marriage Act (DOMA) that defined marriage, for purposes of federal statutes, as the “union of man and woman”— more than a dozen states have had their same-sex marriage bans ruled unconstitutional. This suggests a shift in legal meaning; previously successful arguments against same-sex “marriage” now seem irrational as argumentative ground has shifted. Since favorable rulings redefine “marriage” to include same-sex unions, this thesis analyzes *Kitchen v. Herbert*, a 2014 legal opinion from the United States Court of Appeals Tenth Circuit, to understand the rhetorical processes underpinning its redefinitional act. That analysis draws on Kenneth Burke’s theories of *entitling* and *constitutions* and discusses the rhetorical concepts of *terministic screens, casuistic screens, scope* and *circumference* as key features of the rhetoric of the legal opinions. The findings call for a balancing of deconstructive and conventional approaches to legal discourse.

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Introduction

A. Background and Rationale

In the spring of 2012 as an undergraduate student in *Introduction to Communication and Civic Life*, I was assigned to write a paper about a "body" (*any* body) and how it has been portrayed in public discourse. At the time, my ambivalence about the media portrayals of the shooting of 17 year old Trayvon Martin piqued a personal interest in making some sense of why or how it was that black skin could be so polarizing. In truth, I had been raised in an environment which did not place emphasis on the color of my skin as much as it did "the content of my character" (King). Therefore, I believed that how we are perceived stems from how *we* act and that much of the solution to racial tensions could be solved if blacks could just realize that—"ban the rap music, pull up your pants, get an education, stop making excuses," so I thought.

At the time, I shared the sentiments of Bill Cosby who said all of those things and more at a closed door meeting with black religious leaders and men from the local "black community" in his infamous "Pound Cake" speech (Cosby). What I learned from that assignment, however, was that much of how we see and what we think about "blackness" stems not merely from how black people "act" or "portray themselves," but from how discourses over the centuries had treated the "black body." This was enlightening to me—I had never thought about it from that perspective; I knew that real situations had occurred and human flesh and blood bore the effects of racial ignorance, but I had not

truly considered (I did not even have a frame of reference for understanding) the impact that words could have on what I perceived to be a physical, non-discursive, objective "fact of blackness."

As I reflected on the assignment, I recalled earlier research I had done on landmark, infamous legal cases regarding blacks, *Dred Scott v. Sandford* and *Plessy v. Ferguson*. In *Dred Scott*, a case from 1857, the U.S. Supreme Court declared that blacks were not regarded as "people" under the U.S. Constitution and could not claim citizenship rights. Instead, although he had married a "free woman" and lived on "free soil" for years, Scott remained the "legal property" of his former slave owner (Dred Scott v. Sandford). In 1896, the U.S. Supreme Court in *Plessy* sanctioned what would become the "separate but equal" doctrine when it found a discriminatory Louisiana state law constitutional (*Plessy v. Ferguson* 552). Both cases relied on notions of race which it took to be essential to blackness. Their rulings were packaged as necessary legal conclusions and failed to recognize how, rather than just objectively presenting facts that were merely reflective of reality, they were actively shaping socio-cultural realties. The effects remain deeply embedded in U.S. American identity even today.

Another catalyst for this project—and the most relevant to its scope—came from my reading *Gay Rights and Moral Panic, The Origins of American's Debate on Homosexuality* by Fred Fejes. In it Fejes discusses the conservative, ideologically driven media campaign surrounding ordinances enacted to offer legal protections to homosexuals in the 1960s. What I noted most interestingly about the book is its discussion of the gay community's debate over whether to frame the issues from the perspective of "sexual preference" or "sexual orientation." Motivated by the need to

make cogent, legal arguments, gay rights advocates were scrambling to decide which definition would best win out over time in the fight for legal recognition (Fejes); "sexual preference" could be connected to First Amendment appeals to freedoms of speech, privacy, and intimate associate which had recently been upheld by the U.S. Supreme Court; "sexual orientation" could be connected to Civil Rights legislation which protected classes of persons historically discriminated against.

Unfortunately, in the short and medium term neither of the expressions would shield gays from social, cultural, or legal ostracism as cases such as the 1986 U.S. Supreme Court case, *Bowers v. Hardwick,* ruled that "homosexual conduct" was not constitutionally protected and that state laws could make unequal, moralizing distinctions between classes of persons (an argument which undermined both appeals to "preference" or "orientation") (*Bowers v. Harwick* 195).

Of course, each of these cases was different; yet, each was the same. Each reinforced essentialized notions of blackness or sexuality specifically, and more generally, each case turned on mere definitions—definitions which were taken to be so basic, so essential that the rulings did not even inquire as to how it was those definitions came to have force; thus, any work critical of the legal rulings themselves had to start with the definitions upon which those rulings were situated.

Of course, we can read about *Dred Scott*, *Plessy*, or *Bowers* (and the countless other decidedly similar rulings) in history books and attempt to make critical judgments which aid in legal, social, and cultural progress. Indeed much has been written and critical judgments abound. In many respects, we can celebrate the fact that in those instances, progress was eventually made as new understandings of centuries old problems

came to light— understandings of “blackness”, “womanhood”, and “sexuality” certainly have come a long way.

Yet, the struggle for legal, social, and cultural recognition continues. To those without a legally, socially, or culturally recognized voice—the unnamed, the unsayables, the undefined— this project is an attempt to contribute to that struggle. To those who find themselves identified by definitions that are not fully representative of who they are or how they see themselves or whose definitions are labels imposed on them without any attempt to fully account for them, this project enters as but a few words interjected into an ongoing and perhaps ever enduring conversation. In fact, the recent tide of cases in favor of same-sex marriage provides a perfect entry site for contributing to that conversation by examining how it is possible that entrenched definitions such as those discussed previously might be transcended. To that end, the legal redefinition of marriage to include same-sex couples provides a perfect case study of definitional and redefinitional processes.

In just over one year since the landmark case *United States v. Windsor*— the case invalidating sections of the Defense of Marriage Act (DOMA) that defined marriage, for purposes of federal statutes, as the union of one man and one woman—sixteen states have ruled gay marriage bans unconstitutional. In case after case, judges all around the country are invalidating these bans, and those defending the bans are losing argumentative traction. In some cases, states defending their bans have been exposed as having no rational basis whatsoever for such bans. Often arguments turn on the fact that elected representatives in legislatures have enacted laws that in a democracy should be accorded deference by the courts. Other arguments center on “history and tradition”

(Kindregan 427). These legal arguments posit that marriage, stemming back to English Common Law, has traditionally been understood as a heterosexual institution; thus, as the argument goes, it should continue to be so. Yet, none of these previously cogent, legal arguments make any sense today in light of current U.S. legal jurisprudence as these favorable rulings are premised on redefinitions of marriage that are not tied to gender.

For example, *Loving v. Virginia*—where both "history and tradition" as well as the legislatures of the time outlawed interracial marriage until the U.S. Supreme Court in 1967 rendered these laws unconstitutional—has recently been applied to marriage equality cases. This would have been inconceivable within legal discourse only a few short years ago. While *Loving* declared a right to marry, the legal community did not believe that right extended to same-sex couples; in fact, in *Baker v. Nelson,* a case from 1971, the U.S. Supreme refused to even hear challenge to gender based, "traditional" marriage. Clearly, the argumentative ground upon which these cases are situated has shifted. The positive trend toward inclusion of same-sex couples is worthy of further investigation.

B. Overview

I proceed first with a discussion of the legal paradigm which I believe demands a rhetorical rejoinder. As I will show, it is a paradigm which privileges closure and thus requires definitional certainty. After establishing this underlying legal paradigm, I turn to a rhetorical view of definitions, guided by the work of Kenneth Burke, which insists that we see definitions as more than just words. I suggest that an understanding of the rhetorical processes implicit in defining situations, concepts, and people can be connected with a Burkean notion of constitutionality making possible critical analysis of definitions

and redefinitions. Along the way, I connect these theories to the work of rhetorical scholars whose theoretical concepts and critical applications explore both the nature and the effect of definitions and redefinitions.

Thereafter, I analyze the redefinition of marriage to include same-sex couples. The specific object for analysis is a 2014 legal opinion from the United States Court of Appeals Tenth Circuit, *Kitchen v. Herbert*. This case is selected because I believe its rhetorical implications far exceed the narrow legal ruling passed down by the court, and in just over a year since this ruling was handed down, a shift has occurred within legal discourse leading to the invalidation of dozens of state same-sex marriage bans. The rhetorical analysis is preceded by a historical, contextual, and legal analysis of, several precedent cases related to either same-sex marriage or gay rights that the Tenth Circuit in *Kitchen* relied upon to redefine marriage to include same-sex couples.

This thesis project is an opportunity to study the U.S. Tenth Circuit Court's redefinitional attempt and will help answer some important questions, namely—how does the *Kitchen v. Herbert* legal opinion navigate discipline-specific legal rhetorical constraints in ways that cast the redefinition of marriage to include same-sex marriage as consistent with traditional marriage values and American legal jurisprudence? How does the redefinition reconstitute the social motives underpinning "marriage"? What are the implications for rhetorical scholarship and criticism?

I analyze several appellate opinions redefining "marriage" and the "right to marry:" *Loving v. Virginia (*hereafter *Loving)* from 1967*, Baker v. Nelson* from 1971*, United States v. Windsor (*hereafter *Windsor)* from 2013*,* and *Kitchen v. Herbert (*hereafter *Kitchen)* from 2014. *Loving* is central to this analysis because the Court held that laws

banning interracial marriage were unconstitutional and that States could not infringe on the fundamental "right to marry." In doing so, the court rejected a narrowly construed appeal to "history and tradition" as a register of societal perceptions on interracial marriage and which had banned such marriages for centuries; instead, it focused its analysis of the "right to marry" on the centrality of marriage to societal preservation and linked marriage to child rearing, family stability, and natural rights whose conceptions preceded the formation of the United States (*Loving v. Virginia* 12).

The case against which I compare *Kitchen* is *Windsor*. The ruling in *Windsor* held that it was unconstitutional for the Federal government to define marriage because of the principles of federalism underlying the U. S. Constitution which make the regulation of marriage a state prerogative. In reaching this conclusion, the U.S. Supreme Court in *Windsor* overturned portions of the Defense of Marriage Act which defined "marriage" for the purposes of Federal law as an institution between "one man and one woman" (*United States v. Windsor* 2683).

In fact, the majority opinion in *Kitchen* which held that Utah's ban on same-sex marriages was constitutionally impermissible, depended on *Windsor's* linking of the fundamental "right to marry" to same-sex marriages. There the Court held not only that same-sex couples, like heterosexual couples, had a fundamental right to marry, but that Utah did not articulate a single argument that would provide a rational-basis justification for its same-sex marriage bans; that is, even under the most deferential level of judicial scrutiny available, the States cannot justify their bans (*Kitchen v. Herbert* 1201). In some respects, this breaks from legal trends in gay rights jurisprudence.

C. Legal Paradigm and Rhetorical Perspectives

Law, Conventionally Conceived

Perhaps a good place to begin a discussion about conventional legal paradigms is to reflect on U.S. legal history; instituting judicial review, the U.S Supreme Court in the famous case, *Marbury v. Madison,* suggested that there is something inherently different about written constitutions that both necessitates and constrains judicial interpretation. Written constitutions permit lawyers to trace laws in a constitution back to a set of unchanged, original principals which are fundamental to the society (*Marbury* 176). Fixed at the time of writing, these principals are a set of rules to be applied, interpreted, and expounded upon by judges. Law so conceived is the work of lawyers who are professionally trained to read, understand, interpret and argue for or judge what the law is. What often follows from this logic are perspectives on law that treat legal language as unambiguous and objective. Judges point back to legal language in empirical, positivistic fashion to deduce law. These views of legal discourse and rhetoric even extend to conventional legal scholarship which ultimately attempts to legitimate the state and the rule of law (Wetlaufer 1567).

Wetlaufer argues that although the legal field denies its rhetoricity, that denial has certain effects on the field. He describes the rhetoric of the law to include:

> …commitments to objectivity, certainty, closure, analysis, reason, clarity, and judgment, as well as to authority, hierarchy, intellectual unity, the impersonal voice, coercive argumentation, appeals to narrow rational faculties, the one right answer, the best solution, the disciplines of closure, and the one objective and ascertainable meaning of texts (Wetlaufer 1587).

As he puts it, the legal community focuses on the "extinguishment of contingency" and is committed to rulings rooting in notions of "acontextuality" (Wetlaufer 1587).

Hasian, Condit, and Lucaites refer to this orientation to law as the scientific judicial perspective which they argue gives weight to the authority of the law and contributes to the idea that jurisprudence is "a hermeneutic enterprise that seeks the correct meaning of fixed Constitutional dicta, administrative rules, and general legal principles" (325). They point out that these are commonplace thoughts within contemporary legal scholarship and practice.

Furthermore, they suggest that contemporary legal discourse assumes "that the law is an independent discursive field" that is separate and apart from the public and political spheres and as such is unchanging (Hasian, Condit, and Lucaites 328). That is, classical legal claims "seek to reify contingent and negotiable relationships as permanent and unavoidable" (Hasian, Condit, and Lucaites 328). A consequence of this judicial paradigm is that rhetoric, from a legal perspective, is relegated to the periphery. It is separate and distinct from legal logic and possibly even threatens legal certainty (Hasian "Judicial" 252).

Critical Legal Perspectives

In response to the modern conceptions apparent within American legal jurisprudence, a group of scholars set out to reject the taken-for-granted view of law. This movement, Critical Legal Studies (CLS), sees law as a "legitimating ideology" that cuts off "access to genuine possibilities of transformation" (Freeman 1235). CLS holds that "law is merely an ideology, and as such it represents an illegitimate exercise of coercive power" (Hasian, Condit, and Lucaites 326). For CLS, ideas such as the "rule of law" are a means of "hiding and legitimizing maldistributions of wealth and power in society" (Hasian, Condit, and Lucaites 328). Lucaites notes that the "CLS perspective views the

boundary between law and rhetoric as a political space that may be used to repress and undermine the possibilities for radical social change" (436).

The problem with denying the rhetoricity of law, Wetlaufer states, "arises when we confront the possibility that the 'order' we impose may be neither neutral nor objective nor value free, that our simplifications may not do full justice either to our clients or to the world in which we live, and that our rules of relevance exclude material that ought to be taken into account" (1589). These rhetorical commitments hide the fact that legal discourses are cultural artifacts (Wetlaufer 1587). They are "products of circumstances and purposes that in a certain way have a life of their own….this structure suggests that we may be blind to certain choices we have made and to certain consequences associated with those choices" (Wetlaufer 1587).

As he notes "rhetoric has long had strong connections with advocacy and the study of law," and so Wetlaufer believes that the legal field could benefit by recognizing its rhetoricity (1589). "Rhetoric offers us a set of tools for thinking about the discursive conventions within which we work" (Wetlaufer 1548). "It also teaches us that, through our particular rhetorical conventions and commitments, we constitute our selves, our communities, and perhaps, our world" (Wetlaufer 1548).

Lawyer and legal scholar, Erwin Chemerinsky also invokes "rhetoric" to discuss constitutional interpretation and judicial decisions. In a neo-Aristotelian manner, Chemerinsky considers the rhetorical tactics of a California Supreme Court judicial opinion in *In re Marriage Cases*[1] with respect to its persuasive arguments as tailored to

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[1] This case struck down California's Proposition 8 ban against same-sex marriage as unconstitutional.

the legal community. He notes how the decision is crafted persuasively for its intended audience: lawyers, judges, and scholars (Chemerinsky 1770). The judges accomplish this through meticulous documentation and citations to reflect a solid grounding in law as opposed to a personal policy choice (Chemerinsky 1764).

Law, Rhetorically Conceived

Some rhetorical scholars have also considered the intersection of rhetoric and law by focusing on the ways in which law is constituted. Hasian, Condit, and Lucaites suggest that the law should be viewed as a "rhetorical culture" (326). This conception of law considers the "range of linguistic usages available to those who would address a historically particular audience as a public" (Hasian, Condit, and Lucaites 326). These include "analogies, characterizations, ideographs, images, myths, narratives, and common place argumentative forms that demarcate the symbolic boundaries within which public advocates find themselves flexibly constrained to operate" (Hasian, Condit, and Lucaites 327). These perspectives draws attention to the law as a mutable extension of public culture that adapts to shifting socio-political and cultural exigencies "continually (re)constitut[ing] itself through public discourse" (Hasian, Condit, and Lucaites 327).

Hasian suggests that rhetorical scholars should have a balanced approach to the study of law and its intersection with rhetoric. This entails seeing "the rhetoric of law as a discursive phenomenon that is neither rigidly objective nor nihilistic in nature" (Hasian Jr. "Judicial" 253). To do this Hasian extends on McGee's concept of *fragmentation* to account for law from a postmodernist view (McGee). Law, from this perspective, is a collection of discursive fragments that are co-produced by legal speakers and audiences

within the public sphere: legal discourse and the legal debate is shaped by public discourse (Hasian Jr. “Critical”).

Rountree also demonstrates the need for rhetorical scholars to employ their unique perspectives to issues of law: “the law is *constituted* through endorsements of particular values, actions, behaviors, and visions of the ‘political good’ and simultaneous rejections of other values, actions, behaviors, and visions of the ‘political good’” (172). Since the law is constituted rhetorically through these selections, rhetorical scholars and critics are uniquely positioned to critique law as a site of rhetorical intervention; however, he suggests that this should be balanced against the specialized constraints the legal community places on legal actors. What can be seen from this basic consideration of the discussion of the intersection between law and rhetoric within in the field is that law is an inherently rhetorical enterprise (Rountree 173).

While it is clear that some legal scholarship attempts to grapple with the rhetorical nature of language and the impact it has on judicial interpretation and understanding of the role and effect of law, these concerns are restricted largely to classical conceptions of law and its role in society. As a consequence, to the extent that rhetoric is discussed, this generally involves limited, peripheral neo- Aristotelian considerations of persuasive appeals. That is, legal scholars and practitioners that do embrace the importance of rhetoric to the study and practice of law, generally, albeit with some exceptions, focus on rhetoric as merely a persuasive art without any consideration of the less overt ways in which legal concerns are rhetorical concerns.

As outlined above, some rhetorical scholars have also considered the inextricable link between rhetoric and law, noting the problematic concerns with positivistic legal

notions and pointing to the ways in which legal discourse is constituted as a subset of public discourse. Rhetorical scholars have also called for a balanced dialogue about the rhetoric of law which offers constructive means of working through those problematic notions. On this point, an examination of the legal redefinition of marriage to include same-sex unions provides an opportunity to just that. Understanding how marital rights have come to be extended to homosexuals is no small feat, but it offers a chance for rhetorical critics to glean insights into ways of resisting the essentialism inherent in legal discourse.

Definitions, Titles, and Constitutions

A. Theoretical Framework

In an attempt "to size up [this] situation"— to chart the grammatical moves involved in redefining the term "marriage" to encompass same-sex couples —I turn to elements of Kenneth Burke's *theory of terms* ("*entitlement"*) and c*onstitutionality.* Together they provide an orientation through which to see the process of defining and redefining as a site of dialectical negotiation of meaning rather than an objective presentation of fact; I will show how they make possible critique of the definitional and redefinitional processes. I suggest that Burkean constitutionality offers a means of understanding the complex definitional process by which concepts or ideas are imbued with a particular substance. Rather than just identifying what a thing essentially is, the defining process constitutes the substance of a term. Therefore, Burkean constitutionality provides the theoretical framework needed to critically analyze the redefinition of "marriage."

Burkean Theory of Terms (Entitling)

From a Burkean perspective definitions lack an inherent substance; they only acquire meaning when they are placed in specific contexts just as acts gain meaning based on the scenes which contain them. As Burke notes, "*to define,* or *determine* a thing, is to mark its boundaries, hence to use terms that possess, implicitly at least, contextual references" (*A Grammar of Motives 3*). Because of the different contextual references or ways of placement, thesame word can vary in meaning. For example, if two individuals

saw a speeding car pass by them and then collide into a tree, one might describe the “car crash” they witnessed, the other might refer to the “drunk driver” who sped by. In each case their ways of defining the situation sum up or *entitle* the situation from a particular perspective. Additionally, the scope of their summations reveals something about the individuals as definers, their *motive*. Motive, in this sense, is the ground on which their accounts of the situation are based; it represents the various ways of placing the same situation. Burke uses the *pentad* to demonstrate those available ways of placement, either in terms of the *scene*, *agent*, *act*, *agency*, or *purpose*.

The first witness sizes up the situation with reference to the *scene* by stressing the external conditions of the “car crash” scene. The other witness, defining (or entitling) the situation with reference to the *agent* in the scene stresses the “drunk driver.” The scene centered and agent centered ways of entitling the situation stress different ways of placing the situation. Each placement leads to a particular way of seeing the situation which in turn results in a different way of entitling the very same situation. In each case, these titles are necessarily partial, as the individuals’ motives become *terministic screens* through which the entire situation is viewed and summed up. As Burke puts it, “any given terminology is a *reflection* of reality, by its very nature as a terminology it must be a *selection* of reality; and to this extent it must function as a *deflection* of reality” (“Terministic Screens” 45; emphasis in original). So, the first witness might describe a “car crash” that took place at night involving an individual who sped by a crowded intersection where dozens of pedestrians were gathered. Still the second might describe a situation where an “irresponsible drunk driver willingly ignored 10 traffic laws and put lives in danger because of the driver’s own recklessness.”

Furthermore, a defense attorney might find it useful to describe the accident scene mentioned above as a "car crash" featuring the scenic constraints as controlling, and a prosecuting attorney might find it most helpful to describe the choices that the "drunk driver" made; however, a judge and/or jury would need a more complete account in order to make the correct assessment of the situation and render the corresponding judgment or verdict. In this case, they would need a "fully-rounded vocabulary of motives" in order to get a complete sense of the situation (*A Grammar of Motives* 65). This would include an account of the situation which reflected each of the pentadic elements, not just one—an account which explained who (agent), what (act), when and where (scene), how (agency), and why (purpose); such an account would undoubtedly require a dialectical back and forth to trace each accounting of motive back to the very situation which gave rise to them in the first place— a combining of multiple accounts, asking questions, as well as refuting and accepting claims.

What does that mean for definitions? Burke's theory suggests that we entitle persons and things the same way we entitle situations, summing them up and then applying a label to them. Take the example of "marriage." The terms "faith," "trust," and "certainty" are all implicated under the term marriage, each summing up different situations, but each being brought to a titular head in the one term, "marriage." So, people marry for certainty or stability and to the extent there is trust it is because they feel secure or certain in and of the marital situation; yet, it is precisely because they cannot truly be certain that faith is needed. If they could be absolutely certain, completely stable in a marriage, there would be no need for faith; thus, because faith and certainty are on some level opposites which implicate one another, defining "marriage" requires a balancing of

each against the other. Redefinitions require tracing such terms back to the dialectical site where they each jangle, waiting to be foregrounded in keeping with the rhetorical motive for which the term is invoked; thus, a religious leader might speak of "marriage" as a holy union where two individuals are joined in communion with one another in love and faithfulness while a business tycoon might speak of the hard-work, dedication, and ambition that being "married" to his or her job requires. In each case the utterance of “marriage” implicitly requires tracing the term back to that dialectical site which contains the range of possible meanings featuring by implication the associated terms it sums up.

This underscores the importance of interrogating definitions; yet, the full import of Burke’s theory of terms, or entitlement can be best understood when we realize that the very building blocks of our grammars are not merely descriptive but they are constitutive—definitions name and at the same produce a view of the situation in keeping with that name. but, these definitions that we create to sum up situations or help up make sense of situations, think for us—or better yet act upon us—when we allow them to become hardened and inflexible and essentialized. Often this happens because we forget the context of the situation that gave rise to and gave meaning to the definitions in the first place.

Defining Definitions and Redefinitions

If it is true that definitions become hardened and essentialized, how can rhetorical theoretical and critical concepts illuminate ways of redefining staid terms? A review of scholarship addressing both the nature of and specific attempts to redefine existing terms will aid in understanding the legal redefinition of “marriage” and answering that question.

Similar to Burke, Chesebro sees definitions as strategies which, although always incomplete, are pragmatic and functional—they are created in response to real situations and provide a means of dealing with those situations (Cheseboro 5). On the nature of definitions, Brian McGee suggests that definitions are "continuously subject to revision as the discursive terrain shifts and perceptions of material reality are altered" (153). He further notes, "These definitions, however, are not inscribed by some deity on a wall or stone tablet; they are the product of a community's prior experience with a term or the result of contemporary negotiations over a term's use" (McGee 153).

Schiappa adds to our understanding of the nature of definitions by questioning the assumptions of the relationship between definitions and fact (Schiappa 6). He believes that taken-for-granted views of facts as observable, empirical phenomena lead to conflating "facts of usage" with "facts of essence" (Schiappa 6). In times of definitional crisis the relationship between the two is exposed as one is forced to realize that a question about a thing's essence (e.g. "what is a man?") cannot be answered by merely looking up a fact. Schiappa refers to such moments as *definitional ruptures* and proposes the tension that results from them be resolved by contextualizing the definition and revealing the values inherent in that particular contextualized definition (Schiappa 7). Extending on Schiappa's understanding of definitional ruptures, West notes that definitions are often taken to be objective and "[a]t the institutional level, our faith in the objectivity of definitions in legal statutes and opinions is shaken only in the rarest of circumstances, such as public controversies involving abortion where the definitions of life and choice reveal themselves as contestable terms" (West 166).

While Schiappa's approach to definitions and definitional ruptures reminds us of the rhetorical nature of definitions, his suggestions for resolving the tension are guided by the premise that definitions need to provide certainty, even if that certainty is culturally relative and time bound; however, the work of other rhetorical scholars has focused on exploiting definitional uncertainty as a means of opening up rhetorical spaces previously untenable[2].

Types and Strategies of Redefinition

Olson identifies *transformation* and *transcendence* as primary types of redefinition. According to Olson, *transformation* reverses the material located outside of the definitional boundaries with that which was inside of those definitional boundaries (Olson 132). When this happens "[t]he content of the term changes, no longer naming 'what it is' but now naming 'what it was not'" (Olson 132). Rather than replacing one with the other, *transcendence* blends opposites by merging that which is located "inside and outside" of the definitional boundaries. "It blurs the distinction between figure and ground so that the two no longer dialectically imply each other. A redefinition that relies on transcendence blends aspects of opposing terms into a new term that encompasses parts of both the previous definitions" (Olson 132).

Scholars have shown the power of dissociation as a strategy of redefinition. Dissociation is a rhetorical device that severs the links between concepts by breaking them into "two philosophically opposed terms" and then linking the position one asserts

[2] See Naumoff, Marylou R. and Erika M. Thomas. "Disturbances to Certainty: A Rhetorical Analysis of the Legality of the Pregnant Man." Disturbing Argument, Selected Works of the Eighteenth NCA/AFA Summer Conference on Argumentation. Ed. Catherine H. Palczewski. New York: Taylor & Francis. (2014): 105-110. Print; also West, Isaac. "What's the Matter with Kansas and New York City? Definitional Ruptures and the Politics of Sex." Argumentation and Advocacy 47 (2011): 163. Print

with the positive term and the opposing position with the opposing term in order to discredit the former unitary way of seeing the concept (Zarefesky, Miller-Tutzauer, and Tutzauer 113). Zarefsky, Miller-Tutzauer, and Tutzauer have shown how dissociation can be an effective redefinitional strategy in their examination of Ronald Reagan's use of dissociation to successfully reframe the public debate surrounding social programs (114).

In the context of presidential rhetorical, Zarefsky explores the nature of definitions as names for situations which he argues provide "the basis for understanding [them] and determining the appropriate response[s]" (Zarefsky 611). He analyzes Lyndon Johnson's 1965 Howard University address and notes how Johnson "effectively redefined 'equal opportunity' to embrace equal outcomes, not just equal chances" using analogy and dissociation (Zarefsky 611). His analysis demonstrates the power of redefinitions because he shows that Johnson's "redefinition of 'equal opportunity' created the rhetorical space that made affirmative action possible, by identifying a new policy concept with an established and accepted value" (Zarefsky 611).

Some scholars have drawn on the work of Philosopher Charles L. Stevenson.[3] Stevenson's theory of persuasive definitions holds that words have two meanings: emotive (where the word evokes positive or negative feelings or attitudes) and descriptive (based on the core factual or descriptive content of the term) (Boisvert). Persuasive definitions redefine terms by reframing the descriptive meaning but leaving the emotional meaning intact; the lingering effects of the emotive meaning invite the audience to accept the redefined term (Walton 117). Macagno and Walton's case study analyzed the use of

[3] See Stevenson, Charles L. "Meaning: Descriptive and Emotive." *The Philosophical Review* 57.2 (1948): 127-144.

persuasive definition to redefine scientific, legal, and commonly used terms (1997). Zarefsky, Miller-Tutzauer, and Tutzauer have also studied how persuasive definition permitted Reagan's redefinition of the terms "social safety net" and "truly needy" (113). They demonstrate how Reagan was able to "narrow the scope of the safety net without arousing open hostility to his moves" by employing this strategy in a series of official messages (Zarefsky, Miller-Tutzauer, and Tutzauer 114).

Schiappa examined the use of persuasive definitions in reframing a political debate over environmental concerns in the 1960s and 1970s. President Bush redefined the "wetlands" —which had been defined by scientists and environmentalists as a term to designate areas which according to them should be set aside and preserved because of their ecological value—to a standardized definition which excluded millions of acres of formerly defined "wetlands" (Schiappa).

Several scholars have considered the use of terministic screens in definitions and redefinitions. Heiss analyzes political rhetorical using Burke's concept of terministic screens to demonstrate how ambiguous definitions are used as discursive political strategies (Heiss 1-9). Similarly, Bello analyzed terministic screens employed as rhetorical strategies in defining "political correctness" in academic power struggles (Bello 243-252).

Defining and redefining political situations often means recasting the situations themselves, not just the definitions in new lights; therefore, some scholarly treatment of redefinition has centered on the role of redefinitions in shaping how we see situations not just words. Harter, Stephens, and Japp explore President Clinton's narrative reconstruction to implicitly redefine the role and meaning of Tuskegee Syphilis

experiments (19-34). Olson examined President Reagan's redefinition of the meaning surrounding his visit to Bitburg, a German War cemetary; her analysis was guided by various Burkean concepts—paradox of substance, pentadic ratios, and terministic screens (Olson 129). Reagan's redefinition was filtered through his "scientific perspective" which was at odds with the "[d]ramatistic perspective" of those in opposition to his visit, making redefinition unsuccessful (Olson 146); thus, she concludes that it is "extremely difficult, and sometimes even impossible," to find enough common ground to make attempts at redefinitions successful (Olson 147).

Calling for closer examination of what strategies might be used to successfully redefine terms, she speculates that "by concentrating on cases at the borders, questions of what 'is' and 'is not' contained in a concept, the scientific perspective [which privileges quantitative information] should allow redefinition more readily than should the dramatistic perspective that focuses on the central or essential meaning of a concept" (Olson 147). She notes "[a] rhetor using a definition is not merely presenting an undisputed concept, but is advocating adherence to the particular definition and the perspective sponsoring it" (Olson 131). Additionally, she points out that redefinitions "either may reinforce in a new way the worldview sponsoring the original definition or may portend a more fundamental change in one's perspective" (Olson 131).

Reflecting on the scholarship discussed, it is important to note that the implications of these works call for continued critical investigation into the very processes by which definitions are formed and the means by which they can be resisted. Many of the works reviewed demonstrate the utility of redefinition to heal divisions or balance competing interests; however, works such as those of West and Naumoff and

Thomas call attention to the types of rhetorical practices that might be employed to illuminate the contingent nature of definitions and then exploit those contingencies in ways that allow a new way of being.[4] This thesis explores the possibility of doing both of those rhetorical tasks by examining how the Court unsettles staid notions associated with “marriage” to allow for a new articulation of “marriage;” this initial unsettling requires dialectically working through the definition to expose its other possibilities; those possibilities then have to be articulated in ways that bridge the divide between heterosexuals previously allowed and homosexuals seeking entry.

A Burkean View of Constitutions

This concern with dialectically negotiating meaning to understand what concepts, things, or people actually *are* returns us to Burke’s notion of entitlement noted earlier and the ways in which we assess or size up situations, but it also evokes the related concept of *constitutionality.* While any such individual assessment of a situation is necessarily partial, a more complete account of the context of situations requires a fully rounded account of motives. Similarly, a definition, as an entitlement is necessarily partial, but can be made more complete (or exposed as partial) if it is taken back into the “molten core” (that dialectical site where all of the possible grammatical moves are hanging in limbo waiting to be selected out and defined) out of which it sprang. Burke’s notion of constitutions offers the rhetorical critic a means of doing just that.

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[4] See Naumoff, Marylou R. and Erika M. Thomas. “Disturbances to Certainty: A Rhetorical Analysis of the Legality of the Pregnant Man.” Disturbing Argument, Selected Works of the Eighteenth NCA/AFA Summer Conference on Argumentation. Ed. Catherine H. Palczewski. New York: Taylor & Francis. (2014): 105-110. Print; also West, Isaac. "What's the Matter with Kansas and New York City? Definitional Ruptures and the Politics of Sex." Argumentation and Advocacy 47 (2011): 163. Print.

Although Burke developed this theory of constitutionality to help understand the "drama of human relations," the constitutional process also can help us understand the definitional process (Rueckert). This is because a constitution is a "fully rounded" definition—a definition which fully accounts for all aspects of motive, each of the possible ways of placement (*A Grammar of Motives* 65). Also, it suggests that even the most congealed of definitions can be taken back into the molten core, the constitution, from which they sprang; thus constitutionality provides a heuristic for the rhetorical critic wishing to constructively critique reified definitions.

There are several defining features of constitutionality which are relevant to this discussion of the definitional process. These include a constitution's nature as an act, the fact that constitutions are addressed, the dialectical agon between internal principles within the constitution, and the constitution's need for a constitution-behind-the constitution. After discussing each of the constituent parts of a constitution, I will show how each is generative of a set of related, critical questions which can guide a rhetorical inquiry of redefinitions.

A constitution as a substance or a set of motives, which is just a set of terms, cannot be rendered a hardened representation of fact and universal rule because language is necessarily fluid involving paradox and antinomies of definition that "preclude the possibility of making language a transparent representation" (Wess 17). According to Burke a constitution serves as the motivational basis for shaping human relations. "A constitution is a substance—and as such, it is a set of motives…A given complex of customs and values, from which similar customs and values are deduced… designed to serve as motives for the shaping or transforming of behavior" (*A Grammar of Motives*

342). The concept of substance involves "unresolvable ambiguity" (Henderson 159). A terminology that is presented as "an unambiguous, transparent representation of reality itself, ceases to be seen as a terminology, becoming instead a truth independent of terminology…" (Wess 17).

Constitutional Acts

Burke's articulation of a constitution as an *act* is central to his notion of a constitution being a motivational structure. Implicit in the notion of motive is that agents have a certain level of choice. As Wess puts it "[a]ct is privileged as the essence of all attributions of motives…" (11); this underscores the "realistic force of language as action" (Wess 12). For Burke, constitutions are a means of acting upon the world, shaping the social reality in accord with a particular set of wishes and desires. This view of constitutionality informs the redefinition process because definitions are often cast as essential, as necessary; yet, this dramatistic way of seeing definitions hearkens back to the entitling process described earlier. Since acts are expressions of free will (however limited and constrained by the scene which contains them) they are contestable. This is key when interrogating sedimented definitions which are often presented as universal, essential, and therefore, uncontestable. A rhetor wishing to redefine a reified definition would need to exploit the definition's nature as an act by demonstrating that even the most taken-for-granted definitions are expressions of human rhetorical invention. Similarly a critic would look for and highlight as rhetorical the strategic spots within a discourse which reveal a rhetor's particular choices of defining a situation.

Strategically Addressed

Another important feature of constitutions is their nature as *strategically addressed*. A constitution is a stylized attempt to shape future behavior by substantiation. As Burke put it, “men induce themselves and others to act by devices that deduce ‘let us’ from ‘we must’ or ‘we should.’ And ‘we must’ and ‘we should’ they deduce in turn from ‘it is…’” (*A Grammar of Motives* 337). Humans seek compliance and cooperation from those addressed by strategically attempting to articulate what they believe *ought* to be as an *is.* Thus, substantiated definitions will contain within their dialectical core commands which will be presented as a statement of naturalizing fact and which will serve as the bases for “stylistic identifications” (*Rhetoric of Motives* 46). Implicit or explicit in the meaning being imbued into terms will be “common sensations, concepts, images, ideas, [and] attitudes” making consubstantiality possible (*Rhetoric of Motives* 21).

Furthermore, Burke notes “[i]n propounding a Constitution, 'I' or 'we' say what 'you' may or should and may not and should not do. If a Constitution declares a right 'inalienable' for instance, it is a document signed by men who said in effect 'Thou shalt not alienate this right'” (*A Grammar of Motives* 360). Therefore, constitutional commands and the constitutions themselves must necessarily change, because constitutions are addressed at a certain time by certain persons to certain other persons. Although “the vagueness of address helps greatly to make us forget that commands are addressed,” constitutions which are enacted at a certain time by certain agents cannot be understood exactly the same because they address *different agents* (*A Grammar of Motives* 361). In the same way, definitions which were substantiated at a particular time in response to particular exigencies can never be mere representation because as *new acts* they come to address *new agents*—they are time and culture bound.

Principles

Another mark of constitutions is their expression of constitutional principles or wishes. A constitution "propounds certain desires, commands, or wishes" (*A Grammar of Motives* 373). Burke identifies two types of principles, those that are *volitional* and those that are *necessitarian* (*A Grammar of Motives* 374). "There are principles in the sense of wishes, and there are principles in the sense of interrelationships among the wishes" (*A Grammar of Motives* 375). For Burke, *volitional* principles are those that are the express wishes and ideals of a constitution's clauses. They are agreed upon and laid down by the agents attempting to inscribe a set of motives; however, there is necessarily conflict among principles. As one principle anticipates and demands a certain action and another an opposite action, "a conflict must arise out of these implications" (*A Grammar of Motives* 376). Similarly, substantiated definitions contain within them separate, equal sets of principles which in isolation compete with others and which require balancing and ordering to resolve the tensions they might present. Attempts to redefine a term would need to assert a different way of ordering those internal principles in ways that shift them around, foregrounding some above others.

Constitution-Behind-the-Constitution

A constitution is a strategically addressed enactment of wishes and principles that necessarily conflict and must be understood in a broader context. Burke articulates that context to be the constitution-behind-the constitution. As he puts it, "...no human Constitution can constitute the whole scene, since it itself is an enactment made in a given scene and perpetuated through subsequent variously altered scenes" (*A Grammar of Motives* 362). Therefore, any true understanding of human motivations as revealed in

and shaped by constitutions "will require a wider circumference, as with reference to the social, natural, or supernatural environment in general..." (*A Grammar of Motives* 362). Similarly, attempts to substantiate definitions require contextualization; they must be placed within particular contexts. Those contexts will always be partial so definitions will also be partial—they will be "selections of reality. And any selection of reality must, in certain circumstances, function as a deflection of reality" (*A Grammar of Motives* 59). These selections, reflections, and deflections are *terministic screens.* So terministic screens will govern the choices or assertions in the *scope* of the *circumference*, the boundaries encircling a particular definition. Therefore, the critic will need to look for how the rhetor expands or contracts definitional boundaries since redefinitions require that the scope of the circumference of meaning be stretched to account for this new way of seeing the same term; Burke mentions this procedure, *casuistic stretching,* in *Attitudes Towards History*. This term applies when "one introduces new principles while theoretically remaining faithful to old principles" (*Attitudes* 229).

My read of Burke's constitutions turns the judicial opinion into a resource for the critic that is often overlooked or down played by discipline specific legal rhetoric. That is because any interpretive attempt to find constitutional meaning by defining terms necessarily involves a rhetorically contingent process of substantiation which simultaneously names and produces the thing being defined. This process of substantiation may include citing facts and empirically objective observations; however, "facts appear as metonymic reductions of entitlements, as motivated acts attempting to deflect our attention from the very values which constituted the 'facts' in the first place" (Feehan 48). "To speak any fact already involves us in culturally conditioned patterns of

belief, some program of inference for narrowing attention from a full situation to some preferred focal point" (Feehan 48). Although definitions are often presented as anchored in an objective reality or unambiguous texts that could be transparently represented, this view of constitutions helps us see that definitions are in fact cultural productions that assert a particular locus of motives. Recalling the discussion of entitlement, it is important to note that definitions sum up specific situations and they are ways of placing the same situation; when those contexts change, definitions lose their meaning.

The study of the redefinition of marriage upon which the same-sex marriage legal cases hinge provides a particularly useful study of this entire process because judicial discourse often points to terms and categories as having singular, innate meaning in an attempt to freeze definitions; in recalling the legal paradigm discussed in Chapter One, legal discourse is a discourse of closure; therefore, definitions function to render a debate settled. This requires implicit or explicit strategic concealments which are reflected in the rhetorical choices that are made within the discourse. Because redefinitions require an opening up of the term, redefinitions do their rhetorical work by unsettling that which had been deemed closed. A Burkean theory of constitutions illuminates the definitional process as a complex process of substantiation and as a result offers the means of unsettling such definitions, and in so doing, redefining them.

Theoretical and Critical Application of Burke's 'Constitutions'

So far, I have suggested that Burkean constitutionality is useful for understanding redefinitional acts; however, it is important to note that Burkean constitutionality has already been used to analyze a range of rhetorical acts, from constitutional documents to

individual and collective constitutional identities. This section reviews such scholarship and situates this thesis' concern with redefinition in relation to those works.

Kenny posits that Burke's "theory of a constitutional dialectic is an ideal" philosophical framework for understanding how "normative epistemic[s]" are produced and function "in the social sphere" (Kenny 455). Kenny suggests that Burke's constitutionality points to "the richness of the Constitution as a text, which not only perpetuates through cultural transformations, but even enables those transformations" (Kenny 458). Additionally, he believes that this theory allows critics to chart the dialectical processes that constitutions of identity must undergo if they are to reconstitute customs and values. As an example, Kenny analyzed Jack Kevorkian's attempts to "popularize obitiatry" ("The Rhetoric" 386).

Anderson developed a theory of identity using Burke's notion of constitutionality; his theory suggests that identities can be viewed as argumentative strategies; thus, constitutions of identities act as strategic answers to situations that arise in one's life. From this perspective, Anderson examined conversion narratives and concludes that each narrative "constitute[s] identities that address specific issues within the contexts they address" (*Arguing Identity*). He reads these narratives as "rhetorical engagements that, in constituting an author's transformed identity, would transform something of the historical and cultural situations these authors occupy as well" (*Arguing Identity)*. Anderson later refined that theory in *Identity's Strategy: Rhetorical Selves in Conversion* where he grapples with the difficulty inherent in discussing identity and continues his argument for a rhetorical view of the constitution of identity based on the Burkean frame (37-38).

Fernheimer has considered how Burke's notion of constitutions contributes to what she suggests is the Western rhetorical tradition's promise of "an alternative to violence" through "understanding, listening, and analyzing [which] lead[s] to conflict mediation, resolution, and thus less violence"(Fernheimer ix; 114; viii). Her work explores the usefulness of "Burke's theories of identification and the dialectic of constitutions" in resolving Black Jews' "conflicting claims to Jewish identity in New York and Israel in the late 1960s and early 1970s" (Fernheimer 119; viii). Her work suggests that these theories "do not help us mediate competing claims when no clear means for authentication or legitimization exists, and when identity is precisely the issue at stake" (Fernheimer ix). Phillips applies concepts from Burke's constitutionality to legal decisions. Phillips posits that the dialectic of constitutions is "the deliberative process by which competing values are recognized or denied" ("The Rhetoric of Equality" 57). From this perspective, Phillips analyzes the underlying strategies, motives, and values present in legal decisions which "are particularly visible in situations where there is no appropriate precedent or authoritative text for the Court to look to" ("The Rhetoric of Equality" iv).

Steudeman used Burke's theory of constitutions to examine "ideological tensions present in John McCain's 2008 campaign discourse" (Steudeman). The analysis considered constitutional ideals and wishes, attempts to substantiate motives, and techniques used to reconcile competing interests and ideals present in McCain's discourse (Steudeman). Loewe has argued for a mode of "Burkean criticism based on Burke's constitutional dialectic [which] examine[s] constitutions as the primary objects of study" ("Where Human"). His analysis of an Islamic State draft constitution applies this

kind of criticism and uncovers the “internal conflicts and differences” within the document and also points to the ideological divisions which are “anticipated and woven into a comprehensive plan” put forth in the document (“Where Human”).

The scholarship reviewed focused largely on the strategic nature of constitutional texts; those texts are treated as rhetorical acts that seek to (re)shape individual or collective values and identities. This thesis is consistent with the analyses these scholars offer; but, its focus is on definitions, the building blocks of constitutional texts. Each of the constitutional texts considered by scholars using the Burkean frame is concerned primarily with the rhetorical effect of constitutions; however, this thesis attempts to use Burkean constitutionality to understand the grammatical processes involved in redefinitional acts.

B. Critical Approach

Critical analysis of the redefinition of “marriage” through the Burkean constitutional frame involves noting how each definition is substantiated in the various cases invoking the terms; this theoretical framework offers not a rigid method for critical analysis, but a set of critical questions that emerge which guide my analysis of the definition and redefinition of “marriage.” Although these questions overlap and are interrelated and some imply others, they are useful categories that highlight the defining elements of *constitutionality* noted above—constitutional acts, strategic address, agon between principles, and the constitution-behind-the constitution. Each concept is generative of a set of questions which the critic can use to engage with the discourse under investigation.

Constitutional Acts/Commands: In substantiating “marriage,” which ideals and wishes are espoused as central to the term? What are the relationships among those ideals

and wishes? How do their interrelationships imply others, and how do these conflict? How does the rhetor exploit the nature of the definition as an act, by showing that those wishes are subjective and contestable? How does the rhetor point to the previous articulation as choice among many instead of the only possible choice?

Strategically Addressed: How does the rhetor highlight shifts in understanding over time? How are those shifts negotiated within the redefinition in ways that create a sense of consubstantiality between homosexuals and heterosexuals in light of legal/historical divisions? How do new identifications create an *attitude* toward both homosexuals and same-sex marriage? These are important questions because in asserting a right to marry for same-sex couples and heterosexual couples alike, the redefined "marriage" will need to unify two groups as consubstantial which had never before under law been seen as alike.

Agon between Principles/Clauses: What principles are implied by the definition? What are the relationships among the various principles? How do their interrelationships imply other principles, and how do these conflict? How does the rhetor appeal to those same principles? How does the rhetor point to the ordering inherent in the way the principles are balanced? How does the rhetor stretch the definitional boundaries in ways that allow for the rearticulated definition to be consistent with old principles?

Constitutional Contextualization**:** In what contexts do legal opinions place "marriage?" What is the scope of the asserted circumference around each context? How are these circumferences expanded or contracted to give effect to the meaning of "marriage" underpinning its legal ruling? What terministic screens are used? How does the rhetor stretch the definitional boundaries in ways that allow it to place the term in

contexts that differ from previous articulations? Because substantiation requires contextualization which situates terms into various contexts that give them meaning, it will be important to note where and how the court asserts a particular circumference around the various contexts in which it situates the term "marriage" in its bid to give "marriage" new meaning.

These questions are not exhaustive of all the possible questions, nor are they meant to be an inflexible lens; however, they show the critical insight a Burkean theory of constitutionality yields for the rhetorical critic when considering redefinitions in any discursive field. They reflect a critical orientation rooted in the dialectical nature of the Burkean System as a whole because it is only through dialectical negotiation of meaning that we can more fully size up and entitle situations. In the case of the redefining of "marriage" as it relates to same-sex couples, such questions guide my attempt to give a full account of the legal redefinition of "marriage."

Constitutionalizing Same-Sex Marriage: *Kitchen v. Herbert* and the Legal Redefinition of "Marriage"

There can be no doubting that, on the issue of same-sex marriage, a shift has occurred in American jurisprudence. In just a little over one year since the U.S. Supreme Court invalidated the *federal* definition of marriage as the union of a man and woman, judges all around the nation have found state bans prohibiting same-sex marriage to be unconstitutional; however, the major premise of the U.S. Supreme Court's invalidation of the federal definition was that marriage, both its definition and regulation, has long been the province of the states, not the federal government. By that logic, it would seem that courts would be ruling that states have the right to define marriage as they see fit and that state definitions which exclude same-sex couples are constitutional. Yet, more than a dozen appellate courts have ruled differently. This suggests a sizeable shift in legal meaning has occurred. How can we make sense of the rhetoric underpinning this legal redefinition?

One means of understanding the shift in meaning is to look at the justifications for the rulings—the judicial opinions themselves. The judges, whose judicial opinions are a textual account of their understanding of the issues, have often framed their rulings—which have both invalidated same-sex marriage bans and redefined marriage to include same-sex couples— as both necessary and *clearly* rooted in the U.S. Constitution; yet, much of the nation's history contradicts that position. There is no disputing that the

Founding Fathers would not have conceived of same-sex marriage, and if the legal certitude of the recent rulings were truly a given there would be no debate at all; judicial interpretation would be unnecessary. Table 1 below illustrates this.

Table 1 Chronology of Same-Sex Marriage Related Events[5]

1967	U.S. Supreme Court in *Loving v. Virginia* rule against interracial marriage bans
1970	Jack Baker and James McConnell denied marriage license in Hennepin County, Minnesota; their case is appealed and denied by the U.S. Supreme Court.
1970	Baker and McConnell receive marriage license in Blue Earth County, Minnesota.
1973	Maryland imposes same-sex marriage ban
1977	Florida passes anti-adoption legislation.
1984	Berkeley, California creates domestic partnership as a formal, legal status
1986	U.S. Supreme Court in *Bowers v. Hardwick* ruled that sodomy laws are constitutional;
1989	New York rules same-sex couple a "family unit"
1993	Hawaii's same-sex marriage ban ruled illegal and requires state justify ban
1995	Utah passes first defense of marriage act (DOMA) prohibiting legal recognition of same-sex relationships.
1996	Federal Defense of Marriage Act (DOMA) signed by Bill Clinton
1998	Hawaiian and Alaskan voters pass constitutional amendments restricting marriage to one man and one woman.
1999	Vermont permits civil unions
2003	*Lawrence v. Texas* overturns *Bowers v. Hardwick* ruling that adults have a right to private, consensual relationships;
2004	Massachusetts first state to have legal same-sex marriage; Thirteen states amend constitutions prohibit same-sex marriage.
2008	California Supreme Court rule violative of Equal Protection clause; voters pass Proposition 8, constitutional amendment restricting marriage; California Supreme Court uphold restrictions.

[5] These chronological entries have been taken from entries appearing in *Same –Sex Marriage* (Newton 111-132).

Recall Chapter One's review of the legal scholarship discussing the rhetoricity of law; such scholarship suggests that legal discourse often denies its rhetoricity, instead grounding itself in what it believes are objective, non-contingent terms. This is particularly the case when judges, usually speaking in an impersonal voice, write legal opinions which are presented as merely descriptive of the Constitution or settled law and/or "objectively, deeply rooted in this Nation's history and tradition," (*Washington v. Glucksberg* 720) lest they be called "judicial activist[s]," a charge leveled at judges seen as making law rather than applying law (Kmiec 1442). Such views, consistent with the legal scholarship reviewed earlier, call into question the means by which judges redefine terms at all, especially terms like "marriage" which have a long, deep, and essentialized history.

Where legal scholarship and practice shy away from openly embracing contingency, the study and practice of rhetoric has long been linked to the striving for social justice when exposing and exploiting the inherent ambiguities of even the most hardened of terms; so, it is only fitting that theoretical concepts and critical methods in rhetoric be brought to bear on legal texts in ways that reveal strategic concealments which belie their dogmatic insistence on non-contingency. As I noted in the previous section, the work of Kenneth Burke is particularly suited to that end. Positing that humans are the "symbol-using…mis-using animal," Burke's entire *oeuvre* can be read as attempt to illuminate the ways in which we both use and are used by symbol systems, law being but one of them and definitional certainly being one means by which law does its rhetorical work ("Definition"). Burke invites us to see all definitions as either explicitly or implicitly motivated and, therefore, contingent; accordingly, the definitions on which

we construct our symbolic structures need to be traced backed to the motive ground out of which they spring. This critical orientation underscores both how definitions/grammars are formed and how they might be transformed by being taken back into the "molten core" out of which they were formed and brought back out, partially old and partially new.

Therefore, I analyze the judicial opinion in *Kitchen* v. *Herbert*— the first federal appellate court decision of its kind[6] after the U.S. Supreme Court's invalidation of the Defense of Marriage Act's federal definition of marriage— through the Burkean frame, uncovering the rhetorical processes involved in redefining marriage in ways that encourage the parties and legal audience to accept its ultimate decision as legally sound and certain. My analysis focuses on identifying the substance of *Kitchen's* articulation of the "right to marry" and "marriage" in order to trace how the Court substantiated marriage in genderless terms.

First, however, I review several cases contextually related to *Kitchen's* ruling and its definition of marriage to include same-sex marriage which also highlight the legal field's shifting position on this issue. This review is an attempt to understand and trace shifts in meaning through the various legal issues and arguments that have been raised from case to case. The cases I review are *Loving v. Virginia, Baker v. Nelson,* and *United States v. Windsor,* making note of facts that distinguish each case along with the legal issues at play, the court rulings, and some brief points of rhetorical significance that cast the Court's judicial opinion in *Kitchen v. Herbert,* my primary object of study, into

[6] See Grossman, Joanna L. "Federal Appellate Court Rules Utah's Ban on Marriage by Same-Sex Couples Unconstitutional."

sharper relief. I begin with a brief discussion of *Loving v. Virginia,* the pivotal interracial marriage case from 1967 in which the U.S. Supreme Court ruled state bans on interracial marriage unconstitutional.

Next, I consider *Baker v. Nelson*, a same-sex marriage case from 1971. By dismissing the case, the U.S. Supreme Court expressed its view that same-sex and interracial marriage were not legally analogous. In doing so, the Court rejected an argument that *Loving* could be applied to same-sex marriage cases. Additionally, I consider *United States v. Windsor*— the 2013 case invalidating section three of the Defense of Marriage Act (DOMA) that defined marriage, for purposes of federal statutes, as the union of one man and one woman. *Windsor's* dicta regarding marriage as well as previous gay rights cases help account for the redefinition of "marriage" and the "right to marry" in *Kitchen* v. *Herbert.*

The *Kitchen* ruling is significant to this project because it is here that the Tenth Circuit Court, using *Loving* as binding precedent, ruled Utah's same-sex marriage ban unequivocally unconstitutional by shifting the burden on the State to provide reasons for its ban. Additionally, *Kitchen* is important because, while *Windsor* provided encouragement for same-sex marriage proponents in the form of unbinding dicta, *Windsor* did not actually address the constitutionality of same-sex marriage bans. In that respect, *Kitchen* goes beyond *Windsor* providing a more recent, relevant, and thorough indicator of the substance and the rhetoricity of this rearticulated "right to marry" as it applies to same-sex couples.

A. Contextual Considerations—Precedent and Antecedent Cases

Loving v. Virginia

Loving v. Virginia, the landmark 1967 U.S. Supreme Court case, struck down interracial marriage bans as unconstitutional, declaring a fundamental "right to marry" (*Loving v. Virginia*). The couple at the center of the case was Mildred Jeter, a black woman, and Richard Loving, a white man. They legally married in Washington, D.C.; however, after marrying, they returned to Virginia (*Loving* 1012). In Virginia, the Lovings were soon arrested and indicted by a grand jury under Virginia's 1924 Act to Preserve Racial Integrity which banned interracial marriage and whose legal history could be traced back to the American eugenics movement as well as to statutes enacted by the Virginia Colony in 1630 (Coleman). Finding the couple guilty of interracial marriage, the Virginia judge noted that

> Almighty God created the races white, black, yellow, malay, and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix (*Loving* 1012).

In contrast, the U.S. Supreme Court, in a unanimous ruling, held that anti-miscegenation statutes violate the Fourteenth Amendment. The Court stated, "[f]or reasons which seem to us to reflect the central meaning of those [Fourteenth Amendment] constitutional commands, we conclude that these statutes cannot stand consistently with the Fourteenth Amendment" (*Loving* 1012).

To reach its decision, the U.S. Supreme Court rejected the Virginia Supreme Court's articulation of its legitimate state interests in banning interracial marriage as expressed in *Naim v. Naim*, a 1965 case cited by the Virginia courts as precedential

support for its ruling: "'to preserve the racial integrity of its citizens" and to prevent 'the corruption of blood,' 'a mongrel breed of citizens,' and 'the obliteration of racial pride'" (*Loving* 1015). In doing this, the U.S. Supreme Court also rejected the argument that regulation of marriage should be exclusively left to states since the states had traditionally regulated marriage without federal intervention (*Loving* 1015).

The Court also rejected an argument that since the law applied equally to all races it was not a violation of the Equal Protection Clause. Additionally, the Court reasoned that the "broader, organic purpose" of the Fourteenth Amendment cast light on the historical sources that had been cited to support the State's claim that Fourteenth Amendment framers did not intend to impact miscegenation laws (*Loving* 1016). Ultimately, the Court reasoned, "[m]arriage is one of the 'basic civil rights of man,'…The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by the invidious racial discriminations. Under our Constitution, the freedom to marry, or not to marry, a person of another race resides with the individual and cannot be infringed by the State" (*Loving* 1018).

Redefining the Right: "Marriage" and the "Right to Marry"

The Court's belief that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival"[7] leads it to conclude that individuals of differing races have the "right to marry" one another, but also linked civil rights to "natural" rights. It is as if marriage, a state sanctioned union, is a fundamental right *because* of the need to survive. This is an essentialist, naturalizing argument that suggests

[7] (cited by *Loving* at 1018); See also Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). See also Maynard v. Hill, 125 U.S. 190 (1888).

that the fundamentality of “marriage” is due to the need to procreate (ensuring survival). “The freedom to marry” is so essential that even though states had long regulated and defined the terms of marriage, the Court found state regulations burdening that freedom on racial lines alone so “unsupportable” as to be unconstitutional (*Loving* 1018). The opinion reads this issue as having been firmly established and central to the re-constituting logic of the Fourteenth Amendment.

In sum, *Loving* presents marriage as a fundamental, individual right which is inextricably linked to societal preservation through procreation and childrearing. That right confers on one the right to choose whom to marry, irrespective of social custom and strict laws (as in the centuries’ old interracial marriage bans) which would state otherwise. In finding such a constitutional right, the Court’s logic places the burden on states who would bar some from entry on discriminatory bases. Even history and tradition are not enough to overcome that burden.

Baker v. Nelson

While *Loving* expanded marriage to include couples historically barred from participating in that institution, *Baker v. Nelson,* a 1971 same-sex marriage case, narrowed the substance of marriage by focusing on the implicit, historical definition of marriage. *Baker* involved Richard John Baker and James Michael McConnell, two male students from the University of Minnesota, who applied for a marriage license in 1970. Baker and McConnell filed suit after the Clerk of the Court denied their application; however, the trial court ruled against them and actually instructed the Clerk not to issue a marriage license (*Baker v. Nelson* 185).

Conjugal Marriage

On appeal, the Minnesota Supreme Court ruled against Baker holding that a state restricting marriage to opposite sex couples was not unconstitutional. The Court reasoned that "[t]he institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis" (*Baker v. Nelson* 186). Also, it stated that "[t]he due process clause of the Fourteenth Amendment is not a charter for restructuring [the institution of marriage] by judicial legislation" (*Baker v. Nelson* 186). The opinion rejected the notion that *Loving* was analogous, finding that *Loving* was about "patent racial discrimination" (*Baker v. Nelson* 187). According to the court, "in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex" (*Baker v. Nelson* 187). This "commonsense" view was predicated upon a notion of marriage as essentially conjugal.

Under mandatory review, the U.S. Supreme Court denied Baker's appeal. Under legal rules and procedure, this denial was a ruling on the merits and established *Baker* as binding precedent for lower courts (Minow). The U.S. Supreme Court's dismissal of *Baker* not only affirmed the lower court's ruling, but also the definitions and arguments it was premised on. In finding *Loving* to be exclusively about race and in taking marriage to be clearly established as the union of one man and one woman—a definition it felt was as old as civilization itself— the courts shifted the burden away from states to defend marriage restrictions which bar some individual's entry. Therefore, in a post *Baker* context, a state would not have to articulate a compelling reason for abridging the right to marry. In fact, there was no such thing as a right to marry for anyone wanting to enter

same-sex marriage; the conjugal elements foregrounded the consent based elements of marriage.

United States v. Windsor

Baker's foregrounding of the conjugal attributes of marriage and casting only those elements as essential to the very substance of marriage remained unchallenged at the U.S Supreme Court level until 2013 when the Court's ruling in *United States v. Windsor* invalidated the section of the federal Defense of Marriage Act (DOMA)[8] which defined the terms "marriage" and "spouse" to exclude same-sex partners irrespective of whether the state in which they resided recognized them to be married.[9]

Although Edith Windsor's marriage to her same-sex spouse, Thea Spyer, was recognized by the State of New York, the Internal Revenue Service treated her as unmarried and denied her request for the federal estate tax exemption available to surviving spouses. As a result, she was assessed $363,053in estate taxes. Windsor filed suit claiming that DOMA was an unconstitutional violation of the Fifth Amendment' due process clause's guarantee of equal protection because it discriminated on the basis of sexual orientation (*United States v. Windsor* 2683 -2684). While the lawsuit was still pending, the Attorney General decided not to defend the definition's constitutionality; so, the Bipartisan Legal Advisory Group (BLAG) from the House of Representatives intervened in its defense. The District Court allowed their intervention as an "interested

[8] "1 U.S.C.S. § 7, which provides: 'In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.'" Quoted in *U.S. v. Windsor*, 133 S. Ct. 2675, 570 U.S. 12, 186 L. Ed. 2d 808 (2013).
[9] *U.S. v. Windsor*, 133 S. Ct. 2675, 570 U.S. 12, 186 L. Ed. 2d 808 (2013).

party" (*United States v. Windsor* 2684); however, the Court ruled the section unconstitutional and ordered a refund with interest be issued. On appeal, the Second Circuit affirmed the judgment, but the United States would not comply until a definitive ruling by the U.S. Supreme Court was issued (*United States v. Windsor* 2684).

Procedurally at issue was whether the Court had the jurisdiction to hear the case. This was because the Executive Branch was not defending DOMA's constitutionality; it merely wanted to have the lower court's decision affirmed before refunding the tax. If the Court were to have decided that there was no jurisdiction, there would have been no need to consider the actual merits of DOMA's constitutionality (*United States v. Windsor* 2684).

Ultimately, the Court ruled that it did have the jurisdictional warrant to consider the case on its merits and struck down DOMA's federal definition of marriage. The ruling held that DOMA was in violation of the Fifth Amendment's Due Process right to liberty, and made it clear that the federal government does not have a sufficient interest in defining marriage aside from the definition that the State law uses. Consistent with the decision in *Loving, Windsor* referred back to the historic practice of deferring to the States in the area of family life, domestic relations, and marriage: "State laws defining and regulating marriage must respect the constitutional rights of persons; but, subject to those guarantees, regulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the states" (*United States v. Windsor* 2691).[10] The reiteration that marriage, divorce, and the regulation of marital relations was retained by

[10] See also *Sosna v. Iowa*, 419 U.S. 393, 95 S. Ct. 553, 42 L. Ed. 2d 532 (1975).

the States upon ratification of the Constitution is central to the Court's legal analysis; however, it also expressed the importance of restraints on state regulation.

Redefining Marriage: from "Conjugal" to "Consent"

While the Court's ruling was legally positioned on federalism principles, and the constitutionality of same-sex marriage as such was not properly before the Court, the implications of the Court's holding exceeded mere principles of federalism by actually weighing in on the definition of marriage making possible a linkage to *Loving;* this linkage, while still tenuous in a post-*Windsor* context, makes probable legal arguments that same-sex married couples and would-be married couples had a constitutional right to marry which the state could not abridge—arguments *Baker* unequivocally foreclosed.

The probability of such arguments can be gleaned from *Windsor's* dicta defining what marriage has traditionally meant and what it has come to mean following an "evolving understanding of the meaning of equality" (*United States v. Windsor* 2693). In the dicta, the majority opinion concedes that marriage had traditionally be seen strictly as the union of man and woman, a view "which for centuries had been *deemed* both necessary and fundamental" (*United States v. Windsor* 2689); yet, even as the Court reaffirms this view, it undermines the notion that the traditional, conjugal view is necessary to the definition of marriage. Woven into the opinion are principles which although not directly at issue before the Court offer glimmers of hope for those seeking constitutional protection for same-sex marriage. The opinion paints New York's decision to extend marriage rights to same-sex couples favorably; "[w]hen New York adopted a law to permit same-sex marriage, it sought to eliminate inequality" (*United States v. Windsor* 2694).

Focusing on New York's redefinition of marriage as giving same-sex couples the the opinion continues:

> New York came to acknowledge the urgency of this issue for same-sex couples who wanted to affirm their commitment to one another before their children, their family, their friends, and their community. And so New York recognized same-sex marriages performed elsewhere; and then it later amended its own marriage laws to permit same-sex marriage. New York, in common with, as of this writing, 11 other States and the District of Columbia, decided that same-sex couples should have the right to marry and so live with pride in themselves and their union and in a status of equality with all other married persons. (United States v. Windsor 2689).

While the Court's ruling is presented as necessary due to its legal conclusion that the federal government may not define marriage at all, the opinion places emphasis on marriage as a display of commitment which allows couples to raise children and build families, contributing to their community. It does not explicitly negate a conjugal view of marriage, but its language demonstrates the contingency surrounding the definition thus implicitly undermining *Baker* even as the Justices refused to explicitly overrule the *Baker* decision. Therefore, the opinion makes even state same-sex marriage bans suspect. In fact the Court alludes to this by saying, "[w]hile the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved" (*United States v. Windsor* 2695). Here the Court gestures toward what was to follow—a challenge to state same-sex marriage bans.

B. Kitchen v. Herbert

Of course, while the shift from a conjugal to consent "marriage" is laid out clearly in the dicta of *Windsor's* opinion and the legal pathway to framing it as such is made

possible through its legal reasoning, it is still not solidified by the time the Utah Courts are called on to hear the *Kitchen* case. That is, while the possibility of such a shift in meaning exists, its probability is unclear or possibly even doubtful. The *Windsor* Court's ruling hinged on state's rights rhetoric which holds as its fundamental principle the premise that the federal government must not have a definition of marriage at all. In fact, the *Windsor* Court failed to cite *Loving* as related directly to the legal question at hand. In short, as figure 1 below highlights, the legal linkage between *Loving* and same-sex marriage is still tenuous by the time the Utah Court considers *Kitchen* v *Herbert*.

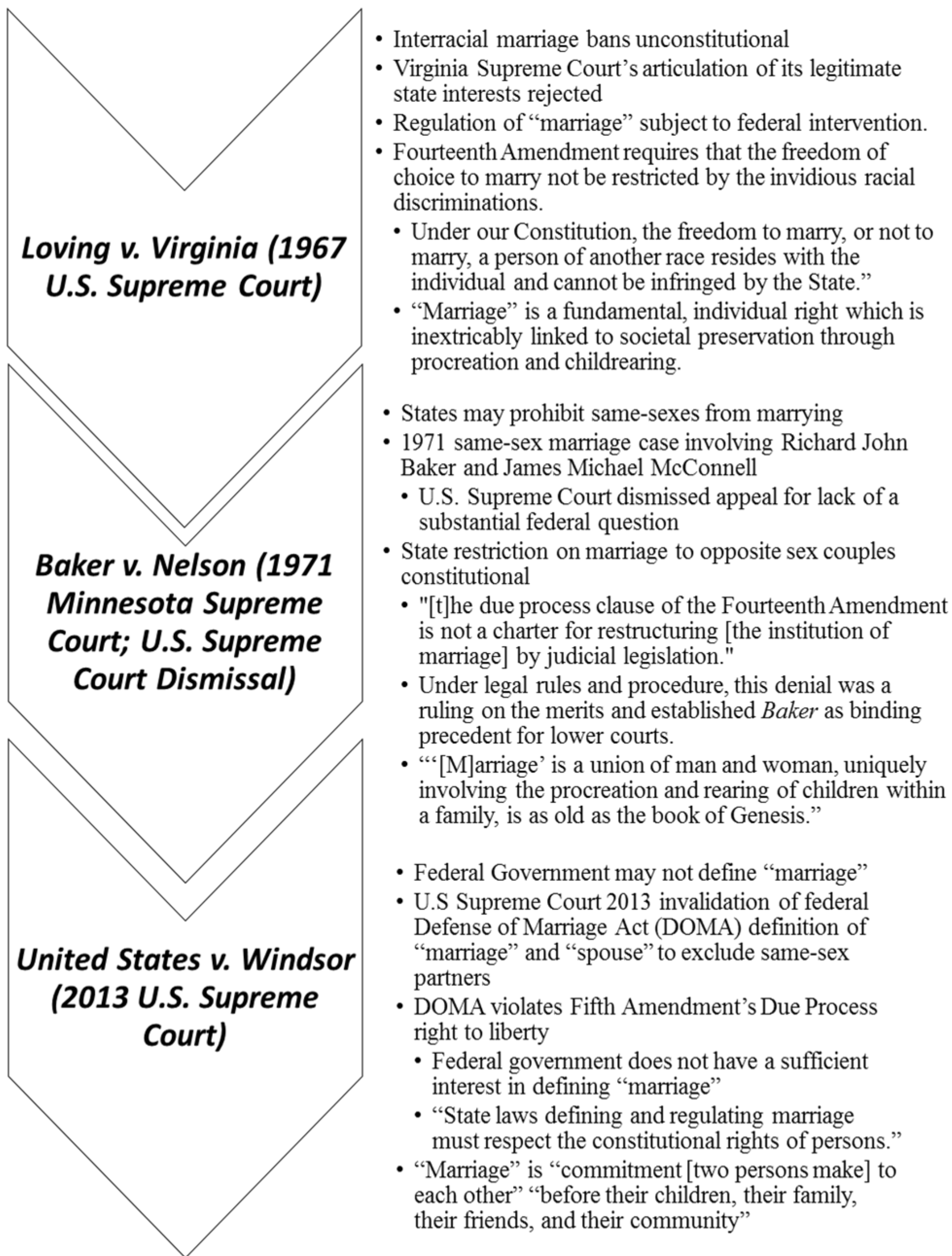

Figure 1 Contextual Case Summary

Background

Kitchen involved three couples. Utah residents Derek Kitchen and Moudi Sbeity, Laurie Wood and Kody Partridge, and Karen Archer and Kate Call were at the center of the *Kitchen* case. Each of the couples had been in loving, committed relationships for years and sought the protections that a marriage could afford them; however, Utah law prohibited both the marrying of same-sex couples and the recognition of same-sex marriages from other states (*Kitchen v. Herbert* 1199-1200).

The couples filed suit in March 2013 against the Governor and Attorney General of Utah and the Clerk of Salt Lake County challenging three provisions of Utah law related to same-sex marriage which "prohibited and declared void" marriages "between persons of the same-sex" (*Kitchen v. Herbert* 1200). However, The Court ruled that Utah's same-sex marriage ban was unconstitutional:

> Having heard and carefully considered the argument of the litigants, we conclude that, consistent with the United States Constitution, the State of Utah may not do so. We hold that the Fourteenth Amendment protects the fundamental right to marry, establish a family, raise children, and enjoy the full protection of a state's marital laws. A state may not deny the issuance of a marriage license to two persons, or refuse to recognize their marriage, based solely upon the sex of the persons in the marriage union (*Kitchen v. Herbert* 1199).

Even in a post-*Windsor* legal context the *Kitchen* case was not an open and shut one. The ruling's contention that same-sex marriage state bans violate the Constitution had not been settled or even discussed in *Windsor; Windsor's* discussion of marriage offered a path to legality, but, even reading *Windsor* optimistically, it casts doubt on the probability of a clear legal path to same-sex marriage. How could *Kitchen* reconcile its ruling with *Baker?* How could *Kitchen* negotiate the internal tensions present in *Windsor*? The answers lie in the definitions of "marriage;" because *Windsor* did not resolve the

definitional crisis over “marriage” and “same-sex marriage,” *Kitchen,* in keeping with the legal paradigm of closure and non-contingency, would have to proceed by defining marriage as either consistent with accepted views or redefine marriage in more inclusive terms.

Scope and Reduction: Framing the Circumference of the Legal Question

In terms of the logical order of the Court’s considerations, it begins by considering the legal question at issue. This would seem a very technical/legal consideration. It would be easy to suggest that the Court necessarily considers the legal question posed to it by lower courts; however, the Court’s reading of the question is more than a mere carrying forward of a technical-legal question already framed by lower courts. From a Burkean perspective, the framing of the question is “a selection of circumference from among the range [that] is in itself an act, an ‘act of faith,’ with the definition of interpretation of the act taking shape accordingly” (*Grammar of Motives* 84). The scope of the question, the circumference around which the Court *chooses* to frame the issue speaks to the decision it ultimately reaches as “the choice of circumference for the scene in terms of which a given act is to be located will have a corresponding effect upon the interpretation of the act itself” (*Grammar of Motives* 77).

This acknowledgement is key because the Court frames the question in Kitchen as follows: “May a State of the Union constitutionally deny a citizen the benefit or protection of the laws of the State based solely upon the sex of the person that citizen chooses to marry” (*Kitchen v. Herbert* 1198)? Such framing instantly shifts the burden away from same-sex individuals claiming the “right to marry” to prove that there is a constitutional right to same-sex marriage specifically. Framing the question as a right to

same-sex marriage would undoubtedly have been a more difficult task, especially in light of *Baker's* explicit disavowal of a right to same-sex marriage and the Constitution's complete silence on the issue. Where *Baker* narrowed the legal question and the right at issue to a right to "same-sex marriage," the question as framed by *Kitchen* widens in scope to a higher, more acceptable level of generality—marriage, not same-sex marriage.

Yet, the Court is not wholly at liberty to pick and choose how the question will be framed. It must do so within the bounds of the legal terministic screen which privileges closure; the Court must take care to present that particular assertion of the question as necessary and legally constrained. Therefore, the *Kitchen* Court considers the scope of the questions related to marriage from previous cases and makes the argument that they are fully representative of those *seemingly* binding cases. The Court reads the *Loving* question as not whether there was a right to "interracial marriage," but a right to marry:

> Thus the question as stated in Loving, and as characterized in subsequent opinions, was not whether there is a deeply rooted tradition of interracial marriage, or whether interracial marriage is implicit in the concept of ordered liberty; the right at issue was 'the freedom of choice to marry.' Loving, 388 U.S. at 12 (*Kitchen v. Herbert* 1210 citing *Loving*).

Here the Court's question and its linkage to *Loving* belies why the framing is so important rhetorically. Because the Court's reading of the question breaks from previous courts', such as *Baker,* it has to overcome the criticisms that it will undoubtedly face—namely, that same-sex marriage is a new phenomenon or that it is not the Court's place to take "sides in the culture wars."[11] The expanded question links *Kitchen* to *Loving,* thus allowing the Court to make the argument that history and tradition cannot dictate the

[11] Romer v. Evans, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996). Scalia, Rehnquist, and Thomas dissenting at 652

outcome of the case anymore than centuries' long history and tradition of banning interracial marriage could overcome the freedom of choice to marry it asserts was central to *Loving.* And, if freedom of choice is central to the right to marry, it should not matter whom one wishes to marry.

The question's linkage to *Loving* is reinforced with the opinion's consideration of the impact of gay right's cases that have influenced jurisprudence since *Loving*—and more importantly, since *Baker. Baker,* as mentioned before, explicitly addresses whether there is a right to same-sex marriage. The *Kitchen* Court could not proceed with its wider question without casting doubt on *Baker's* applicability. Therefore, it turns to *Bowers* and *Lawrence* to anchor the selection shaping its assertion of the scope of the question:

> The Court reversed Bowers v. Hardwick, 478 U.S. 186 (1986), which in upholding a similar statute had framed the question as 'whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time.' Id. at 190. The Lawrence Court held that this framing 'fail[ed] to appreciate the extent of the liberty at stake' and 'misapprehended the claim of liberty there presented to it.' 539 U.S. at 567 (*Kitchen v. Herbert* 1217 citing *Bowers v. Hardwick*).

Although not directly on the issue of same-sex marriage, the opinion notes the importance of the *Bowers'* question. The *Bowers* Court narrowly framed a challenge to sodomy laws as whether individuals had rights to homosexual sodomy. As a result, it was led, without much effort, to the answer—no, the Constitution did not confer on individuals a right to homosexual sodomy. Yet, the Court noted such a narrow focus was errant:

> There was clearly no history of a protected right to 'homosexual sodomy,' just as there is no lengthy tradition of same-sex marriage. But the Lawrence opinion indicates that the approach urged by appellants is too narrow. Just as it was improper to ask whether there is a right to engage in homosexual sex, we do not

> ask whether there is a right to participate in same-sex marriage (*Kitchen v. Herbert* 1218).

The citation of *Lawrence* reminds potential legal critics of what would be for them an uncontestable fact— even if the U.S. Supreme Court had previously seen the issue in its narrowest form— *Lawrence* reversed *Bowers'* narrow question, something the Court rarely, if ever does. Certainly, as this reasoning goes, if the U.S. Supreme Court reversed *Bowers* through *Lawrence* on the premise that its question was too narrowly construed, the *Kitchen* Court could proceed on the basis of a broader question.

Kitchen's assertion that the *Baker* question was too narrow is reinforced by the Court's selection of other cases which support its contention that the right at issue is the "right to marry" versus the "right to same-sex marriage." It strategically cites cases not on the issue at hand to show the wide range of cases in which the U.S. Supreme Court has ruled on the basis of the more general right to marry: "Zablocki considered an equal protection challenge to a state law barring individuals in arrearage of child support obligations from marrying…The right at issue was characterized as the *right to marry, not as the right of child-support debtors to marry* (emphasis added)" (*Kitchen v. Herbert* 1210 citing *Zablocki v. Redhail*). Further, "[i]n Turner, the Court invalidated a prison rule barring inmates from marrying unless a prison superintendent found compelling reasons for the marriage… [the] right at issue was never framed as 'inmate marriage'; the Court simply asked whether the fact of incarceration made it impossible for inmates to benefit from the 'important attributes of marriage'" (*Kitchen v. Herbert* 1211 citing *Turner v. Safley).* It summarizes by stating "Loving was no more about the 'right to interracial marriage' than Turner was about the 'prisoner's right to marry' or Zablocki was about the 'dead-beat dad's right to marry'" (*Kitchen v. Herbert* 1211).

Of course, and further proof of the rhetorical importance of the circumference of the question selected by the Court, the dissenting opinion paints a different picture of the issues that would undermine the Court's selection and instead supports a narrower legal question:

> Plaintiffs suggest that Lawrence should frame the inquiry as a right to marry rather than a right to same-gender marriage. To be sure, the Court recognized that criminalizing private, consensual conduct for one group interfered with personal autonomy, but the Court expressly disclaimed entering the same-gender union fray. See Lawrence, 539 U.S. at 578; id. at 585 (O'Connor, J., concurring) (noting that 'preserving the traditional institution of marriage' would be a legitimate state interest beyond moral disapproval)' (*Kitchen v. Herbert* 1235 citing *Lawrence v. Texas*).

Here the dissenting opinion accepts the premise of an expanded scope for the legal question and in that regard sees Lawrence as related, but it points out that the *Lawrence* opinion specifically does not enter into the debate over same-sex marriage even as it indicates its sanction of "the traditional institution of marriage." What the dissent fails to note—at least overtly, but which is implicit from its citation—is that Justice O'Connor's statement is from the concurring opinion which is not binding on the Court because same-sex marriage was the direct issue before the *Lawrence* Court.

Also, the dissenting opinion casts light on the nature of the majority opinions' interpretive selection as exactly that—interpretive*,* not a dictated constraint—when it speaks of the *Windsor* question. While the majority opinion cites *Windsor* as alluding to a more general "right to marry," the dissent shows that *Windsor* cannot be held to decide the issue before the Court in *Kitchen* because, as it points out,

> it simply did not decide the issue of state prohibitions on same-gender marriages; instead, it concentrated on same-gender marriages already authorized by state law. It certainly did not require every state to extend marriage to same-gender couples, regardless of the contrary views of the electorate and their representatives. After

Windsor, a state remains free (consistent with federal law and comity) to not recognize such marriages (*Kitchen v. Herbert* 1235).

The dissenting opinion rejects the framing of the majority opinion and the linkage to Windsor which would support it, underscoring that even the decision to carry forward a question from a lower court or widen or narrow it involves an interpretive, not a merely descriptive, act.

I am not suggesting that the *Kitchen* Court *purposely* began with a wider question to color its reading of previous cases and affect a ruling upholding that question, but intentional or not, an expanded question substantiates a wider definition; the expanded question is but one of the ways of placing "marriage" in a wider context. Additionally, what is clear from either side of the opinion is that the framing of the question, rather than being a strict following of legal, technical rules of procedure, is an interpretive process that asserts a particular circumference around the issues but which once asserted, necessarily affects the outcome. By the circumferential logic of the scene-act ratio, a scene with an expanded or stretched circumference calls for corresponding acts. In this case, the definitional act of imbuing "marriage" with a substance that treats both homosexuals and heterosexuals as consubstantial participants makes possible the acceptance of the ultimate ruling. Stretching the definitional boundaries in this way, the Court creates the rhetorical space needed for the parties and the legal audience to accept the definition which is being substantiated throughout the opinion. This circumferential logic also speaks to the relation of legal meaning to a larger, social context—expanded legal meaning results in altered rulings; those altered rulings become reflected in and reflective of new socio-cultural possibilities. Table 2 below illustrates this by point to some of the socio-cultural circumferential shifts (in white; legal rulings in gray).

Table 2 Related Legal/ Socio-Cultural Events

1967	U.S. Supreme Court in *Loving v. Virginia* rule against interracial marriage bans (Newton 112).
1973	American Psychological Association removes homosexuality from list of mental illnesses (Hirschman 354)
1981-1985	Aids epidemic framed as gay disease (Hirschman 355).
1986	U.S. Supreme Court in *Bowers v. Hardwick* ruled that sodomy laws are constitutional (Newton 114).
1987	Two thousand same-sex couples protest in Washington, D.C against unequal tax laws (Newton 115).
1992	First Fortune 500 company offers same-sex couples employment benefits (Newton 115).
1995	Utah passes first defense of marriage act (DOMA) prohibiting legal recognition of same-sex relationships (Newton 117).
1996	Federal Defense of Marriage Act (DOMA) signed by Bill Clinton (Newton 117). In Romer *v. Evans* U.S. Supreme Court decides gays cannot be barred from political process (Hirschman 355).
1997	Actress Ellen Degeneres comes out (Hirschman 355).
2003	*Lawrence v. Texas* overturns *Bowers v. Hardwick;* adults have a right to private, consensual relationships (Newton 121).
2003	*Newsweek* magazine features gay and lesbians and discusses the impact of *Lawrence v. Texas* (Moscowitz 53-55).
2004	Massachusetts first state to have legal same-sex marriage; Thirteen states amend constitutions prohibit same-sex marriage (Newton 122).
2004	*Nightline* airs episode interviewed Massachusetts gay couples showing their average American domestic life (Moscowitz 64).

2008	California Supreme Court rule violative of Equal Protection clause; voters pass Proposition 8, constitutional amendment restricting marriage; California Supreme Court uphold restrictions; Iowa Supreme (Newton 128-129).
2010	"Don't Ask Don't Tell" law barring gays from openly serving in the military is repealed (Hirschman 355).

Casuistic Stretching: The "Right to Marry" from Consent to Conjugal

As indicated in my discussion of the framing of the question, the *Kitchen* Court widens the scope of the question as it redefines marriage. Understanding *Kitchen's* articulation of marriage requires recalling the definitions previously articulated by the U.S. Supreme Court in the prior cases discussed earlier in this chapter. Contrasting *Kitchen* with *Loving* and *Baker* provides us background needed to see the *Kitchen* redefinition more clearly. The dissent does exactly that:

> [I]t is a stretch to cast those [*Loving, Windsor,* and other cases related to the question of marriage rights] cases in support of a fundamental right to same-gender marriage. Here's why. First, *same-gender marriage is a very recent phenomenon; for centuries 'marriage' has been universally understood to require two persons of opposite gender*. Windsor, 133 S. Ct. at 2689. Indeed, this case is better understood as an effort to extend marriage to persons of the same gender by redefining marriage. Second, nothing suggests that the term 'marriage' as used in those cases had any meaning other than what was commonly understood for centuries. Courts do not decide what is not before them. That the Court did not refer to a 'right to interracial marriage,' or a 'right to inmate marriage' cannot obscure what was decided; the Supreme Court announced a right with objective meaning and contours' (*Kitchen v. Herbert* 1234 emphasis added).

Here, the dissent states the obvious, objective fact (implicit in *Loving* and *Baker,* and acknowledged even in *Windsor)* that "marriage" had been understood as the union of different gendered individuals; until *Baker* that fact had not been challenged, and the U.S. Supreme Court in *Baker* —less than five years *after Loving*—summarily dismissed the notion that same-gender marriage could even be considered legally possible. So, the

dissenting opinion is correct that this case is best understood as the extending of rights, or at least the expansion of a definition to cover phenomenon not previously covered.

Here we can recall that *Baker's* dismissal was predicated on conjugal notions of "marriage" deemed by the U.S. Supreme Court to be essential in *Loving:* procreation, childrearing, and the preservation of society. The *Loving* Court held that "marriage" was "fundamental to our very existence and survival" (*Loving v. Virginia* 1018). The *Baker* Court held that "[t]he institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis" (*Baker v. Nelson* 186). In both cases, either implicitly as in *Loving* or explicitly as in *Baker,* the U.S. Supreme Court finds "marriage" to be essentially the union of a man and a woman.

So, any definition which is not grounded on conjugal "marriage" would need to rearticulate the substance of "marriage;" however, given legal constraints, such a rearticulation would need to be cast as essentially no redefinition at all. This is the rhetorical task that *Kitchen* is faced with. It does this rhetorical work, not by disavowing conjugal marriage or the historical, uncontestable status of conjugal marriage, but by encompassing the narrower conjugal form within a wider, consent based concept of marriage.

The Definition of "Marriage": from Conjugal to Consent

The rhetorical task of redefining the substance of marriage is no small feat. While doing so, the Court, as in the framing of the question, relies on carefully crafted selections from previous cases; that is, it hones in on the non-conjugal elements of marriage that are equally implicated in those antecedent and precedent cases and which

are common to Western conceptions of marriage. Therefore, the Court can rightly state "[a]s we have discussed, the [U.S.] Supreme Court has *traditionally* described the right to marry in broad terms independent of the persons exercising it."(*Kitchen v. Herbert* 1215 emphasis added). Because it takes its cue from terministic selections from other cases, it can make the claim that it is in keeping with the traditional form of marriage. Although, the opinion takes care to shift the focus toward the importance of the consent-based, non-conjugal elements.

Consequently, the opinion mentions the "'personal aspects' [of marriage] including the 'expression of emotional support and public commitment'" (*Kitchen v. Herbert* 1211 citing *Turner v. Safley*). Citing *Maynard v. Hill* from 1888, the opinion notes that "marriage is 'the most important relation in life'" (*Kitchen v. Herbert* 1209). It continues further by citing *Meyer v. Nebraska* from 1923 where the U.S. Supreme Court held "'[w]ithout doubt,' the liberty protected by the Fourteenth Amendment includes the freedom 'to marry, establish a home [,] and bring up children'" (*Kitchen v. Herbert* 1209). Notice the Court does not say a right to procreate, which would challenge the applicability to same-sex couples, but rather, it declares a right to "bring up children" (*Kitchen v. Herbert* 1209). In fact, the *Kitchen* opinion declares, "[t]hus childrearing, a liberty closely related to the right to marry, is one exercised by same-sex and opposite-sex couples alike, as well as by single individuals" (*Kitchen v. Herbert* 1214).

Of course, in its bid to broaden the question and the substance of marriage, the Court has already linked the issue to *Loving*, but even as it cites *Loving,* it does so in keeping with its need to deflect attention away from the conjugal elements of marriage implicit in that ruling; it states, "'[t]he freedom to marry has long been recognized as one

of the vital personal rights essential to the orderly pursuit of happiness by free men'" (*Kitchen v. Herbert* 1209). Thus, *Kitchen* suggests that an appropriate understanding of the legal issue is one which regards the issue as being essentially about "the freedom to choose one's spouse" (*Kitchen v. Herbert* 1212). To the extent that marriage had been defined exclusively with reference to its conjugal elements, *Kitchen* holds that this was merely a rationalization for excluding same-sex couples from marrying. According to *Kitchen,* marriage, if it means anything, cannot merely mean the conjoining of man and woman to the end of producing offspring*;* to define it as such is an *ex post facto* justification for including heterosexuals who have traditionally had access and excluding homosexuals who had been barred from entry. It is not coincidence that, while not binding precedent, the *Kitchen* opinion takes its cue from a 2003 Massachusetts ruling in *Goodridge v. Dep't of Pub. Health* where the Massachusetts Supreme Court held "[t]o define the institution of marriage by the characteristics of those to whom it always has been accessible, in order to justify the exclusion of those to whom it never has been accessible is conclusory and bypasses the core question . . ." (*Kitchen v. Herbert* 1217 citing *Goodridge v. Dep't of Pub. Health*). This ruling made Massachusetts the first state in the union to extend marriage rights to same-sex couples.[12]

Kitchen's Reconstituted "Marriage"

From what has been presented so far, it can be stated that Kitchen reconstitutes marriage by locating primary meaning in its consent form. The conjugal form of marriage is rooted in a scene-purpose--act ratio: opposite gendered individuals marry primarily so they may fill societal and biological needs for offspring. In fact, the conjugal form's

[12] See *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941, 798 N.E. 941 (2003).

linkage to the preservation of civilization casts marriage as “natural/biological,” an extension of the ultimate scene—“God.” Therefore, conjugal marriage is dictated by or derived from “God” for the purpose of ensuring societal preservation and transmission of cultural ideals. This perspective suggests that heterosexuals participating in “marriage” as strictly a conjugal institution are not choosing to act as much as “God” (as scenic grounding) is acting through them for the purpose of fulfilling “his will.”

On the other hand, marriage as consent elevates the individual above the scene. This agent-act-purpose ratio gives agency to heterosexual or homosexual individuals alike, displacing the scene as prime motivation for marriage. Agents may now choose whom to marry (because of the need for love and commitment), thus acting of their own accord. *Kitchen* suggests that the consent form of marriage actually gives meaning and value to “marriage” rather than merely locating the meaning in the participants; this is precisely what insistence on the conjugal form does. In some sense the reconstitution of “marriage” brings it out of the metaphysical/supernatural realm and grounds it in pragmatic terms giving actual choice to all who claim the “right to marry."

Identifying Narratives

Immediately following the Court’s purpose-driven introduction, humanizing, personal narratives of the same-sex couples, Derek Kitchen and Moudi Sbeity, Laurie Wood and Kody Partridge, and Karen Archer and Kate Call, are presented and woven into the fabric of the opinion, constructed in a manner that provides a basis for identifying them as consubstantial with heterosexual married couples. We read of Kitchen and Sbeity, “Derek Kitchen and Moudi Sbeity have been in a loving, committed relationship for several years” (*Kitchen v. Herbert* 1199).

The opinion goes further by including Kitchen's comments about his partner Sbeity, "[he] is the man with whom I have fallen in love, the man I want to marry, and the man with whom I want to spend the rest of my life" (*Kitchen v. Herbert* 1199). Certainly, these are sentiments that any reader, irrespective of sexual orientation, can identify with, but the Court continues after introducing Kitchen and Sbeity to discuss the real, inequitable harms they face because of Utah's marriage ban:

> [t]he couple cannot access various benefits of marriage, including the ability to file joint state tax returns and hold marital property. The inability to 'dignify [his] relationship' through marriage, communicates to him that his relationship with Sbeity is unworthy of 'respect, equal treatment, and social recognition.' (*Kitchen v. Herbert* 1199).

These are not the explanations of a dispassionate court handing down an unaffected and unmotivated ruling. Referring back to the lower court's ruling, the *Kitchen* opinion uses similar identifying narrative details to introduce Laurie Wood and Kody Partridge:

> Laurie Wood and Kody Partridge are also Utah residents who wish to 'confirm [their] life commitment and love' through marriage;' however, they are unable to do so because of Utah's ban. The [lower] Court then cites a host of financial burdens the inability to marry have caused them. These include 'the inability to qualify for spousal pension benefits and the high costs of insurance. Because Partridge will be unable to obtain benefits under Wood's pension, the couple has procured additional life insurance policies.' (*Kitchen v. Herbert* 1199).

Of course, the trend continues with the third couple: "Karen Archer and Kate Call are also Utah residents in a loving, committed relationship." Highlighting the damaging effects of the same-sex marriage ban, the opinion discusses Archer's failing health and her "fears that the legal documents the couple has prepared will be subject to challenge if she passes away" (*Kitchen v. Herbert* 1199). Sadly, we learn from the opinion that this is something Archer has already faced, "her past experience surviving other partners informs this fear. Although the documents she prepared in a prior relationship served

their purpose when her former partner passed, Archer was ineligible to receive her partner's military pension benefits" (*Kitchen v. Herbert* 1199).

In each of these brief introductions, the Court's tone and tenor seeks to identify the same-sex couples with heterosexual familial norms and also call attention to constraints that harm homosexual couples. This manufacturing of consubstantiality between the two classes of married (or would-be) couples allows the Court to move forward with its argument that homosexual individuals have the "right to marry" in keeping with the legal principle that like classes should be treated alike.[13]

Locating the Constitution behind the Constitution—Contextualizing "Marriage"

Historic Purposes

Of course, identifying narratives alone are not enough to render homosexuals and heterosexuals consubstantial since "identification is compensatory with division" (*Grammar of Motives* 22); thus, it is precisely because the two classes were not seen as legally equal that the redefined "marriage" must find ways of placing them within the same scene in order for the identificatory claim to make sense rhetorically. To that end, the opinion proceeds with purpose-driven appeals to broad American ideals rather than giving a matter of fact description of the basic facts of the case and the legality of the issues at hand:

> Our commitment as Americans to the principles of liberty, due process of law, and equal protection of the laws is made live by our adherence to the Constitution of the United States of America. Historical challenges to these principles ultimately culminated in the adoption of the Fourteenth Amendment nearly one-and-a-half centuries ago. This Amendment extends the guarantees of due process

[13] For more discussion on this idea of law and equality, see O'Donnell, Guillermo A. "Why the rule of law matters." Journal of Democracy 15.4 (2004): 32-46.

> and equal protection to every person in every State of the Union. Those very principles are at issue yet again in this marriage equality appeal brought to us by the Governor and Attorney General of the State of Utah from an adverse ruling of the district court (*Kitchen v. Herbert* 1098).

Not only does this appear to be different in form from many appellate opinions, but this opinion's purpose-driven language immediately places same-sex marriage issues within the same legal context as the struggle for legal recognition and end to racial discrimination surrounding the Civil War and even the Civil Rights Movement. In fact, it suggests that not seeing the same-sex marriage cases in this light would be a failure to adhere to the Constitution, the complete opposite of the U.S. Supreme Court's ruling in *Baker* which held that there was no federal question implicated by a same-sex petitioner's claim of a "right to marry" someone of the same-sex (let alone one of Constitutional significance). Such a suggestion is bolstered by the appeals' linkage to the embattled, yet *settled* Civil War period which led directly to the Fourteenth Amendment expressly enshrining individual rights to equal protection into the Constitution.

Terministic Screens: Speaking in the Voice of the Law

While the Court speaks in personalizing terms during its discussion and construction of the couples' narratives and in its discussion of the historic purposes which it states demand this redefinition, there are times—in keeping with the legal terministic screen which filters its assessment of the situation—when the opinion shifts to the impersonal voice and tone more typical of legal opinions. This occurs when the Court is addressing technical, procedural issues. This usually involves its explanation of institutional constraints and/or the imposition of limiting factors; this is part of a larger rhetorical move to substantiate its redefinition by placing this articulation of marriage

within an increasingly wider series of legal contexts whose legal force becomes weightier but whose reasoning become more ambiguous as the justifications move outward.

What follows is a series of increasingly more abstract appeals which substantiate the redefinition by locating it in larger, more established contexts. The narrowest of such appeals is precedential case law which widens to encompass the U.S. Supreme Court, the legal/judicial institution, and the reconstituted U.S. Constitution

Precedential and Antecedent Case Law as Authoritative Scenic Constraints

Issues of standing and authority are discipline-specific constraints that the *Kitchen* opinion must grapple with in order to situate its ruling on seemingly concrete legal grounds. Citing precedent and some non-binding antecedent cases, the Court treats case law as a scene which necessarily dictates its ruling. Citations ground the Court's decision and establish the authority by which this *lower* appellate court can rule on the issue of same-sex marriage. The Court proceeds with an exhaustive list of citations from cases that are either directly on the question or tangentially related. The sum of these legal acts, when represented as the legal opinion does, becomes a scene in which the Court must show itself to be acting in accords with.

Legally, not all antecedent cases are binding precedent on a court, even on lower appellate courts such as the Tenth Circuit in *Kitchen*. Even when discussing technical, procedural matters, terministic screens filter the selections from those cases in ways that support the position the opinion espouses, presenting it as the *only*, possibly even non-ambiguous option. This can be seen from the dissenting opinion's analysis of the precedent cases which leads the dissenting judge to reach the very opposite conclusion that the majority opinion reaches.

For example, the majority opinion holds that *Baker* is not controlling because of jurisprudential, doctrinal developments. It cites the rulings in *Romer, Lawrence*, and *Windsor* in support of this stance. Yet, the dissent notes:

> This court relies on Lawrence and Windsor as justification for not deferring to Baker. As discussed below, none of these developments can override our obligation to follow (rather than lead) on the issue of whether a state is required to extend marriage to same-gender couples. At best the developments relied upon are ambiguous and certainly do not compel the conclusion that the [U.S.] Supreme Court will interpret the Fourteenth Amendment to require every state to extend marriage to same-gender couples, regardless of contrary state law (*Kitchen v. Herbert* 1233).

Here, even on a technical matter, the majority and dissenting opinions assert differing views which follow from the key selections that they have made from each of the antecedent and precedent cases on the issue, each attempting to substantiate a particular view of "marriage."

While the citation of case law is connected with the Court's need to establish its ruling as both necessary and legitimate, the invocation of the U.S. "Supreme Court" itself becomes a larger ground in which the *Kitchen* decision could be framed as merely descriptive of issues that are clear and legally unambiguous. That is, where specific citations are not enough to render a counter-argument legally indefensible, the opinion makes reference to broader, more boundless comments about the U.S. "Supreme Court" in ways that would support the *Kitchen* ruling:

> Even assuming that appellants are correct in predicting that some substantial degree of discord will follow state recognition of same-sex marriage, the U.S. Supreme Court has repeatedly held that public opposition cannot provide cover for a violation of fundamental rights (*Kitchen v. Herbert* 1227).

Here the opinion assumes for the sake of argument that the state's arguments are correct, that state recognition of same-sex marriage could lead to tensions which the state

preemptively forestalls with the bans; however, the opinion, although listing a citation to another case, invokes the authority of the U.S. Supreme Court in a more general sense, not a specific passage from a particular case. In other places, this strategy continues,

> "[t]he [U.S.] Supreme Court has consistently upheld the right to marry…the [U.S.] Supreme Court consistently describes a general 'fundamental right to marry' rather than 'the right to interracial marriage,' 'the right to inmate marriage,' or 'the right of people owing child support to marry'" (Kitchen v. Herbert 1211).

Thus, the citation of case law whether precedential or not, allows the Court to ground its notion of marriage in something prior to its ruling, but it can only do that by making selections from previous cases that deflect attention away from alternative interpretations of those same cases. This is underscored when the dissenting opinion cites the same case law to the opposite end. In the absence of a specific case citation that would utterly foreclose the issue and in the face of valid, but contrary legal arguments, the *Kitchen* Court's invocation of the U.S. "Supreme Court" itself serves as legitimating ground for its conclusion.

Judicial Institution as Constraint and Authorizing Body

Addressing concerns that the ruling might be criticized for *choosing* to enter this cultural/political debate, the Court notes

> "the judiciary is not empowered to pick and choose the timing of its decisions. 'It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. Pierson v. Ray, 386 U.S. 547, 554 (1967)'" (*Kitchen v. Herbert* 1228).

Here the Court rebuffs possible criticism by appealing to the judicial institution as the source of its authority and as the context in which is *must* act; however, its appeal to the judicial institution also necessitates the Court's imposition of limiting factors that narrow

the scope of the ruling to that of strictly legal opinion that does not reach beyond the law. The Court takes care to emphasize this view:

> the decision relates solely to civil marriage…Plaintiffs must be accorded the same legal status presently granted to married couples, but…[w]e respect the views advanced by members of various religious communities and their discussions of the theological history of marriage. And we continue to recognize the right of the various religions to define marriage according to their moral, historical, and ethical precepts. Our opinion does not intrude into that domain or the exercise of religious principles in this arena (*Kitchen v. Herbert* 1227-1228).

Therefore, the Court proceeds with its expansion while at the same time packaging the ruling as dictated by the conventions of law and the various scenes in which judges must act.

Reconstituted U.S Constitution as Strategically Addressed

The U.S. Constitution is a wider realm of constraint that the judicial opinion must take into account as it redefines "marriage." In fact, direct appeals to the U.S. Constitution ground much of the *Kitchen* opinion, but in doing so the Court highlights the nature of the U.S. Constitution as an instrument addressed to agents at particular time—an instrument which must be interpreted in shifting contexts and changes in the agents under consideration. For instance, at the outset the reader is reminded that "a prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded." Here Constitutional appeals ground the Court's expansion of marriage rights showing its ruling to be consistent with and in fact central to the U.S. Constitution (*Kitchen v. Herbert* 1217). Of course, that contention could be challenged and if left unqualified could even undermine the ruling which has been presented as clearly, objectively, and legally valid.

So, the opinion continues "it is not the Constitution that has changed, but the knowledge of what it means to be gay or lesbian….Consistent with our constitutional tradition of recognizing the 'liberty' of those previously excluded, we conclude that plaintiffs possess a fundamental right to marry and to have their marriages recognized" (*Kitchen v. Herbert* 1218 citing the District Court). Here the Court points to the U.S. Constitution in both its explicit reference to "liberty" and its spirit—it is the "constitutional tradition" which grounds the opinion's ruling (*Kitchen v. Herbert* 1218). Such an appeal once again creates the rhetorical space needed to see the redefinition as consistent with Constitutional principles, but implicitly exposes the nature of C/constitutional[14] discourse as time-bound and in need of corrective interpretive revisions. To that end, the Court goes on to articulate its view of a reconstituted U.S. Constitution—a Constitution shaped anew in light of the expansive Fourteenth Amendment, one of the major Civil War Amendments which extended citizen rights and equal protection to blacks.

Fourteenth Amendment

The centrality of the Fourteenth Amendment of the U.S. Constitution cannot be overstated in this case. Obviously, for legal reasons, the Fourteenth Amendment is central to *Kitchen's* legal analysis of equal protection, but rhetorically the invocation of the Fourteenth Amendment links same-sex marriage and sexual orientation discrimination. Although *Baker* dismissed appeals to the Fourteenth Amendment guarantee of equal protection, *Kitchen* is predicated upon the premise that marriage applies to same-sex

[14] I use C/constitutional because this applies both to the literal U.S. Constitution and constitutions in the Burkean sense.

couples just as it does to racial discrimination. In fact, it is in considering this that it becomes clear why the opinion very early on discusses the history of expanding rights to those previously excluded.

Accepting the District's Courts ruling to reach its decision, the majority opinion finds the arguments against same-sex marriage to be nearly identical to those against interracial marriage in Loving:

> "Anti-miscegenation laws in Virginia and elsewhere were designed to, and did, deprive a targeted minority of the full measure of human dignity and liberty by denying them the freedom to marry the partner of their choice. Utah's Amendment 3 achieves the same result"[15]

This conclusion lays the groundwork for its subsequent ruling which assumes that the issue of race in *Loving* is indeed analogous to same-sex marriage.

Shifting C/consitutional Logics: Lawrence and Romer

If there is any doubt as to whether the Fourteenth Amendment applies to *Kitchen's* question of same-sex marriage, *Romer v. Evans* and *Lawrence* v. *Texas* are offered as proof. That is, *Baker's* 1971 ruling made it clear that the Court did not equate sex or sexual orientation with race and that there is no contesting that states may define the terms of marriage. In order for *Kitchen* to conclude differently, the opinion cites these previous gay rights cases to demonstrate that the Court has set a precedent for extending equal rights to homosexuals. Grammatically, this places homosexuals and heterosexuals in the same legal context; rhetorically, this makes the claim of identification legally intelligible providing a vantage point from which to see both classes as consubstantial.

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[15] Quoted in *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (District Court of Utah 2013). This is the lower court decision which the Tenth Circuit in *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014) affirmed.

Romer v. Evans, a U.S. Supreme Court case decided in 1996, is cited. *Romer* involved a constitutional challenge to a Colorado state law enacted by ballot initiative which repealed local ordinances offering protection against sexual orientation discrimination and mandated that any new laws to that effect be passed either by the legislature or by ballot initiative. The Court struck this law down as an unconstitutional violation of the equal protection clause of the Fourteenth Amendment. *Lawrence* v. *Texas* was a 2003 case which overturned the 1986 ruling in *Bowers v. Hardwick*. In *Bowers* the U.S. Supreme Court's analysis of "history and tradition" grounded its ruling that state bans on homosexual sodomy were constitutional. *Lawrence* concluded that the Court was too narrow in its focus on "history and tradition" and found that homosexuals, like heterosexuals, have a fundamental right to consensual sex that is Constitutionally protected from state intrusion (*Lawrence v. Texas* 588).[16] *Romer* and *Lawrence* are pivotal because they demonstrate a shift in jurisprudence, one that would allow the Court to conclude differently than it had in 1971.

<u>Windsor</u>

Further attempting to situate its decision on firm legal footing, and underscoring doctrinal developments that bolster its conclusion, the *Kitchen* opinion cites *Windsor* and its incorporation of *Lawrence:* "…the [U.S.] Supreme Court has explicitly extended constitutional protection to intimate same-sex relationships, see Lawrence, 539 U.S. at 567, and to the public manifestations of those relationships, Windsor, 133 S. Ct. at 2695" (*Kitchen v. Herbert* 1229 citing *Lawrence v. Texas* and *United States v. Windsor*). In each

[16] Quoted in *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) from *Washington v. Glucksberg*, 521 U. S. 702, 721 (1997)

case, the ruling is cast as grounded in something larger than its own context. The *Kitchen* opinion's citation of these cases points to the importance of the reconstituted U.S. Constitution in resolving the definitional dispute. Here the Court contests the fixity of the U.S. Constitution by offering an interpretation of an evolving Fourteenth Amendment which grows in response to rhetorical exigencies.

Balancing Constitutional Principles

In addition to featuring appeals directly to constitutional clauses, the opinion makes appeals to constitutional principles which are sufficiently broad and widely accepted and undisputedly central to the U.S Constitution and U.S. American identity (*Kitchen v. Herbert* 1198). These include references to "liberty," "equality," "equal protection," and "due process" (*Kitchen v. Herbert* 1198). Such terms, even those such as "due process," a strictly legal term, drive home the opinion's assertion of the Constitutionality of same-sex marriage which stems from its redefinition of marriage. In continuing its discussion of the Fourteenth Amendment's applicability (in the absence of an explicit clause to that effect) to homosexuals (and therefore to same-sex marriage), the opinion notes that among "'the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment'" *(Kitchen v. Herbert* 1218).

This continues with the citation of *Griswold v. Connecticut*, a 1965 landmark U.S. Supreme Court case holding that a "right to privacy" afforded a woman the right to contraceptives:

> There can be little doubt that the right to marry is a fundamental liberty. The marital relationship is 'older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or

> for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.' (Kitchen v. Herbert 1209 citing *Griswold v. Connecticut*).

Just as *Griswold* appealed to broader, uncontestable American sensibilities to garner support for its ruling, the *Kitchen* opinion's use of "liberty" reduces the debate to a simpler issue: one is either for liberty or against it—to extend marital rights is to live up to the American promise of liberty. While each of the terms—"liberty," "equality," "equal protection," and "due process" are used throughout the opinion and each is thoroughly implicated, the opinion foregrounds questions of "liberty," "equal protection," and "equality" while sidelining "due process."

Rhetorically this makes sense because the case before the Court involved a Utah State Constitutional Amendment which had been democratically approved by a majority of voters. Balancing these principles, the easier case to make is that the Constitution demands equal treatment for all citizens even if "due process" had been followed in enacting the law.

Indeed, the entire *Kitchen* opinion can be read as a balancing of competing ideas, principles, and interests in its bid to redefine "marriage." The following chapter will discuss the conclusions and implications of this analysis.

Conclusions and Implications

A. Conclusions

In my analysis of *Kitchen v. Herbert*, I endeavored to understand the redefinition of "marriage" to include same-sex marriage. I began this analysis working from the premise that the legal discipline's specific rhetorical commitments dictate that a court's ruling must be the application of law and not the enacting of new law. Further, I noted that in keeping with those rhetorical commitments, the final ruling in *Kitchen* was said to be clearly and firmly rooted in the U.S. Constitution; however, although presented as the necessary legal conclusion, quite the opposite could have been gleaned from case law, and in fact, the opposite conclusion had been reached in *Baker v. Nelson,* the only case to have been ruled on by the U.S. Supreme Court regarding the legal constitutionality of same-sex marriage. As a result, rather than reading the opinion as merely a series of justifications for the Court's ruling, the opinion is best read as a redefinitional act—an attempt to imbue "marriage" with a transformed substance.

This redefinitional act relied first on the Court's unfixing of the term "marriage" by contesting the substance of marriage. The Kitchen Court's contests an essentialized man and woman only definition of "marriage" by pointing to the term as constitutive. Once it exposes "marriage" as rooted not in essential categories of being but in contextual references to relationships between persons, the *Kitchen* Court then fixed the legal definition by locating the term "marriage" in wider legal-historical contexts. To justify its

strategies the Court uses the rhetorical devices of casuistic stretching and terministic screens. Working within an overarching legal terministic screen the Court cites typical legal conventions of precedents to anchor its ruling; however, in a rhetorical sense, each asserted precedent and antecedent case is strategically chosen to support the position espoused even though there are alternate views of reading the same asserted precedents. Additionally, the use of identification to create a sense of consubstantiality between homosexuals and heterosexual persons are also central to this particular redefinitional act as it creates the rhetorical basis for Court's legal analysis of the application of the 14th Amendment's Equal Protection guarantee.

This analysis of *Kitchen* has demonstrated that rather than being merely the application of legal rules, judicial interpretation is necessarily motivated; the judicial interpretation is an enactment which justifies its strategic choices and relies on carefully crafted concealments in keeping with the legal terministic screen in which it operates. Even in procedural matters, the *Kitchen* ruling belies these strategic choices and concealments. As Cloud points out "affirmation is an act of advocacy" (1). All interpretation of law necessarily involves selections which guide the scope of its interpretation. Appellate courts must decide whether to agree with the legal question as shaped by lower courts (or widen or narrow it); that framing of the question will have a proportional impact on the definitions central to the right being asserted. Each of these moves will then have to be situated within a series of justifications which correspond to the expansion or contraction of the question; those justifications will necessarily involve *selections* from previous cases which *reflect* the stance already explicitly or implicitly asserted in the framing of the questions itself and *deflect* attention away from alternate

readings. Ultimately, that ruling, which will be cast as *the* correct and necessary ruling, will be not a mere application of constitutional/legal rules, but a new, albeit partial act—a judicial *choice* among options, not entirely of the old, not cut of wholly new cloth; all of that will hinge on its ability to substantiate the redefined term underlying the decision.

In Kitchen, each of these judicial choices is purposively situated in widening legal contexts that are cast as dictating the ultimate ruling, allowing for a stretching of the definitional boundaries in ways that appear consistent with traditional principles. In so doing, the Court shifts the argumentative ground upon which same-sex marriage had been legally rooted and reconstitutes the substance of marriage while simultaneously arguing that the redefinition and reconstitution are necessary and essential. A dramatistic analysis demonstrates the contingencies present in this opinion even as the ruling deals with legal categories long rooted in essentialist notions of sex, gender and sexual orientation. The *Kitchen* opinion turns on definitions and thus tries to create definitional certainty. To that end, the ruling presents the redefinition process as driven by contextual constraints; these constraints mask the nature of the judicial act and the relative agency appellate judges have in the judicial decision making process. The myriad of contextual appeals in this opinion foreground the scene displacing the Court's role as acting agent. Yet, judicial interpretation is an overt act and a judge's search for definitional certainty is necessarily colored by his or her own interpretative filters.

A dramatistic analysis ultimately lays bare the definitional and redefinitional processes, showing not only that legal discourse is indeed contingent and rhetorical (not essential) but also the specific grammatical means by which "marriage" is redefined to apply to same-sex couples and how that redefinition actually reconstitutes the very

institution of marriage. This process reminds us of Burke's contention that as the symbol using (mis-using animal), we are "goaded by a spirit of hierarchy" ("Definition" 15). That "spirit of hierarchy" drives us to search for some certain definitional ground upon which we order/structure social relations. The law offers this certainty in appeals to judicial constraints and reified categories; yet, those same categorical definitions being rhetorical in nature undermine that certainty.

Kitchen exploits definitional contingency by raising questions that destabilize essentialized, traditional notions of marriage and redefines "marriage" to encompasses both the traditional conjugal and the seemingly new "consent" marriage. In so doing, the *Kitchen* Court creates the rhetorical space which invites readers to see homosexual unions as marriages. To do this, the opinion reorders the elements already present within traditional marriage but which previous courts had reduced to the background.

Although I did not set out looking for a rhetorical formula for enacting social justice, the legal redefining of marriage provides a case study of how social justice can be achieved working within a particular discursive system; the redefinition of marriage to its more encompassing consent form was accomplished not by drastically altering marriage, but by drawing on elements already traditionally central to the definition of marriage. In this way, the very substance of marriage as it had been traditionally conceived was a grammatical resource for definitional transformation. Ultimately, the *Kitchen* ruling's appeal to the very terms upon which marriage has traditionally been situated, namely loyalty, consent, commitment, that made possible this "newly" redefined marriage.

B. Limitations

Inasmuch as the analysis endeavored to accurately account for the shifts in meaning underlying the redefinition of marriage, there are some limitations that must be acknowledged. First, I approached the study of the documents as texts, not as legal texts which demanded only a legal analysis. Legal meaning is very complex, and I certainly do not have the qualifications to give a legally valid interpretation of any of the legal cases which I considered; therefore, I read them for their grammatical and rhetorical value as important texts, not with a view to giving a complex, legal accounting for how it is that "marriage" was redefined within the texts. This approach assumes that all discourses make general grammatical moves and that the definitional process transcends field-specific rules. While I tried to acknowledge and offer a brief critique of the legal paradigm's treatment of meaning and definitions, that critique must be tempered by the fact that I have not exhaustively considered every legal angle.

Another important limitation centers on my choice of Kenneth Burke's work to frame my critical approach; The issue as it relates to understanding the redefinition of marriage is that I run the risk of reducing a very complex set of social, cultural, legal, and political practices and situations to just words. Surely, "marriage" and its redefinition must mean something more than the words I isolate from the legal opinions analyzed; there must be something non symbolic that we can point to and say, "That's marriage." Such a stress on the structure of language runs the risk of insisting both that there is nothing but the symbolic and that a high level of agency can be found merely by working within the structure of language. However, this project narrowly focused on law as a field which relies heavily on the structure of language and the use of definitions.

Lastly, it is important to note that I discussed only the most relevant cases providing context for *Kitchen.* I briefly incorporate the basic facts from several cases which only date back to 1967. I use *Loving* as a touchstone against which I measure the shifting articulations of "marriage" in subsequent cases for the sake of expediency, but also because *Loving,* represents a pivotal break in marriage rights rhetoric. The U.S. Supreme Court had long ruled that marriage was an individual right and provided Constitutional protections to married couples which have shielded them from state intrusion; case law to this effect dates back to 1888.[17] As I approached the project, I found that *Loving* summed up and extended on jurisprudence up to that point. From that perspective, it seemed fitting to proceed as I did.

C. Implications

Rhetorical Studies and Criticism

One area of scholarship that this project extends upon is an understanding of the redefinitional process. As I mentioned in the literature review, some scholarship addressed at length the role of definitional claims as arguments; however, this thesis has focused on the dialectical processes which make definitions contestable *before* such claims can be made. *Kitchen* suggests that the dialectical back and forth of questioning the ground on which definitions are situated ultimately destabilizes the meaning, exposing definitions as ambiguous and creating the rhetorical space needed to see different possibilities of meaning. This is the case even with highly settled upon terms like "marriage." That is significant because the rhetorical analyses of redefinitions have

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[17] *Maynard v. Hill* from 1888 is a landmark marriage case.

often included political terms whose definitions are more open to negotiation like "equality" and "freedom" than terms like "marriage."

Additionally, this analysis has shown that Burke's theories of entitling and constitutionality can be used as a heuristic for rhetorical criticisms of definitions. The four defining elements of constitutions are also elements of fully rounded definitions. A critic examining redefinitional discourses can use the orientation which emerges from seeing definitions as constitutions. Examining each of the constituting elements—constitutional acts, strategic address, constitutional principles, and contextualization—involves looking at the scope and reduction of the definitional circumference, the use of casuistic stretching to broaden the definitional boundaries in ways that transcend the previously defined term without transforming it into a new term, the terministic screens which guide the definitional act, as well as any identifying attempts to create consubstantiality between those previously divided but who are newly unified under the redefined term.

Cultural Shift and Relation to Public Discourse

Future studies in this area might consider investigating the broader socio-cultural conditions that gave rise to this shift in legal meaning. There are many questions about what made this redefinition possible, especially since earlier attempts had been summarily dismissed. Future studies might trace the redefinition back to when it emerges as a serious possibility culturally. At this point, there is no way of knowing which came first, but it stands to reason that something had to shift culturally that made the legal redefinition possible. Also, my analysis alluded to a shift from social to individual motives in marriage, but it is worth considering whether that shift in motives is reflective

of an even broader shift, such as a shift in American identity. It might be worth questioning whether this is even a shift in motives at all since, on some level, American identity has consistently stressed the importance of the individual (for example, Constitutional rights are individual not group rights.) A continuation of this work would involve considering the constitutive effects of definitions on collectives and asking what roles definitions play in constituting our collective social/cultural reality.

Identity and Self-Definition

Additionally, an area of interest that can be developed using this project as a starting point is that of self-definitions and identity. In fleshing out Burke's theory of entitlement we can say that a definition is a term which sums up or contains a set of terms; "marriage" for example contains love, duty, family, traditions etc. Each articulation of "marriage" balances those competing terms differently; similarly, Burke has stated that "identity is like a mutually adjusted set of terms" (*Rhetoric of Motives* 23). Using this as a premise some scholars have already studied individual and collective identities in light of Burkean concepts. Building on that, future work in this area might contribute to Burkean scholarship by exploring the utility of Burke's constitutionality to the study of identity formation.

Anderson considers identity from the perspective of autobiographical narratives (*Identity's Strategy*). Yet, autobiographical narratives are crafted for particular audiences and purposes while individual identities are far more complex than that. He writes from this perspective given a post-structural understanding of the self and to clarify that a linguistic perspective of identity does not necessarily assume a rational, choosing subject because Burke's concepts are dialectical in nature. The paradox of substance and

entitlement reminds us that there is nothing essential to definitions. Additionally, the concept of the constitution behind the constitutions suggests that the individual is never the sole locus of motives; instead, motives flow from the endless constitutions stretching back to some original constituting act—if such act ever existed. Thus, it would seem that even a linguistic perspective on identity formation could account for the various constitutions (social, political, cultural, legal, familial–the list could go on) that shape and delimit identities.

It is on this point that I connect the critical work Burke was engaged with in a pre and post WWII context with contemporary theorists working to unsettle reified notions of identity. Burke's motto for *A Grammar of Motives*, *"Ad Bellum Purificandum"* (toward a purification of war), reminds me of that. It suggests that Burke sought to point out the ways in which our grammars use us and how our drives to perfect them often push us toward destructive ends. At the same time, by working dialectically to unsettle those grammars or to expose them as strategic grammars and not objective universals, we might be able to transcend them.

One theorist working in this area is Judith Butler. Butler's discussion of the constitutive force and processes involved in establishing and regulating "sex" (typically defined as purely biological and non-discursive) was helpful in understanding the redefinition of marriage to include same-sex couples because "marriage" is so intertwined with notions of sex and gender (Butler 7-12); specifically, it helped me make some sense of the strong, irrational resistance to the inclusion of same-sex couples. An example of that irrationality can be noted from an exchange between conservative Judge

Posner and a lawyer arguing in favor of a state ban on same-sex marriage during an oral argument:

> **Posner**: What concrete factual arguments do you have against homosexual marriage?
> **Samuelson**: Well, we have, uh, the Burkean argument, that it's reasonable and rational to proceed slowly.
> **Posner**: That's the tradition argument. It's feeble! Look, they could have trotted out Edmund Burke in the Loving case. What's the difference? . . . There was a tradition of not allowing black and whites, and, actually, other interracial couples from marrying. It was a tradition. It got swept aside. Why is this tradition better?
> **Samuelson**: The tradition is based on experience. And it's the tradition of Western culture.
> **Posner**: What experience! It's based on hate, isn't it?
> **Samuelson**: No, not at all, your honor.
> **Posner**: You don't think there's a history of rather savage discrimination against homosexuals (Lat)?

Here Posner notes how irrational the vehement opposition to "homosexual marriage" is and refers to "savage discrimination against homosexuals." My read of Butler, put this "savage discrimination" into perspective; her discussion of the "constitutive force of exclusion, erasure, violent foreclosure, [and] abjection…" suggests that traditional notions of marriage are held in place by strict exclusion of others who are barred entry into that institution (Butler 8).

From this view, to the extent that traditional marriage meant anything, it did so because of those permitted to enter and those disallowed; marriage gained and retained its status by including some and excluding others—both those constituted and rendered constitutively outside the bounds of marriage were required; therefore, claims of "marriage" by those constitutively outside of its definitional boundaries threatened to undo not just the meaning of marriage, but the very individual and collective social identities heterosexual marriages have been linked to. Securing the definitional borders of "marriage" from this perspective is more than just a third party attempt to preserve

traditional principles; it was a means of protecting and preserving how individuals saw themselves, and the violent backlash is in response to what might be seen by those espousing traditional marriage as a threat to their very sense of self in the form of some new kind of "marriage."

This view suggests that where definitional boundaries are concerned, there may always be those rendered constitutively outside; however, Butler suggests that the drive to secure those borders leads to contestations over meaning which create instability in the discursive system, unmasking the practices that are used to naturalize the constructions of the subject/abject (Butler 3). These "constitutive instabilities" have a deconstituting effect which expose gaps and create the rhetorical space for something new, something previously rendered "other" to emerge (Butler 10). Therefore, we must be constantly engaged in a dialectical struggle to fully round out our definitions not only because they indeed materialize, becoming more than just words on a page, but also because in doing so we expose those as encrusted practices and norms. Such exposition, Burke and Butler would both agree, is necessary if we would achieve social justice.

Of course these ideas and the necessary theoretical linkages would need to be fleshed out more completely. Reconciling some of the seemingly incompatible theoretical underpinnings of contemporary critical theory with Burkean theory would be necessary. I think, however, that this is a starting point for such work. I find this particularly interesting because the ends seem related— unsettling essentialized notions of identity by dialectically working through and exposing the ways in which discourses affect individuals and collectives.

Definitional Authority

Questions of authority are also implicated in a discussion about definitions and redefinitions: Why do some definitions and redefinitions have suasory force while others do not? In fact, implicit in the *Kitchen* opinion's legal analysis is the fact that it would be accepted as authoritative. There was no question raised as to whether lower courts would be bound by its ruling or whether the public outside of the legal community would be affected by the ruling on some level. Attempts were made to qualify this as a *legal* ruling which does not change the personal or religious meaning of "marriage;" yet, the opinion takes for granted that, unless and until it was struck down by the U.S. Supreme Court, it would become the law and individuals and communities would be legally bound to it. Even as it made that distinction between legal and social/religious, the language of the opinion suggests the Court understood that a ruling in favor of same-sex marriage could have the social effect of de-stigmatizing these couples and their children. On the contrary, if a religious community redefined "marriage," it would probably be easily dismissed as just a religious move; it would certainly not affect more than those who chose to subscribe to that faith—not so with law. In sum, I believe that this study of definitions and redefinitions necessitates a consideration of how it is that some discourses, in this case, the law, have more binding force than others.

Legal Scholarship and Practice

Lastly and most speculatively, I turn to what might be some possible implications for legal scholarship and practice. It is possible that this study offers the makings of a constructive means of critiquing and redefining legal definitions because it recognizes the discipline-specific needs for which law asserts fixed definitions to provide meaning and

stability; the study has shown that even while law fixes meaning, that meaning can be destabilized and then redefined in more inclusive ways. The definition of "marriage" was not obliterated, but transcended. This might be important for those interested in offering critiques which might actually be embraced by legal scholars concerned with meaning and exposing the ambiguities inherent in the law. Some legal scholars acknowledge the rhetoricity of the law because they see that acknowledgement as an opportunity to grapple more productively with the effects that laws have on those subject to them. [18] Such scholars are focused on offering legally sound alternatives to exclusive terminologies or rulings which feign at positivistic objectivity to mask individual motives or political preoccupations. This contrasts with Critical Legal Studies (CLS) scholarship which critiques law in the attempts of offering definitional transformation by pointing to the law a repressive ideology (Freeman 1235). Such attempts have largely been rejected by the legal academy as irrelevant to the practice of law and too far afield to contribute to the constructive, scholarly critique of law.

I also believe the understanding of redefinitions discussed in this study offers a rebuttal to arguments against the recognition of same-sex marriage on the basis that it might it be a slippery slope to marrying inanimate objects, plural marriages or the end of the sanctity of religious marriage. As I understand Burkean constitutionality, a constitution contains a finite range of meaning; therefore, the redefined "marriage" may not mean *any* thing that someone asserts it to mean; its definitional boundaries may be stretched in ways that allow new terms within marriage to be featured, but it still will be a

[18] See McClain, Linda C. "From Romer v. Evans to United States v. Windsor: law as a vehicle for moral disapproval in Amendment 2 and the Defense of Marriage Act;" Wetlaufer, Gerald B. "Rhetoric and its denial in legal discourse." Virginia Law Review (1990): 1545-1597

featuring of terms already present in that dialectical core of meaning. As it relates to law, “marriage” has focused on the joining of two individuals who love and are committed to one another. This was evident from a review of each of the cases cited in the analysis. To suggest that the legal redefinition of marriage could permit one “to marry” a non-human would require more than the grammatical reshuffling of terms already linked to marriage that this redefinition reflects.

As to the argument that the legalization of polygamy is the next logical step, the analysis suggests that while "marriage” has been redefined, it still conforms to the logic of the scene-act ratio, a legal scene requires legal acts. More specifically, what the analysis suggests is that the legal, doctrinal developments since *Baker* (such as those reflected in *Romer*, *Lawrence*, and *Windsor* where the U.S. Supreme Court began to recognize the rights of gays) had the effect of reconstituting the legal scene. That reconstitution required corresponding acts; therefore, the redefinition was a reflection of an already reconstituted legal scene which conditioned the redefinitional act. Such is not the case with polygamy. There have been no such doctrinal developments or shifts in the legal scene which might permit that kind of redefinitional act. This does not preclude future changes toward polygamy; however, grammatically, it does not follow that the one will necessarily lead to the other. The same logic renders moot the question of whether the legal redefinition will change religious marriages. The legal scene permits legal acts. If there are shifts in views toward the religious sanctity of marriage, such shifts will need to be examined in light of more complex social and cultural phenomena than just a shift in the legal domain.

To conclude, I recall an article in the *Seattle University Law Review* which expressed the view that such discussions—those involved in quibbling over words or challenging the nature of the law and truth as well as law's ability to accurately size up situations—were viewed by the legal community as trivial and pointless. [19] The author, Christopher Roederer, quoted judge and prolific legal scholar Richard Posner as saying "'A practising [sic] judge or lawyer is apt to think questions of this sort at best irrelevant to what he does, at worst naïve, impractical, even childlike [like asking] (how high is up?)'" (385).[20] If Posner is right, there will doubtless be more outrageous legal decisions like *Dred Scott*, *Plessy*, or *Bowers*. If that is the case, it underscores the need for rhetorical theorists and critics to focus on even the tiniest building blocks of discourse—words. Or as Burke put it, "we are admonished to dwell upon the word, considering its embarrassments and its potentialities of transformation, so that we may detect its covert influence even in cases where it is overtly absent" (A *Grammar of Motives* 21).

By dwelling on the word, the Tenth Circuit in *Kitchen* legally redefined "marriage." No longer merely "the state of union between persons of the opposite sex,"[21] "marriage" is now a "state-sanctioned" "union" of "two persons" who choose to "establish a family" and "a home" by making an "expression...of [their] emotional support and public commitment;" it has "public and private significance…in their community and in their daily lives" and is one of "the most important relation in life"

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[19] See Roederer, Christopher. "Negotiating the Jurisprudential Terrain: A Model Theoretic Approach to Legal Theory." Seattle UL Rev. 27 (2003): 385.
[20] See Posner, Richard A. The Problems of Jurisprudence. Harvard University Press, 1993.
[21] (*Kitchen v. Herbert 1205* quoting *Baker v. Nelson*)

which must be protected as a constitutional "liberty" and a "fundamental right" guaranteed by the Fourteenth Amendment." [22]

In attempting to fully-round out its definition of "marriage" to include same-sex unions, *Kitchen* v. *Herbert* provides a compelling study of redefinitions.

[22] (Compiled quotations citations listed here in the order presented: *Kitchen v. Herbert* 1213; 1200; 1204; 1199; 1211; 1207; 1209 citing *Maynard v. Hill*; 1199)

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