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Same-Sex Marriage and the Fundamental Right to Marry

As we have seen, the right to marry is well established. Justice Roberts conceded in his *Obergefell* dissent: "There is no serious dispute that, under our precedents, the Constitution protects the right to marry and requires states to apply their marriage laws equally."[1] The question then is, Why would same-sex marriage *not* be included under the fundamental right to marry? In a nation in which the right to marry is constitutionally protected for convicted criminals and parents who fail to make court-ordered child support payments, the right to marry must mean, at a minimum, that the state bears the burden of explaining why gays and lesbians cannot exercise this right.

This chapter will begin be looking at three related explanations have been traditionally proffered for the exclusion of same-sex marriage from the right to marry:

1. Rather than being a primary right, marriage is merely a predicate of the right to procreate and raise children in a traditional family setting.
2. The ability to have children is at the core of marriage.
3. Marriage is by definition dual gendered.

This chapter will examine each of these arguments in turn argue that these arguments quickly collapse in the face of analytic scrutiny. Post-*Obergefell*, these arguments have retained little force in the popular discourse regarding same-sex marriage. The chapter's last section, "Of Nature and Intuition," will examine the contemporary argument of

[1] *Obergefell v. Hodges*, 135 S. Ct. 2584, 2612 (2015).

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whether *Obergefell* will take us down the slippery slope to constitutional protection polygamous or incestuous marriage.

The Right to Marry as a Primary Right

It has been suggested that the right to marry is a predicate to other rights, rather than a right in and of itself. The idea that the right to marry is simply the logical predicate to procreation and childbearing has been an important and influential part of the debate on same-sex marriage. In this view, marriage is not a free-standing constitutional right, but a right that results from society's interest in the bearing and raising of children in a traditional family setting. Lynn D. Wardle has often emphasized this point. "[In *Meyer*] the constitutional right to marry was directly linked to the traditional family, and it was seen as closely connected to the traditional home into which children were born and in which they would be reared."[2] Each case that elaborates upon the right to marry links it to traditional families or to procreation, Wardle says.

Regarding *Skinner v. Oklahoma*, Wardle argues that its "most important contribution to the evolution of the constitutional 'right-to-marry' doctrine was the direct linkage of procreation with the 'right to marry.' The conjoined rights of marriage and procreation embodied fundamental concerns of society."[3] As for *Griswold v. Connecticut*, "the case underscored that marriage is linked with, and the basis for, the traditional family and child-rearing."[4] Wardle notes that even Justice Marshall ties marriage to children and the traditional family, explicitly mentioning the "decision to marry and raise children in a traditional family setting."[5] Wardle concludes: "Marriage provides the most secure environment in which to bring children into the world, and in which to raise children. For this reason, it has been deemed essential to the survival of the human race. Marriage may sometimes best be understood as a legal relationship created for the benefit of children who grow and flourish best in marriage-based families."[6]

It is not only academic commentators who subscribe to this view of the right to marry. Even the Supreme Court of Hawaii, which held that the same-sex marriage ban is a form of gender discrimination,[7] saw the marriage right as the "logical predicate" to the right to procreate and raise children. It therefore held that the right to marry does not apply to

[2] Wardle (1998) at 299. [3] Ibid. at 300. [4] Ibid. at 301. [5] 434 US at 386.
[6] Wardle at 338–339. [7] Chapter 3, supra, for a critical analysis of this claim.

same-sex marriages. As Megan E. Farrell explains, "the *Baehr* court interpreted *Zablocki* to provide an implicit link 'between the right to marry, on the one hand, and the fundamental rights of procreation, childbirth, abortion, and child rearing' because the right to marry 'is simply the logical predicate of the others.'"[8]

Along similar lines, Roberts's dissent in *Obergefell* avers that "for the good of children and society, sexual relations that can lead to procreation should occur only between a man and a woman committed to a lasting bond . . . [s]ociety has recognized that bond as marriage."[9]

Procreation and children, of course, are part of the reason that many people want to marry, and part of the reason that society has an interest in the institution of marriage. But that is very different from the idea that the marriage right is *solely* concerned with children, and that the right does not protect couples who cannot conceive children or raise them in a "traditional family setting." A reference to the right of free speech can help illustrate this point. Courts and scholars have often linked the right of free speech to democratic debate and deliberation,[10] yet it is well settled that freedom of speech covers a great deal of speech that is completely unrelated to democratic debate and deliberation. The sexual images of the Playboy Channel are protected speech, despite their lack of political content;[11] so is advertising the price of liquor.[12] Speech is related to democracy, but "related to" does not mean "the same as." Similarly, marriage might be related to child rearing, but it is far more than a mere child-rearing arrangement. As is obvious to any childless, married couple, there are powerful reasons for being married that are completely unrelated to children. Unsurprisingly, the Supreme Court has never actually held that the fundamental right to marry is dependent upon or ancillary to a couple's intention or ability to have children.

Furthermore, the argument that the right to marry is merely a derivative of reproductive rights ignores the development of both sets of rights. The Court took the position that marriage was a fundamental right long before it ever considered reproductive issues. In *Meyer* in 1923, the justices averred that marriage was "without doubt" among the liberties protected by the Fourteenth Amendment.[13] Not until nineteen years later

[8] Farrell at 603, citing *Baehr v. Lewin*, 852 P.2d at 56.
[9] *Obergefell* at 2613 (Roberts dissenting).
[10] See, e.g., *New York Times Co. v. Sullivan*, 376 US 254 (1964).
[11] *United States v. Playboy Entertainment Group, Inc.*, 120 S. Ct. 1878 (2000).
[12] *44 Liquormart, Inc. v. Rhode Island*, 517 US 484 (1996).
[13] *Meyer v. Nebraska*, 262 US 390, 399 (1923).

in *Skinner* did the Court explicitly discuss reproduction, stating that "[m]arriage and procreation are fundamental to the very existence and survival of the race." The modern doctrine of reproductive freedom began in 1965 with *Griswold*. Justice Douglas's effort to locate a right to contraceptives in the Constitution required him to reach far for support, because there is little in the text or history of that document to point to such a right.[14] He found that support in the marital bedroom. Although the ban on contraceptives applied to married and unmarried couples, Douglas used the understood sacredness of marital privacy to establish the right of sexual privacy, as we have seen.

The Court thus connected marriage and children in a way that is very different from what many opponents of same-sex marriage suggest. The right to marry preceded *Griswold* by many years; and what Douglas actually said in that case was that marriage includes the right *not* to have children at all. Indeed, in his homage to marriage, Douglas describes it "as an association that promotes a way of life, not causes; a harmony in living not political faiths; a bilateral loyalty, not commercial or social projects."[15] Nothing in phrases such as "a harmony in living" or "a bilateral loyalty" implies that marriage is reserved only for those capable of reproduction or planning to raise children. In fact, the emphasis on harmony in living and bilateral loyalty points to the primacy of the couple's autonomy, instead of their willingness to bear children.

There is really no good reason to believe that the right to marry is derivative of the right to reproductive freedom or the right to raise children in a traditional setting. The Court has never held that it is; such a holding would be quite out of step with its jurisprudence on the family. Indeed, although the health and well-being of children is certainly a state concern, the Court has repeatedly held that the Constitution forbids the state from mandating conformity in family structure or child rearing. In *Pierce v. Society of Sisters* in 1925, the Court eloquently explained that the duty to impart values to a child, as well as decisions about the ideas to which a child should be exposed, properly belongs to the parents, not the state. "The child is not the mere creature of the State; those who nurture

[14] Mark V. Tushnet, "Two Notes on the Jurisprudence of Privacy," reporting that Justice Douglas's opinion in *Griswold* "is widely regarded among law professors as fatally flawed." *Constitutional Commentary* 8 (1991): 75–86, 75.

[15] Ironically, the only instance in a Supreme Court case that actually involved Douglas's frightening imagery of a police officer in the bedroom involves the arrest of a gay man for committing sodomy in the privacy of his own bedroom, *Bowers v. Hardwick*, 478 US 106 (1986).

him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[16]

Over and over again, the Court has rejected efforts to create a standardized, governmentally approved family life. In *Moore v. East Cleveland*,[17] it connected the freedom to marry to the freedom to choose one's family structure. Invalidating a single-family zoning ordinance that excluded a grandmother and her two grandsons (who were cousins rather than brothers) from living together as a family, the Court stated:

> A host of cases, tracing their lineage to *Meyer v. Nebraska*, and *Pierce v. Society of Sisters*, have consistently acknowledged a "private realm of family life which the state cannot enter." Of course, the family is not beyond regulation. But when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.[18]

As noted, the Hawaii Supreme Court interpreted *Zablocki* to mean that the right to marry applies only to dual-gendered couples because the *Zablocki* Court linked marriage to "procreation, childbirth, abortion, and child rearing."[19] The *Baehr* Court cited the following passage from *Zablocki*:

> The woman whom appellee desired to marry had a fundamental right to seek an abortion of their expected child or to bring the child into life to suffer the myriad social, if not economic, disabilities that the status of illegitimacy brings . . . Surely, a decision to marry and raise the child in a traditional family setting must receive equivalent protection, and, if appellee's right to procreate means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place.[20]

The identical passage was cited in Justice Roberts's dissent in *Obergefell*, so it obviously merits a careful look. Upon examination, this passage clearly does not limit the marriage right to people who can or wish to have children. Justice Marshall was merely noting that it would be ironic if Mr. Zablocki's intended wife were to become pregnant and the Constitution protected her right to have the child out of wedlock, or even to abort the child, but not her right to marry and raise the child in a traditional family setting. This is an excellent point, yet it shows merely that raising a child in a traditional family should not receive *less* protection than aborting the child or having the baby out of wedlock.

[16] *Pierce v. Society of Sisters*, 268 US 510, 535 (1925). [17] 431 US 494 (1977).
[18] 431 US at 499 (citations omitted). [19] 852 P.2d at 56.
[20] Ibid., quoting *Zablocki*, 434 US at 386.

Furthermore, Marshall makes this argument in the middle of a long passage in which he outlines the many reasons that the Court considers marriage a fundamental right. In that passage he includes much language about the importance of marriage that is unrelated to having or raising children. Much of this language should now be familiar to the reader: marriage is "essential to the orderly pursuit of happiness by free men," "the most important relationship in life," an association that promotes "a bilateral loyalty," and "among the personal decisions protected by the right to privacy."[21] All these points are just as applicable to childless couples as to anyone else. To interpret Marshall as saying that marriage is a fundamental right only because it is a precursor to having and raising children is to ignore much of what he wrote.

If there were any doubt about whether the right to marry is merely derivative of the right to bear children or to raise them in a traditional family, it was answered in *Turner*. Recall that *Turner* involved the right of a state prisoner to marry, even though he was still serving his sentence and was obviously in no position to father children at that time, much less to bring them up in a traditional family setting. Although the Court assumed there would be no conjugal visits even if Mr. Safley did get married, it held that many of the purposes of marriage could be fulfilled while he remained incarcerated:

> First, inmate marriages, like others, are expressions of emotional support and public commitment . . . In addition, many religions recognize marriage as having spiritual significance; for some inmates and their spouses, therefore, the commitment of marriage may be an exercise of religious faith . . . Third, most inmates eventually will be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they ultimately will be fully consummated. Finally, marital status often is a pre-condition to the receipt of government benefits (e.g., Social Security benefits), property rights (e.g., tenancy by the entirety, inheritance rights), and other, less tangible benefits (e.g., legitimation of children born out of wedlock).[22]

The Court's list of these important attributes of marriage makes it crystal clear that the right to marry is not merely a precursor of the right to have children or raise them in a traditional setting. In fact, like Marshall's points about marriage in *Zablocki*, most of these attributes are as applicable to same-sex couples as to heterosexual couples. "Expressions of emotional support and public commitment" apply to all couples. As for marriage as an "exercise of religious faith," recall that in Chapter 2, we

[21] 434 US at 383–386. [22] *Turner v. Safley*, 482 US 78 (1987) at 95–96.

saw that many religions recognize same-sex marriages and that even without state sanction, many same-sex couples have sought spiritual or religious fulfillment by participating in religious commitment ceremonies.[23] Regarding the numerous governmental benefits to which spouses are entitled, most would be available to same-sex couples as well as "traditional" couples: Social Security benefits, tenancy in the entirety, and inheritance rights. In fact, the only attribute of marriage that could remotely be construed as inherently heterosexual is that most prisoners would eventually be released and could then "consummate" their marriage. But the Court speaks only about the couple's eventual consummation of the relationship, *not* about the couple's eventually having children or raising them in a traditional family setting. The Court's most thorough discussion of the attributes of marriage barely mentions the issue of having or raising children.

It is also worth noting that the right to marry includes the right to divorce – hardly a hallmark of "traditional" family life or child rearing. In *Boddie v. Connecticut*,[24] the Court held that court fees for indigent persons seeking a divorce violate the Constitution. Opponents of same-sex marriage argue that *Boddie* is concerned only with procedure, not a substantive right to divorce,[25] but substance and procedure cannot be so neatly separated. The Court did not create a general right to free access to the courts for indigent parties; for instance, there is no constitutional right to have court fees waived for bankruptcy filings, no matter how poor the person.[26] The justices were quite clear that the Constitution protects access to divorce courts because of the fundamental nature of the right to marriage, which is broad enough to include the right to divorce. "We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed . . . for, as we have already noted, in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship," they said.

Finally, the position that marriage is a fundamental right only as a precursor to having children is illogical. Although the Constitution protects the right to bear children, it also protects the right to avoid having them by using contraceptives, to abort them, to bear them out of wedlock, and to raise them in nontraditional settings. Nothing whatsoever in the Court's

[23] Ironically, some have been fired or have had job offers revoked for participating in such ceremonies. See *Shahar v. Bowers*, 120 F. 3d 211 (11th Cir. 1997), *McConnell v. Anderson*, 451 F. 2d 193 (8th Cir. 1971).

[24] 401 US 371 (1971). [25] Wardle (1998) at 311–313.

[26] *US v. Kras*, 409 US 434 (1973).

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jurisprudence indicates that the right to bear and raise children in a traditional setting is right of such talismanic importance that the right to marry must be understood as an appendage of that right.

We have seen that the Court has protected the right to contraceptives for married and unmarried couples alike; the right to abortion on demand; the right to free access to divorce courts; the right to marry even if one is failing to support his or her children; the right of felons to marry while still serving their sentences; the right of grandmothers, grandsons and cousins to live together as a legally recognized family; and so on. If the right to marry were solely for the benefit of traditional, childbearing families, this would cut against the grain of the great majority of the Court's jurisprudence concerning the Constitution and the family.

Children as the Sine Qua Non of Marriage

Related to the argument that the marriage right is reserved only for dual-gendered, child-raising couples is the notion that, regardless of what the Court has said, having children is so central to marriage that it makes no sense to protect the right to marry for couples who obviously cannot have them. Justice Alito's dissent in *Obergefell* endorsed this position:

> [Kennedy's] understanding of marriage, which focuses almost solely on the happiness of persons who choose to marry, is shared by many people today, but it is not the traditional one. For millennia, marriage was inextricably linked to the one thing that only an opposite-sex couple can do: procreate.[27]

The state of Vermont, also argued that procreation is the defining feature of marriage when it defended its same-sex marriage ban to the state Supreme Court.[28] This argument has been accepted in federal court as well; in *Adams v. Howerton*, the judge held that "the main justification in this age for societal recognition and protection of the institution of marriage is procreation, perpetuation of the race."[29] As we will see, this is perhaps the least supportable of the reasons proffered for denying same-sex couples the right to marry.

The idea that marriage inherently requires the ability to reproduce is utterly foreign to Western traditions. Even John Finnis, who strongly opposes same-sex marriage, concedes that

[27] 135 S. Ct. at 2641. [28] Bonauto et al.
[29] *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (Central District of California 1980).

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the ancient philosophers do not much discuss the case of sterile marriages, or the fact (well known to them) that for long periods of time (e.g. throughout pregnancy) the sexual acts of a married couple are naturally incapable of resulting in reproduction. They appear to take for granted what the subsequent Christian tradition certainly did, that such sterility does not render the conjugal sexual acts of the spouses non-marital. (Plutarch indicates that intercourse with a sterile spouse is a desirable mark of marital esteem and affection.)[30]

Even the Christian moralist St. Augustine stated that companionship is an important goal of marriage and never indicated that sterility voided a marriage.[31]

The idea that marriage requires reproductive ability has no support in contemporary law either. "Opposite-sex couples may marry without showing that they possess either the ability or the intention to have children,"[32] William Hohengarten observes. Why, then, does the issue of fertility prevent same-sex marriages but not infertile dual-gendered marriages? In *Adams*, the Court answered that in the case of dual-gendered couples, sterility tests or inquiries about plans for having children would be too intrusive:

> The state has chosen to allow legal marriage as between all couples of opposite sex. The alternative would be to inquire of each couple, before issuing a marriage license, as to their plans for children and to give sterility tests to all applicants, refusing licenses to those found sterile or unwilling to raise a family. Such tests and inquiries would themselves raise serious constitutional questions.[33]

This reasoning cannot withstand even brief analysis. Some people, such as postmenopausal women, obviously cannot have children; no intrusive inquiries would have to be made to establish the inability of an eighty-year-old woman to bear children. But it is inconceivable that a court or legislature would bar such a woman from marrying for this reason.

In addition, states are perfectly willing to force would-be married couples to take other kinds of intrusive tests. "Most states still require examination for venereal disease and other appropriate clinical testing before marriage," Frank B. Grad notes.[34] If potency and fertility are truly the sine qua non of marriage, then they could be tested for, just as the state tests for venereal disease and other medical conditions. The *Adams* Court does not explain why one form of testing is more intrusive than the other. If the

[30] Finnis at 1067–1068. [31] Eskridge (1996) at 96–97.
[32] Hohengarten at 1513–1514. [33] *Adams*, supra, 486 F. Supp. at 1124–1125.
[34] Grad at 383. Admittedly, the trend has been toward eliminating this requirement, but it was a long-standing practice, and some states still continue it. See www.nolo.com/legal-encyclopedia/marriage-requirements-licenses-ceremonies-faq-29142–5.html.

primary purpose of marriage were reproduction, surely the state would want to inform a person if his or her intended spouse were infertile, just as it would notify the person about the presence of venereal disease. Yet, states do not even bother to ask marriage license applicants whether they intend to have children.

The position of the *Adams* Court is not only illogical, but also without empirical support. The court makes no effort to discover or demonstrate that concern for undue intrusiveness is the actual reason that states refrain from fertility testing. It is simply unsupported speculation on the court's part – a thin reed upon which to rest a decision of such importance.[35] Unfortunately, this has been the *sole* explanation the courts have given, when they have given one at all, for why the inability to reproduce bars same-sex, but not dual-gendered, couples from marriage.

Furthermore, as Hohengarten has pointed out, divorce and annulment laws make it abundantly clear that potency and fertility are *not* essential components of marriage. He notes that

> if . . . the primary function of legal marriage is the facilitation of a committed intimate relationship between two adults, then the grounds for divorce and annulment should center on their relationship inter se, without reference to their procreative capacities or accomplishments. An examination of the law of divorce, both before and after the "no-fault" revolution, bears out [this thesis] . . . Similarly, although the law of annulment does refer to gender-specific sexual roles, it carefully avoids referring to the procreative potential of these roles.[36]

As far back as 1898, moreover, the law was clear that infertile women are eligible to marry: "[I]t cannot be held, as a matter of law, that the possession of the organs necessary to conception are essential to entrance to the marriage state, so long as there is no impediment to the indulgence of the passions incident to that state."[37] It is not logically possible that procreational ability is a vital component of marriage, but the lack of it is not a ground for dissolving that marriage. Because the courts, in the context of divorce proceedings, do not shy away from inquiries about the ability to perform sexually or about other embarrassing and private

[35] As discussed in Gerstmann, *The Constitutional Underclass*, the courts have developed an unfortunate habit of denying the constitutional claims of gays and lesbians based upon unsupported pseudosociological speculation such as the repeated assertion that gays and lesbians are too "politically powerful" to require judicial protection from government discrimination. See *The Constitutional Underclass* at 80–90.

[36] Hohengarten, supra, at 1514.

[37] *Wendel v. Wendel*, 52 N.Y.S. 72, 74 (App. Div. 1898) (cited in Hohengarten at n. 84).

matters, the *Adams* explanation for why the courts do not inquire about fertility is an extremely poor one.

Various states' treatment of first cousin marriage further puts the lie to arguments that the sole purpose of marriage is the care of children. In a Seventh Circuit case, *Baskin v. Bogan*, the State of Indiana argued that the sole purpose of marriage was the care of children. It further argued that it was only concerns for the privacy interests of opposite-sex couples that prevented it from inquiring whether such couples intended to or are capable of having children. The problem for these arguments is that Indiana (as well as several other states[38]) specifically allows some types of incestuous marriages for the very reason that those married couples *cannot* produce children. As stated by the *Baskin* Court:

> It's true that infertile or otherwise non-procreative heterosexual couples (some fertile couples decide not to have children) differ from same-sex couples in that it is easier for the state to determine whether a couple is infertile by reason of being of the same sex. It would be considered an invasion of privacy to condition the eligibility of a heterosexual couple to marry on whether both prospective spouses were fertile (although later we'll see Wisconsin flirting with such an approach with respect to another class of infertile couples). And often the couple wouldn't know in advance of marriage whether they were fertile. But then how to explain Indiana's decision to carve an exception to its prohibition against marriage of close relatives for first cousins 65 or older – a population guaranteed to be infertile because women can't conceive at that age? Ind. Code § 31-11-1-2. If the state's only interest in allowing marriage is to protect children, why has it gone out of its way to permit marriage of first cousins *only after* they are provably infertile? The state must think marriage valuable for something other than just procreation – that even non-procreative couples benefit from marriage.[39]

It would be difficult to think of a more clear demonstration that the same-sex marriage ban is not based on a belief that only fertile couples should marry. It is simply incredible that states would allow certain incestuous marriages as long as they cannot produce children and then tell same-sex couples that they cannot marry because they cannot have children.

In sum, nothing in the law indicates that the ability to have children is the one essential component of marriage. The courts and states, frankly, have made up this standard out of thin air, and have applied it only to same-sex couples. Additionally, it is not true that same-sex couples

[38] See Mark Strasser, *The Challenge of Same-Sex Marriage: Federalist Principles and Constitutional Protections*. Connecticut: Praeger, 1999, at 42, for a list of states with such laws.

[39] 766 F. 3d 648, 662 (7th Cir. 2014).

cannot have children; they simply cannot have them via conventional means. Like many heterosexual couples, lesbians can have children through means such as third-party artificial insemination. Courts have scrupulously protected the parental rights of heterosexual fathers whose wives conceived children via third-party insemination.[40] The heterosexual couples are allowed to marry so the nongenetic parent receives full legal recognition as the child's parent. This legal provision cannot justify allowing only dual-gendered couples to marry, as it is the *result* of the fact that only dual-gendered couples were allowed to marry. The argument that only dual-gendered couples can marry because only they can have children is a tautology.

Marriage as Dual Gendered by Definition

Chapter 2 examined whether it is rational to ban same-sex marriage simply because marriage has traditionally been defined as dual gendered. This section examines a similar but distinct question: does the fundamental right to marry apply only to marriages that fit that relatively narrow dictionary definition of marriage?

Numerous courts and commentators have relied upon traditional and dictionary definitions of marriage to show that same-sex couples cannot be married.[41] As noted earlier, Justice Roberts's dissent in *Obergefell* cited both Noah Webster's *An American Dictionary of the English Language* and *Black's Law Dictionary*. Roberts argues, "None of the laws at issue in [the cases cited in the previous chapter and by Justice Kennedy – *Loving v. Virginia*, *Zablocki v. Redhail*, and *Turner v. Safley*] purported to change the core definition of marriage as the union of a man and a woman."[42]

There are several fatal problems with their arguments. First, definitions themselves are not beyond the reach of judicial review. As Strasser argues, "the argument is fallacious insofar as it implies that the legislature is not itself responsible for the legal definition of marriage or insofar as it implies that definitions (as opposed to other types of classifications) can escape judicial scrutiny."[43] Even if dictionaries in the 1950s and 1960s

[40] Yaworsky at 295–302.

[41] See Chapter 2, supra.

[42] *Obergefell* at 2619 (Roberts dissenting). Clarence Thomas's dissent in *Obergefell* also argues that all three of these cases are irrelevant because they all involve either criminal punishments or the rights of prison inmates. Yet he offers no language from any of the cases indicating that this distinction is dispositive or even significant to their outcomes.

[43] Strasser (1995) at 922.

had defined marriage as a union between persons of the same race, they would not have saved the Virginia statute at issue in *Loving*.

Courts have consistently ignored the dictionary in defining constitutional rights. Constitutional law would be very different if the courts used dictionary definitions to shape the contours of our rights. The First Amendment protection for freedom of speech is an illuminating example. *Webster's New Collegiate Dictionary* defines "speech" as "the communication or expression of thoughts in *spoken words*," "something that is *spoken*," "public *discourse*," an individual manner or style of *speaking*," or "the power of expressing or communicating thoughts through *speaking*." All these definitions make clear that speech is something that is spoken, yet freedom of speech protects much more than the spoken word. For constitutional purposes, speech includes wearing black armbands to school, silent picketing, donating money to political candidates, burning the American flag, and printing pornographic cartoons.[44] If the Court relied upon the dictionary to define the right to free speech, that right would be drastically narrower.

The Court has also explicitly rejected the dictionary definition of "search" in interpreting the Fourth Amendment. In a case involving a thermal-imaging device that measured heat radiating from a private home,[45] the majority opinion rejected *Webster's American Dictionary of the English Language*.[46] Citing *Webster's*, Justice Antonin Scalia observed that "when the Fourth Amendment was adopted, as now, to 'search' meant 'to look over or through for the purpose of finding something; to explore; to examine by inspection; as to search the house for a book; to search the wood for a thief.'" Scalia noted that the Court pays this definition no heed: "One might think that the new validating rationale would be that examining the portion of a house that is in plain public view, while it is a 'search' [according to the dictionary] despite the absence of trespass, is not an 'unreasonable' one under the Fourth Amendment. But in fact we have held that visual observation is no 'search' at all."[47]

As with the argument about fertility, however, the dictionary definition argument is used to reject same-sex marriage and then tucked away

[44] See, respectively, *Tinker v. Des Moines School District*, 393 US 503 (1969); *Chicago Police Department v. Mosley*, 408 US 92 (1972); *Buckley v. Valeo*, 424 US 1 (1976); *Texas v. Johnson*, 491 US 397 (1989); and *Hustler Magazine v. Falwell*, 485 US 46 (1988).

[45] *Kyllo v. US*, 533 US 27 (2001).

[46] Noah Webster, *An American Dictionary of the English Language 66* (1828) (6th ed. 1989).

[47] *Kyllo v. US*, 533 US 27, 32 (2001).

again in other contexts. Even if we were to refer sometimes to dictionaries to define constitutional rights, it would be particularly inappropriate in the case of marriage. As we saw in Chapter 2, the law of marriage was once deeply sexist, with the husband as master of the wife.[48] Of course, marriage was defined as dual gendered; without a woman, who would occupy the legally subordinate role? Rigid reliance on long-standing dictionary definitions makes even less sense in the case of marriage than it does in the other examples discussed above.

The Court consistently defines rights according to their underlying purposes. Speech is defined as that which has a specific expressive intent and which is likely to be so understood;[49] a search is defined by reference to a person's expectation of privacy.[50] As discussed, there is nothing about same-sex couples that precludes them from enjoying many of what the Court has defined as the purposes of marriage, even if one regards homosexuality as immoral. Unless the Court drastically alters its method of constitutional interpretation, dictionary definitions do not justify the disqualification of same-sex couples from the fundamental right to marriage. The majority in *Obergefell* was right to reject Justice Roberts's dictionary-based argument.

Of Nature and Intuition

If the arguments against same-sex marriage discussed so far in this chapter are so weak, why were the courts so reluctant for so long to hold that the long-established fundamental right to marry applies to same-sex marriage? Judges are reluctant to speak publicly about cases that might again come before them, so the answer here is necessarily speculative.

One probable answer is that there was an overwhelming intuition that marriage is *naturally* heterosexual. Intuitions about what God or nature intended can be very powerful for us, although they can also be disastrously misleading, and we should be skeptical of them, even when they are our own. The Virginia judge who upheld that state's antimiscegenation laws in *Loving* opined, "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents . . . The fact that he separated the races shows that he did not intend for the races to mix."[51] The idea that interracial marriage is unnatural or against God's will because God put the races on different continents had an internal

[48] See Chapter 2, supra. [49] *Texas v. Johnson*, 491 US 397 (1989).
[50] *Kyllo*, supra. [51] 388 US 1, 3 (1967).

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logic for its proponents – just as the idea that same-sex marriage is unnatural had logic for the heterosexual majority. "Was there ever any domination which did not appear natural to those who possessed it?" asked the great political thinker John Stuart Mill.[52]

But intuitions about nature are not the only reasons cited for opposition to same-sex marriage. Judges, political leaders, and commentators have expressed more substantive concerns. Among them are the specters of polygamy and incest, which have haunted the debate over same-sex marriage since even before it really started and are still much discussed in the wake of *Obergefell*. If there is a fundamental right to marry that is not confined by tradition, nature, and so forth, what is the logical stopping point? Will society go down the slippery slope to marital anarchy, in which the public will be forced to accept marriages to many spouses or to one's brother or sister? Much more challenging than the issues discussed above, these questions represent legitimate concerns, and advocates of same-sex marriage have not always addressed them honestly. These issues will be addressed in the following sections.

Polygamy and the Fundamental Right to Marry

The issue of polygamy has cast a shadow over the debate on same-sex marriage for quite some time. The possibility that the Supreme Court's recognition of a fundamental right to marriage (much less to same-sex marriage) would lead to legalizing polygamy and other nontraditional forms of marriage was very much on Justice Potter Stewart's mind when he declined to join the majority in *Zablocki v. Redhail*, one of the Court's early decisions discussing the fundamental right to marry. He warned that the Court's support for a fundamental right to marry could open the door to various forms of untraditional marriage, writing, "A 'compelling state purpose' inquiry would cast doubt on the network of restrictions that the States have fashioned to govern marriage and divorce."[53]

Stewart was not alone in these fears. Many opponents of same-sex marriage expressed concerns that if society allows same-sex marriage, it would have to allow polygamy. Numerous Republican Congress members, in addition to noted political commentators such as William Bennett, George Will, Robert Bork, and William Safire, have made similar arguments. Also, during congressional hearings on the Defense of Marriage

[52] John Stuart Mill, "The Subjection of Women." In *Essays on Sex Equality*, Alice S. Rossi, ed. Chicago: University of Chicago Press, 1970, at 137.

[53] 434 US 374, 399 (1978).

Act, the analogy between polygamy and same-sex marriage was a dominant theme.

In his dissenting opinion, Chief Justice John Roberts strongly implied that the reasoning of *Obergefell* may lead to exactly that result, writing, "It is striking how much of the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage."[54] And since *Obergefell* was decided, speculation that there may be a constitutional right to polygamous marriage has only intensified.[55]

This section examines the issue of whether *Obergefell* really does create a substantial risk of carrying us down the slippery slope to a constitutional right to polygamous marriage and concludes that it does not. This does not mean that there aren't good reasons to seriously reconsider how the law treats polygamy. It can be surprisingly difficult to articulate why it is perfectly legal for a man to sleep with many women and have children by all of them, even though it is illegal for that man to marry those women. "If consenting adults who prefer polygamy can do everything else a husband and wife can do – have sex, live together, buy property, and bring up children jointly – why should they be prohibited from legally committing themselves to the solemn duties that attach to marriage?," Steven Chapman asks. "How is society worse off if these informal relationships are formalized and pushed toward permanence?"[56] We should be especially careful because much of the argument against polygamy in the courts has relied upon racial stereotypes of the "barbaric" civilizations that practice it. Relatedly, polygamy has been used to justify exclusions of immigrants from Asian and Muslim countries based on their supposed propensity for polygamy.[57] And, as will be discussed later, criminalizing polygamy may

[54] *Obergefell*, 135 S. Ct. at 2621.

[55] See, e.g., Joanna L. Grossman and Lawrence M. Friedman, "Is Three Still a Crowd? Polygamy and the Law after *Obergefell v. Hodges*," JUSTIA (July 7, 2015), https://verdict.justia.com/2015/07/07/is-three-still-a-crowd-polygamy-andthe-law-after-obergefell-v-hodges (observing that, to win in court, polygamists must "convince a court that the justification for allowing same-sex couples to marry applies with equal force to a person who wants multiple spouses," and questioning whether the four "main reasons for recognizing the right of same-sex couples to marry" apply to polygamists); see also Jonathan Turley, "The Trouble with the 'Dignity' of Same-Sex Marriage," *Washington Post* (July 2, 2015), www.washingtonpost.com/opinions/the-trouble-with-the-dignity-ofsame-sex-marriage/2015/07/02/43bd8f70-1f4e-11e5-aeb9-a411a84c9d55_story.html. (All cited in Rodney M. Perry, "*Obergefell v. Hodges*: Same-Sex Marriage Legalized," *Congressional Research Service Report* [August 7, 2015] at 2.)

[56] Steven Chapman, "Two's Company; Three's a Marriage," *Slate On-Line* (June 4, 2001).

[57] John Witte Jr., *The Western Case for Monogamy over Polygamy* (Cambridge Studies in Law and Christianity 2015) at 428.

reflect Western revulsion to the practice rather than a reasoned response to it.

However, the question of whether it is wise to criminalize bigamy is very different from the question of whether there may be a constitutional right to practice it. This section discusses what might be called "traditional polygamy" one man with multiple wives (also called "polygyny"). It focuses on traditional polygamy because it is the form of polygamy most practiced throughout North America and the rest of the world by a very wide margin[58] and because it is the subject of most of the critical commentary. It does not discuss much more theoretical possibilities such as the throwing open of the law to allow for all sorts of plural marriages such as that between intimate caregivers[59] or replacing the conventional "status" model of marriage with a more purely contractual model in which a person can marry as many people as he or she likes under whatever conditions they negotiate. It is worth briefly pointing out though, that such ideas call for truly changing the definition, meaning, and purposes of marriage in a way that merely allowing same-sex couples to marry did not.

In determining whether there is a real possibility that *Obergefell* may push us down a slippery slope to constitutionalizing a right to polygamous marriage, we need to answer two separate questions. The first is whether there is a strong argument that the fundamental right to marriage that protects both heterosexual and same-sex couples also applies to polygamous marriages. Second, even if it does, are there real harms that would stem from allowing polygamous marriages so that the state has a compelling interest in preventing them.

Does the Right to Marry Apply to Polygamous Marriage?

The *Obergefell* Court identified four reasons that marriage is a fundamental right and held that all of these reasons apply to same-sex couples: (1) "the right to personal choice regarding marriage is inherent in the concept of individual autonomy"; (2) "A second principle in this Court's jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals"; (3) "Marriage also affords the permanency and stability

[58] See John Witte Jr. (2015), supra.

[59] These are sometimes called "intimate caregiving units" and could include such relationships as two children caring for their elderly mother who wish to have the legal benefits of marriage. See Ronald C. Den Otter, *In Defense of Plural Marriage* (Cambridge 2015) at 295.

important to children's best interests . . . that gays and lesbians can create loving, supportive families"; and (4) "marriage is a keystone of our social order . . . There is no difference between same- and opposite-sex couples with respect to this principle."[60]

To begin with the obvious, the Supreme Court majority did not see its decision as extending to polygamy, and reason (2) obviously does not apply to polygamy as it is explicitly limited to two-person unions. More importantly, as we will see in the next section there is now strong empirical support for the proposition that neither reason (3) or (4) apply to polygamous marriages.

What about the first reason then? Is the right to polygamous marriage "inherent in the concept of individual autonomy"? The answer is that it probably is not. The same-sex marriage ban violated the autonomy of gay men and lesbians because it prevented them from marrying at all. The *Obergefell* majority specifically cited the *immutable* nature of sexual orientation: "Far from seeking to devalue marriage, the petitioners seek it for themselves because of their respect – and need – for its privileges and responsibilities. And their immutable nature dictates that same-sex marriage is their only real path to this profound commitment."[61] Over the past several decades, public and elite understanding has overwhelmingly shifted toward the view that sexuality is an immutable characteristic. The term "sexual orientation" has largely replaced "sexual preference" in books.[62] Americans are now far more likely see sexual orientation as an inherent characteristic.[63]

There is absolutely no evidence that there is such a thing as an innate orientation toward polygamy. Sexual orientation is deep-seated and stable, and homosexuality appears across all cultures, while people's desire for polygamy is culturally contingent.[64]

Therefore, the ban on same-sex marriage truly deprived gay men and lesbians of their ability to exercise the fundamental right to marriage. Telling them that they had the right to enter into a loveless heterosexual marriage obviously does not further or respect their autonomy. The opposite is true of polygamy. No one is forced to remain unmarried as a result of the ban on polygamy. If a person is prevented from marrying someone they love, it is because they made a choice to stay married to someone else, not a result of an inherent characteristic.

[60] 135 S. Ct. at 2599–2601 (citations omitted). [61] 135 S. Ct. at 2594.
[62] Stephen Macedo, *Just Married: Same-Sex Couples, Monogamy, and the Future of Marriage*. Princeton: Princeton University Press, 2015, at 29.
[63] Id. [64] Macedo (2015) at 162–163.

At this point it becomes clear that polygamists are not seeking entry to the institution of marriage; they already have that right and they don't need to marry someone they don't love in order to exercise it. Unlike same-sex couples, they are seeking to *alter* the institution of marriage, and there is no constitutional right to do that. For all the controversy over same-sex marriage, the only thing that happened as a result of *Obergefell* is that a relatively small group of people gained the right to marry one another. Gays and lesbians did not alter the structure of anybody else's marriage.[65] In sharp contrast, legalizing polygamy would alter *everyone's* marriage. Suddenly, everyone's spouse would have the option of marrying another person while remaining in the first marriage. The two situations are completely different.

A good sense of the difference between same-sex marriage and polygamy comes from the fact that no alterations in marriage laws resulted from same-sex marriage – only a few words on the marriage form had to be changed, from "husband/wife" to "spouse." While marriage has certainly changed enormously, this is a result of the movement toward gender equity not same-sex marriage.[66] Once the husband and wife became legally equal, it required no substantive changes in marriage laws to allow married people to be "spouses." As for polygamy, we will see in the next section that far from being a natural extension of gender equality, polygamy is strongly associated, indeed inherently linked, to gender inequality. And while same-sex couples could get married without changing the laws of marriage, polygamous marriage would require reform of many marital laws, such as those concerning distribution of property and rules about who has medical decision-making power if a spouse is incapacitated.

Furthermore, the global trends regarding same-sex marriage and polygamy could not be more different. In its landmark case *Lawrence v. Texas* the Supreme Court relied upon decisions of the European Court of Human Rights (ECHR) in determining that antisodomy laws violated the constitutionally protected liberty interests of gay men and lesbians.[67] Meanwhile, the ECHR has upheld Turkey's ban on polygamous marriage on the grounds that it undermines the rights and equality of women.[68] Furthermore, all European and Commonwealth countries continue to ban polygamy, as do Western Civil Law countries and major Asian nations

[65] Furthermore, there is no empirical evidence that same-sex marriage indirectly weakens heterosexual marriage in any way. See Macedo at 65–67.

[66] Macedo (2015) at 90. [67] 539 US 558 at 573 (2003).

[68] *Serife Yigit v. Turkey*, S3976/05 (2010).

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such as China and Japan.[69] While the US Supreme Court could certainly look to global legal trends in support of finding that the right to marry includes same-sex couples, it would have to make the opposite conclusion regarding polygamous marriages.

Finally, there are substantial differences between same-sex marriage and polygamous marriages not only in terms of their liberty claims but in terms of their equality claims. Same-sex couples were seeking the same right as everyone else – the right to marry the person they love most. Would-be polygamists are seeking a right nobody else has – the right to marry multiple people.

In sum, there is a very strong argument that fundamental right to marry does not apply to polygamy at all. Because sexual orientation is immutable, the ban on same-sex marriage prevented gay men and lesbians from getting married at all. The same is not true for those who wish to enter into polygamous marriages. A right to polygamy would do far more than make marriage accessible to a group that had been excluded – it would alter everyone's marriage. So while the former is about ending exclusion, the latter is about a fundamental change to the institution of marriage. Such a change is not supported by any sort of international trend or consensus. And while same-sex marriage merely put same-sex couples in a position of equality, a right to polygamy would create a new right to marry multiple people. Thus, it seems extremely unlikely that future courts will believe that *Obergefell* applies to polygamous marriage. As we will see in the next section, even if we assume that the constitutional right to marry applies to polygamous marriage, the state interests against such marriages are far better defined and proven than was the case with same-sex marriage.

Polygamy and Harm

Unfortunately, American courts have often been quite sloppy in discussing the negative aspects of polygamy and we should be careful not to tar polygamists with unsupported assertions – they should not be treated the same way that gay men and lesbians were treated not very long ago. There is an oft-made association between polygamy and patriarchy and there is no doubt a strong state interest in promoting gender equality.[70] However, the argument equating polygamy with patriarchy can be oddly indifferent to the views of the very women whom the polygamy ban purportedly

[69] Witte at 12–17.

[70] See, e.g., William Eskridge, *The Case for Same-Sex Marriage*.

protects. David Chambers, one of the very few academics who have given genuine consideration to the perspective of polygamists, writes of the oft-repeated assertion that polygamy oppresses women:

> At many points in the political attack on the Church, large numbers of Mormon women joined together to speak publicly in support of plural marriage and to affirm that polygamous husbands were living up to the highest callings of their religions . . . There is no reason to doubt the sincerity of these women's beliefs in the sacred meaning of plural marriage . . . These women and their children seem to have lived lives that were as satisfying as the lives of most of their contemporaries.[71]

In fact, there is substantial empirical evidence that the stereotype of women in polygamous marriages competing with one another for the husband's attention, bearing huge numbers of children with distant relationships from the one father, is not always true. Chambers points to Jessie Embry's study of Mormon plural-marriage families in the late nineteenth century, which concludes that

> plural wives established harmonious relationships with each other and tolerable relations with their husbands. Many children, perhaps most, had relationships with their fathers typical of other children of their era. Commonly, the children formed close relationships with both their mothers and their fathers' other wives. Women in plural marriages were motivated by the sacred function of plural marriage to strive to make the complex and awkward familial relationships succeed.[72]

Mormon women in Utah in that century also had greater economic independence than their counterparts back East, despite polygamy. Historian Julie Roy Jeffrey says, "The goals of self-sufficiency and productivity led the Church to encourage and praise those women who became producers . . . As one female traveler observed, 'They close no career on a woman in Utah by which she can earn a living.'"[73]

Apart from the fact that many of the women in polygamous marriages disputed (and continue to dispute) claims that such marriages harm women, there are other issues as well. The history of American treatment of polygamists hardly supports the notion that the practice has been banned out of concern for women's rights or for any of the more palatable reasons offered today. Our treatment of polygamy is rife with

[71] David Chambers, "Polygamy and Same-Sex Marriage," *Hofstra Law Review* 26 (1996): 53–83, 66–67 (citations omitted).

[72] Ibid.

[73] Julie Roy Jeffrey, *Frontier Women: Civilizing the West? 1840–1880*. New York: Hill and Wang, 1998.

racism, sexism, intolerance, and extremism. Attempts to destroy the Mormon Church and polygamy led Congress to violate such basic civil rights such as jury service, property ownership, and even the vote for women, Chambers writes:

> [Congress] began in 1862 by banning polygamy in the territories. Several years later, it enacted additional legislation declaring that in order to be eligible to vote in the territories, men had to take an oath that they were not cohabiting with more than one woman. It also barred polygynists from jury service and political office. Finally, in 1887, in an astonishing gesture, Congress invalidated the corporation of the Mormon Church itself, authorizing the escheat to the United States of all Church property not used exclusively for religious purposes. In the same Act, unhappy that Mormon women continued to vote for Mormon candidates, it took away from women the right to vote.[74]

When the Supreme Court was asked to rule upon polygamy, its holding was steeped in racism and nativism. "Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people," justices wrote.[75] The Court apparently assumed that a practice's association with nonwhites was convincing evidence of its degraded nature.

Thus we need to approach the issue of polygamy carefully. Not all women in such marriages agree that it is patriarchal, and the judicial treatment of polygamy has often smacked more of racism than of enlightened concern for the well-being of women or children. Indeed, it is only recently that we have seen any sort of attempt to empirically measure the harms associated with polygamy.

So, with that call to caution, the question is whether there are real harms caused by polygamous marriages that are inherent to polygamy. It is also important that these harms are demonstrably caused by polygamy itself, not from the fact that polygamy is illegal and therefore might draw people who are unusually inclined to break the law and who operate in the shadows.

Regarding the issue of harm, it is worth noting to start with that, as ably demonstrated by Stephen Macedo,[76] there is virtually no overlap between the harms attributed to polygamy and those that have been attributed to homosexuality. Much of the argument directed against gays and lesbians has been based upon religious texts. For example there are various

[74] Chambers at 63–64. [75] *Reynolds v. United States*, 98 US 145, 164 (1879).
[76] Macedo (2015) at 145–177.

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passages of the Hebrew Bible condemning homosexuality.[77] By contrast, more than two dozen polygamists appear in the Hebrew Bible, including such admired figures as King David and King Solomon.[78] Indeed, it was considered virtuous to marry one's brother's widow, even if one was already married.[79] The New Testament was not concerned with polygamy, and the early Christian Church punished adultery more seriously than polygamy. It was the state, not the church, that led the fight against polygamy.[80]

Also, while homosexuality has often been branded as "unnatural," St. Augustine argued that polygamy was natural. The argument that polygamy violates the laws of nature has never been a major argument. Indeed, polygamy occurs quite often in nature.[81] Critics of homosexuality have also argued that gays and lesbians are "sterile" in the sense that they cannot produce children together. Once again, polygamy is the opposite of homosexuality. Polygamy has generally been seen as a practice that leads to *more* children. Early Christians believed that Old Testament polygamy was God's "temporary dispensation" to fill an empty world.[82]

Thus, if the question is whether *Obergefell* should be read to be applied to polygamy, the starting point should be the recognition that same-sex marriage and polygamy have virtually nothing to do with one another besides being nontraditional forms of marriage. None of the major arguments against same-sex marriage have been arguments used against polygamists. Whatever arguments against same-sex marriage have been rejected by *Obergefell*, these simply are not the arguments used against polygamy.

There are, however, problems caused by polygamy that have nothing to do with the issues discussed in *Obergefell*. Allowing some men to have more than one wife necessitates, as a simple result of mathematics, that some other men will have no wives. While *Obergefell* allows more people to get married, polygamy means fewer people will be able to get married. These effects are far from trivial. If even a relatively small number of wealthy men take three or four wives, this significantly lowers the chances of lower-status men being able to find marriage partners. Even a small increase in this practice "leads to a substantial increase in men without mates."[83] For every Donald Trump who might marry four women, there would be three other men who could not find a partner.

[77] See, e.g., Leviticus 18:22 and 20:13. [78] Witte at 35–36. [79] Id. at 44.
[80] Id. at 140–142. [81] Id. at 452. [82] Id. at 98. [83] Macedo (2015) at 172.

One might retort that the state is not a dating service and that the state has no interest helping lower-status men find wives. However, the societal harm is substantial. Even controlling for socioeconomic and political differences, polygamous societies have higher rates of rape, kidnapping, and prostitution, and as a result, women are pressured into marrying at a younger age.[84]

Furthermore, even while keeping in mind the cautions set out above, there is now strong empirical evidence that polygamy is often harmful to the women and children within those households. Much of this evidence has been developed over the past decade in response to a judicial proceeding in Canada, presided over by the chief justice of the Supreme Court of British Columbia in 2010 and 2011. Same-sex marriage was legalized in Canada in 2005, and, as in this nation, there was a debate about what this meant for a possible right to polygamous marriage. Because British Columbia has a large community of Fundamentalist Latter-Day Saints, the provincial government referred the issue to the Supreme Court of British Columbia. The resulting opinion upholding Section 293 of the Criminal Code of Canada is called the "Polygamy Reference Case."

At the request of the attorney general of Canada, Dr. Rose McDermott of Brown University conducted a quantitative analysis of polygamy's impact on women, children, and society.[85] The study used data from 171 countries and controlled for confounding variables such as national GDP. The dependent variables included life expectancy, birthrates, sex trafficking, domestic violence, political liberties, and civil liberties. She concluded that polygamy has a strong correlation to physical and sexual abuse against women, lower life expectancy for women, lower levels of education for both girls and boys, higher rates for sexual trafficking and sexual abuse of women and girls, and deprivations of civil rights and liberties.[86] While the chief justice carefully considered the argument that correlation does not always equal causation, he determined that McDermott's study amply demonstrated the causal link between polygamy and the social ills she discussed:

> The *Amicus* [defending a right to polygamy] stresses that Dr. McDermott admitted in cross-examination that she could not "prove anything." The most she could do was "create a correlation between the incidence of polygyny and the incidence of something bad" (para. 415). But creating such a correlation is the purpose of the statistical analysis.

[84] Id.

[85] B. J. Wray, Keith Reimer, and Craig Cameron, "The Most Comprehensive Judicial Record Ever Produced: The Polygamy Reference." *Emory Law Journal* 64 (2015): 1877–1902, 1895.

[86] Id. at 1886.

Dr. McDermott did explain in her testimony the difficulties of proving causation through this type of statistical analysis.

"*So the – with any of the qualitative literature or any of the quantitative statistical literature you can never prove causation. The only method that proves causation is experimentation. But you can't really do experiments with polygamy because it's unethical to force people to have randomly, you know, manipulated forms of marital structure. So what you do is you work with the information you have and you can examine statistically the variance in relationship between polygamy and these dependent variables.*" [Transcript, 15 December 2010, p. 80, l. 41 – p. 81, l. 5]

When Dr. McDermott refers to proof here, she is referring to a scientific concept of proof, not the legal concept of proof on the balance of probabilities that applies in a civil case. To reject Dr. McDermott's analysis in its entirety on the basis that she admits she cannot "prove" causation would effectively negate the use of wide swaths of social science evidence in our courts and, particularly, this reference.

At para. 415 of his Final Submissions, however, the *Amicus* concludes from Dr. McDermott's acknowledgement of the limitations of statistical research that "in all probability the incidence of polygyny was wholly irrelevant to virtually every evil she purported to link it with." To support this conclusion, he ascribes great weight to comments made by Dr. Shackelford in direct examination about the limitations of correlational research. In particular:

> "*Yes, there's what is known as the third variable problem. It actually goes by that particular label in statistics, and this is in correlational research you may find that there is a relationship between two variables but it is always possible that there is a third variable that you haven't measured or that you're not aware of that, in fact, is causing both of the variables that you happen to be assessing.*" [Transcript, 15 December 2010, p. 7, l. 47 – p. 8, l.3]

The difficulty in attributing Dr. McDermott's findings to a "third variable problem" is that she found correlations between her independent variable, level of polygyny, and eighteen different dependent variables. Given that the negative outcome related to each of these eighteen dependent variables increased as the level of polygamy increased, I find it difficult to write off these correlations as attributable to an unnamed "third variable."

I find that Dr. McDermott's report was conducted on the basis of well-proven methodology and utilized data of unparalleled scope and quality. Her scientific method and the results it produced cannot be dismissed on the basis of what can only be characterized as a lay person's appeal to so-called common sense. Dr. McDermott's analysis does prove "something." As she says in the conclusion to her report (at para. 158) "polygyny's negative effects are wide-ranging, statistically demonstrated and independently verified using alternative analytical tools."

I find Dr. McDermott's evidence to be compelling.[87]

There is also the question of whether prohibiting polygamy is narrowly tailored to mitigating against the harms found by Dr. McDermott. The Chief Justice of the Supreme Court of British Columbia noted that

[87] Reference re: Section 293 of the Criminal Code of Canada 2011 BCSC 1588 (Canada).

criminal laws "do not 'occupy the field' of harms associated with polygamy as an institution." In other words, just criminalizing sex trafficking, domestic abuse, at so forth, does not address all of the harms associated with polygamy.

Of course, this does not mean that all antipolygamy laws could pass strict scrutiny. Indeed, some might not survive even lower forms of judicial scrutiny. Criminalizing polygamy, as opposed to the state merely refusing to recognize such marriages, may well be a foolish and destructive policy. As can be the case with criminalizing prostitution, the law may put victims of fraud, violence, and coercion in fear of turning to the authorities for help. Also, there is evidence that criminalization of polygamy causes a great deal of stigma, as well as psychological and emotional stress related to fear of prosecution.[88]

And polygamy cannot be defined too broadly without violating people's constitutional rights, as an American federal district court judge held in 2013. In *Brown v. Buhman*, the court struck down the part of Utah's criminal law that "covers not only polygamy but 'cohabitation' . . . in which a married person 'purports to marry another person or cohabits with another person.'"[89]

Furthermore, as a matter of conjecture, it is possible that the federal government's refusal to recognize, for immigration purposes, a polygamous marriage that is legally recognized in the applicant's native country might eventually face a credible constitutional challenge. Of course, all of these situations are a far cry from the courts of the United States holding that the precedent of *Obergefell* requires them to hold decide that there is a constitutional right to polygamous marriage in this country. For all of the reasons above, such a result is extremely unlikely.

Incest and the Fundamental Right to Marry

The issue of incestuous marriage has also shadowed same-sex marriage. If one may marry another of the same gender, the argument goes, then why not a close relative? This is a viscerally powerful argument because incest is such a strong taboo. "The mere word 'incest' triggers strong feelings of revulsion in most people," Carolyn S. Bratt notes.[90] Many people find it easy to distinguish incestuous marriage from same-sex marriage

[88] Wray et al. at 1892 (citing the testimony of Professor Angela Campbell).
[89] 947 F. Supp. 2nd 1170, 1178 (D.C. D. Utah 2013). [90] See Bratt at 257–297.

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because of the strong genetic concerns that incest raises.[91] But even in this case, society has been quick to judge and slow to analyze the quality of its own argument. Contrary to popular myth, consanguineous mating (mating among genetically related people) does not increase the number of defective genes in offspring. "Rather, such matings increase the probability that the spouses both carry an identical recessive gene which will be passed to the offspring in the double dose necessary for the expression of the trait associated with that recessive gene," Bratt says.[92] This danger is quite small, especially for first cousins.[93] In fact, there is a credible argument that incest statutes "may actually increase the likelihood of deleterious recessive gene traits appearing in future generations," she writes.[94]

More important, the incest ban stands alone among laws in its protection of the gene pool. Society does not prohibit the marriage of people with grave genetic disorders that they will pass on to their children; nor does it prevent such people from marrying others with similar conditions that make the genetic risks even higher. If the law prevented two unrelated people from marrying because of their undesirable genetic combination, the public would no doubt consider that cruel. Furthermore, nothing requires incestuous couples to have children in an age of consistently effective birth control. Ironically, should birth control fail, the Constitution protects the woman's right to abort the child, although not her right to marry the father should she decide to bring the child to term. Also, incestuous couples have the option of adopting or of using third-party donors to have children, as do thousands of "mainstream" married couples.

The best policy argument against incest has nothing to do with genetics and everything to do with the protection of minor children. The protection of children from sexual exploitation is among the most compelling of state interests and overrides any constitutional rights.[95] Many incidents of sexual abuse of children, especially girls, are incestuous, occur at a

[91] L. Jaber, G. Halpern, and M. Shohot, "The Impact of Consanguinity Worldwide." *Community Genetics* 1 (1998): 12–17.

[92] See Bratt at 271. [93] Ibid. at 272–273.

[94] Ibid. at 274. "If incest statutes prevent the coming together of two recessive genes in the present generation, the gene will be disbursed throughout the population in general."

[95] See *New York v. Ferber*, 458 US 747, 757 (1982). The "prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." The Court upheld a criminal conviction for selling child pornography, even though the state had not shown the material was obscene under the First Amendment.

shockingly high rate,[96] and result in trauma that is likely to be severe.[97] Large-scale surveys of nonclinical populations yield current estimates that the risk of victimization may be as high as one in ten for boys and greater than one in three for girls. Girls appear to be quite vulnerable to sexual abuse by family members; in a probability survey of more than nine hundred women, 16 percent reported sexual abuse by a relative and 4.5 percent reported sexual abuse by a father or stepfather before age eighteen. Society has an extremely compelling interest to do everything it can to prevent fathers and brothers from viewing their daughters and sisters in a sexualized manner. As Karst points out, "incest laws forbidding parent–child marriage are arguably sustainable even when the child is mature, on the theory that parental authority established during one's childhood may have a lasting impact, dominating what would otherwise be the child's freedom of choice."[98] Not surprisingly, the vast majority of criminal prosecutions for incest involve sexual abuse of children.[99]

Even the ban on incestuous marriage requires caveats, however. There are situations in which the fundamental right to marry might protect relatives who seek to wed. Karst asks,

> But what shall we make of the recent tragic case in which a brother and sister, who had grown up in separate adoptive families without knowing of each other's existence, found each other as adults, loved each other, and married? What the Commonwealth of Massachusetts made of it was a crime. The couple pleaded guilty, and were convicted of incest, fined $100 each and placed on probation.[100]

It is not unthinkable that such consenting adults might be entitled to Supreme Court protection of their marriage right, or that first cousins who did not grow up together in a family setting might have a valid constitutional claim to wed. As the Kansas Supreme Court has observed, "first-cousin marriages were not prohibited at common law . . . such marriages

[96] Judith Herman, Diana Russell, and Karen Trocki, "Long-Term Effects of Incestuous Abuse in Childhood." *American Journal of Psychiatry* 143 (1986): 1293–1296, 1293. "Sexual abuse of children is now recognized as a serious mental health problem, both because it is so widespread and because of increasing evidence of its traumatic effects."

[97] Ibid. "Clinical studies of child victims evaluated when sexual abuse is discovered consistently report a symptom picture of posttraumatic stress disorder. It is clear that for some victimized children these symptoms may persist over many years and into adult life. The resultant impairments of ego functioning and social relatedness increase the likelihood that victims of childhood sexual abuse will present at some point in their lives as psychiatric patients. Indeed, a very high percentage of psychiatric patients have been found to have a history of abuse."

[98] See Karst at 672. [99] See Bratt at 257–258. [100] See Karst at 672.

were not Biblically prohibited."[101] Thus, even those who believe that the fundamental right to marry is limited to "traditional" marriage might find merit to this claim.

The fundamental right to marriage, then, could be applicable even to some limited categories of incestuous marriage. Still, this would not lead to the wholesale collapse of prohibitions against such unions. It would mean that these laws would be subject to heightened judicial scrutiny, so states would be called upon to set forth their reasons for them and to demonstrate that the prohibitions are connected to the achievement of these objectives in the modern world. The prohibitions would have to be based upon reasoned policy making, not visceral antipathy or force of habit. This is not so drastic, for there is nothing natural or inevitable about what is defined as incest in the United States; Sweden, for example, allows marriage between half-siblings, even though it is banned in the United States.[102] Requiring states to give a reasoned explanation of their incest laws would probably be quite positive. If states are forced to take a fresh look at this issue, they might find that although incest is sometimes defined too broadly, at other times it is defined in a dangerously narrow fashion. Milton C. Regan Jr. observes that anti-incest laws "often do not apply to stepparents and stepchildren, to forms of abuse not involving marriage or sexual intercourse, or to caretakers who may not be family members. One can easily argue, then, that incest statutes are a crude form of regulation that sweeps both too broadly and too narrowly."[103] Therefore, even if the courts apply the right to marry to incestuous couples, there would merely be a productive rationalizing of the law. The prohibition on close relatives marrying would doubtless be upheld under nearly all circumstances. Some first cousin marriages might be protected, particularly if the relationship began during adulthood, but states would also be forced to take a fresh look at their incest laws and modify them to emphasize protection against child abuse. Many sexual relationships that currently are not always defined as incestuous, such as relationships between step-siblings, would probably be banned once states modified their laws to emphasize child protection as the governmental interest at stake.

To some, even limited tolerance of certain instances of what is currently defined as incest, or the earlier discussion of polygamy, is shocking

[101] *In the Matter of the Estate of Owen C. Loughmiller*, 629 P. 2d. 156, 158 (1981).
[102] Regan at 1523. [103] Ibid. at 1525.

or repulsive. Yet the Constitution has a well-established history of protecting that which most people find shocking and repulsive. If the fundamental right to marry did not protect some things that shock and repulse most people, it would be a uniquely narrow right. The right to religious freedom protects not only "traditional" religions and religious practices, but also practices that many people find more repulsive than anything the Mormons ever practiced. The Court has protected the right of practitioners of the Santeria religion (often conflated with "voodoo") to commit animal sacrifices.[104] Nazism is one of the most despicable ideologies in the history of the world, but the right of jack-booted Nazis to march in a town populated largely by Holocaust survivors is protected pursuant to the rights of free speech and free association.[105]

The point is not to argue for the merits of polygamy or incest, any more than it is to argue for the merits of animal sacrifice or Nazism. Constitutional liberties are often exercised in ways that are disturbing or unwise. But when the government is legislating in the areas of human aspiration that the Court has defined as our fundamental rights, among them speech, religion, and marriage, we must take a second look at things that shock us. We must ask hard questions about what we are trying to prevent, and whether current laws achieve those goals.

Conclusion

Although marriage is a public act, marriage is among the most personal of all decisions. It is difficult to conceive of ourselves as morally autonomous human beings without the freedom to marry the person we love. It is not surprising that marriage has long been considered one of our fundamental rights. Along with the great rights of freedom of speech, of religion, and of protection from unreasonable incursions into our homes, it limits government interference with our basic choices.

Because marriage is so important, it arouses intense feelings in many people. It is a subject about which emotions often overpower our capacity for analysis. The argument in this chapter might appear inflammatory to some readers, but it is no more than a straightforward set of conclusions that logically stem from long constitutional protection for the fundamental right to marry. To summarize:

[104] *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 US 520 (1993).
[105] *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978).

1 There is a well-established, fundamental constitutional right to marry that is not limited to childbearing couples.
2 There is no reason that this right does not apply to same-sex marriage.
3 One of the reasons that judges, legislators, and even many advocates of same-sex marriage have shied away from this argument is the fear that it could apply to polygamy and incest. This fear is greatly exaggerated.

The central argument of this book – that the Constitution has, does, and should protect everyone's fundamental right to marry the person of his or her choice – has the great advantage that it did not require gays and lesbians to ask for "special" rights or protections or to shape their arguments into gender-bias claims. It allowed them to frame their arguments in terms of equality instead of difference, in terms of aspiration instead of victimhood. Gays and lesbians were asking for nothing more than what heterosexuals have long since granted to themselves: freedom to marry the person they love, regardless of what anyone else thinks. This is the argument that the Supreme Court has now enshrined as constitutional law in *Obergefell*.

This analysis and the *Obergefell* decision give rise to key questions. Was the Court correct in finding a right to marry in the Constitution? Where in the Constitution does it originate? Was strong judicial intervention in the same-sex marriage debate appropriate in a democratic society? Even if the answer is yes, was it wise? What will happen in the world beyond the courtroom? This book shall take up these questions in the next two chapters.