

FROM *REYNOLDS* TO *LAWRENCE* TO *BROWN V. BUHMAN*:
ANTIPOLYGAMY STATUTES SLIDING ON THE
SLIPPERY SLOPE OF SAME-SEX MARRIAGE

By

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Abstract

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In 2003 in *Lawrence v. Texas* (striking Texas' sodomy law), Justice Scalia predicted in his dissent the end of all morals legislation. If Justice Scalia is correct most, if not all, morals-based legislation may fall. For example, in recent years state laws prohibiting same-sex marriage have fallen to constitutional challenges. Ten years after *Lawrence* in 2013, a Utah Federal District Court in *Brown v. Buhman*, though feeling constrained by the 1878 *Reynolds* case (which rejected a First Amendment challenge to an antipolygamy law), nevertheless at the request of a polygamous family concluded that the cohabitation prong of Utah's anti-bigamy statute was unconstitutional. To reach its conclusion, *Brown v. Buhman* believed it necessary to undertake a detailed review of the history of U.S. antipolygamy efforts. Like *Brown v. Buhman* this paper reviews the history of those antipolygamy efforts and current legal trends to conclude that Justice Scalia's prediction, at least as regarding marriage, is accurate. An analysis of the legal and historical underpinnings of antipolygamy laws suggest that those footings have weakened. If Justice Scalia and *Brown v. Buhman* were correct, they will soon fall. When they fall, polygamy will be constitutional.

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Chapter 1

Introduction

[P]olygamous or plural marriages are forever prohibited.

UTAH CONST. art. III, § 1.

The Texas Constitution defined marriage as “the union of one man and one woman.”¹ Yet the Texas Constitution’s gender requirement limiting unions to persons of the opposite sex may ultimately fall if the modern legal trend continues.² The modern trend provided that “marriage” for legal purposes includes same-sex as well as opposite-sex unions. Almost all recent court decisions considering the issue, with one notable exception, concluded that state-law prohibitions on same-sex marriage are unconstitutional – and the United States Supreme Court appears ready to answer the question for the entire country.³ The courts striking prohibitions on same-sex marriage

¹ TEX. CONST., Art. 1, sec. 32 (2005)(“Marriage in this state shall consist only of the union of one man and one woman.”); UTAH CONST., art. I, § 29 (“(1) Marriage consists only of the legal union between a man and a woman.(2) No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.”). Both of these provisions have been determined to be unconstitutional by federal courts. See *DeLeon v. Perry*, 975 F.Supp.2d 632 (W.D. Tex. 2014) *appeal pending* No. 14-50196 (5th Cir. 2014)(oral argument heard January 9, 2015) and *Kitchen v. Herbert*, 755 F.3d 1193, 1198-99 (10th Cir. 2014).

² *DeLeon*, 975 F.Supp.2d at 639-40 (“Accordingly, the Court finds these laws are unconstitutional and hereby grants a preliminary injunction enjoining Defendants from enforcing Texas' ban on same-sex marriage.” The *DeLeon* court held that Texas' prohibition on same-sex marriage in the Texas Constitution conflicts with the United States Constitution's guarantees of equal protection and due process).

³ For example compare *Baskin v. Bogan*, 766 F.3d 648 (7th Cir.2014)(striking down same-sex marriage prohibitions) with *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014)(upholding prohibitions of same-sex marriage). The petition for Writ of Certiorari was granted in *DeBoer*, No.14-571 (U.S. 2014), on January 16, 2015 regarding the following questions: 1) Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex? and 2) Does the Fourteenth Amendment require a state to recognize a

generally reject reference to tradition, custom, religion, or majoritarian views of morality as a proper basis of a legal definition which restricts marriage to only opposite-sex unions. The question presented here is whether similar reasoning should, based on historical precedents, ultimately be applied to prohibitions on plural marriage.⁴

While same-sex marriage is a relatively modern concept, plural marriage is an ancient practice.⁵ Though once thought to be “odious” – an “abomination” – at least in western cultures, polygamous relationships were reconsidered.⁶ If traditional definitions and majoritarian moral considerations are no longer applicable regarding marital gender requirements, what imperative stands in the way of a legal definition of marriage which includes a union of more than two consenting adults of any gender? Stated perhaps more precisely, what legal rationale – other than religion, tradition, or morals – requires marriage to be limited to only unions of two persons? Perhaps none.

Justice Scalia in his 2003 *Lawrence* dissent predicted the end of morals-based legislation:

marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state? United States Supreme Court Order List, http://www.supremecourt.gov/orders/courtorders/011615zr_f2q3.pdf (accessed on January 18, 2015).

⁴ As discussed below, many advocates of same-sex marriage contend that it is fallacious to connect same-sex and plural marriage. See *infra* n. 181.

⁵ Old Testament Bible (English Standard Version). Genesis 4:19 (“And Lamech took two wives. The name of the one was Adah, and the name of the other Zillah.”); Genesis 16:3 (“So, after Abram had lived ten years in the land of Canaan, Sarai, Abram’s wife, took Hagar the Egyptian, her servant, and gave her to Abram her husband as a wife.”); 1 Kings 11:1-3 (“Solomon clung to these in love. He had 700 wives, who were princesses, and 300 concubines.”)

⁶ *Reynolds v. United States*, 98 U.S. 145, 164 & 166 (1878)(Polygamy has always been odious); Mark Twain, *Roughing It*, (Hartford: American Publishing Company, 1871), 115 (“Polygamy is a recent feature in the Mormon religion, and was added by Brigham Young after Joseph Smith’s death. Before that, it was regarded as an ‘abomination.’”).

The Court embraces instead Justice STEVENS' declaration in his *Bowers* dissent, that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice,” This effectively decrees the end of all morals legislation.⁷

At the time, Justice Scalia's *Lawrence* prediction appeared overwrought. Suggesting the end to all laws based on majoritarian moral considerations seemed to be a stretch. Ten years later, however, a Utah Federal District Court in *Brown v. Buhman* found that Utah's anti-bigamy statute criminalizing religious “cohabitation” by a married person with someone other than his legal spouse violated the Free Exercise Clause of the First Amendment and the Due Process of the Fourteenth Amendment.⁸ The *Brown v. Buhman* court did not seem to be overly concerned by the majoritarian American view which apparently rejects plural marriage as immoral.⁹

The Plaintiffs in *Brown v. Buhman* (one male and four females who form a plural family and members of a religious group accepting polygamy as a core religious practice) challenged the Utah anti-bigamy statute. To answer the constitutional questions presented, the *Brown v. Buhman* court believed it was necessary both to confront the United States Supreme Court's 1878 *Reynolds* case (which rejected a First

⁷ *Lawrence v. Texas*, 539 U.S. 558, 599 (2003)(Justice Scalia dissenting).

⁸ *Brown v. Buhman*, 947 F.Supp.2d 1170 (D. Utah 2013).

⁹ According to Gallup, 5% of Americans viewed polygamy as morally acceptable in 2006. In 2014 14% viewed polygamy as acceptable. Gallup Poll, <http://www.gallup.com/poll/170789/new-record-highs-moral-acceptability.aspx> (accessed Feb. 21, 2015). Perhaps foreshadowing the future, a recent news story announced a same-sex, plural marriage: “Three gay men from Thailand have tied the knot in what is thought to be the world's first three-way same-sex marriage.” Daily Mail, <http://www.dailymail.co.uk/news/article-2972542/They-look-like-new-boy-band-s-world-s-THREE-WAY-sex-marriage-Gay-Thai-men-tie-knot-fairytales-ceremony.html#ixzz3Ti90Mknk> (accessed Mar. 7, 2015).

Amendment challenge to a Utah territorial anti-bigamy law) and to review the history of earlier antipolygamy efforts (including the 1894 Utah Enabling Act which, upon Utah's admission to statehood, required the Utah State Constitution through an "irrevocable ordinance" to forever prohibit polygamous and plural marriages).¹⁰ The *Brown v. Buhman* opinion included pages of discussion under the heading "Historical Background," which background, the court advised, "frames the court's 'Analysis' . . . of the multiple constitutional violations Plaintiffs claim."¹¹ The *Brown v. Buhman* Court found itself using history to answer constitutional law questions – something courts often do. Whether judges are competent historians is a matter of current debate. Justice Antonin Scalia and Bryan Garner, in their recent book regarding "originalism" (words must be given the meaning they had when the text was adopted) and "textualism" (judges derive meaning exclusively from text and context), contend it is a "false notion" that judges are unqualified to do the historical research which "originalism" requires while others disagree.¹²

¹⁰ UTAH CONST. art. III, § 1 ("First:—Perfect toleration of religious sentiment is guaranteed. No inhabitant of this State shall ever be molested in person or property on account of his or her mode of religious worship; but polygamous or plural marriages are forever prohibited.").

¹¹ *Brown*, 947 F.Supp.2d at 1180, n.6.

¹² Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretations of Legal Texts* (St. Paul: Thompson/West, 2012), 399. Scalia and Garner begin their discussion of lawyers and judges as historians with a quotation from Max Radin: "Lawyers are . . . necessarily historians . . . If they do not take this task seriously, they will not cease to be historians. They will be bad historians." Max Radin, *The Law and You* (New York: Mentor, 1948), 188-89. Scalia and Garner contend:

It is reasonable to ask whether lawyers and judges can adequately perform historical inquiry of this sort [required for Scalia's view of "originalism."] . . . Today's lawyers and judges, when analyzing historical questions, have more tools than ever before. They can look to an ever growing body of scholarship produced by the legions of academic legal historians populating law and history

In reviewing the history of anti-polygamy laws, *Brown v. Buhman* rejected as “morally repugnant” the United States Supreme Court’s 130-year-old reasoning applied in *Reynolds* which had determined that polygamy was “odious” and an “offence against

faculties at our leading universities. No history faculty of any note would consider itself complete without legal experts; and no law faculty would consider itself complete without its share of expert historians. . . . History is a rock-hard science compared to moral philosophy.

Yet, Judge Richard Posner of the 7th Circuit has suggested to the contrary contending that Judges have the same problems with history as historians: “Judges are not competent historians. Even real historiography is frequently indeterminate, as real historians acknowledge.” Richard Posner, *Reflections of Judging* (Cambridge: Harvard University Press, 2013), 185. Posner notes that even when a group of historians agree and advance their agreed-upon position in connection with a pending case, their view is commonly considered unworthy because – being humanitarian professors – their view is assumed to be biased towards liberal positions. *Id.* at 188. Posner observes: “[I]f history is such a mushy discipline that historians’ political views shape their professional views, history is not a good candidate for bringing objectivity to constitutional decision making.” *Id.* Yet, there is (or ought to be) a “usable past,” that is, the idea “of finding elements in history that can be brought fruitfully to bear on current problems.” Cass R. Sunstein, “The Idea of a Usable Past,” *Columbia Law Review* 95, no. 3 (April 1995): 601-608. Sunstein reasonably argues: “Constitutional history [including consultation of primary sources and understanding of the best and most recent work by historians] provides a way of constraining legal judgments, invoking a set of provisions with at least some kind of democratic pedigree, and providing a shared set of materials from which judicial reasoning can proceed.” *Id.* at 604. Another commentator observes that the fact that advocates from diametrically opposing positions on the ideological spectrum can consult the evidence of history and reach diametrically opposing conclusions is not surprising and raises the question: is historical evidence essentially indeterminate when used in legal analysis? Mathew J. Festa, “Applying a Usable Past: The Use of History in Law,” *Seton Hall Law Review* 38, no.2 (2008), 479–553, 497. Festa proposes the rigorous use of evidentiary rules and standards to evaluate historical claims in the courtroom in order to assuage concerns about parties offering competing versions of the past to persuade the decision makers in the court system. *Id.* at 550. The use of history by judges is particularly relevant to originalism, as noted above, in which a court is attempting to determine “adoption history,” that is, the history surrounding the adoption of the Constitution and its subsequent amendments. A court may also be required to examine the history of unjust discrimination to determine the applicable standard of review. Jack M. Balkin, “The New Originalism and the Uses of History,” *Fordham Law Review* 82 (2013): 641-719, 668-69 (“The U.S. Supreme Court’s current test for heightened scrutiny of government classifications requires a showing that a group has been subject to a history of unjust discrimination. Therefore, arguments that classifications affecting a particular group—homosexuals, for example—should be subject to heightened scrutiny will depend on historical evidence and argument.”)

society.”¹³ The *Brown v. Buhman* court, however, felt nevertheless constrained by the *Reynolds* holding and thus limited its ruling to protecting only religious cohabitation but not plural marriage. The *Brown v. Buhman* court contrastingly apparently did not feel constrained by tradition, religion, or morals which reject plural marriage.

With the *Brown v. Buhman* case – and the recent same-sex marriage cases – it now appears that Justice Scalia’s prophesy of the “end of all morals legislation” may be accurate – at least with respect to restrictions on same-sex and plural marriage. This paper will trace some of the historical roots concerning the battle against polygamy in the United States, beginning with the Republican Party Platform of 1856 (conflating polygamy and slavery) and ending with the *Brown v. Buhman* case striking down, in part, Utah’s anti-bigamy law.¹⁴ The analysis will describe how the relevant courts used history to arrive at and support their legal conclusions.¹⁵ The main focus will be on the United States Supreme Court and the United States Constitution, but related opinions will also be considered.

Following the admission of the State of Utah in 1896, the fight against plural marriage mostly faded from the courts for much of the twentieth century. By the end of the nineteenth century the polygamy fight in Utah between the Mormons and the United States government was over – “as the national government forcibly retooled marriage in

¹³ *Brown*, 947 F.Supp. at 1189; *Reynolds*, 98 U.S. at 164-65.

¹⁴ *Brown v. Buhman* is pending on appeal in the Tenth Circuit as of the date of this paper, see *infra* n. 353.

¹⁵ See *supra* n. 12 regarding judges as historians.

Utah.”¹⁶ By then the “Supreme Court protected the constitutional vision of American Protestants by holding that religious belief was not a valid criterion for challenging legal mandates.”¹⁷ In the nineteenth-century-polygamy battle, there had been a “constitutional triumph of antipolygamy.”¹⁸ The victorious position held that the Protestant view of marriage ought to be protected by a government “composed of men whose religious beliefs and marriages were private and monogamous.”¹⁹ Nineteenth-century antipolygamists believed their approach was righteous and morally correct. They believed the constitution ought to, and did, enshrine in the religion clauses of the First Amendment a Protestant view of monogamous marriage. Because law enforcement was willing to look the way unless other crimes were involved, isolated groups practiced polygamy at the fringes of American society. These isolated groups were apparently not interested in challenging legal restrictions to plural marriage. And, law enforcement officials were in any event mostly willing to look the other way when they encountered polygamy – except when other crimes were involved.²⁰ In the courts

¹⁶ Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in the Nineteenth Century America* (Chapel Hill: The University of North Carolina Press, 2002), 14.

¹⁷ Gordon, 14.

¹⁸ Gordon, 15.

¹⁹ Gordon, 222.

²⁰ For example, there were raids of the Short Creek, Arizona LDS compound in 1935, 1944, and 1950 with some of Short Creek’s leaders being charged with “cohabitation,” a charge which “implied co-residence and sexual intercourse, rather than polygamy.” Martha Sonntag Bradley, “A Repeat of History: A Comparison of the Short Creek and Eldorado Raids on the FLDS” in *Modern Polygamy in the United States: Historical, Cultural, and Legal Issues*, eds. Cardell K. Jacobson and Lara Burton, (Oxford: Oxford University Press, 2011), 6-10. In 2008, Texas officials raided the YFZ Ranch near San Angelo Texas which lead to several convictions of sexual assault including the conviction of Warren Jeffs. *Id.* at xvii-xix. There were some cases in the United States Supreme Court which indirectly touched on polygamy. For example in *Chatwin v. United States*, 326 U.S.455 (1946) the Court overturned a kidnapping conviction

the law prohibiting polygamy remained settled throughout most of the twentieth century. Then near the end of the twentieth century, the majoritarian, traditional, Protestant view of monogamous marriage came under attack. But the attack came not from polygamists as it had in the nineteenth century but from supporters of same-sex marriage. In the early years of the twenty-first century same-sex marriage advocates are now on the verge of complete success in the courts. *Brown v. Buhman* may present the first successful, modern-day attack on traditional marriage by polygamists.

This paper is an historical analysis which follows legal reasoning and the historical narrative left by the antipolygamy efforts and related case law. Such analysis leads inevitably to the conclusion that Justice Scalia's prediction is correct. Morals-based restrictions on marriage regarding gender requirements are at an apparent end. If morals-based opposition is no longer relevant regarding gender, then plural marriage will likely find legal acceptability – same as same-sex marriage.²¹ Antipolygamy laws over a century old may well fall, just as Justice Scalia predicted.

from the 1944 Raid and see discussion at *infra* n. 125. Mainly, anti-polygamy laws were unaffected until *Brown*.

²¹ Thereby perhaps proving Cole Porter correct: “In olden days, a glimpse of stocking, Was looked on as something shocking. But now, God knows, Anything goes. Good authors too who once knew better words, Now only use four-letter words, Writing prose. Anything goes. If driving fast cars you like, If low bars you like, If old hymns you like, If bare limbs you like, If Mae West you like, Or me undressed you like, Why, nobody will oppose. When ev'ry night the set that's smart is intruding in nudist parties in Studios. Anything goes.” *Anything Goes*, Cole Porter (1934).

Chapter 2

Historical Background

[I]t is both the right and the imperative duty of Congress to prohibit in the Territories those twin relics of barbarism – Polygamy, and Slavery.

1856 Republican Party Platform.

It is well beyond the scope of this paper to trace the history of polygamy, even if limited to the United States or limited to the efforts to criminalize the practice in the United States. But some review of the efforts of the United States to criminalize plural marriage as immoral will facilitate an understanding of the issues presented here. In fact, as noted, the District Court’s opinion in *Brown v. Buhman* includes an historical analysis, particularly relating to the LDS Church²² and of the governmental efforts to deal with polygamy mainly in Utah, first as a territory (under federal law), and upon its admission as a State.²³ And, the Utah Supreme Court during the last ten years in the *Green* and *Holm* cases (discussed below) also believed it was necessary to review the

²² LDS Church refers to the Church of Jesus Christ of Latter-day Saints.

²³ For example, the *Brown* Court, 947 F.Supp.2d at 1184, observes:
[I]t is perhaps a bitter irony of the history at issue here that it is possible to view the LDS Church as playing the role of both victim and violator in the saga of religious polygamy in Utah (and America). When the federal government targeted Mormon polygamy for elimination during the half century from the passage of the Morrill Anti–Bigamy Act of 1862 through the Congressional inquiry into the seating of Utah Senator Reed Smoot from 1904 to 1907, the “good order and morals of society” served as an acceptable basis for a legislature, it was believed, to identify “fundamental values” through a religious or other perceived ethical or moral consensus, enact criminal laws to force compliance with these values, and enforce those laws against a targeted group. . . [T]his has remained true in various forms (depending on the particular right and constitutional provision at issue) until the Supreme Court’s decision in *Lawrence v. Texas* [citation omitted] created ambiguity about the status of such “morals legislation.”

history applicable to the creation of the Utah State Constitution in order to reject constitutional challenges to Utah's anti-bigamy statute (which the *Brown v. Buhman* court contrastingly, in part, accepted).²⁴ Some historical background, thus, will be helpful.

2.1 Polygamy Generally

Many cultures accommodated polygamy long before it became an issue in the United States.²⁵ Polygamy is a gender-neutral term for marriages with multiple spouses, regardless of the gender combination. The most common type of polygamy is that known as “polygyny” which is a union between a single husband and multiple wives. As of 2008, the vast majority of practicing polygamists in the United States are polygynists.²⁶ Conversely, “polyandry” involving one wife with multiple husbands, is far less common.²⁷ It occurs currently mainly in the Himalayan regions of the South Asia and in other areas where, due to harsh living conditions, men hope to find “a fraction of a wife in a time sharing mechanism, when the total number of wives a man

²⁴ *State of Utah v. Green*, 99 P.3d 820 (Utah 2004); *State of Utah v. Holm*, 137 P.2d 726, 730 (Utah 2006).

²⁵ Adrienne D. Davis, “Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equity,” *Columbia Law Review* 110, no. 8 (December 2010): 1955-2046 (Professor Davis refutes the analogy between same-sex marriage and polygamy but considers whether and how polygamy might be effectively recognized and regulated consistent with social norms). See *infra* n. 181.

²⁶ A. Davis, 1966, n. 26.

²⁷ A. Davis, 1966.

could afford to support is less than one.”²⁸ Few cultures support a gender neutral marriage group of multiple husbands and multiple wives.²⁹

The factors that give rise to and support plural marriage are many and often debated by sociologists, anthropologists, and economists but include wealth disparities, religious beliefs, economic options, sex ratios, pathogen stress, agricultural productivity, and rent seeking.³⁰ Experts also study and debate the effects of polygamy on fertility, household wealth, individual health, politics, and democracy.³¹ The negative impact of polygamy on women is beyond the scope of this paper, but Professor Davis interestingly observes that there may be a modern, feminist view-point supporting polygamy:

Meanwhile, some radical feminists urge polygamy as a potential weapon in dyadic marriage’s ongoing battle of the sexes. Decades after Betty Friedan’s *The Feminist Mystique*, even after substantial shifts in gender roles, many women continue to complain that conventional marriage leaves them craving deeper emotional intimacy and more equitable divisions of household labor. Thus far, frustrated wives have had three options: surrender and consign themselves to gender inequity and personal exhaustion; remain locked in the battle with their husbands; or divorce. Polygamy presents another option. For some women, increasing the ration of women to men in a household might be more effective than pressuring their husbands to “change” and conform to women’s expectations. Done properly – that is, among women committed to feminist principles – polygamy can provide a “sisterhood” with marriage, generate more adults committed to balancing work/family obligations, and allow more leisure time for each wife.³²

²⁸ A. Davis, 1966, n. 27.

²⁹ A. Davis, 1967, n. 29 (noting the definition of “polyfidelity” as being sexually exclusive to a group).

³⁰ A. Davis, 1967, n. 30 (which includes an extensive list of scholarly work on polygamy’s causes).

³¹ A. Davis, 1967-68, n. 31 (which includes an extensive list of scholarly work on the effects of polygamy).

³² A. Davis, 1972-73.

Professor Davis quotes a leading feminist as claiming that plural marriage is the “ultimate feminist lifestyle.”³³

On the other hand, the more accepted view of polygamy is that it “offends a diverse array of interests.”³⁴ Critics contend it does not represent family values but more likely is “promiscuity in disguise.”³⁵ It is alleged to involve exploitation of

³³ A. Davis, 1973, n. 51 quoting pro-polygamist and attorney Elizabeth Joseph who opined: “I’ve often said that if polygamy didn’t exist, the modern American career woman would have invented it. Because, despite its reputation, polygamy is the one lifestyle that offers an independent woman a real chance to ‘have it all.’” Elizabeth Joseph, *Polygamy - the Ultimate Feminist Lifestyle*, <http://www.patriarchywebsite.com/resources/polygamy-lifestyle.htm> (accessed January 6, 2015). Though certainly of a different time, African polygyny was in some instances actually advantageous to women. David Eltis, *The Rise of African Slavery in the Americas*, (Cambridge: Cambridge University Press, 2000), 91 (African polygyny – one husband with several wives – “often meant more rather than less economic independence for women, as the husband made fewer demands on each individual wife and wives were able to associate more with their affinal group. Indeed, in some societies, women purchased extra wives for their husband in an effort to bolster their own economic status.”). On the other hand, because the slave trade between Africans and Europeans favored males, women in West Africa were pushed into polygamous relationships due to the absence of a number of males. David Brion Davis, *Inhuman Bondage*, (Oxford: Oxford University Press, 2006), 100 (“Overall, about two-thirds of the captives shipped from Africa to the New World were male.”). Frank Tannenbaum, *Slave and Citizen*, (Boston: Beacon Press, 1946), 36 (“Polygamy in Africa made fewer ‘salable’ women available for market: the young females taken in slave raids were kept for wives and the males were sold.”). In a different context, the African acceptance of polygamy may have indirectly advanced the interest in black slave women in eighteenth-century Jamaica as “slaves tolerated promiscuity because West African practices such as polygamy allowed it.” In Africa, however, polygamy operated in a secure social context and reduced domestic friction, while in Jamaica in the eighteenth-century these African rules did not apply. Women in slavery in Jamaica, due, among other reasons, to skewed sex ratios “may have had more say, power, and independence compared to men than women in Africa had.” Competition for women in Jamaica was keen and, thus, “the sexually independent slave women was not uncommon.” Trevor Burnard, *Mastery, Tyranny, & Desire: Thomas Thistlewood and his Slaves in the Anglo-Jamaican World*, (Chapel Hill: University of North Carolina Press, 2004), 163. In any event, the impact, advantages, and disadvantages of polygamy are perhaps much more complex than they may seem at first blush.

³⁴ A. Davis, 1975.

³⁵ A. Davis, 1975. There are countervailing views. For example, in Richard S. Van Wagoner, *Mormon Polygamy: A History* (Salt Lake City: Signature Books, 1989), 90, the author argues that plural marriage had little to do with lust:

women and children, religious brainwashing, the destruction of individual desires and will, welfare abuse, and tax fraud. It is seen as an inherently patriarchal institution that subordinates women.³⁶ It is blamed for injuring liberal democratic principles by promoting a despotic state populated by subjects rather than citizens. Polygamist enclaves reportedly often retreat from civil society by cloaking their members in insular, theocratic-fundamentalist polygamous group that have segregated themselves and perpetrated abuse against their members and fraud upon the state. Polygamy is alleged to be symptom of an illiberal and antidemocratic political community. It involves unequal demographics of sex and intimacy in which young girls are recruited into the group and some men are excluded when the number of females is perceived to be inadequate.³⁷ While polygamy in the Unites States is rare, the insular communities which practice it often reflect its potential harms:

Whether the result is “lost boys,” teen brides, widespread statutory rape and incest, or an uneducated and excessively controlled population, the outcome is the same: demographics that are not consonant with high

Contrary to popular nineteenth-century notions about polygamy, the Mormon harem, dominated by lascivious males with hyperactive libidos, did not exist. The image of unlimited lust was largely the creation of Gentile travelers to Salt Lake City Mormon plural marriage, dedicated to propagating the species righteously and dispassionately, proved to be a rather drab lifestyle The stark reality behind the headlines and head shaking was an essentially puritanical Mormon marriage system.

Von Wagoner proceeds to contend that: “Plural wives, like their husbands, viewed polygamy as a practical and honorable means for providing marriage and motherhood to thousands of women who may have otherwise remained unmarried in a monogamous world.” *Id.* at 90.

³⁶ A. Davis, 1975 citing Maura Strassberg, “The Crime of Polygamy,” *Temple Political & Civil Rights Law Review* 12 (2003): 353-563 (Strassberg urges the continued criminalization of polygamy because it threatens the liberal democratic state).

³⁷ A. Davis, 1976 citing Shayna M. Sigman, “Everything Lawyers Know about Polygamy is Wrong,” *Cornell Journal of Law and Public Policy* 16 (2006): 101-185 (Sigman argues that criminalization of polygamy imposes more harms to women than benefits).

rates of individual well-being. Similarly, polyandry, which generates more husbands per wife, is associated with high rates of female infanticide.³⁸

In the nineteenth century, the discourse against plural marriage was often predicated on racism and xenophobia.³⁹ The modern discourse largely avoids those concepts but the concerns are similar.⁴⁰ Yet, one modern view towards the legal viability of polygamy in the twenty-first century is that rather than channeling “legal energy into continuing to root out, repress, and punish polygamy” there should rather be an effort to admit “polygamy into the marriage pantheon.”⁴¹ Rather than confronting polygamy as an abstract question regarding religious or intimacy liberty, perhaps it should be confronted as a set of actual relationships which, if legally recognized, could be regulated, with one expert suggesting that norms of commercial partnership law might be adapted to deal with plural marriages though such solutions would not resolve issues regarding spousal and child abuse. On the other hand, regarding polygamy’s effect on women’s well-being there is some thought that “women might be advantaged

³⁸ A. Davis, 1977.

³⁹ Gordon, 110. Martha M. Ertman, “Race Treason: The Untold Story of America’s Ban on Polygamy,” *Columbia Journal of Gender and Law* 19, no. 2 (2010): 287-366, 288-89 (“But race is also at the center of antipolygamy law, in a way that forces us to rethink the ban itself. Many Americans . . . viewed the Mormons’ political treason as part of a larger, even more sinister offense According to this view, polygamy was natural for people of color, but unnatural for White Americans of Northern European descent. When Whites engaged in this unnatural practice, antipolygamists contended, they produced a “peculiar race.” Antipolygamists linked this physical degeneration to Mormons’ submission to despotism, reasoning that their primitive form of government was common among supposedly backward races. The Supreme Court accepted this argument in the leading antipolygamy case, *Reynolds v. United States*”)(footnotes omitted).

⁴⁰ A. Davis, 1978-79.

⁴¹ A. Davis, 2044.

as a group as men compete for multiple wives.”⁴² These are fascinating issues outside the scope of this paper.⁴³ But, the ethical, social, cultural, political, and economic issues regarding polygamy as a form of marriage and family may not stand in the way of its legalization.

2.2 Polygamy in the United States

In the United States in the nineteenth century the battle regarding polygamy was a battle with the Mormons, since with few exceptions they were the main practitioners of plural marriage.⁴⁴ The 1850s were the “first years of the clash between Mormon and

⁴² A. Davis, 2045.

⁴³ And perhaps this is also overthinking. Maybe the debate could be simplified: “Bigamy is having one wife too many. Monogamy is the same.” – Oscar Wilde. Brainy Quotes, <http://www.brainyquote.com/quotes/quotes/o/oscarwilde131549.html#dT0HyUod4dQOCrDE.9> (accessed January 2, 2015). Whether Oscar Wilde should be credited with this quote is unclear. Others, including Erica Jong, may be more responsible but the idea probably evolved over decades. Quote Investigator, <http://quoteinvestigator.com/2014/07/16/bigamy/> (accessed Feb. 10, 2015). There are other amusing observations about bigamy and polygamy. Mark Twain’s initial desire to reform Mormon polygamy was affected when he “saw the Mormon women,” causing him to rethink:

With the gushing self-sufficiency of youth I was feverish to plunge in headlong and achieve a great reform here--until I saw the Mormon women. Then I was touched. My heart was wiser than my head. It warmed toward these poor, ungainly and pathetically "homely" creatures, and as I turned to hide the generous moisture in my eyes, I said, "No--the man that marries one of them has done an act of Christian charity which entitles him to the kindly applause of mankind, not their harsh censure--and the man that marries sixty of them has done a deed of open-handed generosity so sublime that the nations should stand uncovered in his presence and worship in silence."

Twain, *Roughing It*, 101.

⁴⁴ For the purpose of this paper the term Mormons refers to members of The Church of Jesus Christ of Latter-day Saints (LDS Church). The LDS Church website contains this explanation of the use of the term Mormon:

In 1838, Joseph Smith was told in a revelation that the Church should be called The Church of Jesus Christ of Latter-day Saints (Doctrine and Covenants 115:4). The Church has been known by that name since that time. Gordon B. Hinckley, prior President of The Church of Jesus Christ of Latter-day Saints, has emphasized the Church’s correct name, saying: . . . We are frequently called Mormons. It is a nickname

federal empires.”⁴⁵ The battle over polygamy witnessed both sides arguing about religious freedom; yet, the First Amendment ultimately failed to protect Mormon religious beliefs regarding plural marriage. As described more specifically below, the United States Supreme Court in 1878 had little trouble in *Reynolds* working around the Free Exercise Clause to ban the “immoral” practice of polygamy which the Court believed could be criminalized because polygamy had always been rejected as wrong by western civilization. Polygamy was “odious among the northern and western nations of Europe.”⁴⁶ Until the establishment of the Mormon Church, according to *Reynolds*, polygamy was almost exclusively a feature of the life of Asiatic and of African people – and, to the nineteenth-century mind, such association was enough to condemn the practice as backward and uncivilized.⁴⁷ Polygamy was thought to be an offense against society, rejected by common law from the earliest times in English history; it was an offense against the very right of marriage.⁴⁸ And, according to *Reynolds*, it was

given us because we believe in the Book of Mormon as the word of God, a book which goes hand in hand with the Bible, becoming a second witness for Jesus Christ. Mormon.com, <http://www.mormon.org/faq/why-mormons> (accessed February 18, 2015); See *infra* nn. 65 & 80 for a discussion of polygamy regarding Native Americans and the Oneida community.

⁴⁵ J. Spencer Fluhman, “*A Peculiar People*”: *Anti-Mormonism and the Making of Religion in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 2012), 107.

⁴⁶ *Reynolds*, 98 U.S. at 165.

⁴⁷ *Reynolds*, 98 U.S. at 164.

⁴⁸ Interestingly, neither exposure to female slaves nor African polygamy had much impact upon the Europeans or their views on monogamous marriage. Europeans were mainly not initially interested in female slaves as they were seen as less valuable than males as “units of labor.” Eltis speculates that if “Africans had sailed to Europe and carried off European slaves instead of the reverse, then the slave cargoes would have almost certainly have been mostly female” intended mostly for reproductive purposes though used for other economic functions as well. Ultimately, the slave trade transformed and female slaves were traded with an eye to more than service as a “unit of labor.” There was, of course, extensive sexual abuse of female slaves

accepted that upon marriage society is built. And, perhaps worse of all for the Reynolds Court, polygamy fetters people in stationary despotism and leads to the patriarchal principle which destroys democracy and undermines social life.⁴⁹ Such an immoral practice was thus simply unacceptable in the nineteenth century.⁵⁰ Yet, polygamy was practiced and protected in Utah throughout the nineteenth century.

Following Joseph Smith's discovery of golden plates in 1823 and time spent in Ohio, Missouri, and Illinois, the Mormons arrived in Utah in 1847.⁵¹ Utah was admitted to the union as a territory as part of the Compromise of 1850.⁵² Debates over the organization of Utah (and other territories acquired in the Mexican American War in the 1840s) revealed divisions between North and South regarding the expansion of slavery.⁵³ In an attempt to take advantage of the slavery-crisis, Mormon-controlled constitutional conventions twice petitioned for statehood in the late 1850s. The efforts failed each time. The "primary stumbling block" was polygamy.⁵⁴ After the Civil War issues both with polygamy and the Mormon Church's control of the political and legal

but there was to the European mind a "difference between taking a black mistress or raping a slave on the one hand and establishing the institutions of polygyny" on the other. The "basic European institutions of the nuclear family and serial monogamy were not threatened by African slavery in the Americas, despite the apparently unfettered power of Europeans over Africans in the New World." Eltis, 103.

⁴⁹ *Reynolds*, 98 U.S. at 164.

⁵⁰ *Reynolds*, 98 U.S. at 166-67.

⁵¹ Gordon, 25.

⁵² Gordon, 110.

⁵³ Gordon, 110.

⁵⁴ Gordon, 111.

systems continued to be roadblocks for statehood. As late as 1865, perhaps as many as two-thirds of all territorial officials in Utah were Mormon polygamists.⁵⁵

Even before the admission of Utah as a territory, Mormon polygamy had long been perceived as a problem which influenced American politics, even at the national level. The continued debate over polygamy was key to formation the “three-party system in the 1850s.”⁵⁶ At the first Republican national convention in 1856, the party adopted a radical (for its day), reformist platform which included an “explicit connection between polygamy and slavery.”⁵⁷ The 1856 Republican Party Platform included a resolution tying together and opposing both the “barbarisms” of polygamy and slavery in the territories:

Resolved: That the Constitution confers upon Congress sovereign powers over the Territories of the United States for their government; and that in the exercise of this power, it is both the right and the imperative duty of Congress to prohibit in the Territories those twin relics of barbarism – Polygamy, and Slavery.⁵⁸

This connection of polygamy and slavery was “deep and abiding in political thought across the North.”⁵⁹ The combination of polygamy and slavery fit the political thinking of the new Republicans. The antislavery plank was a “conduit” to bring together diverse elements concerning issues of the growth of slavery in the western

⁵⁵ Gordon, 111.

⁵⁶ Gordon, 55.

⁵⁷ Gordon, 55.

⁵⁸ The American Presidency Project, <http://www.presidency.ucsb.edu/ws/?pid=29619> (accessed Dec. 28, 2014).

⁵⁹ Gordon, 55. “That Republicans linked slavery and polygamy in the 1850s came as no surprise. Mormonism’s new geography ensured entanglement in the issue of national destiny as surely as the South’s peculiar institution did.” Fluhman, 107.

territories, as well as questions of freedom and local sovereignty.⁶⁰ The antipolygamy plank was the “essential partner” of anti-slavery theory, as it referenced issues less controversial.⁶¹ That is, it was less controversial to condemn polygamists Mormon patriarchs than slaveholding patriarchs. Further the new Republicans wished to be viewed as the protectors of Christian civilization. To the average nineteenth-century American, western civilization was founded on a commitment to Christianity. The political party seen as both the protector of Christian civilization and the “vanquisher of barbarism” (of which slavery and polygamy were un-Christian-twin relics) would likely gain political advantage.⁶² Equating slavery and polygamy to barbarism, thus, allowed

⁶⁰ Fluhman quotes Connecticut’s Truman Smith who had praised Utah’s territorial government in 1850 but later regretted that support when he saw Utah as evidence of the danger of popular sovereignty. “With the slavery question in view and thinking he had Douglas exposed, Smith asked: ‘Did you intend to confer on the people of Utah the power to introduce polygamy, for that appertains to one of the domestic relations?’ ” Fluhman, 107

⁶¹ Gordon, 55; Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge: Harvard University Press, 2000), 73 (“The shadow of Utah hovered over the developing partisan controversy. As a territory in which both slavery and polygamy were practiced, Utah was an example of what could happen when residents of a territory determined their own ‘domestic institutions,’ free from congressional intervention. Like slavery, polygamy showed how the institution of marriage could be manipulated. . . . Antislavery politicians likened the southern sexual practices to those of the Mormons, because slaveholders had harem-like privileges over their female slaves. The newly risen Republican Party condemned the ‘twin relics of barbarism – polygamy and slavery – ’ in its party platform of 1856, and asserted the sovereign power of Congress over the territories and its ‘right and duty to prohibit’ both enormities there.”).

⁶² Gordon, 56. Cott, 23 explains that marriage – particularly the contrast between good monogamy and evil polygamy – played a major role in nineteenth century political thought: The thematic equivalency between polygamy, despotism, and coercion on the one side and between monogamy, political liberty, and consent on the other resonated through the political culture of the United States all during the century. Buttressing the social and religious reasons for Americans to believe in and practice monogamy, this political component also inhabited their convictions, all the more powerful for seeming self-evident. A commitment to monogamous marriage on a Christian model lodged deep in American political theory, as vivid as belief in popular sovereignty or in voluntary consent of the governed or in the necessity of a government of laws.

the Republicans to claim that the pro-polygamist Mormon patriarchs and the pro-slavery Southern patriarchs both violated Christian mandates – and, therefore, both were enemies of Christianity and western civilization. This rationale linked antipolygamy to Christian abolitionism. “Mormonism figured in political speech as a surrogate for discussions of slavery.”⁶³ Though it was easier to condemn polygamy than slavery, linking the two would be “an opening wedge in the protective shield around state’s rights” and slavery.⁶⁴

And, the attack on polygamy was seen as God’s work. Thomas Nelson, a pro-Union Tennessee representative, in urging passage of antipolygamy legislation in 1860 (which would prohibit polygamy in the territories) argued that the “law of God” required congressmen to avenge “the insult [of polygamy]” to their wives and

⁶³ Fluhman, 108.

⁶⁴ Gordon, 57. Gordon notes that the linking of slavery and polygamy was particularly useful in political attacks against Stephen Douglas who was charged with being overly fond of Mormons. Douglas would therefore have to urge intervention in Utah to show that protecting slavery did not mean accepting polygamy. Gordon, 60. Cott explains that in connection with the later passage of the Morrill Act the connection between slavery and polygamy continued. Cott, 73-74. Cott quotes Senator Charles Sumner in his address entitled “The Barbarism of Slavery” in which he makes the link between slavery and polygamy and their effect on marriage. Senator Sumner stated: “There are many disgusting elements in Slavery which are not present in Polygamy, while the single disgusting element of Polygamy is more than present in Slavery. By the license of Polygamy, one man may have many wives, all bound to him by the marriage tie, and in other respects protected by the law. By the license of Slavery, a whole race is delivered over to prostitution and concubinage, without the protection of any law.” Cott, 74.

daughters.⁶⁵ Antipolygamy rhetoric was, thus, underpinned by religious, ethical, and moral principles.⁶⁶

In 1862, the Morrill Act for the Suppression of Polygamy received overwhelming support in the Republican dominated Congress – the Southerners having withdrawn. With the Morrill Act, the Republicans “achieved the integration of law and faith.”⁶⁷ The Act outlawed “bigamy,” providing a prison sentence and fine for its violation. The Act annulled the incorporation of the Church of Later-day Saints and

⁶⁵ Gordon, 57. The concept that the advancement of monogamy was not only viewed as part of God’s scheme but was necessary to the social and political order. This type of political thought was relevant not only to Mormons but also Native Americans. Although Tribal practices differed most Indian groups – notably the Iroquois – did not make the nuclear family so fundamental as an economical and psychological unit as did Protestants. “Heterosexual couples were important, but they married within complex kinship systems that accepted premarital sex, expected wives to be economic actors, often embraced matrilineal residence and matrilineal descent, and easily allowed both polygamy and divorce with remarriage.” Cott, 25. To American Christians “Indian practices amounted to promiscuity.” *Id.* In order to assimilate Indians so that they could acquire citizenship, the majority of Americans accepted that it would be necessary to “civilize them more fully.” *Id.*, 121. “If Indians were viewed as potential citizens, however, the extent of polygamy and self-divorce among them became reprehensible as it was among the Mormons.” *Id.* Thus, by the mid-1880s the Indian Bureau began to exert more pressure “on Indian men to abjure ‘plural wives’ and stop being ‘lax’ in husbandly responsibilities.” *Id.* Cott also references Civil War General Orders No. 8 (1865) entitled “Marriage Rules” which provided for regulation of relations regarding freedmen in Indian Territories by promising to uphold freedmen’s marriages solemnized in Indian fashion, but warned “the system of polygamy or plurality of wives” adopted by some freedmen must be abandoned. Cott, 253, n. 26.

⁶⁶ Fluhman notes that Caleb Lyon of New York “declared that at an antipolygamy position was ‘worthy of Christian statesmen and Christian lawgivers.’” Fluhman, 108. Anti-Catholic sentiment also developed in tandem with anti-Mormon sentiment in the 1850s. Fluhman, 109.

⁶⁷ Gordon, 81; MORRILL ANTI-BIGAMY ACT, ch. 126, 12 Stat. 501 (1862) (“That every person having a husband or wife living, who shall marry any other person, whether married or single, in a Territory of the United States, or other place over which the United States have exclusive jurisdiction, shall, except in the cases specified in the proviso to this section, be adjudged guilty of bigamy, and, upon conviction thereof, shall be punished by a fine not exceeding five hundred dollars, and by imprisonment for a term not exceeding five years; . . .). *The Library of Congress*, <http://rs6.loc.gov/cgi-bin/ampage?collId=llsl&fileName=012/llsl012.db&recNum=532> (accessed Dec. 28, 2014).

prohibited any religious organization from owning real estate valued at more than \$50,000.⁶⁸ The Morrill Act restructured Utah’s law with a “grand vision” designed to protect “the onward march of civilization through the purification of marriage to protect and promote freedom, democracy, and equality – all in a constitutional system that integrated Christian and political liberty.”⁶⁹ The Act, even though criminalizing only one of the dreaded relics of barbarism (polygamy but not slavery), nevertheless raised the question: could the federal government override local (state) sovereignty in the name of protecting decency and morality? And, what about the First Amendment and its protections of religious freedom? Could the federal government essentially disband a church and outlaw religious-based plural marriage?⁷⁰

Though sweeping, the Morrill Act did not in practice dismantle polygamy. It was mostly unenforceable because no Utah grand jury would indict one of its own. In any event during the Civil War, President Lincoln, believing that it was best not to push Utah towards the confederacy, had no interest in enforcing the Act.⁷¹ Five years after

⁶⁸ Gordon, 81.

⁶⁹ Gordon, 82.

⁷⁰ There were other morals-based laws in this period. About ten years after the Morrill Act, the Congress passed the Comstock Act (1873) which banned and criminalized the use of the mails to circulate “obscene, lewd or lascivious” materials, and articles “for any indecent or immoral use.” Cott, 124. The Comstock Act was used, among other ways, to harass so-called free lovers, including Ezra Heywood, a “sex radical from Kansas” who called marriage a “slavish institution” and likened it to prostitution because “the wife exchanged sex for monetary support.” Cott, 125. Heywood had the “temerity to name as ‘twin relics of barbarism’ not slavery and polygamy, but the capitalist profit system and marriage.” Cott, 125 & 265, n. 50.

⁷¹ Edwin B. Firmage and Richard C. Mangrum, *Zion in the Courts* (Champaign: University of Illinois Press, 2001), 139 (“Having signed the Morrill Act, Lincoln reportedly compared the Mormon Church to a log he had encountered as a farmer that was ‘too hard to split, too wet to burn and too heavy to move, so we plow around it. That’s what I intend to do with the Mormons. You go back and tell Brigham Young that if he will let me alone, I will let him alone.’”)

its passage, a judiciary committee announced the Morrill Act was a “dead letter.”⁷² Moral outrage was ineffective to end polygamy in Utah. Yet, the Act revealed that a “contest over religion and law” had broken out.⁷³ The conflict regarding the practice of polygamy (mostly in Utah) created a “constitutional conflict over the meaning and scope of liberty and democracy in the United States.”⁷⁴

Creating laws outlawing polygamy – like the Morrill Act – was one thing, getting the law enforced was another. Mormon polygamy advocates learned by the 1870s that control of the local courts in Utah meant the effective protection of polygamy. Such control over the legal system in Utah was contested between the federally-appointed territorial judiciary and the local Mormons through local probate courts with local judges. The Utah probate courts made the federal judiciary “virtually superfluous” as the probate courts were granted original jurisdiction of most civil and criminal matters.⁷⁵ Most importantly, the local probate courts were in the effective control of Mormons, who were inclined by “blind obedience” to Brigham Young to defy federal law – and thereby inclined to protect polygamists.⁷⁶ In reaction to the

⁷² Gordon, 83.

⁷³ Gordon, 1.

⁷⁴ Gordon, 1-4 (“The national Constitution must not shield such immorality, those who opposed polygamy (antipolygamists) argued, or liberty would be compromised. There must be a relationship between the structures of government created by the Constitution and the structures of Christian morality that made civilized life possible.”)

⁷⁵ Gordon, 111.

⁷⁶ Gordon, 111. Brigham Young (1801-1877) was the territorial governor of Utah from 1851 to 1858 and was an early leader of the Church, serving as President from 1847 to 1877.

perceived abuse of the local court system, Congress passed the Poland Act of 1874 which expanded the reach of federal power in Utah territory.⁷⁷

The Poland Act was designed to facilitate prosecutions of polygamists by reducing the power of the territorial probate judges and by enhancing the selection of more neutral jury pools through the erosion of the power of Mormon Church leaders. The Poland Act also provided for appeal of polygamy convictions to the United States Supreme Court. Although the Poland Act began the process of degrading Mormon control of the Utah judicial system, the Act “granted the Mormons what they claimed to have long want – a test case.”⁷⁸ That test case would be the *Reynolds* case of 1878. For years the Mormons relied on constitutional interpretations which would be considered in *Reynolds*. The United States Supreme Court in *Reynolds* would be required to determine whether the First Amendment’s Free Exercise Clause included a protection of polygamy. Yet, unfortunately for the Mormons, *Reynolds* came at time when Reconstruction was ending. The erosion of the national commitment to reform the South actually increased attention paid to Utah and polygamy.⁷⁹ Also, the Court’s

⁷⁷ POLAND ACT, 18 Stat. 253 (1874). Oddly, obtaining passage of the Poland Act (named after Senator Luke Poland of Vermont) was advanced by an 1873 episode emanating from the very household of Brigham Young (the then-President of the LDS Church and prior territorial governor of Utah). One of Young’s wives who had sued for divorce, Eliza Young (wife No. 19), undertook a “spectacularly successful” lecture tour in the summer of 1873 in which she revealed that life in Young’s polygamous household involved “a systematic torture of women, riven by jealousies, violence, and deception.” During her tour, Eliza spoke in Washington and met President Grant and his wife. Eliza’s story revealed the “polygamic theocracy” of polygamy and strongly influenced in the passage of the Poland Act. Gordon, 112.

⁷⁸ Gordon, 113.

⁷⁹ Gordon, 120. At the same time Congress was enfranchising freed black men in an attempt to empower African Americans it was disenfranchising polygamists to produce non-Mormon voting majorities in Utah. The Mormons saw great hypocrisy in the efforts aimed at

jurisprudence under the Due Process Clause of the Fourteenth Amendment (as to whether there were substantive limitations on what the federal and state governments could regulate or proscribe) remained to be determined by future decisions. Thus, *Reynolds* “lies on this fault line” of constitutional law development.⁸⁰ *Reynolds*, it seems, was not the test case the Mormon’s wanted. The *Reynolds* Court rejected a First Amendment challenge to the antipolygamy laws. And, as discussed below, even 130

them. What has been called a “Victorian compromise” somewhat explains the attack on the polygamists. Lawmakers did not try to stamp out adultery or fornication; rather, they tried to keep it underground, out of sight. Usually, these activities were not punished unless they were “open and notorious.” The problem for the polygamist was “not that polygamous men had sexual relations with more than one woman but that they insisted on openly acknowledging plural wives as spouses. While the Saints condemned non-Mormons for having mistresses but not acknowledging them, Americans punished Mormons for so flagrantly violating the Victorian compromise.” Kathryn M. Daynes, *More Wives than One: Transformation of the Mormon Marriage System 1840-1910* (Chicago: University of Illinois Press, 2008), 48-49. This issue of public versus non-public behavior is present in the *Brown* case in which the Browns allege that they openly practiced plural marriage but were only threatened with prosecution after they appeared on a reality TV show. See *infra* n. 272.

⁸⁰ Gordon, 120. *Reynolds* indirectly impacted other groups beyond the Mormons. There were other forms of marriage practiced in the United States which also met resistance. For example, in 1848 John Humphrey Noyes founded a religious commune in Oneida, New York. Noyes’s community was a “unique social experiment in communism and ‘complex marriage’ (in which no exclusive pairings were allowed and sexual relations between any man and woman could be contemplated).” Cott, 128. Noyes “recognized the decision in *Reynolds v U.S.* . . . as a possible warning” to the Oneida community. *Id.*, 129. Following *Reynolds*, Professor John Mears of Hamilton College began a protest against the Oneida community which caused Noyes to flee to Canada in June 1879, never to return to the U.S. The remaining Oneida community ultimately returned to traditional monogamy in late 1879, although this transformation may have resulted as much by the desire of the younger generation of the Oneida to turn away from the “controlled reproduction” aspect of complex marriage “to monogamous practice, rather than be hounded into it by religious condemnation and legal threat.” *Id.*, 130. Though *Reynolds* indirectly impacted the Oneida community, their nontraditional practices “did not raise such thorny legal issues, or produce such innovative judicial analysis” as did polygamy in the *Reynolds* case. Gordon opines that polygamy was more strongly resisted, in part, due to the questions considered by *Reynolds* concerning “patriarchy’s inconsistency with democracy, a central concern of most antipolygamist theory.” Gordon, 142.

years later *Reynolds* remains as a clear impediment to the legal recognition of polygamy.

The efforts to attack polygamy did not end with *Reynolds*. Legislation in the form of the Edmunds Act of 1882 made “cohabitation” a crime and prohibited polygamists and polygamist sympathizers from voting, sitting on juries, and holding public office.⁸¹ Congress abrogated the charter of the Church of Jesus Christ of Latter-day Saints, dissolved its corporate status, and confiscated most of its property for its role in encouraging and assisting polygamous marriages through the Edmunds-Tucker Act of 1887.⁸² Later, after the Mormon Church renounced the practice of polygamy in 1890, Congress would authorize the return of its property. The Church’s renouncement came on October 6, 1890 through the issuance of a manifesto in the form of Official

⁸¹ EDMUNDS ACT, ch. 47, §§ 1, 5, 8, 22 Stat. 30, 31 (1882). <https://archive.org/details/edmundsactreport00unitrich>. (accessed Feb. 18, 2015).

⁸² EDMUNDS-TUCKER ACT, ch. 397, §§ 13, 17, 24 Stat. 635, 637, 638 (1887). Polygamy played a role in other areas of legislation during this period as well. In 1875 Congress passed the Page Law which was an attempt to prevent Chinese women in general from immigrating into the United States. Some of the Chinese women who were immigrating were either prostitutes or second wives in polygamous marriages. Congress feared the unorthodox Chinese practices of polygamy and prostitution, believing that these customs were reflective of an underlying slave-like mentality that rendered the Chinese unfit for democratic self-governance. By defining Chinese women as outside the boundaries of legal marriage, Congress was able to exclude a group of people from entering the United States. See Kerry Abrams, “Polygamy, Prostitution, and the Federalization of Immigration Law,” *Columbia Law Review* 105, no. 3 (April 2005): 642-716. Cott, 136 notes that the alleged lewdness of Chinese prostitutes “contravened monogamous morality” in the view of politicians as marriage and prostitution were opposites: “where marriage implied mutual love and consent, legality and formality, willing bonds for a good bargain, prostitution signified monetary exchange and desperation or coercion on the part of the women involved.” Further, and maybe worse: “They [immigrating Chinese women] were not Christians; their inherited culture accepted polygamy; their livelihoods showed them to be enemies of the civilization embraced by the American nation.” *Id.*, 137.

Declaration No. 1 announcing the end of Church's acceptance of polygamous marriages.⁸³

Wilford Woodruff, the last of the Mormon presidents to have made the journey westward with Brigham Young, "capitulated" announcing that he had received a communication from God counseling abandonment of the legal claim to practice the "Principle" of plural marriage.⁸⁴ Woodruff's manifesto furthered assured all that he would no longer advise the faithful to engage in unlawful practices.⁸⁵

⁸³ The website for the Church of Jesus Christ of Latter-day Saints explains: "The Doctrine and Covenants is a collection of divine revelations and inspired declarations given for the establishment and regulation of the kingdom of God on the earth in the last days." Doctrine and Covenants section 132 regarding plural marriage states:

And if he have ten virgins given unto him by this law, he cannot commit adultery, for they belong to him, and they are given unto him; therefore is he justified.

⁸⁴ Gordon, 220. On October 6, 1890 the Church issued Church Official Declaration No. 1 announcing end of Church acceptance of polygamous marriages which stated in relevant part:

To Whom It May Concern:

Press dispatches having been sent for political purposes, from Salt Lake City, which have been widely published, to the effect that the Utah Commission, in their recent report to the Secretary of the Interior, allege that plural marriages are still being solemnized and that forty or more such marriages have been contracted in Utah since last June or during the past year, also that in public discourses the leaders of the Church have taught, encouraged and urged the continuance of the practice of polygamy—

I, therefore, as President of The Church of Jesus Christ of Latter-day Saints, do hereby, in the most solemn manner, declare that these charges are false. We are not teaching polygamy or plural marriage, nor permitting any person to enter into its practice

Inasmuch as laws have been enacted by Congress forbidding plural marriages, which laws have been pronounced constitutional by the court of last resort, I hereby declare my intention to submit to those laws, and to use my influence with the members of the Church over which I preside to have them do likewise. . . .

LDS.org, <https://www.lds.org/scriptures/dc-testament/od/1?lang=eng> (accessed Dec. 28, 2014).

⁸⁵ Daynes explains that the church issued further statements: "Additional statements that the church was no longer sanctioning plural marriage were issued at various intervals. More strident than the original Manifesto, the Second Manifesto of 1904 declared that all who entered or preformed new plural marriages would be liable to excommunication, and a 1910 letter to

The legal battle, however, was not over. The 1894 Utah Enabling Act conditioned Utah's admission to statehood upon the express prohibition of polygamy.⁸⁶ The Utah Enabling Act stated in part: "That the inhabitants of all that part of the area of the United States now constituting the Territory of Utah, as at present described, may become the State of Utah, as hereinafter provided."⁸⁷ Delegates to a Utah State constitutional convention were to be elected and the convention was "authorized to form a Constitution and State government for said proposed State."⁸⁸ The Enabling Act also required the new constitution to include an "ordinance irrevocable without the consent of the United States and the people of the State" which would ban polygamy by providing:

First. That perfect toleration of religious sentiment shall be secured, and that no inhabitant of said State shall ever be molested in person or property on account of his or her mode of religious worship; Provided, That polygamous or plural marriages are forever prohibited.⁸⁹

True to the Enabling Act, the Utah State Constitution states:

Perfect toleration of religious sentiment is guaranteed. No inhabitant of this State shall ever be molested in person or property on account of his

stake presidents directed them to enforce that policy. These were followed by still other statements reinforcing the church's position that new polygamous unions were prohibited." Daynes, 209.

⁸⁶ UTAH ENABLING ACT, ch. 138, 28 Stat. 107 (1894).

⁸⁷ UTAH ENABLING ACT, ch. 138, 28 Stat. 107 (1894).

⁸⁸ UTAH ENABLING ACT, ch. 138, 28 Stat. 107 (1894)("Sec. 3. That the delegates to the Convention thus elected shall meet at the seat of government of said Territory on the first Monday in March, eighteen hundred and ninety-five, and, after organization, shall declare on behalf of the people of said proposed State that they adopt the Constitution of the United States, whereupon the said Convention shall be, and is hereby, authorized to form a Constitution and State government for said proposed State.")

⁸⁹ UTAH ENABLING ACT, ch. 138, 28 Stat. 107 (1894).

or her mode of religious worship; but polygamous or plural marriages are forever prohibited.⁹⁰

As will be seen below, the Enabling Act and its specific prohibition against polygamy (the so-called “irrevocable ordinance”) are still meaningful to Courts considering current anti-bigamy laws. For example, in 2006 the Utah Supreme Court in *Holm* commented in depth on the Utah State Constitutional Convention in disposing of a constitutional challenge to Utah’s anti-bigamy statute, observing:

In 1894, the United States Congress passed the Utah Enabling Act, granting the Territory of Utah the ability to convene a constitutional convention and to take steps toward obtaining statehood. Utah Enabling Act [citation omitted]. . . . A review of the constitutional debates surrounding the adoption of the language contained in the irrevocable ordinance reveals that delegates were primarily concerned with fully complying with the requirements contained in the Utah Enabling Act. [citations omitted].

Given the framers’ express intent to comply, and, indeed, their assessment of the necessity of complying with the terms of the Utah Enabling Act, their discussion at Utah’s constitutional convention centered on Congress’s intent in requiring Utah to include such an ordinance in its constitution. . . . [T]he framers of [the Utah] state constitution made it clear they understood that the Utah Enabling Act did not merely prevent legal recognition of polygamy but required its prohibition.⁹¹

In January of 1896, President Cleveland proclaimed Utah to be a state. Officials for the newly formed government were inaugurated in the Mormon Tabernacle.⁹² Through the various antipolygamist efforts the “Mormon Question” had been resolved

⁹⁰ UTAH CONST., art. III, § 1.

⁹¹ *Holm*, 137 P.3d at 739-40.

⁹² Mark E. Brandon, *States of Union: Family and Change in the American Constitutional Order* (Lawrence, KS: University Press of Kansas, 2013), 210.

and “the monogamous family was both nationalized and constitutionalized.”⁹³ The Mormons embrace of nonconforming families and its penchant for autocratic theocracy had been rejected.⁹⁴ To the nineteenth century American mind, society and good morals required monogamy:

Polygamy was barbarism. It debased women. It was inherently authoritarian. A regime grounding in values of liberty and equality required monogamy as its elemental social form.⁹⁵

The great majority of Americans were Christians, and the law mirrored their preferences. “Any argument that religious liberty should protect anything other than ‘general [Protestant] Christianity’ was thus an attempt to shield undemocratic beliefs and practices, confusing the abuse of liberty with its exercise.”⁹⁶ As early as the 1830s, the link between democracy and general Protestantism was established by American courts reassuring Americans “that their government was neither heathen nor sectarian.”⁹⁷ If the Mormons did not understand this, *Reynolds* would in 1878 make it clear.

⁹³ Brandon, 210; Gordon, 1-4 (“The ‘Mormon Question’ as many nineteenth-century Americans call it, posed fundamental questions about religion, marriage, and constitutional law.”).

⁹⁴ Brandon, 210.

⁹⁵ Brandon, 210.

⁹⁶ Gordon, 8

⁹⁷ Gordon, 8. The view that America is a Christian nation was advocated well beyond the nineteenth century by several Presidents. In a speech on “The Bible and Progress” a few years before the First World War, Woodrow Wilson asserted that “America was born a Christian nation.” Wilson further declared: “America was born to exemplify that devotion to the elements of righteousness which are derived from the revelations of Holy Scripture.” John Broesamle and Anthony Arthur, *Clashes of Will: Great Confrontations that have Shaped Modern American* (New York: Pearson Education, Inc. 2005), 103. Decades later, just after the close of the Second World War, Harry Truman repeated the same theme in a letter to Pope Pius XII: “Your Holiness, this is a Christian nation. More than a half century ago that declaration was written into the decrees of the highest court in this land.” *Truman’s Exchange of Messages*

Chapter 3

Supreme Court Case Law regarding the Prohibition of Polygamy

Bigamy and polygamy are crimes by the laws of all civilized and Christian countries They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman, and to debase man. Few crimes are more pernicious to the best interests of society.

Davis v. Beason, 133 U.S. 333, 341 (1890)

3.1 Background

In the nineteenth century the Supreme Court's familial jurisdiction mainly touched on three themes. One was the connection between the family and the economy. The second related to the political status of the family, whether it could be regulated by law or whether it was "a pre-political institution exempt from some sorts of regulation."⁹⁸ The third main area was the importance of the family in promoting and preserving a kind of moral order – and it was regarding this third category in which the polygamy arose.⁹⁹ During the late 1800s, the United States Supreme Court would deal

with Pope Pius XII, <http://www.presidency.ucsb.edu/ws/?pid=12746> (accessed Feb. 25, 2015). In 1953 in an address to the Organization of American States, President Eisenhower stated: "We are Christian nations, deeply conscious that the foundation of all liberty is religious faith." *Eisenhower Address before the Council of the Organization of American States*, <http://www.presidency.ucsb.edu/ws/index.php> (accessed Feb. 26, 2015). The view that the US is a Christian Nation is not, however, necessarily accepted today. President Obama stated in 2009: "I've said before that one of the great strengths of the United States is--although, as I mentioned, we have a very large Christian population, we do not consider ourselves a Christian nation or a Jewish nation or a Muslim nation; we consider ourselves a nation of citizens who are bound by ideals and a set of values." *President Obama's News Conference with President Abdullah Gul of Turkey in Ankara, Turkey*, <http://www.presidency.ucsb.edu/ws/index.php?pid=85974&st=christian+nation&st1> (accessed Feb. 26, 2015).

⁹⁸ Brandon, 211.

⁹⁹ Brandon, 211.

with twelve Mormon polygamy cases within a fifteen-year period.¹⁰⁰ The Court decided in favor of the Mormons in only three of these twelve cases, handing down sixteen opinions on the constitutionality or interpretation of the laws and judicial doctrines created to eliminate polygamy among the Mormons. Strong antipathy towards polygamy was espoused by the Court in several of the cases. For example in

¹⁰⁰ Randall D. Guynn and Gene C. Schaerr. "The Mormon Polygamy Cases," *Sunstone* (September 1987): 8-17. The cases listed by Guynn and Schaerr are *Reynolds v. United States*, 98 U.S. 145 (1878); *Miles v. United States*, 103 U.S. 304 (1881); *Clawson v. United States*, 113 U.S. 142 (1885), *on merits*, 114 U.S. 477 (1885); *Murphy v. Ramsey*, 114 U.S. 15 (1885); *Canron v. United States*, 116 U.S. 55 (1885), *vacated*, 118 U.S. 355 (1886); *Snow v. United States*, 118 U.S. 346 (1886), *on habeas corpus sub nora. In re Snow*, 120 U.S. 274 (1887); *In re Nielsen*, 131 U.S. 176 (1889); *Davis v. Beason*, 133 U.S. 333 (1890); *Late Corporation of the Church of Jesus Christ of Latter-day Saints v. United States*, 136 U.S. 1 (1890), *modified*, 140 U.S. 665 (1890), *after remand*, 150 U.S. 145 (1893); *Bassett v. United States*, 137 U.S. 496 (1890); *Cope v. Cope*, 137 U.S. 682 (1891); *Chapman v. Handley*, 151 U.S. 443 (1894). Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N. C. L. Rev. 1501, 1503 n. 5 (1997) contains a concise, thorough history of the efforts to criminalize polygamy with a discussion of the important cases and their outcome. As noted, federal interference with Mormon religious practices was first held to be constitutionally permissible in *Reynolds v. United States*, 98 U.S. 145, 166 (1878) (holding that the practice of polygamy could be criminalized despite being derived from Mormon religious beliefs). Further unsuccessful challenges to anti-polygamy laws followed *Reynolds*. See also *Clawson v. United States*, 114 U.S. 477, 482 (1885) (upholding challenges to grand jurors who stated belief in Mormon doctrines and polygamy); *Murphy v. Ramsey*, 114 U.S. 15, 40-42, 45 (1885) (upholding disenfranchisement of polygamists, but limiting the disenfranchisement to those who maintained a marriage relationship with a plurality of wives after 1882); *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 45, 64-65 (1890) (holding that Congress had the power to repeal the charter incorporating the Church and confiscate all assets other than places of worship, parsonages, and burial grounds for public use, in order to destroy the practice of polygamy); *Davis v. Beason*, 133 U.S. 333, 341, 345-46 (1890) (holding that mere membership in the Mormon Church, which continued to perform polygamous marriages, was a legitimate basis for denying an applicant the right to vote); *In re Nielsen*, 131 U.S. 176, 190 (1889) (holding that charges of cohabitation and adultery could not be made for the same conduct); *In re Snow*, 120 U.S. 274, 285-86 (1887) (holding that cohabitation was a continuous offense, rather than a series of offenses); *Cannon v. United States*, 116 U.S. 55, 79 (1885) (affirming the interpretation of criminal cohabitation as living together under the appearance of being married).

Davis the Court strongly condemned the Church and the practice of polygamy by observing:

[The Mormon Church] taught and counseled its members and devotees to commit the crimes of bigamy and polygamy And on this point there can be no serious discussion or difference of opinion. Bigamy and polygamy are crimes by the laws of all civilized and Christian countries They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman, and to debase man. Few crimes are more pernicious to the best interests of society¹⁰¹

There are three key Supreme Court cases. The first in 1878 (the Mormon “test case” referred to above) is *Reynolds*, upholding the Morrill Act which made polygamy a criminal offense in any U.S. territory. In 1890 *Davis*, quoted above, held that all Mormons could be denied access to the political process simply because of their association with an organization that advocated polygamy.¹⁰² In *Late Corporation*, the Court in 1890 held that the federal government could dissolve the Church as a legal entity and confiscate all of its property because it advocated conduct (polygamy) that

¹⁰¹ *Davis v. Beason*, 133 U.S. 333, 341 (1890).

¹⁰² *Davis v. Beason*, 133 U.S. 333, 341 (1890). *Davis*, 133 U.S. at 342-43 states: However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation. There have been sects which denied as a part of their religious tenets that there should be any marriage tie, and advocated promiscuous intercourse of the sexes, as prompted by the passions of its members. And history discloses the fact that the necessity of human sacrifices, on special occasions, has been a tenet of many sects. Should a sect of either of these kinds ever find its way into this country, swift punishment would follow the carrying into effect of its doctrines, and no heed would be given to the pretense that, as religious beliefs, their supporters could be protected in their exercise by the constitution of the United States. Probably never before in the history of this country has it been seriously contended that the whole punitive power of the government for acts, recognized by the general consent of the Christian world in modern times as proper matters for prohibitory legislation, must be suspended in order that the tenets of a religious sect encouraging crime may be carried out without hindrance.

had been declared illegal.¹⁰³ The *Late Corporation* court was clear in its absolute rejection of polygamy. Polygamy, a “fundamental and essential doctrine” of the Mormon Church, was “opposed and contrary to good morals, public policy, and the laws of the United States”¹⁰⁴ The practice of polygamy was “a crime against the laws, and abhorrent to the sentiments and feelings of the civilized world.” The Mormon Church was an “organization of a community for the spread and practice of polygamy” which the Court stated “is, in a measure, a return to barbarism. [Polygamy] is contrary to the spirit of Christianity, and of the civilization which Christianity has produced in the western world.”¹⁰⁵

Thus, by 1890 “the authority to punish polygamy was virtually unquestioned.”¹⁰⁶ In fact, with the *Late Corporation* case it could be said that “the constitutional battle over polygamy, finally, was over” – perhaps, that is, until *Brown* in 2013.¹⁰⁷

3.2 *Reynolds* – 1878

In *Reynolds*, George Reynolds, secretary to Mormon Church leader Brigham Young, challenged his conviction under a federal anti-bigamy statute (the Morrill Anti-Bigamy Act).¹⁰⁸ Reynolds was convicted in a Utah territorial district court and his

¹⁰³ *Late Corporation of the Church of Jesus Christ of Latter-day Saints v. United States*, 136 U.S. 1, 18 & 48-49 (1890), *modified*, 140 U.S. 665 (1890), *after remand*, 150 U.S. 145 (1893).

¹⁰⁴ *Late Corporation*, 136 U.S. at 18.

¹⁰⁵ *Late Corporation*, 136 U.S. at 48-49.

¹⁰⁶ Gordon, 219.

¹⁰⁷ Gordon, 219.

¹⁰⁸ *Reynolds v. U.S.*, 98 U.S. 145 (1878); MORRILL ANTI-BIGAMY ACT, ch. 126, 12 Stat. 501 (1862) (“That every person having a husband or wife living, who shall marry any other

conviction was affirmed by the Utah territorial Supreme Court.¹⁰⁹ The *Reynolds* court considered, among other issues,¹¹⁰ whether the federal anti-bigamy statute violated the First Amendment's free exercise clause. Reynolds argued that the anti-bigamy statute was unconstitutional because it prohibited the religious practice of plural marriage such that his conviction under the statute should be reversed. At his trial, Reynolds requested the trial judge to instruct the jury that if they found Reynolds' second marriage to be part of his perceived, religious duty then they should find him not guilty. The trial court refused the instruction.¹¹¹ The jury convicted and Reynolds appealed.

In its analysis of the First Amendment issues, the *Reynolds* court first reviewed the applicable history of the First Amendment and noted that under the First Amendment: "Religious freedom is guaranteed everywhere throughout the United States, so far as congressional interference is concerned."¹¹² The *Reynolds* court observed that several of the colonies and States had attempted to deal with the issue of religious freedom before the adoption of the Constitution. The Court quoted Madison's

person, whether married or single, in a Territory of the United States, or other place over which the United States have exclusive jurisdiction, shall, except in the cases specified in the proviso to this section, be adjudged guilty of bigamy, and, upon conviction thereof, shall be punished by a fine not exceeding five hundred dollars, and by imprisonment for a term not exceeding five years; . . .). The Library of Congress, <http://rs6.loc.gov/cgi-bin/ampage?collId=llsl&fileName=012/llsl012.db&recNum=532>.

¹⁰⁹ *Reynolds*, 98 U.S. at 146.

¹¹⁰ *Reynolds* also raised issues regarding the validity of his indictment by a grand jury with less (15) than the usually required 16 person, whether the jury was impartial, and whether he was provided with the opportunity to confront a witness who provided adverse testimony. The Court rejected all of these points raised by Reynolds as well as his First Amendment challenge.

¹¹¹ *Reynolds*, 98 U.S. at 161-62.

¹¹² *Reynolds*, 98 U.S. at 162.

Memorial and Remonstrance which argued that religion was not “within the cognizance of the civil government.”¹¹³

After discussing Madison, the *Reynolds* Court then turned to Jefferson’s various contributions to the guaranty of religious freedom, beginning with Jefferson’s work in the Virginia legislature. Jefferson – who the Court noted was in France during the Constitutional convention – soon after he saw a draft of the Constitution “expressed his disappointment at the absence of an express declaration insuring the freedom of religion.”¹¹⁴ The Court described the adoption of the Amendment and concluded its historical analysis by quoting Jefferson’s Danbury letter (and its use of the phrase “wall of separation between church and state”) and by stating that Jefferson’s expression of the scope of the First Amendment in the letter should be considered as an “authoritarian declaration.”¹¹⁵

The *Reynolds* Court – notwithstanding its recognition of the wall of separation – concluded that the limitation on Congress created by the First Amendment did not

¹¹³ *Reynolds*, 98 U.S. at 163.

¹¹⁴ *Reynolds*, 98 U.S. at 163.

¹¹⁵ *Reynolds*, 98 U.S. at 164. It is unclear what precisely the *Reynolds* Court thought the wall separated. One interpretation of Jefferson’s wall is that he “located his ‘wall’ between religious opinion (the realm of the church) and conduct subversive of peace and public order (the realm of the civil state).” Daniel L. Dreisbach, *Thomas Jefferson and the Wall of Separation Between Church and State*, (New York: New York University Press, 2002), 53. Whether this was the thinking of *Reynolds* is not clear from its opinion. “The *Reynolds* Court was clearly focused on whether the Constitution granted Congress authority to prohibit *conduct* motivated by religious belief but deemed subversive to good order. One cannot be certain that either Jefferson or the *Reynolds* Court thought this was precisely what the ‘wall’ separated.” *Id.*

affect Congress' power to prohibit violations of "social duties and subversion of good order" by explaining:

Coming as this does from an acknowledged leader of the advocates of the measure, it [Jefferson's recognition of the wall of separation] may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were *in violation of social duties or subversive of good order*.¹¹⁶ (Emphasis added).

The *Reynolds* Court then reviewed the history of polygamy starting with the assumption that polygamy has always been "odious" in Western cultures:

Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people. At common law, the second marriage was always void (2 Kent, Com. 79), and from the earliest history of England polygamy has been treated as an offence against society. After the establishment of the ecclesiastical courts, and until the time of James I., it was punished through the instrumentality of those tribunals, not merely because ecclesiastical rights had been violated, but because upon the separation of the ecclesiastical courts from the civil the ecclesiastical were supposed to be the most appropriate for the trial of matrimonial causes and offences against the rights of marriage, just as they were for testamentary causes and the settlement of the estates of deceased persons.

By the statute of 1 James I. (c. 11), the offence, if committed in England or Wales, was made punishable in the civil courts, and the penalty was death. As this statute was limited in its operation to England and Wales, it was at a very early period re-enacted, generally with some modifications, in all the colonies. In connection with the case we are now considering, it is a significant fact that on the 8th of December, 1788, after the passage of the act establishing religious freedom, and after the convention of Virginia had recommended as an amendment to the Constitution of the United States the declaration in a bill of rights that "all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience," the legislature of

¹¹⁶ *Reynolds*, 98 U.S. at 164.

that State substantially enacted the statute of James I., death penalty included, because, as recited in the preamble, “it hath been doubted whether bigamy or polygamy be punishable by the laws of this Commonwealth.” 12 Hening’s Stat. 691.¹¹⁷

Having concluded that the “odious” practice of polygamy had been condemned from the “earliest history of England,” the *Reynolds* court then considered marriage, the “most important feature of social life.”¹¹⁸ *Reynolds* concludes that it is “impossible” that any constitutional guaranty of religious liberty should be seen as restricting legislation intended to protect marriage from the “odious” practice of polygamy:

In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life. Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal.¹¹⁹

For the *Reynolds* Court, therefore, marriage, the most important feature of social life, had a special place in “civilized nations” which must be protected – even if religious liberty under the Constitution was infringed.¹²⁰ Though the *Reynolds* Court did not explain precisely why polygamy was “odious” (other than it was a practice of Asiatic and African cultures) it did argue that one of the ills of polygamy was the advancement of the “patriarchal principle” which somehow would “fetter” people in

¹¹⁷ *Reynolds*, 98 U.S. at 165.

¹¹⁸ *Reynolds*, 98 U.S. at 165.

¹¹⁹ *Reynolds*, 98 U.S. at 165.

¹²⁰ *Reynolds*, 98 U.S. at 165.

“stationary despotism” citing Francis Lieber, a notable political ethicist of the nineteenth century:

Professor Lieber says, polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy. Chancellor Kent observes that this remark is equally striking and profound. 2 Kent, Com. 81, note (e). An exceptional colony of polygamists under an exceptional leadership may sometimes exist for a time without appearing to disturb the social condition of the people who surround it; but there cannot be a doubt that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion.¹²¹

¹²¹ *Reynolds*, 98 U.S. at 165-66. Professor Lieber by the mid-nineteenth century had become “widely known as a dedicated antipolygamist.” Gordon, 140. Lieber is partially responsible for the link of polygamy to barbarism, racism, xenophobia, and as against western civilization. Lieber wrote that monogamy was a “primordial element” of Western Civilization without which such civilization and the white race would be destroyed. Cott, 115. Cott explains that antipolygamy rhetoric based largely on the Lieber framework “in the 1870s and 1880s in effect made the Mormons over into nonwhites.” Polygamy was linked to “savage and slavish places of colored peoples.” *Id.*, 118. Cott opines that *Reynolds*, by declaring polygamy unprotected by the First Amendment “incorporated this discourse about civilization and elevated it to the level of constitutional interpretation.” *Id.*, 118. Lieber’s work was also cited by leading commentators (including James Kent and Oliver Wendell Holmes) for the proposition that polygamy is inconsistent with Christianity and civilization. Gordon, 272, n. 47. Lieber is also known for drafting instructions for the Government of Armies of the United States in the Field, General Order No. 100 (the so-called Lieber Instructions), an instruction signed by President Abraham Lincoln to the Union Forces of the United States during the American Civil War, that dictated how soldiers should conduct themselves in wartime and provided for the humane, ethical treatment of populations in occupied areas. Mark Grimsley, *The Hard Hand of War: Union Military Policy Toward Southern Civilians 1861-1865* (Cambridge: Cambridge University Press, 1995), 149-51.

Fluhman similarly observes that the court in *Reynolds* grouped the Mormon Church with “Asiatic” and “African” peoples. This “tripartite grouping of the world’s peoples reflected an understanding of race, lineage, and history that rested on Protestant readings of the Bible. . . . [I]n the church’s first decades anti-Mormon antagonists routinely invoked racial epithets as knee-jerk insults. . . . In the decades after 1845 anti-Mormon estimations of Mormon whiteness deteriorated. . . .” *Id.*, 111-12. Antipolygamist, according to Fluhman, “constructed Mormons as racial outsiders” *Id.*, 116.

Thus, the *Reynolds* court held – notwithstanding the First Amendment and Jefferson’s wall of separation – that the anti-bigamy statute could properly punish bigamy.¹²² The First Amendment protected religious belief, but, according to the Court, it did not protect religious practices that were judged to be criminal – such as bigamy. The Court further explained that those who practice polygamy could no more be exempt from the law than those who may wish to practice “human sacrifices,” even if those sacrifices might be “a necessary part of religious worship.”¹²³ The *Reynolds* Court did not explain why it was proper to equate murder (human sacrifice) with plural marriage but purported to draw a distinction between religious beliefs and religious practices.

The *Reynolds* Court, therefore, held that Congress had the power to criminalize bigamy because of the importance of marriage and the right of the state to regulate marriage and, in any event, polygamy had always been an offense against society:

. . . [W]e think it may safely be said there never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity. . . . In our opinion, the [anti-bigamy] statute immediately under consideration is within the legislative power of Congress.

The *Reynolds* court expressly rejected Reynolds’ argument that those who practice polygamy as part of their religion should be excepted from the operation of the anti-bigamy statute, stating: “To permit this would be to make the professed doctrines

¹²² *Reynolds*, is an example of the Court, on the one hand, recognizing the First Amendment’s limitation on the power of Congress to make law involving religion (*i.e.*, the wall of separation) while, on the other, enforcing a law which seems to be entangled with or affecting the practice of religion.

¹²³ *Reynolds*, 98 U.S. at 166.

of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances”¹²⁴

With the 1878 *Reynolds* opinion, the United States Supreme Court declared that marriage is a critically important feature of social life which from its very nature is considered a sacred obligation in civilized nations. Polygamy, however, is simply “odious” and “an offence against society.” It advances the “patriarchal principle,” which, when applied to large communities, fetters the people in stationary despotism. Thus, for *Reynolds*, the religious liberty of the Free Exercise Clause does not prohibit state law prohibiting polygamy.¹²⁵ It is thus abundantly clear from *Reynolds* that the Court in 1878 had no problem enforcing laws based upon majoritarian moral views.

¹²⁴ *Reynolds*, 98 U.S. at 168.

¹²⁵ The impact of *Reynolds* was actually very limited on the actual marital practices in Utah. After *Reynolds*, Mormons “continued to practice plural marriage and solemnize new ones, hoping, according to Joseph F. Smith, that the decision might be reversed if they did not surrender their constitutional rights too easily.” Joseph F. Smith was the sixth president of the LDS Church. He was the last president of the LDS Church to have personally known the founder of the Mormon faith, Joseph Smith, Jr., who was the brother of his father, Hyrum Smith. Daynes at 206. Joseph F. Smith could not have known that *Reynolds* would remain good law until the present.

The United States Supreme Court would deal with Mormons in other contexts as the years went by. See *Chatwin v. United States*, 326 U.S. 455 (1946)(reversed a conviction for violation of the Federal Kidnapping Act regarding a 15-year-old girl who had undertaken and continued a “celestial” marriage relationship with the defendant but in which the evidence failed to establish that she had been “held” within the meaning of the words “held for ransom or reward or otherwise” as used in the Act); *Cleveland v. United States*, 329 U.S. 14 (1946)(the court held it was a violation of the Mann Act for a man to transport a woman across state lines for the purpose of making her his plural wife or cohabiting with her as such – notwithstanding the fact that the practice was founded on his religious belief. While the Mann Act is aimed primarily at the use of interstate commerce for the conduct of commercialized prostitution, it is not limited to that, and a profit motive is not a requirement for proof of a violation); *Musser v. Utah*, 333 U.S. 95, 100-101 (1948)(Utah state law criminal conviction that defendant conspired to commit acts injurious to public morals by conspiring to counsel, advise, and practice

Twelve years after *Reynolds*, the United States Supreme Court decided *Davis* in 1880, as noted above. With *Davis*, it was now clear the “Constitution would not tolerate religious license, antipolygamist were pleased to learn: they labored long and hard to ensure that Protestant Christianity and religious liberty seamlessly reinforced one another.”¹²⁶ In *Davis*, the Court made it clear that “religion” for purpose of the Free Exercise Clause was bounded by the concept of “general Christianity.”¹²⁷ The Constitution did not shield alternative moral structures under the pretense of religion because the result would undermine the “good order, and morals of society.”¹²⁸

By the end of the nineteenth century “[a]ntipolygamists’ moral constitutionalism hardened into law in the Supreme Court’s opinions in the polygamy cases.”¹²⁹ Thus, *Reynolds* and *Davis* reflect how majoritarian views (including, for example, the view that Christian monogamy is one foundation of democracy) underlie constitutional law, certainly with respect to the Court’s antipolygamy stance. But what if those views of

polygamous or plural marriage was reversed. Court, and particularly the dissent, considered whether the Utah statute was construed to proscribe any agreement to advocate the practice of polygamy. “Thus the line was drawn between discussion and advocacy. The Constitution requires that the statute be limited more narrowly. At the very least the line must be drawn between advocacy and incitement, and even the state’s power to punish incitement may vary with the nature of the speech, whether persuasive or coercive, the nature of the wrong induced, whether violent or merely offensive to the mores, and the degree of probability that the substantive evil actually will result.”). There are two Utah Supreme Court cases in the twentieth century relevant to polygamy: *In re Black*, 283 P.2d 887 (Utah Sup. Ct. 1955)(holding polygamous individuals have no parental rights) and *In the matter of W.A.T., et al.*, 808 P.2d 1234 (1991) (Allowing FLDS polygamist family to adopt, effectively overruling *In re Black*).

¹²⁶ Gordon, 225.

¹²⁷ Gordon, 227.

¹²⁸ Gordon, 227; *Davis*, 133 U.S. at 342 (“It was never intended or supposed that the [First] amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order, and morals of society.”)

¹²⁹ Gordon, 228.

morality change? What happens when society's views on marriage and religious freedom evolve? In *Wisconsin v. Yoder* in 1972, the Court held children might be withdrawn from school before they reached the age prescribed for withdrawal because their parents, members of an Amish Church, demonstrated that exposure to four years of high school would undermine the Church's ability to survive.¹³⁰ In his dissent in *Yoder*, Justice William O. Douglas "argued that *Yoder* implicitly overruled *Reynolds*, implying that it was only a question of time before polygamy would reappear in America."¹³¹ And, modern libertarian thought might agree by arguing that "current lifestyles render the prohibition of polygamy ridiculous."¹³²

Yet, more than 130 years later, the *Reynolds* holding remains an obstacle in the path of polygamy advocates in their efforts to legalize polygamy.¹³³ As discussed

¹³⁰ Gordon, 237; *Wisconsin v. Yoder*, 405 U.S. 205 (1972).

¹³¹ Gordon, 237; *Yoder*, 405 U.S. at 247 (Douglas dissenting):

The Court rightly rejects the notion that actions, even though religiously grounded, are always outside the protection of the Free Exercise Clause of the First Amendment. In so ruling, the Court departs from the teaching of *Reynolds v. United States*, 98 U. S. 145, 164, where it was said concerning the reach of the Free Exercise Clause of the First Amendment, "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order." In that case it was conceded that polygamy was a part of the religion of the Mormons. Yet the Court said, "It matters not that his belief [in polygamy] was a part of his professed religion: it was still belief, and belief only." *Id.*, at 167.

Action, which the Court deemed to be antisocial, could be punished even though it was grounded on deeply held and sincere religious convictions. What we do today, at least in this respect, opens the way to give organized religion a broader base than it has ever enjoyed; and it even promises that in time *Reynolds* will be overruled.

¹³² Gordon, 237.

¹³³ But see Todd M. Gillett, "The Absolution of *Reynolds*: The Constitutionality of Religious Polygamy," *William and Mary Bill of Rights Journal* 8, no. 2 (2000): 497-534, 520 asserting that *Reynolds* should be over turned:

below, however, the *Brown v. Buhman* Court in 2013 may have found at least a partial way over (or around) *Reynolds*. *Brown v. Buhman* will reject the nineteenth-century “morally repugnant reasoning” of *Reynolds*, opining that such rationale should now be rejected in favor of a modern analysis.¹³⁴ Yet, *Brown v. Buhman* recognized that the *Reynolds* holding remains as valid Supreme Court authority binding on lower courts.¹³⁵

Finally, in today’s society, the facts in *Reynolds* are not looked upon in the same way as they were when the Court wrote that decision. In *Potter v. Murray City*, a federal court in Utah upheld the prohibition of polygamy, following *Reynolds* as “the decision of the highest court of the land.” Even in following *stare decisis*, however, the court derided *Reynolds*’ assumption that polygamy was as harmful to society as human sacrifice, its over-simplification of the belief/action analysis in Free Exercise claims, and its “seeming insensitivity in passing moral judgment on the sincerity of religious belief.” Because Americans no longer fear practices never imagined in the realm of Christendom, the decisions in *Reynolds* and its brethren appear ripe for review. (Footnotes omitted).

¹³⁴ *Brown*, 947 F.Supp.2d at 1189; Gregg Strauss, “Is Polygamy Inherently Unequal?,” *Ethics* 122, No. 3 (April 2012) 516-544 (assessing polygamy as a “moral ideal” and suggesting that certain new forms of polygamy may be egalitarian in principle. For example, in “polyfidelity” each spouse marries every other spouse in the family, which with the legalization of same-sex marriage would be possible. In “molecular” polygamy, any spouses may marry a new spouse outside the plural family.)

¹³⁵ *Brown*, 947 F.Supp.2d at 1190.

Chapter 4

The End of all Morals Legislation

[T]he promotion of majoritarian sexual morality is not even a legitimate state interest

Lawrence v. Texas, 539 U.S. 558, 599 (2003)(Justice Scalia dissenting).

4.1 Standard of Review

In considering United States Supreme Court cases involving constitutional issues, the standard of review utilized by the Court is extremely important. The higher the standard applied (meaning the more difficult it is for a government to justify a law) the less likely the government will succeed in sustaining the law in question when faced with a constitutional challenge.¹³⁶ Thus, the outcome of a constitutional case is often determined by which standard of review is applied by the court. How to determine which standard applies and how the applicable standard operates, however, are perhaps the most difficult areas of constitutional law – and any full discussion is far beyond the scope of this paper. Yet, in the cases discussed herein these standards of review will come into play. Thus, set forth in this section is an elementary discussion of the three main standards of review most commonly used by the United States Supreme Court (though there are some constitutional experts who argue there are six or more

¹³⁶ Kelso, R. Randall. “Standards of Review under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The “Base Plus Six” Model and Modern Supreme Court Practice.” *University of Pennsylvania Journal of Constitutional Law* 4, no. 2 (2002): 225-59 (and cases and articles cited there); Kermit L. Hall, *The Oxford Companion to the Supreme Court of the United States* (New York: Oxford University Press 1992), 845 (strict scrutiny).

standards).¹³⁷ These standards are mentioned in the discussions of the cases relevant to this paper to the extent necessary to explain the court’s holding, but this paper will not attempt a full scale discussion of the standards and their applicability in those cases.

There are generally three standards of review applicable when courts review the constitutionality of government (state) action (usually in the form of a statute or ordinance). First, there is a lower level of review – typically referred to as the “mere rationality” standard – under which governmental action will be upheld as permissible under the constitution if two elements are shown: (1) the government is pursuing a “legitimate” governmental objective (for example, such as a health, safety, or general welfare goal or objective); and (2) there is a minimally “rational relation” between the means which the government has selected to achieve the objective and the government’s objective. This second part of the mere rationality test is usually extremely easy for the government to satisfy as the courts will in most instances only reject the government’s position if it has acted in an arbitrary and irrational way. If a state law is stricken under the mere rationality test, it is often because the government objective is believed by the reviewing court to be illegitimate. Examples of the type of case involving the lower level of review would include a state’s economic and social laws. If the law being challenged applies only to a particular classification of persons, the statutory classification will likely be upheld if the classification could conceivably bear a rational relationship to a permissible governmental objective (unless the

¹³⁷ Kelso, 258.

classification is “suspect” as discussed below, in which a higher standard will likely apply)

The highest or most difficult standard for a government to satisfy is usually called “strict scrutiny.” A government can satisfy this heightened standard usually only when two fairly difficult requirements are shown: (1) the objective being pursued by the government is “compelling” (not merely “legitimate” as required for the lesser mere rationality test); and (2) the means chosen by the government to achieve its objective is “necessary” to achieve the compelling objective (that is, there must be a very close connection between the method used by the government and the goal). Establishing the second prong (the “necessary” requirement) usually requires that there must not be any less restrictive or less intrusive means available that would accomplish the government’s compelling goal. The strict scrutiny standard of review is usually employed by a court when, for example, a law applies to a “suspect” classification of persons (for example, a classification based on race, national origin, religion, or alienage) or when a “fundamental right” protected by the Constitution is involved.¹³⁸

There is a third, middle standard which is considered as between the lower “mere rationality” standard of review and the higher “strict scrutiny” standard. The middle standard requires a showing that: (1) the governmental objective is “important” (something between “legitimate,” as required for the mere rationality standard and

¹³⁸ A fundamental right is usually thought to be one expressly protected by the Constitution or one which is deeply rooted in the Nation’s history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997).

“compelling” as required for strict scrutiny); and (2) the means chosen by the government to achieve its objective must be “substantially related” to the governmental objective (“substantially related” being somewhere between “rationally related” as required for mere rationality and “necessary” as required for strict scrutiny). This middle level test is generally applied to actions when neither a suspect class nor a fundamental right is involved, but rather when the matter involves a “quasi-suspect class” (for example, gender and legitimacy of birth).¹³⁹ When the middle level review applies, the statutory objective itself must be explicitly stated by the legislature as the Court usually will not hypothesize (as it would in a mere rationality case) about the aims of the legislature.¹⁴⁰

The complexity of the determination and actual application of the proper standard of review is revealed by the following quote from the United States Supreme Court’s 2014 opinion in *Burwell v. Hobby Lobby*, which held under the Religious Freedom Restoration Act of 1993 (RFRA) that regulations which require closely held corporations to provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies' owners violate the RFRA

¹³⁹ Determination of classifications is complex. In the *Windsor* case, the Second Circuit seemed to hold that “sexual preference” (homosexuality) would be a suspect class requiring heightened strict scrutiny but the Supreme Court majority which struck down DOMA’s traditional definition of marriage (a union of one man and one woman) did not seem to directly answer the question, as pointed out by Justice Scalia in his dissent. *U.S. v. Windsor*, 570 U.S. ___, 133 S.Ct. 2675, 2706 (2013) (Scalia, J., dissenting)(“Moreover, if this is meant to be an equal-protection opinion, it is a confusing one. The opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality.”)

¹⁴⁰ Kelso, 227-237.

(which prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest). The *Hobby Lobby* Court in explaining the applicable standard stated:

Congress enacted RFRA in 1993 in order to provide very broad protection for religious liberty. RFRA's enactment came three years after this Court's decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith* [citation omitted] which largely repudiated the method of analyzing free-exercise claims that had been used in cases like *Sherbert v. Verner* [citations omitted] and *Wisconsin v. Yoder* [citations omitted]. In determining whether challenged government actions violated the Free Exercise Clause of the First Amendment, those decisions used a balancing test that took into account whether the challenged action imposed a substantial burden on the practice of religion, and if it did, whether it was needed to serve a compelling government interest. . . .

In *Smith*, however, the Court rejected "the balancing test set forth in *Sherbert*." [citation omitted]. *Smith* concerned two members of the Native American Church who were fired for ingesting peyote for sacramental purposes. When they sought unemployment benefits, the State of Oregon rejected their claims on the ground that consumption of peyote was a crime, but the Oregon Supreme Court, applying the *Sherbert* test, held that the denial of benefits violated the Free Exercise Clause. [citation omitted].

This Court then reversed, observing that use of the *Sherbert* test whenever a person objected on religious grounds to the enforcement of a generally applicable law "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind." [citation omitted]. The Court therefore held that, under the First Amendment, "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest." *City of Boerne v. Flores* [citation omitted].

Congress responded to *Smith* by enacting RFRA. "[L]aws [that are] 'neutral' toward religion," Congress found, "may burden religious exercise as surely as laws intended to interfere with religious exercise." [citation omitted]. In order to ensure broad protection for religious liberty, RFRA provides that "Government shall not substantially burden

a person's exercise of religion even if the burden results from a rule of general applicability." [citation omitted]. If the Government substantially burdens a person's exercise of religion, under the Act that person is entitled to an exemption from the rule unless the Government "demonstrates that application of the burden to the person — (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." [citation omitted].

As enacted in 1993, RFRA applied to both the Federal Government and the States, but the constitutional authority invoked for regulating federal and state agencies differed. As applied to a federal agency, RFRA is based on the enumerated power that supports the particular agency's work, but in attempting to regulate the States and their subdivisions, Congress relied on its power under Section 5 of the Fourteenth Amendment to enforce the First Amendment. [citations omitted]. In *City of Boerne*, however, we held that Congress had overstepped its Section 5 authority because "[t]he stringent test RFRA demands" "far exceed[ed] any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*." [citations omitted].

Following our decision in *City of Boerne*, Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) [citation omitted]. That statute, enacted under Congress's Commerce and Spending Clause powers, imposes the same general test as RFRA but on a more limited category of governmental actions. . . . And, what is most relevant for present purposes, RLUIPA amended RFRA's definition of the "exercise of religion." [citation omitted]. Before RLUIPA, RFRA's definition made reference to the First Amendment. . . . In RLUIPA, in an obvious effort to effect a complete separation from First Amendment case law, Congress deleted the reference to the First Amendment and defined the "exercise of religion" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." [citation omitted]. And Congress mandated that this concept "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution."¹⁴¹

¹⁴¹ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. ___, 134 S. Ct. 2751, 2760-81 (2014).

Fortunately, this paper does not require a full understanding of the foregoing quotation – but the lengthy quote illustrates the complexity in the determination and application of the proper standard of review in constitutional cases and the general complexity of those cases under the First Amendment.

Another example of the importance of the standard of review is the Texas *DeLeon* same-sex marriage case currently pending in the Fifth Circuit.¹⁴² The *DeLeon* plaintiffs argued that the higher (strict scrutiny) standard applies. In contrast, the State of Texas argued that the lower (mere rationality) standard ought to be applied. The plaintiffs prevailed in the lower court and the case is now on appeal to the Fifth Circuit.

In *DeLeon*, the lower court struck Texas’ law (found in the Texas Constitution) which precludes same-sex marriages.¹⁴³ The *DeLeon* plaintiffs – seeking to have the Texas Constitutional definition of marriage determined as violative of the United States Constitution – asserted that the Due Process clause of the United States Constitution protects the “fundamental right” to marry.¹⁴⁴ The *DeLeon* plaintiffs cited *Loving* for the proposition that: “The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”¹⁴⁵ Thus, the

¹⁴² *DeLeon v. Perry*, 975 F.Supp.2d 632 (W.D. Tex. 2014); No. 14-50196 (5th Cir. 2014).

¹⁴³ *DeLeon*, 975 F.Supp.2d at 640; TEX. CONST., Art. 1, sec. 32 (2005)(“Marriage in this state shall consist only of the union of one man and one woman.”).

¹⁴⁴ *DeLeon v. Perry*, No. 14-50196, Appellee’s Brief at 16-18 (5th Cir. 2014).

¹⁴⁵ *DeLeon*, No. 14-50196, Appellee’s Brief at 16-18 citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding interracial couples have a fundamental right to marry); *Turner v. Safley*, 482 U.S. 78, 94-96 (1987) (holding prisoners have a fundamental right to marry); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (holding debtors owing child support have fundamental right to marry); and *Kitchen v. Herbert*, 755 F.3d 1193, 1209 (10th Cir. 2014)(“There can be little doubt that the right to marry is a fundamental liberty.”).

DeLeon plaintiffs argued, the right to marry is a fundamental right, protected by the Due Process Clause.¹⁴⁶ And, they further argued, laws that burden the exercise of a “fundamental” right protected by the Due Process Clause must survive the strict scrutiny standard (which, they asserted, requires the government to show the intrusion is narrowly tailored to serve a compelling government interest).¹⁴⁷

Contrastingly, the State of Texas rejected application of the higher standard requested by the *DeLeon* plaintiffs contending that the lower rationality test controlled. The State asserted that there are only two possible ways for the *DeLeon* plaintiffs to escape the lower rationality review. The first would be to show that Texas’s marriage law infringes a “fundamental” constitutional right (which the *DeLeon* plaintiffs did); the second would be to show that the law contains a “statutory classification” that “proceeds along suspect lines.”¹⁴⁸ The State of Texas contended that the *DeLeon* plaintiffs could not successfully make either showing.

According to the State, the *DeLeon* plaintiffs could not establish a “fundamental right” to same-sex marriage for two reasons. First, the State argued, *Glucksberg* forbids

¹⁴⁶ *DeLeon*, No. 14-50196, Appellee’s Brief at 16-18 citing *United States v. Windsor*, 570 U.S. ___, 133 S.Ct. 2675, 2691 (2013) (“State laws defining and regulating marriage, of course, must respect the constitutional rights of persons.”).

¹⁴⁷ *DeLeon*, No. 14-50196, Appellee’s Brief at 16-18 citing *Zablocki*, 434 U.S. at 388; and *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion) (Due Process Clause “has a substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests.”) (internal quotations omitted).

¹⁴⁸ *DeLeon*, No. 14-50196, Appellant’s Reply Brief at 13 citing *FCC v. Beach Commc’ns*, 508 U.S. 307, 313 (1993) (“In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”)

courts to recognize “substantive due process” rights that are not “deeply rooted in this Nation’s history and tradition.”¹⁴⁹ Same-sex marriage is not deeply rooted in the Nation’s traditions thus, the State argued, it follows same-sex marriage is not a fundamental right. Second, the State contended that United States Constitution prohibits courts from enforcing constitutional “rights” that have no textual basis in the Constitution and no historical pedigree.¹⁵⁰ The State argued that same-sex marriage is not mentioned in the Constitution and has no such historical pedigree. Thus, the State contended, because there was no fundamental right to same-sex marriage the State should not be required to satisfy the higher level of scrutiny.

The State of Texas also countered the *DeLeon* plaintiff’s alternative classification argument (that is, that heightened scrutiny was required based on a contention that sexual orientation is a “suspect classification.”) The State argued Texas’s marriage laws do not expressly classify based on sexual orientation.¹⁵¹ Rather, the State asserted, Texas’s marriage laws only classify based on sex, age, and consanguinity. Therefore, the strict scrutiny standard of review should not be applied.¹⁵²

¹⁴⁹ *DeLeon*, No. 14-50196, Appellant’s Reply Brief at 13 citing *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997)

¹⁵⁰ *DeLeon*, No. 14-50196, Appellant’s Reply Brief at 13 citing *Ullmann v. United States*, 350 U.S. 422, 428 (1956) (“Nothing new can be put into the Constitution except through the amendatory process.”).

¹⁵¹ *DeLeon*, No. 14-50196, Appellant’s Reply Brief at 23.

¹⁵² *DeLeon*, No. 14-50196, Appellant’s Reply Brief at 23-24.

Finally, the State of Texas asserted that the *DeLeon* plaintiffs were actually arguing “a novel standard that they call ‘heightened review.’”¹⁵³ And, according to the State, the *DeLeon* plaintiffs were inappropriately asserting that the reviewing appellate court (the Fifth Circuit) could apply the so-called “heightened review standard” even if same sex marriage is not considered to be a “fundamental right” and even if sexual orientation is not a suspect classification. The State of Texas, however, argued simply: “There is no such thing as ‘heightened review.’”¹⁵⁴ Rather, the State asserted, if a law does not infringe a “fundamental right” or classify according to suspect criteria, then it is subjected only to “rational-basis review.”¹⁵⁵

Whether the *DeLeon* Plaintiffs or the State of Texas are correct as to the proper standard, the *DeLeon* case presents an excellent example of how important the determination and application the proper standard is in constitutional cases. It is likely that the ultimate outcome of the *DeLeon* case will be determined by the Court’s selection of the standard of review (or by the United States Supreme Court resolving the issue before the Fifth Circuit decides *DeLeon*).

Keeping in mind that the standards of review are complex and very important to the outcome of constitutional law cases, a review of some of the key case law relating to polygamy follows (with references to standards of review only as they are relevant to

¹⁵³ *DeLeon*, No. 14-50196, Appellant’s Reply Brief at 25.

¹⁵⁴ *DeLeon*, No. 14-50196, Appellant’s Reply Brief at 25.

¹⁵⁵ *DeLeon*, No. 14-50196, Appellant’s Reply Brief at 25.

those cases – as, for example, when the *Green* and *Brown* cases reference the standard of review described in *Hialeah* and *Smith* explained below).¹⁵⁶

4.2 *Lawrence* - 2003

The *Lawrence* case proved to be very important to *Brown v. Buhman* court, which declared that *Lawrence* “created ambiguity about the status” about “morals legislation.”¹⁵⁷ In *Lawrence* the Supreme held that a Texas statute – prohibiting “deviate sexual intercourse” by making it a crime for two persons of the same sex to engage in certain intimate sexual conduct – violated the Due Process Clause of the Fourteenth Amendment.¹⁵⁸ The *Lawrence* Court first observed that it was not presented with a case involving minors, or persons who might be injured or coerced, or who are situated in relationships where consent might not easily be refused. The case also did not involve public conduct or prostitution. And, the question presented was not whether the government must give formal recognition to any relationship that homosexual persons seek to enter. Rather, the *Lawrence* court considered private conduct involving two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.¹⁵⁹

¹⁵⁶ See e.g., *infra* n. 326.

¹⁵⁷ *Brown*, 947 F.Supp.2d at 1185.

¹⁵⁸ *Lawrence*, 539 U.S. at 578. TEX. PENAL CODE Ann. § 21.06(a) (2003) provides: “A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.” The statute defines “[d]eviate sexual intercourse” as follows:

(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or

(B) the penetration of the genitals or the anus of another person with an object.” § 21.01(1).

¹⁵⁹ *Lawrence*, 539 U.S. at 578.

In striking down the Texas statute, *Lawrence* found that people are “entitled to respect for their private lives.”¹⁶⁰ The State cannot demean a person’s existence or control a person’s destiny by making his or her private sexual conduct a crime. The right to “liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. ‘It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.’”¹⁶¹ Thus, *Lawrence* held that Texas’ anti-sodomy statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

To reach its result, the *Lawrence* court found it necessary to overrule the *Bowers* case.¹⁶² In *Bowers*, only 17 years earlier, the Court had rejected a constitutional challenge to a Georgia sodomy statute similar to the Texas statute (though the Georgia statute prohibited certain conduct whether or not the participants were of the same sex, while the Texas statute applied only to participants of the same sex). *Bowers* had described the issue it confronted as follows: “The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and

¹⁶⁰ *Lawrence*, 539 U.S. at 578.

¹⁶¹ *Lawrence*, 539 U.S. at 578 (quoting *Casey*, 505 U.S. at 847).

¹⁶² *Bowers v. Hardwick*, 478 U.S. 186 (1986)(The Constitution does not confer a fundamental right upon homosexuals to engage in consensual sodomy. Justice White stated for the majority that the Court has acted to protect rights not easily identifiable in the Constitution only when those rights are "implicit in the concept of ordered liberty" (*Palko v. Connecticut*, 302 U.S. 319 (1937)) or when they are "deeply rooted in the Nation's history and tradition" (*Griswold v. Connecticut*, 381 U.S. 479 (1965)).

have done so for a very long time.”¹⁶³ The *Bowers* court rejected the challenge to the Georgia statute and also rejected the concept that there was a fundamental right to engage in homosexual activity.

As particularly illustrative here, the *Lawrence* case included an historical analysis of homosexuality and laws prohibiting homosexuality. The *Lawrence* court first observed that the criminalization of homosexual activity was of rather recent advent:

At the outset it should be noted that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter. Beginning in colonial times there were prohibitions of sodomy derived from the English criminal laws passed in the first instance by the Reformation Parliament of 1533. The English prohibition was understood to include relations between men and women as well as relations between men and men. See, e.g., *King v. Wiseman*, 92 Eng. Rep. 774, 775 (K.B.1718) (interpreting “mankind” in Act of 1533 as including women and girls). Nineteenth-century commentators similarly read American sodomy, buggery, and crime-against-nature statutes as criminalizing certain relations between men and women and between men and men [citations omitted]. The absence of legal prohibitions focusing on homosexual conduct may be explained in part by noting that according to some scholars the concept of the homosexual as a distinct category of person did not emerge until the late 19th century. [citations omitted]. Thus early American sodomy laws were not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally. This does not suggest approval of homosexual conduct. It does tend to show that this particular form of conduct was not thought of as a separate category from like conduct between heterosexual persons.¹⁶⁴

Lawrence, thus, observed that it was not until the 1970s that states began singling out same-sex relations for criminal prosecution. Nevertheless, *Lawrence*

¹⁶³ *Bowers*, 478 U.S. at 190.

¹⁶⁴ *Lawrence*, 539 U.S. at 569.

recognized that there have been “powerful voices” which have long sought to condemn homosexual conduct as “immoral.” The condemnation has been shaped by “religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family.” For many persons these are “not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives.”¹⁶⁵ Yet, for *Lawrence*, such considerations would not answer the question presented. Rather, the issue, according to *Lawrence*, was “whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. Our obligation is to define the liberty of all, not to *mandate our own moral code*.”¹⁶⁶ (Emphasis added).

This obligation to define liberty, the Court believed, required it to consider what had developed since *Bowers* (decided only 17 years earlier in 1986). The *Lawrence* Court, thus, reviewed how other countries had eliminated the criminalization of homosexual acts. Also, it observed, as many as twelve states had eliminated their anti-deviate sexual practices laws. In fact, even the State of Texas admitted it had rarely prosecuted anyone for violation of its sodomy law. Referencing *Casey*, the *Lawrence* court recognized the “substantive force of the liberty” protected by the Due Process Clause and stated: “[O]ur laws and tradition afford constitutional protection to personal decisions relating to *marriage*, procreation, contraception, family relationships, child rearing, and education.”¹⁶⁷ (Emphasis added).

¹⁶⁵ *Lawrence*, 539 U.S. at 572.

¹⁶⁶ *Lawrence*, 539 U.S. at 572.

¹⁶⁷ *Lawrence*, 539 U.S. at 574 citing *Casey*, 505 U.S. at 851.

Thus, in *Lawrence* two concepts were seen which may ultimately impact the acceptance of polygamy. First, the Court found it relevant to recognize that moral codes change over time. Second, the Court recognized that the constitutional protections apply to personal choices applicable to marriage.

As noted above, Justice Scalia strongly dissented in *Lawrence*. He “mocked” the majority’s decision.¹⁶⁸ He was bothered by various things (including the Court’s willingness to diminish, in his view, the doctrine of *stare decisis* by overruling *Bowers* after only 17 years).¹⁶⁹ He was bothered by the majority’s broad definition of liberty

¹⁶⁸ Brandon, 252 (“In dissent, Justice Scalia mocked the Court’s decision.”)

¹⁶⁹ *Stare decisis* means “let the decision stand” and reflects a doctrine pursuant to which judges should look to past decisions for guidance and answer questions of law consistent with precedent. Hall at 663. How and when the doctrine of *stare decisis* applies is complex. For example, in *Vasquez v. Hillery*, 474 U.S. 254, 268-69 (1986), Justice Powell, dissenting, complained about the majority’s reliance on *stare decisis* and stated:

In my view, it follows from a misapplication of the doctrine of *stare decisis*. Adhering to precedent “is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.” *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, 406 (1932) (Brandeis, J., dissenting). Accordingly, “any departure from the doctrine of *stare decisis* demands special justification.” *Arizona v. Rumsey*, 467 U. S. 203, 212 (1984); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 559 (1985) (POWELL, J., dissenting). Nevertheless, when governing decisions are badly reasoned, or conflict with other, more recent authority, the Court “has never felt constrained to follow precedent.” *Smith v. Allwright*, 321 U. S. 649, 665 (1944). Instead, particularly where constitutional issues are involved, “[t]his Court has shown a readiness to correct its errors even though of long standing.” *United States v. Barnett*, 376 U. S. 681, 699 (1964).

In *Lawrence*, 539 U.S. at 577, Justice Kennedy, writing for the majority, explained the doctrine as follows:

The doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command. *Payne v. Tennessee*, 501 U.S. 808, 828, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) (“*Stare decisis* is not an inexorable command; rather, it ‘is a principle of policy and not a mechanical formula of adherence to the latest decision’ ” (quoting *Helvering v. Hallock*, 309 U.S. 106, 119, 60 S.Ct. 444, 84 L.Ed. 604 (1940))).

and whether states can ever impinge on liberty, noting that the Fourteenth Amendment expressly allows states to deprive citizens of liberty so long as due process is provided. But mostly he seemed to be worried about the idea of fundamental rights being found within an “emerging awareness” of liberty. Justice Scalia states:

Bowers’ conclusion that homosexual sodomy is not a fundamental right “deeply rooted in this Nation’s history and tradition” is utterly unassailable. Realizing that fact, the [*Lawrence* majority] instead says: “[W]e think that our laws and traditions in the past half century are of most relevance here. These references 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.” [citations omitted]. Apart from the fact that such an “emerging awareness” does not establish a “fundamental right,” the statement is factually false. States continue to prosecute all sorts of crimes by adults “in matters pertaining to sex”: prostitution, adult incest, adultery, obscenity, and child pornography. . . . In any event, an “emerging awareness” is by definition not “deeply rooted in this Nation’s history and tradition[s],” as we have said “fundamental right” status requires. Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior. Much less do they spring into existence, as the Court seems to believe, because foreign nations decriminalize conduct. The *Bowers* majority opinion never relied on “values we share with a wider civilization,” . . . but rather rejected the claimed right to sodomy on the ground that such a right was not “deeply rooted in this Nation’s history and tradition.”¹⁷⁰

¹⁷⁰ *Lawrence*, 539 at 597-98 (J. Scalia dissenting). In the first part of the dissent, Justice Scalia had noted similarly:

State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*’ validation of laws based on moral choices. Every single one of these laws is called into question by today’s decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding. See ante, at 2480 (noting “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex” (emphasis added)). The impossibility of distinguishing homosexuality from other traditional “morals” offenses is precisely why *Bowers* rejected the rational-basis challenge. “The law,” it said, “is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.” 478 U.S., at 196, 106 S.Ct. 2841.

From this rationale, Justice Scalia proceeded to make his now famous predication. If a law cannot be sustained because the governing majority of a State has traditionally viewed the prohibited act as being immoral, then according to Justice Scalia all morals based legislation will fall:

The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are “immoral and unacceptable,” *Bowers* [citations omitted] — the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity. *Bowers* held that this was a legitimate state interest. The Court today reaches the opposite conclusion. The Texas statute, it says, “furthers *no legitimate state interest* which can justify its intrusion into the personal and private life of the individual,” [citations omitted] (Scalia’s emphasis). The Court embraces instead Justice STEVENS’ declaration in his *Bowers* dissent, that “ ‘the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice,’ ” [citations omitted]. ***This effectively decrees the end of all morals legislation.*** If, as the Court asserts, the promotion of majoritarian sexual morality is not even a legitimate state interest, none of the above-mentioned laws can survive rational-basis review.¹⁷¹ (Emphasis added).

Thus, Justice Scalia predicted the end of morals based legislation because, he argued, majoritarian sexual morality can no longer satisfy the requirement of a legitimate state interest. By this prediction, however, Justice Scalia did not suggest that the law could not change as society’s perceptions of morality changed. He expressly observed that social perceptions of sexual and other morality change over time, and every group has the right to attempt to persuade its fellow citizens that its view of such matters is the best. But “persuading one’s fellow citizens is one thing, and imposing

Lawrence, 539 at 590 (J. Scalia dissenting).

¹⁷¹ *Lawrence*, 539 U.S at 599 (J. Scalia dissenting). Justice Scalia had made a similar prediction in *Romer v Evans*, 517 U.S. 620, 648 (1996)(Scalia, J. dissenting).

one's views in absence of democratic majority will is something else."¹⁷² For Justice Scalia, the proper method of change was through the democratic process, not "through the invention of a brand-new 'constitutional right' by a Court that is impatient of democratic change."¹⁷³ If, for example, later generations believe that laws once thought necessary and proper in fact serve only to oppress, then the later generations can repeal those laws. But, for Justice Scalia, it was the premise of our system that those judgments are to be made "by the people, and not imposed by a governing caste that knows best."¹⁷⁴ That is, for Justice Scalia, it was up to the voting public, not the Courts, to determine that morals-based legislation was no longer advancing society's interests at which time the public can act to replace or repeal the legislation.¹⁷⁵

Justice Scalia also spoke to same-sex marriage, suggesting that the *Lawrence* holding would inevitably lead to the recognition of same-sex marriages:

Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is "no legitimate state interest" for purposes of proscribing that conduct, . . . and if, as the Court coos (casting

¹⁷² *Lawrence*, 539 at 603 (J. Scalia dissenting).

¹⁷³ *Lawrence*, 539 at 603 (J. Scalia dissenting). The notion that change should come from a democratic result (the people) rather than from a court is present in 6th Circuit same-sex marriage case of *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), discussed below, see *infra* n. 191.

¹⁷⁴ *Lawrence*, 539 at 604 (J. Scalia dissenting).

¹⁷⁵ This was also the view of Judge Robert Bork (former Judge of the U.S. Court of Appeals, D.C. Circuit whose nomination by President Reagan as Justice of the Supreme Court to Justice Powell's seat was rejected by Senate in 1987, which led to the vacate seat being filled by current Justice Kennedy). Judge Bork wrote in opposing "judicial activism": "Legislation is far more likely to reflect majority sentiment while judicial activism is likely to represent an elite minority's sentiment. The judge is free to reflect the 'better' opinion because he need not stand for reelection and because he can deflect the majority's anger by claiming merely to have been enforcing the Constitution." Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Touchstone Press, 1990), 17.

aside all pretense of neutrality), “[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring,” . . . ; ***what justification could there possibly be for denying the benefits of marriage to homosexual couples*** exercising “[t]he liberty protected by the Constitution,” . . . ? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry. This case “does not involve” the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court.¹⁷⁶ (Emphasis added).

This thinking (and prognosticating) of Justice Scalia became relevant when a Utah District Judge was faced in *Brown v. Buhman* with the question of the validity of religious cohabitation and whether plural marriage ought to be perceived as an emerging right entitled to constitutional protection.¹⁷⁷

¹⁷⁶ Lawrence, 539 at 604-05

¹⁷⁷ Whether Justice Scalia is correct about the “end of all morals legislation,” see *Massachusetts v. U.S Dep’t of Health and Human Servs.*, 682 F.3d 1, 15 (1st Cir. 2012):

For generations, moral disapproval has been taken as an adequate basis for legislation, although usually in choices made by state legislators to whom general police power is entrusted. But, speaking directly of same-sex preferences, *Lawrence* ruled that moral disapproval alone cannot justify legislation discriminating on this basis. [citations omitted]. ***Moral judgments can hardly be avoided in legislation, but Lawrence and Romer have undercut this basis.*** (Emphasis added).

In *Holm*, the Utah Supreme Court noted that attempts to use *Lawrence* to expand justify various behavior have been frequently rejected:

In fact, numerous litigants have relied upon the *Lawrence* decision to attempt to expand the sphere of behavior protected by the federal constitution. Given the quite limited nature of that case’s holding, however, it should come as no surprise that the *Lawrence* opinion has been distinguished more than forty times since it was issued.

Holm, 137 P.2d at 742, n.10 (Utah 2006); see Jeffrey Michael Hayes, “Polygamy Comes out of the Closet: The New Strategy of Polygamy Activists,” *Stanford Journal of Civil Rights and Civil Liberties* 3, no. 1 (2007): 99-129, 120 (“Many critics, including dissenting Justice Antonin Scalia, argued that the *Lawrence* decision would make laws criminalizing bigamy unconstitutional.”)

Chapter 5

Case Law regarding Same-Sex Marriage

Tradition per se therefore cannot be a lawful ground for discrimination—regardless of the age of the tradition. [Justice Oliver Wendell] Holmes thought it “revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.”

Baskin v. Bogan, 766 F.3d 648, 667 (7th Cir.2014)

Another necessary step before turning to *Brown v. Buhman* is the brief examination of case law considering same-sex marriage which will aid in understanding *Brown v. Buhman*'s analysis – though *Brown v. Buhman* does not rely directly on these same-sex marriage cases as it does on *Lawrence*. Yet, the same-sex marriage cases reflect the kind of thinking to which Justice Scalia objected in *Lawrence* and which is applied in *Brown v. Buhman*. The majoritarian view on same-sex marriage has clearly evolved. For example, The Presbyterian Church will amend its definition of marriage in 2015. Presbyterian Church *Book of Order* W-4.9000 of the currently states:

Marriage is a civil contract between a woman and a man. For Christians marriage is a covenant through which a man and a woman are called to live out together before God their lives of discipleship. In a service of Christian marriage a lifelong commitment is made by a woman and a man to each other, publicly witnessed and acknowledged by the community of faith.¹⁷⁸

Effective June 15, 2015, the new definition will provide:

Marriage involves a unique commitment between two people, traditionally a man and a woman, to love and support each other for the rest of their lives. The sacrificial love that unites the couple sustains

¹⁷⁸ *Book of Order: Annotated Edition* (2012 by the Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.)).

them as faithful and responsible members of the church and the wider community.¹⁷⁹

Even if it is assumed that the current public majority is no longer interested in condemning same-sex marriage as immoral or as against custom and tradition, the Courts nevertheless seemed to be ahead of the public in the process by rejecting state-law bans on same sex marriage. The state-law bans were usually through definitions of marriage which expressly limited the institution to a union of one man and one woman (as, for example, the Texas and Utah State Constitutions currently do).¹⁸⁰

Which approach – change by the public (the democratic process) or change by courts (the judicial process) – may be preferable is perhaps a matter upon which reasonable minds might differ, but as of now almost every Court considering the same-sex marriage question has rejected morality, custom, or tradition as a legitimate basis for the argument that marriage ought to be strictly limited to the traditional definition (of a union of one man and one woman).

Should the legal analysis applied to same-sex marriage cases be applicable to polygamy cases? Same-sex marriage and plural marriage are clearly not the same. There are many distinctions. One leading commentator, Professor Adrienne D. Davis, argues that it is a mistake to analogize between the concepts of same-sex and plural marriage – as any such analogy is a red herring:

In the end, then, the analogy between same-sex marriage and polygamy is both inaccurate and incomplete. The battle for same-sex marriage is fought on dyadic terrain; that is gays and lesbians want the ability to

¹⁷⁹ Presbyterian Church, http://oga.pcusa.org/site_media/media/uploads/oga/pdf/advisory_opinion_marriage_passage.pdf. (accessed March 18, 2015).

¹⁸⁰ See *supra* n. 1.

enter the current couples-only regime. The sex of the spouses makes no regulatory difference, only a moral one. In contrast, as argued above, the number of spouses creates a distinct set of dynamics. Multiplicity can generate additional chances for opportunistic and exploitative behavior that runs counter to the contemporary family law's investment in formal equality and fair treatment. Hence, the gay marriage analogy, as provocative as it is, is a red herring, a distraction from the distinct regulatory issues polygamy poses gay marriage, as long as it is dyadic, does not.¹⁸¹

¹⁸¹ A. Davis, 1995. See also, Maura Strassberg, "Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage," *North Carolina Law Review* 75 (June 1997): 1501-1624 (Professor Strassberg also distinguishes same-sex marriage and polygamy arguing that recognition of same-sex marriage is consistent with and essential to maintaining the role of marriage in a modern liberal state. She agrees with the prohibition of polygamy finding there is no justification for its legalization. Professor Strassberg interestingly rejects the rationale of *Reynolds* which had relied on Francis Lieber's argument that polygamy promotes despotism in favor of her own analysis based on Georg W.R. Hegel's analysis of how polygamy contributes to despotic states, whereas monogamous relationships contribute to the development of modern liberal states.); Jaime M. Gher, "Polygamy and Same-Sex Marriage – Allies or Adversaries within the Same-Sex Marriage Movement." *William and Mary Journal of Women and the Law* 14, no. 3 (2008): 559-603 (Gher concludes that same-sex marriage and polygamy may share some common ground but that same-sex marriage advocates should continue to distance from polygamy but avoid maligning it and thereby playing into the cultural narrative that plural marriage is resoundingly barbaric and misogynistic); Michael Boucai, "Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality," *San Diego Law Review* 49, no. 2 (2012): 415-486, 459. (Boucai contends that plural marriage might advance the interest of bisexuals. Though recognizing that "polygamy seems distinguishable from same-sex marriage on a number of grounds," Boucai notes that same-sex marriage promotes the choice of a single gender of a permanent partner which thereby rejects bisexuality.); Martha C. Nussbaum, "A Right to Marry?" *California Law Review* 98, no. 3 (June 2010): 667-696, 688 (Professor Nussbaum argues "marriage is a fundamental liberty right of individuals" and questions whether it is unconstitutional to "fence out a group of people from the exercise of that right." She is unclear whether polygamist have the right and whether there are reasons strong enough to overcome the right, though she states: "The legal arguments against polygamy, however, are extremely weak."); and William Stacy Johnson, *A Time to Embrace: Same-Sex Relationships in Religion, Law, and Politics* (Grand Rapids, Wm. B. Eerdmans Publishing Co., 2012), 272, n. 16 ("Those opposed to allowing gay marriage often raise the fear that it will lead to polygamy or incest. But freedom to marry the person you choose does not equal freedom to marry as many persons as you choose. Nor does it include the right to marry in violation of incest laws. There is no requirement that church or society must honor relationships that may do tangible harm."). Johnson's remark that there is no requirement society must honor "relationships that may do tangible harm" is interesting, particularly if isolated and applied to marriage generally. Is there any relationship beyond marriage that does more tangible harm when the relationship fails, when spousal abuse occurs, or when child abuse occurs? An argument that a "relationship" may cause harm is not a valid argument that the relationship must be rejected by society.

While rejecting the slippery slope argument made here (that is, the slide from *Lawrence* to recognition of same-sex marriage to the recognition of polygamy), Professor Davis nevertheless admits the attraction of *Lawrence* to the polygamy debate. Writing in 2010 (before *Windsor* in 2013 and some of the more recent same-sex marriage cases), Professor Davis noted that *Lawrence* was “clearly a victory for the very existence of same-sex relationships” but stated it was less clear whether *Lawrence* would lead “gay marriage as a federal right.”¹⁸² She, however, raised the question: “If *Lawrence* opens the door for same-sex marriage, can polygamists follow through?”¹⁸³

In raising this question, Professor Davis quotes Justice Scalia – not from his dissent in *Lawrence* but rather from his dissent seven years earlier in *Romer* (which held Colorado’s state constitutional amendment denying protected status based upon homosexuality or bisexuality violated the Equal Protection Clause). In his writing in *Romer* (1996) it is clear Justice Scalia saw the slope’s slipperiness from same-sex marriage to polygamy even before *Lawrence* (2003):

But there is a much closer analogy, one that involves precisely the effort by the majority of citizens to preserve its view of sexual morality statewide, against the efforts of a geographically concentrated and politically powerful minority to undermine it. The Constitutions of the States of Arizona, Idaho, New Mexico, Oklahoma, and Utah to this day contain provisions stating that polygamy is “forever prohibited.” . . . Polygamists, and those who have a polygamous “orientation,” have been “singled out” by these provisions for much more severe treatment than merely denial of favored status; and that treatment can only be changed by achieving amendment of the state constitutions. *The Court's disposition today suggests that these provisions are unconstitutional,*

¹⁸² A. Davis, 1981

¹⁸³ A. Davis, 1981.

and that polygamy must be permitted in these States on a state-legislated, or perhaps even local option, basis—unless, of course, polygamists for some reason have fewer constitutional rights than homosexuals.¹⁸⁴ (Emphasis added).

Whether the same-sex-marriage-slippery-slope argument is valid is certainly an open question.¹⁸⁵ Nevertheless, the trend of the same-sex cases is certainly relevant to the

¹⁸⁴ *Romer v Evans*, 517 U.S. 620, 648 (1996)(Scalia, J. dissenting) (*Romer* held that Colorado’s Constitutional Amendment, adopted in a 1992 statewide referendum, which prohibited all legislative, executive, or judicial action at any level of state or local government designed to protect homosexuals was violative of the Equal Protection Clause).

¹⁸⁵ Cheshire Calhoun, “Who’s Afraid of Polygamous Marriage? Lessons for Same-Sex Marriage Advocacy from the History of Polygamy,” *San Diego Law Review* 42, no. 3 (Summer 2005); 1023-1042. (This article traces four historical bars to marriage, including the restriction on marriages between slaves, the restriction on marriage between races, the restriction on plural marriages, and the restriction on same-sex marriage. An argument is made that more careful attention to the historical practice of polygamy strengthens the case for same-sex marriage. Attention to the similarities between the social issues at stake in the antipolygamy campaign and the same-sex marriage campaign can productively complicate the sense of what the fundamental issues are in the same-sex marriage debate. Calhoun’s article asserts that it is not altogether clear that legal recognition of polygamous marriage is incompatible with a liberal, democratic, and egalitarian society, suggesting that the proper response to same-sex marriage opponents’ argument may instead be, “And indeed, why not also polygamy?”); James M. Donovan, “Rock-Slating the Slippery Slope: Why Same-Sex Marriage is Not a Commitment to Polygamous Marriage,” *Northern Kentucky Law Review* 29, no. 3 (August 2002): 521-590, 589-90 (“The connection between same-sex marriage and polygamy has been often claimed and as frequently rebutted. To the extent that opponents of same-sex marriage bear the burden to demonstrate that same-sex marriage will result in polygamy, they have failed. But so too have advocates of same-sex marriage, if the burden is on them to show that it will not. For all the heat and furor, not to mention serious scholarship and heartfelt sincerity, neither side has constructively analyzed the problem in its specifics.”); Philip L. Kilbride and Douglas R. Page, *Plural Marriage for Our Times* (Santa Barbara: Praeger, 2013), 203-215 (Generally rejecting the slippery-slope argument and noting that there is no reverse slippery slope. In areas in which polygamy is common (Africa), there has not been a move towards same-sex marriage.). An interesting source which focuses on polygamy in Canada is Gillian Calder and Lori G. Beaman, eds., *Polygamy’s Rights and Wrongs: Perspectives on Harm, Family, and Law* (Vancouver: UBS Press, 2014) which seeks to advocate on behalf of polygamy focusing on the family and on arguments countering the main objections to polygamy (it represents and reifies a patriarchal family form, it is harmful to women and children, women do not freely chose it, and it threatens values and cultural norms)).

polygamy debate regarding the proper applicability of tradition and morals.¹⁸⁶ It is to those cases that this analysis now turns.

5.1 Background regarding same-sex marriage

By the end of 2014 almost all courts considering laws prohibiting same-sex marriage had concluded that such laws failed in the face of a constitutional challenge with only a few exceptions.¹⁸⁷ Although some courts had reached that conclusion

¹⁸⁶ For example, the Petition for Writ of Certiorari in *DeBoer v. Snyder* relied on *Lawrence* for the proposition that later generations may reject laws which were once thought to be necessary only serve currently to oppress:

Our Constitution protects liberties whose manifestations were not anticipated in the eighteenth century. *Lawrence*, 539 U.S. at 578-79 (“[T]hose who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment ... knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.”).

DeBoer v. Snyder, Petition for Writ of Certiorari of April DeBoer, No. No. 14-571 (U.S. 2014).

¹⁸⁷ See *Campaign for Southern Equality v. Bryant*, 2014 WL 6680570 *1, n.1, ___ F.Supp.3d ___ (S.D. Miss. Nov. 25, 2014) stating that in the wake of *Windsor* “nearly every court presented with the issue has found such bans unconstitutional.”

Regarding the Circuit Courts, the 4th, 7th, 9th, and 10th have found same-sex marriage prohibitions to be unconstitutional: *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir.2014); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir.2014); *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014); and *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir.2014). In contrast, the 6th Circuit upheld state law restrictions against same-sex marriage, although the writ of certiorari has been granted in *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. Nov.6, 2014) (upholding four states' same-sex marriage bans) *cert. granted*, ___ U.S.L.W ___ (U.S. Jan. 15, 2015)(No. 14-571). The issue is pending in the 5th Circuit regarding *DeLeon v. Perry*, 975 F.Supp.2d 632 (W.D. Tex. 2014), No. 14-50196 (5th Cir. 2014).

Lower Courts have also found same-sex marriage prohibitions to be unconstitutional: *DeLeon v. Perry*, 975 F.Supp.2d 632 (W.D. Tex. 2014); *Guzzo v. Mead*, No. 14-CV-200, 2014 WL 5317797 (D. Wyo. Oct.17, 2014); *Hamby v. Parnell*, ___ F.Supp.3d. ___, 2014 WL 5089399 (D. Alaska Oct.12, 2014); *General Synod of the United Church of Christ v. Resinger*, 12 F.Supp.3d 790 (W.D.N.C.2014); *DeBoer v. Snyder*, 973 F.Supp.2d 757 (E.D. Mich.2014); *Bassett v. Snyder*, 951 F.Supp.2d 939 (E.D. Mich.2013); *Brenner v. Scott*, 999 F.Supp.2d 1278 (N.D. Fla.2014); *Burns v. Hickenlooper*, No. 14-CV-1817, 2014 WL 3634834 (D. Colo. July 23, 2014); *Bourke v. Beshear*, 996 F.Supp.2d 542 (W.D. Ky. 2014); *Love v. Beshear*, 989 F.Supp.2d 536 (W.D. Ky. 2014); *Baskin v. Bogan*, 12 F.Supp.3d 1137 (S.D. Ind. 2014); *Baskin v. Bogan*, 12 F.Supp.3d 1144 (S.D. Ind. 2014); *Wolf v. Walker*, 986 F.Supp.2d 982 (W.D. Wis.

earlier, once the United States Supreme Court in *Windsor* struck down the definition of marriage in the federal Defense of Marriage Act (which provided that “‘marriage’ means only a legal union between one man and one woman as husband and wife”) the trend became clear, as among the Circuits, only one (the Sixth Circuit) had determined that such state-law restrictions on same-sex marriage are no longer enforceable.¹⁸⁸

2014); *Whitewood v. Wolf*, 992 F.Supp.2d 410 (M.D. Pa. 2014); *Geiger v. Kitzhaber*, 994 F.Supp.2d 1128 (D. Or. 2014); *Latta v. Otter*, — F.Supp.2d —, 2014 WL 1909999 (D. Idaho May 13, 2014); *Henry v. Himes*, 14 F.Supp.3d 1036 (S.D. Ohio 2014); *Obergefell v. Wymyslo*, 962 F.Supp.2d 968 (S.D. Ohio 2013); *Tanco v. Haslam*, 7 F.Supp.3d 759 (M.D. Tenn. 2014); *Bostic v. Rainey*, 970 F.Supp.2d 456 (E.D. Va. 2014); *Bishop v. United States ex rel. Holder*, 962 F.Supp.2d 1252 (N.D. Okla. 2014); *Kitchen v. Herbert*, 961 F.Supp.2d 1181 (D. Utah 2013); *Gray v. Orr*, 4 F.Supp.3d 984 (N.D. Ill. 2013); *Lee v. Orr*, No. 13–CV–8719, 2013 WL 6490577 (N.D. Ill. Dec.10, 2013); *Condon v. Haley*, — F.Supp.3d —, 2014 WL 5897175 (D. S.C. Nov.12, 2014); *Bradacs v. Haley*, No. 3:13–CV–2351, 2014 WL 6473727 (D. S.C. Nov.18, 2014); *McGee v. Cole*, No. 3:13–24068, 2014 WL 5802665 (S.D. W.Va. Nov.7, 2014); *Lawson v. Kelly*, — F.Supp.3d —, 2014 WL 5810215 (W.D. Mo. Nov.7, 2014); *Rolando v. Fox*, —F.Supp.3d —, 2014 WL 6476196 (D. Mont. Nov.19, 2014); *Majors v. Jeanes*, — F.Supp.3d —, 2014 WL 4541173 (D. Ariz. Sept.12, 2014); *Marie v. Moser*, No. 14–CV–2518, 2014 WL 5598128 (D. Kan. Nov.4, 2014); *Griego v. Oliver*, 316 P.3d 865 (N.M. 2013); *Garden State Equality v. Dow*, 434 N.J.Super. 163, 82 A.3d 336 (N.J.Super.Ct. 2013); *Costanza v. Caldwell*, No. 13–52 D2 (La. Dist. Ct. Sept. 22, 2014); *Wright v. State of Arkansas*, No. 60–CV–13–2662 (Ark. Cir. Ct. May 9, 2014); *Barrier v. Vasterling*, No. 1416–CV–3892 (Mo. Cir. Ct. Oct. 3, 2014).

But see *Robicheaux v. Caldwell*, 2 F.Supp.3d 910 (E.D. La.2014) (upholding Louisiana’s same-sex marriage ban); *Conde–Vidal v. Garcia–Padilla*, — F.Supp.3d —, 2014 WL 5361987 (D. P.R. Oct.21, 2014) (uphold Puerto Rico’s restriction against same-sex marriage: “Traditional marriage is “exclusively [an] opposite-sex institution . . . inextricably linked to procreation and biological kinship,” *Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting). Traditional marriage is the fundamental unit of the political order. And ultimately the very survival of the political order depends upon the procreative potential embodied in traditional marriage.”).

¹⁸⁸ *U.S. v. Windsor*, 570 U.S. ___, 133 S.Ct. 2675, 2682-83 (2013) struck down DOMA Section 3. It amends the Dictionary Act in Title 1, § 7, of the United States Code to provide a federal definition of “marriage” and “spouse.” Section 3 of DOMA provides as follows:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.” 1 U.S.C. § 7.

It is beyond the scope of this paper to fully explore the cases regarding same-sex marriage. The trend of those cases, however, is important to recognize because that trend may be predictive of a similar trend regarding plural marriage which may have started with *Brown v. Buhman*.¹⁸⁹ *Baskin v. Bogan* (from the Seventh Circuit in September of 2014) perhaps best reflected the trend and its analysis was illustrative of the majority view of the Circuits. *Baskin* held that the laws of Wisconsin and Indiana prohibiting same-sex marriage violated the Equal Protection Clause of the Fourteenth

¹⁸⁹ Mark Goldfeder (a senior fellow at the Center for the Study of Law and Religion at Emory University, senior lecturer at Emory Law School and adjunct professor of law at Georgia State University College of Law), commenting on *Windsor's* impact on polygamy stated that the *Windsor* court may have unwittingly re-opened the possibility of plural marriage at the state level:

When the Supreme Court struck down the federal Defense of Marriage Act in *U.S. v. Windsor* in June, opening the door to federal recognition of same-sex marriage, it also set the stage for a discussion of plural marriage. DOMA defined marriage as "a legal union between one man and one woman as husband and wife." While DOMA obviously prohibited same-sex marriage (by requiring that a marital unit consist of a man and a woman), it also enshrined the prohibition against polygamy, by requiring that such a union be between only one man and one woman. Even before *Windsor* the Supreme Court had declared morals-based legislation invalid, renewing interest in polygamy. But in calling DOMA definitions unconstitutionally restrictive, the court, perhaps unwittingly, also struck down the federal numerical limitation in a marriage, immediately re-opening the possibility of plural marriage at the state level. . . . Polygamy might not be inherently evil, which is why we need purposeful debates. But unlike traditional marriage, it has never been effectively regulated and so people, especially women and children, have suffered. . . . Same-sex relationships that were only decriminalized in earlier cases were finally given legal recognition in *Windsor*. If there is to be a change in status quo – if we as a nation decide that polygamy cannot or should not be illegal – then going straight from criminalization to full recognition is both the correct legal answer and necessary to assuage public fears. . . . Morals-based legislation has been unconstitutional since 2003's *Lawrence v. Texas*, and so we cannot just continue ignoring the polygamists' clamor for acceptance. . . .

CNN, <http://www.cnn.com/2013/12/16/opinion/goldfeder-polygamy-laws/> (accessed January 2, 2015).

Amendment because “discrimination against same-sex couples is irrational and therefore unconstitutional.”¹⁹⁰

In contrast to *Baskin* and in the minority, was *DeBoer v. Snyder* (from the Sixth Circuit in November of 2014) representing an outlier conclusion.¹⁹¹ The two judge majority in *DeBoer* reversed several district courts’ decisions (several cases were consolidated into *DeBoer*) which had held, in line with most other courts considering the issue, that the laws of Michigan, Ohio, Kentucky, and Tennessee violated the Equal Protection Clause of the Fourteenth Amendment. By reversing those district courts, the *DeBoer* majority left in place the state-law prohibitions of same-sex marriage in those states (Michigan, Ohio, Kentucky, and Tennessee). The *DeBoer* majority seemed more concerned about process than substance stating at the outset: “From the vantage of 2014, it would now seem, the question is not whether American law will allow gay couples to marry; it is when and how that will happen.”¹⁹² The *DeBoer* majority apparently believed it would be doing a service by providing the concerned states with an opportunity to resolve the issue through legislation – noting that if the court decided the issue it would deprive the “people” of the right to settle the issue.¹⁹³ Whether this

¹⁹⁰ *Baskin v. Bogan*, 766 F.3d 648, 656 (7th Cir. 2014).

¹⁹¹ *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014).

¹⁹² *DeBoer*, 772 F.3d at 395.

¹⁹³ *DeBoer*, 772 F.3d at 421 states:

If the Court takes the first approach [deciding the constitutional issue], it may resolve the issue for good and give the plaintiffs and many others relief. But we will never know what might have been. If the Court takes the second approach [leaving the issue to the state], is it not possible that the traditional arbiters of change—the people—will meet today’s challenge admirably and settle the issue in a productive way? In just eleven years, nineteen States and a conspicuous District, accounting for nearly forty-five

approach by the *DeBoer* court was legally correct is unclear (though the dissenting Judge in *DeBoer* thought the majority’s “wait and see” approach almost ridiculous).¹⁹⁴ The *DeBoer* majority, however, seemed to recognize Justice Scalia’s plea that this type of change in marriage laws (*i.e.*, the acceptance of same-sex marriage) ought to flow from the democratic rather than the judicial process. In any event, the *DeBoer* majority created a conflict between results of various federal appellate circuits, making it more

percent of the population, have exercised their sovereign powers to expand a definition of marriage that until recently was universally followed going back to the earliest days of human history. That is a difficult timeline to criticize as unworthy of further debate and voting. When the courts do not let the people resolve new social issues like this one, they perpetuate the idea that the heroes in these change events are judges and lawyers. Better in this instance, we think, to allow change through the customary political processes, in which the people, gay and straight alike, become the heroes of their own stories by meeting each other not as adversaries in a court.

¹⁹⁴ Judge Martha Craig Daughtrey begins her dissent as follows:

“The great tides and currents which engulf the rest of men do not turn aside in their course to pass the judges by.”
Benjamin Cardozo, *The Nature of the Judicial Process*
(1921)

The author of the majority opinion has drafted what would make an engrossing TED Talk or, possibly, an introductory lecture in Political Philosophy. But as an appellate court decision, it wholly fails to grapple with the relevant constitutional question in this appeal: whether a state’s constitutional prohibition of same-sex marriage violates equal protection under the Fourteenth Amendment. Instead, the majority sets up a false premise—that the question before us is “who should decide?”—and leads us through a largely irrelevant discourse on democracy and federalism. In point of fact, the real issue before us concerns what is at stake in these six cases for the individual plaintiffs and their children, and what should be done about it. Because I reject the majority’s resolution of these questions based on its invocation of *vox populi* and its reverence for “proceeding with caution” (otherwise known as the “wait and see” approach), I dissent.

DeBoer, 772 F.3d at 421.

likely the U.S. Supreme Court will confront the same-sex marriage issue head-on and, perhaps, resolve it once and for all.¹⁹⁵

For these purposes this review will focus only the *Baskin* same-sex-marriage case because it presented a well-drafted, current illustration of the trend of the legal reasoning regarding of the same-sex marriage issues. Further, *Baskin* was written by Judge Posner, one of the leading Federal Appellate Court Judges, whose opinion likely will carry a good deal of weight.¹⁹⁶

5.2 *Baskin v. Bogan* – 2014

In *Baskin*, Judge Posner did not struggle to his conclusion but rather made quick work of the attempted defense by Indiana and Wisconsin of their prohibitions of same-sex marriage.¹⁹⁷ Judge Posner began by observing that “Indiana and Wisconsin are among the shrinking majority of states that do not recognize the validity of same-sex marriages”¹⁹⁸ Posner stated that the issue presented – at least “formally” – was about “discrimination against the small homosexual minority in the United States” but

¹⁹⁵ See *supra* n. 3 indicating the petition for Writ of Certiorari granted in *DeBoer* on January 16, 2015.

¹⁹⁶ See also *supra* n. 12 regarding Judge Posner. Judge Posner has commented on polygamy in Richard Posner, *Sex and Reason* (Cambridge: Harvard University Press, 1992), 259-60 in connection with a prediction that western society will likely see worrisome trends in various forms of relationships including:

polygamy, de jure or de facto, in a society of non-companionate marriage; monogamy in a society of companionate marriage; and monogamy with an admixture of de facto polygamy in modern Western nations, where marriage is companionate but many women have children outside of marriage because they are no longer dependent on men, and where in addition to the decline of the traditional morality, and in particular of the limitations of divorce, reduces the felt immorality of polygamy – its conflict with the society’s sexual laws and norms.

¹⁹⁷ *Baskin v. Bogan*, 766 F.3d 648 (7th Cir.2014).

¹⁹⁸ *Baskin*, 766 F.3d at 653.

at a “deeper level” was actually about the welfare of children, since, he said, the states’ main argument in supporting their prohibition of same-sex marriage was to “induce heterosexuals to marry so that there will be fewer ‘accidental births,’ which when they occur outside of marriage often lead to abandonment of the child by the mother (unaided by the father) or foster care.”¹⁹⁹ Judge Posner was not the least bit impressed by the states’ argument; for Posner, the states’ argument “cannot be taken seriously.”²⁰⁰ Judge Posner finds discrimination against same-sex couples is “irrational and therefore unconstitutional” (apparently applying the mere rationality test).²⁰¹ Though the *Baskin* plaintiffs asserted both a Due Process as well as an Equal Protection argument, Judge Posner advised that the court need not reach the Due Process argument because the plaintiffs succeeded under Equal Protection.²⁰² Thus, the *Baskin* court did not reach

¹⁹⁹ *Baskin*, 766 F.3d at 654.

²⁰⁰ *Baskin*, 766 F.3d at 656.

²⁰¹ *Baskin*, 766 F.3d at 656.

²⁰² It is beyond the scope of this paper to discuss in any detail the meaning and distinctions of Due Process and Equal Protection. Substantive due process is a principle which is thought to allow federal courts to protect certain fundamental rights from government interference under the due process clauses of the Fifth and Fourteenth Amendments to the Constitution, which prohibit the government from depriving any person of life, liberty, or property, without due process of law. It is often a controversial doctrine with conservative Justices, such as Justice Scalia, arguing that it is just a tool for the courts to make determinations of policy and morality that properly belongs to the democratic process. See *U.S. v Carlton*, 512 U.S. 26, 39 (1994)(Justice Scalia dissenting)(“If I thought that ‘substantive due process’ were a constitutional right rather than an oxymoron, I would think it violated by bait-and-switch taxation.”). Equal protection is generally invoked when government treats one group differently than another in the pursuit of some social goal. For example, in *Romer v. Evans*, 517 U.S. 620, 623 (1996)(in which the Court struck down Colorado’s state constitutional amendment denying protected status based upon homosexuality or bisexuality as violative of the Equal Protection Clause) the court stated that equal protection requires neutrality where the rights of persons are at stake:

One century ago, the first Justice Harlan admonished this Court that the Constitution "neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U. S. 537, 559 (1896) (dissenting opinion). Unheeded then,

with the question of whether the right to choose whom to marry was a fundamental constitutional right.²⁰³

Judge Posner initially recognized that equal protection challenges, like that asserted in *Baskin*, were not “a license for courts to judge the wisdom, fairness, or logic of legislative choices.”²⁰⁴ In the areas of social and economic policy, he explained, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against an equal protection challenge if there is “any reasonably conceivable state of facts that could provide a rational basis for the classification,” – that is, the mere rationality test applies if the classification is not based on a suspect class and if there is no infringement of a fundamental right.²⁰⁵

those words now are understood to state a commitment to the law's neutrality where the rights of persons are at stake. The Equal Protection Clause enforces this principle and today requires us to hold invalid a provision of Colorado's Constitution.

²⁰³ *Baskin*, 766 F.3d at 657, the *Baskin* court explains:

It is also why we can avoid engaging with the plaintiffs' further argument that the states' prohibition of same-sex marriage violates a fundamental right protected by the due process clause of the Fourteenth Amendment. The plaintiffs rely on cases such as *Hodgson v. Minnesota*, 497 U.S. 417, 435, 110 S.Ct. 2926, 111 L.Ed.2d 344 (1990), and *Zablocki v. Redhail*, 434 U.S. 374, 383–86, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978), that hold that the right to choose whom to marry is indeed a fundamental right. The states reply that the right recognized in such cases is the right to choose from within the class of persons eligible to marry, thus excluding children, close relatives, and persons already married—and, the states contend, persons of the same sex. The plaintiffs riposte that there are good reasons for ineligibility to marry children, close relatives, and the already married, but not for ineligibility to marry persons of the same sex. In light of the compelling alternative grounds that we'll be exploring for allowing same-sex marriage, we won't have to engage with the parties' “fundamental right” debate; we can confine our attention to equal protection.

²⁰⁴ *Baskin*, 766 F.3d at 654.

²⁰⁵ *Baskin*, 766 F.3d at 654 quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993)

Judge Posner then flatly stated that “the governments of Indiana and Wisconsin have given us no reason to think they have a ‘reasonable basis’ for forbidding same-sex marriage.”²⁰⁶ And, yet, Judge Posner believed that the States must show more than a reasonable basis because he concluded that the challenged discrimination was indeed along a suspect line because it was by a state government against a minority (homosexuals) based on an immutable characteristic (homosexuality, which the court finds to be innate in the sense of being in-born) and occurring against an historical background of discrimination against those who have the characteristic.²⁰⁷ (This was another example of the complexity of the determination and application of the proper standard of review).²⁰⁸

After concluding that homosexuals would be harmed by a denial of the right to marry, Judge Posner considered whether Indiana and Wisconsin could establish a governmental interest for denying the right to marry. But first, Judge Posner had to deal with *Baker v. Nelson*, a 1972 case which, although procedurally complex, could be taken as some United States Supreme Court authority for the proposition that prohibiting same-sex marriage did not violate the Constitution.²⁰⁹ Judge Posner

²⁰⁶ *Baskin*, 766 F.3d at 654.

²⁰⁷ *Baskin*, 766 F.3d at 657 (“And there is little doubt that sexual orientation, the ground of the discrimination, is an immutable (and probably an innate, in the sense of in-born) characteristic rather than a choice.”).

²⁰⁸ Judge Posner observes, for example, “The Ninth Circuit concluded, based on a reading of the Supreme Court’s decisions in *Lawrence* and *Windsor*, that statutes that discriminate on the basis of sexual orientation are subject to ‘heightened scrutiny’” *Baskin*, 766 F.3d at 671.

²⁰⁹ *Baker v. Nelson*, 409 U.S. 810 (1972) (mem.)(without issuing an opinion, the Supreme Court dismissed “for want of a substantial federal question” an appeal from a state court that had held that prohibiting same-sex marriage did not violate the Constitution). Because of

concluded, however, that *Baker* was no longer applicable. This reasoning was particularly relevant to the discussion here for it may foreshadow how a future court will deal with prohibitions against polygamy under earlier case precedents (like *Reynolds*). Judge Posner stated the following explanation of how modern trends may indicate that earlier Supreme Court authority no longer applies (and this type of reasoning seems to support Justice Scalia's *Lawrence* conclusion that morals-based laws can no longer stand):

Baker was decided in 1972 – 42 years ago and the dark ages so far as litigation over discrimination against homosexuals is concerned. Subsequent decisions such as *Romer v. Evans* [citation omitted], *Lawrence v. Texas*, [citation omitted], and *United States v. Windsor* are distinguishable from the present two cases but make clear that *Baker* is no longer authoritative. At least we think they're distinguishable. But Justice Scalia, in a dissenting opinion in *Lawrence*, . . . thought not. He wrote that “principle and logic” would require the Court, given its decision in *Lawrence*, to hold that there is a constitutional right to same-sex marriage.

Baker's odd procedural history, it has been argued that *Baker* is not a binding precedent. For example, Nelson Tebbe and Deborah A. Widiss, “Equal Access and the Right to Marry.” *University of Pennsylvania Law Review* 158, no. 5 (April 2010): 1375-1449, 1383-84, n. 25 provides:

[B]oth equal protection and due process doctrines, as related to the question of same-sex marriage, have evolved considerably since 1972, when *Baker* was dismissed. Accordingly, we agree with courts that have held that the dismissal in *Baker* does not bar lower federal courts from substantively considering the federal constitutional claims that case raised. See, e.g., *In re Kandu*, 315 B.R. 123, 135-38 (Bankr. W.D. Wash. 2004). However, we recognize that other federal courts have held that *Baker* is binding precedent. See, e.g., *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1304-05 (M.D. Ha. 2005). In any case, *Baker* is not a binding determination on state constitutional claims, including claims brought under state analogues of federal constitutional provisions. See, e.g., *Hernandez v. Robles*, 855 N.E.2d 1, 17 n.4 (N.Y. 2006) (deeming *Baker* instructive on the scope of the federal Due Process Clause as interpreted in *Loving v. Virginia*, 388 U.S. 1 (1967), but noting that the New York Due Process Clause may be interpreted “more expansively”). And of course, the U.S. Supreme Court may choose to consider any federal constitutional claims on the merits and overrule whatever precedential significance *Baker* holds.

Thus, Judge Posner seems to have accepted the proposition that some earlier Supreme Court authority should be considered as from the “dark ages” and, thus, rejected by later courts even if not directly rejected by the Supreme Court itself.

Judge Posner had a word to say about the validity of tradition as the basis for upholding prohibitions of laws alleged to be unconstitutional. He observed first that Wisconsin argued that “limiting marriage to heterosexuals is traditional and tradition is a valid basis for limiting legal rights.”²¹⁰ This argument held little water for Judge Posner, who rejected it out of hand:

The state’s argument from tradition runs head on into *Loving v. Virginia* . . . since the limitation of marriage to persons of the same race was traditional in a number of states when the Supreme Court invalidated it. Laws forbidding black-white marriage dated back to colonial times and were found in northern as well as southern colonies and states. . . . There are good traditions, bad traditions pilloried in such famous literary stories as Franz Kafka’s “In the Penal Colony” and Shirley Jackson’s “The Lottery,” bad traditions that are historical realities such as cannibalism, foot-binding, and suttee, and traditions that from a public-policy standpoint are neither good nor bad (such as trick-or-treating on Halloween). ***Tradition per se therefore cannot be a lawful ground for discrimination—regardless of the age of the tradition.*** [Justice Oliver Wendell] Holmes thought it “revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.”²¹¹ (Emphasis added).

Judge Posner simply rejected tradition as a basis to support discriminatory legislation:

“If no social benefit is conferred by a tradition and it is written into law and it discriminates against a number of people and does them harm beyond just offending

²¹⁰ *Baskin*, 766 F.3d at 666.

²¹¹ *Baskin*, 766 F.3d at 666-67

them, it is not just a harmless anachronism; it is a violation of the equal protection clause”²¹² Concerning tradition, Judge Posner found himself referencing polygamy, apparently as an example that the traditional acceptance of a practice does not make it right – yet by making this argument illustrated that polygamy is actually a widely accepted practice, outside the West, particularly as compared to same-sex marriage:

The state elaborates its argument from the wonders of tradition by asserting, again in its opening brief, that “thousands of years of collective experience has [sic] established traditional marriage, between one man and one woman, as optimal for the family, society, and civilization.” No evidence in support of the claim of optimality is offered, and there is no acknowledgment that a number of countries permit polygamy—Syria, Yemen, Iraq, Iran, Egypt, Sudan, Morocco, and Algeria—and that it flourishes in many African countries that do not actually authorize it, as well as in parts of Utah. (Indeed it’s been said that “polygyny, whereby a man can have multiple wives, is the *marriage form found in more places and at more times than any other.*” (Emphasis added).²¹³

While Indiana and Wisconsin attempted to justify, in part, their ban on same-sex marriage by referencing tradition, they did not, however, rely on any “moral objection” to same-sex marriage. Judge Posner speculated that perhaps Indiana and Wisconsin were persuaded by Justice Scalia’s prediction in *Lawrence* that morals-based arguments no longer work to support majoritarian legislation: “But Wisconsin like Indiana does not base its prohibition of same-sex marriage on morality, perhaps because it believes

²¹² *Baskin*, 766 F.3d at 667.

²¹³ *Baskin*, 766 F.3d at 667 quoting Stephanie Coontz, *Marriage, a History: How Love Conquered Marriage* (New York: Penguin Books, 2006), 10.

plausibly that *Lawrence* rules out moral objections to homosexuality as legitimate grounds for discrimination.”²¹⁴

Judge Posner also rejected the notion that States could overcome constitutional objections to prohibitions on same-sex marriage by offering to homosexuals a “civil union” with similar legal rights. Judge Posner quickly disposed of the argument by referencing bi-racial marriages, noting that earlier prohibitions on mixed-race marriage failed to meet constitutional scrutiny:

Imagine if in the 1960s the states that forbade interracial marriage had said to interracial couples: “you can have domestic partnerships that create the identical rights and obligations of marriage, but you can call them only ‘civil unions’ or ‘domestic partnerships.’ The term ‘marriage’ is reserved for same-race unions.” This would give interracial couples much more than Wisconsin’s domestic partnership statute gives same-sex couples. Yet withholding the term “marriage” would be considered deeply offensive, and, having no justification other than bigotry, would be invalidated as a denial of equal protection.²¹⁵

In the end, Judge Posner rejected the states’ main justification of the discrimination in its marriage law – which justification was based on the notion that the only real reason states encourage marriage is so that there are fewer accidental births occurring outside of marriage, which, of course, would not apply to same-sex marriages. This rationale was simply unwarranted:

The states’ concern with the problem of unwanted children is valid and important, but their solution is not “tailored” to the problem, because by denying marital rights to same-sex couples it reduces the incentive of such couples to adopt unwanted children and impairs the welfare of those children who are adopted by such couples. The states’ solution is thus, in the familiar terminology of constitutional discrimination law,

²¹⁴ *Baskin*, 766 F.3d at 670.

²¹⁵ *Baskin*, 766 F.3d at 670.

“overinclusive.” It is also underinclusive, in allowing infertile heterosexual couples to marry, but not same-sex couples.²¹⁶

Thus, *Baskin* affirmed the district courts’ invalidation of the Indiana and Wisconsin prohibitions of same-sex marriage. But most importantly, *Baskin* showed that long-standing laws based on traditions – even if supported by Supreme Court authority, especially older authority predicated on earlier notions of morality – may give way to modern trends. If same-sex marriage – once universally condemned as immoral – was now constitutionally protected, why not polygamy?

²¹⁶ *Baskin*, 766 F.3d at 672.

Chapter 6

Utah Bigamy Cases

Given these developments, and the existence of legal mechanisms for protecting the interests of abused or neglected children apart from criminally prosecuting their parents for bigamy, I do not believe the criminalization of religiously motivated polygamous conduct is necessary to further these interests.

State of Utah v. Holm, 137 P.2d 726, 776 (Utah 2006)(Justice Durham dissenting).

There is one other area of the law that must be considered before turning to *Brown v. Buhman*. The Utah Supreme Court in the last ten years has issued two opinions – *Green* and *Holm* – which are critically important to the *Brown v. Buhman* Court’s analysis. In particular, *Brown v. Buhman* was greatly influenced by the *Holm* dissenting opinion of Chief Justice Durham. Additionally, since this paper leans to an historical bent, *Green* and *Holm* are particularly relevant because in both cases the Utah Supreme Court believed a review of the history of the antipolygamy law was crucial to their decision making. The *Brown v. Buhman* Court thought likewise and relied in large part on the historical analyses set forth in *Green* and *Holm*.

6.1 *State of Utah v. Green* – 2004

In *Green*, Thomas Green was convicted of criminal nonsupport and five counts of bigamy.²¹⁷ Green, an avowed polygamist, appealed his conviction; he asserted, among other issues, that his bigamy conviction violated the Free Exercise Clause of the First Amendment. The *Green* Court rejected Green’s First Amendment argument.

²¹⁷ *State of Utah v. Green*, 99 P.3d 820 (Utah 2004).

Green involves the same Utah anti-bigamy statute that is considered in *Brown v. Buhman*.²¹⁸ The *Green* decision provided the Utah Supreme Court's view on the validity of the Utah's anti-bigamy statute and reflected one application of United States Supreme Court law applicable to the First Amendment which will be relevant to the *Brown* case.²¹⁹

²¹⁸ Utah's bigamy statute provides:

A person is guilty of bigamy when, knowing he has a husband or wife or knowing the other person has a husband or wife, the person purports to marry another person or cohabits with another person.

UTAH CODE ANN. § 76-7-101(1) (2003).

²¹⁹ Professor Jonathon Turley, J.B. and Maurice C. Shapiro Professor of Public Interest Law at the George Washington University Law School, who would later represent the Browns in *Brown v Buhman*., commented on *Green* in a 2004 opinion piece in *USA Today* asserting some of the same First Amendment Free Exercise arguments which he later made on the Browns' behalf:

The difference between a polygamist and the follower of an "alternative lifestyle" is often religion. In addition to protecting privacy, the Constitution is supposed to protect the free exercise of religion unless the religious practice injures a third party or causes some public danger. However, in its 1878 opinion in *Reynolds vs. United States*, the court refused to recognize polygamy as a legitimate religious practice, dismissing it in racist and anti-Mormon terms as "almost exclusively a feature of the life of Asiatic and African people." In later decisions, the court declared polygamy to be "a blot on our civilization" and compared it to human sacrifice and "a return to barbarism." Most tellingly, the court found that the practice is "contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western World." Contrary to the court's statements, the practice of polygamy is actually one of the common threads between Christians, Jews and Muslims.

Deuteronomy contains a rule for the division of property in polygamist marriages. Old Testament figures such as Abraham, David, Jacob and Solomon were all favored by God and were all polygamists. Solomon truly put the "poly" to polygamy with 700 wives and 300 concubines. Mohammed had 10 wives, though the Koran limits multiple wives to four. Martin Luther at one time accepted polygamy as a practical necessity. Polygamy is still present among Jews in Israel, Yemen and the Mediterranean. Indeed, studies have found polygamy present in 78% of the world's cultures, including some Native American tribes. (While most are polygynists — with one man and multiple women — there are polyandrists in Nepal and Tibet in which one woman has multiple male spouses.) As many as 50,000 polygamists live in the United States. Given this history and the long religious traditions, it cannot be

The *Green* Court noted first that the First Amendment’s Free Exercise Clause was made applicable to the states by incorporation into the Fourteenth Amendment by the *Smith* case.²²⁰ *Green* then reflected on *Reynolds*, observing that while *Reynolds*’ “reasoning may not necessarily comport with today’s understanding of the language and apparent purpose of the Free Exercise Clause,” the Supreme Court has never explicitly overruled the *Reynolds* decision. In fact, *Reynolds* has been cited with approval in subsequent cases.²²¹ Thus, *Green* felt bound by *Reynolds* (as would *Brown v Buhman*).

seriously denied that polygamy is a legitimate religious belief. Since polygamy is a criminal offense, polygamists do not seek marriage licenses. However, even living as married can send you to prison. Prosecutors have asked courts to declare a person as married under common law and then convicted them of polygamy. . . . I personally detest polygamy. Yet if we yield to our impulse and single out one hated minority, the First Amendment becomes little more than hype and we become little more than hypocrites. For my part, I would rather have a neighbor with different spouses than a country with different standards for its citizens.

USA Today, http://usatoday30.usatoday.com/news/opinion/columnist/2004-10-03-turley_x.htm# (accessed January 2, 2015).

²²⁰ *Employment Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 876–77(1990).

²²¹ *Green* cites *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993)(citing *Reynolds* for the proposition that “a social harm may have been a legitimate concern of government for reasons quite apart from discrimination”); *Employment Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 878–79 (discussing *Reynolds* in explaining that the Court has “never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate”); *United States v. Lee*, 455 U.S. 252, 257 (1982) (citing *Reynolds* as support for the statement that “[n]ot all burdens on religion are unconstitutional”); *Wisconsin v. Yoder*, 406 U.S. 205, 220, (1972) (citing *Reynolds* for the proposition that “it is true that activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers”); and *Cleveland v. United States*, 329 U.S. 14, 20, (1946) (citing *Reynolds* and upholding Mann Act convictions for transporting women across state lines for the purpose of making each woman a plural wife or cohabiting with her as such, despite a challenge based on the Free Exercise Clause). *Green* also references the 10th Circuit case of *Potter v. Murray City*, 760 F.2d 1065, 1066–70 (10th Cir.1985) (recognizing the continued validity of *Reynolds*, finding that the state had a compelling interest in prohibiting bigamy, and affirming the ruling that the discharge of a police officer based on the officer’s practice of polygamy did not violate the officer’s right to free exercise of religion).

The *Green* court then examined whether the Utah anti-bigamy statute could survive a Free Exercise challenge under the then-applicable standard applied by the United States Supreme Court in the *Smith* case²²² as explained in the *Hialeah* case.²²³ (Again, the complexity of the determination and applicability the correct standard of review raises it befuddling head). According to *Green*, the *Smith/Hialeah* rule emphasized the principle that “a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.”²²⁴ The *Hialeah* Court had examined Hialeah City ordinances and found that they were neither neutral nor of general applicability. Rather, the Hialeah City ordinances were written in such a way as to target only those animal killings that occurred attendant to Santeria religious worship. Thus, the *Hialeah* Court found that the city had no compelling governmental interest to support the ordinances. Consequently, the *Hialeah* Court invalidated the ordinances as violative of the Free Exercise Clause of the First Amendment.²²⁵

Following its review of the *Hialeah* analysis, the *Green* court set out to examine Utah’s anti-bigamy statute to determine whether it was neutral and of general applicability. Turning first to whether the statute was neutral, *Green* explained that a law is not neutral if the object of the law is to infringe upon or restrict practices because

²²² *Smith*, 494 U.S. at 876–77.

²²³ *Hialeah*, 508 U.S. at 535 (City of Hialeah's ordinance prohibiting ritual animal sacrifices as practiced by the Afro-Caribbean-based religion of Santeria violated the First Amendment's Free Exercise Clause because the ordinances were neither neutral nor generally applicable in that the ordinances were applied exclusively to the church).

²²⁴ *Green*, 99 P.3d at 826.

²²⁵ *Hialeah*, 508 U.S. at 547.

of their religious motivation. To make such a determination, the court must consider both “facial” and “operational” neutrality.²²⁶ “Facial” neutrality is assessed by examining the law’s text, while “operational” neutrality is assessed by examining the law in its real operation.²²⁷

The minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context. Defendant Green had argued that the Utah anti-bigamy statute was not facially neutral because the limitation on cohabitation was, while not expressed, in fact directed at polygamist because Utah is the only state which outlaws cohabitation (mainly, according to Green’s argument, because of the State’s historical efforts to eliminate polygamy). The *Green* Court did not agree holding that the Utah anti-bigamy statute used the term cohabitation in only a secular way. The anti-bigamy statute was not a law that referred to a religious practice so that the *Green* court held it was facially neutral.²²⁸

Turning next to operational neutrality, the *Green* Court observed that the anti-bigamy statute does not operate to isolate and punish only that form of bigamy which results from the religious practices of polygamists. It contains no exemptions that would restrict the practical application of the statute only to polygamists. In fact, the *Green* Court noted, the last then-reported decision of a prosecution under the bigamy statute

²²⁶ *Green*, 99 P.3d at 826.

²²⁷ *Green*, 99 P.3d at 826.

²²⁸ *Green*, 99 P.3d at 827.

had involved a man who committed bigamy for non-religious reasons. Thus, *Green* found that the anti-bigamy statute was operationally neutral.

The *Green* Court, having determined that the anti-bigamy statute was both facially and operationally neutral, then turned to the next step of the *Smith/Hialeah* analysis: determining if the anti-bigamy statute, which would burden the religious practice of polygamy, was of “general applicability.”²²⁹ Noting that neutrality and general applicability are interrelated, the *Green* court explained that the “generality” requirement reflected the principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief. Utah’s anti-bigamy statute does not attempt to target only religiously motivated bigamy. Any individual who violates the statute, whether for religious or secular reasons, is subject to prosecution under the statute. Thus, because the anti-bigamy statute is not a prohibition only on religious polygamists – but instead upon anyone involved in cohabitation – the statute was generally applicable.²³⁰

Because Utah’s anti-bigamy statute was neutral and of general applicability, *Green* stated the State of Utah – to successfully defend the anti-bigamy statute under the *Smith/Hialeah* test from a First Amendment challenge – was not required to meet the higher standard, that is, the State was not required to show that the interests the statute serves are “compelling” or that the statute is narrowly tailored in pursuit of those interests. Instead, the State need only satisfy the lower standard to defend the statute by

²²⁹ *Green*, 99 P.3d at 828.

²³⁰ *Green*, 99 P.3d at 828-29.

showing only that the anti-bigamy statute is “rationally related” to a legitimate government end (here again the determination of the applicable standard of review is crucial to ultimate outcome). That is, under the lower standard, if the anti-bigamy statute was a valid and neutral law of general applicability, then to be acceptable under the First Amendment, the statute must simply be rationally related to a legitimate government end.²³¹ In this regard, *Green* found the statute rationally related to several legitimate government ends including: (1) the State’s interest in regulating marriage as an important social unit and preventing marriage fraud; and (2) protecting vulnerable individuals from exploitation and abuse. Regarding the second governmental end, the *Green* court observed that the practice of polygamy, in particular, often coincides with crimes targeting women and children. Moreover, the *Green* Court noted, the closed nature of polygamous communities makes obtaining evidence of and prosecuting these crimes challenging. The *Green* court, thus, concluded: “All of the foregoing interests are legitimate, if not compelling, interests of the State, and Utah’s bigamy statute is rationally related to the furthering of those interests.”²³² *Green*, thus, held that Utah’s anti-bigamy statute did not violate the Free Exercise Clause of the First Amendment of the United States Constitution.

6.2 *State of Utah v. Holm* – 2006

Two years after *Green*, the Utah Supreme Court again considered a First Amendment challenge to Utah’s anti-bigamy statute in a case in which Rodney Holm

²³¹ *Green*, 99 P.2d at 829.

²³² *Green*, 99 P.2d at 830.

had been convicted of bigamy and unlawful sexual conduct with a minor. Holm was legally married to Suzie Stubbs in 1986. Subsequent to this marriage, Holm participated in a religious marriage ceremony with Wendy Holm. Then, Holm participated in a second religious marriage ceremony with then sixteen-year-old Ruth Stubbs, Suzie Stubbs's younger sister. After the ceremony, the young Ruth moved into Holm's house, where her older sister Suzie Stubbs (Rodney's legal wife), Wendy Holm, and their children also resided. By the time Ruth turned eighteen, she had conceived two children with Rodney Holm. Ruth testified that although she and Rodney were not legally married she nevertheless considered herself married to Rodney due to their religious marriage ceremony.

The *Holm* Court upheld Rodney Holm's convictions concluding that Holm's behavior fell squarely within the realm of behavior criminalized by Utah's anti-bigamy statute and that the protections enshrined in the federal constitution (including those in the Utah State constitution) guaranteeing the free exercise of religion and conscience, due process, and freedom of association did not protect Holm's polygamous practices.²³³

Holm asserted on appeal that he did not "purport to marry" Ruth Stubbs, as that phrase is used in the Utah anti-bigamy statute, because the word "marry" refers only to "legal" marriage and neither Holm nor Ruth contemplated that the religious ceremony solemnizing their relationship would entitle them to any of the legal benefits of a state-

²³³ *State of Utah v. Holm*, 137 P.2d 726, 730 (Utah 2006).

sanctioned matrimony.²³⁴ Holm also asserted that his conviction under Utah’s anti-bigamy statute was unconstitutional as applied to his case because the conviction unduly infringed upon Rodney’s right to practice his religion, as guaranteed by both the Utah State constitution and the United States Constitution.

Concerning the “purports to marry” language of the Utah anti-bigamy statute, the *Holm* Court concluded that the statute prohibits an individual from claiming to marry a person when already married to another. The term “marry” – for purposes of the statute – was not confined only to legally-recognized marriages. One need not purport that a second marriage is entitled to “legal” recognition to run afoul of the “purports to marry” prong of the bigamy statute. Under the facts of the case, the *Holm* Court thus determined that Holm purported to marry Stubbs by participating in merely a religious ceremony with her and then living with her as husband and wife (by, among other things, having “regularly engaged in sexual intercourse.”)²³⁵ Explaining that one need not seek a second “legal” marriage to run afoul of the Utah anti-bigamy statute, the Holm court stated:

But while a marriage license represents a contract between the State and the individuals entering into matrimony, the license itself is typically of secondary importance to the participants in a wedding ceremony. The crux of marriage in our society, perhaps especially a religious marriage, is not so much the license as the solemnization, viewed in its broadest terms as the steps, whether ritualistic or not, by which two individuals commit themselves to undertake a marital relationship. Certainly Holm, as a result of his [religious] ceremony with [Ruth], would not be entitled

²³⁴ The Utah anti-bigamy statute provides that “[a] person is guilty of bigamy when, knowing he has a husband or wife or knowing the other person has a husband or wife, the person purports to marry another person or cohabits with another person.” UTAH CODE ANN. § 76-7-101 (2003).

²³⁵ *Holm*, 137 P.3d at 737.

to any legal benefits attendant to a state-sanctioned marriage, but there is no language in the bigamy statute that implies that the presence of or desire for such benefits should be determinative of whether bigamy has been committed. . . . The fact that the State of Utah was not invited to register or record that commitment does not change the reality that Holm and [Ruth] formed a marital bond and commenced a marital relationship.²³⁶

The *Holm* Court next considered Holms’ State Constitutional arguments. The Court first observed in this regard that it was “ironic” Holm would argue that the Utah Constitution – which contains an express prohibition of polygamous marriage – actually provides greater protection to polygamous behavior than the United States constitution, which contains no such express prohibition. Although the Utah Constitution “may well provide greater protection for the free exercise of religion” in some respects than the United States Constitution, the *Holm* Court disagreed that “it does so as to polygamy.”²³⁷ To analyze Holm’s Utah State Constitutional arguments, the *Holm* Court wrote several pages on the historical background of the express prohibition of polygamy in the State Constitution.²³⁸ *Holm* first quoted the constitutional prohibition:

Specifically, article III, section 1, entitled “Religious toleration— Polygamy forbidden,” states as follows: “First:—Perfect toleration of religious sentiment is guaranteed. No inhabitant of this State shall ever be molested in person or property on account of his or her mode of religious worship; but polygamous or plural marriages are forever prohibited.” Utah Const. art. III, § 1.

The *Holm* Court then explained that the quoted language – known as the “irrevocable ordinance” – removes polygamy from the “realm of protected free exercise of

²³⁶ *Holm*, 137 P.3d at 737.

²³⁷ *Holm*, 137 P.3d at 738.

²³⁸ *Holm*, 137 P.3d at 738-42.

religion.”²³⁹ The *Holm* Court rejected Holm’s argument that this Constitutional limitation was intended to prevent only multiple “legal” marriages – an argument that the *Holm* dissent would embrace. Although the *Holm* Court recognized it was “plausible” from merely reading the language of the Utah Constitution that the limitation was intended to prevent the State from legally sanctioning plural marriage, a review of the applicable history lead to another conclusion:

Though such an interpretation is plausible when one looks to the text of the ordinance alone, the notion that the ordinance only limits legal recognition of polygamous marriages collapses when the language is looked at in the context of the constitutional convention and in conjunction with the delegates’ decision to look beyond the text to the spirit of the Utah Enabling Act. At the [Utah Constitutional] convention, the delegates took affirmative steps to prevent an interpretation like that advanced by the [*Holm*] dissent from gaining traction. ***Specifically, the framers of our state constitution made it clear they understood that the Utah Enabling Act did not merely prevent legal recognition of polygamy but required its prohibition.***²⁴⁰ (Emphasis added).

Holm further explained that the framers of the Utah Constitution were interested in expressing the continuing vitality of a territorial law passed in 1892 (entitled “An Act to punish polygamy and other kindred offenses”) insofar as the act defined and punished polygamy. The Utah constitutional framers thereby raised the status of the earlier territorial law to that of a constitutional provision. According to *Holm*, the debates from the Utah Constitutional convention reveal that the proponents of expressly declaring the earlier territorial act (criminalizing polygamy) to be operational after statehood were primarily motivated by two concerns: (1) the “revivification” of the territorial law

²³⁹ *Holm*, 137 P.3d at 738.

²⁴⁰ *Holm*, 137 P.3d at 739-40.

criminalizing polygamy (which was necessary because the territorial law had been voided due to the fact that Congress had already “occupied the field” in relation to the criminalization of polygamy); and (2) compliance with the spirit of the Utah Enabling Act, which required the State to evidence its willingness and ability to curtail polygamous behavior.²⁴¹ Thus, *Holm* stated the framers of Utah State Constitution understood the irrevocable ordinance to mandate the prevention of polygamy and not to merely prohibit legal recognition of polygamy. Consequently, the *Holm* majority concluded that the language of the Utah State Constitution foreclosed any attempt to appeal to that document – whether pursuant to the provisions pertaining to the freedom of conscience, individual liberty, or free exercise – to protect behavior that the Constitution was specifically aimed at preventing (polygamy).

Turning again to the United States Constitution, the *Holm* Court noted that several arguments were asserted by Holm attacking his conviction for bigamy as violative of: (1) the federal constitution’s guarantee of the Free Exercise of religion; (2) the liberty interest protected by the Due Process Clause of the Fourteenth Amendment; (3) the Equal Protection Clause (because Utah targets only religiously motivated polygamists with prosecution); and (4) the right of association. Holm also asserted that the term “marry” as used in the Utah anti-bigamy statute was unconstitutionally vague.

The *Holm* Court rejected the First Amendment argument by citing to and relying on *Reynolds*, which it noted “has never been overruled” (as it had observed two years

²⁴¹ *Holm*, 137 P.3d at 740.

earlier in *Green*.)²⁴² It further stated that even if *Reynolds* was “antiquated beyond usefulness,” the Utah Supreme Court’s prior *Green* holding – rejecting a First Amendment attacked – remained good law: “In *Green*, we concluded that Utah’s bigamy statute is a neutral law of general applicability and that any infringement upon the free exercise of religion occasioned by that law’s application is constitutionally permissible.”²⁴³ *Holm*, thus, felt constrained by the current state of the law. Regardless of the “wisdom of the United States Supreme Court’s current federal free exercise analysis,” the analysis was controlling according to *Holm* such that it could not “tamper with or modify pronouncements by that Court.”²⁴⁴ In light of “those pronouncements and our own case law rejecting the notion that religiously motivated polygamy is protected by the federal Free Exercise Clause,” the conviction of bigamy did not violate the First Amendment.²⁴⁵

Defendant Holm’s Fourteenth Amendment argument was based on *Lawrence*. Holm argued that the State of Utah was foreclosed from criminalizing polygamous behavior because the freedom to engage in such behavior is a “fundamental liberty interest” that can be infringed only for compelling reasons (for which, Holm contended, Utah had failed to identify as a sufficiently compelling justification for its criminalization of polygamy).²⁴⁶ (Here is another standard of review issue). In arguing that his behavior was constitutionally protected as a fundamental liberty interest, Holm

²⁴² *Holm*, 137 P.3d at 742.

²⁴³ *Holm*, 137 P.3d at 742.

²⁴⁴ *Holm*, 137 P.3d at 742.

²⁴⁵ *Holm*, 137 P.3d at 742.

²⁴⁶ *Holm*, 137 P.3d at 742.

relied primarily on *Lawrence*. Defendant Holm argued that such liberty interest (of the type discussed in *Lawrence*) was sufficiently broad to shield his polygamous activities.

The *Holm* Court rejected the *Lawrence*-based argument explaining that, in its view, *Lawrence* was “quite narrow” reaching only laws which criminalize private and intimate acts engaged in by consenting adult homosexuals.²⁴⁷ According to *Holm*, the *Lawrence* Court went out of its way to exclude from protection conduct that causes injury to a person or causes an abuse of an institution the law protects. Further, the *Lawrence* Court had noted that it was not dealing with a minor – as was the *Holm* court. *Holm* also distinguished *Lawrence* because it did not involve persons who might be injured or coerced, or who are situated in relationships where consent might not easily be refused – and *Lawrence* did not involve public conduct. The *Holm* Court thus stated: “In marked contrast to the situation presented to the Court in *Lawrence*, this case implicates the public institution of marriage, an institution the law protects, and also involves a minor.”²⁴⁸ Thus, the *Holm* Court believed the polygamous behavior of Rodney Holm with Ruth, a minor, were “the exact conduct identified by the Supreme Court in *Lawrence* as outside the scope of its holding.”²⁴⁹

Furthermore, the behavior at issue in *Holm* was not confined – as in *Lawrence* – to personal decisions made about sexual activity. Rather *Holm* confronted important questions about the State’s ability to regulate marital relationships and prevent the formation and propagation of marital forms that the citizens of the State deem harmful.

²⁴⁷ *Holm*, 137 P.3d at 742.

²⁴⁸ *Holm*, 137 P.3d at 743.

²⁴⁹ *Holm*, 137 P.3d at 743.

Holm stated that the formation of relationships that are marital in nature is of great interest to Utah, no matter what the participants in, or the observers of, those relationships venture to name those unions. Parties can enter into private agreements about their relationships without running afoul of the law but that does not prevent Utah from “having a substantial interest in criminalizing such behavior when there is an existing marriage.”²⁵⁰ Rodney, of course, was legally married to another before his relationship with Ruth began. Utah would, thus, have a substantial interest in criminalizing even an unlicensed or non-legal second marriage. Because marital relationships “serve as the building blocks of our society,” Utah must be able to assert some level of control over those relationships to ensure the smooth operation of laws and further the proliferation of social unions which “society deems beneficial while discouraging those deemed harmful.”²⁵¹ Consequently, the *Holm* majority concluded that *Lawrence* simply does not support Rodney Holm’s claim under the Fourteenth Amendment:

Given the above, we conclude that *Lawrence* does not prevent our Legislature from prohibiting polygamous behavior. The distinction between private, intimate sexual conduct between consenting adults and the public nature of polygamists’ attempts to extralegally redefine the acceptable parameters of a fundamental social institution like marriage is plain. The contrast between the present case and *Lawrence* is even more dramatic when the minority status of [Ruth] is considered. Given the critical differences between the two cases, and the fact that the United States Supreme Court has not extended its jurisprudence to such a degree as to protect the formation of polygamous marital arrangements, we conclude that the criminalization of the behavior engaged in by Holm

²⁵⁰ *Holm*, 137 P.3d at 743.

²⁵¹ *Holm*, 137 P.3d at 744.

does not run afoul of the personal liberty interests protected by the Fourteenth Amendment.²⁵²

The *Holm* majority also rejected Rodney Holm’s Equal Protection argument explaining: “In *Green*, we held that Utah’s bigamy statute is facially neutral as to religion; in other words, it delineates no distinction between classes of individuals.”²⁵³ The Utah anti-bigamy statute was designed to punish behavior regardless of the motivations giving rise to that behavior. There was no evidence that the statute was directed at only religious polygamist – instead, the most recent conviction in Utah under the statute had been of a “man engaging in non-religiously motivated polygamy.”²⁵⁴ Thus, the *Holm* court held, there were no equal protection issues.

Holm’s right-of-association argument also failed because his right to instrumental association had not been infringed by the conviction. There was nothing contained within the language of the Utah anti-bigamy statute that prevented Holm from associating with a group advocating the social and spiritual desirability of a polygamous lifestyle. Although it was true that the statute prevented Holm from expressing his opinions regarding polygamy by engaging in polygamous behavior, the statute did not forbid behavior by which individuals could associate to express their dissatisfaction with the criminal status of that behavior.

The *Holm* Court majority rejected other arguments by Holm – not relevant here – and thereby upheld Rodney Holms’ conviction for bigamy. There was, however, an

²⁵² *Holm*, 137 P.3d at 744-45.

²⁵³ *Holm*, 137 P.3d at 745.

²⁵⁴ *Holm*, 137 P.3d at 745.

important, well-reasoned dissent by Chief Justice Durham which would be very meaningful to the Judge in the *Brown v. Buhman* case. And as particularly relevant to the analysis here, Justice Durham had a very different view from the *Holm* majority regarding the application of *Reynolds* and *Lawrence*.

First, regarding the Utah State Constitution, Justice Durham’s dissent concluded that imposing criminal penalties on Holm’s religiously motivated entry into a religious union is an “unconstitutional burden under [the Utah] constitution’s religious freedom protections.”²⁵⁵ The burden on the religious conduct must be necessary to serve a strong governmental interest unrelated to the suppression of religious freedom. Justice Durham did “not believe that any of the strong state interests normally served by the Utah bigamy law require that the law apply to the religiously motivated conduct at issue here – entering a religious union with more than one woman.”²⁵⁶

Justice Durham also rejected the idea that “protecting vulnerable individuals from exploitation and abuse” was a sufficient state interest to justify the Utah anti-bigamy statute.²⁵⁷ She observed that Utah had provided no evidence of a causal relationship or even a strong correlation between the practice of polygamy (whether religiously motivated or not) and the offenses of incest, sexual assault, statutory rape, and failure to pay child support (which had been cited in *Green*). But, even if such a correlation existed, Justice Durham concluded that neither the evidentiary record nor the recent history of prosecutions of alleged polygamists warranted the conclusion that the

²⁵⁵ *Holm*, 137 P.3d at 770.

²⁵⁶ *Holm*, 137 P.3d at 770.

²⁵⁷ *Holm*, 137 P.3d at 774.

Utah anti-bigamy statute is a necessary tool for the state’s attacks on such harms. In fact, the State of Utah had admitted in the evidentiary record that it does not prosecute those engaged in religiously motivated polygamy under the criminal anti-bigamy statute unless the person has entered a religious union with a girl under eighteen years old. For Justice Durham, such “a policy of selective prosecution” reinforced her conclusion “that a blanket criminal prohibition on religious polygamous unions is not necessary to further the state’s interests.” Justice Durham, in her dissent, thus concluded that the conviction should be overturned based on the protection of religious freedom under the Utah Constitution (and, thus, did not need to consider the outcome under the First Amendment):

Given these developments, and the existence of legal mechanisms for protecting the interests of abused or neglected children apart from criminally prosecuting their parents for bigamy, I do not believe the criminalization of religiously motivated polygamous conduct is necessary to further these interests. Thus, neither the State nor this court’s prior decision in *Green* has identified an important state interest served by the criminal bigamy law that requires its application to those who enter religious unions with no claim of state legitimacy. I would therefore reverse Holm’s bigamy conviction on the ground that it violates his religious freedom as guaranteed by the Utah Constitution.²⁵⁸

Justice Durham – although not dealing with the United States Constitutional issues under the First Amendment – reached a similar result under the Fourteenth Amendment of the United States Constitution and the *Lawrence* case. Justice Durham expressly disagreed with *Holm* Court’s majority analysis of the applicability of *Lawrence*. She viewed *Lawrence* differently explaining its holding as rejecting the very

²⁵⁸ *Holm*, 137 P.3d at 776 (Justice Durham dissenting).

notion that a state can criminalize behavior merely because the majority of its citizens prefer a different form of personal relationship:

Striking down Texas's criminal sodomy statute as unconstitutional, the Court in *Lawrence* recognized that the Fourteenth Amendment's individual liberty guarantee "gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." [citations omitted]. As described in *Lawrence*, this protection encompasses not merely the consensual act of sex itself but the "autonomy of the person" in making choices "relating to ... family relationships." [citations omitted]. The sodomy statute was thus held unconstitutional because it sought "to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals."

Justice Durham believed that the *Lawrence* Court's statement that a state may interfere when such an institution is abused together with its holding that the Texas sodomy statute was unconstitutional, meant that, in *Lawrence*'s view, sexual acts between consenting adults and the private personal relationships within which these acts occur, do not abuse the institution of marriage simply because they take place outside its confines.²⁵⁹ Individuals in today's society may make varied choices regarding the organization of their family and personal relationships without fearing criminal punishment. Justice Durham contended that the *Holm* majority does not adequately explain how the institution of marriage is abused or state support for monogamy threatened simply by an individual's choice to participate in a religious ritual with more

²⁵⁹ Justice Durham (*Holm*, 137 P.3d at 777) (citing Justice O'Connor's concurrence indicating that Texas's criminal sodomy law did not implicate the state's interest in "preserving the traditional institution of marriage" but expressed "mere moral disapproval of an excluded group." *Lawrence*, 539 U.S. at 584 (J. O'Connor concurring). Justice Durham also notes that in the wake of *Lawrence*, the Virginia Supreme Court has come to the same conclusion, striking down its state law criminalizing fornication. *Martin v. Zihlerl*, 269 Va. 35, 607 S.E.2d 367, 371 (2005)).

than one person outside the confines of legal marriage. She expressly rejected the majority's statement to the effect that "the public nature of polygamists' attempts to extralegally redefine the acceptable parameters of a fundamental social institution like marriage is plain."²⁶⁰

Justice Durham was concerned that the *Holm* majority's reasoning might give the impression that Utah was free to criminalize any and all forms of personal relationships that occur outside the legal union of marriage. Under such logic non-marital cohabitation, for example, might be considered to fall outside the scope of federal constitutional protection. Indeed, the act of living alone and unmarried could as easily be viewed as threatening social norms. In Justice Durham's view, however, such conclusions are foreclosed under *Lawrence*. For Justice Durham, *Lawrence* merely reformulated the longstanding principle that, in order to "secure individual liberty, ... certain kinds of highly personal relationships" must be given "a substantial measure of sanctuary from unjustified interference by the State."²⁶¹ Whether referred to as a right of intimate or intrinsic association, as a right to privacy, as a right to make choices concerning family living arrangements, or as a right to choose the nature of one's personal relationships, such an individual liberty guarantee "essentially draws a line around an individual's home and family and prevents governmental interference with

²⁶⁰ *Holm*, 137 P.3d at 778.

²⁶¹ *Holm*, 137 P.3d at 778 citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984) and Laurence H. Tribe, "Lawrence v. Texas: The 'Fundamental Right' That Dare Not Speak Its Name," *Harvard Law Review* 117, no. 6 (April 2004): 1893-1955, 1922 ("[T]he claim *Lawrence* accepted ... is that intimate relations may not be micromanaged or overtaken by the state.").

what happens inside, as long as it does not involve injury or coercion or some other form of harm to individuals or to society.”²⁶² Because, however, Rodney Holm’s conduct involved a minor, Justice Durham believed Holm could not prevail on his individual liberty claim. If Ruth had been an adult, Rodney’s conviction would be reversed because for such a conviction would not stand in face of an individual liberty claim “where an individual enters a private relationship with another adult.”²⁶³ And as particularly relevant here, Justice Durham expressly argued that the *Lawrence* rationale would permit an individual’s private, religiously motivated choice to enter a relationship with another consenting adult:

I believe the majority has erred in suggesting that the Supreme Court’s decision in *Lawrence v. Texas*, [citation omitted] does not recognize private relationships between consenting adults as entitled to protection under the Fourteenth Amendment’s Due Process Clause. I therefore dissent from the majority’s conclusion upholding Holm’s bigamy conviction.

With this review of *Green* and *Holm*, the analysis turns to *Brown v. Buhman*.

²⁶² *Holm*, 137 P.3d at 778.

²⁶³ *Holm*, 137 P.3d at 778.

Chapter 7

Brown v. Buhman – 2013

This decision is fraught with both religious and historical significance for the State of Utah because it deals with the question of polygamy, an issue that played a central role in the State’s development

Brown v Buhman, 947 F.Supp.2d 1170, 1180 (D. Utah 2013).

In July of 2011, Kody Brown along with his “wives” (Meri Brown, who was legally married to Kody, as well as Janelle Brown, Christine Brown, and Robyn Sullivan to whom Kody was “spiritually married”) filed suit challenging Utah’s anti-bigamy law – the same law applicable to *Green* and *Holm*.²⁶⁴ Under Utah’s anti-bigamy law it is a crime when a person “knowing he has a husband or wife or knowing the other person has a husband or wife . . . purports to marry another person or cohabits with another person.”²⁶⁵ In the view of the Browns, the Utah anti-bigamy law criminalized “not just polygamous marriages but also an array of plural intimate relationships and associations of consenting adults.”²⁶⁶ The Browns contended that by criminalizing “religious-based plural families and intimate relationships,” the State of Utah was essentially criminalizing private conduct of consenting adults without a showing of “harm to society or those involved.”²⁶⁷ This “disparate treatment of polygamists” according to the Browns denies them the “basic liberties and equal protection under the law” as guaranteed by the First and Fourteenth Amendments to the

²⁶⁴ *Brown v. Herbert*; Cause No. 2:11cv00652; U.S. Dist. Court, District of Utah, Central Division; July 13, 2011, ¶32.

²⁶⁵ UTAH CODE ANN. § 76-7-101 (West 2010).

²⁶⁶ *Brown* Complaint, ¶10.

²⁶⁷ *Brown* Complaint, ¶11.

Unites States Constitution.²⁶⁸ In addition to asserting a claim under 42 U.S.C. §1983, the Browns, by their lawsuit, requested that the Court enter a declaratory judgment providing that the Utah anti-bigamy law is unconstitutional.²⁶⁹

The Browns, however, did not specifically request that the Court strike down the constitutional prohibition of polygamy in the Utah Constitution.²⁷⁰ On the contrary, they expressly pleaded that they did not seek a declaration that the Constitutional prohibition against polygamy is unconstitutional to the extent it merely prohibited official recognition of polygamous marriage or the acquisition of multiple state marriage licenses. Thus, the Browns clearly asserted – even though they had formed a

²⁶⁸ *Brown* Complaint, ¶12.

²⁶⁹ 48 U.S.C. §1983 (1871). Section 1983 was enacted on April 20, 1871 as part of the Civil Rights Act of 1871, and is known as the "Ku Klux Klan Act" in that one of its primary purposes was to provide a civil remedy against the abuses being committed in the south, by the Ku Klux Klan and others. While the existing law theoretically protected all citizens, in practice the protection was practically unavailable because those officials charged with the enforcement of the laws were unable or unwilling to do so. The Act was intended to provide a private remedy for such violations of federal law, and has subsequently been interpreted to create a type of tort liability. Section 1983 provides a private right of action and allows the recovery of damages and fees in favor of persons whose constitutional rights have been violated by an actor acting under State authority, and provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

²⁷⁰ The Utah State Constitution provides in Article III: "Perfect toleration of religious sentiment is guaranteed. No inhabitant of this State shall ever be molested in person or property on account of his or her mode of religious worship; but polygamous or plural marriages are forever prohibited."

plural family motivated by their religious beliefs and love for one another – that they did not seek official recognition of polygamous marriage.²⁷¹

The Browns claimed they feared prosecution in Utah because they lived openly in a plural family and shared their commitment to raise their children as a plural family unit. In particular, the Browns asserted that a criminal investigation of their family was started by Utah officials after they appeared on *Sister Wives*, a TLC reality television program based on their family.²⁷² They had previously been open about their plural family with state officials (both in Utah and in Nevada, where they moved for fear of prosecution in Utah) who participate in the “Safety Net” program and who work with polygamous families.²⁷³ Even though they had moved to Nevada, the Browns pleaded

²⁷¹ *Brown* Complaint, ¶19 & 32-36. The Browns claimed to be affiliated with the Apostolic United Brethren of Salt Lake City. *The Primer* (A Guidebook for Law Enforcement and Human Services Agencies who offer Assistance to Fundamentalist Mormon Families, August 2009, published by the Utah and Arizona Attorney Generals’ Offices) states regarding the Apostolic United Brethren (“Allred Group”):

This community has approximately 7,500 members who consider themselves “Latter-day Saints” under the direction of a priesthood council legally organized as the Apostolic United Brethren (AUB). Currently (2009) the senior or presiding elder of the priesthood council is J. LaMoine Jenson, who succeeded Owen A. Allred in that position after the latter died in 2005. As a group, they do not view themselves in opposition to, or in competition with, The Church of Jesus Christ of Latter-day Saints. Nor do they view themselves as an entirely separate religion. Rather, they view themselves as a priesthood body whose work runs parallel with that of the LDS Church. For this reason, most AUB adherents generally maintain a fond feeling toward the LDS Church and its members, and they strive to support the LDS Church’s good works whenever possible.

http://web.archive.org/web/20090820102907/http://www.attorneygeneral.utah.gov/cms/documents/The_Primer.pdf (accessed December 9, 2014).

²⁷² See discussion of the impact of public versus non-public behavior as relevant to the early attack on the Mormons *supra*. n. 79.

²⁷³ *Brown* Complaint, ¶32 (Plaintiffs fled to Nevada “for fear that Utah law enforcement officials would prosecute them under the state’s criminal bigamy statute for maintaining a plural family.”). According to its website the “Safety Net” program: “exists to assist people

that they remained subject to prosecution in Utah under the Utah anti-bigamy law. The Browns asserted that under the Utah anti-bigamy law, a polyamorist relationship would qualify as “cohabitation” and thus would likely be considered unlawful conduct.

In their Complaint, the Browns provided a detailed discussion of polygamy (including references to polygyny, polyandry, polyamory, and other forms of group marriage, observing that in some instances these plural relationships were based on religious tenets and sometimes were not). They provided specific allegations regarding polygamy generally and historically. The Browns plead that polygamy is currently practiced by millions of people around the world and remains common in some countries, with polygamy found on every continent at one time. The Browns pleaded that Saskatchewan has provided legal protection to polyandrous families.²⁷⁴ Specifically tying their potential prosecution for bigamy to polygamy, the Browns contended that the criminalization of bigamy emanates from the Utah State Constitution banning “polygamous or plural marriages.”²⁷⁵ Although admitting that polygamy is not always based on religion, the Browns asserted that “polygamy is one of the oldest religious-based practices in the world.”²⁷⁶ They referenced both the Old and New

associated with the practice of polygamy, whether you’re an active polygamist or exiting polygamist.” Family Support Center, <http://www.familysupportcenter.org/Primer.pdf> (accessed Mar. 12, 2015) *The Primer* states: “The Safety Net Committee brings together government agencies, non-profit organizations and interested individuals who are working to open up communication, break down barriers and coordinate efforts to give people associated with the practice of polygamy equal access to justice, safety and services.” *Id.* Christine Brown, one of the Plaintiffs and member of the Brown plural family participated in the Safety Net program and alleged she helped draft *The Primer*. Brown Complaint, ¶149-156.

²⁷⁴ Brown Complaint, ¶59; *Winik v. Wilson Estate*, [1999], 1999 Sask. R. LEXIS 424, *21.

²⁷⁵ Brown Complaint, ¶67; UTAH CONST. Art. III.

²⁷⁶ Brown Complaint, ¶68.

Testaments, contending that both contain favorable references to polygamy. They expressly claimed that polygamy is incorporated into various religious beliefs, including the AUB, the religious sect of which they purport to be members.²⁷⁷ Regarding the LDS Church, the Browns noted the history of the Church first adopting polygamy then rejecting it at the time Utah was seeking entry into the United States. Nevertheless, the Browns alleged that split-off groups, like the AUB, “still view the practice as having divine origins.”²⁷⁸ On the other hand, the Browns recognized that “majoritarian religious groups, including Christians, Jews, and Mormons, are vehemently opposed on moral grounds to the practice of polygamy.”²⁷⁹

The Browns asserted a religious basis for their familial relationship contending that as members of the AUB they believe “only through celestial marriage can they ensure the salvation of their souls following death.”²⁸⁰ They contended that they had lived for years in an open polygamous relationship and were never accused of fraud, child abuse, or spousal abuse.²⁸¹ Although only Kody and Meri Brown are legally married, all five Browns wish to form a plural family, with Kody as the head of the family (imposing upon him the “duty to raise and father children with each of his spiritual wives”) and with the women committed to him as “sister wives.”²⁸² For many years, even though living openly in a plural arrangement, they felt safe from any

²⁷⁷ *Brown Complaint*, ¶69. Apostolic United Brethren (AUB) is a polygamous Mormon fundamentalist church within the Latter Day Saint movement.

²⁷⁸ *Brown Complaint*, ¶83-98.

²⁷⁹ *Brown Complaint*, ¶99.

²⁸⁰ *Brown Complaint*, ¶111-112.

²⁸¹ *Brown Complaint*, ¶121.

²⁸² *Brown Complaint*, ¶113-118.

criminal prosecution for polygamy (consistent with the announced policies of the Utah Attorney General’s office). Yet, after they appeared on the TV reality show *Sister Wives*, local prosecutors began an investigation into their family.²⁸³

The Browns also asserted that polygamy – in addition to being a religious practice – is also a cultural and political practice entitled to protection under international, Canadian, and U.S. law.²⁸⁴ Thus, the Browns asserted that their cultural, political, and associational rights were at issue. They also asserted that “monogamous unions are artificially restrictive and run counter to the biological and emotional needs of human beings.”²⁸⁵ For the Browns, polygamous “families maintain stable plural unions that are not confined (or defined) by the sexual relationship alone.”²⁸⁶ Polygamists, they contend, “wish to treat each other as spouses” even if they do not seek official recognition of their unions as marriages.²⁸⁷

In their Complaint and based on their factual allegations, the Browns asserted various claims including that the Utah anti-bigamy statute violated: (1) the Due Process Clause of the Fourteenth Amendment; (2) fundamental liberties protected by the Equal Protection Clause of the Fourteenth Amendment; and (3) fundamental liberties protected by the Free Exercise Clause of the First Amendment.²⁸⁸

²⁸³ *Brown* Complaint, ¶¶117-158.

²⁸⁴ *Brown* Complaint, ¶¶100-108 (citing the International Covenant on Economic, Social, and Cultural Rights and the International Covenant on Civil and Political Rights).

²⁸⁵ *Brown* Complaint, ¶¶109.

²⁸⁶ *Brown* Complaint, ¶¶110.

²⁸⁷ *Brown* Complaint, ¶¶110.

²⁸⁸ *Brown* Complaint, ¶¶178-231. In particular the Browns asserted the following claims:

- The Utah anti-bigamy statute violates fundamental liberties protected by the Due Process Clause of the Fourteenth Amendment (in reliance on

In August of 2014 (three years after suit was filed), the Utah District Court entered a Judgment (after having in December of 2013 granted the Brown's Motion for Summary Judgment) providing that the Utah anti-bigamy law – to the extent it criminalizes cohabitation – is facially unconstitutional as violative of the Free Exercise Clause of the First Amendment and is without a rational basis under the Due Process Clause of the Fourteenth Amendment.²⁸⁹

Lawrence) because it criminalizes the private conduct of adults exercising their liberty under the Due Process Clause;

- The Utah anti-bigamy statute violates fundamental liberties protected by the Equal Protection Clause of the Fourteenth Amendment because it singles out polygamists for prosecution while other citizens are allowed to have children by multiple partners in both adulterous and non-adulterous situations. The Browns contend, in this regard, that while they consider each other spouses under their private religious beliefs, they would not be prosecuted if they claimed no religious obligation but merely had casual or purely sexual associations;
- The Utah anti-bigamy statute violates fundamental liberties protected by the Free Exercise Clause of the First Amendment because the law targets religious practices (religious-based plural marriage) and the law is not supported by any compelling state interest.
- Because they were investigated after they appeared on a reality TV show, their potential prosecution violates the Free Speech protection of the First Amendment.
- The threat of prosecution violates the Browns right of association under the First Amendment because they were investigated following their appearance on the reality TV show such their right to associate with other like-minded citizens has been infringed.
- The Utah anti-bigamy statute violates the Establishment Clause of the First Amendment. Because their religious-based plural lifestyle is rejected by Judeo-Christian religions, the threat of prosecution for bigamy reflects hostility to their belief structure and the imposition of a Judeo-Christian moral code
- The enforcement of the Utah anti-bigamy law against the Browns violates 42 U.S.C. §1983 because the Defendants, acting under the color of law, are depriving the Browns of various rights protected by the Fourteenth Amendment. *Id.*

²⁸⁹ *Brown v. Buhman*, 947 F.Supp.2d 1170 (D. Utah 2013). The specific holdings of *Brown* are:

- Engaging in polygamy is not a fundamental right triggering heightened scrutiny;

Interestingly, the *Brown v. Buhman* court’s decision – under the heading “Historical Background” – stated that its “decision was fraught with both religious and historical significance for the state of Utah because its deals with the question of polygamy, an issue that played a central role in the State’s development. . . .”²⁹⁰ The Court also observed that it “would be an easy enough matter for the court to do as [the State of Utah] urges and find against the [Browns]” by “simply defaulting to” the *Reynolds* holding (which is indeed what the State of Utah basically argued).²⁹¹ The

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- Religious cohabitation does not qualify as a fundamental right triggering heightened scrutiny;
 - The cohabitation prong of Utah anti-bigamy statute was neither operationally neutral nor generally applicable, subjecting it to strict scrutiny under the Free Exercise Clause;
 - The cohabitation prong of Utah anti-bigamy statute was a facial violation of the Free Exercise Clause;
 - The cohabitation prong of Utah anti-bigamy statute violated substantive due process;
 - The cohabitation prong of Utah anti-bigamy statute was void for vagueness; and
 - The Utah anti-bigamy statute could be saved after striking the cohabitation prong as unconstitutional by adopting narrowing construction of “purports to marry.”

²⁹⁰ *Brown*, 947 F.Supp.2d at 1180. The Judge in the *Brown* case was Judge Clark Waddoups, nominated by President George W. Bush and confirmed by the U.S. Senate on September 26, 2008. Judge Waddoups received his undergraduate degree from Brigham Young University in 1970 and his juris doctorate from the University of Utah's law school in 1973. He had previously worked at O'Melveny & Myers, a large California law firm for seven years in Los Angeles before joining Parr Waddoups in 1981. Prior to that, he served as a law clerk for Hon. J. Clifford Wallace, U.S. Court of Appeals for the Ninth Circuit, from 1973 - 1974. The *Brown* opinion is extraordinarily long and complex. The Westlaw version is 51 pages long (two columns per page) with 70 lengthy footnotes. Clearly the *Brown* Court put a massive amount of thought, energy, and time into considering and writing the opinion, but it is a challenge to understand and synthesize. Judge Posner of the 7th Circuit, referenced above and author of the 2014 *Baskin v. Bogan* same-sex marriage case, has in his book *Reflections of Judging* provided some guidelines for legal opinions which might have been helpful to *Brown*. Judge Posner's fourth rule warns against “lack of economy of expression.” In that fourth rule, Judge Posner urges writers to avoid the tendency “to overkill, to repetition, to tedium, and the clutter of citations.” Posner at 237. His fifth rule warns against “preoccupation with trivia.” *Id.* Some readers of this paper might believe that the application of Posner's rules would have been helpful both to this paper generally and this footnote specifically.

²⁹¹ *Brown*, 947 F.Supp.2d at 1181.

Brown v. Buhman court, however, believed that defaulting to *Reynolds* “would not be the legally and morally responsible approach.” The case was not “easy,” according to the *Brown v. Buhman* court, as the “legal, practical, moral, and ethical considerations” had “weighed heavily on the court.”²⁹² In light of Justice Scalia’s prediction that the United States has come to the end of an era of morals based legislation, the *Brown v. Buhman* court nonetheless felt constrained to a “morally responsible approach.”²⁹³

The *Brown v. Buhman* court observed that about 133 years after *Reynolds*, non-Mormon counsel (for the Browns) were advancing arguments in favor of polygamy which would have “delighted Mormon Apostles and polygamy apologists throughout the period of 1852 to approximately 1904.”²⁹⁴ Noting that things had changed since *Reynolds* – particularly with regard to the Supreme Court strengthening the provisions of the Bill of Rights and recognizing “penumbral” rights of “privacy and repose” emanating from the Bill of Rights.²⁹⁵ In particular, the Supreme Court over decades had assumed:

a general posture that is less inclined to allow ***majoritarian coercion of unpopular or disliked minority groups***, especially when blatant racism, . . . religious prejudice, or some other constitutionally suspect motivation, can be discovered behind such legislation. (Emphasis added).²⁹⁶

²⁹² *Brown*, 947 F.Supp.2d at 1181.

²⁹³ *Brown*, 947 F.Supp.2d at 1181.

²⁹⁴ *Brown*, 947 F.Supp.2d at 1181. The Browns were represented by Professor Jonathon Turley, J.B. and Maurice C. Shapiro Professor of Public Interest Law at the George Washington University Law School and Adam Alba of Bountiful, Utah, a 2010 graduate of George Washington University Law School.

²⁹⁵ *Brown*, 947 F.Supp.2d at 1181.

²⁹⁶ *Brown*, 947 F.Supp.2d at 1181-82.

The *Brown v. Buhman* Court believed that the 1878 *Reynolds* opinion reflected the antiquated concept of “Orientalism” – the view that Western culture was superior to Oriental culture, with “Oriental” used to describe Middle Eastern, African, and Asian cultures. For *Brown v. Buhman*, the *Reynolds* decision had displayed the essence of “Orientalism” through its explicit acceptance of “Western superiority and Oriental inferiority.” Although the object of *Reynolds* was the Mormon Church – an institution almost exclusively comprised of white Americans and European immigrants and not people of the “Orient” – *Reynolds* had nevertheless invoked the “Oriental” framework in its efforts to express the harm posed by the Mormon practice of polygamy and, thus, denigrate plural marriage as a culturally bankrupt practice. The *Brown v. Buhman* court viewed *Reynolds* as having adopted the view that a practice (polygamy) which was accepted by the assumed-inferior group (“Orientals”) was necessarily second-rate if rejected by the assumed-superior group (Western culture).²⁹⁷

²⁹⁷ The *Brown* Court cites and quotes in great detail from several leading scholars in its discussion of the “Orientalism” and polygamy including Edward W. Said, *Orientalism* (New York: Vintage Books, 1979); Zachary Lockman, *Contending Visions of the Middle East: The History and Politics of Orientalism* (Cambridge: Cambridge University Press, 2004), 88–91 (“It should come as no great surprise that many Orientalists took for granted the superiority of Western civilization and the right of Europeans to rule over Asians and Africans: these assumptions were pervasive in nineteenth-century European culture. Though there were always those who rejected them and opposed colonialism and imperialism, most Europeans (and later Americans) sincerely embraced the notion of the ‘white man’s burden’—the idea that the civilized white Europeans had a duty to exercise firm but beneficent tutelage over what they regarded as the less advanced, child-like, dark-skinned races and guide them toward civilization”); Nathan B. Oman, “Natural Law and the Rhetoric of Empire: Reynolds v. United States, Polygamy, and Imperialism,” *Washington University Law Review* 88, no. 3 (2011): 661-703 (arguing that in response to Mormons’ natural law reasoning in support of polygamy, the Supreme Court in *Reynolds* took an approach rooted in “nineteenth-century ideals of progress and imperialism that were replacing the earlier, eighteenth-century ideals of universal reason and natural law” by “implicitly liken[ing] the federal government to the British Raj, bringing civilization through law to a benighted race” and using “the rhetoric of imperialism to reject

The *Brown v. Buhman* court also reviewed the applicable history of the efforts by the federal government to target Mormon polygamy for elimination beginning with the Morrill Anti-Bigamy Act of 1862, which was justified at the time as necessary to the “good order and morals of society.”²⁹⁸ The Morrill Act, according to *Brown v. Buhman*, found acceptability by identifying fundamental values based on religious or other perceived ethical or moral consensus. This process of enforcing majoritarian moral values through the criminalization of unacceptable practices, according to *Brown v. Buhman* “has remained true in various forms . . . until the Supreme Court’s decision in *Lawrence* . . . created ambiguity about the status of such ‘morals legislation.’”²⁹⁹

[the Mormons’ natural law] arguments, tapping into international narratives of racial hierarchy and the progress of civilization,” an approach consistent with and possibly signaling a prelude for, American “imperial adventures at the turn of the [twentieth] century”); Terry Givens, *The Viper on the Hearth: Mormons, Myths, and the Construction of Heresy* (Oxford: Oxford University Press, 1997), 130–37 (observing that Mormons were, for nineteenth-century American society, “a handy, ready-made Other” and an “Asian oddity” in an orientalist view); Martha M. Ertman, “Race Treason: The Untold Story of America’s Ban on Polygamy,” *Columbia Journal of Gender and Law* 19, no. 2 (2010): 287–366, 290–291 (2010) (“Edward Said’s work on Orientalism offers some clues as to why [nineteenth-century] cartoonists might have portrayed Mormon polygamists as Black and Asian. Viewing the discourse as Orientalist—essentially an ‘us/them’ rubric that primarily underpins colonialism—shows that anti-polygamy discourse also spoke of Mormon polygamy in ‘us/them’ terms, treating polygamists not as people, but as problems to be solved. The most valuable insight Orientalism offers here is that framing a group as Oriental—an inherently backward, sensual, and therefore subordinated Other—makes its subjection inevitable. Thus the public imagination’s construction of Mormons as members of subject racial groups (Asian and Black, mainly) played a crucial role in subjecting Mormons to federal control.”); Christine Talbot, “‘Turkey is in our Midst:’ Orientalism and Contagion in Nineteenth Century Anti-Mormonism,” *Journal of Law and Family Studies*, 8, no. 2 (Summer 2006): 363–388, 369–72 (“Early Orientalist anti-Mormonism depended in large part on the emergence of Orientalism in the context of European imperialism. . . . Anti-Mormons mobilized Orientalist metaphors against Mormons to deploy a politics of race that could account for deeply rooted structures of religious and political authority that anti-Mormons found anti-democratic. Orientalist anti-Mormonism facilitated the links anti-Mormons made among religion, the practice of plural marriage, and political theocracy in a national milieu beset with ideas about race and racial progress.”)

²⁹⁸ *Brown*, 947 F.Supp.2d at 1184.

²⁹⁹ *Brown*, 947 F.Supp.2d at 1184.

The *Brown v. Buhman* court thus saw the LDS Church as “a victim of such majoritarian consensus concerning its practice of polygamy” as *Reynolds* had determined that Congress was free to criminalize “actions which were in violation of social duties or subversive of good order.”³⁰⁰ Majoritarian legislation predicated on good order and morals of society was the prevailing view in the 1870s at the time of *Reynolds*. Although the *Brown v. Buhman* court assumed that *Lawrence* has significantly changed that view, *Brown v. Buhman* interestingly expressly doubted whether the *Lawrence* holding really necessitates the end of majoritarian-morals legislation.³⁰¹

The *Brown v. Buhman* court then considered whether there was in fact “social harm” in polygamy. At the time of *Reynolds*, there had been two main perceived harms. One was in the “Orientalism” framework mentioned above. That is, it was thought that Mormons were degrading the morals of the country through their religious practice of polygamy which was a morally inferior cultural practice (being one accepted mainly by “Oriental” peoples) which constituted a “return to barbarism” and was necessarily “contrary to the spirit of Christianity.”³⁰² Secondly, in addition to the fact that Mormons were engaging in a practice which was culturally and racially inferior, there was a perceived harm arising out of the “patriarchal principle,” which it was thought at

³⁰⁰ *Brown*, 947 F.Supp.2d at 1184.

³⁰¹ *Brown*, 947 F.Supp.2d at 1185 (“Although the court doubts that *Lawrence* actually must be interpreted to signal the end of the era in which the ‘good order and morals of society’ are a rational basis for majoritarian legislation, there is no question this was the prevailing view in the 1870s.”)

³⁰² *Brown*, 947 F.Supp.2d at 1187 citing *Late Corp. of The Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890).

the time “fetters the people in stationary despotism.”³⁰³ The patriarchal principle, it was believed at the time of *Reynolds*, could be abused to secure direct political dominance of the Utah territory.

For the *Brown v. Buhman* court, the first perceived social harm of polygamy – a return to barbarism contrary both to the spirit of Christianity and to the civilization which Christianity has produced in the Western world – would in particular now be “unthinkable” as part of a legal analysis of a “modern Supreme Court decision.”³⁰⁴ For *Brown v. Buhman*, such an assessment arising from a derisive societal view about race and ethnic origin (prevalent in the United States at the time of *Reynolds*) simply “has no place in discourse about religious freedom, due process, equal protection or any other

³⁰³ *Brown*, 947 F.Supp.2d at 1187 citing Gordon, *Mormon Question*, 119-45.

³⁰⁴ *Brown*, 947 F.Supp.2d at 1188 stating:

In other words, the social harm was introducing a practice perceived to be characteristic of non-European people—or non-white races—into white American society. “The organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism. It is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world.” *Late Corp.*, 136 U.S. at 49, 10 S.Ct. 792. This observation in *Late Corp.*—unthinkable as part of the legal analysis in a modern Supreme Court decision given the significant (and appropriate) development in the interpretation of the protections afforded to religious minorities under both the Establishment Clause and the Free Exercise Clause in the latter half of the twentieth century, and racial minorities under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, as also recognized in the latter half of the twentieth century—was only a reiteration of the definitive position already taken by the Supreme Court more than a decade earlier in *Reynolds*. . . . Such an assessment arising from derisive societal views about race and ethnic origin prevalent in the United States at that time has no place in discourse about religious freedom, due process, equal protection or any other constitutional guarantee or right in the genuinely and intentionally racially and religiously pluralistic society that has been strengthened by the Supreme Court’s twentieth-century rights jurisprudence.

constitutional guarantee.”³⁰⁵ Yet, the United States Supreme Court (and the Tenth Circuit in which the *Brown v. Buhman* court sits) continues to cite favorably to *Reynolds* for its basic Free Exercise Clause holding. This, according to *Brown v. Buhman*, can “mistakenly give the impression of endorsing the morally repugnant reasoning in *Reynolds*.”³⁰⁶ Thus, *Brown v. Buhman* rejected the *Reynolds* rationale even if its specific Free Exercise Clause holding (providing for the criminalization of polygamy does not in and of itself violate the Free Exercise Clause) remains good law, stating:

In fact, the court believes that *Reynolds* is not, or should no longer be considered, good law, but also acknowledges its ambiguous status given its continued citation by both the Supreme Court and the Tenth Circuit as general historical support for the broad principle that a statute may incidentally burden a particular religious practice so long as it is a generally applicable, neutral law not arising from religious animus or targeted at a specific religious group or practice.³⁰⁷

The *Brown v. Buhman* court therefore felt constrained by the *Reynolds*’ holding as binding on the limited question of any potential free exercise right to the actual practice of polygamy but rejected *Reynolds* as binding on the “religious cohabitation” argument because the *Brown v. Buhman* plaintiffs made no claim as to multiple “legal” marriages. Consequently, though *Reynolds* would control on the issue of “actual polygamy (multiple legal unions)” it would not control with respect to “religious cohabitation.”³⁰⁸ Rather, *Brown v. Buhman* concluded, the cohabitation prong of the Utah anti-bigamy

³⁰⁵ *Brown*, 947 F.Supp.2d at 1188.

³⁰⁶ *Brown*, 947 F.Supp.2d at 1189.

³⁰⁷ *Brown*, 947 F.Supp.2d at 1189.

³⁰⁸ *Brown*, 947 F.Supp.2d at 1190.

law should be considered as a “hybrid right” which a state can interfere with only through a neutral, generally applicable law.³⁰⁹ The cohabitation provision, according to *Brown v. Buhman*, is not operationally neutral or of general applicability (as discussed below) because of its targeted effect on specifically religious cohabitation. It is therefore subject to the strict scrutiny standard of review under the Free Exercise Clause and fails under that standard (again, the standard applied affects the outcome). *Brown v. Buhman* summarized why the cohabitation provision failed constitutional review as follows:

Also, in these circumstances, *Smith*’s hybrid rights exception requires the court to apply a form of heightened scrutiny to Plaintiffs’ constitutional claims, including their Due Process claim, since each of those constitutional claims are “reinforced by Free Exercise Clause concerns,” . . . in light of the specifically religious nature of Plaintiffs’ cohabitation. Alternatively, following *Lawrence* and based on the arguments presented by Defendant in both his filings and at oral argument, the State of Utah has no rational basis under the Due Process Clause on which to prohibit the type of religious cohabitation at issue here; thus, the cohabitation prong of the Statute is facially unconstitutional, though the broader Statute survives in prohibiting bigamy.³¹⁰

At this point in its opinion, the *Brown v. Buhman* court ended its “Historical Background” – though it had completely foreshadowed and summarized its ultimate conclusion – and turned to its “Analysis” in which it set forth its “legal” analysis. It

³⁰⁹ *Brown*, 947 F.Supp.2d at 1189 citing in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) and stating: “But Justice Scalia, writing for the majority in *Smith*, also provided the way forward for this case in *Smith*’s identification of a ‘hybrid rights’ framework ancillary to the primary question of the legislature’s ability to enact ‘a neutral, generally applicable law to religiously motivated conduct,’ as discussed below. *Smith*, 494 U.S. at 881.” *Id.*

³¹⁰ *Brown*, 947 F.Supp.2d at 1190 referencing *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990)

should be noted that while the *Brown v. Buhman* court, following its historical review, rejected the *Reynolds* reasoning as morally repugnant, it did not seem to be concerned with whether current majoritarian morals rejected polygamy or cohabitation. The application of modern morality was a basis to reject the old-fashioned *Reynolds* reasoning but not relevant to whether religious cohabitation could be criminalized.

The *Brown v. Buhman* court began its legal analysis by first examining the constitutionality of the Utah anti-bigamy statute (as interpreted by the Utah Supreme Court in *Holm*), under the Due Process Clause of the Fourteenth Amendment.³¹¹ The first question considered by the Court was whether the right to practice polygamy was a “fundamental right” for purposes of the Fourteenth Amendment (because that determination would control the selection of the proper standard of review).

The *Brown v. Buhman* court concluded that polygamy was not a fundamental right. In this part of the “Analysis,” the *Brown v. Buhman* Court reviewed – again – the history of polygamy. Referencing an earlier case (*Glucksberg*) – which had analyzed the long history of the legal prohibition against assisted suicide – the *Brown* Court elected to follow a similar approach.³¹² Here, the *Brown v. Buhman* Court described in

³¹¹ *State of Utah v. Holm*, 137 P.3d 726 (Utah Sup. Ct. 2006)

³¹² *Washington v. Glucksberg*, 521 U.S. 702, 719, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997). Regarding *Glucksberg*, the *Brown* Court at 1195-96 noted:

Glucksberg concerned a challenge to a statute in the State of Washington prohibiting assisted suicide, including physician-assisted suicide. In its analysis, the Supreme Court carefully described the asserted fundamental liberty interest as “whether the ‘liberty’ specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so.” *Id.* at 723, 117 S.Ct. 2258. The Court referred to the 700 year history of the prohibition of suicide in Anglo–American law (as well as considering other countries’ posture toward it), beginning with evidence of its prohibition as early

even more detail its view of the history of anti-polygamy law going back to its ancient

roots:

The prohibition against polygamy has similarly ancient roots in Anglo–American law. The court need not look as far back as the Council of Hereford in 673 A.D. in this fundamental rights analysis; it is sufficient to trace the prohibition to the 1603 Statute of James, “An act to restrain all Persons from Marriage until their former Wives and former Husbands be dead.” 1 James 1, ch. 11, § 2 “Prior to that, problems of plural marriage were dealt with exclusively by the ecclesiastical authorities.” [citation omitted]. As Chief Justice Durham of the Utah Supreme Court observed, the policy behind this ancient prohibition of polygamy seems to have centered on the often fraudulent nature of a polygamous marriage: “Such an act defrauds the state and perhaps an innocent spouse or purported partner.” *Holm*, [citation omitted] (Durham, C.J., dissenting). Moreover, and with increased relevance for the prohibition as carried forward into the laws of most States of the Union, “[i]t also completely disregards the network of laws that regulate entry into, and the dissolution of, the legal status of marriage, and that limit to one the number of partners with which an individual may enjoy this status.” *Id.*

The text of the Statute of James substantiates this, providing as justification for the enactment that “divers evil desposed Persons being married, run out of one County into another, or into Places where they are not known, and there become married, having another Husband or Wife living, to the great Dishonour of God, and utter undoing of divers honest Men’s Children....” As with suicide, the American colonies adopted this English approach to polygamy and most of them prohibited it from the beginning. [citation omitted]. As states joined the Union,

as the thirteenth century in Henry de Bracton’s treatise on the Laws of England. . . . Sir William Blackstone observed that this was still integral to the common law in the eighteenth century in his Commentaries on the Laws of England, which also was “a primary legal authority for 18th and 19th century American lawyers.” *Id.* at 712, 117 S.Ct. 2258. “For the most part, the early American colonies adopted the common-law approach.” *Id.* at 712–19, 117 S.Ct. 2258 (discussing the prohibition in the American colonies, early State statutes, and the development of statutes—beginning as early as 1828 in New York—explicitly prohibiting assisted suicide). “By the time the Fourteenth Amendment was ratified, it was a crime in most States to assist a suicide.” *Id.* at 715, 117 S.Ct. 2258. Finally, “the Model Penal Code also prohibited ‘aiding’ suicide, prompting many States to enact or revise their assisted-suicide bans.” *Id.* at 715–16, 117 S.Ct. 2258.

they either enacted their own anti-bigamy statutes derived from this English precedent or adopted territorial prohibitions on the practice of polygamy, as did Utah by referring in its 1895 Constitution to the 1892 territorial law prohibiting polygamy, . . .³¹³

Based on this reading of history, the *Brown v. Buhman* court found that (as with assisted suicide) no “fundamental right” exists to engage in polygamy – that is, the Court concluded there was no fundamental right to enter into a second purportedly “legal” matrimonial union when already legally married.

The *Brown v. Buhman* court observed, however, that many people who currently practice modern polygamy (such as the *Brown* plaintiffs themselves) do not have any expectation that their purported religious unions will be “legally” recognized even though they describe their religiously motivated cohabitation as “marriage,” “polygamy,” or “plural marriage.” Consequently, the *Brown v. Buhman* court believed the real issue presented related more to the concept of “religious cohabitation” rather than polygamy. “Religious cohabitation” occurs when “[t]hose who choose to live together without getting married enter into a personal relationship that resembles a marriage in its intimacy but claims no legal sanction.”³¹⁴ Those who choose to live in these religious, intimate relationships intentionally place themselves outside the framework of rights and obligations that surrounds the “legal” marriage institution. A defining characteristic of such cohabitation, as lived by the *Brown* Plaintiffs, is their choice to enter into a relationship that they know will never be “legally” recognized as

³¹³ *Brown*, 947 F.Supp.2d at 1196-97.

³¹⁴ *Brown*, 947 F.Supp.2d at 1197 (citing *Holm*, 137 P.3d at 773 (Durham, C.J., dissenting)).

marriage. Yet, they use religious terminology to describe the relationship (such as “marriage” and “husband and wife” which, of course, happens to coincide with the terminology used by the state to describe the legal status of married persons). The *Brown v. Buhman* court, thus, concluded that the Browns merely appropriated the terminology of marriage for their own religious purposes, even though not purporting to have actually acquired the “legal” status of marriage. Nevertheless, the *Brown v. Buhman* court concluded that such “religious cohabitation” also fails to qualify as a “fundamental right” or a fundamental liberty interest which would trigger heightened scrutiny under the *Glucksberg* substantive due process analysis.³¹⁵

The *Brown v. Buhman* court then turned to the Browns’ argument based on *Lawrence*. In their briefing, the Browns had argued in reliance on *Lawrence* that “morality, without harm, cannot ever be a legitimate state interest” for banning polygamy.³¹⁶ Further, the Browns asserted that the bare belief of a majority of citizens that a practice (polygamy) is immoral is insufficient for a state to criminalize the

³¹⁵ *Brown*, 947 F.Supp.2d at 1197-98

³¹⁶ Browns’ Plaintiff’s Memorandum at p.29:

The purpose of the statute was originally stated and publicly defended on strictly moral and religious grounds— in criminalizing polygamy because society considers it immoral. It is probably now true that morality, without harm, cannot ever be a legitimate government interest. The Supreme Court has held that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.” *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (quoting from *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)). Like *Lawrence*, the present case “does not involve minors[,] . . . persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused[,] . . . public conduct or prostitution[,] . . . [or] whether the government must give formal recognition to any relationship.” *Id.* at 578. Thus, the statute here, as in *Lawrence*, “furthers no legitimate state interest.”

practice.³¹⁷ The Browns argued: “a ban on polygamy cannot be upheld simply as a ban on polygamy – the government must” show more.³¹⁸

In this way, the Browns advanced Justice Scalia’s argument that after *Lawrence* morals-based legislation could not withstand constitutional scrutiny. As noted, the *Brown v. Buhman* Court expressed doubts about Justice Scalia’s predication as to the end of morals legislation explaining, however, that the applicable history of antipolygamy sentiment was nevertheless predicated on a majoritarian consensus:

Although the court doubts that *Lawrence* actually must be interpreted to signal the *end of the era in which the “good order and morals of society” are a rational basis for majoritarian legislation*, there is no question this was the prevailing view in the 1870s. And, in fact, the decades-long “war” by the United States against the LDS Church—beginning with the Republican Party’s 1856 platform of abolishing American chattel slavery and Mormon polygamy as the “twin relics of barbarism” and culminating, depending on how one views the historical episode, with either the Enabling Act in 1894 requiring that Utah ensure that “polygamist or plural marriages are forever prohibited” in Utah as a condition for joining the Union as a State, or the seating of Utah Senator Reed Smoot in 1907—was based on a majoritarian consensus that

³¹⁷ Browns’ Plaintiff’s Memorandum at p.31 states:
The closely related interest of the State in criminalizing a practice viewed “immoral” by the majority of citizens and the LDS Church was the interest in suppressing the practice of polygamy both in public and private areas. By adding the cohabitation provision, the state threatened anyone who was privately maintaining a plural family with consenting adults. That interest can never in itself be sufficient: “if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” *U. S. Dep’t. of Agric. v. Moreno*, 413 U.S. 528, 534 (1973). There is no *res ipsa* doctrine for government interests—“without reference to (some independent) considerations in the public interest,” a law is always unconstitutional. *Id.* at 534-35; see also *Romer*, 517 U.S. at 633 (“[The Court must] ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.”).

³¹⁸ Browns’ Plaintiff’s Memorandum at 31 (“Thus, a ban on polygamy cannot be upheld simply as a ban on polygamy – the government must support the law with some underlying justification.”).

Mormons were indeed “subversive of good order” in their practice of polygamy.³¹⁹ (Emphasis added).

The *Brown v. Buhman* court noted: “Despite Justice Scalia’s dour view in this comment, the court believes the ‘good order and morals of society’ remain a rational basis for much majoritarian legislation under the States’ police power, though perhaps now subject to a more nuanced and equitable analysis than before *Lawrence*.”³²⁰

It seems the *Brown v. Buhman* court was conflicted as to what *Lawrence* really held (or even what Justice Scalia was trying to argue in his dissent). So *Brown v. Buhman* ultimately deferred to the Tenth Circuit’s view of *Lawrence* as set forth in the *Seegmiller* case, to which the *Brown v. Buhman* court concluded it was in any event bound.³²¹ The *Brown v. Buhman* court, however, first quoted at length from *Lawrence* regarding the notion that liberty protects a person from unwarranted government intrusions into a dwelling or other private places and presumes an autonomy of self that

³¹⁹ *Brown*, 947 F.Supp.2d at 1185-86

³²⁰ *Brown*, 947 F.Supp.2d at 1185, n. 19.

³²¹ *Seegmiller v. Laverkin City*, 528 F.3d 762, 769 (10th Cir.2008). In *Seegmiller*, the Tenth Circuit upheld the District Court’s denial of the plaintiff’s substantive due process claim asserting the existence of a “fundamental liberty interest to engage in a private act of consensual sex.” 528 F.3d at 770. The plaintiff in *Seegmiller* was a police officer who had been reprimanded for having an affair with another police officer who was not a member of her department while the two of them both attended an out-of-town training seminar paid for in part by the city. Her conduct resulted in an investigation and oral reprimand by the city council based on the provision of the law enforcement code of ethics requiring officers to keep their private life unsullied. The reprimand stated that the plaintiff had allowed her personal life to interfere with her duties as an officer by having sexual relations with an officer” from the county while at the training seminar paid for in part by the city. The *Seegmiller* held that heightened scrutiny did not apply because it concluded that no fundamental right to sexual privacy exists.

includes freedom of thought, belief, expression, and certain intimate conduct.³²² *Brown v. Buhman* further quoted from *Lawrence* – which considered whether liberty protected private homosexual acts – regarding whether the majority had the right criminalize acts they deem as immoral:

It must be acknowledged, of course, that the Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. ***The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law.***³²³ (Emphasis added)

The *Brown v. Buhman* court thus summarized *Lawrence*'s holding as providing that a state cannot demean a person's existence or control of the person's destiny by making private sexual conduct a crime. The right to liberty under the Due Process Clause gives the person the full right to engage in such conduct without intervention of the government. It is a promise of the Constitution that there is a realm of personal liberty in which the government may not enter. Thus, *Lawrence* had determined, according to *Brown v. Buhman*, that the Texas sodomy statute furthered no legitimate state interest which could justify its intrusion into the personal and private life of the individual. To the *Brown v. Buhman* court, therefore, the *Lawrence* holding seemed to apply the mere rationale basis standard of review rather than the heightened scrutiny standard (though

³²² *Lawrence*, 539 U.S. at 562.

³²³ *Brown*, 947 F.Supp.2d at 1199-1200 (quoting *Lawrence*, 539 U.S. at 571) (emphasis added by *Brown*).

the Scalia's *Lawrence* dissent criticized the *Lawrence* majority for its vagueness in setting forth exactly what standard the majority intended to apply).³²⁴

Though tempted by its reading of *Lawrence* (and by the Browns' argument that morals-based legislation must fail after *Lawrence*), the *Brown v. Buhman* court, as noted above, nevertheless felt it had to comply with Tenth Circuit's interpretation of *Lawrence* in *Seegmiller* which bound *Brown v. Buhman* to conclude that religious cohabitation simply does not qualify for the heightened scrutiny standard of review:

Despite the moral and philosophical appeal of *Lawrence*'s discussion about the Fourteenth Amendment's commitment to a concept of liberty that "protects the person from unwarranted government intrusions into a dwelling or other private places" because it "presumes an autonomy of self that includes ... certain intimate conduct," [citation omitted] and therefore "gives substantial protection to adult persons in deciding how to conduct their lives in matters pertaining to sex," [citation omitted] and the resulting inherent persuasiveness of Plaintiffs' arguments that this broadly outlined substantive due process liberty interest applies to the religious cohabitation at issue here, the court is bound by the Tenth Circuit's interpretation of *Lawrence* in *Seegmiller*. ***It therefore need look no further than Seegmiller to find that such religious cohabitation does not qualify for heightened scrutiny under the substantive due process analysis in the Tenth Circuit.***³²⁵ (Emphasis added).

The *Brown v. Buhman* court, feeling thus constrained by *Seegmiller*'s interpretation of *Lawrence*, therefore rejected the Browns' argument under *Lawrence* that there was a fundamental liberty interest in intimate sexual conduct thereby

³²⁴ *Brown*, 947 F.Supp.2d at 1198 (citing *Lawrence*, 539 U.S. at 586, 123 S.Ct. 2472 (Scalia, J., dissenting) (arguing that the majority applied "an unheard of form of rational basis review."); and see Tribe, 1917 (arguing that "the strictness of the Court's standard in *Lawrence*, however articulated, could hardly have been more obvious" and to assume that rational basis review was applied "requires overlooking passage after passage in which the Court's opinion indeed invoked the talismanic verbal formula of substantive due process but did so by putting the key words in an unusual sequence of another").

³²⁵ *Brown*, 947 F.Supp.2d at 1201.

precluding the application of heightened strict scrutiny to the Brown's substantive due process claim. But all was not lost for the Browns. The *Brown v. Buhman* court concluded that even under the lower standard of review (mere rational relationship) the cohabitation prong of the Utah anti-bigamy Statute could not withstand a substantive due process analysis.

Brown v. Buhman observed that “consensual sexual privacy is the touchstone of the rational basis review analysis” in its considerations (as it was in *Lawrence*).³²⁶ The *Brown v. Buhman* court accepted the Plaintiffs’ argument that, in prohibiting cohabitation under the Utah anti-bigamy Statute, “it is, of course, the state that has equated private sexual conduct with marriage.”³²⁷ That is, in the case of people such as the Browns – who have not even claimed to be “legally” married and who were not making any claim to legal recognition of their unions – “[i]t is the state that is treating the relationship as a form of marriage and prosecuting on that basis.”³²⁸ As such, the State of Utah, in effect, criminalizes “the private consensual relations of adults.”³²⁹ The *Brown v. Buhman* court explained that each of the state interests identified in the *Green* case “surface again, this time to be considered under rational basis review.”³³⁰ Consequently, the *Brown v. Buhman* court looked to “Chief Justice Durham’s astute and commanding [dissenting] analysis in recognizing the concern that the *Holm* majority’s

³²⁶ *Brown*, 947 F.Supp.2d at 1223.

³²⁷ *Brown*, 947 F.Supp.2d at 1223 (Pls.’ Opp. to Def.’s Mot. Summ. J. 25 [Dkt. No. 72]).

³²⁸ *Brown*, 947 F.Supp.2d at 1223 (Pls.’ Opp. to Def.’s Mot. Summ. J. 25 [Dkt. No. 72]).

³²⁹ *Brown*, 947 F.Supp.2d at 1223 (Pls.’ Opp. to Def.’s Mot. Summ. J. 25 [Dkt. No. 72]).

³³⁰ *Brown*, 947 F.Supp.2d at 1223.

approach ‘may give the impression that the state is free to criminalize any and all forms of personal relationships that occur outside the legal union of marriage.’”³³¹

In *Holm*, as noted above, Chief Justice Durham had observed that under *Lawrence* laws criminalizing isolated acts of sodomy are void; yet, further noted that the *Holm* majority suggested that the “relationships within which these acts occur may still receive criminal sanction.”³³² Using such logic, Chief Justice Durham observed in *Holm* that even non-marital cohabitation might not be entitled constitutional protection. Indeed, under that logic, maybe the act of living alone, unmarried could as easily be viewed as threatening social norms. Chief Justice Durham was concerned that perhaps “mere adulterous” cohabitation would not be actionable under the Utah anti-bigamy statute whereas “religious” cohabitation might violate the statute. The only difference between the two examples is the religious element and the resulting belief of the participants to the effect that they are justified in holding themselves out to the public as “husband” and “wife” despite knowing that their “marriage” is not a legal union in the eyes of the State. And yet both scenarios (the mere adulterous cohabitation and the religious cohabitation) might involve minors as the children born to women involved in such relationships; might involve public conduct; and might involve economic implications to women and children. That is, the potential social ills of both – mere adulterous cohabitation and religious cohabitation – were the same, but only one

³³¹ *Brown*, 947 F.Supp.2d at 1223 citing *Holm*, 137 P.3d at 778 (Durham, C.J., dissenting in part).

³³² *Brown*, 947 F.Supp.2d at 1223 citing *Holm*, 137 P.3d at 778 (Durham, C.J., dissenting in part).

(religious cohabitation) seemed subject to criminalization if the participants were following religious beliefs which promoted plural marriage.

This distinction very much bothered Chief Judge Durham in *Holm* and also bothered the *Brown v. Buhman* Court. *Brown v. Buhman* observed: “Adultery, including adulterous cohabitation, is not prosecuted. Religious cohabitation, however, is subject to prosecution at the limitless discretion of local and State prosecutors, despite a general policy not to prosecute religiously motivated polygamy.”³³³ The *Brown v. Buhman* court, however, found no rational basis to distinguish between the two.

At this juncture, *Brown v. Buhman* observed that in fact there were potentially added dangers in the religious-based cohabitation (as compared to mere adulterous cohabitation). There is always the potential for injury and harm in closed religious polygamist communities, but the potential crimes involved could be prosecuted on an independent basis under the statutes specifically designated for those purposes, including criminal laws punishing incest, rape, unlawful sexual conduct with a minor, and domestic and child abuse. In any event, these additional potential risks were inadequate, for *Brown v. Buhman*, to serve as a rational basis for the cohabitation prong of the Utah anti-bigamy Statute since the so-called “collateral crime” (incest, rape, etc.) could be prosecuted separately. The distinction (between religious based cohabitation in a polygamist setting versus mere adulterous cohabitation) simply was not sufficient to provide a rational basis for the *Brown v. Buhman* court, “particularly under *Lawrence*

³³³ *Brown*, 947 F.Supp.2d at 1224.

and its focus on the deeper liberty interests at issue in the home and personal relationships.”³³⁴

The court in *Brown v. Buhman* also considered the State’s interest in preventing the perpetration of marriage fraud, as well as its interest in preventing the misuse of government benefits associated with marital status. The *Brown v. Buhman* court similarly found that the cohabitation prong of the Utah anti-bigamy statute was not rationally related to those state interests. This is because – as observed by Chief Justice Durham’s dissenting opinion – it is difficult to understand how those in polygamous relationships that are ineligible to receive legal sanction are committing welfare abuse when they seek benefits available to unmarried persons.³³⁵

Thus, *Brown v. Buhman* held regarding the Due Process claim of the Browns: “The cohabitation prong of the Statute does not survive rational basis review and must be stricken as a violation of substantive due process under *Lawrence*.”³³⁶ The Browns would prevail, but the *Brown v. Buhman* court was not finished.

Turning from the Fourteenth Amendment to the First Amendment, the *Brown v. Buhman* court considered whether the Utah anti-bigamy statute violated the Free Exercise Clause. *Brown v. Buhman* noted that the United States Supreme Court has held that “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law

³³⁴ *Brown*, 947 F.Supp.2d at 1224.

³³⁵ *Brown*, 947 F.Supp.2d at 1224 citing *Holm*, 137 P.3d at 777.

³³⁶ *Brown*, 947 F.Supp.2d at 1225.

proscribes (or prescribes) conduct that his religion prescribes (or proscribes).”³³⁷ If, however, a law that burdens religious practice is found not to be neutral or of general applicability, then a court evaluating the constitutionality of the challenged law must apply the higher strict scrutiny standard of review, under which the law “must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.”³³⁸ This compelling-governmental-interest standard is, according to *Brown v. Buhman*, roughly equivalent to the strict scrutiny applicable to certain claims in other constitutional fields. If such a law is not narrowly tailored to advance a compelling governmental interest, then it violates the Free Exercise Clause. *Brown v. Buhman* concluded that such strict scrutiny would not apply to the Utah anti-bigamy law’s prohibition of actual polygamy or bigamy, but would indeed be triggered by the statute’s cohabitation prong.

Regarding polygamy, *Brown v. Buhman* looked back again at *Reynolds* and explained that *Reynolds* expressly held that Congress’s long history of specifically targeting Mormons based on the fear that their practice of polygamy posed a threat to American democracy and the resulting federal legislation prohibiting polygamy did not violate the Mormons’ right to the free exercise of their religion.³³⁹ According to *Brown v. Buhman*, therefore, *Reynolds* still controls the analysis of straightforward polygamy

³³⁷ *Brown*, 947 F.Supp.2d at 1225 citing *Smith*, 494 U.S. at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n. 3, (1982) (Stevens, J., concurring in judgment)).

³³⁸ *Brown*, 947 F.Supp.2d at 1225 citing *Hialeah*, 508 U.S. 520, 531–32 (1993).

³³⁹ *Brown*, 947 F.Supp.2d at 1225 citing *Reynolds*, 98 U.S. at 165 (“it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect of” religiously motivated Mormon polygamy).

or bigamy in which there is a claim to multiple, simultaneous legal marriages. On the other hand, *Brown v. Buhman* decided that *Reynolds* is not controlling regarding an analysis of the cohabitation prong under Utah’s anti-bigamy statute. *Brown v. Buhman* concluded that it must apply the strict scrutiny standard of review to the prohibition of religious cohabitation. It then decided that the cohabitation prong could not survive such strict scrutiny analysis.³⁴⁰ This again is another example of the importance of the standard of review.

In its analysis the *Brown v. Buhman* court followed a multi-step analysis to determine that the cohabitation prong of the Statute could not survive strict scrutiny and must be stricken as a facial violation of the Free Exercise Clause of the First Amendment:

- i. Common-law marriage affected religious cohabitation in the nineteenth century. The federal government’s nineteenth-century campaign against the Mormon practice of polygamy indicates that religious cohabitation was included in the concept of polygamy that was being targeted by the federal government at that time. But such is not the case with the Utah anti-bigamy statute. *Brown v. Buhman* observes that “Chief Justice Durham identified the missing puzzle piece in her dissenting opinion in *Holm*” where she noted that in the nineteenth century there was little, if any, distinction between “polygamous marriage” and “polygamous behavior” including, primarily,

³⁴⁰ *Brown*, 947 F.Supp.2d at 1204-05.

unlawful “cohabitation” (which was included as prohibited and punishable behavior in the Edmunds Act of 1882).³⁴¹ The *Brown v. Buhman* court further referenced Chief Justice Durham who had argued that because “common law” marriage was recognized in Utah until 1898, the entry into a polygamous union could be taken as an attempted entry into the “legal” status of marriage. That is, under the law at that time, participation in a religious ceremony was sufficient to establish a marriage cognizable at common law (a “common law marriage”), which would also be considered to be a “legal” marriage. Thus, *Brown v. Buhman* stated that throughout the entire period of the federal government’s campaign against Mormon polygamy religious cohabitation (of the type engaged in by Mormons) could arguably have resulted in multiple purportedly “legal” marriages by operation of law. But common law marriage was ended in Utah in 1898. So after 1898 (with the elimination of common law marriage) the doctrine of common law marriage could no longer render a mere religious cohabitation into a purported “legal” union in Utah. If a couple did not have a marriage license, no amount of “appearing to be married” (a factor for common law marriage) would result in a “legal” union by operation of law.³⁴² Thus, it could not now be argued – because it is not now possible – that religious cohabitation beyond the first spouse could, by operation of law under the

³⁴¹ *Brown*, 947 F.Supp.2d at 1205.

³⁴² *Brown*, 947 F.Supp.2d at 1207 citing *Schurler v. Industrial Comm’n*, 43 P.2d 696, 697 (1935) (“In this state a common-law marriage cannot be consummated.”).

doctrine of common law marriage, result in multiple purported “legal” marriages. Though “cohabitation” might arguably have been a necessary addition to nineteenth-century federal antipolygamy legislation in light of this historical context, its current inclusion in the Utah anti-bigamy statute, according to *Brown v. Buhman*, effects a constitutional violation under the Free Exercise Clause pursuant to the analysis of the *Hialeah* case, which the Brown Court analyzed as follows:

- a. The Statute is facially neutral under *Hialeah*. In *Hialeah* the Supreme Court indicated that a neutral law of general applicability need not be justified by a compelling governmental interest even if its incidental effect is a burden on a particular religious practice.³⁴³ In *Green*, the Utah Supreme Court held that the Utah anti-bigamy statute was indeed facially neutral – and *Brown v. Buhman* agreed. The statute does not mention polygamists or their religion, and “cohabit” has no religious origins or connotations. The statute should, thus, be analyzed as facially neutral.
- b. The Statute is not, however, operationally neutral under *Hialeah*. The next step in the *Hialeah* analysis is whether the statute – though facially neutral – is operationally neutral. That is, even though a statute is on its

³⁴³ *Brown*, 947 F.Supp.2d at 1207 citing *Hialeah*, 508 U.S. at 531-35 (The *Hialeah* Court found that although city ordinances against sacrificial or ritual animal killings were indeed facially neutral in their artful drafting, they nevertheless unconstitutionally targeted specifically the practices of the Santeria religion for elimination, and thus were not neutral or of general applicability, because when “their operation is considered,” their “design ... accomplishes a ‘religious gerrymander’.”).

face neutral, the analysis requires a determination of how the statute actually operates. In this analysis *Brown v. Buhman* disagreed with *Green*. *Brown v. Buhman* concluded that the Utah anti-bigamy statute is not operationally neutral. The *Brown* plaintiffs had demonstrated that virtually all prosecutions under the statute have been of individuals engaging in religious cohabitation. This fact underscored to *Brown v. Buhman* that the statute, in practice, was not operationally neutral under the *Hialeah* analysis.³⁴⁴ Instead, the law was operationally being applied only to those engaged in religious cohabitations.

- c. The Statute is not generally applicable under *Hialeah*. The analysis continued because *Hialeah* requires the court to also determine if the statute in question is generally applicable – because to be valid under the First Amendment, the government cannot in a selective manner impose burdens only on conduct motivated by religious beliefs. The tests of “general applicability” and “neutrality” are closely related, as the failure to satisfy one may be an indication that the other is not satisfied.³⁴⁵ Because those who religiously cohabit fall within the prohibition of the Utah anti-bigamy statute but those who merely adulterously cohabit do not, the *Brown v. Buhman* court found that the statute has “every

³⁴⁴ *Brown*, 947 F.Supp.2d at 1215.

³⁴⁵ *Brown*, 947 F.Supp.2d at 1215 citing *Hialeah*, 508 U.S. at 532-33 (The Supreme Court held in *Hialeah*, “[n]eutrality and general applicability are related, and ... failure to satisfy one requirement is a likely indication that the other has not been satisfied.”).

appearance of a prohibition that society is prepared to impose upon [religious cohabitation] but not upon itself,” as stated in *Hialeah*.³⁴⁶

Thus, *Brown v. Buhman* determined that the cohabitation prong of the statute was not generally applicable but rather applicable only to those in religious cohabitations.

- ii. The cohabitation prong is not narrowly tailored to advance a compelling state interest. Because the cohabitation prong of the Utah anti-bigamy statute was determined by *Brown v. Buhman* as neither operationally neutral nor generally applicable, it must therefore – under *Hialeah* – be both justified by a compelling governmental interest narrowly tailored to advance that interest (that is, a higher standard of review applied). *Brown v. Buhman*, on the one hand, recognized that Utah has an important interest in regulating marriage, but only insofar as marriage is understood as a “legal” status. On the other hand, *Brown v. Buhman* questioned how the institution of marriage is abused or state support for monogamy is threatened simply by an individual’s choice to participate in a religious ritual with more than one person outside the confines of legal marriage. *Brown v. Buhman* found “absurd” Utah’s position against religious cohabitation in the context of trying to “protect” the institution of legal marriage by criminalizing religious cohabitation.³⁴⁷ The *Brown v. Buhman* court thus rejected that Utah’s

³⁴⁶ *Brown*, 947 F.Supp.2d at 1215 citing *Hialeah*, 508 U.S. at 533.

³⁴⁷ *Brown*, 947 F.Supp.2d at 1218.

approach constituted a narrowly tailored means of advancing a compelling state interest of protecting the institution of marriage. Utah also argued that it had an interest in preventing the perpetration of marriage fraud and an interest in preventing the misuse of government benefits associated with marital status. *Brown v. Buhman* rejected this argument noting that Utah’s interest was simply not implicated where no claim to the “legal” status of marriage has been made. The final interest asserted was Utah’s interest in protecting vulnerable individuals from exploitation and abuse. This interest was of the “most concern” to *Brown v. Buhman*. Quoting from *Green*, *Brown v. Buhman* recognized: “The practice of polygamy, in particular, often coincides with crimes targeting women and children. Crimes not unusually attendant to the practice of polygamy include incest, sexual assault, statutory rape, and failure to pay child support.”³⁴⁸ To respond to this concern, however, *Brown* again looked to Chief Justice Durham’s dissent in *Holm* and quoted from it at length, including the following portion of the dissent:

The State has provided no evidence of a causal relationship or even a strong correlation between the practice of polygamy, whether religiously motivated or not, and the offenses of ‘incest, sexual assault, statutory rape, and failure to pay child support,’ cited in *Green* Moreover, even assuming such a correlation did exist, neither the record nor the recent history of prosecutions of alleged polygamists warrants the conclusion that [the Utah anti-bigamy statute] is a necessary tool for the state’s attacks of such harms. For one thing, I am unaware of a single instance

³⁴⁸ *Brown*, 947 F.Supp.2d at 1218 quoting *Green*, 99 P.3d at 830.

where the state was forced to bring a charge of bigamy in place of other narrower charges, such as incest or unlawful sexual conduct with a minor, because it was unable to gather sufficient evidence to prosecute these other crimes. The State has suggested that its initial ability to file bigamy charges allows it to gather the evidence required to prosecute those engaged in more specific crimes. Even if there were support for this claim in the record, I would consider it inappropriate to let stand a criminal law simply because it enables the state to conduct a fishing expedition for evidence of other crimes. Further, the State itself has indicated that it does not prosecute those engaged in religiously motivated polygamy under the criminal bigamy statute unless the person has entered a religious union with a girl under eighteen years old. Such a policy of selective prosecution reinforces my conclusion that a blanket criminal prohibition on religious polygamous unions is not necessary to further the state's interests, and suggests that a more narrowly tailored law would be just as effective.³⁴⁹

Based on the foregoing, *Brown v. Buhman* concluded the cohabitation prong of the Statute could not survive the higher strict scrutiny standard of review and must be stricken as a facial violation of the Free Exercise Clause.³⁵⁰

³⁴⁹ *Brown*, 947 F. Supp.2d at 1220 quoting *Holm*, 137 P.3d at 775 (Durham, C.J., dissenting in part).

³⁵⁰ *Brown*, 947 F. Supp.2d at 1221. For various contentions regarding the constitutionality of polygamy laws see, Elijah L. Milne, "Blaine Amendments and Polygamy Laws: The Constitutionality of Anti-Polygamy Laws Targeting Religion," *Western New England Law Review* 28, no. 2 (2006): 257-92 (The author contends that antipolygamy laws cannot withstand constitutional scrutiny particularly when analyzed in connection with Blaine Amendments in various state constitutions (which were intended to prohibit use of public funds for church – mostly Catholic – schools). The author argues that both Blaine Amendments and antipolygamy laws violate the First Amendment Free Exercise Clause and the Equal Protection and Due Process Clauses of the Fourteenth Amendment.); Richard A. Vasquez, "The Practice of Polygamy: Legitimate Free Exercise of Religion or Legitimate Public Menace? Revisiting Reynolds in Light of Modern Constitutional Jurisprudence," *New York University Journal of Legislation & Public Policy* 5, no. 1 (2002): 225-253, 230 (arguing that Utah's anti-bigamy law would survive a First Amendment attack: "[T]he courts have relied on a "public morality" rhetoric to justify the criminalization of polygamy. A continued reversion to this "public morality" justification by the courts leaves anti-polygamy statutes vulnerable to constitutional challenge. In determining whether Utah's criminal bigamy law is constitutional . . . it is necessary to understand the real harms women and children suffer in polygamous societies.

The *Brown v. Buhman* court, having found the phrase “or cohabits with another person” to be unconstitutional, consequently ordered that the phrase be stricken from the statute. With the cohabitation prong thus stricken, the Utah anti-bigamy statute would then read: “A person is guilty of bigamy when, knowing he has a husband or wife or knowing the other person has a husband or wife, the person purports to marry another person.” But the *Brown v. Buhman* court’s analysis was still not complete. After striking the cohabitation prong, *Brown v. Buhman* believed that it must then also consider the phrase “purports to marry another person” as to whether it was constitutionally acceptable. That is, the *Brown v. Buhman* court stated that its obligation required it to determine if the statute could be saved by simply narrowing it (in this instance, by deleting only the objectionable language regarding cohabitation) such that the remainder, after the deletion, was constitutionally acceptable.

Turning once again to Chief Justice Durham, *Brown v. Buhman* held the Utah anti-bigamy law could indeed be saved after striking the cohabitation prong by adopting Chief Justice Durham’s interpretation of the remaining words “purports to marry” (and of the term “marry”) from her dissent in *Holm* as the “reasonable and readily apparent” narrowing construction.³⁵¹ *Brown v. Buhman* quoted extensively from Chief Justice Durham’s dissent in which she reviewed the history of the so-called “irrevocable ordinance” (now found Article III, section 1 of the Utah State Constitution) which

Using such policy justifications from the criminal and non-criminal arenas, Utah’s criminal bigamy statute would likely survive constitutional review.”)

³⁵¹ *Brown*, 947 F. Supp.2d 1228 at quoting *Holm*, 137 P.3d at 775 (Durham, C.J., dissenting in part).

declares that “polygamous or plural marriages are forever prohibited.” The relevant portion of Chief Justice Durham’s dissent quoted by *Brown* provides:

I [Chief Justice Durham] read both the Enabling Act and the ordinance provisions . . . as carrying forward a restriction that Congress had placed on Utah’s territorial government beginning with the Morrill Act That statute provided that “all . . . acts and parts of acts heretofore passed by the said legislative assembly of the Territory of Utah, which establish, support, maintain, shield or countenance polygamy, be, and the same hereby are, disapproved and annulled.” . . . Among the “acts” to which the Morrill Act referred was undoubtedly the law incorporating the LDS Church . . . [which] had granted the LDS Church full authority to conduct marriages of its members in accord with Church doctrine. When Deseret’s 1850 petition for statehood was denied and a territorial government was established instead, the territorial legislature revalidated the laws enacted by the provisional government. . . . Thus, after 1852, when the Church publicly recognized the doctrine of plural marriage, ceremonies of plural union performed according to Church practice were legally valid marriages under territorial law until the Morrill Act declared otherwise. This history demonstrates that the legal status of polygamous unions was a matter of concern. Accordingly, the language prohibiting plural or polygamous “marriage” in the Enabling Act and Ordinance provisions was likely intended to preclude the reenactment of laws granting polygamous unions legal recognition once Utah achieved statehood.

The above discussion illustrates that when the term “marriage” in the Ordinance provision is understood, as I believe it must be, as ***denoting a legal status***, the meaning of the provision is plain and in accord with territorial history. It could then be argued that the provision establishes that, as a matter of constitutional law, the state’s refusal to recognize polygamous unions as legal marriages may not be construed as discriminatory treatment of those who engage in such unions as a matter of religious practice. . . .

Additional history, far from demonstrating the drafters’ intent to exclude particular private behavior from access to constitutional protections, raises the possibility that the drafters anticipated some relief from governmental interference for those

relationships already in existence. In addition to the provision criminalizing polygamous marriage, quoted above, the 1892 Act contained a separate provision criminalizing unlawful cohabitation, which it defined as “any male person ... cohabit[ing] with more than one woman.” . . . Yet, the unlawful cohabitation provision, unlike the polygamy provision, was not specifically mentioned in article XXIV, section 2. The unlawful cohabitation provision was therefore subject to the general statement in article XXIV, section 2 that “[a]ll laws of the Territory of Utah now in force, not repugnant to this Constitution, shall remain in force until they expire by their own limitations, or are altered or repealed by the Legislature.” . . . Accordingly, that provision would remain valid only if the state courts did not deem it unconstitutional, and only as long as the legislature kept it in effect. ***It is not inconceivable that the drafters, while conceding that polygamous unions could never receive legal recognition, believed that private polygamous practice, including cohabitation with former “wives” and their children, might continue.***³⁵² (Emphasis added).

This historical review was accepted by *Brown v. Buhman*.

Thus, the court in *Brown v. Buhman* held that the cohabitation prong of the Utah anti-bigamy statute is unconstitutional under the Due Process Clause of the Fourteenth Amendment and under the Free Exercise Clause of the First Amendment. To save the statute, *Brown v. Buhman* struck the cohabitation language of the statute and adopted the interpretation of “marry” and “purports to marry” as set forth in Chief Justice Durham’s dissent in *Holm* thereby narrowing the anti-bigamy statute to prohibiting bigamy in the literal sense (being the fraudulent or otherwise impermissible possession of two purportedly valid marriage licenses for the purpose of entering into more than one purportedly “legal” marriage).³⁵³

³⁵² *Brown*, 947 F. Supp.2d 1232 at quoting *Holm*, 137 P.3d at 764–66 (Durham, C.J., dissenting in part) (footnote citations omitted).

³⁵³ *Brown*, 947 F. Supp.2d 1234.

The *Brown v. Buhman* case remains on appeal to the Tenth Circuit Court of Appeals located in Denver, Colorado with no date set for submission.³⁵⁴ Whether it is predictive or not regarding ultimate outcome of *Brown v. Buhman*, it should be noted that the Tenth Circuit in 2014 struck down Utah’s restrictions on same sex marriage in *Kitchen v. Herbert*.³⁵⁵

³⁵⁴ *Brown, et al v. Buhman, et al*; No. 14-4117; Docketed: 09/25/2014 (10th Cir. 2015). The territorial jurisdiction of the Tenth Circuit includes the six states of Oklahoma, Kansas, New Mexico, Colorado, Wyoming, and Utah, plus those portions of the Yellowstone National Park extending into Montana and Idaho. <https://www.ca10.uscourts.gov/clerk>.

³⁵⁵ *Kitchen v. Herbert*, 755 F.3d 1193, 1198-99 (10th Cir. 2014) which provides: [T]he question presented to us now in full bloom: May a State of the Union constitutionally deny a citizen the benefit or protection of the laws of the State based solely upon the sex of the person that citizen chooses to marry? . . . Having heard and carefully considered the argument of the litigants, we conclude that, consistent with the United States Constitution, the State of Utah may not do so. We hold that the Fourteenth Amendment protects the fundamental right to marry, establish a family, raise children, and enjoy the full protection of a state's marital laws. A state may not deny the issuance of a marriage license to two persons, or refuse to recognize their marriage, based solely upon the sex of the persons in the marriage union.

Chapter 8

Conclusion

Faith, marriage, and constitutional law, all complex and charged with moral meaning, are wrapped in layers of history, argument, and theory.

Sarah Barringer Gordon, *The Mormon Question*.

As Professor Gordon correctly noted in the quotation above, marriage – including polygamy – has indeed been complex and the related constitutional law was certainly wrapped in history. Things have changed since the 1856 Republican Party Platform, condemning the twin barbarisms of slavery and polygamy. The law regarding one of the barbarisms – slavery – changed dramatically with the Thirteenth Amendment in 1865, from which time “neither slavery nor involuntary servitude . . . shall exist with the United States.” Majoritarian views which once justified slavery have long since perished in the United States. Slavery, thus, properly came to its long-overdue end – though full racial equality remains a work in progress.

Regarding the other twin barbarism – polygamy, the United States Supreme Court in 1878 in *Reynolds* concurred with the sentiment of the 1856 Republican Platform and the then-current majoritarian view as to the importance of monogamy by rejecting a Free Exercise Clause challenge to the Utah territorial antipolygamy law. *Reynolds* was abundantly clear in its denunciation of the so-called barbarism of polygamy and in its adoption of a Protestant view of monogamous marriage. In the eyes of the *Reynolds* court in 1878, polygamy was odious; it was contrary to good morals and public policy; it was abhorrent to the sentiments and feelings of the civilized

world. Polygamy was practiced by inferior Asiatic and African peoples whose cultures and traditions were unacceptable to Western Civilization. Polygamy was just not Christian. It was an inherently patriarchal institution which subordinated women, destroyed democracy, and fettered people in stationary despotism. Polygamy was just not American. Traditional Protestant marriage – the union of one man and one woman – rather than plural marriage was necessary to build a modern society, especially an American society built on representative government, liberty, and Christian morals. The law – including the *Reynolds* court’s rejection of a Free Exercise Clause challenge regarding polygamy – and the majoritarian view of traditional marriage lined up well in 1878. The Mormons, seeking a test case, had forced the issue on polygamy and with *Reynolds* facilitated “a new constitutional authority” which rejected their faith and reinforced the nineteenth-century majoritarian concept of monogamous, opposite-sex marriage.³⁵⁶ The antipolygamists’ “moral constitutionalism” was hardened into law by the United States Supreme Court in the various polygamy cases.³⁵⁷ Though no nineteenth-century court was called upon to consider same-sex marriage, there can be no doubt that the moral condemnation of polygamy would have been applied with the same (or even more) force to same-sex marriage. Same-sex marriage unquestionably did not fit with the traditional, Protestant view of monogamy. Following *Reynolds*, there was little change in the law – or in the majoritarian moral rejection of polygamy – for over one hundred years.

³⁵⁶ Gordon, 222.

³⁵⁷ Gordon, 228.

But change regarding marriage came. It started with the same-sex marriage. With *Windsor* in 2013 and *Baskin* in 2014 (and the related cases), enormous change came. By the end of 2015 it is likely the United States Supreme Court will have settled the same-sex marriage question for the entire country and all indications point to full legal recognition of same-sex marriage. Whether or not the courts are ahead of the public (though polls indicate public acceptance of same-sex marriage is trending significantly in favor of same-sex marriage) the gender requirement will likely no longer apply to the definition of marriage.³⁵⁸ If so, marriage will then be defined simply as a union between two persons.³⁵⁹ The Texas and Utah constitutional definitions (a union between one man and one woman) will have fallen to constitutional challenges.

So the obvious question – presented at the outset – thus arises. If there is to be no gender requirement, why should there be a numerical limitation? Why should marriage be restricted to only two persons? Why not a union of three or more? Certainly – one would think – the *Reynolds* rationale considering plural marriage as an “odious” practice of only inferior peoples – especially if morally repugnant as *Brown v.*

³⁵⁸ “The rise in support for same-sex marriage has been especially dramatic over the last two decades. It went from 11 percent approval in 1988 to 46 percent in 2010, compared to 40 percent who were opposed, producing a narrow plurality in favor for the first time.” *NORC at the University of Chicago*, <http://www.norc.org/NewsEventsPublications/PressReleases/Pages/american-acceptance-of-homosexuality-gss-report.aspx> (accessed Mar. 6, 2015); *CBS Poll*, Feb. 13-17, 2015. “Do you think it should be legal or not legal for same-sex couples to marry?” Legal - 60%, Not Legal - 35%, and Not Sure - 5%. CBS, <http://www.pollingreport.com/civil.htm> (accessed Feb. 21, 2015).

³⁵⁹ Similar to the new definition of marriage of the Presbyterian Church, effective June 2015 when the definition of marriage will be: “Marriage involves a unique commitment between two people” See *supra* n. 179.

Buhman suggests – has long-since been outdated. Yet, the *Reynolds* holding still stands as valid Supreme Court precedent 130 years later.

Whether the majoritarian moral view towards polygamy has changed since *Reynolds* is unclear.³⁶⁰ Justice Scalia’s prediction in *Lawrence*, however, taught that the majoritarian view simply will no longer be legally relevant. With the striking of Texas’ sodomy law in *Lawrence*, morals-based legislation, according to Justice Scalia, was at an end when faced with a valid constitutional challenge. And now one federal district judge in Utah apparently has agreed at least as to religious cohabitation. With *Brown v. Buhman*, Kody Brown and his Sister Wives found a district judge who cracked open the door to constitutional challenges to antipolygamy laws. The *Brown v. Buhman* reasoning suggested the judge might have gone further – that is beyond protecting only religious cohabitation to protecting legal plural marriage – if not constrained by *Reynolds*.

To arrive at a decision, the *Brown v. Buhman* court found itself studying and writing history. To some extent the source of that history was written by other judges (such as Justice Durham’s dissenting opinion in *Holm*). Illustratively, both the judge in *Brown v. Buhman* and judge in *Holm* believed a comprehensive understanding of the applicable history of antipolygamy efforts in Utah at the end of the nineteenth century was necessary to determine properly their cases, decided over one hundred years later. Whether these judges were competent historians remains uncertain but upon history

³⁶⁰ See *supra* n. 9.

their decisions rested. Whether any judge has been a competent historian also remains a matter of debate,

This paper reviewed of the history of polygamy in the United States and the applicable law to arrive at *Brown v. Buhman*, a case in which the court likewise reviewed history to arrive at its decision. Whether this paper or the *Brown v. Buhman* court's opinion reflect the proper analysis of history is left to professional historians. Regardless of whether history was suitably written here, the initial question presented here nevertheless can be answered with some certainty. Justice Scalia prognostication in *Lawrence*, it turned out, was accurate, at least regarding marriage. Morals-based legislation prohibiting same-sex marriage seems at an end. With *Brown v. Buhman*, legislation prohibiting polygamy has trended similarly.

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