THE SLIPPERY SLOPE: THE VITALITY OF *REYNOLDS V. US* AFTER *ROMER* AND *LAWRENCE*

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INTRODUCTION

One of the concerns currently in the forefront of American social policy is the legal definition of marriage. In the 2004 elections, eleven states passed referenda defining marriage as a union between a man and a woman.[1] At the same time, some political analysts argue that the 2004 presidential election was in large part decided by evangelical Protestant Christians who were motivated to come to the polls by the recent *Goodridge v. Dep't of Health* decision in Massachusetts.[2] Meanwhile, San Francisco mayor Gavin Newcombe defied California state law and issued marriage licenses to same sex couples, leading to intense news coverage and controversy.[3] Clearly, the definition of marriage is the topic of many American conversations today.

The contemporary focus of this debate has rested almost exclusively on marriage between same-sex couples. In fact, at a time when so many states are passing laws defining marriage, an entire subculture exists that has created its own definition of marriage. In fact, polygamous marriages have existed throughout most of American history. At times they have been at the forefront of American politics, but in general these marriages have existed quietly and in the shadows. These are not the ambiguous polyamorists one might find on the internet or whose manifesto is *The Ethical Slut*.[4] Instead, these polygamists are fundamentalist

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[1] *See State Constitutional Amendments Defining Marriage*, WASHINGTONPOST.COM (2004), *at* http://www.washingtonpost.com/wp-srv/elections/2004/stateinitiatives (last visited Mar. 25, 2006).

[2] *See, e.g.*, Alan Cooperman & Thomas B. Edsall, *Evangelicals Say They Led Charge For the GOP*, WASH. POST, Nov. 8, 2004, at A01, *available at* http://www.washingtonpost.com/wp-dyn/articles/A32793-2004Nov7.html. This claim is a controversial one, with polling data being somewhat inconclusive; *see Exit Poll Data Inconclusive on Increase in Evangelical Voters*, WASH. POST, Nov. 8, 2004, at A07, *available at* http://www.washingtonpost.com/wp-dyn/articles/A32794-2004Nov7.html.

[3] *See, e.g.*, The Battle Over Same Sex Marriage, S.F. Gate, http://www.sfgate.com/samesexmarriage (collecting ongoing coverage of the decision of San Francisco Mayor Gavin Newsom to issue marriage licenses to same-sex couples in February 2004).

[4] DOSSIE EASTON & CATHERINE A. LISZT, THE ETHICAL SLUT: A GUIDE TO INFINITE SEXUAL POSSIBILITIES (1997) (The authors discuss how to live an active life with multiple concurrent sexual relationships in a fair and honest way—but do not offer religious grounds for doing so.).

members of the Church of Jesus Christ of Latter Day Saints ("Mormons").[5] Fundamentalist Mormons have long held an oppositional position in the debate over marriage, dating back to Joseph Smith's revelations and interpretations of sacred texts.[6] Indeed, the conflicts over Mormon polygamy[7] led to bloodshed,[8] exodus,[9] and helped keep the Utah Territory from statehood for close to 40 years.[10]

This note is divided into five parts. Part I provides a historical background and compendium of Mormon resistance and assimilation into mainstream American Protestant culture and what it can teach us about the current marriage battles and their possible outcomes. Part II presents a short overview of the jurisprudence of polygamy in Utah State Courts and the Federal Courts. Part III discusses the current state of American marriage jurisprudence and the holdings of *Goodridge* and *Lawrence v. Texas*, while Part IV asks whether these decisions can be applied to create a right for legal polygamy in Utah. Finally, Part V provides policy arguments to demonstrate that recognizing polygamous and gay marriage will be good not only for polygamous Mormons but also for America as a whole.

I. A BRIEF HISTORY OF UTAH, MORMONS, AND POLYGAMOUS MARRIAGE

The Mormon Church was founded in 1830.[11] According to Church history, its founder, Joseph Smith, had a revelation and discovered that another book of the Christian bible had been buried near his home in New York State.[12] After several years, the church moved west to Ohio to escape persecution from local residents.[13] Among Smith's many controversial revelations was one regarding polygamy.

The practice of polygamy, known popularly as Celestial Marriage, was first promulgated secretly during the first ten years of the church's existence.[14] Smith memorialized his revelation in Doctrines and Covenants 132, which reads in part:

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[5] Members of this church are popularly referred to as Mormons, and I will be using this nomenclature throughout the rest of this note.

[6] *See Joseph Smith Jr.*, Wikipedia, http://en.wikipedia.org/wiki/Joseph_Smith%2C_Jr.

[7] "Polygamy" is slightly misleading, but is the common term. In fact, Mormons practice polygyny—where one husband has multiple wives, who are all married only to him. While "polygamy" is not the precise technical term, I will use it throughout this note because it is the more common term associated with the Mormons' practice of multiple marriage.

[8] *See History of the Latter Day Saint Movement*, Wikipedia, *at* http://en.wikipedia.org/wiki/History_of_the_Latter_Day_Saint_movement.

[9] *Id.*

[10] *See* Linda Thatcher, *Struggle for Statehood Chronology*, Utah History to Go, *at* http://historytogo.utah.gov/utah_chapters/statehood_and_the_progressive_era/struggleforstatehoodchronology.html (last visited Mar. 25, 2006) (stating that after Mormon authorities acknowledged that their church practiced polygamy, the institution proved to be "the major stumbling block in attempts to gain statehood.").

[11] *History of the Latter Day Saint Movement*, *supra* note 8.

[12] *Chronology of Church History*, Church of Jesus Christ of Latter Day Saints, *at* http://scriptures.lds.org/chchrono/contents (last visited Mar. 25, 2006).

[13] *See Joseph Smith Jr.*, *supra* note 6 ("To avoid conflict and persecution encountered in New York and Pennsylvania, Smith and his wife, Emma, eventually removed to Kirtland, Ohio early in 1831.").

[14] *Polygyny in the Mormon Movement: Polygyny in the 19th Century*, Religious Tolerance.org, *at* http://www.religioustolerance.org/lds_poly.htm (last visited Mar. 25, 2006).

> If any man espouse a virgin, and desire to espouse another, and the first give her consent, and if he espouse the second, and they are virgins, and have vowed to no other man, then is he justified; he cannot commit adultery for they are given unto him; for he cannot commit adultery with that that belongeth unto him and to no one else.[15]

Polygamous marriages first became public in 1844 when a group of disaffected Mormons broke off from Smith's nascent church and published broadsides describing the practice.[16]

Though Smith and his followers attempted to close down the renegade group,[17] the damage was done. Smith and one of his lieutenants were first arrested and later lynched, and the bulk of his followers began to emigrate from Ohio to present day Utah.[18]

However, the Church continued to deny that its members were practicing polygamy.[19] It was during this period of public denial that the Mormons first attempted to organize a new state. The first proposed state, Deseret, failed for several reasons. In addition to the brewing controversy of Mormon polygamy, the state was excessively large (encompassing most of modern Utah, Nevada, Arizona and parts of several other Western states) and would have included another free state at a time when slavery was a contentious issue in the United States Senate.[20] While the proposed state was rejected, the Utah Territory was established with Mormon leader Brigham Young as its first governor.[21] Shortly after the establishment of the territory, Mormon leader Orson Pratt announced that polygamy was a central tenet of the Mormon faith, and Mormons began to openly take multiple wives.[22]

In the 1856 election, the nascent Republican Party campaigned against the Democratic Party as supporting "the twin relics of barbarism—polygamy and slavery."[23] Newly elected President James Buchanan, faced with political suicide if he repudiated slavery, chose to depose the elected governor of Utah Territory and

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[15] *Doctrine and Covenants* 132:61, Church of Jesus Christ of Latter Day Saints, *available at* http://scriptures.lds.org/dc/132 (Section 63, however, states that virgins, i.e. women, must remain faithful to only their husband.) (last visited Mar. 25, 2006).

[16] *Polygyny in the Mormon Movement*, *supra* note 14.

[17] *Id.*

[18] *Id.*

[19] *See Plural Marriage*, Wikipedia, http://en.wikipedia.org/Plural_marraige_%28Latterday_Saint%29 ("[Polygamy] was practiced as early as 1833 although the practice was not publicly taught until 1852, some five years after the Mormons came to Utah, and eight years after Smith's death.").

[20] *State of Deseret*, Wikipedia, http://en.wikipedia.org/wiki/State_of_Deseret (last visited Oct. 7, 2005).

[21] *Id.*

[22] Jessie L. Embry, *The History of Polygamy*, *in* UTAH HISTORY ENCYCLOPEDIA (Allan Kent Powell ed., 1994), *available at* http://historytogo.utah.gov/utah_chapters/pioneers_and_cowboys/historyofpolygamy.html (last visited Oct. 7, 2005).

[23] Richard D. Poll, *The Utah War*, *in* UTAH HISTORY ENCYCLOPEDIA (Allan Kent Powell ed., 1994), *available at* http://www.media.utah.edu/UHE/u/UTAHWAR.html (last visited Oct. 7, 2005).

install his own non-Mormon governor to take control of the territory.[24] While the so-called "Utah War" may have never escalated into a full-scale insurrection or government persecution, it did represent the first time that official United States government policy attacked this tenet of the Mormon faith.

The Republican takeover of Congress during the Civil War led to the first federal legislation against polygamy. The Morrill Anti-Bigamy Act of 1862[25] "prohibited plural marriage in the territories, disincorporated the Mormon [C]hurch, voided territorial laws that established or supported polygamy and restricted the holdings of religious organizations in the territories to $50,000."[26] This law, while strong on its face, was more of a symbolic gesture in light of the prosecution of the Civil War.[27]

In 1867, the Utah Territorial Legislature asked Congress to repeal the Anti-Bigamy Act; instead, Congress attempted to strengthen it throughout the 1870s.[28] However, it was not until after *Reynolds v. United States*,[29] when the Supreme Court upheld the constitutionality of the Morrill Anti-Bigamy Act, that Congress began to act on its judicially sanctioned power to regulate such facets of religion. The Edmunds Act of 1882 amended the Morrill Anti-Bigamy Act of 1862:

> It restated that polygamy was a felony punishable by five years of imprisonment and a $500 fine. Unlawful cohabitation, which was easier to establish because the prosecution had to prove only that the couple had lived together rather than that a marriage ceremony had taken place, remained a misdemeanor punishable by six months imprisonment and a $300 fine. Convicted polygamists were disenfranchised and were ineligible to hold political office. Those who practiced polygamy were disqualified from jury service, and those who professed a belief in it could not serve in a polygamy case. All registration and election officers in Utah Territory were dismissed, and a board of five commissioners was appointed to direct elections.[30]

This new "Unlawful Cohabitation" crime removed the need for a wife's testimony, and thus allowed Federal authorities to finally incarcerate polygamous Mormons in large numbers.[31] In fact, over 1,300 Mormon men were sent to prison as result of this Act and subsequent amendments.[32]

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[24] *Id.*

[25] Anti-Polygamy Acts, 12 Stat. 501 (1862).

[26] Royce Bernstein, *Friend or Foe: Mormon Women's Suffrage as a Pawn in the Polygamy Debate*, 1856-1896, GENDER & LEGAL HISTORY IN AMERICA PAPERS (1999) *at* http://www.law.georgetown.edu/glh/rbernstein.htm (last visited Oct. 7, 2005).

[27] *Id.*

[28] Embry, *supra* note 22.

[29] Reynolds v. U.S., 98 U.S. 145 (1879); *see* discussion *infra* Part II.

[30] Embry, *supra* note 22.

[31] *Id.*

[32] *Legal Battles over Polygamy*, LDS4U.com, *at* http://www.lds4u.com/d4/legal.htm (last visited Oct. 7, 2005).

Further legislation led to confiscation of Church property, the dissolution of the state militia, and the compulsion of testimony from polygamous wives.[33] These Federal Laws began to have their toll on the Mormon Church leadership. Many went into hiding to avoid prosecution. Finally, in 1890 the new President of the Mormon Church, Willford Woodruff, issued "The Second Manifesto." This document told the faithful that they should no longer practice marriages that contravened Federal Law.[34]

This did not settle the question of Mormon polygamy, however. Many of the faithful continued to practice, while others fled to Mexico and Canada.[35] Meanwhile, many Mormons debated whether The Manifesto dissolved all polygamous marriages or only applied prospectively.[36] However, the majority of Mormons seemed to comply with the new edict of the Church's leadership.[37] Less than six years after The Manifesto, Utah attained statehood.[38] The new Utah State Constitution, however, permanently banned the practice of polygamy.[39] The Second Manifesto of 1904[40] further strengthened the Church's new stance against polygamous marriage, setting forth excommunication as the penalty for polygamy.[41]

Yet, Mormon fundamentalists continue to practice polygamy. Some sources estimate that the figure may be as high as 30,000 people.[42] Tom Green, whose story is discussed in greater detail below, made himself into a media star (and ultimately a martyr) for fundamentalist Mormon marriages.[43] A thriving polygamous Mormon community exists along the Utah-Arizona border in Colorado City.[44] Colorado City (formerly Short Creek) is a community specifically founded by renegade Mormons who chose to split off from the mainstream Church when it

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33 Embry, *supra* note 22.

34 Edward Leo Lyman, *Struggle for Statehood, in* UTAH HISTORY ENCYCLOPEDIA (Allan Kent Powell ed., 1994), *available at* historytogo.utah.gov/utah_chapters/statehood_and_the_progressive_era/struggleforstatehood.html; *see also* Paul H, Peterson, *The Manifesto of 1890, in* 3 ENCYCLOPEDIA OF MORMONISM (Daniel H. Ludlow ed., 1992), *available at* http://www.lightplanet.com/mormons/daily/history/plural_marriage/manifesto_eom.htm. (last visited Oct. 11, 2005).

35 Embry, *supra* note 22.

36 *Id.*

37 *Id.*

38 Thatcher, *supra* note 10; *see also* Lyman, *supra* note 34.

39 Thatcher, *supra* note 10.

40 Embry, *supra* note 22.

41 *Id.*

42 *Utah Man Found Guilty of Bigamy*, ASSOC. PRESS, May 21, 2001, *available at* http://www.firstamendmentcenter.org/%5Cnews.aspx?id=5052 (last visited Oct. 11, 2005).

43 *See infra* notes 92-124 and accompanying text; *see also* Ryan D. Tenney, *Tom Green, Common-law Marriage, and the Illegality of Putative Polygamy*, 17 BYU J. PUB. L. 141 (2002) (discussing the prosecution of polygamist Tom Green).

44 *See generally* John Dougherty, *Polygamy in Arizona: A Special Report*, PHOENIX NEW TIMES, Sept. 19, 2005, *available at* http://www.phoenixnewtimes.com/special_reports/polygamy/index.html (last visited Oct. 11, 2005) [hereinafter *Polygamy in Arizona*].

began to excommunicate its polygamous members.[45] A 1955 raid would ultimately lead to a landmark decision by the Utah Supreme Court that the children of polygamist parents could be placed into foster care solely because of the parents' beliefs about marriage.[46] The Short Creek Raids led to political disaster for Arizona's then-governor. Since then, very little state attention has been brought to bear on the town;[47] the net result of this laissez-faire attitude has been the worst possible situation for women in polygamist marriages. Some women who have left polygamist marriages have lodged allegations of abuse, incest and statutory rape.[48]

However, the insularity of the community, which is specifically created by the oppositional nature of their illegal unions, creates a failure of social safety networks for these women. While some have attempted to band together to provide resources for others who wish to leave polygamist marriages, the nature of a being a member of a persecuted culture creates barriers that need not exist to help women leave abusive marriages.

The history of Utah is marked by an ever-increasing policy of Federal pressure against what was once a central tenet of its settlers' faith. The net effect of this campaign has been to bring the vast majority of Mormons and Utahans into the mainstream of American society as evidenced by the Church's eventual repudiation of polygamy. However, this has also led to a sizable portion of the faith being ostracized from the rest of the nation socially, religiously and politically. This ostracization in turn limits the options of women involved in polygamous marriages that are abusive.

II. FEDERAL AND STATE LAWS PROSCRIBING POLYGAMY AND CASES THEREUNDER

Reynolds v. U.S. was the first case to test the validity of the federal government's anti-polygamy laws. George Reynolds, a polygamous Mormon, chose to contest his conviction under the Morrill Anti-Bigamy Act to determine whether the law was constitutional.[49] Prior to his surrender, there had been no convictions under the Morrill Anti-Bigamy Act in the Utah Territory because the evidentiary difficulty in proving the polygamous marriage was insurmountable.[50] Reynolds, however, implicated himself and took his conviction. In arguments before the Supreme Court, the case touched on issues of Federal Control over

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[45] John Dougherty, *Polygamy's Odyssey*, PHOENIX NEW TIMES, Mar. 13, 2003, *available at* http://www.phoenixnewtimes.com/issues/2003-03-13/news/sidebar.html (last visited Oct. 11, 2005).

[46] *See infra* notes 78-91 and accompanying text.

[47] Dougherty, *supra* note 45.

[48] *See, e.g.*, Celeste Fremon & Carmen Thompson, *Memories of a Plural Wife*, GOOD HOUSEKEEPING, Mar. 1, 1999, at 118 (detailing Thompson's relationship in her polygamous marriage); *see also* ANDREA MOORE EMMETT, GOD'S BROTHEL: THE EXTORTION OF SEX FOR SALVATION IN CONTEMPORARY MORMON AND CHRISTIAN FUNDAMENTALIST POLYGAMY AND THE STORIES OF 18 WOMEN WHO ESCAPED (2004).

[49] Thatcher, *supra* note 10.

[50] Nathan B. Oman, *The Story of a Forgotten Battle*, 2002 BYU L. REV. 745, 751 (2002) (reviewing SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH CENTURY AMERICA (2001)).

territorial governments,[51] criminal procedure[52] and grand juries.[53] However, the case is best remembered for being one of the earliest cases to look at the Establishment Clause of the First Amendment in detail. Reynolds argued at his trial that he was a Mormon, and as a Mormon one of his core beliefs was that polygamous marriage was a "duty" of Mormon men.[54] He asked for jury instructions that would tell the jury at his criminal trial that his religious duty meant that he could not be convicted for a crime.[55] The trial court refused, and Reynolds was convicted.[56]

The Supreme Court upheld Reynolds' conviction.[57] Writing for a unanimous Court, Chief Justice Waite first recounted that polygamy had "always been odious among the northern and western nations of Europe" and that until the Mormon Church was established, it was mainly confined to "the lives of Asiatic and of African people."[58] Waite then went on to outline the history of the crime of polygamy in England and how statutes outlawing the practice had been enacted in at least one former colony prior to the adoption of the Bill of Rights.[59] Marriage was a civil contract, Waite argued, and was the basic foundation on which society was built; thus, the government had an overriding interest in maintaining that certain types of marriages were impermissible.[60]

Since Congress had a legitimate rationale for proscribing marriage laws, the Morrill Anti-Bigamy Act was indeed constitutional.[61] The only question remaining was whether or not Reynolds (and by extension, all Mormons) could claim that the law was inapplicable because it violated their First Amendment Rights to free exercise. Waite framed the issue not as one where a law that was facially neutral (in modern parlance) had a discriminatory effect; instead, he approached the issue as if the Mormons were asking to be exempted from a law.[62] This made his answer inevitable. "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[63] Mormons could *believe* that polygamy was necessary for entry into the Kingdom of Heaven, but they could not act on those beliefs without risking imprisonment at the hands of a society that Chief Justice Waite held was threatened by their very existence.

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51 *Reynolds*, 98 U.S. at 154.

52 *Id.* at 158.

53 *Id.* at 153.

54 *Id.* at 161, 162.

55 *Id.* at 162.

56 *Reynolds*, 98 U.S. at 162.

57 *Id.* at 168.

58 *Id.* at 164.

59 *Id.*

60 *Id.* at 166.

61 *Reynolds*, 98 U.S. at 166.

62 *Id* at 167 ("[To] permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.").

63 *Id* at 166.

As discussed in Part I, *Reynolds* led directly to the passage of stricter laws against polygamy. These laws and their enforcement finally led the Mormon Church to capitulate in its struggle to be admitted to the union on its own terms. When Willford Woodruff issued the Second Manifesto, statehood was not far off. However, in order to gain admission, the federal government required that the new state's constitution bar polygamy.[64] Article III of the Utah State Constitution thus reads "First—Perfect toleration of religious sentiment is guaranteed. No inhabitant of this State shall ever be molested in person or property on account of his or her mode of religious worship; but polygamous or plural marriages are forever prohibited."[65] The holding of *Reynolds*—that belief was tolerable but action was not—was thus enshrined in the Utah Constitution.

While the Supreme Court did touch on some ancillary issues regarding Mormonism and polygamy over the next half century,[66] it did not fully address the illegality of polygamy again until 1946. *Cleveland v. U.S.*[67] upheld the convictions of several members of a Mormon sect known as the Fundamentalists for violations of the Mann Act.[68] The Mann Act was passed to combat the "White Slavery" trade in prostitution, establishing that it was unlawful to transport in interstate commerce "any woman or girl for the purpose of prostitution or *debauchery, or for any other immoral purpose*."[69] Relying on its construction of the act from *Caminetti v. U.S.*[70] in 1917, the Court held that "immoral purposes" did not need to be explicitly commercial to qualify under The Mann Act. The statute was aimed primarily at interstate prostitution, the Court said, but the terms "debauchery" and "other immoral purposes" showed that the act was not limited solely to those ends.[71] Not content to rely on *Reynolds'* finding that polygamy had "always been odious among... [the peoples] of Europe,"[72] Justice Douglas went a step further in equating polygamy with promiscuity. "The establishment or maintenance of polygamous households is a notorious example of promiscuity . . . [these acts] are in the same genus as the other immoral practices covered by the Act."[73]

Whether the court was being obtuse for the sake of bringing married polygamists within the purview of the Mann Act, or simply misunderstood the

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[64] *See* Arizona Enabling Act, 36 Stat. 569 (1910); New Mexico Enabling Act, 36 Stat. 558 (1910); Oklahoma Enabling Act, 34 Stat. 269 (1906); Utah Enabling Act, 28 Stat. 108 (1894).

[65] UTAH CONST. art III, § 1.

[66] Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 49 (1890) ("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."). *See also* Davis v. Beason, 133 U.S. 333 (1890) (holding that act which barred practitioners of polygamy from voting was permissible).

[67] Cleveland v. United States, 329 U.S. 14 (1946).

[68] Mann Act, Pub. L. No. 61-277, 36 Stat. 825 (1910).

[69] *Id.* (emphasis added); *see also Cleveland*, 329 U.S. at 16.

[70] Caminetti v. United States, 242 U.S. 470 (1917).

[71] *Cleveland*, 329 U.S. at 17-18.

[72] *Id.* at 18 (quoting *Reynolds*, 98 U.S at 164).

[73] *Id.* at 19.

difference between polygamy and promiscuity, is up for debate.[74] In fact, Justice Murphy's dissent notes this distinction in a surprisingly forward-looking critique of the Court's reasoning by equating polygamy with prostitution, debauchery and "other immoral purposes:"

> The Court states that polygamy is "a notorious example of promiscuity." The important fact, however, is that, despite the differences that may exist between polygamy and monogamy; such differences do not place polygamy in the same category as prostitution or debauchery. When we use those terms we are speaking of acts of an entirely different nature, having no relation whatever to the various forms of marriage. It takes no elaboration here to point out that marriage, even when it occurs in a form of which we disapprove, is not to be compared with prostitution or debauchery or other immoralities of that character.
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> The Court's failure to recognize this vital distinction and its insistence that polygyny is "in the same genus" as prostitution and debauchery do violence to the anthropological factors involved. Even etymologically, the words "polygyny" and "polygamy" are quite distinct from "prostitution," "debauchery" and words of that ilk. There is thus no basis in fact for including polygyny within the phrase "any other immoral purpose" as used in this statute.[75]

While Justice Murphy went to great pains to explain that he was not sanctioning polygamy nor even equating it with monogamous marriage, he did adopt a position that allowed him to admit that it was a cultural choice.[76] Murphy's position was grounded less in a support for polygamous Mormons and more in his own disapproval of the way in which the Mann Act had been extended to become a Federal morals law;[77] but he provided the first (and really the only) friendly voice that Mormons had ever heard in a Federal court.

Over the next fifty years, Utah state authorities internalized the Federal hostility to polygamy.[78] One of the most notorious instances occurred in 1955 when Arizona authorities conducted raids on the polygamist community of Short Creek that straddles the state border. While the raids ended the career of Arizona's governor,[79] in Utah they led to the case of *In re Black*.[80]

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[74] David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53, 69 (1997). If [the court] is suggesting more—polygamous households as dens of free sex—it reveals a willful ignorance of the families who were before [the] court. It may also reveal that when straight men imagine another man living down the street with three women, they often conjure lurid fantasies they feel the need to repress.
Id.

[75] *Cleveland*, 329 U.S. at 26-27.

[76] *Id.* at 25.

[77] *Id.* at 29 ("The consequence of [this decision] is to make the federal courts the arbiters of the morality of those who cross state lines in the company of women and girls.").

[78] *See generally* Chambers, *supra* note 74.

[79] *See generally Polygamy in Arizona*, *supra* note 44; *see also* Chambers, *supra* note 74.

[80] *In re* Black, 283 P.2d 887 (Utah 1955).

In *Black*, the issue was whether the parents of eight minor children between the ages of 2 and 17 were negligent based solely on their religious beliefs.[81] The Utah District Court found that "there was no evidence that any of the children were destitute and without proper sustenance, clothing or medical care,"[82] but found as a fact that the minor children were neglected because "the home of Leonard Black and Vera Johnson Black at Short Creek, Utah, *is an immoral environment for the rearing of* said children."[83] Accordingly, the District Court held as a matter of law that the children were neglected within the meaning of Section 55-10-6, of the Utah Code,[84] and ordered the children placed into foster care.

At the Utah Supreme Court, the Blacks argued that removing their children based solely on their religious practices violated both the Federal and State Constitutions.[85] The Court quickly dismissed their First Amendment claim, noting that the First Amendment proscribes action solely by the United States Congress.[86] As to the Utah claims, the Court relied heavily on the Supreme Court of the United States' decision in *Reynolds* and in another polygamy case, *Davis v. Beason.*[87] In *Beason,* the Supreme Court upheld the conviction of an Idaho man who was convicted of registering to vote while being a member of the Mormon Church.[88] In *Black*, the Utah Court found support in *Beason* for an idea that religious expression was subordinate to the criminal law when that religious expression advocated illegal activity.[89] Turning to the Blacks' Utah State Constitution arguments, the Utah Court found that three sections of Article I of the Utah Constitution guaranteeing free exercise of religion were superceded by Article II of the State Constitution.[90] While the Blacks presented an easy case because they had violated Article III and Mr. Black admitted at trial that he would continue to do so in the future,[91] the implication was clear that mere advocacy of polygamy was now enough to bring a person within the sights of Utah's judicial system.

After *Black*, most polygamous Mormons lived in a legal state of "Don't Ask, Don't Tell" with state and Federal governments. Tom Green, on the other hand, openly espoused his beliefs and exhorted his polygamous lifestyle in the media for over a decade.[92] Green was married to five women and had at least twenty-five children living with him on a tract of land in rural Utah. Moved in part by Green's

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[81] *Id.* at 888.

[82] *Id.* at 891.

[83] *Id.* at 891 (emphasis in original).

[84] UTAH CODE ANN. § 55-10-6 (1953).

[85] *Black*, 283 P.2d at 900.

[86] *Id.* at 900.

[87] Davis v. Beason, 133 U.S. 333 (1890).

[88] *Id.* at 348.

[89] *Black*, 283 P.2d at 904 (quoting *Davis v. Beason*, 133 U.S. 333 (1890), which likens mere advocacy of polygamy to human sacrifice, and holds that Free Exercise must end where advocacy of any illegal activity begins).

[90] *Id.* at 905.

[91] *Id.* at 890.

[92] Tenney, *supra* note 43, at 143 ("Beginning in the late 1980's, Green and several of his wives began appearing on a string of local and national radio and television shows.").

repeated avowals in public that he was a practicing polygamist, the local prosecutor for Juab County brought assorted charges against him, including several for bigamy.

Green made attempts to argue at his trial that though he was "married" to all of his wives, he was in fact only *legally* married to one, and thus could not be a bigamist under Utah State Law.[93] His contention was that he was thus *innocent* of bigamy despite being faithful to his religion.

> In a carefully constructed attempt to create and ride through a potential loophole in the legal prohibitions on polygamy, Green had orchestrated a system whereby he would only be legally married to one woman at a time. Green accomplished this by marrying each of his wives in Utah and then almost immediately obtaining divorce decrees for those marriages in Nevada. Though the nature of the lifestyle arrangements and relationships never appeared to change from before or after the divorces, Green was thus able to claim that . . . he was legally nothing more than a monogamist. In explaining this pattern to Matt Lauer on NBC's Today show, Green declared that "I've never had . . . more than one [marriage license] at the same time. I always terminated one in a legal divorce before I got a new one."[94]

Unfortunately for Green, the trial court instead allowed the jury to infer that because he had worked as a paralegal, and that because he had written letters to the man who would eventually prosecute him claiming that he was not legally married under the Utah statutory definition of common law marriage, Green both had knowledge of the Utah statute and understood its import.[95] With this understanding, the jury was allowed to infer that Green knew that his common law marriage to Linda Kunz was valid at the same time that he was cohabiting with his other four wives, and thus that he was guilty of bigamy. After a jury trial, Green was convicted of several crimes, including four counts of bigamy.[96]

In *State v. Green*, the Utah Supreme Court faced several challenges to the state's law barring polygamy.[97] Green argued that Utah's constitution violated his Federal Constitutional right of free exercise, that Utah's laws against bigamy were vague, and that the lower courts erred in applying the unsolemnized marriage law against him.[98] The court dismissed each of these challenges in turn. First, the Utah court explained that *Reynolds* was controlling in this instance, noting that while *Reynolds'* wording may be antiquated, it had never been explicitly disapproved or overturned and had even been affirmed in the 125 years since it was first decided.[99] Assuming for argument's sake that the statute needed analysis, however, the Court

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93 *Id.* at 147-148.
94 *Id.* at 144-145.
95 *Id.* at 156-157.
96 *Id.* at 147.
97 State v. Green, 99 P.3d 820 (Utah 2004).
98 *Id.* at 824.
99 *Id.* at 825.

examined Utah's bigamy statute under a Free Exercise analysis promulgated by the U.S. Supreme Court in *Employment Div., Dep't of Human Res. v. Smith*[100] and determined that "a neutral law 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."[101] The court, applying this analysis, found that the Utah statute was written in secular terms[102] and contained no exemptions aimed at any group.[103]

The court contrasted this with the facially neutral regulations struck down in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*[104] which contained numerous exemptions to prohibitions on animal sacrifice that effectively criminalized the practice of Santeria religion.[105] Since the bigamy statute attacked all bigamy, including but not limited to Mormon polygamy, the court reasoned, there was no need to show a compelling governmental interest under the *Smith* test.[106] Though Green argued that the court should look into the motive of the legislature in adopting a law with this kind of religious impact,[107] the court declined to do so, noting that in *Hialeah* the U.S. Supreme Court did not endorse this sort of inquiry.[108] The court also found that the statute was generally applicable, noting that "any individual who violates the statute, whether for religious or secular reasons, is subject to prosecution."[109] From this finding, it is a short step in holding that Utah has a rational basis in regulating marriage, such as regulating marriage[110] and "protecting vulnerable individuals from exploitation and abuse."[111] The court then turned to Green's vagueness claim, holding that the law could only be applied to the actual situation at hand and not to the hypothetical situations raised by Green.[112]

Noting that the word "cohabit" was of common usage[113] and also that the Utah Supreme Court had already defined the word in *Haddow v. Haddow*,[114] the

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100 Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990).

101 *Green*, 99 P.3d at 826.

102 *Id.* at 827.

103 *Id.*

104 Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (holding that ostensibly neutral laws drawn to criminalize Santeria practitioners' practice of animal sacrifice violated Free Exercise Clause).

105 *Id.*

106 *Green*, 99 P.3d at 827.

107 *Id.* at 828 ("Green and amici argue that to complete our assessment of the statute's neutrality we also must consider the statute's legislative history and the motives and intent of the lawmakers who enacted the statute.").

108 *Id.* at 828 ("The author of Hialeah engaged in [a legislative intent] analysis in Part II.A.2 of that opinion . . . . Only one other justice, however, joined in Part II.A.2 of Hialeah, and two of the remaining seven justices expressly disavowed it.").

109 *Id.* at 828.

110 *Green*, 99 P.3d at 829.

111 *Id.* at 830 ("The practice of polygamy, in particular, often coincides with crimes targeting women and children. Crimes not unusually attendant to the practice of polygamy include incest, sexual assault, statutory rape, and failure to pay child support.").

112 *Id.* at 831 (The court fails to illustrate these hypothetical situations).

113 *Id.* at 831.

court struck down his vagueness claim based on Green's living arrangements: while each wife had her own trailer, the whole compound in which the polygamous family lived contained common areas used by all members of the group.[115] "Green's conduct produced precisely the situation that bigamy statutes aim to prevent—all the indicia of marriage repeated more than once."[116] Similarly, the language of the statute was held to be definite enough to remove any element of arbitrary enforcement.[117]

The court turns last to Green's challenge of Utah's unsolemnized marriage statute.[118] Here the court notes that Green had discussed the statute with attorneys prior to his prosecution,[119] which could have led to his understanding that his relationships were common law marriages. Barring that, Green was clearly on notice that Utah considered his marriage to be valid after a judicial proceeding determined that § 30-1-4.5 applied to at least one of his marriages, yet he continued to live his controversial lifestyle even after this decision.[120]

The *Green* case fleshes out the current parameters of Utah state law against polygamous marriage. The codification of standards for Common Law Marriage,[121] when used in conjunction with the Anti Bigamy Statute,[122] means that even if polygamous Utahans choose to live without the benefit of state-sanctioned marriages, they still may find themselves criminally liable, facing several years imprisonment. The wide scope given to the Utah statute defining common law marriages also now means that people who in no way consider themselves polygamous could, theoretically, be brought under its scope.

> The dilemma ultimately posed by the Tom Green prosecution is that if it is now possible to make an unmarried Tom Green into a married bigamist by imposed legislative fiat, then it would be similarly possible to turn other non-married persons into unwillingly married bigamists. [Tom Green's attorney noted] that [Green's conviction] would allow prosecutors to go after married men who were having long-term affairs on charges that those affairs actually constituted bigamy. Thus, the potential bigamization of having a mistress.[123]

Green's attorney may sound like an alarmist, but his point is still relevant. The government simply should not have this kind of weapon to enforce its ideas of morality in marriage.[124]

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[114] Haddow v. Haddow, 707 P.2d 669, 672 (Utah 1985) (holding cohabitation was "common residency and sexual contact evidencing a conjugal association" in divorce proceeding context).

[115] *Green*, 99 P.3d at 832.

[116] *Id.* at 832.

[117] *Id.* at 832.

[118] UTAH CODE ANN. § 30-1-4.5 (1999).

[119] *Green*, 99 P.3d at 833, n17.

[120] *Id.* at 833.

[121] UTAH CODE ANN. § 30-1-4.5 (1999).

[122] UTAH CODE ANN. § 76-7-101 (1999).

[123] Tenney, *supra* note 43, at 158-159.

[124] *Green*, 99 P.3d at 833, n16 (stating that "[i]ndeed, we can envision situations in which

III. THE EMERGING NEW MARRIAGE JURISPRUDENCE

As previously noted, the pre-eminent concern at this stage of American social discourse is over the legitimacy of same-sex marriage. Both opponents and proponents of same-sex marriage take it for granted that polygamy is both undesirable and rightly illegal.[125] Still, an overview of the current battles over the definition of marriage is useful in illuminating the challenges facing polygamous Mormons should they choose to seek recognition of their unions.

The current marriage controversy began with the *Baehr v. Lewin* decision in Hawaii in 1993.[126] This decision did not immediately open the door for same-sex marriages in that state; instead, it required Hawaii to show a compelling governmental interest in its continued bar against same-sex marriages.[127] Though the state lost a second test case in its own Circuit Courts,[128] the case was ultimately made moot by a referendum in 1998 which amended the Hawaii Constitution to permit the state legislature to restrict marriage to men and women only.[129]

The effect of the 1993 decision, however, was electric. Congress passed the Defense of Marriage Act (DOMA),[130] which President Bill Clinton signed into law during the 1996 election cycle. DOMA reads, in part:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, *the word "marriage" means only a legal union between one man and one woman as husband and wife*, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.[131]

As is obvious from the quoted passage, Federal animus towards polygamy remains deeply entrenched in the law. In fact, the hearings for DOMA explicitly linked the issues of polygamy and same-sex marriage.[132] Witness after witness spoke out, alleging that same-sex unions would lead not just to polygamy but even to legalized marriage between children and adults and people and animals.[133]

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application of the word 'cohabit' could be problematic, and the statute might therefore deserve legislative consideration").

125 142 Cong. Rec. H7500 (daily ed. July 12, 1996) (Rep. Barney Frank, an advocate of same sex marriage, stated "For those who pretend not to know the difference between a monogamous relationship between two human beings and polygamy, I must say that I think they debase [the] debate when they use that kind of analogy. Everyone knows the real difference.").

126 Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

127 *Id.* at 67-68.

128 *See* Baehr v. Miike, CIV. No. 91-1394, 1996 WL 694235, at *20-22 (Haw. Cir. Ct. 1996).

129 Lambda Legal, *Marriage Equality for Same-Sex Couples—A History*, *available at* http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1067 (last visited Mar. 26, 2006).

130 Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (1996).

131 DOMA § 3 (emphasis added).

132 *See* Chambers, *supra* note 74, at 57.

133 *Id.* at 58.

DOMA provides the second federal definition of marriage[134] and withholds certain federal benefits from couples whose same-sex marriage is recognized by a state as being outside that definition.[135] Further, the act allows individual states to ignore the Full Faith and Credit Clause of the U.S. Constitution[136] where matters of same-sex marriage are concerned. The Act was clearly targeted at Hawaii's forward-looking jurisprudence. There are questions as to whether or not this law could withstand Constitutional scrutiny, at least as it affects the Full Faith and Credit Clause.[137] Its substantive definition of marriage, however, is almost doubtlessly within the purview of Congressional authority. So long as *Reynolds* remains good law, Congress can choose to legislate who may be married for federal purposes.

The next major decision in the fight over same-sex marriage was *Baker v. Vermont.*[138] *Baker* held that the common-language definition of marriage was controlling, and that "marriage" could be limited to the union of a man and a woman.[139] The *Baker* court goes on to note that many of Vermont's family relation laws use gender specific terms,[140] and that the legislature clearly intended the marriage statute to apply to opposite-sex unions alone.[141]

Nevertheless, the *Baker* court went on to analyze the purpose of the marriage statute in light of the Vermont Constitution's "Common Benefits Clause." That clause 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; and that the community hath an indubitable, unalienable, and indefeasible right, to reform or alter government, in such manner as shall be, by that community, judged most conducive to the public weal.[142]

According to the *Baker* court, the Common Benefits Clause "only allows the statutory classifications . . . if a case of necessity can be established overriding the prohibition of Article 7 by reference to the 'common benefit, protection, and

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134 The first definition was the one promulgated under the Morrill Anti-Bigamy Act.

135 DOMA § 3.

136 *Id.* at § 2; *see also* Symposium, *DOMA and Conflicts Law: Congressional Rules and Domestic Relations Conflicts Law*, 32 CREIGHTON L. REV. 1063, 1063 (1999) ("[DOMA] authorizes states to give no effect to any judgment based on a same-sex union.").

137 *DOMA and Conflicts Law*, *supra* note 136, at 1082-1083 ("DOMA is unconstitutional not primarily because it authorizes ignoring final judgments from solely interested states, although it is clearly suspect on these grounds. The statute is more fundamentally unconstitutional because it replaces state sovereign lawmaking power with congressional back door attempts to legislate substantive rules.").

138 Baker v. Vermont, 744 A.2d 864 (1999).

139 *Id.* at 868.

140 *Id.* at 869.

141 *Id.* at 869 ("[T]he evidence demonstrates a clear legislative assumption that marriage under our statutory scheme consists of a union between a man and a woman.").

142 VT. CONST. Art. VII.

security of the people.'"[143] This level of scrutiny, while still one of rational basis (to use the Federal Courts' parlance), requires a more rational relation than might be required on a Federal level.

Since same-sex couples were explicitly precluded from marrying by the Vermont statute,[144] the *Baker* court examined the government's purposes in denying the benefit and whether they were able to withstand the Common Benefits Clause. Finding little relation between the interest of linking marriage to procreation,[145] the Court held that the exclusion fell short of being "grounded on public concerns of sufficient weight."[146]

However, the *Baker* court stopped shy of requiring the state to issue marriage licenses to same-sex couples.[147] Instead, the court held that same-sex couples must receive the same benefits and protections as married couples, while marriage was reserved for opposite-sex couples.[148] Shortly after the *Baker* decision, the Vermont legislature enacted a Civil Union law[149] that created a separate category of spousal privileges for same-sex couples in the state. While this constituted a strong victory for advocates of same-sex marriage, it remained a half-victory as same-sex couples were still excluded from marriage.

In 2003, the Supreme Court decided *Lawrence v. Texas*.[150] The issue decided in this case was whether or not states could prohibit sodomy between same-sex couples.[151] In *Lawrence*, the Court applied a rational basistest under the Due Process Clause to a Texas law barring same-sex sodomy between consenting adults.[152] The majority opinion explicitly declined to review the statute on equal protection grounds, noting that "[w]ere we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants."[153] After a discussion of the history of proscriptions against sodomy in America[154] and a lecture on the virtues of *stare decisis*,[155] the

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143 *Baker*, 744 A.2d at 872 (quoting State v. Ludlow Supermarkets, Inc., 448 A.2d 791 (1982)).

144 *Id.* at 880.

145 *Id.* at 882 (noting that many opposite-sex marriages bear no children, while many same-sex couples rear children, and finds that the law "exposes [children of same-sex couples] to the precise risks that the State argues the marriage laws are designed to secure against").

146 *Id.* at 884 (addressing briefly other governmental exceptions such as stable households, discouraging marriages of convenience and providing male and female role models to children as being unsusceptible to empirical proof. *Id.* at 884-885.).

147 *Baker*, 744 A.2d at 886.

148 *Id.* at 886.

149 VT. STAT. ANN. tit. 15, § 1202 (2004).

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

151 *Id.* at 562.

152 TEX. PENAL CODE ANN. § 21.06(a) (2003) ("A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.").

153 *Lawrence*, 539 U.S. at 574-575 (italics omitted).

154 *Id.* at 567-574.

155 *Id.* at 577-578.

Court found that the Texas statute furthered no legitimate government interest by barring the personal liberty of same-sex couples to have sexual intercourse.[156]

What makes *Lawrence* interesting for proponents of same-sex marriage is some of its dicta. Notably, the Court states that the "right to association" implicated by statutes criminalizing personal relationships "should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects."[157] This language, and indeed *Lawrence*, is directly applicable only to statutes that criminalize behavior rather than civil statutes that define state-sanctioned relationships. However, when read in conjunction with the statement that "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education,"[158] the Court seems to be dancing around an issue that it finds troubling. The *Lawrence* court notes that in *Romer v. Evans*[159] it held an anti-gay state Constitutional amendment which stripped homosexuals of protections afforded by anti-discrimination laws was "'born of animosity toward the class of persons affected' and further that it had no rational relation to a legitimate governmental purpose"[160] and was thus unconstitutional. These statements show a Court that is at once uncomfortable with the anti-gay marriage agenda, and yet equally uncomfortable with the notion of stepping into this cultural battlefield and settling the question.[161]

Justice Scalia's dissent[162] recognizes this, and the implications of the Court's analysis in *Lawrence*. Responding to Justice O'Connor's concurrence,[163] Scalia notes that her formulation of a law whose interest is "preserving the traditional institution of marriage" is really nothing more than a subtle way of expressing opprobrium towards homosexuals.[164] Scalia argues that "[i]n [this jurisprudence] judges can validate laws by characterizing them as 'preserving the traditions of society' [good]; or invalidate them by characterizing them as 'expressing moral disapproval' [bad]."[165] Scalia's position is simple: if a majoritarian morality is not a legitimate state interest, then a law barring marriage between members of the same sex (indeed, any law defining marriage) is difficult to sustain.

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156 *Id.* at 578 ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.").

157 *Lawrence*, 539 U.S. at 567.

158 *Id.* at 573-574 (citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992)).

159 Romer v. Evans, 517 U.S. 620 (1996).

160 *Lawrence*, 539 U.S. at 574 (quoting *Romer*, 517 U.S. at 634).

161 The Court's decision to refuse to grant certiorari in Goodridge v. Dep't of Public Health, 798 N.E.2d 941 (Mass. 2003) can be seen as yet another attempt to avoid this issue.

162 *Lawrence*, 539 U.S. at 586.

163 *Id.* at 579 (concurring with the majority's holding, Justice O'Connor rests her analysis on Equal Protection grounds).

164 *Id.* at 601.

165 *Id.* at 601-602.

The first statewide decision to affirm the rights of same-sex couples to marry was the 2003 Massachusetts decision in *Goodridge v. Dep't of Public Health.*[166] The *Goodridge* court first denied that the definition of marriage could be construed to be gender neutral, citing the everyday meaning of the word and other statutory provisions which operated under the assumption that marriage included opposite-sex partners.[167] Turning to the broader Constitutional questions, the *Goodridge* court asked whether the bar on same-sex marriage implicated the state constitution's guarantees of equal protection and due process.[168] The Court noted that the marriage statute served legitimate government interests, for example "by encouraging stable relationships over transient ones."[169] The court found that "[marriage] is central to the way the Commonwealth identifies individuals, provides for the orderly distribution of property, ensures that children and adults are cared for and supported whenever possible from private rather than public funds, and tracks important epidemiological and demographic data."[170] The court also noted that benefits, both tangible and intangible, flow from the institution of marriage;[171] and for these reasons, the right to marry as one chooses is often seen as a civil right.[172]

Resting its opinion entirely in the state constitution, the *Goodridge* court declared "[t]he Massachusetts Constitution protects matters of personal liberty against government incursion as zealously, and often more so, than does the Federal Constitution, even where both Constitutions employ essentially the same language."[173] Since the Massachusetts constitution requires that state regulatory action cannot be arbitrary or capricious, the civil marriage statute in question[174] must be related to a legitimate government interest.[175] Working on rational basis scrutiny, the Court found that no compelling government interest was rationally related to the prohibition on same-sex marriage.[176]

The state argued that its interest in regulating marriage was "based on the traditional concept that marriage's primary purpose is procreation."[177] The court brushed this rationale aside by noting that opposite sex couples at death's door may marry under the statute, and that couples do not surrender their marriage licenses for their failure to produce a child.[178] "[It] is the *exclusive and permanent*

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166 *Goodridge*, 798 N.E.2d 941.

167 *Id.* at 952-953.

168 *Id.* at 953.

169 *Id.* at 954.

170 *Id.* at 954.

171 *Goodridge*, 798 N.E.2d at 955.

172 *Id.* at 957 ("It is undoubtedly for these concrete reasons, as well as for its intimately personal significance, that civil marriage has long been termed a 'civil right.'").

173 *Id.* at 959.

174 MASS. GEN. LAWS ch. 207 (2004).

175 *Goodridge*, 798 N.E.2d at 959-960.

176 *Id.* at 961.

177 *Id.* at 961.

178 *Id.* at 961.

commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage."[179] The court also disapproves of the state interest in raising children in a so-called "optimal" setting,[180] noting that both case law and statutes allow same-sex couples to maintain custody over children, both biological and adoptive.[181] Other state rationales, such as "conserving state resources," are even more quickly dismissed.[182]

Much like the *Baker* decision, the *Goodridge* case rests solely on a court's interpretation that its state constitution affords wider protection for its own citizens than the federal constitution.[183] One commentator has noted disapprovingly that while the opinion references many federal decisions, it is grounded solely in state law, as if to ensure that the U.S. Supreme Court cannot review and reverse the decision.[184] Still, *Goodridge* stands as an example that the common law can keep pace with the modern world.

The latest skirmish in the national fight over marriage is the Federal Marriage Protection Amendment (MPA).[185] The MPA has been introduced in each session of Congress since 2002, but gained particular prominence in the wake of the *Goodridge* decision and Mayor Gavin Newsom's order to issue marriage licenses to same-sex couples in San Francisco in early 2004.[186] The MPA, if approved, would use wording first introduced by DOMA[187] to limit the Constitutional definition of marriage to the union of a man and a woman at both the state and Federal levels.[188] This has obvious implications not only for same-sex couples, but for any marriage that does not fit into the narrow confines of "a union of a man and a woman" such as polygamy.

IV. BUILDING A LEGAL STRATEGY TO RECOGNIZE POLYGAMY IN UTAH

Polygamous Mormons face a series of difficult burdens to surmount if they should seek formal legal recognition for their unions. This section examines those various challenges, and analyzes strategies in overcoming those barriers.

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179 *Id.* (emphasis added).

180 *Goodridge*, 798 N.E.2d at 962.

181 *Id.* at 963.

182 *Id.* at 964-965 ("An absolute statutory ban on same-sex marriage bears no rational relationship to the goal of economy.").

183 *Id.* at 948-49 ("The Massachusetts Constitution is, if anything, more protective of individual liberty and equality than the Federal Constitution; it may demand broader protection for fundamental rights; and it is less tolerant of government intrusion into the protected spheres of private life.").

184 William. Duncan, *The Litigation to Redefine Marriage: Equality and Social Meaning*, 18 BYU J. PUB. L. 623, 638 (2004).

185 Marriage Protection Amendment (MPA), S.J. Res. 1, 109th Cong. (2005).

186 *Federal Marriage Amendment*, Wikipedia, http://en.wikipedia.org/wiki/Federal_Marriage_Amendment.

187 Defense of Marriage Act (DOMA), § 3, P.L. 104-199 (1996).

188 MPA, S.J. Res. 1, 109th Cong. (2005) ("Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.").

Utah State Courts are essentially closed to polygamous Mormons as an avenue of relief from the bars against polygamy. The Utah Constitution explicitly prohibits polygamous marriages.[189] Further, the *Green* court made it abundantly clear that there is no legal loophole for living polygamously without the benefit of a civil marriage.[190] Additionally, Utah's Constitution contains no clause as strong as Vermont's Common Benefits Clause[191] or Massachusetts' Equal Protection Clause.[192] Thus, polygamous Utahans cannot look to judicial relief in their own state courts like residents of Vermont and Massachusetts could. Instead, should polygamous Mormons seek to sanctify their marriages, they must either amend their state's constitution or look to relief in the federal courts. There are certainly strong federalist and democratic arguments in favor of a strategy of seeking a state constitutional amendment on this issue; however, this is beyond the purview of this Note.

In the federal courts, polygamists have a difficult hurdle to overcome in distinguishing the *Reynolds* case. Thus, any assault on the constitutionality of the bar to polygamous marriage must rest in a challenge to the constitutionality of a state constitutional provision and also overturn a precedent that has lasted over 125 years. However, *Reynolds* can be distinguished. The case was, at one level, about a federal law dealing with the administration of a federal territory. Additionally, the *Reynolds* decision and subsequent federal legislation all rested on the same sort of animus towards a minority group that was implicated in *Romer*.[193]

In fact, *Romer* explicitly overrules *Beason* to the extent of advocating that polygamy was enough to bar individuals from voting, and seriously questioned whether the law at issue would have survived strict scrutiny.[194] Justice Scalia, in his *Romer* dissent, argued forcefully that the Court's decisions would subject the provisions of Utah's constitution (and those of several other Western states) to being invalidated by the Court.[195] By rejecting the notion that moral opprobrium can be a legitimate state interest in *Romer*, Scalia argues, the Court has hobbled any attempt to outlaw anything that the majority of society finds repellent—including polygamy.[196] The Court's further reliance on *Romer* in its holding in *Lawrence*

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189 UTAH CONST. art. III § 1 ("No inhabitant of this State shall ever be molested in person or property on account of his or her mode of religious worship; but polygamous or plural marriages are forever prohibited.").

190 *See generally* Tenney, *supra* note 43.

191 VT. CONST. art. VII.

192 MASS. CONST. art. I, *amended by* MASS. CONST. art. CVI.

193 Garrett Epps, *What We Talk About When We Talk About Free Exercise*, 30 ARIZ. ST. L.J. 563, 597-598 (1998).

194 *Romer*, 517 U.S. at 867. To the extent *Davis* held that persons advocating a certain practice may be denied the right to vote, it is no longer good law. To the extent it 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. *Id.*

195 *Id.* at 875-878.

196 *Id.* at 876 ("The Court's disposition today suggests that these provisions [barring polygamy] 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

merely buttresses Scalia's argument; unless Utah can show a rational relationship between polygamy and some legitimate governmental interest, then it may be possible that polygamous Mormons can subject Utah's constitution to attack under the decision in *Romer*.

The Supreme Court of the United States has shown a remarkable unwillingness to protect fringe sects throughout its history; however echoes of *Reynolds* continue to appear in free exercise jurisprudence to this day. Compare Justice Waite's language in *Reynolds* to Justice Scalia's warning in *Smith* that free exercise exemptions to the drug laws for use of peyote in religious ritual would create "a private right to ignore generally applicable laws [which is] a constitutional anomaly."[197] Whether polygamous Utahans could count on a kinder, gentler court to sustain their rights is difficult to imagine. Currently, this is the same Court that held that communion of a Schedule One hallucinogen was not permissible under the Free Exercise Clause because "the ritual action may also have permanent consequences in the physical world."[198] Given the antipathy that courts have long held towards polygamy, the centrality of *Reynolds* to Free Exercise jurisprudence, and the policy arguments that are easily made for outlawing polygamy, it is difficult to imagine the Supreme Court would apply *Romer* consistently.

V. PUBLIC POLICY DEMANDS THAT POLYGAMOUS MARRIAGES BE RECOGNIZED

Neither the Federal Government nor the states have any interest in barring polygamous marriages. The continued bar to polygamous marriages implicates the Free Exercise Clause with no compelling interest to do so. In fact, the bar against polygamy frustrates the objectives that many of its supporters claim it promotes. Every government interest offered for the continued prohibition against polygamous marriage acts, not to protect people, but rather to further enhance the social harms which the mainstream associates with the practice.

Much of the early criticism of polygamous marriage was rooted in abolitionism and nineteenth century feminism.[199] Nineteenth century progressives viewed polygamy as no better than slavery.[200] They argued that the polygamous marriage was just a different form of bondage, one that was specifically anti-female.[201] Polygamous marriages, it was believed, stood in the way of women ever achieving true equality with men in society.[202]

Little of the public policy justification for anti-polygamy statutes has changed in the intervening century. In *Green*, for example, the Utah Supreme Court

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than homosexuals.").

197 *Smith*, 494 U.S. at 886.

198 Epps, *supra* note 193, at 578 (summarizing and reviewing free exercise jurisprudence and rationales since *Reynolds*).

199 *See* Chambers, *supra* note 74, at 65-66.

200 Poll, *supra* note 23.

201 *See* Chambers, *supra* note 74, at 65-66.

202 *Id.*

specifically discussed the argument that polygamous marriages created a situation ripe for sexual abuse and exploitation.[203] The insularity of Mormon communities, made necessary through the legal bars to their religious beliefs, has been put forth as a justification for continuing legal bars to the practice.

> Crimes of physical and sexual abuse are easy to commit and especially difficult to prosecute in light of the tactics used by abusers to keep intact the wall of secrecy surrounding the practice. Many abusive parents in polygamous marriages tell their children that, *because polygamy is illegal,* the parents will be arrested if children report crimes to the authorities. Furthermore, parents in polygamous relationships often teach their children to shun outsiders and protect the family secrets at all costs. Given the highly private nature of sexual abuse and the self-imposed isolation of polygamous communities, prosecution may well prove impossible.[204]

The argument is circular. Because polygamy is illegal, it creates a fertile ground for sexual exploitation of children. Therefore, the answer is to continue to make polygamy illegal and ensure that children of abusive polygamous parents continue to have more to fear from the legal system in order to protect them from the sexual abuse endemic to polygamy.

However, no evidence demonstrates that polygamous men sexually abuse children at a rate higher than monogamous men. The legal bar here merely serves to provide another avenue of control to a person who is abusive, not to protect the abused individual. This logic simply does not justify the attack on *this specific group*. Certainly a community of newly arrived immigrants is just as insular, or even a religious sect that is wholly monogamous can be insular. The same arguments apply equally between all children who fear their parents being taken away, irrespective of whether their parents are polygamous or monogamous. While it is always nice to see the state empowered with a tool that combats sexual violence against women, this is simply the wrong tool for the job.

In recent years, the practices of polygamy led to salacious sexual abuse stories. For example, when a young Mormon girl, Elizabeth Smart, was kidnapped in 2002, the media focused intensely on both her religion and the fact that her kidnapper was a polygamous Mormon.[205] Allegations of child rape have been made regarding numerous polygamous Mormons in Utah and Arizona in the past

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[203] *Green*, 99 P.3d at 830.

[204] Richard A. Vazquez, *The Practice of Polygamy: Legitimate Free Exercise of Religion or Legitimate Public Menace? Revisiting Reynolds in Light of Modern Constitutional Jurisprudence*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 225, 243 (2001) (emphasis added).

[205] *See, e.g., Elizabeth Smart Kidnapping*, Wikipedia, http://en.wikipedia.org/wiki/Elizabeth_Smart_kidnapping ("[T]he media began to focus on the [Mormon Church] and the history of polygamy in Utah. Various media outlets published a 27-page religious manifesto by [the suspect] . . . . The Smarts are members of the LDS Church, and both [suspects] had been at one time practicing Mormons as well."); *see also Expert: Smart's religion probably made her more vulnerable to fanatic*, ASSOC. PRESS, Mar. 19 2003, *available at* http://www.courttv.com/news/2003/0319/smart-religion_ap.html.

decade.[206] There is no denying that the connections drawn between polygamy and sexual abuse are not imagined.[207] However, when one views sexual abuse in a larger context it becomes clear that the problem is not limited to polygamous families alone.[208]

Indeed, the same arguments made against polygamous marriage are often made against same-sex marriage; that homosexuals are more likely to abuse their children without any real statistical data to back up the allegations.[209]

If protection of children and women is the state's interest behind anti-polygamy legislation, this is certainly a noble goal. Unfortunately, noble goals do not always pass constitutional muster. Where *Smith* seemed to give governments *carte blanche* to pass laws that penalized religious sects so long as that law was facially neutral, *Hialeah* has certainly reined in this holding. While the current laws against polygamy are ones that appear to pass the *Smith* test because of their facial neutrality, it is useful to note that:

> The most basic reading of legislative history would reveal that the law, like the Hialeah ritual slaughter ordinance, was enacted amid a storm of public and official hostility to the Mormon religion, and was intended to attack one of its religious practices. Further, it was passed and enforced in the context of a larger pattern of anti-Mormon legislation affecting believers' rights to participate equally in the community.[210]

That is, by no means can proponents argue that Utah's bigamy laws are anything but a targeted attack on the Mormon Church and its polygamous followers. Admittedly, a rational basis review allows a legitimate government interest to be *post hoc*, but given the obvious history of intolerance, it can only serve to clarify the bounds of the Free Exercise clause for the Supreme Court to come forward and make it explicit that in the wake of *Hialeah* and *Smith*, mere repugnance at the religious ideals of a community do not countenance laws attacking that group. As discussed above, *Romer* has set the boundaries: bare animus against an unpopular minority is not a rational state interest.[211] The question is whether the other interests can overcome the obvious animus against polygamous Mormons here.

Some scholars argue that polygamous marriage as practiced by Mormons today devalues women as individuals.[212] In polygamous Mormon marriages, after

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206 *See generally Polygamy in Arizona*, *supra* note 44; *see also* Vazquez *supra* note 204, at 240.

207 *See* Vazquez, *supra* note 204, at 239-244; *see also* Fremon & Thompson, *supra* note 48.

208 *See, e.g.*, Citizens Against Sexual Assault, *Statistics*, http://www.casaonline.net/STATS.htm.

209 *See, e.g.*, Dr. Gregory Herek, *Facts About Homosexuality and Child Molestation*, *in* SEXUAL ORIENTATION: SCIENCE, EDUCATION, AND POLICY, *available at* http://psychology.ucdavis.edu/rainbow/html/facts_molestation.html ("[T]he mainstream view among researchers and professionals who work in the area of child sexual abuse is that homosexual and bisexual men do not pose any special threat to children.").

210 Epps, *supra* note 193, at 597-598.

211 *Romer*, 517 U.S. at 865-866.

212 *See* Chambers, *supra* note 74, at 65-66; *see also* Fremon & Thompson, *supra* note 48 ("Many polygamous groups believe a woman should have a baby every year."); *see also Doctrines and*

all, the man is the center of the family.[213] It is a strongly patriarchal family model—but so are many others. As David Chambers eloquently argues,

> I would not count as an adequate harm that women in these marriages are regarded (and regard themselves) as subordinate to their husbands if the lives these women actually lead are tolerable in a pluralist society. We need to remember that large numbers of conservative Christians, Muslims, and Jews in monogamous marriages in the United States today accept a view of wives as subordinate to their husbands.[214]

When society accepts that some women can choose to "surrender to marriage" in a monogamous context, then society cannot simply argue that that same surrender in a different context is somehow inconsistent with its goals.

Finally, there is an argument of equities. Anti-polygamy laws are held out as a way in which to prevent frauds against social services programs such as welfare.[215] But these same laws work to deprive women and offspring of wholly legitimate marriages of their shares of marital assets.[216] The fact is that to the extent that marriage laws exist to protect the partners and children in a relationship, refusing to recognize the reality of a person's relationship creates substantial inequities in the administration of justice.

Richard A. Vazquez suggests that this is an instance where courts should exercise their powers of equity to achieve just results, without recognizing the legitimacy of polygamy.[217] The simple truth is that so long as we continue to view polygamy as illegal, courts will not stretch the boundaries of equity to view polygamists as needing protection. Indeed, in the cases that Vazquez mentions, equity relied more on the fact that a marriage not recognized by that state (California) was solemnized in a foreign nation that did recognize polygamy.[218] In other contexts, the criminalization of polygamy was used as a basis to justify the denial of worker's compensation benefits to a woman who was inadvertently married to two men[219] and used to justify real estate discrimination against polygamists.[220] In a situation where a religious practice is both criminalized and denied first amendment protection, these views cannot help but influence judges in other areas of the law.

Covenants 132.63, *supra* note 15.

213 Fremon & Thompson, *supra* note 48.

214 *See* Chambers, *supra* note 74, at 82.

215 Vazquez, *supra* note 204, at 244-245.

216 *Id.* at 249.

217 *Id.* at 252.

218 *Id.* at 248 (The Court notes that in a 1987 case, the Utah Supreme Court held that polygamous beliefs and practices do not create a per se bar to adoption. *Id.* at 251. It is useful to remember that this case predates *Green* and the increasing hostility to non-traditional forms of marriage it embodies.).

219 Vazquez, *supra* note 204, at 249.

220 *Id.* at 250.

CONCLUSION

It is clear that polygamous Mormons have faced a long history of government sanctioned discrimination and persecution because of their belief in an unusual form of marriage. From discriminatory laws to armed troops, the federal government has, for its own reasons, chosen to attack this fringe sect in an unprecedented manner. However, the decision to treat this minority has had far reaching implications for all Americans, affecting our understanding of our own doctrines of religious freedom. Additionally, the decision to isolate this religious group has created a situation ripe for the very exploitation it is supposed to combat. As America continues to evolve its understanding of the meaning of families and of the meaning of marriage, polygamous Mormons (really polyamorous individuals of all stripes) should be included in that understanding of the institution.