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Joanna L. Grossman
Maurice A. Deane School of Law at Hofstra University

Lawrence M. Friedman

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Verdict

JULY 7, 2015

JOANNA L. GROSSMAN AND LAWRENCE M. FRIEDMAN

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Dissenting opinions often claim that the sky is falling in; they like to list all the horrible consequences that will inevitably flow from the misguided views of the majority. In the case that established the constitutional right of same-sex couples to marry, *Obergefell v. Hodges*, the dissenters, as usual, asked the dreaded question what comes next? And one of the horrors that (they think) the case unleashed might be the legalization of polygamy. Already, at oral argument, Justice Alito raised this burning issue. And Chief



Justice Roberts, in his dissent, also brought it up. Are these just wild exaggerations, or is polygamy actually next?

The Specter of Polygamy in *Obergefell v. Hodges*

To the lawyer for the petitioners, Justice Alito posed the following question at the oral argument in *Obergefell*: “Suppose we rule in your favor in this case, and then after that a group consisting of two men and two women apply for a marriage license. Would there be any ground for denying them a license?”

Coming early in an oral argument that went on for hours, this question set the tone for the dissenters, who would use polygamy to warn what the majority has done. In two previous landmark cases on gay rights, Justice Scalia’s parade of “horribles” came to pass. The Court’s ruling in *Lawrence v. Texas*

[\(https://supreme.justia.com/cases/federal/us/539/558/\)](https://supreme.justia.com/cases/federal/us/539/558/) (2003) did, in fact, lead to the invalidation of most laws regulating consensual, non-commercial sexual relationships between adults (e.g., fornication and cohabitation laws). And the Court’s ruling in

Windsor v. United States (<https://supreme.justia.com/cases/federal/us/570/12-307/>), in which it struck down the federal Defense of Marriage Act as unconstitutional, was followed, as Justice Scalia warned it would be, by a ruling that all bans on the celebration and recognition of marriages by same-sex couples are also unconstitutional. Ironically, the federal court rulings in between *Windsor* and *Obergefell*, in which many courts invalidated state gay marriage bans, cited Justice Scalia’s dissent as authority for *Windsor*’s scope. Will the warnings about polygamy come true as well?

The question is not just a hypothetical. In fact, a Montana polygamist, Nathan Collier, has applied for a marriage license with his second “wife.” If “marriage equality” is now the law of the land, does that mean people have a right to multiple wives or husbands (at the same time)? Collier thinks the principle of marriage equality ought to apply to him and his wives. He has asked for a second, concurrent marriage license. The county lawyer promised him a thoughtful answer to this request.

Collier has appeared on the reality show *Sister Wives*, but he was not the star of the show; that role belongs to Kody Brown, a man with four “wives” (one legal and three spiritual, although he recently divorced the one legal wife and married #4 instead). Kody and his wives fled Utah to avoid prosecution under a bigamy law that criminalizes not only attempts to legally marry a second or subsequent spouse, but also cohabiting with another person while legally married to someone else. From the safety of Nevada, which has a narrower bigamy ban, Kody challenged the cohabitation provision of Utah law and won. (His legal trials and tribulations are explained [here](#)

[\(https://verdict.justia.com/2011/07/18/the-reality-show-sister-wives\)](https://verdict.justia.com/2011/07/18/the-reality-show-sister-wives) and [here](#)

<https://verdict.justia.com/2013/12/24/kodys-big-score-challenge-polygamy-laws>.)

Kody was successful in challenging the law that kept him from living with extra women while legally married to someone else, but he did not succeed in challenging the core of bigamy law: that a person cannot legally have multiple spouses at the same time. It is that core that Nathan Collier is challenging, citing *Obergefell* in support. He told reporters at the *Washington Times* that he wanted to add legitimacy to his polygamous family. And his second wife, he added, deserved that legitimacy because “she’s put up with my crap for a lot of years.” Not exactly the poetic way Justice Kennedy described the quest for marriage by same-sex couples in his majority opinion in *Obergefell*, but probably quite heartfelt.

But polygamists need more than poetry to win their case for recognition. They have to convince a court that the justification for allowing same-sex couples to marry applies with equal force to a person who wants multiple spouses.

As described in more detail [here \(https://verdict.justia.com/2015/06/26/from-zero-to-fifty-in-eleven-years\)](https://verdict.justia.com/2015/06/26/from-zero-to-fifty-in-eleven-years), Justice Kennedy offered four main reasons for recognizing the right of same-sex couples to marry, referring both to the Equal Protection and the Due Process Clauses. First, the right to marry protects individual autonomy, and the right to make personal decisions. Second, “the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals.” Third, marriage safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.” Fourth, because marriage “is a keystone of our social order,” marriage is supported not only by a couple’s vows, but by society’s “pledge to support the couple, “offering symbolic recognition and material benefits to protect and nourish the union.”

Do these principles apply to polygamists? The dissenters suggest that they do. According to Chief Justice Roberts, the majority opinion “inserts the adjective ‘two’ in various places,” but does not explain why polygamy would not be covered by the same reasoning that justified (for Kennedy) same-sex marriage. Nobody before recent times even dreamed that two men or two women might get married; but polygamy, the Chief Justice pointed out, has an ancient and honorable history; and is still practiced in many countries, where indeed it has “deep roots.”

It is certainly true that a lot of Justice Kennedy’s language in the majority opinion could be lifted out of context, and stuffed into the brief of the lawyer for Kody Brown or Nathan Collier. The majority opinion starts, for example, by observing that the “Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons within a lawful realm, to define and express their identity.” The opinion

continues with a broad history of marriage and its venerable place in societies across the globe, from ancient to modern. For Justice Kennedy, marriage is central “to the human condition”; “sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm”; and a “dynamic [that] allows two people to find a life that could not be found alone.” Marriage “responds to the universal fear that a lonely person might call out only to find no one there.”

Polygamy Challenges: A Long History

Yet, despite the possibility of fitting polygamy within these broad notions of autonomy and personal choice, nobody is likely to predict a winning outcome in the Supreme Court. The Supreme Court in fact has already weighed in on the subject— though a long time ago. The case was *Reynolds v. United States* (<https://supreme.justia.com/cases/federal/us/98/145/>), decided in 1878. The issue in the case was Mormon polygamy. Joseph Smith, founder of the church, claimed to have had a revelation in 1843 on “Celestial Marriage,” the duty of leaders of the church to marry and marry and marry. The practice was kept secret for a decade or so. After Smith’s murder, and the migration of the faithful to Utah, the leaders of the church espoused, and practiced, polygamy quite openly.

The reaction from the general population was one of horror and disgust, to a degree hard to fathom today. There was a lurid literature of denunciation, describing the (vastly exaggerated) conditions of life in a polygamous household, the corruption and debauchery, the despoiling of innocent women and children. Utah had become a territory in 1850; it was thus subject to federal law; and the federal government moved strongly against polygamy. The Edmunds Act of 1882 supplemented earlier anti-polygamy laws, and beefed up enforcement. It made “unlawful cohabitation” a crime. This was an attempt to get around a difficulty: Mormon wives whose husbands had been charged with polygamy simply denied the marriage or found ways not to testify. Under Edmunds, the government did not have to prove the wedding—only that the defendant was living with more than one woman.

George Reynolds was a devout Mormon; he had been a private secretary to the president of the church. As a polygamist, he was small potatoes compared to other Mormon leaders; he had only two wives. The case turned on his second marriage, to one Amelia Jane Schofield. There was no point denying the second marriage (Amelia Schofield, who was pregnant by this time, had foolishly admitted it) and in any event, the “cohabitation” was all that was needed, legally speaking. Reynold’s defense was religious freedom. He argued that polygamy was a “duty of male members” of the church,” and that the duty was “directly enjoined upon the male members... by the Almighty God, in a revelation to Joseph Smith.” Reynolds was convicted, however, of unlawful cohabitation. The judge

practically directed a conviction. He also told the jury that “innocent children” and “pure-minded women” were the real victims of the polygamy “delusion.”

The Supreme Court upheld the conviction. Polygamy, said the Court “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.” Indeed, the American system of government and the American economic system—these required monogamy. Polygamy led to the “patriarchal principle,” which “fetters” the people in “stationary despotism.” Congress had undoubted power to punish polygamy in the territories. It was illegal in every state in the Union. The religious defense had no validity. Suppose, the Court asked, “one believed that human sacrifices were a necessary part of religious worship,” or if a “wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband;” in cases of that stamp, surely the government can step in and forbid such vile acts. Laws cannot interfere with “mere religious belief and opinion;” but they may interfere “with practices.”

The Supreme Court has never overruled *Reynolds* and almost certainly would not do so, but clearly, there are aspects of the opinion that are quite obsolete. No court today would dare condemn a practice simply because it was a “feature of the life of Asiatic and of African people.” Nor would it compare having two or more wives with burning widows or making human sacrifices, extreme examples, which involved putting an innocent person to death in the name of religion. Sleeping with several women is hardly in the same category.

Nor is “unlawful cohabitation” any longer a crime. Fornication (sex by an unmarried person) has been decriminalized in most states. A man can have a mistress, or two, or six, without violating any law in these jurisdictions. (A few states still have laws on the books against fornication and cohabitation, but they are unenforceable after the Court’s 2003 ruling in *Lawrence v. Texas* and thus dead letters). Polygamists today, men like Kody Brown, who maintains a household of four wives, are only allowed one legal wife; otherwise neither he nor his wives are breaking any laws in most states. The children, except for the children of wife #1, are not legitimate, but, since Kody acknowledges them as his, their status as illegitimate makes little difference under contemporary law. It is hard to argue that the wives and children are “victims” in the *Reynolds* sense.

Objections to Polygamy?

The real issue, for many people, is gender relations. The polygamist is the patriarch of a harem. (Nobody talks about polyandry—women with more than one husband—which is extremely rare among societies; and at least formally non-existent in the United States). The old anti-Mormon literature claimed the women were sexual slaves, but this hardly

fits the description of Kody Brown's household. There are polygamous sects that have gotten into real trouble with the law—communities where the alpha males have dozens of wives, some of them far too young to be married, and where the patriarchs really do rule a kind of harem of dependent, zombie-like women. Americans have little tolerance for anything they consider a cult, and these communities are surely that.

But can we, and should we, grant the legitimating power of marriage to the “good” polygamists? To groups of dissident Mormons, who practice polygamy, but whose personal and sexual lives, except for this one aspect, are almost boringly conservative? There are, of course, technical issues relating to children and inheritance; but they are not insuperable.

Bigamy is a crime everywhere. In California, for example, a person who has “a husband or wife living,” and who “marries any other person,” is guilty of a crime (Penal Code 281). Bigamists are overwhelmingly men. Typically, the bigamist is committing a kind of fraud—pretending to be single, and duping some woman into marrying him. Which of course means sexual relations. Since the marriage was void, the sexual relations were both scandalous and unlawful, for most of our history. But this aspect of bigamy is pretty much obsolete; what remains is the element of fraud, which is still a feature of most bigamous marriages.

But Kody's wives entered into their “marriages” with their eyes wide open, and even with a certain amount of religious zeal. This is a real difference from the classical bigamous marriage. True, under the California statute, consent or willingness is no excuse: it is also a crime “knowingly and willfully” to marry a married person, if that person would be guilty himself or herself of bigamy. This would presumably cover polygamous marriages, but if a court really felt that polygamy deserved legal protection, it could ignore or strike down this section and restrict prosecution of bigamists to lying and mendacious cheats.

No feminist, of course, is likely to agitate for polygamy. The practice is associated with countries like Saudi Arabia, which really are patriarchies, and where women count for very little. The movement for same-sex marriage was a movement whose slogans included demands for marriage “equality”; the majority opinion takes up these slogans, and is full of ringing statements about “equality” for same-sex couples. Polygamy is, however, inherently about inequality.

Theoretically, a man could run his polygamous household on the basis of gender equality, but this seems extremely unlikely. The majority opinion in *Obergefell* also stresses human dignity, and the marvelous virtues of marriage, but what Kennedy clearly has in mind is two people, who love each other, and are committed to each other. In one sense, allowing gays and lesbians to marry seems a dramatic break with history, but in another

sense it is not; it is even in a way downright old-fashioned. One can almost hear the jeers and catcalls from millions of couples, of whatever sex, all over the world, who choose to live together without getting married, and who think marriage is much too yesterday for them and their peers.

The old anti-Mormon literature, in the 19th century, talked rather hysterically about how women were innocent victims of the diabolic institution of polygamy. But in some ways, men are also victims—or rather, the young men who are left without mates. In some polygamous communities, the alpha males hog all the women; the rest of the men, blocked from the marriage market, either leave the community, or are thrown out on some pretext.

The issue in the *Reynolds* case was religion. A new *Reynolds* case, such as the one likely to be brought by Nathan Collier, raising the same issue, would surely come out the same way. The Court would no longer talk about human sacrifices or the burning of widows, but a line of cases agrees that a religious claim does not necessarily trump sensible state regulations. Freedom of religion does not give people the right to an exemption from generally applicable laws, no matter how deeply their beliefs. In a 1990 case, ***Employment Division v. Smith*** (<https://supreme.justia.com/cases/federal/us/494/872/>), the Supreme Court held that a state could constitutionally deny unemployment benefits to an employee fired for ingesting peyote (a hallucinogenic drug), even though it was taken as part of a confirmed religious ritual. This and other precedents are strong enough to give the Court license to affirm its adherence to *Reynolds*, even though the world has changed in many ways.

Conclusion

There are all sorts of reasons Roberts and Alito need not lose any sleep over polygamy (assuming they were sincerely worried about this issue). *Obergefell* did not really open the door to plural marriages. The strongest reason is probably not a legal reason at all. It is this: the Supreme Court, whatever these dissenters might think, is not fond of dramatic innovation. Except in the rarest of cases, it limps along in the footsteps of dominant public opinion. It almost never gets that far ahead of the crowd. Same-sex marriage, surprisingly, has become genuinely popular. Most young people see no problem with it whatsoever; it's a total non-issue to them. Even Republicans are coming around. But if there is any sort of groundswell for polygamy, for any age group, it has completely escaped our notice.



*Joanna L. Grossman, a Justia columnist, is the Sidney and Walter Siben Distinguished Professor of Family law at Hofstra University. She is the coauthor of **Inside the Castle: Law and the Family in 20th Century America** (Princeton University Press 2011), co-winner of the 2011 David J. Langum, Sr. Prize for Best Book in American Legal History, and the coeditor of **Gender Equality: Dimensions of Women's Equal Citizenship** (Cambridge University Press 2009). Her columns focus on family law, trusts and estates, and sex discrimination.*

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*Lawrence M. Friedman is the Marion Rice Kirkwood Professor of Law at Stanford University and an internationally renowned legal historian. Professors Grossman and Friedman are co-authors of **Inside the Castle: Law and the Family in Twentieth Century America** (Princeton University Press 2011) and working together on a social history of privacy law.*

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