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Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage

Maura I. Strassberg

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DISTINCTIONS OF FORM OR SUBSTANCE: MONOGAMY, POLYGAMY AND SAME-SEX MARRIAGE

MAURA I. STRASSBERG*

The arguments on either side of the same-sex marriage debate originate from an array of personal, philosophical, religious, and scientific premises. In recent years, the legal debate has attempted to distill these arguments and arrive at a valid legal analysis that adequately complements our existing marriage jurisprudence. In this article, Professor Maura Strassberg exposes the philosophical and social flaws apparent in the legal comparison of same-sex marriage to the Mormon practice of polygamy. Analyzing the line of anti-polygamy precedent cited in Justice Scalia's dissent in Romer v. Evans, Professor Strassberg identifies Francis Lieber's argument that polygamy promotes despotism as the foundation of the Supreme Court's decision upholding the criminalization of Mormon polygamy in Reynolds v. United States. Finding Lieber's explanation of this relationship between polygamy and despotism insufficient, Professor Strassberg substitutes a reconstruction of Georg W.F. Hegel's more extensive analysis of how polygamous marriage contributes to the development of despotic states and monogamous marriage contributes to the development of the modern liberal state. Professor Strassberg's reconstruction of the Hegelian analysis provides both a justification for the prohibition of Mormon polygamy and an explanation of the fundamental right to marry. Next, she considers whether this analysis justifies the prohibition of same-sex marriage and concludes that no valid justification exists. Instead, Professor Strassberg concludes that legalization of same-sex marriage is both consistent with and essential to maintaining the valuable role of marriage in the modern liberal state.

* Associate Professor, Drake University Law School; B.A., Swarthmore College, 1977; M.A., Boston University, 1981; J.D., Columbia University Law School, 1984. Maura.Strassberg@drake.edu. I would like to express my gratitude to Dean David Walker and the Drake Law School Endowment Trust for their generous support; to my research assistants Steven Havercamp, Chad Horner, and Eric Faison for their dedication and hard work; to my friends Kathy and Lynn, whose wedding inspired my thinking on this subject; and, as always, to Johanna Meehan and our life together.

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I. INTRODUCTION

Well before it has become a reality, the possibility of the legalization of same-sex marriage in Hawaii¹ has generated strong state and federal responses. Many states have introduced legislation that bans recognition of same-sex marriages valid under the laws of other states, and a number of states have signed such legislation into law.²

1. On May 5, 1993, the Hawaii Supreme Court remanded a case seeking to overturn the denial of marriage licenses to three same-sex couples, instructing that strict scrutiny should be applied to Hawaii laws limiting marriage to heterosexual couples. See *Baehr v. Lewin*, 852 P.2d 44, 68 (Haw.), *reconsideration granted in part*, 875 P.2d 225 (Haw. 1993). The lower court subsequently held the sex-based classification in § 572-1 of the Hawaii Revised Statutes to be “on its face and as applied . . . unconstitutional and in violation of the equal protection clause of article I, section 5 of the Hawaii Constitution.” *Baehr v. Miiike*, No. 91-1394, 1996 WL 694235, at *48 (Haw. Cir. Ct. Dec. 3, 1996). The court enjoined the Hawaii Department of Health from “denying an application for a marriage license solely because the applicants are of the same sex.” *Id.* A day after the decision, the court granted the state’s motion to delay the judicial order pending an appeal to the Hawaii Supreme Court. See John Gallagher, *Marriage, Hawaiian Style*, *ADVOC.*, Feb. 4, 1997, at 25. In 1997, the Supreme Court of Hawaii likely will hear the final appeal on whether Hawaii violates state constitutional prohibitions on gender discrimination by denying same-sex couples marriage licenses. See Joan Biskupic & John E. Yang, *Gay Marriage Is Allowed by Hawaii Court; Trial Judge Says Ban Fails Key Test*, *WASH. POST*, Dec. 4, 1996, at A1. It is highly likely that the Hawaii Supreme Court will uphold the lower court’s decision that no compelling reason exists for Hawaii’s heterosexual-only marriage laws. See Gallagher, *supra*, at 22.

2. As of March 2, 1997, 18 states have passed legislation intended to have this effect. See ALASKA STAT. § 25.05.013 (Michie 1996); ARIZ. REV. STAT. ANN. §§ 25-101(c), 25-112 (West Supp. 1996); ARK. CODE ANN. § 9-11-107, 9-11-109 (Michie Supp. 1997); DEL. CODE ANN. tit. 13, § 101(a), (d) (Supp. 1996); GA. CODE ANN. §§ 19-3-3.1 (Supp. 1997); IDAHO CODE §§ 32-201, 32-209 (1996); 750 ILL. COMP. STAT. ANN. 5/201, 5/213.1 (West 1993 & Supp. 1997); KAN. STAT. ANN. §§ 23-101, 23-115 (Supp. 1996); MICH. COMP. LAWS ANN. §§ 551.1-4, 551.271 (West 1996); MO. ANN. STAT. § 451.022 (West Supp. 1997); N.C. GEN. STAT. § 51-1.2 (Supp. 1996); OKLA. STAT. ANN. tit. 43, § 3.1 (Supp. 1997); 23 PA. CONS. STAT. ANN. § 1704 (Supp. 1997); S.C. CODE ANN. § 20-1-15 (Law. Co-op. Supp. 1996); S.D. CODIFIED LAWS § 25-1-1 (Michie Supp. 1996); TENN. CODE ANN. § 36-3-113 (1996); UTAH CODE ANN. § 30-1-2(5) (1995); VA. CODE ANN. § 20-45.2

Through the Defense of Marriage Act, Congress has sought to avoid any requirement of full faith and credit recognition by states of possible same-sex marriages and to preclude federal recognition of such marriages.³ Should same-sex marriage become a reality in Hawaii, this legislation will quickly come under constitutional scrutiny. In what was surely a foreshadowing of the debate that will take place, Justice Scalia argued in his dissent in *Romer v. Evans*⁴ that the constitutional legitimacy of nineteenth-century statutes discriminating against polygamists⁵ provides strong support for the constitutional

(Michie 1995). Similar legislation was introduced this year in 23 states: Alabama, California, Colorado, Connecticut, Florida, Hawaii, Iowa, Kentucky, Maine, Maryland, Minnesota, Mississippi, Montana, Nebraska, New Jersey, New Mexico, North Dakota, Ohio, Texas, Vermont, Washington, West Virginia and Wisconsin. See *Legislative Reactions to Hawaii Same-Sex Marriage* (visited April, 1997) <<http://www.buddybuddy.com/+line-2.html>>; Evan Wolfson, *Freedom to Marry 1996: Making the Transition From Defensive to Affirmative Work*, LAMBDA UPDATE (Lambda Legal Defense & Educ. Fund, New York, N.Y.), Summer 1996, at 5.

3. See Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (to be codified at 28 U.S.C. § 1738C and 1 U.S.C. § 7). The Defense of Marriage Act was designed to "define and protect the institution of marriage." H.R. 3396, 104th Cong. (1996). The Act states:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

110 Stat. at 2419. In addition, the Act defines "marriage" and "spouse" for purposes of federal benefits, respectively, as "legal union between one man and one woman as husband and wife," and "only . . . a person of the opposite sex who is a husband or a wife." *Id.*

4. 116 S. Ct. 1620 (1996). In *Romer*, the respondents brought suit in state court seeking to have Amendment 2 to the Colorado Constitution declared invalid. See *id.* at 1624. The amendment prohibited state and local governments from taking any legislative, executive, or judicial action designed to protect citizens' status based upon their homosexuality. See *id.* at 1623. The Supreme Court, despite a vehement dissent by Justice Scalia (joined by Chief Justice Rehnquist and Justice Thomas), declared the statute in violation of the Equal Protection Clause of the Fourteenth Amendment. See *id.* at 1629.

5. Enacted in response to the possibility that the Territory of Utah might become a state in which polygamous marriage would be legal, the Morrill Act criminalized the practice of polygamy in the territories. See The Morrill Act, ch. 126, § 1, 12 Stat. 501, 501 (1862) (repealed 1910). Later legislation made cohabitation a crime and prohibited polygamists and polygamist sympathizers from voting, sitting on juries, and holding public office. See The Edmunds Act, ch. 47, §§ 1, 5, 8, 22 Stat. 30, 31 (1882) (repealed 1983). Congress also abrogated the charter of the Church of Jesus Christ of Latter-Day Saints, dissolved its corporate status, and confiscated most of its property for its role in encouraging and assisting polygamous marriages. See The Edmunds-Tucker Act, ch. 397, §§ 13, 17, 24 Stat. 635, 637, 638 (1887). See generally R. Michael Otto, Comment, "Wait 'Til Your Mothers Get Home": Assessing the Rights of Polygamists as Custodial and Adoptive Parents, 1991 UTAH L. REV. 881, 888-94 (detailing congressional attacks on polygamy in

Utah prior to statehood).

After the Mormon Church renounced the practice of polygamy in 1890, Congress authorized the return of its property. See Orma Linford, *The Mormons and the Law: The Polygamy Cases*, pt. 2, 9 UTAH L. REV. 543, 580 (1965) [hereinafter Linford, *Polygamy Cases*, pt. 2]. When Utah finally gained admission to the Union, the Utah Enabling Act conditioned admission upon the prohibition of polygamy. See Utah Enabling Act, ch. 138, 28 Stat. 107 (1894). The act stated “[t]hat the inhabitants of all that part of the area of the United States now constituting the Territory of Utah, as at present described, may become the State of Utah,” *id.* § 1, 28 Stat. at 107, “[p]rovided, [t]hat polygamous or plural marriages are forever prohibited,” *id.* § 3, 28 Stat. at 108.

This federal interference with Mormon religious practices was first held to be constitutionally permissible in *Reynolds v. United States*, 98 U.S. 145, 166 (1878) (holding that the practice of polygamy could be criminalized despite being derived from Mormon religious beliefs). Further unsuccessful challenges to anti-polygamy laws followed *Reynolds*. See *Clawson v. United States*, 114 U.S. 477, 482 (1885) (upholding challenges to grand jurors who stated belief in Mormon doctrines and polygamy); *Murphy v. Ramsey*, 114 U.S. 15, 40-42, 45 (1885) (upholding disenfranchisement of polygamists, but limiting the disenfranchisement to those who maintained a marriage relationship with a plurality of wives after 1882); *cf.* *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 45, 64-65 (1890) (holding that Congress had the power to repeal the charter incorporating the Church and confiscate all assets other than places of worship, parsonages, and burial grounds for public use, in order to destroy the practice of polygamy); *Davis v. Beason*, 133 U.S. 333, 341, 345-46 (1890) (holding that mere membership in the Mormon Church, which continued to perform polygamous marriages, was a legitimate basis for denying an applicant the right to vote); *In re Nielsen*, 131 U.S. 176, 190 (1889) (holding that charges of cohabitation and adultery could not be made for the same conduct); *In re Snow*, 120 U.S. 274, 285-86 (1887) (holding that cohabitation was a continuous offense, rather than a series of offenses); *Cannon v. United States*, 116 U.S. 55, 79 (1885) (affirming the interpretation of criminal cohabitation as living together under the appearance of being married). For a detailed description of criminal prosecutions under the anti-polygamy laws, see generally Orma Linford, *The Mormons and the Law: The Polygamy Cases*, pt. 1, 9 UTAH L. REV. 308, 331-70 (1964) [hereinafter Linford, *Polygamy Cases*, pt. 1]. See also Linford, *Polygamy Cases*, pt. 2, *supra*, at 543-82 (detailing the cases affirming civil disabilities under the anti-polygamy laws).

As recently as 1985, the continuing practice of polygamy among fundamentalist Mormons sparked a challenge to the provision in the Utah Enabling Act, in which Congress had uniquely conditioned Utah's admission into the Union on a constitutional prohibition on polygamous marriages. See *Potter v. Murray City*, 760 F.2d 1065, 1067 (10th Cir. 1985) (challenging the termination of a Utah police officer due to his polygamous marriages on the ground that the Enabling Act was unconstitutional). The argument was made that this condition violated the constitutional requirement that states enter the Union on an “equal footing.” See *id.* See generally Louis Touton, Note, *The Property Power, Federalism, and the Equal Footing Doctrine*, 80 COLUM. L. REV. 817, 833-39 (1980) (discussing the equal footing doctrine). This anti-polygamy condition would have put Utah on an unequal footing with the other states if state sovereign power over domestic matters ordinarily includes the right to legalize alternative marriage relationships such as polygamy. The anti-polygamy condition in the Enabling Act would be constitutional, however, if Congress would have been able to legislatively prohibit polygamy in Utah after it attained statehood. See *Coyle v. Smith*, 221 U.S. 559, 573 (1911). The constitutionality of such legislation, in turn, would depend upon the existence of a constitutional right to monogamous marriage that would be so undermined by the legalization of polygamy that no state could constitutionally legalize polygamy. While the *Potter* court “[a]ssum[ed], *arguendo*,

legitimacy of statutes denying special protection to citizens on the basis of their homosexuality.⁶ Although the majority in *Romer* avoided Justice Scalia's comparison of polygamy and homosexuality,⁷ the analogy will not be as easily dodged when the legislation at issue is narrowly targeted at same-sex marriage.

On first glance, there is no apparent explanation for treating one non-traditional form of marriage any differently than another.⁸ Indeed, it might be argued that if any non-traditional form of marriage could be permissible, Mormon polygamy would have the stronger claim, due to its former grounding in Mormon religious doctrine.⁹

that the Enabling Act does violate the equal footing doctrine," *Potter*, 760 F.2d at 1067-68, the constitutionality of the anti-polygamy condition in the Enabling Act was not decided because, since entering the union, Utah had never sought to legalize polygamy, but instead had established monogamous marriage "as the cornerstone of its regulation of marriage." *Id.* at 1068 (quoting *Potter v. Murray City*, 585 F.Supp. 1126, 1137 (D. Utah 1984)).

6. See *Romer*, 116 S. Ct. at 1635-36 (Scalia, J., dissenting).

7. To make his argument, Justice Scalia relied upon *Davis*, 133 U.S. at 346-47, which prohibited convicted polygamists and those who believed in polygamy from voting or holding office. See *Romer*, 116 S. Ct. at 1635 (Scalia, J., dissenting). The majority deflected the argument by disapproving of that part of the case which upheld the denial of voting rights to believers in polygamy and by subsuming the denial of voting rights to convicted polygamists under the general principle that convicted felons may be denied the right to vote. See *id.* at 1628. The majority thereby avoided the underlying question whether the criminalization of polygamy itself was constitutionally permissible. See *id.*

8. Cf. Michael Grossberg, *Balancing Acts: Crisis, Change, and Continuity in American Family Law, 1890-1990*, 28 IND. L. REV. 273, 306-07 (1995) (describing same-sex marriage as fulfilling the role of "family law folk devil" prominently filled by polygamy in the nineteenth century); Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 47, 51 (suggesting that there is no principled way of distinguishing same-sex marriages from polygamous marriages and that permitting same-sex marriage would require permitting polygamous marriage).

9. From 1843 to 1890, the practice of polygamy was a doctrinal tenet of the Church of Jesus Christ of Latter-Day Saints, which had its headquarters in the Utah Territory. See Otto, *supra* note 5, at 881. Modern-day commentators have argued that polygamy could not have been constitutionally criminalized under contemporary free exercise jurisprudence. See, e.g., Rodney K. Smith, *Getting Off on the Wrong Foot and Back on Again: A Reexamination of the History of the Framing of the Religion Clauses of the First Amendment and a Critique of the Reynolds and Everson Decisions*, 20 WAKE FOREST L. REV. 569, 635-36 (1984) (arguing that criminalization of polygamy could not survive a compelling state interest test). Such an argument assumes that no compelling state purpose supported making polygamy a crime. Cf. Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393, 442-45 (1994) (suggesting that the federal attack on Mormon polygamy could serve as precedent for a modern attack on religions "that stubbornly cling to old fashioned beliefs about sexual morality and marriage between husband and wife" in the event that homosexual rights laws are passed). However, this Article proposes that a compelling state interest existed which could have justified restraining free exercise of the Mormon religion, although it was not articulated in *Reynolds*. Arguably, Mormon polyg-

However, no comparison between polygamy and same-sex marriage can be made without a clear understanding of the basis for the nineteenth-century determination that Congress could constitutionally regulate polygamy. This basis was set out in the first polygamy case, *Reynolds v. United States*,¹⁰ in which the Court speculated that the practice of polygamy could be linked to a political despotism that threatened to undermine the liberal foundation of United States government.¹¹ Implicit in this holding was a view of monogamous marriage as part of the foundation of free government. However, the posited relationships between marriage and a free and democratic government, and polygamy and despotism, were not further elaborated by the case law¹² because the main branch of the Mormon Church repudiated polygamy after *Reynolds* and its progeny,¹³ and the State of Utah came into existence with both a constitutional provision prohibiting polygamous or plural marriages¹⁴ and corresponding criminal laws.¹⁵ Therefore, in order to understand what it was about polygamy that appeared to undermine the constitutional interest in free government and whether same-sex marriage is similarly problematic, it is necessary to articulate more fully the *Reynolds* theory of monogamous marriage as fundamental to a

amy posed a threat to the foundations of the democratic state. See *infra* notes 431-530 and accompanying text.

10. 98 U.S. 145 (1878). Although many other polygamy cases followed *Reynolds*, legal scholars consider the issue of congressional power to prohibit and penalize polygamy conclusively established by *Reynolds*. See Linford, *Polygamy Cases*, pt. 2, *supra* note 5, at 546 n.16, 575.

11. See *Reynolds*, 98 U.S. at 166 (crediting Professor Lieber with the proposition that "polygamy leads to the patriarchal principle, . . . which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy").

12. Cf. Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 472 (1983) (noting that "the case law . . . on our traditional assumptions [about marriage and family relationships] seldom go[es] beyond platitudes and cliches").

13. The Mormon Church officially repudiated polygamy in 1890. See Otto, *supra* note 5, at 895. Nonetheless, there continue to be two major Mormon sects that espouse and practice polygamy: the Fundamentalist Church and the Allred Church, which together may have as many as 11,000 followers. See *id.* at 881-82 n.4. As a result, the effects of polygamy on parental custody rights and qualification to adopt continue to be a developing issue. See *id.* at 902-31 (discussing a recent development in Utah law that may have removed polygamy as an absolute disqualification for custody decisions, and arguing that it should not be an absolute bar to adoption either).

14. See UTAH CONST. art. III, § 1 (stating that "polygamous or plural marriages are forever prohibited").

15. See, e.g., UTAH CODE ANN. § 76-7-101 (1978) (making bigamy a felony).

democratic and free nation.

Such a theory also will help in evaluating the suggestion of the Governor of Hawaii that the state could respond to the possibility of legal same-sex marriage by eliminating marriage as a legal institution and by offering only domestic partnership registration for heterosexual and homosexual couples.¹⁶ Because no state has attempted to abolish marriage, the issue of whether a right exists to marriage per se has never been tested.¹⁷ Thus, while it is almost a truism in American legal thinking that marriage is a fundamental right guaranteed by the Constitution,¹⁸ it has never been necessary for the Court to articulate precisely why marriage should be viewed as a right rather than a mere privilege subject to equal protection. Indeed, the modern cases affirming a due process right to marriage all involve exclusions of certain people or combinations of people from existing state marriage rights.¹⁹ For the most part, courts could have justified the same results on equal protection grounds, as evidenced by courts that bolstered their due process analysis with equal protection examination.²⁰

16. See John Gallagher, *The Great Gay Marriage Debate*, *ADVOC.*, Feb. 20, 1996, at 36.

17. *Cf. Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 629 (1819) ("When any state legislature shall pass an act annulling all marriage contracts, . . . it will be time enough to inquire, whether such an act be constitutional.").

18. The Supreme Court's first specific mention of marriage as a right described marriage as "[w]ithout doubt . . . essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska*, 263 U.S. 390, 399 (1923). By 1987, the status of marriage as a fundamental right became a point which litigants were required to simply concede. See *Turner v. Safley*, 482 U.S. 78, 95 (1987) ("[Petitioners] concede that the decision to marry is a fundamental right under *Zablocki v. Redhail*, 434 U.S. 374 (1978) and *Loving v. Virginia*, 388 U.S. 1 (1967).").

19. See, e.g., *Turner*, 482 U.S. at 99 (striking down a Missouri statute prohibiting marriage of prison inmates except under special circumstances); *Zablocki*, 434 U.S. at 376-77 (striking down a Wisconsin statute denying marriage licenses to those who owed child support); *Loving*, 388 U.S. at 12 (striking down Virginia statutes criminalizing and refusing recognition to certain interracial marriages).

20. See, e.g., *Zablocki*, 434 U.S. at 400 (Powell, J., concurring) (noting that the state's means did not bear an adequate relation to any of its objectives); *Loving*, 388 U.S. at 11-12 (expressly grounding decision on invalid racial classification). However, it is not clear that the result in *Turner* could be justified purely on the grounds of an irrational classification. While the Court did adopt a rational relation test, it considered a number of factors—existence of an alternative means of exercising the right, the impact of accommodation of the right, and the existence of easy, obvious alternatives that do not impinge upon the right—that clearly enhance the scrutiny beyond that given to a statutory classification unrelated to a fundamental right. See *Turner*, 482 U.S. at 89-90. As a result, *Turner*, more than any other modern case, attempts to explain the social and personal value of marriage.

Indeed, declaring that citizens have a right to the legal institution of marriage sounds somewhat peculiar.²¹ A distinct difference exists between stating that the Fourteenth Amendment's protection of liberty protects "the freedom of personal choice in matters of marriage,"²² should such a state-created institution be provided, and suggesting, as does the language now used by the Court, that the orderly pursuit of happiness *requires* that the state provide the legal institution of marriage. Under the former view, proposals for abolishing the legal institution of marriage, such as those made by the Governor of Hawaii or by scholars such as Martha Fineman,²³ can be seriously entertained. Under the latter view, it would be unconstitutional for a state to fail to provide its residents with the opportunity to enter into this privileged legal relationship. A theory which fully articulates how monogamous marriage creates the foundation for a democratic state will make it possible to understand not only why the right to marry should be considered a fundamental right, but also why polygamy could not be included within a fundamental right to marry and why same-sex marriage could coherently be part of such a right.²⁴

This Article will therefore seek to develop more fully a theory of how monogamous marriage can be said to be fundamental to ordered liberty in the context of contemporary society.²⁵ It will begin

21. See *Zablocki*, 434 U.S. at 392-93 (Stewart, J., concurring); *id.* at 397-99 (Powell, J., concurring).

22. *Id.* at 393 (Stewart, J., concurring).

23. Martha Fineman has argued that, as a matter of wise policy, the state should no longer provide the legally protected and defined relationship called "marriage," but should allow such relationships to be governed by private contracts between the parties. See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 4-5 (1995).

24. Cf. Michael Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521, 534 (1989) (arguing that any right to engage in same-sex sex would have to be justified by showing "that much that is valuable in conventional marriage is also present in homosexual unions").

25. See *infra* notes 37-60 and accompanying text. Insofar as this Article attempts to articulate a theory of marriage that explains its fundamental role in democracy, it clearly sidesteps long-standing critiques of heterosexual marriage as essentially an institution of domination inconsistent with the possibility of freedom or equality for women. See, e.g., Nitya Duclos, *Some Complicating Thoughts on Same-Sex Marriage*, 1 LAW & SEXUALITY 31, 48-50 (1991) (arguing that homosexuals might do well to avoid an institution that "strengthens the force of dominant ideologies both in its symbolic and social influences, and in more concrete ways"). Why bother articulating a defense of an institution which may be indefensible? Despite these critiques, the Supreme Court and the mainstream of American society continue to view marriage as fundamental to ordered liberty and of constitutional significance. See, e.g., *Zablocki*, 434 U.S. at 383-84. To the extent that it is

by considering the peculiarly affirmative quality of a right to marry.²⁶ It will demonstrate that a similar affirmative quality can also be found in a number of both natural and acquired rights, and suggest that marriage might best be understood as a right which can only be acquired within civil government.²⁷ The Article will then demonstrate that a similar view of marriage can be found in *Reynolds v. United States*,²⁸ which posited an intriguing connection between the institution of marriage, the possibility of a freely chosen government, and a society in which liberty flourishes.²⁹

This view of marriage, attributed by the Court to the work of the nineteenth-century American legal philosopher Francis Lieber, will be shown to be most fully developed in the earlier work of the German philosopher Georg W.F. Hegel, whose treatment of the family and marriage in the *Philosophy of Right*³⁰ revealed for the first time the function of family life as an essential part of the institutional structure of the liberal state.³¹ The Article will then argue that a Hegelian understanding of marriage, revised so as to take into account current views on gender equality, is not only consistent with our current views on marriage, as revealed in contemporary Supreme Court marriage cases, but also is capable of explaining more thoroughly some of the Court's positions.³² In particular, an examination of Mormon polygamy in light of this theory of marriage will reveal why polygamy was accurately perceived as a threat to fundamental American political ideals and was, therefore, a legitimate federal and state target.³³

The Article will then turn to the question of same-sex marriage.³⁴ At issue is whether same-sex marriage is consistent with the fundamental role of marriage in securing and maintaining our form

possible to articulate the role of marriage in a liberal democracy, it may be possible to prevent the use of arguments premised upon the fundamental nature of marriage from being used as a weapon against same-sex marriage in the way they were used against polygamy. Even a flawed tool should have a clearly defined and limited function that may prevent its use as a mere blunt instrument of destruction.

26. See *infra* notes 37-40 and accompanying text.

27. See *infra* notes 41-60 and accompanying text.

28. 98 U.S. 145 (1878).

29. See *id.* at 166; *infra* notes 61-117 and accompanying text.

30. GEORG W.F. HEGEL, *PHILOSOPHY OF RIGHT* (T.M. Knox trans., Oxford Univ. Press 1952) (1821) [hereinafter HEGEL, *PHILOSOPHY OF RIGHT*].

31. See *infra* notes 118-217 and accompanying text.

32. See *infra* notes 218-430 and accompanying text.

33. See *infra* notes 431-530 and accompanying text.

34. See *infra* notes 531-641 and accompanying text.

of government. This Article will argue not only that same-sex marriage would function in the same way as heterosexual marriage, but also that revision of the Hegelian theory of marriage to accommodate gender equality renders attempts to distinguish between heterosexual and homosexual marriage incoherent.³⁵ Finally, the Article will argue that the failure of government to recognize same-sex marriage will destroy the stabilizing and socially unifying force of the institution of marriage.³⁶

II. UNDERSTANDING MARRIAGE AS AN ACQUIRED RIGHT

A. *The Negative and Affirmative Structure of Fundamental Rights*

The initial concern is to determine why it might be argued that the state must provide the legal institution of marriage in some form. Marriage can be described as an affirmative right in the sense that the right cannot exist in the absence of some state action, such as legislation;³⁷ indeed, marriage is the state recognition of a relationship. In contrast, a negative right would be one which can be exercised without the direct assistance of the state.³⁸ While we tend to view our constitutional rights as primarily negative, that is, as substantive variations on the right "to be let alone,"³⁹ in truth, many recognized fundamental rights under the Constitution may be seen as affirmative.⁴⁰

In what follows, this Article will compare the negative and affirmative structure of two paradigmatic negative rights, "freedom from bodily restraint [and] . . . the right of the individual to contract,"⁴¹ with the right to vote, which has always been understood as

35. See *infra* notes 531-628 and accompanying text.

36. See *infra* notes 629-41 and accompanying text.

37. See William M. Hohengarten, Note, *Same-Sex Marriage and the Right of Privacy*, 103 YALE L.J. 1495, 1496 (1994) (noting that the right to marry is distinctive because it "imposes an affirmative obligation on the state to establish this legal framework").

38. For example, a right to choose and associate with our friends.

39. THOMAS M. COOLEY, COOLEY ON TORTS 29 (1880).

40. Cf. Randy E. Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, 12 CONST. COMMENTARY 93, 109 n.43 (1995) (noting that "constitutional protection of these rights may include both a 'negative' duty of government to refrain from infringing these rights and a 'positive' duty upon government to protect the rights of its citizens from infringement by others").

41. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (listing these as two of several rights, including the right to marry, that are part of the liberty guaranteed by the Fourteenth Amendment).

more affirmative.⁴² While freedom from bodily restraint has a primarily negative focus in the sense that it guarantees bodily freedom as it might be impeded by governmental restraint, an affirmative element also is present in recognition of this right. The underlying value of bodily freedom was derived from its status as a natural right; all human beings were seen as inherently and equally free in the pre-governmental state of nature.⁴³ Natural reason dictated that the maintenance of such freedom required restraints on individual freedom to kidnap, murder, batter, and rape. Thus, prohibitions on such behavior were viewed as dictates of natural law.⁴⁴ Yet, without social enforcement, natural law is simply a matter of individual conscience.⁴⁵ It is undoubtedly one of the prime functions of government to maximize bodily freedom by substantially controlling the private restraints individual citizens can and would impose on each other in the absence of such laws.⁴⁶ This maximization of bodily freedom can occur through the establishment of civil law that reflects the natural law's protection of natural rights.⁴⁷ Such civil law could be in the form of the common law of torts and crimes, or in the form of statutory tort or criminal law.⁴⁸ Thus, underlying the constitutional right to be free from governmental bodily restraint is what could be characterized as an affirmative right to a government that fulfills its essential function of controlling the private violence of its citizens. Recognition of a fundamental right to be free from bodily restraint would necessarily entail some minimal tort and criminal law, even if the precise enforcement mechanism might not be consti-

42. "Though not regarded strictly as a natural right, but as a privilege merely conceded by society according to its will, under certain conditions, nevertheless it is regarded as a fundamental political right, because preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

43. See Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 *YALE L.J.* 907, 927 (1993).

44. See *id.* at 923 ("[N]atural law was a limitation on natural liberty in the sense that humans were capable of reasoning about their liberty and interests.").

45. See *id.* at 930 ("[I]n the state of nature, each individual was his or her own judge as to what natural law required . . .").

46. See *id.* at 930-31 (describing the basis of civil government as the sacrifice of some portion of natural liberty in order to obtain the protection of other natural liberties by the government).

47. See *id.* at 937.

48. While natural law could not dictate the precise content of civil law, due both to the imprecision of natural law and the difference between the circumstances of civil society and those of a state of nature, natural law nonetheless provides a foundation for civil law. See *id.* at 940-44.

tutionally mandated.⁴⁹

The right to contract as a feature of the liberty guaranteed by the Fourteenth Amendment is similarly composed of both negative and affirmative elements. As with the right to be free from bodily restraint, the right to contract prohibits states from disturbing those substantive common-law rules which reflect the natural right to engage in voluntary exchanges. As a negative liberty, therefore, it is the freedom to choose the nature and terms of contracts, subject, of course, to reasonable regulation under state police powers.⁵⁰ Yet, in the absence of valid contract law to establish enforceable rights and obligations resulting from such agreed-upon exchange, such exchanges cannot be said to be contracts.⁵¹ The affirmative element of the right to contract, therefore, is a right to such civil law as is necessary to preserve and enforce the fundamental features of exchange transactions. To the extent this substantive civil law pre-exists the state in the form of common law, it might be argued that the state has no affirmative duty to provide this substantive law, but merely a negative duty not to interfere with it through acts of legislation. Yet the common law is articulated only through judicial opinions, which require state law to give them authority.⁵² The state is free to abolish the common law of sales only so long as it is replaced with the Uniform Commercial Code; citizens possess a right either to state articulation of the common law or to a statutory equivalent, based

49. In *Truax v. Corrigan*, 257 U.S. 312 (1921), this kind of affirmative demand was made upon the state to provide protection by means of positive law in the context of a labor dispute that was viewed as injuring the employer's right to property. *See id.* at 322. The Court held that the Fourteenth Amendment's explicit guarantee of a right not to be deprived of property without due process of law rendered unconstitutional an Arizona statute that provided complete civil and criminal immunity for acts that were otherwise tortious or criminal. *See id.* at 328-30. The impermissible action of the state was a legislative act that undermined features of pre-existing common law. *See id.* The Court understood the background of the common law of torts and crimes as essential to meaningful private ownership of property because the definition of particular acts as invasions of private property established what the right of property ownership amounts to. *See id.* at 327-40. Thus, due process of law includes the substantive law which both shapes and protects the right of property.

50. *See Lochner v. City of New York*, 198 U.S. 45, 53, 61 (1905).

51. *See* RESTATEMENT (SECOND) OF CONTRACTS § 1 (1979) (defining a contract as "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty").

52. Judicial power must be granted by the state through some form of positive law, usually but not necessarily constitutional law, before any judicial action has authority. *See generally* H.L.A. HART, *THE CONCEPT OF LAW* 97 (2d ed. 1994) (noting that secondary rules of adjudication and recognition are necessary to confer judicial powers).

either in common law or civil law.⁵³

A negative and affirmative structure is also present in the right to vote. Its negative element can be understood as the freedom to choose a candidate. At the same time, a state-created institution of voting is necessary for such negative liberty to be exercised. Yet, unlike some of the other rights discussed above, the right to vote is strictly a statutory creation, indeed often described as a privilege,⁵⁴ which depends for its existence on some affirmative action by the state. There is no natural or even common-law right to vote that the states are prohibited from impairing; rather, it is an acquired right.⁵⁵ The state must provide precisely what legal significance any particular act of voting will have by distinguishing between officially recognized votes and unofficial votes that private individuals may cast whenever they please.⁵⁶

At the same time, the state is not free to withdraw the privilege of voting from the populace in general. One could argue that this is because voting is derived from a natural right of self-government which is inherent both in the notion of freedom in a state of nature and in the notion of natural law as the product of human "reasoning about natural liberty."⁵⁷ As a civil right, voting can be seen as reflecting such a natural right of self-government and as preserving whatever vestige of natural liberty is feasible within the constraints of civil government. The institution of voting, therefore, is recognized as an affirmative right precisely because it fundamentally constitutes the kind of government that will acknowledge both its affirmative and negative role in establishing and preserving fundamental rights to life, liberty, and property. Yet, for all its roots in the natural liberty of the state of nature, voting is an artificial institution that is motivated merely by our sense of a natural right of self-government.⁵⁸

53. See *Holden v. Hardy*, 169 U.S. 366, 389 (1898) (holding that a state is free to adopt civil law rather than common law as its substantive law).

54. See *supra* note 42.

55. See *Hamburger*, *supra* note 43, at 921 (noting that habeas corpus and jury rights are "rights that did not exist in the state of nature" but "were rights that could exist only under civil government"). Voting would seem to fall under this rubric, as a right which has no meaning except within civil government.

56. Public opinion polls, straw polls in elementary schools on presidential candidates, and position votes by organizations on matters of public interest (e.g., voting by the ABA House of Delegates on such issues as abortion) are all examples of votes which have no legal significance.

57. *Hamburger*, *supra* note 43, at 927.

58. See *id.* at 921.

The shape of the institution of voting cannot be traced to this natural right.⁵⁹

One might inquire what the right to marry resembles more—the acquired right to vote or the more directly natural law-based rights of freedom from bodily restraint, of ownership of property, and of contract. Because marriage as a common-law and religious institution pre-dated state legislation, marriage might be understood as an institution to which we have an affirmative right as a matter of either natural law or religious freedom. At the same time, however, our understanding of marriage as a fundamental right may be enhanced by analysis of marriage as something of an acquired right as well. Government is often viewed as having an extraordinary power to shape the institution of marriage, well beyond the power viewed as ceded to government with regard to other natural rights. Furthermore, marriage as a statutory creation, like voting, may be better understood under the *Reynolds* Court's view of marriage as a civil right whose shape arises from its function in and relation to the government that gives it legal existence.⁶⁰

B. *Reynolds and Marriage as an Acquired Right*

1. *Reynolds*

In *Reynolds*, the Court explained the traditional Western prohibition against polygamy as arising from a view of polygamy as a social offense “subversive of good order.”⁶¹ Describing marriage as the foundation upon which society is built,⁶² the Court cited legal

59. Other institutions, similarly motivated, might derive equal legitimization from this surrendered natural right. The present shape of our voting rights, in which “one man, one vote” can be regularly diluted by the composition of the geographic district, may not reflect our ideals of equality and freedom as well as limited or cumulative voting schemes. See Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 223 (1989) (demonstrating how limited and cumulative voting can promote “greater diversity on governing bodies by increasing the number of groups large enough to elect the representatives of their choice”).

60. See *Reynolds v. United States*, 98 U.S. 145, 165 (1878).

61. *Id.* at 164 (stating that “from the earliest history of England polygamy has been treated as an offence against society”).

62. See *id.* at 165. This theme was familiar in nineteenth-century legal discourse. See, e.g., *Maynard v. Hill*, 125 U.S. 190, 211 (1888) (describing marriage as “the foundation of the family and of society, without which there would be neither civilization nor progress”); *Randall v. Kreiger*, 90 U.S. (23 Wall.) 137, 147 (1874) (describing marriage as “the basis of the entire fabric of all civilized society”); *Adams v. Palmer*, 51 Me. 481, 485 (1863)

philosopher Francis Lieber's⁶³ argument that a society built upon a foundation of polygamous marriage inherits patriarchal political principles that lead to despotism.⁶⁴ On the other hand, a foundation of monogamous marriage was viewed as antithetical to such despotism,⁶⁵ and nurturing of democratic principles. A "colony of polygamists" within a democratic, monogamous society was seen as ultimately destructive of democratic society,⁶⁶ particularly because those who embraced polygamy would also have the power to vote and shape government. Consequently, the Court later upheld laws denying voter registration to bigamists and polygamists,⁶⁷ as well as to members of organizations that taught polygamy as a religious duty.⁶⁸ The Court justified its decisions on the ground that in order to assure that the nascent state of Utah would be a "free, self-governing commonwealth, fit to take rank as one of the coordinate States of the Union,"⁶⁹ it was necessary to make sure that the state was established

on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all

(describing marriage as "a relation the most important as affecting the happiness of individuals, the first step from barbarism to incipient civilization, the purest tie of social life, and the true basis of human progress"); *Fornhill v. Murray*, 1 Bland, 479, 481 (Md. 1828) ("Marriage . . . [is] the parent, not the child of civil society.").

63. Francis Lieber, born in Berlin in 1798 and trained at the Universities of Berlin and Jena, emigrated to the United States in 1827. See Michael Herz, *Rediscovering Francis Lieber: An Afterword and Introduction*, 16 CARDOZO L. REV. 2107, 2108-10 (1995). Known for his path-breaking work on legal hermeneutics or interpretation, political ethics, constitutional philosophy, and the law of warfare, Lieber was a highly influential thinker within nineteenth-century legal circles. See *id.* at 2111-15.

64. See *Reynolds*, 98 U.S. at 166 (referring to Francis Lieber). One of the arguments made for the Morrill Act by Representative Thayer mirrored Lieber's views: "Wherever [polygamy] has existed, . . . it has always been protected by absolute military despotism. It can be sustained under no other system of government." CONG. GLOBE, 36th Cong., 1st Sess. 1520 (1860); cf. Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106, 1127-28 (1994) (explaining the perceived relationship between monogamous marriage and the proper functioning of the republic as protecting Protestant Christianity in America by protecting women, who were considered to be the font of religious faith and moral virtue).

65. See *Reynolds*, 98 U.S. at 166.

66. *Id.*

67. See *Murphy v. Ramsey*, 114 U.S. 15, 44-45 (1885).

68. See *Davis v. Beason*, 133 U.S. 333, 347 (1890).

69. *Murphy*, 114 U.S. at 45.

beneficent progress in social and political improvement.⁷⁰

However, the *Reynolds* Court viewed the expanded capacity of polygamous families to procreate and “spread themselves over the land”⁷¹ as a threat to a larger democracy⁷² which could be countered only if juries enforced the criminalization of polygamy. Although the Court in *Reynolds* noted that marriage creates “social relations and social obligations and duties, with which government is necessarily required to deal,”⁷³ it failed to provide details explaining how monogamous marriage is critically important for democracy or how polygamous marriage undermines democracy and promotes despotism.⁷⁴ Later polygamy cases added only a few details to the analysis, positing that polygamy destroys the purity of the marriage relation, disturbs the peace of families, and degrades women and debases men,⁷⁵ while also reiterating the view that polygamy represented a “return to barbarism.”⁷⁶

70. *Id.*

71. *Reynolds*, 98 U.S. at 168 (internal quotation marks omitted).

72. *See id.* at 167-68 (affirming the legitimacy of a jury instruction in *Reynolds* reminding jurors that the victims of polygamy, women and children, were rapidly multiplying because of the widespread belief that polygamy was protected as a free exercise of religion).

73. *Id.* at 165.

74. *Cf. Linford, Polygamy Cases*, pt. 1, *supra* note 5, at 341 (arguing that the link between polygamy, patriarchy, and despotism is “not self-evident” and that “the Court never quite explained *why* plural marriage was a threat to the public well-being”). As a result of the Court’s minimal explanation of the non-religious grounds for prohibiting polygamy, commentators on *Reynolds* often deemphasize the political thrust of the argument. *See, e.g., Rodney J. Blackman, Showing the Fly the Way Out of the Fly-Bottle: Making Sense of the First Amendment Religion Clauses*, 42 U. KAN. L. REV. 285, 377-78 (1994) (speculating that the state interest in monogamy that trumped the free exercise claims of Mormons might be tied to better child-rearing or the achievement of more intimate bonding in monogamous marriages).

75. *See Davis v. Beason*, 133 U.S. 333, 341 (1890). Michael Grossberg explains the decision in *Reynolds* as based on Congress’s power to punish antisocial acts, but he also argues that the attack on polygamy was part of a wider late nineteenth-century movement to regulate marriage and prohibit practices that gave considerable freedom to individuals with regard to marriage. *See Grossberg, supra* note 8, at 283. This movement, in his view, was triggered by a “moral panic” which demonized marital freedom as the cause of family destabilization more likely caused by economic and social upheaval. *See id.* at 275. The question remains, however, whether polygamy was a legitimate target. The political focus of the reasoning in *Reynolds* suggested above would, if accurate, suggest that at least this form of marital freedom is, in fact, socially and civilly problematic.

76. *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 49 (1890).

2. *Reynolds*' Reliance on Francis Lieber's Theory of Marriage

The *Reynolds* Court placed considerable emphasis on Francis Lieber's view of polygamy as an institution inconsistent with democratic government.⁷⁷ Lieber's view of marriage as a fundamental political institution was premised on his view of social institutions as clarifying and revealing the possibilities of human moral character.⁷⁸ However, in Lieber's view, not all social and political institutions are equally in tune with the possibilities of human moral character.⁷⁹ Therefore, we may understand Lieber's statement that polygamy is based on principles incompatible with democratic government as a critique of a social institution which he viewed as inhibiting or failing to fully develop our human potential. The institution in question is the family, which was fundamental for Lieber not only because it recreates the primitive conditions of human "sociality,"⁸⁰ for example, the need of human infants for extensive, long-term care,⁸¹ but also because the family promotes the development of sociality beyond these primitive physical origins⁸² to include the possibility of mutual dependence, division of labor,⁸³ and the transmittal of ac-

77. See *Reynolds*, 98 U.S. at 165-66.

78. See 1 FRANCIS LIEBER, *MANUAL OF POLITICAL ETHICS, DESIGNED CHIEFLY FOR THE USE OF COLLEGES AND STUDENTS AT LAW* 120-21 (2d ed. 1911) [hereinafter LIEBER, *POLITICAL ETHICS*] ("Everything that characterizes man as man appears clearer and more distinct with each advancing stage of civilization.").

79. For example, Lieber criticized the static and unresponsive nature of the nineteenth-century French and German states, see Mike Robert Horenstein, *The Virtues of Interpretation in a Jural Society*, 16 *CARDOZO L. REV.* 2273, 2301-02 & n.112 (1995), in which centralized government drew power away from communities and citizens, as compared to what he saw as the dynamic and self-regulating nature of Britain and America, see Paul D. Carrington, *William Gardner Hammond and the Lieber Revival*, 16 *CARDOZO L. REV.* 2135, 2148 (1995), where political and social institutions of self-governance, from local governments to civic, religious, and charitable organizations, wove liberty into the social fabric, see 2 VERNON L. PARRINGTON, *MAIN CURRENTS IN AMERICAN THOUGHT* 92-93 (1927).

80. See 1 LIEBER, *POLITICAL ETHICS*, *supra* note 78, at 102 (describing "sociality" as "the necessity imposed upon [man] to associate, both for the purpose of obtaining ends of the highest importance in the physical as well as the intellectual and moral world").

81. See 1 *id.* at 103; see also Horenstein, *supra* note 79, at 2297 (describing Lieber's view of the family as the primordial society because it provides the most basic means of self-development).

82. See 1 LIEBER, *POLITICAL ETHICS*, *supra* note 78, at 103-04 ("So little is man instinctive, that even his sociality, so indispensable to his whole existence, has first to be developed. He is led to it indeed by the natural relations between the progenitors and their offspring, as we have seen; but he is not, strictly speaking, a gregarious animal.").

83. See 1 *id.* at 103.

quired knowledge.⁸⁴ Thus, the family creates social relations and abilities which are essential for the existence of a society larger than the family.

Lieber argued that the family created by monogamous marriage allows human beings and society to reach their highest development.⁸⁵ Monogamy accomplishes this by reinforcing romantic love, rather than sex, as the tie between spouses.⁸⁶ This in turn makes possible marriage as a permanent and exclusive union of different sexes.⁸⁷ While Lieber recognized that sexual attraction arising out of the distinctively different nature of women might be the wellspring of family,⁸⁸ he insisted that the family as a human, rather than animal, institution does not rest on mere sexual desire⁸⁹ or the possibility of procreation.⁹⁰ Monogamous relationships structured by reverence and romantic love⁹¹ encourage sexual continence,⁹² which grounds family life on a longstanding, unselfish interest in another person.⁹³ Conversely, when sexual relations are possible outside the monogamous family, sexuality itself becomes more emphasized.⁹⁴ The selfishness which accompanies such a focus on sexuality invades the family and leads, in Lieber's view, to a weakening or destruction of parental interest in children's education and moral character, and to the reduction of women to sexual objects.⁹⁵

The development of the moral individuality of women from sex-

84. See 1 *id.*

85. See 1 *id.* at 139 ("The Family cannot exist without marriage, nor can it develop its highest importance . . . without monogamy. Civilization, in its highest state, requires it, as well as the natural organization and wants of man.").

86. See 1 *id.* at 123-25.

87. See 2 *id.* at 65.

88. See 2 *id.* at 122-24; 1 *id.* at 143.

89. See 2 *id.* at 123-24.

90. See 1 *id.* at 104-05 n.1 (arguing that those who view procreation as the essence of marriage fail to grasp the human, rather than animal, nature of this institution, an error which is induced by looking toward primitive rather than civilized humanity to reveal human nature); see *infra* notes 563-604 and accompanying text (discussing the romantic love and non-procreative aspects of marriage).

91. See 2 LIEBER, POLITICAL ETHICS, *supra* note 78, at 123-25. In particular, he derived reverence of women by men from women's "bashfulness" regarding sexual desire. See 2 *id.* at 124. This he described as a "natural" characteristic of women developed only by civilization, and not to be found in uncivilized women. See 1 *id.* at 139.

92. See 2 *id.* at 65.

93. See 2 *id.*

94. See 2 *id.*

95. See 2 *id.* at 65, 110-11.

ual property or slave status⁹⁶ to their civilized roles as wives and mothers was, for Lieber, a progressive development in the moral character of women.⁹⁷ These limited roles for women were both acceptable and essential to Lieber because he viewed women as different in nature from men⁹⁸ and, therefore, as requiring different social institutions to fulfill their potential.⁹⁹ By making women the distinctively different object of love and reverence,¹⁰⁰ the modern institution of monogamous marriage creates a protected legal space within which women can devote themselves to the emotional support of husbands and children,¹⁰¹ thus making it possible for women to fulfill their highest potential as wives and mothers.¹⁰² Although polygamy, as well as monogamy, creates such a protected legal space by requiring some exclusiveness of relationship,¹⁰³ it would seem that polygamy—by making it possible for men to continue to indulge their sexual interest in multiple women—would fail to provide the conditions under which non-sexual male love and reverence can de-

96. *See 2 id.* at 133.

97. *See 2 id.* at 133-35.

98. Lieber took issue with Mary Wollstonecraft and others who claimed that men and women are the same, and acknowledged that his justification of a limited role for women (excluding them from politics, voting, etc.) depends upon the premise that the sexes are distinctly different. *See 2 id.* at 135-38.

99. Lieber proposed:

Woman has received, in the great order of things, a different physiologic organization and mental bias from those of man. The Creator has directed her to receive her impressions more through the channel of feeling; she has been endowed with a more tender sensibility; man has to rely more upon reflection. . . . [S]he steps beyond her proper circle of activity, which is emphatically that of the family, through which nevertheless she becomes a most essential ingredient of the state, if she abandons the sphere of tender sentiment, of affection, peace, and love. And as nowhere the essential order of things can be violated without incurring great danger, so does the woman expose her morality and whole true character, and, therefore, society, to danger, the moment she interferes with politics.

1 *id.* at 138-39.

100. Lieber argued that if a woman were able to participate physically in defending the state, "she would necessarily lose her peculiar character as woman, and thus a necessary element of civilization would be extinguished." *2 id.* at 125.

101. *See 1 id.* at 137-38. Lieber viewed laws prohibiting rape, fornication, prostitution, and adultery, *see 1 id.*, as well as laws mandating financial support for wives and children, creating rights of inheritance, and allowing for spousal privileges and defenses as both clarifying and facilitating the fulfillment of female nature. *See 2 id.* at 63-67 (discussing the evil effects on society of "prostitution," "libertinism," "dissoluteness," "profligacy," and "shamelessness").

102. *See 2 id.* at 124.

103. *See 1 id.* at 104 n.1.

velop.¹⁰⁴ As a result, women in polygamous societies failed to achieve the moral and legal individuality achieved by women in monogamous societies.¹⁰⁵

Lieber may also have viewed monogamy as more civilizing because it could advance the other purposes of the family, such as the development of affectionate relationships and the education of the young, more effectively than polygamy.¹⁰⁶ A single wife reduces the number of adults and children within the family, placing less financial pressure on the family, and allowing for more involvement by the husband in the rearing of children.¹⁰⁷ The monogamous family, therefore, is less internally competitive for physical resources and emotional attention. This lack of competition would appear to promote more affectionate and sympathetic relations between family members. Since Lieber considered the development of our moral capacity of sympathy through simple care-giving, personal self-sacrifice and affection¹⁰⁸ as forming the foundation for the development of "friendship, charity, public spirit,"¹⁰⁹ and ultimately, patriotism,¹¹⁰ he viewed the increased development of our moral capacity of sympathy within families defined by monogamous marriage as leading to greater social cohesion.

At the same time, Lieber viewed countries with polygamous marriage as developing a notion of patriarchal authority and filial duty within the family that is more easily confused with state authority than would be the case if such families were monogamous.¹¹¹ In all families, parental action is neither motivated nor legitimated by

104. Cf. 2 *id.* at 64-66 (describing sexual activity outside of monogamous marriages as preventing the development of reverence for women, without specifically mentioning polygamy).

105. See 2 *id.* at 134.

106. See 1 *id.* at 103.

107. See 1 *id.* at 140.

108. See 1 *id.* at 145.

109. Horenstein, *supra* note 79, at 2285.

110. See 1 LIEBER, *POLITICAL ETHICS*, *supra* note 78, at 141. Explaining the origin of patriotism, Lieber wrote:

As he has affection for the members of the same family, so he found them enlarged into affections for a wider society, he felt himself mingled with it, with its recollections, its history, and its future destiny; he loves his tribe, his nation, his country, until at last this feeling becomes a distinct and ardent devotedness to his country, becomes patriotism . . .

1 *id.* at 107.

111. See 1 *id.* at 146 n.1.

ideals of equality and justice, but rather by care and affection.¹¹² In Lieber's view, confusion between the authority of the father, which is kept in check by the love and lack of self-interest characteristic of family relations, and the authority of the state, which is not so checked, leads to acceptance of absolutism and tyranny.¹¹³ It would seem that such confusion is more likely in polygamous families because the inherent internecine conflict and competition create distinctly less affectionate and altruistic family relationships. Polygamous families, therefore, resemble broader social relations, and the legitimacy of parental despotism creates a foundation for the legitimacy of political despotism.¹¹⁴

In addition, Lieber viewed the absolute power of such despotism as presupposing an absolute obedience of subjects which "annihilate[s] the moral character, that is, individual moral value (requiring free agency) and responsibility."¹¹⁵ Only in societies where the state and government are not understood as outgrowths of familial power relationships may political subjects with individual moral character emerge from families, and may notions of rights and liberty emerge as the justifications for state authority.¹¹⁶ Thus, for Lieber, families created by polygamous marriage are antithetical to the possibility of individual liberty within a state.

The Court's reliance on Lieber in *Reynolds* commits it to a view of marriage as an acquired right. *Reynolds* suggests a view of marriage as essential to civilized society, not only because of its role in the "phylogenetic" development of modern society out of primitive societies, but also because marriage continues to contribute to the ongoing "ontological" shaping of new generations into the citizens

112. See 1 *id.* at 145.

113. See 1 *id.* at 146 & n.1.

114. See 1 *id.* at 390 ("[T]he patriarchal principle, if applied to larger communities, that is, if family relations are made the fundamental principle of the state, fetters the people in stationary despotism,—a species of government to which, it seems to me, polygamy must almost irresistibly lead, and which I cannot imagine to exist long in connection with monogamy . . .").

115. 1 *id.* at 180-81.

116. See 1 *id.* at 390. Lieber argued that the European institution of monogamy resulted from the perceived relationship between the individual and the state. He explained: [I]n Europe that Right was first distinctly grounded upon man's ethical character; that there, consequently, State and Government first became subjects of deep inquiry, because they were not any longer considered either as mere effects of force or the unalterable family relation; and that there man first maintained liberty as a civil institution and became ready to bear great sacrifices for it.

1 *id.*

required by a modern democratic government.¹¹⁷ The right to marriage, understood as based on the essential role marriage plays as a socially constructive institution, is thus less a personal, natural right than a social precondition to personal rights within a state.

III. A HEGELIAN THEORY OF MARRIAGE

In the context of the considerable challenge posed to monogamous marriage by Mormon polygamy, the nineteenth-century Supreme Court turned to Francis Lieber's explanation of the fundamental significance of heterosexual, monogamous marriage to a society that values liberty in order to justify federal prohibitions on polygamy. Yet neither Lieber nor the Court ever fully explained how monogamous marriage nurtures democratic principles beyond arguing that polygamous marriages undermine such principles. Lieber himself left substantially unexplained how monogamous marriage allows for both the development of individuals and a political sphere where individuals have rights. Furthermore, Lieber's understanding of marriage as essentially constituted by a man and a woman¹¹⁸ is derived from a view of women as so fundamentally different from men as to be both repugnant to contemporary sensibilities and inconsistent with contemporary constitutional understandings of gender equality.¹¹⁹

Lieber's insufficiently detailed explanation of the relationship between monogamous marriage and a free society may be filled out, in part, by reference to Georg W. F. Hegel's much more detailed theory of the role of the family in the social construction of civil society and the state. There is little doubt that Lieber's own views on this subject were influenced by Hegel, who was at the peak of his academic career while Lieber was pursuing his education in Germany.¹²⁰ In particular, Hegel's analysis of the historical development

117. The expression "ontology recapitulates phylogeny" refers to the way in which fetal development parallels the evolutionary development of life from fish to amphibian to air breather. One can argue that in the modern liberal state, the development of individual citizens may also have to proceed in stages through institutions that resemble more primitive societal forms. Thus, marriage can be seen as a holdover in modern society of primitive tribal societies.

118. See 1 LIEBER, *POLITICAL ETHICS*, *supra* note 78, at 104-05 n.1.

119. See 2 *id.* at 121-27, 138-39; *supra* notes 96-104 and accompanying text.

120. Hegel taught at the University of Jena between 1801 and 1807. See GEORG W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* xxxiii (Allen W. Wood ed. & H.B. Nisbet trans., 1991) (1821) [hereinafter HEGEL, *ELEMENTS*] (a time-line). As a Professor at the University of Heidelberg between 1816 and 1818, he lectured on the material that

of the modern state developed in considerably more detail the connections between polygamy and historically despotic political structures, as well as the connections between monogamy and the modern state of free individuals. This level of detail enables this Article to further develop the compressed analysis of polygamy in *Reynolds*.¹²¹ As with Lieber, Hegel grounded his understanding of monogamy on out-moded views of women.¹²² Yet, in the case of Hegel, the ultimate justification for these views flows from his logic, rather than from mere convention. Redirection of Hegel's logic allows this Article to reconstruct the Hegelian theory of marriage free of gender prejudices. The more egalitarian analysis that results can then be used to determine whether same-sex marriage undermines monogamous heterosexual marriage or complements it.

A. Interpretation and Analysis of Hegel's Theory of Marriage

1. The Role of Marriage in the State

Hegel viewed marriage and the family as foundations for the modern civil state:

The piety of the family relation should be respected in the

eventually became *The Philosophy of Right*. See *id.* at xxxiv. He succeeded to Fichte's chair in philosophy at the University of Berlin in 1818, at which point he became the "recognized leader of philosophic thought in Germany." *Biographical Note to GEORG W.F. HEGEL, THE PHILOSOPHY OF HISTORY* [hereinafter HEGEL, PHILOSOPHY OF HISTORY], in 46 GREAT BOOKS OF THE WESTERN WORLD vi (Robert Maynard Hutchins et al. eds. & J. Sibree trans., 1952). Although *The Philosophy of Right* was not published until 1821, and *The Philosophy of History* was not published until after his death in 1831, both works reflected his regular lecture series on these subjects. See *id.* (discussing the origins of *The Philosophy of History*); HEGEL, PHILOSOPHY OF RIGHT, *supra* note 30, at 1.

Francis Lieber was born in 1798. See FRANK FREIDEL, FRANCIS LIEBER: NINETEENTH-CENTURY LIBERAL 21-22 (1968). He received his Doctorate from the University of Jena in 1820, *id.* at 27-28, and studied at the University of Berlin during the period in which Hegel occupied a professorship, *id.* at 40-41. Whether Lieber actually attended Hegel's lectures, it seems likely that Lieber would have been exposed to Hegel's views via his influence on the world of German philosophy during Lieber's formative years and his substantial written works available in print before Lieber left Germany for London in 1826. See *id.* at 46. Indeed, Frank Freidel, Lieber's biographer, notes that although Lieber disliked and often criticized Hegelian thought, Hegel gave many of Lieber's fundamental ideas "their most outstanding development." *Id.* at 154-55 n.25.

121. See *Reynolds v. United States*, 98 U.S. 145, 165-66 (1878).

122. See HEGEL, PHILOSOPHY OF RIGHT, *supra* note 30, ¶¶ 165-66 & remarks, at 114-15. The Knox translation of Hegel's *Philosophy of Right* includes Hegel's original paragraphs ("¶"), remarks written by Hegel on those paragraphs ("remarks"), and two appendices of notes on Hegel's work. The first appendix, "Additions," is comprised of notes taken from Hegel's lectures and refers directly to the numbered paragraphs in the original text. The second appendix consists of "Translator's Notes," for which it is named.

highest degree by the state; by its means the state obtains as its members individuals who are already moral (for as mere *persons* they are not) and who in uniting to form a state bring with them that sound basis of a political edifice—the capacity of feeling one with a whole.¹²³

Thus, according to Hegel's philosophy, marriage provides the individual with an experience of unity which is at the same time inextricably tied to individual personality.¹²⁴ This allows the individual to reconcile personal freedom with the universal order imposed by the state.¹²⁵ Marriage also makes possible the development of independent individual consciousness, capable of both recognizing the imprint of its own rationality in the laws and structure of the state, and freely choosing to submit its personal desires to the rule of the state.¹²⁶

The experience of unity was necessary for the Hegelian citizen because Hegel, like Lieber, rejected the contractual view of the state as premised on a necessary antagonism between free subjects, a view proposed by seventeenth-century liberal theorists.¹²⁷ Hegel viewed the modern state as a "a genuine public community,"¹²⁸ in which subjects achieve freedom only through the transcendence of individual personality.¹²⁹ The freedom that the Hegelian citizen achieves, however, is not the uninhibited pursuit of that citizen's particular ends,¹³⁰ but rather the full identification of his particular ends with a

123. HEGEL, PHILOSOPHY OF HISTORY, *supra* note 120, at 151, 172.

124. See HEGEL, PHILOSOPHY OF RIGHT, *supra* note 30, app. Additions n.101, at 261 (referring to ¶ 158).

125. See *id.* ("Love, however, is feeling, i.e., ethical life in the form of something natural. In the state, feeling disappears; there we are conscious of unity as law; there the content must be rational and known to us.")

126. See *id.* ¶¶ 264-65, at 163; see also *id.* app. Additions n.158, at 281 (referring to ¶ 265).

127. See Joan B. Landes, *Hegel's Conception of the Family*, in THE FAMILY IN POLITICAL THOUGHT 125, 142 (Jean Bethke Elshtain ed., 1982).

128. *Id.* at 126.

129. See *id.* at 142-43.

130. See HEGEL, PHILOSOPHY OF RIGHT, *supra* note 30, ¶ 29 & remarks, at 33. In his *Philosophy of History*, Hegel wrote:

The perpetually recurring misapprehension of freedom consists in regarding that term only in its *formal*, subjective sense, abstracted from its essential objects and aims; thus a constraint put upon impulse, desire, passion—pertaining to the particular individual as such—a limitation of caprice and self-will is regarded as a fettering of freedom. We should on the contrary look upon such limitation as the indispensable proviso of emancipation.

HEGEL, PHILOSOPHY OF HISTORY, *supra* note 120, at 172.

universal and rationally ordered state.¹³¹ Hegel explained:

Only that will which obeys law is free; for it obeys itself—it is independent and so free. When the state or our country constitutes a community of existence; when the subjective will of man submits to laws—the contradiction between liberty and necessity vanishes. The rational has necessary existence, as being the reality and substance of things, and we are free in recognizing it as law, and following it as the substance of our own being.¹³²

Therefore, the state is not merely a means to individual ends, but has independent value as the embodiment of freedom.¹³³ The existence of such a state requires citizens who are conscious of individual moral agency¹³⁴ and are capable of possessing the negative rights necessary to exercise individual free will,¹³⁵ yet who are pre-

131. See HEGEL, PHILOSOPHY OF RIGHT, *supra* note 30, ¶ 258 & remarks, at 155-58; see also HEGEL, PHILOSOPHY OF HISTORY, *supra* note 120, at 181 ("Freedom is nothing but the recognition and adoption of such universal substantial objects as right and law, and the production of a reality that is accordant with them—the state."); *id.* at 205 ("[T]he individual personality, instead of following its own capricious choice, is purified and elevated into universality; a subjectivity that of its own free will adopts principles tending to the good of all . . .").

This identification of the particular and universal is experienced on the level of feeling as respect or trust in political institutions, and as patriotism. See HEGEL, PHILOSOPHY OF RIGHT, *supra* note 30, ¶ 268, at 163-64. On a more conscious level, both the rational content of law, see *id.* app. Additions n.101, at 261 (referring to ¶ 158), and the rationality expressed by the shape of the state, see *id.* ¶ 270, at 164-65, are experienced as expressions of our individual, yet universal, rationality. Individual willingness to bow to the authority of the state, and even die to protect it, see *id.* ¶ 258 & remarks, at 156-57, can thus be understood as based on the recognition that the state objectifies all that is universal in us, see *id.* remarks to ¶ 289, at 189.

132. HEGEL, PHILOSOPHY OF HISTORY, *supra* note 120, at 171.

133. See HEGEL, PHILOSOPHY OF RIGHT, *supra* note 30, ¶¶ 260-61, at 160-61. Hegel wrote:

[I]t is the moral whole, the *state*, which is that form of reality in which the individual has and enjoys his freedom; but on the condition of his recognizing, believing in, and willing that which is common to the whole. And this must not be understood as if the subjective will of the social unit attained its gratification and enjoyment through that common will; as if this were a means provided for its benefit; as if the individual, in his relations to other individuals, thus limited his freedom, in order that this universal limitation—the mutual constraint of all—might secure a small space of liberty for each. Rather, we affirm, are law, morality, government, and they alone, the positive reality and completion of freedom.

HEGEL, PHILOSOPHY OF HISTORY, *supra* note 120, at 170.

134. See Landes, *supra* note 127, at 126.

135. See *id.* at 128.

pared for the transcendence of individual personality¹³⁶ required by the “communitarian aspect of political life in the modern state.”¹³⁷ For Hegel, the family was the social institution that provided the material and ethical foundation for the development of this modern individual subject.¹³⁸

Marriage, the first phase of the family,¹³⁹ provides this experience of unity by converting what at first appears to be a mere physical sexual connection between people into “a union on the level of mind,”¹⁴⁰ a sense that one’s essential being is inextricable from the being of another.¹⁴¹ “Love means in general terms the consciousness of my unity with another, so that I am not in selfish isolation but win my self-consciousness only as the renunciation of my independence and through knowing myself as the unity of myself with another and of the other with me.”¹⁴² Love produces self-consciousness which is conditioned towards universality by the paradox of love, meaning that even as the lover experiences individuality through the specificity of love, the lover achieves dissolution of individuality through unity with the beloved.¹⁴³ Thus, the essence of marriage for Hegel is not contract, which has as its premise independent individuals reciprocally using each other to achieve individual ends, but rather a transcendence of contract and individual self-interest in which two individuals become one person.¹⁴⁴ This unity is the first step toward the unification of the particular and the universal which produces concrete freedom.¹⁴⁵ The importance of this experience was such that Hegel viewed marriage as not only a right, but a “socio-ethical

136. *See id.* at 129.

137. *Id.* at 142.

138. *See id.* at 125.

139. *See* HEGEL, *PHILOSOPHY OF RIGHT*, *supra* note 30, ¶ 160, at 111.

140. *Id.* ¶ 161, at 111.

141. *See id.*

142. *Id.* app. Additions n.101, at 261-62 (referring to ¶ 158).

143. *See id.*

144. *See id.* remarks to ¶ 163, at 112.

145. *See* Rudolf J. Siebert, *Hegel's Concept of Marriage and Family: The Origin of Subjective Freedom*, in HEGEL'S SOCIAL AND POLITICAL THOUGHT: THE PHILOSOPHY OF THE OBJECTIVE SPIRIT 177, 178-79 (Donald Phillip Verene ed., 1980) [hereinafter HEGEL'S SOCIAL AND POLITICAL THOUGHT]; *see also* Michael Theunissen, *The Repressed Intersubjectivity in Hegel's Philosophy of Right*, in HEGEL AND LEGAL THEORY 3, 8 (Drucilla Cornell et al. eds., 1991) (“The resulting ‘unity of myself with the other and the other with myself’ is, however, simultaneously *freedom*, an equally *communal freedom*.” (citation omitted)).

duty."¹⁴⁶

Contrary to the Romantic views of his contemporary, Friedrich Schlegel, who championed free love¹⁴⁷ and the superfluousness of marriage ceremonies,¹⁴⁸ Hegel argued that marriage should not be viewed as based on passionate love alone,¹⁴⁹ but should be "more precisely characterized as ethico-legal . . . love, . . . [which] eliminates from marriage the transient, fickle, and purely subjective aspects of love."¹⁵⁰ Passionate love so values the particularity of each individual that the partners may not achieve dispassionate love, which reflects a subsuming of individual personality to the greater unity of the marriage.¹⁵¹ In addition, a commitment of love is worthless, as no one can truly will feelings.¹⁵² Consequently, Hegel placed great significance on the formal marriage ceremony, arguing that it is "the solemn declaration by the parties of their consent to enter the ethical bond of marriage, and its corresponding recognition and confirmation by their family and community,"¹⁵³ rather than "the sensuous moment,"¹⁵⁴ that makes marriage ethical and not a mere matter of

146. Siebert, *supra* note 145, at 205.

147. See Clark Butler, *Commentary* to HEGEL: THE LETTERS 234, 235 (Clark Butler & Christiane Seiler trans., 1984) (comparing Hegel's views on marriage to Schlegel's).

148. See HEGEL, PHILOSOPHY OF RIGHT, *supra* note 30, app. Additions n.106, at 263 (describing Schlegel's novel *Lucinde*, see FRIEDRICH SCHLEGEL'S *LUCINDE* AND THE FRAGMENTS 41-140 (Peter Firchow trans., Univ. Minn. Press. 1971) (1799), as putting "forward the view that the wedding ceremony is superfluous and a formality which might be discarded").

149. See HEGEL, PHILOSOPHY OF RIGHT, *supra* note 30, app. Additions n.105, at 262-63 (referring to ¶ 163).

150. *Id.* app. Additions n.103, at 262 (referring to ¶ 161).

151. See *id.* remarks to ¶ 162, at 111-12. Hegel argued that the universalizing effect of marriage is enhanced when marriages are arranged, and the parties' inclinations are forced to conform to their consent to enter into a unity valued as such, which is "inherently dissoluble . . . [because it is] above the contingency of passion and the transience of particular caprice." *Id.* ¶ 163, at 112. The successful ethical family further suppresses and limits the role of physical passion to what is necessary for reproduction, see Landes, *supra* note 127, at 141, thus transforming the merely contingent and arbitrary into children who objectively embody the ethical bond between the parents. See HEGEL, PHILOSOPHY OF RIGHT, *supra* note 30, app. Additions n.110, at 264 (referring to ¶ 173).

152. Hegel characterizes love as a feeling which is contingent, transient and fickle. See HEGEL, PHILOSOPHY OF RIGHT, *supra* note 30, app. Additions, n.103, at 262 (referring to ¶ 161). This is because feelings have their source in nature and are a source of arbitrary and external determination of the will, rather than an internal and rational determination of the will. See *id.* remarks to ¶ 15, at 27; *id.* app. Additions n.12, at 230-31 (referring to ¶ 15). In other words, to will a feeling is to give in to external determination, which may well change because external determination is, by definition, not under internal control.

153. *Id.* ¶ 164, at 113.

154. *Id.*

feeling and inclination. Indeed, a view of the ceremony as a mere formality or civil requirement improperly identifies the true connection of the parties as physical and subjective and treats the civil institution of marriage as an alien and irrelevant intruder.¹⁵⁵

2. The Importance of Monogamy

Monogamy, for Hegel, is what makes possible the transcendent unity of marriage, which in turn grounds the transcendent unity of the state.¹⁵⁶ "Marriage, and especially monogamy, is one of the absolute principles on which the ethical life of a community depends."¹⁵⁷ Only "mutual, whole-hearted, surrender"¹⁵⁸ of individual personality results in each having the identical relationship with the other which allows both to become conscious of their personhood in the other.¹⁵⁹ Monogamy requires that each come to the marriage viewing the other as sufficiently equal in personhood that each must completely surrender to achieve the transcendent personality of the family.¹⁶⁰ Through the family created by monogamous marriage, "the constitutional state has for its citizens such individuals who bring with them already the solid foundation of being able to feel themselves as being one with its socio-ethical concrete totality."¹⁶¹

However, the citizen must also be a fully particularized subject¹⁶² in order for the unity of the state to be experienced as freedom.¹⁶³ This is because, as we have seen, the highest human freedom arises when individuals can recognize the universal focus of the state as an essential foundation for the development and expression of their particular individuality.¹⁶⁴ However, the state cannot develop or maintain a focus that is both respectful and nurturing of individuality if it does not have fully developed individuals upon which to focus.¹⁶⁵

155. See *id.* remarks to ¶ 164, at 114.

156. See *id.* remarks to ¶ 167, at 115.

157. *Id.*

158. *Id.* ¶ 167, at 115.

159. See *id.*

160. See Landes, *supra* note 127, at 137.

161. Siebert, *supra* note 145, at 204.

162. As defined by Hegel, "[p]articularity is . . . characterized in general by its contrast with the universal principle of the will and thus is subjective need." HEGEL, PHILOSOPHY OF RIGHT, *supra* note 30, ¶ 189, at 126.

163. See *id.* ¶ 260, at 160-61.

164. See *id.* ¶¶ 152-53, at 109.

165. See *id.* ¶¶ 34-36, at 37 (stating that abstract rights require that development of

Nor can those who are not fully developed individuals recognize themselves in their state.¹⁶⁶ Without the full development of individuality, the universality of the state can be experienced only as external and oppressive.¹⁶⁷ Thus, at the same time that the family produces individuals capable of taking the universal ends of the state as their own, the family must also develop the particularity and subjectivity of the individual.¹⁶⁸ According to Siebert,

[T]he family is the only social unit, which has the individual as such for its purpose. Neither the state nor the society are [sic], as such, concerned with the individual. The family is therefore of utmost importance for the development of the individuality of the individual. In the family, free subjectivity arises.¹⁶⁹

This free subjectivity can be discovered in the relationship shared by marital partners as well as in the emerging subjectivity of the children of the marriage.

particularity which creates personality); *id.* app. Additions nn.154-55, at 280 (referring to ¶¶ 260-61) (explaining that immature and despotic states are those in which the particularity of individuals has not yet developed).

166. See HEGEL, *PHILOSOPHY OF HISTORY*, *supra* note 120, at 203. Hegel contended:

[A]s the state is the universal spiritual life, to which individuals by birth sustain a relation of confidence and habit, and in which they have their existence and reality—the first question is, whether their actual life is an unreflecting use and habit combining them in this unity, or whether its constituent individuals are reflective and personal beings having a properly subjective and independent existence. In view of this, *substantial* freedom must be distinguished from *subjective* freedom. Substantial freedom is the abstract undeveloped reason implicit in volition, proceeding to develop itself in the state. But in this phase of reason there is still wanting personal insight and freedom, which is realized only in the individual, and which constitutes the reflection of the individual in his own conscience. Where there is merely substantial freedom, commands and laws are regarded as something fixed and abstract, to which the subject holds himself in absolute servitude. These laws need not concur with the desire of the individual, and the subjects are consequently like children, who obey their parents without will or insight of their own.

Id.

167. *See id.*

168. Hegel believed that civil society is the realm in which the particular needs and wants of individuals are satisfied through property and work. *See* HEGEL, *PHILOSOPHY OF RIGHT*, *supra* note 30, ¶ 256, at 154. It is here that freedom is objectified in its particularity. At the same time, however, civil society provides the experience and objectification of universality in the form of the creation of social needs, *see id.* ¶¶ 190-94, at 127-28, the dependence of individuals on a market of labor and goods, *see id.* ¶ 198, at 129, and a system of justice that, in its view of individuals as possessing rights, only abstractly acknowledges individual particularity, *see id.* ¶ 209 & remarks, at 134, and makes possible each individual's pursuit of that individual's own particular ends, *see id.* ¶ 116, at 266-67.

169. Siebert, *supra* note 145, at 192.

3. The Role of Marriage in the Development of Children into Citizens

While Hegel did not view children as either essential to marriage or its chief end,¹⁷⁰ he did view children within a marital family as the objective embodiment of the unity of marriage.¹⁷¹ However, children are only potentially free and emerging consciousnesses. They can only fully reflect the unity of mind which is at the center of marriage through their individual achievement of the substantive freedom of self-consciousness.¹⁷² This self-consciousness can arise only if the child learns to understand herself as a being who is fundamentally universal, rather than as a being who is purely particular,¹⁷³ as infants and small children necessarily are.¹⁷⁴ Since reason is what is universal in them, children achieve self-consciousness by experiencing themselves as rational beings.¹⁷⁵ Parents, therefore, have the duty to educate children¹⁷⁶ so that their wills are freed from the control of instinct and physical need and are guided by universality in the form of ethical principles.¹⁷⁷ “[S]ince ethical principles must be implanted in the child in the form of feeling,”¹⁷⁸ this education can occur only through the love, trust, and

170. See HEGEL, PHILOSOPHY OF RIGHT, *supra* note 30, remarks to ¶ 164, at 113. This seems similar to the Supreme Court’s view of marriage in *Turner v. Safley*, 482 U.S. 78, 95-96 (1987), in which the Court recognized that the incarceration of one of the partners eliminated the sexual and procreative facets of marriage without destroying what Hegel would describe as marriage’s “ethical character.” HEGEL, PHILOSOPHY OF RIGHT, *supra* note 30, remarks to ¶ 164, at 113. For a fuller discussion of the relationship of marriage and procreation in Supreme Court case law, see *infra* notes 316-29 and accompanying text.

171. See HEGEL, PHILOSOPHY OF RIGHT, *supra* note 30, ¶ 173, at 117. Common family property also serves to consolidate and embody the single personhood of the family. The family itself becomes the locus of property rights against external persons as well as against the rights of individual family members. See Landes, *supra* note 127, at 129-30. Children, however, represent the unity of marriage more accurately as spirit, i.e., free self-contained existence, rather than as a material thing, see HEGEL, PHILOSOPHY OF RIGHT, *supra* note 30, ¶ 110, at 264-65, which is merely composite and never truly unitary. See HEGEL, PHILOSOPHY OF HISTORY, *supra* note 120, at 160.

172. See HEGEL, PHILOSOPHY OF RIGHT, *supra* note 30, ¶ 175, at 117-18; see also Siebert, *supra* note 145, at 188-89 (“It is their child, in which the lovers recognize themselves as being one with each other in one consciousness, that of their child.”).

173. See HEGEL, PHILOSOPHY OF RIGHT, *supra* note 30, remarks to ¶ 187, at 125-26.

174. See *id.* ¶ 175, at 117.

175. See *id.* remarks to ¶ 187, at 125-26.

176. See *id.* ¶ 174, at 117.

177. See *id.* ¶¶ 174-75, at 117.

178. *Id.* app. Additions n.112, at 265 (referring to ¶ 175).

obedience by which family relations are characterized.¹⁷⁹

Although children achieve self-consciousness and individuality through the love and care of the family, they cannot truly exercise their individuality within the family because "[i]n this social relation, morality consists in the members behaving towards each other *not as individuals* . . . possessing an independent will."¹⁸⁰ In order to be treated as individuals with rights, children must leave the family.¹⁸¹ "The ethical meaning of a concrete family-life is that it is a transition: Children are destined to acquire in and through it their independence, and have the right and duty to leave it."¹⁸² Thus, the recognition of children as independent persons capable of holding property and creating new families of their own not only completes the ethical life of the family, but results in its dissolution.¹⁸³

4. Polygamy

In Hegel's view, polygamous marriages are destructive of the possibility of individuality of family members,¹⁸⁴ and also perpetuate a deceptive illusion of universality which is ultimately inconsistent with free rationality.¹⁸⁵ Societies built on the patriarchal principle cannot partake of the love, confidence, and trust of the monogamous family,¹⁸⁶ or the freedom of the modern state.¹⁸⁷ Indeed, Hegel viewed the assumption that the unity of the modern state can be directly derived from the extended patriarchal family as a pernicious error of political theory.¹⁸⁸

In any marital family, whether monogamous or polygamous, the surrender of individual personality by the marital partners, combined with the natural dependence of children, means that no rights exist within the family¹⁸⁹ and that behavior is governed solely by natural

179. *See id.*

180. HEGEL, PHILOSOPHY OF HISTORY, *supra* note 120, at 180.

181. *See* GEORG W.F. HEGEL, ENCYCLOPEDIA OF PHILOSOPHY §§ 434-35, at 247-48 (Gustav Emil Mueller trans., 1959) (1817) [hereinafter HEGEL, ENCYCLOPEDIA OF PHILOSOPHY].

182. *Id.*

183. *See* HEGEL, PHILOSOPHY OF RIGHT, *supra* note 30, ¶ 177, at 118-19.

184. *See infra* notes 189-93 and accompanying text.

185. *See infra* notes 194-95 and accompanying text.

186. *See infra* notes 196-205 and accompanying text.

187. *See infra* notes 206-16 and accompanying text.

188. *See* HEGEL, PHILOSOPHY OF HISTORY, *supra* note 120, at 171-72.

189. *See id.* at 180.

feelings.¹⁹⁰ Hegel believed that in a monogamous marriage, a “mutual, whole-hearted, surrender”¹⁹¹ of individuality that acknowledges the husband and wife as fundamentally equal¹⁹² creates positive feelings of love, confidence and faith. Certainly, a husband in a polygamous family cannot make such an undivided surrender to any single wife.¹⁹³ As a result, none of his wives will return such sentiments of surrender. Because no mutuality of individual sacrifice for the union exists, positive natural feelings cannot characterize the polygamous family.¹⁹⁴ Competition between individual wives and between their children not only precludes love, trust, and confidence between these sub-units of the family, but must breed jealousy and disharmony within the fully consanguineous family sub-units as well. Indeed, modern studies of formal and informal polygamy across many historical and contemporary cultures have suggested that so little loyalty naturally develops among polygamous family members that strong external controls, such as walls, armed guards, or the threat of torture, mutilation, or death for sexual or political disloyalty to the patriarch, are frequently utilized to preserve family integrity.¹⁹⁵ In the polygamous family, therefore, neither love nor justice is likely to flourish.

190. See HEGEL, *ENCYCLOPEDIA OF PHILOSOPHY*, *supra* note 181, §§ 434-35, at 247 (“The natural life of the family is one of ultimate affection and feeling, in which the children are loved simply because they are children.”).

191. HEGEL, *PHILOSOPHY OF RIGHT*, *supra* note 30, ¶ 167, at 115.

192. As I will take up later, *see infra* notes 265-315 and accompanying text, Hegel’s view of the equality of men and women as persons was nonetheless qualified by his view that a natural and ethical division of labor assigned women exclusively to the family and allowed men to emerge from family life into the independence of economic and political life. See HEGEL, *PHILOSOPHY OF RIGHT*, *supra* note 30, ¶ 166, at 114.

193. Hegel did not analyze polygamous family relations in the abstract, but rather only in the historical context of polygamous societies. See generally HEGEL, *PHILOSOPHY OF HISTORY*, *supra* note 120, at 198 (African polygamy), 211-16 (Chinese polygamy), 222-30 (Hindu polygamy). As a result, he did not always fully articulate the precise nature or consequences of polygamous family relations. However, it is possible to bridge these gaps by evaluating the polygamous family using the same rubric Hegel followed in analyzing the monogamous family. The observation cited here, and other unsupported observations that immediately follow, reflect my own efforts in this regard.

194. For example, Hegel recounts a report of a Hindu husband, who, when questioned why he was standing by indifferently as his wife burned herself to death, stated that he had more wives at home. See HEGEL, *PHILOSOPHY OF HISTORY*, *supra* note 120, at 224.

195. See LAURA L. BETZIG, *DESPOTISM AND DIFFERENTIAL REPRODUCTION: A DARWINIAN VIEW OF HISTORY* 79-82 (1986) (describing various means of “claustration,” or seclusion of the despotic patriarchs’ wives or concubines); *see also* Otto, *supra* note 5, at 883 & nn.10-11 (detailing “grisly blood feuds among rival polygamous groups” and “ritualistic slayings” among contemporary Mormon fundamentalists practicing polygamy).

The lack of love in the polygamous family inhibits the full development of independent personality. Hegel illustrated this by reference to descriptions of seventeenth- and eighteenth-century polygamous family relations in China,¹⁹⁶ which were so regulated by law that the way each member of the family was required to behave toward various other members was spelled out precisely by statute.¹⁹⁷ The result of this regulation was that "free sentiment, the moral standpoint generally, [was] thereby thoroughly obliterated."¹⁹⁸ Where individual feelings of love cannot be drawn upon and expressed in any unique or idiosyncratic way, neither adult nor child members of the family can experience their individuality as an essential part of the unitary family.¹⁹⁹ This was especially a problem for women, whom Hegel viewed as achieving the full development of their personalities only within the family:²⁰⁰ "The woman must come into her right just as much as the man. Where [there is] polyg-

196. See HEGEL, *PHILOSOPHY OF HISTORY*, *supra* note 120, at 212. Hegel's sources of information on Chinese government and family relations were reports of Jesuit missionaries to China during the seventeenth and eighteenth centuries. See CLARK BUTLER, *G.W.F. HEGEL* 46-47 (1977). Hegel's accounts of China exaggerated the negative to the point of racism, failed to take into account the coexistence of Buddhist and Taoist religious traditions alongside the official Confucianism, and failed to give proper credit for the emergence of individual subjectivity in China evidenced by peasant uprisings, lyric poetry, and veins of individualist and anarchist thought. See *id.* at 47. Nonetheless, Hegel's basic characterizations of the Chinese family as patriarchal and the government as despotic seem accurate. See *id.* ("Still, none of these facts contradicts the claim that China was predominantly despotic . . .").

197. See HEGEL, *PHILOSOPHY OF HISTORY*, *supra* note 120, at 211-12. Hegel commented:

The duties of the family are absolutely binding, and established and regulated by law. The son may not accost the father, when he comes into the room; he must seem to contract himself to nothing at the side of the door, and may not leave the room without his father's permission. . . . The same minuteness of regulation which prevails in the relation between father and children, characterizes also that between the elder brother and the younger ones.

Id.

198. *Id.* at 214.

199. See *id.* at 207. Hegel wrote:

[T]he internal law, the knowledge on the part of the individual of the nature of his volition, as his own inmost self—even this is the subject of external statutory enactment. The sphere of subjectivity does not then attain to maturity here, since moral laws are treated as legislative enactments . . .

Id.

200. See HEGEL, *PHILOSOPHY OF RIGHT*, *supra* note 30, ¶ 166, at 114 ("The [female] sex is mind maintaining itself in unity as knowledge and volition . . . in the form of concrete individuality and feeling. . . . Woman . . . has her substantive destiny in the family, and to be imbued with family piety is her ethical frame of mind.").

amy, [there is] slavery of women.'²⁰¹

Furthermore, multi-generational polygamous families do not dissolve to release either the children or the marital partners as individuals capable of independent and free existences, but rather persist, maintaining a crushing hold over their members.²⁰² Even men cannot fully escape their past status as sons.²⁰³ Where the family is the primary value, the particularity of the individual can be neither cherished nor nurtured. Indeed, Hegel argued that the legal externality of seventeenth-century family relations essentially reduced all these relations to slavery.²⁰⁴ Thus, while the basis of monogamy is the equality and mutual recognition necessary for the development of individuality, the basis of polygamy is lordship and bondage.²⁰⁵

The seventeenth-century Chinese state, which Hegel characterized as extending the form of the patriarchal family to government,²⁰⁶ similarly stifled individual conscience and freedom. Just as rights are inconceivable within the family, individual rights cannot exist in the patriarchal state.²⁰⁷ Thus, Hegel viewed the seventeenth-century Chinese people as existing in relation to a paternal emperor in the same way that children in a family relate to their parents, which meant that they could exist in the state only with the same lack of individual personality that necessarily characterizes family exist-

201. HEGEL, *ELEMENTS*, *supra* note 120, at 440 (quoting the transcription by C.G. Homeyer of Hegel's second series of lectures on *The Philosophy of Right*, prior to the publication of the manuscript in 1821) (alterations in original).

202. Hegel noted that the Chinese practice of punishing entire families for the crimes of any of its members subverted the development of individuality by putting a heavy price on independent action and distorting the moral connection between responsibility and free will. See HEGEL, *PHILOSOPHY OF HISTORY*, *supra* note 120, at 215 ("[I]f the person who has committed the insult . . . can be discovered, he and his whole family are executed . . . [A]ll subjective freedom and moral concernment with an action are ignored.").

203. Even the Emperor was required to suspend the business of the state to mourn his father or make daily visits to pay his respects to his mother. See *id.* at 211-12. The son's development of a sense of independent personhood was similarly frustrated by the attribution of all of a son's successes to his father. See *id.* at 212.

204. See *id.* at 214 ("Every one has the power of selling himself and his children; every Chinese buys his wife. Only the chief wife is a free woman. The concubines are slaves, and, like the children and every other chattel, may be seized upon in case of confiscation.").

205. See BUTLER, *supra* note 196, at 147.

206. See HEGEL, *PHILOSOPHY OF HISTORY*, *supra* note 120, at 211.

207. See BUTLER, *supra* note 196, at 42-43 ("[T]he patriarchal family as such assures no rights whatsoever to the children or wife. . . . A despotic state is an imitation family, the despot an imitation father, with the result that all his subjects become imitation children.").

tence.²⁰⁸ This lack of individuality may have resulted in an absolute equality of all, but it was an equality untouched by freedom, since freedom consists of the right to have individual interests and privileges²⁰⁹ and to be a distinctive personality.²¹⁰ Indeed, the governing patriarch, like Abraham, was free to murder his subjects.²¹¹ The result is a despotic government²¹² whose benevolence or cruelty is determined by the character of the emperor,²¹³ and whose subjects have no conscience, freedom, or subjectivity.²¹⁴ Only the despot is free in a patriarchal political system.²¹⁵ Thus, Hegel saw both the institution of polygamy, and the patriarchal form of government derived from it, as essentially despotic and inconsistent with the achievement of both particular and universal freedom by individuals. Although Hegel's data on polygamy were limited, modern anthropological studies of polygamous societies have confirmed his perception of the association of polygamy with despotic rule.²¹⁶

5. Summary

Monogamous families appear to advance the particular and universal freedom of those who participate in them in a number of ways. First, monogamous marriage acknowledges the human equality of men and women. Although Hegel excluded women from civil soci-

208. *See id.*

209. *See* HEGEL, *PHILOSOPHY OF HISTORY*, *supra* note 120, at 213.

210. *See id.* at 219 ("And though there is no distinction conferred by birth, and everyone can attain the highest dignity, this very equality testifies to no triumphant assertion of the worth of the inner mind, but a servile consciousness—one which has not yet matured itself so far as to recognize distinctions.")

211. Abraham, the polygamous patriarch of the Hebrew Bible, appears to have had the legal and political power to murder his son when commanded to do so by God. *Genesis* 22:10 (Revised Standard Version) ("Abraham put forth his hand, and took the knife to slay his son."). A ruler whose subjects were individuals with rights, however, would not have the legal or political power to murder a subject, even upon God's command.

212. *See* HEGEL, *PHILOSOPHY OF HISTORY*, *supra* note 120, at 213.

213. *See id.* at 214 ("[T]he emperor is the centre, around which everything turns . . .").

214. *See id.* at 207 ("[T]he internal law, the knowledge on the part of the individual of the nature of his volition, as his inmost self—even this is the subject of statutory enactment.")

215. *See* BUTLER, *supra* note 196, at 40.

216. *See* BETZIG, *supra* note 195, at 88 (concluding that "[d]espotism, defined as an exercised right to murder arbitrarily and with impunity, virtually invariably coincides with the greatest degree of polygyny"). The term "polygyny" refers to the marriage of one man to multiple women, whereas the term polygamy encompasses polygyny and polyandry, which is the marriage of one woman to multiple men. This Article explores the polygamy at issue in Mormon culture, which was strictly polygyny.

ety, monogamous marriage provides women with a sphere in which their equality can be protected and nurtured through love and care. Furthermore, as this Article will explain, the implicit recognition of the equality of men and women which is at the foundation of monogamy must ultimately lead to an explicit recognition of the equality of men and women.²¹⁷ Monogamous marriage also provides the experience of a unity which simultaneously sustains and promotes individuality. It transforms the self-interested adults of the civil economy into individuals who have the ability to identify the state as their highest individual end. This transformation ensures that the universal focus of the state can withstand the pressure of less rational individual wants and desires. The universal focus of the state, in turn, maintains those conditions under which individual particularity can develop and flourish, i.e., a limited and private realm of family and a public realm of civil society. Finally, the limited and transient character of the family created by monogamous—as opposed to polygamous—marriage ensures that the focus of the family will be on the nurturing and development of *individuals* who can emerge from the family and take their place in civil society as holders of rights. Monogamous marriage is therefore peculiarly suited to cultivate the freedom to pursue particular ends and the freedom of self-governance by rational ethical principles which must be characteristic of citizens of a free state.

B. Hegel and the Modern Liberal State

Any use of Hegel's theory of the relationship between the family and the state to explain the constitutional significance of marriage in the United States must overcome two basic barriers: concerns about Hegel's politics and concerns about Hegel's sexism. Hegel's politics may be problematic if his communitarian view²¹⁸ of the state

217. See *infra* notes 283-302 and accompanying text.

218. The term "communitarian" refers to Hegel's overall methodology of providing rational content to freedom by situating it in a concrete community which is structured according to the demands of reason. See generally CHARLES TAYLOR, *HEGEL AND MODERN SOCIETY* 80-84 (1979) [hereinafter TAYLOR, *MODERN SOCIETY*] (explaining Hegel's state as an attempt to divert the divisiveness of liberal individualism by situating the individual in a concrete social setting that, while encouraging the development of unique individual potential, also reveals the unity of this diverse community as the most profound human creation). Modern communitarians, characterized by their insistence that social justice can only be a function of shared understandings arising out of traditional or non-traditional communities, include Charles Taylor, Michael Sandel, Alasdair MacIntyre, and Roberto Unger. See generally SUSAN MOLLER OKIN, *JUSTICE, GENDER AND THE*

is viewed as inconsistent with the underlying premises of American constitutional, representative democracy. Indeed, many have argued that Hegel's political philosophy is essentially totalitarian.²¹⁹ Hegel's sexism becomes problematic if his understanding of marriage *requires* the exclusion of women from civil and political society. A resolution of these concerns is necessary before his explanation of the political significance of family and marriage becomes relevant to our understanding of American democratic institutions.

1. Hegel's Politics

We may start by disposing of the claim that Hegel's communitarianism is essentially supportive of totalitarianism. That argument distorts or ignores his insistence on the full development of and respect for individual conscience²²⁰ and the necessary development of a private sphere of family and economy in which individual freedom could flourish.²²¹ Henning Ottman and others have shown quite con-

FAMILY 42 (1989) (characterizing Taylor's, Sandel's, and MacIntyre's communitarianism as reactionary because it substantially relies on existing communities characterized by inegalitarian social relations); *id.* at 117 (contrasting "reactionary" communitarianism with Unger's radical communitarianism, which insists that only new communities purged of traditional relations of domination can fully realize the liberal goal of equality).

219. See, e.g., KARL R. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* 257 (1950) (attributing "modern totalitarian doctrines" to Hegel's teachings). Henning Ottman has produced a comprehensive historical overview of the many distortions of Hegel's political philosophy to serve the political purposes of the time. See Henning Ottman, *Hegel and Political Trends: A Criticism of the Political Hegel Legends*, in *THE HEGEL MYTHS AND LEGENDS* 53, 53-69 (Jon Stewart ed., 1996). He traces the characterization of Hegel as supporting a totalitarian state from the Bismark Hegelians of the mid- and late-1800s, see *id.* at 59-61, to the nationalists and national socialists of the early- and mid-1900s, see *id.* at 61-63, and to the liberal responses to German aggression after each of the world wars, see *id.* at 64-65.

220. See, e.g., Fred Dallmayr, *Rethinking the Hegelian State*, in *HEGEL AND LEGAL THEORY*, *supra* note 145, at 321, 338 (arguing that "the Popperian charge of collectivism and totalitarian repression can readily be countered"); Franz Grégoire, *Is the Hegelian State Totalitarian?*, in *THE HEGEL MYTHS AND LEGENDS*, *supra* note 219, at 104, 107 (arguing that Hegel's doctrine that "the state and the individual . . . each has its own value . . . precludes us from accusing Hegel of 'totalitarianism,'" and noting that "Hegel was much too careful to harmonize diverse points of view to fall into such a one-sided conception"); Walter A. Kauffman, *The Hegel Myth and its Method*, in *THE HEGEL MYTHS AND LEGENDS*, *supra* note 219, at 82, 90 ("We are bound to misunderstand Hegel when we construe his remarks about conscience in terms of the Nazi state."); T.M. Knox, *Hegel and Prussianism*, in *THE HEGEL MYTHS AND LEGENDS*, *supra* note 219, at 70, 78 ("[I]t is to turn [Hegel's] doctrine upside down to hold that he thinks that the triumph of one 'world-historical' nation over another is a triumph of mere brute force . . . when he thinks in fact that it is a triumph of reason.").

221. See, e.g., Kauffman, *supra* note 220, at 91 ("While Hegel considers the state supreme among human institutions, he does so precisely because we would subordinate the

vincingly that this view of Hegel was developed to serve the political ends of Hegel's various misinterpreters.²²² However, even if Hegel's state is neither totalitarian, fascist, nationalistic nor racist, there can still be genuine concern that his vision of an organic, unitary state is inconsistent with the foundational liberalism of the American political system.

Hegel's communitarianism emerges in his proposals for the rationally structured state.²²³ The feature of his ideal modern state which may be most difficult to harmonize with the American political system is Hegel's non-elective legislature, where the family and the natural sphere of ethical life are represented by the agricultural class, which enters the legislature by right of birth,²²⁴ and civil society and the economic sphere of ethical life are represented by the business class,²²⁵ which enters the legislature not by election in a political contest, but rather through deputies who have emerged from civil society as managers or leaders of some branch of civil society.²²⁶

whole realm of institutions to the highest spiritual pursuits . . . [This] does not imply . . . that Hegel's state is 'totalitarian' . . . "); Knox, *supra* note 220, at 79 ("[Hegel] tries to find a place in the state *both* for individual liberty *and* for strong government . . ."); Ottman, *supra* note 219, at 65 (noting that Hegel's doctrines of "the emancipation of the state from religion and secularization" and the "prepar[ation] . . . [of] the private citizen of the ideologically neutral state for the political universality . . . hinder[] extremism").

222. See, e.g., Ottman, *supra* note 219, at 53 ("Every political trend, whether liberalism, socialism, communism, conservatism, nationalism, or national socialism, has tried to bring [Hegel] over to its side.").

223. Hegel's ideal state includes a constitutional monarchy, see HEGEL, PHILOSOPHY OF RIGHT, *supra* note 30, ¶ 273, at 176, with state support for religion, see *id.* ¶ 270, at 168, separation of powers motivated more by organizational needs, see *id.* ¶ 272, at 175, than distrust, see *id.* app. Additions n.178, at 292 (referring to ¶ 300), and a non-elective legislature structured by class, see *id.* ¶¶ 306-07, at 199. However, Hegel's ideal monarch was neither despotic nor feudal. See Errol E. Harris, *Hegel's Theory of Sovereignty, International Relations, and War, in HEGEL'S SOCIAL AND POLITICAL THOUGHT*, *supra* note 145, at 137, 138. Hegel's proposal for state support of religion was moderated by several factors. First, he was unwilling to allow the state to force a particular religion upon the individual. See HEGEL, PHILOSOPHY OF RIGHT, *supra* note 30, ¶ 270, at 168. Second, he insisted that church doctrine was not a state matter, but rather a matter of individual freedom. See *id.* ¶ 270, at 169-70. Third, he distinguished between political truth and religious truth. See *id.* ¶ 270, at 166-67. Fourth, he argued that the division of the church into various sects promotes freedom of thought. See *id.* ¶ 270, at 168. Fifth, he stated that only the state can offer true universality. See *id.* ¶ 270, at 173-74.

224. See HEGEL, PHILOSOPHY OF RIGHT, *supra* note 30, ¶¶ 306-07, at 199.

225. See *id.* ¶ 308 & remarks, at 200.

226. See *id.* Hegel argued:

Since these deputies are the deputies of civil society, it follows as a direct consequence that their appointment is made by the society as a society. That is to say, in making the appointments, society is not dispersed into atomic units, collected to perform only a single and temporary act, and kept together for a moment and

Hegel's legislature was not elective because he viewed both direct democracy and representative democracy as reproducing in the government the particularistic character of civil society.²²⁷ "[T]he Many, as units—a congenial interpretation of 'people,' are of course something connected, but they are connected only as an aggregate, a formless mass whose commotion and activity could therefore only be elementary, irrational, barbarous, and frightful."²²⁸ For Hegel, the irrationality of pure democracy in the modern state springs from the fact that, in the modern world, unlike the ancient Greek world,²²⁹ the moment of individuality has been fully developed.²³⁰ Such pure particularity cannot produce anything universal; the basis of political life "could then only be the abstract individuality of caprice and opinion."²³¹

Indeed, the immediate compromise of all democracies from consensus to majority rule reveals the fallacy of any claim of universality arising from a democracy in which there is not already an underlying

no longer. On the contrary, it makes the appointment as a society, articulated into associations, communities, and Corporations, which although constituted already for other purposes, acquire in this way a connexion with politics.

Id.

227. See *id.* remarks to ¶ 308, at 200. Hegel explained:

To hold that every single person should share in deliberating and deciding on political matters of general concern on the ground that all individuals are members of the state . . . is tantamount to a proposal to put the democratic element without any rational form into the organism of the state, although it is only in virtue of the possession of such a form that the state is an organism at all.

Id.; see also HEGEL, PHILOSOPHY OF HISTORY, *supra* note 120, at 174 ("[P]articularity and individuality assert themselves in the form of aristocracy and democracy.").

228. HEGEL, PHILOSOPHY OF RIGHT, *supra* note 30, remarks to ¶ 303, at 198.

229. See HEGEL, PHILOSOPHY OF HISTORY, *supra* note 120, at 272. Hegel wrote:

The democratic constitution is here the only possible one: the citizens are still unconscious of particular interests, and therefore of a corrupting element: the objective will is in their case not disintegrated. . . . That very subjective freedom which constitutes the principle and determines the peculiar form of freedom in our world, which forms the absolute basis of our political and religious life, could not manifest itself in Greece otherwise than as a *destructive* element.

Id.

230. In Hegel's view, the full development of individuality was brought about by two factors: first, the freeing influence of Luther's proclamation that Christ, representing universal truth, is imminently present in each human being only through individual, subjective faith, and second, the complex economic world of civil society. Cf. HEGEL, PHILOSOPHY OF RIGHT, *supra* note 30, remarks to ¶ 124, at 84 ("The right of the subject's particularity . . . is the pivot and centre of the difference between antiquity and modern times. This right in its infinity is given expression in Christianity."); *id.* app. Additions, n.116, at 267 ("In civil society each member is his own end, everything else is nothing to him.") (referring to ¶ 182).

231. *Id.* remarks to ¶ 303, at 198.

agreement; there will always be a minority in the modern world, and its views will be trampled in a pure democracy.²³² Furthermore, because the demand of pure democracy for self-rule of particular individuals is inconsistent with the practical necessity of an executive government, obedience to the government always appears as a constraint on liberty,²³³ and results in distrust and hostility toward government officials, no matter who they are.²³⁴

Hegel suggests that universality could emerge within civil society only in the form of social groups formed by the kind of work one does, i.e., classes²³⁵ and "Corporations."²³⁶ Organized around particular trades or skills, the Corporation is like a second family for workers.²³⁷ It serves, as does the family, to connect otherwise iso-

232. See HEGEL, *PHILOSOPHY OF HISTORY*, *supra* note 120, at 173 ("[T]here would be no longer freedom, for the will of the minority would cease to be respected."). Hegel also stated:

[E]specially in large states[, popular suffrage] leads inevitably to electoral indifference, since the casting of a single vote is of no significance where there is a multitude of electors. . . . Thus, the result of an institution of this kind is more likely to be the opposite of what was intended; election actually falls into the power of a few, of a caucus, and so of the particular and contingent interest which is precisely what was to have been neutralized.

HEGEL, *PHILOSOPHY OF RIGHT*, *supra* note 30, remarks to ¶ 311, at 202-03.

233. See HEGEL, *PHILOSOPHY OF HISTORY*, *supra* note 120, at 173. Hegel argued: The state is an *abstraction*, having even its generic existence in its citizens; but it is an actuality, and its simply generic existence must embody itself in individual will and activity. . . . [T]his necessitates the selection and separation from the rest of those who have to take the helm in political affairs, to decide concerning them, and to give orders to other citizens, with a view to the execution of their plans. . . . Yet obedience seems inconsistent with liberty, and those who command appear to do the very opposite of that which the fundamental idea of the state, *viz.*, that of freedom, requires.

Id.

234. See *id.* at 366 ("The particular arrangements of the government are forthwith opposed by the advocates of liberty as the mandates of a particular will and branded as displays of arbitrary power."). Hegel noted that the Sophists' introduction of subjective reflection and individual conscience caused the downfall of the Greek world. See *id.* at 272 ("[T]his decay even Thucydides notices, when he speaks of every one's thinking that things are going on badly when he has not a hand in the management.").

235. See HEGEL, *PHILOSOPHY OF RIGHT*, *supra* note 30, ¶ 201, at 130-31 ("The infinitely complex, criss-cross, movements of reciprocal production and exchange, and the equally infinite multiplicity of means therein employed, become crystallized, owing to the universality inherent in their content, and distinguished into general groups . . . in other words, into class-divisions.").

236. See *id.* ¶¶ 251-52, at 152-53.

237. See *id.* ("[A] selfish purpose, directed toward its particular self-interest . . . [makes] a member of civil society . . . a member of a Corporation . . . [The corporation's] right is to come on the scene like a second family for its members, while

lated individuals and provide them with a sense of unity and common purpose.²³⁸ As members of such social groups, not only do the particular wants and desires of individuals acquire universality,²³⁹ but the individual reexperiences the possible unity of particular and universal.²⁴⁰ Consequently, Hegel saw the Corporation and marriage as "the two fixed points round which the unorganized atoms of civil society revolve."²⁴¹ By arranging the legislature so that it existed to represent these family, class, and corporation interests, Hegel hoped to ensure that legislators contribute something universal to the state.²⁴² At the same time, he also hoped to avoid the hostility to government bred by liberal democracy, by making representation itself arise out of unity rather than isolation, so that the individuals represented would see the state as a larger unity of which they were an essential part.²⁴³

Hegel predicted that the "problem . . . with which history is now occupied, and whose solution it has to work out in the future"²⁴⁴

civil society can only be an indeterminate sort of family . . .").

238. See CHARLES TAYLOR, *HEGEL* 434 (1975) [hereinafter TAYLOR, HEGEL] ("The three classes represent each a dimension which must be present in the modern state. There must be the sense of allegiance to a whole which is above and greater than oneself, the dependence on something bigger . . .").

239. See HEGEL, *PHILOSOPHY OF RIGHT*, *supra* note 30, remarks to ¶ 308, at 200-01. Hegel explained:

The concrete state is the whole, articulated into its particular groups. The member of a state is a member of such a group, i.e. of a social class, and it is only as characterized in this objective way that he comes into consideration when we are dealing with the state. His mere character as universal implies that he is at one and the same time both a private person and also a thinking consciousness, a will which wills the universal. This consciousness and will, however, lose their emptiness and acquire a content and a living actuality only when they are filled with particularity, and particularity means determinacy as particular and a particular class-status Hence the single person attains his actual and living destiny for universality only when he becomes a member of a Corporation, a society, [etc.].

Id.

240. In the Corporation, the "particularity of need and satisfaction" is united with the "universality of abstract rights." *Id.* ¶ 255, at 154.

241. *Id.* remarks to ¶ 255, at 154 (footnote omitted).

242. Cf. W. Ver Eecke, *Relation Between Economics and Politics in Hegel*, in HEGEL'S SOCIAL AND POLITICAL THOUGHT, *supra* note 145, at 91, 98 ("[T]he economic order educates all particulars toward universality . . .").

243. See HEGEL, *PHILOSOPHY OF RIGHT*, *supra* note 30, ¶ 253, at 153 ("It is also recognized that he belongs to a whole which is itself an organ of the entire society, and that he is actively concerned in promoting the comparatively disinterested end of this whole."); see also TAYLOR, HEGEL, *supra* note 238, at 445 (indicating that estates must be founded on "organic articulation of the estates of society" to link people to government).

244. HEGEL, *PHILOSOPHY OF HISTORY*, *supra* note 120, at 367.

would be the collision of “[l]iberalism’ . . . which insists upon the sway of individual wills”²⁴⁵ with the communitarian aspects of the modern state.²⁴⁶ He believed that the atomism of the civil economy must be balanced by institutions which unify people, and that these institutions must further be reflected in and protected by the state in order for the state to gain the trust of its citizens.

Clearly, a legislature structured and constituted as Hegel proposed is inconsistent with American democracy. At the same time, the American insistence on an elected executive and an elected legislature, which reflects a continued “liberal” distrust of those officials, appears to indicate a rejection of Hegel’s critique of liberalism. However, the modern economy has produced a level of social fragmentation and homogenization that went well beyond anything Hegel anticipated.²⁴⁷ The classes and Corporations which Hegel thought would provide a communal experience in civil society parallel to the communal experience of the family in private life have been destroyed,²⁴⁸ at least as positive institutions.²⁴⁹ However, if the continued strength and vitality of the American state is traceable to new institutions that provide unity and cohesion sufficient to balance the fragmentation of modern society, or if the contemporary fracture and decay of American society is attributable to the lack of such balancing,²⁵⁰ then we may say that in principle Hegel was correct. This

245. *Id.* at 366.

246. *See id.* (defining these aspects as “the establishment of rational rights, with freedom of person and property, with the existence of a political organization in which are to be found various circles of civil life each having its own functions to perform”).

247. *See* TAYLOR, HEGEL, *supra* note 238, at 456 (“[T]he manufacturing economy based on division of labour and exchange tended to extend itself endlessly, and in the process to prize men loose from any group allegiance, to accelerate their individual mobility while at the same time intensifying their reciprocal dependence in a vast, impersonal system.”).

248. *See* TAYLOR, MODERN SOCIETY, *supra* note 218, at 111 (arguing that Hegel was wrong about the vitality of rigid social differentiation because he failed to take into account the “increasing ‘classlessness’ of modern society”).

249. *See id.* at 116-17 (arguing that the modern commitment to ideologies of equality requires making all real differences between individuals insignificant).

250. Charles Taylor argues that Hegel’s insight about the necessity of unifying institutions is relevant to contemporary liberal states:

If these common meanings fail, then the foundations of liberal society are in danger. And this indeed, seems a distinct possibility today. The problem of recovering *Sittlichkeit*, of reforming a set of institutions and practices with which men can identify, is with us in an acute way in the apathy and alienation of modern society. For instance the central institutions of representative government are challenged by a growing sense that the individual’s vote has no significance.

assertion, in turn, would support the attempt of this Article to ground the constitutional significance of marriage in a Hegelian view of marriage as a critical political institution that nurtures individuality and promotes social unity. Indeed, the contemporary philosopher Charles Taylor has argued that "liberal society, like any other, cannot hold together simply by the satisfaction of its members' needs and interests. It also requires a common, or at least widespread set of beliefs which link its structure and practices with what its members see as of ultimate significance."²⁵¹ In other words, a liberal society, if it is to survive as a free society, must not fulfill the infinite possibility of individual diversification, or it will lose the glue of commonality which holds it together.²⁵²

I would suggest that the ideology of the American state as purely liberal is moderated by the reality of an American society that generates forces of cohesion and community which counterbalance fragmentation from the emphasis on individual liberty.²⁵³ To the extent that these counterbalancing unifying institutions are no longer as obvious as class and occupation, marriage might be seen as the sole remaining "pillar" upon which a unified society rests. This might then explain why "the family" and "family values" have emerged as so politically significant in contemporary American politics.²⁵⁴ Yet other unifying forces are present. In the United States, as in the rest of the world, nationalism has emerged to provide an enormously unifying counterbalance to people unconnected by traditional communities of culture, religion, or geography.²⁵⁵ A world of

TAYLOR, HEGEL, *supra* note 238, at 460. "Sittlichkeit" is the idea of "a community in which the good is realized in common life . . . reconcil[ing] the fully developed individual subjectivity and the universal." *Id.* at 438.

251. *Id.* at 459.

252. *See id.* at 460. Taylor argues as follows:

A liberal society which is a going concern has a *Sittlichkeit* of its own, although paradoxically this is grounded on a vision of things which denies the need for *Sittlichkeit* and portrays the ideal society as created and sustained by the will of its members. Liberal societies, in other words, are lucky when they do not live up, in this respect, to their own specifications.

Id.

253. *See* Charles Taylor, *Hegel's Ambitious Legacy for Modern Liberalism*, in HEGEL AND LEGAL THEORY, *supra* note 145, at 64, 75 (arguing that a free state requires liberalism balanced by the Hegelian civic humanism, in which defense of individual rights is complemented by "a strong sense of common values . . . particularized and bonded to a particular people in history").

254. *Cf.* Hafen, *supra* note 12, at 479-80 (noting that "mediating structures" such as the family are essential to overcome alienation from the political order).

255. *See* TAYLOR, HEGEL, *supra* note 238, at 455. Taylor explains:

nation-states, involvement in several world and localized wars, and clear conflicts in national ideologies have made national identity and international political and economic dominance strongly unifying factors in modern life.

One can identify features in the American electoral system which could be seen as moderating what Hegel would have considered a dangerously democratic system. Pure popular suffrage is, in fact, almost non-existent in this country. The requirement that candidates represent a party before being placed on the ballot requires, in Hegel's terms, that elected officials take on some of the universal character of their party.²⁵⁶ Finally, the division of the electoral populace into states and districts for purposes of representation, along with the electoral college system, can also be seen as mechanisms for universalizing the representative who emerges victorious.²⁵⁷

[T]he most important force to fill the gap left by the decline of traditional allegiances has been nationalism. . . . [T]he continued, unchecked operation of this drive [toward individualism and homogenization], sweeping all traditional authority and social differentiation before it . . . opened the void that nationalism has been called to fill. And reciprocally, the religion of nationalism . . . has been a powerful instrument of homogenization. How many modern societies could command sufficient loyalty and civic spirit to carry on without a strong dose of nationalism?

Id.

256. Prospective candidates on the general ballot are chosen by a more select group of electors based on their achievements in civil society that identify them as representing certain universal aspects of the electorate. *See, e.g.*, IOWA CODE § 43.65 (1995) (providing that the candidates who receive the highest number of votes in each of the political parties' primaries shall be placed on the ballot in the general election). This system of selecting nominators is similar to the way that the deputies of the business class were chosen. *See* HEGEL, PHILOSOPHY OF RIGHT, *supra* note 30, ¶¶ 310-11, at 201-02. The Democratic and Republican parties each espouse positions that they hope will appeal to particular social groups. *See generally* SAMUEL J. ELDERSVELD, POLITICAL PARTIES IN AMERICAN SOCIETY 273 (1982) (explaining that a "major element in campaign strategy is the need to put together a coalition of interest groups"); NICHOLAS J. O'SHAUGHNESSY, THE PHENOMENON OF POLITICAL MARKETING 6-8 (1990) (explaining the role of political marketing in American politics as persuading narrowly defined groups that a particular candidate has their interest at heart). The continued success of these traditional parties depends upon their ability to appear to represent the "average American" in a way that allows a substantial number of otherwise diverse individuals to identify with and be unified by "the party." *See* FRED DALLMAYR, G.W.F. HEGEL: MODERNITY AND POLITICS 253-54 (1993) (arguing that political parties moderate the tendencies of democracy toward atomization of the populace).

257. Suggestions that proportional or cumulative voting would produce elected officials representative of more socially cohesive groups are premised on a recognition that the fairness of representative democracy requires that elected representatives reflect an interest group. *See, e.g.*, LANI GUINER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 148-49 (1994) (arguing that "[b]ecause geographic districting wastes votes, neither minority groups nor majority voters are fairly

Other unifying forces at work include complex social identifications²⁵⁸ that can be reflected in our government both formally and informally. Various alliances, such as "fraternal organizations, 'rainbow coalitions,' base communities, and especially the so-called 'new social movements' concerned with such issues as ecology, nuclear disarmament, and the dismantling of discriminatory practices,"²⁵⁹ which cut across racial, economic, and other divides, may be the modern bases of public unification.²⁶⁰ Also, a strongly developed system of public education makes possible the learning of a common language and body of knowledge, and forms the core of many communities.²⁶¹ Even ethnicity, which in America creates a multitude of partial communities and can be enormously divisive,²⁶² may be transformed into a largely unifying force.²⁶³ Finally, the United States has a shared political culture based on the Constitution, which grounds a deep and abiding trust in the structure and institutions of our government, even when particular governments fail individuals among us.²⁶⁴

represented," but that "semiproportional systems such as cumulative voting give more voters, not just racial minorities, the opportunity to vote for a winning candidate").

258. Fred Dallmayr has argued that our complex social relationships "cannot be confined to the level of conflict or hostility . . . but must include bonds of sympathy. . . . The same relationism . . . can still be invoked as locus of an open-ended public space and thus as emblem of a democratic 'social bond.'" Dallmayr, *supra* note 220, at 342.

259. *Id.* at 341.

260. *See id.* Charles Taylor, on the other hand, sees one of the primary unifying features of Western society as the continuing ideology of conquering the frontier, *see* TAYLOR, HEGEL, *supra* note 238, at 411, modernized as the transformation of society through mastery of nature and technology, *see* TAYLOR, MODERN SOCIETY, *supra* note 218, at 128.

261. *See* TAYLOR, MODERN SOCIETY, *supra* note 218, at 87-88 (identifying language, culture, home teams, and politics as community-creating institutions).

262. *See id.* at 117 (noting that ethnic differences can become "foci of identity," but suggesting they are "exclusive and divisive"). *But see* MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION (Amy Gutmann ed., 1994) [hereinafter MULTICULTURALISM] (containing essays by Charles Taylor, K. Anthony Appiah, Jurgen Habermas, Steven Rockefeller, Michael Waltzer, and Susan Wolf arguing about the coherence of recognizing ethnic and cultural communities/identities within a liberal state).

263. *See* KWAME ANTHONY APPIAH, IN MY FATHER'S HOUSE: AFRICA IN THE PHILOSOPHY OF CULTURE 26-27 (1992) (suggesting the possibility of "liberating unities of culture" where ethnicity is a matter of consent rather than descent).

264. *See* Taylor, *supra* note 253, at 73 (arguing that the contemporary American polity embodies, in part, Hegel's demand that a stable free society requires "a very strong attachment to particular institutions"); *see also* CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY 505 (1989) [hereinafter TAYLOR, SOURCES OF THE SELF] (suggesting that neoconservative politics that undercut welfare programs erode the existing and necessary identification of American (and British) citizens as part of a community whose unity is both assisted and reflected in public institutions and politics).

In these and other features of American life, and especially in the institution of marriage, we may find the sustaining forces of cohesion and community which give weight to Hegel's view that the modern state must be jointly grounded on individual liberty and social connection and commitment. This in turn justifies the use of Hegel's explanation of the political significance of marriage as being at the heart of our respect for the individual as well as our coherence as a nation.

2. Hegel's Sexism

The second substantial barrier to our use of Hegelian theory is that it premises the transcendent unity of monogamous love upon a radical distinction between men and women, in which women are viewed as arriving at a rather concrete and passive personhood through intuition and feeling, while men achieve a more universal personhood through conceptual thought.²⁶⁵ Indeed, Hegel is notorious for suggesting that "[t]he difference between men and women is like that between the difference between animals and plants. Men correspond to animals, while women correspond to plants"²⁶⁶ For Hegel, women are uniquely, albeit primitively, cognizant of their universality and communal unity without further struggle in the public sphere because they are essentially emotive and immediately focused on the concrete realities of daily existence.²⁶⁷ Women can, therefore, reach their highest potential of universality within the family. At the same time, women's presence in the family creates the unity of feeling that is such an essential contribution of marriage to the development of citizens and the possibility of a coherent state.²⁶⁸ This distinction between the nature of men and the nature of women grounds Hegel's insistence that women be confined to the private sphere of the family, and not be permitted to take part in either the public economic sphere²⁶⁹ or the public political sphere.²⁷⁰

265. See HEGEL, *PHILOSOPHY OF RIGHT*, *supra* note 30, ¶ 166, at 114.

266. *Id.* app. Additions n.107, at 263 (referring to ¶ 166).

267. See *id.* ¶ 166, at 114.

268. See *id.*

269. Hegel makes the man the legal representative of the family, and "it is his prerogative to go out and work for [the family's] living, to attend to its needs, and to control and administer capital." *Id.* ¶ 171, at 116.

270. See *id.* app. Additions, n.107, at 263-64 (referring to ¶ 166). Hegel explained: When women hold the helm of government, the state is at once in jeopardy, because women regulate their actions not by the demands of universality but by arbitrary inclinations and opinions. Women are educated—who knows how?—as

Whatever the outcome of the continuing public debate on the meaning of physiological or neurochemical bases of behavioral differences between men and women, as a matter of constitutional law the Court no longer gives any legal weight to claims that men and women have differing capacities to be educated,²⁷¹ engage in work,²⁷² or function in nurturing family roles.²⁷³ The question that this Article must address, therefore, is whether Hegel's understanding of the nature of marriage and its contributions to the possibility of a stable and free government can withstand the modern erosion of the traditionally perceived difference between men and women.

This inquiry must begin by recognizing that Hegel's view of marital unity arising out of difference was based not merely on acceptance of traditional gender roles,²⁷⁴ but rather upon Hegel's belief that differentiation and contradiction²⁷⁵ are fundamental logical/ontological principles to which the structure of reality must

it were by breathing in ideas, by living rather than by acquiring knowledge. The status of manhood, on the other hand, is attained only by the stress of thought and much technical exertion.

Id.; see also *id.* remarks to ¶ 301, at 195 (noting that the empirical universality claimed for universal suffrage is immediately defeated by the fact that it necessarily "excludes at least children [and] women").

271. See, e.g., *United States v. Virginia*, 116 S. Ct. 2264, 2280 (1996) ("State actors controlling gates to opportunity . . . may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females.'" (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982))).

272. See, e.g., *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 547 (1971) (Marshall, J., concurring) ("[E]mployment opportunity may be limited only by employment criteria that are neutral as to the sex of the applicant.").

273. See, e.g., *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (holding unconstitutional an Illinois statute that terminated the parental rights of unwed fathers, while married fathers and both married and unmarried mothers could have such rights terminated only upon a finding of neglect and lack of fitness).

274. See DALLMAYR, *supra* note 256, at 255 (arguing that Hegel's strict gender roles "should be attributed not simply to personal (patriarchal) leanings of the philosopher, but rather to deep-seated metaphysical premises").

275. Hegel proposed that logic was a system of movement and vitality powered by inherent contradiction. See Robert Pippin, *Hegel's Metaphysics and the Problem of Contradiction*, in *THE HEGEL MYTHS AND LEGENDS*, *supra* note 219, at 239, 241. Hegel demonstrated how important metaphysical concepts were basically incoherent; close examination of their essential meaning revealed that they must be understood as the apparent contradiction of this meaning. See TAYLOR, *HEGEL*, *supra* note 238, at 229. This inherent contradiction forces a movement to a new concept that, while reconciling the initial contradiction, contains contradictions of its own. See, e.g., *id.* at 232 (explaining the opening argument of Hegel's *Science of Logic*, that pure simple being is at the same time nothing unless it is not simple being, but rather being with some determinate quality (referring to GEORG W.F. HEGEL, *SCIENCE OF LOGIC* (G. Lasson ed., Felix Miner, Leipzig (1963) (1812-16))).

conform.²⁷⁶ Thus, Hegel saw the differentiation of sex as recapitulating the basic political contradiction of individuality/particularity and unity/universality.²⁷⁷ Men were characterized by individuality and women were characterized by simply emotive unity. The unity which arose from the marriage of a man and a woman would, therefore, be a more complex unity which took into account individuality, while the individuality which persisted or arose out of such a marriage would be a more complex individuality that took into account the necessity of unity.²⁷⁸

Thus, under Hegel's philosophy, it is the difference of sex that allows a simple unity of family which can nonetheless nurture and develop individuals, just as it is differentiation of class and corporation which makes possible a unity of state which nonetheless respects and protects individuals.²⁷⁹ Instead of being just a "heap" of arbitrarily different individuals, the Hegelian state utilizes these "rational" differences in its organization to produce a greater whole, just as the organization of differentiated cells into organs makes possible an organism which is more than the sum of its parts.²⁸⁰ The Hegelian state, therefore, is organic,²⁸¹ and human differentiation by class, corporation, and sex is, consequently, essential to the possibility of both individual freedom and community.²⁸²

276. For Hegel, external reality was the embodiment of thought or reason, and therefore reality could be shown to reflect the logic of reason. See generally TAYLOR, HEGEL, *supra* note 238, at 225-26 (explaining the difference between modern dualism, which posits thought and reality as distinct, and the Hegelian view that reality is the embodiment of pure, infinite rationality, in which we participate as individual thinkers). For Hegel, logic was therefore both transcendental, in that it revealed the necessary structure of human knowledge, and ontological, in that it revealed the necessary structure of reality as well. See *id.* at 226-27.

277. It is the resolution of this contradiction which creates the possibility of freedom. See HEGEL, PHILOSOPHY OF RIGHT, *supra* note 30, ¶ 260, at 160-61.

278. See *id.* ¶ 166, at 114. Patricia Jagentowicz Mills argues that while, for Hegel, male individuality is directly benefited by female universality, PATRICIA JAGENTOWICZ MILLS, WOMAN, NATURE, AND PSYCHE 42 (1987), female universality is not, under Hegel's account, permitted to achieve independent individuality, see *id.* at 39. Instead, the individuality that arises out of female unity takes the form of communal family property which is inheritable. See *id.* at 40-41.

279. See Raymond Plant, *Economic and Social Integration in Hegel's Political Philosophy*, in HEGEL'S SOCIAL AND POLITICAL THOUGHT, *supra* note 145, at 59, 71 (explaining the way in which labor for Hegel not only developed individuality, but also developed community by creating rationally structured interdependent social relations).

280. See HEGEL, PHILOSOPHY OF RIGHT, *supra* note 30, ¶ 308 & remarks, at 200-01.

281. See TAYLOR, HEGEL, *supra* note 238, at 380.

282. See *id.* at 406-09 (discussing Hegel's view that differentiation by rationally distinguished classes is essential to the possibility of a representative government that can

We must begin by noting that the assumption that women were not individuated in the same way as men produces an internal contradiction in Hegel's account of monogamous marriage.²⁸³ In light of the rather radical differences Hegel posited between men and women, it is difficult to understand how heterosexual marriage could provide enough of an "other" for the man to experience the transcendence of his individual personhood into marital unity.²⁸⁴ Indeed, Hegel's view of the role of the man as the legal representative of the family²⁸⁵ would seem to require that the full surrender of male personality in the marriage be inhibited.²⁸⁶ Hegel's emphasis on the ethical significance of monogamy is "marred by the subordinate status and incomplete individuality of the woman."²⁸⁷ Only a marriage of equals can allow monogamy to fully achieve its promise of a unity which both transcends and nurtures individuality.²⁸⁸

Despite this contradiction, Hegel clung to this view of women as essentially incapable of individuality. However, it is important to recognize that Hegel's sexism is fundamentally related to the classism which led him to presume that freedom could be the product of a non-elective legislature.²⁸⁹ Because he believed that society could only achieve unity out of pure particularity by weaving together partial unities, he took as a given, as "rational," the differentiation of his time, gender and class, and enshrined them in state institutions.

achieve integration of this differentiation); ALLEN W. WOOD, *HEGEL'S ETHICAL THOUGHT* 243-45 (1990) (explaining Hegel's insistence that gender roles are rational and essential as gaining its primary strength from the political need to ensure that the family would remain a place of simple, concrete unity created by feeling).

283. See, e.g., Butler, *supra* note 147, at 235 (commenting that the impossibility of total mutual commitment where only men retain a role in civil society and the state was a contradiction Hegel "might have recognized more explicitly if he had been as concerned to ferret out the objective, institutionalized contradictions of the present as he was to justify the present as a rational triumph over the contradictions of the past"); MILLS, *supra* note 278, at 39 (arguing that given Hegel's view of women as unindividuated, men cannot recognize themselves in women, and "a truly human love is only possible between men"); Andrew Koppelman, *Sex Equality and/or the Family: Bloom vs. Okin to Rousseau vs. Hegel*, 4 *YALE J.L. & HUMAN.* 399, 420 & n.98 (1992) (listing and agreeing with numerous other Hegel commentators who have found his views on gender contradictory to his views on marriage).

284. See MILLS, *supra* note 278, at 39.

285. See HEGEL, *PHILOSOPHY OF RIGHT*, *supra* note 30, ¶ 171, at 116.

286. See MILLS, *supra* note 278, at 40.

287. Landes, *supra* note 127, at 139.

288. See Koppelman, *supra* note 283, at 424 (arguing that "the equality of women, far from destroying the essential goods of family life, is necessary for the full realization of those goods").

289. See HEGEL, *PHILOSOPHY OF RIGHT*, *supra* note 30, ¶ 307, at 199.

While none of the specific differentiations he relied upon appears particularly "rational" today, this Article has nonetheless defended Hegel's insight that some kind of rational differentiation is critical to the possibility of unifying individuals into at least partial communities,²⁹⁰ even if such modern differentiations are considerably more fluid and voluntary than those proposed by Hegel. Recognition that it is this insight that is at the root of Hegel's insistence that a truly free society must institutionalize social, economic, and gender differentiations means that we can reconcile Hegel's sexism with the modern notions of legal and social equality by explaining how the modern family may achieve unity through differentiation without relying on gender differentiation.²⁹¹

The easiest way to reconcile Hegel's outmoded views of gender roles would be to argue that modern men and women possess an equal understanding of unity of family, of the differentiation of economic life, and of the interdependent community of the nation.²⁹² This position is the obvious outgrowth of the liberal demand for equality by homogenization. However, anticipating this, Hegel insisted that only a deep immersion in the concrete life reflecting that particular value could bring proper development of it:²⁹³ "[a] man actualizes himself only in becoming something definite, i.e., something specifically particularized; this means restricting himself exclusively to one of the particular spheres of need."²⁹⁴ Thus, Hegel might have argued that without women devoting themselves exclusively to the family, the family as a real place of unity would not exist.

This argument still has appeal, as conservatives blame the destruction of the family and family values on working women,²⁹⁵ and as

290. See *supra* notes 274-82 and accompanying text.

291. See TAYLOR, HEGEL, *supra* note 238, at 410 (noting that Hegel was wrong about the future of class and social differentiation based on kinds of labor because "[t]he great homogenization of modern society shows that however varied may be the functions performed by citizens they can develop to a unity of outlook and life-style which puts paid to any argument for different relations to the process of decision").

292. See DALLMAYR, *supra* note 256, at 255 (arguing that in the modern "democratic setting, universalism or commonality can no longer be embodied in a specially trained class (of higher civil servants) but must be dispersed or disseminated in the social fabric itself, in a manner allowing all members to be active also as public citizens").

293. See TAYLOR, HEGEL, *supra* note 238, at 434.

294. HEGEL, PHILOSOPHY OF RIGHT, *supra* note 30, ¶ 207, at 133.

295. See Koppelman, *supra* note 283, at 399 (describing the conservative argument as stating that "[t]he family . . . cannot endure unless women willingly subordinate themselves to men and children").

feminists and working women perceive the extraordinary difficulty of creating a family and maintaining family life while devoting substantial energy to work and civic life.²⁹⁶ Some contemporary feminist theorists, like Nancy Chodorow and Carol Gilligan, who argue for "women's distinctive moral capacities and viewpoint,"²⁹⁷ might be viewed as giving modern currency to Hegel's view that women are better at grasping ethics in the form of concrete social relationships, which promotes unity, while men are better at grasping ethics in the form of abstract principles, which promotes individual independence.²⁹⁸ However, other scholars, such as Jessica Benjamin, see these genderized abilities as the pathological consequence of the construction of gender in relations of domination.²⁹⁹ Indeed, Benjamin argues that a healthy individual must integrate these different abilities rather than develop one at the expense of the other.³⁰⁰ Similarly, Susan Moller Okin disputes the dualism of an "ethic of justice and an ethic of care,"³⁰¹ arguing instead that ethics of justice must be rethought to take into account the essential role that feelings, care, and empathy play in the development of a sense of justice.³⁰² Consequently, modern commentators do not resolve the issue of whether Hegel was correct in arguing that the same person cannot be the emotional heart of a family, a self-interested business person, and a politician who can see the greater good.

If Hegel was correct, and the conflict between liberalism and simple communitarianism cannot be coherently resolved within a single individual,³⁰³ then either the squeezing of the family by the

296. See OKIN, *supra* note 218, at 5.

297. WOOD, *supra* note 282, at 245 (footnote omitted).

298. See *id.*; see also ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* 114, 129 (1987) (arguing the conservative position that because men are inherently selfish and individualistic and only women are altruistic, sexual egalitarianism spells the downfall of the family).

299. See JESSICA BENJAMIN, *THE BONDS OF LOVE: PSYCHOANALYSIS, FEMINISM, AND THE PROBLEM OF DOMINATION* 77 (1988).

300. See *id.* at 130-31.

301. OKIN, *supra* note 218, at 15.

302. See *id.* at 97-101 (arguing that John Rawls's detailed account in *A Theory of Justice* of moral development as essentially familial results in a notion of justice that is social rather than purely individualistic); see also JOHN RAWLS, *A THEORY OF JUSTICE* 462-72 (1971) (tracing the development of a sense of justice to a child's upbringing by loving parents who enforce their own standards of morality).

303. Charles Taylor argues that modern crises of alienation stem from the systematic eradication of partial-community identification as a positive contribution to individual identity. See TAYLOR, HEGEL, *supra* note 238, at 411-14. In his view,

economic and civic activities of both parents will be fatal to the family or we will find that one partner will drop out of public life rather than allowing the family to fall apart. However, nothing requires that the female partner be the one to leave public life. One could agree with Hegel that a difference exists between family-creating emotive abilities and individual-creating rational abilities, while viewing his attribution of the ability to make a family to women alone as incorrect. Men arguably can develop the same emotional abilities by taking their roles as nurturing parents more seriously and spending more time with their children. The capacity for creating a unity of feeling which is ethical is more a consequence of how individuals spend their time, rather than biology. Such men may find it as difficult to function in a working world as some family women do when that world gives little weight to family responsibilities. If concurrent roles are impossible, serial roles may be the answer for many.

If, on the other hand, Hegel was wrong and social differentiation can be replicated in modern society by individuals taking on a number of different roles,³⁰⁴ then we can acknowledge Hegel's insight simply by insisting that the role of marital partner and parent be a valued and protected role in our society and that the unique ethics of the family be acknowledged. In such circumstances, it would seem appropriate that both marital partners take on the role of creators of emotional family unity.³⁰⁵ Hegel's claim that it is impossible for one individual to take on substantial public as well as private responsibilities may simply reflect the realities of eighteenth- and early nineteenth-century family, economic, and political life. Time- and labor-saving devices have made the concrete work of sustaining modern families less consuming. Entirely new kinds of labor have developed within civil society to fill in the gaps that working parents cannot cover in their more limited private time.³⁰⁶

one of the great needs of the modern democratic polity is to recover a sense of significant differentiation, so that its partial communities, be they geographical, or cultural, or occupational, can become again important centres of concern and activity for their members in a way which connects them to the whole.

Id. at 416.

304. See WOOD, *supra* note 282, at 246 (suggesting one solution to the inequality that necessarily results from Hegel's essentialist distinction between men and women is to have both sexes integrate both "the substantive and reflective principles").

305. See DALLMAYR, *supra* note 256, at 256 (arguing that the modern transformation of the Hegelian family requires that everyone develop emotive as well as rational abilities and that everyone take part in the nurturing life as well as the economic and public life).

306. See Cathleen D. Zick et al., *Trade-Offs Between Purchased Services and Time in Single-Parent and Two-Parent Families*, 30 J. CONSUMER AFFAIRS 1, 14-15 (1996)

Relieving women of the full burden of creating the unity of family frees women to take up the same position of individuality that men were able to maintain in the traditional Hegelian family. Indeed, if the unity of the Hegelian family is not to rest upon the same destabilizing contradiction upon which the simple unity of the Greek city-state rested, i.e., the exploitation, domination, and exclusion from public life of women, slaves, and non-citizens,³⁰⁷ it must arise out of a partnership of two individuals,³⁰⁸ both of whom are responsible for the emotional stability and concrete life of the family and

(detailing the purchase of meals, child-care and housekeeping services by single parent families). This is not to suggest that the current exploitation of poor and immigrant women that makes possible the careers of middle- and upper-class women is a positive development. Rather, this Article suggests that the evolution of women's work within the family into distinct forms of socially valuable labor that may be performed by non-family members is a necessary step in allowing men and women to balance the demands of family and work. See OKIN, *supra* note 218, at 115. If careers requiring care, nurture, and sensitivity to relationships are given proper social value, i.e., paid in accordance with their real value, the economic sphere could be a place where unifying emotional relationships are created and individual particularity is developed and expressed. At the same time, even non-nurturing work can be transformed by recognition of the demands of family. Today, parental leaves, flexible schedules, shared positions, and work from home all allow for concurrent integration of parental and economic roles by both men and women. This integration of family and work, however, need not be seen as destroying the distinct autonomy of private family units. Contrary to Frederick Engels' vision of the family dissolving as housekeeping and child-rearing become social enterprises, see FREDERICK ENGELS, ORIGIN OF THE FAMILY, PRIVATE PROPERTY AND THE STATE 110 (1972) (1884), the role of families as a critical nurturing and educating institution remains, even if much of the labor of family life is commercialized. See Richard W. Krouse, *Patriarchal Liberalism and Beyond: From John Stuart Mill to Harriet Taylor*, in THE FAMILY IN POLITICAL THOUGHT, *supra* note 127, at 145, 152 (arguing that where "individual autonomy and self-consciousness" are valued, a distinction between public life and private families must be preserved); *id.* at 170 (arguing that "cognitive and moral autonomy and self-development, as well as individual creativity of thought and action . . . require for their cultivation in children and adults alike . . . pluralistic loci of private thought and action, including families (or functionally equivalent forms of affective community)").

307. See MILLS, *supra* note 278, at 49 (arguing that the reciprocal recognition by men of each other in the Hegelian state depends, in part, on the domination of women, as it did in the Greek world); see also Krouse, *supra* note 306, at 147 (noting that "while the polis of classical political philosophy cultivates the intellectual and moral perfection of its citizens, it does so only by permitting them to stand on the bodies of their disenfranchised subjects"); cf. Janet L. Dolgin, *The Family in Transition: From Griswold to Eisenstadt and Beyond*, 82 GEO. L.J. 1519, 1566 (1994) (noting that in order to counter the hierarchy that was implicit in our medieval view of the family as a holistic community, we may have "sacrifice[d] community for independence").

308. Cf. Dolgin, *supra* note 307, at 1545 (arguing that the decision in *Eisenstadt* providing rights of privacy to individuals, whether married or unmarried, rather than to marital units, marked a legal turning point from a view of marriage as an indivisible unit to a view of marriage as an association of individuals (citing *Eisenstadt v. Baird*, 405 U.S. 438 (1972))).

for emerging from the family to take up identities in the public arena. Of course, since Hegel intended the family in the modern state to represent both what was good and bad about Greek society,³⁰⁹ he would not have seen this contradiction as a problem. As this Article has shown, this inability of families to tolerate independent individuality was precisely what made the family inadequate as a principle of political organization in Hegel's schema. Forcing the family to include the husband and wife as full individuals would, from his perspective, force the institution of marriage to solve the conflict between community and individuality, rather than allowing this conflict to be resolved by a state which preserves separate spheres for the development of both strands of human character. Hegel would undoubtedly say that a family of two individuals cannot maintain a connection of love and trust which creates a simple unity of feeling.

To the extent we see the relationships of the modern family legalized,³¹⁰ i.e., structured and judged by the criteria of justice rather than love, Hegel is certainly right. A marriage and family cannot remain intact if spouses do not value the relationship more than their

309. In particular, Hegel saw the unity that characterized the marital family as paralleling the relatively unreflective unity of the Greek city-state, a unity created by custom and tradition. Compare TAYLOR, HEGEL, *supra* note 238, at 395-96 (describing the immediate and unreflecting unity of the Greek city-state grounded in parochialism), *with id.* at 431 (describing the family as "immediate unreflecting unity based on feeling"). Like the Greek city-state, which took on a definite shape only in relation to other Greek city-states with different customs and traditions and in relation to the barbarian world, *see id.* at 395-96, the family is defined by the particular idiosyncrasies of multiple families and in distinction to the public arena, *see* HEGEL, PHILOSOPHY OF RIGHT, *supra* note 30, ¶ 181, at 122. At the same time, the family also reproduces the fundamental contradiction of the Greek city-state, where unreflective unity was made possible by the use of slaves and non-citizens whose existence within the state immediately contradicted the perceived unity. *See* TAYLOR, HEGEL, *supra* note 238, at 395-96. It was this inability of the Greek city-state to acknowledge the freedom and individuality of all rational men that made it unable to persist as a long-term political structure. *See id.* at 396. In the case of the modern family, the unreflective unity which arises is made possible by the non-individuality of women. However, in Hegel's view, the emotive and non-rational nature of women guarantees the basic stability of the family as a unifying but limited social institution that can fade into the background to allow all who are fully capable of individuality, i.e., men, to take up their individuality in civil society. *See* HEGEL, PHILOSOPHY OF RIGHT, *supra* note 30, ¶ 166, at 114; *cf.* Landes, *supra* note 127, at 142 (explaining that "the modern battle of the sexes is seen by Hegel as a degraded substitute for the conflict between family piety (the law of woman) and public law (the law of the land and man)").

310. *See* Dolgin, *supra* note 307, at 1560-61 (noting that courts and legislatures have become increasingly willing to view marital relationships as contracts between individuals that can be more freely negotiated and terminated).

individual desires.³¹¹ However, reconciliation of the demands of love and justice is the challenge of a modern individuality, which is considerably more complex than Hegel ever imagined. Modern society should not retreat to a reconciliation which denies justice to some³¹² and love to others. The modern marriage is the testing ground for modern society.³¹³ If the bonds of love cannot restrain the forces of individuality,³¹⁴ then little hope remains that the weaker bonds of a community or nation can do so.³¹⁵ Hegel was certainly right about the critical role the family plays in the realization of the modern liberal state. We must hope, however, that he was wrong about the shape that family must take.

311. See Koppelman, *supra* note 283, at 406 (discussing the argument that the injustice of a world in which gender subordination preserves "women's spirit of generosity and self-sacrifice" may be preferable to the justice of an egalitarian society in which everyone is "self-centered and indifferent to the needs of others" (citation omitted)).

312. See generally OKIN, *supra* note 218, at 134-69 (detailing the ways in which gender-structured marriage results in injustice to women and children).

313. See *id.* at 119. Okin criticizes the failure to see the transforming possibilities of families as places

where reason and emotion are equally called for, where all people care for others on a day-to-day basis and, through doing so, can learn to reconcile their own ambitions and desires with those of others and to see things from the points of view of others who may differ from themselves in important respects.

Id. (citation omitted); see also Dolgin, *supra* note 307, at 1566 (arguing that maintaining the family as a "model of responsible community in the modern world," while at the same time protecting the individuals within it from enforced inequality, is "one of the most important moral tasks of our time").

314. The extent to which modern family law has tended to protect individuals within the family from the injustices of family life is a reflection of the fact that only where love makes possible the transcendence of individuality can deviation from abstract principles of fairness and equality be tolerated. See MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 30-34 (1982) (arguing that affection and generosity within families obviates the need for justice within families). Modern family law reflects the insights that love cannot be presumed merely from the fact of marriage, and that the sacrifice of individuality cannot be enforced, but must be voluntary. See OKIN, *supra* note 218, at 29-34 (noting that, since in reality, families are sites of selfishness and violence which systematically harm women, we cannot rely upon the presence of generosity but rather must seek to achieve at least justice within the family, even as we continue to aspire to the ideal of the unselfish and generous family); Dolgin, *supra* note 307, at 1553-54 (noting that modern family law has tended to protect individuals within the family rather than the family unit as a whole).

315. Okin argues that a transformation of families from venues of total selflessness may well be accompanied by a transformation of civil society from a venue of total selfishness. See SUSAN MOLLER OKIN, *WOMEN IN WESTERN POLITICAL THOUGHT* 285-86 (1979).

IV. IS THE HEGELIAN VIEW OF MARRIAGE CONSISTENT WITH AMERICAN CASE LAW ON MARRIAGE?

As this Article has explained, the two main functions of marriage for Hegel are its capacity to produce individuals who are self-conscious moral agents, and its capacity to provide such otherwise isolated individuals with a sense that they can be unified with others in a way that preserves their individuality. This Article next explores how Hegel's views compare with the Supreme Court's view of marriage over the past two centuries.

A. Procreation

Lieber and Hegel recognized that the roots of marriage in procreational activity cannot define or justify the complex social institution that now exists.³¹⁶ Although marriage and procreation have often been linked in the case law,³¹⁷ any such reduction of marriage to procreation fails to capture the quintessentially human and social aspects of marriage.³¹⁸ If marriage is to be understood as fundamental, it cannot be based upon the necessity of exercising other fundamental rights which have been only artificially confined to marriage. Marriage is essential to procreation only where extra-marital sex is criminalized and procreation is dependent upon sex. If the right to marriage is reduced to a right to have children, then it would be entirely dependent upon the criminalization of extra-marital sex³¹⁹

316. See *supra* notes 85-95 and accompanying text (expounding Lieber's view); *supra* notes 139-55 and accompanying text (expounding Hegel's view).

317. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (noting that "if appellee's right to procreate means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place"); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (stating that "[m]arriage and procreation are fundamental to the very existence and survival of the race").

318. See generally Hohengarten, *supra* note 37, at 1512 (arguing that both domestic relations law and the right of privacy give a value to marriage independent of procreation); Adrienne K. Wilson, Note, *Same-Sex Marriage: A Review*, 17 WM. MITCHELL L. REV. 539, 544 & nn.30-31 (1991) ("[C]ourts are unlikely to fashion constitutional protections regarding the institution of marriage based solely on the encouragement of and ability to procreate."). *But cf.* *Poe v. Ullman*, 367 U.S. 497, 518-19 (1961) (Douglas, J., dissenting) (implying that since no constitutional question would be raised by the state's attempts to prevent non-procreative sex by banning the sale or manufacture of contraceptive devices, an essential connection exists between sexual relations and procreation in a legally recognized marriage).

319. It is unlikely that the fundamental right to marriage, as developed by the Court in *Zablocki*, 434 U.S. at 386, is based entirely upon the existence of a Wisconsin fornication statute.

and the unavailability of non-sexual reproduction.³²⁰ While the Court has said that states can constitutionally regulate extra-marital sex, and even criminalize it,³²¹ there is no constitutional requirement for its criminalization. Indeed, extra-marital sex has been successfully decriminalized in many states.³²² Just as contemporary legal reform has broken any necessary link between marriage and sex, our contemporary ability to procreate through the use of artificial insemination and various *in vitro* fertilization techniques has made it difficult to maintain the previously assumed necessary relationship between sex and procreation. Although marriage still could be artificially linked to procreation by simultaneously criminalizing all procreative sexual relations and limiting access to non-sexual reproduction to married couples,³²³ this is no different than the artificial link created between marriage and procreation by the criminalization of extra-marital sex. Arguably, modern American society still views marriage as related to procreation, but considers the institution of marriage socially valuable regardless of whether procreation takes place.

In *Turner v. Safley*,³²⁴ the Court explicitly acknowledged the merely supplemental connection that sexual relations, procreative or otherwise, have to marriage. In *Turner*, the Court invalidated a Missouri statute that had the effect of prohibiting prison inmates from marrying, except when there was a pregnancy or the birth of an illegitimate child. It recognized that, even when incarceration limits or

320. Artificial insemination and *in vitro* fertilization make procreation without sex a possibility. See ROBERT BLANK & JANNA C. MERRICK, *HUMAN REPRODUCTION, EMERGING TECHNOLOGIES, AND CONFLICTING RIGHTS* 86-88 (1995).

321. See *Griswold v. Connecticut*, 381 U.S. 479, 498 (1965) (Goldberg, J., concurring) ("The State of Connecticut does have statutes, the constitutionality of which is beyond doubt, which prohibit adultery and fornication."); cf. *Eisenstadt v. Baird*, 405 U.S. 438, 449 (1972) (noting that Massachusetts had the discretion to deter fornication through a variety of means).

322. See *Thomason v. Thomason*, 355 So. 2d 908, 911 (La. 1978) (noting decriminalization of private, consensual sexual conduct between adults); *Kozlowski v. Kozlowski*, 403 A.2d 902, 907 (N.J. 1979) (same); *Edwards v. Roe*, 327 N.Y.S.2d 307, 308 (Civ. Ct. 1971) (same); cf. *Iowa v. Pilcher*, 242 N.W.2d 348, 359 (Iowa 1976) (finding criminal sodomy statute unconstitutional as it applied to private sexual acts between consenting unmarried adults of the opposite sex).

323. Justice Goldberg's prescient remark in *Griswold* that the right to use contraception is the other side of the right not to be forced to use contraception, see *Griswold*, 381 U.S. at 497 (Goldberg, J., concurring), suggests that criminalization of all procreative sexual relations would not be constitutionally permissible even though nonsexual reproductive assistance was freely available.

324. 482 U.S. 78 (1987).

entirely precludes consummation of the marriage, marriage can still serve as an “expression[] of emotional support and public commitment,”³²⁵ and as “an exercise of religious faith.”³²⁶ In addition, the Court noted that marriage triggers certain government benefits, such as Social Security, and property rights, such as tenancy by the entirety and inheritance rights.³²⁷ The importance of consummation as an essential element of marriage was particularly minimized by the Court’s explanation of its earlier summary affirmance of a ban on marriages for prisoners with life sentences. It explained that the earlier decision was based not upon a determination that lack of possible consummation resulted in a lack of a constitutionally protected marital relationship, but rather on a determination that the government’s interest in punishing those crimes which warrant life sentences was sufficient to justify deprivation of the otherwise protected right of such prisoners to decide to be married.³²⁸ Thus, the lack of any possibility of consummation, short of an executive pardon, would appear to have little effect on marriage as a constitutionally protected relationship. The Court’s view is consistent with an evolving social sense that sexual relations of any kind are not essential to marriage as long as both partners are willing to enter into the marriage under these conditions.³²⁹

B. Contract

Although Hegel viewed marriage as beginning in contract, he also argued that the marriage relationship transcended the contractual relationship.³³⁰ Given the difficulty in finding any constitutional basis for a right to marry prior to the enactment of the Fourteenth Amendment,³³¹ nineteenth-century litigants often argued that the

325. *Id.* at 95.

326. *Id.* at 96.

327. *See id.*

328. *See id.*

329. *See, e.g.,* David B. Perlmutter, Annotation, *Incapacity for Sexual Intercourse as Ground for Annulment*, 52 A.L.R.3d 589, 593, 619, 622 (1973) (noting that, in the absence of a statute allowing annulment for incapacity, courts have no jurisdiction to annul; that, at best, such incapacity makes a marriage only voidable, not void, and then only by parties to the marriage; and that knowledge of the incapacity prior to marriage or subsequent ratification would bar annulment); *cf. T.E.P. v. Leavitt*, 840 F. Supp. 110, 111 (D. Utah 1993) (holding that a Utah statute voiding marriages involving a person with AIDS violated the Americans with Disabilities Act (citing 42 U.S.C. §§ 12101-12213 (Supp. V 1993))).

330. *See* HEGEL, *PHILOSOPHY OF RIGHT*, *supra* note 30, remarks to ¶ 163, at 112.

331. There can be little question that the Fourteenth Amendment was intended to secure an affirmative right to marry for formerly enslaved Americans, and not merely an

Constitution's prohibition on laws impairing the obligation of contract³³² was a source of marriage rights that could limit state control over marriage.³³³ However, the Court ultimately held that "marriage is not a contract within the meaning of the prohibition"³³⁴ because a marriage contract does not vest "certain, definite, fixed private rights of property."³³⁵ As a result, marriage was frequently described by courts as a privilege established by state law.³³⁶

In distinguishing marriage from the right of contract, the Court was prepared to reduce at least some of the traditional incidents of

equal protection guarantee of whatever privileges of marriage happened to be granted to white Americans. See Peggy Cooper Davis, *Neglected Stories and the Lawfulness of Roe v. Wade*, 28 HARV. C.R.-C.L. L. REV. 299, 378-86 (1993) (revealing that the constant focus of the debates over the Fourteenth Amendment was on eliminating the deprivations of family liberty brought about by slavery). The denial of the slaves' right to marry and the destruction of families through the separate sale of partners and children has been described as the aspect of American slavery that most dramatized its radical evil both to abolitionists and Americans more generally. See DAVID A.J. RICHARDS, *CONSCIENCE AND THE CONSTITUTION* 225 (1993). The horrific consequences of denying individuals a right to marry clarified the critical role of marriage in securing human liberty. See generally Davis, *supra*, at 317-20, 334-38, 370-75 (recounting stories of enslaved men and women choosing to commit suicide rather than endure permanent separation, of children watching their parents being beaten or sold off for visiting their children, of infants and children snatched from their parents' arms or left starved, ignored, and unsupervised while parents were forced to work in the fields, and of the rape of women for the pleasure of white men or for breeding purposes).

332. See U.S. CONST. art. I, § 10.

333. See, e.g., *Maynard v. Hill*, 125 U.S. 190, 198-99 (1888) (argument for appellant) (arguing that a legislative grant of a divorce, without the consent of the wife, to a husband who had breached the marriage contract by abandoning his wife, was an impairment of the contract); *Randall v. Kreiger*, 90 U.S. (23 Wall.) 137, 144-45 (1874) (argument for appellant) (arguing that a legislative act allowing married women to release their dower interests in property by means of a power of attorney was an impairment of contract); *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 600 (1819) (analogizing marriage to a contract right and noting that a divorce granted by the legislature impaired the obligations of the marriage contract).

334. *Maynard*, 125 U.S. at 210; see also *Randall*, 90 U.S. at 147-48 (holding that marriage is not a contractual relationship, but rather an entirely state-defined relationship, in which "[t]he public will and policy controls" the will of the parties).

335. *Maynard*, 125 U.S. at 210.

336. See, e.g., *Randall*, 90 U.S. at 147. The Court in *Maynard* stated:

"When the contracting parties have entered into the married state, they have not so much entered into a contract as into a new relation, the rights, duties, and obligations of which rest not upon their agreement, but upon the general law of the State, statutory or common, which defines and prescribes those rights, duties, and obligations. They are of law, not of contract. . . . The reciprocal rights arising from this relation, so long as it continues, are such as the law determines from time to time, and none other."

Maynard, 125 U.S. at 210 (quoting *Adams v. Palmer*, 51 Me. 481, 483 (1863)) (alteration in original).

marriage, including "till death do you part," to nothing more than statutory privileges.³³⁷ It would be a mistake, however, to view these decisions as suggesting that marriage itself should be viewed as merely a statutory privilege, which could be freely abolished by state law. During this period, statutory marriage laws were viewed as overlays on a common-law right to marriage by words of present assent,³³⁸ and were presumed not to abolish common-law marriage without express language to that effect.³³⁹ The question of whether a state could entirely abolish the right to marry was never at issue³⁴⁰ in these cases, as state nullification of the common-law right to marriage always took place in the context of statutes enacting statutory forms of marriage.³⁴¹ In describing marriage as a "thing of common right,"³⁴² the Court showed that it recognized marriage as more than a mere statutory privilege.³⁴³

C. Natural Right

Hegel's rejection of a pre-social state of freedom and natural rights theory in general³⁴⁴ precluded him from giving credence to the idea that marriage is a right grounded in nature. The same cannot be said for American case law, which seems to have promoted several competing views of marriage as a natural right. The historical origins of civil marriage in religious marriage³⁴⁵ contributed to a theologically

337. See *Maynard*, 125 U.S. at 210-14; see also *Conner v. Elliott*, 59 U.S. (18 How.) 591, 593 (1855) (holding that marital community property rights were not constitutionally protected as privileges of citizenship, but were instead legal incidents of the marriage contract determined by the place in which the contract was either made or performed).

338. See *Meister v. Moore*, 96 U.S. 76, 78-79 (1877) (finding marriage by words of present assent).

339. See *id.* at 79. This presumption was justified as necessary to allow courts to avoid making illegitimate the offspring of such common-law marriages. See *id.* at 81. The common-law consequences of illegitimacy were severe, as illegitimate children were considered "nullius filius, and incapable of inheriting as heirs either to their putative father, or mother, or to any one else." *Lessee of Brewer v. Blougher*, 39 U.S. (14 Pet.) 178, 181 (1840) (argument for plaintiff).

340. See *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 629 (1819) ("When any state legislature shall pass an act annulling all marriage contracts, . . . it will be time enough to inquire, whether such an act be constitutional.").

341. See *Meister*, 96 U.S. at 79.

342. *Id.* at 81.

343. See *Davis*, *supra* note 331, at 312-13 (describing *Meister* as recognizing a right to marry derived from presumptive validity of common-law marriage).

344. See *supra* notes 127-38 and accompanying text.

345. See HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 21-22 (2d ed. 1988) (noting that after the Norman Conquest, the power to regulate

grounded view of marriage as a natural right. A right to marriage, from this perspective, was an opportunity to conduct one's life in consonance with God's law so as to ensure salvation.³⁴⁶ However, such a religiously grounded view of the right to marriage could, in the proper case, be abandoned when it resulted in an improper entanglement between church and state. Indeed, the Mormon claim to religiously mandated polygamy sharply curbed any tendency the Court might have had to view marriage as a natural right arising out of religious duty.³⁴⁷ The conflict between religiously derived natural rights and the perceived social destructiveness of polygamy forced the Court to endorse a view of natural rights as necessarily consistent with social duties.³⁴⁸ Consequently, the Court was forced to explain the traditional Western prohibition against polygamy as arising from a view of polygamy as a social offense "subversive of good order,"³⁴⁹ rather than as a religious offense.³⁵⁰

In addition, the common-law roots of marriage have provided an alternative to the theological view of marriage as a natural right. By the middle of the twelfth century in England, ecclesiastical courts

marriage was put in the hands of the Church, which viewed marriage as a religious matter).

346. See, e.g., *Reynolds v. United States*, 98 U.S. 145, 165 (1878) (referring to marriage as "a sacred obligation"); *United States v. Ritchie*, 58 U.S. (17 How.) 525, 529-30 (1854) (argument for appellee) (enumerating the right to marry as among the natural rights of humanity possessed by Native Americans and Europeans alike, when the Native Americans at issue were "native civilized Indians, converted to the Christian faith, in full communion with the established Catholic church"); *Hopkins v. State*, 69 A.2d 456, 459 (Md. 1949) (same); *Drach v. Drach*, 9 Ohio N.P. (n.s.) 353, 55 WKLY. LAW BULL. 86 (stating that marriage is a "more important and sacred contract than others").

347. See *infra* text accompanying note 362.

348. See *Reynolds*, 98 U.S. at 164 (quoting Jefferson as stating that "man . . . has no natural right in opposition to his social duties").

349. *Id.* ("[F]rom the earliest history of England polygamy has been treated as an offence against society.").

350. Eleven years after *Reynolds*, however, the Court described polygamy both as "contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world." *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 49 (1890). The Court's easy reliance on Christianity as the touchstone for American law is at least partially explained by the context of the case. The case upheld the constitutionality of a federal law annulling the corporate existence of the Church of Jesus Christ of Latter-Day Saints in the Territory of Utah and confiscating all property held by the Church, other than places of worship, parsonages, and burial grounds, because the vast wealth of the Mormon Church was being used "in preaching, upholding, promoting and defending" the criminal act of polygamy "in defiance of law." *Id.* This characterization of Mormon institutions as criminal made it easier to discount the religious challenge Mormonism posed to the preeminence of Christianity. Nonetheless, even here, Christianity is still closely linked to the social order it is viewed as producing.

controlled legal marriage.³⁵¹ However, the institution of common-law marriage flourished there to such an extent that the ecclesiastical courts were forced to recognize such marriages as legal.³⁵² The recognition of common-law marriage as legal in both the colonies and newly founded states led to a commonly accepted view of marriage as a right that was natural because it predated positive law.³⁵³ Under this view of natural rights, marriage was a natural right because it was essential to personal and political emancipation.³⁵⁴ Indeed, insofar as the rise of common-law marriage reflected defiance of the ecclesiastical courts,³⁵⁵ the tradition of common-law marriage is rooted in a recognition that religious control of marriage is fundamentally incompatible with human freedom. Thus, marriage is a fundamental right primarily as a political instrument of emancipation, rather than as a religious instrument of salvation.³⁵⁶

Yet the Court's reliance on Francis Lieber's essentially political

351. See Franklyn C. Setaro, *A History of English Ecclesiastical Law*, 18 B.U. L. REV. 102, 119-21 (1938).

352. See CLARK, *supra* note 345, at 22 (suggesting that the continued practice of common-law marriages forced the Anglican Church to recognize them in a belated attempt to assert its authority over all marriage).

353. This view of rights as a "natural" property of human beings was reminiscent of the philosophy of Jean-Jacques Rousseau and was consistent with the understanding of natural rights commonly held by Americans in the late eighteenth century as "the freedom of individuals in the state of nature." Hamburger, *supra* note 43, at 918. American courts accepted the natural-rights theory of marriage well into the twentieth century. See, e.g., *Ramon v. Ramon*, 34 N.Y.S.2d 100, 105 (Fam. Ct. 1942) (describing marriage as a natural right, which was not created by law, and as a "right of personality"); *Hine v. Hine*, 157 N.E. 308, 309 (Ohio Ct. App. 1927) ("[M]arriage is a contract having its origin in the law of nature, antecedent to all civil institutions."); *Cumby v. Garland*, 25 S.W. 673, 675 (Tex. 1894) (" 'Marriage existed before statutes; it is of natural right; it is favored by the law.' " (quoting 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE, § 283, at 241 (6th ed. 1881))); *In re McLaughlin's Estate*, 30 P. 651, 653 (Wash. 1892) ("[M]arriage is founded on the law of nature, and is anterior to all human law.").

354. Under this view, natural rights were premised not on the need of the soul to conform to divinely ordered nature, but rather on the needs of inherently autonomous human beings for maximum independence. Thus, natural rights were premised on a view of human beings in the state of nature as "equally free," and as seeking to preserve their freedom. See Hamburger, *supra* note 43, at 924.

355. Cf. Commission on Sexual Orientation and the Law (established by the Hawaii governor and legislature by Hawaii S.B. 888, sex. 3, 18th Leg., 1995 Sess.) (App. E) (Dec. 8, 1995) <<http://www.hawaii.gov/lrb/solcivr.html>> (detailing the effect on Quakers, Baptists, and other sects of the seventeenth-century English rule that only marriages celebrated by an Anglican priest would be recognized as legally valid).

356. The Mormon claim to religiously mandated polygamy forced the Court to further develop the view of marriage as a natural right arising not out of religious duty, but out of social life.

explanation of the evils of polygamy makes it clear that the right in question must be viewed as a social construct,³⁵⁷ a view of rights which is inconsistent with a view of natural rights as either religious or pre-social. Indeed, Lieber's view of marriage as a fundamental political institution was premised on a view of human beings as inherently social,³⁵⁸ which required him to reject the possibility of a pre-social state in nature.³⁵⁹ Thus, for Lieber, rights did not spring full-grown from "the head of Jove,"³⁶⁰ but rather reached greatest fruition in democratic governments "mediated by historically evolved institutions."³⁶¹ Any normative claim to a right to marriage, from this perspective, would have to be explained with reference to the underlying structure of the society in which it exists. Indeed, *Reynolds* can be seen as rejecting both a theological grounding of rights in order to avoid the theological basis of Mormon polygamy³⁶² and a view of rights as grounded in a pre-social human nature, and adopting instead a view of rights as inextricably connected with social duties.

The tension in American case law between the various views of marriage as a religious, natural, or social right on one hand, and the previously articulated view of marriage as a state-shaped and state-controlled privilege on the other, may best be resolved by viewing marriage as an acquired right. Like the right to vote,³⁶³ marriage may be traced to, but not fully explained by, natural liberty in primitive

357. See Horenstein, *supra* note 79, at 2292.

358. See 1 LIEBER, *POLITICAL ETHICS*, *supra* note 78, at 102-06.

359. See 1 *id.* at 106; see also 2 PARRINGTON, *supra* note 79, at 93-94 (describing Lieber's rejection of natural-rights philosophy as the beginning of the end for natural rights philosophy in nineteenth-century American legal thought); Horenstein, *supra* note 79, at 2294-95 (describing Lieber as viewing contract theory as a fiction, and notions of inherent rights as misleading, since Lieber viewed rights as taking on their most perfect existence only within highly organized society).

360. See FRANCIS LIEBER, *ON CIVIL LIBERTY AND SELF-GOVERNMENT* 334-35 (3d ed. 1874) ("Liberty is a thing that grows, and institutions are its very garden beds. There is no liberty which as a national blessing has leaped into existence in full armor like Minerva from the head of Jove.").

361. Guyora Binder, *Institutions and Linguistic Conventions: The Pragmatism of Lieber's Legal Hermeneutics*, 16 *CARDOZO L. REV.* 2169, 2171-72 (1995).

362. See *Reynolds v. United States*, 98 U.S. 145, 165-68 (1878) (grounding holding in analysis of marriage as the foundation of democratic principles, rather than discussing polygamy in terms of a pre-social theological or religious right); see also *supra* notes 61-117 (discussing the theoretical underpinnings of *Reynolds*).

363. See *Hamburger*, *supra* note 43, at 927; see also *supra* notes 54-59 (discussing how the right to vote stems from a natural law concept but that it is primarily a creation of civil government).

political conditions. Viewed as an acquired right which takes its shape from the particular relationship between citizens and the state, rather than as a simple natural right or an arbitrary state privilege, the American understanding of marriage is consistent with the Hegelian view of marriage as an institution which forms and is formed by the civil society in which it exists.³⁶⁴

D. Liberty

Hegel's view of marriage as the primary institution responsible for developing citizens who were autonomous individuals³⁶⁵ is consistent with the American emphasis on the relationship between marriage and liberty, in which marriage is viewed as essential to providing the personal emancipation necessary to develop and exist as an individual. In the nineteenth century, the view of marriage as emancipatory was reflected most strongly in the frequent judicial descriptions of marriage as the primary and most substantial contributor to human happiness.³⁶⁶ "[T]he right . . . to pursue and obtain happiness"³⁶⁷ was viewed, in turn, as a fundamental privilege³⁶⁸ because of the intrinsic connection between the pursuit of happiness

364. See *Reynolds*, 98 U.S. at 165 (describing the American understanding of marriage by stating that "[u]pon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties").

365. See Landes, *supra* note 127, at 125.

366. See, e.g., *Randall v. Kreiger*, 90 U.S. (23 Wall.) 137, 147 (1874) ("The happiness of those who assume its ties usually depends upon it more than upon anything else.").

367. *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3230).

368. See *id.* (interpreting the Privileges and Immunities Clause, U.S. CONST. art IV, § 2, as referring to "those privileges and immunities which are . . . fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign"). The Supreme Court implicitly adopted the reasoning of *Corfield* in *Ward v. State of Maryland*, 79 U.S. (12 Wall.) 418, 430 (1870). If privileges and immunities belong as of right to citizens of a state, it would appear that it would be equally as wrong for a state to deny its citizens such rights as it would be to discriminatorily deny citizens of another state rights granted to its citizens. However, as written, Article IV assumed that there was little danger of states depriving their citizens of such fundamental rights, and the focus of the language is on the discriminatory denial of rights. See RICHARDS, *supra* note 331, at 138. Thus, while the very notion of fundamental rights was inconsistent with wholesale state deprivations of such rights, and any such denial would be recognizably wrong, see *id.* (quoting Representative Bingham during debates on the Fourteenth Amendment as saying that "[n]o State ever had the right, under the forms of law or otherwise . . . to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised that power, and that without remedy"), Article IV failed to give the federal judiciary the power to prevent such denials. It was this failure that necessitated the enactment of the Fourteenth Amendment.

and citizenship in a free government.³⁶⁹ The contribution of marriage to happiness, therefore, was based on the personal emancipation inherent in the institution.³⁷⁰

Justice Curtis eloquently developed this position in his dissent in *Dred Scott v. Sanford*,³⁷¹ when he emphasized the inconsistency between Dred Scott's marriage and his status as a slave:

That the consent of the master that his slave, residing in a country which does not tolerate slavery, may enter into a lawful contract of marriage, attended with the civil rights and duties which belong to that condition, is an effectual act of emancipation. And the law does not enable Dr. Emerson, or any one claiming under him, to assert a title to the married persons as slaves, and thus destroy the obligation of the contract of marriage, and bastardize their issue, and reduce them to slavery.³⁷²

Insofar as marriage presupposes free individuals vested with rights to their bodies, their labor, and their conscience, participation in the institution of marriage confirms that the individuals in question are free in precisely these ways. Thus, the marriage of Dred Scott and his wife gave rise to a legal status recognizing mutual rights and duties of husband and wife entirely inconsistent with their status as the chattel of another. Slavery and legal marriage are so contradictory that permitting a slave to enter into legal marriage effects an emancipation of the slave.

This same incompatibility of monogamous marriage and the slave-status of the participants is at the heart of Hegel's explanation of how monogamy defines the institution of marriage.³⁷³ Only the free and mutual surrender³⁷⁴ of exclusive individuality³⁷⁵ that characterizes monogamous marriage can produce the consciousness of self in another³⁷⁶ that must characterize all freely chosen social bonds. However, for marriage to produce this transcendent unity that pre-

369. See *Corfield*, 6 F. Cas. at 551-52.

370. Cf. Fredrick Crosson, *Religion and Natural Law*, 33 AM. J. JURIS. 1, 13 (1988) (arguing that protection of the "pursuit of happiness" was meant to provide the liberty necessary to realize individual definitions of human good).

371. 60 U.S. (19 How.) 393 (1856).

372. *Id.* at 601 (Curtis, J., dissenting).

373. See HEGEL, PHILOSOPHY OF RIGHT, *supra* note 30, ¶ 167, at 115 (stating that "[i]n essence marriage is monogamy").

374. See *id.* ¶ 168, at 115.

375. See *id.* ¶ 167, at 115.

376. See *id.*

serves individuality,³⁷⁷ the participants must start as independent individuals.³⁷⁸ Therefore, monogamous marriage presumes a society of individuals of equal personhood.³⁷⁹ It also presumes individuals who have the capacity to contract,³⁸⁰ because marriage begins in contract, or free consent, even though ultimately it is “a contract to transcend the standpoint of contract.”³⁸¹ As contract requires that “the parties entering it recognize each other as persons and property owners,”³⁸² the voluntary nature of marriage presumes individuals who can own property and make contracts. Thus, the marriage of Dred Scott inevitably revealed the extent to which the personhood of slaves could not be denied; marriage required capacity to contract and ownership of one’s body and labor.³⁸³

The nineteenth-century view of marriage as emancipatory emerges in twentieth-century Supreme Court cases such as *Griswold v. Connecticut*³⁸⁴ and *Poe v. Ullman*,³⁸⁵ which viewed marriage as guaranteeing those liberties essential to the development of free individuality and a self-governing society. In his dissent to *Poe*, Justice Douglas described marital privacy as “implicit in a free society”³⁸⁶ and argued that it would be an anathema to the very concept of or-

377. *See id.* ¶ 158, at 110.

378. *See id.* ¶ 167, at 115 (“Personality attains its right of being conscious of itself in another only in so far as the other is in this identical relationship as a person, i.e. as an atomic individual.”).

379. *Cf. Landes, supra* note 127, at 137 (“The dialectic of love that Hegel outlines presupposes a relationship between equals in a monogamous love match.”).

380. *See Theunissen, supra* note 145, at 3, 7-8 (noting that for Hegel, the adults who freely consent to marry must already have the abstract rights of a member of civil society).

381. HEGEL, *PHILOSOPHY OF RIGHT, supra* note 30, remarks to ¶ 163, at 112.

382. *Id.* remarks to ¶ 71, at 57.

383. Recognition of the way in which monogamous marriage is premised on free and equal individuals explains why today we can no longer sustain Hegel’s view that hierarchical gender roles, which deny women full personhood, are essential to marriage; such marriages would fail the demands for mutual recognition that define monogamy.

384. 381 U.S. 479, 485-86 (1965) (holding that the institution of marriage requires a zone of privacy that prohibits the criminalization of the use of contraceptives); *see also* Kenneth L. Karst, *The Freedom of Intimate Association*, 89 *YALE L.J.* 624, 626 (1980) (arguing that *Griswold* was one of a number of cases that can be understood to promote intimate association as important “to the development of a sense of individuality”).

385. 367 U.S. 497, 501-09 (1961) (refusing to reach the merits of the constitutional challenge to state criminal statutes prohibiting the giving of advice about contraceptives as well as the actual use of contraceptives).

386. *Id.* at 521 (Douglas, J., dissenting). Justice Douglas’s dissent in *Poe* addressed the merits of the very issue that *Griswold* successfully raised later. *See Griswold*, 381 U.S. at 484. Therefore, it provides the background for his opinion for the *Griswold* Court, as well as a more complete articulation of some aspects of his reasoning.

dered liberty for the government to control the sphere of activity created by the association of two people in the institution of marriage.³⁸⁷ This view of marriage as creating a zone of privacy draws upon Hegel's recognition that the modern state rests upon the twin pillars of private family life and public economic life, and it is the function of monogamous marriage to create a limited arena of private life in which concrete individuality could be nurtured and released.³⁸⁸ Thus, the family, in Hegel's view, necessarily creates a realm of private liberty for exercise of various liberties of feeling³⁸⁹ and the development of free moral agency in children through parental moral education.³⁹⁰

E. Self-Governance

Like Hegel, Justice Douglas recognized in *Poe* that the development of individuality within the family and other social institutions is essential to a society premised on democratic principles of self-governance:

“One of the earmarks of the totalitarian understanding of society is that it seeks to make all subcommunities—family,

387. See *Poe*, 367 U.S. at 515-22 (Douglas, J., dissenting).

388. Cf. HEGEL, *PHILOSOPHY OF RIGHT*, *supra* note 30, ¶ 255, at 154; *supra* text accompanying notes 184-216 (recounting Hegel's comparison of how the polygamous family denies and suppresses the existence of an individual outside the family with the way in which the monogamous family nurtures individuality and steps aside to let men exercise and further develop this individuality in the public sphere and in starting their own families). See generally Siebert, *supra* note 145, at 180 (explaining that rights are “the abstract moment of the definite individuality . . . [in] the sphere of civil society and the state”). For women, this individuality is limited to the opportunity to have their own family, rather than remaining a part of their birth families, see HEGEL, *PHILOSOPHY OF RIGHT*, *supra* note 30, remarks to ¶ 180, at 120, or becoming an appendage to their husbands' families, see *id.* app. Additions n.109, at 264 (referring to ¶ 172). The Hegelian and American insistence on monogamy was, among other things, expressly justified by its effect of raising women to a position of relative equality compared to the slavery implicit in polygamy. See B. CARMON HARDY, *SOLEMN COVENANT* 40 (1992) (describing concerns in the mid- to late-1800's about the enslaving effect of polygamy on women); HEGEL, *ELEMENTS*, *supra* note 120, at 440. Latent in this view of monogamy was the necessity of recognizing women as fully equal to men. See *infra* note 527-28 and accompanying text (discussing the symbolic equality of men and women in monogamous marriage).

389. Compare Hegel's views on the lack of individuation, liberty and free feeling within the polygamous family with his view that marriage must involve free consent, see HEGEL, *PHILOSOPHY OF RIGHT*, *supra* note 30, ¶ 168, at 115, and that continuation of marriage cannot be forced, see *id.* ¶ 176, at 118.

390. See *id.* ¶ 175, at 117 (“Children are potentially free and their life directly embodies nothing save potential freedom.”); see also notes 170-83 (discussing Hegel's views on children).

school, business, press, church—completely subject to control by the State. The State then is not one vital institution among others: a policeman, a referee, and a source of initiative for the common good. Instead, it seeks to be coextensive with family and school, press, business community, and the Church, so that all of these component interest groups are, in principle, reduced to organs and agencies of the State. In a democratic political order, this megatherian concept is expressly rejected as out of accord with the democratic understanding of social good, and with the actual make-up of the human community.”³⁹¹

The “democratic understanding of social good” recognizes that the proper source of what may be considered good stems from the individual and various privately ordered associations of individuals,³⁹² and that this understanding, therefore, requires the protection of the liberty of proposing and actualizing diverse goods within each of those associations.³⁹³

Justice Douglas’s paean to marriage in *Griswold* further develops the importance of marriage as a unique form of social bonding.³⁹⁴ His description of marriage as “harmony in living”³⁹⁵ and “bilateral loyalty”³⁹⁶ invokes Hegel’s concept of the transcendent nature of the connection between marital partners, a connection which, Justice Douglas argued, does not share the individualistic self-interest of “causes[,] . . . political faiths[, or] . . . commercial or social projects.”³⁹⁷ This closely parallels the Hegelian view of marriage as a distinctly different form of social organization characterized by love, self-sacrifice, and mutual surrender of individuality.³⁹⁸ Justice Doug-

391. *Poe*, 367 U.S. at 521-22 (Douglas, J., dissenting) (quoting Robert L. Calhoun, *Democracy and Natural Law*, 5 NAT. L.F. 31, 36 (1960)).

392. *Cf.* Hafen, *supra* note 12, at 482 (arguing that only the “formal family” created by marriage “ensur[es] a political structure that limits government, stabilizes social patterns, and protects pluralistic liberty through the power of its own relational permanency”).

393. Under this view, marriage is an arena of protected fundamental liberties and, as such, it is entitled to social protection. Consequently, it is constitutionally permissible for the states to regulate conduct such as fornication and adultery because such conduct is viewed as antithetical to and destructive of the institution of marriage. *See* *Griswold v. Connecticut*, 381 U.S. 479, 498-99 (1965) (Goldberg, J., concurring).

394. *See id.* at 486.

395. *Id.*

396. *Id.*

397. *Id.*

398. *Cf.* *Turner v. Safley*, 482 U.S. 78, 113 (1987) (Stevens, J., concurring in part and dissenting in part) (describing marriage as socially “rehabilitative”); Hafen, *supra* note 12, at 476-78 (arguing that only the loving yet demanding parent-child relationship can teach

las's characterization of marriage as "an association for as noble a purpose as any involved in our prior decisions,"³⁹⁹ taken together with his earlier linkage of the private association of marriage with " 'the democratic understanding of social good,' "⁴⁰⁰ also reflects a Hegelian view of the unique role of marriage in making possible a freely chosen yet social definition of the good.

F. Fundamental Right

At the same time, Hegel's view of marriage as a "socio-ethical duty"⁴⁰¹ is a useful way to understand why the Court, in such cases as *Loving v. Virginia*,⁴⁰² *Zablocki v. Redhail*,⁴⁰³ and *Turner v. Safley*,⁴⁰⁴ has consistently construed marriage as such a strong affirmative right,⁴⁰⁵ i.e., a right which the state must take affirmative steps to

moderation of self-interest, care for others, and internalization of moral standards, which creates citizens with a sense of "moral and civic duty").

399. *Griswold*, 381 U.S. at 486.

400. *Poe v. Ullman*, 367 U.S. 497, 522 (1961) (Douglas, J., dissenting) (quoting Calhoun, *supra* note 391, at 36).

401. Siebert, *supra* note 145, at 205.

402. 388 U.S. 1, 12 (1967) (striking down a miscegenation statute as an impermissible denial of the fundamental right to marry as well as an improper racial classification).

403. 434 U.S. 374, 383-86 (1978) (reaffirming the fundamental right to marry).

404. 482 U.S. 78, 95 (1987) (noting that petitioner had to concede that marriage is a fundamental right).

405. Concerns that the recognition of a constitutional right to marry would subject traditional limitations on who may be married to a level of scrutiny that they might not survive, *see Karst, supra* note 384, at 671, led three *Zablocki* Justices to question whether there is such an absolute right. *See Zablocki*, 434 U.S. at 392 (Stewart, J., concurring in the judgment) (stating that "[s]urely" it is legitimate for states to prohibit marriages between siblings, marriages to those under 14 years of age, marriages to individuals infected with a venereal disease, or marriages to persons already married); *id.* at 399 (Powell, J., concurring in the judgment) (arguing that a " 'compelling state purpose' inquiry would cast doubt on the network of restrictions that the States have fashioned to govern marriage and divorce"); *id.* at 407 (Rehnquist, J., dissenting) (agreeing with Justice Powell's rejection of marriage as a fundamental right); *see also Wardle, supra* note 8, at 29 n.111 (suggesting, in the context of a challenge to claims that same-sex marriage is a constitutional right, that the Supreme Court has not truly held that marriage is a fundamental right rather than a "fundamental interest" or "basic right").

Nonetheless, Justices Powell and Stewart recognized that "in regulating the intimate human relationship of marriage, there is a limit beyond which a State may not constitutionally go." *Zablocki*, 434 U.S. at 392 (Stewart, J., concurring in the judgment); *accord id.* at 397 (Powell, J., concurring in the judgment) (stating that "there is a right of marital and familial privacy which places some substantive limits on the regulatory power of government"). Furthermore, Justices Powell and Rehnquist joined the majority opinion in *Turner*, which described the petitioners as "conced[ing] that the decision to marry is a fundamental right." 482 U.S. at 95. While the *Turner* majority applied a minimum "reasonable relationship" test because a prisoner's rights were at issue, *see id.* at 89, the

make possible. For Hegel, individual morality requires an ethical community; moral duties cannot be defined by reference to an individual will alone.⁴⁰⁶ "Morality needs a complement in the external world, a world of public life and practices where it is realized."⁴⁰⁷ A view of marriage as a mere privilege that must be granted equally, if at all,⁴⁰⁸ makes state involvement in marriage inessential. This reflects a failure to grasp both Hegel's general point that morality is not an individual achievement as well as his explanation of the importance to the state and the individual of the institution of marriage. If marriage is peculiarly suited to reveal the essential connections between our individual existence and our social existence, then our duty to the state must at the same time be a duty of the state to us.

Indeed, the Hegelian understanding of connection between marriage and the state helps make sense of the implicit holding of *Loving* that state recognition of marriage is an essential part of the right to marry.⁴⁰⁹ Because it was the criminal convictions of the Lovings that formed the basis of the suit,⁴¹⁰ and their reversals that formed the remedy,⁴¹¹ the Court's primary focus was on the state's attempt to make interracial marriage a felony,⁴¹² rather than on the associated statute declaring "[a]ll marriages between a white person and a colored person . . . [to] be absolutely void without any decree of divorce or other legal process."⁴¹³ This focus resulted in an opinion that spoke more of the "freedom to marry,"⁴¹⁴ and "the free-

Court suggested heightened scrutiny may have been justified because the regulation in question also burdened the fundamental rights of non-prisoners to get married, *see id.* at 97. Potential strict scrutiny of Missouri's prohibition on most marriages between prisoners and non-prisoners cannot be reconciled with a refusal to subject the traditional state bars on marriage to the same level of scrutiny.

406. Hegel argued that Immanuel Kant's attempt to derive the content of morality from the formal structure of a rational will was impossible because form cannot generate content. *See* HEGEL, *PHILOSOPHY OF RIGHT*, *supra* note 30, remarks to ¶ 135, at 89-90. Rather, the content of reason can be derived only from the actual embodiment of reason, which is not an abstract individual, *see id.* ¶ 137 & remarks, at 90-91, but a rationally ordered community, *see id.* ¶ 144, at 105; *id.* app. Translator's Notes n.144, at 347-48.

407. TAYLOR, HEGEL, *supra* note 238, at 430.

408. *See Zablocki*, 434 U.S. at 404 (Stevens, J., concurring in the judgment) (arguing that "an individual's interest in making the marriage decision . . . is not, however, an interest which is constitutionally immune from evenhanded regulation" (citation omitted)).

409. *Cf. Loving v. Virginia*, 388 U.S. 1, 7 (1967) (discussing the role of the state in the regulation of marriage).

410. *See id.* at 3.

411. *See id.* at 12.

412. *See id.* at 4.

413. *Id.* at 4 n.3 (quoting VA. CODE ANN. § 20-57 (Michie 1960) (repealed 1968)).

414. *Id.* at 12.

dom of choice to marry,"⁴¹⁵ than the right to marry per se. Characterizing the fundamental right in question as the "freedom to marry" appears to treat marriage as if it were entirely within individual control, as speech might be said to be. Thus, a state's failure to recognize a marriage would not prevent people from getting married informally or within another jurisdiction.

However, despite the Court's characterization of the right to marry as a freedom to marry, it is clear that the Court intended to include among its holdings that the statute voiding interracial marriages was prohibited by the Fourteenth Amendment. Both the Court's specific reference to this statute and the Court's consistent reference in its analysis to the "miscegenation statutes"⁴¹⁶ suggest that the Court found the civil prohibition of interracial marriages as "repugnant to the Fourteenth Amendment"⁴¹⁷ as the statute criminalizing such marriages. The Lovings not only had a right not to have their freedom to marry chilled by criminal penalties, but also had a right to state recognition of their marriage. Thus, the "freedom to marry" implicitly recognized in *Loving* must be understood to mean that individual freedom to enter into a relationship must be complemented by state recognition of that relationship, or such "freedom" to marry is meaningless. This then reflects an understanding of the marriage that we must be free to enter as state-recognized marriage.

The significance of state recognition for Hegel is revealed in his claim that it is the civil component of a wedding ceremony, rather than the sensuous moment of consummation, that captures the essence of marriage because only a civil, public wedding can create a uniquely *ethical* bond.⁴¹⁸ The creation of such a bond must begin with a verbal promise, as in a contract, because that is a determination of the will that takes precedence over any subjective desire to act or not to act as promised.⁴¹⁹ Thus, the expression of commitment in a civil ceremony goes beyond the mere feeling or physical passion expressed in the consummation of the marriage.⁴²⁰ Beyond this, however, the public character of the words of commitment forces the speaker to acknowledge that the bond made by the words is not

415. *Id.*

416. *See id.* at 8, 11, 12 n.11.

417. *Id.* at 12 n.11.

418. *See* HEGEL, *PHILOSOPHY OF RIGHT*, *supra* note 30, ¶ 164, at 113.

419. *See id.* remarks to ¶ 78, at 60.

420. *See id.* remarks to ¶ 164, at 114.

based merely on the strength of individual will, but draws independent strength from the recognition of the bond by the immediate personal community of the marital partners.⁴²¹ This community will expect and demand of them that they achieve some unity of existence. Finally, the legally binding character of the words⁴²² lends the weight of the entire social bond of the state to the ethical bond, which appears to the individual in the form of the legal protections, privileges, and duties of state-recognized marriage, and the willingness of the state to enforce this bond as necessary.⁴²³ The civil wedding, therefore, embodied for Hegel the reciprocal connection between marriage and the state: state recognition of the critical role of marriage in the possibility of a free state, and individual recognition of the essential role of the state in making such a strong connection coexist with individual freedom.⁴²⁴

A "civil" wedding that fails to have legal effect not only prevents the formation of an ethical bond, but prevents the synergism of private and public unity upon which both the institutions of marriage and the state depend. The dangers of public indifference to the very real bonds between those so wed are twofold. To begin with, the need for the civil institution and the ethical bond it produces is thrown into question. We are forced to define the nature of the connection between those whose marriage does not receive public recognition as merely emotional. Yet, because the power of that connection cannot be denied, we become confused about the nature of the connection in recognized marriages, which seem no different, and view all marriages as "in essence" embodying a merely emotional connection. It was for this very reason that Hegel found the views of German Romantics, such as Friedrich Schlegel, so danger-

421. *See id.* ¶ 164, at 113.

422. *See id.* ¶ 103, at 262.

423. *Cf.* Hohengarten, *supra* note 37, at 1501 (noting that marriage provides a uniquely stable basis for a committed relationship by imposing high procedural costs for terminating the relationship).

424. *See* Dallmayr, *supra* note 220, at 327 (pointing out that, for Hegel, "in actuality, public community precedes and renders possible the more limited forms of ethical experience," such as the family). The limited nature of monogamous marriage makes it possible for modern free individuals to tolerate it. Modern marriage is controlled and prevented from dragging us back to either the all-encompassing unity of the Greek state or the despotic state by insisting that marriage be monogamous, by limiting its role to a private sphere, and by making the public sphere the sphere of rights. *See supra* notes 184-216 and accompanying text (summarizing Hegel's views that polygamy fosters despotism); *supra* notes 223-46 (summarizing Hegel's concept of social "Corporations" as opposed to the "pure" democracy of Ancient Greece).

ous, since they saw marriage as pure love and the wedding ceremony as irrelevant and alien to the bond between those who wed.⁴²⁵ The currency of such views can only lead to the degradation of the institution of civil marriage.⁴²⁶

At the same time, the perceived irrelevancy of the legal institution of marriage will produce an alienation from a state that claims civil marriage to be essential.⁴²⁷ As Charles Taylor has argued:

[A]lienation arises when the goals, norms or ends which define the common practices or institutions begin to seem irrelevant or even monstrous, or when the norms are redefined so that the practices appear a travesty of them.

....

What happens here is that the individual ceases to define his identity principally by the public experience of the society. On the contrary, the most meaningful experience, which seems to him most vital, to touch most the core of his being, is private. Public experience seems to him secondary, narrow, and parochial, merely touching a part of himself. Should that experience try to make good its claim to centrality as before, the individual enters into conflict with it and has to fight it.⁴²⁸

Hegel describes the bond of a marriage recognized by the state through a civil ceremony as "ethical" precisely because it exists only as a product of these individuals' particular commitment to each other, the state's commitment to these individuals, and these individuals' commitment to the state. Civil marriage forges the private bonds of individuals out of the social bonds of the state. In this way,

425. See HEGEL, *PHILOSOPHY OF RIGHT*, *supra* note 30, remarks to ¶ 164, at 113.

426. Thus, many heterosexual couples choose not to get married, or delay marriage until well after they have made a deep commitment to each other, because they feel that legal marriage will involve a "selling out" to the state that undervalues the depth of their emotional commitment. For an account of the growing numbers of cohabiting couples since the 1970's, see J. Thomas Oldham & David S. Caudil, *A Reconnaissance of Public Policy Restrictions Upon Enforcement of Contracts Between Cohabitants*, 18 *FAM. L.Q.* 93, 108-10 (1984).

427. See generally TAYLOR, *SOURCES OF THE SELF*, *supra* note 264, at 508 (describing the promotion of "revocable romantic relationships" by contemporary authors such as Gail Sheehy as eroding "the strong identification with the political community which public freedom needs").

428. TAYLOR, *HEGEL*, *supra* note 238, at 384 (describing, among other manifestations of this perceived disconnection between private experience and public existence, the alienation of Western citizens from voting when those elected fail to reflect the reality of the populace).

the most private of experiences also is essentially public.

The failure to recognize some marriages, such as interracial ones, destroys this unity of public and private experience for all. For those whose marriages were declared void or non-existent, the state's failure to recognize that bond that is most freely chosen—the bond of love—makes it impossible to experience any freedom in their relationship to the state. Such a state can only be perceived as external and oppressive. Those whose marriages have been legally recognized also will be affected by the resulting alienation. When the institution that binds some to the state excludes others, both the institution and the state are sullied. Marriage is of value to the state not because two individuals participate in it, but because everyone can do so, and most do so. The social significance of marriage depends upon universalizing the transcendent unity of feeling that marriage can produce as much as practicably possible.⁴²⁹ The less universal marriage is, the less social meaning it can have. Indeed, as an exclusive and exclusionary institution, the meaning of marriage is social exclusion and lack of community. Who can experience a civil marriage as a fully joyful event in which the participants are both one with each other and one with the state, when all those participating know consciously or unconsciously that they are thereby participating in an institution that denies the ability to some to connect both with those they love and with society as a whole? Who can experience the state as universal and unifying, when that which binds them to the state simultaneously alienates and excludes others? Any joy in such a marriage must at the same time be mixed with shame. Thus, we can understand the *Loving* holding—that a denial of state recognition of interracial marriages was unconstitutional—as derived as much from the Court's understanding of how deeply this interfered with the civil function of marriage, expressed by the characterization of marriage as a fundamental right, as from the stated alternative, i.e., the effect this lack of legal recognition had upon the equal protection rights of the individuals denied marital

429. See GEORG W.F. HEGEL, PHENOMENOLOGY OF SPIRIT ¶ 461, at 276-77 (A.V. Miller trans., 1977) (1807). Hegel explained:

The individual who seeks the pleasure of *enjoying his individuality*, finds it in the family, and the necessity in which that pleasure passes away is his own self-consciousness as a citizen of his nation. Or again, it is in knowing that the law of his own heart is the law of all heart, in knowing the consciousness of the self as the acknowledged universal order

Id.

recognition.

G. Summary

We have seen, therefore, that the images of marriage which have emerged over the past two centuries from American case law are consistent with Hegelian views on the critical function of marriage in a coherent and cohesive society of free individuals. The cases that focus on marriage as integrally related to individual liberty can be understood to reflect the Hegelian view of marriage as creating an arena in which individuality and particularity can be nurtured and expressed. The cases that emphasize the critical socializing function of marriage can be understood to reflect the Hegelian view of marriage as laying the foundation for a cohesive community which can coexist with individual liberty. The Hegelian theory of marriage also helps explain why the Court has insisted upon describing marriage as a fundamental right which requires state recognition and involvement, even in the face of threats about the dire consequences of such a view.⁴³⁰ The unity of marriage is a mere emotional, sexual unity without the state participation that makes it possible to achieve an ethical bond that is simultaneously a bond between two individuals, between these individuals and their community, and between these individuals and their state. The unifying nature of marriage further explains why it is essential that the state recognize all marriages which are compatible with that aspect of the reconciliation of individuality and coherent government accomplished by monogamous marriage.

V. MORMON POLYGAMY

As I have argued above, the only legitimate basis for the *Reynolds* decision, as well as for the requirement in the enabling acts of Arizona, New Mexico, Oklahoma, and Utah that the power to legitimate polygamy be forsworn,⁴³¹ is an understanding of monogamous marriage as having a fundamental role in the creation and maintenance of the modern liberal state, and an understanding of polygamy as a fundamentally illiberal institution which would undermine the modern liberal state. The analysis of how marriage

430. See *supra* notes 401-29 and accompanying text.

431. See Arizona Enabling Act, ch. 310, § 20, 36 Stat. 557, 569 (1910); New Mexico Enabling Act, ch. 310, § 2, 36 Stat. 557, 558 (1910); Oklahoma Enabling Act, ch. 3335, § 3, 34 Stat. 267, 269 (1906); Utah Enabling Act, ch. 138, § 3, 28 Stat. 107, 108 (1894).

plays this fundamental role is well developed by Hegel and can be applied to understand the role of marriage in the modern American state without much difficulty. Monogamous marriage is uniquely capable of producing free-thinking and independent individuals who also are capable of choosing to be loyal and trusting citizens. Monogamous marriage harnesses the connecting forces of sex and love for the production of modern, self-conscious individuals, who will become citizens in a state only as individuals, not as family members. As a result, the state must recognize the autonomy and freedom of its citizens; it must be a state that recognizes individual freedom as its substantial goal. Monogamous marriage also is the foundation of the critical distinction between private and public,⁴³² which is central to the liberal state. The private sphere of monogamous marriage is sufficiently limited and non-political that sexual and emotional feelings, which can be highly destructive in the public sphere, may be given free reign.⁴³³ Individuals may seek emotional fulfillment in marriage precisely because a public realm also exists where they are merely abstract individuals to one another, where they are free and equal in a way they are not within a family, and where they are not responsible for others' happiness. Furthermore, a civil institution of monogamous marriage also provides powerful reasons for individuals to identify with and value the government that makes it possible for them to achieve a union with another which is more than sexual, and therefore is more stable and fulfilling, and yet which is not all-encompassing.

Hegel's analysis of polygamy, on the other hand, is rooted in the historical practices of sixteenth- and seventeenth-century China. No example of an emerging modern state existed at the time of his writing in which polygamy was a fully developed social institution. Clearly, the Mormon polygamous family was not the same as the sixteenth- and seventeenth-century polygamous families in China described by Hegel.⁴³⁴ In many ways, polygamous Mormon families might appear to have had more in common with contemporaneous

432. See Krouse, *supra* note 306, at 152 (noting that a "commitment to the preservation of some irreducible sphere of private life, some public/private distinction, is absolutely central to the liberal vision").

433. Cf. Milton C. Regan, Jr., *Reason, Tradition, and Family Law: A Comment on Social Constructionism*, 79 VA. L. REV. 1515, 1522 (1993) (noting that family law arises out of a culture's "need to constrain, channel, and accommodate . . . elementary emotions," such as "rage, aggression, jealousy, sacrifice, loyalty, and fairness").

434. See HEGEL, *PHILOSOPHY OF HISTORY*, *supra* note 120, at 211-15; see also *supra* notes 196-216 and accompanying text (describing Hegel's observations).

American families constituted by non-Mormon monogamous marriage. Indeed, nineteenth-century, and even twentieth-century, monogamous marriage in America has been described as highly patriarchal,⁴³⁵ and nineteenth-century Mormon views on the proper gender roles for women were not particularly unusual, or out-of-step with their non-Mormon contemporaries.⁴³⁶ To justify the result in *Reynolds*, therefore, it is necessary to analyze the concrete personal, social, and political relations that arose from the practice of Mormon polygamy to demonstrate that it was not only fundamentally illiberal but also dangerous to the integrity of the American state.

Justifying the result in *Reynolds* will be significant in a number of ways. If *Reynolds* is grounded in an essentially political critique of polygamy, then it cannot properly be used to support state prohibitions on same-sex marriage that are rooted in quasi-religious moral critiques of homosexuality. At the same time, modern First Amendment scholarship has found the level of respect given to the religious basis of Mormon polygamy to have been considerably less than the Free Exercise Clause would now appear to demand. In the absence of a convincing social evil promoted by polygamy, the *Reynolds* opinion may have been wrongly decided, in which case Mormon polygamy should be legally permissible. A critique of *Reynolds* on these grounds, however, offers little comfort to proponents of same-sex marriage, which cannot be credibly described as a religious practice. Therefore, if we understand precisely and concretely how Mormon polygamy could be argued to undermine the liberal state, then we may look to see whether same-sex marriage might have a similar effect. If it can be shown that same-sex marriage does not have a similar negative effect on the liberal state, then the legitimacy of the legislative attacks on polygamy can provide no support for legislative attacks on same-sex marriage.

435. See OKIN, *supra* note 218, at 138 (“[G]ender-structured marriage involves women in a cycle of socially caused and distinctly asymmetric vulnerability.”).

436. See JESSIE L. EMBRY, MORMON POLYGAMOUS FAMILIES: LIFE IN THE PRINCIPLE 104 (1987) (describing Mormon society as characterized by the same “‘rigid gender-role differentiation’” as American society as a whole (quoting Carroll Smith-Rosenberg, *The Female World of Love and Ritual: Relations Between Women in Nineteenth-Century America*, in HISTORY OF WOMEN IN THE UNITED STATES (K.G. Saur ed., 1992))); LAWRENCE FOSTER, RELIGION AND SEXUALITY: THREE AMERICAN COMMUNAL EXPERIMENTS OF THE NINETEENTH CENTURY 230-31 (1981) (describing the Mormons as sharing the ideas of non-Mormon society on women’s role in religion and as attracting women who held traditional conceptions of male authority and female subservience).

A. The Doctrinal Underpinnings of Mormon Polygamy

What made Mormon polygamy distinctly and dangerously patriarchal was its role in and relationship to Mormon society as a whole. To understand this danger, one must understand the religious principles that grounded Mormon polygamy. The anthropomorphic Mormon view of God as a man⁴³⁷ meant that Mormon "men could progress toward full godhood."⁴³⁸ As heaven and the after-life were perceived as an extension of earthly life in which social relationships established on earth would continue, the Kingdom of Heaven could and had to be substantially achieved on earth.⁴³⁹ Godly power, on earth and in heaven, could be achieved by the building of an expansive social power base on earth.⁴⁴⁰ Such power over others could be achieved only by "celestial marriage," in which a man and a woman would be "sealed" to each other for all eternity,⁴⁴¹ and by the birth of blood progeny from such marriages, who would then be linked to their patriarch for all eternity as well.⁴⁴² Through the "eternal increase" of such godlike patriarchs by means of their children, grandchildren, and further descendants, Mormon men eventually would move on to rule over whole new worlds, achieving full godhood in conjunction with their wives in what could easily be seen as a kind of cosmic "manifest destiny."⁴⁴³

Polygamy was not merely permissible, but very important, as it accelerated the process by which the Kingdom of Heaven could be achieved on earth⁴⁴⁴ and by which individual men could achieve godhood.⁴⁴⁵ Because women could share in the blessings and glory of priesthood and godhood only by being sealed to a man in celestial marriage,⁴⁴⁶ women's status on earth and in heaven was determined

437. See FOSTER, *supra* note 436, at 144 (quoting the words of Joseph Smith, the founder and first Prophet of the Latter-Day Saints).

438. *Id.*

439. *See id.* at 145.

440. *See id.*

441. *Id.*

442. *See id.*

443. *Id.*

444. *See id.* at 166-67.

445. *See id.* at 145.

446. See MARILYN WARENSKI, *PATRIARCHS AND POLITICS: THE PLIGHT OF THE MORMON WOMAN* 36 (1978). Only men could achieve the Priesthood and possible godhood. See FOSTER, *supra* note 436, at 230; see also WARENSKI, *supra*, at 31-36 (explaining that, while the Mormon religion gives women unique religious roles and duties, sometimes described as "Priesthood duties," this is not in any way equivalent to male Priesthood,

by whom they married. Consequently, a woman in a polygamous marriage attained greater status on earth and in heaven.⁴⁴⁷

B. Polygamy and Theocracy

Thus, nineteenth-century Mormon polygamy appears as the primary instrument in the Mormon plan to create an eternal society whose fundamental organizing principle was the patriarchal family.⁴⁴⁸ Given Mormon views on the continuity between life on earth and life in heaven and the necessity of creating social relationships on earth which would persist into eternity, the patriarchal Mormon polity also was necessarily a theocracy, a state in which both the organizational structure and the exercise of power was held by religious authorities. For the Mormons, religious authority was grounded on modern-day revelation, i.e., the direct communication of truth from God. While all Mormons might be capable of receiving revelations, "women can have revelations for themselves but not for the church."⁴⁴⁹ Thus, the social and spiritual authority of men was assured.⁴⁵⁰ The possibility of doctrinal revelations, however, was further limited to the head of the Mormon Church, the Prophet.⁴⁵¹ In the nineteenth-century

which gives all Mormon men eternal spiritual authority over women).

447. See FOSTER, *supra* note 436, at 211-12 (noting that Mormon women in plural marriages had higher status than Mormon women in monogamous marriages because polygamous husbands "tended to belong to the religious and economic elite" and the increased number of children fathered by such a husband would ensure a greater status in heaven).

448. See *id.* at 239-40 (describing the "family and larger kinship networks" as "far more than the basic biological unit" for the Mormons, but rather a representation of "their entire community"). In such a society, authority would be concentrated in men by the creation of extensive families of children whose harnessed energy would be controlled by, focused by, and identified with their patriarch. See *id.* at 17 (describing Mormon polygamy as the means for patriarchal leaders to gain the most status and power); WARENSKI, *supra* note 446, at 146 (describing the motive for Mormon polygamy as the accumulation of power).

449. WARENSKI, *supra* note 446, at 45.

450. See FOSTER, *supra* note 436, at 230 (describing the male Mormon Priesthood as giving the "ultimate basis of religious and social authority" solely to men).

451. Cf. EMBRY, *supra* note 436, at 42 (quoting one Mormon leader as describing the Prophet as the "'one man in all the world . . . who can hold the keys' to receive 'new revelation'"). Foster explained:

What was essential—and what remains essential in the Mormon Church to this day—is that there be a consensus that the head of the Mormon Church is ultimately able authoritatively to determine the specific social forms through which the underlying spirit is expressed as the Church deals with the ever-changing temporal circumstances affecting its existence.

FOSTER, *supra* note 436, at 168.

Mormon theocracy, therefore, the ideal of the patriarchal family as a basis of societal structure was accompanied by a notion of absolute truth that would be handed down by authoritative religious leaders.⁴⁵²

C. Polygamy and Individuality

Hegel claimed that one of the negative features of a patriarchal society was that it neither developed individuals nor valued their freedom. Lawrence Foster has argued that historically, Mormonism can be understood as an attempt "to overcome . . . rampant, exploitative Jacksonian individualism."⁴⁵³ The period in which Mormonism developed was characterized by a proliferation of competing religious sects, and the existence of numerous sects undermined the security of religious faith and social authority.⁴⁵⁴ This period also was characterized by increasing economic differentiation, which took men out of the home and left women exclusively responsible for domestic concerns,⁴⁵⁵ and by greater geographic mobility, which allowed individuals to escape from parental control and make their own familial and lifestyle choices.⁴⁵⁶ Coupled with the growing individualism of society was an "emphasis in the ante-bellum period on individualistic 'romantic love' as the basis for marriage."⁴⁵⁷ All of these factors led to a perception that the family was threatened with destruction.⁴⁵⁸ Foster has argued that Mormonism, as a social phenomenon, can be understood as an attempt to return to "medieval ideals in which religious and social life were inextricably intertwined, and the good of the community took precedence over individual 'self-interest.'"⁴⁵⁹ The retreat to the more primitive political form of

452. While many modern evangelical Christian, Muslim, and Jewish religious sects also maintain strong patriarchal views of women's inferior position without an adherence to polygamous marriage, I would argue that these views are tempered by the inherently equalizing features of monogamous heterosexual marriage. See *infra* text accompanying notes 527-28.

453. FOSTER, *supra* note 436, at 139.

454. See *id.* at 10-12.

455. See *id.* at 12; see also DEBORAH ANNA LUEPNITZ, *THE FAMILY INTERPRETED: FEMINIST THEORY IN CLINICAL PRACTICE* 129-31 (1988) (arguing that the split of family and market place into distinct spheres divided along gender lines simultaneously devalued women's domestic work, yet gave women greater responsibility and freedom to run the domestic domain).

456. See FOSTER, *supra* note 436, at 13.

457. *Id.*

458. See *id.* at 12.

459. *Id.* at 139.

patriarchy was therefore a deliberate attempt to suppress the increased religious, economic, social, and sexual autonomy of individuals in American society.⁴⁶⁰

Nineteenth-century Mormons viewed the institution of polygamy as crucial to their project.⁴⁶¹ As Mormons attributed the social chaos of their times to a loss of patriarchal authority, polygamy was seen as "allow[ing] men to reassert their proper authority and leadership"⁴⁶² by freeing them "from the unnatural sexual influence women hold over men in a monogamous system."⁴⁶³ Polygamy also undermined the "careless individualism of romantic love"⁴⁶⁴ for men and women.⁴⁶⁵ For Mormon plural wives, marriage could not be founded on romantic love, as the necessary exclusivity would be missing.⁴⁶⁶ Nor would marriage provide constant companionship, deep emotional support, or even exclusive economic support.⁴⁶⁷ Marriage was rather a religious and social duty, an opportunity to build a kingdom on earth which would have its reward in heaven.⁴⁶⁸

Polygamy created an institution demanding sacrifice by men as well. Certainly, it would have been easier for men to satisfy sexual desires for multiple women by employing prostitutes, rather than entering the emotional maelstrom of a family with multiple wives who were jealously competing for affection and time, and siring enormous numbers of acknowledged children requiring economic support.⁴⁶⁹

460. See KLAUS J. HANSEN, *MORMONISM AND THE AMERICAN EXPERIENCE* 163-64 (1981) (arguing that Mormon polygamy was designed to reverse the development of individuality which monogamous marriage promoted).

461. See FOSTER, *supra* note 436, at 139.

462. *Id.* at 176.

463. *Id.*

464. *Id.* at 139.

465. See *id.* at 207.

466. See RICHARD S. VAN WAGONER, *MORMON POLYGAMY: A HISTORY* 103 (1986) ("A polygamous wife basing her relationships on romantic love often found the emotional foundation of marriage weakened by jealousy. Women who were not overly fond of their husbands in a romantic sense seemed to make the easiest adjustment to the situation.").

467. See *id.* at 207-09; see also B. CARMON HARDY, *SOLEMN COVENANT: THE MORMON POLYGAMOUS PASSAGE* 91 (1992) (describing Brigham Young's admonishment to wives that "[t]hey should not be concerned with whether they were loved 'a particle' by their companions"); *id.* (noting Brigham Young's advice to husbands that they should "never love [their] wives one hair's breadth further than they adorn the Gospel, never love them so but that [they] can leave them at a moment's warning without shedding a tear").

468. See FOSTER, *supra* note 436, at 208-09.

469. See *id.* at 209; see also Linford, *Polygamy Cases*, pt. 1, *supra* note 5, at 34 ("Polygamy was not instituted merely to satisfy the lustful desires of Mormon men; the

Indeed, Foster describes the institution of polygamy as a “means of de-sexualizing and redirecting the husband-wife relationship so that relations between the sexes became first and foremost goal-directed.”⁴⁷⁰ A polygamous man also had to give up his own ideals of romantic love and take on a second wife, knowing that he was delivering a crushing emotional blow to his first wife, with whom he may well have had a deep romantic relationship. The knowledge that this blow was coming might even have steered men away from romantic first marriages, so as to avoid the inevitable emotional heartache.

Furthermore, in order to maintain harmony within a polygamous marriage, men had to display an equitable impartiality toward their many wives and children.⁴⁷¹ The impossibility of maintaining intense emotional involvement in polygamous families made it easier for polygamous men to dedicate their time and energy to Church business,⁴⁷² thus requiring polygamous women to rely upon their children as emotional anchors.⁴⁷³ Polygamous men were particularly likely to be in leadership roles in the Church because they were likely to be the most ambitious and energetic men in the community⁴⁷⁴ and because they had demonstrated their commitment to the Church by taking on the burden of a polygamous family.⁴⁷⁵ Because polygamous men were particularly likely to be frequently absent from their families on Church business,⁴⁷⁶ polygamous marriage was an effective means of redirecting the individualistic focus of romantic, monogamous marriage toward the goals of the larger social group, which included populating Utah with Mormons and building a social and economic infrastructure to keep succeeding generations dedicated to the religious commitments of their parents.⁴⁷⁷

In addition to undermining the way in which monogamous marriage makes possible the kind of emotional support that nurtures the individuality of the marital partners and the emerging individuality of the children, the patriarchal underpinnings of Mormon polygamy

great expense of more than one family was so prohibitive that only the sincerely religious would undertake it.”).

470. FOSTER, *supra* note 436, at 210.

471. *See id.* at 209.

472. *See id.* at 211.

473. *See id.* at 212.

474. *See* KIMBALL YOUNG, ISN'T ONE WIFE ENOUGH? 105 (1954).

475. *See* WARENSKI, *supra* note 446, at 148.

476. *See id.* at 150 (noting that polygamous men were particularly likely to be called to travel on Church missions for years at a time).

477. *See* FOSTER, *supra* note 436, at 210-11.

were designed to repress the development of independent individual conscience and critical evaluation. Indeed, as the founding Mormons viewed a society of individuals attempting to determine their own religious and social views as an invitation to social chaos, it is not surprising that they would have devised a social system which inhibited the development of such individuality. Certainly, a society which unquestioningly concentrates political and religious authority in patriarchs does not value or encourage independent thinking.⁴⁷⁸ Early Mormons "were expected to become 'as clay in the hands of the potter'; totally subordinating their wills to that of the group, they would allow themselves to be reshaped into a new and more perfect social form as Latter-day Saints."⁴⁷⁹ The role of polygamy in the process of de-emphasizing the independent individual Mormon voice was substantial. For the founding Mormons, polygamy served, among other things, as "one of the chief tests of the total loyalty which [Joseph] Smith . . . demanded of his closest followers."⁴⁸⁰

Among later Mormons in Utah, polygamy continued as a test of loyalty for further advancement in Church leadership positions.⁴⁸¹ Therefore, religious and social power was substantially distributed to men whose faith in religious authority was strong enough to overcome their desire to both express and nurture their individuality through a family created by romantic love.⁴⁸² Commitment to polyg-

478. See WILLIAM J. MCNIFF, *HEAVEN ON EARTH: A PLANNED MORMON SOCIETY* 53 (1940) (explaining that "the individual searcher for truth was likely to run into conflict with the authorities" because the Mormons believe that "intelligence should be subservient to God's will as interpreted by those who held the keys—that is, the Church authorities").

479. FOSTER, *supra* note 436, at 167 (quoting Brigham Young's counselor Heber C. Kimball).

480. *Id.* at 150. Foster writes:

Men or women who had once engaged in polygamous practice were in no position to apostasize, because the air would be blue with stories of their licentious behavior. Likewise, if a man's daughter had been sealed as plural wife to Joseph Smith or another leader of the Church, effective opposition to the practice became exceedingly difficult. To oppose polygamy under such circumstances would be tantamount to disowning one's own children, as well as everything to which one had previously committed one's whole life.

Id.

481. See EMBRY, *supra* note 436, at 8, 62-65.

482. See VAN WAGONER, *supra* note 466, at 97-98 (noting that the church put extreme pressure on monogamous men to enter into polygamy if they desired advancement in the church or even to remain members); YOUNG, *supra* note 474, at 106-10 (noting that Mormon men entered into polygamous marriages because they believed it was required by the church as the socially responsible thing to do and because "the social climate of the time fostered obedience to the system").

amy, either in practice or theory, served to define a culture in which obedience to religious authority could and should overcome the most personal individual judgments.

D. Polygamy and Liberty

Much of the extreme hostility toward Mormons in the nineteenth century was generated by fear that Mormon social cohesion, combined with Mormon beliefs in religious control of political and social organization, would have a distorting effect on a democratic society that maintained individual liberty only by denying the possibility of a completely social definition of what was true, right, and good.⁴⁸³ Indeed, Hegel had argued that one cannot ensure freedom merely by providing a people with a constitution, but a constitution must be an organic development of a people whose substantial existence promotes the very freedom which the state maintains and protects.⁴⁸⁴ Lieber expressed concern that even if the Mormons were to set up a representative political structure, it would merely be “*pro forma*” and would reproduce the underlying theocracy.⁴⁸⁵ Thus, the patriarchal structure of the family would tend to be replicated in the political structure of a Mormon state. In such a state, the free-thinking individual would not be valued.⁴⁸⁶ In Mormon society, polygamy served to elevate the group over the individual by “vastly expand[ing] the network of personal loyalties and the range of possible relationships.”⁴⁸⁷ Polygamy worked to reconstitute a group of otherwise unrelated individuals into a tribe in which personal loyalty and tribal loyalty would be virtually synonymous.⁴⁸⁸ This in turn enhanced the ability of the group to demand the sacrifice of the

483. See FOSTER, *supra* note 436, at 242 (explaining the enormous hostility toward the Mormons prior to the spread of knowledge of the Mormon practice of polygamy as provoked by “the Mormons’ extraordinary group solidarity”).

484. See HEGEL, PHILOSOPHY OF HISTORY, *supra* note 120, at 174-75.

485. See Francis Lieber, *The Mormons: Shall Utah Be Admitted to the Union?*, PUTNAM’S MONTHLY, Mar. 1855, at 225, 231.

486. Not valuing free-thinking individuals might be demonstrated by a lack of tolerance of those who are unwilling to conform. Thus, in 1988, three former members of a fundamentalist Mormon sect were murdered by other sect members. See Otto, *supra* note 5, at 883 n.10 (citing James Coates, *Mormons Fear Sect’s Death List*, CHI. TRIB., July 24, 1988, at C19).

487. FOSTER, *supra* note 436, at 151. Within the short period polygamy was practiced by the Mormons, it created such complex ties of blood and marriage that an elderly man could, at the time of his death, be related to more than 800 people. See *id.* (citing BENJAMIN F. JOHNSON, MY LIFE’S REVIEW 388 (1947)).

488. See *id.* (pointing to the Mormon view of itself as “New Israel”).

individual for group goals and policies.

Consequently, polygamy would promote and expand blind family/social loyalty to a level which could compete with, if not replace, federal political authority. At the same time, participation of Mormons in the federal political structure would threaten the liberties of Americans because the failure of Mormon society to value individual conscience as supreme would in the end justify preventing non-Mormons from disagreeing and having the right to live differently. Thus, the targeting of Mormon polygamy by mainstream American society in the late-nineteenth century, while also motivated by religious and moral antipathy, was substantially based on a recognition of the connection between polygamy and the cohesive patriarchal society the Mormons sought to develop.

E. Polygamy and Equality

Polygamy can also be seen as undermining important ideals of equality that underlie democracy. Laura Betzig has made the Darwinian argument that because human beings, from an evolutionary perspective, "should have evolved to seek out positions of strength as a *means* to reproduction,"⁴⁸⁹ where possible, "power is exploited to the end of reproduction."⁴⁹⁰ Polygamy in particular is an institution designed to give those with power an opportunity to reproduce in greater numbers than those who do not have such power.⁴⁹¹ This is obvious from the fact that polygamy will take place in a society with relatively equal numbers of men and women. The polygynous⁴⁹² marriages of some, and their increased reproduction, means no marriage and possibly no reproduction to a number of other men. This will be possible only if the polygamous men can succeed in overpowering those men whose basic biological urges are being frustrated. Therefore, polygamy can be a viable institution only where there are significant imbalances of power between men.

489. BETZIG, *supra* note 195, at 2.

490. *Id.* at 3.

491. *See id.* at 8-9.

492. As explained *supra* at note 216, "polygyny" refers to the marriage of one man to multiple women. "Polyandry"—the marriage of one woman to multiple men—is so socially unusual that it is impossible to speculate on its political implications. *See* EMBRY, *supra* note 436, at 3 (noting that polyandry has occurred in less than one-tenth of one percent of 862 societies surveyed, while polygyny in some form was present in 84%). The possibility of a coherent social order in which both polygyny and polyandry were present is difficult to imagine. As a result, I have made no attempt to consider the political implications of a practice of polyandry, whether in conjunction with polygyny or not.

The official doctrine of the Mormon Church was that "polygamy was necessary in order to provide earthly bodies rapidly enough for the innumerable spirits awaiting the opportunity to become Saints on earth."⁴⁹³ However, a system based entirely on monogamous marriages could have been equally reproductively successful,⁴⁹⁴ particularly since there was never an imbalance in the number of men and women in Utah.⁴⁹⁵ With this in mind, it is important to recognize that polygamy was practiced by no more than twenty percent of Mormon men.⁴⁹⁶ These were men who had chosen to undertake the burden, expense, and responsibility of plural marriage,⁴⁹⁷ and who had received the permission of church elders to enter into plural marriage.⁴⁹⁸ It would appear from the polygamy prosecutions that the elders of the church constituted a significant proportion of those who chose and were permitted to enter into plural marriages.⁴⁹⁹ This concentration of polygamists among the religious leaders⁵⁰⁰ suggests that the purposes of polygamy included permitting high-achieving men to have the privilege of increased reproduction and diverting these same men into Church service by converting their private lives into a burden justified only by religious belief. Thus the Church, through polygamy, served to control who would have the opportunity for increased reproduction, and who would not.⁵⁰¹

493. Linford, *Polygamy Cases*, pt. 1, *supra* note 5, at 310.

494. See EMBRY, *supra* note 436, at 35 (noting that there is no evidence to suggest that polygamy increased the Mormon population more than monogamy would have, since polygamous women tended to have fewer children than monogamous women did).

495. See FOSTER, *supra* note 436, at 210.

496. See *id.* (citing Stanley S. Irvins, *Notes on Mormon Polygamy*, 10 W. HUMAN. REV. 230 (1956)). But see LEONARD J. ARRINGTON & DAVIS BITTON, *THE MORMON EXPERIENCE: A HISTORY OF THE LATTER-DAY SAINTS* 199 (1979) (claiming that polygamy was practiced by only five percent of Mormon men during the nineteenth century).

497. See Linford, *Polygamy Cases*, pt. 1, *supra* note 5, at 311.

498. See *Reynolds v. United States*, 98 U.S. 145, 161 (1878) (stating that part of Reynolds' First Amendment argument was that he had been given permission to enter into plural marriages by the recognized authorities of the Church).

499. See Linford, *Polygamy Cases*, pt. 1, *supra* note 5, at 370 (stating that "[t]he leading elders might have been polygamists"); Linford, *Polygamy Cases*, pt. 2, *supra* note 5, at 582 ("Hundreds of [the Church's] leading elders were in prison. Hundreds were in exile.").

500. See Linford, *Polygamy Cases*, pt. 1, *supra* note 5, at 310 (citing B.H. ROBERTS, *A COMPREHENSIVE HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS* 57 (1930)); see also EMBRY, *supra* note 436, at 45 (explaining the view that polygamy provided a better chance that children would be raised by two parents who were active and committed members of the Church).

501. Polygamy also made it more likely that the children born would be particularly devoted to the Mormon Church and its religious doctrine. As Jessie Embry reports, children brought up in polygamous families even after polygamy was repudiated by the

As long as the number of men and women remained relatively equal, the practice of polygamy would have to create two classes of men: those privileged to reproduce at a high rate, and those who might have only one wife and family, if any.⁵⁰² To the extent this stratification within Mormon society could have been avoided by importing a greater number of female converts than male to replenish the supply of women for existing Mormon men,⁵⁰³ the practice threatened to make non-Mormons second-class citizens, with less reproductive potential than Mormons. Thus, polygamy was both a vehicle for exercising power and a means for concentrating power,⁵⁰⁴ and this power was controlled by and through the Mormon Church.⁵⁰⁵ Consequently, what was so disturbing about polygamous marriage in Mormon society was not simply that it rested upon an unegalitarian belief as to the greater religious righteousness of some men, but that it would have established a concrete society in which equality was markedly absent. Indeed, Francis Lieber argued that Mormon polygamy was intended to produce an aristocracy or a hereditary order of priests who would have the political power in Mormon society.⁵⁰⁶ The concentration of reproduction and political

Mormon Church accepted the religious necessity of polygamy and maintained a certain defensive emotional attachment to polygamy as their family lifestyle. See EMBRY, *supra* note 436, at 190-91.

502. Demographic evidence shows that polygamous Mormon men had more children than monogamous Mormon men. See *id.* at 36.

503. Even before the exodus of the Mormons from Nauvoo, Illinois to Utah, the Mormons were engaged in a large-scale recruitment of converts, both at home and abroad. See FOSTER, *supra* note 436, at 184-85 (noting that by 1846, more than 4,000 British converts had joined the Mormons in Nauvoo); *id.* at 200 (noting that the 1852 official Church announcement of Mormon belief in polygamy coincided with a large-scale assignment of elders to three- to seven-year foreign missions, in which they were told to "gather the sheep together," but warned not to "make selections before they are brought home and put into the fold").

504. One author has said of Mormon polygamy, "Religion was the pretext; power was the motive." WARENSKI, *supra* note 446, at 146 (quoting DENNIS MICHAEL QUINN, *THE MORMON HIERARCHY 1832-1932: AN AMERICAN ELITE* (1976)).

505. See FOSTER, *supra* note 436, at 204. In actual practice, all plural marriages "had to be formally cleared with the President of the Mormon Church, even when the lower levels of the hierarchy made the initial judgment." *Id.*

506. See Lieber, *supra* note 485, at 225, 231. In fact, it may well have accomplished this end. A modern commentator on Mormon society has noted:

It is a curious fact, however, that those in charge of the Church have been predominantly successful businessmen whose family names have appeared repeatedly throughout Mormon history. Whether spirits borne into prominent Mormon families are endowed more abundantly with righteousness or their rise in the hierarchy is of a political nature as some critics suggest, the eternal progression of well-named Mormon spirits is noticeably accelerated. The Mormon

power produced by Mormon polygamy denied the abstract concept of equality and produced a society structured by inequality.

F. Polygamy and Gender Equality

Discerning the unique effect of Mormon polygamy on the possibility of gender equality is complicated by a number of facts. First, monogamous marriages in nineteenth-century America were based on the same patriarchal ideas about women's nature and gender roles as polygamous Mormon marriages.⁵⁰⁷ Second, nineteenth-century Mormon women often are described as having more economic choices, having more personal independence, and being more financially self-reliant than their Eastern contemporaries,⁵⁰⁸ who were often prevented from engaging in domestic labor and excluded from the marketplace.⁵⁰⁹ Finally, during the height of polygamy in 1870,

aristocracy is recognized as a prevailing force in the system and derives its status more from a heritage of church leadership than from accumulated wealth.

WARENSKI, *supra* note 446, at 65-66.

507. See FOSTER, *supra* note 436, at 212 (noting that the Mormon emphasis on the role of women as mothers and homemakers was "strikingly similar" to the views of their Victorian contemporaries); WARENSKI, *supra* note 446, at 149 (noting that Mormon views on the patriarchal family order, aside from polygamy, were similar to those of early New Englanders).

508. See FOSTER, *supra* note 436, at 214 (describing women running farms, exercising equal responsibility for financial management, and constituting a "relatively large class of professional women in Utah," including a dominant portion of the medical profession, as well as having an equal opportunity for university education at the University of Deseret, a co-educational institution since 1850); see also WARENSKI, *supra* note 446, at 9-12 ("[T]he women out in Utah territory were realizing many of the feminists' goals. With no doors closed to them regarding work, they were participating in almost every business and profession known to man.").

509. See WARENSKI, *supra* note 446, at 153 (quoting a non-Mormon visitor to Utah in 1869 as saying that "'womanhood (in Utah) is not as petted and spoiled as in the Eastern States'"). *The Women's Exponent*, a well-known Mormon periodical from 1872-1914, expressed positions on the inequitable treatment of women in the public sphere as radical as those of their Eastern feminist contemporaries. See FOSTER, *supra* note 436, at 215; WARENSKI, *supra* note 446, at 170-72. Perhaps somewhat paradoxically, Mormon feminists even defended polygamy on the ground that it was an essentially liberating institution for women. See *id.* at 156-57. Among other things, they argued that women could be freed from child-rearing for professional life because they could leave their children with a "sister wife." See *id.* at 157. More recently, it has been suggested that polygamy proved liberating for women because the less intense emotional involvement of husbands and wives in polygamous marriage freed plural wives to pursue their own interests, or because the lower degree of financial support offered to plural wives necessitated that they assume a greater presence in the economic world. See FOSTER, *supra* note 436, at 215-16 (quoting Gail Casterline, "In the Toils" or "Onward for Zion": Images of the Mormon Woman, 1852-1890, at 80-81 (1974) (unpublished M.A. thesis, Utah State University) (on file with author)). However, the freeing possibilities of having "sister wives" to take care of work-

Mormon women were given the right to vote almost fifty years before full female suffrage was achieved by the rest of American women.⁵¹⁰

It would be a mistake, however, to view these various achievements as proof that polygamy is more likely to promote gender equality than monogamy. To begin with, the impressive achievements of some Mormon women and the independence and economic contributions of many Mormon women of that time can be substantially attributed to the exigencies of frontier life,⁵¹¹ and to the absorption by the Church of an enormous amount of men's time and energy on Church business within Utah and on missions abroad.⁵¹² Under these circumstances, women's labor and talents could not be wasted.⁵¹³ The apparently liberating effects of polygamous marriage also were more likely the consequence of placing nineteenth-century women⁵¹⁴ in an ancient institution in a frontier economy. Putting such women in an emotionally unsatisfying or economically inadequate marriage in a society in which men's Church involvement left significant gaps in the marketplace⁵¹⁵ quite predictably produced professional and working women at a level that could not have occurred in the highly populated and economically developed East.

While the Mormon Church has often pointed to the early success of women's suffrage in Utah as evidence of "progressive and

ing wives' children can be seen as less a function of polygamy than as a function of economic wealth and the unusual circumstances of settling the frontier. See WARENSKI, *supra* note 446, at 12 (noting that many women famous as Mormon pioneer achievers "enjoyed servants and a surprising number of privileged-class advantages," possibly because of their "close relations with the patriarchy").

510. See WARENSKI, *supra* note 446, at 144 (noting that a Mormon woman was the first American woman to vote on February 14, 1870).

511. See FOSTER, *supra* note 436, at 214.

512. See *id.* at 213.

513. See *id.* at 214.

514. Given the limited period in which, and extent to which, polygamy was officially practiced by Mormons, see *supra* notes 494-96 and accompanying text, it seems likely that most of these independent plural wives must have been converts raised in non-Mormon monogamous homes or first- or second-generation Mormons raised in monogamous homes. Such women already would have developed as individuals before they entered a polygamous marriage.

515. See WARENSKI, *supra* note 446, at 130 (noting that the concentration of women in medicine was the result of Brigham Young's distrust of non-Mormon doctors, a great need for maternity health care, and the need to reserve men "for the more important work of building the kingdom" (quoting Brigham Young)); *id.* at 151 (noting that Brigham Young pressed women into accounting when it became apparent that many of the male accountants were needed for Church missions).

liberal attitudes toward women,”⁵¹⁶ a significant reason for the Church’s support for suffrage at that time was the political advantage it gave Mormons as a whole.⁵¹⁷ The move to give women the vote in Utah actually began with congressional anti-polygamy activists, who, believing that no woman would voluntarily support polygamy, assumed that giving Mormon women political power would help end polygamy in the Territory.⁵¹⁸ Once suggested, Mormon men embraced the idea, and women’s suffrage was enacted by the Utah legislative body.⁵¹⁹ Mormon women, although happy to have the vote, had not previously sought it themselves.⁵²⁰ Nor did the male decision to give women the vote reflect any sense that Mormon women, or any women, were equal to men.⁵²¹ The Mormon Church supported giving women the vote because they knew that Mormon women were fully committed to the principles of the Church and that this move would therefore “increase the Mormon electorate” in Utah.⁵²² Later, when Utah was approved for Statehood and was drafting its constitution, the debate over the inclusion of women’s suffrage centered around its effect in ensuring that the Mormon Church would have control of Utah government, rather than women’s rights.⁵²³

Polygamy, therefore, made little or no unique contribution to the “liberation” of nineteenth-century Mormon women.⁵²⁴ Indeed,

516. *Id.* at 179.

517. *See id.*

518. *See id.* at 162.

519. *See id.* at 163.

520. *See id.* at 164.

521. While women were given the vote, they were not given the right to hold high-level executive, legislative, or judicial offices because “women ought not to be raised above the level of man to be his governor, guide or law-giver, or invested with powers for which nature has not fitted her.” *Id.* at 163 (citing T.A. Larson, *Woman’s Suffrage in Utah*, UTAH HISTORICAL Q., Winter 1970, at 20).

522. *Id.* at 164. Female suffrage was also perceived as improving the chance for Utah to obtain Statehood. *See id.*

523. *See id.* at 179.

524. As the exigencies of frontier life and populating the Territory of Utah disappeared, the extreme patriarchal Mormon views on women’s subordination to male authority, and on women’s primary role as mothers have re-emerged. *See, e.g., id.* at 83-89 (pointing out how the modern Mormon doctrine requiring women to marry and have children in order to attain eternal salvation makes marriage and motherhood a religious duty for women that is seen as being compromised or threatened by choosing to delay marriage or children, or choosing to work outside the home or develop expertise in non-domestic labor); *see id.* at 226-27 (explaining that Church doctrine discourages women from remaining single because single women merely will be “‘ministering servants’” in heaven,

the intended role of polygamy in Mormon society was to institutionalize patriarchy so as to prevent women from gaining power and authority equivalent to men.⁵²⁵ Nineteenth-century Mormon polygamy thus created a social imbalance of power, grounded in religious doctrines of female inferiority, which was inherently inconsistent with the modern understanding of gender equality.⁵²⁶

Monogamous marriage, on the other hand, is at least potentially consistent with gender equality, even though patriarchal ideals have influenced the structure of monogamous marriage since its inception. To begin with, monogamous marriage grants women some power over men's sexuality and reproductive potential. More importantly, however, monogamous marriage symbolically states that one woman is the measure of one man. Indeed, when seventeenth-century English Royalists suggested that the absolute power of the husband in marriage lent legitimacy to their claim for absolute royal authority, English Parliamentarians were quick to see that the despotism of absolute male authority in marriage, premised upon female inferiority, was as illegitimate as the despotism of absolute royal authority premised upon royal superiority.⁵²⁷ Although nineteenth-century

with no possibility of godhood); *id.* at 244-45 (indicating that modern Mormon women who are unmarried get a clear message that, in order for them not to be blamed in Heaven for not being married, they must make every effort to be desirable for marriage, including changing their habits, speech, appearance, weight, and eccentricities). This subordination has confounded many Mormon women who had taken their pioneer predecessors as role models of independence and achievement. *See, e.g., id.* at 181-224 (documenting how pro-ERA Mormon women were often inspired by what appeared to be a progressive Mormon past, and chronicling their surprise and disenchantment at the substantial efforts of the Mormon Church in 1975 to defeat the ERA in Utah and subsequently nationwide).

525. *See* FOSTER, *supra* note 436, at 176. Polygamy restricted women's authority by depriving women of most, if not all, of the power they would have held in monogamous marriages. Since a woman in a polygamous marriage can and will be replaced, she cannot exercise equal power in the relationship. Her love and affection can be lost without great consequence to the man, but his loss is of great consequence to her. This can be demonstrated by the Mormon views on divorce. While Mormon polygamous men could not as easily divorce their wives as their wives could divorce them, men could always take on another wife. *See id.* at 218. Under the Mormon doctrine of divorce, however, a woman who obtains a civil divorce will still be sealed to her ex-husband for all eternity. If she seeks a temple divorce, she "forfeits her place in the Celestial Kingdom, and the children of the union remain sealed to their father as part of his individual kingdom in heaven." WARENSKI, *supra* note 446, at 248 (noting that "a second marriage for a woman is for time only and not for eternity," although special permission for a second eternal marriage can be granted by Church officials if the woman is worthy).

526. *See, e.g.,* United States v. Virginia, 116 S. Ct. 2264, 2274 (1996) (explaining that classifications based on sex "may not be used . . . to create or perpetuate the legal, social and economic inferiority of women" (citation omitted)).

527. *See* Mary Lyndon Shanley, *Marriage Contract and Social Contract in Seventeenth-*

critics of polygamy did not necessarily believe in women's suffrage or gender equality, their concern about the way in which polygamy appeared to degrade women⁵²⁸ can be recognized as based on notions of female dignity and worth that were inherent in monogamous marriage. These ideas of dignity and worth were the foundation for the ideals of gender equality which eventually emerged.

G. Summary

Despite what nineteenth-century critics claimed,⁵²⁹ Mormon polygamy was not motivated by male desires to have multiple sexual partners or by female desires to share their sexual partner.⁵³⁰ As this Article has explained, polygamy was accepted by nineteenth-century Mormons because of a patriarchal religious doctrine that made progress to godhood possible to men only through the building of kingdoms of progeny on earth, and made celestial glory possible for women only through their eternal marriage to a man who built such a kingdom. However, the practice of polygamy, which most perfectly realized this doctrine, was in fact reasonably perceived as constituting a threat to traditional American ideals of separation of church and state, individual autonomy, individual liberty, and equality of all men, and would now be perceived as threatening the modern American ideal of equality of men and women. The decision in *Reynolds*, therefore, cannot be understood as based on a moral/religious rejection of Mormon sexual mores, but must be understood as based on a determination that the anti-democratic and unegalitarian consequences of the practice of polygamy justified what would otherwise have been a significant infringement upon First Amendment rights. *Reynolds*, therefore, provides the parameters for any legitimate legal analysis of same-sex marriage, requiring that we evaluate the practice

Century English Political Thought, in THE FAMILY IN POLITICAL THOUGHT, supra note 127, at 80, 81 (noting that John Locke suggested that nothing about monogamous marriage, viewed as a freely entered contract, required that women be subordinated to men); *see also* Krouse, *supra* note 306, at 154-56 (noting that Thomas Hobbes and John Locke were able to justify the patriarchal family only "at the price of violence to the logic of their own principles").

528. *See* WARENSKI, *supra* note 446, at 144-45.

529. *See* VAN WAGONER, *supra* note 466, at 89 (arguing that the Eastern image of polygamy as creating a "Mormon harem, dominated by lascivious males with hyperactive libidos" was "the creation of Gentile travelers to Salt Lake City more interested in titillating audiences back home than in accurately portraying plural marriage").

530. *See id.* (noting that Mormon polygamy was "essentially puritanical"); Linford, *Polygamy Cases*, pt. 1, *supra* note 5, at 369 ("As any informed student of Mormon polygamy must concede, the system was not founded upon the lust and carnal desire of men.").

of same-sex marriage in light of the beneficial role of heterosexual monogamous marriage in the modern liberal state and the pernicious effects which polygamous marriage would have brought about.

VI. SAME-SEX MARRIAGE

If polygamous marriage is antithetical to the modern free state, the question this Article must now consider is whether same-sex marriage similarly undermines the liberal ideals that ground American democracy. In his dissent in *Romer v. Evans*,⁵³¹ Justice Scalia argued that the Court, by striking down the Colorado constitutional amendment that would have prohibited any governmental action protecting the rights of homosexuals *qua* homosexuals, had thereby incorrectly “concluded that the perceived social harm of polygamy is a ‘legitimate concern of government,’ and the perceived social harm of homosexuality is not.”⁵³² In what follows, I will demonstrate that the monogamous nature of same-sex marriage, together with the fundamental personal, religious, political, ideological, and geographic diversity of homosexuals, prevents same-sex marriage from being a threat to our political ideals in the way Mormon polygamous marriage was. This means that the reasoning in *Reynolds* cannot be relied upon to justify state and federal legislative attacks on same-sex marriage. Therefore, current federal and state refusal to recognize same-sex marriage⁵³³ or a subsequent federal effort to prohibit same-sex marriage⁵³⁴ can have no legitimate constitutional purpose.

A. The Doctrinal Underpinnings of Same-Sex Marriage

Any comparison of Mormon polygamy and same-sex marriage must begin by considering whether an institution of same-sex marriage would be grounded, as Mormon polygamy was, on any shared religious or philosophical doctrines. In what follows, I will argue that same-sex marriage rests upon a coherent set of philosophical

531. 116 S. Ct. 1620 (1996). The Court in *Romer* held unconstitutional a Colorado constitutional amendment prohibiting all action at any level of government to protect homosexuals from discrimination on the grounds of homosexual orientation, conduct, practices, or relationships. *See id.* at 1629.

532. *Id.* at 1636 (Scalia, J., dissenting).

533. *See, e.g.*, Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (to be codified at 28 U.S.C. § 1738C and 1 U.S.C. § 7).

534. While no current federal legislation prohibits recognition of same-sex marriage by a state, as was done regarding polygamy in the Territory of Utah, I have little doubt that those who oppose same-sex marriage would seek to follow this precedent if they thought it had any chance of success.

principles about sex, love, gender, and the legal institution of marriage. Only by considering the social and political implications of these principles will it be possible to show that a change of this nature in the institution of marriage will not have profound and antidemocratic results.

Although critics of homosexual rights or same-sex marriage often suggest that these practices are based on doctrines ranging from atheism,⁵³⁵ communism, or feminism,⁵³⁶ it must be patently obvious to anyone who has actually surveyed the gay and lesbian community that the movement consists of individuals of every religious persuasion⁵³⁷ and every political ideology.⁵³⁸ A number of religions have recognized that homosexuality is consistent with their religious doctrines,⁵³⁹ but for those religions that have not, or insist that it is impossible, there remain gay and lesbian adherents to those faiths who believe that their homosexuality is not inconsistent with their

535. See, e.g., Duncan, *supra* note 9, at 441-42 (describing protesters seeking gay rights as "Christophobic" and as having "a regulatory agenda aimed at stopping the Church").

536. See, e.g., Douglas W. Kmiec, *America's "Culture War"—The Sinister Denial of Virtue and The Decline of Natural Law*, 13 ST. LOUIS U. PUB. L. REV. 183, 204 (1993) (suggesting that President Clinton's "efforts to proclaim the homosexual lifestyle as normal" are based on a "sinisterly antireligious" "constitutional misinterpretation" based on prevailing ideologies of "materialism, empowerment or economic redistribution").

537. The World Congress of Gay and Lesbian Jewish Organizations coordinates many synagogues serving predominantly gay and lesbian communities. See Lewis John Eron, *Homosexuality and Judaism*, in *HOMOSEXUALITY AND WORLD RELIGIONS* 103, 126 (Arlene Swidler ed., 1993) [hereinafter *WORLD RELIGIONS*]. Homosexuality is "openly practiced in Western Buddhist communities." José Ingacio Cabezón, *Homosexuality and Buddhism*, in *WORLD RELIGIONS*, *supra*, at 81, 94; see also *PECULIAR PEOPLE: MORMONS AND SAME-SEX ORIENTATION* 324-28 (Ron Schow et al. eds., 1991) (noting that the Mormon community also has gay members); Chris Glaser, *The Love That Dare Not Pray Its Name: The Gay and Lesbian Movement in America's Churches*, in *HOMOSEXUALITY IN THE CHURCH: BOTH SIDES OF THE DEBATE* 150, 150 (Jeffrey S. Siker ed., 1994) [hereinafter *HOMOSEXUALITY IN THE CHURCH*] (noting the existence of gay Quakers, Baptists, Lutherans, Catholics, Presbyterians, and Latter Day Saints).

538. In the 1988 presidential election, gays and lesbians registered to vote with numerous political parties: Democratic, 62%; Independent, 19.5%; Republican, 13.1%, Socialist, 2.3%; Libertarian, 2.6%; Other, 2.4%. See *THE GAY ALMANAC* 337 (Berkeley 1996).

539. For example, the United Church of Christ passed a resolution in 1991 that "invites all persons . . . to experience the struggle and joy of the journey towards openness and affirmation of all lesbian, gay and bisexual persons as children of God in the community of faith." *HOMOSEXUALITY IN THE CHURCH*, *supra* note 537, app. at 205 (Selected Denominational Statements on Homosexuality). Buddhist doctrine has been found "essentially neutral on the question of homosexuality (at least as neutral as it is in regard to heterosexual relations.)" Cabezón, *supra* note 537, at 94-95. The attitude of Hinduism toward homosexuality has been described as one of "mild amusement bordering on indifference." Arvind Sharma, *Homosexuality and Hinduism*, in *WORLD RELIGIONS*, *supra* note 537, at 47, 70.

specific religious beliefs or their spiritual advancement.⁵⁴⁰ At the same time, none of these religions suggests that being a homosexual or entering into a same-sex marriage is a religious duty. No gay or lesbian person chooses to practice homosexual sex or to enter a same-sex marriage for the reasons Mormons chose polygamy, i.e., because it was essential to their salvation, even if thought distasteful and unpleasant.⁵⁴¹ Not only does no coherent set of religious beliefs exist among American gays and lesbians, but no religious doctrine would motivate a gay person to seek to enter into a same-sex marriage rather than a heterosexual marriage.

Of course, the same is true of American heterosexuals. While the desire to be married may be motivated by religious doctrine, the motivation for wanting a *heterosexual* marriage does not arise from religious beliefs. This is not to suggest that many religions do not make heterosexual marriage a sacrament in which a religious person might desire to participate. Rather, what I am suggesting is that, for the most part, heterosexual marriage is not chosen because religious doctrine demands it. Heterosexuals simply channel their inclination to couple into the prescribed religious institution.⁵⁴²

Nor can desire to enter into a same-sex marriage be linked to any single coherent set of political beliefs. Gay and lesbian Americans come in every political stripe and are members of myriad diverse organizations.⁵⁴³ Again, some of these organizations make official doctrinal statements that are compatible with homosexuality. Other organizations have doctrinally condemned homosexuality, yet

540. See, e.g., CARTER HEYWARD, OUR PASSION FOR JUSTICE 44-45 (1984) (arguing that "God's being is in loving" including both heterosexual and homosexual love by a lesbian Episcopal priest); John J. McNeill, *Homosexuality: Challenging the Church to Grow*, in *HOMOSEXUALITY AND THE CHURCH*, *supra* note 537, 49, 50-52 (an argument that Catholicism and Christianity in general should view homosexual love by a gay Catholic priest as "holy"); see also LETHA DAWSON SCANZONI & VIRGINIA RAMEY MOLKUKOTT, IS THE HOMOSEXUAL MY NEIGHBOR 135 (1994) (listing gay support groups for Catholics, Episcopalians, Lutherans, Methodists, Mennonites, and Pentecosts among others).

541. See *supra* note 461-77 and accompanying text (describing how polygamy was adopted by Mormon men and women for religious reasons rather than sexual or romantic reasons).

542. Indeed, the only ones who might be said to choose heterosexual marriage purely on religious grounds are religiously devout homosexuals who find their religious beliefs incompatible with their desires. A homosexual entering into a heterosexual marriage for religious reasons is quite comparable to a devout Mormon forcing him or herself into a polygamous marriage despite a disinclination to do so.

543. See, e.g., J. Jennings Moss, *Log Cabin Fever*, *ADVOC.*, Mar. 18, 1997, at 35-37 (discussing gay Republican groups including the Log Cabin Republicans).

their gay and lesbian members continue to believe that in essence they may remain ideologically committed to the organization without compromising their sexuality.

Despite this surface ideological diversity, it might still be possible that the choice to enter into a same-sex marriage could be understood as grounded in some set of coherent beliefs, and that these beliefs could be used, as the doctrinal underpinnings of polygamy were used, to assist in determining the compatibility of same-sex marriage with traditional American political ideals. The question, then, is whether there is a set of beliefs which could be seen as motivating homosexuals to want to enter into same-sex marriage.

Three moments in a choice to enter same-sex marriage can be analytically isolated: same-sex sexual desire, homosexual identity, and a decision to enter into a same-sex marriage. Indeed, three similar moments in the choice to enter Mormon polygamy could be isolated: desire for eternal salvation, Mormon identity, and a decision to enter into a polygamous marriage. The moment of sexual desire has no more relevance to this analysis, however, than the moment of religious desire had in our analysis of the Mormons. There are many theories about the etiology of religious and sexual desire, ranging from the sociobiological to the psychoanalytic.⁵⁴⁴ However, these etiological explanations often have no experiential resonance for those whose behavior is being explained. Nor will these etiological explanations assist us in considering the political and social implications of polygamy or same-sex marriage. Indeed, our evaluation of the political and social implications of Mormon polygamy did not take into account that religion can be explained as a species practice which enhances chances for survival, or as an epiphenomenon of Oedipal identification. It was not necessary to take etiological explanations into account because the institution of polygamy was shaped to achieve the acknowledged ends of Mormon beliefs and doctrines, and that shape is not changed by the origins of those beliefs or doctrines. Therefore, to examine the political and social implications of same-sex marriage, one need not open the Pandora's box of etiological explanations for same-sex sexual desire.

The moment of Mormon identity, however, was crucial to an understanding of Mormon polygamy. That identity was achieved by

544. See generally PAUL E. SIMONDS, *SEXUALITY, EVOLUTION AND HUMANITY* 53-82 (1992) (explaining the adaptive benefits and disadvantages of sexual reproduction); EDWARD O. WILSON, *SOCIOBIOLOGY: THE NEW SYNTHESIS* 560-62 (1975) (explaining religion as an evolutionary adaptation to the environment).

accepting Mormon religious doctrines as true and by seeking to live in a manner consistent with such beliefs. In determining whether an analogous set of shared beliefs or doctrines constitutes or defines homosexual identity for all homosexuals seeking to enter into same-sex marriage, one should begin by noting that Mormon identity was partially constituted by recognition of membership in the Mormon Church. Such membership was authoritatively given by the Mormon Church through the ritual of official baptism⁵⁴⁵ and could be taken away through the ritual of an excommunication trial.⁵⁴⁶ Certainly no authoritative institution or official ritual determines homosexuals' membership in some clearly delineated "homosexual community."

Just as this Article carefully distinguished internal accounts of Mormon identity, i.e., Mormon self-descriptions as shaped by religious doctrine,⁵⁴⁷ from external accounts of Mormon identity,⁵⁴⁸ i.e., Eastern non-Mormon accounts of sexually rapacious men and promiscuous or enslaved women,⁵⁴⁹ we must also be careful to distinguish internal accounts of homosexual identity from external accounts.⁵⁵⁰ However, even in internal accounts of homosexuality, no single set of features or beliefs could be accepted as definitive by all those who identify themselves as homosexual. Indeed, the question of what constitutes gay or lesbian identity is a matter of passionate controversy among those who identify themselves as homosexual.⁵⁵¹

545. See JOHN W. GUNNISON, *THE MORMONS* 46 (1972).

546. For example, at least one Mormon woman was excommunicated from the Mormon Church because of her support of the ERA. See WARENSKI, *supra* note 446, at 295.

547. See *supra* notes 468-69 and accompanying text (explaining that Mormons believed polygamy was a religious duty); see also WARENSKI, *supra* note 446, at 151 (describing Mormon women as entering into polygamy willingly).

548. Cf. Daniel R. Ortiz, *Creating Controversy: Essentialism and Constructivism and the Politics of Gay Identity*, 79 VA. L. REV. 1833, 1844 (1993) (making a distinction between internal and external identity).

549. See WARENSKI, *supra* note 446, at 152.

550. External accounts are problematic because they can easily slip between descriptions of identity as consciously held by homosexuals and identification of homosexuals by a particular etiological theory, for example, "homosexuals are self-consciously communists" versus "homosexuality is a communist plot." They are also problematic to the extent they fail to take into account internal descriptions of identity. A failure to take account of internal descriptions will result in speculative accounts of identity, which, as did many accounts of Mormon identity, bear no resemblance to reality.

551. See generally Ortiz, *supra* note 548, at 1849 (arguing that the numerous apparently conflicting descriptions of gay identity need not be seen as conflicting if identity in general is understood as a fluid construct determined substantially by the intended use or purpose of the description).

Those who would espouse an essentialist⁵⁵² definition of homosexuals as those who experience same-sex desire⁵⁵³ are confronted with, on the one hand, individuals who may experience same-sex desire but define themselves as heterosexual either because they do not act on their desires or because they do not accept such desires as their own⁵⁵⁴ and, on the other hand, individuals who do not experience same-sex desire, but who identify themselves as homosexual because they experience deep same-sex emotional connections.⁵⁵⁵ Those who would define homosexuals as those who experience *exclusively* same-sex desire are confronted with contemporary individuals whose desire is bisexual, but who define themselves as homosexual.⁵⁵⁶ Those who would define homosexuals as those who act on same-sex desire⁵⁵⁷ are confronted by contemporary individuals who choose not to act on their same-sex desires, but nonetheless define themselves as homosexual.⁵⁵⁸ A constructivist⁵⁵⁹ definition of

552. Essentialist definitions of homosexuals focus on "an intrinsic property, one that does not vary across history or culture." *Id.* at 1836.

553. See, e.g., John Boswell, *Categories, Experience and Sexuality, in FORMS OF DESIRE: SEXUAL ORIENTATION AND THE SOCIAL CONSTRUCTIONIST CONTROVERSY* 133, 137 & n.8 (Edward Stein ed., 1990) (defining those who experience same-sex desire as homosexual regardless of when in history they lived or where); see also Ruthann Robson, *Embodiment(s): The Possibilities of Lesbian Legal Theory in Bodies Problematized by Postmodernisms and Feminisms*, 2 *LAW & SEXUALITY* 37, 49 (1992) ("In its grossest form, the decision about whether or not one is a lesbian can be decided upon the basis of the gender of the person(s) one desires as a sexual partner.").

554. For example, those who identify their desires as having an external source, for example, coming from the devil, do not experience these desires as integrally related to who they are.

555. Adrienne Rich argues that there was a continuum of lesbianism which ranged from women-identified women, to women who derive primary emotional sustenance from other women, to women whose emotional and sexual affiliations are strictly with women. See Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence, in THE LESBIAN AND GAY STUDIES READER* 227, 239 (Henry Abelove et al. eds., 1993); see also Robson, *supra* note 553, at 48 ("While there are a plethora of definitions advanced for lesbianism, all rest significantly upon some sort of sexuality, although this sexuality can be variously described as eroticism, attention or emotional commitment.").

556. See, e.g., Katie Cotter, *Dating a Man*, *ADVOC.*, Feb. 18, 1997, at 41 (reporting that JoAnn Loulan, a renowned lesbian sex expert and therapist, continued to identify herself as a lesbian despite being romantically and sexually involved with a man).

557. See Robson, *supra* note 553, at 48-49 (noting some essentialist attempts to define lesbians as women who are sexually engaged with women and not with men).

558. For example, a celibate priest could identify himself as homosexual. See Judith Butler, *Imitation and Gender Insubordination, in INSIDE/OUT: LESBIAN THEORIES, GAY THEORIES* 13, 17 (Diana Fuss ed., 1991) ("Is it not possible to maintain . . . homosexual identifications and aims within heterosexual practices?").

559. Constructivists view identities as labels constructed and imposed by society. See

homosexuality, on the other hand, might view homosexual identity as constituted by a combination of same-sex desire, sexual transgression, and subversion of traditional gender roles.⁵⁶⁰ However, some self-identified homosexuals have accepted as definitive very rigid and traditional gender roles.⁵⁶¹ Furthermore, many lesbian theorists have argued that not only does no coherent essence define gay men and lesbians as homosexuals,⁵⁶² but no coherent essence defines all lesbians across race, class, and ethnicity lines.⁵⁶³ Some theorists, therefore, believe no homosexual identity exists.⁵⁶⁴

Given the extreme difficulty of settling upon a definition of who is a homosexual or what defines homosexual identity, or finding a coherent set of beliefs which are uniquely held by homosexuals, one might turn instead to the moment of same-sex marriage, and ask whether those who believe same-sex marriage is desirable share any doctrinal beliefs that might help predict the political and social implications of such an institution. In fact, it may well be the case that those who view same-sex marriage as a social good that ought to become a civil institution base this evaluation upon a relatively coherent set of doctrines and beliefs. I would divide these beliefs into two main areas: the value of romantic love and non-procreative

Robson, *supra* note 553, at 42 & n.16. As a result, constructivist definitions of homosexual identity are limited to a particular temporal and cultural setting. See Ortiz, *supra* note 548, at 1836-37. Under this view, the possibility of a coherent homosexual identity was impossible prior to the nineteenth century. See *id.* at 1846 (citing David M. Halperin, *One Hundred Years of Homosexuality*, in ONE HUNDRED YEARS OF HOMOSEXUALITY 15, 15 (David M. Halperin ed., 1990)).

560. See Ortiz, *supra* note 548, at 1843 (setting out this constructivist description of homosexual identity).

561. Compare LESLIE FEINBERG, *STONE BUTCH BLUES passim* (1993) (describing, in a fictionalized autobiographical account of the butch/femme community in Buffalo, New York in the 1960s and 1970s, how emerging feminism served to confuse the stone butch position such that the narrator revised her identity from "lesbian woman" to "transgendered person," i.e., a person of male gender in a female body), with Robson, *supra* note 553, at 48 (suggesting that butch/femme was never a seriously questioned part of lesbian terminology, even though regarded as possibly non-feminist).

562. Cf. Robson, *supra* note 553, at 66-68 (insisting upon the necessity of a "lesbian legal theory" as opposed to a "homosexual" or "queer" legal theory, on the ground that otherwise lesbians will continue to be only "the shadows of gay men").

563. See *id.* at 47 (noting that lesbian theorists resist the "false unity" of essentialist definitions of lesbianism by focusing on the heterogeneity of culture, race, class, and ethnicity); see also Ortiz, *supra* note 548, at 1847-48 & n.43 (noting that lesbian theorists often take up an antiessentialist position critical of universal descriptions of women).

564. See, e.g., Butler, *supra* note 558, at 14 ("To install myself within the terms of an identity category would be to turn against the sexuality that the category purports to describe; and this might be true for any identity category which seeks to control the very eroticism that it claims to describe and authorize, much less 'liberate.'").

sex, and the value of a civil institution of marriage.

1. Romantic Love and Non-Procreative Sex

The choice to enter into a same-sex marriage might well be explained as grounded in the following set of beliefs and doctrines regarding romantic love and non-procreative sex that, in part, provide a coherent account of the meaning of same-sex marriage:

- a. a belief that non-procreative sex can be a social good as opposed to a view that only procreative sex is socially valuable;
- b. a belief that romantic love is a social good as opposed to a view that all romantic love is illusory or socially destructive;
- c. a view of non-procreative sex and romantic love as important as expressions of personal individuality and as forces which break down barriers of independent individuality and establish a concrete unity of partners;
- d. a belief that the expressions of individuality are valuable because concretely developed individuals are a prerequisite for the demand for and exercise of personal liberty;
- e. a belief that the unity of partners is valuable because it allows such partners to experience their individuality as most real only in the context of a relationship in which they sacrifice their individuality, thus preparing individuals for identification with larger communities and the state; and
- f. a belief that same-sex romantic love and non-procreative sex, and heterosexual romantic love and non-procreative sex provide the same opportunities for the development of concrete individuality and unity of partnership.

Points *d*, *e* and to some extent *c* should be recognizable as basic elements of Hegel's explanation of the critical importance of marriage to the possibility of a free society. The Hegelian theory has already been shown to provide the most coherent explanation of both the decision in *Reynolds* and the modern case law holding that marriage is a fundamental right. The appropriateness of using this Hegelian theory of marriage to legitimate same-sex marriage, however, depends upon the extent to which the underlying explanations for points *a*, *b*, and *f* are consistent with the theory in general. Such beliefs about the value of non-procreative sex, both heterosexual and homosexual, are certainly controversial, as are the beliefs about the possibility of achieving unity of partnership through homosexual ro-

matic love and non-procreative sex. These beliefs, therefore, must be carefully explained and contrasted with similar beliefs about heterosexual sex and heterosexual unity.

Although homosexual sex is no more a necessary part of same-sex marriage than heterosexual sex is a necessary part of heterosexual marriage, it would be foolish to pretend that those who seek same-sex marriage do not view homosexual sex within a same-sex marriage as at least equivalent in value to heterosexual sex within a heterosexual marriage. Obviously, this is the sticking point for many opponents of same-sex marriage.⁵⁶⁵ What might be seen as the doctrinal basis of equating homosexual and heterosexual sex? From the Hegelian perspective, heterosexual sex within marriage can be socially valuable in only two ways: first, as a way of overcoming the boundaries of individuality through intimacy, love, and care; and, second, as the expression of personal individuality. I shall start with the belief that the same "unity" can arise from same-sex sexual intimacy as can arise from heterosexual sexual intimacy.

One argument against same-sex marriage derives heterosexual unity from the biological/genetic unity that arises from the birth of a child in a heterosexual marriage and that is therefore inaccessible to homosexuals who cannot unify their genetic material into a single being. Indeed, many courts confronted with claims to establish or recognize same-sex marriage have cited the impossibility of two people of the same sex biologically parenting the same child as a basis for rejecting such claims.⁵⁶⁶ Yet we have seen that, as much as pro-

565. See John Gallagher, *Love and War*, *ADVOC.*, July 23, 1996, at 22, 26.

566. See *Adams v. Howerton*, 486 F. Supp. 1119, 1123 (C.D. Cal. 1980), *aff'd*, 673 F.2d 1036 (9th Cir. 1982) ("The legal protection and special status afforded to marriage . . . has historically . . . been rationalized as being for the purpose of encouraging the propagation of the race."); *Dean v. District of Columbia*, 653 A.2d 307, 332 (D.C. Ct. App. 1995) ("[I]n recognizing a fundamental right to marry, the Court has only contemplated marriages between persons of opposite sexes—persons who had the possibility of having children with each other."); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971) (stating that marriage "uniquely involv[es] the procreation . . . of children"); *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974) ("[I]t is apparent that no same-sex couple offers the possibility of the birth of children by their union."). *But cf. Baehr v. Lewin*, 852 P.2d 44, 61-63 (Haw.) (relying on language in *Loving v. Virginia*, 388 U.S. 1, 3 (1967), for its rejection of the state's "tautological and circular nature" argument that same-sex marriage is impermissible because it is "intrinsically unnatural"), *reconsideration granted in part*, 875 P.2d 225 (Haw. 1993).

It is possible for two lesbians to be the biological parents of the same child if one were to serve as the egg donor to the other, who would act as the surrogate. See BLANK & MERRICK, *supra* note 320, at 99 (noting the possibility of genetic and gestational motherhood). At least for the time being, however, two men or two women cannot be the genetic

creation has been linked with marriage in modern case law, an understanding of marriage as distinct from and independent of procreation has emerged.⁵⁶⁷ Furthermore, the current impossibility of same-sex procreation cannot, in itself, bar same-sex couples from marriage where similar reproductive inadequacy has no similar impact on heterosexual couples⁵⁶⁸ for whom it will be impossible to reproduce⁵⁶⁹ because of age, sterility,⁵⁷⁰ illness,⁵⁷¹ dysfunctional⁵⁷² or surgically-constructed sexual or reproductive organs,⁵⁷³ or lack of physical access.⁵⁷⁴ Heterosexual marriage is understood to produce unity, even in the absence of children to serve as reifications of that unity.

Indeed, modern science has revealed the biological unity of parents in their offspring to be something of an illusion, insofar as no more than half the genetic material of either parent is incorporated in the child, and that half can consist of recessive traits that have never emerged in the parent and with which it would be difficult for

parents of the same child. *But see id.* at 92-93 (noting the possibility that emerging technology may someday allow egg fusion, in which two women produce a daughter with two mothers and no father).

567. *See supra* notes 316-29 and accompanying text (discussing the Supreme Court's decisions on marriage, within the context of procreation).

568. *See* Karst, *supra* note 384, at 684 (arguing that it is difficult to explain privileging heterosexual unions that may not produce children over homosexual unions).

569. *See* William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1428 n.21 (1993) (noting that a definition of marriage as essentially procreative "excludes different-sex couples who are unable to bear children"); Mark Strasser, *Family, Definitions, and the Constitution: On the Antimiscegenation Analogy*, 25 SUFFOLK U. L. REV. 981, 1009-12 (1991) (arguing the obvious irrelevance of lack of procreative ability to marriage by considering the likely unconstitutionality of any statute that attempted to make possible or likely procreation a condition of heterosexual marriage).

570. *See, e.g.*, *Marks v. Marks*, 77 N.Y.S.2d 269, 270-71 (Sup. Ct. 1948) (holding that the "[i]nability to beget or bear children does not debar a person from entering into a marriage provided such person is capable of having the sexual intercourse which may result in the conception and birth of children" (citations omitted)).

571. *See, e.g.*, *In re Peterson*, 12 I. & N. Dec. 663, 665 (1968) (holding that lack of sexual relations due to chronic illness had no effect on whether marriage was bona fide).

572. *See, e.g.*, *Martin v. Otis*, 124 N.E. 294, 296 (Mass. 1919) (holding that relatives contesting a will could not seek to have marriage declared void due to incapacity of wife to have sexual relations).

573. *See, e.g.*, *M.T. v. J.T.*, 355 A.2d 204, 211 (N.J. Super. Ct. App. Div. 1976) (allowing a post-operative male-to-female transsexual to marry a man after successful genital replacement surgery).

574. *Cf. Turner v. Safley*, 482 U.S. 78, 96 (1987) (pointing to the reasonable expectation of consummation of prisoner marriages, and noting that for those serving long prison terms, if the wife reaches menopause before the end of the term, consummation and procreation may be impossible, but forbidding the state from prohibiting such marriages nonetheless).

the parent to identify.⁵⁷⁵ Thus, we recognize the uniqueness of children and their right to be accepted for who they are. In addition, most heterosexual adoptive parents would further argue that the unity of nurture which arises from joint parenting can be as profound as the unity of nature which arises from biological parenthood.⁵⁷⁶ The accepted social value of marriages in which biological offspring of the marriage partners are impossible prevents this argument from explaining why same-sex unity is impossible. Heterosexual unity is seen as possible with or without heterosexual sex, with or without biological children, and with or without children at all.

An alternative argument given for the exclusive unity of heterosexual marriage is that this unity is uniquely possible because it arises out of the differentiation of sex.⁵⁷⁷ Under this view, the unity of marriage arises out of heterosexual romantic love and non-procreative sex, both of which are predicated upon biologically based distinctions between the physical, intellectual, and emotional capacities of men and women. Thus, it is the lack of sexual distinctiveness that prevents marriage from occurring between those of the same sex. This is probably what is behind the view of those courts that simply rely on the definition of marriage as a relationship between a man and a woman to deny the possibility of same-sex marriage.⁵⁷⁸

575. Cf. JEFFREY J.W. BAKER & GARLAND E. ALLEN, *THE STUDY OF BIOLOGY* 451-52 (4th ed. 1982) (explaining how pigmented human parents can have albino children if both parents carry a single recessive gene for albinism); F. CLARKE FRASER & JAMES J. NORA, *GENETICS OF MAN* 135-36 (1986) (explaining how parents who each have a single recessive gene, i.e., are "heterozygous" for this gene, can produce offspring who inherit both recessive genes, i.e., are "homozygous" for this gene, and therefore exhibit the characteristics of the recessive gene).

576. Cf. Hohengarten, *supra* note 37, at 1519-20 (arguing that notions of biological parenthood must be supplemented by notions of legal parenthood and functional parenthood).

577. See, e.g., John M. Finnis, *Law, Morality, and "Sexual Orientation,"* 69 NOTRE DAME L. REV. 1049, 1064-66 (1994) (arguing that "in sterile and fertile marriages alike, the communion, companionship, *societas* and *amicitia* of the spouses—their being married—is the very good of marriage" and that such communion can be reached only through the biological unity of (married) male and female reproductive organs, even if sterile); *id.* at 1069 (arguing that same-sex sex "cannot really actualize the mutual devotion which some homosexual persons hope to manifest and experience by it"); Wardle, *supra* note 8, at 39 ("The essence of marriage is the integration of a universe of gender differences (profound and subtle, biological and cultural, psychological and genetic) associated with sexual identity.").

578. See, e.g., *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973) (quoting from three dictionaries that define "marriage" as being between a man and a woman); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971) ("[M]arriage . . . [is] a union of man and woman."). Similar statements have also been made in cases annulling or declaring a nullity marriages

This view corresponds with Hegel's logical argument that unity can arise only out of difference and his political argument that both the unity of family and the unity of society depend upon rigid gender, class, and occupational distinctions.⁵⁷⁹ As this Article explained, however, his insistence that social unity could be achieved only through class distinctions and that family unity could be achieved only through gender distinctions made Hegel's views incompatible with traditional and contemporary American political ideals.⁵⁸⁰ Hegelian unity required the exclusion of women from civil and political life,⁵⁸¹ and a rigidly class-structured society that would reproduce the economic powerlessness of both peasants and workers by making political power the prerogative of landowners, corporate officials, and elite civil servants.⁵⁸² However, Hegel's convictions about the inherent rationality and historical necessity of hierarchical social classes and the necessity of confining women to the domestic arena proved to be false.⁵⁸³ Both proved incompatible with the continued emergence and development of the modern liberal individual and the modern state.⁵⁸⁴

Yet, Hegel's logical insight continues to ring true. A coherent and free social and political unity can arise only if individuals develop forms of social cohesion that serve to universalize their infinitely particular interests, while at the same time identifying important and distinct particular interests for greater social consideration and negotiation.⁵⁸⁵ Marriage, in particular, continues to play a critical role in the development of citizens who value their individuality and the liberty necessary to develop and express it, and yet who understand the way in which accommodating others can affirm individuality even where it may constrain particular liberty.⁵⁸⁶ However, as I argued earlier, the Hegelian marriage cannot success-

in which one partner was, unbeknownst to the other, a transsexual born the same sex as the petitioning spouse. See, e.g., *B. v. B.*, 355 N.Y.S.2d 712, 717 (Sup. Ct. 1974) ("[M]arriage is and always has been a contract between a man and a woman . . ."); *Anonymous v. Anonymous*, 325 N.Y.S.2d 499, 500 (Sup. Ct. 1971) (expressing similar viewpoint); see also Eskridge, *supra* note 569, at 1421, 1427-28 (noting that "[o]pponents of same-sex marriage argue that the concept is oxymoronic").

579. See *supra* notes 123-217 and accompanying text.

580. See *supra* notes 218-315 and accompanying text.

581. See *supra* notes 265-315 and accompanying text.

582. See *supra* notes 220-64 and accompanying text.

583. See *supra* notes 247-52, 283-91 and accompanying text.

584. See *supra* notes 253-64, 292-315 and accompanying text.

585. See *supra* notes 127-37 and accompanying text.

586. See *supra* notes 123-82 and accompanying text.

fully perform even its stated function of developing the social individuality of the husband, unless husbands see their full human potential reflected in their wives and wives see their full human potential reflected in their husbands.⁵⁸⁷ A marriage in which each partner is confined to rigid and distinct gender roles cannot produce a fully developed individual. Consequently, if the modern heterosexual marriage is to result in the kind of unity capable of producing a fully developed individual, that unity must arise out of a differentiation that is grounded, just as modern political and social groupings are, in the actual particularity of participating individuals, rather than in a rigid and imposed differentiation that stifles individuality and real universality.

In fact, the modern individuation of women has resulted in the kind of fluidity of gender roles for men and women that makes the promise of unity and fully developed individuality arising out of marriage more of a reality. Feminine emotiveness and nurturing self-sacrifice or masculine rationality and pursuit of individual independence and self-development, or both, may now be realized by men and women. Thus we may find heterosexual marriages in which the husband and wife each have developed these capacities. We may also find heterosexual marriages in which the husband has primarily taken on the nurturing role and the wife has primarily taken on the independent self-development role, or vice versa. Because there is no guarantee that an individual of a particular sex will have the desired complementary capacities, whether a combination of capacities or fairly exclusive development of just one, a marriage that is to be successful from the Hegelian point of view cannot be arranged merely by assuring that one partner of each sex is present. The opposition of sex alone is no longer a necessary or sufficient basis for marriage.⁵⁸⁸ For precisely this reason, a view of marriage as rooted in romantic love⁵⁸⁹ flourishes today more vigorously than ever. The fo-

587. See *supra* notes 283-315 and accompanying text.

588. See Koppelman, *supra* note 283, at 422-23 (arguing that linkage of "the total commitment that is the telos of marriage" with a gender-based view of "sexual complementarity" grounds marriage on what Rosemary Radford Ruether has described as "a sadomasochistic view of male and female relations" which "demands the continued dependency and underdevelopment of women in order to validate the thesis that two kinds of personalities exist by nature in males and females and which are partial expressions of a larger whole" (quoting Rosemary Radford Ruether, *From Machismo to Mutuality*, in *HOMOSEXUALITY AND ETHICS* 29, 30 (Edward Batchelor ed., 1980))).

589. See TAYLOR, *SOURCES OF THE SELF*, *supra* note 264, at 290 (describing the historical development of "companionate marriage," i.e., a voluntary emotional and personal

cus of romantic love is on the interplay of differentiated individuality, rather than the mere opposition of sex. The notion that there may be one perfect person, one true love,⁵⁹⁰ puts enormous emphasis on features of individual particularity such as personality, interests, style, education, values, etc.⁵⁹¹

At the same time that romantic love focuses attention on non-sex specific features of individual particularity in choosing a marriage partner, the occurrence of romantic love itself develops individuality. Individual development is enhanced in a romantic relationship through close exposure to and identification with a differently developed individual.⁵⁹² Hegel likely was ambivalent about romantic love as a basis of marriage⁵⁹³ precisely because he recognized that romantic love would necessarily individuate women to such an extent that the sacrifice of women to male individuality would then result in a sacrifice of male individuality as well.⁵⁹⁴ However, the modern grounding of heterosexual marriage in romantic love gives voice to the reality that the twentieth-century development of individuality has made gender of as little relevance as social class in the nine-

commitment, as arising out of increased individuation).

590. See LAWRENCE STONE, *THE FAMILY, SEX AND MARRIAGE IN ENGLAND 1500-1800*, at 282 (1977) (describing romantic love as "the notion that there is only one person in the world with whom one can unite fully at all levels").

591. Cf. Koppelman, *supra* note 283, at 423-24 ("[N]o two persons of the same sex are sufficiently alike for their relationship to be free of risk and therefore of the need for trust.").

592. Cf. Karst, *supra* note 384, at 635-37 (arguing that intimate associations "have a great deal to do with the formation and shaping of an individual's sense of his own identity"); Charles Taylor, *The Politics of Recognition*, in *MULTICULTURALISM*, *supra* note 262, at 25, 36 (stating that "[l]ove relationships . . . are also crucial because they are the crucibles of inwardly generated identity").

593. Compare HEGEL, *PHILOSOPHY OF RIGHT*, *supra* note 30, remarks to ¶ 162, at 111-12 (arguing that an arranged marriage is ethically superior to a marriage motivated by love), *with id.* app. Additions n.104, at 262 (referring to ¶ 162) (noting that a marriage arranged without consultation of the potential husband and wife is a reflection of a culture that "hold[s] the female sex in scant respect"), *and id.* ¶ 168, at 115 (insisting that the unity of marriage requires that the individuals have personalities as different as possible, but viewing sameness of personality as simply a function of being part of the same social circle).

594. David Farrell Krell has argued that Hegel's choice of the undeveloped (intellectually as well as physically) girlish figure of Antigone, *see id.* remarks to ¶ 166, at 114-15, rather than the educated and sensuous, fully developed figure of Friedrich Schlegel's Lucinde as the ideal modern woman, *see id.* app. Additions n.106, at 263 (referring to ¶ 164), reflects a realization that such a fully developed personality cannot be sacrificed to the unity of the state, as was Antigone and as would be modern women under Hegel's view. See David Farrell Krell, *Lucinde's Shame: Hegel, Sensuous Woman, and the Law*, in *HEGEL AND LEGAL THEORY*, *supra* note 145, at 287, 296-97.

teenth-century development of individuality.

If the unity of heterosexual marriage results from a romantic love that cherishes all that is distinctive about a person rather than that which is non-distinctive, such a unity is certainly possible where such romantic love exists between two individuals of the same sex. As with heterosexuals, such love cannot occur between any two persons of the same sex, but can occur only between two very distinctive and carefully chosen individuals.⁵⁹⁵ To the extent such unity depends, under the Hegelian view, upon the presence within the relationship of at least one partner who can create emotive unity and one partner who can develop rational independence, no more reason exists to assume that both such capacities cannot be found within a same-sex relationship than to assume that both such capacities will be found within every heterosexual relationship.

Modernity's emphasis on increasing individuation and romantic love can also help explain how non-procreative sex has come to be valued as a social good through the disengagement of sexual desire from procreative sex. The notion of sex as purely procreative can be traced to a view of nature as embodying a rational, God-ordained teleological order accessible only through reason, an order that is imposed upon us and to which we must conform.⁵⁹⁶ Thus, the biological distinctions of sex, as well as sexual desire, are understood as provided for the God-given purpose of reproduction.⁵⁹⁷ The notion of sex as purely procreative, therefore, denies that the sensuality of sex has any independent significance. In contrast, Romantic individualism views nature not as rationally ordered, accessible to reason, and the subject of a universal truth, but as uniquely shaping

595. Cf. Robson, *supra* note 553, at 80 (arguing that "the richness of difference between lesbians is what 'dazzles,' what 'frightens, seduces, astonishes, stupefies and in the end it is absolutely instructive'" (citation omitted)); David A.J. Richards, Book Review, 4 CONST. COMMENTARY 463, 467 (1987) (reviewing ROGER SCRUTON, *SEXUAL DESIRE: A MORAL PHILOSOPHY OF THE EROTIC* (1986)) (arguing that it is "the subtle variations of temperament and personality and character that are the differentiating loci of erotic attraction and love, both heterosexual and homosexual").

596. See DAVID A.J. RICHARDS, *SEX, DRUGS, DEATH AND THE LAW: AN ESSAY ON HUMAN RIGHTS AND OVERCRIMINALIZATION* 37-38 (1982) (explicating the Augustinian view of sexuality as essentially procreational). For a contemporary restatement of this view in the context of an argument against same-sex marriage and sexuality, see Herbert W. Titus, *Defining Marriage and the Family*, 3 WM. & MARY BILL RTS. J. 327, 338-39, 342 (1994) (arguing that since both true legality and liberty can be found only "in discovering God's design and conforming oneself to that design," sexuality must be limited to the purpose of procreation in heterosexual marriage).

597. See Titus, *supra* note 596, at 343.

each individual and a source of personal truth grasped only by passion and feeling.⁵⁹⁸ Because nature is essentially multiple, it is a source of originality for individuation rather than a universal model to which individuals must conform.⁵⁹⁹ It is therefore necessary to give proper significance to our desires if we are to be in touch with our unique nature.⁶⁰⁰ Furthermore, we must express these passions both as a means of self-definition and self-articulation.⁶⁰¹ Thus, the explosion of Romantic literature, music, and art can be seen as expression in the service of "radical individuation."⁶⁰²

According to this Romantic view, sexual desire and sensuality, which became inextricably connected with procreation only as the result of an analysis focused strictly on function, attain an independent significance as modalities of self-definition and self-expression.⁶⁰³ When sensuality takes on an individuating significance independent of procreation, sexual behavior itself is freed of the constraints of reproductive function. Indeed, in the face of lingering demands that sex be strictly procreative, intentionally non-procreative sexuality may be seen as even more individually expressive than the biological act that reflects our universal animal nature. Thus, heterosexual sensuality may take forms that, even in the absence of contraception, could not possibly lead to conception, yet which have value and significance. This, in turn, makes it difficult to distinguish between acts of heterosexual non-procreative sex and acts of homosexual non-

598. See TAYLOR, *SOURCES OF THE SELF*, *supra* note 264, at 371 ("It is through our feelings that we get to the deepest moral and, indeed, cosmic truths.").

599. See *id.* at 376.

600. See *id.* at 372.

601. See *id.* at 175; see also STONE, *supra* note 590, at 282 (stating that romantic love views "the giving of full rein to personal emotions [as] admirable, no matter how exaggerated and absurd the resulting conduct may appear to others").

602. See TAYLOR, *SOURCES OF THE SELF*, *supra* note 264, at 376.

603. See Krell, *supra* note 594, at 293 ("She was not a little surprised, although she sensed it all along, that after the surrender he would be more loving and faithful than before. . . . They were altogether devoted and one, and yet each was altogether himself, or herself, more than they had ever been" (quoting SCHLEGEL, *supra* note 148, at 66-67) (references to the original German version omitted)); see also ANTHONY GIDDENS, *THE CONSEQUENCES OF MODERNITY* 119-22 (1990) (arguing that relationships, and erotic relations in particular, which are "path[s] of mutual discovery" and emotional "self-disclosure," have taken the place of "community and kinship networks" as the basis of the personal trust that is the foundation for the trust in impersonal principles that is essential to modernity); TAYLOR, *SOURCES OF THE SELF*, *supra* note 264, at 373 (suggesting that the fulfillment of romanticism vis-à-vis sensuality has perhaps occurred only in contemporary times).

procreative sex.⁶⁰⁴

The significance of such sensuality, however, is not only as a means of individual expression. As the Romantics understood, more than radical individuality could be developed by acknowledging and expressing our natural impulses and feelings. Contact with nature could also have the effect of forcing us to recognize that

we are part of a larger order of living beings, in the sense that our life springs from there and is sustained from there. Recognizing this involves acknowledging a certain allegiance to this larger order. The notion is that sharing a mutually sustaining life system with other creatures creates bonds: a kind of solidarity which is there in the process of life.⁶⁰⁵

Thus, sensuality has the potential to break down barriers between individuals and create bonds of partnership and communal purpose, while at the same time putting the individual profoundly in touch with his or her self.⁶⁰⁶ The capacity for mutual expressions of sensuality to create such bonds is independent of the procreative possibilities of these expressions and, therefore, is equally present in heterosexual and homosexual expressions of sensuality. The great value of non-procreative heterosexual sex within marriage, a unity of body that is a concrete symbol of the complex emotional and social bonds that define the marital unit and a powerful force in the discovery and development of these bonds, is also the value of non-procreative homosexual sex within marriage.

This analysis has revealed that the modern unity of heterosexual marriage is based on a combination of romantic love, which places primary emphasis on non-gender specific features of personality and style, and a sexuality which is neither constrained nor valued strictly in relation to procreation. The possibility of romantic love between two individuals of the same sex is based upon the same emphasis on

604. Thus, for example, heterosexual sodomy does not differ from homosexual sodomy. Those who argue that erotic experience is essentially heterosexual because it arises out of the mystery of gender difference which cannot be experienced by homosexuals repudiate the modern view of individuality as independent of gender. See Richards, *supra* note 595, at 467.

605. TAYLOR, SOURCES OF THE SELF, *supra* note 264, at 384.

606. *But see* Wardle, *supra* note 8, at 39-44 (arguing that the Supreme Court has taken a rather different approach to sexuality because, in his view, the right to privacy in heterosexual marriage should not be understood as "condoning" or "approving" of sexuality as valuable even in marriage, but rather as simply putting marital sexuality beyond legitimate governmental concern).

unique features of personality and style upon which heterosexual romantic love is based. Modern views about marriage require that non-procreative heterosexual sensuality be valued, and the value of non-procreative heterosexual sensuality is difficult to distinguish from the value of homosexual sensuality. Sensuality, whether heterosexual or homosexual, is an experience of nature that makes possible authentic expressions of individuality by connecting individuals to feelings which are undeniably true, real, and fundamental to self. The romantic view of the experience of nature as a source of solidarity and community supports the belief that homosexual sexual intimacy can break down barriers between individuals, thereby creating socially valuable bonds of partnership and community in precisely the same way it supports a belief that non-procreative heterosexual sexual intimacy can produce such bonds of partnership and community. The doctrinal underpinnings of same-sex marriage—romantic notions of radical individuality, nature as a source of individual inspiration and bonds of solidarity, and the erosion of rigid gender roles and sexual constraints which have characterized contemporary radical individuality—can be seen as indistinguishable from the doctrinal underpinnings of modern heterosexual marriage founded on romantic love and sexual desire and reshaped by gender equality.

2. The Value of Civil Recognition

The doctrinal underpinnings of same-sex marriage set out thus far fail to explain why those who seek homosexual marriage are not satisfied with a romantic and sexual relationship, but desire the possibility of entering into the civil institution of marriage. The points that follow, taken together with the five doctrinal points set forth above, are necessary to more fully articulate the doctrinal underpinnings of a desire for same-sex marriage:

- a. a belief that civil marriage is a socially valuable institution because it creates an enduring legal/social connection between individuals;
 - i. a belief that the existence of an enduring legal/social marriage bond is valuable because only such an external connection creates a protected space in which individuals can make commitments to each other that will be more stable than a connection based purely on

variable emotions;⁶⁰⁷

- ii. a belief that enduring commitment between individuals in a marriage is valuable because such commitment is the basis for citizens' willingness to sacrifice particular liberties for the sake of the state and society as a whole;⁶⁰⁸
- b. a belief that the existence of a legal/social marriage bond is valuable because it demonstrates to individuals that the bonds of society make possible the individual development and fulfillment that occur within marriage;
 - i. a belief that experiencing the critical role of the state in the very possibility of individual happiness reconciles individuals to the apparent loss of personal liberty which social existence requires;
- c. a belief that the social cohesion provided by the commonality of the experience and the status of married or potentially married persons makes the civil institution of marriage a coherent point of social unification which counters the socially disintegrating effects of fully developed individuality.

Those who seek same-sex marriage begin with a belief that it is both personally and socially valuable. However, much controversy abounds among the gay and lesbian community on this point. A consideration of some of these arguments will help reveal the ways in which support for the institution of gay marriage is based on the very functions of heterosexual marriage that give it political and social significance.

One argument made against same-sex marriage is that marriage is inherently patriarchal and that the extension of this institution into

607. Cf. MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* 116-17 (1993) (arguing that the legal status of being married fosters intimate commitment by limiting the vulnerability arising out of relationships that "help shape personal identity" and "by fostering the cultivation of a coherent self that is capable of making and keeping promises"); Hafen, *supra* note 12, at 486 ("Legal marriage is more likely than is unmarried cohabitation to encourage such personal willingness to labor and 'invest' in relationships with other people, whether child or adult."); Karst, *supra* note 384, at 633 (noting that constitutional protection for casual intimate associations is necessary to allow them to "ripen into durable intimate associations"); Hohengarten, *supra* note 37, at 1499 (arguing that marriage makes possible stable mutual commitments that "overcome the deep-seated individualism of contemporary life").

608. Cf. REGAN, *supra* note 607, at 120 (arguing that same-sex marriage is entirely compatible with the "moral aspiration [of] marriage" as "responsibility based on the cultivation of a relational sense of identity").

gay and lesbian life will simply strengthen patriarchy even more.⁶⁰⁹ It seems likely that those who support the idea of legalized same-sex marriage would counter that marriage is inherently patriarchal only if viewed as essentially arising out of a relationship between a man and a woman. Insistence on the fundamental significance of biological sex thus serves as a state-perpetuated foundation for the continuation of patriarchal ideas about gender roles and capacities.⁶¹⁰ Under this view, extension of marriage to same-sex partners will serve to erase the importance of biological sex as a determiner of individual roles and, thereby, erode patriarchy.⁶¹¹ This suggests that same-sex marriage may well be founded on beliefs that could be described as anti-patriarchal or non-patriarchal.

A second argument made against same-sex marriage suggests that inviting state involvement in the definition of homosexual relationships would take away the considerable liberty homosexuals have, in the absence of the possibility of marriage, to define the parameters of those relationships and, therefore, themselves.⁶¹² Thus,

609. See Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535, 1540-41, 1549 (1993) (arguing that since the most persuasive argument for same-sex marriage is that it is not really different or unconventional, advocacy for same-sex marriage will result in suppression of critiques of marriage and therefore eliminate the transforming potential of same-sex marriage); see also Eskridge, *supra* note 569, at 1486-87 (describing this as the "marriage-is-rotten" argument); Sylvia Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 232 n.215 (noting that "[g]iven the deeply patriarchal way in which marriage has traditionally been defined, achieving gay access to marriage may be equivalent to women gaining access to traditional male roles, on male terms").

610. See Law, *supra* note 609, at 232 (describing as "heterosexist" objections to same-sex marriage supported by "a sex-differentiated, patriarchal conception of marriage").

611. See Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9, 18 (1991) (arguing that same-sex marriage would "denaturalize the historical construction of gender at the heart of marriage").

612. See DENNIS ALTMAN, *THE HOMOSEXUALIZATION OF AMERICA, THE AMERICANIZATION OF THE HOMOSEXUAL* 185-90 (1982) (arguing that less oppressive and more varied relationships have been made possible between homosexuals because marriage has been unavailable); Eskridge, *supra* note 569, at 1488 (characterizing this argument as fearing that same-sex marriage will "declaw gaylesbian radicalism"); *id.* at 1491 (noting concerns that same-sex marriage will make some homosexuals "insiders" and leave the rest as "outsiders"); Paula Ettelbrick, *Since When Is Marriage a Path to Liberation?*, in *LESBIANS, GAY MEN, AND THE LAW* 401, 402-04 (William B. Rubenstein ed., 1993) (arguing that same-sex marriage will suppress the radical possibilities of homosexuality as different from heterosexuality, will have the effect of marginalizing and oppressing non-married homosexuals, and will primarily benefit white, middle class gay men); Steven K. Homer, *Against Marriage*, 29 HARV. C.R.-C.L. L. REV. 505, 527 (1994) ("If marriage can work the social magic of 'legitimizing' same-sex relationships, it is only at the cost of a

homosexuals are free not to partner at all; to make a partnership of more than two; to engage in multiple partnerships over time; to continue a single partnership; to form specific relations of economic independence; or choose particular forms of economic dependence. While the availability of legal same-sex marriage will not technically destroy this freedom any more than the availability of legal heterosexual monogamous marriage destroys the freedom of heterosexuals to experiment with alternative forms of relatedness, the attractiveness of legal marriage for homosexuals will function just as it does for heterosexuals—to minimize interest and need for experimentation outside the parameters of the civil institution.⁶¹³

Those who seek the option of entering into a legal same-sex marriage must believe that the individual and social benefits of substantially constraining gay and lesbian emotional and sexual relationships within this form of permanent monogamous coupling⁶¹⁴ outweigh the apparent loss of individual freedoms that might result.⁶¹⁵ While the benefits most frequently noted are government entitlements and presumptions for married couples,⁶¹⁶ or simply the recognition of equality and non-discrimination that same-sex marriage implies,⁶¹⁷ these rationales would evaporate should heterosexual marriage be abolished. Ultimately, support for same-sex marriage must be founded upon an appreciation of the fundamental value of the institution of heterosexual marriage.⁶¹⁸ Viewed

massive conscription of lesbians and gay men into the project of re-writing gay life.”).

613. See Ettelbrick, *supra* note 612, at 404 (“If the laws change tomorrow and lesbians and gay men were allowed to marry, where would we find the incentive to continue the progressive movement we have started that is pushing for societal and legal recognition of all kinds of family relationships?”).

614. *But see* Polikoff, *supra* note 609, at 1549 (decrying a strategy to legalize same-sex marriage which “values long-term monogamous coupling above all other relationships”).

615. See, e.g., Eskridge, *supra* note 569, at 1485 (admitting to “substantial ambivalence” as to the presumed beneficial effects of same-sex marriage for the happiness of homosexuals or for the homosexual community or movement, but concluding that “gay lesbian doubts about same-sex marriage are overstated and that having the marriage option is useful and productive”).

616. See Thomas Stoddard, *Why Gay People Should Seek the Right to Marry, in LESBIANS, GAY MEN, AND THE LAW*, *supra* note 612, at 398, 399-400 (pointing out tax, inheritance, citizenship, Social Security, and other benefits of legal marriage).

617. See *id.* at 400-01 (describing the political and philosophical justifications for same-sex marriages).

618. Critics of same-sex marriage within the homosexual community make the same point in an opposite direction, i.e., since marriage is a socially destructive institution, we ought not to seek same-sex marriage. See, e.g., Polikoff, *supra* note 609, at 1541 (arguing that “a concerted effort to achieve the legalization of lesbian and gay marriage will valorize the current institution of marriage”). What I have sought to provide here is a coherent

in this light, the benefits of marriage over romantic love and lust must be those critical functions that marriage has in the development of an individuality that is inherently social and a society that is respectful of individuality. Only a Hegelian view of marriage can explain why the legal institution of marriage, whether heterosexual or homosexual, is personally and socially valuable.

B. Comparison of the Social and Political Implications of Same-Sex Marriage and Polygamy

The doctrinal underpinnings of a belief in same-sex marriage, as suggested above, differ radically from the doctrinal underpinnings of the Mormon belief in polygamy. As a result, the social and political implications of the practice of same-sex marriage would be quite different from the social and political implications of the practice of polygamy. The practice of same-sex marriage would not lead to despotism or undermine democracy, as the *Reynolds* Court feared polygamy would, nor would it undermine the way in which heterosexual marriage functions to teach, in a deep and concrete way, the lesson that the apparent sacrifices of individuality, required by the community, ultimately reestablish and strengthen individuality.

This Article has explored the way in which the institution of polygamy was integrally related to the existence of an actual Mormon theocracy. While Mormon polygamy was based on religious beliefs about the spiritual authority of men over women and Prophets over men, and the continuity between life on earth and in heaven,⁶¹⁹ no such religious bases for same-sex marriage exist to coherently unite all or even most homosexuals who seek same-sex marriage.⁶²⁰ Belief in same-sex marriage does not arise from accepting religious authority external to personal conscience, but rather from the same trust in personal conscience that underlies American democratic ideals. Consequently, while the religious value of polygamy caused Mormons to accept the practice whether it conformed to personal inclination and morality, no threat exists that homosexuals will seek to impose same-sex marriage upon others, as this would be contrary to the emphasis of individual authenticity that legitimates

account for the existing "valorization" of heterosexual marriage independent of patriarchal justifications. This account, while it stresses long-term monogamy and the legal institutionalization of marriage as socially valuable, would not provide a justification for the continuing influence of patriarchal ideas within marriage.

619. See *supra* notes 437-52 and accompanying text.

620. See *supra* notes 535-41 and accompanying text.

the notion of same-sex marriage in the first place. Same-sex marriage is of no value unless freely chosen because of the existence of fulfilling emotional connections between individuals. Same-sex marriage is therefore not a tool of theocracy or any other political system based upon faith in or submission to external authority over individual conscience. For the same reasons, same-sex marriage cannot be seen as a threat to the development of individuality and individual conscience or to the individual and political liberty of others, as was polygamy.

This Article also has demonstrated that the institution of Mormon polygamy would necessarily lead to relations of inequality between polygamous men and non-polygamous men.⁶²¹ This inequality was buttressed by Mormon doctrines suggesting that polygamous men were the most righteous, deserving of greater reproductive and institutional power. Same-sex marriage, in contrast, is not based on any claim that homosexuals are superior to heterosexuals or that homosexuals are entitled to more rights or social goods than heterosexuals.⁶²² Supporters of same-sex marriage do not seek to create a privileged class like that envisioned by Mormon polygamists.

However, the question remains whether same-sex marriage would in fact create relations of inequality which would deprive some men or women of the opportunity to marry. If some women marry women, those women are not available to be married by men, and, conversely, if some men marry men, those men are not available to be married by women. Does same-sex marriage, therefore, threaten to deprive some heterosexual men of wives and some heterosexual women of husbands, thereby creating a class of people with unequal relationship possibilities? To begin with, such deprivation is possible only to the extent that the number of lesbians and gay men are not approximately equivalent. Supposing, however, that the number of lesbians and gay men did not balance each other out, would that mean that some heterosexuals would be deprived of the opportunity to marry because some women married women and some men married men? To suggest that heterosexuals are being deprived of the opportunity to marry homosexuals is strange, when arguably such a relationship would not be a very fulfilling or desir-

621. See *supra* note 489-506 and accompanying text.

622. Cf. *Romer v. Evans*, 116 S. Ct. 1620, 1626-27 (1996) (finding that laws providing homosexuals protection from discrimination do not provide homosexuals with "special rights").

able one for either party.⁶²³ While plural wives probably would have chosen to enter into monogamous marriages in the absence of a polygamous alternative, most homosexuals who would choose same-sex marriage would not enter heterosexual marriages in the absence of a same-sex alternative.⁶²⁴ Therefore, same-sex marriage likely would not decrease the opportunity for heterosexuals to marry.

Finally, the patriarchal doctrines underlying polygamy and its practice perpetuate inequalities of power between men and women that are antithetical to modern American understandings of gender equality. The vestiges of patriarchy retained by contemporary heterosexual marriage derive from the presumption that marriage is made possible because of the inherent differences between men and women.⁶²⁵ Same-sex marriage would presume that the differing qualities of partners that make marriage possible are not confined to one sex or the other, thereby eroding these patriarchal ideals. However, same-sex marriage is not necessarily a gender-blind institution. Most homosexuals do not love their partners "despite" their gender, but may well seek out and value partners of that gender. Both gay men and lesbians have been implicated in and parties to divisive and sexist gender binaries.⁶²⁶ It might well be asked whether patriarchal (or matriarchal) ideas might not flourish where marital partners are not forced by the act of marriage to acknowledge the equality of a differently gendered person.⁶²⁷ But if we transpose this argument to the sphere of same-race marriages versus interracial marriages, it

623. Cf. Strasser, *supra* note 569, at 995-96 (suggesting that forcing homosexuals and heterosexuals to marry hardly would lead to happy or stable relationships or a healthy family environment).

624. *See id.* at 995 (arguing that those denied same-sex marriage most likely would not marry at all).

625. *See* Wardle, *supra* note 8, at 83-84 ("Differences in human development of males and females are relevant to gender-based distinctions in laws regulating marriage and family relations.").

626. *See* Butler, *supra* note 558, at 23-24.

627. Those who argue against same-sex marriage seem particularly fond of making this argument, despite otherwise patriarchal leanings. *See, e.g.,* Bruce Fein, *No: Reserve Marriage for Heterosexuals*, A.B.A. J., Jan. 1990, at 43 (arguing that "[t]he likelihood of gender prejudice is . . . reduced" in heterosexual households because "[t]he child enjoys the opportunity to understand and respect both sexes in a uniquely intimate climate"); Wardle, *supra* note 8, at 87 ("Legalizing same-sex marriage, on the other hand, would send a message that a woman is not absolutely necessary and equally indispensable to the socially valued institution of marriage, weakening rather than strengthening equality for the vast majority of women."). *But see* Eskridge, *supra* note 569, at 1510 (noting that while same-sex marriages could "contribute to gender hierarchy" in a society that maintained strong patriarchal beliefs, it would not do so in the context of contemporary culture).

would be like saying that, due to the lingering poison of racism, we should require all whites to marry blacks and all blacks to marry whites and forbid same-race marriages as arenas where racism might fester and grow. Some battles cannot, and ought not, be fought in the bedroom. Sexism will not be strengthened by same-sex marriages any more than racism is strengthened by same-race marriages.

Same-sex marriage, therefore, does not pose the kind of threat to the foundation of the modern liberal state that polygamy may have posed, because it is a practice founded in respect for individual difference, autonomy, and equality, as well as social unity. The Hegelian account of the value of modern marriage developed here cannot distinguish heterosexual monogamous marriage from homosexual monogamous marriage. This means that *Reynolds* may not be used to support attacks on same-sex marriage such as the Defense of Marriage Act.⁶²⁸ However, under the account of marriage that has been developed here, legislation such as the Defense of Marriage Act is not invalid merely because it lacks a rational justification. Proper appreciation of the universalizing function of marriage reveals that such legislation necessarily undermines the very institution it seeks to protect.

C. The Negative Consequences of Failure to Legally Recognize Same-Sex Marriage

Until now, this Article has focused on the positive contribution of the legal institution of marriage for the development of individuality and social unity. There are also negative consequences arising out of the arbitrary denial to some individuals of the opportunity to participate in this institution in a meaningful way. The failure to recognize same-sex marriage, which essentially is indistinguishable from heterosexual marriage, will have negative social consequences as profound as its possible positive consequences. Ultimately, these negative consequences undermine the institution of marriage itself.

Legal marriage, which is more than lust and romantic love, makes possible a unifying bond between individuals that is stronger and more stable than mere passion. The presence of such a bond allows individuals to learn the important social lesson that the sacrifice of particular liberties for some greater good ultimately promotes their own particular interest. If lesbians and gay men are denied the

628. See Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (to be codified at 28 U.S.C. § 1783C and 1 U.S.C. § 7).

experience of this stable and enduring commitment, the ability of such individuals to make lasting personal commitments, as well as abstract and less personally rewarding commitments to the state and society as a whole, may be stunted.⁶²⁹ Under this Hegelian view of marriage, the private liberty that appears to be maximized for gays and lesbians when the enduring commitment of legal marriage is not available to them should be understood as a destabilizing force which creates a cult of the individual and encourages resistance to institutionalized structures of social unity. Provision of the legal institution of same-sex marriage, on the other hand, would allow individual choices about sexuality and emotional connection to be sources of common individuality rather than a basis for alienation of homosexuals and heterosexuals from each other and from the state.⁶³⁰

Legal marriage also gives the state credit for the possibility of a unity which reaffirms individuality, so that citizenship itself is understood to reaffirm individuality. When the state refuses to insert itself into relationships which have such individual affirming significance, those who are in such relationships do not experience the state as essential to the possibility of their individual existence and happiness. Thus, gays and lesbians who wish to marry but are not permitted to do so, and who are thereby denied the ability to have children,⁶³¹ to ensure their children a stable family,⁶³² to provide for

629. Cf. REGAN, *supra* note 607, at 120-21 (suggesting that the lack of institutional support for fidelity and self-restraint in gay male relationships disrupts attempts to develop committed relationships and encourages distinctly uncommitted forms of relating to others); Hohengarten, *supra* note 37, at 1529 (arguing that eliminating marriage in general would "produce an isolated legal subject whose capacity to embark upon committed projects with others is limited to the sphere of self-interested economic transactions—*homo economicus* in its purest form").

630. See Claudia A. Lewis, *From This Day Forward: A Feminine Moral Discourse on Homosexual Marriage*, 97 YALE L.J. 1783, 1798 (1988) (arguing that state recognition of marriage produces "a sense of belonging to the community through mutual public identification"); see also Eskridge, *supra* note 569, at 1490 (arguing that "meld[ing] back into society's mainstream" would be positive for homosexuals, and suggesting that fears of assimilation are fueled more by the anger of rejection than by the value of permanent outsider status).

631. For example, homosexuals may be denied access to the services of sperm banks, fertility clinics, or adoption agencies because they are not married. See BLANK & MERRICK, *supra* note 320, at 106 (noting the exclusion of unmarried women and lesbians from assisted reproduction services).

632. For example, except in cases where second-parent adoptions have been allowed, a biological child of one member of a gay or lesbian couple has no assurance that, if the biological parent were to die, the gay or lesbian partner-parent would be able to obtain legal

their partner's financial stability should they die,⁶³³ or to engage in legal sexual relations, must view the state as either indifferent or actively hostile to their happiness. In such circumstances, whole-hearted loyalty and commitment to such a state come only at the cost of internalizing this hostility or indifference as self-hatred.⁶³⁴ Yet for many, this self-hatred is preferable to the rejection of self which would come from a rejection of our connection to and affection for this country. As a result, this affection sometimes resembles a child's tenacious love for an abusive parent, springing as much from the child's recognition of how much love and care such a parent needs as from the child's desperate need for a parent's love and care. The resulting personal cost to gay and lesbian citizens for our deep devotion to this country is enormous.⁶³⁵ It is justified, however, because we know that this country cannot be all it claims to be without us, nor can we be all we claim to be without it. The desire for same-sex marriage reflects a deep commitment to bringing the reality of this country closer to its ideals. As painful as this commitment often is, it is preferable to the alternative belief that this country's ideals are already fully mirrored by the current state of affairs.⁶³⁶

custody. See Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 531-33 (1990).

633. For example, a homosexual partner may be unable to pass on Social Security contributions to a surviving partner, and estates left to such partners that would be tax free if left to spouses are taxable. See David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbians and Gay Male Couples*, 95 MICH. L. REV. 447, 474-75 (1996) (stating that gay and lesbian couples are not entitled to an exemption from estate taxes or social security survivor benefits).

634. Cf. MARTIN S. WEINBERG & COLIN J. WILLIAMS, MALE HOMOSEXUALS: THEIR PROBLEMS AND ADAPTATIONS 153-55 (1974) (documenting how the negative attitudes of others toward homosexuals are more likely to be internalized as low self-esteem when those expressing negative attitudes are held in high esteem).

635. For example, gay and lesbian members of the military risk their lives for a country that claims they are not worthy to do so; gay and lesbian lawyers commit themselves to a legal system that views them as criminals or outlaws; gay and lesbian teachers dedicate themselves to the flourishing of children's individuality at the cost of suppressing and hiding their own; gay social workers struggle to keep other families intact when they can do little to keep their own families intact.

636. Some homosexuals may respond to public rejection by becoming hostile toward the state. While this plays into the stereotypical belief that homosexuals should not be given positions of public trust because they are not loyal to their country, the vast majority of homosexuals overcompensate for their rejection by increased loyalty and the belief that someday things will be better, preferring personal sacrifice over the loss of civic ideals. Compare, for example, two famous English homosexuals, Alan Turing and Guy Burgess. Turing, the English mathematical and computing genius whose work on the German encrypting device Enigma was critical to the British war effort, committed suicide two years

In addition, social indifference to the emotional bonds between gay and lesbian partners leads to an understanding of the civil institution of marriage as potentially coercive and antithetical to individual liberty. This perception of the irrelevance or intrusiveness of marriage is not limited to those who are denied same-sex marriage, but will extend to heterosexuals who may then choose not to participate in the legal institution of marriage.⁶³⁷ Currently, same-sex couples are being married in religious and non-religious ceremonies throughout the country⁶³⁸ and drawing up partnership contracts that set out the legal rights and responsibilities of the parties. The more it makes sense to them and to others to say that they are married, even if they are not legally married, the less the legal institution appears to accomplish, other than to privilege some married people in some ways and penalize them in others.⁶³⁹ Marriage reverts to being a primarily private, or possibly religious, institution over which the state has lost control. Indeed, such social indifference to the emotional bonds between lesbian and gay male partners paradoxically leads to a privileging of these emotional and physical connections over legal and ethical connections. This is why Hegel made a point of emphasizing the ethical legal bond as the true essence of marriage, rather than any romantic love that also may have been present. As the English ecclesiastical courts learned, the development of com-

after being convicted of gross indecency and being sentenced to a period of hormone treatment which caused him to grow breasts. See generally ANDREW HODGES, ALAN TURING: THE ENIGMA (1983) (arguing that Turing's personal commitment to his country through his war work meant that the political was so personal that he could not put the "the personal above the political" and betray his country for personal reasons). Burgess, on the other hand, was a Soviet mole in British intelligence whose treachery arguably was rooted in the social rejection caused by his homosexuality. See CHAPMAN PINCHER, TRAITOR: THE ANATOMY OF TREASON 103 (1987) ("The social and legal condemnation of homosexuals may well have converted some of them into 'outsiders' with a chip on their shoulder, deeply resentful of a society which made a serious offense of the sexual expression which they found natural.").

637. Cf. DEBORAH RHODE, JUSTICE AND GENDER 135 (1989) (noting that enormous increases in heterosexual cohabitation rather than marriage may be explained by changing attitudes toward marriage, among other things).

638. See Eskridge, *supra* note 569, at 1483 (noting that thousands of religious same-sex marriages have been performed).

639. Cf. Commission on Sexual Orientation and the Law (established by the Hawaii governor and legislature by Hawaii S.B. 888, *sex. 3*, 18th Leg., 1995 Sess.) (App. E) (Dec. 8, 1995) <<http://www.hawaii.gov/lrb/solcvr.html>> (noting the necessity of distinguishing between "marriage" and "being legally married" due to the celebration of formal religious marriage ceremonies by same-sex couples and the parallels with Quaker and other non-Anglican Protestants in seventeenth-century England when they were refused government marriage certificates because they were not married by an Anglican priest).

peting privately controlled marriage institutions, as common-law marriage was then, threatens the social control and utility of the public institution.⁶⁴⁰ Recognition of same-sex marriage would allow the emotional and physical bonds between lesbian and gay male partners to shrink in importance next to the state-provided legal and ethical bonds, and would, therefore, reinforce for everyone the critical importance of the state in making any such bonds possible.

Finally, legal marriage allows all citizens to share a similar and equivalent experience of themselves and the state, which promotes social cohesion. For many people marriage is experienced as a right of passage into a full and responsible adulthood. Denial of desired access to the experience and identity of marriage transforms the meaning of marriage for everyone from unification and commonality to exclusion and distinction. Marriage cannot have the same luster to anyone, even heterosexuals, when it is understood as the equivalent of eating at a segregated lunch counter or swimming in a public "whites only" pool.⁶⁴¹ Such a state-sponsored institution of exclusion and distinction creates rifts that undermine the possibility of social unity. Provision of the legal institution of same-sex marriage would allow individual choices about sexuality and emotional connection to be grounds of common individuality rather than a basis for the alienation of homosexuals and heterosexuals from each other and from the state. Same-sex marriage is as essential to the achievement of the social unity of heterosexuals and homosexuals and the fully realized individuality of men and women as recognition of interracial marriage was to the possible social unity and the fully realized individuality of white and black Americans.

VII. CONCLUSION

Unlike polygamy, same-sex marriage poses no threat to American ideals of separation of church and state, individual autonomy, equality of all men, and equality of men and women. The doctrinal underpinnings of same-sex marriage are indistinguishable from the doctrinal underpinnings of heterosexual marriage, as revised to conform to modern norms of gender equality. Same-sex marriage can,

640. See CLARK, *supra* note 345, at 22 (noting that the ecclesiastical courts were forced to recognize common-law marriages in order to maintain authority over the institution of marriage).

641. Imagine the heterosexual experience of obtaining a marriage license if homosexual couples engaged in regular "sit-ins" at county clerks' offices, demanding the same service as heterosexual couples.

in fact, be seen as an inevitable development when the civil institution of heterosexual marriage is based upon ideals of romantic love and non-procreative sex which are inconsistent with patriarchal views regarding the natural superiority of men and inferiority of women. Same-sex marriage not only undermines the patriarchal views of men and women that proved so problematic with polygamy, but may also be viewed as a necessary last step in freeing monogamous marriage from the vestiges of its patriarchal past. As a result, the reasoning in *Reynolds* is inapplicable to same-sex marriage and neither *Reynolds* nor its progeny can be read to provide support for governmental attacks on same-sex marriage. Thus, Justice Scalia's reliance in *Romer v. Evans*⁶⁴² on *Davis v. Beason*⁶⁴³ to support a claim that the legitimacy of regulating polygamy provides support for regulation of homosexuality was not justified.

Nor can same-sex marriage be seen as a threat to the institution of marriage itself, as those who promoted the Defense of Marriage Act have argued.⁶⁴⁴ Marriage must be understood as having constitutional significance as a mediating institution that promotes and reconciles individuality and social unity. The greatest threat to the institution of marriage is posed by the vestiges of patriarchal principles in heterosexual marriage. The continuing social value of marriage as a reconciliation of social unity and individual liberty depends, in part, upon an accommodation of women's need for individuation. It is incoherent to acknowledge that female individuality is not a function of gender, yet insist that the unity of marriage is dependent upon the differentiation of gender. The Defense of Marriage Act must be seen for what it is: a defense of an institution of patriarchal marriage that more closely resembles nineteenth-century Mormon polygamous marriage than the contemporary vision of marriage as a partnership of equals. The recognition of same-sex marriage will advance a non-patriarchal reconstitution of marriage.

Marriage also has enormous value to Americans as an institution that makes social unity possible, even in a world in which

642. 116 S. Ct. 1620, 1635 (1996) (Scalia, J., dissenting).

643. 133 U.S. 333 (1890). In *Davis*, the Court held constitutional a statute depriving polygamists or supporters of polygamy of the right to vote. See *id.* at 347. In *Romer*, the Court held that *Davis* was "no longer good law" to the extent it deprived persons of the right to vote merely because of their beliefs. See *Romer*, 116 S. Ct. at 1628.

644. See 142 CONG. REC. H7494 (daily ed. July 12, 1996) (statement of Rep. Smith that "[s]ame-sex marriage demeans the fundamental institution of marriage" and "threatens cultural values").

individuality has been fully cultivated. Recognition of same-sex marriage would strengthen the social unification function of marriage, not only by allowing additional individuals to experience their individuality as sustained and nurtured by society as a whole, but also by making the practice of marriage more universal and thereby promoting a similarity of experience which universalizes individual needs and desires and promotes social cohesion. Maintaining marriage as an exclusive and excluding institution, as the Defense of Marriage Act seeks to do, both distorts the essence of marriage and undermines its positive social meaning. The Defense of Marriage Act, and legislation like it, must therefore be seen as an attack on marriage, rather than a defense of it.