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On Marriage And Polygamy

JACK B. HARRISON*

This Article posits that the intersectionality of the Supreme Court's historical recognition of the fundamental right to marry, the development of Justice Kennedy's analysis in the gay rights trilogy of Romer, Lawrence, and Windsor, and the Supreme Court's recent recognition in Obergefell of same-sex couples' constitutional right to marry opens the door to the ultimate recognition of polygamous marriages. Although much has been written about the development of the law regarding the recognition of same-sex marriage, very little work has examined how this doctrinal development might impact the recognition of marriage in other relational contexts. The intent of this Article is not to advocate for the recognition of polygamous marriages or, for that matter, any other marriage construct. Rather, this Article makes the somewhat radical and unique claim that the development of same-sex marriage jurisprudence raises significant legal questions regarding the historical regulations impacting marriage—specifically, regulations prohibiting polygamous marriages—that have not been raised in the legal context for generations.

Part II of this Article briefly reviews the history of polygamy. Parts III and IV examine the history of the Mormon faith in the United States and the historical practice of polygamy. Part V then examines how courts have treated the issue of polygamy over time. Following this extensive examination of polygamy in both historical and legal contexts, this Article then turns to the Supreme Court's development of the jurisprudence of privacy and marriage, culminating in the Court's recognition of same-sex marriage. Part VI reviews the Supreme Court's development of the doctrine of the fundamental right to marry. Part VII then explores the

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development of Justice Kennedy's jurisprudence related to the equal protection and due process doctrines through the trilogy of gay rights cases. Part VIII examines the Supreme Court's decision in Obergefell, which struck down state prohibitions against same-sex marriage and recognized same-sex couples' constitutional right to marry. Part VIII focuses on the Court's decision in Obergefell by examining the background leading to the case, the oral arguments before the Court, and the Court's ultimate holding. In particular, Part VIII focuses on how the Obergefell decision might affect future challenges to prohibitions against plural marriages. Part IX, this Article's conclusion, asserts that the Supreme Court's recognition of the fundamental right to marry and Justice Kennedy's evolving analysis in Romer, Lawrence, Windsor, and Obergefell ultimately provide a legal framework for challenges to the recognition of polygamous marriages. At a minimum, this developing jurisprudence related to privacy and marriage, with its wholesale rejection of majoritarian morality and social animus as an appropriate basis for the state to burden fundamental rights or classify groups, will force states to be more thoughtful and creative in articulating their basis for prohibiting polygamous marriages.

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I. INTRODUCTION

This Article posits that the intersectionality of the United States Supreme Court’s historical recognition of the fundamental right to marry, the development of Justice Kennedy’s analysis in the gay rights trilogy of *Romer v. Evans*,¹ *Lawrence v. Texas*,² and *United States v. Windsor*,³ and the Supreme Court’s recent recognition in *Obergefell v. Hodges*⁴ of same-sex couples’ constitutional right to marry opens the door to the ultimate

1. 517 U.S. 620 (1996).
2. 539 U.S. 558 (2003).
3. 133 S. Ct. 2675 (2013).
4. 135 S. Ct. 2584 (2015).

recognition of polygamous marriages.⁵ Although much has been written about the development of the law regarding same-sex marriage, examination as to how this doctrinal development might impact the recognition of marriage in other relational contexts has been minimal.⁶ The intent of this Article is not to advocate for the recognition of polygamous marriages or, for that matter, any other marriage construct. Rather, this Article makes the somewhat radical and unique claim that the development of same-sex marriage jurisprudence raises significant legal questions regarding the historical regulations impacting marriage—specifically, regulations prohibiting polygamous marriages—that have not been raised in the legal context for generations.⁷

Part II of this Article briefly reviews the history of polygamy.⁸ Parts III and IV examine the history of the Mormon faith in the United States and the historical practice of polygamy.⁹ Part V then examines how courts have treated the issue of polygamy over time.¹⁰

Following this examination of polygamy in both historical and legal contexts, this Article then turns to the Supreme Court's development of the jurisprudence of privacy and marriage, culminating in the Court's recognition of same-sex marriage in *Obergefell*.¹¹ Part VI reviews the Supreme Court's development of the doctrine of the fundamental right to marry.¹² Part VII then explores the development of Justice Kennedy's jurisprudence related to the equal protection and due process doctrines through the trilogy of gay rights cases.¹³ Part VIII examines the Supreme Court's decision in *Obergefell*, which struck down state prohibitions against same-sex marriage and recognized same-sex couples' constitutional right to marry.¹⁴ This discussion focuses explicitly on concerns raised throughout the oral arguments and highlights how the Court's decision in *Obergefell* might affect future challenges to prohibitions against plural marriage.¹⁵ Part IX, this Article's conclusion, asserts that the Supreme Court's recognition of the fundamental right to marry and Justice Kennedy's evolving analysis in *Romer*, *Lawrence*, *Windsor*, and *Obergefell* ultimately provide a legal

5. See *infra* Parts III.C, VI, VII.B, X.

6. See, e.g., Jacob Wolinsky, *Gay Marriage Ruling: Justices Suggest Polygamy Next*, VALUEWALK (June 27, 2015, 10:57 PM), <http://www.valuewalk.com/2015/06/gay-marriage-polygamy/>.

7. See *infra* Part IX.

8. See *infra* Part II.

9. See *infra* Parts III, IV.

10. See *infra* Part V.

11. See *infra* Part V.

12. See *infra* Part V, VI.

13. See *infra* Part VII.

14. See *infra* Part VIII.

15. See *infra* Part VIII.

framework for challenges to the recognition of polygamous marriages.¹⁶ At a minimum, this developing jurisprudence related to privacy and marriage, with its wholesale rejection of majoritarian morality and social animus as an appropriate basis for the state to burden fundamental rights or classify groups, will force states to be more thoughtful and creative in articulating their basis for prohibiting polygamous marriages.¹⁷

II. POLYGAMY IN GENERAL

Before this Article explores polygamy in the context of the Mormon faith, it is important that one gain some general knowledge about polygamy. This Part will relay the basics of polygamy by discussing what it is, where and how it started, how common it is, and where it is practiced today. Considering these topics will only further illuminate the lens through which past courts viewed Mormonism and polygamy—the fundamental goal of these background sections.

A. *What is it and Where Did it Come From?*

Polygamy is a “marriage in which a spouse of either sex may have more than one mate at the same time.”¹⁸ Technically, nineteenth-century Mormons, and fundamentalists today, practiced polygyny.¹⁹ Polygyny is “the state or practice of having more than one wife or female mate at one time.”²⁰

Polygamy’s origin is essentially unknown.²¹ However, there are cultural variables that indicate where the practice may have begun, at least in terms of polygyny.²² Specifically, the need for manpower was a contributing factor to the start of polygyny, with war and pre-colonial subsistence farming serving as prime examples of polygyny’s historical importance.²³

16. See *infra* Part IX.

17. Robert C. Farrell, *Justice Kennedy’s Idiosyncratic Understanding of Equal Protection and Due Process, and its Costs*, 32 QUINNIPIAC L. REV. 439, 499-500 (2014).

18. WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 912 (1983) [hereinafter WEBSTER’S DICTIONARY].

19. Irwin Altman, *Polygamous Family Life: The Case of Contemporary Mormon Fundamentalists*, UTAH L. REV. 367, 369 (1996) (describing Mormon practice of plural marriage as polygyny, rather than using broad term polygamy).

20. WEBSTER’S DICTIONARY, *supra* note 18, at 912.

21. Paul Vallely, *The Big Question: What’s the History of Polygamy, and How Serious a Problem is it in Africa?*, INDEPENDENT (Jan. 6, 2010), <http://www.independent.co.uk/news/world/africa/the-big-question-whats-the-history-of-polygamy-and-how-serious-a-problem-is-it-in-africa-1858858.html>.

22. See *id.*

23. *Id.*

B. How Common is it and Where is it Practiced Today?

Surprisingly, or unsurprisingly for some, there are perhaps more polygamous societies across the globe than monogamous ones.²⁴ More specifically, a University of Wisconsin survey of more than a thousand contemporary societies revealed that only 186 were monogamous; “453 had occasional polygyny” and 588 featured a regular practice of polygyny.²⁵ While these statistics reflect the contemporary practice of polygamy, “[s]ome anthropologists believe that polygamy has been the norm through human history.”²⁶

Today, polygamy is still practiced throughout the world.²⁷ Many Arab nations and “animist and Muslim communities of West Africa” seem to have the highest rates of polygamy.²⁸ Although illegal everywhere in the United States, some Americans still practice polygamy today.²⁹ In contrast, polygamy is wholly legal in “South Africa, Egypt, Eritrea, Morocco and Malaysia”³⁰

III. A BIT OF HISTORY: MORMONISM IN AMERICA

Throughout American history, scholars and the general population have cast Mormonism aside and refused to give the religion credibility.³¹ It is unclear whether this widespread disapproval and distrust resulted from a general confusion about the tenets of the faith, or simply bare dislike.³² Recently, however, academia, politics, popular culture, and greater transparency from the Mormon Church have created “A New Mormon Moment.”³³ Television programs, academic publications, two presidential

24. David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53, 61 (1997) (citing Richard A. Posner, *SEX AND REASON* 69 (1992)); see Valley, *supra* note 21.

25. Valley, *supra* note 21.

26. *Id.*

27. *See id.*

28. *Id.*

29. *See id.* (averring that, according to The Salt Lake Tribune, in 2005, “as many as 10,000 Mormon fundamentalists . . . lived in polygamous families.” However, this contention is somewhat suspect because it is unsure exactly how many Mormon fundamentalists actually practice polygamy.); *see also* Jennifer Dobner, *Part of Utah’s Polygamy Law Declared Unconstitutional by Judge*, HUFFINGTON POST (Feb. 13, 2014, 5:59 AM), http://www.huffingtonpost.com/2013/12/14/utah-polygamy-law_n_4443970.html.

30. Valley, *supra* note 21.

31. Jennifer Schuessler, *The Mormon Lens on American History*, N.Y. TIMES (July 2, 2012), http://www.nytimes.com/2012/07/03/books/mormon-studies-attract-more-scholars-and-attention.html?pagewanted=all&_r=0.

32. *See* Cathy Lynn Grossman, *Many Americans Uninformed, but Still Wary of Mormon Beliefs*, USA TODAY (Jan. 25, 2012, 3:40 PM), <http://usatoday30.usatoday.com/news/religion/story/2012-01-17/mormon-beliefs-Americans-uninformed/52776870/1>.

33. *See* Sarah Barringer Gordon & Jan Shipps, *A New Mormon Moment*, N.Y. TIMES (July 4, 2011, 7:00 PM), <http://www.nytimes.com/roomfordebate/2011/07/04/are-republicans-ready-now-for-a-mormon-president/a-new-mormon-moment>.

candidates, and a Broadway musical have brought Mormonism back into the spotlight.³⁴ Despite this boom, many Americans do not know Mormonism's basic history, still disapprove of the Mormon faith, and distrust Mormons in general.³⁵ As prior cases have expounded, knowledge and public opinion of a particular faith creates the lens through which courts examine the faith.³⁶ Thus, in order to grasp how the Supreme Court of the United States viewed *Reynolds v. United States*³⁷ and subsequent polygamy cases, this Part will provide basic historical background information about Mormonism in America.

A. *Treasure Hunter Turned Prophet*

Joseph Smith, who was known in upstate New York as a “counterfeiter, fortuneteller, and treasure hunter,” founded the Church of Jesus Christ of Latter-day Saints, also referred to as “the Mormon Church,” in 1830.³⁸ Smith was the first prophet of the Mormon faith and the Church's first president.³⁹ Albeit an unlikely prophet, the church's inception stems from Smith's experience as an instrument of divine intervention—as the interpreter of the “golden plates.”⁴⁰ According to Mormon belief, an angel told Smith of a book written on golden plates that contained the history and teachings of ancient prophets who lived in America many years ago.⁴¹ From the golden plates, Smith wrote the Book of Mormon—the Mormon faith's sacred text.⁴²

34. *See id.* (referencing academic publications, two Mormon presidential candidates, and a Broadway musical); Grossman, *supra* note 32 (referencing television programs).

35. *See How Americans Feel About Religious Groups*, PEW RES. CTR. (July 16, 2014), <http://www.pewforum.org/2014/07/16/how-americans-feel-about-religious-groups/>.

36. Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America*, 28 J. SUP. CT. HIST. 14, 23-25 (2003) (detailing the prevailing American cultural sentiment surrounding polygamy and how that sentiment bore on the Supreme Court's decision in *Reynolds*).

37. 98 U.S. 145 (1878).

38. *Id.* at 14, 16 (citing RICHARD L. BUSHMAN, *JOSEPH SMITH AND THE BEGINNINGS OF MORMONISM* (1984)).

39. *Id.*

40. *Id.* at 16; Bill McKeever, *Did the Eleven Witnesses Actually See the Gold Plates?*, MORMONISM RES. MINISTRY (Aug. 25, 2008), <http://www.mrm.org/eleven-witnesses> (providing specifics about the beginnings of the Mormon Church from a Mormon perspective).

41. *See* McKeever, *supra* note 40.

42. *See* Gordon, *supra* note 36, at 14, 16; *see also* THE BOOK OF MORMON, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS., <https://www.lds.org/scriptures/bofm?lang=eng> (last visited Oct. 12, 2015) (providing online text of the Book of Mormon).

B. *The Early Years*

In the beginning, even before polygamy, Mormons suffered immense persecution and their faith was tested.⁴³ Most Americans, to put it mildly, strongly opposed the religion and its followers.⁴⁴ Through the teachings of Joseph Smith, Mormons believed that “they were part of a glorious cosmic plan, which was gradually unfolded for their exaltation and, ultimately, for the salvation of the world.”⁴⁵ Moreover, Smith claimed that “[the Book of Mormon] was the only uncorrupted and truly Christian word of God.”⁴⁶ As one can imagine, Christians did not overly welcome Smith’s philosophy.⁴⁷ Likewise, followers of the Mormon faith, and their prophet, were engaged in a never-ending “war of words” with Christians, a war in which they were sorely outnumbered.⁴⁸

As history has shown, wars of words can quickly turn into violent physical conflicts.⁴⁹ In 1838, residents of Haun’s Mill, Missouri killed seventeen Mormon men and boys.⁵⁰ Unfortunately, this was not the last instance of violence and outright condemnation of the Mormon faith.⁵¹ In fact, after Haun’s Mill, “[t]he Governor of Missouri called for the expulsion of all Mormons from the state.”⁵² Other states simply refused to protect Mormons from violence⁵³ and, despite the pleading of Smith and other Mormons, even the federal government refused to protect the Mormons.⁵⁴ Ultimately, due to their religious beliefs and political aspirations, Joseph Smith and his followers struggled to find an area where they could settle free from persecution.⁵⁵

Only ten years after Smith founded the Mormon Church, Mormons collectively, and Smith as an individual, had become extremely controversial.⁵⁶ As one commentator notes, “[t]his period in Mormon history is perhaps the most dramatic of all.”⁵⁷ Not only did this period

43. Gordon, *supra* note 36, at 16.

44. *Id.* at 14, 16.

45. *Id.* at 16.

46. *Id.*

47. *Id.* (“The Mormon Church quickly acquired passionate adherents and equally passionate opponents.”).

48. *See* Gordon, *supra* note 36, at 16.

49. *See id.* (“Everywhere they went, Mormons excited the enmity of their neighbors.”).

50. *Id.*

51. *Id.* (stating that Joseph Smith himself was “tarred and feathered by an angry mob in Ohio”).

52. *Id.*

53. *See* Gordon, *supra* note 36, at 16 (“[O]fficials in other states . . . let Mormons know that they could not rely on state protection.”).

54. *See id.* (“[S]uch questions were reserved for state law.”).

55. *See* Altman, *supra* note 19, at 368 (stating that Joseph Smith and his followers migrated to multiple states but were eventually “driven out” of each state).

56. Gordon, *supra* note 36, at 16.

57. *Id.*

“include[] Smith’s explicit assumption of political and military power,” but it also involved increased “theological and institutional development [in the Mormon faith], including the introduction of polygamy [as a fundamental goal in] Mormonism.”⁵⁸

The practice of polygamy as a part of the Mormon faith, discussed in depth in Part IV of this Article, brought the American public’s disdain for Mormonism to a fever pitch.⁵⁹ Arguably, the defense and practice of polygamy was the ultimate cause of Smith’s death.⁶⁰ In 1844, “Smith ordered a printing press [to be] destroyed when its owner published a story critical of polygamy and containing other rumors”⁶¹ Subsequently, Illinois civil authorities arrested Smith and, while in jail awaiting trial, an anti-Mormon mob attacked the jail and murdered him.⁶²

C. Life After Death

After Smith’s death, Mormons tried to escape continual persecution, resulting in a great physical divide in the Mormon community—“some remain[ed] in the Midwest and others follow[ed] Brigham Young” on a great exodus to Utah.⁶³ Brigham Young was the “second President and Prophet of the church.”⁶⁴ Mormon leaders, including Young, set up an independent Mormon government in Utah, of which Young was the governor.⁶⁵ Utah’s government, known as the “political kingdom,” was a type of theocracy that incorporated tenets of the Mormon faith into its operation.⁶⁶ Marriage was the “foundation” of the Mormon theocracy in Utah.⁶⁷ In fact, government leaders believed that the “perversion” of marriage in the “monogamic states” would ultimately destroy those states.⁶⁸

IV. POLYGAMY AND MORMONISM

Even though polygamy has been commonplace in many cultures throughout history, nineteenth-century American society did not embrace

58. *Id.*

59. *See id.* at 18, 20 (“[A]ntipolygamists claimed that Mormon polygamy was entirely foreign and even barbaric.”).

60. *Id.* at 18; *see also* O. Kendall White, Jr. & Daryl White, *Polygamy and the Mormon Identity*, 28 J. AM. CULTURE 165, 166-67 (2005) (suggesting that Joseph Smith’s death occurred as a result of the practice of polygamy).

61. Gordon, *supra* note 36, at 18.

62. *Id.*

63. White & White, *supra* note 60, at 167.

64. Gordon, *supra* note 36, at 18.

65. *Id.*

66. *Id.*

67. *Id.* (noting that one territorial legislator referred to marriage as “the very foundation of all government.”).

68. *Id.*

the Mormon practice of polygamy, which was referred to as “plural” or “celestial marriage.”⁶⁹ Generally, in the Western world, “[p]olygamy has gone hand [in] hand with murder, idolatry, and every secret abomination.”⁷⁰ Likewise, in 1856, the Republican Party deemed polygamy and slavery as “twin relics of barbarism.”⁷¹ This Republican sentiment, at least in terms of polygamy, rang loudly throughout America and in its courts.⁷² Americans “greeted the Mormon [practice of polygamy] with shock, and . . . condemnation.”⁷³ Moreover, public opinion of polygamy was at center-stage when the Supreme Court heard *Reynolds*, as well as subsequent polygamy cases.⁷⁴ Cultural views on polygamy continue to be a driving force in the judicial arena.⁷⁵ In turn, this section will examine polygamy’s beginnings in the Mormon Church, which was part of the reason why American society condemned polygamy in the nineteenth and twentieth centuries and why, perhaps to a lesser extent, it still does today.⁷⁶

A. *The (Not So) Well-Kept Secret & the “Kingdom of God”*

Polygamy—specifically, “polygyny”—was not a founding principle of the Mormon Church.⁷⁷ From the beginning, Smith questioned the traditional concepts of family, marriage, and adultery.⁷⁸ However, it was not until 1843 that “celestial marriage” was “revealed” to Smith as an integral part of the Mormon faith.⁷⁹ For some time, Smith shared his

69. See Gordon, *supra* note 36, at 14, 18-20 (stating that Americans resoundingly opposed the Mormons’ practice of polygamy); see also White & White, *supra* note 60, at 167-68 (positing that both the American public and government wholly opposed Mormons’ practice of polygamy).

70. See Chambers, *supra* note 24, at 64 (quoting PHILLIP L. KILBRIDE, PLURAL MARRIAGE FOR OUR TIMES: A REINVENTED OPTION? 70 (1994)).

71. Gordon, *supra* note 36, at 22; White & White, *supra* note 60, at 167.

72. See Gordon, *supra* note 36, at 23 (noting that Congress named the “Morrill Anti-Bigamy Act” after Republican Senator Justin Morrill); White & White, *supra* note 60 at 167 (stating that Congress asserted its authority over the Utah territory by “enacting the Morrill Bill”); Chambers, *supra* note 24, at 64 (“Nearly all of the Acts of Congress directed at the Mormons were upheld as constitutional by the United States Supreme Court . . .”).

73. Gordon, *supra* note 36, at 20.

74. *Id.* at 24-25 (discussing the subsequent “prosecution of 2,500 criminal cases” involving polygamy).

75. See John Schwartz, *A Utah Law Prohibiting Polygamy is Weakened*, N.Y. TIMES (Dec. 14, 2013), http://www.nytimes.com/2013/12/15/us/a-utah-law-prohibiting-polygamy-is-weakened.html?_r=0 (stating that courts today take into consideration “the nation’s changing attitude toward government regulation of personal affairs and unpopular groups”).

76. Gordon, *supra* note 36, at 14-16.

77. See *id.* at 16 (“Polygamy was not one of the original tenets of the faith.”); Altman, *supra* note 19, at 369 (using the term “polygyny” to describe the Mormon practice of plural marriage).

78. See White & White, *supra* note 60, at 166 (“[Smith] intentionally performed illegal marriages . . . and he began questioning the legitimacy of civil marriage and the meaning of adultery.”).

79. Gordon, *supra* note 36, at 16.

revelation with only a few of his close cohorts.⁸⁰ While Smith and his trusted associates practiced polygyny, the Mormon leadership continued to deny that polygamy was a part of the Mormon faith; however, many people still knew that it was happening.⁸¹

Smith's revelation on celestial marriage changed the practice and perception of Mormonism.⁸² As a result, celestial marriage "became a necessary condition for exaltation."⁸³ Exaltation is "ultimate salvation" for Mormons; "it is a form of deification that Mormonism posits as its fundamental goal."⁸⁴ Aside from its spiritual importance, polygyny was also a key element of Smith's new theory on government.⁸⁵ Smith wanted to reunite church and state in order to create a "Kingdom of God."⁸⁶ The practice of polygyny in the Mormon faith was essential to achieving this goal.⁸⁷ Smith's revelation posited, "God's command to Mormon men was instituted for the purification and edification of the world."⁸⁸

B. *The Secret is Out*

Ultimately, as noted above, Smith died before Brigham Young, so Young and other Mormon leaders implemented a form of Smith's "Kingdom of God" in Utah.⁸⁹ Mormons used their power in this newly established government "to support the practice of plural marriage."⁹⁰ As a result, Mormons in Utah regularly practiced polygamy.⁹¹ Likewise, rumors about polygamy in Utah became almost impossible to deny.⁹² Thus, in 1852, the Church confirmed its practice and belief in plural marriage.⁹³ Mormon leaders alleged numerous benefits of polygamy, which landed

80. See White & White, *supra* note 60, at 166.

81. See *id.* at 166-67 (suggesting that others knew about the Mormon leadership's practice of polygamy).

82. See Chambers, *supra* note 24, at 62-63 (citing KLAUS J. HANSEN, MORMONISM AND THE AMERICAN EXPERIENCE 29 157 (1981)) (finding that polygamy "placed [the Mormons] outside the mainstream of American Culture.>").

83. White & White, *supra* note 60, at 166; see also Chambers, *supra* note 24, at 62 n.44 (citing HANSEN, *supra* note 82, at 29, 51-83, 162) (discussing the effect of polygamy on the Mormon faith and the cultural opinion of the Mormon faith).

84. White & White, *supra* note 60, at 166.

85. See Gordon, *supra* note 36, at 16, 18.

86. *Id.* at 16.

87. See *id.* at 16, 18.

88. *Id.* at 18.

89. See *id.* at 16, 18.

90. "[Mormons] controlled the Utah Territorial Legislature, and while the legislature never declared plural marriage legally permissible, it enacted laws to accommodate the lives of plural-marriage families." Chambers, *supra* note 24, at 63.

91. See Gordon, *supra* note 36, at 18 (suggesting that as time passed more and more Mormons began to openly practice polygamy in Utah).

92. See *id.*

93. See *id.*

upon deaf ears.⁹⁴ Americans resoundingly opposed the Mormon practice of polygamy, and polygamy in general.⁹⁵

There is strength in numbers. American citizens and politicians knew this adage and feared it in the context of Mormonism.⁹⁶ Americans essentially ignored other religious groups, with relatively small followings, that did not practice traditional principles of monogamous marriage.⁹⁷ Mormons, on the other hand, were large in number and extremely well organized.⁹⁸ In turn, Mormon polygamy spurred a national anti-polygamy movement.⁹⁹

The nineteenth-century anti-polygamy movement was a cultural and political war that the Mormons did not win.¹⁰⁰ Anti-polygamists based their position on two ideas: (1) polygamy was “bad for women” and (2) polygamy was “bad for the entire nation.”¹⁰¹ These two ideas were so powerful that, shortly after the anti-polygamist movement began, it became “clear that no respectable American could openly support polygamy.”¹⁰²

Congress joined the war against polygamy and passed the Morrill Anti-Bigamy Act—the act prohibited the marriage of one man to more than one woman in all United States territories.¹⁰³ For a while, the Act was only window dressing—“no Mormon jury would indict a polygamist, and loyal Mormons controlled the jury pools in Utah.”¹⁰⁴ Eventually, however, the Mormon leadership agreed to a “test case,” which resulted in *Reynolds*.¹⁰⁵ Ultimately, *Reynolds* made it to the United States Supreme Court, only to

94. See *id.* at 18-20 (detailing Orson Pratt’s announcement and support of the Mormon practice of polygamy and stating that Americans did not give merit to the defenses of polygamy); Chambers, *supra* note 24, at 64-65 (detailing the prevailing, general opinion of polygamy in America).

95. See Gordon, *supra* note 36, at 20 (“[T]he rest of the country greeted the Mormon announcement with shock, and soon with condemnation.”).

96. Chambers, *supra* note 24, at 62-63 (suggesting that the amount of Mormons in Utah and their political power greatly troubled non-Mormons in Utah and non-Mormons throughout the U.S.); Gordon, *supra* note 36, at 20-21 (positing that the size of Mormon following and the fact that Mormon’s had their own territory made the nation fearful of Mormonism in particular).

97. Gordon, *supra* note 36, at 20-21 (explaining that other nontraditional religious practices in the context of marriage existed at this time but were not sharply contested like Mormonism).

98. *Id.*

99. *Id.* at 21; see Chambers, *supra* note 24 at 63 (“But it was [the Mormon] practice of polygamy that became the principal articulated grounds of the political efforts to cripple them, and, in truth, it was polygamy, more than any other single practice or belief, that placed them outside the mainstream of American culture.”).

100. Gordon, *supra* note 36, at 21.

101. *Id.*

102. *Id.*

103. *Id.* at 23.

104. *Id.*

105. Gordon, *supra* note 36, at 23 (stating that the Mormon leadership “carefully” chose George Reynolds because he was loyal and was not a stereotypical polygamist).

have the Court rule against the Mormons—largely based on society’s view of polygamy.¹⁰⁶

C. *The End & More Secrets*

Pressures from the federal government were too great for the Mormons to handle.¹⁰⁷ While the *Reynolds* decision had no immediate impact upon the Mormon marital system, the case ultimately led to anti-polygamy laws that were actually enforceable.¹⁰⁸ Likewise, the United States brought 2,500

106. *Id.* at 24-25; Chambers, *supra* note 24, at 64-65 (detailing the tone of the Supreme Court’s decision in *Reynolds*).

107. White & White, *supra* note 60, at 168.

108. Mary K. Campbell, *Mr. Peay’s Horses: The Federal Response to Mormon Polygamy, 1854-1887*, 13 YALE J.L. & FEMINISM 29, 40-43 (2001). The Morrill Act was difficult and ineffective because it was nearly impossible to obtain testimony that proved the existence of plural marriages. *Id.* at 38-39. As described by Mary K. Campbell:

The statute contained a central weakness, however: it required predominantly Mormon juries to convict their own. Additionally, the Act crippled itself by relying upon a formal definition of marriage and bigamy. The Morrill Act required prosecutors to prove that a defendant had married twice—a massive hurdle in a territory that lacked both marriage laws and civil marriage records. At the time, most Utah marriages were either common law or ecclesiastical, and Mormon temple ordinances swore all participants to secrecy. These facts alone promised to reduce Morrill trials to an evidentiary nightmare of conflicting testimony. As a result, the statute languished, unused, for over a decade. When the federal government finally did indict its first polygamist in 1871, it ignored the Morrill Act, choosing instead to indict the defendant for having adulterous relations with his plural wife.

Id. (footnotes omitted).

Therefore, Congress responded by enacting the Edmunds Act, which led to the arrest and incarceration of thousands of Mormon men. Ray Jay Davis, *Plural Marriage and Religious Freedom: The Impact of Reynolds v. United States*, 15 ARIZ. L. REV. 287, 291 (1973); Gordon, *supra* note 36, at 25. The Edmunds Act “made it a misdemeanor in a territory of the United States for a male to cohabit with more than one woman.” Davis, *supra* note 108, at 291; Gordon, *supra* note 36, at 25. Among other things, the Act included the following provisions:

- A wife or wives were forced to testify against their husbands.
- Witnesses did not have to be subpoenaed to be forced to appear in court.
- Definite laws and punishments regarding immoralities (in the eyes of the law) were set forth.
- All marriages performed were to be recorded with a probate court. Probate judges were to be appointed by the President of the United States.
- Women’s suffrage was abolished (to restrict the Mormon elective franchise).
- A test oath was reintroduced into Utah’s elective process: voting, serving on juries, or holding public office were conditional upon signing the oath pledging obedience to and support of all anti-polygamy laws.

Campbell, *supra* note 108, at 50-51 (footnotes omitted). The adoption of the Edmunds Act doomed Mormon polygamy. *Id.* On September 26, 1890, following the adoption of the Edmunds Act, the President of the Mormon Church, Wilford Woodruff, issued the First Manifesto, in which he declared that the “advice to the Latter-Day Saints is to refrain from contracting any marriages forbidden by the

criminal cases and “more than a thousand Mormon men went to prison.”¹⁰⁹ The Mormon leadership was crippled and lost control over Utah.¹¹⁰ Perhaps in an effort to gain more control, the Mormon Church abandoned the practice of plural marriage in favor of statehood.¹¹¹

Essentially, the open practice of plural marriage was over.¹¹² Some Mormons, however, reverted to the days of secrecy and “continued polygamy with marriage ceremonies performed at sea and in foreign lands.”¹¹³ The days of Joseph Smith were back—only a few top officials in the church and those actually entering polygamous relationships knew about continued practice of plural marriage.¹¹⁴

Today, the Latter-day Saints (“LDS”) has renounced the practice of plural marriage and the church excommunicates Mormons who practice plural marriage.¹¹⁵ But fundamentalist Mormon groups still believe that plural marriage is an essential element of the Mormon faith.¹¹⁶ Mormon fundamentalists are not merely small splinter groups; “some estimates are that 20,000 to 40,000 or more people presently belong to fundamentalist Mormon groups in the western United States.”¹¹⁷ However, the number of fundamentalist Mormons who actually practice polygamy is unclear.¹¹⁸ According to some, “fewer than half of fundamentalists overall are engaged in polygamous relationships.”¹¹⁹ Regardless of the propriety of the statistics about polygamous relationships in fundamentalist Mormon households, it is clear that a number of “Mormons” still practice polygyny in the United States and, at least as of 2005, the number is rising.¹²⁰

law of the land.” JESSIE L. EMBRY, *MORMON POLYGAMOUS FAMILIES: LIFE IN THE PRINCIPLE 12* (Linda King Newell ed., 1987). While some confusion remained for some period of time as to the application of the Manifesto to already existing polygamous marriages, its issuance, in effect, presaged an end to Mormon polygamy in the Utah Territories. *Id.* at 16.

109. Davis, *supra* note 108, at 291; see Gordon, *supra* note 36, at 26.

110. White & White, *supra* note 60, at 168.

111. *Id.*

112. *Id.*; Gordon, *supra* note 36, at 26.

113. White & White, *supra* note 60, at 168.

114. *Id.*

115. *Do Mormons Practice Polygamy?*, MORMON.ORG, <http://www.mormon.org/faq/practice-of-polygamy> (last visited Oct. 12, 2015) (stating the current LDS’ position on plural marriage through a quote from a prior president of LDS: “This Church has nothing whatever to do with those practicing polygamy. They are not members of this Church”); Altman, *supra* note 19, at 369-70.

116. Altman, *supra* note 19, at 369-70; see Brooke Adams, *LDS Splinter Groups Growing*, SALT LAKE TRIB. (Aug. 9, 2005, 1:08 AM), <http://archive.slttrib.com/printfriendly.php?id=2925222&itype=NGPSID>.

117. Altman, *supra* note 19, at 369.

118. See Adams, *supra* note 116.

119. *Id.*

120. *Id.*

V. POLYGAMY IN THE COURT OF LAW AND IN THE MODERN COURT OF PUBLIC OPINION

Through the historical lens outlined above, this Section will explore the evolution of the constitutional analyses in polygamy cases decided by the United States Supreme Court, United States Federal District Courts, and the Utah Supreme Court.

A. *The Late Nineteenth Century*

Arguably, whether in the court of law or public opinion, the late nineteenth century was the most detrimental period for the Mormons in the United States.¹²¹ Section III focused on the American cultural view of polygamy in the late nineteenth century; this Part will focus on two major Supreme Court cases from that period—*Reynolds* and *Late Corp. of the Church of Jesus Christ of Latter-day Saints v. United States*.¹²²

1. *Reynolds v. United States*

Reynolds was the first case in which a court ruled on the constitutionality of the Morrill Anti-Bigamy Act.¹²³ George Reynolds was not the stereotypical “grizzled patriarch who married ever-younger women as he grew old and fat.”¹²⁴ He was “young, handsome, and the husband of only two wives.”¹²⁵ Reynolds’ good looks, however, were not enough to save him, or the Mormon leadership as a whole, from the Supreme Court’s ultimate ruling in the case.¹²⁶

Reynolds started out in Utah territorial court.¹²⁷ Reynolds lost in the trial court because the prosecution used testimony from one of Reynolds’ wives to prove that Reynolds had violated the Morrill Act.¹²⁸ Reynolds appealed to the Supreme Court of the Territory of Utah and contended that his religion required him to engage in plural marriage.¹²⁹ Likewise, Reynolds argued that any punishment for his practice of plural marriage would result in a violation “of his first amendment right to the free exercise of his religion.”¹³⁰ The court ignored Reynolds’ constitutional argument,

121. See Gordon, *supra* note 36, at 20-25.

122. 136 U.S. 1 (1890).

123. See Gordon, *supra* note 36, at 23-24; see also Chambers, *supra* note 24, at 64. For basic information about the Morrill Anti-Bigamy Act, see *supra* notes 103-106 and accompanying text.

124. Gordon, *supra* note 36, at 23.

125. *Id.*

126. See *Reynolds v. U.S.*, 98 U.S. 145, 167-68 (affirming the lower courts, ruling against Reynolds, and upholding Morrill Anti-Bigamy Act as constitutional).

127. See Davis, *supra* note 108, at 288.

128. *Id.*

129. *Id.*

130. *Id.*

but overturned his conviction due to a procedural defect.¹³¹ Subsequently, the trial court cured the procedural error and re-convicted Reynolds.¹³² The Territorial Supreme Court affirmed the trial court's ruling, but Reynolds made it to the United States Supreme Court two years later.¹³³

The ultimate issue before the *Reynolds* Court was “whether religious belief can be accepted as a justification of an overt act made criminal by the law of the land.”¹³⁴ The Court looked to “the history of the times in the midst of which the [First Amendment] was adopted” in order to determine the extent to which the First Amendment protects religious freedom.¹³⁵ The Court found solace in a letter from 1802 written by Thomas Jefferson, one of the biggest advocates for a constitutional provision that protected religious freedom.¹³⁶ In the letter, Jefferson stated that “the legislative powers of the government [should] reach actions only, and not opinions”¹³⁷ Ultimately, the *Reynolds* Court fashioned its holding from Jefferson's letter.¹³⁸

The Court held that laws cannot obstruct religious beliefs and opinions, but laws can obstruct religious practices or actions.¹³⁹ Specifically, the Court held that the First Amendment's Free Exercise Clause prohibits Congress from enacting laws that regulate religious opinions or beliefs, but it does not prevent Congress from regulating religious actions “in violation of social duties or subversive of good order.”¹⁴⁰ In turn, the Court classified polygamy as a “social harm . . . subversive of good order” and affirmed the territorial court's ruling.¹⁴¹

The *Reynolds* Court's analysis does not clearly explain why it classified polygamy as a social harm “subversive of good order.”¹⁴² In this sense, it seems the Court's holding rested as much on Western societies' perception of polygamy as it did on the intent behind the First Amendment's Free Exercise Clause.¹⁴³ In reaching his conclusion, Chief Justice Waite, writing for the majority, stated, “[p]olygamy has always been odious among the

131. *Id.* at 288-89.

132. *Davis*, *supra* note 108, at 289.

133. *Id.*

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

135. *Id.*

136. *Id.* at 164.

137. *Id.*

138. *See id.* at 166-67.

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

140. *See id.* at 164, 166.

141. *See Brown v. Buhman*, 947 F. Supp. 2d 1170, 1184-86 (D. Utah 2013) (discussing the *Reynolds* Court's finding that polygamy is subversive of good order); *Reynolds*, 98 U.S. at 168 (affirming the Utah territorial court rulings).

142. *Brown*, 947 F. Supp. 2d at 1186-87.

143. *Id.* at 1186-88 (analyzing the *Reynolds* opinion and trying to discern how the court came to its conclusion about the social harm created by polygamy).

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 African people.”¹⁴⁴ Moreover, the Chief Justice echoed the Court’s belief that monogamy leads to a “government of the people,” while polygamy promotes “stationary despotism.”¹⁴⁵ Therefore, one can conclude that the Court found “orientalism” and “stationary despotism” to be the social harms of polygamy that were “subversive of good order.”¹⁴⁶

Regardless of how the *Reynolds* Court framed Mormon polygamy, the Court’s “distinction between protected religious belief and unprotected religious actions was followed for several decades.”¹⁴⁷ In fact, in the context of plural marriage, the holding is still good law.¹⁴⁸

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

The Supreme Court, in *Late Corp.*, upheld the Edmunds-Tucker Act, which unincorporated the LDS and allowed the federal government to seize the LDS’s assets.¹⁴⁹ The *Late Corp.* Court’s ruling effectively ended the Mormon Church’s official endorsement of plural marriage.¹⁵⁰

The *Late Corp.* Court’s decision rested on the notion that the LDS used its corporate funds for “the purpose of promoting and propagating the unlawful practice [of polygamy]”¹⁵¹ The court stated that “[t]he power

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

145. Chambers, *supra* note 24, at 65 (quoting *Reynolds*, 98 U.S. at 166).

146. Martha E. Ertman, *Race Treason: The Untold Story of America’s Ban on Polygamy*, 19 COLUM. J. GENDER & L. 287, 293 (2010) (citing *Reynolds*, 98 U.S. at 164, 165-66) (“The [*Reynolds*] Court justified criminalizing Mormon polygamy in two passages that link polygamy first to ‘Asiatic and African people,’ then to ‘stationary despotism.’”). Professor Martha Ertman also states:

The most valuable insight Orientalism offers here is that framing a group as Oriental—an inherently backward, sensual, and therefore subordinated Other—makes its subjection inevitable. Thus, the public imagination’s construction of Mormons as members of subject racial groups (Asian and Black, mainly) played a crucial role in subjecting Mormons to federal control.

Id. at 290-91 (footnotes omitted).

147. Robert E. Riggs, *Reynolds v. United States*, in *ENCYCLOPEDIA OF MORMONISM: THE HISTORY, SCRIPTURE, DOCTRINE, AND PROCEDURE OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS* 1229, 1230 (Daniel H. Ludlow ed., 1992) (emphasis omitted).

148. *Id.* at 1230.

149. *Late Corp. of the Church of Jesus Christ of Latter-day Saints v. U.S.*, 136 U.S. at 1 n.1. “The Mormon Church was originally incorporated in 1851 by an act of the so-called State of Deseret” Paul G. Kauper & Stephen C. Ellis, *Religious Corporations and the Law*, 71 MICH. L. REV. 1499, 1517 (1973) (footnote omitted) (discussing the scope of the Edmunds-Tucker Act).

150. *See id.* at 1519 (suggesting that shortly after the Court’s decision in *Late Corp.* the church abolished the practice of polygamy).

151. *Late Corp.*, 136 U.S. at 48-50 (stating the Court’s findings related to the LDS’ use of its funds and the Court’s ultimate dissolution of the LDS as a corporation).

of Congress over the Territories of the United States is general and plenary”¹⁵² Likewise, because the Church was incorporated in Utah—a United States territory—and because the Church used its funds for an unlawful purpose—promoting polygamy—the Court held that Congress had the power to dissolve the LDS as a corporation and seize its property.¹⁵³

In reaching its conclusion, the *Late Corp.* Court explained, in detail and through harsh rhetoric, the social harm and unlawful nature of Mormon religious practices, specifically polygamy.¹⁵⁴ The Court posited that “Mormons were degrading the morals of the country through their religious practices”¹⁵⁵ Moreover, the Court found that polygamy exemplified “a return to barbarism” that was “contrary to the spirit of Christianity.”¹⁵⁶

B. *The Twentieth Century*

Political outcry over polygamy “declined sharply over the first half of this century.”¹⁵⁷ However, the American cultural view of polygamy remained unchanged—American citizens, politicians, and judges strongly opposed the practice.¹⁵⁸ In turn, this Part will introduce two polygamy cases from the twentieth century that exemplify this unchanged sentiment, one United States Supreme Court case, *Cleveland v. United States*,¹⁵⁹ and one Utah Supreme Court case, *In re Black*.¹⁶⁰ Additionally, this Part addresses one United States Court of Appeals case, *Potter v. Murray City*,¹⁶¹ in which the court specifically examined the reasons offered by the state for its polygamy prohibition.

1. *Cleveland v. United States*

Cleveland was the first case to exemplify America’s unchanged perception of polygamy in the twentieth century.¹⁶² In *Cleveland*, the Court granted certiorari to review the convictions of multiple Mormon

152. *Id.* at 42.

153. *See id.* at 45-47, 50-53, 61-62.

154. *Id.* at 48-50.

155. *Brown*, 947 F. Supp. 2d at 1187 (citing *Late Corp.*, 136 U.S. at 49).

156. *Late Corp.*, 136 U.S. at 49 (“The organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism. It is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the western world.”).

157. Chambers, *supra* note 24, at 68.

158. *See id.* (“Yet, on the rare occasions when the issue surfaced, strong disapproval continued to be registered.”).

159. 329 U.S. 14 (1946).

160. 283 P.2d 887 (Utah 1955).

161. 760 F.2d 1065 (10th Cir. 1985).

162. *See* Chambers, *supra* note 24, at 68.

fundamentalists who allegedly violated the Mann Act.¹⁶³ The Mann Act makes transporting “any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose” a federal offense.¹⁶⁴ The Court’s decision in *Cleveland* turned on the meaning of “for any other immoral purpose.”¹⁶⁵ Specifically, the Court had to determine whether the Mann Act covered polygamy (*i.e.*, whether the act covered polygamous men who transported their multiple wives across state lines).¹⁶⁶

Ultimately, the Court concluded, “polygamous practices are not excluded from the Act.”¹⁶⁷ In reaching its conclusion, the Court echoed the rhetoric employed in *Reynolds* and *Late Corp.*¹⁶⁸ The Court restated the idea that polygamy is “almost exclusively a feature of the life of Asiatic and of African people” and that polygamy is a “return to barbarism” that is “contrary to the spirit of Christianity.”¹⁶⁹ Moreover, the Court stated, “[t]he establishment or maintenance of polygamous households is a notorious example of promiscuity” and noted that “polygamous practices have long been branded as immoral in the law.”¹⁷⁰ After one considers *Cleveland*, it is relatively clear that, even sixty-eight years after *Reynolds* and fifty-six years after *Late Corp.*, the Supreme Court’s view on polygamy had not changed.¹⁷¹

2. *In re Black*

In re Black dealt with whether children born from “an unlawful polygamous marriage” were neglected because their parents were in a polygamist marriage.¹⁷² The parents were Leonard Black and Vera Black.¹⁷³ Vera Black was the second of Mr. Black’s three wives and the couple had eight children together.¹⁷⁴

The case made it to the Utah Supreme Court on appeal from the Juvenile Court of the Sixth District of Washington County, Utah.¹⁷⁵ The Juvenile Court found the children had been neglected and ordered that they

163. *Cleveland v. U.S.*, 329 U.S. at 16. In convicting the petitioners for violating the Mann Act, the court described the claims against the petitioners as follows: “Each [petitioner] transported at least on one plural wife across state lines, either for the purpose of cohabiting with her, or for the purpose of aiding another member of the cult in such a project.” *Id.* (footnote omitted).

164. *Id.*

165. *Id.*

166. *See id.* at 16-17.

167. *Cleveland*, 329 U.S. at 18.

168. *See id.* at 18-19.

169. *Id.* (quoting *Reynolds*, 98 U.S. at 164; *Late Corp.*, 136 U.S. at 49).

170. *Id.*

171. *See id.*

172. *In re Black*, 283 P.2d at 888-89.

173. *Id.* at 888.

174. Chambers, *supra* note 24, at 69.

175. *Black*, 283 P.2d at 888.

be removed from their parents, who continually violated Utah's law against polygamy and "wilfully instilled a positive view of polygamy in their children."¹⁷⁶

The Supreme Court of Utah upheld the Juvenile Court's decision and sanctioned the children's removal.¹⁷⁷ The court believed that "public welfare demands that the state take all proper steps available to protect itself against" the parents' polygamous practices.¹⁷⁸ Essentially, the court viewed the parents' actions as deeply immoral and destructive to the welfare of their children.¹⁷⁹ Overall, *In re Black* is illustrative of how the courts and people of Utah viewed polygamy almost one hundred years after *Reynolds* and *Late Corp.*¹⁸⁰

3. *Potter v. Murray City*

In *Potter*, a city police officer asserted that his termination from the police force for practicing polygamy was in violation of his right to the free exercise of his religion under the First Amendment.¹⁸¹ In reviewing the case, the United States Court of Appeals for the Tenth Circuit analyzed whether the state had a compelling interest in prohibiting polygamous marriages that were allegedly at the heart of the police officer's religious belief.¹⁸²

In affirming the district court's grant of summary judgment in favor of the city, the Court of Appeals, while acknowledging the existence of the Supreme Court decision in *Reynolds*, did not simply conclude that *Reynolds* was dispositive of the question before it or that marriage was simply between one man and one woman—end of story.¹⁸³ Instead, the Court of Appeals conducted a thorough analysis to determine whether the state could articulate a compelling interest for infringing upon a religious practice.¹⁸⁴ For the purpose of its analysis, the court assumed that the religious body to which the police officer belonged did in fact recognize polygamy as a core religious practice.¹⁸⁵ However, even with this assumption, the court determined that the state had a compelling interest in prohibiting polygamous marriages—preserving monogamy.¹⁸⁶ According to the court,

176. Chambers, *supra* note 24, at 69 (citing *Black*, 283 P.2d at 888-92).

177. *Id.*

178. *Black*, 283 P.2d at 910.

179. *Id.* at 910-11.

180. Chambers, *supra* note 24, at 68-69 (suggesting that *Black* demonstrates "enduring hostility" towards polygamous families).

181. *Potter v. Murray City*, 760 F.2d at 1066.

182. *Id.* at 1068-70.

183. *Id.*

184. *Id.* at 1069-70.

185. *Id.* at 1069.

186. *Potter*, 760 F.2d at 1070.

this conclusion was supported by “a vast and convoluted network of other laws clearly establishing its compelling state interest in and commitment to a system of domestic relations based exclusively upon the practice of monogamy as opposed to plural marriage.”¹⁸⁷

C. *The Twenty-First Century*

Has there been a recent shift in America’s view of polygamy? Americans still oppose polygamy in general but at least in some regard, their opposition is not nearly as staunch as it was in the nineteenth and twentieth centuries.¹⁸⁸ For example, some Americans have embraced television programs that shed a new light on polygamy in modern day America, such as HBO’s *Big Love* and TLC’s *Sister Wives*, which explore fictional and real polygamous families, respectively.¹⁸⁹ This Part will introduce *Brown v. Buhman*,¹⁹⁰ a federal district court case involving the stars of *Sister Wives*.¹⁹¹ At least in the legal arena, *Brown* seemingly illustrates a changed perception of polygamy.¹⁹² By way of contrast, this Part also discusses a recent Canadian case, *Reference re: Section 293 of the Criminal Code of Canada*,¹⁹³ in which the Supreme Court of British Columbia addressed the issue of polygamy in the context of the religious protections afforded by the Canadian Charter of Rights and Freedoms.¹⁹⁴

1. *Brown v. Buhman*

Brown arose out of TLC’s reality television program *Sister Wives*.¹⁹⁵ The show details the lives of the Browns, a fundamentalist Mormon family that lives in Utah and practices plural marriage.¹⁹⁶ Kody Brown is

187. *Id.* (quoting *Potter v. Murray City*, 585 F. Supp. 1126, 1138 (D. Utah 1984)).

188. Kaitlin R. McGinnis, Note, *Sister Wives: A New Beginning for United States Polygamist Families on the Eve of Polygamy Prosecution?*, 19 VILL. SPORTS & ENT. L.J. 249, 251 (2012) (discussing potential change in perception and suggesting, given the popularity of the television shows, that opposition is not as strong as it used to be).

189. *See id.* at 257, 259; *see also* Felicia R. Lee, ‘*Big Love*’: *Real Polygamists Look at HBO Polygamists and Find Sex*, N.Y. TIMES (Mar. 28, 2006), <http://www.nytimes.com/2006/03/28/arts/television/28poly.html?pagewanted=all> (exploring the reactions of women engaged in, or previously engaged in, polygamous relationships and noting benefits of the show as well as some potentially negative aspects).

190. 947 F. Supp. 2d 1170.

191. *Id.* at 1178.

192. *See id.* at 1234.

193. *Reference re: Section 293 of the Criminal Code of Canada*, [2011] BCSC 1588 (Can.) [hereinafter *Reference*].

194. *See id.*

195. *Brown*, 947 F. Supp. 2d at 1178-79.

196. *Brown*, 947 F. Supp. 2d at 1178; *contra* McGinnis, *supra* note 188, at 257-58 (citing *Who are the Browns*, TLC, <http://tlc.discovery.com/tv/sister-wives/about-the-show.html>) (stating, for informational purposes, that the Browns now live in Nevada—this fact has no bearing on the district court’s analysis in *Brown*).

“married” to four women: Meri, Janelle, Christine, and Robyn.¹⁹⁷ However, Mr. Brown is only legally married to one woman, Meri Brown; Mr. Brown and the other women are engaged in “spiritual marriages.”¹⁹⁸ *Sister Wives* broadened its audience to include a federal district court when the Browns filed a complaint, which challenged the constitutionality of Utah’s bigamy statute on multiple grounds, against Utah County Attorney Jeffrey R. Buhman.¹⁹⁹

The main issue in *Brown* was whether the “cohabitation prong” of Utah’s bigamy statute is constitutional.²⁰⁰ Utah’s bigamy statute “covers not only polygamy but ‘cohabitation’—a term that encompasses a broad category of private relations in which a married person ‘purports to marry or cohabits with another person.’”²⁰¹ The Court deemed Kody Brown’s relationship with Janelle, Christine, and Robyn as “religious cohabitation.”²⁰² According to the court, religious cohabitation occurs when “[t]hose who choose to live together without getting married enter into a personal relationship that resembles a marriage in its intimacy but claims no legal sanction.”²⁰³

Ultimately, the court ruled the cohabitation prong of Utah’s bigamy law unconstitutional on numerous grounds and deleted the cohabitation prong from the statute.²⁰⁴ Initially, after begrudgingly admitting that *Reynolds* still controlled, the court disposed of the issue of whether the prohibition of “straightforward polygamy or bigamy” is constitutional under the Free

197. McGinnis, *supra* note 188, at 257 (citing *Inside the Lives of a Polygamist Family*, OPRAH (Oct. 14, 2010), <http://www.oprah.com/oprahshow/Inside-the-Lives-of-a-Polygamist-Family/print/1>).

198. *Id.* (citing *Inside the Lives of a Polygamist Family*, *supra* note 197).

199. *Brown*, 947 F. Supp. 2d at 1176.

200. *Id.* at 1193 (stating that prohibition of polygamy itself cannot be challenged, rather the analysis must focus on “religious cohabitation”).

201. *Id.* at 1178 (citing UTAH CODE ANN. § 76–7–101 (West 2010)).

202. *Id.* at 1190.

203. *Id.* at 1197 (quoting *Holm*, 137 P.3d at 773).

204. *Brown*, 947 F. Supp. 2d at 1234 (“The court finds the cohabitation prong of the Statute unconstitutional on numerous grounds and strikes it.”); *contra* *State v. Green*, 99 P.3d 820, 832 (Utah 2004) (holding that the meaning of “cohabitation” in the Utah statute was not unconstitutionally vague); *State v. Holm*, 137 P.3d 726, 732–33 (Utah 2006) (interpreting the “purports to marry” language contained in the Utah bigamy statute as not requiring an attempt to seek legal recognition). As the court stated in *Holm*:

But while a marriage license represents a contract between the State and the individuals entering into matrimony, the license itself is typically of secondary importance to the participants in a wedding ceremony. The crux of marriage in our society, perhaps especially a religious marriage, is not so much the license as the solemnization, viewed in its broadest terms as the steps, whether ritualistic or not, by which two individuals commit themselves to undertake a marital relationship.

Id. at 737.

Exercise Clause of the First Amendment.²⁰⁵ Therefore, the court focused its constitutional analysis solely on polygamous cohabitation.²⁰⁶

First, the court examined the constitutionality of the cohabitation prong in relation to the Free Exercise Clause of the First Amendment.²⁰⁷ The court determined that, under the Free Exercise Clause, strict scrutiny review applied to the cohabitation prong of the Utah Statute.²⁰⁸ Therefore, the cohabitation prong of Utah's bigamy statute had to be "justified by a compelling governmental interest" and "narrowly tailored to advance that interest."²⁰⁹ In turn, the court held that none of the "state interests" in prohibiting polygamous cohabitation—regulating marriage and "protecting monogamous marriage as a social institution"—survived strict scrutiny review.²¹⁰ Likewise, the court held the statute unconstitutional as a violation of the Free Exercise Clause.²¹¹

Next, the court examined the cohabitation prong in relation to the Fourteenth Amendment's guarantee of substantive due process.²¹² The court held that the cohabitation prong of Utah's bigamy statute "[did] not survive rational basis review under the substantive due process analysis"²¹³ In reaching its holding, the court compared *Brown* to *Lawrence v. Texas* and stated, "[c]onsensual sexual privacy is the touchstone of the rational basis review analysis in this case, as in *Lawrence*."²¹⁴ The court reasoned that *Lawrence* stands for the proposition that to "secure individual liberty, . . . certain kinds of highly personal relationships' must be given 'a substantial measure of sanctuary from unjustified interference by the State.'"²¹⁵ In turn, the court dismissed the defendant's argument that religious polygamous cohabitation can cause serious harm "in closed religious polygamist communities" because those harms—"incest, rape, unlawful sexual conduct with a minor, and domestic and child abuse"—can be prosecuted independently under other Utah statutes.²¹⁶ Moreover, the court held that the cohabitation prong was not "rationally related" to other

205. *Id.* at 1189-90, 1203 ("The court need not be entirely bound by the extremely narrow free exercise construct evident in *Reynolds*; that case is, perhaps ironically considering the content of the current case, not controlling for today's ruling that the cohabitation prong of the Statute is unconstitutional. In fact, the court believes that *Reynolds* is not, or should no longer be considered, good law").

206. *Id.* at 1197.

207. *Id.* at 1204-05.

208. *Id.* at 1204.

209. *Brown*, 947 F. Supp. 2d at 1217.

210. *Id.*

211. *Id.* at 1221.

212. *Id.* at 1222-23.

213. *Id.*

214. *Brown*, 947 F. Supp. 2d at 1223.

215. *Id.* at 1224 (quoting *Roberts v. U.S. Jaycees*, 468 US 609, 618 (1984)).

216. *Id.*

state interests, such as the “interest in preventing the perpetration of marriage fraud [and] the misuse of government benefits associated with marital status.”²¹⁷ Therefore, the court ruled the cohabitation prong of Utah’s bigamy statute unconstitutional on substantive due process grounds.²¹⁸

Overall, instead of broadly applying *Reynolds*, the court employed a more open-minded approach in *Brown*.²¹⁹ In fact, the court stated that, given the developments in constitutional law that afford more protection to certain personal choices, “defaulting simply to *Reynolds* . . . would not be the legally or morally responsible approach . . . given the . . . constitutional protections at issue.”²²⁰

2. *The Bountiful Litigation: Reference re: Section 293 of the Criminal Code of Canada*

Bountiful is a community in British Columbia where the residents adhere to a fundamentalist form of Mormonism that still permits polygamy.²²¹ The fundamentalist Mormon sect has been investigated numerous times over the last two decades.²²² The Bountiful litigation was initiated in 2009 when James Oler and Winston Blackmore were arrested and charged for violating Canadian law prohibiting polygamy.²²³ Section 293 of the Criminal Code of Canada explicitly bans polygamy and threatens offenders with a five-year prison term.²²⁴

Blackmore was bishop of the Canadian Fundamentalist Latter-day Saints (FLDS) until Warren Jeffs excommunicated him in 2002 for challenging the authority of Jeffs as Prophet and President of the FLDS.²²⁵ Blackmore’s excommunication resulted in a split among the polygamist community in Bountiful.²²⁶ Upon Blackmore’s excommunication, Oler

217. *Id.*

218. *Id.* at 1225.

219. *See Brown*, 947 F. Supp. 2d at 1181 (“The proper outcome of this issue has weighed heavily on the court for many months as it has examined, analyzed, and re-analyzed the numerous legal, practical, moral, and ethical considerations and implications of today’s ruling.”).

220. *Id.*

221. *Reference*, [2011] BCSC 1588 at paras. 381-92; Jonathan Turley, *The Loadstone Rock: The Role of Harm in the Criminalization of Plural Unions*, 64 EMORY L.J. 1905, 1914 (2015).

222. Turley, *supra* note 221, at 1914.

223. *Id.*

224. *Reference*, [2011] BCSC 1588 at paras.1, 852.

225. Turley, *supra* note 221, at 1914.

226. *Id.*; Emily Morgan, *Jeffs’ Appeal Goes Before Utah Supreme Court*, DESERET NEWS (Nov. 3, 2009, 12:00 AM), <http://www.deseretnews.com/article/705341547/Jeffs-appeal-goes-before-Utah-Supreme-Court.html?pg=all>; *B.C. Polygamy Evidence Helps Warren Jeffs Conviction*, CBCNEWS (Aug. 11, 2011, 9:34 PM), <http://www.cbc.ca/news/canada/british-columbia/b-c-polygamy-evidence-helps-warren-jeffs-conviction-1.1083446>.

became the bishop of the Canadian FLDS.²²⁷ Oler was connected to Jeffs, who was ultimately convicted in the United States on charges related to the practice of polygamy.²²⁸

While both Oler and Blackmore were arrested in January 2009, the charges were ultimately dropped after the appointment of the special prosecutor was successfully challenged.²²⁹ Following the dismissal of the 2009 criminal charges, the Attorney General of British Columbia petitioned for a review of the constitutionality of the Canadian law that criminalized the practice of polygamy through a reference to the British Columbia Supreme Court.²³⁰ The primary question before the court was whether the Canadian law criminalizing the practice of polygamy violated the religious protections contained in the Canadian Charter of Rights and Freedoms (“Charter”).²³¹

Throughout this litigation, the court focused on: (1) whether Section 293 infringed on religious liberties protected by the Charter; (2) whether harm resulted from the practice of polygamy; and (3) if harm did result from the practice of polygamy, whether the regulation of that harm was substantial enough to trump the protection of religious liberties embodied in the Charter.²³² In addressing these questions, Canadian law required the court to determine whether Section 239 imposed restrictions on religious liberties protected by the Charter and, if so, whether those restrictions were justified by a rationale that was “pressing and substantial.”²³³ As Professor Jonathan Turley, who testified as an expert in the Bountiful litigation and who represented the plaintiffs in *Brown*, has written:

From the outset, a number of salient elements in the case strengthened the arguments for decriminalization. The parties seeking decriminalization constituted consenting adults who were not accused of any abuse of spouses or children. Moreover, they included polyandrists (unions with one woman and multiple men) and polyamorists (involving often secular-based plural unions involving multiple couples), rather than exclusively polygynists like Blackmore or Oler. Finally, the Attorney General accepted one threshold fact (which the court then used to frame its

227. Turley, *supra* note 221, at 1914.

228. *Id.*

229. *Id.*

230. *Id.* at 1915.

231. See Maura I. Strassberg, *Scrutinizing Polygamy: Utah’s Brown v. Buhman and British Columbia’s Reference re: Section 293*, 64 EMORY L.J. 1815, 1818 (2015).

232. *Id.* at 1841.

233. *Id.* at 1818.

analysis): ‘the case against polygamy is all about harm. Absent harm, [the Attorney General] accepted that [Section] 293 would not survive scrutiny under the Charter.’²³⁴

From an American perspective, the reference context is unusual in that the case presents no specific “case or controversy,” but rather asks the court to, in effect, issue an advisory opinion on whether Section 293 represents an unconstitutional violation of the Charter.²³⁵

The litigation of this case before the British Columbia Supreme Court took forty-two hearing days.²³⁶ The evidence presented to the court on both sides of the issue was extensive, including “ninety affidavits and expert reports.”²³⁷ “The expert witnesses represent[ed] a broad range of disciplines including anthropology, psychology, sociology, law, economics, family demography, history and theology.”²³⁸ Additionally, the court was presented with “Brandeis Brief materials” from all parties, comprising “several hundred legal and social science articles, books and DVDs.”²³⁹ As part of the proceeding, the court determined that the final submissions to the court could be televised or streamed online, given the importance of the issue before the court and the level of public interest.²⁴⁰ The court stated:

The media set up two web cameras in the courtroom which provided virtually live webcast of the entire closing submissions. I say “virtually” because it was a condition of my order that there be an approximate 10 minute delay in broadcast to permit recourse in the event of inadvertent reference to certain protected evidence. While I cannot speak for counsel, I did not find the cameras to be obtrusive or otherwise distracting. No concerns arising from the webcast have been brought to my attention.²⁴¹

In 2011, following this extraordinary litigation process, the court issued a voluminous 228 page opinion, in which it thoroughly reviewed the evidence presented regarding the practice of polygamy, the potential harms

234. Turley, *supra* note 221, at 1915 (quoting *Reference*, [2011] BCSC 1588 at para. 2).

235. Strassberg, *supra* note 231, at 1818; *see* Constitutional Question Act, R.S.B.C. 1996, c. 68, (Can.), available at http://www.bclaws.ca/civix/document/id/complete/statreg/96068_01 (last visited Oct. 5, 2015) (allowing constitutional questions to be referred to the courts by the government).

236. Strassberg, *supra* note 231, at 1818.

237. *Id.*

238. *Reference*, [2011] BCSC 1588 para. 29.

239. *Id.* at para. 32.

240. *Id.* at paras. 33-35, 42.

241. *Id.* at para. 43.

resulting from it, the religious rights potentially infringed upon by the restriction or criminalization of the practice, and the objective sought to be achieved by Section 293.²⁴² The court concluded that while the

242. *Id.* at paras. 8-14; Strassberg, *supra* note 231, at 1818-19. While strongly disagreeing with the finding by the court, Professor Turley describes the harms found by the court supporting the criminalization of polygamy and plural marriage in the following manner:

- *Women:* Women in polygamous relationships are at an elevated risk of physical and psychological harm. They face higher rates of domestic violence and abuse, including sexual abuse. Competition for material and emotional access to a shared husband can lead to fractious co-wife relationships. These factors contribute to the higher rates of depressive disorders and other mental health issues that women in polygamous relationships face. They have more children, are more likely to die in childbirth and live shorter lives than their monogamous counterparts. They tend to have less autonomy, and report higher rates of marital dissatisfaction and lower levels of self-esteem. They also fare worse economically, as resources may be inequitably divided or simply insufficient.

- *Children:* Children in polygamous families face higher infant mortality, even controlling for economic status and other relevant variables. They tend to suffer more emotional, behavioural and physical problems, as well as lower educational achievement than children in monogamous families. These outcomes are likely the result of higher levels of conflict, emotional stress and tension in polygamous families. In particular, rivalry and jealousy among co-wives can cause significant emotional problems for their children. The inability of fathers to give sufficient affection and disciplinary attention to all of their children can further reduce children's emotional security. Children are also at enhanced risk of psychological and physical abuse and neglect. Early marriage for girls is common, frequently to significantly older men. The resultant early sexual activity, pregnancies and childbirth have negative health implications for girls, and also significantly limit their socio-economic development. Shortened inter-birth intervals pose a heightened risk of various problems for both mother and child.

- *Society:* Polygamy has negative impacts on society flowing from the high fertility rates, large family size and poverty associated with the practice. It generates a class of largely poor, unmarried men who are statistically predisposed to violence and other anti-social behaviour. Polygamy also institutionalizes gender inequality. Patriarchal hierarchy and authoritarian control are common features of polygamous communities. Individuals in polygynous societies tend to have fewer civil liberties than their counterparts in societies which prohibit the practice. Polygamy's harm to society includes the critical fact that a great many of its individual harms are not specific to any particular religious, cultural or regional context. They can be generalized and expected to occur wherever polygamy exists.

The court described these families as inherently harmful despite noting that the conventional structure or definition of a family is changing dramatically in Canada. The court notably relied on the research of Dr. Zheng Wu, Chair of the Department of Sociology at the University of Victoria and Director of the University's Population Research Group. Wu laid out the data on the composition of Canadian families. That data showed a steadily changing structure of such families away from the traditional model of a two-parent family. In 2006, 84.1% of Canadian families were 'couple families' - down from roughly 89% in 1981. The largest change in this category was 'common-law couples,' which Wu

criminalization of polygamy did infringe upon religious liberties protected by the Charter, such infringement was justifiable in this case because the need to limit the harms resulting from the practice of polygamy was pressing and substantial.²⁴³ As the court wrote in its opinion:

[1330] To constitute a justifiable limit on a right or a freedom, the objective of the impugned measure must advance concerns that are pressing and substantial in a free and democratic society.

[1331] As I have concluded, s. 293 has as its objective the prevention of harm to women, to children and to society. The prevention of these collective harms associated with polygamy is clearly an objective that is pressing and substantial.

[1332] The positive side of the prohibition which I have discussed - the preservation of monogamous marriage - similarly represents a pressing and substantial objective for all of the reasons that have seen the ascendance of monogamous marriage as a norm in the West.²⁴⁴

Following the issuance of the *Reference* opinion, Oler and Blackmore were again arrested in 2014 by Canadian authorities.²⁴⁵ On this occasion, the charges alleged multiple marriages, sexual abuse, and child trafficking

defined as unmarried cohabitation, and he placed conjugal unions in the same category. This group had grown from roughly 6% of 'couple families' in 1981 to over 18% in 2006. These and other changes were part of what Wu described as the 'gradual decline of marriage' and 'the diversification of conjugal life' in Canada. Wu detailed how common law marriages currently represent well over ten percent of families in every Canadian region, including 23.6% in Yukon, 27.5% in the Northwest Territories, 28.8% in Quebec, and 31.3% in Nunavut. In total, some 15.5% of all Canadian families are composed of common law families. The diversification of Canadian families, however, did not prompt the court to seriously question whether the Canadian law, and the supporting arguments for criminalization, were based on a facially narrow model of monogamous marriage.

Turley, *supra* note 221, at 1916-17 (citing *Reference*, [2011] BCSC 1588 at paras. 8-10, 13-14, 471-73, 476).

243. *Reference*, [2011] BCSC 1588 at paras. 1330-32.

244. *Id.*

245. Turley, *supra* note 221, at 1914-15; see Mike Laanela, *Winston Blackmore Polygamy Charge Upheld by B.C. Supreme Court*, CBCNEWS (Jun. 26, 2015, 6:56 AM), <http://www.cbc.ca/news/canada/british-columbia/winston-blackmore-polygamy-charge-upheld-by-b-c-supreme-court-1.3127640>; *Polygamy Charges Against B.C. Men Raise Charter Questions*, CBCNEWS (Aug. 18, 2014, 6:20 AM), <http://www.cbc.ca/news/canada/british-columbia/polygamy-charges-against-b-c-men-raise-charter-questions-1.2739179>.

across the Canadian border.²⁴⁶ As part of the polygamy charges, Canadian authorities stated that Blackmore had twenty-four marriages and that Oler had four wives.²⁴⁷ As he had done in 2009, Blackmore attempted to challenge the criminal process by asserting that procedural improprieties existed in the criminal prosecution, including the manner in which the special prosecutor handling the case was appointed.²⁴⁸ In June 2015, the British Columbia Supreme Court rejected these challenges, holding that the criminal prosecution could move forward.²⁴⁹ Given this ongoing criminal prosecution, it is likely that the Canadian courts, including the Supreme Court of Canada, will have the opportunity to revisit the question of the constitutionality of laws that criminalize polygamy or plural marriage in the context of an actual case.²⁵⁰

With the historical and legal context for polygamy established, this Article now turns to an analysis of the United States Supreme Court's development of a jurisprudence of the fundamental right to marry, and ultimately concludes that this right is rooted in constitutional understandings of privacy, liberty, dignity, and equality. This conclusion has the potential for great impact on the Supreme Court's future review of laws that regulate polygamy and other relational constructs, particularly in light of *Obergefell*, which held that state prohibition against same-sex marriage is unconstitutional.²⁵¹

VI. THE FUNDAMENTAL RIGHT TO MARRY²⁵²

Throughout its decisions in the marriage context, the Supreme Court has held that marriage is one of the most significant and fundamental rights protected under the Constitution.²⁵³ In his opinion in *Griswold v. Connecticut*,²⁵⁴ Justice Douglas described marriage as a “coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, . . . a harmony in living . . . [and] a bilateral loyalty”²⁵⁵

246. Turley, *supra* note 221, at 1914-15.

247. *Id.*

248. Laanela, *supra* note 245.

249. *Id.*

250. *Polygamy Charges Against B.C. Men*, *supra* note 245.

251. See *Obergefell v. Hodges*, 135 S. Ct. at 2607-08.

252. An earlier version of the discussion contained in this section appeared in Jack B. Harrison, *The Strange Intersection Between Law, Religion, and Government in the Regulation of Marriage*, 6 CHARLESTON L. REV. 547 (2012).

253. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); *Turner v. Safley*, 482 U.S. 78, 94-95 (1987); *Zablocki v. Redhail*, 434 U.S. 374, 386-87 (1978).

254. 381 U.S. 479.

255. *Id.* at 486.

In *Griswold*, the Court was faced with the question of whether Connecticut could prevent married couples from using contraception.²⁵⁶ Thus, the ultimate issue before the Court was whether married couples could engage in contraceptive conduct within the marital relationship without interference from the State.²⁵⁷ While acknowledging that the State was perhaps encouraging procreation by banning contraceptives, the Court held that the State's interest in banning contraception for married persons impermissibly interfered with the intimate relationship of "bilateral loyalty" that formed the core of marriage.²⁵⁸ The Court rejected the contention that the foundation for this protectable liberty interest was solely based on procreation and the rearing of children.²⁵⁹ The Court concluded that marriage was deserving of protection because some protectable liberty interest was inherent in marriage itself.²⁶⁰

In *Turner v. Safley*,²⁶¹ the Court addressed whether a state policy placing significant limitations on the ability of inmates to marry impermissibly interfered with the inmates' constitutionally protected right to marry.²⁶² In striking down the state regulation that prohibited inmates from marrying without the permission of the warden, the Court identified several fundamental aspects of marriage, including: (1) an emotional commitment and a public affirmation; (2) a spiritual and personal dynamic; and (3) many government benefits are contingent upon the marital status of the recipient.²⁶³ The fundamental aspects of marriage identified by the Court, including the spiritual significance of marriage, are equally significant for polygamous and polyamorous relationships seeking civil recognition comparable to monogamous, different-sex couples.²⁶⁴

256. *Id.* at 480.

257. *Id.* at 485-86.

258. *Id.*

259. *See Griswold*, 381 U.S. at 486.

260. *See id.*

261. 482 U.S. 78.

262. *Id.* at 81.

263. *Id.* at 95-96.

264. Ronald C. Den Otter, *Three May Not be a Crowd: The Case for a Constitutional Right to Plural Marriage*, 64 EMORY L.J. 1977, 1985-87 (2015). This certainly does not mean that civil recognition of same-sex marriage or, ultimately, polygamous or plural marriage would force religious bodies to perform sacramental or quasi-sacramental ceremonies of spiritual recognition for such relationships. *See* Justin T. Wilson, Note, *Preservationism, or the Elephant in the Room: How Opponents of Same-Sex Marriage Deceive Us into Establishing Religion*, 14 DUKE J. GENDER L. & POL'Y 561, 658-59 (2007). For example, while the Supreme Court's decision in *Loving* declared prohibitions on interracial marriage unconstitutional, that decision did not alter the right of religious bodies to refuse to perform religious ceremonies bestowing the religious rite of marriage upon interracial couples. *See Loving*, 388 U.S. at 12; *see generally* U.S. CONST. amend. I.; *see also* State v. Barclay, 708 P.2d 972, 977 (Kan. 1985) (upholding an ordained Baptist minister's right to be free from state coercion, including criminal prosecution, as a result of his refusal to perform interracial marriages because they violated his religious beliefs).

As it has had throughout American history, the state undoubtedly has a role to play in the regulation of marriage.²⁶⁵ However, according to the Court in *Zablocki v. Redhail*,²⁶⁶ state regulation is limited to those “reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship”²⁶⁷ States may adopt more intrusive or limiting restrictions on the right to marry, but such restrictions must be “supported by sufficiently important state interests and [must be] closely tailored to effectuate only those interests.”²⁶⁸

At times in its jurisprudence regarding marriage, the Court focused solely on the protected interests of the individual participants in the marriage relationship.²⁶⁹ At other times, the analytical focus has been on the interests of the family unit as a whole or the interests of children living within that family construct.²⁷⁰

At the core of the Court’s marriage jurisprudence is the concept that the fundamental right to marry exists separately, independent from the fundamental rights to procreation, to bear children, to raise children, or to create a family.²⁷¹ The right to marry is not necessarily rooted in or

265. *Zablocki*, 434 U.S. at 386. For an interesting discussion of the history of marriage in America, see NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION (2000).

266. 434 U.S. 374.

267. *Id.* at 386-87.

268. *Id.* at 388.

269. See, e.g., *Turner*, 482 U.S. at 99 (holding that the fundamental right to marry extends to inmates); *Loving*, 388 U.S. at 12 (“[T]he freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.”).

270. *Zablocki*, 434 U.S. at 386 (recognizing the right to marry as a fundamental right and the foundation of family in society); see *Troxel v. Granville*, 530 U.S. 57, 68-69 (2000) (citing *Reno v. Flores*, 507 U.S. 292, 304 (1993)) (“[S]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.”); see generally EVAN WOLFSON, WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE’S RIGHT TO MARRY (2004) (describing the different dimensions of marriage in the United States). For example, in *Zablocki*, the Court stated:

It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. [Since] it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.

Zablocki, 434 U.S. at 386; *contra* *Lofton v. Sec’y of the Dept. of Children & Family Servs.*, 358 F.3d 804, 814 (11th Cir. 2004) (rejecting the appellant’s argument that foster families should be afforded the same protections as traditional “family units” by upholding Florida’s ban on adoption by gay and lesbian individuals).

271. Compare *Zablocki*, 434 U.S. at 386 (indicating that the decision to marry has been placed on the same level of importance as the decision to procreate), with *Obergefell*, 135 S. Ct. at 2600-01 (The Court discussed a lack of necessity for procreation and other rights traditionally associated with marriage; however, the Court addressed the importance of marriage for children).

ancillary to these constitutional rights; rather, the Court has recognized that constitutionally protected rights to sexual activity, to procreation, or to raising children exist outside the context of marriage.²⁷²

According to the Court, “[t]he demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household.”²⁷³ In discussing the existence of a fundamental interest in childrearing, the Court must consider the myriad of ways persons become parents, thereby creating a constitutionally protected parent-child relationship.²⁷⁴ For example, a child raised by her biological mother and the mother’s lesbian partner, who has legally adopted the child, or a child raised by her biological mother and father in a polygamous relationship, has a constitutionally protected interest in the parent-child relationship.²⁷⁵ This legally recognized parent-child relationship implicates a constitutionally protected fundamental interest—an interest that can experience interference only where a state can show some compelling state interest supporting the interference.²⁷⁶

The Court has recognized that the right to marriage is fundamental, that this right is flexible and expansive enough to include same-sex couples, and that changes in the family dynamic must be recognized and incorporated in analyses related to the fundamental right to marry.²⁷⁷ What, then, must be incorporated in this analysis to further recognize the constitutional legitimacy of persons who wish to marry multiple partners?²⁷⁸ Individuals living in loving polygamous and polyamorous relationships, like gay and lesbian individuals and couples, have adopted children, have children that were biologically conceived, have children through artificial insemination and surrogacy, and have children that were the product of a previously existing marriage.²⁷⁹ In every single one of these situations, these

272. See *Lawrence v. Texas*, 539 U.S. at 578; *Lehr v. Robertson*, 463 U.S. 248, 263, 265 (1983); *Michael H. v. Gerald D.*, 491 U.S. 110, 131 (1989).

273. *Troxel*, 530 U.S. at 63.

274. *Id.* at 63-64, 66; *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (“We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected.”).

275. See *Goodridge v. Dep’t of Health*, 798 N.E.2d 941, 988 (Mass. 2003).

276. *Troxel*, 530 U.S. at 65-66.

277. See Joseph A. Pull, *Questioning the Fundamental Right to Marry*, 90 MARQ. L. REV. 21, 23 (2006).

278. See generally RONALD C. DEN OTTER, IN DEFENSE OF PLURAL MARRIAGE (2015) [hereinafter IN DEFENSE OF PLURAL MARRIAGE].

279. See generally WOLFSON, *supra* note 270; see Molly Cooper, Note, *Gay and Lesbian Families In the 21st Century: What Makes a Family? Addressing the Issue of Gay and Lesbian Adoption*, 42 FAM. CT. REV. 178, 180 (2004). But see *Lofton*, 358 F.3d at 827 (upholding Florida’s ban on adoption by gay and lesbian individuals); see also *Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 377 F.3d 1275 (11th Cir. 2004) (*en banc* denied). The full Court of Appeals for the Eleventh Circuit voted 6-6 on whether to rehear the case *en banc*. Linda Greenhouse, *Justices Refuse to Consider Law Banning Gay Adoption*, N.Y. TIMES (January 11, 2005), at <http://www.nytimes.com/2005/01/11/politics/justices-refuse-to-consider-law-banning-gay-adoption.html>. The result of this tie vote was that the case was not

individuals, couples, and their children have a right to privacy and liberty with respect to matters of family life under the Court's prior decisions, including *Obergefell*.²⁸⁰ As the Court stated in *Zablocki*, it makes "little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society."²⁸¹

Given that the Court has recognized that the state has an interest, albeit a limited one, in procreation and child rearing, the question for courts in future cases related to prohibitions on polygamous and plural marriages will concern the scope of that interest and, ultimately, whether that interest is necessarily furthered by prohibiting polygamous marriages.²⁸² In this context, courts will have to determine, as they often have in the context of same-sex relationships, what specific evidence, if any, supports privileging monogamous relationships over polygamous relationships.²⁸³

For example, Justice Scalia has long understood that the procreation argument is unpersuasive as a rationale for attempts to restrict marriage, noting that this argument cannot be used to restrict marriage when "the sterile and the elderly are allowed to marry."²⁸⁴ State prohibitions on polygamous or plural marriage are under-inclusive to the extent that such prohibitions allow those who cannot have children to marry.²⁸⁵ At the same time, such prohibitions are over-inclusive, as they preclude individuals who already have children from marrying.²⁸⁶

Those who argue that polygamous marriages are not constitutionally protected assert that the right to marry multiple partners is certainly not "implicit in the concept of ordered liberty" or is "deeply rooted in this Nation's history and tradition."²⁸⁷ However, at one time or another, this right could equally have been asserted regarding same-sex marriages,

reheard. *Id.* Judge William Pryor, who had been added to the Eleventh Circuit in a recess appointment by President George W. Bush after he was filibustered by Democrats on the Senate Judiciary Committee and denied an open vote, casted the tying vote. *Id.* Subsequently, the Supreme Court refused to hear an appeal of the case. *Id.*

280. See *Obergefell*, 135 S. Ct. at 2599; *Lawrence*, 539 U.S. at 574; *Troxel*, 530 U.S. at 63.

281. *Zablocki*, 434 U.S. at 386.

282. See Mark W. Myott, *Neutral Grounds Revisiting the Current Legal Approaches in Frozen Embryo Disposition Disputes Through the Lens of Neutrality*, 10 GEO. J. L. & PUB. POL'Y 619, 635 (2012); See *Kitchen v. Herbert*, 755 F.3d 1193, 1215 (10th Cir. 2014).

283. IN DEFENSE OF PLURAL MARRIAGE, *supra* note 278, at 63.

284. *Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting).

285. See WOLFSON, *supra* note 270, at 81.

286. See *id.* at 81-82.

287. *Bowers v. Hardwick*, 478 U.S. 186, 191-92 (1986) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937); *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)); *contra* Mark Strasser, *Lawrence, Same-Sex Marriage and the Constitution: What is Protected and Why?*, 38 NEW ENG. L. REV. 667, 676 (2004).

interracial marriages, marriages involving indigents, or prison marriages.²⁸⁸ However, facing these situations in *Obergefell*, *Loving v. Virginia*,²⁸⁹ *Zablocki*, and *Turner*, the Court concluded that these marriages were protected by the Constitution, recognizing that the idea of protected fundamental liberties is fluid.²⁹⁰

Asking whether certain marital relationships were envisioned by the Founders, implicit in the concept of ordered liberty, or deeply rooted in the history and tradition of our country is not dispositive on the issue of constitutional protection.²⁹¹ As the Court recognized in *Lawrence*, the constitutional standard for discerning protected constitutional interests was not static: “As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”²⁹²

VII. THE GAY RIGHTS TRILOGY: FROM *ROMER* TO *LAWRENCE* TO *WINDSOR*

Justice Kennedy has authored three opinions that have formed the structure of his developing jurisprudence related to equal protection and due process.²⁹³ In these opinions, Justice Kennedy bypassed the Supreme Court’s historical analysis of both equal protection and due process, and focused instead on an analysis that was rooted in the ideas of liberty, dignity, and equality.²⁹⁴ As this Article explores, Justice Kennedy’s

288. See *Obergefell*, 135 S. Ct. at 2618; *Loving*, 388 U.S. at 11; *Zablocki*, 434 U.S. at 399-400; *Turner*, 482 U.S. at 96-97.

289. 388 U.S. 1 (1967).

290. See *Obergefell*, 135 S. Ct. at 2604-05 (allowing same-sex couples to marry); *Loving*, 388 U.S. at 12 (extending constitutional protection to interracial marriages); *Zablocki*, 434 U.S. at 390 (allowing parents who are behind on child support to remarry); *Turner*, 482 U.S. at 96 (protecting inmates’ right to marry).

291. Strasser, *supra* note 287, at 676.

292. *Lawrence*, 539 U.S. at 579. Asking whether particular marital constructs were envisioned by the Founders or were implicit in the concept of ordered liberty or were deeply rooted in the history and tradition of our country is not dispositive on the issue of constitutional protection because these questions do not account for those marriages and related interests that the Court has determined are protected under the constitutional right of privacy. Strasser, *supra* note 287, at 676.

293. See *Romer v. Evans*, 517 U.S. at 635-36 (holding that Colorado’s Amendment 2 violated the Equal Protection Clause); *Lawrence*, 539 U.S. at 578-79 (holding that the Government’s interference in homosexual activity violated Due Process); *U.S. v. Windsor*, 133 S. Ct. at 2696 (holding that Section 3 of the Defense of Marriage Act violated the Equal Protection Clause and was unconstitutional).

294. See Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817, 818-19, 857-59 (2014); see generally Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747 (2011); Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, (2008); Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99 (2007); Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, (2004); Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473 (2002); William N. Eskridge, Jr., *Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L. REV. 1183 (2000); David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935 (1989); Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV.

analyses in these three gay rights cases ultimately provided the basis for the *Obergefell* Court to strike down prohibitions against same-sex couples' right to marry.²⁹⁵

A. *The Gay Rights Cases*

1. *Romer v. Evans*

Romer focused on a Colorado constitutional amendment, Amendment 2, designed to prohibit any statute, regulation, or ordinance that would prohibit discrimination on the basis of sexual orientation.²⁹⁶ As a result of the passage of Amendment 2, local and municipal laws and certain state regulations that prohibited discrimination on the basis of sexual orientation were declared invalid.²⁹⁷ Further, as a result of Amendment 2 and its concomitant prohibitions on political action that would address discrimination based on sexual orientation, gay and lesbian persons were effectively denied the opportunity to work through the political process to protect their interests.²⁹⁸

The Colorado Supreme Court declared Amendment 2 unconstitutional and held that the amendment violated the Equal Protection Clause because it violated "the fundamental right to participate equally in the political process."²⁹⁹ Since the court concluded that Amendment 2 violated a fundamental constitutional right, the court applied strict scrutiny.³⁰⁰ On remand, despite the state's assertion of six compelling interests, the trial court concluded that the state had failed to meet its burden of showing a compelling interest to support Amendment 2 and entered a permanent injunction to prohibit the amendment's enforcement.³⁰¹ On appeal, the Colorado Supreme Court affirmed the trial court's decision, which led the defendants to appeal to the United States Supreme Court.³⁰²

Writing for a majority of six, Justice Kennedy rejected the two interests that the state offered in support of Amendment 2: (1) that the amendment furthered freedom of association by protecting the interests of those in

1161 (1988); Kenneth L. Karst, *The Supreme Court, 1976 Term Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977).

295. See *Obergefell*, 135 S. Ct. at 2596-2600, 2608.

296. See *Romer*, 517 U.S. at 623-24; COLO. CONST. art. II, § 30b (1992); see generally Stephen Zamansky, *Colorado's Amendment 2 and Homosexuals' Right to Equal Protection of the Law*, 35 B.C. L. REV. 221 (1993).

297. *Romer*, 517 U.S. at 624.

298. *Id.*

299. *Evans v. Romer*, 854 P.2d 1270, 1276, 1279, 1282, 1286 (Colo. 1993) [hereinafter *Evans I*] (en banc).

300. *Id.* at 1286.

301. *Evans v. Romer*, 882 P.2d 1335, 1339-41 (Colo. 1994) [hereinafter *Evans II*] (en banc).

302. *Romer*, 517 U.S. at 626.

Colorado who had “personal or religious objections to homosexuality” and (2) that the amendment acted to “conserve resources to fight discrimination against suspect classes.”³⁰³

2. *Lawrence v. Texas*

Lawrence provided the Supreme Court with the opportunity to revisit its 1986 opinion in *Bowers v. Hardwick*,³⁰⁴ a decision in which the Court upheld Georgia’s statute prohibiting sodomy.³⁰⁵ In *Lawrence*, Houston police had arrested two men in a private residence for a violation of a Texas criminal statute that prohibited “deviate sexual intercourse with another individual of the same sex.”³⁰⁶ Following their arrest and charge, the two men challenged the constitutionality of the Texas sodomy statute, asserting that the statute violated the Equal Protection Clause.³⁰⁷ The trial court did not accept this constitutional challenge, so the two men entered a plea of *nolo contendere*, which resulted in a fine of \$200 each and an assessment of court costs in the amount of \$141.25.³⁰⁸ On appeal, Texas state appellate courts rejected their constitutional challenge to the statute, thus leading the case to be heard by the Supreme Court.³⁰⁹

Again writing for a majority of six, as he had in *Romer*, Justice Kennedy continued his focus on liberty, equality, and dignity, which had been at the heart of his opinion in *Romer* over ten years prior.³¹⁰ In *Lawrence*, the Court overruled *Bowers*, holding that the liberty interest embedded in the substantive due process requirements of the Fourteenth Amendment protected intimate sexual conduct between persons of the same gender.³¹¹

3. *United States v. Windsor*

In *Windsor*, the Supreme Court was faced with a challenge to the federal Defense of Marriage Act (“DOMA”).³¹² The case involved two women, Edith Windsor and Thea Spyer, who had been lawfully married in Ontario, Canada in 2007.³¹³ They subsequently returned to their home in

303. *Id.* at 630-31, 635.

304. 478 U.S. 186.

305. *Lawrence*, 539 U.S. at 564, 566.

306. *Id.* at 563.

307. *Id.*

308. *Id.*

309. *Lawrence v. State*, 41 S.W.3d 349, 362 (Tex. Ct. App. 2001).

310. *Lawrence*, 539 U.S. at 567, 575; *see Romer*, 517 U.S. at 630-31, 633.

311. *Lawrence*, 539 U.S. at 578.

312. *Windsor*, 133 S. Ct. at 2684.

313. *Id.* at 2682.

New York, a state that recognized their marriage.³¹⁴ Two years later, in 2009, Thea Spyer died, leaving her entire estate to Windsor.³¹⁵ As a result of the inheritance, Windsor paid more than \$350,000 in federal income taxes because Section 3 of DOMA barred her from using the estate tax exemption for surviving spouses—the federal government simply could not recognize her marriage.³¹⁶ Thus, the law forced her to pay taxes that she would not have paid had her deceased spouse been a man.³¹⁷ In turn, Windsor sued in the United States District Court for the Southern District of New York, challenging Section 3 of DOMA,³¹⁸ which provided:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.³¹⁹

The district court found for Windsor, holding that DOMA was unconstitutional, because it discriminated based on sexual orientation and that DOMA was not rationally related to a legitimate government interest.³²⁰ The district court indicated that DOMA was rooted in “‘a desire to harm a politically unpopular group’” and, therefore, was subjected to a heightened review under the rational basis test.³²¹

On appeal, the United States Court of Appeals for the Second Circuit affirmed the district court’s decision, but took a different analytical approach.³²² Finding that gay and lesbian persons constituted a quasi-suspect class, the Court of Appeals held that discrimination based on sexual orientation should be subject to heightened scrutiny, which DOMA could not pass.³²³ Subsequently, the Supreme Court granted certiorari.³²⁴

314. *Id.* at 2682-83.

315. *Id.* at 2682.

316. *Id.* at 2683.

317. *See Windsor*, 133 S. Ct. at 2683.

318. *Windsor v. United States*, 833 F. Supp. 2d 394, 396 (S.D.N.Y. 2012) [hereinafter *Windsor II*].

319. 1 U.S.C.A. § 7 (West 2012).

320. *Windsor II*, 833 F. Supp. 2d at 401-02.

321. *Windsor*, 833 F. Supp. 2d at 401-02 (quoting *Lawrence*, 539 U.S. at 579-80 (O’Connor, J., concurring)).

322. *See Windsor v. United States*, 699 F.3d 169, 181, 187-88 (2d Cir. 2012) (affirming the district court’s decision after applying heightened scrutiny to Windsor’s claim).

323. *Id.* at 181, 184, 188.

324. *United States v. Windsor*, 133 S. Ct. 786, 787 (2012).

Writing for a majority of five, Justice Kennedy continued the trajectory he had followed from *Romer* through *Lawrence*.³²⁵ In his opinion, while giving a nod to the federalism issues present in the case,³²⁶ Justice Kennedy again focused on the fundamental concepts of liberty, dignity, and equality that form the core of his jurisprudence discussed more fully below.³²⁷ In *Windsor*, Justice Kennedy concluded that Section 3 of DOMA violated both the liberty interest embedded in the Fourteenth Amendment and the equality interest embedded in the Fifth Amendment.³²⁸

B. Justice Kennedy's Jurisprudence Through the Gay Rights Trilogy of Romer / Lawrence / Windsor

1. Justice Kennedy's Standard of Review in the Gay Rights Trilogy: Rational Basis With Teeth

In *Romer*, Justice Kennedy nominally claimed to be employing a rational basis standard of review to determine the constitutionality of Amendment 2.³²⁹ While Justice Kennedy claimed to be employing rational basis review in *Romer*, his opinion is circumspect as to what form of rational basis he is using—specifically, whether that rational basis embodied some heightened form of rational basis review.³³⁰ As one commentator has written:

Kennedy's unwillingness to be forthright in conceding that he was applying a heightened standard of review is a longstanding problem with the Supreme Court's rational-basis-review decisions. Rational basis review purports to be one standard—that a classification be rationally related to a permissible purpose. But, in practice, this one standard is in fact two, with different methods that

325. See *Windsor*, 133 S. Ct. at 2681, 2692-93 (citing *Romer*, 517 U.S. at 633; *Lawrence*, 539 U.S. at 567).

326. *Id.* at 2689-93.

327. *Id.* at 2695-96.

328. *Id.*

329. *Romer*, 517 U.S. at 631. Justice Kennedy wrote:

The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons. We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.

Id. (internal citations omitted).

330. Farrell, *supra* note 17, at 452.

produce different results. Rationality review is, in most cases, so deferential as to amount to no review at all. This extreme deference results because, when applying the standard, the Court (1) does not look for evidence of actual purpose but will hypothesize purpose or accept the post hoc rationalizations of government attorneys as to purpose; (2) does not insist that there be an actual correlation between the challenged classification and purpose but only that the government could have plausibly believed that there was such a connection, even if the government is wrong in that belief; (3) places on the challenger the burden of attacking the legislative arrangement to negative every conceivable basis which might support it (an impossible burden); and (4) does not invalidate statutes on the basis of an impermissible purpose, since the Court is not looking for an actual purpose that might invalidate a statute but rather is hypothesizing a purpose that will validate it.

Occasionally and without explanation, the Court applies a heightened version of rational basis review where it puts aside the deferential techniques identified in the previous paragraph and, by contrast, (1) aggressively looks for evidence of the actual purpose of a statute and (2) having identified such actual purpose, rules out as impermissible the purpose of harming a particular group or (3) insists that the challenged classification actually advance a permissible state interest.³³¹

Justice Kennedy initially outlined his understanding of rational basis review in *Romer* by citing to his prior opinion in *Heller v. Doe*.³³² This reference to *Heller* would appear to signal that Justice Kennedy intended to employ a more deferential version of rational basis analysis in reviewing the constitutionality of Amendment 2.³³³ However, to ultimately support his finding that Amendment 2 was unconstitutional, Justice Kennedy cited to the Court's use of heightened rational basis review in *U.S. Department of Agriculture v. Moreno*,³³⁴ stating:

331. *Id.* at 452-53 (footnotes omitted).

332. 509 U.S. 312; *Romer*, 517 U.S. at 631.

333. Farrell, *supra* note 17, at 452.

334. 413 U.S. 528 (1973).

A second and related point is that laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. ‘[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.’ *Department of Agriculture v. Moreno*, 413 U.S. 528, 534, 93 S.Ct. 2821, 2826, 37 L.Ed.2d 782 (1973). Even laws enacted for broad and ambitious purposes often can be explained by reference to legitimate public policies which justify the incidental disadvantages they impose on certain persons. Amendment 2, however, in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it. We conclude that, in addition to the far-reaching deficiencies of Amendment 2 that we have noted, the principles it offends, in another sense, are conventional and venerable; a law must bear a rational relationship to a legitimate governmental purpose, *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 462, 108 S.Ct. 2481, 2489–2490, 101 L.Ed.2d 399 (1988), and Amendment 2 does not.³³⁵

In *Romer*, Justice Kennedy’s clearly analyzed Amendment 2 under some form of heightened rational basis (assuming that it is accurate to call the standard of review in *Romer* rational basis at all).³³⁶ The problem in *Romer*, and in the other two cases in the trilogy discussed in this section, is that Justice Kennedy never expressly stated what form of rational basis was actually being employed.³³⁷ However, the decision provides ample evidence that but for Justice Kennedy’s employment of a heightened standard of review, the ultimate decision in the case would have been different.³³⁸ As one commentator has noted:

[*Romer*], without doubt, applies the more demanding form of rationality review, but Kennedy neither acknowledges

335. *Romer*, 517 U.S. at 634-35.

336. Farrell, *supra* note 17, at 451.

337. *Id.* at 452, 474-75, 483.

338. *Id.* at 452.

that fact nor concedes that the decision would have to come out differently if he were applying the traditional deferential version. If he had been using the deferential version, Kennedy would have had to consider other purposes that might have motivated Amendment 2, both those advanced by its proponents and those he might hypothesize on his own. It is clear that either of the purposes advanced by the proponents—protecting freedom of association and focusing on discrimination against other groups—is permissible and might have, in fact, been a purpose of the Amendment. Further, it would not matter whether Amendment 2 would actually have advanced these purposes, but only whether the Colorado voters might reasonably have perceived a connection. Finally, the challengers would have had to negate every conceivable basis that might have supported the Amendment, something that they did not do and could never do.³³⁹

Justice Kennedy's opinion in *Lawrence* was equally obtuse as to what standard of review should be used in assessing the constitutionality of the Texas statute criminalizing same-sex sodomy.³⁴⁰ In *Lawrence*, portions of Justice Kennedy's opinion indicate that the appropriate standard of review is heightened scrutiny, while at other points in the opinion he indicates that rational basis review is the appropriate standard.³⁴¹ This complete lack of clarity on the part of Justice Kennedy has led both scholars and lower courts to read *Lawrence* in an inconsistent and contradictory fashion.³⁴² As one commentator has written:

Since the claim [in *Bowers*] was one of substantive due process, it might have been expected that the Court would

339. *Id.* at 454. As he did in each of the trilogy cases discussed in this section, Justice Scalia offered a strong dissent. *Romer*, 517 U.S. at 636 (Scalia, J., dissenting); *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting); *Windsor*, 133 S. Ct. at 2697 (Scalia, J., dissenting). In dissent, Justice Scalia agreed with the majority that rational basis is the appropriate standard of review. *See Romer*, 517 U.S. at 640 (Scalia, J., dissenting). However, Justice Scalia rejected the idea that homosexuality should be on an equal analytical footing to race or religion. *Romer*, 517 U.S. at 636 (Scalia, J., dissenting). Justice Scalia clearly foresaw that by analyzing restrictions related to homosexuality employing an analysis similar to that employed by the Court in cases involving race or religion, the Court would ultimately be forced to use some level of heightened review under which majoritarian morality would not be a legitimate basis or compelling reason for classifying homosexual persons according to their disfavored status. *See Romer*, 517 U.S. at 636, 639-40 (Scalia, J., dissenting); Farrell, *supra* note 17, at 454-55.

340. Farrell, *supra* note 17, at 468.

341. *See id.* at 469, 471; *see* Franklin, *supra* note 294, at 861-63, 872.

342. Farrell, *supra* note 17, at 468, 470-71; *see Lofton*, 358 F.3d at 817; *Williams v. Attorney Gen. of Ala.*, 378 F.3d 1232, 1238 (11th Cir. 2004).

have followed the traditional framework for substantive due process claims. The Court would have had to consider whether the governmental conduct infringed on an implied fundamental right, and if so, would have required the government to show that the infringement was necessary or narrowly tailored to a compelling interest. This is what the Court had done in *Roe v. Wade*, where it found that the implied fundamental right of privacy included within it a woman's decision to terminate a pregnancy and thus required the state to show that its intrusion into that decision was necessary to a compelling interest. On the other hand, in *Bowers v. Hardwick*, the Court determined that the conduct regulated by the state—sodomy—was not a fundamental right and therefore upheld the challenged statute under the deferential test that it be rationally related to the state's interest in promoting a traditional form of morality. In *Lawrence*, Justice Kennedy's opinion never aligned itself entirely with either of these standards, although it contained some measure of each.³⁴³

Again, in *Windsor*, Justice Kennedy provided virtually no guidance regarding the level of scrutiny being applied.³⁴⁴ Justice Kennedy stated that, at least nominally, rational basis review was appropriate for the Court's review of the constitutionality of Section 3 of DOMA.³⁴⁵ However, as in his prior opinions in *Romer* and *Lawrence*, Justice Kennedy's language and analysis combined with the ultimate determination of the Court that Section 3 of DOMA was unconstitutional, indicates that some elevated level of scrutiny was employed.³⁴⁶

Thus, while the debate over Justice Kennedy's standard of review in this trilogy of gay rights cases has continued over the years, it seems apparent that Justice Kennedy was invoking some level of higher scrutiny in all three cases.³⁴⁷ Regardless of how it was nominally classified, heightened scrutiny was even used in factual contexts where the legitimate government interest supported a majoritarian morality or its counterpoint, majoritarian animus.³⁴⁸

343. Farrell, *supra* note 17, at 468-69 (footnotes omitted).

344. *Id.* at 483.

345. See *Windsor*, 133 S. Ct. at 2706 (Scalia, J., dissenting) (“As nearly as I can tell, the Court . . . does not apply strict scrutiny, and its central propositions are taken from rational-basis cases like *Moreno*. But the Court certainly does not apply anything that resembles that deferential framework.”)

346. *Id.* at 2693; Farrell, *supra* note 17, at 452-54, 469-70, 481-84.

347. Farrell, *supra* note 17, at 452-54, 469-70, 481-84.

348. *Id.*

2. *The “Double Helix” of Due Process And Equal Protection*

In both *Romer* and *Lawrence*, Justice Kennedy located the issue before the Court in the interconnection between equality and liberty, both of which Justice Kennedy clearly views as foundations for his understanding of human dignity.³⁴⁹ In *Romer*, Justice Kennedy began his opinion addressing the question of classifications and equality under the Constitution, with a reference to Justice Harlan’s dissent in *Plessy v. Ferguson*,³⁵⁰ whereas in *Lawrence*, he began by offering a broad and almost spiritual description of “liberty,” writing:

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.³⁵¹

For Justice Kennedy, the question in *Lawrence* fits squarely within the Court’s prior jurisprudence related to the right to privacy; beginning with *Griswold*, Justice Kennedy concluded that the liberty interest at stake in *Lawrence* was fundamentally the same as those at stake in the Court’s prior right to privacy cases.³⁵² With this context firmly established, Justice Kennedy then turned to the specific liberty interest at stake in *Lawrence* and necessitated a review of the Court’s prior decision in *Bowers*.³⁵³ Justice

349. See *Romer*, 517 U.S. at 623; *Lawrence*, 539 U.S. at 562.

350. 163 U.S. 537 (1896); *Romer*, 517 U.S. at 623 (“One century ago, the first Justice Harlan admonished this Court that the Constitution ‘neither knows nor tolerates classes among citizens.’”).

351. *Lawrence*, 539 U.S. at 562.

352. *Id.* at 564-66.

353. *Id.* at 566-67. In reviewing *Bowers*, Justice Kennedy made it clear that he believed the Court had completely misunderstood the nature of the liberty interest, as he wrote:

The Court began its substantive discussion in *Bowers* as follows: ‘The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time.’ That statement, we now conclude, discloses the Court’s own failure to appreciate the extent of the liberty at stake. 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. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a

Kennedy asserted that the *Bowers* Court had misread both the history and the evolving understanding and acceptance of homosexual persons, even at the time *Bowers* was decided.³⁵⁴

Justice Kennedy analyzed whether the Court's prior decision in *Romer* provided a sufficient basis for finding the Texas sodomy statute unconstitutional on equal protection grounds alone, as the statute was homosexual specific.³⁵⁵ While Justice Kennedy seemed to signal that the analysis of *Romer* would sufficiently strike down the Texas statute on equal protection grounds, he asserted that when it came to privacy issues, the Court could not ignore a linkage between due process liberty interests and equality:

Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of *Bowers* has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons.³⁵⁶

particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals. . . . When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

Id. (internal citations omitted).

354. *Id.* 567-69, 571.

355. *Lawrence*, 539 U.S. at 574-75.

356. *Id.*

Based on this analysis, the Court, through Justice Kennedy, overruled *Bowers*.³⁵⁷

While Justice Kennedy began his opinion in *Windsor* addressing the potential federalism issue inherent in the case, namely the intrusion of the federal government into the area of the definition of marriage (an issue historically left to the states),³⁵⁸ he quickly concluded that the federalism issue was important only as it related to the equality, dignity, and liberty interests of the persons and couples impacted by Section 3 of DOMA.³⁵⁹

In *Windsor*, Justice Kennedy's foundational analysis focused on the interplay between equal protection and due process.³⁶⁰ In perhaps its highest form prior to *Obergefell*, *Windsor* showcases the fundamental linkage between equal protection jurisprudence and due process jurisprudence.³⁶¹ Throughout the cases in this trilogy, Justice Kennedy has

357. *Id.* at 578 (“*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent.”).

358. *Windsor*, 133 S. Ct. at 2689-93.

359. *Id.* at 2692. As Justice Kennedy wrote:

The States' interest in defining and regulating the marital relation, subject to constitutional guarantees, stems from the understanding that marriage is more than a routine classification for purposes of certain statutory benefits. Private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State, and it can form 'but one element in a personal bond that is more enduring.' By its recognition of the validity of same-sex marriages performed in other jurisdictions and then by authorizing same-sex unions and same-sex marriages, New York sought to give further protection and dignity to that bond. For same-sex couples who wished to be married, the State acted to give their lawful conduct a lawful status. This status is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages. It reflects both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.

Id. at 2692-93 (internal citation omitted). In dissent, Chief Justice Roberts tried mightily to limit the holding in *Windsor* to the issue of federalism. *Id.* at 2697 (Roberts, C.J., dissenting). However, a careful reading of Justice Kennedy's opinion shows that federalism was certainly not the determining factor in striking down Section 3 of DOMA. *Id.* at 2705 (Scalia, J., dissenting). In fact, in his very strong and vituperative dissent, Justice Scalia demolished the hope that the case could be limited to federalism. *Windsor*, 133 S. Ct. at 2705 (Scalia, J., dissenting).

360. *Id.* at 2695.

361. See Daniel J. Crooks III, *Toward "Liberty": How the Marriage of Substantive Due Process and Equal Protection in Lawrence and Windsor Sets the Stage for the Inevitable Loving of Our Time*, 8 CHARLESTON L. REV. 223, 274 (2014). Crooks describes this dilemma as follows:

Reasonable minds—including the Justices themselves—disagree about whether the 'rooted in history and traditions' test applied in *Bowers* and *Glucksberg* is still the proper framework for evaluating a substantive due process claim. After all, *Casey*, with its focus on liberty, was decided in 1992. However, *Glucksberg*, returning to the *Bowers*-brand of 'rooted in history and traditions,' was decided a scant five years later, and yet it limited and distinguished *Casey*. Then, a mere six

developed a constitutional analysis that exemplifies the interconnectedness and interplay between due process and equal protection.³⁶² Justice Kennedy's analysis evidences what Professor Laurence Tribe described in the wake of *Lawrence* as one where "due process and equal protection, far from having separate missions and entailing different inquiries, are profoundly interlocked in a legal double helix."³⁶³ Thus, *Romer*, *Lawrence*, and *Windsor* are all cases about liberty, equality, and human dignity:

[A] liberty case is one in which the Court borrows from either or both substantive due process and equal protection principles to decide whether a law improperly intrudes upon that sphere of autonomy belonging to every citizen and containing within its bounds life's most intimate decisions, actions, and relationships.³⁶⁴

As in *Romer* and *Lawrence*, Justice Scalia offered a very strong attack, asserting that by melding due process and equal protection analysis under a broader rubric of dignity and liberty, Justice Kennedy has placed the Court on a dangerous footing that is inconsistent with the Court's traditional constitutional due process or equal protection analysis.³⁶⁵

VIII. THE SUPREME COURT ON SAME-SEX MARRIAGE: *OBERGEFELL V. HODGES*

Following *Windsor*, when confronted with the question of the constitutionality of state bans on same-sex marriage, lower courts almost universally followed Justice Kennedy's analyses discussed above and focused on the concepts of liberty, dignity, and equality.³⁶⁶ In post-*Windsor* cases, appellate courts reviewed state bans on same-sex marriage by applying one of three analytical approaches:

years after *Glucksberg*, *Lawrence* framed the issue in the broad liberty terms that *Casey* employed and *Glucksberg* was shunned—all without so much as a 'see also' acknowledging *Glucksberg's* existence. Assuming, as this article does, that *Glucksberg* represents the traditional view of substantive due process, *Lawrence* is at least a non-traditional substantive due process case. Therefore, if *Windsor* is anything at all, it is either a non-traditional, *Lawrence*-brand substantive due process case or the newest addition to the Court's distinct lineage of liberty cases.

Id. at 273-74 (footnotes omitted).

362. *Id.* at 272-74.

363. See Tribe, *supra* note 294, at 1898.

364. Crooks, *supra* note 361, at 274.

365. *Windsor*, 133 S. Ct. at 2705-07 (Scalia, J., dissenting).

366. Farrell, *supra* note 17, at 451, 468, 481-82.

1) Marriage is a fundamental right that can only be infringed upon by a showing of a compelling state interest.³⁶⁷

2) *Windsor* calls for an equal protection analysis with a degree of heightened scrutiny in cases where the regulation is rooted in majoritarian morality or animus, assuming that such regulations begin with a taint of irrationality.³⁶⁸

3) *Windsor* calls for an unconventional equal protection rational basis analysis that rejects deference to the state's rationale for bans on same-sex marriage and focuses on whether the costs imposed on gay couples by these bans outweigh benefits of those laws that are proven by the state.³⁶⁹

The only appellate court to uphold bans on same-sex marriage, the Court of Appeals for the Sixth Circuit, did so by relying on *Baker v. Nelson*,³⁷⁰ a

367. See *Bostic v. Schaefer*, 760 F.3d 352, 377(4th Cir. 2014) (holding that Virginia's laws banning same-sex marriage were unconstitutional as a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment). Unlike the Seventh Circuit, the Fourth Circuit's analysis hinged on its holding that the fundamental right to marry encompasses the right to same-sex marriage. *Id.* at 376-77. Overall, the Fourth Circuit engaged in a conventional due-process-fundamental-right analysis. *Id.* The Fourth Circuit's analysis was divided into two steps. *Id.* at 375. First, the court determined what level of constitutional scrutiny to apply—"either rational basis review or some form of heightened scrutiny . . ." *Id.* Second, the court determined whether Virginia's laws banning same-sex marriage met the applicable level of scrutiny. *Bostic*, 760 F.3d at 375; see also *Kitchen v. Herbert*, 755 F.3d 1193, 1193, 1229-30 (10th Cir. 2014) (holding that Utah's laws banning same-sex marriage were unconstitutional as a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment). Like the Fourth Circuit, the Tenth Circuit's analysis hinged on its holding that the fundamental right to marry encompasses the right to same-sex marriage. *Kitchen*, 755 F.3d at 1229-30.

368. See *Latta v. Otter*, 771 F.3d 456, 464-65, 468 (9th Cir. 2014) (holding that Nevada's laws prohibiting same-sex marriage were unconstitutional as a violation of the Equal Protection Clause of the Fourteenth Amendment). The court had previously considered the effects of *Windsor* in *SmithKline Beecham Corp. v. Abbott Labs.* 740 F.3d 471, 480 (9th Cir. 2014). In *SmithKline*, the Ninth Circuit held that "*Windsor* established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review." *Id.* at 481. In the Ninth Circuit's view, "*Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation." *Id.* Therefore, in *Latta*, the court applied "heightened scrutiny" to Idaho and Nevada's laws prohibiting same-sex marriage. *Latta*, 771 F.3d at 468 ("Because Idaho and Nevada's laws discriminate on the basis of sexual orientation . . ." heightened scrutiny is applied).

369. See *Baskin v. Bogan*, 766 F.3d 648, 654, 656-57 (7th Cir. 2014) ("We'll see that the governments of Indiana and Wisconsin have given us no reason to think they have a 'reasonable basis' for forbidding same-sex marriage."). The court opined that Indiana and Wisconsin's "[d]iscrimination against same-sex couples is irrational, and therefore unconstitutional even if the discrimination is not subjected to heightened scrutiny." *Id.* at 656. This conclusion allowed the court to "largely elide the more complex analysis found in more closely balanced equal-protection cases" and "avoids the Plaintiffs' further argument that the states' prohibition of same-sex marriage violates a fundamental right protected by the due process clause of the Fourteenth Amendment." *Id.* at 656-57.

370. 409 U.S. 810 (1972).

1972 one sentence summary dismissal of a case challenging Minnesota’s laws prohibiting same-sex marriage for “want of substantial federal question.”³⁷¹

A. DeBoer v. Snyder: The Decision by the United States Court of Appeals for the Sixth Circuit

*DeBoer v. Snyder*³⁷² was filed in the United States District Court for the Eastern District of Michigan and is the main case challenging Michigan’s laws prohibiting same-sex marriage.³⁷³ For purposes of appeal, the Sixth Circuit combined *DeBoer* with other cases challenging same-sex marriage from districts within the Sixth Circuit.³⁷⁴ The United States District Court for the Eastern District of Michigan, as well as the Southern District of Ohio, the Middle District of Tennessee, and the Western District of Kentucky, ruled that state laws prohibiting same-sex marriage are unconstitutional as a violation of the Fourteenth Amendment.³⁷⁵

The Sixth Circuit, in a 2-1 decision, disagreed with the district courts and upheld the laws in Michigan, Ohio, Tennessee, and Kentucky prohibiting—and/or precluding the recognition of—same-sex marriage as constitutional.³⁷⁶ In *DeBoer*, Judge Sutton, writing for the majority, framed the court’s analysis within a specific construct of the role courts should play

371. *DeBoer v. Snyder*, 772 F.3d 388, 400, 421 (6th Cir. 2014) [hereinafter *Deboer I*].

372. 973 F. Supp. 2d 757 (E.D. Mich. 2014) [hereinafter *Deboer II*].

373. *Id.* at 759. The Plaintiffs challenged the Michigan Marriage Amendment, which states: “To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.” *Id.* (quoting MICH. CONST. art. I, § 25). April DeBoer and Jayne Rowse—an unmarried same-sex couple residing in Michigan—were the Plaintiffs. *Id.*

374. *Deboer I*, 772 F.3d at 396-99. Those cases included: *Bourke v. Beshear*, 996 F. Supp. 2d 542 (W.D. KY 2014), from the Western District of Kentucky; *Tanco v. Haslam*, 7 F. Supp. 3d 759 (M.D. Tenn. 2014), from the Middle District of Tennessee; *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968 (S.D. Ohio 2013) [hereinafter *Wymyslo*], from the Southern District of Ohio; and *Henry v. Himes*, 14 F. Supp. 3d 1036 (S.D. Ohio 2014), also from the Southern District of Ohio.

375. *DeBoer II*, 973 F. Supp.2d at 775 (holding Michigan’s laws prohibiting same-sex marriage unconstitutional as a violation of the Equal Protection Clause of the Fourteenth Amendment); *Wymyslo*, 962 F Supp.2d at 997 (holding Ohio’s laws precluding the recognition of valid same-sex marriages from other states unconstitutional as a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment); *Henry*, 14 F. Supp.3d at 1062 (holding Ohio’s laws precluding the recognition of valid same-sex marriages from other states unconstitutional as a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment); *Tanco*, 7 F. Supp. 3d at 769 (holding that Plaintiffs were likely to succeed on merits of equal protection claim and granting Plaintiffs’ motion for preliminary injunction, which enjoined Tennessee from enforcing its laws precluding the recognition of valid same-sex marriages); *Bourke*, 996 F. Supp. 2d at 544 (holding Kentucky’s laws precluding the recognition of valid same-sex marriages unconstitutional as a violation of the Equal Protection Clause of the Fourteenth Amendment).

376. *DeBoer I*, 772 F.3d at 421.

in our democracy and how activist courts should be.³⁷⁷ In Judge Sutton's opinion, the court made clear its belief that the people of each respective state, not a federal court applying the federal constitution, should decide the issue of same-sex marriage.³⁷⁸ In the Sixth Circuit's view, it only had power to decide whether "the Fourteenth Amendment to the United States Constitution prohibit[s] a State from defining marriage as a relationship between one man and one woman."³⁷⁹

Baker was the starting point for the court's analysis, as it had been for every other circuit that had considered the same-sex marriage issue.³⁸⁰ Contrary to every other circuit that had addressed the issue, the Sixth Circuit in *DeBoer* found that *Baker* was still binding precedent.³⁸¹ For Judge Sutton, neither *Lawrence*, *Romer*, or *Windsor* evidenced subsequent doctrinal developments that would be sufficient for the court to choose to not follow *Baker*.³⁸² In applying *Baker*, the court simply could have dismissed *DeBoer* without reaching the merits.³⁸³

Nonetheless, Judge Sutton chose to move forward and address the merits of the plaintiffs' claim in *DeBoer*.³⁸⁴ In order to determine whether same-sex marriage was protected by the Fourteenth Amendment, the court looked to the original meaning of the Fourteenth Amendment and our nation's history and tradition,³⁸⁵ stating that "[a]ll Justices, past and present, start their assessment of a case about the meaning of a constitutional provision by looking at how the provision was understood by the people who ratified it."³⁸⁶ According to Judge Sutton, "[n]obody . . . argue[d] that the people who adopted the Fourteenth Amendment understood it to require the States to change the definition of marriage."³⁸⁷ In his *DeBoer* opinion, Judge Sutton points to an array of Supreme Court cases—ranging from

377. See *id.* at 396 ("Of all the ways to resolve this question, one option is not available: a poll of the three judges on this panel, or for that matter all federal judges, about whether gay marriage is a good idea."); see also Lyle Denniston, *Sixth Circuit: Now, a split on same-sex marriage*, SCOTUSBLOG (Nov. 6, 2014, 4:50 PM), <http://www.scotusblog.com/2014/11/sixth-circuit-the-split-on-same-sex-marriage/> (detailing the majority's approach).

378. *DeBoer I*, 772 F.3d at 396.

379. *Id.*

380. *Id.* at 399-400. The Sixth Circuit, however, viewed *Baker* quite differently than the Fourth, Seventh, Ninth, and Tenth Circuits. Compare *id.* at 400 (stating that *Baker* is still binding Supreme Court precedent), with *Bostic*, 760 F.3d at 375 (declining to view *Baker* as binding Supreme Court precedent), *Baskin*, 766 F.3d at 660 (declining to view *Baker* as binding Supreme Court precedent), *Latta*, 771 F.3d at 466-67 (declining to view *Baker* as binding Supreme Court precedent), and *Kitchen*, 755 F.3d at 1205-06 (declining to view *Baker* as binding Supreme Court precedent).

381. *DeBoer I*, 772 F.3d at 400-01.

382. *Id.* at 401-02.

383. See *id.*

384. *Id.* at 402-03.

385. *Id.* at 403-04.

386. *DeBoer I*, 772 F.3d at 403.

387. *Id.*

*Marbury v. Madison*³⁸⁸ to *NLRB v. Noel Canning*³⁸⁹—where an original meaning approach was likewise employed.³⁹⁰ Judge Sutton asserted that applying an original meaning approach to the issue in *DeBoer* “[p]ermits today’s marriage laws to stand until the democratic processes say they should stand no more.”³⁹¹

Additionally, the Sixth Circuit refused to recognize the fundamental right to marriage as expansive enough to encompass the right to same-sex marriage, and required the application of some form of heightened scrutiny to the state laws prohibiting same-sex marriage.³⁹² According to Judge Sutton’s opinion, in order for the court to consider the right to same-sex marriage as a fundamental right, the right to same-sex marriage “turns on bedrock assumptions about liberty.”³⁹³ The court quickly dismissed this as implausible because “[t]he first state high court to redefine marriage to include gay couples did not do so until 2003”³⁹⁴ Next, Judge Sutton noted that “matters do not change because [*Loving*] held that ‘marriage’ amounts to a fundamental right.”³⁹⁵ In the court’s view, *Loving* implied the foundational idea that “marriage” means only marriage between a man and a woman.³⁹⁶

The Sixth Circuit likewise refused to apply heightened scrutiny to the state laws prohibiting same-sex marriage in the context of the plaintiffs’ equal protection claim.³⁹⁷ In his opinion, Judge Sutton recognized that Supreme Court cases “call[] for heightened review of laws that target groups whom legislators have singled out for unequal treatment in the past.”³⁹⁸ However, Sixth Circuit precedent led the court to conclude that it was to apply rational basis review to sexual orientation classifications.³⁹⁹ Additionally, the court concluded that Supreme Court precedent did not support applying heightened scrutiny to sexual orientation classifications, in that “[t]he Supreme Court has never held that legislative classifications based on sexual orientation receive heightened review and . . . has not recognized a new suspect class in more than four decades.”⁴⁰⁰

388. 5 U.S. 137 (1803).

389. 134 S. Ct. 2550 (2014).

390. *DeBoer I*, 772 F.3d at 403-04.

391. *Id.* at 404.

392. *Id.* at 411-12.

393. *Id.* at 411.

394. *Id.*

395. *DeBoer I*, 772 F.3d at 411.

396. *Id.*

397. *Id.* at 413.

398. *Id.*

399. *Id.*

400. *DeBoer I*, 772 F.3d at 413.

Ultimately, the majority applied rational basis review to those state laws that prohibited same-sex marriage.⁴⁰¹ The court applied traditional rational basis review—rather than a more demanding form found in *Windsor*—which is extremely deferential to the government.⁴⁰² According to the court, rational basis means that “[s]o long as judges can conceive of some ‘plausible’ reason for the law—any plausible reason, even one that did not motivate the legislators who enacted it—the law must stand, not matter how unfair, unjust, or unwise the judges may consider it as citizens.”⁴⁰³

The court stated that at least two rational reasons exist in support of state laws prohibiting same-sex marriage.⁴⁰⁴ First, the court, concluding that procreative channeling was a rational reason for state same-sex marriage bans,⁴⁰⁵ stated, “one can well appreciate why the citizenry would think that a reasonable first concern of any society is the need to regulate male-female relationships and the unique procreative possibilities of them.”⁴⁰⁶ Additionally, the court asserted that “[b]y creating a status (marriage) and by subsidizing it (e.g., with tax-filing privileges and deductions), the States created an incentive for two people who procreate together to stay together for purpose of rearing offspring.”⁴⁰⁷ The court ultimately concluded that because same-sex couples cannot procreate, same-sex marriages do not serve the state’s policy goals in this area.⁴⁰⁸ Second, the majority found that “another rational explanation for the decision of many States not to expand the definition of marriage [is to] wait and see before changing a norm that our society . . . has accepted for centuries.”⁴⁰⁹ Therefore, because the court found a rational basis for the traditional definition of marriage, it upheld state laws prohibiting—and/or precluding the recognition of—same-sex marriage.⁴¹⁰

On January 16, 2015, the Supreme Court granted certiorari in the cases emanating from the Sixth Circuit to answer the following questions:

401. *Id.* at 404.

402. *Id.*

403. *Id.* (citations omitted).

404. *Id.*

405. *DeBoer I*, 772 F.3d at 404.

406. *Id.* at 405.

407. *Id.*

408. *Id.* at 404-05.

409. *Id.* at 406.

410. *DeBoer I*, 772 F.3d at 407, 421. In dissent, Judge Daughtrey forcefully stated that she would give no effect to *Baker*. *Id.* at 430-31 (Daughtrey, J., dissenting). For Judge Daughtrey, prior cases such as *Romer*, *Lawrence*, and *Windsor* represented, at a minimum, a tacit overruling of *Baker*. *Id.* at 431. Judge Daughtrey also stated that she would find that same-sex marriage bans violate equal protection, in that they are predicated on unconstitutional animus. *Id.* at 435-36. Judge Daughtrey would have applied Justice Stevens’ articulation of equal protection analysis outlined in his concurrence in *City of Cleburne, Tex. v. Cleburne Living Cen.*, 473 U.S. 432 (1985), and hold that same-sex marriage bans simply have no rational basis at all. *DeBoer I*, 772 F.3d at 434-36 (Daughtrey, J. dissenting).

- 1) Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?
- 2) Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?⁴¹¹

Oral argument took place for these consolidated cases on April 28, 2015.⁴¹²

B. Concerns About Polygamy in the Oral Arguments in Obergefell

While issues related to polygamous marriages or polyamorous relationships appear only in Chief Justice Roberts' dissent in *Obergefell*,⁴¹³ it was of concern to Justice Alito throughout the oral arguments in the case.⁴¹⁴ In fact, in reviewing the transcript of the oral arguments, it appears that concern about the possible recognition of polygamous marriage dominated Justice Alito's questioning.⁴¹⁵

Throughout the oral argument in *Obergefell*, Justice Alito returned to the issue of the implications inherent in the *Obergefell* arguments for the future recognition of polygamous or polyamorous relationships.⁴¹⁶ Justice Alito engaged in several exchanges with Mary Bonauto, arguing on behalf of the same-sex couples seeking recognition of their marriages, asking her at one point: "Suppose we rule in your favor in this case and then, after that, a group consisting of two men and two women apply for a marriage license. Would there be any ground for denying them?"⁴¹⁷ While Bonauto argued that this would not be the result required by the recognition of same-sex marriage,⁴¹⁸ Justice Alito pushed further, asking:

Well, what if there's no—these are 4 people, 2 men and 2 women, it's not—it's not the sort of polygamous relationship, polygamous marriages that existed in other societies and still exist in some societies today. And let's say they're all consenting adults, highly educated. They're all lawyers. (Laughter.) What would be the ground

411. *DeBoer I*, 772 F.3d 388 (6th Cir. 2014), *cert. granted*, 2015 WL 213646 (U.S. Jan. 16, 2015) (No. 14-556).

412. *Obergefell*, 135 S. Ct. 2584.

413. *See id.* at 2621-22.

414. *See* Transcript of Oral Argument at 17-18, *Obergefell*, 135 S. Ct. 2584 (2015) (No. 14-556), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-556q1_11o2.pdf.

415. *See id.* at 17-19.

416. *Id.*

417. *Id.* at 17.

418. *Id.* at 17-20.

under—under the logic of the decision you would like us to hand down in this case? What would be the logic of denying them the same right?⁴¹⁹

As John Bursch argued on behalf of the states against the recognition of same-sex marriage,⁴²⁰ Justice Alito again returned to the issue of polygamy in the following exchange:

Justice Alito: [T]he reason for marriage is to provide a lasting bond between people who love each other and make a commitment to take care of each other, I'm not—do you see a way in which that logic can be limited to two people who want to have sexual relations—

Mr. Bursch: It—it—can't be.

Justice Alito: [W]hy that would not extend to larger groups, the one I mentioned earlier, two men and two women, or why it would not extend to unmarried siblings who have the same sort of relationship?⁴²¹

C. The Majority Opinion: Extending the Romer / Lawrence / Windsor Trilogy

On June 26, 2015, the Court issued its decision in *Obergefell*.⁴²² In a 5-4 decision, with Justice Kennedy writing for the Court, the Court answered the two questions presented in *Obergefell* as follows: “The Fourteenth Amendment requires a State to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State.”⁴²³ As he had in each of his opinions in the Court’s gay rights trilogy—*Romer*, *Lawrence*, and *Windsor*—Justice Kennedy rooted his decision in concepts of both liberty and dignity, extending his understanding that analysis rooted in due process and equal protection were inextricably bound together.⁴²⁴

As in *Lawrence* where he attacked the Court’s prior framing of the homosexual sodomy question in *Bowers*, Justice Kennedy was first

419. Transcript of Oral Argument, *supra* note 414, at 18-19.

420. *Id.* at 41-42.

421. *Id.* at 57; see Amy Davidson, *Justice Alito's Polygamy Perplex*, NEW YORKER (April 30, 2015), <http://www.newyorker.com/news/amy-davidson/justice-alitos-polygamy-perplex>.

422. *Obergefell*, 135 S. Ct. 2584.

423. *Id.* at 2588, 2607-08.

424. *Id.* at 2596-99, 2602-04.

concerned with how the question before the *Obergefell* Court was to be framed.⁴²⁵ Justice Kennedy rejected the notion that the question before the Court was simply whether there was a constitutional right to gay marriage.⁴²⁶ Rather, Justice Kennedy sought to frame the question before the Court within the context of the evolution of the understanding of marriage and the evolution of the Court's marriage jurisprudence as described above.⁴²⁷

After reviewing both the evolving understanding of marriage and the Court's development of a jurisprudence related to marriage, Justice Kennedy concluded that marriage was a fundamental right under the Constitution, gleaned four principles that were at the core of defining this fundamental right.⁴²⁸ Justice Kennedy identified these core principles as follows:

- 1) "[T]he right to personal choice regarding marriage is inherent in the concept of individual autonomy [creating an] abiding connection between marriage and liberty."⁴²⁹
- 2) Marriage "supports a two-person union unlike any other in its importance to the committed individuals."⁴³⁰
- 3) "[P]rotecting the right to marry . . . safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education."⁴³¹
- 4) "[M]arriage is a keystone of our social order."⁴³²

Justice Kennedy then identified the question before the Court as being whether limiting marriage solely to opposite sex couples, to the exclusion of same-sex couples, was manifestly inconsistent with the central meaning of the fundamental right to marry.⁴³³ Justice Kennedy explicitly rejected the

425. *Id.* at 2602.

426. *Id.*

427. *Obergefell*, 135 S. Ct. at 2602.

428. *Id.* at 2599.

429. *Id.*

430. *Id.*

431. *Id.* at 2600 (citations omitted).

432. *Obergefell*, 135 S. Ct. at 2601.

433. *See id.* at 2602. Specifically, Justice Kennedy stated:

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 impose stigma and injury of the kind prohibited by our basic charter.

argument that gay and lesbian couples were not simply seeking “to exercise the right to marry,” but rather were asking for the recognition of “a new and nonexistent ‘right to same-sex marriage.’”⁴³⁴

As he had in the *Romer*, *Lawrence*, and *Windsor* trilogy discussed above, Justice Kennedy did not specify whether the case was being decided on due process or equal protection grounds.⁴³⁵ However, what is much clearer in *Obergefell* is that no choice between due process and equal protection analysis need be made; as he sees the Constitution, these two constitutional clauses are inextricably tied together under the umbrella of personal dignity.⁴³⁶

In *Obergefell*, Justice Kennedy again analyzed the question before the Court under some form of heightened scrutiny, but not a heightened scrutiny that begins with traditional constructs of suspect groups or classifications.⁴³⁷ In this case, the analysis begins with the idea that marriage is a fundamental right under the due process clause, thus subjecting exclusions from that right to heightened scrutiny.⁴³⁸ Therefore, the question in *Obergefell* was whether there existed a substantial or compelling, let alone rational, basis for the exclusion of same-sex couples from this fundamental right.⁴³⁹ In the Court’s analysis, the answer to this question was an unequivocal: “No.”⁴⁴⁰ As Justice Kennedy writes in the final paragraph of his opinion:

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would

Id.

434. *Id.* As Justice Kennedy wrote:

Loving did not ask about a ‘right to interracial marriage’; *Turner* did not ask about a ‘right of inmates to marry’; and *Zablocki* did not ask about a ‘right of fathers with unpaid child support duties to marry.’ Rather, each case inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right.

Id.

435. *See supra* Part VII-A; *see generally* *Obergefell*, 135 S. Ct. 2584.

436. *Obergefell*, 135 S. Ct. at 2602-05.

437. *See generally id.*

438. *Id.* at 2599.

439. *Id.* at 2604-05.

440. *Id.* at 2607-08 (“[T]he 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 performed in another State on the ground of its same-sex character.”).

misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.⁴⁴¹

D. Dissenting Opinions

Chief Justice Roberts' primary objection was on what he saw as the anti-democratic nature of the decision, cutting off the robust debate that had been taking place already in the states.⁴⁴² Chief Justice Roberts also clearly saw this decision and the analysis employed by Justice Kennedy as reviving the often criticized substantive due process analysis employed by the Court in *Lochner v. New York*,⁴⁴³ a case Chief Justice Roberts referenced some sixteen times in his dissent.⁴⁴⁴ Chief Justice Roberts placed Justice Kennedy's analysis in the *Lochnerian* substantive due process tent, offering a scathing criticism of *Lochner* and its approach to substantive due process analysis, which, according to Chief Justice Roberts, allows judges to turn "personal preferences into constitutional mandates."⁴⁴⁵

It was Chief Justice Roberts who expressly focused on the implications of the majority's analysis for the possibility of future recognition of polygamous or polyamorous relationships.⁴⁴⁶ Chief Justice Roberts wrote:

One immediate question invited by the majority's position is whether States may retain the definition of marriage as a union of two people. Although 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. Indeed, from the standpoint of history and tradition, a 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. If the majority is willing

441. *Obergefell*, 135 S. Ct. at 2608.

442. *Id.* at 2611-12, 2624-26 (Roberts, C. J., dissenting).

443. 198 U.S. 45 (1905).

444. *Obergefell*, 135 S. Ct. at 2612, 2615-19, 2621-23 (Roberts, C. J., dissenting).

445. *Id.* at 2618.

446. *Id.* at 2621-22.

to take the big leap, it is hard to see how it can say no to the shorter one.

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. If '[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices,' why would there be any less dignity in the bond between three people who, in exercising their autonomy, seek to make the profound choice to marry? If a same-sex couple has the constitutional right to marry because their children would otherwise 'suffer the stigma of knowing their families are somehow lesser,' why wouldn't the same reasoning apply to a family of three or more persons raising children? If not having the opportunity to marry 'serves to disrespect and subordinate' gay and lesbian couples, why wouldn't the same 'imposition of this disability' serve to disrespect and subordinate people who find fulfillment in polyamorous relationships?⁴⁴⁷

The dissenting opinions from Justices Scalia, Alito, and Thomas offer very little in the way of legal analysis.⁴⁴⁸ Rather, their approach is to simply attack the majority for what they see as an inappropriate use of judicial power, or as Justice Scalia writes: "Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court."⁴⁴⁹ Justice Alito joined in this attack: "A lesson that some will take from today's decision is that preaching about the proper method of interpreting the Constitution or the virtues of judicial self-restraint and humility cannot compete with the temptation to achieve what is viewed as a noble end by any practicable means."⁴⁵⁰

Rather than analyzing the application of the precedents established by the Court in both its marriage jurisprudence and in the *Romer*, *Lawrence*, and *Windsor* gay rights trilogy to the questions presented in *Obergefell*, the dissenting justices chose to avoid this analysis, instead resorting to *ad hominem* attacks on the majority, as exemplified by Justice Scalia's dissent.⁴⁵¹

447. *Id.* (internal citations omitted).

448. *See id.* at 2626-31 (Scalia, J., dissenting), 2631-40 (Thomas, J., dissenting), 2640-43 (Alito, J., dissenting).

449. *Obergefell*, 135 S. Ct. at 2627 (Scalia, J., dissenting).

450. *Id.* at 2643 (Alito, J., dissenting).

451. *See id.* at 2629-31 (Scalia, J., dissenting). By way of example, Justice Scalia wrote:

IX. CONCLUSION: THE REQUIREMENT OF A REAL AND CONCRETE HARM

Having explored the development of the Supreme Court's recognition of the fundamental right to marry,⁴⁵² the development by Justice Kennedy's jurisprudential analyses, in the *Romer*, *Lawrence*, and *Windsor* trilogy, focused on the fundamental concepts of liberty, dignity, and equality,⁴⁵³ and the application of that jurisprudence to the constitutionality of state efforts to ban same-sex marriage culminating in *Obergefell*,⁴⁵⁴ this Article asserts that the Supreme Court's recognition of the fundamental right to marry and Justice Kennedy's evolving constitutional jurisprudence of liberty, dignity, and equality, along with the Court's recognition that state prohibitions against same-sex marriage are unconstitutional, all serve to change the legal landscape related to polygamy and open the door to recognition of the right of polygamous marriages under the constitution.⁴⁵⁵ Has the Supreme Court, both in its cases recognizing the fundamental right to marry and in its developing gay rights jurisprudence exemplified by Justice Kennedy's *Romer*, *Lawrence*, and *Windsor* trilogy, created a pathway for a future recognition of polygamous marriage? This Article argues that is indeed what the Court has done.

The focus of this Article has been to divide strands from the Court's decisions to create a potential legal framework for prohibitions against polygamous marriages or other forms of relationships, where such restrictions are rooted solely in a tradition of majoritarian morality and animus. As one commentator noted:

If, even as the price to be paid for a fifth vote, I ever joined an opinion for the Court that began: 'The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity,' I would hide my head in a bag. The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie.

Id. at 2630 n.22.

452. *See supra* Part VI.

453. *See supra* Part VII.

454. *See supra* Part VIII.

455. *See generally* IN DEFENSE OF PLURAL MARRIAGE, *supra* note 278; Otter, *supra* note 264; Stu Marvel, *The Evolution Of Plural Parentage: Applying Vulnerability Theory To Polygamy And Same-Sex Marriage*, 64 EMORY L.J. 2047 (2015); Jonathan A. Porter, Comment, *L'amour For Four: Polygyny, Polyamory, And The State's Compelling Economic Interest In Normative Monogamy*, 64 EMORY L.J. 2093 (2015); Hadar Aviram & Gwendolyn M. Leachman, *The Future Of Polyamorous Marriage: Lessons from The Marriage Equality Struggle*, 38 HARV. J.L. & GENDER 269 (2015); *see contra* John Witte, Jr., *Why Two in One Flesh? The Western Case for Monogamy over Polygamy*, 64 EMORY L.J. 1675 (2015); Martha Bailey & Amy Kaufman, *Should Civil Marriage Be Opened Up to Multiple Parties?*, 64 EMORY L.J. 1747 (2015); Rose McDermott & Jonathan Cowden, *Polygyny and Violence Against Women*, 64 EMORY L.J. 1767 (2015).

Viewed collectively, the theoretical threads woven throughout the three Supreme Court opinions affirming substantive protections for LGBT citizens—*Romer*, *Lawrence*, and *Windsor*—reveal each case to be an integral part of a larger tapestry of equal liberty protections, with common themes of equal status and dignity and respect, and the unconstitutionality of government-imposed stigma.⁴⁵⁶

From the review detailed in this Article, the following lessons emerge for these future cases:

- The Court has consistently recognized the right to marry as a fundamental right that is not static, but rather evolves over time.⁴⁵⁷
- The fundamental right to marry arises from the fundamental right to privacy, first acknowledged in *Griswold*.⁴⁵⁸
- There has been a shift away from the Court's historic due process and equal protection analysis, where these doctrines were seen as wholly independent, to a much more fluid analysis that sees due process and equal protection linked and rooted in concepts of liberty and dignity.⁴⁵⁹
- Classifications and restrictions that are predicated on majoritarian morality or majoritarian animus against a class or group of persons are inherently suspect and cannot alone be a reasonable basis for the classification of restriction.⁴⁶⁰
- Whether one nominally calls the standard of review for such classifications rational basis, intermediate scrutiny,

456. Nancy C. Marcus, *Deeply Rooted Principles of Equal Liberty, Not "Argle Barge": The Inevitability of Marriage Equality after Windsor*, 23 TUL. J.L. & SEXUALITY 17, 59 (2014).

457. *See supra* Part VI.

458. *See supra* Parts VI-VII.

459. *See supra* Part VII.

460. *See supra* Parts VII-VIII.

or even strict scrutiny, the Court has consistently applied some manner of heightened scrutiny in these cases.⁴⁶¹

- States seeking to defend such classifications and restrictions must offer more than mere history, tradition, or conclusions that are simply “unsupported conjecture.”⁴⁶²

Throughout these developments, the Court has recognized that the definition of “family,” with constitutionally protected privacy and liberty interests, is not one single model, but one that evolves over time.⁴⁶³ As one commentator has written:

In other words, courts have found that the state has no interest in preferring a single heterosexual model of the family above all others: ‘The composition of families varies greatly from household to household, . . . and there exist successful, well-adjusted children from all backgrounds.’ [A]ll happy families are not alike. Traditional heterosexual marriage is not the only successful way to arrange intimate and family life. . . .

Constitutional concerns about equality have often been instrumental in convincing courts to set limits on the state’s power to enforce a single, normative model of marriage and family. Concerns about racial equality led the Court in *Loving* to recognize Virginia’s ban on interracial marriage as a violation of its citizens’ liberty interests. ‘To deny this fundamental freedom,’ the Court held, ‘on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law.’ Concerns about sex discrimination have likewise prompted the Court to recognize as violative of due process laws that seek to enforce a single, conventional model of men’s and women’s roles in marriage and the family.⁴⁶⁴

461. *See supra* Part VII.

462. *See supra* Parts VII-VIII.

463. Franklin, *supra* note 294, at 885-86.

464. *Id.* at 884-86 (footnotes omitted).

In order to see how these principles might come into play in a case raising a challenge to restrictions against polygamous marriages, another look should be taken at the scenario presented in *Brown*, discussed in Part V of this Article.⁴⁶⁵ *Brown* challenged Utah's anti-bigamy/polygamy statute by a fundamentalist "Mormon" family.⁴⁶⁶ *Brown* involved Kody Brown, who is "married" to four women—Meri, Janelle, Christine, and Robyn.⁴⁶⁷ Mr. Brown is only legally married to one woman, Meri Brown; Mr. Brown and the other women are engaged in "spiritual marriages."⁴⁶⁸

While the *Brown* Court did find the cohabitation prong of the Utah statute unconstitutional as a violation of both the Free Exercise Clause of the First Amendment and the Due Process Clause, it is the court's discussion of the history of the ban on polygamous marriages, the rationales offered by the state for such bans, and the legal history of the development of the jurisprudence supporting the bans that is perhaps most interesting.⁴⁶⁹ While the *Brown* Court ultimately determined that it was bound by the Supreme Court's 1879 decision in *Reynolds*, regarding the actual practice of polygamous marriages, it raised serious questions about the continuing validity of *Reynolds*, specifically the rationale offered by the state for the prohibition.⁴⁷⁰ The Court wrote:

When the federal government targeted Mormon polygamy for elimination during the half century from the passage of the Morrill Anti-Bigamy Act of 1862 through the Congressional inquiry into the seating of Utah Senator Reed Smoot from 1904 to 1907, the 'good order and morals of society' served as an acceptable basis for a legislature, it was believed, to identify 'fundamental values' through a religious or other perceived ethical or moral consensus, enact criminal laws to force compliance with these values, and enforce those laws against a targeted group. In fact, with the exception of targeting a specific group, this has remained true in various forms (depending on the particular right and constitutional provision at issue) until the Supreme Court's decision in *Lawrence* created ambiguity about the status of such 'morals legislation.' But the LDS Church was a victim of such majoritarian consensus

465. *Brown*, 947 F. Supp. 2d at 1178-79.

466. *Id.* at 1176, 1178.

467. McGinnis, *supra* note 188, at 257 (citing *Inside the Lives of a Polygamist Family*, *supra* note 197).

468. *Id.* at 257-58.

469. *Brown*, 947 F. Supp. 2d at 1190.

470. *Id.* at 1184-85.

concerning its practice of polygamy as a foundational and identifying tenet of religious faith.⁴⁷¹

In light of the Supreme Court's developing understanding of the fundamental right to privacy and Justice Kennedy's gay rights jurisprudence, including *Obergefell*, it is critical to look back at *Reynolds* to examine the state's rationale in support of the ban on polygamous marriages and whether such a rationale could pass constitutional scrutiny today.⁴⁷² So what rationale did the state offer in support of its prohibition against polygamous marriages? As described by the *Brown* Court, the social harm being addressed by bans on polygamous marriages was "introducing a practice perceived to be characteristic of non-European people—or non-white races—into white American society."⁴⁷³ In further describing the state's rationale, the *Brown* Court wrote:

But what exactly was the 'social harm' identified by the *Reynolds* Court in the Mormon practice of polygamy that made the practice 'subversive of good order'? 'Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people.' [T]his expression of the social harm identified in the Mormon practice of polygamy aptly exemplifies the concept. A decade later, the Supreme Court clarified the social harm further, explaining that Mormons were degrading the morals of the country through their religious practices, such as polygamy, which, the Supreme Court declared, constituted 'a return to barbarism' and were 'contrary to the spirit of Christianity.'⁴⁷⁴

Given the Supreme Court's decisions in the *Romer*, *Lawrence*, *Windsor*, and *Obergefell* line of cases, where Justice Kennedy consistently asserted that majoritarian morality or animus alone could not serve as a reasonable or rational basis for state restrictions or classifications (particularly when they involved fundamental rights), it is inconceivable that the state's original articulated rationale for bans on polygamous marriages would be

471. *Id.* (footnotes omitted) (citations omitted).

472. *See generally* Turley, *supra* note 221; Strassberg, *supra* note 232.

473. *Brown*, 947 F. Supp. 2d at 1188.

474. *Id.* at 1186-87 (internal citations omitted).

deemed adequate today.⁴⁷⁵ In fact, that rationale likely would be deemed irrational on its face.

If, in fact, as the *Brown* Court posits, *Reynolds* is open to future challenge in light of the developing Supreme Court doctrines outlined in this Article, then what rationales might the state offer to support continuing bans against polygamous marriage, particularly if that practice is rooted in a group's religious belief? These state rationales would likely look a lot like those that have been offered by states to support their existing bans on same-sex marriage, all of which have been almost universally rejected by the courts post-*Windsor*.⁴⁷⁶

One can imagine that states would assert that the maintenance of monogamous marriage is critical to the preservation of the institution of marriage, just as they have asserted that heterosexual marriage is necessary.⁴⁷⁷ Likewise, questions of child welfare and parenting will be raised, focusing on anecdotal or fear-based accounts of how much worse children will fare in polygamous families.⁴⁷⁸ Moreover, states might argue that bans on polygamous marriages are necessary to protect women from being placed in situations of abuse, manipulation, or marriages when they are much too young to make such a decision. However, there are a host of criminal statutes that provide such protection from abuse and, to be frank, monogamous marriages are not free of abuse directed at women.⁴⁷⁹ As for polygamy necessarily leading to younger individuals inappropriately entering plural marriage, the age limits on who may marry already address such issues in states.⁴⁸⁰

In all constitutional analyses, justifications for particular prohibitions, restrictions, or classifications are contingent on the type of harm to be avoided.⁴⁸¹ Professor Turley asserts that the "harm question" must focus on specific and concrete harms, rather than assumed harms that are rooted in traditional moral constructs.⁴⁸² For Turley, the guiding principle in the analysis of the "harm question" should be John Stuart Mill's "Harm Principle."⁴⁸³ Mill's harm principle is rooted in the idea that "the only purpose for which power can be rightfully exercised over any member of a

475. Turley, *supra* note 221, at 1921.

476. *See supra* Parts VI-VII.

477. *See Obergefell*, 135 S. Ct. at 2621 (Roberts, C.J. dissenting).

478. *Black*, 283 P.2d at 900-01.

479. *Brown*, 947 F. Supp. 2d at 1224.

480. *Id.*

481. Turley, *supra* note 221, at 1909.

482. *Id.* at 1909-11.

483. *Id.*; *see also* JOHN STUART MILL, ON LIBERTY 23 (David Bromwich & George Kateb eds., 1863).

civilized community, against his will, is to prevent harm to others.⁴⁸⁴ For Mill, harm is focused on an actual, concrete harm.⁴⁸⁵ As Turley writes: “The scope of that harm for Mill is necessarily confined to actual as opposed to spiritual or moral harm. Otherwise, any law could be justified on a claim that the law codifies or protects morality.”⁴⁸⁶

As discussed above, Justice Kennedy’s fundamental analyses through the Court’s gay rights cases turns on the question of harm, but, as is made clear in those cases, that harm cannot simply be rooted in majoritarian morality or animus.⁴⁸⁷ Justice Kennedy’s analyses throughout *Romer*, *Lawrence*, *Windsor*, and *Obergefell* is firmly rooted in this Millian concept of harm, in that for the state to justify the classifications and restrictions found in each of these cases, the state is required to offer evidence that the conduct being restricted results in actual concrete harm to others or to society.⁴⁸⁸ In each of these cases, as discussed above, the state failed to meet this burden and the classification or restriction failed.

484. Turley, *supra* note 221, at 1909.

485. *Id.* at 1910.

486. *Id.* As Turley notes:

In case after case, courts return to the question of harm: harm in interracial marriage, harm in same sex marriage, harm in plural marriage. While the first two claims were ultimately rejected, harm remains the magnetic focal point for modern analysis. It functions much like what Dickens called ‘The Loadstone Rock’ in *A Tale of Two Cities*—the rock upon which inevitably all cases must break. It draws all analysis to the question of what is the harm of a consensual union that would justify criminal sanctions. While the criminalization of different forms of marriage—whether interracial, plural, or homosexual—was once based on open majoritarian moral judgments, modern cases and scholarship have tended to emphasize social harm. Modern jurisprudence—and sensibility—eschews direct moral dictates. This can create a thin veneer for what are really moral dictates. Normative or moral claims underlying criminal sanctions are sometimes justified on loose claims of social harm, such as the effect of certain acts in degrading or marginalizing particular groups. This nexus between social harm and criminal sanctions is placed into sharp relief when courts seek to satisfy tests for the constitutionality of the underlying laws. In the United States, the harm analysis is unavoidable, regardless of the test applied, from strict scrutiny to intermediate scrutiny to rational basis standards. While the burden differs significantly, they all inevitably arrive at the Loadstone Rock of harm. Even the mere demand of a rational basis requires some nexus to a concrete harm—a linkage that was found missing in *Brown*. Moreover, a Millian view of harm suggests a broader use of ‘rational basis with bite,’ which is often cited in animus jurisprudence in areas like equal protection. If ‘the hallmark of animus jurisprudence is its focus on actual legislative motive,’ the hallmark of harm analysis must be concrete injury to individuals or society at large.

Id. at 1910-11 (footnotes omitted).

487. *See supra* Parts I, VII.

488. Turley, *supra* note 221, at 1974-75. As Turley writes:

What we see throughout these cases is a constitutional analysis that holds that the protection or preservation of majoritarian morality or animus is not an adequate justification for classifications and restrictions that interfere with or seek to limit some fundamental right.⁴⁸⁹ To justify continued prohibition in the case of polygamy or plural marriage, the harms offered by the state must demonstrate actual concrete harm resulting from such relationships, rather than a simple assertion that that these relationships are “deemed harmful because they run against majoritarian values and sentiments.”⁴⁹⁰

A Millian definition of harm favors a bright-line rule that protects core rights of free exercise as well as free speech and free association. It is not, however, the invitation to immorality that some have suggested in the public debate. Rather, it allows for different moral codes to flourish within a pluralistic society. Indeed, it would be a triumph for morality in the truest sense since it allows people to pursue their own moral codes and paths rather than yield to the moral codes of their neighbors. When such majoritarian codes were routinely enforced in the nineteenth century, they did not create a more moral society but only the appearance of such a society. It was a coerced or compelled morality—the very antithesis for principles of free choice and self-determination. That is why the decisions in *Bountiful* and *Brown* were less about polygamy than they were about privacy.

The ‘Loadstone Rock’ of harm in constitutional analysis holds both the greatest promise and greatest danger for liberty interests in the United States and Canada. The rejection of the Millian view in the *Bountiful* decision and the adoption of that view in *Brown* embody that sharp contrast. However, for those of us who see Millian harm as a key to realizing true freedoms of religion, speech, and association, cases like *Brown* hold not just an ideal but also an inevitable direction for society. The great irony of compulsive liberalism is the notion of the oppressed rising as the new oppressors. While Devlin’s direct moral-superiority language is no longer considered appropriate, it has been replaced with a new moralism citing the abuse of status and dignity of different groups. There is an underlying belief that criminal law remains an instrument in achieving correct values and correct decisions. Even with the rise of compulsive liberalism in scholarship, however, there remains a natural progression toward individual choice and freedom. In *Brown*, individual choice prevailed over those who wanted to use criminal law to protect social institutions. Despite the longstanding hatred and rage directed at plural families, the court heard the voices of those who only asked to be left alone to pursue their own moral course and relations. The Browns did not prevail by finding counsel or a court who agreed with their choices but rather people who agreed with their right to make such choices. Despite the calls for greater limits on speech and consensual conduct, the decision suggests that there may still be a Millian line that can be drawn to preserve individual freedom and make each man and woman the ‘guardian’ of their own values.

Id.

489. *See id.* at 1974.

490. *Id.* at 1910; *see generally* Strassberg, *supra* note 231 (arguing that the *Brown* court was incorrect in applying heightened scrutiny in reviewing Utah’s cohabitation prohibition, but that even if heightened scrutiny was appropriate the cohabitation and polygamy statutes were constitutional, given the specific harms that result from the practice of polygamy, particularly religious polygamy).

Unless social science supports the various arguments offered by states to support bans on polygamous marriages, as it has not done in the case of same-sex monogamous households, these arguments will be nothing more than “unsupported conjecture.”⁴⁹¹ If that is the case and the state is unable to articulate some supportable rationale for the ban on polygamous marriages, then a future Supreme Court is likely to revisit *Reynolds* and determine that the majoritarian morality and animus underlying these prohibitions are irrational.⁴⁹² Then, bans on polygamy cannot withstand even a rational basis review.⁴⁹³

In *Obergefell*, the Supreme Court recognized the constitutional right of gay and lesbian couples to marry, determining that state bans on such marriages are unconstitutional to the extent that they infringe upon the fundamental right to marry.⁴⁹⁴ As outlined in this Article, it was the Court’s marriage jurisprudence, alongside the Court’s evolving understanding of due process and equal protection as inextricably linked and rooted in individual liberty, that led the Court to uphold the constitutional right of gay and lesbian couples to marry.⁴⁹⁵ While not advocating for polygamous marriages, this Article posits that the Court has created a pathway for cases to challenge state bans against polygamous and polyamorous marriages, and those who wish to maintain these bans must develop a rationale, albeit *post hoc*, that is not rooted in majoritarian morality and animus.

491. *See supra* Part VIII.

492. *Brown*, 947 F. Supp. 2d. at 1184-86.

493. *Id.*

494. *Obergefell*, 135 S. Ct. at 2607-08.

495. *See supra* Parts VII-VIII.