

Reevaluating *Reynolds*: The Constitutional Case for Religiously Motivated Polygamy

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Abstract

In 1879, the U.S. Supreme Court defined, and applied, the free exercise clause of the United States Constitution for the first time. The case, *Reynolds v. United States*, concerned the constitutionality of the Morrill Act of 1862, which made it a federal crime to practice polygamy. This congressional act was neither the first nor the last federal action taken to suppress the growing Mormon faith. However, the *Reynolds* case did signify the first time that the Supreme Court rendered a decision concerning minority religious rights. Although the Mormon Church believed that the First Amendment protected such integral faith-based actions as polygamy, the Court deemed polygamy to be "morally odious" and outside the realm of constitutional protection. However, the judicial unanimity reached in *Reynolds* would be more difficult to arrive at today. The evolution of American society over the past 133 years has supplied ample room for a contemporary reevaluation of *Reynolds v. United States*. In particular, modern First Amendment jurisprudence casts considerable doubt on the legal wisdom of *Reynolds*. The Supreme Court's recent protections of heterodox lifestyles, faiths, and sexual behaviors also indicate that a religiously motivated polygamy case would likely receive a much more favorable treatment today.

Keywords: *Reynolds v. United States*, U.S. Constitution, first amendment, free exercise clause, polygamy, Mormonism

1. Introduction

1.1 Polygamy, Anti-Bigamy Laws, and *Reynolds*

In 1847, following a tumultuous early existence that suffered arson, murder, and multiple threats of extermination, the Mormon people finally believed that they had found their haven in the Utah Territory. Within a few years, close-knit communities and agricultural innovation led to prosperity for the Mormon people. Seeing the economic resourcefulness and population growth in this region, Protestants attempted to plant churches in the Utah Territory. Much to their chagrin, Protestantism stalled, largely due to the stronghold that Mormonism held over local economic, political, and spiritual institutions. The Protestant establishment, after failing to convert Mormon Utahans, turned to propaganda:

Nearly all of the ministers of Utah's Protestant churches wrote anti-Mormon pamphlets, some of which gained wide circulations. Listening to their local ministers preach sermons in which Mormon leaders were demonized and Latter-day Saints characterized as dangerous to the nation's true churches, Christian homes energized the members of mainstream churches to take action against the Saints. In doing so, they attacked Mormonism's Achilles' heel, polygamy (Shipps, 1998: 95).

Although polemical in their approach, Protestant ministers and writers were correct: polygamy was a central tenet of the Mormon faith in the Utah Territory. Known as the "celestial law of plural marriage," polygamy was an essential practice for faithful Mormons; in fact, for Mormons, this sacrament was deemed to be a precondition for elevation in the multi-tiered heavenly realm (Gordon, 2002: 1). Many Mormon men did not wish to engage in polygamous relations, but finally complied because they believed that polygamy was indeed a divine command. This unusual practice incensed many staunch Protestants, not simply for the blatant violation of orthodox domestic standards, but also for the progressive social doctrines linked to Mormon polygamy.

The Mormon community in Utah held beliefs regarding gender, sexuality, and family that differed greatly from the ideals of the rest of the country. These deep ideological disagreements led to extensive nineteenth-century

anti-Mormon literature, featuring dozens of scurrilous novels and sensational news articles decrying the hypnotic powers of the sex-crazed Mormons who bought, sold, and enslaved women (Gordon, 2002). Although the Mormon people chose the remote Utah Territory as a refuge against persecution, these diverse propaganda strategies proved to be a successful means of further marginalizing the minority Mormon faith.

By the early 1860s, the majority of Americans had united in an effort to lionize traditional values and quash polygamy, the last relic of barbarism in America (Waltman, 2011). Polygamy had become a significant political platform for Republican candidates in many national races, and legislation targeting the Mormon faith became commonplace in the U.S. Congress. In attempts to eradicate the “foul abomination of spiritual wifery” in the Utah Territory, Congress passed mortmain laws and anti-bigamy laws, most notably, the Morrill Act for the Suppression of Polygamy, which “outlawed bigamy, providing for a prison sentence of up to five years and a fine of \$500... and prohibited any religious organization from owning real estate valued at more than \$50,000” (Gordon, 2002: 69, 81). Legal scholar Sarah Barringer Gordon comments, “The federal government had never before assumed such supervisory power over structures of private authority. The Morrill Act was unprecedented” (Gordon, 2002: 81). Mormons, who felt vindicated under the free exercise clause of the First Amendment, clung to their sacramental practices even after the passage of these federal statutes. George Reynolds, a young Mormon man with two wives, was chosen by the confident Mormon leadership to be the test case as the Mormon Church challenged the constitutionality of the Morrill Act of 1862. After years of rhetoric from federal executives and legislatures, the issue of polygamy was finally headed to the courts. *Alea iacta est.*

After a convoluted path, which included two separate hearings in front of the territorial supreme court, George Reynolds’s case arrived in front of the United States Supreme Court in November 1878 (Gordon, 2002). The two opposing counsels offered two radically different approaches when arguing before the Court. Reynolds’s legal team provided a case steeped in federalism and free exercise argumentation. The Mormon’s lawyers wanted the Court to respect “traditional theories of the limitations of federal powers to change the decisions of majorities in areas of law traditionally reserved for local populations” (Gordon, 2002: 122-123). Up until the 1860s, the federal government remained absent from all laws concerning domestic relations. Not a single federal statute concerning polygamy had been passed before the “Mormon threat” took hold of the public psyche (“Great Supreme Court Cases,” 2007). George Washington Biddle, lead counsel for Reynolds, understood that the free exercise clause of the First Amendment did not provide an exemption to all religious practices seeking protection; Biddle believed that Congress could restrict spiritual activities that were “contrary to the law everywhere—only those things ‘*mala in se*’ (‘law Latin’ for ‘evil in themselves’, rather than as a result of some positive declaration),” and polygamy did not qualify for such federal regulation (Gordon, 2002: 126). Opposing counsel allocated almost no time to constitutional considerations or the scope of federal legislative powers; instead, the government’s lawyers inveighed against polygamy, and Mormonism, with the hackneyed scare tactics of the day: polygamy was the last remaining form of slavery in the United States, polygamy would lead to other fanatical practices—such as human sacrifice—gaining constitutional exemption, and polygamy reflected anti-Western incivility (Waltman, 2011).

In the early months of 1879, the Supreme Court had reached a verdict. In *Reynolds v. United States*, the Court returned with a unanimous decision supporting the constitutionality of the Morrill Act. Chief Justice Morrison Waite’s reasoning clearly aligned with the government counsel’s arguments and social concerns. In Waite’s mind, both English common law and Article I of the U.S. Constitution indicate that the legislature is vested with powers broad enough to protect society from harmful actions. However, the government could not constitutionally restrict Reynolds’s religious beliefs. This “belief-action” distinction created a cardinal precedent in free exercise jurisprudence, lasting almost one hundred years before being circumscribed.

The majority opinion took great pains to address the concept of religious exemptions *from* laws, but the opinion largely ignored the possibility that the law in question may itself be unconstitutional. Due to this presumption of constitutionality, the Court showed great reservation at the prospect of granting deference to religious conscience instead of generally applicable laws: “To permit [the religious use of polygamy] would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances” (Reynolds, 1879). Believing that such religiously motivated exemptions would necessarily lead to the destruction of family, societal disaster, and the protection of other “morally odious” acts, the nineteenth-century Supreme Court exhibited an inability to incorporate the rights of minority faiths into the First Amendment (Reynolds, 1879).

1.2 Areas of Contemporary Reevaluation

Since *Reynolds v. United States* was decided in 1879, monumental changes have occurred within American society, especially in the fields of social equality and human sexuality. As I shall demonstrate, each of these respective societal shifts has left indelible marks on constitutional analysis. For example, whereas the early Supreme Court's lens used to be limited to American law with the occasional reference to English common law, today's high court has shown a growing penchant for widening its ambit and allowing political philosophy and international legal standards to influence statutory and constitutional analysis. This shift has led to increased emphasis on the philosophy of law and comparative constitutional law.

Legal scholars have predicted that many of the aforementioned societal shifts will cause, and should cause, a reevaluation of earlier case law. University of Chicago professor of law Martha Nussbaum details the philosophical incoherence of free exercise case law and argues the importance of revisiting these early free exercise cases:

By the time the Fourteenth Amendment applied the Bill of Rights to the states, it was to be understood as a guarantor not just of liberty, but also of equal liberty...The application of these ideas to concrete cases remained to be worked out, but the broad analytical framework was set. The nineteenth century, however, did not see the flowering of equal respect that these theoretical developments might have seemed to promise...Panics involving people with strange and apparently threatening religions—Mormons, Jehovah's Witnesses, and, above all, Roman Catholics—threatened the tradition of equal respect, in some cases making a hollow mockery of its high ideals (Nussbaum, 2008: 356-357).

Reynolds v. United States stands as the most influential First Amendment free exercise case of the nineteenth-century, setting precedents and legal groundwork for many religion cases in the twentieth-century. If legal reevaluation of free exercise jurisprudence is recommended, then *Reynolds* is the first case on the docket. For the purposes of this paper, the principal areas that will be examined in order to reevaluate the *Reynolds* decision shall be:

1. Free exercise jurisprudence since *Reynolds*, with emphasis placed on the *Sherbert* and *Smith* standards;
2. Constitutional analysis, focusing both on the majority reasoning of *Reynolds* and recent protections of alternative lifestyles.

2. Free Exercise Jurisprudence since *Reynolds v. United States*

In the free exercise case of *Thomas v. Review Board of Indiana Employment Security Division*, the Supreme Court asserted that “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protections” (Thomas, 1981) This 1981 decision, however, does not stand as an accurate representation of free exercise of religion history. As has already been shown, the *Reynolds v. United States* majority holding does not easily accord with the broad protections for heterodox faiths in *Thomas v. Review Board of Indiana*. These glaring differences in constitutional understanding highlight the mercurial nature of free exercise history, which is filled with cases that advance, rescind, strengthen, and cheapen judicial tests and precedents. It is for this reason that the free exercise of religion clause is best understood as the perennially swinging pendulum of constitutional law. However, the capricious nature of the clause, and the clashing judicial philosophies that engage in interpretation warfare, do not obfuscate the enterprise of reevaluating *Reynolds*. On the contrary, the landmark free exercise of religion cases decided after 1879—although dissimilar in tests of scrutiny, religious protections, and outcomes—embolden the constitutional case for religiously motivated polygamy. Whether modern judges view *Reynolds* through the vantage point of the compelling interest test or the general applicability test, whether judges focus on the legislative intent or strictly statutory wording, the Mormon polygamy case of 1879 would receive different constitutional treatment today.

In the decades immediately following *Reynolds*, there was not great activity in the area of free exercise jurisprudence. This dormancy has less to do with the breadth and wisdom of *Reynolds*, and more to do with the dearth of federal religious rights cases. Until the 1940s, “most church-state issues arose at the level of the individual states” (Durnham and Smith, 2010: 79-80). In *Cantwell v. Connecticut*, the Supreme Court incorporated the free exercise clause of the First Amendment. Through incorporation, the clause—which formerly applied only to federal action—could then be applied to state and local action.

2.1 *Sherbert* and the Compelling Interest Test

One of the first cases that significantly altered the *Reynolds* understanding of the free exercise clause was the 1963 case of *Sherbert v. Verner*. The case involved a Seventh-day Adventist, Adell Sherbert, who could not maintain a job because she was unwilling to work on her Sabbath, which fell on Saturday. When let go from her

job, the complainant discovered that South Carolina's unemployment division would not offer her unemployment benefits due to the fact that she had turned down work opportunities, albeit for religious reasons.

In a 7-2 ruling, the Court found that South Carolina had unconstitutionally infringed upon the appellant's free exercise rights. If a law's effect prevents religious observance, the majority ruled, then the law would most likely be deemed unconstitutional. In his majority opinion, Justice Brennan asserted that the free exercise clause protects citizens from having to choose between obligatory religious observance and legal compliance. Brennan wrote: "The pressure upon her [Sherbert] to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand" (Sherbert, 1963). Using *Everson v. Board of Education* as precedent, the majority held that the state is not able to exclude an individual from receiving public welfare benefits solely because of her religious faith. The state's legal institutions seemed to have already acknowledged a portion of this logic: South Carolina unemployment statutes provided exemptions for Sunday worshippers, but they had not carved out equal treatment for other religiously motivated citizens, like the Sabbatarian Sherbert.

In finding for Ms. Sherbert, the Court expounded a new judicial test for scrutinizing free exercise cases. To pass the new compelling state interest test, also known as the Sherbert test, the state would have to prove that it had a compelling interest in burdening religious activities. The state would also have to utilize the least restrictive means in accomplishing its objectives (Sherbert, 1963). This novel test suggests that religion should perform a crucial role in supporting and sustaining a moral society, and that government is limited in its ability to circumscribe religiously motivated activity. As the Court cites: "In this highly sensitive constitutional area, 'only the gravest abuses, endangering paramount interests, give occasion for permissible limitation'" (Thomas, 1945).

In light of the majority reasoning supplied in *Sherbert*, the *Reynolds* decision appears less tenable. At the heart of *Sherbert* is the presupposition that a citizen's spirituality assumes such an elevated status that it merits protection from the political community. The primacy guaranteed to religious practice in *Sherbert* undercuts a central argument in *Reynolds v. United States*. Chief Justice Waite's opinion empowered the federal legislature when it upheld Congress's ability to directly attack heterodox faiths through criminal codes. The belief-action distinction administered in *Reynolds*—which assured government the power to regulate religious action whenever such action contravened the law—became weakened in *Sherbert v. Verner*, when Justice Brennan counterpunched: "Government may neither compel affirmation of a repugnant belief nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities" (Reynolds, 1879; Sherbert, 1963). Challenging legal mandates might be acceptable, under *Sherbert*, if evidence of legislative discrimination against specific religious practices could be proved.

In Brennan's compelling interest test, legal scholars can discover even more appealing reasons for reevaluating the *Reynolds* holding. Under the first condition of the compelling interest test, the *Reynolds* holding appears to stumble. Firstly, the counselors who argued on behalf of the government during the *Reynolds* trial spent a remarkable amount of time sensationalizing Mormonism and an unremarkable amount of time asserting the compelling interests which warranted anti-polygamy statutes. However, Chief Justice Waite did posit several government interests in his majority opinion. The interests listed by Waite, which must be protected against the spread of polygamy, are the "social duties, good order" and sound behavior expected from American citizens (Reynolds, 1879).

Let us set aside the overt racism and cultural provinciality found in these "government interests" for later and instead turn to understanding the forms of duty and order which Waite intended to protect. The social, economic, and political establishment in America in the mid-1800s viewed the Protestant hallmarks of family integrity, the protection of rights, and economic stability as imperative to good governance. In *Reynolds*, we can observe the extent to which branches of government were authorized to legislate morality in order to fulfill their "social duties" and maintain Protestant "order" in America. Since the *Reynolds* decision, however, historians and political scientists have unearthed evidence that Mormon polygamist communities did not hinder these Protestant measures of order and duty, but surpassed them:

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. In terms of educational and economic opportunities, civil and political rights, and autonomy within marriage, they rated quite well in comparison to New England women in monogamous marriages. Each plural wife lived in her own house, functioning as the head of household and relying on her own judgment while her husband was away on Church missions or staying with other wives (Calhoun, 2005: 1038).

Additionally, Mormon polygamist communities witnessed strong social and political cohesion while holding lower infidelity rates and prostitution problems than the national average (Nussbaum, 2008). To those proponents of the *Reynolds* decision, who may fear the possibility of grave immorality and illicit behavior from religiously motivated polygamy, Martha Nussbaum writes: “From the point of view of legitimate state interests, it is not so easy to find compelling arguments against polygamy that are not also arguments against key elements of the dominant form of monogamous marriage” (Nussbaum, 2008: 188).

To cement the favorable reevaluation that religiously motivated polygamy would receive under the compelling interest test, one must go no further than a free exercise of religion case settled nine years after *Sherbert v. Verner*. In *Wisconsin v. Yoder*, the majority court exempted Old Order Amish families from complying with state compulsory school attendance laws. Although Wisconsin’s attorneys asserted that the *Reynolds* precedent forbade using the free exercise clause as an instrument for skirting the law, the Supreme Court disagreed. In his majority opinion, Chief Justice Burger belabored the long history and deeply held convictions of the Amish before ruling that the Old Order Amish’s interest in preserving their religious practices outweighed the state’s important interest in education (Wisconsin, 1972).

Legal scholars have contended that “*Yoder* implicitly overruled *Reynolds*” (Gordon, 2002: 237). This argument holds weight, particularly because of the words Justice Douglas wrote concerning *Wisconsin v. Yoder*. In his partial dissent, Justice Douglas wrote that the belief-action distinction of *Reynolds* has been “rightly rejected” by the compelling state interest test, and that “the Court departs from the teaching of *Reynolds v. United States* where it was said, ‘Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order’” (Wisconsin, 1972).

After Douglas observed the flimsy state interests which had been offered in 1879, he forecasted the upshot of enhanced religious action under the compelling interest test: “[In *Reynolds*] action which the Court deemed to be antisocial could be punished even though it was grounded on deeply held and sincere religious convictions. What we do today... opens the way to give organized religion a broader base than it has ever enjoyed, and it even promises that in time *Reynolds* will be overruled” (Wisconsin, 1972).

2.2 Smith and the General Applicability Test

For over twenty-five years, the compelling state interest test functioned as the judicial norm in deciding free exercise cases. However, the 1990 case of *Employment Division of Oregon v. Smith* reshaped the configuration of religious rights in America, and in so doing swung the constitutional pendulum back towards a restrictive model of free exercise interpretation. *Smith* concerned the free exercise claim of an employee who, like Adell Sherbert, was denied state unemployment benefits after being fired for conduct that resulted from a religious obligation. Smith was fired from his job after ingesting the Native American sacramental plant peyote, which was an illegal substance in Oregon at the time. The principal question before the Court was the same question that lay before Waite’s Court in 1879: does sincere religious belief justify engaging in criminal conduct?

In many respects, the two different Supreme Courts answered this First Amendment question similarly: citizens must comply with the law, even when such compliance adversely affects citizens’ religious convictions. Writing for the majority, Justice Scalia maintained, “the free exercise clause permits the state to prohibit sacramental peyote use, and thus the state may deny unemployment benefits to persons discharged for such use” (*Employment Division of Oregon*, 1990). Scalia could have formulated a restrained opinion and simply distinguished the *Smith* case from *Sherbert* (this was O’Connor’s approach in her concurring opinion). Scalia, however, opted to substantially rework the judicial test used in free exercise cases.

In place of *Sherbert*’s compelling interest test, *Smith* substituted the general applicability test. The general applicability test repositioned the burden of proof onto the individual, by contending that generally applicable laws can only be deemed unconstitutional if they directly attempt to prohibit religious practice (*Employment Division of Oregon*, 1990). Many legal scholars saw this as the death knell for the free exercise clause, because this new interpretation appeared to grant primacy to all acts of government over individual religious liberties. The greatest weakening of the free exercise clause occurred when Scalia controversially wrote that unless a government act specifically targeted a religion for attack, other constitutional safeguards must buoy up a free exercise claim for it to pass *Smith*’s new constitutional standard; Scalia called these legitimate free exercise concerns “hybrid” cases (*Employment Division of Oregon*, 1990).

Employment Division of Oregon v. Smith represents a decidedly Lockean shift in free exercise jurisprudence. By relegating the free exercise clause to complete dependence on other constitutional rights, the *Smith* case extinguished the accommodations demanded by *Sherbert* and instead greatly separated the religious realm from the governmental. Detailing Locke’s philosophy towards religion in the state, Martha Nussbaum writes:

Locke holds that protecting equal liberty of conscience requires only two things: laws that do not penalize religious belief, and laws that are non-discriminatory about practices, applying the same laws to all in matters touching on religious activities... A law...may stand even though it may incidentally impose burdens on some religious activities more than on others (Nussbaum, 2010).

The general applicability test instituted in *Smith* mirrors each of these Lockean standards. Scalia believes that a government sufficiently respects religious beliefs only when the legal system constructs a rigid equality between the standard of compliance for nonbelievers and believers. Scalia fears that favorable judicial treatment and federally carved exemptions for religious practice disturb this balance of equal compliance and dance too close to establishment violations. If religious groups desire additional protections, Scalia reasons, then they should direct their energies towards legislative actions. Critics argue that expecting minority faiths to garner the political capital necessary to exact change through legislative exemptions is unrealistic in many circumstances. In fact, one of the overriding purposes of the free exercise clause was to safeguard religious rights from the oppression of legislative rule and majoritarian politics.

As applied to *Reynolds v. United States*, *Employment Division of Oregon v. Smith* vitiated the compelling state interest test and made a favorable reevaluation less likely on several counts. However, the general applicability test set down in *Smith* also furnishes religiously motivated polygamy with constitutional fodder that even *Sherbert* had not entirely offered.

2.3 Church of Lukumi Babalu Aye and Prohibitive Laws

In the 1993 case of *Church of Lukumi Babalu Aye v. City of Hialeah*, the Supreme Court was charged with applying its new free exercise standard. The case concerned the recent creation of a Santeria church, school, and community center in Hialeah, Florida. A central tenet of the Santeria faith calls for animal sacrifice. When the broader community discovered this Santeria practice, there was an outcry. The local government passed city ordinances that had the effect of banning Santeria animal sacrifice. The Church sued the city, claiming that the ordinances—which “expressed concern over religious practices inconsistent with public morals” and “prohibited the possession, sacrifice, or slaughter of animals if it is killed for any type of ritual”—were directly aimed at curbing the minority group’s exercise of religion (*Church of Lukumi Babalu Aye*, 1993).

Writing for the unanimous court, Justice Kennedy discarded the Hialeah ordinances as unconstitutional violations of Santeria believers’ religious rights. In order for a government action to pass the general applicability test, it must be neutral towards religion. Kennedy added, “If the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral” (*Church of Lukumi Babalu Aye*, 1993). The Hialeah ordinances were clearly not neutral. To substantiate this finding of discrimination, Justice Kennedy’s opinion references the religious diction used in the prohibitive laws as well as the Santeria-specific attacks that permeated municipal hearings leading up to the ordinances.

By finding the Hialeah ordinances unconstitutional, the majority court offers increasing justification for a reevaluation of *Reynolds*. Although the general applicability test limits free exercise rights severely, it does establish important signals for discerning unconstitutional government actions. The *Church of Lukumi Babalu Aye* ruling outlines the forms of government action that the Supreme Court deems illegitimate. In ruling against the city of Hialeah, Justice Kennedy considered several factors to assess the act’s neutrality: the legislative history, the intention of the act, and the effect of the act.

The same social duties, good order, and the behavioral expectations that triggered Congress to pass anti-polygamy statutes in the 1850s and 1860s motivated the predominantly Christian community of Hialeah to restrict Santeria practices. Members of the community decried this “cannibalistic, Voodoo-like sect which attracts the worst elements of society” and government leaders agreed that Santeria stood as an attack to “civilized behavior” (O’Brien, 2004: 35). Within Hialeah, protecting civilized behavior was synonymous with protecting the Christian faith. Hialeah Council members voiced their spiritual concerns when debating these animal sacrifice ordinances, expressing that they were “totally against the sacrifice of animals. The Bible says we are allowed to sacrifice an animal for consumption, but not for any other purpose. I don’t believe the Bible allows that” (O’Brien, 2004: 42). Many church heads, fearing that Santeria’s mystical nature would steal churchgoers away from their Christian pews, joined the political rancor.

In the middle of the nineteenth-century, American leaders were leveling similar arguments about the growing Mormon Church: this cult attracted uncivilized people who had an adverse effect on public morality. Just as Hialeah Christians singled out Santeria as a morally odious faith and passed legislation directly incriminating their sacramental practices, political leaders at every level of nineteenth-century American government expressed their dismay at the expanding Mormon faith. Federal legislators were called on to curb this national

security fear and to “dismantle the power and property of the Mormon Church itself” (Gordon, 2002: 14). Congress responded by passing statutes specifically targeting Mormon polygamy.

The federal act in question during *Reynolds v. United States* was the Morrill Act for the Suppression of Polygamy. The author of the Morrill Act, Congressman Justin Morrill of Vermont, specifically targeted Mormon faith and the Utah Territory as he crafted and defended his bill for Congress. Sarah Barringer Gordon writes, “Justin Morrill...claimed that the voluntarism essential to freedom had been violated by Mormon polygamists” (Gordon, 2002: 63). Morrill and his numerous backers believed that it was the government’s responsibility to pass anti-polygamy statutes and rid the country of “an insolent and all-grasping power” that embraced the “foul abomination of spiritual wifery” (Gordon, 2002: 69).

Just as *Church of Lukumi Babalu Aye v. City of Hialeah* found the animal sacrifice ordinances to be facially discriminatory, it is apparent from the legislative history, the intention, and the effect of the Morrill Act for the Suppression of Polygamy that the federal government could not defend its actions as being facially neutral and non-discriminatory towards the Mormon Church.

2.4 Free Exercise Today

Since *Employment Division of Oregon v. Smith* was handed down in 1990, many factors have impacted the status of religious rights in America. Viewing the majority holding in *Smith* as a grave minimization of religious liberty, everyday Americans partnered with religious-based lobbies and civil rights groups to effectively pressure Congress into counteracting the Court’s decision. This public mobilization led to increased legislative action, in the form of the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA). Fortunately, public consciousness of free exercise of religion jurisprudence has led to greater academic study and legal activity in the subfield of religious rights.

I believe that this religious rights renaissance will translate into a de facto compelling interest test the next time that the Supreme Court hears a controversial free exercise case. However, regardless of whether a judge today applies the compelling interest test or the general applicability test, a religiously motivated polygamy case will receive a more favorable constitutional treatment because of the significant evolution of free exercise jurisprudence since 1879.

3. The *Reynolds* Reasoning and Modern Constitutional Complaints

3.1 A Protestant Constitution, a Protestant America

During the early and middle parts of the nineteenth-century, America underwent a profound religious rebirth thanks to the Second Great Awakening. This movement galvanized the American public and brought thousands back to Christianity with its fiery revivals. Although the Mormon Church originated during this timeframe, the Second Great Awakening was also responsible for reinvigorating the relationship between mainstream Christianity, politics, and law. In fact, at the time of *Reynolds*, American political thought had become so entwined with mainstream Christianity that the American public had a “sense that the de facto establishment of ‘general’ Christianity was consistent with good order, community welfare, and popular sentiment” (Gordon, 2002: 74). Unfortunately, the comprehensive doctrine that held monolithic sway over American politics during the time of *Reynolds*—Protestant Christianity—was less than tolerable of other belief systems, especially when those belief systems appeared threatening.

Powerful Protestant politicians feared that if rival religious groups formed cohesive communities and expanded in size, they could slowly upend the Protestant stranglehold over social and political life. To many Protestants, the rapid growth of Mormonism affirmed this fear. The political bloc voting and economic prowess of Mormons angered local governments and Protestant churches in every location that the transient Mormon communities travelled. This set off one of the greatest interreligious political battles in American history.

Radical declarations, brutal fights, and political skirmishes ensued for decades leading up to *Reynolds v. United States*. In the beginning, Mormon leaders believed that the problem was local in nature, and collaboration with federal officials could ameliorate the increasing interreligious hostility. Unfortunately for the Mormon Church, the problem was not endemic to a few Midwestern communities:

Mormons repeatedly petitioned Washington for aid. Their constitutional rights, they argued, were violated by state officials in Ohio, Illinois, and Missouri (whose governor, Lilburn Boggs, for example, declared in 1838 that Mormons must be “exterminated, or driven from the State if necessary for the public peace”). Inevitably, political officials in Washington...told the supplicants that the national government was powerless to intervene (Gordon, 2002: 107).

As we shall see, when the federal courts did elect to intervene—in cases such as *Reynolds v. United States*—the justices’ logic was deeply influenced by the pervasive anti-Mormon sentiment supplied by the Protestant mainstream.

3.2 Waite’s Originalist Ruling

Chief Justice Waite’s opinion in *Reynolds v. United States* has undergone great criticism, largely due to the method of interpretation the Justice utilized. The Chief Justice attempted to connect the Supreme Court’s decision to an originalist reading of the religion clauses. Whereas many contemporary originalists analyze constitutional history, scouring for our founders’ intent or meaning in order to arrive at a decision, Waite exercised originalism in order to justify the judgment that the Supreme Court had already made (Drakeman, 2010). This uncommon sequence can be attributed, at least partially, to the fact that the use of originalism as a tool for constitutional interpretation was quite rare in the nineteenth-century Supreme Court (Drakeman, 2010). Waite’s originalist reading, though controversial, has held profound influence on the train of free exercise clause jurisprudence.

A common critique of Waite’s originalist ruling is that the majority decision represents yet another case of law office history: Waite, like many judges before and after him, desired a certain outcome and then used existing legal precedent and shoddy history to support his preconceived decision. Although I believe that this is a difficult criticism to dismiss, constitutional scholar Donald Drakeman attributes many of the historical flaws found in Waite’s decision to the shortcomings of professional historians in nineteenth-century America; Drakeman observes that the “one-sided, goal-oriented law office history” appearing in *Reynolds* aptly reflects “the way historians themselves were writing” (Drakeman, 2010: 11).

The reason that Chief Justice Waite’s inconsistencies match those of nineteenth-century American historians is because Waite turned to several well-known historians to help him with the *Reynolds* case. In order to determine how our founding fathers dealt with questions of church-state relations, Waite consulted George Bancroft, who in turn led him to two scholars specializing in the history of Virginia, Robert Semple and Robert Howison (Drakeman, 2010: 22). These historians believed that Virginia’s pre-constitutional state history held the key to the enigma of religion’s role in the state. Waite deferred to these academics, introducing his foray into the history of American religious liberties by claiming: “the controversy upon this general subject was animated in many of the States, but seemed at last to culminate in Virginia” (Reynolds, 1879). Unfortunately, these influential historians possessed strong ideological bents, which colored their historical accounts of church-state relations. Waite’s historical research—under the guidance of Bancroft, Semple, and Howison—led him to prioritize the writings of Thomas Jefferson and James Madison, as well as Virginia’s early legislative dealings with religion, above other legitimate visions of religious free exercise.

Drakeman outlines how both Howison and Semple “placed Virginia disestablishmentarianism at the center of American freedoms,” although other state histories offered contrasting, and compelling, accounts of religious protections (Drakeman, 2010: 70). If Waite had turned to other free exercise perspectives in American pre-constitutional history, a decision to uphold the Morrill Act would have been less tenable. Instead, Waite’s originalist decision hinges on a general recounting of several debates in the Virginia state legislature from the 1780s, in addition to letters written by Jefferson and Madison. This historical evidence functions as the sole representative sample of America’s seventeenth- and eighteenth-century political conversation about religious rights. Drakeman laments:

In his historical summary of the origins of the religion clauses, he [Chief Justice Waite] left out the debates in the First Congress, the state ratifying debates, any hint of a role played by the anti-federalists, widely ready constitutional commentaries from nineteenth century luminaries such as Story and Cooley, the tax-supported churches in New England that endured well into the nineteenth century, and a host of other documents and events that could potentially be relevant to a comprehensive treatment of the subject (Drakeman, 2010: 72).

More puzzling than the scarcity of data which Waite drew from for his authoritative account of American religious rights is the deliberate way in which the chief justice chose to emphasize certain political arguments of legislative debates while silencing other noteworthy voices from Virginia legislative history. Patrick Henry, and many other revered Virginia state legislators, proffered an accommodationist understanding of religious rights, not a Jeffersonian strict separationist understanding. Waite under-emphasizes these important voices, voices that resonated throughout the state-sponsored religion fights of eighteenth-century Virginian politics. Although some historians believe that accommodationism supplies the supreme guide to understanding Virginia’s religious

freedom amendments, Waite discards these accommodationist voices because he “is searching for signs of Jefferson and Madison, so he overlooks Patrick Henry’s contribution to the Virginia debate” (Drakeman, 2010).

For Waite, an originalist interpretation of the free exercise clause could be achieved simply by identifying the words and beliefs of James Madison and Thomas Jefferson. Only these two forefathers could furnish “an authoritative declaration of the scope and effect of the [First] Amendment” (Reynolds, 1879). Although Waite relied heavily on historical evidence, modern political historians have soundly refuted both the accuracy of the evidence that buttresses Waite’s opinion and the breadth of his pre-constitutional history. Interestingly, the two monumental figures who Waite deferred to are not represented with historical integrity, for if they had been, the *Reynolds* majority holding would have been significantly less defensible:

For the chief justice to reach a decision in the Reynolds case—bearing in mind that his assignment was to craft an opinion for the majority who voted to sustain the conviction—he needed to work around the odes to religious liberty he found in the words of Jefferson and Madison...Only by drawing on Jefferson’s final qualifying phrases in the Virginia Bill for Establishing Religious Freedom...does Waite in effect rescue his opinion from the torrent of Virginia writings and history that could easily have pushed the decision in the opposite direction (Drakeman, 2010: 64).

Both before and after his tenure as President of the United States, James Madison wrote prolifically about the role of religion in the state. One of the most consistent themes detected in Madison’s writings is his vigilance against performing political actions that could fortify a religious group’s dominance in federal politics. Madison was cautious—especially in his *Memorial and Remonstrance against Religious Assessments*—to support practices that could harm the basic liberties of citizens.

When a sizable and powerful religious group, such as the Protestant community in America, attempts to systematically inculcate their principles and organizational expectations into the laws and structures of the state, multiple problems arise. Madison believed that even the most altruistic religious majority would be a detriment to the political community if the religious group set its sights on amassing political power. A politically potent religious group would style the laws of the state in accordance with the beliefs of the faith, thereby relegating the social and legal statuses of citizens who do not subscribe to the majority’s religious dogmas.

Even if the majority group were to be less aggressive in the imposition of its comprehensive doctrines, and instead espoused tenets of toleration, Madison reasoned that the majority would still fail to respect the dignity of non-believing citizens. In a state where a religious group dominated federal politics, the coercive power of the state would infringe on citizens’ liberty of conscience, even if the majority religious group strove to promote toleration. Citizens who were not affiliated with the dominant religious group, or its system of beliefs, would hold a political and social standing inferior to members of the dominant group. This form of political governance would be unjust, and would also fall outside the purview of the First Amendment.

The nineteenth-century political clash between the American Protestant establishment and the newborn Mormon faith, which reached a climax in *Reynolds v. United States*, provides a prime example of how a strong mainstream religious group can degrade the basic liberties of a minority group. Madison warned against a majority religious group using political channels to maintain its organizational strength. Throughout the 1850s and 1860s, some Protestant politicians used the executive, legislative, and judicial branches of the federal government to systematically marginalize the burgeoning Mormon faith. In *Reynolds*, this marginalization becomes explicit as Chief Justice Waite draws a link between the practices of Mormonism and the barbarity of other supposedly inferior groups: “Asiatic and African people” (Reynolds, 1879). This is a primary reason why Madison fought against Protestant “Christian principles” becoming too entrenched in the American political arena (Waldman, 2008: 180). This is a primary reason why Madisonian thought, in its purest form, would have addressed the case of religiously motivated polygamy differently than the Waite Court.

Chief Justice Morrison Waite wielded an originalist form of constitutional interpretation in order to rationalize the judgment that the Supreme Court had made in *Reynolds*. Unfortunately, several factors impeded Waite from penning a meritorious account of the free exercise clause. The most gaping hole in Waite’s analysis lies in the gamut of his pre-constitutional history. Waite is under the delusion that a complete comprehension of the First Amendment can be drawn from the legislative record of one state. In truth, the original meanings and intentions of the free exercise clause “were undoubtedly much more complex and variegated than local Virginia battles over a weak and unpopular Anglican establishment” (Drakeman, 2010: 73). Several partisan historians misled Chief Justice Waite into believing that the only relevant voices in the American religious rights discussion were Thomas Jefferson and James Madison. This is patently untrue. And although the chief justice defers to these two founding fathers, his representations of Jeffersonian and Madisonian thought are incomplete. Chief Justice Waite

tries his hand at originalism, and although his attempt bravely sails into uncharted constitutional waters, his historical analysis does not pass muster. Part of this failure may be attributed to the tool of originalism. The free exercise clause does not lend itself to a clear and indisputable historical reading, some have argued (Waldman, 2008). However, deflecting constitutional responsibility off onto the interpretative tool, instead of onto the interpreter, provides a poor standard of critically assessing constitutional case law. Chief Justice Waite was responsible for his majority opinion. If the chief justice had been able to better affix his research to historical accuracy, he would have been led to different perspectives and possibly a different judicial outcome.

3.3 Sexuality and the Court

Beyond the considerations for historical precedents and pre-constitutional lessons, Waite's majority ruling in *Reynolds* also hinges on protecting a specific form of marriage. Chief Justice Waite, and his peers on the bench, feared the political, social, and moral consequences of permitting non-traditional relationships in America. On the subject of marriage, Waite argues in *Reynolds*, "Traditional marriage is the building block of society" and that immediately after orthodox conceptions of marriage and fidelity dissipate in American society "marriage wouldn't survive, directly leading to anarchy and the disintegration of religion and Western civilization" (Reynolds 1879). Interestingly, these harbingers of destruction replicate the scare tactics used by the government's lawyers during the oral argument phase of the *Reynolds* proceedings. Today, 134 years after the *Reynolds* decision was handed down, there is ample room to reevaluate this argument about human relationships. In fact, this argument has reemerged as a political hot topic in recent years.

American society has shifted its relationship standards since 1879. In the 1870s, many states placed strict limitations on marital exit. Today, hundreds of thousands of American marriages end in divorce each year (Center for Disease Control, 2010). State laws have eased the path of marital exit and accommodated our society's acceptance of frequent marriages, as well as the common practice of cohabitation without marriage. The government has not proscribed cohabitation, which sometimes consists of multiple humans living together. In fact, cohabitating adults have been able to secure strong parental rights.

This modern shift reveals a contradiction between polygamous marriages and other legally protected relationships. As legal scholar Jonathon Turley points out: "a person can live with multiple partners and even sire children from different partners so long as they do not marry. However, when that same person accepts a legal commitment for those partners 'as a spouse,' we jail them" (Turley, 2004). Offering fewer rights to loyal, long-term spouses than to temporal and uncommitted relationships is backward. Turley also observes the foolishness of allowing citizens to "have multiple husbands so long as they are consecutive, not concurrent" (Turley, 2004). It would be a remarkable feat to convincingly argue that a thrice-divorced citizen, or an adult who cohabits with numerous partners without a binding legal commitment, upholds the enduring and society-affirming ideal of marriage while a faithful, religiously-ordained polygamous marriage leads to anarchy and the extermination of religion.

Since 1879, the United States has witnessed a dip in marital fidelity, a spike in divorce rates, and enhanced protection for alternative lifestyles and modes of sexual expression. This social metamorphosis, which stood as the central fear of the Waite Court in *Reynolds v. United States*, has not presaged the death of marriage, or "anarchy," or "the disintegration of religion and Western civilization" (Reynolds, 1879). Even as nontraditional relationships, such as homosexual relationships, have made legal gains, Waite's fears have not been realized.

Two modern Supreme Court cases, which ruled on the rights of homosexuals, aptly mirror the constitutional evolution between the 1879 *Reynolds* decision and the likely decision if *Reynolds* was reevaluated today. In 1986, the Supreme Court decided *Bowers v. Hardwick*, a case that addressed the constitutionality of certain sexual activities. In 1982, a Georgia man—Mr. Hardwick—was found engaging in homosexual sodomy (Bowers, 1986). At that time, a Georgia law prohibited citizens from performing any acts of sodomy, regardless of whether the act was between heterosexual or homosexual couples (Bowers, 1986). Although Hardwick was not convicted of a sodomy charge, he filed a lawsuit that challenged the constitutionality of Georgia's sodomy law (Bowers, 1986). Hardwick argued that the law violated his constitutional right to privacy. The central question before the Supreme Court was whether a homosexual was constitutionally protected in manifesting his relationship through sexual conduct.

The majority of the justices decided against Hardwick, ruling that unlike other contemporary cases with legitimate privacy claims, homosexual conduct did not qualify as a fundamental liberty. In his majority decision, Justice Byron White takes great pains to assert that not every "kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription" (Bowers, 1986). Justice White's constitutional analysis is eerily similar to the analysis of Chief Justice Waite in *Reynolds*. In order to demonstrate that the

sexual conduct of homosexuals does not meet the criteria of a fundamental liberty, Justice White turns to the English common law and American pre-constitutional history. These originalist records reveal that homosexual relationships, and sexual expressions of homosexual relationships, were unconventional, illegal, and downright morally odious to early generations of Americans (much like polygamy was unconventional, illegal, and morally odious at this period in American history).

Hardwick's fallback claim is that the Georgia sodomy law is not rationally based, due to the fact that the primary impetus for the Georgian law was a Christian attack on "immoral and unacceptable" relationships (Bowers, 1986). Justice White rebuts this claim in the same manner that Chief Justice Waite tacitly dismisses the fact that religiously-imbued bigamy statutes were targeting Mormons. White asserts that state laws are "constantly based on notions of morality," and this is perfectly legitimate because laws can be guided by a single vision of moral decency, even if such visions have purely religious roots (Bowers, 1986). In his concurring opinion, Chief Justice Burger candidly states the vision on moral decency that needs to be upheld: "Judeo-Christian moral and ethical standards" (Bowers, 1986).

In 2003, the Supreme Court reevaluated the constitutionality of sodomy laws, especially in cases where these laws targeted homosexual activity. The facts of *Lawrence v. Texas* are nearly identical to the facts surrounding the *Bowers* case. Texas law enforcement officials entered the home of John Lawrence in response to an arms suspicion; while inside Mr. Lawrence's residence, they discovered him engaging in homosexual sodomy (Lawrence, 2003). Both Mr. Lawrence and his partner were convicted under a state statute that forbade homosexual sodomy (Lawrence, 2003). The men filed a grievance, claiming that the Texas sodomy statute unconstitutionally restricted their personal relationship (Lawrence, 2003). The Supreme Court was faced with the question of whether to uphold, revise, or overturn the seventeen-year-old *Bowers* precedent.

In a 6-3 decision, the Supreme Court overturned *Bowers v. Hardwick* and ruled to decriminalize homosexual sodomy because the constitutional right to privacy is broad enough to encompass citizens' choice of sexual relations within their homes. In his majority opinion, Justice Anthony Kennedy wrote that in a constitutional democracy, the majority may not legislate its "religious beliefs, conceptions of right and acceptable behavior" onto the entire population, especially when such religiously founded standards infringe on citizens' "transcendent liberties" (Lawrence, 2003). Justice Kennedy's opinion opens the way for a reevaluation of *Reynolds*, principally because Kennedy's arguments in support of both sexual expression and freedom from government intrusion in relationships offer constitutional protection past the immediate case of homosexual sodomy. Kennedy believes that the precedent leading up to, and including, *Lawrence* confirms that "our laws and traditions afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education," and that *Lawrence* "should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries" (Lawrence, 2003).

Since the *Lawrence* decision in 2003, the homosexual lobby has continued to make great strides in the American legal arena. The fieriest issue connected to the lobby is same-sex marriage. In 2002, every state in America disallowed marriage between homosexual couples (Pearson, 2012). Making the *Lawrence* decision a centerpiece of their fight for equal marital rights, gay activists have since become a more potent political force on the local, state, and national levels of government. Today, nine states and the District of Columbia allow for gay marriage, and several other states have implemented civil union statutes.

In 1996, Congress passed the Defense of Marriage Act (DOMA) in an effort to curb the political gains of the homosexual lobby. The act, which was supported by both President Bill Clinton and George W. Bush, sought to accomplish two objectives: to define marriage as a union between a man and a woman and also to ensure that no state would be forced to respect a same-sex marriage (104th Congress, 1996). DOMA quickly became a political lightning rod, effectively dividing the nation over the question of alternative lifestyles. Since its enactment, the act has been the subject of several lawsuits, many of which argue that DOMA violates the equal protection clause of the Fourteenth Amendment. On February 23, 2011, President Barack Obama decided that the United States Department of Justice would not defend the Defense of Marriage Act in court, because of President Obama's belief that the act is in fact unconstitutional (Montopoli, 2011).

The role of federalism in the area of marriage laws has supplied a compelling political argument for proponents of state same-sex marriage laws. A well-established tenet of federalism states that local forms of government, such as municipality and state governments, should be regarded as centers of political experimentation. Local governments should feel free to exercise their police powers, which oftentimes requires trying out unorthodox laws. In the 2005 case of *Gonzalez v. Raich*, the Supreme Court addressed the constitutionality of California's

Compassionate Use Act of 1996. In her dissenting opinion, Justice Sandra Day O'Connor wrote: “One of federalism’s chief virtues, of course, is that it promotes innovation by allowing for the possibility that ‘a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country’” (Gonzalez, 2005). Justice O’Connor’s defense of our nation’s federalist heritage offers insight into the issues of same-sex union and religiously motivated polygamy.

Domestic relations laws, which govern the realm of relationships, marriages, and families, historically have been within the jurisdiction of local governments. This fact can be traced back to our tradition of federalism. The police powers held by the states encompass the safety and welfare of citizens, and this necessarily includes legal authority concerning domestic relations. Current same-sex state laws activate our federalist expectation that autonomous local governments enact differing domestic relations laws, wherein some states find it prudent public policy to protect same-sex marriages while other states do not feel compelled to offer similar protections. Unfortunately, although the Utah Territory found polygamy to be legally permissible, the majority decision in *Reynolds* rejected America’s federalist tradition of protecting local differences in domestic relations laws. Although George Reynolds’s lawyers argued that the Court should “validate the traditional theories of the limitations of federal power to change (or even to investigate) the decisions of majorities in areas of law traditionally reserved for local populations,” the Supreme Court disregarded our federalist tradition and instead upheld Congress’s unwarranted reach into local domestic relations jurisdiction (Gordon, 2002: 122-123). In light of the recent reemphasis on states’ domestic relations authority, which has resurfaced due to the political controversy surrounding same-sex marriage laws, it is difficult to imagine how the federal government could attack the legality of polygamy if a state were to protect the practice today.

Even Justice Antonin Scalia, who objected to the majority decision in *Lawrence*, wrote in his dissent: “State laws against bigamy… are likewise sustainable only in light of *Bowers*’ validation of laws based on moral choices. Every single one of these laws is called into question by today’s decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding” (*Lawrence*, 2003). Scalia acknowledges “the impossibility of distinguishing homosexuality from other traditional ‘morals’ offenses” based on the constitutional foundation of *Lawrence v. Texas* (*Lawrence*, 2003). To add strength to Scalia’s observation, one must only note that the homosexual relationships and activities that garnered constitutional protection in *Lawrence* were motivated solely by individual desire and sexual orientation. The polygamous relationships and sexual activities at issue in *Reynolds* oftentimes were not motivated by individual desire, and many Mormon men and women reluctantly engaged in this form of marriage (Gordon, 2002). These followers practiced polygamy because the nineteenth-century Mormon Church deemed it an indispensable salvation-granting sacrament. If the current Supreme Court is willing to protect heterodox relationships and sexual behaviors from morals-based legislation, then the court stands on more stable ground in safeguarding religiously motivated relationships from morals-based legislation.

4. Conclusions

In 1890, the President of The Church of Jesus Christ of Latter-day Saints announced a revelation, which called for all Mormons to respect the anti-polygamy statutes “pronounced constitutional by the court of last resort” (The Church of Jesus Christ of Latter-day Saints, 1890). This revelation, which came to be known as The Manifesto, shifted Mormon doctrine away from the practice of polygamy. The Manifesto led to great division within the church, but the change of doctrine did not extinguish the religious practice of polygamy. Just as the resilient practice survived social and legal attacks in the public square, polygamy withstood the dictates of the church, which many viewed as being motivated by sheerly “political purposes” (Anderson, 2010: 51). The majority of modern-day polygamists has been excommunicated by the Mormon Church and has joined fundamentalist offshoots that still adhere to early church principles (Anderson, 2010: 45). In a recent article about polygamy, *National Geographic* reported, “An estimated 38,000 breakaway Mormon fundamentalists continue the practice of plural marriage in North America today” (Anderson, 2010: 46). This tally does not do justice to the true number of religiously motivated polygamists, because these estimates do not include statistics from the many other North American religious groups that sanction polygamy.

The issue of polygamy has begun to generate national discussion, and not just in the academy. As same-sex marriage statutes and lawsuits shape our political discourse, the United States has been forced to reevaluate legally acceptable marital norms. In the entertainment industry, a new hit television series follows the family life of a polygamous household in Utah. The fundamentalist Mormon family is currently in court, challenging state bigamy laws (Huffington Post, 2012).

Although a public discussion of polygamy no longer produces the type of political outcry that it once did, it is easy to understand Americans' continued sensitivity about political questions concerning the family. Just as marriage was in disarray in nineteenth-century America, leading many to admit "the failure of heterosexual monogamous marriage to deliver the social benefits that warrant the state's legally recognizing these marriages," legitimate questions about the conventional nuclear family have been raised in twenty-first century America (Calhoun, 2005: 1030).

There is no doubt that a modern constitutional reevaluation of *Reynolds v. United States* would be contentious, both inside and outside of the courtroom. The Mormon Church would be troubled by a reversal of *Reynolds*, which could potentially force the church to reconsider its doctrinal stances as well as deal with the membership statuses of thousands of fundamentalist Mormons whose central complaint against the Church of Jesus Christ of Latter-day Saints is its rejection of the sacrament of polygamy. In addition to the potential rife within the Mormon Church, another growing religious group in America—Muslims—would be impacted by a reversal of *Reynolds*. Some scholars have estimated that 50,000 American Muslims live in families in which polygamy is practiced (Hagerty, 2008). Both inside and outside of the mosque, the American Muslim community may face turmoil if polygamy is deemed constitutional. Setting aside the concerns of religious communities, the Supreme Court itself might be troubled by the idea of reevaluating a case decided more than a century ago, although I believe that the erosion of *Reynolds*'s legal reasoning and precedents would make the thought of reevaluation more palatable.

I believe that a reevaluation of *Reynolds* is a prudent plan, regardless of the controversy that may ensue. Opponents of *Reynolds* view the case as a bad apple in First Amendment free exercise jurisprudence and in need of immediate correction for the thousands of religiously motivated polygamists residing in the United States today. Even modern defenders of the *Reynolds* decision acknowledge the weak reasoning throughout the case, not to mention the countless examples offered by Chief Justice Waite that would never be legally permitted, much less dispositive, by any federal court today. Aside from the religious and legal observers who would benefit from a rehearing, thousands of law enforcement officials would also gain clarity from the case. Federal and state anti-polygamy statutes are still in place today, causing strain on law enforcement officials who must decide whether to allocate resources to the lengthy process of prosecuting polygamists.

If set before the Supreme Court, the case for religiously motivated polygamy would be stronger today than it was in 1879. Legal scholars recognize that the majority reasoning of *Reynolds v. United States* was fraught with amateur originalism, inaccurate historical accounts, and misconstrued beliefs from James Madison and Thomas Jefferson. Since *Reynolds* was decided, free exercise standards have evolved. Cases such as *Sherbert v. Verner* and *Employment Division of Oregon v. Smith* highlight compelling arguments for polygamists, and damning flaws against the interests, intentions, and effects of anti-polygamy statutes. Recent Supreme Courts cases dealing with alternative lifestyles have successfully protected heterodox sexual practices, even though these practices were solely motivated by personal desire, not religious belief. For these reasons and more, it is safe to assume that religiously motivated polygamy would receive a much more favorable constitutional treatment today than it did 133 years ago.

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