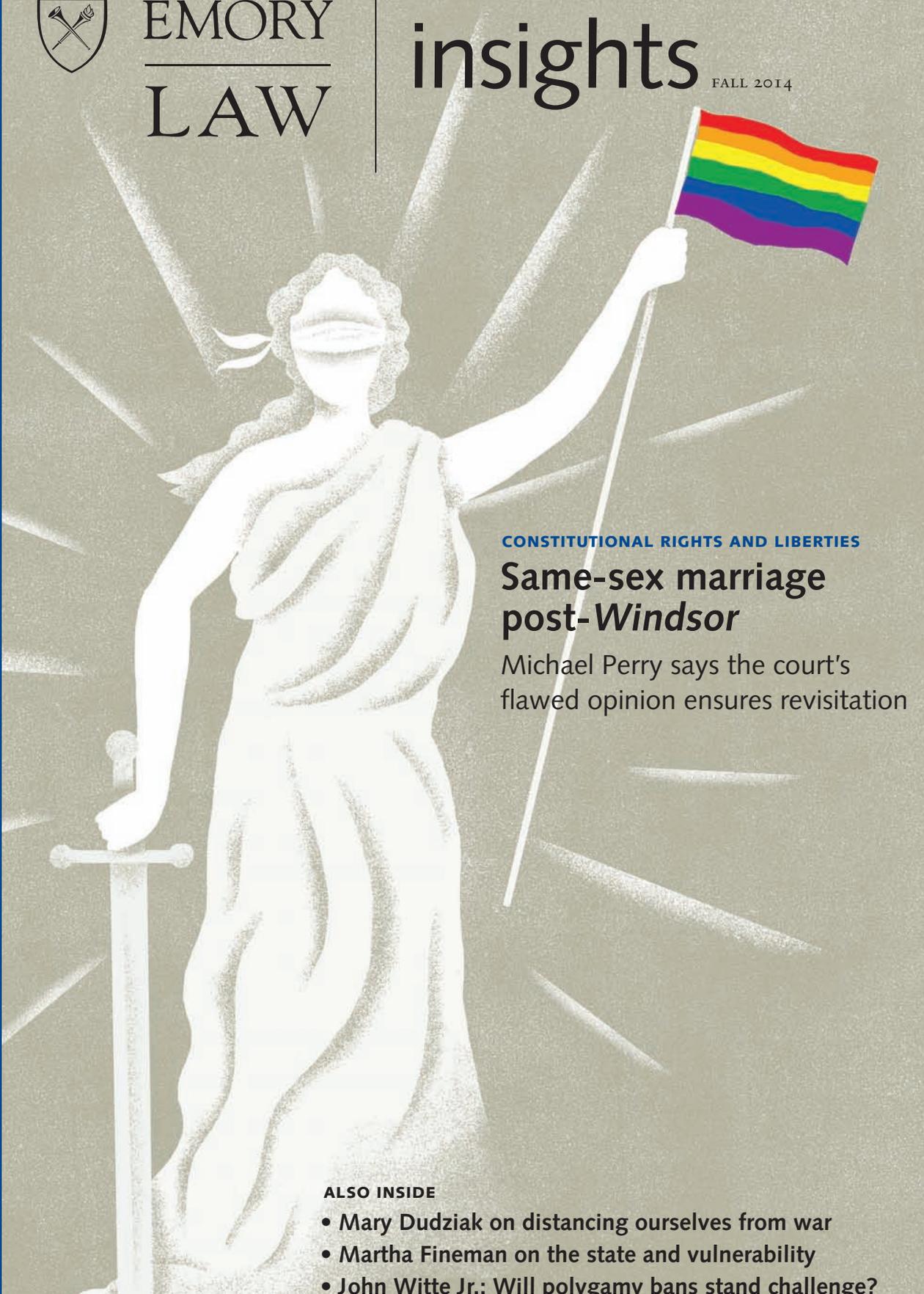




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CONSTITUTIONAL RIGHTS AND LIBERTIES

## Same-sex marriage post-*Windsor*

Michael Perry says the court's  
flawed opinion ensures revisitation

**ALSO INSIDE**

- Mary Dudziak on distancing ourselves from war
- Martha Fineman on the state and vulnerability
- John Witte Jr.: Will polygamy bans stand challenge?



“It would have made much more sense if the court had made it clear that what it was opposing was the idea that the state could mark this sexual conduct, this sexual intimacy, as immoral. There’s a whole line of cases in which the court is saying that there are certain kinds of moral judgments that the states may not make.”

—Professor Michael Perry on *United States v. Windsor*



**CONSTITUTIONAL RIGHTS AND LIBERTIES**

- 2 Keeping the Peace, Distancing Ourselves from War  
*Mary L. Dudziak*
- 5 Universal Vulnerability Should Inform Public Policy  
*Martha Albertson Fineman*
- 8 Examining the Court’s Reasoning on Same-Sex Marriage  
*Michael J. Perry*
- 11 Can Polygamy Bans Survive a Legal Challenge?  
*John Witte Jr.*
- 15 Recent Scholarship  
*Morgan Cloud, Michael S. Kang, Kay Levine, Ani Satz, Robert Schapiro, Julie Seaman, Charles A. Shanor, Joanna Shepherd, Alexander Volokh, Barbara Bennett Woodhouse*

**About Emory Law Insights**

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## Keeping the Peace, Distancing Ourselves from War



### Mary L. Dudziak

Asa Griggs Candler Professor of Law  
Director, Project on War and Security in Law, Culture,  
and Society

AB, University of California, Berkeley, 1978  
JD, Yale Law School, 1984  
MA, MPhil, Yale University, 1986  
PhD, Yale University, 1992

**Scholarly interests:** civil rights history, constitutional law, constitutional and legal history, law and war, diplomatic history, foreign relations law, legal history

**D**uring the Civil War, the staggering death toll transformed the nation into a “veritable republic of suffering,” in the words of Frederick Law Olmsted. In her pathbreaking book that takes its title from those words, Drew Gilpin Faust writes that no American could escape an intimate association with that war’s death, injury, and destruction.

Fast forward. Today, President Barack Obama can make a decision to authorize a drone strike in Pakistan, and the American public is completely unaware. Even if people do learn of it, most don’t care.

How did we get from point A to point B? How did we go from a nation essentially defined by the experience of war to a nation in which the citizens have given up meaningful political control over the use of armed force?

That is the question Mary L. Dudziak is working to answer in her upcoming book, *Going to War: An American History*. She will use broad historical inquiry to answer how political restraints have atrophied over time, looking beyond the examination of the roles of Congress, the presidency, and the courts, which are the focus of most works. Instead, Dudziak sees three significant cultural and structural developments underlying the ever-increasing disconnect between Americans and the nation’s armed conflicts, including changes in the state, changes in the military, and changes in technology.

Important changes in the state, Dudziak argues, followed World War II. There was disagreement about how the government should be restructured to assume its new mantle of leader of the free world. Some members of the Truman administration, including the president himself, still thought

**How did we go from a nation essentially defined by the experience of war to a nation in which the citizens have given up meaningful political control over the use of armed force?**

## Excerpt: The Future as a Concept in National Security Law

With their focus on the future of national security law, the articles in this issue share a common premise: that the future matters to legal policy, and that law must take the future into account. But what is this future? And what conception of the future do national security lawyers have in mind?

The future is, in an absolute sense, unknowable. Absent a time machine, we cannot directly experience it.... Political scientist Harold Lasswell wrote in his classic work *The Garrison State* that the ideas about the future guiding social scientific work are rational predictions.

If law is premised on ideas about something unknowable, something that can, at best, be a prediction, then it seems important to examine what those ideas, assumptions, and predictions are. This essay examines future-thinking in prominent works related to national security, including the ideas that the future is peacetime, a long war, a “next attack,” and a postwar. Drawing from scholarship on historical memory and conceptions of temporality, this essay argues that understandings of the future depend on more than the rational empirical predictions that Lasswell had in mind. The future is a cultural construct. It does not exist apart from the politics and values that inform our perceptions. The future does not unfold on its own. We produce our future through both our acts and our imaginations....

Some post-9/11 scholarship is haunted by a particular idea: that a “next attack” is inevitable. Bruce Ackerman titled a 2006 book *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism*.... Ackerman uses the specter of a future attack as the basis for arguing that legal reform must be taken in advance so that the right balance between government power and the protection of civil liberties will be maintained.... Works assuming the “next attack” do not presume to know precisely what that attack will actually look like. But the idea of a next attack builds on assumptions about temporality, law, and the workings of American politics.... An event that would count as a next attack is not any act of terrorism, but something that shares important characteristics with 9/11.

Ackerman begins by asking readers to think about the future, to imagine “waking up the morning after the next terrorist attack.”... His focus ... is on what the attack would do to American politics. “After each successive attack, politicians will come up with a new raft of repressive laws that ease our anxiety by promising greater security—only to find that a different terrorist band manages to strike a few years later.” American politics would spiral downward, with increasing repression generated by the crisis of each new attack.

This is a bleak future, indeed, which helps to explain why Ackerman proposes a dramatic corrective of constitutional emergency powers. The justification for these powers is his prediction—not only of future attacks, but also of the pattern of crisis-and-response that he sees as characterizing the 9/11 experience. This illustrates the way that an account of the “next attack” as a focal point for national security law requires an analysis of the paradigmatic moment that scholars depart from. We need to understand 9/11 itself in order to understand what the impact of 9/11-like repetitions would be.

This requires that we consider what 9/11 was. If this seems to be so obvious that there is no need to inquire, then it is important to reflect on the nature of historical memory. As Marita Sturken has described it, a culture’s memory “is a narrative rather than a replica of an experience that can be retrieved and relived.” Memory is formed in part by forgetting, for it would be overwhelming to attempt to construct a narrative of all the microevents of lived experience. “A desire for coherence and continuity produces forgetting,” and what a culture remembers is tied to contemporary imperatives.

The “9/11” that informs the “next attack” literature is such a memory. The events of September 11, 2001, were not accompanied by a uniform and stable understanding of their meaning.... Among differing accounts of 9/11, one narrative cut across political divides: the idea that September 11 had “changed everything.” The events that day were of such a character that they were thought to break time itself, to usher in a new era....

The perceived cultural break and transformation that is thought to have accompanied 9/11 is a central characteristic that Ackerman expects to be repeated.... What drives this account is not tangible events in the physical world, like explosions, but what happens in the minds and hearts of Americans: the perception that the world has changed, that time has broken yet again, and hence that new and repressive laws are called for. This illustrates the way that the idea of the next attack depends not only on an idea of the future (that there is a repeat), but also on a set of ideas about 9/11 itself: that it was transformative. 9/11 is in this way reified as a paradigmatic event against which the future will be measured.

The emergence of 9/11’s assumed transformative status has parallels in the way Reinhart Koselleck describes the evolution of the concept of “revolution” [after the French Revolution].... In, perhaps, a more modest way, 9/11 became a paradigmatic concept that, to borrow from Koselleck, became “charged with ordering historically recurrent convulsive (continued on following page)

experiences.” For national security law scholars, this historical framing is a way of anticipating a future. The future is thought to play out within a particular understanding of the 9/11 paradigm. The future, in this rendering, will not simply be a future full of violence. It will be a future with 9/11-type events—events that will evoke a culture and politics of transformation.

As with the concepts of peacetime and the long war, the future is more than a rational prediction. Because the idea of the “next attack” is tied to the historical memory of 9/11, the imagined future is inflected with the narrative we have made about 9/11.

—from *The Future as a Concept in National Security Law*, *Pepperdine Law Review* (forthcoming 2015)

in terms of distinct “wartimes” and “peacetimes,” says Dudziak, and so advocated working to get back on a peacetime footing. Others, however, contended that the Soviet Union was such a frightful and aggressive threat that we needed to be prepared militarily to take it on at any time in any place.

### **“The Vietnam era was the last time when there was meaningful political pushback from the American people in the context of war.”**

Then came the Korean War. “Once the North Koreans invaded South Korea, the debate was over,” says Dudziak. “It was resolved that the country needed to be perpetually ready for war, and in this political context you get the development of the National Security State.” NSC 68, an important national security assessment, called for ongoing global projection of military force. “Even the concept of peace became militarized, as presidents used peace as a justification for military engagements,” says Dudziak.

Another important development: the actual makeup of the military changed after the Vietnam War with the elimination of the draft.

“The Vietnam era was the last time when there was meaningful political pushback from the American people in the context of war,” says Dudziak. “Scholars argue the massive antiwar demonstrations affected Nixon’s military decisions toward the end of the war, and one way to avoid that is to eliminate the draft and go to an all-volunteer army.”

Over time, the percentage of American families touched by war shrank dramatically. In addition, many military functions were increasingly outsourced to private firms—everything from cooking and cleaning to interrogating prisoners. “With many military tasks now done by private

contractors, the nation can project force with fewer and fewer soldiers,” says Dudziak.

Completing the troika of structural developments is change in technology. Across time, the distance between the shooter and the target has vastly expanded, so even soldiers themselves are somewhat distanced from war. Today’s weapons not only go much further, they are accompanied by a narrative of precision. During the 1991 Persian Gulf War, the American public was treated to television images following the visual display of laser-guided missiles, and military leaders argued that they took out only the bad guys and spared civilians.

“So war became more distant and more sanitized at the same time,” says Dudziak. “Together, these changes have meant that the percentage of Americans deeply engaged with, or directly touched by war has become smaller and smaller.”

Americans undoubtedly welcome this distance from the death and destruction of war, but as a people we must consider how this impacts our military decisions. “This distance puts us in a situation where the government can decide to use force without input from or even awareness of the American people,” says Dudziak. “Meaningful political accountability in this context will be difficult, but accountability to the people is essential in a democracy.”

## **SELECTED PUBLICATIONS**

### **Books**

*Going to War: An American History* (under contract, Oxford University Press, in progress)

*War-Time: An Idea, Its History, Its Consequences* (Oxford University Press 2012)

*Cold War Civil Rights: Race and the Image of American Democracy* (2nd ed., Princeton University Press 2011)

*Exporting American Dreams: Thurgood Marshall’s African Journey* (Oxford University Press 2008; paperback ed., Princeton University Press 2011)

(continued on page 14)

## Universal Vulnerability Should Inform Public Policy



### Martha Albertson Fineman

Robert W. Woodruff Professor of Law  
Director, Feminism and Legal Theory Project  
Director, Vulnerability and the Human Condition Initiative

BA, Temple University, 1971  
JD, University of Chicago, 1975

**Scholarly interests:** child advocacy, children's rights, equality theory, family law, feminist legal theory, sexuality and law, women and the law, reproductive issues

When Martha Albertson Fineman founded the Feminism and Legal Theory Project (FLT) in 1984, feminism's most visible goal was equality—equal rights, equal pay, and equal access to workplace opportunities.

While there has been undeniable progress for women in many areas of law since then, some areas, such as reproductive rights and their relationship to pay equity, are still at issue.

Formal equality isn't always the solution, says Fineman, now Robert W. Woodruff Professor of Law at Emory. Sometimes it is the problem.

Her work on law and the search for gender equity led Fineman early in her career to question the feminist embrace of equality. While formal equality (the kind the law delivers) is appropriate when the question is equal pay for equal work or one person, one vote, it cannot address all situations.

"For example, when you're considering what is just and equitable at divorce, equal division of the burdens and benefits existing at that time will result in considerable inequities, because it does not take into account inequalities that existed across the life of the marriage, many of which will also affect future opportunities," she says.

"Three kinds of inequalities should be taken into account when deciding property division, post-divorce support, and custody: inequalities in the labor market, inequalities in the bargaining power between spouses relating to earning power that make the primary wage earners' interests paramount in family decisions, and inequalities in the burdens associated with being the primary caretaker of children both in and after marriage. In fact, formal equality actually delivers an injustice to the person who made the greater career

**"The vulnerable subject is the embodiment of the realization that vulnerability is a universal and constant aspect of the human condition. Dependency and vulnerability are not deviant, but natural and inevitable."**

## Excerpt: *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*

### Defining the Political–Legal Subject

The Western legal tradition is built on liberal notions of the political and legal subject, in which the appropriate relationships among the state, societal institutions, and individuals are constructed in the shadow of individual liberty or autonomy. The liberal political and legal subject thus defined has the attributes necessary to function fully and independently. This liberal subject is a competent social actor capable of playing multiple and concurrent adult (formerly all-male) societal roles: the employee, the employer, the spouse, the parent, the consumer, the manufacturer, the citizen, the taxpayer, and so on. This liberal subject informs our economic, legal, and political principles. It is indispensable to the prevailing complementary ideologies of personal responsibility and the noninterventionist or restrained state.

Our primary metaphor for examining social and institutional relationships (outside of the family) is that of contract. Society is constituted through a social contract, and autonomous and independent individuals interact with the state and its institutions, as well as with each other, through processes of negotiation, bargaining, and consent. Society is conceived as a collection of self-interested individuals, each of whom has the capacity to manipulate and manage their independently acquired and overlapping resources. Importantly, rather than being dependent on or asserting entitlement to the provision of socioeconomic goods by the state, the liberal subject demands only the autonomy that will enable him to provide for himself and his family. His demand for liberty is refined as the freedom to make choices, the right to contract. Significantly, this demand for liberty on the part of the individual effectively operates as a restraint on the state, which is deterred from interference with individual liberty, even for the purpose of ensuring greater social equality.

The image of the human being encapsulated in the liberal subject is reductive and fails to reflect the complicated nature of the human condition. A vulnerability analysis asks us (and our economists, philosophers, and politicians) to embrace a more complex reality by bringing human dependency and vulnerability back into the center of the inquiry into what it means to be human. A vulnerability approach replaces the liberal subject with the “vulnerable subject.” The vulnerable subject is the embodiment of the realization that vulnerability is a universal and constant aspect of the human condition. Dependency and vulnerability are not deviant, but natural and inevitable.

### Dependency

Dependency is not a characteristic typically associated with the liberal subject. If visible in liberal

discourse, dependency is stigmatized. The preferred accommodation for dependency is to hide it within the private family. This family is the mechanism by which we privatize dependency and insulate policy and political discussions from having to grapple seriously with its significant societal implications. Burying dependency within the family is necessary to the construction of simplistic solutions to widespread poverty and inequality that rely on individual responsibility and assume both the desirability and the availability of a position of independence and self-sufficiency for individual and family alike, an ideology of autonomy that bears little relationship to the human condition....

### Vulnerability

Vulnerability on one level can be thought of as an heuristic device, forcing us to examine hidden assumptions and biases folded into legal, social, and cultural practices. Vulnerability is universal. Detached from specific subgroups or populations, placed at the core of our understanding of what it means to be human, vulnerability can form the foundation upon which to build ideas about appropriate social and state responsibility for all....

In addition to describing the biological and constant nature of human vulnerability, as well as the possible internal and external causes of harms, it is important to realize that vulnerability is complex and can manifest itself in multiple forms. Our bodily vulnerability is compounded by the possibility that, should we succumb to illness or injury, there may be accompanying economic and institutional harms and disruption of existing social, economic, or family relationships. These harms are not located in the body, but can be catastrophic to the individual nonetheless, and illustrate how we are also vulnerable to and dependent upon the vagaries of societal institutions.

It is also important to recognize that, in addition to the ways in which economic and institutional harms can accumulate in a vulnerable individual life, there may also be a basis for recognition of harm to social groupings based on shared characteristics. While the quality or nature of economic and institutional harms may not be different assessed from an individual perspective, there may be statistically relevant distinctions in a quantitative sense, both on an individual and a group basis. For example, economic and institutional harms suffered by individuals can also affect their families when the burdens they generate are transferred from one generation to another. Further, negative economic and institutional harms may cluster around members of a socially or culturally determined grouping who share certain societal positions or have suffered discrimination based on constructed categories used

to differentiate one class of persons from another, such as race, gender, ethnicity, or religious affiliation.

### **Universality and Particularity**

The recognition that vulnerability varies across individual experiences reveals a final and somewhat paradoxical point about vulnerability: While it must initially be understood as universal and constant when considering the general human condition, vulnerability must be simultaneously understood as particular, varied, and unique on the individual level. Two forms of individual difference are relevant. The first form of difference is physical: mental, intellectual, and other variations in human embodiment. The second is social and constructed, resulting from the fact that individuals are situated within overlapping and complex webs of economic and institutional relationships....

#### *Status and institutional differences in resilience*

Differences are produced as a result of an individual's experiences within societal institutions and relationships over the life course. These differences

structure options and create or impede opportunities. This focus of a vulnerability analysis is particularly significant because addressing this form of difference brings societal institutions into conversation with the vulnerable subject. This shifts our critical focus to the operation of societal institutions, including the state. This provides a much needed counterweight to the current assignment of dependence and vulnerability as solely a personal responsibility....

The societal institutions we create should be seen as functioning in interlocking and overlapping ways, creating layered possibilities of opportunities and support, but also in configurations containing gaps and potential pitfalls. These institutions collectively form systems that can play an important role in lessening, ameliorating, and compensating for individual vulnerability, providing us with the resilience or resources with which to respond in specific times of crisis or opportunity.

—from *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013)  
(with Anna Grear)

and personal sacrifices during the marriage for the benefit of both spouses and the children.”

Fineman, who today is internationally recognized as an authority on family law and feminism, started FLT while at the University of Wisconsin to provide “a safe place to develop feminist legal theory.” It was a brand new area in law and legal studies; not all law schools were receptive to feminist scholars. Since then, FLT has fostered interdisciplinary examinations of the ways in which the interaction of law and culture shapes expectations, policies, and practices related to gender.

The project has traveled with her over the years from Wisconsin to Columbia University to Cornell. In 2004, Fineman brought FLT to Emory, where it is thriving.

The project produced the first anthology of feminist legal theory, *At the Boundaries of Law*, in 1990. It has published an additional thirteen volumes since then and been instrumental in the development of hundreds of journal articles by scholars who have participated in FLT workshops held around the world since 1985, examining such issues as sex, reproduction, the family, violence, labor, and employment.

FLT also hosts “Uncomfortable Conversations,” which focus on productive dialogues between advocates whose goals may create tensions. The first conversation was between advocates for women and advocates for children, and concerned

issues surrounding divorce, child custody and support, and abuse and neglect.

In addition, FLT hosts visiting scholars from around the world with current visitors in residence from India, China, Chile, and the United States. Many of Fineman’s scholarly pieces on feminist legal theory are now being translated into Chinese and Spanish. Earlier work has appeared in Korean and Japanese.

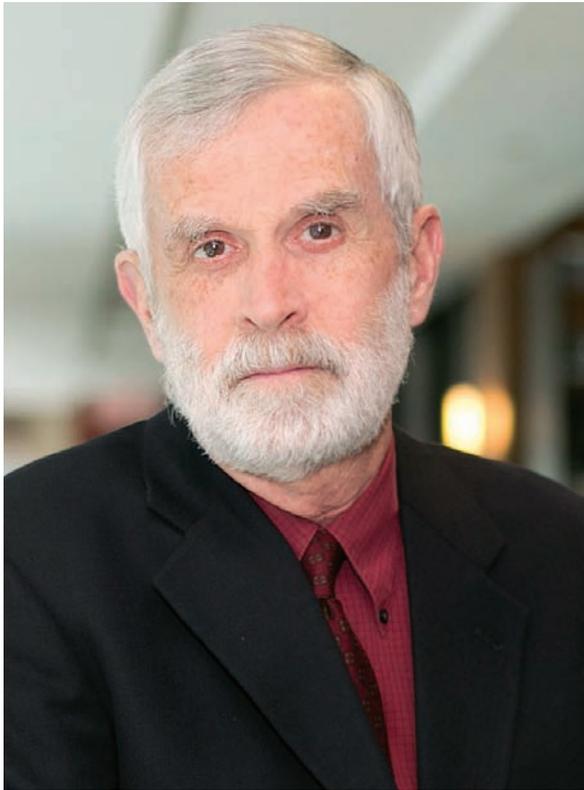
An outgrowth of Fineman’s concern with gender issues relating to age, race, class, ability, and sexuality is the Vulnerability and the Human Condition Initiative (VHC), which she founded in 2008. This initiative brings together diverse perspectives and disciplines to advance a social justice framework rooted in the universality of human vulnerability and the need for a responsive state.

“Vulnerability should be recognized as the primal human condition. As embodied beings we are constantly susceptible to harm, whether caused by disease and physical decline or natural or manufactured disasters,” Fineman explains. She notes that vulnerability may be most evident during times of dependency, when we are infants, ill, aged, or disabled, but argues that it is continuously present throughout life.

Recognizing vulnerability has political and policy implications.

(continued on page 14)

## Examining the Court's Reasoning on Same-Sex Marriage



### Michael J. Perry

Robert W. Woodruff Professor of Law

AB, Georgetown University, 1968

JD, Columbia University, 1973

**Scholarly interests:** constitutional law, human rights, international human rights law, law and religion

emory Law Professor Michael Perry predicted discord would result from the US Supreme Court's opinion in *United States v. Windsor*. And indeed, a year after the 2013 decision, same-sex marriage cases were in progress in five federal appeals courts—the Fourth, Fifth, Sixth, Ninth, and Tenth Circuits.

On June 25, one day before *Windsor's* one-year anniversary, a three-judge panel from the Tenth Circuit US Court of Appeals became the first federal appeals court to find it unconstitutional for a state (particularly, Utah) to ban same-sex couples from marriage. Disagreement among the appeals courts will force the US Supreme Court to weigh in and issue a ruling for the entire country, he says.

Perry, Robert W. Woodruff Professor of Law, wrote last year he found the *Windsor* opinion “confused and confusing” and “gratuitously insulting to many who oppose the legalization of same-sex marriage.” The majority opinion lent itself to the view that the court believes people who oppose same-sex marriage do so because of a demeaning view of gays and lesbians, he says.

“In fact, many of the people who oppose the legalization of same-sex marriage do so on the basis of a view about the immorality of a particular conduct, not the moral inferiority of any human beings. That’s a hard point for people to wrap their head around, but it’s a very important point,” Perry says.

“It would have made much more sense if the court had made it clear that what it was opposing was the idea that the state could mark this sexual conduct, this sexual intimacy, as immoral. That’s a different issue,” he says. “There’s a whole line of cases in which the court is saying that there are certain kinds of moral judgments that the states may not make.”

In 2003, *Lawrence v. Texas* effectively invalidated antisodomy laws across the US. Rather than finding the Texas law invalid under the Equal Protection Clause, Justice Anthony Kennedy said

**“Many of the people who oppose the legalization of same-sex marriage do so on the basis of a view about the immorality of a particular conduct, not the moral inferiority of any human beings.”**

## Excerpt: *Human Rights in the Constitutional Law of the United States*

In the period since the end of the Second World War, there has emerged what has never before existed: a truly global morality—specifically, a global *political* morality. That morality, which I call “the morality of human rights,” consists both of a fundamental imperative, which serves as the normative ground of human rights, and of various human rights—of various rights, that is, recognized by the great majority of the countries of the world as human rights.

Some of the morality of human rights is entrenched—more precisely, some of the rights internationally recognized as human rights are entrenched—in the constitutional law of the United States. Because, as I explain in chapter 2, a human right is, whatever else it is, a moral right, I refer to the set of internationally recognized human rights that are entrenched in the constitutional law of the United States as “the constitutional morality of the United States.”

A basic understanding of the morality of human rights greatly enhances our understanding of the constitutional morality of the United States. My aim in part I of this book is to provide that basic understanding. I begin, in chapter 1, by sketching the internationalization of human rights: the growing international recognition and protection, in the period since the end of the Second World War, of certain rights as human rights. Then, in chapter 2, I explain what it means to say, in the context of the internationalization of human rights, that a right is a “human right.” Finally, in chapter 3, I discuss the normative ground of human rights: the fundamental imperative, articulated in the very first article of the foundational human rights document of our time—the Universal Declaration of Human Rights (1948)—that governments “act towards all human beings in a spirit of brotherhood.”

With part I behind us, we are ready to turn, in part II, to the constitutional morality of the United States. The three international human rights with which I am concerned in this book—each of which, as I explain in due course, is entrenched in the constitutional law of the United States and is therefore part of the constitutional morality of the United States—are the right not to be subjected to “cruel and unusual” punishment, the right to moral

equality, and the right to religious and moral freedom. (At the beginning of part II, I identify the conditions whose satisfaction warrants our concluding that a right is entrenched in the constitutional law of the United States.) I elaborate each of those three rights in part II, and I pursue three inquiries:

- Does punishing a criminal by killing him violate the right not to be subjected to “cruel and unusual” punishment?
- Does excluding same-sex couples from civil marriage violate the right to moral equality or the right to religious and moral freedom?
- Does criminalizing abortion violate the right to moral equality or the right to religious and moral freedom?

I also pursue, in part II, a fourth inquiry: In exercising judicial review of a certain sort—judicial review to determine whether a law (or other public policy) claimed to violate a right that is part of the constitutional morality of the United States does in fact violate the right—should the Supreme Court of the United States inquire whether in its own judgment the law violates the right? Or, instead, should the court proceed deferentially, inquiring only whether the lawmakers’ judgment that the law does not violate the right is a reasonable one? In short, how large/small a role should the court play in protecting (enforcing) the constitutional morality of the United States?

I have long been engaged by, and have before written about, questions such as those I address in this book: questions about the implications of constitutionally entrenched human rights—and the question about the proper role of the Supreme Court in adjudicating such questions. (The title of my first book, published over thirty years ago, in 1982: *The Constitution, the Courts, and Human Rights*.) Indeed, I have before written about each of the three constitutional controversies at the heart of this book: capital punishment, same-sex marriage, and abortion. Because I am not satisfied with my earlier efforts, I revisit the controversies here.

—from *Human Rights in the Constitutional Law of the United States* (Cambridge University Press 2013)

the Due Process Clause gave gays “the full right to engage in private conduct without government intervention.” He also wrote, “Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”

At the time, Kennedy said *Lawrence* didn’t require the government to extend marriage or civil unions to same-sex couples. He did, however, note significant change in the nation’s laws and mores since *Bowers v. Hardwick*, a 1986 Georgia anti-sodomy case which *Lawrence* overruled.

“They show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex,” Kennedy’s opinion reads.

The speed of change in public opinion on LGBT issues since the Defense of Marriage Act became federal law in 1996 has been similarly, “breath-taking,” Perry says. “If ten years ago someone predicted that the Supreme Court of the United States would do what it’s done or what it’s about to do in the next year or two, that would have looked pretty implausible,” he says.

About 44 percent of Americans live in states where same-sex couples have been granted access to civil marriage. (Nineteen states and the District of Columbia allow same-sex unions.)

Internationally, the US is not an outlier in its national stance on same-sex unions. As of mid-2014, only 18 countries (out of 193 UN Member States) had approved same-sex marriage nationwide, according to Pew Research Center. It’s worth noting that in many of those 18 nations, change was driven by lawmakers, not judges, Perry says.

“Most of the countries outside of the United States that have admitted same-sex couples to civil marriage have not done so because courts required that they do so—they’ve done so because their Parliaments, their lawmakers, have decided to do so,” Perry says. “That obviously is less provocative because these are democracies and people understand that in democracies, your view doesn’t always win.”

In the United States, when change comes from the courts, those who disagree often complain it doesn’t seem very democratic.

Still, when religious organizations challenge the government in court, their objections deserve thoughtful examination, and Perry says one shouldn’t assume everyone who objects to same-sex marriage does so from prejudice.

“One of the major institutional voices opposing the legalization of same-sex marriage in the United States, the United States Conference of Catholic Bishops, makes it about as clear as one can make it that they regard gay and lesbian persons as fully human, equally human, equally beloved children of God—our brothers and our sisters,” he says.

“Their opposition is based on a moral view that ‘inherently nonprocreative’ sexual conduct is immoral, and that includes the use of contraceptives by a heterosexual, married couple,” he says.

“Similarly, their opposition to same-sex marriage is not based on a view that gays or lesbians are morally inferior human beings.”

The federal trial court decisions post-*Windsor* appear to echo *Windsor’s* suggestion that failing to recognize same-sex unions is a demoralizing, dehumanizing assault on gay citizens’ dignity.

The Defense of Marriage Act’s fatal problem, Perry says, was that its exclusion was based on the belief that same-sex sexual conduct is immoral.

Perry says a better approach in *Windsor* would have been to say the state has no legitimate jurisdiction to reach into the realm of such personal, private behavior to declare it immoral—instead of suggesting those opposed to same-sex marriage view gays as less than human, a position that dissenters will continue to use to their advantage.

## SELECTED PUBLICATIONS

### Books

*Constitutional Rights, Moral Controversy, and the Supreme Court* (Cambridge University Press 2011) (Chinese translation 2014)

*The Political Morality of Liberal Democracy* (Cambridge University Press 2010)

*Toward a Theory of Human Rights: Religion, Law, Courts* (Cambridge University Press 2007)

*Under God? Religious Faith and Liberal Democracy* (Cambridge University Press 2003)

### Book Chapters

Same-Sex Marriage, the Right to Religious and Moral Freedom, and the Catholic Church, in *Learning: Essays on Sexual Diversity and the Catholic Church* (J. Patrick Hornbeck II & Michael Norko eds., 2013)

Why “Act Towards One Another in a Spirit of Brotherhood”? The Grounds of Human Rights, in *Human Rights at the Crossroads* (Mark Goodale ed., 2013)

Human Rights, in *The Routledge Companion to Theism* (Charles Taliaferro, Victoria S. Harrison & Stewart Goetz eds., 2012)

### Articles

Why Excluding Same-Sex Couples from Civil Marriage Violates the Constitutional Law of the United States, *Illinois Law Review* (forthcoming 2014)

The Morality of Human Rights, *San Diego Law Review* (forthcoming 2014)

Freedom of Conscience as Religious and Moral Freedom, *29 Journal of Law and Religion* 124 (2014)

## Can Polygamy Bans Survive a Legal Challenge?



### John Witte Jr.

Jonas Robitscher Professor of Law  
Alonzo L. McDonald Distinguished Professor  
Director, Center for the Study of Law and Religion

BA, Calvin College, 1982  
JD, Harvard University, 1985

**Scholarly interests:** American legal history, human rights, law and religion, legal history, marriage and family law, religious liberty

For nearly two thousand years, the Western tradition has viewed polygamy as inherently wrong, a crime akin to adultery, prostitution, and sex with minors. Polygamy was a capital crime in the West from the ninth to the nineteenth centuries, and every state in America and every nation in the West still counts it a crime today.

These bans are now being challenged as a violation of the rights of liberty, equality, privacy, sexual autonomy, and (for some) religious freedom. Indeed, Professor John Witte Jr. contends that polygamy laws will likely become the next hot legal topic on the contested borderlines between constitutional law, family law, and religious freedom. The Jonas Robitscher Professor of Law, Alonzo L. McDonald Distinguished Professor, and director of the Center for the Study of Law and Religion at Emory, Witte is one of the world's leading scholars of law and religion in Western history. In a comprehensive new 600-page tome, *The Western Historical Case for Monogamy over Polygamy* (Cambridge University Press, forthcoming 2015), Witte analyzes the history of monogamy versus polygamy in the West from ancient Greek, Roman, and Hebrew sources to the present day, and uses that history to assay the current cultural and constitutional debates about whether polygamy should be criminalized, tolerated, or made a valid marital option alongside traditional and same-sex marriage.

Though criminal, polygamy is currently being practiced, albeit usually discretely, by various Fundamentalist Mormons, Muslim and Hmong immigrants, Native American Indians, and others. Also, mainstream media have begun shining light on the practice. "Popular shows, such as *Sister Wives* and *Big Love*, and popular magazines, such as *People* and *Time*, are making the polygamous

**"On the frontier are hard questions about extending the forms of valid marriage to include polygamy."**

### Excerpt: *The Western Historical Case for Monogamy over Polygamy*

For more than 2,500 years, the Western legal tradition has defined marriage as the union of one man and one woman with the fitness, capacity, and freedom to marry each other. This has been the consistent normative teaching of ancient Greeks and Romans, first millennium Jews and Christians, medieval Catholics and early modern Protestants, modern Enlightenment philosophers and liberals, common law and civil law jurists alike. While monogamous marriage is neither good for everyone nor always good, these writers have argued, in general and in most cases monogamous marriage brings essential private goods to the married couple and their children, and vital public goods to society and the state.

The historical sources commend monogamy on various grounds. The most common argument is that exclusive and enduring monogamous marriages are the best way to ensure paternal certainty and joint parental investment in children who are born vulnerable and utterly dependent on their parents' mutual care and remain so for many years. Such marriages, furthermore, are the best way to ensure that men and women are treated with equal dignity and respect within the domestic sphere, and that husbands and wives, parents and children, provide each other with mutual support, protection, and edification throughout their lifetimes. This latter logic also now applies to dyadic same-sex couples.

For more than 1,750 years, in turn, the Western legal tradition has declared polygamy to be a serious crime—a capital crime till the mid-nineteenth century. While some Western writers and rulers have allowed polygamy in rare individual cases of urgent personal, political, or social need, virtually all Western writers and legal systems have denounced polygamy as an alternative form of marriage and have denounced the occasional polygamous experiments of early Jews, medieval Muslims, early modern Anabaptists, nineteenth-century Mormons, and current-day immigrants to the West.

The historical sources condemn polygamy on a number of grounds. The most common argument is that polygamy is unnatural, unfair, and unjust to wives and children—a violation of their fundamental rights. Polygamy, moreover, is also too often the cause or consequence of sundry other harms, crimes, and abuses. And polygamy, according to more recent writers, is a threat to good citizenship, social order, and political stability, even an impediment to the advancement of civilizations toward liberty, equality, and democratic government. For nearly two millennia, therefore, the West has thus declared polygamy to be a crime, and has had little patience with occasional arguments raised in its defense.

Both historical social observers of polygamy and

modern social scientists have emphasized the serious harms too often associated with polygamy. Young women are harmed because they are often coerced into early marriages with older men. Once pushed aside for a rival co-wife, women are reduced to rival servants or slaves within the household. They are then exploited periodically for sex and procreation by detached husbands. They are forced to make do for themselves and their children with dwindling resources as still other women and children are added to the household against their wishes. If they protest their plight, if they resort to self-help, if they lose their youthful figure and vigor, they are often cast out of their homes—impoverished, undereducated, and often incapable of survival without serious help from others.

Children are harmed, these same historical and modern observers continue, because they are often set in perennial rivalry with other children and mothers for the affection and attention of the family patriarch. They are deprived of healthy models of authority and liberty, equality and charity, marital love and fidelity, which are essential to their development as future spouses, citizens, and community leaders. And they are harmed by having too few resources to support their nurture, education, care, and preparation for a full and healthy life as an adult.

Men are harmed by polygamy, too. Polygamy promotes marriage by the richest and most powerful men, not necessarily the fittest in body, mind, or virtue. In isolated communities, polygamy often leads to ostracism of rival younger men, who have fewer marital opportunities and are often consigned to seduction, prostitution, and other untoward sexual behavior. Polygamy inflames a man's lust, for once he adds a second wife, he will inevitably desire more, even the wife of another. And polygamy deprives men of that essential organic bond of exclusive marital companionship and friendship, which ancients and moderns alike say is critical to most men's physical, psychological, moral, and even spiritual health.

The Western legal tradition reminds us that even the biblical titans of the faith who practiced polygamy did not fare well. Think of the endless family discord of Abraham with Sarah and Hagar, or Jacob with Rachel and Leah. Think of King David who murdered Uriah the Hittite to add the shapely Bathsheba to his already ample harem. Or King Solomon with his "thousand wives," whose children ended up raping, abducting, and killing each other, precipitating civil war in ancient Israel. Anthropologists point to similar problems in modern polygamous households and communities.

The Western legal tradition has thus long regarded polygamy as a *malum in se* offense—something "bad in itself." Other *malum in se* offenses

today include slavery, sex trafficking, prostitution, indentured servitude, obscenity, bestiality, incest, sex with children, self-mutilation, organ-selling, cannibalism, and more. All of these activities, most Western legal systems still consider to be inherently wrong—or too often the cause or consequence of other wrongdoing. That someone wants to engage in these activities voluntarily for reasons of religion, bravery, custom, or autonomy makes no difference. That other cultures past and present allow such activities makes no difference. The Western legal

tradition condemns polygamy because it routinizes patriarchy, jeopardizes consent, fractures fidelity, divides loyalty, dilutes devotion, fosters inequity, promotes rivalry, foments lust, condones adultery, confuses children, and more. Not in every case, to be sure, but in enough cases to make the practice of polygamy too risky to condone as a viable legal option.

—from *The Western Historical Case for Monogamy over Polygamy* (Cambridge University Press, forthcoming 2015)

lifestyle look mainstream, even edgy and glamorous,” says Witte.

The hard question is whether these criminal laws against polygamy can withstand a challenge that they violate an individual’s constitutional rights to privacy and sexual liberty, to marriage and domestic autonomy, to equal protection and nondiscrimination, and to religious freedom. Cases challenging polygamy bans have already been filed in Canada and the United Kingdom. And in 2013, a US District Court struck down parts of Utah’s anti-polygamy law in *Brown v. Buhman*, a case involving the aforementioned *Sister Wives* family.

“Is polygamy just another one of those stubborn traditional Christian sex crimes inevitably vulnerable to the same constitutional logic of privacy and sexual liberty that toppled traditional laws against abortion, or contraception, or sodomy?” Witte wondered at the 2013 Cary and Ann Maguire Lecture delivered at The John W. Kluge Center at The Library of Congress. “Are defenders of anti-polygamy laws just prudish patriarchs, chauvinists, and homophobes, clutching to their traditional morality at the cost of true liberty for all?”

And could it go even further? If polygamy becomes decriminalized, could it then become legalized?

“With so much marital pluralism and private ordering already available, why not add a further option, that of polygamous marriage?” Witte asks in his new book. “Why not give the polygamist families the same status afforded to other domestic unions recognized by state law? Would that not be better than consigning polygamists to a shadow marriage world controlled by religious authorities who have none of the due process constraints imposed upon state authorities?”

The historical arguments against polygamy have been myriad, Witte notes, and his work reflects the most persistent and common

argument—that polygamy is too often the cause or consequence of harm. Both ancient and modern writers have argued it is inherently unnatural, unfair, and unjust to wives and children. In his upcoming book, Witte also demonstrates how polygamy is harmful to men.

*The Western Historical Case for Monogamy over Polygamy* is the 28th book for Witte, a prolific author who has also published 220 articles and 15 journal symposia.

“Two generations ago, contraception, abortion, and women’s rights were the hot topics,” he says. “This past generation, children’s rights and same-sex unions have dominated the cultural and constitutional wars. On the frontier are hard questions about extending the forms of valid marriage to include polygamy, and extending the forums of marital governance to include religious and cultural legal systems that countenance polygamy. This book aims to put those looming questions in larger and longer context. No such comprehensive historical account exists, and I hope this book will help resource the debates both in the West and well beyond.”

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(continued on following page)

## Fineman

continued from page 7

“If we look at American society, we see a long and growing list of material and social inequalities; we have no guarantee of basic social goods such as food, housing, and health care, and we have a network of dominant economic and political systems that not only tolerate, but justify grossly unequal distributions of wealth, power, and opportunity,” Fineman wrote in a 2008 article for the *Yale Journal of Law and Feminism*.

With principles of autonomy, self-sufficiency, and the restrained state still firmly entrenched in American discourse, Fineman reflects that there is still a lot to do.

For example, the legal research database company HeinOnline is creating an online repository of the project’s work and papers. The VHC is also garnering increasing international attention, with scholars coming from across the world to learn more about this emerging paradigm.

Fineman takes the long view on that progress, hopeful that she is “part of an historic process that will result in progressive change.”

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continued from page 4

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continued from previous page

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### Morgan Cloud

Charles Howard Candler Professor of Law

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### Michael S. Kang

Professor of Law

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### Kay Levine

Associate Professor of Law

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### Ani Satz

Associate Professor of Law

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Seaman

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Shanor



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*continued from previous page*

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Associate Professor of Law

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### Barbara Bennett Woodhouse

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