What Does Obergefell Mean for Multiple-Partner Marriages?

Dissenting in *Obergefell v. Hodges*[1], Chief Justice Roberts noted that "much of the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage."[2] "Although the majority randomly inserts the adjective 'two' in various places," he wrote, "it offers no reason at all why the two-person element of the core definition of marriage may be preserved while the man-woman element may not."[3] In making this argument, Justice Roberts was speaking to a pervasive view about the relationship between same-sex marriage and multiple-partner marriages, held both by supporters (who see same-sex marriage as paving a path forward toward recognition of a broader array of families and relationships)[4] and opponents (who see same-sex marriage as spelling the end of any ability for states to preserve traditional relationship norms).[5] In its strong form, this view suggests that the premises behind the policy of recognizing same-sex marriages ineluctably lead to recognizing multiple-partner marriages. In its weak form, articulated by Justice Roberts in *Obergefell*, it is not that recognition of same-sex marriage leads to recognition of multiple-partner marriages, but rather that the particular legal arguments for the unconstitutionality of same-sex marriage bans cannot be contained to that context, and are naturally extendable to multiple-partner marriages.

[1] 576 U.S. ___, 135 S. Ct. 2584 (2015).
[2] *Id*. at 2622 (Roberts, C.J., dissenting).
[3] *Id*. at 2621.
[4] For one example of this view, see Jillian Keenan, *Legalize polygamy: Marriage equality for all,* Slate (May 29, 2016 12:17 PM), http://www.slate.com/articles/double_x/doublex/2013/04/legalize_polygamy_marriage_equality_for_all.html.
[5] For one example of this view, see Carson Holloway, *Justice Sotomayor and the Path to Polygamy*, Public Discourse (May 29, 2016 12:20 PM), http://www.thepublicdiscourse.com/2013/04/9725/.

The strong form of this view seems plainly wrong. To pick just one example, a person can support same-sex marriage but oppose multiple-partner marriage simply because she thinks the first is morally better than the second. Perhaps, for example, she sees no reason why sexual complementarity is morally important to marriage, but believes that it *is* morally important to marriage for the union of spouses to be complete and undivided.[6] Across the wide range of considerations that go into a decision as to whether to support same-sex marriage, or some other form of relationship recognition, as a policy matter, it is implausible that there are not several that differ between same-sex marriage and multiple-partner marriage.

The weak form, however, has some force to it. Constitutional argument by necessity is constrained in the kinds of reasons and considerations it appeals to; the doctrine restricts what kinds of reasons can be relevant at each stage of the analysis. Moral arguments in particular have little purchase when it comes to restricting the scope of constitutional rights.[7] Further, the adoption of stringent constitutional standards for state involvement in certain intimate choices can be a tough hurdle to overcome even if there are good policy reasons (unlike in the case of same-sex marriage) for the involvement. The question of whether *Obergefell v. Hodges*, and the similar array of constitutional cases holding that same-sex marriage bans are invalid, undermine the ability of states to defend the limitation of marriage to two spouses is thus a fair one. I take up that question in this paper.

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[6] *See, e.g.*, G. W. F. Hegel, *Elements of the Philosophy of Right* § 167 (Allen Wood ed., H. B. Nisbet trans., Cambridge University Press 1991) (marriage involves "the mutual and *undivided* surrender" of the individual personality of each spouse).

[7] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 571 (2003) ("The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. 'Our obligation is to define the liberty of all, not to mandate our own moral code.'").

To somewhat oversimplify a complicated doctrinal picture, courts in the United States ruling against limitations of marriage to different-sex couples have taken one or more of three approaches. The first, taken by state supreme courts in Iowa[8], Connecticut[9], and New Mexico[10], and by at least one federal appeals court[11], is to hold that sexual orientation discrimination is the kind of constitutionally objectionable discrimination that requires a special level of justification, and that the rationales for same-sex marriage bans to not pass muster under that standard. The second, the route taken by *Obergefell*, is to conclude that the right to marry a partner of the same sex is part of the fundamental right to marry, and none of the state rationales offered in defense of prohibiting that right can stand up to the stringent scrutiny required of state infringements on fundamental rights.[12] The third, taken by several district courts[13], is to conclude that none of the policy justifications offered for same-sex marriage bans pass even the lowest level of constitutional scrutiny, rational-basis review.

In this paper, I pursue what each of these three legal theories might have to say about multiple-partner marriages. I ask, in turn, whether the standard arguments for heightened equal protection scrutiny of same-sex marriage bans clearly apply to bans on multiple-partner marriage; whether the standard arguments for heightened scrutiny of same-sex marriage bans on account of the fundamental right to marry clearly apply to bans on same-sex marriage; and whether there are important policy arguments against multiple-partner marriage, cognizable in

[8] *See* Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).
[9] *See* Kerrigan v. Commissioner of Public Health, 957 A.2d 407 (Conn. 2008).
[10] *See* Griego v. Oliver, 316 P.3d 865 (N.M. 2013).
[11] *See* Latta v. Otter, 771 F.3d 456 (9th Cir. 2014). Arguably, *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014), also takes this approach, though the case is not a model of clarity on this point.
[12] *Obergefell*, 135 S. Ct. at 2604-07. This approach was also taken in the lead-up to *Obergefell* by the Tenth Circuit in Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014), and by the Fourth Circuit in Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014).
[13] *See, e.g.*, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

constitutional litigation, that do not apply to same-sex marriage. Ultimately, I conclude that none of the legal arguments for the constitutional requirement of same-sex marriage are especially helpful for reaching the conclusion that bans on multiple-partner marriage are invalid. That is not to say that such bans are actually valid—it is just to say that the legal case against them needs to do much more than simply point to the same-sex marriage cases.

Before beginning, a few clarifying notes. I am not here making a policy argument against the legal recognition of multiple-partner marriages. I am not sure whether or not they should be recognized. I think there are important policy arguments against such recognition, and especially against its recognition through the legal doctrines of suspect classification and the fundamental right to marry, arguments that are serious enough as to clearly distinguish the case from same-sex marriage. But I do not claim here to have arrived at a final, knock-down argument against multiple-partner marriage, or even against the constitutional case for it. My point, instead, is simply that, in a post-*Obergefell* world, the constitutional questions relevant to multiple-partner marriage are largely independent of those relevant to same-sex marriage. That said, constitutional argument and policy argument are not hermetically sealed off from one another, and what I have to say here about constitutional arguments has bearing on particular policy arguments for recognizing multiple-partner marriages. For example, the argument I make for why multiple-partner relationship recognition does not engage equal protection the way same-sex relationship recognition does have bearing more broadly on arguments about equality in the context of relationship recognition.

I consider here multiple-partner marriages in general, in which I mean to include both a system where one person is dyadically married to more than one other person (polygamy) and a system where more than two people share one marriage together (group marriage). I will

consider both structures throughout. Similarly, I consider the issue both with respect to polygamy as practiced by particular religious groups like fundamentalist Mormons and some Muslim communities, and also with respect to the more free-form and generally less religious polyamory practiced in other communities. These different instances of "poly" relationships are distinguishable, and there is no *a priori* reason to think they stand or fall together, but I take the argument I advance in this paper to be adequate for both.

EQUAL PROTECTION

Maybe the most compelling argument for the constitutional invalidity of same-sex marriage bans is that they constitute unfair discrimination against lesbian, gay, and bisexual people. The thought here is straightforward: in a society where only different-sex couples can get married, straight people's normal pattern of romantic relationship-forming will have access to marriage, lesbian and gay people's normal pattern of romantic relationship-forming will not have access to marriage, and bisexual people's normal pattern of romantic relationship-forming will have only limited, partial access to marriage.[14] If it is generally unfair and unjustified to discriminate against LGB people, then, it is unfair to prohibit same-sex marriage.

Doctrinally, this argument is framed as an equal protection argument, usually through the lens of sexual orientation as a suspect classification.[15] Sexual orientation is a suspect or quasi-

[14] I assume here that these relationship-forming patterns are *otherwise* marriage-eligible, but for the differences in the sex of romantic partners, which seems broadly true (at least past a certain age)—most people are not in incestuous or polygamous relationships, and adults in relationships with other adults are not denied access to marriage on account of age.

[15] Some courts have held that same-sex marriage bans discriminate on the basis of sex. *See, e.g.*, Baehr v. Lewin, 852 P.2d 44, 59-63 (Haw. 1993). I do not consider this argument here, because, though I think it is correct, it played a relatively marginal role in the success of same-sex marriage in the courts. In any event, it is the easiest case for my

suspect classification, and therefore discriminations on the basis of sexual orientation get some form of heightened scrutiny.[16] Further, discrimination between different-sex couples and same-sex couples in access to marriage is sexual orientation discrimination because of the tight link between sexual orientation and same-sex couple status.[17] Together, it follows that prohibitions on same-sex marriage violate equal protection unless the rationales for them pass intermediate or strict scrutiny, which they invariably do not.

One might extend this argument to multiple-partner relationships in the following way. People interested in multiple-partner relationships—call them "polyamorists," understood to include all such people—are discriminated against by laws limiting marriage to two people and limiting the number of (undissolved) marriages a person can have to one, just as LGB people are discriminated against by laws prohibiting same-sex marriage. Further, polyamorists are a group that plausibly meet at least three of the four standard criteria for suspect classification[18]: they have certainly been historically discriminated against, there is no apparent reason why they are limited in their ability to contribute to society, and they have substantial lack of political power. The one criterion where their showing might be harder is immutability. But it is not clear immutability is required at all for suspect classifications, or what *kind* of immutability is

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thesis: it is hard to imagine an argument that bans on multiple-partner marriage are sex discrimination. *But see supra* note 46 and accompanying text.

[16] Courts have varied on whether to treat sexual orientation discrimination as meriting intermediate scrutiny or as meriting strict scrutiny. *Compare* Windsor v. United States, 699 F.3d 169, 185 (2d Cir. 2012) (applying intermediate scrutiny), *aff'd on other grounds*, 133 S. Ct. 2675, *with* In re Marriage Cases, 183 P.3d 384, 442 (Cal. 2008) (applying strict scrutiny).

[17] *See, e.g., In re Marriage Cases*, 183 P.3d at 441 ("By definition, gay individuals are persons who are sexually attracted to persons of the same sex and thus, if inclined to enter into a marriage relationship, would choose to marry a person of their own sex or gender. A statute that limits marriage to a union of persons of opposite sexes, thereby placing marriage outside the reach of couples of the same sex, unquestionably imposes different treatment on the basis of sexual orientation.")

[18] *See Windsor*, 699 F.3d at 181 (listing the traditional suspect classification factors as a history of discrimination, relevance of the factor to ability to contribute to society, immutable or otherwise "obvious" or "distinguishing" characteristics, and political powerlessness).

required, or whether it should be required at all, so in and of itself that seems a thin reed for defenders of the two-person rule.[19]

But this extension elides a key distinction between the argument in the same-sex marriage case and the argument in the multiple-partner marriage case. Equal protection law distinguishes between discriminations that expressly classify on the basis of a category and discriminations that merely have a disparate impact across people of different categories.[20] This issue complicated equal-protection challenges to same-sex marriage bans, which do not, after all, directly reference sexual orientation: a gay man and a gay woman could get married in Alabama before 2015, while two straight men could not. Likewise, a ban on multiple-partner marriages does not directly reference whether or not someone is a "polyamorist" in the sense of generally desiring a multiple-partner relationship; it does not bar a polyamorist from getting monogamously married, and it equally restricts someone who really would prefer a two-person marriage from having a polygamous one instead.

Courts have largely rejected attempts by defenders of state same-sex marriage bans to classify them as merely having a disparate impact on the basis of sexual orientation. The main reason offered is that the connection between being gay and entering a same-sex marriage is not some incidental, tenuous connection, but rather is an inextricable part of what it means to be gay.[21] But this cannot be the entire story. In general, if there are good policy reasons to oppose a particular practice or behavior, it is not obvious why it should matter whether some members of the public desire to engage in that practice more than other members of the public. That fact might make us suspicious of the opposition to the practice—perhaps it is just the people not

[19] *See, e.g.*, Jessica A. Clarke, *Against Immutability*, 125 Yale L.J. 1 (2015) (criticizing the immutability doctrine).
[20] *See, e.g.*, Washington v. Davis, 426 U.S. 229, 242 (1976).
[21] *See In re Marriage Cases*, 183 P.3d at 441.

interested in the practice unduly discounting the enjoyment the minority of interested people get out of it—but that has never been deemed sufficient for heightened equal-protection scrutiny.

I offer a slightly modified account. The reason same-sex marriage bans discriminate on the basis of sexual orientation is *both* because sexual orientation is deeply linked to same-sex couple status *and* because married same-sex couples are understood by courts and society to be fundamentally analogous to married different-sex couples. That is to say, in comparing same-sex marriage to different-sex marriage, what sticks out is not any change in the structure or essential nature of the marriage (which, after all, is more or less legally identical), but just the kinds of people who seek it. Instead of one practice, same-sex marriage, and another distinct practice, different-sex marriage, there is just marriage, as practiced by straight people (and some bisexual people), and marriage, as practiced by gay people (and some other bisexual people).[22] To ban one, and not the other, thus looks like sexual orientation discrimination in the same way that selectively denying legal recognition to Jewish ceremonial weddings would be discrimination on the basis of religion. The primary function of the discrimination is not to distinguish between two different kinds of marriage, because the kinds of marriage at stake are basically the same, but just to distinguish between *people*, because it is differences between people that mostly constitute the distinction.

[22] One worry about my line of argument here is that it is essentially assimilationist; it positions LGB people as "just like" straight people but for one minor difference. But I am making a much narrower claim; not that LGB people are just like straight people, but that LGB *marriages* are legally identical to and correspond to the same basic goods (companionship, sexuality, family life) as straight marriages. It may nonetheless be true that fewer LGB people pursue marriage than straight people, or that the marital behavior of same-sex couples differs on average from the marital behavior of different-sex couples, say, in a more egalitarian distribution of household tasks, or in greater tolerance (at least among male married same-sex couples) for extra-marital sexual outlets. But they face the same legal framework in making those choices, and their decisions will match those of some different-sex married couples even if the proportions differ.

The central question as to whether this analogy extends to multiple-partner marriage is whether the analogy between same-sex marriage and different-sex marriage is substantially stronger than the analogy between multiple-partner marriage and monogamous dyadic marriage. Consider first same-sex marriage. Same-sex marriage surely challenged pervasive ideas of how marriage was supposed to look and work. But same-sex marriage did not change the legal framework of marriage; same-sex couples are subject to the same rights and responsibilities as different-sex couples. Of particular significance, marital property rules and post-divorce support obligations do not differ between same-sex couples and different-sex couples. This has not, to be sure, always been the case: when the legal structure of marriage was more rigidly gendered, with different rights and responsibilities allocated to the husband and the wife, same-sex marriage would not have been as tightly analogous with different-sex marriage. But by the time of Obergefell, that argument was unavailing—among other reasons, because such a legal structure of marriage would almost certainly be held to be unconstitutional sex discrimination today.[23]

Another possible disanalogy is the suggestion that same-sex marriage alters the law's treatment of the relationship between marriage and parentage. But all the means for same-sex couples to acquire parentage through marriage were already established for different-sex couples. Step-parent adoption and donor insemination statutes granting legal parentage to the spouses of mothers conceiving with donor sperm both long predated same-sex marriage. And the use of the marital presumption of parentage to confer legal parentage on people who clearly are not genetic parents is a matter of long-standing tradition.[24] Likewise, more broadly, same-sex marriage did

[23] *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973) (invalidating a statute distinguishing between husbands and wives).

[24] *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 124-26 (1989) (discussing how "our traditions have protected the marital family" from disruptive inquiries about genetic parentage, in the course of turning aside a substantive due process challenge to a conclusive marital presumption of parentage applied to a person who unambiguously was

not invent the phenomenon of couples who marry despite known infertility, or couples who marry with no intention of having children.

Multiple-partner marriage is *not* analogous to monogamous dyadic marriage in the same way that same-sex marriage is analogous to different-sex marriage. The relational structure of an association involving three or more people is different from that of an association involving only two; the regulatory problems and distributive problems are quite different in kind. Monogamous dyadic marriage as presently practiced has no set of rules for, say, handling conflict between spouses over access to the resources of a third spouse, or conflict between spouses as to whether to add an additional spouse to a marriage. Its assumption of a two-person marriage, where both spouses are forbidden to marry anyone else, pervades its regulatory structure and its other legal incidents. A system of marriage that accommodated multiple-partner marriage would have to look quite different from the system of marriage we have today.

Understood in this way, as reflecting the nature of marriage's current legal framework, a ban on multiple-partner marriages is appropriately understood for equal protection purposes to distinguish between relationship types rather than between polyamorists and non-polyamorists. The question of suspect classification, then, is irrelevant; whether or not direct discrimination against polyamorists should get heightened equal-protection scrutiny, prohibitions on multiple-partner marriages should not.

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not a genetic parent). To be sure, the marital presumption differs somewhat in different states. But to the extent that in actual practice it is genuinely confined to children who likely are in fact the biological children of both parents, nothing about the equal treatment of same-sex couples requires that the wives of women who conceive through donor insemination be granted parental rights any more than the husbands of women who conceive the same way. For one discussion of this issue, see Henderson v. Adams, 2016 U.S. Dist. LEXIS 84916 (S.D. Ind. June 30, 2016) at *30-35.

There is sense to this result beyond the narrow logic of doctrinal categories. Equality law is not a general warrant to re-evaluate social policy choices, but rather a limited tool to challenge the exclusion of particular people from pre-existing rights, responsibilities, or institutions. Same-sex marriage fits neatly into this conception. While many opponents argued that including same-sex couples in marriage would not amount to mere inclusion but rather would fundamentally transform the institution, this argument is no different in kind from similar arguments that have been raised against, say, the inclusion of women in male-only schools.[25] In both cases, at least facially, the eligibility condition (being a man, being a different-sex couple) was not directly embodied in the structure of the institution (you can be subject to a particular pedagogical approach whether you are a man or a woman, and you can be assigned the legal rights and duties of marriage whether you are part of a same-sex couple or a different-sex couple). Opponents had to argue that, *nonetheless*, there was some way in which worthy aspects of the culture or practice of the institution would be damaged by the inclusion of women or same-sex couples, an argument that rightly belongs at the government justification stage of the analysis, rather than at the threshold question of what standard of review to apply. Not so here. A constitutional argument for the recognition of multiple-partner relationships as marriages would certainly be an argument for greater inclusion, like an argument for the recognition of same-sex relationships as marriages. But it also, necessarily, would be an argument for changing the rules of the institution—not just the entry rules, but the rules of how it works once you are in it, and not just in some ultimate cultural sense, but immediately, facially, legally. Equality, or at least the narrow kind of equality at issue in equal protection, is not the right way to think about this problem.

[25] *See, e.g.*, United States v. Virginia, 518 U.S. 515, 542-43 (1996) (considering and rejecting argument that "admission of women would downgrade [the Virginia Military Institute's] stature, destroy the adversative system and, with it, even the school").

FUNDAMENTAL RIGHT TO MARRY

A second constitutional argument for the invalidity of same-sex marriage bans is that they infringe on the fundamental right to marry. This approach is ultimately that adopted by *Obergefell*, and therefore perhaps the one most important to the question of whether the legalization of multiple-partner marriage can rely on the constitutional case for same-sex marriage. The argument works as follows. Longstanding Supreme Court precedent holds that marriage is a fundamental right that can only be restricted with a strong justification.[26] Same-sex marriage bans prohibit particular couples from getting married without any especially persuasive justification, and therefore are an invalid infringement on the right to marry.

The key issue in the fundamental-right-to-marry argument—and the part that is most crucial for understanding its relevance to multiple-partner marriage—is the threshold question of how to determine whether or not the right to marry a person of the same sex is part of the fundamental right to marry, such that a bar on it constitutes an infringement of that right. On one view, advanced by the dissents in *Obergefell*, the scope of the fundamental right to marry is determined by history and tradition.[27] If this is so, then obviously multiple-partner marriage is out, because the history and tradition of marriage in the United States has been as a dyadic institution entered into to the exclusion of all others. But same-sex marriage is also out, for the same reason: marriage has historically and traditionally been a man-woman union. Thus Chief Justice Roberts' question: if the fundamental right to marry is not constrained by history and

[26] *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978) (invalidating a ban on marriage by people with outstanding child support obligations, because it infringed upon the right to marry without sufficient justification).
[27] *Obergefell*, 135 S. Ct. at 2618 (Roberts, C.J., dissenting).

tradition, but instead applies broadly on account of the importance of liberty and autonomy to intimate family life, why would it not apply to a challenge to the two-person limitation?

There is much in Justice Kennedy's opinion that indeed does raise this question. Kennedy gives an account of "four principles and traditions" that "demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples."[28] The first is that "the right to personal choice regarding marriage is inherent in the concept of individual autonomy";[29] the second 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";[30] the third is that "it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education";[31] the fourth is that "marriage is a keystone of our social order."[32] With the exception of the qualification of "two-person" in the second, which looks a lot, per Justice Roberts, like a "random[] insert[ion of] the adjective 'two',"[33] all four of these "principles and traditions" are readily applicable to multiple-partner relationships. Multiple-partner marriages undoubtedly implicate "the right to personal choice regarding marriage" in the sense that they involve autonomous choices about marital life; multiple-partner marriages, as marriages, are important in a distinct way from other non-marital unions a person might have[34]; multiple-partner marriages can also involve children and family life; and Kennedy certainly offers no reason (and none is obvious) why multiple-partner marriages would be less a part of the

[28] *Id*. at 2599.
[29] *Id*.
[30] *Id*.
[31] *Id*. at 2600.
[32] *Id*. at 2601.
[33] *Id*. at 2622 (Roberts, C.J., dissenting).
[34] Kennedy could be taken to mean that marriage is *more important* than any other union to the individuals in one, which may *not* be true for a multiple-partner marriage, but may not be true for a two-person marriage either.

"keystone of our social order" than monogamous two-person marriages. Were this all Kennedy had to say, Justice Roberts would be right.

But that is not all Kennedy has to say. In a different part of the opinion, Kennedy takes on directly the suggestion that his approach is inconsistent with *Washington v. Glucksberg*,[35] the due process case most directly setting forth the history-and-tradition method of fundamental rights jurisprudence. While acknowledging that "that approach may have been appropriate for the asserted right there involved (physician-assisted suicide)," Kennedy notes that "it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy. *Loving* did not ask about a 'right to interracial marriage'; *Turner* did not ask about a 'right of inmates to marry'; and *Zablocki* did not ask about a 'right of fathers with unpaid child support duties to marry.'"[36] He elaborates, "[i]f rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied."[37]

Kennedy is not especially clear by what he means in this passage, especially not as to what distinguishes the rights claims at issue in *Glucksberg* from the rights claims at issue in *Obergefell*. But given his discussion of the previous marriage cases and his reference to "rights [being] defined by those who exercised them in the past," Kennedy can be read here as drawing a distinction between the assertion of *new rights* as in *Glucksberg*, where the appropriate methodology is the history and tradition one, and a challenge specifically to *party-based*

[35] 521 U.S. 702 (1997).
[36] *Obergefell*, 135 S. Ct. at 2602.
[37] *Id.*

restrictions on well-established rights, as in *Loving*, *Turner*, *Zablocki*, and *Obergefell*.[38] On this reading, the difference between Kennedy and the dissents in *Obergefell* on the proper methodology of fundamental-rights jurisprudence is much narrower than it appears. Kennedy is not overruling *Glucksberg*, as Roberts suggests he is in dissent.[39] Instead, he is limiting it. While the dissents would include in the definition of the right what parties are eligible for it (at least sometimes), Kennedy suggests that, at least as to parties, the history-and-tradition methodology does not suffice. Where the restriction is not party-based, as with physician-assisted suicide, the history-and-tradition methodology might still be perfectly appropriate.[40]

A same-sex marriage ban is a party-based restriction on marriage: particular couples are barred from marriage on account of their sex composition. A ban on group marriage clearly is not: you need not know anything about the individual identities of the parties who seek to join a group marriage to know that no such legal arrangement is possible. A ban on polygamy is a more difficult question. If Richard marries Jonathan, and then Richard attempts to marry Aaron, Richard and Aaron cannot get married because one of them (Richard) is already married to someone else. That looks like a party-based restriction on marriage. But that is not the best way to think about the restriction. If Richard were to be simultaneously married to Jonathan and to Aaron, the content of the marital obligations he would owe to each would necessarily differ; if he

[38] This is how the Fourth Circuit and the Tenth Circuit distinguished *Glucksberg*. *See Bostic*, 760 F.3d at 376-77; *Kitchen*, 755 F.3d at 1215 ("As we have discussed, the Supreme Court has traditionally described the right to marry in broad terms independent of the persons exercising it. The Court's other substantive due process cases similarly eschew a discussion of the right-holder in defining the scope of the right").
[39] *Obergefell*, 135 S. Ct. at 2621 (Roberts, C.J., dissenting).
[40] For a similar argument, see Morris v. Brandenburg, 2016 N.M. LEXIS 151 (N.M. June 30, 2016) at *35 (rejecting a constitutional right to physician-assisted suicide in part "because unlike Loving, Turner, Zablocki, and Obergefell, which had as a tradition the fundamental right to marry with all of the rights, responsibilities, and divorce procedures carefully defined, we do not have such a tradition to fall back on regarding physician aid in dying").

were to die intestate, for example, both of his spouses could not each inherit all of his property.[41] The restriction against forming multiple dyadic marriages, then, can be understood as turning on the necessary resultant alteration of the legal relationship, rather than on the identity of one of the parties.

Fundamental-rights jurisprudence involves a running methodological debate about how much to rely on a judge's abstract principled reasoning, on the one hand, and on deference to common and historical practice, on the other hand. Go too far in one direction, and the worry is that a judge's policy judgment substitutes for that of more directly representative bodies. Go too far in the other, and the worry is that blind deference to existing practice simply licenses ongoing historical injustices. Including same-sex marriage within the fundamental right to marry, contrary to the protestations of the *Obergefell* dissenters, is justifiable on all but the most tradition-oriented approaches. The plaintiffs in *Obergefell* were, after all, seeking *exactly the same* legal treatment already offered to different-sex couples. They were not seeking a different legal framework, that they nonetheless argued was relevantly similar; they were seeking the same legal framework with all the same legal rights and responsibilities. To say that, if such a legal framework is well-recognized as a fundamental right for different-sex couples, it should also be recognized as a fundamental right for same-sex couples, requires *some* independent judgment on the part of a court, but not much.[42] To say that multiple-partner marriages falls within the fundamental right requires a much greater level of independent judgment. It involves

[41] *See, e.g.*, Mass. Gen. Laws Ann. ch. 190B, § 2-102(1) (West 2016) (providing that a surviving spouse inherits the entire intestate estate if the decedent has no living parents or children, or if the only children of either spouse are the children of both spouses).

[42] At least not much beyond that already embodied in sex discrimination jurisprudence, that marriage should not be legally structured in a rigidly gendered way and that men and women should not be subject to broad stereotypes that diminish their individual capacities.

the court, not only in invalidating an entry barrier, but in constructing a new form of relationship recognition.

GOVERNMENT INTERESTS

On any standard of scrutiny, a government policy subject to due process or equal protection challenge must make at least some rudimentary showing that it serves a legitimate public purpose. In the end, maybe the most persistent difficulty same-sex marriage opponents had was their inability to come up with a policy justification that was persuasive to courts. In *Obergefell*, the main substantive policy argument made by opponents, that same-sex marriage would "sever[] the connection between natural procreation and marriage," was dismissed cursorily in a single paragraph as "rest[ing] on a counterintuitive view of opposite-sex couple's decisionmaking processes regarding marriage and parenthood."[43] Similarly, the doctrinal arguments for the distinction between same-sex marriage and multiple-partner marriage are rather hollow if, in the end, the justifications for the legal restriction that could be given to a court are just as unpersuasive and seemingly jury-rigged as those relied upon by same-sex marriage opponents.

And, indeed, many common policy arguments against multiple-partner marriage are quite weak, or otherwise defective for purposes of defending the restriction against constitutional attack. The most basic reason multiple-partner marriage is not permitted is probably that it is deviant, that it contradicts dominant social mores about what is acceptable and valuable in sexual and romantic relationships, but even if there are good moral arguments against multiple-partner relationships (I doubt it), it is doubtful that courts would accept such unabashed legal moralism

[43] *Obergefell*, 135 S. Ct. at 2606-07.

today. Several common social harm arguments are also not especially persuasive. One approach is to argue that multiple-partner marriage engenders misogyny and child neglect by encouraging men to invest in acquiring more wives (including by seeking to marry younger and younger girls) rather than in improving the well-being of their children.[44] But it seems rather strange to say that the remedy for forced or underage marriage is to restrict a person's number of spouses, rather than directly to enforce the laws against forced or underage marriage. As for the worry that men will invest in wives rather than kids, it is not clear why this is not equally an argument against cars, or intense high-status careers, or any number of other goals that might equally distract a father from being sufficiently committed to his children.

Another approach is to argue that multiple-partner marriage is objectionable because it produces an excessive number of unmarried men. The argument here is that multiple-partner marriages will in practice overwhelmingly involve one man married to several women, meaning that the pool of unmarried women will be smaller than the pool of unmarried men and that many men will be unable to find wives. These unmarried men, in turn, are socially dangerous because they are especially likely to be violent or otherwise irresponsible members of society.[45] One response to this argument is that it is not at all obvious that this would in fact be the result today. But there is a deeper problem with the gender politics of this argument: it functions to restrict women's choices (to marry men who are already married) so as to ensure they are available to tame unmarried men by marrying them. The logic of the argument equally militates against women choosing to stay single, or indeed doing anything that might reduce their chance of

[44] *See, e.g.*, Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, ¶¶ 518-33.
[45] *See, e.g.*, Jonathan Rauch, *No, Polygamy Isn't the Next Gay Marriage*, Slate (May 29, 2016 3:07 PM), http://www.politico.com/magazine/story/2015/06/polygamy-not-next-gay-marriage-119614.

properly fulfilling their role as wives to otherwise-criminal men. Quite aside from the general constitutional status of restrictions on multiple-partner marriage, this argument seems inconsistent with the constitutional commitment to the equal citizenship of men and women.[46]

I suggest an alternative. Unlike same-sex marriage, where the arguments in opposition primarily concerned broad and purportedly negative cultural effects from including same-sex couples in marriage, and contrary to the arguments of some multiple-partner marriage opponents that similarly point to broad social harms from multiple-partner marriage, the most powerful reasons to oppose multiple-partner marriage have nothing to do with broader society and everything to do with the particular people involved in the relationship. In addition to being a powerful dignitary marker of status, marriage is also—if anything, more centrally—a regulatory and distributive legal structure, a vehicle that assigns particular rights and duties to spouses and that redistributes property in the event of a divorce. While it can accommodate (perhaps more or less well) a wide variety of different social and economic circumstances between *two people*, as presently structured it cannot accommodate more than two. And the problem of how to workably adapt it to more than two people, without sacrificing important policy goals associated with marriage, is quite difficult and possibly unsolvable.

[46] While restrictions on multiple-partner marriage do not discriminate facially on the basis of sex, "the necessary discriminatory . . . purpose" for an equal protection violation need not "be express or appear on the face of the statute." *Davis*, 426 U.S. at 241. On this rationale, the purpose is restricting multiple women from marrying one man; the statute may also restrict multiple men from marrying one woman, but that actually undermines the purpose by increasing the number of unmarried men. The whole argument depends on the idea that a facially neutral polygamy ban will disproportionately restrict women. As sex discrimination, this policy must be justified by "an exceedingly persuasive justification" and "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *United States v. Virginia*, 518 U.S. at 531, 533. Since everything about the argument relies on such "overbroad generalizations," it seems doubtful that it would pass constitutional muster. *Cf. Craig v. Boren*, 429 U.S. 190, 201-04 (1976) (rejecting arguments that greater male irresponsibility justifies sex discrimination).

There are two basic strategies for trying to adapt marriage law to accommodate multiple-partner marriages. One is group marriage, where marriage is altered so as to accommodate more than two parties, all of whom are treated as being in a legal relationship with each other, as in a business partnership. The other is polygamy in the narrow sense of the word: keeping marriage as a two-person legal union, but permitting people to have more than one, and finding rules to handle the resultant issues. I consider each in turn and suggest that both give rise to regulatory and distributive problems that legitimate government restrictions on these relationship forms. I do not consider every possible way that a multiple-partner marriage might work; there is too much potential variety. But I try to illustrate the set of problems and the difficulties encountered in trying to solve them.

Group marriage

Dyadic marriage can be usefully analogized to a partnership, in the sense of the business association, between two people: there is an agreement to cooperate in a common enterprise (marriage and family life), profits (income) are shared, and each spouse has fiduciary obligations to the other. Building on this analogy, Adrienne Davis, noting that partnerships in business law have no limitation to only two people, proposes that multiple-partner marriage be instituted as a modified partnership regime.[47] This proposal functions as a group marriage. Just as in a dyadic marriage, income is averaged across all the spouses in the group and, in the event of divorce, property is divided equally. This approach has several advantages. It is a fairly natural extension of dyadic marriage, it has a simple, egalitarian rule for handling competing claims on property

[47] Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 Colum. L. Rev. 1955, 2002-2004 (2010).

and income within a household, and it avoids the tricky problems for equality and mutuality of obligation that can result when one person is married to several other people who are only married to him.

But the partnership analogy, fruitful as it is, also illustrates the problem with this proposal. In a classic commercial partnership, partners are compensated for their contributions by their equal share of partnership profits.[48] Their ability to benefit from the partnership in other ways is strictly limited; they cannot deal with it as an adverse party, for example, without breaching their duty of loyalty.[49] The result is a relative homogeneity of interest among partners. It is not a perfect homogeneity; they still might contribute in different ways and make different choices about how much to contribute. But because their primary source of benefit is partnership profits, and partnership profits are shared among all the partners, the incentives of the partners are relatively aligned toward securing shared benefits.[50]

This model, somewhat idealized even as applied to really existing commercial partnerships, is unlikely to be very reflective of how multiple-partner marriages would work. This claim is not about the virtue or character of people in multiple-partner relationships; it is just about the nature of romantic relationships. While sometimes marrying someone is primarily a means of income-boosting, for the most part marriage is not a commercial project and marrying someone is about securing other benefits, like companionship. But, unlike monetary profits, companionship gains cannot be divided up equally among the spouses. Further, interest in companionship (or in sex) with a particular person is likely to differ across spouses. The result is

[48] Revised Uniform Partnership Act (RUPA) § 401(b).
[49] RUPA § 404(b)(2).
[50] For one discussion of the benefits of homogeneity of interest in business enterprises, see Henry Hansmann, *Ownership of the Firm*, 2 J. L. Econ. & Org. 267, 278-79, 283-84 (1988).

a potential for conflict that is hard to adjudicate. If Robert and Julian are business partners considering whether to bring Andrew on board, the question can be answered according to a common yardstick by asking whether Andrew's boost to the partnership's profits will exceed the one-third share he will take. If it will, both of them gain by adding him, and if it will not, both of them lose. But if Robert and Julian are spouses considering whether to add Andrew to their marriage, their interests might differ considerably. Robert might be strongly romantically attracted to Andrew, while Julian might have no interest; Robert might find Andrew's personality endearing, while Julian finds it obnoxious; and so on.

The conflict extends beyond questions of who to add to a relationship. To extend the previous example, once Andrew is part of the marriage, Robert and Julian are likely to disagree on his role. Julian's interest will be in maximizing the income Andrew brings in, because he gets a share of the income but no share (or not much of a share) of the non-monetary gains. Robert also has an interest in Andrew generating more income, all else being equal, but might happily prefer he work a lower-paying job in exchange for him being able to come home earlier and spend more time with Robert. This is not simply the free-riding problem that exists in any partnership. Even if Andrew is entirely non-selfish, either choice he makes benefits one at the expense of the other.

The result of such conflict is profound vulnerability on the part of spouses in a world with multiple-partner marriage structured as a partnership. It is always possible, of course, even in a dyadic marriage, for one spouse to undermine the interests of the other spouse. But the hope, in a dyadic marriage, is that some combination of shared affection, norms of commitment, and divorce law will reduce the risk of exploitation to a tolerable level, with the first two generating greater identity of interest between the spouses and the third providing a way out if those fail.

Divorce law remains an option on this model, but the other two cannot deal effectively with the conflict of interest. Robert will feel affection for both Julian and Andrew, whose interests conflict, while Julian and Andrew may have no affection for each other; that just reproduces the conflict. Norms of commitment are indeterminate because being committed to one member of the marriage can mean undermining one's commitment to another. Worse, the commitment norm people might actually be inclined to follow may not reflect the scheme's assumption of a group marriage. Andrew might be strongly committed to Robert and indifferent or indeed antagonistic toward Julian. And because of heterogeneity of interests, Andrew is perfectly capable of conferring benefits on Robert specifically while simply serving as an income siphon with respect to Julian.

Davis proposes two ways of reducing the risk of exploitation. One is a requirement of unanimous consent to join a marriage.[51] This requirement helps but it does not suffice. Mutual consent can be present in form but not in substance; a spouse might go along with adding another spouse under pressure and primarily to please the other spouse.[52] Unanimous consent is also only possible at the initial stage, at the point where the additional spouse is added to the marriage. Because being married to someone on this scheme is transitive—if Julian is married to Robert

[51] Davis, *supra* note 47, at 2008-10.

[52] Davis argues that this problem can be reduced through legal norms of duress and fiduciary duty. *Id*. But it seems doubtful that these concepts are anywhere near capacious enough to get around this problem. Duress might help in a case where the reluctant spouse had no real choice. *See* Austin Instrument, Inc. v. v. Loral Corp., 29 N.Y.2d 124 (1971) ("A contract is voidable on the ground of duress when it is established that the party making the claim was forced to agree to it by means of a wrongful threat precluding the exercise of his free will"). But a spouse might choose to go along to make her spouse happy, or to avoid the risk of divorce, or for some other reason that falls short of duress while still not being reassuring about her protection from exploitation. As far as fiduciary duty, spouses regularly have opposing interests and preferences, and one spouse pushing for a course of action that accords with her preference presumably is not in breach of fiduciary duty just because that course of action does not accord with the preference of the other spouse. In any event, it is not obvious what remedy Davis proposes if a court finds after the fact that there was duress or breach of fiduciary duty involved in the addition of a spouse to a marriage. See *supra* at 31-33 for a discussion of an analogous issue about contracting.

and Robert is married to Andrew, Julian must also be married to Andrew—Julian cannot divorce Andrew without also divorcing Robert, so once he has consented once, his only choice is to take or leave the whole package.

The other proposal is for spouses to be able to select, when they marry, whether their marriage will be a marriage of the form to which spouses can be added, or a marriage not of that form.[53] But while this proposal at least ensures that the limited vulnerability principle will not be undermined by surprise, it does not alter the fact of the vulnerability. And insofar as it seeks to justify that vulnerability through consent, it is subject to the same objections as the unanimous-consent requirement: a person might agree to the non-dyadic form under pressure, and once agreed to, it cannot be unilaterally altered if the person changes her mind.

There is a third approach that is more promising for at least some polyamorous relationships. My argument has stressed heavily the heterogeneity of interests that can develop in a multiple-partner marriage. But heterogeneity to homogeneity is a continuum. While I have used the example of a same-sex triad, the most obvious heterogeneity involves straight people: classically, a man married to two women, where the man is interested in both women and each woman is only interested in the man. This classic model does not exhaust the possibilities. Same-sex couples who introduce a third person out of shared sexual and romantic interest are a better fit for the partnership model; likewise relationships of both men and women where all members are bisexual; and also, perhaps, a multiple-partner relationship among straight people where the members who are not sexually and romantically attracted to each other are nonetheless close, committed friends. But it is hard to imagine a workable legal scheme for limiting this

[53] Davis, *supra* note 47, at 2013-16.

relationship structure to these sorts of poly relationships, especially since most people are straight. And even in a situation where both original spouses start out with similar interests with respect to a third spouse, as the relationship develops, that mutuality may fade.

Conceivably, cultural norms might help. There could, for example, be a social expectation of mutual commitment and affective interest (of some variety) among all the spouses, and a sense that a defect in such relationship between any two of the spouses is a failure of the marriage of the sort that could justify divorce. In effect, the proposal here would be to scale up the protective mechanisms of shared affection, norms of commitment, and divorce law that limit the risk of exploitation in dyadic marriages.[54] But it is reasonable to worry that such a norm is less natural than a norm allowing for "V-shaped" relationships, where Susan and Abigail share mutual commitment and Abigail and Katherine do as well, but Susan and Katherine do not see each other as committed partners. Among other things, the mutuality norm leads to instability—even for a triad, there are three binary relationships that must be managed[55]—and loss aversion will undermine it as people seek to stay in relationships with one of their spouses even as their relationship with the other has deteriorated. This risk is especially large because of competition among spouses. If Susan, Abigail, and Katherine once shared mutual commitment and interest, but Susan's and Katherine's relationship has deteriorated, both may delay exit in the hope that the other will exit first, enabling them to preserve their marriage to Katherine. The result is the previously described Susan-Abigail-Katherine V-shaped relationship.

Versions of these issues, of course, can arise in dyadic marriages too. A couple whose relationship has deteriorated may find themselves staying together nonetheless for the sake of the

[54] *See infra* at 22-23.
[55] The number of binary relationships is $n(n\text{-}1)/2$, where n is the number of spouses, and increases quadratically as the number of spouses increases (six for four spouses, ten for five, and fifteen for six).

children, or because they have both made long-term investments that are hard to untangle, or because they do not want to face the social stigma of divorce. Such spouses will not be protected from exploitation by divorce law (a route they have chosen to forgo) or mutual affection (which has faded). Commitment norms might do some of the work, but also perhaps not. What is special about multiple-partner marriage, constructed in this way as a partnership, is not that it opens the door to exploitation where there was no possibility of it before, but rather that it expands the potential for exploitation. Because of the difficulty scaling up the protective mechanisms of dyadic marriage, even as flawed and liable to failure as they are, these problems take on a special significance for group marriage.[56]

In sum: group marriage, structured as a partnership, increases vulnerability within marriage by applying legal marital obligations to relationships between people (like Julian and Andrew, or Susan and Katherine) where it is unrealistic to expect them to work. There is no clear way to avoid this problem while retaining the underlying model. The government therefore has a substantial interest in not permitting this sort of marriage structure.

Polygamy

An alternative to group marriage is to preserve marriage as a legal union between two people, but do away with the requirement that a person can only be in one marriage at a time. This proposal is likely to be substantially more complicated than either dyadic marriage or group marriage as partnership. It must set rules for resolving competing legal claims among people

[56] Further, it does not detract from this argument to point to the high rate of divorce for dyadic marriage to cast doubt on whether such marriages are so successful. My worry here is not about break-up rates, but about how the relevant legal rules work while the marriage is intact and in whatever property distribution results from dissolution.

who may not have direct legal relationships with each other (say, between Julian and Andrew, when both are married to Robert and not to each other), and because this problem does not exist for contemporary marriage law, it is not obvious what those rules would look like. While polygamy has been widely practiced, it has not been widely practiced in a society where sex equality is a strong norm of marriage law and where marriage can occur between two people of the same sex. It is one thing to resolve competing claims where the husband earns the income (or is deemed to have earned it) and has support obligations to his multiple wives, each of whom can only be married to one man. It is another to do so when some of those wives might themselves earn income, or be married to other people.

Three features of the regulatory and distributive aspects of contemporary marriage law pose problems for multiple-partner marriage. The first is that marriage law reflects an assumption of social and economic union. Couples are taxed jointly; workplace benefits like health insurance are structured to facilitate providing them to one's spouse; social programs like Social Security seek to protect dependent spouses from the loss of the income-earner who supports them; divorce law, through property division and alimony, does not treat income earned during and even after a marriage as solely belonging to the person who earned it. I will call this aspect of marriage law *union* for ease of reference.

The second is that marriage law is, at least formally, egalitarian and reciprocal; what Spouse A owes to Spouse B, Spouse B also owes to Spouse A. Because marriage no longer is (and constitutionally cannot be) an institution that assigns rights and duties differentially based upon sex, each spouse has the same rights and duties as the other spouse. I will call this aspect of marriage law *reciprocity*.

The third, not usually stated expressly but nonetheless straightforward, is that the rights and duties of marriage extend to one's *spouse* and not to some other person. While the legal obligations of marriage make a person somewhat vulnerable to exploitation at the hands of her spouse, a core limitation on this vulnerability is that it is only *to* her spouse, and not to third parties (except perhaps through her spouse, through normal spousal obligation). I will call this aspect of marriage law *limited vulnerability*. This label should not be taken too literally; in some sense, all three of these aspects of marriage law are about limiting vulnerability. My aim here is to capture the *specific* protection embodied in the idea that one owes marital obligations specifically to one's spouse and not to others.[57]

Polygamy puts stress on each of these. Start with union. As a matter of practical fact, in many polygamous households the earnings of each spouse will be relevant to the economic position of all the other spouses, whether or not there is a direct legal relationship. Many important economic decisions, like where to live, will have to be made collectively (at least assuming cohabitation), and so sometimes one spouse will take an economic loss (say, by losing an optimal job opportunity) for the sake of increasing the earnings of another spouse, to whom the first spouse might not be directly married. Does that mean that, to prevent the resultant unfairness, we impose income-sharing and support obligations not only on people directly married to each other, but also on people who are two steps (or more?) apart on the marriage network? The flip side of promoting union in this way is undermining limited vulnerability.

Reciprocity also poses difficulties. Clearly, polygamy in today's society cannot retain the traditional rule that one spouse is entitled to marry more than one person and the other spouses

[57] One way to understand the problem with group marriage as partnership is that it undermines this principle.

are limited only to him. But it will still be the case that many relationships will involve one person married to multiple other people, each of whom are married only to her. Because marital obligations with respect to property are competing, this poses a problem of mutuality of obligation. For the person with multiple spouses, her obligation to each is constrained by her obligation to the others. But because her spouses are only married to one person, their obligations may not be constrained in the same way. This rule is not inevitable; we could avoid this problem by limiting the marital obligations a person in only one marriage has to her spouse when her spouse is in multiple marriages. But in doing so, we move further away from marriage as an economic union.

Indeed, it is tempting in thinking about this problem to suggest that the solution is to substantially weaken, or jettison entirely, the idea of marriage as an economic union for polygamous marriage. The default rule that marriage is an economic union is highly contestable even for marriage as it presently exists, especially for dual-earner couples who separate out their finances. Weakening or eliminating the principle might be quite appropriate for many polyamorous relationships, encouraging the development of relative economic independence that makes the spouses less vulnerable to each other's relationship choices. Do away with the idea of economic union and there is no reciprocity problem (minimal or nonexistent economic obligations will not compete with each other) and no limited vulnerability problem (since spouses are taken to be economically independent, there is no question of extending economic obligations to people not directly married to each other).

The result, though, is a legal framework that may not map on to how people actually live, and that will result in substantial unfairness when it does not. For the framework to work well, each spouse's decisions about income-producing activity should occur relatively independently

of each other spouse's, so as to ensure that one spouse's economic opportunities are not sacrificed for the sake of another's. Further, each spouse should predominantly rely on her own income to support herself, to prevent the creation of economic dependence and the associated vulnerability. In practice, these assumptions will often be violated.

Another possibility is to abandon the notion of a general legal framework for property division and support obligations in a polygamous relationship, and instead opt for case-by-case adjudication based on the actual circumstances. Property could be divided evenly across all the spouses when that corresponds to the behavior and expectations of the parties to the marriage and where exploitation seems minimal or absent. Where the facts are otherwise, other rules could prevail. But this solution too seems inadequate, for multiple reasons. Because this solution relies on the ability of judges to decide discretionarily between quite different property division schemes based on their reading of complicated factual circumstances, it would make outcomes unpredictable and interfere with the ability of spouses to plan ahead and account for the possibility of divorce. For the same reason, it is dubious to rely on the *ex post* decisions of a judge to effectively identify and police exploitation and unfairness within a polygamous household.[58]

Further, fundamentally, it is entirely non-obvious what the *fair* outcome is in many cases; some of the value conflicts are quite difficult. Consider again the Julian, Robert, and Andrew example, now operating in a polygamous framework.[59] Say Julian and Robert are married and so

[58] I acknowledge that, to some extent, this is already true of property division and support obligations upon divorce. But at least in that context, it is easier to come up with fairly general rules to reduce the discretion and fact-sensitivity of the analysis. *See, e.g.*, Cal. Fam. Code § 2550 (LexisNexis 2016) (providing for equal division of the community estate).
[59] *Infra* at 22.

are Robert and Andrew, but Julian and Andrew are not married to each other. And say that Andrew decides to take the lower-paying job that brings less income into the household but enables him to spend more time with Robert. It seems right to say that this should diminish any claim he has over Julian's income and property purchased with that income.[60] But it seems *also* right that it should secure to him additional support obligations from Robert; he is sacrificing his own earnings for the sake of his husband. But that, in turn, raises a reciprocity problem for Julian and Robert. And if the solution to *that* problem is to limit Julian's obligations to Robert, then there are new problems for fairness with respect to Robert, who may have perfectly legitimately relied on expectations of income support from his (other) husband. The problem is not just practical. It is in the legal relationship structure itself, with the reality that the decisions of all the spouses impact each other, but (given heterogeneity of interests) no effective means of navigating and adjudicating the consequences of those impacts.

Contract and private ordering

My argument so far might be subject to two sorts of objections relating to contracting. First, one response to the difficulties with coming up with a workable rule for the economic obligations of a polygamous marriage is to not come up with one at all, but leave it up to the private arrangements of the parties, perhaps by requiring that they draft a contract specifying the terms as an eligibility requirement for access to multiple-partner marriage. Second, since the substantive terms of marital agreements are often not policed very heavily today, many of the

[60] Note, though, that this is not entirely obvious. What if all the parties expected that Andrew would have such a claim—perhaps because they did actually make many economic decisions together? Does Andrew's precise attitude toward Julian matter--e.g., does it matter whether Andrew acted maliciously or callously, or is it enough that he acted to secure a good that was not shared across the parties?

features of particular rules that I have objected to would be achievable through premarital or marital agreements. Marriage is an economic union by default, but spouses can limit the associated obligations by contract. Marriage involves reciprocal obligations, but this too is probably alterable through contract, though in cases of extreme one-sidedness it might be invalidated as substantively unconscionable. As long as mutual consent is required, one could understand the decision to add a spouse to a marriage, or to permit one spouse to marry another person, as a kind of marital agreement analogue. I treat these two objections together, because most of what I have to say about each applies to both.

As an initial matter, it is open to question whether contracting is an especially good means of resolving these problems, or whether marriage law's current relatively laissez-faire attitude toward the substantive terms of marital and premarital agreements is justified. Marriage law's defaults do not suit every couple, and it is reasonable that couples should have flexibility to tailor its norms to meet their needs. But while some marital agreements will reflect departures from the default rules that both spouses prefer, others will reflect the preference of one spouse, consented to by the other because of differences in bargaining power or access to information. It is not consent in itself that makes contracts fair, but robust competition, ready access to reliable information, and arms-length bargaining. The first will hardly ever be present in the marriage "market," since prospective spouses are not fungible, and the second and third often will not be. A state that takes this view on a consistent basis can avoid the force of the contract objections.

But the contract objections fail even on the more moderate prevailing view about marital agreements, where they are policed for procedural unfairness but not (much) on their substantive

terms.[61] The problem is that the default rules for marriage remain as an important backdrop even when they are modified by agreement.[62] If the agreement is invalid because of procedural defects, it cannot be enforced against a spouse seeking relief under the default rules. This fact breaks the analogy between a marital agreement and a choice to add a spouse to a marriage. It is workable and reasonably fair to apply the default rules of marriage where the agreement modifying those rules is invalid. But it seems much less workable or reasonably fair to *void the marriage* that was consented to through an invalid process; that disrupts the legitimate expectations of the additional spouse, who may have no fault whatsoever.[63] Similarly, if the property rules and support obligations for a polygamous household are set by contract, and that contract is invalidated at the point of divorce on account of procedural defects, resort to the normal (non-marital) rules for people who do not have contracts with each other would fail to protect the choices the spouses made in reliance on their marriages.

One potential solution to the remedy problem is to have a judicial pre-check on a multiple-partner marriage contract prior to the parties being able to marry. The judge could ensure that the substantive and procedural requirements are complied with and approve the contract, and the contract would then be enforceable. This proposal seems inadequate to resolve the problem, however. The same defects in bargaining that motivate restrictions on the

[61] *See, e.g.*, Uniform Premarital and Marital Agreements Act (UPMAA) § 9(a) (2012) (setting forth procedural requirements for the enforceability of a premarital agreement).
[62] *Cf.* Davis, *supra* note 47, at 2000-02 (noting the importance of marital default rules).
[63] To be sure, a marriage can be annulled for duress. *See, e.g.*, N.Y. Dom. Rel. Law § 7(4) (LexisNexis 2016) (marriage is voidable if consent was obtained "by reason of force, duress or fraud.") Procedural requirements for premarital agreements often substantially exceed merely requiring the absence of duress. *See, e.g.*, UPMAA § 9(a)(2) (requiring the party to "have access to independent legal representation"), (4) (requiring "adequate financial disclosure"). This breadth seems reasonable where non-enforcement simply means return to a default rule that treats neither party unjustly, but is harder to justify as grounds for annulment. Even a narrow annulment-for-duress rule poses special difficulties in the multi-partner context, where unanimous consent means that an added spouse can lose her marital entitlements on account of a defect in consent on the part of a third party to her romantic partnership. It is still probably the right rule, if we are going to have multiple-partner marriage, but it is not so comforting as a go-to solution for consent problems.

enforceability of prenuptial agreements would prevent the sort of robust, adversarial presentation of issues that would permit the judge to adequately assure that the requirements were met. A person who has been deceived or who has not received adequate disclosure will not yet know about those defects; a person pressured by the threat of her fiancé walking away is unlikely to want to cause trouble before the judge either.

In sum: multiple-partner marriage poses risks of unfairness and vulnerability to exploitation, as dyadic monogamous marriage does, but also in some new ways. None of the options for protecting against those risks—group marriage, polygamy, or contracting—seem fully adequate for that purpose. To be sure, I have not undertaken an exhaustive survey of all the possibilities, and there may be better ways of addressing some of these problems that I have not considered. Nor do I mean to suggest that the problems I have outlined necessarily outweigh the benefits of granting *de jure* recognition to relationships that already exist *de facto*, or that the difficulties of having a fair legal regime for multiple-partner relationships should necessarily supersede the benefit to liberty of leaving people the option. The policy question remains open. But as a constitutional matter, the regulatory and distributive problems associated with multiple-partner marriages make the government interests on the side of restriction look serious, certainly much more serious than the interests purportedly at stake in keeping same-sex couples from marrying. Nothing about the constitutional law of same-sex marriage speaks to those problems, or to the legitimacy of a state relying on them in defense of its marriage law.

SOME FINAL THOUGHTS

American constitutional law distinguishes between, on the one hand, ordinary social and economic legislation, and, on the other hand, legislation that impinges on fundamental liberty or discriminates against marginalized minorities.[64] The point of this paper, in a sense, is that the restrictions on multiple-partner marriage fall more naturally within the first category than within the second and third. The most important policy questions involved are not really about who should be in and who should be out of central social institutions, or what the right balance is between public morality and the general welfare on the one hand and the freedom to construct one's own intimate life on the other. Instead, they are about questions that rarely are treated as raising constitutional issues: how do you structure a legal relationship so that it is fair to all the parties involved? How do you allocate rights and duties to prevent exploitation? The limitation of marriage to two people and the prohibition on marrying while already married look on this view like just another of the ways in which marriage law regulates the relationship between the spouses, akin to the rules of marital property, the fiduciary duties spouses have to each other, or the provision for support payments in the event of divorce.

That said, too much should not be made of this conclusion. All of the above may be right, but it is still true that societal attitudes toward polyamorous and polygamous relationships are heavily moralistic and rooted in part in distaste for unconventional forms of relationship.[65] The

[64] *Compare, e.g., Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 488 (1955) ("The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought") *with, e.g., Obergefell*, 135 S. Ct. at 2604-05 (invalidating same-sex marriage bans under the Due Process and Equal Protection Clauses).

[65] *See, e.g.*, Peter Moore, *Polyamory: taboo for religious Americans but not for the rest*, YouGov (May 30, 2016 8:37 AM), https://today.yougov.com/news/2015/08/12/polyamory-taboo-religious-americans/ (finding that 56% of Americans think polyamory is morally wrong and 69% think that polygamy is).

constitutional claim for *marriage* specifically is only one constitutional claim relevant to the legal interests of people in multiple-partner relationships. My conclusions about it do not necessarily apply to other constitutional claims. For example, it is extremely doubtful that it is appropriate for governments to make people criminally liable for being in a legally-unrecognized multiple-partner marriage.[66] *Obergefell* probably does not help here, but *Lawrence v. Texas* might.[67] Likewise, legal recognition of multiple-partner relationships in particular contexts might be constitutionally required under the Equal Protection Clause or Due Process Clause.[68]

Legal marriage, however, is a different matter. The policy challenges to extending its framework to contexts beyond monogamous dyads make it difficult to argue that the legal restrictions against multiple-partner marriages are a simple matter of moralism or policing deviance. And those policy challenges mean that the merits of so extending legal marriage must stand or fall on their own merits, both as a matter of policy and as a matter of constitutional law. *Obergefell* has no bearing on the question; Chief Justice Roberts' challenge can be met. What *Obergefell* means for multiple-partner marriages is, in short, very little.

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[66] *See* Brown v. Buhman, 947 F. Supp. 2d 1170 (D. Utah 2013), *vacated*, No. 14-4117, 2016 U.S. App. LEXIS 6571 (10th Cir. April 11, 2016).

[67] *Lawrence* rejects "attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects." 539 U.S. at 567. It affirms that "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." *Id*. at 574. One way *Obergefell* may help indirectly is that it makes clear that *Lawrence* is a fundamental rights case, overriding federal appeals court rulings that held otherwise. *Compare Obergefell*, 135 S. Ct. at 3598-99, 2606 (classifying *Lawrence* as a fundamental-rights case) *with, e.g.*, Seegmiller v. Laverkin City, 528 F.3d 762, 771 (10th Cir. 2008) (classifying *Lawrence* as a rational-basis case). *But see* Ondo v. City of Cleveland, 795 F.3d 597, 608 (6th Cir. 2015) (refusing, shortly after *Obergefell*, to give up on its misreading of *Lawrence*).

[68] *See, e.g.*, Diaz v. Brewer, 656 F.3d 1008, 1013-14 (9th Cir. 2011) (affirming, on rational-basis review, a preliminary injunction against Arizona's withdrawal of health benefits from unmarried same-sex domestic partners); *see also Obergefell*, 135 S. Ct. at 2623 (Roberts, C.J., dissenting) (distinguishing between the constitutional analysis involved in a challenge to "the laws defining marriage generally" from that involved in "a more focused challenge to the denial of certain tangible benefits"); *cf. Beyond Same-Sex Marriage: A New Strategic Vision*, beyondmarriage.org (May 30, 2016 8:22 AM), http://www.beyondmarriage.org/full_statement.html (calling for respecting the worth of, among others, "[c]ommitted, loving households in which there is more than one conjugal partner," without specifying the appropriate legal framework for doing so).