SETTING A DANGEROUS PRECEDENT: A CONSTITUTIONAL ANALYSIS OF KENTUCKY COURTS' PUBLIC POLICY EXCEPTION TO CONFLICTS-OF-LAW JURISPRUDENCE

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INTRODUCTION

In resolving contractual disputes in which the contract or the contracting parties are connected to multiple states, courts are often charged with the daunting task of determining which state's law provides the proper avenue for handling the dispute. In Kentucky, courts generally follow the *Restatements (Second) of Conflicts of Laws* "most significant relationship" test.[2]

The most significant relationship test instructs courts to consider several factors: the place of formation of the contract; the place where the contract was or is to be performed; the physical location, if any, of the contract's subject matter; as well as the domicile, residence, and/or place of business of the contracting parties.[3] The idea is for these factors, taken together, to provide a defendable means for Kentucky courts to determine which state has the "most significant relationship to the transaction and the parties," and, consequently, which state's law *should* govern the contractual dispute.[4]

But even if the application of the most significant relationship test clearly identifies a state other than Kentucky as the state with the most significant relationship to the transaction and the parties, Kentucky courts will nevertheless refuse to apply the law of that state if doing so would violate a well-established public policy of the Commonwealth.[5] Notably, however, Kentucky courts will invoke this public policy exception to the most significant relationship test only for the protection of a Kentucky resident. As Justice Abramson once wrote for the Supreme Court of Kentucky, the public policy exception requires a "well-founded rule of domestic policy established to protect the morals, safety, or welfare of *our people*."[6] The court emphasized that "[w]here no Kentucky resident has been affected, rarely will that standard be met."[7]

This Note explores the constitutionality of Kentucky courts' refusal to extend the public policy exception to nonresidents who properly bring suit in Kentucky. Part I employs case law examples to illustrate how Kentucky courts routinely apply the

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[2] *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Hodgkiss-Warrick, 413 S.W.3d 875, 878 (Ky. 2013) (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS §188(1) (AM. LAW INST. 1977)).

[3] *Id.* at 878–79.

[4] *Id.* at 878 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS §188(1) (AM. L. INST. 1977)).

[5] State Farm Mut. Auto. Ins. Co. v. Marley, 151 S.W.3d 33, 35 (Ky. 2004).

[6] *Hodgkiss-Warrick*, 413 S.W.3d at 882 (quoting R.S. Barbee & Co. v. Bevins, Hopkins & Co. 195 S.W. 154, 155 (Ky. 1917)).

[7] *Id.*; *see also Marley*, 151 S.W.3d at 42 (Cooper, J., dissenting) ("Kentucky has no interest in applying our public policy to provide benefits to Indiana residents who would not be entitled to them under Indiana law.").

public policy exception for the protection of Kentucky residents, and it traces the historical trend of Kentucky courts toward denying the public policy exception to nonresidents. Part II analyzes the constitutionality of Kentucky courts' application of the public policy exception under the Equal Protection Clause. Part III examines the constitutionality of Kentucky courts' application of the public policy exception under the Privileges and Immunities Clause. Part IV provides a brief synopsis of the reasons why Kentucky should apply the public policy exception equally to all persons within its boundaries, regardless of residency.

I. THE CASE LAW

Recently, the public policy exception was used for the protection of a Kentucky resident in the case *Woods v. Standard Fire Insurance Company*.[8] In *Woods,* a Kentucky resident was gravely wounded in a car crash on a Kentucky roadway.[9] Woods, the Kentucky resident, acquired medical charges surpassing $250,000.[10] During the collision, Woods was operating her father's car, a resident of Connecticut.[11] The car was insured by Standard Fire, a Connecticut insurance company with its principal place of business in Connecticut.[12] Under the terms of the policy, Woods' father was the named insured and Woods was in no way covered.[13]

The other motorist in the collision was insured by United States Automobile Association (USAA).[14] Woods settled her tort claim with USAA for $50,000.[15] Woods obtained $11,000 in "UIM benefits" from Standard Fire, the insurer of her father's vehicle, and requested an additional $100,000 in UIM benefits from the company.[16] The Standard Fire policy contained a set-off provision which lowered its "limit of liability . . . by all sums" paid by other parties possibly "legally responsible" for collisions causing physical damage.[17]

Under Connecticut law, where such provisions are enforceable, this clause would reduce ("set-off") Woods' $100,000 UIM payment from Standard Fire by $61,000, the total amount previously received from USAA and Standard Fire.[18] Under Kentucky law, however, such set-off provisions are not enforceable as against public policy and would therefore not reduce Woods' total amount recoverable by the prior amounts received.[19] Consequently, the case turned on whether Connecticut law or Kentucky law governed the interpretation of the policy.[20]

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[8] Woods v. Standard Fire Ins. Co., 411 F. Supp. 3d 397, 406 (E.D. Ky. 2019).
[9] *Id.* at 399.
[10] *Id.*
[11] *Id.* at 400.
[12] *Id.*
[13] *Id.*
[14] *Id.* at 399.
[15] *Id.* at 400.
[16] *Id.*
[17] *Id.*
[18] *Id.* at 400–01.
[19] *Id.* at 401.
[20] *Id.*

Despite its conclusion that the application of the most significant relationship test weighed in favor of applying Connecticut law, the court nevertheless held that the public policy exception required application of Kentucky law to the insurance policy.[21] The court "acknowledge[d] that application of the public policy exception in this case swallows the most significant relationship test analysis, which points in favor of application of Connecticut law."[22] But the court reasoned that Kentucky state courts have "demonstrated a willingness to disregard the most significant relationship test" when its application would clearly violate the public policy of Kentucky.[23]

Although the court made no comment of the fact that it was disregarding another state's substantive law for the protection of a Kentucky resident, as opposed to a non-resident, this decision is consistent with the pattern of Kentucky courts only applying the public policy exception if a Kentucky resident stands to benefit.

A similar example reflecting this pattern is found in the case of *Schardein v. State Auto Insurance Company.*[24] *Schardein* involved an automobile accident on a Kentucky roadway between a Kentucky resident and another driver.[25] The Kentucky resident, a 19-year-old, was killed in the collision.[26] The decedent's estate moved against the uninsured motorist policy of his father, an Indiana resident insured by State Auto.[27] Similar to the insurance policy in *Woods*, the policy issued by State Farm to the decedent's father contained a set-off provision which reduced the payments receivable from State Farm by all other amounts paid by other parties as a result of the collision.[28]

The decedent's estate conceded that under Kentucky's traditional conflict of laws analysis Indiana law would apply, but nevertheless argued that Kentucky law should apply under the public policy exception.[29] The court agreed.[30] Despite the fact that the named policy holders were both Indiana residents, the court held that the decedent was a resident of Kentucky and therefore his estate was "entitled to the protection of Kentucky's laws."[31]

A. *THE UNFOLLOWED EXCEPTION*

State Farm v. Marley appears to be the only case in which the Kentucky Supreme Court applied the public policy exception for the protection of a nonresident of

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[21] *Id.* at 405–06.
[22] *Id.* at 405.
[23] *Id.*
[24] Schardein v. State Auto. Ins. Co., No. 12-288-C, 2012 U.S. Dist. LEXIS 180746, at *4–5 (W.D. Ky. Dec. 20, 2012).
[25] *Id.* at *1.
[26] *Id.*
[27] *Id.* at *2.
[28] *Id.* at *2–3.
[29] *Id.* at *3–4.
[30] *Id.* at *6.
[31] *Id.* at *4.

Kentucky,[32] but that opinion has not been followed and was later implicitly rejected by the Kentucky Supreme Court itself.[33]

In *Marley*, an Indiana resident fell asleep behind the wheel and lost control of his vehicle while driving through Kentucky with his family.[34] The driver of the vehicle had a personal liability umbrella insurance policy issued in Indiana.[35] The driver's injured family members, all of which were Indiana residents, subsequently filed a personal injury claim against the driver in Kentucky.[36] The driver's insurer contended that a household exclusion provision within the policy was valid and enforceable and therefore prevented the family members from recovering against the driver's policy.[37]

In finding that such provisions clearly violated the public policy of Kentucky, the court held the household exclusion provision void and unenforceable as applied to the automobile liability coverage.[38] The court reasoned that it is clear public policy of Kentucky "to ensure that victims of motor vehicle accidents on Kentucky highways are fully compensated."[39] The majority opinion made no distinction between residents and non-residents in holding the household exclusion provision unenforceable as against public policy.[40]

Despite the majority's constitutionally-compliant opinion, the dissenting opinion has since become the prevailing view of the Commonwealth.[41] The dissent takes the position that it is illogical for Kentucky courts to apply Kentucky's public policy exception in a way that would "provide rights to nonresidents to which they are not entitled under the law of their home state."[42] Because all of the parties to this action were residents of Indiana, the dissent contends, Indiana law should govern the interpretation of the policy and that should be the end of the matter.[43] The crux of the dissent's argument is that nonresidents of Kentucky should not be afforded the protections of the public policy of Kentucky merely because they got into an accident in Kentucky.[44]

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[32] *See* State Farm Mut. Auto. Ins. Co. v. Marley, 151 S.W.3d 33, 34, 36 (Ky. 2004).

[33] State Farm Mut. Auto. Ins. Co. v. Hodgkiss-Warrick, 413 S.W.3d 875, 882, 885 (Ky. 2013) (concluding that the *Marley* rationale was only applicable in limited circumstances: "Where no Kentucky resident has been affected, rarely will [the public policy exception] be met."); *see also* Georgel v. Preece, No. 13-57-DLB-EBA, 2014 U.S. Dist. LEXIS 154678, at *22 (E.D. Ky. Oct. 30, 2014) ("[T]he Court sees no plausible basis for applying a public policy exception to the standard choice of law framework.").

[34] *Marley*, 151 S.W.3d at 34.

[35] *Id.*

[36] *Id.*

[37] *Id.* at 35

[38] *Id.* at 36.

[39] *Id.*

[40] *See id.* ("This claim arises from the ownership, operation, and use of a motor vehicle within Kentucky . . . .").

[41] *See* State Farm Mut. Auto. Ins. Co. v. Hodgkiss-Warrick, 413 S.W.3d 875, 885, 887 (Ky. 2013); Georgel v. Preece, No. 13-57-DLB-EBA, 2014 U.S. Dist. LEXIS 154678, *at 22 (E.D. Ky. Oct. 30, 2014) ("[T]he Court sees no plausible basis for applying a public policy exception to the standard choice of law framework.").

[42] *Marley*, 151 S.W.3d at 41 (Cooper, J., dissenting).

[43] *Id.*

[44] *See id.* at 40 (Cooper, J., dissenting).

In support of this view, the dissent makes two main arguments. First, the dissent argues generally that extending the public policy exception to out-of-state residents encourages forum shopping, which, itself, violates the public policy of Kentucky.[45] Second, and more related to the facts of the case at hand, the dissent contends that a majority of other jurisdictions have held such household exclusion clauses enforceable "if valid where the policy was issued and where the parties reside even if invalid in the state where the accident occurred."[46]

On their face, the dissent's arguments in support of denying the public policy exception to out-of-state residents are both logical and well-reasoned. It is true that a majority of other jurisdictions have held these clauses enforceable if valid where the policy was issued, even if the clauses were invalid in the state where the accident occurred.[47] It is likewise true that forum shopping is against the public policy of Kentucky.[48] Logical as these arguments may be, however, they suffer two critical flaws.

First, the dissent's "everyone else is doing it" argument overlooks, as many other jurisdictions have, the fact that routinely applying this exception for the protection of in-state residents while consistently denying its applicability to similarly-situated nonresidents implicates the Equal Protection Clause. The Equal Protection Clause unequivocally commands that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[49] The public policy exception clearly constitutes law, and it certainly provides protection for those whom it is invoked for.[50] Accordingly, it is difficult to see how the Equal Protection Clause could be read to require anything other than that Kentucky courts apply the protections of the public policy exception equally to residents and nonresidents in Kentucky.

Second, the dissent's forum-shopping argument overlooks the Supremacy Clause. As explained above, it is hard to see how the Equal Protection Clause could be read to not require Kentucky courts to apply the protections of the public policy exception equally to residents and nonresidents alike. The dissent's argument that applying the public policy exception to non-residents would violate state law of preventing forum-shopping therefore creates a direct conflict of laws between the

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[45] *Id.* at 41 (Cooper, J., dissenting).

[46] *Id.* at 42 (Cooper, J., dissenting)..

[47] *See, e.g.*, Am. Fam. Mut. Ins. Co. v. Williams, 839 F. Supp. 579, 583 (S.D. Ind. 1993) (upholding exclusion clause under Indiana law even though accident occurred in Kansas where exclusion was invalid); Allstate Ins. Co. v. Hart, 611 A.2d 100, 103–04 (Md. 1992) (upholding exclusion clause under Florida law even though accident occurred in Maryland where exclusion violated public policy); Sotirakis v. United Serv. Auto. Ass'n., 787 P.2d 788, 790–91 (Nev. 1990) (upholding exclusion clause under California law even though accident occurred in Nevada where exclusion was invalid); Draper v. Draper, 772 P.2d 180, 183 (Idaho 1989) (upholding exclusion clause under Oregon law even though accident occurred in New Mexico where exclusion was invalid).

[48] *See, e.g.*, Stewart v. Kentuckiana Med. Ctr., 604 S.W.3d 264, 270 (Ky. Ct. App. 2019).

[49] U.S. CONST. amend. XIV.

[50] *See* State Farm Mut. Auto. Ins. Co. v. Hodgkiss-Warrick, 413 S.W.3d 875, 881 (Ky. 2013) ("[P]ublic policy, invoked to bar the enforcement of a contract, is not simply something courts establish from general considerations of supposed public interest, but rather something that *must be found clearly expressed in the applicable law*.") (emphasis added).

U.S. Constitution and state law. In situations such as this, the Supremacy Clause commands that the U.S. Constitution prevail over state law.[51]

B. *Denial of Public Policy Exception to Nonresidents*

In the 2013 decision of *Hodgkiss-Warrick*,[52] the Kentucky Supreme Court implicitly changed its view on the applicability of the public policy exception to out-of-state residents. In that case, a Pennsylvania resident sued to recover for injuries sustained in an automobile collision while riding with her daughter on a Kentucky roadway.[53] The suit named the injured Pennsylvania resident's insurance company as defendant, alleging insufficient motorist coverage under a policy issued in Pennsylvania and covering a vehicle registered and used exclusively in Pennsylvania.[54] The policy at issue contained an exclusion prohibiting the injured Pennsylvania resident from recovering damages arising out of an accident involving an automobile used by a resident relative, including the Pennsylvania resident's daughter.[55]

While conceding that under traditional conflict-of-law analysis Pennsylvania law would govern the interpretation of the insurance policy, the Pennsylvania resident argued that the exclusion of her daughter's vehicle from the policy's coverage would so violate the public policy of Kentucky that Kentucky law, rather than Pennsylvania law, must apply.[56] Under Kentucky law, the Appellee argued that such exclusions from insurance policies are unenforceable as against Kentucky public policy.[57]

Although the court found that the exclusion at issue did not, in fact, run afoul of Kentucky public policy, the court acknowledged that, even if it did, the public policy exception would nevertheless be inapplicable to the facts of this case.[58] The court reasoned that in order for the public policy exception to bar enforcement of a contractual provision that is valid where made, the Kentucky public policy against such enforcement must be significant.[59] According to the court, a public policy is only substantial if it is a "well-founded rule of domestic policy established to protect the morals, safety or welfare of *our people*."[60] "Where no Kentucky resident has been affected," the court continued, "rarely will that standard be met."[61]

Following the logic of *Hodgkiss-Warrick*, the U.S. District Court for the Eastern District of Kentucky, applying Kentucky law, similarly declined to invoke the public policy exception for the benefit of a Kentucky nonresident in the 2014 case of

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[51] U.S. CONST. art. VI, cl. 2.
[52] *Hodgkiss-Warrick*, 413 S.W.3d 875.
[53] *Id.* at 876.
[54] *Id.*
[55] *Id.* at 878.
[56] *Id.* at 878, 879.
[57] *Id.* at 878.
[58] *See id.* at 882–83.
[59] *Id.* at 882.
[60] *Id.* (quoting R.S. Barbee & Co. v. Bevins, Hopkins & Co. 195 S.W. 154, 155 (Ky. 1917)).
[61] *Id.*

Georgel v. Preece.[62] *Georgel* involved an accident between a West Virginia resident and a Kentucky resident on a Kentucky roadway.[63] Georgel, the West Virginia resident, filed suit against Preece, the Kentucky resident, as well as Preece's insurance company seeking damages for injuries he sustained as a result of the accident.[64] Georgel's insurance company countered that Georgel's own comparative fault precluded Georgel from recovery.[65] Because West Virginia law encompasses the doctrine of modified comparative negligence, which bars a plaintiff who is fifty percent or more responsible from recovery, Georgel's chances of recovery were far less viable in West Virginia than in Kentucky.[66]

In its application of the "most significant relationship" test, the court ultimately concluded that West Virginia had the most significant relationship to the transaction and the parties and, therefore, West Virginia law should apply.[67] Georgel urged the court to apply the public policy exception, arguing that Kentucky has a strong, clearly-established public policy of recognizing pure comparative fault.[68] Georgel explained that the purpose behind Kentucky's doctrine of pure comparative fault is "to promote the policy of allowing injured persons to recover despite being partially responsible for their own injuries."[69] If the court were to apply West Virginia law, Georgel argued, he would be denied the policy's benefit.[70]

But Georgel's pleas fell on deaf ears due to the simple fact that Georgel was not a resident of Kentucky.[71] In declining to extend the public policy exception, the court distinguished a prior case recognizing this public policy on the sole basis that in that case the party who stood to benefit from Kentucky law was a Kentucky resident, whereas Georgel was not.[72] In addition to the court's reliance on *Hodgkiss-Warrick*, the court also cited the dissenting opinion in *Marley* for the proposition that Kentucky has no interest in applying its public policy to provide benefits to out-of-state residents who would not be entitled to such benefits in their own state of residence.[73]

II. CONSTITUTIONALITY UNDER EQUAL PROTECTION CLAUSE

As addressed above, Kentucky courts' denial of the public policy exception to nonresidents implicates the Equal Protection Clause. To be sure, the Clause is implicated whenever a government action draws a distinction between groups of people and provides one group more or less protection under the law than the other

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[62] Georgel v. Preece, No. 13-57-DLB-EBA, 2014 U.S. Dist. LEXIS 154678, at *18–19, *21–22 (E.D. Ky. Oct. 30, 2014).
[63] *Id.* at *2.
[64] *Id.* at *2–3.
[65] *Id.* at *3.
[66] *Id.*
[67] *Id.* at *16–17.
[68] *Id.* at *20.
[69] *Id.*
[70] *Id.*
[71] *Id.* at *20–21.
[72] *Id.*
[73] *Id.* at *21 (quoting State Farm Mut. Auto. Ins. Co. v. Marley, 151 S.W.3d 33, 42 (Ky. 2004)).

group.[74] Here, in the context of conflict-of-law disputes, Kentucky courts have drawn a distinction between Kentucky residents and nonresidents and afforded Kentucky residents greater protection under the law by only invoking the public policy exception on their behalf. The Equal Protection Clause is implicated by this residency-based discrimination, and the question next becomes the appropriate level of scrutiny for constitutional review.[75]

Typically, laws or government actions which draw such classifications between groups of people will survive judicial review under the Equal Protection Clause so long as the classification is "rationally related to a legitimate government interest."[76] This standard is known as rational basis review, and it is used to analyze government regulations, laws, or actions involving classifications that do not implicate an immutable characteristic (e.g., race, national origin, aliens, gender) or encroach on a fundamental right (i.e., rights specifically recognized by the Supreme Court as granted by the Constitution).[77] This is a relatively lenient standard in which the government is normally—though not always—given a significant amount of deference.[78]

In the context of Kentucky's denial of its public policy exception to nonresidents, rational basis review is likely the proper standard of constitutional scrutiny. The classification made by Kentucky courts in this regard is based on state of residency, which is not an immutable characteristic warranting a higher level of scrutiny.[79] Likewise, it is unlikely that the denial of the public policy exception to nonresidents interferes impermissibly with the exercise of a fundamental right—at least under traditional Equal Protection Clause analysis.[80] Even under rational basis review, however, courts will strike down laws or governmental actions if there is simply no plausible legitimate state interest for the state to advance.[81]

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[74] *See* Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON U. C.R. L. J. 219, 220 (2009).

[75] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 727 (Wolters Kluwer eds., 5th ed. 2017).

[76] *See id.* at 728 ("Rational basis review is the minimum level of scrutiny that all laws challenged under equal protection must meet. All laws not subjected to strict or intermediate scrutiny are evaluated under the rational basis test.").

[77] *See, e.g.*, Colin Callahan & Amelia Kaufman, *Equal Protection*, 5 GEO. J. GENDER & L. 17, 23, 26 (2004).

[78] CHEMERINSKY, *supra* note 75, at 728.

[79] *Id.* ("The notion [that immutable characteristics warrant heightened scrutiny] is [predicated on the fact] that it is unfair to penalize a person for characteristics that the person did not choose and that the individual cannot change.").

[80] *Id.* at 730. *Cf.* Part III, *infra* pp. 12–14 (discussing the possibility under Privileges and Immunities Clause analysis that the distinction encroaches on the fundamental right to equal protection of the laws). The only other fundamental right which could possibly be encroached by the denial of the public policy exception is the fundamental right to travel. The Supreme Court has made clear that "freedom to travel throughout the United States has long been recognized as a basic right under the Constitution." Dunn v. Blumstein, 405 U.S. 330, 338 (1972) (citation omitted). Thus far, however, the Supreme Court's jurisprudence concerning the fundamental right to travel has primarily concerned state durational residency requirements. *See id.* at 334; Attorney Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898, 900–01, 907 (1986). Since the denial of the public policy exception is not a durational residency requirement, it is unlikely such a denial implicates any fundamental right as to require strict scrutiny.

[81] *See, e.g.*, CHEMERINSKY, *supra* note 75, at 728.

In *Romer v. Evans*, for example, the Court struck down under rational basis review a Colorado Constitutional Amendment which precluded any judicial, legislative, or executive action designed to protect persons from discrimination based on their sexual orientation.[82] The State's proffered interest in adopting the Amendment was the protection of "the liberties of landlords or employers who have personal or religious objections to homosexuality."[83] In declining to deem this interest legitimate, the Court reasoned that if equal protection of the laws means anything, "it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* government interest."[84]

Similarly, in *Metropolitan Life Insurance Company v. Ward*, the Court used rational basis review to strike down an Alabama law which attempted to promote the growth of an in-state insurance industry by taxing in-state companies at much lower rates than out-of-state companies doing business in the State.[85] The Court found the State's preferred interest to be "purely and completely discriminatory," and accordingly deemed the law the "very sort of parochial discrimination that the Equal Protection Clause was intended to prevent."[86]

Based on the language of the Kentucky opinions denying the public policy exception to out-of-state residents, there appear to be two state interests Kentucky could advance in support of making this distinction. First, Kentucky could argue that it has a legitimate state interest in declining to "provide rights to nonresidents to which they are not entitled in their home state."[87] It is difficult to distinguish such an interest from the impermissible state interest offered by the Colorado government in *Romer*, as it seems to be more of a bare desire to disfavor a particular group of people within the Kentucky's borders than an effort to advance a bona-fide interest for the benefit of the Commonwealth.

Though Kentucky's inequal application of its public policy exception harms a group of people less directly than the Colorado constitutional amendment did in *Romer* (which is perhaps part of the reason why such practices have escaped Constitutional scrutiny thus far), the practical effect is the same. In both instances, the government action singles out a particular group with little political power (homosexual Colorado citizens in *Romer*) or no political power (nonresidents who properly bring suit in Kentucky) within a state and disadvantages that group.[88] Accordingly, it seems plausible that even under rational basis review this interest would fail to qualify as legitimate.

Alternatively, Kentucky could argue that it has a legitimate state interest in refusing to disrupt the balance of public policies that other states have chosen for their citizens.[89] Here too, though, it is uncertain whether such an interest would

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[82] Romer v. Evans, 517 U.S. 620, 623–24, 635 (1996).

[83] *Id.* at 635.

[84] *Id.* at 634 (quoting United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

[85] Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 882–83 (1985).

[86] *Id.* at 878.

[87] State Farm Mut. Auto. Ins. Co. v. Marley, 151 S.W.3d 33, 41 (Ky. 2004) (Cooper, J., dissenting).

[88] *See Romer*, 517 U.S. at 635.

[89] *See* State Farm Mut. Auto. Ins. Co. v. Hodgkiss-Warrick, 413 S.W.3d 875, 883 (Ky. 2013) (explaining that "nothing requires a Kentucky court to interfere with the balance Pennsylvania has chosen for its citizens.") (citation omitted).

qualify as legitimate, as there appears to be no case law even remotely on point. Logically speaking, however, one major flaw in this argument is that Kentucky has no issue overriding the balance of public policies and substantive laws that another state has chosen for its residents when doing so protects a Kentucky resident.[90]

Furthermore, such a disparate treatment of non-residents who properly bring suit in Kentucky could be analogized, albeit imperfectly, to Alabama's "purely and completely discriminatory" treatment of out-of-state companies doing business in Alabama as in *Ward*.[91] Just as the Supreme Court there deemed the State's interest in discriminating against out-of-state companies in order to protect domestic growth to be illegitimate,[92] the Supreme Court could likewise hold Kentucky's interest in declining to disrupt the balance of policies chosen by other states for their residents, except when doing so would benefit a Kentucky resident, to be insufficient. Accordingly, it seems quite plausible Kentucky's practice of denying its public policy exception to nonresidents could fail even the most deferential standard of constitutional scrutiny.

III. CONSTITUTIONALITY UNDER PRIVILEGES AND IMMUNITIES CLAUSE

Article IV, Section 2 of the United States Constitution requires that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[93] Historically, the Privileges and Immunities Clause has been used primarily to protect rights which are either fundamental or involve important economic activities.[94]

The most obvious privileges and immunities, for example, are constitutional rights,[95] such as the right to own and dispose of property,[96] or the right to pursue "a common calling."[97] By the same token, the right to engage in a particular trade or profession, or to pay an equal licensing fee as residents for certain commercial activities, also qualify as privileges and immunities under the clause.[98] Rights which are not considered fundamental, such as the right to hunt for sport, for example, do not qualify as privileges and immunities.[99]

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[90] *See, e.g.*, Woods v. Std. Fire Ins. Co., 411 F. Supp. 3d 397, 404 (E.D. Ky. 2019); Schardein v. State Auto. Ins. Co., No. 12-288-C, U.S. Dist. LEXIS 180746 *4 (W.D. Ky. Dec. 21, 2012).

[91] Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 869 (1985).

[92] *Id.*

[93] U.S. CONST. art. IV, § 2, cl. 1.

[94] CHEMERINSKY, *supra* note 75, at 476.

[95] Duncan v. Louisiana, 391 U.S. 145, 166 (1968) ("What more precious 'privilege' of American citizenship could there be than that privilege to claim the protections of our great Bill of Rights?").

[96] Blake v. McClung, 172 U.S. 239, 249 (1998).

[97] United Bldg. & Constr. Trades Council v. Camden, 465 U.S. 208, 219 (1984) ("[T]he pursuit of a common calling is one of the most fundamental of those privileges protected by the [Privileges and Immunities] Clause.").

[98] Sup. Ct. of N.H. v. Piper, 470 U.S. 274, 281 (1985) (discussing the privileges and immunities clause in terms of a particular trade); Toomer v. Witsell, 334 U.S. 385, 395 (1948) (discussing the privileges and immunities clause in terms of paying an equal licensing fee).

[99] Baldwin v. Fish & Game Comm'n, 436 U.S 371, 388 (1978) (holding that elk hunting by nonresidents in Montana was not a fundamental right under the Privileges and Immunities Clause).

In the context of conflicts-of-law, the Privileges and Immunities Clause has a particularly curious history. While Supreme Court justices have acknowledged the inherent overlap between constitutional law and conflicts-of-law principles,[100] the modern Court has never heard a Privileges and Immunities Clause challenge to a state conflicts-of-law rule.[101] In fact, the Court has not invalidated a state conflict-of-law decision under *any* constitutional provision since 1951.[102] This is true despite the fact that conflict-of-law rules that give preference to local litigants constitute a "prima facie" violation of the Privileges and Immunities Clause under even the most liberal reading of the Clause's text.[103]

But for some reason, the Supreme Court has steered clear of this convoluted intersection of law for more than a half-century, leaving its resolution entirely to state courts and legal theorists.[104] The result of leaving this power with the states has, predictably, resulted in a system by which local discrimination against nonresidents often escapes judicial review.[105]

In the context of Kentucky only applying its public policy exception for the protection of Kentucky residents, for example, certain residents of other states who lawfully bring suit in Kentucky are denied Kentucky's favorable policies. Truthfully, it is less than clear exactly what constitutes a "privilege" or "immunity" under the Clause as to warrant constitutional protection against discrimination on the basis of state residency.[106] But because Kentucky advances these policies for the protection of Kentucky residents, its denial to residents of other states at least arguably deprives those citizens of a fundamental right or "privilege" under the clause—the constitutional right to equal protection of the laws.

As one prominent legal theorist put it, "if the state's conflicts rules provides that a local right will prevail in a particular case when asserted by a local, that right must prevail when asserted in the same case by an out-of-state[] [resident], unless there is some nondiscriminatory reason why it should not."[107] The theorist continued, "[j]udicious use of garden-variety antidiscrimination principles embedded in the . . . Privileges and Immunities Clause," would prevent such local favoritism by states.[108]

Yet, because the Supreme Court refuses to address this issue, states are permitted to continue discriminating against nonresidents through conflict-of-law rules in ways that run afoul of the Privileges and Immunities Clause.[109] For this reason, it is crucial for states like Kentucky who employ these rules to recognize the

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[100] *See* Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 2 (1945).

[101] Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 257 (1992).

[102] *Id.*; Hughes v. Fetter, 341 U.S. 609, 613 (1951) (holding that a state's refusal to enforce the law of the state where the injury occurred violates the Full Faith and Credit Clause).

[103] Laycock, *supra* note 101, at 265.

[104] *Id.* at 258–59.

[105] *See id.* at 268, 278.

[106] *E.g.*, Baldwin v. Fish and Game Comm'n., 436 U.S. 371, 380 (1978) (noting that "the contours of [the Privileges and Immunities Clause] are not well developed").

[107] Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2517 (1999).

[108] *Id.* at 2453.

[109] Laycock, *supra* note 101, at 268, 278.

constitutional ramifications of their actions and lead the way in shifting towards a less-discriminatory body of law. If Kentucky were to reconcile its conflicts-of-law rules with the U.S. Constitution, the Commonwealth would be taking a significant step towards achieving the Framers' core purpose in drafting the Privileges and Immunities Clause.[110]

IV. KENTUCKY COURTS SHOULD APPLY THE PUBLIC POLICY EXCEPTION WITHOUT REGARD TO RESIDENCY

Given the constitutional issues surrounding conflicts-of-law practices in Kentucky, Kentucky courts should apply its public policy exception equally to residents and nonresidents alike. For one, it is questionable whether Kentucky's current practice of denying its public policy exception to out-of-state residents could survive even the lowest level of constitutional scrutiny under the Equal Protection Clause.[111] Secondly, such discriminatory behavior is precisely what the Privileges and Immunities Clause was drafted to protect against.[112]

While it is true that the practice is unlikely to be reviewed by the Supreme Court in the near future,[113] Kentucky should nevertheless lead the way in exercising constitutionally compliant conflicts-of-law rules. To be sure, equal protection in the courts between residents and nonresidents alike was a vital part of the Framers' understanding of the Privileges and Immunities Clause.[114] Further, the plain text of the Equal Protection Clause requires that no *person* (whether or not that *person* is a *citizen*, *noncitizen*, *resident or nonresident*) within a state's jurisdiction be denied equal protection of the laws of that state.[115]

In order for nonresidents who properly bring suit in Kentucky to receive equal protection in this context, they must be governed by "equal application of equal laws."[116] By embedding within its conflicts-of-law rules an exception, which can only be used for the protection of Kentucky residents, Kentucky courts violate this principle in the most literal sense.

CONCLUSION

In sum, by denying out-of-state residents, who properly bring suit in Kentucky, certain legal protections afforded to in-state residents, Kentucky's application of the public policy exception to the *Restatement (Second) Conflicts of Law* test is at odds with both the Equal Protection Clause and the Privileges and Immunities Clause of the United States Constitution. If Kentucky courts wish to continue overriding the Commonwealth's conflicts-of-law principles with public

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[110] *Id.* at 266.

[111] *See* Part II, *supra* pp. 9–12.

[112] Laycock, *supra* note 101, at 266.

[113] *See id.* at 257 (noting that the Court has not invalidated a state conflict-of-law decision under *any* constitutional provision since 1951).

[114] Laycock, *supra* note 101, at 266.

[115] U.S. CONST. amend. XIV (emphasis added).

[116] Laycock, *supra* note 101, at 266.

policy, they should do so without regard to the claimant's residency. By continuing to apply the public policy exception in a way that favors only local litigants, Kentucky courts set the dangerous precedent of ignoring some of the United States' most fundamental laws.