MARRYING INTO HEAVEN: THE CONSTITUTIONALITY OF POLYGAMY BANS UNDER THE FREE EXERCISE CLAUSE

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Polygamy[1] comes into many American homes through the Home Box Office, Inc. ("HBO") series *Big Love*, which portrays a modern polygamous family in suburban Utah. It is ironic that American society currently can tolerate a show like *Big Love*, when a century ago American society feared that polygamy would lead to the destruction of American morals.[2]

Polygamy was first introduced to Americans in the 1850s when Mormons began the practice.[3] Congress enacted a series of laws in the nineteenth-century to eliminate polygamy, and the Supreme Court upheld those laws. After much struggle, Mormons abandoned the practice in 1890;[4] however, Mormon fundamentalists have continued the practice to this day.[5] In recent years, the Court modified its free exercise jurisprudence to recognize religious conduct in a way that was not recognized when it determined the constitutionality of the nineteenth-century anti-polygamy statutes. This Comment argues that because of these modifications, if the Court were to determine the constitutionality of the nineteenth-century anti-polygamy statutes today, it would conclude that those laws violate the Free Exercise Clause of the U.S. Constitution because those laws specifically tar-

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1. "Polygamy" is defined as "[t]he state or practice of having more than one spouse simultaneously." BLACK'S LAW DICTIONARY 1197 (8th ed. 2004). This comment uses the terms "polygamy" and "bigamy" interchangeably. Generally, state criminal codes refer to the practice of "bigamy." *See, e.g.*, IDAHO CODE ANN. § 18-1101 (2007) ("Every person having a husband or wife living, who marries any other person . . . is guilty of bigamy.").

2. Reynolds v. United States, 98 U.S. 145, 166 (1878).

3. Sarah Barringer Gordon, *A War of Words: Revelation and Storytelling in the Campaign against Mormon Polygamy*, 78 CHI.-KENT L. REV. 739, 741 (2003).

4. Irwin Altman, *Polygamous Family Life: The Case of Contemporary Mormon Fundamentalists*, 1996 UTAH L. REV. 367, 368 (1996).

5. *Id.* at 369.

geted the Mormon Church. Utah's current state bigamy statute, however, would remain constitutional to the extent that it excludes all bigamist marriages from legal recognition.

Part I of this Comment discusses the historical context of Mormonism and Mormon polygamy to demonstrate the centrality of polygamy to the Mormon faith. Part II explores the interpretation of the Free Exercise Clause, beginning with the Supreme Court's nineteenth-century decisions that upheld criminal bigamy statutes and ending with the Court's modern understanding of the Free Exercise Clause. Part III analyzes statutes that Congress enacted to eliminate polygamy, and concludes that if the Court analyzed those statutes under modern free exercise jurisprudence, it would find them unconstitutional. Finally, Part IV examines Utah's current anti-bigamy statute under the free exercise analysis and concludes that, while the statute itself is constitutional, applying the statute to religious polygamists who do not seek to have their relationships recognized as legal marriages is unconstitutional.

I. HISTORICAL BACKGROUND OF MORMONISM AND MORMON POLYGAMY

In order to understand the constitutional issues of Mormon polygamy, one must begin with an understanding of Mormon history. The religion's tumultuous beginnings explain in part the attitude of American society and the United States government toward Mormons and their practices. The nineteenth-century Mormon polygamists and the contemporary Mormon fundamentalist polygamists both trace their religious histories to the following events.

A. Historical Beginnings of the Church

Joseph Smith Jr., known as the father of Mormonism, grew up in upstate New York in the early nineteenth century.[6] In 1823, Smith was visited by an angel called Moroni, who told him about the existence of golden tablets that were buried in a nearby hillside.[7] In 1827, Moroni allowed Smith to take the tablets, and Smith began translating

6. Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America*, 28 J. SUP. CT. HIST. 14, 16 (2003).

7. JON KRAKAUER, UNDER THE BANNER OF HEAVEN: A STORY OF VIOLENT FAITH 59 (2003).

them.[8] Smith published his translation of the golden tablets in 1830, and the publication became known as the Book of Mormon.[9] Smith founded his church on April 6, 1830,[10] which he called The Church of Jesus Christ of Latter-day Saints ("LDS Church").[11]

Soon after founding the LDS Church, Smith and his followers, colloquially called "Mormons," began a westward migration. Their first move was to Ohio, and then to Missouri.[12] Missourians responded to the rapid influx of Mormons with both acts of violence and acts of the state legislature.[13] Smith called on the federal government to protect his people.[14] But the constitutional understanding of the day was that the Free Exercise Clause was binding only on the federal government.[15] Therefore, the federal government could not help Smith and the Mormons in their conflicts with the states.[16]

After the turmoil in Missouri, Smith moved his followers again, this time to Illinois. He set up a theocratic city called Nauvoo.[17] The city flourished, and the residents constructed a temple there to perform marriage ceremonies and other rites.[18] But after trouble with residents in neighboring towns, Smith and his brother were murdered.[19]

After Smith's murder, the Mormons moved again. This time, they began the migration to the Great Basin with Smith's successor, Brigham Young, leading them to the area that is now Utah.[20] They petitioned Congress for statehood in 1850.[21] Young was to be governor with several other church leaders appointed to high state offices.[22]

8. *Id* at 61.

9. Gordon, *supra* note 6, at 16.

10. RICHARD S. VAN WAGONER, MORMON POLYGAMY: A HISTORY 2 (3d ed. 1992).

11. *Id.*

12. KRAKAUER, *supra* note 7, at 98.

13. *Id.* at 100-02. For example, vigilantes attacked Mormon settlements, forced Mormons to sign pledges that they would leave Missouri, and tarred and feathered Mormon leaders. The state of Missouri exiled Mormons to a desolate county. However, even that move did not stop the violence as the ever-growing Mormon population spilled into neighboring counties. Mormons responded to the attacks in kind by raiding non-Mormon towns and stealing food and other valuables. *See id.*

14. Gordon, *supra* note 6, at 16.

15. *Id.*

16. *Id.*

17. VAN WAGONER, *supra* note 10, at 26.

18. *Id.* at 26-27.

19. *Id.* at 104-05.

20. *Id.* at 123.

21. *Id.* at 124.

22. *Id.*

The request for statehood was denied, however, and Utah became a territory under the control of the U.S. government ("Utah Territory").[23]

Nineteenth-century LDS Church theology included some distinctive tenets that contributed to the opposition Mormons faced in every place they re-located to. The basis of these tenets was an emphasis on the power of divine revelation. Smith taught that Mormons could communicate directly with God and receive personal, literal revelations of God's will for their lives.[24] Incidentally, shortly after founding Mormonism, Smith claimed that he received a revelation that he was the only person that God appointed to receive revelations regarding the doctrines of the LDS Church.[25] These doctrinal revelations became an important part of LDS Church history and theology, and Smith's revelations, as well as the revelations of subsequent LDS Church presidents, are canonized in the sacred LDS Church text, *The Doctrine and Covenants*.[26]

Some of Smith's actions demonstrate that he held a belief that God's laws were above secular government's laws. For example, many state governments in the early nineteenth century did not recognize Mormon clerics as ministers, and thus would not license them to perform marriage ceremonies.[27] Smith, however, received a revelation that it was God's will for Mormons to be married by Mormon elders, not secular civil authorities, and certainly not ministers of other gospels.[28] Despite the fact that Mormon elders were not licensed, and even though any marriages they performed would not be legally recognized, Smith insisted that Mormon elders perform Mormon marriages.[29] This example demonstrates that Smith perceived God's vision of marriage to be superior to federal and state regulations on marriage. This perception is critical in the fight between Mormons and the U.S. government over the freedom to define marriage in the context of their religious beliefs.

23. *Id.*

24. *See* KRAKAUER, *supra* note 7, at 78.

25. *Id.* at 79.

26. THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, THE DOCTRINE AND COVENANTS OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS & THE PEARL OF GREAT PRICE, Explanatory Introduction (1982) [hereinafter THE DOCTRINE AND COVENANTS].

27. VAN WAGONER, *supra* note 10, at 10.

28. *See id.* at 9-10.

29. *See id.* at 10.

B. Mormon Polygamy

Perhaps the most controversial Mormon practice was the practice of polygamy. This section highlights the history of the beginning of Mormon polygamy, as well as the doctrinal basis for Mormon polygamy, in order to demonstrate that Mormons' practice of polygamy is the result of sincerely held religious beliefs that merit constitutional protection.

1. History of Mormon Polygamy

Mormons embrace the belief in the imminent second coming of Christ.[30] In preparation for Christ's second coming, nineteenth-century Mormons engaged in practices that were derived from Old Testament theology, including polygamy.[31] Historians believe that Smith began practicing polygamy in secret as early as 1833.[32] Ten years later, he claimed to receive a revelation from God that the union of a man to more than one woman was justified according to Abraham's example,[33] and he canonized the polygamy revelation when he recorded *The Doctrine and Covenants* § 132.[34] *The Doctrine and Covenants* § 132 refers to the Biblical patriarchs who had multiple wives: Abraham, Isaac, Jacob, Moses, David, and Solomon.[35]

Mormon polygamy was a closely guarded secret until 1852, when the church publicly announced the practice at a general conference.[36] Soon after the public announcement, Americans began to voice their opposition to the practice. In response, Congress passed a series of laws designed to eliminate polygamy.

Mormons in the Utah Territory desperately hoped that statehood

30. Mary K. Campbell, *Mr. Peay's Horses: The Federal Response to Mormon Polygamy, 1854-1887*, 13 YALE J.L. & FEMINISM 29, 34 (2001).

31. *See id.* at 33-34. *See also* Richard A. Vazquez, Note, *The Practice of Polygamy: Legitimate Free Exercise of Religion or Legitimate Public Menace? Revisiting Reynolds in Light of Modern Constitutional Jurisprudence*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 225, 227 (2001).

32. KRAKAUER, *supra* note 7, at 118.

33. Gordon, *supra* note 3, at 741.

34. THE DOCTRINE AND COVENANTS, *supra* note 26, at § 132:61-62 ("And again, as pertaining to the law of the priesthood—if any man espouse a virgin, and desire to espouse another, and the first give her consent, and if he espouse the second, and they are virgins, and have vowed to no other man, then is he justified; he cannot commit adultery for they are given unto him; for he cannot commit adultery with that that belongeth unto him and to no one else. And if he have ten virgins given unto him by this law, he cannot commit adultery, for they belong to him, and they are given unto him; therefore is he justified.").

35. *Id.* at § 132:1.

36. Gordon, *supra* note 6, at 18.

would relieve them from the oppressive hand of the federal government.[37] As the Utah Territory moved toward statehood, however, resolve for maintaining the practice of polygamy began to weaken in the face of federal opposition. Wilford Woodruff, the LDS Church President at that time, believed it was time for the Church to relinquish the practice and live by the laws of the United States.[38] He issued the Woodruff Manifesto ("Manifesto") on October 6, 1890, announcing that the LDS Church was officially abandoning the practice of polygamy.[39]

The Manifesto, however, did not end Mormon polygamy. In the years following the Manifesto, many Mormons, including church leaders, practiced polygamy in secret.[40] However, by the early twentieth century, most mainstream Mormons had completely abandoned the practice.[41] Today, members of the mainstream LDS Church do not practice polygamy, and the LDS Church excommunicates members who do.[42] Nevertheless, a group called the Fundamentalist Church of Jesus Christ of Latter-day Saints ("FLDS") continues to proclaim that Woodruff was wrong to abandon one of the central teachings of their faith, and FLDS members continue to practice polygamy.[43]

2. Polygamy as a Religious Belief

Nineteenth-century Mormons called the practice of polygamy "celestial marriage."[44] Celestial marriage was not the only form of marriage among Mormons, nor was it the most prevalent. Most Mor-

37. VAN WAGONER, *supra* note 10, at 203. In an 1889 letter, then-Church President Wilford Woodruff wrote: "We are now, politically speaking, a dependency or ward of the United States; but in a State capacity we would be freed from such dependency, and would possess the powers and independence of a sovereign State, with authority to make and execute our own laws." *Id.*

38. *Id.* at 212.

39. *Id.* ("Inasmuch as laws have been enacted by Congress forbidding plural marriages, which laws have been pronounced constitutional by the court of the last resort, I hereby declare my intention to submit to those laws, and to use my influence with the members of the Church over which I preside to have them do likewise. . . . And now I publicly declare that my advice to the Latter-day Saints is to refrain from contracting any marriage forbidden by the laws of the land.").

40. *See* KRAKAUER, *supra* note 7, at 255.

41. *Id.*

42. Altman, *supra* note 4, at 370.

43. Elizabeth Harmer-Dionne, Note, *Once a Peculiar People: Cognitive Dissonance and the Suppression of Mormon Polygamy as Case Study Negating the Belief-Action Distinction*, 50 STAN. L. REV. 1295, 1335 (1998).

44. Gordon, *supra* note 3, at 741.

mons continued to practice monogamy.[45] Yet, Mormons considered celestial marriage to be the highest form of marriage.[46] Celestial marriage was the only marriage that could endure death and determine the rewards granted in the afterlife.[47] A contemporary Mormon offered this analysis about the centrality of polygamy in nineteenth-century Mormon belief:

> Perhaps the most radical doctrinal tenet of Mormonism is that mankind can achieve godhood and God himself was once a mere mortal. The Prophet Joseph Smith explicitly taught that a man would progress through eternity in proportion to the magnitude of his posterity on earth and that polygamy was a central part of the pursuit of godhood. More wives ensured both increased progeny and greater future glory. Men who rejected the practice of polygamy not only forfeited godhood, but were damned. Accordingly, the salvation of women depended on their union with a righteous—by definition, polygamous—man.[48]

The religious rationale for Mormon polygamy involved both a present component and a future component. Mormon leaders believed that polygamy allowed Mormons to have ordered families. Polygamy facilitated the ability of a "righteous" man to sire numerous children.[49] Mormon leaders also believed that polygamy had many social benefits outside the home, including curing the ills of prostitution and adultery and allowing women to be united with a respectable man.[50] Finally, Mormon leaders believed polygamy was essential for Mormon men who desired to climb the ladder of leadership in the LDS Church.[51] In addition to facilitating orderly families on earth, polygamy ensured that adherents had desirable positions in the hereafter.[52] Nineteenth-century LDS Church doctrines espoused the belief that a polygamous man and his wives could live as royalty in their own kingdoms in heaven.[53] Mormon men who wished to achieve the most glorious hereafter had to practice polygamy on earth.[54] The salvation

45. *See id.* at 745.
46. *Id.*
47. *Id.* at 741-742.
48. Harmer-Dionne, *supra* note 43, at 1319-20 (citations omitted).
49. Altman, *supra* note 4, at 368.
50. Gordon, *supra* note 6, at 19-20.
51. Harmer-Dionne, *supra* note 43, at 1321.
52. Altman, *supra* note 4, at 369.
53. *Id.*
54. Campbell, *supra* note 30, at 34-35.

of a Mormon woman depended on the earthly behavior of her husband—because there were few truly "righteous" men, several women had to be yoked to the same man in order to secure their salvation.[55]

Polygamy was an important tenet in early Mormon theology because it dictated both how Mormons should live on earth and how they would live in heaven. Because the FLDS is derivative of the nineteenth-century LDS Church, the same religious rationales for nineteenth-century Mormon polygamy apply to contemporary FLDS polygamy.[56] Mormon polygamy implicates the Free Exercise Clause because it is a central tenet of Mormon religious beliefs. Laws that prohibit polygamy force Mormon polygamists to choose between disobeying the law or disobeying a tenet of their faith, and therefore receiving eternal damnation.

II. EVOLUTION OF THE FREE EXERCISE CLAUSE

The First Amendment of the U.S. Constitution provides in part that "Congress shall make no law . . . prohibiting the free exercise [of religion]."[57] This passage is known as the Free Exercise Clause.[58] The Supreme Court has interpreted the Free Exercise Clause to provide, at a minimum, the right to profess whatever religious belief one's conscience dictates.[59] The Court recognizes that the exercise of religious belief often includes engaging in conduct in furtherance of those beliefs;[60] however, the Court has been willing to allow Congress and the states to proscribe certain religious conduct. But the Court has from time to time required these bodies to provide religious exemptions to otherwise generally applicable laws to accommodate religious conduct.[61]

Polygamy is conduct that was initially proscribed by federal anti-

55. *Id.*

56. Altman, *supra* note 4, at 369.

57. U.S. CONST. amend. I.

58. Harmer-Dionne, *supra* note 43, at 1340.

59. Employment Div. v. Smith, 494 U.S. 872, 877 (1990) ("The government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma." (citations omitted)).

60. Cantwell v. Connecticut, 310 U.S. 296**,** 303-04 (1940) ("Thus the Amendment embraces two concepts, --freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." [sic]).

61. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972).

bigamy laws, and currently is proscribed by state anti-bigamy laws.[62] The constitutionality of these bans depends on whether the Court interprets the Free Exercise Clause as requiring an exemption for religious polygamy. The Court's interpretation of Free Exercise Clause requirements has changed since it first held that Congress was not required to exempt religious polygamy from its anti-bigamy statutes. This section highlights those changes.

A. Nineteenth-Century Anti-Bigamy Cases

The nineteenth-century anti-bigamy cases were among the first to construe the Free Exercise Clause. These cases upheld federal bigamy prohibitions, as well as a territorial bigamy prohibition.

1. Reynolds v. United States

The first case to interpret the Free Exercise Clause was the result of the prosecution of a Mormon polygamist under the first federal anti-bigamy statute, the Morrill Act. George Reynolds was convicted of bigamy, and he appealed to the U.S. Supreme Court.[63] The Court decided whether the Free Exercise Clause requires an exemption for religious conduct from a general law.[64] The *Reynolds* Court answered this question in the negative.[65]

The Court's analysis, however, is flawed from a modern standpoint, and the Court would analyze this case differently if *Reynolds* came before it today. The *Reynolds* Court rested its holding on the belief-conduct dichotomy by distinguishing religious beliefs from religious conduct.[66] The Court acknowledged that the Free Exercise Clause prevents the government from interfering with religious beliefs, but held that the government had the power to regulate religious practices.[67] It determined that if a person's conduct could be excused because it was religious conduct, religion would become superior to criminal law.[68] Today, the Court recognizes that in order for the Free Exercise Clause to have any meaning at all, it must protect the con-

62. *See, e.g.*, Morrill Act, ch. 125 § 1, 12 Stat. 501 (1862); UTAH CODE § 76-7-101 (2006).

63. Reynolds v. United States, 98 U.S. 145, 146-147 (1878).

64. *Id.* at 162.

65. *Id.* at 166.

66. *Id.* at 164.

67. *Id.* at 166.

68. *Id.* at 167.

duct that is the external manifestation of those beliefs.[69] Religious beliefs manifestly require participating in or abstaining from certain conduct and activities, and to prohibit or require these activities certainly inhibits the free exercise of religion.[70] For example, the religious tenets of Jehovah's Witnesses prohibit adherents from saluting the flag,[71] and a law requiring school children to salute the flag and recite the Pledge of Allegiance would require children who are Jehovah's Witnesses to choose between violating a secular law and violating a religious rule. Under, *Reynolds* such a law would be permissible because it regulates conduct by requiring that all children salute the flag. However, such a law would require these children to violate a tenet of their faith. *Reynolds* is erroneous because it does not recognize the necessity of protecting religious adherents from being compelled to perform conduct that violates their faith or to abstain from conduct that their faith requires.

The *Reynolds* decision is also flawed from a modern standpoint to the extent it relied on public morality as a justification for anti-polygamy laws. The Court reasoned that "upon [marriage] society may be said to be built, and out of its fruits spring social relations and social obligations and duties."[72] The Court found that "it is in the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion."[73] Today, this social morality interest could not serve as a legitimate government interest in criminalizing behavior. *Lawrence v. Texas* in particular gives credence to the argument that the government may not justify criminalizing consensual sexual conduct with an interest in protecting the morality of its citizens.[74] The Court phrased the issue in *Lawrence* as "whether the majority may use the power of the state to enforce the views on the whole society through the operation of criminal law."[75] This issue is remarkably similar to the interest the *Reynolds* Court furthered—that the government had an interest in

69. Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).

70. *See* Employment Div. v. Smith, 494 U.S. 872, 893 (1990) (O'Connor, J., concurring) ("A law that prohibits certain conduct—conduct that happens to be an act of worship for someone—manifestly does prohibit that person's free exercise of his religion. A person who is barred from engaging in religiously motivated conduct is barred from freely exercising his religion.").

71. West Virginia Sch. Bd. of Educ. v. Barnette, 319 U.S. 624, 630 (1943).

72. *Reynolds*, 98 U.S. at 165.

73. *Id.* at 166.

74. Lawrence v. Texas, 539 U.S. 558, 563 (2003).

75. *Id.* at 571.

eliminating polygamy because it harmed public morals. After *Lawrence*, such an interest would not be a legitimate government interest that could survive rational basis review.[76]

2. Davis v. Beason

Davis v. Beason involved a challenge to an Idaho territorial statute that denied all Mormons, including polygamists, the right to vote or hold public office.[77] In deciding the constitutionality of this provision in 1890, the Court echoed the sentiments of *Reynolds*. The Court determined that the free exercise guarantee is weaker than valid criminal laws of the states and territories, and that if religions that advocated fornication or human sacrifices sprang up in the United States, those practices would not be tolerated.[78] The Court held that the territory could constitutionally withhold the right to vote from persons convicted of criminal offenses and those who advocate criminal behavior.[79] The *Davis* Court defined "religion" as "one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."[80] Like the *Court's* approach in *Reynolds*, this definition ignores the reality that belief and action are not easily separable. To deny an individual the right to practice a particular religious tenet may mean causing the individual to engage in conduct that he sincerely believes will damn him to hell. The Court also relied on public morality as a justification for upholding this law,[81] which would not be a legitimate interest today.

3. Reynolds and Davis Today

Neither *Reynolds* nor *Davis* has been explicitly overruled, but the Court has limited their application. The *Davis* Court heavily relied on the *Reynolds* Court's reasoning,[82] so to that extent, the application of both cases is the same today. The Court has abandoned the belief-conduct dichotomy and has acknowledged that the Free Exercise

76. *Id.* at 578.

77. Davis v. Beason, 133 U.S. 333, 335-337 (1890), *abrogated by* Romer v. Evans, 517 U.S. 620, 634 (1996).

78. *Davis*, 133 U.S. at 342-343.

79. *Id.* at 347.

80. *Id.* at 342.

81. *Id.* at 341.

82. *Id.* at 343-45.

Clause protects religious conduct in addition to religious belief.[83] In addition, the Court abrogated *Davis* to the extent it holds that states may deny the right to vote to people who advocate certain practices.[84] Moreover, after *Lawrence*, Congress or the states are not permitted to use a public morality justification to uphold anti-bigamy statutes.

The Court continues to cling to the notion that religious conduct is not absolutely protected in that the government can constitutionally require people to observe laws that might incidentally burden their religious beliefs.[85] As the *Reynolds* Court urged, the Free Exercise Clause does not give people an automatic right to ignore criminal laws. However, if this issue in *Reynolds* came before the Court today, it would examine the Morrill Act for neutrality instead of relying on the proposition that the Free Exercise Clause does not protect religious conduct at all.

B. Modern Free Exercise Jurisprudence

Today, the Court recognizes that the Free Exercise Clause provides limited protection for religious conduct by requiring exemptions within certain statutes for religious conduct. As the following cases demonstrate, the Court's explanation of which statutes require religious exemptions has varied. In order for religious bigamists to avoid violation of anti-bigamy laws while continuing the practice, they would need to demonstrate that the anti-bigamy statutes require exemptions for religious bigamy. These cases provide the framework for how the Court determines when exemptions for religious conduct are constitutionally required.

1. Sherbert v. Verner

Sherbert v. Verner marked the beginning of modern free exercise jurisprudence. Ms. Sherbert was a Seventh-Day Adventist who was fired from her job because she would not work on Saturdays, her Sabbath, and the state denied her unemployment compensation claim.[86] The Court held that Ms. Sherbert's refusal to work on Saturdays was conduct prompted by a religious belief, and as such, the Free Exercise Clause was implicated because the state effectively

83. Cantwell v. Connecticut, 310 U.S. 296**,** 303-04 (1940).

84. Romer v. Evans, 517 U.S. 620, 634 (1996) ("To the extent *Davis* held that persons advocating a certain practice may be denied the right to vote, it is no longer good law.").

85. Employment Div. v. Smith, 494 U.S. 872, 878-79 (1990).

86. Sherbert v. Verner, 374 U.S. 398, 400-01 (1963).

made her choose between following a tenet of her faith or receiving a government benefit.[87] The Court then applied strict scrutiny and found that no compelling state interest justified substantially infringing on Ms. Sherbert's right to freely exercise her religious beliefs.[88] Thus, the *Sherbert* decision reflects the Court's determination that in order for the government to infringe on free exercise rights, it must justify the regulation with a compelling interest.

2. Employment Division v. Smith

In 1990, the Supreme Court radically scaled back the reach of the Free Exercise Clause from its determination in *Sherbert*. In *Employment Division v. Smith*, Alfred Smith and Galen Black were fired from their jobs for misconduct after they had ingested peyote as part of a Native American religious ceremony.[89] Smith and Black were denied unemployment compensation because they had been fired for misconduct.[90] On appeal, the Court decided the issue of whether Smith and Black were entitled to a religious exemption for their sacramental use of peyote,[91] and the Court framed the issue as whether the state was constitutionally required to provide a religious exemption for a criminal law.[92]

The Court found that no exemption was required, holding that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[93] The Court opined that it would be unconstitutional for the government to prohibit certain conduct that is practiced solely for religious reasons, such as taking communion, gathering to worship, keeping kosher, and the like.[94] However, the Court found that when the state enacted a generally applicable law, such as controlled substances laws, the Free Exercise Clause does not require the state to grant exemptions for conduct that is contrary to the

87. *Id.* at 403-04.

88. *Id.* at 408.

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

90. *Id.*

91. *Id.* at 876.

92. *Id.*

93. *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

94. *Id.* at 877.

general law.[95] Thus, under *Smith's* narrow interpretation of the Free Exercise Clause, states are not required to grant exemptions to religious polygamists as long as the bigamy prohibitions are neutral and generally applicable.

3. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah

Three years after *Smith*, the Court clarified the definition of a neutral and generally applicable law in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, leaving the door open for some Free Exercise Clause challenges. *Church of the Lukumi Babalu Aye* involved the Santeria religion, which included animal sacrifices as a major tenet of its faith.[96] After that religion announced plans to establish a house of worship in Hialeah, Florida, the city council passed a series of ordinances that prohibited the unnecessary killing of an animal.[97] The ordinances also contained a number of exemptions, including an exception for kosher killings.[98]

The Court examined the ordinances for neutrality and general applicability. The Court defined a law as non-neutral if "the object of a law is to infringe upon or restrict practices because of their religious motivation."[99] The Court examined two types of neutrality—facial neutrality and operational neutrality.[100] A law is not facially neutral if it "refers to a religious practice without a secular meaning discernable from the language or context."[101] The Court found that the ordinance's use of the words "sacrifice" and "ritual" did not defeat facial neutrality because these words also have an established secular meaning.[102] However, the Court found that Hialeah's ordinances were not neutral in operation because they excluded almost all animal killings except for Santeria sacrifices.[103]

Finally, a law is not generally applicable if the government selectively burdens religious conduct.[104] The Court held that the City of

95. *Id.* at 890.

96. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 524 (1993).

97. *Id.* at 527.

98. *Id.* at 528.

99. *Id.* at 533.

100. *Id.* at 534.

101. *Id.* at 533.

102. *Id.* at 534.

103. *Id.* at 536.

104. *Id.* at 543.

Hialeah pursued its interests of protecting public health and preventing cruelty to animals selectively against the Santeria sacrifices because the city failed to pursue those interests against other types of animal deaths, such as hunting, fishing, and slaughtering.[105]

A law that burdens religious conduct that is neither neutral or of general applicability must withstand strict scrutiny to be upheld, meaning that the law will up upheld only if it is narrowly tailored to meet a compelling government interest.[106] Thus, *Church of the Lukumi Babalu Aye* would require an exemption for religious polygamy if the anti-bigamy statutes are not neutral or generally applicable, unless the government has a compelling interest.

III. NINETEENTH-CENTURY RESPONSE TO MORMON POLYGAMY

Many nineteenth-century Americans found the polygamy occurring in Utah appalling. Throughout the later half of the nineteenth century, Congress passed a series of laws for the purpose of eliminating polygamy. These laws were all upheld by the Supreme Court. If evaluated under current free exercise standards, however, these laws would likely be found unconstitutional because they were neither neutral nor supported by a compelling government interest.

A. Morrill Act and Edmunds Act

Congress criminalized bigamy in 1862 with the Morrill Act by providing that "every person having a husband or wife living, who shall marry any other person, whether married or single, in a Territory of the United States . . . shall . . . be adjudged guilty of bigamy."[107] The act further invalidated several Utah territorial laws, including the incorporation of the LDS Church.[108]

Congress attempted to limit the Morrill Act by providing that it should not be construed "to affect or interfere with . . . the right to 'worship God according to the dictates of conscience.'"[109] However, Congress qualified its religious exception by providing that the provision should be construed "only to annul all acts and laws which establish, maintain, protect, or countenance the practice of polygamy, eva-

105. *Id.* at 544.

106. *Id.* at 546.

107. Morrill Act, ch. 126 § 1, 12 Stat. 501. The Morrill Act also contained a few exceptions, namely for a missing spouse, divorce, and annulment. *Id.*

108. *Id.* at § 2.

109. *Id.*

sively called spiritual marriage, however disguised by legal or ecclesiastical solemnities, sacraments, ceremonies, consecrations, or other contrivances."[110]

In 1882, Congress amended the Morrill Act with the Edmunds Act. In addition to the criminalization of bigamy under the Morrill Act, Congress created the crime of cohabitation in the Edmunds Act, which made it a misdemeanor for any man to cohabit with more than one woman.[111]

B. Neutrality Analysis

In determining whether these prohibitions violate the Free Exercise Clause, it is necessary to determine if they are neutral. At first glance, the statutes appear facially neutral because bigamy is not defined in religious terms. Also, the statutes appear operationally neutral because they do not carve out exceptions that would exclude nonreligious polygamy while punishing religious polygamy.

The Morrill Act, however, takes a decidedly non-neutral turn in its Section 2. This provision includes language that is of a much more religious character than the language describing the sacrifices at issue in *Church of the Lukumi Babalu Aye*. Here, Congress uses the words "spiritual," "ecclesiastical," and "sacraments" which are all decidedly religious terms without secular meaning. It also specifically dissolves the corporate charter of the LDS Church, which demonstrates that the Morrill Act was targeted at Mormon polygamy.

In addition, the provision of the Edmunds Act criminalizing cohabitation is not operationally neutral because it effectively singles out Mormon polygamy. The Edmunds Act only criminalizes cohabitation of a man with more than one woman. A woman who cohabited with more than one man could not be punished under the Edmunds Act. A distinctive feature of Mormon polygamy was that Mormon men took multiple wives—a Mormon woman never would have been permitted to take multiple husbands. The Edmunds Act is not operationally neutral because it criminalized only the type of polygamy that was practiced in the Mormon faith.

The Morrill Act and the Edmunds Act targeted both polygamy and the LDS Church.[112] The *Church of the Lukumi Babalu Aye* Court

110. *Id.*

111. Edmunds Act, ch. 47 § 3, 22 Stat. 30 (1882).

112. Soc'y of Separationists v. Whitehead, 870 P.2d. 916, 923-24 (Utah 1993) (recognizing that Congress specifically targeted the anti-bigamy acts at Mormonism and Mormon

indicated that such targeting could be evidence that the law burdening the religious practice is not neutral. One of the ordinances at issue in *Church of the Lukumi Babalu Aye* expressed the concern of some residents that "certain religions may propose to engage in practices which are inconsistent with public morals, peace, and safety."[113] However, only two Justices in *Church of the Lukumi Babalu Aye* joined the portion of the opinion that considered circumstantial evidence of targeting a particular religion or its practices, such as legislative history, in determining neutrality.[114] While history suggests that the Morrill and Edmunds Acts were passed to target Mormon polygamy specifically, it is unclear whether the Court would consider the historical context in determining their neutrality today. Nevertheless, even without considering legislative history, these acts are not operationally neutral and would be unconstitutional unless the government could justify them with a compelling interest.

C. Applying Strict Scrutiny to the Anti-Polygamy Acts

Laws that are not neutral can be upheld only if the government demonstrates that it has a compelling interest and the law burdening the religious conduct is narrowly tailored to meet that interest.[115] In *Reynolds*, the Court upheld the Morrill Act in part because the government had an interest in maintaining the institution of marriage and monogamy for the good of society.[116] The Court believed that marriage was the bedrock of society and that the government had the duty to regulate it,[117] and it feared that unless restricted, polygamous communities would upset the balance of social life that monogamy preserves.[118]

Such an interest could not withstand strict scrutiny under today's jurisprudence. The states continue to have jurisdiction to grant marriage licenses and divorce decrees; however, after *Loving v. Virginia*, *Griswold v. Connecticut*, and *Lawrence*, the Court has directed them to take a blind eye as to what goes on in our bedrooms. After *Lawrence*, the government cannot claim a legitimate interest in regulating

polygamy).

113. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 535 (1993).

114. *Id.* at 541-42.

115. *Id.* at 546.

116. Reynolds v. United States, 98 U.S. 145, 165 (1878).

117. *Id.*

118. *See id.* at 166.

conduct for the sake of social morality.[119] Therefore, the government's interest in prohibiting polygamy for the sake of morality is not compelling and, as such, would not survive strict scrutiny.

IV. CONTEMPORARY POLYGAMY PROSECUTIONS IN UTAH

Even though the LDS Church officially ended the practice of polygamy in the late nineteenth century, religious polygamy continues in Utah to this day. The FLDS adherents follow the teachings of Joseph Smith and Brigham Young, and their religious justifications for polygamy are the same as the nineteenth-century Mormons' justifications for that practice. When Utah became a state in 1896, it included a provision in its constitution that its religious freedom guarantee did not extend to the practice of polygamy.[120] While the federal anti-polygamy acts are no longer applicable in the state, Utah has its own statute criminalizing bigamy.[121]

In recent years, the Utah Supreme Court has examined the state's bigamy statute in light of the most recent federal free exercise jurisprudence. It would seem logical that Utah's anti-bigamy statute is unconstitutional because the federal anti-polygamy statutes would be unconstitutional under a modern analysis. However, the Utah court has been unwilling to find that a religious exemption from the bigamy statute is constitutionally required.[122] The Utah court is probably correct in so holding because the state statute is phrased in much more neutral terms than the federal statutes discussed above. However, an FLDS polygamist has argued that his conduct is not proscribed under the anti-bigamy statute because he and his wives did not seek the state's recognition of their marriages.[123] While the Utah Supreme Court disagreed with that argument, it will likely be called on to reexamine it because the court did not give a clear definition of marriage, and its use of religious factors in defining marriage violate the Free Exercise Clause.

A. Utah v. Green

In 2004, the Utah Supreme Court held that the Free Exercise

119. Lawrence v. Texas, 539 U.S. 558, 571-72 (2003).

120. UTAH CONST. art. III, § 1.

121. UTAH CODE ANN. § 76-7-101 (2007).

122. State v. Green, 99 P.3d 820, 822 (Utah 2004).

123. State v. Holm, 137 P.3d 726 (Utah 2006).

Clause does not require the state to grant an exemption from its bigamy statute to religious polygamists. Thomas Green was convicted of four counts of bigamy and appealed his convictions in part under the Free Exercise Clause.[124] Utah's bigamy statute provides that "[a] person is guilty of bigamy when, knowing he has a husband or wife or knowing the other person has a husband or wife, the person purports to marry another person or cohabits with another person."[125] The court examined Mr. Green's argument that the anti-bigamy statute violated his free exercise rights in light of *Smith* and *Church of the Lukumi Babalu Aye*.[126] The court held that Utah's bigamy statute is facially neutral because it does not refer to any specific religion and it defines bigamy in secular terms.[127] The court also held that the statute was operationally neutral because it allowed for the prosecution of both religious and nonreligious bigamists alike.[128] Finally, the court found that the bigamy prohibition was generally applicable because "[a]ny individual who violates the statute, whether for religious reasons or secular reasons, is subject to prosecution."[129] Because the court found that the statute was neutral and generally applicable, it concluded that Green was not entitled to an exemption for his religious bigamy.[130]

That result is probably constitutionally correct. The statute does not refer specifically to religious polygamy, nor does it refer to the FLDS. Unlike the situation in *Church of the Lukumi Babalu Aye*, this statute does not carve out exceptions for nonreligious polygamy. The statute is operationally neutral because a nonreligious polygamist could be prosecuted under the law just as readily as a religious polygamist could.

The *Utah v. Green* court did not apply quite the same general applicability approach that the Court applied in *Church of the Lukumi Babalu Aye*, but the outcome would not change. Under *Church of the Lukumi Babalu Aye*, the general applicability principle is that the "government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious be-

124. *Green*, 99 P.3d at 822.

125. UTAH CODE ANN. § 76-7-101 (2007).

126. *Green*, 99 P.3d at 825.

127. *Id.* at 827.

128. *Id.* at 828. The court made a special note of the fact that the last prosecution under the bigamy statute was of a non-religious bigamist. *Id.* at 827-28.

129. *Id.* at 828.

130. *Id.*

lief."[131] In *Green*, the government advanced the interest of protecting marriage as a state contract so that only legally married couples would receive the benefits of state sanctioned marriage.[132] This interest is advanced against both religious and nonreligious bigamists because prosecution of both religious bigamy and nonreligious bigamy protects the state's interest in ensuring that only legally married couples receive the benefits of marriage.[133]

Because this statute is both neutral and generally applicable, under *Smith*, Utah is not constitutionally required to grant a religious exemption from the bigamy statute.

B. Utah v. Holm

In *Utah v. Holm*, an FLDS polygamist attempted a different argument—that the anti-bigamy statute did not apply to him because he did not seek to have his marriages recognized by state law.[134] However, the court found that Holm was subject to the bigamy statute because it interpreted "marry" to include entering into marriages that are not recognized by the state as well as those marriages that are legally recognized.[135] To reach this conclusion, the court examined definitions of marriage and looked to the character of Holm's relationships with his wives,[136] ignoring the provision of the Utah Constitution defining marriage as "the legal union between a man and a woman."[137] In determining whether marriages that were not recognized under state law were included in the bigamy prohibition, the court looked at the religious nature of the wedding, taking special consideration of the fact that Holm and his bride exchanged vows before a religious leader.[138]

131. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 543 (1993).

132. *Green*, 99 P.3d at 830.

133. Before Green's conviction, the last prosecution of a Utah bigamist was against a nonreligious bigamist. *See* State v. Geer, 765 P.2d 1 (Utah Ct. App. 1988).

134. State v. Holm, 137 P.3d 726, 732 (Utah 2006) (noting that "Holm argues that he did not 'purport to marry' Ruth Stubbs, as that phrase is used in the bigamy statute, because the word 'marry' in subsection 76-7-101(1) refers only to legal marriage and neither Holm nor Stubbs contemplated that the religious ceremony solemnizing their relationship would entitle them to any of the legal benefits attendant to state-sanctioned matrimony.").

135. *Id.* at 734.

136. *Id.* at 737.

137. UTAH CONST. art. 1, § 29.

138. *Holm*, 137 P.3d at 736-37.

The court opined that to many couples, especially religious ones, the marriage license is not as important as the actual wedding ceremony.[139]

1. Sherbert Analysis

The court's interpretation of "marriage" means that, as applied to religious polygamists, the Utah bigamy statute violates their free exercise rights. In *Sherbert*, an administrative tribunal interpreted Sherbert's religiously motivated conduct as rejecting employment without good cause and denied her unemployment compensation;[140] in *Holm*, the court interpreted Holm's religiously motivated conduct as criminal and upheld his conviction. In *Sherbert*, the Court said that Sherbert's conscientious objection to Saturday employment was not within the realm of conduct that could be prohibited by the state legislature.[141] Similarly, Holm participated in a religious ceremony, conduct that the government normally does not take an interest in—he could have taken part in a number of types of ceremonies, such as a baptism or a bar mitzvah, and the government would not have cared about his conduct. Holm participated in a religious wedding ceremony, however, and the court used the nature of that ceremony to uphold his conviction, even though he never believed that his marriages were legally recognized. Participating in the wedding's sealing ceremony, where a couple is sealed in marriage for eternity, is a central part of FLDS beliefs,[142] and this interpretation forces Holm and other FLDS adherents to choose between forgoing a central tenet of their religious beliefs or continue to participate in FLDS sealing ceremonies and be subject to prosecution.[143] This certainly infringes on the FLDS polygamists' exercise of their religion.

The next step in the *Sherbert* analysis is to determine if the state has a compelling interest to support burdening FLDS polygamists' free exercise rights.[144] The state probably has a compelling interest in regulating marriage as a state contract. A state marital contract allows Utah to grant the benefits of marriage, such as intestate succession,

139. *Id.* at 737.

140. Sherbert v. Verner, 374 U.S. 398, 401 (1963).

141. *Id.* at 403.

142. Altman, *supra* note 4, at 369.

143. *Cf. Sherbert*, 374 U.S. at 404 ("The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.").

144. *Id.* at 406.

next-of-kin status, and tax benefits, to legally married couples.[145] If the states were required to recognize polygamous unions as legal marriages, it would be very difficult for them to determine who is eligible for these benefits.[146] However, that same interest does not apply when the government is attempting to regulate polygamist *conduct*, where religious polygamists do not seek legal recognition. These polygamists do not expect to receive state benefits reserved for married couples. This type of conduct is analogous to the homosexual conduct in *Lawrence*, where the Court found that the state could not criminalize sexual conduct based on a societal perception of morality.[147]

In addition, the state has advanced the interest of protecting children from sexual abuse as a compelling interest justifying polygamy prohibitions.[148] In *Green*, the Utah Supreme Court reasoned that child abuse coincides with polygamy, and because of the closed nature of polygamous communities, child abuse prosecutions are difficult.[149] No reasonable person would disagree that extinguishing such abuse is a compelling interest. However, in the context of the anti-bigamy statutes, this interest is not narrowly tailored. Child abuse is not an ill that is unique to the polygamous lifestyle. Utah has its own statutes criminalizing incest,[150] child abuse,[151] and statutory rape.[152] The Free Exercise Clause certainly would not prevent the state from prosecuting polygamists under these laws because they are neutral, generally applicable laws aimed at preventing child abuse. The state has prosecuted polygamists under these laws independent of a bigamy prosecution.[153] Because there is no compelling interest that justifies upholding the *Holm* interpretation, the interpretation fails under the *Sherbert* analysis.

2. Neutrality and General Applicability Analysis

The *Holm* interpretation would also be unconstitutional under a neutrality and general applicability analysis. The court's interpretation

145. State v. Holm, 137 P.3d 726, 752 (Utah 2006).

146. *See* State v. Green, 99 P.3d 820, 830 (Utah 2004).

147. *See* Lawrence v. Texas, 539 U.S. 558, 571 (2003).

148. *See, e.g.*, *Green*, 99 P.3d at 830.

149. *Id.*

150. UTAH CODE ANN. § 76-7-102 (2007).

151. UTAH CODE ANN. § 76-5-404.1 (2007).

152. UTAH CODE ANN. § 76-5-401.2 (2007).

153. *See* State v. Kingston, 46 P.3d 761 (Utah Ct. App. 2002) (affirming David O. Kingston's conviction for incest and statutory rape).

of the bigamy statute is not facially or operationally neutral, as required by *Smith* and *Church of the Lukumi Babalu Aye*. It is not facially neutral because it places special importance on the religious nature of the religious ceremony. Among the factors it considers in determining the definition of marriage is whether the ceremony was performed by an FLDS official and that solemnization is a central component of a religious marriage.[154]

The interpretation is also not operationally neutral because by its very nature, the *Holm* opinion singles out religious bigamists for distinctive treatment because religious bigamists are more likely than nonreligious bigamists to participate in solemnization ceremonies. The religious marriage ceremonies themselves are just as important in the FLDS belief structure as the practice of polygamy.[155] Because of their religious belief in eternal marriage, FLDS adherents practice wedding ceremonies where a couple is sealed in marriage for eternity.[156] Under the *Holm* interpretation, these sealing ceremonies would permit the government to prosecute polygamists who have been sealed in the eyes of God, but not legally married in the eyes of the state. The *Holm* interpretation would give prosecutors evidence to prove a bigamy charge against a religious bigamist that they would not have against a non-religious bigamist.

Moreover, the court's interpretation is not generally applicable. Under *Church of the Lukumi Babalu Aye*, a law is not generally applicable if "the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation."[157] While the *Church of the Lukumi Babalu Aye* Court did not articulate a specific standard of general applicability, it equated it with an underinclusiveness analysis.[158] The *Holm* court articulated an interest in preserving and controlling relationships that society approves of.[159]

154. State v. Holm, 137 P.3d 726, 736-37 (Utah 2006).

155. *See* Altman, *supra* note 4, 369.

156. *Id.*

157. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 543 (1993).

158. *Id.*

159. *Holm*, 137 P.3d at 744 ("[M]arital relationships serve as the building blocks of our society. The State must be able to assert some level of control over those relationships to ensure the smooth operation of laws and further the proliferation of social unions our society deems beneficial while discouraging those deemed harmful. The people of this State have declared monogamy a beneficial marital form and have also declared polygamous relationships harmful. . . . Utah 'is justified, by a compelling interest, in upholding and enforcing its ban on plural marriage to protect monogamous marriage relationships.'")(citing Potter v. Murray City,

Under *Lawrence*, such morality and societal approval justifications are no longer legitimate interests that the state can claim in criminalizing behavior.[160] However, the court also articulated that Utah had an interest in "prohibiting unlicensed marriages when there is an existing marriage" because otherwise "the State would be unable to enforce important marital rights and obligations."[161] Assuming that this is a legitimate state interest, the court advances it only against religious polygamists. For example, in the case of adultery, one or both parties are married to other people. This type of relationship leads to the same type of harm that the *Holm* court is concerned with—that Utah is unable to enforce support and other obligations in the adulterous relationship; yet, Utah does not prosecute people who engage in these types of relationships.[162] Because the interpretation does not advance the state's interests against religious and non-religious bigamists equally, it is not generally applicable.

Had the *Holm* court interpreted the word "marry" in the same way that it is defined in the Utah Constitution, it would have found that the bigamy prohibition did not apply to Holm because Holm did not expect his marriage to be legally recognized. The result for FLDS polygamists would be that they could engage in religious polygamy privately, without fear of prosecution. As it is, *Holm* opens the door to more prosecutions of FLDS polygamists because the court defined marriage ambiguously, and this ambiguous definition will allow more polygamists to challenge the interpretation of violating their free exercise rights.

V. CONCLUSION

The understanding of the reach of the Free Exercise Clause has changed in the 130 years since the Court first declared that the government did not have to grant an exemption for religious polygamy. The Court has moved away from the *Reynolds* understanding that the clause only protects religious beliefs to the *Church of the Lukumi Babalu Aye* understanding that it provides at least limited protection for religious conduct that the government has targeted. Under this modern understanding, the anti-polygamy laws that gave rise to *Reynolds*

760 F.2d 1065, 1070 (10th Cir. 1985)).

160. *See* Lawrence v. Texas, 539 U.S. 558, 571 (2003).

161. *Holm*, 137 P.3d at 744 (referring to support obligations, divorce procedures, distribution of assets, and probate procedures).

162. *Id.* at 772 (Durham, C.J., concurring in part and dissenting in part).

would be unconstitutional. Yet, despite this legal change, Utah has been reluctant to allow FLDS polygamists to practice their religious conduct in private, without recognition of the state. In his *Holm* concurrence, Justice Nehring surmised that one reason why the legal view of polygamy has not changed in Utah is because of Utah's tumultuous history with that practice.[163] While the Utah Supreme Court may currently be reluctant to grant any constitutional protections to religious polygamy, society's view of intimate relationships and family structure is changing. The Utah court will have more opportunities to examine the FLDS polygamy issue, and perhaps a decision in favor of allowing FLDS adherents to practice religious polygamy privately would not have the negative reaction that Justice Nehring fears.

163. *Holm*, 137 P.3d at 753 (Nehring, J., concurring) ("This case stands apart from other cases that put us to the test of wrestling uncertainty into submission because it probes a particularly sensitive area of our state's identity. No matter how widely known the natural wonders of Utah may become, no matter the extent that our citizens earn acclaim for their achievements, in the public mind Utah will forever be shackled to the practice of polygamy. This fact has been present in my consciousness, and I suspect has been a brooding presence in one form or another in the minds of my colleagues, from the moment we opened the parties' briefs. I also suspect that I have not been alone in speculating what the consequences might be were the highest court in the State of Utah the first in the nation to proclaim that polygamy enjoys constitutional protection. These musings have left me with little doubt that the predominant reaction to a holding in keeping with the Chief Justice's dissent would be highly charged and unflattering.").