ANNUAL REVIEW NOTE

"THERE CAN BE NO ASSUMPTION . . . ":* TAKING SERIOUSLY CHALLENGES TO POLYGAMY BANS IN LIGHT OF DEVELOPMENTS IN RELIGIOUS FREEDOM JURISPRUDENCE

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I. INTRODUCTION: THE MODERN RELEVANCE OF THE POLYGAMY QUESTION

In recent years, the question of polygamy has become particularly salient in the American consciousness and especially relevant to a number of questions presented in recent litigation. First, high profile cases challenging aspects of the Affordable Care Act related to contraception and insurance coverage have raised the question of whether the First Amendment allows or even requires exceptions to rules of general applicability on the basis of religious belief.[1] More recently, these issues have been highlighted in the context of anti-discrimination statutes as a number of state legislatures have introduced or passed statutes which explicitly permit individuals to discriminate against lesbian, gay, bisexual, or

* "There can be no assumption that today's majority is 'right' and the Amish and others like them are 'wrong.' A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different." Wisconsin v. Yoder, 406 U.S. 205, 223-24 (1972).

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1. *E.g.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

transgender (LGBT) Americans by way of "religious liberty" exemptions.[2] Second, in light of the successes of the LGBT equality movement, many opponents have suggested the coming collapse of the institution of marriage—claiming, for example, that marriage equality for same-sex couples will inevitably lead to the legalization and recognition of polygamous marriages. The question of whether this could actually be the case, although examined previously by others,[3] makes this Article especially relevant. Third, there has been renewed attention to polygamy itself, not only through popular culture, but also through polygamous families challenging the constitutionality of various bans on polygamy.[4] In other words, the significance of polygamy as a legal matter has arisen primarily out of the "culture wars" as they are fought out in the court system. While some of these aspects of polygamy have been examined piecemeal, they have yet to be addressed in relation to one another.[5]

Although the question of the legitimacy of polygamy bans was ostensibly settled in *Reynolds v. United States*, in which the Supreme Court subjected polygamy bans to a rational basis analysis as laws of general applicability,[6] the past century has resulted in a number of significant changes in religious freedom law and jurisprudence. First, Congress and a number of states have enacted legislation subjecting burdens upon religious exercise to strict scrutiny, rather than the rational basis analysis used in *Reynolds*.[7] Second, the Supreme Court has held that laws that target the practices of a specific religion must be subject to strict scrutiny—a doctrine likewise not in place at the time of the *Reynolds* decision.[8] Finally, some have argued that Supreme Court decisions in the realm of LGBT equality, specifically in *Lawrence v. Texas*, prevent the consideration of morality or mere tradition as legitimate government interests, thereby leaving polygamy bans vulnerable even under rational basis analysis.[9]

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2. *E.g.*, Jacob Gershman, *Religious-Freedom Bills Proliferate in Statehouses*, LAW BLOG, WALL ST. J. (Feb. 25, 2014, 8:02 PM), http://blogs.wsj.com/law/2014/02/25/religious-freedom-bills-proliferate-in-statehouses/.

3. Michael G. Myers, *Polygamist Eye for the Monogamist Guy: Homosexual Sodomy . . . Gay Marriage . . . Is Polygamy Next?*, 42 HOUS. L. REV. 1451, 1452 (2006).

4. *E.g.*, Brown v. Buhman, 947 F. Supp. 2d 1170 (D. Utah 2013).

5. *E.g.*, Kristen A. Berberick, *Marrying into Heaven: The Constitutionality of Polygamy Bans Under the Free Exercise Clause*, 44 WILLAMETTE L. REV. 105, 111 (2007); Richard A. Vazquez, *The Practice of Polygamy: Legitimate Free Exercise of Religion or Legitimate Public Menace? Revisiting* Reynolds *in Light of Modern Constitutional Jurisprudence*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 225 (2002).

6. 98 U.S. 145 (1878).

7. *See* 42 U.S.C.A. § 2000bb-bb4 (West, Westlaw through P.L. 113-234); *see also* Christopher C. Lund*, Religious Liberty After Gonzales: A Look at State RFRAs*, 55 S.D. L. REV. 466 (2010).

8. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 521 (1993) ("Where such a law is not neutral or not of general application, it must undergo the most rigorous of scrutiny: It must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.").

9. Lawrence v. Texas, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting) ("State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices.

I will argue that although anti-polygamy laws are more vulnerable today than they were at the time of *Reynolds*, they are not constitutionally infirm. Furthermore, as between the two major relevant jurisprudential developments since *Reynolds*—increased scrutiny for infringements on religious exercise and changes to rational basis analysis under *Lawrence* and other gay rights cases—it is the former that presents the greatest challenge to current polygamy bans. While it is possible that anti-polygamy laws could be subject to heightened scrutiny, even under such an approach it is likely that they would be upheld: despite the claims of many conservatives, polygamy and same-sex marriage are distinguished by numerous state interests outside of morality or preservation of tradition. Likewise, under a rational basis framework, anti-polygamy laws would undoubtedly be upheld, regardless of whether *Lawrence* or other decisions prevent "morality" from being considered as a "legitimate government interest."

II. POLYGAMY IN THE UNITED STATES

Because a number of histories and law review articles trace the history of polygamy generally, as well as specifically within the United States, an exhaustive review of this history is not necessary in this Article.[10] However, it is worthwhile to review the *current* legal landscape as it pertains to polygamy; these regulations of marriage generally tend to take the form of criminal statutes, although this does not have to be the case.

Although the United States federal government no longer prohibits polygamous marriage per se,[11] the federal government imposes sanctions on polygamy and polygamists in a variety of ways. For example, the Internal Revenue Service has denied preferential tax status to organizations that seek to promote polygamy and provide certain services to polygamists.[12] Likewise, the federal government refuses to recognize polygamous marriages for the purposes of immigration law.[13] Furthermore, under 8 U.S.C. Section 1182(a)(11), persons who engage in polygamy are ineligible to "receive visas . . . or admission" to the United

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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.").

10. *See, e.g.*, Jason D. Berkowitz, *Beneath the Veil of Mormonism: Uncovering the Truth About Polygamy in the United States and Canada*, 38 U. MIAMI INTER-AM. L. REV. 615 (2007); Emily J. Duncan, *The Positive Effects of Legalizing Polygamy: "Love Is A Many Splendored Thing,"* 15 DUKE J. GENDER L. & POL'Y 315, 316 (2008); Mary K. Campbell, *Mr. Peay's Horses: The Federal Response to Mormon Polygamy, 1854-1887*, 13 YALE J.L. & FEMINISM 29 (2001).

11. The statute at issue in Reynolds v. United States, 98 U.S. 145 (1878), was An Act to punish and prevent the Practice of Polygamy in the Territories of the United States, 12 Stat. 501-502 (1862). However, this act was promulgated under Congress's ability to regulate the territories of the United States; it is no longer in force.

12. *E.g.*, I.R.S. P.L.R. 201323025 (June 7, 2013) (Denying tax exempt status on public policy grounds because, *inter alia*, "[f]or purposes of federal tax laws, marital status is determined by state laws . . . . Since State law forbids polygamous marriages, it follows that polygamy is against the policy of the Federal tax code for purposes of a State corporation.").

13. IMMIGRATION LAW & FAMILY § 4:19 (2013 ed.).

States;[14] individuals who have already been issued visas or admitted to the United States may be deported and have their visas revoked if they engage in polygamy.[15]

In addition, polygamy is prohibited in all fifty states.[16] Beyond refusing to recognize polygamous marriages as legitimate and criminalizing polygamous marriage or "purporting" to be in a polygamous marriage, the states prevent polygamy through a variety of other measures. Michigan, for example, prohibits the "teaching, soliciting, or advocacy" of polygamy.[17] The state of Utah also prohibits polygamous cohabitation—a measure that was recently struck down by

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14. 8 U.S.C.A § 1182(a)(11) (West, Westlaw through P.L. 113-234).

15. *Id*. § 1227(a)(2)(A); *see generally* Claire A. Smearman, *Second Wives' Club: Mapping the Impact of Polygamy in U.S. Immigration Law*, 27 BERKELEY J. INT'L L. 382 (2009).

16. ALA. CODE § 13A-13-1(West, Westlaw through 2014-457); ALASKA STAT. ANN. § 25.05.021 (West, Westlaw through ch. 116 of 2014 Reg. Sess.); ARIZ. REV. STAT. ANN. § 13-3606 (West, Westlaw through 2d Reg. Sess. of 51st Leg.); ARK. CODE ANN. § 5-26-201 (West, Westlaw through 2014 2d E. Sess); CAL. PENAL CODE § 281 (West, Westlaw through 2014 Reg. Sess.); COLO. REV. STAT. ANN. § 18-6-201 (West, Westlaw through 2d Reg. Sess. of 2014 Gen. Assemb.); CONN. GEN. STAT. ANN. § 53a-190 (West, Westlaw through 2014 Feb. Reg. Sess.); DEL. CODE ANN. tit. 11, § 1001 (West, Westlaw through 79 Laws 2014 ch. 443); FLA. STAT. ANN. § 826.01 (West, Westlaw through ch. 255 2014 Reg. Sess.); GA. CODE ANN. § 16-6-20, 21 (West, Westlaw through Acts 343-669 of 2014 Reg. Sess.); HAW. REV. STAT. § 709-900 (West, Westlaw through Act 235 of 2014 Reg. Sess.); IDAHO CODE ANN. § 18-1101 (West, Westlaw through 2014 2d Reg. Sess.); 750 Ill. Comp. Stat. Ann. 5/212 (West, Westlaw through P.A. 98-1174 of the 2014 Reg. Sess.); IND. CODE ANN. § 35-46-1-2 (West, Westlaw through 2014 Reg. Sess.); IOWA CODE ANN. § 726.1 (West, Westlaw through 2014 Reg. Sess.); KAN. STAT. ANN. § 21-5609 (West, Westlaw through 2014 Reg. Sess.); KY. REV. STAT. ANN. § 530.010 (West, Westlaw through 2014); LA. REV. STAT. ANN. § 14:76, 77 (West, Westlaw through 2014 Reg. Sess.); ME. REV. STAT. tit. 17-A, § 551 (West, Westlaw through 2013 Reg. Sess.); MD. CODE ANN., CRIM. LAW § 10-502 (West, Westlaw through 2014 Reg. Sess.); MASS. GEN. LAWS ANN. ch. 272, § 15 (West, Westlaw through ch. 389 of 2014 2d Ann. Sess.); MICH. COMP. LAWS ANN. § 750.439 (West, Westlaw through 2014 Reg. Sess.); MINN. STAT. ANN. § 609.355 (West, Westlaw through 2014 Reg. Sess.); MISS. CODE. ANN. § 97-29-13 (West, Westlaw through 2014 E. Sess.); MO. ANN. STAT. § 568.010 (West, Westlaw 2014 Reg. Sess.); MONT. CODE ANN. § 45-5-611 (West, Westlaw through 2013 Reg. Sess.); NEB. REV. STAT. § 28-701 (West, Westlaw through 2014 Reg. Sess.); NEV. REV. STAT. ANN. § 201.160, 170 (West, Westlaw through 28th Spec. Sess.); N.H. REV. STAT. ANN. § 639:1 (West, Westlaw through ch. 330 of 2014 Reg. Sess.); N.J. STAT. ANN. § 2C:24-1 (West, Westlaw through L.2014 ch. 80); N.M. STAT. ANN. § 30-10-1 (West, Westlaw through 2d Reg. Sess. 51st Leg.); N.Y. PENAL LAW § 255.15 (McKinney, Westlaw through ch. 533); N.C. GEN. STAT. ANN. § 14-183 (West, Westlaw through 2014 Reg. Sess.); N.D. CENT. CODE ANN. § 12.1-20-13 (West, Westlaw through ch. 522 of 2013 Reg. Sess.); OHIO REV. CODE ANN. § 2919.01 (West, Westlaw through File 146 of 130th Gen. Ass.); OKLA. STAT. ANN. tit. 21, § 881 et seq. (West, Westlaw through 2d Sess. of 53d Leg.); OR. REV. STAT. ANN. § 163.515 (West, Westlaw through 2014 Reg. Sess.); 18 PA. CONS. STAT. ANN. § 4301 (West, Westlaw through 2014 Reg. Sess.); R.I. GEN. LAWS ANN. § 11-6-1 (West, Westlaw through ch. 555 of Jan. 2014 Sess.); S.C. CODE ANN. § 16-15-10 (West, Westlaw through 2014 Reg. Sess.); S.D. CODIFIED LAWS § 22-22A-1 (West, Westlaw through 2014 Reg. Sess.); TENN. CODE ANN. § 39-15-301 (West, Westlaw through 2014 Reg. Sess.); TEX. PENAL CODE ANN. § 25.01 (West, Westlaw through 2013 3rd Sess.); UTAH CODE ANN. § 76-7-101 (West, Westlaw through 2013 3d Sess. of 83d Leg.); VT. STAT. ANN. tit. 13, § 206 (West, Westlaw through 2013-2014 Adj. Sess.); VA. CODE ANN. § 18.2-362 (West, Westlaw through 2014 Reg. Sess.); WASH. REV. CODE ANN. § 9A.64.010 (West, Westlaw through 2014 Leg.); W. VA. CODE ANN. § 61-8-1 (West, Westlaw through 2014 2d E. Sess.); WIS. STAT. ANN. § 944.05 (West, Westlaw through 2013 Act 380); WYO. STAT. ANN. § 6-4-401 (West, Westlaw through 2014 Bud. Sess.).

17. MICH. COMP. LAWS ANN. § 750.441 (West, Westlaw through 2014 Reg. Sess.).

a federal district court.[18]

However, because these other measures frequently implicate other constitutional questions—freedom of speech and the right to privacy, for example—in addition to issues of freedom of religion, space limitations require limiting my analysis largely to prohibitions on the recognitions of the marriages themselves.

III. STRICT SCRUTINY: RFRA AND DISCRIMINATION

Although religious belief may not be regulated by the State, action may sometimes be regulated if it is done through a "neutral law of general applicability" and is rationally related to a legitimate government interest.[19] However, as a result of the Religious Freedom Restoration Act of 1993, federal laws are subject to a higher standard of scrutiny. Furthermore, even if the laws in question are not federal laws, they may nonetheless be subject to heightened scrutiny if they are not "neutral law[s] of general applicability"[20]—that is, if they are designed to infringe on religious practice—or if the jurisdiction in question has passed its own version of the Religious Freedom Restoration Act. Finally, even if these two claims fail, claimants may nonetheless press forward under the standard rational basis religious liberty analysis established in *Smith*.

A. RELIGIOUS FREEDOM RESTORATION ACT OF 1993 (RFRA)

Under the Religious Freedom Restoration Act of 1993, [21] federal burdens upon religious expression must meet the *Sherbert* test.[22] Under the *Sherbert* test, the court inquires, first, whether the individual has a claim involving a sincere religious belief, and, second, whether the state action imposes a substantial burden upon the individual's ability to act on her belief.[23] If both these elements are met, then the government action must meet strict scrutiny: it must be in furtherance of a "compelling government interest" and must be the least restrictive means of achieving that interest.[24]

It is worth noting, however, that some language from the Supreme Court's decision in *Hobby Lobby* may indicate the possibility of a shift away from this

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

19. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 879 (1990) ("Subsequent decisions have consistently held 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).'" (quoting United States v. Lee, 455 U.S. 252, 263 (1982))).

20. *Smith*, 494 U.S. at 879.

21. 42 U.S.C.A. § 2000bb et seq. (West, Westlaw through P.L. 113-234).

22. The Act sought to reverse the Supreme Court's decision in *Smith*, 494 U.S. at 872, which held that "neutral laws of general applicability" are subject only to rational basis analysis. Although the Supreme Court held that RFRA does not apply to the states in City of Boerne v. Flores, 521 U.S. 507 (1997), it remains in effect as applied to federal action. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).

23. Sherbert v. Verner, 374 U.S. 398, 403 (1963); *see also* Wisconsin v. Yoder, 406 U.S. 205 (1972).

24. *Sherbert*, 374 U.S. at 406-09.

framework in the future, toward an even more burdensome standard for the government. In a footnote, the Court wrote that "RFRA did more than merely restore the balancing test used in the *Sherbert* line of cases; it provided even broader protection for religious liberty than was available under those decisions."[25] Although the Court provided no elaboration of what this sort of test might entail, if it does choose to pursue this standard it seems unlikely that polygamy bans would survive. However, this reasoning has yet to be invoked in any decision, either by the Supreme Court or any lower court.

Sincerity of Belief

The "sincerity of belief" prong is typically fairly easy to demonstrate. Though mainstream Mormonism no longer holds polygamy as a primary tenet of faith, there are other sects of Mormonism and other religions that engage in the practice of polygamy.[26] Moreover, the Supreme Court has held that a formal position by an organized religion is not a requirement for a belief to be "sincere" for the purposes of RFRA.[27] Nonetheless, one potential barrier to meeting this requirement is that the practice must be *religious*—not merely a tradition.[28] Yet disentangling *religious* practices from *cultural* traditions can be tricky. As a result, some trials may involve an investigation into the religious tenets of plaintiffs, and the claims of at least some plaintiffs may not require strict scrutiny on these grounds.[29]

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25. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2761 n.3 (2014).

26. Elizabeth Harmer-Dionne, *Once a Peculiar People: Cognitive Dissonance and the Suppression of Mormon Polygamy as a Case Study Negating the Belief-Action Distinction*, 50 STAN. L. REV. 1295, 1331-40 (1998) (discussing the shift of the mainstream Mormon Church away from polygamy); *see, e.g.*, Jaime M. Gher, *Polygamy and Same-Sex Marriage—Allies or Adversaries Within the Same-Sex Marriage Movement*, 14 WM & MARY J. WOMEN & L. 559, 561 (2008) ("About eighty-three percent of human societies permit polygamy . . . . Polygamy is most prevalent in Muslim countries and in traditional or agrarian communities; however, it is estimated that as many as 30,000 people practice polygamy in the Western United States and Canada.").

27. Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829, 832 (1989) ("Never did we suggest that unless a claimant belongs to a sect that forbids what his job requires, his belief, however sincere, must be deemed a purely personal preference rather than a religious belief. Indeed, in *Thomas*, there was disagreement among sect members as to whether their religion made it sinful to work in an armaments factory; but we considered this to be an irrelevant issue and hence rejected the State's submission that unless the religion involved formally forbade work on armaments, Thomas' belief did not qualify as a religious belief. Because Thomas unquestionably had a sincere belief that his religion prevented him from doing such work, he was entitled to invoke the protection of the Free Exercise Clause.").

28. United States v. DeWitt, 95 F.3d 1374, 1376 (8th Cir. 1996).

29. Generally speaking, however, courts are reluctant to make such investigations; the result is that the claim of sincerity of belief is frequently given much deference. *See, e.g.*, Hernandez v. C.I.R., 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."); Sample v. Lappin, 424 F. Supp. 2d 187, 193 (D.D.C. 2006) (applying *Hernandez* to a RFRA claim). On the other hand, the Court has said that "[t]o qualify for RFRA's protection, an asserted belief must be 'sincere;'" a "pretextual assertion of a religious belief in order to obtain an exemption for financial reasons would fail." *Hobby Lobby*, 134 S. Ct. at 2774 n.28. This seems to indicate at least some willingness to look beyond a mere claim to a belief.

It should be noted that, because RFRA—and the *Sherbert* test—specifically requires the demonstration of a "sincere religious belief," even a victory by religious plaintiffs would not likely result in a declaration of the *facial* unconstitutionality of a polygamy ban. Individuals who merely wish to engage in polygamy—but who are not religiously required to do so—do not receive the protection of RFRA, as they would be unable to meet the first prong of the test. In *United States v. DeWitt*, the Eighth Circuit held that the defendant's use of illicit drugs was not religious, but rather done as an end in itself, and therefore not protected by RFRA.[30] It seems likely that individuals who seek to engage in polygamy not as a religious practice, but rather as an end in itself, would likewise not be protected by RFRA.

Substantial Burden

In addition to a sincere belief, however, the government action in question must also result in a substantial burden upon that belief—it cannot be a simple inconvenience or a burden upon a mere tradition. Thus, for example, in *Weir v. Nix*, a federal district court held that prison officials limiting a fundamentalist Christian to three hours per week of group worship—and limiting that worship to Fridays, rather than Sundays—was not a substantial burden.[31] According to the court:

> The requirement of a "substantial" burden differentiates those burdens which have only an incidental effect or merely inconvenience the exercise of the person's religion from those which burden the exercise of the religion by "pressuring [the adherent] to commit an act forbidden by the religion or by preventing him or her from engaging in conduct or having a religious experience which the faith mandates." Only the latter are constitutionally or statutorily significant.[32]

On appeal, the Eighth Circuit affirmed the decision, noting that while evidence suggested that Sunday worship is "traditional," it is not a "doctrinal necessity" for fundamentalists, and as such did not constitute a protected "central tenet" of faith.[33] Although the "substantial burden" test varies between circuits, all look to whether there is a deprivation of a central, or important, "religious experience" mandated by the individual's faith or through required conduct forbidden by central tenets of the individual's faith.[34]

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30. 95 F.3d at 1376.

31. 890 F. Supp. 769, 788-89 (S.D. Iowa 1995).

32. *Id*. (internal citations omitted).

33. Weir v. Nix, 114 F.3d 817, 821 (8th Cir. 1997).

34. However, in examining the specifics, the various federal circuits are split. The Seventh Circuit has helpfully summarized the differing approaches:

> The Fourth, Ninth, and Eleventh Circuits define "substantial burden" as one that either compels the religious adherent to engage in conduct that his religion forbids (such as eating pork, for a

In analyzing this prong, it is important to consider the specific manner in which the government seeks to prohibit polygamy. For example, demonstrating that a prohibition on polygamous cohabitation is a "significant burden" would be much more likely.[35] However, denying individuals who believe in polygamy state recognition of their relationships—even if their genuinely held beliefs require that they engage in polygamy—likely does not rise to the level of "substantial burden."

First, any plaintiff's claim that their religion *requires* (rather than merely prefers or advocates for, which would likely not be protected under RFRA) government recognition of their relationship will likely strike a court as opportunistic and not genuinely held. Second, and more significantly, it seems implausible to argue that government non-recognition of a polygamous relationship would impact the actual *religious conduct* of the individuals involved.

In this very limited context, the litigation surrounding marriage equality may serve as a helpful barometer of the willingness of courts to entertain this sort of religious liberty challenge to prohibitions on marriage recognition. In 1971, the Michigan State Supreme Court heard an appeal from two gay men who challenged a Michigan statute recognizing marriage only for opposite-sex couples.[36] The couple raised a number of constitutional claims, including a First Amendment religious liberty claim. Although the court rejected the couple's Due Process and Equal Protection arguments, it refused to even address their religious liberty claim.[37] On appeal, the Supreme Court dismissed the case for "want of a substantial federal question," giving the decision by the Michigan State Supreme Court at least some precedential value.[38] In 1973, a Kentucky state appeals court

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Muslim or Jew) or forbids him to engage in conduct that his religion requires (such as prayer). Goodall by Goodall v. Stafford County School Board, 60 F.3d 168, 172-73 (4th Cir. 1995); Cheffer v. Reno, 55 F.3d 1517, 1522 (11th Cir. 1995); Bryant v. Gomez, 46 F.3d 948 (9th Cir. 1995) (per curiam). The Eighth and Tenth Circuits use a broader definition—action that forces religious adherents "to refrain from religiously motivated conduct," Brown-El v. Harris, 26 F.3d 68, 70 (8th Cir. 1994), or that "significantly inhibit[s] or constrain[s] conduct or expression that manifests some central tenet of a [person's] individual beliefs," Werner v. McCotter, 49 F.3d 1476, 1480 (10th Cir. 1995), imposes a substantial burden on the exercise of the individual's religion. The Sixth Circuit seems to straddle this divide, asking whether the burdened practice is "essential" or "fundamental," Abdur-Rahman v. Michigan Dept. of Corrections, 65 F.3d 489, 491-92 (6th Cir. 1995).

Mack v. O'Leary, 80 F.3d 1175, 1178 (7th Cir. 1996), *cert. granted, judgment vacated*, 522 U.S. 801 (1997).

35. *See generally* Brown v. Buhman, 947 F. Supp. 2d 1170 (D. Utah 2013) (holding that cohabitation prong of bigamy statute was unconstitutional).

36. Baker v. Nelson, 291 Minn. 310 (1971); MINN. STAT. ANN. § 517.08 (West, Westlaw through 2015 Reg. Sess.).

37. *Baker*, 291 Minn. at 312 n.2 ("We dismiss without discussion petitioners' additional contentions that the statute contravenes the First Amendment and Eighth Amendment of the United States Constitution.").

38. Baker v. Nelson, 409 U.S. 810 (1972). It is worth pointing out that, in the past decade, efforts to invoke the Court's dismissal in *Baker* as precedent against due process and equal protection claims have generally failed. The Second Circuit, for example, noted the substantial developments in both due process

likewise rejected a religious liberty challenge to the denial of a marriage license to a same-sex couple.[39] Perhaps recognizing the argument to be a losing one, no other plaintiffs have since brought a religious liberty claim to achieve marriage recognition.

The hostility of the courts to religious liberty claims as a means of establishing an entitlement to marriage recognition is underscored by the decision of the Utah State Supreme Court in *State v. Holm*.[40] The court, though not addressing the question of a "significant burden," upheld a polygamy ban against, *inter alia*, a First Amendment religious freedom challenge, explaining: "[M]arital relationships serve as the building blocks of our society. The State must be able to assert some level of control over those relationships to ensure the smooth operation of laws and further the proliferation of social unions our society deems beneficial while discouraging those deemed harmful."[41]

As a result, regardless of what test is used, it seems extremely unlikely that any court would find a prohibition on polygamy to be a "substantial burden," thus depriving claimants the use of RFRA as a means of achieving some sort of heightened scrutiny. Furthermore, the "substantial burden" requirement, combined with the "sincere belief" requirement, significantly narrow the breadth of claims that can be brought under RFRA—they could conceivably be used to establish some narrow, judicially-mandated exemptions, but the statute itself would survive scrutiny. Even those religious claims that satisfy these two requirements, however, would not necessarily invalidate the statute as applied.[42]

Note on State Laws and Constitutions

As mentioned above, RFRA applies only to federal law; as such, the scrutiny required by the statute would not apply to any state regulations prohibiting polygamy. Even so, eighteen states have passed nearly identical statutes—"State Religious Freedom Restoration Acts" or "mini-RFRAs"—which impose the

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and equal protection doctrine renders *Baker* largely irrelevant. Windsor v. United States, 699 F.3d 169, 179 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 786 (2012), *and aff'd*, 133 S. Ct. 2675 (2013). A number of other courts have also held that *Baker* is no longer binding at all. *See, e.g.*, Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1194 (D. Utah 2013); *see also* McGee v. Cole, 993 F. Supp. 2d 639, 651 (S.D.W. Va. 2014).

39. *E.g.*, Jones v. Hallahan, 501 S.W.2d 588 (Ky. Ct. App. 1973). Challenges under the equal protection and due process clauses have been more successful. *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675 (2013) (striking down federal prohibition on recognition of same-sex marriages as violation of equal protection and due process clauses).

40. 137 P.3d 726 (Utah 2006).

41. *Id*. at 744.

42. Even where a prima facie claim is not at issue, the strict scrutiny standard in this area of law is not fatal in fact. *See, e.g.*, *In re* Three Children, 24 F. Supp. 2d 389, 392 (D.N.J. 1998) (holding that government interest in preventing illegal business practices was sufficiently compelling to override RFRA claim). For example, in demonstrating that the action at issue is the "least restrictive means," the government does not need to address every conceivable possibility, but only those advanced by the challenger. Newland v. Sebelius, 881 F. Supp. 2d 1287 (D. Colo. 2012).

same or similar standard on state and local government action.[43] These "mini-RFRAs," though similar to the federal RFRA, sometimes differ slightly in their language and required test. Furthermore, because state courts are not required to follow federal precedent in interpreting state laws, the doctrine has developed somewhat differently. In some situations, this has meant that the state RFRAs actually provide little additional religious liberty protection to claimants.[44] In the thirty-two states which have no "mini-RFRA" statute, even the most compelling religious objections to bans on polygamy would likely be subject to rational basis analysis, unless those challenging the statute could establish heightened scrutiny another way.

Because states frequently have guarantees of religious liberty in their constitutions, the level of scrutiny applied in religious liberty claims may also vary from state to state; although the First Amendment applies to the states, these protections exist in addition to and are distinct from federal religious liberty guarantees.[45] In fact, some scholars have argued that, generally speaking, citizens can expect greater religious liberty protections from state constitutions than from the Federal Constitution.[46] State courts have interpreted the Minnesota and Washington state constitutions, for example, to require strict scrutiny for impositions on religious liberty—effectively, the same result under the federal RFRA.[47] Other state constitutions, however, have not been interpreted to be quite as protective.[48]

It is also important to note that four states include prohibitions on polygamy in their constitutions—and in many of those states, the prohibition is included in the same section as the guarantee of religious liberty.[49] As a result, in these states, challenges brought under state RFRAs would fail: state constitutions supersede state statutes.[50]

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43. *E.g.*, N.M. STAT. ANN. § 28-22-1 (West, Westlaw through 2d Reg. Sess. 51st Leg.).

44. *E.g.*, Lund, *supra* note 7, at 484-89 (summarizing the interpretation of state RFRAs and specifically noting the "watered down" interpretation of state RFRAs by courts, including in Connecticut and Florida).

45. *See generally* Angela C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-Smith Jurisprudence*, 1993 B.Y.U. L. REV. 275 (1993).

46. Gary S. Gildin, *The Sanctity of Religious Liberty of Minority Faiths Under State Constitutions: Three Hypotheses*, 6 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 21, 33 (2006).

47. *E.g.*, Open Door Baptist Church v. Clark Cnty., 995 P.2d 33, 52 (Wash. 2000) ("Our court has traditionally guarded with utmost vigilance the needle's eye through which government may rarely enter to thwart religious liberty. Such vigilance is focused through the lens of strict scrutiny to critically review any state action which burdens the free practice of religion." (internal citation omitted)); Hill-Murray Fed'n of Teachers, St. Paul, Minn. v. Hill-Murray High Sch., Maplewood, Minn., 487 N.W.2d 857, 864 (Minn. 1992) ("We have construed this provision of our constitution to afford greater protection for religious liberties against governmental action than the first amendment of the federal constitution.").

48. *E.g.*, State v. DeLaBruere, 577 A.2d 254, 271 (Vt. 1990) (Declining to interpret state constitution beyond protections afforded in *Smith*).

49. Ariz. Const. art. 20 ¶ 2; N.M. Const. art. XXI, § 1; Okla. Const. art. I, § 2; Utah Const. art. III; Idaho Const. art. I, § 4.

50. States which have both state RFRAs *and* constitutional prohibitions on polygamy are Arizona, New Mexico, Oklahoma, and Idaho. *See id.*; ARIZ. REV. STAT. ANN. § 41-1493.01 (West, Westlaw through

B. RELIGIOUS DISCRIMINATION

If plaintiffs are unable to establish a legitimate claim under RFRA or a state RFRA—either because they are unable to meet the "sincerity of belief" or "substantial burden" standards, or because their state has no RFRA statute in place—they may seek to challenge the polygamy ban on the grounds that it is not a "neutral law of general applicability," but rather is purposefully targeted to infringe on their religious practice. In such instances, the state action in question is subject to strict scrutiny.[51] In *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, the Supreme Court considered a town ordinance that prohibited animal sacrifice in an emergency session of the town council when members of the Santeria religion, which practices animal sacrifice, announced their intent to establish a house of worship in the town.[52]

In examining whether the statute was "neutral" and of "general applicability," the Court held: "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context."[53] However, even facial neutrality is "not determinative."[54] As a result, the Court also examined the record and operation of the statute, which it found revealed intent to suppress the Santeria religion.[55] Further damning was that the statute appeared to be "gerrymandered" so as to exclude, for example, slaughterhouses and other similar practices.[56] Unlike RFRA, these restrictions apply with equal force both to federal and state law.[57]

Facial Neutrality

The *Church of the Lukumi Babalu Aye* statute expressed concerns over specific religious practices (e.g., "animal sacrifice"); by contrast, none of the anti-polygamy statutes contain such expressions of distress.[58] Plaintiffs might attempt to distinguish the two cases by suggesting that marriage is a fundamentally religious institution, and as such attempts to restrict it necessarily implicate issues of religious freedom. However, recent case law highlights the distinction between

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2d Reg. Sess. of 51st Leg.); IDAHO CODE ANN. § 73-402 (West, Westlaw through 2014 2d Reg. Sess.); N.M. STAT. ANN. § 28-22-3 (West, Westlaw through 2d Reg. Sess. 51st Leg.); OKLA. STAT. ANN. tit. 51, § 253 (West, Westlaw through 2d Sess. of 53rd Leg.).

51. 508 U.S. 520, 521 (1993).

52. *Id*.

53. *Id*. at 533.

54. *Id.* at 534.

55. *Id*. at 534-35.

56. *Id*. at 535.

57. *Cf.*, Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (incorporating first amendment guarantee of free exercise of religion against state governments).

58. *See, e.g.*, UTAH CODE ANN. § 76-7-101 (West, Westlaw through 2013 3d Sess. of 83d Leg.); s*ee also* State v. Green, 99 P.3d 820, 827 (Utah 2004) ("Utah's bigamy statute explains what it prohibits in secular terms, without referring to religious practices . . . . Utah's bigamy statute is not a statute that 'refers to a religious practice without a secular meaning discernable from the language.'").

civil and religious marriage.[59] Furthermore, as mentioned above, courts have repeatedly rejected religious freedom claims against restrictions on civil marriage.[60] Finally, in contrast to the statute at issue in *Church of the Lukumi Babalu Aye*, the anti-polygamy statutes include no carve-outs, and are not "gerrymandered" so as to target one religion in particular while leaving exempt other, similar practices.[61] The prohibitions on polygamy extend not solely to Mormons, but to all persons of all religions. The statutes, then, generally speaking, are facially neutral.

Operational Neutrality

However, facial neutrality is not sufficient to save a statute. The Court has also reasoned that "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality."[62] Courts must also look at "the effect of a law in its real operation," which serves as "strong evidence of its object."[63] In *Church of the Lukumi Babalu Aye*, the Court expressed concern that "almost the only conduct subject to [the relevant ordinances] is the religious exercise of Santeria church members."[64] By contrast, the state bans on polygamy impact not only fundamentalist Mormons, but numerous others as well—including the activity of many Muslims, polyamorists, and other groups.[65] That the burden of the statute falls upon a broad swath of individuals of many different faiths is strong evidence of its operational neutrality.

General Applicability

Although the Court in *Church of the Lukumi Babalu Aye* did not lay out a specific test for whether a law is "generally applicable," its analysis involves an inquiry as to whether "the governmental interests it seeks to advance are worthy

59. *See, e.g.*, Varnum v. Brien, 763 N.W.2d 862, 906 (Iowa 2009) ("A religious denomination can still define marriage as a union between a man and a woman, and a marriage ceremony performed by a minister, priest, rabbi, or other person ordained or designated as a leader of the person's religious faith does not lose its meaning as a sacrament or other religious institution. The sanctity of all religious marriages celebrated in the future will have the same meaning as those celebrated in the past. The only difference is *civil* marriage will now take on a new meaning that reflects a more complete understanding of equal protection of the law. This result is what our constitution requires.") (emphasis in original).

60. *See supra* text accompanying notes 34-39.

61. *See* UTAH CODE ANN. § 76-7-101 (West, Westlaw through 2014 Gen. Sess.) (held unconstitutional by Brown v. Herbert, 2014 WL 4249865 (D.Utah 2014)).

62. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993).

63. *Id.* at 535.

64. *Id*.

65. Gher, *supra* note 26, at 561 ("About eighty-three percent of human societies permit polygamy . . . . Polygamy is most prevalent in Muslim countries and in traditional or agrarian communities; however, it is estimated that as many as 30,000 people practice polygamy in the Western United States and Canada.").

of being pursued only against conduct with a religious motivation."[66] Some authors have argued that anti-polygamy laws are not "generally applicable" because, for example, "Utah does not prosecute people who engage in [two-person relationships where one or both parties are married to other people]."[67]

Such an analysis misses the point: the proper inquiry is whether the purpose of the law is directed only at religious conduct. In *Church of the Lukumi Babalu Aye*, the ordinance was deemed not to be "generally applicable" because while it prohibited "animal sacrifice" out of a purported interest in preventing animal cruelty, it failed to prohibit other similar, but non-religious, practices, such as animal slaughter. By contrast, anti-polygamy statutes prohibit polygamy for a variety of religiously neutral reasons—for example, an interest in preventing harm to women, an interest in preventing fraud, or an interest in ensuring stable households for the rearing of children—which are served through the prohibition of *both* religious and non-religious polygamy. Were the law to prohibit only the religious practice of polygamy upon those same bases, it would fail a "general applicability" inquiry, but this is not the case; it instead prohibits all forms of polygamy.

Historical Analysis

Also significant in determining the neutrality of a law is its legislative history. As the Court held in *Church of the Lukumi Babalu Aye*:

> Relevant evidence [in determining the neutrality of a law] includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decision-making body.[68]

Executing such an analysis, the Court examined the legislative history of the challenged ordinances, noting the numerous statements by lawmakers indicating animus toward the Santeria religion.[69]

Likewise, a look at the history of some polygamy statutes may provide the strongest case that they are targeted to inhibit the religious freedom of one specific religion—that is, Mormonism. A number of commentators have pointed out the concern over Mormon polygamy in particular as the motivation behind

66. *Church of Lukumi Babalu Aye*, 508 U.S. at 543; *see also* Berberick, *supra* note 5, at 127 ("While the *Church of the Lukumi Babalu Aye* Court did not articulate a specific standard of general applicability, it equated it with an underinclusiveness analysis.").

67. Berberick, *supra* note 5, at 128.

68. *Church of the Lukumi Babalu Aye*, 508 U.S. at 540.

69. *Id*. at 540-42.

prohibiting polygamy in the territories; for example:

> It was argued in the House of Representatives that if the government allowed polygamy to exist in Utah, "it may not be so difficult to fill with sisters and daughters—those whom God destined for a nobler domestic sphere—an American Harem, a Mormon Seraglio." Congress was urged to "nip this evil in the bud, for the sake of morality, religion, and Christianity." . . . Congress had a duty to uphold "religion and morality" in the territories, not "Mormonism and polygamy."[70]

In fact, nearly every congressional action made with regard to polygamy in the nineteenth century was done as a means of targeting Mormonism.[71] Though the legislative history of many of the state statutes is difficult to obtain, at least some of them may be assumed to have been motivated by the same, or similar, animus. For example, the Utah state constitutional ban on polygamy was required by Congress as a condition of admission to the Union through the passage of the Utah Enabling Act in 1896, as part of the Congress's larger campaign against Mormonism.[72]

Under *Church of the Lukumi Babalu Aye* the sort of animus expressed against the Mormon faith in the process of passing some of these laws would render the resulting statutes unconstitutional. However, the Court has provided little guidance with regard to how the passage of a significant amount of time—over a century, in many cases—should impact this analysis. The notion that a law passed a century ago would be struck down due to its legislative record, but that an identical law passed subsequently with a different record would be upheld, is arguably absurd. This is not to suggest that the passage of time alone would cure this sort of constitutional defect; but when so much time has passed, and the reasoning used to defend a statute has changed so substantially,[73] the significance of the statute's legislative history should be, if not disregarded, at the very least de-emphasized.

It might be argued that the Court has declined to accept the mere passage of time as a cure for constitutional infirmity. In *McCreary County v. American Civil*

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70. Keith Jaasma, *The Religious Freedom Restoration Act: Responding to* Smith*; Reconsidering* Reynolds, 16 WHITTIER L. REV. 211, 263-66 (1995) (providing numerous other examples of anti-Mormon sentiment driving anti-polygamy statutes).

71. Stephanie Forbes, *"Why Just Have One?": An Evaluation of the Anti-Polygamy Laws Under the Establishment Clause*, 39 HOUS. L. REV. 1517, 1531 (2003) ("Each anti-polygamy statute passed by Congress specifically targeted Utah and the Mormon Church."). *See generally* Kelly Elizabeth Phipps, *Marriage and Redemption: Mormon Polygamy in the Congressional Imagination*, 1862-87, 95 VA. L. REV. 435 (2009).

72. Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. LEGAL HIST. 119, 157 (2004).

73. For example, condemnations of Mormonism, xenophobia, and fears that polygamy would result in the destruction of the democratic order rarely, if ever, make their way into modern defenses of anti-polygamy statutes. *See, e.g.*, Brown v. Buhman, 947 F. Supp. 2d 1170, 1188 (D. Utah 2013).

Liberties Union of Kentucky, the Court declared a display of the Ten Commandments in a context with other historical documents to be a violation of the Establishment Clause in large part due to the history of the display; previously, the display was comprised solely of the Ten Commandments.[74] Just as the Ten Commandments display was a violation of the Establishment Clause, not considered in isolation but in historical context, the argument might go, so too should the polygamy bans be considered violations of the Free Exercise, regardless of their current use or implementation, due to their history. However, the Court's holding was based significantly upon the fact that the change in the display was ostensibly pursued as part of a litigation strategy; notwithstanding any changes to the display, the underlying purpose of advancing a certain religion remained.[75] Furthermore, the passage of time between the original display and the final display was a matter of months or years, not decades or centuries—a particularly relevant consideration for the Court in light of its "reasonable observer" analysis in Establishment Clause jurisprudence.[76] Finally, given the significant differences between Establishment Clause and Free Exercise jurisprudence—for example, the Court does not make use of a "reasonable observer" standard in Free Exercise cases—*McCreary* may be even further distinguished.

In addition, not all anti-polygamy statutes date back to the nineteenth century—and not all were passed as a reaction against Mormonism. For example, the current Utah statute prohibiting polygamy was passed in 1973.[77] What evidence is available does not suggest that the statute was directed specifically against Mormonism; nor does the mere fact that the original enactment prohibiting polygamy was directed against Mormonism make the later enactment invalid on those grounds.[78] At a minimum, those laws passed in the twentieth century—subsequent to the disavowal by the mainstream Mormon Church of polygamy and its assumption of a strong stance against it in 1890—should be considered neutral.

C. APPLYING STRICT SCRUTINY

Even supposing that plaintiffs do manage to establish that anti-polygamy laws must be subject to strict scrutiny, it is unclear that they will prevail. In order to survive strict scrutiny, laws must (1) serve a compelling government interest and

74. 545 U.S. 844, 869 (2005).

75. *Id*. at 871-72 ("These new statements of purpose were presented only as a litigating position, there being no further authorizing action by the Counties' governing boards.").

76. *Id*. at 869 ("The reasonable observer could only think that the Counties meant to emphasize and celebrate the Commandments' religious message.").

77. UTAH CODE ANN. § 76-7-101 (West, Westlaw through 2013 3d Sess. of 83d Leg).

78. State v. Holm, 137 P.3d 726, 771 (Utah 2006) ("However, I do not presume that our modern criminal bigamy statute, enacted in 1973, addresses the same fears—which have since been discounted by many as grounded more in bias than in fact—that propelled Congress' legislation a century earlier.").

(2) be narrowly tailored to do so.[79]

Opponents of polygamy bans insist that the reasoning employed in striking down bans on anti-gay sodomy statutes and same-sex marriage require that polygamy bans be likewise struck down. That the anti-gay sodomy statutes and same-sex marriage bans were ostensibly struck down using rational basis review, while polygamy bans might be subject to strict scrutiny, lends some credence to the argument.[80] Yet laws targeting the rights of lesbian, gay, and bisexual Americans can—and should—be distinguished from those prohibiting the practice of polygamy. Most notably, the state has a plethora of compelling interests in prohibiting the practice of polygamy, none of which were served through state bans on same-sex sodomy or marriage equality. Contrary to the claims of supporters of polygamy, polygamy bans—unlike restrictions on the rights of LGBT people—likely survive even strict scrutiny.

State Interests in Banning Polygamy

There are a number of state interests advanced through polygamy bans. For example, the Tenth Circuit has held: "Monogamy is inextricably woven into the fabric of our society. It is the bedrock upon which our culture is built."[81] This state interest has been repeatedly, and successfully, used to defend polygamy bans against Free Exercise challenges.[82] The possibility of fraud and failure to pay child support made possible by polygamy may also serve as a compelling government interest in prohibiting recognition of such relationships.[83]

Another key government interest is the prevention of harm to, and exploitation of, women and children. Research suggests that sexual assault and incest are prevalent in polygamous communities and families—a fact recognized by the Utah Supreme Court in upholding a polygamy ban.[84] The sort of abuse that takes place within polygamous communities and families is illustrated by one particularly horrifying example:

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79. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 521 (1993).

80. *E.g.*, Romer v. Evans, 517 U.S. 620, 632 (1996) ("[The amendment's] sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests."); *but see* Jeremy B. Smith, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 FORDHAM L. REV. 2769 (2005) (arguing that the Supreme Court has in fact been applying heightened scrutiny in cases involving classifications on the basis of sexual orientation).

81. Potter v. Murray City, 760 F.2d 1065, 1070 (10th Cir. 1985).

82. *E.g.*, Bronson v. Swensen, 394 F. Supp. 2d 1329, 1332 (D. Utah 2005), *vacated on other grounds*, 500 F.3d 1099 (10th Cir. 2007).

83. Vazquez, *supra* note 5, at 244-45.

84. State v. Green, 99 P.3d 820, 830 (Utah 2004) ("Utah's bigamy statute serves the State's interest in protecting vulnerable individuals from exploitation and abuse. The practice of polygamy, in particular, often coincides with crimes targeting women and children. Crimes not unusually attendant to the practice of polygamy include incest, sexual assault, statutory rape, and failure to pay child support."); *see also* Vazquez, *supra* note 5, at 240.

> When Jane turned fifteen, her father, John Daniel Kingston, told her she would be married to her thirty-two-year-old uncle, David Ortell Kingston, as his fifteenth plural wife. John Daniel and David Ortell were both members of a 1,500 member polygamous sect known as the Latter Day Church of Christ that has an estimated $150 million business empire in Salt Lake County and in other parts of Utah and Nevada. . . .
>
> Despite her vehement objections, Jane was married to David Ortell a few months later in a secret ceremony. She attempted to escape from her uncle twice . . . . The second time . . . John Daniel ordered Jane into his truck . . . . They proceeded to a barn near the border of Utah and Idaho, a place ex-Kingston clan members claimed Latter Day Church of Christ husbands used to discipline their wayward wives. There, John Daniel savagely beat Jane with his belt, telling her he would give her "10 licks for every wrongdoing." Jane lost consciousness from the attack, and awoke in the home of Margaret Larsen, one of John Daniel's twenty-plus wives. The following day, Jane walked nearly seven miles to a gas station and dialed 911.[85]

Jane was not alone in facing such a predicament—numerous commentators have recounted the terrifying stories of young girls forced or pressured into marriages in which they faced physical and sexual abuse.[86] In fact, this problem is so pervasive that state departments of children and family protective services have intervened to rescue hundreds of young girls from such marriages.[87]

Even supposing that Jane had formally consented to such an arrangement (she, clearly, had not), the social pressures exerted upon her to enter into the polygamous marriage would likely have been so great as to render her formal consent meaningless. In fact, it could be said that a woman (or girl) "voluntarily" enters into a polygamous relationship in much the same way that bakers in New York State in the early twentieth century "voluntarily" contracted to work inhumane hours in unhealthy conditions.[88] Many fundamentalist Mormon sects

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85. Vazquez, *supra* note 5, at 240-41.

86. *See, e.g.*, Amy Fry, *Polygamy in America: How the Varying Legal Standards Fail to Protect Mothers and Children from Its Abuses*, 54 ST. LOUIS U. L.J. 967, 968 (2010); *see also* Martin Guggenheim, *Texas Polygamy and Child Welfare*, 46 HOUS. L. REV. 759, 787 (2009).

87. *See, e.g.*, *In re* Texas Dep't of Family & Protective Servs., 255 S.W.3d 613, 613-14 (Tex. 2008) ("On March 29, 2008, the Texas Department of Family Protective Services received a telephone call reporting that a sixteen-year-old girl named Sarah was being physically and sexually abused at the Ranch. On April 3, about 9:00 p.m., Department investigators and law enforcement officials entered the Ranch, and throughout the night they interviewed adults and children and searched for documents. Concerned that the community had a culture of polygamy and of directing girls younger than eighteen to enter spiritual unions with older men and have children, the Department took possession of all 468 children at the Ranch without a court order. The Department calls this 'the largest child protection case documented in the history of the United States.' It never located the girl Sarah who was the subject of the March 29 call.")

88. *Compare* Lochner v. New York, 198 U.S. 45, 52 (1905) ("It is assumed that the word means nothing more than the requirement arising from voluntary contract for such labor in excess of the number

operate on compounds, and girls are frequently pulled out of the educational system at a young age.[89] Girls and women are almost completely cut off from the outside world;[90] "disobedient" girls and women are sent to "re-education camps."[91]

Because, in the process of forming these sorts of "marriages," consent is either coerced or nonexistent, and because these "marriages" are so often characterized by their sexual and physical abuse and exploitation of women, the state has a compelling interest in protecting women from that abuse by banning polygamy.[92] Some feminist theorists have also noted that polygamy tends to be male-centric, creating a culture that is "structurally unequal."[93] Others have wondered whether, even outside of the compounds, there can be meaningful consent to polygamy, which often harms women and benefits men.[94]

Finally, there are some rationales that, though not thus far put forth by states as their interests in polygamy, have been borne out by social science research. For example, there is a legitimate state interest in ensuring an optimal environment for raising children, an interest which has often been implicated in questions of marriage.[95] Admittedly, many instances in which this interest has been asserted have been through defenses to bans on same-sex marriage and adoption by same-sex couples.[96] However, though numerous studies have confirmed that same-sex couples are equally capable parents as compared with opposite-sex couples,[97] the opposite has been found to be true of parenting in polygamous

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of hours specified in the statute. There is no pretense in any of the opinions that the statute was intended to meet a case of involuntary labor in any form.") *with* Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177, 183 (1941) (recognizing the role of economic coercion and denial of work in preventing efforts at unionization).

89. Fry, *supra* note 86, at 967.

90. Rosanne Piatt, *Overcorrecting the Purported Problem of Taking Child Brides in Polygamist Marriages: The Texas Legislature Unconstitutionally Voids All Marriages by Texans Younger Than Sixteen and Criminalizes Parental Consent*, 37 ST. MARY'S L.J. 753, 758-59 (2006) ("They were treated like chattel, dressed in clothes from head to foot even in warm weather, denied education, kept in the compound except for occasional group trips to Wal-Mart, and forced to work long hours performing manual labor. The most egregious wrong inflicted upon the women was their subjugation to polygamist marriages, often when they were very young, with the expectation that they would produce many children for the group.").

91. Fry, *supra* note 86, at 967.

92. In fact, considering the conditions that so frequently accompany religiously-motivated polygamy, it would seem that a strong argument could be made in favor of exempting some forms of secular polygamy without endangering the achievement of state interests.

93. Martha C. Nussbaum, SEX & SOCIAL JUSTICE 98 (1999).

94. Cheryl Hanna, *Rethinking Consent in a Big Love Way*, 17 MICH. J. GENDER & L. 111 (2010).

95. *See, e.g.*, Guggenheim, *supra* note 86, at 782; *see also* Katharine K. Baker, *The Stories of Marriage*, 12 J. L. & FAM. STUD. 1, 43 (2010) ("One of the main purposes of marriage is to raise children.").

96. Guggenheim, *supra* note 86, at 782.

97. COMMITTEE ON LESBIAN, GAY, AND BISEXUAL CONCERNS, COMMITTEE ON CHILDREN, YOUTH, AND FAMILIES, AND COMMITTEE ON WOMEN IN PSYCHOLOGY, AMERICAN PSYCHOLOGICAL ASSOCIATION, LESBIAN & GAY PARENTING 8 (2005), *available at* http://www.apa.org/pi/lgbt/resources/parenting-full.pdf (indicating the professional psychological consensus on positive outcomes among children of same-sex parents

relationships: children of polygamist families tend to suffer from "more mental health and social difficulties as well as poorer school achievement and poorer relationships" and are generally less well-off than their peers raised in two-parent families.[98] If, as conceded by nearly all sides in the litigation over marriage equality, marriage and parenting are tied together, there may be a legitimate state interest in preventing developmental harm to children through being raised in a polygamist environment.[99]

Note on Compelling Government Interests Under RFRA

Although the strict scrutiny analysis under RFRA and under religious discrimination are, for now, largely similar, there is one significant difference which is worth pointing out: under RFRA, the government must "demonstrate that the compelling interest test is satisfied through the application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened."[100] This standard is significantly more difficult to meet, and would require an individualized analysis for each claim brought under RFRA. It is distinctly possible that, given this, some religious freedom challenges to polygamy bans may succeed. However, such victories would be rare: many of the government interests mentioned above are, in fact, particular to religious communities—for example, Jane's forced marriage to an older man as part of a polygamous sect's religious practice.[101] Moreover, other government interests arguably encompass all polygamous marriages, for example the interest in "promoting monogamy," or nearly all polygamous marriages, for example concerns over the quality of child-rearing and the harm to

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and that the parenting skills of same-sex parents are as good as or "superior to those of matched heterosexual couples").

98. Alean Al-Krenawi & Vered Slonim-Nevo, *Psychosocial and Familial Functioning of Children From Polygynous and Monogamous Families*, 148 J. OF SOC. PSYCHOLOGY 745 (2008); Natascha Wagner & Mathias Rieger, *Polygamy and Child Health: Do babies get sick if daddy has many wives?*, GRADUATE INST., GENEVA (2011), *available at* http://www.natascha-wagner.com/uploads/9/0/1/5/9015445/costs_of_polygyny.pdf (indicating a "moderate" relationship between polygamy and negative physical health outcomes for children in such families); Salman Elbedour et al., *The Effect of Polygamous Marital Structure on Behavioral, Emotional, and Academic Adjustment in Children: A Comprehensive Review of the Literature*, 5 CLINICAL CHILD & FAM. PSYCHOL. REV. 255, 264 (2002) ("[Polygamous families produce] multiple stressful factors [which] would be expected to have a highly disruptive effect on the home environment required for children to foster a sense of dependency and security, and to provide a foundation for sound development. Indeed, some researchers hypothesize that problems associated with polygamous marriages negatively affect the family unit and constrain children to an attenuated, less adaptive range of coping strategies than is available to their counterparts living in monogamous families.").

99. Nancy D. Polikoff, *For the Sake of All Children: Opponents and Supporters of Same-Sex Marriage Both Miss the Mark*, 8 N.Y. CITY L. REV. 573 (2005).

100. *E.g.*, Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 420 (2006) (quoting 42 U.S.C.A. § 2000bb-1(b) (West, Westlaw through P.L. 113-234)).

101. Ironically, individuals seeking secular polygamous marriages—where such harms are less commonplace (although not entirely absent)—would not be able to bring a RFRA claim, as their participation in the marriage would not be the result of a "religious belief."

gender equality.

Least Restrictive Means

Of course, the mere existence of compelling state interests alone is not enough; the means used to achieve those interest must be "narrowly tailored" so as to achieve them.[102] Some have questioned whether, notwithstanding the state interests in prohibiting polygamy, those interests are sufficiently narrowly tailored to the desired end; however, current precedent suggests that polygamy bans tend to be accepted as sufficiently narrowly tailored.[103] This is in part due to the use of the promotion of monogamy as itself the government interest being advanced.[104] Nonetheless, it is not necessary to rest the entire defense of the prohibition of polygamy upon this particular interest alone.

Admittedly, some of the other state interests above could arguably be achieved through less restrictive means. For example, denying a religious exemption likely does not narrowly address concerns regarding fraud and child support; similarly, concerns over sexual and physical abuse could arguably be assuaged through legislation directly addressing those problems—prohibiting sexual and physical abuse, or enhancing enforcement of those statute—rather than prohibiting polygamy. But because many polygamous communities are so tight-knit and encourage lying to law enforcement and government officials, prevention and punishment of physical and sexual abuse can be extremely difficult;[105] polygamy bans arguably help effectuate the legitimate state goal of enforcement of these laws.[106]

However, given the longstanding recognition of the connection between marriage and the rearing of children,[107] it is likely that ensuring an optimal environment for children will be accepted as sufficiently narrowly tailored.

Furthermore, though it is often said that strict scrutiny is "strict in theory but fatal in fact,"[108] this is not necessarily the case. Some scholars have suggested that, in applying the jurisprudence to which RFRA seeks to return, the Court's bark was worse than its bite: "Elsewhere, the [strict scrutiny standard] was 'strict

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102. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993).

103. *See, e.g.*, Bronson v. Swensen, 394 F. Supp. 2d 1329, 1333 (D. Utah 2005), *vacated on other grounds*, 500 F.3d 1099 (10th Cir. 2007).

104. *Id.*

105. *See* Lauren C. Miele, *Big Love or Big Problem: Should Polygamous Relationships Be A Factor in Determining Child Custody?*, 43 NEW ENG. L. REV. 105, 131 (2008).

106. Vazquez, *supra* note 5, at 246 ("Opponents of general anti-polygamy legislation could argue that selective prosecution is a less restrictive means of infringing on the exercise of the Mormon religion. However, as the following example shows, selective prosecution of specific crimes in polygamous communities is not an effective alternative in the eyes of polygamy defenders. Defenders point to selective prosecution of these specific crimes as a pretextual infringement on the free exercise of religion under *Lukumi*.").

107. *Cf.* Baker, *supra* note 95, at 43.

108. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

in theory but fatal in fact'; in religious liberty cases, it was strict in theory but feeble in fact."[109] That this largely continues to be the case is corroborated by some empirical research: laws challenged under RFRA are upheld more than seventy percent of the time—though laws challenged under a religious discrimination or animus theory have a zero percent survival rate.[110] Given that whatever chance a plaintiff might have for strict scrutiny would be through a RFRA challenge, and also considering current precedent, legal arguments, and available statistical data, it seems likely that a polygamy ban would be upheld.

IV. RATIONAL BASIS: POLYGAMY AND LGBT EQUALITY

If plaintiffs are unable to secure strict scrutiny either through RFRA or through a religious discrimination or animus claim, they will find themselves in the realm of rational basis: under *Smith*, these laws need only be rationally related to some legitimate government interest.[111]

As with much of religious liberty jurisprudence, there have been significant changes to rational basis analysis since the *Reynolds* decision—notably developments in LGBT equality. Over the course of the past few decades, it has often been claimed that court decisions favoring LGBT equality will lead inevitably to, among other things, the legalization of polygamy.[112] In particular, social conservatives have suggested that the Court's decision in *Lawrence* may portend an end to morality as a legitimate state interest under the rational basis test, thereby weakening the constitutional strength of polygamy laws even under the lowest level of scrutiny.[113] Subsequent to the *Buhman* decision, many social conservatives declared their prognostications fulfilled. Yet this rests upon a

109. CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 43 (2007).

110. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 860-61 (2006).

111. *See* Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 879 (1990).

112. The relevance of this Article to marriage equality, in light of Justice Scalia's dissent in *Lawrence* and the claims of other conservatives, bears noting. Lawrence v. Texas, 539 U.S. 558, 590 (2003). Considering the insight provided by a modern religious liberty analysis of polygamy bans, it is with some irony that conservatives assail judicial decisions protecting lesbian, gay, bisexual, and transgender persons from state-sponsored animus. Though *Lawrence* has been mobilized, in some limited contexts, as a tool to expel the state from the privacy of the home, broadly speaking such efforts have failed. In contrast to the prognostications of so many social conservatives subsequent to *Lawrence*, the vitality of public morality remains strong. Likewise, because polygamists do not constitute a discernable class for the purposes of equal protection analysis, their marital practices can find no refuge in *Romer*, or key parts of *Lawrence* and *Windsor*. Romer v. Evans, 517 U.S. 620 (1996); *Lawrence*, 539 U.S. at 558, United States v. Windsor, 133 S. Ct. 2675 (2013). If polygamy gains legal recognition through our courts, it will likely be the result *not* of the progress of LGBT equality, but rather of the longstanding conservative support for broad religious liberty exemptions from even neutral laws of general applicability. Though under current doctrine a claim under the Religious Freedom Restoration Act would likely fail, that legal strategy also represents the strongest argument against a blanket polygamy ban. In fact, this may come sooner than expected: the Court has hinted at making RFRA's protections more burdensome on the government than ever before. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2761 n.3 (2014).

113. *See, e.g.*, *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting).

fundamental misconception of the implications of the legal advancements of LGBT equality and the decision in *Buhman*.

On the one hand, it is possible that *Lawrence* may be interpreted as removing "morality" as a compelling government interest, in which case the argument in favor of prohibition must find other bases upon which to rest; on the other, it is possible that *Lawrence* does not say this at all, and that morality remains on the table as a possible legitimate state interest.[114]

Notwithstanding the parade of horribles predicted by Justice Scalia in his dissent in *Lawrence v. Texas*,[115] it is no foregone conclusion that morality has ceased to be a legitimate state interest.[116] In fact, courts have repeatedly rejected attempts to marshal *Lawrence* as a tool to remove the state from the realm of relationships, sexual intimacy, or even morals legislation, entirely. In one case, a court rejected a constitutional challenge to a criminal prosecution arising out of a sadomasochistic relationship, explaining: "The *Lawrence* Court did not extend constitutional protection to *any* conduct which occurs in the context of a consensual sexual relationship."[117] Likewise, the Seventh Circuit has rejected the claim that *Lawrence* protects consensual incestuous relationships.[118] The Tenth Circuit has even rebuffed—in the context of an affair between two police officers—an attempt to use *Lawrence* to establish a "fundamental right to engage in a private act of consensual sex."[119]

It is clear that, aside from the narrow right to privacy at issue in *Lawrence* and its significance in the context of the Court's jurisprudence on the persecution of lesbian, gay, and bisexual Americans, *Lawrence* provides no ammunition for litigious polygamists. Key to the decision was the Court's recognition that "the Texas statute makes homosexuals unequal in the eyes of the law by making

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114. In either case, however, polygamy bans would be upheld under the rational basis standard, as rationales other than popular sentiment, morality, or animus exist for prohibiting polygamy. *See supra* Part III(c).

115. *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting) ("State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity 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.").

116. Daniel F. Piar, *Morality as a Legitimate Government Interest*, 117 PENN ST. L. REV. 139 (2012).

117. State v. Van, 688 N.W.2d 600, 615 (Neb. 2004).

118. Muth v. Frank, 412 F.3d 808, 817 (7th Cir. 2005) ("*Lawrence* also did not announce, as Muth claims it did, a fundamental right, protected by the Constitution, for adults to engage in all manner of consensual sexual conduct, specifically in this case, incest.").

119. Seegmiller v. LaVerkin City, 528 F.3d 762, 770 (10th Cir. 2008). Other circuits have come to similar conclusions. *E.g.*, Williams v. Attorney Gen. of Ala., 378 F.3d 1232, 1236 (11th Cir. 2004) ("[W]e are not prepared to infer a new fundamental right [to sexual privacy] from an opinion [*Lawrence*] that never employed the usual *Glucksberg* analysis for identifying such rights"); Cook v. Gates, 528 F.3d 42, 56 (1st Cir. 2008) ("*Lawrence* did not identify a protected liberty interest in all forms and manner of sexual intimacy"); Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 745 n. 32 (5th Cir. 2008) ("Lawrence did not categorize the right to sexual privacy as a fundamental right, and we do not purport to do so here.").

particular conduct—and only that conduct—subject to criminal sanction."[120] As Professor Laurence Tribe has described it, the analysis in *Lawrence* is a "blend of equal protection and substantive due process."[121]

This may explain, for example, the First Circuit's description of *Lawrence*: "*Lawrence* balanced the strength of the state's asserted interest in prohibiting immoral conduct against the degree of intrusion into the petitioners' private sexual life caused by the statute in order to determine whether the law was unconstitutionally applied."[122] That is, *Lawrence* does not prohibit the consideration of morality—it requires only that morality be weighed against other asserted rights.

Even clearer is that a strong argument could be made that while *Lawrence* precludes the use of morality *alone* as a state interest, the existence of morality as one state interest among many is not prohibited under *Lawrence*. Given the numerous state interests enumerated *supra*, it is clear that there are non-moral justifications—for example, concerns regarding coercion, gender equality, or child-rearing—that underlie prohibitions on polygamy. It would therefore not be *irrational* for the government to insist upon monogamy over polygamy, even for all families, and even without a religious liberty exemption.[123]

V. CONCLUSION

Since the Court's often-cited decision in *Reynolds* over a century ago,[124] many have criticized the Court's opinion and logic as unsound.[125] Furthermore, a great deal has changed in protections for religious liberty in this country—both statutorily and jurisprudentially. The Religious Freedom Restoration Act has since established an especially high burden upon the government even when it merely incidentally burdens religious freedom; similar state statutes have imposed similar burdens upon state and local governments. Likewise, the protections of religious freedom in both the federal and state constitutions have expanded; today, for example, religious discrimination is subject to especially searching review by the courts. Similarly, advances in the struggle for equality for LGBT people have brought into question the legitimacy of mere morality or tradition as legitimate justifications for laws that impinge on the asserted rights of Americans.

120. *Lawrence*, 539 U.S. at 581.

121. Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1902 (2004).

122. *Cook*, 528 F.3d at 56.

123. Berkowitz, *supra* note 10, at 615.

124. *E.g.*, Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 879 (1990).

125. *See, e.g.*, Duncan, *supra* note 10, at 315.

Despite the changing landscape and the need for a more thorough analysis, polygamy bans remain constitutional—albeit more tenuously so—and will likely continue to be absent the Court imposing an even greater burden upon the government. Though I believe the ultimate outcome—that is, the constitutional legitimacy of polygamy bans—remains the same, few of these protections existed at the time of *Reynolds*, making this re-examination all the more significant.