ABSTRACT

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

Paul Baumgardner

Director: Dr. Jerold Waltman, Ph.D.

In 1878, the U.S. Supreme Court defined, and applied, the free exercise clause of the First Amendment 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. Although the Mormon Church believed that the free exercise clause 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 evolution of marital standards, minority freedoms, and free exercise jurisprudence over the past 133 years of American history has supplied ample room for a contemporary reevaluation of Reynolds v. United States. In particular, the Supreme Court's recent protections of same-sex lifestyles and heterodox religious conduct indicate that a religiously motivated polygamy case would receive a much more favorable treatment today.

APPROVED BY DIRECTOR OF HONORS THESIS:

Dr. Jerold Waltman, Department of Political Science

APPROVED BY THE HONORS PROGRAM:

Dr. Andrew Wisely, Director.

DATE: _____

REEVALUATING *REYNOLDS*:

THE CONSTITUTIONAL CASE FOR RELIGIOUSLY MOTIVATED POLYGAMY

A Thesis Submitted to the Faculty of

Baylor University

In Partial Fulfillment of the Requirements for the

Honors Program

By

Paul Baumgardner

Waco, Texas

May 2012

TABLE OF CONTENTS

CHAPTER ONE

An Introduction to *Reynolds v. United States*

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 signified the first time that the Supreme Court rendered a decision concerning minority religious rights. Although the Mormon Church believed that the First Amendment free exercise clause 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.

I. Origin of the Mormon Faith

The path to assimilation and social acceptance generally stands as a difficult trek for all non-Protestant, minority religions in the United States. But for one faith, the constant battle for cultural equality has been particularly arduous. What makes

Mormonism, and its believers, especially intriguing is the tortuous path that it has endured. Richard Ostling writes: "No religion in American history has aroused so much fear and hatred, nor been the object of so much persecution and so much misinformation."[1]

The origin of the Mormon faith has been well documented. It is common knowledge to the student of American history that Joseph Smith started the Mormon Church in the mid-1800s, following a sequence of divine revelations. Smith recounted his heavenly instructions and introduced a novel account of Christian history. Smith asserted that he translated this history, which is now found in the Book of Mormon, from a set of hidden Native American plates. These plates told of an ancient North American branch of Christianity that had become extinct. But why did this fantastical faith appeal to scores of nineteenth-century American citizens? Why did Mormonism survive while dozens of other American-based faiths dissipated?

Mormonism, unlike many new religious groups, saw a rapid startup in dedicated membership. Within fifteen years of the Church's creation, the membership had exploded from six members to 26,000 faithful bodies.[2] This abrupt swelling was the result of numerous doctrinal factors. Atypical of an introductory faith, Mormonism had no problems with heightened public visibility; the Mormon religious communities were geared towards expansion. These idiosyncrasies derive from a fundamental Mormon calling that is still apparent today: all members are instructed to function as missionaries

[1] Richard N. Ostling, *Mormon America: The Power and the Promise* (San Francisco: Harper, 1999), XVI.

[2] Douglas J. Davies, *An Introduction to Mormonism: Introduction to Religion* (New York: Cambridge University Press, 2003), p. 8.

in their communities, sharing the faith's old and new spiritual dogmas.[3] Early missions were sent out to all regions of America and several European nations.[4] The most important reason for Mormonism's growth regarded Joseph Smith's teachings on the Second Coming *in America*: "For the early generation of Latter-Day Saints the expectation that the end of the world was near fired just such an excitement of faith, motivating arduous migration to the U.S. from Europe and equally perilous trekking to designated destinations."[5] This religious fervor did lead to an expanded congregational head count, but it also attracted hostility from traditional Christian faiths and from the government.

After researching the history of several emerging religious bodies in America, David Franz and James Hunter discovered a specific pattern that has frequently been followed by American faiths. Regarding this typical paradigm for American religious socialization, Franz and Hunter wrote: "Every surge of expansion challenges the stability of public culture. Accordingly, tension, conflict, and even violence ensue as rising groups challenge an existing social, religious, and political establishment."[6] Although Joseph Smith's followers took umbrage at the Protestant establishment's abuses, the Mormon Saints were by no means blameless during the early decades of their existence. It is easy to understand how a burgeoning new community, well armed and spiritually unorthodox, may generate suspicion amongst the majority population. During a period of American

---

[3] ibid, p. 8.

[4] Richard N. Ostling, *Mormon America: The Power and the Promise* (San Francisco: Harper, 1999), XIX.

[5] Douglas J. Davies, *An Introduction to Mormonism: Introduction to Religion* (New York: Cambridge UP, 2003), p. 10.

[6] David Franz and James Hunter *A Nation of Religions: The Politics of Pluralism in Multireligious America* (Chapel Hill: The University of North Carolina Press, 2006), p. 257.

history when the entire national army consisted of 8,500 troops, the Mormon community assembled a militia of 4,000-armed men.[7] The Church's leaders also had their fair share of faux pas in democratic America: the Mormon Council supported violent suppression of the press, vocal leaders called for the extermination of non-Mormons on several impetuous occasions, and Joseph Smith was continually plagued with financial wrongdoings, property violations, and alleged murder plots.[8] The marginalization of the Mormon people was induced, to a degree, by Mormon action. However, both the secular and Protestant establishments were guilty of advancing—and following through with—severe threats that changed the course of Mormon history.

Primarily afraid of the political and religious force that the growing Mormons could wield, citizens violently confronted Smith's disciples. Mob action—characterized by arson, murder, and the threat of extermination—constantly plagued the Mormons, expelling them from one Zion and setting them up for a collision course in a new location.[9] Battered from state to state, the Mormon people still maintained hope for a functioning theocratic community. In 1847, the Mormon people believed that they had finally found their haven in the Utah Territory.

II. Polygamy, Anti-Bigamy Laws, and Reynolds

In the Utah Territory, the Mormon community prospered. Seeing the economic resourcefulness and population dilation in this region, a multitude of Protestant churches attempted to assimilate into the Utah Territory. Much to their chagrin, Protestantism

[7] Richard N. Ostling, *Mormon America: The Power and the Promise* (San Francisco: Harper, 1999), p. 1.

[8] ibid, p. 16, 32, 34

[9] ibid, p. 33.

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.[10]

Although overly 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 a necessary condition for elevation in the multi-tiered heavenly realm.[11] Study has shown that many Mormon men did not wish to engage in polygamous relations, but that they finally complied because of their faith that polygamy was indeed a divine command. This uncommon practice incensed many staunch Protestants, not simply for the blatant violation of orthodox domestic standards, but for the progressive social doctrine that Mormon polygamy engendered.

The Mormon community existing in 1860s represented a new political order in the United States, and the semi-theocratic Utah Territory was seen as an iconoclastic affront to common law and democracy. The Mormon community's theories regarding

---

[10] Jan Shipps, "Difference and Otherness: Mormonism and the American Religious Mainstream", *Minority Faiths and the American Protestant Mainstream* (Urbana: University of Illinois Press, 1998), p. 95.

[11] Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America* (Chapel Hill: The University of North Carolina Press, 2002), p. 1.

gender, sexuality, ideal government, and family differed greatly from the ideals of the rest of the country. These deep ideological disagreements led to an extensive nineteenth century anti-Mormon literature, featuring dozens of scurrilous novels and sensational news articles decrying the hypnotic powers of the sex-crazed Mormons, some of who bought, sold, and enslaved women.[12] 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 (the first relic, slavery, was on the verge of extinguishment).[13] 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."[14] Legal scholar Sarah Barringer Gordon comments, "The federal government had never before assumed such supervisory power

---

[12] ibid, p. 44.

[13] Jerold Waltman, *Religious Free Exercise and Contemporary American Politics: The Saga of the Religious Land Use and Institutionalized Persons Act of 2000* (New York: Continuum International Publishing Group, 2011), p. 22.

[14] Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America* (Chapel Hill: The University of North Carolina Press, 2002), p. 69, 81.

over structures of private authority. The Morrill Act was unprecedented."[15] Mormons, who for years had vindicated their polygamous dogmas under free exercise constitutional claims, 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 legal test cast, 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.[16] The two opposing counsels offered two drastically 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."[17] 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.[18] George Washington Biddle, lead counsel for Reynolds, understood that the free exercise clause of the First

---

[15] ibid, p. 81.

[16] ibid, p. 116, 119.

[17] ibid, p. 122-123.

[18] "Great Supreme Court Cases- Reynolds v. United States." Great Supreme Court Cases. 2007. Allsupremcourtcases.com. 10 Apr. 2009 http://www.allsupremecourtcases.com/reynolds-v-united states

Amendment did not provide a carte blanche 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.[19] 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.[20]

In the early months of 1879, the Supreme Court had reached a uniform verdict. In *Reynolds v. United States*, the Supreme Court's first ever case defining religious free exercise rights, 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 should be 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.

---

[19] ibid, p. 126.

[20] Jerold Waltman, *Religious Free Exercise and Contemporary American Politics: The Saga of the Religious Land Use and Institutionalized Persons Act of 2000* (New York: Continuum International Publishing Group, 2011), p. 23.

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 presupposition 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."[21] 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.[22]

III. 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, human sexuality, and political philosophy. As this thesis 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

[21] Reynolds v. United States*,* 90 U.S. 145 (1879)

[22] ibid.

academic and legal emphasis on the philosophy of law and comparative constitutional law.

Legal scholars have predicted that many of these 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.[23]

Reynolds v. United States stands as the most influential First Amendment free exercise case of the nineteenth-century, setting precedents and legal groundwork for the religion clause cases of 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 Supreme Courts' protections of alternative lifestyles

[23] Martha Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (New York: Basic Books, 2008), p. 356-357.

3. Liberal and communitarian political thought, vis-à-vis the role of government in regulating religion, the family, and conceptions of the good

CHAPTER TWO

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."[24] 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. The 133-year history of free exercise jurisprudence 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 polygamous practice. 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.

---

[24] Thomas v. Review Board of Indiana Employment Security Division, 450 U.S. 707 (1981)

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 underdevelopment of religious rights case law at the federal level. Until the 1940s, "most church-state issues arose at the level of the individual states."[25] 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.

A slight departure in the arena of religiously motivated polygamy arises in the 1946 case of *Cleveland v. United States*. In this case, the Court was charged with determining whether a fundamentalist Mormon who was transporting his multiple wives over state lines could be convicted under the Mann Act. The Mann Act was passed in an effort to curb the transport of women across state lines for "prostitution, debauchery, or other immoral purposes."[26] The majority court allied itself with the precedents erected in *Reynolds* and upheld the criminal conviction, finding polygamy to be a regulable and immoral purpose. However, unlike the unanimity expressed in *Reynolds v. United States*, the 1946 case concerning religiously motivated polygamy had three dissenting justices. The sharpest reaction against the constitutional reasoning in *Reynolds* came from Justice Frank Murphy.

From the outset, Justice Murphy frames his dissent as a reaction against the moralistic marginalization of Mormonism and polygamy. Murphy asserts: "I disagree

---

[25] W. Cole Durham Jr. and Robert T. Smith, "Religion and the State in the United States at the Turn of the Twenty-First Century," in *Law and Religion in the 21st Century: Relations between States and Religious Communities* (Burlington, VT: Ashgate Publishing Company, 2010), p. 79-80.

[26] Cleveland v. United States, 329 U.S. 14 (1946)

with the conclusion that polygamy is 'in the same genus' as prostitution and debauchery."[27] His defense of polygamy does not come from a stance of personal proclivities; Murphy repeatedly reiterates his own assurance in the moral foundation of monogamy. Instead, the justice's eye turns to the historical and anthropological weight of polygamy, calling this practice "one of the basic forms of marriage. Historically, its use has far exceeded that of any other form."[28] Similar to the arguments later used in free exercise jurisprudence to protect Amish religious practices, Murphy's arguments emphasize the importance of paying deference to longstanding cultural and spiritual practices, even when such practices fall outside of the American mainstream:

> Polygyny, like other forms of marriage, is basically a cultural institution rooted deeply in the religious beliefs and social mores of those societies in which it appears. It is equally true that the beliefs and mores of the dominant culture of the contemporary world condemn the practice as immoral, and substitute monogamy in its place. To those beliefs and mores, I subscribe, but that does not alter the fact that polygyny is a form of marriage built upon a set of social and moral principles. It must be recognized and treated as such.[29]

Whereas the *Reynolds* ruling, at best, contained only latent protections for minority faiths, by the middle of the twentieth-century, judicial opinions began to recognize the importance of protecting minority religious groups from majoritarian politics. As we shall see, these legal protections will arrive via evolving free exercise judicial standards.

---

[27] ibid.

[28] ibid.

[29] ibid.

I. *Sherbert and the Compelling Interest Test*

One of the first cases that radically altered the *Reynolds* understanding of the free exercise clause was the 1963 case of *Sherbert v. Verner*. In this case, the Court was forced to decide whether government must secure religious-based exemptions for citizens. 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. It is important to note that the law brought to question in *Sherbert* did *not* prohibit the complainant from practicing her faith; it simply disallowed her from practicing her Sabbath worship while also receiving monetary benefits from the state.

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 prevented 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."[30] Using *Everson v. Board of Education* as precedent, the majority held that the state is not able to exclude an

[30] Sherbert v. Verner, 374 U.S. 398; 83 S. Ct. 1790 (1963)

individual from receiving public welfare benefits solely because of his/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.[31] 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.'"[32]

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 within, and 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

[31] ibid.

[32] Thomas v. Collins, 323 U.S. 516 (1945)

Reynolds—which assured government the power to regulate religious action whenever such action contravened the law—became weakened in *Sherbert v. Verner*. Whereas in *Reynolds* the Court strictly ruled that "religious belief is not a valid criterion for challenging legal mandates," Justice Brennan's majority opinion in *Sherbert* 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."[33] 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 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 wrote the Supreme Court briefs and argued on behalf of the government before the Supreme Court 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 "social duties, good order" and behavioral expectations in the Western world.[34]

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

[33] Reynolds v. United States, 90 U.S. 145 (1879); Sherbert v. Verner, 374 U.S. 398; 83 S. Ct. 1790 (1963)

[34] Reynolds v. United States, 90 U.S. 145 (1879)

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.[35]

Additionally, Mormon polygamist communities held lower infidelity rates and prostitution problems than the national average and witnessed greater social and political cohesion than in the rest of the country.[36] 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

[35] Cheshire Calhoun, *Who's Afraid of Polygamous Marriage? Lessons for Same-Sex marriage Advocacy from the History of Polygamy*, 42 San Diego L.Rev. 1038 (2005).

[36] Martha Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (New York: Basic Books, 2008), p. 186-188.

not also arguments against key elements of the dominant form of monogamous marriage."[37]

To cement the favorable reevaluation that religiously motivated polygamy would receive under the compelling interest test, one must only look at a free exercise of religion case that came 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.[38]

Legal scholars have contended that "*Yoder* implicitly overruled *Reynolds*."[39] 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

[37] ibid, p. 188.

[38] Wisconsin v. Yoder, 406 U.S. 205 (1972)

[39] Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America* (Chapel Hill: The University of North Carolina Press, 2002), p. 237.

was left free to reach actions which were in violation of social duties or subversive of good order.'"[40]

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."[41]

II. 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* radically 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?

[40] Wisconsin v. Yoder, 406 U.S. 205 (1972)

[41] ibid.

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."[42] 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. Scalia viewed the compelling interest test as a vehicle for judicial activism, because under this test it becomes the judges' duty to determine whether an interest is compelling or not. Additionally, Scalia perceived such a subjective test as "courting anarchy."[43] Scalia wrote:

> To make an individual's obligation to obey… a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling'—permitting him, by virtue of his beliefs 'to become a law unto himself,' *Reynolds v. United States*—contradicts both constitutional tradition and common sense.[44]

In place of *Sherbert*'s compelling interest test, the majority court in *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.[45]

---

[42] Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872; 110 S. Ct. 1595 (1990)

[43] ibid.

[44] ibid.

[45] ibid.

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.[46]

Employment Division of Oregon v. Smith represents a decidedly Lockean shift on the Court. By relegating the free exercise clause to complete dependence on other constitutional rights, the *Smith* case extinguished the accommodations demanded through *Sherbert* and instead greatly separated the religious realm from the governmental. *Smith*'s deference to societal standards over religious conscience smacks of a strong Lockean bent. 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.[47]

The general applicability test instituted in *Smith* mirrors each of these Lockean standards. Scalia, with a tip of the hat to Locke, believes that a government sufficiently respects religious beliefs and believers if the legal system constructs a rigid equality between the standard of compliance for nonbelievers and believers. Scalia fears that favorable judicial

[46] ibid.

[47] Martha Nussbaum, "Veiled Threats," *New York Times*, 11 July 2010. Print.

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, legal historians point out that the one of the overriding purposes of the free exercise clause was to safeguard religious rights, especially those of minority groups, 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.

III. 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, and when these practices became known to the broader community 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.[48]

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."[49] 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

[48] Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993)

[49] ibid.

elements of society" and government leaders agreed that Santeria stood as an attack to "civilized behavior."[50] 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."[51] 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."[52] 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

---

[50] David O'Brien, *Animal Sacrifice and Religious Freedom: Church of the Lukumi Babalu Aye v. City of Hialeah* (Lawrence: University Press of Kansas, 2004), p. 35.

[51] ibid, p. 42.

[52] Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America* (Chapel Hill: The University of North Carolina Press, 2002), p. 14.

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."[53] 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."[54]

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.

IV. Conclusion

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.

[53] ibid, p. 63.

[54] ibid, p. 69.

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.

CHAPTER THREE

The *Reynolds* Reasoning and Modern Constitutional Complaints

In addition to the evolution of First Amendment free exercise jurisprudence, many other elements of the U.S. Constitution have been clarified since *Reynolds* was decided in 1879. Several of these constitutional elements will be especially pertinent to a reevaluation of the majority holding in *Reynolds*. Since 1879, the Supreme Court has extended the ambit of constitutional protection to include formerly marginalized groups of American society, such as homosexuals. These contemporary cases, which have protected persons who—like Mormons—formerly possessed rights inferior to those of monogamous, heterosexual, WASP males, will offer invaluable insight to our current constitutional project.

Although a broad array of citizens, and non-citizens, have made legal and political gains since *Reynolds*, it is important to locate an equally important area of reevaluation and analysis when applying modern constitutional law to *Reynolds v. United States*. The very constitutional approach wielded in the Reynolds majority ruling should be scrutinized, in order to reveal the prejudices, inconsistencies, and social fears that played prominent roles in the justices' decision-making. This chapter will be two-fold. Firstly, it will analyze the historical and cultural context that set the stage for an anti-polygamy ruling. This context translated into a highly discriminatory ruling by Chief Justice Waite, who engaged in second-rate originalism in order to achieve the publically desirable ruling. Secondly, this chapter will display the link between recent constitutional efforts to protect alternative lifestyles with the rejuvenated argument for reevaluating religiously motivated polygamy.

I. A Protestant America, A Protestant Constitution

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."[55] However, one can imagine a political environment in which a religion maintains great sociopolitical influence, yet still enables other faith groups with divergent systems of belief to flourish. 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 stood in contrast to Protestantism and were acquiring members quickly.

Protestant supremacy was sustained by all branches of the federal government. As discussed earlier, this united effort was buoyed up by political fear. 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 upset local governments,

[55] ibid, p. 74.

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.[56]

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.

II. Waite's Originalist Ruling

> His tortuous and unconvincing historical argument utterly neglects the debates surrounding the drafting of the amendment and the evidence of early drafts—all of which…tells strongly in favor of reading the word "exercise" as offering protection to acts as well as belief. Nor does Justice Waite confront the evidence of the state constitutions at the time of the Founding, which also typically protect acts…Instead, he alludes to several statements by Jefferson—not a framer of the First Amendment—that don't really prove what Waite needs to prove anyway.[57]

---

[56] ibid, p. 107.

[57] Martha Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (New York: Basic Books, 2008), p. 194.

Chief Justice Waite's opinion in *Reynolds v. United States* has undergone great criticism recently, largely due to the manner of interpretation which 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.[58] 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.[59] 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."[60]

---

[58] Donald Drakeman, *Church, State, and Original Intent* (Cambridge: Cambridge University Press, 2010), p. 63-64.

[59] ibid, p. 4-5.

[60] ibid, p. 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.[61] 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."[62] 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, yet compelling, accounts of religious protections.[63] If Waite had turned to other free exercise perspectives in American pre-constitutional history, Waite's majority decision would have been less tenable. Instead, Waite's originalist

[61] ibid, p. 22.

[62] Reynolds v. United States*,* 90 U.S. 145 (1879)

[63] ibid, p. 70.

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.[64]

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 "Chief Justice Waite, of course, is searching for signs of Jefferson and Madison, so he overlooks Patrick Henry's contribution to the Virginia debate."[65]

---

[64] ibid, p. 72.

[65] ibid, p. 56.

For Waite, an originalist interpretation of the free exercise clause could be achieved 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."[66] 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. 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.[67]

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

---

[66] Reynolds v. United States*,* 90 U.S. 145 (1879)

[67] Donald Drakeman, *Church, State, and Original Intent* (Cambridge: Cambridge University Press, 2010), p. 64.

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 collectively 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—such as nineteenth-century American Protestants—using political channels to maintain its organizational strength. Throughout the 1850s and 1860s, Protestant Americans used the executive, legislative, and judicial branches of the federal government to systematically marginalize a burgeoning faith that threatened the size,

wealth, and power of Protestantism. In *Reynolds*, this marginalization becomes explicit as Chief Justice Waite draws a link between the practices of Mormonism and the barbarity of other inferior groups: "Asiatic and African people."[68] This is a primary reason why Madison fought against Protestant "Christian principles" becoming too entrenched in the American political arena.[69] 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."[70] 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

---

[68] Reynolds v. United States, 90 U.S. 145 (1879)

[69] Steven Waldman, *Founding Faith: How Our Founding Fathers Forged a Radical New Approach to Religious Liberty* (New York: Random House, 2008), p. 180.

[70] Donald Drakeman, *Church, State, and Original Intent* (Cambridge: Cambridge University Press, 2010), p. 73.

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.[71] However, deflecting constitutional responsibility off onto the interpretative tool, instead of onto the interpreter, provides a poor standard of critically assessing the 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.

III. 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, 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."[72] 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, 133 years after the *Reynolds* decision was

[71] Steven Waldman, *Founding Faith: How Our Founding Fathers Forged a Radical New Approach to Religious Liberty* (New York: Random House, 2008), p. 194.

[72] Reynolds v. United States*,* 90 U.S. 145 (1879)

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.[73] 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 rights as parents.

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."[74] 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."[75] 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 while a

[73] Center for Disease Control. "Births, Marriages, Divorces, and Deaths: Provisional Data for 2009." *National Vital Statistics Reports*, Vol. 58, No. 25 (August 27, 2010): 1-5. Online.

[74] Jonathon Turley. "Polygamy Laws Expose Our Own Hypocrisy." USA TODAY 3 October 2004. 31 November 2011 http://www.usatoday.com/news/opinion/columnist/2004-10-03-turley_x.htm

[75] ibid.

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."[76] 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 rule 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 homosexual activity. In 1982, a Georgia man—Mr. Hardwick—was found engaging in homosexual sodomy.[77] 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.[78] Although Hardwick was not convicted of a sodomy charge, he filed a lawsuit that challenged the constitutionality of Georgia's sodomy law.[79] Hardwick argued that the law violated his constitutional right to privacy. The central question before the Supreme Court was

[76] Reynolds v. United States, 90 U.S. 145 (1879)

[77] Bowers v. Hardwick, 478 U.S. 186 (1986)

[78] ibid.

[79] ibid.

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."[80] 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.[81] 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

[80] ibid.

[81] ibid.

single vision of moral decency, even if such visions have purely religious roots.[82] 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."[83]

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.[84] Both Mr. Lawrence and his partner were convicted under a state statute that forbade homosexual sodomy.[85] The men filed a grievance, claiming that the Texas sodomy statute unconstitutionally restricted their personal relationship.[86] 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

[82] ibid.

[83] ibid.

[84] Lawrence v. Texas, 539 U.S. 558 (2003)

[85] ibid.

[86] ibid.

infringe on citizens' "transcendent liberties."[87] 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."[88]

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.[89] Making the *Lawrence* decision a centerpiece of their fight for equal marital rights, gay activists have become a potent political force on the local, state, and national levels of government. Today, eight states and the District of Columbia allow for gay marriage, and several other states have implemented civil union statutes.[90] 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

---

[87] ibid.

[88] ibid.

[89] Michael Pearson. "Maryland Senate Approves Same-Sex Marriage Bill." CNN 23 February 2012. 25 February 2012 http://articles.cnn.com/2012-02-23/us/us_maryland-same-sex-marriage_1_marriage-bill-marriage-law-civil-unions?_s=PM:US

[90] ibid.

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.[91] 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.[92]

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.'"[93] Justice

---

[91] 104th Congress of the United States of America. "H.R.3396—Defense of Marriage Act." Library of Congress. 3 January 1996. 24 February 2012 http://thomas.loc.gov/cgi-bin/query/z?c104:H.R.3396.ENR:

[92] Brian Montopoli. "Obama Administration Will No Longer Defend DOMA." CBS 23 February 2011. 24 February 2011 http://www.cbsnews.com/8301-503544_162-20035398-503544.html

[93] Gonzalez v. Raich, 545 U.S. 1 (2005)

O'Connor's defense of our nation's federalist heritage offers insight into the issues of same-sex unions 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 aforementioned 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.[94] 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.

---

[94] Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America* (Chapel Hill: The University of North Carolina Press, 2002), p. 122-123.

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."[95] Scalia acknowledges "the impossibility of distinguishing homosexuality from other traditional 'morals' offenses" based on the constitutional foundation of *Lawrence v. Texas*.[96] 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.[97] 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.

[95] Lawrence v. Texas, 539 U.S. 558 (2003)

[96] ibid.

[97] Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America* (Chapel Hill: The University of North Carolina Press, 2002), p. 23.

CHAPTER FOUR

A Philosophical Reevaluation: Liberal and Communitarian Insights into Polygamy

> Marriage, meaning the institution regulating sex, reproduction, and family life, is a route into classical philosophical issues such as the good and the scope of individual choice, as well as itself raising distinctive philosophical questions.[98]

In American courthouses of the nineteenth-century, references to past constitutional cases, the American founding, English common law, Western traditions, and the prevailing moral ethos largely determined constitutional law. Political philosophy held sway, but the influence of philosophy during this time period can best be observed in subtle ways: the training of individual justices, personal beliefs surfacing occasionally in cases, or the brief citation of a work tied to the thoughts and deeds of our nation's founding fathers. In contemporary legal decision-making, political philosophy has played a more prominent role. Not only are judges willing to infuse personal philosophical doctrines into their writings, but prevailing philosophical thought also has sprouted openly in court hearings. Libertarian and liberal strains of political philosophy have been particularly successful in finding their way into the highest courthouses of our nation. Due to the increased significance of moral and political philosophy in modern American law, it seems appropriate to consider several philosophical perspectives regarding *Reynolds v. United States*.

The political philosophy that has gained the most ground in American constitutional law over the past several decades is Rawlsian liberalism. In fact, political theorists such as Ronald Dworkin have labored to efficiently apply liberalism directly to

---

[98] "Marriage and Domestic Partnership." *Stanford Encyclopedia of Philosophy Online*. Stanford Encyclopedia of Philosophy, 2009. 28 January 2012.

the pressing constitutional questions before the Supreme Court today. Since the 1980s, a potent reaction to Rawlsian liberalism has come from Michael Sandel and a group of philosophers and political scientists labeled as communitarians (although many individuals who fall within this camp, including Sandel, have taken issue with the label). This section shall focus on the division between liberal and communitarian thought, and how each respective philosophical camp treats questions of marriage, religion, and lifestyle.

I. John Rawls and Political Liberalism

As one of the most influential thinkers of the twentieth-century, John Rawls forever changed the complexion of political philosophy. In 1971, A Theory of Justice catapulted Rawls into the academic foreground, where he would stay for the rest of his life. In this work, Rawls introduces his conception of a well-ordered society, and the philosopher outlines his liberal principles of justice. For the next three decades, Rawls would review and recast these liberal principles in hopes of providing a cohesive and realistic philosophy, a philosophy capable of better protecting individual rights and successfully readjusting political institutions. To Rawls's credit, liberalism has become the prevailing philosophy in American politics, especially when fundamental questions of morality and religion arise.[99] In the pursuit of reevaluating *Reynolds*, it is also important to note that the judiciary stands as the branch of federal government most influenced by

[99] Michael J. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (Cambridge, MA: Harvard University Press, 1996), p. 4.

Rawls's teachings.[100] Fortunately, Rawlsian liberalism has much to say about the roles of religion and family in a well-ordered society.

In his 1993 work entitled Political Liberalism, Rawls recasts his principles of justice and introduces the idea of an overlapping consensus by stating, "One of the deepest distinctions between conceptions of justice is between those that allow for a plurality of reasonable though opposing comprehensive doctrines…and those that hold that there is but one such conception to be recognized by all citizens."[101] The well-ordered liberal state, Rawls believes, is one that allows for people of diverse heritages, religions, races, and beliefs to arrive at a political conception of justice from different directions. The well-ordered state, Rawls argues, must be willing to acknowledge the fact of reasonable pluralism.

The fact of reasonable pluralism, for Rawls, stands as the "first fact" of our democratic political culture.[102] Rawls believes that the Protestant Reformation showcased the inexorable process of diversification occurring amongst modern citizens. The schisms caused by the Reformation resulted in multiple religious, philosophical, and political doctrines seeking cultural expansion. As different beliefs arose, adherents physically and intellectually struggled for dominance. Due to the diversity of religious, philosophical, and metaphysical claims in liberal democracies, Rawls believes that it is impossible to gain political agreement in a democratic society through a single comprehensive doctrine. Any attempt to foster agreement through one doctrine will result in oppression and

---

[100] ibid, p. 55.

[101] John Rawls, *Political Liberalism* (New York: Columbia UP, 1993), p. 134.

[102] John Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA: Harvard University Press, 2001), p. 33.

illiberality.[103] Parties in the original position must be reconciled to this feature of democracy, because Rawls strongly holds that the fact of reasonable pluralism will remain a common element of all Western democracies.

As applied to *Reynolds v. United States*, it is apparent that the multiple morality-based attacks on polygamy supplied by the three branches of the federal government represented a political society disrespecting the fact of reasonable pluralism. Rawlsian liberalism is clear: "When government seeks to…shape the moral character of its citizens, it imposes on some the values of others and so fails to respect our capacity to choose our own values and ends."[104] In fact, it is safe to assume that the form of "power protect" governance employed by Protestants in the late 1800s was diametrically opposed to Rawls's well-ordered liberal society, especially regarding political questions of religion and public morality. In "The Idea of Public Reason Revisited," Rawls outlines a constitutional government that respects the dictates of the law only when the law continues the domination of a specific faith; in this government, leaders' "allegiance to…constitutional principles is so limited that none is willing to see his or her religious or nonreligious doctrine losing ground in influence and numbers."[105] As seen in previous chapters, such a constitutional government eerily resembles the American government of the nineteenth-century, which took drastic and discriminatory action against the upstart Mormon faith in order to safeguard the nation's Protestant standards of morality.

---

[103] ibid, p. 34.

[104] Michael J. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (Cambridge, MA: Harvard University Press, 1996), p. 291.

[105] John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), p. 150.

Rawls concludes his explanation of reasonable pluralism by depicting the neutral state required for the security of citizens' manifold beliefs. The well-ordered society must be a neutral state, where no hierarchical distinctions are drawn between and among people. The state may not privilege, or devalue, a group of citizens as a result of their conflicting affiliations. In particular, Rawls expects the state to be neutral concerning "good life" concepts: "A people of a constitutional democracy has, as a liberal people, no comprehensive doctrine of the good."[106] As evidenced by the strictures of the neutral state, much of the political allure associated with Rawlsian liberalism centers on the high premium placed on personal autonomy and mutual respect. The conception of freedom within a liberal framework is capacious, providing ample political space for citizens to arrive at their choices and self-determined ends. As a direct refutation of political utilitarianism, liberalism promises to respect the autonomy of the chooser by not sacrificing his/her self-legislating rights for the sake of majoritarian interests.[107]

Deprived of the possibility of moral consensus, Rawlsian liberalism seeks a different path to political stability. Rawls brackets morally divisive questions in order to achieve political agreement: "By insisting only that each respect the freedom of others to live the lives they choose, this toleration promises a basis for political agreement that does not await shared conceptions of morality."[108] Although Rawls imagines that certain good life concepts—such as religiously motivated cannibalism—must be excluded from the public political forum, Rawls foresees that the majority of comprehensive doctrines

---

[106] ibid, p. 40.

[107] John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), p. 3-4.

[108] Michael J. Sandel, *Public Philosophy: Essays on Morality in Politics* (Cambridge, MA: Harvard University Press, 2005), p. 139.

will be able to be reconciled with democratic institutions and liberal principles of justice. Otherwise, the overlapping consensus that functions as Rawls's philosophical fulcrum amounts to little more than a sideshow attraction for a handful of religious and philosophical visions.

A significant feature of both *Reynolds v. United States* and Rawlsian liberalism is the political value of the family unit. In section five of "The Idea of Public Reason Revisited," Rawls uses the family dynamic to express the overlap between public and private personhood. The family is one of the basic structures of society, but it is also a private association. Many of the family's internal workings stand apart from the basic structures of society, because these workings are conducted by private persons. However, Rawls details the circumstances in which the state lays claim to family members as public persons: "political principles…impose essential constraints on the family as an institution and so guarantee the basic rights and liberties, and the freedom and opportunities, of all its members. This they do…by specifying the basic rights of equal citizens."[109] The family functions as an instrument of moral and political cultivation and, as such, the family is responsible for raising democratic citizens and also protecting these citizens' fundamental rights. However, Rawls clearly states the limited role that the government possesses over family life:

> The government would appear to have no interest in the particular form of family life, or of relations among the sexes, except insofar as that form or those relations in some way affect the orderly reproduction of society over time. Thus, appeals to monogamy as such, or against same-sex marriages, as within the government's legitimate interest in the family, would reflect religious or comprehensive moral doctrines. Accordingly, that interest would appear improperly specified.[110]

[109] John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), p. 159.

[110] ibid, p. 147.

Within their internal workings, a church and a family may manifest views that are not rational, publically accessible, or politically defensible from the vantage point of political justice. Rawls is comfortable with this expression of private personhood, so long as such nonpublic reasons and political values do not unduly harm the democratic participation and basic liberties of a human in his capacity as a public person. Although Rawls supports the state's prerogative to "reform the family," he limits this right to instances in which a specific family structure degrades women and subverts children's political development.[111]

These conditions do not easily apply to polygamy. Firstly, Rawls reaffirms a liberal society's openness to evolving sexual norms when he later writes, "No particular form of the family (monogamous, heterosexual, or otherwise) is required by a political conception of justice so long as the family is arranged to fulfill these [political] tasks effectively."[112] Religiously motivated polygamous households, such as the Mormon households of the late 1800s, are capable of caring for children, providing moral education and cultural awareness, teaching principles of justice, and encouraging participation in the public political forum just as well as monogamous families.[113] At the very least, no publically justified reasons were offered during the passage of our nation's anti-polygamy statutes to suggest that Mormon parents were incapable of instilling virtue in their progeny or readying them for the rigors of civic life.

---

[111] ibid, p. 160.

[112] ibid, p. 157.

[113] ibid, p. 157.

In Justice as Fairness, Rawls displays a strong concern for the protection of women within the household, particularly focusing on a woman's ability to enter and exit a marriage without harmful repercussion.[114] Rawls outlines the financial protections and legal rights that need to complement marital standards in a well-ordered liberal society, and he pays special attention to those protections and rights that are activated during the time during and after a divorce. Cheshire Calhoun addresses the issue of women's rights, and their relation to polygamous families, when he declares:

> The social and legal persecution of Mormon polygamy in the nineteenth century did not end the social practice of polygamy. What it did do was to eliminate the legal status of 'wife' for all but first wives. As a result all secondary wives lost their legal claim for support and their children became illegitimate. Unless we are now willing to use the coercive force of the law to ensure that there simply are no polygamous relationships, some women will in fact participate in plural marriages in the United States. Failure to extend civil marriage to plural marriages leaves them unprotected by marriage and divorce law. Women who enter plural marriages without the benefit of legal divorce have substantially restricted exit options from those marriages, since they are not legally entitled to make claims for alimony or fair property distribution.[115]

It is evident that Rawlsian liberals would be greatly swayed by the fact that, as compared to the legal disapprobation in the status quo, a legal recognition of religiously motivated polygamy more fully protects women who feel called to engage in this spiritual practice.

Rawls's stance towards alternative lifestyles befits his voluntaristic conception of the person. Whether a person's self-selected desire pertains to favorite basketball teams, religious affiliations, or sexual partners, the political liberalism is clear: "People should be free to choose their intimate associations for themselves, regardless of the virtue or

---

[114] ibid, p. 160-161.

[115] Cheshire Calhoun, *Who's Afraid of Polygamous Marriage? Lessons for Same-Sex marriage Advocacy from the History of Polygamy*, 42 San Diego L.Rev. 1041 (2005).

popularity of the practices they choose so long as they do not harm others."[116] The well-ordered liberal state, as conceived by Rawls, furnishes a broad matrix for individuals to live out their identities, especially sexual identities. It is important to note that during the *Reynolds* hearing, no proof of physical harm, emotional abuse, or social maltreatment between George Reynolds and his wives was established, nor was evidence of such misconduct within other Mormon polygamous marriages cited. Such injuries, which political liberalism would see as constituting threats to political society, were not present in *Reynolds v. United States*. As described earlier in this thesis, historians affirm that the family situation for polygamous households in the nineteenth century was just as stable, if not more stable, than the situation of monogamous households. Barring the evidence of these harms, it is unrealistic to assume that Rawlsian liberalism could justify the use of coercive force against the voluntary associations within a religious community.

An argument could be made that the Mormon communities of the nineteenth-century were not democratic, and therefore should not be considered as full members of the liberal society. Although scholars have argued that polygamy is compatible with a democratic regime, the issue is worthy of more in-depth analysis.[117] As Rawls outlines in "The Idea of Public Reason Revisited," the "basic requirement" of public reason and participation in the public political forum "is that a reasonable doctrine accepts a constitutional democratic regime and its companion idea of legitimate law."[118] To many politicians of the day, the Mormon faith espoused political theories of law, political

---

[116] Michael J. Sandel, *Public Philosophy: Essays on Morality in Politics* (Cambridge, MA: Harvard University Press, 2005), p. 136-137.

[117] Cheshire Calhoun, *Who's Afraid of Polygamous Marriage? Lessons for Same-Sex marriage Advocacy from the History of Polygamy*, 42 San Diego L.Rev. 1039-1040 (2005).

[118] John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), p. 132.

regime, and family that were inconsistent with American norms. It was widely held that these Mormon communities constructed a political kingdom in the Utah Territory that stood as an affront to the democratic government of the surrounding nation.

In response to this concern, it may prove helpful to reexamine the political context of late nineteenth-century America and observe the true form of "liberal democracy" that existed during the period. At that time, the political order was believed to be shaped by one higher law: the divine dictates, moral lessons, and legal principles of Christianity. In addition to this strong Christian cornerstone, our federal government routinely weeded out other growing religious cultures and moral systems that posed a threat to conventional political thought. From the use of presidential pronouncements to severe legislative action to united judicial opinions, the federal government was able to perpetuate the political strength of Christianity in America. In the case of Mormonism, with its new manners of living, governing, and worshipping, both Congress and the Supreme Court were able to wield gross analogies to slavery and human sacrifice in order to successfully marginalize the minority faith from America's public political culture.

Under the Rawlsian conceptions of legitimacy and reciprocity—which stipulate that whenever addressing "a constitutional essential or matter of basic justice, all appropriate government officials act from and follow public reason"—it is safe to assume that there was very little legitimate law, or reciprocity, directed towards Mormons in the nineteenth-century.[119] Because a comprehensive doctrine should not forcefully bring a society into political agreement, Rawls believes that our democratic society should offer a different framework from which we can all participate in answering fundamental

[119] ibid, p. 137.

political questions. Public reason, which "neither criticizes nor attacks any comprehensive doctrine," offers citizens a way to bracket their clashing comprehensive doctrines and resort to solid public justifications for political answers.[120] The public reason of our democratic culture is responsible for unearthing the political values necessary for stable governance.

The political values that Rawls is referencing are "free-standing" moral values, which are publically defensible.[121] When defending a restriction of religious expression, public reason dictates that lawmakers provide justification "we might reasonably expect that they, as free and equal citizens, might reasonably also accept."[122] Neither the representatives in Congress who passed anti-bigamy statutes, nor the justices ruling over the *Reynolds* case, met this requirement of reciprocity when significantly curbing Mormons' religious exercise. The political questions swirling around marriage in nineteenth-century America were not answered using strictly political values, as liberalism mandates. Instead, the polygamy cases of the 1800s, which include and follow *Reynolds*, depict the clear endorsement of a comprehensive belief system. The Supreme Court believed that the "divine ordinance… of the family organization" undergirded our political system, and must be defended against all unconventional faiths and family types that did not comport with this "law of the Creator."[123] In 1890, the Supreme Court extended their preexisting animus against the Mormon faith, ruling in *Davis v. Beason*

---

[120] ibid, p. 132.

[121] John Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA: Harvard University Press, 2001), p. 181.

[122] John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), p. 138.

[123] Bradwell v. Illinois, 83 U.S. 130 (1873)

that to even "call their advocacy [of polygamy] a tenet of religion is to offend the common sense of mankind."[124] After authoritatively declaring the central practices of Mormonism to be outside the scope of religion, the Supreme Court had no problem concluding that Mormon "polygamy…is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western World."[125] To these Supreme Courts, a healthy public morality required the elevation of one comprehensive, and civilized, doctrine over all others. Fortunately, as the court absorbed liberal principles in the twentieth-century, the judicial practice of judging the truth, value, and organization of religions against the standard of Christianity has been widely discouraged in American law.

Another anti-democratic gesture committed about Mormonism, Rawls would argue, lies in the unequal footing Mormon polygamists were given, which amounted to an unfair system of cooperation. President Rutherford B. Hayes famously encouraged legislators to use politics to quell the Mormon threat, saying, "Laws must be enacted which will take from the Mormon Church its temporal power…as a system of government it is our duty to deal with it as an enemy of our institutions and its supporters and leaders as criminals."[126] Political liberalism also stresses that a prominent example of an illiberal society is when a citizen's associational membership corresponds with his political status. For instance, Rawls believes that it is unjust to accord a citizen a different

[124] Davis v. Beason, 133 U.S. 333 (1890)

[125] Late Corporation of Latter-day Saints and Romney v. United States, 136 U.S. 1 (1890)

[126] Nancy Rosenblum. "Democratic Sex: Reynolds v. U.S., Sexual Relations, and Community." *Sex, Preference, and Family: Essays on Law and Nature*. Eds. Estlund & Nussbaum. New York: Oxford UP, 1997. 76-77. Print.

set of rights or political standing as a result of the citizen's religious conversion.[127] A society structured in accordance to Rawlsian liberalism "insists on toleration, fair procedures, and respect for individual rights" regardless of religious affiliation.[128] Unfortunately, the American public did not embody these benchmark liberal principles when subjugating Mormon polygamists. The societal standing of the average Mormon was radically different than the standing of a Protestant in nineteenth-century America. If a citizen changed his associational membership from Lutheran to Mormon, he could expect his public identity to change, he could expect greater hurdles for public participation, and he could expect the government to treat his family in an inferior manner.

It is altogether unclear that Mormon communities were anti-democratic in nature. In fact, Brigham Young repeatedly petitioned the federal government for the Mormon-dominated Utah Territory to be admitted as a state.[129] Young dreamed that the Mormon communities located in the Utah Territories would one day achieve statehood and further assimilate into our democratic nation. As we have observed, it is evident that the surrounding political society was less than democratic in its conduct towards the Mormon people, yet no one has come forward to renounce all federal statutes, court decisions, and executive orders from this time period because of the majority's illiberal treatment towards the Mormon religion.

---

[127] John Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA: Harvard University Press, 2001), p. 93.

[128] Michael J. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (Cambridge, MA: Harvard University Press, 1996), p. 8.

[129] Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America* (Chapel Hill: The University of North Carolina Press, 2002), p. 26.

Even if it is contended that Mormon polygamists tend to be less democratic in their preferred form of governance than other citizens, political liberalism does not argue that undemocratic citizens should be excluded from liberal society or be afforded inferior rights. During his lifetime, John Rawls held a deep respect for the Amish faith. Although Rawls believed that the Amish were deficient democratic citizens, he did not suggest that a liberal democracy strip political space from the believers of illiberal comprehensive doctrines. For Rawls, Amish citizens failed the political duty of reciprocity and did not accept their responsibility to society. However, Rawls consistently maintained that all democracies, in order to be truly liberal, must be accepting of illiberal and undemocratic comprehensive beliefs, so long as these beliefs do not significantly hinder the greater political society or the rights of other citizens. Rawls wrote, "Justice as fairness honors…the claims of those who wish to withdraw from the modern world in accordance with the injunctions of their religion."[130] After decades of persecution and tension, thousands of Mormons elected to politically and physically withdraw from mainstream America, in the same way that the historically persecuted followers of the Amish faith have politically and physically withdrawn from mainstream America. Rawlsian liberalism acknowledges the existence of illiberal, yet non-threatening, communities in a liberal society. The proper response to these small communities is not to vilify and marginalize, but to respect these citizens and hope that the progressive course of history will amend their illiberal ways.

From the perspective of political liberalism, the legal and philosophical reasoning embedded in *Reynolds v. United States* is highly questionable. When viewing the political

[130] John Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA: Harvard University Press, 2001), p. 157.

actions and everyday public defamations against Mormons from the era, a Rawlsian defense of religiously motivated polygamy becomes even stronger. In fact, some liberal theorists explicitly include protections for polygamy in their conceptions of a well-ordered society, arguing:

> If there is freedom of contract, then we should have the freedom to devise whatever marriage contract with whatever partner or partners we please… [This] is as things should be in a liberal society that permits citizens to pursue their own conception of the good so long as doing so does not infringe on others' rights, even if that conception is a minority or unpopular one.[131]

It is unfortunate that John Rawls glosses over many low points in American religious rights history when he proclaims that a "peculiar virtue of the American people" is that of all the religions found in America "none has been able to dominate and suppress the other religions by the capture and use of state power."[132] Such domination and suppression was witnessed in the 1800s, as the political establishment was successfully pressured by Protestants across America to quash the Mormon threat. Outside of the prohibitions against plural marriage, one need only look at the other pieces of legislation used to protect one comprehensive doctrine at the expense of another: "The federal government further penalized polygamists…by taking away Utah women's right to vote, by making the affirmation that one is not a polygamist a condition of voter registration for men, by denying polygamists the right to serve in public office or on juries…and ultimately by seizing the assets of the Mormon Church."[133] The Morrill Act was simply one piece of legislation in a long line of political attacks on the Mormon faith, attacks

---

[131] Cheshire Calhoun, *Who's Afraid of Polygamous Marriage? Lessons for Same-Sex marriage Advocacy from the History of Polygamy*, 42 San Diego L.Rev. 1034 (2005).

[132] John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), p. 166.

[133] Cheshire Calhoun, *Who's Afraid of Polygamous Marriage? Lessons for Same-Sex marriage Advocacy from the History of Polygamy*, 42 San Diego L.Rev. 1024 (2005).

that aggressively sought to preserve the sanctity of one higher law over all others. These vicious political decisions are not met with approval by liberal political thought, nor would such discriminatory acts stand up in a court of law today.

II. Michael Sandel and Communitarianism

Advocating a "politics of the common good," communitarianism has been associated with many different political and philosophical beliefs since the 1980s; most commonly, communitarians align with the civic republican tradition of Aristotle and Machiavelli, arguing that "we cannot justify political arrangements without reference to common purposes and ends, and that we cannot conceive of ourselves without reference to our role as citizens, as participants in a common life."[134] Communitarians received their name as a result of the importance that they place on community influence and tradition when addressing fundamental political questions. This community-oriented framework of political thought has come to be seen as a principal alternative to Rawlsian liberalism: "Whereas Rawls seemed to present his theory of justice as universally true, communitarians argued that the standards of justice must be found in forms of life and traditions of particular societies and hence can vary from context to context."[135] Not to be confused with a system of political thought that advocates on behalf of a single majoritarian comprehensive belief imposed on all citizens, communitarian thought recognizes the importance of "compromises among competing values and interests"

[134] Michael J. Sandel, *Public Philosophy: Essays on Morality in Politics* (Cambridge, MA: Harvard University Press, 2005), p. 152.

[135] "Communitarianism." *Stanford Encyclopedia of Philosophy Online*. Stanford Encyclopedia of Philosophy, 2009. 28 January 2012.

whenever the citizenry converse about the contours of the common good.[136] In fact, it is this sense of moral conversation amongst citizens that vividly separates communitarian politics from American politics of the nineteenth-century.

As observed above, in the realm of constitutional law, liberal theorists stress the protection of autonomy and individual choice. Communitarians, on the other hand, evaluate the social practices in question by asking which legal outcome would further the types of behavior and conduct conducive to civic morality and perpetual self-government. Concerning the issue of alternative lifestyles, Sandel writes that the social and legal validity of any form of sexuality should stand not on an appreciation of individual choice, but on the human goods and virtues attained through such intimate relationships.[137] In reference to *Griswold v. Connecticut*, Sandel suggests that if a sexual union is "'intimate to the degree of being sacred…a harmony in living,' an association for a 'noble…purpose'" then such a union possesses a strong constitutional claim.[138] Michael Sandel views the substantive moral decision-making in *Lawrence v. Texas* as an exemplar for future judges.[139] In this 2003 Supreme Court case, which recognized the constitutionality of homosexual sexual conduct, the majority discovered a moral good in the conduct and intimacy connected to homosexual relationships. Sandel's approbation of the reasoning in *Lawrence* affirms the conclusions we drew in chapter three: there is no legal distinction between the sanctity, harmony, and nobility of monogamous sexuality—

---

[136] R. Bruce Douglass. "Democratic Soulcraft." *The Communitarian Network*, Vol. 11, No. 4 (Fall 2001): 6. Online.

[137] Michael J. Sandel, *Public Philosophy: Essays on Morality in Politics* (Cambridge, MA: Harvard University Press, 2005), p. 137.

[138] ibid, p. 137.

[139] ibid, p. 142.

either heterosexual or homosexual—and the closeness present in polygamous sexuality. One distinction that actually should render the polygamous union *greater* legal protection is the religious nature of Mormon polygamy, which offers additional sanctity and immunity in the eyes of the law.

Before we delve into the communitarian treatment of religion, it is informative to highlight several of the cardinal differences between political liberalism and communitarianism, especially regarding the formation and duty of government. Sandel disagrees with the governmental carte blanche and toleration propagated by Rawls and other liberals. Rawls encourages state neutrality because of the fact of reasonable pluralism, but Sandel responds by highlighting that this fact doesn't apply solely to moral beliefs, but also to theories of justice.[140] Although Rawls's fear of political disagreement and irrationality led him to encourage state neutrality towards diverse comprehensive beliefs, his fear has been realized as a result of excessive neutrality: "Where political discourse lacks moral resonance, the yearning for a public life of larger meanings finds undesirable expressions."[141] Communitarians believe that neutrality towards conceptions of the good cannot, in practice, lead to social cooperation and long-term stability; such a policy does not ensure camaraderie and egalitarianism as Rawls forecasts, but instead leads to a low quality of respect for many comprehensive beliefs.[142] Communitarians assert that in order for government to resolve the controversial, yet imperative, political questions of today, we must all be willing to engage in public political discussions that

[140] ibid, p. 232-234.

[141] ibid, p. 246.

[142] ibid, p. 139.

value deep-seated moral commitments and allow citizens to collectively deliberate about the common good by way of critical moral, religious, philosophical, social, and political analysis.

John Rawls viewed humans as being voluntaristic in their relationships, ends, and attachments. To Rawls, humans exercise their autonomous and self-legislating abilities to freely associate and tie themselves to groups and belief systems: "A moral person is a subject with ends he has chosen, and his fundamental preference is for conditions that enable him to frame a mode of life that expresses his nature as a free and equal rational being as fully as circumstances permit."[143] A primary responsibility of the law is to protect citizens in their autonomous capacities, so that we may associate with any church, sports team, or political party without state coercion of our autonomous will. Communitarians believe that this conception of personhood is philosophically, and legally, problematic. Some of humans' most important ties, ties that have a heavy hand in molding human identity, are not voluntarily sought. Instead, humans often find themselves "obligated to fulfill certain ends we have not chosen—ends given by nature or God, for example, or by our identities as members of families, peoples, cultures, or traditions."[144] Michael Sandel argues that the obligatory nature of human identity presents numerous problems for a judiciary bent on governmental neutrality: "In the case of religion, the liberal conception of the person ill equips the Court to secure religious

[143] John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), p. 561.

[144] Michael J. Sandel, *Public Philosophy: Essays on Morality in Politics* (Cambridge, MA: Harvard University Press, 2005), p. 213.

liberty for those who regard themselves as claimed by religious commitments they have not chosen."[145]

The constitutional treatment of religion is important to Michael Sandel and other communitarians, because these thinkers recognize both that government neutrality towards religion represents a politically liberal evolution that has proved detrimental to politics and religion in America and also that this evolution "is not a long-standing principle of constitutional law, but a development of the last fifty years."[146] When evaluating First Amendment free exercise jurisprudence, Sandel takes issue with *Employment Division of Oregon v. Smith*, but applauds *Sherbert v. Verner* and the judicial standards set down in the case, saying that "in this case…the Constitution was not blind to religion but alive to its imperatives."[147] Unlike the *Smith* decision, which proffered no substantive protection to minority faiths unless these faiths were constitutionally mistreated in numerous ways—thus providing a "hybrid" case to the court—the *Sherbert* decision cast religion, and its diverse obligations, as a meaningful moral force that demands protection and expression in the public political forum.[148]

As aforementioned, Sandel notes that several fundamental political questions "cannot be neutral with respect to moral and religious controversy. [They] must engage rather than avoid the comprehensive moral and religious doctrines at stake."[149] The issue

---

[145] Michael J. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (Cambridge, MA: Harvard University Press, 1996), p. 65.
[146] ibid, p. 56.

[147] ibid, p. 68-69.

[148] Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872; 110 S. Ct. 1595 (1990)

[149] Michael J. Sandel, *Public Philosophy: Essays on Morality in Politics* (Cambridge, MA: Harvard University Press, 2005), p. 226.

of polygamy is one of these fundamental political questions that requires moral discussion and public reasoning. True communitarianism would address the question of religiously motivated polygamy by looking at the moral and religious animus behind the cases for and against polygamy. It is important to note that in this respect, the Waite Court took a course of action more similar to the communitarian resolution than the politically liberal resolution. However, the starting point for the communitarian analysis is not identical to the starting point for the Waite Court's analysis in 1879. Although the Waite Court entertained the moral and religious arguments of both sides, there is no doubt that the Supreme Court was unwilling to afford both arguments equal weight when adjudicating *Reynolds v. United States*.

Communitarians like Sandel yearn for "a formative politics, a politics that cultivates in citizens the qualities of character that self-government requires."[150] Major questions about religiously motivated polygamy surface within this context. The communitarian would ask, "How does polygamy factor into Mormons' conception of the good life? What type of citizen does this practice craft? Does polygamy stand in opposition to any common goods of the political community?"[151] Both liberals and communitarians alike would be alert to the common fear that some forms of polygamy can lead to severe gender inequality. When evaluating this fear, and how it affects the question of political goods, Cheshire Calhoun reminds us that "Mormon women were able to mount a plausible defense of plural marriage…because their background

---

[150] Michael J. Sandel, *Public Philosophy: Essays on Morality in Politics* (Cambridge, MA: Harvard University Press, 2005), p. 10.

[151] ibid, p. 256.

conditions were favorable to women's autonomy."[152] In fact, Mormon women of the nineteenth-century repeatedly testified that "plural marriage promised to solve the social problems created by the failure of monogamous companionate marriage."[153] The story of Mormon political organization in the Utah Territories reveals that these religiously motivated polygamists actually erected one of the most structured forms of self-government in America, a participatory order that led to economic success, social equality, and obedience to the law. Religiously motivated polygamists fall squarely into Sandel's category of "reflectively situated beings," persons who find themselves "claimed by the history that implicates [them] in a particular life, but self-conscious of its particularity, and so alive to other ways, wider horizons."[154] Such citizens are dedicated to their religious commitments, but they also are tied to the nation in which they live. As a people who were both fiercely religiously and patriotic, Mormon polygamists strove to remain connected to the nation, even as the nation pushed them into the margins.

As we have already seen, an especially troubling fact before the Waite Court was the foreign nature of polygamy, a practice which could only be found in the benighted "Asiatic and African" cultures.[155] To the argument that polygamy is barbaric and only observed in uncivilized non-Western states, the communitarian responds that, even if we were to grant that polygamy is less common in the West than in other cultures and religions, "cultural particularity should both make one sensitive to the possibility of

---

[152] Cheshire Calhoun, *Who's Afraid of Polygamous Marriage? Lessons for Same-Sex marriage Advocacy from the History of Polygamy*, 42 San Diego L.Rev. 1039 (2005).
[153] ibid, p. 1031.

[154] Michael J. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (Cambridge, MA: Harvard University Press, 1996), p. 16.

[155] Reynolds v. United States, 90 U.S. 145 (1879)

justifiable areas of difference between the West and the rest."[156] Communitarians would surely deem such a xenophobic prohibition to be unjust. A Western state cannot prohibit a cultural or religious practice simply because of the practice's non-Western heritage (although it is noteworthy to remember that the very religious tradition that the Waite Court strove to protect reveres numerous patriarchs who practiced polygamy).

Because the *Reynolds* decision has already been rendered, and multiple cases and legislative enactments have reiterated and extended the Court's ruling over the past century, communitarians are able to move beyond an evaluation of past actions, as we have done, and deliberate about the best treatment of religiously motivated polygamists today. Some communitarian scholars stipulate that if a community has been historically mistreated by other communities, the injured community should be assured protection today. In *Democracy's Discontent: America in Search of a Public Philosophy*, Michael Sandel writes, "Special responsibilities flow from the particular communities I inhabit… I may owe to members of those communities with which my community has some morally relevant history."[157] The relevant histories that Sandel uses as examples are those in which one community consciously oppressed the political or religious rights of another community. Popular communitarian scholar Amitai Etzioni carries Sandel's reasoning further, arguing that minority religious communities require special protection against majoritarian politics; this protection, Etzioni believes, definitely includes legal

---

[156] "Communitarianism." *Stanford Encyclopedia of Philosophy Online*. Stanford Encyclopedia of Philosophy, 2009. 28 January 2012.

[157] Michael J. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (Cambridge, MA: Harvard University Press, 1996), p. 15.

exemptions for religiously motivated activity.[158] A modern constitutional reevaluation of *Reynolds* that wielded communitarian political thought would be favorable to granting legal refuge to religiously motivated polygamists if instances of past discrimination and mistreatment were proven.

From the communitarian perspective, a primary flaw of the nineteenth-century War on Polygamy was its inability to provide a "substantive moral discourse" capable of engaging the public in discussions over marriage, sexuality, community, and the scope of religious rights.[159] In fact, the most non-communitarian political setup—one in which a group "tries to impose a policy on the rest of society that can fairly be construed as a power play… at the expense of the others"—happens to be the historical script performed by our nineteenth-century Protestant nation.[160] Over one hundred years after *Reynolds*, American politics is still plagued by an inability to productively converse about these fundamental issues of religion and relationships. Far from bringing our collective intellect and pluralistic beliefs into public dialogue, the status quo spotlights the vitriol of opposing firebrands and passes over the contributions of more level-headed citizens. Communitarian political thought offers a sobering, yet hopeful, message: "People's hearts and minds, as well as their behavior, need to change if the same old battles are not to be fought over and over again indefinitely."[161] The key to successful politics lies in our

---

[158] Amitai Etzioni. "Lawmaking in a Good Society." *The Communitarian Network*, Vol. 11, No. 4 (Fall 2001): 15-16. Online.

[159] Michael J. Sandel, *Public Philosophy: Essays on Morality in Politics* (Cambridge, MA: Harvard University Press, 2005), p. 5.

[160] R. Bruce Douglass. "Democratic Soulcraft." *The Communitarian Network*, Vol. 11, No. 4 (Fall 2001): 7. Online.

[161] ibid, p. 9.

community's ability to reevaluate our multifarious comprehensive beliefs and converse about the difficult questions that divide us. As evidenced by America's changing attitudes towards relationship standards, the issue of marriage may soon benefit from the fruitful conversation expected from communitarian thinkers.

The communitarian response to the rapid growth of Mormonism would have been far fairer, and democratic, than the response given by the branches of our federal government in the latter part of the nineteenth-century. In the communitarian journal *Communitarian Network*, political scientist Thomas A. Spragens Jr. succinctly sums up the communitarian outlook on anti-polygamy statutes: "they are largely ineffectual, they are improperly intrusive in people's private lives, and they seek to impose contestable comprehensive moralities rather than to encourage civic morality."[162]

---

[162] Thomas A. Spragens, Jr. "The Bounds of Civic Morality." *The Communitarian Network*, Vol. 11, No. 4 (Fall 2001): 12. Online.

CHAPTER FIVE

Conclusion

> We respect our fellow citizens' moral and religious convictions by engaging, or attending to them—sometimes by challenging and contesting them, sometimes by listening and learning from them.[163]

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."[164] 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."[165] 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.[166] 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."[167] This tally does not do justice to the true number of

---

[163] Michael J. Sandel, *Public Philosophy: Essays on Morality in Politics* (Cambridge, MA: Harvard University Press, 2005), p. 247.

[164] "Official Declaration-1." The Church of Jesus Christ of Latter-day Saints. 2012. 1 March 2012 http://www.lds.org/scriptures/dc-testament/od/1?lang=eng

[165] Anderson, Scott. "The Polygamists." *National Geographic* February 2010: 51. Print.

[166] ibid, p. 45.

[167] ibid, p. 46.

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 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.[168]

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," the conventional conceptions of the nuclear family are under attack in twenty-first century America.[169]

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 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

---

[168] "'Sister Wives' Lawsuit: Federal Judge Rules TV Family Can Question Bigamy Statute." Huffington Post. 5 February 2012. 2 March 2012. http://www.huffingtonpost.com/2012/02/05/sister-wives-law-suit-bigamy_n_1255622.html

[169] Cheshire Calhoun, *Who's Afraid of Polygamous Marriage? Lessons for Same-Sex marriage Advocacy from the History of Polygamy*, 42 San Diego L.Rev. 1030 (2005).

of Latter-day Saints is its rejection of the sacrament of polygamy. The Supreme Court also would be troubled at the idea of reevaluating a case decided more than a century ago, although there is strong evidence to argue that because of the erosion of the precedent and legal reasoning in *Reynolds*, a reevaluation of the case would not be extraordinary for the Court.

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 scattered 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 great 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. The Supreme Court has also become increasingly alert to modern political thought. Two of the most influential political philosophical currents today, political liberalism and communitarianism, offer conflicting accounts of the role of government in regulating religion, the family, and conceptions of the good, yet both philosophies supply ample room for the practice of polygamy in the well-ordered society. 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.

BIBLIOGRAPHY

104th Congress of the United States of America. "H.R.3396—Defense of Marriage Act." Library of Congress. 3 January 1996. 24 February 2012 http://thomas.loc.gov/cgi-bin/query/z?c104:H.R.3396.ENR:

Amitai Etzioni. "Lawmaking in a Good Society." *The Communitarian Network*, Vol. 11, No. 4 (Fall 2001): 15-16. Online.

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

Bradwell v. Illinois, 83 U.S. 130 (1873)

Brian Montopoli. "Obama Administration Will No Longer Defend DOMA." CBS 23 February 2011. 24 February 2011 http://www.cbsnews.com/8301-503544_162-20035398-503544.html

Center for Disease Control. "Births, Marriages, Divorces, and Deaths: Provisional Data for 2009." *National Vital Statistics Reports*, Vol. 58, No. 25 (August 27, 2010): 1-5. Online.

Cheshire Calhoun, *Who's Afraid of Polygamous Marriage? Lessons for Same-Sex marriage Advocacy from the History of Polygamy*, 42 San Diego L.Rev. 1038 (2005).

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

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

"Communitarianism." *Stanford Encyclopedia of Philosophy Online*. Stanford Encyclopedia of Philosophy, 2009. 28 January 2012.

David Franz and James Hunter *A Nation of Religions: The Politics of Pluralism in Multireligious America* (Chapel Hill: The University of North Carolina Press, 2006), p. 257.

David O'Brien, *Animal Sacrifice and Religious Freedom: Church of the Lukumi Babalu Aye v. City of Hialeah* (Lawrence: University Press of Kansas, 2004), p. 35.

Davis v. Beason, 133 U.S. 333 (1890)

Donald Drakeman, *Church, State, and Original Intent* (Cambridge: Cambridge University Press, 2010), p. 63-64.

Douglas J. Davies, *An Introduction to Mormonism: Introduction to Religion* (New York: Cambridge UP, 2003), p. 8.

Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872; 110 S. Ct. 1595 (1990)

Gonzalez v. Raich, 545 U.S. 1 (2005)

"Great Supreme Court Cases- Reynolds v. United States." *Great Supreme Court Cases*. 2007. Allsupremcourtcases.com. 10 Apr. 2009 http://www.allsupremecourtcases.com/reynolds-v-united states

Jan Shipps, "Difference and Otherness: Mormonism and the American Religious Mainstream", *Minority Faiths and the American Protestant Mainstream* (Urbana: University of Illinois Press, 1998), p. 95.

Jerold Waltman, *Religious Free Exercise and Contemporary American Politics: The Saga of the Religious Land Use and Institutionalized Persons Act of 2000* (New York: Continuum International Publishing Group, 2011), p. 22.

John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), p. 3-4.

John Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA: Harvard University Press, 2001), p. 33.

John Rawls, *Political Liberalism* (New York: Columbia UP, 1993), p. 134.

John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), p. 150.

Jonathon Turley. "Polygamy Laws Expose Our Own Hypocrisy." USA TODAY 3 October 2004. 31 November 2011 http://www.usatoday.com/news/opinion/columnist/2004-10-03-turley_x.htm

Late Corporation of Latter-day Saints and Romney v. United States, 136 U.S. 1 (1890)

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

"Marriage and Domestic Partnership." *Stanford Encyclopedia of Philosophy Online*. Stanford Encyclopedia of Philosophy, 2009. 28 January 2012.

Martha Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (New York: Basic Books, 2008), p. 356-357.

Martha Nussbaum, "Veiled Threats," *New York Times*, 11 July 2010. Print.

Michael J. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (Cambridge, MA: Harvard University Press, 1996), p. 4.

Michael J. Sandel, *Public Philosophy: Essays on Morality in Politics* (Cambridge, MA: Harvard University Press, 2005), p. 139.

Michael Pearson. "Maryland Senate Approves Same-Sex Marriage Bill." CNN 23 February 2012. 25 February 2012 http://articles.cnn.com/2012-02-23/us/us_maryland-same-sex-marriage_1_marriage-bill-marriage-law-civil-unions?_s=PM:US

Nancy Rosenblum. "Democratic Sex: Reynolds v. U.S., Sexual Relations, and Community." *Sex, Preference, and Family: Essays on Law and Nature*. Eds. Estlund & Nussbaum. New York: Oxford UP, 1997. 76-77. Print.

"Official Declaration-1." The Church of Jesus Christ of Latter-day Saints. 2012. 1 March 2012 http://www.lds.org/scriptures/dc-testament/od/1?lang=eng

R. Bruce Douglass. "Democratic Soulcraft." *The Communitarian Network*, Vol. 11, No. 4 (Fall 2001): 6. Online.

Reynolds v. United States, 90 U.S. 145 (1879)

Richard N. Ostling, *Mormon America: The Power and the Promise* (San Francisco: Harper, 1999), XVI

Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America* (Chapel Hill: The University of North Carolina Press, 2002), p. 1.

Scott Anderson. "The Polygamists." *National Geographic* February 2010: 51. Print.

Sherbert v. Verner, 374 U.S. 398; 83 S. Ct. 1790 (1963)

"'Sister Wives' Lawsuit: Federal Judge Rules TV Family Can Question Bigamy Statute." Huffington Post. 5 February 2012. 2 March 2012. http://www.huffingtonpost.com/2012/02/05/sister-wives-law-suit-bigamy_n_1255622.html

Steven Waldman, *Founding Faith: How Our Founding Fathers Forged a Radical New Approach to Religious Liberty* (New York: Random House, 2008), p. 180.

Thomas A. Spragens, Jr. "The Bounds of Civic Morality." *The Communitarian Network*, Vol. 11, No. 4 (Fall 2001): 12. Online.

Thomas v. Collins, 323 U.S. 516 (1945)

Thomas v. Review Board of Indiana Employment Security Division, 450 U.S. 707 (1981)

W. Cole Durham Jr. and Robert T. Smith, "Religion and the State in the United States at the Turn of the Twenty-First Century," in *Law and Religion in the 21st Century: Relations between States and Religious Communities* (Burlington, VT: Ashgate Publishing Company, 2010), p. 79-80.

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