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## Three May Not Be a Crowd: The Case for a Constitutional Right to Plural Marriage

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## THREE MAY NOT BE A CROWD: THE CASE FOR A CONSTITUTIONAL RIGHT TO PLURAL MARRIAGE

Ronald C. Den Otter\*

### ABSTRACT

*This Article takes seriously the substantive due process and equal protection arguments that support plural marriage (being able to marry more than one person at the same time). While numerous scholars have written about same-sex marriage, few of them have had much to say about marriages among three or more individuals. As progressive, successful, and important as the Marriage Equality Movement has been, it focuses on same-sex marriage at the expense of other possible kinds of marriages that may be equally worthwhile. The vast majority of Americans still do not discuss plural marriage openly and fairly, as if the topic were taboo. One of the goals of this Article is to convince readers that marriage in the future could be a much more diverse institution that does a better job of meeting individual needs. After all, one size may not fit all. Unfortunately, too often, scholars reduce plural marriage to the exploitation of women and the abuse of children. This approach makes it too easy to dismiss the possibility that a plural marriage might work better than the alternatives for at least some individuals in some circumstances.*

*Because the expansion of marriage to include same-sex couples is bound to cover a broader range of marital relationships, lawmakers, judges, and the rest of us eventually will have to decide which kinds of intimate relationships will be accorded legal status and which kinds will be left out. Today, a growing number of Americans reject the double standard when a state does not treat same-sex couples the same as opposite-sex couples when it comes to eligibility for marriage licenses. The strong dignity language of the recent Windsor decision indicates that future courts will be more skeptical of the rationale for limiting marriage to a man and a woman if it is predicated upon demeaning sexual minorities. Another double standard, which is the focal*

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*point of this Article, concerns why the state allows almost all couples to marry for just about any personal reason that they happen to have. At the same time, all states continue to refuse to recognize any plural union. Those who care about gays and lesbians being discriminated against cannot ignore whether those who would marry multiple partners, if they were allowed to do so, are also being treated unfairly. The former kind of discrimination may be more widespread and worse than the latter, but that does not mean the latter is constitutionally permissible.*

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## INTRODUCTION

This Article is about the unconstitutionality of laws that limit civil marriage to couples.<sup>1</sup> As of this writing, even though numerous legal scholars have contributed to the same-sex marriage debate, most legal scholars have been reticent about marital multiplicity.<sup>2</sup> The Marriage Equality Movement has focused on same-sex marriage, and this focus, while understandable at this historical moment, has come at the expense of other forms of marriage that may be equally worthwhile. With about three-fourths of the states finally legally recognizing marriage between two men or two women, it is about time to contemplate the constitutional implications of requiring states to grant marriage licenses to same-sex couples.<sup>3</sup> Anyone who endorses the view that government may not limit marriage to opposite-sex couples, either on substantive due process or equal protection grounds, must be curious about whether states may continue to prevent even fully informed, consenting adults from marrying more than one person at the same time.

These days, it would be unusual to find a progressive that opposes any kind of unequal legal treatment of sexual minorities. Even some conservatives have seen the writing on the wall and have modified their positions accordingly.<sup>4</sup> That said, most legal scholars would not see plural marriage in the same light. As Eugene Volokh writes, “[I]t’s pretty clear that a state may choose not to

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<sup>1</sup> RONALD C. DEN OTTER, IN DEFENSE OF PLURAL MARRIAGE (forthcoming 2015).

<sup>2</sup> However, there are some exceptions. See MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA’S TRADITION OF RELIGIOUS EQUALITY 197–98 (2008) [hereinafter NUSSBAUM, LIBERTY OF CONSCIENCE]; MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 229–30 (2000) [hereinafter NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT]; RICHARD A. POSNER, SEX AND REASON 257–60 (1992); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1421–35 (2d ed. 1988); Elizabeth F. Emens, *Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277 (2004); Sanford Levinson, *Thinking About Polygamy*, 42 SAN DIEGO L. REV. 1049 (2005); Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081, 2110 (2005).

<sup>3</sup> As of April 30, 2015, same-sex marriage exists in thirty-seven states—Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, Montana, New Hampshire, New Mexico, Nevada, New Jersey, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming—and in the District of Columbia. *Marriage Center*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/campaigns/marriage-center> (last visited May 17, 2015); see also Adam Liptak, *Supreme Court to Decide Marriage Rights for Gay Couples Nationwide*, N.Y. TIMES, Jan. 16, 2015, at A1, available at <http://www.nytimes.com/2015/01/17/us/supreme-court-to-decide-whether-gays-nationwide-can-marry.html>.

<sup>4</sup> See Perry Bacon, Jr., *Conservatives Increasingly Weary of Opposing Gay Marriage*, NBC NEWS (June 20, 2014, 4:49 pm), <http://www.nbcnews.com/politics/politics-news/conservatives-increasingly-wary-opposing-gay-marriage-n137046>.

recognize polygamous marriages.”<sup>5</sup> Additionally, many progressives remain reluctant to broach the plural marriage question, as if it were taboo. Their refusal to do so was more defensible at a time when opponents of same-sex marriage invoked the slippery slope to discredit such marriage by leading Americans to believe that the legal recognition of same-sex marriage would entail people’s marrying nonhuman animals and inanimate objects.<sup>6</sup> The purpose of this Article is to induce readers to consider the possibility that the constitutional arguments against nonmonogamous marital alternatives are much weaker than they may appear to be. At the very least, their doing so would demand that they not boil down its wide variety of forms to the worst aspects of patriarchal polygyny found in some religious or cultural traditions. Antipolygamists have been allowed to frame what little debate there has been about the topic to make it seem that being open to the idea of plural marriage is the equivalent of endorsing the exploitation of women and the abuse of children.<sup>7</sup>

The ongoing debate about same-sex marriage is not only about gay and lesbian couples and their constitutional right not to be discriminated against; it is also concerns the most appropriate legal definition of marriage in a country that has exhibited an unfortunate tendency to discriminate invidiously against different minorities. At stake is nothing less than discerning the meaning of the United States Constitution when those who have different ideas about marital relationships want the freedom to live unconventionally. In the last few years, the debate over how marriage should be defined has pushed a growing number of Americans to confront a problematic double standard in situations where a state refuses to accord same-sex couples the same constitutional right to marriage that their opposite-sex counterparts already may exercise. The strong dignity language of the recent *Windsor* decision, several lower courts’ subsequent interpretation of it, and the resulting scholarly discussion of the meaning of animus for constitutional purposes indicate that future judges could

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<sup>5</sup> Eugene Volokh, *Crime to Conduct Same-Sex or Polygamous Marriage Ceremony?*, VOLOKH CONSPIRACY (Jan. 14, 2015), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/14/crime-to-conduct-same-sex-or-polygamous-marriage-ceremony/>.

<sup>6</sup> See, e.g., Dan Amira, *Rand Paul Walks Back Suggestion that Gay Marriage Will Lead to Interspecies Marriage*, N.Y. MAGAZINE (June 26, 2013, 4:54 p.m.), <http://nymag.com/daily/intelligencer/2013/06/rand-paul-gay-marriage-animal-human.html>.

<sup>7</sup> See, e.g., Shoshana Grossbard, *Polygamy is Bad for Women*, N.Y. TIMES: ROOM FOR DEBATE (Dec. 17, 2013, 6:39 PM), <http://www.nytimes.com/roomfordebate/2013/12/17/should-plural-marriage-be-legal/polygamy-is-bad-for-women>.

be more skeptical of the reasoning behind restricting marriage to a man and a woman if such a restriction is predicated upon demeaning sexual minorities.<sup>8</sup>

Another double standard, which is less visible yet equally disconcerting, involves why the state only allows couples to marry. Those who care about gays and lesbians being discriminated against cannot ignore whether those who would marry multiple partners, if they were allowed to do so, are also being treated impermissibly under the Constitution. The former kind of discrimination may be worse than the latter, but that is not the issue. As the debate over the meaning of marriage continues, those who oppose plural marriage can be expected to draw upon some of the arguments that traditionalists have deployed against marriage between people of the same gender. In articulating their normative constitutional view, they will have to do more than consult a dictionary, refer to religious understandings, conduct survey research, embrace “tradition,” investigate how most people happen to use the “m” word, put forth empirically unfounded claims, or generalize from outliers. In the face of this double standard, progressives could (1) change their minds and reject a constitutional right to same-sex marriage (or its equivalent on equal protection grounds) or (2) attempt to defend the constitutionality of unequal legal treatment of polygamists and polyamorists who would marry if they could. In the past, those who favored same-sex marriage hesitated to align themselves with those who advocated decriminalizing polygamy or legally recognizing plural marriages. Instead, they went out of their way to distinguish sharply between discrimination against gays and lesbians and discrimination against polygamists.<sup>9</sup>

However, there must be a legally relevant difference between the two kinds of marriage or else the state must cease to privilege monogamous marriage. In 2015, fewer Americans believe that states may put their stamp of approval on opposite-sex marriages to the detriment of same-sex ones to validate heterosexuality.<sup>10</sup> As it turns out, some of the most compelling reasons that advocates of same-sex marriage offer in the name of such marriage also support the option of plural marriage. The slope from same-sex to plural marriage may be slipperier than they realize in the sense that some of the same reasons, like respecting marital choice and promoting equal treatment, which

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<sup>8</sup> United States v. Windsor, 133 S. Ct. 2675, 2692 (2013).

<sup>9</sup> See, e.g., WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 280–81 (1999).

<sup>10</sup> See Justin McCarthy, *Same-Sex Marriage Support Reaches New High at 55%*, GALLUP (May 21, 2014), <http://www.gallup.com/poll/169640/sex-marriage-support-reaches-new-high.aspx>.

figure so prominently in defense of same-sex marriage, are equally applicable to being able to marry more than one person simultaneously. If progressives reject their constitutional equivalence, they must explain why the state may treat the two types of marriage differently without acting unconstitutionally. This explanation would aim at establishing that numerical limitations are justified in a way that those based on sexual orientation (or gender) are not. Not only have they failed to do so as of this writing, they almost always draw a bead on polygyny as if it were the only form that a plural marriage could possibly take. Those who concern themselves with treating everyone as fairly as possible should not be indifferent to other, more hidden manifestations of marital discrimination, particularly when a plural marriage could be same-sex, bisexual, or asexual. This Article argues that for constitutional purposes, the legal definition of marriage in each state must include the option of plural marriage. By not making marriage considerably more inclusive, without adequate justification, the state fails to accept the marital choices of all adults and treat them equally. As such, states that issue marriage licenses to couples also must give them to “plural marriage enthusiasts” so that they can form a multi-person marriage.<sup>11</sup>

This Article shall be divided into the following Parts: (1) the first Part puts the topic of plural marriage into a legal context by clarifying the relevant terminology and articulating how the ongoing debate over same-sex marriage in this country relates to whether states only have to recognize monogamous marriages; (2) the second Part discusses reasonable concerns about how women are treated in polygynous relationships and distinguishes between two kinds of gender equality: internal (the interpersonal dynamics of the intimate relationship) and external (how the law treats the relationship) because standard critiques of plural marriage, which almost always target polygyny, conflate the two types; (3) the third Part spells out worries about child development in families with “thruples” or “moresomes,” explains why such worries are overstated, and suggests that parental multiplicity may be a superior parenting arrangement; (4) the fourth Part argues for the value of marital choice on substantive due process grounds by drawing on not only constitutional doctrine but also on well-known constitutional cases; (5) the fifth Part advances the view that equal protection requires states not to discriminate against plural marriage enthusiasts by denying them marriage licenses; and (6) the sixth Part summarizes the possible adverse consequences

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<sup>11</sup> Sonu Bedi refers to them as “plural marriage enthusiasts.” SONU BEDI, BEYOND RACE, SEX, AND SEXUAL ORIENTATION 236–44 (2013).

of judicial recognition of a constitutional right to plural marriage and elaborates on why fears about the judiciary's moving the country in a particular normative direction usually are not as compelling as they seem to be. The Article concludes with some thoughts on why ordinary Americans may begin to discuss plural marriage with the kind of care that the topic deserves sooner rather than later.

## I. BACKGROUND

### A. Terminology

Anthropologists tell us that “polygyny” is a man with multiple wives, “polyandry” is a woman with multiple husbands, and “group marriage” is any combination of three or more persons.<sup>12</sup> “Polyamory” also covers multi-person intimate unions.<sup>13</sup> “Polyfidelity” underscores how individual choice and equality could characterize such a relationship.<sup>14</sup> I will use “polygamy” when more than two adults consider themselves to be a unit, are not legally married, and each of them is physically intimate with at least one of the other persons, to highlight the open sexual nonexclusivity that characterizes intimate relationships with multiple persons. Approximately 500,000 polygamous households exist in the United States.<sup>15</sup> Fundamentalist Latter-day Saints (FLDS) polygamists comprise as many as 60,000 of them.<sup>16</sup> Polygynous living arrangements appear in Muslim immigrant communities as well.<sup>17</sup> The fallacy in equating plural marriage with FLDS polygyny (or any other variation, of which there are many) lies in the fact that such an action usually ends the conversation before it even has a chance to begin. In doing so, antipolygamists invoke memories of sociopathic cult figures and then make it almost impossible to take seriously the possibility that any multi-person relationship could be morally unobjectionable. Only a small number of FLDS practice polygyny.<sup>18</sup> Polygyny is just one of the multiple forms of plural marriage, and

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<sup>12</sup> MIRIAM KOKTVEDGAARD ZEITZAN, *POLYGAMY: A CROSS-CULTURAL ANALYSIS* 3 (2008).

<sup>13</sup> See DEBORAH ANAPOL, *POLYAMORY IN THE TWENTY-FIRST CENTURY: LOVE AND INTIMACY WITH MULTIPLE PARTNERS* (2010).

<sup>14</sup> Maura I. Strassberg, *The Challenge of Post-Modern Polygamy: Considering Polyamory*, 31 *CAP. U. L. REV.* 439, 452 (2003).

<sup>15</sup> SHERIF GIRGIS, RYAN T. ANDERSON & ROBERT P. GEORGE, *WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE* 51 (2012).

<sup>16</sup> ZEITZAN, *supra* note 12, at 89.

<sup>17</sup> JANET BENNION, *POLYGAMY IN PRIMETIME: MEDIA, GENDER, AND POLITICS IN MORMON FUNDAMENTALISM* 7 (2012).

<sup>18</sup> *Id.*

not all polygynous relationships are dysfunctional or involve crimes. Even if polygyny became more widespread and more states were to let people marry more than one person at the same time, the sky would not fall.

FLDS polygynous “marriages” continue to serve as the archetype for plural marriage. To confine ourselves to that example is to impair our thinking about the forms that such marriage could take in a society that did not force such persons to conceal their unconventional intimate relationships. It is unreasonable to believe that the number of polygynous marriages would explode if women were suddenly allowed to marry a man who is already married, especially if they had more marital options, including nonsexual ones rooted in a close friendship or caretaking. The insinuation that all polygynous marriages are like those of Warren Jeffs or Winston Blackmore is more than a rhetoric cheap shot; it exploits prejudices against religious minorities and non-Western immigrant communities and fear of difference more generally. The typical FLDS polygynous “marriage” does not encourage other felonies.<sup>19</sup> When someone commits serious crimes, then of course he or she should be prosecuted, notwithstanding whether an intimate relationship contains more than two persons. The proper legislative response to problems that may arise more often in such situations is regulation, not prohibition. The status quo, where states permit polygynous cohabitation and criminalize polygynous “marriages” but rarely enforce laws against them is virtually incoherent. It is intelligible only if one cares about symbolism or wants to empower prosecutors to charge a defendant with additional crimes to improve their bargaining position during plea negotiations.

Unfortunately, many critics of plural marriage have been allowed to argue from irrelevant extremes for such a long time. Their ability to get away with such a tactic has contributed to the popular belief that a plural marriage could not be loving or caring. Not only is this view demonstrably false, it seems to draw nourishment from the underlying but unwarranted belief that monogamous intimate relationships always are superior to their polygamous and polyamorous counterparts. This double standard has not been satisfactorily defended. Marriage does not have to be about sexual gratification or procreation; it also can contain many other sorts of intimacy that can be expressed in different ways. The participants of a plural marriage may find such a relationship to be more emotionally satisfying or more consistent with their conceptions of “the good life.” In a family environment that has multiple

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<sup>19</sup> *Id.* at xvi.

caregivers, a more efficient division of domestic labor, and greater financial stability, children, the elderly, and the disabled may be more likely to receive the care that they need.

When referring to being married to more than one person simultaneously, this Article uses “plural marriage” to eschew the negative preconceptions associated with patriarchal polygyny. This term covers any legal status where at least three persons constitute a single marital unit, notwithstanding its configuration, gender composition, or interpersonal dynamics. For the purposes of this Article, then, polygamy is an intimate relationship among three or more adults that the state does not recognize as a marriage or its legal equivalent. The only difference between polygamy and a plural marriage is that the state recognizes the latter as a legal status. The definition of marriage that this Article claims to be constitutionally mandated would dramatically alter the current legal meaning of marriage by covering a much wider variety of intimate relationships. With this new definition of marriage in place, irrespective of their gender, two or more adult siblings or close friends could marry each (or one) another. Such marriage still could be reasonably regulated. To argue against numerical restrictions is not to argue against all restrictions, some of which may be valid. After all, no thoughtful person takes seriously the view that the legal recognition of different kinds of plural marriages would enable adults to marry children, animals, or inanimate objects, which are incapable of giving legal consent.

### *B. The Double Standard*

At best, the topic of plural marriage is an afterthought in the ongoing debate about same-sex marriage. Most participants, who vocally advocate for same-sex marriage, assume that the Constitution does not protect the right to plural marriage (or its equivalent on equal protection grounds).<sup>20</sup> Thus, they must distinguish same-sex marriage from plural marriage in defending a constitutional right to the former without proving too much and thereby unintentionally creating a right to the latter. When it comes to two-person marriage, opposite sex or same sex, the law never concerns itself with the personal reasons that a couple has for marrying as long as the marriage is not fraudulent for immigration purposes. With that exception, the personal reasons

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<sup>20</sup> See, e.g., Hema Chatlani, Article, *In Defense of Marriage: Why Same-Sex Marriage Will Not Lead Us Down a Slippery Slope Toward the Legalization of Polygamy*, 6 APPALACHIAN J.L. 101 (2006); Elizabeth Larcano, Note, *A “Pink” Herring: The Prospect of Polygamy Following the Legalization of Same-Sex Marriage*, 38 CONN. L. REV. 1065 (2006).

for a monogamous marriage are assumed to be good enough to justify legal recognition. By contrast, the personal reasons for a plural marriage are assumed to be so bad that they could not possibly be sufficient, even when one or both persons are fully informed about the nature and possible consequences of the legal relationship that they would like to form. Usually, this double standard escapes the scrutiny that it should receive. This state of affairs should not go unnoticed when so few people believe that the state may vet the personal reasons of couples applying for marriage licenses, no matter how silly, trivial, or idiotic they might be. Constitutionally, for couples, the meaning of marriage is left to competent adults who can decide for themselves what they want their marital relationship to be.

Unless one dogmatically subscribes to the view that all monogamous marriages are better along all dimensions than all multi-person intimate relationships, little imagination is required to appreciate how a plural marriage could be happier, healthier, and more conducive to human flourishing. Not only is that view demonstrably false, it fails to account for the fact that different people have different ideas about intimacy and what is most important to them more generally. In the past, typical media coverage of plural marriage only involved law enforcement raids on polygynous compounds and stories of cultist behavior, exploitation, and abuse,<sup>21</sup> leading most Americans to conclude that plural marriage can be reduced to other illegal or immoral behaviors. However, just because some polygamous relationships are polygynous does not mean that all of them are or would be in a different marital regime. And just because some of the polygynous relationships are dysfunctional or tainted by criminality does not mean that all of them are under all circumstances. If a state were to permit plural marriages, it still could continue to impose reasonable restrictions, like consent and age requirements, and prosecute people for crimes like forcible or statutory rape, underage marriage, incest (between an adult and a minor), intimate partner violence, child abuse or neglect, tax evasion, or welfare fraud. The relevant bases of comparison cannot be the worst forms of polygyny and ideal forms of monogamy.

For the most part, Americans do not discuss plural marriage with the kind of sophistication that it calls for, but that state of affairs seems to be changing

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<sup>21</sup> See, e.g., Michelle Roberts & Paul J. Weber, *Texas Ranger Says Raid of Warren Jeffs' FLDS Compound Vindicated*, ASSOCIATED PRESS, Aug. 11, 2011, available at <http://www.deseretnews.com/article/700170119/Texas-Ranger-says-raid-of-Warren-Jeffs-FLDS-compound-vindicated.html>.

slowly but surely. In the future, marriage could be a much more diverse institution that more effectively meets individual needs. People are similar in some respects and different in other respects, and considerable variance is to be expected. Americans are becoming more accustomed to the possibility that it may not be inappropriate for people to have an unconventional, nonmarital intimate relationship when those involved are consenting adults who are completely honest with one another. There is a world of moral difference between an open marriage and infidelity, where the person who is not sexually exclusive conceals his or her behavior. Those who prefer monogamy should not summarily dismiss the likelihood that a plural marriage might work better than the alternatives for at least some individuals in some circumstances.

At present, open marriages exist, swinging occurs, adultery is not uncommon, alternative lifestyles are not as hidden as they used to be, the meaning of sexual identity is being contested, transgender persons are less likely to be hidden from view, and premarital sexual activity is less likely to be condemned as immoral provided that neither person is too young nor in an exclusive relationship. In an era of no-fault divorce, almost all Americans put up with “serial polygamy” in which many people have more than one marital partner during their lifetimes. In 2013, a U.S. district court invalidated part of Utah’s anti-bigamy law.<sup>22</sup> In the wake of this judicial decision, the *New York Times* broached the plural-marriage question.<sup>23</sup> The more charitable media portrayal of polygamy, in conjunction with the ongoing battle over same-sex marriage, finally has prompted academics and others to discuss the quality of the rationale for not extending the right of marriage beyond couples. After all, it could be true that limiting the size of a marriage is as constitutionally problematic as restricting marriage to same-race or opposite-sex couples.

## II. GENDER INEQUALITY

Constitutionally, same-sex marriage is an easier case than its plural counterpart.<sup>24</sup> As of this writing, public opinion polls indicate that 55% of Americans accept the former.<sup>25</sup> For most scholars, none of the constitutional arguments against refusing to let same-sex couples marry are close to

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<sup>22</sup> *Brown v. Buhman*, 947 F. Supp. 2d 1170 (D. Utah 2013).

<sup>23</sup> *Should Plural Marriage Be Legal?*, N.Y. TIMES: ROOM FOR DEBATE (Dec. 17, 2013), <http://www.nytimes.com/roomfordebate/2013/12/17/should-plural-marriage-be-legal>.

<sup>24</sup> For my characterization of same-sex marriage as an easy case, see RONALD C. DEN OTTER, JUDICIAL REVIEW IN AN AGE OF MORAL PLURALISM 245–61 (2009).

<sup>25</sup> McCarthy, *supra* note 10.

compelling. Such arguments often contain controversial moral (or religious) and unproven empirical premises that people can (and do) reasonably reject. It is becoming increasingly evident that such arguments no longer can justify a conception of marriage that excludes gays and lesbians, are predicated on the superiority of heterosexuality, and cannot be squared with a commitment to legal equality. However a person casts her opposition to same-sex marriage, it will be difficult for her to maintain that how gays and lesbians are being treated satisfies the constitutional requirement of equal protection. When opponents of same-sex marriage contend that opposite-sex marriage is inherently superior, they are probably wrong, empirically and morally. Even if they were right about that, they still would be advancing a particular conception of marriage that would be, at the very least, constitutionally controversial inasmuch as the rationale for unequal treatment is not supposed to reflect an evaluation of the merits of such marriages. Their other option is to identify other state interests that excluding gays and lesbians from marriage are supposed to serve, which is not promising when the connection between those potential interests (such as promoting responsible procreation) and allowing same-sex couples to marry is so attenuated.<sup>26</sup> Once the debate is framed in terms of freedom of marital choice and marital equality, the game is over for opponents of same-sex marriage.

By contrast, plural marriage raises legitimate concerns about gender equality and whether women actually choose such marital arrangements. Probably the most serious objection to creating a constitutional right to plural marriage (or its equivalent on equal protection grounds) would be that to permit such marriage is to subordinate some women and condemn them to unhappiness or misery. Recently in Canada, the Bala Report attempted to document the kinds of harms that traditional polygyny inflicts upon women.<sup>27</sup> What understandably makes many progressive academics uneasy with the very idea of a person's marrying more than one person at the same time, probably more than any other single factor, concerns the extent to which women in

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<sup>26</sup> See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 999–1000 (N.D. Cal. 2010) (“The evidence supports two points which together show Proposition 8 does not advance any of the identified interests: (1) same-sex parents are of equal quality, and (2) Proposition 8 does not make it more likely that opposite-sex couples will marry and raise offspring biologically related to both parents.”); see also JO BECKER, *FORCING THE SPRING: INSIDE THE FIGHT FOR MARRIAGE EQUALITY* 215–18 (2014).

<sup>27</sup> Nicholas Bala et al., *An International Review of Polygamy: Legal and Policy Implications for Canada*, in *POLYGAMY IN CANADA: LEGAL AND SOCIAL IMPLICATIONS FOR WOMEN AND CHILDREN: A COLLECTION OF POLICY RESEARCH REPORTS* 7–19 (2005).

traditional polygynous relationships never would be equals.<sup>28</sup> Even if most polygynous marriages did not seriously harm women, they still are likely to be unequal in certain important respects (such as their division of domestic labor), and that likelihood could support the state's not according them legal status.

This objection presupposes not only that such women should not be able to choose an unequal marital relationship even when they are as fully informed as they can be about its likely nature but also conditions the public that they would have better lives in a different, more equal living arrangement (e.g., if they only married one person or did not marry at all). It is hard to imagine that the kind of woman who would choose a traditional polygynous marriage over the alternatives would find herself in a more equal setting if she were denied that option and then opted for a two-person marriage or polygynous cohabitation, as if both of them could be assumed to be sufficiently egalitarian. To deny an adult woman any kind of plural marriage, including a polygynous one, is not necessarily to save her from subordination in her personal life. After all, there is no way to know in advance what she would do if she were denied her first choice and had to settle for something else, which may not be preferable.

Another response is to deny that if women had a menu of marital options, they would select polygyny even if some of them in fact would do so, probably for religious or cultural reasons. A plural marriage could be same-sex, could be polyandrous, or could be asexual. Thus, many of them may not resemble the kind of polygyny that has raised understandable worries in the past about the welfare of women in such living situations. Additionally, it seems improbable that large numbers of American women would select such an arrangement in the midst of an expanded range of marital options, coupled with less social and economic pressure on them to be a part of a more traditional, inequalitarian marital relationship. A woman might prefer a same-sex or platonic thruple, quad, or moresome over an opposite-sex monogamous marriage that incorporates an unequal, gendered division of labor and lacks shared decisionmaking. If gender equality is paramount, then a polyamorous arrangement could be the most promising option.

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<sup>28</sup> See, e.g., Susan Moller Okin, *Is Multiculturalism Bad for Women?*, in *IS MULTICULTURALISM BAD FOR WOMEN?* 7, 9–10 (Joshua Cohen et al. eds., 1999).

As philosophers would say, gender inequality is a contingent, rather than a conceptual, feature of polygamy.<sup>29</sup> How unequal any marriage is turns out to be a function of its particulars. Alternatively, proponents of plural marriage may concede that even if most of these marriages were more often than not unequal, they would not be demonstrably worse in this way than monogamous marriages are and, consequently, should not be rejected on that basis. Even if most plural marriages were much worse in terms of gender equality, such an objection still would not necessarily be decisive. The state's interest in promoting equality in personal relationships, known as internal equality, would have to override the importance of marital choice. This trade-off must be confronted, and those who are convinced that the former trumps the latter must defend their view without resorting to negative stereotypes about what all polygynous relationships are like. In Martha Nussbaum's words, "[T]o rule that [opposite-sex] marriage as such should be illegal on the grounds that it reinforces male dominance would be an excessive intrusion upon liberty, even if one should believe marriage irredeemably unequal."<sup>30</sup> An individual cannot simply play the gender-equality card as if the mere fact that some plural marriages would be egalitarian warrants denying legal recognition to all of its conceivable forms. Indeed, it is counterintuitive to ban unequal marriages but permit those that are otherwise dysfunctional, including violent ones, unless one is preoccupied with internal equality. A marriage could be sufficiently egalitarian yet lack love, caring, honesty, and other kinds of intimacy. One would have to be able to prove that the promotion of internal equality overrides the importance of protecting marital choice. That is easier said than done when all of us want at least some space to shape our intimate relationships to fit our idiosyncratic ends. In the context of intimate relationships, some of us may care more about internal equality than others.

The above concerns about the unequal treatment of women in polygamous relationships have not arrived upon the scene recently. In the notorious *Reynolds* decision, the Court endorsed the double standard that many Americans still accept: monogamous intimate relationships tend to be equal enough, whereas polygamous ones always fall short.<sup>31</sup> Even if a traditional polygynous marriage is likely to be less egalitarian than a monogamous one, though, it does not mean that the former is intrinsically superior to the latter.

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<sup>29</sup> Cheshire Calhoun, *Who's Afraid of Polygamy? Lessons for Same-Sex Marriage Advocacy from the History of Polygamy*, 42 SAN DIEGO L. REV. 1023, 1038 (2005).

<sup>30</sup> MARTHA C. NUSSBAUM, *SEX & SOCIAL JUSTICE* 295 (1999).

<sup>31</sup> *Reynolds v. United States*, 98 U.S. 145 (1879).

All intimate relationships are probably more equal in some respects than in others. An opposite-sex marriage may be more equal when it comes to domestic labor compared with another given marriage but less equal when it comes to, say, familial decisionmaking regarding the children, finances, or whose career is a priority. Current family law tries to account for what each person wants and, in doing so, acknowledges the importance of personal choice, flexibility, and familial diversity. More than a few people could be more emotionally satisfied in a multi-person relationship.<sup>32</sup> Polyamorous marriages can serve as examples of how monogamous relationships and marriages could be improved.<sup>33</sup> At minimum, those who oppose plural marriage will have to spell out their objections to expanding the legal definition of marriage without falling back upon anti-Mormon or anti-Muslim prejudices, negative stereotypes, questionable data, or overly sentimental views about monogamous marriage.

The least controversial meaning of internal equality in any marriage is that power is evenly distributed in the collective decisionmaking (including over finances), and the couple, thruple, quad, or moresome has a more or less equal division of domestic labor and the same right to exit the relationship with an equitable division of the marital property and the same custody and visitation rights in the event that they have children. American family law tries to ensure that neither person, in a two-person marriage, is too disadvantaged when the marriage ends.<sup>34</sup> The assumption about the state's aforementioned interest in promoting equality in personal relationships animates feminist critiques of plural marriage. Although polygynous marriages may undermine gender equality, such inequality may have other causes that the state can address through regulatory schemes without condemning all plural marriages. If after experimenting with such marriages, it turns out that they do not further gender inequality or only have a negligible impact, the case for a constitutional right to plural marriage would be even more compelling.

Not all feminists are opposed to plural marriage in the abstract. An increasing number of them are much more open to the idea than they used to

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<sup>32</sup> See David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53, 81 (1997); Emens, *supra* note 2, at 284.

<sup>33</sup> For example, advocates of polyamory call attention to the social importance of its five main principles: self-knowledge, radical honesty, consent, self-possession, and the avoidance of emotions like jealousy. See Emens, *supra* note 2, at 320–30.

<sup>34</sup> WILLIAM BURNHAM, INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF THE UNITED STATES 525 (5th ed. 2011).

be. Cheshire Calhoun was one of the first feminist theorists to detach polygyny from its background conditions to show that plural marriages are not invariably inegalitarian.<sup>35</sup> According to Martha Nussbaum, polygamy may be acceptable under some circumstances.<sup>36</sup> She concedes that “[p]olygamy . . . is a structurally unequal practice.”<sup>37</sup> In a traditional polygynous relationship, an asymmetry of power exists between the man and his wives, given its hub and wheel structure, where the man is romantically involved with everyone else but none of the women have that sort of relationship with one another, even though they may bond in other ways. The sole husband can marry other women, divorce his wives at will, and exercise other kinds of control over them with no accountability, creating a situation that invites the abuse of his power. For this reason, Nussbaum’s defense of polygamy is qualified, as it should be. She ties it to the possibility that plural marriages also could be polyandrous. For her, the best argument against polygamy is that “men are permitted plural marriages, and women are not.”<sup>38</sup>

The standard legal position against plural marriage, then, is predicated on the view that the state has an important or compelling interest in ensuring decent treatment in intimate relationships. Nobody disputes that the state may enact laws to reduce intimate partner violence, spousal rape, and other sociopathic behaviors. The state also may bring into existence a community-property regime or equitable divorce laws requiring spousal and child support to reduce the likelihood that women and children are rendered economically vulnerable upon dissolution of the marriage. The state should intervene when one person is unquestionably harming another, even if they happen to be married or living together, and not ignore the fact that the husband frequently takes his earning power with him in the event of divorce. Nobody should have to remain in an unhappy or dangerous marriage because becoming single again is not a financially viable option.

That said, even though the state may legislate to require employers to grant parental leave, to subsidize childcare, or to prevent sexual harassment in the workplace without violating the Constitution, laws that try to force equality upon those who would prefer to have an unequal marital relationship raise a related but distinct issue that calls for more subtle treatment than it usually receives. Because the Constitution shields choice in the most important aspects

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<sup>35</sup> Calhoun, *supra* note 29, at 1023–41.

<sup>36</sup> NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT*, *supra* note 2, at 230.

<sup>37</sup> NUSSBAUM, *supra* note 30, at 98.

<sup>38</sup> NUSSBAUM, *LIBERTY OF CONSCIENCE*, *supra* note 2, at 197.

of their personal lives from unjustified legislative infringement,<sup>39</sup> Americans ought to be able to choose to have an unequal marital relationship, at least until it dissolves. The well-known feminist challenge to the public-private dichotomy cannot entail that all behavior is subject to the authority of the state, including every single aspect of how partners relate to each other in their personal lives, because that understanding would leave no room for the personal freedom that all of us want to have. Legally, their vulnerability while the marriage lasts is one thing; their vulnerability after it ends is another. In a manner of speaking, to claim that people may not choose to have an unequal relationship is to undermine the constitutional principle that legislative majorities should not interfere with people's most intimate decisions unless it has no other choice. In this respect, the American constitutional tradition is semi-libertarian. Absent harm or the serious risk of it, personal choice is called for. People are largely left alone to have the kind of marriage that they want even when it is unequal in some respects. At present, a spouse cannot have her right of support enforced until she is legally separated or divorced.<sup>40</sup>

Nor does a marriage license require any specific conduct from either party.<sup>41</sup> With few exceptions, family law is indifferent toward hierarchy and morally questionable behaviors more generally unless harm occurs. As Nussbaum remarks, "It just seems an intolerable infringement of liberty for the state to get involved in dictating how people do their dishes."<sup>42</sup> In sum, there are constitutional limits when it comes to how the state may attempt to regulate the behavior that takes place within a marriage or intimate relationship. The issue is what those limits are. The state cannot force a particular kind of intimate relationship upon women who desire to follow more traditional gender practices. In a liberal society, women are free to adopt whatever identity they want and live accordingly, even when their decision leaves something to be desired by feminist standards. Nor can the law force men to have more progressive attitudes. What the state can do, though, is legislate against the adverse consequences of such personal decisions when one or both persons want to end their marital relationship. No American lawmaking body

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<sup>39</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (finding a law that criminalized consensual sexual conduct between adults to be unconstitutional); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (recognizing the right of parents to direct the upbringing of their children); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (finding that a law prohibiting the use of contraceptives unconstitutionally intruded on the right to privacy).

<sup>40</sup> NUSSBAUM, *supra* note 30, at 98.

<sup>41</sup> *Id.*

<sup>42</sup> NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT*, *supra* note 2, at 280.

or court ever has conditioned the constitutional right to marriage on its actual or apparent equality while it lasts.

As a result, opponents of plural marriage must show that the kind of gender inequality that is likely to exist in a plural marriage is not only unique but worse than other kinds that our society already tolerates. A just constitutional democracy is not committed to fostering internal equality at all costs, as in without regard to other constitutional principles. Exactly the same concern arises with respect to any familial relationship that is rooted in a gendered division of labor or other sexist beliefs and behaviors. Such an argument against plural marriage proves too much: it is not evident why most multi-person relationships cannot be reformed along egalitarian lines if their monogamous counterparts can be so reformed unless one is convinced that their structure alone renders them irredeemably inegalitarian.

### III. THE WELFARE OF CHILDREN

When the public debate over plural marriage begins, critics will allege that such marriage is not conducive to the welfare of children. The vast majority of social scientists have come to believe that opposite-sex parents are not inherently superior to same-sex parents.<sup>43</sup> Other variables, which are independent of gender of each person in the couple, like continuity of care, have a much greater impact on the psychological development of children. As Elizabeth Brake notes, different kinds of families, including less conventional ones, can provide such care.<sup>44</sup> The quality of the parenting in particular instances depends on the ability, resources, and willingness of their caregiver(s) to meet the various needs of the children. In the real world, the most apt comparison is among various suboptimal options. Ultimately, the view that plural marriage will undermine the welfare of children cannot be successfully defended because (a) children can be protected more directly from harm, (b) the presence of more than two adults in a household may improve the quality of parenting more often than not, and (c) even if a substantial majority of multi-personal arrangements are not superior, the alternatives may be worse.<sup>45</sup> If one takes a somewhat different tack by contending that plural

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<sup>43</sup> See CARLOS A. BALL, *SAME-SEX MARRIAGE AND CHILDREN: A TALE OF HISTORY, SOCIAL SCIENCE, AND LAW* (2014).

<sup>44</sup> Elizabeth Brake, *Minimal Marriage: What Political Liberalism Implies for Marriage Law*, 120 *ETHICS* 302, 318 (2010).

<sup>45</sup> It is important to keep in mind that the relevant basis of comparison may not be two opposite-sex parents. In many cases, the alternative may be financially and emotionally worse for the children. On this

marital arrangements set a bad example for children, then one has to deal with the unfortunate fact that couples set bad examples for their own children (and for other children) through behaviors like alcohol and drug abuse, violence, manipulation, racism, sexism, homophobia, intolerance, out-of-control gambling, irresponsible spending, infidelity, callousness, excessive attention to physical appearance, and crass consumerism.

Americans never have been and never will be licensed to be parents.<sup>46</sup> A couple assumes legal responsibility for their children simply by procreating. Whether either individual has the minimum skills, the financial resources, or mental health to parent competently is beside the point. As a generalization, most parents are good in some respects and bad in others. They are not legally required to pay any attention to their children's wishes, respect their autonomy, discern and nurture their talents, or even care about what they want to do with their lives. They may (and often do) foist their visions of the good life upon them. Provided that they do not abuse or neglect them, they can interact with them just about however they please, for better or for worse. In the debate over same-sex marriage, it is not hard to appreciate why the mantra of saving the children has been so effective. In principle, Americans rarely oppose anything that is supposed to improve the lives of children.

However, upon closer inspection, "saving the children" begins to look too much like a rhetorical technique used to make it seem as if favoring the legal option of plural marriage would be tantamount to indifference to how children are raised. At present, marriage privatizes dependency.<sup>47</sup> The legal duties that parents have towards their children already have been detached from the marital relationship. After all, many biological parents hardly live up to the ideal. Even if, more often than not, two married, biological parents constitute the best parenting arrangement, individualized assessment still would be called for inasmuch as child welfare remains the overarching concern. Americans should care less about the form of a marriage and more about its particular dynamics, regardless of its configuration, if what is at stake concerns how children are being prepared for adulthood. Not many of us think that bad parents should be automatically divorced if they are married and prohibited

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point, see Mark Goldfeder & Elisabeth Sheff, *Children of Polyamorous Families: A First Empirical Look*, 5 J. L. & SOC. DEVIANCE 150, 166–69 (2013).

<sup>46</sup> However, the most compelling argument probably ever formulated in support of licensing parents is found in Hugh LaFollette, *Licensing Parents*, 9 PHIL. & PUB. AFF. 182 (1980).

<sup>47</sup> See MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 108 (2004); Martha Albertson Fineman, *Why Marriage?*, in JUST MARRIAGE 46 (Mary Lyndon Shanley ed., 2004).

from marrying and having children ever again. A return to a fault divorce regime may not benefit children if that policy change fails to take into account the costs of preserving marriages that are characterized by conflict.<sup>48</sup> In some cases, parents who stay together are making a horrific mistake. The burdens that women and children may bear if it were harder for couples to end their marriages cannot be wished away.<sup>49</sup> The main advantages of two parents, compared with a single parent, lie in higher income and more thorough supervision.<sup>50</sup> At minimum, policymakers should avoid the kind of sentimentality that prevents clear-headed, empirically sophisticated, and morally nuanced analysis of the familial conditions under which children typically thrive.

This child-welfare rationale for not permitting same-sex marriage may extend to polygamy. If multi-person relationships are bad for children, then that is another argument against legal recognition of such relationships. On the one hand, those who oppose plural marriage still can play the child-welfare card by insisting that plural marriage is not an ideal environment for children even if it does not increase the likelihood that they will be abused or neglected.<sup>51</sup> On the other hand, children may be loved and cared for in unconventional families provided that their caregivers have the necessary skills and the motivation to use them. Three or more parental figures could be advantageous in most situations. Adolescents may benefit from having more than two adults to talk to about their lives and from whom they can receive advice. It is probably fair to say that most children and young adults are more inclined to discuss important issues with one parent rather than the other, and some of them may not feel comfortable sharing any aspect of their personal lives, like their problems, fears, and self-doubts, with either parent. Recently, the state of California enacted legislation that allows children to have more than two legal parents.<sup>52</sup> The presence of multiple parental figures not only reflects the existence of blended families; it also probably would benefit children more often than not due to better coordination in their efforts to nurture their children and provide for their emotional and material needs.

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<sup>48</sup> JUDITH STACEY, IN THE NAME OF THE FAMILY: RETHINKING FAMILY VALUES IN THE POSTMODERN AGE 78–80 (1996).

<sup>49</sup> FINEMAN, *supra* note 47, at 87.

<sup>50</sup> NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 74 (2008).

<sup>51</sup> *See, e.g.*, BHIKHU PAREKH, RETHINKING MULTICULTURALISM: CULTURAL DIVERSITY AND POLITICAL THEORY 290 (2000).

<sup>52</sup> *See* CAL. FAM. CODE § 3040 (West Supp. 2015).

At present, the sample size of polygamous and polyamorous families is too small to generate any reliable results about how well “poly parents” parent.<sup>53</sup> As such, the jury is still out. Some vocal critics of polygamy concede that more data on contemporary polygamous families is needed before how they impact children can be evaluated.<sup>54</sup> This much is certain: the empirical case against plural marriage on child welfare grounds has not yet come close to being corroborated by the evidence if the burden of proof lies with those who allege the children cannot flourish with more than two parental figures. It may not take an entire village to raise a child but it stands to reason that, other things being equal, parental multiplicity may be even more conducive to meeting children’s needs. In fact, the existence of more than two caregivers may turn out to be the superior parenting arrangement.

Other critics of polygamy maintain that the practice facilitates child abuse and that the state should be able to ban it to shield children from such harm. The trouble with this view is that (1) parenting can be detached from marriage or marriage-like relationships, and (2) almost all people can practice polygamy without abusing or neglecting the children. Utah, which has a history of persecuting certain polygynous families, leaves such families alone unless serious crimes occur. Under its penal code, criminal liability only results from the participants’ trying to marry in a private ceremony or representing themselves as being married.<sup>55</sup> Even if it could be proven that children who grow up in polygamous households are more at risk of being abused or neglected than those who grow up in a more traditional family, it is not acceptable to proscribe an otherwise legitimate practice merely because it “tends to encourage” other kinds of crimes.<sup>56</sup> The penal code can directly address the worst problems associated with traditional, religiously motivated polygyny, such as underage girls being coerced into marriages, sexually assaulted, and physically abused.<sup>57</sup> Those who commit such felonies should be prosecuted for what they have done, like anyone else, regardless of the context.

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<sup>53</sup> However, some recent qualitative research shows that concerns about poly-parenting may be exaggerated. See Goldfeder & Sheff, *supra* note 45.

<sup>54</sup> See, e.g., Strassberg, *supra* note 14, at 560.

<sup>55</sup> UTAH CODE ANN. § 76-7-101 (West 2004), *invalidated in part* by *Brown v. Buhman*, 947 F. Supp. 2d 1170 (D. Utah 2013).

<sup>56</sup> Samantha Slark, Study Note, *Are Anti-Polygamy Laws an Unconstitutional Infringement on the Liberty Interests of Consenting Adults?*, 6 J.L. & FAM. STUD. 451, 458 (2004).

<sup>57</sup> Elizabeth F. Emens, *Just Monogamy?*, in *JUST MARRIAGE*, *supra* note 47, at 75, 76.

Nationally, the overwhelming majority of abused and neglected children do not grow up in polygamous households.<sup>58</sup> Because many two-person intimate relationships and marriages damage children, it is not evident that plural forms are or would be worse under more ideal conditions.<sup>59</sup> A plural marriage may turn out to be more conducive to the raising of children with the advantages that come with multiple caregivers and multiple incomes. Polygamous parents could more easily institute a more efficient division of labor than couples and single parents with respect to parenting responsibilities. It is no secret that there are not enough hours in the day or days in the week for most couples to cross off everything on their lists, especially when both of them work outside the home to earn two incomes. Also, a plural marriage may turn out to be good for children because one parent leaving the marriage or dying probably would not be as disruptive.<sup>60</sup>

The possibility that, on average, thruples or moresomes constitute a superior parenting framework cannot be ruled out. Most people have few concerns with close friends or relatives sharing in the performance of parental duties when necessary. This is one of the reasons why, compared with single-person and even two-person households, extended families are capable of providing better childcare; additional persons can work together to do whatever needs to be done. In this country, it is common for couples that work outside the home and can afford to hire help for childcare to do so. Moreover, the effect of a bad or mediocre parent might be offset when a better parent could do what either the bad parent does not want to do or cannot do competently. Normally, the quality of parenting in a given household would reflect whether the adults have the motivation, parenting skills, economic and social resources, and time to devote to raising their children. The point is not that moresomes always are terrific parents. All human beings have shortcomings and some circumstances can be trying even for the best of parents. A single mother or father may turn out to be better than a couple or thruple. Rather, it is almost meaningless to discuss the likely quality of parenting in the abstract. At most, without knowledge of all of the relevant details, one can do no more than speculate. Until American lawmakers prohibit the worst parents from having or raising children or implement a licensing

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<sup>58</sup> Expert Witness Report Prepared for the Amicus Curiae by Jonathan Turley at paras. 167, 170. Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588 (Can.) (No. S-097767), *available at* <https://jonathanturley.files.wordpress.com/2010/11/turley-affidavit.pdf> [hereinafter Expert Report].

<sup>59</sup> Will Kymlicka, *Rethinking the Family*, 20 PHIL. & PUB. AFF. 77, 92 & n.17 (1991).

<sup>60</sup> See PHILIP L. KILBRIDE & DOUGLAS R. PAGE, PLURAL MARRIAGE FOR OUR TIMES: A REINVENTED OPTION? 10–11 (2d ed. 2012).

scheme, the argument that plural marriages should not be allowed because they do not serve the welfare of children cannot get off the ground.

#### IV. SUBSTANTIVE DUE PROCESS

##### A. *Liberal Neutrality*

The first three Parts of this Article elaborate on the weakness of the state's two main interests—ensuring gender equality in marriages and promoting child welfare—in not permitting plural marriage. In terms of standards of review, they may not be important or compelling, which is what strict or intermediate scrutiny would call for and they may fall short of being legitimate inasmuch as they are rooted in animus.<sup>61</sup> Just as the state must have an adequate constitutional rationale not to grant marriage licenses to same-sex couples, it also must have such a rationale for not allowing a person who already is married to marry someone else or for a person who is not already married to marry someone who already is married. The kinds of reasons that opponents of plural marriage muster on behalf of their view purport to have something to do with a connection between numerical restrictions and preventing harms. Not only are those reasons empirically far from certain, given the inherent difficulty of causal inference, but they are morally controversial as well.

Under conditions of moral pluralism, the state is not supposed to favor particular conceptions of the good at the expense of others as long as the conceptions in question are reasonable by not harming third parties or putting them at risk. Among political theorists and philosophers, the very idea of neutrality is contentious, and those who endorse some version of it are likely to dispute its meaning and application in borderline cases. The reality of sincere and reasonable disagreement, though, has never caused them to waver in their confidence in the soundness of their arguments of political morality. They continue to write, more often than not, as if they could not possibly be wrong. With the exception of perfectionists, many liberals adhere to one version of such neutrality or another by being committed to the principle that the state

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<sup>61</sup> *Romer*, *Lawrence*, and *Windsor* make clear that such a justification is suspect in the context of discrimination on the basis of sexual orientation. *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *Romer v. Evans*, 517 U.S. 620, 632 (1996). For a recent and interesting take on animus, see Dale Carpenter, *Windsor Products: Equal Protection for Animus*, 2013 SUP. CT. REV. 183.

should not dictate to people what kind of life they ought to have.<sup>62</sup> As far as the state is concerned, the meaning of life is in the eye of the beholder. For anti-perfectionist liberals, such neutrality excludes appeals to controversial moral beliefs when the state enacts public laws. The state would violate such neutrality, for instance, if it promoted only one kind of sexual behavior, love, or intimacy on the ground that it was intrinsically superior. Whatever else may be said against same-sex marriage, the disparate treatment of gays and lesbians cannot be justified as a means of endorsing heterosexism—that is, validating opposite-sex intimate relationships or being straight.

American constitutional law incorporates something similar to a neutrality requirement in which the state may not compel or even encourage people to live certain kinds of lives because one way of living is inherently better than others.<sup>63</sup> The religion clauses of the First Amendment reflect the principle that the state should not use its power to endorse one religion over others. The doctrine of substantive due process, which emphasizes personal choice and liberty, is at odds with the idea that the state can try to dictate to people how they should live their lives. For Bedi, “[T]here is some synergy between liberal neutrality and the Equal Protection Clause.”<sup>64</sup> One way to understand the deeper purpose of equal protection doctrine is to see it as a restriction on the extent to which the state may enact legislative classifications that favor some groups over others, thereby making it more difficult for the disadvantaged minority to have a better life. It may be unconstitutional, then, for the state to confer the status of marriage on some intimate relationships but not on others. As long as the state stays in the marriage business, neutrality implies that the state must respect the right of all competent adults to choose the marital arrangement that best suits their particular needs. Even if most people were made healthier, wealthier, and happier by being married to only one person, the state still may not promote a parochial conception of marriage or continue mononormative or amatonormative practices. The constitutional principle of neutrality means that the state should not advance controversial conceptions of the good.<sup>65</sup> Thus, the state may not deliberately advance such conceptions in

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<sup>62</sup> TAMARA METZ, UNTYING THE KNOT: MARRIAGE, THE STATE, AND THE CASE FOR THEIR DIVORCE 106–07 (2010).

<sup>63</sup> For the view that such a neutrality requirement is to be found in the Canadian Charter of Rights and Freedoms, see Wilfrid Waluchow, *On the Neutrality of Charter Reasoning*, in NEUTRALITY AND THEORY OF LAW 203 (Jordi Ferrer Beltrán et al. eds., 2013).

<sup>64</sup> BEDI, *supra* note 11, at 15.

<sup>65</sup> STEVEN WALL, LIBERALISM, PERFECTIONISM AND RESTRAINT 41 (1998).

the absence of an adequate justification that is independent of the “merits” of the way of life in question.

This Article does not intend to offer another philosophical defense of such neutrality but instead to see what follows constitutionally from such a commitment with respect to marriage. Because the principle of neutrality limits the extent to which the state may interfere with their personal decisions and may treat people unequally, states may be constitutionally required to grant marriage licenses to plural marriage enthusiasts when states already give such licenses to opposite and same-sex couples that meet the other valid requirements. That conclusion may seem radical at this particular moment in American history, but its time may come someday. After all, many contemporary, well-established constitutional understandings were once widely believed to be lacking constitutional support. In particular, the Due Process and Equal Protection Clauses have been construed in ways that their authors and ratifiers never would have anticipated. For example, it is remarkable how rapidly what was once an unthinkable constitutional position (namely that the state must accord legal status to same-sex couples) has morphed into a view that no liberal would reject and many conservatives are acquiescing to because the writing is on the wall. At the very least, even if this Article only preaches to the converted, fails to move anybody off the fence, and does not convince a single person who initially opposed plural marriage, its aim is to establish that the constitutional position that it develops and defends is more than tenable.

### *B. The Constitutional Principle of Autonomy*

From the standpoint of substantive due process, the significance of being able to select multiple marital partners cannot be overestimated. This section explains why a competent adult should be able to marry however many people she wants for just about whatever personal reasons she happens to have, unless a marriage is so large and complex that it becomes administratively unmanageable. That already is the situation for couples that satisfy the other eligibility requirements, at least for opposite-sex ones in all states and for same-sex ones in well over half of states. The basic strategy of this Article is to call attention to the double standard under which the state does not examine the quality of the reasons that most couples have for wanting to marry, yet at the same time assume that the reasons that people have for wanting a plural marriage cannot be satisfactory. Before getting to equal protection analysis, this Article articulates how marital choice is as important as other kinds of

personal choices that the Court shields from legislative encroachment, such as whether to use birth control, to have a child, to have consensual sex with another adult, or to end one's life.<sup>66</sup> As Nussbaum states, "Articulating and protecting . . . spheres of personal liberty has been a crucial task of our tradition of constitutional law."<sup>67</sup> No doubt, it would be harder to establish a constitutional right to plural marriage if Americans did not live in the shadow of marriage—that is, if, apart from the material and expressive benefits that come with it, marriage were not laden with so many shared social meanings. In 2015, most Americans care deeply about being allowed to make the most personal of personal decisions, including whom to marry, and often are not indifferent to their own marital status or that of others. As misguided as any personal decision may turn out, under existing constitutional doctrine, there is a strong presumption in favor of letting competent adults decide what they want to do. The more personal the decision is, the higher the likelihood that the state cannot interfere with it. It is hard to imagine too many personal decisions that are more important, for most people, than the decision about how to arrange their intimate lives.

As this section shows, the well-entrenched constitutional right of personal choice, or autonomy, extends to the right to marry more than one person at the same time, particularly when the importance of such choice in a society like our own is so high and the importance of countervailing state interests is so low. This Article interprets "privacy" to be synonymous with autonomy—that is, one's capacity to formulate a conception of the good life and act accordingly with undue interference by the state. In equating privacy with the broader concept of personal liberty, this Article is not breaking new ground.<sup>68</sup> Its novelty comes from connecting the exercise of autonomy to marital choice, including being able to select a multi-person marriage. One has to wonder how controversial the right to privacy would be, whatever it is called, if it had not served as the foundation of the *Roe v. Wade* decision,<sup>69</sup> which many

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<sup>66</sup> I stick with fundamental-rights analysis and do not venture into the territory of fundamental rights under equal protection because if a right is fundamental, strict scrutiny applies. On this point, see ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 691–92 (4th ed. 2011).

<sup>67</sup> MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW, at xvi (2010).

<sup>68</sup> See, e.g., DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* 659, 916 n.25, 939 n.92 (1998).

<sup>69</sup> 410 U.S. 113 (1973).

Americans reject.<sup>70</sup> While the word “privacy” can be more trouble than it is worth, it has not ceased to capture the place of autonomy (and agency) in our constitutional tradition.

Just as importantly, the term reflects how critical it is to give all people as much freedom as possible so that they can pursue even their idiosyncratic ends. A society like ours that is committed to protecting such freedom as an end in itself or as a means to human flourishing, then, cannot simply defer to legislative judgments in such situations, as if it were self-evident that lawmakers can be trusted to protect minority groups and foster individual rights. Judicial review in America always will be predicated on the belief that legislative majorities have a tendency to exceed their authority and be hostile or unsympathetic to legitimate differences. A commitment to constitutionalism does not have to take the form of American-style judicial review, but Americans have grown accustomed to delegating to judges the power to determine constitutional limits in real cases, and that state of affairs will not disappear in the foreseeable future. As rare as it is these days, judicial restraint or deference should not be praised when the alternative, namely judicial abdication, is worse. There is no point in granting the power of judicial review to judges if they are not inclined to use it to check lawmakers who act unconstitutionally.

In the abstract, most Americans value personal choice in other contexts and therefore are reluctant to let lawmakers make such decisions for them, unless the state is unequivocally justified in denying such choice. In the midst of the widely held belief that competent adults are supposed to have as much control as possible over their lives, it is surprising that so many academics are so dismissive of the case for a constitutional right to plural marriage. The vast majority of them have given little thought to the matter. That they are not doing so is no longer excusable as the debate over same-sex marriage comes to an end. And, their defense of monogamy cannot simply invoke gender equality or the purported foolishness of wanting to experiment with a plural marriage. True, people often make cognitive errors in trying to achieve their goals.<sup>71</sup> One could concede this point, which is found in the literature in social psychology and behavioral economics, and nonetheless maintain that as far as the law is concerned, you are the expert about your own life or at least better informed

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<sup>70</sup> Ashley Southall, *Abortion Opponents March in Washington on Anniversary of Roe v. Wade Decision*, NY TIMES LEDE NEWS BLOG (Jan. 22, 2014, 8:09 PM), <http://thelede.blogs.nytimes.com/2014/01/22/abortion-opponents-march-in-washington-on-anniversary-of-roe-v-wade-decision/>.

<sup>71</sup> SARAH CONLY, *AGAINST AUTONOMY: JUSTIFYING COERCIVE PATERNALISM* 2 (2013).

than others. Under the marital status quo, each person not only has a right to marry one (unmarried) consenting adult, but the couple can more or less structure their shared life however they please unless they physically harm each other. How could it be otherwise when our society continues to make considerable room for individual, religious, and cultural differences, and to permit unconventional beliefs and the practices that follow from them? This right to select a marital partner is predicated on the belief that most persons differ in what they are looking for in an intimate partner and what they want their intimate relationships to be like in terms of their aspirations, expectations, interactions, respective workloads, finances, and collective decisionmaking. Their feelings about what is most important to them may change over time, especially when their circumstances do not remain constant.

The trouble with the family-values movement in this country and its traditional views about marriage is that—in addition to demeaning the intimate lives of gays and lesbians—those views are often based on the poorly defended view that a certain kind of family structure is superior to others. Because it is almost self-evident that the claim is not only false but pernicious, notwithstanding its ongoing rhetorical force in some circles, the central assumption of this Article is that one size does not fit all with respect to marriage, and thus, the more options, the better. Having a wide range of intimate relationships to choose from not only makes normative sense by enhancing marital flexibility, but the act of according all of them legal status informs the public that no particular kind of marriage or family is preferable. When it comes to the problem of the state only endorsing opposite-sex marriage, the solution, which an ever expanding number of Americans favor, is to equalize the two types of marriage by making the legal definition of marriage more inclusive.

It is increasingly harder to maintain that the average same-sex marriage is demonstrably worse than its opposite-sex counterpart. In fact, to their credit, when they are not making comparisons, many conservative Christian denominations do not idealize marriage and devote resources to help (opposite-sex) couples work through their marital problems.<sup>72</sup> When traditionalists do not place real opposite-sex monogamous marriages on a pedestal, they do not necessarily think that the best same-sex marriage is better

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<sup>72</sup> See, e.g., Anthony J. Garascia, *Counseling, FOR YOUR MARRIAGE*, <http://www.foryourmarriage.org/support/> (last visited May 17, 2015) (Catholic marriage counseling); *Marriage and Family Therapists*, METHODIST COUNSELING CENTER, <http://www.methodistcounseling.org/staff> (last visited May 17, 2015).

than the worst opposite-sex one, but they come close to doing so. They seem to be conceding that, regardless of their gender composition, some opposite-sex marriages will be dysfunctional. Of course, they could, as they have done in the past, continue to appeal to the definition of marriage that they take for granted. This strategy cannot work as long as the issue to be resolved centers on how marriage *should* be defined for legal purposes. They cannot simply conclude that marriage is only between a man and a woman because marriage is only between a man and a woman (which is circular reasoning). What is underappreciated is the extent to which they give ground with respect to whether a same-sex relationship without children could be functional and even fulfilling, regardless of whether the state treats it as a marriage or a marriage-like relationship. The risk of basing one's position on empirical claims is that when more data becomes available, one's position may be undermined. To keep open the question of the quality of same-sex marriages is to reveal curiosity about what might turn out be true. If some same-sex marriages exhibit at least some of the virtues that opposite-sex marriages are supposed to exhibit—like caregiving, selflessness, sacrifice, and commitment—then it is not a stretch to believe that but for what a religious source allegedly says about them, they would be worthy of acceptance. Likewise, polygamous relationships could be characterized by the same kinds of admirable behaviors that Americans hope couples will display. There is no reason in principle to deny that a plural marriage could be loving or caring.<sup>73</sup> In fact, such a marriage may be better in some respects, including how children are raised.<sup>74</sup>

As noted, our constitutional practice incorporates a commitment to something like autonomy, in the sense of giving competent adults the maximum freedom to pursue the ends that they find most worthwhile, whatever that happens to be, and be able to learn what works best for them. At present, whether they realize it, Americans have little marital choice. If they had more choice, they might think and act more unconventionally, which should be encouraged in a society that is enamored with conformity more than it is willing to admit. With a more inclusive conception of marriage in place, Americans might not be overly optimistic about their marital expectations. After all, each marriage will have ups and downs and varying dynamics as

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<sup>73</sup> Elizabeth Brake, *Recognizing Care: The Case for Friendship and Polyamory*, SYRACUSE L. & CIVIC ENGAGEMENT F., <http://slace.syr.edu/slance-journal-vol-1/recognizing-care-the-case-for-friendship-and-polyamory/> (last visited May 17, 2015).

<sup>74</sup> See ELISABETH SHEFF, *THE POLYAMORISTS NEXT DOOR: INSIDE MULTI-PARTNER RELATIONSHIPS AND FAMILIES* (2014).

long as people have different personalities and as long as circumstances do not remain static. In the name of marital diversity, then, it is more than conceivable the state may be committing a serious wrong by reinforcing marital norms that make it harder for individuals to think and act unconventionally in their intimate relationships. Independent of not respecting their autonomy, the specific outcomes, namely personal happiness or satisfaction, may be optimal when they have a longer menu to select from, including nonsexual marriages between or among close friends.

In any society that venerates monogamy, it may be hard to comprehend why anyone would prefer marital multiplicity. One scholar doubts that much emotional intimacy could exist among multiple persons.<sup>75</sup> Many episodes of HBO's *Big Love* depict the challenges of a four-person polygynous "marriage." However, the same concern is just as applicable to many of the important personal decisions that most people make during their lifetimes, including those involving intimate relationships. Maybe those who put plural marriage under a microscope should worry more about how much intimacy actually exists in much more widespread monogamous marriages. Usually, critics compare the worst kinds of polygynous relationships with ideal monogamous ones, as if the latter could not be dysfunctional. Some people will complement each other perfectly, whereas others will bring out the worst in each other in intimate relationships. Even when they are not violent or otherwise abusive, many married couples interact in unhealthy ways, in some instances for most of their lifetimes. Nor do a lot of them display the willingness or ability to work through their own problems to achieve the intimacy that both of them probably desire. As one commentator observes,

The law determines who is eligible for marriage . . . but it says almost nothing about what marriage itself consists in; it is a contract without content. The law prescribes no behaviors, not even sexual consummation, that must be exhibited in order to marry or stay married. It dictates no requirements for the living arrangements of married people.<sup>76</sup>

It is revealing that some critics of plural marriage, who seem so concerned about the likely lack of emotional intimacy in plural relationships, have little or no interest in policing the emotional intimacy of monogamous couples. To respect personal choice in this context, to repeat, is not to approve of the

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<sup>75</sup> Samuel C. Rickless, *Polygamy and Same-Sex Marriage: A Response to Calhoun*, 42 SAN DIEGO L. REV. 1043, 1047–48 (2005).

<sup>76</sup> Brook J. Sadler, *Re-Thinking Civil Unions and Same-Sex Marriage*, 91 MONIST 578, 579–80 (2008).

choices that people happen to make about whom to marry and how they will conduct themselves. In states that now permit both types of couples to marry, the meaning of marriage is left to the man and man, woman and woman, or man and woman. Unless one is wedded to the view that there is something unnatural about allowing two adults of the same sex to marry each other or that a religious source condemns it, the double standard that this Article concerns itself with is increasingly hard to defend in the wake of the increased marital freedom for same-sex couples that now exists in this country. The constitutional right to autonomy—what one can believe, say, or do—never hinged on the wisdom of the personal choice in question. To respect the exercise of such autonomy is to empower competent adults to make personal choices, some of which will turn out to be mistaken. But, the implication of the possibility or even likelihood of regrets is not enough for the state to take away such personal choice and save competent adults from the consequences of their poor judgment. For instance, as evidenced by the high divorce rate, for many persons, particularly younger ones, the decision to marry is erroneous.<sup>77</sup> It probably would not be a bad idea to set the minimum age for a marriage license at thirty where more people are financially stable and mature enough to undertake the responsibilities that marriage demands. Along similar lines, the state could regulate childbearing and childrearing more strictly if the primary concern involves outcomes and not the value of making the personal choice.

That said, such proposals are constitutionally unthinkable, even if they were motivated by the best of intentions. The Constitution does not require the decision to have a child or marry (one person) to be minimally informed. With respect to monogamous marriage, neither person is asked to put serious thought into the decision even though one or both of them may subsequently have second thoughts. At most, the state could entice them to do so by providing financial incentives to receive premarital counseling. A profoundly personal choice, like whom to marry, is assumed to be at minimum semiautonomous, and those who marry reap the benefits or suffer the consequences. Competent adults are treated as if their marital decision is sufficiently well-informed, and this legal treatment does not account for the risk factors. Even if social scientists could accurately identify the risks, the Constitution still would allow competent adults to exercise their own judgment. Contemporary marriage law is virtually silent about how couples

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<sup>77</sup> *Marriage & Divorce*, AM. PSYCHOL. ASS'N, <http://www.apa.org/topics/divorce/> (last visited May 17, 2015) (“[A]bout 40 to 50 percent of married couples in the United States divorce.”).

must interact with each other.<sup>78</sup> They do not have to live together, pool their finances, cooperate, treat each other nicely, be mutually emotionally supportive, or love each other; they only must refrain from harming each other. Within such a minimally regulated monogamous marriage, “individuals are free to create a variety of meanings of marriage for themselves.”<sup>79</sup> If personal choice more generally were not so important, then the state might be able to force women to have abortions or compel fathers to marry the mothers of their children.

The final push for same-sex marriage equality seems to reaffirm why most Americans value the institution and want the state to remain involved with it despite a decrease in the marriage rate. The existence of a menu of marital options would make marriage more voluntary, move people to be more reflective, and strengthen the institution on the assumption that fewer uninformed people would marry. After all, marriage should be treated as a morally serious decision given its potential to harm the participants and third parties. It is hard to imagine that Americans ever will be anti-marriage in the sense they would not marry under any circumstances. If you do not think that marital choice is important, use your imagination to envision a society in which the state arranges all marriages not for eugenic purposes, a la Plato, but to generate better outcomes, such as fewer divorces or more low-conflict marriages. Ultimately, almost everyone would prefer to make such marital choices for themselves, even if they knew that they would not choose wisely, because the value of such a choice never can be reduced to its likely consequences.

### C. *The Implications of Lawrence*

A constitutional right to plural marriage is shorthand for giving people as much discretion as possible to customize their marital arrangements. The more important the choice is in terms of her life plan, the more the state should be inclined to defer to that individual’s judgment in a constitutional democracy that does not leave all of its political decisions to legislative majorities. Although *Lawrence v. Texas* is not an inkblot test, the case provides support for the view that lawmakers cannot prevent people from forming, revising, and pursuing their respective conceptions of the good without adequate

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<sup>78</sup> I borrow the term “internal marriage,” which covers the personal interactions of the couple, from MILTON C. REGAN, JR., *ALONE TOGETHER: LAW AND THE MEANING OF MARRIAGE* 5 (1999).

<sup>79</sup> FINEMAN, *supra* note 47, at 97.

justification.<sup>80</sup> Like Laurence Tribe, one can construe the holding as creating a broad constitutional right of autonomy.<sup>81</sup> *Lawrence* should play a central role in the coming debate over plural marriage because it helps to establish the constitutional right of marital choice. Justice Kennedy begins his majority opinion in *Lawrence* by writing that “[f]reedom extends beyond spatial bounds” and speaking of the “transcendent dimensions” of liberty.<sup>82</sup> Law is interpretive, and the kind language found in the majority opinion invites interpreters to expand the constitutional right to autonomy to cover situations that involve the most personal of personal decisions.<sup>83</sup> The freedom to select intimate partners would be less imperative if doing so had nothing to do with the quality of one’s life. Shortly thereafter, Kennedy writes, this “case involves liberty of the person in both its spatial and more transcendent dimensions.”<sup>84</sup> To see *Lawrence* as a case merely about same-sex sexual activity (or sexual activity more generally) is to miss the forest for the trees.

Similarly, *Bowers v. Hardwick* was wrongly decided not only because it makes it too easy for states to prohibit certain kinds of consensual sex acts, which should not be illegal in the first place and stigmatize certain sexual minorities (particularly gay men), but, just as importantly, because anti-sodomy laws interfere with the intimacy that any couple may try to develop and express as they come to know each other more than superficially. The anti-sodomy law in Georgia applied to all couples, including the most committed ones, and was not simply about the right to perform certain kinds of sex acts in the privacy of one’s home for bodily pleasure.<sup>85</sup> To reduce all sexual activity to such pleasure or procreation is to be obtuse. That is not to say that all couples always want to be physically intimate with each other, but it is to say that most of them do and that to make anal and oral sex illegal is to deprive any committed couple of what might be an essential part of the kind of intimacy they want to have. That such an act cannot result in reproduction is beside the constitutional point. When it interferes in this manner, with such a flimsy justification that relies on a narrow interpretation of tradition, the state exceeds its authority. As long as what the couple is doing is consensual and

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<sup>80</sup> See *Lawrence v. Texas*, 539 U.S. 558, 571, 577–78 (2003).

<sup>81</sup> See Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1896–1900 (2004).

<sup>82</sup> *Lawrence*, 539 U.S. at 562.

<sup>83</sup> See *id.* at 578.

<sup>84</sup> *Id.* at 562.

<sup>85</sup> *Bowers v. Hardwick*, 478 U.S. 186, 188 n.1 (1985).

they are not breaking other valid laws, the couple should be able to relate to each other however they please.

When someone finds it constitutionally acceptable to allow lawmakers to ban only same-sex sex, as the three dissenters did in *Lawrence*, the red flag is even redder.<sup>86</sup> Just like straight persons, gays and lesbians have a fundamental right to form, revise, and pursue their life plans. One could acknowledge this point yet not go so far as to believe that marriage is as constitutionally important as the personal freedom to be intimate with others and express that intimacy as he or she sees fit. Marriage is not a means to an end or an end in itself for some people, and it is not unreasonable, even in 2015, to eschew marriage inasmuch as one believes that it is a patriarchal or heterosexist institution that is beyond redemption. The point is that, given its material and symbolic benefits in a society like ours, most Americans will not be indifferent to their marital status. In his dissent in *Lawrence*, Justice Scalia fails to distinguish a law that criminalizes consensual same-sex sex acts from same-sex marriage.<sup>87</sup> After all, it is not illogical to take the view that even when the state cannot proscribe same-sex sex, it still does not have to recognize same-sex unions. However, even a cursory look at *Lawrence* reveals that the Court did not come close to equating the right to engage in same-sex sexual intercourse with same-sex marriage or even civil unions. As Kennedy writes, this case “does not involve whether government must give formal recognition to any relationship that homosexual persons seek to enter.”<sup>88</sup>

In fairness to Scalia, one can speculate about the implications of the majority opinion, which does not speak for itself and may come to have a broader meaning in the future. Precedents do not apply themselves, can be ignored, and legal reasoning is not like an LSAT logic game. Scalia alleges Kennedy’s conception of autonomy foreshadows judicial recognition of same-sex marriage.<sup>89</sup> Ultimately, Scalia may be more right than he is wrong in connecting what the Court said in *Lawrence* to the future meaning of marriage. American constitutional history amply demonstrates that no one can know with anything like certainty that the current interpretation of the holding of a

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<sup>86</sup> *Lawrence*, 539 U.S. at 600 (Scalia, J., dissenting) (“[M]en can violate the law only with other men, and women only with other women. But this cannot itself be a denial of equal protection, since it is precisely the same distinction regarding partner that is drawn in state laws prohibiting marriage with someone of the same sex while permitting marriage with someone of the opposite sex.”).

<sup>87</sup> *Id.* at 604 (Scalia, J., dissenting).

<sup>88</sup> *Id.* at 578 (majority opinion).

<sup>89</sup> *Id.* at 604 (Scalia, J., dissenting).

particular case at one moment forecloses its application to subsequent fact patterns in unanticipated ways. There may be adequate reasons to justify a ban on plural marriages that do not exist with respect to criminalizing same-sex sex acts. *Lawrence* easily could stand for a strong presumption in favor of freedom of choice in the most important aspects of people's private lives.<sup>90</sup> Or, it may mean that mere moral disapproval, as a rationale for regulating people's private lives, is suspect.<sup>91</sup> Regardless, nobody thinks that *Lawrence* provided constitutional support for a state's continuing resistance to same-sex marriage.<sup>92</sup>

In a post-*Lawrence* world, then, it is not as easy as it used to be for the state to interfere with people's private lives by limiting their choice of marriage partners. Mere moral disapproval of same-sex consensual sex no longer justifies criminalization. As noted, the idea that people exercise their autonomy or freedom of choice poorly, with respect to either their means or ends, is constitutionally neither here nor there. Someone may make sad, or even tragic, personal choices, but that possibility does not adequately justify state interference with the most important features of that person's private life unless compelling reasons for such interference exist. And a "compelling" reason does not mean any reason that the state happens to come up with.<sup>93</sup> The rationale for intervention cannot be the poor quality of the decisionmaking process or the likely undesirable outcome of the choice for the agent. Under the status quo, many individuals make awful choices regarding whether to marry. They may marry the worst possible partner for them or marry for the wrong reasons. When they later have buyer's remorse, the state does not interfere; it is up to them to decide how they want to proceed. An unhappy marriage with some good days may be better than being alone. The mere possibility of future regrets never warrants the elimination of marital choice. The state could not subject those who want to marry to background checks or psychological evaluations, as if they were purchasing a handgun, to identify marriages that are more prone to be dysfunctional or are at greater risk of failing. There is not a legal limit on how many times people can marry or divorce or how many children they may have despite criminal records, diagnosed personality disorders or other mental health issues, substance abuse

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<sup>90</sup> *Id.* at 578 (majority opinion).

<sup>91</sup> Levinson, *supra* note 2, at 1052.

<sup>92</sup> See DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF *LAWRENCE V. TEXAS* 283 (2012).

<sup>93</sup> See CHERMERINSKY, *supra* note 66, at 687 (noting that, in order for the government interest to be compelling, "[t]he government must have a truly significant reason for discriminating, and it must show that it cannot achieve its objective through any less discriminatory alternative").

problems or other addictions, anger management difficulties, a history of violence, insolvency, or delinquent child or spousal support obligations. They are free to make the same bad choices over and over again.

A high divorce rate indicates that many couples eventually realize that they cannot continue to live together and would prefer to be single or look for another partner. Even if they do not divorce, a married couple may stay together for the wrong reasons and be anything but happy. Being together for fifty years does not necessarily reflect marital bliss. It may reveal risk aversion or codependency. Like it or not, with respect to monogamous marriage, as far as the state is concerned, adults are left to reap the benefits or to suffer the consequences. For the most part, the state pays no attention to its quality. Why, then, is marital choice so limited when it comes to marrying more than one person at the same time or marrying someone who is already married to someone else? The decision to enter into such a marital relationship may turn out to be wonderful, terrible, or somewhere in between the two extremes. The outcome cannot be predicted without a crystal ball.

#### *D. The Right to Marriage*

Although the constitutional right to marriage does not appear in the text of the Constitution, most scholars do not see that fact as much of an obstacle. After all, many important constitutional rights (and powers) are unenumerated, and only the most fanatical of textualists would take the opposite view. Several well-known Supreme Court decisions take for granted the existence of such a right to marriage,<sup>94</sup> and disagreement arises with respect to its proper scope in particular cases.<sup>95</sup> Unlike many other fundamental rights, marriage is a positive right that requires the state to accord a legal status.<sup>96</sup> Therefore, states can decide almost all of its eligibility requirements and determine which financial benefits and legal privileges come with it.<sup>97</sup> As noted, critics of plural marriage have not satisfactorily explained why states may define marriage in a manner

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<sup>94</sup> See, e.g., *Zablocki v. Redhall*, 434 U.S. 374, 384 (1978) (“[T]he right to marry is of fundamental importance for all individuals.”); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974) (“This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”).

<sup>95</sup> In discussing the constitutional right to marry, Cass Sunstein draws a useful distinction between its content and its scope. See Sunstein, *supra* note 2, at 2082.

<sup>96</sup> Patricia A. Cain, *Imagine There’s No Marriage*, 16 QUINNIPIAC L. REV. 27, 32 (1996).

<sup>97</sup> *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

that excludes marital relationships that contain more than two adults. When their constitutional opposition rests on legal moralism, tradition, paternalism, and the empirically dubious secondary effects of traditional polygyny, they run the risk of violating both the letter and the spirit of *Planned Parenthood of Southeastern Pennsylvania v. Casey* and *Lawrence*.<sup>98</sup> At present, the idea that a particular kind of behavior allegedly corrupts public morals or causes others distress but does not directly harm them is unlikely to rise to the level of an important or compelling interest, which a heightened standard of review would require. Even if there were a better philosophical rationale for denying people the opportunity to marry more than one person at the same time, it still is hard to visualize how such a rationale could be squared with existing constitutional doctrine and cases that unequivocally put the burden of proof on the state to show why the personal choice in question should not be allowed. The more important the choice, the more compelling the state's rationale must be to deny that choice.

If questioned, few scholars, judges, and lawyers would doubt the existence of the fundamental right to marry, even though it does not appear in the constitutional text or comport with original public meaning, understood as the framers' intent or original expected applications. However, that does not mean that they agree on which restrictions are allowed.<sup>99</sup> Those who are against the extension of the fundamental right to marriage must necessarily be of the mindset that most plural marriages are much worse than their monogamous counterparts. The response to this objection is simple: if traditional monogamous marriages were inherently unequal, frequently involved less than fully autonomous choices, or were deeply dysfunctional, states still would not prohibit them to save the couple from their own bad judgment. To do so would unarguably violate their right to marital choice.<sup>100</sup>

At minimum, the state's refusal to expand the coverage of the constitutional right of marriage to plural marriage enthusiasts has to be defended more vigorously than it has been in the past. In *Loving v. Virginia*, Chief Justice Warren articulated the importance of a person's being able to choose his or her

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<sup>98</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

<sup>99</sup> See, e.g., *Turner v. Safley*, 482 U.S. 78 (1987) (declaring laws that prevent prisoners from marrying are unconstitutional); *Zablocki*, 434 U.S. 374 (declaring laws that prohibit those who are delinquent on their child support payments from remarrying are unconstitutional); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (declaring laws that require unreasonably high filing fees and court costs to divorce are unconstitutional); *Loving*, 388 U.S. 1 (declaring laws that ban interracial marriages are unconstitutional).

<sup>100</sup> See Calhoun, *supra* note 29, at 1040–41.

spouse.<sup>101</sup> In the context of the debate over same-sex marriage, though, each side tends to interpret the holding narrowly or broadly in the service of their desired constitutional conclusion. *Loving* could represent the constitutional principle that the state cannot act on the basis of racist reasons to limit marriage to same-race couples.<sup>102</sup> However, its holding could be construed to incorporate a broader constitutional principle of marital nondiscrimination and include all classifications in which judges do not simply defer to the state's eligibility requirements. In other words, the state must have adequate reasons for treating some persons differently than others when it refuses to give only some persons the right to marry the person that they want to marry. In 2015, few people think that bans on interracial marriage are unproblematic simply because a person could always marry another person from his or her own racial group.

## V. EQUAL PROTECTION

### A. Background

The relationship between the Due Process and Equal Protection Clauses is complicated and beyond the scope of this Article. However, to render American constitutional doctrine, case law, and practice as coherent as possible, it makes sense to conceptualize one of its main normative purposes as respecting the freedom and equality of all of American citizens. In legal literature, this is known as a public justification requirement.<sup>103</sup> If the Constitution incorporates such a requirement, or something like it, then laws that do not permit competent adults to marry multiple partners are at minimum constitutionally questionable. In equal protection cases, judges do not ask why the state may try to prevent everyone from behaving in certain ways. Alternatively, they decide whether the state may treat one group of people more or less favorably and, therefore, deny them a benefit when others already enjoy it. A law that only allows persons over a certain age to consume alcohol,

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<sup>101</sup> *Loving*, 388 U.S. at 12.

<sup>102</sup> The Virginia Supreme Court had found that the state's purposes of preserving "the racial integrity of its citizens" and preventing "the corruption of blood" were legitimate. As Warren pointed out, these reasons are an "endorsement of the doctrine of White Supremacy." *Id.* at 7.

<sup>103</sup> In POLITICAL LIBERALISM, Rawls referred to the U.S. Supreme Court as "exemplar of public reason." JOHN RAWLS, POLITICAL LIBERALISM 231 (expanded ed. 2005); see also John Rawls, *The Ideal of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 768, 786 (1997). Lawrence Solum was the first legal scholar to begin to develop the place of public reason in law and legal reasoning. See, e.g., Lawrence B. Solum, *Pluralism and Public Legal Reason*, 15 WM. & MARY BILL RTS. J. 7 (2006).

for instance, would be constitutional if judges accept the state's reasons under the appropriate standard of review. The higher the applicable standard of review, the better those reasons must be for the challenged law to pass muster.

In equal protection cases, then, a state may treat certain groups differently as long as it can successfully defend such treatment. The fundamental question in such cases concerns whether the legislative classification in question is "justified by a sufficient purpose."<sup>104</sup> For a heightened standard of review, such as strict or intermediate scrutiny, judges assess the reasons that the state advances on behalf of the legislative classification at issue with a presumption that they are unsatisfactory.<sup>105</sup> When it comes to marriage, those state interests cannot be the promotion of white supremacy.<sup>106</sup> It has become increasingly evident that states are not on firm constitutional ground inasmuch as refusal to allow same-sex couples to marry is based on animus against gays and lesbians or heteronormativity. More generally, if lawmakers invidiously discriminate against sexual minorities, then judges may apply something more like a heightened standard of review by not deferring to what lawmakers have decided to do. Laws that do not treat same-sex couples equally imply their inferiority.<sup>107</sup> While *Lawrence* is not technically an equal protection case, it is pertinent to the question of when, if ever, states may treat sexual minorities differently.<sup>108</sup> In that case, by not repealing such a law, Texas was substantiating their status as second-class citizens.

As this Part will try to show, equal protection analysis leads to the conclusion that laws that fail to allow plural marriage enthusiasts to have the kind of intimate relationship that they want violate the Constitution. Restrictions based on sexual orientation are no longer nearly as easy to defend as they once were, and many judges doubt that state interests suffice to override unequal legal treatment with respect to marriage licenses. In *Romer v. Evans*, the Court found that animus against gays and lesbians fails to rise to the level of a legitimate state interest.<sup>109</sup> *Perry v. Schwarzenegger* and *Perry v. Brown* call into question the quality of the state's reasoning for not allowing gays and lesbians to marry.<sup>110</sup> The Court decided *Hollingsworth* on procedural

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<sup>104</sup> CHEMERINSKY, *supra* note 66, at 685.

<sup>105</sup> *Id.* at 687.

<sup>106</sup> *See Loving*, 388 U.S. at 7.

<sup>107</sup> *See John Corvino, Homosexuality and the PIB Argument*, 115 ETHICS 501, 509 (2005).

<sup>108</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>109</sup> 517 U.S. 620 (1996).

<sup>110</sup> *See Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated sub nom.* *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

grounds, but in doing so it reaffirmed the lower federal courts' decisions to invalidate Proposition 8.<sup>111</sup> The dignity language of *Windsor* raises the question of whether any state that refuses to let a man marry another man or a woman marry another woman is acting constitutionally.<sup>112</sup> This decision could stand for the view that legally there is no meaningful difference between those who are straight and those who are not.<sup>113</sup> Many lower federal courts are reading *Windsor* in a manner that underscores its dignity language and connects it to the right to marriage.<sup>114</sup>

The inappropriateness of using sexual orientation as the basis of a legislative classification also may undermine confidence in the belief that numerical restrictions are constitutionally allowable. This is how the courts may connect the dots. When a judge invalidates a particular legislative classification on equal protection grounds, he or she thinks not only that one group is being discriminated against but also that the state lacks a sufficient interest in such discriminatory treatment. By their very nature, legislative classifications treat different people differently. If the Equal Protection Clause requires identical treatment in all situations, then the state never could make any legal classifications, no matter how warranted. Alternatively, judges also have come around to the view the reasons the state has offered on behalf of the law do not justify the unequal treatment in question.<sup>115</sup> The application of a heightened standard of review, more generally, in some equal protection cases reflects the worry that the state probably is acting on the basis of the wrong reasons.<sup>116</sup> Even if only rational basis is triggered, the legislative classification cannot be rooted in animus against a politically unpopular group.<sup>117</sup> The state may not make distinctions under the Equal Protection Clause without sufficient justification. The more that states' reasons for imposing numerical restrictions

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<sup>111</sup> *Hollingsworth*, 133 S. Ct. 2652.

<sup>112</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2710 (2013) (Scalia, J., dissenting).

<sup>113</sup> *Id.* at 2696 (majority opinion).

<sup>114</sup> William Peacock, *One Year After Windsor: The State of Same-Sex Marriage*, FINDLAW (June 26, 2014, 2:48 PM), <http://blogs.findlaw.com/strategist/2014/06/one-year-after-windsor-the-state-of-same-sex-marriage.html>.

<sup>115</sup> One of the most recent, impressive, and innovative approaches to understanding equal protection jurisprudence in terms of public reasons is found in the work by BEDI, *supra* note 11.

<sup>116</sup> *See, e.g.*, TRIBE, *supra* note 2, at 1564–65 (noting that the Supreme Court's application of intermediate scrutiny to gender discrimination reflected the Court's low tolerance for "legislative classifications than presume that women have no responsibilities outside the home").

<sup>117</sup> *See Romer v. Evans*, 517 U.S. 620, 632 (1996); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 472, 446–47 (1985); *Plyler v. Doe*, 457 U.S. 202, 216–17 (1982); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

resemble those for not permitting persons of the same gender to marry each other, the more constitutionally suspect such laws are.

### *B. The Analogy*

Although the interdisciplinary literature on same-sex marriage and the family generally is voluminous, little has been written about plural marriage and other unconventional forms of marriage, like asexual or incestuous (between or among consenting adults).<sup>118</sup> This oversight reflects the fact that the same-sex marriage battle is not over and that opponents of same-sex marriage use slippery slope arguments indiscriminately to discredit such marriage.<sup>119</sup> The result is that plural marriage is not discussed with the kind of care that it warrants. The same-sex marriage debate suggests that more Americans are becoming accustomed to the idea that intimacy does not have to be opposite sex. Even those who continue to reject the legal recognition of a marriage between a man and another man or a woman and another woman probably concede that two men or women could love each other even when they cannot reproduce without the aid of technology. If love can be same sex, then it is not unreasonable to believe that there can also be “big love,” so to speak. For progressives, the reasons that conservatives deploy to support their opposition to same-sex marriage fall short. At the same time, many progressives overlook or downplay the extent to which the main reasons for supporting same-sex marriage (such as personal choice and equal legal treatment) can be used to defend the legal recognition of plural marriage.

The slope from one kind of marriage to the other may be slippery.<sup>120</sup> An individual who denies their constitutional similarity will not only have to establish that the two kinds of marriage are not the same in relevant ways but also that the state may treat them differently without acting unconstitutionally. As this Article emphasizes, a plural marriage could take a variety of forms; it

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<sup>118</sup> For a brief discussion of incestuous marriage, see WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* 149–51 (1996). For a nuanced defense of its adult form, see Andrew F. March, *What Lies Beyond Same-Sex Marriage? Marriage, Reproductive Freedom and Future Persons in Liberal Public Justification*, 27 *J. APPLIED PHIL.* 39, 42–45 (2010).

<sup>119</sup> *E.g.*, Stanley Kurtz, *The Libertarian Question: Incest, Homosexuality, and Adultery*, in *SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE* 263, 263, 268 (Robert M. Baird & Stuart E. Rosenbaum eds., 2d ed. 2004) (arguing that same-sex marriage would “set in motion a series of threats to the ethos of monogamy” and remove the societal “taboos” associated with incest and adultery).

<sup>120</sup> See Kent Greenfield, *The Slippery Slope to Polygamy and Incest*, *AM. PROSPECT* (July 15, 2013), <http://prospect.org/article/slippery-slope-polygamy-and-incest>.

could be same sex, bisexual, or asexual and is not synonymous with the most troubling features of patriarchal polygynous relationships. Critics like to pull a bait and switch. When discussing legal recognition of plural marriage, critics cite polygynous marriages in undeveloped nations with dramatically different background conditions as if only two options exist—prohibition or an “anything goes” alternative with no administrative oversight whatsoever. That is a false choice when the state could regulate such marriages to minimize exploitation and other harms.

The same-sex marriage debate is instructive because it is not just about whether states are acting unconstitutionally when they deny same-sex couples marriage licenses. It is also about the meaning of the “m” word under conditions of moral pluralism, how the state should be involved in the institution, how Americans should interpret marital equality, and when, if ever, the marital choice of competent adults ought to be limited. Oddly enough, recent arguments in defense of same-sex marriage have a noticeably conservative dimension: those who defend it, in the name of marital equality, are determined to show that legal recognition will reinforce the traditional understanding of marriage in which two, and no more than two, persons are committed to each other in a long-term, sexually exclusive relationship. The gender of each person in the dyad is neither here nor there. That strategy, while shrewd, has the unintended consequence of perpetuating “amatonormativity,” the unjustified favoring of sexual dyads at the expense of other equally worthwhile intimate relationships.<sup>121</sup>

### *C. Similarities and Differences*

Amatonormativity resembles heteronormativity in several respects. For example, both of them can emerge from a fear or intolerance of difference. Just as gays and lesbians have been the “other” in a society like our own in which straight persons constitute a majority and being straight is considered normal, these days polygamists often serve as a stand-in for sexual deviance, even when they are heterosexual. In terms of the granting of marriage licenses, race is and sexual orientation (gender) should be legally irrelevant. At the time of this Article’s publication, only thirteen states continue to exclude same-sex couples from the institution.<sup>122</sup> Recently, the U.S. Supreme Court granted a

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<sup>121</sup> Elizabeth Brake coined this term in *MINIMIZING MARRIAGE: MARRIAGE, MORALITY, AND THE LAW* 5 (2012).

<sup>122</sup> *Marriage Center*, *supra* note 3 (including Arkansas, Georgia, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nebraska, North Dakota, Ohio, South Dakota, Tennessee, and Texas).

petition for a writ of certiorari in several cases involving such states.<sup>123</sup> The issue of same-sex marriage implicates multi-person intimate relationships inasmuch as the legal definition of marriage may fail to be sufficiently inclusive. Some scholars believe that the debates over same-sex and plural marriage are not analogous.<sup>124</sup> After all, one could believe they are different in at least two relevant ways. First, linking them may be a misguided political strategy.<sup>125</sup> Second, the reasons that do not warrant treating same-sex couples differently than their opposite-sex counterparts nevertheless may justify treating multi-person intimate relationships differently. Unfortunately, too many progressives are too eager to differentiate same-sex from plural marriage so that they can establish a constitutional right to the former without proving too much and thereby also making room for a right to the latter. During the hearings that preceded the passage of the DOMA, some of those who testified equated polygamy with same-sex marriage.<sup>126</sup>

#### D. *The Slippery Slope*

It is far from obvious, then, that same-sex and plural marriage are morally or legally equivalent. A restriction based on sexual orientation may not be sufficiently similar to a numerical restriction. A fair number of defenders of same-sex marriage “go to great lengths” to deny the equivalence between same-sex and plural marriage.<sup>127</sup> Some of them insist that the legal recognition of same-sex marriage will not necessarily precipitate the advent of the legal recognition of plural marriage.<sup>128</sup> For them, anyone who seeks to marry more than one person at the same time can at least marry one person that he or she loves. Their motivation for this response is not hard to grasp when one considers that traditionalists never tire of making the slope between the two types of marriage as slippery as possible.<sup>129</sup> In his dissent in *Lawrence*, Justice

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<sup>123</sup> Obergefell v. Hodges, 135 S. Ct. 1039, 1040 (2015) (mem.).

<sup>124</sup> See, e.g., Elizabeth M. Glazer, *Sodomy and Polygamy*, 111 COLUM. L. REV. SIDEBAR 66, 71 (2011).

<sup>125</sup> Jaime M. Gher, *Polygamy and Same-Sex Marriage—Allies or Adversaries Within the Same-Sex Marriage Movement*, 14 WM. & MARY J. WOMEN & L. 559, 602 (2008).

<sup>126</sup> Chambers, *supra* note 32, at 53.

<sup>127</sup> Andrew F. March, *Is There a Right to Polygamy? Marriage, Equality and Subsiding Families in Liberal Public Justification*, 8 J. MORAL PHIL. 246, 247 (2011).

<sup>128</sup> See, e.g., ESKRIDGE, *supra* note 118, at 148–49; EVAN GERSTMANN, SAME-SEX MARRIAGE AND THE CONSTITUTION 104 (2d ed. 2008); JONATHAN RAUCH, GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA 123–37 (2004); Jonathan Rauch, *Marrying Somebody*, in SAME-SEX MARRIAGE: PRO AND CON 285, 286 (Andrew Sullivan ed., rev. ed. 2004); Andrew Sullivan, *Three’s a Crowd*, in SAME-SEX MARRIAGE: PRO AND CON, *supra*, at 278, 279.

<sup>129</sup> See, e.g., Kurtz, *supra* note 119, at 263, 266.

Scalia stated that the decriminalization of laws against same-sex sex set a dangerous precedent.<sup>130</sup> A few of these slippery-slope fears are absurd: Just because a man can marry another man, or a woman can marry another woman, does not mean that a person can marry a toaster. No empirical evidence comes close to proving that the legal recognition of same-sex marriage must culminate in the legal recognition of all conceivable kinds of marriage.<sup>131</sup> Children cannot legally consent to a marriage contract, and neither can animals or inanimate objects. The vast majority of slippery-slope arguments incorrectly assume that no one in the future could draw a principled distinction between these two scenarios from those involving consenting adults.

That said, several slippery-slope arguments are not as ridiculous as most of them. In redefining marriage to include same-sex couples, lawmakers and judges are setting a precedent of willingness to entertain a new definition of marriage that is more inclusive, which an increasing number of Americans are coming to believe is more just. The main reasons that support compelling states to accord legal status to same-sex marriages (such as personal choice and equal legal treatment) reach plural marriages as well.<sup>132</sup> A conscientious person concerns herself with combating all kinds of unjustified legal discrimination, even when she has not directly suffered from the discrimination in question. Normally, to fully comprehend the harm of being marginalized is to empathize with the victims. According to Pro-Polygamy.com, plural marriage is “the next civil rights battle.”<sup>133</sup> Even if that statement is over the top, a good point can stand to be overstated. It is not ridiculous to believe that discrimination against plural marriage enthusiasts may be caused more by prejudice than anything else and that such discrimination, which is unnecessary, diminishes their lives. Part of the effort on the part of polyamorists to convince the public to become less hostile to their cause has been to highlight the similarities between plural marriage and same-sex marriage.<sup>134</sup> Those who take this approach hope that eventually more Americans will begin to acquiesce to the phenomenon of same-sex marriages and then question the rationale for numerical restrictions.

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<sup>130</sup> *Lawrence v. Texas*, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting).

<sup>131</sup> See Judith Stacey & Tey Meadow, *New Slants on the Slippery Slope: The Politics of Polygamy and Gay Family Rights in South Africa and the United States*, 37 *POL. & SOC'Y* 167, 190–92 (2009).

<sup>132</sup> BRAKE, *supra* note 121, at 198; March, *supra* note 127.

<sup>133</sup> PRO-POLYGAMY.COM, <http://www.Pro-Polygamy.com> (last visited May 17, 2015).

<sup>134</sup> Jeffrey Michael Hayes, Comment, *Polygamy Comes Out of the Closet: The New Strategy of Polygamy Activists*, 3 *STAN. J. C.R. & C.L.* 99, 104–05 (2007).

Slippery-slope arguments stem from the belief that no logical stopping point exists in a particular context. Their force tends to come less from their soundness and more from the probability that people will fail to distinguish between the two things in question. In the case of plural marriage, a right to such marriage may follow from a right to same-sex marriage if same-sex marriage serves as a precedent for redefining marriage. Just imagine that in a Supreme Court's majority opinion concluding that states must allow same-sex couples to marry, the Court includes broad language that provides some support for the view that the state must cease to discriminate against plural marriage enthusiasts. In contemporary America, the distance between the legal recognition of opposite-sex and same-sex monogamous marriage is not nearly as wide as it used to be. While the same cannot be said about the distance between monogamous and plural marriage, times may change, and the public may come to see the two kinds of marriage as not so different. Over time, more Americans may care less about the structure of a marriage and more about its interpersonal dynamics. Few of them see a four-person family and a ten-person family as being so dramatically different due to their numbers that they warrant different legal treatment. If the public's attitude changes, then the constitutional principle of nondiscrimination could lead to the constitutional conclusion that marriage cannot be limited to couples. In 1967, no one anticipated that one day *Loving* would be enlisted to support the cause of marriage equality for gays and lesbians. The creative use of an old case in new circumstances never can be ruled out because of the uncertainty of the future.

For constitutional purposes, a principled distinction between same-sex and plural marriage may be hard to maintain. The right to marry someone at all is not exactly the same, in every respect, as the right to marry multiple persons. Some commentators insist that "[t]he gay situation is unique."<sup>135</sup> That is true, as this Article concedes, but the implication is not that the situation of plural marriage enthusiasts, whether gay, straight, bisexual, or transgender, is fine. Requesting the right to marry more than one person simultaneously is no more trivial than wanting to have more than one close friend or child, unless one is in the thrall of the view that a person could not possibly love or care for more than one person at the same time. That view is demonstrably false. Whether her desire for a nonmonogamous marital arrangement is frivolous is a function of the quality of the personal reasons for wanting such an arrangement. The quality of these reasons is subjective in the sense that whether they are good or bad reflects on his or her priorities. A considerable number of people want to

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<sup>135</sup> RAUCH, *supra* note 128, at 127.

be able to structure their personal lives in a manner that maximizes their chances of achieving their ends, whatever those ends happen to be. Americans do not have to decide which kind of discrimination is worse. The rights of all polygamists should not be cast away as if they do not matter. From a constitutional perspective, the lives of all persons—including all sexual minorities—count equally.

### *E. Standards of Review*

The Equal Protection Clause mandates that legislative classifications must be sufficiently publicly justified.<sup>136</sup> When a heightened standard of review is applicable, the court is probably going to find the law being evaluated to be unconstitutional. In Gerald Gunther's famous words, strict scrutiny is "'strict' in theory and fatal in fact."<sup>137</sup> According to Sonu Bedi, "[W]hether a group counts as a suspect class makes all of the constitutional difference in the world."<sup>138</sup> Doctrinally, only suspect classes receive extra judicial protection, which is to say that almost all legislative classifications only trigger rational basis standard of review and, thus, are likely to be found to be constitutional.<sup>139</sup> The rationale for such extra protection comes from the imperative of protecting "discrete and insular minorities."<sup>140</sup> In deciding whether a particular group constitutes a suspect or quasi-suspect class, the three criteria are: an immutable or fixed characteristic, political powerlessness, and history of discrimination.<sup>141</sup> A growing number of judges believe that gays and lesbians meet these criteria.<sup>142</sup>

As the first part of this Article attempted to establish, the strength of the main state interests against plural marriage—ensuring gender equality and

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<sup>136</sup> See CHEMERINSKY, *supra* note 66, at 685.

<sup>137</sup> Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

<sup>138</sup> BEDI, *supra* note 11, at 2.

<sup>139</sup> However, empirically, when real judges apply standards of review to real cases, the result may be harder to predict. Between 1990 and 2003, only 73% of all race-conscious laws subjected to strict scrutiny were invalidated. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 839 (2006). At times, judges may use a kinder, gentler form of strict scrutiny, and their doing so increases the probability that the law whose constitutionality is being challenged will survive. *Id.* at 814 (noting that "even where strict scrutiny applies, '[c]ontext matters'" (alteration in original) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 327 (2002))).

<sup>140</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

<sup>141</sup> CHEMERINSKY, *supra* note 66, at 688–89. For an extended discussion, see BEDI, *supra* note 11, at 38, 43–71 (adding irrelevance as a fourth criteria).

<sup>142</sup> See, e.g., Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985).

promoting the welfare of children—are weak. The promotion of internal equality is not important or compelling in the constitutional sense of the terms. If it were, then one would expect that the state would scrutinize two-person marriages much more closely. In terms of such equality, the best polyamorous marriage would be much better than the worst opposite-sex, monogamous one. If the state is to defend the double standard with a greater chance of success, it must be able to demonstrate that plural marriages—and not just some polygynous ones—are inherently dysfunctional and that, as a consequence, the state may restrict marital choice even when a fully informed, competent adult agrees to a multi-person marital arrangement. As noted, the argument from gender inequality assumes that most legally recognized plural marriages would be one male and multiple women, but that assumption needs to be backed up by a better argument. If the state began to accord legal status to a much wider range of intimate relationships, then women would have more options to choose from, like an all-female plural marriage or an asexual monogamous one. It is virtually impossible to know ahead of time what kinds of marriages people would select if they had true marital freedom. More likely than not, individual plural marriages would be as diverse, with respect to their interpersonal dynamics, as the monogamous ones that Americans tend to romanticize.

Polygamists or plural marriage enthusiasts could be treated as a suspect class under existing constitutional doctrine. Constitutionally, if plural marriage enthusiasts qualify as such a class, then the burden of proof falls on the state to show that it has a substantial or a compelling interest in defining marriage to exclude multi-person relationships and why the legislative means that it has chosen directly advance that interest. Such enthusiasts meet at least two of the three traditional criteria—immutability, a history of discrimination, and political powerlessness—for extending additional judicial protection in the form of a heightened standard of review. The criteria “are indicia, not necessary conditions.”<sup>143</sup> Therefore, not all three of them have to be met before one can conclude that the group qualifies as a suspect or quasi-suspect class.

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<sup>143</sup> NUSSBAUM, *supra* note 67, at 116.

### 1. *Immutability*

The standard interpretation of immutability is that the trait in question is unchangeable and, thus, one is not responsible for it.<sup>144</sup> Because one cannot choose one's race or sex, it would be unfair to discriminate against someone for something that is beyond her control. However, that line of analysis encounters the inherent philosophical difficulty of knowing what it means to choose something, like a religion. Anyone could be asked to change her deepest religious convictions and convert to the religion of the majority. The point is not that she could not possibly do so or that it would be hard for her to adopt a different belief system. Rather, it would be wrong to ask her to do so in a society, like ours, that tries to protect freedom of conscience. Whether chosen or not, certain beliefs and the practices that follow from one's belief system are central to that person's identity. Many religious people cannot imagine themselves as not being a Christian, Jew, Muslim, Hindu, or Buddhist. That is not to say that they have not made any sort of choice or could not possibly have done otherwise. Rather, it is beside the constitutional point. Similarly, to refer to her desire to marry more than one person as a whim or preference is to beg the question against its significance in her life. Not being allowed to marry at least one person would strike most Americans as a serious injustice. In the abstract, they appreciate why such a right should not be infringed upon. The issue is less about whether an identity is chosen, and thus could be rejected, and more about the unfairness of being disadvantaged because of who she is and how she wants her life to be.

At the end of the day, it should not matter whether a particular identity is fixed in the sense that one could not change it even if one desired such a change. What is crucial is the respect, or at least tolerance, that the person is entitled to under the Constitution unless it harms others or unreasonably puts them at risk. The problem with the way in which immutability is usually conceptualized is that such an approach does not capture the rationale of the immutability requirement—namely that there is nothing wrong with being a racial minority, female, or gay. As an example, even if a gay man could alter his sexual orientation and corresponding identity through therapy or medication, he should not have to do so any more than an atheist should try to accept divine entities. Although polygamists are not born that way, being “poly” is a crucial part of many of their identities, and having a multi-person,

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<sup>144</sup> CHEMERINSKY, *supra* note 66, at 688 (“The notion is that it is unfair to penalize a person for characteristics that the person did not choose and that the individual cannot change.”).

intimate relationship is morally permissible. It is also critical to keep in mind that being polygamist or polyamorous is not the same as wanting to have sex indiscriminately or swing. That characterization—the lifestyle is all about sex—impairs monogamists’ willingness to take multi-person, intimate relationships seriously and evaluate the possible advantages. In lumping all of them together and sexualizing them, critics are trying to delegitimize them. To assert that marital multiplicity amounts to either behavior is overlooking the serious personal reasons that religious and nonreligious people may have for preferring a nonmonogamous arrangement. Even if being poly were not an immutable characteristic in the traditional sense of the term, it still may be appropriate to treat it as a sexual orientation for purposes of antidiscrimination law.<sup>145</sup>

## 2. *Political Powerlessness*

The purpose of this criterion is to try to prevent legislative majorities from invidiously discriminating against minority groups that cannot defend themselves in the legislative process. In “Federalist No. 10,” James Madison not only warns against the dangers of faction but defends a larger republic as the most promising solution to the problem.<sup>146</sup> Very much like balance-of-power arrangements in realist international-relations theory, the thought is that no faction will grow too powerful when other factions, out of self-interest, form coalitions to prevent any faction from achieving hegemony. Despite Madison’s remarkable insights and the extension of the right to vote to previously disenfranchised groups over time, it is still possible for legislative minorities to be dominated repeatedly in the legislative process. Lani Gunier’s theory of fairness in political representation is designed to give each group greater influence over the outcomes that matter most to them.<sup>147</sup>

Because such changes are not forthcoming, notwithstanding their merits, it seems that the only other plausible alternative is to invite courts to intervene to prevent legislative majorities from exceeding their constitutional authority. One way, then, to construe the meaning of “political powerlessness” is to ask when a particular group has been or is likely to be targeted and needs additional protection in the form of judicial intervention. Historically, the U.S.

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<sup>145</sup> See BEDI, *supra* note 11, at 208–47; Ann E. Tweedy, *Polyamory as a Sexual Orientation*, 79 U. CIN. L. REV. 1461 (2011).

<sup>146</sup> THE FEDERALIST NO. 10 (James Madison).

<sup>147</sup> LANI GUNIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* (1994).

Supreme Court's record of riding to the rescue has been far from impressive. Under some circumstances, though, a federal court may be able to veto the discriminatory legislation in question when it is produced by constitutionally impermissible reasons. In his dissent in *Romer*, Justice Scalia notoriously overstated the political influence of gays and lesbians.<sup>148</sup> If they have so much influence, then it is hard to explain why about one-fourth of the states, as of this writing, still do not allow same-sex couples to marry.<sup>149</sup> Some of them fail to protect sexual minorities from different sorts of discrimination for which racial minorities and women have legal remedies.<sup>150</sup> During the trial in *Perry v. Schwarzenegger*, expert witness Gary Segura testified that gays and lesbians are usually unable to combat the discrimination that they face through political measures.<sup>151</sup> At best, due to demographics, they may have enough political power proportional to their numbers in a few places. By comparison, polygamists have even fewer resources. As Eugene Volokh puts it, "pro-polygamy forces are in a lousy political position."<sup>152</sup> Given the nature of contemporary public opinion, it may be even easier for a gay or lesbian individual to out himself or herself than for a straight polygamist or polyamorist to do so. Even today, almost all Americans would agree that allowing a competent, fully informed adult marry more than one person simultaneously is not permissible.<sup>153</sup>

### 3. *History of Discrimination*

The other traditional criterion for treating a minority group as a suspect class is a history of discrimination. Again, the logic of this criterion is not hard to grasp. That a minority group has been victimized over an extended period indicates that lawmakers have not lived up to their constitutional duty to ensure that the Constitution works for everyone. That gays and lesbians in this country have been the victims of pervasive discrimination by the state and private actors is beyond dispute. As noted, it is not productive to make comparative

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<sup>148</sup> *Romer v. Evans*, 517 U.S. 620, 645–46 (1996).

<sup>149</sup> *Marriage Center*, *supra* note 3.

<sup>150</sup> See, e.g., *Statewide Employment Laws and Policies*, HUM. RTS. CAMPAIGN, [http://www.hrc.org/state\\_maps](http://www.hrc.org/state_maps) (last visited May 17, 2015) (click on "Select an Issue" and select "Statewide Employment Laws and Policies") (showing that nineteen states offer no protection against employment discrimination based on sexual orientation).

<sup>151</sup> BECKER, *supra* note 26, at 160–61.

<sup>152</sup> Eugene Volokh, *Same-Sex Marriage and Slippery Slopes*, 33 HOFSTRA L. REV. 1155, 1177 (2005).

<sup>153</sup> According to a recent Gallup Poll, 90% of Americans believe that the practice of polygamy is immoral. Lydia Saad, *Americans Evenly Divided on Morality of Homosexuality*, GALLUP (June 18, 2008), <http://www.gallup.com/poll/108115/Americans-Evenly-Divided-Morality-Homosexuality.aspx>.

judgments as if all that matters is which minority group has suffered more than others. The problem of mistreatment of those who are different probably characterizes all human societies at all times in all places to a greater or lesser extent.

Certain kinds of differences seem to trigger stronger public reactions than others do. Religious minorities often fall into this category, even in a nation like the United States that is morally, politically, and constitutionally committed to the free exercise of religion. The most well-known free exercise cases involve such minorities.<sup>154</sup> Mormons (LDS), and especially Fundamentalist Latter-day Saints (FLDS), have been demonized for their religious convictions and behaviors.<sup>155</sup> FLDS still can be prosecuted for some of their religiously motivated polygynous practices, and that reality demonstrates that they continue to experience the sort of stereotyping that dehumanizes the other. Psychologically, it is probably asking a lot of anyone to hate the sin and love the sinner—to separate behavior they are convinced is morally reprehensible from the person who behaves in that way. As in the past, many Americans still associate plural marriage with Mormonism.<sup>156</sup> The persecution of Mormons for unconventional marital arrangements should not be papered over on the assumption that it obviously pales in comparison to what racial and sexual minorities and women have gone through and, consequently, merits no concern. In the antebellum period, the Republican Party dubbed polygamy and slavery the “twin relics of barbarism.”<sup>157</sup> In 1852, the same year that it officially endorsed polygamy, Utah legalized slavery.<sup>158</sup> Private actors also persecuted Mormons.<sup>159</sup> Recently, some journalistic

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<sup>154</sup> See, e.g., *Emp’t Div. v. Smith*, 494 U.S. 872, 874 (1990) (involving the use of peyote as part of a Native American religious practice); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524 (1993) (involving “practices of the Santeria religion”).

<sup>155</sup> See JILL NORNGREN & SERENA NANDA, *AMERICAN CULTURAL PLURALISM AND LAW* 87–104 (3d ed. 2006). In 1882, the Edmunds Act banned polygamy and unlawful cohabitation and set up a federal commission to administer test oaths compelling voters to swear that they were neither bigamists nor polygamists. Mormons who refused to take these oaths were barred from public service and voting. *See id.* at 89, 91–92. During the 1880s, the federal government prosecuted more than 1,300 Mormons for the religious practice of polygyny. *See id.* at 92. In 1887, the Edmunds-Tucker Act disinherited the children of plural marriages and disenfranchised Mormons who advocated polygamy even when they did not practice it. *See id.* at 94. In 1890, due to intense pressure from the federal government, as a condition of statehood for Utah, the Mormon Church formally repudiated polygamy. *See id.* at 96.

<sup>156</sup> Emens, *supra* note 2, at 282.

<sup>157</sup> SARAH BARRINGER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA* 55–58 (2002).

<sup>158</sup> JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 76 (1988).

<sup>159</sup> For a concise description of anti-Mormon legislation, see NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 112–20 (2000); and GORDON, *supra* note 157, at 33.

accounts of FLDS fundamentalism have portrayed its polygynous practices in the worst possible light.<sup>160</sup>

#### F. *The Long Shadow of Reynolds*

A number of times, the judiciary has substantiated the popular belief that FLDS polygynous marriage is nothing but an opportunity to harm women and children. In *Reynolds*, the Court decided that the Free Exercise Clause does not protect the practice of plural marriage.<sup>161</sup> In his majority opinion, Chief Justice Morrison Waite conceded that the practice of plural marriage was rooted in sincere religious convictions but concluded that only beliefs—and not religiously motivated actions—were constitutionally protected.<sup>162</sup> More than a century has passed and the Court still has not overturned *Reynolds*.<sup>163</sup> Nevertheless, the language of *Reynolds*—that plural marriage is contrary to “social duties” and “good order,” and “odious among the northern and western nations of Europe”—should not be minimized in a morally pluralistic society that is not supposed to be imposing the sentiments of the majority on those who refuse to conform.<sup>164</sup> As one scholar writes, “The *Reynolds* [C]ourt both drew upon and reinforced [a] discourse of racial and cultural superiority of whites over others, casting the American-born Mormon religion as foreign and other.”<sup>165</sup>

This is neither the time nor the place to offer anything like a comprehensive explanation of the multiple historical causes of anti-polygamist propaganda, but concerns about racism and religious bigotry should not be dismissed out of hand. A handful of scholars have argued that polygyny constitutes a solution to the problem of the lack of marriageable men in certain African-American communities.<sup>166</sup> More recently, opposition to polygyny may be driven by anti-Muslim feelings as well.<sup>167</sup> The Qur’an allows a man to marry as many as

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<sup>160</sup> See, e.g., JON KRAKAUER, *UNDER THE BANNER OF HEAVEN: A STORY OF VIOLENT FAITH* (2003).

<sup>161</sup> *Reynolds v. United States*, 98 U.S. 145, 166–67 (1879).

<sup>162</sup> *Id.* at 166.

<sup>163</sup> See *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1188–90 (2013) (criticizing the reasoning in *Reynolds* but noting that “the Supreme Court has periodically continued to cite *Reynolds* in Free Exercise cases” and admitting that the case is “binding on the limited question of any potential free exercise right to the actual practice of polygamy”).

<sup>164</sup> *Reynolds*, 98 U.S. at 164.

<sup>165</sup> SARAH SONG, *JUSTICE, GENDER, AND THE POLITICS OF MULTICULTURALISM* 148–49 (2007).

<sup>166</sup> See, e.g., PATRICIA DIXON-SPEAR, *WE WANT FOR OUR SISTERS WHAT WE WANT FOR OURSELVES: AFRICAN AMERICAN WOMEN WHO PRACTICE POLYGyny BY CONSENT* (2009).

<sup>167</sup> See, e.g., POLYGAMY’S RIGHTS AND WRONGS: PERSPECTIVES ON HARM, FAMILY, AND LAW 160 (Gillian Calder & Lori G. Beaman eds., 2014).

four wives, subject to certain conditions, but does not make it a religious duty.<sup>168</sup> Some advocates of plural marriage remind us that such marriage may not differ from serial monogamy or habitual infidelity. In the West, without question, anti-polygamy sentiments are found in the Christian tradition, which privileges opposite-sex monogamy.<sup>169</sup> By 1000 C.E., the practice of polygamy in Jewish communities was uncommon.<sup>170</sup>

Beyond marital relationships and their structure, composition, and dynamics, Americans seem to be preoccupied with sexual behavior and often condemn unconventional kinds of sexual behavior without making any effort to understand them. According to Nussbaum, “Americans characteristically exhibit a lot of anxiety about sexual variety.”<sup>171</sup> In trying to discredit same-sex marriage, conservatives used to rely upon the so-called “unnaturalness” of same-sex intimate relationships and focused on their sexual aspects, as if everything else were secondary. No one ever seems to oppose same-sex marriage on the basis of the wrongfulness of two men having an emotionally close friendship. Indeed, films like *Sideways* and television programs like *Entourage* celebrate male friendship. If any of the characters were physically intimate with each other, then many viewers would react differently because they would see its content as being salacious. Men can be as close as the closest brothers and hug each other after winning a game. However, the moment that they engage in sex acts, what was admirable immediately becomes debased in the eyes of the viewers.

In this sense, opposition to polygamy has something in common with opposition to homosexuality. In his dissent in *Romer*, Scalia favorably compared laws that discriminate against gays and lesbians with those that do likewise to polygamists.<sup>172</sup> For many Americans, same-sex sex acts are considered deviant. In Nussbaum’s view, “appeal to disgust . . . has been a crucial part of the antigay strategy.”<sup>173</sup> Likewise, most of them frown upon have multiple sexual partners, and sexual non-exclusivity is one of the defining

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<sup>168</sup> PAREKH, *supra* note 51, at 282–85.

<sup>169</sup> See JOHN WITTE, JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION 37, 48 (2d ed. 2012).

<sup>170</sup> NORMAN SOLOMON, JUDAISM: A VERY SHORT INTRODUCTION 92 (2d ed. 2014).

<sup>171</sup> NUSSBAUM, *supra* note 67, at 25.

<sup>172</sup> *Romer v. Evans*, 517 U.S. 620, 648 (1996) (Scalia, J., dissenting).

<sup>173</sup> NUSSBAUM, *supra* note 67, at 8.

features of some polygamous unions.<sup>174</sup> For one political theorist, “[t]he restriction on polygamy may instead be a case in which allegations of social instability are used to suppress an unpopular minority whose actions are seen as morally indecent or corrupt.”<sup>175</sup> Another scholar has come up with the term “polyphobia” to describe prejudice against polygamists and their relationships.<sup>176</sup> The topic of sex makes many Americans uncomfortable.<sup>177</sup> They may feel even more uncomfortable with alternative lifestyles that involve unfamiliar sexual behaviors and threaten well-entrenched norms like monogamy. Although very few people in this country still believe adultery or divorce should be illegal, most of them are quick to condemn cheating on one’s partner, and mere allegations of such behavior on the part of public figures are always newsworthy. This moral reaction is understandable due to the deception that infidelity usually involves and the trauma that it causes, yet such a reaction usually leaves no room for public discussion about whether the couple has an open marriage or whether having more than one long-term intimate partner might work better for some persons in some circumstances.

Before *Bowers* was overturned in 2003,<sup>178</sup> it would have been considerably harder to put together a plausible constitutional argument to support same-sex marriage. Most contemporary legal academics would place *Bowers v. Hardwick* in the category of other notorious decisions like *Dred Scott*, *Plessy v. Ferguson*, and *Korematsu*.<sup>179</sup> Pre-*Lawrence*, it was not evident whether a state’s unwillingness to accord legal status to a same-sex marriage would trigger the analysis found in *Bowers* or that of *Romer*, in which the Court held that animus against gays and lesbians could not qualify as a legitimate state interest to satisfy the first part of rational basis standard of review.<sup>180</sup> In his dissent in *Romer*, Justice Scalia chides the justices in the majority for taking a

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<sup>174</sup> “Polyamory” intimates that members of the group will not necessarily be sexually exclusive only with one another, whereas “polyfidelity” suggests that the members of the group only will be sexual with other members. See SHEFF, *supra* note 74, at 2–4.

<sup>175</sup> Kymlicka, *supra* note 59, at 93–94.

<sup>176</sup> BENNION, *supra* note 17, at 7.

<sup>177</sup> See MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 21 (1999).

<sup>178</sup> See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

<sup>179</sup> See, e.g., Teemu Ruskola, *Gay Rights Versus Queer Theory: What Is Left of Sodomy After Lawrence v. Texas?*, SOC. TEXT, Fall–Winter 2005, at 235, 237 (“I too am elated that *Hardwick* . . . has ended up . . . in the company of cases such as *Dred Scott*, *Plessy v. Ferguson*, *Korematsu*, and others.”).

<sup>180</sup> Compare *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986) (finding no fundamental right to engage in consensual homosexual sodomy), and *Romer v. Evans*, 517 U.S. 620, 635 (1996) (finding that “a general announcement that gays and lesbians shall not have any particular protections from the law” does not “bear a rational relationship to a legitimate governmental purpose”).

constitutional position that ignores the precedential value of *Bowers*.<sup>181</sup> Fortunately, since 1996, the legal community is not as hostile to the rights of sexual minorities as it used to be in the sense that lawmakers and private actors no longer can discriminate against them with impunity. As Andrew Koppelman writes, “Together, *Lawrence* and *Romer* establish a fairly clear rule: If a law singles out gays for unprecedentedly harsh treatment, the Court will presume that what is going on is a bare desire to harm, rather than mere moral disapproval.”<sup>182</sup>

Nevertheless, polygamists still can be prosecuted for in essence doing what straight and gay married and unmarried people can do without fear of incurring criminal liability. Because they could lose their families, friends, jobs, and even their children in a custody dispute, many polygamists and polyamorists are frightened to come out of the closet.<sup>183</sup> In some jurisdictions, they could face criminal charges.<sup>184</sup> There are many traumatic life experiences that human beings may have to go through, but one of them, which ought to be near the top of the list, concerns the burden of having to hide who one is for fear of how others will react if they knew the truth. This point would not be lost on anyone who is a sexual minority in America and feels like she has to live a double life. The constitutional importance of *Romer* cannot be underestimated because, like many important constitutional cases, it can be read narrowly or broadly. The decision could stand for the proposition that the judges must be more skeptical of the rationale advanced by the state in defense of a legislative classification whose constitutionality is being disputed. Of course, when a suspect group is being put at a legal disadvantage, it may be difficult to ascertain whether the intent that underlies the law in question is invidious.

The principal disagreement between Justice Kennedy and Justice Scalia in *Romer* centered on how to describe properly why the voters of Colorado had approved Amendment 2: that is, whether the voters were driven by animus against gays and lesbians. This disagreement resurfaces in *Windsor*. In his dissent in *Windsor*, Justice Scalia complains about the implication of the majority opinion that he and others like him who continue to oppose same-sex

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<sup>181</sup> *Romer v. Evans*, 517 U.S. 620, 640–43 (1996) (Scalia, J., dissenting).

<sup>182</sup> ANDREW KOPPELMAN, *SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES* 78 (2006).

<sup>183</sup> On the risks of this sort of coming out, see TRISTAN TAORMINO, *OPENING UP: A GUIDE TO CREATING AND SUSTAINING OPEN RELATIONSHIPS* 229–31 (2008).

<sup>184</sup> Most states treat polygamy as a felony but some of them treat it as a misdemeanor. Slark, *supra* note 56, at 453 & nn.18–19.

marriage are bigots.<sup>185</sup> That complaint would have merit if it were legitimate to (a) morally disapprove of same-sex relationships in the first place, and (b) express that disapproval in law by doing what Amendment 2 did by functioning as an anti-antidiscrimination measure in not only taking away the protection of local ordinances but also making it considerably more difficult for such measures to be enacted in the future. Many opponents of same-sex marriage have not stopped endeavoring to preserve what they see as the traditional meaning of marriage and sincerely believe that the redefinition of marriage will produce adverse consequences. If that is the case, irrespective of whether marriage is deinstitutionalized as a growing number of states allow gays and lesbians to marry their partners, then not everyone who opposes same-sex marriage could be automatically labeled a homophobe. Perhaps not every voter in California who voted for Proposition 8 in 2008 had homophobic reasons for doing so. Andrew Koppelman asserts that “more recent legislative initiatives . . . do not necessarily reflect a desire to harm gay people as such, or even a disrespectful devaluation of their interests.”<sup>186</sup> By contrast, during the trial in *Perry*, Judge Vaugh Walker was less generous in questioning the strength of the state’s interests. Whether one gives those who voted for either Amendment 2 or Proposition 8 the benefit of the doubt with respect to the constitutional legitimacy of their individual reasons for voting the way that they did comes down to the considerations that are most relevant and have the most weight, and reasonable persons might differ about their relevance and weight. Even if same-sex sex acts and relationships can legitimately be morally disapproved of, in not redefining marriage to include same-sex couples, such couples are asked to pay the costs of preserving a particular conception of marriage.

Anyone who wants to maintain the symbolic meaning of monogamous, opposite-sex marriage by excluding gays and lesbians from the institution is demanding that they make a considerable sacrifice that he or she probably would not be willing to make himself or herself. After all, there are numerous other culprits to blame when it comes to undermining monogamous, opposite-sex marriage, yet opponents of same-sex marriage have no intention to target those who divorce. At most, they may favor the option of covenant marriage or other measures that might make it more difficult for a couple to divorce. They certainly do not want to eliminate no-fault divorce or prosecute

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<sup>185</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2708–09 (2013) (Scalia, J., dissenting).

<sup>186</sup> Andrew Koppelman, *Beyond Levels of Scrutiny: Windsor and “Bare Desire to Harm,”* 64 CASE W. RES. L. REV. 1045, 1052 (2014).

those who are unfaithful to their marital partners. It may be true that the vast majority of straight people who oppose same-sex marriage are uncomfortable with same-sex relations. But like Scalia did in his dissent in *Romer*, one could argue that those who voted for Amendment 2 were not homophobic.<sup>187</sup> Rather, they were expressing their genuine moral disapprobation of gays and lesbians and same-sex relationships in the midst of a cultural war. In doing so, they would be assuming that it is legitimate to morally disapprove of homosexuality. However, their doing so may call into question the constitutionality of the law that they helped bring into being. As Koppelman puts it, “The constitutional status of laws that discriminate against gays . . . is uncertain after *Romer*.”<sup>188</sup> That situation results from the lack of clarity concerning the kinds of reasons that the state may offer in support of its view that sexual orientation can be a relevant difference in treating gays and lesbians differently. *Windsor* makes clear that the state cannot treat married gays and lesbians differently with respect to federal marital benefits when such differential treatment is rooted in a bare desire to harm a politically unpopular group.<sup>189</sup> In *Windsor*, Kennedy did not simply rely on *Romer* but instead extended its rationale in the direction of marital equality.

In 2015, in *Obergefell v. Hodges*, the U.S. Supreme Court finally may end the controversy over whether the Constitution requires states to allow same-sex couples to marry.<sup>190</sup> The prospects of a victory for those who have fought for marriage equality for gays and lesbians look even better than they did in 2013.<sup>191</sup> As of this writing, only thirteen states refuse to permit a man to marry another man or a woman to marry another woman.<sup>192</sup> In the aftermath of *Windsor*, the same-sex marriage advocates have prevailed in most of the lower courts. The Sixth Circuit decision that the Supreme Court decided to review has the dubious distinction of being the only case in the last two years in which the other side has had success.<sup>193</sup> The rapid change in circumstances makes it

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<sup>187</sup> *Romer v. Evans*, 517 U.S. 620, 644 (1996) (Scalia, J., dissenting) (“Of course it is our moral heritage that one should not hate any human being or class of human beings. But I had thought that one could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals—and could exhibit even ‘animus’ toward such conduct.”).

<sup>188</sup> ANDREW KOPPELMAN, *THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW* 7 (2002).

<sup>189</sup> *Windsor*, 133 S. Ct. at 2693.

<sup>190</sup> *Obergefell v. Hodges*, 135 S. Ct. 1039, 1040 (2015) (mem.).

<sup>191</sup> See Ilya Somin, *Same-Sex Marriage Returns to the Supreme Court – And Its Prospects Look Good*, VOLOKH CONSPIRACY (Jan. 16, 2015), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/16/same-sex-marriage-returns-to-the-supreme-court-and-its-prospects-look-good/>.

<sup>192</sup> *Marriage Center*, *supra* note 3.

<sup>193</sup> Somin, *supra* note 191.

much easier for a majority of justices to minimize their worries about backlash and make martial equality for gays and lesbians a constitutional reality.

### G. *Animus*

In *Obergefell*, the Court will have to revisit the debate between Kennedy and Scalia over how to characterize the reasons that states fall back upon to justify treating opposite-sex couples so much more favorably regarding marriage. States cannot simply point to the fact that a practice has existed for a long time. Recently, Judge Richard Posner took the states of Indiana and Wisconsin to task in a same-sex marriage case for selectively interpreting the tradition of marriage.<sup>194</sup> The doctrine of animus is judicially underdeveloped.<sup>195</sup> That may change over time as legal scholars explicate its meaning; investigate the possible broader precedential impact of cases like *Romer*, *Windsor*, and maybe *Obergefell*; say more about how it can be identified; and influence the thinking of the legal community. The underdeterminacy of the case law with respect to the meaning of animus may be a blessing in disguise for those who seek to use it in the future to protect other discrete and insular minorities from being disadvantaged by the law. What is sincere moral disapproval for Scalia is animus against a sexual minority for Kennedy. The description of the state's interest, then, will determine its legitimacy and whether the legislative classification at issue passes rational basis.

For instance, not permitting interracial couples to marry or cohabit only could be rationalized by a false belief of white supremacy.<sup>196</sup> These days, it would be hard to find a judge who would allow the state to enact legislation designed to convey the message that one racial group is superior. A white supremacist does not have to hate racial minorities and want them to be murdered, even though some white supremacists surely do want this state of affairs to come about. While some readers may object to the comparison of interracial and same-sex marriage, those who have been denied the right to marriage on the basis of their sexual orientation may have been denied that right on the basis of a characteristic that is just as arbitrary as race is. Justice Kennedy begins his majority opinion in *Romer* by comparing racial

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<sup>194</sup> Baskin v. Bogan, 766 F.3d 648, 654 (7th Cir. 2014).

<sup>195</sup> See Susannah W. Pollvogt, *Balkanization Symposium on Unconstitutional Animus—Collected Posts*, BALKANIZATION (Oct. 8, 2014, 1:00 PM), <http://balkin.blogspot.com/search?q=Symposium+on+Unconstitutional+Animus>.

<sup>196</sup> ESKRIDGE, *supra* note 118, at 109.

discrimination to discrimination based on sexual orientation.<sup>197</sup> This view is becoming more prevalent. If more Americans can at least imagine that the state's failures to permit both kinds of marriage—same-sex and plural, regardless of its gender composition—are morally and legally equivalent, then they also might entertain the possibility that animus underlies laws that do not allow same-sex couples to marry. Even under rational basis review, lawmakers and voters may not act on such a basis.

For a judge to decide whether such animus exists in a given case, she must not only make a factual judgment about the totality of the circumstances in which the law in question was engendered but also make a moral judgment about what animus means. Legal reasoning never can be strictly deductive, which means that the exercise of constitutional judgment requires both factual and normative evaluations, neither of which is likely to prove uncontroversial in important constitutional cases. Animus is an interpretive concept, and it is safe to assert that it is not synonymous with hatred or a desire to harm others. If animus is to be interpreted in this way, it would be an extremely rare law that would be tainted in that way. It would require that the court shift the burden of proof from the parties challenging the law to the state defending the law to show that those who enacted the law had additional, legitimate reasons for doing so. In his dissent in *Romer*, Justice Scalia goes so far as to assert that the voters are entitled to be hostile towards gays and lesbians.<sup>198</sup> His meaning seems to be that they can express their moral disapproval of same-sex sexual relations by singling out gays, lesbians, and bisexuals for unfavorable treatment. Although the precise meaning of “animus” is disputed, many legal scholars and judges believe that a legislative majority may not act on the basis of certain reasons, namely those rooted in malice.<sup>199</sup> In *Windsor*, Justice Kennedy referred to “discrimination of an unusual character” and later in his majority opinion mentions that which is designed to disparage and injure.<sup>200</sup> According to Dale Carpenter, the “[a]nimus doctrine constitutionalizes [the] basic precept” that “one should not hate any human being or class of human beings.”<sup>201</sup> “Hate” is a strong word, and almost all of those who reject same-sex marriage would resist the characterization of their continuing

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<sup>197</sup> *Romer v. Evans*, 517 U.S. 620, 623–24 (1996).

<sup>198</sup> *Id.* at 644 (Scalia, J., dissenting).

<sup>199</sup> *See, e.g.*, Carpenter, *supra* note 61, at 185.

<sup>200</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2693, 2696 (2013) (quoting *Romer*, 517 U.S. at 633) (internal quotation marks omitted).

<sup>201</sup> Carpenter, *supra* note 61, at 185 (quoting *Romer*, 517 U.S. at 644 (Scalia, J., dissenting)) (internal quotation mark omitted).

opposition to it as having anything to do with hatred. Just because they do not see the connection, however, does not mean that it does not exist. When a white supremacist insists that he does not hate African-Americans, for example, most of us will take what he has said with a large grain of salt. If only hatred is synonymous with malice for constitutional purposes, then the problem in Equal Protection cases lies less in the inappropriateness of the subjective motivation for voting for, say, Amendment 2, Proposition 8, or Section 3 of DOMA, and more in the failure to treat the minority group at issue fairly. Even Chief Justice Roberts, in his dissent in *Windsor*, stated that it was constitutionally impermissible to “codify malice.”<sup>202</sup>

The issue, then, is what such malice amounts to. At some point, when legal professionals have to apply the law to real fact patterns and legal scholars have to meet deadlines, the process of making fine conceptual distinctions must come to an end. Given what is known about the flaws of the legislative process, constitutionally, it makes at least some sense to see animus as a nonpublic reason: that is, a reason that reasonable persons would not and could not share as justification for unequal treatment. According to Bedi, “[T]he Equal Protection Clause is best understood . . . as a limit on the kinds of reasons government may invoke.”<sup>203</sup> Coupled with *Lawrence*, which disqualifies mere moral disapproval as a public reason, and in the absence of harm to others, the state is under a constitutional obligation to put forth a better rationale for the law than that it reinforces the moral impermissibility of same-sex sex acts or relations. If a court is going to uphold the law, then the justification that its defenders offer on its behalf cannot involve a moral judgment that expresses the view that being straight is better than all alternative lifestyles. In other words, animus rules out moral opposition to same-sex marriage as a rationale for unequal treatment. That such opposition can be traced to a religious source is neither here nor there. In 2015, few of us would care about the origins of the religious reasons that a person might have for being against interracial marriage, notwithstanding the sincerity of such beliefs. The conclusion would be that animus underlies the opposition, which is to say that the moral disapproval expressed is inappropriate. After all, that sort of relationship is morally unobjectionable. By contrast, if an individual were to morally condemn how her neighbor abuses her intimate partner, then

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<sup>202</sup> *Windsor*, 133 S. Ct. at 2696 (Roberts, C.J., dissenting); see also Carpenter, *supra* note 61, at 189 (“Chief Justice Roberts, in dissent, implicitly agreed that it is unconstitutional to ‘codify malice’ . . .”).

<sup>203</sup> BEDI, *supra* note 11, at 20.

his moral approval would be warranted in a manner in which such opposition to an interracial couple never could.

If opposition to same-sex marriage more closely resembles opposition to interracial couples, as opposed to the above neighbor's poor treatment of her intimate partner, then the state's interest is not legitimate. In his dissent in *Windsor*, Justice Scalia takes the same tack that he did in *Romer* by denying that animus explains why members of Congress passed DOMA.<sup>204</sup> However, according to Koppelman, even "extreme indifference is a constitutional harm that has a remedy."<sup>205</sup> *Romer*, *Lawrence*, and *Windsor* lay the foundation for a constitutional right to same-sex marriage because it is reasonable to infer from them that none of the reasons that lawmakers or voters could use to defend only allowing opposite-sex couples to be eligible for marriage licenses are adequate. Likewise, one might be equally doubtful of the interests that states have in keeping polygamy illegal.<sup>206</sup> Although the focus of this Article is not decriminalization, the reasons that states usually give for continuing to criminalize polygamy also bear on not allowing competent adults to marry more than one person at the same time. The most obvious way to ensure that states provide the option of plural marriage is to formulate an equal protection argument to support the constitutional conclusion that the state cannot favor monogamous marriages over plural ones by only licensing the former.

As noted, to do so would be to show that a state's only giving marriage licenses to couples, opposite or same sex, triggers a heightened standard of review. Even if such a law only is subject to rational basis, the state still lacks a legitimate interest in privileging monogamous marital relationships. Either way, the basic constitutional strategy would be to show that the state's interests in not broadening the definition of marriage are much weaker than individuals' interests in having a wider range of martial options and cannot withstand scrutiny. The state is not supposed to use its power to validate heterosexuality. Similarly, it is not supposed to dictate which way of living or marriage is most conducive to human flourishing. The Equal Protection Clause sets parameters for the exercise of political power by not enabling the states to treat different groups differently unless they can successfully defend such treatment. The traditional "tiers-of-scrutiny" do not give much guidance about when a rationale is unsatisfactory.<sup>207</sup> Thus, judges have considerable discretion in

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<sup>204</sup> *Windsor*, 133 S. Ct. at 2707–11 (Scalia, J., dissenting).

<sup>205</sup> Koppelman, *supra* note 186, at 1068.

<sup>206</sup> Expert Report, *supra* note 58, para. 132.

<sup>207</sup> See BEDI, *supra* note 11, at 4.

determining the strength of the state's interests. This fact helps to explain why strict in theory is not always fatal in fact. A public-reasons approach can be employed to decide when the state has exceeded its constitutional authority when it makes legislative classifications.<sup>208</sup> Such an approach is not perfect, of course, yet it helps the decisionmaker focus on what is most important for the legal analysis, namely the reasons that the state offers as justification for why it did what it did.

The anti-animus principle that emerges from *Windsor* calls upon judges to assess the quality of the state's reasons for discriminating. Deciding whether a particular law is sufficiently motivated by animus, understood as having the wrong motive, is bound to be complicated more often than not in the midst of so many possible motives. That does not mean that animus is in the eye of the beholder. In the context of racial discrimination, for example, nobody still believes that Jim Crow laws were not driven by what contemporary Americans would call animus. A finding of animus may shift the burden of proof to the state to show that it has other, more widely acceptable reasons for treating one group differently than another, or it may be fatal to the law in question. This sort of analysis appears in the *Hollingsworth* and *Windsor* litigation, where the judges did not take the state's asserted interest at face value. Instead, they questioned the sincerity of the reasons offered on behalf of laws that discriminated against same-sex couples because they provided little, if any, support. According to Carpenter, "the flimsiness of these justifications reinforces the conclusion that the law was infected by animus."<sup>209</sup> The reasoning is something like this: when lawmakers put forth reasons that are so bad, they probably are insincere. Their insincerity suggests that they have other reasons that they are trying to conceal. They would not conceal them unless they were suspect.

If animus, understood as a lack of sufficiently public reasons for a law, explains why all states limit marriage to couples, then states may be constitutionally required to make marriage as inclusive as possible. As noted, it may be easier to know the difference between moral disapproval in the abstract than in actual cases. This is where a public-reasons approach proves its worth because it tells the judge to reject reasons that the state advances when those

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<sup>208</sup> Elsewhere, I described same-sex marriage as an easy case because those who oppose it have been unable put forth such reasons. See DEN OTTER, *supra* note 24, at 245–61.

<sup>209</sup> Carpenter, *supra* note 61, at 192.

reasons are too sectarian to serve as the basis of a law. As Judge Walker wrote in *Perry v. Schwarzenegger*,

Whether [the] belief is based on moral disapproval of homosexuality, animus towards gays and lesbians or simply a belief that a relationship between a man and a woman is inherently better than a relationship between two men or two women, this belief is not a proper basis on which to legislate.<sup>210</sup>

As a result, the judge's job is at least somewhat easier because he or she can strike down a law that is premised upon a conception of the good. The state may not take away the option of a plural marriage from plural marriage enthusiasts unless it has sufficient public reasons for doing so. This Article has elaborated on why those reasons do not exist. Legislators cannot simply cite the "fact" that monogamy is superior or that the public believes it to be so any more than it can defend not permitting a man to marry another man or a woman to marry another woman on the ground that their intimate relationships are intrinsically inferior to a heterosexual relationship. After all, they are not, and even if it were proved that they were so beyond a shadow of a doubt, the state still cannot rely on such a rationale.

Constitutionally, the issue comes down to who should decide and not whether any decision to marry is wise. The lives of plural marriage enthusiasts are just as important as those of who prefer monogamy. Unnecessary numerical restrictions make it harder for them to have kind of life that for them is most fulfilling. While to some supporters of same-sex marriage, discrimination against such enthusiasts may seem comparatively trivial, that belief does not change the fact that the state does not have to treat polygamists and polyamorists unequally when it comes to marriage. At the end of the day, the constitutionality of any restriction on whom one may marry is a function of the quality of the reasons that the state puts forth.<sup>211</sup> The more heightened the standard of review, the better those reasons have to be. When they turn out to be unsatisfactory, a court is supposed to find the law, which infringes on a fundamental right or treats a suspect class unequally, to be unconstitutional. Those who care about treating everyone fairly must be aware of how easy it is to not notice that a minority group has been invidiously discriminated against. Because the distinction between same-sex and plural marriage is a distinction without a constitutional difference, they merit the same legal treatment.

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<sup>210</sup> *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1002 (N.D. Cal. 2010).

<sup>211</sup> See generally BEDI, *supra* note 11; DEN OTTER, *supra* note 24 (providing extensive reasoning to counter the traditional state arguments on these and other issues).

## VI. CONSEQUENCES

Those who hope real marital freedom and equality will come into being someday in this country may not witness anything close to such a change in their lifetimes. Radical constitutional positions do not gain adherents overnight. The social environment in which such change could take place has to be conducive to elite and especially public opinion shifting away from a deeply ingrained belief that monogamy is superior. With rare exceptions, courts tend to acknowledge the soundness of constitutional arguments only when the timing is right.<sup>212</sup> Unfortunately, such arguments only receive the attention that they deserve in an atmosphere where the public is more tolerant of difference. At some point, the willingness of more and more Americans not to summarily dismiss the very idea of marital multiplicity may start a discourse about the best meaning of marital equality. Their willingness may prompt them to consider that a plural marriage might work better for some people in some circumstances and perhaps conclude, as this Article has tried to show, that the Constitution requires states to allow polygamists and polyamorists to marry. A constitutional argument can be sound, yet it also must be recognized as such by the legal community prior to its being able to influence the outcome of real cases. The constitutional litigation regarding same-sex marriage nicely illustrates this point.<sup>213</sup>

As of this writing, though, no state has decriminalized polygamy and no state is on the verge of doing so.<sup>214</sup> DOMA not only discriminates against same-sex couples but also against all polygamous unions.<sup>215</sup> The constitutional conclusion that this Article argues for—that states that only legally recognize two-person marital unions are acting unconstitutionally—probably strikes a considerable number of readers as a product of the worst kind of utopian theorizing. Those who have that reaction should keep in mind that the improbability of any sort of legal recognition of marital multiplicity in the foreseeable future does not imply that the idea lacks constitutional merit or that its time will never come. In the late eighteenth century, the abolition of slavery

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<sup>212</sup> See Michael L. Wells, “*Sociological Legitimacy*” in *Supreme Court Opinions*, 64 WASH. & LEE L. REV. 1011, 1014–15, 1024 (2007).

<sup>213</sup> See MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 19–20 (2013).

<sup>214</sup> Although the District Court for the District of Utah recently declared the cohabitation language in Utah’s bigamy statute unconstitutional, *Brown v. Buhman*, 947 F. Supp. 2d 1170 (D. Utah 2013), no state has, by popular or legislative initiative, taken steps to decriminalize polygamy.

<sup>215</sup> Martha M. Ertman, *Race Treason: The Untold Story of America’s Ban on Polygamy*, 19 COLUM. J. GENDER & L. 287, 357–62 (2010).

and the enfranchisement of women were unrealistic. Above all, even when the reader continues to be skeptical, which is understandable, this Article assumes that he or she can conceptualize a possible world where states do not disrespect plural marriage enthusiasts. The scholarly treatment of many interesting and important theoretical constitutional questions would become sidetracked if scholars always were caught up in practical questions about feasibility. For example, a number of prominent legal scholars, especially those on the left these days, have made the case for limiting the role of the U.S. Supreme Court or eliminating judicial review.<sup>216</sup> In 2015, neither change to the status quo is terribly realistic in the sense that Americans can be expected to embrace it. If anything, judicial review probably will become even more entrenched given the current dysfunction of the federal government and judicial trends in other developed democracies. In short, one should not respond to the question of whether the practice of judicial review by federal courts makes good normative sense only by trying to calculate the probability of the change and how such a proposal could be institutionalized.<sup>217</sup>

Likewise, practical questions never should dominate the constitutional discussion of plural marriage to the point where nobody cares about the soundness of the arguments. This is neither the time nor the place to defend ideal theory and its role in either political or constitutional thought. But, this Article presupposes the utility of a scholarly division of labor in which assessing the soundness of a constitutional argument cannot be equated with the likelihood of its being implemented within the next few decades. American constitutional history indicates that at least some resistance to any more-than-trivial change in constitutional meaning is inevitable. The institution of marriage will continue to evolve, and those who reject those changes will insist that the future is dark. There was a time when almost all Americans would not have worried about a conception of marriage that by contemporary standards would be not only racist but also misogynistic. At the founding, most of them probably would not have viewed an even lower age of consent for marriage or for sexual relations as problematic. After the Civil War, surely Americans would not have fathomed that our Constitution could force states to permit members of the same gender to marry each other.<sup>218</sup>

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<sup>216</sup> See, e.g., ERWIN CHEMERINSKY, *THE CASE AGAINST THE SUPREME COURT* 271–75, 297–98 (2014).

<sup>217</sup> At least one legal scholar believes that family law could accommodate marital multiplicity quite easily MARK GOLDFEDER, *LEGALIZING PLURAL MARRIAGE: THE NEXT FRONTIER IN FAMILY LAW* (forthcoming 2015) (manuscript at 161–62).

<sup>218</sup> See Orin Kerr, *Is There an Originalist Case for a Right to Same-Sex Marriage?*, *VOLOKH CONSPIRACY* (Jan. 28, 2015), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/28/is-there-an->

It should be more difficult, then, to summarily dismiss any proposed reform due to its being alleged to be too radical or ridiculously utopian. When the law is unsettled and the timing is optimal, legal professionals can put together arguments that justify the outcome they desire. In constitutional controversies, public opinion can shift rapidly.<sup>219</sup> American constitutional experience demonstrates that divining our future is fraught with difficulties. Some constitutional understandings, which the legal community used to consider far-fetched, are now widely accepted.<sup>220</sup> As noted, twenty years ago, the view that same-sex couples have a constitutional right to marry would not have been taken seriously.<sup>221</sup> Recent political rhetoric about the family has oversimplified its complicated history.<sup>222</sup> Marriage never has and never will have a universal meaning. In some places and at some times, it has reinforced notions of racial, gender, and religious supremacy.<sup>223</sup> One of the worst mistakes that anyone can make, when it comes to arguing for a particular normative view of what marriage should be, is to conceal its checkered past. In fact, the idea of (monogamous) same-sex marriage is more unprecedented than polygyny in human history.<sup>224</sup>

The vast majority of Americans reject plural marriage.<sup>225</sup> As a result, those who want states to diversify marriage must persuade ordinary Americans, their elected representatives, and judges to view plural marriage as morally permissible under certain conditions so that polygamists and polyamorists are treated equally. The truth is that understanding and compassion do not come to most of us easily. At present, the chances that advocates of same-sex marriage will align themselves with those who support the legal recognition of plural marriage are small. Any conversation about the merits of plural marriage may

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originalist-case-for-a-right-to-same-sex-marriage/; Orin Kerr, *More on Originalism and Same-Sex Marriage*, VOLOKH CONSPIRACY (Jan. 29, 2015), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/29/more-on-originalism-and-same-sex-marriage/>. But see Ilya Somin, *Originalism is Broad Enough to Include Arguments for a Constitutional Right to Same-Sex Marriage*, VOLOKH CONSPIRACY (Jan. 28, 2015), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/28/originalism-is-broad-enough-to-include-arguments-for-a-constitutional-right-to-same-sex-marriage/>.

<sup>219</sup> According to a recent Pew Center poll, 14% of Americans surveyed proclaimed that they had changed their minds in favor of permitting same-sex marriage. *Public Voices on Same-Sex Marriage, Homosexuality*, PEW RES. CTR. (June 6, 2013), <http://www.people-press.org/2013/06/06/homosexuality-opinion>.

<sup>220</sup> See JACK M. BALKIN, *LIVING ORIGINALISM* (2011).

<sup>221</sup> KLARMAN, *supra* note 213, at 19.

<sup>222</sup> STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICA'S FAMILIES AND THE NOSTALGIA TRAP* (1992).

<sup>223</sup> COTT, *supra* note 159, at 4–5.

<sup>224</sup> GOLDFEDER, *supra* note 217 (manuscript at 88–94).

<sup>225</sup> *Supra* note 153.

be premature when the American public still is divided over same-sex marriage.<sup>226</sup> In 2013, the United States Supreme Court failed to take advantage of two opportunities to recognize a constitutional right to same-sex marriage (or its equivalent on equal protection grounds).<sup>227</sup> However, recently, the Court granted certiorari in such a case.<sup>228</sup> So far, no state has recognized any sort of plural marriage.<sup>229</sup> Nor will any legislature or court do so in the foreseeable future. In 2007, the Court declined to hear such a case.<sup>230</sup> At most, the decriminalization of polygamy in some states may be off in the distance. The extension of the constitutional right of marriage beyond couples appears to be something that most Americans are not ready for.

It is possible that this situation will not remain stagnant as time passes, particularly when those who are unsympathetic to marital multiplicity resist the temptation to reduce it to the most egregious sorts of polygyny to score rhetorical points. The American public might not be so adamantly opposed to plural marriage if it were better informed about its variations. There was a time in our not-so-distant past when nearly all Americans would have drawn upon the most pernicious stereotypes to deny treating gays and lesbians fairly. Television programs like TLC's *Sister Wives* and HBO's *Big Love* can continue to humanize polygynists and in doing so, make the unfamiliar more familiar. American attitudes toward sexuality and marriage have evolved, and it is no longer as easy as it once was for Americans to know "normal" when they see it. Alternative lifestyles are a more visible phenomenon than they used to be, and their increased visibility may induce more Americans to be less dogmatic about the morality and constitutionality of numerical restrictions. For the most part, though, Americans do not discuss plural marriage fairly, as if the topic was not worthy of anyone's time. It may be wishful thinking to expect less hostility and more charity in the near future, but anti-plural-marriage views may become less prominent as more people become more curious about what they are really like and begin to see that discrimination against plural marriage enthusiasts is akin or at least similar to discriminating against gays,

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<sup>226</sup> McCarthy, *supra* note 10; *Changing Attitudes on Gay Marriage*, PEW RES. CENTER (Sept. 24, 2014), <http://www.pewforum.org/2014/09/24/graphics-slideshow-changing-attitudes-on-gay-marriage/> (poll finding that 52% of Americans support same-sex marriage).

<sup>227</sup> See *United States v. Windsor*, 133 S. Ct. 2675 (2013) (reviewing the Second Circuit's decision to invalidate part of DOMA); *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (reviewing the Ninth's Circuit's decision to invalidate California's Proposition 8 and deciding that on appeal, the petitioners lacked standing to challenge the District Court's order to enjoin the enforcement of Proposition 8).

<sup>228</sup> *Obergefell v. Hodges*, 135 S. Ct. 1039, 1040 (2015) (mem.).

<sup>229</sup> KOPPELMAN, *supra* note 182, at 30–31.

<sup>230</sup> *Holm v. Utah*, 549 U.S. 1252 (2007) (mem.).

lesbians, and other sexual minorities. The time may come when such marital discrimination is no longer socially acceptable as more Americans come to realize that their friends, coworkers, and neighbors want nonmonogamous marital arrangements or want to experiment with them. Some polygamists already are coming out of the closet, despite the legal risks of doing so. It is time for our society to stop marginalizing them and start treating them as equals.

### CONCLUSION

This purpose of this Article has been not only to survey the constitutional landscape in search of rationales in support of a right to plural marriage or its equivalent on equal protection grounds. It also takes a normative position by embracing marital diversity and contending that as long as the state remains in the marriage business, it must legally recognize any intimate relationship that competent, consenting adults want to form, regardless of its number, gender composition, or interpersonal dynamics, provided that the behaviors do not violate other valid laws. This conclusion finds considerable constitutional support in the meanings of substantive due process, understood as the value of marital choice, and equal protection, understood as identical legal treatment in the absence of sufficient justification for the contrary. When all is said and done, the state's interests in denying marital choice are weak. From the standpoint of the Constitution, the meaning of marriage ought to lie in the eye of the beholder. The state should not be trying to save competent adults from what may turn out to be poor marital choices when a substantial majority of states allow couples to marry for just about any personal reason that they happen to have. Additionally, some states let minors marry with parental consent.<sup>231</sup> When someone is being physically abused, then without question, the state can intervene. But there is a world of constitutional difference between preventing such harm and infringing upon the personal choice only of plural marriage enthusiasts in the name of an ideal of internal equality that many couples do not live up to or even care about. Like everyone else, such enthusiasts have lives to lead. Sooner rather than later, Americans must ask themselves whether such unequal treatment is constitutionally tolerable in a society that is supposed to respect the freedom and equality of all of its members.

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<sup>231</sup> BURNHAM, *supra* note 34, at 518.

As this Article explains, the understandable preoccupation with same-sex marriage in the midst of ongoing legal discrimination against gays and lesbians in many states should not come at the expense of excluding a wide variety of multi-person intimate relationships, opposite or same-sex. It should not matter that polygamists and polyamorists do not yet have the resources to advance their agenda or that their being nonmonogamous may often not be as central to their self-understanding as sexual orientation is for most gays and lesbians in a society that continues to make so much of their difference. At this moment, the numbers are neither here nor there. The fate of legal recognition of plural marriage should not turn on whether it enjoys as much popular support as same-sex marriage. The cause of marriage equality, then, could be less sectarian and more about ending all forms of marital discrimination.

Americans inhabit a place in which polygamous relationships exist, and that state of affairs is not going to change in the near future. In attempting to discern whether the current legal definition in all states is underinclusive and therefore both morally unenlightened and constitutionally objectionable, this Article endeavors to start a conversation that is long overdue. After all, everyone has the right to be treated fairly under the Constitution, even when they have different conceptions about what kind of intimacy is most important to them. The voters or their elected representatives often are not equipped to make such judgments for such discrete and insular minorities. Indeed, that intolerant attitude is partially responsible for the misery that many minorities experience because of their difference. In a pluralistic society, considerable variance in ways of life is to be expected. The lives of polygamists and polyamorists not only count but count equally. As a result, they must be allowed to marry everyone who wants to marry them unless a marriage becomes so large that it is administratively unmanageable. The point is not that multi-partner relationships are for everyone or even for most adults. Polyamorists are vocal about how challenging they tend to be. Rather, it is that such a decision is best left to the individuals most directly affected by how their intimate lives are structured.

Someday, there may be a U.S. Supreme Court decision for plural marriage enthusiasts that would do for them what *Romer*, *Lawrence*, and *Windsor* are doing to improve the lives of gays and lesbians in this country. While courts do not initiate invidious discrimination, they can constitutionalize it by permitting it. Eventually, some lawmakers and judges may be more critical of the rationale for continuing to criminalize the mere act of being “married” to more than one adult simultaneously and more willing to acknowledge that

regulation, as opposed to prohibition, is not only fair but more humane and effective at addressing crimes associated with certain polygynous arrangements. As it stands, women in illegal, polygynous relationships are vulnerable in multiple ways. However, a change in thinking may pave the way for evaluating the strengths and weaknesses of the case against the constitutional right to plural marriage more objectively. As circumstances change, what was at one point an almost inconceivable constitutional view may become more plausible.

When it comes to marriage, then, the state does not have to define marriage in a needlessly narrow way that is predicated on the dubious claims that some kinds of marriages are intrinsically superior and produce better overall consequences. The decision not to marry, to marry only one person, or to marry multiple persons simultaneously can be left to individuals who may have very different perspectives on the meaning of marriage, how it should be configured, its dynamics, and its place in their lives. The quality of any personal relationship, including marriage, is bound to be a product of its particulars. All of the well-known objections made against multi-person intimate relationships can be made against same- or opposite-sex monogamy as well, resulting in an indefensible double standard. Sadly, many two-person intimate relationships are dysfunctional, and a closer, more brutally honest look at them should not inspire confidence in their superiority. Americans do not have to internalize this double standard, family law does not have to incorporate it, lawmakers do not have to put up with it, and judges do not have to put their imprimatur on it.