

POST-WINDSOR PROSPECTS FOR MORALS LEGISLATION: THE CASE OF POLYGAMOUS IMMIGRANTS

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This Note evaluates the effects of United States v. Windsor on the legitimacy of moral justifications for legislation by examining the hypothetical case of polygamous prospective immigrants. Coupled with Lawrence v. Texas, its predecessor in reasoning, and now Obergefell v. Hodges, its natural extension, Windsor signals the Supreme Court's willingness to strike legislation motivated by impermissible moral justifications. The Court neither defines the moral arguments to which it is opposed, however, nor specifies whether moral justification remains permissible in some legislative contexts. Recent instances of polygamous spouses seeking admission to the United States provide the foundation for a strong test case for the lingering viability of legislated morality. The polygamy bans contained in state public policy and federal immigration law originated in legislatures motivated in part by religious and other types of moral reasoning, at least some of which offends modern sensibilities. If the current Supreme Court were to hear an equal protection or substantive due process challenge to these bans, recent precedent suggests that the Court would apply heightened scrutiny based on a finding of apparent animus or a deeply rooted tradition, respectively. In response, the federal government could justify the continued existence of the polygamy bans in part on non-moral reasoning. Nevertheless, the legacy of their passage and the ongoing moral opprobrium of many Americans towards polygamy suggest that a Court adhering to its Windsor precedent would invalidate these bans for a violation of equal protection. The implicit dependence of the Windsor and Lawrence Courts on the "emergent rights" of a minority has little parallel for polygamists, however, militating against any near-term decision in their favor, although not dispelling concerns that the Court has narrowed the historic role of religious and other moral justifications for legislation.

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“[W]hat can be done to minimize the risk that moral justifications will be abused while still allowing moral judgments to remain a part of the law?”¹

“[U.S. Citizenship and Immigration Services] has an established practice of *not* recognizing polygamous marriages This practice is consistent with [Board of Immigration Appeals] precedent and not contrary to the law.”²

INTRODUCTION

The U.S. Supreme Court decision in *United States v. Windsor*³ reignites a long-running debate about the extent to which legislatures may justify laws on moral bases. Ten years beforehand in *Lawrence v. Texas*,⁴ the Court made its most recent major contribution to this debate, finding that moral reasons were insufficient to sustain a law criminalizing same-sex sodomy, and striking that law as a violation of substantive due process.⁵ Yet, the *Lawrence* majority did

1. Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233, 1239 (2004).

2. *Al Sharabi v. Heinauer*, No. C-10-2695 SC, 2011 WL 3955027, at *4 (N.D. Cal. Sept. 7, 2011).

3. 133 S. Ct. 2675 (2013).

4. 539 U.S. 558 (2003).

5. *See id.* at 571, 577-78.

not define what constitutes a moral argument; the Court merely illustrated by reference to an apparently impermissible example.⁶

Lawrence created several specific ambiguities with respect to moral justifications. For example, did the Court oppose legislated morality in general, or only as it pertains to sexual freedoms or discrete minorities? Would moral justification remain permissible when accompanied by a non-moral rationale, or, in fact, should courts tolerate no moral justifications whatsoever? Alternatively, did the Court simply oppose statutes whose legislative history overtly references the Judeo-Christian roots of American morality, as commonly understood? Without greater clarity, the next legislator would risk invoking unacceptable moral arguments to pass a law, and the government would risk relying on such inappropriate moral justifications to defend it. The *Windsor* Court only reinforced the salience of these ambiguities when it criticized the reasons motivating Congress to pass the Defense of Marriage Act (DOMA) and held section 3 of that law unconstitutional.⁷

The uncertain status of moral justifications may have greatest relevance for sexual issues, which frequently spark morally charged legislative battles and judicial aftermath. *Lawrence* and *Windsor* suggest that a particular grouping of sexual practices—those historically proscribed under Judeo-Christian morality—would be most likely to require the Court to clarify its jurisprudence on legislated morality. Recognizing that these decisions explicitly expand the category of parties who may lawfully engage in sexual activity and marriage, Justice Scalia and others have argued that *Lawrence* and *Windsor* open the door to polygamy, incest, and other sexual practices traditionally viewed as deviant; the justification for each such prohibition rests primarily on moral reasoning, which this recent precedent declares impermissible.⁸ Other commentators have decried Justice Scalia's logic as a slippery slope that will not come to fruition.⁹

Notwithstanding such criticism, it is at least plausible that the Supreme Court's recent statements on morals-based justifications for legislation affect the legal basis for bans on traditionally deviant practices, regardless of whether the Court would in fact follow its reasoning to its natural conclusion. Following the same-sex marriage decision in *Windsor*, chief among these sexual hot topics is polygamy, another marital form vying for legal recognition and perhaps gaining ground. In late 2013, a federal district judge applying rational basis

6. See *infra* Part I.A.

7. See *infra* Part I.B.

8. See, e.g., *Windsor*, 133 S. Ct. at 2707 (Scalia, J., dissenting); *Lawrence*, 539 U.S. at 590, 599 (Scalia, J., dissenting).

9. See, e.g., John Corvino, *Homosexuality and the PIB Argument*, 115 ETHICS 501 (2005); James M. Donovan, *Rock-Salting the Slippery Slope: Why Same-Sex Marriage Is Not a Commitment to Polygamous Marriage*, 29 N. KY. L. REV. 521 (2002); cf. Shayna M. Sigman, *Everything Lawyers Know About Polygamy Is Wrong*, 16 CORNELL J.L. & PUB. POL'Y 101, 105 (2006) (“[P]olygamy [is being used] as a rhetorical tool . . .”).

review invalidated parts of Utah's bigamy ban as a violation of substantive due process, among other constitutional doctrines.¹⁰

This Note will evaluate the feasibility of a challenge to polygamy laws by the polygamous spouses who may be best positioned to succeed: those seeking U.S. immigration benefits. Board of Immigration Appeals (BIA) and federal court decisions on polygamy commonly involve one of two fact patterns: either a noncitizen who has received lawful permanent resident (LPR) status wishes to bring his second, concurrent wife with him, or a U.S. citizen or LPR marries a second woman abroad without yet terminating his first marriage.¹¹ To streamline the analysis and avoid a possible standing issue, this Note will focus on a version of the second fact pattern, in which a U.S. citizen or LPR and his second wife who were married abroad now seek her LPR status in the United States.¹² These spouses would face several "polygamy bans," both in the form of state public policy objections to their marriage and inadmissibility grounds in federal immigration law.¹³ For at least two reasons, this couple would be better positioned than an American polygamous couple to challenge the United States' polygamy bans.

10. Appellate results remain to be seen. *See Brown v. Herbert*, No. 2:11-CV-0652-CW, 2014 WL 4249865 (D. Utah Aug. 27, 2014); *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1222-23 (D. Utah 2013); Bill Mears, *Judge Strikes Down Part of Utah Polygamy Law in 'Sister Wives' Case*, CNN (Dec. 16, 2013, 11:03 AM), <http://www.cnn.com/2013/12/14/justice/utah-polygamy-law>.

11. *See, e.g., Al Sharabi v. Heinauer*, No. C-10-2695 SC, 2011 WL 3955027 (N.D. Cal. Sept. 7, 2011); *Matter of Mujahid*, 15 I. & N. Dec. 546 (B.I.A. 1976); *see also* Claire A. Smearman, *Second Wives' Club: Mapping the Impact of Polygamy in U.S. Immigration Law*, 27 BERKELEY J. INT'L L. 382, 405-06 (2009). The latter circumstance more directly invokes bigamy laws. Professor Smearman describes the technical difference between polygamy and bigamy in immigration law:

[Immigration and Nationality Act §] 212(a)(10)(A) does not define polygamy, but according to the Board of Immigration Appeals, "[i]n immigration law, the terms 'bigamy' and 'polygamy' are neither synonymous nor interchangeable." To sustain a charge of polygamy, the non-citizen must be found to subscribe specifically to the religious practice or historical custom of polygamy, that is, the taking of plural wives. In contrast, immigration law defines bigamy as "a criminal act resulting from having more than one spouse at a time without benefit of a prior divorce."

Id. at 401 (footnotes omitted). Although the two statuses have a few different immigration consequences, it will suffice to treat both under the heading of polygamy for the purposes of this Note.

12. Considering a case brought by a U.S. citizen or LPR avoids standing issues which could complicate a challenge by two spouses, neither of whom has been granted admission to the United States. A U.S. citizen or LPR could plausibly allege a concrete, personal injury caused by the U.S. government's denial of LPR status available to other non-resident spouses. *See Allen v. Wright*, 468 U.S. 737, 751 (1984) (articulating three-pronged constitutional inquiry of standing doctrine); *Matter of Zeleniak*, 26 I. & N. Dec. 158 (B.I.A. 2013) (recognizing the statutory availability of LPR status for a foreign spouse upon application by U.S. citizen petitioner). If the U.S. government brings an enforcement action against polygamous immigrant spouses, for example, *Bayari v. Holder*, 560 Fed. App'x 607 (7th Cir. 2014), then there is no standing issue for the spouses.

13. *See infra* Part II.C.

First, between the state and federal bans, the federal one is more directly implicated by *Windsor*, a case striking a federal limitation on the definition of marriage. The implications for the state public policy bans were initially less clear since the *Windsor* Court cabined its holding to federal recognition of marriages already “made lawful by the State,”¹⁴ a distinction which did not hold water.¹⁵ Furthermore, only prospective immigrants—not American polygamists—would have one of the above-described occasions to challenge a federal immigration ban. The basic implications of *Windsor* were readily apparent in the immigration context.¹⁶ Within days of the decision, the U.S. Department of Homeland Security began extending benefits to same-sex couples filing spousal visa petitions with U.S. Citizenship and Immigration Services (USCIS).¹⁷ Several weeks later, the BIA affirmed the validity of this interpretation in *Matter of Zeleniak*.¹⁸ Polygamous spouses applying for immigration benefits could cite *Zeleniak* for proof that the Obama administration extended *Windsor* to immigrants. In turn, they could argue that the logic of *Windsor* and *Zeleniak* should vindicate their rights too.

Second among reasons that polygamous immigrants may be more successful, polygamy is legal in many immigrant-sending countries,¹⁹ satisfying the requirement in U.S. immigration law that a marriage be lawful in the place of celebration.²⁰ An American polygamist, on the other hand, would find no state law in his favor.²¹ The sheer number of prospective immigrants to whom the state public policy ban may apply dwarfs the number of American polygamists seeking recognition of their relationship.²² Furthermore, USCIS and consular

14. United States v. Windsor, 133 S. Ct. 2675, 2695 (2013).

15. Predictably, as this Note neared publication, *Obergefell v. Hodges*, No. 14-556 (U.S. June 26, 2015), established a federal constitutional right to same-sex marriage. *Obergefell* therefore removed the distinction between federal and state marriage definitions as far as gender is concerned.

16. *But see* Alberto R. Gonzales & David N. Strange, Op-Ed., *What the Court Didn't Say*, N.Y. TIMES (July 17, 2013), <http://www.nytimes.com/2013/07/18/opinion/what-the-court-didnt-say.html> (arguing that the Obama administration's interpretation did not follow from *Windsor* and therefore “is not consistent with the law”).

17. Benjamin P. Edwards, *Welcoming a Post-DOMA World: Same-Sex Spousal Petitions and Other Post-Windsor Immigration Implications*, 47 FAM. L.Q. 173, 174, 178 (2013).

18. 26 I. & N. Dec. 158 (B.I.A. 2013).

19. *See* Smearman, *supra* note 11, at 385-86.

20. *See* Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1666 (2007).

21. *See* Smearman, *supra* note 11, at 429 (considering both bigamy and polygamy prohibitions). As a definitional matter, this Note will refer to a “polygamist” as a man who marries multiple women. Although polygamy also encompasses polyandry, in which one woman marries multiple men, polygamy in the United States and among prospective immigrants rarely involves polyandry, given social relations domestically and abroad. *See id.* at 387 n.31.

22. *See id.* at 385-86 (recognizing the prevalence of polygamy in many of the countries sending the highest numbers of immigrants to the United States).

officials must enforce both the state and federal polygamy bans during the visa petition and application processes, whereas state law enforcement officers often decline to enforce analogous bans in the domestic setting.²³ Recent litigation illustrates that foreign polygamists continue to seek lawful immigration status in the United States for themselves and their spouses, demonstrating that polygamous immigration is a live, if under-recognized, issue.²⁴

Considering polygamy bans in the immigration context is also instructive because such bans necessarily implicate those facing an American polygamist. An intending immigrant whose marriage is valid in the place of celebration may nevertheless be barred by the public policy of the place of domicile, e.g., state statutes and state court precedent against polygamy.²⁵ Thus, analysis of the litigation prospects for a polygamous immigrant also suggests how a challenge to the polygamy ban would fare in the domestic context.²⁶ Although the plenary power doctrine could affect the Court's willingness to vindicate a rights claim in the immigration setting, this Note will discuss the minimal impact of that doctrine in a case brought by a polygamous couple.²⁷

The goals of this analysis are twofold. First, this Note will address the effects of *Lawrence* and *Windsor* for moral, often religiously based reasoning in general, with particular emphasis on sexual issues. Supreme Court decisions on same-sex matters suggest the types of reasoning that the Court will find persuasive in other cases implicating sex and marriage. These applications in turn affect the likelihood that the Court would accept moral justifications for legislation unrelated to sexual issues. Second, this Note will discuss the implications of *Windsor* for polygamous couples, a specific, oft-overlooked group whose legal status is arguably affected by that decision.

This inquiry is urgent because it is difficult to imagine a legislative process that does not permit at least some moral justifications. Even Professor Suzanne Goldberg, quoted above,²⁸ can ardently support the outcome in *Lawrence*,²⁹ which overruled *Bowers v. Hardwick*,³⁰ and yet concede: "Notwithstanding

23. See Abrams, *supra* note 20.

24. See Bayari v. Holder, 560 Fed. App'x 607 (7th Cir. 2014); Al Sharabi v. Heinauer, No. C-10-2695 SC, 2011 WL 3955027 (N.D. Cal. Sept. 7, 2011).

25. See Abrams, *supra* note 20.

26. For recent lower court cases in the domestic setting which reach different conclusions, compare *State v. Holm*, 137 P.3d 726 (Utah 2006) (polygamy ban justified), with *Brown v. Buhman*, 947 F. Supp. 2d 1170 (D. Utah 2013) (part of bigamy ban unconstitutional).

27. See Parts III.B. & IV.B (noting that this factor might stop the Court from invalidating the federal immigration provision but should not pertain to state public policies, which are also a hurdle for polygamous immigrants).

28. See Goldberg, *supra* note 1, and accompanying text.

29. Professor Goldberg "represented John Lawrence and Tyrone Garner in the Texas state courts as a senior staff attorney for Lambda Legal Defense and Education Fund." *Id.* at 1233 (author's note).

30. 478 U.S. 186 (1986).

Bowers's flawed conclusion that statements of majoritarian morality alone sufficed to justify Georgia's sodomy law, Justice White was probably correct that "[t]he law . . . is constantly based on notions of morality."³¹ The real contest lies in determining which moral arguments are impermissible. Whereas some commentators would permit legislation which is otherwise founded on morality, as long as the prevention of harm is among secondary justifications,³² others recognize that our very notions of "harm" depend on our (differing) conceptions of morality.³³ Furthermore, most would agree that arguments based on animus should be prohibited, but reasonable minds can differ when distinguishing between animus towards people themselves and moral opposition towards particular practices.³⁴

Although it is somewhat difficult to discern how the Court addresses these nuances, this Note will argue that *Lawrence* and *Windsor* prohibited only those types of moral reasoning which do *not* appear to enjoy support from most Americans, with a small exception for "emergent rights" which appear destined for majority support.³⁵ Commentators may argue that the Court did not intend such a prohibition, but this Note will attempt to show that the Court's reasoning extends as far, whether or not the Court later chooses to stand behind this language. A brief look at *Obergefell v. Hodges*,³⁶ decided as this Note neared publication, suggests that the Court continues to permit one subset of moral reasoning while excluding others.³⁷

In other words, the equal protection and substantive due process principles relied upon in *Lawrence* and *Windsor* should—as a descriptive, not a

31. Goldberg, *supra* note 1, at 1300-01 (quoting *Bowers*, 478 U.S. at 196).

32. See Sonu Bedi, *Repudiating Morals Legislation: Rendering the Constitutional Right to Privacy Obsolete*, 53 CLEV. ST. L. REV. 447, 461 (2006) ("[A]s long as an appropriate justification can be given, such as the prevention of harm, [laws that might be based in part on morality] pass rational review.").

33. See Goldberg, *supra* note 1, at 1303 ("Even determinations that concrete injuries amount to cognizable harms to others are, ultimately, informed by judgments about what harm means."). For particularly relevant examples of "harm" arguments in action, see *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013) ("DOMA also brings financial harm to children of same-sex couples."), and *Lawrence v. Texas*, 539 U.S. 558, 572 (noting that the Model Penal Code in 1955 disapproved of "criminal penalties for consensual sexual relations conducted in private" because such "statutes regulated private conduct not harmful to others" (internal quotation marks omitted)).

34. Compare *Windsor*, 133 S. Ct. at 2693 (identifying animus), with *Bowers*, 478 U.S. at 196 (1986) (identifying moral justification). For a direct application to polygamy in the context of a broader *Windsor* analysis, see Michael J. Klarman, *Windsor and Brown: Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 142 (2013) ("Justice Kennedy says nothing that would help a subsequent court decide whether a criminal ban on polygamy is based on an illegitimate 'desire to harm' polygamists or on an acceptable moral or other distinction between monogamous marriage and polygamy that would justify disparate legal treatment of the two.").

35. See *infra* Part I.D.

36. No. 14-556 (U.S. June 26, 2015).

37. See *infra* Part I.C.

normative, matter—also vindicate the claims of a U.S. citizen or LPR polygamist seeking LPR status in the United States for his second, concurrent wife. The state public policies and federal immigration law denying this status are based in part on moral reasoning similar in substance to that condemned in these cases. That is, the bans on same-sex sodomy, same-sex marriage, and polygamy share a moral outlook perhaps best characterized by their Judeo-Christian roots.³⁸ The key difference, however, between the same-sex and polygamy bans is the degree of popular support for the minority group at issue. *Windsor* followed a groundswell of popular opinion in support of gay and lesbian couples.³⁹ That degree of support simply does not exist at the moment for polygamous spouses, whether American or foreign.⁴⁰ This Note will conclude that *Lawrence* and *Windsor* are unlikely to make a difference right now for polygamous immigrants, not because the holdings of these cases do not extend so far—they probably do—but because the public opinion which made a difference in those cases simply is not there (yet). As a result, the Court would uphold the polygamy ban, dismiss the case on justiciability grounds, or more likely, decline to grant certiorari.⁴¹

Part I surveys the debate over the permissibility of moral justifications for legislation, with particular emphasis on the effects of language in *Lawrence* and *Windsor*. In order to identify the implications of these cases for polygamy bans, Part I also attempts to isolate precisely what the Court means by “moral” argumentation, clarifying the role of arguments with religious foundations. Part II lays the foundation for a test case by reviewing the history and current state of the polygamy bans contained in state law and federal immigration law. In light of *Lawrence*, *Windsor*, and the current polygamy bans, Part III identifies the grounds for a legal challenge by polygamous spouses who seek immigration benefits, as well as the level of scrutiny that the current Supreme Court may apply to such a case. Lastly, Part IV evaluates the likely arguments in defense of and opposition to the polygamy bans and predicts how the Court would rule on each ban based on its recent precedent. In conclusion, the likelihood that a polygamy ban would survive the current Supreme Court, while a same-sex marriage ban recently fell on similar logic, highlights a certain arbitrariness of constitutional adjudication driven by public opinion, without alleviating concern that the space for morality-based legislation has decreased.

38. See *infra* Part I.D.

39. See, e.g., *Marriage*, GALLUP, <http://www.gallup.com/poll/117328/marriage.aspx> (last visited May 5, 2015).

40. See, e.g., *id.* Gallup polling indicates that popular support for polygamy doubled between 2010 and 2014. Yet, the latest statistic is a mere fourteen percent of the public finding that polygamy is “morally acceptable.” This is a far cry from the fifty-five percent of the public stating in 2014 that same-sex marriages should be “recognized by the law as valid.” *Id.* As this Note is quick to observe, legal and moral validity are separate questions, but for purposes of registering public support, the Gallup questions are a good proxy.

41. See *infra* Part IV.

I. THE MORAL JUSTIFICATIONS DEBATE SINCE *LAWRENCE*

In perhaps the seminal article on legislated morality in the decade before *Windsor*, Professor Goldberg analyzed the Supreme Court's approach to this topic over the half century preceding *Lawrence*.⁴² Her article confronted the definitional issue shared by this Note:

"The Supreme Court . . . has not sought to define morality even in its most enthusiastic celebrations of the morals-based police power. However, . . . the Court tends to invoke morality to refer to a systematic way of thinking about right and wrong forms of conduct, consistent with the term's dictionary definition."⁴³

While Professor Goldberg was content to "use the term [morality] in that general sense,"⁴⁴ developments since *Lawrence*, in particular *Windsor*, require that we develop a finer-grained understanding of what the current Court considers "moral" justifications, if we are to determine which types (if any) are permissible and which types are not. Whereas *Lawrence* suggested a broad prohibition of moral bases for legislation, subsequent developments culminating in *Windsor* suggest that the Court objects more narrowly to specific types of moral justifications.

A. *Implications of Lawrence for Moral Justifications*

In *Lawrence v. Texas*, the Court struck down a state prohibition on same-sex sodomy as a violation of substantive due process, expressly overruling *Bowers v. Hardwick*.⁴⁵ Justice Kennedy took two steps which together could be interpreted as precluding moral justifications for legislation.⁴⁶ First, the *Lawrence* Court stated that moral justification could not stand on its own, adopting language from Justice Stevens's dissent in *Bowers v. Hardwick*: "[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 . . ."⁴⁷ However, the Court did not appear content merely to render moral reasoning *insufficient* justification. At stake in Justice Kennedy's second step was the permissibility of *any* moral justification: "The issue is whether the majority may use the power of the State to enforce these

42. See Goldberg, *supra* note 1.

43. *Id.* at 1241-42.

44. *Id.* at 1242.

45. *Lawrence v. Texas*, 539 U.S. 558 (2003), *overruling* *Bowers v. Hardwick*, 478 U.S. 186 (1986).

46. The fact that these steps do not occur in the opinion in the order in which I will present them suggests that Justice Kennedy was unaware of—or troublingly imprecise with—the full implications of his language.

47. *Lawrence*, 539 U.S. at 577 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)) (internal quotation marks omitted).

[moral] views on the whole society through operation of the criminal law.”⁴⁸ The opposition to “enforc[ing] these views on the whole society” implies that morals-based justification would be impermissible in any and every circumstance—at least in the criminal law context—not simply in the event that the legislature relied on a purely morals-based justification.

The ensuing debate turned on the extent, if any, to which *Lawrence* in fact rendered moral justifications impermissible.⁴⁹ A few have argued that *Lawrence* created a new threat to morals-based justifications.⁵⁰ Foremost among these critics, Justice Scalia appeared to object to the *Lawrence* language on two levels. At a general level, he objected that the adoption of Justice Stevens’s *Bowers* dissent “effectively decrees the end of all morals legislation.”⁵¹ At a more specific level, striking the sodomy law on these grounds effectively rendered off-limits state regulation of sexual decisions:

State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*’ validation of laws based on moral choices. Every single one of these laws is called into question by today’s decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding.

. . . .
 . . . If, as the Court asserts, the promotion of majoritarian sexual morality is not even a *legitimate* state interest, none of the above-mentioned laws [including “criminal laws against . . . bigamy”] can survive rational-basis review.⁵²

The weight of post-*Lawrence* scholarship attempted to debunk Justice Scalia’s twin warnings. At the general level, one strand of scholarship maintained that *Lawrence* did not change the contemporary status of moral reasoning.⁵³ Even before 2003, Court decisions on so-called moral issues turned on the sufficiency of non-moral, secondary justifications for laws prohibiting objectionable behavior.⁵⁴ Professor Goldberg has argued that

48. *Id.* at 571.

49. See, e.g., Corvino, *supra* note 9; Donovan, *supra* note 9; Goldberg, *supra* note 1; Joseph Bozzuti, Note, *The Constitutionality of Polygamy Prohibitions After Lawrence v. Texas: Is Scalia a Punchline or a Prophet?*, 43 CATH. LAW. 409 (2004); Elizabeth Larcano, Note, *A “Pink” Herring: The Prospect of Polygamy Following the Legalization of Same-Sex Marriage*, 38 CONN. L. REV. 1065 (2006); see also Sarah L. Eichenberger, Note, *When for Better is for Worse: Immigration Law’s Gendered Impact on Foreign Polygamous Marriage*, 61 DUKE L.J. 1067 (2012) (noting Justice Scalia’s prediction in the context of a broader discussion of unequal impact of the polygamy ban on prospective immigrant women).

50. See, e.g., *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting); Bedi, *supra* note 32, at 460; Bozzuti, *supra* note 49, at 441-42.

51. *Lawrence*, 539 U.S. at 599 (Scalia, J., dissenting).

52. *Id.* at 590, 599 (Scalia, J., dissenting).

53. See, e.g., Goldberg, *supra* note 1, at 1267.

54. See *id.* at 1244-45, 1245 n.35 (“[T]he Court has grappled with the sufficiency of a pure morals justification only in the rare instance that no harm-based argument has been

Bowers is the lone example in the post-World War II era of a Supreme Court decision “rel[ying] solely on a pure invocation of morality.”⁵⁵ The *Lawrence* language could appear alarming merely because the insufficiency of moral argumentation previously went unsaid.⁵⁶ Besides, one could argue that Kennedy’s reference to the Stevens dissent in *Bowers* is mere window-dressing, dictum in a case otherwise based on substantive due process.

Another strand of scholarship focused on broader trends in morality in the public square and the courts, a trend into which *Lawrence* fits neatly.⁵⁷ From this perspective, *Lawrence* shifted, but did not foreclose, the space for permissible moral argumentation.⁵⁸ The ruling sanctioned alternative moral argumentation by recognizing a “new moral autonomy theory”⁵⁹ in which permissible moral reasoning respects individual liberty.⁶⁰ Such an argument is consistent with a limited view of state police powers, in which regulation is justified for the prevention of harm and not for much else.⁶¹ Put differently, rulings like *Lawrence* reflect a different morality, the “morality of self-fulfillment,” come to replace the “morality of higher purposes.”⁶²

Other commentators discussed not the status of moral reasoning in general, but rather Justice Scalia’s specific assertion that *Lawrence* lacked a limiting principle with regard to sexual issues.⁶³ The slippery slope which Justice Scalia implies would not come to fruition, the argument goes, because same-sex marriage may be distinguished on moral grounds from polygamy, incest, and

advanced to support the government action at issue.”). *But see supra* text accompanying notes 32-33 (implying broader use of morals-based justifications than Professor Goldberg recognizes here).

55. Goldberg, *supra* note 1, at 1244-45.

56. Indeed, “the decision [in *Lawrence*] marks the first time that a majority of the Court has declared *illegitimate* a government’s interest in preserving or advancing the public’s morality.” *Id.* at 1234 n.8.

57. *See, e.g.*, Edward L. Rubin, *Sex, Politics, and Morality*, 47 WM. & MARY L. REV. 1, 13-15 (2005).

58. *See* John Lawrence Hill, *The Constitutional Status of Morals Legislation*, 98 KY. L.J. 1, 65-66 (2010) (concluding that *Lawrence* reflects the recent judicial “retreat[] from the traditional recognition of unlimited state power in all matters that touch on morality to a sober, circumscribed recognition that while the State has in [sic] important role to play in shaping and expressing public morality, it may not merely” act based on animus).

59. *See* Goldberg, *supra* note 1, at 1283 n.197 (considering the possibility of a recent judicial shift in this direction).

60. *See* Randy E. Barnett, *Justice Kennedy’s Libertarian Revolution: Lawrence v. Texas*, in CATO SUPREME COURT REVIEW 21, 37-38 (James L. Swanson ed., 2003).

61. *See id.* at 36-37 (discussing implicit recognition in *Lawrence* of limits on state police power).

62. *See* Rubin, *supra* note 57, at 14-15 (coining “morality of self-fulfillment” and “morality of higher purposes” as part of a broader description of culture wars not limited to reviewing judicial opinions).

63. *See, e.g.*, Corvino, *supra* note 9; Donovan, *supra* note 9; *see also* *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting).

bestiality, to name a few in the so-called “parade of horrors.”⁶⁴ Just another brash statement from Justice Scalia, these commentators would posit.

Since 2003, courts have disagreed about the scope of *Lawrence*’s implications for morality-based legislation.⁶⁵ For example, in *Williams v. Morgan*, the Eleventh Circuit distinguished *Lawrence* on the grounds that it concerned “private sexual conduct” rather than the “public, commercial activity” of selling sexual devices.⁶⁶ If the Supreme Court had intended its language on morality to sweep more broadly than simply invalidating the application of public morality to laws against private sexual conduct, then “[o]ne would expect the Supreme Court to be manifestly more specific and articulate than it was in *Lawrence*,” because moral reasoning in legislation is a “traditional and significant jurisprudential principal [sic].”⁶⁷ Ruling on similar legislation, the Fifth Circuit rejected a *Williams*-type interpretation and reached opposite conclusions in *Reliable Consultants, Inc. v. Earle*.⁶⁸ The court interpreted *Lawrence* to prohibit “public morality” from sustaining laws that restrict “private sexual intimacy,” which include laws prohibiting the sale of sexual devices.⁶⁹ The public-private distinction, however, as invoked here, is probably better understood as a way of conveying courts’ more fundamental disagreement about whether morality-based legislation remains permissible at all.

Whatever the precise import of *Lawrence*, the consensus view is that the Court either initiated a shift or recognized a recent shift in the permissibility of at least some types of moral reasoning. The extent of this general prohibition remained vague after *Lawrence*. In particular, it is contestable whether the language in *Lawrence* affected the lifespan of specific laws prohibiting traditionally disfavored sexual activity. The Court’s much-anticipated decision on same-sex marriage weighed in on both the general and specific questions.

64. See Corvino, *supra* note 9 (analyzing the slippery slope argument with respect to polygamy, incest, and bestiality and finding it not persuasive); Donovan, *supra* note 9 (arguing that romantic love distinguishes same-sex marriage from polygamy, forestalling any necessary implication that permitting the former requires the same treatment of the latter).

65. See Nathan R. Curtis, Note, *Unraveling Lawrence’s Concerns About Legislated Morality: The Constitutionality of Laws Criminalizing the Sale of Obscene Devices*, 2010 BYU L. REV. 1369 (2010); see also Lofton v. Sec’y of Dep’t of Children & Family Servs., 358 F.3d 804, 819 n.17 (11th Cir. 2004) (noting in dictum the Supreme Court’s and Eleventh Circuit’s repeated insistence on the validity of moral reasoning).

66. *Williams v. Morgan*, 478 F.3d 1316, 1322 (11th Cir. 2007).

67. *Id.* at 1323 (quoting *Williams v. Att’y Gen. of Ala.*, 378 F.3d 1232, 1237-38 n.8 (11th Cir. 2004)) (internal quotation marks omitted).

68. *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 743-44 (5th Cir. 2008).

69. *Id.* at 745.

B. *Implications of Windsor for Moral Justifications*

Decided on the tenth anniversary of *Lawrence*, *Windsor* continued to narrow the permissible scope of moral justifications for legislation, although less candidly. It has been difficult to identify with precision the doctrinal basis for *Windsor*.⁷⁰ Among the key precedents cited in the opinion, however, is the 1973 equal protection decision, *United States Department of Agriculture v. Moreno*.⁷¹

In *Moreno*, class action plaintiffs whose households included one or more unrelated persons objected to federal regulations restricting food stamps to households consisting entirely of related persons.⁷² Invoking “traditional equal protection analysis,” the Court recognized that “a legislative classification must be sustained, if the classification itself is rationally related to a legitimate governmental interest.”⁷³ Legislative history suggested that Congress had passed the food stamp legislation with the general goal of promoting health and nutrition and that this specific provision was designed to prevent funding for hippie communes.⁷⁴ In striking down a classification made on the latter basis, and rejecting the Government’s insistence on fraud prevention, the Court established that, “if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate*

70. Some post-*Windsor* scholarship argues that the case artfully brings together equal protection and substantive due process doctrines. See, e.g., Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817, 819 (2014) (recognizing in *Windsor* an “acknowledge[ment] [of] the intertwined nature of due process and equal protection”); Lide E. Paterno, Note, *Federalism, Due Process, and Equal Protection: Stereoscopic Synergy in Bond and Windsor*, 100 VA. L. REV. 1819, 1854 (2014) (“*Windsor* reflects a new, more conservative approach to the old, liberal fundamental interest-equal protection doctrine. . . . [A]n individual’s fundamental interest in the recognition of her state’s rights under a federalist system converges with equal protection concerns to yield heightened judicial review of a discriminatory law.”). Other commentators find the doctrinal basis muddled. See, e.g., Klarman, *supra* note 34, at 140-41 (“Justice Kennedy’s majority opinion in *Windsor* is . . . unconvincing as a doctrinal matter. . . . [T]he Court has typically required that interests protected under [substantive due process] doctrine be grounded in history and tradition, which gay marriage clearly is not. Conventional equal protection analysis, about which Justice Kennedy’s opinion said very little, typically proceeds by identifying the relevant tier of scrutiny. . . . Justice Kennedy eschewed this route as well.”); William Baude, *Interstate Recognition of Same-Sex Marriage After Windsor*, 8 N.Y.U. J.L. & LIBERTY 150, 154 (2013) (“It is difficult to tell what *Windsor* says . . . because it is not framed in a way that easily tracks existing doctrine. It declines to pick a ‘level of scrutiny’ for discrimination on the basis of sexual orientation and does not even clarify whether the decision is ultimately rooted in ‘equal protection’ principles or in so-called ‘substantive due process’ principles.”). Rather than trying to reconcile equal protection and due process strands in *Windsor*, this Note focuses on *Windsor*’s implications for moral reasoning under either strand.

71. 413 U.S. 528 (1973).

72. *Id.* at 529-31.

73. *Id.* at 533.

74. *Id.* at 533-34.

governmental interest.”⁷⁵ Yet, in doing so, the Court disregarded arguments that arguably could be a rational basis for Congress to adopt the legislation at issue, prompting subsequent criticism that *Moreno* departed from a rational basis standard theretofore highly deferential.⁷⁶

Applying rigorous rational basis scrutiny under *Moreno*, the *Windsor* Court held that the legislative history of DOMA demonstrated animus amounting to “a bare congressional desire to harm.”⁷⁷ According to the Court’s prior ruling in *Romer v. Evans*, animus towards gays and lesbians may be inferred from legislation which “impos[es] a broad and undifferentiated disability on a single named group.”⁷⁸ Among objectionable language in the House Report was the indication “that DOMA expresses ‘both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.’”⁷⁹ Whereas in *Lawrence*, the Court appeared to take issue with moral reasoning in general, the *Windsor* Court dismissed certain reasoning—arguably a specific strand of “moral” reasoning—as animus. In its place, *Windsor* built on the “new moral autonomy theory” validated in *Lawrence*⁸⁰ to justify state laws supporting “a class of persons . . . entitled to recognition and protection to enhance their own liberty.”⁸¹

Although *Windsor* continues *Lawrence*’s trajectory on moral reasoning writ large, the scope of the Court’s reasoning on sexual issues specifically is ambiguous. Justice Kennedy invoked both the *Moreno* line of equal protection cases and the substantive due process protection for liberty,⁸² but he neither set forth a specific level of scrutiny for sexual orientation nor found that a right to enter same-sex marriage deserved protection under substantive due process.⁸³ Thus, the application of this case to other individuals who seek to engage in sexual behavior outside the mainstream, e.g., polygamous spouses, is ambiguous on both equal protection and due process grounds.

Regardless of the grounds for this decision, Justice Scalia again thought the threat sufficient to challenge the validity of laws on sexual matters:

[T]he Constitution does not forbid the government to enforce traditional moral and sexual norms. See *Lawrence v. Texas* [T]he Constitution neither

75. *Id.* at 535.

76. See, e.g., Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans*, 32 IND. L. REV. 357, 373-75 (1999).

77. *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (quoting *Moreno*, 413 U.S. at 534-35) (internal quotation marks omitted).

78. *Romer v. Evans*, 517 U.S. 620, 632 (1996).

79. *Windsor*, 133 S. Ct. at 2693 (quoting H.R. REP. NO. 104-664, at 12-13 (1996)).

80. See *supra* text accompanying notes 59-60.

81. *Windsor*, 133 S. Ct. at 2695.

82. *Id.* at 2693, 2695-96; see also *supra* note 70.

83. See *id.* at 2705-07 (Scalia, J., dissenting); see also *supra* note 70.

requires nor forbids our society to approve of same-sex marriage, much as it neither requires nor forbids us to approve of . . . polygamy⁸⁴

Indeed, the *Windsor* decision may be a first step in vindicating Justice Scalia's fear that *Lawrence* had no limiting principle with respect to sexual issues.⁸⁵ Polygamous families and states opposed to same-sex marriage certainly see it this way.⁸⁶

Since *Windsor*, at least one lower court considering same-sex marriage statutes has observed the apparent illegitimacy of at least some moral justifications. In the Seventh Circuit case of *Baskin v. Bogan*, Judge Richard Posner rejected several states' argument that tradition justifies the protection of marriage between one man and one woman.⁸⁷ However, "[a]rguments from tradition must be distinguished from arguments based on morals. Many unquestioned laws are founded on moral principles that cannot be reduced to cost-benefit analysis. . . . [N]either Indiana nor Wisconsin make a moral argument against permitting same-sex marriage."⁸⁸ Judge Posner suggested that neither state made a moral argument in support of its law "perhaps because [they] believe[] plausibly that *Lawrence* rules out moral objections to homosexuality as legitimate grounds for discrimination."⁸⁹ This Note will consider just how plausible that belief is today.

C. A Word on Obergefell

Shortly before this Note went to press, *Obergefell v. Hodges*⁹⁰ seemed to confirm this Note's analysis of the post-*Windsor* prospects for morals legislation. Writing for the Court, Justice Kennedy predictably extended *Windsor* and held that state bans on same-sex marriage violate substantive due process and equal protection. What is important for this Note, however, are the majority's comments on moral reasoning:

84. *Id.* at 2707 (Scalia, J., dissenting).

85. See *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting); Casey E. Faucon, *Marriage Outlaws: Regulating Polygamy in America*, 22 DUKE J. GENDER L. & POL'Y 1, 5-6 (2014) (proposing methods for regulating polygamy, on the assumption that it will be rendered lawful soon on the logic of *Windsor*, *Brown v. Buhman*, and other cases).

86. See Brief Addressing the Merits of the States of Indiana et al. as Amici Curiae Supporting Petitioners, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144), 2013 WL 416198; Daniel Distant, *Polygamists Celebrate DOMA Ruling: Does Gay Marriage Open the Door for Polygamy?*, CHRISTIAN POST (June 27, 2013, 12:56 PM), <http://www.christianpost.com/news/polygamists-celebrate-doma-ruling-does-gay-marriage-open-the-door-for-polygamy-98954>.

87. *Baskin v. Bogan*, 766 F.3d 648, 666 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 316 (2014).

88. *Id.* at 668.

89. *Id.* at 670.

90. No. 14-556 (U.S. June 26, 2015).

Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied.⁹¹

It is true that Justice Kennedy does not expressly denigrate these “decent and honorable religious and philosophical premises,” as he did in *Lawrence*. However, the comments are disparaging in the same way as the above-described *Windsor* comments: they confine this strain of moral reasoning to the realm of personal convictions on which legislation may not be based. As in *Lawrence* and *Windsor*, the Court does not explain why these premises are no longer a permissible part of the democratic process. That some premises may be offensive to some voters fails to distinguish the vast majority of legislation. And when these premises have supported a definition of marriage for millennia, the Court should hesitate to substitute its judgment for that of the voters in states which disagree.⁹²

The remainder of this Note focuses on the effects of *Windsor* on the space for moral reasoning and the prospects for polygamous immigrants. *Obergefell* does not significantly affect the moral reasoning analysis, though it appears to increase the likelihood that polygamous immigrants could prevail over adverse state public policy.⁹³

D. What Is “Moral” Argumentation, and When Is It Permissible?

Before addressing the implications of *Windsor* for polygamous immigrants, we first must attempt to pinpoint precisely what Justice Kennedy means by opposing “moral” justification. There are at least three candidate arguments potentially rendered impermissible by his language: ethical appeals, religious rationales, and types of reasoning with which not all Americans would agree.

Beginning with the broadest interpretation, it is clear that ethical appeals are not categorically invalid. According to Merriam-Webster, “ethical” matters “involv[e] questions of right and wrong behavior.”⁹⁴ Professor Goldberg suggests that the Court means something like this when it refers to moral

91. *Id.* at 19.

92. *See* No. 14-556 (U.S. June 26, 2015) (Roberts, C.J., dissenting); No. 14-556 (U.S. June 26, 2015) (Scalia, J., dissenting).

93. *See infra* text accompanying note 156. Furthermore, the polygamy question is rendered more salient by Chief Justice Roberts’s dissent. The Chief Justice finds it “striking how much of the majority’s reasoning would apply with equal force to the claim of a fundamental right to plural marriage.” No. 14-556, at 20-21 (U.S. June 26, 2015) (Roberts, C.J., dissenting) (discussing various arguments that polygamists might make). This Note agrees.

94. *Ethical*, MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/ethical> (last visited June 7, 2015).

reasoning.⁹⁵ It is true that we may disagree about their application in some contexts, but a strong majority of Americans share certain values which make it possible to invoke a common ethical foundation. For example, not since the nineteenth century has the average American supported slavery, for our modern notion of equality extends, at least, to the principle that one human must not enslave another. Similarly, in the twentieth century, Americans reached consensus on the equal educational rights of boys and girls. And, for a timeless example, killing another person is generally unlawful because, in the viewpoint of Western civilization, it is objectionable to inflict harm on others, particularly to the point of death.

With such examples in mind, characterizing *Windsor* as prohibiting appeals to a common ethical foundation is an overstatement. As criticized in *Windsor*, the Congress which passed DOMA made the ethical argument that same-sex marriage is wrong because it conflicts with “traditional moral teachings reflected in heterosexual-only marriage laws.”⁹⁶ Yet, if the Court were to oppose any argument based on ethics, then our very legal system would crumble, for justice itself is an ethical construct. The Court does not, or at least cannot consistently, oppose ethical arguments per se.

Perhaps instead the Court objects to religious arguments, such as those marshalled in opposition to sodomy and same-sex marriage. A religious argument draws on the resources of a faith tradition to articulate a reason to support or oppose a given public policy. For example, we see references to Judeo-Christian principles in the legislative history of a statute banning same-sex marriage and in judicial opinions in same-sex marriage cases.⁹⁷ The House Report issued at the passage of DOMA announced a “moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.”⁹⁸ The *Lawrence* Court noted Chief Justice Burger’s characterization of the same-sex issues in his *Bowers* concurrence: “Condemnation of those [homosexual] practices is firmly rooted in Judeo-Christian moral and ethical standards.”⁹⁹ Yet, Justice Kennedy did not dismiss this comment merely because it cited a religious rationale. Justice Kennedy instead disagreed as a factual matter, arguing that “[t]he sweeping references by Chief Justice Burger . . . to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction.”¹⁰⁰ Although Justice

95. See *supra* text accompanying note 43.

96. *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (quoting H.R. REP. NO. 104-664, at 16 (1996)).

97. For a critical account touching these themes, see Ronald Turner, *Traditionalism, Majoritarian Morality, and the Homosexual Sodomy Issue: The Journey From Bowers to Lawrence*, 53 U. KAN. L. REV. 1 (2005).

98. H.R. REP. NO. 104-664, at 16 (1996).

99. *Lawrence v. Texas*, 539 U.S. 558, 571 (2003) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (Burger, C.J., concurring)).

100. *Id.* at 572.

Kennedy proceeded to cite non-religious authorities, it does not appear that the *Lawrence* Court objected to all arguments which may draw on religious content.

Although *Lawrence* stopped short of prohibiting all religious rationales, the *Windsor* Court appeared to go further. Justice Kennedy cited disapprovingly DOMA's legislative history, which "expresses 'both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.'"¹⁰¹ Although this passing reference to a religious rationale does not appear to differ from Justice Kennedy's reference in *Lawrence*, the *Windsor* Court clarified that such reasoning "interfere[s] with the equal dignity of same-sex marriages" and thus is impermissible.¹⁰²

If then the Court might object to some, but not all, religious arguments, we must distinguish between those that are and are not permissible. We can do so by focusing precisely on the values invoked by the Court in striking the laws at issue in *Lawrence* and *Windsor*. As discussed in further detail below, the majority in each case relies on some combination of freedom and equality, broadly defined.¹⁰³ These are ethical arguments: these values dictate what we should do based on our agreement that freedom and equality, generally speaking, are right and good. Freedom and equality are also arguably religious rationales. For example, religious authorities have long argued that the dignity of the human person warrants freedom from bondage and recognition of the equal worth of each human life.¹⁰⁴ The fact that there is a religious argument for freedom and equality apparently does not invalidate these types of justification from the Court's perspective.

It seems instead that the invocation of a certain Judeo-Christian perspective on same-sex marriage is problematic because this notion of morality is not shared by all Americans. In both *Lawrence* and *Windsor*, Justice Kennedy recognizes the influence of changing norms.¹⁰⁵ Whereas sixty years ago American notions of sexual morality were rather settled and widespread, intervening events such as the sexual revolution and the legalization of contraception and abortion have heralded an era of much disagreement over sexual propriety.¹⁰⁶ For Justice Kennedy, the outcome of these tumultuous

101. *Windsor*, 133 S. Ct. at 2693 (quoting H.R. REP. NO. 104-664, at 16).

102. *Id.* at 2693.

103. See *infra* Part III (discussing equal protection and substantive due process arguments in light of *Lawrence* and *Windsor*).

104. See, e.g., *Life and Dignity of the Human Person*, U.S. CONFERENCE OF CATHOLIC BISHOPS, <http://www.usccb.org/beliefs-and-teachings/what-we-believe/catholic-social-teaching/life-and-dignity-of-the-human-person.cfm> (last visited May 5, 2015).

105. See *Windsor*, 133 S. Ct. at 2689, 2693 (recognizing the recent "beginnings of a new perspective, a new insight" according to an "evolving understanding of the meaning of equality"); *Lawrence*, 539 U.S. at 572.

106. See Goldberg, *supra* note 1, at 1296-97.

decades grows ever clearer: there is “an *emerging awareness* that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”¹⁰⁷ The *Lawrence* Court thus appeared to rely on a “concept of emergent rights,” based on changing “societal attitudes toward homosexuals,” in deciding how much constitutional protection this group should receive.¹⁰⁸ A decade later, the Court likewise interpreted New York’s legalization of same-sex marriage as an indicator of “the community’s . . . *evolving understanding* of the meaning of equality.”¹⁰⁹

In contrast to the emerging ethical foundation articulated above, the Court objects to moral justifications that it does not perceive to be so widely shared as to stand on non-religious grounds, as generic notions of freedom and equality now can.¹¹⁰ The modern notion of equality, as understood by the Court, does not encompass the specific Judeo-Christian morality articulated in *Bowers* and the legislative history preceding DOMA.

Instead, the *Windsor* Court justified dismissing the *Bowers*-DOMA arguments because they purportedly demonstrated “animus.”¹¹¹ A moral argument need not involve animus, however, nor does any argument directed at a certain practice automatically amount to an attack on those who engage in the activity. Justice Kennedy neglected this distinction when he wrote that “the principal purpose and the necessary effect of [DOMA] [were] to demean those persons who are in a lawful same-sex marriage.”¹¹² His assertion makes light of the fact that same-sex marriage was not lawful in any state when Congress passed DOMA.¹¹³ It is hard for a Congressional action to demean those in a lawful marriage if it is not yet lawful. More to the point, a congressional decision not to grant marital benefits to a certain type of relationship may reflect a judgment about the content of marriage that is entirely distinct from animus towards those who seek that sanction. If this were not so, then the vast majority of Americans would be guilty of animus towards polygamous couples, when the real modern objections to polygamy are quite different.¹¹⁴

107. *Lawrence*, 539 U.S. at 572 (emphasis added).

108. Lisa K. Parshall, *Redefining Due Process Analysis: Justice Anthony M. Kennedy and the Concept of Emergent Rights*, 69 ALB. L. REV. 237, 298 (2005-06).

109. *Windsor*, 133 S. Ct. at 2692-93 (emphasis added).

110. *Cf.* Parshall, *supra* note 108 (arguing that *Lawrence* protects “emergent right” which has only recently begun to enjoy public recognition). It is important to note, however, that Americans disagree quite vehemently about what freedom and equality entail, challenging the very notion that these values can be widely shared. *See generally* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1981-82).

111. *See supra* Part I.B.

112. *Windsor*, 133 S. Ct. at 2695.

113. *See* Alison Mitchell, *Clinton Signs Bill Denying Gay Couples U.S. Benefits*, N.Y. TIMES (Sept. 21, 1996), <http://www.nytimes.com/1996/09/21/us/clinton-signs-bill-denying-gay-couples-us-benefits.html>.

114. For the major arguments against polygamy, see the arguments of the United States in the hypothetical case discussed in Part IV.

In summary, *Lawrence* and *Windsor* object to *certain* moral arguments, those that are not almost universally shared, as certain conceptions of freedom and equality now are. The objectionable arguments may or may not have religious undertones. It so happens that many of the current moral arguments on sexual issues have religious roots, and some of these were dismissed in *Lawrence* and *Windsor*. Reliance on emergent rights places the Court's rulings in perspective: some reasoning which this Court calls "animus" a former Court would call "notions of morality."¹¹⁵ This Note recognizes that the two are conflated and strives to disentangle them. Justice Kennedy's approach leaves us with the question of how much opposition to someone's decisions—whether that opposition is deemed "animus" or "morality"—versus "legitimate" reasons for passing a law, would invalidate a statute. The Supreme Court must face this question in the hypothetical case of a polygamous couple seeking immigration benefits, as discussed below.¹¹⁶

II. POLYGAMY PROHIBITIONS: THEN AND NOW

This Part considers *why* and *how* the polygamy bans came to be. These questions are fundamental to determining how the Supreme Court would handle an equal protection challenge that would require it to scrutinize the motive for these prohibitions.¹¹⁷ Similarly, the broader history of these prohibitions, both preceding the formal bans and subsequent to their introduction, will illuminate the likely application of the Court's "history and tradition" test to a substantive due process claim.¹¹⁸ As seen in the disagreement between the *Lawrence* majority and dissent,¹¹⁹ the way the historical account is framed may control the outcome. The discussion concludes by introducing several of the current provisions in immigration law which would exclude a polygamous spouse.

Two principles will guide this necessarily brief consideration of the history of U.S. polygamy law. First, a goal of this analysis is to identify the balance of "moral" versus "non-moral" justifications for the polygamy prohibitions. Such an attempt aims at a moving target, for categorization of these justifications as "moral" or "non-moral" may shift with time. Second, rationales for a given policy may change. If a reviewing court finds that such justifications were

115. See *supra* note 31 and accompanying text.

116. See *infra* Part IV.

117. See U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973); *infra* Part III.B.

118. See *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (articulating the "history and tradition" test); see also *infra* Part III.B.

119. Compare *Lawrence v. Texas*, 539 U.S. 558, 568 (2003) ("[T]here is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter."), with *id.* at 596 (Scalia, J., dissenting) ("[O]ur Nation has a longstanding history of laws prohibiting *sodomy in general*—regardless of whether it was performed by same-sex or opposite-sex couples . . .").

originally impermissible and are only now permissible, should the starting point alone invalidate the law? The moral objection to sodomy and same-sex marriage arguably remained the same since the inception of each prohibition, and so the *Lawrence* and *Windsor* Courts did not need to deal with this question. However, a Court hearing a polygamy challenge likely could not avoid it, for current jurisprudence would require scrutiny of the changing polygamy rationales at a fixed point in time.

A. *Early Anti-Polygamy Impulses*

Other sources document extensively the development of the polygamy bans.¹²⁰ For our purposes, it will suffice to note the major factors driving their introduction.¹²¹ Religion and Western tradition arguably played the earliest role in the development of American anti-polygamy laws. England outlawed polygamy as antithetical to Christianity.¹²² The American colonies inherited this prohibition in keeping with the predominant faith.¹²³ By the mid-nineteenth century, when Congress¹²⁴ and later the Court¹²⁵ considered whether polygamy should be legal in the Utah Territory, both declined due in part to traditional Christian values, including the belief in monogamous marriage.¹²⁶

The polygamy issue was also tied to abolition. Opposition to polygamy gained traction in the antebellum Congress as anti-polygamists equated the practice with slavery and inequality.¹²⁷ Congressman Morrill of Vermont “assumed that meaningful consent by women was by definition lacking in all

120. See, e.g., SARAH BARRINGER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA* (2002); Sigman, *supra* note 9, at 108-42.

121. For a summary of the factors involved in the early polygamy debates that forms the basis for this discussion, see Sigman, *supra* note 9, at 103-04.

122. See GORDON, *supra* note 120, at 135.

123. See *Reynolds v. United States*, 98 U.S. 145, 165 (1878); Sigman, *supra* note 9, at 108.

124. See GORDON, *supra* note 120, at 81 (describing the Morrill Act for the Suppression of Polygamy).

125. See *Reynolds*, 98 U.S. at 165.

126. See *id.*; GORDON, *supra* note 120, at 80-82, 135. Compared with homosexuality, polygamy has been the subject of greater historical debate when it comes to the degree of Judeo-Christian support. Although at times polygamy has had Jewish and Christian adherents, the weight of modern Christian and Jewish authority is against these practices. See, e.g., CATECHISM OF THE CATHOLIC CHURCH ¶¶ 1610, 2387 (2d ed. 2000); Naftali Silberberg, *Does Jewish Law Forbid Polygamy?*, http://www.chabad.org/library/article_cdo/aid/558598/jewish/Does-Jewish-Law-Forbid-Polygamy.htm (last visited May 5, 2015). For modern Mormon doctrine, decidedly rejecting polygamy, see Danel Bachman & Ronald K. Esplin, *Plural Marriage*, *ENCYCLOPEDIA OF MORMONISM* (2007), http://eom.byu.edu/index.php/Plural_Marriage.

127. See GORDON, *supra* note 120, at 63-65.

polygamous marriages,” resulting in women’s suffering.¹²⁸ His advocacy would result in the Morrill Act, which prohibited bigamy in Utah and other territories.¹²⁹

The polygamy debates also had a racial element. As opposition to Chinese contract laborers mounted in the mid-nineteenth century, congressmen attacked Chinese marriage and family customs and sought to exclude Chinese women for being second wives, concubines, and prostitutes.¹³⁰ The Page Law, explicitly enacted to prohibit the immigration of Chinese prostitutes, significantly increased the barriers to immigration for all Chinese women, many of whom were second wives.¹³¹ Racism played more overtly into the consideration of Mormon polygamy as the Court and others lumped Mormons together with “Asiatic and . . . African people” for participating in so non-European and “odious” a practice.¹³² The first piece of immigration legislation to prohibit polygamists, the Act of March 3, 1891, reflected opposition to the Chinese, the Mormons, or perhaps both.¹³³

Through each of these nineteenth-century debates, it is apparent that the concept of polygamy was a political pawn.¹³⁴ Perhaps most poignantly, the emergent Republican Party attempted to undermine the Southern Democrats by decrying polygamy and slavery as the “twin relics of barbarism.”¹³⁵ Thus, independent of any substantive reasons for passing polygamy bans, opponents of the practice appeared to seek side benefits.

The foregoing factors may be divided, with some difficulty, into moral and non-moral justifications for opposing polygamy. It may be easiest to begin with non-moral justifications. The rhetorical and political value of opposing polygamy is a non-moral reason, albeit not a legitimate reason to support a challenged statute. Argument based on Western tradition alone, to the extent that it is an element of culture distinguishable from Christianity and synonymous with “the way things are,” is arguably non-moral as well.¹³⁶ The other factors all have some moral content, at least from a nineteenth-century perspective. Xenophobia was fed by the perceived failure of foreign races to

128. *See id.* at 63.

129. *See id.* at 81; *see also supra* note 11 (discussing relationship between bigamy and polygamy laws).

130. *See* Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641 (2005).

131. *See id.*; Martha M. Ertman, *Race Treason: The Untold Story of America’s Ban on Polygamy*, 19 COLUM. J. GENDER & L. 287, 355-56 (2010).

132. *Reynolds v. United States*, 98 U.S. 145, 164 (1878); *see also Ertman, supra* note 131, at 288-89.

133. *See Smearman, supra* note 11, at 395 (noting that different scholars attribute the law to anti-Chinese or to anti-Mormon sentiment).

134. *See Sigman, supra* note 9, at 104 (calling polygamy a perennial “bogeyman”).

135. *See GORDON, supra* note 120, at 55-58, 62.

136. *See, e.g., Baskin v. Bogan*, 766 F.3d 648, 668 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 316 (2014) (distinguishing between arguments from tradition and morality).

conform to the practices of Western Christian civilization. Argument based on the equality of women and the concomitant harms of subjugation in polygamy likewise reflected Christian ethics.¹³⁷ And the Christian foundation for English and eventually American state anti-polygamy laws is a moral consideration. It is clear, then, that a court reviewing the origins of the polygamy ban must evaluate both moral and non-moral considerations, though the categorization of these moral rationales may differ today. Racist and xenophobic rationales remain types of “moral” justifications, though both such rationales are now commonly considered immoral. The current Court would likely deem harm-based rationales like the threat to women to be permissible as non-moral secondary justifications,¹³⁸ but they could instead be considered moral arguments, even without their historic religious overtone.

B. *Introducing and Policing the Polygamy Ban in Immigration Law*

In 1891, Congress passed the first ban on the immigration of “polygamists,” which has been maintained in some form ever since.¹³⁹ Courts and the BIA have consistently upheld the polygamy ban, finding in the statute an indication that polygamous marriage is against the public policy of the place of domicile, the United States.¹⁴⁰ Such decisions generally contain no other justification for the polygamy ban, with the exception that, as recently as the 1960s, some opinions also noted that polygamy was “repugnant . . . to the laws of nature as generally recognized in Christian countries.”¹⁴¹ Thus, the BIA and one or more courts have endorsed at least one of the moral justifications for the ban.

It is curious that the Christian references do not continue past the 1960s. A general search of decisions citing *Matter of H—*, the BIA precedent decision setting forth the public policy exception, indicates that neither the courts nor the BIA have ever cited that opinion’s reliance on the Christian laws of nature.¹⁴² Perhaps these adjudicators found the public policy exception to be sufficient and the Christian language to be dictum. Alternatively, the courts and the BIA may find the language uncomfortable or objectionable, presaging the way in which the Supreme Court may handle the polygamy bans today.

137. See GORDON, *supra* note 120, at 56-57, 63.

138. See *supra* text accompanying notes 32-33.

139. See Smearman, *supra* note 11, at 395.

140. See, e.g., *Al Sharabi v. Heinauer*, No. C-10-2695 SC, 2011 WL 3955027 (N.D. Cal. Sept. 7, 2011); *Matter of H—*, 9 I. & N. Dec. 640 (B.I.A. 1962).

141. *Matter of H—*, 9 I. & N. Dec. at 641; see also *Ng Suey Hi v. Weedon*, 21 F.2d 801, 802 (9th Cir. 1927).

142. Search by the author using Lexis Advance and Westlaw Next.

C. *Current Grounds for Exclusion of Polygamous Immigrants*¹⁴³

Polygamists are subject to a range of unfavorable provisions in immigration law, depending on whether they seek admission, adjustment of status, asylum, or various forms of relief from removal.¹⁴⁴ Admission may best illustrate the nexus between immigration provisions and moral justifications. Professor Claire Smearman concludes, upon thorough examination of polygamy provisions in immigration law, that “[t]he most common situation in which the issue of polygamous marriage arises is when a husband petitions on behalf of a second or third wife in a polygamous marriage that was valid in the country in which it was contracted.”¹⁴⁵ The polygamist wishing to challenge his wife’s exclusion would face prohibitions based on state public policy and federal statutory grounds for inadmissibility. The successful petitioner must surmount each of these in order to gain admission for his beneficiary.

1. State Public Policy Exception

At the visa application stage, a man petitioning on behalf of his second wife must prove that this is a valid marriage.¹⁴⁶ The BIA precedent decision in *Matter of H*— recites the test:

The general rule is that the validity of a marriage is determined by the law of the place where it is contracted or celebrated; if valid there, it is valid everywhere. An exception to the general rule, however, is ordinarily made in the case of marriages repugnant to the public policy of the domicile of the parties, in respect to polygamy . . . , or otherwise contrary to its positive laws.¹⁴⁷

The Board determined that polygamy is contrary to public policy by reference to the ground of exclusion introduced in the Act of March 3, 1891, and maintained ever since.¹⁴⁸

Matter of H— obscures features of the public policy exception which are important for evaluating the likely effects of *Windsor*. Professor Kerry Abrams notes that *Matter of H*— departed inexplicably from the general rule that public policy exceptions to the “place of celebration” rule for a valid marriage are determined on the basis of *state*, rather than federal, policy.¹⁴⁹ The application

143. Professor Smearman’s careful analysis of the relevant provisions guides this Subpart. See Smearman, *supra* note 11, at 398.

144. For an excellent description of legal provisions affecting polygamous immigrants at various stages in the immigration process, see *id.* at 398-438.

145. See *id.* at 405-06.

146. See *id.* at 404.

147. *Matter of H*—, 9 I. & N. Dec. 640, 641 (B.I.A. 1962).

148. *Id.*

149. Abrams, *supra* note 20, at 1671; see also *id.* at 1666 (describing the “valid if valid where celebrated” rule and the “public policy exception” in the general context of state regulation of marriage).

of federal public policy to invalidate a marriage, she argues, reflects a broader trend of encroachment by Congress on family law, a traditional state domain.¹⁵⁰ Between 1996 and the *Windsor* decision in 2013, DOMA codified this federal public policy against plural marriages.¹⁵¹ Although the Court has held DOMA section 3 invalid,¹⁵² the federal public policy exception recognized in *Matter of H*— remains intact, albeit vulnerable under the *Windsor* logic, as argued below.¹⁵³ If the Court were to strike the federal public policy against polygamy, state law would determine whether there is a public policy exception to the “place of celebration” rule.¹⁵⁴ Currently, a polygamous beneficiary may be out of luck, for laws against bigamy or polygamy remain on the books in every U.S. state.¹⁵⁵ The likelihood that the Supreme Court would overturn these state laws as well, however, is higher now that *Obergefell* has extended the *Windsor* reasoning to invalidate state laws against same-sex marriage.¹⁵⁶

2. Inadmissibility Grounds Under INA Section 212(a)(10)(A)

Even if the petitioner were to prove a valid marriage, the consular official applying the inadmissibility grounds would find the beneficiary inadmissible. The threshold inadmissibility ground for an individual in a polygamous marriage is the outright ban.¹⁵⁷ Immigration and Nationality Act (INA) section 212(a)(10)(A) provides that “[a]ny immigrant who is coming to the United States to practice polygamy is inadmissible.”¹⁵⁸

Several features of this ban are relevant to the discussion in Parts III and IV. First, this prohibition does not apply to each party to a polygamous marriage. A man may petition on behalf of his first wife, even though he remains married to one or more subsequent wives in his country of origin.¹⁵⁹ In

150. *See id.* at 1667-68.

151. *See Smearman, supra* note 11, at 405.

152. *See United States v. Windsor*, 133 S. Ct. 2675, 2683, 2696 (2013).

153. *See infra* Parts III, IV.

154. *Cf. Edwards, supra* note 17, at 182-83 (indicating that, even after *Windsor*, a same-sex married beneficiary must still satisfy the state law requirements).

155. *See Smearman, supra* note 11, at 429 (documenting state law bans).

156. *Obergefell v. Hodges*, No. 14-556 (U.S. June 26, 2015).

157. An individual practicing polygamy also may be inadmissible in any state in which bigamy is a crime involving moral turpitude (CIMT). *See Smearman, supra* note 11, at 429; 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2013). This Note focuses on the state public policy exception and the specific inadmissibility grounds for polygamous immigrants under Immigration and Nationality Act § 212(a)(10)(A) because the arguments for and against the CIMT provision largely mirror those directed at these other, unavoidable bans on polygamy.

158. 8 U.S.C. § 1182(a)(10)(A) (2013).

159. *See Smearman, supra* note 11, at 407, 416.

contrast, the second wife of a polygamist practitioner does fall within the prohibition of section 212(a)(10)(A).¹⁶⁰

Second, the language of the current provision narrows the scope of the initial ban, contained in the Act of March 3, 1891, which simply prohibited “polygamists.”¹⁶¹ Although the original act did not define a polygamist, the legislative history to the 1990 revision suggests that Congress thought the existing provision—revised since 1891 but still containing a prohibition of “polygamists”—barred even those who had practiced this form of marriage in the *past*.¹⁶² The revision illustrates congressional intention that the polygamy ban only apply prospectively.¹⁶³ The modern language reduces the likelihood that a former polygamist seeking immigration benefits for himself would be inadmissible, yet the revision leaves unaffected the ban on a second wife as a beneficiary.

III. CONTEXT FOR A CHALLENGE TO THE POLYGAMOUS IMMIGRANT BANS

A. *Legal Grounds for a Challenge*

The polygamist as petitioner and his second wife as beneficiary may challenge her exclusion on both equal protection and substantive due process grounds. To invalidate both the state public policy exception and the inadmissibility grounds, the Supreme Court would need to revisit its anti-polygamy decision in *Reynolds v. United States* and the BIA’s anti-polygamy decision in *Matter of H—*.¹⁶⁴ These decisions came down in an era of narrower protections available under the Fourteenth Amendment, as illustrated by subsequent expansions in the equal protection and substantive due process doctrines.¹⁶⁵ *Windsor* signals the current Court’s openness to resolve marriage-related claims on equal protection grounds, though the lack of clarity in that opinion and in *Lawrence* suggests that the Court may be receptive to a fundamental rights argument as well.¹⁶⁶

160. *See id.* at 407.

161. Law of Mar. 3, 1891 (Immigration Act of 1891), ch. 551, 26 Stat. 1084, 1084 (1891).

162. *See* Smearman, *supra* note 11, at 397-98.

163. *See id.*

164. *See* *Reynolds v. United States*, 98 U.S. 145 (1878); *Matter of H—*, 9 I. & N. Dec. 640 (B.I.A. 1962).

165. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374 (1978); *Loving v. Virginia*, 388 U.S. 1 (1967).

166. *See* *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (“DOMA . . . violates basic due process and equal protection principles applicable to the Federal Government.”); *supra* Part I.B. And indeed, *Obergefell* relies primarily on fundamental rights analysis. *See Obergefell v. Hodges*, No. 14-556 (U.S. June 26, 2015).

The polygamous couple could argue that they have suffered discrimination in violation of the Equal Protection Clause.¹⁶⁷ The U.S. citizen or LPR husband does not receive equal protection in the visa petition process in comparison with his monogamous peer petitioning on behalf of his own wife. Although the polygamist may wish to petition on behalf of only one spouse, like his peers, he may be prohibited from petitioning if he has chosen the “wrong” spouse, his second wife.¹⁶⁸ One might think that the relevant standard of equal protection comparison for the second wife would be an unmarried prospective immigrant, since this immigrant too would not be able to rely on a petitioning spouse. However, it is not clear that a prospective immigrant alone could avail herself of the Equal Protection Clause, nor would such a single immigrant have standing to sue.

Polygamous spouses also could allege a violation of substantive due process on the basis of their constitutionally protected liberty to marry.¹⁶⁹ The Supreme Court held in *Loving v. Virginia* that the right to marry may not be restricted on the basis of an intended spouse’s race.¹⁷⁰ The polygamous spouses would argue that the scope of the *Loving* liberty to marry extends to the second, concurrent wife. To evaluate a new substantive due process claim, the Court likely would apply the two-pronged *Washington v. Glucksberg* test, requiring 1) proof of a “fundamental right[] [or] libert[y] which [is], objectively, deeply rooted in this Nation’s history and tradition,” and “implicit in the concept of ordered liberty;” and 2) a “careful description of the asserted fundamental liberty interest.”¹⁷¹ The would-be second wife could argue that she should not be denied the right to marry the person of her choosing based on her status as second-in-line, which, she might insist, is as arbitrary as discrimination on the basis of race. Furthermore, the polygamous spouses could argue together that the right to marry has no inherent limitation on the number of spouses; any alleged American tradition of two is too narrowly construed, they might claim, if it overlooks the place of polygamy in this country, however controversial that place may be.¹⁷² Part IV will evaluate these equal protection and substantive

167. See generally *Zablocki*, 434 U.S. 374 (finding that classification interfering with marriage does not satisfy heightened scrutiny).

168. The argument rings of the Page Law prohibitions on Chinese prostitutes, who were, in practice, often second wives or their equivalents. See *supra* text accompanying notes 130-31. For a more contemporary example, consider arguments made by same-sex spouses seeking marriage-based immigration benefits. See *Edwards*, *supra* note 17, at 180.

169. See *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citing *Loving* for proposition that “the ‘liberty’ specially protected by the Due Process Clause includes the rights to marry”); *Loving*, 388 U.S. at 12; cf. *Windsor*, 133 S. Ct. at 2695-96 (appearing to apply Due Process Clause to liberty interest of same-sex couples in marriage).

170. 388 U.S. 1, 12 (1967).

171. *Glucksberg*, 521 U.S. at 720-21 (citations omitted) (internal quotation marks omitted).

172. See *infra* Part IV.A.

due process claims, in light of the level of scrutiny discussed in the following Subpart.

B. *Level of Scrutiny*

The polygamous couple's case may turn on the level of scrutiny. As discussed in the following Part, the United States could offer a number of justifications for the polygamy bans which plausibly could withstand rational basis review.¹⁷³ To succeed, the couple would need to argue for *Moreno*-type heightened scrutiny, to which they may be entitled on several grounds. Yet, even if the Court were inclined to find that a polygamy prohibition ordinarily would trigger heightened scrutiny, the immigration setting supplies an added layer of judicial deference which the couple must overcome.¹⁷⁴

Rational basis is the Court's default level of scrutiny for equal protection and substantive due process challenges to legislation "[i]n the area of economics and social welfare."¹⁷⁵ However, the polygamous couple could draw on the grounds articulated by same-sex marriage advocates in arguing that discrimination against them warrants heightened scrutiny for a violation of the Equal Protection Clause.¹⁷⁶ Although this author is unaware of any definitive judicial list of indicia of suspectness, former Attorney General Eric Holder, Jr., summarized in a letter to Congress during the *Windsor* litigation:

[The Supreme Court has] rendered a number of decisions that set forth the criteria that should inform this and any other judgment as to whether heightened scrutiny applies: (1) whether the group in question has suffered a history of discrimination; (2) whether individuals "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group"; (3) whether the group is a minority or is politically powerless; and (4) whether the characteristics distinguishing the group have little relation to legitimate policy objectives or to an individual's "ability to perform or contribute to society."¹⁷⁷

173. See *infra* Parts IV.A-IV.B.

174. See *Fiallo v. Bell*, 430 U.S. 787, 794-95 (1977) (rejecting argument that heightened scrutiny should apply to Congress's policy choices in immigration matters). *But cf.* *Nguyen v. Immigration & Naturalization Serv.*, 553 U.S. 53, 72-73 (2001) (applying Equal Protection Clause to immigration setting and finding no violation without reaching question of relationship between equal protection and congressional plenary power in immigration matters).

175. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

176. See Brief on the Merits for Respondent Edith Schlain Windsor at 17-18, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307).

177. Letter from Eric H. Holder, Jr., Attorney Gen., to John A. Boehner, Speaker, U.S. House of Representatives, (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html> (quoting *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441-42 (1985)); see also *Frontiero v. Richardson*, 411 U.S. 677, 686, 688 (1973) (finding sex to be an "immutable characteristic" that "frequently bears no relation to ability to perform or contribute to

Polygamists could easily prove “a history of discrimination” by reference to the state laws and federal immigration laws prohibiting their marital arrangement.¹⁷⁸ Furthermore, such laws are but one indication that polygamists lack political power in the United States, at least since the late nineteenth century.¹⁷⁹ Some of the other justifications for heightened scrutiny for same-sex married couples may be more difficult, though not impossible, to apply in the polygamous couple’s case. Although polygamists would have trouble arguing that they have an “immutable” characteristic—the polygamist could stop further marriage after marrying the first wife or could divorce the second and subsequent wives—they would have a good argument that their relationship is a “distinguishing” characteristic of their lives. And lastly among common arguments for a right to same-sex marriage, polygamous spouses may have the same “ability to perform or contribute to society” that monogamous spouses have.¹⁸⁰

The logic of *Lawrence* and *Windsor*—although not the tea leaves¹⁸¹—suggests that the Supreme Court would find at least some of these factors persuasive, triggering heightened scrutiny for a violation of equal protection.¹⁸² These decisions also indicate that if the Court were to apply heightened scrutiny, it likely would do so *not* by defining a suspect class which warrants intermediate or strict scrutiny—gays and lesbians had a better claim to class treatment which neither case officially recognized¹⁸³—but rather by applying heightened scrutiny of the *Moreno* variety.¹⁸⁴ Under this type of review, the

society,” and furthermore that “classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect,” triggering strict scrutiny); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (noting as possible trigger of increased scrutiny “prejudice against discrete and insular minorities”).

178. *See, e.g.*, UTAH CONST. art. III (“[P]olygamous or plural marriages are forever prohibited.”); 8 U.S.C. § 1182(a)(10)(A) (2013).

179. *See* Sigman, *supra* note 9, at 127-28 (noting that Edmunds Anti-Polygamy Act of 1882 “disenfranchised not just polygamists, but also their wives” and introduced “prohibitions against polygamists taking office”).

180. The polygamist would argue that the potential counterarguments of harm to women and girls are rebuttable or inapplicable to polygamous practices in the home country. *See infra* notes 218-21 & 253-54 and accompanying text.

181. *See* Part IV (discussing briefly the certiorari and justiciability issues).

182. *See Windsor*, 133 S. Ct. at 2693, 2695-96 (referring to same-sex couples as a “politically unpopular group” whose marriages are made “less worthy than the marriages of others” by a “demean[ing]” law).

183. *But cf.* *Lawrence v. Texas*, 539 U.S. 558, 580-85 (2003) (O’Connor, J., concurring) (discussing how Texas law discriminates against homosexuals as a class in violation of Equal Protection Clause).

184. *See Windsor*, 133 S. Ct. at 2693-94 (noting that same-sex couples are a “class” subjected to “a law having the purpose and effect of disapproval of that class” but invoking *Moreno* rather than defining a level of scrutiny). *Lawrence* purported *not* to apply rigorous rational basis scrutiny under the *Moreno* line of cases—the Court explicitly rejected the argument that it should rely on *Romer v. Evans*, 517 U.S. 620 (1996)—but in fact its holding is quite similar to a *Moreno* outcome. *See Lawrence*, 539 U.S. at 574-76.

Court increases its scrutiny of a particular piece of legislation based on a finding of “animus” towards a particular group; the illegitimate reasoning may not be marshaled in support of the legislation upon judicial review.¹⁸⁵

If the Court were to refuse to increase scrutiny on the basis of a suspect class or finding of animus, the Court may nevertheless consider whether the polygamy prohibitions infringe on the liberty protected by substantive due process. The Court would first evaluate whether the asserted liberty is “deeply rooted in this Nation’s history and tradition.”¹⁸⁶ Reading the polygamous couple’s claim at a low level of generality,¹⁸⁷ the Court likely would find that the liberty to marry multiple people is *not* deeply rooted. Although practiced by small sects for 150 years, plural marriage has been illegal throughout the nation’s history.¹⁸⁸ In contrast, after briefly discussing states’ legalization of same-sex marriage in recent times, the *Windsor* Court focused on the “history and tradition” of “state power and authority over marriage” before concluding that the liberty encompassed by the Due Process Clause does extend to same-sex marriage.¹⁸⁹ In the polygamy context, it is possible that the Court would consider the liberty to marry at a similarly high level of generality,¹⁹⁰ reasoning that “sufficiently important state interests” and “closely tailored” means would be necessary to support a restriction on the number of people an individual may choose to marry.¹⁹¹

Aside from either of these two approaches, the Court could take the middle route endorsed in *Plyler v. Doe*.¹⁹² In *Plyler*, the Court held that neither are “[u]ndocumented aliens . . . a suspect class . . . [n]or is education a fundamental right.”¹⁹³ Nevertheless, the special characteristics of education and undocumented immigrant children warranted heightened scrutiny.¹⁹⁴ Although the Court has generally avoided relying on *Plyler*,¹⁹⁵ the Court

185. See, e.g., *Windsor*, 133 S. Ct. at 2693; *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973).

186. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)) (internal quotation marks omitted).

187. Cf. *Michael H. v. Gerald D.*, 491 U.S. 110, 122-24 (1989) (plurality opinion) (cabining the history and traditions inquiry).

188. See *supra* text accompanying notes 122-26 (discussing origins of polygamy ban in the United States).

189. See *Windsor*, 133 S. Ct. at 2689-91, 2695-96; *id.* at 2714-15 (Alito, J., dissenting) (reciting history and tradition test and arguing that it is certainly not satisfied here despite Court’s appearing to rely on substantive due process for its holding).

190. Cf. *Michael H.*, 491 U.S. at 139 (Brennan, J., dissenting) (assuming a higher level of generality than adopted by plurality and finding that asserted right was indeed rooted in history and tradition).

191. See *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978); see also *id.* at 407 (Rehnquist, J., dissenting) (noting that Court’s standard of review amounted to strict scrutiny).

192. 457 U.S. 202 (1982).

193. *Id.* at 223.

194. *Id.* at 223-24, 230.

195. See, e.g., *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 459 (1988).

arguably did so (*sub silentio*) in *Windsor* by raising scrutiny on the basis of the importance of marriage for a minority subject to discrimination,¹⁹⁶ without expressly identifying a class for equal protection purposes or a fundamental right for substantive due process purposes. The characteristics of polygamy, as a form of marriage, and polygamous couples, as a subject of discrimination, may prompt such a combination approach again in this context.

The immigration overlay complicates the question of the appropriate level of scrutiny. Under the plenary power doctrine, Congress has broad immigration powers to which the Court consistently defers.¹⁹⁷ Such powers include the decision about whom to exclude, which requires only a “facially legitimate and bona fide reason.”¹⁹⁸ A U.S. citizen or LPR petitioning on behalf of a noncitizen who has not previously been admitted may try to argue that Congress adopted improper exclusion policies, perhaps in violation of Fifth Amendment equal protection or substantive due process.¹⁹⁹ Yet, the Court may reject such claims on the basis of Congress’s plenary power.²⁰⁰

In the case of the polygamous couple, the plenary power doctrine may bar some of their claims. The outright ban under INA section 212(a)(10)(A) appears to be a straightforward exercise of Congress’s power to exclude. The state public policy exception, on the other hand, appears to fall outside the scope of the plenary power doctrine. The polygamy ban contained in this state public policy relies not on a congressional determination of whom to exclude but rather on determinations made by state courts or legislatures. Therefore, the state public policy exception is subject to challenge even if the plenary power insulates INA section 212(a)(10)(A). What remains to be seen is whether a finding of animus would overcome the plenary power even where it is applicable, a question this Note will address in the following Part.

IV. CONTESTING THE POLYGAMY BANS AT THE SUPREME COURT

If a polygamous couple’s case were to reach the Supreme Court, the Court would have a few threshold options for disposing of it. The state law same-sex marriage decisions which initially reached the Court suggest that, if this case

196. See *United States v. Windsor*, 133 S. Ct. 2675, 2693, 2695-96 (2013); see also Brief on the Merits for Respondent Edith Schlain Windsor at 17-18, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) (citing *Plyler*, 457 U.S. 202, in advocating heightened scrutiny).

197. See *Fiallo v. Bell*, 430 U.S. 787, 792 (1977).

198. *Id.* at 794-95 (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972)) (internal quotation marks omitted).

199. See, e.g., *id.* at 790-91, 790 n.3.

200. See *supra* note 174 (discussing application of plenary power doctrine to constitutional claims in *Fiallo* and *Nguyen*).

were to reach the Court, the Court would decline to grant certiorari,²⁰¹ or would grant it but decide that the issue is not justiciable for several possible reasons.²⁰² This Part proceeds on the assumption that the Court would in fact grant cert and proceed to the merits. Even if the Court were not to reach the merits, however, the arguments below would remain relevant: the Court would likely consider these arguments in the parties' briefs when deciding whether to grant cert or dispose of the case on justiciability grounds.

I will first address the government's likely arguments in defense of a given polygamy ban before turning to the polygamous couple's counterarguments. If the case were to reach the Court anytime soon, both of the polygamy bans would probably survive. However, to reach such an outcome, the Court would have to qualify its recent precedent, deciding that a finding of animus is not sufficient where there is no emergent right to engage in the activity at issue.

A. *State Public Policy Exception*

Argument over the state public policy exception would focus on the legality of polygamy in general, apart from the immigration context or the foreign dynamics of polygamous relationships.²⁰³

The United States could defend the exception on the grounds of federalism, separation of powers, and state police powers. From a structural perspective, the federal government evaluates the validity of an immigrant's marriage on the basis of state law because marriage is an area of traditional state concern.²⁰⁴ Recognizing a marriage according to the law of the place of celebration, with an exception for the strong public policy of the place of domicile, reflects the well-established doctrine in family law for dealing with a marriage celebrated in another state.²⁰⁵ To trench on state public policy exceptions would be an affront to federalism.²⁰⁶ The recent invalidation of DOMA section 3 turned in

201. See, e.g., *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 316 (2014).

202. This Note has sought to propose a case that would not be dismissed for lack of standing. However, for an example of the Court's willingness to decide on this grounds in the marriage area, see *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), in which the Court decided that petitioners lacked standing to appeal. The Court also might be inclined to decide that the polygamy issue simply is not yet ripe for consideration or that the immigration setting is an inappropriate one for deciding an issue with more significant domestic law ramifications. For a classic case on a sexual matter in which the Court dismissed a challenge to state law on ripeness grounds, see *Poe v. Ullman*, 367 U.S. 497 (1961).

203. This Note will consider these facets in the context of the inadmissibility grounds under 8 U.S.C. § 1182. See *infra* Part IV.B.

204. See *Abrams*, *supra* note 20, at 1666-67; see also *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013) ("The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens.").

205. See *Abrams*, *supra* note 20, at 1666-67.

206. See *supra* text accompanying notes 149-50.

part on renewed respect for the state police power over marriage.²⁰⁷ The Court should continue this deference to state determinations of marriage policy by validating USCIS's reliance on the state public policy exception for polygamy.

The United States also could argue that state prohibitions of polygamy and bigamy reflect the judgment of state legislatures. Popularly elected representatives have decided that simultaneous marriage to multiple people is morally objectionable. Other courts have recognized the legitimacy of a legislative determination that "monogamy [is] a beneficial marital form and . . . polygamous relationships [are] harmful."²⁰⁸ This decision is entitled to judicial deference unless constitutionally offensive. Because moral reasoning has been a legitimate and perhaps inescapable basis for decisionmaking since the founding of this country,²⁰⁹ the Court should allow such laws to stand.

Substantively, the government would argue, polygamy prohibitions are justified under state police powers for the prevention of harm to those involved. In the fundamentalist Mormon context, studies have concluded that women in polygamous marriages often suffer from emotional and sexual abuse.²¹⁰ Furthermore, polygamy as practiced in U.S. enclaves frequently restricts women to the traditional gender role of caring for the family.²¹¹ In addition to these types of harm, polygamous relationships in this country often involve teenage women who have limited scope for consent, possibly no knowledge of statutory rape laws, and restricted access to help in the event of an abusive husband.²¹² There is also some evidence that children of polygamous marriages suffer psychologically in various ways and that their families may be less able to provide for them financially.²¹³ Although the polygamist may argue that some of these harms, like the inability to access help in the event of domestic abuse, would be mitigated by legalization of polygamy in this country, others inhere in the structure and reproductive purposes of polygamy.²¹⁴

Lastly, addressing the substantive due process standard, the United States could argue that the fundamental right to marry is limited in our history and

207. See *Windsor*, 133 S. Ct. at 2691 ("[T]he Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations [including marriage].").

208. *State v. Holm*, 137 P.3d 726, 744 (Utah 2006).

209. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 589 (2003) (Scalia, J., dissenting) ("Countless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority's belief that certain sexual behavior is 'immoral and unacceptable' constitutes a rational basis for regulation.").

210. See *Bozzuti*, *supra* note 49, at 439-40.

211. See *Larcano*, *supra* note 49, at 1104; *Sigman*, *supra* note 9, at 171.

212. See *Sigman*, *supra* note 9, at 178-79, 181 (noting harms to underage girls of polygamous marriage in fundamentalist and immigrant communities); *Bozzuti*, *supra* note 49, at 436; see also *Holm*, 137 P.3d at 744 (describing some of these concerns in the context of this recent polygamy case).

213. See *Bozzuti*, *supra* note 49, at 437-39.

214. See *id.* at 439-40; cf. *Sigman*, *supra* note 9, at 171 (qualifying this argument).

tradition to monogamy. Any assertion to the contrary may be rebutted by reference to the Utah Constitution,²¹⁵ which to this day expressly prohibits polygamy in the state where that practice was most widespread (albeit before statehood).²¹⁶ Precedent indicates that fundamental rights should be narrowly construed,²¹⁷ which requires in this context that the Court focus on the mainstream monogamy practiced since our country's founding, to the exclusion of the polygamous practices of nineteenth-century Mormons and modern sects.

The polygamous couple could argue in turn that many of the alleged harms of polygamy represent over-generalizations.²¹⁸ In fact, women may wish to choose a polygamous relationship, perhaps for religious or familial support reasons, and the prohibition simply "infantilizes women" by "declaring them incapable of providing consent."²¹⁹ Furthermore, harms to women and children which are analogous to those discussed above are commonplace in American monogamous marriages today.²²⁰ Any egregious harms are primarily a product of the underground practice and fundamentalist nature of the bulk of American polygamous marriages today.²²¹

The real reason for the polygamy bans, the couple would argue, is a Christian tradition opposing this form of marital arrangement.²²² More than any physical harms, these legislatures attempted to prohibit the very sort of "moral" harm to society which the *Windsor* Court found unconvincing in the same-sex marriage setting.²²³ It is unclear why any greater moral harm would result from permitting polygamous marriage than from permitting same-sex monogamous marriage or from our current tolerance of nonmarital "polyamory," that is, multi-partner relationships.²²⁴ The invalidation of DOMA represents a ringing condemnation of any legislation motivated by animus, they could assert, including that masquerading as so-called moral reasoning.²²⁵

215. See UTAH CONST. art. III

216. See Bozzuti, *supra* note 49, at 418-19.

217. See *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (plurality opinion); see also *supra* notes 187 and 190 (describing debate between *Michael H.* plurality and dissent regarding appropriate level of generality).

218. See Sigman, *supra* note 9, at 166-68 (arguing that "traditionally expected harms of polygamy . . . [are] overstated" and that other harms stem from criminalization of polygamy rather than the practice itself).

219. See *id.* at 171-72.

220. See *id.* at 173-74.

221. See *id.* at 166-68, 181-82, 184.

222. See *supra* text accompanying notes 122-26.

223. Cf. *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (dismissing purportedly moral arguments contained in House Report at passage of DOMA).

224. See Angi Becker Stevens, *Polyamory: Not Harmful to Society*, HUFFINGTON POST (Oct. 30, 2013, 9:10 PM), http://www.huffingtonpost.com/angi-becker-stevens/polyamory_b_4179696.html.

225. See *Windsor*, 133 S. Ct. at 2693, 2696.

Responding to the federalism argument, the polygamous couple could argue that *Windsor* overstates the Court's deference to state judgment on marriage and sexuality issues.²²⁶ Indeed, the *Lawrence* Court eagerly invalidated a state law pertaining to sex without referring to federalism concerns.²²⁷ Furthermore, the dissenters in *Windsor* noted the likelihood that the Court would apply the same logic to strike a state law ban on same-sex marriage, proving the red herring that the federalism argument was.²²⁸

Relying on *Lawrence*, the couple would argue for the application of the history and traditions standard at a high level of generality. In *Lawrence*, the Court prioritized developments in the preceding half century, finding that the "emerging recognition" of rights to engage in private homosexual conduct deserved greater weight than did earlier public sentiments.²²⁹ Justice Kennedy's selective reading of history and tradition relied to some extent on his prior observation that "[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry."²³⁰ If a right to sodomy can be found in history and tradition weighing much more heavily to the contrary,²³¹ then surely, the couple would argue, history and tradition must also recognize a long-standing practice of plural marriage in some communities in this country. Indeed, the practice would be more widespread if not for prosecution and discrimination since the nineteenth century. Narrow readings of history and tradition sustained criticism even before *Lawrence*,²³² the couple might argue, and that case has now definitively opened the door to greater recognition of the fundamental rights of minorities.

These arguments leave the Court in a predicament. If the current Court were to consider a challenge to the state public policy exception to polygamous marriage, it would have to reconcile a conflict between its precedent and the prevailing political sentiment. Under the logic of *Lawrence* and *Windsor*, the Court likely would find persuasive the polygamous couple's argument that the state public policy exception originated with animus towards particular people with a particular marital arrangement, in keeping with the Court's reading of DOMA. Applying *Moreno* scrutiny, the Court would require further

226. See *Windsor*, 133 S. Ct. at 2710 (Scalia, J., dissenting) ("By formally declaring anyone opposed to same-sex marriage an enemy of human decency, the majority arms well every challenger to a state law restricting marriage to its traditional definition.").

227. See *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003).

228. See *Windsor*, 133 S. Ct. at 2709 (Scalia, J., dissenting) ("[T]he view that *this* Court will take of state prohibition of same-sex marriage is indicated beyond mistaking by today's opinion."). *Obergefell* vindicated this concern.

229. See *Lawrence*, 539 U.S. at 571-73.

230. *Id.* at 572 (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)) (internal quotation marks omitted).

231. See *id.* at 595-96 (Scalia, J., dissenting) (citing *Bowers v. Hardwick*, 478 U.S. 186, 192-94 (1986)).

232. See *Michael H. v. Gerald D.*, 491 U.S. 110, 139 (1989) (Brennan, J., dissenting).

justification from the United States than simply morality or tradition. The harm argument is not altogether convincing, given the particularities of underground fundamentalist communities which seem inapplicable were polygamy to be scaled in this country. The government's federalism argument too is probably unavailing, given the Court's decision in *Obergefell* to apply similar logic to a state prohibition of same-sex marriage. If these were the only factors, then the Court likely would invalidate state bans on polygamous marriage due to the impermissible motive behind their passage and maintenance.

Neither *Windsor* nor *Lawrence* turned entirely on a prohibition of moral reasoning considered to be animus, however, and the emergent-rights approach underlying those cases²³³ suggests an alternative outcome in this case. The *Lawrence* language in support of private control over an adult's own sexual life certainly should support a right to engage in *polyamorous* relationships involving multiple *unmarried* partners.²³⁴ The question is whether there is an emergent right to plural *marriage*, which invites consideration of state law and, more generally, public recognition.²³⁵ As previously noted, there are no state laws in support of marriage to multiple people,²³⁶ and aside from the odd, if popular, television show,²³⁷ there is virtually no public recognition of a right to engage in polygamy.

This analysis of the political winds, and the role that they played in recent precedent, supports the Supreme Court outcome that a layman would predict: a state ban on polygamy remains valid. There are insufficient grounds to find that polygamous marriage is an emergent right. The Court could distinguish *Lawrence* and *Windsor* on pragmatic grounds, deciding that the alleged harms of polygamy are real, and thus the states have a rational basis for legislating against this expansion in the definition of marriage.

B. *Inadmissibility Grounds Under INA Section 212(a)(10)(A)*

To support the inadmissibility grounds under INA section 212(a)(10)(A), the United States could build on the arguments in favor of the state public policy exception and advance an additional set of arguments unique to the immigration setting. As at the state level, the prevention of harm to women and children remains a reason to ban immigration of those coming to practice

233. See *supra* Part I.D.

234. See Stevens, *supra* note 224; cf. Sigman, *supra* note 9, at 166 (noting study documenting incidence of polygamy-like features in an American racial minority population).

235. See Parshall, *supra* note 108, at 298 (“To the extent that societal attitudes toward homosexuals have evolved, the Court has taken note, treating the changes in public opinion and legislative enactments as objective referents . . .”).

236. See Smearman, *supra* note 11, at 429.

237. E.g., *Sister Wives* (TLC television broadcast 2013).

polygamy.²³⁸ The inadmissibility grounds also reflects the considered judgment of Congress for more than 124 years that polygamy is morally reprehensible,²³⁹ and the Court should defer under separation of powers doctrine.

Specifically in the immigration context, the United States would argue, the Court gives strong deference to the Congressional plenary power over immigration control.²⁴⁰ Much as Congress has decided that drug traffickers,²⁴¹ security threats,²⁴² and persons afflicted by certain diseases²⁴³ should be excluded, so should Congress be able to prohibit those coming to practice polygamy. Reasons for this ban are not only moral, but pragmatic as well.

Congress's decision to maintain the polygamy ban could be justified based on a traditional goal of immigration reform: limit immigration numbers.²⁴⁴ To admit polygamous beneficiaries would swell the count of immediate relatives, a preference category which is not currently subject to limits but which relies to some extent on the assumption that only a limited number of individuals can qualify.²⁴⁵ By taking greater advantage of the immediate relative provision for spouses and children, polygamous beneficiaries would challenge the goodwill which these provisions have long enjoyed, possibly prompting Congress to restrict them.²⁴⁶

In addition, the polygamy ban may be justified on the basis of fraud prevention.²⁴⁷ It is already difficult for USCIS to ensure the validity of monogamous opposite-sex, and, as of recently, same-sex, marriages.²⁴⁸ To permit people to qualify for immediate relative benefits on the basis of polygamous marriages could incentivize sham marriages designed to obtain immigration benefits.²⁴⁹ Immigration officers would need to check for unique

238. *See supra* notes 210-214 (discussing harm-related arguments).

239. *See supra* Parts II.B & II.C.

240. *See supra* Part III.B.

241. 8 U.S.C. § 1182(a)(2)(C) (2013).

242. 8 U.S.C. § 1182(a)(3) (2013).

243. 8 U.S.C. § 1182(a)(1)(A) (2013).

244. *See generally* Select Commission on Immigration and Refugee Policy, *U.S. Immigration Policy and the National Interest*, in *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 3-24 (THOMAS ALEXANDER ALEINIKOFF ET AL. eds., 7th ed. 2012) [hereinafter Select Commission] (summarizing history of American immigration reform which frequently involved efforts to limit immigration).

245. Thanks to Professor David Martin for highlighting the connection between the good graces of Congress and the longevity and limited nature of the immediate relative category.

246. *See id.*

247. *Cf.* Abrams, *supra* note 20, at 1682-83 (discussing requirements to prove valid marriage for immigration purposes).

248. *See id.* at 1682-83; Edwards, *supra* note 17, at 184-85.

249. *Cf.* Abrams, *supra* note 20, at 1684-85 (addressing this issue in monogamous-marriage setting).

patterns of behavior that signal valid or fraudulent polygamous relationships.²⁵⁰ Congress may justify its prohibition of polygamous marriages on the difficulty of identifying these types of relationships and the administrative expense of retraining its officers for this purpose.²⁵¹

The polygamous couple could challenge these arguments on several grounds. Even if the harm-based rationale holds water in the domestic context, a contention which is shaky at best,²⁵² there is insufficient evidence that these harms are replicated with the same frequency in polygamous immigrant households.²⁵³ Harms to women and children in such households are not necessarily greater than in monogamous households.²⁵⁴

Furthermore, the couple would argue, the harm argument is an *ex post* justification for legislation which would not have passed were it not for a legacy of prejudice against the Mormons and the Chinese.²⁵⁵ The so-called “moral” reason for the polygamy ban should be assessed with respect to this initial, illegitimate justification, which amounts to nothing more than a “bare congressional desire to harm a politically unpopular group.”²⁵⁶ Although Congress historically has exercised its plenary power to exclude specific groups, such as the Chinese²⁵⁷ and homosexuals,²⁵⁸ Congress has eventually removed each discriminatory ban once the injustice or inappropriateness became apparent.²⁵⁹ The inadmissibility grounds for polygamous immigrants remains because Americans remain opposed to polygamy.

250. See Kerry Abrams, *Marriage Equality, Immigration, and . . . Fraud?*, CONCURRING OPINIONS (July 15, 2013, 3:36 PM), <http://www.concurringopinions.com/archives/2013/07/marriage-equality-immigration-and-fraud.html> (discussing this issue among same-sex petitioners for marriage-based immigration benefits).

251. For an argument that immigration authorities must be sensitive in applying marital-validity criteria after *Windsor*, see Edwards, *supra* note 17, at 187-88.

252. See Part IV.A (discussing polygamous couple’s argument against harm-based rationale for state public policy exception).

253. See Sigman, *supra* note 9, at 181.

254. See *id.* at 173, 181.

255. See *supra* Part II.A (describing opposition to Chinese and Mormon practices as early motive for polygamy bans).

256. U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

257. See *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

258. See *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982) (describing Congressional intent behind marriage provisions in immigration law); James R. Edwards, Jr., *Homosexuals and Immigration: Developments in the United States and Abroad*, CENTER FOR IMMIGRATION STUDIES (May 1999), <http://www.cis.org/Immigration%2526Homosexuals-PolicyTowardHomosexuals>.

259. See Edwards, Jr., *supra* note 258 (describing repeal of homosexual prohibition). Congress replaced discriminatory provisions against Chinese immigrants and immigrants from other nations with the introduction of fairly uniform per-country limits in 1965. See Select Commission, *supra* note 244, at 20.

In response to the immigration control argument, the polygamous couple could argue that this too is nothing more than an *ex post* justification for a law that was actually motivated by impermissible bias. In 1891, when Congress first introduced the polygamy ban into immigration law, U.S. immigration law contained merely qualitative controls, rather than the quantitative controls introduced in the 1920s.²⁶⁰ To make a numbers argument in this context is anachronistic.

Hearing these arguments, the Court would face a predicament similar to that involved with the state public policy exception. Under *Moreno* scrutiny, the Court would find offensive two aspects of this inadmissibility grounds: the bias on which the initial ban was based, and the fact of changing justifications. The polygamous couple makes a persuasive argument that the various reasons which the government *could* provide for the inadmissibility grounds today likely would *not* prevent the current Court from concluding that the ban originated in, and conceivably perpetuates based on, animus. *Ex post* justifications for discriminatory laws do not satisfy the equal protection clause.²⁶¹ Nor would the Court likely find the plenary power doctrine sufficient to insulate from constitutional challenge a law based on impermissible bias.²⁶² Thus, under *Moreno* scrutiny, the Court might be inclined to strike the polygamy ban for lack of an (adequate) rational basis.

Here again, however, the absence of an emergent right to engage in polygamous marriage would give the Court pause before applying its precedent in *Lawrence* and *Windsor* to the polygamy setting. If U.S. citizens do not have an emergent right to engage in polygamy, as concluded above, then immigrants do not have a persuasive claim either based only on their marital arrangements abroad. Indeed, the domestic public policy exception supersedes the law of the place of celebration where there is a conflict.²⁶³ For this reason, a majority of the current members of the Court probably would find that the ban should stand, and the Court need not even reach the plenary power issue.

260. See Select Commission, *supra* note 244, at 11, 15.

261. Cf. *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (“The principal purpose [of DOMA was] to impose inequality, not for other reasons like governmental efficiency.”); *United States v. Virginia*, 518 U.S. 515, 535-36 (1996) (noting that, for gender-based classifications, Supreme Court “precedent instructs that ‘benign’ justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded”).

262. See *Nguyen v. Immigration & Naturalization Serv.*, 553 U.S. 53 (2001).

263. See *supra* Part II.C (describing the public policy exception as governed by *state* law, in theory, but *federal* law, in practice, according to *Matter of H—*).

CONCLUSION

United States v. Windsor was popularly conceived as a decision permitting consenting adults to marry whom they love and still qualify for federal benefits. That view is inaccurate. One minority group—gay and lesbian couples—now may take advantage of *Windsor*; yet, another group of older pedigree still cannot. Polygamous couples have been more or less legitimate in other parts of the world for millennia, and yet, the favorable logic of *Windsor* is not enough to invalidate a 124-year ban on polygamous immigration to the United States. The disparity highlights a difference in American popular opinion, which may change, and the more fundamental decay in respect for morals legislation, which may be irreversible.

This Note aimed to clarify the implications of *Windsor* for moral reasoning in the legislative process, specifically as it pertains to polygamous prospective immigrants. The specific application, at least, is straightforward. The prospects for admissibility of polygamous immigrant spouses remain unchanged, in the near term, by either *Lawrence* or *Windsor*. If the Supreme Court were to reach the merits of a case today which challenged the state public policy exception and the inadmissibility grounds for polygamous spouses, the Court would probably rule in favor of the United States. The emergent-rights reasoning that prompted the *Lawrence* and *Windsor* Courts to act on a finding of animus simply does not extend to polygamous conduct at this time. Thus, the excitement of the polygamists and the fears of Justice Scalia are not subject to prompt realization.

Yet, the deeper concern with the validity of moral reasoning remains. The logic of *Lawrence* and *Windsor* suggests that the Court would describe the motives behind both the state public policy exception and the federal inadmissibility grounds as “animus,” given arguments similar to those at issue in *Lawrence* and *Windsor*. If the Court were to make such a finding, the Court’s *Moreno* scrutiny would be sufficient to invalidate both the state public policy exception and the inadmissibility grounds—notwithstanding plenty of moral and non-moral justifications—were it not for the absence of an emergent right. Some may question the likelihood that a *Moreno*-based invalidation will come to pass anytime soon. Yet, again, this is a predictive claim rather than the descriptive claim advanced in this Note, namely, that the *Windsor* logic does extend this far. Despite this discrepancy between predictive and descriptive perspectives, in the not too distant future, polygamous spouses may be able to join gay and lesbian couples in claiming emergent rights.²⁶⁴ In that event, virtually nothing would prevent the Court from invalidating the polygamy bans as they apply to consenting adults.

264. See *supra* note 10 (citing *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1222-23 (D. Utah 2013)).

Such a result would only confirm the implication of *Lawrence* and *Windsor*: an elected legislature may no longer prohibit conduct simply because the majority believes that it is immoral.²⁶⁵ On one hand, this innovation would benefit those who disagree that these practices are immoral and wish to engage in them. On the other hand, this new judicial requirement would interfere fundamentally with the plenary power of the federal legislature in immigration matters and with the police powers of state legislatures in social matters. Invalidating animus-based legislation remains an admirable and appropriate goal. Yet, when opposition to people is conflated with opposition to a particular practice, and when animus is conflated with certain “decent and honorable religious or philosophical premises,”²⁶⁶ the likes of which a slim majority of the Court flatly rejects, basic respect for separation of powers, federalism, and the will of the people suffers.

265. See *supra* text accompanying notes 208-09.

266. *Obergefell v. Hodges*, No. 14-556, at 19 (U.S. June 26, 2015).

