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

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

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

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

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

I. HISTORICAL BACKGROUND OF MORMONISM AND MORMON POLYGAMY

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

WLR44-1_B

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

The Manifesto, however, did not end Mormon polygamy. In the years following the Manifesto, many Mormons, including church leaders, practiced polygamy in secret.[40] However, by the early twenti-

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

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

II. EVOLUTION OF THE FREE EXERCISE CLAUSE

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

Polygamy is conduct that was initially proscribed by federal anti-

55. *Id.*

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

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

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

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

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

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

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

2. *Davis v. Beason*

Davis v. Beason involved a challenge to an Idaho territorial statute that denied all Mormons, including polygamists, the right to vote or hold public office.[77] In deciding the constitutionality of this provision in 1890, the Court echoed the sentiments of *Reynolds*. The Court determined that the free exercise guarantee is weaker than valid criminal laws of the states and territories, and that if religions that advocated fornication or human sacrifices sprang up in the United States, those practices would not be tolerated.[78] The Court held that the territory could constitutionally withhold the right to vote from persons convicted of criminal offenses and those who advocate criminal behavior.[79] The

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

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

B. Modern Free Exercise Jurisprudence

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

1. Sherbert v. Verner

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

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

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

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

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

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

2. *Employment Division v. Smith*

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

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

87. *Id.* at 403-04.
88. *Id.* at 408.
89. *Smith*, 494 U.S. at 874.
90. *Id.*
91. *Id.* at 876.
92. *Id.*
93. *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).
94. *Id.* at 877.

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

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

III. NINETEENTH-CENTURY RESPONSE TO MORMON POLYGAMY

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

A. Morrill Act and Edmunds Act

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

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

105. *Id.* at 544.

106. *Id.* at 546.

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

108. *Id.* at § 2.

109. *Id.*

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

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

B. Neutrality Analysis

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

The Morrill Act, however, takes a decidedly non-neutral turn in its Section 2. This provision includes language that is of a much more religious character than the language describing the sacrifices at issue in *Church of the Lukumi Babalu Aye*. Here, Congress uses the words "spiritual," "ecclesiastical," and "sacraments" which are all decidedly religious terms without secular meaning. It also specifically dissolves the corporate charter of the LDS Church, 02 TD.752l26 747.1Ltporaons thas the2i8 T0 -1.1302y ss a

indicated that such targeting could be evidence that the law burdening the religious practice is not neutral. One of the ordinances at issue in *Church of the Lukumi Babalu Aye* expressed the concern of some residents that "certain religions may propose to engage in practices which are inconsistent with public morals, peace, and safety."[113] However, only two Justices in *Church of the Lukumi Babalu Aye* joined the portion of the opinion that considered circumstantial evidence of targeting a particular religion or its practices, such as legisla-

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

IV. CONTEMPORARY POLYGAMY PROSECUTIONS IN UTAH

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

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

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

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

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

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

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

127. *Id.* at 827.

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

129. *Id.* at 828.

130. *Id.*

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

1. Sherbert Analysis

The court's interpretation of "marriage" means that, as applied to religious polygamists, the Utah bigamy statute violates their free exercise rights. In *Sherbert*, an administrative tribunal interpreted Sherbert's religiously motivated conduct as rejecting employment without good cause and denied her unemployment compensation;[140] in *Holm*,

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

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

2. Neutrality and General Applicability Analysis

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

The interpretation is also not operationally neutral because by its

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

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

V. CONCLUSION

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

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

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

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

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

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

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