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# Marriage, Free Exercise, and the Constitution

Mark Strasser†

## Introduction

Same-sex marriage opponents frequently suggest that if same-sex unions are constitutionally protected, then polygamous unions must also be protected, as if no more must be said to establish that neither should be recognized.<sup>1</sup> Yet, this *reductio ad absurdum* fails for two distinct reasons. First, even were it constitutionally permissible for states to ban polygamous relationships, that hardly would establish that same-sex unions could also be prohibited, since the kinds of reasons that tend to be accepted as justifications for polygamy bans have little or no force in the same-sex marriage context.<sup>2</sup> Second, the case establishing the permissibility of polygamy bans is not nearly as obvious or strong as its opponents imply. Indeed, a strong case can be made for the proposition that polygamy is constitutionally protected.<sup>3</sup>

Part I of this Article briefly discusses the oft-made claim that if same-sex marriages are constitutionally protected, then plural marriages must also be protected. This Part suggests that although that argument is false because the two are distinguishable in constitutionally significant ways, a good argument can be made for the proposition that both same-sex marriage and plural marriage are constitutionally protected. Part II discusses free exercise jurisprudence generally, focusing on how the current jurisprudence can be squared with the Court's discussions and holdings on polygamy. Part III analyzes the

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†. Trustees Professor of Law, Capital University Law School, Columbus, Ohio.

1. Jeffery J. Ventrella, *Square Circles?! Restoring Rationality to the Same-Sex "Marriage" Debate*, 32 HASTINGS CONST. L.Q. 681, 694 (2005) ("The true analogue to same-sex 'marriage' is not interracial marriage, but rather polygamy . . ."); Amy L. Wax, *The Conservative's Dilemma: Traditional Institutions, Social Change, and Same-Sex Marriage*, 42 SAN DIEGO L. REV. 1059, 1081 (2005) ("Traditionalists warn that sanctioning same-sex marriage will inevitably lead to the legalization of other suspect forms of conduct, including polygamy, group marriage, incest, and bestiality."); Stanley Kurtz, *Beyond Gay Marriage*, WEEKLY STANDARD, Aug. 4, 2003, at 26 ("Among the likeliest effects of gay marriage is to take us down a slippery slope to legalized polygamy and 'polyamory' (group marriage).").

2. See discussion *infra* Part I.

3. See discussion *infra* Part II.

harms associated with plural marriage, suggesting that current plural marriage bans are not narrowly tailored enough to withstand the close scrutiny that should be given to statutes that either target religious practices or that implicate hybrid rights. This Part also discusses the free exercise implications for Native American marriages and same-sex marriages. The Article concludes that the Free Exercise Clause requires an exception be recognized for some same-sex marriages and for some plural marriages involving consenting adults.

## I. On Same-Sex Marriage and Plural Marriage

Some commentators suggest that recognition of same-sex marriages will force states to also recognize polygamous unions.<sup>4</sup> Regrettably, these commentators fail to explain why such a result might be expected. Indeed, when the claim is examined more closely, its implausibility becomes apparent. The two types of marriages are distinguishable in several ways that have constitutional import.<sup>5</sup> For example, same-sex marriage bans classify on the basis of sex because men are permitted to marry women but not men, and women are permitted to marry men but not women.<sup>6</sup> Plural marriage bans do not suffer from a similar infirmity, although it may well be that neither type of relationship can be prohibited without offending constitutional guarantees.

Historically, courts and commentators suggested that if exceptions were made to the then-current marriage laws, a variety of hitherto prohibited marriages would also have to be recognized.<sup>7</sup> For example, when rejecting the argument that an interracial

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4. See, e.g., Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 47 ("If same-sex marriage must be legalized to accommodate the subjective, identity-defining sexual-intimacy preferences of gays and lesbians, it would be very difficult to refuse to recognize consanguineous marriage, polygamy, and other prohibited marriages on a principled basis.").

5. Nicholas Bala, *The Debates About Same-Sex Marriage in Canada and the United States: Controversy over the Evolution of a Fundamental Social Institution*, 20 BYU J. PUB. L. 195, 197 n.7 (2006) ("[R]ecognition of same-sex marriage raises very different issues from recognition of polygamy, from both constitutional and social policy perspectives.").

6. See, e.g., *Baehr v. Lewin*, 852 P.2d 44, 60 (Haw. 1993) (noting that the state's same-sex marriage ban regulates "access to the status of married persons, on the basis of the applicants' sex"); Elizabeth Larcano, *A "Pink" Herring: The Prospect of Polygamy Following the Legalization of Same-Sex Marriage*, 38 CONN. L. REV. 1065, 1067 (2006) ("Where a ban on same-sex marriage violates equal protection, polygamy does not. In banning same-sex marriage, states use 'sex' as the forbidden variable. This serves to unjustifiably and unconstitutionally discriminate against same-sex couples.").

7. See, e.g., Wardle, *supra* note 4.

marriage validly celebrated in another domicile had to be recognized locally, the Tennessee Supreme Court in *State v. Bell*<sup>8</sup> reasoned:

[Otherwise,] we might have in Tennessee the father living with his daughter, the son with the mother, the brother with the sister, in lawful wedlock, because they had formed such relations in a State or country, where they were not prohibited . . . . Yet none of these are more revolting, more to be avoided, or more unnatural than the case before us.<sup>9</sup>

By the same token, in *Scott v. State*,<sup>10</sup> in which the Georgia Supreme Court upheld that state's antimiscegenation law, Justice McCay implied in his concurring opinion that the state's power to prohibit interracial marriage was on the same footing as the state's power to prohibit incestuous relationships.<sup>11</sup> Needless to say, when the United States Supreme Court clarified in *Loving v. Virginia*<sup>12</sup> that interracial marriage bans were unconstitutional, the parade of horrors anticipated by these jurists did not materialize in Tennessee or Georgia, even though *Loving* made those states' interracial marriage bans unenforceable.<sup>13</sup>

History repeats itself in the context of the same-sex marriage debate, where it has been suggested that the recognition of such marriages will lead to the state's recognition of a variety of relationships that are currently prohibited.<sup>14</sup> So too, the

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8. 66 Tenn. 9 (1872).

9. *Id.* at 11.

10. 39 Ga. 322 (1869).

11. McCay wrote:

Marriage is a civil contract, regulated by law, and I see no reason why the prohibition against persons of different color entering into that contract is regulating the social status of the citizen, any more than the law regulating the age of the parties, or the laws fixing the degrees of their relationship, or the law providing that there shall be but one such contract in existence at a time, are laws regulating the social *status*. They all stand upon the same footing.

*Id.* at 327 (McCay, J., concurring).

12. 388 U.S. 1, 12 (1967).

13. Tennessee and Georgia were among the sixteen states outlawing interracial marriage at the time *Loving* was decided. *See id.* at 6 n.5.

14. *See* George Dent, *Traditional Marriage: Still Worth Defending*, 18 BYU J. PUB. L. 419, 440 (2004) ("If two unrelated men can marry, why can't two brothers marry? There certainly is no concern about birth defects. And if two women can marry, is it degrading to women to let three women marry?"); *cf.* *Romer v. Evans*, 517 U.S. 620, 648 (Scalia, J., dissenting) ("The Court's disposition today suggests that these provisions are unconstitutional, and that polygamy must be permitted in these States on a state-legislated, or perhaps even local-option, basis—unless, of course, polygamists for some reason have fewer constitutional rights than homosexuals."); *Lewis v. Harris*, 875 A.2d 259, 270 (N.J. Super. Ct. App. Div. 2005) ("[T]here is arguably a stronger foundation for challenging statutes prohibiting polygamy than statutes limiting marriage to members of the opposite sex 'because, unlike gay marriage, [polygamy] has been and still is condoned by many religions

analogous parade of horrors has not materialized in Massachusetts, notwithstanding that state's recognition of same-sex marriage.<sup>15</sup>

One claim frequently made is that the recognition of same-sex marriage will lead to the recognition of polygamous marriages.<sup>16</sup> Yet, recognition of the former hardly entails recognition of the latter, given that the former marriages are composed of exactly two people while the latter are composed of at least three. Indeed, some commentators suggest that the polygamy argument is so implausible that its being offered is a sign of desperation.<sup>17</sup>

Other commentators take this slippery slope claim more seriously. For example, Professor Volokh offers one reason that an individual might link the recognition of same-sex unions to the recognition of polygamous unions:

[W]hen polygamists seek recognition of their marriages, one intuitive response is that polygamy just isn't "marriage" within the American constitutional right to marriage and the American legal tradition of marriage: Marriage is what it has traditionally been, namely the union of one man and one woman, and polygamous unions simply don't qualify. And this definitional argument could be supported by a Burkean empirical claim—we shouldn't lightly change centuries-old institutions, because such changes are likely to be harmful.<sup>18</sup>

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and societies." (quoting George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & POL. 581, 628 (1999)), *aff'd as modified*, 908 A.2d 196 (N.J. 2006); *Andersen v. King County*, 138 P.3d 963, 996 (Wash. 2006) (Johnson, J., concurring in judgment only) ("The last prohibition, like the bigamy/polygamy prohibition, is definitional. A 'marriage' means a marriage between one man and one woman (and the only marriage of each spouse)."); *Sen. Santorum Compared Same-Sex Marriage to 'Man on Child, Man on Dog' Sex*, U.S. FED. NEWS, 2006 WLNR 19372569, Nov. 7, 2006 ("The National Gay & Lesbian Task Force issued the following news release: Rick Santorum, the third-ranking GOP senator, compared same-sex marriage to 'man on child, man on dog' sex.").

15. Cf. David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53, 82 (1997) (discussing the implausibility of "the prospect conjured by Senator Jesse Helms that permitting gay marriage would lead to the collapse of American society").

16. See Ventrella, *supra* note 1, at 694; Wax, *supra* note 1, at 1081; Kurtz, *supra* note 1, at 26.

17. See, e.g., EVAN WOLFSON, WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE'S RIGHT TO MARRY 71 (2004) ("Slippery-slope diversions are what opponents of equality try when they don't have a good reason to justify ongoing discrimination, the equivalent of a lawyer with no arguments and no evidence pounding the table."). But see Cheshire Calhoun, *Who's Afraid of Polygamous Marriage? Lessons for Same-Sex Marriage Advocacy from the History of Polygamy*, 42 SAN DIEGO L. REV. 1023, 1037 (2005) ("[D]isestablishing a single form of marriage would . . . open the doors to state recognition of polygamous marriages.").

18. Eugene Volokh, *Same-Sex Marriage and Slippery Slopes*, 33 HOFSTRA L. REV. 1155, 1170 (2005). But see Mark Strasser, *Same-Sex Marriages and Civil*

Professor Volokh then writes that “if the public accepts the notion that tradition isn’t a good enough reason to reject same-sex marriage, it will be harder to argue that tradition is a good enough reason to reject polygamous marriage.”<sup>19</sup> While noting that other reasons might be offered to justify recognizing one and not the other,<sup>20</sup> he states that “the argument from tradition—an important and easily understandable argument that might appeal to the public more than theoretical academic distinctions would—would be much weakened.”<sup>21</sup>

Numerous responses might be made to this Burkean argument. Were an appeal to tradition a persuasive way to justify the difference, one might simply characterize the relevant tradition somewhat differently; instead of talking about marriage as the union of one man and one woman, one might instead characterize the tradition in terms of the number of people involved—two rather than three or more.<sup>22</sup> For example, when describing the vital social institution of marriage, the Supreme Judicial Court of Massachusetts in *Goodridge v. Department of Public Health*<sup>23</sup> explained that the “exclusive commitment of two individuals to each other nurtures love and mutual support; it brings stability to our society.”<sup>24</sup> The court limited its analysis to relationships involving only two people, implying that the analysis had no import for relationships involving more than two adults.

It may be that the public would accept an appeal to tradition as a justification for limiting marriage to two adults, especially if Professor Volokh is correct that those seeking to marry a same-sex partner have more political allies than do those seeking to marry many partners.<sup>25</sup> Yet, appealing to a definition of marriage as a

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*Unions: On Meaning, Free Exercise, and Constitutional Guarantees*, 33 LOY. U. CHI. L.J. 597, 623 (2002) (noting that recent court decisions have not relied on the traditional definition of marriage when examining polygamy restrictions).

19. Volokh, *supra* note 18, at 1170.

20. *Id.* at 1170–71.

21. *Id.* at 1171.

22. See, e.g., *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003).

23. *Id.*

24. *Id.* at 948 (emphasis added); see also Ruth K. Khalsa, *Polygamy as a Red Herring in the Same-Sex Marriage Debate*, 54 DUKE L.J. 1665, 1693 (2005) (“Polygamous relationships can be distinguished from dyadic heterosexual and same-sex relationships on the basis of underlying values and ideals.”); Larcano, *supra* note 6, at 1080 (arguing that same-sex marriage is distinguishable from polygamous marriage because it “remains focused on unity and partnership; that is, on the exclusive commitment of two individuals”).

25. Volokh writes:

Disapproval of polygamy seems deeply rooted in American culture; it is not easy to overcome this sort of opposition. The gay rights movement did

method of excluding the claims of those seeking access to that institution is dissatisfying for a number of reasons. One significant ill is that states would then seem able to restrict marriage in any desired way by simply defining marriage restrictively—for example, by saying that interracial unions simply do not qualify as marriages.<sup>26</sup> Restricting marriage by merely appealing to definitions or traditions is more likely to be viewed as a question-begging way of avoiding the issues rather than as a way of resolving them.<sup>27</sup>

There is further difficulty with appealing to tradition as a way of precluding plural marriages. As Justice Murphy explained in his dissent in *Cleveland v. United States*,<sup>28</sup> polygyny

was quite common among ancient civilizations and was referred to many times by the writers of the Old Testament; even today it is to be found frequently among certain pagan and non-Christian peoples of the world. We must recognize, then, that polygyny, like other forms of marriage, is basically a cultural institution rooted deeply in the religious beliefs and social mores of those societies in which it appears.<sup>29</sup>

Insofar as tradition should be our guide, our marriage laws might have to be much more inclusive than is commonly thought.<sup>30</sup>

The focus here is not on whether tradition requires the recognition of either same-sex or polygamous unions. Nor is it on

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overcome such opposition, but it had natural allies that polygamists likely will not. Gays have many straight friends and family members who are part of the American mainstream. Polygamy in America today seems to be chiefly practiced by separatist Mormon communities, whose political connections are limited by their living apart.

Volokh, *supra* note 18, at 1176.

26. See Mark Strasser, *Family, Definitions and the Constitution: On the Antimiscegenation Analogy*, 25 SUFFOLK U. L. REV. 981, 985–86 (1991).

27. See *id.* at 989 (“Jurists and theorists who appeal either to definitions or to legislative intentions to establish the impossibility of same-sex marriages seem not to appreciate the implications of their position. An appeal to legal definitions is simply question-begging, while an appeal to nonlegal definitions may support the opposite position.”).

28. 329 U.S. 14 (1946).

29. *Id.* at 26 (Murphy, J., dissenting); see also Calhoun, *supra* note 17, at 1028 (“Polygamy has, in fact, a lengthy history within the Judeo-Christian tradition—beginning with the polygamous marriages of the Old Testament patriarchs. Nowhere in either the Hebrew Bible or the New Testament is polygamy forbidden.” (footnote omitted)); Michael G. Myers, *Polygamist Eye for the Monogamist Guy: Homosexual Sodomy . . . Gay Marriage . . . Is Polygamy Next?*, 42 HOUS. L. REV. 1451, 1474 (2006) (“Polygamy is legal in more than half of all nonindustrialized societies.”).

30. Justice Murphy discussed four fundamental forms of marriage: monogamy, polygyny, polyandry, and group marriage. *Cleveland*, 329 U.S. at 25 (Murphy, J., dissenting). For a discussion of some of the ways in which same-sex unions have been recognized, see generally JOHN BOSWELL, *SAME-SEX UNIONS IN PREMODERN EUROPE* (Vintage Books 1994).

which would be more palatable to public tastes. Rather, the focus is on whether one or both might plausibly be afforded some constitutional protection under the Free Exercise Clause.<sup>31</sup>

## II. Polygamy and the Constitution

Any discussion of the constitutionality of plural marriage bans must consider current free exercise jurisprudence on the one hand and some of the Supreme Court cases dealing with polygamy on the other. Free exercise jurisprudence has evolved greatly over the past 130 years,<sup>32</sup> so it is not at all clear that something that passed muster under those guarantees in the 19th century would also pass muster in the 21st century. That said, the seminal case involving the regulation of polygamy is *Reynolds v. United States*.<sup>33</sup>

### A. *Reynolds v. United States*

Any analysis of the constitutionality of polygamy bans must take *Reynolds* into account. In *Reynolds*, the Supreme Court rejected a constitutional challenge to a law criminalizing polygamy,<sup>34</sup> even while noting that “Congress cannot pass a law for the government of the Territories which shall prohibit the free exercise of religion.”<sup>35</sup> Thus, the Court was confident that the polygamy ban at issue did not offend then-current free exercise guarantees.<sup>36</sup>

It is not immediately obvious why the *Reynolds* Court believed the polygamy ban survived examination under the Free Exercise Clause, although an examination of some of the Court’s reasoning may shed light on what the Justices were thinking. The Court explained that “[p]olygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people.”<sup>37</sup> Yet, the

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31. The Free Exercise Clause reads “Congress shall make no law . . . prohibiting the free exercise [of religion].” U.S. CONST. amend. I.

32. See discussion *infra* Parts II.A & II.B.

33. 98 U.S. 145 (1878).

34. See *id.* at 166 (“In our opinion, the statute immediately under consideration is within the legislative power of Congress. It is constitutional and valid as prescribing a rule of action for all those residing in the Territories, and in places over which the United States have exclusive control.”).

35. *Id.* at 162.

36. *Id.* at 166.

37. *Id.* at 164; see also *Cleveland v. United States*, 329 U.S. 14, 18 (1946) (quoting *Reynolds*, 98 U.S. at 164).



Court's noting where and by whom polygamy has been practiced seems to be a non sequitur—it is not as if the Constitution includes a provision specifying that practices accepted in northern and western Europe cannot be regulated but that practices only accepted in other parts of the world are permissibly proscribed. Indeed, some commentators suggest that by discussing where polygamy was practiced, the *Reynolds* Court was not merely offering a non sequitur, but in addition was engaging in xenophobia.<sup>38</sup>

A charitable interpretation of the Court's comments regarding the views of northern and western Europeans is that the Court was attempting to establish that it was not the intent of the Framers to protect polygamy. Thus, the Court wrote that "there never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity,"<sup>39</sup> concluding that it was "impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life."<sup>40</sup> According to this interpretation of *Reynolds*, the Court was considering European practices as well as practices in the United States at the time of the Constitution's adoption to determine whether it could plausibly be argued that the Framers (and, perhaps, the Framers of the Fourteenth Amendment) intended to include polygamy within the practices protected by the Free Exercise Clause.<sup>41</sup>

The *Reynolds* decision, concerning the "most important feature of social life,"<sup>42</sup> is easier to understand in light of the Court's apparent belief that the state had to choose between polygamy and monogamy—the Court noted that "it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion."<sup>43</sup> Yet, at least one of the questions

38. Calvin Massey, *The Political Marketplace of Religion*, 57 HASTINGS L.J. 1, 29 n.164 (2005); see also Calhoun, *supra* note 17, at 1041 ("Justice Waite's reason for rejecting polygamy in *Reynolds* was driven in part by hostility to non-European cultures.").

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

40. *Id.*

41. Cf. Kurt T. Lash, *Two Movements of a Constitutional Symphony: Akhil Reed Amar's The Bill of Rights*, 33 U. RICH. L. REV. 485, 498 (1999) (suggesting that it may be more important to "focus[] on Reconstruction, not the Founding, if we want to understand the intended meaning of incorporated liberties[, including those afforded by the Free Exercise Clause]").

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

43. *Id.* at 166.

at hand is whether both might be recognized within the same system,<sup>44</sup> especially considering that even if polygamy were permitted, it seems extremely unlikely that a high percentage of marriages would involve polygamous unions.<sup>45</sup> If there would be relatively few polygamous relationships even were they permitted,<sup>46</sup> then it is not at all clear that the recognition of plural marriages would somehow harm society. Even if, as some claim, monogamy is built into the moral fabric of society,<sup>47</sup> that fabric would not be torn asunder merely because a minority of individuals practiced plural marriage.<sup>48</sup>

Just as current jurists and commentators sometimes suggest that the recognition of same-sex marriage would lead to the

44. Cf. Keith F. Sealing, *Polygamists out of the Closet: Statutory and State Constitutional Prohibitions Against Polygamy Are Unconstitutional Under the Free Exercise Clause*, 17 GA. ST. U. L. REV. 691, 754–55 (2001) (noting that England has survived despite allowing polygamy within its borders).

45. See Chambers, *supra* note 15, at 82; 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, 544 (2002) (“First, even within polygamy-tolerant societies, the percentage of men taking more than one wife is actually quite low.”); Keith Jaasma, *The Religious Freedom Restoration Act: Responding to Smith; Reconsidering Reynolds*, 16 WHITTIER L. REV. 211, 294 (1995); cf. Elizabeth Harmer-Dionne, *Once a Peculiar People: Cognitive Dissonance and the Suppression of Mormon Polygamy As a Case Study Negating the Belief-Action Distinction*, 50 STAN. L. REV. 1295, 1331 (1998).

46. While it is doubtful that many would practice polygamy, it should not be thought that the discussion here is of mere theoretical interest. See James Askew, *The Slippery Slope: The Vitality of Reynolds v. U.S. after Romer and Lawrence*, 12 CARDOZO J.L. & GENDER 627, 631 (2006) (“Yet, Mormon fundamentalists continue to practice polygamy. Some sources estimate that the figure may be as high as 30,000 people.”); Chambers, *supra* note 15, at 61 (“Most Americans do not know that polygamy, and particularly polygyny, the practice of men marrying more than one woman, remains widespread in the world as a whole. Well more than half of nonindustrialized societies permit polygyny still today.”); Harmer-Dionne, *supra* note 45, at 1298 (“The question of polygamy is not merely a historical one. Both African Christians and Moslems may currently engage in the practice.”); Jaasma, *supra* note 45, at 246–47 (“It has been estimated that there are some 50,000 practicing Mormon polygamists in the United States . . . .”); Charles J. Reid, Jr., *And the State Makes Three: Should the State Retain a Role in Recognizing Marriage?*, 27 CARDOZO L. REV. 1277, 1297–98 (2006) (“Polygamy was also—and remains—a regular feature of life in sub-Saharan Africa. Yoruban women of Western Nigeria continue to practice polyandry.”); Sealing, *supra* note 44, at 693–94 (discussing “the estimated 25,000 to 50,000 Mormon practitioners of polygamy, as well as the nearly 1,000 Christian polygamists, and Islamic and African practitioners of polygamy” (footnote omitted)); Maura Strassberg, *The Crime of Polygamy*, 12 TEMP. POL. & CIV. RTS. L. REV. 353, 354 (2003) (“Today, there are ten times as many Mormon fundamentalists living in polygynous marriages as there were in the original Mormon community in 1862.”).

47. See, e.g., *Potter v. Murray City*, 760 F.2d 1065, 1070 (10th Cir. 1985) (“Monogamy is inextricably woven into the fabric of our society. It is the bedrock upon which our culture is built.”).

48. See Sealing, *supra* note 44, at 754–55.

recognition of polygamous marriage,<sup>49</sup> the *Reynolds* Court worried that permitting an exception to a neutral polygamy ban for Mormons would require the Court to make a variety of exceptions for those wishing to exercise their religious beliefs.<sup>50</sup> The Court implied that there would be no justifiable stopping point if it recognized an exception here, and the Court would be compelled to recognize human sacrifice as protected as well.<sup>51</sup> But this result would be absurd.<sup>52</sup>

Yet, it is not at all clear why the Court could not examine each case on its merits and judge whether the implicated state interests were sufficiently compelling to justify refusing to make an exception.<sup>53</sup> The harms implicated in permitting consenting adults to enter into plural marriages can hardly be thought equivalent to the deliberate ending of innocent human life. By the same token, if the worry about polygamy is that young girls are forced into relationships against their wills, it is not clear how permitting adults but not children to enter into such relationships would result in an increase in the number of forced marriages involving minors.<sup>54</sup>

*Reynolds* was issued in 1878 and might be thought to have little relevance now, almost 130 years later.<sup>55</sup> Yet, that decision has been cited with approval in numerous decisions,<sup>56</sup> and some of

49. See Wardle, *supra* note 4, at 47.

50. *Reynolds v. United States*, 98 U.S. 145, 166–67 (1878).

51. *Id.* at 166.

52. *Cf. id.* at 166–67.

53. *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 899 (1990) (O'Connor, J., concurring in the judgment); see also Harmer-Dionne, *supra* note 45, at 1302 (suggesting that the *Reynolds* Court ignored "any ability of the courts to make analytical distinctions"); Jaasma, *supra* note 45, at 254 ("[T]here is no reason that granting one exception for religiously motivated conduct, such as polygamy, necessarily requires government to make an exception for other religiously inspired conduct, such as suicide or human sacrifice.").

54. See Strassberg, *supra* note 46, at 368 ("Even if concerns about coercion and forced marriages justify criminalization of polygyny when teenage brides are involved, these concerns may not be able to be generalized to polygynous marriages by adults.").

55. See *State v. Holm*, 137 P.3d 726, 742 (Utah 2006) (noting the plaintiff's "assertion that *Reynolds* is antiquated beyond usefulness"); *State v. Green*, 99 P.3d 820, 825–26 (Utah 2004) (noting that *Reynolds* "may be antiquated in its wording and analysis").

56. See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993); *Smith*, 494 U.S. at 894 (O'Connor, J., concurring in the judgment); *Employment Div., Dep't of Human Res. v. Smith* 485 U.S. 660, 671 (1988); *Bowen v. Roy*, 476 U.S. 693, 702 (1986); *United States v. Lee*, 455 U.S. 252, 257–58 (1982); *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972); *School Dist. v. Schempp*, 374 U.S. 203, 249 (1963); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963); *Braunfeld v. Brown*, 366 U.S. 599, 603–04 (1961); *McGowan v. Maryland*, 366 U.S.

the reasoning in *Reynolds* has been repeated in subsequent decisions.<sup>57</sup> For example, over half a century after *Reynolds*, the *Cleveland* Court also worried that permitting a religious belief defense would create a loophole to protect a variety of practices.<sup>58</sup>

That *Reynolds* has been cited with approval in recent decisions is an important but not dispositive factor in any analysis of its continuing vitality. Needless to say, the Court's free exercise jurisprudence has changed greatly since *Reynolds*.<sup>59</sup> For example, it seems unlikely that the *Reynolds* Court would have struck down a law prohibiting religious animal sacrifice, since the Court might then have wondered whether it would thereby be committed to permitting human sacrifice as well.<sup>60</sup> Yet, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court recently declared unconstitutional a law targeting religious animal sacrifice.<sup>61</sup> While *Hialeah* does not overrule *Reynolds*, it nonetheless suggests that the relevant jurisprudence is evolving and should be reexamined.

### B. The Religious Accommodation Cases

In a series of cases, the Court has examined the conditions under which the state must make an exception to its laws to accommodate religious practices. Most of these cases involved the denial of unemployment benefits,<sup>62</sup> but some involved other issues.<sup>63</sup>

In *Sherbert v. Verner*,<sup>64</sup> the Court examined whether an individual could rightly be disqualified from receiving

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420, 462 (1961); *Cleveland v. United States*, 329 U.S. 14, 20 (1946).

57. See, e.g., *Potter v. Murray City*, 585 F. Supp. 1126, 1140 (C.D. Utah 1984) ("There appears to the court to be no reasonable alternatives to the prohibition of the practice of polygamy to meet the compelling state interest found in the maintenance of the system of monogamy upon which its social order is now based.").

58. *Cleveland*, 329 U.S. at 20 ("It is also urged that the requisite criminal intent was lacking since petitioners were motivated by a religious belief. That defense claims too much. If upheld, it would place beyond the law any act done under claim of religious sanction.").

59. See *Green*, 99 P.3d at 825 ("We are cognizant of the fact that *Reynolds*[s] ... reasoning may not necessarily comport with today's understanding of the language and apparent purpose of the Free Exercise Clause.").

60. Cf. *Reynolds v. United States*, 98 U.S. 145, 166 (1878) ("Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice?").

61. *Hialeah*, 508 U.S. at 547.

62. See, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963).

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

64. 374 U.S. 398 (1963).

unemployment benefits when her reason for being unavailable for Saturday work involved her religious beliefs.<sup>65</sup> The Court noted that Adell Sherbert, a Seventh Day Adventist, was forced to choose between following her religious beliefs and foregoing benefits on the one hand, and forsaking her beliefs and working on Saturday on the other,<sup>66</sup> and likened the burden imposed on her to a tax. The Court reasoned that “[g]overnmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship,”<sup>67</sup> and held that the state’s refusal to recognize an exception for Sherbert violated free exercise guarantees.<sup>68</sup>

When striking down South Carolina’s refusal to make an exception for Seventh Day Adventists, the Court rejected the state’s contention that building such an exception into the law would violate Establishment Clause guarantees.<sup>69</sup> The Court reasoned instead that extending unemployment benefits to those observing Saturday as a day of worship was nothing more than the government’s acting neutrally in light of different religious practices.<sup>70</sup> The Court also rejected the state’s contention that it could deny Sherbert unemployment benefits because they involved a mere privilege rather than a right,<sup>71</sup> noting, “[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.”<sup>72</sup>

The *Sherbert* Court was not suggesting, however, that all religious practices, no matter how dangerous, must be exempted from the law. On the contrary, regulations posing “some substantial threat to public safety, peace or order”<sup>73</sup> have been upheld, even if contravening particular religious beliefs.<sup>74</sup>

Unemployment benefits were also at issue in *Thomas v. Review Board of the Indiana Employment Security Division*.<sup>75</sup> Eddie Thomas, a Jehovah’s Witness who had been working in a

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65. See *id.* at 400–01.

66. *Id.* at 404.

67. *Id.*

68. See *id.* at 410.

69. *Id.* at 409.

70. *Id.*

71. *Id.* at 404 (“Nor may the South Carolina court’s construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant’s ‘right’ but merely a ‘privilege.’”).

72. *Id.* (footnote and citations omitted).

73. *Id.* at 403.

74. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972).

75. 450 U.S. 707 (1981).

foundry, was transferred to a department that produced turrets for tanks.<sup>76</sup> Because his religious beliefs precluded him from participating in the production of war materials and because there were no positions available where he could perform work which would not involve the production of weapons, he quit.<sup>77</sup> He then applied for unemployment compensation benefits, which were denied.<sup>78</sup>

Unlike Thomas, some Jehovah's Witnesses believed that the production of weapons is not religiously prohibited;<sup>79</sup> however, Thomas rejected that interpretation of his religious duty.<sup>80</sup> The Court noted that there were different views about whether Thomas's religion precluded him from producing munitions, but stated that "it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation."<sup>81</sup> The Court explained that the relevant question was whether the individual's beliefs were sincerely held, noting that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."<sup>82</sup>

Indiana was burdening the free exercise of religion by attaching significant costs to Thomas's acting in light of his beliefs, just as South Carolina had burdened the free exercise of Sherbert's religious beliefs. The *Thomas* Court explained:

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76. *Id.* at 709.

77. *Id.* at 709–10.

78. *Id.*

79. *See id.* at 711 ("[Thomas] said that when he realized that his work on the tank turret line involved producing weapons for war, he consulted another Blaw-Knox employee—a friend and fellow Jehovah's Witness. The friend advised him that working on weapons parts at Blaw-Knox [sic] was not 'unscriptural.'").

80. *See id.* ("Thomas was not able to 'rest with' this view, however. He concluded that his friend's view was based upon a less strict reading of Witnesses' principles than his own.").

81. *Id.* at 716; *see also* *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829, 834 (1989) (rejecting "the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization" and stating that because plaintiffs "refusal was based on a sincerely held religious belief. . . . [H]e was entitled to invoke First Amendment protection" (footnote omitted)).

82. *Thomas*, 450 U.S. at 714; *cf.* *United States v. Ballard*, 322 U.S. 78, 88 (1944) (affirming that the district court had "ruled properly when it withheld from the jury all questions concerning the truth or falsity of the religious beliefs or doctrines of respondents"). The *Ballard* Court explained that the Framers "fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views." *Id.* at 87.

Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.<sup>83</sup>

Thus, free exercise guarantees may be implicated where benefits, rather than rights, are at issue. Even indirect pressure to forego religious practice is enough to trigger constitutional protections of religion.<sup>84</sup>

As was also true in *Sherbert*,<sup>85</sup> *Thomas* makes clear that sincere belief does not immunize a practice or prevent the government from burdening its expression if the exercise of that belief endangers society.<sup>86</sup>

The mere fact that the petitioner's religious practice is burdened by a governmental program does not mean that an exemption accommodating his practice must be granted. The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest.<sup>87</sup>

Thus, the fact that the state is precluding an individual from freely exercising his religion does not establish that the state is acting impermissibly. That said, the state must establish that the interest implicated is compelling and the means employed are narrowly tailored to promote that interest.

In *Thomas*, the plaintiff's job description rather than his religious beliefs had changed during the course of his employment.<sup>88</sup> At issue in *Hobbie v. Unemployment Appeals Commission*<sup>89</sup> was whether unemployment benefits could be denied to someone who could no longer perform her job because of a change in her religious beliefs subsequent to her initial employment.<sup>90</sup> The Court refused to treat a person who converted during the employment differently,<sup>91</sup> reasoning that the timing of her conversion was not relevant to the analysis of whether her free exercise rights had been infringed.<sup>92</sup> Because she was forced to

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83. *Thomas*, 450 U.S. at 717–18.

84. *Id.*

85. *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

86. *Thomas*, 450 U.S. at 718.

87. *Id.*

88. *See id.* at 710.

89. 480 U.S. 136 (1987).

90. *Id.* at 137 (footnote omitted).

91. *Id.* at 144.

92. *Id.*

choose between her employment and her religious beliefs, the state's denial of unemployment benefits because she chose the latter violated free exercise guarantees.<sup>93</sup> Here, as in *Sherbert*, the Court rejected the argument that making an exception for Hobbie would violate the Establishment Clause,<sup>94</sup> since "the government may (and sometimes must) accommodate religious practices . . . without violating the Establishment Clause."<sup>95</sup> Thus, in all of these cases, the Court rejected the arguments that a right had to be at issue before free exercise guarantees would be implicated and that Establishment Clause guarantees would prevent the state from accommodating the religious practices of these individuals.

In *Wisconsin v. Yoder*,<sup>96</sup> the Court examined the constitutionality of Wisconsin's requirement that children attend school through age sixteen.<sup>97</sup> At issue was whether Wisconsin had to include an exception for children whose parents refused to send them to school for religious reasons. For example, the Amish sincerely believed<sup>98</sup> that, "by sending their children to high school, they would not only expose themselves to the danger of the censure of the church community, but . . . also endanger their own salvation and that of their children."<sup>99</sup> The issue before the Court was not whether the Wisconsin requirement was constitutional as a general matter,<sup>100</sup> but only whether an exception had to be made to accommodate free exercise concerns.<sup>101</sup>

The *Yoder* Court reasoned that Wisconsin's requirement could withstand a free exercise challenge either by showing that the requirement did not really impinge on free exercise or by showing that "there [was] a state interest of sufficient magnitude"

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93. *Id.*

94. *Id.*

95. *Id.* at 144–45 (footnote omitted); see also *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005) ("This Court has long recognized that the government may . . . accommodate religious practices . . . without violating the Establishment Clause." (quoting *Hobbie*, 480 U.S. at 144–45)).

96. 406 U.S. 205 (1972).

97. *Id.* at 206.

98. See *id.* at 209 ("The State stipulated that respondents' religious beliefs were sincere.").

99. *Id.*

100. See *id.* at 213 ("There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education.").

101. See *id.* at 214 ("[A] State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment." (citation omitted)).



to justify the limitation of religious liberty.<sup>102</sup> The State was unable to establish either of those conditions.<sup>103</sup>

In *Yoder*, there was abundant support for the claim that a religious, rather than secular, way of life was at issue—"the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living."<sup>104</sup> Further, it had been established beyond dispute that Amish children receiving a high school education were seriously affected by that education.

The conclusion is inescapable that secondary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals, and values contrary to beliefs, and by substantially interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community at the crucial adolescent state of development, contravenes the basic religious tenets and practice of the Amish faith, both as to the parent and the child.<sup>105</sup>

Of course, establishing that a high school education had a serious effect on these children did not end the relevant inquiry. The regulation might still have been upheld if the State could show that its interest was of "sufficient magnitude," which would have justified placing this burden on religious exercise.

The *Yoder* Court admitted that individuals' activities, even when based on religious beliefs, may nonetheless be subject to regulation by the state.<sup>106</sup> However, the Court also noted that some kinds of conduct are protected by free exercise guarantees, "even under regulations of general applicability."<sup>107</sup> The Court explained that even a neutral law may violate constitutional requirements "if it unduly burdens the free exercise of religion."<sup>108</sup> Whether a regulation *unduly* burdens free exercise depends on the magnitude of the State's interest and on the extent to which it is necessary to burden the religious exercise to promote that interest.

Wisconsin claimed that its interest in the education of its youth was so compelling that interference with religious belief was justified.<sup>109</sup> However, the *Yoder* Court was unwilling to accept the

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102. *Id.*

103. *Id.* at 219.

104. *Id.* at 216.

105. *Id.* at 218.

106. *Id.* at 220.

107. *Id.* (citation omitted).

108. *Id.* (citation omitted).

109. *Id.* at 221.

importance of the State's interest in enforcing this law against the Amish, "despite its admitted validity in the generality of cases,"<sup>110</sup> precisely because "fundamental claims of religious freedom are at stake."<sup>111</sup> Rather, the Court felt compelled to "searchingly examine the interests that the state seeks to promote by its requirement for compulsory education to age 16, and the impediment to those objectives that would flow from recognizing the claimed Amish exemption."<sup>112</sup> Thus, the Court accepted that the State might, as a general matter, have compelling interests at stake in requiring school attendance until age sixteen. However, the Court was unconvinced that permitting an exception for the Amish would undermine those compelling interests.

The Court suggested that upholding the regulation would have imposed more than a slight burden. At issue was a "severe interference with religious freedom."<sup>113</sup> Noting that "[a] way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different,"<sup>114</sup> the *Yoder* Court held that the regulation as applied violated constitutional guarantees.<sup>115</sup>

The Free Exercise Clause does not always require the state to accommodate religious beliefs. For example, *United States v. Lee*<sup>116</sup> involved an Amish farmer who refused to pay social security for his employees.<sup>117</sup> "[T]he Amish believe it sinful not to provide for their own elderly and needy and therefore are religiously opposed to the national social security system."<sup>118</sup> Indeed, the Amish were religiously barred both from accepting social security benefits and from contributing to that system.<sup>119</sup> The sincerity of these beliefs was not contested,<sup>120</sup> and the Court accepted that required participation in the social security system burdened Lee's free exercise rights.<sup>121</sup>

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110. *Id.*

111. *Id.*

112. *Id.* (citation omitted).

113. *Id.* at 227.

114. *Id.* at 224.

115. *Id.* at 234.

116. 455 U.S. 252 (1982).

117. *Id.* at 254.

118. *Id.* at 255 (footnote omitted) (referencing the district court's analysis).

119. *Id.*

120. *See id.* at 257 ("[T]he Government does not challenge the sincerity of this belief.").

121. *Id.* ("Because the payment of the taxes or receipt of benefits violates Amish religious beliefs, compulsory participation in the social security system interferes with their free exercise rights.").

The Court's finding that there was a conflict between the law and the sincerely held religious beliefs was "only the beginning, however, and not the end of the inquiry."<sup>122</sup> The Court noted that some burdens on religion are permissible,<sup>123</sup> and that state limitations on religious liberty are acceptable if "essential to accomplish an overriding governmental interest."<sup>124</sup> The Court reasoned that required participation in the social security system was a fiscal necessity<sup>125</sup> and that a national system based on voluntary participation would be very difficult, if not impossible, to administer.<sup>126</sup> The Court then concluded that the Government had a very important interest in assuring mandatory participation in the social security system.<sup>127</sup>

However, Lee was not suggesting that participation in the social security system should be made voluntary for all. Rather, he was suggesting that the Free Exercise Clause demanded exemptions for those with religious beliefs requiring non-participation.

The *Lee* Court's reasoning anticipates the effect on the judicial system of exempting Amish citizens from participation in the social security system.<sup>128</sup> The Court noted that it could not readily distinguish between social security taxes and general tax revenues.<sup>129</sup> It then considered the myriad of tax challenges to general expenditures that it would receive, such as challenges by those who believed their tax dollars should not be used to support a war effort which contravened their religious principles.<sup>130</sup> The Court explained that the "tax system could not function if denominations were allowed to challenge [it] because tax payments were spent in a manner that violates their religious

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122. *Id.*

123. *Id.*

124. *Id.* at 257-58.

125. *Id.* at 258.

126. *Id.*

127. *Id.* at 258-59.

128. *See id.* at 262 (Stevens, J., concurring in the judgment) ("The Court rejects the particular claim of this appellee, not because it presents any special problems, but rather because of the risk that a myriad of other claims would be too difficult to process.").

129. *Id.* at 260 ("There is no principled way, however, for purposes of this case, to distinguish between general taxes and those imposed under the Social Security Act.").

130. *Id.* at 260 ("If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax.").

belief.”<sup>131</sup> It then concluded that, because there is such an important interest in maintaining a sound tax system, sincere religious beliefs would not justify the failure to pay one’s taxes.<sup>132</sup> The Court understood that rejecting Lee’s challenge would burden his free exercise rights, but offered the consolation that maintenance of a religiously pluralistic society requires some religious practices to be sacrificed for the common good.<sup>133</sup>

While there have been several cases over the years involving free exercise guarantees,<sup>134</sup> one of the most important cases in the development of this jurisprudence was *Employment Division, Department of Human Resources v. Smith*.<sup>135</sup> In *Smith*, the Court addressed whether Oregon could include the religious use of peyote within its general prohibition on use of that drug and whether the state could deny unemployment benefits to individuals who were fired from their jobs for the sacramental use of peyote.<sup>136</sup> The Court held that the Free Exercise Clause did not preclude Oregon from criminalizing the religiously inspired use of peyote,<sup>137</sup> noting that the *Reynolds* Court had “rejected the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice.”<sup>138</sup>

The *Smith* Court explained that “[t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections.”<sup>139</sup> This analysis, sometimes called the Hybrid Rights analysis,<sup>140</sup> suggests that neutral, generally applicable laws will be upheld against free exercise challenges unless the plaintiffs can establish that the statutes also implicate another constitutionally

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131. *Id.* (citation omitted).

132. *Id.*

133. *Id.* at 259.

134. *See, e.g.,* *Locke v. Davey*, 540 U.S. 712 (2004) (upholding a Washington constitutional provision precluding funding for vocational religious instruction); *McDaniel v. Paty*, 435 U.S. 618 (1978) (striking down a Tennessee statute barring clergypersons from being delegates to the state’s limited constitutional convention as a violation of free exercise guarantees).

135. 494 U.S. 872 (1990).

136. *Id.* at 874.

137. *Id.* at 890.

138. *Id.* at 879.

139. *Id.* at 881.

140. *See, e.g.,* Kyle Still, *Smith’s Hybrid Rights Doctrine and the Pierce Right: An Unintelligent Design*, 85 N.C. L. REV. 385 (2006) (discussing *Smith*’s hybrid rights claims specifically in the context of parents’ hybrid claims involving religion and schooling).

protected interest.

*Smith's* characterization of the pre-existing jurisprudence is inaccurate.<sup>141</sup> *Sherbert*, *Thomas*, and *Hobbie* all involved successful challenges to existing laws where the plaintiff did *not* assert that the statute at issue implicated a constitutionally protected interest in addition to her free exercise rights. Indeed, both the *Sherbert* and *Thomas* Courts denied that the success of a free exercise challenge depended on whether a right in addition to free exercise was at issue.<sup>142</sup> While the *Smith* Court offered its own analysis of the unemployment compensation cases, the point remains that the hybrid analysis simply did not account for the then-existing jurisprudence.<sup>143</sup> Indeed, perhaps appreciating that its account was inaccurate, the Court offered a kind of fallback hybrid theory, suggesting that generally applicable *criminal* laws will only implicate First Amendment free exercise guarantees if both free exercise and an additional constitutionally protected interest are at issue.<sup>144</sup>

Another difficulty involved in the *Smith* analysis is that its suggestion that only hybrid challenges to generally applicable laws have been successful is ambiguous. Such a claim might be taken to mean that, while strict scrutiny has been employed when state regulations burdened free exercise rights, it turns out that only the hybrid challenges have been successful.<sup>145</sup> For example, *Lee* involved an unsuccessful challenge to the government's requirement of participation in the social security system. In that case, the Court believed the state's interest sufficiently important and the means sufficiently closely tailored to pass muster

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141. See *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520, 571 (1993) (Souter, J., concurring in part and concurring in the judgment) ("[W]hatever *Smith's* virtues, they do not include a comfortable fit with settled law.").

142. See *supra* notes 71–72, 83 and accompanying text (discussing rejection of the states' claims that they could deny unemployment compensation because mere benefits rather than rights were at issue).

143. See *Black v. Snyder*, 471 N.W.2d 715, 719 (Minn. Ct. App. 1991) ("The Supreme Court's most recent free exercise decision, *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), effected a significant change in first amendment law.").

144. *Smith*, 494 U.S. at 884 ("Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law.").

145. Cf. *id.* at 896–97 (O'Connor, J., concurring in the judgment) ("That we rejected the free exercise claims in those cases hardly calls into question the applicability of First Amendment doctrine in the first place. Indeed, it is surely unusual to judge the vitality of a constitutional doctrine by looking to the win-loss record of the plaintiffs who happen to come before us.").

*notwithstanding the Court's employment of strict scrutiny.*<sup>146</sup>

Conversely, the success of free exercise challenges when implicating hybrid rights might suggest that only hybrid free exercise challenges to generally applicable laws will trigger strict scrutiny. The *Smith* Court interpreted the jurisprudence as adopting this approach.<sup>147</sup> Such a reading contradicts *Lee*, not with respect to the result, but with respect to the level of scrutiny avowedly employed by the Court.

The *Smith* Court denied that strict scrutiny had to be employed when examining Oregon's statute, fearing the burden that would thereby be imposed on the state whenever it passed legislation impacting religious exercise.<sup>148</sup> The Court questioned whether any state could afford to have such a burden imposed as a matter of law, and reasoned that such a system would be especially dangerous in a state with a multiplicity of religious views.<sup>149</sup>

*Smith* suggests that the United States Constitution does not require strict scrutiny to be employed whenever a state statute burdens religious practices. Of course, a separate issue is implicated if such a standard is adopted by statute pursuant to a recognized power.<sup>150</sup>

At issue in *City of Boerne v. Flores*<sup>151</sup> was an attempt by Congress to restore protection to religious freedom, which it

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146. See *supra* text accompanying notes 122–27.

147. Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. REV. 631, 664–65 (2006) (“*Smith* noted that in ‘hybrid situation[s],’ where ‘the Free Exercise Clause [is raised] in conjunction with other constitutional protections, such as freedom of speech,’ extra Free Exercise Clause scrutiny might still be required even when the government action is religion-neutral.”).

148. *Smith*, 494 U.S. at 888 (“If the ‘compelling interest’ test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously commanded.” (footnote omitted)).

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[The] danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because “we are a cosmopolitan nation made up of people of almost every conceivable religious preference,” *Braunfeld v. Brown*, 366 U.S. [599, 606 (1961)], and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.

*Id.*

150. See *Cutter v. Wilkinson*, 544 U.S. 709, 714 (2005) (“The [*Smith*] Court recognized, however, that the political branches could shield religious exercise through legislative accommodation, for example, by making an exception to proscriptive drug laws for sacramental peyote use.” (citation omitted)).

151. 521 U.S. 507 (1997).

believed had been removed by *Smith*.<sup>152</sup> Basically, the Religious Freedom Restoration Act ("RFRA") required that strict scrutiny be employed when courts reviewed statutes burdening the free exercise of religion.<sup>153</sup> The Court understood Congress's action to be an attempt to correct the *Smith* decision, thereby making Congress, rather than the Court, the ultimate arbiter of what the Constitution means.<sup>154</sup> The Court held that Congress had exceeded its power insofar as the RFRA was to govern state laws.<sup>155</sup>

Yet, the *Boerne* Court did not thereby invalidate the RFRA for all purposes. At issue in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*<sup>156</sup> was whether the RFRA barred the federal government from precluding a religious sect from using a hallucinogenic tea for sacramental purposes.<sup>157</sup> The government argued that it "ha[d] a compelling interest in the *uniform* application of the Controlled Substances Act, such that an exception" could not be made even for the sacramental use of the hallucinogen.<sup>158</sup> However, the Court rejected the argument that the uniformity rationale sufficed as a justification.<sup>159</sup> The *Gonzales* Court explained that a substantial burden on free exercise could not be justified merely by asserting a general interest in uniformity.<sup>160</sup> Rather, an analysis would have to be offered explaining why the requested accommodation could not be granted.<sup>161</sup> The Court explained that the refusal to grant an exemption might be justified if doing so would make it very

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152. *Id.* at 512 ("Congress enacted RFRA in direct response to the Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990)."); see also *id.* at 529 (stating that the RFRA "invalidate[s] any law which imposes a substantial burden on a religious practice unless it is justified by a compelling interest and is the least restrictive means of accomplishing that interest").

153. Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb(a)(3) (1993).

154. See *Flores*, 521 U.S. at 536 ("When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is." (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177)); *id.* at 519 ("Congress does not enforce a constitutional right by changing what the right is.").

155. *Id.* at 536 ("[T]he provisions of the federal statute here invoked are beyond congressional authority . . .").

156. 546 U.S. 418 (2006).

157. See *id.* at 423.

158. *Id.*

159. *Id.* ("We conclude that the Government has not carried the burden expressly placed on it by Congress in the Religious Freedom Restoration Act, and affirm the grant of the preliminary injunction.").

160. *Id.* at 435.

161. *Id.*

difficult to administer the program at issue;<sup>162</sup> however, the Court denied that free exercise protections could be overridden simply by making a general slippery-slope argument.<sup>163</sup> Instead, the *Gonzales* Court reaffirmed “the feasibility of case-by-case consideration of religious exemptions to generally applicable rules.”<sup>164</sup> Basically, *Gonzales* offers a reading of what protections would be offered under free exercise jurisprudence where strict scrutiny has been triggered.<sup>165</sup>

The *Smith* Court’s suggestion that strict scrutiny of a generally applicable law would only be triggered when a hybrid claim was presented is quite controversial. Other members of the Court were not persuaded that this analysis represented existing doctrine,<sup>166</sup> was necessary to prevent the state from being subjected to impossible constraints,<sup>167</sup> or even captured the Framers’ intent.<sup>168</sup> As Justice O’Connor noted in her concurrence, “[t]here is nothing talismanic about neutral laws of general applicability or general criminal prohibitions, for laws neutral toward religion can coerce a person to violate his religious

162. *Id.*

163. *Id.* at 435–36.

164. *Id.* at 436 (citing *Cutter v. Wilkinson*, 544 U.S. 709 (2005)).

165. *See id.* at 439 (2006).

But Congress has determined that courts should strike sensible balances, pursuant to a compelling interest test that requires the Government to address the particular practice at issue. Applying that test, we conclude that the courts below did not err in determining that the Government failed to demonstrate, at the preliminary injunction stage, a compelling interest in barring the UDV’s sacramental use of *hoasca*.

*Id.*

166. For example, Justice Blackmun wrote:

This Court over the years painstakingly has developed a consistent and exacting standard to test the constitutionality of a state statute that burdens the free exercise of religion. Such a statute may stand only if the law in general, and the State’s refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means.

*Employment Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 899 (1990); *see also id.* at 901 (O’Connor, J., concurring in the judgment) (“The Court today gives no convincing reason to depart from settled First Amendment jurisprudence.”).

167. *See id.* at 894 (O’Connor, J., concurring in the judgment) (“Under our established First Amendment jurisprudence, we have recognized that the freedom to act, unlike the freedom to believe, cannot be absolute.”).

168. *City of Boerne v. Flores*, 521 U.S. 507, 550 (1997) (O’Connor, J., dissenting) (“Although the Framers may not have asked precisely the questions about religious liberty that we do today, the historical record indicates that they believed that the Constitution affirmatively protects religious free exercise and that it limits the government’s ability to intrude on religious practice.”); *cf. id.* at 565 (Souter, J., dissenting) (writing that there are “serious doubts about the precedential value of the *Smith* rule,” especially in light of historical understanding of the Free Exercise Clause).



conscience or intrude upon his religious duties just as effectively as laws aimed at religion."<sup>169</sup>

One of the implications of *Smith* is that the practices of religious minorities might well be subjected to burdens imposed through the political process.<sup>170</sup> This would seem to be the antithesis of a clause designed to protect religious freedom, since the religious practices of the majority would seem to be at much less risk of being curtailed through the political process in the first place. As Justice O'Connor noted:

[T]he First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility. The history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups such as the Jehovah's Witnesses and the Amish.<sup>171</sup>

*Smith* did not address the appropriate level of scrutiny applied to neutral or generally applicable laws.

At issue in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*<sup>172</sup> were three ordinances which precluded animal sacrifice.<sup>173</sup> The Court recognized that these ordinances were

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169. *Smith*, 494 U.S. at 901 (O'Connor, J., concurring in the judgment).

170. *Id.* at 890; Elliot M. Mincberg, *A Progressive Organization's Look at RFRA*, 21 CARDOZO L. REV. 801, 803 (1999) ("*Smith* has in fact harmed religious liberty, particularly with respect to minority religions and those most vulnerable."); see also Edward McGlynn Gaffney, Jr., *Hostility to Religion, American Style*, 42 DEPAUL L. REV. 263, 295 (1992) (arguing that, after *Smith*, it became very easy for governments to withstand Free Exercise challenges made by oppressed religious minorities).

171. *Smith*, 494 U.S. at 902 (O'Connor, J., concurring in the judgment).

172. 508 U.S. 520 (1993).

173. The ordinances were described as follows:

In September 1987, the city council adopted three substantive ordinances addressing the issue of religious animal sacrifice. Ordinance 87-52 defined "sacrifice" as "to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption," and prohibited owning or possessing an animal "intending to use such animal for food purposes." It restricted application of this prohibition, however, to any individual or group that "kills, slaughters or sacrifices animals for any type of ritual, regardless of whether or not the flesh or blood of the animal is to be consumed." The ordinance contained an exemption for slaughtering by "licensed establishment[s]" of animals "specifically raised for food purposes." Declaring, moreover, that the city council "has determined that the sacrificing of animals within the city limits is contrary to the public health, safety, welfare and morals of the community," the city council adopted Ordinance 87-71. That ordinance defined sacrifice as had Ordinance 87-52, and then provided that "[i]t shall be unlawful for any person, persons, corporations or associations to sacrifice any animal within the corporate limits of the City of Hialeah, Florida." The final Ordinance, 87-72, defined "slaughter" as "the killing of animals for food" and prohibited slaughter outside of areas zoned for slaughterhouse use. The ordinance provided an exemption, however, for the slaughter or processing for sale of "small

passed in order to suppress the practices of a particular religion<sup>174</sup> and examined the ordinances with strict scrutiny.<sup>175</sup>

The *Hialeah* Court made clear that, as a general matter, statutes targeting religious belief or practice will not pass muster.<sup>176</sup> While reaffirming that a neutral law of general applicability need not trigger strict scrutiny merely because some religious practices have been burdened,<sup>177</sup> the Court also made clear that the facial neutrality of an ordinance would not immunize it from close scrutiny.<sup>178</sup> The Free Exercise Clause “protects against governmental hostility which is masked as well as overt.”<sup>179</sup>

The *Hialeah* analysis may well have important implications for statutes adopted to criminalize polygamy. It seems clear that Mormons in particular were targeted when Congress precluded polygamy in the territories.<sup>180</sup> While not per se unconstitutional, such targeting will rarely survive strict scrutiny.<sup>181</sup>

Consider the Court’s discussion of polygamy in *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United*

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numbers of hogs and/or cattle per week in accordance with an exemption provided by state law.” All ordinances and resolutions passed the city council by unanimous vote. Violations of each of the four ordinances were punishable by fines not exceeding \$500 or imprisonment not exceeding 60 days, or both.

*Id.* at 527–28 (quoting HIALEAH, FLA., ORDINANCES §§ 87-52, -71, -72).

174. *Id.* at 534 (“The record in this case compels the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances.”).

175. *Id.* at 533–34 (“[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, see [*Smith*, 494 U.S. at 878–79]; and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.”).

176. *Id.* at 523 (“The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions.”).

177. *Id.* at 531; see also *Cutter v. Wilkinson*, 544 U.S. 709, 714 (2005) (“[T]he Court held, in [*Smith*, 494 U.S. at 878–82], that the First Amendment’s Free Exercise Clause does not inhibit enforcement of otherwise valid laws of general application that incidentally burden religious conduct.”).

178. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (“Facial neutrality is not determinative. . . . Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.”).

179. *Id.*

180. *Cf. Jaasma*, *supra* note 45, at 255 (“Under the type of scrutiny that the Court applied in *Lukumi*, it is questionable whether the statute examined in *Reynolds* would be found to be neutral or generally applicable, further undermining the precedential value of *Reynolds*.”).

181. *Hialeah*, 508 U.S. at 546.

*States*.<sup>182</sup> Understanding that polygamy laws targeted Mormons, the *Late Corp.* Court implied that this was a reason to uphold, rather than strike down, the laws. The Court suggested that the "organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism. It is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world."<sup>183</sup> Lest there be any doubt who was the subject of the law, the Court wrote:

It is unnecessary here to refer to the past history of the sect, to their defiance of the government authorities, to their attempt to establish an independent community, to their efforts to drive from the territory all who were not connected with them in communion and sympathy. The tale is one of patience on the part of the American government and people, and of contempt of authority and resistance to law on the part of the Mormons.<sup>184</sup>

One factor that makes the *Late Corp.* Court's implicit position on the constitutionality of laws targeting Mormon polygamy more complicated is that the Court rejected the idea that a religious practice was at issue. Characterizing the claim that polygamy fell within the protections afforded to religious practices as a "pretence,"<sup>185</sup> the Court described such an argument as "altogether a sophistical plea."<sup>186</sup> The Court noted: "No doubt the Thugs of India imagined that their belief in the right of assassination was a religious belief; but their thinking so did not make it so,"<sup>187</sup> thereby suggesting that polygamy, like assassination, was *falsely* thought to involve a religious practice. So, too, the Court said that the "practice of suttee by the Hindu widows may have sprung from a *supposed* religious conviction,"<sup>188</sup> as if to emphasize that this would not accurately be thought a religious practice.

The *Late Corp.* Court stated that "the state has a perfect right to prohibit polygamy, and all other open offenses against the enlightened sentiment of mankind, notwithstanding the *pretense* of religious conviction by which they may be advocated and practiced."<sup>189</sup> Yet, it is simply unclear how much of a role is played by the Court's rejection of these practices as religious and

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182. 136 U.S. 1 (1890).

183. *Id.* at 49.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* (emphasis added).

189. *Id.* at 50 (emphasis added).

how, if at all, the Court's analysis would have been different had polygamy been viewed as a veridical religious practice.

Unlike the *Late Corp.* Court, the *Reynolds* Court dealt with polygamy as a religious practice. The Court stated that, while laws "cannot interfere with mere religious belief and opinions, they may with practices."<sup>190</sup> The Court further defined the relevant question as "whether those who make polygamy a part of their religion are excepted from the operation of the statute."<sup>191</sup> While both Courts discussed suttee, the *Reynolds* Court discussed "a wife [who] religiously believed it was her duty to burn herself upon the funeral pile of her dead husband,"<sup>192</sup> without qualifying the belief as "a supposed religious conviction," as did the *Late Corp.* Court.<sup>193</sup>

While differing about whether polygamy was a religious practice, the *Reynolds* and *Late Corp.* Courts reached the same conclusion regarding the constitutionality of the imposition of burdens on polygamy. It might be thought, then, that the *Late Corp.* Court would have reached the same result even had the members of that Court considered the issue before it<sup>194</sup> as involving a veridical free exercise claim. Yet, such a conclusion may not be warranted. The composition of the Court differed between the decisions,<sup>195</sup> and the decisions were written by different Justices.<sup>196</sup> It could be, for example, that members of the *Late Corp.* Court would have taken a "legitimate" free exercise

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

191. *Id.*

192. *Id.* But see *Murdock v. Pennsylvania*, 319 U.S. 105, 109–10 (1943) (suggesting that *Reynolds* did not view polygamy as a religious rite subject to First Amendment protection).

193. *Late Corp.*, 136 U.S. at 49 (emphasis added).

194. At issue before the Court was a congressional act that targeted polygamy by invalidating the incorporation of the Church of the Latter Day Saints and by causing its property to escheat to the state. *Id.* at 6–8.

195. There was a great deal of turnover during the twelve years between the two decisions. Justices Miller, Field, Bradley, and Harlan were on both Courts. 98 U.S. v (1878); 136 U.S. iii (1889). Chief Justice Waite of the *Reynolds* Court was replaced by Chief Justice Fuller of the *Late Corp.* Court. KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* app. B-3 (15th ed. 2004). Associate Justice Clifford of the *Reynolds* Court was replaced by Associate Justice Gray of the *Late Corp.* Court. *Id.* Associate Justice Strong of the *Reynolds* Court was replaced by Associate Justice Lamar of the *Late Corp.* Court. *Id.* Associate Justice Hunt of the *Reynolds* Court was replaced by Associate Justice Blatchford of the *Late Corp.* Court. *Id.* Associate Justice Swayne of the *Reynolds* Court was replaced by Associate Justice Brewer of the *Late Corp.* Court. *Id.*

196. The *Reynolds* opinion was written by Chief Justice Waite, *Reynolds*, 98 U.S. at 153, while the *Late Corp.* opinion was written by Justice Bradley. *Late Corp.*, 136 U.S. at 3.

claim quite seriously.<sup>197</sup>

In any event, the Court taking a serious approach is not equivalent to the Court upholding the challenge. Indeed, the *Reynolds* Court implied that the Free Exercise Clause did not provide particularly robust protections, worrying that were an exception made for those with particular religious beliefs, "then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do, must be acquitted and go free."<sup>198</sup> Yet, this alleged anomaly is part of the current free exercise jurisprudence—an individual who is unavailable for work for religious reasons may be eligible for unemployment compensation whereas an individual who is unavailable for work for some other reason may not be so entitled. An individual who keeps her fifteen-year-old out of high school for religious reasons may be immunized from criminal prosecution, whereas an individual who keeps her fifteen-year-old out of high school for another reason might be subject to prosecution.

There are a number of reasons, then, why *Reynolds* should not be thought dispositive in a case involving a challenge to a state's polygamy ban. The current jurisprudence allows an

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197. A mere two years after *Late Corp.*, the Court decided *Holy Trinity Church v. United States*, 143 U.S. 457 (1892), in which the Court made clear that "this is a religious nation." *Id.* at 470. At issue in *Holy Trinity* was how to construe a federal statute which read:

*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled.* That from and after the passage of this act it shall be unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States, its Territories, or the District of Columbia, under contract or agreement, parol or special, express or implied, made previous to the importation or migration of such alien or aliens, foreigner or foreigners, to perform labor or service of any kind in the United States, its Territories, or the District of Columbia.

*Id.* at 458. The question before the Court was whether the statute should be construed to apply to the importation of clergy. *Id.* The Court suggested that such was not the intent of Congress. *Id.* at 459. The Court further suggested that it would have reached the same conclusion even had the clergyperson involved been Catholic, Baptist, Episcopalian, or Jewish. *See id.* at 472. However, the Court did quote with approval a New York case in which Chancellor Kent upheld a blasphemy conviction and also said:

Nor are we bound, by any expressions in the Constitution as some have strangely supposed, either not to punish at all, or to punish indiscriminately, the like attacks upon the religion of *Mahomet* [sic] or of the *Grand Lama*; and for this plain reason, that the case assumes that we are a Christian people, and the morality of the country is deeply ingrafted upon Christianity, and not upon the doctrines or worship of those impostors.

*Id.* at 471 (quoting *People v. Ruggles*, 8 Johns. 290, 294–95 (N.Y. 1811)).

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

exception for religious practice, which would not be offered for non-religious practice, notwithstanding *Reynolds's* view to the contrary. Even if the *Smith* free exercise jurisprudence accurately reflects the current jurisprudence, a statute *targeting* religious practice<sup>199</sup> would still have to be examined with strict scrutiny following *Hialeah*.<sup>200</sup> Further, the hybrid rights rule recognized in *Smith* would also seem applicable in this kind of case.<sup>201</sup> At issue is the right to marry, which is a fundamental interest.<sup>202</sup> Presumably, that interest is sufficiently important to trigger the hybrid rule.<sup>203</sup> If the interest in educating one's child as implicated in *Yoder* triggers hybrid analysis,<sup>204</sup> then the right to marry must do so as well.<sup>205</sup> Thus, even under *Smith*, many polygamy bans would be appropriately subjected to strict scrutiny.

### III. On Harms and Tailoring

Recently, individuals have challenged polygamy bans as violations of free exercise guarantees.<sup>206</sup> While none of these challenges has been successful, the courts examining the implicated issues have disagreed in a number of respects, including which state interests are served by such bans and what level of scrutiny should be employed when reviewing the constitutionality of these statutes. These differences are very important because the proper identification of the interests at issue and the degree to which the existing regulation promotes

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199. Calhoun, *supra* note 17, at 1024 ("Bars to *polygamous marriages* were targeted at the Mormon practice of plural marriage in the Utah territory, and were first erected under the Morrill Act of 1862 that made bigamy a federal offense." (footnote omitted)); *see also* Potter v. Murray City, 760 F.2d 1065, 1067 (10th Cir. 1985) ("Because of the claim that Utah's proscription against plural marriages was mandated by Congress in Utah's Enabling Act as a condition for admission into the Union, the trial court on motion of the State of Utah ordered the United States to be joined as a party." (footnote omitted)).

200. Jaasma, *supra* note 45, at 255; Sealing, *supra* note 44, at 737.

201. *See* Jaasma, *supra* note 45, at 254–55 (suggesting that polygamy may fall into the hybrid category recognized in *Smith*).

202. *See* Zablocki v. Redhail, 434 U.S. 374, 383 (1978) ("[T]he right to marry is of fundamental importance.").

203. *See* Sealing, *supra* note 44, at 737 ("First, under *Smith*, because marriage is a fundamentally important right protected by the Due Process Clause, it meets Justice Scalia's 'hybrid situation' test.").

204. *See* Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 881–82 (1990).

205. *Zablocki*, 434 U.S. at 386 ("[T]he decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships.").

206. *See, e.g.,* State v. Holm, 137 P.3d 726, 741 (Utah 2006); State v. Green, 99 P.3d 820, 826 (Utah 2004).

those interests will be central if strict scrutiny is employed.<sup>207</sup> Indeed, precisely because marriage plays such an important role in a variety of religious traditions, limitations on marriage should be required to be narrowly tailored to promote compelling state interests.

### A. *The Harms of Polygamy*

Courts and commentators have discussed a number of harms associated with the practice of polygamy, ranging from the imposition of patriarchy to the abuse and neglect of women and children.<sup>208</sup> However, those justifying polygamy bans on these bases fail to consider the implications of the position asserted. Often, the legitimate state interests asserted would be served even with an exception for some polygamous unions. Further, were these rationales really sufficient justifications for restricting marriage, a whole host of marriages currently permitted would be at risk of prohibition. While there may be plausible justifications for current polygamy laws, they have not yet been offered.

The Utah Supreme Court has described some of the harms associated with polygamy. The court has explained that polygamy "often coincides with crimes targeting women and children[, including] incest, sexual assault, statutory rape, and failure to pay

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207. The Tenth Circuit upheld Utah's polygamy ban under strict scrutiny, believing that permitting polygamy would undermine monogamy. See *Potter v. Murray City*, 760 F.2d 1065, 1070 (10th Cir. 1985) ("[T]he State is justified, by a compelling interest, in upholding and enforcing its ban on plural marriage to protect the monogamous marriage relationship."). However, it is unclear why permitting some to enter into polygamous marriages would erode this foundation. The *Potter* district court warned about all who would try to enter into polygamous relationships if they could. See *Potter v. Murray City*, 585 F. Supp. 1126, 1140 (C.D. Utah 1984).

There appear to the court to be no reasonable alternatives to the prohibition of the practice of polygamy to meet the compelling state interest found in the maintenance of the system of monogamy upon which its social order is now based. Any broad exception to that prohibition in cases of polygamy sincerely practiced as a "religious" belief would engulf the prohibition itself with ever extending and complicating exceptions based largely on subjective claims, irremediably eroding the police power of the state and its compelling interest.

*Id.* But it is not at all clear that there would be such a groundswell to engage in this practice, even were it permitted. See *supra* text accompanying note 45 (suggesting that not many would enter into polygamous unions even were the option available).

208. See, e.g., *State v. Green*, 99 P.3d 820, 830 (Utah 2004); Samantha Slark, *Are Anti-Polygamy Laws an Unconstitutional Infringement on the Liberty Interests of Consenting Adults?* 6 J.L. & FAM. STUD. 451, 455 (2004) ("Statutory rape, incest, unlawful sexual conduct with a minor, child abuse, cohabitant abuse and criminal non-support of children have been identified as crimes associated with the practice of polygamy.").

child support.”<sup>209</sup> *State v. Green*<sup>210</sup> and *State v. Holm*<sup>211</sup> illustrate some of the harms implicated in or resulting from polygamous relationships. Green was convicted of criminal nonsupport and bigamy.<sup>212</sup> An avowed polygamist, he had simultaneous relationships with numerous women and fathered twenty-five children.<sup>213</sup> In *Holm*, the defendant was convicted of bigamy and unlawful sexual conduct with a minor.<sup>214</sup> Holm legally married Suzie Stubbs<sup>215</sup> and then took part in additional religious marriage ceremonies, including one with Ruth Stubbs, Suzie’s sixteen-year-old sister.<sup>216</sup> While aware that her union with Rodney was not a civil ceremony recognized by the law, Ruth testified at trial that she considered herself married to Holm.<sup>217</sup>

Sometimes, polygamous relationships are contracted without everyone having full knowledge of the other participants<sup>218</sup> and without following legal requirements like formally divorcing one spouse before attempting to marry another.<sup>219</sup> When that occurs, there appears to be a clear violation of laws precluding an individual from having more than one spouse at a time. Green and Holm were not so obviously in violation of the bigamy statute as would someone who contracted multiple, simultaneous marriages.

Consider Green, who participated in several marriage ceremonies with different women.<sup>220</sup> Each time, he was careful to divorce his current wife before marrying the next.<sup>221</sup> That said, he did participate in unlicensed ceremonies while already legally

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209. *State v. Green*, 99 P.3d 820, 830 (Utah 2004); see also Slark, *supra* note 208, at 455.

210. 99 P.3d 820.

211. 137 P.3d 726 (Utah 2006).

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

213. *Id.*

214. *Holm*, 137 P.3d at 730.

215. *Id.*

216. *Id.*

217. *Id.* at 731.

218. See, e.g., *State v. Geer*, 765 P.2d 1, 2 (Utah Ct. App. 1988) (discussing wife who apparently did not know that her husband had also married other women without divorcing any of them).

219. See *id.* (“Geer told [Sergeant] Mann that he had been married thirteen times and was not certain if he was married at the time he married Colleen Edwards in September 1987. Geer also told Mann he was not involved in any divorce proceedings.”).

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

221. *Id.* (“Green avoided being in more than one licensed marriage at a time by terminating each licensed marriage by divorce prior to obtaining a license for a new marriage.” (footnote omitted)).



married.<sup>222</sup> Further, he continued his relationships with his divorced wives as if they and he were still married.<sup>223</sup> Thus, he seemed to be violating the spirit if not the letter of a ban on plural marriages. The same might be said of Holm, who had participated in religious ceremonies not having civil import when establishing his relationships with his plural wives.<sup>224</sup>

Yet, both Green and Holm violated both the letter and the spirit of the Utah bigamy statute<sup>225</sup> because that statute extends both to individuals participating in multiple, simultaneous, civil marriage ceremonies as well as individuals who cohabit. It reads: "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."<sup>226</sup> Thus, because Green was married to one woman and cohabiting with another, he violated the bigamy statute, notwithstanding the fact that he had never participated in a licensed marriage ceremony while being married to someone else.<sup>227</sup> The same analysis would seem applicable to Holm,<sup>228</sup> but the *Holm* court found that Holm's behavior fell within the statute's "purports to marry" prong.<sup>229</sup>

The *Green* court addressed whether Utah's bigamy statute was constitutional in light of federal free exercise guarantees.<sup>230</sup> The court noted that *Smith* stood for the proposition that "a neutral law of general applicability need not be justified by a compelling governmental interest, even if the law has the

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222. *Id.*

223. *Id.*

224. *State v. Holm*, 137 P.3d 726, 730–31 (Utah 2006); cf. Alyssa Rower, *The Legality of Polygamy: Using the Due Process Clause of the Fourteenth Amendment*, 38 FAM. L.Q. 711, 717 (2004) ("In order to avoid prosecution, many Fundamentalist men legally marry only their first wife and 'spiritually marry' their subsequent wives.").

225. UTAH CODE ANN. § 76-7-101 (2003).

226. *Id.*

227. See *State v. Green*, 99 P.3d 820, 833 (Utah 2004) ("To successfully prosecute Green under Utah's bigamy statute, the State had the burden of establishing that Green was legally married and then purported to marry or cohabited with another woman.").

228. See *Holm*, 137 P.3d at 735 ("[T]he bigamy statute does not require a party to enter into a second marriage (however defined) to run afoul of the statute; cohabitation alone would constitute bigamy pursuant to the statute's terms.").

229. See *id.* at 737.

230. *Green*, 99 P.3d at 826 ("Second, even if this court were required to extend its analysis beyond *Reynolds*, Utah's bigamy statute would survive a federal free exercise of religion challenge under the most recent standards enunciated by the United States Supreme Court.").

incidental effect of burdening a particular religious practice.”<sup>231</sup> Yet, the court’s analysis of whether the law at issue was neutral was not particularly persuasive.

The *Green* court noted that “Utah’s bigamy statute does not attempt to target only religiously motivated bigamy. Any individual who violates the statute, whether for religious or secular reasons, is subject to prosecution.”<sup>232</sup> Yet, a neutral statute can of course target religious practices without doing so expressly. For example, the statute at issue in *Hialeah* did not specifically target religious activity—on the contrary, anyone who sacrificed animals would be subject to criminal prosecution.<sup>233</sup>

As the *Hialeah* Court explained, the Free Exercise Clause “protects against governmental hostility which is masked, as well as overt.”<sup>234</sup> In other words, the facial neutrality of a statute does not immunize that statute from further examination. Thus, the *Green* court did not fully establish that the statute at issue was neutral, only noting that the statute also criminalized conduct performed for non-religious reasons. Further, it would at least seem relevant that the state had a practice of not prosecuting individuals who violated the law for non-religious reasons.<sup>235</sup>

Even were the statute plausibly read as a neutral law of general applicability, rather than as a statute targeting religious practices, a separate question would be whether the law implicates hybrid rights as the amici argued in briefs before the *Green* court.<sup>236</sup> However, the court declined to address that argument because of procedural concerns.<sup>237</sup> The court did address whether Utah’s bigamy statute passed the rational basis test, concluding

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231. *Id.* (citing *Employment Div., Dep’t. of Human Res. v. Smith*, 494 U.S. 872, 878–80 (1990)).

232. *Id.* at 828.

233. The *Hialeah* Court noted that the ordinances at issue “define[d] ‘sacrifice’ in secular terms, without referring to religious practices.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993).

234. *Id.* at 534.

235. See *Holm*, 137 P.3d at 772 (Durham, C.J., concurring in part and dissenting in part) (“[T]he state perceives no need to prosecute nonreligiously motivated cohabitation, whether one of the parties to the cohabitation is married to someone else or not.”).

236. See *Green*, 99 P.3d at 829 (“Amici argue that Utah’s bigamy statute should nonetheless be strictly scrutinized for a compelling interest because the statute violates not only Green’s free exercise of religion, but also Green’s constitutional rights of privacy and free association, thus presenting a ‘hybrid situation.’”).

237. *Id.* (“We cannot address amici’s arguments because Green neither preserved nor properly raised or argued any claims alleging violation of constitutional rights to free speech, privacy, or free association.”).

that it did.<sup>238</sup>

When analyzing whether the statute passed muster under rational basis review, the *Green* court noted some of the interests promoted by the polygamy ban. For example, the court noted that "prohibiting bigamy implicates the state's interest in preventing the perpetration of marriage fraud, as well as its interest in preventing the misuse of government benefits associated with marital status."<sup>239</sup> The court failed to note that had these marriages been permitted, there would be no implicated issues involving marriage fraud. Indeed, some commentators suggest that permitting polygamous marriage would help reduce fraud because, for example, second wives could not then claim to be entitled to state benefits for single mothers with children.<sup>240</sup>

The *Green* court might have worried that recognizing a religious exception for plural marriages would permit nonbelievers to engage in the practice—they would only need to assert falsely that this was their religious belief as well.<sup>241</sup> Yet, whenever a religious exception is granted, there is the possibility that some will falsely assert that they have the relevant beliefs. It is up to the state, as prosecutor, and the court, as fact-finder, to ascertain whether the beliefs asserted are sincerely held.<sup>242</sup> Needless to say, analogous claims did not win the day with respect to unemployment compensation, notwithstanding the potential for abuse.<sup>243</sup>

When rejecting the argument that the Free Exercise Clause required bigamy statutes to contain a religious exception, the *Holm* court pointed to the *Green* court's analysis to support the proposition that Utah's bigamy statute is a neutral, generally

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Having concluded that the State need only show a rational relationship between its bigamy law and a legitimate government interest, we assess whether the State has met its burden in this regard. We conclude that Utah's bigamy statute is rationally related to several legitimate government ends. First, this state has an interest in regulating marriage.

*Id.*

239. *Id.* at 830.

240. Rower, *supra* note 224, at 728 ("[T]he legality of polygamy would help prevent polygamous families from committing welfare fraud. Currently, polygamous communities receive a substantial amount of assistance from the state and federal government. By not registering their marriages, multiple wives are able to collect welfare as single mothers.").

241. *Potter v. Murray City*, 760 F.2d 1065, 1139 (10th Cir. 1985).

242. *Cf. State v. Holm*, 137 P.3d 726, 766 (Utah 2006) (Durham, C.J., concurring in part and dissenting in part) ("The State does not dispute the sincerity of Holm's religious motivation . . .").

243. See *supra* text accompanying notes 64–95 (discussing the unemployment benefits cases).

applicable law that passes constitutional muster.<sup>244</sup> Yet, the *Holm* court failed to mention that part of *Green* court's analysis was based on a procedural point that precluded the court from considering whether hybrid rights were at issue.<sup>245</sup>

To be fair, the *Holm* court did not rely exclusively on *Green* for this part of its analysis. For example, the *Holm* court implied that no hybrid right was at issue because there was no right to enter into polygamous unions protected by the Constitution.<sup>246</sup> Yet, at the very least, this goes too far.<sup>247</sup> First, to the extent that the Free Exercise Clause only protects rights which are protected independently by the Constitution, the Clause would be meaningless. If the right to enter into a polygamous union was already constitutionally protected, then one would not need to cite the Free Exercise Clause to establish that this right was protected;<sup>248</sup> and if the right to enter into such a union is not already constitutionally protected, then citing the Free Exercise Clause would not afford it protection anyway. Second, it does not account for *Yoder*. While parents have the right to educate their children,<sup>249</sup> the Wisconsin statute at issue in *Yoder* was found constitutional, notwithstanding that fundamental right.<sup>250</sup> When considering the *Holm* analysis, one may assume the right at issue in *Yoder* should not be protected. But that was not what *Yoder* held. On the contrary, the *Yoder* Court required an exception be made to accommodate the religious beliefs of the Amish—it did not conclude that no parent could be prosecuted for failing to have her child attend school until reaching the age of sixteen.<sup>251</sup>

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244. *Holm*, 137 P.3d at 742.

245. See *supra* text accompanying note 237.

246. *Holm*, 137 P.3d at 746 (“[T]he right to engage in polygamous behavior is not encompassed within the ambit of the individual liberty protections contained in our federal constitution.”).

247. Cf. *Potter v. Murray City*, 585 F. Supp. 1126, 1138 (C.D. Utah 1984) (“Nor is the State’s argument sound that there is no fundamental right to the practice of polygamy as such and therefore only the rationality standard is applicable.”).

248. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 567 (1993) (Souter, J., concurring in part and concurring in the judgment).

249. See generally *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (finding that the states cannot force parents to send their children to attend public school only); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (striking down state statute prohibiting instruction of a foreign language at a certain age, deciding it infringed on parents’ and teachers’ rights).

250. See *Wisconsin v. Yoder*, 406 U.S. 205, 225 (1972) (affirming the lower court’s requirement that the statute contain a free exercise exception).

251. See *Yoder*, 406 U.S. at 214 (“[A] State’s interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment.”).

The *Holm* court noted that the people of Utah have “declared monogamy a beneficial marital form and have also declared polygamous relationships harmful.”<sup>252</sup> Yet, a mere declaration of what is beneficial or harmful to society cannot be all that is needed, or else a “way of life that is odd or even erratic”<sup>253</sup> might simply be declared harmful and, thus, permissibly prohibited.

One of the state interests implicated in *Holm* was preventing sexual relations between minors and substantially older adults. The *Holm* court expressly noted that Holm had frequently engaged in sexual activity with Ruth while she was still a minor.<sup>254</sup> Certainly, the state has a compelling interest in protecting its children. But that does not resolve the issue presented in *Holm*. According to state law, Holm would not have violated any statutes by marrying Ruth when she was sixteen (with her father’s consent)<sup>255</sup> and then having frequent sexual relations with her, as long as he had not been married to anyone else at the time.<sup>256</sup> Thus, it is misleading to suggest that the state was attempting to protect minors from having sexual relations with individuals ten or more years their senior,<sup>257</sup> given the parental consent exception.<sup>258</sup>

The *Green* court believed one of the most important reasons to ban polygamy was to prevent crimes against women and children.<sup>259</sup> Yet, several points can be made about such a rationale. It is not clear that permitting consenting *adults* to participate in plural marriage would result in more plural marriages involving *children*, especially if the law clearly stated that marriages involving children would not be permitted. Indeed, the state has in effect adopted such a law, since it does not seem to believe it important to prosecute individuals for entering into plural marriages unless one of the parties is a child.<sup>260</sup> However,

252. *State v. Holm*, 137 P.3d 726, 744 (Utah 2006).

253. *Yoder*, 406 U.S. at 224.

254. *Holm*, 137 P.3d at 744.

255. *Id.* at 751 (“Stubbs’s father consented to her religious union with Holm.”).

256. *Id.* (noting that Holm could have legally married Ruth).

257. See UTAH CODE ANN. § 76-5-401.2 (2007) (making it unlawful for an actor to have sexual relations with someone sixteen or seventeen if the actor is ten or more years older than the minor).

258. *Holm*, 137 P.3d at 751 (Holm argues his exception is based on Utah Code section 30-1-9).

259. *State v. Green*, 99 P.3d 820, 830 (Utah 2004); see also Richard A. Vazquez, *The Practice of Polygamy: Legitimate Free Exercise of Religion or Legitimate Public Menace? Revisiting Reynolds in Light of Modern Constitutional Jurisprudence*, 5 N.Y.U. J. LEGIS. & PUB. POL’Y 225, 239–40 (2001) (suggesting that the prevention of abuse of women and children justifies polygamy bans).

260. See *Holm*, 137 P.3d at 775 (Durham, C.J., concurring in part and dissenting

if the state's interest really is to prevent crimes against women and children,<sup>261</sup> the law could be more narrowly tailored to serve that interest.<sup>262</sup> General bans on polygamy involving consenting adults<sup>263</sup> are not a particularly effective way to prevent marriages involving children.<sup>264</sup>

A statute permitting polygamy might nonetheless impose restrictions based on age or consanguinity. Assault is not somehow immunized from prosecution because the victim is a marital partner. While there is general agreement that the state interests in preventing these harms are legitimate and perhaps compelling, there is far less agreement about whether the means chosen to effectuate these ends are sufficiently tailored to survive close scrutiny, since those interests could be served even were polygamy permitted.<sup>265</sup>

The *Holm* court further noted the difficulties associated with prosecuting polygamous practices, given the closed nature of the communities where this is practiced.<sup>266</sup> Yet, it is difficult to see how the criminalization of polygamy would make the communities where polygamy is practiced less closed—it seems more reasonable

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in part) ("Further, the State itself has indicated that it does not prosecute those engaged in religiously motivated polygamy under the criminal bigamy statute unless the person has entered a religious union with a girl under eighteen years old.").

261. Cf. Joseph Bozzuti, *The Constitutionality of Polygamy Prohibitions After Lawrence v. Texas: Is Scalia a Punchline or a Prophet?*, 43 CATH. LAW. 409, 436 (2004) ("Polygamous wives are often teenagers. In some communities, male polygamists 'consistently marry [girls] between the ages of fourteen and sixteen.' Often, the age disparity between husband and wife is upward of twenty years or greater." (quoting Strassberg, *supra* note 46, at 366)).

262. See *Holm*, 137 P.3d at 775 (Durham, C.J., concurring in part and dissenting in part) ("[A] blanket criminal prohibition on religious polygamous unions is not necessary to further the state's interests, and suggest that a more narrowly tailored law would be just as effective.").

263. Cf. *Potter v. Murray City*, 760 F.2d 1065, 1069 (10th Cir. 1985) ("The plaintiff has made an undisputed showing that his two wives consented to the plural marriage . . .").

264. Commentators do not appreciate that this disconnect suggests that the statute could in fact be more narrowly tailored. See Vazquez, *supra* note 259, at 247 ("[T]here is no alternative to Utah's criminal bigamy statute that is less restrictive on the free exercise of religion while still managing to combat the crimes committed in polygamous communities.").

265. Cf. D. Marisa Black, *Beyond Child Bride Polygamy: Polyamory, Unique Familial Constructions, and the Law*, 8 J.L. & FAM. STUD. 497, 505 (2006) ("The Utah Attorney General's Office has said that the prosecution of polygamy falls on local law enforcement, but that as a practical matter bigamists will not be prosecuted in the absence of the more serious crimes of child abuse, domestic violence, and fraud.").

266. *State v. Green*, 99 P.3d 820, 830 (Utah 2004) ("[T]he closed nature of polygamous communities makes obtaining evidence of and prosecuting these crimes challenging.").

to believe that they are closed, at least in part, because of the very laws prohibiting the conduct. Indeed, it may be that permitting adult polygamy would make communities less closed<sup>267</sup> and so less likely to shelter (other) illegal activity.<sup>268</sup>

At least one issue lurking in the background in these cases is whether the implicit picture of polygamous relationships is in fact accurate.<sup>269</sup> Some commentators suggest that stereotypical depictions of polygamous relationships were offered in the past,<sup>270</sup> and that this practice of misrepresentation continues today.<sup>271</sup> Even if some of the criticisms of polygamy as practiced in the later 1800s were accurate, i.e., that it imposed a system of patriarchy,<sup>272</sup> those same criticisms might not be accurate of present-day polygamy.<sup>273</sup>

267. Slark, *supra* note 208, at 459.

268. See Rower, *supra* note 224, at 727. But see Strassberg, *supra* note 46, at 411 ("It is these threats that may well provide the ultimate justification for the continued criminalization of polygamy.").

269. Cf. State v. Holm, 137 P.3d 726, 749 (Utah 2006).

Holm contends that the trial court erred by not allowing him to put into evidence expert testimony addressing the social history and health of polygamous communities. Specifically, Holm argues that such testimony was necessary to rebut the notion that polygamous communities are rife with abuse and victimize children.

*Id.*

270. See Irwin Altman, *Husbands and Wives in Contemporary Polygamy*, 8 J.L. & FAM. STUD. 389, 392 (2006) ("[A] pattern of stereotyping [of polygamy that] was evident in nineteenth century writings and legal opinions."); cf. Sealing, *supra* note 44, at 703 (discussing the "flood" of anti-polygamy tomes [whose] . . . themes included plural wives as slaves, the lust of old men for young girls, and incest in polygamous families").

271. Altman, *supra* note 270, at 392 ("Some of these and other stereotypes and caricatures are still used today, with polygamous men labeled as selfish, controlling, and exploitive of women. . . . As with many stereotypes, such qualities are applied to whole populations, are often exaggerations, and are based on a limited number[] of cases.").

272. Cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah 508 U.S. 520, 569 (1993) (Souter, J., concurring in part and concurring in the judgment) ("*Reynolds*, which in upholding the polygamy conviction of a Mormon stressed the evils it saw as associated with polygamy . . ." (citing *Reynolds v. United States*, 98 U.S. 145, 166 (1878))); *Reynolds*, 98 U.S. at 166 ("Professor Lieber says, polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy."). But see Calhoun, *supra* note 17, at 1038 ("The Mormon women's rights advocates at the time argued, with good reason, that plural wives were in fact more liberated than their New England counterparts.").

273. Calhoun, *supra* note 17, at 1040 ("The quick dismissal of polygamy on grounds that it, unlike monogamy, is distinctively gender-inegalitarian is the result of smuggling in a set of unstated assumptions . . . that are implausible assumptions about plural marriage in a liberal egalitarian democracy."); cf. Strassberg, *supra* note 46, at 391 ("[P]olygyny ultimately improved the situation of a considerable number of women who had experienced extreme social, economic and/or emotional deprivation in the Mormon mainstream.").

Professor Eskridge notes that “allowing a man to take two wives might create or exacerbate hierarchical structures within the marriage,”<sup>274</sup> arguing that, because “the husband would have to deal with at least twice as many wives, it is probable that he would establish a more authoritarian structure for the marriage.”<sup>275</sup> Yet, such an argument proves too much. If marriages can be precluded because of a fear that hierarchical relationships would otherwise be promoted, then it would seem that a whole host of marriages involving only two individuals might also be prohibited.<sup>276</sup> For example, such a rationale would justify precluding those who believe women should be subservient to their husbands from marrying.<sup>277</sup>

The point here should not be misunderstood. Various United States Supreme Court Justices have been critical of polygamous practices. In *Davis v. Beason*,<sup>278</sup> the Court wrote:

Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. They are crimes by the laws of the United States, and they are crimes by the laws of Idaho. They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman, and to debase man. Few crimes are more pernicious to the best interests of society, and receive more general or more deserved punishment.<sup>279</sup>

The *Cleveland* Court stated that the “establishment or maintenance of polygamous households is a notorious example of promiscuity.”<sup>280</sup> In *McGowan v. Maryland*, Justice Douglas made clear that he considered polygamy an “extreme” situation appropriately subject to prohibition, although he did not expressly state which harms he associated with polygamy.<sup>281</sup>

At least one issue in polygamy cases should be whether the state must provide evidence that the practice at issue, especially if confined to consenting adults, would cause the harms sometimes

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274. WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* 149 (1996).

275. *Id.*

276. See Calhoun, *supra* note 17, at 1040–41 (noting that such an argument suggests that we should be “willing to also eliminate monogamous civil marriage because it, too, sometimes takes social forms that are oppressive to women”).

277. Cf. Chambers, *supra* note 15, at 82 (“We need to remember that large numbers of conservative Christians, Muslims, and Jews in monogamous marriages in the United States today accept a view of wives as subordinate to their husbands.”).

278. 133 U.S. 333 (1890).

279. *Id.* at 341.

280. *Cleveland v. United States*, 329 U.S. 14, 19 (1946).

281. See *McGowan v. Maryland*, 366 U.S. 420, 574 (1961) (Douglas, J., dissenting).



alleged. As Justice Blackmun pointed out in his *Smith* dissent, the free exercise jurisprudence has "not allowed a government to rely on mere speculation about potential harms, but ha[s] demanded evidentiary support for a refusal to allow a religious exception."<sup>282</sup> It has never been clear that permitting an exception for polygamy for consenting adults as a matter of free exercise would have the horrible implications sometimes alleged. While some, but not all, polygamous relationships<sup>283</sup> might involve abuse or exploitation,<sup>284</sup> the same can be said of monogamous relationships.<sup>285</sup>

Some commentators suggest that recognizing polygamous relationships may in fact fill a need, i.e., where there is a dearth of available males.<sup>286</sup> For example, Professor Wing suggests that polygamy might provide an additional option for racial and ethnic minority women.<sup>287</sup> To some extent, past Mormon polygamous actions might have also provided alternative options for older unmarried women or for women who were widowed.<sup>288</sup>

### B. Non-Mormon Plural Relationships

In the public mind, polygamy is generally associated with fundamental Mormonism.<sup>289</sup> A related, non-Mormon practice,

282. *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 911 (1990) (Blackmun, J., dissenting).

283. See, e.g., *Potter*, 585 F. Supp. 1126, 1129 (C.D. Utah 1984) ("Plaintiff's wives and children receive adequate care, love and attention and want for no necessity of life.").

284. Cf. Chambers, *supra* note 15, at 66 (noting that "some women in polygamous marriages suffered badly"); Harmer-Dionne, *supra* note 45, at 1330 ("[O]ther women endured dreadful situations, ridden with strife and jealousy, from which their children bore sensitive scars.").

285. See Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 335 (2004) ("But coercion and oppression, of course, afflict bilateral relationships as well as multiparty ones."); cf. Harmer-Dionne, *supra* note 45 at 1329-30 ("The reality of polygamy very much reflected the reality of monogamy, [s]ometimes it worked, and sometimes it didn't.").

286. Cf. Adrien 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, 858 (2001) ("African Americans today face conditions in which de facto polygamy can flourish. A disproportionate number of our men are unavailable for marriage—due to early death, imprisonment, high unemployment, and intermarriage.").

287. *Id.* at 863; cf. Harmer-Dionne, *supra* note 45, at 1329 (discussing the argument offered by Mormons in the 19th century, that where "there is a surplus of women and their status depends very much on being a wife and mother," they should be provided with such status").

288. Harmer-Dionne, *supra* note 45, at 1329-30 ("Often the women who married into polygamy were immigrants, widows, or spinsters.").

289. See Larcano, *supra* note 6, at 1068 (discussing "polygamy as most

polyamory, is receiving growing attention. Professor Strassberg explains: "Contemporary practitioners have coined the names 'polyamory' and 'polyfidelity' to describe a wide range of partner arrangements that vary as to the number of people involved, the sexes of those involved, the sexualities of those involved, the level of commitment of those involved, and the kinds of relationships pursued."<sup>290</sup>

Polyamory is similar to polygamy in that more than two parties are involved in the relationship, but it is different both because it might involve multiple male partners and/or same-sex or bisexual relationships.<sup>291</sup>

Polyamory involves multiple consensual relationships,<sup>292</sup> although those relationships need not all be marriages.<sup>293</sup> Polyamorists may seek recognition of their relationships for a multitude of reasons, such as to secure insurance coverage,<sup>294</sup> or to merely avoid losing child custody because of having a polyamorous relationship.<sup>295</sup>

Polyamorists may view themselves as "practicing nonmonogamy as part of an ethical practice that shares some of its aspirations with more mainstream models of intimate relationships."<sup>296</sup> These intimate relationships may, but need not, be sexual.<sup>297</sup> Further, all of these relationships *may* involve obligations to all of the involved parties.<sup>298</sup> For example, some relationships might require the consent of all parties involved before an individual may bring more parties into the

Americans traditionally understand it—a practice tied to fundamental Mormonism"); Rower, *supra* note 224, at 712 ("In the United States, polygamy is almost exclusively associated with the Mormon Church.").

290. Maura I. Strassberg, *The Challenge of Post-Modern Polygamy: Considering Polyamory*, 31 CAP. U. L. REV. 439, 439–40 (2003).

291. *Id.* at 440–41; Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79, 124 (2001).

292. Black, *supra* note 265, at 500 ("Polyamory . . . proponents emphasize the consensual nature of such a relationship choice.").

293. *Id.* ("Polyamory . . . is not necessarily based on multiple marriages.").

294. *Id.* at 505 ("Some polyamorists are legally married for health benefits, citizenship, or other reasons, and therefore may be living in violation of the bigamy and adultery prohibitions.").

295. *See id.* at 503 ("A pervasive fear among polyamorists is that their children will be taken from their home or that parental custody will be curbed due to a parent's polyamorous lifestyle.").

296. Emens, *supra* note 285, at 283.

297. *See id.* at 305. *But see id.* ("[S]ome writers posit that the term polyamory must incorporate sexual nonexclusivity.").

298. *See* Strassberg, *supra* note 290, at 446 ("Groups of any size, from two on up, can limit their sexual relationships to those within the group or can allow extra-group sexual relationships.").

relationship.<sup>299</sup>

Polyamorous relationships are also prohibited if more than two of the parties wished to marry. Further, under a bigamy statute like Utah's that has a cohabitation prong, polyamorists could be subject to prosecution even if only two members of the relationship contracted to marry.<sup>300</sup>

The existence of polyamorous relationships further complicates the analysis of polygamy statutes. A legislature, which passed statutes prohibiting plural marriage in an attempt to address the alleged harms implicated in polyamorous relationships, would not thereby be targeting religious practices. Such a statute would not run as high a risk of invalidation under free exercise guarantees as would a similar statute targeting religiously-inspired plural marriages.<sup>301</sup>

Another complicating factor in the analysis of polygamy legislation is that Mormons have not been the only group to practice plural marriage. Historically, some Native American tribes recognized polygamous unions as well. That another group engaged in the practice has several implications.

Congress did not choose to void plural marriages involving Native Americans.<sup>302</sup> This at least suggests that Congress was distinguishing among groups practicing polygamy and targeting Mormon practices in particular. Thus, the federal statutes targeting polygamy are even more appropriately subject to a *Hialeah* analysis because the statutes at issue in *Hialeah* differentiated among religious groups.<sup>303</sup>

An analogous point might be made about various state laws. Some states had to decide whether they would recognize Native American plural marriages, and courts sometimes recognized them out of comity.<sup>304</sup> For example, in *Ortley v. Ross*,<sup>305</sup> the

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299. Emens, *supra* note 285, at 308 ("A term such as 'polyfidelity' clarifies the type of commitment among the parties, and is defined as [a] lovestyle in which three or more primary partners agree to be sexual only within their family. Additional partners can be added to the marriage with everyone's consent." (citations and internal quotations omitted)).

300. UTAH CODE ANN. § 76-7-101(1) (2003).

301. See *supra* Part II.B.

302. *Hallowell v. Commons*, 210 F. 793, 800 (8th Cir. 1914) ("Congress could have passed a law prohibiting plural marriages among tribal Indians if it saw fit, but it did not do so.").

303. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 536 (1993) (noting that one of the exceptions appeared to "cover kosher slaughter").

304. See, e.g., *Hallowell*, 210 F. at 800; *Kobogum v. Jackson Iron Co.*, 43 N.W. 602, 605 (Mich. 1889); *Morgan v. McGhee*, 24 Tenn. 13, 14 (1844).

305. 110 N.W. 982 (Neb. 1907).

Nebraska Supreme Court recognized a Native American plural marriage that had been celebrated in accord with Native American "customs and usages."<sup>306</sup> The Nebraska Legislature subsequently enacted legislation that (1) precluded Native Americans marrying solely according to custom,<sup>307</sup> (2) required those Native Americans marrying to do so civilly,<sup>308</sup> and (3) made Native American plural marriage illegal, whether celebrated civilly or according to custom.<sup>309</sup>

The Nebraska response is unique. While almost all states criminalize bigamy or polygamy,<sup>310</sup> no other state has a separate law specifying how Native American plural marriages will be treated. Most of the statutes criminalize plural marriage within their bigamy statutes,<sup>311</sup> although some expressly criminalize

306. *Id.* at 983.

307. NEB. REV. STAT. § 42-403 (2004).

308. NEB. REV. STAT. § 42-404 (2004).

309. *See* NEB. REV. STAT. § 42-406 (2004). Section 42-402 addresses the legitimacy of children.

Whenever any man and woman, either of whom is whole or in part of Indian blood, shall have cohabited together as husband and wife according to the customs and manners of Indian life, the issue of such cohabitation shall be taken and deemed to be the legitimate issue of such persons so living together, notwithstanding the fact that the father and mother may have been divorced or separated according to Indian customs, or otherwise, and married to other persons, according to Indian custom, or otherwise.

*Id.*

310. Slark, *supra* note 208, at 453 ("[B]igamy and polygamy are expressly prohibited in all jurisdictions except Hawaii, where the second marriage is simply annulled."). *But cf.* Tagupa v. Tagupa, 121 P.3d 924, 926 (Haw. Ct. App. 2005) ("In Hawai'i, living person A's purported marriage to living person C, while living person A is lawfully married to living person B, is void ab initio.").

311. ALASKA STAT. § 11.51.140(a) (2006); ARIZ. REV. STAT. ANN. § 13-3606(A) (2001); ARK. CODE ANN. § 5-26-201(a) (2006); CAL. PENAL CODE § 281(a) (West 1999); DEL. CODE ANN. tit. 11, § 1001 (2001); D.C. CODE ANN. § 22-501 (LexisNexis 2001); FLA. STAT. ANN. § 826.01 (West 2006); IDAHO CODE ANN. § 18-1101 (2004); IND. CODE ANN. § 35-46-1-2 (LexisNexis 2004); IOWA CODE ANN. § 726.1 (West 2003); ME. REV. STAT. ANN. tit. 17-A, § 551(1) (2006); MD. CODE ANN., CRIM. LAW § 10-502(b) (LexisNexis 2002); MISS. CODE ANN. § 97-29-13 (2006); MONT. CODE ANN. 45-5-611(1) (2007); NEB. REV. STAT. § 28-701(1) (2004); NEV. REV. STAT. § 201.160 (2005); N.H. REV. STAT. ANN. § 639:1 (2007); N.J. STAT. ANN. § 2C:24-1(a) (West 2005); N.M. STAT. ANN. § 30-10-1 (West 2003); N.Y. PENAL LAW § 255.15 (McKinney 2000); N.D. CENT. CODE § 12.1-20-13 (1997); OKLA. STAT. ANN. tit. 21, § 881 (West 2003); OR. REV. STAT. ANN. § 163.515(1) (West 2001); 18 PA. CONS. STAT. ANN. § 4301(a) (West 1983); S.C. CODE ANN. § 16-15-10 (2003); S.D. CODIFIED LAWS. § 22-22A-1 (2006); TENN. CODE ANN. § 39-15-301(a) (2006); WASH. REV. CODE ANN. § 9A.64.010(1) (West 2000); WYO. STAT. ANN. § 6-4-401(a) (2004). Many of the statutes cited here include a specification of defenses to the charge, for example, that the previous marriage had been dissolved or declared void or that the spouse had been absent for a period of years and was not known to be living. *See, e.g.*, DEL. CODE ANN. tit. 11, § 1002 (listing defenses including a belief "after diligent inquiry" that first spouse was dead); OKLA. STAT. ANN. tit. 21, § 882 (listing "[e]xceptions to the rule of bigamy"). *But cf.* ME. REV. STAT. ANN. Tit. 17-A, § 551

polygamy.<sup>312</sup> In addition, some states, such as Utah, include cohabitation within their polygamy statutes.<sup>313</sup>

As a general matter, a state may refuse to recognize a plural marriage, even if validly celebrated elsewhere.<sup>314</sup> A separate issue is whether an exception must be made on free exercise grounds. Even were an exception made on free exercise grounds for plural marriages involving adults, the state would presumably have a sufficiently compelling interest in refusing to recognize plural marriages involving minors,<sup>315</sup> even if validly celebrated elsewhere.<sup>316</sup>

### C. Same-Sex Marriages

Some commentators suggest a key difference between polygamous and same-sex unions is that the former but not the latter implicate free exercise guarantees.<sup>317</sup> Yet, this is incorrect both because some plural marriages do not implicate free exercise concerns and, more importantly, because some same-sex unions

(failing to enumerate specific defenses).

312. MASS. ANN. LAWS ch. 272, § 15 (LexisNexis 1992); MICH. COMP. L. ANN. § 750.439 (West 2004).

313. ALA. CODE § 13A-13-1(a) (LexisNexis 1975 & Supp. 2004); COLO. REV. STAT. § 18-6-201(1) (2006); GA. CODE ANN. § 16-6-20(a) (2007); R.I. GEN. LAWS § 11-6-1 (2002); TEX. PENAL CODE ANN. § 25.01 (Vernon 2003 & Supp. 2007); UTAH CODE ANN. § 76-7-101(1) (2003). Some states include cohabitation in a different way, making it a crime to cohabit with someone after having celebrated a plural marriage with that person elsewhere. See CONN. GEN. STAT. ANN. § 53a-190(a) (West 2007); 720 ILL. COMP. STAT. 5/11-12(a) (West 2002); KAN. STAT. ANN. § 21-3601(a) (1995); KY. REV. STAT. ANN. § 530.010(1) (LexisNexis 1999); LA. REV. STAT. ANN. § 14:76 (2004); MINN. STAT. § 609.355(2) (2006); MO. ANN. STAT. § 568.010.1 (West 1999); N.C. GEN. STAT. ANN. § 14-183 (West 2005); OHIO REV. CODE ANN. § 2919.01(A) (LexisNexis 2004); VT. STAT. ANN. Tit. 13, § 206 (1998); VA. CODE ANN. § 18.2-362 (2003); WIS. STAT. ANN. § 944.05(1) (West 2005).

314. *People v. Ezeonu*, 588 N.Y.S.2d 116, 117 (Sup. Ct. 1992) (“[A] polygamous marriage legally consummated in a foreign country will be held invalid in New York.” (citation omitted)); *Bronislaw v. Tadeusz*, 393 N.Y.S.2d 534, 535 (Fam. Ct. 1977).

315. Indeed, Utah makes this a separate offense:

An actor 18 years of age or older is guilty of child bigamy when, knowing he or she has a wife or husband, or knowing that a person under 18 years of age has a wife or husband, the actor carries out the following with the person who is under 18 years of age: (a) purports to marry the person who is under 18 years of age; or (b) cohabits with the person who is under 18 years of age.

UTAH CODE ANN. § 76-7-101.5(1) (2003).

316. See, e.g., *Ezeonu*, 588 N.Y.S.2d at 116–17 (invalidating a marriage between a Nigerian adult and his thirteen-year-old wife).

317. See, e.g., Elijah L. Milne, *Blaine Amendments and Polygamy Laws: The Constitutionality of Anti-Polygamy Laws Targeting Religion*, 28 W. NEW ENG. L. REV. 257, 285–86 (2006) (arguing that, unlike same-sex marriages, polygamous marriages implicate free exercise concerns).

do. A variety of religious traditions recognize same-sex unions,<sup>318</sup> and a person wishing to marry a same-sex partner as part of his or her religious tradition has an equally valid argument that the state's refusal to allow such a marriage triggers free exercise guarantees.

Commentators note the central role marriage plays within a variety of religious traditions,<sup>319</sup> and there is no reason to believe that same-sex unions do not play an important role in the spiritual lives of individuals seeking to marry a same-sex partner.<sup>320</sup> Even were there reason to believe that religious traditions recognizing same-sex unions did not consider such unions to be of central importance, that would not alter the force of the point here. As the *Smith* Court stated:

It is no more appropriate for judges to determine the "centrality" of religious beliefs before applying a "compelling interest" test in the free exercise field, than it would be for them to determine the "importance" of ideas before applying the "compelling interest" test in the free speech field. What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is "central" to his personal faith?<sup>321</sup>

Indeed, to trigger free exercise protections, there is no requirement either that the prohibited practice be central to a person's faith or that the practice be accepted by the general populace. As the *Thomas* Court explained: "[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."<sup>322</sup> Indeed, those practices need not even be accepted by all members of the religion to trigger the relevant protections. The *Thomas* Court noted that "it is not within the judicial function and judicial competence to inquire

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318. See Jamal Greene, *Divorcing Marriage from Procreation*, 114 YALE L.J. 1989, 1995 (2005) (noting that many religions recognize same-sex marriage); Joseph William Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 STAN. J. CIV. RTS. & CIV. LIBERTIES 1, 24 (2005) (noting that some religions celebrate same-sex unions).

319. Richard L. Elbert, *Love, God, and Country: Religious Freedom and the Marriage Penalty Tax*, 5 SETON HALL CONST. L.J. 1171, 1203 (1995) ("Today, marriage remains a fundamental tenet of the major religions practiced in the United States."); Steven L. Nock, *Why Not Marriage?*, 9 VA. J. SOC. POL'Y & L. 273, 290 (2001) (discussing "the centrality of marriage in western religion").

320. See Greene, *supra* note 318, at 1995 (suggesting that marriage has "substantial spiritual significance for same-sex couples" regardless of whether it is sanctioned by their religion).

321. *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 886–87 (1990) (citation omitted).

322. *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 714 (1981).

whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.”<sup>323</sup>

Commentators comparing same-sex and polygamous unions tend not to focus on the point that the state refusal to recognize either might implicate free exercise protections. Instead, they have sought to highlight some of the differences between the two as a way to establish that polygamous unions may not be constitutionally protected even if same-sex unions are.<sup>324</sup>

Yet, some of the differences mentioned, even if accurate, are not the kind of differences upon which to base a decision about which marriages are or should be protected. For example, some commentators suggest that the desire to enter into a same-sex union is more deeply rooted than the desire to enter into polygamous relationships and for this reason same-sex but not polygamous relationships should be recognized.<sup>325</sup> But we generally do not impose the requirement that only those with a deeply rooted desire to marry may do so. Nor is it clear how we would go about testing the relative strengths of individuals’ desires to marry.

Likewise, there is some disagreement about the relative strengths of individuals’ desires to have deep, possibly sexual, relationships with more than one individual.<sup>326</sup> Some commentators claim that this is a near-universal desire that is systematically undervalued.<sup>327</sup> Even if such desire did not exist, there is still the separate issue of measuring the desire to marry more than one person when doing so would fulfill a religious obligation.<sup>328</sup>

Other commentators have made the related argument that same-sex marriage goes to essential aspects of identity and personhood, whereas polygamous marriage involves a mere choice

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323. *Id.* at 716.

324. *See, e.g.,* Strassberg, *supra* note 290; *see also* Larcano, *supra* note 6, at 1086 (listing her article’s goals without mentioning free-exercise issues); Donovan, *supra* note 45, at 589 (“To the extent that opponents of same-sex marriage bear the burden to demonstrate that same-sex marriage will result in polygamy, they have failed.”).

325. *See* Chambers *supra* note 15, at 79 (discussing commentators making this argument).

326. *Id.*

327. Emens, *supra* note 285, at 342–43 (“[T]he desire to be sexually involved with more than one person, or with someone other than an existing partner, is viewed as nearly universal.”).

328. *See* Chambers, *supra* note 15, at 79 (arguing that gay people’s need to marry is no more compelling than the needs of others to engage in polygamy).

to marry more than one individual.<sup>329</sup> Yet, this is exactly the sort of argument which is open to abuse—some same-sex marriage opponents argue that sexual orientation is not an essential aspect of personhood<sup>330</sup> and that this is a reason to deny same-sex couples the right to marry. Given that same-sex marriage serves many of the same societal and individual interests<sup>331</sup> as opposite-sex marriages,<sup>332</sup> it is not at all clear that such marriages would appropriately be prohibited even if sexual orientation is not an

329. James M. Donovan paraphrases one such argument put forth by political commentator Andrew Sullivan:

[T]o be homosexual is just that: to be something. But to be polygamous is merely to do something. Homosexuality is state of being, while polygamy is an activity. This ontological difference requires that the two be treated differently legally. At the very least, a principled ground thereby exists for such differential treatment.

Donovan, *supra* note 45, at 541. Larcano adopts this argument in her 2006 law review article:

[T]he most inherent (and most hotly contested) difference (and the most hotly contested assertion) between same-sex marriage and polygamy is that polygamy represents a choice, while sexual orientation is an immutable characteristic, such as race or gender. While this statement has been challenged, studies show there is a hormonal and genetic basis for sexual orientation making sexual orientation biologically fated. This does not apply to polygamists. Plural wives can enter "into monogamous marriages in the absence of a polygamous alternative," while most gay and lesbian individuals "would not enter into heterosexual marriages in the absence of a same-sex alternative." Because sexual orientation is an immutable characteristic, gay and lesbian couples should have the same rights to marry as heterosexuals—anything less wholly denies them the right to marry. Polygamists, under the current structure, are not denied the right to marry someone, just the right to marry anyone and everyone.

Larcano, *supra* note 6, at 1080–81 (footnotes omitted). As Elizabeth F. Emens notes: "Unlike homosexuals, who are understood by many to possess a distinct and unalterable identity, polyamorists are rarely seen as having a distinct identity." Emens, *supra* note 285, at 342.

330. See Jason Montgomery, *An Examination of Same-Sex Marriage and the Ramifications of Lawrence v. Texas*, 14 KAN. J.L. & PUB. POL'Y 687, 700 (2005) ("Another argument against same-sex marriage is that the state has a legitimate interest in discouraging homosexuality. This argument assumes homosexuality is harmful and is a lifestyle choice rather than a biological predetermination."); Edward Clark, *The Construction of Homosexuality in New Zealand Judicial Writing*, 37 VICT. U. WELLINGTON L. REV. 199, 207 (2006) (discussing a New Zealand child custody case that treated sexual orientation "as a rather trivial choice").

331. See *Turner v. Safley*, 482 U.S. 78 (1987). The plurality opinion discussed some of the important individual interests implicated in marriage, including "expressions of emotional support and public commitment," *id.* at 95, and "the receipt of government benefits," *id.* at 96. The Court expressly noted that "the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication." *Id.*

332. See Strasser, *supra* note 18, at 603–04 (2002) (arguing that same-sex marriage promotes the same kinds of societal and individual interests as do opposite-sex marriages, i.e., providing a setting in which children and adults might flourish).



important part of individual identity.

Some commentators suggest that same-sex marriage should be differentiated from polygamous marriage because only the former is based on romantic love.<sup>333</sup> Yet, this criterion is also subject to abuse. Some same-sex marriage opponents suggest that same-sex marriage should not be permitted precisely because they would not be contracted for love.<sup>334</sup>

Suppose that individuals wishing to enter into a plural marriage claimed to be in love. Would some test be used to establish the truthfulness of the claim? Would that same test be used for two-person unions (regardless of whether they involved same-sex or opposite-sex couples) to determine whether they could marry? The difficulties inherent in defining and testing love counsel against employing such a criterion. Many two-party marriages might be prohibited because the individuals could not establish that they had the requisite amount of the "correct" kind of feelings.

Same-sex unions and polygamous unions can be differentiated in constitutionally significant ways. The relevant statutes are facially distinguishable in an important respect for equal protection purposes, namely, that one distinguishes on the basis of sex while the other does not. Further, the claimed interests served by the statutes, such as the prevention of child marriages, differ. Yet, the differences between them should not obscure an important similarity, namely, that polygamy and same-sex marriage bans may well implicate free exercise guarantees.

## Conclusion

In *Romer v. Evans*, the Supreme Court struck down a Colorado constitutional amendment precluding the state and local governments from banning discrimination on the basis of sexual orientation.<sup>335</sup> The Court held, six to three, that such an amendment, which imposed a unique disability on a disfavored class, did not pass muster even under rational basis review.<sup>336</sup> In

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333. *E.g.*, Donovan, *supra* note 45, at 563 ("[T]raditional marriage, grounded in romantic love, in which gays and lesbians seek to share, is antithetical to the practice of polygamy.").

334. *See, e.g.*, Dent, *supra* note 14, at 424 ("[M]any gay marriages would be marriages of convenience entered into primarily for the tangible benefits." (footnote omitted)).

335. *Romer v. Evans*, 517 U.S. 620, 623–24 (1996).

336. *Id.* at 631–32 ("[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end. Amendment 2 fails, indeed defies, even

his dissent, Justice Scalia argued that the majority failed to explain how a law prohibiting polygamy “was not an ‘impermissible targeting’ of polygamists,” while the milder amendment 2 was an “impermissible targeting of homosexuals.”<sup>337</sup> He wondered whether the Court concluded that the perceived social harm of polygamy is a “‘legitimate concern of government,’ and the perceived social harm of homosexuality is not.”<sup>338</sup> Justice Scalia’s comments are instructive on a number of counts.

First, after *Lawrence v. Texas*,<sup>339</sup> perhaps the perceived social harm of same-sex relations cannot be used to justify a unique disability on members of the lesbian, gay, bisexual, and transgender community.<sup>340</sup> Second, Justice Scalia carefully characterized the relevant statutes to target polygamy rather than Mormons in particular,<sup>341</sup> presumably because targeting Mormons is impermissible under contemporary jurisprudence, even if the *Reynolds* Court had no compunctions about such targeting.

Justice Scalia’s dissent in *Romer* serves as notice that he would interpret a holding that same-sex marriage is constitutionally protected to require similar protection for polygamous unions.<sup>342</sup> While such a claim is false, because the allegedly compelling state interests served by the respective bans

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this conventional inquiry.” (citations omitted)).

337. *Id.* at 651 (Scalia, J., dissenting).

338. *Id.* (quoting *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993)).

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

340. *See id.* at 577–78 (“Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.” (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting))).

341. Some commentators fail to appreciate that Justice Scalia’s characterization makes the discrimination appear non-religious, and hence not subject to invalidation on its face. *See Sealing, supra* note 44, at 700 (“Justice Scalia succeeded in removing the anti-polygamy provisions he cited from the generally applicable law of his heavily criticized *Smith* holding, and by showing that the provisions were aimed against a particular group, placing them in the *Church of the Lukumi Babalu Aye* category.”)

342. *See Romer*, 517 U.S. at 648 (Scalia, J., dissenting) (“The Court’s disposition today suggests that these provisions are unconstitutional, and that polygamy must be permitted in these States on a state-legislated, or perhaps even local-option, basis—unless, of course, polygamists for some reason have fewer constitutional rights than homosexuals.”).

are quite different,<sup>343</sup> it may well be that both should be constitutionally protected—Scalia’s presumed view to the contrary notwithstanding.

There is good reason to believe that some laws targeting polygamy were adopted as a way of targeting Mormons. Suppose, however, that some laws are adopted to combat the alleged evils of plural marriage as a general matter, not to target Mormons in particular or religious practices more generally. Even still, an exception should be made for religiously-inspired plural marriages involving adults. Indeed, many of the claimed harms of polygamy might be combated as well or better were a more carefully crafted prohibition created.

The differences between plural and same-sex marriages must not obscure an important similarity between them. Either marriage might be sought, at least in part, for its spiritual significance. Given that marriage is a fundamental interest, a challenge either to a polygamy or a same-sex marriage ban by a sincere individual with the relevant religious beliefs should trigger the strict scrutiny promised under *Smith*’s hybrid analysis.

Would such a challenge be successful? That is unclear,<sup>344</sup> but the state would at least have to show which compelling interests were served by the ban and why that prohibition was sufficiently tailored to achieve those interests. Were the Court to take its avowed obligations seriously, as explained in either *Hialeah* or *Gonzales*, and actually consider whether the statute before it served compelling state interests—which could not also be served with a free exercise exception—it is hard to imagine how it would uphold the current statutes. Time will tell whether the Court will be willing to take its own free exercise jurisprudence seriously or instead will invent a new rule affording even less protection to the rights of religious minorities.

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343. See *supra* text accompanying notes 340–41.

344. See Brietta R. Clark, *When Free Exercise Exemptions Undermine Religious Liberty and the Liberty of Conscience: A Case Study of the Catholic Hospital Conflict*, 82 OR. L. REV. 625, 664 (2003) (“[M]any have argued that while *Smith* substantially narrowed the theoretical scope of free exercise protection for religious conduct, it did not really change the outcome for most cases.”); Jaasma, *supra* note 45, at 291 (“Even the application of a compelling interest test would in no way provide a guarantee, or even a likelihood, that a free exercise challenge to laws against polygamy would succeed, as evidenced by the Supreme Court’s long history of rejected free exercise claims.”).