Was Justice Scalia Right about the Slippery Slope to “the End of All Morals Legislation”? 
After Same-Sex Marriage, Is Polygamy Next?

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Note to Participants in Princeton University LAPA Seminar, February 13, 2017: This paper is a draft of Chapter 3 of a book project (with Linda C. McClain, a visiting faculty fellow in the Princeton University Center for Human Values) on the legal enforcement and promotion of morals and public values. I prepared the first draft as a public lecture and the present draft retains some of the polemical and conversational style of that lecture. I should mention that I always write early drafts in outline format. Doing so helps me to distill my points and to hammer out a draft without having to worry about transitions or footnotes. I look forward to your comments on the paper.

I. INTRODUCTION

A. The title of my paper is: “Was Justice Scalia Right about the Slippery Slope to ‘the End of All Morals Legislation’? After Same-Sex Marriage, Is Polygamy Next?”

1. Let me explain the title and topic.

2. In U.S. politics and constitutional law, many have argued that recognizing constitutional rights of gay men and lesbians puts us on a slippery slope to protecting . . . [fill in the blank with your chosen horrible outcome].

3. For example, in Lawrence v. Texas (2003), which recognized a right of gay men and lesbians to intimate association, Justice Antonin Scalia protested in dissent that the case “effectively decrees the end of all morals legislation.” Is Scalia right that there is really no distinction between same-sex intimate association and, to quote his list, “bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity”?

4. Similarly, in Obergefell v. Hodges (2015), which recognized the right of gay men and lesbians to marry, Chief Justice John Roberts suggested in dissent that the decision puts us on a slippery slope to protecting a right to plural marriage or polygamy.

B. Let us distinguish two quite different responses to Scalia’s slippery slope argument.

1. The first, taken by some libertarians, is to embrace his argument, greasing the slide down the steep slope to the end of all morals legislation!

2. The second response, which I shall take, is to rebut Scalia’s slippery slope argument, insisting that we can draw some significant distinctions between same-sex intimate association and marriage, on the one hand, and most of the horribles on his list, on the other.
C. Analyzing *Lawrence* and *Obergefell*, I show how a careful articulation of the rights in question can avoid problems like Scalia’s (as well as Roberts’s) slippery slopes.

1. First, I make some general observations about the circumstances in which slippery slope arguments are prevalent and thought to be persuasive.

2. Second, I rebut Justice Scalia’s argument about the slippery slope from same-sex intimate association and marriage to “the end of all morals legislation.” I shall do so through sketching five tools that are available in our constitutional practice for getting some traction on such slopes.

3. Finally, I criticize Chief Justice Roberts’s argument about the slippery slope from same-sex marriage to polygamy.

   a. I should make clear at the outset that I do not argue *against* a right to plural marriage.

   b. Rather, I argue that Roberts was wrong to suggest that it would have been a smaller step to plural marriage than to same-sex marriage and to imply that *Obergefell* itself makes the case for protecting plural marriage.

D. Those who are familiar with my work will not be surprised that I will be deeply critical of Justice Scalia’s arguments in *Lawrence*.

1. As you know, Scalia died last year, but I will not pull any of my punches in criticizing his arguments.

2. It would dishonor him, the most pugilistic person in the history of American constitutional law, to do so.

E. This paper is part of a book I am writing (along with Linda C. McClain) on the legal enforcement and promotion of morals and public values.


2. That’s *ordered* liberty, to be contrasted with Scalia’s horrific vision of disordered liberty or liberty run amuck.

3. Our book will analyze classical controversies over law and morality as they have arisen in contemporary struggles for the rights of gay men and lesbians.

4. Conservatives like Justice Scalia have warned for decades that protecting a right of same-sex couples to intimate association would put us on a slippery
slop not only to gay marriage and polygamy but to “the end of all morals legislation.” This warning presupposes that government may enforce traditional morality.

5. Yet many conservatives have objected that when government prohibits discrimination against gay men and lesbians, it legislates morality and thereby denies liberty.

6. Liberals and progressives often flip these two complaints about governmental moralizing, condemning traditional morals legislation and advocating governmental measures to promote a different moral objective: the status and benefits of equal citizenship for all.

7. It seems, to paraphrase Mark Twain, that nothing so needs reforming as other people’s morals.

8. The gay rights debate is thus the latest round of an old problem in liberal societies: the right relationship between law and morality.

9. But the gay rights debate is unique in its capacity to advance liberal thought toward a resolution of this problem.

10. Our book will show how this debate points to the appropriate scope of the enforcement and promotion of morals and public values.

II. THE CIRCUMSTANCES FOR SLIPPERY SLOPE ARGUMENTS

A. Slippery slope arguments are so common in U.S. politics and constitutional law that you may simply take them for granted as a tool in the political and legal analyst’s toolkits.


2. And some, like the British conservative Edmund Burke, have suggested that slippery slope arguments are a peculiarly American phenomenon.

   a. Burke wrote: “In other countries [than the American colonies], the people...judge of an ill principle in government only by an actual grievance; here they anticipate the evil, and judge of the pressure of the grievance by the badness of the principle. They augur misgovernment at a distance and snuff the approach of tyranny in every tainted breeze.”
3. Slippery slope arguments may not be peculiar to the U.S.

4. But there is no doubt that they are more prevalent and more extreme here than elsewhere.

5. In other countries, people might think you were paranoid if you made the kind of slippery slope arguments that are common in our political and constitutional culture.

   a. Especially those made with respect to the First Amendment’s protection of freedom of speech, the Second Amendment’s protection of the right to bear arms, and the Fourteenth Amendment’s protection of substantive liberties like the right to privacy or autonomy.

6. But in the U.S., people often are persuaded by such slippery slope arguments.

   B. This leads me to ask, what is it about the U.S. political and constitutional cultures that fosters slippery slope arguments? Or, what are the circumstances in which slippery slope arguments are prevalent?

1. Circumstances of distrust of government in general.

   a. E.g., a culture in which many view government as, at best, a “necessary evil” (to use the term from Garry Wills’s well-known book) rather than a force for positive good.

   b. In such circumstances, slippery slope arguments are the coin of the realm not only among libertarians who hate government.

   c. But also among ACLU liberals who fear government.

   d. And such arguments gain more general currency in the political and constitutional culture.

2. Circumstances of diversity, moral pluralism, and deep disagreement on fundamental moral, political, and constitutional questions—and related distrust of one another.

   a. In such circumstances, people may not trust those with whom they radically disagree to wield political or judicial power reasonably or with appropriate respect for the principled development of our constitutional commitments.

   b. We might expect slippery slope arguments to be less common or less extreme in societies that are more homogeneous morally.
3. Circumstances of distrust of common law constitutional interpretation, of reasoning by analogy from one case to the next, and of the possibility of making reasoned judgments in drawing lines and maintaining cogent distinctions in building out constitutional doctrines.

   a. See, e.g., Scalia’s book, *A Matter of Interpretation* (1997) (based on his Tanner Lectures at Princeton University), which is a jeremiad against common law constitutional interpretation and in favor of originalism (and the view that the founders already made our judgments for us).

   b. See also his dissents in *Planned Parenthood v. Casey* (1992), *Lawrence*, and *Obergefell*, which are all-out attacks on the very possibility of “reasoned judgment” in interpreting abstract constitutional commitments to liberty and equality as distinguished from arbitrary imposition of justices’ subjective preferences.

4. Circumstances of moral flux and change together with fear of further change.

   a. E.g., many conservatives are wary of change: as part of what Albert Hirschman famously called the “rhetoric of reaction,” they stir up opposition to change by conjuring up horribles concerning where that change might take us.

   b. And some conservatives, most famously Lord Patrick Devlin, seem to believe that traditional morality is a seamless web, and that any change in it leads to the “disintegration” of the moral fabric of a society. (Cf. Robert George’s idea of the “moral ecology.”)

   c. In expressing a similar view, Justice Scalia has characterized change in terms of “destruction” and “rot.”

C. Do these circumstances for slippery slope arguments sound familiar?

   1. Don’t they sound like the very circumstances of the political and constitutional culture of the U.S. at the present time?

   2. In Chapter 8, we shall consider whether the prevalence of extreme slippery slope arguments in the U.S.—in particular, with respect to the right to bear arms—is a symptom of political and constitutional dysfunction or pathology.

III. SCALIA’S SLIPPERY SLOPE FROM LAWRENCE TO “THE END OF ALL MORALS LEGISLATION”

A. Now let us turn to assessing Justice Scalia’s slippery slope argument in *Lawrence*. Does recognizing a right of gay men and lesbians to intimate association really spell
the end of all morals legislation”?

B. Is there really no distinction between same-sex intimate association and, to recall Scalia’s list, “bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity”?

C. Trigger warning: constitutional law is not for the squeamish, and I shall be discussing some of these horribles on Scalia’s list, even though we do not ordinarily talk about such things in polite society!

D. At the end of the majority opinion in Lawrence, Justice Anthony Kennedy articulated some limits on the scope of the liberty being recognized there (presumably in response to Scalia’s warnings in dissent about the slippery slope). Kennedy stressed that:

1. “The present case does not involve minors.” Instead, it involves adults.

2. “It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused.” In other words, the sexual intimacy does not inflict harm upon others. And it involves consenting adults. Furthermore, it does not involve incest or sex trafficking.

3. “It does not involve public conduct or prostitution.” Instead, it involves sex between consenting adults, without pay, in private.

4. “It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.” That is, they are not seeking the right to marry.

a. Aha!, you may interject, because you know that, twelve years later, gay men and lesbians did seek and win the right to marry in Obergefell.

b. But below I shall distinguish between extending the principles in precedents through the ordinary processes of common law constitutional interpretation (as in the development from Lawrence to Obergefell) and sliding down a slippery slope.

5. Earlier in the opinion, Kennedy had emphasized that protecting the right of gay men and lesbians to sexual intimacy does not involve “injury to a person or abuse of an institution the law protects.” Again, he is saying that there is no injury to others. And there is no abuse of the institution of marriage (e.g., through incest, adultery, or bigamy).

6. These limits, he suggests, distinguish the sexual intimacy protected in
According to Justice Kennedy, same-sex intimate association is analogous to opposite-sex intimate association, not to the horribles on Scalia’s list.

1. Kennedy judged gay men’s and lesbians’ sexual intimacy and way of life to be as morally worthy and entitled to respect as that of straights.

2. Therefore, he wrote that petitioners are entitled to “respect for their private lives.” He concluded that the state may not “demean their existence or control their destiny by making their private sexual conduct a crime.”

3. Accordingly, the majority opinion held that the right of intimate association already recognized for straights in previous constitutional cases extended to gay men and lesbians.

4. That holding represents the principled extension of a right through the ordinary processes of common law constitutional interpretation: reasoning by analogy from one case to the next, building out a line of cases interpreting our constitutional commitments to liberty and equality through making reasoned judgments on the basis of experience, new insights, moral progress, and evolving constitutional consensus.

5. Those ordinary processes of constitutional interpretation do not put us on a slide down a slippery slope to the end of all morals legislation.

6. Indeed, they embody moral judgments about the best understanding of our constitutional commitments.

IV. TOOLS FOR GETTING TRACTION ON SCALIA’S SLIPPERY SLOPE

A. What, more generally, are the tools available in our constitutional practice for getting traction on Justice Scalia’s slippery slope in his dissent in Lawrence? Here I shall sketch five.

B. How we conceive the right being protected.

1. First, does Lawrence presuppose that I have a liberty to choose to do whatever traditionally immoral things I wish to do?

   a. If so, it indeed does hurl us down the slippery slope.

   b. And there is no distinction between the conduct protected there and the types of conduct on Scalia’s list.
2. Or does *Lawrence* presuppose simply that the rights of spatial privacy and intimate association already recognized for straights extend to gay men and lesbians?

  a. If so, it does not put us on the slippery slope.
  
  b. For there are significant distinctions between the conduct protected there and the sorts of conduct on Scalia’s list.
  
  c. And *Lawrence* grows out of the extension of principles in precedents through the ordinary processes of common law constitutional interpretation.

3. Second, does *Lawrence* launch a libertarian revolution by holding or presupposing that moral disapproval as such is not a legitimate basis for laws?

  a. If so, it shoves us down Scalia’s slippery slope.

4. Or does *Lawrence* instead seek to secure the status of equal citizenship for gay men and lesbians by striking down laws that “demean their existence”: an existence that we judge to be a morally worthy way of life entitled to respect?

  a. If so, it holds merely that moral disapproval that demeans the existence of a group whose members are worthy of status of equal citizenship is not a legitimate basis for laws.
  
  b. Thus understood, *Lawrence* does not push us down Scalia’s slippery slope.
  
  c. For there is a distinction between the conduct and way of life protected there and, for example, bestiality: If the person wanting to have sex with or to marry his horse complains that the law prohibiting bestiality demeans his existence and reduces him to the status of second class citizenship, we just aren’t going to be moved.

5. Justice Kennedy’s opinion in *Lawrence* (like that in *Obergefell*) intertwines concern for protecting liberty and the aspiration to securing equality in a way that makes clear that the Court was protecting the liberty of gay men and lesbians to intimate association and to marry in order to secure the status and benefits of equal citizenship for them.

  a. Bringing out the aspiration to securing the status and benefits of equal citizenship for a morally worthy group of citizens enables us to get
traction on the slippery slope.

b. Doing so shows that we don’t have to worry about sliding down to the morally unworthy horribles on Scalia’s list.

C. **How we justify protecting the right.**

1. Do *Lawrence* and *Obergefell* justify protecting the right of gay men and lesbians to intimate association and to marry on the ground that individuals have a right (1) to choose whom or what to have sex with, (2) to decide whom or what to marry, and (3) to choose to do whatever they damn well please with their bodies—a right to choose without regard for the moral good of what is chosen?

   a. If so, those decisions put us on Scalia’s slippery slope to bigamy, adult incest, prostitution, adultery, fornication, and bestiality.

2. Or do *Lawrence* and *Obergefell* to the contrary justify protecting the right of gay men and lesbians to intimate association and to marry on the ground that doing so promotes moral goods?


   b. He also quotes the Massachusetts Supreme Judicial Court’s formulation concerning moral goods in *Goodridge v. Dep’t of Public Health* (2003): because marriage “fulfills yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life’s momentous acts of self-definition.” That court also mentions the moral goods of “commitment, mutuality, companionship, intimacy, fidelity, and family.”

   c. If we protect the fundamental right to marry for same-sex couples because marriage is an “esteemed institution” for furthering such noble purposes and promoting such moral goods, doing so does not hurl us down the slippery slope.

   d. To work down Scalia’s list, if someone says she needs the right to commit incest or adultery or to engage in prostitution to enable her to pursue the moral goods of intimacy, commitment, and loyalty, we will not be persuaded to protect any such rights. We are not going to accept those rights as justified by those moral goods or as analogous
to intimate association and marriage for straights and gays.

D. **How we understand the processes of constitutional change that have brought us to recognize the right.**

1. Do we conceive extant processes of constitutional change (as Scalia does) as involving idiosyncratic judges arbitrarily imposing their subjective preferences and moral predilections on the rest of us?

2. Or do we conceive those processes in terms of common law constitutional interpretation: reasoning by analogy from one case to the next, building out lines of doctrine interpreting our constitutional commitments on the basis of experience, new insights, moral progress, and evolving contemporary consensus, all of which contribute to making moral judgments about the best understandings of those commitments?


3. If we hold the former view of the processes of constitutional change, we will worry about Scalia’s slippery slope, because who knows where the moral predilections of five subjective, willful justices might lead us?

   a. Although I doubt that anyone who would be confirmed to the Supreme Court (a) would hold idiosyncratic moral predilections or (b) would protect rights to the horribles on Scalia’s list.

4. But if we hold the latter view, we will not be worried about such a slippery slope.

   a. For we will understand that in making judgments about the best understanding of our constitutional commitments, justices do not go it alone.

   b. For example, in making judgments about evolving contemporary consensus, justices might look for evidence of desuetude, underenforcement of old laws on the books, and democratic repeal of such laws.

   c. E.g., Cass Sunstein argues that desuetude is a good ground for the decision in *Lawrence*: “Without a strong justification, the state cannot bring the criminal law to bear on consensual sexual behavior if enforcement of the relevant law can no longer claim to have significant moral support in the enforcing state or the nation as a
whole.”

d. On this second view of the processes of constitutional change, we will understand that courts generally do not lead but instead follow, consolidating democratic change that is already occurring, invalidating outlier statutes, and embodying evolving contemporary consensus.

e. Furthermore, we will understand that as these processes of constitutional change unfold, social movements are hard at work drawing analogies between rights already recognized in previous cases and the rights they are seeking to vindicate (e.g., as we have seen with the gay rights movement).

5. If one thinks that courts are in the vanguard of constitutional change, and impose change before social movements and the democratic processes do their work in securing the preconditions for it, one might fear the slippery slope.

6. But if one thinks courts come along and consolidate change in understanding of constitutional commitments that is already underway through social movements and the democratic processes, one should not fear the slippery slope.

a. For those preconditions for constitutional change—e.g., social movements, desuetude, underenforcement, and democratic repeal—simply are not in place for the types of conduct on Scalia’s list of horribles.

E. How we limit the extension of liberty: harm arguments.

1. Recall that Justice Kennedy’s majority opinion in Lawrence mentions, as one limit on the reach of the liberty protected through its holding, that recognizing the right of gay men and lesbians to intimate association does not involve “injury to a person or abuse of an institution the law protects.”

2. This formulation may seem to evoke John Stuart Mill’s “harm principle” as a limit on governmental regulation. Mill famously argued that the only justification for government to restrict individual liberty is to prevent harm to others.

3. Indeed, Chief Justice Roberts charges Kennedy with interpreting the Fourteenth Amendment to “enact” Mill’s harm principle. (I will rebut that charge below and in Chapter 4.)
4. But Kennedy is not using a comprehensive harm principle as a *sword* to strike down all traditional morals legislation that does not harm others.

5. Instead, he is mentioning that same-sex intimate association does not harm others as a *shield* to limit further extension of liberty: he is implicitly acknowledging that some practices really do inflict harm on others or on institutions that are worth protecting—and that those practices might be outlawed for that reason.

6. Let me sharpen this distinction between sword and shield in light of how plaintiffs make arguments and how courts write opinions in U.S. constitutional law.

   a. Plaintiffs do not successfully make arguments, as a matter of first principle, that they have a right to do X because doing X is a purely self-regarding act that imposes no harm on others or on institutions. That would be making harm arguments as a sword.

   b. Instead, plaintiffs make arguments for extending rights through the ordinary processes of common law constitutional interpretation and, when pressed for limits on the extension of those rights or when confronted with dire warnings about the harmful consequences of extending the rights, they reply that protecting the right will not impose the feared harmful consequences upon others or institutions. That is making harm arguments as a shield.

7. Put another way, justices on the Supreme Court do not write opinions making arguments that an asserted right causes “no harm to others” affirmatively as a sword to carve out a boundary between the proper jurisdiction of governmental regulation and that of individual liberty.

8. Instead, they mention “no harm to others” defensively as a shield to deflect warnings that liberty is boundless, unruly, or poses substantial risks of harmful consequences to others or to institutions.

9. To recapitulate:

   a. In U.S. constitutional law, we emphatically do not see use of the harm principle as a sword affirmatively to strike down laws on the ground that the practices prohibited do not impose harm on others or on institutions.

   b. But we do see use of harm arguments defensively to limit the extension of liberty and to respond to dire warnings about harmful consequences from protecting particular liberties.
10. Thus, in U.S. constitutional law, litigants and judges typically use harm arguments as a shield to limit slippery slope arguments—or to justify not extending precedents to recognize asserted liberties—as we will see when we turn to rebutting Roberts’s arguments about the slippery slope to polygamy.

11. One final observation about harm arguments in U.S. constitutional law:

   a. More generally, “no harm to others” may sometimes appear as a factor or circumstance in totality of the circumstances, all things considered judgments concerning the appropriate balance between governmentally enforced order and individually protected liberty—to wit, ordered liberty.

   b. Engaging in that type of utilitarian or consequentialist talk about harm certainly does not amount to interpreting the Constitution to enact Mill’s harm principle.

   c. It is hardly the case that Mill has a trademark on the term “harm” and that every time anyone uses that word she or he is invoking Mill.

F. How we test slippery slope arguments: comparative constitutional inquiry.

1. In *Lawrence*, Justice Scalia also objected to Justice Kennedy’s reference to a “wider civilization” beyond the U.S. in justifying protecting the right of gay men and lesbians to intimate association.

   a. Quoting Justice Clarence Thomas, Scalia protested that “this Court...should not impose foreign moods, fads, or fashions on Americans.”

   b. He insisted that the only thing that matters is “this nation’s history and tradition” (emphasizing “this nation’s”).

   c. Yet Scalia’s objection to the majority’s engaging in comparative constitutional inquiry to *support* protecting the right did not stop Scalia himself from engaging in such inquiry to *oppose* protecting it: as discussed below, he warned that, just as Canada moved from protecting intimate association for same-sex couples to protecting marriage for them, so too, were we likely in the U.S. to slide down that slope in the aftermath of *Lawrence*.

   d. Chief Justice Roberts likewise engaged in comparative constitutional inquiry to oppose protecting same-sex marriage, as we will see in rebutting his arguments about the supposed slippery slope to polygamy.
2. Despite the resistance in U.S. constitutional law to comparative constitutional inquiries in judicial decisions, these inquiries would seem useful to test slippery slope arguments.

3. In response to the warning that protecting right X leads ineluctably down the slippery slope to protecting right Y (and that that’s a bad thing), we might test that warning by asking, have the countries that have protected right X ended up (or are they moving toward) protecting right Y? Or have they been able to draw lines and maintain significant distinctions and thus to avert the slide?

4. Or, in response to the worry that not protecting right X leads inexorably to evil Y, we should inquire whether evil Y has come to pass in other countries that have not protected right X.

5. For example, in his opinion for the Court of Appeals for the Seventh Circuit in American Booksellers Ass’n v. Hudnut (1986), Judge Frank Easterbrook made a well-known slippery slope argument in the context of the First Amendment.

   a. He objected that upholding the Indianapolis antipornography ordinance (affirming the equal citizenship of women in regulating pornography) against a First Amendment challenge would amount to subjecting people to a regime of “thought control” through favoring the viewpoint that women are equal to men over the viewpoint that women are subordinate to men.

   b. He proclaimed that doing so would put us on a slippery slope leading to “totalitarian government.”

6. Comparative inquiry suggests how parochial, unfounded, and overblown such slippery slope arguments can be.

   a. For Canada, our reasonable and freedom-loving neighbor to the north, came to the opposite conclusion regarding a similar antipornography law. In Butler v. The Queen (1992), the Supreme Court of Canada, while acknowledging that the country’s criminal obscenity law restricted freedom of expression, upheld the law on the ground that it was justifiable to ban pornography that harms women.

   b. It’s been 30 years since Hudnut and 25 years since Butler. The last time I checked, Canada had not fallen down the slippery slope into totalitarian government.

   c. Such comparative constitutional inquiries might help deflate overblown slippery-slope arguments, whether made by conservative
judges like Easterbrook and Scalia or liberal organizations like the ACLU.

d. (Of course it is another matter whether Canada’s approach to pornography has been effective.)

7. Thus, comparative constitutional inquiry can help us get traction on slippery slopes.
   a. Through providing empirical test cases, it may suggest that fears of slippery slopes are overstated.
   b. We’ll use this tool below to test the supposed slippery slope from same-sex marriage to polygamy.

G. If we use all five of these tools, we will be able to get some traction on Justice Scalia’s slippery slope from Lawrence’s recognition of the right of gay men and lesbians to intimate association to “the end of all morals legislation.”

H. We will be able to see that, far from being “the end of all morals legislation,” Lawrence is the beginning of legitimate morals legislation: legislation that does not demean or humiliate the morally worthy ways of life of people who are morally entitled to the status of equal citizenship.

   1. Lawrence entails and undertakes a decidedly moral inquiry: deciding what ways of life are morally worthy of not being demeaned or humiliated, and whether laws denying them basic liberties and the status of equal citizenship are demeaning or humiliating to them.

   2. It does not stem from a relativistic, utilitarian, or libertarian rejection of morals as such as a basis for justifying laws.

V. ROBERTS’S SLIPPERY SLOPE FROM OBERGEFELL TO POLYGAMY

A. Now let us turn to Chief Justice Roberts’s slippery slope from Obergefell’s protection of the right of gay men and lesbians to marry to recognition of the right to plural marriage or polygamy.

   1. First, we should observe that Roberts’s slippery slope argument is not as sweeping and overwrought as Scalia’s. It is narrower and more direct.

   a. Unlike Scalia, Roberts is not saying that once you recognize a right to X, there is no limiting principle and anything goes or everything is permitted!
b. Instead, Roberts is saying that if you accept the principles Kennedy articulates in his majority opinion in *Obergefell* to justify recognizing the fundamental right to marry for same-sex couples, the logical next step in applying those principles is to recognize a right to polygamy.

c. Indeed, he is saying that it would be a smaller leap from those principles to polygamy than to same-sex marriage.

2. Second, as suggested above, we might distinguish between sliding down slippery slopes and principled extension of lines of cases through reasoning by analogy from one case to the next.

   a. Just because one case (e.g., *Lawrence*) leads to another (e.g., *Obergefell*) does not mean that the first case put us on a slippery slope to the second.

   b. We should distinguish (1) principled development of a line of cases through extending their holdings and rationales in a new case from (2) sliding down a slippery slope.

   c. In light of this distinction, we might argue that the movement from *Lawrence* to *Obergefell* was not down a slippery slope toward the end of all morals legislation; instead, we can see that the principled development of the line of cases that led to protecting the right in *Lawrence* in turn also leads to protecting the right in *Obergefell*.

3. Whether we conceive Roberts’s argument in dissent as a slippery slope argument or more narrowly as an argument against the way the majority opinion in *Obergefell* extended the principles articulated in the line of cases protecting the right to autonomy, I shall focus on two arguments he makes: the first from history and tradition and the second from the majority’s reasoning in *Obergefell*.

B. This Nation’s History and Tradition

1. One of the standard doctrinal tests for deciding whether an asserted liberty is protected by the Due Process Clause is whether it is “deeply rooted in this nation’s history and tradition.” *Moore v. City of East Cleveland* (1977).

2. Purportedly applying that test, Roberts contends that “from the standpoint of history and tradition, a leap from opposite-sex marriage to same-sex marriage is much greater than one from a two-person union to plural unions, which have deep roots in some cultures around the world. If the majority is willing to take the big leap, it is hard to see how it can say no to the shorter one.”
a. He mentions the cultures of “the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs.”

3. Not so fast. Roberts’s argument from history and tradition seems completely disingenuous.

4. After all, Roberts himself advocates *Washington v. Glucksberg*’s (1997) approach to the due process inquiry instead of Kennedy’s approach, which is represented in *Casey, Lawrence*, and now *Obergefell*.

   a. (*Glucksberg* had sought to rein in and narrow *Casey*’s approach—calling for “reasoned judgment” about the full meaning of our constitutional commitments to abstract moral principles of liberty—to a positivist inquiry into historical facts concerning “this nation’s history and tradition”).

   b. *Glucksberg*’s approach does not look to the historical practices of “some cultures around the world” in interpreting the Due Process Clause of the U.S. Constitution; under it, those practices are irrelevant.

   c. *Glucksberg* stresses that what matters is “this nation’s history and tradition” (as noted above, Scalia adds the emphasis to “this nation’s”).

5. *This nation’s* history and tradition does not include any legal recognition whatsoever of plural unions, whatever may have been the case with Roberts’s examples of the Kalahari Bushmen, the Han Chinese, the Carthaginians, the Aztecs, and others.

6. From the standpoint of *this nation’s* history and tradition—which includes evolving contemporary consensus toward protecting gay rights but not toward protecting plural unions—it would be a much greater leap to plural unions than it was to marriage for gay men and lesbians.

C. The Majority’s Reasoning in *Obergefell*

1. Chief Justice Roberts also writes: “It is striking how much of the majority’s reasoning would apply with equal force to the claim of a fundamental right to plural marriage.”

2. Maybe so, if constitutional interpretation and change is basically a matter of justices sitting in a constitutional theory seminar room—and applying abstract principles and general phrases from precedents to new cases—rather than engaging in a dialogue about constitutional interpretation and change
with other institutions.

3. But it is not. Constitutional interpretation and change proceed through the processes of common law constitutional interpretation, democratic deliberation, and social movements as described above.

4. I shall argue below that none of the preconditions for constitutional change that were in place for recognizing a right to marriage for gay men and lesbians in Obergefell is in place with respect to recognizing a right to plural marriage.

D. Collier v. Fox

1. Before making that argument, I want to observe that Roberts’s dissent in Obergefell may have given a boost to the arguments for a right to plural marriage.

2. Imagine that you are a lawyer who has been trying to make the case for a right to plural marriage.

   a. You have just read Obergefell and understandably have been emboldened by Roberts’s dissent arguing that its principles “apply with equal force to the claim of a fundamental right to plural marriage.”

   b. You also take heart from his claim that it would be a smaller step to protect plural marriage than to recognize same-sex marriage.

3. Imagine that you cut and past the key language from Obergefell into a complaint challenging the Montana statute prohibiting bigamy.

4. Imagine that you do a search and replace: find every “gay men and lesbians” or “homosexuals” in the language from Obergefell and replace it with “polygamists.”

5. Do these things and you will have practically drafted the complaint actually filed in Collier v. Fox.

6. Indeed, in August 2015, not long after Roberts filed his dissent in Obergefell, Christine Collier, Victoria Collier, and Nathan Collier filed such a complaint in federal district court in Montana challenging that state’s marriage laws for not recognizing plural marriage.

7. This sounds like clever lawyering. But will it succeed?
a. Roberts’s dissent in Obergefell, combined with Scalia’s dissents in Lawrence and United States v. Windsor (2013), practically cried out for advocates of plural marriage to try this!

b. Indeed, Scalia’s dissent in Windsor—objecting that the reasoning of the majority in striking down the federal Defense of Marriage Act entailed a federal constitutional right to marry for same-sex couples—was cited by several lower court judges in justifying reaching exactly that conclusion after Windsor (2013) and before Obergefell (2015).

c. We might expect to see the same thing happen with Roberts’s dissent in Obergefell regarding the right to plural marriage.

8. When are conservative justices going to learn not to write dissents like these?

a. Instead of engaging in such gloom and doom prophesying about the radical implications of the majority’s reasoning in cases like Lawrence, Windsor, and Obergefell, one might think that they would learn to be more prudent in trying to control the damage by arguing that the opinions in these cases were narrowly limited to deciding the specific issues before the Court (and had no implications for deciding other worrisome questions that might come down the pike).

(1) In Windsor, Roberts, unlike Scalia, took the more prudent, limiting approach in dissent.

(2) In Obergefell, however, Roberts wrote a dissent more like Scalia’s, warning about the radical implications of the majority’s reasoning.

b. One might ask, what is the purpose of and who is the audience for these evidently self-fulfilling and self-defeating dissents?

(1) Perhaps conservative cause organizations seeking to raise funds and rally troops in the culture war.

(2) Perhaps the Republican Party Presidential Platform Committee.

(3) Perhaps, as Scalia sometimes said in speeches and interviews, the law students who represent the next generation and who may in the long term fight to correct the error. Cf. Justice Ginsburg’s statement that “dissents speak to a future age.”
9. We’ll have to wait and see what ultimately happens in Collier v. Fox (or subsequent cases like it).
   a. The federal magistrate dismissed the case on the ground that plaintiffs lacked standing to challenge Montana’s law.
   b. The Colliers had filed suit after a county clerk refused to issue a marriage license for Christine to legally marry Nathan, who was already legally married to Victoria.
   c. In the letter denying the license, the county clerk told the applicants that obtaining a second marriage license would be considered polygamy.
   d. But the letter did not explicitly threaten prosecution.
   e. That is why the magistrate concluded that plaintiffs lacked standing to sue: The government had not threatened them with prosecution.

VI. **Tools for Getting Traction on Roberts’s Slippery Slope**

A. Even if a court were to conclude that plaintiffs did have standing to challenge bans on polygamy, I doubt that such a lawsuit would succeed for all the reasons I gave above for why I do not believe Lawrence and Obergefell put us on Justice Scalia’s slippery slope.

   1. That is, we can use those tools to get traction on Chief Justice Roberts’s slippery slope in drawing some distinctions between same-sex marriage and plural marriage.
   2. Let’s apply three of those tools: (1) understanding of change; (2) comparative constitutional inquiries; and (3) harm arguments.

B. **How we understand the processes of constitutional change that lead courts to recognize rights.**

   1. Chief Justice Roberts excoriates Justice Kennedy’s majority opinion in Obergefell for putting a stop to the democratic process, through which the people have been deliberating about whether to change the institution of marriage to recognize same-sex marriage.

   a. I am going to use Roberts’s very arguments here to undercut his suggestion that Obergefell puts us on a slippery slope to plural marriage.
b. Roberts’s objections to recognizing a right to same-sex marriage are flawed, but they may be good reasons for not protecting a right to polygamy.

2. Roberts quotes Justice Ruth Bader Ginsburg’s famous critique of the Court in *Roe v. Wade* (1973) for its “heavy-handed judicial intervention” just as the people through the democratic process were considering whether and how to liberalize abortion laws, and he contends that her critique applies to *Obergefell* as well.

3. Even if we concede for the sake of argument that Ginsburg’s criticism was sound with respect to *Roe*, it is not sound as against *Obergefell*.

4. For we as a people were much farther along in the national and state-by-state debate about same-sex marriage as of June 25, 2015 (the day before *Obergefell*) than we were in the corresponding debates about abortion as of January 21, 1973 (the day before *Roe*).

5. *Roe* had the effect of invalidating the abortion statutes in 49 states, whereas by the time of *Obergefell* many states had already recognized same-sex marriage or civil unions providing all or most of the benefits of marriage to same-sex couples.


7. Moreover, public opinion polls indicated remarkable social change: that a majority of the people nationwide supported marriage for same-sex couples and that there was a decided generational gap in favor of supporting it.

8. These developments led many to believe that nation-wide acceptance of same-sex marriage was more or less inevitable, merely a matter of time.

C. Thus, Roberts’s analogy between *Obergefell* and *Roe* putting a stop to the democratic process is overblown.

1. And his objections to the Supreme Court being the vanguard of social change and of transformation of the basic institution of marriage are wildly exaggerated.

2. The Court is hardly the vanguard of social change in *Obergefell*.

3. It is following and consolidating social change that has been occurring
through democratic and judicial processes—along with conversations over
the family dinner table—throughout the nation over a period of at least 45
years (since Stonewall) and especially the last 30 years (since the defeat in
*Bowers* mobilized the gay and lesbian rights movement).

4. Indeed, Roberts practically concedes as much when he acknowledges that the
proponents of same-sex marriage had “the winds of change” at their backs.

D. Nothing like this has happened with respect to polygamy: proponents of plural
marriage do not have the winds of change at their backs.

1. The Supreme Court would be taking a much bigger leap if it were to
recognize plural marriage than it did when it recognized same-sex marriage
in *Obergefell*.

2. Not a single state legislature has repealed its laws criminalizing
bigamy—compared with 37 states having repealed their laws prohibiting
sodomy by the time of *Lawrence* and 37 states recognizing same-sex
marriage by the time of *Obergefell* (and more if we count states recognizing
civil unions affording all the rights, responsibilities, and benefits but not the
name of marriage).

3. Not a single federal or state court has recognized a right to plural marriage.
   a. In *Brown v. Buhman* (2013), to be discussed, a federal district court
      struck down a law prohibiting polygamous “cohabitation.”
   b. But the district court treated *Reynolds v. United States* (1878), which
      upheld a prohibition on bigamy, as binding with respect to
      polygamous marriage.
   c. In any case, the federal court of appeals reversed on the ground that
      plaintiffs lacked standing to sue: Because local prosecutors had a
      policy of not prosecuting most polygamy cases, the plaintiffs had no
      credible fear of being prosecuted.
   d. The Supreme Court recently declined to hear the appeal from the
court of appeals decision.

4. More generally, we do not have a ubiquitous social movement mobilizing for
recognition of a right to plural marriage.

5. Well, what do we have?
   a. To be sure, we had a Mormon presidential candidate in 2012, Mitt
Romney, but he did not practice or advocate polygamy.

b. He did not insist on a pro-polygamy plank in the Republican Platform.

c. Nor indeed did the leaders of the main branches of the Mormon Church.

d. We had an HBO series, Big Love, and now a reality show, Sister Wives (with Kody Brown and his wives).

e. But there is no broad social movement underway seeking to show us that polygamists are folks just like the rest of us or your friends and neighbors—rather than alien others—as there has been with respect to gay men and lesbians.

6. Admittedly, states like Utah and Montana may underenforce laws concerning polygamy—and they may generally leave Mormons practicing polygamous cohabitation alone—presumably out of a live and let live attitude.

a. But that form of live and let live attitude is a far cry from moving beyond (1) grudging toleration to (2) appreciation and respect and ultimately to (3) full social acceptance of those who practice polygamy.

b. These were the steps down the road of what Scalia characterized as the “homosexual agenda” in his dissents in Romer and Lawrence. Or the steps down the road of what we might less polemically call social and constitutional change toward securing the status of equal citizenship for gay men and lesbians.

c. Scalia and Roberts surely knew that polygamists have made little progress down the parallel road.

d. And I should observe that in recent months some of western states have criminally prosecuted some of the more extreme polygamist Mormon sects, for example, for food-stamp fraud and for failure to pay property taxes, rather than simply leaving them alone.

7. And so, a court making the decision to extend the right to marry to plural marriage would be taking a big step—a bigger step than the Supreme Court took in Obergefell.

a. Doing so also would be far more adventurous than Roe—there we had a women’s movement and a reproductive rights movement
seriously underway and at the forefront of national political and constitutional deliberation.

b. Not to mention precedents like *Griswold* and *Eisenstadt* protecting the right of the individual, married or single, to decide whether to bear or beget a child.

c. A court recognizing a right to plural marriage would be making its own judgment from abstract principles or basic reasons underlying precedents, without regard for the processes of constitutional change, including social movements, desuetude, and democratic repeal of laws prohibiting it.

d. All of this goes to show that there is no evidence of an evolving contemporary consensus in favor of a right to plural marriage.


1. Next, I want to invoke the tool of comparative constitutional inquiry for getting traction on the supposed slippery slope to polygamy.

2. In *Lawrence* (as noted above), notwithstanding his general opposition to comparative constitutional inquiry in judicial decisions, Justice Scalia engaged in such an inquiry to substantiate his worries that recognizing a right to same-sex intimate association would lead down the slippery slope to protecting a right to same-sex marriage—he pointed out that that very development had already occurred in Canada in *Halpern v. Toronto* (2003).

3. Let’s follow Scalia’s logic further: To test Scalia’s and Roberts’s worry that recognizing a right to same-sex marriage in turn will take us down the slippery slope to protecting a right to plural marriage, let’s check and see whether that has happened in Canada since 2003.

4. Canada considered this very question of plural marriage in 2011, and the Supreme Court of British Columbia handed down a major decision reaffirming the prohibition of bigamy: *The British Columbia Reference Case*, or the *Bountiful* case for short.

5. I want to emphasize, too, that the decision in *The British Columbia Reference Case* was no *Baker v. Nelson*. That was the first U.S. Supreme Court decision to consider the question of same-sex marriage, back in 1971: the decision was a cursory one-sentence dismissal of the case for want of a substantial federal question.
6. By contrast, the Supreme Court of British Columbia in *The British Columbia Reference Case* issued a 150 page opinion based on the most comprehensive judicial assessment of polygamy—in light of constitutional principles of gender equality and evidence of harm to children—in the history of the world.

7. That opinion credited the evidence concerning harm to children in deciding not to protect a right to plural marriage.

8. The fact that *The British Columbia Reference Case* came out the way it did confirms my claim that, contrary to Scalia’s and Roberts’s implications, recognizing a right to same-sex marriage does not lead ineluctably to protecting a right to plural marriage!

9. It also supports my contention that recognizing plural marriage would be a bigger step (from precedents protecting a right to intimate association) than recognizing same-sex marriage.

F. Limiting the Extension of Liberty Through Harm Arguments.

1. Finally, let’s consider harm arguments as a limit on the supposed slippery slope from *Obergefell* to plural marriage.

2. Research shows that the fears of Justice Scalia in dissent *Lawrence* and Chief Justice Roberts in *Obergefell* about the slippery slope from recognizing same-sex marriage to a right to polygamy are ill-founded: there are rational bases for outlawing plural marriages.

   a. One basis is rooted in the concern that polygamy in its traditional form (one husband with multiple wives, or polygyny) subordinates women to men, a result offensive to the constitutional commitment to securing gender equality in the U.S.

   b. Another concern is preventing harm to children in plural marriage: not only the harm from the practice of polygamists taking child brides but also documented evidence of much higher rates of child abuse and conflict in such unions.

   c. And yet a third concern is that polygamy in its traditional form (virtually the only form known outside of desperately poor circumstances) disadvantages lower-status males, contributing to social conflict. This includes the so-called “lost boys” phenomenon resulting from powerful polygamous males expelling lower-status males from the community (in part, to eliminate the competition).
3. We know from Scalia’s dissent in *Romer* that he believes that Kennedy would distinguish same-sex intimate association from polygamy on the basis of harm.

   a. Scalia scoffed at that distinction there.

   b. But it is a sound distinction.

4. Raising such harm arguments makes it necessary to consider another argument that Roberts made in his dissent in *Obergefell* in criticizing Kennedy’s majority opinion.

G. Was Chief Justice Roberts Right that *Obergefell* Illegitimately Interprets the Constitution to Enact John Stuart Mill’s Harm Principle?

1. Chief Justice Roberts charges that Justice Kennedy’s majority opinion in *Obergefell* illegitimately reads John Stuart Mill’s “harm principle” into the Fourteenth Amendment’s protection of liberty.

   a. What is Mill’s harm principle? In *On Liberty* (1859), Mill argued that the only justification for government to restrict individual liberty is to prevent harm to others.

   b. This famous principle figures prominently in arguments against the legal enforcement of traditional morals.

2. Roberts makes the inevitable paraphrase of Justice Oliver Wendell Holmes’s dissent in *Lochner v. New York* (1905): “The Fourteenth Amendment does not enact John Stuart Mill’s On Liberty any more than it enacts Herbert Spencer’s *Social Statics*.”

   a. This quotable line may have superficial appeal.

3. To be sure, Kennedy does say that same-sex marriage “poses no risk of harm to [the couples themselves] or third parties.”

4. But he is not saying—in the spirit of Mill—that the only ground for government to restrict individual liberty is to prevent harm to others.

   a. Indeed, if he were enacting Mill, he would not have mentioned that same-sex marriage poses no risk of harm to the couples themselves.

   b. For the only harm that would be relevant would be harm to others.

5. Instead, Kennedy pens this line to reject the argument behind the Defense of
Marriage Act (invalidated in *Windsor*)—that extending marriage to gay men and lesbians will harm the institution of marriage, leading straight couples not to marry.

6. Kennedy’s statement is one way of saying that no evidence whatever supports the claim of harm to opposite-sex marriage.

7. He does not imply that the Fourteenth Amendment “enacts” Mill’s comprehensive harm principle.

8. To recall our distinction above, Kennedy does not use Mill’s harm principle as a *sword* to attack all traditional morals legislation and to extend liberties—to protect all self-regarding conduct and to limit the jurisdiction of government to regulating only other-regarding acts.

9. Instead, in *Obergefell*, just as in *Lawrence*, Kennedy uses harm arguments to draw distinctions to avert the slippery slope—as a *shield* against extending liberties to activities that *do* threaten to impose harm on others or on institutions like marriage.

H. What kinds of harm to others or to the institution of marriage might count as a sufficient reason for not extending the right to marry to plural unions? That is, for making harm arguments as a shield?

1. Precisely the kinds of palpable, empirical harm I mentioned above, and which studies of polygamy have documented, and which the Supreme Court of British Columbia credited in upholding the prohibition of bigamy in *The British Columbia Reference Case*.

   a. To begin with, child abuse through adult polygamous males taking child brides.

   b. But, less sensationally, other harmful outcomes for children.

      (1) less attention from parents

      (2) higher conflict within families

      (3) poorer performance in school or less success in life

      (4) “lost boys” phenomenon

   c. If these are demonstrated, empirical harms—and there is good reason to accept that they are—they may be good grounds for not extending the right to marry to plural unions.
2. Furthermore, these concerns for palpable, empirical harms to children and to the institution of the family do not simply reflect outmoded stereotypes rooted in animus against Mormons as a despised religious minority or stemming from judgments that demean their existence.

3. Nor does the commitment to securing the status of equal citizenship for women through establishing or maintaining an egalitarian structure for the institution of marriage reflect such animus or demeaning judgments.

4. In this essay, I am not going to undertake a thorough assessment of these harm arguments or gender equality arguments against protecting a right to plural marriage. (We plan to do that in Chapter 4 of the book.)

5. I shall simply report that I have been persuaded that these arguments are credible by the assessment of Stephen Macedo in his book, *Just Married: Same-Sex Couples, Monogamy, and the Future of Marriage* (2015).

6. But I want here to examine an argument to the contrary, that these ostensible harm arguments and gender equality arguments amount to an attempt to impose an objectionable “compulsive liberalism” upon polygamists, that is, to enforce liberal morals upon them through the law.

7. The argument is that such a “compulsive liberalism” is no more defensible than is Lord Devlin’s well-known “compulsive moralism” in the legal enforcement of morals on conservative, traditionalist grounds.

VII. DOES PROHIBITION OF POLYGAMY STEM FROM OBJECTIONABLE LEGAL ENFORCEMENT OF LIBERAL MORALS?

A. The Hart-Devlin Debate: From Devlin’s Compulsive Conservatism to Today’s Compulsive Liberalism?

1. Jonathan Turley, the George Washington University law professor who litigated and won the Kody Brown polygamy case at the federal district court level, tries to build upon Mill’s harm principle in arguing against the prohibition of plural marriage and for a right to polygamy.

2. In order to assess his argument, I have to revisit a classic debate in jurisprudence concerning the legal enforcement of morals and the harm principle, the Hart-Devlin debate from the 1960s. I shall paint with a very broad brush here.

3. In 1957, in the UK, the Wolfenden Report recommended decriminalizing “homosexual offenses.”
4. Patrick Devlin, a prominent Law Lord at the time, gave a famous 1959 Maccabean Lecture criticizing that recommendation.

a. In that lecture and his subsequent book, *The Enforcement of Morals* (1965), Lord Devlin defended the legal enforcement of traditional morals—including the prohibition of “homosexual offences”—on majoritarian grounds.

b. He argued that a people have the right to enact into the criminal law prohibitions of anything that arouses “intoleration, indignation, and disgust” in the minds of “the man on the Clapham omnibus” (or “the ordinary person in the street”).

c. In short, he argued that the moral outrage of the ordinary person against certain traditionally immoral offenses provided sufficient ground for criminalization of those practices.

d. Devlin also argued that traditional morality was a seamless web that constituted a society—and that actions violating that morality were analogous to treason because they threatened the subversion and very disintegration of the society.

5. H.L.A. Hart, Professor of Jurisprudence at Oxford, famously rebutted Devlin’s arguments, reworking Mill’s conception of liberty and his harm principle.

a. Hart argued that the intoleration, indignation, and disgust—the moral outrage—of the person in the street were not sufficient justifications for the legal enforcement of traditional morality and, in particular, for the traditional prohibition of “homosexual offenses.”

b. And he argued that the analogy between immorality and treason was far-fetched and too destructive of liberty to be accepted as a ground for outlawing “homosexual offenses.”

6. In U.S. constitutional law, Robert Bork, in *The Tempting of America* (1990), made arguments similar to those of Devlin in favor of legal enforcement of traditional morality. He argued that nothing more than the moral outrage of ordinary citizens was necessary to justify laws seeking to preserve traditional morality.

7. And in his dissents in *Romer* and *Lawrence*, Justice Scalia seemed to credit similar arguments in presupposing that government may seek to preserve traditional morality by outlawing what the majority view as immoral acts.
B. As against Devlin (as well as Bork and Scalia), U.S. constitutional law has rejected many forms of traditional morals legislation.

1. Let’s begin with the case that might seem to have been the beginning of “the end of all morals legislation,” *Griswold*.

2. That case invalidated traditional morals legislation, from the era of Anthony Comstock, prohibiting the use of contraceptives by married couples.

3. Since the Hart-Devlin debate was occurring around the time that the Supreme Court decided *Griswold* in 1965, one might have expected the opinion in that case to take the route of Mill and Hart by invoking some version of the harm principle.

   a. For example, one might have expected *Griswold* to argue that the use of contraceptives by married couples imposes no harm on others or on the institution of marriage.

   b. But the Court did not do so. It did not strike down the law on the basis of anything like Mill’s harm principle or Hart’s updated version of it.

   (1) The main echo of Hart in Justice William Douglas’s majority opinion in *Griswold* is his use of the word “penumbra,” a word Hart made famous in his 1961 classic, *The Concept of Law*.

   (2) But Douglas views “penumbras” or “emanations” from particular constitutional provisions basically as the spirit emanating from the letter of those provisions, whereas Hart views the penumbra as a shadow of doubt or uncertainty in the application of general rules.

   c. In fact, far from saying that the use of contraceptives by married couples causes no harm to others or to the institution of marriage, Douglas says that the government’s prohibition of the use of contraceptives harms the intimate relation of husband and wife and threatens the noble institution of marriage.

   d. That violation of marital privacy—not Mill’s harm principle—was the ground for invalidating the law.

   e. And Justice Douglas’s majority opinion (along with Justice John Marshall Harlan’s concurring opinion) defended the right of marital privacy on the basis of the moral goods or noble purposes furthered
by the institution of marriage, not on any ground that would have augured “the end of all morals legislation.”

4. Nor does *Griswold*’s progeny interpret the Constitution to “enact” Mill’s harm principle.

   a. In fact, if you re-read *Griswold, Eisenstadt, Roe*, and *Casey*, you will find that those decisions do not speak of harm or the absence of harm to others as the ground for invalidating traditional morals legislation.

   b. That would have been to use Mill’s harm principle as a sword.

   c. Instead, those cases invalidating traditional morals legislation develop a right of privacy or autonomy best understood as the right of personal self-government—the right to make certain decisions fundamentally affecting one’s destiny or way of life.

5. Consider, for example, *Roe*: Mill’s harm principle is neither explicit nor implicit in the opinion.

   a. There, the Court protects the right of a woman to decide whether to terminate her pregnancy.

   b. The decision is grounded in a right of privacy, understood as a right of autonomy to make a decision so fundamentally affecting one’s destiny as whether to bear or beget a child.

   c. The Court in *Roe* did not justify that right on the ground that a woman’s getting an abortion imposes no harm on others.

   d. Yet critics of *Roe*, including Judge Henry Friendly, have argued that interpreting the Constitution to protect a woman’s right to decide whether to terminate her pregnancy mistakenly interprets the Constitution to enact Mill’s *On Liberty*.

   e. This misguided interpretation passes for great wisdom among Friendly’s law clerks, including Chief Justice Roberts, who invoked Friendly’s argument in his dissent in *Obergefell*, arguing: “The Fourteenth Amendment does not enact John Stuart Mill’s *On Liberty* any more than it enacts Herbert Spencer’s *Social Statics.*”

6. In Chapter 4, we shall assess these arguments more fully and systematically.

7. The point relevant here is that the Supreme Court decisions from *Griswold* to *Roe*, and beyond to *Obergefell*, striking down traditional morals legislation have not been animated by Mill’s harm principle.
C. Turley’s Argument that Opposition to Polygamy Stems from Objectionable “Compulsive Liberalism”

1. Let’s fast forward 50 years from the Hart-Devlin debate to Turley’s 2015 article arguing from a right to same-sex marriage to a right to plural marriage.

2. Turley observes that liberals, feminists, and progressives who argue that recognizing same-sex marriage does not imply that we must recognize plural marriage typically make harm arguments and gender equality arguments to distinguish the two.

3. But Turley argues that these harm arguments and gender equality arguments are overstated and insufficient to justify the bans on plural marriage.
   a. He says that they are based on extreme cases like that of polygamist Warren Jeffs (who was convicted of child abuse through taking child brides and having sex with them) and should not apply to folks like Kody Brown (who do not harm children through taking them as child brides and do not subordinate their wives).
   b. In fact, he contends that such harm arguments are pretexts for the intolerance, indignation, and disgust that liberals, feminists, and progressives feel toward the decidedly illiberal, unfeminist, and unprogressive Mormons who wish to practice polygamy.
   c. He presents such liberals, feminists, and progressives as analogous to the Devlin-type moral conservatives who were morally outraged—felt intolerance, indignation, and disgust—at the very idea of “homosexual offenses.”

4. Whereas Devlin advocated a compulsive moral conservatism, Turley argues that many of today’s opponents of polygamy advocate a “compulsive liberalism.”

5. In other words, Turley believes liberals, feminists, and progressives opposed to polygamy are trying to impose a liberal morality under the guise of protecting against harm to children and women.

D. But, are liberal, feminist, and progressive arguments for securing the status of women as equal citizens and for protecting children from abuse and harm really analogous to Devlin’s arguments for enforcing traditional sexual morality? I think there are two significant differences.

1. First, the harms that critics of polygamy point to are concrete, palpable harms to real people living real lives.
a. They are nothing like the moral outrage experienced by moral conservatives who felt intollerance, indignation, and disgust at the very idea of abominable “homosexual offenses” being committed in the privacy of gay men’s and lesbians’ homes.

b. To be sure, moral conservatives in Devlin’s time persuaded themselves that there were harms both to the people having gay sex and to the society (e.g., that their violation of traditional sexual norms caused the moral fabric of the society to disintegrate and thus was analogous to treason).

c. In our own time, some fundamentalist rabbis argued that gay sex caused earthquakes in Haiti (2010), and the Moral Majority leader Jerry Falwell implied that our nation’s tolerance of gay sex caused the 9/11 terrorist attack on the World Trade Center and the Pentagon.

d. But by 2003 (Lawrence), there were no credible arguments that gay sex harmed gays or other people.

e. And by 2015 (Obergefell), there were no credible arguments that same-sex marriage harmed children, the institution of marriage, or straights who were married or were considering getting married.

f. The arguments that polygamy harms children and undermines the public value of gender equality are more plausible and are empirically grounded, not merely ideological.

2. Second, we should distinguish between (1) government seeking to preserve traditional sexual morality and (2) government promoting the public value of gender equality through the structure of its basic institutions like marriage.

a. Securing the status of equal citizenship for women is one of our deepest constitutional commitments.

b. And protecting children from harm is one of our most compelling governmental objectives.

c. Both are far more compelling governmental objectives than is expressing moral outrage against those who refuse to conform to traditional sexual morality (or simply preserving traditional sexual morality).

3. Thus, promoting the public value of gender equality (and preventing harm to children) is not compulsive liberalism analogous to compulsive moralism supporting criminalization of traditional morals offenses.
E. More generally, my concerns about polygamy are not moralistic but are empirical and systemic.

1. The empirical concerns are that the evidence regarding harm to children in polygamy seems credible—more credible than was the corresponding evidence with respect to harm to children from being reared in interracial marriages (in 1967, say, just before *Loving v. Virginia*) or in same-sex marriages (in 2015, just before *Obergefell*). It seems less likely that such concern about harm to children merely reflects prejudice or moral outrage.

2. The systemic concerns are more complex. In our book, *Ordered Liberty*, Linda McClain and I develop a civic liberalism, defending a formative project of government and the institutions of civil society (including the family) inculcating civic virtues in children and developing their capacities for responsible political and personal self-government in our constitutional democracy.

   a. Within such a formative project, we aspire to, or at least hope for, some congruence between the structures and values of the basic institutions of civil society and the public values of our constitutional democracy; those public values include securing the status of equal citizenship for women.

   b. From this vantage point, an egalitarian institution of marriage is likely to be more congruent with the public values of equal citizenship than is a patriarchal institution of marriage; and so, the evolution of marriage from a patriarchal institution to a more egalitarian institution has been a good thing.

   c. Indeed, that evolution has made the institution of marriage more hospitable, and more attractive, to same-sex couples.

   d. Likewise, an inegalitarian institution of marriage like polygamy would raise concerns; it would be a structure with systemic inequality built into it, and so it would be in deep conflict with, rather than congruent with, the public value of equal citizenship for women.

3. I am not saying that this as a definitive argument against recognizing a right to plural marriage.

   a. Indeed, I acknowledge that some basic liberties protect rights in conflict with the public value of securing equal citizenship for women or for gay men and lesbians in our constitutional democracy.

   b. E.g., protecting freedom of speech, free exercise of religion, and Due
Process liberty to direct the upbringing and education of children may foster individuals and families who reject the constitutional commitments to gender equality and to marriage equality.

4. What I am saying is that an egalitarian institution of marriage recognizing same-sex unions is congruent with the public value of securing equal citizenship for all; by contrast, an inegalitarian institution of marriage recognizing plural marriage would be in conflict with that public value.

5. I am also saying that recognizing same-sex marriage does not put us on a trajectory to protecting plural marriage.

6. Before recognizing a right to plural marriage, we need to work through the processes of constitutional change sketched above in deciding whether or not to protect such a right.

7. Recognizing same-sex marriage in *Obergefell* does not get us there.

F. Furthermore, to suggest that we are on a slippery slope from same-sex marriage to polygamy is fundamentally to misunderstand the evolution in the institution of marriage in recent years.

1. Marriage (at least in its formal structure) has been evolving away from an unequal, patriarchal institution toward a more egalitarian institution.

2. Those developments made it a small step to same-sex marriage, which had no history of patriarchy and holds promise for being more egalitarian in structure than was traditional opposite-sex marriage.

3. But those developments in an egalitarian direction have made it a larger step to recognizing plural marriage, with its patriarchal structure.

4. Indeed, Macedo suggests in *Just Married* that polygamy seems to be patriarchy on steroids.

5. In sum, as he has put it, same-sex marriage and plural marriage, far from being on a slippery slope from one to the other, have been on opposite trajectories: the former toward a more egalitarian structure for marriage, the latter toward a more patriarchal structure.

VIII. **CONCLUSION**

A. In conclusion, I want to clarify my arguments.

1. I am not saying that the U.S. Supreme Court will never recognize a
constitutional right to plural marriage.

2. I am not even saying that it should not do so.

3. I am just saying that we are not there yet: and that there are good reasons to let the processes of constitutional change take their course, to look before we leap.

4. I also am saying, contrary to Chief Justice Roberts’s implications, that recognizing a right to plural marriage would be a much greater leap than was protecting a right to same-sex marriage in Obergefell.

5. And I am saying that Obergefell does not get us to a right to plural marriage.

B. The moral of the story is that the five tools I have sketched here can help us get traction on Scalia’s (and Roberts’s) slippery slopes.

1. I urge you all as citizens, lawyers, and professors to go forth and use these tools to protect against sliding down such slopes.

2. The processes of constitutional interpretation and change I have sketched mark out a steadier course: a surer path to constitutional justice through building out our constitutional commitments to liberty and equality with coherence and integrity.

C. The story also shows that, far from being “the end of all morals legislation,” Lawrence is the beginning of legitimate morals legislation: legislation that does not demean or humiliate the morally worthy ways of life of people who are morally entitled to the status of equal citizenship.

1. Lawrence entails and undertakes a decidedly moral inquiry: deciding what ways of life are morally worthy of not being demeaned or humiliated, and whether laws denying them basic liberties and the status of equal citizenship are demeaning or humiliating to them.

2. It does not stem from a relativistic, utilitarian, or libertarian rejection of morals as such as a basis for justifying laws.

D. And, far from leading to polygamy, Obergefell promises to contribute to a more egalitarian future for marriage.