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The More, the Marry-er? The Future of Polygamous Marriage in the Wake of *Obergefell v. Hodges*
Amberly N. Beye*

I. Introduction

Since this nation's inception, the United States Supreme Court has grappled with conceptualizing marriage in a way that reflects both this nation's values and this nation's Constitution. Conceptualizing marriage in a concordant way has proven to be a time-intensive task, leading the Supreme Court to analyze a variety of factual scenarios to determine which relationships fall within the protective confines of the Constitution. Over time, the Supreme Court's perception of marriage has adapted to changing societal norms, dealing with issues such as race,¹ poverty,² and criminality.³ The limits of such adaptation were tested in recent years, when courts were faced with the constitutionality of same-sex marriage.

The Supreme Court addressed the constitutionality of same-sex marriage and the related fundamental right to marry in *Obergefell v. Hodges*.⁴ In *Obergefell*, a class of homosexual plaintiffs claimed that their constitutional rights were violated when they were denied the right to marry their same-sex partner.⁵ Ultimately, on June 26, 2015, the Supreme Court ruled in the plaintiffs' favor and held that a fundamental right to marry protects marriages between same-sex couples.⁶

In the wake of *Obergefell*, one of the main criticisms of the majority opinion is that it will reduce governmental restriction of marriage, opening the floodgates to marriages of all sorts. For

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¹ *Loving v. Virginia*, 388 U.S. 1 (1967).

² *Zablocki v. Redhail*, 434 U.S. 374 (1978).

³ *Turner v. Safley*, 482 U.S. 78 (1987).

⁴ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

⁵ *Id.* at 2593.

⁶ *Id.* at 2607.

example, some have questioned whether the fundamental right to marry recognized by *Obergefell* also includes the right to marry multiple people.⁷ Chief Justice Roberts' dissent in *Obergefell* questions the viability of a definition of marriage that is limited to those unions between two people. In his view, the majority calls this definition and its limit into question.⁸ He also suggests that an extension of the fundamental right to marry to polygamous marriages may be even more natural than an extension of the right to same-sex marriages, since polygamous marriages are more deeply steeped in some global cultural traditions.⁹

Similarly, a *New York Times* op-ed piece by William Baude, published soon after the Supreme Court handed down its decision in *Obergefell*, questioned the validity and power given to “the number two” in the legal definition of marriage.¹⁰ Like Chief Justice Roberts, Baude argued that the jump from same-sex marriage to plural marriage is not a large one, especially since the majority's opinion focused primarily on a “fundamental right to marry,” rather than the narrow issue of sexual orientation.¹¹ Baude explains that the “fundamental right to marry” is more loosely defined, and is characterized by concepts such as autonomy, personal fulfillment, child rearing, and social order.¹² This broad judicial conceptualization of marriage may therefore include and

⁷ There are three types of plural marriage, or what is more colloquially referred to as “polygamy”: (1) polygyny, the most common type, in which one man is married to two or more wives; (2) polyandry, in which one woman is married to two or more husbands; and (3) polygynandry, a group marriage in which two or more wives are simultaneously married to two or more husbands. Alean Al-Krenawi & Vered Slonim-Nevo, *Psychosocial and Familial Functioning of Children from Polygynous and Monogamous Families*, 148 J. SOC. PSYCHOL. 745, 745 (2008). In accordance with both statistics and relevant literature, this Comment will use the term “polygamy” interchangeably with “polygyny.” See *Reference re: Section 293 of the Criminal Code of Canada*, [2011] B.C.S.C. 1588, para. 136 (Can. B.C. S.C.) (“Over the course of human history, polygyny has been the only form of polygamy practiced on a significant basis. Polyandry has been exceedingly rare and has tended to be a temporary adaption to environmental stresses or other ecological factors.”).

⁸ *Obergefell*, 135 S. Ct. at 2621 (Roberts, J., dissenting) (“One immediate question invited by the majority's position is whether the States may retain the definition of marriage as a union of two people. Although the majority randomly inserts the adjective ‘two’ in various places, it offers no reason at all why the two-person element of the core definition of marriage may be preserved while the man-woman elements may not.”) (internal citations omitted).

⁹ *Id.*

¹⁰ William Baude, *Is Polygamy Next?*, N.Y. TIMES, July 21, 2015, http://www.nytimes.com/2015/07/21/opinion/is-polygamy-next.html?_r=0.

¹¹ *Id.*

¹² *Id.*

protect “groups of adults who have profound polyamorous attachments and wish to build families and join the community.”¹³

This Comment will examine the fundamental right to marry and analyze whether *Obergefell* compels the United States Supreme Court to recognize plural marriages. Part II of this Comment will briefly summarize the Supreme Court’s rulings on the fundamental right to marry and the closely associated right to privacy. This Part highlights the Court’s different (and at times, disparate) approaches in cases dealing with a fundamental right to marry. Part III will then discuss the fundamental right to marry in the wake of *Obergefell*. Here, the main question is whether the Court would recognize the right to marry multiple people as a fundamental right. Because it is not clear what standard or test(s) the Court would apply, Part III will discuss and analyze three possible approaches. Part III will ultimately argue that the fundamentality of the right to marry multiple people will probably depend on the mode of the Court’s analysis. Part IV argues that even if the Court were to find that the fundamental right to marry includes a right to plural marriage, laws prohibiting polygamous marriage could withstand constitutional scrutiny because such marriages pose a significant risk to the welfare of women and children. Finally, Part V will conclude that, in the wake of the United States Supreme Court’s decision in *Obergefell*, a future ruling as to the constitutionality of polygamous marriage will largely depend on the standard of scrutiny the Court applies.

II. The Foundational Cases

A. The History of the Fundamental Right to Marry

As early as 1888, the Supreme Court recognized that marriage “creat[es] the *most important* relation in life.”¹⁴ Underscoring this sentiment, marriage has been epitomized as “the

¹³ *Id.*

¹⁴ *Maynard v. Hill*, 125 U.S. 190, 205 (1888) (emphasis added).

foundation of the family and of society, without which there would be neither civilization nor progress.”¹⁵ Thus, the fundamentality of marriage was recognized, separate from Due Process Clause issues.¹⁶ Over the next seventy-nine years, the Court came to recognize the right to marry as a fundamental part of the *liberty* protected by the Due Process Clause,¹⁷ but marriage was not considered a *separate* “fundamental right.”

In 1967, the Supreme Court recognized a fundamental “freedom to marry.”¹⁸ In *Loving v. Virginia*, a couple alleged that their constitutional rights had been violated when they were indicted on charges of violating the state’s ban on interracial marriage.¹⁹ The Court reversed the indictment, applied strict scrutiny,²⁰ recognized a fundamental right to marry, and held that the fundamental right to marry included the right to marry a person of a different race.²¹

¹⁵ *Id.* at 211. *See also* *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (“[m]arriage and procreation are fundamental to the very existence and survival of the race”).

¹⁶ This Comment will look at polygamous marriage through the lens of substantive due process. There are two types of Fourteenth Amendment Due Process claims: procedural and substantive. Procedural due process claims ensure that proper court procedures are followed before an individual’s right to life, liberty, or property is taken away. Aaron J. Shuler, Short Essay, *From Immutable to Existential: Protecting Who We Are and Who We Want to Be with the “Equality” of the Substantive Due Process Clause*, 12 J.L. & SOC. CHALLENGES 220, 223 (2010). Comparatively, substantive due process is a doctrine that has evolved to protect rights *not* explicitly enumerated in the constitution. *Id.* Substantive due process is commonly accepted to encompass fundamental, or something akin to fundamental, rights. *Id.*

¹⁷ *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

¹⁸ *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

¹⁹ *Id.* at 2–3.

²⁰ Strict scrutiny is a standard of review courts use when reviewing cases. Specifically, strict scrutiny is used to determine whether restrictions of a fundamental right are constitutional. “When a statutory classification significantly interferes with the exercise of a fundamental right,” strict scrutiny says “it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.” *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). However, strict scrutiny is not the only judicial standard of review available. Traditionally, if a right is not deemed “fundamental,” the court may apply a more deferential standard of review known as “rational basis review.” Rational basis review requires that “an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 452 (1985) (Stevens, J., concurring). Since rational basis review is more deferential toward lawmakers, and since it doesn’t require that the law at issue be the only means possible of achieving the goal, this is a much easier standard to meet.

²¹ *Loving*, 388 U.S. at 12 (“Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not to marry, a person of another race resides with the individual and cannot be infringed by the state.”) (internal citations omitted).

Over time, the Supreme Court held that the fundamental right to marry protected couples from different economic backgrounds, thereby reaffirming the fundamental right to marry. For example, in *Zablocki v. Redhail*,²² a group of Wisconsin residents challenged the constitutionality of a Wisconsin statute that prohibited parents behind on child support from legally marrying.²³ Applying strict scrutiny, the Court held for the plaintiffs, reaffirming that there is a fundamental right to marry, and extending the holding in *Loving* to the facts in *Zablocki*.²⁴ Here, the Court suggested that it would be antithetical to recognize a right to privacy, while permitting such restrictions on the right to marry.²⁵ Notably, however, the Court stated that recognition of a fundamental right to marry does not mean that there cannot be any state regulation of marriage. Instead, the Court clarified that the State may regulate decisions and acts associated with marriage, so long as these regulations “do not significantly interfere with decisions to enter into the marital relationship.”²⁶

The fundamental right to marry was further strengthened and institutionalized by the Supreme Court’s decision in *Turner v. Safley*.²⁷ In this case, the Court considered whether the constitutionally protected right to marry applies to prison inmates. The Court held that it does, but it applied a lower standard of review.²⁸ Rather than strict scrutiny, which requires narrow tailoring, the Court in *Turner* held that the regulation needed only to be “reasonably related to legitimate

²² *Zablocki v. Redhail*, 434 U.S. 374 (1978).

²³ The statute would not allow parents with child support obligations to obtain a marriage license until they submitted proof of compliance with the obligations, and demonstrated that the children “are not then and are not likely thereafter to become public charges.” WIS. STAT. §§ 245.10(1), (4), (5) (1973) (repealed 1977).

²⁴ *Zablocki*, 434 U.S. at 384 (“Although *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for all individuals.”).

²⁵ *Id.* at 386 (“It would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.”).

²⁶ *Id.*

²⁷ *Turner v. Safley*, 482 U.S. 78 (1987).

²⁸ *Id.* at 89.

penological interests.”²⁹ Thus, unlike the strict scrutiny standard applied in *Loving* and *Zablocki*, the Court in *Turner* applied the more deferential rational basis review, since this case dealt with prison inmates.³⁰ Despite the different standard of review, this case is yet another example of the Court’s extension of the fundamental right to marry.

B. The Fundamental Right to Marry Someone of the Same Sex

While the United States Supreme Court recognized a fundamental right to marry, this did not mean that all individuals could exercise this right, free from government restriction. Notably, same-sex couples remained outside the right’s protective confines. However, this did not mean that the arena of same-sex constitutional issues was without judicial reform. Years after the fundamental right to marry was extended to heterosexual interracial couples, debtor parents, and incarcerated persons, a related right was recognized and extended to homosexual couples in *Lawrence v. Texas*.³¹

In *Lawrence*, the Supreme Court was confronted with a challenge to the Texas Penal Code, Section 21.06(a), which criminalized sodomy between two individuals of the same sex. Without identifying their specific standard of review,³² the Court ultimately held that such an “intrusion into the personal and private life of the individual” was constitutionally unjustifiable.³³ In doing so, this case extended Due Process Clause protection to same-sex relationships in an unprecedented way.³⁴

²⁹ *Id.*

³⁰ *Id.*

³¹ *Lawrence v. Texas*, 539 U.S. 558 (2003).

³² Though the Court did not announce a particular standard of review, it did use language that suggested it was applying rational basis review. *See id.* at 578 (“The Texas statute furthers no *legitimate state interest* which can justify its intrusion into the personal and private life of the individual.”) (emphasis added).

³³ *Id.* at 578.

³⁴ *Id.* at 567 (“The liberty protected by the Constitution allows homosexual persons the right to make this choice.”).

In 2013, a decade after *Lawrence*, *United States v. Windsor*³⁵ challenged the constitutionality of section three of the Defense of Marriage Act (DOMA), which denied federal recognition to same-sex marriages validly performed under state law.³⁶ In its opinion, the Supreme Court did not specify a particular standard of review³⁷ or explicitly mention “substantive due process.”³⁸ Nevertheless, the Court held that section three of DOMA was unconstitutional. In so holding, the Court left section two of DOMA untouched, “allow[ing] states to refuse to recognize same-sex marriage performed under the laws of other states.”³⁹ Thus, *Windsor* did not result in blanket acceptance of same-sex marriage.⁴⁰

Two years later, in *Obergefell*, the Court finally extended the fundamental right to marry to homosexual couples.⁴¹ In *Obergefell*, as in *Lawrence* and *Windsor*, the Court did not expressly

³⁵ *United States v. Windsor*, 133 S. Ct. 2675 (2013).

³⁶ The Defense of Marriage Act, 1 U.S.C.S. §7 (1996).

³⁷ Though the court did not specify which standard of review it was applying, some of the majority opinion’s language was reminiscent of rational basis review. *Windsor*, 133 S. Ct. at 2696 (“The federal statute is invalid, for no *legitimate purpose* overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.”) (emphasis added). However, the Court’s opinion seemed to hold the Defense of Marriage Act to a higher standard than rational basis. *See id.* at 2706 (Scalia, J., dissenting) (“As nearly as I can tell, the Court . . . [in] its opinion does not apply strict scrutiny, and its central propositions are taken from rational-basis cases [T]he Court certainly does not apply anything that resembles that deferential framework.”). *See also SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2014) (“In its words and its deed, *Windsor* established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review. In other words, *Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation”); Robert C. Farrell, *Justice Kennedy’s Idiosyncratic Understanding of Equal Protection and Due Process, and Its Costs*, 32 QUINNIAC L. REV. 439, 481–84 (2014); Jack Harrison, *On Marriage and Polygamy*, 42 OHIO N.U. L. REV. 89, 130 (2015) (“Justice Kennedy’s language and analysis combined with the ultimate determination of the Court that Section 3 of DOMA was unconstitutional, indicates that some elevated level of scrutiny was employed.”); Raphael Holoszyc-Pimentel, Note, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U.L. REV. 2070, 2116 (2015) (“The Court did not explicitly state what level of scrutiny it applied in reviewing [the Defense of Marriage Act]. However, the Court’s “opinion did not apply strict scrutiny, and its central propositions were taken from rational-basis cases such as *Moreno* and *Romer*. Therefore, *Windsor* fits within the tradition of rational basis with bite.”) (internal quotation marks omitted).

³⁸ *See Windsor*, 133 S. Ct. at 2706 (Scalia, J., dissenting) (“The majority never utters the dreaded words ‘substantive due process,’ perhaps sensing the disrepute into which the doctrine has fallen.”).

³⁹ *Id.* at 2682–83.

⁴⁰ *Id.* at 2697 (Roberts, J., dissenting).

⁴¹ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015) (“the right to marry is a *fundamental right* inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.”) (emphasis added).

state the standard of review it applied. In fact, the Court seemed to ignore the preexisting analytical framework that had been established for substantive due process claims.⁴² Instead, the Court identified four “principles and traditions” that demonstrated why marriage is a fundamental, constitutional right.⁴³ After analyzing these four “principles and traditions,” the Court found that they applied equally to heterosexual and homosexual unions.⁴⁴ Resultantly, the Court extended the fundamental right to marry to same-sex couples.⁴⁵

C. Why Do These Cases Matter?

There are several lessons to be learned from the preceding review of Supreme Court precedent. First, there is a fundamental right to marry that has been upheld and protected by the Supreme Court since 1967.⁴⁶ Additionally, the Court has viewed the fundamental right to marry as an ever-changing right.⁴⁷ However, despite expansion of the fundamental right to marry, that right has only been extended to *couples*.⁴⁸

Furthermore, the preceding review shows that the Supreme Court’s treatment of the fundamental right to marry has been both extensive and complex. The Court has repeatedly upheld a fundamental right to marry, and a concurrent, yet separate, fundamental right to privacy.⁴⁹ These

⁴² *Id.* at 2602 (“*Glucksberg* did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy.”). *See also id.* at 2621 (Roberts, J., dissenting) (noting that “the majority’s position requires it to effectively overrule *Glucksberg*”).

⁴³ *Id.* at 2589; *see also infra* Part III.C.

⁴⁴ *Id.* at 2590.

⁴⁵ *Id.* at 2604.

⁴⁶ *Loving v. Virginia*, 388 U.S. 1 (1967).

⁴⁷ *See, e.g., Obergefell*, 135 S. Ct. at 2596 (“[C]hanged understandings of marriage are characteristic of a nation where new dimensions of freedom became apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process.”).

⁴⁸ *See, e.g., id.* at 2607 (“same-sex *couples* may exercise the right to marry in all states”) (emphasis added).

⁴⁹ *See, e.g., Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (stating, on the topic of marriage: “We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our

holdings have been based on a variety of factors and tests.⁵⁰ At times, the Court has completely avoided any language reminiscent of a standard of review, and when a specific method *has* been employed (either implicitly or explicitly), it has ranged from rational basis review⁵¹ to strict scrutiny.⁵² Thus, when dealing with the fundamental right to marry, the Court’s methodology remains relatively undefined.

III. The Fundamental Right to Plural Marriage

As evidenced in Part II, the United States Supreme Court has yet to embrace a uniform framework for analyzing the fundamental right to marry. Because of the variety of methods and tests used in previous cases, it is difficult to predict how the Court will analyze the right to plural marriage. In most substantive due process cases, the Court uses a two-step inquiry. The first question is whether the right at issue is “fundamental.” Importantly, a right’s fundamentality (or lack thereof) determines the applicable standard of review. Generally, the Court applies strict scrutiny to “fundamental” rights and rational basis review to non-fundamental rights.⁵³

This Part will strive to determine whether the right to plural marriage is “fundamental.” Since the Court has not adopted a uniform approach, this Part will view the potential fundamentality of plural marriage through three different lenses: the traditional “deeply rooted” approach, the flexible approach, and the *Obergefell* four-part test. As this Part will show, the Court’s methodology will largely dictate how it will address challenges to restrictions on polygamous marriage.

prior decisions”). *See also* *Roe v. Wade*, 410 U.S. 113, 152 (1973) (noting that the fundamental right to privacy “has some extension to activities relating to marriage”).

⁵⁰ *See infra* Part II.

⁵¹ *See, e.g.*, *Turner v. Safley*, 482 U.S. 78 (1987).

⁵² *See, e.g.*, *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Loving v. Virginia*, 388 U.S. 1 (1967).

⁵³ *See* *Reno v. Flores*, 507 U.S. 292, 301–02 (1993) (noting that “‘due process of law’ . . . forbids the government to infringe certain ‘fundamental’ liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest”).

The fundamentality of a right to plural marriage can be outcome determinative since a judicially recognized fundamental right is protected by the Constitution and cannot be impinged upon by state law.⁵⁴ Since *Loving*, the Court has struck down state laws that have infringed upon the fundamental right to marry.⁵⁵ Most recently, in *Obergefell*, the Court extended the fundamental right to marry to same-sex, monogamous couples. Significantly, a two-person limit is evident at various points throughout *Obergefell*.⁵⁶ Thus, while the Court expanded the fundamental right to marry, it did not diverge from the monogamous model it has retained as a defining element of this right.

By definition, plural marriage does not fall within the traditionally protected, monogamous, marital model. Resultantly, the right to marry multiple people cannot be automatically inferred from *Obergefell*, and would require an individualized inquiry. Post-*Obergefell*, the Supreme Court could adopt one of three approaches to analyze challenges to restrictions on plural marriage.

A. Approach 1: The *Glucksberg* Approach

In *Washington v. Glucksberg*,⁵⁷ the Supreme Court enumerated a two-factor approach to be used when determining whether a right is fundamental. First, the right needs to be “objectively,

⁵⁴ See *Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992) (“[A]ll fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the states.”) (internal quotation marks omitted).

⁵⁵ See, e.g., *Turner*, 482 U.S. 78; *Zablocki*, 434 U.S. at 384.

⁵⁶ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015) (“The four principles and traditions to be discussed demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same sex couples.”) (emphasis added); *id.* (“The right to marry is fundamental because it supports a *two-person union* unlike any other in its importance to the committed individuals.”) (emphasis added); *id.* (“The nature of marriage is that, through its enduring bond, *two* persons together can find other freedoms, such as expression, intimacy, and spirituality.”) (emphasis added); *id.* at 2601 (“[J]ust as a *couple* vows to support each other, so does society pledge to support the *couple*, offering symbolic recognition and material benefits to protect and nourish the union.”) (emphasis added); *id.* at 2602 (“The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth amendment is derived, too, from that Amendment’s guarantee of the equal protection of the laws.”) (emphasis added).

⁵⁷ *Washington v. Glucksberg*, 521 U.S. 702 (1997). The plaintiffs argued that the State’s ban on physician-assisted suicide was an unconstitutional violation of the Fourteenth Amendment. *Id.* at 708. The Court determined that there was not a fundamental right at issue, and applied rational basis review. *Id.* at 728. After applying rational basis review, the Court held that the ban on physician-assisted suicide was rationally related to a legitimate governmental interest, and was therefore constitutional. *Id.*

deeply rooted in this Nation’s history and tradition.”⁵⁸ Second, the asserted right must be described narrowly, so as to include only the specific interests at stake.⁵⁹ For example, in *Glucksberg*, the Court rejected the plaintiffs’ loosely-defined “liberty to shape death,”⁶⁰ replacing it with a narrower “right to commit suicide which itself includes a right to assistance in doing so.”⁶¹ By defining the contested right narrowly, the Court placed it outside the protective confines of the Constitution. Thus, judicial framing can determine whether or not a contested right is “fundamental.”

Post-*Obergefell*, the Court may adopt the *Glucksberg* approach to decide if restrictions on polygamous marriage are constitutional. First, since the *Glucksberg* approach requires narrow tailoring of the issue, it is likely that the Court would view restrictions on polygamous marriage in light of “the right to marry multiple people.” The limited “right to marry multiple people” can be distinguished from the broader, deeply rooted, fundamental “right to marry.” As in *Glucksberg*, this narrow categorization could prove fatal.

In step two, the Court would ask if the right to marry multiple people is “deeply rooted in this Nation’s history and tradition.”⁶² Polygamy has been prohibited throughout Western societies for more than 1750 years.⁶³ In America, polygamy has *always* been viewed as an “offence against

⁵⁸ *Id.* at 720–21 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)) (stating that fundamental rights and liberties that are afforded constitutional protection are those that are, from an objective perspective, “deeply rooted in this Nation’s history and tradition”). *But cf. Obergefell*, 135 S. Ct. 2602 (“*Glucksberg* did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy.”). Because of this apparent incongruity, and *Obergefell*’s explicit repudiation of the *Glucksberg* framework, it is unlikely that the Court would ask whether or not the right to plural marriage is deeply rooted. However, since this possibility is seemingly, but not completely or explicitly, banned in the case of polygamous marriage, this Comment will walk through the legal analysis that would ordinarily be required.

⁵⁹ *Glucksberg*, 521 U.S. at 720–21.

⁶⁰ *Id.* at 722.

⁶¹ *Id.* at 723.

⁶² *Id.*

⁶³ *See, e.g., Reference re: Section 293 of the Criminal Code of Canada*, [2011] B.C.S.C. 1588, para. 229 (Can. B.C. S.C.) (“[F]or more than 1750 years the Western legal tradition has . . . declared polygamy to be an offence. The

society, cognizable by the civil courts and punishable with more or less severity.”⁶⁴ In fact, when states first joined the Union, they prohibited polygamy either by their own statute, derived from English common law, or by virtue of territorial prohibitions.⁶⁵ Although members of some religions had customarily engaged in plural marriages prior to the Nation’s founding, neither states⁶⁶ nor individuals⁶⁷ were granted immunity from the prohibition of polygamous marriage. Today, polygamous marriage remains a criminal offense, prohibited by penal statutes across the country.⁶⁸ Thus, under the *Glucksberg* approach, the Supreme Court would probably deny that polygamy is deeply rooted, and would therefore likely hold that there is *not* a fundamental right to polygamous marriage.

B. Approach 2: The Flexible Approach

Part II demonstrates that the United States Supreme Court has recognized an ever-evolving fundamental right to marry.⁶⁹ Allowing for the evolution of this right, the Court has adopted a relatively flexible analysis.⁷⁰ For example, instead of carving out personalized rights for non-traditional couples (e.g. a right to marry someone of a different race, or a right to marry someone

denunciation of the practice has been based on natural, philosophical, political, sociological, psychological and scientific arguments.”). *See also* *Reynolds v. United States*, 98 U.S. 145, 164 (1879) (“At common law, the second marriage was always void (2 Kent. Com. 79), and from the earliest history of England polygamy has been treated as an offence [sic.] against society.”).

⁶⁴ *Reynolds*, 98 U.S. at 165.

⁶⁵ *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1197 (D. Utah 2013).

⁶⁶ Utah was required to ban polygamous marriage in order to be accepted into the union. *See* Casey E. Faucon, *Marriage Outlaws: Regulating Polygamy in America*, 22 DUKE J. GENDER L. & POL’Y 1, 12 (2014) (“The Utah Constitution of 1896 permanently banned the practice [of polygamy], allowing Utah to attain statehood in 1896.”). *See also* UTAH CONST. art. XXIV, § 2.

⁶⁷ *See Reynolds*, 98 U.S. at 165 (“[A]s a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed.”).

⁶⁸ *See, e.g.*, NY PENAL LAW § 255.15 (Consol. 2016) (“A person is guilty of bigamy when he contracts or purports to contract a marriage with another person at a time when he has a living spouse, or the other person has a living spouse. Bigamy is a class E felony.”). *See also* *State v. Holm*, 137 P.3d 726, 741–45 (Utah 2006).

⁶⁹ *See, e.g.*, *Obergefell*, 135 S. Ct. at 2604 (“[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.”).

⁷⁰ For example, the right to interracial marriage (*Loving*) and the right to marry someone of the same sex (*Obergefell*).

of the same sex), the Court adopted a more broad-based approach, including many non-traditional couples under the broader umbrella of the fundamental right to marry.⁷¹

The main difference between the second approach and the first approach is the way in which the right is defined. Under Approach 1, the *Glucksberg* approach, the right at issue is *narrowly* defined.⁷² Under Approach 2, the flexible approach, the right at issue is *broadly* defined. The breadth of the second approach allows more couples to be protected by the fundamental right to marry.

Members of the Court have struggled with these two approaches and have expressed different preferences.⁷³ Thus far, no approach has triumphed. Since members of the Court have adopted both approaches,⁷⁴ it is difficult to predict which approach would be favored in future cases. Furthermore, the differences in these two approaches could yield two different views on the constitutionality of the prohibition of polygamous marriage.

The United States Supreme Court seems to have adopted the second approach, or something akin to it, in many landmark cases dealing with the fundamental right to marry.⁷⁵ Under

⁷¹ This can be compared to the Court's approach in *Lawrence v. Texas*, 539 U.S. 558 (2003). In *Lawrence*, the Court analyzed the Texas statute under the broad umbrella of "liberty," instead of a more myopic right, the right to engage in homosexual sodomy.

⁷² See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 705 (1997) ("a right to commit suicide which itself includes a right to assistance in doing so").

⁷³ Some justices have embraced the first approach, narrowly defining the right at issue. See e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (stating that the court "refer[s] to the *most specific* level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.") (emphasis added). However, there is not a uniform approach, either between or within cases. See e.g., *id.* at 132 (O'Connor, J., concurring) (disagreeing with the majority and citing cases, including *Loving* and *Turner*, to point out that "[o]n occasion the Court has characterized relevant traditions protecting asserted rights at levels of *generality* that might not be 'the most specific level' available") (emphasis added). See also *Moore v. E. Cleveland*, 431 U.S. 494, 503 (1977) ("Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful respect for the teachings of history and solid recognition of the basic values that underlie our society.") (citations omitted). But see *id.* at 549 (White, J., dissenting) ("What the deeply rooted traditions of the country are is arguable.").

⁷⁴ Compare *Glucksberg*, 521 U.S. at 705 ("[A] right to commit suicide which itself includes a right to assistance in doing so."), with *Lawrence*, 539 U.S. at 562 ("The instant case involves liberty of the person both in its spatial and more transcendent dimensions.").

⁷⁵ See *Obergefell*, 135 S. Ct. at 2602 ("*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 father with unpaid child support duties

this approach, the Court has viewed the borders of the fundamental right to marry as relatively malleable. Resultantly, the Court has extended the protections associated with the fundamental right to marry to interracial couples,⁷⁶ inmates,⁷⁷ and parents who have not paid child support.⁷⁸

It is feasible that the Court could use this second approach if asked to analyze the constitutionality of restrictions on plural marriage. Use of this approach would likely entail analysis under the broader umbrella of the fundamental right to marry. Resultantly, this would eliminate the need for separate analysis of a “right to marry multiple people.” Since the fundamental right to marry is “deeply rooted in this Nation’s history and tradition,” the Court would likely conclude that the fundamental right to marry encompasses a right to plural marriage.

C. Approach 3: The *Obergefell* Four-Part Test

In *Obergefell*, the United States Supreme Court adopted a third approach, a four-part test. Using this approach, the Court compared same-sex marriage to marriage more generally, and considered whether the “principles and traditions [that] demonstrate the reasons marriage is fundamental under the Constitution apply with equal force”⁷⁹ to those in same-sex marriages. Ultimately, the Court held that each of the four principles and traditions applied equally.⁸⁰

Under this approach, the Court may try to envelop polygamous marriage in the cloak of the fundamental right to marry. This would require considering whether the “principles and traditions [that] demonstrate the reasons marriage is fundamental under the Constitution apply with equal force”⁸¹ to those in polygamous marriages. The four “principles and traditions” enumerated

to marry.’ Rather, each case inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right.”).

⁷⁶ *Loving v. Virginia*, 388 U.S. 1 (1967).

⁷⁷ *Turner v. Safley*, 482 U.S. 78 (1987).

⁷⁸ *Zablocki v. Redhail*, 434 U.S. 374 (1978).

⁷⁹ *Obergefell*, 135 S. Ct. at 2589.

⁸⁰ *Id.* at 2589.

⁸¹ *Id.*

in *Obergefell* were: (1) “individual autonomy,”⁸² (2) the importance of the “two-person union,”⁸³ (3) the rights of “childrearing, procreation, and education,”⁸⁴ and (4) “social order.”⁸⁵

First, the Court would need to determine whether the right to marry multiple individuals is characteristic of ordered liberty. In *Obergefell*, the Court found that a person's choice to enter into a marital union is “inherent in the concept of individual autonomy.”⁸⁶ An individual’s decisions regarding marriage have profound implications, affecting many aspects of one’s freedom.⁸⁷ Resultantly, this factor focuses on the general decision to marry, without specifying whether, and to whom, one should marry.⁸⁸ As a result, the Court held that the implications of the decision to marry were unaffected by sexual orientation.⁸⁹ As with monogamous marriage, the choice to enter into a polygamous marriage can also “shape an individual’s destiny.”⁹⁰ Thus, it is conceivable that the Court could find that this factor also applies to polygamous marriages.

Second, the Court found “that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals.”⁹¹ Applying this finding to same-sex marriages, the Court concluded that same-sex marriage supports an equally significant two-person union. The Court held that protection given to the intimate relationship between married individuals does not vary based on the sexual orientation of the couple.⁹² In *Obergefell*, the Court’s analysis of this factor seems to turn on the intimate relationship between

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 2590.

⁸⁵ *Obergefell*, 135 S. Ct. at 2590.

⁸⁶ *Id.* at 2599.

⁸⁷ For example, expression, intimacy, and sexuality. *Id.*

⁸⁸ *Id.* See also *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 955 (Mass. 2003) (“the decision whether and to whom to marry is among life’s momentous acts of self-definition”).

⁸⁹ *Obergefell*. 135 S. Ct. at 2589 (“Decisions about marriage are the most intimate that an individual can make. This is true for all persons, whatever their sexual orientation.”) (citations omitted).

⁹⁰ *Id.* at 2599.

⁹¹ *Id.* at 2599.

⁹² *Id.* at 2600.

married individuals and the constitutional protections afforded to that relationship.⁹³ Superficially, this analysis seems like it would apply equally to those in polygamous marriages. However, the Court specifically quantified the union as being between *two* individuals.⁹⁴ Based on its analysis in *Obergefell*, the Court may take one of two routes if it decides to use this approach in future cases: (1) it may decide to focus on the “union” aspect of this factor, and the importance of protecting the intimate relationship between married individuals;⁹⁵ or (2) the Court may choose to preserve the “two-person” limit spelled out in *Obergefell*. If the Court takes the second approach, polygamous marriage would be seen as conflicting with the traditional, constitutionally protected right to marry.

Third, the Court said same-sex marriage should be protected because it “safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.”⁹⁶ This factor is the most challenging for plural marriage advocates to overcome. Many studies have suggested the danger polygamous marriage poses to women and children.⁹⁷ For this reason, it is likely that the Court would view polygamous marriage as distinguishable from monogamous marriages.

Lastly, the Court emphasized that marriage is important to our Nation because it is “the keystone of our social order.”⁹⁸ Like same-sex marriage, polygamous marriage is *not* deeply rooted in our nation’s legal tradition. However, in *Obergefell*, the court focused on the traditional,

⁹³ *Id.*

⁹⁴ *Id.* at 2599 (“two-person union unlike any other”) (emphasis added).

⁹⁵ *Obergefell*, 135 S. Ct. at 2600 (“Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.”).

⁹⁶ *Id.*

⁹⁷ See *infra* Part IV. Note that, though there is a large body of evidence suggesting that polygamous marriage can and does significantly harm women and children, the evidence is not conclusive.

⁹⁸ *Obergefell*, 135 S. Ct. at 2601.

generalized, importance of “marriage,” rather than “same-sex marriage” specifically.⁹⁹ Here, the Court observed that marriage is a key part of many legal and social rights.¹⁰⁰ By denying same-sex couples the right to marry, states were also barring them from accessing these legal and social rights.¹⁰¹ Similarly, those in plural marriages are denied access to many legal and social rights that are reserved to married *couples*. For this reason, polygamous marriage is akin to same-sex marriage, pre-*Obergefell*. Since the *Obergefell* Court recognized the importance of making such rights available to all married individuals, this factor would probably weigh in favor of protecting those in plural marriages.

In sum, factors one and four seem to favor protecting individuals in plural marriages. However, factors two and three present some hurdles for plural marriage advocates. Given the novelty of this test, future use and analysis of these factors has yet to be determined. Resultantly, an analysis using these factors could either favor or disfavor plural marriage.

D. Is There a Fundamental Right to Plural Marriage?

In the wake of *Obergefell*, it is unclear whether the Court would recognize a fundamental right to a plural marriage. If faced with the constitutionality of restrictions on plural marriage, there are three main approaches the Court may take. If the Court uses the “deeply rooted” approach it would probably hold against protecting those in plural marriages. However, if the Court adopts the flexible approach, plural marriages may be protected as a subpart of the more general fundamental right to marry. The Court’s analysis of polygamous marriage under the *Obergefell* four-part test is less clear. Unlike the *Glucksberg* approach or the flexible approach, this third approach could weigh for *or* against legal recognition of polygamous marriages.

⁹⁹ *Id.* (“There is no difference between same- and opposite-sex couples with respect to this principle.”).

¹⁰⁰ *Id.* at 2601.

¹⁰¹ *Id.*

As analysis of these three approaches shows, the United States Supreme Court could recognize a fundamental right to plural marriage. If it did so, it would likely be under the guise of the more general, fundamental right to marry.¹⁰² However, this would not be the end of the conversation—the Court would then need to look at the means and ends of the legislation at issue, as well as any alternative options.

IV. Even If the Right to Plural Marriage is Fundamental, Can it Survive Judicial Review?

There are two steps to determining whether or not a particular piece of legislation is constitutional under a substantive due process analysis. First, the Court must determine whether or not there is a fundamental right at issue. Part III demonstrated that plural marriage may or may not be viewed a fundamental right. Since it is possible that the Court *may* view plural marriage as a fundamental right,¹⁰³ Part IV will examine the second question—whether anti-polygamy legislation can survive judicial review.

Traditionally, the applicable level of scrutiny depends on whether the right is “fundamental.” Generally, strict scrutiny has been applied to cases where a fundamental right has been identified.¹⁰⁴ Under “strict scrutiny,” the government action must be *narrowly tailored* to promote a *compelling state interest*.¹⁰⁵ Thus, strict scrutiny requires a two-part analysis: (1) whether the state has a *compelling interest* in limiting the fundamental right, and (2) whether the state action is *narrowly tailored* to furthering that compelling interest.

¹⁰² In *Obergefell*, the Court clearly said that it was going to look at marriage in general, instead of as an amalgamation of separate rights. *Id.* at 2602.

¹⁰³ As Part III shows, the Court may view plural marriage as either “the right to marry multiple people,” or as part of the broader-based “right to marry.” *See infra* Part III.

¹⁰⁴ *See, e.g., Zablocki v. Redhail*, 434 U.S. 374 (1978); *Loving v. Virginia*, 388 U.S. 1 (1967).

¹⁰⁵ *See Zablocki*, 434 U.S. at 388 (“When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.”). *See supra* note 20.

The State has a compelling interest in prohibiting plural marriage because of the danger it poses to women and children.¹⁰⁶ Some studies have shown polygamous marriage to harm women and children both in terms of their physical wellbeing (e.g. by abuse and increased health risks¹⁰⁷), and in terms of their emotional wellbeing.¹⁰⁸ The fact that plural marriage poses this danger to women and children differentiates it from same-sex marriage.¹⁰⁹ Though there are studies to the contrary,¹¹⁰ the potential for such substantial harm may allow the State to lawfully restrict plural marriage.¹¹¹

A. Harm to Women

Women are harmed by polygamous marriage, and the State has a compelling interest in prohibiting this harm. Most prominently, polygamy violates norms of gender equality¹¹² since it

¹⁰⁶ See Richard A. Vazquez, Note, *The Practice of Polygamy: Legitimate Free Exercise of Religion or Legitimate Public Menace? Revisiting Reynolds in Light of Modern Constitutional Jurisprudence*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 225, 233 (2001) (“The courts have an interest in protecting women and children from the strikingly real crimes committed in polygamous communities.”).

¹⁰⁷ *Reference re: Section 293 of the Criminal Code of Canada*, [2011] B.C.S.C. 1588, para. 8 (Can. B.C. S.C.) (noting that women in polygamous marriages “are more likely to die in childbirth and live shorter lives than their monogamous counterparts”).

¹⁰⁸ See Salman Elbedour et al., *The Effect of Polygamous Marital Structure of Behavioral, Emotional, and Academic Adjustment in Children: A Comprehensive Review of the Literature*, 5 CLINICAL CHILD AND FAMILY PSYCHOL. REV. 255, 259 (2002) (“[T]he stress of polygamous family life predisposes mothers and children to psychological problems.”).

¹⁰⁹ Nicholas Bala, *Why Canada's Prohibition of Polygamy is Constitutionally Valid and Sound Social Policy*, 25 CAN. J. FAM. L. 165, 169 (2009) (“Unlike the recognition of same-sex marriage, which promoted equality, protected the interests of children and saved government resources, the recognition of polygamy would promote inequality, impose costs on society, and harm children.”). See also *id.* at 177 (polygamy “raises very different social and constitutional issues from the recognition of same-sex marriage”).

¹¹⁰ *But see* Angela Campbell, *Bountiful Voices*, 47 OSGOODE HALL L.J. 183 (2009) (drawing on interviews with women in a Canadian polygamous community, Campbell presents a counter-narrative, arguing that polygamy is not always as harmful as it is made out to be); Emily Duncan, Note, *The Positive Effects of Legalizing Polygamy: “Love is a Many Splendored Thing,”* 15 DUKE J. GEND. L. & POL'Y 315, 332 (2008) (arguing that “legalizing polygamy would positively effect polygynist women and children” and that “[c]ondemning every practicing polygynist to prevent the abuses of some may be counterintuitive”).

¹¹¹ *See* *State v. Holm*, 137 P.3d 726, 744 (Utah 2006) (“[M]artial relationships serve as the building blocks of our society. The State must be able to assert some level of control over those relationships to ensure the smooth operation of laws and further the proliferation of social unions our society deems beneficial while discouraging those deemed harmful.”).

¹¹² *See* Bala, *supra* note 109, at 182 (“[T]he social reality today is that polygyny is the only form of polygamy that is widely practiced, and many of the concerns about polygyny are based on the inherent inequality in a relationship where one man has two or more wives. The recognition of the importance of monogamy and gender equality, combined with the negative psychological and physical health effects on women and children, help explain why there is a growing international trend to prohibit or restrict polygamy.”). *See also* *Reynolds v. United States*, 98

is a “deeply patriarchal institution.”¹¹³ Though, in theory, plural marriage can be between a woman and multiple men, in the overwhelming majority of cases plural marriage takes the form of one man marrying multiple women (i.e. polygyny).¹¹⁴

In many polygamous communities, wives’ roles are determined by theology and the structure of their families.¹¹⁵ Because of their position within the family, “[w]omen in polygamous marriages are in an inherently vulnerable and unequal position in social and economic terms, and are more likely to be victims of domestic violence.”¹¹⁶ There are many reports of husbands abusing their wives, and of wives abusing one another.¹¹⁷ At times, the animosity between cowives is palpable, even to external family members.¹¹⁸

Women in polygamous marriages may also witness the abuse of their cowives.¹¹⁹ Oftentimes, cowives will not intervene to stop such violence.¹²⁰ Additionally, some wives perpetuate violence themselves.¹²¹ One of the most prominent and disturbing examples of

U.S. 145, 166 (1879) (“[P]olygamy leads to the patriarchal principle . . . which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy.”).

¹¹³ Bala, *supra* note 109, at 168. *See also Reference re: Section 293 of the Criminal Code of Canada*, [2011] B.C.S.C. 1588, para. 13 (Can. B.C. S.C.) (stating that the patriarchal nature of “[p]olygamy also institutionalized gender inequality”).

¹¹⁴ Al-Krenawi & Slonim-Nevo, *supra* note 7, at 745.

¹¹⁵ Bala, *supra* note 109, at 192 (quoting COMMITTEE ON POLYGAMOUS ISSUES, LIFE IN BOUNTIFUL: A REPORT IN THE LIFESTYLE OF A POLYGAMOUS COMMUNITY 12 (Apr. 1993)).

¹¹⁶ *Id.* at 194.

¹¹⁷ *Id.* (“Although some plural wives report harmonious, ‘sisterly’ relationships, competition between wives (and sometimes their children) is an unfortunate reality in many polygamous families, and it is not uncommon for a dominant wife to physically abuse other wives.”).

¹¹⁸ The Canadian Case, *Reference re: Section 293 of the Criminal Code of Canada*, cited the testimony of a child of a polygamous marriage, who noted that her relationship with her father’s other wives was “[v]ery strange . . . with the two women who’d married him before my mother, [and her relationship was] much like the relationship [her] mother had with them.” She said, “[m]y mother was my dad’s favourite wife, and being the favourite wife is a curse. You don’t want it. Because the other women are envious of it and everybody is vying for it, and so you’re put down and torn down and ostracized in a lot of ways. Some women, I’ll hear them talk about this great camaraderie they have with their sister wives, and I say not true, because every day of your life is competition for his resources, and they are limited and there’s not enough of him to go around.” *Reference re: Section 293 of the Criminal Code of Canada*, [2011] B.C.S.C. 1588, para. 667 (Can. B.C. S.C.).

¹¹⁹ Dena Hassouneh-Phillips, *Polygamy and Wife Abuse: A Qualitative Study of Muslim Women in America*, 22 HEALTH CARE FOR WOMEN INT’L 735, 744 (2001).

¹²⁰ *Id.*

¹²¹ *See id.* at 745 (“In cases where emotional, physical, and/or sexual abuse was ongoing, cowives sometimes became combatants.”).

violence in polygamous marriages are the “Shafia family murders,” which occurred in 2009. In a quadruple honor killing, the husband (Mohammad Shafia), his second wife, and his son murdered Shafia’s first wife (who was infertile) and his three daughters (believing them to be too “Western”).¹²²

Women in polygamous marriages are not only more susceptible to physical harm; they are also more prone to emotional and psychological harm.¹²³ In a study comparing Bedouin Arab women in monogamous marriages to Bedouin Arab women in polygamous marriages, researchers Alean Al-Krenawi and John R. Graham found that women in polygamous marriages “showed significantly more psychological distress than their counterparts in monogamous marriages.”¹²⁴ Specifically, these women were more likely to report higher levels of somatization, obsession-compulsion, depression, interpersonal sensitivity, hostility, phobia, anxiety, paranoid ideation, psychotism, [and] GSI-general symptom severity.¹²⁵ The study’s findings also evidenced a negative correlation between polygamy and life satisfaction, as well as the quality of women’s marital and family lives.¹²⁶ Though this study was not performed in the United States, and its transferability is limited accordingly, it does show the comparative effect of polygamous marriages on women.

B. Harm to Children

In addition to women, children are also harmed by polygamous marriage. Polygamous marriages pose several risk factors, the most significant being “family conflict, family distress, the

¹²² Melinda Dalton, *Shafia Jury Finds All Guilty of 1st-degree Murder*, CBC NEWS MONTREAL, Jan. 29, 2012, <http://www.cbc.ca/news/canada/montreal/shafia-jury-finds-all-guilty-of-1st-degree-murder-1.1150023>.

¹²³ See Bala, *supra* note 109, at 192–93 (referring to the findings of the Committee on Polygamous Issues, saying that “the indoctrinated conformity and lack of personal empowerment for women leads to an underdeveloped sense of self, and inability to understand or exercise choice, and a blurring of personal and collective identity”).

¹²⁴ Alean Al-Krenawi & John R. Graham, *A Comparison of Family Functioning, Life and Marital Satisfaction, and Mental Health of Women in Polygamous and Monogamous Marriages*, 52 INT’L J. SOC. PSYCHIATRY 5, 10 (2006).

¹²⁵ *Id.*

¹²⁶ *Id.*

absence of the father, and financial stress.”¹²⁷ Combined, these risk factors negatively affect a child’s emotional and physical development and wellbeing. Because plural marriage poses this threat, states have a compelling interest in prohibiting plural marriage.

1. Familial Conflict and Distress

Marital conflict is often a defining characteristic of polygamous marriages.¹²⁸ Oftentimes such conflict manifests itself in physical or emotional abuse.¹²⁹ Such abuse has been shown to negatively impact a child’s physical, emotional, and social development.¹³⁰ Even if children are not directly harmed in the course of fights between their parents, or between their parents and themselves, the fighting can still wreak havoc on their developing bodies and psyches, causing permanent damage.¹³¹

For example, children in abusive households are more likely to exhibit signs of distress and anger, such as running away from their home and being violent with others.¹³² They are also more likely to internalize emotional issues, leading to increased levels of depression and anxiety.¹³³ In fact, feelings of depression may be so severe that the child may feel as though there is no way out,

¹²⁷ Elbedour et al., *supra* note 108, at 258.

¹²⁸ *Id.* (“Considerable research demonstrates that children of polygamous families experience a higher incidence of marital conflict, family violence, and family disruptions than do children of monogamous families.”).

¹²⁹ Such physical and emotional abuse is also known as “spousal abuse.” See JAVAD H. KASHANI & WESLEY D. ALLAN, *THE IMPACT OF FAMILY VIOLENCE ON CHILDREN AND ADOLESCENTS* 33 (1998) (defining spousal abuse as “a behavior pattern, characteristically inflicted on a female by a male, that occurs in physical, emotional, and psychological forms”).

¹³⁰ See e.g., Abigail H. Gewirtz & Jeffrey L. Edleson, *Young Children’s Exposure to Intimate Partner Violence: Towards a Developmental Risk and Resilience Framework for Research and Intervention*, 22 *J. FAM. VIOLENCE* 151, 151 (2003) (“exposure to intimate partner violence can variably affect a child’s development depending on other individual and environmental influences”).

¹³¹ See Paul R. Amato & Juliana M. Sobolewski, *The Effects of Divorce and Marital Discord on Adult Children’s Psychological Well-Being*, 66 *AM. PSYCHOL. REV.* 900 (2001) (“Using 17-year longitudinal data from two generations, results show that divorce and marital discord predict lower levels of psychological well-being in adulthood.”); Elbedour et al., *supra* note 108, at 259 (“The psychological literature suggests that marital distress is linked with suppressed immune function, cardiovascular arousal, and increases in stress-related hormones.”) (internal citations omitted).

¹³² Kashani & Allan, *supra* note 129, at 37.

¹³³ *Id.* at 37–39.

precipitating suicidal and/or homicidal thoughts.¹³⁴ This cognitive experience has been termed the “lockage phenomenon.”¹³⁵ Significantly, children in abusive homes are also more likely to have issues with their social development.¹³⁶ Marital problems, specifically, have been shown to have dramatic, negative effects on childhood development.¹³⁷ Additionally, researchers have shown that in those families where a child’s father abuses his or her mother, the father is also more likely to abuse the child him or herself.¹³⁸

Marital conflict also affects a child’s interactions with other family members. For example, conflict between parents may lead to displaced parental aggression; the parents may direct their frustration and anger toward their children, who become “scapegoats.”¹³⁹ Additionally, because of the level of conflict in plural marriage households, older siblings may need to step into a parenting role for their younger siblings, and also (sometimes) for their parents.¹⁴⁰ Thus role assumption can cause emotional issues for the older child later on in the child’s life.¹⁴¹

Furthermore, polygamous marriages are often marked by periods of intense disruption, due to the fluid nature of the marriage.¹⁴² The marital unions that comprise a plural marriage generally do not occur simultaneously; instead, additional wives and/or husbands are added to the marriage over time. This modification of the marital unit can negatively impact a “developing

¹³⁴ *Id.* at 38–39.

¹³⁵ *See id.* (The “lockage phenomenon” . . . proposes that in conflicted or abusive families, an adolescent may be under such intense and relentless pressure, either from abuse or witnessing of abuse, that he or she can only see two possible means of escape: suicide or homicide”).

¹³⁶ *Id.* at 39–40.

¹³⁷ *See* Elbedour et al., *supra* note 108, at 258–59 (“Development outcomes of children predicted by marital problems include the following: poor social competence, a poorly developed sense of security, poor school achievement, misconduct and aggression, and elevated heart rate reactivity. Marital conflict is also likely to disrupt effective parenting and parental involvement. Further, children who experience intense marital conflict tend to use aggressive behaviors as a means of problem solving, show hostile patterns of interaction, and may be forced to ally with one parent against the other.”) (internal citations omitted).

¹³⁸ Kashani & Allan, *supra* note 129, at 35.

¹³⁹ Elbedour et al., *supra* note 108, at 259.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

child's trust, security, and confidence."¹⁴³ In summation, since plural marriages carry a high risk of both conflict and instability, they pose a danger to children in them.

2. The Absence of a Father

Sarah Hammon's father, a member of the Fundamentalist Latter Day Saints (FLDS) church, had nineteen wives and seventy-five children; she, personally, was raised in a home with thirty siblings. Of her relationship with her father she said:

I didn't have a relationship with my dad. He didn't know my name or who my mother was or even that I was his child unless I was in the house with him. And that was for 13 years that I lived with him I felt very lost in the family. Like a number more than . . . a valuable member of it.¹⁴⁴

As this quote shows, the size of polygamous families can pose significant problems. As the number of children and wives increases, interfamilial bonds become increasingly attenuated.¹⁴⁵

The father-child bond is often strained by plural marriages. Because polygamous marriages involve additional wives and children, a father's time and attention is more thinly divided. The resultant absence of a father figure negatively affects children.¹⁴⁶ Summarizing the available research, Elbedour et al. concluded that "there are four key correlates of a father's absence that have the strongest effect on children: (a) economic distress, which is associated with academic and psychosocial maladjustment; (b) the child's perception of abandonment by the father; (c) social isolation; and (d) parental conflict."¹⁴⁷ These key correlates have the potential to evoke lasting psychological and physical harm.

¹⁴³ See *id.* at 258 ("It is likely then that the sudden shift from a monogamous to a polygamous family system that occurs when a new spouse is added to the family would constitute just the kind of a major challenge to a developing child's sense of trust, security, and confidence.").

¹⁴⁴ Reference re: *Section 293 of the Criminal Code of Canada*, [2011] B.C.S.C. 1588, para. 667 (Can. B.C. S.C.).

¹⁴⁵ See Bala, *supra* note 109, at 198 ("Although children are surrounded by many sibling role models, and may receive care from more than one maternal figure, they receive less care and attention as more children are added to the family: both mother and father become less available, and the bonds between parent and child weaken.").

¹⁴⁶ See Elbedour et al., *supra* note 108, at 259 (internal quotation omitted).

¹⁴⁷ *Id.* (internal citations omitted).

3. Financial Stress

Polygamy is associated with high fertility rates, causing many polygamous families to have economic needs beyond their means.¹⁴⁸ The relatively large size of polygamous families affects children by decreasing the amount of economic resources available to them.¹⁴⁹ This strain has led “many polygamous families in the United States [to] receive social assistance.”¹⁵⁰ Additionally, many wives in plural marriages do not work outside the home, and must therefore rely on their husband to be the main (or sole) financial provider.¹⁵¹ As a result, some women in polygamous marriages do not feel that they can leave the marriage, even if they are unhappy.¹⁵²

A parent’s financial stress can harm the children of the marriage. In particular, a mother’s financial stress can negatively affect the way in which she cares for her children.¹⁵³ Numerous studies have shown that a family’s income has a direct effect on the psychological health of the children and is “negatively correlated with problems such as externalizing or internalizing behavior; depression, antisocial behavior, and poor impulse control; poor academic outcomes; and self-concept.”¹⁵⁴

In conclusion, marital conflict, marital distress, the absence of a father, and financial stress affect a child’s mental and physical wellbeing. This can start a “downward cycle of conflict,”

¹⁴⁸ *Reference re: Section 293 of the Criminal Code of Canada*, [2011] B.C.S.C. 1588, para. 13 (Can. B.C. S.C.). See also Symposium, *Divorce Reform: Rights Protections in the New Swaziland*, 8 GEO. J. GENDER & L. 883, 898 n.89 (2007) (“People in polygamous relationships tend to be very poor. The most vulnerable children come from polygamous relationships.”) (quoting Interview with Phindile Weatherson, Bank Personnel, in Ezulwini, Swaz. (Mar. 7, 2006)).

¹⁴⁹ See Bala, *supra* note 109, at 198 (“[T]he more wives and children, the fewer resources available for each family member.”).

¹⁵⁰ *Id.*

¹⁵¹ Elbedour et al., *supra* note 108, at 259.

¹⁵² Joseph Bozzuti, Note, *The Constitutionality of Polygamy Prohibitions After Lawrence v. Texas: Is Scalia a Punchline or a Prophet?*, 43 CATHOLIC LAW. 409, 440 (2004) (“Women feel trapped due to, among other things, their many children and their financial dependence on the benevolence inherent in polygamous communities.”).

¹⁵³ See Elbedour, et al., *supra* note 108, at 259 (“[T]he mother’s distress has serious implication[s] for her children, because it can diminish her level of caring, supervision, and involvement. Some distressed mothers can become withdrawn, depressed, and even hostile towards their children.”) (internal citation omitted).

¹⁵⁴ See *id.* at 260 (internal citations omitted).

since a child's wellbeing may increase tension between his or her parents.¹⁵⁵ A 2008 study of polygamous marriage amongst Bedouin Arabs in Israel exemplifies the problems associated with polygamous marriages and the way in which it negatively impacts children. In this study, the authors found that children in polygamous marriages were more likely than children in monogamous marriages to suffer from psychiatric illnesses and issues, "including somatization, obsessive compulsion, depression, interpersonal sensitivity, hostility, phobic anxiety, paranoid ideation, and psychosis."¹⁵⁶ Additionally, children in polygamous marriages reported experiencing issues relating to their peers, performing more poorly in school, and having worse relationships with their fathers.¹⁵⁷

4. Effect on Adolescent Males

Polygamy also poses a threat to the wellbeing of adolescent males. In many polygamous communities, and in Fundamentalist Mormon (FLDS) communities in particular, many adolescent and young men are effectively forced to leave the community to ensure that the "chosen" men have multiple wives.¹⁵⁸ These young men are usually ill equipped to face life outside of the confines of polygamous life. A main reason for this is that these young men usually have inadequate educations and insufficiently developed life skills and social support.¹⁵⁹

Additionally, an increase in unmarried men poses a threat to society because unmarried men are "statistically predisposed to violence and other anti-social behavior."¹⁶⁰ If the United States Supreme Court were to legalize polygamy, a logical consequence would likely be an increase of unmarried males. Since polygyny is the most common form of polygamy, legalization

¹⁵⁵ Al-Krenawi & Graham, *supra* note 124, at 10.

¹⁵⁶ Al-Krenawi & Slonim-Nevo, *supra* note 7, at 759.

¹⁵⁷ *Id.*

¹⁵⁸ Bala, *supra* note 109, at 192.

¹⁵⁹ *Reference re: Section 293 of the Criminal Code of Canada*, [2011] B.C.S.C. 1588, para. 11 (Can. B.C. S.C.).

¹⁶⁰ *Id.* at para. 13.

of polygamy would likely lead more men to take more wives, decreasing the pool of potential brides.¹⁶¹ This could result in increased crime levels and a more prevalent exhibition of antisocial behavior by the large number of young, unmarried males.¹⁶²

In his report, “Polygyny in Cross-Cultural Perspective: Theory and Implications,” Dr. Joseph Heinrich found that unmarried men commit crimes more often, and the crimes they commit are often much more serious than the crimes committed by married men.¹⁶³ Dr. Heinrich also found that marriage could decrease a man’s probability of criminal activity as much as thirty-five percent.¹⁶⁴ Chief Justice Bauman of the Supreme Court of British Columbia found this study to be particularly compelling because of the breadth of the population studied; the study that Dr. Heinrich relied upon tracked the criminal activity of men ages seventeen to seventy.¹⁶⁵ After conducting a cross-country comparison, Dr. Heinrich also found that polygamy is widely associated with higher levels of both murder and rape.¹⁶⁶ Additionally, he found that higher crime rates were generally associated with greater numbers of unmarried males.¹⁶⁷ This supports the belief that legalized polygamy, by increasing the number of unwed young males, could lead to higher crime rates.

C. The State’s “Compelling Interest”

The harms inherent in plural marriages were highlighted in the landmark Canadian case, *Reference re: Section 293 of the Criminal Code of Canada*, [2011] B.C.S.C. 1588 (Can. B.C. S.C.). Canada’s parliament prohibits polygamy in Section 293 of the Criminal Code of Canada. This

¹⁶¹ *Id.* at para. 499 (regarding the conclusions of Dr. Joseph Heinrich’s study, “Polygyny in Cross-Cultural Perspective: Theory and Implications”).

¹⁶² *Id.*

¹⁶³ *Id.* at para. 509.

¹⁶⁴ *Id.*

¹⁶⁵ *Reference re: Section 293 of the Criminal Code of Canada*, [2011] B.C.S.C. 1588, para. 509 (Can. B.C. S.C.).

¹⁶⁶ *Id.* at para. 511.

¹⁶⁷ *Id.*

case was brought by British Columbia to determine whether the prohibition of polygamy remained consistent with the Canadian Constitution, post-legalization of same-sex marriage. In his majority opinion, Chief Justice Bauman concluded that “this case is essentially about harm This includes harm to women, to children, to society and to the institution of monogamous marriage.”¹⁶⁸ He therefore held that the prohibition of polygamy does not constitute an unconstitutional prohibition.¹⁶⁹ Because of the strength of the evidence attesting to the harm caused by polygamous marriages, it seems likely that the United States Supreme Court could find a similarly compelling interest.

Some supporters of polygamous marriages have analogized polygamous marriage to same-sex marriage, arguing that both are “equally legitimate.”¹⁷⁰ However, polygamous marriage is a distinct institution.¹⁷¹ Most prominently, the harm that polygamous marriage causes to women and children is well documented and differentiates a constitutional analysis of polygamous marriage from a similar analysis of same-sex marriage.

In *Obergefell*, the third of the Court’s four reasons for recognizing the right to marry someone of the same sex was that such recognition would protect children and families.¹⁷² In contrast, the State may have a compelling reason to prohibit polygamous marriage since there is substantial evidence that polygamous marriages cause substantial harm to women and children. Thus, *Obergefell*’s holding cannot be automatically applied to polygamous marriage. For the

¹⁶⁸ *Id.* at para. 5.

¹⁶⁹ *Id.* at para. 1361 (here, the law “is substantially constitutional and peripherally problematic”).

¹⁷⁰ Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955, 1957 (2010).

¹⁷¹ *See id.* (“[W]hile the gay analogy may make for splashy punditry and good television, it distracts us from what is truly distinctive, and legally meaningful, about polygamy—namely, its challenges to the regulatory assumptions inherent in the two-person marital model.”). Also, many American laws are tailored to the two-person marital model. Examples include tax law, health law, estate law, divorce law, and family law. Recognition of polygamous marriage as a legal marital institution would require substantial changes to such laws.

¹⁷² *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015).

purposes of this Comment, it seems the most important exception to *Obergefell*'s holding (if it is not found to be limited to couples) is the institution of polygamous marriage itself.

D. Is the Prohibition of Polygamous Marriage “Narrowly Tailored”?

It seems that the State has a compelling interest in prohibiting polygamous marriage. Thus, the remaining question is the relationship of the “ends” (protection of women and children from the harms of polygamous marriage) to the “means” (the prohibition of polygamous marriage). Under strict scrutiny, the State needs to show that the prohibition of polygamous marriage is the *only* way to protect women and children from the associated harms. Generally, domestic violence laws, child support laws, child custody laws, and child marriage laws protect women and children from some of the specific harms associated with polygamous marriage. As a result, it might be difficult to show that prohibition of polygamous marriage is the *only* way to protect women and children from associated harms. Thus, prohibition of polygamy may fail under the narrowly tailored prong of the strict scrutiny test.

Even if the United States Supreme Court were to conclude that anti-polygamy legislation is not narrowly tailored, it would not automatically toll the death-knell for anti-polygamy legislation. Thus far, the Court has declined to articulate a specific standard of review for cases dealing with the fundamental right to marry.¹⁷³ Instead of applying strict scrutiny, the Court may apply rational-basis review as it did in *Turner v. Safley*. Under rational basis review, the protection of women and children need only be rationally related to a legitimate state interest.¹⁷⁴ Because this is a much easier standard for the State to satisfy, prohibition of polygamous marriage is more likely to be upheld. The State clearly has a legitimate interest (the protection of women and

¹⁷³ See *supra* Part II.

¹⁷⁴ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (“The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.”).

children from the harms of polygamous marriage), and the prohibition of polygamous marriage is rationally related to accomplishing that goal. Thus, a determination of the constitutionality of anti-polygamy legislation could depend on the mode of judicial analysis.

V. Conclusion

There is a fundamental right to marry that has been repeatedly recognized and reaffirmed by the United States Supreme Court.¹⁷⁵ If the right to marry multiple people is seen as part of this fundamental right, restrictions on polygamous marriage would probably be subjected to heightened scrutiny. Strict scrutiny, though not wholly insulating,¹⁷⁶ is a hard standard for the State to satisfy. Given the presence of alternative options, under strict scrutiny restrictions on polygamous marriage would probably be considered unconstitutional. However, the Supreme Court has not yet held that strict scrutiny would be required, and thus it is equally likely that rational basis review or another deferential standard may apply. It would be relatively easy for the Court to justify the prohibition of polygamous marriage under a less scrutinizing standard, given the strength of the State's compelling interest in protecting women and children.

Despite the findings and conclusions made in this Comment, which weigh against the legalization of polygamous marriage, there are undoubtedly those who will argue in favor of polygamy's constitutionality, on other grounds.¹⁷⁷ This Comment has viewed the constitutionality

¹⁷⁵ See, e.g., *Obergefell*, 135 S. Ct. 2584 (2015); *Turner v. Safley*, 482 U.S. 78 (1987); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *Loving v. Virginia*, 388 U.S. 1 (1967).

¹⁷⁶ Strict scrutiny is not always fatal to the legislation at issue. See *Adarand Constructors v. Peña*, 515 U.S. 200, 204 (1995) ("It is not true that strict scrutiny is strict in theory, but fatal in fact.").

¹⁷⁷ For example, some plural marriage advocates have argued that polygamy is a religious belief that is protected by the First Amendment. However, American courts have repeatedly rejected this argument. Resultantly, there is a wide body of precedent testifying to the fact that participants in polygamous marriage cannot use their religion as a shield. See, e.g., *Cleveland v. United States*, 329 U.S. 14, 20 (1946) (stating that "the fact that polygamy is supported by a religious creed affords no defense in a prosecution for bigamy"); *State v. Holm*, 137 P.3d 726, 746 (Utah 2006) (holding that "Utah's prohibition on polygamous behavior does not run afoul of constitutional guarantees protecting the free exercise of religion"); *State v. Green*, 98 P.3d 820, 830 (Utah 2004) (reaffirming the Court's holding in *Reynolds* and holding that "Utah's bigamy statute does not violate the Free Exercise Clause of the First Amendment of the United States Constitution"); *State v. Fischer*, 199 P.3d 663, 667 (Ariz. Ct. App. 2008)

of polygamy through the lens of substantive due process. Thus, other constitutional arguments are beyond the breadth of this Comment.

Post-*Obergefell*, the constitutionality of polygamous marriage is unclear. Inclusion, or a lack thereof, of polygamous marriage in the fundamental right to marry will largely determine whether or not polygamous marriage is viewed as a fundamental right. Additionally, even if polygamous marriage is held to be a fundamental right, we do not yet know which standard of review the Supreme Court would apply.¹⁷⁸ Despite the particular form of judicial review, polygamous marriage will still be haunted by the harm it can cause to women and children. Evidence of such harm may be a major hurdle to a judicially-recognized right to marry multiple people. Perhaps even more importantly, though *Obergefell* widened access to the fundamental right to marry, entrance remains limited to two people at a time.

(“The United States Supreme Court has declined to extend the protection of the Free Exercise Clause of the First Amendment to the practice of polygamy.”).

¹⁷⁸ The Court could choose to apply any standard of review in the spectrum, from rational basis review to strict scrutiny.