

ARTICLES

THE MORE PERFECT UNION: MONOGAMY AND THE RIGHT TO MARRIAGE

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ABSTRACT

For years, legal observers have warned that if the United States Supreme Court recognized a right to same-sex marriage, it would also be forced to recognize a right to polygamous marriage. After the Supreme Court decided Obergefell v. Hodges, right on cue, polygamists seized on the decision in asserting their right to marry more than one person. This Article argues that Obergefell does not actually help the polygamists' cause. First, it shows that Obergefell defined marriage as a relationship that provides stability for individuals, couples, children, and society. Next, this Article provides a historical overview of monogamy, demonstrating that it has slowly prevailed over polygamy during the past 2,000 years because two-spouse marriages strengthen families and society. This Article ultimately concludes that polygamy does not comport with Obergefell's definition of marriage, and thus the Court should hold that there is no constitutional right to polygamous marriage.

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INTRODUCTION

After the United States Supreme Court handed down its landmark decision *Obergefell v. Hodges*,¹ the Collier family of Montana, who have guest-starred in the TLC reality show *Sister Wives*, wasted no time in filing a lawsuit citing *Obergefell* as support for legal recognition of polygamous marriage.² This move came as a surprise to no one, as countless critics (and even some supporters) of same-sex marriage have predicted that a Supreme Court decision recognizing a constitutional right to same-sex marriage could be used to argue that polygamy is also a constitutional right.³

Unfortunately for the “sister wives” and their husband, *Obergefell* may prove less helpful to their cause than they hope. While *Obergefell* appears at first glance to open the door to judicial recognition of a right to polygamy,⁴ a deeper analysis reveals that the decision may actually shut that door firmly. *Obergefell* identified stability as the primary objective of marriage, and polygamy, as this Article will show, has a profoundly destabilizing effect on both families and society.

Part I of this Article discusses the implications *Obergefell* has for constitutional claims involving marriage, including a polygamy case. First, it argues that

1. 135 S. Ct. 2584 (2015).

2. ‘*Sister Wives*’ Polygamists Cite Gay Marriage Ruling in Court Fights, WALL ST. J. (Aug. 28, 2015), <http://blogs.wsj.com/law/2015/08/28/sister-wives-polygamists-cite-gay-marriage-ruling-in-court-fights/>; Complaint for Declaratory, Injunctive, and Other Relief, *Collier v. Fox.*, 1:15-cv-00083 (2015).

3. See, e.g., *Obergefell*, 135 S. Ct. at 2621 (Roberts, C.J. dissenting) (“[F]rom the standpoint of history and tradition, a leap from opposite-sex marriage to same-sex marriage is much greater than one from a two-person union to plural unions, which have deep roots in some cultures around the world. If the majority is willing to take the big leap, it is hard to see how it can say no to the shorter one.”); Fredrik Deboer, *It’s Time to Legalize Polygamy: Why Group Marriage Is the Next Horizon of Social Liberalism*, POLITICO (June 26, 2015), <http://www.politico.com/magazine/story/2015/06/gay-marriage-decision-polygamy-119469> (“[W]ith the Supreme Court’s ruling and broad public support, marriage equality is here to stay. Soon, it will be time to turn the attention of social liberalism to the next horizon[. . .] the legal recognition of marriages between more than two partners.”); Daniel Fisher, *Does A Victory for Gay Marriage Lead To Polygamy? Depends On The Reasoning*, FORBES (Apr. 24, 2015), <http://www.forbes.com/sites/danielfisher/2015/04/24/does-a-victory-for-gay-marriage-lead-to-polygamy-depends-on-the-reasoning/> (quoting legal experts such as Eugene Volokh as predicting that a ruling in favor of same-sex marriage would give support to polygamy advocates).

4. *Obergefell*, 135 S. Ct. at 2621 (Roberts, C.J., dissenting) (“It is striking how much of the majority’s reasoning would apply with equal force to the claim of a fundamental right to plural marriage.”).

Obergefell clarified the procedure for evaluating right-to-marry claims, holding that litigants must prove that the rationales behind the right “apply with equal force” to the particular form of marriage they wish to enter into.⁵ Second, it analyzes the Court’s four “reasons marriage is fundamental under the Constitution,” and its holding that the right to marry is respected by law, because marriage provides stability for 1) individuals, 2) relationships, 3) children, and 4) society.⁶ Part I concludes with a discussion of *Obergefell*’s historical review of the evolution of marriage over time⁷ and its consideration of whether “new insights” supported or undermined the “received legal stricture” that was being challenged.⁸

Part II examines “the context of the historical evolution of the laws and institution”⁹ of monogamy. This Part is divided into sections on monoandry (marriages with only one husband), monogyny (marriages with only one wife), and monohomogamy (marriages with two same-sex spouses). This Part shows that Western civilization (and, later on, nations around the world) prohibited polygamy by law, because polygamy has destabilizing effects on relationships and on society.

Part III argues that the longstanding Western prohibition of polygamy is still very relevant today. It shows that polygamy continues to throw personal lives into turmoil, harm relationships, expose children to domestic neglect and abuse, and undermine social order. Part III argues that, in regard to all four of the marriage objectives identified by *Obergefell*, polygamy fails to provide the same levels of stability that monogamy provides.

This Article concludes by asserting that, because monogamy laws are necessary to achieve *Obergefell*’s four objectives of marriage, state prohibitions of polygamy are justified under the U.S. Constitution.

I. THE *OBERGEFELL* FRAMEWORK FOR RIGHT-TO-MARRY CASES

This Part discusses the implications that *Obergefell* has for right-to-polygamy cases. First, this Part shows that, while the *Obergefell* majority used language that depicted marriage as a monogamous institution, it did not directly address the polygamy issue. *Obergefell*’s passing references to monogamy could be dismissed as dicta. However, while *Obergefell* did not provide specific insight into how the Court will address a right-to-polygamy case, it *did* provide insight into how the Court will approach right-to-marry cases generally. For example, the Court clarified that historical practices do not dictate to whom a right applies. This holding resolved a key ambiguity in fundamental rights jurisprudence.

Finally, this Part discusses the “Equal Force” test that *Obergefell* established for cases involving the reach and applicability of a recognized right. The Court

5. *Id.* at 2599.

6. *Id.* at 2599–02.

7. *Id.* at 2595.

8. *Id.* at 2598.

9. *Kotch v. Bd. of River Port Pilot Comm’rs*, 330 U.S. 552, 557 (1947).

held that, when determining whether a claimant is entitled to exercise a fundamental right in a certain way, the Court must “respect the basic reasons why the right. . . has been long protected” and determine whether those reasons apply “with equal force” to the claimant’s form of exercise.¹⁰ The *Obergefell* Court went on to find that the right to marry is based on “four principles and traditions.”¹¹ Thus, this Part will conclude that a right-to-polygamy claim will be judged on its compatibility with those four factors.

A. *OBERGEFELL*’S MONOGAMY DICTA IS NOT DETERMINATIVE FOR POLYGAMY CASES

Although the *Obergefell* decision never addressed monogamy directly, the Court did describe marriage as a union between “two” persons no less than sixteen times,¹² and used the term “couple” a staggering ninety-one times.¹³ “The Court’s attempts to clarify that [marriage] is a union of ‘two’ people,” one journalist wrote, “are so forced as to be cringe-inducing.”¹⁴

Obergefell’s heavy use of the words “two” and “couple” were likely intended to assuage fears that the decision would be used to dismantle restrictions on polygamy. Legal scholars have argued that “a two-person limit is evident at various points throughout *Obergefell*,” and that the decision “did not diverge from the monogamous model.”¹⁵ Opponents of polygamy seized on the Court’s language as proof that *Obergefell* does not support a right to polygamy. “I don’t think in the majority opinion I saw anything but ‘two’ and ‘couple’ throughout,” the Utah Attorney General’s federal solicitor said in an interview about a polygamy case.¹⁶

Despite the *Obergefell* Court’s painstaking efforts to characterize marriage as a monogamous relationship, the decision does not settle constitutional questions surrounding polygamy. In his dissent from *Obergefell*, Chief Justice Roberts said that “[i]t is striking how much of the majority’s reasoning would apply with equal

10. *Obergefell*, 135 S. Ct. at 2599.

11. *Id.*

12. *Obergefell*, 135 S. Ct. at 2588 (specifying that marriage involves “two” individuals three times); *id.* at 2593 (three times); *id.* at 2594 (four times); *id.* at 2599 (four times); *id.* at 2607 (one time); *id.* at 2608 (one time).

13. *Id.* at 2587 (using the word “couple” in a general reference to marriage one time); *id.* at 2588 (three times); *id.* at 2589 (seven times); *id.* at 2590 (eleven times); *id.* at 2591 (eight times); *id.* at 2595 (two times); *id.* at 2596 (three times); *id.* at 2597 (five times); *id.* at 2598 (one time); *id.* at 2599 (four times); *id.* at 2600 (seven times); *id.* at 2601 (nine times); *id.* at 2602 (six times); *id.* at 2603 (one time); *id.* at 2604 (five times); *id.* at 2605 (three times); *id.* at 2606 (five times); *id.* at 2607 (twelve times).

14. Sean Trende, *Why Obergefell Is Unlikely to Lead to Polygamy*, REAL CLEAR POLITICS (July 6, 2015), http://www.realclearpolitics.com/articles/2015/07/06/why_obergefell_is_unlikely_to_lead_to_polygamy_127242.html.

15. Amberly B. Beye, *The More the Marry-er? The Future of Polygamous Marriage in the Wake of Obergefell v. Hodges*, 47 SETON HALL L. REV. 197, 205 (2016).

16. Ben Winslow, *Same-sex Marriage Decision Might Not Impact Utah’s Polygamy Appeal Because of One Word*, FOX 13 SALT LAKE CITY (July 1, 2015), <http://fox13now.com/2015/07/01/same-sex-marriage-decision-might-not-impact-utahs-polygamy-appeal-because-of-one-word/>.

force to the claim of a fundamental right to plural marriage.”¹⁷ He noted that “[a]lthough 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 element may not.”¹⁸

Polygamists, no doubt, will raise this same point. Because *Obergefell* failed to address why marriage is a relationship between “two” people, polygamists could attempt to dismiss its referrals to “two” individuals and “couples” as dicta. They could validly argue that the language characterizing marriage as monogamous can be severed without compromising the decision’s overall integrity.¹⁹ To determine whether *Obergefell* supports or undermines the cause of polygamists, a deeper analysis must be undertaken. To that end, the approach that *Obergefell* adopted in determining whether same-sex marriage is a right is more instructive than its passing references to monogamy.

B. *OBERGEFELL*’S MODIFICATION OF *GLUCKSBERG*’S HISTORICAL BASIS TEST

The *Obergefell* ruling laid out the procedure that courts must now follow in cases concerning the applicability of the right to marriage to specific types of partnerships. Before *Obergefell* was decided, there was some question about whether *Washington v. Glucksberg*’s²⁰ historical basis test²¹ was still good law.²² *Obergefell* clarified that *Glucksberg* does not apply to right to marry cases.²³ While the *Obergefell* Court was somewhat opaque in distinguishing *Glucksberg*,²⁴ the most logical interpretation is that a *Glucksberg*-style historical analysis may still be an appropriate test for determining the general existence of a

17. *Obergefell*, 135 S. Ct. at 2621 (Roberts, C.J., dissenting).

18. *Id.*

19. See Trende, *supra* note 14 (“[A]most every such sentence could be rewritten, without becoming any less truthful, by [. . .] simply excluding any reference to a number.”).

20. 521 U.S. 702 (1997).

21. *Id.* at 703 (noting that “the Court has regularly observed that the [Due Process] Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation’s history and tradition”); *id.* at 702 (finding that “[a]n examination of our Nation’s history, legal traditions, and practices demonstrates that Anglo-American common law has punished or otherwise disapproved of assisting suicide for over 700 years,” which ultimately led the Court to conclude that there was no fundamental right to physician-assisted suicide).

22. See, e.g., Diana Hassel, *Sex and Death: Lawrence’s Liberty and Physician-Assisted Suicide*, 9 J. CONST. L. 1003, 1029 (2007) (noting that the *Lawrence* Court placed emphasis on “emerging trends” as well as “past history”).

23. *Obergefell*, 135 S. Ct. at 2602 (“[W]hile [the *Glucksberg*] 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.”).

24. Compare *id.* (recognizing that *Glucksberg*’s use of the historical-basis test “may have been appropriate for the asserted right there involved”), with *id.* at 2621 (Roberts, C.J., dissenting) (arguing “the majority’s position requires it to effectively overrule *Glucksberg*”); see also *id.* at 2630 (Scalia, J. dissenting) (stating that “the opinion’s showy profundities are often profoundly incoherent” after noting that “limiting marriage to one man and one woman” was “accepted by every nation in history until 15 years ago”).

right, but not for determining who that right applies to.²⁵ The Court stated that “[h]istory and tradition” should dictate “broad principles rather than specific requirements.”²⁶ It also held that while “[h]istory and tradition guide and discipline” a fundamental rights analysis, they “do not set [a right’s] outer boundaries.”²⁷

The logic behind this holding possibly reflects the fact that the Anglo-American legal tradition has often recognized the rights of hegemonic demographic groups but refused to recognize those same rights when invoked by less politically-powerful groups.²⁸ The Court expressed concern that “[i]f rights were defined by who exercised them in the past,” then historically-marginalized groups would be unable to invoke rights that, in light of the rights’ underlying principles, should be applicable to these groups.²⁹

This did not mean, however, that history is irrelevant in cases concerning the applicability of a right. *Obergefell* noted that history is a story of “both continuity and change,” and that we can look to history to see how our understanding of constitutional rights “evolved over time.”³⁰ Historical review can reveal the existence of “new insights and societal understandings” affecting a right.³¹ *Obergefell* acknowledged that the Court has often “made assumptions defined by the world and time of which it is a part,”³² and that a review of history can help expose “changed understandings”³³ and outdated holdings.³⁴

C. *OBERGEFELL*’S “EQUAL FORCE OF ESSENTIAL ATTRIBUTES” TEST

Applying these principles, the *Obergefell* Court began its analysis by looking to history. The Court’s historical review revealed that marriage had long been a “male-dominated” institution, and that homosexuals had long been discriminated against by society.³⁵ The Court acknowledged that, in cases that defined marriage as an opposite-sex institution, it “has made assumptions defined by the world and time of which it is a part,”³⁶ and that there had been “changed understandings”

25. See Billy Gage Raley, *Safe at Home: Establishing a Fundamental Right to Homeschooling*, 2017 BYU EDUC. & L.J. 59, 68 n. 50 (2017) (“[I]f the *Obergefell* Court really intended to overturn *Glucksberg*’s historical basis test, it would not have emphasized that its findings about the ‘essential attributes of th[e] right [to marry]’ were ‘based in history [and] tradition.’ It appears that the Court merely distinguished *Glucksberg* by holding that historical support is necessary for establishing the existence of a general right but should not be mandatory in cases concerning the applicability of the right, since courts throughout history have unjustly held that disfavored minorities are not covered by a right’s protection.” (citations omitted)).

26. *Obergefell*, 135 S. Ct. at 2598.

27. *Id.* (emphasis added).

28. *See id.*

29. *Id.* at 2602.

30. *Id.* at 2595.

31. *Id.* at 2603.

32. *Id.* at 2598.

33. *Id.* at 2596.

34. *Id.*

35. *Id.* at 2595.

36. *Id.* at 2598.

towards both marriage and homosexuals in the years since those cases were decided.³⁷

Though cases which “presumed a relationship involving opposite-sex partners” were found to rest on outdated assumptions, the Court found “other, more instructive precedents” about the right to marriage which “expressed constitutional principles of broader reach.” These cases “identified essential attributes of that right based in history, tradition, and other constitutional liberties inherent in this intimate bond.”³⁸ The Court ultimately discovered “[f]our principles and traditions [which] demonstrate . . . the reasons marriage is fundamental under the Constitution,”³⁹ each corresponding to the interests of successively broader groups of stakeholders: (1) individuals’ interests in marriage, (2) couples’ interests in marriage, (3) children’s interests in marriage, and (4) society’s interests in marriage.

“A first premise of the Court’s relevant [right to marriage] precedents,” *Obergefell* held, “is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy.”⁴⁰ *Obergefell* found that an individual’s interest in marriage lies in the fact that it provides an “enduring bond” that “fulfills yearnings for security, safe haven, and connection.”⁴¹ Because the choice of a lifelong partner “shape[s] an individual’s destiny” and “is among life’s momentous acts of self-definition,”⁴² the Court respects a person’s “autonomy to make such profound choices.”⁴³

“A second principle in this Court’s jurisprudence,” the *Obergefell* majority continued, “is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals.”⁴⁴ The Court held that a couple’s interest in marriage lies in the fact that it “responds to the universal fear that a lonely person might call out only to find no one there” and “offers the . . . assurance that while both still live there will be someone to care for the other.”⁴⁵ The Court concluded that “the right to marry thus dignifies couples who ‘wish to define themselves by their commitment to each other.’”⁴⁶

“A third basis for protecting the right to marry,” the Court held, “is that it safeguards children and families.”⁴⁷ The Court found that the “recognition, stability, and predictability marriage offers” is a benefit to children.⁴⁸ “By giving recognition and legal structure to their parents’ relationship, marriage allows children to

37. *Id.* at 2596.

38. *Id.*

39. *Id.* at 2599.

40. *Id.*

41. *Id.* (quoting *Goodridge v. Dep’t of Pub. Health*, 440 Mass. 309, 322 (2003)).

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 2600.

46. *Id.* (quoting *Windsor v. United States*, 133 S. Ct. 2675, 2689 (2013)).

47. *Id.*

48. *Id.*

understand the integrity and closeness of their own family,” providing the psychological benefits that come with a sense of security.⁴⁹

Finally, *Obergefell* held that “this Court’s cases and the Nation’s traditions make clear that marriage is a keystone of our social order.”⁵⁰ Quoting Tocqueville, the Court noted that “when the American retires from the turmoil of public life to the bosom of his family, he finds in it the image of order and of peace . . . [H]e afterwards carries [that image] with him into public affairs.”⁵¹ “For this reason,” the Court continued, “just 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.”⁵²

Turning from marriage generally to same-sex marriage specifically, the Court stated that “[i]n assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long protected.”⁵³ The Court then set out to determine whether the “four principles and traditions” behind the right to marriage “apply with equal force” to same-sex marriage.⁵⁴ The Court ultimately concluded that “the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples,”⁵⁵ and in doing so, the Court again focused heavily on the theme of stability. It noted that the plaintiffs “seek[] relief from the continuing uncertainty their unmarried status creates in their lives,”⁵⁶ and that by being shut out of the institution of marriage, “[s]ame-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives.”⁵⁷ It also noted that “[w]ithout the recognition, stability, and predictability marriage offers, [same-sex couple’s] children suffer the stigma of knowing their families are somehow lesser,”⁵⁸ and that the plaintiffs sought “the certainty and stability all mothers desire to protect their children.”⁵⁹

D. PART I CONCLUSION

For all of the hype about how *Obergefell* supposedly upended constitutional law,⁶⁰ the decision’s analytical procedure fits quite comfortably within the

49. *Id.*

50. *Id.* at 2601.

51. *Id.* (quoting 1 DEMOCRACY IN AMERICA 309 (H. Reeve trans., rev. ed., 1990)).

52. *Id.*

53. *Id.* at 2599.

54. *Id.*

55. *Id.*

56. *Id.* at 2595.

57. *Id.* at 2590.

58. *Id.* at 2600.

59. *Id.* at 2606.

60. *See id.* at 2618–19 (Roberts, C.J., dissenting) (stating that the majority’s “aggressive application of substantive due process breaks sharply with decades of precedent”); David Bernstein, *Justice Kennedy’s Opinion in the Gay Marriage Case May Upend Fifty-Plus Years of Settled Equal Protection and Due Process Jurisprudence*, WASH. POST (June 26, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/26/justice-kennedys-opinion-in-the-gay-marriage-case-may-upend-fifty-plus-years-of-settled-equal-protection-and-due-process-jurisprudence/?utm_term=.dc6c9063e311.

Court's broader Fourteenth Amendment jurisprudence. In *Kotch v. Board of River Port Pilot Commissioners*,⁶¹ for example, the Court held that when an exclusion is challenged, the Court must "consider the relationship" of the exclusion "to the broad objectives"⁶² of the regulated institution, which *Obergefell* did in weighing same-sex marriage prohibitions against the four stability objectives of marriage. Furthermore, *Kotch* held that the Court "must view" the exclusion "in the context of the historical evolution of the laws and institution,"⁶³ which *Obergefell* did when it considered how the "institution [of marriage] has evolved over time."⁶⁴ *Lawrence v. Texas* also took a similar approach to *Obergefell*, conducting a historical review that exposed an "emerging awareness" in "the past half century" about the right to autonomy and privacy in sexual matters.⁶⁵

In summary, a post-*Obergefell* right to marry case would require the plaintiffs to demonstrate that the type of marriage they seek to enter is consistent with the "[f]our principles and traditions" outlined in *Obergefell*. The plaintiffs would have to prove that the form of marriage in question would promote stability for individuals, couples, children, and society. A historical review would be necessary to help determine whether the exclusion is based on contemporarily-relevant or outdated assumptions.

II. THE "CONTEXT OF THE HISTORICAL EVOLUTION" OF MONOGAMY

Applying the historical review procedure discussed above, this section provides "the context of the historical evolution of the laws and institution"⁶⁶ of monogamy, showing how it "evolved over time."⁶⁷ This section first discusses the historical origins of monoandry (marriages with only one husband), monogyny (marriages with only one wife), and monohomogamy (marriages with only two, same-sex spouses). This background provides a useful reference for the discussion in Part III, which considers whether monogamy laws align with the four objectives discussed in *Obergefell*.

A. MONOANDRY

Going back to Darwin himself, "ideas about selective pressures accounting for the evolution of mating systems pivot around the necessity (or not) of male parental care."⁶⁸ According to evolutionary theorists, many of marriage's attributes can be understood as manifestations of a mating strategy aimed at incentivizing paternal investment in children. The most common human mating system is

61. 330 U.S. 552 (1947).

62. *Id.* at 557.

63. *Id.*

64. *Obergefell*, 135 S. Ct. at 2595.

65. 539 U.S. 558, 571–72 (2003).

66. *Kotch v. Bd. of River Port Pilot Comm'rs*, 330 U.S. 552, 557 (1947).

67. *Obergefell*, 135 S. Ct. at 2595.

68. Patricia Adair Gowaty, *Battles of the Sexes and Origins of Monogamy*, in *PARTNERSHIPS IN BIRDS: THE STUDY OF MONOGAMY* 23 (Jeffery M. Black ed., 1996).

monoandry (literally meaning “one man”), in which a female limits herself sexually to one male partner in order to assure him of his paternity of her children.⁶⁹

Monoandry evolved as a response to selective pressures caused by bipedalism. The bipedal-suited skeletal structure is not well-suited for pregnancy—particularly not for a large-brained species such as ours—so human infants are born, in effect, prematurely. The competing demands of bipedalism and childbearing is known as the “obstetrical dilemma.”⁷⁰

In the prehistoric era, young children required more care than a mother alone could provide.⁷¹ While other primate infants “can cling to their mother while she walks around, her hands unencumbered,” helpless human infants “seriously compromise a mother’s food gathering” abilities.⁷² Paternal investment was required for survival, and thus “[w]e number among the small fraction of mammalian species in which males play important roles in raising offspring.”⁷³

Natural selection, however, strongly discriminates against males who spend their paternal capital on another male’s child.⁷⁴ Evolution dictates that males will invest in offspring only if their confidence of paternity is high.⁷⁵ To incentivize

69. The paternity establishment theory of marriage has been endorsed by many of the historical sources favored by the Court when it conducts Fourteenth Amendment historical analysis. Emory University Distinguished Professor John Witte, Jr. says the thinkers who ascribed to this theory constitute an “honor roll” of Enlightenment writers, including “Hugo Grotius, Samuel von Pufendorf, Jean Barbeyrac, John Locke, Mary Wollstonecraft, Baron Montesquieu, François Voltaire, David Hume, Henry Home, Francis Hutcheson, Adam Smith, Jeremy Bentham, William Blackstone, William Paley, Thomas Jefferson, Joseph Story, James Kent, and scores of other philosophers and jurists writing from roughly 1600 to 1900.” John Witte, Jr., *The Nature of Family, the Family of Nature: The Surprising Liberal Defense of the Traditional Family in the Enlightenment*, 64 EMORY L. J. 591, 597 (2015). According to Prof. Witte, “their basic argument was that exclusive and enduring monogamous marriages are the best way to ensure paternal certainty and joint parental investment in children who are born vulnerable and utterly dependent on their parents’ mutual care.” *Id.* at 597–98. The paternity establishment theory goes back even further than the Enlightenment, as Aristotle was one of the earliest sources to articulate the theory. For more information about the paternity establishment theory of marriage, see generally Billy Gage Raley, *The Paternity Establishment Theory of Marriage and Its Ramifications for Same-Sex Marriage Constitutional Claims*, 19 VA. J. SOC. POL’Y & L. 133 (2011).

70. See, e.g., John L. Locke, *Language and Life History: A New Perspective on the Development and Evolution of Human Language*, 29 BEHAV. & BRAIN SCI. 259, 261 (2006).

71. PETER B. GRAY & KERMYT G. ANDERSON, FATHERHOOD: EVOLUTION AND HUMAN PATERNAL BEHAVIOR 20 (2010) (stating that human infants “command more care, even require more care, than a mother alone can provide”).

72. ROBERT WRIGHT, THE MORAL ANIMAL 57 (1994); see also STEVEN PINKER, HOW THE MIND WORKS 480 (1997) (“When a foraging woman is pregnant, nursing, and bringing up children, she and the children are vulnerable to hunger, protein deficiency, predation, rape, kidnapping, and murder.”).

73. GRAY & ANDERSON, *supra* note 71, at 30; see also David C. Geary, *Evolution and Proximate Expression of Human Paternal Investment*, 126 PSYCHOL. BULL. 55 (2000) (“In more than 95% of mammalian species, males provide little direct investment in the well-being of their offspring. Humans are one notable exception to this pattern.”).

74. See, e.g., WRIGHT, *supra* note 72, at 65 (“Not long for this world are the genes of a man who spends his time rearing children who aren’t his.”).

75. Carel P. van Schaik et al., *Paternity Confusion and the Ovarian Cycles of Female Primates*, in INFANTICIDE BY MALES AND ITS IMPLICATIONS 42, 44 (2000); see also MICHAEL P. MUEHLENBEIN, HUMAN EVOLUTIONARY BIOLOGY 356 (2010) (“The level of paternal investment is directly correlated with both paternity confidence and assessment of a wife’s fidelity.”).

paternal investment, “a female needs to provide the male with a high enough probability of paternity to make it selectively advantageous for the male” to support her children.⁷⁶

In a species that requires paternal investment, “adaptations should evolve to help guarantee that the female’s offspring are also [the investing male’s] own.”⁷⁷ Monoandry was such an adaptation, as female humans began limiting themselves to one male in order to assure him of his paternity.⁷⁸ Male jealousy is also an adapted trait, as men who felt no urge to “mate guard” were long ago selected out of the gene pool.⁷⁹

Monoandry is a nearly universal characteristic of opposite-sex marriage. Polyandry—a marriage containing multiple husbands—is “vanishingly rare.”⁸⁰ Because men are reluctant to invest in children if they cannot be assured of their biological paternity, polyandry is not a very viable form of marriage.⁸¹

According to Professor Larry Arnhart, “[i]n the few cases where it does occur, polyandry is fraternal: a wife of one brother becomes the wife of all.”⁸² In this type of relationship, a husband knows that any child born to the wife is at least his niece or nephew, if not his own child. Kin selection thus helps keep fraternal polyandrous marriages intact.⁸³

Polyandry, even of the fraternal kind, is so unusual among human beings that some anthropologists have suggested that it is “unnatural,”⁸⁴ occurring only in

76. *Id.*

77. WRIGHT, *supra* note 72, at 65.

78. IAN TATTERSALL, *BECOMING HUMAN* 120 (1998).

79. See generally Martin Daly et al., *Male Sexual Jealousy*, 3 *ETHOLOGY & SOCIOBIOLOGY* 11 (1982) (noting in its abstract that “[s]exual jealousy functions to defend paternity confidence and is therefore expected to be a ubiquitous aspect of male psychology,” and ultimately finding that “[c]oercive constraint of female sexuality by the use or threat of male violence appears to be cross-culturally universal”).

80. DORIS ZUMPE & RICHARD P. MICHAEL, *NOTES ON THE ELEMENTS OF BEHAVIORAL SCIENCE* 299 (2012); see also J. PATRICK GRAY, *Ethnographic Atlas Codebook*, 10 *WORLD CULTURES* 86, 90 (1998) (finding that, of the 1,231 societies evaluated, polyandry was normative in only four).

81. KATHRINE E. STARKWEATHER, *EXPLORATION INTO HUMAN POLYANDRY: AN EVOLUTIONARY EXAMINATION OF THE NON-CLASSICAL CASES* 25 (2010) (stating that “[i]t seems that polyandry is a far more unstable form of marriage or union than is polygyny, although there are no exact numbers to do a proper comparison,” and that there are certain inherent “stressors in a polyandrous union that lead to instability”).

82. LARRY ARNHART, *DARWINIAN NATURAL RIGHT: THE BIOLOGICAL ETHICS OF HUMAN NATURE* 264 (1998).

83. See, e.g., Levine & Joan B. Silk, *Why Polyandry Fails: Sources of Instability in Polyandrous Marriages*, 38 *CURRENT ANTHROPOLOGY* 375, 378 (1997) (“If the reproductive costs of polyandry are offset by the reproductive gains accrued by close kin, then it might be predicted that most stable and cohesive polyandrous households will be composed of men who are closely related to one another.”).

84. DONALD SYMONS, *THE EVOLUTION OF HUMAN SEXUALITY* 225 (1979) (describing polyandry as a product of harsh, “unnatural” environments where human males resort to polyandry as a last resort, concluding that “half a loaf is better than none”).

situations where there is extreme scarcity of women⁸⁵ or of arable land.⁸⁶ In the modern Himalayas, for example, brothers will enter into a marriage with the same woman because fraternal polyandrous arrangements help assure that family land remains intact and undivided. If every brother married separately and had children, family land would have to be split into ever-smaller plots, but when all brothers share the same wife, land can remain intact as it is passed down through the generations.⁸⁷

Even when co-husbands share fraternal bonds, polyandrous relationships are still plagued by jealousy and instability. Older brothers may attempt to restrict younger brothers' sexual access to the wife,⁸⁸ and "mounting dissatisfaction of junior husbands leads them to leave when new marital prospects materialize."⁸⁹ Brothers who practice fraternal polyandry often fight over the management of land, and researchers have hypothesized that "numerous and violent quarrels between brothers about property may be the reverberations of repressed sexual hostility."⁹⁰

In the extremely rare examples of polyandry between non-related males, the marriages "are unstable and sometimes explosive."⁹¹ While the "fraternal arrangement moderates the jealousy of the males and ensures that the offspring are related to them,"⁹² the male mate-guarding instinct is unmitigated in marriages containing unrelated husbands. Violence and defection are common in such relationships.⁹³

In light of these inherent biological issues, it is not surprising that polyandry is not a popular form of marriage. A study of the *Ethnographic Atlas* showed that "[p]olygyny occurs 141 times more frequently than polyandry."⁹⁴ The researchers

85. 2 ALBERT ELLIS & ALBERT ABARBANEL, *THE ENCYCLOPÆDIA OF SEXUAL BEHAVIOUR* 669 (2013).

86. STEPHEN K. SANDERSON, *THE EVOLUTION OF HUMAN SOCIALITY: A DARWINIAN CONFLICT PERSPECTIVE* 230 (2001).

87. ELLIS & ABARBANEL, *supra* note 85.

88. Nancy E. Levine & Joan B. Silk, *Why Polyandry Fails: Sources of Instability in Polyandrous Marriages*, 38 *CURRENT ANTHROPOLOGY* 375, 386 (1997) ("In Tibetan households, the eldest brother has greater authority and may take advantage of his position to delegate unpleasant work to his junior siblings or sexually monopolize the common wife. It is plausible that strong-willed younger siblings resent this.").

89. Kathrine E. Starkweather & Raymond Hames, *Exploration into Human Polyandry: An Evolutionary Examination of the Non-Classical Cases*, 23 *HUMAN NATURE* 149, 165 (2012).

90. David G. Mandelbaum, *Polyandry in Kora Society*, 18 *MAN IN INDIA* 49 (1938).

91. L.R. Hiatt, *Polyandry in Sri Lanka: A Test Case for Parental Investment Theory*, 15 *MAN* 583, 587 (1980).

92. ARNHART, *supra* note 82.

93. Prof. William R. Jankowiak, an ethnographer who specializes in marriage studies, states that "[c]o-husbands must experience jealousy at some point, even under the best of circumstances." WILLIAM R. JANKOWIAK, *INTIMACIES: LOVE AND SEX ACROSS CULTURES* 131 (2013). He quotes a wife with three husbands as saying that "[j]ealousy is really common regarding food, clothing, and sex," and another wife who complained that co-husbands often "fight and leave." *Id.*

94. William Tulio Divale & Marvin Harris, *Population, Warfare, and the Male Supremacist Complex*, 78 *AM. ANTHROP.* 521, 523 (1976) (citing GEORGE P. MURDOCK, *ETHNOGRAPHIC ATLAS: A SUMMARY* (1967)).

concluded that “the fact that polygyny is so much more common than polyandry” implies the presence of “powerful” evolutionary influences at work.⁹⁵

B. MONOGYNY

Unlike its near-universal bias against human polyandry, evolution does not always select against polygyny in humans. In fact, evolutionary theorists believe that humans are somewhat polygynous by nature,⁹⁶ and that our polygynous history is reflected through our very bodies. “Male-biased sexual dimorphism is a correlate of polygyny: the more polygynous a species, the bigger males are in relation to females,” and in humans, “[a]dult males are on average bigger (i.e., taller as well as heavier) than females.”⁹⁷

Our sexual dimorphism is relatively slight, however, indicating that our ancestors were only moderately polygynous.⁹⁸ According to evolutionary psychologists:

Our best guess about the sort of reproductive system in which the human psyche evolved, and to which it is adapted, is one in which mateships were predominately but not exclusively monogamous, paternal investment was significant, and the variance in reproductive success was slightly greater among men than among women (eective [moderate] polygyny).⁹⁹

The prevalence of polygyny depends largely on socioeconomic conditions.¹⁰⁰ Evolutionary theory holds that a woman will seek to maximize the level of paternal support her potential children will receive.¹⁰¹ As a consequence, a woman’s decision to marry monogamously or polygynously is heavily influenced by stratification of wealth.

95. *Id.*

96. KATHERINE A. DETTWYLER, CULTURAL ANTHROPOLOGY & HUMAN EXPERIENCE: THE FEAST OF LIFE 107 (2011) (“[T]he natural system of mating in modern humans would be moderate polygyny”). The ethnographic record bears this out, as “[t]he vast majority of cultures known to anthropology allowed at least some men to have more than one wife simultaneously.” Melvin Ember et al., *Comparing Explanations of Polygyny*, 41 CROSS-CULTURE RES. 428 (2007).

97. WALTER SCHEIDEL, MONOGAMY AND POLYGyny IN GREECE, ROME, AND WORLD HISTORY 2 (2008).

98. *Id.*

99. Margo Wilson & Martin Daly, *The Man Who Mistook His Wife for a Chattel*, in THE ADAPTED MIND: EVOLUTIONARY PSYCHOLOGY AND THE GENERATION OF CULTURE 300 (Jerome H. Barkow et al. eds., 1995).

100. STEPHEN SANDERSON, HUMAN NATURE AND THE EVOLUTION OF SOCIETY 172 (2014) (“Other than status and resources, few factors show any consistent relationship with polygyny.”).

101. See, e.g., Elizabeth Cashdan, *Women’s Mating Strategies*, 5 EVOLUTIONARY ANTHROPOLOGY 134 (1996) (noting that “traditional evolutionists” theorize that “[b]ecause acquiring resources for her offspring is of paramount importance, a woman will try to attract wealthy, high-status men who are willing and able to help her.”); SANDERSON, *supra* note 100, at 171 (“In all societies, women seek husbands of high status who command resources.”).

If all men in a society have roughly the same level of wealth, a woman will prefer to marry a man with no other wife, so that her children will not have to share the man's resources with another woman's children.¹⁰² In societies with high levels of inequality, on the other hand, many women will "choose to enter polygynous marriages and put up with the disadvantages,"¹⁰³ because their children will be better off sharing a wealthy man's resources with another wife's children than they would with exclusive access to a poor man's resources¹⁰⁴ (as George Bernard Shaw put it, "The maternal instinct leads a woman to prefer a tenth share in a first-rate man to the exclusive possession of a third-rate one").¹⁰⁵ UC Davis anthropologist Monique Borgerhoff Mulder, in discussing a study comparing polygynous and monogamous households in fifty-six villages in Tanzania, gives the following example in explaining polygyny: "If you have a choice of a guy who has 180 cows, lots of land and other wives, it might be better for you to marry him rather than a guy who has no wives, three cows and one acre."¹⁰⁶

Polygyny, therefore, is directly correlated with inequality.¹⁰⁷ In egalitarian societies, polygyny is limited.¹⁰⁸ In societies with unequal distribution of wealth, polygyny is more common.¹⁰⁹

The history of monogyny is complex. It can be roughly separated into three periods: 1) the egalitarian and monogynous prehistoric period, 2) the inegalitarian and polygynous Neolithic period, and 3) the inegalitarian but monogynous period from Classical Antiquity to the present. This subsection provides an overview of monogamy norms in each era.

1. Ecologically-Based Monogyny in the Prehistoric Era

Throughout most of our history, humans lived a hunter-gatherer lifestyle that was marked by low levels of material inequality. Hunter-gatherers lived a

102. Nikhil Chaudhary et al., *Polygyny Without Wealth: Popularity in Gift Games Predicts Polygyny in BaYaka Pygmies*, 2:150054 R. SOC. OPEN SCI. 1, 2 (2015) ("[W]omen engaging in polygynous marriages are incurring the substantial cost of sharing a provider for themselves and their offspring.").

103. SANDERSON, *supra* note 100, at 173.

104. Douglas R. White & Michael L. Burton, *Causes of Polygyny: Ecology, Economy, Kinship, and Warfare*, 90 AM. ANTHROPOLOGIST 871, 872 (1988) ("As inequality among men increases, polygyny increases, since women will choose to marry wealthy men who already have several wives.").

105. CAROLINE THOMAS HARNSBERGER, BERNARD SHAW: SELECTIONS OF HIS WIT AND WISDOM 191 (1965).

106. Kate Pickles, *Polygamous Households 'Are Wealthier and Have Healthier Children'*, DAILY MAIL (Oct. 29, 2015), <http://www.dailymail.co.uk/health/article-3294883/Can-sharing-husband-GOOD-women-Polygamous-households-wealthier-healthier-children.html>.

107. See, e.g., RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 165 (1985) ("[I]n its usual form — polygyny (many wives) — polygamy presupposes some inequality of wealth."); Douglas R. White & Michael L. Burton, *Causes of Polygyny: Ecology, Economy, Kinship, and Warfare*, 90 AM. ANTHROPOLOGIST 871 (1988) ("As inequality among men increases, polygyny increases, since women will choose to marry wealthy men who already have several wives.").

108. POSNER, *supra* note 107 (stating that if the amount of polygyny is small in a society that tolerates it, this "indicate[s] that the inequality of wealth is not great (as appears to be true in most primitive societies)").

109. SANDERSON, *supra* note 100, at 171.

nomadic, hand-to-mouth existence, following game and collecting wild nuts and berries on a daily basis.¹¹⁰ Because food spoilage prevented hunter-gatherers from stockpiling the fruits of their labor,¹¹¹ and because the “nomadic way of life prevent[ed] accumulation of possessions”¹¹² of any type, hunter-gatherer societies “displayed (and still display wherever they exist) relatively equal distributions of income.”¹¹³

The egalitarian hunter-gatherer lifestyle favored monogamy over polygyny. According to anthropology professor Bernard Chapais, “prior to the advent of socioeconomic stratification brought about by the adoption of agriculture and cattle herding, monogamy was the predominant type of union.”¹¹⁴ Genetic evidence supports this hypothesis, as “[p]hylogenetic reconstructions suggest that marriages in early ancestral human societies probably had low levels of polygyny.”¹¹⁵ This pattern holds up even today, as “among most hunter-gatherers, monogamy is the usual pattern.”¹¹⁶

Polygyny was not banned by hunter-gatherer societies, as there are examples of high-status men such as chiefs and particularly-successful hunters taking

110. Clark Spencer Larsen, *Animal Source Foods and Human Health During Evolution*, 133 J. NUTRITION 3893, 3894 (2003) (observing that hunter-gatherers lived a “hand-to-mouth, day-to-day existence” and that “before (agriculture) most men must have spent their waking moments seeking their next meal, except when they could gorge after a great kill”).

111. See, e.g., 1 KENNETH F. KIPLE & KRIEMHILD CONEÈ ORNELAS, *THE CAMBRIDGE WORLD HISTORY OF FOOD*, 434–35 (2000) (“[T]he ideal among [our] prehistoric hunter-gatherer successors [was] to consume a hunted animal immediately after it had been killed . . . while it was still fresh and unspoiled.”); Chaudhary et al., *supra* note 102, at 1 (“resource availability is dependent on male hunting capacity and limited by the lack of storage.”). Food storage technologies did not develop until the Pre-Pottery Neolithic A (“PPNA”) Era, roughly 10–12,000 years ago. See Ian Kuijta & Bill Finlayson, *Evidence for Food Storage and Predomestication Granaries 11,000 Years Ago in the Jordan Valley*, 106 PNAS 10966, 10966 (2009) (“People in the PPNA were the first in the world to develop systematic large-scale food storage.”); STEVEN E. CHURCHILL, *THIN ON THE GROUND: NEANDERTAL BIOLOGY, ARCHEOLOGY AND ECOLOGY* 294 (2014) (“Evidence of [food] storage during the Middle Paleolithic is rare.”); Brian A. Nummer, *Historical Origins of Food Preservation*, NAT’L CTR. FOR HOME FOOD PRESERVATION (May 2002), http://nchfp.uga.edu/publications/nchfp/factsheets/food_pres_hist.html (stating that the earliest known example of human use of food drying techniques dates back to 12,000 B.C.).

112. GERHARD LENSKI ET AL., *HUMAN SOCIETIES: AN INTRODUCTION TO MACROSOCIOLOGY* 121 (7th ed. 1995); see also BERNICE COHEN, *THE ORIGIN OF CIVILISATION: AN EXPLANATION OF DYNAMIC CULTURAL CHANGE* 44 (1998) (“Personal wealth and portable goods were limited, even unnecessary, as encumbrances that hamper the essential mobility of a nomadic foraging lifestyle.”); Chaudhary et al., *supra* note 102, at 1–2 (stating that hunter-gatherers “lived in foraging societies characterized by high mobility and no accumulation of material resources”).

113. Carles Boix, *Origins and Persistence of Economic Inequality*, 13 ANN. REV. POL. SCI. 489, 512 (2010).

114. Bernard Chapais, *The Evolutionary History of Pair-bonding and Parental Collaboration*, in *THE OXFORD HANDBOOK OF EVOLUTIONARY FAMILY PSYCHOLOGY* 42 (Catherine Salmon & Todd K. Shackelford, eds., 2011).

115. Robert S. Walker et al., *Evolutionary History of Hunter-Gatherer Marriage Practices*, 6 PLOS ONE 1, 1 (2011).

116. See, e.g., Kristen Hawkes, *Foraging Differences Between Men and Women: Behavioral Ecology of The Sexual Division of Labor*, in *THE ARCHAEOLOGY OF HUMAN ANCESTRY: POWER, SEX AND TRADITION* 283, 296 (Stephen Shannon & James Steele, eds., 2005).

multiple wives.¹¹⁷ Rather, hunter-gatherers marriages were predominately monogamous because most men were incapable of amassing significantly more resources than their sexual competitors. Anthropologists refer to this condition as “ecologically-imposed monogamy,” which is not “imposed politically by a powerful nation-state but arises because of the lack of resources available to men to support more than one wife.”¹¹⁸

2. Inequality-Based Polygyny After the Agricultural Revolution

The end of the Ice Age marked a turning point for human society. “Until the end of the last Ice Age, around 11,000 B.C., all peoples on all continents were still hunter-gatherers,”¹¹⁹ but the Holocene glacial retreat coincided with the extinction of megafauna which had served as their key food source.¹²⁰ This development, known as the “Quaternary extinction event,” forced humans to abandon the hunter-gatherer lifestyle and adopt “plant-intensive resource-use strategies,” i.e., agriculture.¹²¹

Agriculture fundamentally changed humans’ ability to accumulate personal wealth. “In hunter-gatherer societies, there is little reward to those who can steal or defend perishable animal carcasses from others, but stores of [grain] and the land that produces them are another matter; they retain their value with time.”¹²² In addition to allowing humans to store wealth, agriculture also gave rise to complex societies with hierarchal socioeconomic ranks.¹²³

117. See, e.g., LYNN H. GAMBLE, *THE CHUMASH WORLD AT EUROPEAN CONTACT: POWER, TRADE, AND FEASTING AMONG COMPLEX HUNTER-GATHERERS* 191, 193 (2008) (providing a Catalonian explorer’s description of polygyny among a Native American hunter-gatherer tribe: “Although in this district the captains commonly enjoy the privilege of taking two or three wives . . . the ordinary men have only one”); BRIAN MORRIS, *ANTHROPOLOGY, ECOLOGY, AND ANARCHISM* 114 (2015) (“[I]n most South American societies, polygamous marriage is closely associated with chiefly power . . . although successful hunters may also have polygamous marriages.”).

118. SANDERSON, *supra* note 87, at 247.

119. JARED DIAMOND, *GUNS, GERMS, AND STEEL* 16 (1999).

120. PETER J. RICHERSON ET AL., *PRINCIPLES OF HUMAN ECOLOGY* 45 (2001) (stating that the late Pleistocene hunter-gatherer “style of life mostly disappeared with the climatic changes and waves of big game extinctions about 10,000 years BP”).

121. Peter J. Richerson et al., *Was Agriculture Impossible During the Pleistocene but Mandatory During the Holocene? A Climate Change Hypothesis*, 66 *AM. ANTIQUITY* 387 (2001) (stating that “agriculture was impossible under last-glacial conditions,” but “in the Holocene, agriculture was, in the long run, compulsory”).

122. FRANCES MCCALL ROSENBLUTH & MICHAEL F. THIES, *JAPAN TRANSFORMED: POLITICAL CHANGE AND ECONOMIC RESTRUCTURING* 21 (2010).

123. See, e.g., PETER J. RICHERSON & ROBERT BOYD, *INSTITUTIONAL EVOLUTION IN THE HOLOCENE: THE RISE OF COMPLEX SOCIETIES* 198, 207 (2001) (“Until a few thousand years ago humans lived in relatively small, egalitarian societies with a modest division of labor. After the domestication of plants and animals, beginning about 11,500 years ago, human densities rose substantially and the potential for an expanded division of labor grew. Beginning about 5,000 years ago, complex societies began to emerge. Hierarchical states arose to administer the increasingly minute division of labor. Families became dependent on the products of strangers for routine subsistence. Leaders came to have great and sometimes quite arbitrary authority to coerce common citizens. Complex systems also universally develop social stratification in which objective material well-being and culturally defined prestige vary

Agriculture dramatically distorted the distribution of wealth and status in human societies. The “agricultural way of life created an unprecedented inequality of property by which there was, for the first time, a clear distinction between the rich and the poor.”¹²⁴ While hunter-gatherer societies were egalitarian, “everywhere it occurred, the Neolithic [agricultural] revolution brought political hierarchies and wealth inequality in tandem.”¹²⁵

The inequality that accompanied the development of agriculture brought about unprecedented rates of polygyny. “Extreme polygyny” emerged “[r]elatively recently in human history, with the inequalities engendered by agricultural surpluses and the rise of complex, role-differentiated societies.”¹²⁶ The levels of polygyny enabled by agriculture would have been mind-boggling to our hunter-gatherer ancestors; as sociologist Stephen K. Sanderson notes, “in societies in which differences in status and wealth are extreme, men of the highest rank often have harems of hundreds of wives.”¹²⁷

Chromosomal research shows that polygyny became so extreme in the early days of agriculture that at one point, seventeen women were reproducing for every one man who was reproducing.¹²⁸ A biological anthropologist who took part in the study attributed the results to the fact that, in early agricultural societies, “only a few men accumulated lots of wealth and power, leaving nothing for others.”¹²⁹ If this hypothesis is correct, “it would be one of the first instances that scientists have found of culture affecting human evolution.”¹³⁰

Though polygyny rates declined from this early high-water mark, extreme polygyny has persisted “across thousands of years of Eurasian, African, and [indigenous] American history,” continuing up to “the fairly recent past” in some

greatly by social role. Those in high positions in the command and control system seemingly inevitably acquire a more or less disproportionate share of society’s rewards.”). For a specific example of this phenomenon in action, see GRAEME BARKER, *THE AGRICULTURAL REVOLUTION IN PREHISTORY: WHY DID FORAGERS BECOME FARMERS?* 175–78 (2006) (discussing “signs of increasing complexity in social and economic structures” in the Indian subcontinent after the emergence of agriculture).

124. LARRY ARNHART, *POLITICAL QUESTIONS: POLITICAL PHILOSOPHY FROM PLATO TO PINKER*, 292 (4th ed. 2015) (Arnhart continues by noting that “modern anthropologists and archaeologists agree that the adoption of agriculture about ten thousand years ago laid the foundation for modern civilization, which brought about great inequality in political power, social status, and economic wealth.”).

125. ROSENBLUTH & THIES, *supra* note 122; *see also, e.g.*, Boix, *supra* note 113 (“The agricultural revolution and the concomitant formation of the state came hand in hand with the emergence of marked inequalities of income across individuals and over generations.”).

126. Wilson & Daly, *supra* note 99, at 301.

127. SANDERSON, *supra* note 100, at 171.

128. *See generally* Monika Karmin et al., *A Recent Bottleneck of Y Chromosome Diversity Coincides With a Global Change in Culture*, 25 *GENOME RES.* 459 (2015); *see also* Dianne Depra, *Development of Agriculture May Have Induced Shift In Human Reproduction*, *TECH TIMES* (Mar. 21, 2015), <http://www.techtimes.com/articles/40799/20150321/development-of-agriculture-may-have-induced-shift-in-human-reproduction.htm> (stating that the timing of this genetic bottleneck “occurred when people in various parts of the world became sedentary farmers”).

129. Francie Diep, *8,000 Years Ago, 17 Women Reproduced for Every One Man*, *PACIFIC STANDARD* (Mar. 17, 2015), <https://psmag.com/8-000-years-ago-17-women-reproduced-for-every-one-man-6d41445ae73d#7hadua8cr>.

130. *Id.*

places.¹³¹ Anecdotal accounts from different cultures and time periods hint at how common it was throughout history for wealthy men to have large numbers of wives. For example, the Bible states that King Solomon “was greater in riches . . . than all the other kings of the earth,”¹³² and, not coincidentally, had over seven hundred wives and three hundred concubines.¹³³ Accounts by Franciscan friars in Mexico claim that the Aztec emperor Montezuma II, who ruled over the most advanced economy in the pre-colonial Americas,¹³⁴ had “4,000 concubines.”¹³⁵ Genetic and anecdotal evidence suggests that the Khans of the Mongolian Empire, who as rulers of the Silk Road were among the wealthiest men in history,¹³⁶ may also have been among the most polygynous men in history.¹³⁷

It was not only despots who practiced polygyny; lesser state officials and wealthy businessmen have also had large harems. The polygamous patriarchs of the Bible, while wealthy, were not royalty.¹³⁸ The Inca had a “graded political and economic hierarchy that closely correspond to a graded hierarchy of polygyny,” with the number of wives allotted by law ranging from twelve to fifty according to socioeconomic rank.¹³⁹ In the Aztec empire, an elite man would have “as many women as he could afford, which often numbered in the hundreds.”¹⁴⁰ Sir John Barrow, commenting on life in China at the turn of the nineteenth century, noted that “every great officer of state has his harem,” and “every merchant of Canton

131. *Id.*

132. 1 Kings 10:23 (New International Version).

133. 1 Kings 11:3.

134. Frederic Hicks, *First Steps Toward a Market-Integrated Economy in Aztec Mexico*, in *EARLY STATE DYNAMICS* 92 (Henri J. M. Claessen & Pieter Van De Velde eds., 1987).

135. JOHN MIDDLETON, *WORLD MONARCHIES AND DYNASTIES* 375 (2015).

136. See, e.g., Jacob Davidson, *The 10 Richest People of All Time*, *MONEY* (July 30, 2015), <http://time.com/money/3977798/the-10-richest-people-of-all-time/> (ranking Genghis Khan as the tenth-richest person of all time).

137. While the average man who lived in 1,000 A.D. has approximately 20 direct male descendants alive today, geneticists estimate that Genghis Khan has an astounding 16 million direct male descendants alive today, a number that would only be possible if Genghis and his male descendants fathered children with a very large number of women. Steve Sailer, *Genes of History's Greatest Lover Found?* UPI (Feb. 6, 2003), www.upi.com/Odd_News/2003/02/06/Genes-of-historys-greatest-lover-found/15661044569919/ (citing Zerjal et al., *The Genetic Legacy of the Mongols*, 72 *AM. J. HUM. GENETICS* 717 (2003)). Contemporary accounts from that time lend support to the genetic findings: Marco Polo wrote that “throughout the year,” Kublai Khan had six virgin concubines brought to him every three nights. MARCO POLO, *THE BOOK OF SER MARCO POLO, THE VENETIAN* 318–19 (Henry Yule trans., 2010). These are just a few of the more well-known examples of extreme polygyny, but there are many others that could be cited. Extreme polygyny become so common after the Agricultural Revolution that historian Walter Scheidel says “the pertinent evidence is too massive to be summarized . . . even in the most superficial manner.” He suffices to say that it “extends across thousands of years of Eurasian, African, and [indigenous] American history,” continuing up to “the fairly recent past” in some places. SCHEIDEL, *supra* note 97, at 5.

138. See *Genesis* 12:10-20 (describing how Abraham was living as a subject in Egypt when his wife was taken into the Pharaoh’s harem); *Genesis* 29:15-28 (stating that Jacob was a servant of his father-in-law when he married Rachel and Leah).

139. SANDERSON, *supra* note 100, at 171.

140. JOHN MIDDLETON, *WORLD MONARCHIES AND DYNASTIES* 375 (2015).

has his seraglio.”¹⁴¹ In colonial Africa, “merchants and wealthy farmers had many wives,”¹⁴² and “[s]ome wealthy merchants had twenty-five or more wives.”¹⁴³

Polygyny has caused major social problems since the early days of civilization.¹⁴⁴ Most negative effects of polygyny can be traced to the fact that it is a “zero sum game,”¹⁴⁵ since the ratio of men and women is usually equal, if one man marries two wives, some other man will be left without a wife. In polygamous societies, where wealthy men are allowed to marry more than their “fair share” of wives, many “[m]en of ordinary social status and few economic resources” never marry.¹⁴⁶

Anthropologists have found that the “scarcity of marriageable women in polygamous cultures increases competition among men for the remaining unmarried women,” and this competition “increases the likelihood men will resort to crime to gain resources and women.”¹⁴⁷ “Faced with high levels of intra-sexual competition and little chance of obtaining even one long-term mate, unmarried, low-status men will heavily discount the future and more readily engage in risky status-elevating and sex-seeking behaviours,”¹⁴⁸ such as “violent combat with rivals” and crimes that help “acquire the resources needed to attract members of the high-investing sex.”¹⁴⁹ Studies have found that polygynous societies have “higher rates of murder, theft, rape, social disruption, kidnapping (especially of females), sexual slavery and prostitution.”¹⁵⁰

141. SIR JOHN BARROW, *TRAVELS IN CHINA: CONTAINING DESCRIPTIONS, OBSERVATIONS, AND COMPARISONS, MADE AND COLLECTED IN THE COURSE OF A SHORT RESIDENCE AT THE IMPERIAL PALACE OF YUEN-MIN-YUEN, AND ON A SUBSEQUENT JOURNEY THROUGH THE COUNTRY FROM PEKIN TO CANTON* 100 (1805).

142. JOHN SCHLOTTERBECK, *DAILY LIFE IN THE COLONIAL SOUTH* 114 (2013).

143. K. David Patterson, *The Vanishing Mpongwe: European Contact and Demographic Change in the Gabon River*, 16 *J. AFRICAN HIST.* 217, 226 (1975); see also EDWARD WARD, *MARRIAGE AMONG THE YORUBA* 27 (1937) (stating that among the Yoruba people in Nigeria, in addition to “big men” rulers who had hundreds of wives, “there were hundreds of others, minor kings, chiefs, and wealthy farmers and traders, who were multiple polygenists, the number of whose wives varied between three and two hundred”).

144. Some of the oldest-existing statutes, for example, were aimed at combating common side-effects of polygyny. See *infra* text accompanying notes 161–163 and 169–171 (discussing laws that limited the number of wives a man can take, which would help assure that there are women available for most men to marry, and regulations concerning the division of resources within families, which would help prevent domestic disputes in polygynous households).

145. Jonathan Rauch, *One Man, Many Wives, Big Problems*, *REASON* (Apr. 3, 2006), <http://reason.com/archives/2006/04/03/one-man-many-wives-big-problem>.

146. SANDERSON, *supra* note 100, at 171.

147. *Press Release: Monogamy reduces major social problems of polygamist cultures*, UBC PUBLIC AFFAIRS (Jan. 23, 2012), <http://news.ubc.ca/2012/01/23/monogamy-reduces-major-social-problems-of-polygamist-cultures/>.

148. Joseph Henrich et al., *The Puzzle of Monogamous Marriage*, 367 *PHIL. TRANS. R. SOC. BIOLOGY* 657, 660 (2012).

149. David Buss & Joshua D. Duntley, *The Evolution of Aggression*, in *EVOLUTION AND SOCIAL PSYCHOLOGY* 271 (Mark Schaller et al. eds., 2013).

150. Henrich et al., *supra* note 148.

Societies with a surplus of single men shut out by polygyny tend to have authoritarian political systems, as police states “are better equipped to deal with possible large-scale intrasocietal violence” that comes with a large population of single males.¹⁵¹ An empirical study of 186 modern societies found a significant correlation between “despotism and polygyny.”¹⁵² This correlation may help account for the emergence of despotism in highly-polygamous early civilizations.¹⁵³

Polygynous societies are also more prone to war.¹⁵⁴ Due to the increased crime and violence in polygynous societies, “high-sex-ratio societies are governable only by authoritarian regimes capable of suppressing violence at home and exporting it abroad through colonization or war.”¹⁵⁵ A high prevalence of polygyny “may increase men’s desire to raid another group in order to gain access to reproductive women,”¹⁵⁶ and it may also increase the ruling class’s desire to go to war in order to reduce the number of surplus single men.¹⁵⁷ Osteo-archaeologists are beginning to find “shocking evidence for violent assaults”¹⁵⁸ during the Neolithic, as would be expected for a highly-polygamous era.

It appears that ancient civilizations recognized the socially-corrosive effects of excessive polygyny and made attempts to reign it in. For example, in the same passage where the Mosaic law forbids a king from “acquiring for himself excessive silver and gold,” it also stipulates that “he must not take many wives,”¹⁵⁹ which suggests that the Israelites were aware of the connection between inequality and polygyny. The Code of Hammurabi also placed limits on polygyny,¹⁶⁰

151. Valerie M. Hudson & Andrea Den Boer, *A Surplus of Men, A Deficit of Peace*, in *NEW GLOBAL DANGERS: CHANGING DIMENSIONS OF INTERNATIONAL SECURITY* 357 (Michael E. Brown ed., 2004).

152. *Id.*

153. See Simon T. Powers & Laurent Lehmann, *An Evolutionary Model Explaining the Neolithic Transition From Egalitarianism to Leadership and Despotism*, 281 *PROC. R. SOC. BIOLOGY* 1, 1 (2014) (stating that “hereditary and more despotic forms of leadership [. . .] arose during the Neolithic”); and *supra* text accompanying notes 111–122 (describing how polygyny flourished in the Neolithic).

154. See, e.g., *The Link Between Polygamy and War*, *ECONOMIST* (Dec. 19, 2017), <https://www.economist.com/news/christmas-specials/21732695-plural-marriage-bred-inequality-begets-violence-link-between-polygamy-and-war>.

155. VALERIE M. HUDSON & ANDREA M. DEN BOER, *BARE BRANCHES: THE SECURITY IMPLICATIONS OF ASIA’S SURPLUS MALE POPULATION* 202 (2004).

156. Satoshi Kanazawa, *Evolutionary Psychological Foundations of Civil Wars*, 71 *J. POL.* 25, 27 (2009).

157. ROY EDWARD COOMBS, *AN ARGUMENT FOR MONOGAMY AS A SOCIAL IDEAL* 63 (1929) (thesis, Boston University) (“A considerable excess of women over men in a population [is] possible only either through the killing off of men in war or through the capture or importation of women.”).

158. *Bloody Stone Age: War in the Neolithic*, *CURATED ARCHEOLOGY* (Mar. 30, 2009), <https://www.archaeology.co.uk/articles/features/bloody-stone-age-war-in-the-neolithic.htm>; see also George Dvorsky, *Europe’s First Farmers Were Shockingly Violent*, *GIZMODO* (Aug. 18, 2015), <http://io9.gizmodo.com/europes-first-farmers-were-shockingly-violent-1724792763> (describing new archeological discoveries that “strongly suggests that [violent] clashes were not isolated or infrequent; during the Early Neolithic, it appears that farming communities went to war against rival farming communities”).

159. *Deuteronomy* 17:17.

160. §144-48 *The Code of Hammurabi*, *THE AVALON PROJECT* (L.W. King, trans.), <http://avalon.law.yale.edu/ancient/hamframe.asp>.

including a law that forbade men who already had children from taking a second wife.¹⁶¹

Neolithic/Bronze Age narratives also provide glimpses into the lives of early polygynous families, revealing that they were highly dysfunctional. Lamech is the first depiction of a polygamist in the Bible,¹⁶² and the names of his wives are interpreted by the Midrash as an indictment of polygyny's effects on family life.¹⁶³ The biblical accounts of the patriarchs contain numerous instances of bitter rivalries between co-wives and half-siblings,¹⁶⁴ and other stories of less ancient origin also portray troubled polygynous families.¹⁶⁵ Tellingly, nearly all of the examples of polygyny in the Bible involved wealthy and/or politically powerful men.¹⁶⁶

Statutes from that period indicate that lawmakers sought to prevent battles over the division of resources in polygynous families. The Law of Moses, for example, stipulated that if a husband "marries another woman, he must not deprive the first one of her food, clothing and marital rights,"¹⁶⁷ and also prohibited men from giving a first-born son's inheritance to the younger sons of favored wives.¹⁶⁸ The Cuneiform laws also contained regulations about the division of property and assignment of rights among co-wives and their children.¹⁶⁹

161. *Id.* at §144-45.

162. *Genesis* 4:19.

163. WITTE, *supra* note 69, at 51; ANDRE LACOCQUE, *ONSLAUGHT AGAINST INNOCENCE: CAIN, ABEL AND THE YAHWIST* 137 (2010). The Midrash interprets the name of Lamech's first wife, Adah, as the "deposed one," and the name of the second wife, Zillah, as "she shaded herself" or "luxuriate." George A. Barton & Louis Ginzberg, *Adah*, in *JEWISH ENCYCLOPEDIA* 173 (1906). Adah was "reduced to a widow"-like status when her husband married a second wife. Witte, *supra* note 69, at 51; *see also* LENN E. GOODMAN, *JUDAISM, HUMANITY, AND NATURE* 103 (2014) (also using the description of "widow"). Zillah's name suggests that she was a favored "trophy wife." RABBI MICHAEL KATZ, *SEARCHING FOR MEANING IN MIDRASH* 34 (2002).

164. *See Genesis* 16 (describing how Abraham's second wife Hagar fled his household after suffering abuse at the hands of his first wife Sarah); *Genesis* 21:8-10 (describing how Sarah banished Hagar from the household after Hagar's son Ishmael mocked Sarah's son Isaac); *Genesis* 29-30 (describing the jealousy between Jacob's wives, Rachel and Leah); *Genesis* 37 (describing how Jacob showed favoritism to Rachel's son Joseph, symbolized by his coat of many colors, and how Leah's sons abducted Joseph and sold him into slavery out of jealousy).

165. *See* 1 *Samuel* 1 (describing the conflict between Elkanah's wives Hannah and Peninnah); 2 *Samuel* 3 (describing how Saul's son Ishbosheth had a falling out with a general over the general's relationship with his deceased father's concubine, which set in motion Ishbosheth's fall from power); 2 *Samuel* 13 (discussing how Amnon, the son of David's wife Ahinoam, raped his half-sister Tamar, the daughter of David's wife Maachah, and how Amnon's half-brother and Tamar's full brother Absalom killed Amnon out of a sense of vengeance); 2 *Samuel* 16:20-22 (describing how Absalom seized control of his father's harem and had a public orgy with the concubines).

166. *See* DAVID INSTONE-BREWER, *DIVORCE AND REMARRIAGE IN THE BIBLE: THE SOCIAL AND LITERARY CONTEXT* 22 (2002) ("In the biblical text it is generally the wealthy individuals who had more than one wife.").

167. *Exodus* 21:10 (New International Version).

168. *Deuteronomy* 21:15-17.

169. *See, e.g.*, §24-28 *Code of Lipit-Ishtar*, *SUMERIAN LAW CODE: THE CODE OF LIPIT-ISHTAR*, http://professordeannaheikkinen.weebly.com/uploads/1/6/8/5/16856420/mesopotamian_law_codes.pdf.

Though Neolithic records are generally scarce, there are strong indications that ancient cultures recognized the shortcomings of polygyny. Bronze Age literature and law suggest that people from that era drew the connection between polygyny and family troubles. Mesopotamian family law also provides evidence of early legislative attempts to regulate and limit polygyny.

3. Legally-Based Monogyny from Classical Antiquity to Present

The first Western nation on record to impose an outright ban on polygyny was ancient Athens, during the Solonian reforms.¹⁷⁰ Like Solon's other reforms, which ultimately laid the foundation for Athenian democracy,¹⁷¹ this policy of refusing to recognize polygynous marriages aimed to create a more egalitarian society. In preventing elite and wealthy men from taking a disproportionate share of wives, Greek family law "ensur[ed] access to legitimate wives for low-resource men and preserv[ed] an appearance of sexual equality that chimed with concurrent ideals of judicial and sometimes political equality."¹⁷² This revolutionary concept of widespread accessibility to marriage helped foster Greece's nascent spirit of democracy, as assuming the role of head of a family gave citizens a position of authority and autonomy, which in turn "secured inner peace and made a man independent of Fortune and of the power of the emperor."¹⁷³

Evidence that Athenian marriage policies were motivated by concerns about the sex ratio and accessibility to marriage can be seen in a brief legalization of bigamy after the Peloponnesian War.¹⁷⁴ High male war casualties during the war were the justification for this temporary measure.¹⁷⁵ As one historian writes, "the motives of the decree would have been . . . to reduce the number of Athenian women who were left to become old maids."¹⁷⁶ Interestingly, during this period of post-war polygyny in Athens, we again see narratives concerning familial

170. See, e.g., Tracy Clark-Flory, *Is Monogamy Essential to Democracy?* SALON (July 23, 2011), (quoting Prof. Joseph Henrich: "In the Western tradition, the earliest we can trace laws about monogamy is actually to Athens when the first notions of democracy began to be instituted. The argument is that it's meant to create equality among citizens so that, essentially, there'll be wives available to all Athenian men, rather than having all the rich men take many wives."); Henrich et al., *supra* note 148 (stating that "the roots of the package of norms and institutions that constitute modern marriage can be traced back to classical Greece.").

171. See ARISTOTLE, *POLITICS* 34 (Benjamin Jowett trans., 2005) (c. 350 B.C.E.) (Solon "put an end to the exclusiveness of the oligarchy, emancipated the people, established the ancient Athenian democracy, and harmonized the different elements of the state.").

172. See IAN MORRIS & WALTER SCHEIDEL, *THE DYNAMICS OF ANCIENT EMPIRES: STATE POWER FROM ASSYRIA TO BYZANTIUM* 288 (2009).

173. Paul Veyne, *The Roman Empire*, in *A HISTORY OF PRIVATE LIFE: FROM PAGAN ROME TO BYZANTIUM* 36 (Philippe Ariès & Georges Duby eds., 1992).

174. See MORRIS & SCHEIDEL, *supra* note 172, at 284.

175. DAVID HUME, *ESSAYS AND TREATISES ON SEVERAL SUBJECTS* 164–65 (1788) ("[T]he republic of Athens, having lost many of its citizens by war and pestilence, allowed every man to marry two wives, in order the sooner to repair the waste which had been made by these calamities.").

176. DOUGLAS MAURICE MACDOWELL, *THE LAW IN CLASSICAL ATHENS* 90 (1986).

conflict pop up, with fights between the co-wives of prominent Greeks becoming the stuff of legend.¹⁷⁷

After Greece imposed monogamy by law, “people began to internalize, as a moral code, what had been a civic and dotal institution.”¹⁷⁸ Hellenistic comedies “regularly depicted romantic love, rather than necessity, as the basis for marriage.”¹⁷⁹ Philosophers began redefining marriage as a relationship based not only on childbearing, but also on love.¹⁸⁰ Plato portrayed marriage as a dyadic relationship based on mutual affection.¹⁸¹ Even the sober-minded Stoics noted that monogamy was conducive to emotional bonding between the husband and wife.¹⁸² Our modern conception of marriage as an affectionate, companionate relationship traces back to these Greek teachings.¹⁸³

The Romans copied Greek monogamy customs, both legal and cultural.¹⁸⁴ Like the Greeks, the Romans came to regard polygamy as “a barbarian custom or a mark of tyranny.”¹⁸⁵ The practice of monogamy was firmly entrenched by the

177. David Hume recounts a tale about the great playwright Euripides, who “happened to be coupled to two noisy Vixens who so plagued him with their jealousies and quarrels, that he became ever after a professed woman hater and is the only theatrical writer, perhaps the only poet, that ever entertained an aversion to the sex.” HUME, *supra* note 175, at 165. Euripides himself reportedly stated about polygamy: “Ne’er will I commend more beds, more wives than one, nor children cursed with double mothers, banes and plagues of life.” 2 WILLIAM ALEXANDER, *THE HISTORY OF WOMEN, FROM THE EARLIEST ANTIQUITY, TO THE PRESENT*, 281–82 (1779). In addition, “[s]ome ancient authors write, that Socrates married a second wife . . . and that he suffered exceedingly from them both, as they were continually quarreling with each other, and never agreed, but in loading him with reproaches, and offering him the grossest insults.” CHARLES ROLLIN, *THE ANCIENT HISTORY OF THE EGYPTIANS, CARTHAGINIANS, ASSYRIANS, BABYLONIANS, MEDES AND PERSIANS, MACEDONIANS AND GRECIANS* 460 (1879); *see also id.* at 282 (“Socrates too had two wives, but the poor culprit had as much reason to repent of his temerity as Euripides.”).

178. Paul Veyne, *The Roman Empire, in A HISTORY OF PRIVATE LIFE: FROM PAGAN ROME TO BYZANTIUM* 36 (Philippe Ariès & Georges Duby eds., 1992).

179. MICHAEL GAGARIN, *ANCIENT GREECE AND ROME* 241 (2009).

180. VEYNE, *supra* note 178, at 37 (“Marriage outlives the duty to produce children, it was argued, so there must be some other reason why it exists. Husband and wife, both reasonable beings, live together all their lives. Thus marriage, the Stoics deduced, must be a kind of friendship, a durable affection between two good people.”); JOHN WITTE JR., *EXPORT REPORT PREPARED FOR THE ATTORNEY GENERAL OF CANADA* 5 (2010) (“From the fifth century B.C.E. onward, classical philosophers treated marriage as a natural and necessary institution designed to foster the mutual love, support, and friendship of husband and wife.”).

181. PLATO, *SYMPOSIUM* 27 (Alexander Nehamas & Paul Woodruff ed., 1989) (stating that marital love “calls back the halves of our original nature together; it tries to make one out of two and heal the wound of human nature.”).

182. *See* Veyne, *supra* note 178, at 37.

183. WITTE, *supra* note 69, at 74 (stating that the Western understanding of “marital love, intimacy, friendship, and companionship” was derived from Aristotle and the Roman Stoics).

184. JOHN WITTE, JR., *THE WESTERN CASE FOR MONOGAMY OVER POLYGAMY* 104 (2015) (“[L]aws of various Greek city-states made clear that valid marriages had to be monogamous, and this norm also became commonplace in the first Roman law collections.”); *see also History of Monogamy, in* EDWARD BLISS FOOTE, *PLAIN HOME TALK* 663 (1870) (“The Romans adopted Grecian law as originated by Solon, and gradually it crept into the management of the family.”).

185. WITTE, *THE WESTERN CASE*, *supra* note 184.

imperial era, and the prohibition of polygamy was even “inserted in the Institutes of Justinian.”¹⁸⁶

The Christian church incorporated the Greco-Roman concept of monogamous, companionate marriage into its creed¹⁸⁷ and spread the norm throughout the rest of Europe during the Middle Ages.¹⁸⁸ Early Christian writers supported church teachings by noting that polygamy was “often associated with household rivalries, internecine conflict, violence, sibling rape, and even murder.”¹⁸⁹ Modern researchers believe that the church’s efforts to impose monogamy throughout Europe had the effect that the theologians predicted, as it “reduced abductions and rapes of women and probably calmed the endemic violence of early medieval life.”¹⁹⁰

Unlike Christianity, Islam did not retain the monogamy customs of the Romano-Byzantine territories through which it spread.¹⁹¹ Interestingly, it appears that Islam’s toleration of polygyny began as a response to the demographic distortions of war, similar to Athens’ temporary legalization of bigamy after the Peloponnesian War.¹⁹² Islamic justification of polygyny traces back to a verse in the Koran where Mohammad gives the following instruction to Muslim men: “If ye fear that ye shall not be able to deal justly with the orphans, marry women of your choice, Two or three or four . . . or captives that your right hands possess.”¹⁹³ Modern Muslim scholars often note that this command was given in the context of the early Muslim conquests, which left large numbers of widows, orphans, and

186. JAMES KENT, COMMENTARIES ON AMERICAN LAW 47–48 (1860); *see also* SCHEIDEL, *supra* note 97, at 6 (stating that “the emperor Justinian claimed that ‘ancient law’ prohibited husbands from keeping wives and concubines at the same time”).

187. *See, e.g.*, 1 *Corinthians* 7:2 (“[L]et every man have his own wife, and let every woman have her own husband”); *Ephesians* 5:25 (“Husbands, love your wives, even as Christ also loved the church, and gave himself for it”); *see also* SCHEIDEL, *supra* note 97, at 13 (“In the early fifth century CE Augustine called monogamy a ‘Roman custom.’ Pauline Christianity may well have been monogamous because it evolved in a Greco-Roman context and not because of anything that was specific to this movement, let alone its latently polygamous Jewish background.”).

188. SCHEIDEL, *supra* note 97, at 6 (“Greco-Roman SIUM [‘Socially Imposed Universal Monogamy’] was preserved and gradually reinforced by the Christian church which labored to suppress polygamy among Germans and Slavs at a time when the Arab conquests lent ideological support to polygamy in parts of the Mediterranean and across the Middle East. The Middle Ages, as SIUM spread as a by-product of Christianization, witnessed the church’s struggle against divorce and elite concubinage, practices whose curtailment would render monogamous precepts more effective.”).

189. WITTE, *THE WESTERN CASE*, *supra* note 184, at 98.

190. DAVID HERLIHY, *MEDIEVAL HOUSEHOLDS* 78 (2009).

191. BERYL RAWSON, *A COMPANION TO FAMILIES IN THE GREEK AND ROMAN WORLDS* 147 (2010) (“Prescriptive monogamy came under pressure as the Roman Empire unraveled: powerful neighbors and conquerors” such as “Islamic Arabs . . . did not subscribe to comparable marital norms.”).

192. RAKESH KUMAR SINGH, *TEXTBOOK ON MUSLIM LAW* 61 (2011) (stating that during Islam’s formative years, “limited polygamy was allowed because of the social need of that society. In the wars with disbelievers, a large number of male Muslims lost their lives as a result of which the females outnumbered males in that society. There were several war-widows and orphans to whom nobody was ready to maintain and give protection. Rather, such women were being exploited and children born to them too could not get any social status. To avoid injustice being done to them, Islam permitted four wives so that one man could solve the problem of at least four females at a time.”).

193. Quran 4:3.

female captives.¹⁹⁴ Just like earlier polygamous societies, the Koran has several regulations regarding the division of property among co-wives.¹⁹⁵ Mohammed himself exhorted his followers to be fair and equal in their treatment of their wives.¹⁹⁶ Interestingly, just like the Old Testament's depictions of the patriarchs' families, "[m]any of the accounts on life in the Prophet's household contain detailed descriptions of the jealousies and domestic political maneuvers" among his wives.¹⁹⁷

In response to the growth of "Asiatic" (Islamic) polygyny,¹⁹⁸ Christian theologians and Western philosophers began developing theoretical justifications for monogyny.¹⁹⁹ Aquinas, "the most famous and influential of all natural law theorists,"²⁰⁰ was one of the first to critically examine polygamy. He wrote that polyandry is not practiced because "paternity would be uncertain" in such marriages.²⁰¹ In regard to polygyny, he stated that when "one man [has] several wives there arises discord at the domestic hearth, as experience shows."²⁰² Aquinas also argued that polygyny interferes with the development of "friendship" between a husband and wife and puts women in an unequal position.²⁰³

Later thinkers echoed Aquinas' observations²⁰⁴ and added a few of their own. Adam Smith noted that "the greater part of men can get no wives" if certain men are able to marry multiple women.²⁰⁵ Voltaire opined that "the more married men you have, the fewer crimes there will be."²⁰⁶ Montesquieu argued that "the father and mother cannot have the same affection for their offspring" in a polygamous

194. See, e.g., SINGH, *supra* note 192.

195. *Id.* at 62.

196. Quran 4:129.

197. BARBARA FREYER STOWASSER, *WOMEN IN THE QUR'AN, TRADITIONS, AND INTERPRETATION* 108 (1994).

198. Many Western critics of polygamy described it as an "Asiatic" practice. See, e.g., DAVID HUME, *ESSAYS AND TREATISES ON SEVERAL SUBJECTS, ETC.* 112 (1758); 2 JAMES KENT, *COMMENTARIES ON AMERICAN LAW*, 80–81 (1836). The Western understanding of polygamy was heavily influenced by European contact with its closest polygamous neighbors: the Islamic Ottoman empire in West Asia. The "Turkish harem," with its sensual, forbidden nature, has been a source of fascination in the West for centuries. See MICHAEL CURTIS, *ORIENTALISM AND ISLAM: EUROPEAN THINKERS ON ORIENTAL DESPOTISM IN THE MIDDLE EAST AND INDIA* 69–70 (2009).

199. See SCHEIDEL, *supra* note 97, at 4 (describing how the Christian church provided reinforcement for Greco-Roman monogamy "at a time when the Arab conquests lent ideological support to polygamy in parts of the Mediterranean and across the Middle East").

200. Robert P. George, *Kelsen and Aquinas on "The Natural-Law Doctrine,"* 75 *NOTRE DAME L. REV.* 1625 (2000).

201. THOMAS AQUINAS, *OF GOD AND HIS CREATURES* 505 (Joseph Rickaby, trans., 1950).

202. *Id.*

203. *Id.*

204. John Witte, Jr., *Why Two in One Flesh? The Western Case for Monogamy over Polygamy*, 64 *EMORY L. J.* 1675 (2015) (stating that Aquinas' arguments became commonplace in "Western thought and law thereafter, especially among Enlightenment liberals and common law jurists who took it as axiomatic").

205. ADAM SMITH, *LECTURES ON JUSTICE, POLICE, REVENUE AND ARMS* 81 (1763).

206. He continued by advising the reader to "[e]xamine the frightful columns of your criminal calendars; you will there find a hundred youths executed for one father of a family." 4 *VOLTAIRE, A PHILOSOPHICAL DICTIONARY* 409 (J.G. Gurton trans., 1824).

marriage, as “a father cannot love twenty children with the same tenderness as a mother can love two.”²⁰⁷ Henry Home was one of the first to note the connection between inequality and polygyny, stating that “polygamy may appear in the present state of things, where inequality of rank and of fortune have produced luxury and sensuality.”²⁰⁸ American jurist James Kent argued that polygamy and despotism go hand-in-hand, a conclusion the U.S. Supreme Court would go on to endorse in its landmark polygamy ruling *Reynolds v. United States*.²⁰⁹

By the turn of the nineteenth century, polygamy was considered so thoroughly discredited that Blackstone felt he could dismiss the entire subject by briefly noting that “the fallaciousness of [polygamy] has been fully proved by many sensible writers” and that “the policy of all prudent states” was to prohibit it.²¹⁰ Kent was expressing a common consensus when he wrote that polygamy was “[i]ncompatible with civilization, refinement, and domestic felicity.”²¹¹ Modern social science would eventually come to validate the early scholarship concerning polygamy.²¹²

As the world has become more aware of polygyny’s flaws, there has been a dramatic growth in the number of nations that legally impose monogamy. “[I]n recent centuries, as other societies sought to emulate the West[’s]” political traditions, laws prohibiting polygamy have been adopted across the world.²¹³ A writer for *The Atlantic* notes that “[a]s societies move away from hierarchy and toward equal opportunity, they leave polygamy behind. They monogamize as they modernize.”²¹⁴ The “most compelling hypothesis” for this trend “is that polygamy succumbed to the need for social cohesion in larger, more developed societies, which had a competitive advantage over less organized neighbors.”²¹⁵

Although monogamy is now “both normative and legally enforced in most of the world’s highly developed countries,”²¹⁶ many nations in the Middle East and

207. CHARLES DE SECONDAT BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* 254 (Thomas Nugent trans., 1949).

208. LORD HENRY HOME KAMES, *KETCHES OF THE HISTORY OF MAN: IN FOUR VOLUMES* 16 (W. Creech ed., 1778).

209. 98 U.S. 145, 166 (1878), *citing* 2 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 81 (1840) (“[P]olygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot exist long in connexion with monogamy. The remark is equally striking and profound.”).

210. WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND: IN FOUR BOOKS* 163 (Edward Christian ed., 1795).

211. 2 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 81 (1836).

212. *See infra* text accompanying notes 221–237.

213. Henrich et al., *supra* note, 148, at 657 (“While the roots of the package of norms and institutions that constitute modern marriage can be traced back to classical Greece and Rome, the global spread of this peculiar marriage system has occurred only in recent centuries, as other societies sought to emulate the West, with laws prohibiting polygyny arriving in 1880 in Japan, 1953 in China, 1955 in India and 1963 in Nepal”).

214. Jonathan Rauch, *One Man, Many Wives, Big Problems*, *THE ATLANTIC* (Apr. 2006), <http://www.theatlantic.com/magazine/archive/2006/04/one-man-many-wives-big-problems/304829/>.

215. EDUARDO PORTER, *THE PRICE OF EVERYTHING: FINDING METHOD IN THE MADNESS OF WHAT THINGS COST* 70 (2011).

216. Henrich et al., *supra* note 148, at 657.

Africa continue to permit polygyny.²¹⁷ In fact, it is estimated that “a third of the world’s population belongs to a community that allows polygamy.”²¹⁸

When polygamy occurs in modern societies, the problems long associated with the practice again manifest themselves. *The Economist* suggests that polygamy may contribute to social unrest in the Middle East and Africa. Nigeria, for example, “has lots of young men, many of them living hand to mouth. It is also polygamous: 40% of married women share a husband. Rich old men have multiple spouses; poor young men are left single, sex-starved and without a stable family life. Small wonder some are tempted to join Boko Haram.”²¹⁹

In Mormon communities that continue to practice polygyny, the sects’ leaders will carry out periodic purges to dispose of surplus single men. For example, in recent years, “[u]p to 1,000 teenage boys have been separated from their parents and thrown out of their communities by a polygamous sect to make more young women available for older men.”²²⁰ The scale of this androgenic cleansing was quite drastic, as the sect at the time had only around 10,000 followers.²²¹

Polygyny also continues to be a source of family discord.²²² Researchers have found that “in polygynous societies violence between co-wives is not uncommon.”²²³ “Hostility among wives ranges from simmering jealousy to vicious resentment that can boil into violence” as “co-wives compete for access to their husbands and for material resources.”²²⁴ Tragically, “both conflict and competition can have appalling effects on the health and survival of the children.”²²⁵

217. Tsoaledi Daniel Thobejane & Takayindisa Flora, *An Exploration of Polygamous Marriages: A Worldview*, 5 MEDITERRANEAN J. SOC. SCI. 1058, 1060 (2014) (“The main exceptions to this global trend [of monogamization] were the least secularised Islamic countries of the Middle East and more generally sub-Saharan Africa.”).

218. Todd M. Gille, *The Absolution of Reynolds: The Constitutionality of Religious Polygamy*, 8 WM. & MARY BILL RTS. J. 497, 508 (2000).

219. *Of Men and Mayhem*, ECONOMIST (Jan. 23, 2016), <http://www.economist.com/news/special-report/21688587-young-single-idle-males-are-dangerous-work-and-wedlock-can-tame-them-men-and-mayhem>.

220. Julian Borger, *The Lost Boys, Thrown Out of US Sect So That Older Men Can Marry More Wives*, THE GUARDIAN (June 14, 2005), <http://www.theguardian.com/world/2005/jun/14/usa.julianborger>.

221. *Id.*

222. See generally Billy Gage Raley, *Polygamy In Family Court: A Resource For Judges Dealing With An Unfamiliar Family Structure*, 68 JUV. & FAM. CT. J. 5 (2017) (providing an overview of “how sexual competition frequently arises between co-husbands, and how material competition frequently arises between co-wives,” and how “[p]olygamy can [negatively] affect the parent-child relationship in two major ways: paternal neglect and child abuse”).

223. David Levinson, *Family Violence in Cross-Cultural Perspective*, in HANDBOOK OF FAMILY VIOLENCE 438 (Alan S. Bellack et al. eds., 2013).

224. ROBERT C. BROOKS, SEX, GENES & ROCK ‘N’ ROLL: HOW EVOLUTION HAS SHAPED THE MODERN WORLD 212 (2011); see also DEEPA NARAYAN-PARKER & PATTI L. PETESCH, FROM MANY LANDS 105 (2002) (“Violence between women can arise between co-wives over the sharing of things bought by the husband, or such fights may be a carry-over of conflicts between children of different women.”).

225. BROOKS, *supra* note 224, at 212–13.

The problems that plague polygamous households are so common that they seep into modern folklore. Stories about dysfunctional polygamous marriages “constitute almost a special genre in the African folktale tradition beloved by women story-tellers.”²²⁶ In these tales, “[c]onflict, tension, deliberate cruelty and death become symbols of polygyny,” with violence towards children often portrayed as a consequence of rivalry between co-wives.²²⁷

Abuse in polygamous households is also a common motif in Indian folktales.²²⁸ In one account,

a clever mother at her death bed advises her co-wife to feed her son poorly, not to let him out, nor to send him to school, with the result that the foolish but jealous stepmother does just the opposite and the son grows up to be a fine and able young man.²²⁹

In India’s Assam region, many traditional stories concern co-wives in a king’s harem who kill a favored wife’s children,²³⁰ leading one anthropologist to suggest that “the stories of the jealous queens are possibly intended to teach the dangers and distresses of polygamy.”²³¹ Assamese proverbs also warn of polygamy’s ill effects, with one stating, “If the son is in the co-wife’s lap, He cannot sleep but has to cry.”²³²

Anthropological research indicates that these traditional stories are firmly grounded in reality. One team of researchers found that “[c]o-wife conflict is ubiquitous in polygynous households. From anthropology, a review of ethnographic data from sixty-nine non-sororal polygynous societies from around the globe reveals no case where co-wife relations could be described as harmonious.”²³³

Contemporary studies also back up the historical understanding that jealousy is an inherent weakness of polygyny. While women generally do not exhibit the

226. K.E. Agovi, *Many Wives, Many Powers in Africa?*, PASSAGES (1992), <http://quod.lib.umich.edu/p/passages/4761530.0003.009/-many-wives-many-powers-in-africa?rgn=main;view=fulltext>; see also Fatoumata Ouattara & Katerini Storeng, *A Chain of Family and Domestic Violence, in ORDINARY VIOLENCE AND SOCIAL CHANGE IN AFRICA* 33 (Jacky Bouju & Mirjam de Bruijn eds., 2014) (“Modelled on the scenes of daily life, rivalries and malice between co-wives feed African fiction.”).

227. Agovi, *supra* note 226.

228. See Mandakini Baruah, *The Co-Wife and Step-Mother Motifs in Folklore: A Case Study of Some Assamese Proverbs*, 31 INDIAN FOLKLIFE 19 (2008) (stating that “[i]n woman-oriented Assamese proverbs, two of the most common motifs are those of the co-wife and the step-mother,” and describing how child abuse often comes up in these tales); P. Goswami, *The Cinderella Motif in Assamese Folk-Tales*, in SURESH KANT SHARMA & USHA SHARMA, DISCOVERY OF NORTH-EAST INDIA 329 (2005) (describing how the “Cinderella” motif takes place in a polygamous context in Assamese folktales).

229. P. Goswami, *The Cinderella Motif in Assamese Folk-Tales*, 23 INDIAN HIST. Q. 311, 318 (1947).

230. *Id.*

231. *Id.* at 319.

232. MANDAKINI BARUAH, CONSTRUCTION OF WOMANHOOD: A STUDY WITH SPECIAL REFERENCE TO ASSAMESE PROVERBS 149 (2009).

233. Henrich et al., *supra* note 148, at 665.

same levels of sexual jealousy that men do because they “do not risk investing inadvertently in unrelated offspring,” women do “experience jealousy as a response reducing or eliminating the threat of resource loss,” as they “risk losing access to resources critical for reproduction if men divert resources to attract other women.”²³⁴ Anthropologists who interviewed women in polygamous tribes in Africa reported that “respondents who would not be pleased to have a co-wife frequently indicated an aversion to having to share resources, both sexual and material,” and also found that “[i]n several societies, the potential for jealousy or rivalry is reflected in the terminology used to refer to co-wives.”²³⁵

In summary, monogyny has a rich and complicated history, rising and falling according to socioeconomic factors. We can, however, see a clear trend of societies moving to mandate it by law. To quote *Obergefell*, “changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations,”²³⁶ and many nations have changed their positions on polygamy after they have come to see how monogamy promotes social stability and political freedom.

C. MONOHOMOGAMY

Same-sex relationships have been “in the closet” for most of history, and as a result there is little information in the historical record about gay and lesbian unions. There is also a dearth of information concerning the evolutionary origins of same-sex relationships.²³⁷ Fortunately, however, the *legal* history of same-sex marriage is informative and well-documented and gives a clear picture of what the legal objectives of this type of union are. The record shows that the same-sex marriage legalization movement was driven by a desire to stabilize same-sex relationships through a public and legally-binding commitment to monogamy.

The push to gain legal recognition of same-sex marriage began in earnest in 1989, when gay columnist Andrew Sullivan published an article titled *Here Comes the Groom*.²³⁸ The landmark article focuses almost entirely on the benefits that monogamous commitment would have for both homosexuals and for society.

234. Jonathan Stieglitz et al., *Infidelity, Jealousy, and Wife Abuse Among Tsimane Forager-Farmers: Testing Evolutionary Hypotheses of Marital Conflict*, 33 *EVOLUTION HUM. BEHAV.* 1, 3 (2012).

235. Dominique Meekers & Nadra Franklin, *Women’s Perceptions of Polygyny Among the Kaguru of Tanzania*, 34 *ETHNOLOGY* 315–16 (1995) (“For example, among the Luo (Kenya) a co-wife is called nyieka (my partner in jealousy), the Hausa (Nigeria) use the term kishiya (jealousy), and the Yoruba (Nigeria) word for co-wife is orogun (rival or competitor). Likewise, among the Bakgalagadi of Botswana the term for co-wives, bagadikano, means rivals, and the term for polygyny, lefufa, implies jealousy.”).

236. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015).

237. See, e.g., JIM MCKNIGHT, *STRAIGHT SCIENCE?: HOMOSEXUALITY, EVOLUTION AND ADAPTATION* x–xiii (1997) (describing institutional resistance to the evolutionary study of homosexuality and the opposition the author faced from his academic peers in pursuing the subject).

238. See, e.g., Omar G. Encarnación, *What to Read on Marriage Equality*, *FOREIGN AFFAIRS* (Apr. 28, 2015), <https://www.foreignaffairs.com/articles/2015-04-28/what-read-gay-marriage-marriage-equality> (noting that the “landmark essay by the British-born former editor of *The New Republic* is credited with beginning debates about gay marriage in earnest, at least in the United States,” citing

In Sullivan's own summary of his article, he states that his thesis was that same-sex marriage "would promote stability and monogamy among homosexuals and responsibility in the society as a whole."²³⁹

Though some sexual-liberation activists pushed societal acceptance of gay and lesbian relationships in the hopes that it would undermine heterosexual monogamy norms, Sullivan clearly sought to pattern the institution of same-sex marriage after the historical Western concept of monogamous, companionate marriage, stating "the way to go about [providing some civil recognition for gay relationships] is not to undermine straight marriage; it is to legalize old-style marriage for gays." Sullivan explained that the function of this "legalize old-style marriage" was to offer "general social approval and specific legal advantages in exchange for a deeper and harder-to-extract-yourself-from commitment to another human being," and believed that it would "provide[] role models for young gay people who, after the exhilaration of coming out, can easily lapse into short-term relationships and insecurity with no tangible goal in sight." He also argued that same-sex marriage would "help bridge the gulf often found between gays and their parents" by bring[ing] the essence of gay life—a gay couple—into the heart of the traditional straight family in a way the family can most understand and the gay offspring can most easily acknowledge."²⁴⁰

Sullivan's article provided the argumentative blueprint for the same-sex marriage movement.²⁴¹ Advocates of same-sex marriage argued that legal recognition of monogamy would lend stability and permanence to same-sex relationships, which in turn would benefit couples, children, and society. In addition, many activists echoed Sullivan in arguing that same-sex marriage could help combat negative stereotypes about gay communities.²⁴²

Most significantly, the *Obergefell* opinion—which is now the definitive legal explication of same-sex marriage—incorporates many of the themes of *Here Comes the Groom*. Justice Kennedy's language and arguments are virtually identical to Sullivan's in many passages.²⁴³ In the decision, the Court clearly endorses the Sullivan-esque argument that marriage is a dyadic relationship based on

Andrew Sullivan, *Here Comes The Groom: A (Conservative) Case For Gay Marriage*, NEW REPUBLIC (Aug. 28, 1989), <https://newrepublic.com/article/79054/here-comes-the-groom>).

239. ANDREW SULLIVAN, SAME-SEX MARRIAGE: PRO AND CON 146 (2004).

240. SULLIVAN, *supra* note 239.

241. Steven Waldman, *Just Married*, MEDIUM (June 27, 2015), <https://medium.com/@stevenwaldman/just-married-35786177f540> ("The intellectual firepower for the idea [of same-sex marriage] came from a gay conservative [Andrew Sullivan]").

242. See MICHAEL S. RANKINS ET AL., SAME-SEX MARRIAGE: VOICES OF MARRIED MALE COUPLES IN THE UNITED STATES 416 (2008) (quoting a gay couple as stating that the inability of gays to reinforce their relationships through marriage contributed to "promiscuity and commitment-avoiding" stereotypes).

243. Compare, for example, the following passages from *Here Comes the Groom* and *Obergefell*:

1. "[Marriage offers] general social approval and specific legal advantages in exchange for a deeper and harder-to-extract-yourself-from commitment to another human being." Sullivan, *supra* note 239.

"[J]ust as a couple vows to support each other, so does society pledge to support the couple,

affection and social reinforcement, and that same-sex marriage will have many of the same stabilizing influence on individuals, couples, families, and society that traditional opposite-sex marriage has had.

Same-sex marriage, therefore, is clearly a monogamous institution. Same-sex marriage is just the latest example of society adopting monogamous customs in order to avoid the problems that come with multiple partners.

D. PART II CONCLUSION

In conclusion, the “context of the historical evolution of the laws and institution”²⁴⁴ of marriage shows that it has “evolved over time”²⁴⁵ from a polygamous to monogamous union. Unlike laws prohibiting same-sex marriage, “new insights and societal understandings”²⁴⁶ have validated rather than weakened the justifications for prohibiting polygamy. Modern theory supports the traditional belief that monogamy has enormous benefits for both families (by eliminating polygamous rivalries and encouraging the development of companionate marriage) and for society (as it mitigates the negative effects of income inequality by putting marriage within reach of even the poorest of men).

offering symbolic recognition and material benefits to protect and nourish the union.” *Obergefell*, 135 S. Ct. at 2601.

2. Same-sex marriage is “clear and dignified.” Sullivan, *supra* note 239.
“There is dignity in the bond between two men or two women who seek to marry.” *Obergefell*, 135 S. Ct. at 2599.
3. Same-sex marriage “could bring the essence of gay life—a gay couple—into the heart of the traditional straight family in a way the family can most understand and the gay offspring can most easily acknowledge.” Sullivan, *supra* note 239.
Same-sex marriage helps family members “to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.” *Obergefell*, 135 S. Ct. at 2600.
4. Same-sex marriage “cast[s] no aspersions on traditional marriage. It merely asks that gays be allowed to join in. [. . .] It is not, in short, a denial of family values. It’s an extension of them.” Sullivan, *supra* note 239.
“Far from seeking to devalue marriage, the petitioners seek it for themselves because of their respect and need for its privileges and responsibilities.” *Obergefell*, 135 S. Ct. at 2594.
5. “[M]ore and more [gays] have committed themselves to one another for life in full view of their families and their friends.” Sullivan, *supra* note 239.
Same-sex couples wish to “affirm their commitment to one another before their children, their family, their friends, and their community.” *Obergefell*, 135 S. Ct. at 2597.
6. “Gay marriage also places more responsibilities upon gays.” Sullivan, *supra* note 240.
“[G]ays and lesbians” would benefit from the “responsibilities intertwined with marriage.” *Obergefell*, 135 S. Ct. at 2606.
7. Same-sex marriage “says for the first time that gay relationships are not better or worse than straight relationships, and that the same is expected of them.” Sullivan, *supra* note 240.
“[S]ame-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.” *Obergefell*, 135 S. Ct. at 2602.

244. *Kotch v. Bd. of River Port Pilot Comm’rs*, 330 U.S. 552, 557 (1947).

245. *Obergefell*, 135 S. Ct. at 2595.

246. *Id.* at 2603.

III. THE CONSTITUTIONALITY OF MONOGAMY LAWS UNDER *OBERGEFELL*

With the “context of the historical evolution of the laws and institution” of marriage in mind, we will now move on to “consider the relationship” of monogamy laws “to the broad objectives”²⁴⁷ of marriage identified in *Obergefell*. As discussed in Part I, *Obergefell* found that the chief benefit of the right to marry is that it provides stability for 1) individuals, 2) couples, 3) families, and 4) society.²⁴⁸ This Part will assert that these “four principles and traditions” *do not* “apply with equal force to”²⁴⁹ polygamous unions, and thus the general right to marry does not encompass a right to marry more than one person.

First, this Part will discuss the harmful effects that polygamy can have on individuals. Second, this Part will show how polygamy strains the relationship between spouses and destabilizes marriages. Third, this Part will address how polygamy affects children, including an increased risk of child abuse. Finally, this Part will discuss the destabilizing effects that polygamy can have on society as a whole. This Part will conclude by arguing that polygamy will not further the objectives behind the right to marry, and therefore a right to polygamy does not fall under the general right to marry.

A. MONOGAMY AND INDIVIDUALS’ INTERESTS

Obergefell held that “[a] first premise of the Court’s relevant [right to marriage] precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy.”²⁵⁰ The Court stated that marriage’s “enduring bond” helps to fulfill “yearnings for security, safe haven, and connection,” providing a stability in one’s personal life that allows the individual to confidently go forward and “find other freedoms, such as expression, intimacy, and spirituality.”²⁵¹ Because “the decision whether and whom to marry is among life’s momentous acts of self-definition,” the Court respects a person’s “autonomy to make such profound choices.”²⁵²

Advocates of polygamy often cite personal autonomy as a reason the United States should recognize polygamous marriages. One feminist, for example, voiced support for polygamy despite its association with patriarchy because “a feminist defends every other woman’s right to choose, no matter how repugnant the choice,”²⁵³ and another asked, “Why shouldn’t you or your daughters have

247. *Kotch*, 330 U.S. at 557.

248. *Obergefell*, 135 S. Ct. at 2599-601.

249. *Id.* at 2599.

250. *Id.*

251. *Id.*

252. *Id.*

253. Rebecca Walsh, *Feminists waffle in FLDS case*, SALT LAKE TRIB. (May 25, 2008), http://archive.sltrib.com/story.php?ref=/news/ci_9374627; see also Jillian Keenan, *Legalize Polygamy! No. I am not kidding.*, SLATE (Apr. 15, 2013), http://www.slate.com/articles/double_x/doublex/2013/04/legalize_polygamy_marriage_equality_for_all.html (“The case for polygamy is, in fact, a feminist one and shows women the respect we deserve. Here’s the thing: As women, we really can make our own

the opportunity to marry the best man available, regardless of his marital status?”²⁵⁴ African-American Muslims have argued that polygyny would provide more options for African-American women who, due to high male incarceration rates in the African-American community, face a shortage of marriageable black men.²⁵⁵

But due to the natural dynamics of heterosexual relationships,²⁵⁶ any additional options that polygamy would give to women and desirable men would come at the expense of men at the bottom of the socio-economic ladder. If history and evolutionary theory are any indication, opposite-sex polygynous marriage is likely to be the most common form of polygamy by a significant margin. Widespread polygyny could reduce many American men to involuntary singlehood, leaving them without the autonomy that marital options provide.²⁵⁷

The threat of polygamy also harms autonomy by increasing the pressure on women to submit to narrowly-defined social roles. Rather than providing “security, safe haven, and connection,”²⁵⁸ “[t]he fact that men can take another wife . . . is a source of insecurity and anxiety for women” in contemporary polygynous societies, and this insecurity leads women to self-impose limits on their own autonomy by “adher[ing] to conservative social norms in areas like reproduction, circumcision, work, etc.”²⁵⁹ Medieval and Enlightenment-era philosophers were the first to note the link between polygamy and the repression of women,²⁶⁰ and today, polygamy “is connected with gender inequality by organizations such as the United Nations and most social scientists.”²⁶¹

choices. We just might choose things people don’t like. If a woman [. . .] wants to marry a man with three other wives, that’s *her damn choice.*”) (emphasis in original).

254. Natalie Angier, *Birds’ Design for Living Offers Clues to Polygamy*, N.Y. TIMES (Mar. 3, 1998), <http://www.nytimes.com/1998/03/03/science/birds-design-for-living-offers-clues-to-polygamy.html> (quoting a speech at a National Organization for Women meeting by Utah lawyer and practicing polygamist Elizabeth Joseph).

255. Pauline Bartolone, *For These Muslims, Polygamy is an Option*, SAN FRAN. CHRON. (Aug. 5, 2007), <http://www.sfgate.com/opinion/article/For-these-Muslims-polygamy-is-an-option-2549200.php>.

256. See *supra* notes 100–110 and accompanying text describing the relationship between socio-economic inequality and polygyny.

257. See *supra* notes 146–148 and accompanying text describing how polygyny creates a “surplus” of single men.

258. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015).

259. Martha Bailey & Amy Kaufman, *Should Civil Marriage Be Opened Up to Multiple Parties?*, 64 EMORY L. J. 1747, 1764 (2015) (citing MAITRAYEE MUKHOPADHYAY ET AL., NETH. MINISTRY OF FOREIGN AFFAIRS, MUSLIM WOMEN AND DEVELOPMENT ACTION RESEARCH PROJECT, Annex 6, at 4 (2001) (reporting on Sudan)).

260. See AQUINAS *supra* text accompanying note 201; BARON CHARLES DE SECONDAT MONTESQUIEU, *THE SPIRIT OF THE LAWS* 255 (Thomas Nugent trans., 1949) (stating that polygamous husbands often resort to “bolts and bars” to prevent wives from defecting to one of the many single men who might try to woo them away”).

261. ANGELA CAMPBELL, *POLYGAMY IN CANADA: LEGAL AND SOCIAL IMPLICATIONS FOR WOMEN AND CHILDREN* 5 (2005); see Report of the Committee on the Elimination of Discrimination Against Women - Thirteenth Session, U.N. Doc. A/49/38 (Apr. 12, 1994), <http://www.un.org/documents/ga/docs/49/plenary/a49-38.htm> (stating that “[p]olygamous marriage contravenes a woman’s right to

In addition, polygamy can harm personal autonomy through its tendency to throw people's lives into chaos. Polygamy undermines the relationship between spouses and drastically increases the risk of divorce and domestic violence.²⁶² It will be harder to plan out and exert control over one's life's course if polygamy is a complicating factor in marital relationships.

Some have argued that even if the United States begins to recognize polygamous marriages, individuals can still maintain autonomy and control over their relationships if the law gives spouses veto power over any additional marriages by their spouse(s), but this could raise thorny legal issues²⁶³ and would probably not be very effective in preserving relationship stability and personal autonomy anyway. Some polygynous nations already require spousal consent before a man can marry an additional wife, but polygyny still puts a strain on relationships in these countries.²⁶⁴ Even if the law provides spouses with veto power, they may feel social and religious pressure to consent to the entry of new spouses into the marriage.

Most importantly, polygamy would lead to a general erosion of personal freedoms. Individual autonomy tends to be suppressed in polygamous societies, as authoritarian governments are needed to deal with the social problems that polygamy causes.²⁶⁵ It is no coincidence that when liberal democracy was born, monogamy was its twin.²⁶⁶ By "respect[ing]"²⁶⁷ a person's autonomy to make the choice to engage in polygamy, the Court would be undermining the person's autonomy in every other aspect of life by creating the type of social conditions that police states flourish under.

Polygamy, therefore, would provide individuals with less autonomy in several different ways. It would put marriage out of the reach of men of lower

equality with men, and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited").

262. See *infra* text accompanying notes 278–283.

263. The resolution of this problem would likely turn on whether the marriage contract is defined as a partnership similar to a "business association," in which the addition of new spouses must be approved by the "board" of spouses, or as a "(nonexclusive) binary" contract. Kevin Barney, *Legalization of Polygamy?*, COMMON CONSENT (July 3, 2015), <https://bycommonconsent.com/2015/07/03/legalization-of-polygamy/>.

264. Iranian law, for example, "currently allows Muslim men to have up to four wives, but only after obtaining a court order demonstrating the permission of the first spouse and his ability to treat them all equally." *Iranian women fight controversial 'polygamy' bill*, AMNESTY INT'L (Nov. 30, 2011), <https://www.amnesty.org/en/latest/news/2011/11/iranian-women-fight-controversial-polygamy-bill/>; see also Family Protection Act § 11, 14 (Iran 1975). Despite the fact that Iranian wives hold this veto power, "the practice of polygamy in society has many prolonged [negative] psychological and physical effects on women." ZAHRA TIZRO, DOMESTIC VIOLENCE IN IRAN: WOMEN, MARRIAGE AND ISLAM 99 (2013).

265. See *supra* text accompanying notes 153–157.

266. See *supra* text accompanying notes 172–175 (discussing how ancient Athens, as part of its democratic experiment, was the first nation to impose monogamy by law).

267. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015) (stating that "the Court must respect the basic reasons why the right to marry has been long protected," including "the concept of individual autonomy").

socioeconomic status,²⁶⁸ pressure women to conform to traditional gender roles,²⁶⁹ disrupt the lives of married individuals,²⁷⁰ and erode freedoms generally by increasing the need for authoritarian government.²⁷¹ Thus, with respect to the first *Obergefell* principle, polygamy does not promote the constitutional objective of personal autonomy.

B. MONOGAMY AND COUPLES' INTERESTS

The “second principle” listed in *Obergefell* “is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals.”²⁷² The Court found that the right to marry “dignifies couples who wish to define themselves by their commitment to each other.”²⁷³ The binding ties of marriage offer a couple “the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.”²⁷⁴

But if a right to polygamy is recognized by the Court, marriage’s commitment-signaling function will be undermined. Marital vows will be of diminished importance if the commitment is subject to dilution by the future entry of other spouses. Marriage will no longer be viewed as an exclusive relationship, and couples will lose their ability to “define themselves by their commitment to each other” through marriage.²⁷⁵

Furthermore, polygamy “destabilize[s] spousal relations,” even to the point of “increasing the likelihood of domestic violence.”²⁷⁶ This destabilization has been a constant feature of polygamy throughout history, as the dysfunctional polygynous family has been a trope of traditional storytelling for millennia,²⁷⁷ and some of the oldest-surviving family law statutes addressed conflict in polygamous families.²⁷⁸ Modern findings reinforce the traditional wisdom connecting polygamy and domestic discord.²⁷⁹

Studies of contemporary polygynous societies suggests that polygamy greatly increases the chances that a spouse will renege on their marital commitment, as polygynous marriages suffer from a higher divorce rate than monogamous

268. See *supra* notes 146–148 and accompanying text.

269. See *supra* notes 261–263 and accompanying text.

270. See *infra* notes 278–283 and accompanying text.

271. See *supra* notes 153–157 and accompanying text.

272. *Obergefell*, 135 S. Ct. at 2599–600.

273. *Id.* at 2600.

274. *Id.*

275. *Id.* at 2599.

276. Nayereh Tohidi, *Iran*, in *WOMEN’S RIGHTS IN THE MIDDLE EAST AND NORTH AFRICA: PROGRESS AMID RESISTANCE* 136 (Sanja Kelly & Julia Breslin eds., 2010).

277. See *supra* text accompanying notes 164–168 (examples from the Bible); *supra* text accompanying note 179 (examples from ancient Greece); *supra* text accompanying notes 199 (examples from in the Quran); *supra* text accompanying notes 228–234 (examples from modern folktales).

278. See *supra* text accompanying notes 169–171.

279. See *supra* text accompanying notes 225–227.

marriages.²⁸⁰ Astonishingly, “polygynous families with more than two wives are *five times* more likely to divorce.”²⁸¹ America already suffers from a high divorce rate,²⁸² but the legalization of polygamy will likely push those rates even higher.

Finally, in regard to the Court’s finding that marriage “offers the hope of companionship,”²⁸³ it is worth noting again that marriage came to be seen a companionate relationship only after monogamy was imposed by law.²⁸⁴ Though some believe that romance-based marriage is a product of post-Industrial Revolution individualism,²⁸⁵ the “ideal of wedded love” actually started emerging soon after monogamy took root in Classical Antiquity.²⁸⁶ Polygamy, on the other hand, is considered by many to be incompatible with companionate marriage.²⁸⁷

Rather than strengthening intimate unions, polygamy undermines them. It weakens marriage’s commitment-signaling function, strains marital bonds, and interferes with the formation of companionate relationships. It is clear, therefore, that polygamy is inconsistent with *Obergefell*’s second principle of the right to marry.

C. MONOGAMY AND CHILDREN’S INTERESTS

Obergefell’s third basis for protecting the right to marry “is that it safeguards children and families.”²⁸⁸ By giving “recognition and legal structure to their

280. JOSEPH HENRICH ET AL., ELECTRONIC SUPPLEMENTARY MATERIALS FOR THE PUZZLE OF MONOGAMOUS MARRIAGE 22 (2012) (“Systematic and controlled analyses from polygynous societies generally show higher divorce rates for polygynous vs. monogamous marriages in the same society.”)

281. *Id.*

282. See Marriage & Divorce, AMERICAN PSYCHOLOGICAL ASSOCIATION, <http://www.apa.org/topics/divorce/> (last visited Feb. 25, 2018) (stating that approximately 40 to 50 percent of married couples in the United States will end up divorcing).

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

284. See *supra* text accompanying notes 180–185.

285. See, e.g., GENE H. STARBUCK, IS THERE A POST-INDUSTRIAL FAMILY FORM? AN EXPLORATION USING GLOBAL DATA 5 (2001) (stating that “[i]ndustrialization impacted the development ‘romantic love’ as a criterion for mate selection”); Jordi Roca & Begonya Enguix, *Love and its Transformations*, in RETHINKING ROMANTIC LOVE 1, 4 (Begonya Enguix & Jordi Roca eds., 2015) (“The emergence of romantic love, framed in the context of the bourgeoisie and industrial revolutions disrupted and revolutionised the basis of the previous loving model. With the increasing dissolution of the social ties that structured traditional societies, in capitalist contexts people were becoming increasingly individualized [. . .]. In turn, marriage, definitively and inseparably linked to love....”).

286. See, e.g., RICHARD A. POSNER, SEX AND REASON 176 (2009) (stating that “companionate marriage made progress during the [Roman] empire, paving the way for the Christian embrace of the institution”).

287. See, e.g., STEPHEN SANDERSON, HUMAN NATURE AND THE EVOLUTION OF SOCIETY 174 (2014) (stating that “[p]erhaps the most promising explanation of socially imposed monogamy is the incompatibility of polygyny with companionate marriage”); James M. Donovan, *Rock-Salting the Slippery Slope: Why Same-Sex Marriage is Not a Commitment to Polygamous Marriage*, 29 N. KY. L. REV. 521, 560 (2002) (arguing that the Western companionate notion of romantic love “is by design incompatible with polygamy”); H  l  ne Neveu Kringelbach, “Marrying Out” for Love: Women’s Narratives of Polygyny and Alternative Marriage Choices in Contemporary Senegal, 59 AFRICAN STUDIES REV. 155, 163 (2016) (stating that, even in traditional African societies where polygamy is practiced, “most educated women saw polygamy as incompatible with companionate marriage”).

288. *Obergefell*, 135 S. Ct. at 2600.

parents' relationship," marriage provides more "stability and predictability" in children's lives.²⁸⁹ It also provides children with emotional security by helping them "understand the integrity and closeness of their own family."²⁹⁰

In comparison to monogamous marriage, polygamous marriage will provide children with less "stability and predictability" in their home lives. As noted already, polygamy is a source of jealousy and tension, and drastically raises the risk of marital breakdown.²⁹¹ Polygamy thus has the potential to harm children by undermining their parents' relationship.

Children in polygamous marriages will also be vulnerable to the "Cinderella Effect" (abuse by stepparents).²⁹² Research shows that "[c]hildren residing in households with unrelated adults were nearly 50 times as likely to die of inflicted injuries than children residing with 2 biological parents."²⁹³ Children in polygamous households will always have at least one stepparent, and oftentimes they will have *multiple* stepparents.

The fact that polygyny is the most common form of polygamous marriage will probably not diminish the potential for abuse, as stepmothers abuse stepchildren at rates comparable to—and perhaps even greater than—stepfathers.²⁹⁴ Surveys reveal that stepmothers are only half as likely as stepfathers to report that they have "any 'parental feeling' (much less 'love') for their stepchildren,"²⁹⁵ and "stepmother households tend to be even more extremely overrepresented than stepfather households among adolescent runaways who aver that they are fleeing abusive families."²⁹⁶ Even more troubling, stepmothers "represent a substantially greater risk of filicide" than stepfathers, and stepmaternal filicides exhibit more "extreme ongoing abuse and severe neglect" than murders committed by stepfathers.²⁹⁷

289. *Id.*

290. *Id.*

291. See HENRICH ET AL., *supra* note 280 (stating that "polygynous families with more than two wives are five times more likely to divorce").

292. Greg A. Tooley et al., *Generalising the Cinderella Effect to unintentional childhood fatalities*, 27 *EVOL. HUM. BEHAV.* 224, 225 (2006) (stating that research "has demonstrated repeatedly that, relative to children living with both biological parents, step children are at dramatically increased epidemiologic risk of being the victims of physical abuse and homicide," and that this phenomenon is referred to as the "Cinderella Effect").

293. Patricia G. Schnitzer & Bernard G. Ewigman, *Child Deaths Resulting From Inflicted Injuries: Household Risk Factors and Perpetrator Characteristics*, 116 *PEDIATRICS* 687 (2005).

294. MARTIN DALY & MARGO WILSON, THE "CINDERELLA EFFECT": ELEVATED MISTREATMENT OF STEPCHILDREN IN COMPARISON TO THOSE LIVING WITH GENETIC PARENTS 6 (2005) ("[S]tepmothers are often omitted from the data presentation [. . .] because small children live with stepmothers so infrequently[. . .] Nevertheless, all available evidence indicates that excess risk from stepmothers (relative to genetic mothers) is roughly on the same order as excess risk from stepfathers (relative to genetic fathers)").

295. DALY, *supra* note 294, at 7.

296. *Id.* at 6.

297. Grant T. Harris et al., *Children killed by genetic parents versus stepparents*, 28 *EVOLUTION HUM. BEHAV.* 85, 92 (2007).

The Cinderella Effect could be even worse in polygynous families than in monogamous blended families. Research has shown that in families with stepmothers, a child's regular contact with the biological mother "was related to lower quality relationships between stepmothers and stepchild."²⁹⁸ The presence of rival spouses under the same roof could thus increase the risk of stepparental abuse.

There is already significant evidence that polygynous households are vulnerable to the Cinderella Effect.²⁹⁹ The historical record is replete with examples of abusive relationships between co-wives and stepchildren.³⁰⁰ Folktales and anecdotal accounts in modern polygynous societies also suggest that it is a major source of domestic violence.³⁰¹

In addition, "[b]oth theory and empirical data suggest polygamous families invest fewer resources into each child."³⁰² In large polygynous families, fathers must divide their resources and attention among the children of multiple wives.³⁰³ Girls, in particular, receive less parental investment in polygynous societies, as parents feel pressure to shift resources from their daughters to their sons in order to help them compete for scarce marriageable women.³⁰⁴

Polygyny-based son preference may even contribute to the risk of female infanticide,³⁰⁵ as polygyny increases the genetic payoff for rearing sons rather than

298. W. Glenn Clingempeel & Sion Segal, *Stepparent-Stepchild Relationships and the Psychological Adjustment of Children in Stepmother and Stepfather Families*, 57 *CHILD DEV.* 474, 475 (1986).

299. See BROOKS, *supra* note 224, at 212–13 (stating that "conflict and competition [between co-wives] can have appalling effects on the health and survival of the children").

300. See, e.g., *Genesis* 21:8-21 (describing how Sarah exiled her young step-son into the Desert of Beersheba, where he faced a seemingly-certain death); DAVID P. BARASH, *OUT OF EDEN: THE SURPRISING CONSEQUENCES OF POLYGAMY* 51 (2016) (discussing the relationship between polygamy and the "near-universal" motif of the "evil stepmother").

301. See *supra* text accompanying notes 228–237.

302. JASPER F. WIRTSHAFTER, *ARE UNITED STATES ANTI-POLYGAMY LAWS EFFICIENT?* 27 (2016). For example, "confusion of paternity could lead to lowered or lack of investment on the part of the doubting male in polyandrous households." Raley, *supra* note 222, at 17. In polygynous households, "[a]ttempts to avoid favoritism can also lead to paternal neglect," as fathers often refrain from individualized investment in their children to ward off accusations of favoring one wife's children over another's. Raley, *supra* note 222, at 18–19.

303. See Montesquieu, *supra* note 207 and accompanying text.

304. See LENA EDLUND & NILS-PETTER LAGERLÖF, *POLYGyny AND ITS DISCONTENTS: PATERNAL AGE AND HUMAN CAPITAL ACCUMULATION* 10 (2012) ("In polygynous societies girls receive little human capital investment or bequests in the form of physical capital or land."); TED BERGSTROM, *ON THE ECONOMICS OF POLYGyny* 2 (1994) (stating that in polygamous societies, "males who inherit economic wealth from parents or other relatives can increase their reproductive success substantially by acquiring additional wives, mistresses, or concubines. For females, on the other hand, [. . .] additional wealth does little to relax the biological constraints on the number of offspring she can have," and therefore, we can "expect to see parents leave their inheritances predominately to their sons rather than to their daughters" in polygamous societies).

305. LAURA L. BETZIG, *DESPOTISM AND DIFFERENTIAL REPRODUCTION: A DARWINIAN VIEW OF HISTORY* 38 (1983).

daughters.³⁰⁶ Scholars have noted “the frequency of the combination female infanticide/polygyny,” and suggest that they “fuel each other in an escalating syndrome.”³⁰⁷ The most well-known example of this phenomenon is from the violent Viking culture in pre-Christian Scandinavia,³⁰⁸ when parents had an “imperative to produce male warriors” who could obtain wives through raids that was “so powerful . . . that selective infanticide was practiced through the exposure of female infants.”³⁰⁹

As bad as polygyny can be, children in polyandrous families may not fare much better. As noted before, polyandrous marriages are susceptible to conflict, violence, and divorce.³¹⁰ Polyandry also “select[s] for reduced male care relative to monoandry,”³¹¹ as paternal investment is directly correlated with a husband’s “assessment of a wife’s fidelity.”³¹² Though polyandrous marriages will likely continue to be rare if polygamy is permitted, the few polyandrous households that are formed are unlikely to provide a stable environment for children.

Rather than “safeguard[ing]” children,³¹³ polygamy increases their vulnerability to violence. Rather than providing children with “stability and predictability,”³¹⁴ polygamy makes their home life less stable and predictable. Rather than helping them “understand the integrity and closeness of their own family,”³¹⁵ polygamy often places children in the middle of bewildering spousal rivalries. Polygamy, therefore, is not consistent with *Obergefell*’s third objective of marriage.

D. MONOGAMY AND SOCIETY’S INTERESTS

“Fourth and finally,” *Obergefell* held that “this Court’s cases and the Nation’s traditions make clear that marriage is a keystone of our social order.” Quoting Tocqueville, the Court noted that “when the American retires from the turmoil of public life to the bosom of his family, he finds in it the image of order and of peace. . . . [H]e afterwards carries [that image] with him into public affairs.” “For this reason,” the Court continued, “just 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.”³¹⁶

306. Douglas R. White & Michael L. Burton, *Causes of Polygyny: Ecology, Economy, Kinship, and Warfare*, 90 AM. ANTHROPOLOGIST 871, 872 (1988) (“[P]olygyny allows women to have large numbers of grandchildren, provided they have sons.”).

307. Carol J. Clover, *The Politics of Scarcity: Notes on the Sex Ratio in Early Scandinavia*, 60 SCANDINAVIAN STUD. 147, 171 (1988).

308. *Id.*

309. DAVID WYATT, SLAVES AND WARRIORS IN MEDIEVAL BRITAIN AND IRELAND 169 (2009).

310. *See supra* text accompanying notes 278–283.

311. LUKE HOLMAN AND HANNA KOKKO, THE CONSEQUENCES OF POLYANDRY FOR POPULATION VIABILITY, EXTINCTION RISK AND CONSERVATION 2 (2012).

312. MICHAEL P. MUEHLENBEIN, HUMAN EVOLUTIONARY BIOLOGY 357 (2010).

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

314. *Id.*

315. *Id.*

316. *Id.* at 2601.

While monogamous marriage promotes domestic harmony and social order, polygamy undermines both. In regard to family life, there is not the same respite from the “turmoil of public life” in a polygamous household, as they tend to be highly dysfunctional. And for many low-status men, polygamy will leave them with no family to come home to at all.

Polygamy not only harms public life through upsetting domestic tranquility, but also through exacerbating inequality. The shift from monogamy to polygamy after the adoption of agriculture shows how closely-related polygyny is to wealth inequality, and the early Neolithic record demonstrates how polygyny can shut vast numbers of men out of the marriage marketplace.³¹⁷ In societies with a high ratio of single men, the strategies that low-status, unmarried men “choose to better their position in society erode the stability of the societies in which they live,”³¹⁸ as “[y]oung males participate in collective aggression to acquire the resources needed to attract a mate.”³¹⁹

There is “both strong theory and persuasive historical evidence” that a large population of men with no marriage prospects “can contribute significantly to intrasocietal violence.”³²⁰ A surplus of single men corrodes the very foundations of society, as it leads to an increase in violent crime, warfare, and authoritarian crackdowns.³²¹ As one writer put it, “[l]eaving lots of men without wives is not just inegalitarian: it’s dangerous.”³²²

While polygamy creates a large population of potentially-violent single men, monogamy results in a large population of law-abiding married men. A landmark Harvard study found that “being married is associated with an average reduction of approximately thirty-five percent in the odds of crime compared to nonmarried states for the same man,” providing “robust” evidence that “marriage causally inhibit[s] crime.”³²³ By providing even young, unestablished men with access to marriage, monogamy pacifies a potentially-troublesome demographic.

Monogamy truly has provided universal access to marriage in the United States. According to the U.S. Census Bureau, only “4.6 percent of women and 4.3 percent of men 70 and older had never been married”³²⁴ as of 2013 (considering that roughly four percent of Americans identify as LGBT,³²⁵ a substantial

317. See *supra* text accompanying notes 120–131 (explaining how humans were mostly monogamous when the hunter-gatherer lifestyle prevented the accumulation of wealth, and how polygamy rates skyrocketed after agriculture allowed for the building of vast fortunes).

318. Hudson & Boer, *supra* note 151, at 356.

319. *Id.* at 360.

320. *Id.* at 356.

321. See *supra* text accompanying notes 149–160.

322. WRIGHT, *supra* note 72, at 101.

323. Robert J. Sampson, *Does Marriage Reduce Crime? A Counterfactual Approach to Within-Individual Causal Effects*, 44 CRIMINOLOGY 465, 465 (2006).

324. Mona Chalabi, *When Will Everyone I Know Be Married?*, FIVETHIRTYEIGHT (Sept. 1, 2015), <http://fivethirtyeight.com/features/when-will-everyone-i-know-be-married/> (citing U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY (2013)).

325. *State of the States: LGBT Percentage Highest in D.C., Lowest in North Dakota*, GALLUP (Feb. 15, 2013), <http://www.gallup.com/poll/160517/lgbt-percentage-highest-lowest-north-dakota.aspx>.

proportion of those who had never married may be homosexuals who, at the time, were barred from marrying a same-sex partner). Though the number of unmarried Americans has risen in recent years, many are not “single” but are rather in informal monogamous relationships³²⁶ (indeed, some of the decline in marriage rates may be attributable to the lessened need for courts to declare informal relationships to be common-law marriages in order to establish legal paternity).³²⁷

The high marriage rate in the U.S. may be a crucial factor in maintaining social order. Contemporary research suggests that monogamy is key to the stability of developed nations,³²⁸ which tend to have high levels of income-disparity. By preventing the wealthy from building harems, monogamy may help capitalist nations like the United States limit the negative social effects of inequality.

Unfortunately, the United States has the highest rate of income inequality in the developed world,³²⁹ which could create ripe conditions for extreme polygyny to make a comeback if legalized. The wealth of America’s notorious “one percent” rivals that of the historical elites who maintained massive harems. For example, the Bible states that the prolific polygamist King Solomon received an annual tribute of 666 talents of gold per year,³³⁰ which would be worth approximately \$650 million at today’s gold price.³³¹ Rapper Dr. Dre earned nearly that same amount in 2014 from the sale of his stake in Beats headphones to Apple.³³²

It is possible that modern American family laws, such as no-fault divorce, alimony, and child support, could act as a limit on polygamy. Unfortunately, it does

326. Hudson & Boer, *supra* note 151, at 344 (stating that “[s]ingle men in the West are not surplus males: Indeed they can and often do form semi-permanent attachments to women and produce children in that context. Surplus males, on the other hand, do not have such possibilities”).

327. See PETER N. SWISHER, *FAMILY LAW: CASES, MATERIALS AND PROBLEMS* 14 (2012) (noting that “[u]ntil recently, the recognition of common law marriages in the United States seemed to be on the decline”); Raley, *supra* note 69, at 155–56 (stating that “a series of decisions under the Equal Protection Clause that gave illegitimate children many of the same rights as children born to married parents [. . .] largely eliminated the paternity establishment concerns that had previously motivated courts to recognize informal marriages”).

328. See WIRTSHAFTER, *supra* note 302, at 30.

329. See, e.g., Mark Gongloff, *The U.S. Has The Worst Income Inequality In The Developed World, Thanks To Wall Street: Study*, HUFF. POST (Aug. 16, 2013), http://www.huffingtonpost.com/2013/08/15/income-inequality-wall-street_n_3762422.html (citing OECD, *CRISIS SQUEEZES INCOME AND PUTS PRESSURE ON INEQUALITY AND POVERTY – NEW RESULTS FROM THE OECD INCOME DISTRIBUTION DATABASE* (2013)); Erik Sherman, *America is the richest, and most unequal, country*, FORTUNE (Sept. 30, 2015), <http://fortune.com/2015/09/30/america-wealth-inequality/>, (citing KATHRIN BRANDMEIR ET AL., *ALLIANZ GLOBAL WEALTH REPORT 2015* (2015)).

330. 1 *Kings* 10:14.

331. The Biblical talent was sixty-seven pounds. ROBERT A. MUNDELL, *THE BIRTH OF COINAGE* 5 (2002). Gold has traded at approximately \$1,000 per troy ounce in recent years. NASDAQ, *Latest Commodity Prices*, <http://www.nasdaq.com/markets/commodities.aspx> (last visited Nov. 9, 2015) (listing COMEX Gold at \$1,093.30 as of 03:52:47, Nov. 9, 2015). \$1,000 (price of gold per troy ounce) * 14.58 (troy ounces per pound) * 67 (pounds per biblical talent) * 666 (Solomon’s talents of gold) = \$650,588,760.

332. Zack O’Malley Greenburg, *The World’s Highest-Paid Musicians Of 2014*, FORBES (Dec. 10, 2014), <http://www.forbes.com/sites/zackomalleygreenburg/2014/12/10/the-worlds-highest-paid-musicians-of-2014/> (stating that “Dr. Dre took home \$620 million this year before taxes, thanks largely to that deal” with Apple).

not take a very high rate of polygyny to begin destabilizing society. One author concluded that if just ten percent of American men practiced polygyny on a modest scale (only two to four wives each), this would push the sex ratio of singles to a level that studies suggest may be dangerous.³³³

Even if polygyny does not become widespread enough to shut low-status men out of the marriage market, it could still inflame social tensions. There will doubtlessly be at least a few practitioners of polygamy, and since “Americans are fascinated by polygamy,” the media can be counted on to indulge this fascination and raise the profile of such households.³³⁴ One can easily imagine, for example, the paparazzi being whipped into a frenzy as a celebrity strolls through an upscale area with a wife at each arm. A wealthy man flaunting his harem of wives could become a new symbol of inequality, with the potential to add a toxic layer of sexual jealousy on top of already-existing material envy.

In addition, polygamy could increase resentment towards *the poor*. Today, many practitioners of polygamy engage in it for religious reasons, and these households are not necessarily wealthy; in fact, some rely on welfare.³³⁵ Media outlets across the globe have already begun scrutinizing polygamists on welfare, publishing scandalous exposés of large polygamous families leeching off the public purse.³³⁶ This sort of scrutiny will likely increase if polygamy is legalized and polygamists begin receiving the countless state-provided “material benefits” that married people are entitled to receive.³³⁷ If voters feel that polygamists are taking unfair advantage of the “constellation of benefits that the States have

333. Rauch, *supra* note 145 (“Hudson and den Boer suggest that societies become inherently unstable when sex ratios reach something like 120 males to 100 females: in other words, when one-sixth of men are surplus goods on the marriage market. The United States as a whole would reach that ratio if, for example, 5 percent of men took two wives, 3 percent took three wives, and 2 percent took four wives — numbers that are quite imaginable, if polygamy were legal for a while. In particular communities — inner cities, for example — polygamy could take a toll much more quickly. Even a handful of ‘Solomons’ (high-status men taking multiple wives) could create brigades of new recruits for street gangs and drug lords, the last thing those communities need.”).

334. JANET BENNION, *POLYGAMY IN PRIMETIME: MEDIA, GENDER, AND POLITICS IN MORMON FUNDAMENTALISM* 163 (2012).

335. See, e.g., Randi Kaye, *How polygamy affects your wallet*, CNN (May 11, 2006), (stating that “[m]ore than 65 percent of the people are on welfare” in one polygamous Mormon community, “compared with 6 percent of the people of the general population”); *Anger over welfare payments for wives in polygamous marriages*, SBS (Dec. 11, 2016), <http://www.sbs.com.au/news/article/2016/12/11/anger-over-welfare-payments-wives-polygamous-marriages> (discussing controversy over welfare payments to polygamous Muslim families in Australia); *Syrian refugee in Germany with 4 wives, 22 kids sparks social media fuss over welfare*, RT (Oct. 24, 2016), <https://www.rt.com/news/363948-germany-refugee-syria-polygamy/>.

336. See WIRTSHAFTER, *supra* note 302, at 52 (“Media sources claim that welfare fraud is rampant [among polygamous families] but offer only a few anecdotal examples.”).

337. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015). Regarding those “material benefits,” the *Obergefell* Court found that “while the States are in general free to vary the benefits they confer on all married couples, they have throughout our history made marriage the basis for an expanding list of governmental rights [and] benefits,” including tax breaks and social security benefits. “Valid marriage under state law is also a significant status for over a thousand provisions of federal law.” *Id.*

linked to marriage,”³³⁸ this may reduce voters’ continued willingness to “pledge to support” marriages with state incentives.³³⁹ Again, sexual jealousy could worsen the problem, as single male taxpayers could come to resent having to subsidize the very lifestyle they hold responsible for their dearth of marital options.

It is clear that polygamy undermines rather than supports “social order.” Polygamous households are far from “the image of order and of peace” that Tocqueville described,³⁴⁰ and by bringing chaos into the home, polygamy frays the “first bond of society.”³⁴¹ Polygamy also amplifies the effects of inequality, leaving many men without marital options and increasing class tensions. Worst of all, by creating a large underclass of single men, polygamy promotes violence and warfare.

E. PART III CONCLUSION

Obergefell held that the Constitution protects marriage because marriage provides increased stability for individuals, couples, children, and society.³⁴² Polygamy, on the other hand, throws personal lives into turmoil, drives couples apart, exposes children to abuse, and increases social problems. It is clear, therefore, that “the reasons marriage is fundamental under the Constitution” do not “apply with equal force”³⁴³ to polygamy.

CONCLUSION

As *Obergefell* noted, “[t]he history of marriage is one of both continuity and change,”³⁴⁴ and this is particularly true in regard to monogamy. Humanity has gone from “ecologically-imposed monogamy,” to inequality-based polygamy, and finally to legally-imposed monogamy. The 2,000-year experiment in legally-mandated monogamy has provided “new insights” that “have strengthened, not weakened, the institution,”³⁴⁵ as we now understand that monogamy fosters the development of companionate unions and peaceful homes. Monogamy laws not only “worked deep transformations in the structure of marriage,”³⁴⁶ but also in the structure of society, helping humanity regain some of the egalitarianism that was lost during the Agricultural Revolution. Our experience with socially-imposed monogamy has resulted in “new dimensions of freedom becom[ing] apparent to new generations,”³⁴⁷ as humanity has come to see how monogamy promotes the social order that liberty thrives in.

338. *Id.* at 2590.

339. *Id.* at 2601.

340. *Id.*

341. *Id.* at 2594.

342. *Id.* at 2599–601.

343. *Id.* at 2599.

344. *Id.* at 2595.

345. *Id.* at 2596.

346. *Id.* at 2588.

347. *Id.* at 2596.

Polygamy, on the other hand, is inconsistent with the constitutional objectives of marriage. It fails to fulfill an individual's "yearnings for security, safe haven, and connection,"³⁴⁸ and also promotes an authoritarian social order that is inconsistent with "the concept of individual autonomy."³⁴⁹ It provides little "hope of companionship,"³⁵⁰ as it harms marriages and interferes with the development of companionate relationships. Rather than helping children "understand the integrity and closeness of their own family,"³⁵¹ polygamy thrusts children into the middle of spousal power-struggles. Finally, rather than serving as a "keystone of our social order,"³⁵² polygamy is so destabilizing that a police state is required to control the social unrest it causes.

In conclusion, only monogamy fulfills the constitutional objectives of marriage identified in *Obergefell*. Indeed, monogamy is foundational not only to the right to marriage, but also to "the concept of ordered liberty"³⁵³ in general. The courts, therefore, should reject constitutional challenges to monogamy laws.

348. *Id.* at 2599.

349. *Id.*

350. *Id.* at 2600.

351. *Id.*

352. *Id.* at 2601.

353. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).