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“I Now Pronounce You Husband and Wives”: The Case for Polygamous Marriage after *United States v. Windsor* and *Burwell v. Hobby Lobby Stores*

Peter Nash Swisher *

*“Unconventional [marital] relationships between men and women are now at least tolerated. We hear of . . . homosexual marriages, new types of marriages are now advocated, and the institution of marriage, as well as the conduct of married persons, is being subjected to fewer legal restraints. The Victorian Age of [Chief Justice] Morrison Waite [who wrote Reynolds v. United States in 1876] is far behind us . . .”*¹

*“Marriage is both a private and public institution. Although it involves an individual’s deeply personal decision to make a lifelong commitment to another, states place strictures on who has the right to marry and confer benefits and obligations on married individuals. Accordingly, legislatures and courts have struggled to achieve a balance between the public and private dimensions of marriage. A current example of this struggle is the nationwide controversy over same-sex marriage. As marriage continues to be re-conceptualized and re-structured, an interesting inquiry is whether the traditional ban against polygamy will continue to be upheld.”*²

I. INTRODUCTION

Polygamous or plural marriage,³ like same-sex marriage, has long been held to be void *ab initio* in the vast majority of American jurisdictions. Polygamous marriage was recognized at one time in the Utah Territory by members of the Church of Jesus Christ of Latter-

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1. Ray Jay Davis, *Plural Marriage and Religious Freedom: The Impact of Reynolds v. United States*, 25 ARIZ. L. REV. 287, 302–03 (1973).

2. Alyssa Rower, *The Legality of Polygamy: Using the Due Process Clause of the Fourteenth Amendment*, 38 FAM. L.Q. 711 (2004).

3. The general term “polygamy” or plural marriage is used throughout this article, for purposes of convenience, to include both polygyny, or the marriage of one man to two or more women at the same time, and polyandry, or the marriage of one woman to two or more men at the same time. It also includes bigamous marriages.

day Saints, commonly known as Mormons. In 1879, the United States Supreme Court, in the case of *Reynolds v. United States*,⁴ held that polygamy was an “odious” act that Congress had the legislative power to prohibit. Chief Justice Morrison Waite, writing for the Court, concluded that “Congress was deprived of all legislative power over mere [religious] opinion, but was left free to reach actions which were in violation of social duties or subversive of good moral order.”⁵ No legal precedent was cited for this conclusion. Nevertheless, *Reynolds* continues to be recognized as binding legal authority, prohibiting polygamous marriages in America today.⁶

The purpose of this article is to question the continuing validity of *Reynolds* in light of subsequent United States Supreme Court decisions, including—most recently—*United States v. Windsor*⁷ and *Burwell v. Hobby Lobby Stores, Inc.*⁸ Based upon these subsequent Supreme Court decisions, and the Religious Freedom Restoration Act of 1993,⁹ proponents of polygamous marriage now have a very strong case for validating polygamous marriages on cultural, religious, and constitutional grounds.

II. POLYGAMOUS MARRIAGE: THE HISTORICAL BASIS

Whether the prohibition of a fundamental right to marry is subject to a compelling state interest, or only a rational basis test, generally has been determined by whether a person’s “fundamental liberty interests” are “so rooted in the traditions and conscience of our people as to be ranked fundamental.”¹⁰ Accordingly, same-sex marriage, lacking any historical basis, has been subjected only to a rational basis test in a number of states.¹¹ Polygamous marriage, on the other hand,

4. *Reynolds v. United States*, 98 U.S. 145 (1879).

5. *Reynolds*, 98 U.S. at 164.

6. *See, e.g.*, *Potter v. Murray City*, 760 F.2d 1065 (10th Cir. 1985); *Bronson v. Swenson*, 394 F. Supp. 2d 1329 (D. Utah 2005); *State v. Holm*, 137 P.3d 726 (Utah 2006).

7. *United States v. Windsor*, 133 S. Ct. 2675, (2013).

8. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

9. The Religious Freedom Restoration Act of 1993, 107 Stat. 1488, 42 U.S.C. §2000bb. (1993).

10. *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). *See also* Cheshire Calhoun, *Who’s Afraid of Polygamous Marriage? Lessons for Same-Sex Marriage Advocacy from the History of Polygamy*, 42 SAN DIEGO L. REV. 1023, 1030 n. 39 (2005) (“It is important to bear in mind that our U.S. tradition occurs within a multination state whose traditions include those of Indian nations for whom monogamy was not always the defining form of marriage . . .”).

11. *See, e.g.*, *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D. Va. 2014).

has enjoyed a rich historical tradition down through the ages, as illustrated below.

A. Biblical and Historical Polygamy

Polygamy is as old as man himself and polygamy has existed in most of the world's known cultures, including ancient China, the Incas of Peru, the American Navajo, and the Macedonians of Persia. During the age of the Old Testament patriarchs, Abraham, Esau, and Jacob headed polygamous households, and the great kings of Israel, David and Solomon, took plural wives, with apparent biblical approval. Likewise, there was no prohibition of polygamy in the New Testament and it was practiced in Judea and Galilee during the ministry of Jesus.¹² Moreover, under Islamic Shari'ah law, in the past and present, a man may have up to four wives so long as he can adequately provide for them and treat them justly.¹³

Martin Luther, while not endorsing polygamy as an ideal practice, nevertheless observed that polygamy does not contradict Scripture and so cannot be prohibited by Christianity.¹⁴ It was not until the Council of Trent in 1563, that the Roman Catholic Church finally prohibited the practice of polygamous marriage.¹⁵ At this time, monogamous marriage, according to one commentator, "became co-extensive with religious devotion":

[A]dultery, fornication, and concubinage were deemed "sinful" and outlawed. . . . In time, the Church came to exercise exclusive temporal power over matrimonial matters, establishing monogamy as the only legitimate marital form in Western Europe. Simultaneously, polygamy came to be identified in Christian ethnocentric thought with the Moslem infidels and the heathens in "uncivilized" lands, an attitude which has survived well into the twentieth [and twenty-first] century.¹⁶

Bigamy, the crime of taking more than one spouse at a time, be-

12. See, e.g., G. Keith Nedrow, *Polygamy and the Right to Marry: New Life for an Old Lifestyle*, 11 U. MEM. L. REV. 303, 307-08 (1981). See also Calhoun, *supra* note 10, at 1028 ("Nowhere in the Hebrew Bible or the New Testament is polygamy forbidden").

13. See THE KORAN: WITH PARALLEL ARABIC TEXT 4:3 (N. J. Dawood trans., 2000).

14. PHILLIP KILBRIDE, PLURAL MARRIAGE FOR OUR TIMES: A REINVENTED OPTION? 63 (1994).

15. *Id.* at 64.

16. G. Keith Nedrow, *supra* note 12, at 309 (citing as authority JOHN CAIRCROSS, AFTER POLYGAMY WAS MADE A SIN: THE SOCIAL HISTORY OF CHRISTIAN POLYGAMY (1974)).

came punishable in English courts in 1604; in the United States, each state eventually enacted its own bigamy statutes making plural marriage a crime. Few persons were prosecuted under these bigamy laws until the middle of the nineteenth century when Joseph Smith, founder of the Church of Jesus Christ of Latter-day Saints, exhorted his followers to practice plural marriage as an article of faith.¹⁷

B. Polygamy in America: The Mormon Experience

1. Early foundations

In the 1830s and 1840s, Joseph Smith, the founder of the Church of Jesus Christ of Latter-day Saints, encouraged his followers to embrace the practice of polygamy, emulating the Old Testament patriarchs. In 1852, Brigham Young made an announcement of plural marriage as an article of faith.¹⁸ Although only a small minority of early Mormons practiced polygamy,¹⁹ and although Mormons treated polygamy as a serious religious commitment,²⁰ most Americans in the nineteenth century were scandalized by polygamy as a “lascivious” and “barbaric” practice and a sinful indulgence in sex.²¹ Anti-polygamists of the nineteenth century often equated husband and wives in a plural marriage to a slave master and slaves, regarding polygamous marriages as “no better than Turkish harems, a practice designed to serve male lust without women’s willing consent.”²²

17. *Id.* at 309–10.

18. *See, e.g.*, JOHN HENRY EVANS, JOSEPH SMITH: AN AMERICAN PROPHET 271–72 (1933).

19. It is estimated that only five percent of Latter-Day Saints (most of whom were church leaders) maintained polygamous households. RICHARD VAN WAGGONER, MORMON POLYGAMY: A HISTORY 103 (2d ed. 1989). *See also* Elijah L. Milne, *Blaine Amendments and Polygamy Laws: The Constitutionality of Anti-Polygamy Law Targeting Religion*, 28 W. NEW ENG. L. REV. 257, 265–66 (2006). While most male Mormons remained monogamous, those who practiced polygamy generally married only one additional wife. *Id.*

20. One historian has observed: “Mormon plural marriage, dedicated to propagating the species righteously and dispassionately, proved to be a rather drab lifestyle compared to the imaginative tales of polygamy, dripping with sensationalism, demanded by the scandal-hungry eastern media market.” WAGGONER, *supra* note 19, at 89.

21. *See id.*; Calhoun, *supra* note 10, at 1041.

22. *See, e.g.*, Calhoun, *supra* note 10, at 1037–38. Abolitionist Harriet Beecher Stowe, for example, compared polygamy to slavery; she argued that both were barbarous practices that needed to be eradicated. *See generally* Sarah B. Gordon, *A War of Words: Revelation and Storytelling in the Campaign Against Mormon Polygamy*, 78 CHI.-KENT L. REV. 739, 764–71 (2003).

In contrast to this widespread nineteenth-century moralistic and sensationalist view of polygamy, contemporary feminist-historian, Joan Smyth Iversen, offers persuasive evidence that nineteenth-century plural marriage was *not* a gender-discriminatory form of marriage. Mormon-women's-rights-advocates argued at that time, that plural wives, in fact, were more liberated than their New England counterparts. In terms of educational and economic opportunities, and in terms of civil and political rights, married Mormon women rated quite well in comparison to New England women in monogamous marriages.²³ Each plural wife, for example, lived in her own house functioning as the head of the household. Married-Mormon women had the legal right to own property and sometimes owned their own homesteads.²⁴ Plural marriage also freed wives from some of the evils of "male lust"—protecting them against diseases that might be brought home from prostitutes and freeing pregnant women from marital sexual duties.²⁵ Mormon women were among the first women to vote in the United States²⁶ and half of the first entering class at the University of Deseret (now the University of Utah) were women.²⁷ Many plural marriages involved well-educated women. Mormon women also were able to exit marriage through divorce, with seventy-three percent of divorce actions in the Utah Territory brought by women.²⁸

All these arguments fell upon deaf ears. In 1856, four years after Brigham Young's announcement endorsing polygamous marriage as a Mormon article of faith, the Republican Party's national platform called for the abolition of "those twin relics of barbarism—polygamy and slavery" in the territories.²⁹ Accordingly, six years later, in 1862, in the midst of a bloody Civil War, the Radical Republicans in Congress passed, and President Lincoln signed, the Morrill Anti-Bigamy Act,³⁰ which provided in relevant part:

23. See generally JOAN SMYTH IVERSEN, *THE ANTI-POLYGAMY CONTROVERSY IN U.S. WOMEN'S MOVEMENTS, 1880-1925: A DEBATE ON THE AMERICAN HOME* (1997).

24. *Id.* at 510-14.

25. *Id.* at 509.

26. *Id.* at 505.

27. *Id.* at 55.

28. *Id.* at 60.

29. *REPUBLICAN PLATFORM OF 1856 in NATIONAL PARTY PLATFORMS: 1840-1972*, 27 (Donald Johnson and Kirk Porter eds., 5th ed. 1975). For a young Republican Party attempting to replace the old Whig Party, this anti-polygamy and anti-slavery rhetoric became a key rallying device. See Laura E. Brown, *Regulating the Marrying Kind: The Constitutionality of Federal Regulation of Polygamy Under the Mann Act*, 39 *MCGEORGE L. REV.* 267, 273 (2008).

30. Act of July 1, 1862, ch. 1626, 12 Stat. 501 (1862) (repealed 1978).

[E]very person having a husband or wife living, who shall marry any other person, whether married or single, in a Territory . . . over which the United States have exclusive jurisdiction . . . [is] guilty of bigamy and . . . shall be punished by a fine not exceeding five hundred dollars, and by imprisonment not exceeding five years.³¹

Enforcement of this Act was delayed for twenty-six years, but the first case tried under this statute, *Reynolds v. United States*,³² became a landmark case in the Supreme Court's continuing effort to define the constitutional limits of religious freedom.³³

2. *Reynolds v. United States*

George Reynolds was an English immigrant to the United States. He took Mary Ann Tuddenham as his wife soon after he settled in the Utah Territory in 1865. By the time he had married a second wife, Amelia Jane Schofield in 1874, Reynolds had acquired some prominence as the private secretary of Brigham Young, the second President of the Church of Jesus Christ of Latter-day Saints. Reynolds' second marriage led to his indictment for the violation of the Morrill Anti-Bigamy Act. In his appeal to the Utah Territorial Supreme Court, Reynolds argued that his punishment for compliance with his religious belief in plural marriage deprived him of his First Amendment right to the free exercise of his religion. Nevertheless, the Territorial Supreme Court convicted him of bigamy.³⁴

Approximately two years after Reynolds' conviction had been affirmed by the Utah Territorial Supreme Court, the United States Supreme Court also affirmed Reynolds' conviction of bigamy under the Morrill Act. Chief Justice Waite held in *Reynolds v. United States*³⁵ that, although Congress could not legislate over "mere [religious] *opinion*," it did have the power to prohibit "*actions* which were in violation of social duties or subversive of good moral order."³⁶ Reynolds was sent to prison where he served 19 months, receiving five months off for good behavior. Reynolds then returned to Utah, where he was

31. *Id.*

32. *Reynolds*, 98 U.S. at 145 (1879).

33. *See, e.g.,* Nedrow, *supra* note 12, at 312.

34. For an excellent history of the *Reynolds* decision, and other polygamy cases, *see generally* Orma Linford, *The Mormons and the Law: The Polygamy Cases*, 9 UTAH L. REV. 308 (1964).

35. *Reynolds*, 98 U.S. at 145.

36. *Id.* at 164 (emphasis added). For a comprehensive analysis of the *Reynolds* decision, *see* Part III.A. *infra*.

hailed by his Mormon compatriots as a "living martyr."³⁷ Four years later he married wife number three, Mary Goold.³⁸

3. *After Reynolds*

The *Reynolds* decision had no immediate impact on Mormon polygamy. Mormon attorneys found a procedural loophole in the Morrill Act, and argued that the testimony of a second wife to establish a pre-existing marriage of the first wife could not be used in court since, until the first marriage could be established, the second wife was prima facie presumed to be the lawful wife and she could not testify against her husband, presumably applying the last-in-time marriage presumption.³⁹ The United States Supreme Court agreed with this reasoning in *Miles v. United States*,⁴⁰ reversing a bigamy conviction of a Mormon man who allegedly had two wives. One year later, a frustrated Congress enacted the Edmunds Anti-Bigamy Act,⁴¹ which made it a misdemeanor in a territory of the United States to cohabit with more than one woman. This meant that the government no longer had to prove the existence of plural *marriage* to substantiate bigamy charges, but now only had to show that defendants had unlawfully *cohabited* with one another. During this decade, more than 1,300 men were imprisoned for unlawful cohabitation,⁴² and the Edmunds Act further expanded punishment of polygamists to include the disenfranchisement of polygamous voters and their disqualification from public office.⁴³

37. Ray Jay Davis, *Plural Marriage and Religious Freedom: The Impact of Reynolds v. United States*, 25 ARIZ. L. REV. 287, 291 (1973).

38. *Id.*

39. See, e.g., Peter Nash Swisher & Melanie Jones, *The Last-in-Time Marriage Presumption*, 29 FAM. L. Q. 409 (1995).

40. *Miles v. United States*, 103 U.S. 304, 314-15 (1881).

41. Act of March 22, 1882, 22 Stat. 30-31 (1882) (repealed 1983).

42. B. H. ROBERTS, A COMPREHENSIVE HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 211 (1930).

43. *Id.* It must also be kept in mind that the LDS Church was an enormously powerful religious community in the American West in the nineteenth century, and a potential threat to the federal government in Washington, D.C. In addition to occupying Utah, the LDS Church planned to expand into other territories, including parts of California, Oregon, Arizona, New Mexico, Colorado, Wyoming, and all of Nevada and Utah. See Calhoun, *supra* note 10, at 1029. See also *infra* note 48, and accompanying text.

Finally, in 1887, the Mormon Church was prosecuted for its continuing advocacy of polygamy. In the case of *Church of Jesus Christ of Latter-Day Saints v. United States*, the Court affirmed the power of Congress to revoke the church charter and to confiscate its property.⁴⁴ Four months later, Wilford Woodruff, President of the Mormon Church, issued a public statement, known popularly as the “Manifesto”, in which he declared that the church no longer taught or practiced plural marriage, nor permitted its members to do so. He advised all Mormons “to refrain from contracting any marriage forbidden by the laws of the land.”⁴⁵

On July 16, 1890, Congress passed legislation enabling Utah to become a state, but required Utah’s state constitution to include the so-called “Irrevocable Ordinance,” which stated that “Perfect toleration of religious sentiment is guaranteed. No inhabitant of this State shall ever be molested in person or property on account of his or her mode of religious worship; but polygamous or plural marriages are forever prohibited.”⁴⁶

Today, the Church of Jesus Christ of Latter-day Saints makes it clear that teaching or practicing polygamous or plural marriage is a transgression of church law.⁴⁷ Members who do practice polygamy are excommunicated, and those who are not members and are practicing polygamy, are not accepted into membership.⁴⁸ However, polygamous marriage has *not* died out in America. Some splinter groups, calling themselves Fundamentalist Latter-day Saints, still practice plural marriage in America,⁴⁹ as well as a number of Muslim Americans and African Americans,⁵⁰ as will be discussed in more detail below.

44. *Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. U.S.* 136 U.S. 1, 61–62 (1890).

45. G. LARSON, *THE AMERICANIZATION OF UTAH FOR STATEHOOD* 264 (1971) (cited in G. Keith Nedrow, *supra* note 12, at 313–14).

46. UTAH CONST. art. III.

47. *THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, GENERAL HANDBOOK OF INSTRUCTIONS* 122 (1968).

48. See Ray Jay Davis, *supra* note 1, at 291–92.

49. See, e.g., David Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53, 67–73 (1997) (discussing the continuing practice of polygamy by Fundamentalist Latter-day Saints after 1890).

50. See, e.g., Michele Alexandre, *Lessons from Islamic Polygamy*, 64 WASH. & LEE L. REV. 1461, 1469–70 (2007) (discussing Islamic polygamy and *de facto* polygamy in various African American communities).

C. Polygamous Marriage Today

One might assume that after the 1890s, polygamous marriage would die out in the United States. Yet polygamy did *not* die out. Many "fundamentalist" Mormons refused to renounce plural marriage, regardless of threats of excommunication by the Mormon Church and the possibility of criminal bigamy prosecution by the state. Many fundamentalists regarded Wilford Woodruff's "Manifesto," and the "Irrevocable Ordinance" in the Utah state constitution, as coerced, and therefore invalid.⁵¹ Most importantly,

existing plural families were loathe to dissolve, leaving wives without husbands, [and] children without fathers. Many preferred to risk prosecution rather than separate. . . . These recalcitrant Mormons have resisted for [over] one hundred years what they believe to be an impermissible intrusion upon their private lives and religious beliefs by state and federal governments.⁵²

More than a century after this schism within the Mormon Church, Mormon fundamentalists have established polygamous communities throughout the United States, including Hildale, Utah and Colorado City, Arizona.⁵³ In order to avoid prosecution for bigamy, many fundamentalist men legally marry their first wife, and then "spiritually marry" their subsequent wives.⁵⁴ Over the years, there have been few criminal prosecutions⁵⁵ resulting from these polygamous unions. However:

51. This argument was rejected by the Utah Supreme Court in the case of *State v. Barlow*, 153 P.2d 647, 654 (1944). In reviewing the Mormon experience in America, however, I believe there is indeed a strong showing of federal governmental coercion. See generally, *supra* Part II.B. See also Donald L. Drakeman, *Reynolds v. United States: The Historical Construction of Conventional Reality*, 21 CONST. COMMENT. 697, 700 (2004) (arguing that in passing the Morrill Act, and other related Acts, the federal government's underlying desire was to divest the LDS Church of its power).

52. G. Keith Nedrow, *supra* note 12, at 314.

53. See JON KRAKAUER, *UNDER THE BANNER OF HEAVEN: A STORY OF VIOLENT FAITH* 1, 9–12 (2003).

54. *Id.* at 12. This means, however, that the "spiritual wives" are deprived of those legal rights normally associated with marriage, including spousal support and maintenance, marital property rights, intestate succession, workers compensation benefits, wrongful death actions, and social security benefits.

55. For an exception to this general rule, see *State v. Green*, 99 P.3d 820, 825 (Utah, 2004). Thomas Green, an avowed polygamist, was found guilty of violating Utah's bigamy statutes, after appearing on various television talk shows and *NBC Dateline*. Notoriety from television talk shows can have some unexpected legal consequences. See also *State v. Holm*, 137 P.3d 726, 730–31 (2006) (defendant was convicted of unlawful sex with a 16 year old minor who was one of his "wives").

While polygamy is illegal in the United States, forms of it are still practiced either overtly, pursuant to religious traditions, or covertly, by the maintenance of two or more family units. Historically, the prosecution of polygamists has been rare in the United States, and a growing tolerance has been shown towards them It has been estimated that as many as 60,000 individuals practice polygamy in the United States.⁵⁶

Critics of these isolated fundamentalist polygamous communities have highlighted three negative implications of polygamy: (1) underage marriage, child abuse, and incest; (2) subjugation of women; and (3) welfare fraud.⁵⁷ As I will argue later in this article,⁵⁸ state and federal remedies, that are much less onerous than prohibiting a person's right to marry *per se*, already exist to combat these problems. Moreover, polygamist marriages are not confined only to isolated fundamentalist communities.

Indeed, there are various women's websites, interest groups, and TV mini-series currently extolling the virtues of polygamy.⁵⁹ For example, a woman attorney, Elizabeth Joseph, wrote an opinion piece in the *New York Times* describing her own polygamous marriage, arguing that polygamy offers women a viable solution for "successfully juggling career, motherhood, and marriage."⁶⁰ Home Box Office also produced a television series, entitled *Big Love*, that sympathetically portrays a fictional middle-class polygamist family, consisting of a husband and his three wives, who live in Salt Lake City.⁶¹

Polygamous marriage is not limited only to the Mormon experience, since a number of Evangelical Christian Americans and Muslim Americans also practice overt or covert polygamy in the United States today.⁶² Muslim Americans cite to verse 4.3 of Islam's *Holy*

56. See Alexandre, *supra* note 49, at 1463.

57. See Alyssa Rower, *supra* note 2, at 715, 715–17. But see also Jaime M. Gher, *Polygamy and Same-Sex Marriage—Allies or Adversaries Within the Same-Sex Marriage Movement*, 14 WM. & MARY J. WOMEN & L. 559, 585 (2008) ("although research indicates that women in polygamous marriages often face sexual, physical, and emotional abuse at the hands of their husbands, such abuse similarly occurs within monogamous heterosexual and [same-sex] married and unmarried relationships.")

58. See *infra* Part III.C.

59. See, e.g., Jeffrey Michael Hayes, *Polygamy Comes Out of the Closet: The New Strategy of Polygamy Activists*, 3 STANFORD J.C.R. & C.L. 99, 108–09 (2007) (discussing the use of polygamous wives as spokespersons, and the use of other female interest groups, in the pro-polygamy movement).

60. Elizabeth Joseph, *My Husband's Nine Wives*, N.Y. TIMES, May 23, 1991, at A31.

61. HBO Television, *Big Love* (2007).

62. See Eliza Souk, *Polygamists Unite! They Used to Live Quietly, but Now They're Making Noise*, NEWSWEEK Mar. 20, 2006 at 52 (stating that the total number of Evangelical Christian

Qur'an, which allows a man to have up to four wives, so long as he can adequately provide for them, and treat them justly.⁶³ Polygamous marriages are legally recognized in many African, Asian, and Muslim countries under Islamic Shari'ah law.⁶⁴ Although the practice of polygamy is in a decline throughout the Muslim world due to social and economic factors, arguments for and against its legality and morality are still being made. The four most commonly advanced arguments supporting polygamy are as follows: (1) the *Qur'an*, (like the Old Testament of the Bible) gives religious authority to a man having more than one wife; (2) polygamy is justified when the wife is barren or unwell, allowing the husband to have children without divorcing his first wife or leaving her ill provided for; (3) polygamy helps to prevent immorality, such as prostitution, rape, fornication, adultery, and the high divorce rate found in many Western monogamous societies; and (4) polygamy protects widows and orphans by responding to the excess of women over men in time of war or other disasters.⁶⁵ Similar arguments have been made supporting plural marriage in America, including the rising incidence of extramarital sex and a soaring divorce rate.⁶⁶

De facto polygamy also is prevalent in a number of African American communities.⁶⁷ Various reports have shown that a number of African American women, including those belonging to the middle and professional classes, have begun to adhere to the philosophy that informal polygamy might be their only option if they are to have a fam-

and Muslim polygamists in America may now outnumber Mormon polygamists). Early Christian teachings, for example, did *not* prohibit polygamy. See, e.g., notes 12 and 14, *supra*, and accompanying text.

63. See *supra* note 13, and accompanying text.

64. Although polygamous marriages, valid in the countries where contracted, will not be recognized as valid marriages in the United States, some states still allow polygamous wives to recover in intestate succession actions as putative spouses. See, e.g., *In re Dalip Singh Bir's Estate*, 188 P.2d 499, 502 (Cal. Ct. App. 1948). *But see contra* *Moustafa v. Moustafa*, 888 A.2d 1230, 1234 (Md. Ct. App. 2005) (refusing to recognize a foreign bigamous marriage based on the forum state's strong public policy). See generally HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* Sec. 2.6, 64-70 (2d ed. 1988).

65. See HODKINSON, *MUSLIM FAMILY LAW: A SOURCEBOOK* 107-08 (1984). Some recent commentators have argued that the patriarchal culture that has influenced Islamic jurisprudence in family law matters over the centuries should yield to the Qur'anic Principle of Equality. See, e.g., Azizah al-Hibri, *Islam, Law, and Custom: Redefining Muslim Women's Rights*, 12 AM. U. J. INT'L L. & POL'Y 1, 42-43 (1997).

66. See, e.g., Nedrow, *supra* note 12, at 304 n. 5.

67. See, e.g., Alexandre, *supra* note 49, at 1469-70 (citing Adrian K. Wing, *Polygamy from Southern Africa to Black Britannia to Black America*, 11 J. CONTEMP. LEGAL ISSUES 811, 857-59 (2001) (noting that polygamy does not occur "only among breakaway Mormon sects" and that "various forms of polygamy exist in the United States" today)).

ily. A major reason for this phenomenon is that African American women are reminded that African American men are increasingly unavailable for marriage—due to early death, imprisonment, high unemployment, and intermarriage. Additionally, many more young African American women have obtained higher educations than African American men, which further widens the gap between these women and men available for marriage.⁶⁸

In conclusion, approximately eighty-three percent of human societies permit polygamy.⁶⁹ Polygamy is still practiced world-wide, including the United States, and polygamy enjoys a rich cultural and religious tradition spanning centuries of human history and experience.⁷⁰ Polygamous men and women enter plural unions for significantly different reasons, and with significantly different goals and aspirations. Accordingly, polygamous marriage should no longer be characterized one-dimensionally, as in *Reynolds v. United States*, as a “harmful” and “evil” marital relationship.⁷¹ Finally, as Professor Cheshire Calhoun persuasively argues:

Opponents might object that, in fact, polygamy, as it is practiced worldwide, tends to take forms that are oppressive to women. Permitting polygamous civil marriage would thus open the doors to illiberal ethnic groups in the United States practicing social forms of polygamy that are oppressive to women. Two responses to this objection bear noting.

First, unless we are willing to also eliminate monogamous civil marriage because it, too, sometimes takes social forms that are oppressive to women, targeting polygamy for a special bar would involve the state in a clear failure to exercise neutrality with respect to alternative conceptions of [marriage]

Second, the existence of ethnic and religious groups in the United States that practice gender oppressive forms of polygamy is *all the more* reason to extend civil marriage to polygamous groups . . . Failure to extend civil marriage to plural marriages leaves [plural wives] unprotected by marriage and divorce law⁷²

68. *Id.*

69. See, e.g. DAVID M. BUSS, *THE EVOLUTION OF DESIRE: STRATEGIES OF HUMAN MATING* 179, 178 (1994) (summarizing a study of 853 cultures world-wide).

70. See, e.g., Gher, *supra* note 56, at 599 (“[P]olygamy is not merely an anomaly in Western cultures. Polygamy is practiced around the world, as well as within many American communities.”).

71. *Id.* at 603.

72. Calhoun, *supra* note 10, at 1040–41 (emphasis in original).

III. CONSTITUTIONAL ARGUMENTS SUPPORTING POLYGAMOUS MARRIAGE

In addition to cultural and religious justifications for polygamous marriage,⁷³ there are at least three major arguments, based upon recent constitutional developments, which would—and should—overrule *Reynolds v. United States*, and legitimize polygamous marriage in America today. The archaic and moralistic Victorian rationale of *Reynolds v. United States* is no longer supportable based upon significant doctrinal developments since the *Reynolds* case was decided in 1879. First, polygamous marriage should be recognized under a fundamental constitutional right to marry argument. Second, polygamous marriage should be protected under an individual's first amendment right to freedom of religion. And third, polygamous marriage should be protected by the Due Process Clauses of the Fifth and Fourteen Amendments of the United States Constitution.

A. Reynolds v. United States is an Outdated Moralistic Precedent that Must be Rejected Based Upon Subsequent Significant Doctrinal Developments

In the case of *Reynolds v. United States*,⁷⁴ a seminal case that declared polygamous marriage in the United States to be void ab initio, Chief Justice Morrison Waite, writing for the Court, noted that "the question is raised, whether religious belief can be accepted as a justification of an overt act made criminal by the law of the land."⁷⁵ He looked at the background of the First Amendment and concluded that "Congress was deprived of all legislative power over mere [*religious*] *opinion*, but was left free to reach *actions* which were in violation of social duties or subversive of good order."⁷⁶ Waite then classified polygamy as an "evil" and "odious" act over which Congress had the legislative power to prohibit.⁷⁷

There were no cases that Morrison Waite could use as precedential authority for these conclusions, and his "opinion versus action" rationale has been greatly eroded by subsequent Supreme Court deci-

73. See generally, *supra* Part II.

74. *Reynolds*, 98 U.S. at 162 (1879).

75. *Id.* at 162 (emphasis added).

76. *Id.* at 164.

77. See generally, Davis, *supra* note 1, at 289–91.

sions. For example, in *Wisconsin v. Yoder*,⁷⁸ members of the Amish religion were convicted for refusing to send their children to public high school, as required by Wisconsin's compulsory education law. The Supreme Court refused to utilize Waite's "opinion versus action" rationale, and instead applied a balancing of interests approach to religious opinion cases:

No longer is there the sharp dichotomy that Waite expounded in the *Reynolds* case. *Yoder* recognizes its erosion: the protection of the first amendment extends not only to religious opinion, but also to some religious acts What has evolved in more recent cases has been a weighing process in which the importance to the individual of the practice involved [such as polygamous marriage] is weighed against the interest of society; in order for restrictions on religiously based actions to be constitutionally valid there must be "a state interest of sufficient magnitude to override the interest claiming protection under the free exercise clause."⁷⁹ The judiciary is now guided by the balance of these interests, not solely by contemporary societal mores as the *Reynolds* Court had suggested.⁸⁰

And how are American polygamists "in violation of social duties or subversive of good order?"⁸¹ Do they riot in the streets, and burn down public buildings? Do they engage in wild bacchanal sex orgies and entice other Americans to join them? Or do polygamists, like other Americans, have a constitutional right to make "moral and sexual choices" of their own, free from governmental intrusion?⁸²

One particularly outrageous application of the antiquated and moralistic *Reynolds* rationale was the case of *Cleveland v. United States*,⁸³ where the Supreme Court had no trouble finding that the interstate transportation of a woman for the purpose of making her a plural wife, was a violation of the White Slave Traffic Act, commonly known as the Mann Act.⁸⁴ The Mann Act provides in relevant part that a woman or girl may not be transported in interstate commerce "for the purpose of prostitution or debauchery, or for any other im-

78. *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972).

79. *Id.* at 214.

80. Davis, *supra* note 1, at 297-98 (citing *Reynolds*, 98 U.S. at 164; *Yoder*, 406 U.S. at 214).

81. *Reynolds*, 98 U.S. at 164.

82. *United States v. Windsor*, 133 S. Ct. 2675, 2694-95 (2014) (holding that the federal Defense of Marriage Act, which discriminated against same-sex spouses—and polygamous spouses—was unconstitutional). See also *infra* note 137, and accompanying text.

83. *Cleveland v. United States*, 329 U.S. 14 (1946).

84. 18 U.S.C. § 2421 (1976).

moral purpose,"⁸⁵ and the Supreme Court reasoned in the *Cleveland* case that "[t]he establishment or maintenance of polygamous households is a notorious example of promiscuity. The permanent advertisement of their existence is an example of the sharp repercussions which they have in the community These polygamous practices have long been branded as immoral in the law."⁸⁶ Yet there was also a prescient dissent by Justice Murphy in the *Cleveland* case:

It is equally true that the beliefs and mores of the dominant culture of the contemporary world condemn the practice [of polygamy] as immoral and substitute monogamy in its place. To those beliefs and mores I subscribe, but that does not alter the fact that polygyny is a form of marriage built upon a set of social and moral principles. It must be recognized and treated as such.

The Court states that polygamy is "a notorious example of promiscuity." The important fact, however, is that, despite the differences that may exist between polygamy and monogamy, such differences do not place polygamy in the same category as prostitution and debauchery.⁸⁷

The major problem here, of course, is that the Supreme Court, in the *Reynolds* and *Cleveland* cases, treats polygamy as a species of sexual misconduct and immoral promiscuity, rather than as an alternative form of marriage.⁸⁸ However, significant doctrinal developments made by the United States Supreme Court and Congress, have fatally eroded the long-standing moralistic rationale of *Reynolds v. United States*, as discussed in more detail in the next section.

B. Marriage is a Fundamental Constitutional Right—Including Polygamous Marriage

In the case of *Meyer v. Nebraska*,⁸⁹ 44 years after the *Reynolds* decision, the Supreme Court in dicta stated that there was a constitutional right to marry under the liberty guarantees of the Fourteenth Amendment to the United States Constitution:

85. *Id.*

86. *Cleveland*, 329 U.S. at 19.

87. *Id.* at 25–26 (Murphy, J., dissenting). See also Laura E. Brown, *Regulating the Marrying Kind: The Constitutionality of Federal Regulation of Polygamy Under the Mann Act*, 39 MCGEORGE L. REV. 267, 297 (2008) ("The growing concern about polygamy among Mormon fundamentalists in the western states and among Islamic immigrants in New York may lead to [more] federal Mann Act prosecutions.").

88. See generally Nedrow, *supra* note 12, at 315–18.

89. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

While this Court has not attempted to define with exactness the liberty thus guaranteed . . . [w]ithout doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, [and] to worship God according to the dictates of his own conscience . . .⁹⁰

Further, in the landmark case of *Loving v. Virginia*,⁹¹ which declared state miscegenation laws to be unconstitutional, a unanimous Supreme Court stated that:

Marriage is one of the “basic civil rights of man,” fundamental to our very existence and survival. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of the law.⁹²

It was not until 1978, however, in the case of *Zablocki v. Redhail*,⁹³ that the Supreme Court forcefully declared that the right to marry was a basic freedom guaranteed by the United States Constitution. *Zablocki* involved the constitutionality of a Wisconsin statute that forbade the issuance of a marriage license to a person under a court order who failed to support his or her minor children. The Supreme Court noted that there were *less onerous means* of collecting child support, rather than prohibiting marriage *per se*,⁹⁴ and therefore legislation that “directly and substantially” interferes with the fundamental right to marry must now satisfy a higher standard of constitutional review—the “strict scrutiny” or “compelling state interest” test—in order to prohibit marriage.⁹⁵

In reviewing state statutes pertaining to marital relations and marital restrictions, the courts have struggled mightily to ascertain which statutes should be tested by the “strict scrutiny/compelling state interest” test, the “intermediate level of scrutiny” test, or the

90. *Id.* at 399.

91. *Loving v. Virginia*, 388 U.S. 1 (1967).

92. *Id.* at 12 (citing *Maynard v. Hill*, 125 U.S. 190 (1888); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

93. *Zablocki v. Redhail*, 434 U.S. 374 (1978).

94. *Id.* at 404.

95. *Id.* at 396.

"rational basis" test.⁹⁶ And it does not help that the Supreme Court itself in recent decisions such as *Lawrence v. Texas*⁹⁷ and *United States v. Windsor*⁹⁸ refuses to disclose what test *should* be applied in these contemporary cases.⁹⁹

According to the case of *Washington v. Glucksberg*,¹⁰⁰ whether the prohibition of a fundamental right is subject to a "strict scrutiny/compelling state interest" test, or only a "rational basis" test generally is determined by whether a person's "fundamental liberty interests" are "so rooted in the traditions and conscience of our people as to be ranked as fundamental."¹⁰¹ Therefore, same-sex marriage, which lacks any cultural or historical basis, normally has been subjected only to a rational basis test,¹⁰² unless there is a violation of a state constitutional provision.¹⁰³ However, it is submitted that polygamous marriage, based upon its rich world-wide cultural and religious history,¹⁰⁴ must now be evaluated utilizing a "strict scrutiny/compelling state interest" test, despite opposition from the majoritarian culture to the contrary.

However, assuming *arguendo* that polygamous marriage is judicially evaluated utilizing only a rational basis test, then polygamous marriage must *still* be recognized under contemporary constitutional principles. Recognizing the similarities between same-sex and polygamist relationships, Justice Scalia, for example, dissenting in the case of *Lawrence v. Texas*,¹⁰⁵ argued that "laws against bigamy" were also called into question by the Court's decision in *Lawrence*. "If, as the

96. For example, state statutes that only *regulate* marriage, rather than *prohibit* marriage *per se* would only be subject to a rational basis test. *See, e.g., Moe v. Dinkins*, 533 F. Supp. 623 (S.D. N.Y. 1981) (holding that a New York statute forbidding underage marriage was subject only to a rational basis test, since such a marriage was only *delayed* until the parties reached the age of majority, rather than being prohibited *per se*).

97. *Lawrence v. Texas*, 539 U.S. 558 (2003).

98. *United States v. Windsor*, 133 S. Ct. 2675 (2013).

99. To quote poet Robert Frost: "We dance around the circle and suppose; but the secret sits in the middle and knows."

100. *Washington v. Glucksberg*, 521 U.S. 702 (1997).

101. *Id.* at 720–21 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

102. *See, e.g., Morrison v. Sadler*, 821 N.E.2d 15, 29–30 (Ind. Ct. App. 2005); *Goodridge v. Dep't of Pub. Health*, 798 N.E. 2d 941, 960 (Mass. 2003); *Hernandez v. Robles*, 821 N.Y.S.2d 770, 780 (N.Y. 2006).

103. *See, e.g., In re Marriage Cases*, 76 Cal. Rptr. 3d 683, 702–03 (2008) (applying a strict scrutiny constitutional test); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008) (applying an intermediate level of scrutiny constitutional test).

104. *See generally supra* Parts II and III.

105. *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that a Texas sodomy statute was unconstitutional for violating the constitutional right to privacy of two persons of the same sex to engage in intimate, consensual conduct).

Court asserts,” he wrote, “the promotion of majoritarian sexual morality is not even a *legitimate* state interest,” then the laws against polygamy cannot even “survive rational-basis review.”¹⁰⁶

In conclusion, significant doctrinal developments since *Reynolds v. United States* now recognize that marriage is a fundamental constitutional right, and whether courts apply a strict scrutiny/compelling state interest test to polygamous marriage or only a rational basis test, polygamous marriage should be treated as an alternative form of marriage, rather than a species of immoral promiscuity or sexual misconduct.

C. Polygamous Marriage is Protected by the First Amendment Right to Freedom of Religion

If George Reynolds had made his freedom of religion argument in support of polygamous marriage today, he would find a more sympathetic and tolerant Supreme Court than the moralistic Victorian Supreme Court of the late 1800's. First, he would discover that Chief Justice Waite's "opinion versus action" rationale has now been greatly eroded, if not overruled sub silentio, by a "balancing of interests" approach to religious freedom cases.¹⁰⁷

For example, in the case of *Sherbert v. Verner*,¹⁰⁸ the appellant, a Seventh-Day Adventist, lost her job after she declined to work on Saturdays, the Sabbath Day of her faith. Unable to find other work for the same reason, she applied for unemployment benefits. The South Carolina Unemployment Commission declined to extend any benefits to her, finding that her religious restriction disqualified her, and the courts below affirmed this finding.¹⁰⁹ The *Sherbert* Court reversed and remanded for future proceedings, finding no compelling state interest for enforcing the substantial infringement on appellant's religion, because there was no abuse or danger that justified such infringement. Justice Brennan wrote for the *Sherbert* majority, "The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs. . . . Government may neither compel affirmation of a repugnant belief. . . . nor penalize

106. *Id.* at 599 (Scalia, J., dissenting) (emphasis in original). See also Elijah J. Milne, *Blaine Amendments and Polygamy Laws: The Constitutionality of Anti-Polygamy Laws Targeting Religion*, 28 W. NEW ENG. L. REV. 257, 285–86 (2006).

107. See, e.g., *supra* Part III.A.

108. *Sherbert v. Verner*, 374 U.S. 398 (1963).

109. *Id.* at 399–400.

or discriminate against individuals or groups because they hold religious views abhorrent to the authorities"¹¹⁰

Justice Brennan conceded that there were certain "overt acts prompted by religious beliefs or principles" that could be legislatively restricted, but such "conduct or actions so regulated have invariably posed some substantial threat to public safety, peace, or order."¹¹¹
Query: What "substantial threat to public safety" is posed by polygamous marriage today?

Indeed, after *Sherbert v. Verner*, Professor Laurence Tribe suggested that *Reynolds v. United States* may be a candidate for reconsideration.¹¹² Professor Tribe writes:

The *Sherbert* Court . . . advanced beyond earlier cases by making overt use of the least restrictive alternative—compelling state interest mode of analysis in a free exercise context *Sherbert* further establishes that cost-saving and efficiency—and therefore presumably other even more diffuse concerns—do not constitute sufficient justification for a substantial, albeit indirect, intrusion on religious freedom. If this principle is to be taken seriously, it compels reconsideration of a variety of issues One such case is *Reynolds v. United States*, in which the Court affirmed a polygamy conviction over the Mormon defendant's religious objection. The *Reynolds* Court perceived a sufficient secular purpose in preserving monogamous marriage and preventing exploitation of women. Few decisions better illustrate how amorphous goals may serve to mask religious persecution The question, after *Sherbert*, must be whether the monogamy-promotion goal is sufficiently compelling, and the refusal to exempt Mormons sufficiently crucial to the goal's attainment, to warrant the resulting burden on religious conscience.¹¹³

A second significant religious freedom case subsequent to *Reynolds v. United States* was *Wisconsin v. Yoder*.¹¹⁴ *Yoder* involved Amish parents who were convicted of violating Wisconsin's compulsory public school attendance law.¹¹⁵ Defendant parents argued that sending their children to public schools after the eighth grade violated their religious beliefs and threatened their religious way of life.¹¹⁶ The Supreme Court agreed with the freedom of religion argument

110. *Id.* at 402–403 (citations omitted and emphasis added).

111. *Id.* at 403.

112. LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 853 (1978).

113. *Id.* at 852–54.

114. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

115. *Id.*

116. *Id.* at 208–209.

made by the defendant parents based upon a balancing of interests test, rather than being guided solely by contemporaneous societal mores as the *Reynolds* Court suggested.¹¹⁷ The *Yoder* Court also rejected the *Reynolds* rationale that “actions, even though religiously grounded, are *always* outside the protection of the Free Exercise Clause of the First Amendment.”¹¹⁸ Moreover, although the Amish religion and culture is quite different from the majoritarian American culture, the Amish still are entitled to their freedom of religion and religious culture. Nevertheless, “There can be no assumption that today’s majority is ‘right’ and the Amish and others like them are ‘wrong’. *A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different.*”¹¹⁹ Accordingly, as Justice Douglas wrote as part of his dissenting opinion in *Yoder*:

The Court rightly rejects the notion that actions, even though religiously grounded, are always outside the protection of the Free Exercise Clause of the First Amendment. In so ruling, the Court departs from the teaching of *Reynolds v. United States*, 98 U.S. 145, 164, where it was said concerning the reach of the Free Exercise Clause of the First Amendment, “Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.” In that case it was conceded that polygamy was a part of the religion of the Mormons. Yet the Court said, “It matters not that his belief [in polygamy] was a part of his professed religion; it was still belief and belief only. Action, which the Court deemed to be antisocial, could be punished, even though it was grounded on deeply held and sincere religious convictions. What we do today, at least in this respect, opens the way to give organized religion a broader base than it has ever enjoyed; and it even promises that in time *Reynolds* will be overruled.”¹²⁰

However in 1990, in the case of *Employment Division, Department of Human Resources of Oregon v. Smith*,¹²¹ the Supreme Court rejected this balancing of interests test found in *Sherbert* and *Yoder*. The *Smith* case involved two members of the Native American Church who were fired for ingesting peyote for sacramental purposes.¹²² When

117. See, e.g. the related discussion of *Yoder* in Part III.A.

118. *Yoder*, 406 U.S. at 247.

119. *Id.* at 223–24 (emphasis added).

120. *Id.* at 247 (Douglas, J., dissenting) (citation omitted).

121. *Employ. Div. Oregon Dep’t. of Human Res. v. Smith*, 494 U.S. 872 (1990).

122. *Id.* at 874.

they sought unemployment benefits, the State of Oregon rejected their claims on the ground that consumption of peyote was a crime.¹²³ The Supreme Court of Oregon, applying the *Sherbert* test, held that the denial of benefits violated the Free Exercise Clause of the First Amendment.¹²⁴ But the United States Supreme Court reversed, stating that use of the *Sherbert* and *Yoder* balancing of interests test “would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind.”¹²⁵ The Court held that under the First Amendment, “neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest.”¹²⁶ Congress responded swiftly to the *Smith* case by enacting the Religious Freedom Restoration Act of 1993 (RFRA),¹²⁷ which applies both to the federal government and to a number of states and restores the *Sherbert* and *Yoder* balancing of interests test to religious freedom controversies.

In its most recent religious freedom decision, *Burwell v. Hobby Lobby Stores, Inc.*,¹²⁸ the Supreme Court had to decide if a for-profit closely held corporation was mandated by the Patient Protection and Affordable Health Care Act (ACA) to provide health insurance coverage for abortion-inducing drugs and devices in violation of the company owners’ constitutional protection of religious freedom.¹²⁹ Both the majority and dissenting opinions in *Hobby Lobby* recognized that they were bound by the Religious Freedom Restoration Act (RFRA) in deciding this religious freedom controversy.¹³⁰

The RFRA basically prohibits the “Government [from] substantially burden[ing] a person’s exercise of religion even if the burden results from a rule of general applicability’ unless the Government ‘demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.’”¹³¹ Thus, not only has the balancing of interests test and compelling state interest test been rehabilitated in the *Sherbert* and *Yoder*

123. *Id.*

124. *Id.* at 875.

125. *Id.* at 888.

126. See *City of Boerne v. Flores*, 521 U.S. 507, 514 (1997); see generally *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

127. 42 U.S.C. § 2000bb.

128. *Hobby Lobby*, 134 S. Ct. at 2759.

129. *Id.*

130. *Id.*

131. *Id.* at 2754 (citing 42 U.S.C. § 2000bb 1(a), (b)).

cases, but the RFRA has gone one step further in requiring a “least restrictive means of furthering that compelling governmental interest.”¹³²

Accordingly, any prohibition against polygamous marriage must likewise meet these stringent requirements of the RFRA, in addition to the earlier *Sherbert* and *Yoder* decisions. For example, some opponents of polygamous marriage argue that there have been three negative implications to polygamous marriage in isolated American polygamous communities: “(1) underage marriage, child abuse, and incest; (2) subjection of women; and (3) welfare fraud.”¹³³ Yet there are state and federal remedies already in place, such as child abuse statutes and welfare fraud statutes, to combat these problems. These apply both to monogamous marriage as well as polygamous marriage and are a “least restrictive means” rather than prohibiting polygamous marriage per se. Therefore, polygamous marriage today arguably is protected by the First Amendment right to freedom of religion under the RFRA.

D. Polygamous Marriage Is Protected by the Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution

The seminal case of *Lawrence v. Texas*¹³⁴ held that a constitutional right to privacy existed for two persons of the same sex who engaged in intimate consensual sexual conduct, although such conduct was in violation of a Texas sodomy statute.¹³⁵ *But query*: Should this constitutional due process protection under the Fifth and Fourteenth Amendments of the U.S. Constitution also extend to marriage and marriage-like relationships? In *Lawrence*, the Supreme Court recognized that the Due Process Clauses of the Fifth and Fourteenth Amendments “afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.”¹³⁶ Justice Kennedy, writing for the majority, cautioned that the *Lawrence* case was a limited holding:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not in-

132. *Id.* at 2780.

133. Rower, *supra* note 2, at 715.

134. *Lawrence v. Texas*, 539 U.S. 558 (2003).

135. *Id.*

136. *Id.* at 574.

volve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.¹³⁷

Although a number of commentators have argued that the *Lawrence* decision should be extended to include same-sex marriage as well,¹³⁸ in practice, courts thus far have refused to apply a *Lawrence*-based rationale to validate *polygamous* marriage. For example, in the case of *Bronson v. Swensen*,¹³⁹ a Utah federal district court judge held the following:

Giving the required deference to the Supreme Court's own stated limitations of its *Lawrence* holding, this court cannot hold that *Lawrence* can be read to require the State of Utah give formal recognition to a public relationship of a polygamous marriage. Contrary to the Plaintiffs' assertion, the laws in question here do not preclude their private sexual conduct. They do preclude the State of Utah from recognizing the marriage of Plaintiff G. Lee Cook to Plaintiff J. Bronson as a valid marriage under the laws of the State of Utah.¹⁴⁰

Justice Scalia wrote a scathing dissent to the *Lawrence* opinion. He strongly argued that the majority's ruling in *Lawrence* would call into question state laws against bigamy, among other statutes that are based on moral choices.¹⁴¹ Scalia then concluded:

At the end of its opinion—after having laid waste the foundations of our rational-basis jurisprudence—the Court says that the present case “does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.” Do not believe it. More illuminating than this bald, unreasoned disclaimer is the progression of thought displayed by an earlier passage in the Court's opinion, which notes the constitutional protections afforded to “person decisions relating to *marriage*, procreation, contraception, family relationships, child rearing, and education” and then declares that “[p]ersons in a homosexual relation-

137. *Id.* at 604.

138. See, e.g., Carlos Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage and the Aftermath of Lawrence v. Texas*, 88 MINN. L. REV. 1184 (2004); Laurence Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004); Mark Strasser, *The Lawrence Reader: Standhardt and Lewis on Women in Love*, 24 ST. LOUIS UNIV. PUB. L. REV. 59 (2005).

139. *Bronson v. Swensen*, 394 F. Supp. 2d 1329 (D. Ct. Utah, 2005).

140. *Id.* at 1334, *reaffirming* *Potter v. Murray City*, 760 F.2d 1065 (10th Cir. 1985) (applying Utah law).

141. *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting).

ship may seek autonomy for these purposes, just as heterosexual persons do . . .¹⁴²

So what does the *Lawrence* case stand for in reference to polygamous marriage? Although the *Lawrence* decision is difficult to interpret, two key points may be drawn from this opinion. First, even when viewed most narrowly, the majority opinion in *Lawrence* “poked a hole” in the government’s traditional use of morality and history to justify a statute—which arguably could include the now-discredited moralistic and historical rationales used to justify the ban on polygamous marriage in *Reynolds v. United States*.¹⁴³ Second, *Lawrence* now leaves the door open to challenge anti-polygamy statutes, through the Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution.¹⁴⁴

The question of how narrowly—or how expansively—*Lawrence v. Texas* should be interpreted was addressed once again in the case of *United States v. Windsor*.¹⁴⁵ *Windsor* involved two women, residents of New York, who were married in a lawful ceremony in Ontario, Canada in 2007.¹⁴⁶ When one of the spouses, Thea Spyer, died in 2009, she left her estate to her surviving spouse, Edith Windsor.¹⁴⁷ When Windsor sought to claim the federal estate tax exemption for surviving spouses, she was barred from doing so under the federal Defense of Marriage Act (DOMA), which excluded a same-sex partner from the definition of “spouse,” even though New York law deemed their Ontario marriage to be a valid one.¹⁴⁸ In DOMA, § 3 provided in relevant part:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between *one man* and *one woman* as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.¹⁴⁹

Note that within this definition of marriage, Congress intended to prohibit polygamous marriage, as well as same-sex marriage, by

142. *Id.* at 604 (Scalia, J., dissenting) (emphasis in original) (citations omitted).

143. See Rower, *supra* note 2, at 724; see generally *supra* Part III.A.

144. See, e.g., ROWER, *supra* note 2, at 725.

145. *United States v. Windsor*, 133 S. Ct. 2675 (2013).

146. *Id.* at 2679.

147. *Id.*

148. *Id.* at 2682–83.

149. 1 U.S.C. § 7 (emphasis added).

requiring that the legal union be between *one* man and *one* woman, to the exclusion of all others.

The *Windsor* majority opinion, again written by Justice Kennedy, held that § 3 of DOMA was unconstitutional as a “deprivation of the liberty of a person protected by the Fifth Amendment of the Constitution.”¹⁵⁰ Kennedy continued,

[L]iberty protected by the Fifth Amendment’s Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws. While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved.¹⁵¹

Justice Kennedy concluded that “[t]his opinion and its holding are confined to those lawful [same sex] marriages.”¹⁵²

Once again, there was a scathing dissent to *Windsor* written by Justice Scalia. First, he agreed with Chief Justice Roberts’ dissent that the Supreme Court lacked jurisdiction in this particular case because *Windsor* already had won her case in the courts below, and so had “cured” her injury.¹⁵³ Then Scalia laid waste to the majority’s contention that *Windsor* was “confined” only to “lawful [same sex] marriages”:

The penultimate sentence of the majority’s opinion is a naked declaration that “[t]his opinion and its holding are confined” to those couples “joined in same-sex marriages made lawful by the State”. . . . I have heard such “bald, unreasoned disclaimer[s] before Now we are told that DOMA is invalid because it “demeans the couple, whose moral and sexual choices the Constitution protects,” with an accompanying citation of *Lawrence*. It takes real cheek for today’s majority to assure us, as it is going out the door, to give formal recognition to same-sex marriage [or arguably to polygamous marriage as well] is not at issue here . . . I promise you this: The only thing that will “confine” the Court’s holding is its sense of what it can get away with.¹⁵⁴

Thus, the Supreme Court in *Windsor* concluded that § 3 of DOMA could not withstand constitutional scrutiny because the

150. *Windsor*, 133 S. Ct. at 2695.

151. *Id.*

152. *Id.* at 2696.

153. *Id.* at 2698–2705.

154. *Id.* at 2709 (internal citations omitted).

“principal purpose and necessary effect [of § 3] are to demean those persons who are in a lawful same-sex marriage,” and—like the unmarried same-sex couple in *Lawrence*—have a constitutional right to make “moral and sexual choices.”¹⁵⁵

So *query*: Don't parties to polygamous or plural marriage *also* have the same constitutional right to make “moral and sexual choices” of their own, according to those same constitutional protections found in the Fifth and Fourteenth Amendments to the United States Constitution? I would respectfully submit that they do.

IV. CONCLUSION

Polygamous marriage, like same-sex marriage, traditionally has been held to be a void *ab initio* marriage in the vast majority of American states. Unlike same-sex marriage, polygamous or plural marriage has enjoyed a rich historical tradition throughout the world, including the United States, where plural marriage still exists today, either overtly or covertly.

Polygamous marriage was prohibited in *Reynolds v. United States*, an 1879 United States Supreme Court case which continues to be recognized as binding legal authority in America. Based upon recent constitutional developments, *Reynolds v. United States* should be overruled and polygamous marriage should be validated for a number of compelling reasons. First, the archaic and moralistic Victorian rationale of *Reynolds* is no longer supportable based upon significant doctrinal developments since the *Reynolds* case was decided in 1879; polygamous marriage should now be recognized under a fundamental right to marry. Second, polygamous marriage should be protected under a person's First Amendment right to freedom of religion, as found in a number of subsequent Supreme Court cases as well as the Religious Freedom Restoration Act of 1993. Finally, polygamous marriage arguably is protected by the due process clauses of the Fifth and Fourteenth amendments of the United States Constitution, as is, apparently, same-sex marriage.

Therefore, proponents of polygamous marriage today have a very strong case for validating polygamous or plural marriage on cultural, religious, and constitutional grounds.

155. *Id.* at 2694-95.

