COMMENT*

POLYGAMIST EYE FOR THE MONOGAMIST GUY:[1] HOMOSEXUAL SODOMY . . . GAY MARRIAGE . . . IS POLYGAMY NEXT?

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* This Comment was the recipient of the 2005 Weil, Gotshal & Manges LLP Award for the best paper in the area of civil rights. The Author does not advocate polygamy. This Comment serves solely to analyze whether the legalization of homosexual sodomy, if ultimately extended to mandate recognition of same-sex marriage, strengthens polygamists' claim of a constitutional right to adult, consensual plural marriage.

1. The title of this Comment alters the name of a popular television show, *Queer Eye for the Straight Guy*, a show about five gay men "out to make over the world one straight guy at a time." Bravotv.com, Queer Eye for the Straight Guy, http://www.bravotv.com/Contestants/ (last visited Jan. 12, 2006). The Author also acknowledges Jonathan Turley, Commentary, *Polygamy Laws Expose Our Own Hypocrisy*, USA TODAY, Oct. 4, 2004, at 13A, for coining the phrase used in this title.

I. INTRODUCTION

The November 2004 elections propelled marriage onto center stage.[2] Voters in eleven states overwhelmingly passed ballot measures defining marriage as a union between one man and one woman.[3] The passage of these eleven amendments, and two subsequent amendments in 2005, increases the total number of states in which voters have approved constitutional measures limiting marriage to a heterosexual, monogamous couple to eighteen since President Clinton signed into law the Defense of Marriage Act (DOMA) on September 21, 1996.[4] DOMA defines

2. *See* INITIATIVE & REFERENDUM INST., UNIV. S. CAL., BALLOTWATCH: 2004 ELECTION SUMMARY 1 (2004), http://www.iandrinstitute.org/BW%202004-10%20(Election%20Summary).pdf (summarizing the 2004 election cycle and concluding that "[t]he most popular issue [in the elections] was marriage").

3. *Id.* at 1–6. The eleven states include the following: Arkansas, 75% to 25%; Georgia, 77% to 23%; Kentucky, 75% to 25%; Michigan, 59% to 41%; Mississippi, 86% to 14%; Montana, 67% to 33%; North Dakota, 73% to 27%; Ohio, 62% to 38%; Oklahoma, 76% to 24%; Oregon, 57% to 43%; and Utah, 66% to 34%. *Id.*

4. In addition to the eleven states which approved constitutional prohibitions to same-sex marriage in November 2004, voters previously approved similar bans in five other states, namely Alaska, Louisiana, Missouri, Nebraska, and Nevada,. *See* Stephen Buttry & Leslie Reed, *Voters OK Same-Sex Union Ban*, OMAHA WORLD HERALD, Nov. 8, 2000, at A1 (reporting Nebraska voters' approval of a constitutional same-sex marriage ban); Alan Cooperman, *Same-Sex Bans Fuel Conservative Agenda*, WASH. POST, Nov. 4, 2004, at A39 (enumerating the passage of constitutional bans in thirteen states in 2004); Elaine Herscher, *Same-Sex Marriage Suffers Setback: Alaska, Hawaii Voters Say No*, S.F. CHRON., Nov. 5, 1998, at A2 (reporting Alaska's approval by a 2 to 1 margin for a same-sex marriage ban to be added to the state constitution); *The Nation Votes: A State-by-State Summary of Results*, ST. PETERSBURG TIMES, Nov. 6, 2002, at 7A (reporting Nevada's vote on same-sex marriage). In 2005, Kansas and Texas also approved constitutional amendments banning same-sex marriage. *See* Nina J. Easton, *Massachusetts Landmark Ruling Pushed Issue onto Ballots*, BOSTON GLOBE, May 15, 2005, at A18 (reviewing the political fallout from the constitutional ban approved by

marriage for purposes of federal law as a "legal union between one man and one woman as husband and wife."[5] Even before the 2004 elections, thirty-eight states had already passed laws defining marriage as a union between one man and one woman.[6] This surge to maintain marriage as a heterosexual, monogamous union has received overwhelming bipartisan support, evidenced by DOMA's extremely high passage rates in both the House and the Senate.[7]

There are few issues in public and legal policy that generate more interest than the debate over extending marriage beyond its traditional definition.[8] In June 2003, when the U.S. Supreme Court declared laws prohibiting gay sodomy unconstitutional in *Lawrence v. Texas*,[9] many politicians and scholars predicted that *Lawrence* would be the beginning of the end to "traditional marriage." Senator Rick Santorum (R-Pa.) expressed his opinion that *Lawrence* would have a profound effect on marriage in the United States: "'If the Supreme Court says that you have the right to consensual (gay) sex within your home, then you have the right to bigamy, you have the right to polygamy, you have the right to incest, you have the right to adultery. You have the right to anything.'"[10] In his dissenting opinion in *Lawrence*, Justice

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Kansas voters in April 2005); Martin Kasindorf, *Texans Approve Amendment Banning Same-Sex Marriages*, USA TODAY, Nov. 9, 2005, at 4A (discussing the Texas electorate's action, the most recent vote for a constitutional ban of same-sex marriage). In one other state, Hawaii, voters approved a constitutional amendment that permitted, but did not require, legislative action to prohibit same-sex marriages. Herscher, *supra*.

5. Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7, 28 U.S.C. § 1738C (2000)); DOMA also provides that no state must recognize a legal same-sex marriage or union from another state as a marriage for its own state purposes. *Id. See generally* Peter Baker, *President Quietly Signs Law Aimed at Gay Marriages*, WASH. POST, Sept. 22, 1996, at A21.

6. Lambda Legal, State Laws Banning Marriage Between Same-Sex Couples, http://www.lambdalegal.org/cgi-bin/iowa/documents/record2.html?record=1254 (last visited Jan. 12, 2006).

7. DOMA passed the House by a vote of 342–67. 142 CONG. REC. 17,094 (1996). DOMA passed the Senate by a vote of 85–14. 142 CONG. REC. 22,467 (1996).

8. *See* Kevin J. Worthen, *Who Decides and What Difference Does It Make?: Defining Marriage in "Our Democratic, Federal Republic,"* 18 BYU J. PUB. L. 273, 273–74 (2004) (discussing the intense public debate over nontraditional marriage).

9. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

10. Sean Loughlin, *Santorum Under Fire for Comments on Homosexuality*, CNN.COM, Apr. 22, 2003, http://www.cnn.com/2003/ALLPOLITICS/04/22/santorum.gays/ (quoting Sen. Santorum). Since *Lawrence*, some scholars have argued that Senator Santorum was prophetic: "If consent provides the standard of inclusion within the right of privacy, [the practices Senator Santorum mentioned] must all be admitted." Robert P. George, *Rick Santorum Is Right: Where Will the Court Go After Marriage?*, NAT'L REV. ONLINE, May 27, 2003, http://www.nationalreview.com/comment/comment-george052703.asp (arguing that those who oppose Senator Santorum's statement have not refuted his argument). "Polygamy" refers to the "state of being simultaneously married to more than

Antonin Scalia echoed Senator Santorum's prediction that *Lawrence* will subject marriage to attack from groups seeking to gain legal recognition of marital relationships other than the traditional one-man, one-woman union.[11] After the U.S. Supreme Court decided *Lawrence*, polygamists enthusiastically discussed the future of plural marriage on their websites.[12]

Senator Santorum's and Justice Scalia's predictions that *Lawrence* would affect marriage may appear to be somewhat of a stretch—*Lawrence* involved sodomy prosecutions and did not specifically address the issue of marriage.[13] However, some legal scholars have argued that *Lawrence* mandates the recognition of same-sex marriage.[14] In fulfillment of Senator Santorum's and Justice Scalia's prophecies, state and federal courts have already begun extending the reasoning in *Lawrence* to hold that laws limiting marriage to one man and one woman are unconstitutional.[15]

Supporters of homosexual rights dismiss as a right-wing scare tactic the argument that the legalization of homosexual sodomy and same-sex marriage will lead to polygamy.[16] However, many well-respected legal and social-science scholars have taken this "slippery slope" argument seriously, particularly after *Goodridge v. Department of Public Health*.[17] In addition, both

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one spouse." BLACK'S LAW DICTIONARY 1180 (7th ed. 1999). "Bigamy" is the "act of marrying one person while legally married to another." *Id.* at 154. Specifically, the practice of marrying more than one wife is "polygyny," and marrying more than one husband is "polyandry." *Id.* at 1180. This Comment will use the term polygamy to collectively refer to the above mentioned practices.

11. *See Lawrence*, 539 U.S. at 590, 599 (Scalia, J., dissenting) (arguing that the state interest invalidated in *Lawrence* is "the same interest furthered by criminal laws against fornication, *bigamy*, adultery, adult incest, bestiality, and obscenity" (emphasis added)).

12. *See, e.g.*, Pro-Polygamy.com, http://www.pro-polygamy.com/ (last visited Jan. 12, 2006) ("Freely-consenting, adult, non-abusive, marriage-committed POLYGAMY is the next civil rights battle. *Lawrence v. Texas* has just guaranteed it!").

13. *Lawrence*, 539 U.S. at 578 (stating that *Lawrence* "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter").

14. *See, e.g.*, Jason Parish & Joy Haynes, *Same-Sex Marriage and Domestic Partnerships*, 5 GEO. J. GENDER & L. 545, 553 (2004) (arguing that after *Lawrence*, a sound constitutional basis for laws that ban same-sex marriage does not exist).

15. *See, e.g.*, Citizens for Equal Prot., Inc. v. Bruning, 368 F. Supp. 2d 980, 993, 1002 n.20, 1004 (D. Neb. 2005) (citing *Lawrence* three times in support of its holding that a state constitutional amendment limiting marriage to its traditional definition violates the Equal Protection Clause of the U.S. Constitution); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003) (citing *Lawrence* numerous times and overturning a Massachusetts law prohibiting same-sex marriages).

16. George W. Dent, Jr., *Traditional Marriage: Still Worth Defending*, 18 BYU J. PUB. L. 419, 441 (2004).

17. *See, e.g.*, Eugene Volokh, *Same-Sex Marriage and Slippery Slopes*, 33 HOFSTRA

conservative and liberal federal judges, including U.S. Supreme Court Justice Ruth Bader Ginsburg, have argued that laws prohibiting polygamy discriminate against women and should be struck down as unconstitutional.[18]

The Utah Supreme Court recently upheld polygamist Tom Green's conviction for one count of criminal nonsupport and four counts of bigamy.[19] Although the polygamy debate presents

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L. REV. 1155, 1160–63 (2005) (surveying the Court's right-of-privacy jurisprudence culminating in *Lawrence* and noting that "slippery slope arguments can't be casually dismissed"); *see also* David L. Chambers, *What if? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 491 (1996) (arguing that the extension of marriage to three or more persons becomes more conceivable over time as the state incrementally changes its conception of marriage); George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & POL. 581, 628–31 (1999) (stating that the same arguments that currently call for approval of same-sex marriage apply with equal force to the polygamy debate).

18. Justice Ruth Bader Ginsburg, while serving as general counsel of the American Civil Liberties Union, questioned the constitutionality of antibigamy laws. RUTH BADER GINSBURG & BRENDA FEIGEN FASTEAU, REPORT OF COLUMBIA LAW SCHOOL EQUAL RIGHTS ADVOCACY PROJECT: THE LEGAL STATUS OF WOMEN UNDER FEDERAL LAW 190–91 (1974). More recently, Judge Richard Posner has argued that "polygamy with the consent of all of the husband's wives would be the unambiguously best regime for women." RICHARD A. POSNER, SEX AND REASON 257 (1992).

19. State v. Green, 99 P.3d 820, 822 (Utah 2004). In Utah, "[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." UTAH CODE ANN. § 76-7-101(1) (2003). All fifty states and the District of Columbia criminalize bigamy or polygamy to some extent. ALA. CODE § 13A-13-1 (1994); ALASKA STAT. § 11.51.140 (2004); ARIZ. REV. STAT. ANN. § 13-3607 (2001); ARK. CODE ANN. § 5-26-201 (1997); CAL. PENAL CODE § 281 (West 1999); COLO. REV. STAT. § 18-6-201 (2004); CONN. GEN. STAT. ANN. § 53a-190 (West 2001); DEL. CODE ANN. tit. 11, § 1001 (2001); D.C. CODE ANN. § 22-501 (LexisNexis 2001); FLA. STAT. ANN. § 826.01 (West 2000); GA. CODE ANN. § 16-6-20 (2003); HAW. REV. STAT. ANN. § 580-21 (LexisNexis 2005); IDAHO CODE ANN. § 18-1101 (2004); 720 ILL. COMP. STAT. ANN. 5/11-12 (LexisNexis 1993); IND. CODE ANN. § 35-46-1-2 (LexisNexis 2004); IOWA CODE ANN. § 726.1 (West 2003); KAN. STAT. ANN. § 21-3601 (1995); KY. REV. STAT. ANN. § 530.010 (LexisNexis 1999); LA. REV. STAT. ANN. § 14:76 (2004); ME. REV. STAT. ANN. tit. 17-A, § 551 (1983); MD. CODE ANN., CRIM. LAW § 10-502 (LexisNexis 2002); MASS. GEN. LAWS ANN. ch. 272, § 15 (West 2000); MICH. COMP. LAWS ANN. § 750.439 (West 2004); MINN. STAT. ANN. § 609.355 (West 2003); MISS. CODE ANN. § 97-29-13 (West 1999); MO. ANN. STAT. § 568.010 (West 1999); MONT. CODE ANN. § 45-5-611 (2003); NEB. REV. STAT. § 28-701 (1995); NEV. REV. STAT. ANN. § 201.160 (LexisNexis 2001); N.H. REV. STAT. ANN. § 639:1 (LexisNexis 1996); N.J. STAT. ANN. § 2C:24-1 (West 1995); N.M. STAT. § 30-10-1 (2004); N.Y. PENAL LAW § 255.15 (McKinney 2000); N.C. GEN. STAT. § 14-183 (2003); N.D. CENT. CODE § 12.1-20-13 (1997); OHIO REV. CODE ANN. § 2919.01 (LexisNexis 2003); OKLA. STAT. ANN. tit. 21, § 881 (West 2002); OR. REV. STAT. § 163.515 (2003); 18 PA. CONS. STAT. ANN. § 4301 (West 1983); R.I. GEN. LAWS § 11-6-1 (2002); S.C. CODE ANN. § 16-15-10 (2003); S.D. CODIFIED LAWS § 22-22-15 (1998 & Supp. 2003); TENN. CODE ANN. § 39-15-301 (2003); TEX. PENAL CODE ANN. § 25.01 (Vernon 2003); UTAH CODE ANN. § 76-7-101 (2003); VT. STAT. ANN. tit. 13, § 206 (1998); VA. CODE ANN. § 18.2-362 (2004); WASH. REV. CODE ANN. § 9A.64.010 (West 2000); W. VA. CODE ANN. § 61-8-1 (LexisNexis 2000); WIS. STAT. ANN. § 944.05 (West 2005); WYO. STAT. ANN. § 6-4-401 (2005); *see also* Samantha Slark, Study Note, *Are Anti-Polygamy Laws an Unconstitutional Infringement on the Liberty Interests of Consenting Adults?*, 6 J.L. & FAM. STUD. 451, 453 & n.20 (2004) (citing the statutes listed and noting

constitutional and moral issues, polygamy prosecutions are a relatively infrequent occurrence. Green's conviction marked what many claim to be the first prosecution of a polygamist in over fifty years.[20] Because most polygamists live in relative isolation, some dispute exists as to the actual number of polygamists in the United States; most estimates range between 30,000 and 60,000.[21] The isolation of these polygamist groups may play a part in the lack of prosecution.[22] Despite the dearth of prosecutions, polygamists, such as Green, hope that *Lawrence* will open the door to recognition of plural marriage.

This Comment weighs-in on the polygamy debate by analyzing whether *Lawrence*, if ultimately read to mandate recognition of same-sex marriage, has the additional effect of legalizing plural marriage. Part II of this Comment briefly introduces polygamy, Mormon polygamy, and the history and justifications of antipolygamy legislation in the United States. Part II also reviews *Reynolds v. United States*,[23] the seminal U.S. Supreme Court decision upholding a ban on polygamy. Part III of this Comment analyzes how *Lawrence* affects marriage, and further discusses its holding in light of *Goodridge v. Department of Public Health*[24]—a recent case that has interpreted *Lawrence* to mandate same-sex marriage—and it questions what the result would be if the U.S. Supreme Court were to agree with *Goodridge*. Part III then analyzes whether the nonmorals-based justifications for banning polygamy would pass the degree of scrutiny that the U.S. Supreme Court has afforded the right to marry. Following these analyses, this Comment concludes that if courts read *Lawrence* to mandate recognition of same-sex marriage, which some courts have already done, the same logic extending *Lawrence* to same-sex marriage must also extend to

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that all U.S. jurisdictions expressly prohibit bigamy and polygamy "except Hawaii, where the second marriage is simply annulled").

20. Ryan D. Tenney, Comment, *Tom Green, Common-law Marriage, and the Illegality of Putative Polygamy*, 17 BYU J. PUB. L. 141, 142 (2002) (citing Julie Cart, *Polygamy Verdict Set Precedent*, L.A. TIMES, May 20, 2001, at A18). *But see* State v. Geer, 765 P.2d 1, 2 (Utah Ct. App. 1988) (charging defendant with one count of bigamy in Utah in 1987).

21. Tenney, *supra* note 20, at 142.

22. *See* Maura Strassberg, *The Crime of Polygamy*, 12 TEMP. POL. & CIV. RTS. L. REV. 353, 408–10 (2003) (claiming that polygamists rarely face prosecution in part because they keep their relationships "'under the radar' of state oversight and control" in order to avoid paying the state for child support and to continue to build up the coffers of their "theocracy").

23. Reynolds v. United States, 98 U.S. 145 (1878).

24. Goodridge v. Dep't of Public Health, 798 N.E.2d 941 (Mass. 2003).

plural marriage.[25] This Comment takes the position that such a decision would be detrimental to our society because it would result in state and federal courts overstepping their "properly limited role[s] in the constitutional structure."[26] Defining marriage is a subject properly handled through the democratic arenas set forth by the U.S. Constitution. If the Supreme Court continues down the path it started in *Lawrence*, marital laws and policies established by the people through Congress may "survive only at the sufferance—indeed, the whim—of the federal judiciary. In a democratic system, that is completely unacceptable."[27]

II. POLYGAMY AND FEDERAL ANTIPOLYGAMY LEGISLATION AND LITIGATION

In the United States, people generally associate polygamy with the Church of Jesus Christ of Latter-day Saints (the Mormons); however, polygamy is actually a common theme found in Christianity, Judaism, Islam, and other religions. For example, in early times many prophets or patriarchs from the Old Testament entered into polygamous relationships and claim to have done so with divine approval.[28] Additionally, the Old

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25. However, many legal scholars claim that although the argument for same-sex marriage is also an argument for polygamy, courts may never recognize plural marriage because no polygamy movement similar to the gay-rights movement, which has brought about some acceptance of the gay lifestyle, exists. *See, e.g.*, POSNER, *supra* note 18, at 259 n.40 (concluding that although polygamy is good for marriage and women, the practice will remain illegal because "the taboo against polygamy runs too deep to make the suggestion to permit it a feasible one in any state of the U.S."); *see also* Turley, *supra* note 1 (noting that the "day of social acceptance will never come for polygamists" as it has to some degree for homosexuals). This acceptance argument may not hold as much merit as some suggest—the majority of the American public is against extending marriage to homosexuals, yet some courts have already done so. *See supra* notes 3–7, 14 and accompanying text (outlining the recent legislative push to limit marriage to one man and one woman and providing two examples of judicial invalidation of same-sex marriage prohibitions).

26. *See* Cass R. Sunstein, *Liberty After* Lawrence, 65 OHIO ST. L.J. 1059, 1075–76 (2004) (arguing that courts overstep their limited judicial powers in the constitutional arena when they mandate the definition of marriage). For a thorough analysis of the proper forum for resolving the substantive issues of defining marriage, see Worthen, *supra* note 8, at 302–05 (concluding that a state statute or state constitutional amendment, rather than a state judicial decision or a federal statute, amendment, or judicial decision, is the correct forum for defining marriage).

27. *What Is Needed to Defend the Bipartisan Defense of Marriage Act of 1996?: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the S. Comm. on the Judiciary*, 108th Cong. 262 (2003) [hereinafter *Hearing*] (testimony of Prof. Richard G. Wilkins).

28. *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, 707–08 (2001). Sealing provides the following

Testament required a man to marry his dead brother's widow, regardless of whether or not the surviving brother already had a wife.[29] Furthermore, perhaps the most explicit sanctioning of polygamy in the Old Testament is found in the law prohibiting a man to favor the children of a "beloved" wife over those of his "hated" wife.[30]

Martin Luther, the fifteenth-century religious reformer, also concluded that plural marriage was not "'against Holy Scripture.'"[31] Polygamy is legal in Muslim countries under Islamic law,[32] and the Koran teaches that a man may take up to four wives.[33] The African continent is home to the highest number of polygamous marriages,[34] and polygamy has been

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examples: Lamach had two wives. *Genesis* 4:19 (King James). Abraham, who was in good standing with God, had more than one wife. *Id.* at 16:3. Jacob married Laban's two daughters, and each daughter also gave Jacob their maid as a concubine. *Id.* at 29:15–28; 30:1–10. Elkanah also had two wives. 1 *Samuel* 1:1–2 (King James). Rehoboam, King Solomon's son and ruler over Judah, had eighteen wives and sixty concubines. 2 *Chronicles* 11:17, 21 (King James). The Old Testament later implies that Rehoboam's polygamous relationship was not a violation of the Lord's law because he later "forsook the law of the Lord." *Id.* at 12:1. Abijah, a ruler of Judah, defeated King Jeroboam in battle with the help of the Lord and then "waxed mighty, and married fourteen wives, and begat twenty and two sons, and sixteen daughters." *Id.* at 13:1–21. David took "more wives" when he was in favor with the Lord. 1 *Chronicles* 14:3 (King James). Esau married two women. *Genesis* 26:34 (King James). King Solomon had seven hundred wives and hundreds of concubines. 1 *Kings* 11:3 (King James).

29. *See Genesis* 38:8 (King James); *Deuteronomy* 25:5 (King James); *see also* Sealing, *supra* note 28, at 708.

30. *See Deuteronomy* 21:15–16 (King James) ("If a man have two wives, one beloved, and another hated, and they have born him children, *both* the beloved and the hated; and *if* the firstborn son be hers that was hated: Then it shall be, when he maketh his sons to inherit *that* which he hath, *that* he may not make the son of the beloved firstborn before the son of the hated, *which is indeed* the firstborn.").

31. ROBERT J. HITCHENS, MULTIPLE MARRIAGE: A STUDY OF POLYGAMY IN LIGHT OF THE BIBLE 67 (1987) (quoting Letter from Martin Luther to Gregory Bruck, Chancellor of Saxony (Jan. 13, 1524)). Prince Phillip of Hesse questioned Martin Luther about polygamy because, while Prince Phillip did not believe in divorce or adultery, he was unhappy with his first wife. *Id.* at 67–68. Martin Luther studied the Old Testament and told the Prince to "[g]o ahead [and take another wife], but keep it quiet." JACQUES BARZUN, FROM DAWN TO DECADENCE: 500 YEARS OF WESTERN CULTURAL LIFE: 1500 TO THE PRESENT 17 (2000). For a biography of Martin Luther, *see generally* MICHAEL A. MULLETT, MARTIN LUTHER (2004).

32. *See* Press Release, Coal. on Women's Rights In Islam, Campaign for Monogamy (Mar. 16, 2003), http://www.sistersinislam.org.my/PressStatement/16032003.htm (reviewing briefly the state of polygamy in Muslim countries).

33. *See* AL-QURAN [THE KORAN]: A CONTEMPORARY TRANSLATION 73 (Ahmed Ali trans., Princeton Univ. Press 5th ed. 1994) ("If you fear you cannot be equitable to orphan girls . . . then marry women who are lawful for you, . . . two, three, or four; but if you fear you cannot treat so many with equity, marry only one, or a maid or captive. This is better than being iniquitous.").

34. HIV & AIDS IN AFRICA: BEYOND EPIDEMIOLOGY 50 (Ezekiel Kalipeni et al. eds., 2004) (examining recent studies in which African polygamy has been found to be ten times more prevalent than in other world societies).

practiced in some Native American tribes and in China as well.[35] Of 1170 societies recorded in the punch-card version of Murdock's *Ethnographic Atlas*, polygamy is practiced in 850.[36] Indeed, polygamy is a common thread that has woven itself through almost all religions and cultures at one time or another.

In the United States, the crusade to criminalize polygamy arose as a direct result of the Mormon practice of plural marriage. The following sections provides a brief history of Mormon polygamy, the legislation criminalizing plural marriage, and the litigation surrounding the practice.

A. Mormon Polygamy

The Mormon Church officially ended its practice of polygamy in 1890, imposing the penalty of excommunication for members who thereafter entered into plural marriages.[37] However, even today, it is frequently assumed that Mormons continue the practice of polygamy, erroneously associating Mormons with apostate groups that have broken away from the church to engage in plural marriage. The official doctrine of the Mormon Church today states that "[m]arriage between man and woman is essential to [God's] eternal plan."[38] At the time of *Reynolds*, the Mormon Church practiced and sanctioned polygamy. Joseph Smith, the first President of the Mormon Church, received a revelation regarding plural marriage as early as 1831, and in

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35. Turley, *supra* note 1; Julie Chao, *Chinese Province Targets Men Who Keep a 'Second Wife*,' SAN DIEGO UNION-TRIB., July 29, 2000, at A-23 (reporting that in the province of Guangdong, China, many residents live by the saying, "'If a man doesn't keep a concubine, he's not successful'"—prompting Chinese authorities to revise the marriage laws); Bethany Ruth Berger, *After Pocahontas: Indian Woman and the Law, 1830 to 1934*, 21 AM. INDIAN L. REV. 1, 37 (explaining that the practice of having multiple wives "may frequently have been more a matter of sharing work than an accommodation of male sexual desire"; for example, an elderly Omaha man responded to white prohibition of polygamy, "I must take another wife . . . my old wife is not strong enough now to do all her work alone.").

36. John Hartung, *Polygyny and Inheritance of Wealth*, 23 CURRENT ANTHROPOLOGY 1, 2 (1982) (citing GEORGE PETER MURDOCK, ETHNOGRAPHIC ATLAS (1967)).

37. *See* THE DOCTRINE AND COVENANTS OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 291–92 (1973) [hereinafter DOCTRINE] (declaring that the Mormon Church, led by church President Wilford Woodruff, ceased to preach the practice of polygamy in 1890); *see also* THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, CHURCH HISTORY IN THE FULNESS OF TIMES 470 (rev. ed. 1993) (1989) [hereinafter CHURCH HISTORY] (recounting the declaration that any Mormon performing or participating in a plural marriage would be excommunicated).

38. *See* THE FIRST PRESIDENCY AND COUNCIL OF THE TWELVE APOSTLES OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, THE FAMILY: A PROCLAMATION TO THE WORLD (1995), *available at* http://www.lds.org/languages/proclamations/family/start_here_0.pdf.

1841 he began to overtly instruct the doctrine of plural marriage and the responsibility of those holding the priesthood to practice polygamy.[39] The Mormon Church officially published the plural-marriage revelation in 1843.[40] Although Mormons did practice plural marriage and believed that the practice was a commandment from God, Mormons believed that marriage properly consisted of one man and one woman "unless by revelation the Lord commands plurality of wives."[41]

As the Mormons moved west into what became the Utah Territory, they began to practice polygamy more openly.[42] Utah Territorial law did not directly recognize or prohibit polygamy as a valid form of marriage, but some enactments indirectly sanctioned polygamy.[43] For example, the incorporating ordinance of the Mormon Church authorized marriages "'compatible with the revelations of Jesus Christ,'" provided they were "'founded in the revelations of the Lord.'"[44] The church recognized only the Constitution of the United States and the provisional state of Deseret[45] as authorities that could limit this power; hence, the

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39. *See* CHURCH HISTORY, *supra* note 37, at 424 (summarizing the history of polygamy in the Mormon Church).

40. The plural-marriage revelation states in part:

> And again, as pertaining to the law of the priesthood—if any man espouse a virgin, and desire to espouse another, and the first give her consent, and if he espouse the second, and they are virgins, and have vowed to no other man, then is he justified; he cannot commit adultery for they are given unto him; for he cannot commit adultery with that that belongeth unto him and to no one else.
>
> And if he have ten virgins given unto him by this law, he cannot commit adultery, for they belong to him, and they are given unto him; therefore is he justified.

DOCTRINE, *supra* note 37, at 245. Other verses of Mormon scripture teach that it is proper for a man to "have . . . one wife" unless the Lord commands him to "raise up seed unto me." THE BOOK OF MORMON: ANOTHER TESTAMENT OF JESUS CHRIST, *Jacob* 2:27, 30.

41. *See* BRUCE R. MCCONKIE, MORMON DOCTRINE 577–79 (2d ed. 1979) (summarizing Mormon doctrinal beliefs on plural marriage and citing THE BOOK OF MORMON, *supra* note 40, at *Jacob* 2:27, 30).

42. *See* L. Rex Sears, *Punishing the Saints for Their "Peculiar Institution": Congress on the Constitutional Dilemmas*, 2001 UTAH L. REV. 581, 587 (summarizing the history of Mormon polygamy).

43. *See id.* at 587–88 (citing Joint Resolution Legalizing the Laws of the Provisional Government of the State of Deseret, 1851 Utah Laws 205 (approved Oct. 4, 1851)).

44. *See id.* at 588 (quoting An Ordinance, Incorporating the Church of Jesus Christ of Latter-day Saints, § 3 (Feb. 4, 1851)).

45. Deseret was the name originally given to the Utah territory. CHURCH HISTORY, *supra* note 37, at 352–53. Senator Stephen A. Douglas, the chairman of the Senate Committee on territories, changed the name to Utah (after the Ute Native American tribe) because some of his colleagues thought Deseret sounded too much like desert. *Id.* at 353.

common law did not preclude the church's authority to perform plural marriages.[46]

B. Federal Antipolygamy Legislation and Litigation

Beginning with the Homestead Bill of 1854, Congress considered several pieces of legislation aimed, either directly or indirectly, at eliminating the practice of polygamy. In some instances, the legislation was a direct result of a dislike or distrust of the Mormon Church by certain members of Congress. This section details those legislative enactments and analyzes the seminal Supreme Court case on the subject, *Reynolds v. United States*.[47]

1. Homestead Bill of 1854. In 1854, Congress introduced the Homestead Bill, the first piece of federal legislation targeting polygamy.[48] The legislation would not have outlawed polygamy per se, but instead would have made it illegal for polygamists residing in the Utah Territory to acquire title to land from the federal government.[49] According to Congress, the purpose of the bill was "'to establish the office of surveyor general of Utah, to grant donations to actual settlers therein, and for other purposes,'" such as granting homesteads to white males except for those "'who shall now, or at any time hereafter, be the husband of more than one wife.'"[50] While debating the 1854 homestead legislation, Representative John Letcher of Virginia expressed his views on the bill: "'If [Mormons] had a decent religion, they would not have polygamy there. It is not a matter of religion. It is a matter of vice.'"[51] For Letcher, it seems, the Homestead Bill was too limited in its scope. In the end, the bill did not pass; a similar bill was enacted in 1855 establishing the Office of Surveyor General of Utah leaving out the homestead provision.[52]

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46. Sears, *supra* note 42, at 588.
47. Reynolds v. United States, 98 U.S. 145 (1878).
48. Sears, *supra* note 42, at 589.
49. *Id.*
50. *Id.* (quoting CONG. GLOBE, 33d Cong., 1st Sess. 1091–92 (1854)).
51. *Id.* at 597 (quoting CONG. GLOBE, 33d Cong., 1st Sess. 1112 (1854)).
52. *Id.* at 589 (citing Act of Feb. 21, 1855, ch. 117, 10 Stat. 611 (1855)).

2. Morrill Act of 1862. In 1856, Representative John Morrill of Vermont introduced a bill to the House Committee on the Territories, which would have made polygamy a felony but the bill did not make it to the House floor.[53] In 1862, after three unsuccessful attempts to enact the legislation, both houses finally passed the bill.[54] The purpose of the Morrill Act was "to punish and prevent the Practice of Polygamy in the Territories of the United States."[55] Oddly enough, although many members of Congress voiced their dislike of polygamy when debating the bill, the Morrill Act only criminalized polygamy in the territories, such as Utah, and not in the states.[56]

The Morrill Act criminalized polygamy by imposing a fine of up to $500 and maximum imprisonment of five years.[57] The Morrill Act also annulled the territorial incorporation statute for the Mormon Church, and prohibited any religious or charitable organization from holding more than $50,000 worth of property in the territories.[58] The purpose of this prohibition was to keep the Mormon Church from acquiring large tracts of land in the territory.[59] Some Representatives expressed concern that the Roman Catholic Church's holdings might also exceed the $50,000 limitation, so Congress granted an informal postponement until Representative Morrill reported that the Roman Catholic Church's property was "'protected under treaty stipulations,'" after which the bill quickly passed.[60]

During the debates on the Morrill Act, members of Congress voiced their strong sentiments against the Mormons and polygamy.[61] Congressman McClernand stated that with the large influx of non-Mormon settlers in the area, their influence would soon "overrule and correct Mormon abuses and vices—to enforce

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53. *Id.* at 589–90 (citing CONG. GLOBE, 34th Cong., 1st Sess. 1491 (1856)).

54. *Id.* at 590 (citing CONG. GLOBE, 37th Cong., 2d Sess. 1847–48, 2506–07, 2906 (1862)).

55. Morrill Act of 1862, ch. 126, 12 Stat. 501 (1862).

56. *See* Keith Jaasma, Comment, *The Religious Freedom Restoration Act: Responding to* Smith*; Reconsidering* Reynolds, 16 WHITTIER L. REV. 211, 263 (1995) (pointing out that the Morrill Act would only outlaw polygamy in the territories and not the states, which suggests that Congress harbored ill will for the Mormons).

57. Morrill Act § 1.

58. *Id.* §§ 2–3.

59. Jaasma, *supra* note 56, at 266–67.

60. *See* Sears, *supra* note 42, at 621 (recounting the events surrounding the postponement to verify protection of the Roman Catholic Church's holdings and quoting CONG. GLOBE, 37th Cong., 2d Sess. 2906 (1862)).

61. *Id.* at 597 (providing a detailed discussion of these debates).

among them the canons of an approved and Christian morality."[62] The House Judiciary Committee Report that accompanied the 1860 Morrill legislation stated that the

> [F]ramers of the Constitution . . . did not mean to dignify with the name of religion a tribe of Latter Day Saints disgracing that hallowed name. . . . [The framers] never intended that the wild vagaries of the Hindoo or the ridiculous mummeries of the Hottentot should be ennobled by so honored and sacred a name.[63]

The same report called the Mormon religion an "odious and execrable heresy."[64]

President Lincoln eventually signed the bill in 1862, but with the Civil War raging on, he apparently never intended to expend much federal effort to enforce the Act. When the second Mormon president, Brigham Young,[65] sent the Deseret News Editor T.B.H. Stenhouse to Washington to ask President Lincoln about his plans for the Mormons and the Morrill Act, President Lincoln responded as follows:

> "Stenhouse, when I was a boy on the farm in Illinois there was a great deal of timber on the farms which we had to clear away. Occasionally we would come to a log which had fallen down. It was too hard to split, too wet to burn and too heavy to move, so we plowed around it. That's what I intend to do with the Mormons. You go back and tell Brigham Young that if he will let me alone, I will let him alone."[66]

Sixteen years later, *Reynolds* upheld the legality of the Morrill Act;[67] however, just as President Lincoln had suggested would happen, the Government did not aggressively prosecute Mormons until Congress "dismantled Utah's judicial system by giving the United States district courts (controlled by non-Mormon federal appointees) exclusive civil and criminal jurisdiction" over the Utah territory.[68]

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62. CONG. GLOBE, 36th Cong., 1st Sess. 1515 (1860).

63. H.R. REP. NO. 36-83, at 2 (1860).

64. *Id.* at 4.

65. As a successor to Joseph Smith, Brigham Young became the second president of the Mormon Church, leading the migration west in 1846–1847 to the Rocky Mountains and founding Salt Lake City. *See* Brigham Young, 2nd President of the Church, http://www.lds.org/churchhistory/presidents/controllers/potcController.jsp?leader=2&topic=facts (last visited Jan. 12, 2006) (providing biographical information on Brigham Young).

66. PRESTON NIBLEY, BRIGHAM YOUNG: THE MAN AND HIS WORK 369 (5th ed. 1965) (quoting President Lincoln).

67. Reynolds v. United States, 98 U.S. 145, 168 (1878).

68. CHURCH HISTORY, *supra* note 37, at 426.

3. Edmunds Act of 1882. In 1882, Congress passed the next major piece of legislation targeting polygamy, the Edmunds Act.[69] The Act recognized a separate crime of cohabitation, thus eliminating the need to prove that a polygamist had actually taken on a second wife.[70] The Act also permitted counsel in any prosecution of a polygamist to challenge for cause those veniremen who were not only actual polygamists, but also anyone who believed in polygamy—thus excluding some potential jurors solely for their religious beliefs.[71] In addition, the Edmunds Act disqualified practicing polygamists from holding public office.[72] The Act did provide some incentives for ending polygamy, such as presidential amnesty for polygamous behavior before the passage of the Act, and legitimization of children of plural marriages entered into before January 1883.[73]

4. Edmunds-Tucker Act of 1887. Congress subsequently passed the Edmunds-Tucker Act of 1887, which mandated that prospective voters, jurors, and holders of public office take an oath of loyalty to the laws of the United States; dissolved the Mormon Church; eliminated the perpetual emigration fund that the Mormon Church had set up to help Mormons overseas immigrate to the United States; and ordered the U.S. Attorney General to begin proceedings to forfeit the property of the Mormon Church to the government for public school use in the territories.[74] The Edmunds-Tucker Act also allowed plural wives to testify against their husbands without consent, required certificates of marriage, and annulled territorial laws permitting illegitimate children to inherit.[75]

After Congress passed the Edmunds-Tucker Act, the U.S. Supreme Court upheld an Idaho Territorial law that disenfranchised all Mormons and disqualified all Mormons from holding public office.[76] Shortly thereafter, the Supreme Court upheld the dissolution and forfeiture provisions of the Edmunds-Tucker Act, requiring Mormon land to escheat to the United

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69. Edmunds Act of 1882, ch. 47, 22 Stat. 30 (1882) (repealed 1983).

70. Sears, *supra* note 42, at 592 (citing Edmunds Act § 3).

71. *Id.* (citing Edmunds Act § 5).

72. *Id.* (citing Edmunds Act § 8).

73. *See id.* at 592–93 (summarizing the incentive provisions contained in the Edmunds Act).

74. Edmunds-Tucker Act of 1887, ch. 397, §§ 13, 16, 17, 24, 24 Stat. 635, 637–40 (1887) (repealed 1978).

75. *Id.* §§ 1, 9, 11; *see also* Sears, *supra* note 42, at 593 (summarizing the provisions of the Edmunds-Tucker Act).

76. Davis v. Beason, 133 U.S. 333, 348 (1890); *see also* Sears, *supra* note 42, at 594.

States.[77] In its decision, the Court cited a need to deal with the "barbarism" of Mormonism.[78] Congress interpreted these Supreme Court decisions as providing a green light to continue targeting the practice of polygamy in Utah, and attempted to pass the Cullom-Strubble Bill, which would have divested all Utah Mormons of the rights they enjoyed as U.S. citizens.[79]

5. Reynolds v. United States*.* In the midst of this contentious political environment, the U.S. Supreme Court issued its landmark decision of *Reynolds v. United States*, in which the Court upheld the bigamy conviction of George Reynolds, a Mormon living in what was then the Utah Territory.[80] Although *Reynolds* was primarily decided on procedural issues of federal control over the territories,[81] the Court based its decision on Judeo-Christian ideas of the immorality and inherent evils of plural marriage.[82] The Supreme Court has never overturned *Reynolds*;[83] thus, it remains the seminal case in this area and must be overcome in any contemporary challenge to antipolygamy legislation.[84]

a. The Facts. After converting to the Mormon Church in England, George Reynolds immigrated to the United States.[85] Upon his arrival, the church's First Presidency asked him to serve as its secretary.[86] The Mormon Church was anxious to resolve the matter of polygamy and in the summer of 1874, Mormon leaders met with U.S. Attorney General William Carey and agreed to bring a test case before the courts.[87] Brigham

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77. Late Corp. of Church of Jesus Christ of Latter-day Saints v. United States, 136 U.S. 1, 65–66 (1890).

78. *Id.* at 49.

79. *See* RICHARD S. VAN WAGONER, MORMON POLYGAMY: A HISTORY 137 (2d ed. 1989) (summarizing Congress's attempt to strip Utah Mormons of their U.S. citizenship).

80. Reynolds v. United States, 98 U.S. 145, 168 (1878).

81. *Id.* at 153–54 (noting that a federal law requiring at least sixteen grand jurors did not supersede territorial law mandating no more than fifteen); *see also* Tenney, *supra* note 20, at 141.

82. *Reynolds*, 98 U.S. at 164–66; *see also* Tenney, *supra* note 20, at 141.

83. Tenney, *supra* note 20, at 141.

84. *See* Joseph Bozzuti, Note, *The Constitutionality of Polygamy Prohibitions After* Lawrence v. Texas*: Is Scalia a Punchline or a Prophet?*, 43 CATH. LAW. 409, 432–33 (2004) (asserting that although *Reynolds* was premised on moral views, there are other valid bases for outlawing polygamy). *But cf.* Kenneth W. Starr, *Liberty and Equality Under the Religion Clauses of the First Amendment*, 1993 BYU L. REV. 1, 2 (criticizing courts that look to antiquated precedent like *Reynolds*).

85. CHURCH HISTORY, *supra* note 37, at 427.

86. *Id.*

87. Orma Linford, *The Mormons and the Law: The Polygamy Cases*, 9 UTAH L. REV. 308, 332 (1964).

Young asked Reynolds, who, at thirty-two years of age had recently married his second wife, to stand in for the church as a plaintiff.[88] There were actually two trials; the first trial began on March 31, 1875 and lasted just two days.[89] The trial court found Reynolds guilty of bigamy, but the Territorial Supreme Court reversed the conviction on grounds that the jury was illegally composed.[90] A new grand jury indicted Reynolds, and the lower court then convicted Reynolds of bigamy, fined him $500, and sentenced him to two years hard labor—despite the lack of a statutory provision allowing hard labor for bigamy.[91] The Territorial Supreme Court upheld the conviction on a second appeal making no mention of religious freedom or the Free Exercise Clause in its opinion.[92] Reynolds then appealed his case to the U.S. Supreme Court on a writ of error, as provided for in the Poland Act for cases involving polygamy, eventually reaching the Supreme Court two years after the lower court's ruling.[93]

Reynolds argued that taking a second wife was a legal tenet of his religion, and therefore the Government could not punish him for it.[94] Reynolds also argued that the Poland Act was unconstitutional because by seeking to control the laws of marriage, Congress had assaulted the sovereignty of the states and territories.[95]

b. The Supreme Court's Opinion. The Supreme Court first dismissed Reynolds's challenge that he had been tried by a partial jury and ignored his objection to the jury instructions.[96]

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88. CHURCH HISTORY, *supra* note 37, at 426.

89. Linford, *supra* note 87, at 332.

90. *Id.* (citing United States v. Reynolds, 1 Utah 226 (1875) (reversing the conviction because the grand jury was composed of twenty-three members instead of fifteen, which the territorial law required)).

91. Linford, *supra* note 87, at 333–34.

92. *Id.* at 334.

93. *Id.*; *see also* Poland Act, ch. 469 § 3, 13 Stat. 253, 254 (1874).

94. Reynolds v. United States, 98 U.S. 145, 161–62 (1878).

95. *Id.* at 152–53. Reynolds did not put forth an implied right of privacy argument because the Supreme Court did not recognize the privacy right until 1965 when it was included in the "penumbra" of rights stemming from the Bill of Rights. *See* Griswold v. Connecticut, 381 U.S. 479, 483 (1965).

96. *Reynolds*, 98 U.S. at 153–57. Reynolds objected to the following instruction:

> "I think it not improper, in the discharge of your duties in this case, that you should consider what are to be the consequences to the innocent victims of this *delusion*. As this contest goes on, they multiply, and there are pure-minded women and there are innocent children,—innocent in a sense even beyond the degree of the innocence of childhood itself. These are to be the sufferers; and as jurors fail to do their duty, and as these cases come up in the Territory, just so do these victims multiply and spread themselves over the land."

Id. at 150 (emphasis added).

The Court then turned to the question of whether or not Reynolds's plural marriage violated the Constitution.[97]

In deciding the case, the Court concluded that the government had no legislative "power over mere opinion," but that the government could restrict actions that were contrary to "social duties or subversive of good order,"[98] and ruled that plural marriage was a crime against social norms.[99] The Court 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."[100] The Court then noted that polygamy was at one time punishable by death in England and Wales,[101] and discussed the importance of marriage, stating that "society may be said to be built" upon marriage and that it was a "sacred obligation."[102]

The only outside evidence the *Reynolds* Court cited in support of their condemnation of polygamy came from a professor named Francis Lieber.[103] The Court recounted Professor Lieber's statement that "polygamy leads to the patriarchal principle . . . which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy."[104] The Court neither cited to Professor Lieber's works, nor did it explain or attempt to show how Mormon polygamy in the United States actually led to a patriarchal system or "despotism," or how polygamy would be unconstitutional even if it did.[105] The Court apparently accepted Lieber's statements as fact, simply repeating his conclusions.[106] Thus, the Court derived its only social science or psychological evidence for the dangers of polygamy from interpretations of

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97. *Id.* at 162.

98. *Id.* at 164.

99. *Id.* at 165–66 (stating that polygamy is "an offence [sic] against society").

100. *Id.* at 164.

101. *Id.* at 165–66. In a related case a few years later, the Court called polygamy and its promotion by the Mormon Church a "blot on our civilization" and a "return to barbarism." Late Corp. of Church of Jesus Christ of Latter-day Saints v. United States, 136 U.S. 1, 49 (1890).

102. *Reynolds*, 98 U.S. at 165.

103. *See* Sealing, *supra* note 28, at 711–12 & n.146 (discussing Professor Lieber and his connection to *Reynolds* and summarizing articles that have been written about him and his works).

104. *Reynolds*, 98 U.S. at 166.

105. *Id.*; *see also* Sealing, *supra* note 28, at 713 (stating that the Court "made no attempt to explain why Mormon polygamy led to a patriarchal system of societal organization, why patriarchies are bad (or at least constitutionally infirm), or why polygamy leads to despotism").

106. *Reynolds*, 98 U.S. at 166.

Professor Lieber's writings.[107] The U.S. Supreme Court upheld the Territorial Supreme Court's affirmation of George Reynolds's bigamy conviction.[108] As mentioned earlier, the Supreme Court has not overturned *Reynolds*, and thus, the decision remains good law that must be overcome in any contemporary challenge to antipolygamy legislation.

III. FROM HOMOSEXUAL SODOMY TO SAME-SEX MARRIAGE TO POLYGAMY?

In his dissenting opinion in *Lawrence v. Texas*, Justice Scalia said that the Court's decision "leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples."[109] Justice Scalia also turned to the polygamy issue, just as he had seven years earlier in *Romer v. Evans*:[110] "[S]tate laws against bigamy . . . [are] 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."[111] A superficial reading of *Lawrence* reveals nothing about marriage—*Lawrence* deals solely with two consenting adults engaging in homosexual sex in the privacy of their home; however, the Court's analysis and interpretation of the Due Process Clause opens the door to extend *Lawrence* to marriage.[112]

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107. Sealing, *supra* note 28, at 714–15 (reviewing the Court's reference to Professor Lieber's statements).

108. *Reynolds*, 98 U.S. at 168.

109. Lawrence v. Texas, 539 U.S. 558, 601 (2003) (Scalia, J., dissenting). This Comment includes neither a detailed statement of the facts in *Lawrence* nor an exhaustive critique of the majority, concurring, and dissenting opinions. This Comment solely analyzes whether and in what manner *Lawrence* might extend to marriage and polygamy. Numerous law review articles have been written analyzing and critiquing *Lawrence*. *See, e.g.*, Edward Stein, *Introducing* Lawrence v. Texas*: Some Background and a Glimpse of the Future*, 10 CARDOZO WOMEN'S L.J. 263 (2004); Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004); *see also* Symposium, *Equality, Privacy, and Lesbian and Gay Rights After* Lawrence v. Texas, 65 OHIO ST. L.J. 1057 (2004). For a comprehensive review of *Lawrence*, see generally Adrienne Butcher, Note, *Selective Constitutional Analysis in* Lawrence v. Texas*: An Exercise in Judicial Restraint or a Willingness to Reconsider Equal Protection Classification for Homosexuals?*, 41 HOUS. L. REV. 1407 (2004).

110. In 1996, the Supreme Court held unconstitutional a Colorado state constitutional amendment prohibiting any local legislation protective of gays. Romer v. Evans, 517 U.S. 620, 635–36 (1996). In *Romer*, Justice Scalia stated in dissent, "The Court's disposition today suggests that . . . polygamy must be permitted . . . on a state-legislated, or perhaps even local-option, basis—unless, of course, polygamists for some reason have fewer constitutional rights than homosexuals." *Id.* at 648 (Scalia, J., dissenting).

111. *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting).

112. *See* Cass R. Sunstein, *What Did* Lawrence *Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 68–72 (analyzing marriage after

In the near future, the U.S. Supreme Court very well may hear a case arguing that the definition of marriage should include relationships beyond traditional heterosexual, monogamous unions. What follows analyzes the reasoning the Court may employ if it were to decide such a case. This Part first evaluates how the Supreme Court views marriage and whether the Court recognizes a constitutional right to marry. It then examines the reasoning in *Lawrence* and how that decision affects marriage. Finally, it looks to a recent case that interprets *Lawrence* to mandate recognition of same-sex marriage, and then discusses how this mandate, if adopted by the U.S. Supreme Court, affects the claim for a constitutional right to polygamy.

A. A Constitutional Right to Marry?[113]

The U.S. Supreme Court has long recognized a constitutional right to marriage.[114] In one of its earlier decisions dealing with the right to marry, the Court stated that marriage was "the most important relation in life" and "the foundation of the family and of society, without which there would be neither civilization nor progress."[115] In another case, the Court declared that the Constitution safeguarded the right "to marry, establish a home and bring up children."[116] Several decades later, the Court maintained that marriage was "fundamental to the very existence and survival of the [human] race."[117] In holding that the U.S. Constitution prohibits states from banning the use of contraceptives by married couples, the Court emphasized that marriage implicated a "right of privacy [the same right as in *Lawrence*] older than the Bill of Rights—older than our political parties, older than our school system."[118]

In more recent years, the Court has addressed the constitutional right to marry more directly.[119] In *Loving v. Virginia*, the Court struck down a law prohibiting interracial

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Lawrence under the Due Process Clause and suggesting that *Lawrence* mandates same-sex marriage).

113. For a more thorough and detailed legal analysis of the constitutional right to marry, see generally Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081 (2005).

114. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 383–85 (1978) (chronicling Supreme Court right-to-marry cases).

115. Maynard v. Hill, 125 U.S. 190, 205, 211 (1888).

116. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

117. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

118. Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

119. *See Zablocki*, 434 U.S. at 384; Loving v. Virginia, 388 U.S. 1, 2 (1967).

marriage on equal protection and due process grounds.[120] The Court stated that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[121] The Court further stated that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."[122]

In *Zablocki v. Redhail*, the Court struck down a law forbidding a person who owes child support to remarry unless that person could demonstrate that he met those obligations and that his children would not become public charges.[123] The Court emphasized the fundamental right to marry: "[T]he right to marry is of fundamental importance for all individuals."[124] The Court further stated that "the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships."[125] The Court indicated that it would uphold "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship," but that it would strictly scrutinize any direct and substantial interference with the right to marry.[126] In his concurring opinion, Justice Stevens stated that the Constitution would call into question any "classification which determines who may lawfully enter into the marriage relationship."[127] The Court extended *Zablocki* in *Turner v. Safley*, declaring unconstitutional a regulation prohibiting inmates from marrying unless "compelling reasons" exist for them to do so.[128]

These cases stress that the government violates the Due Process Clause by denying the fundamental right to marry on an "unsupportable" basis.[129] The decisions mentioned above also indicate that the Court views marriage as a fundamental right;

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120. *Loving*, 388 U.S. at 11–12.

121. *Id.* at 12.

122. *Id.* (quoting *Skinner*, 316 U.S. at 541).

123. *Zablocki*, 434 U.S. at 387 (stating that the statute in question was unconstitutional because "[s]ome of those in the affected class . . . will never be able to obtain the necessary court order, because they either lack the financial means to meet their support obligations or cannot prove that their children will not become public charges" and that they "are absolutely prevented from getting married").

124. *Id.* at 384.

125. *Id.* at 386.

126. *See id.* at 386–87.

127. *Id.* at 404 (Stevens, J., concurring).

128. Turner v. Safley, 482 U.S. 78, 94–96 (1987); *see also* Sunstein, *supra* note 113, at 2088–89 (arguing that *Turner* extended the reasoning in *Zablocki* by concluding that "even in prisons, the right to marry must be respected unless the state produces 'compelling reasons' to interfere with such a right").

129. Loving v. Virginia, 388 U.S. 1, 12 (1967).

thus, legislation restricting marriage must pass heightened scrutiny—the government must respect the right to marry unless some "compelling reason" exists to deny that right.[130]

B. "On Shaky Grounds": Lawrence *and Marriage*

As noted above, Justice Scalia stated that *Lawrence* "leaves on pretty shaky grounds state laws limiting marriage" to heterosexual, monogamous relationships.[131] *Lawrence* does so by dramatically expanding the Due Process Clause and ending morals-based legislation. This section discusses both of these effects in turn.

1. Expanding the Due Process Clause. The Court's opinion in *Lawrence* states that the Due Process Clause endows people with the constitutional entitlement to define for themselves their "'own concept of existence, of meaning, of the universe, and of the mystery of human life.'"[132] If the Court believes this statement, as it undoubtedly does, "this sentence . . . is adequate to support a holding imposing same-sex marriage on all 50 States."[133]

a. Expanding the Scope of the Due Process Clause. Justice Kennedy, writing for the majority,[134] began the opinion in *Lawrence* with a breakdown of important Supreme Court precedent addressing the due process and the right to privacy doctrines.[135] Referring to *Griswold v. Connecticut*, the Court asserted that "the right to make certain decisions regarding sexual conduct extends beyond the marital relationship."[136] The Court then quoted *Eisenstadt*: "'If 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

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130. *Id.* (recognizing the right to marry as a fundamental right protected by the Due Process Clause); *see also* Sunstein, *supra* note 26, at 1070–76 (arguing that U.S. Supreme Court precedent clearly establishes a fundamental right to marry).

131. Lawrence v. Texas, 539 U.S. 558, 601 (2003) (Scalia, J., dissenting).

132. *Id.* at 574 (majority opinion) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)).

133. *See Hearing*, *supra* note 27, at 260 (testimony of Prof. Richard G. Wilkins) (testifying before Congress on DOMA and citing to an ACLU article noting how *Lawrence* will help expand marriage beyond the traditional definition).

134. Justices Stevens, Souter, Ginsburg, and Breyer joined Justice Kennedy's majority opinion. *Lawrence*, 539 U.S. at 561.

135. *Id.* at 564–66 (discussing Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923); Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); Roe v. Wade, 410 U.S. 113 (1973); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); and Bowers v. Hardwick, 478 U.S. 186 (1986)).

136. *Id.* at 565 (stating that this right came into existence after *Griswold*).

so fundamentally affecting a person as the decision whether to bear or beget a child.'"[137] Thus, for the first time, the Court concluded that "the Constitution recognizes a right to make sexual choices free from state control."[138] According to the Court, the government may not intrude into sexual freedom and autonomy "absent injury to a person or abuse of an institution the law protects."[139] Although these cases do not speak directly to the marriage issue, decisions regarding marriage should enjoy even more constitutional protection than other personal choices.

The Court further quoted from *Casey*, an abortion decision reaffirming the constitutional right of privacy: "'It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.'"[140] According to the Court, *Casey* "confirmed that our laws and tradition afford constitutional protection to personal decisions relating to *marriage*, procreation, contraception, family relationships, child rearing, and education."[141] The use of this language is curious considering that the "personal decisions" the petitioners claimed in *Lawrence* did not involve marriage but only the decision to engage in homosexual relations.[142] However, the Court then stated, "Persons in a homosexual relationship may seek autonomy . . . just as heterosexual persons do."[143] The majority also cited the now well-known "mystery of human life" passage from *Casey*, a statement which the Court then applied to homosexual sex:

> "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 human life. Beliefs about these matters could not define the

137. *Id.* (quoting *Eisenstadt*, 405 U.S. at 453).

138. Sunstein, *supra* note 112, at 39.

139. *Lawrence*, 539 U.S. at 567; *see also* Sunstein, *supra* note 112, at 39 (noting that this principle is the foundation for a reading of *Lawrence* as supporting sexual autonomy).

140. *Lawrence*, 539 U.S. at 578 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847 (1992)).

141. *Id.* at 573–74 (emphasis added).

142. *See id.* at 578–79 (noting that the petitioners' claim dealt only with the right to engage in consensual, private, homosexual conduct).

143. *Id.* at 574.

> attributes of personhood were they formed under compulsion of the State."[144]

The Court's use of this powerful language appears to open the door for any person—such as a polygamist who believes the government has infringed upon his right of privacy—to define her own "'concept of existence, of meaning, of the universe, and of the mystery of human life.'"[145]

The *Lawrence* Court noted that both *Griswold* and *Eisenstadt* were precursors to *Roe v. Wade*, a case that dramatically extended a person's liberty interest to the abortion context "and confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person."[146] Perhaps Justice Kennedy had the same idea as some scholars, namely, that *Lawrence* is "akin to *Griswold*" and "will lead to its own *Roe*."[147]

b. Subjecting the Due Process Clause to International Interpretation. Lawrence also expands the Due Process Clause by "suggest[ing] that the meaning of the Clause may be heavily influenced by the legal traditions of other nations."[148] In *Lawrence*, the majority cited several international sources to interpret the meaning and reach of the Due Process Clause.[149] Specifically, the Court cited the European Court of Human Rights to refute the claim in *Bowers v. Hardwick* that laws regulating homosexual sex are universal.[150] In addition, the Court cited a brief submitted by Mary Robinson, who served as UN High Commissioner for Human Rights, for the proposition that "[o]ther nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct."[151]

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144. *See id.* (quoting *Casey*, 505 U.S. at 851).

145. *See id.* at 573–74 (quoting *Casey*, 505 U.S. at 851); *see also* 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) (criticizing the Court's use of the "mystery" passage).

146. *Lawrence*, 539 U.S. at 565 (discussing Roe v. Wade, 410 U.S. 113 (1973) and noting its expansion of the liberty interest under the Due Process Clause).

147. *See* Sunstein, *supra* note 112, at 68 (predicting that a due process analysis after *Lawrence* will expand marriage beyond one man and one woman, much like *Roe* extended the due process rights to include abortion).

148. *Hearing*, *supra* note 27, at 260 (testimony of Prof. Richard G. Wilkins).

149. *See Lawrence*, 558 U.S. at 572–77 (referring to international court decisions and foreign law in defining the scope of the Due Process Clause).

150. *Id.* at 576–77.

151. *Id.*

Many scholars have criticized the *Lawrence* Court's analysis of international law to interpret the U.S. Constitution.[152] Judge Posner likened the use of foreign decisions in interpreting the Constitution to "subjecting legislation enacted by Congress to review by the United Nations."[153] Another legal scholar has noted, "Should the Court follow this analytical path, it is only a matter of time before same-sex marriage becomes part and parcel of the United States Constitution."[154]

Polygamy is legal in more than half of all nonindustrialized societies.[155] According to Judge Posner, "Polygamy, in the form of polygyny, or plural wives . . . is so common in non-Western societies that it can fairly be regarded as the norm."[156] In *Lawrence*, the Court overturned *Bowers* partly because the right to homosexual sodomy had "been accepted as an integral part of human freedom in many other countries."[157] Because the Court clearly has no problem looking to international law in interpreting the Constitution, other courts may take this lead and act similarly when deciding the acceptability and constitutionality of polygamy.

2. Morals-Based Legislation. In overruling *Bowers*, a case upholding the criminalization of both homosexual and heterosexual sodomy,[158] *Lawrence* declared an end to morals-based legislation: "'[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is

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152. *See, e.g.*, Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57, 65 (2004) (summarizing and evaluating the misuses of international and foreign law in interpreting the Constitution). *But cf.* Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 495 & n.257 (2003) (noting the benefits and usefulness of national courts using foreign law when addressing international disputes, but not addressing the issue of applying foreign sources to domestic affairs).

153. *See* Richard Posner, *No Thanks, We Already Have Our Own Laws: The Court Should Never View a Foreign Legal Decision as a Precedent in Any Way*, LEGAL AFF., July–Aug. 2004, *available at* http://www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.msp (criticizing the Supreme Court's use of international case law to establish the meaning of the U.S. Constitution).

154. *Hearing*, *supra* note 27, at 260 (testimony of Prof. Richard G. Wilkins).

155. *See* David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53, 61 (1997) (citing 1 JESSIE L. EMBRY, MORMON POLYGAMOUS FAMILIES: LIFE IN THE PRINCIPLE 3 (1987)); *see also supra* notes 32–36 and accompanying text (discussing the international presence of legalized polygamy).

156. *See* POSNER, *supra* note 18, at 69.

157. Lawrence v. Texas, 539 U.S. 558, 577 (2003); *see also Hearing*, *supra* note 27, at 260 (testimony of Prof. Richard G. Wilkins) (suggesting that the Supreme Court's reliance on foreign authority in *Lawrence* will eventually lead to the Court's overturning of laws passed limiting marriage to one man and one woman).

158. Bowers v. Hardwick, 478 U.S. 186, 196 (1986).

not a sufficient reason for upholding a law prohibiting the practice.'"[159] Emphasizing the importance of freedom from government intrusion, the Court stated, "The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law."[160] The Court's "'obligation is to define the liberty of all, not to mandate our own moral code.'"[161] This language suggests that after *Lawrence*, the Court will not tolerate any legislative attempt to restrict liberties on the sole basis of majoritarian morality.[162]

The majority also stressed the "stigma" attached to homosexuals as a result of a criminal conviction under antisodomy statutes, stating that although the conviction was a misdemeanor, "it remains a criminal offense with all that imports for the dignity of the persons charged. The petitioners will bear on their record the history of their criminal convictions."[163] Likewise, those convicted under antipolygamy statutes also received this same stigma—a conviction under the Morrill Act was punishable by a fine of $500 and imprisonment for up to five years.[164] Certainly many people who do not practice plural marriage look upon a polygamy conviction as evidence of the person's degradation and lack of moral character.[165]

An end to morals-based legislation will strengthen the argument for a right to plural marriage; for certainly both

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159. *See Lawrence*, 539 U.S. at 577 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).

160. *Id.* at 571.

161. *See id.* (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992)).

162. *See, e.g.*, Butcher, *supra* note 109, at 1425 (arguing that morality is no longer a sufficient basis for upholding discriminatory legislation); Seema Saifee, Note, *Penumbras, Privacy, and the Death of Morals-Based Legislation: Comparing U.S. Constitutional Law with the Inherent Right of Privacy in Islamic Jurisprudence*, 27 FORDHAM INT'L L.J. 370, 406 (2003) (stating that the *Lawrence* Court put an end to morals-based legislation); Randy E. Barnett, *Kennedy's Libertarian Revolution:* Lawrence*'s Reach*, NAT'L REV. ONLINE, July 10, 2003, http://www.nationalreview.com/comment/comment-barnett071003.asp (arguing that the *Lawrence* Court adopted, as a constitutional principle, the stance that morals-based legislation is an insufficient reason by which to curtail an individual's freedom). *But see* Miranda Oshige McGowan, *From Outlaws to Ingroup:* Romer*,* Lawrence*, and the Inevitable Normativity of Group Recognition*, 88 MINN. L. REV. 1312, 1313–14 (2004) (calling the rejection of morals-based justifications nothing but rhetoric).

163. *Lawrence*, 539 U.S. at 575.

164. Morrill Act of 1862, ch. 126, 12 Stat. 501 (1862); *see also* Reynolds v. United States, 98 U.S. 145, 150–51, 168–69 (1878) (upholding conviction of $500 fine and two years imprisonment, but overturning the imposition of hard labor because the penalty of hard labor was not placed into the Morrill Act by Congress).

165. *See supra* Part II.B (summarizing federal antipolygamy legislation and the reasons Congress passed these laws).

Reynolds and the antipolygamy legislation passed in the 1800s were based on what the "governing majority" traditionally viewed as immoral.[166] As *Lawrence* stated:

> Had 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. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.[167]

Again, the Court uses very broad language that could potentially aid a polygamist. Plural marriage was not an unknown subject to those who "drew and ratified" the Due Process Clauses of the Fifth and Fourteenth Amendments, and neither was homosexuality. If the Framers "did not presume" to have the insight to foresee challenges to laws prohibiting homosexual sex, they certainly did not foresee challenges to the antipolygamy laws either.

In sum, if the argument just articulated holds true—that the communities' disapproval of homosexual sex is no longer a valid reason for legislation prohibiting homosexual sodomy—then the same argument must apply to polygamy. Moral grounds alone cannot uphold prohibitions on plural marriage—any legislation criminalizing plural marriage must have a nonmorals-based rationale.[168]

C. Goodridge v. Department of Public Health*: Extending* Lawrence *to Marriage*

In 2003, the Supreme Judicial Court of Massachusetts decided *Goodridge v. Department of Public Health*, declaring that no "constitutionally adequate reason" existed to deny same-sex couples the right to marry, and that such laws restricting marriage are "'arbitrary and capricious.'"[169] In other words,

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166. *See supra* Part II.B (noting the moral reasoning Congress used when passing antipolygamy laws, and the Supreme Court's affirmation of these morality based laws).

167. *Lawrence*, 539 U.S. at 578–79.

168. *See* Bozzuti, *supra* note 84, at 433–41 (analyzing several nonmorals-based reasons for upholding prohibitions on plural marriage); *see also infra* Part III.D (analyzing the most commonly cited nonmorals-based rationales for banning polygamy).

169. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948, 959–60 (Mass. 2003) (quoting Commonwealth v. Henry's Drywall Co., 320 N.E.2d 911 (1974)).

according to *Goodridge*, the current law defining the boundaries of marriage is irrational because it fails to "serve 'a legitimate purpose in a rational way.'"[170] Should *Goodridge* become the standard to which state and federal courts look when evaluating the issue of alternative marriages, as some now demand,[171] laws limiting marriage to heterosexual, monogamous unions are doomed to fall by the wayside.[172]

1. The Facts. Seven same-sex couples sued the Department of Public Health in an effort to compel the department to issue them marriage licenses.[173] The couples argued that the denial of marriage licenses excluded them from the "legal and social status of civil marriage, as well as the protections, benefits and obligations of marriage."[174] The trial court ruled in favor of the department, holding that the relevant marriage statute precluded same-sex couples from obtaining a marriage license.[175] The trial court also noted that the denial of marriage licenses to same-sex couples furthered the state's interest in safeguarding procreation as the "primary purpose" of marriage.[176] The seven couples claimed that the denial of marriage licenses based on the sex of the applicants violated the Massachusetts constitution.[177]

The department cited three main justifications for the denial of marriage licenses to same-sex couples: "(1) providing a 'favorable setting for procreation'; (2) ensuring the optimal setting for child rearing, which the department defines as 'a two-parent family with one parent of each sex'; and (3) preserving scarce State and private financial resources."[178] The

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170. *Goodridge*, 798 N.E.2d at 959–60 (quoting Rushworth v. Registrar of Motor Vehicles, 596 N.E.2d 340, 344 (1992)); *see also* Richard G. Wilkins, *Constitutional Governance and the Irrationality of Marriage*, UNITED FAMS. INT'L, http://www.unitedfamilies.org/wilkins_article.asp (last visited Jan. 12, 2006) (criticizing the *Goodridge* decision as declaring the institution of marriage irrational).

171. *See, e.g.*, Sarah Carlson-Wallrath, Current Public Law and Policy Issues, *Why the Civil Institution of Marriage Must be Extended to Same Sex Couples*, 26 HAMLINE J. PUB. L. & POL'Y 73, 92 (2004) (arguing that all states and federal government institutions should adhere to the *Goodridge* decision).

172. *See Hearing*, *supra* note 27, at 260–62 (testimony of Prof. Richard G. Wilkins) (arguing that a federal constitutional amendment is necessary to preserve the intent of DOMA).

173. *Goodridge*, 798 N.E.2d at 949–50.

174. *Id.* at 950.

175. *Id.* at 950–51.

176. *Id.* at 951.

177. *Id.* at 950.

178. *Id.* at 961 (quoting the department's "three legislative rationales for prohibiting same-sex couples from marrying").

Massachusetts Judicial Supreme Court held for the seven couples, dismissing each justification as bigoted.[179]

2. The Analysis. The majority and concurring opinions cited *Lawrence* numerous times in extending the protection of the Due Process Clause to same-sex couples.[180] According to one legal scholar's reading of *Goodridge*, states "may not make value judgments (moral or otherwise) regarding the social utility of various kinds of consensual relationships—all such relationships are 'equal' and the 'value' of such relationships is determined (not by the needs, expectations, or goals of society) but by the idiosyncratic values cherished by each partnership."[181] Massachusetts Chief Justice Marshall, writing for the majority, began by acknowledging "that our decision marks a change in the history of our marriage law."[182] He then cited *Lawrence*: "'Our obligation is to define the liberty of all, not to mandate our own moral code.'"[183] The court thus adopted the holding in *Lawrence* that morals-based legislation is no longer valid. In the following paragraph, the majority referred again to *Lawrence*, declaring that "the Court affirmed that the core concept of common human dignity protected by the Fourteenth Amendment to the U.S. Constitution precludes government intrusion into the deeply personal realms of consensual adult expressions of intimacy and one's choice of an intimate partner."[184] Thus, consenting adults desiring to enter into a plural marriage should be afforded the same protection as consenting, adult homosexuals if the Constitution does in fact grant this right as conceived by *Goodridge*.

Referring yet again to *Lawrence*, the majority stated, "Whether and whom to marry, how to express sexual intimacy, and whether and how to establish a family—these are among the

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179. *See id.* at 968 (stating that the department failed to give any valid justifications for upholding the denial of marriage licenses to same-sex couples and that the law was rooted in "persistent prejudices" against homosexuals). Since *Goodridge*, one U.S. federal district court has invalidated a state provision like that in Massachusetts. The U.S. District Court for the District of Nebraska held that similar justifications forwarded by Nebraska in regards to that state's constitutional amendment banning same-sex marriages violated the U.S. Constitution. Citizens for Equal Prot., Inc. v. Bruning, 368 F. Supp. 2d 980, 985 (D. Neb. 2005). The interests that Nebraska cited included the following: "to preserve marriage as the union between a man and a woman, to promote procreation and family life, and to ensure that Nebraskans are not forced to recognize same-sex marriages from other jurisdictions." *Id.* at 1000.

180. *Goodridge*, 798 N.E.2d at 948; *Id.* at 973 (Greaney, J., concurring).

181. *See* Wilkins, *supra* note 170 (criticizing the *Goodridge* decision).

182. *Goodridge*, 798 N.E.2d at 948.

183. *See id.* (citing Lawrence v. Texas, 539 U.S. 558, 559 (2003)).

184. *Id.*

most basic of every individual's liberty and due process rights."[185] Extension of this logic to the polygamy debate is not difficult: Even if it is not the norm that some consenting adults desire to enter into plural marriage, or that to do so is considered taboo by the majority, it remains that polygamy, like same-sex marriage, is a decision regarding "[w]hether and whom to marry," and "whether and how to establish a family."[186] Thus, a polygamist should be afforded the constitutional protection to make this decision, just as homosexuals, because whom to marry is "the most basic of every individual's liberty and due process rights."[187]

In its analysis, *Goodridge* dismissed the justifications given by the department for denying marriage licenses to homosexual couples.[188] The court dismissed the "optimal home for the child" argument[189] because, it concluded, same-sex couples can be "excellent parents," raising their children in order "to love them, to care for them, [and] to nurture them."[190] The court further noted that the state cannot deprive children of state benefits because it disapproves of the parents' choice of sexual orientation.[191] Finally, the court rejected the "conservation of resources" justification put forth by the department because Massachusetts does not grant marital status based on need.[192]

Here again, these arguments can be applied to the polygamy issue. First, the argument that growing up in a polygamous household is not the optimal situation for a child would fail because, just as homosexuals can excel at parenthood, polygamists can be "excellent parents" as well. In addition, just as gay couples face discrimination because of their lifestyle and denial of the benefits of marriage, polygamists face problems with raising their children because of "their status as outliers to the marriage laws," and the majority's moral disapproval of their

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185. *See id.* at 959 (citing *Lawrence*, 539 U.S. at 573).

186. *Id.*

187. *Id.*

188. *Id.* at 962–65.

189. The court stated that the department's first argument (the procreation rationale) "shades imperceptibly into its second" (the "optimal" setting justification). *Id.* at 962. Thus, the state cannot consider marriage and procreation together because such a link "confers an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and are not worthy of respect." *Id.*

190. *Id.* at 963 (finding that the task of child-rearing is made unnecessarily more difficult for homosexual couples because of "their status as outliers to the marriage laws").

191. *Id.* at 964.

192. *See id.* (stating that this justification bears no relationship to the goal of economy because it is a generalization, and it ignores the fact that many same-sex couples live with and provide for dependants).

lifestyle.[193] Furthermore, just as the state's disapproval of same-sex marriages denies state benefits to the children of same-sex couples, the state's criminalization of polygamy also deprives children of such benefits simply because the state disapproves of their parents' choice of marital partners.

In sum, *Goodridge* continues the expansion of the Due Process Clause and privacy rights set forth in *Lawrence*, because in the Massachusetts court's opinion, the justifications for limiting marriage to one man and one woman are based on nothing more than homosexual prejudices.[194] *Goodridge* fulfills Justice Scalia's prediction that *Lawrence* "leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples."[195] In fact, as noted above, some have argued that *Goodridge* should be the standard by which all state and federal laws regulating marriage should be judged,[196] which would likely render the federal definition of marriage under DOMA unconstitutional.[197] If the U.S. Supreme Court were to read *Lawrence* to mandate same-sex marriage just as the Massachusetts Supreme Judicial Court has, polygamists have a strong argument that their "consensual relationship"—assuming of course that the relationship is in fact consensual—is "'equal' and the 'value' of such relationships is determined (not by the needs, expectations, or goals of society) but by the idiosyncratic values cherished by [the] partnership."[198] If the U.S. Supreme Court interprets *Lawrence* consistent with *Goodridge*, polygamists should have the same right to engage in polygamous marriages as homosexuals have to enter into same-sex marriages.

D. Compelling Nonmorals-Based Rationales for Prohibiting Polygamy

The analysis above describes how after *Lawrence*, the government can no longer prohibit polygamy based solely on the reasoning that the practice has a long history of illegality or because the majority of Americans believe it is immoral and

193. *Id.*

194. *Id.* at 968.

195. Lawrence v. Texas, 539 U.S. 558, 601 (2003) (Scalia, J., dissenting).

196. *See* Carlson-Wallrath, *supra* note 171, at 92 (advocating *Goodridge* as the standard for marriage law).

197. *See Legal Threats to Traditional Marriage: Implications for Public Policy: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong. 4 (2004) (statement of Lincoln C. Oliphant, Research Fellow, The Marriage Law Project) (summarizing the justifications that Congress gave for passing DOMA and arguing that they are the same as those that *Goodridge* declared unconstitutional).

198. Wilkins, *supra* note 170.

reprehensible. The *Lawrence* court specifically stated that it will no longer uphold laws founded and based on moral beliefs or on the long history of criminalizing the practice in question.[199] Thus, the U.S. Supreme Court has difficulty honoring the holding in *Reynolds* that the government has a compelling interest in prohibiting polygamy simply because it is contrary to "social duties or subversive of good order" and "odious among the northern and western nations of Europe."[200] For a court to uphold a ban on polygamy today, it would need to find a compelling, nonmoral reason to criminalize the practice.[201] The following paragraphs analyze some of the most commonly cited nonmoral reasons for banning polygamy.

1. Statutory Rape, Incest, and Child Abuse. Individuals have argued that statutory rape, incest, and child abuse are prevalent in some polygamous communities.[202] Some polygamous males "consistently marry [girls] between the ages of fourteen and sixteen."[203] In some cases, the age disparity is upward of twenty years.[204] The "wives" may literally still be children who receive intense pressure to marry from the older man and often from the child's parents as well.[205]

No one would contest the state's compelling interest in preventing statutory rape, incest, and child abuse.[206] However, states already have separate criminal laws prohibiting these practices, which serve to protect children from these heinous crimes.[207] One author argues, "It is not justifiable to prohibit an otherwise legitimate practice because it tends to encourage infringement of other criminal laws by some participants."[208] Clearly, banning polygamy does not solve these problems—

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199. *Lawrence*, 539 U.S. at 577.

200. Reynolds v. United States, 98 U.S. 145, 164 (1878) (concluding that the Constitution gave Congress no legislative power of religious opinions, but that Congress could exercise legislative power over religions that were "subversive of good order").

201. *See* Slark, *supra* note 19, at 458.

202. *See* State v. Green, 99 P.3d 820, 830 (Utah 2004) (noting that incest, sexual assault, statutory rape, and failure to pay child support often accompany the practice of polygamy).

203. Strassberg, *supra* note 22, at 366.

204. *Id.*

205. *Id.* at 366–68 (recanting the story of one sixteen-year-old girl who became the fifteenth wife of her thirty-two-year-old uncle and felt powerless to stop it).

206. *See* Elizabeth Hollenberg, Note, *The Criminalization of Teenage Sex: Statutory Rape and the Politics of Teenage Motherhood*, 10 STAN. L. & POL'Y REV. 267, 270–71 (1999) (noting that one of the purposes behind these laws is to protect minors from "predatory adult men").

207. *See* Slark, *supra* note 19, at 458.

208. *Id.*

polygamy is outlawed in all fifty states,[209] yet the practice stands at the current level of 30,000–60,000 people in the United States.[210] If polygamy remains a criminal offense, polygamists will continue to isolate and hide their practice, impeding law enforcement's ability to combat, for example, the aforementioned crimes of statutory rape, incest, and child abuse.[211] Thus, the criminalization of plural marriage may afford victims of these offenses less protection than if polygamy were open and legitimate.[212]

The argument that criminalizing polygamy will stop statutory rape is similar to the ridiculous argument that proposes criminalizing higher education because rapes and sexual assaults occur on college campuses across the nation.[213] A less intrusive remedy than banning plural marriage already exists to combat these crimes—aggressively prosecuting the perpetrator to the full extent of the law.[214] If a polygamist commits any of the above mentioned crimes, he should be prosecuted for that particular offense, just as a man or woman who commits these crimes in a monogamous marriage similarly should be prosecuted.

2. Spousal Abuse and Degradation of Women. Some commentators claim that plural marriage forces a woman to remain inferior to her husband and solidifies women as second-class citizens.[215] The reason cited for this exile to second-class status is the presence of domestic abuse in some plural marriages.[216] However, just as with the crimes mentioned above, states already criminalize spousal abuse; outlawing polygamy most likely will continue to impede law enforcement from arresting the abusing polygamist in hiding.[217]

Following the previously stated logic, the law should declare traditional marriages illegal as well because women in traditional marriages who suffer abuse have thus also been

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209. *See supra* note 19.

210. Tenney, *supra* note 20, at 142.

211. Slark, *supra* note 19, at 459.

212. *Id.*

213. One in every eight female college students is sexually assaulted during her college years. Penn State University Health Services, Sexual Assault Awareness, http://www.sa.psu.edu/uhs/sexassault/assault.cfm (last visited Jan. 12, 2006).

214. Slark, *supra* note 19, at 458.

215. *See* Bozzuti, *supra* note 84, at 440–41 (citing Al-Krenawi, et al., *Mental Health Aspects of Arab-Israeli Adolescents from Polygamous Versus Monogamous Families*, 142 J. SOC. PSYCHOL. 446, 455–57 (2002)).

216. *Id.* at 439–40.

217. Slark, *supra* note 19, 458–59.

subjected to second-class citizenship. The fact is that domestic abuse prevails across the United States in traditional marriage: "Every 9 seconds a woman is battered in the United States"; "95% of all victims of domestic violence are women";[218] "Approximately 1,155,600 adult American women have been victims of one or more forcible rapes by their husbands"; "Every day, four women are murdered by boyfriends or husbands"; and "In the United States, a woman is more likely to be assaulted, injured, raped, or killed by a male partner than by any other type of assailant."[219]

Many legal scholars and judges who follow the law-and-economics movement have actually argued that polygamy benefits women (even those women who remain monogamous) because the practice increases the demand for women, our society currently has more women than men, and it allows the polygamous couples to benefit from economies of scale.[220] Some African-American feminist scholars have gone so far as to argue that polygamy will specifically benefit African-American women more than those of other races for these same reasons.[221] Just as with the other crimes mentioned above, a polygamist who abuses

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218. *See* The Riley Center, About Domestic Abuse, http://www.rileycenter.org/domestic-violence-statistics.html (last visited Jan. 12, 2006) (citing the Family Violence Prevention Fund, 1994, and a Bureau of Justice Statistics Special Report, respectively).

219. Women's Rural Advocacy Programs, Statistics About Domestic Abuse, http://www.letswrap.com/dvinfo/stats.htm (last visited Jan. 12, 2006).

220. *See* GARY S. BECKER, A TREATISE ON THE FAMILY 80–107 (1991); *see also* POSNER, *supra* note 18, at 253.

221. Adrien Katherine Wing stated the following:

> In my view, African Americans today face conditions in which . . . polygamy can flourish. A disproportionate number of our men are unavailable for marriage—due to early death, imprisonment, high unemployment, and intermarriage. More of our young women have obtained higher educations than the young men. Socially, we as Black women, like most women, have been reared to want men of an equal or higher social status. We have also been socialized to prefer our own men, to men from other racial/ethnic groups. A wealth of well employed and educated Black women seek a small pool of 'suitable' men. The net result is that the few men have a surplus of women from which to select. They can be either *de facto* polygamists or womanizers. They can have children with multiple women and support none of them. Since the Civil Rights movement, more black men than women have taken advantage of the opportunity to date or marry outside the race, an act that could have resulted in a lynching in the past. The net result is that only 39% of Black women are married, compared to 60% of white women, and 67% of Black children are born out-of-wedlock compared to 25% of white babies. In the U.S. Constitution, Blacks were counted as three-fifths of a person for representation purposes. Today, some lonely women remain ready to have a much smaller piece than three-fifths of a man.

Adrien Katherine Wing, *Polygamy from Southern Africa to Black Britannia to Black America: Global Critical Race Feminism as Legal Reform for the Twenty-first Century*, 11 J. CONTEMP. LEGAL ISSUES 811, 858 (2001) (footnotes omitted).

one of his spouses should be prosecuted, but not because he is a polygamist; he should be punished because spousal abuse is a crime.

3. Polygamy Deprives Children of Their Fathers. Many also argue that polygamy should remain illegal because at times the children are raised without the presence of a father—sometimes polygamists reside in more than one household, or the father may leave the family—and that the mother may feel "overwhelmed."[222] Single-parent families are, no doubt, one of the most significant social problems in the United States.[223] However, the fact that some children may not have a father is not a sufficient reason to criminalize polygamy. An estimated 24.7 million children live without their father; 57.7% of all African-American children, 31.8% of all Hispanic children, and 20.9% of all Caucasian children;[224] and yet the government does not criminalize single parents from having more children.[225]

Some have argued that by prosecuting the father for polygamy, the polygamy statutes themselves cause more harm because they force the father to leave the home.[226] But, in fact, many who have entered into plural marriages have claimed that polygamy actually provides a child more attention and caregiving.[227] Moreover, the law currently allows a man to have children with numerous partners and to emotionally and physically ignore the kids; yet once this same man commits to those women and children through marriage, he is thrown in jail.

4. Financial Strain on the Family and the Government. Another reason cited for upholding antipolygamy statutes is the potential financial burden that it may place on the family.[228] Some authors also claim that the cost to society will dramatically

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222. *See, e.g.*, Bozzuti, *supra* note 84, at 437–38.

223. "According to 72.2% of the U.S. population, fatherlessness is the most significant family or social problem facing America." National Center for Fathering, Fathering in America Poll, Jan. 1999, http://www.fathers.com/research/.

224. *Id.*

225. *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (recognizing the right to procreate as fundamental).

226. *See, e.g.*, Todd M. Gillett, Note, *The Absolution of* Reynolds*: The Constitutionality of Religious Polygamy*, 8 WM. & MARY BILL RTS. J. 497, 534 (2000) (stating that children in a polygamous relationship clearly suffer when the father is jailed).

227. *See, e.g.*, Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 314–17 (2004) (recounting the experiences of a successful female attorney living in a plural marriage relationship and the advantages she sees from the marriage).

228. *See* Bozzuti, *supra* note 84, at 437–38.

increase because many polygamists' "wives file welfare claims as single mothers in need of child support."[229] These "wives" collect welfare in large amounts and at times commit welfare fraud.[230]

The U.S. Supreme Court has already stated, however, that prohibiting a person to marry because they will have children and collect welfare is an unconstitutional impediment to their fundamental right to marry.[231] The government allows, and must allow, millions of women collecting welfare to marry, have children, and continue collecting welfare.[232] Thus, polygamists may argue that a potential financial burden is not a compelling enough reason to ban polygamy; if it were, the government would be forced to set financial prerequisites on all persons wishing to marry.[233]

If more than two people desire to marry each other, absent traditional and moral legal precedent, the government cannot produce "strong justifications for forbidding them to do so . . . in the domain of heightened scrutiny."[234] The nonmoral justifications for banning polygamy might prove true, but "in the abstract, [they] are somewhat speculative concerns."[235] As discussed above, these concerns can be addressed through less intrusive means than a ban on polygamy; criminal laws already exist to combat each potential harm resulting from plural marriage.[236] Moral reasons, without accompanying external justifications, are no longer sufficient to criminalize behavior.

IV. CONCLUSION

The *Lawrence* Court expanded the reach of the Due Process Clause and ended morals-based legislation. After *Lawrence*, neither

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229. Cassiah M. Ward, Note, *I Now Pronounce You Husband and Wives:* Lawrence v. Texas *and the Practice of Polygamy in Modern America*, 11 WM. & MARY J. WOMEN & L. 131, 148 (2004).

230. *See id.* at 148–49 (summarizing the welfare costs to society as a result of illegal polygamy); *see also* Tom Zoellner, *Polygamy on the Dole: Welfare Aids the Illegal Lifestyle of Many Families in Utah-Arizona Border Community: Polygamy Thrives with Taxpayer Funds*, SALT LAKE TRIB., June 28, 1998, at A1.

231. Zablocki v. Redhail, 434 U.S. 374, 375–77 (1978) (striking down a law forbidding people subject to child-support obligations to remarry unless the person could demonstrate that they met those obligations and that their children would not become public charges).

232. *Id.* at 383–87*; see also* JANE G. MAULDON ET AL., WHAT DO THEY THINK? WELFARE RECIPIENTS' ATTITUDES TOWARD MARRIAGE AND CHILDBEARING, RESEARCH BRIEF FROM THE WELFARE REFORM AND FAMILY FORMATION PROJECT 3 (2002), *available at* http://www.abtassociates.com/attachments/wrff-rb2.pdf (summarizing a University of California study of women on welfare and concluding that the majority of women on welfare do not stop having children).

233. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d. 941, 964 (Mass. 2003).

234. Sunstein, *supra* note 26, at 1074.

235. *Id.*

236. *See* Slark, *supra* note 19, at 458.

tradition nor society's moral views are decisive when regulating conduct between consenting adults.[237] Polygamy advocates hope that this new constitutional regime created by *Lawrence* will be their springboard to gaining marital rights. Indeed, some state and federal courts have already extended *Lawrence* to marriage. This extension is destructive to our society because these courts have overstepped their "properly limited role in the constitutional structure" by reading *Lawrence* to mandate recognition of nontraditional marital relationships. As argued earlier, this subject is properly handled via the democratic arenas set forth by the U.S. Constitution.[238] The U.S. Supreme Court has affirmed that individuals have a constitutional right to marry, which the government cannot restrict without a compelling reason, and only then by the least restrictive means.[239] Additionally, the nonmoral justifications for criminalizing polygamy do no more to solve potential problems arising in plural marriage than banning traditional marriage would. Furthermore, less intrusive means than banning polygamy to combat these dangers already exist.

The day may never arrive when plural marriage becomes more acceptable, and public opinion in the United States overwhelmingly opposes expanding marriage beyond one man and one woman as evidenced by the 2004 elections.[240] However, according to the Supreme Court, states may not pass laws criminalizing polygamy just because the majority of Americans deplore the practice.[241] Courts should not determine whether marriage should be extended beyond heterosexual, monogamous marriage. If the Supreme Court continues down the wrong path it started with *Lawrence* by agreeing with the reasoning in recent state and federal cases, marital laws and policies established by the people through Congress may survive at the sufferance and whim of the judiciary—an outcome that would be unacceptable in a democratic system of government.

Michael G. Myers

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237. Lawrence v. Texas, 539 U.S. 558, 599 (2003).

238. *See supra* notes 26–27 and accompanying text.

239. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967); *see also supra* Part III.A.

240. *See supra* notes 2–3 and accompanying text.

241. However, because no polygamist-rights movement similar to the gay-rights movement exists, Judge Posner probably got it right when he said that even if polygamy started to gain acceptance, the practice would remain illegal because the taboo against polygamy runs too deep to make the suggestion to permit it a feasible one. POSNER, *supra* note 18, at 253; *see also* Volokh, *supra* note 17, at 1175–76 (arguing that the polygamy movement will never take hold like same-sex marriage because polygamists neither have the political power nor an activist, vocal lobby similar to that of the gay-rights movement).