

# LATTER-DAY CONSTITUTIONALISM: SEXUALITY, GENDER, AND MORMONS

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*The extensive involvement of the Church of Jesus Christ of Latter-day Saints in the campaign that in 2008 overrode gay marriage in California brought sharp scrutiny to the interaction of Mormon theology and public constitutionalism. This Article explores “Latter-day constitutionalism” as an important normative phenomenon that illustrates the deep and pervasive interaction among social norms, constitutional rights, and faith-based discourse.*

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I became interested in the constitutional theology of the Church of Jesus Christ of Latter-day Saints (“LDS”) through discussions over many decades with Mormon faithful, including recent in-depth interviews with Eduardo Lopez-Reyes (in New York City) and David Baker (in Washington, D.C.). Theo Rostow (J.D. Candidate, 2017, Yale Law School) provided invaluable research assistance for this project. This Article benefitted enormously from comments received during the Symposium, Law, Religion, and the Family Unit After *Hobby Lobby*: A Tribute to Professor Harry Krause, convened by Professor Robin Fretwell Wilson and held at the University of Illinois School of Law in September 2015, and from anonymous comments received from more than a dozen LDS readers.

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On March 12, 2015, Utah Governor Gary Herbert signed into law the Antidiscrimination and Religious Freedom Amendments to the state antidiscrimination code.<sup>1</sup> The 2015 Amendments add sexual orientation and gender identity to the list of personal traits that cannot be the basis for employment discrimination,<sup>2</sup> but with allowances for employers to require reasonable dress standards and sex-specific facilities,<sup>3</sup> and for employees to engage in some religious expression within the workplace.<sup>4</sup> The 2015 Amendments also prohibit such discrimination in housing,<sup>5</sup> but with exemptions as well.

Why would one of the nation's most politically conservative, religiously strict, business-friendly states add new antidiscrimination protections for lesbian, gay, bisexual, and transgender ("LGBT") persons? The emerging conventional wisdom is that the Church of Jesus Christ of Latter-day Saints ("LDS") is responding to the bad press it received from its sponsorship of California's Proposition 8, which amended the state constitution to bar same-sex marriages. The story, however, is a broader one, with deep implications for appreciating what has been at stake in the marriage equality debate and for understanding the evolution of American constitutional law.

In this article, I shall explore the implications of the distinctive theology of the LDS Church for the Mormons' engagement with public-law issues—what I am calling "Latter-day constitutionalism." To my surprise, and perhaps to yours as well, that engagement has been dynamic, especially as to issues of sexual variation (such as homosexuality and same-sex marriage). In the short term, I suggest that the LDS Church has changed in response to its engagement in public law, just as public law has been influenced by Mormon engagement. In the long term, I speculate that this mutual engagement will produce changes in fundamental norms or (at least) in the practical application of the LDS Church's distinctively gendered theology.

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1. S.B. 296, 60th Leg. 2015 Gen. Sess. (Utah 2015).

2. *Id.* § 5 (amending UTAH CODE § 34A-5-106).

3. *Id.* §§ 7–8 (adding new UTAH CODE §§ 34A-5-109 and 110).

4. *Id.* § 10 (adding new UTAH CODE § 34A-5-112).

5. *Id.* § 14 (amending UTAH CODE § 57-21-5).

## I. THE MORMON THEOLOGY OF THE FAMILY

The family is, theologically, more important to Mormon religious doctrine and practice than it is to almost any other faith tradition. Like the Roman Catholic Church and most Protestant traditions, the LDS Church holds that God created men and women as biological, sexual, and emotional complements: male and female reproductive organs fit together in a way that procreates the next generation of the human race, and the children born of that sexual union are best reared in gendered households, where male and female traits complement one another and provide sexual as well as gender role modeling for their biological children. Like other faith traditions, the LDS Church holds that God-sanctioned marriage is the perfect wedding of those complementary features and is the only morally valid situs for sexual activities. What makes LDS doctrine “stricter” or more “conservative” (and less receptive to certain equality claims of women and LGBT persons) than that of other traditionalist faith communities is its intense metaphysical commitment to a deeply gendered family.

As summarized in the important LDS church document, *The Family: A Proclamation to the World*, all human beings are created in the image of God, but deeply gendered. “Gender is an essential characteristic of individual premortal, mortal, and eternal identity and purpose.”<sup>6</sup> Thus, human beings have a premortal existence, as “sons and daughters” who “worshipped God as their Eternal Father.”<sup>7</sup> At some point, these persons attain an earthly form (i.e., they are born) and are supposed to live their mortal lives in obedience to God’s plan for them. God’s central commandment is “for His children to multiply and replenish the earth” through “the sacred powers of procreation . . . employed only between man and woman, lawfully wedded as husband and wife.”<sup>8</sup> Hence, “family is ordained of God. Marriage between man and woman is essential to His eternal plan.”<sup>9</sup> Indeed, Mormons believe that marriage on earth parallels the heavenly union between God the Father and God the Mother; the Mother in Heaven is a belief distinctive to LDS faith.<sup>10</sup>

The eternal plan entails a gendered division of labor within the marital family. “By divine design, fathers are to preside over their families in

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6. THE FIRST PRESIDENCY AND COUNCIL OF THE TWELVE APOSTLES OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, *The Family: A Proclamation to the World*, LDS.ORG ¶ 2 (Sept. 23, 1995), available at [https://www.lds.org/topics/family-proclamation?lang=eng&\\_r=1](https://www.lds.org/topics/family-proclamation?lang=eng&_r=1) [hereinafter *Proclamation*]. The Proclamation was read by President Gordon Hinckley to the Relief Society (the LDS women’s society) meeting in Salt Lake City on September 23, 1995. A framed version of it hangs in the homes of many Mormon families.

7. *Id.* ¶ 3.

8. *Id.* ¶ 4.

9. *Id.* ¶ 7.

10. See Church of Jesus Christ of Latter-day Saints, *Mother in Heaven*, LDS.ORG (2015), available at <https://www.lds.org/topics/mother-in-heaven?lang=eng> (last visited Aug. 20, 2016); see also TERRY L. GIVENS, WRESTLING THE ANGEL: THE FOUNDATIONS OF MORMON THOUGHT: COSMOS, GOD, HUMANITY 106–12, 274–79 (2014); David L. Paulsen & Martin Pulido, “A Mother There”: A Survey of Historical Teachings about Mother in Heaven, 50 BYU STUDIES 70–97 (2011).

love and righteousness and are responsible to provide the necessities of life and protection for their families. Mothers are primarily responsible for the nurture of their children.”<sup>11</sup> This admonition does not necessarily prohibit wives from working outside the home and husbands from helping raise the children, but certainly encourages wives to remain home nurturing the couple’s children, while the husband provides for the household through outside economic activities. Read literally, though, this admonition does seem to bar arrangements where the wife is the sole breadwinner, while the husband remains at home and assumes primary responsibility for childcare and housekeeping. (To be sure, most of the Mormons I consulted do not read this passage literally and see no conflict between the *Proclamation* and working wives/domestic husbands.)

Families formed in the mortal world survive in the afterlife, according to LDS doctrine. “The divine plan of happiness enables family relationships to be perpetuated beyond the grave.”<sup>12</sup> Indeed, one’s family life affects one’s status and comfort in the afterlife. Reconceptualizing Hell as a transitory state for all but the most pernicious, LDS doctrine cheerfully holds that most people go to Heaven after mortal death—but how high in Heaven people go depends upon their attainments on earth.<sup>13</sup> Within the Celestial Kingdom (the best place to be for eternity) there are tiers, with the top tier reserved for male-female couples whose marriages were “sealed within the Temple.”<sup>14</sup>

Although nineteenth-century Mormons enjoyed their share of “homosexual activities” and some LDS leaders have been notorious “sodomites” or “homosexuals,” Mormon doctrine has never approved of same-sex intimacy and, between 1945 and 1995, it took an increasingly stern attitude toward homosexuality.<sup>15</sup> Hence, the Mormon belief system does not recognize a stable “sexual orientation,” even for self-identified “homosexuals” who only have sexual feelings for persons of the same sex. Although everyone has a premortal and postmortal gender, no one has a premortal or postmortal homosexual orientation. So there are, literally, no “homosexuals” in Heaven, though there are, apparently, some Mormons in the Celestial Kingdom who had “same-gender attraction” (the LDS-preferred term) but were sealed in marriage to women, as well as unmarried men and women having “same-gender attraction” in the lower reaches of Heaven and, perhaps, in Hell.<sup>16</sup>

Mormons have evolved in their understanding of the virtuous family. As is well-known, the early LDS Church celebrated plural marriage. Although most Mormon families were not polygamous, a significant mi-

11. *Proclamation*, *supra* note 6, ¶ 7.

12. *Id.* ¶ 3.

13. See, e.g., Larry E. Dahl, *Degrees of Glory* in ENCYCLOPEDIA OF MORMONISM 327–28 (Daniel A. Ludlow ed. 1992).

14. *Id.*; CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, DOCTRINE AND COVENANTS § 131.

15. See CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, *First Presidency Statement Opposing Same Gender Marriages*, <https://www.lds.org/ensign/1994/04/news-of-the-church/first-presidency-statement-opposing-same-gender-marriages?lang=eng> (last visited Aug. 20, 2016).

16. *Id.*

nority were, and this fact fueled a social backlash and a fierce federal campaign against polygamy. In the wake of the federal anti-polygamy campaign, LDS President Wilfred Woodruff in 1890 received a Revelation from the Lord and issued a Manifesto ending Church encouragement of polygamy. Although LDS doctrine suggests the possibility that the Celestial Kingdom is filled with polygamous families, perhaps including Mormons who have remarried after the death of their spouses, modern LDS historians and thinkers argue that fidelity within a monogamous marriage is the “eternal norm.”<sup>17</sup>

The Mormon theology of the Family has run up against a massive change in the social and legal structure for families in the United States. The big variable has been the changing status and economic role of women in this country. Between 1948 and 2012, the percentage of women in the national workforce has grown from 32.7% to 57.7%, a 76.5% increase in women’s participation in work outside the home.<sup>18</sup> With women increasingly working outside the home and having careers, women have engaged in sexual activities earlier in their lives, but have delayed and increasingly declined marriage and bearing children.<sup>19</sup> For decades, the rate of divorce escalated even as the marriage rate declined; divorce, too, reflected the idea that marriage is centrally about personal satisfaction, and not about a couple’s carrying forth divine plans centered on procreation within a lifetime marriage.<sup>20</sup> Together, these trends have contributed to a conception of marriage as more individualized, more hedonic (focused on the happiness of the marital couple), and less gendered than is contemplated by the relatively communitarian Mormon model.<sup>21</sup>

Women’s economic and sexual liberation has also contributed to the decline, as well as the social transformation, of marriage. Although they postponed marriage to later in life, more women sexually cohabit and sometimes bear children within cohabiting rather than marital relationships. The rising cohabitation rate has largely offset the declining marriage rate.<sup>22</sup> More children are born and raised outside of marriage (by

17. Has the LDS Church ever revoked its belief that nineteenth-century polyamorous families reunited in the Celestial Kingdom? Does this possibility extend beyond 1890, when the Church ended its sanction of polygamy? For a thoughtful and influential essay defending the one-man, one-woman ideal of fidelity *against* polyamory (either on earth or in the Celestial Kingdom), see Eugene England, *On Fidelity, Polygamy, and Celestial Marriage*, 20 *DIALOGUE: A JOURNAL OF MORMON THEOLOGY* 138, 147–53 (1987).

18. U.S. BUREAU LAB. STAT., *WOMEN IN THE LABOR FORCE: A DATABOOK*, REP. 1049, at 10 (2014), available at [http://www.bls.gov/opub/reports/cps/womenlaborforce\\_2013.pdf](http://www.bls.gov/opub/reports/cps/womenlaborforce_2013.pdf).

19. PEW RES. CTR., *BARELY HALF OF U.S. ADULTS ARE MARRIED—A RECORD LOW* 2 (2011), available at <http://www.pewsocialtrends.org/files/2011/12/Marriage-Divorce.pdf>; Andrew J. Cherlin, *Postponing Marriage: The Influence of Young Women’s Work Expectations*, 42 *J. MARRIAGE & FAM.* 355, 355 (1980).

20. Frank F. Furstenberg, Jr., *Divorce and the American Family*, 16 *ANN. REV. SOC.* 379, 380 (1990).

21. ANDREW J. CHERLIN, *THE MARRIAGE-GO-ROUND: THE STATE OF MARRIAGE AND THE FAMILY IN AMERICA TODAY* 87–115 (2009); Andrew J. Cherlin, *Deinstitutionalization of American Marriage*, 66 *J. MARRIAGE & FAM.* 848, 851 (2004).

22. Larry L. Bumpass & James A. Sweet, *National Estimates of Cohabitation*, 26 *DEMOGRAPHY* 615, 624 (1989); see also CTRS. FOR DISEASE CONTROL & PREVENTION, *National Survey of Family*

single or cohabiting parents) today than at any other point in American history.

The sexual revolution of the 1960s flowed, in part, from the ready availability of the birth control pill and other contraceptive techniques, which enabled straight couples to separate sexuality from procreation. Reflecting a complete separation of sexual activities from procreation, lesbians and gay men were beneficiaries of the sexual revolution, as their sexual expression could be understood as similar to that of unmarried, contraceptive-using straight couples. With greater tolerance for both sexual freedom and liberation from traditional pregnancy-linked gender roles, LGBT persons began “coming out of the closet” in significant numbers after 1969.<sup>23</sup> After the 1970s, many of them came out of the closet as couples, increasingly including couples raising children.

Since the 1960s, American family law has been transformed, closely following (and sometimes perhaps leading) the foregoing transformation of the American family. Thus, in the last half century, most states have decriminalized consensual sex outside of procreative marriage, have legalized and regulated sexual cohabitation, have removed most discriminations against nonmarital children, have opened up civil marriage to more couples (including lesbian and gay couples today), have passed laws allowing no-fault relatively easy divorce, and have eliminated many gendered features of alimony and child support law.<sup>24</sup>

States with significant Mormon populations, such as Utah and Idaho, were late-comers to most of these developments. Thus, Utah did not adopt a no-fault divorce law until the 1980s, and has never reformed its consensual sex crime laws.<sup>25</sup> In 1971, Idaho’s legislature decriminalized noncommercial sexual activities between consenting adults in private spaces—and the grass-roots, Mormon-fueled outrage impelled the legislature to repeal its new criminal code and reinstate its old one the next year.<sup>26</sup>

Idaho’s revolt against sex crime liberalization was mostly a spontaneous, localized response, but it was a harbinger of more focused LDS attention. By the mid-1970s, the Salt Lake City leadership of the Church—the First Presidency (consisting of the President/Prophet and two Counselors), the Quorum of the Twelve Apostles (from which the First Presidency is normally drawn), and the Presidency of the Seventy (the next level)—perceived the contours of social and legal trends that

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*Growth: Cohabitation with the Opposite Sex*, [http://www.cdc.gov/nchs/nsfg/key\\_statistics](http://www.cdc.gov/nchs/nsfg/key_statistics) (last updated Aug. 20, 2015) (reporting that almost half of adult Americans have sexually cohabited at some point).

23. DONALD P. HAIDER-MARKEL, *OUT AND RUNNING: GAY AND LESBIAN CANDIDATES, ELECTIONS, AND POLICY REPRESENTATION* 17 (2010).

24. For an overview of the transformation of American family law toward a hedonic regime, see William N. Eskridge Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 *GEO. L.J.* 1881 (2012).

25. See Denese Ashbah Vlosky & Pamela A. Monroe, *The Effective Dates for No-Fault Divorce Laws in the 50 States*, 51 *FAM. RELATIONS* 317, 323 (2002) (no fault-divorce).

26. See WILLIAM N. ESKRIDGE JR., *DISHONORABLE PASSIONS: SODOMY LAW IN AMERICA, 1861–2003* (2008).

were at odds with the Mormon theology of the family. Knowing from their own bitter experience that social, political, and legal developments could harm the LDS Church and could create conditions antithetical to the flourishing of traditionalist Mormon families, the LDS leadership decided to become engaged with new issues arising out of politically engaged women and gay persons.<sup>27</sup>

To some extent, the LDS Church has adapted to the new social environment. Many Mormon women became politically engaged on moral and social issues within the church as well as in society. In the 1980s, for the first time, women spoke publicly at Salt Lake City conferences for the Relief Society, the primary LDS association for female believers.<sup>28</sup> Long pushed into a chapel closet, “homosexual” Mormons became more visible, and a nervous LDS leadership began issuing directives on how LDS leaders ought to deal compassionately but firmly with the “problem of homosexuality.” The main advice was to comfort the troubled soul who felt he might be “homosexual” and press him not to act on his transient impulses.<sup>29</sup>

But in the generation between the 1980s and today, the LDS Church has not retreated from its traditional theology of the family. Indeed, the Church has reaffirmed the central tenets of that theology, even as it seeks to adapt to the new family order.<sup>30</sup> And Mormons have engaged in political activism on a national level, seeking to forestall values and norms at odds with their theology of the gendered family. Latter-day constitutionalism is the process by which Mormons have engaged in democratic activism aimed at entrenching LDS family values in national and state constitutional law.

## II. LATTER-DAY CONSTITUTIONAL ACTIVISM TO PRESERVE THE “TRADITIONAL FAMILY”

The parents of Latter-day constitutional activism on my generation’s issues relating to sexuality, gender, and family were LDS President Spencer W. Kimball (1973–1985) and Gordon Hinckley, the founding chair of the LDS Special Affairs Committee (1974–1981),<sup>31</sup> a Counselor

27. O. Kendall White, Jr., *Overt and Covert Policies: The Mormon Church’s Anti-ERA Campaign in Virginia*, 19 VA. SOC. SCI. J. (Winter 1984).

28. See THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, *Introduction to Relief Society*, [https://www.lds.org/callings/relief-society/getting-started/introduction-to-relief-society?lang=eng&\\_r=1](https://www.lds.org/callings/relief-society/getting-started/introduction-to-relief-society?lang=eng&_r=1) (last visited Aug. 20, 2016).

29. ELDER BOYD PACKER, TO THE ONE 2, 6 (1978) (distinguishing between sinful acts and neutral orientation); First Presidency Spencer Kimball, *The Problem of Homosexuality* (Feb. 1981), available at [http://www.religioustolerance.org/hom\\_lds2.htm](http://www.religioustolerance.org/hom_lds2.htm).

30. Letter from Ezra Taft Benson, Gordon Hinckley & Ted Monson, LDS First Presidency, to Members of the LDS Church, *Standards of Morality and Fidelity* (Nov. 14, 1991) (reaffirming church teachings that any sexual relations outside of marriage are sinful, as is infidelity within marriage).

31. As a young man with a background in journalism, Gordon Hinckley was the secretary of the Church’s first publicity committee, the Radio, Publicity, and Missionary Committee, starting in 1935. As chair of the Special Affairs Committee, Hinckley advised the First Presidency on how to situate the Church on matters of political interest. See e.g., Jacob W. Olmstead, *The Mormon Hierarchy and the MX*, 3 J. MORMON HIST. 1–30 (2007) (detailing the process by which Hinckley and his Committee per-

in the First Presidency (1981–1995), and finally President (1995–2008). The LDS Church is headed by a collective leadership of very senior men, and so change comes very gradually to church policy. Nevertheless, Kimball and Hinckley were key figures in Mormon political activism on matters important to its conception of the family; these leaders committed the Church to nationwide and highly mobilized opposition to two of the great constitutional debates of the last century—equal rights for women and marriage equality for LGBT persons.

On September 23, 1995, President Hinckley read to the Relief Society Conference the important church document, *The Family: A Proclamation*. In the *Proclamation*, the LDS leadership “warn[ed] that the disintegration of the family will bring upon individuals, communities, and nations the calamities foretold by ancient and modern prophets” and therefore called upon “responsible citizens and officers of government everywhere to promote those measures designed to maintain and strengthen the family as the fundamental unit of society.”<sup>32</sup> Mormon activism achieved a series of great constitutional triumphs—defeating the proposed Equal Rights Amendment and overturning gay marriage in California.

#### A. *LDS Opposition to the ERA*

Congress voted in favor of the Equal Rights Amendment (“ERA”) by overwhelming majorities and sent the amendment on to the states for ratification on March 22, 1972.<sup>33</sup> By the end of 1973, ratification had come in thirty states, closing in on the thirty-eight needed to add the ERA to the Constitution. Idaho, for example, ratified the ERA within two days (on March 24, 1972).<sup>34</sup> Montana ratified in January 1974,<sup>35</sup> and Utah’s legislature seemed poised to ratify the ERA the next year, which would have continued the amendment’s cascade into the law of the land. Or so its supporters expected . . .

Instead, the proposed amendment hit a roadblock in 1975. Only three states ratified the ERA after Montana, and five that had ratified (including Idaho) later voted to rescind their ratification.<sup>36</sup> Utah never did ratify, nor did neighboring Nevada. These are all states with significant Mormon populations.<sup>37</sup> The decisive variable for Utah, Nevada, and

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sued the First Presidency to oppose locating the MX missile in Utah, a position that killed the defense project).

32. *Proclamation*, *supra* note 6, at ¶ 8–9.

33. *Equal Rights Amendment*, WORLD PUB. LIBRARY, [http://www.worldlibrary.org/articles/equal\\_rights\\_amendment](http://www.worldlibrary.org/articles/equal_rights_amendment) (last visited Aug. 20, 2016).

34. *Id.*

35. THOMAS H. NEALE, CONG. RES. SERV., R42979, THE PROPOSED EQUAL RIGHTS AMENDMENT: CONTEMPORARY RATIFICATION ISSUES 9 (2013) available at <http://www.equalrightsamendment.org/misc/CRS%20ERA%20report%204-8-14.pdf>.

36. *Id.* at 9–11.

37. A majority of the non-ratifying states were former slave states south of the Mason-Dixon line, namely, Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, Missouri, North Carolina, South Carolina, and Virginia.



Idaho was that the LDS leadership mobilized against the ERA in 1975. The key event was when Spencer Kimball became LDS President upon the death of President Harold Lee on December 26, 1973. Advised and coordinated by Hinckley's Special Affairs Committee, Kimball's First Presidency devoted unprecedented church resources to a national constitutional effort.<sup>38</sup>

Why did the LDS Church become so strongly involved in the ERA debate? The Church had a tradition of recognizing women as equal to men; dominated by Mormons since its inception, the Territory of Utah had granted women rights to own property and transact business, as well as the right to vote in 1870, half a century before the Nineteenth Amendment.<sup>39</sup> Because it only applied to discrimination by government, the ERA's prohibition of discrimination "on account of sex" had no formal bearing upon the LDS's gendered theology of the family. On the face of it, the ERA did not seem inevitably dangerous to Mormon doctrine, and LDS President Harold Lee (1972–1973) was reluctant to engage the Church in a debate that might alienate thousands of Mormon women. His death removed an obstacle to Church involvement, and Kimball and Hinckley (as chair of the new Special Affairs Committee after 1974) committed the LDS Church to the cause of blocking the ERA. Presumably, they were aware of and influenced by STOP ERA, led by Mrs. Phyllis Schlafly, who showed the way for hundreds of thousands of women of all backgrounds to oppose the amendment.<sup>40</sup>

Like Mrs. Schlafly, the new LDS leadership team were persuaded that the ERA would contribute to a national culture hostile to the Mormon theology of the family. As the official LDS First Presidency's statement on the ERA put it in 1980, a general concern was that "[o]ur Creator has especially suited fathers and mothers, through physical and emotional differences, to fulfill their particular parental responsibilities," and any legal development "that could blur those roles gives cause for concern."<sup>41</sup> Specifically, "[c]ourt and administrative interpretations of the ERA could endanger time-honored moral values by challenging laws that have safeguarded the family and afforded women necessary protections and exemptions."<sup>42</sup>

38. On LDS opposition to the ERA, see ROBERT GOTTLIEB & PETER WILEY, *AMERICA'S SAINTS: THE RISE OF MORMON POWER* 201–13 (1984); D. Michael Quinn, *The LDS Church's Campaign Against the Equal Rights Amendment*, 20 J. MORMON HIST. 85–155 (1994); Neil J. Young, "The ERA Is a Moral Issue": *The Mormon Church, LDS Women, and the Defeat of the Equal Rights Amendment*, 59 AM. Q. 623 (2007).

39. "The place of the woman in the Church is to walk beside the man, not in front of him or behind him." ELDER JOHN A. WIDTSOE, *THE CHURCH OF JESUS CHRIST OF LATER-DAY SAINTS, IMPROVEMENT ERA* 161 (1942).

40. Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1389 (2006).

41. Spencer W. Kimball et al., *The Church and the Proposed Equal Rights Amendment: A Moral Issue*, ENSIGN 11 (1980), <https://www.lds.org/ensign/1980/03/the-church-and-the-proposed-equal-rights-amendment-a-moral-issue?lang=eng>. [hereinafter *Church and ERA*].

42. *Id.* at 7.

Consider the specific LDS concerns with ERA ratification. First, “[a]ny reasonable chance for reversing the accelerating trend of courts to grant abortion on demand would probably be eliminated.”<sup>43</sup> Although the Supreme Court had grounded the right to choose an abortion within the “liberty” protected by the Due Process Clause, feminists (starting with Sara Weddington, who had argued *Roe v. Wade*) maintained that the right rested upon equal protection for women.<sup>44</sup> The LDS leadership was, obviously, listening to these concerns and was probably alarmed by them.

Second, relying on “constitutional authorities” such as Harvard Professor Paul Freund, the LDS leaders were concerned that “passage of the ERA could extend legal protection to same-sex lesbian and homosexual marriages, giving legal sanction to the rearing of children in such homes.”<sup>45</sup> Because the ERA barred any state discrimination “on account of sex,” it might bar a state from denying marriage licenses to all-male or all-female couples even as it granted licenses to any man-woman couple. Just as it is race discrimination to deny a Caucasian-African American couple a license while giving them to any Caucasian-Caucasian American couple, so it might be sex discrimination to deny the license to the man-man couple while giving them to any man-woman couple.<sup>46</sup>

Third, “the ERA could make it more difficult for wives and mothers to remain at home because it could require the removal of legal requirements that make a husband responsible for the support of his wife and children.” This was a major concern for the LDS leadership. “Great pressure could be brought to bear on a woman not to marry or have children and to join or remain in the labor force.”<sup>47</sup> Relatedly, the ERA might end the country’s longstanding exclusion of women from compulsory military service; if married women were subject to the draft, that would further undermine the family.<sup>48</sup>

The Utah Legislature was poised to ratify the ERA when its session began in January 1975, as almost half of its members were on record in support.<sup>49</sup> But the day before the session commenced, an editorial in the *LDS Deseret News* strongly but vaguely objected to the proposed constitutional amendment, as “dangerous” because its broad language could work to the “disadvantage of both women and men.”<sup>50</sup> LDS church members understood the editorial to represent the views of the First

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43. *Id.* at 8.

44. *Abortion: Hearings Before the Subcomm. on Constitutional Amendments of the Comm. on the Judiciary*, 94th Cong. 1st sess. 299 (1975) (statement of Sara Weddington).

45. *Church and ERA*, *supra* note 41 (citing S. REP. No. 92-689, at 47 (discussing Professor Freund’s testimony linking the ERA with constitutionally required gay marriage)).

46. Andrew Koppleman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 65 N.Y.U. L. REV. 137 (1994), (relying on *Loving v. Virginia*, 388 U.S. 1 (1967) (it is race discrimination to deny marriage licenses to Caucasian-African American couples)).

47. *Church and ERA*, *supra* note 41.

48. *Id.*

49. GOTTlieb & WILEY, *supra* note 38, at 203.

50. Editorial, *Equal Rights Amendment*, *DESERET NEWS*, Jan. 11, 1975 at 16; see Young *supra* note 38.

Presidency and responded accordingly, by stepping away from the previously acceptable proposal. The Senate sponsor, for example, voted against his own proposal, because of LDS opposition.<sup>51</sup> When the legislature voted on February 18, 1975, the ERA went down in defeat, 21–54.<sup>52</sup>

Even with the Utah rout, the ERA's ratification count stood at thirty-four states by April 1975, with just four more needed. Indiana ratified on January 24, 1977. That ran the total to thirty-five states—though Nebraska and Tennessee legislators had voted to rescind their ratification, a move whose legal significance was uncertain. The legislature in Mormon Idaho voted to rescind on February 8, 1977. If the rescissions were effective, the ERA would need six more state ratifications—but even if the rescissions were not effective, they were an indication that the three remaining states would be hard to muster—especially in the face of STOP ERA and, now, its powerful ally, the LDS Church.

Next up was Nevada, where opponents held up ERA ratification pending the results of a 1978 voter referendum. Polls showed a close vote, with pro-ERA forces having an edge—until the Church mobilized in opposition. About ten percent of the Nevada population is made up of Mormons, who turn out in disproportionate numbers in elections. Under the guidance of Elder Hinckley's Special Affairs Committee, local Mormon leaders held a meeting for 2000 married LDS members in vote-rich Las Vegas the weekend before the election.<sup>53</sup> These rank-and-file Mormons were warned that the ERA would undermine the family and require unisex bathrooms and women to serve in the armed forces. Fired up, these volunteers were given instructions for canvassing door-to-door, to persuade co-religionists and neighbors to turn out against the amendment—as they did on election day, defeating the ERA by a two-to-one margin.<sup>54</sup>

As pro-ERA groups desperately sought a new ratifying state, Virginia and Missouri were battlegrounds in 1978–1979. Even though these states had small Mormon populations, the LDS leadership team mobilized resources to help defeat ratification efforts in these states as well. Coordinated from Salt Lake City by the Special Affairs Committee, lay bishops and stake leaders formed the Missouri Citizens Council and the Virginia Citizens Coalition (as well as local coalitions) to oppose ratification.<sup>55</sup> As directed by Elder Hinckley and Bill Evans (the secretary of the Special Affairs Committee), ward bishops solicited contributions for anti-ERA groups from congregations, sought signatures for anti-ERA peti-

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51. D. MICHAEL QUINN, *THE MORMON HIERARCHY: ORIGINS OF POWER* 377 (1994).

52. *Id.*

53. Laura Myers, *Mormon Voters Lean Toward Romney, Regardless of Party Affiliation*, *LAS VEGAS REV. J.* (Sept. 4, 2012), <http://www.reviewjournal.com/news/elections/mormon-voters-lean-toward-romney-regardless-party-affiliation>.

54. James T. Richardson, *The "Old Right" in Action: Mormon and Catholic Involvement in an Equal Rights Amendment Referendum*, in *NEW CHRISTIAN POLITICS* 213, 215, 222 (David G. Bromley & Anson Shupe eds., 1984); Young, *supra* note 38, at 636.

55. Linda Sillitoe, *Church Politics and Sonia Johnson: The Central Conundrum*, *SUNSTONE*, Jan.–Feb. 1980, at 35–40.

tions in ward lobbies, offered church buildings for anti-ERA meetings, published tens of thousands of pamphlets (*Equality Yes, ERA No*), and personally “called” several thousand Mormon women to serve as the ground troops for the campaign.<sup>56</sup> These women circulated cautionary literature, wrote letters and lobbied state legislators, helped organize and participated in demonstrations, and collected signatures for anti-ERA petitions. The Special Affairs Committee made clear to local lay leaders and the volunteers that the LDS Church should not be explicitly named as the organizer of most efforts, and church funds were not to go to anti-ERA organizations.<sup>57</sup>

It is not clear whether LDS efforts were decisive in these states. Apparently, Mormon women in northern Virginia generated most of the grass-roots petitioning, lobbying, and letter-writing in that state’s campaign. But Virginia’s tradition-minded legislators probably did not need that much pressure to decline an invitation to ratify the ERA; after all, Virginia had not ratified the Nineteenth Amendment until 1952.<sup>58</sup> Between 1972 and 1982, the ERA never made it out of committee or to a floor vote in either chamber of the Virginia Legislature.<sup>59</sup> The ERA had greater success in Missouri, whose lower chamber repeatedly voted to ratify the amendment, starting in 1975; but the state senate never voted to ratify, notwithstanding significant pressure from pro-ERA lobbyists and grass-roots mobilizers. As part of the effort to hold the senate against the ERA, the LDS mobilization may have been critically important in Missouri.

Mormon grass-roots activists (especially Mormon women) were also involved in the successful campaigns to defeat the ERA in Illinois, Florida, and North Carolina. As in Virginia, it is doubtful that LDS involvement was decisive, but it was certainly decisive in Utah and Nevada and possibly in Missouri—thereby earning President Kimball and Elder Hinckley the satisfaction of leading their Church into a key role in the defeat of the ERA. (Even after a congressional extension, the ERA secured no new state ratifications, and its constitutional moment ran out in 1982).

### B. *LDS and the “Homosexual Agenda”*

The national debate over equal rights for women, including the right to choose abortion and other methods of family planning, came at the same time that gay people were streaming out of their closets in unprecedented numbers. Although not the political powerhouse that wom-

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56. A “call” is a request for service from a lay bishop or higher; LDS members may of course reject the call, but accepting it improves their standing within the church and, assertedly, in the celestial kingdom after death.

57. Sillitoe, *supra* note 55, at 36.

58. Jennifer Davis McDaid, *Woman Suffrage in Virginia*, ENCYCLOPEDIA VIRGINIA (Oct. 26, 2015), [http://www.encyclopediavirginia.org/woman\\_suffrage\\_in\\_virginia#start\\_entry](http://www.encyclopediavirginia.org/woman_suffrage_in_virginia#start_entry).

59. On LDS involvement in Virginia’s history of ERA nonratification, see White, *supra* note 27 at 14–16.

en were (with more than half the nation's voters), LGBT persons were also demanding equal treatment in the 1970s. The "homosexual agenda," as opponents derided it, was to repeal or nullify consensual sodomy laws, to secure judicial, executive, and legislative directives against discrimination because of sexual orientation, and (in a distant third place) to win the right to marry.<sup>60</sup>

Without active LDS engagement one way or the other, gay people made virtually no advances in the western states with significant Mormon populations. In the 1970s, Utah, Nevada, and Montana reformed their sex crime codes and retained criminal penalties for "homosexual" but not heterosexual sodomy between consenting adults; after the LDS-inspired popular response to its 1971 decriminalization, Idaho in 1972 reinstated its prior criminal code that left all consensual sodomy a felony. None of the four states adopted anti-discrimination measures or showed any interest in same-sex marriage.

But the LDS leadership was aware of the "homosexual agenda." The brain trust for the leadership on these issues was Elder Dallin H. Oaks. Before he was called to serve on the Quorum of the Twelve Apostles in April 1984, Oaks had enjoyed a remarkable career as a law professor and associate dean at the University of Chicago and as a justice on the Utah Supreme Court.<sup>61</sup> Renowned for his legal acumen, Oaks was an intelligent choice to lay out a roadmap for the LDS leadership to deal with the emerging issues of rights for "homosexuals."

In an internal LDS document entitled *Principles to Govern Possible Public Statement on Legislation Affecting Rights of Homosexuals*, distributed in August 1984, Elder Oaks revealed erudition and foresight about possible church involvement in issues relevant to sexual minorities. Logically, he divided his discussion into the three topics noted above. Pervading his discussion was a recognition that "homosexuality" could mean either a condition or particular sex acts. *Principles* argues that the LDS Church ought to follow the Roman Catholic Church in its reluctance to demonize "homosexuals" as a class of people.<sup>62</sup>

### 1. Sex Crimes Distinctive to Homosexuals

One might have expected an internal LDS document to give short shrift to the legality of gay people's sexual activities, as the Church taught that nonprocreative sodomy is a sin and that same-sex sodomy is especially pernicious (because it is by definition outside of marriage). Elder Oaks, however, observed that most sex-based sins that are condemned by the Church, are either not the subject of the criminal law

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60. On the pro-gay agenda in the 1970s, see ESKRIDGE, *supra* note 26, at 194–201.

61. *General Authorities and General Officers: Elder Dallin H. Oaks*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, <https://www.lds.org/church/leader/dallin-h-oaks?lang=eng> (last visited Apr. 8, 2016).

62. DALLIN H. OAKS, *PRINCIPLES TO GOVERN POSSIBLE PUBLIC STATEMENT ON LEGISLATION AFFECTING RIGHTS OF HOMOSEXUALS* 4–6 (Aug. 7, 1984).

(e.g., fornication) or are crimes but almost never prosecuted (e.g., adultery).<sup>63</sup> Should the LDS Church oppose gay people's demands that consensual sodomy be decriminalized, when fornication and adultery are not crimes? Although Elder Oaks believed the state had legitimate reasons to criminalize all these sexual activities, *Principles* suggested that LDS leaders steer clear of debates over the continued criminalization of consensual sodomy. Written right after the identification of the HIV virus and of the incidence of AIDS in gay male subcultures throughout the United States, it is significant that the memorandum made no mention of the connection of sodomy with the disease that other faith traditions were labeling the "gay plague."

Concerned that the Church not be seen as "going after homosexuals" as a class of people whose sins are no worse than the sins of adulterers (for example), Elder Oaks urged the LDS Church not to support laws that target only homosexual (and not heterosexual) sodomy.<sup>64</sup> Ironically, "homosexual sodomy" statutes in Montana, Nevada, and Utah were already discriminating in precisely this way<sup>65</sup>—and Elder Oaks was not urging the Church to seek repeal or reform of those laws.

## 2. *Anti-Discrimination Laws*

In 1984, no state had a comprehensive code barring anti-gay discrimination in employment, housing, public accommodations, and the like.<sup>66</sup> Some municipalities had such laws, but none did in the four western Mormon states. Nonetheless, *Principles* discusses the possibility of such laws and what stance the LDS Church should take. Although laws protecting "homosexuals" against discrimination might be said to "promote homosexuality," a big problem from the perspective of Mormon theology, the memorandum urged restraint, for entirely pragmatic reasons:

The best strategy to oppose further anti-discrimination legislation protecting homosexuals is to propose well-reasoned exceptions rather than to oppose such legislation across the board. Total opposition (that is, opposition to all non-discrimination legislation benefiting homosexuals) would look like a religious effort to use secular law to penalize one kind of sinner without comparable efforts to penalize persons guilty of other grievous sexual sins (adultery, for example).<sup>67</sup>

Again, Elder Oaks was not urging LDS to support anti-discrimination laws, but simply to show restraint in opposing them.

*Principles* suggested a line consistent with LDS's gendered theology of the family and with public opinion. Why should anyone discriminate

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63. *Id.* at 1–4.

64. *Id.* at 7–10.

65. *See, e.g.*, MONT. CODE ANN. § 45-5-505 (1973).

66. California and Wisconsin prohibited sexual orientation discrimination by employers.

67. OAKS, *supra* note 62, at 14.

against “homosexuals” in jobs like engineering and medical research? Few Americans actively supported such discrimination, and it did not behoove the Church to insist that it remain unremedied if there was a serious demand for legislation protecting against sexual orientation discrimination in these kinds of jobs.

On the other hand, Americans were more squeamish about jobs or positions involving minors. “Parents who prefer and a society which prefers male-female marriages and procreation should be able to insist on teachers and youth leaders who will teach and (or at least not contradict) those values.”<sup>68</sup> Accordingly, “arguments for job discrimination against homosexuals are strongest in those types of employment and activities that provide teaching, association and role models for young people. This would include school teachers (especially at the elementary and secondary levels), and youth leaders and counselors (such as scout masters, coaches, etc.).”<sup>69</sup> Elder Oaks recommended that if a proposed anti-discrimination law has ample youth-oriented exceptions and religious allowances, then LDS ought to consider neutrality in such public debates.

At the same time that Elder Oaks was circulating the *Principles*, this issue was percolating within the Boy Scouts of America (“BSA”). Some scoutmasters were starting to come out publicly as gay men, which created a dilemma for BSA, which had traditionally dealt with such matters “discreetly.” Because every Mormon boy was enrolled in the local scout troop when he reached second grade, LDS families accounted for almost one-sixth of all boy scouts,<sup>70</sup> and the Church’s influence was strong within the BSA. If all LDS scouts withdrew from BSA, the organization would suffer a huge membership decline and an even larger financial blow, and so BSA leaders were attentive to Mormon concerns.

Not coincidentally, when BSA took a public position against gay scoutmasters, it closely followed Elder Oaks’s *Principles*. “We believe,” BSA announced in 1991, “that homosexual conduct is inconsistent with the requirements in the Scout Oath that a Scout be morally straight and in the Scout Law that the Scout be clean in word and deed, and that homosexuals do not provide a desirable role model for Scouts.”<sup>71</sup> In 1984, Elder Oaks had suggested that exclusion of homosexuals from youth-oriented positions “should be explained, with careful emphasis on the bad effects of homosexual practices (not homosexuals) and the need—for the good of society—to protect youth from homosexual proselytizing and role models among their teachers and counselors.”<sup>72</sup>

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68. *Id.* at 13.

69. *Id.* at 13–14.

70. Tad Walch, *LDS Church Will Continue Boy Scout Program*, DESERET NEWS (Aug. 26, 2015, 9:40 AM), <http://www.deseretnews.com/article/865635368/LDS-Church-will-continue-Boy-Scout-program.html?pg=all>.

71. BOY SCOUTS OF AMERICA, POSITION STATEMENT ON HOMOSEXUALITY (June 1991). The Supreme Court upheld the BSA’s First Amendment right to exclude “homosexual” persons from being scout leaders in *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000).

72. OAKS, *supra* note 62, at 16.

### 3. “Homosexual Marriages”

No state in the United States issued marriage licenses to same-sex couples in 1984, nor would any state do so for another twenty years—so “homosexual marriage” was another issue on which Elder Oaks was farsighted—but on this issue he was quite uncompromising. Same-sex marriage went to the core of the Mormon theology of the family. “[I]n religious terms, homosexual ‘marriages’ would be a devilish perversion of the procreative purposes of God and the earth life He has granted His children. Homosexual relations are wholly deviant to the procreative purpose of sexual relations. Homosexual marriages are wholly deviant to the patriarchal family.”<sup>73</sup>

*Principles* urged the Church not to oppose “homosexual marriages” on sectarian grounds, however. The primary argument should be “defense of the family.” In particular, the “legal rights conferred on marriage partners are granted in consideration of the procreative purpose and effects of a marriage between a man and a woman. (Even marriages between men and women who are past the child-bearing years serve this procreative purpose, since they are role models for younger, child-bearing couples.)”<sup>74</sup> Veering off the rails a bit, Elder Oaks added: “One generation of homosexual ‘marriages’ would depopulate a nation, and, if sufficiently widespread, would extinguish its people. Our marriage laws should not abet national suicide.”<sup>75</sup>

“Homosexual marriage,” according to Elder Oaks, is where the LDS leadership should invest its resources and energies. As it turned out, that issue came to the fore earlier than either LDS or LGBT leaders anticipated. And when it did become prominent, it became the most famous example of Latter-day constitutionalism.

#### C. *Latter-Day Constitutionalism and Marriage Ballot Initiatives*

The Hawaii Supreme Court astounded the western world when it ruled, in *Baehr v. Lewin*, that the state exclusion of same-sex couples from civil marriage required heightened scrutiny under the state Equal Rights Amendment—precisely the same argument that LDS leaders and church documents had made against the national ERA.<sup>76</sup> The Hawaii Supreme Court remanded the case for trial, to see if the state could meet the exacting standard. For the next five years, Hawaii’s judicial and political process debated whether to recognize lesbian and gay relationships as marriages—and other states debated what to do if Hawaii did so. Consistent with *Principles*, the LDS First Presidency, by that point effectively led by First Counselor Gordon Hinckley, assumed a leadership position

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73. *Id.* at 18 n.\*.

74. *Id.* at 18–19.

75. *Id.* at 19.

76. See *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993).



to nip this development in the bud, just as Hinckley's Special Affairs Committee had helped kill the ERA.<sup>77</sup>

On February 1, 1994, just months after the *Baehr* ruling, the First Presidency (President Howard Hunter and Counselors Gordon Hinckley and Thomas Monson) issued a call to action in opposition to any efforts to give legal authorization to "same-gender marriages":

Marriage between a man and a woman is ordained of God to fulfill the eternal destiny of His children. The union of husband and wife assures perpetuation of the race and provides a divinely ordained setting for the nurturing and teaching of children. This sacred family setting, with father and mother and children firmly committed to each other and to righteous living, offers the best hope for avoiding many of the ills that afflict society. We encourage members to appeal to legislators, judges, and other government officials to preserve the purposes and sanctity of marriage between a man and a woman, and to reject all efforts to give legal authorization or other official approval or support to marriages between persons of the same gender.<sup>78</sup>

At the same time, LDS leaders started mobilizing their resources to defeat "same-gender marriage" politically within the state. The LDS population in Hawaii is significant, and boasts a glorious temple outside Honolulu. Its Mormon community is tight-knit and active.<sup>79</sup> And, as it had done in the late stages of the ERA debate, the Salt Lake City leadership team was prepared to devote national resources to head off this change in what it considered the eternal definition of marriage.

Immediately after Gordon Hinckley assumed his position as LDS President in 1995, he issued the *Proclamation* quoted above and led the Church to commit \$500,000 to political efforts in Hawaii and, later, to commit the same amount to support the traditional marriage ballot initiative in Alaska.<sup>80</sup> The point person for political activism against "same-gender marriage" was Elder Loren Dunn. As the LDS's North Area West President, Elder Dunn coordinated the church's efforts in Hawaii, Alaska, California, and Washington. At President Hinckley's suggestion, Dunn and other members of the Salt Lake City leadership team formed an alliance with the Roman Catholic Church in Hawaii to form an umbrella organization to coordinate the campaign for traditional marriage. Fearful that open LDS leadership on this issue would provoke a back-

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77. After President Spencer Kimball died in 1985, his successors, Ezra Taft Benson and Howard Hunter, were men whose old age infirmities prevented their vigorous leadership of the Church—and their First Counselor Gordon Hinckley exercised a great deal of effective leadership. When he became President in 1995, his leadership was formally confirmed.

78. LDS FIRST PRESIDENCY, SAME GENDER MARRIAGES (Feb. 1, 1994), reprinted in ENSIGN (April 1994), available at <https://www.lds.org/ensign/1994/04/news-of-the-church/first-presidency-state-ment-opposing-same-gender-marriages?lang=eng>.

79. *Facts and Statistics*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, <http://www.mormonnewsroom.org/facts-and-statistics/country/united-states/state/hawaii> (last visited Aug. 20, 2016).

80. Letter from Loren C. Dunn to Elder Neal A. Maxwell (Oct. 31, 1995) (discussing need to raise \$100,000 for marriage legislation in Hawaii).

lash, the politically cautious Hinckley urged that the Mormons take a back seat to the Catholics.

In the wake of a trial court judgment requiring the state to recognize same-sex marriages (stayed pending appeal), Hawaii's legislature in 1997 voted to advance a state constitutional amendment for the November 1998 election; the amendment would allow the legislature to limit marriage to one man, one woman. Coordinating with Andrew Pugno, the chief aide to California state Senator Pete Knight, the LDS leadership had early on hoped to win a trifecta in November 1998, with a California initiative along the same lines as the Hawaii and Alaska initiatives. But the California process was slow, and the LDS leadership worked with Knight and Pugno to develop what would become Proposition 22 for a later ballot contest in California.

In February 1998, Pugno asked Professor Lynn Wardle, an eminent professor of family law at Brigham Young University's law school, for advice on revising Senator Knight's initiative. The draft language was this: "Notwithstanding any other provision of law, only a marriage between *one man* and *one woman* is valid and recognized under California law."<sup>81</sup> Pugno was concerned that courts might interpret this language not only to bar recognition of lesbian and gay marriages, but also to bar recognition of remarriages by divorced men (hence, men who had married more than "one woman").<sup>82</sup> I do not know what advice Wardle gave Pugno to make sure that straight men and women could divorce their spouses and remarry without problem under the proposed language, but the initiative was subsequently reworded so that "only a marriage between *a man* and *a woman* is valid and recognized in California."<sup>83</sup>

On October 18, 1998, the Marriage Law Project operated by Catholic University Professor David Coolidge brought together key supporters of traditional marriage, including representatives working in various states (like Hawaii, Alaska, and California), as well as law professors and representatives from the National Conference of Catholic Bishops, the Christian Legal Society, the Alliance for Justice, Independent Women, and the Northstar Foundation. Professor Wardle attended and reported the discussion to the LDS leadership.<sup>84</sup> There was concern that LGBT groups might win the right to marry in one of the states where it was being contested, and most of the attendees expressed interest in or support for a constitutional amendment to enshrine one man, one woman marriage in the U.S. Constitution. Interestingly, Mormon Professor Wardle opposed that suggestion, on the ground that a "top-down" solution was unwise. Supporters of traditional marriage had the advantage at the local

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81. CALIF. FAM. CODE § 308.5 (West 2000) (repealed 2015).

82. Letter from Andy Pugno & Pete Knight, California State Senator, to Lynn D. Wardle, Professor, J. Reuben Clark Law School (Feb. 26, 1998).

83. CALIF. FAM. CODE § 308.5 (West 2000) (repealed 2015). Personally, I do not think either version of the amendment posed a threat to heterosexual remarriage.

84. Letter from Lynn D. Wardle, Professor, J. Reuben Clark Law School to Elder Marlin K. Jensen, Chair SGM Comm., Presidency of the Seventy, et al. (Oct. 19, 1998).

level, and so the best response to gay marriage in Hawaii, for example, would be grass-roots activism in all the other states to head off recognition and to amend their own state constitutions to bar gay marriage. “The authoritarian-dictatorial approach might be fine for advocates of radicalism like same-sex marriage, but the sovereign-people-grassroots approach is most appropriate for our position.”<sup>85</sup> Only Andy Pugno openly agreed with Wardle, but most of the attendees apparently had no strong opinion.

Whatever support there was for the daunting process of a constitutional amendment probably diminished soon after that meeting, as Professor Wardle’s state-by-state process worked well for the LDS position in 1998. Supported by LDS volunteers and financial contributions, the supporters of traditional marriage won the Hawaii referendum with sixty-nine percent of the vote—well beyond the sixty percent needed to amend the state constitution.<sup>86</sup> The same day, Alaska voters amended their state constitution to bar same-sex marriages by a similar lopsided margin.<sup>87</sup>

The LDS Church received a tremendous return on its investment and then concentrated its efforts on California. As it had done in opposing the ERA, the LDS leadership channeled money, intellectual and legal support, and grass-roots volunteers to support Proposition 22. In May 1999, the leadership sent a series of letters to California stakes and members, imploring them get involved in the nascent campaign for Proposition 22,<sup>88</sup> but also avoiding direct LDS handling of contributions or publicity for the initiative.<sup>89</sup> At the October 1999 General Conference of the Church in Salt Lake City, President Hinckley rallied all Mormons to support Proposition 22, an event that triggered local Mormon congregations to devote church buildings and resources to advancing this cause. In early 2000, Church pressure for members to contribute money and time to the initiative grew more intense. With the help of Mormon money and volunteers, Proposition 22 prevailed with the voters by a whopping sixty-one percent to thirty-nine percent margin on March 7, 2000.<sup>90</sup> Most California initiatives go down to defeat, and few successful ones secure more

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85. *Id.* at 2.

86. STATE OF HAW. OFFICE OF ELECTIONS, GENERAL STATEWIDE SUMMARY REPORT 4 (Nov. 3, 1998).

87. B.A. Robinson, *The Path to Attaining Same-Sex Marriage in Alaska: 1994 to 2014*, RELIGIUSTOLERANCE.ORG, [http://www.religioustolerance.org/hom\\_mar9.htm](http://www.religioustolerance.org/hom_mar9.htm) (last visited Aug. 20, 2016).

88. Letter from John B. Dickson et al., North America West First Presidency, to California Latter-day Saints (May 11, 1999).

89. Letter from Elder Douglas L. Callister, Area Authority, to California Stake Presidents (May 20, 1999).

90. *California Proposition 22, Limit on Marriages* (2000), BALLOTPEDIA, [https://ballotpedia.org/California\\_Proposition\\_22\\_Limit\\_on\\_Marriages\\_\(2000\)#cite\\_note-1](https://ballotpedia.org/California_Proposition_22_Limit_on_Marriages_(2000)#cite_note-1) (last visited Aug. 20, 2016).

than fifty-five percent of the vote,<sup>91</sup> so the triumph of Proposition 22 was all the more impressive.

Advised by Professor Wardle and others, the LDS leadership was aware that a state constitutional challenge to the same-sex marriage exclusion was likely to succeed in Massachusetts, as it did in 2003–2004, and that a state constitutional challenge to Proposition 22 would also make its way to the California Supreme Court in the next five years.

Although Senator Knight died in 2004, his former legislative aide Andy Pugno led the efforts to form Protect Marriage in 2004.<sup>92</sup> Responding to increased constitutional pressure from LGBT groups and the Mayor of San Francisco to recognize same-sex marriage, the primary goal of Protect Marriage was to sponsor an initiative to entrench traditional (one man, one woman) in the state constitution. As before, LDS scholars and leaders worked with Pugno at every stage. On May 5, 2008, the California Supreme Court interpreted the state constitution to require marriage equality in the *Marriage Cases*.<sup>93</sup> Protect Marriage was well on its way to gathering almost twice as many signatures as needed to place on the November 2008 ballot Proposition 8, which would amend the state constitution to limit civil marriage to a man and a woman (following the Proposition 22 language, to assure that any deprivation of marriage rights would only affect committed LGBT couples and not divorced straight couples).

Between June (when Proposition 8 qualified for the ballot) and November 2008 (the vote on Proposition 8), the LDS leadership in Salt Lake City and in many local California stakes and wards devoted more money, energy, and excitement to Proposition 8 than any religious group has ever devoted to a ballot measure in American history. Although President Hinckley died in January 2008, the reconstituted First Presidency (led by the new President Thomas Monson, who had served as First Counselor under President Hinckley) carried on the constitutional campaign in a big way.

In letters from the First Presidency read by all California LDS wards in June and July 2008, Mormons were urged to support Proposition 8 with their votes, their canvassing, and their monetary contributions.<sup>94</sup> The First Presidency designated Apostle M. Russell Ballard (a member of the Quorum of the Twelve Apostles) to be in charge of the

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91. ALEX PADILLA, CALIF. SEC'Y OF STATE, APPROVAL PERCENTAGES OF INITIATIVES VOTED INTO LAW (2014) available at <http://elections.cdn.sos.ca.gov/ballot-measures/pdf/approval-percentages-initiatives.pdf>.

92. Protect Marriage was the successor organization to the Proposition 22 Legal Defense and Education Fund that Pugno had established in 2001 to assure implementation of Proposition 22.

93. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); for background, see William N. Eskridge Jr., *Foreword: The Marriage Cases—Reversing the Burden of Inertia in a Pluralist Constitutional Democracy*, 97 CALIF. L. REV. 1785 (2009).

94. The first such missive was the Letter from the LDS First Presidency, Preserving Traditional Marriage and Strengthening Families (read to all California LDS congregations on June 29, 2008) (asking ward leaders to read a plea from the First Presidency to mobilize in support of Proposition 8 and, thereby, “to preserve the sacred institution of marriage”).

effort to mobilize fundraising and grass-roots Mormon support for Proposition 8; Apostle Ballard, in turn, named Elder L. Whitney Clayton (a member of the Presidency of the Seventy) to coordinate the LDS efforts with Protect Marriage's campaign. In a conference call with all of the presidents of LDS California stakes, Apostle Ballard analogized Proposition 8 as the Gettysburg for the culture war over same-sex marriage. If supporters of traditional marriage could "hold" California, that might snuff out the possibility of gay marriage expanding beyond Massachusetts. (Between May 2004, when Massachusetts started handing out marriage licenses, and July 2008, no new state had recognized same-sex marriage).

During the summer, contributions from Mormons, rich, poor, and in between, poured into the coffers of Protect Marriage.com, ultimately amounting to as much as half of the forty million dollars raised and spent in support of Proposition 8.<sup>95</sup> More important was the massive grass-roots effort. On October 8, Apostle Ballard and other members of the LDS leadership shared their inspirational words with LDS congregations all over California, through a satellite broadcast.<sup>96</sup> Ballard asked that each Mormon congregation call upon thirty members to donate four hours a week to the campaign, urged all young married couples to blog and text message their support to all their friends, and announced a new website with materials that the faithful could distribute to get out the truth about Proposition 8.

The website PreservingMarriage.org elaborated upon the philosophy of the family announced in President Hinckley's 1995 *Proclamation*. Although one man, one woman marriage is a "divine institution," it is also one that has been foundational for every society. Its transhistorical purpose has been "to preserve and foster the institution most central to rearing children and teaching them the moral values of civilization."<sup>97</sup> Conceding that single parents and lesbian and gay parents often rear children successfully, this LDS-sponsored website maintained that "gender-differentiated parenting" is uniquely useful to a child's healthy development. In light of the "close links that have long existed between marriage, procreation, gender, and parenting," same-sex marriage is not just another individual right, but is "a far-reaching redefinition of the very nature of marriage itself."<sup>98</sup>

The Church's argument in favor of Proposition 8 was broader than that which the Church had deployed in past constitutional marriage campaigns. No longer was the main argument that "redefining" marriage

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95. *Church Clarifies Proposition 8 Filing, Corrects Erroneous News Reports*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, NEWSROOM (Feb. 2, 2009), <http://www.mormonnewsroom.org/article/church-clarifies-proposition-8-filing-corrects-erroneous-news-reports>.

96. See Veronique de Turenne, *Southern California—This Just In*, L.A. TIMES (Oct. 9, 2008, 11:22 AM), <http://latimesblogs.latimes.com/lanow/2008/10/now-the-mormon.html>.

97. *The Divine Institution of Marriage*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, NEWSROOM, <http://www.mormonnewsroom.org/article/the-divine-institution-of-marriage>.

98. *Id.*

away from one man, one woman would undermine traditional marriage (the central LDS concern), but the website's new emphasis was that gay marriage was a threat to religious liberty. Thus, in some states Catholic Charities had been "forced" to abandon its adoption services, in the face of demands that it place children in lesbian and gay households. Churches might lose their tax exemptions, wedding photographers might be subject to lawsuits, and parents might have no way to prevent their children from being taught that gay marriage is just as good as straight marriage.<sup>99</sup>

In a less-balanced LDS-inspired pamphlet that saturated the Internet when it was released on August 24, 2008, *Six Consequences If Proposition 8 Fails* included charges that, if the state constitution were not amended to restore the traditional definition of marriage, (1) children in public schools will have to be taught that same-sex marriage is just as good as traditional marriage, (2) churches would lose their tax-exempt status if they refuse to perform same-sex marriages, (3) religious adoption agencies would have to give up their policy of placing children in homes with one mother and one father, (4) religious schools would have to open their married student housing to same-sex couples, (5) ministers preaching against same-sex marriage could be charged with hate speech, and (6) everyone would have to pay for the many lawsuits engendered by same-sex marriage advocates.<sup>100</sup>

All of the foregoing were either speculative or exaggerated claims about the legal effects of marriage equality. The most compelling claim was the first. It rested upon the correct premise that if California schools teach health education, state law says that they must teach respect for "marriage and committed relationships," including domestic partnerships.<sup>101</sup> Echoing an argument made by the sponsors of Proposition 8, the LDS argument was that, after the *Marriage Cases*, this required instruction would have to teach students that gay people could get married and that such marriages are just as good as traditional marriages.<sup>102</sup> Exactly what schools teach about marriage is a matter of their discretion, so long as it is neutral. Thus, before the *Marriage Cases*, and after Proposition 8, schools could teach that domestic partners ought to be admired just as much as married couples, or they could say nothing about gay (or straight) couples and just talk about the virtues of committed relationships.<sup>103</sup> Moreover, in 2008, California's Education Code also barred schoolteachers from discriminating against sexual and gender minorities in their instruction.<sup>104</sup> Before the *Marriage Cases* and after Proposition 8,

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99. *Id.*

100. *Six Consequences If Proposition 8 Fails*, PROP 8 BLOG (Aug. 24, 2008), <http://prop8savingmarriage.blogspot.com/2008/08/six-consequences-if-proposition-8-fails.html>.

101. CAL. EDUC. CODE §§ 51890(a)(1)(D), 51933(f) (2008).

102. See e.g., Letter from [Proposition 8 Sponsor] Dennis Hollingsworth, at 2 (Oct. 9, 2008) Trial Ex. PX0009, *In re Marriage Cases* 43 Cal. 4th 757 (2008) (making the claim that schoolteachers would have to endorse legalized gay marriage and teach that it is as worthy as traditional marriage).

103. Brief for Prof. William N. Eskridge Jr. et al. as Amici Curiae Supporting Appellees at 10, *Perry v. Schwarzenegger*, 602 F.3d 976 (9th Cir. 2010) (No. 10-16696), 2010 WL 4622570.

104. CAL. EDUC. CODE § 51500 (2008).

a teacher could probably not, consistent with the anti-discrimination law, tell the students that man-woman marriage is a serious commitment but woman-woman partnership or marriage is not. Finally, it is relevant that under California law parents have a statutory right to remove their children from public school instruction that conflicts with their religious beliefs.<sup>105</sup>

In short, the compelled-instruction argument was mostly a criticism of existing California law, created by the legislature, rather than a telling criticism of marriage equality recognized by the Court. On the other hand, close legal analysis is not the norm for political campaigns or religious crusades, and the argument called upon voters to reject the norm shared by the California Education Code and the *Marriage Cases*—namely, that the state should treat lesbian and gay relationships exactly the same as straight relationships, across the board. Indeed, Proposition 8 might have had the effect of preempting some of the equality protections reflected in the Education Code, for it might have been interpreted to require teachers to recognize a difference between traditional marriage and lesbian and gay unions.

In the last month of the campaign, Yes-on-8 commercials emphasized the religious-liberty threats posed by marriage equality. Tens of thousands of Mormon volunteers (“called” to service from local congregations) made this argument in the door-to-door and telephone canvassing that became intense in the weeks leading up to the election.<sup>106</sup> In the last weeks of the campaign, Yes-on-8 campaign manager Frank Schubert confided that the polling was weak for Proposition 8, and that it would lose if the campaign could not raise \$5 million for last-minute ads. He put the word out to LDS donors, one of whom (the grandson of a former President) donated \$1 million. The campaign had more than enough money for heavy advertising in the week before the election.

Yes-on-8 saturated the airwaves with new ads in the waning days of the campaign. Opponents of Proposition 8 felt that the last blast of Yes-on-8 ads hit below the belt, with exaggerated or false charges about how deeply gay marriage would deny religious freedom, for example. Intemperate ads went both ways, however. The Courage Campaign Issues Committee, opposing Proposition 8, aired “Home Invasion” on a cable channels before the election.<sup>107</sup> The ad depicted two clean-cut young white men, dressed in the Mormon uniform of white shirts and black ties, who politely inform a newly married lesbian couple that they are here “to take away your rights.” The apparent LDS representatives barge into the women’s home, confiscate each wife’s wedding ring, and rifle through the couple’s drawers and boxes to find the state marriage license, which they rip up in front of the astonished but powerless couple. “That was

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105. *Id.* § 51240.

106. Leading Prop 8 strategists estimate that 25,000 of the 30,000 grass-roots volunteers for Prop 8 were Mormons called by the Church to participate.

107. Courage Campaign, “Home Invasion”: *Vote NO on Prop 8*, YOUTUBE (Oct. 31, 2008), <https://www.youtube.com/watch?v=q28UwAyzUkE>.

too easy,” smirks one of the men as they leave the broken home. An angry reaction to the heavy LDS investment and an invocation of stereotypes of predatory Mormons, the ad went viral on the Internet.<sup>108</sup>

On election day, November 4, 2008, Senator Barack Obama swept the state of California and the nation to become America’s forty-fourth President. Due in large part to an impressive get-out-the-vote campaign by Mormon volunteers, on top of previous contributions from Mormons, Proposition 8 won a decisive fifty-two percent to forty-eight percent victory. Most major demographic groups (except for Asian- and Jewish-Americans) voted in favor of Proposition 8.

Proposition 8 was the LDS Church’s last great hurrah in the marriage-equality debate.<sup>109</sup> Within two years, Proposition 8 was nullified by a federal district court, whose judgment ultimately withstood appellate challenges because of a procedural technicality.<sup>110</sup> Three years later, on December 20, 2013, federal District Judge Robert Shelby ordered Utah to issue marriage licenses to same-sex couples.<sup>111</sup> The ruling was a shock to Utah’s LDS communities, and the state dropped the ball on an effort to ask Judge Shelby to stay his ruling. Within a week, all Utah counties were complying with the ruling, even as the Utah Attorney General was appealing the ruling and the denial of a stay. Although the Supreme Court stayed Judge Shelby’s order on January 6, 2014,<sup>112</sup> thousands of lesbian and gay couples were married in Utah before the Supreme Court’s action. On June 25, 2014, the Tenth Circuit affirmed Judge Shelby’s finding that Utah’s exclusion was inconsistent with the Fourteenth Amendment. When the Supreme Court denied further review on October 6, 2014, Utah’s Governor Herbert ordered marriage licenses to be issued once again. Ultimately, the U.S. Supreme Court followed the Tenth Circuit when it ruled, in *Obergefell v. Hodges*,<sup>113</sup> that state marriage exclusions unconstitutionally deprive same-sex couples of their fundamental right to marry.

### III. LESSONS SUGGESTED BY LATTER-DAY CONSTITUTIONALISM FOR AMERICAN INDIVIDUAL-RIGHTS LAW

There are many lessons that can be drawn from the experience of Latter-day constitutionalism. There are lessons for the nature of American constitutionalism, for the evolution of religious faiths, and for the less-gendered future of the family.

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108. *Id.*

109. But not the very last LDS involvement. In 2009, the LDS supported a referendum in Maine that revoked the marriage equality statute enacted by the Maine Legislature. In 2012, four states had referenda on marriage equality; LDS played no significant role in any of them.

110. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 927 (N.D. Cal. 2010).

111. *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013).

112. *Herbert v. Kitchen*, 134 S. Ct. 893 (2014).

113. 135 S. Ct. 2584 (2015).



### A. *Our Democratic-Pluralist Constitution*

Academics tend to believe that the evolution of American constitutional law has not been completely driven by original meaning, constitutional structure and principles, *stare decisis*, or any other strictly legal methodology. Instead, the constitutional law of individual rights, in particular, is driven largely by social movements—including social movements advancing civil rights for people of color, for women, for people with disabilities, for gun owners, and for sexual and gender minorities.<sup>114</sup> The relationship between social movements and constitutional law is incomplete, however, without considering the important role of the traditional family values (“TFV”) movement, which has usually been marginalized as a “countermovement” or as an extended apology for the status quo. Latter-day constitutionalism is an important and distinctive facet of the larger TFV movement and helps us see what an engaged and important normative force it has been. Moreover, the LDS constitutional initiatives reveal a great deal about the evolution of constitutional norms and about the nature of our constitutional culture.

Consider the norm of women’s complete equality—a norm which was at odds with the common law and centuries of American public policy, with the original debates surrounding the Reconstruction Amendments, and with a century of pre-1971 Supreme Court precedent. Government policy grounded in sex-based classifications was placed on the nation’s constitutional agenda *not* by judges and *not* by individual litigants and *certainly not* by long-dead constitutional framers, but by the women’s rights movement and the ACLU. Women’s rights advocates worked with the judicial branch of government as well as the executive and legislative branches to advance the liberal norm that most of them embraced or acquiesced in by the early 1970s.

Liberal feminists supporting the ERA and constitutional litigation framed the debate in terms of women’s equal citizenship; framed that way, the liberal norm seemed to be sweeping the country. Doctrinalists would say that the liberal norm was prevailing because government officials had only lame or stereotype-riddled defenses for existing sex discriminations. Realists would say that the country could not be at rest if government policy were a constant affront to half the population.

But Mrs. Phyllis Schlafly and STOP ERA reframed the debate as one about what legal structure best suited the genuine interests of women and the good of the country.<sup>115</sup> Latter-day constitutionalism fit into this reframing of the debate, with a focus on the family and a skeptical

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114. William N. Eskridge Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002); see Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008).

115. See Phyllis Schlafly, *What’s Wrong with “Equal Rights” for Women?*, PHYLLIS SCHLAFLY REPORT, 5, no. 7, (Feb. 1972), reprinted in *WOMEN’S RIGHTS IN THE UNITED STATES: A DOCUMENTARY HISTORY* 291 (Winston E. Langley & Vivian C. Fox eds., 1994); see generally Siegel, *supra* note 40, at 1389–1403 (detailed account of Mrs. Schlafly’s philosophy and her ERA critique).

view about the erasure of all gender discriminations on the welfare of children and, relatedly, the good of the country. Once these and other institutions got involved in the ERA debate, they transformed it into an even more exciting national conversation about equality, family, and gender roles.

The debate also saturated ongoing constitutional litigation. Although the ERA was never ratified, the Supreme Court recognized sex as a quasi-suspect classification and created a framework for sweeping away state sex discriminations that denied women equal opportunities for life flourishing and equal citizenship (such as jury duty).<sup>116</sup> This framework was responsive to the strong public support for the ERA and even stronger support for throwing out laws that excluded women from opportunities because of stereotypes. For example, the LDS First Presidency's statement opposing the ERA repeatedly endorsed the norm that women should have equal opportunities. Latter-day constitutionalism made a contribution by issues it did *not* contest, as well as issues the Church vigorously contested. It is no coincidence that the Supreme Court's sex discrimination jurisprudence bowed to the strongest concerns raised by STOP ERA and by the LDS First Presidency, namely, concerns that sex equality might force women to serve in the military, states to recognize gay marriages, and governments to repeal special protections for women.<sup>117</sup> Thus, in the ten years the country was debating the ERA (1972–1982), a Supreme Court that struck down sex discriminations denying women equal life opportunities also rejected equal protection challenges to government prohibitions of same-sex marriage,<sup>118</sup> to women's ineligibility for draft registration,<sup>119</sup> and to laws rationally designed to protect women's interests, especially their interests in pregnancy and family.<sup>120</sup>

In short, there was a very close relationship between the Supreme Court's sex discrimination jurisprudence and Latter-day constitutionalism. Both Church and Court endorsed the norm that women ought to have the same life opportunities as men and ought to be considered formally equal to men. Neither Court nor Church was willing to disturb longstanding sex-based rules rooted in the "real [biological] differences"

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116. When the country was still seriously debating the ERA, the controlling group on the Court declined to impose heightened scrutiny on sex-based classifications. See *Frontiero v. Richardson*, 411 U.S. 677, 691–92 (1973) (Powell, J., joined by Burger, C.J., and Blackmun, J., concurring in the judgment); *id.* at 691 (Stewart, J., concurring in the judgment). After the ERA's chances seemed to recede (and right after LDS opposition sealed its fate in Utah), the Court subjected sex-based classifications to heightened but not strict scrutiny in *Craig v. Boren*, 429 U.S. 190 (1976).

117. Eskridge, *supra* note 114, at 2138–43; Siegel, *supra* note 40, at 1403–14.

118. *Baker v. Nelson*, 409 U.S. 810 (1972) (dismissing a same-sex marriage challenge as lacking a "substantial federal question").

119. *Rostker v. Goldberg*, 453 U.S. 57 (1981).

120. *Califano v. Webster*, 430 U.S. 313 (1977) (upholding gendered social security provision, which the Court read as advantaging female wage earners and their families, as a way of redressing society's longstanding disparate treatment of women); see also *Michael M. v. Sup. Ct.*, 450 U.S. 464 (1981) (upholding a state law making sex with an underage female, but not male, statutory rape).

between men and women.<sup>121</sup> Nor was either institution in favor of disturbing rules against same-sex marriage and women's exclusion from the draft, for large majorities of women in the 1970s were opposed to same-sex marriage and compulsory military service.

In this way, constitutional norms are typically the result of conflict not just between newly mobilized social groups and the government, but conflict as well as consensus among social groups themselves, in a normative contest for Americans' allegiance in our constitutional culture.<sup>122</sup> This understanding of constitutionalism is rooted in democratic pluralism.<sup>123</sup> Our society consists of many different social groups, and one role of government is to mediate group conflict and to integrate new social groups into our constitutional culture, but without alienating existing social groups. As reflected in Latter-day constitutionalism, the constitutional model is the Religion Clauses of the First Amendment.<sup>124</sup> At the founding, the sharpest normative conflicts were among religious traditions. The Free Exercise Clause barred the government from persecuting minority religions, and the Establishment Clause barred majority religions from using government to entrench their advantage. One consequence of the Religion Clauses has been a rich religious pluralism in this country—and it is to America's credit that the Mormons, long disparaged by mainstream Christian faiths, have been able to flourish here and, now, to form alliances with denominations once their enemies. Consider how this Democratic-Pluralist Constitution played out productively and democratically in the same-sex marriage debate.

### 1. *Constitutional Law as a Deliberative Social Process*

In the first half of the twentieth century, “homosexuals and other sex perverts” (the terms of the era) were decidedly not a social group participating in America's pluralist constitutional culture. These people were, literally, outlaws. And almost all of them hovered in the closet, away from public notice and unable to organize themselves into organizations with political clout. As understood then, the Constitution had no objection to state imprisonment of “homosexuals” for private sodomy, to indefinite hospitalization and possible castration or sterilization of such sex offenders, and to government intervention to disrupt their rearing of their own children. No one in the United States thought that two lesbians had a constitutional right to marry each other.

As the century progressed, more sexual and gender minorities edged out of the closet and formed a tiny social movement, at first asking

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121. *Michael M.*, 450 U.S. at 481.

122. Siegel, *supra* note 40, at 1329–32.

123. Eskridge, *supra* note 114, at 2375–90.

124. Cf. William N. Eskridge, Jr., *A Jurisprudence of “Coming Out”: Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411 (1997) (arguing that the Religion Clauses provide a general model for constitutional accommodation of conflicting social groups, including traditional family values groups competing with LGBT groups).

for tolerance of admitted misfits and, after 1969, asking for social acceptance and legal equality. Once Americans started seeing openly gay or transgender persons in the world, many were immediately alarmed. Hence, parallel to the LGBT rights movement was a TFV movement which included Latter-day constitutionalism. As more gay people streamed out of their closets as committed couples, increasingly as couples raising children, Americans reconsidered traditional discriminations against this social group. Personal interactions and the media were probably the primary mechanism for this evolving gay-tolerating and then gay-accepting culture, but an important forum for normative discussion was the law—especially courtrooms where LGBT people could present evidence of their humanity and arguments against considering their consensual private activities to be crimes, against anti-gay and anti-trans discriminations, and in favor of recognizing their parental and marriage rights.<sup>125</sup>

Marriage equality for LGBT persons was the critical constitutional issue, and one where the American people swiftly turned from opposition to acceptance or acquiescence (in the decade between 2003 and 2013). As the Proposition 8 debate illustrates, however, this was not a linear progression, and the TFV movement won a great victory in California in 2008. But the closeness of the vote, notwithstanding the greatly superior LDS campaign, was a harbinger for the future. And new lesbian and gay couples kept coming out—popping up everywhere, babies in tow. Once straight people became engaged in large numbers—as parents of lesbian daughters who gave them grandchildren, as children of gay and lesbian couples, as civil-rights activists—marriage equality became inevitable. Almost no one was surprised when a narrow Supreme Court majority ruled, in *Obergefell v. Hodges*,<sup>126</sup> that the Fourteenth Amendment bars the states from excluding same-sex couples from their marriage laws.

But *Obergefell* was not possible without extensive public deliberation in hundreds of governmental forums—from state courtrooms to state and local legislatures to government agencies to the White House itself. Once one state (Massachusetts 2003–2004) started handing out marriage licenses to lesbian and gay couples, the tide would turn, because of social as well as policy feedback. A central LDS concern was that gay marriage would dissolve the connection between marriage, self-sacrifice, and responsible child-rearing. This was by no means a far-fetched claim—but one that was partially undermined when Massachusetts issued thousands of marriage licenses to lesbian couples raising children, including the lead couple (Holly and Jule Goodridge), who were raising a daughter within their committed relationship. *Goodridge*,

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125. The discussion of the origins, evolution, and conflict between the LGBT rights movement and the TFV movement is taken from JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940–1970* (1985); ESKRIDGE, *supra* note 26, at 109–228; ORAN P. SMITH, *THE RISE OF BAPTIST REPUBLICANISM* (1997).

126. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015).

was followed by waves of marriage equality litigation, almost always including couples raising children within their households. And as those children reached ages where they could speak for themselves, they spoke out against the LDS concern that gender-differentiation is needed for good parenting.

Deliberation does not and ought not mean that society picks a winner and kicks the losers to the curb, however. A notable feature of Justice Kennedy's opinion for the *Obergefell* Court was its engagement with the norms reflected in Latter-day constitutionalism. The Court ruled that same-sex couples were being denied their fundamental right to marry; because heightened scrutiny is so demanding, Justice Kennedy was able to write an opinion casting no aspersions of animus or ill-will by supporters of traditional marriage toward LGBT persons and couples. The centerpiece of the Court's opinion was its discussion of *why* marriage is fundamental, and much of the discussion could have been written by the late LDS President Gordon Hinckley. Consistent with the Mormon theology of the family, the Court opined that marriage is essential for individual flourishing, for personal interconnection, for the welfare of children, and for the good of society.<sup>127</sup> Except for its disregard of gender differentiation (admittedly, a big "except"), this opinion deeply reflects and tries to build upon LDS family values.

Even though it settled the issue of marriage equality, *Obergefell* explicitly opened up new issues for ongoing constitutional debate and, thereby, contemplated a continuation of the social deliberative process. Dissenting Justices feared that supporters of traditional marriage would now find themselves "vilified" the way southern racists have been in the wake of the civil-rights revolution.<sup>128</sup> In its *amicus* brief in *Obergefell*, lawyers for the LDS Church and other faith traditions worried that marriage equality for sexual minorities would mean losses in liberty for religious minorities (like the Mormons).<sup>129</sup> Nothing in recognition of equality in civil marriages, Justice Kennedy advised, prevents religious organizations and persons from continuing to recognize only one-man, one-woman marriages consistent with their faith traditions. Indeed, the First Amendment affirmatively protects the freedom of religious organizations and persons "to teach the principles that are so fulfilling and so central to their lives and faiths" and to advocate and live "the family structure they have so long revered."<sup>130</sup> This assurance did not satisfy the

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127. *Id.* at 2597–2602.

128. *Id.* at 2642 (Alito, J., joined by Scalia & Thomas, JJ., dissenting); *accord id.* at 2638–39 (Thomas, J., joined by Scalia, J., dissenting).

129. Brief of Major Religious Organizations as Amici Curiae in Support of Respondents at 12–39, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556 et al.), 2015 WL 1534341 (joined by LDS as well as other major Christian and Jewish faith traditions).

130. *Obergefell*, 135 S. Ct. at 2607. First Amendment protections include not just those of the Free Exercise Clause, see *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012) (protecting churches against application of anti-discrimination laws to "ministerial" personnel), but also (potentially) the Free Speech Clause and the general freedom of association that the amendment has long been understood to guarantee. Of course, Justice Kennedy only spoke of teaching and

dissenting justices, but thoughtful Mormons will recall that Justice Kennedy was the fifth vote to recognize the LDS-affiliated Boy Scouts' First Amendment right to exclude gay people from positions of trust.<sup>131</sup>

2. *The Irrelevance of Federal Constitutional Amendments: Constitutional Law from the Bottom Up*

The foregoing account of Latter-day constitutionalism suggests some important reasons why the federal constitutional amendment process is irrelevant to individual rights in America today.<sup>132</sup> Existing amendments, like the ones added during Reconstruction, are important—but the process of adding new ones seems irrelevant for the foreseeable future. The ERA debate reminds us how hard it is to amend the U.S. Constitution—significantly harder than to amend any other national constitution in the world and any state constitution in this country.<sup>133</sup> The big hurdle is securing ratification by three-quarters of the state legislatures, a herculean task, and one that can grind to a halt once serious arguments and political mobilization form against a proposed amendment, even one with as much popular and institutional support as the ERA.

Indeed, the ERA has been the last time Congress sent a constitutional amendment to the states and therefore the last major national debate over amending the U.S. Constitution. Why? Supporters of the ERA were frustrated that they were not able to surmount the difficult ratification process—and then elated that the Supreme Court was able to implement the least controversial features of the ERA through interpretation of the existing Equal Protection Clause. Marriage equality was an issue where there might have been a constitutional amendment, but mobilization came much too late.

Realizing that gay-rights attorneys were pressing equal-protection arguments under state constitutions, supporters of traditional marriage became immediately interested in a federal constitutional amendment barring same-sex marriage *or* authorizing state legislatures to limit marriage to one man, one woman. Although discussed since 1998, the Federal Marriage Amendment was not introduced in Congress until 2002 and did not generate significant attention until after the Massachusetts Supreme Court interpreted the state constitution to require marriage equality in 2003.<sup>134</sup>

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advocating religious views, omitting any guidance that would be relevant to the hot debate regarding wedding vendors and others who do not want participate in same-sex ceremonies.

131. *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

132. See generally David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001).

133. See, e.g., Aziz Z. Huq, *The Function of Article V*, 162 U. PA. L. REV. 1165 (2014).

134. In 2004, a narrower proposal, the Marriage Protection Amendment, was introduced in Congress and endorsed by President George W. Bush. Although supported by all the LDS senators and almost all the GOP senators, the MPA never received even majority support in a series of Senate votes.

Latter-day constitutionalism was surprisingly lukewarm to entrenching one-man, one-woman marriage in the U.S. Constitution. Recall that Professor Wardle, one of America's most eminent Mormon law professor, had opposed the idea in 1998 and had endorsed an agenda whereby TFV groups would work through grass-roots mobilization state by state. "[T]he process of working state-by-state will [educate] the citizenry [and] [promote] family values."<sup>135</sup> Note that this precisely described the LDS approach to the ERA: conceptualize, mobilize, and educate.

That Latter-day constitutionalism was not enthusiastic about federal constitutional amendments does not mean that LDS constitutionalism shunned the amendment process—for the Church strongly and successfully supported state constitutional amendments such as California's Proposition 8. Such a strategy was entirely consistent with Professor Wardle's state-by-state educational approach. LDS leaders learned valuable lessons from Hawaii's flirtation with same-sex marriage between 1993 and 1998: judges were going to be tempted by LGBT equality arguments, legislators much less so, and the voters least of all (or so it seemed in the 1990s). State constitutional initiatives and referenda were key to Latter-day constitutionalism, for they represented a democratic process by which traditionalists could entrench their normative understanding of the family into a state constitution. Between *Goodridge* (November 2003) and Proposition 8 (November 2008), twenty states put constitutional marriage amendments to the voters, who resoundingly voted for traditional marriage in all but one.<sup>136</sup> This was democracy in action and therefore was more legitimate than the decrees of judges who were appointed (even those judges subject to retention votes). Because TFV groups organized themselves before gay marriage could gain traction in these states, they were able to head it off.

Ironically, at the very point that Professor Wardle was urging a state-by-state approach for supporters of traditional marriage, Mary Bonauto of Gay and Lesbian Advocates and Defenders ("GLAD") in Boston was urging the same approach for advocates of same-sex marriage. There was no viable possibility for national constitutional activism, and so GLAD suggested local activism and educational efforts, followed by state constitutional litigation, in gay-friendly states like Vermont and Massachusetts. Like Wardle and his LDS allies, Bonauto and her LGBT allies believed that door-to-door persuasion and local education were the best way to advance their cause. Constitutional litigation impelled the Vermont Legislature to adopt the Civil Unions Act in 2000, and brought same-sex marriage to Massachusetts as a result of its high court ruling in *Goodridge v. Department of Public Health*. Although marriage equality advocates were unable to secure a second state for five years after *Goodridge*, California's Supreme Court issued a breakthrough opinion in

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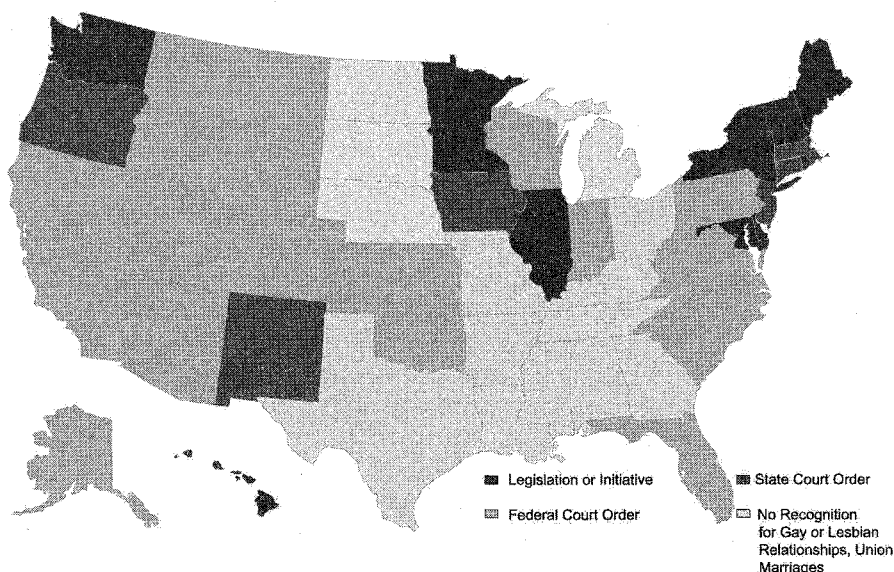
135. Wardle, *supra* note 84.

136. Arizona voters defeated a broad constitutional marriage initiative in 2006 but voted for a narrower one in 2008.

May 2008 that promised to be a rallying point for marriage equality—until the decision was overridden by Proposition 8 in November 2008.

With Proposition 8, Latter-day constitutionalism won the battle but failed to end the ground-level culture conflict. Deliberation about what to do about lesbian and gay couples saturated America, and recognition came from everywhere—corporate boards, municipalities, state judges, state legislatures, even the White House. By the time the Supreme Court handed down its disposition in *Obergefell*, most states were handing out marriage licenses, as illustrated by the map below. The map depicts the thirty-six marriage equality states, as of June 25, 2015 (the day before *Obergefell* pushed the number up to fifty), and the process by which each state got to that point.

FIGURE 1: Marriage Equality, June 25, 2015



The *Obergefell* dissenters objected that the Court was making a big move, to “redefine” marriage (as the Mormons were saying), without the democratic deliberation needed for such a big change. But the majority responded:

Yet there has been far more deliberation than this argument acknowledges. There have been referenda, legislative debates, and grassroots campaigns, as well as countless studies, papers, books, and other popular and scholarly writings. There has been extensive litigation in state and federal courts. Judicial opinions addressing the issue have been informed by the contentions of parties and counsel, which, in turn, reflect the more general, societal discussion of same-sex marriage and its meaning that has occurred over the past decades. As more than 100 *amici* make clear in their filings, many of the central institutions in American life—state and local governments, the military, large and small businesses, labor unions,



religious organizations, law enforcement, civic groups, professional organizations, and universities—have devoted substantial attention to the question. This has led to an enhanced understanding of the issue—an understanding reflected in the arguments now presented for resolution as a matter of constitutional law.<sup>137</sup>

### 3. *The Pluralism-Facilitating Role of the Supreme Court*

Latter-day constitutionalism suggests a critique of the federal constitutional litigation brought in 2009 by celebrated lawyers Ted Olson and David Boies (the constitutional powerhouses who dueled in *Bush v. Gore*). Press and academic accounts have praised the Olson-Boies initiative for speeding the judiciary along toward marriage equality,<sup>138</sup> but Latter-day constitutionalism provides a perspective that views the lawsuit more skeptically. If constitutionalism is, centrally, a debate among normative social groups in various public fora, including those with the legitimacy bonus that goes with democratic voting, the process for revisiting Proposition 8 should have been a 2012 constitutional initiative revoking Proposition 8. As before, the public debate would have been vigorous, but I am sure marriage equality would have prevailed, fair and square, just as Latter-day constitutionalism had prevailed in 2008, fair and square. (Marriage equality advocates won all four state referenda in 2012).

In *Hollingsworth v. Perry*,<sup>139</sup> the Supreme Court avoided deciding the constitutionality of Proposition 8, based upon an aggressive reading of Article III, to deny standing to the Protect Marriage supporters of Proposition 8. Given the assumptions of our Democratic-Pluralist Constitution, the Court should have ducked the Fourteenth Amendment issue in 2013. The nation was not completely at rest on the issue, as suggested by the map below (Figure 2). By June 2013, nine states had recognized marriage equality, and ten more had a separate institution. That was a tremendous achievement for the marriage equality movement and certainly militated against a Supreme Court judgment cutting off equality rights altogether. LGBT groups were finally winning state constitutional initiatives, but the Roman Catholic Church, the Southern Baptist Convention, and the Church of Jesus Christ of Latter-day Saints were still staunchly opposed. Why not allow the issue to continue to percolate at the state level—especially when the Court was at the same time considering a constitutional challenge to the spiteful Defense of Mar-

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137. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015) (citations omitted); see Joint Appendix Vol. I, *Obergefell*, 135 S. Ct. at 2584 (Nos. 14-556 et. al.) 2015 WL 881797 and Joint Appendix Vol. II, *Obergefell*, 135 S. Ct. at 2584, (Nos. 14-556 et. al.) 2015 WL 832466, for a list of state and federal judicial opinions as well as statutes recognizing marriage equality.

138. See e.g., JO BECKER, *FORCING THE SPRING: INSIDE THE FIGHT FOR MARRIAGE EQUALITY* (2014); see also KENJI YOSHINO, *SPEAK NOW: MARRIAGE EQUALITY ON TRIAL* (2015).

139. 133 S. Ct. 2652 (2013).



Democrats) came to the conclusion that the Fourteenth Amendment does require states to issue marriage licenses to same-sex couples. By the time the Supreme Court handed down *Obergefell*, the marriage map looked very different than it had in 2013 (see the first map, above). Latter-day constitutionalism can still object, as it has, that the Court should have ducked the issue or should have upheld the exclusions in *Obergefell*, but frankly I felt the debate was over by 2015. So did many (though not most) Mormons.

### B. *Constitutionalism and the Evolution of Faith*

If American constitutionalism is a dialectical process whereby competing social movements strongly influence the rules reached by constitutional lawyers and judges, a similar process of discussion and feedback affects the social movements themselves. Thus, a central reason LDS became involved with the ERA and marriage equality debates was that its leadership feared that standing by and allowing the ERA and gay marriage to sweep the nation would have a normative effect on Mormon family values and perhaps even its gendered theology of the family. There was good reason for the leadership to suppose this might be the case—and the best example came during the Church's involvement in the ERA debate.

In the nineteenth century, LDS theology disparaged persons of African descent and, perhaps, other persons of color. Many nineteenth century religious thinkers seized upon Noah's curse upon the descendants of Canaan, the son of Ham, who may have violated Noah (Genesis 9:20–27). Ham or Canaan was by some biblical traditions considered to be the father of the African peoples.<sup>142</sup> Accepting the tradition that Africans descended from Ham were afflicted with Noah's Curse, LDS founding Prophet Joseph Smith nonetheless came to oppose slavery by the time of his martyrdom in 1844.<sup>143</sup> After Smith's martyrdom, however, LDS leaders responded more sympathetically to pervasive racial attitudes in this country, some of which were deployed against the Mormons themselves. The leaders seized upon Noah's curse and expanded upon it by also tracing African lineage to Cain, the son of Adam and Eve who slew his gentle brother, Abel. Invoking both the mark of Cain and Noah's curse against the descendants of Ham, LDS President (and Utah Governor) Brigham Young in 1852 legalized slavery for persons of African or Indian descent.<sup>144</sup> On February 13, 1849, President Young announced a Revelation from the Lord that even free persons of African descent could not

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142. STEPHEN R. HAYNES, *NOAH'S CURSE: THE BIBLICAL JUSTIFICATION OF AMERICAN SLAVERY* 7–8 (2002).

143. See Lester E. Bush Jr., *Mormonism's Negro Doctrine: A Historical Overview*, 8 *DIALOGUE* 54, 59–66 (Spring 1973) (detailed account of Joseph Smith's complicated and not entirely consistent views on persons of African descent, 1836–44).

144. Newell G. Bringhurst, *The Mormons and Slavery—A Closer Look*, 50 *PAC. HIST. REV.* 329 (1981); Bush, *supra* note 143, at 65–75 (detailed account of Brigham Young's slavery legislation, together with the social as well as theological background).

be Mormon priests nor could they be allowed in the holy parts of the Temple nor have their marriages “sealed” within the Temple.<sup>145</sup>

The Mormon theology of racial differentiation also relied on Scripture distinctive to the LDS faith tradition. Specifically, the Book of Mormon reports an ancient conflict between two lost tribes of Israel, the Lamanites and the Nephites, in North America. Because the Lamanites sinned and were iniquitous, “the Lord God did cause a skin of blackness to come upon them.” (2 *Nephi* 5:21). When the Lamanites became Christians, “their curse was taken from them, and their skin became white like unto the Nephites.” (3 *Nephi* 2:15). These passages can be read metaphorically, but in the mid- and late- nineteenth century, LDS theologians and leaders read them literally, to support the association of white skin with purity and virtue, and dark skin with impurity and sin. Indeed, it was widely believed that, after murdering his brother, Cain’s skin darkened, and this lore became part of the justification for excluding African Americans from the priesthood and from Temple privileges.<sup>146</sup>

Although the Thirteenth Amendment ended slavery and lifted Noah’s curse from the law, the Reconstruction Amendments did not affect the status of President Young’s Revelation from the Lord and the Book of Nephi’s linkage of dark skin to sin—which was consistent with apartheid-supporting theology Southern Protestant churches formulated after the end of Reconstruction. In 1881, LDS President John Taylor explained that the dark legacy of Cain continued after the Flood through the descendants of Ham—and that this was God’s Will because then Satan himself would thereby continue to operate within humankind after the Flood.<sup>147</sup> Although there remained dissenting voices within the LDS Church, the First Presidency repeatedly reaffirmed (as late as 1949) that the priesthood and other restrictions on African Mormons were divinely inspired Revelation to the Prophet and were not just Church policy.<sup>148</sup>

These race-based teachings of the Church were increasingly controversial in the post-1945 civil-rights era. Public attitudes changing all around the country—and they had an effect on LDS leaders, including Presidents David McKay (1951–1970) and Spencer Kimball (1973–1985), both of whom were committed to a world-wide ministry.<sup>149</sup> Because

145. NEWELL G. BRINGHURST, *SAINTS, SLAVES, AND BLACKS: THE CHANGING PLACE OF BLACK PEOPLE WITHIN MORMONISM* 97–99 (1981). For the critically important context of American racist attitudes generally, and toward Mormons in particular, see the splendid historical recovery and analysis in PAUL REEVE, *RELIGION OF A DIFFERENT COLOR: RACE AND THE MORMON STRUGGLE FOR WHITENESS* (2015).

146. See Bush, *supra* note 143, at 81–83 (Cain’s asserted darkening followed from his sin of fratricide, invoked as a further justification offered by nineteenth-century LDS doctrine).

147. See *id.* at 76–79 (account of the Presidency of John Taylor, who reaffirmed and applied the exclusionary theology accepted under President Brigham Young).

148. Letter from George Albert Smith, First Presidency, Aug. 17, 1949, *discussed in* RICHARD OSTLING & JOAN OSTLING, *MORMON AMERICA* 101–02 (1999).

149. GREGORY A. PRINCE & WM. ROBERT WRIGHT, *DAVID O. MACKAY AND THE RISE OF MODERN MORMONISM* 60–105, 358–79 (2005) (detailing the move away from the exclusion of African Americans by LDS President McKay); Ed Kimball, *Spencer W. Kimball and the Revelation on Priest-*

Mormon missionaries ministered to races all around the world, many of them were embarrassed by these doctrinal stances, which Third World cultures found disturbingly similar to South African apartheid.<sup>150</sup> As a result of these changes in American, and even world, constitutional culture, the Church sought to distance itself from apartheid and to associate its overall theology with equality aspirations. In 1963, on the eve of the March on Washington and the adoption of the Civil Rights Act of 1964, the Church formally endorsed “full civil equality for all of God’s children.”<sup>151</sup> The First Presidency was more precise in 1969: “Negro[es]” should enjoy “full Constitutional privileges,” though “matters of faith, conscience, and theology are not within the purview of the civil law.”<sup>152</sup> As a legal matter, the Church could discriminate within its faith community—but an increasing array of missionaries and other Mormon voices were unhappy with what they (privately) considered “racist” doctrine.

After several years of gathering information that undermined the racial exclusion and of building consensus within the Church leadership, on June 8, 1978, President Kimball, his Counselors in the First Presidency, and the Quorum of the Twelve Apostles announced a new Revelation that God did *not* approve of the exclusion of persons of African descent from Mormon priesthood and Temple privileges.<sup>153</sup> President Brigham Young must have been mistaken about this issue, as he had been mistaken about the acceptability of polygamy (another keystone of early LDS theology, reversed by President Wilford Woodruff in 1890, after a Revelation from the Lord). What about the skin color passages in the Book of Mormon? Well, some of them were simply rewritten. In 1981, the Church revised 2 Nephi 30:6, which had said that conversion to Christianity creates a “white and delightsome people,” to read a “pure and delightsome people.”<sup>154</sup>

On December 6, 2013, the LDS Church announced in its online website ([www.lds.org](http://www.lds.org)) that its past association of dark skin with impurity or evil was a most unfortunate relic of the slavery-saturated era of its founding.<sup>155</sup> The Church sort of blamed its racist doctrines on the bad influence of Southern slaveholders who stumbled into Utah and misled

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hood, 47 *BYU STUDIES* Issue 2, at 4 (2008) (account of the evolving views held by President Spencer Kimball, the author’s father).

150. BRINGHURST, *supra* note 145, at 188–89.

151. *Id.* at 231.

152. *Id.* 232–33 (stating that “the Negro” should be an equal member of society and enjoy all constitutional privileges, but denying blacks the ability to enter the priesthood as a matter of religious freedom).

153. This Revelation from the Lord is canonized as Official Declaration 2 in the Church’s Doctrine and Covenants. See generally ARMAND L. MAUSS, *ALL ABRAHAM’S CHILDREN: CHANGING MORMON CONCEPTIONS OF RACE AND LINEAGE* 231–36 (2003) (discussing events leading up to the 1978 policy change).

154. Bill McKeever & Eric Johnson, *White and Delightsome or Pure and Delightsome?—A Look at 2 Nephi 30:6*, *MORMONISM RES. MINISTRY* (Feb. 23, 2016), <http://www.mrm.org/white-and-delight-some>.

155. *Race and the Priesthood*, CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS (Dec. 6, 2013), [https://www.lds.org/topics/race-and-the-priesthood?lang=eng&\\_r=1](https://www.lds.org/topics/race-and-the-priesthood?lang=eng&_r=1).

early Mormon leaders. Ignoring almost a century of doctrinal debate and complicated evolution, the narrative skipped from *Dred Scott* to World War II. “By the late 1940s and 1950s, racial integration was becoming more common in American life[,]” and so the First Presidency and other church leaders reconsidered the nineteenth-century doctrine, resulting in the June 1978 Revelation.<sup>156</sup> In the 2013 posting, the LDS leadership explicitly “disavow[ed] the theories advanced in the past that black skin is a sign of divine disfavor or curse, or that it reflects unrighteous actions in a premortal life; that mixed race marriages are a sin; or that blacks or people of any other race or ethnicity are inferior in any way to anyone else.”<sup>157</sup>

The LDS Church leadership’s official explanation makes it apparent that core Mormon doctrine evolved pretty much in sync with America’s constitutional culture. So long as American culture considered people of African descent inferior and so long as many American Christians accepted the racist reading of Noah’s Curse (and the legacy of Cain), Mormon doctrine generally followed those precepts and teachings, with a great deal of debate over its details and its precise theological pedigree. After racial inferiority had begun sliding into serious cultural and constitutional discredit, the Church deemphasized that feature of its doctrine. Once conservatives as well as liberals agreed that it was racist and unacceptable to say that dark-skinned people and races are impure, inferior, or sinful, the LDS leadership reversed 129 years of revealed truth. It is very likely that America’s (and the world’s) constitutional culture played a decisive role in the evolution, and ultimately the termination, of this particular LDS doctrine.

Given the foregoing account of the responsiveness of the LDS Church to evolving public attitudes toward racial exclusions, the *Obergefell* dissenters had a valid point about the coercive nature of constitutional culture. Specifically, the dissenters feared that the constitutional culture that now accepts marriage equality for sexual and gender minorities is one that will pressure supporters of traditional marriage into conformity, much as the LDS leaders were pressured into conformity with the constitutional culture of racial equality in the 1970s and had been more brutally pressured into conformity by constitutional animus against polygamy in the late nineteenth century.<sup>158</sup> In my view, this process has already commenced and will in fact proceed along the lines suggested by the *Obergefell* dissenters. The transformation of religious practice and doctrine proceeds because of both external (constitutional culture) and internal (people within the Church) pressure. Of course, these two sources of pressure interact with one another.

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156. *Id.*

157. *Id.*

158. *E.g.*, *Obergefell v. Hodges*, 135 S.Ct. 2584, 2640–43 (2015) (Alito, J., dissenting).

Recall the pattern of LDS response to the civil-rights movement and to the gradual entrenchment of an anti-racist constitutional culture in this country:

- *Step One: Tolerance.* Perceiving a shift in constitutional values, the LDS leadership altered its rhetoric, minimizing inflammatory racial references, such as the old doctrine associating dark skin color with impurity and sin. The Church made an effort to create tolerant spaces for Mormons of color.
- *Step Two: Public Nondiscrimination.* The LDS leadership aligned the Church with laws and constitutional norms barring government discrimination based upon race—while at the same time reserving the Church’s right to follow the theological teachings that would not pass muster if they were government policies.
- *Step Three: Doctrinal Shift.* After the first two steps came a Revelation that created new theological doctrine, which the LDS leadership deployed to revise Scripture and to create a race-neutral faith community.

Is the LDS Church on the same path toward remaking its faith tradition to accommodate the new constitutional culture where LGBT Americans are full and equal citizens? Or will the Church’s path follow the very different (and highly oppositional) response to the post-*Roe v. Wade* constitutional culture, where women are entitled to secure abortions?

*Step One. Tolerance.* Elder Dallin Oaks’s *Principles* created a conceptual structure that helped the LDS leadership to avoid some rhetorical pitfalls and to position the Church as tolerant, even if judgmental. For example, LDS leaders in the 1970s and 1980s routinely confused “homosexuality” the condition, with “homosexual acts,” a confusion insulting to gay people and embarrassing to a Church that wants to participate in civic discourse. Since *Principles*, the First Presidency has more consistently distinguished between “same-gender attraction,” which is concerning to the Church but is not a sin, and “homosexual acts,” which are sinful.<sup>159</sup> Church leaders have backed away from public statements suggesting that “same-gender attraction” is something that can be readily abandoned or changed through controversial (and often barbaric) conversion therapy. From within the Church, moreover, there is pressure for greater tolerance than just these rhetorical moves.

One episode illustrates how external constitutional culture and internal religious discussions can work together to adjust institutional stances. The context was the LDS mobilization in favor of California’s Proposition 22 in 2000. Religious discourse was pretty rough in its char-

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159. Letter, Standards of Morality and Fidelity from Ezra Taft Benson, Gordon B. Hinckley & Thomas S. Monson, The First Presidency, to all members of the Church of Jesus Christ of Latter-day Saints (Nov. 14, 1991) in *PREPARING FOR AN ETERNAL MARRIAGE STUDENT MANUAL* 230 (2003); *Understanding and Helping Those Who Have Homosexual Problems*, FIRST PRESIDENCY, CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 1992 (updating a poorly informed 1981 advice on this matter).

acterization of homosexuality. One BYU student, for example, ridiculed gay people's claim for minority rights as no better justified than claims by "pedophiles, prostitutes, exhibitionists, sadists, abusers, murderers, satanists, and other minority groups . . ." <sup>160</sup> Henry Stuart Matis, a young gay Mormon, responded to this insulting comparison, insisting, "we have the same needs you and . . . most importantly, we are all children of God." <sup>161</sup> Even as he wrote this response, though, Matis was depressed by the conflict between his sexual feelings and his faith.

In the early morning of February 25, 2000, Matis shot himself to death on the steps of the Los Altos LDS meeting house. The suicide note he left recalled deep pain from his inability to reconcile his faith and his homosexuality, which was not something he could change or long resist. The suicide note concluded: "On the night of March 7th, many California couples will retire to their beds thrilled that they helped pass the Knight Initiative. What they don't realize is that in the next room, their son or daughter is lying in bed crying and could very well one day be the victim of society's homophobia." <sup>162</sup> Matis's parents wrote a book exploring this tragedy, published by the LDS-affiliated *Deseret News*. <sup>163</sup>

Although President Hinckley's leadership team did not waver in its support for Proposition 22 and even ramped up its support for traditional marriage after that, the Church was not oblivious to the anguish of young Mormons like Stuart Matis. Thousands of Mormon families were dealing more constructively with the knowledge that some of their loved ones were lesbian or gay. For example, Bill Marriott, the powerful Mormon chairman of the Marriott hotel chain, has a gay relative, Michael, who has been outspoken on matters of LGBT equality. Thus, planners for the 2002 Salt Lake City Winter Olympics worked with Michael Marriott and other LGBT leaders to create a surprisingly gay-friendly Olympics. <sup>164</sup> Perhaps inspired by Michael's activism, Marriott hotels have been highly gay-supportive as well. <sup>165</sup>

Until 2007, Brigham Young University (the flagship Mormon university) made it an Honor Code offense for a student to engage in "advocacy of homosexual behavior," which officials sometimes used to discipline or expel students who came out as gay or lesbian. In April 2007,

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160. Letter from James Nickerson, Student, to Editor, Brigham Young University Daily Universe (Feb. 16, 2000), available at <http://universe.byu.edu/2000/02/16/letter-to-the-editor-embrace-all-types-of-people/>.

161. FRED MATIS & MARILYN MATIS WITH TY MANSFIELD, IN QUIET DESPERATION: UNDERSTANDING THE CHALLENGE OF SAME-GENDER ATTRACTION 38 (2004).

162. Stephanie Mencimer, *Mormon Church Abandons Its Crusade Against Gay Marriage*, MOTHER JONES (Apr. 12, 2013), <http://www.motherjones.com/politics/2013/04/prop-8-mormons-gay-marriage-shift>.

163. See MATIS & MATIS WITH MANSFIELD, *supra* note 161 (discussing an account by Matis's parents, published by the LDS-affiliated *Deseret News*).

164. Stephanie Mencimer, *Mitt Romney's Big, Gay Olympics*, MOTHER JONES (July 31, 2012), [www.motherjones.com/politics/2012/07/mitt-romney-big-gay-olympics](http://www.motherjones.com/politics/2012/07/mitt-romney-big-gay-olympics) (last visited Aug. 23, 2016).

165. Yitz Jordan, *How Marriott's Owner Put Aside His Mormon Beliefs to Cash in on the LGBT Travel Market*, QUARTZ (June 5, 2014), <http://qz.com/216328/how-marriotts-owner-put-aside-his-mormon-beliefs-to-cash-in-on-the-lgbt-travel-market/>.



the Honor Code was changed to say that “same-gender attraction is not an Honor Code offense,” though any kind of “homosexual intimacy” remains an offense. Since then, BYU students have secured their own support organization, Understanding Same-Gender Attraction.

More than its support for Proposition 22, the well-publicized LDS support for Proposition 8 created big rifts within the Church, and within Mormon families. Gary Lawrence is an important LDS pollster, whose work contributed to the Proposition 8 campaign. His gay son, Matt Lawrence, left the Church because “two anti-gay initiatives in eight years, it’s impossible not to feel attacked.”<sup>166</sup> Matt was not the only disaffected Mormon. The Oakland stake organized gatherings where tearful gay Mormon youth poured out their feelings of fear and alienation from their families and their Church because of what they considered the hateful messages in the Proposition 8 campaign. Elder Marlin Jensen, the official LDS historian, met with the group and actually apologized for the Church’s role in that pain—virtually unheard of in LDS history.<sup>167</sup> Afterwards, the local LDS ward leader “called” Mitch Mayne, an openly gay Mormon, to serve as an official in the San Francisco ward. Younger Mormons report to me that LDS congregations vary widely in their attitudes toward LGBT youth, with many lay leaders openly accepting of sexual and gender minorities within their congregations and others sympathetic but wanting the help those youth with their “homosexual problems.”<sup>168</sup>

In the larger LDS community, Northstar offers a support network for persons who are attracted to people of the same sex.<sup>169</sup> Although its website says that it is neither affiliated with nor supported by the Church, the LDS leadership is fully aware of its activities and apparently finds it an acceptable voice within that evolving faith tradition. In 2012, the LDS Church created its own website, *Mormonsandgays.org*, which seeks to provide support for and dialogue with gay Mormons. That the Church would even use the word “gays” rather than “persons afflicted with same-gender attraction,” its long-preferred terminology, may be further evidence of a thaw.

In the wake of *Obergefell*, the Church responded with balance, given its strongly negative doctrinal commitments. In a Letter from the First Presidency read in congregations all over the United States on either July 5 or 12, 2015, the Church reaffirmed the *Proclamation* and its view that God-sanctioned marriages can only be one man, one woman. Hence, Mormon clergy and meeting houses cannot host same-sex marriage cer-

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166. Mencimer, *supra* note 162 (quoting Matt Lawrence).

167. *Id.*

168. For example, David Baker has been a member of several LDS congregations in the last decade. In one, the local leadership accepted him as a gay man, while in another he was advised to seek conversion therapy. See Interview with David Baker, in Washington, D.C. (Aug. 7, 2015) (on file with author).

169. See generally NORTHSTAR, *www.northstarlds.org* (last visited Aug. 23, 2016).

emonies—but “those who avail themselves of laws or court rulings authorizing same-sex marriage should not be treated disrespectfully.”<sup>170</sup>

In the past, LDS has excommunicated openly gay church members, but the situation today is more complicated. Tom Christofferson, a successful businessman and the younger brother of a top LDS official, identifies as gay and for a time left the Church. The Christofferson family has apparently been very supportive of Tom, who was in a committed relationship with a medical doctor. No longer partnered with the doctor, Tom has reportedly returned to an active role in the Church generally and an LDS meeting house in Connecticut in particular.<sup>171</sup> Whether that congregation and others accept openly gay and (more controversially) “same-gender” partnered congregants is a matter to be worked out at the local level. The First Presidency’s post-*Obergefell* letter suggests that there is not strong pressure from Salt Lake City to purge LDS of people like Tom Christofferson.

On the other hand, the LDS Church has reaffirmed its commitment to traditional marriage in another, quite surprising, manner. In early November 2015, within months of *Obergefell*, the Church revised its Handbook to instruct congregations that the now-legal “same-gender” marriages constitute an “apostasy” in violation of God’s Word and that children raised in “same-gender” households cannot be baptized in the Church; youth eighteen years old and higher can be baptized only if the LDS leadership can be persuaded that they will live according to the dictates of the Church and that they “disavow” their parents’ apostasy.<sup>172</sup> This was a clumsy administrative response to marriage equality, as it seemed to encourage strife within lesbian and gay families and, worse, seemed to punish children for the “apostasy” of their parents. Hundreds of Mormons resigned their church membership over this issue, and the First Presidency tried to soften the change with a letter on November 13, 2015, making clear that children who only lived part time with lesbian or gay parents might still be baptized.<sup>173</sup> In early 2016, it is not apparent how this ongoing controversy will play out at the local level or even within the Salt Lake City leadership.

As the Handbook controversy makes clear, no gay person and no committed lesbian or gay couple would mistake LDS tolerance for the welcoming attitude that the Reformed Jews, Unitarian Universalists,

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170. *Church Leaders Counsel Members After Supreme Court Same-Sex Marriage Decision*, CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS (June 29, 2015), <http://www.mormonnewsroom.org/article/top-church-leaders-counsel-members-after-supreme-court-same-sex-marriage-decision>.

171. Peggy F. Stack, *Gay Mormon Shares His Journey Back to Faith, Awaits Conference*, SALT LAKE TRIB. (May 27, 2014), <http://www.sltrib.com/sltrib/blogsfaithblog/57994467-180/christoffersonlds-family-gay.html.csp>.

172. The new Handbook provisions are reprinted and discussed in Jennifer Dobner, *New Mormon Policy Makes Apostates of Married Same-Sex Couples, Bars Children from Rites*, SALT LAKE TRIB. (Nov. 5, 2015), [www.sltrib.com/home/3144035-155/new-mormon-policy-would-make-apostates](http://www.sltrib.com/home/3144035-155/new-mormon-policy-would-make-apostates).

173. See Michael Otterson, Managing Director, [LDS] Church Public Affairs, *Understanding the Handbook*, CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, NEWSROOM (Nov. 13, 2015), <http://www.mormonnewsroom.org/article/commentary-understanding-the-handbook> (last visited Aug. 23, 2016).

Episcopalians, Quakers, and now Presbyterians have toward their LGBT faithful and their families. But it is also clear that the LDS today is a far cry from the LDS just ten years ago.<sup>174</sup>

*Step Two. Public Nondiscrimination.* Even as the Church of Jesus Christ of the Latter-day Saints struggles with issues of tolerance, it is also taking a second major step toward accommodating our new constitutional culture. Steps One and Two overlapped in precisely the same way in the Church's accommodation of civil-rights norms, and the new LDS policy today closely tracks its civil-rights policy in the 1960s. In *Principles*, Elder Oaks assumed that laws barring discrimination because of sexual orientation were not consistent with Mormon theology, because they would "promote homosexuality." Hence, Elder Oaks suggested that the LDS Church should either oppose anti-discrimination laws or acquiesce in laws that made sufficient concessions. In the wake of the triumph of Latter-day constitutionalism in the Proposition 8 vote, the Church has, surprisingly, moved dramatically beyond Elder Oaks' assumptions. Indeed, because Dallin Oaks is now a key member of the Quorum of the Twelve Apostles and has participated in the Church's recent initiatives, it is likely that his own views have evolved as well.

Contrary to its leaders' expectations, gay people and their allies angrily blamed the LDS Church and its leaders for taking away their right to marry in California. The day after the 2008 election, a thousand or so LGBT persons and allies marched around the Westwood, Los Angeles LDS Temple and plastered its fences with signs protesting the Church's stance on gay rights.<sup>175</sup> Video cameras captured Mormons ripping the signs off of fences, and several lesbian and gay protesters were allegedly injured by irate Mormons. In the ten days after the election, at least seven LDS houses of worship in Utah and ten in California were objects of vandalism and graffiti. A peaceful candlelight vigil by 600 parents of LGBT persons at the LDS Salt Lake City Temple on November 8 was a more effective sign of the anguish Latter-day constitutionalism had engendered. LDS leaders all over the United States were talking, discreetly, about how exposed they felt their Church was because of its prominent, and increasingly well-publicized, role in Proposition 8.<sup>176</sup> At the same time, that Mormons were seeking to create a more tolerant culture within their faith community, their leaders were thinking about bringing the new gay-friendly constitutional culture to Utah.

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174. Jack Jenkins, *Religious Leaders on Same-Sex Marriage: "No One View Speaks For Religion,"* THINK PROGRESS (Apr. 21, 2015, 8:00 AM), <http://thinkprogress.org/lgbt/2015/04/21/3649064/thousands-religious-leaders-urge-supreme-court-protect-sex-marriage/>.

175. Jessica Garrison & Joanna Lin, *Prop. 8 Protesters Target Mormon Temple in Westwood, L.A.* TIMES (Nov. 7, 2008), <http://www.latimes.com/local/la-me-protest7-2008nov07-story.html>.

176. A prominent source of anguish was the "Home Invasion" video aired in the last days of the Prop 8 campaign, *supra* note 107. The ad mobilized old stereotypes of predatory Mormons—precisely the reason why LDS had sought a behind-the-scenes role in previous campaigns against the ERA and same-sex marriage. I was not aware of this video until a high-ranking Mormon called me to talk about it.

Soon after the Proposition 8 demonstrations, LDS leaders opened a discreet dialogue with gay-rights advocates, and specifically with Equality Utah, the umbrella LGBT rights group. In 2009, after declining repeated requests, LDS leaders met with Jim Dabakis and four other representatives of Equality Utah.<sup>177</sup> Although the discussions were “difficult” because of the gulf between Equality Utah’s view and the LDS theology of the gendered family, Elder D. Todd Christofferson (Tom Christofferson’s older brother and a member of the Quorum of the Twelve Apostles) suggested his side’s desire to “grow in understanding, for example, about same-sex attraction as we all have.”<sup>178</sup> Informed observers say the Church’s willingness to make peace with LGBT critics stemmed in part from the atrocious publicity and increasing perception that the Church was persecuting gay people, and in part from internal pressure from LDS parents and siblings speaking up for their LGBT family members.<sup>179</sup> That comparison for all God’s children and dignified treatment for each person are fundamental principles of Mormon faith also must have played a role in the Church’s interest in dialogue.

In the wake of this openness, Salt Lake City’s Council in 2009 adopted an ordinance barring sexual-orientation discrimination in housing and employment. The Church immediately characterized the new ordinance as “fair and reasonable and [it] does not do violence to the institution of marriage,” a surprisingly warm reception.<sup>180</sup> With these encouraging words from the LDS leadership, nineteen Utah municipalities adopted anti-discrimination ordinances copied from the Salt Lake City one in 2009–2010. Although there was discussion among Utah state legislators about a law preempting the new anti-discrimination ordinances, LDS leaders apparently discouraged such efforts. Starting in 2008, gay-friendly Democratic Party legislators proposed statewide measures prohibiting sexual-orientation discrimination in employment and services. In 2013, Republican Senator Steve Urquhart became the chief sponsor. In 2014, Urquhart re-introduced the legislation and arranged a series of meetings among legislators, staff members, lesbian and gay families, and representatives of Equality Utah. While only a few legislators attended these meetings, they were transformed by them. One powerful Mormon Republican representative recalls learning how “these families looked just so much like my family—parents expressing their love for their children.”<sup>181</sup> Other legislators learned from media attention and from conversations with their own children that LGBT persons were per-

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177. The meeting and subsequent negotiations are described in Jennifer Dobner, *Little-Known History Behind Utah’s LGBT Nondiscrimination Law Recounted*, SALT LAKE TRIB. (Mar. 16, 2015, 5:24 PM), <http://www.sltrib.com/home/2295501-155/little-known-history-behind-utahs-lgbt-nondiscrimination>.

178. *Id.*

179. *Id.* (relying on analysis from Mormon historian Greg Prince).

180. UPC Staff, *A Look at Utah’s Nondiscrimination Ordinances*, UTAH POL. CAP. (Jan. 14, 2014), <http://utahpoliticalcapitol.com/2014/01/14/a-look-at-utahs-nondiscrimination-ordinances/#>.

181. Source on file with author.

secuted by bigots, sometimes turned out of their homes, and subject to pervasive employment and housing discrimination.

At the same time that LDS church leaders and legislators were listening to the stories of LGBT families and discussing anti-discrimination protections with Equality Utah, federal Judge Shelby stunned the state when he invalidated Utah's statutory and 2004 constitutional exclusions of same-sex couples from the state marriage laws.<sup>182</sup> In December 2013, the state issued marriage licenses to same-sex couples; the Supreme Court allowed the state to cease in January 2014, but when the Court turned down Utah's appeal in October 2014, Utah immediately returned to issuing marriage licenses to same-sex couples all over the state. Should clerks who did not want to issue such licenses have to do so? Would some offices then be unable to process the lawful claims of LGBT couples? These matters demanded legislative or gubernatorial attention.

In December 2014, on the eve of the 2015 session of the Utah Legislature, Senator Urquhart addressed the GOP caucus (holding twenty-five of the twenty-nine seats in the chamber). He laid out the case for an anti-discrimination bill; his colleagues listened respectfully, but no one felt that the bill had any chance of enactment. That feeling started to change on January 22, 2015, when a representative of the LDS Public Affairs Committee contacted the Senate leadership, alerting them that the Church was prepared to endorse anti-discrimination legislation. At a press conference on January 27, 2015, Elders Dallin Oakes, Jeffrey Holland, and Todd Christofferson, as well as Sister Neill Marriott (Second Counselor of the LDS Young Women General Presidency), announced their support for state and federal legislation barring job and housing discrimination because of sexual orientation or gender identity, provided there are sufficient allowances for religious liberty. The public endorsement by prominent LDS leaders made it much more likely that state anti-discrimination legislation would be enacted, so long as it contained sufficient allowances for religious freedom, a process in which Professor Robin Fretwell Wilson of the University of Illinois was instrumental.<sup>183</sup> As I understand it, negotiations between Equality Utah, the LGBT group, and Republican legislators also included discussions with LDS leaders and representatives. At one or two points, the Church broke logjams by encouraging the legislators to accommodate LGBT concerns.<sup>184</sup>

For the most remarkable example, an early draft of S.B. 296, the anti-discrimination bill, would have created a special, separate set of protections for sexual and gender minorities, as well as a special, separate set

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182. See *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah Dec. 20, 2013), motion for stay pending appeal, 2013 WL 6834634 (D. Utah Dec. 23, 2013), reversed on the stay issue, 134 S. Ct. 893 (2014).

183. Stephanie F. Ward, *States Deal with Religious and Gay Rights in the Wake Of Same-Sex Marriage Ruling*, A.B.A. J. (Sept. 1, 2015), [http://www.abajournal.com/mobile/mag\\_article/states\\_deal\\_with\\_religious\\_and\\_gay\\_rights\\_in\\_the\\_wake\\_of\\_same\\_sex\\_marriage](http://www.abajournal.com/mobile/mag_article/states_deal_with_religious_and_gay_rights_in_the_wake_of_same_sex_marriage).

184. Every legislator I talked with said that endorsement by the LDS leadership created a political climate where the anti-discrimination law was possible and desirable. No legislator admitted that the Church intervened directly, but other participants in the legislative process assured me that LDS representatives did so at critical junctures.

of religious conscience allowances. This was normal “red state” politics. At the same time Utah was considering its anti-discrimination law, the Indiana legislature and governor were adopting a religious freedom law, clearly aimed at diluting local ordinances protecting sexual and gender minorities. The Indiana law provoked a national backlash, but Utah Republicans felt that their approach was totally different, as they were willing to create a statewide set of protections as well as religious conscience allowances. Equality Utah insisted that this “separate but not equal” approach was no more acceptable than the Indiana approach—and LDS leaders as well as academic experts quietly backed them up, completely behind the scenes. The Utah Senate leadership immediately revised the bill to integrate sexual orientation and gender identity into the state’s existing anti-discrimination statute.

Under ferocious time pressure and frequently misunderstanding one another because of missed communications, the GOP leadership, LDS administrators and some leaders, and Equality Utah worked out all of the arenas of dispute. One final bone of contention was the Senate leadership’s and Professor Wilson’s work on a separate piece of legislation, S.B. 297, that created a structure for local marriage license bureaus to handle applications for same-sex as well as different-sex couples, but with accommodations for clerks who did not want to participate, for reasons of conscience. This was a mutually acceptable policy—but S.B. 297 also contained provisions barring the government from penalizing persons or institutions who violate S.B. 296 because of their religious faith. Most provocatively, S.B. 297 would have protected counselors engaged in hated (and professionally discredited) sexual orientation “reparative therapy” from losing their licenses. When Equality Utah first obtained a copy of S.B. 297, on March 6, 2015, its leaders and legislative allies went ballistic. These provisions were deal-killers for S.B. 296 as well as S.B. 297. Late in the legislative session, this might have been the end of the Utah Compromise—but apparently some gentle pressure or mediation from LDS staffers or leaders (or both) persuaded the GOP leadership to drop the offending provisions. Both S.B. 296 and S.B. 297 sailed through the Utah Legislature, with conservative Mormon Republicans taking the lead and providing moving accounts of their “conversion” to support an anti-discrimination measure.

On March 12, 2015, Utah Governor Gary Herbert signed S.B. 296, the Antidiscrimination and Religious Freedom Amendments to the state anti-discrimination code.<sup>185</sup> (The governor also signed S.B. 297 into law at the same time.) As noted in the introduction, the law combines job and housing protections for sexual and gender minorities with liberal allowances for religious persons and institutions. Although vigorously criticized by less compromising supporters of traditional marriage and of LGBT rights, the 2015 legislation has largely been hailed on both sides as a step forward. It is the first time a Republican-controlled legislature and

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185. S.B. 296, 61st Leg., Gen. Sess. (Utah 2015).

governor have adopted a law protecting LGBT people against discrimination—and LDS was responsible for motivating those GOP converts. Three cheers for the Utah legislature and governor, the LDS leadership and staff, and Equality Utah and its political allies.

*Step Three. Doctrinal Shift.* Notwithstanding these remarkable developments, no one is saying that the Mormon theology of the gendered family, outlined in Part I, has changed or is going to change anytime soon. Indeed, the June 29, 2015 Letter from the First Presidency, responding to *Obergefell*, explicitly reaffirmed the precepts contained in President Hinckley's *Proclamation*. And the November 2015 changes to the Church's Handbook for local congregations give the LDS's theology of the gendered family an unexpected bite that highlights the normative gulf between the Church of Jesus Christ of Latter-day Saints and Equality Utah. These reaffirmations are strong evidence that LDS support for anti-discrimination measures is not a preface to a gradual but complete doctrinal reversal, as had been the case after the 1963 LDS support for laws banning race discrimination. Do the reaffirmations also suggest that the Church will never soften its doctrine on LGBT families?

Not necessarily. As documented by Mormon historians such as Lester Bush, official doctrinal reaffirmations over many decades do not necessarily entrench doctrine in the LDS Church. Thus, church leaders confirmed the exclusion of persons of African descent from the priesthood repeatedly between 1908 and 1949—while at the same time making practical accommodations compromising that policy at the local level.<sup>186</sup> After 1949, sentiment for change within the LDS Church grew significantly. Because of the collective nature of its leadership, change comes slowly to LDS theology and doctrine, and it took more than thirty years for the Church to formally abandon the priesthood ban.

President Spencer Kimball's son reports the following reasons why his father and the First Presidency abandoned this doctrine in 1978:

- “The American conscience was awakened to the centuries of injustice against blacks; the balance had tipped socially against racism and toward egalitarianism.”<sup>187</sup> This shift created social pressure against the traditional LDS ban, social pressure keenly felt by a new generation of LDS leaders (such as Spencer Kimball).
- The Church's commitment to international missions pushed LDS outreach into regions with large African populations (like Brazil), as well as into Africa itself.
- “Study by General Authorities and independent scholars weakened the traditional idea that Joseph Smith taught priesthood ex-

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186. For example, when it learned that priests in Hawaii with one-eighth African blood were performing baptisms, the Quorum of the Twelve Apostles dispatched a representative to correct the situation but directed him to retrospectively authorize the baptisms if they were numerous. See Bush, *supra* note 143, at 87–88.

187. Kimball, *supra* note 149, at 43–44 (quoting one of the seven reasons why the Kimball First Presidency revoked the priesthood ban, reasons that I have boiled down to three in text).

clusion and cast a shadow on the policy's purported scriptural justifications."<sup>188</sup>

The first of these reasons is very similar to the reason the Church opened up a dialogue with Equality Utah. The second reason cuts the other way in the current debate, as Africa and other situses of Mormon missionary work would in the short and medium term be repelled by LDS embrace of marriage equality for LGBT persons.

The third reason, perhaps surprisingly, might have some resonance in the current debates. There are reports from Mormon historians that the LDS founding Prophet, Joseph Smith, was more accepting of same-sex intimacy and some kind of marriage or union than the twentieth- and twenty-first century Church has been. Thus, Mormon historian D. Michael Quinn reports that Joseph Smith tolerated the notorious "sodomite" John Bennett and made him an assistant to the Presidency, before Bennett's disgrace and excommunication from the Church. Joseph Smith was famously intimate with other men, once referring to himself as "married" to his beloved young secretary, Robert Thompson, and frequently encouraging young men to sleep together in an intimate embrace.<sup>189</sup> Mormon dissident Antonio Feliz claims that Joseph Smith "sealed" male couples into eternal companionship, a practice that Quinn believes was more like a father-son adoption than a marriage ceremony.<sup>190</sup> But these and other historians do agree that the founding Prophet did "seal" male couples.

In short, there are a great many parallels between the rise and decline of Mormon race-based exclusions and the rise and possible decline of Mormon gender-based exclusions. If LGBT families and same-sex marriage continue their process of social entrenchment in this country, is it possible that the next generation of LDS leaders (perhaps the First Presidency in 2045) would revisit the "same-gender" marriage issue, similar to the manner in which the First Presidency revisited the race issue a generation after the end of World War II? I showed drafts of this article or of this suggestion to more than a dozen Mormon readers. Every reader over the age of fifty considered the possibility preposterous (though none used such abrasive language), and almost every reader under the age of fifty considered it plausible and, for most of them, a good thing for the Church.

Start with the skeptics. Mormons, especially older ones with standing in church circles, are quick to observe that their Church's previous

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188. *Id.* at 44.

189. See D. MICHAEL QUINN, SAME-SEX DYNAMICS AMONG NINETEENTH-CENTURY AMERICANS: A MORMON EXAMPLE 89, 136, 266-68, 408-12 (1996) (judicious account by a Mormon historian of Prophet Joseph Smith's tolerance of what today would be considered homoerotic attachments).

190. Compare ANTONIO A. FELIZ, OUT OF THE BISHOP'S CLOSET (1988) (claiming that Joseph Smith "sealed" male couples in a tacit recognition of their eternal intimacy), with QUINN, *supra* note 188, at 136-40 (providing a tamer account of the "sealed" male couples as more like an adoption than a marriage).



doctrines on racial exclusion were far from central to the LDS faith, while their gendered theology of the family is more central to its faith tradition (and to many other faith traditions). Their view is well-founded. As we saw in Part I of this article, the gendered family is central to Mormon cosmology, which distinctively understands God as a Father and a Mother, with us (human beings) as their progeny. Because the race-based priesthood exclusion was never as central to Mormon doctrine as the gendered understanding of marriage is, older Mormons tend to believe that the LDS definition of marriage simply cannot ever change.

This last point is not as persuasive to me, as the LDS definition of marriage has in fact changed. The most famous change was the 1890 Revelation to President Woodruff and his First Presidency that revoked God's approval of polygamy as a worthy family structure. Scholars of LDS history have argued, persuasively, that the Church endorsement of polygamy was, even at its peak, a policy in conflict with other values. Church historian Eugene England, the descendant of polygamists, defends the original Revelation as a good thing for the growth of the early Church but defends the Revelation of 1890, in part because polygamy is in conflict with "a theology of absolute and equal fidelity between a man and a woman as the basis for sexual morality, marital happiness, eternal increase, and, in its fullest implications, for godhood itself, the creative power that makes all existence possible."<sup>191</sup> I have no insight into why God's Will has required the Church marriage policy to evolve, but the marriage policy certainly has evolved. Has its evolution been univocally in the direction of one-man, one-woman marriage as the only foundation for a family? Not quite.

More recently, LDS doctrine has shown itself remarkably adaptable to modern changes in family structure—especially the rise of single-parent families. The LDS advice to single parents is not that they are "apostates" or that their children should "disavow" their "lifestyles." In light of the *Proclamation* and LDS doctrine, the Church's counsel is rather generous: "Because of a variety of circumstances, including death, divorce, and separation, many Church members find themselves in single-parent families. Regardless of their family situation, all Church members are entitled to receive all the blessings of the gospel of Jesus Christ."<sup>192</sup>

To be sure, the traditional LDS advice to women who become pregnant outside of wedlock is, first, to marry the father and, failing that, to arrange an adoption through the LDS Family Services or an equivalent agency.<sup>193</sup> This policy has come under heavy fire as not in the best interests of children or the mental health of mothers who hate giving them

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191. England, *supra* note 17, at 143.

192. Church of Jesus Christ of Latter-day Saints, *Single-Parent Families*, LDS.ORG (2006), [www.lds.org/topics/single-parent-families?lang=eng](http://www.lds.org/topics/single-parent-families?lang=eng).

193. LDS Family Services, *Adoption and the Unwed Mother*, ENSIGN (Feb. 2002) available at [www.lds.org/ensign/2002/02/adoption-and-the-unwed-mother?lang=eng](http://www.lds.org/ensign/2002/02/adoption-and-the-unwed-mother?lang=eng) (summarizing LDS policy, reaffirmed by the First Presidency in 1998).

up for adoption. Some Mormon mothers keep their children and raise them within the Church. More important, the Church does not punish the children and does not call upon them to “disavow” their mothers in order to be baptized. (This new policy might have accompanied the November 2015 slap at gay and lesbian households but apparently was not the intent of the LDS leadership.) Instead, the LDS Handbook invites unwed mothers to join the Relief Society, the society for Mormon women, and to participate in religious activities. In 2012, Elder David Baxter, who was raised by a single mother, admonished local congregations that they need to focus on the well-being of the single-parent family—the mother and the children—rather than pronouncing judgments on these children of God.<sup>194</sup>

Unlike my older Mormon readers, I do not consider LDS marriage doctrines to be written in stone. Like many of the younger Mormon readers, I believe that LDS marriage doctrines will change in the next generation but do not know exactly how those doctrines will change. Perhaps the Church will move toward a treatment of lesbian and gay families similar to its treatment of single-parent families. Perhaps the Church will, in a distant decade, recognize same-sex “marriages” under some kind of euphemism or will simply recognize the marriages without sealing them. Maybe the Church will even “seal” them, as Prophet, Joseph Smith allegedly did in the nineteenth century. Overall, I think that a faith tradition populated so many highly educated and morally sophisticated people will respond in a positive way to the social pressures of the new American families, including LGBT families.

But what of the 1995 *Proclamation*? My older LDS readers insist that this foundational document will not be displaced anytime soon. Surely, they are right—but does that mean it will not be reinterpreted? Even now, I doubt that the *Proclamation* is read in ways that cast aspersions on Mormon families that do not conform to traditional stereotypes. For example, it appears that many local congregational leaders will not readily chastise or correct Mormon families where the wife works outside the home and the husband assumes most of the domestic duties (both contrary to a literal reading of the *Proclamation*). Indeed, when I ask younger Mormon husbands whether they are risking apostasy by “allowing” or “acquiescing in” their wives’ fulltime careers outside the home, they think I am joking. When I refer to language in the *Proclamation* (which most have framed in their homes), they reject my reading as “off the wall.” Surely, many Mormon families read the *Proclamation* to require stricter gender roles within the family; my point is that many do not, and it would be insanity for the Church to insist that everyone follow

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194. See Jane Edwards, *Has the LDS Church Changed Its Policies on Adoption?*, [Birth Mother] FIRST MOTHER FORUM (Sept. 29, 2013), <http://www.firstmotherforum.com/2013/09/has-lds-church-changed-its-policies-on.html> (reporting LDS tolerance for unwed mothers and describing Elder Baxter’s supportive address).

the strictest reading of the *Proclamation*. Like other LDS documents, the *Proclamation* is already being interpreted dynamically and pluralistically.

It is inevitable that the Church's gendered theology of the family will evolve, and it is probable that the theology will change substantially. Even now, there is an intense discussion within the Church as to whether or not President Hinckley's *Proclamation* has the status of Revelation or Scripture or whether it is instead just a statement of LDS policy.<sup>195</sup> (There was no serious question whether President Brigham Young's declaration on the status of African Americans was a Revelation.) Previous presidential proclamations have not been considered canonical, and like them President Hinckley's *Proclamation* has not been added to the *LDS Doctrine and Covenants*. (The 1978 Revelation on African integration was promptly added to *Doctrine and Covenants*.)<sup>196</sup>

At the very least, the *Proclamation* can be supplemented through interpretation and through subsequent proclamations. For example, even though President Brigham Young's 1849 Revelation held that persons of African descent were an inferior race and that their marriages could not be "sealed" in the Temple, the Church recognized marriages for Mormons of color, and it is likely that such marriages were quietly honored in many congregations. Today, LGBT Mormons are accepted in many congregations. In some congregations, they are probably accepted as couples, a practice that may be disrupted by the November 2015 changes in the Handbook. Indeed, on the day Proposition 8 was approved, Elder Clayton asserted that LDS does not oppose "civil unions" and "domestic partnerships" that provide insurance benefits and property rights for same-sex partners.<sup>197</sup>

If the number of LGBT Mormons married to someone of the same sex proliferates in Utah and other Mormon-populated states, and if those couples raise children responsibly and lovingly, I would be very surprised if there were not new Salt Lake City letters, handbooks, or proclamations creating space for parenting and committed relationships that are not gender-differentiated. In other words, if a new generation of Mormons (straight and gay) comes to believe that gender differentiation is not absolutely essential for rearing children and for good parenting, then I do not see why the LDS leadership would not distance the Church from the strong emphasis on gender differentiation found in the *Proclamation* (and in many other church documents as well). Indeed, future LDS letters, handbooks, and proclamations might focus more on the importance of committed married parents and less on the need for the parents to be one man and one woman. At some point, LDS leaders might announce a new doctrine or even a new Revelation from the Lord about a wider

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195. See Dave Banack, *Policy or Revelation?*, TIMES AND SEASONS (Jan. 14, 2016), <http://timesandseasons.org/index.php/2016/01/policy-or-revelation/>.

196. See *Race and the Priesthood*, *supra* note 155.

197. Carrie A. Moore, *LDS Official Lauds Work for California's Proposition 8*, DESERET NEWS (Nov. 6, 2008, 12:00 AM), <http://www.deseretnews.com/article/705260852/LDS-official-lauds-work-for-Californias-Prop-8.html?pg=all>.

generosity of God's favor toward committed couples of all sorts, including lesbian and gay couples.

Is there not another path that the Church might follow? In the wake of *Roe v. Wade* and the abortion choice social movement, some faith traditions became *more* dogmatic about this issue and bolstered their doctrinal pro-life armament. Indeed, Latter-day constitutionalism discussed in this article is an example of this phenomenon.<sup>198</sup> Mormon doctrine was opposed to abortion before 1970, but that moral issue has assumed a great deal more prominence since 1970. Once abortion became a prominent moral issue, church leaders created reams of official statements, sermons, and speeches condemning abortion (except in cases of rape or incest, serious jeopardy to the life or health of the mother, or medical determination that the fetus is so impaired that the baby would probably not survive beyond birth).<sup>199</sup> It appears that our constitutional culture allowing abortion choice has not driven a parallel change in LDS doctrine or practice and, if anything, may have intensified Mormon opposition to abortion choice. It also appears that Latter-day constitutionalism may have affected the larger constitutional culture more than vice-versa, as the Supreme Court has steadily retreated from strong protections for abortion choice and is now closer to LDS doctrine than it was forty years ago.<sup>200</sup>

Is it possible that LDS doctrine and practice regarding lesbian and gay families will follow the *abortion* trajectory rather than the *race* one? Yes. For example, it is possible that the Church will reach a different resolution regarding LGBT people than the one regarding people of color. Perhaps the current doctrine is the stopping point: No one should be mean to LGBT people, and the government should not discriminate against them. But within the LDS faith tradition, such people are sinners if their sexual and gender behaviors do not conform to the divine plan that was sealed when God created them (premortal men and women, genders lasting for an eternity). Same-sex "married" couples are "apostates." LGBT persons wanting relationships outside their gender roles will have to go elsewhere for their spiritual sustenance. The LDS Church will remain a haven for persons of faith who believe in traditional gender roles. This is a sorting process that characterizes American religious pluralism: There is a faith community for almost everyone. Does the Church of Jesus Christ of Latter-day Saints want to be one of the faith communities where LGBT persons (and their larger families) are not welcome?

This self-segregation is a plausible strategy but is at odds with the sociology of a religion that is highly evangelical and cosmopolitan.

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198. Indeed, the leading LDS document, President Hinckley's *Proclamation on the Family*, was probably produced in response to the possibility of same-sex marriage in Hawaii.

199. LINDA GREENHOUSE & REVA B. SIEGEL, *BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING 69-79* (2012) (detailing the various religious groups that spoke against abortion).

200. See e.g., *Carhart v. Gonzales*, 550 U.S. 124 (2007) (upholding a federal ban on "partial-birth abortion").

Moreover, there is an internal tension within the Mormon focus on the family, once you consider the phenomenon of “pop up homosexuals,” or children who unexpectedly turn out to be LGBT. LDS parents and leaders who believe that “same-gender attraction” is a matter of choice are deeply misguided. LGBT children of Mormon husband-wife marriages are not going to become straight because their Church or their parents tell them this is God’s sexual orientation and ought to be theirs, and most of those children will want families of their own. Many of these children will have to leave the Church—but given the LDS commitment to the whole family, this process is going to drive some devout parents from the Church as well. Their stories of pain and alienation are going to roil many LDS faith communities. These internal tensions will become more powerful if young straight Mormons have friends, teachers, mentors, and relatives who are LGBT and come to see their Church as bigoted or cruel to people they love.

That LGBT people are coming out all over the place creates a big contrast between the trajectory of LGBT relationships and abortion. At the same time that women choosing abortion have been retreating into the closet,<sup>201</sup> gay Mormons and Mormon women working outside the home have been coming out of their closets. The more the Church is populated with wives working outside the home, husbands doing domestic work, and lesbian and gay congregants together with their extended families, the more internal pressure the Church will feel to soften doctrine and, ultimately, change it. With the media and society (including Utah) offering positive role models for LGBT youth, including Mormon youth, this is a human issue that will continue to press the Church.

Consider an LDS analogy.<sup>202</sup> Young Mormons are expected to devote two years to missionary work, and the Church provides them extensive advice and training for their mission to educate, persuade, and convert people of all backgrounds all over the world to their faith. When you proselytize, the most effective strategy is to share your own “conversion story,” how you came to understand the Lord’s Truth. Thousands of Mormon families with lesbian or gay children, siblings, and cousins are sharing conversion stories like these with their congregations, with local lay leaders, and with LDS leaders in Salt Lake City. The conversion stories are of the following sort: Some LDS leaders and documents have advised that “same-gender attraction” is just an immature passing fad or a perversion inspired by Satan, but my son/daughter is a good person whom God has created with love in his/her heart for persons of the same gender/sex. My gay/lesbian child did not choose this way of being, and I cannot stop loving this child the way God has created him/her. For all my life, I have accepted the Church’s preaching that “homosexual marriage”

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201. See Colette Brown, *Why Abortion is Still the Secret that Women Won't Reveal to Their Friends*, INDEPENDENT (May 3, 2014), <http://www.independent.ie/opinion/columnists/colette-browne/why-abortion-is-still-the-secret-that-women-wont-reveal-to-their-friends-30063406.html>.

202. This analogy was suggested to me by Eduardo Lopez-Reyes, a devout married Mormon who advocates within the Church for openness to LGBT persons and their committed relationships.

is satanic and unnatural, but now that I have raised a child who is a lesbian or gay adult, I can no longer accept that doctrine. Does the Church insist that I choose between my son/daughter and God?

When lifetime Mormons, often going back several generations, provide conversion narratives such as this one, is it right for church officials and lay leaders to pretend that these Mormon parents and their beloved children can just grit and bear the unfortunate truth of God's Will, that homosexuality is "apostasy" or something evil? If the Church was so wrong for more than a century about God's Will on matters of race, is it not possible that the Church is misinterpreting God's Will on matters of sexuality and gender? Millennial Mormons (straight as well as gay) are very open to these stories. And in several decades they will be the elders running the Church.

### C. *Family and Constitutionalism*

The final and perhaps the most important lesson from the foregoing case study involves the relationship between the American family and our constitutional culture. Latter-day constitutionalism makes the family central to religious belief and to the public culture that religion wants to support and influence. This is an old-fashioned way of understanding public culture and governance, but it retains a great deal of its power. For the USA, as for the LDS, family has traditionally been central to constitutionalism, and *Obergefell* illustrates how it remains so.

Allow me to start with an elementary but fundamental point. "Family" is a governance structure, for most people the most important governance structure of their lives. It is a structure where most of us are both the governed (when we are minors) and the governors (when we are parents or caregivers). Political philosophers such as Rousseau and Hegel have emphasized that the family (especially the marriage-based family) has the potential to create conditions for the flourishing of the community or the state, by inculcating in the next generation the moral, emotional, and even intellectual capacities of individual agency within a structure requiring self-sacrifice.<sup>203</sup> No one knows exactly how important the link is between family and the State, nor is there consensus about precisely what kind of "family" conduces toward a healthy state. But the link between family and state governance remains intuitive—and it saturates American constitutionalism. One reason why Latter-day constitutionalism is so interesting and so important is that it explicitly makes family central to public norms and highlights the many ways in which the United States has done so as well.

For example, "family" is famously at the center of our national understanding of the right to privacy. Although Louis Brandeis's famous

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203. On the Hegelian case for family as the foundation of civil society and the state, see the excellent analysis and thoughtful application in Maura I. Strassberg, *Distinctions of Form and Substance: Monogamy, Polygamy, and Same-Sex Marriage*, 75 N.C.L. Rev. 1501, 1523–57 (1997).

article propounding a right of privacy focused on unwanted publicity, the constitutional right of privacy for more than a hundred years has focused on family—marriage, parental rights, child-rearing and education, contraception, abortion, and even sodomy.<sup>204</sup> Not only are privacy rights important for individual Americans, but they have typically been at the center of social movement campaigns for equal citizenship. Thus, the civil-rights movement did not win complete formal equality under the Constitution until *Loving v. Virginia* ended state bans on interracial marriage, and the gay rights movement won its greatest constitutional victory in *Obergefell*.

With Justice Kennedy's opinion for the Court in *Obergefell*, family also assumes a central place in the Court's jurisprudence of due process "liberty" (the new and broader home for privacy doctrine). "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity."<sup>205</sup> Within this broad framework, Justice Kennedy situates "marriage" as central rather than fading. In its most heartfelt passages, his opinion for the Court argues that marriage for LGBT people, just as for straight people, is the choice Americans make that seeks to advance their possibilities for individual flourishing, for interpersonal connection, and for raising children.<sup>206</sup> Although Latter-day constitutionalism vigorously opposed the holding of *Obergefell*, much of its discussion about the governance values of marriage could have been penned by Mormon theologians.

Latter-day constitutionalism makes clear that equal citizenship for women is all about family in a deep and pervasive way. From a liberal point of view, the deepest roots of sexism stem from the gendered marital role of women as childbearing and domestic, and liberals read the Court's sex discrimination jurisprudence as assuring women freedom to structure their familial relationships. Hence, contraception and abortion are, properly, equal protection as well as liberty issues, as Justice Ginsburg has argued.<sup>207</sup> From the LDS point of view, in contrast, women's, or anybody's, equal citizenship does not allow them to take a human life, nor ought the Equal Protection Clause be interpreted to *encourage* women to avoid their familial destiny (i.e., procreative marriage).

Similarly, Latter-day constitutionalism reveals ways in which the First Amendment pervasively involves conceptions of the family. Today, the Free Exercise Clause's protection for religious minorities, such as the

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204. On the family-based (as well as other) dimensions of the privacy right, see Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335 (1992); cf. Louis Brandeis & Samuel Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (informational privacy). In *Lawrence v. Texas*, 559 U.S. 558 (2003), the Supreme Court protected gay people's liberty to engage in consensual sodomy—a decision that *Obergefell* read as paving the way for marriage equality.

205. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015).

206. *Id.* at 2598–2602.

207. See generally Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985).

Mormons, often involves the minority's understanding of the family.<sup>208</sup> Justice Kennedy's *Obergefell* opinion assured religious parents believing traditional marriage is the only valid form of family, that they would have every right to raise their children in their faith tradition, including homeschooling if they choose.<sup>209</sup> Does the First Amendment or the Due Process Clause *also* provide constitutional protection for parents who want to shield their children from public school instruction inconsistent with their denomination's theology of the family? Justice Kennedy's opinion provides no assurances here, nor could it, as a practical matter.

In this way, Latter-day constitutionalism represents a persuasive framework at odds with the Court's opinion and consistent with Justice Alito's dissenting views: Nationwide marriage equality will impose pressure on parents' different understanding of family, because their children will see contrary images (namely, LGBT families) in the media, in their communities, and in the classroom. If same-sex marriage is pervasive in society and accepted by much of society, how can a traditionalist parent prevent her or his child from engaging with this expanded understanding of marriage and family?

The best illustration of the First Amendment implications of Latter-day constitutionalism is, of course, *Boy Scouts of America v. Dale*,<sup>210</sup> where the Supreme Court protected the LDS-inspired gay scoutmasters exclusion by a private organization (the Boy Scouts of America) against a state anti-discrimination law. *Dale* is the Court's leading case on the First Amendment's right of expressive association—and it is centrally a case involving parental concerns about gay role models for their children (the LDS concern, outlined in Elder Oaks's *Principles*). But even *Dale* is a cautionary tale. In the wake of the Boy Scouts' constitutional victory, the organization faced an escalating social backlash, both within local troops and from outside scouting. In July 2015, the Boy Scouts voted to allow openly gay scoutmasters, but with local sponsoring organizations controlling those appointments. The LDS Church and the Roman Catholic Church sponsor the largest number of local scout troops (by a large margin), and both have agreed to the local option compromise, for the time being.

The centrality of family to American constitutionalism is even deeper, as revealed by Latter-day constitutionalism. To liberals, the most striking thing about the Mormon theology of the family is its potentially anti-liberal gendered feature—but to Mormons themselves the most striking thing (after its divine inspiration) is its communitarian feature, the emphasis on each spouse's dedication of her and his energies to ad-

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208. See *e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *cf.* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014) (interpreting the federal Religious Freedom Restoration Act to protect a close corporation's refusal to provide health benefit coverage for medicines its owners considered "abortifacents" and thus antithetical to their faith tradition).

209. *Cf. Yoder*, 406 U.S. at 236 (allowing Amish parents to homeschool their children, so that they would not be exposed to secular influences inconsistent with their faith tradition).

210. 530 U.S. 640 (2000).



vancing the human race by procreation and then advancing the interests of their children through constant self-sacrifice.<sup>211</sup> Each perspective on the LDS theology of the family provides deep insights about larger constitutional issues.

Start with the liberal perspective. Latter-day constitutionalism reveals, more starkly than most other constitutional discourse, the interaction of sexuality, gender, and the law. Recall Elder Oaks's central theological objection to marriage equality for LGBT persons in 1984: "Homosexual marriages are wholly deviant to the patriarchal family."<sup>212</sup> From a liberal point of view, this is an argument *in favor of* marriage equality, a point suggested by *Obergefell's* linkage of gay people's freedom to marry with the feminist critique of traditional marriage rules (such as coverture) and with the Court's sex discrimination jurisprudence.<sup>213</sup> The Mormon theology of the family makes clear that the stakes of the marriage equality debate involve *both* sexuality *and* gender—and that the two features are related. That is, a deep normative objection to homosexual intimacy is that it is intrinsically nonprocreative and is inconsistent with the supposed centrality of gender differentiation to intimate relationships (and beyond).<sup>214</sup>

Looking forward, gay and lesbian persons or groups will be challenging discriminatory policies under the Equal Protection Clause. Because its holding rests upon the fundamental right to marry, *Obergefell* neither requires nor prohibits heightened equal protection scrutiny for lower court evaluation of state sexual orientation discriminations. Because the Court treats sexual orientation as a policy-neutral and natural trait and acknowledges government mistreatment of sexual minorities in the past, *Obergefell* will be cited in support of heightened scrutiny for sexual orientation classifications. LGBT advocates should make this pitch for heightened scrutiny—but should at the same time make a pitch that most discriminations affecting this group are also sex discriminations, the argument for LGBT rights that Professor Andrew Koppelman has been flagging for more than two decades and that has now been accepted by the EEOC as the grounds for interpreting Title VII to bar job discrimination against gay as well as transgender employees.<sup>215</sup>

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211. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015) (Scalia, J., dissenting) (adverting to the liberty-sacrificing features of marriage).

212. OAKS, *supra* note 62, at 18 n.\*.

213. *Obergefell*, 135 S. Ct. at 2595–96, 2603–04; see Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9 (1991) (arguing that marriage equality for LGBT persons will, as a formal matter, undermines traditional gender roles).

214. For an influential statement of the deep links between homophobia and sexism, see Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, reprinted in BLOOD, BREAD, AND POETRY: SELECTED PROSE 23–75 (1986).

215. Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994). Sex discrimination arguments have already been successful for transgender persons, e.g., *Macy v. Holder*, EEOC Doc. 0120120821, 2012 WL 1435995, \*1 (2012), and are now becoming successful for lesbian and gay persons—e.g., *Complainant v. McHugh*, EEOC DOC 0120133395, 2015 WL 1607756, \*1 (2015).

A further lesson of Latter-day constitutionalism is that a great deal of post-*Obergefell* discrimination now will be *relational*: Public as well as private employers and other institutions will be said to discriminate by not recognizing same-sex relationships on the same terms they recognize different-sex relationships.<sup>216</sup> For example, the LDS's Brigham Young University does not offer married student housing to same-sex married couples (including couples married in Utah), though it does offer university housing to different-sex married couples and to single lesbian and gay students.<sup>217</sup> So the discrimination is not that gay people cannot secure student housing—but is instead that gay students in a same-sex marriage cannot secure such housing under circumstances where straight married student could do so. This discrimination, by the way, does not violate the new Utah anti-discrimination statute, which exempts student housing from its coverage<sup>218</sup>—but it might violate Title IX, a federal statute barring universities receiving federal funds from discriminating on account of sex.<sup>219</sup>

In contrast to the foregoing analysis from a liberal perspective, consider the communitarian perspective, which is a great contribution of Latter-day constitutionalism. LDS theology rests upon the authority of Scripture and Revelation, but is also offered as a vision of marriage and family grounded in sound public policy.<sup>220</sup> The Mormon theory of the family is rooted in the norm of self-sacrifice for the benefit of others (the family itself as well as the larger community): Backed up by religious, social, and state sanctions, marriage is a commitment mechanism, whereby the spouses each give up personal freedoms in order to create a public good—procreation that perpetuates the human race, and then rearing the procreated children in an environment that provides a time-tested good structure for them. Contrary to the Supreme Court's depiction of a right to marry as resting upon and enhancing *freedom* and *liberty*, the Mormon theory of marriage rests upon *responsibility* and *duty* and is liberty-sacrificing.<sup>221</sup> In my view, you cannot understand “marriage” without

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216. On relational discrimination, see Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CALIF. L. REV. 1169 (2012).

217. Barbara Christiansen, *BYU Doesn't Anticipate Changes from Same-Sex Marriage Ruling*, DAILY HERALD (June 26, 2015, 3:20 PM), [http://www.heraldextra.com/news/local/education/college/byu/byu-doesn-t-anticipate-changes-from-same-sex-marriage-ruling/article\\_238e3c42-2e7a-56a5-9259-6b3b4a8898b6.html](http://www.heraldextra.com/news/local/education/college/byu/byu-doesn-t-anticipate-changes-from-same-sex-marriage-ruling/article_238e3c42-2e7a-56a5-9259-6b3b4a8898b6.html).

218. UTAH CODE ANN. § 57-21-5 (West 2015).

219. Likewise, BYU's Honor Code might violate Title IX. The BYU Bulletin summarizes the Honor Code in this way: “One's stated same-gender attraction is not an Honor Code issue. However, the Honor Code requires all members of the university community to manifest a strict commitment to the law of chastity. Homosexual behavior is inappropriate and violates the Honor Code. Homosexual behavior includes not only sexual relations between members of the same sex, but all forms of physical intimacy that give expression to homosexual feelings.”

220. See *United States v. Windsor*, 133 S. Ct. 2675, 2711 (2013) (Alito, J., dissenting) (maintaining that DOMA adopts a traditional “conjugal” understanding of marriage, rather than an individual choice understanding).

221. *Accord*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2630 (2015) (Scalia, J., joined by Thomas, J., dissenting).

apprehending both the Court's liberal view and the LDS's communitarian view.

The Mormon theory of *virtuous families* is communitarian in its focus—and stands in striking contrast to *Obergefell's* individualist focus on *hedonic families* formed to maximize spousal happiness.<sup>222</sup> Thus, the deep LDS critique of Justice Kennedy's opinion for the Court would be that its focus on individual *liberty* is wrong; the essential point of marriage is not so much libertarian as it is liberty-sacrificing. As the four *Obergefell* states argued, the reason they vest marriage with so many benefits and rewards, as well as limits on spousal liberties, is that procreative marriage serves society in a big way. An underemphasized feature of the LDS theology is the notion that gendered marriage contributes to the possibility of unselfish, liberty-denying conduct on the part of spouses in ways that nongendered marriage does not.

I am not persuaded by this claim, in part because the lesbian and gay couples who have sought the right to marry have been models of self-sacrifice and community-building. For example, April DeBoer and Jayne Rowse, the Michigan couple in *Obergefell*, are raising five adopted children in a female household that is the epitome of the virtuous family. The Mormon theology of the family maintains, primarily, that this set-up does not reflect the will of God; as Elder Oaks's *Principles* articulated, however, the Church understands that divine command is not the kind of secular argument that judges can credit. As reflected in *Principles*, the Church supports what Elder Oaks called "patriarchal marriage" (not the best term anymore) as the structure that best serves children, society, and even the liberty-sacrificing spouses.

I do not believe that gender differentiation is, overall, the big variable that makes virtuous, nurturing families more likely. Nor is there professionally accepted, systematic evidence that gender differentiation is the big variable. As Professors June Carbone and Naomi Cahn argue from nationwide data, education and wealth are more likely to be key variables for the flourishing of a stable marriage or family unit, and the gender differentiation undergirding much "red state" family law has no empirical correlation to family success.<sup>223</sup> As with most issues of family law, however, the empirical evidence is far from conclusive that the Mormon view is wrong—and LDS-dominated Utah is the reddest of the red states, codifies the precepts of traditional marriage more than almost

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222. Cf. KATH WESTON, *FAMILIES WE CHOOSE* (1993).

223. NAOMI CAHN & JUNE CARBONE, *RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE* (2010) (arguing through demographic evidence that "blue state" [hedonic model] families are more stable than those in "red states" [theological models]); see also W. Bradford Wilcox & Nicholas Zill, *Red State Families: Better than we Knew* AM. ENTER. INST. (June 11, 2015), <https://www.aei.org/publication/red-state-families-better-than-we-knew/> (demonstrating that many red states have stable families and suggesting that the key variable is educational level).

any other state,<sup>224</sup> and enjoys a flourishing family culture<sup>225</sup> (though one increasingly riven by anxieties by and about gay Mormon youth).

So Latter-day constitutionalism poses a set of empirical questions that might be explored in the wake of *Obergefell*. Just as I think that marriage equality will work out fine in Utah and other states and that there will be a lot of couples like DeBoer and Rowse who do a splendid job raising their families, so dedicated LDS and other researchers might investigate to see whether marriage equality has a quantitative effect on nonmarital births and childrearing and a (harder to measure) qualitative effect on the levels of commitment and self-sacrifice of parents to their children. If marriage equality really does impose a communitarian cost upon American families, Latter-day constitutionalism ought to propound new policy initiatives, such as some form of covenant marriage. And American legislators and judges ought to be attentive.

In other words, the agenda for Latter-day constitutionalism in the post-*Obergefell* era ought to be how to improve the family-based setting for the benefit of children. If marriage is the best setting, how might more couples be persuaded to get married and to raise children in a marital setting? What policy strategy helps lower divorce rates? If Latter-day constitutionalism makes genuine progress on these issues, America needs to listen.

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224. Stacy Johnson, *Poll: Utah Fourth-Most Conservative State*, DAILY HERALD (Feb. 3, 2014), [http://www.heraldextra.com/news/local/poll-utah-fourth-most-conservative-state/article\\_1fb190f6-8d0d-11e3-a825-0019bb2963f4.html](http://www.heraldextra.com/news/local/poll-utah-fourth-most-conservative-state/article_1fb190f6-8d0d-11e3-a825-0019bb2963f4.html).

225. See Derek Monson, *Strong Family Culture and Policy Help Drive Utah's Dynamic Economy*, SUTHERLAND INST. (Sept. 30, 2014), <http://sutherlandinstitute.org/news/2014/09/30/strong-family-culture-and-policy-help-drive-utahs-dynamic-economy-2/>.