Georgia State University Law Review

Volume 17
Issue 3 *Spring 2001*

Article 4

3-1-2001

Polygamists Out of the Closet: Statutory and State Constitutional Prohibitions Against Polygamy are Unconstitutional Under the Free Exercise Clause

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POLYGAMISTS OUT OF THE CLOSET: STATUTORY AND STATE CONSTITUTIONAL PROHIBITIONS AGAINST POLYGAMY ARE UNCONSTITUTIONAL UNDER THE FREE EXERCISE CLAUSE

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INTRODUCTION

The *Romer v. Evans*[1] colloquy between Justices Kennedy and Scalia over the applicability of the nineteenth century polygamy[2] cases to the more current debate over gay rights and

1. 517 U.S. 620 (1996) (holding that Colorado's Amendment 2, which declared that all existing local legislation providing protections to homosexuals was unconstitutional and required a constitutional amendment to adopt any new local legislation protective of gays, violated the Equal Protection Clause of the Fourteenth Amendment).

2. The term "polygamy" will be used herein, although it is commonly used incorrectly. Polygamy is the practice of having more than one husband or wife at the same time. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1016 (1973). More specifically, the Mormons actually practiced polygyny, the practice of a man having more than one wife at a time. *Id.* Less common is polyandry, the practice of a woman having more than one husband at the same time. *Id.* Although not explicit in the above definitions, the common implication is that such multiple marriages are with at least the knowledge, if not the consent, of all parties concerned. Bigamy is the practice of marrying one person while married to another, *id.* at 130, but by contrast, generally implies that the multiple partners are not aware of each other's existence.

same-sex marriages[3] was of more than academic interest to the estimated 25,000 to 50,000 Mormon[4] practitioners of polygamy,

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Black's notes that bigamy implies two marriages while polygamy implies three or more. BLACK'S LAW DICTIONARY 1159 (6th ed. 1990). *Black's* defines polygamy and polyandry but not polygyny. Although both terms are subsumed under polygamy, polyandry and polygyny are treated very differently by modern practitioners. For example, Christian polygamists practice polygyny, but consider polyandry "unnatural" because it has no textual support in the Bible. *See* Hannah Wolfson, *Christian Polygamy Takes Root in Utah*, LAS VEGAS REV.-J., Aug. 29, 1999, at 14B, *available at* 1999 WL 9291827. Likewise, Islamic law allows polygyny but not polyandry. *See* Jorge Martin, *English Polygamy Law and the Danish Registered Partnership Act: A Case for Consistent Treatment of Foreign Polygamous Marriages and Danish Same-Sex Marriages in England*, 27 CORNELL INT'L L.J. 419, 427 (1994) (arguing that England should recognize same-sex marriages contracted under Danish law in the same way that it recognizes polygamous marriages contracted under the laws of nations allowing polygamy).

3. *See Romer*, 517 U.S. at 634, 648-51. It is, perhaps, ironic that present day Mormons have weighed in as strong opponents of same-sex marriage after having suffered for their belief in polygamous marriage. The Mormon Church spent $1.1 million to fight same-sex marriage propositions in Hawaii and Alaska in 1998, and the 740,000 Mormons in California were asked to spend as much to support California's Proposition 22, the Protection of Marriage Act, which states, "Only marriage between a man and a woman is valid or recognized in California." The proposition appeared on the March 2000 state ballot. *See* Sybel Alger, *Mormons Join Ballot Fight on Marriage Inland Donations Flow*; PRESS-ENTERPRISE (Riverside, Cal.), Aug. 16, 1999, at B1, *available at* 1999 WL 18899294; Thomas D. Elias, *Mormons Join Political Fray*, ATLANTA J. & CONST., July 29, 1999, at B4, *available at* 1999 WL 3787314. Support for Proposition 22 breaks down along denominational lines: the Episcopal Church, the United Methodist Church, the Evangelical Lutheran Church of America, the Presbyterian Church (USA), and the United Church of Christ opposed the proposition, while the Mormons, Roman Catholics, Southern Baptists, and some Muslims favored the proposition. *See Proposition 22 Opposed*, ATLANTA J. & CONST., Feb. 12, 2000, at B1, *available at* 2000 WL 5440961. In the resulting vote, Californians approved the measure by a 61% (4,160,708) to 39% (2,617,838) margin. *See* Michelle Locke, *California "Not Ready for a Marriage" Between Gays*, ATLANTA J. & CONST., Mar. 9, 2000, at A1.

4. The Mormons are officially known as the Church of Jesus Christ of Latter-day Saints. *See* Wolfson, *supra* note 2. The Church renounced polygamy in the nineteenth century. *See id.* The 25,000 to 50,000 practicing polygamists generally live in the West and "trace their roots to historical Mormonism." *Id.*; *see also* RICHARD N. OSTLING & JOAN K. OSTLING, MORMON AMERICA: THE POWER AND THE PROMISE (1999) (noting that the number of practicing polygamists ranges from 30,000 to "several times that") (The Ostlings' text will be referenced throughout this Article and is recommended as a neutral survey of the Mormon Church's history, present, and future; it does not focus on polygamy but does discuss it.); RICHARD S. VAN WAGGONER, MORMON POLYGAMY: A HISTORY, at ix (2d ed. 1989) (placing the number of polygamists at 30,000 or more); Irvin Altman, *Polygamous Family Life: The Case of Contemporary Mormon Fundamentalists*, 1996 UTAH L. REV. 367, 369 (placing the number at 20,000 to 40,000, or more). Utah State Senator Ron Allen places the number of practicing polygamists at 50,000. Allen sponsored a bill that would earmark $500,000 for the prosecution of polygamy. Some view the bill as an attempt to clean up the state's image for the 2002 Winter Olympic Games. *See Crimes by Polygamist Groups Targeted: Utah Senate Approves $500,000 To*

as well as the nearly 1,000 Christian polygamists,[5] and Islamic[6] and African[7] practitioners of polygamy. The degree to which divergent religious practices will be accommodated is of increasing importance in a nation where the variety of religions is changing and expanding from the once overwhelmingly Protestant Christian colonial era.

Part I of this Article first discusses at the *Romer v. Evans* colloquy.[8] Part II briefly explores the history of the Mormon Church including its adoption and later repudiation of polygamy.[9] Part II also examines non-Mormon polygamy.[10] Part III considers the scriptural basis for polygamy.[11] Part IV analyzes four nineteenth century cases that still apparently stand as anti-polygamy precedent: *Reynolds v. United States*,[12] *Murphy v. Ramsey*,[13] *Davis v. Beason*,[14] and *Late Corp. of the Church of Jesus Christ of Latter-day Saints v. United States*.[15] This Part also discusses a modern polygamy case, *Potter v. Murray City*.[16] Part V explores modern Free Exercise Clause jurisprudence: *Sherbert v. Verner*;[17] *Employment Division, Department of Human Resources of Oregon v. Smith*,[18] and

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Fund Battle, DENV. POST, Feb. 24, 2000, at A18, *available at* 2000 WL 4453723. Practicing Mormon polygamists call themselves "Fundamentalists," and I will use the term "Fundamentalist Mormons" throughout to distinguish the group both from the Fundamentalist Protestants, who advocate a literal interpretation of the Bible, but who have never, to my knowledge, interpreted the Bible to advocate polygamy, and from the current Mormons who now thoroughly denounce polygamy. *See* FRED C. COLLIER, THE CHURCH OF THE FIRSTBORN AND THE HOLY ORDER OF GOD (1977) (claiming descent from Joseph Smith, Jr., but claiming to be different from modern Mormons, hinting at, but not directly referencing, polygamy).

5. The Christian polygamists distance themselves from traditional Mormonism. *See* Wolfson, *supra* note 2; *infra* Part II.B and note 353 (discussing Christian polygamists).

6. See *infra* note 106 and accompanying text for a discussion of polygamy and Islam.

7. See *infra* notes 107-09 and accompanying text for a discussion of polygamy in Africa.

8. *See infra* Part I.

9. *See infra* Part II.A.

10. *See infra* Part II.B.

11. *See infra* Part III.

12. 98 U.S. 145 (1878); *see infra* Part IV.A.

13. 114 U.S. 15 (1885); *see infra* Part IV.B.

14. 133 U.S. 333 (1890); *see infra* Part IV.C.

15. 136 U.S. 1 (1890); *see infra* Part IV.D.

16. 585 F. Supp. 1126 (D. Utah 1984), *aff'd*, 760 F.2d 1065 (10th Cir. 1985), *cert. denied*, 474 U.S. 849 (1985); *see infra* Part IV.E.

17. 374 U.S. 398 (1963); *see infra* Part V.A.

18. 494 U.S. 872 (1990); *see infra* Part V.B.

Church of the Lukumi Babalu Aye v. City of Hialeah.[19] Part V also considers Congress' counterstroke to *Smith*, the Religious Freedom Restoration Act (RFRA), which was subsequently invalidated in *City of Boerne v. Flores*.[20]

Part VI surveys today's diverse religious landscape[21] and argues that the Free Exercise Clause protects religiously motivated polygamy for two separate but interrelated reasons. First, because marriage is a fundamental right, the situation presents a hybrid claim of interference with a fundamental right as well as a Free Exercise claim.[22] Second, under *Church of the Lukumi Babalu Aye v. City of Hialeah*,[23] the prohibitions are not of general applicability but rather are aimed at a specific religious practice because they are born of antipathy to the underlying religion.[24] Furthermore, the prohibition against polygamy, a practice that is required of those who desire to ascend to heaven under original Mormon teachings, is a substantial burden on religion.[25] Following the breakdown of the traditional family as the sole child-rearing unit, there is no compelling government interest in prohibiting polygamy.[26] The Article concludes that opponents of same-sex marriages are wrong to rely on the nineteenth century anti-Mormon cases for support because when those cases are re-examined in a twentieth century context, they must be held unconstitutional.

As a final introductory note, the genesis of this Article lay in a desire to repudiate Justice Scalia's reliance upon the nineteenth century polygamy cases in his attack on Justice Kennedy's majority opinion in *Romer v. Evans*.[27] However, in making that attempt, the Article raises other troubling issues.

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19. 508 U.S. 520 (1993); *see infra* Part V.D.
20. 521 U.S. 507 (1997); *see infra* Part V.C.
21. *See infra* Part VI.A-C.
22. *See infra* Part VI.D-E.
23. 508 U.S. 520 (1993).
24. *See infra* Part VI.F. Professors Ides and May reach the opposite conclusion because, they argue, the law proscribes polygamy under all circumstances, not just Mormon polygamy. ALLAN IDES & CHRISTOPHER N. MAY, CONSTITUTIONAL LAW: INDIVIDUAL RIGHTS: EXAMPLES AND EXPLANATIONS 380 (1998). However, they note that "one could argue... that the anti-polygamy law was not neutral if it could be shown that its specific purpose was to outlaw a practice engaged in by members of what was at that time considered a radical and dangerous religion." *Id.*
25. *See infra* Part VI.G.
26. *See infra* Part VI.H.
27. 517 U.S. 620, 651 (1996) (Scalia, J., dissenting).

The vast majority of those known as polygamists—both of Mormon and non-Mormon origin—actually practice polygyny, one man with multiple wives, while polyandry, one wife with multiple husbands, is rare and often condemned.[28] Even discounting for a degree of anti-Mormon hysteria—tales of incest, underage girls forced into polygamy with older men, slave-like situations for unwilling plural wives—the typical polygamist family still seems like a male sexist's dream world. Indeed there is much about polygamy that offends modern feminist theory. For example, early Mormon polygamists believed that women could only reach heaven through their husbands, a belief that encouraged plural marriage to the reluctant but virtuous person. Certainly, the polygamists are not the only group whose religious beliefs are potentially harmful to women. Many Christian groups limit women's roles in the clergy. In addition, Islamic treatment of women is offensive to feminists, and suttee[29] is perhaps the most offensive religiously based concept imaginable.

Perhaps the lesson to be learned is that the Free Exercise Clause should not be the weapon used to attack polygamy. Rather, the Free Exercise Clause needs to be read, not narrowly as it was in *Smith*, but broadly as it was in *Church of the Lukumi Babalu Aye* so as to protect unpopular, non-mainstream practices. In any case, the lessons of *Reynolds* and the other polygamy cases, regarding both the Free Exercise Clause and the more current dispute over same-sex marriage, must be re-examined despite their more troubling implications.[30]

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28. *See supra* note 2.

29. "Suttee," a practice of a widow burning herself on the funeral pyre with the body of her husband, prevailed in India until it was abolished by the British in 1829; however, isolated instances of suttee still occur in remote parts of India today. *See infra* note 167.

30. *See* Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. REV. 1501, 1532-36 (1997) (arguing that polygamy should be outlawed because it results in despotism, but that same-sex marriage should not be outlawed); *see also* Altman, *supra* note 4, at 380-90 (describing modern polygamy's rather chaste courting, marriage, honeymoon, and family rituals); Elizabeth Harmer-Dionne, Note, *Once a Peculiar People: Cognitive Dissonance and the Suppression of Mormon Polygamy as a Case Study Negating the Belief-Action Distinction*, 50 STAN. L. REV. 1295, 1328 (1998) (describing Mormon polygamy as "essentially a puritanical system" and noting that Brigham Young argued polygamy was neither aimed at satisfying man's carnal desires nor at punishing women).

I. THE *ROMER V. EVANS* COLLOQUY

In *Romer v. Evans*,[31] Justice Kennedy affirmed the opinion of the Colorado Supreme Court[32] that Colorado's Amendment 2, which declared all existing local legislation providing protections to homosexuals unconstitutional and required a constitutional amendment to adopt any new local legislation protective of gays, violated the federal Constitution.[33] Justice Kennedy found that Amendment 2 failed even the rational relationship test because it imposed "a broad and undifferentiated disability on a single named group" and seemed "inexplicable by anything but animus toward the class."[34]

Justice Kennedy, although writing the majority opinion, was actually responding to Justice Scalia's dissent, which discussed *Davis v. Beason*.[35] Justice Kennedy noted that to the extent *Davis* held that a person may be denied the right to vote because he advocated a certain practice, *Davis* had been overruled by *Brandenburg v. Ohio*.[36] Further, to the extent that *Davis* stood for the proposition that a convicted felon may be denied the right to vote, "its holding is not implicated by [the

31. 517 U.S. 620 (1996).

32. Evans v. Romer, 882 P.2d 1335 (Colo. 1994).

33. Justice Kennedy reached his conclusion on alternate grounds from the Colorado Supreme Court, which held that the legislation violated the gay plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment. *See Romer*, 517 U.S. at 620. The Colorado court reasoned that even though gays are not a suspect class, the legislation was subject to strict scrutiny because it took away gays' rights to participate in the political process. Thus, implicitly, the Colorado court held that the case fell under the fundamental rights branch of the strict scrutiny analysis. In doing so, the court relied on what has elsewhere been described as the political structure line of Equal Protection cases. *See* Keith Sealing, *Proposition 209 as Proposition 14 (As Amendment 2): The Unremarked Death of Political Structure Equal Protection*, 27 CAP. U. L. REV. 337, 357-62 (1999) (arguing that Justice Kennedy should have adopted the Colorado Supreme Court's reasoning). The Colorado court held that strict scrutiny applied to any law that infringed upon a fundamental right to participate in the political process. *See Evans*, 854 P.2d at 1276-77.

34. *Romer*, 517 U.S. at 632; *cf.* City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (holding that the city's denial of a permit was motivated by irrational animus toward the mentally retarded and, thus, failed the rational relationship test).

35. *Romer*, 517 U.S. at 634 (citing Davis v. Beason, 133 U.S. 333 (1890)). Justice Kennedy did not even mention *Murphy v. Ramsey* although Justice Scalia did so.

36. *Id.* (citing Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam)).

Court's] decision and is unexceptionable."[37] Most importantly, Justice Kennedy argued: "To the extent [*Davis*] held that the groups designated in the statute may be deprived of the right to vote because of their status, its ruling could not stand without surviving strict scrutiny, a most doubtful outcome."[38] Justice Kennedy did not specify why strict scrutiny was appropriate. Clearly, polygamists as a group were not *per se* entitled to strict scrutiny. Had Justice Kennedy adopted the Colorado Supreme Court's reasoning, one could infer that Mormon polygamists were entitled to strict scrutiny because they had been denied the right to fair participation in the political process.[39] We are left with the conclusion that strict scrutiny would be appropriate because voting is a fundamental right. Overall, Justice Kennedy did little to rebut Justice Scalia's argument that the Mormon polygamy cases support the constitutionality of Colorado's Amendment 2.[40]

Justice Scalia's arguments in reliance upon Mormon cases came in the context of a harshly critical dissent in which he challenged that "the Court has mistaken a Kulturkampf for a fit of spite."[41] Justice Scalia wrote: "[T]here is a much closer

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37. *Id.* (citing Richardson v. Ramirez, 418 U.S. 24 (1974) (holding that the Equal Protection Clause does not prevent prohibition on voting by felons)).

38. *Id.* (citing Dunn v. Blumstein, 405 U.S. 330 (1972) (holding that Tennessee laws imposing one-year state and three-month county residency requirements for voters violated the Equal Protection Clause because they furthered no compelling state interest), and comparing United States v. Brown, 381 U.S. 437 (1965) (holding that a federal law making it a crime for a member of the Communist Party to serve as an officer or employee of a labor union was void as a bill of attainder), with United States v. Robel, 389 U.S. 258 (1967) (holding that the Subversive Activities Control Act violated the First Amendment right of association by making it illegal for a member of a Communist organization to work in any defense-related facility)).

39. Justice Kennedy's omission did not go unnoticed by Justice Scalia. *See Romer*, 517 U.S. at 650 n.3 (Scalia, J., dissenting).

40. Kennedy's opinion contained no footnotes, a "bare minimum" of analysis, and a Warren-Court-style "casual attitude toward precedent." Louis Michael Seidman, *Romer's Radicalism: The Unexpected Revival of Warren Court Activism*, 1996 SUP. CT. REV. 67, 69.

41. *Romer*, 517 U.S. at 636 (Scalia, J., dissenting). Scalia, joined by Justices Rehnquist and Thomas, found a rational basis for Amendment 2 in *Bowers*, where the Court upheld the states' power to declare homosexual conduct a crime. *Id.* (citing Bowers v. Hardwick, 478 U.S. 186 (1986)). Scalia argued that if it is rational to criminalize the conduct of homosexuals, it is also rational to "deny special favor and protection." *Id.* at 642. Further, the amendment prohibits "favored status for homosexuality" and nothing more. *Id.* at 642, 644. Claiming that "our constitutional jurisprudence has achieved terminal silliness," Scalia argued that animosity toward homosexuality is not "un-American" and

analogy, one that involves precisely the effort by the majority of citizens to preserve its view of sexual morality statewide, against the efforts of a geographically concentrated and politically powerful minority to undermine it."[42]

Justice Scalia assumed that the anti-polygamy provisions in the Utah,[43] Oklahoma,[44] Idaho,[45] and New Mexico[46] state constitutions are constitutional.[47] Justice Scalia then wrote: "The Court's disposition today suggests that these provisions

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that Coloradans were not gay bashers; rather, gays were a politically powerful group with an agenda of achieving not merely "tolerance" but finally "affirmation." *Id.* at 646 (citing Andrew M. Jacobs, *The Rhetorical Construction of Rights: The Case of the Gay Rights Movement, 1969-1991*, 72 NEB. L. REV. 723, 724 (1993)). Finally, Justice Scalia found the causation of the Court's seemingly too-tolerant attitude toward homosexuality in "the views and values of the lawyer class from which the Court's members are drawn," citing as proof the fact that the Association of American Law Schools requires member schools to agree not to discriminate on the basis of sexual preference in hiring. Scalia contrasted the thus-tainted Court with the "more plebian attitudes that apparently still prevail in the United States Congress, which has been unresponsive to repeated attempts to extend homosexuals the protection of federal civil rights laws." *Id.* at 653.

42. *Id.* at 648 (Scalia, J., dissenting).

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

44. The Oklahoma Constitution states that "polygamous or plural marriages are forever prohibited." OKLA. CONST. art. I, § 2.

45. The Idaho Constitution provides:

> The exercise and enjoyment of religious faith and worship shall forever be guaranteed; and no person shall be denied any civil or political right, privilege, or capacity on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, or excuse acts of licentiousness or justify polygamous or other pernicious practices, inconsistent with morality or the peace or safety of the state; nor to permit any person . . . to commit the crime of bigamy or polygamy, or any other crime. No person shall be required to attend or support any ministry or place of worship, religious sect or denomination, or pay tithes against his consent; nor shall any preference be given by law to any religious denomination or mode of worship. Bigamy and polygamy are forever prohibited in the state, and the legislature shall provide by law for the punishment of such crimes.

IDAHO CONST. art. I, § 4.

46. The New Mexico Constitution provides: "Perfect toleration of religious sentiment shall be secured, and no inhabitant of this state shall ever be molested in person or property on account of his or her mode of religious worship. Polygamous or plural marriages and polygamous cohabitation are forever prohibited." N.M. CONST. art. XXI, § 1.

47. *See Romer*, 517 U.S. at 648 (Scalia, J., dissenting).

are unconstitutional, and that polygamy must be permitted in these States on a state-legislated, or perhaps even local-option, basis—unless, of course, polygamists for some reason have fewer constitutional rights than homosexuals."[48]

Of course, Justice Scalia's aim was not to provide support for polygamists, but rather to discredit the majority opinion with a parade of "horribles." However, Justice Scalia succeeded in removing the anti-polygamy provisions he cited from the generally applicable law of his heavily criticized *Smith* holding, and by showing that the provisions were aimed against a particular group, placing them in the *Church of the Lukumi Babalu Aye* category.

Turning to *Davis v. Beason*,[49] Justice Scalia described the Idaho provision at issue in that case as depriving polygamists of the ability to achieve their political goal of making polygamy legal by effectuating a state constitutional amendment. Specifically, by depriving polygamists of the power to vote, they were prevented from voting to amend their state's constitution.[50] Further, the fact that one could be denied the right to vote because he had been convicted of the felony of polygamy begs the question of whether making polygamy a felony withstands constitutional scrutiny. However, according to Justice Scalia, it is still good law that polygamy can be criminalized.[51] Further, Justice Scalia explained that the *Beason* Court considered and rejected the Equal Protection Clause argument.[52] Finally, Justice Scalia noted that Justice Kennedy had cited *Beason* with approval in his 1993 *Church of the Lukumi Babalu Aye* opinion.[53] Thus, Justice Scalia concluded, the Court could only

48. *Id.* (Scalia, J., dissenting).

49. 133 U.S. 333 (1890).

50. *See Romer*, 517 U.S. at 649 (Scalia, J., dissenting). As Justice Kennedy noted, the *Davis* holding is no longer good law to the extent that it would deny the right to vote to someone who simply believed in polygamy. Scalia concurred on that point. *Id.* at 649-50 (citing Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam)).

51. *Id.* at 650 (Scalia, J., dissenting) (citing Richardson v. Ramirez, 418 U.S. 24, 53 (1974) (stating that the Equal Protection Clause does not prevent prohibition on voting by felons)).

52. *Id.* at 649-50 (Scalia, J., dissenting). Justice Scalia noted that among the *Davis* Justices rejecting the Equal Protection argument were Justice Harlan and Justice Bradley, "the two whose views in other cases the Court today treats as equal protection lodestars." *Id.* at 650.

53. *Id.* at 651 (Scalia, J., dissenting) (citing Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 535 (1993)).

reconcile the two cases if the perceived social harm of polygamy was a legitimate government concern and the perceived social harm of homosexuality was not.[54]

Justice Scalia then concluded his review of the polygamy analogy with a lengthy quote from *Murphy v. Ramsey*,[55] which is a paean to heterosexual monogamy and which suggests that adherence to monogamy is a necessary precursor to worthiness for admission to the Union as a state.[56] The quote demonstrated to Justice Scalia the differing levels of animosity the Court would allow on the issues of polygamy and homosexuality.[57]

II. MORMONS AND OTHER POLYGAMISTS

Although the polygamy debate in the United States has focused primarily on Mormon polygamy, polygamy is not uncommon throughout the world. This section first looks at the nineteenth century Mormon polygamists and their modern Mormon Fundamentalist successors, then briefly at other polygamists including the Christian polygamists, Islamic polygamists, and polygamists of sub-Saharan origin.

A. The Mormons and Mormon Fundamentalists

According to Mormon belief, church founder Joseph Smith, Jr., received, at age twenty-four, a set of gold plates from an angel. The plates, translated by Smith into King James version-style English, became the Book of Mormon, describing the pre-Columbian American Indians as being of Hebrew origin and as

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54. *Id.* (Scalia, J., dissenting).

55. 114 U.S. 15 (1885).

56. *Romer*, 517 U.S. at 651 (Scalia, J., dissenting) (citing Murphy v. Ramsey, 114 U.S. 15, 45 (1885)). The *Murphy* Court stated:

> [C]ertainly, no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.

Murphy, 114 U.S. at 45.

57. *Romer*, 517 U.S. at 651 (Scalia, J., dissenting).

being the chosen people in the promised land of America.[58] Smith's new religion was born in an era of religious enthusiasm and revivalism, but also of liberalism, and it has been described as a conservative counter-reaction to that liberalism.[59] Other religions of the time had nontraditional sex practices, such as the celibacy of the Shakers and the "complex marriage" of the Oneida community.[60] Smith's teachings were related to those of Swedish scientist and philosopher Emanuel Swedenborg, who also meshed biblical interpretation and direct, personal contact with a higher power.[61] Swedenborg's "spiritual wifery" envisioned souls that had known each other prior to life reuniting in marriage while on the earth and remaining remarried in the spiritual realm.[62]

Although Joseph Smith, Jr., began privately advocating plural marriages in the 1840s or earlier, the official revelation on plural marriage came to Smith on July 12, 1843.[63] These secret teachings survived his 1844 murder.[64] Smith had as many as forty-eight wives, and Brigham Young, his successor who initially was opposed to polygamy, had at least twenty.[65] Young led the Mormons' exodus to the Rocky Mountain basin where the church publicly announced its advocacy of polygamy in 1852.[66] The outcry—both public and in Congress—was immediate. On July 1, 1862, President Lincoln signed the Morrill Anti-bigamy Act, which was unambiguously aimed at Utah and its Mormons.[67] However, the Act was largely ignored in Utah, where many judges were Mormons. In fact, the Mormon Church took the position that the Morrill Act was an unconstitutional violation of the First Amendment.[68]

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58. *See* VAN WAGGONER, *supra* note 4, at 1. However, "not a single person, place or event unique to Joseph Smith's 'gold bible' has ever been proven to exist." OSTLING & OSTLING, *supra* note 4, at 259.

59. *See* Altman, *supra* note 4, at 369.

60. *See* OSTLING & OSTLING, *supra* note 4, at 67.

61. *See* VAN WAGGONER, *supra* note 4, at 42.

62. *See id.* Swedenborg's spiritual wifery theories were adopted by Smith's contemporaries, the Perfectionists of New England. *See id.* at 42-43.

63. *See* OSTLING & OSTLING, *supra* note 4, at 69.

64. *See* VAN WAGGONER, *supra* note 4, at 11. Smith was shot to death by a mob while in jail awaiting trial on a polygamy charge. *See id.*

65. *See* OSTLING & OSTLING, *supra* note 4, at 58.

66. *See* VAN WAGGONER, *supra* note 4, at 107.

67. *See* Act of July 1, 1862, ch. 126, § 1, 12 Stat. 501, 501-02 (repealed 1910).

68. *See* VAN WAGGONER, *supra* note 4, at 108.

Anti-polygamy sentiment grew at the same time as the anti-slavery movement, and the two ideas were linked in the popular mind. John Charles Fremont, the first Republican presidential candidate, campaigned against "those twin relics of barbarism—polygamy and slavery."[69] A "flood" of anti-polygamy tomes began to appear; themes included plural wives as slaves, the lust of old men for young girls, and incest in polygamous families.[70]

In 1874, the Poland Act shifted enforcement of the Morrill Act from local (and more often than not, Mormon) judges to federal appointees.[71] Following the Civil War, President Ulysses S. Grant appointed General J. Wilson Shaffer as Governor of Utah, and he, in turn, appointed James B. McKean as Chief Justice of the Utah Supreme Court.[72] Shaffer immediately brought charges against Brigham Young,[73] but the case was dismissed by the United States Supreme Court for a flawed method of jury selection.[74] Hoping for ultimate vindication of their belief in polygamy, the Mormons set up a test case using Brigham Young's personal secretary, George Reynolds.[75]

As Utah's bid for statehood intensified,[76] so did anti-polygamy sentiment in Congress. Congress passed the Edmunds Act in 1882 to disenfranchise Mormons, make them ineligible for public office and jury duty, and make "unlawful cohabitation" criminal.[77] The even harsher Edmund-Tucker Act followed.[78]

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69. ROBERT J. HITCHENS, MULTIPLE MARRIAGE, A STUDY OF POLYGAMY IN LIGHT OF THE BIBLE 81 (1987) (citing IRVING WALLACE, THE TWENTY-SEVENTH WIFE 13 (1961)). Hitchens' book presents the fundamentalist Baptist view on polygamy and ultimately concludes that it cannot be reconciled with Christianity. *See id.*

70. *See id. See generally* WILLIAM HEPWORTH DIXON, NEW AMERICA (1867); JENNIE A. FROISETH, WOMEN OF MORMONISM (1882); FANNY STENHOUSE, THE TYRANNY OF MORMONISM (1888); AUSTIN WARD, THE HUSBAND IN UTAH (1857); MARIA WARD, FEMALE LIFE AMONG THE MORMONS (1855); KIMBALL YOUNG, ISN'T ONE WIFE ENOUGH? (1954).

71. *See* OSTLING & OSTLING, *supra* note 4, at 70.

72. *See* VAN WAGGONER, *supra* note 4, at 109.

73. *See id.*

74. *See* Young v. Godbe, 82 U.S. 562 (1872).

75. *See* VAN WAGGONER, *supra* note 4, at 110.

76. Utah began petitioning to join the Union in 1850. *See* OSTLING & OSTLING, *supra* note 4, at 53.

77. *See* Act of Mar. 22, 1882, ch. 47, § 8, 22 Stat. 30 (repealed 1983).

78. *See* Act of Mar. 3, 1887, ch. 397, §§ 13, 17, 24 Stat. 635, 637-38 (repealed 1978); *see also* VAN WAGGONER, *supra* note 4, at 132-33. The Edmond-Tucker Act made unrecorded marriages felonies, forced wives to testify against husbands, disinherited children of polygamous marriages, and allowed for the confiscation of virtually all church property.

Utah legislators began drafting an anti-polygamy constitution the following year.[79] Pressure came from the Supreme Court as well as Congress. On May 19, 1890, the Court upheld the constitutionality of the government's seizure of church property in *Late Corp. of the Church of Jesus Christ of Latter-day Saints v. United States*.[80] This decision was doubly vexing because Smith had preached that the United States Constitution was divinely inspired.[81]

Against this background and facing the imminent passage of the Cullom-Stubble Bill, which was designed to take away all the citizenship rights of Mormons, Church President Wilford Woodruff issued a press release, the "Woodruff Manifesto," outlawing polygamy in 1890.[82] However, the practice of polygamy continued under a resumed mantle of secrecy until at least 1904.[83]

There are number of historical reasons for skepticism about the sincerity of the Woodruff Manifesto. Polygamy began in secrecy. Smith, one of the group's greatest advocates, practiced polygamy in secret while denying any involvement in public.[84] In addition, more than 250 polygamous marriages were consecrated between the date of the Manifesto and 1904.[85] However, today "no group seems more anti-polygamous than Utah Mormons."[86]

The continued practice of polygamy prompted congressional efforts in 1902 to begin the process of amending the United States Constitution to ban polygamy in the United States.[87] However, the amendment, opposed by President Theodore Roosevelt, did not make it through Congress.[88]

See id.

79. *See* VAN WAGGONER, *supra* note 4, at 130.

80. 136 U.S. 1 (1890).

81. *See* OSTLING & OSTLING, *supra* note 4, at 53.

82. *See* VAN WAGGONER, *supra* note 4, at 140.

83. *See id.* at ix.

84. *See* OSTLING & OSTLING, *supra* note 4, at 14. Polygamy may have begun as early as 1830, but the Doctrine & Covenants of the Mormon Church prohibited it until 1876. *See id.* at 60.

85. *See id.* at 73.

86. VAN WAGGONER, *supra* note 4, at ix.

87. *See id.* at 160. It is at least curious that Congress felt that a federal constitutional amendment was needed in light of the recent Court decisions upholding draconian anti-polygamy statutes and state constitutional prohibitions against polygamy.

88. *See id.*

According to Fundamentalist Mormon belief, Mormon President Taylor met with martyred Joseph Smith, Jr., and Jesus Christ on September 27, 1886, and then met with church leaders who were "put under covenant that he or she would defend the principle of Celestial or Plural Marriage, and that they would consecrate their lives, liberty and property to this end."[89] This appears to have been the origin of a secret continuation of Mormon polygamy in opposition to the church hierarchy.[90]

Today, many Christians ask, "Are the Mormons Christian?,"[91] and Mormons ask, "Are non-Mormon 'Christians' truly Christian?" The Ostlings devote an entire chapter to the issue and conclude that both groups answer "no."[92] Mormons and more mainstream Christians disagree on a number of major points. For example, the Mormons believe that: (1) God, once a man,[93] is an evolving being and is one of many gods;[94] (2) there was no original sin;[95] (3) the Holy Trinity is not one God in three manifestations but rather three individuals;[96] (4) men can join God as gods themselves;[97] and (5) western Missouri was the site of the Garden of Eden.[98] Mormons excluded those of African descent from the Priesthood until 1978,[99] and still prohibit mixed-race marriages[100] because they believe that dark skin is a curse from God.[101] In addition, the Mormon Church participated in the fight to defeat the Equal Rights

89. *Id.* at 184 (quoting Joseph Musser's Journal).
90. *See id.* at x. Some 25,000 to 30,000 Fundamentalist Mormons live in Utah, Arizona, and Montana.
91. Gayle White, *Mormon Would-Be Methodists Must Be Rebaptized*, ATLANTA J. & CONST., May 20, 2000, at B1. Baptized Mormons must be re-baptized if they join the Methodist Church, which does not consider Mormon baptism Christian baptism. *See id.* The Southern Baptist Church and the Presbyterian Church (USA) agree. *See id.* Likewise, baptized Methodists who convert to Mormonism must be re-baptized. *See id.*
92. *See* OSTLING & OSTLING, *supra* note 4, at 315-333.
93. *See id.* at 295.
94. *See id.* at 11.
95. *See id.* at 302.
96. *See id.* at 305.
97. *See id.* at 307.
98. *See id.* at 30.
99. *See id.* at 94-95.
100. *See id.* at 99.
101. *See id.* at 99-101. Young legalized African slavery in Utah in 1852.

Amendment.[102] Nevertheless, few would argue that Mormonism is not a religion entitled to First Amendment protection.

Although there are only 4.9 million Mormons in the United States, they "approach the end of this millennium with political representation that far outstrips their numbers."[103] On a per capita basis, the Mormon Church is America's richest, with twenty-five to thirty billion dollars in assets and five to six billion dollars a year in income.[104] The structure of the Church is such that its president wields more absolute power than the Roman Catholic Pope, and similarly holds a lifetime appointment.[105]

B. Non-Mormon Christian Polygamists and Other Polygamists

The Koran allows up to four wives, but counsels that one should not take more wives than one can treat with equity.[106]

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102. *See id.* at 170.

103. Valerie Richardson, *Mormons Enter Mainstream of Modern American Politics; But Sizeable Percentage Would Not Elect One to White House*, WASH. TIMES, July 21, 1999, at A2, *available at* 1999 WL 3090332. There are ten million Mormons worldwide. *See* OSTLING & OSTLING, *supra* note 4, at xvi. Mormons represent 1.8% of the population, but hold 5% of Senate seats and 2.8% of seats in the House of Representatives. *See* Richardson, *supra*. Four Mormons have run for President: founder Joseph Smith in 1844, Michigan Governor George Romney in 1968, Representative Morris "Mo" Udall (D-Ariz.) in 1976, and Populist James "Bo" Gritz in 1992. *See id.* In Utah, Mormons hold the governorship, both U.S. Senate seats, including that of the powerful Judiciary Committee Chairman Orin G. Hatch, and all three U.S. House of Representatives seats. *See id.* In addition, Mormons hold three Senate seats outside Utah—Michael Crapo (R-Idaho), Gordon Smith (R-Or.), and Harry Reid (D-Nev.). *See id.*

104. *See* OSTLING & OSTLING, *supra* note 4, at xvi. Much of this income is derived from a mandatory tithe of ten percent of income. *See id.* at 115.

105. *See id.* at 148, 151. The combination of the President's lifetime tenure and the fact that the most senior of his advisory body, the Quorum of Twelve Apostles, is automatically chosen as his successor, assures that the officeholder is always elderly. *See id.* The current President, Gordon Hinckley, recently turned ninety. *See* Gayle White, *Coming of Age, Led By Their Spry, Personable President, Mormons Are Moving into the Religious Spotlight*, ATLANTA J. & CONST., July 1, 2000, at B1.

106. *See* AHMED ALI, AL-QURAN [THE KORAN]: A CONTEMPORARY TRANSLATION 73 (Princeton Univ. Press rev. ed. 1988). The Koran provides:

> If you fear you cannot be equitable to orphan girls (in your charge, or misuse their persons) then marry women who are lawful for you, two, three, or four, but if you fear you cannot treat so many with equity, marry only one, or a maid or captive. This is better than being iniquitous.

Id. Smith was aware of Islam and promised freedom of worship to its practitioners in his community. *See* OSTLING & OSTLING, *supra* note 4, at 67.

The fact that Africa has the highest number of polygamous marriages is frequently cited,[107] and one cannot help but detect a racial overtone to the statements. Indeed, it is noted that the first polygamist mentioned in the Bible is one of the descendents of Ham.[108] Flourishing polygamy in sub-Saharan Africa has been a concern to Christian missionaries.[109]

Chinese polygamy, first noted by Jesuit missionaries in the seventeenth and eighteenth centuries,[110] continues to this day. In China, this practice, called *bao ernai*, is based in part upon the belief that "[i]f a man doesn't keep a concubine, he's not successful."[111] *Bao ernai* offends both Chinese feminists and "socialist morality and customs," and is being debated, along with other marriage issues, such as China's increasing divorce rate, as part of marital law reform.[112]

III. THE SCRIPTURAL BASIS FOR POLYGAMY

Nineteenth century Mormon polygamists derived their belief in the religious importance of polygamy not only from the Bible but also from the more recent word of God as revealed to Joseph Smith.[113] A number of Old Testament patriarchs had multiple

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107. *See, e.g.*, HITCHENS, *supra* note 69, at 35.

108. *See* Keith E. Sealing, *Blood Will Tell: Scientific Racism and the Legal Prohibitions Against Miscegenation*, 5 MICH. J. RACE & L. 559, 571-74 (2000).

109. "[W]hat is (criminal) bigamy in the Occident is the first step in gaining status in parts of Africa." JACQUES BARZUN, FROM DAWN TO DECADENCE: 500 YEARS OF WESTERN CULTURAL LIFE: 1500 TO THE PRESENT 762 (2000).

110. *See infra* note 160 and accompanying text.

111. Julie Chao, *Chinese Province Targets Men Who Keep a 'Second Wife'*, SAN DIEGO UNION-TRIB., July 29, 2000, at A23, *available at* 2000 WL 13978059.

112. *See id.* Chinese polygamists take two, three, or four wives and keep them in either separate or the same homes. *See id.*

113. However, polygamy is prohibited in several passages of the current Book of Mormon. *See Ether* 10:5 (stating that Riplakish "did not do that which was right in the sight of the Lord" by taking many wives and concubines); *Jacob* 1:15 (noting that the people of Nephi began engaging in the "wicked practices" of having multiple wives and concubines, similar to David and Solomon); *Jacob* 2:23-27 (stating that the Nephites misunderstood God's view of polygamy because of the examples of David and Solomon and that God wants man to have one wife and no concubines); *Jacob* 3:5 (explaining that the Lamanites are more righteous than the Nephites because they have one wife and no concubines); *Mosiah* 11:2-4, 14 (declaring that King Noah ruled in wickedness by keeping many wives and concubines).

wives: Lamach,[114] Abraham,[115] Jacob,[116] Elkanah,[117] Rehoboam,[118] Abijah,[119] David,[120] Esau,[121] and, of course, Solomon.[122] But perhaps the clearest explication of the legality of polygamy in the Old Testament era is found in *Deuteronomy* where a rule prohibits a man from preferring the children of a loved wife over those of a disliked wife in his will.[123] Note that, unlike what some anti-polygamists have argued, the Old Testament polygamists appear to have been in good standing with God—indeed, often favored—while engaged in polygamy.

In addition, the "Levirate" marriage, requiring a brother to marry his dead brother's widow, tended to encourage polygamy, since the obligation arose even when the surviving brother was already married.[124]

Considering all the above evidence, Martin Luther concluded that polygamy was "not against Holy Scripture."[125] John Milton

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114. Lamach, a descendant of Ham, had two wives. *See Genesis* 4:19.

115. Abraham's wife, Sarah, gave him a slave girl as a second wife because she could not conceive. *See Genesis* 16:3.

116. Jacob had two wives and two concubines. *See Genesis* 29-30. Jacob married the two daughters of Laban, Leah and Rachael. *See Genesis* 29:15-21. Each wife later gave him her maid as a concubine. *See Genesis* 30:1-10.

117. Elkanah had two wives, Hannah, who had no children, and Peninnah, who had a number of sons and daughters. Nevertheless, he loved Hannah more. *See* 1 *Samuel* 1:2.

118. Rehoboam, the son of Solomon and ruler of Judah, had eighteen wives and sixty concubines. *See* 2 *Chronicles* 11:21. In a later chapter, he "abandoned the law of the Lord." 2 *Chronicles* 12:1. Thus, by implication, his eighteen wives were not a violation of the law of the Lord.

119. Abijah, ruler of Judah, defeated King Jeroboam of Jerusalem with the help of God. Afterward, this favorite of God "grew strong" and took fourteen wives and had thirty-eight children. *See* 2 *Chronicles* 13:1-21.

120. King David "took more wives" in Israel at a time when he was in the Lord's favor. *See* 1 *Chronicles* 14:3. Six wives are mentioned in 2 *Samuel* 3:2-5.

121. Esau married two Hittite women when he was forty. *See Genesis* 34.

122. King Solomon had seven hundred wives and more than three hundred concubines. *See* 1 *Kings* 11:3.

123. The passage states:

> If a man has two wives, one of them loved and the other disliked, and if both the loved and the disliked have borne him sons, the firstborn being the son of the one who is disliked, then on the day that he wills his possessions to his sons, he is not permitted to treat the son of the loved as the firstborn in preference of the son of the disliked, who is the firstborn.

Deuteronomy 21:15-16.

124. *See* HITCHENS, *supra* note 69, at 56 (citing *Genesis* 38:8 and *Deuteronomy* 25:5-10).

125. *See id.* at 66-67 (citing MARTIN LUTHER, PRELUDE TO THE BABYLONIAN CAPTIVITY OF THE CHURCH (1520), *reprinted in* LEO MILLER, JOHN MILTON AMONG THE POLYGAMOPHILES (1974)). Luther was asked about polygamy by his supporter, Prince Phillip of Hesse, who believed neither in divorce nor extramarital affairs but was

concurred,[126] as did Tommaso Campanella.[127] Hugo Grotius felt that "polygamy was permitted by the laws of nature but condemned by the New Testament."[128] David Hume wrote an essay entitled, *Of Polygamy and Divorces*, in which he admitted that marriage could take many forms, but after examining Turkish polygamy, rejected it because it destroyed friendship and love.[129]

Modern Fundamentalist Mormons rely upon the biblical passages already discussed and the revelations of Joseph Smith, Jr., and they reject mainstream Mormonism's subsequent repudiation of polygamy.[130]

The Christian polygamists' Web pages outline a variety of Old and New Testament passages that provide "proof" of the biblical support for polygamy.[131] The Ostlings stated that "polygamy is not countenanced in later Judaism or the New Testament."[132]

Not surprisingly, non-Mormon Christians argue that the Bible supports monogamy. They contend that the polygamous Old Testament patriarchs were post-Fall and pre-Jesus sinners and that a slow transition from pagan polygamy to Christian monogamy was manifested through Christianity. Rather than eliminating polygamy with one blow, God slowly minimized it, then eliminated it.[133] However, such arguments are handicapped by the fact that the various polygamous patriarchs are represented as being held in high esteem by God, and by the fact that there is no statement from Jesus condemning polygamy. Further, there is no explicit repudiation of polygamy in the New Testament.

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unhappy with his first wife. After reviewing the Old Testament, Luther, perhaps establishing the early Western link between polygamy and secrecy, cautioned, "Go ahead [and take a second wife], but keep it quiet." BARZUN, *supra* note 109, at 17.

126. *See* HITCHENS, *supra* note 69, at 69 (citing MILLER, *supra* note 125, at 3-12, 121-35).

127. Campanella, the poet and Utopian author, concurred in his book, *The City of the Sun*. More precisely, Campanella believed in a communism of goods, which implied a communism of ownership of women. *See* BARZUN, *supra* note 109, at 117-18.

128. HITCHENS, *supra* note 69, at 69.

129. *See* 3 DAVID HUME, PHILOSOPHICAL WORKS 199 (1854). Hume also rejected the institution of divorce. *See id.*

130. *See* COLLIER, *supra* note 4.

131. *See The Standard Bearer*, *at* http://thestandardbearer.com (last visited Aug. 18, 2000).

132. OSTLING & OSTLING, *supra* note 4, at 66.

133. *See generally* HITCHENS, *supra* note 69.

IV. THE MORMON CASES AND STATE CONSTITUTIONAL PROHIBITIONS

The tone and tenor of the nineteenth century Mormon polygamy cases clearly demonstrate that the decisions were based on antipathy toward the Mormons, and the cases contain little or no legal reasoning to support the opinions rendered.

A. Reynolds v. United States

Reynolds v. United States[134] demonstrates the degree to which even the Supreme Court was in the grip of anti-Mormon hysteria and was willing to ignore constitutional concepts of fundamental fairness in trials against Mormons. Consider whether Mr. Reynolds' trial would be considered to have been infected with reversible error if it were tried today.

Reynolds was put forward as a test case by the Mormons. Once charged, Reynolds pleaded not guilty to polygamy.[135] In the subsequent trial, obviously polygamous jurors were struck for cause, and jurors with fairly obvious anti-polygamous opinions were allowed to remain.[136] At the conclusion of the trial, the judge instructed the jury, *inter alia*, that:

> I think it not improper, in the discharge of your duties in this case, that you should consider what are to be the consequences to the innocent victims of this delusion. As this contest goes on, they multiply, and there are pure-minded women and there are innocent children,—innocent in a sense even beyond the degree of the innocence of childhood itself. These are to be the sufferers; and as the jurors fail to do their duty, and as these cases come up in the Territory, just so do these victims multiply and spread themselves over the land.[137]

Not surprisingly, based upon instructions such as these, Reynolds was convicted and sentenced to two years of hard labor and a $500 fine.[138] On appeal, the Court found that Reynolds had been tried by an impartial jury despite the

134. 98 U.S. 145 (1878).
135. *Id.* at 146.
136. *Id.* at 149.
137. *Id.* at 150.
138. *Id.* at 150-51.

allegedly biased jurors and the absence of polygamists on the jury.[139]

The Court then turned to the Free Exercise question, noting that the term "religion" had not been defined in the Constitution.[140] The Court found the origin of the thought-action dichotomy in the 1784 Virginia "Bill for Establishing Religious Freedom," drafted by Thomas Jefferson.[141] This bill was the nature of the religious freedom intended by 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."[142] The Court noted that polygamy was treated as a crime "from the earliest history" in England and Wales and was punishable by death.[143] The Court also observed that Virginia, in 1788 after passage of the Religious Freedom Act, adopted the English statute rendering polygamy a capital felony, apparently to clarify any confusion as to whether bigamy and polygamy were illegal in Virginia.[144] Next, the Court declared that while marriage is a "sacred obligation," it is a civil contract regulated by law "in most civilized nations."[145]

The Court's only outside support for the evils of polygamy came from Professor Francis Lieber[146] who was quoted as stating

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139. *Id.* at 154-55.

140. *Id.* at 162. The Court turned to "the history of the times in the midst of which the provision was adopted" to determine the meaning of the term. *Id.*

141. The Court noted:

> In the preamble of [the Act drafted by Jefferson] religious freedom is defined; and after a recital "that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys religious liberty," it is declared "that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order." In these two sentences is found the true distinction between what properly belongs to the church and what to the State.

Id. at 163. An easily accessible full text version of the Bill is available in THOMAS JEFFERSON, WRITINGS 346-48 (Merrill D. Peterson ed., Library of America 1984).

142. *Reynolds*, 98 U.S. at 164. Of course, while seemingly answering the question of Congress' power to legislate religiously-motivated actions, the Court fails to define "social duties" or "good order," leaving that to the tenor of the times.

143. *Id.*

144. *Id.* at 165.

145. *Id.*

146. At the time, Professor Francis Lieber was sufficiently well-known such that the

that "polygamy leads to the patriarchal principle, . . . which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy."[147] Additionally, Chancellor James Kent described Professor Lieber's insight as "equally striking and profound."[148] Lieber was best known for his work on

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Court did not even bother to state his first name. In fact, Lieber was considered the country's most famous law professor of the antebellum period. *See* Guyora Binder, *Institutions and Linguistic Conventions: The Pragmatism of Lieber's Legal Hermeneutics*, 16 CARDOZO L. REV. 2169 (1995) (describing Lieber's legal theories as an amalgam of German hermeneutics and the Whig legal science of Chancellor Kent and Judge Joseph Story); Paul D. Carrington, *William Gardner Hammond and the Lieber Revival*, 16 CARDOZO L. REV. 2135 (1995) (describing Hammond's 1880 edition of Lieber's text, *Legal and Political Hermeneutics, Or Principles of Interpretation and Construction in Law and Politics* (1837), as part of a post-war movement to revive American democracy); Lawrence A. Cunningham, *Hermeneutics and Contract Default Rules: An Essay on Lieber and Corbin*, 16 CARDOZO L. REV. 2225 (1995) (applying Lieber's theory to the question of what courts should do to fill in gaps in contracts); William N. Eskridge, Jr., *Fetch Some Soupmeat*, 16 CARDOZO L. REV. 2209 (1995) (discussing the continuing vitality of Lieber's theory of statutory interpretation); Michael Herz, *Rediscovering Francis Lieber: An Afterword and Introduction*, 16 CARDOZO L. REV. 2107 (1995) (citing Paul D. Carrington, *Meaning and Professionalism in American Law*, 10 CONST. COMM. 297, 304 (1993)); Wolfgang Holdheim, *A Hermeneutic Thinker*, 16 CARDOZO L. REV. 2153 (1995) (describing Lieber as uniting American legal theory with German hermeneutic philosophy); Mike Roberts Horenstein, *The Virtues of Interpretation in a Jural Society*, 16 CARDOZO L. REV. 2273 (1995) (arguing that Lieber's work is of current rather than historical importance); Lawrence Lessig, *The Limits of Lieber*, 16 CARDOZO L. REV. 2249 (1995) (arguing that following strict textual analysis of the Constitution will result in interpretations unfaithful to the Founders' intent); Aviam Soifer, *Facts, Things and the Orphans of Girard College: Francis Lieber, Protopragmatist*, 16 CARDOZO L. REV. 2305 (1995) (describing Lieber's efforts in the development of Girard College, Philadelphia); *see also* M. RUSSELL THAYER, THE LIFE, CHARACTER AND WRITINGS OF FRANCIS LIEBER 30 (1873), *reprinted in* 1 THE MISCELLANEOUS WRITINGS OF FRANCIS LIEBER 13 (Daniel C. Gilman ed., 1873). Although Lieber placed himself in the same class as, *inter alia*, Aristotle, Thomas Moore, and Hugo Grotius, he is now a rather obscure figure. For a rather complete explication of Lieber's works, see Georgia Warnke, *One True Sense*, 16 CARDOZO L. REV. 2191 (1995) (applying Lieber's belief that reason and good faith would uncover the one true meaning of any legal text to Ronald Dworkin's analysis of the constitutionality of abortion).

147. *Reynolds*, 98 U.S. at 166. The simple dictionary definition of a patriarchy is a "social organization marked by the supremacy of the father in the clan or family," with the wife and children legally dependant on the father and descent traced through the male line. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 863 (1984).

148. *Reynolds*, 98 U.S. at 166. This is apparently the only scientific or sociological evidence of any kind contained in any of the four major nineteenth century anti-polygamy cases, and scant support appears thereafter. Chancellor Kent was, in fact, a close friend of Professor Lieber. *See* William G. Hammond, *Preface to the Third Edition of* FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS, OR PRINCIPLES OF INTERPRETATION AND CONSTRUCTION IN LAW AND POLITICS, WITH REMARKS ON

hermeneutics[149] and as the author of what is regarded as the first set of articles of war,[150] but he had also written on marriage, monogamy, and polygamy when he considered polygamy in the context of Utah's bid for statehood.[151]

Although no citation was given, the Court referred to an article Lieber had published in *Putnam's Monthly* in 1855.[152] Because the Court apparently took Professor Lieber's conclusion as a given, the Court made no attempt to explain why Mormon polygamy led to a patriarchal system of societal organization, why patriarchies are bad (or at least constitutionally infirm), or why polygamy leads to despotism. However, the answers to those questions are taken up in detail elsewhere by Professor Strassberg.[153] Professor Strassberg argues that Professor Lieber, who was probably strongly influenced by German philosopher Georg W.F. Hegel on the matter,[154] believed that the traditional marital family was an essential part of the modern liberal state.[155] Lieber viewed polygamy as a social institution that failed to fully develop the human potential.[156] Lieber believed women in polygamous families failed to fully develop their individuality, and that the patriarchal structure of polygamous households led to an acceptance of state tyranny.[157] As noted, Professor Lieber's view was based on the more clearly articulated views of Hegel, who

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PRECEDENTS AND AUTHORITIES (3d ed. 1880), *reprinted in* 16 CARDOZO L. REV. 1887 (1995). Edwin Yoder describes Professor Lieber's statement as a "lulu." *See* Edwin Yoder, *Can't Deploy Polygamy Against Same-Sex Marriage*, SALT LAKE TRIB., May 27, 1996, *available at* http://www.sltrib.com.

149. *See* FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS, OR PRINCIPLES OF INTERPRETATION AND CONSTRUCTION IN LAW AND POLITICS, WITH REMARKS ON PRECEDENT AND AUTHORITIES (William G. Hammond ed., 3d ed. 1880).

150. Lieber wrote *General Orders Number 100*, consisting of 157 numbered paragraphs detailing the appropriate conduct of the Union army during the Civil War. It has been described as the first codification of the laws of warfare. *See* Herz, *supra* note 146, at 2112.

151. *See* 1 FRANCIS LIEBER, MANUAL OF POLITICAL ETHICS, DESIGNED CHIEFLY FOR THE USE OF COLLEGES AND STUDENTS AT LAW (2d ed. 1876).

152. *See* Francis Lieber, *The Mormons: Shall Utah Be Admitted into the Union?*, 5 PUTNAM'S MONTHLY 225-36 (1855).

153. *See* Strassberg, *supra* note 30, at 1532.

154. *See id.* at 1510. Professor Strassberg notes that Professor Lieber was a student at the University of Berlin while Hegel was a professor there. *See id.* at 1524 n.120.

155. *See id.* at 1510.

156. *See id.* at 1518.

157. *See id.* at 1521-22.

believed that the unity created by the marital unit, with its voluntary submission of individuality to a group ethos, was a necessary precursor to the similar voluntary sublimation of the individual to the state.[158]

But there are a number of problems with reliance on a Lieber/Hegel analysis of why polygamy is a danger to a liberal society, many of which are acknowledged by Professor Strassberg even though she supports the ultimate conclusion that polygamy is dangerous. First, Hegel's view of marriage was grossly sexist by modern standards.[159] Second, Hegel based his negative views on polygamy on second-hand reports from seventeenth and eighteenth century China.[160] Finally, the monogamous marriage that Lieber and Hegel envisioned, while perhaps closer to the nineteenth century ideal, bears little relationship to the reality of a modern panoply of marital realities.[161]

Professor Strassberg, acknowledging that practitioners of monogamous same-sex marriage can claim no religious motivation and, thus, cannot muster any Free Exercise Clause support,[162] argues that the monogamous marriage, whether traditional or same-sex,[163] has the same role of preparing the individual for voluntary membership in the state; therefore, *Reynolds* cannot be used to justify state bans on same-sex marriage.[164]

Thus, the *Reynolds* Court's only social science or psychological evidence for polygamy's dangers is derived from its interpretation of Professor Lieber's interpretation of Hegel's interpretation of the racially and culturally biased interpretation

158. *See id.* at 1529.

159. *See id.* at 1524. "As with Lieber, Hegel grounded his understanding of monogamy on out-moded views of women." *Id.*

160. Hegel relied upon reports of Jesuit missionaries. *See id.* at 1534 n.196 (citing CLARK BUTLER, G.W.F. HEGEL 46-47 (1977)). Hegel's reports were "exaggerated to the point of racism" and failed to consider the countervailing influences of Buddhism and Taoism on Confucianism. *See id.*

161. *See infra* Part VI.C.

162. *See* Strassberg, *supra* note 30, at 1578.

163. The distinction between male-female and same-sex marriages is further diminished by the fact that modern technology (not to mention modern case law) has effectively separated the roles of marriage and child-bearing.

164. *See* Strassberg, *supra* note 30, at 1594.

of Jesuits observing polygamy in seventeenth and eighteenth century China.[165]

The Court then turned to what would become a familiar refrain in the anti-polygamy cases, the question of what would happen if "one believed that human sacrifices were a necessary part of religious worship,"[166] or whether the state would have the power to stop a widow who wished to throw herself upon the burning funeral pyre of her dead husband.[167] In the context of these feelings and beliefs, it was not surprising then that the Court found no appeal to "the passions and prejudices" of the jury in the jury charge cited above,[168] and accordingly affirmed the judgment below.[169]

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165. *Cf.* Robert G. Dyer, *The Evolution of Social and Judicial Attitudes Towards Polygamy*, 1977 UTAH B.J. 35, 39 ("[I]n light of the modern Court's dependence on detailed social science and psychological studies that often accompany briefs today, the evidence of social disorder in the *Reynolds* case seems to amount to little more than assertions based on popular opinion.").

166. Reynolds v. United States, 98 U.S. 145, 166 (1878). Of course, the long-utilized *Smith* test would deal with this question easily. This "slippery slope" argument has been a mainstay of those who would circumscribe the Free Exercise Clause. An example of a slippery slope argument can be seen in the colloquy between Justice Stevens and Justice Brennan over whether allowing a Jewish Air Force doctor to wear a yarmulke would lead to an Air Force featuring turbaned Sikhs, saffron-robed Satchidananda Ashram-Integrated Yogis, and dreadlocked Rastafarians. *See* Goldman v. Weinberger, 475 U.S. 503, 512 (1986) (Stevens, J., concurring); *id.* at 519 (Brennan, J., dissenting). Such a "classic parade of horribles" is no different than discussing suttee and human sacrifice in the context of the polygamy debate.

167. *See Reynolds*, 98 U.S. at 166. Suttee (alternative spellings: sati or sute) is a Hindu practice, based upon the sacred Eleventh Century text *Padmapurana*, that was suppressed in India during the period of British rule and remained quiescent during the period of continuing British influence, but may be making a comeback in present-day India. Christendom's first exposure to the Hindu practice of suttee came with Great Britain's colonization of what is now India and Pakistan. The British colonial government's initial attitude in the early nineteenth century was one of tolerance toward such practices. *See* LAWRENCE JAMES, THE RISE AND FALL OF THE BRITISH EMPIRE 136 (1994); Rone Tempest, *Hindu Women Victims of Ancient "Dowry Killing" Code*, ATLANTA J. & CONST., Oct. 14, 1987, at B1. By the middle of the century, however, the British saw the native religions as the chief obstacle to progress toward modernization and began sweeping measures to eradicate practices such as suttee. *See* JAMES, *supra*, at 220-21. The practice, decried by Indian feminists, is theoretically voluntary, but in reality is often coerced, or the woman is ostracized for refusing to perform the ritual. *See* Tempest, *supra*.

168. *Reynolds*, 98 U.S. at 167-68. "All the court did was to call the attention of the jury to the peculiar character of the crime for which the accused was on trial, and to remind them of the duty they had to perform." *Id.* at 168.

169. *Id.* The opinion was unanimous, except that Justice Field disagreed as to the admissibility of testimony from a former trial by one of Reynolds' plural wives. *Id.*

One quote is of particular interest because of the bias it reveals: "Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people."[170] It is not too much to suggest, in the context of the racist sentiment of the time, that the statement contains a thinly veiled racist implication.

B. Murphy v. Ramsey

In *Murphy v. Ramsey*,[171] the Court did not uphold the constitutionality of the anti-Mormon 1882 Act (the "Edmonds Act"), which denied voting rights and the right to hold office to practicing polygamists and denied the right to sit on juries to both practitioners and believers in polygamy,[172] but simply assumed its constitutionality[173] in parsing through the complex pleadings and procedural posture of the case.[174] What is more

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(Field, J., concurring). Upon rehearing, it was brought to the Court's attention that the Act of Congress under which Reynolds was tried allowed only imprisonment as punishment, not imprisonment with hard labor, as Reynolds was sentenced, and the case was remanded to correct this error only. *Id.* at 168-69.

170. *Id.* at 164.

171. 114 U.S. 15 (1885).

172. Act of Mar. 22, 1882, 22 Stat. 30 (amending section 5352 of the Revised Statutes of the United States in reference to bigamy).

173. Most of the constitutional analysis in the case is devoted to determining that the law denying polygamists the right to vote is not void as an ex post facto law.

174. In five consolidated actions, plaintiffs Jesse J. Murphy, Arthur Pratt, Mary Ann M. Pratt, Alfred and Mildred E. Randall suing for injuries to her, Hiram B. and Ellen C. Clawson suing for injuries to her, and James M. Barlow sued Board of Commissioners members Alexander Ramsey, A.S. Ramsey, A.B. Carleton, and J.R. Pettigrew, Registration Officer E. D. Hoge, and Deputy Registration Officers Arthur Pratt, John S. Lindsay, Harmel Pratt, and James Little for refusing to allow them to register to vote, thus denying them the right to vote for Utah's delegate to the Forty-eighth Congress in the November 7, 1882 election. *Murphy*, 114 U.S. at 17-34. All defendants demurred as to all plaintiffs, and the Supreme Court of the Territory of Utah sustained all demurrers. The Court summarily affirmed the demurrers of the five commissioners because they had merely appointed the other defendants and had not actually participated in the decisions to deny the plaintiffs the right to vote. *Id.* at 37. As to the other defendants, the Court initially noted that none of the plaintiffs had pleaded that they were actually legally qualified voters. *Id.* at 37-38. However, when the Court turned to the individual complaints, it found that Mary Ann M. Pratt and Mildred E. Randall and her husband had alleged that they were legally qualified voters. *Id.* at 38. The Court held that Ellen C. Clawson had failed to allege that she was a qualified voter. *Id.* at 39. Regarding Murphy and Barlow, the Court held that they had failed to plead that they were not polygamists at the time of their application for the right to vote and that the Act was not aimed at past offenses because, if it were so aimed, it would be void as an ex post facto law. *Id.* at

interesting is the Court's statement regarding the impact of the Edmonds Act upon Utah's goal of attaining statehood:

> [N]o legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.[175]

C. Davis v. Beason

Davis v. Beason[176] is equally short on constitutional analysis but perhaps more transparent in its condemnation of Mormon beliefs:[177]

> [Bigamy and polygamy] tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman and to debase man. Few crimes are more pernicious to the best interests of society and receive more general or more deserved punishment. To extend exemption from punishment for such crimes would be to shock the moral judgment of the community. To call their advocacy a tenet of religion is to offend the common sense of mankind.[178]

39-41; *see also* U.S. CONST. art. I, § 9, cl. 3 (federal government shall make no ex post facto laws); *id.* art. I, § 10, cl. 1 (states shall make no ex post facto laws). Thus, the Court was faced with the possibility, properly pleaded, that Pratt and the Randalls had been denied the right to vote by the Registration Officer and the Deputy Registration Officer without reasonable cause, and the Court reversed and remanded with instructions to overrule the demurrers, while affirming all other demurrers. *Murphy*, 114 U.S. at 42-47.

175. *Murphy*, 114 U.S. at 45.

176. 133 U.S. 333 (1890).

177. Samuel Davis and others were convicted for registering to vote in Oneida County in the then-Territory of Idaho, and, in so doing, taking an oath in which, *inter alia*, they stated that they were not polygamists and did not belong to any organization that taught or encouraged polygamy, despite the fact that they were Mormons. *Davis*, 133 U.S. at 333. Davis filed a writ of habeas corpus, arguing that the statutes under which he was convicted, sections 501 and 504 of the Idaho Code, violated the First Amendment. *See id.*

178. *Id.* at 341-42.

The Court distinguished Mormonism from true religion as being a "cultus or form of worship of a particular sect."[179]

The Court then turned to a theme that Justice Scalia would take up again in *Smith*, the idea that the First Amendment was not intended to protect against "acts inimical to the peace, good order and morals of society."[180] Indeed, in language that reads as if it were part of *Smith*, the Court stated, "However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation."[181]

The Court then advanced the slippery slope argument[182]—that certain (unnamed) sects had, as part of their religious tenets, opposed any marriage and advocated promiscuity, yet such practices, along with human sacrifice, were not constitutionally protected.[183] Finally, the Court noted that many state constitutions expressly excluded "acts of licentiousness"[184] from protection on the basis of the free exercise of religion.[185]

D. Late Corp. of the Church of Jesus Christ of Latter-day Saints v. United States

Perhaps the most devastating blow to Mormon hopes for accommodation came with the Court's decision in *Late Corp. of the Church of Jesus Christ of Latter-day Saints v. United*

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179. *Id.* at 342.

180. *Id.*

181. *Id.* at 342-43.

182. Indeed, the Court later asked, "Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice?" *Id.* at 344. Many years later, the state argued in *Bowers v. Hardwick* that striking down laws prohibiting consensual sodomy would lead down a slippery slope and promote attacks on laws "which prohibit *polygamy*; homosexual, same-sex marriage; consensual incest; prostitution; fornication; adultery; and possibly even personal possession in private of illegal drugs." PETER IRONS, A PEOPLE'S HISTORY OF THE SUPREME COURT 460 (1999) (emphasis added).

183. *See Davis*, 133 U.S. at 343.

184. Licentiousness can be defined as "lacking moral discipline or sexual restraint." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 753 (William Morris ed., 1973). Mormon polygamy was not characterized by any such lack of moral restraint.

185. *Davis*, 133 U.S. at 348 (citing the constitutions of California, Colorado, Connecticut, Florida, Georgia, Illinois, Maryland, Minnesota, Mississippi, Missouri, Nevada, New York, and South Carolina).

States.[186] Once again, the social science support for the Court's anti-polygamy stance was scarce, and the anti-Mormon bias was apparent. For example, the Court upheld the 1887 Act and discussed the forfeit and escheat of the Church's property.[187] At issue was Congress's power to repeal the Church's charter and the power to seize its property.[188] The Court barely discussed the first question because it was "too plain for argument" that Congress had the power.[189] In answering the second question in the affirmative, the Court revealed its feelings toward the Church in general and polygamy in particular in no uncertain terms, describing polygamy as "a crime against the laws, and abhorrent to the sentiments and feelings of the civilized world."[190] The Court once again referred to the Church as a sect,[191] although it is not clear from the virulent context of the passage whether the Court was excluding the Church from Free Exercise analysis on the theory that it is not a religion. The Court continued:

> The existence of such a propaganda is a blot on our civilization. The organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism. It is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world.[192]

Based upon this "analysis," the Court characterized the Church's Free Exercise argument as "altogether a sophistical plea."[193] The Court then turned once again to the same slippery slope argument, warning about the "Thugs of India,"[194] suttee, and human sacrifices "by our ancestors in Britain."[195]

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186. 136 U.S. 1 (1890).
187. *Late Corp.*, 136 U.S. at 6-7.
188. *Id.* at 42.
189. *Id.* at 45.
190. *Id.* at 48.
191. *Id.* at 49.
192. *Id.*
193. *Id.*
194. The Thagi or Thugee, which provides the obvious derivation for the English word "thug," were a Hindu cult of assassin-priests who preyed on travelers. JAMES, *supra* note 167, at 220-21. Believing that such practices as Thugee and Suttee were holding back British efforts to modernize India, Governor-General Lord William Bentinck began adopting measures to suppress them in the mid-nineteenth century. *Id.*
195. *Late Corp.*, 136 U.S. at 49-50.

Finally, the Court turned to the doctrine of charitable uses to determine that the Church's property should be used to benefit the public schools in the Territory.[196]

E. A Few Modern Cases

Potter v. Murray City,[197] provides what at least purports to be a *de novo* review of the *Reynolds* rationale, but fails to live up to that billing.[198] Royston Potter, who was hired by Murray City as a police officer in 1980, held a "genuine religious belief, faith and commitment in the principle and practice of plural marriage (polygamy)."[199] He was fired two years later because of his polygamous marriage to two women, despite the fact that there were no complaints about his job performance.[200] The court faced two main issues:[201] (1) whether there had been a "showing of a 'compelling state interest' in the prohibition of plural marriage with no less restrictive alternatives consistent with that interest reasonably available to accommodate plaintiff's practice of polygamy," and (2) whether "any compelling state interest in the prohibition of polygamy [must] yield to the plaintiff's religious belief or his right of privacy, equal protection or other fundamental right by reason of an appropriate balancing of such rights with the interest of the State."[202]

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196. *Id.* at 62-64.

197. 585 F. Supp. 1126 (D. Utah 1984), *aff'd*, 760 F.2d 1065 (10th Cir. 1985), *cert. denied*, 474 U.S. 849 (1985).

198. *See* VAN WAGGONER, *supra* note 4, at xi, 3.

199. *Potter*, 585 F. Supp. at 1129. The nature of Potter's religious affiliation, if any, was not disclosed.

200. *Id.* The plaintiff had two wives and five children, none of whom was neglected or deprived. *Id.* Potter was named Murray City's "Employee of the Month" less than a year before his firing, which resulted from the complaint of a whistle-blowing citizen. *See* VAN WAGGONER, *supra* note 4, at xi.

201. The court also considered issues regarding burdens of proof and presumptions; whether the Eleventh Amendment barred the suit and any relief as to the State of Utah, the governor, and the attorney general; whether Murray City, its chief of police, or the city's Civil Service Commission enjoyed qualified immunity; whether the United States was properly made a party; whether Utah's polygamy statute was any less the established policy of the state because it had been enacted under the compulsion of the Enabling Act; and whether the case was ripe for adjudication by summary judgment. *Potter*, 585 F. Supp. at 1128.

202. *Id.* at 1130.

The court first noted that there were between 5,000 and 10,000 members of polygamous families currently in Utah,[203] but that there had been no more than twenty-five criminal prosecutions for polygamy since 1952.[204] The Court was then faced with Potter's argument that "the evolving mores and attitudes of society and the erosions of the *Reynolds* rationale by subsequent decisions of the Supreme Court have destroyed the precedential value of the case."[205]

The court stated that the level of scrutiny was the "exacting 'compelling interest' standard"[206] because the fundamental right of practicing polygamy "in pursuance of a sincere religious belief" was implicated.[207] Next, the court noted that *Reynolds* had never been overruled, but that Justice Douglas, in his dissent in *Wisconsin v. Yoder*, had suggested that it might one day be overruled.[208] The court stated that when a statute, such as the polygamy statute, "impinges upon fundamental rights, the court examining the statute must employ a strict scrutiny test requiring a compelling state interest and a showing that no less restrictive alternatives are reasonably available."[209] Further, the court noted that "the bother of responding to constitutional mandates does not justify their disregard."[210] Finally, the court held that the states had an absolute right to regulate marriage, incest, bigamy, and homosexuality.[211] The court also noted, but

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203. See *supra* note 4 for much higher estimates.
204. *Potter*, 585 F. Supp. at 1129.
205. *Id.* at 1130.
206. *Id.* at 1131-32 (citing Plyler v. Doe, 457 U.S. 202, 216-17 (1982)).
207. *Id.* at 1132 (citing Wilson v. City of Littleton, 732 F.2d 765 (10th Cir. 1984)). However, it is unclear what support *Wilson* provides. Therein, the court upheld the firing of a police officer who refused to remove a black shroud from his badge because his "speech" was not related to a matter of public concern and, thus, was not constitutionally protected. *See Wilson*, 732 F.2d at 767.
208. *Potter*, 585 F. Supp. at 1135 (citing Wisconsin v. Yoder, 406 U.S. 205, 247 (1972) (Douglas, J., dissenting) ("What we do today ... even promises that in time *Reynolds* will be overturned.")).
209. *Id.* at 1137 (citing Espinosa v. Rusk, 634 F.2d 477 (10th Cir. 1980) (holding that an ordinance which regulated "secular" but not "religious" fund-raising violated the Free Exercise Clause when it attempted to regulate fund-raising by the Seventh-day Adventist Church which the city considered secular but which the church considered part of its religious mission)).
210. *Id.* at 1138 (citing Miranda v. Arizona, 384 U.S. 436 (1966); Brown v. Bd. of Educ., 347 U.S. 483 (1954)).
211. *Id.* (citing Zablocki v. Redhail, 434 U.S. 374, 399 (1978) (Powell, J., concurring); Maynard v. Hill, 125 U.S. 190, 205 (1888)).

did not appear to rely on, the argument that police officers' conduct may be more severely restricted than that of civilians.[212]

Despite having set the stage carefully, the court almost summarily discovered a compelling state interest:

> The State of Utah beyond the declaration of policy and public interest implicit in the prohibition of polygamy under criminal sanction, has established a vast and convoluted network of other laws clearly establishing its compelling state interest in and commitment to a system of domestic relations based exclusively upon the practice of monogamy as opposed to plural marriage.[213]

Thus, stripped of excess verbiage, the state established a compelling interest in its polygamy law by adopting more laws in reliance thereof. The reason why any one such law protects a compelling interest is not made clear.

On the other hand, the plaintiff was not successful in arguing that exempting all persons with a religious belief in polygamy from the statute was a reasonably available alternative.[214] Such a revision of the legal system would create "practical, legal, conceptual, social and assuredly constitutional" problems.[215] However, the court did not specifically list any such problems. Further, it would be "the height of naiveté" to assume that one could root out those who chose polygamy for physical gratification rather than religious motivation.[216]

The court concluded that *Reynolds* was still the law of the land, but stated:

> Disregarding its suggestion that polygamy should be barred as subversive to good order for the same reason

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212. *Id.* at 1141 (citing Kelley v. Johnson, 425 U.S. 238 (1976) (declaring that the county did not deprive a policeman of his Fourteenth Amendment liberty interest by enacting hair cut regulations and that uniformity and police department *esprit de corps* were sufficient reasons for the regulations)).

213. *Id.* at 1138.

214. *Id.* at 1138-39.

215. *Id.* at 1139 (discussing United States v. Lee, 455 U.S. 252 (1982) (holding that a statute requiring participation in the Social Security system is constitutional despite the clash with Amish belief in self reliance because of government's need for uniformity)).

216. *Id.* But this same argument has failed to hold sway in the Vietnam-era conscientious objector cases. *See, e.g.*, United States v. Seeger, 380 U.S. 163, 176 (1965) (holding that any individual who opposes war based on a sincere belief which fills the same place as a more traditional belief in "God" may claim conscientious objector status).

> that human sacrifice and Suteeism would, its oversimplification of a proper belief/action analysis of First Amendment problems, and its seeming insensitivity in passing moral judgment on the sincerity of religious belief, there yet remains in *Reynolds* a sound basis for the modern compelling interest analysis found to be controlling in the present case.[217]

The Court of Appeals affirmed in an ultimately unconvincing opinion.[218] Potter argued, in addition to his free exercise claim, that the portion of the Enabling Act requiring Utah to forever prohibit polygamy was void under the equal footing doctrine;[219] that his firing violated his right of privacy;[220] that the firing violated Due Process and Equal Protection rights; and that Utah had not enforced its polygamy statute for some time, and thus, it was in desuetude.[221]

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217. *Potter*, 585 F. Supp. at 1141 (citation omitted).

218. Potter v. Murray City, 760 F.2d 1065 (10th Cir. 1985), *cert. denied*, 474 U.S. 849 (1985).

219. *Potter*, 760 F.2d at 1067. The court held that even if the equal footing doctrine were violated, that fact would not entitle the plaintiff to any relief, but then went on to hold that the equal footing doctrine was not violated. *Id.* The court noted that even if Utah were coerced into adopting an anti-polygamy provision of its constitution (a proposition for which no "if" is required), the state had not attempted to change the policy in the interim. *Id.* at 1068 (citing Utah v. Barlow, 153 P.2d 647, 654 (Utah 1944) (stating that convicted polygamists "cannot challenge the validity of ratification a half century after it transpired"), *cert. dismissed*, 324 U.S. 829 (1945) (per curiam)). This argument, of course, ignores the fact that Utah cannot change its constitutional prohibition on polygamy without the approval of the United States.

220. *Potter*, 760 F.2d at 1067. The court stated, "We find no authority for extending the constitutional right of privacy so far that it would protect polygamous marriages." *Id.* at 1070-71 (citing Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965); Doe v. Duling, 603 F. Supp. 960 (E.D. Va. 1985) (holding that statutes prohibiting fornication and cohabitation violated rights to privacy), *vacated*, 782 F.2d 1202 (4th Cir. 1986) (finding no case or controversy and, thus, not reaching constitutional issues)).

221. *Potter*, 760 F.2d at 1067. The court stated, "We disagree." *Id.* at 1071. The court also stated that, "Polygamy has been prohibited in our society since its inception." *Id.* (citing Reynolds v. United States, 98 U.S. 145, 164-65 (1878)). It is one thing to say that society has always prohibited bigamy, another to assert that society has always prohibited the different institution of polygamy. At early English law, bigamy included marrying a second wife after the first had died or marrying a widow. BLACK'S LAW DICTIONARY 163 (6th ed. 1990). The court characterized the firing of Potter, while leaving some 9999 other practicing Utah polygamists alone, as "some selectivity in enforcement." *Potter*, 760 F.2d at 1071.

The Tenth Circuit disagreed with Potter's assertion that "later cases have 'in effect' overturned" *Reynolds*.[222] Potter argued that, 'under *Yoder*,[223] summary judgment was appropriate because the state had not presented any empirical evidence that monogamy is superior to polygamy, and that the state legislature had not considered the wisdom of its polygamy statute.[224] The court said that it could not disregard *Reynolds* because in *Yoder* and in subsequent cases, the Court recognized the *Reynolds'* validity.[225]

The court agreed with the district court that monogamy was part of a vast and convoluted body of state laws, stating that "[m]onogamy is inextricably woven into the fabric of our society. It is the bedrock upon which our culture is built."[226] The court then did what the lower court failed to do—list at least some laws that would be affected by allowing polygamous marriages[227]—but failed to indicate why it would be overly burdensome to make adjustments to those laws to accommodate

222. *Potter*, 760 F.2d at 1068 (citing Brief for Appellant at 15); Wisconsin v. Yoder, 406 U.S. 205 (1972) (Douglas, J., dissenting in part); Harrop A. Freeman, *A Remonstrance for Conscience*, 106 U. PA. L. REV. 806, 822-26 (1958) (arguing that *Reynolds* was wrongly decided and that the nation could have safely tolerated polygamy until its natural disappearance, and noting that the *Reynolds* Court was not aware of the many religions that believed in polygamy); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 853-54 (1978). Tribe suggested that *Reynolds* might be reconsidered after *Sherbert v. Verner*, but as the court pointed out, he also suggested that *Reynolds* might be secure elsewhere in the same text. *Potter*, 760 F.2d at 1069-70 & n.6 (citing TRIBE, *supra*, at 946 & n.19A).

223. 406 U.S. 205 (1972).

224. *Potter*, 760 F.2d at 1068-69.

225. *Id.* at 1069. The court noted that *Reynolds* was one of the cases cited in *Yoder* for the proposition that some religiously based activities can be regulated under the state's police powers or the federal government's delegated powers. *Id.* (citing Wisconsin v. Yoder, 406 U.S. 205, 220 (1972)); *see also* cases cited *id.* at 1069-70 & n.7.

226. *Id.* at 1070 (discussing Zablocki v. Redhail, 434 U.S. 374, 384 (1978)).

227. *Id.* at 1070 n.8 (citing UTAH CODE ANN. §§ 30-1-27 to -28 (1976) (limiting the right of an individual who has prior child support obligations to marry); *id.* § 30-1-30 (helping those under nineteen years of age and those previously divorced to have pre-marital counseling); *id.* § 30-2-9 (making both husband and wife responsible for family and child education expenses); *id.* § 30-2-10 (Supp. 1983) (homestead protection for both spouses); *id.* § 75-2-102 (1978) (defining a surviving spouse's intestate share of estate); *id.* § 75-2-201 (right of a surviving spouse to take an elective share against the will); *id.* § 75-2-301 (right of spouse not included in will but who married after will's execution); *id.* § 75-2-401 (Supp. 1983) (surviving spouse's homestead allowance); *id.* § 75-3-203 (explaining the surviving spouse's place in hierarchy of persons seeking appointment as personal representative in probate)).

polygamists.[228] Thus, the court concluded that "in light of these fundamental values, the State is justified, by a compelling interest, in upholding and enforcing its ban on plural marriage to protect the monogamous marriage relationship."[229]

Some Utah state court cases have taken a more tolerant view toward polygamy. For example, the Supreme Court of Utah held in *Johanson v. Fischer (In re adoption of W.A.T.)*[230] that it may be appropriate to place an adoptee in a polygamous family. In *Sanderson v. Tryon*,[231] the court held that one parent's practice of polygamy, standing alone, cannot be dispositive in a custody battle.

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228. *See infra* notes 430-44 and accompanying text.

229. *Potter*, 760 F.2d at 1070. Potter, who was fired but not jailed, was a 1983 guest on the Phil Donahue television show along with Alex Joseph, Fundamentalist Mormon and Mayor of Big Water, Utah. *See* VAN WAGGONER, *supra* note 4, at x.

230. 808 P.2d 1083 (Utah 1991). In *Johanson*, petitioners Vaughn Fischer and Sharane Fischer were legally married, but Vaughn also "married" Katrina Stubbs. *Id.* at 1083. Later Vaughn "married" Brenda Thornton, who had produced six children in a polygamous relationship, since dissolved, with Joseph Phil Thornton. *Id.* All parties were members of the Church of Jesus Christ of Latter-day Saints and the Kingdom of God (Fundamentalist Mormons). *Id.* at 1083 & n.2. The Fischers and Stubbs sought to legally adopt the six Thornton children with the consent of Brenda who knew she was dying. *Id.* at 1083-84. Intervenors, two of Brenda's half-sisters and her father, sought to block the adoption. *Id.* at 1084. The trial court held that the petitioners' criminal conduct of practicing plural marriage alone rendered them ineligible to adopt children. *Id.* The Utah Supreme Court reversed and remanded, stating, "The fact that our constitution requires the state to prohibit polygamy does not necessarily mean that the state must deny any or all civil rights and privileges to polygamists." *Id.* at 1085.

231. 739 P.2d 623 (Utah 1987). In *Sanderson*, Jennifer Sanderson and Robert Tryon produced three children as a result of their polygamous union. *Id.* at 624. They were never legally married, and when they broke up, Sanderson took their children and joined the Allred Church, which advocated polygamy, and entered into a polygamous relationship with Bill Bowles, who already had two wives. *Id.* Tryon, however, abandoned the practice of polygamy. *Id.* Initially, Tryon acknowledged paternity and was ordered to pay child support. *Id.* Later, Sanderson filed an action seeking legal custody and an increase in child support, and Tryon then counterclaimed for custody. *Id.* At trial, the sole issue, argued as cross-motions for summary judgment, was "whether children may be taken from an otherwise fit and proper parent solely for the reason that the parent practices plural marriage." *Id.* The trial judge held that Sanderson was unfit solely on the basis of her polygamous marriage. *Id.* at 625. The Utah Supreme Court reversed and remanded, holding that a parent's practice of polygamy could only be considered as one of many factors used in determining the best interests of the child. *Id.* at 627.

V. THE FREE EXERCISE CASES

Justice Brennan's seven to two opinion in *Sherbert v. Verner*[232] created settled law for three decades and would have simply required that, because prohibiting polygamy is clearly a burden on the Mormon religion, a state show a compelling governmental justification for the prohibition. However, the applicability of *Sherbert* was severely curtailed by the much-maligned decision of *Employment Division, Department of Human Resources of Oregon v. Smith*,[233] in which Justice Scalia changed the playing field, but in so doing, created (one assumes unintentionally) a new argument against the validity of the nineteenth century anti-Mormon cases. Finally, in *Church of the Lukumi Babalu Aye v. City of Hialeah*[234] the Court created an exception to the *Smith* rule which also can be used to invalidate the Mormon cases.

A. The Long Reign of Sherbert

In *Sherbert*, a Seventh-day Adventist was fired because she refused to work on Saturday, which Seventh-day Adventists consider the Sabbath.[235] She could not get another job because of her unwillingness to work on Saturdays, and she was refused South Carolina unemployment compensation because she refused to accept "suitable work when offered."[236]

Justice Brennan first concluded that there was a burden on the plaintiff's free exercise of religion in that she necessarily felt pressure to give up her religious beliefs in order to get unemployment compensation.[237] Therefore, the question became whether a compelling state interest justified the burden on her free exercise of religion.[238] The Court held that the possibility of the filing of fraudulent claims was not a sufficiently compelling state interest.[239] In so doing, Justice

232. 374 U.S. 398 (1963).
233. 494 U.S. 872 (1990).
234. 508 U.S. 520 (1993).
235. *Sherbert*, 374 U.S. at 399.
236. *Id.* at 399-401.
237. *Id.* at 404.
238. *Id.* 406-07.
239. *Id.* at 407. A similar argument can be used to overcome the objection that allowing religiously based polygamy would open up the opportunity for bigamy based on secular

Brennan distinguished *Braunfeld v. Brown*,[240] and found that there was a strong state interest in that case: assuring that there were uniform rules regarding a day of rest for workers.[241]

B. The Smith *Test*

In *Employment Division, Department of Human Resources of Oregon v. Smith*,[242] Justice Scalia delivered a controversial opinion that seemed to end the *Sherbert* era. The State of Oregon prohibited all use of the drug peyote, and Native Americans' religiously-inspired use of peyote was thus considered criminal.[243] Therefore, a person fired from her job for ingesting peyote, even as part of a religious ceremony, was rendered ineligible for unemployment compensation.[244]

Justice Scalia began with a reiteration of the "beliefs versus acts" dichotomy.[245] He then described the case as a unique one in which a generally applicable criminal law that was not aimed at religious practice nevertheless had a negative impact on religious practice.[246] He then stated, "We have never held that an

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and licentious desires.

240. 366 U.S. 599 (1961) (holding that a Pennsylvania criminal statute which forbade sales of clothes and home furnishings on Sundays did not burden free exercise of religion for Jewish merchants who, for religious reasons, could not work from nightfall Friday to nightfall Saturday and, thus, could not do business for the entire weekend).

241. *Sherbert*, 374 U.S. at 408. Brennan also addressed the Establishment Clause, finding that the holding of the case did not have the effect of fostering the establishment of Seventh-day Adventism as a religion. *Id.* at 409.

242. 494 U.S. 872 (1990).

243. *Smith*, 494 U.S. at 874.

244. As a result, respondents Alfred Smith and Galen Black, both members of the Native American Church, were fired from their jobs at a private drug rehabilitation organization and were subsequently denied unemployment compensation because they were fired for "misconduct." *Id.* The Oregon Supreme Court held that they were entitled to unemployment compensation because the justification of preserving the integrity of the unemployment compensation fund was inadequate to justify the burden imposed on religion. *See* Smith v. Emp. Div., Dep't of Human Res., 721 P.2d 445, 449-50 (Or. 1986), *cert. granted*, 480 U.S. 916 (1987). The Court did not reach the constitutional issue because it could not determine if religious peyote use was illegal in Oregon; thus, the Court vacated the judgment and remanded the case. *See* Emp. Div., Dep't of Human Res. v. Smith, 485 U.S. 660, 670 (1988). On remand, the Oregon Supreme Court held that its criminal statute did not except religiously inspired use of peyote and found that the prohibition violated the Free Exercise Clause. *See* Smith v. Emp. Div., 763 P.2d 146 (Or. 1988). The United States Supreme Court again granted certiorari. *See* 489 U.S. 1077 (1989).

245. Emp. Div., Dep't of Human Res. v. Smith, 494 U.S. at 877-78.

246. *Id.* at 878.

individual's religious beliefs exclude him from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate."[247] Justice Scalia asserted that the only cases in which a generally applicable law violated the First Amendment were situations in which another constitutional protection was also involved.[248] Justice Scalia named this the "hybrid situation."[249] Justice Scalia then argued that the *Sherbert* test had never invalidated any government action except the denial of unemployment.[250] Finding that the *Sherbert* test was not applicable to generally applied government regulations,[251] Justice Scalia held that when the law is of general application, the government interest does not need to be compelling—that is, the Court need not apply strict scrutiny and search for a compelling state interest.[252]

Justice O'Connor, who would later lead Court criticism of the *Smith* test, concurred in the judgment because she believed the Oregon law would pass the strict scrutiny test.[253] However, she stated that she would continue to apply the *Sherbert* test.[254] Justice O'Connor recognized that the First Amendment does not distinguish between belief and conduct and that there must be at least some protection of conduct by the Free Exercise Clause.[255] A law that prohibits conduct prohibits free exercise when a religious practitioner must either abandon his belief or face criminal prosecution.

The three dissenters noted that there was no evidence that religious use of peyote had harmed anyone.[256] Further, almost

247. *Id.* at 878-79. Justice Scalia stated that *Reynolds* represented the first instance in which the Court had asserted that principle. *Id.* at 879. He then wrote: "Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id.* (citing United States v. Lee, 455 U.S. 252, 263 & n.3 (1982) (Stevens, J., concurring)).

248. *Id.* at 881.

249. *Id.* at 882.

250. *Id.* at 883.

251. *Id.* at 885.

252. *Id.* at 885-86.

253. *Id.* at 891 (O'Connor, J., concurring).

254. *Id.* at 900 (O'Connor, J., concurring).

255. *Id.* at 893 (O'Connor, J., concurring).

256. *Id.* at 907 (Blackmun, J., dissenting). Justice Blackmun wrote for himself and Justices Brennan and Marshall.

half the states and the federal government have exempted religiously inspired peyote use from general drug laws.[257] In fact, Justice Scalia paid little attention to the facts regarding Native Americans' religious use of peyote. The Native American Church regarded the use of peyote as a sacrament akin to the bread and wine of Christianity.[258] Because Peyote often made those who ingested it ill, peyote was not a likely candidate for recreational drug use, and further, Church users of the drug were less prone to alcohol abuse.[259]

C. Scholarly Attacks on Smith, *the RFRA, and* City of Boerne v. Flores

Clearly, *Smith* stands as a roadblock to any argument that laws prohibiting polygamy are unconstitutional, and equally clearly, *Smith*—except to the extent it is circumscribed by the *Church of the Lukumi Babalu Aye v. City of Hialeah*—is still the law, but any discussion of the Free Exercise Clause must note the extensive scholarly commentary, mostly critical, of Justice Scalia's opinion.[260]

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257. *Id.* at 911-12 (Blackmun, J., dissenting).

258. More than forty years ago, author Aldous Huxley described the Church as "a sect whose principal rite is a kind of Early Christian agape, or love feast, where slices of peyote take the place of the sacramental bread and wine. These Native Americans regard the cactus as God's special gift to the Indians, and equate its effects with the workings of the divine Spirit." ALDOUS HUXLEY, THE DOORS OF PERCEPTION AND HEAVEN AND HELL 69-70 (Perennial Library 1990) (1954).

259. Huxley also noted studies which reached the same conclusion. *See id.* at 71.

260. *See, e.g.*, James R. Mason, III, *Smith's Free-Exercise "Hybrids" Rooted in Non-Free-Exercise Soil*, 6 REGENT U. L. REV. 201, 211 (1995) (explaining the hybrid approach as applying the categorical *Smith* rule to free speech, free press, and parental rights situations in order to "bring an otherwise confusing and ultimately illogical passage into focus"); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990) (arguing that *Smith*, "the most important development in the law of religious freedom in decades," is contrary to the logic of the First Amendment); Roald Mykkeltvedt, Employment Division v. Smith: *Creating Anxiety by Relieving Tension*, 58 TENN. L. REV. 603 (1991) (stating that the *Smith* decision ends the tension between the Free Exercise Clause and the Establishment Clause by eliminating the compelling interest test of *Sherbert*); Richard K. Sherwin, *Rhetorical Pluralism and the Discourse Ideal: Countering* Division of Employment v. Smith, *A Parable of Pagans, Politics, and Majoritarian Rule*, 85 NW. U. L. REV. 388 (1991) (arguing that *Smith* was an example of the prevailing trend of deference to majoritarian interests and management efficiency, which is creating a crisis regarding the legitimacy of governmental authority); Harry F. Tepker, Jr., *Hallucinations of Neutrality in the Oregon Peyote Case*, 16 AM. INDIAN L. REV. 1 (1991) (arguing that *Smith* is inconsistent with prior precedent and that the Court narrowed the concept of religious liberty); Ernest P. Fronzuto, III,

More than one hundred constitutional law scholars petitioned for rehearing in the case. The Supreme Court denied the petition for rehearing, but Congress passed the Religious Freedom Restoration Act[261] (RFRA) in 1993, in an attempt to restore *Sherbert* as the applicable test.

City of Boerne v. Flores[262] was the first case (and the only one needed) to test the constitutionality of the RFRA. The Boerne City Council passed an ordinance requiring permission from the Historic Landmark Commission before making changes to any building in a historic district.[263] St. Peter Catholic Church had become too small, but was denied permission to expand.[264] The church sued.[265] Under the RFRA, the City would have to defend under *Sherbert* principles and prove that the measure, which was a burden on the free exercise of religion, answered a compelling state interest, but under Justice Scalia's *Smith* test, the City would have the lesser burden of proof because the law was one of general applicability and not aimed at the church.[266]

Thus, the Court was clearly faced with the issue of whether the RFRA is a constitutional use of Congress' power to enforce the Fourteenth Amendment under section five of the amendment.[267] The Court held that section five is remedial not substantive—that is, it can only enforce, not decree, the substance of the guarantees contained in the Fourteenth

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Comment, *An Endorsement for the Test of General Applicability:* Smith II, *Justice Scalia, and the Conflict Between Neutral Laws and the Free Exercise of Religion*, 6 SETON HALL CONST. L.J. 713 (1996) (arguing that the general applicability test is superior to the compelling interest test); Bertrand Fry, Note, *Breeding Constitutional Doctrine: The Provenance and Progeny of the "Hybrid Situation" in Current Free Exercise Jurisprudence*, 71 TEX. L. REV. 833 (1993) (focusing on Scalia's "hybrid situation," as articulated in *Smith*, as a wholly new form of First Amendment analysis); Sandra Ashton Pochop, Note, Employment Division, Department of Human Resources of Oregon v. Smith: *Religious Peyotism and the "Purposeful" Erosion of Free Exercise Protections*, 36 S.D. L. REV. 358 (1991) (arguing that the Court failed to follow unemployment case precedent in deciding *Smith*).

261. 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

262. 521 U.S. 507 (1997).

263. *Id.* at 512.

264. *Id.*

265. *Id.* The United States District Court for the Western District of Texas found the RFRA unconstitutional, 877 F. Supp. 355 (W.D. Tex. 1995), and the United States Court of Appeals for the Fifth Circuit reversed, 73 F.3d 1352 (5th Cir. 1996).

266. *See City of Boerne*, 521 U.S. at 513.

267. *Id.* at 516.

Amendment.[268] The Court compared the RFRA to the Voting Rights Act.[269] There, the Court said that Congress was acting in light of known state abuses of minorities' voting rights and narrowly tailored the Voting Rights Act to address those abuses.[270] But in the case of the RFRA, the Court found that Congress acted despite the fact that there have been no generally applicable laws passed because of religious bigotry in forty years.[271] Thus, the Court held that the RFRA was not remedial; the RFRA was not designed to prevent unconstitutional behavior, but rather attempted to make a substantive change in constitutional protections.[272]

In addition, the Court found that the measure was not narrowly tailored because it affected every law that had an incidental effect on free exercise of religion.[273] The Court argued that every law that happened to have an impact on religion would be subject to strict scrutiny, "the most demanding test known to constitutional law."[274] The Court found that "[i]t is a reality of the modern regulatory state that numerous state laws, such as the zoning regulations at issue here, impose a substantial burden on a large class of individuals."[275]

In his concurring opinion, Justice Stevens stated that he would simply find that the RFRA was a "law respecting the establishment of religion," in that it would give more protection to the church than it would an atheist's building.[276] Justice O'Connor dissented, stating that she would use the case to overrule *Smith*.[277] Justice Souter also dissented, asserting that he would also use the case to overrule *Smith*, but he noted that the issue was not briefed.[278] Similarly, Justice Breyer would have requested briefs on whether *Smith* was wrongly decided.[279]

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268. *Id.* at 519.
269. *Id.* at 530-31.
270. *Id.* at 530.
271. *Id.* Of course, the point of this Article is to argue that the laws prohibiting Mormon polygamy were passed because of "religious bigotry."
272. *Id.* at 531.
273. *Id.* at 533-34.
274. *Id.* at 534.
275. *Id.* at 535.
276. *Id.* at 536-37 (Stevens, J., concurring).
277. *Id.* at 544-45 (O'Connor, J., dissenting).
278. *Id.* at 565 (Souter, J., dissenting).
279. *Id.* at 566 (Breyer, J., dissenting).

Finally, in yet another concurring opinion, Justice Scalia provided the "substantive defense" of *Smith*.[280]

D. Church of the Lukumi Babalu Aye v. City of Hialeah

In *Church of the Lukumi Babalu Aye v. City of Hialeah*,[281] the Court had a post-*Smith* opportunity, not only to continue its questioning of Justice Scalia's *Smith* opinion, but also to invalidate an ordinance that had been clearly aimed at the exercise of religion and thereby carve out an exception to the *Smith* rule that strongly argues in favor of the unconstitutionality of anti-polygamy statutes. The case involved the religious practices of Santeria,[282] a religion with some 50,000 practitioners in south Florida.[283] The source of the controversy was Santeria's practice of animal sacrifice, a religious tradition from the Old Testament which was a part of traditional Judaism and modern Islam.[284]

Trouble began when the Church of the Lukumi Babalu Aye (the "Church") leased land with the intent of establishing a church, school, and cultural center in the City of Hialeah, and announced that it planned to bring its ritual of animal sacrifice out into the open.[285] In response, the City adopted three ordinances clearly aimed at prohibiting the Santerian religious animal sacrifice.[286] Following the adoption of the ordinances, the

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280. *Id.* at 537-44 (Scalia, J., concurring); *see* Michael W. McConnell, *Freedom from Prosecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 819, 822 (1998) (citing, *inter alia*, JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, *in* 8 THE PAPERS OF JAMES MADISON 295, 299, 301 (Robert Rutland et al. eds., 1973) and arguing in favor of a "freedom-protective" interpretation of the Free Exercise Clause, as opposed to *Smith's* "nondiscrimination" interpretation).

281. 508 U.S. 520 (1993).

282. The religion is derived from the native African religion of the Yoruba people, who were brought to Cuba as slaves from western Africa. Traditional African elements were fused with Roman Catholicism and its saints, with traditional spirits, or "orishas," matched with the Catholic saints. *See Church of the Lukumi Babalu Aye*, 508 U.S. at 525 (citing Church of the Lukumi Babalu Aye v. City of Hialeah, 723 F. Supp. 1467, 1469-70 (S.D. Fla. 1989)); *see also* 1 ENCYCLOPEDIA OF AMERICAN RELIGIOUS EXPERIENCE 183 (C. Lippy & P. Williams eds., 1988); 13 ENCYCLOPEDIA OF RELIGION 66 (M. Eliade ed., 1987).

283. *Church of the Lukumi Babalu Aye*, 508 U.S. at 525.

284. *Id.* at 524-25 (citing 14 ENCYCLOPAEDIA JUDAICA 600-05 (1971); CYRIL GLASSE, CONCISE ENCYCLOPEDIA OF ISLAM 178 (1989)).

285. *Id.* at 525-26.

286. *Id.* at 527. The first ordinance defined sacrifice as "to unnecessarily kill, torment,

Church filed a Section 1983 action[287] alleging, *inter alia*, violation of the Church's rights under the Free Exercise Clause.[288]

Many of the points Justice Kennedy made in reversing the lower courts can be applied to the instant analysis of the constitutionality of anti-polygamy statutes. First, Justice Kennedy noted that the City had not, and indeed could not, argue that Santeria was not a religion.[289] Second, he stated, "Although the practice of animal sacrifice may seem abhorrent to some, 'religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.'"[290] Finally, Justice Kennedy stated that "petitioners' assertion that animal sacrifice is an integral part of their religion 'cannot be deemed bizarre or incredible.'"[291] Thus, to translate Justice Kennedy's opening argument into an argument against the anti-polygamy statutes: Mormonism or Mormon Fundamentalism is a religion; polygamy merits First Amendment consideration despite being abhorrent to some; and

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torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption." *Id.* (quoting Ord. 87-52). It prohibited such sacrifices "for any type of ritual" regardless of whether the animal would be eaten, with the exemption of slaughter of animals raised to be eaten at licensed slaughterhouses. *Id.* The second ordinance declared animal sacrifice to be "contrary to the public health, safety, welfare and morals of the community," and made it unlawful for persons or entities to engage in animal sacrifice within the city limits. *Id.* at 528 (quoting Ord. 87-71). Finally, the third ordinance defined slaughter as "killing of animals for food," and made it unlawful to slaughter outside areas zoned for slaughterhouses, excepting small numbers of hogs and cattle pursuant to certain state law exemptions. *Id.* (quoting Ord. 87-72). Violations were punishable by a $500 fine, imprisonment up to sixty days, or both. *Id.*

287. 42 U.S.C. § 1983 (1994).

288. *Church of the Lukumi Babalu Aye*, 508 U.S. at 528. Initially, the United States District Court for the Southern District of Florida found for the City. *See* Church of the Lukumi Babalu Aye v. City of Hialeah, 723 F. Supp. 1467 (S.D. Fla. 1989). Then, the United States Court of Appeals for the Eleventh Circuit affirmed in a one-paragraph per curiam opinion. *See* Church of the Lukumi Babalu Aye v. City of Hialeah, 936 F.2d 586 (11th Cir. 1991).

289. *Church of the Lukumi Babalu Aye*, 508 U.S. at 531. Likewise, nineteenth century Mormonism and Mormon Fundamentalism are clearly religions.

290. *Id.* (quoting Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 714 (1981) (holding that denying unemployment compensation to a Jehovah's Witness who quit her job when the factory in which she worked began manufacturing weapons of war violated her Free Exercise rights)). Simply substitute the word "polygamy" for "animal sacrifice," and the constitutional law argument should remain the same.

291. *Id.* (citing Frazee v. Ill. Dep't of Emp. Sec., 489 U.S. 829, 834 & n.2 (1989)). As discussed earlier, the nineteenth century Mormons believed polygamy to be an essential aspect of their religious practice. *See supra* Part II.A.

the fact that polygamy is an integral part of these religions is credible. Thus, we turn to the First Amendment argument.

Justice Kennedy first cited *Smith* for the proposition that "a *law that is neutral and of general applicability* need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."[292] But Justice Kennedy, beginning to narrow the *Smith* holding, stated that "neutrality" and "general applicability" are interrelated, and failure to satisfy one suggests the failure to satisfy the other.[293] Thus, he concluded, "A law failing to satisfy these requirements must be justified by a compelling government interest and must be narrowly tailored to advance that interest."[294]

"If the object of a law is to infringe upon or restrict practices because of their religious motivation," Justice Kennedy then stated, "the law is not neutral."[295] No laws were more clearly aimed at religious behavior than the anti-Mormon, anti-polygamy state constitutional provisions of Utah and other southwestern states. In the case of Hialeah's ordinances, "suppression of the central element of the Santeria worship service was the object of the ordinances."[296]

Justice Kennedy noted that the ordinances allowed almost all animal killings except those for religious purposes, including those no more humane or necessary than those committed in Santeria ceremonies.[297] Kosher slaughter by Jews was also protected.[298] Obviously, Judaism is a more accepted, mainstream religion than Santeria, and Judiac kosher slaughter is based upon Old Testament edicts.[299] However, if Old

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292. *Id.* (emphasis added).
293. *Id.*
294. *Id.* at 531-32.
295. *Id.* at 533.
296. *Id.* at 534. Once again, to paraphrase, suppression of the (or at least "a") central element of the Mormon religion was the object of the constitutional provisions. That Kennedy did not make this connection is apparent from his citation to *Reynolds v. United States* and *Davis v. Beason* as examples of presumably permissible targeting or legitimate objects of discrimination. *See id.* at 535.
297. *Id.* at 536.
298. *Id.*
299. The obvious difference between kosher slaughter and slaughter as part of a Santeria ritual is that kosher slaughter is for human consumption. In Santeria, the purpose of the slaughter is to feed the orishas (spirits who will die without being fed, thus, making the slaughter a central part of the religion) and, thus, the animal is not

Testament support is to be the test of respectability, the Jews also slaughtered animals for sacrifice in the Old Testament.[300] Many other kinds of killing were exempted as well: killing of game as a result of hunting, fishing, slaughter of animals for food, pest control, euthanasia, and the use of live rabbits to train greyhounds.[301] These facts diffused the City's public health arguments and indicated that the ordinances were not narrowly tailored. Further, as Justice Kennedy noted, Santerian practitioners utilized the same method of killing as kosher practitioners, and such method was deemed humane.[302]

Next, in a section not representing the opinion of the Court, Justice Kennedy noted that the Equal Protection cases could provide guidance as to the neutrality of the ordinances.[303]

Turning to the question of general applicability, Justice Kennedy described the ordinances as falling "well below" the minimum standard.[304] The City advanced two interests the ordinances targeted: protecting the public health and preventing cruelty to animals. Justice Kennedy found the ordinances to be underinclusive on both counts because they failed to prohibit non-religious conduct that was equally threatening to the public health or equally likely to cause cruelty to animals.[305] Therefore, Justice Kennedy determined that the law was neither neutral nor of general application, and

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eaten.

300. *See, e.g., Exodus* 20:24; *Leviticus* 1:2.

301. *Church of the Lukumi Babalu Aye*, 508 U.S. at 537.

302. *Id.* at 539 (citing 7 U.S.C. § 1902(b) (providing that slaughter is considered humane and, thus, legal if done "in accordance with the ritual requirements of the Jewish faith or any other religious faith that prescribes a method of slaughter whereby the animal suffers loss of consciousness . . .")).

303. *Church of the Lukumi Babalu Aye*, 508 U.S. at 540 (citing Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 696 (1970) (Harlan, J., concurring) ("[N]eutrality in its application requires an equal protection mode of analysis."); Arlington Heights v. Metro. Hous. and Dev. Corp., 429 U.S. 252, 266 (1977) (holding that ordinances that have a disproportionate impact on minorities do not violate Equal Protection without discriminatory intent or purpose, but may violate the Fair Housing Act based upon impact alone)).

304. *Id.* at 543.

305. *Id.* at 543-44. Examples of cruelty to animals included fishing, killing mice and rats, euthanasia for strays, destruction of animals removed from their owners for humanitarian reasons, the infliction of pain on animals for scientific reasons, using poison in one's own yard, using live animals to hunt, and, finally, hunting wild hogs. *Id.* Examples of health risks included eating uninspected fish and meat from fishing and hunting. *Id.* at 545.

therefore, must undergo "the most rigorous of scrutiny."[306] Justice Kennedy found the ordinances to be both overbroad and underinclusive, and he stated, "The absence of narrow tailoring suffices to establish the invalidity of the ordinances."[307]

Next, Justice Kennedy noted that the City had not demonstrated that its governmental interests were compelling. Justice Kennedy wrote:

> Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling. It is established in our strict scrutiny jurisprudence that "a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited."[308]

As demonstrated below, the various anti-polygamy statutes and constitutional provisions attack only the religiously based practice of polygamy but ignore a host of threats to the supposedly compelling interest of maintaining the traditional Christian monogamous family unit as the basic building block of society.[309]

Justice Kennedy then concluded that the Free Exercise Clause is triggered by "even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices," and the Court invalidated the ordinances.[310]

Justice Scalia, joined by Chief Justice Rehnquist, concurred in the judgment but disagreed with the portion of the opinion that examined the anti-Santeria motives of the Hialeah City Council, arguing that the Court had in the past refrained from looking into motives and should continue not to do so.[311]

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306. *Id.* at 546.

307. *Id.* (citing Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) (holding that the Freedom of the Press Guarantee was violated by state's scheme of taxing general interest magazines but exempting newspapers, religious, professional, trade, and sports journals)).

308. *Id.* at 546-47 (citing Fla. Star v. B.J.F., 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring)).

309. *See infra* Part VI.D-H.

310. *Church of the Lukumi Babalu Aye*, 508 U.S. at 547.

311. *Id.* at 557-58 (Scalia, J., concurring).

Concurring in part and concurring in the judgment, Justice Souter questioned the validity of the *Smith* rule, but argued that reconsideration of *Smith* should be reserved for a later date because the instant case, involving a law that was not of general applicability, fell outside the *Smith* rule.[312] Nevertheless, Justice Souter did not seem to be concerned with the holding of *Reynolds*, apparently accepting the arguments that Mormon polygamy posed a real threat to society.[313]

In an opinion concurring in the judgment, which was joined by Justice O'Connor, Justice Blackmun stressed his continued belief that *Smith* was wrongly decided.[314] Blackmun argued that when a law discriminates against a religion as such, it should automatically fail strict scrutiny under *Sherbert*.[315]

VI. THE FREE EXERCISE CLAUSE PROTECTS POLYGAMY

This Part argues that, given the breadth of religious views in America, as well as the wide variety of marriages and marriage-like relationships, the Free Exercise Clause protects polygamy. First, under *Smith*, because marriage is a fundamentally important right protected by the Due Process Clause, it meets Justice Scalia's "hybrid situation" test. Second, under *Church of the Lukumi Babalu Aye*, current anti-polygamy statutes and state constitutional provisions are void because (1) they were not laws of general applicability but rather were enacted out of antipathy toward a particular religion; (2) they further no compelling government interest; and (3) they place a substantial burden on a central tenet of that religion.

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312. *Id.* at 559 (Souter, J., concurring).

313. Justice Souter wrote:

> *Reynolds*, which in upholding the polygamy conviction of a Mormon stressed the evils it saw as associated with polygamy ("polygamy leads to the patriarchal principle, and . . . fetters the people in stationary despotism"), has been read as consistent with the principle that religious conduct may be regulated by general *or targeting* law only if the conduct "pose[s] some substantial threat to public safety, peace or order."

Id. at 569 (citations omitted) (emphasis added).

314. *Id.* at 578 (Blackmun, J., concurring) (arguing that *Smith* ignored the value of religion as an individual freedom and cast the Free Exercise Clause as a mere antidiscrimination principle).

315. *Id.* at 579 (Blackmun, J., concurring).

A. Defining "Religion" Today

Although it was not necessarily the case in *Davis v. Beason*, where Mormonism was defined as a "cultus,"[316] the Mormon Fundamentalists who practice polygamy today are generally viewed as members of a religion. Thus, we need not address in great depth the question of what belief systems are entitled to constitutional protection as religions. However, it should be noted that a court can avoid a Free Exercise Clause analysis by simply assuming that a given practice is not a religion.[317]

Religion is now defined very broadly, certainly more broadly than the founders envisioned. Justice Story believed that the Free Exercise Clause was not intended to protect "Mahometanism, or Judaism, or infidelity . . . but [was intended] to exclude all rivalry among [C]hristian sects."[318] A belief system need not teach belief in a God to be considered a religion.[319] For example Transcendental Meditation[320] has been held to be a religion.[321]

B. The Varieties of (American) Religious Experience[322]

The issue of the degree to which the Free Exercise Clause protects religiously motivated *actions* must be addressed in the context of an increasingly polyglot religious spectrum in the

316. Davis v. Beason, 133 U.S. 333, 342 (1890).

317. For a discussion of the evolving definition of what the courts consider to be a religion, see Eduardo Penalver, Note, *The Concept of Religion*, 107 YALE L. J. 791 (1997) (noting a Western, Christian bias in the courts' definitions of religion).

318. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1877, at 594 (1851), *quoted in* Goldberg v. Weinberger, 475 U.S. 503, 511 n.3 (1986) (Stevens, J., concurring) (noting that Story's view had been repudiated in *Wallace v. Jaffree*, 472 U.S. 38, 52-55 (1985) ("The Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.")).

319. *See* Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961) ("Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others.").

320. Transcendental Meditation is also known as "the Science of Creative Intelligence" or "TM." *See Transcendental Meditation*, New Religious Movements, *at* http://www.religiousmovements.lib.virginia.edu/nrms/transmed.html.

321. *See* Malnak v. Yogi, 592 F.2d 197 (3d Cir. 1979). Note that this is an Establishment Clause case in which transcendental meditators were arguing that it was *not* a religion so that it would be eligible for federal funding in public schools.

322. *Cf.* WILLIAM JAMES, VARIETIES OF RELIGIOUS EXPERIENCE (Harvard Univ. Press ed. 1985) (1910).

United States. The number of individuals professing membership in a religion other than Protestant Christianity, Roman Catholicism, or Judiasm has increased seven-fold over the period from 1947 to 1998.[323]

In addition to the more than 250 million Christians in North America,[324] there are approximately 6 million Jews who have litigated a variety of issues, from wearing yarmulkes to being required to close their business establishments on Sunday.[325] There are 4.4 million Muslims in the United States, and the number is growing.[326] Like the Santerians, some Muslims engage in animal sacrifice, for example, sacrificing lambs during the month-long observance of Ramadan which begins in early December and ends in early January.[327] There are

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323. *See* GEORGE GALLUP, JR. & D. MICHAEL LINDSAY, SURVEYING THE RELIGIOUS LANDSCAPE 16 (1999).

324. Gayle White, *Q & A on the News* (with Colin Bessonette), ATLANTA J. & CONST. Dec. 26, 1999, at A2, *available at* 1999 WL 3819856.

325. *Id.*; *see also* Bd. of Educ. of Kiryas Joel v. Grumet, 512 U.S. 687 (1994) (holding that a statute creating a special school district for Satmar Hasidim Jews violated the Establishment Clause); Goldman v. Weinberger, 475 U.S. 503 (1986) (holding that an Orthodox Jew in the Air Force can be denied the right to wear a yarmulke); Braunfeld v. Brown, 366 U.S. 599 (1961) (holding that a Sunday closing law did not impose substantial burden on Orthodox Jewish merchants who also closed on Saturday and, thus, could only operate for a five-day week). A Mississippi school district backed down and avoided a lawsuit after the American Civil Liberties Union entered the fray on behalf of a Jewish boy who was told he could not wear a Star of David necklace to school. The prohibition had been part of a ban on gang symbols, and the necklace was similar to one favored by a local gang. *See* Anne Rochell Konigsmark, *Lawsuit on Star of David Near End*, ATLANTA J. & CONST., Aug. 25, 1999, at A6, *available at* 1999 WL 3793228. Jewish polygamy was ended in Europe in the Tenth Century by Rabbi Gershan Me'on Hagolah. *See* HITCHENS, *supra* note 69, at 65 (citing LOUIS M. EPSTEIN, THE JEWISH MARRIAGE CONTRACT: A STUDY IN THE STATUS OF THE WOMAN IN JEWISH LAW, 50 (1973)). The yarmulke issue reared its head again when a Hebrew school's boys basketball team was forced to forfeit a game because some members refused to comply with a referee's order that they remove their yarmulkes. The referee's decision was defended by the Commissioner of the Southeastern Virginia Officials Association, who warned that the clips holding the yarmulkes in place could come loose and poke someone in the eye, and that such an accident would not be covered by the Association's $5 million insurance policy. The author, who is nationally licensed to referee soccer and has refereed many games, can personally testify to the variety of hair clips that make their way onto the soccer field every Saturday, with nary of report of injury. *See Yarmulkes at Issue*, ATLANTA J. & CONST., Feb. 12, 2000, at B1, *available at* 2000 WL 5440961.

326. White, *supra* note 324; *see also* O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (finding no Free Exercise Clause claim when Islamic prisoners complained that prison work regulations interfered with their ability to attend Jumu'ah, the Friday midday Islamic service).

327. *See* Mark Bixler, *Animal Slaughter Law Highlights Cultural Clash*, ATLANTA J. &

2.5 million Buddhists in the United States.[328] There are 1.3 million Hindus.[329] The issues presented by the 175,000 Amish, prompted the well-known case of *Wisconsin v. Yoder*.[330] The animal sacrifices of the practitioners of Santeria, of course, gave rise to the pivotal case discussed above.[331] The Christian Scientists' refusals to allow life-saving medical treatments have generated headline-making controversies.[332] The dreadlock-wearing Rastafarians, who believe that marijuana was put on the Earth by God to be smoked, present a visible reminder of American religious diversity.[333] Jehovah's Witnesses, aided by

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CONST., Dec. 27, 1999, at C1, *available at* 1999 WL 3819907.

328. White, *supra* note 324.

329. *Id.* I am aware of no reports of Hindu widows attempting suttee in the United States.

330. 406 U.S. 205 (1972) (holding compulsory school attendance laws void as applied to Amish who wish to withdraw their children from school at sixteen for religious reasons). But the Amish lost in *United States v. Lee*, 455 U.S. 252 (1982). Justice Burger distinguished *Yoder* and found a compelling interest in required participation in the Social Security system even though the Amish were completely self-sufficient and believed that it was a sin not to take care of your own elderly. *See also* Jennifer Brown, *Amish Have Few Y2K Worries, A Simple Lifestyle Has Insulated the Amish from Most Computer-Related Problems*, GREENSBORO NEWS & REC., Dec. 28, 1999, at B8, *available at* 1999 WL 26315021. Mormons also have no need for special millennial stockpiling, since every Mormon family is charged by the Church with maintaining a one-year supply of emergency food and other items. *See also* Minnesota v. Hershberger, 444 N.W.2d 282 (Minn. 1989), *vacated sub nom.* Minnesota v. Herschberger, 495 U.S. 901 (1990), *remanded to* 462 N.W.2d 393, 399 (Minn. 1990) (upholding Amish right not to display glow-in-the-dark triangles on their vehicles, despite the Court's vacation of an earlier opinion and remand with instructions to reconsider in light of *Smith*).

331. *See* Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).

332. "A Christian Science mother prayed over her son for days as she watched him die of juvenile onset diabetes." Marci A. Hamilton, *Religious Conduct Crosses the Line*, ATLANTA J. & CONST., Sept. 7, 1999, at A9.

333. In the 1930s, a group of Jamaicans began claiming that the Abyssinian (present-day Ethiopia) ruler, Ras Tafari, was the Messiah. (After giving his name to the Rastafarian religion, Tafari changed his name to Haile Selassie.) The movement was linked to, but not directly a part of, Marcus Garvey's Universal Negro Improvement Association, which sought to end the African diaspora. The Rastafarians study the Christian Bible, particularly the Old Testament, which frequently references Ethiopia and, in the Rastafarians' view, predicts the coming of Haile Selassie; they also smoke marijuana as a sacred ritual, not unlike the Native American Church's use of peyote. *See* INSIGHT GUIDE: JAMAICA 103-06 (Paul Zach ed., 1984). The related Ethiopian Zion Coptic Church's marijuana use has prompted two unsuccessful Free Exercise Clause challenges. *See* Olsen v. Iowa, 808 F.2d 653 (8th Cir. 1986); United States v. Rush, 738 F.2d 497 (1st Cir. 1984), *cert. denied*, 470 U.S. 1004 (1985). Justice Brennan distinguished the Rastafarians' dreadlocks from Jewish yarmulkes in *Goldman v. Weinberger*, 475 U.S. 503, 519-20 (1986) (Brennan, J., dissenting). Justice Brennan noted that the issue of someone attempting to wear dreadlocks in the Air Force was not before the Court, but

the American Civil Liberties Union, took forty-five cases to the Supreme Court between 1938 and 1945, winning thirty-six.[334] The approximately 50,000 Wiccans are quick to distance themselves from Satanists, but Congressman Bob Barr (R-Ga.) and others may disagree.[335] Some who practice the Druid tradition would argue that Druid rituals are at the heart of Christian pageantry.[336] The Native American Church's practitioners' use of peyote, of course, prompted the *Smith*

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seemed to imply that dreadlocks might present a health or safety problem. Thus, although Brennan would have allowed members of the Air Force to wear yarmulkes, he might have disallowed dreadlocks.

334. *See* Thomas v. Rev. Bd., 450 U.S. 707 (1981) (following *Sherbert* to uphold denial of unemployment compensation to a Jehovah's Witness who quit work at a munitions factory because of his opposition to war); Prince v. Massachusetts, 321 U.S. 158 (1944) (holding that a child labor law which prohibited under-eighteen Jehovah's Witnesses from selling religious materials did not violate the Free Exercise Clause even though the Church viewed it as the child's religious duty to perform such work); W. Va. St. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (reversing *Gobitis*); Minersville Sch. Bd. v. Gobitis, 310 U.S. 586 (1940) (stating that Jehovah's Witnesses who believe that the salute to the flag violates *Exodus* 4:5 nevertheless must participate in the salute); Cantwell v. Connecticut, 310 U.S. 296 (1940) (examining a case in which Jehovah's Witnesses, proselytizing in a ninety percent Catholic neighborhood, were convicted of soliciting donations without proper approval, and holding that the statute as construed deprived them of liberty interest in violation of the Fourteenth Amendment and that this concept of liberty embraced the liberties guaranteed by the First Amendment). More than 10,000 Jehovah's Witnesses were sent to German concentration camps in 1933 for their refusal to give the Nazi salute; this strengthened their resolve in the United States regarding the flag salute. *Gobitis* resulted in a wave of attacks against Jehovah's Witnesses throughout the United States, prompting the reversal in *Barnette*. *See* IRONS, *supra* note 182, at 335-44.

335. Wicca practitioners can be described as belonging to "a nature-based religion that claims roots in pre-Christian Europe." Gayle White, *Bewitched: When an Old Religion Meets Pop Culture*, ATLANTA J. & CONST., Oct. 30, 1999, at E1, *available at* 1999 WL 3808637. Wicca has become a topic of fascination for pop culture. *See id.* The book *Teen Witch: Wicca for a New Generation* sold 80,000 copies. *See id.* U.S. Representative Bob Barr (R-Ga.) caused a controversy when he called Wicca "nonsense" and sent a letter to military officials urging that it be barred from military bases. *See* Gayle White, *Barr Opposition Spurs Unity, Wiccans Say*, ATLANTA J. & CONST., Oct. 30, 1999, at E4, *available at* 1999 WL 3808628. We may yet see litigation on the question of whether the Free Exercise Clause protects Wiccans, as a North Carolina school teacher who is an ordained Wiccan minister is seeking help from the American Civil Liberties Union after she was suspended for her beliefs. She stated that she had mentioned Wicca in the classroom, but had not attempted to recruit anyone. However, her coven had for a time run photographs on its Web site that included a nude celebration. The teacher was not in the photos, which have since been removed. *See* Knight Chamberlain, *Wiccan Teacher Is Fighting Suspension in N. Carolina*, ATLANTA J. & CONST., Jan. 14, 2000, at A20, *available at* 2000 WL 5435524.

336. Druids rose to the defense of Wiccans when they were attacked by U.S. Representative Bob Barr. *See* White, *Barr Opposition Spurs Unity*, *supra* note 335.

case.[337] The Sikhs' practice of carrying ceremonial knives has clashed with the public school system's strict "zero tolerance" no weapons on campus policies.[338] The Church of Scientology, which boasts celebrity members such as Tom Cruise and John Travolta, engaged in a twenty-six year battle over its tax-exempt status with the Internal Revenue Service.[339] The Church of Scientology was founded in 1954 by science fiction author L. Ron Hubbard,[340] who wrote that humans are spirits that were banished to Earth seventy-five million years ago by an evil ruler of the galaxy.[341] The Reverend Sun Myung Moon's Unification Church, which practices mass marriages, has affected not only Free Exercise Clause jurisprudence but international relations as well.[342]

But difficult constitutional problems are raised by other than non-Christian denominations. Some of the issues raised by the growing Christian Fundamentalists (particularly in the South)[343] are illustrated by *Bob Jones University v. United States*.[344] In that case, the Internal Revenue Service disqualified Bob Jones University as a non-profit "charity" because it practiced racial discrimination,[345] based on its belief that the Bible forbade

337. *See* Emp. Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990) (discussed *supra* Part V.B); *see also* Lyng v. Northwest Indian Cemetery Ass'n, 85 U.S. 439 (1988) (allowing timber harvesting in an area sacred to the Indians and holding that programs which have an incidental effect of making it more difficult to practice a religion do not require strict scrutiny).

338. *See* Hamilton, *supra* note 332.

339. The IRS revoked the Church's tax-exempt status in 1967, but reversed itself twenty-six years later after a prolonged legal battle. *See* Founding Church of Scientology v. United States, 409 F.2d 1146 (D.C. Cir. 1969).

340. *See, e.g.*, L. RON HUBBARD, BATTLEFIELD EARTH (1982). *Battlefield Earth* is now a Warner Brothers motion picture starring Scientologist John Travolta.

341. *See* Jean Marbella, *A Private War: Millionaire Spending Big Bucks in Battle Against Scientology*, ATLANTA J. & CONST., Jan. 30, 2000, at M1.

342. In *Larson v. Valente*, 456 U.S. 228 (1982), an Establishment Clause case, the Court invalidated a law that required religious organizations that receive more than fifty percent of their charitable donations from non-members to register and report their receipts, but did not impose the same requirement on churches receiving the majority of their funds from members. *Id.* The Unification Church successfully argued that the law demonstrated a preference to traditional, over untraditional, religions in violation of the Establishment Clause. *Id.*

343. "Fundamentalist," in the more common meaning here, refers to a literalist interpretation of the Bible and is not a reference to Mormon Fundamentalists.

344. 461 U.S. 574 (1983).

345. *Id.* at 578.

interracial dating and marriage.[346] As a result, the school was all white until 1971.[347] From 1971 to 1975, the school admitted blacks but only married blacks who had married within their own race.[348] Thereafter it allowed single blacks to enroll but threatened expulsion for interracial dating or even for espousing support for interracial marriage.[349]

In ruling against the university, the Court stated that the elimination of racial discrimination has been a fundamental national policy since *Brown v. Board of Education*.[350] The Court then stated that the Free Exercise Clause is an absolute prohibition against regulation of beliefs but not of conduct when there is a compelling government purpose.[351]

In addition, the United States is home to Mormons, Fundamentalist Mormons, and members of the Church of God in Christ.[352] There are about twelve polygamous Christian denominations in the United States.[353]

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346. *Id.* at 580.
347. *Id.*
348. *Id.* at 580-81.
349. *Id.* at 581.
350. *Id.* at 593 (citing Brown v. Bd. of Educ., 347 U.S. 483 (1954)).
351. *Id.* at 603. Bob Jones University also argued that denial of tax-exempt status would violate the Establishment Clause because it amounted to favoring of religions with non-discriminatory beliefs over those with discriminatory beliefs. *Id.* at 604 n.30. The Court dismissed this argument with just a footnote. *Id.* The Court stated that the government may not "prefer one religion over another," but that a regulation does not violate the Establishment Clause just because it happens to harmonize with one religion's beliefs as opposed to those of another. *Id.*
352. The members of the Church of God in Christ take *Deuteronomy* 22:5 literally when it states, "A woman shall not wear a man's apparel, nor shall a man put on a woman's garment: for whoever does such things is abhorrent to the Lord your God." The prohibition may have been aimed at pagan cultic practices by those who worshiped the Mesopotamian goddess Ishtar. *See* HARPER COLLINS STUDY BIBLE 302 (Wayne A. Meeks ed., 1993). This prohibition against cross-dressing led to the firing of a Mobile County, Alabama Sheriff's Department detective who refused to wear uniform pants. Lark Huber, an eighteen-year veteran and former Deputy of the Month, offered to wear a skirt or culottes when she was transferred from plainclothes to the uniformed division. *See* Mark Holan, *Alabama Cop Says County Dress Code Violates Her Religion*, ATLANTA J. & CONST., Aug. 24, 1999, at D1.
353. *See* OSTLING & OSTLING, *supra* note 4, at 74.

C. The Variety of American "Marriages"

Although there is a movement underway to revive the traditional American marriage,[354] marriage and familial relationships today take many forms either nonexistent or rare when *Reynolds* was decided.[355] For example, miscegenous marriages were prohibited in sixteen states until *Loving v. Virginia*[356] was decided in 1967, but there are a growing number of such marriages as well as racially-mixed progeny.[357] Nineteenth century opponents of Mormon polygamy expressed the belief that polygamy created genetic abnormalities.[358] In this, they were akin to the nineteenth century scientific racists who justified anti-miscegenation statutes on the grounds that

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354. *See* Maggie Gallagher, *The Marriage Movement Aims To Revive Institution*, ATLANTA J. & CONST., July 7, 2000, at A17. The Marriage Movement's initial statement downloads as twenty-eight pages and ninety-two end-notes, but has essentially nothing to say about gay marriage, polygamous marriage, or any other non-traditional marriage, for that matter. *See The Marriage Movement*, *at* http://www.marriagemovement.org (last visited July 9, 2000). It does note, however, that "a healthy marriage culture benefits every citizen of the United States . . . [whether] gay or straight." *Id.* The statement argues that being pro-marriage is neither liberal nor conservative, does not promote male tyranny or domestic violence, and does not punish single parents or their children, and calls for "more marriage-supportive" divorce laws. *See id.*

355. *See* Mary P. Treuthart, *Adopting a More Realistic Definition of "Family,"* 26 GONZ. L. REV. 91, 92 (1991) ("Social institutions and the law have not kept up with the changes in family life. As a result, many groups which function as families are not recognized as such, and are denied benefits which society bestows upon families which resemble the traditional model."); *see also* PHILIP KILBRIDE, PLURAL MARRIAGE FOR OUR TIMES: A REINVENTED OPTION? 89-90 (1994) (describing two or more women knowingly "sharing" a man without marriage, extramarital polygamy by both sexes, and same gender and mixed gender group sexual relationships); Altman, *supra* note 4, at 371.

> The stereotyped ideal of the nuclear family of a mother, father, and their children that pervaded American and Western society in the first decades of the twentieth century has given way to acceptance, or at least acknowledgement, of the fact that the social landscape is now populated by a great diversity of close relationships and family types.

Id.

356. 388 U.S. 1 (1967).

357. *See generally* Sealing, *supra* note 108.

358. *See* VAN WAGGONER, *supra* note 4, at 106 n.5. Van Waggoner cites a paper presented in 1861 by Samuel A. Cartwright and C.G. Forshey, quoting original material by United States Army Assistant Surgeon Robert Bartholow, *Effects and Tendencies of Mormon Polygamy in the Territories of Utah*. "The yellow, sunken, cadaverous visage; the greenish-colored eye; the thick, protuberant lips; the low forehead; the light, yellowish hair; and the lank, angular person constitute an appearance so characteristic of the new race, the production of polygamy, so as to distinguish them at a glance." *Id.*

the progeny of mixed-race marriages were either sterile or defective.[359]

As Royston Potter argued, "the high rate of divorce in the United States has often turned today's American familial relationships into a form of serial polygamy."[360] Consider some of current America's families. We now see many more single parent families consisting of a mother who never married and her children.[361] There are now more marriages consisting of two previously married and divorced spouses, the familial units of which may include children of the wife's prior marriage, children of the husband's prior marriage, and children of the current marriage, in any combination. Homosexual marriages, official sanction of which was anticipated for a time in Hawaii, have recently been sanctioned by the Supreme Court of Vermont[362] in a lengthy, carefully worded opinion which, although it carries little precedential value outside the state,[363]

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359. *See* Sealing, *supra* note 108, at 567-68.

360. Potter v. Murray City, 585 F. Supp. 1126, 1142 (D. Utah 1984) (discussed *supra* Part IV.E).

361. The first year that data on illegitimacy were gathered was 1920 when the rate of illegitimate births was 3%; in 1992, the rate had risen to 32%. ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 155 (1996). The number of first births conceived out of wedlock rose to 53% for the period 1990-1994, with 41% born out of wedlock. Raven Hill, *Most Young First-Time Moms Unmarried*, ATLANTA J. & CONST., Nov. 9, 1999, at D1, *available at* 1999 WL 3810856. Eighty-nine percent of births to teenagers occur before marriage. *Id.* According to Census Bureau analyst Amara Bachu, one reason for the increase is that having illegitimate children is now more socially acceptable. *See id.*

362. *See* Baker v. Vermont, 744 A.2d 864 (Vt. 2000).

363. Chief Justice Amestoy was careful to point out that the decision is based, not on the Equal Protection Clause of the Fourteenth Amendment to the Constitution, but rather on the Common Benefits Clause of the Vermont Constitution, which states: "That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community." *Baker*, 744 A.2d at 867 (citing VT. CONST., ch. I, art. 7). The court asserted that the Vermont "constitution is not a mere reflection of the federal charter. Historically and textually, it differs from the United States Constitution. It predates the federal counterpart, as it extends back to Vermont's days as an independent republic. It is an independent authority, and Vermont's fundamental law." *Id.* at 870 (quoting Vermont v. Badger, 450 A.2d 336, 347 (Vt. 1982)). Thus, the court did not apply one of the levels of scrutiny developed in Equal Protection jurisprudence—strict scrutiny, intermediate scrutiny, or the rational relationship test—but rather asked whether the law "bears a reasonable and just relation to the governmental purpose" put forward, *i.e.*, furthering the link between procreation and child rearing. *Id.*

illuminates some of the points discussed herein.[364] Of particular note, the court rejected the State's claim that the heterosexuals-only marriage statutes were constitutional because "they rationally furthered the State's interest in promoting 'the link between procreation and child rearing.'"[365]

Unmarried couples now account for 5.9 million American households, or one out of every seventeen households; of those households, only 25% are gay, and 75% are heterosexual.[366] A small percentage of these are elderly retirees who would marry but for the loss of Social Security or pension benefits.[367]

Increasingly common are homosexual unions in which one spouse has custody or partial custody of the children of a prior heterosexual marriage.[368] There are many lesbian unions in which one spouse is the biological mother, and the paternal sperm is obtained through a sperm bank or otherwise.[369]

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364. The court held that Vermont is constitutionally required to extend the same common benefits and protections that flow from heterosexual marriage to same-sex couples, but left it to the state legislature to decide whether such inclusion would take the form of a marriage license, a parallel "domestic partnership" system, or an equivalent statutory alternative. *Id.* at 886.

365. *Id.* at 868.

366. Hank Ezell, *Domestic Dilemmas, Unmarried Couples Must Plan Carefully*, ATLANTA J. & CONST., Jan. 30, 2000, at P3, *available at* 2000 WL 5438560.

367. *Id.*

368. Note that such children need not be the product of artificial insemination.

369. A conservative estimate finds there have been more than 500,000 children conceived by artificial insemination in the United States. *See* Katheleen R. Guzman, *Property, Progeny, Body Part: Assisted Reproduction and the Transfer of Wealth*, 31 U.C. DAVIS L. REV. 193 (1997). Singer Melissa Etheridge and filmmaker Julie Cypher, a lesbian couple, recently announced that their two children were produced by artificial insemination by rock singer David Crosby, who has a family of his own with three children. *See Peach Buzz*, ATLANTA J. & CONST., Jan. 10, 2000, at C2. "[T]here is no dispute that a significant number of children today are actually being raised by same-sex parents, and that increasing numbers of children are being conceived by such parents through a variety of assisted-reproductive techniques. *Baker*, 744 A.2d at 881 (citing David Flaks et. al, *Lesbians Choosing Motherhood: A Comparative Study of Lesbian and Heterosexual Parents and Their Children*, 31 DEV. PSYCHOL. 105, 105 (1995) (finding that between 1.5 and 5.0 million lesbian mothers resided with their children in the United States from 1989-1990, and noting that "thousands" have chosen motherhood through adoption or artificial insemination); G. Dorsey Green & Frederick W. Bozett, *Lesbian Mothers and Gay Fathers, in* HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY 197, 198, 213 (John C. Gonsiorek & James Weinrick eds., 1991) (recognizing there are 6 to 14 million children of gay parents); C. Patterson, *Children of the Lesbian Baby Boom: Behavioral Adjustment, Self-Concepts, and Sex Role Identity, in* LESBIAN AND GAY PSYCHOLOGY (B. Greene et al. eds., 1994) (noting that the number of families with lesbian mothers is increasing); E. Donald Shapiro & Lisa Schultz, *Single-Sex Families: The Impact of Birth Innovations upon Traditional Family Notions*,

Consider marriages in which two otherwise average people have a beautiful child because the egg that produced the child was purchased from a "supermodel."[370] Consider the unconventional Hecht family, which consisted of William Hecht (a suicide victim), William Everett Kane, Jr., and Katherine Kane (Hecht's children by a former spouse), Deborah Ellen Hecht (Hecht's second wife and widow), and fifteen frozen vials of Hecht's sperm.[371] A California court denied the children's attempt to prevent Deborah from using the sperm to impregnate herself and, thus, bear William a posthumous child.[372]

D. Hybrid Claim—First Amendment Plus the Fundamental Right To Marry

The hybrid claim has been criticized as an invention of Justice Scalia in an attempt to advance his *Smith* thesis.[373] Professor Tepker argues that Justice Scalia inaccurately characterized *Meyer v. Nebraska*[374] and *Pierce v. Society of Sisters*[375] in an attempt to prove that the Court only upheld the Free Exercise Clause argument in *Yoder* because it was reinforced by an additional liberty interest.[376] Professor Tepker makes a compelling argument that suggests that one, particularly one otherwise critical of *Smith*, should not utilize the hybrid argument to argue for Free Exercise protections. But for good or ill (or both), *Smith* has radically changed the First Amendment landscape. But for *Church of the Lukumi Babalu Aye*, this change has weakened the protections of non-mainstream religious practitioners, which hopefully pardons the

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24 FAM. L. 271, 281 (1985) (stating that a considerable number of children are being born in single-sex families)).

370. *See* Bruce Horovitz, *Selling Beautiful Babies*, USA TODAY, Oct. 25, 1999, at A1. It later appeared that the egg auction was either a hoax or part of an enticement to a pornographic pay-per-view Web site. *See id.* Nevertheless, the possibility suggested by the apparent hoax is all too real.

371. *See* Hecht v. Super. Court, 50 Cal. App. 4th 1289 (1996).

372. *See id.*

373. *See* Tepker, *supra* note 260, at 24, 45-49.

374. 262 U.S. 390 (1923) (holding that a statute which forbade teaching of Bible stories in German violated the Due Process Clause of the Fourteenth Amendment).

375. 268 U.S. 510 (1925).

376. *See* Tepker, *supra* note 260, at 24, 45-49.

use of the *Smith*-derived hybrid argument. The hybrid claim derives from the following language in *Smith:*

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press . . . or the right of parents . . . to direct the education of their children . . . .[377]

Justice Scalia called such a situation, where the Free Exercise Clause is viewed in conjunction with another constitutional protection, a "hybrid situation," and held that *Smith* did not present such a case.[378] To fit polygamy into this hybrid situation, we must demonstrate that marriage is a fundamental right.

E. The Fundamental Importance of Marriage

The right to marry is a fundamental right subject to the protection of strict scrutiny analysis, as a result of the close link between the right of marriage and the practice of religion. The concept of marriage as a fundamental right began with *Meyer v. Nebraska*,[379] in which the Court held that the word "liberty" in the Due Process Clause[380] included, *inter alia*, the right to marry.[381]

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377. Emp. Div., Dept. of Human Res. v. Smith, 494 U.S. 872, 881 (1990) (citing Wisconsin v. Yoder, 406 U.S. 205 (1972) (compulsory education); Follett v. McCormick, 321 U.S. 573 (1944) (flat tax on solicitation); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (flat tax on solicitation); Cantwell v. Connecticut, 310 U.S. 296, 304-07 (1940); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (compulsory education)); *see also* Fry, *supra* note 260, at 835 (describing the hybrid concept as a new constitutional doctrine fashioned from whole cloth).

378. *See Smith*, 494 U.S. at 882.

379. 262 U.S. 390 (1923).

380. U.S. CONST. amend. XIV, § 1.

381. The Court stated that liberty included:

> [t]he 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, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Meyer, 262 U.S. at 399 (emphasis added).

Chief Justice Earl Warren's unanimous[382] opinion declaring Virginia's anti-miscegenation statute unconstitutional in *Loving v. Virginia*[383] focused, first and foremost, on Equal Protection grounds, but also stated that the anti-miscegenation law took away the Lovings' constitutionally protected right to marry without due process of law. Chief Justice Warren wrote, "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[384] In *Boddie v. Connecticut*,[385] the Court held that the marriage relationship was so important "in this society's hierarchy of values" that a law which effectively prevented indigents from seeking divorce violated the Due Process Clause.[386] In *Zablocki v. Redhail*,[387] the Court relied upon *Loving*[388] to hold that the right to marry is a fundamental liberty protected by the Due Process Clause.[389] In *Turner v. Safley*,[390]

382. Justice Black joined the *Loving* opinion only after Chief Justice Warren agreed to delete a more straightforward reference to his belief in a fundamental right to marriage; Justice Black believed this view of the Due Process Clause was too expansive. Thus, because Chief Justice Warren felt the need to make *Loving* a unanimous opinion, he diluted the language to secure Justice Black's vote. *See* ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 452-53 (1997). Justice Stewart concurred in the judgment because of his belief, stated in a concurrence to *McLaughlin v. Florida*, that any state law that makes the criminality of an act dependent on the race of the actor is unconstitutional. *See* Loving v. Virginia, 388 U.S. 1, 13 (1967) (Stewart, J., concurring) (citing McLaughlin v. Florida, 379 U.S. at 198 (Stewart, J., concurring)).

383. 388 U.S. 1 (1967). In 1958, Richard Loving, a white man, and Mildred Jeter, an African-American woman, both Virginia residents, went to the District of Columbia, where miscegenous marriages were legal, and married. *Loving*, 388 U.S. at 3. When they returned to Virginia to live together as husband and wife, they were criminally charged and convicted. *Id.* The Supreme Court of Appeals of Virginia modified their sentence but upheld the constitutionality of the anti-miscegenation statute. *Id.* at 3-4 (citing Loving v. Virginia, 147 S.E.2d 78 (Va. 1966)).

384. *Id.* at 12.

385. 401 U.S. 371 (1971). In *Boddie*, Connecticut welfare recipients challenged state laws that required them to pay certain court fees and costs to bring actions for divorce. Because they could not afford these costs, they were denied the right to seek divorces. *Id.* at 373.

386. *Id.* at 374.

387. 434 U.S. 374 (1978). The case involved a class action suit challenging a Wisconsin statute that required a court order to obtain a marriage license if the individual seeking the license was under court order to support a minor. *Zablocki*, 434 U.S. at 375. The individual needed to show that he or she was in compliance in order to obtain the license. *Id.* The law was intended to assure that minor children did not become public charges. *Id.*

388. 388 U.S. 1 (1967) (holding that Virginia's anti-miscegenation law violates the Equal Protection Clause).

389. Although not all regulations of marriage are subject to rigorous scrutiny, only

the Court held that the right of marriage is fundamental because, *inter alia*, it "may be an exercise of religious faith."[391]

According to Professor Chemerinsky, the infrequent cases upholding a law which impacts on the right to marry are distinguishable as involving "judicial deference to legislative decisions about how to allocate scarce funds in a program like Social Security."[392]

A legally recognized spouse is entitled to more than three hundred state benefits and one thousand federal benefits.[393] The marital estate provides an abundance of protections (and reciprocal obligations) based not upon the marriage contract but upon the law.[394] These protections are not available to a second (or subsequent) polygamous wife who marries secretly in a religious ceremony that, necessarily, is not recognized by the state. Ironically, the complexity of these obligations was cited in *Murray v. Potter City*[395] as a reason for not allowing polygamous marriage—that is, the manifold obligations created would be too complex to administer. These obligations included: (1) the right to receive a portion of the estate of a spouse who dies intestate;[396] (2) the right to avoid disinheritance by taking against the will;[397] (3) preference in being appointed as the

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"reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed." *Zablocki*, 434 U.S. at 386.

390. 482 U.S. 78 (1987).

391. *Id.* at 96.

392. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 647 (1997); *see* Bowen v. Owens, 476 U.S. 340 (1986) (upholding constitutionality of Social Security Act provision that denied continuation of benefits to a divorced spouse who remarried); Califano v. Jobst, 434 U.S. 47 (1977) (upholding the constitutionality of Social Security Act's provision that terminated benefits to disabled children paid to wage earners when their children married).

393. The state benefits given are those of Vermont, used by way of an example. *See* Jay Croft, *Gay Rights Victory in Vermont*, ATLANTA J. & CONST., Dec. 21, 1999, at A1, *available at* 1999 WL 3819090.

394. *See, e.g.*, Adams v. Palmer, 51 Me. 481, 485 (1863) (stating that rights, duties and obligations of marriage are based not upon contract but upon general laws).

395. 760 F.2d 1065 (10th Cir. 1985).

396. *See, e.g.*, VT. STAT. ANN. tit. 14, § 401 (1989) (surviving spouse shall receive not less than one third of estate); *id.* § 403 (spouse also receives all household goods); *id.* § 404 (probate court makes a reasonable allowance for living expenses of spouse and dependent children from date of death to date of settlement); *id.* § 551 (under general rules of intestate succession, spouse takes first $25,000 of the estate plus half of remainder, with the rest going to surviving children or other kin, as detailed). These statutes were cited in *Baker v. Vermont*, 744 A.2d 864, 883 (Vt. 1999).

397. *See, e.g.*, VT. STAT. ANN. tit. 14, § 402 (1989) (stating that provision of section 401

personal representative of a spouse who dies intestate;[393] (4) the right to sue for wrongful death of a spouse;[399] (5) the right to sue for loss of consortium;[400] (6) the right to workers' compensation survivor benefits;[401] (7) the right to spousal benefits guaranteed to public employees;[402] (8) the ability to be covered as a spouse under an employee's group health and life insurance policies;[403] (9) the right to claim the evidentiary privilege of marital immunity;[404] (10) homestead rights;[405] (11) the presumption of joint ownership of property with right of survivorship;[406] (12) hospital visitation rights and other rights regarding

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applies when a spouse waives allowance made in will). This section was cited in *Baker*, 744 A.2d at 883.

398. *See, e.g.*, VT. STAT. ANN. tit. 14, § 903 (1995) (stating that if no executor is named, the surviving spouse or his or her appointee has the first priority). This statute was cited in *Baker*, 744 A.2d at 883.

399. *See, e.g.*, VT. STAT. ANN. tit. 14, § 1492 (1989) (requiring that, in an action for wrongful death, everything goes to the surviving spouse if there are no children, but if there are children, proceeds are divided up on basis of actual loss). This section was cited in *Baker*, 744 A.2d at 883-84.

400. *See, e.g.*, VT. STAT. ANN. tit. 12, § 5431 (1989) (establishing that an action for loss of consortium may be brought by either spouse, and abrogating common law rule that only husband could bring such an action). This statute was cited in *Baker*, 744 A.2d at 884.

401. *See, e.g.*, VT. STAT. ANN. tit. 21, § 632 (1999) (outlining the amounts of compensation an employer must pay surviving spouse and varying numbers of dependent children for death of employee). This section was cited in *Baker*, 744 A.2d at 884.

402. *See, e.g.*, VT. STAT. ANN. tit. 3, § 631 (1999) (defining term "dependents" as spouse and unmarried children for purposes of state employees' insurance benefits). This statute was cited in *Baker*, 744 A.2d at 884.

403. *See, e.g.*, VT. STAT. ANN. tit. 8, § 4063 (1984) (establishing that health insurance policies may be issued to cover the policy holder, spouse, and dependent children); *id.* § 3811 (allowing group life insurance policy to insure employee for loss due to death of spouse and children). These statutes were cited in *Baker*, 744 A.2d at 884.

404. *See, e.g.*, VT. R. EVID. 504 (giving anyone the privilege to refuse to disclose or prevent spouse from disclosing confidential communications made during marriage and to refuse to testify and prevent spouse from testifying against the other). This rule of evidence was cited in *Baker*, 744 A.2d at 884.

405. *See, e.g.*, VT. STAT. ANN. tit. 27, § 105 (1989) (establishing that a homestead passes to and vests in spouse of the deceased without being subject to the debts of deceased); *id.* § 106 (allowing executor to sell homestead if there are surviving children and surviving spouse had not lived there for last two years); *id.* § 108 (stating that homestead is liable for taxes). These statutes were cited in *Baker*, 744 A.2d at 884.

406. *See, e.g.*, VT. STAT. ANN. tit. 27, § 2 (1989) (noting the rule of construction that tenancy in common is favored over joint tenancy does not apply to conveyance to husband and wife). This provision was cited in *Baker*, 744 A.2d at 884.

decisions in medical treatment;[407](13) spousal support and property division in the event of divorce;[408] and others.[409]

Therefore, the right to marry is a fundamental right, and laws forbidding polygamy present the "hybrid situation" of the Free Exercise Clause plus an additional constitutional protection outlined by Justice Scalia in *Smith*. Thus, anti-polygamy statutes and state constitutional provisions are subject to strict scrutiny if they place a substantial burden on religion.

F. Anti-Polygamy Laws Were Aimed at Mormons— They Were Not Laws of General Applicability

It is clear from the history of the relationship between the Mormon Church and the federal government that nineteenth century America's condemnation of the Mormon's religiously motivated polygamy was of near-hysterical proportions.[410] Condemnation came in many forms. Writers and commentators linked anti-polygamy sentiment to the growing anti-slavery movement.[411] Others suggested that polygamy would cause genetic defects, as was then believed to be the case with the progeny of miscegenous unions.[412] Lurid stories of underage girls forced into plural marriage captured the popular

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407. *See, e.g.*, VT. STAT. ANN. tit. 18, § 1852 (1999) (including in the "Patients' Bill of Rights" the right that immediate family members be allowed to stay with a terminally ill patient twenty-four hours a day wherever possible). This section was cited in *Baker*, 744 A.2d at 884.

408. *See, e.g.*, VT. STAT. ANN. tit. 15, § 751 (1989) (requiring that upon divorce the court shall distribute the property to the husband and wife equitably); *id.* § 752 (allowing that upon divorce the court may order either spouse to make temporary or permanent maintenance payments). These statutes were cited in *Baker*, 744 A.2d at 884.

409. *See also* Baehr v. Lewin, 852 P.2d 44, 59 (Haw. 1993); David Chambers, *What If?, The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447 (1996) (arguing that long-held rights and responsibilities of marriage can logically be extended to same-sex couples without damaging the institution); Jennifer Robbenolt & Maria Kilpatrick Johnson, *Legal Planning for Unmarried Committed Parties: Empirical Lessons for a Preventive and Therapeutic Approach*, 41 ARIZ. L. REV. 417 (1999) (suggesting legal planning methods to cope with needs of unmarried life partners in areas of health care and property planning); James Trosino, Note, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 B.U. L. REV. 93, 96 (1993) (listing additional marital rights, such as the right to jail visitation).

410. *See supra* Part IV.

411. *See supra* note 69 and accompanying text.

412. *See supra* notes 358-59 and accompanying text.

imagination.[413] Even Sherlock Holmes had to face the Mormons' "Avenging Angels."[414] Polygamy was characterized un-Christian, or as a practice to be found among Africans or Asians but not civilized Europeans.[415] As has been demonstrated in *Reynolds*,[416] *Murphy*,[417] *Davis*,[418] and *Late Corp. of the Church of Jesus Christ of Latter-day Saints*,[419] the Supreme Court relied on virtually no scientific support; followed the accepted white, "Christian" view of polygamy as belonging to the savage, non-white races; and equated it with human sacrifice and suttee.[420] The laws that were adopted, the state constitutional provisions that were enacted, as well as the Supreme Court cases cited above, were not aimed at bigamists, or persons who remarried after their first spouse died, or people who divorced and then remarried, or at individuals that cheated on their spouses, but were aimed at Mormons who engaged in plural marriage on the basis of their interpretation of the Old Testament and Smith's claimed revelations from God.[421] Thus, these laws and state constitutional provisions were aimed at a particular religious practice and therefore should be subject to strict scrutiny under *Church of the Lukumi Babalu Aye*.

G. Anti-Polygamy Provisions Place a Substantial Burden on Religion

Justice Scalia would argue that it is impossible to determine whether a certain belief is central to a religion.[422] Justice O'Connor, however, posits that "the distinction between questions of centrality and questions of sincerity and burden is admittedly fine, but it is one that is an established part of our

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413. *See supra* note 70 and accompanying text.
414. *See A Study in Scarlet*, *in* SIR ARTHUR CONAN DOYLE, 1 THE COMPLETE SHERLOCK HOLMES 15-86 (Doubleday 1930) (1892).
415. *See supra* notes 107-09, 170 and accompanying text.
416. Reynolds v. United States, 98 U.S. 145 (1878); *see* discussion *supra* Part IV.A.
417. Murphy v. Ramsey, 114 U.S. 15 (1885); *see* discussion *supra* Part IV.B.
418. Davis v. Beason, 133 U.S. 333 (1890); *see* discussion *supra* Part IV.C.
419. Late Corp. of the Church of Jesus Christ of Latter-day Saints v. United States, 136 U.S. 1 (1890); *see* discussion *supra* Part IV.D.
420. *See* discussion *supra* Part IV.
421. *See supra* Parts II.A, IV.
422. Emp. Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 887 (1990) ("What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is 'central' to his personal faith?").

free exercise doctrine and one that courts are capable of making."[423]

If the spirits of Santeria are denied the fruits of ritual animal sacrifice, they will starve and die.[424] Thus, a law which prohibits animal sacrifice places a substantial burden on the Santerian religion. To the nineteenth century Mormons and modern Fundamentalist Mormons, plural marriage is an integral and necessary part of their religion. Smith linked eternal marriage to celestial exultation.[425] Because wives could only get into heaven through the intercession of their husbands, a surplus of more women than men necessitated the institution of plural marriage. Further, a plurality allowed for more children—vessels for unborn souls in heaven.

Therefore, any law prohibiting polygamy places a substantial burden on a religion that views polygamy as an requirement of its faith. As noted above, because marriage is a fundamental right, strict scrutiny must be applied under *Smith*.[426]

H. No Compelling Government Interest Justifies the Anti-Polygamy Provisions

That a modern nation can allow polygamy within its borders and survive is demonstrated by the English experience.[427] Faced with large numbers of polygamous immigrants from former colonies where polygamy is legal, England relied upon the *lex*

423. *Id.* at 907 (O'Connor, J., concurring) (citations omitted) (citing United States v. Ballard, 322 U.S. 78, 85-88 (1994); Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 303-05 (1985)).

424. Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 525 (1993).

425. The Ostlings note that this linkage was not found in the Old Testament. *See* OSTLING & OSTLING, *supra* note 4, at 67.

426. As discussed, strict scrutiny must be applied not only under the *Smith* analysis but also under the *Church of the Lukumi Babalu Aye* analysis.

427. *See generally* Martin, *supra* note 2. Professor Martin reports that England applies the *lex loci celebrationis* conflict of laws theory and honors polygamous marriages valid in the place of celebration, *e.g.*, from Pakistan under Islamic law. *See id.* at 424. The change was a necessary adaptation to the influx of polygamous immigrants from former colonies where local law and religion allowed polygamy. *See id.* at 423. In so doing, the English courts moved away from a public policy of adhering to Christian matrimonial principles and toward a conflict of laws principle. *See id.* at 438-39. The same issue may soon be faced with Brazilian immigrant same-sex couples to the United States. *See* Larry Rohler, *Brazil Grants Rights to Gay Couples*, ATLANTA J. & CONST., June 10, 2000, at A7. Brazil now allows the survivor of a same-sex union to inherit pensions and social security entitlements. *See id.*

loci celebrationis principle of conflict of laws (a marriage is generally valid everywhere if it is valid in the place where it was celebrated) to reverse its common law rule based upon Christian matrimonial principles.[428]

There are no modern cases in which the Court has examined the compelling government interests that would be necessary to justify a ban on religiously motivated polygamy on a First Amendment or hybrid basis. Instead, as was done in *Potter v. Murray City*,[429] the Court simply assumes that the mass of marriage-related laws makes dealing with multiple wives (or husbands) overly burdensome. But as noted above, England has not found this to be true.

Consider the spousal benefits discussed above[430] as exemplars of the process. First, state accommodation would include giving more than one wife the right to receive a portion of the estate of a spouse who dies intestate. This would not be a problem because state intestate laws already provide for fixed shares for multiple persons: one wife and an unlimited number of children.[431] Second, the state would have to guarantee all wives subsequent to the first the right to avoid disinheritance by taking against the will.[432] This could be easily done and would eliminate the problem of second wives becoming wards of the state. Third, the state would have to invent a new rule for determining preference in being appointed as the personal representative of a spouse who dies intestate. Why not simply appoint the wives in order of seniority of marriage?[433] One 1948 California case applied the *lex loci celebrationis* principle to a polygamous marriage validly contracted in India, and the court held that two women would be recognized as wives for estate administration purposes.[434] Fourth, the state would have to allow

428. *See* Martin, *supra* note 2, at 423-24, 438-39.

429. 585 F. Supp. 1126 (D. Utah 1984); *see* discussion *supra* Part IV.E.

430. *See supra* notes 396-409 and accompanying text.

431. For example, VT. STAT. ANN. tit. 14, §§ 401, 403, 404, 551 (1989) could easily be modified to divide the available money and household goods among multiple wives.

432. For example, VT. STAT. ANN. tit. 14, § 402 (1989) could be easily modified to accommodate multiple wives.

433. Thus, we would modify VT. STAT. ANN. tit. 14, § 903 (1995).

434. *See In re* Dalip Singh Bir's Estate, 188 P.2d 499 (Cal. Dist. Ct. App. 1948). Bir died intestate in California and two women, Harnam Kaur and Jiwi, both residing in India, claimed equal interests in his estate as his wives, both of whom were lawfully married to Bir in India under Indian law. *Id.* at 499. The court applied the *lex loci celebrationis*

all wives the right to sue for wrongful death of a spouse. With modern rules about joinder of parties, this would present no difficulties.[435] Fifth, the state would have to allow all wives the right to sue for loss of consortium. Again, this creates no special problem in light of available joinder rules.[436] Sixth, the state would have to offer all wives the right to workers' compensation survivor benefits. This is more problematic but could be solved with a household-based rather than individual-based award.[437] Seventh, the state would have to offer all wives the right to spousal benefits guaranteed to public employees. Benefits are already awarded based on variations in the number of children a worker has, so this should not be a major problem.[438] Eighth, additional wives would have the ability to be covered as a spouse under an employee's group health and life insurance policies. Again, this issue could be handled in the same way that the problem of varying numbers of children is solved.[439] Ninth, the state would have to allow the right to claim the evidentiary privilege of marital immunity. The state already grants multiple immunities to physicians, attorneys, and one spouse. Having one wife or several is no different than having a sole practitioner or a large firm as one's legal representative.[440] Tenth, the state would have to accord homestead rights to more than one wife. The wives could simply hold the right as tenants in common.[441] Eleventh, the presumption of joint ownership of property with

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principle as to the property, noting that there could be no objections on the grounds that public policy disfavored polygamy, since Bir had never unlawfully cohabited with his two wives in California. *Id.* at 502. The court found support for its holding in a number of other American cases as well as one from Canada. *Id.* at 500-02.

435. Thus, modifying the language of VT. STAT. ANN. tit. 14, § 1492 (1989) is not burdensome.

436. Query whether, if one wife were entitled to $100,000 for loss of consortium, three wives would be entitled to $100,000 each, or $33,333 each. Again, by way of example, see VT. STAT. ANN. tit. 12, § 5431 (1999).

437. VT. STAT. ANN. tit. 21, § 632 (1999) already contains a formula to divide benefits depending on the number of children, if any. Why would it be more difficult to divide compensation for an employee's death among one wife and three children than among three wives and one child?

438. VT. STAT. ANN. tit. 3, § 631 (1999) would only have to be modified by making the word "spouse" plural.

439. VT. STAT. ANN. tit. 8, §§ 4063, 3811 (1984) would only have to be modified by making the word "spouse" plural.

440. VT. R. EVID. 504 would also need little modification.

441. Modifying VT. STAT. ANN. tit. 27, §§ 105-108 (1989) would seem to present little difficulty.

the right of survivorship would have to be extended. But it is already possible for three or more persons to acquire property as joint tenants with rights of survivorship.[442] Twelfth, the additional wives would have to be accorded hospital visitation rights and other rights regarding decisions in medical treatment. One would have to envision Solomon's harem of four hundred to foresee problems with visitation rights, and in the case of disputes over medical treatment, the senior wife could once again be given the deciding vote.[443] All wives would be entitled to fair treatment in terms of spousal support and property division in the event of divorce; this is only fair and would, again, prevent second wives from becoming wards of the state.[444]

CONCLUSION

Very little effort has been put into the analysis of the current constitutionality of the nineteenth century polygamy cases in light of current trends in the American religious landscape,[445] the modern American family, and First Amendment jurisprudence. Justice Scalia's use of these cases to demonstrate flaws in Justice Kennedy's *Romer v. Evans* opinion was misplaced because scrutiny reveals that the polygamy cases are no longer valid.

This analysis is of interest to more than just polygamists or would-be polygamists for two reasons. First, the next group to require Free Exercise Clause protection may be the Wiccans or the Scientologists or the Transcendental Meditators. Unless and until *Smith* is overruled, those whose religious practices are challenged by laws of general applicability must either rely upon the "hybrid exception," which was either created in *Smith* or first explained in *Smith* by Justice Scalia, depending on one's

442. Again, VT. STAT. ANN. tit. 27, § 2 (1989) could be easily adapted.

443. Thus, VT. STAT. ANN. tit. 18, § 1852 (1999) could be easily modified. It would seem to make no difference under the Patients' Bill of Rights if the "immediate family members" included more than one wife, as the term could include multiple siblings and multiple children without limit.

444. Of course, equitable considerations and the fact that the marital estate is of finite quantity would affect the distribution. Thus, modification of VT. STAT. ANN. tit. 15, §§ 751-752 (1989) would not present a problem.

445. The Free Exercise Clause no longer merely serves as an arbiter between rival Protestant factions, even though the Founders may well have envisioned that as its role.

point of view, or make a showing that the law in question was actually drafted due to animosity toward a religious practice, as in *Church of the Lukumi Babalu Aye*.

This Article's attempted demonstration of the error of *Reynolds*, *Murphy*, *Davis* and *Late Corp. of the Church of Jesus Christ of Latter-day Saints* indicates what protections a Muslim or a Druid might still have in a post-*Smith* polyglot America. In addition, and from an entirely different perspective, this Article shows not merely that Justice Scalia was wrong to rely on these cases in his *Romer* dissent, but also that the American institution of marriage can survive not only polygamy but same-sex marriage, and it is strengthened, not weakened, thereby. A Supreme Court case born of prejudice is equally wrong whether it is based upon the racism of the era, as was, for example, *Plessy v. Ferguson*,[446] or of anti-Mormon near-hysteria, as was *Reynolds*.

446. 163 U.S. 537 (1896).