

2015

Foreword

The Editors

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Recommended Citation

The Editors, *Foreword*, 64 Emory L. Rev. 1669 (2015).

Available at: <https://scholarlycommons.law.emory.edu/elj/vol64/iss6/1>

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FOREWORD

Nearly one hundred forty years ago in 1879—in a time far removed from our own in many ways—the United States Supreme Court decided *Reynolds v. United States*, holding that criminal laws banning polygamous marriages did not violate the U.S. Constitution. That decision, infamously laden with contentious and arguably offensive language by modern sensibilities but also affirming traditional marriage norms long taken for granted in the Western tradition, has generated discussion and controversy ever since. That decision also remains good law.

Fast forward to the present: in just a few weeks, when the Court hands down what will no doubt be a long anticipated and highly contentious decision in *Obergefell v. Hodges*,¹ the Court will answer whether the Fourteenth Amendment requires states to license marriages for same-sex couples. While many believe the Court is poised to answer that question affirmatively, assuming it will, it is far less clear how expansive or limited the decision's holding will be or what implications will flow from its rationale. At oral argument, Justice Alito pressed the petitioners as to the logical implications of a holding in favor of same-sex marriage, asking, “Suppose we rule in your favor in this case and then, after that, a group consisting of two men and two women apply for a marriage license. Would there be any ground for denying them?”² In other words, would a holding in favor of a constitutional right to same-sex marriage inevitably require recognition of a constitutional right to polygamous marriage as well?

Some scoff at such a suggestion, asserting that the specter of polygamous marriage lurking in the shadow of same-sex marriage is just a red herring. That is, some argue there are crucial sociological differences between polygamy and same-sex marriage as practiced which counsel different treatment of the two involving harm and coercion in the former but not in the latter. These commentators maintain that warnings about legal recognition of polygamy are merely slippery-slope arguments designed to distract us from the questions actually at issue in the same-sex marriage cases and make us fear judicial

¹ 135 S. Ct. 1039 (2015) (mem.).

² Transcript of Oral Argument, Question 1, at 17, *Obergefell v. Hodges*, No. 14-556 (U.S. Apr. 28, 2015), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-556q1_11o2.pdf.

rulings in favor of a same-sex marriage right that most Americans currently are willing to embrace.

But others disagree; they insist, as Justice Alito suggests, that a right to polygamous marriage is indeed the logical extension of a holding in favor of same-sex marriage, just as Justice Scalia warned that a right to same-sex marriage would be the logical extension of the Court's holding in *Lawrence v. Texas*, which struck down criminal bans against sodomy and invalidated moral reasoning as a basis for such laws.³ These individuals further insist that just as we can identify shining examples of families built around responsible, loving, and committed same-sex couples exhibiting the best of family values, so too can we identify such examples of families built around plural unions leaving little principled reason for recognizing a right to marriage for one constituency but not the other. Within this latter camp, commentators embrace polygamy along with same-sex marriage, finding both to be welcome reforms to a marriage institution built upon outmoded traditional assumptions and prejudices rather than modern norms reflecting contemporary enlightenment thought.

While the Supreme Court has shocked the nation with unexpected rulings from time to time, in recent decades the Court has often shown a measure of reserve in tackling contentious social issues, preferring instead to allow the political process to run its course if possible before stepping in to adjudicate. For the most controversial issues, the Court's posture is perhaps best illustrated by Justice Ginsburg's recent commentary on the ever-contentious *Roe v. Wade*⁴ decision. While agreeing with the underlying policy promoted by the decision, Ginsburg has suggested that the Court may have acted too hastily. At the time of *Roe*, states were increasingly recognizing abortion rights (just as states have increasingly done with same-sex marriage rights today), and had the Court instead chosen to restrain itself from prematurely intervening, Ginsburg reasons that the political process likely would have achieved the same result as *Roe*, except without the sledgehammer force that a constitutional holding imposes and, more importantly, without the continuous political backlash against the Court that *Roe* perpetuated.⁵

³ 539 U.S. 558, 590–91 (2003) (Scalia, J., dissenting).

⁴ 410 U.S. 113 (1973).

⁵ E.g., Meredith Heagney, *Justice Ruth Bader Ginsburg Offers Critique of Roe v. Wade During Law School Visit*, U. CHI. L. SCH. (May 15, 2013), <http://www.law.uchicago.edu/news/justice-ruth-bader-ginsburg-offers-critique-roe-v-wade-during-law-school-visit>.

As with *Loving v. Virginia*,⁶ where the Court held unconstitutional laws that prohibited interracial marriage, once again, the Court has opted to take up the question of same-sex marriage only after a majority of states, whether through the political process or judicial ruling, has already recognized same-sex marriage. Perhaps we should expect a similar trajectory for polygamy before the Court or the lower federal courts consider disturbing *Reynolds*. But while the Court may prove to be content to revisit the question of polygamy on the back end, the rest of us will undoubtedly confront this issue far sooner, regardless of the outcome in *Obergefell*. Indeed, culturally, that conversation has already begun with television shows such as *Sister Wives* and *Big Love*, which have raised awareness of plural unions in the popular consciousness by introducing relatable human faces to the American family, just as *Will and Grace* did for the gay community in the late 1990s.

Whether a right to polygamous marriage should be recognized as a matter of constitutional or statutory law is a question that we editors of the *Emory Law Journal* are disinclined to answer ourselves. But we do believe this important question is one worth asking, and *Obergefell* certainly gives new energy to that conversation. And while questions surrounding polygamy are not new to the academic legal literature, there remains plenty of room for further inquiry and dialogue. Accordingly, in this paper symposium, we have collected a number of articles and essays by leading and emerging scholars to tackle the question of polygamy and its many attendant issues. Some have forthcoming books on the topic; others have previously written extensively about polygamy or related issues. All bring a unique voice and perspective to this contentious issue.

We start with those arguing against polygamy, the traditional view by Western standards. In *Why Two in One Flesh? The Western Case for Monogamy over Polygamy*, drawing from a forthcoming monograph bearing a nearly identical title, John Witte, Jr. examines polygamy from a historical and comparative perspective, reaching across the globe and thousands of years back to marshal arguments against polygamy from the Western socio-legal tradition.⁷ In reaching his conclusions, Witte distinguishes same-sex marriage from polygamy in arguing that recognition of the former does not logically entail recognition of the latter and argues that anti-polygamy laws are neither purely a function of Christian morality nor antithetical to religious freedom

⁶ 388 U.S. 1 (1967).

⁷ 64 EMORY L.J. 1675 (2015).

norms. Martha Bailey and Amy Kaufman follow suit with *Should Civil Marriage Be Opened Up to Multiple Parties?*, in which they argue that the state has legitimate reasons not to open up civil marriage to multiple parties beyond two, including fostering optimal family arrangements for child rearing and for fostering equality and mutual support for the spouses involved.⁸ They reject the idea that the rights of children born out of wedlock compels an opposite result, and they caution that there are legitimate reasons to reject criminal bans of polygamy and to embrace recognition of valid foreign polygamous unions, even while resisting domestic polygamous civil marriage. Rose McDermott and Jonathan Cowden in *Polygyny and Violence Against Women* approach the issue from a sociological perspective, injecting comprehensive empirical research into the dialogue to argue that polygamy as practiced across the globe causes a variety of social harms to children, women, men, and nations themselves.⁹ Maura I. Strassberg, in *Scrutinizing Polygamy: Utah's Brown v. Buhman and British Columbia's Reference re: Section 293*, closely engages these two cases, one American and the other Canadian, analyzing the differing logics and methodologies both courts employed in reaching opposite results.¹⁰ She examines how the *Brown* court distinguished *Reynolds* en route to subjecting Utah's polygamy criminal ban to strict scrutiny and argues that not only was the court's analytical move not warranted, but even under strict scrutiny the state's polygamy ban should stand given the evidence and arguments exhaustively fleshed out in its Canadian counterpart. Finally, BJ Wray, Keith Reimer, and Craig Cameron, the Canadian attorneys who prosecuted *Reference re: Section 293*, offer a short descriptive summary of the case in *The Most Comprehensive Judicial Record Ever Produced: The Polygamy Reference*, contextualizing the issues examined and arguments made by the state for the benefit of readers less familiar with this key Canadian decision, which upheld a criminal ban on polygamy under Canada's Charter of Rights and Freedoms.¹¹

The symposium then turns to arguments in favor of legal recognition of polygamous marriages. Pivoting on the fulcrum of the Canadian attorneys' essay, like Strassberg, Jonathan Turley in *The Loadstone Rock: The Role of Harm in the Criminalization of Plural Unions* examines both *Reference* and *Brown* but draws contrary conclusions to Strassberg.¹² Turley, the attorney

⁸ 64 EMORY L.J. 1747 (2015).

⁹ 64 EMORY L.J. 1767 (2015).

¹⁰ 64 EMORY L.J. 1815 (2015).

¹¹ 64 EMORY L.J. 1877 (2015).

¹² 64 EMORY L.J. 1905 (2015).

representing the Brown family in the case bearing their name that partially struck down Utah's criminal ban on polygamy, argues that the harm principal promoted by John Stuart Mill should inform conflicts between individual choice and social mores and that a proper application of this principal warrants a conclusion that a right to polygamous marriage should be constitutionally protected. Largely drawing from his forthcoming monograph, *In Defense of Plural Marriage*, Ronald C. Den Otter in *Three May Not Be a Crowd: The Case for a Constitutional Right to Plural Marriage* thoroughly reviews the substantive due process and equal protection arguments that support plural marriage and further argues that constitutional recognition of same-sex marriage inescapably entails recognition of other alternative marriage forms, including polygamous marriages.¹³ Den Otter critiques what he sees as a series of double standards informing the institution of marriage in the West and advocates for a normative definition of marriage consistent with modern progressive values. Stu Marvel, in *The Evolution of Plural Parentage: Applying Vulnerability Theory to Polygamy and Same-Sex Marriage*, likewise argues that recognition of plural marriage logically follows from recognition of same-sex marriage, but for very different reasons.¹⁴ Marvel twines together application of vulnerability theory to recent gay marriage and polygamy cases and the implications for polygamy of same-sex parents' use of assisted reproductive technologies to argue that plural parentage necessarily inheres in our evolving marriage norms and will increasingly play a crucial role in mediating the vulnerabilities of children, the state, and the institution of marriage. Martha Albertson Fineman offers a brief afterword to Marvel's work in *Vulnerability and the Institution of Marriage*, further contextualizing how Marvel's cutting-edge piece fits within the larger vulnerability project.¹⁵

To close the symposium, we offer a student comment, *L'Amour for Four: Polygyny, Polyamory, and the State's Compelling Economic Interest in Normative Monogamy*, by Jonathan A. Porter.¹⁶ He develops one final argument against polygamy, that the economic benefits that monogamy provides the state over and above polygamy, as supported by recent social science research, provides a compelling state interest for laws banning polygamy.

¹³ 64 EMORY L.J. 1977 (2015).

¹⁴ 64 EMORY L.J. 2047 (2015).

¹⁵ 64 EMORY L.J. 2089 (2015).

¹⁶ 64 EMORY L.J. 2093 (2015).

The future of state involvement in familial relationships and intimate settings is a topic of conversation that will continue to evolve as our society confronts issues that were once taboo but are now increasingly a part of our reality. At the time of *Reynolds*, the idea that access to contraception, abortion, interracial marriage, and same-sex marriage might be recognized as constitutionally protected was unfathomable; today, polygamous marriage remains so. Whether and for how long is sure to be a matter of great debate within our society. We hope this symposium does its best to steward that debate well.

—THE EDITORS