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POL 316 Final Examination

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Word Count: 3994

Submitted at:

**WHITMAN V. MASSACHUSETTS**

The Commonwealth of Massachusetts currently recognizes same-sex marriage; it does not, however, permit polygamy. The Petitioners in this case wish to form three-person marriages, but the Massachusetts’s ban on bigamy prevents them from doing so. Whitman, Wilder and O’Shea wish to marry in order to cement the bond between couple and surrogate mother, while Thatcher, Ames and Watson wish to marry for religious purposes. Massachusetts filed a motion to dismiss the complaint, which the District and Appellate Courts have granted. This Court should affirm.

The Petitioners challenge the ban on polygamy, claiming that the ban violates the Due Process clauses of the 5th and 14th Amendments and the Equal Protection clause of the 14th Amendment. The Due Process clauses state that the federal and state governments cannot deprive any person “of life, liberty, or property without due process of law”. In line with the Court’s decision in *Planned Parenthood v. Casey*, the Petitioners claim that personal decisions, such as marriage, are part of the liberty that the Due Process clauses protects. They claim a fundamental right to marriage, so that the government must be furthering a compelling government interest in order to restrict marriage. A fundamental right is a right that is and has been crucial for the existence of American society, while an government’s interest is compelling if it is necessary for the running of the state. The Petitioners claim that marriage is fundamental because the family structure has been an integral part of our Nation’s history. They then use the Equal Protection clause of the 14th Amendment, which prevents any state from denying “any person within its jurisdiction the equal protection of the laws,” to claim that Massachusetts’s statute against polygamy is unconstitutional, because it unfairly proscribes polygamists from exercising their fundamental right to marry.

Thatcher, Ames and Watson continue that even if the Court upholds the restrictions on polygamy, a religious exemption should be created for them because they are fundamentalist Mormons, for whom polygamy is a part of their faith. The 1st Amendment, as incorporated to the states through the 14th Amendment, states that Congress and state legislatures “shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”. Thatcher et al. claim a fundamental right to freedom of religion, because religious freedom and toleration are central to the liberty upon which the US was built, and for this reason wish for this Court to secure them an exemption from the Massachusetts law.

The Commonwealth of Massachusetts counters the Petitioners’ claims, saying that laws against polygamy are within its police powers. A state’s police powers are derived from the 10th Amendment, which states, “The powers not delegated to the United States by the Constitution…are reserved to the States respectively, or to the people”. The 10th Amendment is the basis of federalism, and gives the states the power to regulate behavior in the name of the general welfare, as long as such regulations do not conflict with the powers delegated to the federal government. The capacity to regulate actions to further state interests is called police power, and one such power is the right to define what constitutes a marriage. It is through this police power that Massachusetts claims the right to restrict marriage to monogamy.

The Petitioners use Sherif Girgis’s writings on the meaning of marriage to support their claim that polygamous marriage is a fundamental right. In *What is Marriage,* Girgis, Ryan Anderson and Robert George argue that traditional marriage is necessary for society because of the stability it provides to both spouses and children. Marriage makes adults more financially and emotionally stable, which in turn allows children to develop in a stable environment that is more conducive to producing an upstanding and educated citizenry. Because marriage is centered on child rearing, it has traditionally been between a man and a woman. Girgis claims that marriage is centered around coitus, because it is only through sex that spouses can truly be united, emotionally and physically, and in the process produce children. Without coitus, marriage would confer legal protection to those who have no intention of furthering the state interest of producing a stable future generation.

However, because Massachusetts allows same-sex marriage, the state has, according to the Petitioners, made marriage about affection and therefore must allow polygamous marriage as well. Once the state diverges from the traditional view of marriage as between two heterosexual people with the intent of producing a child and instead makes it about affection, the definition of marriage is no longer based in history and tradition, but is an arbitrary distinction. Because the state has created an arbitrary distinction between same-sex marriage and polygamy, the Petitioners claim that the Massachusetts’s statute is furthering no compelling state interest, and is therefore in violation with the Equal Protection clause, as it unfairly restricts the liberty of its polygamist citizens.

A fundamental right is one that is rooted in the national tradition and is necessary for the proper functioning of society. While traditional marriage is part of liberty to privacy protected by the Due Process clauses, there is no evidence that polygamy itself has any bearing in our Nation’s history or tradition, begging the question of whether polygamy is really a fundamental right. Furthermore, the right to privacy implied by the Due Process clause is not absolute. States are allowed to regulate when and how an abortion occurs, and can take custody of children when parents are negligent, so it seems plausible that they can regulate marriage in some form. However, because Massachusetts revised its definition to be based on affection instead of reproduction, polygamy is in this case, according to the Petitioners, included in the fundamental right of marriage that is protected under the Due Process clauses.

In order to answer the question of whether Massachusetts’s ban of polygamy is constitutional, it is first necessary to determine the state’s interest in marriage. Marriage is a positive liberty, one that the state provides to its citizens, in order to promote stable familial relationships. Historically, Girgis’s concept of marriage was correct. Child rearing was restricted to a man and a woman, and the act of sex is what connected partners in body and mind and at the same time produced children. However, changing technologies have changed the meaning of sex, effectively splitting sex from procreation. The rise of contraception has allowed for coitus purely as a means of emotional connection between partners, with no intention of producing a child, while in vitro fertilization and surrogacy have allowed for procreation without sex altogether. The evolution of the meaning and purpose of sex has made Girgis’s strict definition of marriage obsolete.

In light of the changing role of sex in modern society, it becomes apparent that same-sex couples are equally capable of fulfilling the state’s interest of providing a stable environment in which to raise children. Homosexual conduct, like coitus with contraception, is capable of creating a strong emotional connection between partners. Same-sex marriages therefore provide the same emotional and financial stability that traditional marriages do, and they are now, thanks to fertility technology, capable of raising children in line with the state’s interests. To deny same-sex marriage would therefore be in violation of the Equal Protection clause, as the State would have had to create an arbitrary distinction based on sexual orientation. In failing to acknowledge that technology has made same-sex couples equally capable of producing children, Girgis, and the Petitioners by extension, wrongfully assume that allowing same-sex couples to marry is a fundamental change in the definition of marriage. Because both same-sex and opposite-sex marriages fulfill the same state interest of producing a stable family, the definition of marriage as a monogamous institution centered on familial stability is fundamentally unchanged. The inclusion of same-sex marriage into the definition of marriage does not change the basis of marriage from familial stability to affection, so there was no expansion of the fundamental right of marriage to include polygamy. Because there is no fundamental right to polygamous marriage, the State must simply show that its law is furthering a legitimate state interest.

The State is able to proscribe polygamy because it not only does not further the state interest of promoting a stable family relationship, but it even has the potential to undermine the concept of marriage altogether. Whitman et al. claim that the purpose of their marriage is to provide stability for their child. But suppose O’Shea wishes to marry someone whom she loves as well. There is no way the State could prevent such a marriage from occurring if they allowed the original bigamy to occur. But O’Shea’s new marriage begs the question of who the primary spouse is, and what, if any, are the limits to polygamy. Because any impositions on polygamous marriage by the State must be arbitrary, it in reality cannot enforce any restrictions, so the state would be forced to accept something akin to the minimal marriage that Elizabeth Brake proposes in “Marriage: What Political Liberalism Implies for Marriage Law”, which allows persons to marry anyone with whom they want to share any marital benefit. Minimal marriage, however, completely abandons marriage’s role of promoting a close-knit, stable family, and is therefore incompatible with the State’s interest. The State therefore has a legitimate interest in defining marriage as a monogamous institution.

The Petitioners then argue that while polygamy may not be justified for the public, Thatcher et al. should be granted a religious exemption because the State is preventing the Petitioners from practicing a sacred tenet of their faith, in violation of the Free Exercise clause. Religion is, according to Robert George in “Religious Liberty”, the attempt to understand spiritual truths and meanings that are beyond human-made constructions. In doing so, religion urges people to seek something greater than one’s self and to live their lives in accordance with such beliefs. Religion helps to create a sense of morality and civic duty that is necessary for the success of a republic. The free exercise of religion, and the critical thought and expression that it fosters, has a long and rich history in our Nation, and is in fact one of the principles upon which our Nation was built. Because of its important role in the creation of the US, religious freedom is a fundamental right. The Petitioners claim that Massachusetts’s ban on polygamy is infringing upon their fundamental right to exercise their religion, and that they therefore deserve an exemption from following the law.

This Court affirms the claim that the free exercise of religion is a fundamental right, so the burden of proof is on Massachusetts to show that its restriction religious expression is furthering a compelling state interest, and the Court finds that it does. While the lone exemption of allowing fundamentalist Mormons to engage in polygamy would not be in itself harmful to the State’s interests, it would set the precedent of allowing religion to supersede state laws as the ultimate authority. The inability to properly divine what constitutes a religion would essentially allow for lawlessness in the name of religious freedom, which the State has a compelling interest to prevent. George, in his explanation of religion, argues that the concept of religion, not what a specific religion teaches, is what promotes morality. Religion, for George, is the act of seeking spiritual truths, beyond human sources. However, the diversity of religion means that it is difficult to categorize religion. It can be monotheistic, polytheistic or atheistic, institutional or personal. In allowing for exemptions of neutral laws of general applicability for long established, institutional religions but not for personal religious convictions, the State would in effect be favoring one religion over another, in violation of the Establishment clause of the 1st Amendment, which states that “Congress shall make no law respecting an establishment of religion”. In order to allow for completely free exercise of religion, the State would have to allow exemptions for every religious conviction, institutional or personal, making it possible to evade laws necessary for the running of the State and creating the potential for lawlessness. The State has a compelling interest in ensuring that none of its citizens are above the law. In effect, this Court affirms the *Smith* decision and the philosophy of “equal liberty” proposed by Sager and Eisgruber in “Equal Liberty”. It is impossible to determine what constitutes a religion, so the only solution for the State is to treat all institutions, religious or not, equally before the law.

For the reasons set forth, Massachusetts’s definition of marriage as a monogamous institution, without exception, is constitutional.

**The Incompatibility of the Sanctity of Life Ethic with the US Constitution**

While there is common consensus that life is the most important of our unalienable rights, the justification for the importance of life is anything but homogeneous. In the context of our national debates on abortion and physician-assisted suicides, the sanctity-of-life ethic is of great weight, as it offers the most prominent arguments against the taking of human life in any condition. Opposing the sanctity-of-life ethic is the quality-of-life ethic, which furthers the view that life does not have value in itself, but has value because it allows one to enjoy the liberties that make life meaningful. The US Constitution, with its emphasis on both life and liberty, is more consistent with the quality-of-life ethic than with the sanctity-of-life ethic.

The sanctity-of-life ethic is premised upon the claim that human life has inherent value, so any act that ends another human’s life, with the end of taking the life, is morally wrong without exception. As Robert George explains in “Embryo Ethics,” life is a continuum of development that starts at conception. Development is gradual, so there is no one point when pre-nascent life gains personhood, or when it gains protection of the law, because it always has it as a member of the human race. A human being, even in its embryonic form, is self-developing. Its development is autonomous, so it is a complete, independent organism, worthy of equal respect as a member of the human race. Human beings, no matter their physical or mental capacity at the beginning or end of life, inherently have dignity, so abortion, assisted suicide or other acts that prematurely end life, according to George, are immoral.

The quality-of-life ethic, on the other hand, emphasizes the usefulness of life rather than the inherent dignity of life. Ronald Dworkin, a proponent of the quality-of-life view as the basis of life, argues in “Do We Have the Right to Die?” that life is not an end in itself, but is solely a means to live a life that has worth and meaning. Once a life has begun, according to Dworkin, it is important because a person can fill it with meaning. Life is more than just a beating heart, but requires brain function, so that a person can decide their own purpose and fulfill their own aspirations. Part of the decision that a person makes about his or her own life is when the act of living no longer adds worth or value to the life as a whole. Dworkin does not diminish the value of life with his quality-of-life ethic, but changes its emphasis to value liberty as a qualification of life. For Dworkin, life gains its importance not because life is intrinsically valuable, but because life is valuable when combined with the liberty to make it meaningful through one’s own actions and decisions.

In order to resolve the question of which theory of life’s value is more consistent with our Nation’s political philosophy, it is first necessary to determine why life is unalienable to begin with. Thomas Hobbes, in his *Leviathan*, proposed the social contract theory of government. He argued that when man is in a state of nature, where there are no laws, he has complete liberty. But because man’s desires are infinite while natural resources are scarce, he will inevitably conflict with his fellow man. With no laws, there is nothing securing man’s life, so he lives in perpetual fear of death, what Hobbes calls a state of war. Hobbes argues that the only way to ensure security of life is to enter into a social contract with a sovereign, in which man gives up his absolute liberty in exchange for an assurance of life. For Hobbes, life is the only unalienable right, or right that it is impossible to give up, because man gives up all his other rights in order to protect his right to life. If a person is willing to give up his or her right to life, then there is no reason to submit one’s self to a sovereign, because that person, in losing his or her life, is no better off than in a state of nature.

While Hobbes may advocate the sanctity-of-life ethic, his condonance of an absolutist government makes his philosophy, when taken in its entirety, incompatible with our Nation’s republican and federalist nature. Liberty and security are, according to Hobbesian theory, on opposite ends of a spectrum. When man has absolute liberty, he has liberty to all other men’s lives, which means that no life is secure. As man submits himself to a sovereign, he sacrifices his rights and gains security of life. However, this implies that any amount of liberty has the possibility to threaten someone’s life. Murders happen because people have the liberty to act to kill someone; traffic accidents happen because people have the liberty to drive. The sanctity-of-life view argues that life is the most important right, and that the role of government is to protect it because of its intrinsic value. However, in order to enforce absolute sanctity-of-life and preserve the lives of its citizens in all situations, government would be required to severely restrict liberty in the name of security. Because the government does not prohibit gun ownership, prevent people from driving, or force unwilling patients to accept life-saving treatment, even though all of the above would further protect life, it is necessary to acknowledge that security is not the sole function of government, and that there exists a balance between security and liberty in our society. In applying the sanctity-of-life ethic only to the beginning and end of life, George is drawing an arbitrary line about when security of life is more important than liberty, and arbitrariness is inconsistent with the notion that life is the most important right bar none.

John Locke’s *Two Treatises of Government*, with its emphasis on the unalienable rights of life, liberty and property, acknowledge a balance between security of life and liberty. Locke’s inclusion of liberty as an unalienable right resonated with our Founding Fathers, and became one of our Nation’s founding principles. Because both life and liberty are unalienable, sanctity of life is incompatible with the principles upon which our Nation was built. Sanctity of life values the unalienable right to life absolutely. However, the right to life cannot be superior while there exists an unalienable right to liberty, because liberty inherently implies that the unalienable right to life is not absolute. The role of government spans a continuum, ranging from protecting absolute security to absolute liberty. In including both security of life and liberty as unalienable rights, Locke therefore claims that the role of government is to function at a midpoint on the spectrum and that it must balance life and liberty. There must therefore be some situations in which the unalienable right to liberty trumps the unalienable right to life.

The incompatibility of the sanctity-of-life ethic is made more explicit with the Due Process clauses of the 5th and 14th Amendments. The clauses forbid Congress and States, respectively, from depriving any person of “life, liberty or property without due process of the law”. While the Due Process clause provides protection from arbitrary state action, it still accepts that there are certain situations in which the government is allowed to take away the life of one of its citizens. In permitting capital punishment in the Constitution, our Founding Fathers argued that there exists a point at which other people’s lives and liberties are more important than the life of someone who has been deemed a felon. The view of life held in by Constitution conflicts with the sanctity-of-life ethic’s view that all life is inherently full of dignity and all lives are treated equally on that account. Instead, the Constitution argues that the role of government is not to protect the right to life above all other rights, but it is to find a proper balance between the right life and the right to liberty.

Because the sanctity-of-life ethic is incompatible with our Constitution, it is necessary to view life through the lens of the quality-of-life ethic. The position forwarded by Dworkin, that life is a means of enjoying liberties and is not an end in itself, is more consistent with the constitutional importance of both life and liberty. Dworkin’s insistence on the quality of life ethic does not seek to diminish the value of life, but simply acknowledges that there needs to exist a balance between the unalienable right to life and the unalienable right to liberty. There are no absolute answers about when, how and to whom the right of life is attached to that the government may invoke the law and restrict liberties in order to preserve someone’s life. The role of government, and by extension the people in our republic form of government, is to determine the adequate balance of life and liberty in accordance with the beliefs of the people within the government’s jurisdiction. For abortion, the government must determine the correct balance between the liberty of the mother to choose when to give birth and the life of the fetus. With regards to the end of life and the “right to die,” the government must determine the correct balance between the liberty of terminally ill patients to decide when, how and in what mental or physical state they die, and the state’s interest in protecting life.

In line with Dworkin’s view of life, the quality-of-life ethic argues that life is more valuable when it is possible to enjoy other liberties. Brain function is necessary for a person to benefit from liberty, and life is, according to Dworkin, made more valuable when it is possible to enjoy liberties. Because the value of life increases with brain function, it becomes harder for the right to liberty to outweigh the right to life when that life has brain function. For abortion, this means that when the fetal brain develops, it becomes more difficult for the mother’s liberty to outweigh the importance of fetal life. With respect to the “right to die,” a patient must have a more compelling reason, such as terminal illness or rapid degradation of mental capacities, for refusing end of life care or opting for assisted suicide. It becomes harder for the patient’s liberty to decide to die to trump his or her own right to life.

This essay argues neither in favor nor against abortion and assisted suicide. It does, however, disclaim the absolutism of the sanctity-of-life ethic. The sanctity-of-life ethic, in its unconditional form, is simply incompatible with a liberal democracy based upon liberty, and should therefore not be used as a justification against abortion or assisted suicide. The point of this essay is to argue that in every decision regarding life, the government must look at all of our unalienable rights, and cannot solely focus on life. It is still possible for the government, in balancing life and liberty, to decide that life outweighs liberty in the cases of abortion and assisted suicide, but to fail to acknowledge that a right to liberty exists is contrary to the American history and tradition. Every decision must take the unalienable right to liberty into account and balance it with the unalienable right to life. To do otherwise would contradict the principles upon which our Nation was founded.

This paper represents my own work in accordance with University regulations.