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Keeping "I Do" Between Two: A Post-Obergefell Analysis of a Bigamous Marriage and Its Implications for Louisiana's Matrimonial Regime

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Keeping "I Do" Between Two: A Post-*Obergefell* Analysis of Bigamous Marriage and Its Implications for Louisiana's Matrimonial Regime

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INTRODUCTION

Meet Kody Brown, an advertising salesman living happily in Utah with his four wives and 18 children.[1] Apart from the fact that Kody has multiple wives, the Browns are an otherwise normal family. They take vacations, argue with one another, and share meals together at the end of a long day. Unfortunately for the Browns, local authorities began investigating them to determine whether they were in violation of the state's criminal bigamy laws.[2] Fearing for their safety, Kody moved his family to Nevada and filed suit against the state, claiming that the investigation violated his family's right to privacy. At trial, the lower court ruled in favor of the Browns and struck down as unconstitutional the portion of the state's bigamy statute that criminally implicated Kody for cohabiting[3] with multiple wives.[4] The appellate court, however, dismissed the case and effectively reinstated the statute that criminalized Kody and his family's way of life.[5]

TLC's popular television series "Sister Wives," which follows the Browns' lives, has entertained millions of viewers over the course of seven seasons.[6] What many viewers may not realize, however, are the legal issues raised by the show's plot. The Utah district court's ruling in favor of the Browns and striking down of the criminal portion of Utah's bigamy statute

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1. The following hypothetical described herein is based on the factual circumstances in the 2013 Utah state court decision of *Brown v. Buhman*. *See generally* Brown v. Buhman, 947 F. Supp. 2d 1170 (D. Utah 2013).

2. UTAH CODE ANN. § 76-7-101 (West 2017); *Bigamy*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("[Bigamy is] [t]he act of marrying one person while legally married to another."); *see also Polygamy*, BLACK'S LAW DICTIONARY 1347 (defining polygamy as "[t]he state or practice of having more than one spouse simultaneously").

3. *Cohabitation*, BLACK'S LAW DICTIONARY ("[Cohabitation is] [t]he fact, state, or condition of living together, esp[ecially] as partners in life, usu[ally] with the suggestion of sexual relations.").

4. *Brown*, 947 F. Supp. 2d at 1222–23.

5. *See* Brown v. Buhman, 822 F.3d 1151, 1179 (10th Cir. 2016). The court justified its dismissal of the case by concluding that because Utah prosecutors had a policy of not pursuing most bigamy cases, the plaintiffs had no credible fear of future prosecution and thus lacked standing. *Id.* at 1167; *see also* discussion *infra* Part II.A.

6. *See* Michael Rothman, *"Sister Wives": Everything You Need to Know About Kody Brown and Family*, ABC NEWS (Apr. 12, 2016), http://abcnews.go.com/Entertainment/kody-brown-sister-wives/story?id=38331357 (providing background of the Brown family and discussing the purpose and plot of the show) [https://perma.cc/HS38-9QVA].

was vacated recently by the Tenth Circuit Court of Appeals on procedural grounds.[7] The Tenth Circuit's decision, along with the recent United States Supreme Court decision in *Obergefell v. Hodges* prohibiting states from banning same-sex marriages,[8] has intensified a new and controversial debate concerning the legality of anti-bigamy laws. A central issue debated concerns whether marriage should be restricted to relationships consisting of only two individuals, thus denying marriage rights to individuals, such as Kody and his family, who are in bigamous unions.

Perhaps the most controversial matter surrounding the constitutionality of bigamous marriage is whether states should recognize the practice legally and confer governmental benefits to individuals in these unions. A major concern surrounding the legal recognition of bigamous marriage is the effect such recognition would have on tax and community property laws—two areas of law shaped by the concept of marriage as a legal union between two individuals. A United States Supreme Court decision requiring states to recognize bigamous marriage as a legal institution would disrupt tax and community property laws significantly throughout the United States.[9] The issue of bigamous marriage is particularly relevant to Louisiana—not only because Louisiana is a community property state[10] but also because of Louisiana's criminal bigamy statute.[11]

Part I of this Comment provides background on the United States Supreme Court's recent expansion of individual rights and liberties and the significant ambiguities surrounding the Supreme Court's interpretation of the Due Process and Equal Protection clauses of the Fourteenth Amendment. Part II analyzes Louisiana's criminal bigamy statute and the issues surrounding the bigamous marriage debate generally. Part III conducts a constitutional analysis of Louisiana's criminal bigamy statute and highlights the central issues the statute raises. Lastly, Part IV proposes that the Louisiana Supreme Court, if confronted with the constitutionality of Louisiana's criminal bigamy statute, should decline to extend the fundamental right to marry to bigamous unions under a rational basis review. Instead, the Louisiana Supreme Court should hold the portion of the statute criminalizing bigamous marriage unconstitutional in light of

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7. *Brown*, 822 F.3d at 1179; *see also* discussion *infra* Part II.A.

8. Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015).

9. *See* Samuel D. Brunson, *Taxing Polygamy*, 91 WASH. U.L. REV. 113, 117 (2013).

10. *See, e.g.*, LA. CIV. CODE art. 2338 (2017). The question of legally recognizing bigamous marriage presents a significant challenge to community property states that treat marriage as an institution consisting of only two people. *See, e.g.*, Hadar Aviram & Gwendolyn Leachman, *The Future of Polyamorous Marriage: Lessons from the Marriage Equality Struggle*, 38 HARV. J.L. & GENDER 269, 318 (2015).

11. LA. REV. STAT. § 14:76 (2017).

Lawrence v. Texas[12] and the greater privacy rights that Louisiana citizens enjoy under the state constitution.[13]

I. BACKGROUND AND PROGRESSION TOWARD THE BIGAMY DEBATE

Marriage is one of the most profound and important institutions in American society, and many people consider marriage to be the most significant moment an individual can experience during one's life.[14] Marriage also is a unique institution because of its nationwide recognition as a contract formed between the spouses and the government.[15] The legal aspect of marriage seems rather peculiar in light of the particularly intimate and private nature associated with the institution of marriage.

Marriage offers the opportunity for two people to join together in a single union composed of love, fidelity, and spirituality.[16] The government also benefits from this arrangement because marriage can be an effective mechanism to facilitate child-rearing in stable family environments—the building blocks of a strong and productive society.[17] The government's extensive role in regulating marriage, however, raises the question of how far regulations should extend when individual rights and liberties are concerned. An examination of the United States Supreme Court's interpretation of individual rights and liberties and the extent to which they are protected by the United States Constitution highlights the significance concerning the issue of governmental regulation of bigamous relationships.

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12. Lawrence v. Texas, 539 U.S. 558 (2003).

13. LA CONST. art. I, § 5; *see also* S. Con. Res. 39, 1997 Leg., Reg. Sess. (La. 1997). Former Supreme Court Justice Byron White famously stated, "The [Supreme] Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." Bowers v. Hardwick, 478 U.S. 186, 194 (1986). It is with this idea in mind that this Comment approaches its analysis of bigamous marriage.

14. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2594 (2015) ("The centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations. Since the dawn of history, marriage has transformed strangers into relatives, binding families and societies together.").

15. *See* EDWARD SCHILLEBEECKX, MARRIAGE: HUMAN REALITY AND SAVING MYSTERY 388 (1965) (explaining that the contractual nature of marriage came from the Roman *consensus* idea of marriage).

16. *See, e.g.*, *Obergefell*, 135 S. Ct. at 2608 ("No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family.").

17. *See id.* at 2600; *see also, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 399–400 (1923).

A. Introduction to the Due Process and Equal Protection Clauses

The Fourteenth Amendment of the United States Constitution is one of the most significant constitutional amendments because it safeguards fundamental individual rights and mandates equal protection of the laws.[18] Section One of the Fourteenth Amendment contains both the Due Process Clause and the Equal Protection Clause.[19] The Due Process Clause declares that no state shall "deprive any person of life, liberty, or property, without due process of law."[20] Additionally, the Equal Protection Clause mandates that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[21] Together, these two clauses form one of the most heavily litigated sections of the United States Constitution.[22] The high volume of litigation is primarily a result of the Supreme Court's ambiguous interpretation of the overlap between these two clauses.[23]

The United States Supreme Court has relied on the Due Process Clause to recognize independent substantive and procedural requirements that state laws must observe.[24] The Court's interpretation of the Due Process Clause often concerns the "fundamental rights" of individuals that the Court deems "implicit in the concept of ordered liberty."[25] When deciding whether a right is "fundamental," the Court examines whether the right is "deeply rooted in this Nation's history and tradition."[26] If a court deems the right fundamental, then it applies "strict scrutiny" analysis under which the government must

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18. U.S. CONST. amend. XIV.

19. *Id.* § 1.

20. *Id.*

21. *Id.*

22. *The Enabling Clause of the Fourteenth Amendment: A Reservoir of Congressional Power?*, 33 COLUM. L. REV. 854, 854 (1933).

23. *See* discussion *infra* Part I.B.

24. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 569 (5th ed. 2015).

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

26. *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) ("Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful 'respect for the teachings of history (and), solid recognition of the basic values that underlie our society.'"). This analysis by the Court primarily concerns rights not mentioned expressly in the text of the Constitution, unlike other fundamental rights, such as the right to trial by jury and the Fourth Amendment's safeguard from unreasonable searches and seizures. *See* CHEMERINSKY, *supra* note 24, at 826.

demonstrate a compelling state interest[27] that is advanced by a narrowly tailored law that infringes upon the right at issue.[28] Strict scrutiny analysis is the most stringent judicial standard of review and ordinarily results in a court striking down the law in question.[29] If a court determines that the law under review does not implicate or infringe upon a fundamental right, then "rational basis" review applies, which requires the government to show only that the law in question rationally relates to some legitimate state interest.[30] Comparatively, the rational basis test is the least stringent standard of review and ordinarily results in the court upholding the law.[31]

Congress ratified the Fourteenth Amendment and the Equal Protection Clause largely in response to widespread discrimination against former slaves after the Civil War.[32] The Equal Protection Clause mandates that all persons in similar capacities be treated equally under the law.[33] In an equal protection analysis, courts focus on whether a sufficient governmental interest exists to justify the discriminatory effect of the law at issue on a certain class of people.[34] The two primary ways in which a law can be held unconstitutional under the Equal Protection Clause is if the court finds that the

27. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 (1986) ("Under strict scrutiny the means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose.").

28. *See, e.g.*, Adarand Constructors v. Pena, 515 U.S. 200, 227 (1995).

29. CHEMERINSKY, *supra* note 24, at 567.

30. *See, e.g.*, Williamson v. Lee Optical, Inc., 348 U.S. 483, 491 (1955).

31. *See, e.g.*, CHEMERINSKY, *supra* note 24, at 565–66. An additional level of scrutiny that courts sometimes apply is the middle tier of review known as "intermediate scrutiny." *Id.* Under this standard of review, which is slightly more stringent than rational basis but slightly less stringent than strict scrutiny, a law will be upheld as long as it is substantially related to an important governmental purpose. *See id.*; *see also* Lehr v. Robertson, 463 U.S. 248, 266 (1983). Although intermediate scrutiny is applied in various contexts, such as laws involving gender discrimination and regulation of commercial speech, *see, e.g.*, Craig v. Boren, 429 U.S. 190 (1976); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995), rational basis and strict scrutiny are the only levels of scrutiny at issue in this Comment.

32. CHEMERINSKY, *supra* note 24, at 695.

33. U.S. CONST. amend. XIV, § 1.

34. *See* Skinner v. Oklahoma, 316 U.S. 535, 544 (1942). Additionally, the levels of scrutiny that apply to an analysis under due process also apply to an analysis under equal protection. *See, e.g.*, CHEMERINSKY, *supra* note 24, at 567.

law in question implicates a "suspect class,"[35] such as race,[36] or if the law discriminates against a non-suspect class but nevertheless burdens a fundamental right.[37] The latter scenario, which implicates the overlap of both due process and equal protection, marks the point when an analysis under the Fourteenth Amendment becomes especially complex due to the Court's failure in recent decisions to specify the appropriate levels of scrutiny for analyzing individual rights.[38]

B. A Clausal Collision: The Ambiguities in Fourteenth Amendment Jurisprudence

American society has defied social injustice throughout its history and its legal regime has evolved, albeit gradually, to incorporate new rights and freedoms for all its citizens.[39] In the past 50 years alone, the United States Supreme Court has facilitated a significant expansion of social liberties, especially within the realm of individual rights and liberties.[40] Today, United States citizens have the constitutional rights to privacy and to marry any individual, regardless of race, social status, or sexual orientation.[41] The expansion of social liberties is especially significant in relation to bigamous marriage because the expansion highlights the two interrelated constitutional issues central to this debate: the right to privacy and the right to marry.

1. The Right to Privacy

Although the United States Constitution does not provide explicitly for a right to privacy, the Supreme Court has affirmed repeatedly an individual right to freedom from unwarranted intrusion or exposure in

35. In determining whether a class warrants a heightened standard of scrutiny under the equal protection clause, the Supreme Court considers history of discrimination, political powerlessness, immutability of the characteristic, and the relation between the characteristic and the ability of the group to perform or contribute to society. *See* Frontiero v. Richardson, 411 U.S. 677, 684–86 (1973).

36. CHEMERINSKY, *supra* note 24, at 698.

37. *Skinner*, 316 U.S. at 541.

38. CHEMERINSKY, *supra* note 24, at 822.

39. *See, e.g.*, *id.* at 695–96.

40. *See, e.g.*, *id.*

41. *See, e.g.*, *id.* at 696. *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965); Loving v. Virginia, 388 U.S. 1 (1967); Zablocki v. Redhail, 434 U.S. 374 (1978); Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

one's private and intimate affairs.[42] In particular, the Court has analyzed this right frequently in the context of marriage.[43]

In 1965, the Supreme Court in *Griswold v. Connecticut* invalidated a law that criminalized the use of contraceptives as violating the marital "right to privacy,"[44] finding the right protected by the Due Process Clause of the Fourteenth Amendment.[45] Seven years later in *Eisenstadt v. Baird*, the Court held a Massachusetts state law unconstitutional under the Fourteenth Amendment's Equal Protection Clause for preventing unmarried couples from accessing contraceptives.[46] The Court reasoned that the law resulted in impermissible discrimination by denying the right to possess contraceptives to unmarried couples.[47]

In 2003, the Court promulgated the momentous decision of *Lawrence v. Texas*, a case that involved a controversial Texas criminal law that classified consensual homosexual intercourse as illegal sodomy.[48] The case arose after Texas police arrested two men for engaging in sexual intercourse and later fined them under a Texas criminal law that prohibited "deviant sexual intercourse"—defined under the law as sexual activity between same-sex individuals.[49] The Court struck down the law as unconstitutional and held that an individual has a right to engage in intimate and consensual sexual conduct under the Due Process Clause of the Fourteenth Amendment.[50] In a vigorous dissent, Justice Scalia heavily criticized Justice Kennedy's holding in the majority opinion as ambiguous for failing to articulate the applicable level of scrutiny.[51] Furthermore, the Court did not define the right to privacy as "fundamental" or mention strict scrutiny in the opinion.[52] Although the holding in *Lawrence* concerned a

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42. *Right of privacy*, BLACK'S LAW DICTIONARY (10th ed. 2014).

43. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

44. *Id.* at 485–86 (emphasizing that the idea of allowing police "to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives . . . is repulsive to the notions of privacy surrounding the marriage relationship").

45. *See id.* at 485.

46. *See* Eisenstadt v. Baird, 405 U.S. 438, 447 (1972).

47. *Id.* at 452.

48. Lawrence v. Texas, 539 U.S. 558, 558 (2003).

49. *Id.* at 563.

50. *Id.* at 567 ("When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.").

51. *Id.* at 586 (Scalia, J., dissenting).

52. CHEMERINSKY, *supra* note 24, at 882.

statute criminalizing homosexual sodomy,[53] many scholars believe that the broader impact of this decision was the Court's implied recognition of a "fundamental right to privacy."[54] The *Lawrence* decision set the stage for later Supreme Court decisions that would expand individual civil liberties further, particularly the right to marry.[55]

2. The Right to Marry

Although marriage is not defined in the United States Constitution, the judicial understanding of this institution has evolved throughout the nation's history.[56] The Supreme Court first recognized marriage as a fundamental right in the groundbreaking decision of *Loving v. Virginia*.[57] In *Loving*, the Court held unconstitutional a Virginia statute that prohibited a white person from marrying another person of a different race.[58] The first part of the Court's opinion explained why the law violated the Equal Protection Clause, stating that "[t]here can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause."[59] The Court held that the law deprived the Lovings, the interracial couple prosecuted in Virginia for violating its anti-miscegenation law, of their constitutionally protected liberty without due process of law.[60]

In *Zablocki v. Redhail*, the Court invalidated a Wisconsin law that prevented noncustodial parents, if they were required to pay child support to a minor not in their custody, from marrying without first obtaining permission from a court.[61] Although the Court accepted the state's claim that it had a substantial interest in ensuring that noncustodial parents paid child support, the Court concluded that the law was not related sufficiently

53. *Lawrence*, 539 U.S. at 558.

54. CHEMERINSKY, *supra* note 24, at 881; *see also* Casey E. Faucon, *Polygamy after* Windsor*: What's Religion Got to Do with It?*, 9 HARV. L. & POL'Y REV. 471, 499–500 (2015) ("[T]he *Lawrence* decision expanded upon the scope of Due Process to include sexual conduct beyond the marital relationship, allowing the individual, married or single, to be free from unwarranted governmental intrusions.").

55. Obergefell v. Hodges, 135 S. Ct. 2584 (2015); *see also* discussion *infra* Part I.B.2.

56. *Obergefell*, 135 S. Ct. at 2613–16 (Roberts, C. J., dissenting) (discussing the aspects of marriage that have changed over time).

57. Loving v. Virginia, 388 U.S. 1, 1 (1967).

58. *Id.* at 4.

59. *Id.* at 12.

60. *Id.*

61. Zablocki v. Redhail, 434 U.S. 374, 375 (1978).

to that end.[62] Thus, the Court held that the law violated the Equal Protection Clause because it impermissibly interfered with the right to marry.[63]

In *United States v. Windsor*, the Court struck down as unconstitutional a portion of the federal Defense of Marriage Act ("DOMA") for denying equal protection to homosexual individuals.[64] Under DOMA, federal law defined marriage as a legal union between one man and one woman.[65] The Court emphasized that there was "no legitimate purpose" served by the federal government's refusal to recognize marriages that a state acknowledged under its laws.[66] In the majority opinion, Justice Kennedy declared DOMA unconstitutional but, again, failed to specify which level of scrutiny applied[67] and did not address whether the law impermissibly infringed upon the fundamental right to marry.[68]

It was not until 2015 in *Obergefell v. Hodges* that the Court recognized that the fundamental right to marry applied equally to same-sex couples.[69] In *Obergefell*, the Court declined to frame the purported right at issue as whether a fundamental right to same-sex marriage existed.[70] Instead, the Court asked the broader question of whether the fundamental right to

62. *Id.* at 390–91. The Court determined that because the law at issue triggered a "strict scrutiny" analysis for interfering with the exercise of the fundamental right to marry, the state not only was required to show a sufficiently important state interest justifying the law but also that the law was tailored closely to meet that interest. *Id.* at 388. Thus, although the state satisfied its first burden under a strict scrutiny analysis in proffering a sufficient state interest, it failed to show that the law was sufficiently tailored to meet that interest. *Id.* at 390–91.

63. *Id.* at 388.

64. United States v. Windsor, 133 S. Ct. 2675 (2013).

65. Defense of Marriage Act, 1 U.S.C. § 7 (2012), *invalidated by Windsor*, 133 S. Ct. 2675.

66. *Windsor*, 133 S. Ct. at 2696.

67. *See id.* at 2706 (Scalia, J., dissenting).

68. *See id.*

69. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015). An important caveat that the Court made clear in its opinion in *Obergefell* was that its holding was not intended to interfere with the fundamental rights protected under the First Amendment. *Id.* at 2607. In other words, only the states are bound by the ruling in *Obergefell*, rather than religious organizations and persons who oppose same-sex marriage because of their beliefs, whether religiously motivated or not. *Id.* ("The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.").

70. *Id.* at 2602.

marry also applied to same-sex couples.[71] Thus, *Obergefell* is significant for recognizing the legality of same-sex marriages and for the Court's ambiguous opinion that confused the doctrines of due process and equal protection without explaining how each doctrine applied to the facts at hand.[72]

In *Obergefell*, Justice Kennedy declined to follow the traditional fundamental rights analysis ordinarily applied by the Court, choosing instead to list four distinct reasons as to why the fundamental right to marry also applies to same-sex couples.[73] In his dissenting opinion, Chief Justice Roberts criticized Justice Kennedy's "test" for contradicting the fundamental rights analysis used by the Court in prior decisions.[74] Under the traditional fundamental rights analysis, the Court asks whether the purported right at issue is "fundamental to this Nation's history and tradition of ordered liberty."[75] In the majority opinion, however, Justice Kennedy explained that marriage is fundamental to society under the Constitution because it: (1) "is inherent in the concept of individual autonomy"; (2) "supports a two-person union unlike any other in its importance to the committed individuals"; (3) "safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education"; and (4) "is a keystone of our social order."[76] Justice Kennedy concluded that these core functions of marriage equally applied to same-sex couples; in other words, same-sex couples, like heterosexual couples, were "similarly situated" in regards to the fundamental right of marriage.[77] Justice Kennedy's inability to adhere to the traditional fundamental rights analysis marked the point when he essentially combined the doctrines of due process and equal protection; although Justice Kennedy raised due process concerns by focusing on the right to marry, he posed the question of his analysis through an equal protection framework.[78]

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71. *Id.* In his dissent, Chief Justice Roberts criticized the majority for this broad framing of the right at issue, arguing that "[o]ur precedents have accordingly insisted that judges 'exercise the utmost care' in identifying implied fundamental rights, 'lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.'" *Id.* at 2616 (Roberts, C. J., dissenting) (quoting Washington v. Glucksberg, 521 U.S. 702, 720 (1997)).

72. *See* discussion *infra* Part III.A.2.

73. *See Obergefell*, 135 S. Ct. at 2589–90.

74. *Id.* at 2616 (Roberts, C. J., dissenting).

75. CHEMERINSKY, *supra* note 24, at 672.

76. *Obergefell*, 135 S. Ct. at 2599–601.

77. *Id.* at 2599.

78. *See generally* Susannah W. Pollvogt, Obergefell v. Hodges*: Framing Fundamental Rights*, SSRN (June 29, 2015), https://ssrn.com/abstract=2624725 [https://perma.cc/5D7E-SPBV].

The muddled overlap between the Fourteenth Amendment doctrines of due process and equal protection is the consequence of vague reasoning rendered by the Court in the last few decades.[79] The ambiguity of the Supreme Court's opinions regarding the Fourteenth Amendment doctrines has been exacerbated by the Court's recent opinions that fail to articulate the levels of scrutiny used when analyzing purported rights and liberties.[80]

II. THE CONSTITUTIONAL CONUNDRUM OF PLURAL UNIONS

This section first provides context to the United States Supreme Court's initial interpretation of the practice of bigamy in addition to recent interpretations by the lower courts. Second, this section conducts a cursory analysis of Louisiana's criminal bigamy statute to highlight the two primary issues addressed in this Comment: whether the government has a constitutional basis for criminally charging individuals in bigamous unions and whether the government can decline to grant legal recognition to those unions. Lastly, this section addresses the potential ramifications of legally recognizing bigamous marriage, particularly in terms of its potential impact on Louisiana's matrimonial regime.

A. Bigamy and Reynolds v. United States

Because the recent United States Supreme Court decisions expand upon the right to privacy and the right to marry,[81] an important debate has emerged regarding how these decisions should impact bigamous unions. Bigamy is a practice that has remained illegal in all 50 states since the Supreme Court's decision in *Reynolds v. United States*,[82] which has yet to be overruled.[83] In *Reynolds*, the Court upheld the validity of laws banning bigamy under the Free Exercise Clause of the First Amendment.[84] The Court justified its decision to ban bigamous marriages by articulating that,

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79. *See* discussion *supra* Part I.B.

80. *See* discussion *supra* Part I.B.

81. *See* discussion *supra* Part I.B.

82. Reynolds v. United States, 98 U.S. 145 (1878).

83. *See* State v. Holm, 137 P.3d 726, 742 (Utah 2006) (arguing that *Reynolds* remains valid precedent because the courts have continued to cite to it with approval in modern Free Exercise cases).

84. *Reynolds*, 98 U.S. at 149. The Court previously has elaborated on the distinction between religious beliefs and religiously motivated conduct, stating that the Free Exercise Clause "embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940).

although religious beliefs are protected from governmental interference, the same conclusion is not true for religious practices that harm the public order of society.[85]

A recent decision by a federal district court in Utah, however, addressed the constitutionality of Utah's criminal bigamy statute.[86] Rather than confront whether states can deny legal recognition to bigamous unions as a form of marriage, the court instead held the statute unconstitutional for criminalizing cohabitation, a private activity the court deemed protected under the Due Process Clause.[87] The Tenth Circuit, however, recently vacated the district court's decision on procedural grounds without a discussion of the merits,[88] further intensifying the debate surrounding this controversial issue. Adding fuel to this debate is the constitutional uncertainty of Louisiana's bigamy statute, which contains similar elements as the Utah statute that was struck down initially in the *Buhman* decision.[89]

B. The Problem with Louisiana's Criminal Bigamy Statute

Louisiana's criminal bigamy statute defines bigamy as "the marriage to another person by a person already married, and having a husband or wife living, or the habitual cohabitation, in [Louisiana], with such second husband or wife, regardless of the place where the marriage was celebrated."[90] This statute, though similar to Utah's bigamy statute, is distinguishable because the Utah statute defines bigamy as the act of "purporting[91] to marry" and cohabiting with another person when one of the parties is currently married.[92] Despite containing similar "cohabitation" language, the Louisiana statute is narrower in scope because it applies only to individuals who marry another person while in an existing marriage.[93] Nevertheless, the Louisiana statute does not discriminate as to the location of where the marriage was performed;[94] therefore, individuals who have more than one spouse and move to Louisiana from another state or country are susceptible to criminal liability under this statute. Thus, the two main questions for this analysis are whether

85. *See generally Reynolds*, 98 U.S. at 166.
86. Brown v. Buhman, 947 F. Supp. 2d 1170 (D. Utah 2013).
87. *See id.* at 1202; *see also supra* note 2.
88. *See* Brown v. Buhman, 822 F.3d 1151 (10th Cir. 2016); *see also supra* note 5.
89. *See* discussion *infra* Part II.B.
90. LA. REV. STAT. § 14:76 (2017).
91. *Purport*, BLACK'S LAW DICTIONARY (10th ed. 2014) (explaining that to purport is to "profess or claim, esp[ecially] falsely").
92. UTAH CODE ANN. § 76-7-101 (West 2017).
93. *See* § 14:76.
94. *Id.*

the government may criminalize the practice of bigamy and, if not, then whether bigamous unions also should be recognized as a legal form of marriage.

Although the broader issue confronted in this Comment concerns the constitutionality of laws denying legal recognition to bigamous unions, the criminal nature of bigamy laws, like Louisiana's bigamy statute, is crucial to address in light of the *Lawrence* decision.[95] Laws criminalizing bigamy raise serious concerns not only because of the constitutional uncertainty of the laws but also because they present the opportunity for state authorities to target minorities or other groups of individuals in a potentially unconstitutional way.[96]

The Louisiana Supreme Court, if given the opportunity, should address the constitutionality of both the criminal nature of Louisiana's bigamy statute and the broader issue of whether it is constitutional for Louisiana to continue denying legal recognition to these unions. When a court decides a case without discussing the merits at issue, as the Tenth Circuit did in the *Buhman* decision,[97] it creates a muddled precedent for other courts to follow and leaves individuals uncertain as to the full scope of their rights as law-abiding citizens.

C. The Question and Implications of Legalizing Bigamous Unions

The constitutional question of legalizing bigamous unions has two far-reaching implications. First, the bigamous marriage debate highlights the complex ambiguity that plagues current Supreme Court jurisprudence interpreting the Fourteenth Amendment and the uncertain future of due process and equal protection.[98] Furthermore, this debate raises the issue of how bigamous unions can be incorporated into the current American legal system.

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95. Samantha Slark, *Are Anti-Polygamy Laws an Unconstitutional Infringement on the Liberty Interests of Consenting Adults?*, 6 J.L. & FAM. STUD. 451, 456 (2004).

96. *See, e.g.*, Julia O'Donoghue, *Louisiana House Votes 27-67 to Keep Unconstitutional Anti-Sodomy Law on the Books*, TIMES-PICAYUNE (Apr. 15, 2014), http://www.nola.com/politics/index.ssf/2014/04/post_558.html [https://perma.cc/NVR8-32S4]; Aaron Looney, *Deputies arrest man for bigamy*, LIVINGSTON PARISH NEWS (May 30, 2004), http://www.livingstonparishnews.com/news/deputies-arrest-man-for-bigamy/article_b0317bd4-7676-59fd-8db3-856f1d116b65.html [https://perma.cc /6L98-57VG]; *see generally* Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955 (2010).

97. *See* Brown v. Buhman, 822 F.3d 1151 (10th Cir. 2016).

98. *See* discussion *supra* Part I.B.

1. Uncertainty After Obergefell

Regarding the constitutional question of bigamous unions, several legal scholars have proposed various ways in which the legal right to bigamy can fit within a constitutional framework.[99] Much of the legal scholarship concerning this issue, however, remains uncertain as to how the legalization of bigamy could be achieved or whether such a framework exists at all. Some scholars suggest that bigamous unions can obtain legal recognition under due process[100] while others believe that equal protection, especially after *Windsor*, provides the clearest path.[101] Finally, the *Obergefell* decision suggests that the legal recognition of bigamy may be achieved through a combination of both due process and equal protection reasoning.[102] These various proposals emphasize the ambiguity plaguing this constitutional debate.

Obergefell is not the only vague Supreme Court decision that has interpreted the scope of individual rights; the *Lawrence* and *Windsor* holdings also declined to specify a scrutiny standard.[103] The *Lawrence* and *Windsor* decisions, however, primarily addressed the right at issue under

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99. *See, e.g.*, Aviram & Leachman, *supra* note 10, at 309; Faucon, *supra* note 54, at 476.

100. Cassiah M. Ward, *I Now Pronounce You Husband and Wives:* Lawrence v. Texas *and the Practice of Polygamy in Modern America*, 11 WM. & MARY J. WOMEN & L. 131, 142 (2004) (suggesting that advocates of plural marriage might argue that a due process right to engage in this practice resulted from the right to sexual privacy created in *Lawrence*); Michael G. Myers, *Polygamist Eye for the Monogamist Guy: Homosexual Sodomy...Gay Marriage...Is Polygamy Next?*, 42 HOUS. L. REV. 1451, 1471–74 (2006). *But see* Hema Chatlani, *In Defense of Marriage: Why Same-Sex Marriage Will Not Lead Us Down a Slippery Slope Toward the Legalization of Polygamy*, 6 APPALACHIAN J.L. 101, 128–32 (2006) (arguing that polygamy differs too much in structure and content from same-sex marriage to support any colorable legal analogy).

101. *See, e.g.*, Ronald C. Den Otter, *Three May Not Be a Crowd: The Case for a Constitutional Right to Plural Marriage*, 64 EMORY L.J. 1977, 2021–24 (2015); *see also* Aviram & Leachman, *supra* note 10, at 309 (arguing that a sexual orientation classification could trigger a strict scrutiny standard or a heightened standard of scrutiny).

102. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2604 (2015) ("These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.") (emphasis added); *see also* discussion *infra* Part III.A.2.

103. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003); United States v. Windsor, 133 S. Ct. 2675, 2695–96 (2013).

either due process or equal protection grounds—but not both.[104] In *Obergefell*, on the other hand, the Court combined the two doctrines without explaining its analysis under either of the two clauses.[105]

2. The Potential Impact of Legalizing Bigamous Unions

In addition to the significant ambiguities regarding the constitutionality of bigamous marriage, another concern is how the practice can be incorporated into the current American legal system. The major issue with this proposal concerns the potential effect that legalizing bigamous marriage would have on areas of law that regard marriage as a relationship between two individuals.[106] Specifically, this Comment focuses on the potential impact bigamous marriage would have on tax and community property law.

United States tax law likely would be affected most by the legalization of bigamous marriage because of the federal joint-filing income tax system that distinguishes between married and unmarried couples for tax rate purposes.[107] Because United States tax law is already wrought with complexity,[108] it is alarming that this potential issue largely has been ignored by scholars in the bigamous marriage debate.[109] The United States Internal Revenue Code in its current form is wholly ill-equipped to incorporate bigamous marriage unless the law undergoes significant and necessary revisions.[110]

The incorporation of bigamous marriage into the American legal system also will impact community property laws significantly. Although there are only nine community property states,[111] the number includes Texas and

104. *See, e.g.*, *Lawrence*, 539 U.S. at 578 ("Their right to liberty under the *Due Process Clause* gives them the full right to engage in their conduct without intervention of the government.") (emphasis added); *see, e.g.*, *Windsor*, 133 S. Ct. 2675 at 2680 ("DOMA is unconstitutional as a deprivation of the *equal liberty* of persons that is protected by the Fifth Amendment.") (emphasis added).

105. *See Obergefell*, 135 S. Ct. at 2604–05; *see also* discussion *infra* Part III.A.2.

106. *See, e.g.*, Aviram & Leachman, *supra* note 10, at 318.

107. 26 U.S.C. § 6013 (2012); s*ee, e.g.*, *id.*

108. *See, e.g.*, Brunson, *supra* note 9, at 125 (citing Samuel A. Donaldson, *The Easy Case Against Tax Simplification*, 22 VA. TAX REV. 645, 682–83 (2003)).

109. *See, e.g.*, *id.* at 115 ("[A]side from a glancing mention of tax evasion, no scholarship has analyzed the tax environment polygamists face.").

110. *Id.* at 168.

111. Diane J. Klein, *Plural Marriage and Community Property Law*, 41 GOLDEN GATE U.L. REV. 33, 72 (2010).

California, two of the most heavily populated states in the country.[112] Thus, the legalization of bigamous unions potentially would impact a large number of citizens in the United States. Unlike the states that adopted the common law marriage regime, community property states recognize that the assets obtained after the marriage has come into existence are owned equally by the spouses.[113] The legalization of bigamous marriage would have serious implications for community property law because, similar to United States tax law, community property law treats marriage as a union between two individuals.[114] Allowing marriage to be a union between more than two people significantly complicates the structural bounds of community property law[115] because it is unclear how the rules governing divorce and the division of marital assets would apply to relationships unlimited in number or form.

III. DETERMINING THE CONSTITUTIONAL SCOPE OF MARRIAGE

This Comment performs a constitutional analysis of bigamous unions to determine the proper level of scrutiny that should apply if a court were to address this issue. Additionally, this analysis will determine if a sufficient governmental interest in criminalizing and declining recognition to these unions exists.

A. Defining the Proper Scrutiny Standard

To consider fully the constitutional implications of Louisiana's criminal bigamy statute, Louisiana courts must determine the proper level of scrutiny that should apply when analyzing two central questions. The first issue raised by Louisiana's bigamy statute is whether the state

112. U.S. CENSUS BUREAU, RESIDENT POPULATION OF THE 50 STATES, THE DISTRICT OF COLUMBIA, AND PUERTO RICO (2000), https://www.census.gov/population/www/cen2000/maps/respop.html [https://perma.cc/AF5H-KP6E].

113. *See, e.g.*, Caroline B. Newcombe, *The Origin and Civil Law Foundation of the Community Property System, Why California Adopted It, and Why Community Property Principles Benefit Women*, 11 U. MD. L.J. RACE RELIG. GENDER & CLASS 1, 6–7 (2011) ("[C]ommunity property is not something that spouses voluntarily agree to by contract. Instead, this civil law system of marital property law automatically springs into being when a couple gets married."); *see also* Paul Due, *Origin and Historical Development of the Community Property System*, 25 LA. L. REV. 78, 78 (1964).

114. Davis, *supra* note 96, at 1990.

115. Relatedly, the legalization of bigamous marriage potentially will impact the rules of inheritance laws and their effects upon the termination of marriage. *See, e.g.*, Aviram & Leachman, *supra* note 10, at 275.

constitution prohibits the government from imposing criminal penalties on individuals engaged in the practice of bigamy. If it is unconstitutional for the government to criminalize bigamy, the second issue is whether the government can continue to deny legal recognition to this practice.

1. The Level of Scrutiny for Criminalizing Bigamous Unions

The Supreme Court decision in *Lawrence v. Texas* offers the most helpful guidance for a constitutional analysis of laws criminalizing bigamous unions because of the broad privacy interests articulated by the Court in its finding of a fundamental right to privacy.[116] Furthermore, the Court seemed to suggest that it no longer would uphold laws that rely on moral reasons for their justification;[117] thus, the *Lawrence* decision potentially marks the end of any legislation "restricting liberties solely based on a majoritarian perception of morality."[118] The *Lawrence* court, however, reached a narrow holding on the constitutionality of legislation prohibiting homosexual sodomy.[119] Nevertheless, *Lawrence* should require the decriminalization of bigamy because the decision supports the notion that the right to privacy protects the personal and intimate relations of individuals from governmental intrusion.[120]

Justice Kennedy's rationale in *Lawrence* raises an important question: is the right to privacy broad enough to include the right of individuals to practice bigamy without the fear of criminal punishment? [121] Although the opinion was relatively ambiguous regarding the level of scrutiny applied in its analysis,[122] the *Lawrence* decision did more than invalidate laws prohibiting homosexual sodomy; the decision set forth a powerful affirmation by the Supreme Court of a right to privacy under the Constitution.[123] Moreover, Justice Kennedy's opinion in *Lawrence* emphasized that the Court has

116. *See* Lawrence v. Texas, 539 U.S. 558, 564 (2003).

117. DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF *LAWRENCE V. TEXAS* (Norton 2012); *Lawrence*, 539 U.S. at 577 ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting))).

118. Faucon, *supra* note 54, at 499.

119. *Lawrence*, 539 U.S. at 574.

120. CHEMERINSKY, *supra* note 24, at 788.

121. *Lawrence*, 539 U.S. at 564.

122. *See id.* at 578; *see also* CHEMERINSKY, *supra* note 24, at 882 ("Nowhere did the Court [in *Lawrence*] speak of a fundamental right or mention strict scrutiny. On the other hand, the Court did rely on privacy cases where strict scrutiny had been used.").

123. *See, e.g.*, *Lawrence*, 539 U.S. at 564–65.

safeguarded privacy for almost a century in decisions involving family autonomy, contraception, and abortion.[124] Nowhere in the opinion, however, did Justice Kennedy explain the level of scrutiny applied in his analysis.[125] Justice Kennedy seemed to suggest that the statute infringed a fundamental right but only used the language "legitimate basis,"[126] implying that he applied a rational basis standard.[127] After *Lawrence*, however, laws justified on moralistic grounds that prohibit private and intimate activity likely will fail to pass a judicial analysis under the rational basis test.

Lawrence v. Texas is an important decision in the context of laws criminalizing bigamy because of the similarities between bigamy and the intimate activity protected by the *Lawrence* Court's holding.[128] For the same reasons that marriage and sexual activity are related, bigamy and sexual activity are related in ways as well, despite being separate concepts, because they are both private activities that benefit the parties involved. What becomes crucial in applying the rationale in *Lawrence* to the practice of bigamy is how the purported "right" is framed.[129] In *Lawrence*, the majority opinion declined to frame the intimate activity as a "right to homosexual sodomy."[130] Instead,

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124. *Id.* at 564–66 (first citing Griswold v. Connecticut, 381 U.S. 479 (1965); then citing Eisenstadt v. Baird, 405 U.S. 438 (1972); and then citing Roe v. Wade, 410 U.S. 113 (1973)).

125. CHEMERINSKY, *supra* note 24, at 879. Many scholars have noted the absence of any discussion in *Lawrence* regarding the levels of scrutiny traditionally applied by the Court in a constitutional analysis. *See* Eric Berger, Lawrence*'s Stealth Constitutionalism and Same-Sex Marriage Litigation*, 21 WM. & MARY BILL RTS. J. 765, 782 (2013) ("It is therefore especially striking that *Lawrence*, a case about both liberty and equality, declined to identify a tier of scrutiny at all."); Cass R. Sunstein, *What Did* Lawrence *Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 55 SUP. CT. REV. 27, 46 (2003) (explaining that much of the opacity in *Lawrence* stems from the Court's failure to identify a level of scrutiny).

126. *Lawrence*, 539 U.S. at 578.

127. CHEMERINSKY, *supra* note 24, at 882. In *Romer v. Evans*, a precursory decision to *Lawrence*, the Supreme Court was confronted with a Colorado initiative that had the effect of encouraging discrimination against homosexual individuals. Romer v. Evans, 517 U.S. 620 (1996). Justice Kennedy, writing for the majority, held that because the only purpose behind the law was animosity toward gays, lesbians, and bisexuals, the law failed even the rational basis test. *Id.* at 634.

128. Faucon, *supra* note 54, at 499 ("The holding and language of *Lawrence* also do much in overruling the negative implications of *Reynolds* on marriage and alternative lifestyles in the constitutional jurisprudence.").

129. *See* Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1173 (1988).

130. *Lawrence*, 539 U.S. at 567.

Justice Kennedy spoke of the constitutional protection for all individuals in "the most intimate and private aspects of their lives."[131] Justice Kennedy clarified this distinction in how the right is framed when he explained that to define narrowly the right in *Lawrence* as "simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."[132] Although individuals in bigamous unions should not be entitled to have their relationships recognized as a legal form of marriage,[133] they should be allowed the right to define their relationships because "these liberties extend to personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."[134] Thus, if confronted with the constitutionality of Louisiana's criminal bigamy statute, the Louisiana Supreme Court should apply a strict scrutiny analysis[135] and hold that the right to privacy under the Due Process Clause protects an individual's right to practice bigamy free of criminal liability.

2. The Level of Scrutiny for Denying Legal Recognition to Bigamous Unions

The proper scrutiny standard for the issue of legalizing bigamous unions is best determined through an analysis under both equal protection and due process. This approach is necessary because of the convoluted overlap between the two doctrines in recent Supreme Court jurisprudence[136] and the uncertainty as to how this overlap affects the determination of the proper standard of scrutiny for future rights, such as the legal practice of bigamy.

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131. *Id.* at 574.

132. *Id.* at 558.

133. *See* discussion *infra* Part III.A.2.

134. William Duncan, *Transforming the Right to Privacy*, THE FAMILY IN AMERICA 371, 382 (2015) (describing the "self-definition" conception of the right to privacy).

135. Because Justice Kennedy failed to explain the level of scrutiny applied in *Lawrence*, the Louisiana Supreme Court should provide explicitly that because Louisiana's bigamy statute infringes upon a fundamental right—the right to privacy—strict scrutiny therefore must apply to its constitutional analysis of the statute. *See Lawrence*, 539 U.S. at 578.

136. *See* discussion *supra* Part I.B.

a. Analysis Under Equal Protection

One potential legal avenue for recognizing bigamous unions as a right warranting strict scrutiny is through an analysis under the Equal Protection Clause.[137] In this context, the legalization of bigamous marriage might occur through an argument based on sexual orientation as a suspect classification,[138] an idea recently implied but not expressly stated by the Supreme Court in *Windsor*.[139] The problem with this approach, however, is that sexual orientation has not been designated as a suspect classification deserving of strict scrutiny[140] because, similar to the Court's approach in the fundamental rights arena, the Court is hesitant to define new classifications that warrant an almost insurmountable standard for the government to defeat.[141] If the Court declined to define sexual orientation as a suspect classification, it is unlikely that individuals in bigamous unions will be granted suspect classification status either. The Court has not introduced a new suspect class under the Equal Protection Clause since it invalidated racially discriminatory legislation[142]

137. *See* Ann E. Tweedy, *Polyamory as a Sexual Orientation*, 79 U. CIN. L. REV. 1461, 1476 (2011).

138. *Id.* According to two scholars, some polygamists feel that "being polyamorous is a fundamental part of their self-definition, regardless of their relationship structure at any given time, to the extent that they report that efforts to be monogamous feel unnatural to them." Aviram & Leachman, *supra* note 10, at 313. It is certainly questionable, however, whether a court would consider polygamy as a sexual orientation. *See id.* at 314; *Discrimination*, BLACK'S LAW DICTIONARY (10th ed. 2014) (explaining sexual-orientation discrimination as "discrimination based on a person's predisposition or inclination to be romantically or sexually attracted to a certain type of person (i.e., heterosexuality, homosexuality, bisexuality, or asexuality), or based on a person's gender identity (i.e., a person's internal sense of gender)").

139. *See* United States v. Windsor, 133 S. Ct. 2675, 2684 (2013).

140. CHEMERINSKY, *supra* note 24, at 699.

141. *Id.* The Court may be hesitant to define new suspect classifications because of the potential danger in preventing the government from enforcing its laws. *See* Lawrence v. Texas, 539 U.S. 558, 575 (2003).

142. In fact, the Court last addressed bigamy in its *Reynolds* opinion when it upheld the constitutionality of laws banning bigamy, a decision that allegedly contained racial motivations itself. *See* Reynolds v. United States, 98 U.S. 145, 164 (1878) ("Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people. At common law, the second marriage was always void, and from the earliest history of England polygamy has been treated as an offence against society."); *see also* Faucon, *supra* note 54, at 480.

from the Civil Rights Era. Consequently, many scholars doubt whether the Supreme Court will recognize another suspect class anytime soon.[143]

Nevertheless, *Windsor* is significant because it is one of the more recent decisions by the Court to examine sexual orientation as a social classification.[144] In *Windsor*, however, the Court neither specified which scrutiny it applied nor addressed whether the law violated the fundamental right to marry.[145] Thus, *Windsor*'s effect on the debate regarding the constitutionality of bigamous marriage is uncertain. Although *Windsor*'s effect on the bigamy question remains unclear, the opinion's ambiguous holding remains significant because it suggests that the Court used a rational basis standard to hold the law unconstitutional rather than explicitly defining sexual orientation as a class warranting a heightened scrutiny standard.[146] Because only a legitimate state interest is needed to uphold a law under a rational basis standard of review, *Windsor*'s holding suggests that bigamous marriages will gain legal recognition only when the government lacks a legitimate interest for denying legal recognition to the unions.

Although it was clear in *Windsor* that no legitimate interest existed for the government to define marriage to exclude same-sex couples from the fundamental right to marry, the government likely will be able to deny legal recognition to bigamous unions if a rational basis standard is applied because of the impact bigamous marriage would have on tax and community property law.[147] Though the decision in *Windsor* was significant in paving the way for the legal recognition of same-sex marriage, it does not do enough to change the overall structural and systematic nature of marriage. In that regard, "*Windsor* does not represent the sort of wholesale shift in how intimate adult relationships are recognized under the law."[148] Because individuals in bigamous unions have not been identified explicitly as a suspect class warranting a strict scrutiny standard analysis by the Supreme Court, the government should be required to meet only a rational basis standard in denying these unions legal recognition.

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143. *See, e.g.*, William D. Araiza, *After the Tiers:* Windsor*, Congressional Power to Enforce Equal Protection, and the Challenge of Pointillist Constitutionalism*, 94 B.U. L. REV. 367, 385 (2014).

144. CHEMERINSKY, *supra* note 24, at 821.

145. United States v. Windsor, 539 U.S. 2675, 2706 (Roberts, C. J., dissenting).

146. *Id.* at 2696 ("The federal statute is invalid, for no *legitimate* purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.") (emphasis added).

147. Faucon, *supra* note 54, at 513–14; *see also* discussion *infra* Part. III.B.

148. *Id.* at 514.

b. Analysis Under Due Process

Bigamy also could obtain legal recognition through a strict scrutiny analysis in light of the fundamental right to privacy recognized in *Lawrence*.[149] Though Justice Kennedy used broad language in *Lawrence*'s majority opinion in the sense that he declined to recognize a specific scrutiny standard for his analysis,[150] the holding nevertheless is insufficient for the legal recognition of bigamy. The *Lawrence* decision focused on the right to be free, or "left alone," from governmental interference in one's private and intimate affairs.[151] Although *Lawrence* certainly was concerned with the liberty interests granted to individuals under due process, the opinion focused more on an individual's freedom from governmental intrusion[152] as opposed to an individual's right of access to government institutions like marriage.[153] This distinction, in the context of bigamous marriage, highlights the contrast between "positive" and "negative" rights long recognized in constitutional law.[154] The concepts of "positive" and "negative" rights, explained by Justice Scalia's dissent in *Obergefell*, suggests that although individuals have the right to be free from government intrusion in their private affairs,[155] it does not follow that this principle also requires the government to recognize bigamy as a form of marriage.[156] The holding in *Lawrence* is insufficiently broad to grant the legal recognition of bigamous marriage because the decision focused more on the fundamental right to privacy rather than the right to marry.[157]

The notion that *Lawrence* is insufficient for the legalization of bigamous unions may be weakened by an argument focused on the reasoning from both *Lawrence* and *Griswold*. The concept of an individual's "zone of privacy" recognized in *Griswold*[158] may be expansive enough to warrant the legal recognition of bigamous marriage when paired with the broad affirmation of the right to privacy in *Lawrence*. An argument, however, that the broad privacy interests recognized in *Griswold* should warrant the legal recognition

149. *See, e.g.*, *id.* at 497.
150. *See supra* note 122.
151. CHEMERINSKY, *supra* note 24, at 881.
152. *Id.* at 882.
153. *Id.*
154. *See* Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2283 (1990).
155. CHEMERINSKY, *supra* note 24, at 577.
156. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2635 (2015) (Scalia, J., dissenting).
157. Faucon, *supra* note 54, at 503.
158. *See* Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).

of bigamous marriage is insufficient because *Griswold* focused only on the privacy interests attached to marriage rather than the idea of expanding the legal scope of what marriage as an institution entails.[159] Thus, for bigamous marriage to warrant strict scrutiny analysis—which likely would grant bigamy legal recognition[160]—such an outcome would need to result from a judicial analysis under the broad liberty interests associated with the right to marry.[161] For a judicial analysis of bigamy under due process, a strict scrutiny standard should apply only if the purported right to bigamous marriage is determined to fall within the contours of the broader fundamental right to marry.

The answer to the question of whether bigamous unions should be granted legal recognition likely will turn on how the court frames the purported right. For example, if the purported right is framed as a "right to bigamous marriage," it likely will fail the traditional fundamental rights analysis because bigamous marriage is unlikely to be recognized as a practice deeply rooted in the nation's tradition.[162] The analysis changes, however, if the issue is framed as whether the right to marry more than one person is "nothing but a subset of the more general right to marry."[163] The framing of the right at issue is central to the confusion regarding the interplay between due process and equal protection, a problem further exacerbated by *Obergefell*.

Chief Justice Roberts's dissenting opinion in *Obergefell* applied Justice Kennedy's reasoning from the majority opinion to raise the central question of the bigamy debate: whether the reasons for why marriage is crucial to society are equally applicable to individuals in bigamous unions, just as they were for same-sex couples.[164] Regarding Justice Kennedy's test in *Obergefell*,[165] it is reasonable to conclude that its first principle, that the right to personal choice regarding marriage is inherent in the concept of individual autonomy, is equally applicable to individuals in bigamous unions.[166] No adequate reason exists to suggest that the personal choices involved with marriage are any more meaningful for persons in monogamous unions, or that individuals in bigamous unions cannot express the same

159. *See, e.g.*, *id.*
160. CHEMERINSKY, *supra* note 24, at 567.
161. Faucon, *supra* note 54, at 516.
162. *See* Pollvogt, *supra* note 78.
163. Aviram & Leachman, *supra* note 10, at 315.
164. Obergefell v. Hodges, 135 S. Ct. 2584, 2622–23 (2015) (Roberts, C. J., dissenting).
165. *Id.* at 2599.
166. *Id.* at 2600.

intimacy to their partners that individuals in monogamous unions share with each other. The majority also justified its test by arguing that the right to marry safeguards children and families[167] and that marriage is a keystone of social order.[168] These reasons are difficult concepts to apply to bigamous marriage; relevant data suggests that bigamous marriage in fact would be harmful to both women and children,[169] and legalizing bigamous marriage likely would upset social order because of its potential to disrupt the majority of United States marriage laws.[170]

The analysis under Justice Kennedy's test becomes more problematic with the additional principle set forth in *Obergefell*: Justice Kennedy argued that the right to marry is fundamental because "it supports a *two-person* union unlike any other in its importance to the committed individuals."[171] Although this principle certainly applies to same-sex couples, proponents of bigamous marriage likely will be unable to apply this same principle equally to bigamous unions because of the obvious fact that they consist of more than two individuals. Chief Justice Roberts, however, criticized the majority opinion for this argument, suggesting that its reasoning could be extended to plural marriage—despite, in his view, Justice Kennedy's "random[]" insertion of the phrase "two-person union."[172]

Justice Kennedy should have conducted his analysis under the traditional fundamental rights approach used by the Court in past decisions interpreting the Fourteenth Amendment. Because the Court consistently

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167. *Id.*; *see also In re* Marriage Cases, 183 P.3d 384, 432 (Cal. 2008) ("[P]romoting and facilitating a stable environment for the protection and raising of children is unquestionably one of the vitally important purposes underlying the institution of marriage and the constitutional right to marry.").

168. *Obergefell*, 135 S. Ct. at 2601.

169. *See* John Witte, Jr., *Why Two in One Flesh? The Western Case for Monogamy over Polygamy*, 64 EMORY L.J. 1675, 1738 (2015); *see also* Aviram & Leachman, *supra* note 10, at 316–17 (citing ELISABETH SHEFF, THE POLYAMORIST NEXT DOOR: INSIDE MULTIPLE-PARTNER RELATIONSHIPS AND FAMILIES 135–63 (2015)); Ruth K. Khalsa, *Polygamy as a Red Herring in the Same-Sex Marriage Debate*, 54 DUKE L.J. 1665, 1692 n.137 (2005) (noting the "third-party effects" of bigamous relationships on women and children).

170. *See* discussion *infra* Part III.B; *see also, e.g.*, Aviram & Leachman, *supra* note 10, at 318 (noting the government's interest in conserving the resources that would be required by the extension of marital rights to plural unions, "since many legal and administrative constructs in the United States rely on the structure of marriage as involving two parties").

171. *Obergefell*, 135 S. Ct. at 2599 (emphasis added).

172. *Id.* at 2621 (Roberts, C. J., dissenting). In fact, nowhere in the opinion does Justice Kennedy provide any explicit argument for his description of marriage as a "two-person" union. *Id.*

has held the right to marry as fundamental under the scope of this test,[173] Justice Kennedy should have analyzed whether same-sex couples were seeking access to this same right or a different right altogether. In *Obergefell*, same-sex couples sought access to the same right enjoyed by heterosexual couples; in other words, the fundamental right to marry applied to same-sex couples in the same manner in which it applied to heterosexual couples because they were "similarly situated" to the right to marry.[174] This "similarly situated" language speaks to the delicate tension and overlap between due process and equal protection that the Court unfortunately failed to articulate in *Obergefell*.[175]

In a companion case to *Windsor*, the district court's majority opinion alluded to the overlap between due process and equal protection when it held that a law prohibiting same-sex marriage as unconstitutional under both the Due Process Clause and Equal Protection Clause.[176] The majority's analysis argued that the defining characteristics of marriage do not involve the race, gender, or sexual orientation of the individuals seeking to join in marriage[177]—a concept previously supported by the Court in *Loving*.[178] Instead, the court opined that marriage should be defined by the fidelity displayed between the consenting and committed individuals joining together in union;[179] thus, the court concluded that a law banning same-sex marriage could not be upheld because the right to marry applied equally to same-sex couples as it did for opposite-sex couples.[180] In contrast, plural relationships

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173. Loving v. Virginia, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.").

174. *Obergefell*, 135 S. Ct. at 2599; *see also* Pollvogt, *supra* note 78.

175. *See* discussion *supra* Part I.B.

176. *See generally* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 994 (N.D. Cal. 2010), *aff'd sub nom.* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *vacated and rem. sub nom.* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013). The aforementioned case, *Hollingsworth v. Perry*, involved a series of federal cases that invalidated a California initiative that banned same-sex marriage. *See Hollingsworth*, 133 S. Ct. at 2656. The district court's ruling that had held the law unconstitutional was given controlling effect when the Supreme Court, hearing on appeal in *Hollingsworth*, declined to address the merits of the case due to a lack of standing. The district court's ruling, however, did not apply as controlling precedent for states other than California. *See Hollingsworth*, 133 S. Ct. at 2652.

177. *Perry*, 704 F. Supp. 2d at 993–94.

178. *Loving*, 388 U.S. at 12.

179. *Perry*, 704 F. Supp. 2d at 993 ("Plaintiffs seek to have the state recognize their committed relationships, and plaintiffs' relationships are consistent with the core of the history, tradition and practice of marriage in the United States.").

180. *Id.*

inherently are defined by inequality.[181] The promise of fidelity in monogamous marriage encourages spouses to devote themselves to each other unconditionally and entirely. The parties to a bigamous marriage, however, may owe to each other different levels of commitment entirely, especially if one of the parties to the union is married to only one individual while the other party is married to several. Although Justice Kennedy's analysis in *Obergefell* was ambiguous and ignored the traditional fundamental rights analysis of the Court, the ultimate conclusion reached was doctrinally sound. If race no longer bars individuals from seeking to enjoy the right to marry after *Loving*,[182] then neither should sexual orientation.

Although Justice Kennedy hinted at these "core functions" of marriage in his explanation of why the right to marry applied to same-sex couples,[183] he did so using an obscure and unprecedented analysis. Furthermore, he declined to specify the scrutiny standard used and, instead, vaguely stated that the law at issue violated both equal protection and due process,[184] exacerbating the confusion as to how courts should interpret new rights in future decisions. Additionally, Justice Kennedy's approach creates a dangerous precedent for Supreme Court analysis. By ignoring the traditional fundamental rights approach of prior Supreme Court decisions, justices of the Court create possibilities for future justices to supply their own beliefs and morals instead of a proper constitutional analysis. Thus, the Louisiana Supreme Court should conclude that under the traditional fundamental rights approach, the holding in *Obergefell* should not result in the recognition of bigamous marriage as a fundamental right warranting strict scrutiny because individuals in bigamous unions are not "similarly situated" to the right to marry as are same-sex couples.[185]

B. Identifying a Justifiable Governmental Interest

This Comment next addresses whether a narrowly tailored governmental interest exists for a state that declines to recognize bigamous unions as a legal

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181. Ruth K. Khalsa, *supra* note 170, at 1692.

> In light of the high value modern U.S. culture places on individual autonomy and equality, the cornerstones of the companionate ideal of marriage, it is unlikely that polygamy could be legalized under the same individuality-focused rationale of *Lawrence* or *Goodridge* because polygamy tends to be premised on dependence, inequality, and even subordination.

Id.

182. *Loving*, 388 U.S. at 12.

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

184. *See id.* at 2616 (Roberts, C. J., dissenting).

185. Faucon, *supra* note 54, at 516.

form of marriage. The two major areas considered under this analysis are the potential conflicts between the legalization of bigamous unions and the areas of tax and community property law in the United States.[186]

1. The Conflict with Tax Law

Not only is United States tax law one of the most complex areas of law within the American legal system,[187] it is also a body of law that largely has been ignored by scholars in the bigamous marriage debate.[188] Specifically, much of the legal scholarship debating the constitutionality of bigamous marriage overlooks the question of how this practice could coexist legally with current American law, such as tax law, which treats married and unmarried individuals differently in several respects.[189]

A significant distinction that tax law makes between married and unmarried taxpayers is the difference in applied tax rates.[190] For example, married couples can file and pay their taxes as a unified or joint taxpayer and thus have different rates applied to them than the rates that apply to unmarried taxpayers.[191] This distinction is important to the bigamous marriage debate because "while the current tax rates could accommodate same-sex couples without any substantive changes, applying the current tax brackets to polygamous taxpayers would have absurd and often unjust results."[192]

The legalization of bigamous marriage would pose a unique and significant challenge to American tax law that was not present in the constitutional debate of same-sex marriage.[193] In same-sex unions, the dyadic nature of "traditional"

186. *See* Aviram & Leachman, *supra* note 10, at 318; *see also, e.g.*, Plyler v. Doe, 457 U.S. 202, 216 ("A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill.").

187. *See* discussion *supra* Part II.C.2.; *see also, e.g.*, Brunson, *supra* note 9, at 167 ("While there is no single 'correct' way to tax married persons, joint filing appears to be unworkable in a world of expanded familial options.") (footnote omitted).

188. *See supra* note 108.

189. *Id.*

190. MARGOT L. CRANDALL-HOLLICK ET AL., THE POTENTIAL FEDERAL TAX IMPLICATIONS OF *UNITED STATES V. WINDSOR* (STRIKING SECTION 3 OF THE DEFENSE OF MARRIAGE ACT (DOMA)): SELECTED ISSUES 8 (2013).

191. *See, e.g.*, Aviram & Leachman, *supra* note 10, at 318.

192. Brunson, *supra* note 9, at 113.

193. *See, e.g.*, Aviram & Leachman, *supra* note 10, at 318.

marriage is maintained because there is no quantitative distinction present. Same-sex relationships, at least those similar to the relationships represented in *Obergefell*, still are unions between two equally consenting individuals.[194] The only difference between same-sex and heterosexual unions is the sexual orientation of the partners involved. Bigamous unions, however, are relationships that are without limit as to the number of individuals who can form and participate in the relationship. This fact seriously complicates American tax law because the tax filing system is designed to treat married persons as an economic unit consisting of only two individuals.[195]

An additional problem with incorporating bigamous marriage into the current tax law concerns the significant lack of predictability concerning plural unions and the various forms they can take.[196] One scholar illustrates this problem when she explains that although asymmetric and group marriage probably would cover a significant fraction of the actual arrangements people might desire, they would not exhaust the possibilities.[197] Although the idea of creating a new tax system designed to apply a standard tax rate to marriages consisting of more than two individuals may be possible theoretically,[198] the issue lies in designing a tax system capable of applying rates to marriages varying wildly in both form and number.

Conceivably, any government can solve this problem by creating a tax system to apply a standard rate to all bigamous marriages, no matter the number of partners involved.[199] The level of complexity with incorporating bigamous unions into the current tax filing system, however, demands an equally complex solution. Though providing an individualized tax system tailored to each family would create the fairest system, "doing so would add unnecessary complexity to the tax law and would be virtually un-administrable."[200] Even assuming that the government can create a tax filing system that sufficiently addresses the problems that legal incorporation of bigamous unions would present, "Congress would need to make significant, complex changes to joint filing . . . [that] may be difficult, if not impossible, to design and implement."[201] Because of the significant complexities with

194. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2588 (2015).
195. *See* CRANDALL-HOLLICK, *supra* note 190, at 9.
196. Davis, *supra* note 96, at 2007.
197. Klein, *supra* note 111, at 49.
198. *See, e.g.*, Aviram & Leachman, *supra* note 10, at 319.
199. *See* Brunson, *supra* note 9, at 117.
200. *Id.* at 129; *see also, e.g.*, Heather M. Field, *Choosing Tax: Explicit Elections as an Element of Design in the Federal Income Tax System*, 47 HARV. J. ON LEGIS. 21, 66 (2010).
201. Brunson, *supra* note 9, at 168.

meeting such a high administrative burden, the government could provide efficiency reasons for refusing to recognize polygamous marriages legally.[202]

2. The Conflict with Community Property Law

The granting of legal recognition to bigamous unions poses significant conflicts for the process of terminating marriage, a problem that is highlighted when analyzed within the context of community property law. Community property states follow the rule that all assets and earnings acquired during the existence of the marriage are owned equally by both spouses.[203] This concept raises complex questions concerning how bigamous marriages could coexist legally in a state that recognizes community property law, such as Louisiana.

The assumption in the majority of community property states is to divide the assets equally upon dissolution of the marriage,[204] but this process would become "drastically complicated in polygamous marriages, especially when one wife may leave the family unit behind or when the husband dies, leaving all of his wives to 'split' the pie."[205] The legalization of bigamous marriage would raise serious concerns in regards to the termination stage of marriage because whether by death or divorce, all marriages terminate at some point and the law must have an appropriate mechanism to address this end.[206] The conundrum of how community property law would be able to partition property in bigamous marriages is problematic because "it is not at all obvious how best to understand, classify, and divide the community property of a person with more than one spouse at a time, as must be done at death or divorce."[207]

Similar to the potential conflict between bigamous marriage and current tax law, the widely varying forms of bigamous unions also pose a concern for community property states.[208] For example, community property law could

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202. The Court in the past generally has disfavored the excuse of administrative burdens when making decisions regarding constitutional rights, but only when the right in question has warranted a strict scrutiny analysis. *See* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 102 & n.9 (1972) (holding that for fundamental rights, mere "administrative convenience" is not a compelling interest).

203. Klein, *supra* note 111, at 33.

204. *Community property*, BLACK'S LAW DICTIONARY (10th ed. 2014). Specifically, these assets include property that is acquired during the marriage by means other than an inheritance, devise, or gift, with each spouse generally holding a one-half interest in the property. *Id.*

205. Casey E. Faucon, *Marriage Outlaws: Regulating Polygamy in America*, 22 DUKE J. GENDER L. & POL'Y 1, 23 (2014).

206. Davis, *supra* note 96, at 1990.

207. Klein, *supra* note 111, at 39.

208. *See* discussion *supra* Part II.A.2.

incorporate bigamous unions that consist only of separate, two-person unions because, although all the partners may live together in one household, they nevertheless are married legally to only one other individual. This fact changes, however, in a bigamous union that desires to be recognized as one family or "community."[209] A simple solution to this potential issue would be to require all individuals in bigamous marriages to form their families as a series of two-person couples. This solution is insufficient, however, because some bigamous families may consist of an odd number of individuals. Additionally, it seems unjust to have a law mandating how bigamous families should form their relationships because "the decision to add a spouse implicates an individual's freedom of intimate association."[210]

IV. PROPOSING A DOCTRINAL SOLUTION

Because of the recent confusion regarding due process and equal protection, courts no longer have a clear standard to follow when determining whether a new fundamental right exists. The Louisiana Supreme Court, if presented with the issue of bigamous marriage, should confront the tension between equal protection and due process under both the Louisiana and United States constitutions to guide the state legislature in its enactment of future laws regarding bigamy and to influence the legal opinions concerning this issue on a larger scale.

In terms of Louisiana's criminal bigamy statute,[211] the Louisiana Supreme Court should rule unconstitutional the law that criminalizes bigamous unions because of the right to privacy recognized by the United States Supreme Court in *Lawrence*.[212] Although *Lawrence* might be an insufficient basis for this proposition because its holding only concerned laws prohibiting homosexual sodomy,[213] the Louisiana Supreme Court nevertheless should rule the criminal aspect of the statute unconstitutional given the heightened standard of privacy mandated by the Louisiana constitution.[214] This facet of

209. Klein, *supra* note 111, at 42.
210. *Id.* at 53.
211. *See* discussion *supra* Part II.B.
212. Lawrence v. Texas, 539 U.S. 558, 560 (2003).
213. *Id.*
214. LA CONST. art. I, § 5; *see also* S. Con. Res. 39, 1997 Leg., Reg. Sess. (La. 1997). Although the Louisiana Supreme Court has never determined the exact parameters of the state's constitutional right to privacy in the sexual arena, *see e.g.*, State v. Smith, 766 So. 2d 501, 518 (La. 2000) (Calogero, J., dissenting), the court has recognized it as an express right providing a higher standard of individual liberty than that afforded by the federal constitution. *See* State v. Baxley, 633 So. 2d 142, 145 (La. 1994).

Louisiana's criminal bigamy statute should be ruled unconstitutional on the same grounds as the statute at issue in *Lawrence*: the statute invades an area of constitutionally-protected privacy by prohibiting consensual, private, non-commercial acts of sexual intimacy.[215]

Laws criminalizing the practice of bigamy also should be struck down because they do not exist to protect against coercion, injury, or public harm.[216] Opponents of bigamy have argued that this practice is harmful and abusive to women, often referencing the history of this practice in Muslim countries to bolster their argument.[217] Numerous other studies, however, reveal that although these concerns are valid, little evidence exists to show that these same concerns are equally present in the United States.[218] Moreover, even though there always exists a concern that abuse will occur in traditional monogamous relationships, it does not follow that this potential harm justifies governmental interference.[219] As long as valid consent exists between individuals in bigamous unions, the individuals in those unions should be able to define their relationship in whatever manner they choose without fear of criminal punishment. The criminal nature of Louisiana's bigamy statute cannot be justified because the legislation lacks a *compelling* interest to justify its effect of intruding upon private and intimate activity between consenting individuals. Therefore, the Louisiana Supreme Court should invalidate the criminal aspect of the bigamy statute as unconstitutional for failing to pass strict scrutiny.

A potential obstacle to this approach, however, is whether the Louisiana Legislature actually will remove the criminal aspect of its bigamy statute even if the Louisiana Supreme Court were to rule it unconstitutional. Despite the ruling in *Obergefell*, statutes prohibiting same-sex marriage in Louisiana have yet to be repealed.[220] Although the Louisiana Supreme Court lacks the ability to legislatively modify the bigamy statute, it does have the power to strike part of the law down as unconstitutional under the Louisiana Constitution. By removing the criminal aspect of the Louisiana bigamy statute the Louisiana

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215. *Lawrence*, 539 U.S. at 567.

216. *See id.* at 579.

217. *See* Witte, Jr., *supra* note 169, at 1691.

218. *See* Faucon, *supra* note 54, at 488.

219. Sanford Levinson, *Thinking about Polygamy*, 42 SAN DIEGO L. REV. 1049, 1052 (2005).

220. LA. CIV. CODE art. 89 (2017). In addition to the existence of these unconstitutional laws, there have been previous instances in which Louisiana law enforcement has still enforced them. *See supra* note 96; *see also* Michelle Garcia, *Louisiana: Men Arrested Under Unconstitutional Sodomy Law*, ADVOCATE (Feb. 22, 2015), https://www.advocate.com/crime/2015/02/22/louisiana-men-arrested-under-unconstitutional-sodomy-law [https://perma.cc/GNU6-RSQ4].

Supreme Court can create the necessary pressure to "force the hand" of the legislature to reform the statute. Moreover, even if the legislature declines to reform the statute, a ruling invalidating the criminal aspect of the statute will allow individuals in bigamous unions the protection they need to sue the government if criminal charges were brought against them.

After striking down the criminal aspect of Louisiana's bigamy statute, the Louisiana Supreme Court next should confront whether bigamous unions should be granted legal recognition. Because the statute raises two separate questions, the court can apply a different level of scrutiny to this second issue.[221] Thus, after striking down the criminal aspect of the bigamy statute, the Louisiana Supreme Court should decline to legally recognize the practice of bigamous unions under a rational basis analysis.

In its analysis of "framing"[222] the purported right at issue, the court should analyze whether the practice of bigamy falls under the constitutionally recognized right to marry while relying on United States Supreme Court precedent.[223] Although Justice Kennedy's language in *Obergefell* describing the right to marry as a "two-person union"[224] suggests that the Louisiana Supreme Court justifiably can decline legal recognition to bigamous unions on this basis alone, the court nevertheless should focus on the traditional fundamental rights test to reach this conclusion. By doing so, the Louisiana Supreme Court can reach a conclusive result while simultaneously adhering to United States Supreme Court precedent—an approach that Justice Kennedy unfortunately declined to follow in *Obergefell*.[225]

Through the traditional fundamental rights approach, the Louisiana Supreme Court should articulate that, unlike same-sex couples, individuals in bigamous unions seek a right different from the right to marry previously recognized by the Supreme Court as fundamental to the nation's history and tradition.[226] Thus, the Louisiana Supreme Court should determine that under a rational basis standard, the potential destabilizing effect that the legalization of bigamous unions would have on Louisiana's governmental institutions—especially Louisiana's tax-filing administration and community property regime—is a legitimate interest in denying these unions legal recognition. In

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221. Jennifer L. Greenblatt, *Putting the Government to the (Heightened, Intermediate, or Strict) Scrutiny Test: Disparate Application Shows Not All Rights and Powers Are Created Equal*, 10 FL. COASTAL L. REV. 421, 442–44, 443 nn.106–07 (2009).

222. *See* discussion *supra* Part III.A.2.

223. *See* discussion *supra* Part I.B.

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

225. *See* discussion *supra* Part II.B.1.

226. *See* discussion *supra* Part III.A.2; *see also* CHEMERINSKY, *supra* note 24, at 829.

this way, the court can provide a solution to both of the central issues raised by the statute. By denying legal recognition to bigamous unions, the court will safeguard the protection of Louisiana's governmental institutions and preserve the state's ability to regulate marriage. Additionally, the court will ensure that consenting individuals in bigamous unions will be able to define their relationships in the manner they desire without the fear of the state violating their privacy through criminal punishment.

CONCLUSION

The constitutional question of legalizing bigamous unions is a significant and complex issue that likely will require an equally complex solution. Although the overlap between due process and equal protection has become increasingly ambiguous and difficult to apply in the realm of individual rights, the tension between these two doctrines highlights the need for a court to provide clarity to this muddled area of precedent. The Louisiana Supreme Court, if confronted with these issues, should analyze the question of bigamous marriage through the traditional fundamental rights framework previously applied by the United States Supreme Court. By taking the initiative in addressing the question of bigamous marriage, the Louisiana Supreme Court can not only properly define the parameters of the state's ability to regulate its most important governmental institutions but also can safeguard the privacy rights of its citizens.

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