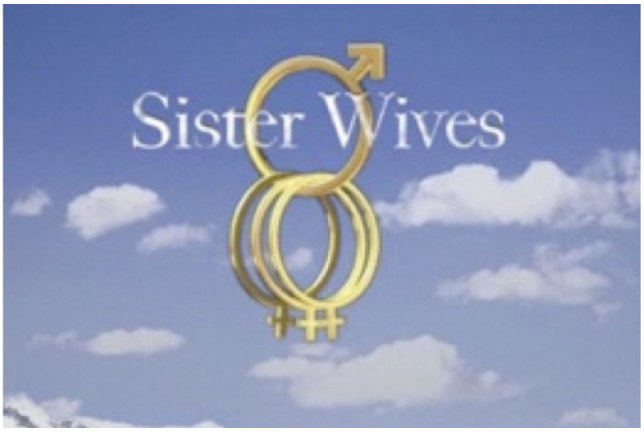
Is Polygamy the Next Form of "Marriage" to be Legalized?



In the wake of the *Obergefell v. Hodges* decision, many serious legal analysts are suggesting that the same "constitutional" justifications for legalizing homosexual "marriage" relied on by the Supreme Court in that controversial case could be used next to force states to sanction polygamous relationships, as well.

An op-ed published July 21 in the *New York Times* makes the case for pulling polygamy into the sphere of legalized unions:

> With same-sex marriage on the books, we can now ask whether polyamorous relationships should be next.
>
> There is a very good argument that they should. Justice Anthony M. Kennedy's majority opinion in *Obergefell* did not focus primarily on the issue of sexual orientation. Instead, its main focus was on a "fundamental right to marry" — a right that he said could not be limited to rigid historical definitions or left to the legislative process. That right was about autonomy and fulfillment, about child rearing and the social order. By those lights, groups of adults who have profound polyamorous attachments and wish to build families and join the community have a strong claim to a right to marry.

The idea that the arguments advanced by the petitioners (arguing in favor of legal recognition of same-sex marriages) could conceivably apply to those seeking "equal rights" for polygamous unions, as well, was brought up in the oral arguments. "Suppose we rule in your favor in this case, and then after that a group consisting of two men and two women apply for a marriage license. Would there be any ground for denying them a license?"Justice Alito asked the lawyer representing James Obergefell.

Advocates of same-sex marriage mock the musings of those who wonder if polygamy is the next gay marriage. They accuse those who ask the question of claiming that "the sky is falling in" and of listing "all the horrible consequences that will inevitably flow from the misguided views of the majority."

The dismissive denials disregard the irrefutable fact that similar "progress" was made in the aftermath of other controversial Supreme Court rulings.

First, the *Lawrence v. Texas* (2003) decision that invalidated state laws outlawing same-sex sexual activity was followed immediately by the legalizing of nearly every consensual sexual conduct between adults (excluding prostitution).

Then, in the wake of the *Windsor* case's holding that the federal Defense of Marriage Act (DOMA) was unconstitutional and that the federal government could not interpret "marriage" and "spouse" to apply only to heterosexual unions, the court handed down the *Obergefell* ruling, forcing states to recognize homosexual marriages, just as Justice Antonin Scalia warned would happen in his *Windsor* dissent.

In light of this legacy, it is nonsensical to insist that polygamous "marriages" will not be the next non-

traditional union to be forcibly granted legal recognition, based on the logic laid out by the majority in *Obergefell*.

Or as Justice Scalia hypothesized during oral arguments in the *Obergefell* case regarding a scenario where two men and two women wanted to be legally wed, "They are all consenting adults. Highly educated. They are all lawyers," he said. "What would be the logic of denying them the same right?"

A similar question was posed by Chief Justice John Roberts in his dissenting opinion:

> Although the majority randomly inserts the adjective "two" in various places, it offers no reason at all why the two-person element of the core definition of marriage may be preserved while the man-woman element may not. Indeed, from the standpoint of history and tradition, a leap from opposite-sex marriage to same-sex marriage is much greater than one from a two-person union to plural unions, which have deep roots in some cultures around the world. If the majority is willing to take the big leap, it is hard to see how it can say no to the shorter one. It is striking how much of the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage.

And, later in his dissent: "When asked about a plural marital union at oral argument, petitioners asserted that a State 'doesn't have such an institution.' But that is exactly the point: the States at issue here do not have an institution of same-sex marriage, either."

Notably and inarguably, if one were to strip out Justice Kennedy's "two-person union" qualifier in the second of his "four principles and tradition," every single word of those four points put forward by majority as their "constitutional" justification for legalizing same-sex marriage, applies absolutely to those who would choose to be simultaneously married to multiple partners.

Justice Alito warned of this and other dire consequences of the legal basis upon which the *Obergefell* decision was built. "If a bare majority of justices can invent a new right and impose that right on the rest of the country, the only real limit on what future majorities will be able to do is their own sense of what those with political power and cultural influence are willing to tolerate," he wrote.

"All Americans, whatever their thinking on that issue, should worry about what the majority's claim of power portends," he added in conclusion.

Accepting the decision of the Supreme Court as the final say on an issue that has been already decided by the people and their elected state representatives in several states is not the action of a constitutionalist, regardless of one's own moral position on the matter.

Furthermore, as set out in Article VI of the Constitution, all state legislators and other state officials (including attorneys general and governors) are duty-bound to refuse to enforce any act of the federal government that exceeds its constitutionally defined powers.

The undeniable fact of the founding of this union and the drafting of the Constitution that created the federal government is that any power not specifically granted to the federal authority by the states in the Constitution is retained by the states and the people. The Constitution grants no power to decide the definition of marriage to the federal government — any branch of it — therefore the states still possess that power.

As James Madison explained in the Virginia Resolution of 1798:

> In case of a deliberate, palpable, and dangerous exercise of other powers, not granted by the said compact, the states who are parties thereto, have the right, and are in duty bound, to interpose for

> arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them.

The push to apply the *Obergefell* decision to polygamous relationships is not hypothetical.

Nathan Collier, the star of the reality TV show *Sister Wives*, has requested issuance of a concurrent marriage license for him and his second "wife" in Montana.

In an interview, Collier stated that if, as the *Obergefell* majority wrote, "the right to personal choice regarding marriage is inherent in the concept of individual autonomy," why can't he and two or more consenting women exercise that right to join themselves in holy matrimony?

As is the case in so many other examples of federal overreach, the way around the controversy is nullification. Simply put, the states retain the authority to govern themselves and needn't be bound by actions of the federal government that exceed the boundaries placed by the Constitution around its very limited sphere of authority.

As Alexander Hamilton explained in *The Federalist*, No. 78, "There is no position which depends on clearer principles, than that every act of a delegated authority contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the constitution, can be valid."

Whether it pertains to same-sex "marriage," polygamy, or any other brand of proposed legal recognition of unions among consenting adults, there is no federal authority over the matter and there is absolutely no reason that conservatives and people of faith committed to the protection of traditional marriage should hang on the words of black-robed oligarchs who have no constitutional authority to set at nought the will of the people of the various states as manifested through their elected representatives in the state legislatures.