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DOWN THE SLIPPERY SLOPE? DOES THE FUNDAMENTAL RIGHT TO MARRY PROTECT POLYGAMOUS MARRIAGE?

Evan Gerstmann*

RONALD C. DEN OTTER, IN DEFENSE OF PLURAL MARRIAGE, (CAMBRIDGE UNIVERSITY PRESS 2015). PP. 372. HARDCOVER \$103.00.

STEPHEN MACEDO, JUST MARRIED: SAME-SEX COUPLES, MONOGAMY, & THE FUTURE OF MARRIAGE, (PRINCETON UNIVERSITY PRESS 2015). PP. 320 HARDCOVER \$29.95. PAPERBACK \$23.95.

JOHN WITTE JR., THE WESTERN CASE FOR MONOGAMY OVER POLYGAMY (CAMBRIDGE STUDIES IN LAW AND CHRISTIANITY 2015). PP. 550. HARDCOVER \$124.00. PAPERBACK \$51.00.

When it held that there is a constitutional right to same-sex marriage in *Obergefell v. Hodges*, “the United States Supreme Court rested its decision upon the fundamental right to marry.”¹ Because fundamental rights are generally protected by strict scrutiny, which is the Court’s highest level of protection, the *Obergefell* case has led to much speculation about whether there might be a constitutional right to polygamous marriage. Indeed, in his dissenting opinion, Chief Justice John Roberts strongly implied that the reasoning of *Obergefell* may lead to exactly that result, writing: “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.”²

The issue of polygamy has cast a shadow over the debate on same-sex marriage for quite some time. The possibility that the Supreme Court’s recognition of a fundamental right to marriage at all (much less to same-sex marriage) would lead to legalizing polygamy and other non-traditional forms of marriage was very much on Justice Potter Stewart’s mind when he declined to join the majority in *Zablocki v. Redhail*.³ *Zablocki* was one of the Court’s early decisions discussing the fundamental right to marry. Justice Stewart warned that the Court’s support for a fundamental

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1. Rodney M. Perry, CONG. RESEARCH SERV. R44143, *Obergefell v. Hodges: Same-Sex Marriage Legalized* 2 (2015) (Citing *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)).

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

3. 98 S. Ct. 673, 684 (1978) (Stewart, J., concurring).

right to marry could open the door to various forms of non-traditional marriage, writing: “A ‘compelling state purpose’ inquiry would cast doubt on the network of restrictions that the States have fashioned to govern marriage and divorce.”⁴

Stewart was not alone in these fears. Many opponents of same-sex marriage have expressed concerns that if society allows same-sex marriage, it would have to allow polygamy. Numerous Republican congressmen, in addition to noted political commentators William Bennett, George Will, Robert Bork, and William Safire, have made similar arguments. Also, during congressional hearings on the Defense of Marriage Act, the analogy between polygamy and same-sex marriage was a dominant theme. Since *Obergefell* was decided, speculation that there may be a constitutional right to polygamous marriage has only intensified.⁵

There has also been increased interest in polygamy in the popular media with television shows such as *Big Love* and *Sister Wives*. National Geographic had both a magazine cover story and a television special focusing on polygamy.

In 2013, a federal district court in Utah brought further attention to the issue when it partially invalidated Utah’s anti-bigamy law.⁶ While the court’s ruling only applied to Utah’s broad cohabitation provisions and left intact Utah’s ban on seeking multiple marriage licenses, it hinted that for the first time courts might be at least somewhat open minded in hearing the constitutional claims of polygamous families.

All of this has also generated significant scholarly interest. The three new books reviewed in this essay each examine the polygamy question through a different lens. *In Defense of Plural Marriage*, by Ronald C. Den Otter, vigorously defends plural marriage on both policy and legal grounds and attempts to expand the conversation past traditional male-dominated polygamy to more egalitarian plural marriage arrangements. John Witte, Jr.’s *The Western Case for Monogamy Over Polygamy*, is less polemic but patiently lays out how the western argument against (and sometimes in favor of) polygamy has evolved over the millennia. Stephen Macedo, in *Just Married: Same-Sex Couples, Monogamy and the Future of Marriage*, directly confronts the analogy between same-sex marriage and polygamy, and argues that there is no slippery slope from the former to the latter.

While Otter’s defense of polygamy is ultimately unsatisfactory, he makes a convincing case that the debate over plural marriage so far has been shallow and that the

4. *Id.* at 688.

5. See, e.g., Joanna L. Grossman & Lawrence M. Friedman, *Is Three Still a Crowd? Polygamy and the Law After Obergefell v. Hodges*, JUSTIA (July 7, 2015), <https://verdict.justia.com/2015/07/07/is-three-still-a-crowd-polygamy-and-the-law-after-obergefell-v-hodges> (observing that, to win in court, polygamists must “convince a court that the justification for allowing same-sex couples to marry applies with equal force to a person who wants multiple spouses,” and questioning whether the four “main reasons for recognizing the right of same-sex couples to marry” apply to polygamists); see also William Baude, *Is Polygamy Next?*, N. Y. TIMES (July 21, 2015), <http://www.nytimes.com/2015/07/21/opinion/is-polygamy-next.html>; Richard A. Posner, *The Chief Justice’s Gay Marriage Dissent is Heartless*, SLATE (June 27, 2015), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2015/scotus_roundup/supreme_court_gay_marriage_john_roberts_dissent_in_obergefell_is_heartless.htm [Jonathan Turley, *The Trouble with the ‘Dignity’ of Same-Sex Marriage*, WASH. POST (July 2, 2015), https://www.washingtonpost.com/opinions/the-trouble-with-the-dignity-of-same-sex-marriage/2015/07/02/43bd8f70-1f4e-11e5-aeb9-a411a84c9d55_story.html?utm_term=.3de82fe542df (All cited in Perry, *supra* note 1, at 7).

6. *Brown v. Buhman*, 947 F. Supp. 2d 1170 (Dist. Ct. Utah 2013 (case was ultimately dismissed on standing grounds. See, *Brown v. Buhman*, 822 F.3d 1151 (10th Cir 2016)).

courts and society in general need to engage in the sort of serious evaluation of plural marriage that has finally occurred with same-sex marriage. Says Otter: “As it turns out, none of the state’s interests in not permitting plural marriages are either compelling or important. In fact, they may not be legitimate.”⁷ That is a strong claim, but he is certainly correct that the courts have often done a remarkably poor job of setting out the state’s interest against plural marriages. It can be surprisingly difficult to articulate why it is perfectly legal for a man to sleep with many women and have children by all of them, even though it is illegal for that man to marry those women. “If consenting adults who prefer polygamy can do everything else a husband and wife can do—have sex, live together, buy property, and bring up children jointly—why should they be prohibited from legally committing themselves to the solemn duties that attach to marriage?”, Steven Chapman asks. “How is society worse off if these informal relationships are formalized and pushed toward permanence?”⁸

We should be especially careful because much of the argument against polygamy in the courts has relied upon racial stereotypes of the “barbaric” civilizations that practice it, and polygamy has been used to justify the exclusion of immigrants from Asian and Muslim countries based on their supposed propensity for polygamy.⁹ As Otter points out, the Western argument against polygamy “has had a disturbing racial dimension.”¹⁰

Further, criminalizing polygamy, as opposed to the state merely refusing to recognize such marriages, may well be a foolish and destructive policy. As can be the case with criminalizing prostitution, the law may frighten victims of fraud, violence and coercion from turning to the authorities for help. Also, there is evidence that criminalization of polygamy causes a great deal of stigma, as well as psychological and emotional stress related to fear of prosecution.¹¹

Otter also points out that the polygamy laws are seriously under-enforced, which obviously undermines any argument that plural marriage is inherently damaging to individuals or to society. Otter calls the current state of polygamy law “don’t ask, don’t tell.”¹² Prosecutions are limited to cases of underage marriage and cases where polygamists engage in other crimes such as rape or battery. Otter argues that if society is concerned about underage marriage, the more direct approach would be to simply enforce and perhaps raise the age of consent. As for rape and battery, the answer is to prosecute those crimes, regardless of whether they take place in a polygamous relationship.

It is certainly true that polygamy has historically been associated with patriarchal dominance. An important example is the past religious practice of polygamy among

7. RONALD C. DEN OTTER, IN DEFENSE OF PLURAL MARRIAGE 2 (2015).

8. Steven Chapman, *Two’s Company; Three’s a Marriage*, SLATE (June 4, 2001), http://www.slate.com/articles/news_and_politics/hey_wait_a_minute/2001/06/twos_company_threes_a_marriage.html.

9. JOHN WITTE JR., THE WESTERN CASE FOR MONOGAMY OVER POLYGAMY 428 (2015).

10. OTTER, *supra* note 7, at at 21.

11. BJ Wray, Keith Reimer, & Craig Cameron, *The Most Comprehensive Judicial Record Every Produced: The Polygamy Reference*, 64 EMORY L. J. 1877, 1891 (2015) (Citing the testimony of Professor Angela Campbell).

12. OTTER, *supra* note 7, at 132.

early Mormons. But, as Stephen Macedo points out, “Early Mormonism was a highly gendered aristocracy,” even apart from the issue of polygamy.¹³ Otter asks whether under today’s conditions of relative gender equality, polygamy could potentially take on more gender egalitarian forms if it were not driven into the shadows by the fear of prosecution.

It is an intriguing argument, but ultimately unconvincing. There is now strong empirical evidence that polygamy is often harmful to the women and children within those households across cultures and across a broad variety of conditions. Much of this evidence has been developed relatively recently in response to a judicial proceeding in Canada, presided over by the Chief Justice of the Supreme Court of British Columbia in 2010 and 2011. Same-sex marriage was legalized in Canada in 2005, and, as in this nation, there was a debate about what this meant for a possible right to polygamous marriage. Because British Columbia has a large community of Fundamentalist Latter-Day Saints, the provincial government referred the issue to the Supreme Court of British Columbia. The resulting opinion upholding Section 293 of the Criminal Code of Canada is called the “Polygamy Reference Case.”¹⁴

At the request of the Attorney General of Canada, Dr. Rose McDermott of Brown University conducted a quantitative analysis of polygamy’s impact on women, children, and society.¹⁵ The study used data from 171 countries and controlled for confounding variables such as national GDP. The dependent variables included life expectancy, birth rates, sex trafficking, domestic violence, and political and civil liberties. She concluded that polygamy has a strong correlation to physical and sexual abuse against women, lower life expectancy for women, lower levels of education for both girls and boys, higher rates for sexual trafficking and sexual abuse of women and girls, and deprivations of civil rights and liberties.¹⁶ While the Chief Justice carefully considered the argument that correlation does not always equal causation, he determined that McDermott’s study amply demonstrated the causal link between polygamy and the social ills she discussed:

The Amicus [defending a right to polygamy] stresses that Dr. McDermott admitted in cross-examination that she could not “prove anything.” The most she could do was “create a correlation between the incidence of polygyny and the incidence of something bad” (para. 415). But creating such a correlation is the purpose of the statistical analysis . . .

The difficulty in attributing Dr. McDermott’s findings to a “third variable problem” is that she found correlations between her independent variable, level of polygyny, and eighteen different dependent variables. Given that the negative outcome related to each of these eighteen dependent variables increased as the level of polygamy increased, I find it difficult to write off these correlations as attributable to an unnamed “third variable.”

13. STEPHEN MACEDO, JUST MARRIED: SAME-SEX COUPLES, MONOGAMY, AND THE FUTURE OF MARRIAGE 154 (2015).

14. WRAY ET AL., *supra* note 11, at 1879-80.

15. *Id.* at 1895.

16. *Id.* at 1896.

I find that Dr. McDermott's report was conducted on the basis of well-proven methodology and utilized data of unparalleled scope and quality. Her scientific method and the results it produced cannot be dismissed on the basis of what can only be characterized as a lay person's appeal to so-called common sense. Dr. McDermott's analysis does prove "something." As she says in the conclusion to her report (at para. 158) "polygyny's negative effects are wide-ranging, statistically demonstrated and independently verified using alternative analytical tools."

I find Dr. McDermott's evidence to be compelling.¹⁷

Otter also makes the argument that, in theory, plural marriage could evolve into forms that go far beyond the patriarchal arrangements we associate with polygamy today. He discusses the possibility of re-imagining marriage as a purely contractual arrangement rather than a "status" arrangement. In status arrangements such as contemporary Western marriage, the form and legal rights and responsibilities are set by the state rather than by the parties themselves. He quotes Sir Henry Maine's famous adage that "[t]he movement of progressive societies has hitherto been a movement from Status to Contract."¹⁸ Marriage could be negotiated by the parties, ranging from two-person marriage, to traditional polygamy with one man and multiple women, to groups of multiple men and multiple women marrying one another under terms and conditions negotiated by the parties to the marriage. Nor would such arrangement be limited to romantic or reproductive partners. Children caring for their elderly parents could form "Intimate Care Giving Units" that would have helpful rights with respect to one another that today are reserved for married couples.

Otter acknowledges some of the potential problems with such arrangements. Purely contractual arrangements, for example, would not fit things such as testimonial privilege and immigration status. But the problems with replacing status marriage with contract marriage go far deeper than this. In *Just Married: Same-Sex Couples, Monogamy, & the Future of Marriage*, Stephen Macedo defends status-based two-person marriage and takes a sharp look at the idea of replacing marriage with contract. He engages the argument that the state has an overly large role in defining the contours of marriage and that the "simple dichotomy between 'single' and 'married' does not do justice to what people might chose."¹⁹

In theory, a shift from marriage as a status to a contractual arrangement with its contours chosen by the partners may promise greater flexibility and freedom of choice. But Macedo points out that it has rarely worked this way in practice. To begin with, people do not seem to have much enthusiasm for the contractual marriage options they are already afforded. While prenuptial agreements are relatively easy to make, very few are actually executed. And in states where there are alternatives to the standard marriage model, such as covenant marriage, they are far from popular.²⁰

Further, a shift to a more contractual view of marriage, be it couples only or plural in form, is unlikely to promote equality. As Macedo points out, prenuptial

17. Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588 (Canada).

18. OTTER, *supra* note 7, at 4.

19. MACEDO, *supra* note 13, at 121, quoting RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, & HAPPINESS 222 (2009).

20. MACEDO, *supra* note 13, at 122-23.

agreements are:

‘almost always coercive’ and one-sided, involving the exercise of power by the stronger (and wealthier) over the weaker party. “The less moneyed spouse generally gives away most of her marital rights as provided by law to the moneyed spouse . . . prenups are typically a contract to defeat the relative fairness that the law of marriage requires . . . the laws were written and interpreted over a long period of time by very knowledgeable people applying fairness and thoughtfulness to real life experiences and situations.”²¹

Even more fundamentally, the contract model undermines the values of intimacy and commitment at the core of modern companionate marriage. A contract is supposed to be an arms-length transaction in which each side is looking out for their own interests. A fundamental concept of contract law is that of “efficient breaches”—that the law should encourage breaches of contracts if it produces more efficient results, as long as the injured party is made whole for the losses resulting from the breach. This translates incredibly poorly to the modern understanding of marriage. Should adultery be encouraged if it brings greater benefit to the adulterer than it brings pain to the other spouse? And lest we be too cynical about the prevalence of adultery, Macedo points out that the norm against adultery is still robust and that, in fact, the belief that adultery is “always wrong” increased from seventy percent in 1973 to eighty-two percent in 2004.²²

There is certainly merit to the idea of expanding marriage-like rights to more people such as a daughter living and caring for her ailing grandmother. Rights such as tenancy in common and authority over medical decisions might be beneficial and humane. But in no way does creating a legal category of intimate caregiving partners require the redefinition of marriage as we know it. Macedo argues that there are broad public benefits to marriage as it is currently practiced. He cites the “mountain of evidence” that:

Beginning with adults, on average, married people are happier, are healthier, enjoy better sex and social lives, live longer, and are more financially secure . . . Married people have lower rates of depression and are less likely to use controlled substances, they also experience less chronic disease and greater longevity. They tend also to have sexual relations more frequently, experience less violence inside and outside the home . . . The family income of married couples is higher, and they experience less economic stress. The benefits of marriage are often especially pronounced for men, and seem to depend less (than in the case of women) on social context. And it important to emphasize that the advantages of marriage in the United States are in comparison with cohabitation, and not only being single.²³

The social benefits of marriage extend beyond just those applicable to the couples themselves. Children benefit enormously from marriage. While being careful not to vilify single parents and to acknowledge the controversy over the impact of single

21. *Id.* at 128-29, quoting Laurie Israel, *Ten Things I Hate About Prenuptial Agreements*, <http://www.ivkdlaw.com/the-firm/our-articles/prenuptial-agreements-and-lawyering/ten-things-i-hate-about-prenuptial-agreements> (last visited Oct. 4, 2016). <http://www.ivkdlaw.com/the-firm/our-articles>.

22. MACEDO, *supra* note 13, at 95-96.

23. *Id.* at 109 (citations omitted).

parents, Macedo cites an abundance of statistics indicating the benefits to children born to and raised by married parents. These include significantly lower rates of depression, loneliness, suicide and attempted suicide as well as lower rates of physical and sexual abuse.²⁴

Macedo is not just interested in demonstrating that there are broad public benefits that come from status-based, two person marriages. He makes a strong case that these benefits apply just as much to same-sex couples as they do to opposite-sex couples, while these benefits are undermined by polygamy. In fact, the argument that there is a slippery slope from same-sex marriage to polygamy misleadingly assumes that the two forms of marriage have significant aspects in common. To the contrary, they have almost nothing in common besides being “non-traditional.”

To begin with, people with a preference for polygamy are not comparable to people with a gay or lesbian sexual orientation. “The history of the struggle for gay rights has demonstrated that a large class of people have deep-seated and stable same-sex orientations . . . but there is no class of people who, by nature or deep-seated nurture, have the ‘orientation’ of only falling in love with two or more people at a time.”²⁵ Further, same-sex orientation appears across virtually all cultures, while people’s desire for polygamy is culturally contingent.²⁶

Therefore, the ban on same-sex marriage truly deprived gay men and lesbians of their ability to exercise the fundamental right to marriage. Telling them that they had the right to enter into a loveless heterosexual marriage obviously does not further or respect their autonomy. The opposite is true of polygamy. No one is forced to remain unmarried as a result of the ban on polygamy. If a person is prevented from marrying someone they love, it is because they made a choice to stay married to someone else, not a result of an inherent characteristic.

At this point it becomes clear that polygamists are not seeking entry to the institution of marriage; they already have that right and they do not need to marry someone they do not love in order to exercise it. Unlike same-sex couples, they are seeking to alter the institution of marriage and there is no constitutional right to do that. For all the controversy over same-sex marriage, the only thing that happened as a result of *Obergefell* is that a relatively small group of people gained the right to marry one another. Gays and lesbians did not alter the structure of anybody else’s marriage.²⁷ In sharp contrast, legalizing polygamy would alter everyone’s marriage. Suddenly, everyone’s spouse would have the option of marrying another person while remaining in the first marriage. The two situations are completely different.

A good sense of the difference between same-sex marriage and polygamy comes from the fact that no alterations in marriage laws resulted from same-sex marriage—only a few words on the marriage form had to be changed from “husband/wife” to “spouse.” While marriage has certainly changed enormously, this is a result

24. *Id.* at 111.

25. *Id.* at 162.

26. *Id.* at 163.

27. Further, there is no empirical evidence that same-sex marriage indirectly weakens heterosexual marriage in any way. *See* MACEDO, *supra* note 13, at 65-67.

of the movement toward gender equity not a result of same-sex marriage.²⁸ Once the husband and wife became legally equal, it required no substantive changes in marriage laws to allow married people to be “spouses”. As for polygamy, far from being a natural extension of gender equality, polygamy is strongly associated, indeed inherently linked, to gender inequality. And while same-sex couples could get married without changing the laws of marriage, polygamous marriage would require reform of many marital laws such as those concerning distribution of property and rules about who has medical decision-making power if one spouse is incapacitated.

Further, the global trends regarding same-sex marriage and polygamy could not be more different. In its landmark case *Lawrence v. Texas*, the Supreme Court relied upon decisions of the European Court of Human Rights (“ECHR”) in determining that anti-sodomy laws violated the constitutionally protected liberty interests of gay men and lesbians.²⁹ Meanwhile, the ECHR has upheld Turkey’s ban on polygamous marriage on the grounds that it undermines the rights and equality of women.³⁰ Further, all European and Commonwealth countries continue to ban polygamy, as do Western Civil Law countries and major Asian nations such as China and Japan.³¹ While the United States Supreme Court could certainly look to global legal trends in support of finding that the right to marry includes same-sex couples it would have to make the opposite conclusion regarding polygamous marriages.

Finally, there are substantial differences between same-sex marriage and polygamous marriages not only in terms of their liberty claims, but in terms of their equality claims. Same-sex couples were seeking the same right as everyone else—the right to marry the person they love most. Would-be polygamists are seeking a right nobody else has—the right to marry multiple people.

While Otter and Macedo are mostly engaged in the contemporary debate over same-sex marriage, polygamy, and status marriage versus contract marriage, John Witte, Jr. takes the longer view in “The Western Case for Monogamy over Polygamy.” In this thoroughly researched, often fascinating (although sometimes repetitive) book Witte takes us through a multi-millennia tour of the Western view of polygamy.

He reminds us that polygamy has a strong presence in the Hebrew Bible—with more than two dozen polygamists featured—including the great Hebrew Patriarchs; Abraham, King David, and King Solomon. But this is not to say that the Jewish tradition embraces polygamy. The practice was not at all common among Jews, and by the end of the First Millennium many Jewish communities banned it. Indeed, the Hebrew Bible was tolerant but hardly approving of polygamy. The Hebrew word for “co-wife” literally means “trouble.”³² And trouble is exactly what the polygamous patriarchs got. Their biblical stories include disputes about inheritance, succession, and deadly competitions among half siblings that featured rape and enslavement.³³

28. MACEDO, *supra* note 13, at 90.

29. 539 U.S. 558, 573 (2003).

30. *Serife Yigit v. Turkey*, S3976/05 Eur. Ct. H.R. (2010).

31. *See* WITTE, *supra* note 9, at 12-17.

32. *Id.* at 35.

33. *Id.* at 36.

Indeed, the chief concern of both the Hebrew Bible and the Talmud regarding polygamy was limiting the circumstances under which its practice was acceptable and formalizing rules to protect women and children when it was practiced. If a man's wife could not bear a child, he was then entitled to marry another who could, as Abraham did with Hagar. But the Hebrew Bible consistently taught that such arrangements were bound to lead to trouble, and after a great deal of such trouble in the House of Abraham, Sarah (Abraham's first wife) eventually gave birth to Isaac. Far from solving anything, when Abraham's barren wife gave birth, her son and Hagar's son began a feud that still has consequences for world politics.

For the early Jews, polygamy was also acceptable when a man's brother died—the Bible affirmatively approved of Levirate Marriage in which a man marries his deceased brother's widow even if he is already married.³⁴ But this was for the protection of the deceased brother's wife and children. The Talmud and other early Jewish teachings recognized that polygamy existed, but sought to protect against abuses. The Talmud allowed for polygamy only when a man had the means to support multiple wives. Jewish law prohibited the man from taking money from his first wife to pay for the expenses of additional wives, and it required that children of every wife got an equal inheritance.

Early Christians argued that Old Testament polygamy was God's "temporary dispensation" to fill an empty world more efficiently.³⁵ Yet Church Fathers were not overly concerned with the question of polygamy. Adultery was much more severely punished than polygamy, and it was the state rather than the church that took the lead in punishing polygamists.

Beginning in the 13th Century, church courts took the lead in governing marriage and the modern argument against polygamy began to develop:

Women are harmed because they are reduced to rival slaves within a household, exploited for sex with an increasingly sterile and distracted husband, sometimes deprived of the children they do produce, and forced to make do for themselves and their children with too few resources as other women and children are added to the house hold against their wishes . . . And societies are harmed because polygamy results in too many unattached men who become menaces to public order and morality.³⁶

Nevertheless, up through the 16th Century polygamy had its defenders among Christians who pointed to the Hebrew Patriarchs and who argued that polygamy actually benefited those women who could not otherwise procure a husband. In response, the Western argument against polygamy began to emphasize that polygamy violates not just natural law (after all God had created just one wife for Adam) but also women's natural rights, such as the first wives' rights to fidelity, trust and property. By the 18th Century, theology became less important to the Western case against polygamy, and the state became more important. The most influential political

34. *Id.* at 45.

35. *Id.* at 98.

36. See WITTE, *supra* note 9, at 191.

thinkers of the age, including John Locke, William Blackstone and Mary Wollstonecraft, all argued that polygamy violated the natural rights of women.³⁷

By the time of the founding of the United States, the idea that polygamy harmed women and children had become common place in the West. However, there was also a strong overlay of racism and xenophobia. Referring to the influential writer Francis Lieber, Witte writes:

Lieber's argument—although culturally smug, even xenophobic in some of his later-life statements—was a new variation on an old Western argument about the superiority of monogamy over polygamy . . . In the seventeenth and eighteenth centuries, European observers of the non-Western world had made marriage a 'boundary-marker' between what they considered to be the cultivated, Christian people of the West who maintained a faithful monogamy, and the barbaric peoples of the pagan world who practice faithless polygamy . . . This was a standard Western argument.³⁸

This mixture of Enlightenment concern with the natural rights of women and children on the one hand and harsh xenophobia and racism on the other continued through American history to the present day. After the civil war, there was much concern that the freed slaves would return to the "African" practice of polygamy.³⁹ Polygamy practiced among some Native American tribes was used to justify the removal of Native Americans from their land and the removal of Native American children from their homes.⁴⁰ Suspicion about polygamy among Asians and Muslims was used to justify exclusionary policies.⁴¹

Like Macedo, Witte concludes that the arguments against polygamy are almost completely unrelated to the arguments against same-sex marriage.⁴² Same-sex couples were attacked as "sterile" while polygamy was seen as a way to fill an empty world and bring children to family where the first wife could not bear children. Homosexuality has been accused of being "unnatural," while even St. Augustine called polygamy "perfectly natural."⁴³ Witte concludes that the erosion of traditional arguments against same-sex marriage has no bearing on the question of polygamy.⁴⁴

Together, these three books teach us valuable lessons. Same-sex marriage and polygamy are truly distinct issues, and the Supreme Court's holding that the fundamental right to marry extends to same-sex couples in no way means that Americans must or should allow polygamy. While opponents of same-sex marriage were unable to point to any harms that stem from allowing gays and lesbians to marry, Western courts and thinkers have had little trouble showing that polygamy violates the natural rights of women and children. While more egalitarian, contract-based plural marriages are theoretically possible, they would represent a fundamental change in the meaning and nature of marriage that goes far beyond any changes represented by

37. *Id.* at 364-72.

38. *Id.* at 421.

39. *Id.* at 426.

40. *Id.* at 426-27.

41. *See* WITTE, *supra* note 9, at 428.

42. *Id.* at 451.

43. *Id.* at 449, 451.

44. *Id.* at 452.

allowing same-sex marriage.

However, there is also a strong strain of racism and xenophobia in the Western argument against polygamy. And the long history of refusal to allow same-sex marriage should warn us against our instinct for disgusted dismissal of non-traditional marriage. Our consideration of polygamy should be careful and fact-based. As noted at the beginning of this essay, the criminalization of polygamy, as opposed to merely not legally recognizing such marriages, may actually be harming the very women and children we claim to be helping. They may fear going to the police when their plural marriage involves abuse and neglect. And, as noted earlier, we may want to consider extending some marriage-like rights to non-romantic intimate care giving couples such as a child caring for an aging parent.

So the case against polygamy is strong, just as the case against same-sex marriage was weak. And yet, while victory for same-sex marriage does not imply the same for polygamy, there are certainly lessons to be learned by comparing Western treatment of these forms of non-traditional marriage. These three books together offer a thorough, often fascinating tour and analysis of the arguments that have shaped both debates.