

Polygamy After *Windsor*: What's Religion Got to Do with It?

Casey E. Faucon*

Ever since the 1878 case, Reynolds v. United States, polygamists have argued that their plural marriage practices are protected by the Free Exercise Clause of the First Amendment. After Lawrence v. Texas, polygamists added substantive Due Process arguments under the Fourteenth Amendment's "intimacy privacy" interpretation to their arsenal. This article argues that in order for polygamists to find constitutional protection and recognition, they must shed their arguments founded in religion and rely instead on substantive Due Process. Although First Amendment jurisprudence would subject polygamy bans to a higher level of scrutiny, this heightened protection comes at a cost. The landmark same-sex marriage case, United States v. Windsor, and the opinion's protected liberty interest of "equal dignity" provides polygamy advocates with substantive grounds to protect their plural marriage practices, as well as pave the way for recognition of "intimate pluralism" and alternative relationship forms like polyamory and group marriage.

I. INTRODUCTION

The legal tide is beginning to shift in favor of polygamists in America. On December 13, 2013, the Utah federal district court struck a prong of Utah's criminal anti-polygamy statute as being unconstitutional in violation of the polygamous family's First Amendment and substantive Due Process rights.¹ The family members at the heart of *Brown v. Buhman* are no strangers to the controversial limelight. Kody Brown and his four "wives," Meri Brown, Janelle Brown, Christine Brown, and Robyn Sullivan Brown, are members of a religious fundamentalist offshoot of the Mormon Church who practice polygamy as a tenet of their faith.² The Browns star in TLC's hit reality television show, "Sister Wives," scheduled to air its sixth season in September 2015.³ The intent of the show is to "explore[] the daily issues and realities of a plural family" and to "defend[] plural families and discuss[] the Browns' religious belief in polygamy."⁴ Touting polygamy as the

* Casey E. Faucon is the 2013–2015 William H. Hastie Fellow at the University of Wisconsin Law School. LL.M. (expected), University of Wisconsin Law School. J.D./D.C.L., LSU Paul M. Hebert School of Law. B.A., Rice University. The author would like to thank Professor Tonya Brito for her direction, guidance, and valuable time; the University of Wisconsin Law School's Institute for Legal Studies Workshop participants; the participants of the University of Wisconsin Law School's Junior Faculty Workshop; and Professors Mitra Shirafi, Adam Lamparello, and Eric Berger for suggestions on earlier drafts and arguments.

¹ See *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1225–26 (D. Utah 2013) (striking down the "religious cohabitation" prong of the Utah bigamy statute).

² *Id.* at 1178.

³ Azalea Pena, 'Sister Wives' season 6 cast news and updates: Meri divorces Kody because of Robyn, Robyn's reaction to critics, CHRISTIAN TODAY (Mar. 16, 2015), <http://perma.cc/74EU-X6VP>.

⁴ *Brown*, 947 F. Supp. 2d at 1178. The family members routinely participate in outreach and education efforts to educate the public about their lifestyle. Even before the show aired,

“next civil rights movement,”⁵ polygamy advocates herald the case as a victorious leap in their quest to legitimize the otherwise taboo marital practice of up to 150,000 polygamists currently living as outlaws in the United States.^{6,7}

The *Brown* decision marks a sharp turn in the legal treatment of polygamy since the 1878 U.S. Supreme Court case, *Reynolds v. United States*, which upheld criminal sanctions against a Mormon polygamist over freedom of religion objections.⁸ The federal district court in *Brown* held unconstitutional a portion of Utah’s criminal bigamy statute that criminalized “cohabitation” between a married person and someone other than his or her spouse.⁹ Because religious polygamists can only legally marry one spouse, they engage in de facto polygamy with subsequent wives, “marrying” them in religious ceremonies that have no legal effect or recognition. The court further found that prosecutors have historically enforced this provision only when such cohabitation was religiously motivated or when an underage girl was involved.¹⁰ Ultimately, the court held that exercising discriminatory enforcement of the “cohabitation” provision against religious polygamists, as opposed to any other type of non-religiously motivated cohabitation, violated both the First Amendment and Fourteenth Amendment protections.¹¹ The decision did not, however, nor did it attempt to, change the *legal* definition of marriage, namely, the portion restricting civil marriage to *one* man and *one* woman.¹² This holding simply had the effect of decriminalizing *de facto* polygamy and did not, conversely, define a positive right that second, third, and fourth wives should have their unions legally recognized.

This article argues that in order to redefine the legal definition of marriage to allow spouses in multi-party relationships to allocate marital rights to more spouses than one, polygamists should, as a policy, abandon their arguments grounded in religious freedoms and, instead, look to the arguments grounded in Equal Protection and substantive Due Process as defined by the U.S. Supreme Court’s recent landmark decision, *United States v.*

Christine Brown was interviewed by HBO in 2007, appeared in the TV show *48 Hours* in 2008, and spoke at the University of Utah about polygamy and her practices in 2009. Brown v. Hebert, 850 F. Supp. 2d 1240, 1244 (D. Utah 2012).

⁵ See Randy Hall, *Polygamy Is ‘Next Civil Rights Battle,’ Activists Say*, CNSNEWS.COM (July 7, 2008), <http://perma.cc/65RH-5Y2V>.

⁶ See, e.g., Samuel D. Brunson, *Taxing Polygamy*, 91 WASH. U. L. REV. 113, 146 (2013) (estimating up to 150,000); Barbara Bradley Hagerty, *Some Muslims in U.S. Quietly Engage in Polygamy*, NAT’L PUB. RADIO (May 27, 2008), <http://perma.cc/68U6-QMEV> (estimating 50,000–100,000 Muslim polygamists alone).

⁷ See, e.g., Lawrence M. Friedman & Joanna L. Grossman, *Kody’s Big Score in the Challenge to Polygamy Law*, VERDICT (Dec. 24, 2013), <http://perma.cc/9TBZ-GRK4>; Jonathan S. Tobin, *Topic: Brown v. Buhman, ‘Big Love’ Vindicated: Polygamy and Privacy*, COMMENTARY (Dec. 15, 2013), <https://perma.cc/H57R-GVZ3>.

⁸ See *Reynolds v. United States*, 98 U.S. 145, 161–68 (1876).

⁹ See *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1176 (D. Utah 2013).

¹⁰ *Id.* at 1179.

¹¹ *Id.* at 1191–1226.

¹² *Id.* at 1195.

Windsor.¹³ The Court struck down the federal Defense of Marriage Act's definition limiting "marriage" to "one *man* and one *woman*," which excluded same-sex couples from receiving federal benefits reserved to married heterosexual couples, as an unconstitutional deprivation of liberty.¹⁴ The *Windsor* decision found that the federal government's refusal to recognize state-sanctioned same-sex marriages "demeans the couple."¹⁵ Justice Kennedy's opinion further emphasized the favored status of marriage. In *Windsor's* companion case, *Hollingsworth v. Perry*, the lower court recognized that, in the United States, whether someone is married or not makes all the difference.¹⁶ Denying same-sex couples the same "equal dignity" as afforded heterosexual couples works an unequal protection of the laws and impedes the liberty interest protected by the Fifth Amendment. Because the *Windsor* court favored traditional, two-person marriage, some scholars argue that the case that will change the fundamental nature of traditional dyadic marriage will be the one after *Windsor*.¹⁷ The language and the approach in *Windsor*, however, creates a theoretical and analytical bridge between the liberty interests at stake for same-sex couples and for those who engage in polygamy and other alternative forms of "intimate pluralism." The larger political danger in failing to legally recognize and regulate polygamy is the current and future impact that this would have on the value of diversity in America, which is now expanding to include sexual orientation and alternative relationships structures, or "intimate pluralism," as part of that cultural and social diversity.¹⁸

The need to recognize the autonomous choice of consenting adults to structure their intimate associations in a manner best suited to the parties is more than just theoretical. The practical effect of the failure to not only decriminalize but also to legally recognize polygamy and other alternative relationship forms leaves second, third, and fourth wives living in informal polygamous marriages with none of the constellation of rights—or protec-

¹³ *United States v. Windsor*, 133 S. Ct. 2675 (2013).

¹⁴ *See id.* at 2695–96 (emphasis added).

¹⁵ *Id.* at 2694.

¹⁶ *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 994 (N.D. Cal. 2010), *aff'd sub nom.*, *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated and rem. sub nom.*, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (discussing intangible benefits of marriage and how permitting same-sex marriage confirms the value of these relationships).

¹⁷ *See* William D. Araiza, *After the Tiers: Windsor, Congressional Power to Enforce Equal Protection, and the Challenge of Pointillist Constitutionalism*, 94 B.U. L. REV. 367, 371 (2014) (arguing that *Windsor* confirms that future Equal Protection decisions considering equality claims by emerging groups will likely turn less on application of suspect class doctrine and more on estimations of rationality); *Obergefell v. Hodges*, 576 U.S. — (2015).

¹⁸ *See* Ariela R. Dubler, *Essay: Sexing Skinner: History and the Politics of the Right to Marry*, 110 COLUM. L. REV. 1348, 1373–76 (2010) (discussing the larger policy of "intimate pluralism"); Ariela R. Dubler, *From McLaughlin v. Florida to Lawrence v. Texas: Sexual Freedom and the Road to Marriage*, 106 COLUM. L. REV. 1165, 1181 (2006) (characterizing both *McLaughlin* and *Lawrence* as landmark cases for recognizing intimacy outside of marriage).

tions—afforded legal spouses.¹⁹ Many women see that criminalization only compounds the downsides of their situations: one polygamous woman in British Columbia, a mother of nine, testified that because of the polygamy ban, she cannot see a marriage counselor; if she works outside the compound, she has to lie about her status or she'll be fired. Another young woman testified that she and her siblings have to lie to doctors, teachers, and officials so that their parents will not be arrested. A third woman testified that she has to spend money on lawyers and worry about child protection services taking her children away. If polygamy were legal, she argued, she could spend more time living her life openly without threat of prosecution.²⁰ When second or third wives leave a polygamous marriage, they have no rights to marital property or other benefits traditionally reserved for “spouses,” and courts fail to recognize their plight based on public policy and uphold restrictions on their civil rights.²¹

Many argue that polygamy can improve upon the social conditions of many religious women because it is both “pragmatic” and “identitarian.” The situations of many African-American Muslim women living in polygamous marriages have gained national attention from the media. In 2008, National Public Radio produced a two-part series on polygamous marriages in Philadelphia,²² which has the highest density of polygamy, “due to a combination of conversions to Islam, currents of racial nationalism, and the demographic effects of male incarceration and underemployment.”²³ NPR interviewed first and second wives engaged in *de facto* polygamous marriages. Many of these women saw the opportunity as a blessing. One woman, whose name had been changed to “Mona,” was divorced and otherwise looked down upon in her Muslim community. Once she became a second wife, however, she said that she felt the social stigma and weight of being a single, divorced woman lift.²⁴ Another woman, called “Mecca,” wanted to travel to the Middle East and study Arabic, which meant time away from her husband. She had the idea to find her husband a second wife,

¹⁹ See JANET BENNION, *POLYGAMY IN PRIMETIME: MEDIA, GENDER, AND POLITICS IN MORMON FUNDAMENTALISM* 6 (2012).

²⁰ *Id.*

²¹ See, e.g., LA. CIV. CODE art. 88, 94, 96 (denying any civil rights to parties deemed bigamous); *Brownson v. Swensen*, 500 F. 3d 1099, 1104 (10th Cir. 2007) (“refusal to give civil recognition to polygamous marriages.”); *Potter v. Murray City*, 585 F. Supp. 1126 (D. Utah 1984) (polygamy not constitutionally protected); *In re Black, State in Interest of*, 283 P.2d 887 (Utah 1955) (polygamous parents properly deprived of child custody); *Patton v. Cities of Philadelphia & New Orleans*, 1 La. Ann. 98 (La. 1846) (children of polygamous marriages do not inherit). Also, equity is used in some states to give “innocent” bigamous spouses some interests in property that would have been community property had the marriage been valid. See, e.g., WIS. STAT. ANN. § 766.73 (2007); LA. CIV. CODE art. 96 (2014); *Medina v. Medina*, 131 P. 3d 696 (N.M. Ct. App. 2006).

²² Hagerty, *supra* note 6; Barbara Bradley Hagerty, *Philly’s Black Muslims Increasingly Turn to Polygamy*, NAT’L PUB. RADIO (May 28, 2008), <http://perma.cc/ERR7-GST7>.

²³ Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955, 1979 (2010).

²⁴ See Hagerty, *supra* note 6.

preferring the polygamous lifestyle because of the attendant freedom to travel and ability to pursue her studies.²⁵

Even in strictly monogamous, majority non-Muslim countries and communities, there have been calls for the legalization of polygamy. Caroline Humphrey, who did a study of polygamy in Russia, found that both Russian men and women think that the legalization of polygamy can resolve a social deficit. Some women believe that “half a good man is better than none at all,” and that “legalization of polygamy would be a godsend: it would give them rights to a man’s financial and physical support, legitimacy of their children, and rights to state benefits.”²⁶ The dire social need is not the only reason to recognize polygamous relationships. In 2012, news reverberated throughout Brazil that a trio from Rio de Janeiro, a man and two women, had formalized their union in order to protect their rights in case of separation or death. Sao Paulo’s public notary stated that the three should be entitled to family rights: “We are only recognizing what has always existed. We are not inventing anything. For better or worse, it doesn’t matter, but what we considered a family before isn’t necessarily what we would consider a family today.”²⁷ Recognizing a new, modern kind of family seems to be driving the push in Brazil. For these and the many other social, cultural, and religious reasons, over fifty countries throughout the world continue to recognize *de facto* and legal polygamous marriages within their borders.²⁸

In the United States, where society and the law have historically sensationalized polygamy as being subversive and abusive toward women and children,²⁹ public sentiments are shifting in its favor. While most polygamists continue to live in secret, the practice is slowly becoming more visible and acceptable to mainstream society.³⁰ After same-sex marriage, polygamy has been heralded by some as the “next civil rights movement.”³¹ August 19th is National Polygamy Day, which in 2012 was held in Old

²⁵ See Hagerty, *supra* note 22.

²⁶ MARTHA BAILEY & AMY J. KAUFMAN, POLYGAMY IN THE MONOGAMOUS WORLD, MULTICULTURAL CHALLENGES FOR WESTERN LAW AND POLICY 2 (2010).

²⁷ Jessica Elgot, *Brazil Approves Civil Union for Three People, Sparking Religious Fury*, THE HUFFINGTON POST (Aug. 29, 2012, updated Sept. 6, 2013), <http://perma.cc/8B34-GL84>.

²⁸ For a detailed discussion of polygamy regulations in countries throughout the world, see Casey E. Faucon, *Marriage Outlaws: Regulating Polygamy in America*, 22 DUKE J. GENDER L. & POL’Y 1, 27–33 (2014). Of all Western counties, polygamy is legal in Australia, but only where the union is performed based on religious or cultural reasons. See Elgot, *supra* note 27. The U.K. permits polygamous unions if performed in countries where it is legal; the marriages cannot be performed in the U.K. The U.K. also extends welfare benefits to the “spiritual wives” and children of polygamists. Thomas Buck, Jr., *From Big Love to the Big House: Justifying Anti-Polygamy Laws in an Age of Expanding Rights*, 26 EMORY INT’L L. REV. 939, 943 (2010); see also Baroness Flather, *Polygamy, Welfare Benefits and an Insidious Silence*, DAILY MAIL (Sept. 16, 2011), <http://perma.cc/H8EJ-EBJ8>. See generally BAILEY & KAUFMAN, *supra* note 26, at 7–68.

²⁹ See Laura Elizabeth Brown, *Regulating the Marrying Kind: The Constitutionality of Regulation of Polygamy Under the Mann Act*, 39 McGEORGE L. REV. 267, 268 (2008).

³⁰ See BENNION, *supra* note 19, at 3; Maura Strassberg, *The Crime of Polygamy*, 12 TEMP. POL. & CIV. RTS. L. REV. 353, 355 (2003).

³¹ See Hall, *supra* note 5.

Orchard Beach, Maine and developed into a “widespread and religiously-neutral” celebration.³² Public blogs and websites promote and discuss the choice to live a polygamous lifestyle.³³ In 2006, HBO premiered its first episode of *Big Love*, a television show about the family and social life of a fundamentalist Mormon polygamist and his three wives.³⁴ The show ran for five seasons on HBO and, in its fourth season, averaged over five million viewers per episode.³⁵ With the popularity of “reality” television shows, TLC aired the first episode of *Sister Wives* on September 26, 2010, which tracks the lives of the polygamous Brown family.³⁶ After five years on the air, the series is scheduled for a sixth season to begin in September 2015.³⁷

The Brown family parlayed their popularity to affect legal and political change. The *Brown* case marks the first time in over 130 years that polygamists have found some success in court. Since the very first case dealing with polygamy in 1878, *Reynolds v. United States*, polygamists have attempted to escape criminal prosecution based on arguments founded in religious freedom, never with much success.³⁸ When the Supreme Court decided *Lawrence v. Texas*,³⁹ however, polygamists found a new approach founded in substantive Due Process. In *Lawrence*, the Court recognized for the first time that intimate relationships outside of marriage are protected liberty interests, at least with respect to homosexual sexual intimacy.⁴⁰ Advocates for polygamy have tried to use that same reasoning to argue for the decriminalization of polygamous behavior.⁴¹ Many scholars decry the comparison between same-sex relationships and polygamous relationships as too attenuated in practice to support any colorable legal analogy.⁴² Polygamists, such scholars argue, differ too much in structure, content, and influence of

³² See *Pro-Polygamists Celebrate 12th Annual ‘Polygamy Day’*, PRO-POLYGAMY.COM (Aug. 19, 2012), <http://perma.cc/93ML-JDJQ> (detailing the events surrounding Polygamy Day).

³³ See, e.g., BLACK POLYGAMY, <http://perma.cc/E2VB-NQZD>.

³⁴ BENNION, *supra* note 19, at 3–4.

³⁵ Stuart Levine, ‘*Big Love*’ Says Goodbye, VARIETY (Oct. 28, 2010), <http://perma.cc/MZD8-SSTF>.

³⁶ See *Sister Wives* (TLC television broadcast 2010–2015) (depicting the relationships between Kody Brown and his four wives, only one of whom has legal status as his wife).

³⁷ Pena, *supra* note 3.

³⁸ See, e.g., *Reynolds v. United States*, 98 U.S. 145 (1878); *State v. Green*, 99 P.3d 820 (Utah 2004); *Bronson v. Swensen*, 500 F.3d 1099 (10th Cir. 2007) (remanding case dealing with three-person marriage); *Potter v. Murray City*, 585 F. Supp. 1126 (D. Utah 1984).

³⁹ 539 U.S. 558 (2003).

⁴⁰ *Id.* at 578.

⁴¹ See, e.g., Michael G. Myers, *Polygamist Eye for the Monogamist Guy: Homosexual Sodomy . . . Gay Marriage . . . Is Polygamy Next?*, 42 HOUS. L. REV. 1451 (2006); Joseph Bozzuti, *The Constitutionality of Polygamy Prohibitions After Lawrence v. Texas: Is Scalia a Punchline or a Prophet?*, 43 CATH. LAW. 409 (2004); Cassia M. Ward, *I Now Pronounce You Husband and Wives: Lawrence v. Texas and the Practice of Polygamy in Modern America*, 11 WM. & MARY J. WOMEN & L. 131 (2004); James Askew, *The Slippery Slope: The Vitality of Reynolds v. US After Romer and Lawrence*, 12 CARDOZO J. L. & GENDER 627 (2006).

⁴² See generally Davis, *supra* note 23, at 1997; Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. REV. 1501, 1615–18 (1997); Hema Chatlani, *In Defense of Marriage: Why Same-Sex Marriage Will Not Lead Us*

their relationships from those in dyadic, same-sex relationships.⁴³ Recognizing polygamous marriages would require wholesale change in the civil legal marriage system, they argue, as thousands of federal, state, and private benefits are structured around two-person marriage.⁴⁴

Comparing the structure, content, and goals of polygamy with same-sex marriage, however, skews the focus. Instead of focusing on the substantive differences between monogamous marriage and polygamous marriage and the administrative burden extension of marriage rights to polygamists would entail, the focus should be on the similarities between the particular liberty interests asserted. Since the inception of the idea that marriage is a fundamental right subject to equal protection of the laws,⁴⁵ the Supreme Court has moved away from determining access to certain rights based on defining classes and more toward protecting the right, in its manifest forms, regardless of the class necessarily being excluded from enjoying that right.⁴⁶ Until the Supreme Court's 2013 decision in *United States v. Windsor*,⁴⁷ it appeared that the precedent established in *Lawrence* and its progeny cases did not provide an encompassing enough right to extend to persons attempting to change the structure of marriage to include more persons than one. After *Windsor*, however, and Justice Kennedy's broad determination of the liberty interest at stake—what this article terms “equal dignity” liberty—polygamists find a much more supportable analogy to same-sex marriage cases to promote their cause for both decriminalization and legalization of polygamous marriage.

Although several intervening Supreme Court cases since the *Reynolds* decision in 1878 falling under Equal Protection, substantive Due Process, and freedom of religion have slowly reversed some of the more archaic iterations on marriage and polygamy first set out in *Reynolds*,⁴⁸ some of the more engrained societal and legal restrictions on marriage remain. While the *Brown* case represents a bold step toward decriminalization of informal polygamous relationships, the decision does not go far enough—nor does it attempt—to change the *legal* definition of marriage to include more than one spouse.⁴⁹ Even after *Windsor*, marriage—or access to marriage—remains an exclusionary tool to use against unpopular groups. In the case of polygamy, some same-sex marriage advocates are quick to shut the door in the face of polygamists for fear of association with historical abuses and seemingly archaic characterization linked to polygamy. In order to use *Windsor* as a springboard for arguments to support the decriminalization and potential le-

Down a Slippery Slope Toward the Legalization of Polygamy, 6 APPALACHIAN J.L. 101, 128–32 (2006).

⁴³ See, e.g., Davis, *supra* note 23, at 1989–95.

⁴⁴ See, e.g., *id.*

⁴⁵ See *Loving v. Virginia*, 388 U.S. 1 (1967); *Zablocki v. Redhail*, 434 U.S. 374 (1978).

⁴⁶ See Araiza, *supra* note 17, at 371.

⁴⁷ 133 S. Ct. 2675 (2013).

⁴⁸ *Reynolds v. United States*, 98 U.S. 145 (1878); see *infra* Part III.

⁴⁹ *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1194–95 (D. Utah 2013).

galization of polygamy, polygamy advocates must shed their arguments grounded in religion and rely instead on the substantive Due Process arguments as delineated in *Windsor*. The *Windsor* decision recognizes the need to mirror a state's choice to recognize a same-sex marriage with "equal dignity" as a heterosexual one.⁵⁰

The decision to do even that with respect to same-sex couples, let alone polygamous relationships, is not without controversy. The history of civil marriage fails to embrace the value of "marriage minorities" or "sexual minorities" as positive attributes to society or adult relationships.⁵¹ Since the inception of early American constitutional and philosophical development, religion and law have been, theoretically, running on different (if not parallel) tracks.⁵² With respect to marriage formation, however, this has not been the case. Civil marriage laws are based heavily off of a Judeo-Christian, Westernized version of monogamous marriage.⁵³ Non-traditional marriage customs are viewed as an attribute of "otherness" and distinctly "non-American."⁵⁴ To normalize or Americanize these disparate groups, the marriage laws act as bumpers, pushing these non-traditional marriage practices toward the homogenous, monogamous American ideal of marriage.^{55,56} Thus, American marriage and Free Exercise laws fail to represent the diversity of culture and religion present within the country.

Polygamy represents just one type of an alternative marital relationship in the larger quest for "intimate pluralism," which pushes against this traditional, restrictive view of marriage, in an attempt to give all marital-like relationships "equal dignity" under the law. Even among practicing polygamists in the United States, a diversity of cultural and religious motivations emerge.⁵⁷ Fundamentalist Mormons are not the only players in the po-

⁵⁰ *Windsor*, 133 S. Ct. at 2693.

⁵¹ Bigamy is a crime in 49 states and the District of Columbia. Massachusetts is the only state that criminalizes polygamy and does not have a separate bigamy statute. See Claire A. Smearman, *Second Wives' Club: Mapping the Impact of Polygamy in U.S. Immigration Law*, 27 BERKLEY J. INT'L L. 382, 429 & n.356 (2009).

⁵² See *infra* Part II.

⁵³ See Cyra Akila Choudhury, *Between Tradition and Progress: A Comparative Perspective on Polygamy in the United States and India*, 83 U. COLO. L. REV. 963, 1002–03 (2012).

⁵⁴ See *id.* at 1002.

⁵⁵ See *infra* Part II; Antonette Sedillo Lopez, *Evolving Indigenous Law: Navajo Marriage—Cultural Traditions and Modern Challenges*, 17 ARIZ. J. INT'L & COMP. L. 283, 292 (2000); Sarah L. Eichenberger, *When for Better is for Worse: Immigration Law's Gendered Impact on Foreign Polygamous Marriage*, 61 DUKE L.J. 1067, 1084 (2012); Rose-Marie Armstrong, *Turning to Islam—African-American Conversion Stories*, THE CHRISTIAN CENTURY, July 12, 2003 at 19–23, available at <http://perma.cc/4XQD-3WPZ>; see generally WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 86 (Oxford University Press, 1995).

⁵⁶ This ideal affects immigration from countries that recognize polygamy. Compare 8 U.S.C. § 1182(a)(10)(A), § 1229(b)(1)(B) (2006) (providing that the cancellation of removal for inadmissible permanent residents requires a finding of good moral character), with 8 U.S.C. § 1101(f) (practicing polygamists might well be ineligible).

⁵⁷ See BENNION, *supra* note 19, at 6; Irwin Altman, *Husbands and Wives in Contemporary Polygamy*, 8 J.L. & FAM. STUD. 389, 392 (2006).

lygamy arena.⁵⁸ Polygamists in the Islamic faith retain a large statistical presence in the United States (and a larger presence worldwide) alongside Mormon polygamists.⁵⁹ And like Mormons of the nineteenth century, for whom polygamy became just one manifestation of their rebellion against the federal government and mainstream pronouncements on proper marriage behavior, many Muslims in the United States, particularly African-American Muslims, embrace the practice as an indicator of their culture and difference.⁶⁰ But unlike other types of alternative relationship structures, such as polyamory, group marriages, friend marriages, or same-sex marriage,⁶¹ most practicing polygamists still ground their justification in religion.⁶² American polygamists are part of the seventy-eight percent of polygamists worldwide that structure their marriage as “polygynous,” with the husband as the head of the household with their multiple wives and children.⁶³ Mormon doctrine characterizes this structure as a wheel, with the husband at the center and the wives as different spokes, running through and connected by the husband at the hub.⁶⁴

That attachment to religion, however, clouds the long-term picture. It links three-person marriage to a much longer history and tradition, shrouded in mistrust and public sensationalism of latent and patent abuses, preventing

⁵⁸ Davis, *supra* note 23, at 1974–75. For a detailed discussion of the demographics of practicing polygamists in the United States, see Casey E. Faucon, *Marriage Outlaws: Regulating Polygamy in America*, 22 DUKE J. GENDER L. & POL’Y 1, 1–3 (2015).

⁵⁹ Cf. Davis, *supra* note 23, at 1974 (“Philadelphia has the highest density of polygamy, due to a combination of conversions to Islam, currents of racial nationalism, and the demographic effects of male incarceration and underemployment.”); Maura Strassberg, *The Crime of Polygamy*, 12 TEMP. POL. & CIV. RTS. L. REV. 383, 405 (2003) (“If Mormon polygyny had never developed in the United States, it seems likely that the issue of polygyny would only have arisen in relation to the immigration of people from those African, Middle Eastern, Asian and Southeast Asian cultures that practice polygyny.”). Polygamy in the United States is not limited to Utah, Mormons, or Muslims, however. Michele Alexandre, *Lessons from Islamic Polygamy: A Case for Expanding the American Concept of Surviving Spouse So As to Include De Facto Polygamous Spouses*, 64 WASH. & LEE L. REV. 1461, 1462 (2007); D. Marisa Black, *Beyond Child Bride Polygamy: Polyamory, Unique Familial Constructions, and the Law*, 8 J.L. & FAM. STUD. 497, 498 (2006).

⁶⁰ Davis, *supra* note 23, at 1972.

⁶¹ Polyamory has been defined as “ethical nonmonogamy” or “engaging in loving, intimate relationships with more than one person—based upon the knowledge and consent of everyone involved.” See Jessica Bennett, *Polyamory: The Next Sexual Revolution*, NEWSWEEK (July 28, 2009), <http://perma.cc/28VX-LF6Z>.

⁶² Alexandre, *supra* note 59, at 1463; Adrian Katherine Wing, *Polygamy from Southern Africa to Black Britannia to Black America: Global Critical Race Feminism as Legal Reform for the Twenty-first Century*, 11 J. CONTEMP. LEGAL ISSUES 811, 837 (2001); Black, *supra* note 59, at 500. *But see* Wing, *supra*, at 838 (“In many African countries . . . the practice is based on nationality or ethnicity, and not religion.”); BAILEY & KAUFMAN, *supra* note 26, at 8 (listing socio-cultural justifications for polygamy).

⁶³ Davis, *supra* note 23, at 1966. As opposed to polygyny (one man with multiple wives), some cultures continue to practice polyandry (one woman with multiple husbands). *Id.* Polygamy is a gender-neutral term used to encompass both polygyny and polyandry. JANET BENNION, *WOMEN OF PRINCIPLE: FEMALE NETWORKING IN CONTEMPORARY MORMON POLYGAMY* 138 (1998).

⁶⁴ BENNION, *supra* note 63, at 138.

polygamy from taking its place as the next step in the advancement of and modernist move toward the deconstruction of traditional marriage in the United States. Our exception for religious polygamy aside, over the past few decades, the country has experienced a more “laissez faire attitude toward family structure.”⁶⁵ For many reasons, unmarried cohabitation continues to rise.⁶⁶ States are rapidly recognizing and performing marriages between same-sex couples.⁶⁷ With the breakdown of traditional, two-person marriage emerges the potential for even more diverse adult relationship structures. Polyamorous relationships, which encompass polygamy as a form of polyamory, are complex in content and can take a multitude of forms.⁶⁸ The polyamorous movement, which attempts to validate multi-party relationships free from traditionally defined dyadic partner roles, is viewed as a modernist movement,⁶⁹ with some studies claiming as many as half a million people in the United States openly living in relationships between multiple consenting adults.⁷⁰ The political impetus behind polygamy and its historical link toward “backward” religious practices, however, keep polygamy from being included in the discussions surrounding same-sex marriage, polyamory, and group marriage, for example, despite sharing that common goal of respecting consenting adult relationships that do not adhere to the traditional opposite sex monogamous ideal. Modernist marriage advocates, in fact, consciously separate themselves from religious polygamists because of the historical distaste for the practice as “barbaric.”⁷¹

The inability to separate polygamy from its religious ties prevents the practice from inclusion in the modernist marriage movement. In order to find social and legal recognition, polygamy proponents should divert their arguments from religious freedoms and focus instead on the need for “inti-

⁶⁵ BAILEY & KAUFMAN, *supra* note 26, at 3.

⁶⁶ D’vera Cohen et al., *Barely Half of U.S. Adults are Married—A Record Low*, PEW RESEARCH SOCIAL AND DEMOGRAPHIC TRENDS (Dec. 14, 2011), <http://perma.cc/4N4S-XD53>; see also Aja Gabel, *The Marriage Crisis: How Marriage has Changed in the Last Fifty Years and Why it Continues to Decline*, THE UNIVERSITY OF VIRGINIA MAGAZINE (Summer 2012), <http://perma.cc/Q9QQ-VKJP>; Rose M. Kreider, *Increase in Opposite-Sex Cohabiting Couples from 2009 to 2010 in the Annual Social and Economic Supplement (ASEC) to the Current Population Survey (CPS)*, Housing and Household Economic Statistics Division Working Paper.

⁶⁷ Before the Supreme Court announced its decision in *Obergefell v. Hodges* on June 26, 2015, see 576 U.S. ___ (2015), which held that both substantive due process and equal protection under the Fourteenth Amendment require states to grant same-sex marriages and recognize same-sex marriages validly performed in other states, thirty-seven states and the District of Columbia recognized same-sex marriages after *Windsor*. See *37 States with Legal Gay Marriage and 13 States with Same-Sex Marriage Bans*, PROCON.ORG (Mar. 4, 2015), <http://perma.cc/TKE3-BSBW?type=source>.

⁶⁸ See Bennett, *supra* note 61.

⁶⁹ See *id.* (“Today there are poly blogs and podcasts, local get-togethers, and an online polyamory magazine called Loving More with 15,000 regular readers.”) But Bennett also notes that some polyamorists are not particularly interested in pressing a political agenda.

⁷⁰ See *id.*

⁷¹ Cf. *id.* (discussing same-sex marriage advocates’ desire to distance themselves from polygamists).

mate pluralism” based on “equal dignity” after *Windsor*. Further, although including a freedom of religion basis for accommodating religious practices may provide a higher level of scrutiny for religious polygamists, the aftermath of such a choice could elevate religious polygamy over non-religious polygamy, such as that practiced for cultural, social, or necessity reasons, or polyamory in other constitutionally impermissible ways. Although the *Brown* court took much time to chronicle the historical persecution of religious polygamists in the United States, the *Windsor* case and its analysis of Due Process and Equal Protection in the marriage context provide a wider jumping-off point for polygamists and all other persons who seek to legalize alternative marital arrangements, devoid of any freedom of religion claim.

Part II of this article introduces the landmark U.S. Supreme Court case *Reynolds v. United States* and discusses the historical and social context influencing the Court’s first foray into polygamy and the limits of the Free Exercise Clause. This section will point out the lasting legacies that the *Reynolds* decision had on civil marriage and polygamy. Part II takes each such legacy in turn and contradicts or supports its continued validity today. Part II concludes with a discussion of *Reynolds*’ legacy on Free Exercise doctrine, recognizing that despite the Court’s expansion and contraction of religious freedoms throughout its modern jurisprudence, polygamy always remained an outlier.

Part III focuses on two interconnected concepts and their jurisprudential bases that will influence any analysis of the constitutional recognition of polygamy: the fundamental right to marriage and protected sexual intimacy. This section will discuss the development of both doctrines and then discuss how same-sex marriage advocates have used both lines to successfully challenge criminal and civil statutes outlawing same-sex activity and marriage. Part III will then contribute to an ongoing debate about whether same-sex marriage cases can be used to support recognition of polygamy, with legal advocates and scholars coming down on both sides, ultimately concluding that the argument is analogous enough to lend precedential support.

Part IV introduces the recent Utah federal district court *Brown* case, marking a shift in the criminal treatment of religious polygamy since 1878. This section discusses the legal arguments employed by the court in striking down a portion of Utah’s criminal ban against “religious cohabitation” as unconstitutional. Part IV concludes with a discussion about the implications of the *Brown* case on future polygamy litigation, pointing out that this case did not challenge the civil restrictions against multiple simultaneous spouses.

Part V introduces the concept of “intimate pluralism” and the same-sex marriage case, *United States v. Windsor*. This section discusses the language used by Justice Kennedy in *Windsor*, its legal aftermath, and its scholarly criticisms, and briefly discusses the Supreme Court’s decision in *Obergefell*

v. *Hodges*,⁷² a consolidated same-sex marriage case that asked whether the Fourteenth Amendment compels states to recognize same-sex marriages, and the implications of that decision on polygamy. After analyzing the holding in *Windsor* and its clarification and expansion in *Obergefell*, this Part reviews the effect of the decision on state laws restricting same-sex marriages and the different arguments employed by such lower courts following the vague standard set out in *Windsor*.

Finally, Part VI discusses three critiques of *Windsor*, using those critiques as an aid in predicting any arguments in support of polygamous marriage under the Fourteenth Amendment's Equal Protection and substantive Due Process. Finally, Part VI discusses polygamists' stake from a First Amendment standpoint, weighing the costs and benefits of adding a freedom of religion challenge to the overall outcome. This section investigates what adding a freedom of religion claim does for the potential legal success of the claim and also how such an addition limits the ultimate goal of "intimacy pluralism." This section concludes that, even with respect to polygamy and despite its strong religious connotations, philosophical and precedential reasons mandate that "intimacy pluralism," and not Free Exercise arguments, should drive the analysis. Part VI concludes with an argument as to how this approach to *Windsor* eradicates those lasting harmful effects of *Reynolds* on marriage and polygamy in the United States and discusses the benefits of striving for an ultimate goal of "intimate pluralism."

II. MARRIAGE AND POLYGAMY IN AMERICA AND THE LIMITS OF THE FREE EXERCISE OF RELIGION

Any discussion of the potential legality of polygamy starts with *Reynolds v. United States*, the seminal U.S. Supreme Court case that upheld the constitutionality of criminal sanctions for polygamy.⁷³ The *Reynolds* decision not only had the immediate effect of affirming the criminal conviction of George Reynolds, but also entrenched into the legal and cultural rhetoric a much larger legacy on both marriage policy in the United States and the development of Free Exercise jurisprudence under the First Amendment.⁷⁴ It would take over 130 years before the chilling effect of *Reynolds* on polygamy in the United States would begin to thaw.⁷⁵

A. *The Reynolds Decision*

In 1876, Congress enacted the Morrill Anti-Bigamy Act ("the Morrill Act"), which outlawed and criminalized polygamy in the federal territo-

⁷² *Obergefell v. Hodges*, 576 U.S. ___ (2015).

⁷³ *Reynolds v. United States*, 98 U.S. 145, 145 (1878).

⁷⁴ U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion nor prohibiting the free exercise thereof").

⁷⁵ See generally *Brown v. Buhman*, 947 F. Supp. 2d 1170 (D. Utah 2013).

ries.⁷⁶ In 1878, Brigham Young's secretary, George Reynolds,⁷⁷ was charged under the Morrill Act for marrying Amelia Jane Schofield while still married to Mary Ann Tuddenham.⁷⁸ The trial court instructed the jury to curtail the spread of polygamy like one would an infectious disease, using protectionist rhetoric and acting as a fear-monger would.⁷⁹ In response, the jury convicted Reynolds of bigamy,⁸⁰ and the Utah Territorial Supreme Court affirmed.⁸¹ Reynolds appealed to the U.S. Supreme Court to make an exception to the polygamy prohibition because of his genuine religious belief.⁸² The Court's response as to his one religious-based defense became the standard by which not only polygamous marriage was judged, but also all conduct attendant to religious observance was measured.⁸³ The Court acknowledged that the First Amendment guarantees religious freedom, but that "religion" is nowhere defined in the Constitution.⁸⁴ In examining the scope of religious freedom in the context of polygamous marriage, the Court proffered two arguments in denying Reynolds' request.

In an oft-quoted passage from Chief Justice Waite's opinion,⁸⁵ the Court considered polygamy a distinctly non-Western cultural trait—"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."⁸⁶ This short statement harkens to reliance upon "natural law" and differences between races to

⁷⁶ "Bigamy" refers to the crime of entering into another legal marriage while one has a living spouse. Buck, *supra* note 28, at 940–41. "Polygamy" refers to the practice of having more than one spouse at a time. The Morrill Act failed largely because, in order to establish bigamy, the government had to prove that a valid marriage ceremony took place while one spouse was legally married to someone else. Morrill Act of July 1, 1862, ch. 126, 12 Stat. 501 (repealed 1910); *see also* SARAH BARRINGER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH CENTURY AMERICA* 114–115 (2002). Most of Utah's jurors and judges were Mormon, and the judicial system was unlikely to produce convictions for polygamy. Brown, *supra* note 29, at 274.

⁷⁷ Todd M. Gillet, *The Absolution of Reynolds: The Constitutionality of Religious Polygamy*, 8 WM. & MARY BILL RTS. J. 497, 511 (2000).

⁷⁸ *Reynolds*, 98 U.S. at 145 (1878). The Morrill Act provided: "Every person having a husband or wife living, who marries another, whether married or single, in a Territory, or other place over which the United States have exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than \$500, and by imprisonment for a term of not more than five years." Morrill Act of July 1, 1862, ch. 126, 12 Stat. 501 (repealed 1910).

⁷⁹ 98 U.S. at 145. The trial judge instructed the jury, "[Y]ou should consider what are to be the consequences to the innocent victims of this delusion. As this contest goes on, they multiply, and there are pure-minded women and there are innocent children . . . [S]o do these victims multiply and spread themselves over the land." *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 161–67.

⁸³ *See* Gillett, *supra* note 77, at 512–13.

⁸⁴ *Reynolds v. United States*, 98 U.S. 145, 162 (1878) ("Religious freedom is guaranteed everywhere throughout the United States, so far as congressional interference is concerned. The question to be determined is, whether the law now under consideration comes within this prohibition.").

⁸⁵ *See, e.g.*, Choudhury, *supra* note 53, at 982; Gillet, *supra* note 77, at 513.

⁸⁶ *Reynolds*, 98 U.S. at 164.

justify disparate social and legal treatment.⁸⁷ Professor Martha Ertman argues that, while it may have been acceptable for Eastern or African races to engage in polygamy as in tune with their “barbaric” and “primitive” natures, the public sentiment and resulting political determinates involved in the case saw that Mormons—white Americans—were regressing by acting in this fashion.⁸⁸ She terms this behavior “race treason.”⁸⁹ The Court also relied on its own Western legal tradition in looking to historical precedent.⁹⁰ Despite polygamy’s being one of the primary forms of marriage on a global scale,⁹¹ the Court looked only to the treatment of polygamy in the English court system—“[F]rom the earliest history of England polygamy has been treated as an offense against society.”⁹² The Court’s “oddly incomplete account of political history” ignored the history of concubinage among royalty and aristocracy in northern and western Europe.⁹³

⁸⁷ “Wedlock, or monogamic marriage . . . is one of the elementary distinctions—historical and actual—between European and Asiatic humanity. . . . It is one of the pre-existing conditions of our existence as civilized white men, as much so as our being moral entities is a pre-existing condition of the idea of law. . . . Strike it out, and you destroy our very being; and when we say *our*, we mean our race—a race which has its great and broad destiny, a solemn aim in the great career of civilization, with which no one of us has any right to trifle.” Francis Lieber, *The Mormons: Shall Utah be Admitted into the Union?*, 5 PUTNAM’S MONTHLY 225, 233–34 (1855) (emphasis in original).

⁸⁸ See, e.g., Martha Ertman, *Race Treason: The Untold Story of America’s Ban on Polygamy*, 19 COLUM. J. GENDER & L. 287, 306–31. In Martha Ertman’s work on race perception and polygamy, she chronicles political cartoons of Mormon polygamists of the day; some couched Mormon polygamists with “others”—Chinese immigrants, Native-Americans, African-Americans, and Irish immigrants—as “troublesome.” *Id.*

⁸⁹ Congressional Republicans introduced a new basis to oppose polygamous marriages, “race treason,” comparing Mormon polygamy to “Chinese, Muslim, and South Asian ‘despotic’ cultural practices, like concubinage, coolieism, and prostitution.” Ertman, *supra* note 88, at 312–13. According to these characterizations, “civilization rose ‘like the sun in the farthest reaches of the East and advanced progressively westward,’ leaving behind China, India, and the Arab world as cultures ‘past their glory.’” *Id.* at 313 (quoting JOHN KUO WEI TCHEN, *NEW YORK BEFORE CHINATOWN: ORIENTALISM AND THE SHAPING OF AMERICAN CULTURE 1776-1882* xvi (1999)); see also Leti Volpp, *Blaming Culture for Bad Behavior*, 12 YALE J.L. & HUM. 89, 96 n.39 (2000) (“China is changeless, the West progressive[;] the Chinese are passive, Westerners active[;] the Chinese are lemmings, Westerners individuals[;] the Chinese state is despotic, the Western state democratic[;] the Chinese are irrational, Westerners rational[;] the Chinese are ruled by morality, Westerners by law”) (quoting Teemu Ruskola, *Taking Chinese Law Seriously: Towards a Critical Theory of Comparative Law* 52 (unpublished manuscript)).

⁹⁰ *Reynolds*, 98 U.S. at 164–65.

⁹¹ The ancient Chinese practiced polygamy, and the practice saw a resurgence in the demographic in the 1990s. See D.E. Greenfield, *Marriage by Chinese Law and Custom in Hong Kong*, 7 INT’L & COMP. L.Q. 437, 443–44 (1958). The Incas of Peru also practiced polygamy. Carmen Rodriguez de Munoz & Elsa Roca de Salonen, *Law and the Status of Women in Peru*, 8 COLUM. HUM. RTS. L. REV. 207, 208 (1976). The sultans of the Ottoman Empire also practiced polygamy. See Brooke D. Rodgers-Miller, *Out of Jahiliyya: Historic and Modern Incarnations of Polygamy in the Islamic World*, 11 WM. & MARY J. WOMEN & L. 541, 551 (2005).

⁹² *Reynolds*, 98 U.S. at 164–65.

⁹³ MARK E. BRANDON, *STATES OF UNION: FAMILY AND CHANGE IN THE AMERICAN CONSTITUTIONAL ORDER* 206 (2013).

The second justification, apart from notions of cultural propriety and legal treatment, was that polygamy promotes the “patriarchal principle.”⁹⁴ Justice Waite’s opinion reasoned that the “wheel” structure with the husband at the center can “lead[] to the patriarchal principle, and which, when applied to larger communities, fetters the people in stationary despotism”⁹⁵ Despite critiques of monogamy as being just as patriarchal as polygamy,⁹⁶ the Court found the fear of the “patriarchal principle” a sufficient reason to restrict religious exercise.⁹⁷

Based upon these two justifications—proper racial and cultural behavior and the dangers of patriarchy—the founding fathers did not intend the “free exercise of religion” to encompass behavior such as polygamy.⁹⁸ Even though the practice was motivated by religious beliefs, the government was able to limit the practice for the social good, to prevent a religious “renegade” from becoming a “law unto himself,” and to backstop against other disdainful religious practices—such as human sacrifice or wife immolation—that could result if polygamy were to open such a slippery slope.⁹⁹ The Court continues to view polygamy as so contrary to the public good that it has become the primary example of why limits on Free Exercise are justified.¹⁰⁰

⁹⁴ *Reynolds*, 98 U.S. at 166. When Henry Maine addressed the issue of patriarchy in his famous 1861 work *Ancient Law*, he “posit[ed] it as the genesis of all known societies, in which fathers exercised unqualified dominion over their wives, children, and slaves.” HENRY SUMNER MAINE, *ANCIENT LAW* 111, 118–19, 133 (3d Am. ed. 1888). Islam also views polygamy as a husband-oriented institution, heavily entrenched in gender norms. BAILEY & KAUFMAN, *supra* note 26, at 8–9. In the Islamic tradition, a man can have up to four wives at a time, as long as he treats them all justly and equally. Davis, *supra* note 42, at 1966. As opposed to polygyny (one man with multiple wives), some cultures have and continued to practice polyandry (one woman with multiple husbands). *Id.* at n.27.

⁹⁵ *Reynolds*, 98 U.S. at 166.

⁹⁶ Just one year after women in Utah were granted the vote, Susan B. Anthony and Elizabeth Cady Stanton went to Utah and spoke to the Mormon women there and discovered: “Though the Mormon women, like all others, stoutly defend their own religion, yet they [are] no more satisfied than any other sect.” ELIZABETH CADY STANTON, *EIGHTY YEARS AND MORE* 284 (Source Book Press 1970) (1898). The American Woman’s Suffrage Association did not support polygamous women. To them, polygamy did nothing but undermine that equal bargaining power of monogamy. When the Utah women’s votes had failed to extinguish polygamy by 1882, the NWSA no longer associated with Mormon polygamous women either. Ertman, *supra* note 88, at 330.

⁹⁷ Gillet, *supra* note 77, at 514.

⁹⁸ It is also implicit that Professor Lieber’s theories on polygamy were likely more a reflection of his overtly critical stance toward Mormonism in general. *Id.* at 514. Professor Lieber had written other articles in which he characterized Mormon theology by ‘vulgarity,’ ‘cheating,’ ‘jugglery,’ ‘knavery,’ ‘foulness,’ and as bearing ‘poisonous fruit.’” Francis Lieber, *The Mormons: Shall Utah Be Admitted Into the Union?*, 5 PUTNAM’S MONTHLY 225, 233 (1855).

⁹⁹ *Reynolds*, 98 U.S. at 166–67.

¹⁰⁰ See Buck, *supra* note 28, at 981–82.

B. *The Immediate Aftermath of Reynolds and its Lasting Legacies*

Reynolds was a resounding defeat of polygamy in the nineteenth century. Without a doubt, it was not until after the *Reynolds* decision that the Mormon Church eventually renounced polygamy. Utah prohibited polygamy forever in its state constitution in order to gain statehood.¹⁰¹ Subsequent Mormon polygamy cases further solidified the federal government's defeat of the practice, and *Reynolds* was used in later cases to justify much more than criminal penalties for polygamy, such as restricting voting rights of those who professed belief in polygamy or confiscating the property of the Mormon Church valued over \$50,000.¹⁰² Despite its age, *Reynolds* has never been overruled and, although its practical effect was to legitimize criminal sanctions against polygamy, its lasting effects on marriage policy in the United States are much more profound. This subsection chronicles the immediate aftermath of the decision and the continuing impact of *Reynolds* on marriage policy today.

1. *Turned Polygamists into Outlaws*

While the majority of the Church complied with the Church's new stance against polygamy, many followers created splinter fundamentalist sects that continued to preach the divine nature of "celestial marriage,"¹⁰³ or polygamy.¹⁰⁴ The criminality of their behavior, however, drove these groups

¹⁰¹ See Gillet, *supra* note 77, at 533.

¹⁰² In *Davis v. Beason*, the Court upheld the conviction of an Idaho man who was denied the right to vote because of his affiliation with the Mormon Church. 133 U.S. 333, 341 (1890). The Court quickly dismissed the case, holding the statute constitutional, by repeating many of the arguments made in *Reynolds*. The Court rejected the claim that polygamy was protected by the free exercise of religion and argued instead that "[b]igamy and polygamy are crimes by the laws of all civilized and Christian countries. . . . They tend to destroy the purity of the marital relation, to disturb the peace of families, to degrade woman, and to debase man." *Id.* at 341. *Davis* was overturned in 1996 for restricting the right to vote based on religious beliefs. *Romer v. Evans*, 517 U.S. 620 (1996). That same term, the Court decided [*Mormon Church*] v. *United States*, upholding the constitutionality of the Edmunds-Tucker Act, which confiscated any real property of the Mormon Church valued over \$50,000 and escheated such proceeds to the federal government. *Late Corp. of the Church of Jesus Christ of Latter-Day Saints ("Mormon Church") v. United States*, 136 U.S. 1 (1890). After characterizing the teachings of polygamy as being odious and pernicious to an enlightened society, the Court chastised the Church, thus justifying the government's taking of the Church's property. The dissolution of a religious organization seems to clearly counter the doctrine of separation of church and state, and the majority decision, in this instance, sparked a dissent signed by three justices. *Mormon Church*, 136 U.S. at 66.

¹⁰³ The term "celestial marriage" comes from a more general belief that man has the ability to attain a state of godhood after death, whereas heaven is just an extension of a man's life. The reverse could be true, and a state of godliness could be achieved on earth. The only way to do this was to increase one's progeny on earth. Strassberg, *Distinctions*, *supra* note 42, at 1579. Mormon fundamentalists, as a whole, dislike both "polygamy" and "polygyny" and prefer the terms "the Work," "the Principle," or "Celestial Marriage." BENNION, *supra* note 19, at xvi.

¹⁰⁴ *The Primer: A Guidebook for Law Enforcement and Human Services Agencies Who Offer Assistance to Fundamentalist Mormon Families*, UTAH OFFICE OF THE ATTORNEY GEN-

underground, creating secretive communities which spread throughout the West and Southwest,¹⁰⁵ others fleeing as far as Mexico and Canada.¹⁰⁶ Polygamists thus became renegades—marriage outlaws—cut off from mainstream society and who, to this day, continue to grow in unregulated communities, outside of the eyes of the law.

The fear of criminal prosecution for the act of polygamy alone has left these religious outlaws outside of the protection that decriminalization and legal recognition can provide. Outlawing polygamy leaves second, third, and fourth wives with no legal rights or protections as only one wife, usually the first one, can claim the legal status as a spouse. Many laws effectively ignore the rights or situations of *de facto* second or third wives, refusing to grant them “divorces” based on the absolutely null nature of their alleged “marriages,” or denying them any support or property entitlements. Even if the husband treats them equally and fairly in private, these subsequent wives can only reveal their married status in certain social circles, their relationships being relegated to a place of silence and inferiority in public for fear of social stigma or criminal sanctions.¹⁰⁷ Although the Court’s purported intent was to protect innocent women,¹⁰⁸ it only exacerbated their tenuous legal positions by pushing their lifestyles and existence into the shadows.

The continuing criminalization of polygamy, some argue, is the very reason that the practice can perpetuate abuse.¹⁰⁹ One witness who had lived in polygamy in Utah acknowledged that some fundamentalist Mormon groups have unsavory practices, such as arranged marriages and teenage brides.¹¹⁰ She believes, however, that if polygamy is decriminalized, polygamous groups could be educated about incest, underage marriage, and sexual assault.¹¹¹ Abuse could be dealt with more effectively than it is under the current laws, where polygamists facing prosecution are sent into hiding.¹¹² Some even argue that decriminalization, in addition to legal recognition and regulation, would give the women and children involved even more rights. Polygamy could be regulated in the same way as monogamy is, giving people the right to be protected.¹¹³ However, the impact that *Reynolds* had—

ERAL 8 (2011), <http://www.familysupportcenter.org/Primer.pdf> (last visited Sept. 22, 2014 [hereinafter “*The Primer*”]) (“The fundamentalists adapted to a secret, underground lifestyle to avoid prosecution and what they perceived as persecution from the ‘world.’”)

¹⁰⁵ *Id.*

¹⁰⁶ Askew, *supra* note 41, at 631.

¹⁰⁷ See *Polygamists Share Their Faith and Family Lives*, NAT’L PUB. RADIO (Aug. 19, 2011), <http://perma.cc/46TS-Y5RL>; Hagerty, *supra* note 6; Hagerty, *supra* note 22.

¹⁰⁸ *Reynolds v. United States*, 87 U.S. 145, 165 (1878).

¹⁰⁹ See BENNION, *supra* note 19, at 243–51.

¹¹⁰ *Id.* at 6.

¹¹¹ *Id.*; see also Faucon, *supra* note 28, at 25–27.

¹¹² BENNION, *supra* note 19, at 6.

¹¹³ *Id.* at 195–258. Emily Duncan argues that polygamy, like prostitution and alcohol consumption, is an area where public policy could reflect practicality, not morality, and allow for more effective regulation. Emily J. Duncan, *The Positive Effects of Legalizing Polygamy: “Love is a Many Splendored Thing”*, 15 DUKE J. GENDER L. & POL’Y 315, 332 (2008) (“The illegality of these acts merely drove the practitioners underground, exacerbating the practices’ negative effects. Prohibition spawned bootleggers, speakeasies, the sale of poisonous alcohol,

engraining the criminality of the practice—continues to push these communities underground, outside of the purview and reach of the normalizing influence of mainstream society.

2. *Established Monogamy as the Marriage Form that Protects Women and Children*

The *Reynolds* Court also determined that monogamy, as opposed to polygamy, was the best marriage structure to protect innocent women and children who would otherwise be unable to escape from such “despotism.” This perception continues to thwart polygamy advocates to this day, and media reports sensationalize instances of abuse of young girls in the polygamous context.¹¹⁴ The argument that monogamy is the best marriage structure to protect women and children, however, overlooks the statistical reality that abuse is no more common in polygamous relationships than in others. Criminalizing every practicing polygamist to prevent the abuses of some is an over-broad restriction.¹¹⁵ Even law enforcement agrees; one FBI agent who dealt with polygamous communities said, “At least 99% of all polygamists are peaceful, law-abiding people, no threat to anybody. It’s unfortunate that they’re stigmatized by a band of renegades.”¹¹⁶

Abuse occurs in all types of relationships, monogamous ones included, and across all different cultural landscapes.¹¹⁷ One recent anthropological study of polygamous families found that Mormon polygamy is no more likely to involve abuse than mainstream monogamy.¹¹⁸ Professor Debra Majeed, who interviewed over 400 African-American Muslims and over a dozen involved in a polygamous marriage, found no evidence of physical or sexual abuse of children within polygamous marriages in that community.¹¹⁹

and created a lawless liquor industry largely run by the mafia. In the case of prostitution, many scholars believe the laws against the practice have only helped make life more difficult for prostitutes because the laws exclude them from legal protection, encouraging predators to take advantage of their ‘powerlessness.’”)

¹¹⁴ See, e.g., Brown, *supra* note 25, at 277; Janet Heimlich, *No Refuge*, TEXAS OBSERVER (Aug. 1, 2012), <http://perma.cc/8RQS-ND66>; BENNION, *supra* note 19, at 2, 163–94.

¹¹⁵ Duncan, *supra* note 113, at 332.

¹¹⁶ Bella Stumbo, *No Tidy Stereotype: Polygamists: Tale of Two Families* L.A. TIMES (May 13, 1988), <http://perma.cc/AWW2-HCGV>.

¹¹⁷ See BENNION, *supra* note 63, at 154 (arguing that abuse in polygamous societies is a result of individual personality types that would be abusive in monogamous culture as well); Duncan, *supra* note 113, at 332; see also Eve D’Onofrio, *Child Brides, Inegalitarianism, and the Fundamentalist Polygamous Family in the United States*, 19 INT’L. J.L. POL’Y & FAM. 373, 374 (2005) (comparing the erosion of the traditional monogamous family model with the polygamist family model); Strassberg, *Distinctions*, *supra* note 42, at 1578 (“[M]onogamous marriage in America has been described as highly patriarchal, and nineteenth-century Mormon views on the proper gender roles for women were not particularly unusual, or out-of-step with their non-Mormon contemporaries.”); SUSAN MOLLER OKIN, JUSTICE, GENDER AND THE FAMILY 138 (1989) (“[G]ender-structured marriage involves women in a cycle of socially caused and distinctly asymmetric vulnerability.”).

¹¹⁸ BENNION, *supra* note 63, at 154; see also Askew, *supra* note 41, at 648–49.

¹¹⁹ If it does occur, she states, it is exceedingly rare. *Inside African-American Muslim Polygamy*, NAT’L PUB. RADIO (July 23, 2008), <http://perma.cc/834Q-C8CB>.

Tim Dickson, a lawyer who argued that the anti-polygamy laws are unconstitutional, suggested that the high instance of teen pregnancy in Bountiful, B.C., may be linked to religion and isolation rather than to polygamy per se. He referred to a U.S. study that suggested that evangelicals and members of other highly religious groups tend to have higher rates of teen pregnancy than the general population.¹²⁰ Dickson indicated that other small religious towns in the same region have extremely high teen birth rates (such as Hazelton, where births to mothers under 20 account for 22 percent of all live births).

In 2006, Janet Bennion published an article detailing the results of study that she conducted on abuse within polygamous communities in the Utah Valley.¹²¹ Bennion concluded:

I found that 95 percent of the abuse cases occurred in a rural environment. In the study, I describe six cases of arrests of perpetrators from polygamous groups and examined the factors that contributed to the abuse. Three men were arrested for sexually abusing their daughters, two were incarcerated for marrying child brides, and one was arrested for beating his children. In all six cases, I found the following conditions: a rural environment, frequent absence of the father from the home, lack of female network, isolated locations with natural geographical barriers to escape, overcrowded households, and the presence of “father worship,” as defined by Jankowiak. Combined with the adoration of the father was a strict code that required the obedience of all children and wives. The punishment for breaking this code was known as blood atonement, a physical whipping or cutting of the skin to atone for the sins against the father. In my view, correlation between abuse and isolation is twofold: abusers deliberately choose remote places in order to maintain control over their victims without being observed; and women in such isolated locations are unable to leave the community easily. I believe that this correlation offers strong evidence against finding a necessary causal connection between polygamy and abuse. Instead, it is my belief that forcing polygamous families to the fringes of society facilitates instances of abuse taking place outside the watchful eye of law enforcement.¹²²

Isolationism, in tandem with “frequent absence of the father from the home, lack of female network, isolated locations with natural geographical barriers to escape, overcrowded households, and the presence of ‘father worship,’”¹²³ Bennion argues, perpetuates the abuse, and not the practice of polygamy per se. In these types of conditions, men who are prone to abuse

¹²⁰ BENNION, *supra* note 19, at 6.

¹²¹ *Id.*

¹²² *Id.* at 15–16.

¹²³ *Id.*

have the opportunity to flourish, regardless of whether they are the head of a polygamous household or a monogamous one.¹²⁴

Many feel the laws against polygamy are antiquated and do not consider the variability in polygamous lifestyles. Similarly, Professor Adrian Nedrow points out that if polygamy were lawful, “some women would no doubt make poor choices of plural mates, just as some women now make poor choices of monogamous mates; that is no basis for eliminating the opportunity to make that choice.”¹²⁵ By taking such a protectionist position, polygamy bans thwart an available option for modern men and women looking to navigate through life in an increasingly diversifying and complicated society.¹²⁶ Many polygamous women maintain that they choose polygamy or polyamorous relationships because it fills a personal and community void, regardless of its religious connotations. Bennion, who lived with two fundamentalist Mormon groups known as the Harker Group and the Allred Group for eighteen months, found that “polygamy ultimately improved the situation of a considerable number of women who had experienced extreme social, economic and/or emotion deprivation in the Mormon mainstream.”¹²⁷ The women chose this lifestyle because it ensured that they had the opportunity to marry and raise their children within a strong network of sister wives and other women, all within the valuable context of religion.

Under these same arguments, some have posited that polygamy can improve upon the social conditions of African-American Muslim women.¹²⁸ Although many African-American women likely tire of constantly being reminded about the lack of marriageable African-American men,¹²⁹ polygamy and polyamory can be a viable alternative, especially for devout Muslim women who will not marry outside of their religion.¹³⁰ Although *Reynolds* established monogamy as the form that best protects women, time has shown that modern women are capable of determining their own intimate lifestyles.

3. *Used Governmental Control over Civil Marriage as an Exclusionary Tool Against Unpopular Political Groups*

One of the more influential legacies of *Reynolds* was its explicit announcement on who controls the issue of marriage—the government, not individuals—and what factors contribute to that determination. Historically,

¹²⁴ Another study concluded that these abuses are the result of “particularly dysfunctional” polygynist families rather than problems inherent to polygyny. Strassberg, *Crime of Polygamy*, *supra* note 30, at 398.

¹²⁵ Keith Nedrow, *Polygamy and the Right to Marry: New Life for an Old Lifestyle*, 11 MEM. ST. U. L. REV. 303, 337 (1981).

¹²⁶ BENNION, *supra* note 19, at 8–9.

¹²⁷ BENNION, *supra* note 63, at 154.

¹²⁸ See Davis, *supra* note 23, at 1970–71; Wing, *supra* note 62, at 858.

¹²⁹ See, e.g., Wing, *supra* note 62, at 858.

¹³⁰ See *Qur’an* 2:221. Supposedly women, being the “weaker sex,” may be forced to renounce their religion due to pressure from their husbands. Wing, *supra* note 62, at 2900.

before the advent of “civil marriage,” persons united to form families either through their mutual agreement or through family and community consent.¹³¹ If this concept were carried forth into today, it would allow persons to structure their marriages however they deemed desirable, with minimal interference from the state—same-sex marriage, polygamy, and polyamory, to name a few. Professor Elizabeth Brake argues that “marriage minimalism” requires that states only impose a duty of care between/among spouses, leaving the contours of the rest of the constellation of marriage rights up to the individuals in the marriage.¹³² Despite the quest for this minimalist idealism,¹³³ civil authorities continue to regulate marriage, if not to simply protect against underage marriage and to ensure consent.¹³⁴ The *Reynolds* decision addresses this struggle head-on: to allow individuals to define for themselves the contours of such an important feature of social life as marriage would be to allow every man to “become a law unto himself.”¹³⁵ This need for procedural control, some argue, takes the guise of individual protection: “Like the ‘protection’ small businesses get from the mafia, implicit in the need for protection is the threat to the state’s control over the meaning of marriage, of a social as well as legal variety.”¹³⁶ Similarly, restrictions on access to marriage, as defined by the state, represent the state’s ability to control an otherwise intimate relationship between consenting adults.

The *Reynolds* opinion recognized the sacredness of the marital relationship and the individual contractual nature of marriage, but then also grasped upon the civic and social importance of marriage in support of governmental control and oversight.¹³⁷ Because of the elevated status and desirability of civil marriage,¹³⁸ governmental actors have used access to marriage as a po-

¹³¹ See generally JEAN BRISSAUD, A HISTORY OF FRENCH PRIVATE LAW 88 (1912).

¹³² Elizabeth Brake, *Minimal Marriage: What Political Liberalism Implies for Marriage Law*, in *Ethics: An International Journal of Social, Political, and Legal Philosophy*, in CHICAGO JOURNALS Vol. 2 (Henry S. Richardson ed., 2010), <http://www.jstor.org/stable/10.1086/651429>, <http://perma.cc/F7RR-EELJ>.

¹³³ Because such liberalism with respect to marriage could not exist in a society requiring justice, as such marriages could be structured as asymmetrical, Brake argues that such minimalism is merely an ideal. *Id.* (citing Steven Wall, “Perfectionism, Public Reason, and Religious Accommodation,” *Social Theory and Practice* 281–304 (2005) (on the conflict between public reason and perfectionism)).

¹³⁴ Incest, along with polygamy and bestiality, is called the “trinity of deviant forms.” Although this article recognizes that consent, and the ability to consent, plays a large role in shaping the reach of state control over marriage, incest introduces different social and public policy reasons that separate it in different ways from polygamy and polyamory. See generally James M. Donovan, *Rock-Salting the Slippery Slope: Why Same-Sex Marriage is Not a Commitment to Polygamous Marriage*, 29 N. KY. L. REV. 521, 521–90 (2002), <http://perma.cc/9UYF-BZSD>; Kent Greenfield, *The Slippery Slope to Polygamy and Incest*, THE AMERICAN PROSPECT (July 15, 2013), <http://perma.cc/632E-WC7R>; *German Incest Couple Lose European Court Case*, CNN.COM (Apr. 13, 2012), <http://perma.cc/7HB9-BBGB>.

¹³⁵ *Reynolds v. United States*, 98 U.S. 145, 167 (1878).

¹³⁶ Katherine B. Silbaugh, *The Practice of Marriage*, 20 WIS. WOMEN’S L.J. 189, 215 (2005).

¹³⁷ *Reynolds*, 98 U.S. at 164–65.

¹³⁸ See generally *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff’d sub nom.* *Perry v. Brown*, 671 F. 3d 1052 (9th Cir. 2012) (as the *Perry* court understood, in America, whether you are married makes all the difference).

litical tool to gain power or suppress unpopular groups. Indeed, in the case of *Reynolds*, the Mormon Church was considered threatening by the federal government not only for their polygamous practices, but because the Church's unfettered growth in the then-underdeveloped Utah Territory threatened the federal government as its own "separatist theocracy."¹³⁹ After their arrival in the "Mormon Corridor," the Mormons set up their own form of secular government, called the State of Deseret, with its own constitution, a General Assembly, a Governor, and a Supreme Court. Deseret even had its own alphabet, the Deseret Alphabet, composed of thirty-six letters based on phonetic sound. The Mormons developed their own militia, their own currency, and voted according to church politics.¹⁴⁰ The *Reynolds* decision was later used to restrict voting rights or jury services of those who professed a belief in the practice.¹⁴¹

Even today, state and federal actors use their civil control over marriage to suppress politically unpopular groups, and this process is nothing new. Anti-miscegenation laws in effect during the Jim Crow era were part of the broader attempt to disenfranchise and segregate blacks.¹⁴² The current debate over same-sex marriage is more prominently than ever a political and civil rights issue, with national influence and significance.¹⁴³ Supporters for or against marriage equality for gays separate across party lines, and access to equal rights for gays has been called the "greatest civil rights question of our generation."¹⁴⁴ In that same vein, polygamy advocates hail their struggle as the "next civil rights movement."¹⁴⁵ As *Reynolds* perpetuates, controlling access to marriage is a tool of the political majority, as traditional marriage is still elevated above all other types of intimate relationships in the eyes of the law and society and thus a status worth "protecting" from politically

¹³⁹ See generally Ertman, *Race Treason*, *supra* note 88, at 298–99.

¹⁴⁰ *Id.*

¹⁴¹ In *Davis v. Beason*, the Court upheld the conviction of an Idaho man who was denied the right to vote because of his affiliation with the Mormon Church. 133 U.S. 333, 348 (1890). The Court quickly dismissed the case, holding the statute constitutional, by repeating many of the arguments made in *Reynolds*. The Court rejected the claim that polygamy was protected by the free exercise of religion and argued instead that "[b]igamy and polygamy are crimes by the laws of all civilized and Christian countries. . . . They tend to destroy the purity of the marital relation, to disturb the peace of families, to degrade woman, and to debase man." *Id.* at 341. *Davis* was overturned in 1996 for restricting the right to vote based on religious beliefs. See *Romer v. Evans*, 517 U.S. 620 (1996).

¹⁴² See *Loving v. Virginia*, 388 U.S. 1, 1 (1967) (overruling Virginia ban on interracial marriages).

¹⁴³ See Adam Lamparello, *Why Justice Kennedy's Opinion in Windsor Shortchanged Same-Sex Couples*, 46 CONN. L. REV. ONLINE 27, 32 (2014) (arguing that the Court's majority opinion in *Windsor* threatened its institutional legitimacy by implying that *Windsor* was a political, rather than constitutional, decision); *Lawrence v. Texas*, 539 U.S. 558, 585 (2003). (O'Connor, J., concurring) (finding that the inherent problem with Justice Kennedy's liberty-driven analysis in *Lawrence* was that it increases the likelihood that presidential elections, not the Constitution, will play the primary role in creating and expanding individual rights).

¹⁴⁴ Adam Liptak, *High court to rule on same-sex marriage across US*, THE BOSTON GLOBE (Jan. 16, 2015), <http://www.bostonglobe.com/news/nation/2015/01/16/supreme-court-will-decide-gay-marriage-issue-this-term/EWmTyyDuqUfuRQ9m5Jn5bJ/story.html>, <http://perma.cc/83PV-WLF4>.

¹⁴⁵ See Hall, *supra* note 5.

unpopular groups.¹⁴⁶ More than ever, marriage equality issues are becoming national and international focal points, and national policies on the issues can play out on a world stage. Although the Morrill Act is no longer in effect,¹⁴⁷ *Reynolds* still is, and its political and cultural implications gave later courts a basis to deny and devalue “marriage diversity” in later substantive Due Process and Equal Protection marriage cases.

4. *Nationalized Monogamy Based on Westernized, Christian Notions of Morality*

Apart from the immediate practical effects of outlawing polygamy, often overlooked is the fact that the Morrill Act represents one of the few times that Congress enacted a federal definition or limitation on marriage.¹⁴⁸ The choice of monogamy over polygamy, as argued in *Reynolds*, became the prerogative of each controlling government to define,¹⁴⁹ despite being traditionally within the power of the states.¹⁵⁰ With *Reynolds*, the “monogamous family” became nationalized and federalized.¹⁵¹ The nationalization and federalization of monogamous marriage as the marital ideal in America so early on in our development of concepts of inalienable and fundamental rights had the effect of labeling any type of non-conforming marital arrangement thereafter as being “un-American.”¹⁵² Restricting the analysis of acceptable marital behavior to the historical vacuum of Western civilization, indeed to English common law and U.S. legal treatment, ignores the global influences that shape marriage both inside and outside of the U.S.

This limited view of fundamental rights has a larger influence on society’s treatment of other non-conforming cultural and religious practices that immigrants might continue to practice and thus establish in the United States. Although American courts now attempt to respect religion and cultural practices of its citizens without unnecessarily intermingling themselves with issues of religious theory and practice, this “American secularism” is

¹⁴⁶ See *Reynolds v. United States*, 98 U.S. 145, 164–65 (1878).

¹⁴⁷ Morrill Act of 1862, 7 U.S.C. § 301 *et seq.*

¹⁴⁸ See BRANDON, *supra* note 93, at 206.

¹⁴⁹ *Reynolds*, 98 U.S. at 167.

¹⁵⁰ See *Windsor*, 133 S. Ct. at 2680. For a discussion of the early tradition of the federal family, see Kristin A. Collins, *Federalism’s Fallacy: The Early Tradition of Federal Family Law and the Invention of States’ Rights*, 26 CARDOZO L. REV. 1761 (2005).

¹⁵¹ This quest began much earlier with the attempt to assimilate the indigenous, who did engage in informal, de facto polygamy. Government actors were more apt to recognize potentially polygamous marriages between the indigenous and European settlers, however, as an acceptable abeyance in furtherance of the larger goal of assimilation. Lopez, *supra* note 55, at 292.

¹⁵² This ideal affects immigration from countries that recognize polygamy. Immigration and Nationality Act (INA) § 212(a)(10)(A), 8 U.S.C. § 1182(a)(10)(A) (2006); INA § 204A(b)(1)(B), 8 U.S.C. § 1229(b)(1)(B) (providing that the cancellation of removal for inadmissible permanent residents requires a finding of good moral character, for which practicing polygamists are per se ineligible under INA § 101(f), 8 U.S.C. § 1101(f)); see also Sarah L. Eichenberger, *When for Better is for Worse: Immigration Law’s Gendered Impact on Foreign Polygamous Marriage*, 61 DUKE L.J. 1067, 1084 (2012).

still based upon a Judeo-Christian and Western ideologies.¹⁵³ Under these options, “American secularism” has been described as being distinctly “assimilative”—“When in Rome, do as the Romans do.”¹⁵⁴ Gary Jacobsohn describes this secularism as an attempt “to create a national civil and political identity with which all citizens and aspiring citizens must conform.”¹⁵⁵ From these descriptions come two main themes: that Americans are free to have a diversity of religious beliefs, but that these religious beliefs must be subsumed under a normative, assimilative national identity that is distinctly “American.” It is this second tenet of American secularism that allows the curtailment of total exercise of religious freedom, including polygamy.¹⁵⁶

This application finds no greater example than in the arena of family law and marriage formation.¹⁵⁷ The earliest judicial decisions against polygamy make express their disgust for the practice based on the good morals of a “Christian” society.¹⁵⁸ Although the First Amendment developed out of a fear of the political embrace of any one religion, *Reynolds* emerged during a time when Protestant Christianity was unquestioned as the socially dominant, majority religion.¹⁵⁹ It would take hundreds of years, numerous federal challenges, and rebukes by the Supreme Court to chip away at the authority of legislatures to use morality as a basis for disparate treatment and to separate public culture from this Christian version of society, a battle still fought

¹⁵³ In a multi-ethnic country with a large immigrant population, religious and cultural secularism can take one of four forms. MATHAIS ROHE, *MUSLIM MINORITIES AND THE LAW IN EUROPE: CHANCES AND CHALLENGES* 16–17 (2007). The first model is “assimilation,” in which diverse immigrants give up their own cultural and religious identities and completely adapt to the lifestyle of the majority. *Id.* The second model is a sort of intermingling in which “differing cultures overlap resulting in a fundamental change to the previous cultural context of the receiving population.” *Id.* The third model is “segregation,” where the local majority and the immigrant minorities remain separated as much as possible, keeping their own cultural identities and religious practices. *Id.* The fourth model is “acculturation,” in which both the local population and the immigrant population change and meld in culture and practices in a process of “mutual communication.” *Id.*

¹⁵⁴ For an excellent discussion of theory of assimilation in the context of immigration into the United Kingdom, see Meena Bhamra, *On Cultural Diversity: The Importance of Normative Foundations for Legal Responses*, in *LAW AND ETHNIC PLURALITY: SOCIO-LEGAL PERSPECTIVES* 9–30 (Prakash Shah ed. 2007). Kymlicka points out that while it is possible to leave one’s culture, such is “analogous to the choice to take a vow of perpetual poverty and enter a religious order.” KYMLICKA, *supra* note 55, at 86. Thus, asking someone to live without their own culture is like “asking them to live an impoverished existence.” Bhamra, *supra* note 154, at 13.

¹⁵⁵ Choudhury, *supra* note 53, at 969.

¹⁵⁶ Hera Hashmi, *Too Much to Bare? A Comparative Analysis of the Headscarf in France, Turkey, and the United States*, 10 U. MD. L.J. RACE, RELIGION, GENDER, & CLASS 409, 433–37 (2010).

¹⁵⁷ BAILEY & KAUFMAN, *supra* note 26, at 69–71; Rosemary R. Hicks, *Religious Pluralism, Secularism, and Interfaith Endeavors*, in *THE CAMBRIDGE COMPANION TO AMERICAN ISLAM* 162–64 (2013).

¹⁵⁸ *Reynolds v. United States*, 98 U.S. 145, 163 (1878).

¹⁵⁹ *Cf.* Hicks, *supra* note 157, at 161–62 (“[S]ecularism in the United States has never been neutral or antireligious but accommodates particular kinds of Protestant practices more than, and sometimes to the exclusion of, Catholic, Jewish, Muslim, and other traditions (such as Native Americans) that were not originally considered ‘religious’ or relevant to First Amendment protections.”).

today.¹⁶⁰ Consider the attention received when a holy book other than the Bible was used at an official swearing in ceremony.¹⁶¹ Despite these steps, strong proponents of morals-based government action and the upholding of “traditional” family values based on monogamy and Christianity persist and find very public support in all three branches of the federal government.

5. *Intertwined the Question of Marriage with Religion*

By grounding the decision on the Christian morals of Western society, the Court in *Reynolds* irreversibly intertwined the legal analysis of marriage and polygamy with religion. It is important to remember that *Reynolds* was, and remains, a First Amendment case. Although a Bill of Rights existed at the time of the *Reynolds* decision, the concepts of substantive Due Process and fundamental rights, especially the right to marry, had yet to crystallize in the legal rhetoric. The Court recognized the sacredness of the “sacrament of marriage,” but the only substantive ground upon which *Reynolds* based his appeal was under freedom of religion.¹⁶² Much of the Court’s opinion provides the type of language and analysis which today would inform the right to marry and intimacy privacy.¹⁶³ But the Court used this type of analysis to limit Free Exercise under the First Amendment, thus allowing marriage laws to be informed and influenced by Judeo-Christian morality. This intermingling, although slowly on the decline in terms of legitimate constitutional analysis, still influences perceptions and laws on proper marriage structure and behaviors today. Despite Free Exercise rights experiencing great expansions and retractions according to the composition of the Court over the last century, the religious practice of polygamy always remained as an outlier, seemingly beyond question as a religious practice that states could restrict.¹⁶⁴ In order to escape this lasting effect, courts must rid their analyses of polygamy as a religious issue.

¹⁶⁰ See Choudhury, *supra* note 53, at 968–71.

¹⁶¹ Thomas Jefferson’s *Qur’an*, now part of the Library of Congress, was used in the swearing-in ceremony of Keith Ellison, the first Muslim American elected to the U.S. Congress in 2007. Virginia Congressman Virgil Goode stated that he feared many more Muslims would come to the United States if immigration policies were not enforced to uphold “the values and beliefs traditional to the United States of America.” Zachary A. Goldfarb, *Va. Lawmaker’s Remarks on Muslims Criticized*, WASH. POST (Dec. 21, 2006), <http://perma.cc/G7P7-EBQN>. Ellison responded that his family had been in the United States since 1742: “I’m not an immigrant . . . I’m an African-American.” Rachel L. Swarns, *Congressman Criticizes Election of Muslim*, N.Y. TIMES (Dec. 21, 2006), http://www.nytimes.com/2006/12/21/us/21koran.html?_r=0, <http://perma.cc/M2CE-SPSX>.

¹⁶² *Reynolds*, 98 U.S. at 160–66.

¹⁶³ *Id.*

¹⁶⁴ Buck, *supra* note 28, at 978–83 (arguing that the Supreme Court views polygamy as so contrary to the public welfare that its mere existence justifies limits on free exercise of religion).

III. THE FUNDAMENTAL RIGHT TO MARRIAGE, AND EXPANDING ON INTIMACY PRIVACY

The law and scholarship on marriage policy in America has expanded from the archaic policies that informed the *Reynolds* decision. The Supreme Court in *Reynolds* recognized the sacred nature of marriage and, over time, developed a line of jurisprudence encompassing sexual intimacy as part of an individual's privacy interests. Although rights to marriage and private sexual intimacy differ, they are not mutually exclusive, but have deep overlap as individual privacy, sexual intimacy, and marriage are all definitive degrees on the same spectrum of rights. This section will briefly discuss the fundamental right to marriage and equal protection after *Loving v. Virginia* and *Zablocki v. Redhail*, then discuss the development of privacy intimacy after *Lawrence v. Texas*. Same-sex rights advocates rely upon these cases to support marriage equality. Although many scholars want to expand the rationales in these cases to include polygamous marriage, others decry the extension as improper and ill fitting.¹⁶⁵ This section addresses that debate and ultimately concludes that the reasoning pre-*Windsor* as gleaned from those cases fall short of supporting an analogy. However, the language used to define the liberty interest at stake in *Windsor* does support an application to polygamy now.

A. Finding a Fundamental Right to Marriage

Scholars point out that, although the Constitution says little about the family, "assumptions about the forms and functions of families were in the background."¹⁶⁶ Even before *Loving v. Virginia* and *Zablocki v. Redhail*, the Supreme Court characterized marriage as "the most important relation in life"¹⁶⁷ and "the foundation of the family and of society, without which there would be neither civilization nor progress."¹⁶⁸ In 1923, in *Meyer v. Nebraska*, the Court held that the freedom to marry was a constitutional right guaranteed by the "liberty" protected by the Due Process Clause.¹⁶⁹ Thus,

¹⁶⁵ *Id.* at 990–91.

¹⁶⁶ BRANDON, *supra* note 93, at 263.

¹⁶⁷ *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

¹⁶⁸ *Id.* at 211.

¹⁶⁹ *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) ("While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."). Two years later, the Court reaffirmed this right under both the First and Fourteenth Amendments in *Pierce v. Society of Sisters*, 268 U.S. 510, 536 (1925), and later in 1942 with *Skinner v. Oklahoma*, 316 U.S. 535, 537 (1942) ("[M]arriage and procreation are fundamental to the very existence and survival of the race.").

the right to marry was wrapped up in the larger liberty interest at stake in the Bill of Rights, protected as fundamental under the Due Process and Equal Protection Clauses.¹⁷⁰ But it was not until the 1960s that the Court began to crystallize the contours of the liberty interest in the right to marry and then expand the reach of its protection.¹⁷¹ In *Griswold v. Connecticut*, the Court struck down a state law that banned married couples from obtaining contraceptives.¹⁷² The *Griswold* case marked the first time that the Court tied marriage to the right to privacy, a right “older than the Bill of Rights . . .” The Court extended the constitutional privacy protection, a much more developed concept in the Supreme Court’s legal rhetoric, to marriage and emphasized that couples who had attained the status of “married” were granted certain rights.¹⁷³ Thus, the Court recognized that married couples had a privacy component at stake in their liberty interests, thus expanding upon the rights attendant to that status.

Although the Court did not specifically hold that there was a fundamental right to marry, this language found its way into the constitutional jurisprudence two years later in the famous 1967 case of *Loving v. Virginia*.¹⁷⁴ In *Loving*, the Court held that Virginia’s ban on interracial marriage violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment.¹⁷⁵ Although the decision is most known for its Equal Protection analysis in terms of prohibiting interracial marriage, the Court conducted an additional, and equally controlling, analysis under the Due Process Clause:

The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival. To deny this fundamental freedom on so unsupportable a basis as [] racial 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.¹⁷⁶

¹⁷⁰ Nedrow, *supra* note 125, at 305.

¹⁷¹ *Id.*

¹⁷² *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

¹⁷³ Nedrow, *supra* note 125, at 323.

¹⁷⁴ 388 U.S. 1, 12 (1967).

¹⁷⁵ The Court determined that the right to marry was a fundamental one, but never fully explained the constitutional basis for such finding. The general consensus is that either the Fourteenth Amendment’s personal liberty right or its orderly pursuit of happiness right guarantees the fundamental right to marry. *See id.* at 12; *see also* Nedrow, *supra* note 125, at 324.

¹⁷⁶ *Loving*, 388 U.S. at 12. One commentator argues that based on *Loving* and *Griswold* alone, religious polygamists should find constitutional protection: “If *Griswold* were to be stretched to its furthest extent, the decision would permit polygamous relations within licensed marriages. If a citizen chose to live with one woman while married to another, the state would not have the right to interfere with the relationships without sending “police to search the sacred precincts of the marital bedrooms.” A First Amendment challenge to laws outlawing polygamy might combine the right to exercise one’s religion freely and the right to privacy within marriage espoused in *Griswold*.” Gillet, *supra* note 77, at 515.

Thus, using *Loving* and later marriage cases,¹⁷⁷ what began to emerge was the concept that the right to marry is fundamental and, based on *Griswold*, that married couples enjoy a right to privacy within that marriage sphere.

It was not until *Zablocki v. Redhail*, however, that the Court distinctly recognized the fundamental right to marry—“The right to marry is of fundamental importance for all individuals.”¹⁷⁸ The decision also marks the first time that the Court held that direct restrictions on the right to marry would receive “strict scrutiny.” Professor Adrien Nedrow, writing in 1981 in favor of polygamous marriage recognition, opined that although *Loving* and *Zablocki* provide that restrictions on the fundamental right to marry receive strict scrutiny, no case had yet to define how polygamous lifestyles might be protected, if at all.¹⁷⁹ This, however, is not accurate. *Loving* was, foremost, a decision rooted in Equal Protection. The Court specifically held that marriage cannot be denied to anyone on the basis of race. The Court also found that the purpose of the law was to discriminate, and thus, animus alone could not support the strictest possible scrutiny. So although the substance of the right to marry, and all of what that entails, had nebulous boundaries in the constitutional rhetoric, the Equal Protection Clause was used to protect that interest when denied to suspect classes. The substance of the right to marry and what it encompasses, however, becomes more important over time because, as scholars point out,¹⁸⁰ the Court’s abandonment of any salient Equal Protection analysis in recent gay rights cases leaves the lower courts clinging to the substantive Due Process analysis taken from these cases and the extension of the “liberty” interest to ground their decisions.

B. *The End of Morals-Based Legislation*

The *Loving* decision ignited another small departure from *Reynolds*—the use of public morality and sheer animus to justify unequal treatment.¹⁸¹ The Court’s famous 2003 case, *Lawrence v. Texas*, solidified that shift away from morality, at least in theory.¹⁸² In *Lawrence*, the Court declared Texas laws criminalizing gay sodomy unconstitutional.¹⁸³ The *Lawrence* decision overruled a previous decision by the Court, *Bowers v. Hardwick*, which upheld the criminalization of both homosexual and heterosexual sodomy.¹⁸⁴ In *Lawrence*, the Court reasoned: “[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a suffi-

¹⁷⁷ See *Zablocki v. Redhail*, 434 U.S. 374 (1978).

¹⁷⁸ *Id.* at 374.

¹⁷⁹ Nedrow, *supra* note 125, at 328–29.

¹⁸⁰ See Eric Berger, *Lawrence’s Stealth Constitutionalism and Same-Sex Marriage Litigation*, 21 WM. & MARY BILL RTS. J. 765, 778 (2013); Lamparello, *supra* note 143, at 30; Araiza, *supra* note 17, at 385.

¹⁸¹ *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (white supremacy insufficient reason to support bans on interracial marriage).

¹⁸² 539 U.S. 558 (2003).

¹⁸³ *Id.* at 578.

¹⁸⁴ See *Bowers v. Hardwick*, 478 U.S. 186, 189 (1986).

cient reason for upholding a law prohibiting the practice.”¹⁸⁵ *Lawrence* shows the Court moving away from traditional notions of marital make-up as a basis for the States’ criminalizing homosexual activity.¹⁸⁶

Not only did the majority opinion read a much more expanded view of the Constitution than its plain language would suggest in order to move away from the traditional vision of morality and relationships, but it also recognized the force that the popular majority has in America: “The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law.”¹⁸⁷ The Court found that its “obligation is to define the liberty of all, not to mandate its own moral code.”¹⁸⁸ As such, both the Court and constitutional commentators found *Lawrence* to herald the death of legislation restricting liberties solely based on a majoritarian perception of morality. The holding and language of *Lawrence* also do much in overruling the negative implications of *Reynolds* on marriage and alternative lifestyles in the constitutional jurisprudence.

Much has been written of Justice Scalia’s dissent from the decision, naming him either a “punchline” or a “prophet” in the marriage and morality arena.¹⁸⁹ Justice Scalia’s dissent argued that the *Lawrence* decision left all morals-based legislation subject to judicial attack. With respect to this “slippery slope” argument, Scalia continued: “State laws against bigamy . . . [are] called into question by today’s decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding.”¹⁹⁰ Thus, Justice Scalia’s slippery slope argument has been invoked to continue using moral judgment in order to protect against harms society perceives as even more immoral than homosexual sexual behavior. This approach plays a large role in the current debate over using same-sex marriage cases to support expanded protection for polygamists.

C. Expanding the Due Process Clause

The Court stated in *Lawrence* that the Due Process Clause endows people with the constitutional right to define for themselves their “own concept of existence, of meaning, of the universe, and of the mystery of human life.”¹⁹¹ Under this concept of autonomy, the *Lawrence* decision expanded

¹⁸⁵ *Lawrence*, 539 U.S. at 577 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).

¹⁸⁶ “Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.” *Id.* at 578–79.

¹⁸⁷ *Id.* at 571.

¹⁸⁸ *Id.* at 559 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 850 (1992)).

¹⁸⁹ See Bozzuti, *supra* note 41.

¹⁹⁰ *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting).

¹⁹¹ *Id.* at 574 (quoting *Planned Parenthood*, 505 U.S. at 851).

upon the scope of Due Process to include sexual conduct beyond the marital relationship, allowing the *individual*, married or single, to be free from unwarranted governmental intrusions. Thus, the government may not intrude into sexual freedom and autonomy “absent injury to a person or abuse of an institution the law protects.”¹⁹² Many polygamy advocates use the nebulous prose, such as the now-infamous “mystery of life” rationale, as support for polygamists to define their own concept of existence.

Another effect of *Lawrence* was that the Court subjected the Due Process Clause to not just the confines of Western and Christian history, but opened the analysis up to more international interpretations. Some scholars have argued that *Lawrence* expands the Due Process Clause by “suggest[ing] that the meaning of the Clause may be heavily influenced by the legal traditions of other nations.”¹⁹³ The Court cited the European Court of Human Rights to refute the claim in *Bowers v. Hardwick* that laws regulating homosexual sex are universal.¹⁹⁴ It also cited a brief submitted by Mary Robinson, who served as UN High Commissioner for Human Rights, for the proposition that “[o]ther nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct.”¹⁹⁵ Although this approach has been criticized by some legal scholars as improper use of foreign law,¹⁹⁶ this approach embraces a more multi-cultural, global understanding of human rights removed from the confines of Western morality and tradition. Related to the concept of international interpretations was *Lawrence*’s mandate that the moral code of the majority cannot dictate the private practices of the minority.¹⁹⁷

D. Using *Lawrence* in the Polygamy Debate

Since *Lawrence*, polygamy proponents have seized upon its expanded conception of fundamental liberty and privacy rights to argue that polyga-

¹⁹² *Id.* at 567.

¹⁹³ *What is Needed to Defend the Bipartisan Defense of Marriage Act of 1996? Hearing before the Subcomm. on the Constitution, Civil Rights and Property Rights of the S. Comm. on the Judiciary*, Sept. 4, 2003, available at <http://perma.cc/4KD6-FB4R> (statement of Richard G. Wilkins, Professor of Law, Brigham Young University).

¹⁹⁴ See *Lawrence*, 539 U.S. at 560.

¹⁹⁵ *Id.* at 576.

¹⁹⁶ See Buck, *supra* note 28, at 984. But see RICHARD A. POSNER, *SEX AND REASON* 69 (1992) (“Polygamy, in the form of polygyny, or plural wives . . . is so common in non-Western societies that it can fairly be regarded as the norm.”).

¹⁹⁷ Some retort that even removing “Christian” morality from the analysis and looking strictly to the history of Western legal tradition, monogamy was the marriage culture during the height of the Roman Empire, even before the advent of Christianity in the West. Buck, *supra* note 28, at 986. Even earlier, Plato emphasized the need for dyadic marriage as a way for humans to “draw[] the two halves of [their] original nature back together and tr[]y to make one out of two and to heal the wound in human nature,” recognizing monogamy as “foundational to any republic.” PLATO, SYMPOSIUM 191d 24 (Christopher Gill trans., Penguin Books 1999) (c. 385-380 B.C.E.); see also PLATO, LAWS 6.773b, in *THE COLLECTED DIALOGUES OF PLATO* 1350 (Edith Hamilton & Huntington Cairns eds., Lane Cooper et al. trans., Princeton Univ. Press 1989) (c. 355-347 B.C.E.).

mous behavior should also be decriminalized.¹⁹⁸ Because the language of *Lawrence* focused on private sexual activity of consenting adults, instead of on Equal Protection based on discrimination against homosexuals as a class, some argue that *Lawrence*'s broad brush stroke as to what expanded liberty means in this sexual privacy arena could also include the private relationships of consenting polygamous adults.¹⁹⁹ Just because the majority may disparage the practice, they argue, liberty requires that polygamists be allowed to engage in their private sexual and intimate lives without fear of prosecution or stigma. This analogy is not without controversy. Many scholars, including proponents of equal rights for same-sex couples, in fact oppose the argument that the legalization of same-sex marriage will lead to the legalization of polygamy. Much has been written on this issue²⁰⁰ and, instead of rehashing that extensive body of argument, I offer a few additional thoughts on the analogy, ultimately finding that the "right" as defined by *Lawrence* would not support an application to polygamous families.

The fact that the Court did not perform any "class" analysis in *Lawrence* was better for polygamists because the structural and substantive differences between same-sex and polygamous relationships are rife. Despite the potentially similar liberty interests, one scholar argues that the analogy fails because polygamy and same-sex marriage are different in content and structure. Same-sex marriage is still "traditional," two-person marriage, whereas polygamy contemplates more than two, affecting all current laws based off of a two-person marriage model.²⁰¹ Another argument is that polygamy, unlike same-sex marriage, has multiple entrances and exits, and opposed to one beginning and an end by either death or divorce. A substantive distinction often made is that marriage is a reflection of a person's desire to be legally connected to the person/sex to whom they are sexually and personally attracted. Thus, same-sex marriage stems out of one's natural sexual orientation, while polygamy does not implicate an alternative and unchangeable sexual orientation. This distinction is a distinction without meaning, however, as sexual preference is not the only motivation driving marriage. People marry for a multitude of reasons, sexual attraction only being one of them, or for some, not at all. Further, polygamists and polyamorists are also sexually attracted, in differing degrees, to their partners.

From a legal and political standpoint, same-sex marriage proponents, for the most part, distance themselves as far as possible from the polygamy debate. The reason for this, however, is unnecessarily reactionary. As Justice Scalia's opinion in *Lawrence* indicates, same-sex marriage opponents use the "slippery slope" argument in an attempt to deny homosexuals legal rights: recognizing same-sex marriages could lead to the repeal of laws against

¹⁹⁸ Gillet, *supra* note 77, at 530–31; Shayna M. Sigman, *Everything Lawyers Know About Polygamy Is Wrong*, 16 CORNELL J.L. & PUB. POL'Y 101, 102 (2006). *But see* Strassberg, *Crime of Polygamy*, *supra* note 30, at 363–67.

¹⁹⁹ *See, e.g.*, *supra* note 41.

²⁰⁰ *See supra* notes 41, 42.

²⁰¹ Davis, *supra* note 23, at 1990.

“bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity.”²⁰² In response, same-sex marriage advocates try to distance themselves and their lifestyles from polygamy and other alternative marriage forms, instead of addressing the incredulity of such a slippery slope argument at its face. Of course, same-sex marriage will not lead to bestiality or pedophilia—a child cannot consent; an animal cannot consent. Where the “consent” distinction runs into contact with the “public policy” role of regulation concerns incest. In a recent case from Germany, the European High Court affirmed the conviction of a German man charged with incest after marrying and having four children with his biological sister.²⁰³ Other public policies might mandate some restrictions on marriages between consenting close relatives. States differ on this issue already: some allow marriage between first cousins, while the general trend is to limit it to between second cousins. Incest implicates a different set of policy issues. However, adults should be able to allocate to their siblings certain rights generally given to spouses, such as the ability to make health care decisions or be named conservator or trustee of a spouse’s property.

Similarities exist, however, between the legal and cultural treatment of polygamy and same-sex marriage. Historically, both criminal and civil laws imposed restrictions on both homosexuality and polygamy.²⁰⁴ Although the political impetus and the religious nature behind polygamy differentiate it from homosexuals and same-sex marriage, as a group, again their paths are parallel. The law criminalized their “deviate sexual intercourse.”²⁰⁵ Both groups are forced to live in the proverbial “closet” for fear of criminal prosecution and social stigma. With polygamists, as a group their legal treatment has pushed them to live in secretive communities or to hide their polygamous identities from mainstream society.²⁰⁶ Further, many of the social misperceptions and negative stereotypes which were used to discriminate against gays have also been used against polygamists: that they are pedophiles, sexually deviant, and abusive and immoral.²⁰⁷ Opponents to both groups use such unfounded rhetoric to justify unequal treatment.

Public perceptions of both activities have slowly changed the larger public perceptions about homosexual behavior and polygamy stemming from those pernicious personifications. Badly handled police raids and dubious governmental activity, illuminated by the media, have aided in the turn-

²⁰² See *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting).

²⁰³ CNN Wire Staff, *German Incest Couple Lose European Court Case*, CNN.COM (Apr. 13, 2012), <http://perma.cc/8UZU-XKT5>.

²⁰⁴ See *Lawrence*, 539 U.S. at 558 (invalidating Texas statute criminalizing homosexual sodomy); *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1170 (D. Utah 2013) (invalidating Utah statute criminalizing “religious cohabitation”).

²⁰⁵ *Lawrence*, 539 U.S. at 563.

²⁰⁶ See *supra* Part II.

²⁰⁷ See *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting); Ertman, *supra* note 86, at 312–23.

ing of public sentiments toward community acceptance.²⁰⁸ Isn't this community acceptance part of the liberty interest at stake for both same-sex marriage and polygamists?²⁰⁹ Although differences exist between polygamy and same-sex marriage, the history of legal and public perceptions of both practices run parallel, and in that regard increased public and media exposure has benefitted both groups.

The *Lawrence* Court, however, did not give subsequent cases the opportunity to make those distinctions and comparisons for purposes of defining a class. The language used was, instead, grounded in this concept of liberty wrapped up in substantive Due Process. Scholars critique the prosaic nature of Justice Kennedy's opinions in both *Lawrence* and later *Windsor* as not providing a textual basis to support recognizing *rights* for homosexuals as a protected class.²¹⁰ It is hard to say, then, what the decision even really meant for homosexuals, much less for future constitutional analysis and application to polygamists. Unless scholars use Justice Kennedy's broadly defined liberty interest in a results-oriented manner, as some scholars say that Kennedy, himself, admits to doing,²¹¹ judicial restraint would mandate that the liberty interest protection in *Lawrence* cannot then extend to polygamous relationships. The liberty interest was still confined to intimate relationships based on a two-person model. The liberty interest, however, as later expanded upon in *Windsor*, does open the door to an application of the right to same-sex marriage to a right to polygamous marriages.

IV. A WIN FOR THE "SISTER WIVES": *BROWN v. BUHMAN*

The judicial prudence of using *Lawrence* to support rights for polygamous families is again ripe for discussion. On September 26, 2010, a reality TV show called "Sister Wives" starring a polygamous family living in Utah, headed by Kody Brown and his wives Meri Brown, Janelle Brown, Christine Brown, and later Robyn Sullivan Brown, aired on TLC.²¹² Some believed that the Browns would be opening themselves up to criminal prosecution because in Utah, as with all other states in the U.S., polygamy is a crime.²¹³ Kody claimed that he was breaking no laws because he was only legally married to one of his wives—in this case, Meri.²¹⁴ However, Utah's bigamy statute allows a court to find a polygamous marriage based upon informal cohabitation akin to common-law marriage, which requires no legal registra-

²⁰⁸ See, e.g., *Photos from a Notorious 1953 Raid on a Polygamist Arizona Town*, LIFE MAGAZINE, available at <http://perma.cc/5P88-WMJF>; Gary Kamiya, *1961 police raid pivotal for gay rights in S.F.*, SFGATE.COM (Jun. 21, 2013), <http://perma.cc/53JQ-SEPC>.

²⁰⁹ See *infra* Part VI.

²¹⁰ See Lamparello, *supra* note 143, at 30; Berger, *supra* note 178, at 789–806.

²¹¹ See Lamparello, *supra* note 143, at 33–34.

²¹² See *Sister Wives* (TLC television broadcast 2010) (depicting the relationships between Kody Brown and his four wives, only one of whom has legal status as his wife).

²¹³ *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1178–79 (D. Utah 2013).

²¹⁴ *Id.*

tion for its recognition: “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*.”²¹⁵ Thus, under Utah’s bigamy statute, a married person who merely cohabits with another person is guilty of bigamy.

Despite the risks, the Browns proceeded with the show. Findings of fact indicate that state officials acknowledged that the show triggered an investigation of the family.²¹⁶ The Browns, in turn, sought a declaratory summary judgment that the Utah Anti-Bigamy statute was unconstitutional.²¹⁷ The Utah District Court, in a 91-page Memorandum Decision, granted the Browns’ motion for summary judgment providing an introduction chronicling the historical persecution and racialized perceptions of polygamy in the United States.²¹⁸ What the opinion reveals is a court astutely aware of the magnitude of its decision, keen to hedge its bets, and eager to address the merits of the constitutional challenges. The following subsections present and analyze the court’s reasoning under the Fourteenth and First Amendments.

A. *Substantive Due Process Under the Fourteenth Amendment: Heightened Scrutiny*

The first step in the court’s analysis was to determine whether or not restrictions on polygamy would receive heightened scrutiny under substantive Due Process. Under the substantive Due Process implicit in the Fourteenth Amendment, the government cannot infringe on certain fundamental liberty interests unless the infringement is narrowly tailored to serve a compelling state interest.²¹⁹ This type of heightened scrutiny only applies when “fundamental rights” are at issue under Due Process. To establish the existence of a fundamental right, the right must be “deeply rooted in this Nation’s history and tradition and implicit in the concept of ordered liberty,” with a “careful description of the asserted fundamental liberty interest.”²²⁰

The court took the second prong first—what exactly is the liberty interest at stake? Is it the right to marry more than one person at a time? Or is it more nuanced than that: the right to live with different persons at the same time in a sexual relationship without fear of prosecution? The court made a significant distinction at this point in the opinion between what it terms “po-

²¹⁵ UTAH CODE ANN. § 76-7-101(1) (West 1997) (emphasis added).

²¹⁶ *Brown*, 947 F. Supp. 2d at 1179.

²¹⁷ The complaint alleged seven constitutional claims: Due Process, Equal Protection, Free Speech, Free Association, Free Exercise, the establishment of religion, and a claim under 42 U.S.C. § 1983 (2012). Under 42 U.S.C. § 1983, the Plaintiff alleged that the Defendant violated the statute by denying rights secured by the Fourteenth Amendment. *Id.* at 1176.

²¹⁸ *Id.* at 1180–90.

²¹⁹ *Id.* at 1196–97.

²²⁰ *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

lygamy” and “religious cohabitation.”²²¹ The former involves the attempt to legally marry or purport to marry one spouse while still married to another; the latter being the right at issue in the present case—occurring when “[t]hose who choose to live together without getting married enter into a personal relationship that resembles marriage in its intimacy but claims no legal sanction.”²²² But then the court held that such “religious cohabitation” failed to qualify as a fundamental right or fundamental liberty interest that would trigger heightened scrutiny.

The court contemplated using *Lawrence* in order to employ strict scrutiny, as advanced by the Browns through their attorney, constitutional scholar Jonathan Turley, but ultimately rejected this approach.²²³ The court acknowledged that “no one disputes a right to be free from government interference in matters of consensual sexual privacy,”²²⁴ but ultimately rejected the Browns’ claim that a fundamental right to engage in private consensual sexual conduct existed. Thus, the court rejected the use of strict scrutiny to the Browns’ substantive Due Process claim.

B. Free Exercise Grounds: Strict Scrutiny

Moving on from the substantive Due Process claim, the court then addressed the plaintiff’s Free Exercise claim. Ultimately on this issue, the court held that the Anti-Bigamy Statute was not operationally neutral because of its targeted effect on specifically “religious cohabitation.” The statute thus failed under a strict scrutiny application of the Free Exercise Clause. A statute that is general in name but specifically targeted at a religious group for purposes of enforcement or prosecution must meet a strict scrutiny standard, and the government must identify a compelling interest to survive constitutional muster.²²⁵ The court chronicled the history of the anti-polygamy legislation in the United States, much in the same vein as previous scholars, who point out the blatantly religious and political motivations behind the ban on polygamy.²²⁶

The court looked first to “polygamy” and concluded that *Reynolds* still controls the analysis of “straightforward polygamy or bigamy in which there is a claim to multiple simultaneous legal marriages.”²²⁷ As a generally applicable law, the ban against simultaneous legal marriages was not required to pass muster under strict scrutiny under the First Amendment. Although not the locus of the court’s decision, its use of *Reynolds* as precedent in this context is questionable. The defendant in *Reynolds* did not attempt two legal

²²¹ *Brown*, 947 F. Supp. 2d at 1197–98.

²²² *Id.* at 1197.

²²³ *Id.* at 1190.

²²⁴ *Id.* at 1223–25.

²²⁵ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993).

²²⁶ *Brown*, 947 F. Supp. 2d at 1180–90.

²²⁷ *Id.* at 1203.

marriages at once, but rather was convicted of engaging in the same conduct as “religious cohabitation” at question in the *Brown* case. As such, the *Brown* case does not hold that *Lawrence* overruled *Reynolds*. What the court more particularly meant to hold was that the neutral anti-polygamy civil laws remain unaffected, but that the criminal laws banning informal polygamy, just as in *Reynolds*, are unconstitutional.

With respect to the “religious cohabitation” prong of the prohibition, the court did apply a strict level of review. The court found that although the cohabitation prong of the statute was facially neutral, it was not operationally neutral and was targeted as applied specifically at religious cohabitation or religious plural unions.²²⁸ Only religious cohabitation was prohibited; “virtually any other cohabitation is ‘unpunished.’”²²⁹ Mere cohabitation, adultery, and fornication prosecutions are rare, occurring next to never, and that adultery in which one person is married to another but lives with his or her mistress or lover is not prosecuted under the bigamy or other statutes.²³⁰ The opinion is apt to point out that the State itself indicates that it does not prosecute those engaged in polygamy under the criminal statutes unless the person has entered into a religious union with a girl under eighteen.²³¹ The court took great pains to detail from the record the religious motivations behind the types of polygamy that may incite prosecution.²³²

Because of the operationally biased application of “religious cohabitation” prosecutions, the court found that any curtailment of the religious practice must be narrowly tailored to support a compelling government interest.²³³ In proceeding with this analysis, the court had to first identify the compelling state interest: the state’s interest in regulating marriage, based upon laws premised on monogamy (the Tenth Circuit in *Potter* found this to be a compelling interest).²³⁴ The ambiguity created by the cohabitation prohibition alone, however, demonstrated sufficiently to the court that the statute was not narrowly tailored to support monogamy.²³⁵ Religious cohabitation, the court opined, cannot “plausibly be said to threaten marriage as a social or legal institution.”²³⁶ Criminal sanctions are unnecessary to further the state’s interest in that regard. The state failed to adequately explain “how the institution of marriage is abused or state support for monogamy threatened simply by an individual’s choice to participate in a religious ritual with more than one person outside the confines of legal marriage.”²³⁷ The court went so far as to point out the irony in the defendant’s position, as the statute penalizes people for making a “firm marriage-like commitment to each other,

²²⁸ *Id.* at 1209–10.

²²⁹ *Id.* at 1210.

²³⁰ *Id.* at 1210–15.

²³¹ *Id.* at 1211.

²³² *Id.*

²³³ *Id.* at 1203.

²³⁴ *Id.* at 1217–18.

²³⁵ *Id.*

²³⁶ *Id.* at 1218.

²³⁷ *Id.*

even though they know that their religious cohabitation does not result in state-sanctioned or recognized marriages.”²³⁸ As the Browns pointed out, the state’s position “would suggest that Kody Brown would have avoided any criminal exposure if he had simply maintained relations with multiple women, had children by them, but never expressed a belief in being spiritually bonded to them.”²³⁹

The court continued: “Encouraging adulterous cohabitation over religious cohabitation that resembles marriage in all but State recognition seems counterproductive to the goal of strengthening or protecting the institution of marriage.”²⁴⁰ Thus, although the court accepted the government’s compelling interest of protecting monogamous marriage, prohibiting “religious cohabitation” was an over-broad restriction.²⁴¹ Because of the failure of the statute to adhere to the mandates of strict scrutiny under Free Exercise jurisprudence, the court struck down the cohabitation prong of Utah’s anti-polygamy statute. The court noted that with the cohabitation prong stricken, religious polygamists will have “less of a need to be underground and the State can more directly prosecute the independent crimes that are sometimes alleged to be rampant in those communities.”²⁴²

C. Hybrid Rights Grounds

The court did not stop there, continuing through its analysis in order to cover all potential grounds for challenge and to ensure that the cohabitation prong would not stand on any basis. The court used the hybrid rights analysis set out in *Employment Division v. Smith*, where a Free Exercise claim coupled with a “colorable showing” of infringement of another recognized and constitutional right will subject the restriction to heightened scrutiny.²⁴³ Without much analysis, the court found that each of the Browns’ “companion constitutional claims—the Freedom of Association claim, the Substantive Due Process Claim, the Equal Protection Claim, the Free Speech Claim, or the Establishment Clause claim, . . .—makes a ‘colorable showing’ of a constitutional violation, thus requiring heightened scrutiny . . .”²⁴⁴ As such,

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.* at 1219.

²⁴¹ Another interest posited by the state but dismissed by the court was the prevention of fraud and the misuse of government benefits. Without claiming legal status to marriage, the court reasoned, “[I]t is difficult to understand how those in polygamous relationships who are ineligible to receive legal sanction are committing welfare abuse when they seek benefits available to unmarried persons.” *Id.* at 1224–25. The third “compelling interest” presented to the court focused on protecting vulnerable women and children from exploitation and abuse. The court noted that the state presented no evidence of a causal relationship between the act of polygamy and the offenses of “incest, sexual assault, statutory rape, and failure to pay child support.” *Id.* at 1220. The court was unaware of any instance where the state was forced to bring a bigamy claim in place of the more egregious enumerated charges. *Id.* at 1220 n.64.

²⁴² *Id.*

²⁴³ 494 U.S. 872 (1990).

²⁴⁴ *Brown*, 947 F. Supp. 2d at 1222.

the court struck down the cohabitation prong using the hybrid rights approach, in addition to finding no compelling interest. It is unfortunate, however, that the district court did not spend more time analyzing the hybrid rights theory, as it provides the strictest form of scrutiny and presents the strongest legal claim to decriminalize religious polygamy.²⁴⁵

D. Due Process Grounds

The final analysis performed by the court returned to the substantive Due Process rights asserted by the Browns. Noting that the “narrowest ground upon which this court can find for the plaintiff is under the Due Process Clause.”²⁴⁶ The court provided that, although strict scrutiny was unavailable for the fundamental rights question, the cohabitation prong of the statute was still unconstitutional under a mere rational basis review, relying on *Lawrence* to support that point. Finding the “consensual sexual privacy” of the Brown family members to be the “touchstone of rational basis review analysis in this case, as in *Lawrence*,” the court noted that while the protection of the monogamous legal family would be a legitimate governmental interest (indeed, it is still considered a compelling one), the court held that no rational basis exists for the state to limit religious cohabitation in furtherance of that end.²⁴⁷ It then struck down the cohabitation prong as a violation of Due Process under *Lawrence*.

E. Holding and Larger Implications

The court’s decision, as it now stands, struck down the cohabitation prong of the Utah anti-polygamy statute, although the remainder of the statute survives to prohibit and criminalize attempts to perfect two simultaneous legal marriages. The court’s use of *Lawrence* solidifies the parallels between homosexual intimacy cases and plural union cases in the legal rhetoric, and represents a great leap forward for polygamy advocates in pushing themselves more into the realm of a protected class/activity. Although the immediate effect is to decriminalize “religious cohabitation,” the type of non-legal “marital” relationship as between Kody Brown and his second, third, and fourth “wives,” the decision does not go far enough to protect the rights of subsequent wives, to decriminalize attempts to perfect more than one simultaneous marriage, or to change the legal definition of civil marriage to include non-monogamous and alternative marital relationships.

In terms of the use of precedent, the *Brown* court’s use of *Lawrence* to apply to “privacy intimacy” in polygamous relationships is profound. Although polygamy advocates have, since the *Lawrence* decision, argued that

²⁴⁵ For a discussion of the hybrid rights theory, see *infra* Part VI.A.

²⁴⁶ *Brown*, 947 F. Supp. 2d at 1222.

²⁴⁷ *Id.* at 1222–25.

its holding,²⁴⁸ no court has used *Lawrence* and applied it to polygamy until now. The decision at least solidifies that the comparison between same-sex marriage and polygamy is valid. By accepting the Browns' argument and basing its holding on the idea that the cohabitation prong fails a rational basis test under *Lawrence*, the *Brown* court has forced the Tenth Circuit to do an analysis of the parallel, accepting or rejecting it once and for all.²⁴⁹

Although the opinion does much to protect the religious liberty interests at stake in polygamy, it does little to address the civil ramifications. Granted, the court could only address the facts and arguments before it, but the more groundbreaking case would be one in which the parties attempt to register or officially add another spouse to their marriage.²⁵⁰ The Browns were fully open about the fact that, for 20 years, Kody was only legally married to his first wife, Meri. News reports are now surfacing that Kody and Meri divorced in 2014, and that Kody discreetly married his fourth wife, Robyn Sullivan Brown, last fall.²⁵¹ Although he still calls his other wives as such, he never purported or tried to be legally married to more than one at a time.²⁵² The court says that that type of behavior is acceptable and not subject to criminal prosecution. What this holding does is decriminalize polygamy, but then encourage those who practice to continue doing so unregulated and outside of the protection of the law, leaving the non-legal spouse prone to emotional jealousy mandated by the inability to legally recognize more wives than one. The decision only makes an accommodation for and encourages the lack of any legal recognition, regulation, or protection for those subsequent wives, perpetuating the inequality, social discrimination, and lower status experienced by subsequent wives.

If such "religious cohabitation" is allowed, should the law legally recognize his second, third, and fourth wives? In the case of the Brown family, consider the financial harms alone to the high-earner subsequent spouse, Janelle, who has multiple children by Kody and who makes large financial contributions to the family,²⁵³ but who would have no rights to any marital or community property for those contributions. Although the first wife's homemaker and managerial skills are extremely valuable in such a large plural family, many would find it unfair that she would be granted support and property entitlements if Kody were to divorce or die, whereas Janelle, Christine, and Robyn would have none of the constellations of rights that flow to Meri. Although all four spouses likely bring in financial revenue from their

²⁴⁸ See *supra* note 198.

²⁴⁹ *Brown*, 947 F. Supp. 2d at 1170, *appeal docketed*, No. 14-4117 (10th Cir. Sept. 25, 2014).

²⁵⁰ See generally *Bronson v. Swenson*, 500 F.3d 1099, 1103 (10th Cir. 2007) (plaintiffs sought multiple marriage licenses because they "subscribed to the religious doctrine of plural marriages").

²⁵¹ See *Pena*, *supra* note 3.

²⁵² *Brown*, 947 F. Supp. 2d at 1178.

²⁵³ 'Sister Wives' news: What is Janelle Brown doing for work?, EXAMINER.COM (Jan. 26, 2014), <http://perma.cc/2DS4-9TAF>.

TV show and appearances, subsequent wives in less notorious polygamous families who do not capitalize on their lifestyle in such a way may feel—and indeed are—slighted by the law, leaving the decision open to potential Equal Protection claims by such second, third, and fourth wives. The *Brown* decision does nothing to eradicate, but instead perpetuates, that inequality.

The last critique of the decision is that the parties and the court made very obvious that its reasoning did not attempt to change or even challenge the prohibition against simultaneous legal marriages, thus reinforcing the state's adherence to a monogamous ideal. In fact, the court accepted without much critique previous decisions by the Tenth Circuit holding that promoting and protecting "monogamous marriage" was a compelling state interest. Again, the case that truly challenges the systematic and legal reliance on dyadic monogamy will be one that attempts to change the legal definition of marriage to include more spouses than one.²⁵⁴ Such an attempt will herald a fundamental shift in adult intimate relationships in furtherance of putting alternative marital arrangements, including polygamy and polyamory, on the same legal and social playing field as two-person marriage.

V. MARRIAGE DIVERSITY AFTER *WINDSOR*

Where the *Brown* decision so tactfully fears to tread, the recent blockbuster U.S. Supreme Court case *United States v. Windsor* could be used to support arguments for the legal recognition of polygamous marriages.²⁵⁵ The language of the opinion provides a particularly expansive framework to insert polygamous relationships into the majority's privacy basis for striking down the federal definition in the Defense of Marriage Act ("DOMA"), which defined marriage as being between one man and one woman.²⁵⁶ This section will briefly discuss the *Windsor* decision, its holding and immediate aftermath, and will then analyze three scholarly critiques of the decision and how the aftermath of *Windsor* can be used to support arguments for polygamous marriage. In fact, the case for constitutional recognition of religious polygamy is even stronger than homosexual marriage because of the added element of the First Amendment implications.

²⁵⁴ See, e.g., *Bronson*, 500 F. 3d at 109 (plaintiffs attempted to apply for multiple marriage licenses based on their belief in plural marriage).

²⁵⁵ 133 S. Ct. 2675, 2707 (2013).

²⁵⁶ Section 3 of the Defense of Marriage Act ("DOMA") 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." 1 U.S.C. § 7 (2012), *invalidated by Windsor*, 133 S. Ct. 2675 (2013). This definition, restricting marriage between one man and one woman, also prohibits polygynous marriages, which contemplate more than one woman.

A. *The Language of Windsor*

In 1963, Edith Windsor and Thea Spyer began a long term relationship after meeting in New York City.²⁵⁷ In 1993, the women registered as domestic partners as soon as New York made that option available for same-sex couples.²⁵⁸ In 2007, in light of Spyer's failing health, they traveled to Ontario, Canada, where they were married.²⁵⁹ They returned to New York City, which deemed their marriage valid, where Spyer later died in 2009.²⁶⁰ Spyer left her entire estate to Windsor, her spouse, who then filed for the federal tax exemption in inheritance taxes as Spyer's surviving spouse after paying \$363,053 in estate taxes.²⁶¹ The Internal Revenue Service denied the refund, claiming that Windsor was not a "surviving spouse" under DOMA's definition of the term.²⁶²

On appeal to the Supreme Court, Justice Kennedy delivered the majority opinion. Although the first half of the opinion was dedicated to the Court's finding of jurisdiction under Article III's requirement of a "case or controversy,"²⁶³ the profoundness of the Court's decision is its ultimate holding that DOMA's definition of marriage as applied by the federal government to state-sanctioned same-sex marriages was an unconstitutional deprivation of liberty under the Fifth Amendment and violated Equal Protection and Due Process.²⁶⁴ The Court arrived at this finding based on two precepts: federalism concepts and Equal Protection/Due Process analysis.

On the basis of federalism concepts, the Court first discussed the history of the authority to regulate marriage, finding that the "regulation of domestic relations" is "an area that has long been regarded as a virtually exclusive province of the States."²⁶⁵ "[A]t the time of the adoption of the Constitution, [the states] possessed full power over the subject of marriage and divorce [and] the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce."²⁶⁶ Although the Court acknowledged that in certain instances the arm of the federal government would reach into the marriage arena to regulate recognition for distinct federal purposes, such as immigration and federal life insurance,²⁶⁷ DOMA had "a far greater reach; for it enacts a directive applicable to over 1,000 federal statutes and the whole realm of federal regulations.

²⁵⁷ *Windsor*, 133 S. Ct. at 2682–83.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 2683.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.* at 2684–88.

²⁶⁴ *Id.* at 2693–96.

²⁶⁵ *Id.* at 2691 (citing *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)).

²⁶⁶ *Id.* (citations omitted).

²⁶⁷ *Id.* at 1290.

And its operation is directed to a class of persons that the laws of New York, and of 11 other States, have sought to protect.”²⁶⁸

After providing this lesson in federalism, however, the Court inquired into whether the resulting injury and indignity to same-sex couples “is a deprivation of an essential part of the liberty protected by the Fifth Amendment,”²⁶⁹ which guarantees that no person “be deprived of life, liberty, or property without due process of law[.]”²⁷⁰ The Court then went back to the fundamental and sacred nature of the intimate adult relationship, citing *Lawrence*.²⁷¹ Thus, although this aspect of the Court’s opinion started off as an exercise in federalism principles, it ended up validating New York’s expanded recognition of the value of intimate same-sex relationships as being constitutionally protected.

The Court’s second justification is that DOMA’s definition of marriage and its different treatment of similarly situated married persons under New York law “violates basic due process and equal protection principles applicable to the Federal Government.”²⁷² This is because disparate treatment requires some other basis, which “‘must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot’ justify disparate treatment of that group.”²⁷³ The Court did not need to look further than DOMA’s legislative history to find this “desire to harm.” Indeed, the court found that the discriminatory intent was the “essence” of DOMA.²⁷⁴ Because the principle effect of DOMA was to “identify a subset of state-sanctioned marriages and make them unequal, . . . [t]he principal purpose is to impose inequality, not for other reasons like governmental efficiency.”²⁷⁵ As such, DOMA’s differentiation “demeans the couple, whose moral and sexual choices the Constitution protects.”²⁷⁶ The Court then struck down DOMA’s definition of “marriage” as an unconstitutional deprivation of liberty protected by the Fifth Amendment, as made “more specific and all the better understood and preserved” by the Equal Protection guarantee of the Fourteenth Amendment.²⁷⁷

²⁶⁸ *Id.* (citations omitted).

²⁶⁹ *Id.* at 2681.

²⁷⁰ U.S. CONST. amend. V.

²⁷¹ *Windsor*, 133 S. Ct. at 2692–93 (“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.’ *Lawrence v. Texas*, 539 U.S. 558, 567 (2003). . . . This status is a far-reaching legal acknowledgement 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.”).

²⁷² *Id.* at 2693 (citing U.S. CONST. amend. V; *Bolling v. Sharpe*, 347 U.S. 497 (1954)).

²⁷³ *Id.* (citing *Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534–35 (1973)).

²⁷⁴ *Id.* at 2681.

²⁷⁵ *Id.* at 2694.

²⁷⁶ *Id.* (citing *Lawrence v. Texas*, 539 U.S. 558 (2003)).

²⁷⁷ *Id.* at 2695.

B. *Legal Aftermath of Windsor*

Although the Court restricted its holding to those same-sex marriages lawfully recognized by states at the time, the broad language that the Court used to expand the liberty interest at stake opened the door to expanded application to same-sex couples, even in states that did not recognize them.²⁷⁸ Indeed, Justice Scalia's dissent points out the ease with which the majority opinion can be altered to apply, not only to the federal government, but also to the states themselves.²⁷⁹ One of Justice Scalia's fears, among others, with the Court's opinion is that it is too broad in its expanded conception of liberty and the fundamental right to marriage and family,²⁸⁰ a recurring critique of opinions written by Justice Kennedy.²⁸¹ By replacing certain words in the Court's majority opinion, Justice Scalia points out the ease with which the holding in *Windsor* could be made applicable to all states that choose to discriminate against same-sex couples wishing to marry. To his likely dismay, he was correct. It is almost shocking the rapidity with which state and federal courts struck down state restrictions against same-sex marriage following the 2013 *Windsor* opinion. The Court's decision in *Obergefell* now compels that result in all 50 states and the District of Columbia.²⁸²

C. *Scholarly Reactions to Windsor*

The groundbreaking decision in *Windsor* also resulted in an avalanche of scholarly reaction and criticism,²⁸³ some hailing the decision as the final piece in the "Kennedy Triumvirate" of *Romer v. Evans*,²⁸⁴ *Lawrence*, and *Windsor*,²⁸⁵ which effectively eradicates the legitimization of discrimination against homosexuals after *Romer*. The decision, while a grand leap forward with respect to same-sex marriage rights, does not do enough to change the structural and systematic nature of marriage. Some scholars argue that the administrative burdens resulting from the legalizing same-sex marriages are slight: changing terms in legislation to be gender neutral, or to replace "hus-

²⁷⁸ See *Obergefell v. Hodges*, 576 U.S. __ (2015).

²⁷⁹ *Windsor*, 133 S. Ct. at 2709–11 (Scalia, J., dissenting).

²⁸⁰ *Id.*

²⁸¹ See Lamparello, *supra* note 143, at 27.

²⁸² *Obergefell*, 576 U.S. at __.

²⁸³ See, e.g., Lamparello, *supra* note 143; Berger, *supra* note 180; Araiza, *supra* note 17; William Baude, *Interstate Recognition of Same-Sex Marriage after Windsor*, 8 N.Y.U. J.L. & LIBERTY 150 (2013); Anna Stolley Persky, *The State of Same-Sex Marriage after Windsor*, 28 WASH. LAW. 25 (2014); Scott Titshaw, *Revisiting the Meaning of Marriage: Immigration for Same-Sex Spouses in a Post-Windsor World*, 66 VAND. L. REV. EN BANC 167 (2013); John R. Dorocak, *Is the Constitution Only Libertarian and Not Socially Conservative—U.S. v. Windsor and the Unconstitutionality of DOMA's Definition of Marriage to Exclude Same-Sex Couples—Requiem for a Heavyweight*, 24 GEO. MASON U. C.R. L.J. 263 (2014); Mark Strasser, *What's Next after Windsor*, 6 ELON L. REV. 387 (2014).

²⁸⁴ 517 U.S. 620 (1996).

²⁸⁵ See Nathan Goetting, *Gay Marriage Is a Fundamental Right*, 70 NAT'L LAW. GUILD REV. 137, 138 (2013).

band” or “wife” with the term “spouse.”²⁸⁶ In that regard, *Windsor* does not represent the sort of wholesale shift in how intimate adult relationships are recognized under the law. This subsection takes some of the reactionary scholarship and judicial decisions after *Windsor* and uses those critiques to determine how a court might decide the polygamy issue.

One of the more implicit critiques of *Windsor* is its effect on non-marital families, which could include “religious cohabitation” like the Brown family. One scholar has recently critiqued *Windsor* as being a loss from the perspective of recognition of non-marital families.²⁸⁷ The critiques rest on *Windsor*’s effect on gay and lesbian couples, and their families, living in any of the other states that have not chosen to “dignify” their relationships.²⁸⁸ In light of larger trends in cohabitation among all types of couples, fears exist that the stance taken in *Windsor* favoring marriage could lead to Equal Protection claims of non-marital couples. Such an argument could again be used to protect religious polygamists in any efforts for legal recognition of their families.

Another critique of *Windsor*, albeit of recent Equal Protection and substantive Due Process cases coming out of the Supreme Court more generally, is that the Court did not expressly define whether or not sexual orientation is a suspect class or whether sexual intimacy after *Lawrence* is a fundamental right.²⁸⁹ The Court has not done a suspect class analysis for purposes of Equal Protection since the Civil Rights Era, and many argue that they are unlikely to classify any new suspect classes or to even do such an analysis.²⁹⁰ The Court, in fact, explicitly refused to do a suspect class analysis with respect to sexual orientation in *Bowers*, despite *Bowers* being overruled by *Lawrence* and *Windsor*.²⁹¹ Recent courts have implied this scrutiny level from *Windsor* in crafting their own opinions. Others argue that same-sex marriage advocates need a judicial decree that sexual orientation is such a suspect class and a Supreme Court decision that implies “intimate pluralism” is the only view of human sexuality that passes constitutional muster.²⁹² “Intimate pluralism” would not only validate alternative marital structures, but informal cohabitation relationships as well, as being on equal par with traditional monogamous marriage.

²⁸⁶ See, e.g., Davis, *supra* note 23, at 1989.

²⁸⁷ See generally Erez Aloni, *Deprivative Recognition*, 61 UCLA L. REV. 1279 (2014).

²⁸⁸ See *Windsor*, 133 S. Ct. at 2692.

²⁸⁹ See Lamparello, *supra* note 143, at 30; Araiza, *supra* note 17, at 391.

²⁹⁰ Araiza, *supra* note 17, at 385; Lamparello, *supra* note 143, at 30.

²⁹¹ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

²⁹² Courts striking down definitions of marriage and re-writing them to pass constitutional muster, some argue, results in state and federal courts “overstepping their ‘properly limited role[s] in the constitutional structure.’” Myers, *supra* note 41, at 1457 (quoting Cass R. Sunstein, *Liberty After Lawrence*, 65 OHIO ST. L.J. 1059, 1075–76 (2004)). See also Kevin J. Worthen, *Who Decides and What Difference Does It Make?: Defining Marriage in “Our Democratic, Federal Republic,”* 18 BYU J. PUB. L. 273, 302–05 (2004) (arguing that a state statute or state constitutional amendment, instead of a state judicial decision or federal statute, amendment, or judicial decision, is the correct arena to define marriage).

Many argue, however, that the Court is unlikely to make a suspect class analysis or to analyze restrictions against unpopular groups using any sort of scrutiny standard at all. Although some courts following *Windsor* have used *Windsor*'s implications to use strict scrutiny when analyzing their own state statutes, others argue that this approach is improper, considering how the Court in *Windsor* used "bare congressional" animus to ground its overturning DOMA. Professor Bill Araiza recently argued, among many others,²⁹³ that *Windsor* marks the end of the tiers in the Supreme Court, relying instead on "the Court's holistic, if ad hoc and particularized, estimations of the rationality and public-purpose basis for a challenged law."²⁹⁴ The "animus" approach, he argues, "reflects the Court's attempt to read the social meaning of legislation, and to test that meaning against Equal Protection's core requirement that government act only in pursuit of a public purpose."²⁹⁵ Although many argue that sexual orientation should be considered a suspect class, the Court is unlikely to make such a finding as this type of process is "deteriorating." In the face of such a deterioration, the focus on the right under substantive Due Process becomes all the more important, as the Supreme Court recently proved in *Obergefell v. Hodges*, in which the Court expounded upon the liberty interest at stake under substantive Due Process. In *Obergefell*, the Court had an opportunity to either clarify its opinion in *Windsor* with some return to Equal Protection's tiers analysis or further expand upon the substantive Due Process's liberty guarantee. The Court took the latter route and crystalized the liberty interest at stake. While the Court additionally found that denying marriages to same-sex couples²⁹⁶ violates Equal Protection, it did so by focusing on the interconnectedness between substantive Due Process and Equal Protection—it did not explicitly define same-sex couples as a protected class, although the result is the same. The holding in *Obergefell* thus does not exclude polygamists, and by focusing on the importance of the right under substantive Due Process and comparing their similar liberty interests, polygamists would then have to argue that their liberty interests fit within the contours defined by *Obergefell*.

VI. "INTIMATE PLURALISM" OR "RELIGIOUS POLYGAMY" AFTER *WINDSOR*

Taking into account the previous predictions arguing that the case that will result in irreversible systematic change in marriage will be the next case after *Windsor*, it is important to consider the end-game and the scope of any

²⁹³ Araiza, *supra* note 17, at 367.

²⁹⁴ *Id.* at 371.

²⁹⁵ *Id.* The danger in taking the "animus" approach is that it leaves legislatures without direction on how to shape reactionary enforcement legislation to eradicate the harm. Enforcement legislation must be "congruent and proportional" to the violation being remedied. If a group is defined as a suspect class or a quasi-suspect class, it is easier to show a pattern of state constitutional violations justifying enforcement legislations.

²⁹⁶ See *Obergefell v. Hodges*, 576 U.S. — (2015).

future allowable marital structures. This would include legalized alternative marital structures, such as same-sex marriage, polygamy, group marriage, sibling/friend relationships, to name a few, allowing potential family members to choose from a list of available civil options vis-à-vis other adults involved in the marriage. Polygamy challenges the traditional, two-person model of marriage in a way that even same-sex marriage cannot. Its recognition could lead to the end of traditional marriage as the elevated marital form, benefiting all divergent sexual and marital minority groups. The language of *Windsor* and the implications of the holding on the rights of “emerging” groups like modern-day polygamists and polyamorists can be used to support an argument to recognize multi-party marriages. This section addresses the liberty interests at stake for polygamists as compared to those implicated in *Windsor*, recognizing the dual legal characterizations of polygamy as representative of “intimate pluralism” or as confined to “religious polygamy.” This section also weighs the costs and benefits that characterizing the liberty interest as either secular or religious will have on the ultimate goals of those who support intimate pluralism as the only force behind expanded marital rights. Although this article ultimately pushes for the removal of religious influences from the legal analysis in favor of the larger goal of “intimate pluralism,” it recognizes the practical benefits of a Free Exercise claim.

A. *Defining the Liberty Interest of Polygamists*

Because of the tenuous nature of the tiers approach after *Windsor*, the modified analysis in *Windsor* breaks down to a two-part approach to legislation. The first step is to determine the liberty interest at stake. The second is to then inquire whether the state’s restrictions are based on mere desire to harm (*animus*) or another purpose like governmental efficiency. With respect to same-sex relationships, the *Windsor* Court implies that marriage regulation is necessary not only for statutory benefits—bereavement leave, healthcare options, pension benefits, spousal support, marital property, and custody, adoption, and visitation, to name a few—but also because marriage has a sacred element that is worthy of protection. The language elevates the status of an enduring personal bond, with consensual “deviant” sexual behavior being part of the liberty interest inherent in that human relationship. The Court provides that marriage is a “status” worthy of “dignity” in the “community,” “equal with all other marriages.”²⁹⁷ This reflects, Justice Kennedy states, the community’s considered perspective on the historical roots of marriage, and the evolving understanding of the meaning of equality.²⁹⁸ Thus, the “liberty” interest at stake for same-sex couples is “equal dignity” in the law and society. But the issues at stake for polygamists are

²⁹⁷ *Windsor*, 133 S. Ct. at 2692–93.

²⁹⁸ *Id.*

more than just “equal dignity” and acceptance of their *families*. Individual actors involved in the marriages have a strong interest in legal recognition.

Using this same approach for polygamists, is the liberty interest the same? It is at this point in the analysis where defining the liberty interest drastically determines the course of the remaining affected law. If the liberty interest is defined as equal dignity of all alternative marital structures, including polygamy as the primary example (the “intimate pluralism” school), then this keeps the analysis within the confines of the fundamental right to marriage, and Equal Protection/substantive Due Process Fourteenth Amendment scholarship. In the style of Justice Scalia’s dissent, the same arguments could be used to expand the Court’s conception of liberty in the marriage arena to polygamous and all multi-party marriages. The effect of failing to legally recognize polygamy is to take a class of persons and make them unequal, depriving them of both the legal rights and obligations of their marriages. The restrictions signal to the world that multi-party marriages are not worthy of recognition in the community, equal with other types of relationships that are granted the status of marriage. The children of polygamous marriages suffer the ill effects of discrimination which Justice Kennedy invoked. Not only are they told their parents are criminals, but also that their parents’ marital choice means they must close themselves off to the rest of society. The analogy to the “equal dignity” liberty interest in *Windsor* is parallel for polygamists and polyamorists.

If the liberty interest is, instead, confined to “religious polygamy,” as it was defined for the family in the *Brown* case, then this kicks in an entirely different area of the law—namely free exercise of religion—and a direct comparison to the liberty interest at stake in *Windsor* becomes tenuous. However, the legal arguments become stronger under the “hybrid rights” theory. In 1972, the U.S. Supreme Court took up the case of *Wisconsin v. Yoder*, which some argue represents the outermost limits of the expansion of Free Exercise cases after *Reynolds*.²⁹⁹ In *Yoder*, the Court exempted an Amish family from a Wisconsin statute mandating attendance at school until the age of sixteen. One tenet of the Amish faith is restricting interaction with the secular, outside world. The state argued that it could enforce its educational requirements under the rationale in *Reynolds*, that a state can regulate conduct. But instead of jumping on the question of whether or not limiting education after the eighth grade level is subversive of good order, the Court established a new paradigm for determining what conduct is protected by the First Amendment. The Court held that the Amish family was exempted from the state mandate not only because of the existence of a genuine religious belief, but also because of the fundamental right of parents to educate their children according to their own parameters.³⁰⁰

²⁹⁹ *Wisconsin v. Yoder*, 406 U.S. 205 (1972); see generally John Witte, Jr., *Overview: Religious Liberty in America*, FIRST AMENDMENT CENTER, available at <http://perma.cc/3YT3-R4ZV>.

³⁰⁰ *Yoder*, 406 U.S. at 205.

Although much of the opinion has been criticized as overly glorifying the beautiful Amish way of life,³⁰¹ as the dissent by Justice Douglas is quick to point out as a sharp departure from the contours of the guidelines set out in *Reynolds*,³⁰² what emerges from this opinion is that courts will find that religious conduct is exempted from generally applicable regulation if it implicates not only religious conviction but also some other constitutionally protected fundamental right, such as freedom of speech or the press or freedom of association.³⁰³ Justice Scalia later referred to this type of analysis as “hybrid rights.”³⁰⁴ Thus, religious conviction plus some other constitutionally protected fundamental right exempts a religious practice from a generally applicable law. However, just because the religious liberty interest provides a historical liberty interest and elevates the activity into a more defined protected sphere, does not mean that the equal dignity “intimate pluralism” aim alone will not suffice. Indeed, this equal dignity of same-sex marriage sufficed in *Windsor* as a status worthy of protection, and the import of religious gloss causes more problems than its elevated status can justify.

*B. Polygamy Restrictions Are Less Likely Based on Animus than
Restrictions on Same-Sex Marriage*

Finding that the liberty interests at stake for polygamists, whether they be secular or religious, are worthy of protection, the *Windsor* Court analysis requires, at the least, a “reasonable” analysis of the discriminatory statute. After determining the liberty interest, the next thing the Court did was investigate the legislation’s intent. In the case of DOMA, the Court essentially found the definition of marriage to be “unreasonable” based on the “bare congressional desire to harm a politically unpopular group,” an insufficient basis to restrict such an important liberty interest as marriage.³⁰⁵ In other words, in an attempt to cling to some sort of traditional tiers analysis, the Court found no basis—whether it be compelling, rational, or legitimate—for the distinction because of the negative intent of DOMA.³⁰⁶ Another part of section 3 of DOMA’s definition of marriage restricted marriage to *one* man and *one* woman, thus also restricting marriage to a two-person model.³⁰⁷ A review of the legislative history, while revealing animus toward same-sex marriage, reveals no such explicit hostility toward polygamists. It appears that the numerosity limitation of *one* and *one* was automatic, so engrained as the “norm” that no debate surrounded its inclusion. No explicit animus is apparent in the legislative histories explicitly prohibiting all forms of polygamy, at least in the secular sense in recent years.

³⁰¹ *Id.* at 247 (Douglas, J., dissenting).

³⁰² *Id.*

³⁰³ See *Emp’t Div. v. Smith*, 494 U.S. 872, 881 (1990).

³⁰⁴ *Id.* at 882.

³⁰⁵ *Windsor*, 133 S. Ct. at 2717.

³⁰⁶ *Id.*

³⁰⁷ 1 U.S.C. § 7 (2012), *invalidated by Windsor*, 133 S. Ct. 2675 (2013).

With respect to the Morrill Act and the subsequent federal anti-polygamy statutes, more explicit animus is apparent with respect to *religious* polygamists. The Edwards-Tucker Act, enacted to supplement the Morrill Act, specifically targeted Mormon polygamists, disenfranchising the corporate charter of the Church³⁰⁸ and escheating any property worth over \$50,000 to the federal government.³⁰⁹ Those Acts, however, have been largely overruled to remove any direct cause of action against the Mormon Church or its members. Today, almost all anti-bigamy and anti-polygamy state restrictions have been enacted without any clear animus or hostility directly toward religious groups. It is questionable then whether polygamists could use *Windsor*'s "direct evidence of animus" test to find that anti-polygamy statutes are unreasonable.

The only state where direct evidence of animus could be found in the language of the legislation could be with the Utah Constitution's "irrevocable ban" on polygamy, as its language is more directly aimed at *religious* polygamists. The state constitutional provision begins by stating that freedom of religion is guaranteed in Utah, but that polygamy is forever prohibited. The direct tie between religion and polygamy is apparent, and the legislative and political history with respect to the 1890 constitutional provision only illuminates this curt animus. With respect to other modern state restrictions on polygamy, even the current Utah civil statute against polygamy, the religious discrimination and political motivations are not apparent.

From a legal standpoint, adding the religious protection elevates the practice into the realm of "strict scrutiny" under First Amendment analysis, which is an incarnation of the Fourteenth Amendment application of a tiers approach that the Court still uses today in religion cases. Under this test, as in the *Lukumi* animal sacrifice case, the statute cannot target religious practices or show direct animus.³¹⁰ If the law, however, is generally applicable and does not directly target a religious group or practice, as most polygamy restrictions are today, then the restriction is considered to be constitutional. Most restrictions today fall under this "neutral and general" category and thus escape Free Exercise challenge. However, the First Amendment allows the use of strict scrutiny if the government animus in enforcement is apparent. With respect to *religious* polygamists, as shown in the *Brown* case, police specifically target religious cohabitants over all other forms of multiple simultaneous adult relationships.³¹¹ Under strict scrutiny for restricting "religious cohabitation" then, the government had to show a "compelling" state interest.

Also recognizing, however, that religious polygamists present both a fundamental right to marriage issue and a religious exercise issue, a court could employ, as did the court in *Brown*, the "hybrid rights" theory estab-

³⁰⁸ Edmunds-Tucker Act, § 17, 24 Stat. 635, 638 (1887) (repealed 1978).

³⁰⁹ *Id.* §§ 13, 16, 17, 24 Stat. at 637–38.

³¹⁰ *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

³¹¹ *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1210 (D. Utah 2013).

lished in *Wisconsin v. Yoder*.³¹² By recognizing dual fundamental rights, this duality pushes the activity into the protected arena, further requiring strict scrutiny for governmental restrictions. Coupling the right to engage in religious practices as part of the liberty interests of polygamists to the equal dignity of their relationships subjects restrictions on legal access to polygamy to strict scrutiny. Although the hybrid rights approach set out in *Yoder* has been criticized by scholars as an aberration in First Amendment jurisprudence,³¹³ the analysis remains and could be used by religious polygamists to bolster their support for heightened scrutiny under the First Amendment. This approach would also recognize the value of religion as a deeply rooted aspect of an individual's culture, contributing more to the goals of acceptance of religious culture in the United States. Protecting the rights of religious polygamists grants marginalized religious groups the same legal status as those belonging and subscribing to the majority, Judeo-Christian religions, valuing the cultural diversity that their religious practices import.

C. Government Interest or Efficiency

But animus alone, even under *Windsor*, is not the end of the inquiry. The Court does indicate that it is searching for some other legitimate or rational state function in limiting marriage to opposite-sex couples. The Court points out that the intent of DOMA was to "identify a subset of state-sanctioned marriages and make them unequal, . . . [t]he principal purpose is to impose inequality, *not for other reasons like governmental efficiency*."³¹⁴ This reference to governmental efficiency suggests that such a justification could be sufficient for disparate treatment, which further suggests "rational basis" review, as "administrative burden" is usually an insufficient compelling reason to restrict a fundamental right or to impose unequal treatment. Such a stance fits in line with interpretations after *Lawrence* that sexual orientation is not a protected class. This also suggests that state courts following *Windsor* that implied such heightened scrutiny may have overshot the standard in an attempt to follow in *Windsor*'s ultimate holding. Regardless, the Court had already pointed out that with respect to same-sex marriages, the administrative burden would be so minute as to not warrant serious merit as a defense to disparate treatment.

The "governmental efficiency" justification for polygamists, however, is much more problematic. If religious protection were included, however,

³¹² *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

³¹³ See *Emp't Division v. Smith*, 494 U.S. 872, 896 (O'Connor, J., concurring) ("The Court endeavors to escape from our decisions in *Cantwell* and *Yoder* by labeling them 'hybrid' decisions . . . but there is no denying that both cases expressly relied on the Free Exercise Clause . . ."); *id.* at 908 (Blackmun, J., dissenting) ("[The majority] mischaracterize[s] this Court's precedents. The Court discards leading free-exercise cases such as [*Cantell* and *Wisconsin*] as 'hybrid.'"), see also Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1121 (1990) ("One suspects that the notion of 'hybrid' claims was created for the sole purpose of distinguishing *Yoder* in this case.").

³¹⁴ *Windsor*, 133 S. Ct. at 2694 (emphasis added).

then governmental efficiency would not be an issue. At that point the government would be correcting and accommodating its restriction on a fundamental right, and “governmental efficiency” cannot defeat strict scrutiny.³¹⁵ If secular polygamists are not a protected class under Equal Protection or substantive Due Process, as they are unlikely to be explicitly labeled as such in any future Supreme Court cases on the issue considering their current move away from such an analysis, then “governmental efficiency” may hinder legal recognition of polygamy and multi-party marriages. With respect to “religious polygamy,” if viewed as a protected class under First Amendment case law, it cannot be defeated by something like “governmental efficiency.” The purpose must be compelling. Legal recognition of polygamy, unlike same-sex marriage, will require a wholesale shift in marriage statutes, on both the federal and state court levels. If even one state, say Utah, were to legally recognize polygamous marriages, the *Windsor* effect would also require the federal government to take those state-sanctioned marriages and make them equal under the roughly 1,000 federal statutes affecting marriage.³¹⁶ Much legislative and administrative effort would have to be expended in order to properly set up a scheme that regulates the contours of polygamous marriage, at least with respect to the entrance and exit rules. Even eliminating the philosophical and political reasons that courts and legislatures cling to monogamy, the administrative burden is apparent in legalizing not only polygamy but any other type of alternative marital structure that challenges the two-person marital arrangement and the status-based implications of such a label.

Despite the administrative burden, such an objection should not prevent legislatures, nor have they prevented lawmakers in other countries that do recognize polygamy, from crafting a scheme to turn “intimacy pluralism” into marriage. Even today, statutes are set up to accommodate *serial* polygamy, or serial monogamy, granting more than one ex-spouse federal pension benefits, for example, if married to the claimant for more than ten years. Legal scholars have also begun to craft rules to accommodate more than one simultaneous spouse. Recently, following in the heels of Professor Adrienne Davis’ argument to adopt business partnership default rules to inform polygamy regulations,³¹⁷ Professor Brunson published an article detailing how polygamous marriage supports a larger policy to change federal tax laws to individual filer, regardless of the marriage status of the parties. The author of this article has proposed a regulatory scheme to regulate entrance and exit to polygamous marriage which attempts to leave as much of the default contours of those relationships up to the autonomous contractual will of the parties, with some judicial and administrative oversight. Further, if a court were to find, based on the historical treatment in discrimination against

³¹⁵ See *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 102 n.9 (1972) (holding that for fundamental rights, “mere administrative convenience” is not a compelling interest).

³¹⁶ *Windsor*, 133 S. Ct. at 2679.

³¹⁷ Davis, *supra* note 23, at 2002–24.

polygamists, that they are a protected class, then this government burden of re-writing the marriage laws cannot defeat a claim for Equal Protection and substantive Due Process.

Second and third wives also need both legal protection and societal acceptance that their marriages and commitments to their husband are just as valid and valuable as a first wife. While some argue that informal cohabitants may have an Equal Protection claim after *Windsor*, so too would the “religious cohabitants” who have no formal recognition or protection. Subsequent polygamous wives are routinely discriminated against. Immigration laws only allow one “wife” to enter the country under a spousal visa. Courts will not grant such informal polygamous wives “divorces,” leaving them with no property rights or spousal support or any of the multitude of rights that should recognize their value and contributions to the marriage. If families wish to structure their polygamous marriage differently than those equal default rules, such should be acceptable with some limitations, but in all instances the law should strive to recognize the rights of subsequent wives. While governmental efficiency initially seems to be a legitimate concern mitigating against extending the contours of marriage, the more important concern of protecting “equal dignity” should prevail.

Even without the addition of religious protection, *Windsor* can be used to support an argument to recognize polygamy. The secular liberty interests are analogous (equal dignity of consensual adults). While the animus in the legislation is not as explicit against secular polygamists as against same-sex couples or religious polygamists, the enforcement does evidence animus. Not only would this approach validate and protect families and their members in their alternative marital choice, but it could also lead to a wholesale shift in marital regulation and the approach to intimate adult relationships that cannot emerge while the United States clings to its two-person monogamous marital ideal.

D. What About Religion? A Counterproductive Framing

Couching polygamy with other alternative marriage structures ignores a lingering and undeniably defining feature of the practice: religion. As indicated previously, most practicing polygamists in the world, the United States included, find their authority from religion.³¹⁸ In both the fundamentalist Mormon and the orthodox Islamic traditions, men are allowed (and with fundamentalist Mormonism’s teachings encouraged) to take multiple wives as a part of their religious practices. For many polygamists, their religious beliefs are the most important feature of their lives. Entire communities center around shared religious beliefs in both the fundamentalist Mormon

³¹⁸ Alexandre, *supra* note 59, at 1463; Wing, *supra* note 62, at 837; Black, *supra* note 59, at 500 (“[Polygamy’s] defenders frequently cite religious convictions for such a practice.”); Davis, *supra* note 23, at 1969. *But see* Wing, *supra* note 62, at 838 (“In many African countries . . . the practice is based on nationality or ethnicity, and not religion.”); BAILEY & KAUFMAN, *supra* note 26, at 8 (listing sociocultural justifications for polygamy).

and orthodox Islamic traditions.³¹⁹ Ignoring the religious nature of the practice in the legal analysis could also devalue liberty interests of those who practice for not just social or cultural reasons. Adding religious influences and a Free Exercise claim into the legal analysis would give polygamists more weapons in the legal assault on anti-polygamy laws, as it provides the strongest avenue for constitutional protection under the “hybrid rights” theory, but what does such an approach cost? This section will discuss how adding a free exercise of religion claim to the Equal Protection and substantive Due Process approach of *Windsor* benefits the analysis for polygamists, but then balances those gains against the cost to the lasting effects of such a holding. It is quite possible that religious polygamy may come before secular “intimate pluralism” as the next step in that direction.

From a legal standpoint, it has been discussed previously that religious protection adds a more grounded liberty interest and a higher level of scrutiny, immune from “governmental efficiency” justifications. But other benefits arise from including a Free Exercise claim. Although it may seem counterintuitive, considering the country’s continued general distaste for polygamy, another policy reason to add religion to the claim is that Americans are most familiar with, and are more apt to accept, polygamy practiced as a result of religious impetus over secular polygamists or polyamorists who may still be considered by the monogamous majority as merely sexually deviant. The recent increased exposure to polygamy focuses mostly on religious polygamists. The Brown family, as well as the fictitious HBO family the Hendricksons, is motivated by religion.³²⁰ One of the main focuses of the “Sister Wives” show is to not only shed light on the polygamist lifestyle of the cast, but also to share their religious beliefs behind it.³²¹ As a country heavily entrenched in religion, Christianity or otherwise, society may be more accepting of alternative marriages performed according to religious ceremonies and beliefs as a reflection of their own beliefs in the sacred and spiritual nature of marriage.

Although employing a Free Exercise claim in addition to the *Windsor* approach will definitely push the level of scrutiny higher and help to embrace religious diversity as a valuable and worthy outcome in line with larger national goals of pluralism, adding a claim may come at great cost, implicating other First Amendment and Equal Protection tenets.

Under general accommodation and Free Exercise cases, religious exceptions from generally applicable laws do not necessarily translate into positive law. Most religious accommodation/Free Exercise cases are individuals attempting to opt out of a law because of their genuine religious convictions. Opting out of the draft, for example, does not mean that the government must then create a separate institution to regulate those draft dodgers. Or smoking peyote as a part of one’s spiritual enlightenment may exempt one

³¹⁹ See Hagarty, *Philly’s Black Muslims*, *supra* note 107.

³²⁰ *Big Love* (Home Box Office television broadcast 2007).

³²¹ *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1178 (D. Utah 2013).

from criminal laws, but it does not mean that the court would have to then create a separate set of rules for Native American peyote smokers; they are just left alone to smoke peyote without being prosecuted. With polygamous marriage recognition, however, more than just exemptions from criminal law are at stake. This article envisions positive legislation creating an alternative type of marriage. If a court were to strike down civil polygamy restrictions, thus prompting reactionary enforcement legislation that is “congruent and proportional” to the violation, then the legislation would be limited in how it crafts the polygamy scheme to permit those with sincere religious beliefs to have access. Otherwise, the resulting legislation would not be proportional to the rights sought to be protected.

Creating a separate scheme of marriage available only to those who profess sincere religious belief will violate Establishment Clause principles. Although many countries that do recognize polygamy limit it based on the adherent’s belonging to a certain religion, such a stance could import into the U.S. system a scheme that favors religion over non-religion. It would elevate those who engage in polygamy, polyamory, or multi-party marriages for religious reasons over those who would choose to engage in it for the multitude of other social, cultural, and individual purposes at stake. Even assuming that the law can create default rules for dyadic marriage and religious polygamous marriage that confer exactly equal legal rights, such a law would grant religious polygamists legal recognition for an additional legitimate sexual partner and potentially additional marital property that unrecognized non-religious polygamists would not enjoy. This could lead then to Equal Protection violations for non-religious polygamists who seek the benefits of recognized polygamy.

Another concern arising out of that point is that restricting access to religious adherents could lead to fraudulent claims of religious exercise in order to gain access to the institution of polygamy. Studies show, however, that most people do not adopt fundamentalist Mormonism or orthodox Islam simply because of polygamy, discovering instead later on that their religions allow them to take on additional wives. Indeed, people who engage in polygamy today do so despite the criminal risks and social stigmas involved, either because their conviction is so strong or their lifestyles so engrained that criminal prosecution does not deter them. But the risk of fraudulent claims of religion increases when the criminality and social stigma is removed. The availability of polygamy to only religious adherents would require an extra evidentiary showing of sincere religious belief, as such evidentiary showings are currently employed in Free Exercise/accommodation cases. While fact finders are likely savvy enough to determine whether or not a person’s individual religious beliefs are genuine, and indeed a regulatory scheme could be set up to manage this issue, the potential greatly increases that fraudulent religious beliefs will seep into the analysis, thus diminishing the integrity of the purposes of the free exercise of religion mandate.

Further, the court in the *Brown* case pointed out that the narrowest grounds upon which to strike down the cohabitation prong of Utah’s criminal

statute was based upon substantive Due Process. Even under “rational basis” review, as the *Brown* court employed, the cohabitation prong was struck down. In that regard, we do not really *need* the religion claim to get us to the ultimate goal of “intimacy pluralism,” and those who practice polygamy as a tenet of their religion would be subsumed under that larger goal anyway. Including a Free Exercise analysis also makes religion the most protected aspect of the activity, instead of the fundamental right to marriage and intimacy privacy aspects of the practice. Focusing on the latter could lead to even more alternative marital arrangements having a claim for equal protection under the law.

The larger implications of including Free Exercise touch on that ultimate goal of intimacy pluralism, and such a claim would only further intertwine religious influences that shape the contours of marriage. As similarly argued by Destro with respect to same-sex marriage, legal recognition of polygamy and alternative marital structures is a “strategic objective in a more ambitious and longer-term philosophical and political effort to separate from ‘hetero-normativity’ and ‘heteropatriarchy’ of cultures of Judeo-Christian and Muslim religions.”³²² Restricting polygamous marriage to only religious adherents brings more religious influences—albeit of a minority religious belief—into the marriage regulation arena. This would also signal to the individuals involved in the polygamous marriages that marriage rules mandated by their religion as to the content of the marriage are also valid for purposes of regulating rights and conduct within the marriage, instead of empowering members to structure their polygamous marriages in a manner more protective of their individual needs. Although religious polygamists structure their behavior within their marriage according to their religious teachings, the law should not encourage that influence, as almost all traditional religions and their rules on the rights of women and marriage are almost always invoked to subvert those rights and hinder progress.

Further, excluding religion from the analysis undercuts the “slippery slope” argument against polygamy first established in *Reynolds* that such behaviors lead to legitimization of other dangerous religious practices such as human sacrifice. By making polygamy a marriage issue and not a religious one, it closes the door to the use of an argument to recognize such religious practices. Although the “slippery slope” argument against polygamy in the marriage context remains, where polygamy recognition could lead to the recognition of other non-traditional marital arrangements, this is actually the direction where intimacy pluralists want polygamy to lead.

Philosophically, this Author supports the recognition of polygamy without any religious constraints or showings as part of a larger push for recognition of all alternative marital structures and private contractualization of marital rights and obligations. But considering the direction that the *Brown* case took and the strength that free exercise of religion claims add to the

³²² Robert A. Destro, “*You Have the Right to Remain Silent*”: *Does the U.S. Constitution Require Public Affirmation of Same-Sex Marriage?*, 27 *BYU J. PUB. L.* 397, 397 (2013).

argument in support of polygamy, the next step in the process may realistically be that religion and religious freedom become the motivating factors in any upcoming cases on polygamy. Even as such, a step in that direction could still lend support for an argument to recognize all alternative marriage forms.

VII. CONCLUSION: ERASING THE LEGACY OF *REYNOLDS* ON MARRIAGE AND POLYGAMY

Taking such a holistic approach to polygamy and other alternative marital structures can eradicate those remaining legacies of *Reynolds* that limit a court's analysis of proper civil marriage in the United States. Legal recognition will remove the continued criminality aspect of attempting to legally obtain more than one marriage license, giving polygamists less of a reason to hide from society for fear of police, but would also give them a positive impetus to legally register their polygamous marriages. This gives the members of the family, especially the second, third, and fourth wives, the ability to be more open about their lifestyles and marriages in public, instead of having to lie to those who may not be accepting. As a proponent of the power of positive legislation, legal recognition can also lead to more societal acceptance of polygamy, which is still shunned and disfavored by the majority of society, despite its increased recent exposure through television shows and media coverage.

This approach also gives all wives legal protections, including the constellation of rights that the legislature will have to determine flows from such a union. Rights to marital property, spousal support, insurance and pension benefits, and custody and visitation rights, to name a few, give such subsequent spouses legal personality, filling up the hollow legal existence of second, third, and fourth wives, even where the *Brown* decision falls short. Valuing these subsequent wives under the law will also increase their bargaining power and position in the marriage. It could curtail the practice of some Mormon polygamists who have absurd numbers of wives, by requiring consent of all the wives to add a new spouse, thus empowering each individual wife to protect her rights if her own religious convictions do not comport with adding yet another spouse.

Further recognizing and legalizing polygamy can create a civil process that attracts participation in the legal system, creating a "norm" among polygamists. If the system is successful in that regard, then this legal norm of registering and regulating polygamists will then become the cultural, community norm within the insular communities. As previously argued for, "If the participants are aware of their legal statuses and rights upon entering a polygamous marriage, then this collective knowledge can establish a baseline of acceptable behavior by establishing any unsavory, abusive, or criminal behavior as errant and never acceptable as a 'norm' within any

polygamous community.”³²³ The more familiar a religious community becomes with the legal marriage process, the easier it becomes to change the cultural belief within these societies that the law and authority figures are to fear. Legal recognition not only can change the culture within these communities, but it can also provide secular, civil oversight that is detached from any particular idiosyncratic belief about polygamous marriage. Secular decision-makers can serve that necessary ferreting out function to protect against underage applications or incestuous applications where a religious belief might allow both.

This approach removes the racial and cultural biases in the law that currently influence restrictions on marriage diversity in America. It does so by refusing to let the Judeo-Christian morals of the majority dictate the contours of marriage, an influence which has been used to justify “natural law” restrictions on access to marriage in the past. Although polygamy is most prominent among racial minorities and immigrant populations in the United States today, the most visible polygamists are “white” Americans. Thus, instead of linking polygamy with “other” races, legal recognition will reverse the stigma that Mormons are “race traitors” in the larger attempt to make marriage and polygamy “race-less.” It thus gives society a larger, global view of marriage, accepting a more expansive, multicultural approach to religious practices and marriage without favoring such religiously motivated practices over non-religiously motivated one. This recognizes and values the other social, cultural, and practical reasons why many polygamists choose this alternative lifestyle. It values the diversity in marriage, which would include the types that stretch back into human history—not just Western history—embracing the multicultural aspects which marriage rituals have come to define.

Legal recognition and regulation of polygamy also takes an institution viewed as barbaric and unprogressive and makes it almost the exact opposite: polygamy could be the most liberal of all available marriage structures. It gives individuals more autonomous choice in the contours of their marriage, more in line with liberty and privacy interests, and provides more room for private ordering in one’s intimate adult relationships. Even among polygamists, each family differs in how they allocate resources and manage their households. Some polygamist wives live in the same house with their children, while others may live in completely different buildings or neighborhoods, but they are left to their own determination as a family as to how to manage their private lives. It also allows working wives to feel less “guilty” about leaving the marital home to pursue personal interests as another spouse is available to balance those other necessary duties.

³²³ Faucon, *supra* note 28, at 47. *But see* RICHARD POSNER, THE PROBLEMS OF JURISPRUDENCE 213–14 (1990) (rejecting the notion that law affects behavior indirectly by altering attitudes and through them behavior).

It further takes some of the control away from the government in determining the contours of marriage, pushing the institution out of the hands of politically motivated actors and into the private, individual sphere. Although the state may fear that allowing such private ordering in marriage could make every man a “government unto himself,” with respect to privacy intimacy and personal adult relationships, each man and woman *should* be able to consensually govern this most important aspect of their private lives. The government should only intrude to protect against lack of consent, underage marriage, and abuse, as it does now with respect to all marriages. Otherwise, allowing polygamy gives parties more options than its prohibition.

This return to embracing individual determinations over the contours of marriage, instead of the government, can start the removal of access to marriage from the arsenal of political parties. Although historically access to marriage has been used to suppress unpopular political groups and although many fortuitously call polygamy the “next civil rights movement,”³²⁴ permitting polygamy and making “intimacy pluralism” the ultimate goal of marriage makes access to marriage a less effective means of suppressing politically unpopular groups. Granted, the fight for legal recognition of polygamy and other alternative forms of marriage would decidedly be a political one—the ACLU has taken up the case of religious polygamists—but the aftermath of its recognition would have a chilling effect against all those in power who would seek to use marriage as a political tool.

Polygamy in the legal scholarship and, indeed, in the jurisprudence is nothing new. Many have argued that polygamy *should* not only be decriminalized, but also legally recognized since the *Reynolds* decision was handed down in 1878. The exercise, however, appeared merely academic, as the potential for actual recognition of polygamy in the legal and social climate of the United States seemed so far-fetched and incredulous to warrant serious consideration. But since the *Brown* case and the positivity from legal scholars that the decision has invoked for a move toward social and legal acceptance, higher courts and legislatures may very well have to square the issue of polygamy with modern conceptions of marriage and liberty sooner than anticipated. The law will soon have to make a choice among simply decriminalizing polygamy, recognizing it for religious polygamists only, or allowing polygamy as an alternative marital structure. Courts may very well seize upon the freedom of religion jurisprudence to ultimately strike down restrictions on polygamy, and in that case, even positive benefits about diversity of religion can result. These are not insignificant goals, nor should the religious aspect of polygamy fail to inform the judiciary’s and legislature’s analysis of the issue.

³²⁴ Hall, *supra* note 5.