

THE CONSTITUTIONALITY OF POLYGAMY PROHIBITIONS AFTER *LAWRENCE V. TEXAS*: IS SCALIA A PUNCHLINE OR A PROPHET?

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“[*W*]e have no government armed with power capable of contending with human passions unbridled by morality and religion. . . . Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other.”¹

INTRODUCTION

Associate Justice Antonin Scalia has been labeled the Supreme Court’s “most notorious dissenter.”² Among the high Court’s most conservative members,³ his emotionally charged dissenting opinions have, on more than one occasion, evoked firestorms of controversy.⁴ Indeed, it is safe to say that a large segment of the populace will not soon describe themselves as Scalia devotees.⁵ Many observers, however, admire Scalia’s unfeigned, straightforward approach to jurisprudence.⁶ Scalia is “the

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¹ Letter from John Adams to the Officers of the First Brigade of the Third Division of the Militia of Massachusetts (Oct. 11, 1798), in 9 THE WORKS OF JOHN ADAMS, at 229 (Charles Francis Adams ed., 1854).

² Michael Frost, *Rhetorical Question: What Would Aristotle Make of Scalia?*, LEGAL AFF., Nov.-Dec. 2003, at 26.

³ See, e.g., Jonathan Ringel, *Bar Inductees Get Candid Glimpse of Supreme Court*, THE RECORDER (Atlanta), Sept. 17, 2003, at 7 (describing the Court’s liberals as Justices Ginsburg, Stevens, Souter, and Breyer, and naming Chief Justice Rehnquist and Justices Scalia and Thomas as its conservatives). Justices Kennedy and O’Connor are considered the swing voters, though Justice Kennedy has, of late, sided predominantly with the Court’s majority. See *id.*

⁴ As a conservative-minded jurist, Justice Scalia often espouses views that are at odds with America’s social norms. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 346–49 (2003) (Scalia, J., concurring in part, dissenting in part); *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 691–705 (2001) (Scalia, J., dissenting); *Romer v. Evans*, 517 U.S. 620, 636–53 (1996) (Scalia, J., dissenting).

⁵ See, e.g., Sally K. Hilander, *The 1998 Convention: Justice Scalia Debunks the “Living Constitution” Theory*, 24 MONT. LAW. 1, 33 (Oct. 1998) (“Scalia’s critics have been diverse and numerous. Their basic complaint is his originalist ideas tend to freeze the Constitution in time, rather than allowing it to speak to contemporary needs, all of which Scalia freely admits.”).

⁶ Scalia even has his own fan club, which has taken to the World Wide Web. See *Cult of Scalia*, at <http://members.aol.com/schwenkler/scalia> (1996) (last visited Oct. 2, 2004).

veritable personification of the desire to leave legislating to legislators.”⁷ He believes that the Supreme Court should not stray from the Constitution’s mandate.⁸ Staying true to this philosophy, Scalia says what others are arguably afraid to say. Often, the ideas he conveys are unpopular and out of sync with our nation’s politically correct social posture.⁹

In the high Court’s landmark decision *Lawrence v. Texas*,¹⁰ the justices overruled *Bowers v. Hardwick*¹¹ and held that homosexuals enjoy a constitutionally protected right to engage in private intimate conduct.¹² Justice Scalia’s dissent was very critical of the majority opinion¹³ and predicted that the scope of the Court’s ruling left all morals-based legislation vulnerable to attack.¹⁴ Specifically, Scalia predicted that state laws against same-sex marriage, bestiality, and bigamy, among other

(“Overcome by unadulterated awe, we, the votaries of perhaps the greatest jurist of our time, have taken wholeheartedly to the net, that he might be more widely known and appreciated.”)

⁷ Michael R. Dimino, *Pay No Attention to That Man Behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians*, 21 YALE L. & POL’Y REV. 301, 360 n.355 (2003).

⁸ See, e.g., *Alabama v. Shelton*, 535 U.S. 654, 681 (2002) (Scalia, J., dissenting) (“Today’s imposition upon the States finds justification neither in the text of the Constitution, nor in the settled practices of our people, nor in the prior jurisprudence of this Court. I respectfully dissent.”). See generally Shawn Burton, *Justice Scalia’s Methodological Approach to Judicial Decision-Making: Political Actor or Strategic Institutionalist?*, 34 U. TOL. L. REV. 575, 575 (2003) (“Justice Scalia has generated a vigorous dialogue regarding his self-proclaimed approach to judicial decision-making. Textual originalism and the enunciation of clear rules of law, Justice Scalia proclaims, are the only appropriate ways to uncover and effectuate the true principles of the United States Constitution.”).

⁹ Occasionally, Scalia’s ideology puts him at odds with even his fellow conservative justices. One commentator observed:

Justice Scalia writes passionately, artfully, and sharply. His wit is often barbed and his criticism scathing. He also tends to aim his sharpest and most vocal denunciations not at those more liberal members on the Court with whom he disagrees routinely, but instead at those more conservative members of the Court whenever they fail to live up to Scalia’s own conservative standards. He openly ridicules their legal reasoning, casts doubt on their morality, and even sometimes appears to call into question both their intellectual capacity and personal integrity.

Richard J. Lazarus, *Rehnquist’s Court*, 47 ST. LOUIS U. L.J. 861, 871 (2003).

¹⁰ 539 U.S. 558 (2003).

¹¹ 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

¹² See *Lawrence*, 539 U.S. at 578 (“The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.”).

¹³ See *id.* at 603 (Scalia, J., dissenting) (“What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new ‘constitutional right’ by a Court that is impatient of democratic change.”).

¹⁴ See *id.* at 589–92.

things, were “called into question” by the Court’s expansive decision.¹⁵ This remains to be seen. Recently, however, the storm that Scalia forecasted has undoubtedly reared its ugly head in the latest challenge to Utah’s prohibition of polygamy.¹⁶

Identified only as J. Bronson, D. Cook, and G. Lee Cook, three Utahans brought suit challenging the constitutionality of Utah’s polygamy statute.¹⁷ On December 22, 2003, plaintiffs J. Bronson and G. Lee Cook sought a marriage license from the Salt Lake County’s elected clerk, defendant Sherrie Swensen.¹⁸ They did so for the purpose of entering into a plural marriage, one “similar to that practiced in the Church of Jesus Christ of Latter-day Saints in Utah prior to 1890.”¹⁹ The clerk’s office denied the license, because plaintiff G. Lee Cook’s application indicated that he was already legally married.²⁰ G. Lee Cook then orally notified a state clerk and Swensen’s co-defendant, Val Rasmussen, of the fact that he wished to marry J. Bronson as his second lawful wife.²¹ Rasmussen and her supervisor, co-defendant Lorie Tafoya, refused to violate Utah law to provide the plaintiffs with a license.²²

In Utah, polygamy is constitutionally and statutorily prohibited. In fact, the State’s entrance into the Union was conditioned on outlawing the practice.²³ Article III, Section 1 of Utah’s constitution reads as follows:

Perfect toleration of religious sentiment is guaranteed. No inhabitant of this State shall ever be molested in person or property on account of his or her mode of religious worship; but polygamous or plural marriages are forever prohibited.²⁴

¹⁵ See *id.* at 590.

¹⁶ See generally Leonard Post, *Lawyers Square Off Over Polygamy Case: Scalia’s Dissent in the Texas Sodomy Case is Echoed in a Utah Action*, NAT’L L.J., Jan. 26, 2004, at 4 (“Scalia may have sounded like Chicken Little to some. But a challenge to the law against polygamy in Utah may change skeptics’ minds.”).

¹⁷ See *id.*

¹⁸ See generally Complaint of J. Bronson, G. Lee Cook, and D. Cook, *Bronson v. Swensen*, (D. Utah 2004) (No. 02:04-CV-0021) [hereinafter “Complaint”].

¹⁹ See Complaint at 3–4, ¶¶ 12–15 (“The sincere and deeply held religious beliefs of J. Bronson, D. Cook, and G. Lee Cook are that the doctrine of plural marriage, *i.e.*, a man having more than one wife, is ordained of God and is to be encouraged and practiced.”).

²⁰ See Complaint at 4–5, ¶¶ 19–24 (noting also that the plaintiffs paid the fifty dollar application fee).

²¹ See Complaint at 4, ¶ 21.

²² See Complaint at 5, ¶¶ 23–24.

²³ See Utah Enabling Act, UTAH CODE ANN §§ 1, 3 (1991). The Act provided “[t]hat the inhabitants of all that part of the area of the United States now constituting the Territory of Utah, as at present described, may become the State of Utah . . . [p]rovided, [t]hat polygamous or plural marriages are forever prohibited.” *Id.*

²⁴ UTAH CONST. art. III, § 1.

Moreover, the Utah Criminal Code, in pertinent part, provides as follows:

- (1) A person is guilty of bigamy when, knowing he has a husband or wife or knowing the other person has a husband or wife, the person purports to marry another person or cohabits with another person.
- (2) Bigamy is a felony of the third degree.²⁵

In addition, another statute criminalizes the activity of any state clerks who knowingly provide marriage licenses for prohibited marriages.²⁶ Thus, Rasmussen, Tafoya, and Swensen's conduct was well within their lawful duties as state employees.

The plaintiffs' complaint states three causes of action. First, the plaintiffs assert that the defendants' conduct violated their rights under the Free Exercise Clause of the First Amendment.²⁷ Next, they claim that the "defendants have improperly limited and restricted [their] right to intimate expression and association."²⁸ Finally, they maintain that defendants violated their right to privacy "with regard to private, intimate matters."²⁹ For this proposition, the plaintiffs cited the Supreme Court's *Lawrence v. Texas* decision.³⁰ Plaintiffs are seeking declaratory relief, claiming that the above provision of the Utah Constitution and the above statute proscribing polygamy violate the United States Constitution.³¹ They also seek nominal damages in the amount of one dollar.³² The case is captioned *Bronson v. Swensen* and is venued in the United States District Court for the District of Utah.³³

This Note employs the *Bronson v. Swensen* case as the backdrop for an examination into the constitutionality of polygamy after *Lawrence v.*

²⁵ UTAH CODE ANN. § 76-7-101 (2003).

²⁶ *See id.* § 30-1-16 (1998).

Every clerk or deputy clerk who knowingly issues a license for any prohibited marriage shall be punished by confinement in the state prison for a term not exceeding two years, or by fine in any sum not exceeding \$1,000, or by both such fine and imprisonment, and upon conviction shall be removed from his office by the judgment of the court before which his conviction is had; and if he willfully issues a license contrary to his duty as herein prescribed, he shall be fined not exceeding \$1,000.

Id.

²⁷ *See* Complaint at 7, ¶ 37 ("The conduct of defendants violated the First Amendment to the United States Constitution in that defendants have improperly limited and restricted plaintiffs' rights and ability to fulfill and practice a major tenet of their religion.").

²⁸ *See* Complaint at 7, ¶ 40.

²⁹ *See* Complaint at 8, ¶ 43 (asserting that defendants violated rights protected "by the First, Fourteenth, and other Amendments to the United States Constitution").

³⁰ *See* Complaint at 8, ¶ 43.

³¹ *See* Complaint at 8, Relief ¶ 1.

³² *See* Complaint at 8-9, Relief ¶ 2.

³³ *See* Complaint at 1-2, ¶¶ 3-4.

Texas. Part I of this Note provides a brief glimpse into the practice of polygamy as practiced by Mormon fundamentalists and looks at the historical criminalization of the practice. Part II, in turn, summarizes the *Lawrence* decision, critiquing both Justice Kennedy's majority opinion and Justice Scalia's dissent. Part III then analyzes polygamy prohibitions in light of *Lawrence* and the Supreme Court's current approach to substantive due process. An examination of polygamy prohibitions under current free exercise jurisprudence is beyond the scope of this Note. In sum, Part III explains why polygamy statutes need not be overturned after *Lawrence*. This Note concludes, however, that the *Lawrence* decision may very well have left all morals-based legislation vulnerable to constitutional attack. Courts must now look beyond mere assertions of moral propriety before upholding legislation.

I. FUNDAMENTAL MORMONISM AND CRIMINALIZATION OF POLYGAMY: A HISTORICAL PERSPECTIVE

This section discusses the Mormon religion and its evolution within American society. Likewise, it traces the criminalization of polygamous practices from before Utah entered the Union until today. The seminal Supreme Court case dealing with polygamy prohibition, *Reynolds v. United States*,³⁴ will be discussed at length. In *Reynolds*, the Court affirmed a criminal conviction of a Mormon for practicing polygamy, holding that outlawing polygamous conduct did not violate the Constitution's Free Exercise Clause.³⁵

A. *Who are the Mormons?*

Although it was considered offensive during the 1800s, it has become common practice to refer to members of the Church of Jesus Christ of Latter-day Saints as "Mormons."³⁶ The birth of Mormonism stems from, as the stories go, several visions and revelations of Joseph Smith.³⁷ Smith

³⁴ 98 U.S. 145 (1878).

³⁵ See *id.* at 166–67 (“To permit [plural marriage] 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.”).

³⁶ See Sarah Barringer Gordon, *A War of Words: Revelation and Storytelling in the Campaign Against Mormon Polygamy*, 78 CHI.-KENT L. REV. 739, 739 n.1 (2003) (stating that “[n]o disparagement is intended” by referring to the members of the Latter-day Saints Church as Mormons).

³⁷ See James W. Gordon, *Religion and the First Justice Harlan: A Case Study in Late Nineteenth Century Presbyterian Constitutionalism*, 85 MARQ. L. REV. 317, 403 (2001) (“Mormon founder Joseph Smith claimed to have received a divine revelation supplementing the Bible . . .”).

first received a visit from God and Jesus Christ, whereupon he was told “that he should not join any existing church, but should be God’s agent to restore the true Church of Christ.”³⁸ Subsequently, Smith purportedly received a visit from the angel Moroni who informed him that he should “unearth and translate a holy book written on plates of gold.”³⁹ The plates contained the religious text of America’s ancient prophets.⁴⁰ Three years later, Smith completed this translation—the finished product being the Book of Mormon, the Church’s great scripture.⁴¹ It then became Smith’s obligation to restore the Church as he was commanded.⁴²

Thus, in 1829, John the Baptist visited Smith and gave him the authority of a priest.⁴³ This was followed by visits from other apostles who bestowed upon Smith similar grants of authority.⁴⁴ With his newfound power, Smith formally founded the Mormon Church in 1830.⁴⁵

Joseph Smith was killed in 1844 at the age of thirty-eight.⁴⁶ During the time between his founding of Mormonism and his death, Smith was

³⁸ See *Religion and Ethics: Mormonism*, British Broadcasting Corp., at <http://www.bbc.co.uk/religion/religions/mormon/history/history3.shtml> (last visited Oct. 2, 2004) [hereinafter “BBC Mormonism”]. The British Broadcasting Corporation’s informational site is akin to an encyclopedia and was instrumental in the author’s research for this Note. Since the website has static URLs, the author will cite to the URLs as he would normally cite to page numbers.

³⁹ *Id.*; see Mary K. Campbell, *Mr. Peay’s Horses: The Federal Response to Mormon Polygamy, 1854-1887*, 13 YALE J.L. & FEMINISM 29, 34 (2001) (“Smith translated Moroni’s plates into *The Book of Mormon*. This translation did nothing less than provide America with a pre-Columbian history completely independent of Europe.”).

⁴⁰ See BBC Mormonism, at <http://www.bbc.co.uk/religion/religions/mormon/history/history3.shtml>.

⁴¹ See Keith E. Sealing, *Polygamists Out of the Closet: Statutory and State Constitutional Prohibitions Against Polygamy Are Unconstitutional Under the Free Exercise Clause*, 17 GA. ST. U. L. REV. 691, 701–02 (2001) (“The plates, translated by Smith into King James version-style English, became the Book of Mormon, describing the pre-Columbian American Indians as being of Hebrew origin and as being the chosen people in the promised land of America.”); see also *Scott v. Hammock*, 133 F.R.D. 610, 611 n.1 (D. Utah 1990) (“[T]he religious Book of Mormon . . . is an authoritative doctrinal and historical text of the Church.”).

⁴² See BBC Mormonism, at <http://www.bbc.co.uk/religion/religions/mormon/history/history3.shtml> (“Joseph set about building the restored church, continuing to receive direct guidance from God on how to do it.”).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See Todd M. Gillett, Note, *The Absolution of Reynolds: The Constitutionality of Religious Polygamy*, 8 WM. & MARY BILL RTS. J. 497, 503 (2000) (“On April 6, 1830, Joseph Smith, Jr., a twenty-four-year-old farmer, founded the religious community that became the Church of Jesus Christ of Latter-day Saints.”).

⁴⁶ BBC Mormonism, at <http://www.bbc.co.uk/religion/religions/mormon/history/history3.shtml>.

badly persecuted and jailed countless times.⁴⁷ Church membership, however, grew from six to twenty-six thousand during Smith's life.⁴⁸

The persecution suffered by Joseph Smith was common among other Mormons.⁴⁹ This led Smith's successor as the Mormon's leader, Brigham Young, to organize a migration of Mormons to America's west—beyond what was the United States' physical border at that time.⁵⁰ The Mormons eventually settled in the Great Salt Lake Basin in 1847.⁵¹ Their migration was not easy, but it was necessary to escape their widespread persecution.⁵² Mormons were severely discriminated against on account of, among other things, their refusal to keep slaves and their belief in plural marriages.⁵³ Thus, Salt Lake City became, and remains, the nerve center of Mormonism.⁵⁴

As in other Christian religions, Christ is the central figure in the Mormon Church. Nonetheless, significant differences exist between

⁴⁷ *Id.*

⁴⁸ *Id.*; see also Kamron Keele, *A Plea for the Repeal of Section 107: No More Tax-Free Mansions for Dubious "Ministers of the Gospel"*, 56 TAX LAW. 73, 97 (2002) ("There are some 4.8 million Mormons in the United States . . . and some 4.9 million adherents abroad. The Mormon Church has a robust annual growth rate of 4.7% in the United States and nearly double that abroad. Some have estimated that Mormon Church membership worldwide should reach 260 million in 80 years.").

⁴⁹ See Senator Gordon Smith, *Protecting the Weak: Religious Liberty in the Twenty-First Century*, 1999 BYU L. REV. 479, 492–93 (1999). Senator Smith commented:

[T]he Mormons . . . were subjected to persecution early in their history "because their ideas and ways differed so greatly from the customary." The Mormons were anti-slavery in Missouri at a time before the Civil War, when tensions on this issue ran to the extreme. This created severe problems for the group, which was forced to leave Missouri under attack from serious mob violence and an "extermination order" from the governor of the state. Smith was subsequently murdered by a mob in 1844; in order to escape their enemies, the Mormons fled westward across the great plains to present-day Utah, where they have prospered to the present day.

Id.; see also Timothy Egan, *The Persistence of Polygamy*, N.Y. TIMES MAG., Feb. 28, 1999, at 53–54 (stating that Mormons have been persecuted since their founding).

⁵⁰ See BBC Mormonism, at <http://www.bbc.co.uk/religion/religions/mormon/history/history4.shtml> ("After Smith's death the new Church leader, Brigham Young . . . decided that their future lay in the American West. He decided that the people would emigrate en-masse. It would be a migration like that of the Israelites who had been forced to leave Egypt in search of the Promised Land.").

⁵¹ *See id.*

⁵² *See id.*

⁵³ *See id.*; see also Note, *Wagering on Religious Liberty*, 116 HARV. L. REV. 946, 949 (2003) ("[T]he Mormons were . . . subject to massive and brutal persecution by state authorities and the federal government precisely because they deviated from the Protestant norm.").

⁵⁴ See Dennis Moore, *What's Buzzing About Olympic Host*, USA TODAY, Feb. 10, 2002, at 10 ("The Utah population, 2.25 million, is approximately 70% Mormon. However, the Mormon makeup of Salt Lake City, population 181,743, is slightly less than half."); BBC Mormonism, at <http://www.bbc.co.uk/religion/religions/mormon/history/history4.shtml>.

Mormonism and other more widespread religions.⁵⁵ “Mormons believe their church is a restoration of the Church as conceived by Jesus and that the other Christian churches have gone astray.”⁵⁶ Marriage and family are central to Mormon life. In fact, Mormons believe it is their religious obligation to have children; therefore, many have children while still relatively young.⁵⁷ Likewise, marriage is fundamental in the Mormon Church—Mormons believe that they must be married to reach the ultimate salvation in the afterlife.⁵⁸ Mormons additionally subscribe to the practice of tithing, giving one-tenth of their annual income to the Church.⁵⁹

One significant tenet of the Mormon faith is the widespread service of its membership in missionary activities and broad-spectrum compassion for other human beings.⁶⁰ Approximately forty percent of young Mormon men complete missionary service, typically serving for two years beginning at age nineteen.⁶¹ Women most often carry out eighteen months of missionary service, but their service is not founded in the same religious compulsion as their male counterparts.⁶² Mormons are encouraged to complete missionary service as an analog to tithing. Their missionary service amounts to a “tithe” on a period of twenty years of their lives.⁶³

Today, there are over eleven million practicing Mormons worldwide, with nearly five million in the United States, and these numbers are

⁵⁵ See BBC Mormonism, at <http://www.bbc.co.uk/religion/religions/mormon/intro.shtml> (Mormonism “has substantial differences in belief to the Catholic, Protestant, and Orthodox Christian Churches.”).

⁵⁶ *Id.*

⁵⁷ See *id.* at <http://www.bbc.co.uk/religion/religions/mormon/customs/family.shtml> (“Mormon parents regard it as their duty (and of course as a source of great joy) to have children in order to create physical bodies for spirits to come to earth in order to fulfil [sic] God’s plan.”).

⁵⁸ See *id.* at <http://www.bbc.co.uk/religion/religions/mormon/features/rites/marriage.shtml> (“Mormons also believe that marriage is part of the plan of salvation. They see it as essential for exaltation, and believe that unmarried people cannot reach the highest level of the Celestial Kingdom after their death.”).

⁵⁹ See Keele, *supra* note 48, at 97 (noting that Mormons tithe approximately 5.2 billion dollars per year to the Church).

⁶⁰ See Campbell, *supra* note 39, at 34 n.43. Campbell discussed Mormon benevolence: “Good works” is not a hollow concept in most Mormon communities. Quick to ridicule Mormonism for polygamy and missionaries, popular culture often loses [sic] sight of Mormons’ tremendous willingness to care for one another. The Church’s formal welfare system is without parallel in the U.S., and this community ethic trickles down through Mormon society as a whole. A member experiencing financial or familial problems can expect a wide range of support, including everything from childcare to housing to substantial monetary assistance.

Id.

⁶¹ See BBC Mormonism, at <http://www.bbc.co.uk/religion/religions/mormon/features/mission.shtml>.

⁶² *Id.*

⁶³ *Id.*

increasing dramatically.⁶⁴ Although figures vary considerably, a conservative estimate places the number of polygamists in America at around 30,000.⁶⁵ Mormons practicing polygamy are typically called “Mormon fundamentalists.”⁶⁶ The next section will discuss Mormon fundamentalism and the practice of polygamy during the nineteenth century and today as well as look at the criminalization of polygamy in our nation.

B. Mormon Polygamy

Polygamy, also known as plural marriage, is the “state of being simultaneously married to more than one spouse.”⁶⁷ The practice became an official tenet of the Mormon Church in 1852.⁶⁸ Although renounced today,⁶⁹ the Church of Jesus Christ of Latter-day Saints endorsed polygamy until 1890.⁷⁰ Joseph Smith himself began practicing polygamy in 1841.⁷¹ At first, there was public outcry and confusion among Mormons about polygamy, but Smith “resolved the confusion by announcing the receipt of two revelations.”⁷² This announcement, in a sense, legitimized

⁶⁴ See *id.* at <http://www.bbc.co.uk/religion/religions/mormon/intro.shtml>; see also John Kincaid, *Extinguishing the Twin Relics of Barbaric Multiculturalism—Slavery and Polygamy—From American Federalism*, 33 PUBLIUS 75, 81 (2003) (announcing that “if current worldwide rates of conversion are sustained through this century, by 2100 the Mormon Church will be the second largest Christian denomination (after the Roman Catholic Church) and the first major world faith established since Mohammed founded Islam 1,400 years ago”).

⁶⁵ See BBC Mormonism at <http://www.bbc.co.uk/religion/religions/mormon/features/polygamy.shtml> (“There are said to be over 30,000 people practising [sic] polygamy in Utah, Idaho, Montana and Arizona, who either regard themselves as preserving the original Mormon beliefs and customs, or have merely adopted polygamy as a desired way of life and not as part of the teachings of any church.”).

⁶⁶ See generally Irwin Altman, *Polygamous Family Life: The Case of Contemporary Mormon Fundamentalists*, 1996 UTAH L. REV. 367, 369 (1996) (examining modern Mormon fundamentalism).

⁶⁷ BLACK’S LAW DICTIONARY 1180 (7th ed. 1999).

⁶⁸ See Altman, *supra* note 66, at 368.

⁶⁹ See, e.g., Elizabeth Harmer-Dionne, *Once a Peculiar People: Cognitive Dissonance and the Suppression of Mormon Polygamy As a Case-Study Negating the Belief-Action Distinction*, 50 STAN. L. REV. 1295, 1336 (1998) (“Mormons now define themselves in opposition to polygamy rather than in conjunction with it. . . . For decades, polygamy has been, as it continues to be, an offense meriting excommunication.”).

⁷⁰ See Altman, *supra* note 66, at 369 (explaining that “the Mormon church succumbed to governmental pressures and first rejected the practice of polygyny in 1890”).

⁷¹ See L. Rex Sears, *Punishing the Saints for Their “Peculiar Institution”*: Congress on the Constitutional Dilemmas, 2001 UTAH L. REV. 581, 587 (2001) (“Joseph Smith may have first attempted to practice plural marriage in 1833, but it was not until 1841 that he began to establish the practice in a more permanent fashion, secretly introducing the practice among a number of his close associates in high Church office over the next several years.”).

⁷² Harmer-Dionne, *supra* note 69, at 1320.

the practice. One commentator summarized the historical view of Mormonism towards polygamy as follows:

Mormons endowed polygamy with unprecedented moral attributes by incorporating it into their eschatology. Perhaps the most radical doctrinal tenet of Mormonism is that mankind can achieve godhood and that God himself was once a mere mortal. The Prophet Joseph Smith explicitly taught that a man would progress through eternity in proportion to the magnitude of his posterity on earth and that polygamy was a central part of the pursuit of godhood. More wives ensured both increased progeny and greater future glory. Men who rejected the practice of polygamy not only forfeited godhood, but were damned. Accordingly, the salvation of women depended on their union with a righteous—by definition, polygamous—man.⁷³

In light of this, it is understandable why many members of the Mormon Church felt obligated to practice polygamy during the 1800s.

Nineteenth century Mormons' belief in polygamy put the Territory of Utah at odds with our young nation. Thus, in 1862, Congress passed the Morrill Act, which criminalized polygamous practices within the United States' Territories.⁷⁴ "The leaders of the Mormon Church held the reins of political power in the Territory and the possibility that the Territory would come into the Union as a state in which polygamous marriage was legal was on the minds of those in the federal government."⁷⁵ Thereafter, in 1882, Congress enacted The Edmunds Act, which made "cohabitation a crime and prohibit[ed] polygamists and polygamist sympathizers from sitting on juries or holding public office."⁷⁶

Needless to say, the laws of the late nineteenth century were sternly aligned against the Mormons and polygamy. Congress' Edmunds-Tucker Act of 1887 epitomizes the federal government's opposition to Mormonism at this time.⁷⁷ This Act "required plural wives to testify against their husbands, erased the loan institution that helped members of the Mormon Church immigrate to the United States from Europe, and provided a mechanism for the government to acquire property of the Church."⁷⁸ Feeling a sense of defeat, Utah entered the Union in 1894 on

⁷³ *Id.* at 1319–20.

⁷⁴ See The Morrill Act, § 1, Pub. L. No. 37-126, 12 Stat. 501, 501 (1862) (repealed 1910); Maura Strassberg, *The Crime of Polygamy*, 12 TEMP. POL. & CIV. RTS. L. REV. 353, 353 (2003).

⁷⁵ Strassberg, *supra* note 74, at 353.

⁷⁶ See *id.*; see also *id.* at 353 n.5.

⁷⁷ The Edmunds-Tucker Act, ch. 397, §§ 13, 17, 24 Stat. 635, 637, 638 (1887); See Stephanie Forbes, Comment, "Why Just Have One?": An Evaluation of the Anti-Polygamy Laws Under the Establishment Clause, 39 HOUS. L. REV. 1517, 1524 (2003).

⁷⁸ Forbes, *supra* note 77, at 1524.

the condition that polygamous practices were forever forbidden.⁷⁹ This came four years after the Church's official renouncement of the practice.⁸⁰

Nonetheless, the so-called Mormon fundamentalists breathed new life into polygamy during the 1930s and 1940s.⁸¹ These groups exist even today, residing primarily in the western United States, as well as small portions of northern Mexico and southern Canada.⁸² Much to the disdain of the mainstream Mormon Church, which excommunicates those espousing polygamous views,⁸³ Mormon fundamentalists believe in practicing Mormonism as Joseph Smith did during the mid-nineteenth century.⁸⁴ Thus, in *Bronson v. Swensen*, the plaintiffs' complaint reads: "A sincere and deeply held religious major tenet of the beliefs of J. Bronson, D. Cook and G. Lee Cook is the practice of plural marriage similar to that practiced in the Church of Jesus Christ of Latter-day Saints in Utah prior to 1890."⁸⁵

Today, polygamy is outlawed throughout the United States.⁸⁶ For many years, however, there has been considerable controversy over the lack of enforcement.⁸⁷ Very often law enforcement officials feel that their resources are better spent elsewhere. But, the trial and conviction of Utah polygamist Tom Green⁸⁸ and Salt Lake City's hosting of the 2002 Winter Olympics certainly brought polygamy to the forefront of American social debates.⁸⁹ This recent media attention, however, pales in comparison to

⁷⁹ See Utah Enabling Act, UTAH CODE ANN §§ 1, 3 (1991).

⁸⁰ See *supra* note 69–70 and accompanying text.

⁸¹ Altman, *supra* note 66, at 369; Strassberg, *supra* note 74, at 354.

⁸² See Strassberg, *supra* note 74, at 354 (specifying that today's Mormon fundamentalists reside mainly in "small isolated rural communities in Arizona, Utah, Montana and Idaho").

⁸³ See *supra* note 69.

⁸⁴ See Altman, *supra* note 66, at 370 (stating that "fundamentalists consider themselves to be Mormons and the 'true' followers of Joseph Smith and original church theology").

⁸⁵ See Complaint at 3, ¶ 13.

⁸⁶ See *Reynolds v. United States*, 98 U.S. 145, 166–67 (1878) (holding that religious beliefs are no defense to polygamy). *But see* Gillett, *supra* note 45, at 508 (noting that Native Americans are allowed to practice polygamy "according to their customs").

⁸⁷ See Strassberg, *supra* note 74, at 354. The state of Utah, however, has taken strides in recent years to increase enforcement. See, e.g., *Utah Senate Approves Bill To Fight Polygamist Crimes*, N.Y. TIMES, Feb. 24, 2000, at A12 ("Polygamy, a third-degree felony, is rarely prosecuted because many of the marriages, while performed in a church, are not registered with the authorities.").

⁸⁸ Green's prosecution was Utah's first polygamy trial in fifty years. See Ryan D. Tenney, *Tom Green, Common-Law Marriage, and the Illegality of Putative Polygamy*, 17 BYU J. PUB. L. 141, 142 (2002) (criticizing Green's bigamy conviction); Pauline Arrillaga, *Putting Polygamy on Trial in Utah*, WASH. POST, Dec. 8, 2000, at A49 (providing background on Green's family and prosecution).

⁸⁹ See Katharine Biele, *Tiptoeing Out to Meet the World*, N.Y. TIMES, Feb. 3, 2002, § 4, at 15 ("Although polygamy is no longer allowed within the Mormon Church and the relatively few

the pandemonium surrounding the potential entrance of the polygamy-friendly state into the Union during the late 1800s. The next section will discuss the Supreme Court's decision in *Reynolds v. United States*,⁹⁰ which arose in that context. *Reynolds* is the last time the Supreme Court spoke on the issue of polygamy.

C. *Reynolds v. United States*

Reynolds v. United States was commenced as a challenge to the Morrill Act, which outlawed polygamy in the Territories of the United States. The case was decided on free exercise grounds but remains relevant to this Note for two key reasons. First, *Reynolds* is the backdrop of any challenge to anti-polygamy legislation.⁹¹ Although "ancient," it, nonetheless, is the seminal Supreme Court precedent in this area, and it must be overcome in any contemporary challenge.⁹² Second, any challenge to polygamy prohibitions based upon the right to privacy would arguably be bolstered by its foundation in religious beliefs.⁹³ In *Reynolds*, the Court spoke directly on the topics of religion and morality. Therefore, although a detailed analysis of the Free Exercise Clause is beyond the scope of this Note, this section will discuss briefly the *Reynolds* decision, which upheld the constitutionality of anti-polygamy legislation.

George Reynolds was a member of the Mormon Church.⁹⁴ He was convicted of bigamy in violation of the Morrill Act, which criminalized all persons "having a husband or wife living, who marries another."⁹⁵

polygamists who live here have splintered off on their own, that hasn't stopped the wisecracks . . .").

⁹⁰ 98 U.S. 145 (1878).

⁹¹ See, e.g., Complaint at 7, ¶¶ 34–35 ("Plaintiffs give notice that the case of *Reynolds v. United States*, if followed in this case, would summarily resolve plaintiff' claims. . . . Plaintiffs seek a review and overturning of that decision in light of more recent decisions by the United States Supreme Court.").

⁹² See Kenneth W. Starr, *Liberty and Equality Under the Religion Clauses of the First Amendment*, 1993 BYU L. REV. 1, 2 (1993) (criticizing those justices who invoke such antiquated precedent as *Reynolds v. United States*).

⁹³ See, e.g., Steven Morris, *Unleashing the Wave: Lawrence Decision Raises More Legal Questions*, 12 TEX. TRIANGLE ONLINE 1, at <http://www.txtriangle.com/archive/1217/topstories.htm> (posted Jan. 29, 2004) (quoting BYU Law School Professor Richard Wilkins as stating that, "[i]f you can't require monogamy, how in the world can you deny the claims of the polygamists, particularly when it's buttressed by the claim of religion?").

⁹⁴ *Reynolds*, 98 U.S. at 161 (explaining that Reynolds was a Mormon and procured his second marriage under the authority of the Church).

⁹⁵ See *id.* at 146 (noting that the fine for bigamy was up to \$500 and that it was an offense punishable by up to five year in jail); see also ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 458 (3d ed. 1982) ("Polygamy (many marriages) is employed at times as a synonym of bigamy and at other times to indicate the simultaneous marriage of two or more spouses.").

Reynolds argued that his taking of a second wife was a legitimate tenet of his religion.⁹⁶ Therefore, he claimed that he should not lawfully be punished for his conduct.⁹⁷ The Court was then faced with the question of whether the Constitution's Free Exercise Clause forbade Congress from enacting this legislation, or, in other words, whether Reynolds' criminal guilt could be overcome by his religious justification.⁹⁸

In reaching its conclusion, the Court extensively reviewed the rich history of debate among the Founding Fathers as to what type of religious freedom, if any, our citizens should be afforded.⁹⁹ The Court noted that the upshot of these debates was the enactment of the First Amendment, by which "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."¹⁰⁰ The Court then found that polygamy prohibitions fell into the latter, rather than the former category.¹⁰¹ Polygamy was, and remained, a crime contrary to social normalcy.¹⁰²

Writing for the Court, Chief Justice Waite stated that "[p]olygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people."¹⁰³ The Court further noted that second marriages were always void at common law.¹⁰⁴ Furthermore, polygamy was once punishable by death in England and Wales.¹⁰⁵ Although the harsh punishment of execution did not carry over into America, the Court explained that polygamy has always been a punishable offense in our nation.¹⁰⁶ Therefore, the Court wrote that it would defy logic to suggest that the enactment of the First Amendment

⁹⁶ See *Reynolds*, 98 U.S. at 161–62.

⁹⁷ See *id.* at 162.

⁹⁸ See *id.*

⁹⁹ The Court undertook this examination of history because the word "religion" is not defined in the Constitution; this made an historical analysis the appropriate method of determining the true meaning of the First Amendment. See *id.* at 162–66.

¹⁰⁰ *Id.* at 164.

¹⁰¹ See *id.* at 164–65.

¹⁰² See *id.* at 165–66.

¹⁰³ *Id.* at 164.

¹⁰⁴ *Id.* at 164–65 (adding that polygamy cases were tried most often in the ecclesiastical courts to preserve the separation of the ecclesiastical courts from the civil courts).

¹⁰⁵ *Id.* at 165 (noting that it was these same statutes that were modified and reenacted in the American colonies).

¹⁰⁶ See *id.* ("[W]e think it may safely be said there never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity.").

was intended to put a stop to the prohibition of polygamy—instantly transforming it from a social evil into a religious right.¹⁰⁷

Accordingly, the Court discussed the important role that marriage plays in the social order. Marriage is the cornerstone of society.¹⁰⁸ It is not only a “sacred obligation,” but also a civil contract governed by law.¹⁰⁹ Out of marriage grows “social relations and social obligations and duties, with which government is necessarily required to deal.”¹¹⁰ To this end, the Court observed that it is the rightful job of a government to maintain the social order.¹¹¹ Thus, Congress’s proscription of polygamy was a legitimate exercise of its governmental authority.

The Court added that to permit Reynolds and others to exempt themselves from the Morrill Act on the basis of their religious practice of polygamy would be inconsistent with the our nation’s system of freedom of religion as established. “Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.”¹¹² To allow Reynolds to circumvent the Act’s mandate would essentially make him above the law.¹¹³ “Government could exist only in name under such circumstances.”¹¹⁴ Therefore, because Reynolds knowingly entered into a plural marriage,¹¹⁵ the Court sustained his conviction and upheld Congress’s prohibition on polygamy.¹¹⁶

¹⁰⁷ *See id.* (“In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life.”).

¹⁰⁸ *See id.* (commenting that “society may be said to be built” upon marriage).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *See id.* at 166. The Court reasoned as follows:

An exceptional colony of polygamists under an exceptional leadership may sometimes exist for a time without appearing to disturb the social condition of the people who surround it; but there cannot be a doubt that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion.

Id.

¹¹² *Id.*

¹¹³ *See id.* at 166–67 (“To permit this 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.”).

¹¹⁴ *Id.* at 167.

¹¹⁵ The Court went into some detail in examining Reynolds’ *mens rea* in committing the crime of polygamy. In sum, it concluded that all of Reynolds’ actions were undertaken knowingly, thus his conviction was justified under basic criminal law principles. *See id.* (observing that no case has gone as far as to allow those whose conduct consisted entirely of positive criminal acts to escape punishment merely “because he religiously believed the law which he had broken ought never to have been made”).

¹¹⁶ *Id.*

There have been countless cases regarding the Free Exercise and Establishment Clause since *Reynolds*,¹¹⁷ but the Supreme Court has never revisited polygamy in light of contemporary precedent. Thus, *Reynolds* remains a significant hurdle to litigants challenging anti-polygamy statutes. The next section examines whether last year's *Lawrence* decision lowered this hurdle.

II. A COURT DIVIDED: THE LANDMARK *LAWRENCE V. TEXAS* DECISION

This section will recount the Supreme Court's June 2003 decision in *Lawrence v. Texas*.¹¹⁸ The author will review and analyze the majority and dissenting opinions in *Lawrence*¹¹⁹ as they may or may not arise in a challenge to a polygamy prohibition. Justice Scalia and many legal commentators feel as if *Lawrence* radically limits the rights of legislatures to base legislation, in part or in whole, on any moralistic reasoning.¹²⁰ It remains to be seen whether anti-polygamy statutes are vulnerable to attack on this premise.

A. *The Facts Giving Rise to Litigation*

Petitioners John Geddes Lawrence and Tyron Garner were arrested upon the arrival of local police to their private residence.¹²¹ The police were responding to a weapons disturbance, but instead observed the two men engaging in homosexual acts.¹²² The men were charged under a Texas statute criminalizing homosexual sodomy.¹²³ At trial in the Harris County Criminal Court, the men challenged the statute as violative of the Constitution's Equal Protection Clause.¹²⁴ This challenge was rejected,

¹¹⁷ See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (holding that licensing, inspection and zoning approvals to establish a church, including a ritual of animal sacrifice, violated the Free Exercise Clause).

¹¹⁸ 539 U.S. 558 (2003).

¹¹⁹ Justice Clarence Thomas' brief dissenting opinion will not be discussed in this Note. In short, Justice Thomas reasoned that the Texas law was foolish, but within the state legislature's power to enact. He noted that, if given the chance, he would vote to repeal the statute. See *id.* at 605 (Thomas, J., dissenting).

¹²⁰ See discussion *infra* Part II.C.

¹²¹ *Lawrence*, 539 U.S. at 563.

¹²² See *id.* ("The right of the police to enter does not seem to have been questioned.").

¹²³ The applicable state law mandated that "[a] person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." TEX. PENAL CODE ANN. § 21.06(a) (Vernon 2003). The statute then defined "deviate sexual intercourse" as the following: "(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object." *Id.* § 21.01(1).

¹²⁴ *Lawrence*, 539 U.S. at 563.

and the two men eventually plead no contest to the charges.¹²⁵ Upon appeal, the Court of Appeals for the Texas Fourteenth District affirmed the lower court's decision.¹²⁶ The appellate court considered the constitutionality of the statute under the Due Process and Equal Protection Clauses of the Fourteenth Amendment and concluded there was no constitutional violation.¹²⁷ The court found the Supreme Court's 1986 decision in *Bowers v. Hardwick*¹²⁸ to be dispositive of petitioners' due process privacy claims.¹²⁹ The Supreme Court granted certiorari, whereupon it considered the case only in light of the due process claims and revisited its holding in *Bowers*.¹³⁰

B. Flagrantly Vague? The Lawrence Majority

In the majority opinion, Justice Anthony Kennedy noted that the Court granted certiorari to consider three questions: (1) whether the Texas statute violated the Equal Protection Clause of the Fourteenth Amendment; (2) whether the notions of liberty and privacy embodied in the Fourteenth Amendment's Due Process Clause were violated by petitioners' convictions; and (3) whether *Bowers v. Hardwick* should be overruled.¹³¹ The Court, however, decided the case solely on substantive due process grounds, thus avoiding petitioners' equal protection claims.¹³²

If the Court had decided the case on equal protection grounds, it would not likely have been cited in J. Bronson, D. Cook, and G. Lee Cook's complaint.¹³³ This is because judicial recognition of homosexuals as a protected class would not be relevant to a potential liberty interest of Mormons to practice polygamy. Justice O'Connor's concurring opinion took the equal protection route; she would have invalidated the statute as unconstitutionally discriminating between homosexuals and

¹²⁵ *Id.*

¹²⁶ *See Lawrence v. Texas*, 41 S.W.3d 349, 362 (Tex. Ct. App. 2001), *rev'd*, 539 U.S. 558 (2003).

¹²⁷ *See id.* at 350–59.

¹²⁸ 478 U.S. 186 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

¹²⁹ *See Lawrence*, 41 S.W.3d at 359–62 (looking also to historical proscription of sodomy as a justification for the state's right to prohibit conduct based upon its legislature's notion of privacy). The court concluded that “we find no constitutional ‘zone of privacy’ shielding homosexual conduct from state interference.” *Id.* at 362.

¹³⁰ *See Lawrence*, 539 U.S. at 564.

¹³¹ *Id.*

¹³² *See id.* (“[This] case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution.”).

¹³³ *See supra* notes 27–30 and accompanying text.

heterosexuals.¹³⁴ Nonetheless, the majority decided the case exclusively on substantive due process grounds. Notwithstanding the fact that there likely may not have been a majority had the case been decided on equal protection principles,¹³⁵ the majority's choice to frame the issue as one of liberty protected by due process may very well have been a dangerous proposition.¹³⁶

Justice Kennedy began the majority opinion by breaking down the seminal Supreme Court cases decided on substantive due process and right-to-privacy grounds. Noting that the Court has defined broadly the scope of liberty protected by the Fourteenth Amendment,¹³⁷ Justice Kennedy looked first to *Griswold v. Connecticut*.¹³⁸ In *Griswold*, the Court recognized the "right to make certain decisions regarding sexual conduct extends beyond the marital relationship."¹³⁹ Justice Kennedy then went on to consider *Eisenstadt v. Baird*,¹⁴⁰ where the Court reasoned that "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."¹⁴¹ These past cases certainly do not speak to polygamy, but it seems that a necessary corollary of their pronouncements is that decisions about marriage are worthy of even more protection than other personal choices. This sentiment is bolstered by other leading cases dealing with marriage.¹⁴²

¹³⁴ See *Lawrence*, 539 U.S. at 579–85 (O'Connor, J., concurring). O'Connor noted that "Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage." *Id.* at 585.

¹³⁵ See Jerry Elmer, *A Victory for Gay Rights in Lawrence v. Texas*, 52 R.I. B.J. 5, 37 (2003) (observing that "the Court was explicit in explaining that the *reason* it chose not to rely on equal protection is that then Georgia-style anti-sodomy laws would not come within the ambit of the decision.").

¹³⁶ See James W. Paulsen, *The Significance of Lawrence v. Texas*, 41 HOUS. LAW. 32, 37, 38 (2004) (commenting that "the Court's decision to frame the issue as protecting an individual's liberty to engage in private conduct free from state intervention creates a ruling that sweeps broadly" and that "it is hard not to come away with the impression that . . . *Lawrence's* effects will likely ripple across the nation for years to come").

¹³⁷ See *Lawrence*, 539 U.S. at 564–65.

¹³⁸ 381 U.S. 479 (1965).

¹³⁹ *Lawrence*, 539 U.S. at 565.

¹⁴⁰ 405 U.S. 438 (1972).

¹⁴¹ *Id.* at 453.

¹⁴² See, e.g., *Turner v. Safley*, 482 U.S. 78 (1987) (overturning severe restrictions placed on inmate marriages and stating that prison officials must have strong reasons before limiting inmates' rights to marry); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (reasoning that depriving citizens the right to marry based upon race "is surely to deprive all the State's citizens of liberty without due process of law.").

Nonetheless, it is the Court's examination and overruling of *Bowers* where polygamists can potentially gain the most ammunition from *Lawrence*'s majority opinion. In sum, *Bowers* upheld a Georgia statute that criminalized both heterosexual and homosexual sodomy.¹⁴³ In *Bowers*, the justices framed the issue as whether or not there was a fundamental right to engage in sodomy.¹⁴⁴ The *Lawrence* majority noted that framing the issue in that manner was incorrect, because it "disclose[d] the Court's own failure to appreciate the extent of the liberty at stake."¹⁴⁵ The Court then re-examined the issues of *Bowers* and overruled the seventeen-year-old decision.¹⁴⁶

In examining *Bowers*, Justice Kennedy seemingly chose to look at the case's big picture rather than scrutinize the Court's prior reasoning. Justice Kennedy's opinion looked more to the positive rights of homosexuals rather than to the states' ability to infringe upon their freedoms.¹⁴⁷ He viewed the liberty interests at stake more as the right of people to engage in their own private relationships. Granted, much of Justice Kennedy's opinion is phrased in terms of sexual relations, which does not necessarily equate with marriage,¹⁴⁸ but his words acknowledged unequivocally that states should go to great lengths to avoid interfering with a citizen's personal sphere of liberty rights.

In that respect, Justice Kennedy wrote: "The issue is whether the majority may use the power of the State to enforce [its moral] views on the whole society through operation of the criminal law. 'Our obligation is to define the liberty of all, not to mandate our own moral code.'"¹⁴⁹ In light of the Court's eventual holding, this is truly expansive language. Arguably, it can be used to undermine any legislature's attempt to

¹⁴³ See *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (reasoning that "[t]he law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.").

¹⁴⁴ *Id.* at 190 ("The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time.").

¹⁴⁵ See *Lawrence*, 539 U.S. at 566–67 (explaining that the manner in which the *Bowers* Court framed the issue "demeans the claim the individual put forward").

¹⁴⁶ See *id.* at 566–79. In overruling *Bowers*, the Court stated that "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled." *Id.* at 578.

¹⁴⁷ See, e.g., *id.* at 567 (emphasizing that the petitioners' behavior deserves protection, because it involves private, sexual conduct that is generally superior to a state's interest).

¹⁴⁸ See *id.* (commenting that "it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse").

¹⁴⁹ See *id.* at 571 (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 850 (1992)).

influence its processes with moral justifications for certain enactments.¹⁵⁰ To this end, Justice Kennedy reviewed the extensive history of sodomy prohibitions, and the more recent trend of repealing such statutes, both domestically and worldwide.¹⁵¹ He further noted that there was no longstanding American tradition of laws aimed at homosexuality; rather, any laws that remained on the books were rarely enforced.

Moreover, subsequent Supreme Court precedent had diminished *Bowers*' effect such that *stare decisis*' strong, but flexible, command could be circumvented.¹⁵² Of particular relevance to this Note was *Planned Parenthood of Southeastern Pennsylvania v. Casey*.¹⁵³ In *Casey*, the Court reasoned that the substantive component of the Fourteenth Amendment's Due Process Clause provides each citizen with a realm of personal autonomy in which the government should not meddle.¹⁵⁴ Much to the dismay of commentators,¹⁵⁵ and much to the pleasure of polygamists seeking potential constitutional protection for plural marriage, Justice Kennedy quoted extensively from *Casey*. Specifically, he looked to *Casey*'s famed "sweet-mystery-of-life" passage.¹⁵⁶ That passage reads as follows:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of

¹⁵⁰ See Sherry F. Colb, *Welcoming Gay People Back into the Fold: The Supreme Court Overrules Bowers v. Hardwick*, FINDLAW'S LEGAL COMMENTARY, at <http://writ.news.findlaw.com/colb/20030630.html> (June 30, 2003) ("[*Lawrence*] calls into question the State's role as enforcer of morality and suggests that where no one is harmed, decisions must usually be left in the hands of the individual. Though the majority might not be willing to take the principle to its logical conclusion at the moment, some Court might do so in the future.").

¹⁵¹ See *Lawrence*, 539 U.S. at 568–71.

¹⁵² For example, in *Romer v. Evans*, 517 U.S. 620 (1996), the Court held that an amendment to Colorado's Constitution that made it unlawful to protect gays as a defined class was unconstitutional and could not survive even rational basis review. *Id.* at 635–36.

¹⁵³ 505 U.S. 833 (1992).

¹⁵⁴ See *id.* at 847 ("It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. We have vindicated this principle before.").

¹⁵⁵ See, e.g., Gary D. Allison, *Sanctioning Sodomy: The Supreme Court Liberates Gay Sex and Limits State Power to Vindicate the Moral Sentiments of the People*, 39 TULSA L. REV. 95, 142–45 (2003) (extensively critiquing the Court's decision and noting that the Court rather boldly employed *Casey*'s "sweet-mystery-of-life" passage, which was developed in the abortion context, to apply to homosexual sex).

¹⁵⁶ See *Lawrence*, 539 U.S. at 588 (Scalia, J., dissenting) (mocking the majority's reliance on this passage and labeling it dictum).

human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.¹⁵⁷

This is sweeping, powerful language, and Justice Kennedy's quotation of the text seems to reinforce its current vitality. The Court's use of this language not only aids polygamists in their struggle to declare state prohibitions on polygamy unconstitutional, it arguably aids all litigants seeking to shield any asserted interest under the guise of the right to privacy.

In deeming the statute unconstitutional, Justice Kennedy concluded that "[h]ad those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight."¹⁵⁸ This, again, is broad language that can possibly be used by polygamists to argue their cause. Justice Kennedy's other closing language, however, tempers the above to some extent. As the majority opinion winded down, Justice Kennedy finally began to tailor his words to the instant case's specific subject matter. For example, Kennedy stressed that Texas was prohibiting two *adults* from engaging in *homosexual* conduct within the *privacy* of their own *home*.¹⁵⁹ This arguably narrows the scope of the decision.

According to Justice Scalia, however, the general import of the majority opinion goes well beyond validating the petitioners' rights to engage in homosexual sodomy.¹⁶⁰ It speaks to all morals-based legislation. The next section looks at Justice Scalia's dissenting opinion in the context of polygamy challenges.

¹⁵⁷ *Planned Parenthood*, 505 U.S. at 851.

¹⁵⁸ *See Lawrence*, 539 U.S. at 578–79.

¹⁵⁹ *See id.* at 578. Justice Kennedy's opinion reads in pertinent part:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.

Id.

¹⁶⁰ *See id.* at 590 (Scalia, J., dissenting) (explaining that "the Court makes no effort to cabin the scope of its decision").

C. One Angry Man: Scalia's Dissent

In his dissent, Justice Scalia voiced skepticism and criticism regarding the majority's decision.¹⁶¹ Scalia immediately lashed out against the majority's refusal to declare homosexuality a fundamental right and their unwillingness to subject the Texas statute to anything more than "an unheard-of form of rational-basis review."¹⁶² Accordingly, Scalia quickly revealed the theme of his dissent—the majority's opinion "will have far-reaching implications beyond this case."¹⁶³

The conservative jurist that he is, Scalia seemed to be very critical of the majority's approach to *stare decisis*. He accused the majority of applying *stare decisis* in a "manipulative" manner, puppeteering through past cases to reach its desired result.¹⁶⁴ Thus, Scalia disapproved of the majority citing *Casey*'s "sweet-mystery-of-life" passage rather than citing *Casey*'s ultimate holding.¹⁶⁵ The majority's citation to this passage, wrote Scalia, threw a shadow of doubt over the entire opinion and could have future ramifications.¹⁶⁶ *Casey*'s passage is abstract, aspirational prose. If taken to the extreme, defining liberty as a citizen's "own concept of existence" could strip the government of its power over our personal lives,¹⁶⁷ including the right to enter into a plural marriage.

Scalia also critiqued the majority's willingness to dispense with the proposition that the "governing majority's" moral beliefs are capable of providing a rational basis for social legislation.¹⁶⁸ Scalia listed a half dozen past cases that cited *Bowers* and relied on the premise that it is within the rightful power of the government to legislate based partly on

¹⁶¹ At least one commentator revealed in Scalia's dissent. See, e.g., Colb, *supra* note 150 ("Almost as satisfying as the Court's recognition of how destructive and mean-spirited the *Hardwick* decision was, is Justice Scalia's rage at its passing. One need only read the tone of his dissent to know what a monumental event *Lawrence v. Texas* really is.").

¹⁶² See *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting).

¹⁶³ See *id.*

¹⁶⁴ See *id.* at 587 ("I do not myself believe in rigid adherence to *stare decisis* in constitutional cases; but I do believe that we should be consistent rather than manipulative in invoking the doctrine.").

¹⁶⁵ See *id.* at 588.

¹⁶⁶ See *id.*

¹⁶⁷ There certainly are public aspects to marriage that seemingly extend beyond those matters covered in *Casey*'s "sweet-mystery-of-life" passage, but the personal nature of marriage might be included in the passage's breadth. The public/private characterizations that can be used in arguments distinguishing polygamy from homosexual sodomy will be discussed in Part III of this Note.

¹⁶⁸ *Lawrence*, 539 U.S. at 589 (observing that "[c]ountless judicial decisions and legislative enactments have relied on [this] ancient proposition").

morality.¹⁶⁹ Thus, Scalia wrote the following controversial, headline-grabbing passage:

State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding. The impossibility of distinguishing homosexuality from other traditional "morals" offenses is precisely why *Bowers* rejected the rational-basis challenge

What a massive disruption of the current social order, therefore, the overruling of *Bowers* entails.¹⁷⁰

While it seems far-fetched to think that expanding the rights of homosexuals will compel courts to declare unconstitutional bestiality and similar statutes, Scalia makes a legitimate point.¹⁷¹ Granted it is often difficult to separate the message from the messenger, but as Scalia noted, the *Lawrence* majority seemingly withdrew morals-based legislation from the government's inventory of permissible actions. States will now need to look beyond traditional morals in enacting legislation.¹⁷² Whether polygamy statutes are susceptible to constitutional attack on this premise will be discussed in the next section, but the argument can certainly be made.

Justice Scalia's dissenting opinion further criticized the majority for allegedly taking a result-oriented approach towards antisodomy laws.¹⁷³ Scalia lambasted the majority for relying on the notion that antisodomy laws were rarely enforced "against consenting adults acting in private" because according to the majority it is obvious that such conduct is very

¹⁶⁹ See *id.* at 589–90. One case Scalia cited was *Milner v. Apfel*, 148 F.3d 812 (7th Cir. 1998), where the Seventh Circuit cited *Bowers* in noting that "[l]egislatures are permitted to legislate with regard to morality rather than confined to preventing demonstrable harms." *Id.* at 814 (citations omitted).

¹⁷⁰ *Lawrence*, 539 U.S. at 590–91 (citations omitted).

¹⁷¹ One would be hard-pressed to deny that states could not come up with plausible, non-morals-based reasons, for prohibiting bestiality.

¹⁷² See *Lawrence*, 539 U.S. at 577–78 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 217 (1986) (Stevens, J., dissenting), *overruled by* *Lawrence v. Texas*, 539 U.S. 558, 578 (2003)) ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice' . . . Justice Stevens' analysis . . . should control here.").

¹⁷³ See *id.* at 596.

unlikely to be prosecutable.¹⁷⁴ Scalia pointed out that, notwithstanding the difficulty of building a case against a person engaging in homosexual sodomy, over two hundred reported prosecutions have taken place.¹⁷⁵ Moreover, Scalia observed that, in contrast to the majority's assertions, states have continually prosecuted adults acting in the privacy of their homes "in matters pertaining to sex."¹⁷⁶ Were they not to prosecute such crimes, child pornography, incest, and prostitution would go unpunished.¹⁷⁷

Scalia concluded his discussion of due process by reinforcing his view that Texas' antisodomy statute is constitutional as supported by a rational basis.¹⁷⁸ "The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are 'immoral and unacceptable.'"¹⁷⁹ The majority's decision to deem Texas' statute as without a rational basis, wrote Scalia, essentially leaves states powerless. Scalia proclaimed that "[t]his effectively decrees the end of all morals legislation."¹⁸⁰ Being that courts have viewed polygamy as "immoral" and "barbaric," there is a justifiable question as to where polygamy statutes stand after *Lawrence*.¹⁸¹ The next section considers this question.

III. IS *LAWRENCE* FATAL TO POLYGAMY PROHIBITIONS?

Much has and will be written on whether *Lawrence* was the death knell of institutionalized discrimination against homosexuals in America.¹⁸² This section, however, examines whether *Lawrence*'s mandate was powerful enough to overturn polygamy prohibitions on the

¹⁷⁴ See *id.* at 597 (stating sarcastically that "consensual sodomy . . . is rarely performed on stage").

¹⁷⁵ *Id.* (adding that "[t]here are also records of 20 sodomy prosecutions and 4 executions during the colonial period").

¹⁷⁶ See *id.*

¹⁷⁷ See *id.* at 598 ("In any event, an 'emerging awareness' is by definition not 'deeply rooted in this Nation's history and tradition[s],' as we have said 'fundamental right' status requires." (alteration in original)).

¹⁷⁸ See *id.* at 599 ("[The] proposition [that Texas' statute has no rational basis] is so out of accord with our jurisprudence—indeed, with the jurisprudence of *any* society we know—that it requires little discussion.").

¹⁷⁹ *Id.* (citing *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003)).

¹⁸⁰ *Id.*

¹⁸¹ See Harmer-Dionne, *supra* note 69, at 1302.

¹⁸² See, e.g., Richard Brookhiser, *Now That Sodomy is Legal, Is Gay Marriage Far Behind?*, N.Y. OBSERVER, July 28, 2003, at 1; David L. Hudson, Jr., *Court Won't Tie Lawrence to Gay Adoption Law*, 3 NO. 5 ABA J. E-REP., Feb. 6, 2004, at 1; Tony Mauro, *Double-Edged Ruling: Lawrence v. Texas a Boon For Gay Rights – Or is it?*, THE RECORDER, Feb. 9, 2004, at 1.

basis that they violate polygamists' right to privacy. By making several key distinctions between the right to enter into a polygamous marriage and other freedoms protected under the guise of the right to privacy, this section concludes that *Lawrence* may not be the springboard Justice Scalia's dissent claimed. Polygamy is distinct from homosexual sodomy and is sufficiently justified on non-morals-based reasoning such that the status quo is likely to carry forward.

A. Outlawing Polygamy as a Moral Prohibition

To argue that America's polygamy prohibitions were not put into place based on moral principles would be an exercise in futility. The majority of nineteenth century Americans opposed the practice.¹⁸³ In fact, they condemned it. "[O]pponents [of polygamy] believed that traditional monogamy was necessary to the survival of decent civilization. They associated polygamy not with love, but with uncontrolled and unnatural lust."¹⁸⁴ Therefore, Congress enacted several pieces of legislation to counteract this perceived moral predicament.¹⁸⁵ Most noteworthy is the Morrill Act, which outlawed polygamy in all of the Territories.¹⁸⁶ Though challenged on free exercise grounds, the Supreme Court's language in upholding the Act confirmed that polygamy prohibitions were in part morals-based.¹⁸⁷ Chief Justice Waite's majority opinion in *Reynolds v. United States* essentially belittled polygamy—noting, among other things, that "[p]olygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people."¹⁸⁸ Even a cursory glimpse at the *Reynolds* decision reveals the moral undertones in the Court's reasoning; the Court undoubtedly treated polygamy as immoral, uncivil conduct.¹⁸⁹

Thus, if courts interpret *Lawrence* as expansively as the text arguably reads, polygamy prohibitions may be in hot water. The *Lawrence* majority dispensed with *Bowers* and did an about-face on the issue of whether states

¹⁸³ See David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53, 61–65 (1997).

¹⁸⁴ *Id.* at 64. See generally Sarah Barringer Gordon, "The Liberty of Self-Degradation": Polygamy, Woman Suffrage, and Consent in Nineteenth Century America, 83 J. AM. HIST. 815 (1996) (discussing public opinion on nineteenth century Mormon women).

¹⁸⁵ See *supra* notes 74–80 and accompanying text.

¹⁸⁶ The Morrill Act, § 1, Pub. L. No. 37-126, 12 Stat. 501, 501 (1862) (repealed 1910).

¹⁸⁷ See *Reynolds v. United States*, 98 U.S. 145, 162, 164 (1878).

¹⁸⁸ *Id.* at 164.

¹⁸⁹ See Kincaid, *supra* note 64, at 85 (stating that the *Reynolds* Court "held that rights abuses could be determined by standards found in prevailing practices and customary norms").

can use the power of the majority to instill moral views on all of society.¹⁹⁰ *Lawrence* says morality should play no part in determining the scope of liberty under the Due Process Clause.¹⁹¹ In enacting the Morrill Act, Congress specifically targeted the religious views of the Mormons,¹⁹² as evidenced by the Act's mandates.¹⁹³ Moral and religious views, however, are often so intertwined that they are virtually indistinguishable. Therefore, moral views *alone* cannot substantiate prohibiting polygamy. Nonetheless, sufficient external justification exists such that polygamy prohibitions appear to be safe for the time being. The next section examines several of these non-morals-based rationales for upholding polygamy.

B. Why the Right to Privacy Can be Expanded Without Compromising the Ability to Proscribe Polygamy

Justice Scalia was quick to predict that *Lawrence* would lead to the elimination of all morals-based legislation.¹⁹⁴ Arguably, though, very few pieces of legislation are supportable by looking only to the moral views of the majority. Laws prohibiting prostitution, for example, can be sustained on the basis of non-moralistic justifications. Prostitution involves more than merely the ethical quandary of whether our society should permit the exchange of sexual favors for money; prostitution laws are also premised largely on safety concerns for the women involved.¹⁹⁵ Similarly, polygamy prohibitions can be justified on other-than-purely moralistic reasons. The following will explain how.

¹⁹⁰ See *Lawrence v. Texas*, 539 U.S. 558, 571 (2003).

¹⁹¹ See *id.* (explaining that the Court's "obligation is to define the liberty of all, not to mandate [its] own moral code").

¹⁹² See Richard Collin Mangrum, *Good News Club v. Milford Central School: Teaching Morality From a Religious Perspective on School Premises After Hours*, 35 CREIGHTON L. REV. 1023, 1037–38 (2002). Mangrum summarized the Act:

The Morrill Act, enacted in 1862, not only targeted the religious practice of polygamy, but also the Mormon church's corporate structure and power. The second section of the Act both revoked an 1855 act of the Utah Territorial Legislation incorporating the Church of Jesus Christ of Latter-Day Saints and annulled any territorial legislation that countenanced polygamy. The third section was aimed at the economic power of the Mormon church, prohibiting any religious or charitable organization in any territory from holding real estate valued at more than \$50,000.

Id.

¹⁹³ See *id.*

¹⁹⁴ See *supra* notes 160–81 and accompanying text.

¹⁹⁵ See Marjorie E. Murphy, *Book Review: A Question of Procurement: Not Prostitution*, 87 COLUM. L. REV. 1075, 1076 (1987) (acknowledging public health and safety concerns "underlie the prohibition against prostitution").

1. Marriage is Not Sex: The Public/Private Distinction

Lawrence was first and foremost about the rights of consenting adults to engage in homosexual conduct within the privacy of the home.¹⁹⁶ The protection of this liberty interest, which is sexual in nature, does not lead inescapably to the conclusion that Americans must soon enjoy the right to enter into plural marriages. Although courts must now look beyond morality when ruling on legislation, the notion that protecting intimate sexual conduct leads to wholesale marital freedom seems to be nothing more than wishful thinking.

Marriage is generally regarded as a legal status, though often entered into through religious ceremonies.¹⁹⁷ Marriage is more than the ability to have sex with your spouse. Furthermore, despite the claims of many opponents of same-sex marriages,¹⁹⁸ marriage is more than simply a vehicle for procreation. Marriage—notwithstanding today’s tremendous public debates that may one day reshape our society’s views—is about a relationship between two people. With this relationship come certain rights and responsibilities and a lifetime of commitment. To equate the sexual intimacy discussed in *Lawrence* with marriage would be to demean this venerated institution. At the heart of *Lawrence* was sex; it requires way too many inferential leaps for *Lawrence* to speak to marriage. Courts are unlikely to take such leaps.¹⁹⁹

¹⁹⁶ See *Lawrence*, 539 U.S. at 578 (Kennedy, J.) (“The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. . . . Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.”).

¹⁹⁷ See *Marriage as Contract and Marriage as Partnership: The Future of Antenuptial Agreement Law*, 116 HARV. L. REV. 2075, 2076 (2003). One commentator noted:

Historically, judicial opinions discussed marriage in purely public status terms, emphasizing public-policy-driven state regulation of the institution of marriage and focusing on the state’s role in preserving and protecting the marital relationship. Two more modern conceptions of marriage, however, treat it as a quasi-contract or as an analogue to a commercial partnership.

Id.

¹⁹⁸ As the debate over same-sex marriages rages on, one common argument of opponents is that marriage is largely about the potential to produce offspring. We will see how this debate plays out, but with the onset of civil disobedience in issuing marriage licenses and a growing public sentiment recognizing gay rights, permissible same-sex marriages may not be too far in the distant future.

¹⁹⁹ But see Gillett, *supra* note 45, at 534 (“Laws restricting polygamy do not uphold the sanctity of marriage. . . . The extra marriages do not cheapen the polygamists’ respect for marriage as an institution or their marital responsibilities.”); Jeff Jacoby, *Is Lawful Polygamy Next?*, TOWNHALL.COM, at <http://www.townhall.com/columnists/jeffjacoby/printj20040116.shtml> (Jan. 16, 2004) (stating that if courts follow the Supreme Court in *Lawrence* and the Massachusetts Supreme Court, then “the damage inflicted on marriage as we know it—indeed, on the social order as we know it—will be considerable”).

Sexual intercourse, as most people understand it, is a private matter that takes place between consenting adults in the bedroom. It is the most intimate behavior in which the citizenry engages. *Lawrence* spoke to this discreet, personal activity. Marriage, on the other hand, includes both public and private conduct. Within the privacy of the home, marriage means essentially whatever the married individuals wish it to mean. Nonetheless, marriage extends beyond the confines of the home to our society. It is a relationship created by the laws of the state.²⁰⁰ With a marriage flow significant benefits from the state,²⁰¹ including public recognition of the relationship. Intimate sexual activity simply does not correspond to marriage on this level. The sole logical reading of *Lawrence* is that the “autonomy of self” that the majority attempted to reinforce speaks to private sexual conduct rather than marriage, which encompasses both a public and private dynamic.²⁰²

2. Polygamy Prohibitions as Regulating the Secondary Effects of Plural Marriage

Anti-polygamy statutes can be rooted on much more than outlawing a tenet of fundamental Mormonism or preserving the traditional paradigm of what constitutes a marriage. There are numerous external reasons for forbidding a person from entering into a plural marriage. This section documents some of the noteworthy, non-moralistic bases upon which anti-polygamy statutes can be grounded. The author does not maintain that this list is exhaustive. Rather, it is illustrative of proof to which legislative bodies can point in justifying prohibitions on polygamy. This section relies largely on evidence concerning fundamentalist Mormon activity in Utah.

a. Anti-polygamy Statutes as Vehicles for Child Protection

Prohibitions on polygamy can be grounded on a state’s desire to safeguard children. This logic is twofold: states want to protect children from being forced into polygamous marriages, and states also want to protect children born of these marriages.

²⁰⁰ See, e.g., UTAH CODE ANN. § 30-1-7 (1998) (requiring marriage licenses); *id.* § 30-1-1 (voiding incestuous marriages); *id.* § 30-1-2.2 (validating all interracial marriages).

²⁰¹ These benefits include, among countless other things, inheritance rights, the ability to sue on behalf of your spouse, and tax incentives.

²⁰² See *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

i. Teenage Wives

Polygamous wives are often teenagers.²⁰³ In some communities, male polygamists “consistently marry [girls] between the ages of fourteen and sixteen.”²⁰⁴ Often, the age disparity between husband and wife is upward of twenty years or greater.²⁰⁵ Religious leaders and family members often fix these marriages.²⁰⁶ Romantic initiation of polygamous relationships is the exception rather than the norm.²⁰⁷ This coercion deprives these young women of both their independence and their childhood. In the name of religion, older men take advantage of these teenage girls, placing tremendous pressure on them.²⁰⁸ Moreover, even when a polygamous marriage is authorized—insofar as it is the husband’s first marriage—the parental consent needed to issue a marriage license to a couple that includes an underage girl is often given without taking into consideration the young girls’ feelings.²⁰⁹

The above brings to light the issue of statutory rape. Many argue that statutory rape is prevalent in Mormon polygamy.²¹⁰ Teenage girls are often unaware such laws exist²¹¹ and regardless, fear violent retribution

²⁰³ See Strassberg, *supra* note 74, at 366 (explaining that teenage plural wives are a reality of polygamy).

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ See *id.* at 366 (“At most, there may be a ‘brief, business-like . . . courtship’ after the older potential husband has been approved for polygymous marriage by the religious hierarchy and by the girl’s father.”) (quoting D. MICHAEL QUINN, *Plural Marriage and Mormon Fundamentalism*, in *FUNDAMENTALISMS AND SOCIETY* 257–58 (Martin E. Marty & R. Scott Appleby eds., Univ. Chicago Press 1993)).

²⁰⁷ See *id.* at 366–67 (commenting that such marriages “are rarely, if ever, the result of a naturally developing romantic relationship between peers”).

²⁰⁸ See *id.* at 366–68 (describing classic stories about teenage plural wives).

²⁰⁹ See *id.* at 381–89 (concluding that teenage female consent is artificial and more of a result of religious pressure from the community and parental demands, rather than from autonomous deliberation). One interesting topic Strassberg discusses is the complex dynamics involved in the teenage female’s decision-making process. See, e.g., *id.* at 385 (discussing the role of impending motherhood in teenager’s consent to enter into plural marriages). Although the author relies extensively on Strassberg’s work, other commentators criticize Strassberg for emphasizing the negative aspects of polygamy. See, e.g., Chambers, *supra* note 183, at 81 (“To my reading, the actual experiences of American men and women in plural marriages seems more complex and less sinister than Strassberg portrays them I wish that . . . Strassberg, whose work I admire, had approached [her] inquiry into polygamy more open-mindedly and sympathetically.”).

²¹⁰ See Strassberg, *supra* note 74, at 377–81.

²¹¹ See Egan, *supra* note 49, at 54–55 (quoting a former plural wife as stating, “I was in my late 20’s before I even knew there was a law against statutory rape When I finally got out, at age 28, I had the knowledge of the outside world of an 11-year-old.”).

should they protest.²¹² This is compounded by the isolationism of polygamous communities.²¹³ Crimes are harder to police in such communities.²¹⁴ Furthermore, incest and child abuse are said to be common among Mormon fundamentalists.²¹⁵ This is due both to the aforementioned isolationism and to a general absence of disdain for these wicked practices in certain segments of the Mormon community. One former polygamist wife proclaimed that polygamy is tantamount to “organized crime, operating under the cover of religion.”²¹⁶ Therefore, polygamy must be within the power of the government to regulate. Moreover, section III.B.2.b. of this Note, *infra*, will discuss additional problems associated with wives of all plural marriages—regardless of a woman’s age upon entering the marriage.

ii. Children of Polygamous Marriages

Clearly, children born of plural marriages are raised in an environment where young women are subject to the conduct described above. All children of plural marriages, however, are potentially damaged in many other ways by virtue of their being born and raised by polygamous parents. Arguably, they are raised in an environment that “denies [them] their rights.”²¹⁷ Often these children grow up without the presence of a

²¹² Granted, many polygamous men could avoid statutory rape laws if they were able to obtain a state license prior to their marriages. *See* Strassberg, *supra* note 74, at 378 (stating that “sexual relations in the context of a valid marriage to a minor is a defense to what otherwise would be statutory rape”).

²¹³ Because they are set apart from mainstream society, many polygamist communities are able to evade governmental oversight. *See id.* at 405–412. Strassberg summarized this notion in pertinent part:

The survival and growth of both polygyny and associated theocracies inevitably require a diversion of resources from the secular government and society. With these resources, religious institutions have the ability to create a small-scale theocratic kingdom within the state. They can insulate themselves from general government oversight and control by buying isolated tracts of land large enough to support an entire community, owning community businesses that provide employment, privately duplicating state services such as schools, and buying political power and protection for their theocracy.

Id. at 409.

²¹⁴ *See id.* at 410 (describing the characteristics of Mormon communities).

²¹⁵ *See, e.g.,* WIN News, *Polygamy Practiced by Mormons and Tolerated in Utah*, 24 LEXINGTON 77, 77 (1998) (discussing crimes associated with Mormon polygamy).

²¹⁶ *See* Egan, *supra* note 49, at 52 (examining the plight of polygamy “survivors”).

²¹⁷ *See* Forbes, *supra* note 77, at 1544–45 (explaining that opponents of polygamy believe that “when a teenage girl marries an older man, she is essentially being killed off and deprived of a normal childhood”). *But see* Gillett, *supra* note 45, at 534 (arguing that anti-polygamy statutes do not protect children because prosecutions remove fathers from their lives).

father and are raised largely by an overwhelmed mother.²¹⁸ Insufficient financial support frequently becomes an issue.²¹⁹ This takes the form of a general deficiency of funds, as well as non-payment of child support.²²⁰ Additionally, in some fundamentalist Mormon communities, children are housed in structures resembling “half-finished motels or dormitories.”²²¹ These living conditions do not bode well for children’s emotional well-being.²²²

One academic anthropologic study of Arab-Israeli adolescents born of polygamous marriages documented significant mental health problems associated with polygamous families.²²³ Granted, Muslim polygamy does not wholly equate with Mormon polygamy, but the results of the study remain disturbing.²²⁴ It was documented that “husbands often favor the junior wife and accord her and her children greater levels of economic and social support.”²²⁵ This situation, perhaps the epitome of a dysfunctional family, was shown to significantly affect the self-esteem and mental well being of the children.²²⁶ These children demonstrated greater levels of

²¹⁸ *But see* Forbes, *supra* note 77, at 1544 (“Polygamous family life provides a very effective social re-enforcement for children. Having multiple wives allows for increased supervision of young children. It is a mother’s duty to nurture her children, and fundamentalist women make that a primary goal each day.”).

²¹⁹ Money also factors into a different argument opposing polygamy. Some proponents fear that legalizing polygamy will allow wealthy men a monopoly on wives and prohibit poor men from attracting wives. *See* Chambers, *supra* note 183, at 82 (arguing that this scenario is conceivable but unlikely because polygamy will likely never become the norm).

²²⁰ *See* Strassberg, *supra* note 74, at 408–09 (noting that the illegal and thus unlicensed nature of polygamy hinders states from forcing fathers to pay paternity payments).

²²¹ *See* Egan, *supra* note 49, at 54 (discussing the Hillsdale and Colorado City communities).

²²² The reproduction rate of polygamous families is consistently increasing, yet the best interests of the children seem to be consistently ignored. *See id.* (explaining that the reproduction rate allows one town’s population to increase by ten percent annually and noting that husbands will not allow their wives to use birth control); *see also supra* note 64 (describing the Mormons’ rate of growth).

²²³ *See generally* Alean Al-Krenawi et al., *Mental Health Aspects of Arab-Israeli Adolescents From Polygamous Versus Monogamous Families*, 142 J. SOC. PSYCHOL. 446 (2002) (undertaking a comparative study of 101 Arab Muslim adolescents from polygamous and monogamous families).

²²⁴ *See id.* at 448 (“[I]t is essential to note that Islam allows a man to marry upwards of four wives, under several preconditions. He must possess sufficient financial resources to support all wives and their children; treatment, support, love, and attention accorded each wife must be symmetrical”); *see also* Valerie Richardson, *Two Many Wives*, INSIGHT ON THE NEWS, May 7, 2001, at 32 (recounting the tale of Mormon Rulan Jeffs who is said to have at least sixty wives, some of whom are an astounding seventy years younger than he).

²²⁵ Al-Krenawi, *supra* note 223, at 456.

²²⁶ *See id.* (“Such problematic maternal psychosocial dynamics . . . may adversely influence adolescents’ self-identity, self-esteem, and psychological well-being.”). *But see* Forbes, *supra* note 77, at 1546 (“[M]any children thrive in polygamous families. Children are never without a

depression than children from monogamous families.²²⁷ Significant familial tension arose from the inter-family dynamic, and, notably, these children displayed lower levels of academic success.²²⁸ Of course, these results cannot be altogether generalized to American children in polygamous families. Nonetheless, they should not be ignored. The United States goes to great lengths to protect the rights of its children.²²⁹ Children born of polygamous marriages have no choice in the matter.²³⁰ The government, on the other hand, has the choice not to sanction the installation of children into such circumstances.

b. The Effects of Plural Marriage on the Myriad of Wives

The evidence is abundant that fundamentalist Mormon polygamy is potentially physically and emotionally damaging to women.²³¹ There are always two sides to every story,²³² but tales of emotional abuse are quite prevalent.²³³ Once in a plural marriage, many endure “an experience of complete exploitation: sexual, emotional, reproductive, and economic.”²³⁴ Sex is demanded of polygamous wives.²³⁵ Intercourse is frequently the

play group and might not face some of the ordinary social problems that children in mainstream society face. Children of polygamous families build strong bonds with their sisters and brothers, and with other polygamous children.”)

²²⁷ See Al-Krenawi, *supra* note 223, at 457 (noting that these results were “not surprising in light of potential family tensions, hostility, and miscommunication, as well as lower levels of self-esteem, perceived academic achievement, and perceived parental support”).

²²⁸ See *id.* (recognizing the limited sampling of adolescents from polygamous families in the study).

²²⁹ It does not seem to be a stretch to say that the protection of children is a paramount concern in our government. There are countless examples of this, one being the truly remarkable American public education system—at all levels of schooling—as compared to other nations.

²³⁰ Of course, no children have a choice as to who their parents are. Nonetheless, it seems the state should take all reasonable measures to ensure the well being of children. Arguably, anti-polygamy statutes are one such measure.

²³¹ See generally Sandra Dallas, *Polygamy’s Victims Find Their Voice*, BUS. WK, Sept. 11, 2000, at 4 (noting that former plural wives say the practice of polygamy is “fundamentally degrading and rife with rape, incest, and abuse.”).

²³² See, e.g., Richardson, *supra* note 224, at 30 (discussing the success of fundamental Mormon Dr. Jerry Thompson, who has two wives, professional success, and family happiness). Richardson also provided some insight into a male polygamist’s psyche. See *id.* at 33 (“Thompson would be the first to attest that the life of a polygamist husband is not the erotic fantasy it’s cracked up to be. Balancing the emotional needs of two wives and dealing with their inherent jealousies and insecurities is more taxing than most men realize . . .”).

²³³ See, e.g., Dallas, *supra* note 231, at 4 (describing the saga of Kaziah M. Hancock, who struggled to escape from an abusive Mormon polygamous marriage).

²³⁴ Strassberg, *supra* note 74, at 395–96.

²³⁵ See, e.g., *id.* at 366–68 (recounting the story of Mary Ann Kingston, a sixteen-year-old girl who was forced to sexually consummate her arranged polygynous marriage to her thirty-two-year-old uncle); see also Egan, *supra* note 49, at 54 (discussing the introduction of Viagra in the Mormon community).

result of threats and coercion.²³⁶ In many respects, the relationship evolves into something akin to slavery.²³⁷ Often, wives find themselves unable to deal with the reality of their husbands' other wives.²³⁸ The sentiment that they are unable to escape the relationship once entering in to it only makes things worse.²³⁹ Women feel trapped due to, among other things, their many children and their financial dependence on the benevolence inherent in polygamous communities.²⁴⁰ This is compounded by Mormon doctrine that condemns wives for leaving their families.²⁴¹ Thus, polygamy potentially sentences women to a lifetime of emotional uncertainty and despair.

In light of the above, many commentators decry polygamy as sanctioning the subordination of women.²⁴² There is not as much evidence of this subordination in contemporary Mormon polygamy as in the past;²⁴³ nonetheless, polygamous wives remain inferior to their husbands. They

²³⁶ See Strassberg, *supra* note 74, at 377–81.

²³⁷ See Gordon, *supra* note 36, at 764–71 (analytical comparison of polygamy and slavery); see also Kincaid, *supra* note 64, at 82 (discussing the intersection of the anti-polygamy and antislavery movements and noting that Harriet Beecher Stowe “became an ardent” opponent of polygamy).

²³⁸ See Strassberg, *supra* note 74, at 395–96. Strassberg described this phenomenon of jealousy:

One reality ‘survivors’ of polygyny found that they were unprepared for was the emotional devastation caused by sharing their husband with one or more women. It is clear that these women entered plural marriages believing that their emotional need to be loved by their husband would be met and that any jealousy of other wives could be overcome by religious belief. They had a fantasy of a romantic marriage in which they charitably shared their husband with a less fortunate woman who was not an emotional threat. For these survivors, the reality of polygyny was sex without emotional intimacy, intense loneliness and isolation, and feelings of jealousy that shook either their faith in God or their sense of their own worthiness to God.

Id. at 395; see also J.E. Hulett, Jr., *Social Role and Personal Security in Mormon Polygamy*, 45 AM. J. SOC. 542, 549–53 (1940) (examining the elements that produce insecurity in plural wives, including “a very real danger that [they will] be refused a share in the husband’s estate”).

²³⁹ See Strassberg, *supra* note 74, at 400–05 (“[S]ignificant factors making it difficult for some polygynous women to escape polygyny include rural isolation, ignorance of legal options, and lack of economic opportunities and legal resources.”).

²⁴⁰ See *id.* at 400–01 (commenting that “[i]t is difficult to understand whether this [fear of losing their children is] based in practical reality or religious belief”).

²⁴¹ See *id.* at 401.

²⁴² There is widespread belief that polygamous marriages subordinate the interests of women to those of men. See generally Strassberg, *supra* note 74, at 394–402 (exploring the victimization of women in polygamous marriages).

²⁴³ See James M. Donovan, *Rock-Salting the Slippery Slope: Why Same-Sex Marriage is Not a Commitment to Polygamous Marriage*, 29 N. KY. L. REV. 521, 579–81 (2002) (discussing the effect of women’s voting rights in the social progress of polygamous women and explaining why “[t]here is good reason to doubt that Mormon women view[] themselves as degraded, especially as compared to their female contemporaries”).

are second-class citizens to the marriage.²⁴⁴ To that end, one prominent anti-polygamy advocacy group, formed by former polygamous wives, counts the following as reprehensive characteristics of polygamous marriages: “[m]ales are believed to have more rights and abilities than females,” “leadership is never shared,” and women are “prohibit[ed] [from] critical analysis and independent thinking.”²⁴⁵ Conduct that forces such feelings onto state citizens appears to raise legitimate concerns upon which the government can regulate intrastate relationships.

Granted, there is less of a justification for state interference in that many women knowingly consent to enter into plural marriages.²⁴⁶ In this situation, however, concerns about the authenticity of their consent as well as for the eventual children of these marriages, must also be considered.²⁴⁷ In fact, legislatures should always look to the cumulative effect of all non-moralistic reasons for prohibiting polygamy when enacting legislation. In this respect, they should likewise consider possible reasons for outlawing polygamy that are not examined in this Note, including the potential for polygamists’ abuse of U.S. taxation laws²⁴⁸ and the dependence of countless state laws on the monogamous marital relationship.²⁴⁹

CONCLUSION

It appears as if anti-polygamy statutes need not be overturned in light of *Lawrence*. Justice Scalia, however, was correct to say that the majority’s opinion raises the threshold of legislative proof needed before enacting legislation. Moral reasons, unaccompanied by external justifications, are no longer sufficient to maintain a state’s right to criminalize certain behavior. Nonetheless, legitimate external justifications exist to support polygamy statutes such that the status quo will likely remain. Hopefully, however, the Supreme Court will perceive a future challenge to polygamy prohibitions as an appropriate vehicle by

²⁴⁴ See Al-Krenawi, *supra* note 223, at 455–57 (discussing the deleterious effects of polygamy on wives).

²⁴⁵ Tapestry Against Polygamy, *Danger Signs of Abuse Within a Polygamous Relationship*, at <http://www.polygamy.org/dangersigns.shtml> (last visited Oct. 2, 2004). Tapestry Against Polygamy is at the frontlines of the battle against polygamy. See generally Richardson, *supra* note 224, at 31–32 (discussing the evolution of Tapestry Against Polygamy as well as certain cases that brought the group’s cause into the spotlight).

²⁴⁶ See Strassberg, *supra* note 74, at 390–94 (discussing the large amount of adult women who chose to convert to Mormonism later in life).

²⁴⁷ It is extremely difficult to say whose rights or which reasoning should trump in this situation. Thankfully, the issue is beyond the scope of this Note.

²⁴⁸ The author did not examine this because the evidence is largely anecdotal.

²⁴⁹ See, e.g., *Potter v. Murray City*, 760 F.2d 1065, 1070 n.8 (10th Cir. 1985) (listing nine Utah laws that “are premised upon monogamy”).

which it can examine these statutes in light of both substantive due process and the First Amendment's religion clauses.