THE UNINTENDED CONSEQUENCES OF CHICKEN STEALING: SAME-SEX MARRIAGE AND THE PATH TO POLYGAMY

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ABSTRACT

The United States Supreme Court's 2015 holding in Obergefell v. Hodges*, placing same-sex marriage under the protective mantle of the Fourteenth Amendment, appears on its face to be almost seismic in its redrawing of the definition of marriage. The ruling appears to have finally severed any logical connection between marriage and the traditionally defined nuclear family, and might seemingly offer hope to those who advocate the legalization of plural marriage. Certainly, the four dissenting Justices viewed it as such, warning that it represented a return to the undisciplined Lochner era and threatened to pry open the marital door even further than it already was. But how seismic was it? A common thread that warps through over a 130-years' worth of Supreme Court cases is that the state cannot deprive an individual of the fundamental right to marry or form an intimate relationship with the partner of his or her choice—not for reasons of race, or money, or liberty, or gender. But deprivation and regulation need not be synonymous. Challenges to statutory bans on polygamy likely will continue to fail so long as the prohibitions do not result in the absolute exclusion of a potential marriage partner, are regulatory in intent, are facially neutral, and are applied consistently and even-handedly.*

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"I'm sick of these conventional marriages. One woman and one man was good enough for your grandmother, but who wants to marry your grandmother? Nobody, not even your grandfather."

-Captain Spaulding [Groucho Marx], *Animal Crackers*, 1930[1]

I. INTRODUCTION

On May 7, 1942, the Justices of the U.S. Supreme Court met in their wood-paneled conference room to discuss the fate of Jack T. Skinner, a small-town Oklahoma petty crook and one-time chicken thief.[2] At stake for Jack Skinner was not jail time nor a fine—he already was serving a multi-year sentence for armed robbery at the Oklahoma State Prison in McAlester[3]—but something much more fundamental: the physical ability to procreate. When the Court issued its holding twenty-six days later,[4] the nine Justices unwittingly had set the country on a path that would culminate seventy-three years later in the legal marriage of two men living in Ohio and the shattering of the traditional concept of marriage.[5]

What makes *Skinner* even more remarkable, given the long shadow that it ultimately cast over the concept of marriage, is the fact that marriage was not at issue in the case. In fact, were it not for the clever lawyering skills of Skinner's attorneys (discussed *infra*), the case likely would have remained an obscure footnote to a dark and rather clouded time in U.S. history. Instead, the Court's linkage of Jack Skinner's natural procreative rights to the concept of civil marriage resulted in the recognition of what Justice Douglas termed "one of the basic civil rights of man. . . . fundamental to the very existence and survival of the race."[6] Indeed, this newly recognized right to procreation and marriage was so fundamental, wrote

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[1] ANIMAL CRACKERS (Paramount Pictures 1930).

[2] *See* VICTORIA F. NOURSE, IN RECKLESS HANDS: *SKINNER V. OKLAHOMA* AND THE NEAR TRIUMPH OF AMERICAN EUGENICS 91–92 (2008); Rachel Gur-Arie, Skinner v. Oklahoma *(1942)*, EMBRYO PROJECT ENCYCLOPEDIA (Aug. 27, 2016), https://embryo.asu.edu/pages/skinner-v-oklahoma-1942 [https://perma.cc/NF4A-APXY]. Like many men of his generation, Skinner's motivation for crime likely had more to do with Depression-era desperation than genetics. His first crime was stealing twenty-three chickens; his third crime, the one that he was in prison for in 1942, was robbing a gas station of $17. *See* NOURSE, *supra*, at 92.

[3] *See* NOURSE, *supra* note 2, at 91–92.

[4] Skinner v. Oklahoma, 316 U.S. 535 (1942).

[5] *See id.*; Obergefell v. Hodges, 576 U.S. 644 (2015). Plaintiff James Obergefell and his partner, John Arthur, actually were married in Maryland in 2013, where same-sex marriage was legal, and returned to their home in Ohio, which refused to recognize their marriage. *Id.* at 658. The legal battle then ensued.

[6] *Skinner*, 316 U.S. at 541.

Douglas, that any attempt by a state to burden that right must survive the "strict scrutiny" of the Court.[7]

The discussion that follows in the next section focuses briefly on the legal evolution of the concept of marriage, how the Court got from *Skinner*, which narrowly tied marriage to procreation and the formation and maintenance of the nuclear family, to a concept now cast in the broader terms of privacy rights "inherent in the liberty of the person."[8] The second section attempts to distill the current view of marriage, now shorn of any implicit ties to the nuclear family. The discussion then briefly examines how plural marriage—polygamy[9]—has been dealt with by U.S. courts historically and how the holdings have reflected the politics and social mores of their era. Finally, the focus then shifts to what the evolving concept of marriage, culminating in the Court's 2015 holding in *Obergefell,* means for the legal arguments for, and against, polygamy. If the implicit, if not explicit, ties between marriage and the traditional nuclear family—one man, one woman, and their offspring—no longer exist, then what guardrails remain? Despite concerns raised by the dissenters in *Obergefell v. Hodges* that "much of the majority's reasoning [in upholding a constitutional right to same-sex marriage] would apply with equal force to the claim of a fundamental right to plural marriage,"[10] the door may not have been flung open as widely as some may fear, or others may hope. There is a discernable principle that threads through over a hundred years of Supreme Court opinions, and it has remained constant and unaltered: The state may not

[7] *See id*. Douglas's dictum represents the first use of the term "strict scrutiny" as a standard of review for constitutional issues. *See id.*; Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 799 (2006).

[8] *Obergefell*, 576 U.S. at 675; *see Skinner*, 316 U.S. at 541.

[9] Polygamy is the practice of one individual having multiple spouses simultaneously. *See Polygamy*, OXFORD ENGLISH DICTIONARY (3d ed. 2006). The term often is used somewhat synonymously, if erroneously, with Polygyny, in which one man has two or more wives simultaneously. *See Polygyny*, OXFORD ENGLISH DICTIONARY (3d ed. 2006). Polygyny is the most common form of plural marriage worldwide, which likely explains why it so frequently is used interchangeably with Polygamy. *See* Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955, 1966 (2010). Polyandry, in which one woman has multiple husbands, has been documented anthropologically but is considerably less common. *See Polyandry*, OXFORD ENGLISH DICTIONARY (3d ed. 2006); Davis, *supra*, at 1966. Neither should be confused with the overlapping legal concept of bigamy, which involves illegally marrying a second individual, generally with deceptive or fraudulent intent. *See Bigamy*, OXFORD ENGLISH DICTIONARY (3d ed. 2006). For this paper, Polygamy will be used in the colloquial sense to mean Polygyny.

[10] *Obergefell*, 576 U.S. at 704 (Roberts, C.J., dissenting). Joined by Justices Scalia and Thomas, the Chief Justice argued plural marriages have more support under a "history and tradition" analysis used by the majority. *Id.*

impose a total restraint on the fundamental right of an individual to select and bond with another individual in an intimate relationship—regardless of whether that relationship is called "marriage" or not. The hopes of would-be polygamists notwithstanding, existing state bans on bigamy and polygamy appear to impose no such total deprivation but rather merely regulate and condition the timing and sequencing of those relationships for the purpose of meeting arguably legitimate state ends.

II. PIECES OF THE PUZZLE: THE EVOLVING PICTURE OF MARRIAGE

The legal cases that define the concept of marriage span over 130 years. Examining each individually, as if they were jigsaw puzzle pieces plucked one-by-one from the box, reveals no clear pattern, but when all of the pieces are arrayed face-up on the card table, a clear picture can start to be assembled, provided you start at the edges.

The constitutional issue of same-sex marriage came to a head in June 2015 when the Supreme Court issued its holding in *Obergefell v. Hodges*. By the time the larger motes of doctrinal dust had begun to settle, marriage was established, clearly and unequivocally, as "a fundamental right inherent in the liberty of the person" that was protected from undue state interference by both the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[11] Gone, once and for all, was any explicit or implicit tether between marriage and the nuclear family. In retrospect, the outcome was foreseeable, though by no means inevitable, but the early opinions in the line of cases that culminated in the summer of 2015 were anything but prescient. In no small part, this lack of legal clarity resulted from the fact that many of the Court's early holdings implicating marriage didn't derive from cases involving marriage at all—such as *Skinner*—and the Court's views on the fundamental nature of marriage often were expressed in sweeping, almost tautological, comments that had very little to do with the final holdings in the cases. And yet, as seismic as the changes to the concept of marriage might appear, there is a solid core of logic that threads through the Court's myriad holdings over the last hundred years—even if the Court itself has not always emphasized it. The logic chain involving marriage is, in fact, a good case study on how Court dicta become Court dogma through time. It is a story that appears straightforward in hindsight but is

[11] *Id.* at 675 (majority opinion).

anything but a straight path—and it all began with a death on the Oregon Trail.

A. Maynard v. Hill, 1888

Maynard v. Hill[12] established marriage as fundamental to human existence and placed its regulation squarely within the control of the state.[13]

History has a sense of humor. It is no small irony that the case widely cited as the starting point for the Court's view of marriage as a fundamental right[14] actually was concerned with the validity of a divorce.[15] In 1850, David Maynard, physician and entrepreneur, left his wife Lydia in Ohio (they had been married in Vermont) and headed for the west coast to start a new life.[16] Whatever the underlying problem was, it is clear that Dr. Maynard had no intention of returning to either Lydia or the cornfields of Ohio, and it was somewhere along the Oregon Trail, en route to present-day Seattle, that Dr. Maynard met Catherine Broshears, a recent widow who would soon become the second Mrs. Maynard.[17] First, however, he had the logistically unenviable task of securing a divorce from Lydia, who at that time was living over 2000 miles away in an era before phones, faxes, and the internet. However he managed it, by late 1852, Dr. Maynard had checked all of the administrative blocks, and in December, he received what must have seemed like a much sought-after Christmas gift—the Legislative Assembly of the Territory of Oregon (which included what would later become Washington State) declared that "the bonds of matrimony heretofore existing between D. S. Maynard and Lydia A. Maynard be and the same are hereby dissolved."[18]

The marital affairs of Dr. Maynard and his two wives likely would have been lost to history were it not for the fact that David Maynard was one of the founding fathers of Seattle,[19] and as such possessed

[12] Maynard v. Hill, 125 U.S. 190 (1888).
[13] *See id.* at 204–05 (citing Loan Ass'n v. City of Topeka, 87 U.S. 655, 663 (1874)).
[14] *See e.g.*, *Obergefell*, 576 U.S. at 669 (citing *Maynard*, 125 U.S. at 211, 213).
[15] *See Maynard*, 125 U.S. at 203.
[16] *See* Steven H. Hobbs, *Love on the Oregon Trail: What the Story of* Maynard v. Hill *Teaches Us About Marriage and Democratic Self-Governance*, 32 HOFSTRA L. REV. 111, 117 (2003).
[17] *See id.* at 117–19.
[18] T.O. ABBOTT, REAL PROPERTY STATUTES OF WASHINGTON TERRITORY FROM 1843 TO 1889 70 (1892).
[19] *See Alki Walking Tour*, SOUTHWEST SEATTLE HIST. SOC'Y, https://www.loghousemuseum.org/alki-walking-tour/ [https://perma.cc/RV3G-NN6C]. It was Maynard who recommended that the town then known as of New York-Alki be renamed Seattle after his Duwamish friend, Chief Seattle. *See id.*

sizable territorial land grants.[20] Some of these grants subsequently were lost to rival claimants, and in 1888, Maynard's grown children from his marriage to Lydia (David and Lydia were both by then deceased) brought suit to recover some of this land on the grounds that their parents' territorial divorce was invalid.[21] If the divorce was invalid, they argued, then Lydia (and through her, her children) had valid claims to half of the land.[22] It was in this context that the U.S. Supreme Court found itself faced with the seemingly pedestrian task of determining whether a territorial legislature could legally dissolve a state-sanctioned (in this instance, Vermont) marriage.[23] In justifying its holding—that the Maynards' divorce was in fact valid—the Court went on to recognize the special role that marriage plays within society.[24] It is an institution, Justice Field wrote, that forms "the foundation of the family and of society, without which there would be neither civilization nor progress."[25] Thus with the stroke of a jurist's pen, a fundamental right to marriage had been created. Equally as important, however, is that Justice Field's opinion unequivocally placed the regulation of marriage under the state, not the church. "Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature."[26]

The first link in the chain had been forged; the next would originate from a most unlikely source: a common Bible story.

B. *Meyer v. Nebraska, 1923*

Meyer v. Nebraska,[27] a cornerstone of substantive due process, linked marriage to the formation and maintenance of the nuclear family.[28]

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[20] *See Maynard*, 125 U.S. at 214.
[21] *See The Lasting Effects of* Maynard v. Hill *on the Definition of Marriage*, BERKMAN BOTTGER NEWMAN & SCHEIN LLP (Nov. 3, 2020), https://www.berkbot.com/blog/the-lasting-effects-of-maynard-v-hill-on-the-definition-of-marriage/ [https://perma.cc/A448-2UYR].
[22] *See* Hobbs, *supra* note 16, at 112.
[23] *See Maynard*, 125 U.S. at 207–08.
[24] *Id.* at 205, 209.
[25] *Id.* at 211.
[26] *Id.* at 205. Justice Field had expressed the same view eleven years earlier in an opinion better known for its impact on civil procedure. *See* Pennoyer v. Neff, 95 U.S. 714, 734–35 (1878). In *Pennoyer*, the Justice observed that "[t]he State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved." *Id.*
[27] Meyer v. Nebraska, 262 U.S. 390 (1923).
[28] *Id.* at 399.

As was the case in *Maynard*, the next seminal case in the definition of marriage did not directly involve marriage at all. In the isolationist atmosphere of World War I, several states passed laws in an attempt to curb the use and teaching of foreign languages, notably German.[29] One of these was Nebraska, which in 1919 adopted the Siman Act, prohibiting the teaching of any foreign languages in public and parochial schools until "after a pupil shall have attained and successfully passed the eighth grade."[30] To the large German-American Lutheran community living in rural Nebraska at the time, the law was an intolerable encroachment on their parental rights, and to many who still conducted religious ceremonies in the German language, it also was a clear, albeit indirect, burden on their freedom of worship.[31] Pushed into the middle of this fray was Robert Meyer, a balding middle-aged school teacher in the small agrarian town of Hampton, who was arrested and convicted for teaching German to ten-year-old children during recess.[32]

In its 7-2 reversal of Meyer's conviction, the U.S. Supreme Court expanded the *Lochnerian* concept of substantive due process to encompass the non-economic right of parents to raise their children as they might see fit.[33] As Justice McReynolds wrote,

> Without doubt, [the Fourteenth Amendment] . . . denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, 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.[34]

[29] Paul Finkelman, *German Victims and American Oppressors: The Cultural Background and Legacy of* Meyer v. Nebraska, *in* LAW AND THE GREAT PLAINS 33, 33, 40 (John R. Wunder ed., 1996).
[30] *Id.* at 44.
[31] *See* Frederick C. Luebke, *Legal Restrictions on Foreign Languages in the Great Plains States, 1917-23*, *in* LANGUAGES IN CONFLICT: LINGUISTIC ACCULTURATION ON THE GREAT PLAINS 1, 13, 15 (Paul Schach ed., 1980); William G. Ross, *Meyer v. Nebraska, A Lutheran Contribution to Constitutional Law*, 2014 LUTHERAN F. 21, 24.
[32] *See* Luebke, *supra* note 31, at 14. Meyer was arrested after the county attorney entered the Zion Lutheran Church's single-room classroom during recess and found student, Raymond Parpart, reading the story of Jacob's Ladder in German. *See id.*
[33] *See Meyer*, 262 U.S. at 400, 403.
[34] *Id.* at 399 (citing Slaughter-House Cases, 83 U.S. 36 (1873)).

Marriage, already recognized as a fundamental right, now was appreciated for its larger role — the mechanism by which the family is created and maintained.

C. Skinner v. Oklahoma, 1942

Skinner v. Oklahoma[35] linked procreation to marriage and established the basis for the reproductive rights cases that would follow in the 1960s.[36]

At issue in *Skinner* was Oklahoma's 1935 Habitual Criminal Sterilization Act, a eugenics program passed the year following Skinner's incarceration at the McAlester State Prison.[37] In some respects, Oklahoma's goal of curbing future crime through the forced sterilization of "habitual criminal[s]"[38] presaged the three-strikes-and-out movement that was to shape much of the latter half of the Twentieth Century.[39] The state's rationale now seems unbelievable when viewed through the sharply focused lens of history, but in 1936 the picture was less than clear; the pernicious social engineering of Nazism had yet to be exposed and the final nail had not been driven into the coffin of the American eugenics movement.[40] In fact, backed by science widely accepted at the time, Oklahoma's legislators, with the enthusiastic support of the state's populist governor, Alfalfa Bill Murray, sought to break what was believed to be a chain of genetic propensity for crime by sterilizing habitual criminals, specifically those convicted of two or more felonies involving "moral turpitude."[41] Unfortunately for Jack Skinner that included his earlier conviction for chicken stealing.[42]

The Sooner State was not alone in its limited understanding of genetics. In fact, just nine years earlier, the U.S. Supreme Court had upheld the constitutionality of a facially similar Virginia eugenics law designed to promote the greater "welfare of society . . . by the sterilization of mental defectives."[43] In that case, Carrie Buck, an eighteen-year-old "feeble minded white woman," daughter of a "feeble

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[35] Skinner v. Oklahoma, 316 U.S. 535 (1942).
[36] *See id.* at 541.
[37] *See id.* at 536, 537.
[38] *Id.* at 536.
[39] *See id.* at 47 (asserting a similarity between the two types of laws).
[40] *See* NOURSE, *supra* note 2, at 130–31.
[41] *See id.* at 84–86.
[42] *See Skinner*, 316 U.S. at 537.
[43] *See* Buck v. Bell, 274 U.S. 200, 205 (1927). Today, the *Buck* case is perhaps best remembered for Justice Holmes' *was-that-my-out-loud-voice?* dictum that "[t]hree generations of imbeciles are enough." *See id.* at 207.

minded" mother and mother of her own "feeble minded" child, unsuccessfully challenged the state's authority to sexually sterilize her through a salpingectomy.[44] But whereas the Court upheld Virginia's eugenics law in *Buck*, a unanimous *Skinner* Court took a different, and more narrow, approach (crafted in part to not overturn *Buck*, perhaps out of deference to Justice Stone, the lone holdover from the *Buck* Court and an admirer of Justice Holmes).[45] The problem with Oklahoma's sterilization law, the Justices reasoned, was that it was poorly drafted, and to the majority, it presented a clear equal protection issue stemming from the loose manner in which moral turpitude was defined.[46] Specifically, the Court found itself unable to understand how, under the Oklahoma statute, "[a] person who enters a chicken coop and steals chickens . . . may be sterilized if he is thrice convicted," but an embezzler, "no matter how habitual his proclivities for embezzlement are and no matter how often his conviction," may not.[47] In the final analysis, Oklahoma's poor statutory drafting skills made the decision an easy one for the Justices, and Jack Skinner avoided the surgeon's knife.

Perhaps the more interesting question that emerges from *Skinner*, however, is why the Court, having dealt with the constitutionality of the challenged Sterilization Act, felt the need to propound on the role of marriage in society. Jack Skinner was unmarried,[48] and his ability to physically procreate—not marriage—was the issue before the Court; the constitutionality of Oklahoma's law did not require an examination of the role of marriage.[49]

The answer may lie in the skills of Skinner's legal team. In their brief to the Court, Skinner's lawyers emphasized that the Oklahoma statute called for habitual criminals to be "rendered sexually sterile [provided it was accomplished] without detriment to his or her

[44] *See id*. at 205, 208. In fact, it likely is the case that neither Carrie Buck nor her daughter, Vivian, were of anything but normal intelligence. *See* NOURSE, *supra* note 2, at 24.
[45] *See Skinner*, 316 U.S. at 538, 542 (citing *Buck*, 274 U.S. at 208); *Buck*, 274 U.S. at 208. *Buck v. Bell* has never been formally overruled and is still dusted off and cited from time to time. *See, e.g.*, Vaughn v. Ruoff, 253 F.3d 1124, 1127, 1128–29 (8th Cir. 2001) (finding that a "mildly retarded" woman's due process rights were violated when Missouri Department of Family Services employees required her to submit to coerced sterilization. Citing to *Buck*, the court nonetheless acknowledged that "[i]t is true that involuntary sterilization is not always unconstitutional if it is a narrowly tailored means to achieve a compelling government interest." (citing *Buck*, 274 U.S. at 207–08)).
[46] *See Skinner*, 316 U.S. at 536, 541.
[47] *Id.* at 539.
[48] *See* Caroline Halter, *Before* Roe *There Was* Skinner*: How an Oklahoma Case Helped Legalize Abortion*, KGOU (Jan. 22, 2019), https://www.kgou.org/post/roe-there-was-skinner-how-oklahoma-case-helped-legalize-abortion [https://perma.cc/S3BG-3G8K].
[49] *See Skinner*, 316 U.S. at 537.

general health."[50] The state, aware that it was treading on the soft pursuit-of-happiness ground if ever there was such a thing, had sought to stay within the bounds of the Constitution by leaving the "patient . . . capable of enjoying the 'sexual congress', robbing him only of the power of procreation."[51] And here is where Skinner's legal team showed their true skill. Knowing that their client was unlikely to engender much sympathy from the Court, the lawyers took the opposite tack—raising the specter of a parent's worst nightmare: prisons full of habitual ne'er-do-wells soon to be released to fornicate freely without whatever inhibiting effect that a concern for the responsibilities of fatherhood might have.[52] "There is something singularly obscene," Skinner's lawyers argued, about the idea of the state rendering habitual criminals capable of sexual congress without the governing constraint of fatherhood, in that it implies "that lascivious gratification is the chief reason why men and women are endowed with this urge and given the right to its proper fulfillment."[53] Rather, the lawyers countered, as if it hardly required saying, the urge to procreate "[c]ertainly . . . was bestowed that the human race might continue to exist."[54] In other words, sex for the sake of sex was wrong; sex for the purpose of procreation is good and natural. Sterilization, whether court-mandated or not, promotes the former at the expense of the family. And lest the point be lost, the next paragraph of Skinner's brief evoked *Meyer v. Nebraska*, reminding the Court of its previous linkage of marriage and family,[55] almost daring the Justices to affirm the Oklahoma statute and hasten the downfall of modern society.

The Justices refused to accept the bait. Writing for the majority, Justice Douglas—at the time the youngest member of the Court—quickly dismissed the Oklahoma statute as running "afoul of the equal protection clause."[56] But then, perhaps in response to the moral indignation expressed by Skinner's lawyers, Justice Douglas addressed the role of procreation in dicta that would reverberate long after Mr. Skinner himself would.[57] "We are dealing here with . . . one

[50] Brief of Petitioner at 7, Skinner v. Oklahoma, 316 U.S. 535 (1942) (No. 782), 1942 WL 54254.
[51] *Id.* at 25.
[52] *See* Ariela R. Dubler, *Sexing* Skinner*: History and the Politics of the Right to Marry*, 110 COLUM. L. REV. 1348, 1362–63 (2010). Ariela Dubler has termed this approach the "sexing" of Skinner. *See id.* at 1353.
[53] Brief of Appellant at 25, *Skinner*, 316 U.S. 535 (No. 782).
[54] *Id.*
[55] *See id.* at 25–26.
[56] *See Skinner*, 316 U.S. at 541.
[57] *See id.*; Dubler, *supra* note 52, at 1362–63. Jack Skinner died in 1977. *See* NOURSE, *supra* note 2, at 160. After his parole in 1939, he married and moved to California, his ability to

of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."[58]

Where *Meyer* linked marriage to its obvious role in fostering the family unit, *Skinner* took the idea to its next logical connection: The family can't exist without physical procreation; seeking to protect one without safeguarding the right to the other is fruitless.

D. Griswold v. Connecticut, 1965

Griswold v. Connecticut[59] linked the fundamental right of marriage with the broader right of privacy that protects the "sacred precincts of marital bedrooms."[60]

Griswold picked up the loose thread not tied off by the Court four years earlier in a case docketed as *Poe v. Ullman*.[61] In that case, two Connecticut couples and their physician, C. Lee Buxton, brought a suit challenging an eighty-two-year-old Connecticut law that prohibited the use of contraceptives, even by married couples.[62] The plaintiffs argued, in language that was to be recycled a few years later, that the state law was an impermissible invasion of their marital privacy right.[63] But in this case, because the state had neither taken nor threatened action against the plaintiffs, a 5-4 Court dismissed the suit as lacking a case or controversy[64] and never reached the merits.[65] Nevertheless, the privacy argument resonated with the dissenters, and it soon would be revived in *Griswold*.

Four years later, the plaintiffs in Griswold were Estelle Griswold, Executive Director of the Planned Parenthood League of Connecticut,

father children intact. *See id.* He was survived by a stepdaughter, six grandchildren, and ten great-grandchildren. *See id.*

[58] *Skinner*, 316 U.S. at 541.

[59] Griswold v. Connecticut, 381 U.S. 479 (1965).

[60] *Id.* at 485.

[61] Poe v. Ullman, 367 U.S. 497 (1961).

[62] *See id.* at 498–500, 501. The law had been passed in 1879 with the sponsorship of circus showman and then Connecticut legislator, P.T. Barnum. *See* Jonathan T. Weisberg, *In Control of Her Own Destiny: Catherine G. Roraback and the Privacy Principle*, YALE L. REP., Winter 2004, at 41.

[63] *See* Brief for Appellants at 28, *Poe*, 367 U.S. 497 (Nos. 60, 61) ("When the long arm of the law reaches into the bedroom and regulates the most sacred relations between a man and his wife, it is going too far.")

[64] *Poe*, 367 U.S. at 508, 509 ("This Court cannot be umpire to debates concerning harmless, empty shadows.").

[65] Although the Court didn't reach the merits of the case, it is interesting to note that *Poe v. Ullman* was decided on the same day as *Mapp v. Ohio*. *See id.*; Mapp v. Ohio, 367 U.S. 643 (1961). The *Mapp* decision is a cornerstone of privacy rights, best known for its holding that evidence obtained in violation of the Fourth Amendment must be excluded from use in state courts. *See Mapp*, 367 U.S. at 655.

and the League's Medical Director, C. Lee Buxton,[66] reprising his earlier role in *Poe v. Ullman*.[67] This time, both had been convicted of misdemeanor counts of aiding and abetting the distribution of contraceptives and birth-control information in violation of the Connecticut law.[68] The Connecticut Court of Appeals and the Connecticut Supreme Court[69] affirmed the convictions, and the U.S. Supreme Court granted certiorari.[70]

Justice Douglas, one of the four dissenters in *Poe v. Ullman*,[71] authored the often-quoted majority opinion of the *Griswold* Court and dealt with the Connecticut law quickly. "We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse,[72] hopefully enduring, and intimate to the degree of being sacred."[73] The marital right of privacy exists in what Douglas famously referred to as the "penumbras" of the Bill of Rights, "formed by emanations from those guarantees."[74] In a somewhat less-poetic concurring opinion, Justice Goldberg picked up where Douglas left off, invoking *Meyer v. Nebraska* and noting that "the marital relation and the marital home" are "a particularly important and sensitive area of privacy."[75] The marital relation—now with its sexual component fully acknowledged—is, in fact, so "fundamental and basic" that a state "cannot constitutionally abridge" it.[76]

The 7-2 majority opinion in *Griswold* had the effect of "transforming the case from one about limits on state intervention in intimate life into one that was almost exclusively about preventing

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[66] Griswold v. Connecticut, 381 U.S. 479, 480 (1965). The case was known as *Buxton* as it was working its way through the Connecticut courts. Weisberg, *supra* note 62, at 43. In a 2004 interview in the Yale Law Report, Catherine Roraback, one of the attorneys for the Plaintiffs, commented that "I don't know why it got changed to Griswold in the U.S. Supreme Court, but that's their business." *Id.*

[67] *Compare Griswold*, 381 U.S. at 480 *with Poe*, 367 U.S. at 500.

[68] *See* Connecticut v. Griswold, 200 A.2d 479, 545 & n.1 (Conn. 1964) ("Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned."), *rev'd*, 381 U.S. 479 (1965).

[69] The court was then known as the Supreme Court of Errors. *Overview of the Supreme Court: History of the Supreme Court*, ST. CONN. JUD. BRANCH, https://www.jud.ct.gov/external/supapp/overview/suphist.html [https://perma.cc/QS7G-7DZS].

[70] Connecticut v. Griswold, 200 A.2d 479 (Conn. 1964), *rev'd*, 381 U.S. 479 (1965).

[71] *Poe*, 367 U.S. at 509.

[72] One can only speculate on Douglas's choice of wording. He was married four times and divorced three. *See* Stephen Robertson, *William Douglas*, FIRST AMEND. ENCYCLOPEDIA, https://mtsu.edu/first-amendment/article/1328/william-douglas [https://perma.cc/8BS2-2K9U].

[73] *Griswold*, 381 U.S. at 486.

[74] *Id.* at 484.

[75] *Id.* at 495 (Goldberg, J., concurring).

[76] *See id.* at 499.

state interference with marriage and procreation."[77] In other words, where *Skinner* had stood for the principle that the state could not infringe upon the fundamental right (or physical ability) to procreate, *Griswold* held that the converse was also true—that neither could the state interfere with the decision not to procreate. By inference, the Court validated a right, at least inhering to marital partners, to pursue happiness by engaging in non-procreative sex.

E. Eisenstadt v. Baird, 1972

Eisenstadt v. Baird[78] effectively extended *Griswold*'s holding to unmarried couples, and thus extended the concept of a fundamental right to intimacy.[79]

William Baird was a consultant for the drug manufacturer, Emko, when he began what he viewed as a private crusade to increase awareness of contraceptives among married—and unmarried—couples.[80] On April 6, 1967, after delivering a lecture at Boston University on birth control techniques, Baird handed a young—and unmarried—female student a package of Emko contraceptive foam.[81] He was arrested and subsequently convicted under a Massachusetts law that made the distribution of contraceptives to unmarried individuals an offense punishable by imprisonment for up to five years.[82] An ensuing *habeas corpus* proceeding was dismissed at the District Court level but reversed on appeal to the First Circuit.[83] The Suffolk County (MA) sheriff—Thomas Eisenstadt—then appealed the First Circuit's remand, and the U.S. Supreme Court took up the case.[84]

Justice Brennan, writing for the 6-1 majority,[85] acknowledged that the matter before the Court involved an unmarried student, as opposed to the married couples at the heart of the *Griswold* ruling, but he quickly dismissed the distinction as dispositive:

[77] Melissa Murray, Griswold's *Criminal Law*, 47 CONN. L. REV. 1045, 1064 (2015); *see Griswold*, 381 U.S. 479.
[78] Eisenstadt v. Baird, 405 U.S. 438 (1972).
[79] *See id.* at 454–55.
[80] *See* John Killilea, *Time Runs Out for William Baird*, HARV. CRIMSON (Oct. 23, 1967), http://www.thecrimson.com/article/1967/10/23/time-runs-out-for-william-baird [https://perma.cc/7ZRU-XUZZ]. Baird claimed to have begun his crusade after witnessing a woman die following her botched attempt to abort her fetus with a coat-hanger. *See id.*
[81] *See* Baird v. Eisenstadt, 310 F. Supp. 951, 952, 956 (D. Mass. 1970).
[82] *See id.* at 953, 956.
[83] *See Eisenstadt*, 405 U.S. at 440 (citing *Baird*, 310 F. Supp. 951).
[84] *See Eisenstadt*, 405 U.S. at 440 (citing Eisenstadt v. Baird, 401 U.S. 934 (1971)).
[85] *See Eisenstadt*, 405 U.S. 438.

> It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[86]

And it logically followed that "[i]f under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible"[87] under the Equal Protection Clause.

It is tempting to read *Eisenstadt v. Baird* as little more than a footnote to *Griswold*. The facial interpretation is that the former simply tidied up an administrative loose end by extending *Griswold*'s right of access to contraceptives to unmarried couples. But from the standpoint of understanding the evolving concept of marriage, *Eisenstadt v. Baird* more than holds its own place in the queue. What *Eisenstadt* effectively did was recognize a fundamental right to intimacy that is not defined solely by the contours of the nuclear family. Where *Griswold* had established that not all "marital relations" need to be procreative, *Eisenstadt* took the next step—not all protected "relations" need to be marital.

F. Loving v. Virginia, 1967

Griswold, and the line of cases that led up to it, established the constitutional right to procreation and marriage, but it was *Loving v. Virginia*[88] that began to establish a constitutional right to marry the person of your choice, including, in the case of Mr. and Mrs. Loving, the right "to marry, or not marry, a person of another race."[89]

On the early morning of July 11, 1958, Caroline County Sheriff R. Garnett Brooks entered the house of Richard and Mildred Loving, awoke them in their bed, and arrested them for unlawful habitation under a Virginia miscegenation statute that made criminal the

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[86] *Id.* at 453 (emphasis in original) (citing Stanley v. Georgia, 394 U.S. 557 (1969)).
[87] *Eisenstadt*, 405 U.S. at 453.
[88] Loving v. Virginia, 388 U.S. 1 (1967).
[89] *Id.* at 12.

marriage of mixed-race couples.[90] Richard was white, Mildred was black,[91] and they had been married in Washington, D.C., almost seven weeks earlier.[92] At the time, Virginia was operating under a 1924 Racial Integrity Act that both prohibited and punished interracial marriages,[93] and it did not recognize mixed-race marriages, even those solemnized just a few miles away in the nation's capital. The Lovings pleaded guilty and were sentenced to one year in jail, suspended for twenty-five years on the condition that the couple leave the state of Virginia and agree not to return.[94] The Supreme Court of Appeals of Virginia affirmed the convictions, which set up the U.S. Supreme Court's ultimate involvement.[95]

In a relatively short 2600-word decision, the Court held that the Virginia statute ran afoul of the Equal Protection Clause of the Fourteenth Amendment and could not stand.[96] Writing for a unanimous Court, Chief Justice Warren found that "[t]here can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race," and as such are "odious to a free people whose institutions are founded upon the doctrine of equality."[97] Then, invoking both *Skinner* and *Maynard*, the Court went on to sound the increasingly familiar note that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival,"[98] and "essential to the orderly pursuit of happiness by free men."[99]

[90] *See* Robert A. Pratt, *Crossing the Color Line: A Historical Assessment and Personal Narrative of* Loving v. Virginia, 41 HOW. L.J. 229, 236 (1998).
[91] Mildred Loving also claimed to be part Cherokee Indian, as were many of the inhabitants of that part of Virginia. *See id.* at 234–35. In fact, the Loving's D.C. marriage license lists the bride, Mildred Delores Jeter, as "Indian." *See* Jason Daley, *See the Marriage License From the Historic Loving Decision*, SMITHSONIAN MAG. (Sept. 2, 2016), https://www.smithsonianmag.com/smart-news/historic-loving-decision-marriage-license-display-180960323/ [https://perma.cc/PH6J-CC2V].
[92] *See* Daley, *supra*, note 91.
[93] An Act to Preserve Racial Integrity, Act of March 20, 1924, ch. 371, 1924 Va. Acts. 534. Because many of Virginia's leading families claimed ancestry to the early European colonists, including John Rolfe, the law contained what has come to be known as the "Pocahontas Exception" that allowed marriage between whites and individuals of limited Native American ancestry. *See* Kevin Noble Maillard, *The Pocahontas Exception: The Exemption of American Indian Ancestry from Racial Purity Law*, 12 MICH. J. RACE & L. 351, 354–55 (2007). The judge in the *Loving* case ignored the provision. *See Loving*, 147 S.E.2d 78.
[94] Loving v. Virginia, 147 S.E.2d 78, 79 (Va. 1966), *rev'd*, 388 U.S. 1 (1967).
[95] *See id.* at 83.
[96] *See* Loving v. Virginia, 388 U.S. 1, 11–12 (1967).
[97] *Id.* at 11 (citing Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).
[98] *Loving*, 388 U.S. at 12 (citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).
[99] *Loving*, 388 U.S. at 12.

G. Post-Loving Cases, 1971–1996

In a twenty-five-year span following *Loving*, the Court decided a number of cases that touched upon and continued to shape the evolving concept of marriage, building upon each previous one in the process. In some of the cases, marriage itself was only tangential to the matter before the Court; yet, in each of these cases, the Court was quick to reaffirm the fundamental nature and importance of the marital relationship. The constitutional tool of choice, more often than not, was the Due Process Clause.

1. *Boddie v. Connecticut*,[100] 1971**:** In 1971, the Court, as it had done eighty-three years earlier in *Maynard*,[101] shaped the understanding of the concept of marriage by addressing a divorce issue.[102] At question was a class action suit brought by female welfare recipients who had been denied divorces on the grounds that they were unable to pay the required court costs.[103] In holding that Connecticut's imposition of divorce fees was unconstitutional, Justice Harlan's majority opinion emphasized that marriage is "a fundamental human relationship,"[104] and because of the state's "monopolization of the means for legally dissolving [a marriage]," due process must prohibit the state from "denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages."[105] So long as bigamy laws remain in place, the inability to gain a divorce precludes the fundamental right to select a (subsequent) marital partner and cannot be conditioned by the state on the basis of economic status.

2. *Moore v. City of East Cleveland*,[106] 1977: *Moore* involved a challenge to an East Cleveland zoning ordinance that limited the

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[100] Boddie v. Connecticut, 401 U.S. 371 (1971).
[101] Maynard v. Hill, 125 U.S. 190 (1888).
[102] *Boddie*, 401 U.S. at 372.
[103] *See id.* at 372–73.
[104] *Id*. at 382–83.
[105] *Id*. at 374.
[106] Moore v. City of E. Cleveland, 431 U.S. 494 (1977). Justice Harlan built his opinion from Cleveland Board of Education v. LaFleur, a due process case involving the constitutionality of a Cleveland School Board rule requiring pregnant teachers to take five months of unpaid maternity leave prior to and following the birth of their children. *See id.*; Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 634–36 (1974). In his *LaFleur* opinion, holding the Cleveland regulation unconstitutional, Justice Stewart noted "[t]his Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *LaFleur*, 414 U.S. at 639 (citing Roe v. Wade, 410 U.S. 113 (1973)).

occupancy of a dwelling in certain areas to single families.[107] Inez Moore lived in one of these areas in a single-family home with her son and two grandsons—who were cousins rather than siblings.[108] The city convicted Ms. Moore of violating the ordinance on the grounds that the presence of the second grandson violated the city's single-family definition.[109] In overturning the ordinance, Justice Powell recognized "freedom of personal choice in matters of marriage and family life" and went on to note that in such matters the Court "must examine carefully the importance of the governmental interests" being challenged.[110]

3. *Carey v. Population Services International*,[111] 1977: In a New York case involving a prohibition on the sale or distribution of contraceptives to, *inter alia*, minors under the age of sixteen years and to anyone except through a licensed pharmacist, the Court found the New York law in violation of the Due Process Clause.[112] Justice Brennan delivered the Court's opinion, writing that "it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions 'relating to marriage . . . procreation . . . contraception . . . family relationships . . . and child rearing . . . .'"[113]

4. *Zablocki v. Redhail*,[114] 1978: Roger Redhail brought a suit against the Milwaukee County Clerk after being refused a marriage license under a Wisconsin law prohibiting any resident from obtaining a license if he or she was delinquent on court-ordered child support.[115] Redhail had fathered a child while in high school and was delinquent in support payments when he sought to marry a subsequent girlfriend who was expecting his next child.[116] The Court found that the statute was both under-inclusive and over-inclusive and violated the Equal Protection Clause of the Fourteenth Amendment.[117] In voicing the Court's opinion, Justice Marshall

[107] *See Moore*, 431 U.S. at 495–96.
[108] *See id.* at 496–97.
[109] *See id.* at 495–96.
[110] *Id.* at 499 (first quoting Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639 (1974); and then citing Poe v. Ullman, 397 U.S. 497, 554 (1961) (Harlan, J., dissenting)).
[111] Carey v. Population Servs. Int'l, 431 U.S. 678 (1977).
[112] *See id.* at 681.
[113] *Id.* at 684–85 (quoting Roe v. Wade, 410 U.S. 113, 152–53 (1973)).
[114] Zablocki v. Redhail, 434 U.S. 374 (1978).
[115] *See id.* at 375–78.
[116] *See id.* at 377–79.
[117] *See id.* at 377, 390.

noted that "the right to marry is of fundamental importance for all individuals," invoking the legacy of *Maynard*, *Meyer*, *Skinner*, *Loving*, and *Griswold*.[118]

5. *Turner v. Safley*,[119] 1987: *Turner* established that there is a "constitutionally protected marital relationship in the prison context."[120] Prisoners at the Renz Correctional Institute in Missouri brought suit against the Division of Corrections challenging the constitutionality of a regulation that prohibited prisoners from marrying except with the permission of the superintendent of the prison.[121] The Court, citing to *Zablocki*, affirmed a constitutional right to marry,[122] and while it acknowledged the state's authority to "regulate the time and circumstance under which the marriage ceremony itself takes place," the Court held that the prison's "almost complete ban on the decision to marry . . . . is facially invalid."[123]

In other words, the state may restrain an individual's freedom, but that restraint cannot permanently burden the fundamental right to select a marital partner.

6. *Planned Parenthood v. Casey*,[124] 1992: In a mixed, and somewhat convoluted ruling, the Court addressed the constitutionality of a 1988 Pennsylvania abortion statute.[125] In an opinion announced by Justices O'Connor, Kennedy, and Souter, the Court upheld the essential holding of *Roe v. Wade*, largely for prudential reasons, citing the stabilizing influence of *stare decisis*.[126] The law, the Justices wrote, "affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child-rearing, and education."[127] But it was another

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[118] *Id.* at 384; *see also* Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); Skinner v. Oklahoma, 316 U.S. 535 (1942); Meyer v. Nebraska, 262 U.S. 390 (1923); Maynard v. Hill, 125 U.S. 190 (1888).

[119] Turner v. Safley, 482 U.S. 78 (1987).

[120] *Id.* at 96.

[121] *See id.* at 81–82.

[122] *See id.* at 95 (citing *Zablocki*, 434 U.S. 374).

[123] *Turner*, 482 U.S. at 99. The prisoners were also challenging a regulation that restricted correspondence between prisoners in violation of the First Amendment. *See id.* at 81, 85. In that challenge, the Court found that the state had legitimate security concerns, that the regulation was narrowly tailored to address those concerns, and that it was therefore reasonable and facially valid. *See id.* at 92.

[124] Planned Parenthood v. Casey, 505 U.S. 833 (1992).

[125] *See id.* at 843.

[126] *See id.* at 845–46; Roe v. Wade, 410 U.S. 113 (1973). The *Roe* opinion focuses on the woman's right of privacy and makes only passing reference to marriage rights. *See Roe*, 410 U.S. at 159.

[127] *Casey*, 505 U.S. at 851 (citing Carey v. Population Servs. Int'l 431 U.S. 678, 685 (1977)).

passage, written in sweeping, almost poetic, language that would become central to the Court's later holding in *Lawrence v. Texas* (discussed *infra*):

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[128]

7. *M.L.B v. S.L.J,*[129] 1996: A Mississippi Chancery Court terminated the parental rights of a mother, known to the court as M.L.B., in favor of her divorced husband (S.L.J.) and his second wife.[130] M.L.B. filed a timely appeal of the decision, but her appeal was denied when she was unable to pay required court fees for preparing a copy of the record.[131] The U.S. Supreme Court held that M.L.B.'s right to appeal could not be conditioned on the payment of fees when "a family association so undeniably important is at stake."[132] The Court took the opportunity to reaffirm that "[c]hoices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society,' rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect."[133]

H. Lawrence v. Texas, 2003

Lawrence v. Texas[134] affirmed that sexual relations between consenting adults are within the sphere of privacy into which the government cannot intrude.[135] It extended the privacy right to

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[128] *Casey*, 505 U.S. at 851. Not everyone was enamored of the passage. Justice Scalia, in his dissent in Lawrence v. Texas, derided it as the Court's "famed sweet-mystery-of-life" dictum. *See* Lawrence v. Texas, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting).
[129] M.L.B. v. S.L.J., 519 U.S. 102 (1996).
[130] *See id.* at 106, 107–08.
[131] *See id.* at 106, 108–09.
[132] *Id.* at 116–17.
[133] *Id.* at 116 (quoting Boddie v. Connecticut, 401 U.S. 371, 376 (1971); and then citing Turner v. Safley, 482 U.S. 78 (1987)).
[134] Lawrence v. Texas, 539 U.S. 558 (2003).
[135] *See id.* at 567.

engage in non-procreative sex free of government control, identified previously in *Griswold* and *Eisenstadt*, to same-sex couples.[136]

Lawrence was central to the later Court holdings in *United States v. Windsor* and *Obergefell* (both discussed *infra*), and with the exception of *Reynolds v. United States* (discussed *infra*), few cases have had as much impact on the reemergence of the debate over plural marriage in the United States as *Lawrence*.

What actually happened on the night of September 17, 1998, depends on who is telling the story. What is known is that sometime around 11:00 pm, four Harris County sheriff's officers, responding to a reported weapons disturbance, entered the Houston apartment of John Lawrence with their guns drawn.[137] There they found Lawrence and an acquaintance, Tyron Garner,[138] doing something, though what both men were actually doing at the time would be the source of disagreement.[139] The arresting officer claimed that he observed Lawrence and Garner engaging in anal sex.[140] Another officer recalled seeing the two men engaging in oral sex.[141] The other two officers, who entered the room after the first two deputies, saw no sex acts.[142] For their part, both Lawrence and Garner also denied having sex of any sort that evening, though they also both pleaded no contest when they appeared before the Justice of the Peace.[143]

Regardless of what actually happened that night in Lawrence's apartment, the conviction presented an ideal platform from which to

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[136] *See id.* at 564–65 (first citing Griswold v. Connecticut, 381 U.S. 479, 485 (1965); then citing Eisenstadt v. Baird, 405 U.S. 438 (1972)).

[137] *See* DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF *LAWRENCE V. TEXAS* 46, 63–65 (2012). The apartment was located in an un-incorporated section of Houston, which is why the Sheriff's Department and not the Houston Police Department, responded. *See id.* at 46.

[138] *See id.* at 61. A third member of the group, Robert Eubanks, had been drinking at Lawrence's apartment with the other two men but had left, possibly jealous of Garner showing attention to Lawrence, and called the police to report "a black male going crazy with a gun" at Lawrence's address. *Id.* at 61–62. He later admitted that the report was a hoax, but the call was sufficient exigent circumstance for the sheriff's officers to affect a warrantless entry into Lawrence's apartment. *See id.* at 77.

[139] *See id.* at 67.

[140] *See id.* at 67–68.

[141] *See id.* at 68.

[142] *See id.* at 75.

[143] *See id.* at 114 139–140. At their arraignment, both Lawrence and Garner pleaded not guilty. *See id.* at 114. Later, after obtaining legal representation from national gay-rights organizations, the two changed their pleas to "no contest." *See id.* at 124, 139–140. The defense team's concern was that by pleading not guilty the men might actually win their case in court and preclude the opportunity to get the issue in front of the Supreme Court. *See id.* at 131. Even then, the plan almost failed when the Justice of the Peace, Mike Parrott, initially fined each man $100, an amount that would have extinguished the right of appeal by one cent. *See id.* at 140. At the request of defense counsel, and with the approval of the District Attorney, the judge increased the fine to $125 to preserve the right to appeal. *See id.*

challenge the Supreme Court's 1986 ruling in *Bowers v. Hardwick*,[144] which at the time was the controlling case on homosexual sex rights.

In *Bowers*, a fragile 5-4 Court majority[145] upheld a Georgia statute criminalizing homosexual sodomy.[146] The Court declined to comment on the wisdom of the challenged law and instead confined itself to the narrow question of "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."[147] It found none.[148]

Lawrence, which shared a fact pattern similar to that in *Bowers*, presented an opportunity to revisit the issue. This time around, however, proponents for gay rights succeeded in refocusing the Court's inquiry more broadly. Rather than examining whether there was a fundamental right to sodomy, as it had in *Bowers*, the Court instead considered whether "criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment."[149]

Justice Kennedy, writing for the 6-3 majority,[150] set the tone with his opening sentence: "Liberty protects the person from unwarranted

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144 Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

145 *See Bowers*, 478 U.S. at 187, 199. In 1990, Justice Powell, who had been the deciding vote in *Bowers*, reportedly told students at New York University' School of Law that in retrospect he regretted his vote in *Bowers*: "I think I probably made a mistake in that one." Linda Greenhouse, *Black Robes Don't Make the Justice, but the Rest of the Closet Just Might*, N.Y. TIMES (Dec. 4, 2002), http://www.nytimes.com/2002/12/04/politics/04SCOT.html [https://perma.cc/LCH2-SKAR]; *see also Bowers*, 478 U.S. at 187.

146 *See Bowers*, 478 U.S. at 196.

147 *Id.* at 190.

148 *See id.* at 196. Because the Court found no "fundamental" right to sodomy, the standard of review was rational basis. *See id.* On that basis, the Court found no reason to overturn the Georgia State legislature's decision, even when the decision was based on the electorate's "notions of morality." *See id.*

149 Lawrence v. Texas, 539 U.S. 558, 564 (2003).

150 *See id.* at 561. Justices Kennedy, Breyer, Ginsburg, Souter, and Stevens, with O'Connor concurring in the judgment, formed the majority. *See id.* Justice Powell, the deciding vote in *Bowers*, had died 23 days before Lawrence and Garner had been arrested. *See History of the Court- Timeline of the Justices- Lewis F. Powell, Jr., 1972-1987*, SUP. CT. HIST. SOC'Y, https://supremecourthistory.org/history-of-the-court-timeline-of-the-justices-lewis-f-powell-jr-1972-1987/ [https://perma.cc/Y4AG-GPPH]; Adam Liptak, *John Lawrence, Plaintiff in Gay Rights Case, Dies at 68*, N.Y. TIMES (Dec. 23, 2011), https://www.nytimes.com/2011/12/24/us/john-lawrence-plaintiff-in-lawrence-v-texas-dies-at-68.html [https://perma.cc/KDF9-ZPYH]. The numerical break-down of the decision belies the truly deep division of the Court. Justice Scalia, in a dissent joined by Chief Justice Rehnquist and Justice Thomas, accused the Court of being "the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct." *Lawrence*, 539 U.S. at 586, 602 (Scalia, J., dissenting).

government intrusions into a dwelling or other private places."[151] He then tackled the core argument of *Bowers* head-on: "To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."[152] The Court's thinking about marriage had evolved since 1986, Kennedy observed, seriously eroding the *Bowers* holding. In particular, the Court's decision in *Planned Parenthood v. Casey* established that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life,"[153] and it had "again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child-rearing, and education."[154] The opinion went on to note that the alleged offense in *Lawrence* did not involve minors or other persons that required state protection, and that the Court found that "[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life" of Lawrence and Garner.[155]

The opinion concluded, "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled."[156] And so it was, but not without a prediction concerning the slippery slope onto which the Court had tread.

Justice Scalia, in a dissent that has often been derided as reactionary,[157] foresaw the Court's trajectory, even if he framed his warning somewhat hyperbolically.

> State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices. Every single one of these laws is called into question by today's [*Lawrence*]

[151] *Lawrence*, 539 U.S. at 562.
[152] *Id.* at 567. There is a faint echo of Skinner's defense team's argument that sexual congress should not be divorced from procreation. *See* Brief of Petitioner, *supra* note 50, at 25.
[153] *Lawrence*, 539 U.S. at 574 (quoting Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992)).
[154] *Lawrence*, 539 U.S. at 573–74 (citing *Casey*, 505 U.S. at 851).
[155] *Lawrence*, 539 U.S. at 578.
[156] *Id.*
[157] *See, e.g.*, Joseph Bozzuti, *The Constitutionality of Polygamy Prohibitions After* Lawrence v. Texas*: Is Scalia A Punchline or A Prophet?*, 43 CATH. LAW. 409, 429 (2004); Shayna M. Sigman, *Everything Lawyers Know About Polygamy is Wrong*, 16 CORNELL J. L. & PUB. POL'Y 101, 104 (2006) (referring to Scalia's dissent in *Lawrence* as "apoplectic").

> decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding.[158]

With *Lawrence*, any vestige of a necessary link between marriage-procreation-sex, which effectively had been severed for heterosexuals with *Griswold* and *Eisenstadt*, ceased to exist for all. In its place, the Court found a fundamental right of individuals to form intimate relations with partners of their choosing, free from government burden.

I. United States v. Windsor, 2013

United States v. Windsor[159] reaffirmed that marriage is "a virtually exclusive province of the States."[160]

Ironically, given that the law at the center of the case was entitled the "Defense of Marriage Act" (DOMA),[161] *Windsor* did little to further the per se definition of marriage rights. Certainly, Congress, in enacting DOMA, had sought to define marriage.[162] Section 3 of the Act provided that "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."[163] But the definition did little to ground the concept of marriage rights in a broader tradition, in the manner that, for example, *Maynard* or *Loving* had.

At its core, *Windsor* presented a relatively simple fact pattern: A same-sex couple, Edith Windsor and Thea Spyer, were married in Canada in 2007, but resided in New York.[164] Spyer died in 2009 and left her estate to Windsor.[165] Although New York recognized the couple's Canadian marriage, DOMA's definition of marriage

[158] *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting). This was not the first time that Justice Scalia had rung this bell. Seven years earlier, in *Romer v. Evans*, the Court held a Colorado statute that singled-out homosexuals for state protection to be unconstitutional under the Equal Protection Clause. *See* Romer v. Evans, 517 U.S. 620, 635–36 (1996). In his dissent, Justice Scalia warned that by the same logic, individuals with "polygamous 'orientation'" could not be singled-out by statute. *See id.* at 648 (Scalia, J., dissenting). "The Court's disposition today suggests that these [anti-polygamy] provisions 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." *Id.*

[159] United States v. Windsor, 570 U.S. 744 (2013).

[160] *Id.* at 766 (quoting Sosna v. Iowa, 419 U.S. 393, 404 (1975)).

[161] *Windsor*, 570 U.S. at 750–51.

[162] *See id.*

[163] *Id.* at 752.

[164] *See id.* at 749–50.

[165] *See id.* at 750.

precluded the possibility of same-sex spouses for federal matters, and Windsor was forced to pay federal estate tax.[166] Windsor challenged the Act's constitutionality and won at the District Court and Court of Appeals level.[167] She won at the Supreme Court level as well, but the 5-4 decision was deeply divided.[168]

Windsor stands apart from the other holdings in the chain of marriage rights cases in that it represents an example of an impermissible intrusion of the federal government into an area normally fenced off for state control. The majority of cases, such as *Loving* or *Griswold*, ran to the contrary in that they involved state intrusion into federally protected constitutional rights of the individual. In the final analysis, *Windsor*'s contribution to the concept of marriage rights is not so much the delineation of a right of the individual, but rather the affirmation of the authority of the states in "defining and regulating the marital relation, subject to constitutional guarantees."[169] But where *Windsor* drew a line over which the federal government could not cross, it stopped short of establishing a constitutional right to same-sex marriage. That final step would have to wait for *Obergefell v. Hodges*.

J. Obergefell v. Hodges, 2015

In *Obergefell v. Hodges*,[170] the Court held that "the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty."[171]

In the wake of the *Lawrence* and *Windsor* rulings, advocates of same-sex marriage renewed their challenges to state marriage laws. Courts of Appeal for the Fourth, Seventh, Ninth, and Tenth circuits subsequently ruled state-law bans against same-sex marriages to be unconstitutional,[172] but a problem arose when the Court of Appeals for the Sixth Circuit, in a consolidated case entitled *DeBoer v.*

[166] *See id.* at 750–52, 753 (citing Windsor v. United States, 699 F.3d 169, 177–78 (2d Cir. 2012), *aff'd*, 570 U.S. 744 (2013)).
[167] *See Windsor*, 570 U.S. at 751–52.
[168] *See id.* at 749, 775, 778, 802.
[169] *Id.* at 769.
[170] Obergefell v. Hodges, 576 U.S. 644 (2015).
[171] *Id.* at 675.
[172] *See, e.g.*, Kitchen v. Herbert, 755 F.3d 1193, 1229–30 (10th Cir. 2014); Bostic v. Schaefer, 760 F.3d 352, 367 (4th Cir. 2014); Latta v. Otter, 771 F.3d 456, 464–65 (9th Cir. 2014); Baskin v. Bogan, 766 F.3d 648, 653, 672 (7th Cir. 2014).

Snyder,[173] upheld similar state bans in Kentucky, Michigan, Ohio, and Tennessee.[174] In reaching its holding in *DeBoer*, the Sixth Circuit found itself bound by the Supreme Court of Minnesota's ruling forty-four years earlier in *Baker v. Nelson*,[175] and declined to overturn the state laws.[176] With the Circuits split, the U.S. Supreme Court granted certiorari to resolve.

Obergefell was argued on April 28, 2015, and decided fifty-nine days later.[177] Whereas previous Court decisions had nibbled around the edges, in *Obergefell*, the Justices finally took a solid bite out of the line circumscribing marriage.[178] In sweeping language, Justice Kennedy delivered the opinion of the 5-4 majority:

> The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right

[173] DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom* Obergefell v. Hodges, 576 U.S. 644 (2015). The DeBoer case consolidated six separate cases, including *Obergefell v. Hodges*. *See id.*

[174] *See DeBoer*, 772 F.3d at 418. The Eighth Circuit also had upheld a state ban on same-sex marriage in 2006. *See* Citizens for Equal Prot. v. Bruning, 455 F.3d 859, 871 (8th Cir. 2006), *abrogated by Obergefell v. Hodges,* 576 U.S. 644 (2015)). Applying a rational-basis standard of review, the court ruled that a Nebraska constitutional amendment did not offend the Equal Protection Clause. *See id.* at 870–71.

[175] Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971). Baker presented a same-sex marriage challenge brought just four years after *Loving v. Virginia*, and the Minnesota Court had declined to extend Loving's protection to gay marriage, holding that in both common sense and constitutional sense, "there is a clear distinction between a marital restriction based merely upon race [in the sense of Loving] and one based upon the fundamental difference in sex." *Baker*, 191 N.W.2d at 187; *id.* (citing *Loving v. Virginia*, 388 U.S. 1 (1967)). The Plaintiff, Baker, appealed the holding to the U.S. Supreme Court, which rejected it for lack of a substantial federal question. *See* Baker v. Nelson, 409 U.S. 810 (1972). The Sixth Circuit Court of Appeals, in deciding *DeBoer*, determined that because the U.S. Supreme Court had neither overruled *Baker*, nor found a substantial federal question, the lower federal courts were not free to act. *See DeBoer*, 772 F.3d at 400 (first quoting *Baker*, 409 U.S. at 810; and then citing Hicks v. Miranda, 422 U.S. 332, 345 (1975)).

[176] *DeBoer*, 772 F.3d at 421.

[177] *See Obergefell*, 576 U.S. 644.

[178] The decision was not, however, without predictable friction. Justices Kennedy, Breyer, Ginsburg, Kagan, and Sotomayor formed the slim majority. *See id.* Chief Justice Roberts, and Justices Alito, Scalia, and Thomas dissented. *See id.* at 686 (Roberts, C.J., dissenting); *id.* at 736 (Alito, J., dissenting). Scalia, in particular, showed his contempt for the majority opinion, declaring it to be a "judicial Putsch," *id.* at 718 (Scalia, J., dissenting), whose "mummeries and straining-to-be-memorable passages," *id.* at 716, are "as pretentious [in their style] as [their] content is egotistic." *Id.* at 719. An official opinion full of "showy profundities [that] are often profoundly incoherent," *id.*, and "lacking even a thin veneer of law." *Id.* at 716.

> impose stigma and injury of the kind prohibited by our basic charter.[179]

Moreover, "[t]he fundamental liberties protected by [the Due Process] Clause . . . extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."[180] The Court then outlined four fundamental principles of marriage: (1) it is rooted in the concept of individual autonomy, (2) it supports the formation of enduring intimate two-person unions, (3) it promotes childrearing and procreation, and (4) it is a keystone of social order.[181]

The Court then tied the threads together into a single cord. "The analysis compels the conclusion . . . . that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples,"[182] and "[i]t follows that the Court also must hold — and it now does hold — that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage."[183]

III. THE CURRENT PICTURE OF MARRIAGE

The current state of marriage rights has been long in its growth and evolution. Justice Harlan, in his dissent in *Poe v. Ullman*, noted that the "liberty" protected by Due Process:

> [C]annot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints.[184]

[179] *Id.* at 670–71 (majority opinion).
[180] *Id.* at 663 (citing Duncan v. Louisiana, 391 U.S. 145, 147–49 (1968)).
[181] *Obergefell*, 576 U.S. at 665–69 (first citing Loving V NAME, 388 U.S. 1, 12 (1967); then citing Griswold v. Connecticut, 381 U.S. 479, 485 (1965); then citing Pierce v. Soc'y of Sisters, 268 U.S. 510, 1925); and then citing Maynard v. Hill, 125 U.S. 190, 211 (1888)).
[182] *Obergefell*, 576 U.S. at 665.
[183] *Id.* at 681.
[184] Poe v. Ullman, 367 U.S. 497, 543 (Harlan, J., dissenting) (citing Allgeyer v. Louisiana, 165 U.S. 578 (1897)).

So it is with the concept of marriage, now expanded to encompass a right to procreation and privacy and interpersonal intimacy.

With *Maynard* in 1888, the Court established marriage as a fundamental right.[185] Thirty-five years later, *Meyer*, used substantive due process to link marriage to the broader concept of the nuclear family and childrearing.[186] In 1942, *Skinner* used the Equal Protection Clause to refine the right to marriage and family by recognizing that without the ability to procreate, rights associated with family were meaningless.[187] In the 1960s the Court logically held that just as the state could not take away the right to procreate, neither could it burden the decision not to procreate.[188] *Griswold* and *Eisenstadt* effectively established a right, grounded in privacy, to enjoy marital relations separate from the intent to procreate,[189] and laid the groundwork for *Roe v. Wade* and *Lawrence*. In *Lawrence*, the Court drew upon the Due Process Clause and the right to privacy to extend the concept of marital relations to encompass a liberty right to intimacy between two individuals irrespective of marriage.[190] *Loving*, *Carey*, *Zablocki*, and *Turner v. Safley* drew a clear line around the right of men and women to marry that the state could not intrude upon.[191] *Obergefell* extended the right to interpersonal intimacy to all couples, regardless of sex and gender.[192]

Because these cases tended to be very fact-specific, it is easy to see superficial similarities but still not recognize the solid warp thread that weaves them together.[193] Analyses of these cases typically have focused on the interplay of the Equal Protection and the Due Process clauses on the facts at issue,[194] and there has been less appreciation

[185] *See* Maynard v. Hill, 125 U.S. 190, 210–11 (1888).
[186] *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (citing Slaughter-House Cases, 83 U.S. 36 (1872)).
[187] *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).
[188] *See* MURRAY, *supra* note 77, at 1064.
[189] *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (citing Stanley v. Georgia, 394 U.S. 577 (1969)); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (quoting NAACP v. Alabama, 377 U.S. 288, 307 (1964)).
[190] *See* Lawrence v. Texas, 539 U.S. 558, 567, 578 (2003).
[191] *See* Turner v. Safley, 482 U.S. 78, 96 (1987); Zablocki v. Redhail, 434 U.S. 374, 384 (1978); Carey v. Population Servs. Int'l, 431 U.S. 678, 684–85 (1977) (citing Loving v. Virginia, 388 U.S. 1, 12 (1967)).
[192] Obergefell v. Hodges, 576 U.S. 944, 675 (2015).
[193] As Laurence Tribe notes, "[i]t's always possible to persuade oneself that data points lying along a great arc are in fact just so many isolated points — to see the dots but not the path that passes through them." Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1936–37 (2004).
[194] *See, e.g.*, Matthew R. Grothouse, *Implicit in the Concept of Ordered Liberty: How* Obergefell v. Hodges *Illuminates the Modern Substantive Due Process Debate*, 49 J. MARSHALL L. REV.

for the pattern that emerges when the cases are examined when laid end-to-end.[195] Taken as a whole, there emerges a clear principle that the Government—with very few exceptions—cannot impose an absolute burden on the selection of an intimate partner.

From this perspective, *Obergefell v. Hodges* is the culmination of over 130 years of interlocked and progressive growth, but some see it for something much bigger. For some, it appears to be a radical departure from the traditional concept of marriage—historically grounded on a concept of the nuclear family—and a cracked, if not fully opened, door through which polygamy may finally enter the discussion. For this reason, a short review of how plural marriage has been dealt with in the United States is useful, particularly as it relates to the role that societal animus toward the Mormon Church has played.

IV. POLYGAMY AND ITS HISTORY IN U.S. LAW

The history of polygamy in the United States is closely tied to the development and westward expansion of the Mormon Church. Notwithstanding its prevalence among some cultures around the world, polygamy has never been widely practiced in Western Europe,[196] nor is it so today.[197] As a result, American law, grafted as it were from English rootstock, had little reason to deal with polygamy prior to the rise of Mormonism and the perceived threat engendered by Brigham Young's attempt to found the theocratic

1021, 1021 (2016); Pamela S. Karlan, *Colloquium: The Boundaries of Liberty after* Lawrence v. Texas*: Foreword: Loving* Lawrence*,* 102 MICH. L. REV. 1447, 1448–49 (2004).

[195] Tribe also sees a similar thread running through these cases, but one of a slightly different color. For Tribe, what binds these cases together is not Equal Protection or Due Process, but rather the "First Amendment's ban on government abridgements of 'speech' and 'peaceable . . . assembly,' taking those terms in their most capacious sense. For what . . . is government doing but abridging the freedoms of speech and peaceable assembly when it insists that the language of love remain platonic or be reserved for making babies (or when that is impossible, at least going through the standard baby-making motions)?" Tribe, *supra* note 193, at 1939–40.

[196] In England, the Parliament of King James passed the Polygamy Act in 1604 making polygamy a secular crime. JOHN WITTE, JR., THE WESTERN CASE FOR MONOGAMY OVER POLYGAMY 288 (2015). Despite passage of the Act, there is no evidence that polygamy was ever widely practiced.

[197] The trend is changing rapidly, in large part to the heavy influx of immigrants from Africa and the Middle East. *See, e.g.*, Paul Belien, *Polygamy All Over the Place*, BRUSSELS J. (Nov. 16, 2005), http://www.brusselsjournal.com/node/480 [https://perma.cc/WFN5-8RQC]; *France's Polygamy Problem*, DW (July 31, 2005), http://www.dw.com/en/frances-polygamy-problem/a-1664241 [https://perma.cc/LUY2-X2ZL]; *Many wives' tales*, ECONOMIST (May 6, 2010), http://www.economist.com/node/
16068972 [https://perma.cc/8SXA-CYQH].

State of Deseret in 1849.[198] For this reason, American courts' first exposure to the issue of polygamy came primarily through challenges from Mormons practicing polygamy as a religious directive.[199] As a consequence, the case or controversy brought before the court was, from the beginning, extensively conflated with the First Amendment's Free Exercise Clause, and it remains largely so even today, despite the fact that a challenge on due process grounds is likely to be more productive.

A. The Rise of the Latter-Day Saints and the Government's Response

In the late 1820s, at the height of the Second Great Awakening, a charismatic twenty-four-year-old western New York farmer had a religious encounter with an angel named Moroni.[200] The farmer, Joseph Smith, would go on to found a new religion, the Church of Jesus Christ of Latter-Day Saints (LDS)—more commonly known as Mormonism.[201] The LDS Church grew rapidly, though somewhat tumultuously, aided in both aspects by a public adoption of the practice of polygamy by the Church leadership.[202] Predictably, the Church's practice of "Celestial Marriage," which included the taking of multiple wives,[203] combined with a tendency of xenophobia common to upstart religious groups,[204] did little to ingratiate the Church to its non-LDS neighbors, and by June 27, 1844, Joseph Smith and his

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198 *See* Morrill Anti-Bigamy Act, ch. 126 1, 12 Stat. 501 (1862). While polygamy was relatively unknown to the early European colonists to the Americas, it had been practiced by some of the first peoples of North America. *See* Matthew L.M. Fletcher, *Same-Sex Marriage, Indian Tribes, and the Constitution*, 61 U. MIAMI L. REV. 53, 54 (2006) (noting that, despite its popularity in the past, "[m]ost, if not all, Indian tribes no longer recognize polygamous marriages . . .").

199 *See* Reynolds v. United States, 98 U.S. 145, 161, 167 (1879).

200 See *Testimony of the Prophet Joseph Smith*, CHURCH JESUS CHRIST LATTER-DAY SAINTS, https://www.churchofjesuschrist.org/study/scriptures/bofm/js?lang=eng [https://perma.cc/CT78-X37U].

201 Smith had more than one purported encounter with angels, his first occurring at age fourteen. *See* Joseph Smith, *Journal*, 1835–36, THE JOSEPH SMITH PAPERS, https://www.josephsmithpapers.org/paper-summary/journal-1835-1836/25, [https://perma.cc/9PTJ-6VNY]. Nor was his religious fervor an isolated event; so many religious revivals had "burned" through western New York State in the early 1800s that the area came to be known as the "Burned-over District." *See* WHITNEY R. CROSS, THE BURNED-OVER DISTRICT: THE SOCIAL AND INTELLECTUAL HISTORY OF ENTHUSIASTIC RELIGION IN WESTERN NEW YORK, 1800–1850 at 3 (1982).

202 *See* RICHARD S. VAN WAGONER, MORMON POLYGAMY: A HISTORY 85 (2d ed. 1989). In 1851, the Church's leader, Brigham Young, having succeeded Joseph Smith, publicly announced that he had taken multiple wives. See id. It would be made Church tenet the following year. *See id.* at 83.

203 *See id.* at 43.

204 *See* Phil Zuckerman, *Religion, Secularism, and Xenophobia*, PSYCHOL. TODAY (July 24, 2018), https://www.psychologytoday.com/us/blog/the-secular-life/201807/religion-secularism-and-xenophobia, [https://perma.cc/6WJY-A59G].

brother, Hyrum, had paid the price—having both been shot to death by an angry mob in Carthage, Illinois.[205] A brief struggle for the Church's leadership ensued but was finally resolved in favor of one of Smith's young apostles, Brigham Young, who two years later began moving the LDS faithful west, into what was then part of Mexico, but what would soon become the Territory of Utah.[206] There, in the isolation of the Great Basin, the Saints, as the LDS faithful had begun calling themselves, hoped to establish a theocratic kingdom free from the interference of the United States.[207]

In retrospect, the LDS plan for self-government was doomed from the beginning, but its demise certainly was hastened by events unfolding thousands of miles away in Washington, D.C. On May 30, 1854, just two years after the Church publicly recognized plural marriage as a central tenet of faith,[208] the Kansas-Nebraska Act was signed into law, nullifying the Missouri Compromise, and entangling Utah's hope for popular sovereignty with the divisive, and ultimately pernicious, issue of slavery.[209]

Nor were the Saints doing anything to help calm the troubled waters. In the months leading up to the 1856 presidential election, Brigham Young, now dual-hatted as both leader of the LDS Church and the Territorial Governor, had grown increasingly bellicose, threatening to declare the independence of Utah as a sovereign

[205] *See* Joseph Smith*, The Murder of the Mormon Prophet and Subsequent Trial*, ILL. HIST. & LINCOLN COLLECTIONS (Oct. 11, 2018), https://publish.illinois.edu/ihlc-blog/2018/10/11/joseph-smith-the-murder-of-the-mormon-prophet-and-subsequent-trial/ [https://perma.cc/23AJ-PEYV].

[206] *See Brigham Young*, NEW PERSP. ON WEST, https://www.pbs.org/weta/thewest/people/s_z/young.htm [https://perma.cc/7WUF-EVEM].

[207] VAN WAGONER, *supra* note 202, at 87.

[208] *See* Barbara Jones Brown*, Commentary: What the Media isn't Saying About the History of Mormon Polygamy in Mexico*, SALT LAKE TRIBUNE (Nov. 8, 2019, 7:22 PM), https://www.sltrib.com/religion/2019/11/09/commentary-what-media/ [https://perma.cc/G2ZN-58SJ].

[209] *See The Kansas-Nebraska Act*, U.S SENATE, https://www.senate.gov/artandhistory/history/minute/Kansas_Nebraska_Act.htm [https://perma.cc/B6DA-UWNP]; *see generally* THOMAS GOODRICH, WAR TO THE KNIFE: BLEEDING KANSAS, 1854–1861 (1988). The full extent of this entanglement can be seen in the platform built by the newly formed Republican Party in Philadelphia in June 1856. *See Republican Philadelphia*, U.S HISTORY, https://www.ushistory.org/gop/convention_1856.htm [https://perma.cc/P8CW-BYEF]. The first two planks were almost boilerplate paeans to the founding fathers; the third plank, however, was anything but routine. *See* THOMAS H. MCKEE, THE NATIONAL CONVENTIONS AND PLATFORMS OF ALL POLITICAL PARTIES, 1789 TO 1905, at 98 (1906). The Party, meeting in its first national convention, took clear aim at Young and his followers when it resolved that "[i]t is both the right and the duty of Congress to prohibit in the territories those twin relics of barbarism" — Mormon polygamy and southern slavery. *Id.*; *see* Kelly Elizabeth Phipps, *Marriage and Redemption: Mormon Polygamy in the Congressional Imagination, 1862-1887*, 95 VA. L. R. 435, 438 (2009).

nation.[210] This presented James Buchanan, who won the 1856 presidential election in a landslide over the Republican and Know-Nothing candidates,[211] with the need to take swift action, lest he risk a revolt within his own party. Shortly after swearing into office, he stripped Young of his governor's position and ordered federal judges into the Utah territory to assume control of the courts.[212] But it wasn't enough, and by December 1857, when the President sent his first State of the Union message to Congress, Buchanan also announced his intent to send 2,500 federal troops[213] to the Utah Territory to quell what he characterized as a state of "substantial rebellion",[214] and to "restore the supremacy of the Constitution."[215]

The Utah War,[216] as it came to be known,[217] proved to be nothing much of a war. It was characterized by stalemates and much maneuvering by both the U.S. forces and the Mormon militia, but ultimately there was little bloodshed, at least among the designated combatants.[218] By July 1858, the tensions had subsided, thanks largely to facial concessions by the LDS leadership,[219] and the problems posed by the inhabitants of the Utah Territory were soon

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[210] *See* DAVID L. BIGLER & WILL BAGLEY, THE MORMON REBELLION: AMERICA'S FIRST CIVIL WAR, 1857–1858, at 89–91 (2011).

[211] *See* Richard Pallardy, *United States Presidential Election of 1856*, BRITANNICA (October 28, 2019), https://www.britannica.com/event/United-States-presidential-election-of-1856 [https://perma.cc/8W35-M6KP].

[212] *See* Thomas G. Alexander, *Carpetbaggers, Reprobates, and Liars: Federal Judges and the Utah War (1857–58)*, 70 HISTORIAN 209, 209 (2008); BIGLER & BAGLEY, *supra* note 210, at 10.

[213] *See* Alexander, *supra* note 212, at 209. Twenty-five-hundred troops may seem inconsequential, especially in light of the fact that at that time the Utah Territory measured over 200,000 square miles, corresponding roughly to the area now organized as the states of Nevada and the antebellum military forces possessed by the United States at the time. *See id.* at 209, 218. The total actual strength of the U.S. Army in 1857 was reported as 15,918 men. *See id.* at 209.

[214] Alexander, *supra* note 212, at 209.

[215] VAN WAGONER, *supra* note 202, at 87.

[216] *See* Shayna M. Sigman, *Everything Lawyers Know About Polygamy is Wrong*, 16 CORNELL J. L. & PUB. POL'Y 101, 116 (2006). Buchanan ultimately almost doubled the 2500 troops he dispatched to Utah, despite the fact that he simultaneously found himself confronted with a Third Seminole War in the Florida wilderness, and the pre-war internecine hostilities that came to be called "Bleeding Kansas," which were then reaching their height. *See* H.R. REP. No. 35-2, 5–6 (1858).

[217] *See* BIGLER & BAGLEY, *supra* note 210, at 3. Sometimes referred to by the LDS community as "Buchanan's Blunder." VAN WAGONER, *supra* note 202, at 88.

[218] *See* BIGLER & BAGLEY, *supra* note 210, at 3. Among the civilian casualties were a group of Missouri and Arkansas settlers, known as the Baker-Fancher Party, that arrived at the wrong place at the wrong time. *See* SALLY DENTON, AMERICAN MASSACRE: THE TRAGEDY AT MOUNTAIN MEADOWS, SEPTEMBER 1857 xxi (2003). On September 11, 1857, Mormon militia killed over 120 of the party in what came to be known as the Mountain Meadows Massacre. *See id.* The fallout from these murders would influence how the government treated the LDS Church for years afterward. *See* DENTON *supra*, at 239.

[219] *See* BIGLER & BAGLEY, *supra* note 210, at 319.

drowned out by the opening cannon shots of the Civil War. But it would prove to be a short reprieve.

In the years leading up to the Civil War, an odd alliance had formed between the Utah Saints and the slave-holding sinners of the South.[220] Buchanan's brief military foray notwithstanding, organized federal actions against the LDS faithful largely had been held in check by a solid block of southern legislators who saw, in Brigham Young and his followers, kindred spirits in the struggle for States' Rights.[221] Following Lincoln's election as President in the fall of 1860, however, these slave states seceded, one by one,[222] leaving their erstwhile ally Utah at the mercy of an abolitionist Congress spoiling for a fight. It began, in 1862, when Vermont Representative Justin Morrill succeeded in pushing through the legislature an anti-bigamy law that would later come to be associated with his name.[223]

The Morrill Anti-Bigamy Act was unabashedly intended "to punish and prevent the Practice of Polygamy in the Territories of the United States and other Places . . . ."[224] The law specifically declared that any individuals residing in U.S. territories who engaged in plural marriage were guilty of the crime of bigamy.[225] And, just in case Brigham Young and his followers failed to understand who the Act really was directed against, Section 2 of the statute annulled all laws legalizing polygamy that had been enacted by the State of Deseret—the forerunner of the Utah Territory.[226] Section 3 went even further in its punishment: No religious or charitable organization in the

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[220] *See* Sigman, *supra* note 216, at 117–18. This de facto alliance explains the Republican Party's otherwise *non sequitur* linkage of slavery and polygamy as the "twin relics of barbarism." THOMAS HUDSON MCKEE, THE NATIONAL CONVENTIONS AND PLATFORMS OF ALL POLITICAL PARTIES 1789 TO 1905: CONVENTION, POPULAR, AND ELECTION VOTE 98 (6th ed. 1906).

[221] *See* Sigman, *supra* note 216, at 117–8. Though somewhat paradoxically, the alliance did not extend to agreement regarding the practice of slavery, which the Mormon Church disavowed. *See id.* at 117.

[222] *See id.* at 117–18.

[223] *See* Morrill Anti-Bigamy Act, ch. 126 1, 12 Stat. 501 (1862); *Morrill Anti-Bigamy Act of 1862* WASH. COUNTY HIST. SOC'Y, https://wchsutah.org/laws/morrill-anti-bigamy-act.php [https://perma.cc/GUS2-6MTB]. The Morrill Anti-Bigamy Act was signed by President Lincoln on July 8, 1862. *See id.* Morrill probably is best remembered, at least by non-Mormons, for another act bearing his name that had been signed six days earlier. *See* Morrill Land Grant Act, ch. 130, 12 Stat. 503 (current version at 7 U.S.C.S. § 301 (2020)). The Morrill Land Grant Act, provided for the creation of the extensive land-grant college system that transformed American higher education. *See id.*

[224] 12 Stat. 501 § 1.

[225] *See id.*

[226] *See id.* at § 2.

Territory of Utah could own or possess property in excess of $50,000.[227] Holdings in excess were to escheat to the United States.[228]

It was in this strained environment that a thirty-two-year-old polygamist named George Reynolds found himself in the summer of 1874.

B. Polygamy and the Supreme Court: The "Slippery Slope"

Precisely because marriage traditionally has been under the regulation of the states, the Supreme Court has had few occasions to opine on the status of plural marriage. Polygamy seldom implicates the same constitutional issues as did *Skinner* or *Griswold* or *Loving*. As a result, when the Court has had the rare occasion to address a plural-marriage issue, it usually has come in the form of a challenge to territorial authority or a claim involving the Free Exercise Clause of the First Amendment, or occasionally, both. Of the dozen or so cases to reach the highest court, only three or four have significantly defined the legal concept of polygamy, and it all began with the case against George Reynolds.

1. *Reynolds v. United States*,[229] 1878: *Reynolds v. United States* held that polygamy, even when religiously required, is not protected under the Free Exercise Clause of the First Amendment.[230]

The Morrill Act, notwithstanding LDS leadership, subscribing to the theory of natural law, never doubted that polygamy was legal, and they had little fear that a court would find otherwise.[231] For the LDS Saints, plural marriage was a commandment from God and a holy duty, sheltered under the mantle of the Free Exercise Clause of the First Amendment and immune from government interference.[232] But without a case to test their belief, polygamy would remain *mala prohibitum*, a situation that Brigham Young and the Church leadership found intolerable. Consequently, throughout the summer of 1874, the U.S. Attorney in Salt Lake City, who also sought judicial

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[227] *See id.*

[228] *See id.* at § 3.

[229] *See* Reynolds v. United States, 98 U.S. 145, 145 (1878).

[230] *See id.* at 166–67.

[231] *See* GEORGE Q. CANNON, A REVIEW OF THE DECISION OF THE SUPREME COURT OF THE UNITED STATES, IN THE CASE OF GEO. REYNOLDS VS. THE UNITED STATES 7 (1879). At trial, Reynolds' lawyers argued the distinction between *mala in se* and *mala prohibita*. *See* Nathan B. Oman, *Natural Law and the Rhetoric of Empire:* Reynolds v. United States*, Polygamy, and Imperialism*, 88 WASH. U. L. REV. 661, 670 (2011). Thuggism and sutteeism, alluded to by the Court, are examples of the former; polygamy the latter. *See* CANNON, *supra*, at 33.

[232] *See Reynolds*, 98 U.S. at 161.

clarity on the matter, worked with Church leadership to identify a suitable test case.[233] The search resulted in George Reynolds, personal secretary to Brigham Young, being stopped on the street one summer day by a Church official who told him that he had been chosen for a most special task.[234]

Reynolds was indicted under the Morrill Anti-Bigamy Act in October 1874 and convicted—a verdict not overly surprising given that he admitted to his plural marriages at trial and his second wife, Amelia Jane Schofield, readily confirmed as much from the witness stand.[235] The "conviction[, however,] was overturned by the territorial supreme court on the grounds that the jury was improperly constituted."[236] At the subsequent retrial, Reynolds was again convicted and sentenced to two years at hard labor,[237] setting up a review by the U.S. Supreme Court.

Reynolds was argued during the Court's October term of 1878, and despite facing several weighty issues raised in the complaint,[238] the Justices made relatively short work of the central one, finding that the Morrill Anti-Bigamy Act was constitutional as applied to "all those residing in the Territories."[239] The Court wrote as if its reasoning hardly required stating, but Chief Justice Waite stated it

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[233] *See* James L. Clayton, *The Supreme Court, Polygamy and the Enforcement of Morals in Nineteenth Century America: An Analysis of* Reynolds v. United States, 12 DIALOGUE 46, 49 (1979).

[234] *See id.*

[235] *See id.*; *see also* Martha M. Ertman, R*ace Treason: The Untold Story of America's Ban on Polygamy*, 19 COLUM. J. GENDER & L. 287, 301 (2010) (stating Reynolds was tried under the Morrill Act).

[236] Clayton, *supra* note 233, at 49.

[237] *See id.*

[238] *See id.* at 153 (indicating that there are six different issues before the Court in this case).

[239] *Id.* at 166. The *Reynolds* case was the first opportunity for the Supreme Court to address the Free Exercise Clause of the First Amendment, but it also was the first case to address the forfeiture-by-wrongdoing exception to the Confrontation Clause of the Sixth Amendment. *See Reynolds*, 98 U.S. 145. Reynolds' second wife, Amelia Jane Schofield, whose testimony had been crucial in the first trial, could not be located at the subsequent trial — likely as a result of George Reynolds influence. *See id.* at 158, 159–60. The trial court, however, allowed her testimony from the first trial to be read into evidence at the second trial. *See id.* at 160. Reynolds objected, citing his right to confrontation. *See id.* at 145. The U.S. Supreme Court held that her testimony from the first trial was admissible. *See id.* at 160–61.

> The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege.

Id. at 158.

anyway, "[p]olygamy 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."[240] The Court then drew a legal distinction between thoughts and actions that is still cited a hundred years later.[241] To allow the practice of polygamy to seek shelter behind the First Amendment, "would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[242] A man may not excuse practices contrary to law simply by invoking the name of religion, for 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. Government could exist only in name under such circumstances."[243] In other words, a person can believe in polygamy, just not practice it.

Reynolds remains good law, in the sense that it has never been reversed, and the principle it articulated—that the government can permissibly burden religious practices (but not thoughts) to achieve legitimate state ends[244]—is one in "which [the Court] ha[s] adhered ever since."[245]

2. *Murphy v. Ramsey*,[246] 1885, and *Davis v. Beason*,[247] 1890: *Davis v. Beason* affirmed that state and federal laws criminalizing polygamy did not impermissibly burden the Free Exercise Clause of the First Amendment.[248] Its enduring significance is in upholding the

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240 *Id.* at 164.

241 *See, e.g.*, Emp't Div. v. Smith, 494 U.S. 872, 872 (1990) (citing *Reynolds*, 98 U.S. at 166–67) (holding that the Free Exercise "Clause does not relieve an individual of the obligation to comply with a law that incidentally forbids (or requires) the performance of an act that his religious belief requires").

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

243 *Id.* at 167.

244 *Id.* at 166–67.

245 *Smith*, 494 U.S. at 882. *See, e.g.*, Cleveland v. United States, 329 U.S. 14, 16, 18–19 (1946) (citing *Reynolds*, 98 U.S. at 164) (finding that a polygamous man could be charged under the Mann Act, Justice Douglas wrote that "[t]he establishment or maintenance of polygamous households is a notorious example of promiscuity" and can be banned under *Reynolds*). *But see* Wisconsin v. Yoder, 406 U.S. 205, 234 (1972) (finding that the Amish had a First Amendment right to withhold their children from public school after the eighth grade). "What we do today . . . opens the way to give organized religion a broader base . . . and it even promises that in time *Reynolds* will be overruled." *Id.* at 247. (Douglas J., dissenting).

246 Murphy v. Ramsey, 114 U.S. 15 (1885).

247 Davis v. Beason, 133 U.S. 333, 333 (1890), *overruled* by Romer v. Evans, 517 U.S. 620 (1996).

248 *See id.* at 342–43, 345, 346–47; *see also Free Exercise Clause*, BLACK'S LAW DICTIONARY (11th ed. 2019).

religious thought/practice dichotomy of *Reynolds* and in forcing doctrinal change in the LDS Church.

The *Reynolds* case served to highlight to Congress the inherent deficiency of the Morrill Act. Despite Reynolds being convicted—twice[249]—the case hadn't gone as smoothly as expected for either side. At the first trial, a confident and cooperative George Reynolds supplied the names of fifteen witnesses who could attest to his polygamy,[250] but to the frustration of all who wanted the trial to serve as a test case—not the least of whom was Reynolds himself—none of the witnesses wanted to implicate themselves and thus experienced the temporary inability to recall anything about a second marriage or a second wife.[251] It seemed that while the Morrill Anti-Bigamy Act could outlaw plural marriages, it couldn't compel witnesses to remember anything of importance, and without witnesses there would be no easy convictions, and without easy convictions, there would be no deterring the "odious" practice.

In early 1882 Congress, angered by the fact that polygamy was continuing to be practiced in the Western territories despite passage of the Morrill Act,[252] enacted the more stringent Edmunds Anti-Polygamy Act.[253] The Act, authored by another Vermonter, Senator George Edmunds,[254] addressed the pragmatic deficiency of the earlier Morrill Act, namely the difficulty in compelling the witnesses necessary to prove polygamy to testify. To overcome this, the Act made it a crime for "any male person, in a Territory or other place over which the United States have exclusive jurisdiction . . . [to] cohabit[] with more than one woman."[255] The Act went further,

[249] *See* James L. Clayton, *The Supreme Court, Polygamy and the Enforcement of Morals in Nineteenth Century America: An Analysis of* Reynolds v. United States*, in* 8 THE SUPREME COURT IN AMERICAN SOCIETY, CONSCIENCE AND BELIEF: THE SUPREME COURT AND RELIGION 58, 61 (Kermit L. Hall ed., 2000).

[250] *See id.* Among those called by Reynolds as witnesses were his parents and the Mayor of Salt Lake City, who had performed the ceremony for his second marriage just a few weeks before the trial. *See id.*

[251] *See id.*

[252] *See* Kelly Elizabeth Phipps, *Marriage and Redemption: Mormon Polygamy in the Congressional Imagination, 1862-1887*, 95 VA. L. REV. 435, 451 (2009). Phipps argues that the Northern view of polygamy can only be understood within the larger framework of Reconstruction and congressional debate on how to treat the newly re-admitted southern states. *See id.,* at 439–40; Sigman, *supra* note 216, at 127; *see also* Edmunds Act, ch. 47, 22 Stat. 30 (1882).

[253] *See* 22 Stat. 30; *see also* Sigman, *supra* note 216, at 127.

[254] *See* Phipps, *supra* note 252, at 480.

[255] Edmunds Act, ch. 47, 22 Stat. 31 § 2 (1882). Cohabitation is demonstrably easier to prove than polygamy. By criminalizing cohabitation, the law removed the government's requirement to prove that multiple marriage ceremonies had taken place and eliminated the need for testimony by wives or clergy who had themselves taken part in the marriages. The territories,

however, by prohibiting anyone practicing polygamy, or even having membership in a group advocating it, from voting, serving on a jury, or holding public office.[256] This had the effect of precluding polygamists from appearing before sympathetic judges or juries of their like-minded polygamist peers and eliminated the real possibility of jury nullification.

The first significant challenge to the newly enacted law came in 1885 when Jesse Murphy, and six others, were denied the right to vote in the Utah Territory on account of their polygamous cohabitations.[257] The Court ruled in *Murphy v. Ramsey* that "[t]he people of the United States, as sovereign owners of the National Territories, have supreme power over them and their inhabitants."[258] Accordingly, the government of the United States has the power to determine who will participate in the election of officers.[259] Having clarified the procedural issue of who controls voting rights, Justice Matthews then went on to comment on the concept of marriage:

> For certainly 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 coordinate [s]tates 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. And to this end, no means are more directly and immediately suitable than those provided by this act, which endeavors to withdraw all

including Utah, quickly adopted laws compliant with the Act. The first person convicted of polygamy under the new law was Rudger Clawson. Clawson v. United States, 113 U.S. 143 (1885). He appealed his conviction to both the territorial Supreme Court and the U.S. Supreme Court on the grounds that the statute violated the Free Exercise Clause of the First Amendment. *See id.* at 147. The Courts denied the appeals and Clawson was imprisoned for more than three years before receiving a pardon from President Cleveland. *See* United States v. Clawson, 5 P. 689, 689 (Utah 1885); Rudger Clawson, *Rudger Clawson papers, 1870–1943*, ARCHIVES WEST, http://archiveswest.orbiscascade.org/ark:/80444/xv59097 [https://perma.cc/MWN4-VATY].

256 *See* Phipps, *supra* note 252, at 439.

257 *See* Murphy v. Ramsey, 114 U.S. 15, 35 (1885).

258 *Id.* at 44.

259 *See id.*

> political influence from those who are practically hostile to its attainment.[260]

Four years later, the Edmunds Act was again challenged, this time in Idaho. In 1863 the Idaho Territory split off from what had been the Oregon Territory, and it soon became a refuge for polygamist Mormons fleeing the increasing scrutiny that the Utah Territory had come under following the passage of the Morrill Act.[261] When the Edmunds Act was passed in 1882, the Idaho Territorial Legislature quickly enacted implementing statutes to bring it into compliance, including a *Test Oath Statute* that required voters to swear under oath that they were not polygamists, that they did not belong to any organization that taught or required polygamy, and that they did not themselves advocate polygamy.[262] The penalty for false swearing was fine or imprisonment.[263]

In April 1889, Samuel Davis, a resident of Oneida County, Idaho, was indicted under the Test Oath statute for giving a false oath, namely that he swore that he did not belong to any organization that espoused the practice of polygamy while at that time being a member of the LDS Church.[264] Convicted, Davis immediately filed for a writ of *habeas corpus* with the U.S. Supreme Court.[265] At the time, however, Idaho had its sights set on statehood, and the Republicans, who had swept the 1888 national elections and now controlled both Houses of Congress and the White House, remained uneasy about the spread of polygamy in the West.[266] The outcome of the case, filed as *Davis v. Beason*, ultimately would have much to do with Idaho's future.[267]

The *Davis* Court's ruling is long on polemic and short on rationale. Given that they were hearing a *habeas corpus* appeal, the Justices confined themselves to consideration of "whether, these allegations being taken as true, an offense was committed of which the territorial

[260] *Id.* at 45.

[261] Merle W. Wells, *The Creation of the Territory of Idaho*, 40 PAC. NORTHWEST Q. 106, 107, 119–20 (1949); *see* Morrill Anti-Bigamy Act, ch. 126 1, 12 Stat. 501 § 2 (1862) (disproving and annulling any ordinances of the provisional territory of Utah's government "which establish[ed], support[ed], maintain[ed], shield[ed], or countenance[d] polygamy").

[262] *See* Dennis C. Colson, *Idaho's Founders and Their Mormon Test Oath,* 50 ADVOC. 11, 11 (2007).

[263] *See id.*

[264] *See* Davis v. Beason, 133 U.S. 333, 334–35 (1890), *overruled* by Romer v. Evans, 517 U.S. 620 (1996).

[265] *See id.*

[266] *See* Colson, *supra* note 262, at 12.

[267] *See id.*

court had jurisdiction to try the defendant. And on this point there can be no serious discussion or difference of opinion."[268] But the Court wasn't finished, and it took the opportunity to comment on the fundamental nature of marriage by quoting Justice Matthews' passage in *Murphy*, that the legislation under review was "wholesome and necessary."[269] But Justice Field went even further and left no doubt as to the Court's real opinion of polygamy.

> Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. They are crimes by the laws of the United States, and they are crimes by the laws of Idaho. They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman and to debase man. Few crimes are more pernicious to the best interests of society 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.[270]

In fact, for Justice Field, who lumped plural marriage into the same hell-in-a-handbasket category as "promiscuous intercourse of the sexes" and "human sacrifices," any attempt to even consider polygamy "a tenet of religion is to offend the common sense of mankind."[271] Mormonism, the Justice wrote, is not a religion, but rather is a "cultus or form of worship of a particular sect" that is plainly distinguishable from religion.[272] And as such, it deserves no protection under the Constitution. Echoing the same sentiment that had been expressed in *Reynolds* twelve years earlier, the Court declared that the First Amendment:

> [W]as never intended or supposed . . . [to] be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society . . . . 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.[273]

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[268] *Davis*, 133 U.S. at 341.
[269] *Id.* at 344 (quoting Murphy v. Ramsey, 114 U.S. 15, 45 (1885)).
[270] *Davis*, 133 U.S. at 341.
[271] *Id.* at 342, 343.
[272] *Id.* at 342.
[273] *Id.* at 342–43.

Davis v. Beason was decided in the territory's favor on February 3, 1890;[274] 150 days later Idaho was admitted into the Union.[275]

3. *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*,[276] 1890: *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States* held that Congress could dissolve a Church in a U.S. territory and seize its assets.[277] As with *Davis v. Beason*, the enduring significance of the case is in upholding *Reynolds* and in forcing doctrinal change in the LDS Church.

Late Corp. is a relatively simple case wrapped up in a confusing narrative of details involving asset transfer and assignment.[278] It was decided only 105 days after *Davis*.[279]

Five years after passage of the Edmunds Anti-Polygamy Act, Congress passed the even more draconian Edmunds-Tucker Act, which retained all the punitive features of the original Morrill Act and the 1882 Edmunds Act, but had the additional effect of annulling the LDS Church's corporate charter.[280] Shortly after its passage, the U.S. Attorney General was instructed to declare forfeited and escheat to the United States the real estate and property of the LDS Church.[281] Accordingly, the attorney general then filed an action with the Supreme Court of the Territory of Utah to have a receiver appointed to administer assets, and the court did so.[282] In response, the Church, as well as some of its members acting separately, filed an appeal, and the U.S. Supreme Court took the case for adjudication.[283]

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[274] *See id.* at 333, 348.
[275] *See* Colson, *supra* note 262, at 12.
[276] Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890).
[277] *See id.* at 42, 44, 46, 47, 63–64.
[278] *See* EDWIN BROWN FIRMAGE & RICHARD COLLIN MANGRUM, ZION IN THE COURTS: A LEGAL HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, 1830-1900 at 252–53 (1988). LDS officials, anticipating passage of the Edmunds-Tucker Act, had begun shifting ownership of Church property to individuals in order to hide it and protect it from confiscation. *See id.*
[279] *See Latter-Day Saints*, 136 U.S. at 1 (deciding case on May 19, 1890); *see also Davis*, 133 U.S. at 333 (deciding case on February 3, 1890).
[280] *See* Act of Feb. 19, 1887, ch. 397, 24 Stat. 635 § 17.
[281] *See Latter-Day Saints*, 136 U.S. at 8. The Temple Square property in downtown Salt Lake City, which was deemed to be exclusively for public worship, was exempted from escheat. *See id.* at 8. The cumbersome name of the case stemmed from the fact that the Edmunds-Tucker Act had annulled the church's corporate charter, requiring the resulting receivership action be brought against "the late corporation known and claiming to exist as the Church of Jesus Christ of Latter-Day Saints." *Id.*
[282] *See id.* at 8, 10.
[283] *See id.* at 32.

The Court approached the case in a stepwise fashion. First, the Justices established that Congress had the authority to repeal the Church's corporate charter. Without direct reference, the Court relied upon a principle that it had articulated thirty-four years earlier in its *Dred Scott*[284] decision, namely that the power to acquire territory includes all powers necessary to administer the territory.[285] Then, quoting from its earlier holding in *Murphy v. Ramsey*, the Court reiterated that "'[i]t has passed beyond the stage of controversy into final judgment. The people of the United States as sovereign owners of the national Territories, have supreme power over them and their inhabitants.'"[286]

With that prerequisite established, the Justices next addressed whether Congress had the power to seize the property of the Church. The 6-3 majority[287] found that the answer flowed naturally from trust law:

> Where a charitable corporation is dissolved, and no private donor, or founder, appears to be entitled to its real estate, (its personal property not being subject to such reclamation,) the government, or sovereign authority, as the chief and common guardian of the State . . . necessarily has the disposition of the funds of such corporation . . . .[288]

In other words, it followed that once the Church was dissolved, its assets devolved to the relevant level of government, in this case the United States, to administer in trust.

With the pragmatic aspects of the case addressed the Court as it had done previously in *Murphy* and *Davis*,[289] did not miss the chance to voice its disapproval of plural marriage. The Church's "pretense for this obstinate course is, that their belief in the practice of polygamy, or in the right to indulge in it, is a religious belief, and, therefore, under the protection of the constitutional guaranty of religious freedom."[290] But to Justice Bradley, writing for the majority,

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[284] *See* Scott v. Sandford, 60 U.S. 393, 448 (1857).
[285] *See Latter-Day Saints*, 136 U.S. at 42.
[286] *Id.* at 44 (quoting Murphy v. Ramsey, 114 U.S. 15, 44 (1885)).
[287] *See Latter-Day Saints*, 136 U.S. at 66 (Fuller, J., dissenting).
[288] *Id.* at 48 (majority opinion). The confiscated property was to be applied to public and charitable purposes, such as schools. *See id.* at 65. *Latter-Day Saints* remains a common citation for an early application of the *cy-pres* doctrine of trust administration. *See id.*
[289] *See* Davis v. Beason, 133 U.S. 333, 341–42 (1890), *overruled* by Romer v. Evans, 517 U.S. 620 (1996); *Murphy*, 114 U.S. at 45.
[290] *Latter-Day Saints*, 136 U.S. at 49.

this view is misguided and "altogether a sophistical plea."[291] Then the Court showed exactly how slippery it viewed the slope and why it was reluctant to take that step:

> No doubt the Thugs of India imagined that their belief in the right of assassination was a religious belief; but their thinking so did not make it so. The practice of suttee by the Hindu widows may have sprung from a supposed religious conviction. The offering of human sacrifices by our own ancestors in Britain was no doubt sanctioned by an equally conscientious impulse. But no one, on that account, would hesitate to brand these practices, now, as crimes against society, and obnoxious to condemnation and punishment by the civil authority.
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> The State has a perfect right to prohibit polygamy, and all other open offences against the enlightened sentiment of mankind, notwithstanding the pretense of religious conviction . . . .[292]

Whereas *Reynolds* had been a metaphorical body shot, the combined effect of *Davis* and *Late Corporation* was no less than a kill-shot. *Reynolds* would imprison; *Davis* would disenfranchise; *Late Corporation* would impoverish.

One hundred twenty-six days after the Court announced its holding in *Late Corporation*, LDS President Wilford Woodruff, after "struggling all night with the Lord," issued what came to be known as the "1890 Manifesto."[293] In it, Woodruff and the LDS Church capitulated:

> Inasmuch as laws have been enacted by Congress forbidding plural marriages, which laws have been pronounced constitutional by the court of last resort, I hereby declare my intention to submit to those laws, and to use my influence with

[291] *Id.* at 49.
[292] *Id.* at 49–50.
[293] VAN WAGONER, *supra* note 202, at 139; Edward Leo Lyman, *Manifesto (Plural Marriage)*, UTAH HIST. ENCYCLOPEDIA, https://www.uen.org/utah_history_encyclopedia/m/MANIFESTO_PLURAL_MARRIAGE.shtml [https://perma.cc/GU77-3VHB]. President Woodruff likely also spent some of the night struggling with the Church bookkeepers. Over $3 million worth of Church property (almost $87 million in 2020 dollars) was at stake. *Latter-Day Saints*, 136 U.S. at 9.

> the members of the Church over which I preside to have them do likewise.[294]

With the publication of Woodruff's Manifesto, polygamy ceased to be a recognized tenet of the Latter-Day Saints, and five years later, the people of the Territory of Utah would be directed by Congress to draft a constitution that included a provision ensuring religious freedom.[295] On its face, the constitutional provision that resulted is not unusual: "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 . . . ."[296] It is the last eight words tacked on to the end of the provision, however, that set it apart: "[b]ut polygamous or plural marriages are forever prohibited."[297]

The effect of the Church's reversal on the issue of polygamy was immediate. "[H]aving defeated the Mormons in the courts, federal politicians quickly extended the glad hand of political fellowship,"[298] and on January 4, 1896, Utah entered the Union as the 45th state.[299]

The struggle was not over, of course. Public statements notwithstanding, members of the Church continued to practice plural marriage, and LDS leadership continued to perform the marriage ceremonies.[300] The matter would continue to simmer, but not boil, at least until 1903, when Reed Smoot, one of the LDS Church's Quorum of Twelve Apostles, was elected to the United States Senate.[301] Non-

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[294] *Official Declaration 1*, CHURCH JESUS CHRIST LATTER-DAY SAINTS, https://www.churchofjesuschrist.org/study/scriptures/dc-testament/od/1?lang=eng&clang=eng [https://perma.cc/YZ6N-LHT9].

[295] *See* UTAH CONST. art. III, § 1; *The Mormon Church Officially Renounces Polygamy*, HIST., https://www.history.com/this-day-in-history/the-mormon-church-officially-renounces-polygamy [https://perma.cc/7AKV-6B9W]; David Roberts, *Brink of War*, SMITHSONIAN MAG. (June 2008), https://www.smithsonianmag.com/history/the-brink-of-war-48447228/ [https://perma.cc/WRA8-R8FA].

[296] UTAH CONST. art. III, § 1.

[297] UTAH CONST. art. III, § 1 (1896). The people of Utah were not given much of a choice in the matter. The Utah Enabling Act, 28 STAT. 107 § 3, passed by Congress on July 16, 1894, required that the territory adopt a constitution specifying "[t]hat polygamous or plural marriages are forever prohibited." Utah Enabling Act, ch. 138, 28 Stat. 107 § 3. The amendment sometimes is referred to as the "Irrevocable Ordinance." *Id.*

[298] JILL NORGREN & SERENA NANDA, AMERICAN CULTURAL PLURALISM AND LAW 108 (2d ed. 1996).

[299] Bonnie K. Goodman, *OTD in History… January 4, 1896, Utah is Admitted as the 45th State of the Union*, MEDIUM (Jan. 4, 2019), https://medium.com/@BonnieKGoodman/otd-in-history-january-4-1896-utah-is-admitted-as-the-45th-state-of-the-union-b5d0b12b2dac [https://perma.cc/HB5U-Y749].

[300] *See* VAN WAGONER, *supra* note 202, at 156–57.

[301] *See* KATHLEEN FLAKE, THE POLITICS OF AMERICAN RELIGIOUS IDENTITY: THE SEATING OF SENATOR REED SMOOT, MORMON APOSTLE 12 (2004).

LDS public opposition to his election was immediate and loud, and led to the Senate refusing his credentials until Smoot's position on polygamous marriage could be explored fully.[302] The resulting "Smoot Hearing" lasted off and on from January 1904 until February 1907, and the first witness called by the investigating committee, LDS President, Joseph F. Smith, appeared to confirm the public's concerns: President Smith himself had five wives.[303] Smith's revelation to the Senate committee, and the public spectacle created by the Smoot Hearing, resulted in the Church quickly releasing a second Manifesto on April 7, 1904.[304] In it, President Smith declared "[i]f any officer or member of the church shall assume to solemnize or enter into any such [polygamous] marriage he will be deemed in transgression against the church, and will be liable to be dealt with according to the rules and regulations thereof and excommunicated therefrom."[305]

The second Manifesto had its desired calming effect. Public and congressional concern slowly dissipated,[306] and Reed Smoot was allowed a seat as Utah's senator—a position he would hold for the next thirty years.[307] The Church had turned a chapter in its evolution, and "America moved on, happy to forget about the Latter-Day Saints and, if reminded, to consider them merely peculiar, not dangerous."[308]

C. Polygamy in the Post-Manifesto Era

While the second Manifesto damped public concerns about plural marriage, the LDS practice of polygamy still did not stop simply because the Church leadership now publicly disavowed it; rather, it was driven farther underground, to become a rallying point for individuals who splintered off from the parent Church to form what came to be called "fundamentalist Mormonism."[309] These splinter

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[302] *See* FLAKE, *supra* note 301, at 34–35; VAN WAGONER, *supra* note 202, at 161.
[303] *See* VAN WAGONER, *supra* note 202, at 164.
[304] *See id.* at 168.
[305] VAN WAGONER, *supra* note 202, at 168.
[306] *See* FLAKE, *supra* note 301, at 159.
[307] *See* FLAKE, *supra* note 301, at 159, 169.
[308] FLAKE, *supra* note 301, at 159.
[309] *See Fundamentalist Church of Jesus Christ of Latter-Day Saints*, SPLC SOUTHERN POVERTY L. CTR., https://www.splcenter.org/fighting-hate/extremist-files/group/fundamentalist-church-jesus-christ-latter-day-saints [https://perma.cc/86EF-LLPL]. The largest of the splinter groups is organized as the Fundamentalist Church of Jesus Christ of Latter-Day Saints (FLDS), centered in the twin communities of Hildale, Utah, and Colorado City, Arizona. *See id.* The number of adherents is unknown; however, the Southern Poverty Law Center estimates FLDS membership at approximately 10,000. *See id.*

groups remained dedicated to practicing the "Principle," as plural marriage is known to the faithful,[310] and the relatively few polygamy cases to reach the courts in the last several decades have originated primarily from these groups. Several of these cases serve to illustrate the current relationship between polygamy and the law.

1. *Potter v. Murray City*,[311] 1985: Royston Potter, a police officer in Murray City, Utah, was fired from his job after the city learned that he was in a polygamous marriage.[312] The city took the position that Potter's marriages invalidated his pledge to obey the Utah State Constitution, which includes the "Irrevocable Ordinance" prohibiting plural marriage.[313] Potter appealed his dismissal on the grounds that the city violated his right to Free Exercise and his right of privacy, newly affirmed by *Roe v. Wade*.[314] In *Potter v. Murray City*, the Tenth Circuit Court of Appeals disagreed, holding that *Reynolds* still controlled on the matter of polygamy, and because "[m]onogamy is inextricably woven into the fabric of our society. . . . [And] is the bedrock upon which our culture is built[,]" the state has "a compelling interest, in upholding and enforcing its ban on plural marriage to protect the monogamous marriage relationship."[315] As to Potter's argument for privacy, the court found "no authority for extending the constitutional right of privacy so far that it would protect polygamous marriages."[316]

The U.S. Supreme Court denied Potter's petition for writ of certiorari.[317]

2. *State v. Green*,[318] 2004: In 2002, Thomas Green, a Utah polygamist of some notoriety,[319] was convicted on four counts of

[310] *See e.g.*, FLAKE *supra* note 301, at 187 n.24, 187 n.27.
[311] Potter v. Murray City, 760 F.2d 1065, 1065 (10th Cir. 1985).
[312] *See id.* at 1067.
[313] *See id.*; *see also* UTAH CONST. art. III, § 1 ("[P]olygamous or plural marriages are forever prohibited.").
[314] *Potter*, 760 F.2d at 1067; *Cf. id.* at 1070 n.9 (first citing Roe v. Wade, 410 U.S. 113, 170–71 (1973); then citing Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965); and then citing Doe v. Duling, 603 F. Supp 960, 965 (E.D. Va. 1985)).
[315] *Potter*, 760 F.2d at 1070.
[316] *See id.*
[317] *See id.*, *cert. denied*, 474 U.S. 849, 849 (1985).
[318] State v. Green, 99 P.3d 820, 820 (Utah 2004).
[319] *See id.* at 823. Green was not a member of the Church of Christ of Latter-Day Saints though he subscribed to the tenets of the early Church. *Tom Green, Polygamist coverage*, CHURCH JESUS CHRIST LATTER-DAY SAINTS (Sept. 5, 2002), https://newsroom.churchofjesuschrist.org/ldsnewsroom/eng/commentary/tom-green-polygamist-coverage [https://perma.cc/8NE3-7LYY]. He was excommunicated from the LDS in the 1980s. *See id.*

bigamy resulting from his simultaneous cohabitation with several women.[320]

Green appealed his conviction the year following the *Lawrence* decision, and despite the Court having shown in that case a willingness to entertain a substantive Due Process challenge more favorably,[321] Green still chose to ground his argument largely on the familiar basis of a Free Exercise Clause violation.[322] The Utah Court of Appeals quickly certified that hot potato to the Supreme Court of Utah, and in *State v. Green,* Utah's high court made short work of the central question, noting that "Green is not the first polygamist to launch an attack on the constitutionality of a law burdening the practice of polygamy," and reminded all that the U.S. Supreme Court had reviewed the practice in *Reynolds*, "found it to be socially undesirable, and upheld Reynolds' bigamy conviction."[323] The Utah Court recognized that "*Reynolds* was decided over a century ago and may be antiquated in its wording and analysis. . . . [n]evertheless, the Supreme Court has never explicitly overruled the decision."[324]

The Utah Justices also acknowledged that there are more recent standards that are applied to Free Exercise challenges, notably *Employment Division, Department of Human Resources v. Smith*[325] and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*[326]—but noted that both of these cases relied on the *Reynolds* holding.[327] Accordingly, the Justices found that Utah's bigamy law would survive a challenge even if these more-recent standards were applied,[328] and held that the "statute is operationally, as well as facially, neutral."[329]

3. *State of Utah v. Holm*,[330] 2006: In *State of Utah v. Holm*, the Utah Court was asked to review Rodney Holm's felony convictions

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[320] *Green*, 99 P.3d at 822–23, 823. The Utah bigamy statute incorporated the cohabitation clause from the original Edmunds Act: "[a] person is guilty of bigamy when, knowing he has a husband or wife or knowing the other person has a husband or wife, the person purports to marry another person or cohabits with another person." UTAH CODE ANN. § 76-7-101(1) (West 2003).

[321] *See* Lawrence v. Texas, 539 U.S. 558, 575, 577–78 (2003).

[322] *See Green*, 99 P.3d at 822.

[323] *Id.* at 825 (citing Reynolds v. United States, 98 U.S. 145,168 (1879)).

[324] *Green*, 99 P.3d at 825.

[325] Emp't Div., Dep't of Human Res. Of Or. v. Smith, 494 U.S. 872 (1990).

[326] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

[327] *See Green*, 99 P.3d at 825 (citing *Church of the Lukumi Babalu Aye*, 508 U.S. at 535; *Smith*, 494 U.S. at 878–79).

[328] *See Green*, 99 P.3d at 826.

[329] *Id.* at 828.

[330] State v. Holm, 137 P.3d 726 (Utah 2006).

"for bigamy and unlawful sexual contact with a minor."[331] Holm based his appeal on U.S. Supreme Court's holding in *Lawrence,* decided a month before Holm's first trial, which he believed invalidated the Utah statute on plural marriage.[332] Specifically, Holm argued that as a member of the Fundamentalist Church of Jesus Christ of Latter-Day Saints, he had a fundamental right to, and indeed was required to, engage in plural marriage.[333] His appeal was based on violations of the Free Exercise Clause, Due Process Clause, and Equal Protection Clause of the Constitution.[334]

Somewhat predictably, the Supreme Court of Utah rejected the Free Exercise argument, noting that it recently had dealt with the same issue in *Green*.[335] In its opinion, the Court reiterated that "*Reynolds*, despite its age, has never been overruled by the United States Supreme Court and, in fact, has been cited by the Court with approval in several modern free exercise cases, signaling its continuing vitality."[336]

4. *Bronson v. Swensen,*[337] 2007: A Utah resident, G. Lee Cook, applied for a marriage license from the Salt Lake County clerk that would allow him to marry a second wife, J. Bronson.[338] Sherrie Swensen, the clerk, dutifully denied the application after she learned that he was already married.[339]

Cook, his legal first wife, and the would-be second wife, Bronson, brought a civil rights action under 42 U.S.C. § 1983 against Swensen alleging violations of their right to free exercise of religion, their right to privacy, and their right to intimate expression and association (following *Lawrence*).[340] The trial court entered summary judgment for Swensen, finding *Reynolds* and *Potter* to be controlling, and Bronson and the Cooks filed a timely appeal.[341]

On appeal, the Tenth Circuit Court of Appeals held that the Supreme Court previously had dealt with the Free Exercise challenge

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[331] *Id.* at 730. At the time of his arrest, Rodney Holm had three wives, including one he had married when she was sixteen years of age, and who bore him two children by the age of eighteen. *See id.*
[332] *See id.* at 731.
[333] *See id.*
[334] *See id.* at 741.
[335] *See id.* at 742.
[336] *Id.* (citing State v. Green, 99 P.3d 820 (Utah 2004)).
[337] Bronson v. Swensen, 500 F.3d 1099 (10th Cir. 2007).
[338] *See id.* at 1101.
[339] *See id.* at 1103.
[340] *See id.* at 1103.
[341] *See id.* at 1103–04.

to polygamy in *Reynolds*, and that "[m]ore contemporary decisions from the Supreme Court and from this Court have acknowledged the continued validity of [that holding]."[342]

5. *Brown v. Buhman*,[343] 2013: *Brown v. Buhman* has come the closest to opening the door to plural marriage. The case involved a civil suit brought by members of a fundamentalist Mormon group, the Apostolic United Brethren, challenging the constitutionality of Utah's bigamy statute.[344] Kody Brown and his four wives had achieved wide notoriety through their nationally syndicated television reality program, *Sister Wives*, a fact that gained the attention, and likely the ire, of embarrassed state officials.[345] Ultimately, the state declined to press criminal charges; however, the hanging threat of prosecution prompted the Browns to seek a judicial ruling on the constitutionality of the statute.[346]

The district court acknowledged that "[i]t would be an easy enough matter for the court to . . . default[ ] simply to *Reynolds v. United States*," but to do so "would not be the legally or morally responsible approach . . . given the current contours of the constitutional protections at issue."[347] The judge went on to note that *Reynolds* had been decided 133 years earlier, and

> To state the obvious, the intervening years have witnessed a significant strengthening of numerous provisions of the Bill of Rights, and a practical and morally defensible identification of "penumbral" rights "of privacy and repose" emanating from those key provisions of the Bill of Rights, as the Supreme Court has over decades assumed a general posture that is less inclined to allow majoritarian coercion of unpopular or disliked minority groups, especially when blatant racism (as expressed through Orientalism/imperialism), religious prejudice, or some other constitutionally suspect motivation, can be discovered behind such legislation.[348]

[342] *Id.* at 1105 (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 535 (1993); Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 649 (10th Cir. 2006)). The Court ultimately vacated the verdict and remanded on the grounds that the District Court had lacked jurisdiction to hear the case. *See id.* at 1113.
[343] Brown v. Buhman, 947 F. Supp. 2d 1170 (D. Utah 2013), *vacated as moot*, 822 F.3d 1151 (10th Cir. 2016).
[344] *See id.* at 1176, 1178 n.5.
[345] *See id.* at 1178–79; Brown v. Buhman, 822 F.3d 1151, 1155 (10th Cir. 2016).
[346] *Brown*, 822 F.3d 1156–57.
[347] *Brown*, 947 F. Supp at 1181.
[348] *Id.* at 1181–82 (footnotes omitted).

In fact, it was "the entrenched nature of an orientalist [racist] mindset among ruling elites during the time period when *Reynolds* was decided," that makes the holding suspect.[349] Moreover, in the judge's opinion, the Supreme Court's subsequent citation of *Reynolds* in Free Exercise cases, such as in *Employment Division, Department of Human Resources of Oregon v. Smith*, had done little to correct the situation and may actually have "mistakenly give[n] the impression of endorsing the morally repugnant reasoning in *Reynolds*."[350] Viewed in this light, "the court believes that *Reynolds* is not, or should no longer be considered, good law, but also acknowledges its ambiguous status given its continued citation by both the Supreme Court and the Tenth Circuit."[351]

Understanding his position within the judicial hierarchy, the trial judge then parsed the question carefully, deferring to *Reynolds* "as binding on the limited question of any potential free exercise right to the actual practice of polygamy," but then drawing a fine dividing line by noting that "the cohabitation prong of the Statute is not operationally neutral or of general applicability because of its targeted effect on specifically religious cohabitation. It is therefore subject to strict scrutiny under the Free Exercise Clause and fails under that standard."[352]

The judge accordingly struck down the State's prohibition of cohabitation as "unconstitutional on numerous grounds"; however, "to save the Statute, the court adopt[ed] . . . [a narrow] construction of the Statute," in which "the interpretation of 'marry' and 'purports to marry'" refer only to civil ceremonies rather than religious ones.[353] Multiple wives, so long as they make no claim to the rights attendant to civil marriage, are outside of the control of *Reynolds*.

On April 11, 2016, the U.S. Court of Appeals for the Tenth Circuit dismissed an appeal by the Browns for lack of standing.[354]

[349] *Id.* at 1182.
[350] *Id.* at 1189.
[351] *Id.*
[352] *Id.* at 1190.
[353] *Id.* at 1234.
[354] *See* Brown v. Buhman, 822 F.3d 1151, 1163 (10th Cir. 2016). The Utah County Attorney's Office had adopted a policy under which the "Utah County Attorney will bring bigamy prosecutions only against those who (1) induce a partner to marry through misrepresentation or (2) are suspected of committing a collateral crime such as fraud or abuse." *Id.* at 1155. The Tenth Circuit reasoned that because neither element of the policy applied to Brown, he was not in danger of prosecution and therefore lacked a case or controversy under which to bring suit. *See id.* at 1170.

V. OBERGEFELL'S EFFECT ON ANTI-POLYGAMY STATUTES

The evolution of the concept of traditional marriage rights and the history of how the courts in the United States have dealt with the practice of polygamy could not be more dissimilar. Marriage, despite being long recognized as a fundamental building block—if not a cornerstone—of American society, has nonetheless followed a dynamic trajectory, constantly evolving, constantly embracing, and constantly pulling ever more individuals in under its umbrella. By contrast, the perception of polygamy, which certainly has never been afforded any fundamental status, has remained stable, its social stigma and legal acceptability relatively unchanged since before the time of *Reynolds*.[355]

Constitutional challenges to anti-polygamy laws historically have been grounded on perceived violations of the Free Exercise Clause, and to a lesser extent, the Equal Protection Clause and the Due Process Clause.[356] Recent Supreme Court opinions, such as *Obergefell*, have dramatically redrawn the contours of marriage but are unlikely to have much effect on future challenges to anti-polygamy laws.

A. *Free Exercise of Religion*

Proponents of legalizing polygamy have not made, and likely will not make, much progress pursuing their goal through the First Amendment Free Exercise Clause. *Reynolds* emphatically closed that avenue over 140 years ago when it drew a distinction between

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[355] *Compare* Reynolds v. United States, 98 U.S. 145, 164 (1878) ("[F]rom the earliest history of England polygamy has been treated as an ofence [sic] against society."), *and* Jeffrey Michael Hayes, *Polygamy Comes Out of the Closet: The New Strategy of Polygamy Activists*, 3 STAN. J. C.R. & C.L. 99, 102 (2007) (discussing the practice of polygamy's poor popularity when it was introduced in the United States in 1843), *with* Fredrik deBoer, *It's Time to Legalize Polygamy: Why Group Marriage is the Next Horizon of Social Liberalism*, POLITICO (June 26, 2015), https://www.politico.com/magazine/story/2015/06/gay-marriage-decision-polygamy-119469 [https://perma.cc/E746-84AA] (stating polygamy is considered taboo in society). Though this may be showing signs of change. A 2015 Gallup poll shows that the number of Americans who now find polygamy to be "morally acceptable" has more than doubled since 2003 to 16 percent. Andrew Dugan, *Once Taboo, Some Behaviors Now More Acceptable in U.S.*, GALLUP (June 17, 2015), http://www.gallup.com/poll/183455/once-taboo-behaviors-acceptable.aspx [https://perma.cc/4BK3-A3YN].

[356] *See, e.g.*, *Brown*, 822 F.3d at 1156 (stating that the plaintiffs alleged that a Utah bigamy statute violated their rights to substantive due process, equal protection, and free exercise of religion); Potter v. Murray City, 760 F.2d 1065, 1066 (10th Cir. 1985) (discussing that part of plaintiff's principle claim was that his termination as a city police officer as a result of his practice of polygamy violated his rights to the free exercise of religion); State v. Green, 99 P.3d 820, 822 (Utah 2004) (noting the plaintiff's assertion that his bigamy convictions violated the Free Exercise Clause).

religious thought and religious acts,[357] and too much rides on it to upset the precedential apple cart now. Certainly, there is more play in the joints than there was when Chief Justice Morrison Waite wrote that to restrict the legislature's ability to limit religious acts "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."[358] But *Reynolds* remains good law, and nothing in the recent evolution of marriage, or the interpretation of Free Exercise, has significantly altered the doctrinal foundation on which it was built, nor made the slope leading from it any less slippery. There are, however, three relatively recent Free Exercise cases that have modified the landscape somewhat and warrant noting—though none is likely to have a significant impact on the issue of polygamy in the near future.

In two cases decided within a span of nine years, the Court looked as if it might be cracking open the door that *Reynolds* had so solidly slammed shut, though neither case directly involved marriage. In 1963, eighty-five years after *Reynolds*, the Court rejected a South Carolina denial of unemployment rights to a Seventh-day Adventist who was unwilling to work on Saturdays due to her religious beliefs.[359] In reaching its opinion in *Sherbert v. Verner*,[360] the Court applied strict scrutiny to discern "whether some compelling state interest . . . justifies the substantial infringement of appellant's First Amendment right."[361] Finding none, the Court held that "[i]t is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area."[362]

Nine years later, in *Wisconsin v. Yoder*,[363] the Court again took up the difference between religious belief and religious acts. It did so reluctantly, noting that it had "heretofore been anxious to avoid" questions involving religious practices.[364] In a case that revived echoes of *Meyer*, the Justices were faced with the issue of whether the State of Wisconsin could compel school attendance by Amish children beyond the eighth grade, when doing so would violate the parents'

[357] *See Reynolds*, 98 U.S. at 166.
[358] *Id.* at 167.
[359] *See* Sherbert v. Verner, 374 U.S. 398, 399, 410 (1963).
[360] *Id.* at 410.
[361] *Id.* at 406.
[362] *Id.*
[363] Wisconsin v. Yoder, 406 U.S. 205 (1972).
[364] *Id.* at 240 (1972) (White, J., concurring).

religious beliefs.[365] The Court held that it could not,[366] but in language that easily could have applied to George Reynolds and his fellow Utah Saints, the Court noted that "we are not dealing with a way of life or mode of education by a group claiming to have recently discovered some 'progressive' or more enlightened process for rearing children,"[367] but rather was confronted with a religious group that has

> [C]onvincingly demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continued survival of [their religious] communities and their religious organization, and the hazards presented by the State's enforcement of a statute generally valid as to others.[368]

In place of the bright line between action and thought that *Reynolds* had drawn, in these two cases the Court appeared inclined to adopt a balancing test that, while remaining sensitive to the principle of federalism and the states' needs, sought to protect religious beliefs that are "sincerely" held. Any thawing of the position, however, came somewhat to an end with *Employment Division, Department of Human Resources of Oregon v. Smith*.[369] In *Smith*, two members of a Native American Church were dismissed from their job for using hallucinogenic peyote, which was illegal under Oregon law.[370] The men claimed protection under the *Sherbert* balancing test, but the Court rejected the argument, holding that

> [T]he sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the [*Sherbert*] test inapplicable to . . . challenges [of criminal prohibitions]. The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development."[371]

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[365] *See id.* at 207 (majority opinion).
[366] *See id.* at 234.
[367] *Id.* at 235.
[368] *Id.*
[369] Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).
[370] *Id.* at 874.
[371] *Id.* at 885 (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988)).

Smith removed the state's requirement to show a compelling interest and established that laws that are neutral and applied generally do not offend the Free Exercise Clause, even when they result in a substantial burden on the exercise of religion.

To many legislators, *Smith* presented its own type of slippery slope that threatened greater government intrusion into religious life, and in response, in 1993, Congress passed the Religious Freedom Restoration Act (RFRA),[372] re-imposing the *Sherbert* balancing test and re-establishing the requirement to show a compelling state interest. Under RFRA, the federal government may not

> [S]ubstantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except . . . (b) [when] that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.[373]

But there is an important caveat to RFRA in that the Court retained the *Smith* test for neutral and generally applicable laws. When "addressing the constitutional protection for free exercise of religion, our cases establish the general 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."[374]

Because *Reynolds* remains good law, a challenge to an anti-polygamy law on Free Exercise grounds will have to overcome the legal inertia of *stare decisis*—no small feat given the perhaps unfair, but nonetheless real, political unpopularity of the majority of the proponents for polygamy[375]—and to overcome the challenge the state

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[372] Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb–2000bb-4 (2018). The Act specially acknowledges its purpose is "to restore the compelling interest test as set forth in *Sherbert v. Verner, 374 U.S. 398 (1963)* and *Wisconsin v. Yoder, 406 U.S. 205 (1972)* and to guarantee its application in all cases where free exercise of religion is substantially burdened." *Id.* at § 2000bb(b)(1). RFRA, crafted under the umbrella of the Commerce Clause, was subsequently held unconstitutional as applied to states but remains in effect for the federal government. City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

[373] 42 U.S.C. § 2000bb-1.

[374] Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531 (1993) (citing *Smith*, 494 U.S. 872).

[375] With the LDS Church officially disclaiming plural marriage, the current proponents for polygamy typically are pulled from splinter fundamentalist LDS groups, orthodox Islamic adherents, and immigrants from several African countries. *See* Casey E. Faucon, *Marriage Outlaws: Regulating Polygamy in America*, 22 DUKE J. GENDER L. & POL'Y 1, 2 n.4, 3 (2014). None of these groups possesses much political leverage in the current political and social

will simply have to establish that the challenged polygamy (and bigamy) laws are neutral in their intent and are applied generally across the population.

Most courts faced with a free-exercise challenge to an anti-polygamy law likely will look to the Supreme Court of Utah for persuasive reasoning. The Utah high court, which has more experience dealing with the issue than most jurisdictions, has ruled repeatedly and consistently that Utah's anti-polygamy law is neutral and evenly applied. For example, in *State of Utah v. Green*, the Court held that the state's bigamy law is both facially neutral in that "[t]he statute does not on its face mention polygamists or their religion,"[376] and is operationally neutral as well in that it "does not . . . operate to isolate and punish only that bigamy which results from the religious practices of polygamists. . . . It contains no exemptions that would restrict the practical application of the statute only to polygamists."[377] Similarly, in *State v. Holm*,[378] decided two years after *Green*, the Supreme Court of Utah applied the *Smith* test to again quickly dismiss the Free Exercise argument, holding "that a state may, even without furthering a compelling state interest, burden an individual's right to free exercise so long as the burden is imposed by a neutral law of general applicability."[379] The Utah Supreme Court then completed its analysis by noting that, as it had in *Green*, "Utah's bigamy statute is a neutral law of general applicability and that any infringement upon the free exercise of religion occasioned by that law's application is constitutionally permissible."[380] Similar challenges were unsuccessful in *Bronson v. Swensen*,[381] and even in *Brown v. Buhman*,[382] in which a federal district court ruled that Utah's prohibition on polygamous cohabitation was

environments, and none garners much popular sympathy. *See, e.g.*, Elizabeth S. Scott & Robert E. Scott, F*rom Contract to Status: Collaboration and the Evolution of Novel Family Relationships*, 115 COLUM. L. REV. 293, 303 (2015).

[376] State v. Green, 99 P.3d 820, 827 (Utah 2004).

[377] *Id*. The Court noted that, "[i]n fact, the last reported decision of a prosecution under the current bigamy statute in our state courts involved a man who committed bigamy for non-religious reasons." *Id.*

[378] State v. Holm, 137 P.3d 726 (Utah 2006).

[379] *Id.* at 742 (citing Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 878–80 (1990)).

[380] *Holm*, 137 P.3d at 742 (citing *Green*, 99 P.3d 820).

[381] Bronson v. Swensen, 500 F.3d 1099, 1113 (10th Cir. 2007).

[382] Brown v. Buhman, 947 F. Supp. 2d 1170, 1190 (D. Utah 2013). The court found *Reynolds* to be "binding on the limited question of any potential free exercise right to the actual practice of polygamy." *Id.* at 1190.

unconstitutional[383]—and thus breathed new life into the issue—adroitly avoided confronting *Reynolds* on the matter of Free Exercise.

B. Equal Protection Clause

Proponents of plural marriage have not had any more success challenging anti-polygamy laws on the basis of equal protection. The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike,"[384] and as long as a statute or government action treats like individuals similarly, the action "is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest"[385] and does not arise from animus toward a particular group.

Unfortunately for polygamists attempting to advance an equal protection claim, the courts consistently have found legitimate state interests in banning polygamy,[386] and have not, to date, recognized polygamists as a class inviting protection, regardless of how unpopular the practice of plural marriage may be within the community. For obvious reasons, simply practicing a prohibited act does not create a legally protected class. In a rather thickly worded opinion, Chief Justice Burger wrote that the Equal Protection Clause

> [D]en[ies] to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object

383 *See id.* at 1234.

384 City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) (citing Plyler v. Doe, 457 U.S. 202, 216 (1982)).

385 *Cleburne Living Ctr.*, 473 U.S. at 440 (citing Schweiker v. Wilson, 450 U.S. 221, 230 (1981)).

386 *See* State v. Green, 99 P.3d 820 (Utah, 2004). In *State v. Green*, where the Supreme Court of Utah enumerated some of the most-commonly cited state interests in prohibiting bigamy and polygamy. *See id.* at 829–30. "First, this state has an interest in regulating marriage. . . . [A]s a type of 'civil contract'" that results in its own "network of laws, many of which are premised on the concept of monogamy." *Id.* at 829, 830. Next, the state has an interest in "preventing the perpetuation of marriage fraud, as well as its interest in preventing the misuse of government benefits associated with marital status." *Id.* at 830. "Most importantly Utah's bigamy statute serves the State's interest in protecting vulnerable individuals from exploitation and abuse," notably women and children, and in preventing "[c]rimes not unusually attendant to the practice of polygamy . . . [such as] incest, sexual assault, statutory rape, and failure to pay child support." *Id.* It is notable that at a higher level of scrutiny, anti-polygamy laws as written are not narrowly tailored, being either over-inclusive or under-inclusive to achieve these stated ends and could not stand.

> of the legislation, so that all persons similarly circumstanced shall be treated alike."[387]

In other words, it is a "practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons,"[388] but "[i]n the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous."[389] Put in plainer terms, categories based on prohibited activities do not, in and of themselves, create protected classes, and polygamists do not become a target class by virtue of polygamy being prohibited any more than cat burglars are impermissibly discriminated against by burglary laws or smokers by a no-smoking ordinance.

The exception to this principle is where "the classifications drawn by . . . [a] statute constitute an arbitrary and invidious discrimination."[390] "For if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."[391]

In *Lawrence*, *Windsor*, and subsequently, *Obergefell*, the Court found just such invidious discrimination in the statutes burdening same-sex intimacy and marriage. In the Court's opinion, the discrimination in these cases was not incidental, but rather lay at the core of the legislation. For example, the Court found that "[t]he avowed purpose and practical effect of [DOMA] are to impose a

[387] Reed v. Reed, 404 U.S. 71, 75–76 (1971) (quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)) (involving the Court striking down an Idaho inheritance law that gave preference to males over females as executors of wills).

[388] Romer v. Evans, 517 U.S. 620, 631 (1996) (citing Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 271–72 (1979)).

[389] *Romer*, 517 U.S. at 632 (citing City of New Orleans v. Dukes 427 U.S. 297 (1976)).

[390] Loving v. Virginia, 388 U.S. 1, 10 (1967); *see also* United States v. Windsor, 570 U.S. 744, 770 (2013) (a law "motived by an improper animus or purpose" cannot stand an Equal Protection challenge).

[391] U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (In Moreno, the Court found that a law to prevent food-stamp abuse clearly was drafted to target "hippies" and was unconstitutional.); *see also* Lawrence v. Texas, 539 U.S. 558, 582 (2003) (O'Connor, J, concurring in judgment) ("[W]e have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons."); *Romer*, 517 U.S. at 631 (but if a law doesn't "target[] a suspect class, [the Court] will uphold the legislative classification so long as it bears a rational relation to some legitimate end. (citing Heller v. Doe, 509 U.S. 312, 319–20 (1993))).

disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages."[392]

No such targeted animus is readily apparent in laws prohibiting polygamy, even if it in fact once existed or may still exist at some deeply rooted level. Certainly, early legislation, such as the Morrill Act and the Edmunds-Tucker Act (discussed *supra*), were crafted with expressed hostility toward polygamists and the LDS church in particular,[393] and neither act was neutral or generally applicable when enacted, but in the over 120 years since Utah gained statehood, much has changed.[394] Given that the LDS leadership now officially disavows plural marriage as a tenet,[395] it is difficult today to ascribe to the state the same level of hostile intent toward Mormons that once existed among the drafters of the anti-polygamy statute. Certainly, the Supreme Court of Utah has not seen fit to do so. "[I]n *Green*, [the Utah high court] concluded that the facially neutral text of the bigamy statute is not merely a smokescreen meant to disguise a discriminatory intent to prosecute only religiously motivated polygamy."[396]

States have legitimate interests in regulating marriage (discussed *infra*), and nothing in the Court's holdings in *Windsor* or *Obergefell* would appear to alter that fact.[397] Therefore, in the absence of a showing that polygamists form an inherent class of individuals suffering under legislative animus, anti-polygamy laws—so long as they are drafted in neutral terms and applied even-handedly—are not violative of the Equal Protection Clause.

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[392] *Windsor*, 570 U.S. at 770.

[393] For example, the Morrill Anti-Bigamy Act, *supra* note 223, was written with no pretext of neutrality and was intended specifically to "[t]o punish and prevent the Practice of Polygamy in the Territories of the United States and other Places." Morrill Anti-Bigamy Act, ch. 126, 12 Stat. 501 (1862).

[394] Mormons are not the only groups challenging anti-polygamy laws, and Utah certainly is not the only state dealing with these challenges. *See, e.g.*, Mayle v. Orr, No. 17 C 0449, 2017 U.S. Dist. LEXIS 54245, at *3–4 (N.D. Ill. Apr. 10, 2017). However, for purpose of discussion, both Utah statutes and Utah court challenges are illustrative.

[395] *See Plural Marriage and Families in Early Utah*, CHURCH JESUS CHRIST LATTER-DAY SAINTS, https://www.churchofjesuschrist.org/topics/plural-marriage-and-families-in-early-utah?lang=eng (https://perma.cc/N6ZH-JE6L).

[396] State v. Holm, 137 P.3d 726, 745 (Utah 2006) (citing State v. Green, 99 P.3d 820, 827–28 (2004).

[397] *See* Obergefell v. Hodges, 576 U.S. 644, 670 (2015) ("States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order."); United States v. Windsor, 570 U.S. 744, 766 (2013) ("The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens." (citing Williams v. North Carolina, 317 U.S. 287, 298 (1942)).

C. Due Process Clause

The Due Process Clause serves to "specially protect[] those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'"[398] Marriage, as a social and legal institution, clearly has deep roots extending well into the Nation's past, and the line of cases that include *Turner*, *Zablocki*, and *Loving* establish that the fundamental right to marriage is protected by substantive due process.[399] But "while the Court has recognized a fundamental right to marriage, every decision vindicating that right has involved two persons of the opposite gender."[400] What the Supreme Court's holdings in *Windsor* and *Obergefell* contributed to the discussion was not to change the fundamental dyadic character of marriage, but rather to make it blind to gender in the same way that *Loving* had blinded it to race. How this breaking with tradition will impact the broader discussion of polygamy remains to be played out, but for the present anti-polygamy laws as modernly applied do not tread upon the fundamental right or character of marriage and so remain reviewable under a rational basis standard.

Because the right to *simultaneous* plural marital partners is not a component of the fundamental right to intimacy and marriage, bans on polygamy remain reviewable under a Rational Basis standard. The Court in *Obergefell* was clear: "the right to marry is a fundamental right inherent in the liberty of the person."[401] That liberty, which is independent of the sex or gender of the person, is grounded in both the Due Process and Equal Protection Clauses of the Fourteenth Amendment:

> The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived,

[398] Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977)).

[399] *See Washington*, 521 U.S. at 720 ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the rights to marry, *Loving v. Virginia*; to have children, *Skinner v. Oklahoma ex rel. Williamson*; to direct the education and upbringing of one's children, *Meyer v. Nebraska*; *Pierce v. Society of Sisters*; to marital privacy, *Griswold v. Connecticut*; to use contraception, *ibid*; *Eisenstadt v. Baird*; to bodily integrity, *Rochin v. California*, and to abortion, [*Planned Parenthood v.*] *Casey*." (citations omitted)). *See also* Kitchen v. Herbert, 755 F.3d 1193, 1234 (10th Cir. 2014) (Kelly, J., dissent) ("[T]he Court has recognized a fundamental right to marriage protected by substantive due process." (citing to *Turner*, 482 U.S. 78, 94 (1987))).

[400] *Kitchen*, 755 F.3d at 1231 (Kelly, J., dissent). This statement was true at least until *Windsor* and *Obergefell*.

[401] *Obergefell*, 576 U.S. at 675.

> too, from that Amendment's guarantee of the equal protection of the laws. The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, yet in some instances, each may be instructive as to the meaning and reach of the other.[402]

In this regard, *Obergefell* simply added a link to the chain that the Court had begun forging more than 130 years earlier in *Maynard v. Hill*. What *Obergefell* specifically contributed, by focusing on the rights of the individual shorn of gender, is the final extension of marriage beyond the traditional male-female pairing. *Eisenstadt* and *Lawrence* had already broken down the link to the nuclear family by recognizing a marriage-like privacy interest in sexual intimacy, but *Obergefell* took it one step further by declaring that privacy interest to be fundamental.

Justice Kennedy appears to have appreciated the implications of this extension, for in his majority opinion in *Obergefell*, there is a repeated attempt to cabin the results, leaving the remaining framework of "traditional" marriage—specifically its dyadic nature—untouched, lest it become the toe on the slippery slope. There is recurrent reference throughout his opinion to marriage being the union of two individuals. Marriage "allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons."[403] "The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality."[404] A paragraph later, Kennedy writes, marriage "is fundamental because it supports a two-person union unlike any other."[405] In the penultimate paragraph of the majority opinion: "In forming a marital union, two people become something greater than once they were."[406]

The *Obergefell* dissenters likewise appreciated the significance of breaking the traditional definition of marriage. They too saw the toe on the slope and cautioned where that break with tradition might lead. Chief Justice Roberts, joined by Justices Scalia and Thomas,[407]

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[402] *Id.* at 672.
[403] *Id.* at 657.
[404] *Id.* at 666.
[405] *Id.* (citing Griswold v. Connecticut, 381 U.S. 475, 485 (1965)).
[406] *Obergefell*, 576 U.S. at 681.
[407] *See id.* at 686 (Roberts, C.J., dissenting).

observed that "[a]lthough the majority randomly inserts the adjective 'two' in various places, it offers no reason at all why the two-person element of the core definition of marriage may be preserved while the man-woman element may not."[408] Then, in words that must have been music to the ears of many polygamists, Roberts noted that the "leap from opposite-sex marriage to same-sex marriage is much greater than one from a two-person union to plural unions, which have deep roots in some cultures around the world."[409] Moreover, he went on to note that it is "striking how much of the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage,"[410] and while he did "not mean to equate marriage between same-sex couples with plural marriages in all respects" neither had he heard any "relevant differences that compel different legal analysis."[411]

Are there relevant differences between same-sex marriage and plural marriage? Is there anything in the evolutionary track of marriage that compels the inclusion of simultaneous multiple partners as part of the fundamental marital right? For if polygamy remains outside of the definition of protected marriage, then the state must only demonstrate a rational basis for its prohibition—a relatively easy bar to clear.

The chain of cases that began with *Maynard* and *Skinner* and ended, at least for now, with *Obergefell*, suggests that there are, in fact, relevant differences. It is no longer open to question that marriage, if it is anything, is a fundamental right of individuals to bond intimately with another individual, and it cannot be unduly burdened by the state. The thread that runs from *Skinner* to *Griswold* to *Eisenstadt* to *Lawrence* established a clear link between "marital" bonding and sexual intimacy. Other cases, beginning with *Loving* and running through *Moore*, *Turner*, *Windsor*, and *Obergefell* further established a fundamental right to associate and bond in marriage with the individual of your choice that cannot be permanently burdened by the state—not on the basis of race, or money, gender, or even criminal status.

But there is nothing in this long continuum of cases that would compel an extension of the dyadic concept of marriage to simultaneous multiple partners. What *Loving*, *Turner*, *Obergefell*, and the related cases have in common, and what the Court has

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[408] *Id.* at 704.
[409] *Id.*
[410] *Id.*
[411] *Id.* at 705.

consistently ruled to be unconstitutional, is that the state was imposing a permanent (or overly lengthy) burden on the right to marital association based on a class characteristic, legal constraint, or biological imperative beyond the control of the individuals: In *Loving* it was race;[412] in *Turner* it was liberty;[413] in *Windsor* and *Obergefell* it was sexual orientation.[414] In each of these cases, the state's action had the effect of placing an entire class of individuals off limits as marriage partners, a total and absolute deprivation, and in doing so placed an impermissible burden on a fundamental right.

While the *Obergefell* Court established that "the right to marry is a fundamental right inherent in the liberty of the person,"[415] and thus removed gender from the equation, the fact that it also took great care to not disturb the dyadic structure of marriage was not an oversight. The Court, as an institution, is fundamentally conservative,[416] and, despite the wide doctrinal divide that currently exists among the Justices,[417] there is an understanding that the Court "must therefore 'exercise the utmost care whenever [it is] asked to break new ground in this field,' lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court."[418] The language of *Obergefell* is as precise as it is clear: "The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality."[419] The concerns of Chief Justice Roberts notwithstanding, the fact that the Court didn't go further in redrawing the contours of marriage should be viewed as intentional.

In contrast to miscegenation laws or bans on same-sex marriage, statutory bans on polygamy place no class of individuals off limits as marriage partners and result in no total infringement on a protected right. Rather, what anti-polygamy statutes do is impose an

[412] *See* Loving v. Virginia, 388 U.S. 1, 2 (1967).
[413] *See* Turner v. Safley, 482 U.S. 78, 96 (1987).
[414] *See Obergefell*, 576 U.S. at 666 (citing United States v. Windsor, 570 U.S. 744, 770–72, 774 (2013)).
[415] *Obergefell*, 576 U.S. at 675.
[416] *See* Sam Wang, *SCOTUS Tea Leaf Watch*, PRINCETON ELECTION CONSORTIUM (May 23, 2018, 8:51 AM), https://election.princeton.edu/2018/05/23/tea-leaf-watch/ [https://perma.cc/5YB3-Y23K].
[417] *See The Political Leanings of the Supreme Court Justices*, AXIOS (June 1, 2019), https://www.axios.com/supreme-court-justices-ideology-52ed3cad-fcff-4467-a336-8bec2e6e36d4.html [https://perma.cc/42J7-VURE].
[418] Washington v. Glucksberg, 521 U.S 702, 720 (1997) (quoting Moore v. East Cleveland, 431 U.S. 494, 502 (1977) (plurality opinion)).
[419] *Obergefell*, 576 U.S. at 666.

administrative restraint on the order and timing of marriage, but not a constraint on the choice of partners.

The same distinction, and the same legal reasoning, can be seen in the Court's handling of *Boddie v. Connecticut*,[420] in which the Court held that because the State monopolized the instrument of divorce, it could not impose an excessive obstacle to the dissolution of a marriage based on a party's inability to pay court fees.[421] An excessive burden on obtaining a divorce, a prerequisite to remarriage, would thus serve to impose a de facto total deprivation of a fundamental right to marriage. The Court had the opportunity to underscore this principle in another divorce case, *Sosna v. Iowa*,[422] decided four years later, and in doing so the Court drew a distinction applicable to the discussion of polygamy. At issue in *Sosna* was a state residency requirement for divorce rather than a fee requirement as had been the case in *Boddie*.[423] The Court held that unlike the situation in *Boddie*, "[n]o similar total deprivation is present" in a residency requirement, "and the delay which attends the enforcement of the one-year durational residency requirement is, for the reasons previously stated, consistent with the provisions of the United States Constitution."[424] In other words, while the State cannot impose a total deprivation through its control of the mechanism of divorce, it reasonably can regulate and condition the process to serve legitimate state ends.

Applying the same logic to state anti-polygamy statutes suggests that as long as the State doesn't unduly bind the fundamental right to marriage—to the point of imposing a long-term deprivation—then it remains within the power of the State to regulate administrative aspects of marriage, such as timing and sequencing. It is a principle rooted in federalism that has been recognized and reaffirmed since before *Maynard*.[425] "By history and tradition the definition and

[420] Boddie v. Connecticut, 401 U.S. 371 (1971); *see supra* notes 100–05 and accompanying text.
[421] *See Boddie*, 401 U.S. at 374.
[422] Sosna v. Iowa, 419 U.S. 393 (1975).
[423] *Id.* at 395.
[424] *Id.* at 406–07, 410 (finding that because divorce affects not only the couple's "marital status and very likely their property rights," but also "provisions for [child] custody and support" the state "may insist that one seeking to initiate such a proceeding have the modicum of attachment to the State required" by the residency requirement).
[425] Maynard v. Hill, 125 U.S. 190, 205 (1888) (acknowledging that the state legislature "prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution."); *see also* Chen v. Ashcroft, 381 F.3d 221, 230 (3d Cir. 2004) ("[A]ll states impose minimum marriage age requirements, and we assume that these laws are constitutional." (footnote omitted) (citing Moe v. Dinkins, 669 F.2d 67, 68 (1982))).

regulation of marriage . . . has been treated as being within the authority and realm of the separate States."[426] And despite the political turmoil seemingly threatened by the *Obergefell* holding, "[t]he fundamental right to marry does not include a right to make a State change its definition of marriage,"[427] and the state's basic authority over marriage is unaltered.

The mere fact that marriage is recognized as a fundamental right does not mean that all aspects of marriage must be viewed through the same lens. As the Court noted in *Zablocki*, the recognition of the right to marry as fundamental does not concomitantly require "that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed."[428]

Anti-polygamy laws that do not significantly interfere with the choice of marriage partners, in the manner in which the laws challenged in *Loving* or *Obergefell* did, but rather merely condition the administrative sequencing and timing of the marriage, as did the divorce residency requirement at issue in *Sosna*,[429] presumably fall into a permissible area of state regulation. In other words, where *Loving* held that Virginia could not keep a white man from marrying a black woman,[430] and *Obergefell* invalidated Ohio's refusal to recognize the marriage of one man to another,[431] bans on polygamy impose no such total deprivation. Anti-polygamy laws do not preclude a white man from marrying a black woman, or for that matter, preclude a white man from marrying two black women, or from marrying a black man, or even two black men. What anti-polygamy statutes seek to do is regulate the order in which the marriages occur. They do, in other words, preclude a white man marrying two black women *simultaneously*—but not sequentially. In much the same manner that a state cannot deny an incarcerated prisoner the right to marry, it can nonetheless "regulate the time and

[426] United States v. Windsor, 570 U.S. 744, 764 (2013); *see also* Williams v. North Carolina, 317 U.S. 287, 298 (1942) ("Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders.").
[427] Obergefell v. Hodges, 576 U.S. 644, 686 (Roberts, C.J., dissenting).
[428] Zablocki v. Redhail, 434 U.S. 374, 386 (1978).
[429] *Sosna*, 419 U.S. at 395–96.
[430] *See* Loving v. Virginia, 388 U.S 1, 12 (1967).
[431] *See Obergefell*, 576 U.S. at 680–81.

circumstance under which the marriage ceremony itself takes place."[432]

In this regard, the law begins to hew toward the concept of marriage as a pseudo-contract, over which the state may exercise control, such as regulating the timing and sequencing of marriage partners so as to structure the order and administration of marital benefits and safeguards. But, by doing so, it is not constraining or limiting the pool of potential mates in an impermissible manner. For example, ensuring a legal divorce from one partner prior to the marriage of another partner—serial monogamy—simply ensures that the first partner's, and the State's, property, inheritance, and benefit rights are legally recognized and secured. The same logic can be seen in the establishment of marital age. A requirement that a marital partner be of a minimum age is necessary to ensure one partner's pseudo-contract rights relative to the other, but it does not foreclose marriage to that partner—it simply imposes a timing restriction. If an adult man wishes to marry a ten-year-old girl (or vice versa), he may do so under the Constitution, but the state may also legitimately require him to wait until his partner reaches a minimum age for informed consent. In this regard, it is little different than if the adult man wished to sell a car to a ten-year-old girl. Most people would accept that a state may impose an age-of-contractual-consent restriction on the sale of a car without unduly burdening the freedom of contract. Conversely, restrictions on contracting that are based on sex, race, or sexual orientation are in a different category altogether. So it is with marriage. No passage of time would transform Richard Loving's skin color to black, or Mildred Loving's to white, or alter the sexual orientation of James Obergefell and his partner, John Arthur. Unlike the situations faced by the Lovings or by Obergefell and Arthur, where the then-existing state laws, if allowed to stand, would forever preclude their unions, bans on polygamy merely condition the timing, but do not so impermissibly burden the right to marriage.

The line of cases that have come to define the concept of marriage are consistent in their logic and lead to a clear doctrinal outcome: individuals have the fundamental right to form legally recognized marital unions with willing partners, free from any state interference that ultimately, or permanently, defeats that right. Bans on simultaneous plural marriage do not ultimately defeat that right, but merely regulate the sequence and timing of these marital unions for

[432] Turner v. Safley, 482 U.S. 78, 95–96, 99 (1987).

legitimate, if not compelling, state ends.[433] States presumably may continue to regulate or ban plural marriage outright so as long as the regulation bears upon an important and legitimate state interest and the regulation does not result in the total exclusion of potential partners based on class characteristics—including sex and race—beyond their control or biology.[434]

CONCLUSION

The contours of marriage are dynamic and ever-evolving. The most recent Supreme Court adjustment to the concept of marriage, by extending the fundamental right to same-sex couples, appears on first review to be seismic in its departure from tradition, but a more detailed review of the line of cases that led up to *Obergefell* reveals an internal consistency of the Court's holding. A common thread that warps through over a hundred years' worth of cases is that the state, in the exercise of its regulatory power, cannot unduly or absolutely deprive an individual of the fundamental right to marry or form an intimate relationship with the partner of his or her choice—not for reasons of race, or money, or liberty, and now—gender.

But a fundamental right to select a marriage partner does not equate to a fundamental right to marriage in all its possible forms. Looking for a fundamental right to plural marriage is much akin to the *Bowers* Court questioning "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."[435] It is the wrong question to ask. The fundamental right of marriage inheres in the right to form an intimate relationship, and nothing in *Obergefell* requires the state to abrogate its right and responsibility to regulate a host of legitimate societal concerns attendant to marriage and intimacy. Marriage, despite a broadening of its definition, remains a social compact (if not contract) within and

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[433] Ironically, proponents of polygamy may have had a stronger argument in the past, before divorce became commonplace and administratively simple. The Court in *Lawrence*, *Windsor*, and *Obergefell* placed great emphasis on how the challenged laws stigmatized the affected groups. When divorce carried a significant social stigma and was legally burdensome to obtain, the inability to divest one partner for another could have been interpreted as foreclosure of a marital partner by state agency. *See Obergefell*, 576 U.S. at 670–73; United States v. Windsor, 570 U.S. 744, 771–75 (2013); Lawrence v. Texas, 539 U.S. 558, 575–78 (2003).

[434] Conversely, as *Windsor* made clear, if, or when, a state chooses to legalize plural marriage, there likely is little that the federal government can do about it, and, if *Obergefell* has precedential authority, other states likewise will be forced to grant recognition. *Cf. Windsor*, 570 U.S. at 766–67.

[435] Bowers v. Hardwick, 478 U.S. 186, 190 (1986); *see supra* notes 144–48 and accompanying text.

under the power of the states to regulate subject to broad Constitutional constraints. *Obergefell* did not change that.

Challenges to state bans on polygamy likely will continue to fail so long as the state can show a legitimate reason for imposing the ban and the prohibitions are facially neutral, applied consistently and even-handedly, and do not result in the absolute exclusion of a potential marriage partner.