

Introduction

In this book, I take seriously the idea of plural marriage.¹ While many legal scholars have written about same-sex marriage, none of them have produced a sustained treatment of marriages among three or more individuals. The state's continuing and extensive involvement in the institution of marriage, coupled with the growing belief that the state may not discriminate against gays and lesbians, puts into some doubt whether the state may limit marriage to couples. As progressive, important, and successful as the marriage equality movement has been, it is parochial by focusing on same-sex marriage at the expense of other kinds of intimate relationships that may also deserve legal recognition. This book begins to fill the lacuna in the scholarly literature by elaborating on why the constitutional arguments that support the option of plural marriage are better than the constitutional arguments against it.² A fair evaluation of such marriage is imperative when even the most open-minded of us are socialized in a society that venerates monogamy and too often self-righteously condemns unconventional beliefs and practices without adequate information or understanding.

It is not too much to ask from those who oppose plural marriage to formulate their respective positions without relying on prejudice, disgust, negative stereotypes, dubious empirical claims, speculation about adverse consequences, fear of difference, or controversial religious views.³ Even the

¹ In the rest of this book, when I refer to "marriage," I mean civil marriage – that is, marriage the state treats as a legal status. By "plural marriage," I mean being legally married to more than one person at the same time.

² Because they do not resonate in modern liberal democracies, I do not address some of the traditional arguments used to defend plural marriage, such as guaranteeing a husband for every woman, reducing adultery and prostitution, and increasing the number of children.

³ For a detailed history of the religious origins of marriage in the West, see John Witte Jr., *From Sacrament to Contract: Marriage, Religion, and the Law in the Western Tradition* (2nd ed.) (Louisville, KY: Westminster John Knox Press, 2012).

most deferential standard of review – rational basis – demands that the state have a legitimate interest in limiting marriage to couples.⁴ Unfortunately, public opinion about plural marriage has not changed much since the nineteenth century. Many Americans still cling to a sentimental notion of monogamous marriage, overlook its flaws, and refuse to consider the possibility that a plural marriage might work better for some persons under some circumstances or that those involved in a multiperson relationship might love one another and be happy together. As I shall show, opponents of such marriage ought to have the burden of persuasion to demonstrate that the state’s failure to recognize plural marriage is constitutionally permissible, which is a way of saying that discrimination against polygamists who would marry if they were allowed to do so should trigger a heightened standard of review or a stronger form of rational basis. As it turns out, none of the state’s interests in not permitting plural marriages are either compelling or important. In fact, they may not be legitimate. According to one scholar: “The legal arguments against polygamy . . . are extremely weak.”⁵ Under existing constitutional doctrine, a strong presumption in favor of marital choice has existed for a while.⁶ In a constitutional democracy like our own, competent adults should be able to marry more than one person at the same time unless the state can prove that it has adequate reasons for denying such choice.

In this book, I have three main aims. First, I invite readers to think about plural marriage in the first place if they have not done so already. The ongoing debate about same-sex marriage is not only about gay and lesbian couples and their constitutional right not to be legally discriminated against, but it is also about the even more complicated question of the most appropriate definition of marriage under the conditions of moral pluralism that characterize America. At stake is nothing less than how the law should treat those who

⁴ Constitutionally, animus – understood as visceral dislike, disgust, or hatred – cannot count as such an interest. See *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), *Cleburne v. Cleburne*, 473 U.S. 432 (1985), *Romer v. Evans*, 517 U.S. 620 (1996), and *United States v. Windsor*, 570 U.S. _ (2013). Dale Carpenter refers to these four cases as the “animus quadrilogy.” Dale Carpenter, “*Windsor* Products: Equal Protection From Animus”: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2424743.

⁵ Martha C. Nussbaum, “A Right to Marry?” *California Law Review*, 98 (2010), 688.

⁶ In this book, I do not have much to say about the decriminalization of polygamy. Rather, my concern is about the lack of official recognition by the state of consensual multiperson intimate relationships through a licensing scheme. The removal of criminal prohibitions would be the first stage in the process of legalization. Polygamy has never been effectively regulated. Such regulation might mitigate its worst aspects and therefore might be better public policy. See Mark Goldfeder, “It’s Time to Reconsider Polygamy”: www.cnn.com/2013/12/16/opinion/goldfeder-polygamy-laws/index.html?http=op_+1.

have unconventional ideas about intimate relationships, want the freedom to live accordingly, and desire equal legal treatment. At first, plural marriage may seem to be unequivocally morally disturbing due to its historical association with patriarchal practices, its recent connection to Warren Jeffs, and its continuing role in the practice of Fundamentalist Latter-Day Saints (FLDS) polygyny.⁷ A closer examination of its various forms, though, reveals that it deserves a second look. American history contains numerous examples of behaviors that were once widely thought to be immoral and are now considered to be morally permissible or even morally praiseworthy. Because we have often been wrong in the past, we should not be so confident that our contemporary moral judgment is infallible. With the benefit of hindsight, Americans may look back at a norm, which at the time seemed unproblematic, and conclude it made no sense. Not that long ago, many of them could not stomach same-sex marriages. In those days, most Democrats took positions on the issue that an increasing number of Republicans would not embrace in 2015. For years, Barack Obama's "public posture" with respect to same-sex marriage had been "all over the map."⁸ Such relationships are now more visible and less foreign.⁹ In the minds of many Americans and especially younger ones, same-sex marriages signify what is best in human life when two persons commit to sharing their lives with each other. The fact that the couple consists of two men or two women is increasingly irrelevant.

Second, I would like readers to evaluate the possible forms of plural marriage more objectively, as hard as that may be to do.¹⁰ For too long, antipolygamists have framed the issue to make it seem as if to be open to the idea of plural marriage is to endorse Hugh Hefner's lifestyle or to condone Jeffs's crimes. If monogamous marriage is to remain the only kind of marriage that bears the imprimatur of the state, those who care about treating others fairly should examine the case against plural marriage more closely before rendering a judgment. Although a lot of what I have to say gestures toward the disestablishment of civil marriage and its replacement with a more inclusive alternative, I devote most of my attention to plural marriage, with an

⁷ On Jeffs, see Stephen Singular, *When Men Become Gods: Mormon Polygamist Warren Jeffs, His Cult of Fear, and the Women Who Fought Back* (New York: St. Martin's Press, 2009).

⁸ Mark Halperin and John Heilemann, *Double Down: Game Change 2012* (New York: Penguin Press, 2013), 57.

⁹ For the story of how this state of affairs came to be, see Michael J. Klarman, *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage* (New York: Oxford University Press, 2013).

¹⁰ Scholarship concerning marriage more generally tends to be politicized. Hendrick Hartog, *Man and Wife in America: A History* (Cambridge, MA: Harvard University Press, 2000), 3–4.

emphasis on its legal aspects.¹¹ In the final chapter, I explain why I do not advocate abolition, which is understood as the complete privatization of marriage and reliance on private marital contracts the state is supposed to enforce, and introduce a semicontractual alternative I believe would enable people to customize their marriages as much as possible.¹²

My proposal may remind readers of Sir Henry Maine's famous remark: "The movement of the progressive societies has hitherto been a movement from Status to Contract."¹³ However, as Mary Anne Case notes: "The state has been a relative latecomer in the regulation of marriage. . . . [T]he history of marriage in Anglo-American law seems thus far to have been one of movement from contract to status and only part way back again."¹⁴ I do not mean that status would be entirely dispensed with. Instead, my suggestion is that more nuanced contractual alternatives should not be ruled out without assessing their advantages in the midst of growing familial diversity and economic uncertainty. At present, marriage is a hybrid of status and contract, with default rules that can be contracted around. For example, in California, a married couple can avoid the consequences of community property law through a valid prenuptial agreement to protect the inheritance of their children from a previous relationship. Postnuptial agreements are becoming more common than they used to be.¹⁵ In states that still refuse to recognize same-sex marriage or even civil unions, gay and lesbian couples who seek to protect their intimate relationship have no choice but to use legal instruments like private contracts. The very idea of marital contracts is not nearly as otherworldly as it initially may appear to be. While such contracts can hinder freedom and equality, they can promote each of these values and serve other ends depending on their terms. They also provide the kind of

¹¹ In the literature, "disestablish" is a term of art. Normally, it does not entail the elimination of the legal status of a marriage-like relationship (abolition or complete privatization) but the creation of a new, more inclusive status the state would continue to recognize, subsidize, and compel such third parties as government agencies, employers, and hospitals to acknowledge.

¹² At the outset, I want to acknowledge how much my contractual account of marriage owes to its first serious treatment – more than thirty years ago – found in Lenore J. Weitzman, *The Marriage Contract: A Guide to Living With Lovers and Spouses* (New York: The Free Press, 1981). For a more recent and equally insightful discussion of contracts and the role they play (and can play) in family law more generally, see Martha M. Ertman, *Love's Promises: How Formal and Informal Contracts Shape All Kinds of Families* (forthcoming from Beacon Press).

¹³ Henry Sumner Maine, *Ancient Law*, (3rd American edn.) (Sioux Falls, SD: NuVision Publications [2009] 1888), 165.

¹⁴ Mary Anne Case, "Marriage Licenses," *Minnesota Law Review*, 89 (2005), 1766.

¹⁵ Jacoba Urist, "Postnups Becoming More Popular, but They're Not for Everyone," www.thedailybeast.com/articles/2012/05/20/postnups-becoming-more-popular-but-they-re-not-for-everyone.html.

flexibility that can accommodate individual differences. As such, they deserve serious attention. They also cannot be dealt with by the mere assertion that they would be bad for women and children.

The recent arguments in support of disestablishment, which Tamara Metz, Elizabeth Brake, and Sonu Bedi have advanced, are consistent with the legal recognition of various kinds of plural marriage.¹⁶ By “disestablish,” most scholars mean eliminating civil marriage as a legal status and putting in its place state-recognized caretaking relationships or private contracts that would empower the parties to devise most of the terms of their legal relationship. In the marital regime I favor, people would be able to form marriages that could contain more than two persons, could be same sex, and would not require love, physical intimacy, caregiving, or any other substantive value. A marriage could be premised on the emotional closeness that comes with an old friendship.¹⁷ They could form just about whatever kind of intimate relationship they desire and tailor it to meet their particular needs, provided they do not violate other valid laws. The state would subsequently treat the contractual relationship as a marriage-like status – whatever its form – and require other entities, such as hospitals and employers, to recognize them.

Third, I argue that as long as states continue to license monogamous marriages – different sex or same sex – they must provide the option of different kinds of plural marriages to fulfill the constitutional mandate of nondiscriminatory treatment.¹⁸ In doing so, they would give the same legal recognition that is already accorded to different-sex monogamous marriage in all states and same-sex marriage in some states, putting all marriage-like relationships on the same footing. I refer to this state of affairs – equal legal treatment of all marital arrangements (notwithstanding their structure or dynamics) – as “external equality,” whereas the kind of equal treatment within the intimate relationship that may occur is “internal equality.” The latter is

¹⁶ Tamara Metz, “The Liberal Case for Disestablishing Marriage,” *Contemporary Political Theory*, 6 (2007), 196–217; Metz, *Untying the Knot: Marriage, the State, and the Case for Their Divorce* (Princeton, NJ: Princeton University Press, 2010); Elizabeth Brake, “Minimal Marriage: What Political Liberalism Implies for Marriage Law,” *Ethics*, 120 (2010), 317; Brake, *Minimizing Marriage: Marriage, Morality, and the Law* (New York: Oxford University Press, 2012); Sonu Bedi, *Beyond Race, Sex, and Sexual Orientation: Legal Equality Without Identity* (New York: Cambridge University Press, 2013), especially 208–51.

¹⁷ The idea of marriage as friendship is underappreciated but hardly new. See, for example, Ruth Abbey and Douglas J. Den Uyl, “The Chief Inducement? The Idea of Marriage as Friendship,” *Journal of Applied Philosophy*, 18 (2001), 37–52.

¹⁸ I borrow the term “mandate of nondiscriminatory treatment” from Pamela S. Karlan, “Let’s Call the Whole Thing Off: Can States Abolish the Institution of Marriage?” *California Law Review*, 98 (2010), 701.

what people are usually referring to when they object to plural marriage because it is supposed to be too inegalitarian.

I do not limit myself to the tools of legal analysis – narrowly construed – but I also draw upon arguments of political morality found in contemporary normative political theory scholarship. I take this approach due to my belief that American constitutional practice incorporates something like a neutrality or public justification requirement that demands that states offer sufficiently public reasons on behalf of laws that infringe on fundamental rights or permit unequal treatment. Before it may do so, the state must be able to articulate a rationale that all reasonable persons could share so the law in question is legitimate. That public justification requirement precludes appeals to the alleged superiority of a particular way of life or to empirically questionable claims or speculation about adverse consequences.¹⁹ In the context of the debate over how to define marriage as fairly as possible, one cannot simply argue that monogamous marriage is intrinsically better than all the alternatives. First, it may not be so, given the well-known pathologies of monogamous marriage and intimate relationships. Second, even if it were better, generally speaking, that fact would still not necessarily justify not having the option of marital multiplicity. People are allowed to form and stay in all kinds of unhealthy personal relationships, including violent ones. That some or perhaps many marital choices are less than wise does not entail that either person should be denied the right to marry or stay in the marriage. One does not have to be a Libertarian to appreciate why some and probably most of the most personal of personal choices are best left to the people who are most directly affected by them. Usually, they are in a better position to make such choices due to the likelihood they know themselves and their personal needs better than anyone else does.

At times, it can be difficult to discern where an argument of political morality ends and where a constitutional argument begins because the implications of abstract constitutional language may not be evident. As I see it, in hard cases, what the Constitution means is really about what it should mean more often than not. The constitutional text itself and external sources, such as case law, history, structure, and moral theory, cannot answer the most challenging questions in a manner that is beyond reasonable dispute. Arguments of political morality have always been and always will be relevant to judging and understanding the nuances of constitutional practice. In such cases, judges have considerable discretion and thus can construct new

¹⁹ For an overview of the philosophical concept of public justification, see Kevin Vallier and Fred D'Agostino, "Public Justification," <http://plato.stanford.edu/entries/justification-public>.

constitutional meanings.²⁰ Like it or not, that is judicial lawmaking – however judges describe their actions. As long as judges retain the power of judicial review and do not let all the laws they could invalidate stand, they will be legislating. The only remaining issues are how often they do it, when they should do it, and whether it is justified in particular instances.

Although the task of providing answers to hard constitutional questions seems to fall only on judges, it is also the responsibility of lawyers, public officials, political elites, and the rest of us to decide which new constitutional meanings will be conceived. This country might benefit from a frank discussion about the nature of judging in hard constitutional cases and the inevitability of judicial lawmaking so that ordinary Americans at the very least, ordinary Americans can be better informed about the constitutional choices that are made in their name. It is troubling, if not pernicious, to mislead the public by pretending that judging is always like umpiring or that the law always produces deductively valid answers. The implication is that someone who disagrees with the outcome of a particular case must be acting in bad faith in the sense of not caring what the law is.

Initially, for purely practical reasons, many people would reject the view, which I shall develop and defend in this book, that the Constitution requires states – as long as they remain in the marriage business – to provide alternatives to dyadic marriage.²¹ But one cannot simply respond to any normative claim by insisting it is unrealistic, as if doing so were enough to end the conversation. At one moment in American history, the abolition of slavery and the enfranchisement of women looked unrealistic. At least one legal scholar believes that family law could accommodate marital multiplicity quite easily.²² Another scholar introduces some interesting proposals about how the tax system could be reformed if states were to recognize polygamous relationships.²³ It should not be too easy to summarily dismiss any proposed

²⁰ See, for example, Richard A. Posner, *Reflections on Judging* (Cambridge, MA: Harvard University Press, 2013).

²¹ Nonetheless, concerns about the possible unconstitutionality of laws that criminalize polygamy or fail to recognize multiperson relationships as marriages have arisen in other countries. See, for example, Martha Bailey et al., “Expanding Recognition of Foreign Polygamous Marriages: Policy Implications for Canada.” *Queens University Legal Studies Research Paper No. 7-12*. Prepared for Status of Women Canada. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1023896. The report recommends that “Canada prepare for a constitutional challenge to the limitation of marriage to two persons.” Recently, the British Columbia Supreme Court issued an advisory opinion regarding Section 293 of the Criminal Code of Canada, which keeps polygamy illegal, and concluded it was constitutional.

²² Goldfeder, *Legalizing Plural Marriage: The Next Frontier in Family Law*, 149 (forthcoming, University of New England Press), esp. 162–187.

²³ Samuel D. Brunson, “Taxing Polygamy,” *Washington University Law Review*, 91 (2013), 113–68.

reform – marital or otherwise – on the grounds it is utopian. After all, in constitutional controversies, public opinion can shift rapidly.²⁴ Anyone with specialized legal knowledge and imagination – when the law is unsettled and the timing is right – can put together a legal argument that arguably justifies the outcome he or she prefers. This phenomenon appears over and over again. American history demonstrates that forecasting our constitutional future must be done with humility. Certain constitutional understandings, which the legal community used to consider farfetched, are now widely accepted.²⁵ Not long ago, the claim that same-sex couples have a constitutional right to marry would have been met with derision by most legal experts.²⁶ From the standpoint of world history, the very idea of (monogamous) same-sex marriage is far more unprecedented than certain forms of polygamy. We should try to avoid having too selective of a memory.

Before I proceed any further, I want to clarify some of the terminology that appears in this book. According to anthropologists, “polygyny” is a man with multiple wives, “polyandry” is a woman with multiple husbands, and “polygynandry” (or group marriage) is any combination of three or more persons.²⁷ “Polyamory” also covers such arrangements and is not pejorative.²⁸ “Polyfidelity” emphasizes the possibility of individual choice and equality when three or more persons form such a relationship.²⁹ I will use “polygamy” to refer to any situation in which three or more adults consider themselves to be a unit, they are not legally married, and each of them is physically intimate with at least one of the other persons, even when they do not live together.³⁰ For the most part, I use “polygamy” and “polyamory” interchangeably,

²⁴ According to a recent Pew Center poll, 14 percent of Americans surveyed proclaimed they had changed their minds in favor of permitting same-sex marriage. www.people-press.org/2013/06/06/homosexuality-opinion.

²⁵ See Jack M. Balkin, *Living Originalism* (Cambridge, MA: The Belknap Press of Harvard University Press, 2011).

²⁶ Klarman, *From the Closet to the Altar*, 19.

²⁷ Miriam Koktvedgaard Zeitzen, *Polygamy: A Cross-Cultural Analysis* (New York: Berg, 2008), 3.

²⁸ See Deborah Anapol, *Polyamory in the Twenty-First Century: Love and Intimacy With Multiple Partners* (Lanham, MD: Rowman & Littlefield, 2010). However, some commentators caution against using “polyamory” and “polygamy” interchangeably. See, for example, D. Marisa Black, “Beyond Child Brides: Polygamy, Polyamory, Unique Familial Constructions, and the Law,” *Journal of Law and Family Studies*, 8 (2006), 498.

²⁹ Maura I. Strassberg, “The Challenge of Post-Modern Polygamy: Considering Polyamory,” *Capital Law Review*, 31 (2003), 452.

³⁰ Historically, the meaning of “polygamy” has varied. In some places, “polygamy” referred to a man (or, less frequently, a woman) who had abandoned his first spouse without divorcing her and then had “married” another woman. What made polygamy wrong, then, is what made adultery wrong. See, for example, John Witte Jr., *The Western Case for Monogamy Over Polygamy* (forthcoming from Cambridge University Press).

even though many scholars would not conflate them. I do so due to my belief that even egalitarian marriages, including traditional polygynous ones, are entitled to legal protection as long as they involve consenting adults do not violate other valid laws. A “triad” or a “thruple” involves three partners who are sexually connected. A “hinge” or “pivot” exists when only one of the partners has a sexual relationship with the other two persons. “Quads” contain four persons and “moresomes” include five or more adults.³¹ Group marriages can be configured in multiple ways.³² While my definition of polygamy is probably underinclusive, it captures the basic distinction between monogamy and polygamy in the minds of most Americans: open sexual nonexclusivity.³³

While “polyamory” implies a more egalitarian relationship, I deliberately use “polygamy” to cover all multiperson intimate relationships among adults the state refuses to recognize as a legal status. I do so because I doubt (a) the state should recognize only marriages that are sufficiently internally egalitarian; (b) even if the state wanted to do so, it could determine with much precision whether the prospective marital partners are likely to meet the minimum equality criteria when they apply for a marriage license; (c) and the state could effectively oversee people’s behaviors during their marital relationship without intolerable invasions of privacy. As a practical matter, according legal status to polyamorous relationships also entails according such status to polygynous ones.³⁴

In referring to being married to more than one person simultaneously, then, my preference is to use “plural marriage” – not only to avoid connoting polygyny rooted in patriarchal religious or cultural traditions but to eschew a premature evaluation of the rights and wrongs of such relationships. Americans too frequently make snap judgments about beliefs and practices that seem exotic to them. I suspect this term is about as neutral as possible to

³¹ Arin Greenwood, “Who Are ‘The Polyamorists Next Door’? Q&A With Author Elisabeth Sheff,” *Huffington Post*, March 5, 2014.

³² See Diane J. Klein, “Plural Marriage and Community Property Law,” *Golden Gate University Law Review*, 41 (2010), especially 48–53.

³³ It may not be as easy to define monogamy as it initially may seem because different couples may understand infidelity or appropriate boundaries differently. See Meg Barker and Darren Langdrige, “Introduction,” in *Understanding Non-Monogamies*, ed. Meg Barker and Darren Langdrige (New York: Routledge, 2010), 3–20.

³⁴ Legal scholars cannot afford the luxury of assuming ideal conditions given the intractable imperfections of human beings and their institutions. That a real liberal democracy could never ensure internal equality in marriages in the absence of draconian measures is an independent and probably decisive reason for not incorporating equality into its licensing criteria.

American eyes and ears and I will employ it to cover any legal status where at least three persons constitute a single marital unit – notwithstanding its configuration and gender composition. Furthermore, this book addresses whether consenting adults should be able to have such a marital relationship and only touches upon whether any kind of plural marriage is better than its monogamous counterpart, which is not the real issue, constitutionally speaking. For my purposes, polygamy is an intimate relationship among three or more adults that the state does not recognize as a marriage or its legal equivalent. By this definition, right now, there could be as many as 500,000 polygamous households in the United States.³⁵ As of this writing, no state has decriminalized polygamy or come close to doing so. What is left of the Defense of Marriage Act (DOMA) discriminates not only against same-sex couples but also against all polygamous unions.³⁶ For my purposes, the only difference between polygamy and a plural marriage is that the state recognizes the latter as a legal status.

The definition of marriage, which I defend in subsequent chapters and believe to be constitutionally required, would dramatically change the current legal meaning of marriage by covering a much wider variety of intimate relationships. Only by making marriage considerably more inclusive can states respect the marital choices of all adults and treat them equally without making controversial moral judgments about their respective ways of life. With this new definition of marriage in place, irrespective of their gender, two or more adult siblings or close friends could marry each (or one) another. Such marriage would not have to be premised on any sort of sexual intimacy, and it also would include incestuous relationships between or among consenting adults.³⁷

I. CONTEMPORARY POLYGAMY

Whatever names they go by, the ideas of polygamy and plural marriage are not new. The Hebrew Bible refers to multipartner relationships, such as those of Moses, Abraham, David, and Solomon.³⁸ In the past, certain Christian sects

³⁵ Sherif Girgis, Ryan T. Anderson, and Robert P. George, *What Is Marriage? Man and Woman: A Defense* (New York: Encounter Books, 2012), 51.

³⁶ Martha M. Ertman, “Race Treason: The Untold Story of America’s Ban on Polygamy,” *Columbia Journal of Gender and Law*, 19 (2010), 357–62.

³⁷ For a qualified defense of (adult) incestuous marriage, see Andrew F. March, “What Lies Beyond Same-Sex Marriage: Marriage, Reproductive Freedom and Future Persons in Liberal Public Justification,” *Journal of Applied Philosophy*, 27 (2010), 39–58.

³⁸ 1 Samuel 25: 43–44; and 1 Kings 7: 8. The *Talmud* also allows polygamy. In Western Europe, the practice was banned around 1000 CE. Norman Solomon, *Judaism: A Very Short*