San Diego Law Review

Volume 42 | Issue 3 — Article 16

8-1-2005

Who's Afraid of Polygamous Marriage? Lessons for Same-Sex Marriage Advocacy from the History of Polygamy

Cheshire Calhoun

Follow this and additional works at: https://digital.sandiego.edu/sdlr

Part of the Law Commons

Recommended Citation

Cheshire Calhoun, *Who's Afraid of Polygamous Marriage? Lessons for Same-Sex Marriage Advocacy from the History of Polygamy*, 42 San Diego L. Rev. 1023 (2005).
Available at: https://digital.sandiego.edu/sdlr/vol42/iss3/16

This Article is brought to you for free and open access by the Law School Journals at Digital USD. It has been accepted for inclusion in *San Diego Law Review* by an authorized editor of Digital USD. For more information, please contact digital@sandiego.edu.

Who's Afraid of Polygamous Marriage? Lessons for Same-Sex Marriage Advocacy from the History of Polygamy

CHESHIRE CALHOUN*

I. INTRODUCTION

In United States history, there have been four important bars to civil marriage. First, during the period of U.S. slavery, marriages between slaves, though informally celebrated, were not legally recognized.[1] The bar to civil marriage between slaves was part of slaves' general legal incapacity to enter into contracts, and was not an expression of social disapproval of slave marriages.[2] Indeed, slaveholders sometimes promoted informal marriage unions between slaves.[3] The three other marriage bars, however, specifically targeted relationships that were the subjects of intense social disapproval and were treated by lawmakers as dangerous to societal order.

Bars to *marriage across racial lines*—particularly between whites and blacks, but in the West, also between whites and Asians or Native Americans—were first erected in the eighteenth century and proliferated

---

* Charles A. Dana Professor of Philosophy, Colby College, Waterville, Maine.

1. Nancy F. Cott, *Giving Character to Our Whole Civil Polity: Marriage and the Public Order in the Late Nineteenth Century*, *in* U.S. HISTORY AS WOMEN'S HISTORY: NEW FEMINIST ESSAYS 111 (Linda K. Kerber et al. eds., 1995).

2. NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 35 (2000).

3. Cott, *supra* note 1, at 107, 111.

after abolition.[4] Forty-one states barred interracial marriages at some point in their history.[5] These antimiscegenation laws were finally invalidated in 1967 in the Supreme Court case of *Loving v. Virginia*.[6]

Bars to *polygamous marriages* were targeted at the Mormon practice of plural marriage in the Utah territory, and were first erected under the Morrill Act of 1862 that made bigamy a federal offense.[7] Shortly thereafter, the federal government further penalized polygamists by making cohabitation an offense, by taking away Utah women's right to vote, by making the affirmation that one is not a polygamist a condition of voter registration for men, by denying polygamists the right to serve in public office or on juries, by requiring women in polygamous marriages to testify against their husbands in court, and ultimately by seizing the assets of the Mormon church.[8] In addition, in the nineteenth century, every state made bigamy a crime.[9] The constitutionality of this marriage bar was challenged on First Amendment freedom of religion grounds in 1878, in *Reynolds v. United States*.[10] In said case, the Supreme Court upheld the bar on polygamy,[11] and that ruling still stands today.

Legal bars to *same-sex marriage* are of substantially more recent vintage, having largely arisen within the last decade. Bars to same-sex marriage began to proliferate at both the state and federal level only after same-sex couples began suing in court for the right to marry under marriage laws that did not specify the gender of the spouses.[12] As of November 2004, thirty-eight states explicitly defined marriage as between one man and one woman, and seventeen had incorporated those definitions into their constitutions.[13] The 1996 Defense of Marriage Act defined marriage for federal purposes as between one man and one woman.[14] It also qualified the Full Faith and Credit Clause, relieving states of the requirement to recognize marriages legally performed in

4. COTT, *supra* note 2, at 99; Cott, *supra* note 1, at 118–19.
5. Cott, *supra* note 1, at 118.
6. Loving v. Virginia, 388 U.S. 2 (1967).
7. COTT, *supra* note 2, at 112.
8. Cott, *supra* note 1, at 118–19; Nancy Rosenblum, *Democratic Sex: Reynolds v. U.S., Sexual Relations, and Community*, *in* SEX, PREFERENCE, AND FAMILY: ESSAYS ON LAW AND NATURE 76–77 (David M. Estlund & Martha C. Nussbaum eds., 1997).
9. COTT, *supra* note 2, at 112.
10. Reynolds v. United States, 98 U.S. 145, 166 (1878).
11. *Id.* at 166, 168.
12. *See, e.g.*, David Orgon Coolidge, *The Question of Marriage*, *in* HOMOSEXUALITY AND AMERICAN PUBLIC LIFE 200, 204–08 (Christopher Wolfe ed., 1999).
13. National Gay and Lesbian Task Force Marriage Map, http://www.thetaskforce.org/community/marriagecenter.cfm (last visited Aug. 1, 2005).
14. Defense of Marriage Act, H.R. 3396, 104th Cong. § 3 (1996).

another state.[15] More recently, some have advocated a Federal Marriage Amendment that would make the monogamous heterosexual nature of marriage a matter of constitutional definition.[16]

What the law recognizes as civil marriage has not, however, been determinative of how citizens understand the social institution of marriage. Slaves did marry without legal sanction.[17] Nineteenth-century members of the Latter-day Saints (LDS) protested the federal regulation of polygamy by continuing to practice plural marriage, either openly or underground;[18] and today members of some fundamentalist offshoots of Mormonism practice polygamy in the absence of state recognition of their marriages.[19] Antimiscegenation laws did not prevent interracial couples from constructing lives together, nor do same-sex marriage bars prevent gays and lesbians from publicly celebrating their unions, or religious communities from recognizing them.

The central issue raised by marriage bars is thus not whether the state should *permit* nonmonogamous and nonheterosexual marriages, but whether the state should *support* nonmonogamous and nonheterosexual marriages by assigning them the legal status of civil marriage.[20] With the legal status of civil marriage comes immigration rights, the right not to testify against one's spouse, social security survivor's benefits, inheritance without a will, and the right to give proxy consent. With the status of civil marriage also comes coverage under divorce laws and thus legal determination of property distribution, alimony payment, and child custody and support. Informally, having the status of civil marriage can also mean access to such benefits as a partner's health insurance plan, reduced membership fees for the spouse, and access to family rates.

Given that neither the polygamous marriages of some citizens nor the same-sex marriages of others are currently recognized by the state, one

15. *Id*. § 2.

16. The nineteenth-century antipolygamy campaign also produced (unsuccessful) demands for a constitutional amendment that would settle, with finality, the nation's commitment to heterosexual monogamy as its sole marriage form.

17. COTT, *supra* note 2, at 34–35.

18. JESSIE L. EMBRY, MORMON POLYGAMOUS FAMILIES: LIFE IN THE PRINCIPLE, 17–27 (1987); IRWIN ALTMAN & JOSEPH GINAT, POLYGAMOUS FAMILIES IN CONTEMPORARY SOCIETY 43–44 (1996).

19. *See generally* ALTMAN & GINAT, *supra* note 18.

20. This requires some qualification. Because cohabitation was made an offense—sometimes a felony offense, as in the 1935 Utah law—polygamy ended up not only being not supported in the law but coercively prohibited. IRWIN & GINAT, *supra* note 18, at 46.

might have expected that advocates of same-sex marriage rights would make common cause with advocates of polygamous marriage rights. That has not been the case. With few exceptions, advocates of same-sex marriage have exercised a vigorous silence about the *other* marriage bar currently in effect, namely the bar to polygamy.[21] There are two main reasons for that silence. Opponents of same-sex marriage often invoke polygamy in order to make *reductio* arguments against expanding the definition of marriage to include same-sex couples: If the definition of marriage is treated as something that is *not* fixed, then what, they ask, is to prevent the definition of marriage from being expanded to include not only same-sex marriages, but also polygamous marriages (and incestuous marriages and marriages with animals, etc.)? In this way, social hostility to polygamy is invoked as a reason not to permit same-sex marriage. Thus, advocates of same-sex marriage have found it strategically unwise to press an analogy between the bars to same-sex and polygamous marriage.

The political expediency of not associating same-sex marriage with polygamous marriage explains the silence of those at the front of the political fray. It does not fully explain why academic philosophers and legal theorists have maintained a similar silence about the "other" marriage bar. The principle reason appears to be a conviction that same-sex marriages and polygamous marriages are substantially *disanalogous*. While same-sex marriages challenge the traditional gender structure of marriage, polygamy is more likely to exaggerate the gender hierarchy within marriage and is thus incompatible with a liberal democracy that values women's equality. Same-sex marriage advocates thus routinely dismiss the issue of polygamous marriage as irrelevant to the question of whether the bar to same-sex marriage should be lifted. In particular, they insist that polygamous marriages are sufficiently socially dangerous that extending marriage rights to same-sex couples will not put us on a slippery slope toward recognizing polygamous marriages.[22]

Despite all this, the refusal to regard the marriage bar to polygamy as a significant political issue bears closer scrutiny. In what follows, this Article will be arguing that more careful attention to the historical practice of polygamy *strengthens* the case for same-sex marriage; and attention to the similarities between the social issues at stake in the

21. *But see* GORDON ALBERT BABST, LIBERAL CONSTITUTIONALISM, MARRIAGE, AND SEXUAL ORIENTATION: A CONTEMPORARY CASE FOR DIS-ESTABLISHMENT 87–89 (2002) (arguing that there is a critical legal analogy between the bars to same-sex, interracial, and polygamous marriage insofar as legal reasoning in all three cases appeals to alleged Christian values and views of divine purpose).

22. *See* WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 148–49 (1996).

antipolygamy campaign and the same-sex marriage campaign can productively complicate our sense of what the fundamental issues are in the same-sex marriage debate. Finally, this Article will suggest that it is not altogether clear that legal recognition of polygamous marriage is incompatible with a liberal, democratic, and egalitarian society. The proper response to same-sex marriage opponents' *reductio* argument may instead be, "And indeed, why *not* also polygamy?"[23]

II. COUNTERING APPEALS TO A MARRIAGE TRADITION

So let us turn first to the ways that more explicit attention to polygamy might help to build a stronger case for same-sex marriage. The same-sex marriage debate is a debate between expansionists, who argue that the traditional conception of marriage enshrined in law should be expanded to include same-sex couples, and traditionalists, who insist on the value of preserving the traditional conception of marriage as between one man and one woman. Traditionalists argue that citizens will find laws and public policies reasonable only if they are consistent with citizens' core values.[24] It is thus always relevant for the law to take into account "our" particular moral traditions and to be extremely cautious of legal innovations that might undermine core social values. In assessing the desirability of extending civil marriage to same-sex couples, traditionalists point out that it is particularly important to bear in mind the two thousand-year-old tradition of understanding marriage as the union of one man and one woman, a tradition that includes Judeo-Christian, Western European, and American cultural histories.[25] Given the extraordinary importance attached to heterosexual marriage and the absence of any comparable tradition of recognizing same-sex unions, traditionalists conclude that the state ought not expand the current legal definition of marriage.

One way of challenging the traditionalist's argument is to challenge the propriety of premising our laws on the majority's moral or religious values, no matter how longstanding, given the fact that ours is a liberal democracy designed to protect individuals' liberty to pursue a plurality of ways of life. Another way of challenging the traditionalists' argument

---

23. *See supra* note 21 and accompanying text.
24. CARLOS A. BALL, THE MORALITY OF GAY RIGHTS: AN EXPLORATION IN POLITICAL PHILOSOPHY 139–45 (2003).
25. John Witte, Jr., *The Tradition of Traditional Marriage*, *in* MARRIAGE AND SAME-SEX UNIONS: A DEBATE 47–49 (Lynn D. Wardle et al. eds., 2003).

is to challenge the truth of their claims about the Judeo-Christian marriage tradition. In this vein, one option is to observe that there has been at least a minor thread within the Judeo-Christian tradition of acknowledging same-sex unions. John Boswell's rediscovery of the union ceremonies for monks performed by the Roman Catholic Church in the Middle Ages is by now well known.[26] In the 1800s, so-called Boston marriages between two women emerged as a recognized cultural phenomenon in the U.S. which was not, at the time, regarded as incompatible with a Judeo-Christian tradition.[27] Finally, at present, a variety of religious denominations, including Unitarians, the United Church of Christ, Reform Judaism, the Society of Friends, and Episcopalians recognize same-sex unions.[28]

These facts, however, are unlikely to move traditionalists given that most of the evidence is from very recent developments within Christian and Jewish communities; and those religious communities are doing exactly what traditionalists object to the law doing—adopting policies that fly in the face of a millennia-old tradition of heterosexual monogamous marriage.[29]

A more powerful challenge might be framed by inviting traditionalists to consider whether the Judeo-Christian tradition will support *both* of the marriage bars they wish to sustain: the bar to same-sex marriage *and* the bar to polygamy. If it will not, then the Judeo-Christian "tradition" may be a dangerous tool for same-sex marriage opponents to invoke.

Polygamy has, in fact, a lengthy history within the Judeo-Christian tradition—beginning with the polygamous marriages of the Old Testament patriarchs.[30] Nowhere in either the Hebrew Bible or the New Testament is polygamy forbidden.[31] Indeed, some European Jews practiced polygamy until the eleventh century; and even then the ban on polygamy was adopted only to avoid Christian persecution in France and Germany. Martin Luther, while not endorsing polygamy as an ideal or pervasive practice, nevertheless observed that polygamy does not contradict the Scripture and so cannot be prohibited by Christianity.[32]

26. JOHN BOSWELL, SAME-SEX UNIONS IN PREMODERN EUROPE 218–21 (1994).

27. LILLIAN FADERMAN, SURPASSING THE LOVE OF MEN: ROMANTIC FRIENDSHIP AND LOVE BETWEEN WOMEN FROM THE RENAISSANCE TO THE PRESENT 16, 190, 208–13 (1981).

28. BABST, *supra* note 21, at 83 n.14.

29. *See supra* note 25 and accompanying text.

30. ALTMAN & GINAT, *supra* note 18, at 41–42; PHILIP L. KILBRIDE, PLURAL MARRIAGE FOR OUR TIMES: A REINVENTED OPTION? 59–66 (1994).

31. EMBRY, *supra* note 18, at 4–5. But note 1 *Timothy* 3:2,12, where "overseers" and "deacons" in the church are to be "husband of but one wife" (personal correspondence, Steve Palmquist).

32. I confess, indeed, I cannot forbid anyone who wishes to marry several wives, nor is that against Holy Scripture; however, I do not want that custom

And within Catholicism, the question of whether polygamy was acceptable in exceptional circumstances was not finally settled until the Council of Trent in 1563.[33]

Polygamy has had an especially significant place in U.S. social life after Joseph Smith's 1843 revelation that members of the Church of Jesus Christ of the Latter-day Saints (the LDS church) should begin practicing what they called "plural marriages" patterned on Old Testament patriarchal polygamy. The LDS church was an enormously powerful religious community in the nineteenth century. Occupying the Utah territory, the Church planned to expand into a territory that included parts of California, Oregon, Arizona, New Mexico, Colorado, Wyoming, and all of Nevada and Utah.[34] The Church set up its own legal system, including legally recognizing plural marriages and granting divorces and property settlements.[35] The political and economic power of the Mormon Church made credible its aim to break away from the United States and motivated a series of federal acts designed to rein in the Utah territory, including the disenfranchisement of polygamists and seizure of the Church's finances.[36] Under this federal pressure, the LDS church formally repudiated plural marriage in 1890, but fundamentalist offshoots continue to practice plural marriage today.[37] One study estimates membership at twenty to fifty thousand.[38]

In short, polygamous marriage cannot be dismissed as a negligible blip in an otherwise consistent tradition of heterosexual monogamous marriage. On the contrary, polygamy is very much part of a millenias-long *pluralist*

> introduced among Christians among whom it is proper to pass up even things that are permissible, to avoid scandal and to live respectably, which Paul everywhere enjoins.

KILBRIDE, *supra* note 30, at 63 (quoting Luther's correspondence).

33. *Id.* at 64.

34. Rosenblum, *supra* note 8, at 72–73.

35. Brigham Young issued 1645 divorces during his presidency of the Church. JOAN SMYTH IVERSEN, THE ANTIPOLYGAMY CONTROVERSY IN U.S. WOMEN'S MOVEMENTS, 1880–1925: A DEBATE ON THE AMERICAN HOME 59 (1997).

36. President Hayes observed that "[l]aws must be enacted which will take from the Mormon Church its temporal power. Mormonism as a sectarian idea is nothing, but as a system of government it is our duty to deal with it as an enemy of our institutions and its supporters and leaders as criminals." Rosenblum, *supra* note 34, at 75 (quoting Hayes).

37. *See* ALTMAN & GINAT, *supra* note 18. Two prominent religious communities that accept the principle of "plural marriage" are located in Hildale, Utah and Colorado City, Arizona. *Id.* at 50–51.

38. *Id.* at 2.

Judeo-Christian tradition of marriage.[39] Traditionalists thus enter quite perilous territory when they invoke the Judeo-Christian tradition as a reason for rejecting same-sex civil marriage. The same tradition that traditionalists believe justifies *limiting* civil marriage to heterosexual relationships, would also justify *extending* civil marriage to polygamous relationships. Such an implication is likely to seriously undermine the appeal, for traditionalists, of using tradition as a guide to marriage policy. Moreover, given how pervasive appeals to tradition are in the same-sex marriage debate, marriage rights advocates stand to gain quite a lot by reminding those who would appeal to tradition that it does not support state and federal definitions of marriage as not only heterosexual, but between *one* man and *one* woman.

III. FUNDAMENTAL QUESTIONS ABOUT THE STATE FORM OF MARRIAGE

More importantly, attending to the details of the nineteenth-century polygamy debate throws into relief the larger issues—both social and legal—that are at stake when marriage bars are erected and subsequently challenged. Neither the polygamy debates of the nineteenth century nor the same-sex marriage debates of today were just about a minority sexual practice. They were also debates about how to respond to the failure of heterosexual monogamous marriage to deliver the social benefits that warrant the state's legally recognizing these marriages in the first place. Should heterosexual monogamy as a marital form be protected? Or should alternative marital forms be granted social and legal standing? Both plural marriage advocates and same-sex marriage advocates argued that state support should instead be given to a *different* definition of marriage—polygamous or gender-neutral.

Rising divorce rates in both the late nineteenth and late twentieth centuries[40] called into question the cultural ideal of a marriage as what Karen Struening has called a "multipurpose association."[41] Marriages are supposed to satisfy a plurality of individuals' needs, including needs for sexual and emotional intimacy, reproduction, childrearing, and the care of adults' material needs. The expectation that marriages will meet individuals' sexual and emotional needs encourages individuals to dissolve their marriages when those needs are not met, and to search for

39. It is important to bear in mind that our U.S. tradition occurs within a multination state whose traditions include those of Indian nations for whom monogamy was not always the defining form of marriage and which sometimes recognized unions between same-sexed persons. *See* ESKRIDGE, *supra* note 22, at 27–30; COTT, *supra* note 2, at 25.

40. IVERSEN, *supra* note 35, at 106–07; COTT, *supra* note 2, at 105–07, 203.

41. KAREN STRUENING, NEW FAMILY VALUES: LIBERTY, EQUALITY, DIVERSITY 85 (2002).

new partners[42]—hence liberalization of divorce law and a rise in the divorce rate in both periods. The failure of many marriages to endure, however, is at odds with the expectation that marriages will provide stable contexts for the rearing of children and the economic support of adults—expectations that require long-term commitment to staying in the marriage.

In the nineteenth century, the polygamy debates centered on the question of what the best social response should be to the failure of conventional marriage to serve as a "multipurpose association." Moral reform movements assumed that the problem had more to do with the individuals within marriages than with the form of marriage itself.[43] Moral reformers thus argued that conventional marriage should remain the normative form of marriage but be shored up with social reform and legal regulation. They focused energy on curbing male lust, eliminating prostitution, and reducing the number of unwed mothers. Controlling the rate of divorce was also linked in the public's imagination to controlling the Mormon practice of polygamy, because relatively liberal divorce laws were condemned for permitting "serial polygamy" under conventional marriage.[44] Many called for legal steps to be taken to check both serial polygamy and Mormon plural marriage.[45] As a result, the demand for federal control of Mormon polygamy was conjoined to a request for a federal marriage law that would control the rate of divorce within monogamous marriage.[46]

On the other side, polygamy advocates argued that an alternative marital form was more likely to meet with success. Mormon women, for example, argued that plural marriage promised to solve the social problems created by the failure of monogamous companionate marriage to supply both adequate sexual satisfaction for men and a stable reproductive environment for women and children.[47] Sharing their

---

42. *Id.*

43. Julie Dunfey, *'Living the Principle' of Plural Marriage: Mormon Women, Utopia, and Female Sexuality in the Nineteenth Century*, 10 FEMINIST STUDIES 523, 527 (1984).

44. Rosenblum, *supra* note 8, at 75. According to Joan Iversen, social critics charged divorce rates in New England with creating "polygamy in New England." IVERSEN, *supra* note 35, at 106.

45. IVERSEN, *supra* note 35, at 107.

46. *Id.* at 106–07, 219–20.

47. For example, the Utah women's journal, *The Women's Exponent*, "cited stories of infanticide, alcoholic and abusive husbands, desertion, divorce, and prostitution as

monogamous sisters' assumption that a large part of the problem was due to men's higher sex drive, Mormon women argued that if only men were allowed to have plural wives, they would not be motivated to use prostitutes (or presumably, to divorce), and thus fewer women would be degraded by work as prostitutes and fewer would suffer the hardships of bearing children out of wedlock or of being left without adequate economic support.[48] Moreover, given the scarcity of "worthy men" and the surfeit of "pure women," plural marriage would guarantee that no woman who wished to be married would have to marry beneath herself.[49]

Twentieth-century debates over same-sex marriage have been very much about the same question of what to do about conventional marriage's failure to serve all its intended purposes. Opponents of same-sex marriage see same-sex marriage as the last straw in a larger social process of decaying social commitment to committed, long-term, sexually faithful, monogamous relationships and as the culmination of a social shift toward basing relationships purely on self-indulgent personal preferences. The social consequence of this collapse of conventional marriage is a more than fifty percent divorce rate,[50] a reduction in the percentage of adults who are married,[51] the escalation of female-headed households, and the growing number of children born to never-married women.[52] These trends are also blamed for putting pressure on the welfare system and producing a generation of children who have failed to internalize values of loyalty, commitment, and self-restraint.[53] Legal recognition of same-sex marriage, on this view, is objectionable not so much because it is same-sex, but because same-sex marriage symbolizes a kind of last straw in the social assault on the traditional conception of marriage.

Thus, in the twenty-first-century marriage debate, as in the nineteenth-century marriage debate, one side argues that conventional marriage should remain the normative form of marriage but be shored up with social and legal reforms. Proposed reforms today include conducting abstinence education in schools, reducing payments to unwed welfare mothers, reintroducing fault-based divorce, and improving tax breaks for married couples. Protecting the social status of

---

evidence of the corruption of the larger society." Dunfey, *supra* note 43, at 527–28; *see also* IVERSEN, *supra* note 35, at 63.

48. Dunfey, *supra* note 43, at 528, 530.

49. *Id.* at 523–26, 528–29.

50. COTT, *supra* note 2, at 203.

51. The percentage of adults who are married dropped from 75% in the early 1970s to 56% in the late 1990s. *Id.* at 203.

52. *Id.* at 204.

53. *Id.*

marriage as a unique and sacred institution by withholding legal recognition of same-sex marriage becomes part of this "shoring up" strategy.

The other side argues that alternative marital and family forms are more likely to meet with success—especially if they do not burden a single relationship with meeting the full range of individuals' sexual, emotional, reproductive, childrearing and material needs. For example, the growing practice of parenting outside of a marriage—whether as a result of divorce or of not marrying in the first place—detaches reproductive and childrearing relationships from sex and romantic love. The caretaking networks that emerged in response to the AIDS epidemic similarly detached adult caretaking relationships from those that satisfy sexual and romantic needs. Advocacy of same-sex marriage becomes part of this splitting off of the romantic and sexual from the reproductive and caretaking functions of conventional marriage. This is not to say that those joined via same-sex unions do not produce and rear children. It is to say that the advocacy of same-sex marriage rights has primarily invoked the importance of individuals being able to satisfy their romantic, companionate, and sexual needs.

In short, both the latter half of the nineteenth century and the past decade have been important moments in our collective social life for thinking about what sorts of relationships might best satisfy individuals' complex needs for emotional and sexual intimacy, procreation, childrearing, and adult care-taking—and for reflecting on the ways that the state should, and should not, be involved in protecting those relationships. Perhaps most crucially, these historical moments also presented the opportunity to take up fundamental political questions concerning marriage: Should there be a *state supported* form of marriage? If so, should there be *more than one* state supported form of marriage? Or should the state simply enforce whatever *contracts* into which individuals voluntarily enter?

Because civil marriage has always been an uneasy merging of a public status with a private contract, it is appropriate to ask these fundamental questions about whether and how the state should be involved in marriages.[54] Civil marriages are contracts insofar as they are entered into only by voluntary consent. Civil marriage is a public status insofar

54. See *id.* at 11, 101–02, and BABST, *supra* note 21, at 16–21, for discussions of the contract and status features of civil marriage.

as individuals are not free to determine the terms of the marital contract—who may enter a marriage, what obligations spouses have, or the terms for dissolving a marriage. These features are all set by the state.

The contract and status aspects of civil marriage pull against each other.[55] To the extent that we think of civil marriage as a private contract, voluntarily entered into for the purpose of satisfying some combination of the individual's particular sexual, emotional, caretaking, and reproductive needs, we are inevitably pulled toward the idea that if there is freedom of contract, then we should have the freedom to devise whatever marriage contract with whatever partner or partners we please and to determine the conditions of dissolution of the marriage.[56] This, one might think, is as things should be in a liberal society that permits citizens to pursue their own conception of the good so long as doing so does not infringe on others' rights, even if that conception is a minority or unpopular one. From the viewpoint of liberal theory, the state should remain neutral with respect to competing conceptions of what marriage is and of how individuals' needs for sex and emotional intimacy, material support in daily life, reproduction, and childrearing are to be met. The state fails to be neutral when it chooses one particular form of relationship to support. If we focus on the contractual, consent-based nature of marriage, the central question is: "What legal protections and supports, if any, should the state provide for the *plurality* of purposes that individuals might have for entering into marital contracts?"

On the other hand, to the extent that we think of marriage as a public status, like citizenship or eligibility for public office, we move in the direction of a less pluralistic definition of civil marriage. We think of civil marriage not as something that individuals define for themselves, but as a relationship that the state defines for all of us: civil marriage is state marriage. On this view, it is not up to individuals, with their varied preferences and values, to determine what will qualify as the state's form of marriage. Instead, the state must accept or reject the various candidates for the state's form of marriage—monogamous, polygamous, heterosexual, same-sex—according to whether those relationships are believed to contribute to the *social good*, not the individual's private

55. Nancy Rosenblum pursues this tension as it manifests itself in liberal democratic thought. On the one hand, a privacy model of marriage pulls in a libertarian direction; on the other hand, the view that marriages and families are first schools of justice pulls in the direction of a more restrictive conception of marriage. Rosenblum, *supra* note 8, at 80–81.

56. See generally Will Kymlicka, *Rethinking the Family*, 20 PHILOSOPHY AND PUBLIC AFFAIRS 77 (1991) (reviewing SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY (1989)), for an elaboration of this contractual view.

good. That social good may be the cultivation in adults of key social virtues such as self-sacrifice, loyalty, and sexual self-restraint. Or it may be the training of adults and children in democratic virtues of equal respect. Or it may be the preservation of a foundational social tradition, such as the Judeo-Christian tradition of marriage. Monogamous, polygamous, heterosexual, and same-sex relationships then get evaluated and accepted or rejected as candidates for the state's form of marriage according to whether those relationships are believed to contribute to the social good. For example, Justice Waite, who rendered the Court's opinion in *Reynolds*,[57] assumed a status conception of marriage when he affirmed that "it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion."[58] He rejected polygamy as the law of social life on the grounds that it is more allied with despotism than democracy and thus is contrary to the social good.

Civil marriage's peculiar hybridization of private contract and public status means that social campaigns to revise the terms of civil marriage—by liberalizing divorce laws, offering an option of covenant marriage, or extending marriage rights to formerly excluded individuals—are often ambiguous between two claims. On the one hand, revisionist campaigns might be viewed as pressing the state toward a more genuinely contractual and pluralist conception of marriage. These campaigns might aim to *disestablish* a state form of marriage in order to afford individuals greater liberty to pursue their own conceptions of the good.[59] On the other hand, one might see revisionist campaigns as pressing the state toward simply a *different* status conception of civil marriage.

What is striking about the pro-polygamy and pro-same-sex marriage campaigns is that neither campaign was committed to fully pluralizing marital and familial forms by insisting that the law be neutral with respect to competing conceptions of how people can best satisfy their needs for emotional and sexual intimacy, care-taking, reproduction, and childrearing. Instead the debate focused on which one of rivaling legal definitions of marriage—monogamy *or* polygamy, monogamous

57. Reynolds v. United States, 98 U.S. 145, 153 (1878).
58. *Id.* at 166.
59. Nancy F. Cott argues that an array of changes in marriage and divorce law as well as the nonprosecution of Mormon fundamentalist polygamy indicate the disestablishment of (a single form of) marriage. COTT, *supra* note 2, at 200–15.

heterosexual *or* monogamous gender-neutral marriage—should define the state's marital form.

In the nineteenth century, polygamy advocates pursued the recognition of plural marriage as the state's marital form. Monogamous marriage had failed adequately to deliver the goods it purported to produce—to combine romantic love with a stable context for childrearing, to regulate male sexuality, and to provide women with adequate economic support and children with fathers. Polygamy was being offered up by the LDS church not just as *their* preferred marriage form given their particular religious beliefs, but as *the* marriage form that would best secure the social goods with which a state should concern itself. Justice Waite, in his *Reynolds* opinion, was exactly right to see that the question at issue was *which* form of marriage—monogamy *or* polygamy—was to be the state's marriage.[60]

In recent decades, same-sex marriage advocates have pursued recognition of non-gender-specific monogamy not just as *their* preferred marriage form but as *the state's* marital form. Heterosexual marriage has failed to prove that it can uniquely deliver important goods such as long-term commitment and satisfaction of individuals' needs for emotional intimacy. Unlike polygamy advocates, same-sex marriage advocates may not be able to argue that same-sex marriages are *more* likely to deliver the goods—with the one possible exception of gender equality within marriage—but advocates are positioned to argue that same-sex marriages would do *at least as well* as the currently flagging institution of heterosexual marriage. Thus, the state form of marriage should be redefined in gender-neutral terms. What is to be retained, however, is the existence of a singular definition of marriage, which, while gender-neutral, still presumes the monogamous and companionate form of conventional marriage. Thus, marriage rights advocates are often quick in the face of the challenge, "And what about polygamy?" to affirm their resistance to any more wide-ranging reform of marriage.[61] As Judith Butler notes, with some disenchantment, the same-sex marriage debate is not just a debate over whose relationship will be legitimated and supported by the state, but also over whose desire will become the state's desire.[62]

In short, despite their apparent radicalism, both the pro-polygamy and pro-same-sex marriage campaigns have been marked by an antipluralist and exclusionary conception of marriage. Neither debate seized the

60. *See supra* note 58 and accompanying text.
61. *See, e.g.*, ESKRIDGE, *supra* note 22, at 148–49.
62. Judith Butler, *Is Kinship Always Already Heterosexual?*, 13 DIFFERENCES: A JOURNAL OF FEMINIST CULTURAL STUDIES 14, 22 (2002).

opportunity to question the desirability of defining a *single form* of state marriage. Both simply assumed that the state should support marriage and only one form of marriage. However, maintaining a single state definition of marriage is at odds with the fundamental premises of a liberal political society, with the private, contractual aspect of marriage, and with satisfying individuals' multiple relational needs. Thus, the state would do better to move toward a more pluralistic conception of personal relationships; and it might do so in one of two ways. On the one hand, we might adopt a fully contractual approach to emotional, sexual, childrearing, and adult support relationships.[63] In that case, the state would simply enforce the terms of the contracts agreed upon by the contracting parties. On the other hand, the state might remain in the business of licensing marriages or other relational forms. But in a pluralist liberal society, one would expect that there would be a plurality of marriage or relational options rather than a single state form of marriage. The U.S. is in fact moving in the direction of creating various packages of rights designed to protect and support a plurality of relational choices. On offer already are domestic partnerships (California, New Jersey), heterosexual civil marriage, same-sex civil unions (Vermont, Connecticut), same-sex marriage (Massachusetts), and covenant marriage (Arkansas, Arizona, Louisiana).[64] Same-sex marriage advocacy loses much of its radical (and plain old liberal) potential by refusing to take up the banner of disestablishing a single state form of marriage. Disestablishing a single state form of marriage would in turn, of course, open the doors to state recognition of polygamous marriages.

IV. WHO'S AFRAID OF POLYGAMOUS MARRIAGE: POLYGAMY AND GENDER EQUALITY

Up to this point in our discussion, polygamous marriage has remained safely in the past. If the state is to support the plurality of individuals' relational choices, and if one significant relational choice is of plural spouses, then the question of polygamy must be confronted.

Why *not* polygamy? John Stuart Mill famously asserted in *On Liberty* that polygamy was "a mere riveting of the chains of one half of the

63. *See generally* Kymlicka, *supra* note 56.

64. *See, e.g.*, 2000 Vt. Acts & Resolves H. 847, § 3 (codified as amended at VT. STAT. ANN. tit. 15, § 1201 (2002)), 2005 Conn. Acts 05-10 (Reg. Sess.) (effective Oct. 1, 2005).

community [namely women], and an emancipation of the other from reciprocity of obligation towards them."[65] Antipolygamists of the nineteenth century likened husband and wives in a plural marriage to slave master and enslaved subject.[66] New England women's rights advocates of that century regarded polygamous marriages as no better than Turkish harems, a practice designed to serve male lust without women's willing consent.[67]

In marked contrast to this view, the feminist historians Joan Smyth Iversen and Julie Dunfey both offer persuasive evidence that nineteenth-century plural marriage was not a uniquely gender-inegalitarian form of marriage.[68] The Mormon women's rights advocates at the time argued, with good reason, that plural wives were in fact more liberated than their New England counterparts. In terms of educational and economic opportunities, civil and political rights, and autonomy within marriage, they rated quite well in comparison to New England women in monogamous marriages.[69] Each plural wife lived in her own house, functioning as the head of household and relying on her own judgment while her husband was away on Church missions or staying with other wives.[70] Married Mormon women had the right to own property and sometimes owned their homesteads.[71] Plural marriage was designed to free wives from some of the evils of male lust—protecting them against diseases that might be brought home from visits to prostitutes and freeing pregnant women from marital sexual duties.[72] Mormon wives were substantially more involved in economically contributing to their families than were their eastern counterparts, because their economic contribution was critical to both frontier society and their own support.[73] They were among the first women to vote in the United States,[74] and half the first enrollees in the University of Deseret (now the University of Utah) were women.[75] They entered plural marriages as well-educated women raised

---

65. JOHN STUART MILL, *On Liberty, in* THE PHILOSOPHY OF JOHN STUART MILL: ETHICAL, POLITICAL AND RELIGIOUS 291–92 (Marshall Cohen ed., 1961) (1863).

66. IVERSEN, *supra* note 35, 134–35; SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA 47–49 (2002).

67. IVERSEN, *supra* note 35, at 142–44.

68. Dunfey, *supra* note 43; *see also* Joan Iversen, *Feminist Implications of Mormon Polygyny*, 10 FEMINIST STUDIES 505–22 (1984); *see also* IVERSEN, *supra* note 35, at 53–75.

69. Iversen, *supra* note 68 at 510–11, 513.

70. *Id.* at 513–14.

71. *Id.* at 511.

72. Dunfey, *supra* note 43, at 528, 530, 531; Iversen, *supra* note 68, at 509.

73. Iversen, *supra* note 68, at 511; Rosenblum, *supra* note 8, at 79.

74. Iversen, *supra* note 68 at 505.

75. IVERSEN, *supra* note 35, at 55.

originally with the expectation of monogamous marriage.[76] They were able to exit marriage through divorce, and seventy-three percent of divorce actions in Utah territory were by women.[77]

What these historical details remind us is that gender inequality is a contingent, not a conceptual, feature of polygamy. Whether or not polygamy is strongly connected to women's inequality depends on at least three sets of factors. First are the *background social conditions* that affect women's overall level of opportunity and self-determination. Do women have basic civil and political rights including freedom to travel and the right to own property? Do they have access to education? Do they have the means to be economically self-supporting? Is there readily available information about, and access to, alternative ways of life? Such background conditions affect women's level of genuine freedom of choice to enter into polygamous relationships as well as women's status within those relationships. One reason why Mormon women were able to mount a plausible defense of plural marriage—in spite of the patriarchal ideological underpinnings of plural marriage—was because their background conditions were favorable to women's autonomy.

Second, whether or not polygamy is strongly connected to women's inequality depends on the form that the *social practice* of polygamy takes. By whom are plural spouses selected and courted? Whose consent is presumed necessary? Who is presumed to have decisionmaking authority (and over what) within the marriage? How do participants understand their duties as a spouse? Is polygamy practiced only by heterosexuals and only as *polygyny*?[78] Or do lesbians, gay men, and bisexuals also practice polygamy as well as heterosexual women in polyandrous relationships?[79] The customary social practices associated with polygamy help determine the degree of gender equality, mutuality, and individual autonomy versus unilateral dominance and gender inequality that is likely to occur in actual polygamous marriages. As Nancy Rosenblum observes, "There is no reason why egalitarian norms of property distribution, parenting, and the division of domestic and market labor

76. Dunfey, *supra* note 43, at 529, 524.
77. IVERSEN, *supra* note 35, at 60.
78. Polygyny is defined as "[t]he condition or practice of having more than one wife at the same time." BLACK'S LAW DICTIONARY 1198 (8th ed. 2004).
79. Polyandry is defined as "[t]he condition or practice of having more than one husband at the same time." BLACK'S LAW DICTIONARY 1197 (8th ed. 2004).

recommended by democratic theorists could not be adjusted for plural marriage."[80]

Finally, whether or not polygamy facilitates gender inequality depends critically on the *legal* form it takes. To whom is polygamous civil marriage available? Same-sex groups? One woman with multiple men? Two women and two men? In a liberal political society governed by norms of gender equality, polygamous civil marriage could not be legally *equated* with polygyny,[81] but would have to permit a variety of gender configurations. In a society that recognizes same-sex marriages, polygamy would necessarily extend to all-male or all-female polygamous marriages. Moreover, if the idea that there is a single "head of household" is not operative in legal conceptions of monogamous marriage, it would be inconsistent to introduce that assumption into a legal conception of polygamous marriage. Of equal importance is the question, from whom is consent required? Liberal societies would not tolerate a form of civil marriage which did not assign equal importance to the consent of all spouses, and which did not offer the exit option of divorce to all spouses. What rules govern divorce and property distribution? In a liberal society that grants no-fault divorces to monogamous marriages, exit from polygamous marriages would likewise have to be on a no-fault basis. In short, the legal form of polygamous marriage determines the extent to which assumptions about gender relations and sexual orientation are encoded into marriage law. It also determines the level of required formal consent for entrance into marriage and the availability of exit options for disaffected spouses.

The quick dismissal of polygamy on grounds that it, unlike monogamy, is distinctively gender-inegalitarian is the result of smuggling in a set of unstated assumptions about the background social conditions for women, the social practice of polygamy, and its likely legal form that would render it inegalitarian, but that are implausible assumptions about plural marriage in a liberal egalitarian democracy.

Opponents might object that, in fact, polygamy, as it is practiced worldwide, tends to take forms that are oppressive to women. Permitting polygamous civil marriage would thus open the doors to illiberal ethnic groups in the United States practicing social forms of polygamy that are oppressive to women. Two responses to this objection bear noting.

First, unless we are willing to also eliminate monogamous civil marriage because it, too, sometimes takes social forms that are oppressive to women, targeting polygamy for a special bar would involve the state in a clear failure to exercise neutrality with respect to alternative conceptions of

80. Rosenblum, *supra* note 8, at 81.
81. See *supra* note 78 for a definition of polygyny.

the good. Indeed, Justice Waite's reason for rejecting polygamy in *Reynolds* was driven in part by hostility to non-European cultures.[82] "Polygamy," he noted, "has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people."[83] Subsequent Supreme Court Justices rejected polygamy out of hostility to non-Christian ways of life: "Bigamy and polygamy are crimes by the laws of all civilized and Christian countries,"[84] and polygamy is "a return to barbarism[;] [i]t is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world."[85]

Second, the existence of ethnic or religious groups in the United States that practice gender oppressive forms of polygamy is *all the more* reason to extend civil marriage to polygamous groups. The social and legal persecution of Mormon polygamy in the nineteenth century did not end the social practice of polygamy.[86] What it did do was to eliminate the legal status of "wife" for all but first wives.[87] As a result all secondary wives lost their legal claim for support and their children became illegitimate. Unless we are now willing to use the coercive force of the law to ensure that there simply are no polygamous relationships, some women will in fact participate in plural marriages in the United States. Failure to extend civil marriage to plural marriages leaves them unprotected by marriage and divorce law. Women who enter plural marriages without the benefit of legal divorce have substantially restricted exit options from those marriages, since they are not legally entitled to make claims for alimony or fair property distribution. For this reason, even those who are most committed to the belief that polygamy will be practiced in gender-oppressive forms should think

82. *See* Reynolds v. United States, 98 U.S. 145, 164 (1878).
83. *Id.*
84. Davis v. Beason, 133 U.S. 333, 341 (1890); *see also* BABST, *supra* note 21, at 96 (quoting *Davis v. Beason* and discussing the case's relevance to "shadow establishment").
85. Late Corp. of the Church of Jesus Christ of Latter-day Saints v. United States, 136 U.S. 1, 49 (1890); *see also* BABST, *supra* note 21, at 97 (quoting the case and discussing the case's relevance to "shadow establishment"). Babst argues that the persistent appeal to Christian values in court rulings with respect to interracial, polygamous, and same-sex marriage bars is evidence of what he calls a "shadow establishment" of religion in U.S. judicial practice.
86. *See supra* note 20.
87. Dunfey, *supra* note 43, at 525.

twice about insisting on using the denial of civil marriage as a way to deter that practice.

V. CONCLUSION

The silence about polygamy on the part of same-sex marriage advocates is a mistake—at least in academic circles, because the historical practice of polygamy is a substantial reason for rejecting the claim that there is a millennias-long tradition of defining marriage as between one man and one woman. In addition, reflection on the similarities between the polygamy and same-sex marriage debates helps to illuminate the larger social issue of how to satisfy individuals' multiple relational needs and whether the state should endorse a single form of marriage. Finally, the supposedly *reductio* force of "And why not also polygamy?" challenges to same-sex marriages are most effectively met by challenging their underlying assumptions about the nature of polygamy.