IN THE UTAH STATE COURT OF APPEALS

STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
vs.	:	
THOMAS ARTHUR GREEN,	:	Case No.
Defendant/Appellant.	:	

BRIEF OF AMICUS CURIE

W. ANDREW MCCULLOUGH (2170)
TRENTON RICKS (7770)
MCCULLOUGH & ASSOCIATES, L.L.C.
Attorney for Amicus Curie
6885 South State Street
Midvale, Utah 84047
Telephone: (801) 565-0894

LIST OF ALL PARTIES

The Utah Coalition for Religious Freedom and Tolerance includes in its membership Native Americans, current and former members of the Church of Jesus Christ of Latter-day Saints, independent fundamentalists, Muslims, members of New Age worship groups, Scientologists, Christians of many denominations, and members who claim no specific religious orientation. Among some of the membership's personal ministries have been efforts to help the Tom Green family winterize its property in Green Haven.

The Coalition takes offense at the anti-polygamy rhetoric in the state constitution and in *Reynolds*. It would like an official apology and the overturning of the embarrassing and politically incorrect language in *Reynolds*. In a recently published pamphlet on religious freedom and tolerance, Ken Larson, one of the Coalition's founders, wrote:

> "Government establishment of religious values caused our Pilgrim founders to flee Europe. Persecution of fundamentalist polygamists have now become an active part of the agenda of the government of the very state that was founded by religious refugees. This prohibition of the free exercise of religion prevents you and other consenting adults from exercising your personal choices, even when you harm no one."

TABLE OF CONTENTS

TABLE OF AUTHORITIES

JURISDICTIONAL STATEMENT

STATEMENT OF ISSUES AND STANDARD OF REVIEW

A. citation to record showing issue preserved in trial court

B. grounds for seeking issue not preserved in trial court

CONSTITUTIONAL or STATUTORY PROVISIONS

76-7-101. Bigamy–-Defense

(1) A person is guilty of bigamy when, knowing he has a husband or wife or knowing the other person has a husband or wife, the person purports to marry another person or cohabits with another person.
(2) Bigamy is a felony of the third degree.
(3) It shall be a defense to bigamy that the accused reasonably believed he and the other person were legally eligible to remarry.

Chapter 6 - HUSBAND AND WIFE - COHABITANT ABUSE ACT
(Definition of "cohabit" under Sec. 30-6-1)

30-6(2) Utah Criminal Code

"Cohabitant" means an emancipated person pursuant to Section 15-2-1 or a person who is 16 years of age or older who:
(a) is or was a spouse of the other party;
(b) is or was living as if a spouse of the party;
(c) is related by blood or marriage to the other party;
(d) has one or more children in common with the other party;
(e) is the biological parent of the other party's unborn child;
(f) resides or has resided in the same residence as the other party

31(a)-21-501

-Same as 30-6(2) without (e)

1st Amendment:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof ...

5th Amendment:

No person shall be ... deprived of life, liberty, or property, without due process of law.

9th Amendment:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

14th Amendment:

... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

STATEMENT OF FACTS

According to the Encyclopedia of Mormonism, the first official acknowledgment and defense of polygamy by the Church of Jesus Christ of Latter-day Saints was given by Orson Pratt on August 29, 1852. His words implied that Joseph Smith had been a polygamist and "the Principle" had been revealed through him before his death. So began the on-the-record life of the LDS Church's "most controversial and least understood practice." The doctrine, as an official church practice, survived only fifty years, but it was a vital period in the LDS Church's emerging identity–both from the inside and the outside. Polygamy created a chasm that re-enforced the Mormon's self-isolation and "peculiar people" self-image; and it served as a great weapon for

those who Mormons saw as their enemies. Again from the Encyclopedia of Mormonism:

> Bigamy was recognized as an offense by the early English ecclesiastical courts, which considered it an affront to the marriage sacrament. Parliament enacted a statute in 1604 that made bigamy a felony cognizable in the English common law courts. After American independence, the states adopted antibigamy laws .... However, (U.S.) lawmakers were not so forthcoming about their own religious bigotry: their aim was to destroy the Church's economic and political power, and bigamy was their tool.

The national anti-polygamy campaign that followed the church's acknowledgment of the Principle first came together in the Republican Party's National Platform in 1856 that referred to polygamy as one of the "twin relics of barbarism," slavery being the other. Then, between 1862 and 1887 several anti-bigamy laws were passed by the federal government, aimed primarily at terminating the practice of polygamy among members of the LDS Church. Under these laws, more than 1,300 members of the church went to prison, paid fines, and lost the right to vote, hold public office and serve as a juror. Many of those who avoided prosecution did so by either abandoning their plural wives, or by going into hiding. The federal pressure was turned up again in 1887 with the Edmunds-Tucker Act, which dis-incorporated the LDS Church and the Perpetual Emigrating Fund, and authorized the seizure of some church real estate.

In 1890, the Manifesto was published. This begins a tough transitional period for many members of the Church who had fought to understand and believe in the Principle. Some continued the practice, refusing to stand down from responsibilities they had assumed when they married multiple wives. Few took new wives, although some did. They had been told that their salvation turned on it. Others agreed with Joseph Smith, who wrote, "It mattereth not whether the Principle is popular or unpopular. I will maintain a true principle even if I stand alone in it." *Teachings of the Prophet Joseph Smith*, p. 332.

The prosecution of polygs falls off and there is little or no prosecution after 1893.

In 1896, Utah became a state, but only after ... Utah Enabling Act ... Utah Constitution

In April 1904, the Second Manifesto was published ...

Fudamentalists polygs begin to be isolated from the main body of the Church ... Woolley surfaces with his story of a secret calling from John Taylor ...

The Raids up until the 1950s

Polygamy, even when it was sanctioned and closely governed by the official body of the Church, was never a single thing. The acceptance varied from church member to member, the relationships varied ... no reason to believe it is different from monogamous marriages, in which some are for love or money or convenience or family or religious pressure ...

SUMMARY OF ARGUMENT

ARGUMENT

I. The Utah Enabling Act and Utah's Constitution Does Not Bar This Court From Finding Utah's Bigamy Statute Unconstitutional.

As a threshold issue, it becomes important to address whether the Utah Enabling Act and Utah Constitution precludes this Court from any action that legalizes plural marriages in Utah. The Utah Constitution's article III states:

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

This addition to the state constitution was a result of a deal made between Mormon leadership and the federal government, reflected in the Utah Enabling Act provided in part:

> An Act to enable the people of Utah to form a constitution and state government, and to be admitted into the Union on an equal footing with the original States. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the inhabitants of all that part of the area of the United States now constituting the Territory of Utah, as at present described, may become the State of Utah, as hereafter provided. First. That perfect toleration of religious sentiment shall be secured, and that no inhabitant of said State shall ever be molested in person or property on account of his or her mode of religious worship: Provided, That polygamous or plural marriages are forever prohibited.

The Equal Footing Doctrine, established in *Coyle v. Smith*, 221 U.S. 559, 55 L. Ed. 853, 31 S. Ct. 688 (1911) holds that each state is "equal in power, dignity, and authority" any arrangement made between a territory and the federal government upon granting the territory statehood cannot constitutionally diminish that state's sovereign power. This guarantees that the citizens in any state are on equal footing with those in the other states.

In *Potter v. Murray*, 760 F.2d 1065 (1985), a Murray City employee, who was fired because for practicing polygamy, challenged his dismissal on a number of constitutional grounds. Mister Potter also argued, as an affirmative defense, that Utah Enabling Act was void b y reason of the equal footing doctrine. The Tenth Circuit Court of Appeals, however, found the issue moot because Utah's legislature had never made an attempt to change the state's public policy prohibiting polygamy:

> Assuming, arguendo, that the Enabling Act does violate the equal footing doctrine, as the district court recognized, the State of Utah had full power since statehood to enact or amend in the manner provided by its own laws, any constitutional or statutory provisions dealing with the subject of marriage .... If there was an unlawful coercion in the Enabling Act, the Supreme Court of Utah observed some time ago that there has been no attempt to change the State's law. *Id*. at ____.

The implication is that Utah's Enabling Act, as evaluated by the equal footing doctrine, stands as neither a bar to finding Utah's Bigamy Statute unconstitutional, nor as an affirmative defense to the practice of polygamy.

II. As it has been applied to Tom Green, Utah's Bigamy Statute Violates the Free Exercise Clause of the First Amendment.

A. The "Free Exercise" of Religion

Starkly and majestically, the First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." These words, cornerstones of American liberty, have been reduced to shibboleths that mask their complexity. First Amendment slogans such as "separation of church and state" and "religious freedom" have become ingrained in the lay and legal vernacular of this country. However, every now and again we must pause and reflect on what it means to assert that our government, state or federal, cannot prohibit the "free exercise" of religion. Now is one such moment.

The word "exercise" connotes action, so it is reasonable to assume at step one that the First Amendment protects the right to engage in religious acts. Though this is qualifiedly true, it overlooks the precursor to such action: religious belief. To the extent that a religious act is undertaken with certainty and volition, it is impelled or caused by thought or belief. "Free exercise" of religion includes, at a minimum, freedom of religious thought or belief. The First Amendment's "free exercise" guarantee sets a floor on religious freedom; the floor is religious belief and no law can drop below the floor by in any way interfering with or restricting such belief. This is a concept, based on liberty and tolerance. This is the American way.

If the First Amendment's "free exercise" clause is taken literally, it means that the laws of the land cannot in any way interfere with or restrict a person's religious actions. This is a concept, also based on liberty and tolerance, that might cause the thoughtful among us to pause. This pause might cause us to conclude that anarchy and chaos would reign if citizens could justify any act or undertaking in the name of religious freedom. The Supreme Court, a reasonably thoughtful group, has recognized that religious freedom, as manifest in religious action, cannot be absolute in a country founded on the rule of law. This recognition means, of course, that the First Amendment cannot quite mean what it literally says:

> [T]he Amendment embraces two concepts,--freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. *Cantwell v. Connecticut*, 310 U.S. 296, 303-04, 60 S. Ct. 900, 903, 84 L.Ed. 1213 (1940).

As the Supreme Court put it in *Cantwell,* "[i]n every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." *Id. At 304, 60 S. Ct at 903.* The regulation must have be for the *protection of society.*

In *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), the Court ruled that a town ordinance outlawing the unnecessary killing of animals, passed solely to stop a local Santeria church from slaughtering animals during its rituals, was unconstitutional. *Id.* at 546-47. The Court based its decision on the fact that the law was passed in response to the church's rituals and burdened "Santeria adherents but almost no others." *Id.* at 536. Because the law was neither neutral nor generally applicable to the population, the Court determined that the prohibition “had to advance interests of the highest order, and had to be "narrowly tailored in pursuit of those interests." *Id.* at 546. Because the slaughter ordinance did not advance such

interests and because the legislature passed it solely to burden the church, the Court found the provision unconstitutional. *Id.*

In practice, government's power to regulate religious freedom usually has meant that if government enacts "neutral laws of general applicability"--i.e., laws not directed toward a particular religious practice or group--the law may incidentally impair religious action. The Supreme Court has not always upheld neutral laws of general applicability when they "forbid one to do that which one's religion commands," or when they "command one to do that which is forbidden by one's religion." W. Van Alstyne, *First Amendment* 1053 (2d ed. 1995).

In *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed 2d 15 (1972), the Supreme Court held that a state law requiring all children under the age of 16 to attend public or private schools impermissibly infringed on the Amish religious belief in home schooling. While the state argued that it had a right to restrict religious action, the justices deferred to the Amish plaintiffs, allowing them to "survive free from the heavy impediment compliance with the Wisconsin compulsory-education law would impose." *Id.* at 235 n. 22. The Court in Yoder claimed that it based its decision on the free exercise of religion combined with the parents' right to educate their children. *Id.* at 233. Much of the majority opinion, however, was devoted to praising the Amish lifestyle, rather than providing legal analysis. *Id.* at 235. On the last page of the majority opinion, the Court went so far as to state that the Amish had proved the sincerity and values of their beliefs by a "convincing showing, one that probably few other religious groups or sects could make." *Id.* at 235-36.

In his dissent in *Yoder*, Justice Douglas acknowledged that the Court made an exception to *Reynolds* in this matter, ruling that the sincerity of views coupled with the beauty of the Amish lifestyle justified noncompliance with a state law. *Id* at 246. Douglas noted that the Court in

Reynolds did not protect the Mormon practice of polygamy, a segment of Mormon life arguably of equal import to the Amish tradition of child rearing. *Id.* at 247. Douglas acknowledged that, in *Reynolds*, behavior "which the Court deemed to be antisocial, could be punished even though it was grounded on deeply held and sincere religious convictions." *Id.* By expanding the protection granted by the Free Exercise Clause in this way, the Court weakened its prior holding considerably, "even promis[ing] that in time *Reynolds* will be overruled." *Id.*

The *Yoder* exception is an implicit evaluation of the religion's bona fides and an explicit balancing of the law and practice at issue. *See Yoder*, 406 U.S. at 235-36, 92 S. Ct. at 1543-44. Following *Yoder*, a court is compelled to grant a "free exercise" exception to an otherwise illegal religious practice if: (1) the religion was of a respectable vintage; (2) it was recognized as a legitimate faith; (3) the beliefs were sincerely held; (4) the practice which was proscribed by law did not cause others any direct harm; and (5) uniform application of the law was not essential to maintaining public order. *Id.* In other words, under *Cantwell, Yoder,* and their progeny, courts have balanced religious and social interests. *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed 2d 965 (1963).

Some state courts, apparently taking their cue from *Yoder,* held that drug laws forbidding the use of hallucinogens impermissibly infringes on the Native American Church's use of peyote during religious ceremonies. *State v. Whittingham*, 19 Ariz. App. 27, 504 P. 2d 950 (Ariz. Ct. App. 1973); *Whitehorn v. State*, 561 P.2d 539 (Okla. Ct. Crim. App. 1977).

Unwilling or unable to work with the discretion and ambiguity that such an approach requires, this specialized exception was temporarily interrupted in 1990 with the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990). In *Smith*, an Oregon drug rehabilitation program

fired two workers because they smoked peyote as part of a religious ceremony at a Native American Church. *Id.* at 874. Justice Scalia, author of the majority opinion, wrote that the Court had "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Id.* at 878-79. He explicated that the only instances in which "the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press." *Id.* at 881.

The Court stated that this "hybrid" test had always been used in Free Exercise cases, including *Yoder*. Because the law at issue in *Smith*, a prohibition on the unauthorized possession of "controlled substance[s]," was a neutral law that applied to all citizens, the Court accepted that plaintiffs could not claim protection from it solely under the First Amendment guarantee of Free Exercise. *Id.* at 878-79. In addition, Justice Scalia stated that evidence demonstrating the importance of the ritual to the plaintiffs should not be considered. *Id.* at 882. Although the Court in *Yoder* based its ruling in part on "the vital role that belief and daily conduct play" in Amish life. *Yoder*, 406 U.S. at 235. Scalia announced that it was not the courts' role "to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Smith*, 494 U.S. at 887.

The Court rejected the *Yoder* balancing test and held that neutral laws of general applicability are not subject to free exercise challenges. *Id.* at 885-90. Explaining its decision to dispense with "balancing" and "strict scrutiny" when confronted with a free exercise challenge to a neutral law of general applicability, the Court observed:

> Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at

> the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities. *Id.* at 879 (quoting *Minersville School Dist. Bd. Of Ed. V. Gobitis*, 310 U.S. 586, 594-95, 60 S. Ct. 1010, 1013 L. Ed. 1375 (1940)).

Justice Scalia recognized that the Court's decision subjected free religious exercise to the vagaries of political accommodation, and concluded that this "unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs." *Id*. 494 U.S. at 890.

Congressional reaction to the changing of the free exercise guard in *Smith* was almost immediate. Accepting Justice Scalia's invitation to legislate religious accommodation, Congress did so with ironic vengeance by repudiating the *Smith* decision and specifically reviving the balancing test:

> [I]n *Employment Division v. Smith*, 494 U.S. 872 (1990), the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion. [T]he compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests. 42 U.S.C. sec. 2000bb(a)(4)-(5).

The Religious Freedom Restoration Act restores "the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L.Ed 2d 15 (1972)," and provides a "defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. sec. 2000bb(b)(1)-(2). , government may substantially burden a person's exercise of religion only if it demonstrates that the burden (i.e., the law at issue, even if neutral and general): (1) furthers a

compelling governmental interest; (2) is the least restrictive means of furthering that interest, (3) and is for the protection of society. *Cantwell*, 310 U.S. at 303-04.

B. Anti-Polygamy Laws Were Aimed at Mormons- They Were Not Laws of General Applicability

Legal precedent born of prejudice is equally wrong whether it is based upon the racism of the era, as was, for example, *Plessy v. Ferguson*, or of anti-Mormon hysteria, as was *Reynolds*. De facto discrimination is unconstitutional where a law had previously been de jure discrimination. *See Swann [cite]*(discussing segregation in the south).

In order to understand *Reynolds v. United States*, 98 U.S. 145 (1878), one must understand the climate of hostility that existed between the American government and the Mormon Church when the case was decided in 1878. In 1862, Congress passed a bill that Vermont Congressman Justin Morrill drafted to "punish and prevent the Practice of Polygamy in the Territories of the United States ... and [to disapprove] and [annul] certain Acts of the Legislative Assembly of the Territory of Utah." Morrill Act, ch. 126, 12 Stat. 501 (1862). The Morrill Act made polygamy punishable by "fines of up to five hundred dollars and imprisonment for as much as five years." FIRMAGE & MANGRUM, supra note 56, at 131. The Act also contained provisions aimed "at the [Mormon] church's corporate structure and economic power." Id. at 132. Apparently, the majority of Congress feared the church structure itself and the personal power of Brigham Young, Smith's successor as President of the Mormon Church. See id. at 35. During the 1860 Congressional debates, Representative John McClernand of Illinois stated his opinion of Young and his followers, echoing the popular sentiment of the day:

> "The government of these Mormons is hierarchy concentrated in one man, who exerts an absolute temporal and spiritual power over his followers. He thinks for them; and they obey him from a dread of his temporal and spiritual power. ... The government is an artfully-contrived one. It combines all the incentives which can appeal to the passions of bad men. It concedes to the sensual many wives; to the military adventurer the distinctions of military position; and to the priest abundant tithes and perfect impunity to the civil authority. ... There is not now so absolute a hierarch living or reigning in any other quarter of the globe. The civil authorities kept up there by this Government are powerless--a mere mockery." Id. at 132 (quoting CONG. GLOBE, 36th Cong., 1st Sess. 1514 (1860) (statement of Rep. John A. McClernand)).

Despite McClernand's strong distaste for the Mormons and their practices (In the same speech, McClernand characterized the Mormons as bandits, unfit for induction into American society, and referred to the practice of polygamy as a "crying evil," descended from the Biblical villains Lamech and Cain. See CONG. GLOBE, 36th Cong., 1st Sess. 1514 (1860) (statement of Rep. John A. McClernand) his speech was not entirely inaccurate. The few federal officials in Utah during the 1860s "felt powerless, lost in a hostile sea of Mormons whose way of life they were challenging." FIRMAGE & MANGRUM, supra note 56, at 139. In 1865, Utah Governor James Doty appealed to the Secretary of State, claiming that the Mormons had created their own "shadow government" that coexisted with the officially sanctioned territorial government. See id. at 140. Doty's letter stated:

> "[T]he leaders of 'the church' under the Territorial laws, have the appointment, and control in fact through its members, of all the civil and militia officers not appointed by the President of the United States. In addition, the same party, in 1861 formed an independent government in the 'State of Deseret' whose boundaries include Utah and portions of Idaho and Arizona. This form of government is preserved by annual elections of all the state officers; the legislature being composed of the same men who are elected to the Territorial legislature, and who, in a Resolution, re-enact the same laws for the 'State' which have been enacted for the Territory of Utah." *Id.* (quoting letter of James Doty to the Secretary of State).

Nonetheless, due to the power of the Mormon Church in Utah and the Civil War raging throughout the nation, the federal government did not enforce the Morrill Act when it was enacted. Abraham Lincoln, having signed the Act, "reportedly compared the Mormon Church to a log he had encountered as a farmer that was 'too hard to split, too wet to burn and too heavy to move, so we plowed around it.'" FIRMAGE & MANGRUM, supra note 56, at 139. Lincoln then told his listeners to "go back and tell Brigham Young that if he will let me alone, I will let him alone." *Id.* Unlike the ass-backwards crackers in the South, Lincoln recognized the Mormons as a force to be reckoned with.

Reynolds began with a deal between the United States government and the Mormon Church. The church and the government decided to use a test case in which both the federal judiciary and the church presidency hoped to determine the constitutionality of the anti-polygamy statute. George Reynolds, Brigham Young's personal secretary, agreed to test the statute and cooperate in his prosecution in return for the government's agreement not to seek a harsh punishment.

In 1874, the Utah territorial court tried and convicted Reynolds. *See* VAN WAGONER, supra note 7, at 111. However, the Utah Supreme Court overturned his conviction because the grand jury had been chosen according to federal rather than state guidelines. *United States v. Reynolds*, 1 Utah 226 (Utah 1875). Despite his acquittal, Reynolds' polygamous behavior was a matter of public record, and officials arrested him again in October 1875. See FIRMAGE & MANGRUM, supra note 56, at 152. This time, his conviction stood until it reached the United States Supreme Court. *See id.* at 151-52; see also *United States v. Reynolds*, 1 Utah 319 (Utah 1876).

Reynolds claimed that the Free Exercise Clause of the First Amendment protected his right to practice polygamy as a tenet of his religion. See *Reynolds v. United States*, 98 U.S. 145, 162 (1879). He relied on the plain language of the First Amendment to the Constitution which guarantees that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. In order to decide if the Act's ban on polygamy impeded the free exercise of religion, the Court stated that it had to look outside the Constitution to define the term "religion." *Reynolds*, 98 U.S. at 162.

The Court examined the "history of the times in the midst of which the provision was adopted" to determine the nature of the "religious freedom which has been guaranteed." *Id.* The Court focused on the words of Thomas Jefferson's Declaration of Religious Freedom, written in response to the state's current laws against heresy:

> In the preamble of this act ... religious freedom is defined; and after a recital "that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty," it is declared "that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order." In these two sentences is found the true distinction between what properly belongs to the church and what to the State. *Id*. at 163.

The Court also cited Thomas Jefferson's statement that, in regards to the separation of Church and State, the "legislative powers of the government reach actions only, and not opinions ...." *Id.* at 164. Using Jefferson as its authority, the Court declared that while the Free Exercise Clause deprived "Congress ... of all legislative power over mere opinion, ... [it] was left free to reach actions which were in violation of social duties or subversive of good order." *Id.*

Having determined that Congress was free to regulate "subversive" activities performed

in the name of religion, the Court turned its attention to the practice of polygamy. The Court's first sentence on the subject succinctly expressed its viewpoint: "Polygamy 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 African people." *Id.* The Court stated that "from the earliest history of England polygamy has been treated as an offence against society." *Id.*

In an effort to prove that polygamy caused actual harm, the Court also offered the opinion of Professor Francis Lieber, "a prominent intellectual and founder of American political science," (FIRMAGE & MANGRUM, supra note 56, at 155.) who said that "'polygamy leads to the patriarchal principle, ... which, when applied to large communities, fetters the people in stationary despotism.'" *Reynolds* 98 U.S. at 166. The Court concluded that "to permit [the practice] would be to make the professed doctrines of religious belief superior to the law of the land." *Id.* The Court theorized that if all religious activities were tolerated, the government might not have the power to stop religious leaders who wished to commit a ceremonial human sacrifice or widows who wished to commit Suttee, the religious act of a throwing oneself on a husband's funeral pyre. *Id.*

The Court offered these theories without a scintilla of evidence to support their claims other than the opinions of their Mormon “expert” Professor Lieber. The Court failed to mention that Professor Lieber, besides his account of polygamy, had written another tract on Mormonism itself. In his judgment, Mormon theology was "characterized by 'vulgarity,' 'cheating,' 'jugglery,' 'knavery,' 'foulness,' and as bearing 'poisonous fruits.'" *Reynolds* at 166 (quoting Prof. Lieber).

The reasoning behind the Court's arguments against polygamy is suspect. In *Reynolds* the Court claimed that the practice of plural marriage had always been "odious," yet never explained

why it was a threat to the public well-being. The Mormons of Utah were prosperous, and the women were more independent than many women on the East Coast. Weisbrod & Sheingorn, *Reynolds v. United States: Nineteenth-Century Forms of Marriage and the Status of Women*, 10 CONN. L. REV. 828, 851. In passing judgment on polygamy the Supreme Court declined to acknowledge any beneficial aspects of the practice or provide any empirical proof to support their accusations.

The Court's opinion in *Reynolds* mirrored the anti-polygamy sentiment prevalent at the time. In the 1860 congressional debates, Roger A. Pryor noted that giving Mormons protection under the rubric of the freedom of religion clause would "'avail to cover any abomination which affects a religious character. It will suffice for the protection of ... Suttee, as well as polygamy.'" See Van Wagoner, supra note 7, at 103.

The majority opinion in *Reynolds* displayed a disdain for the Mormon church that bordered on contempt. The decision equated the church to the "Asiatic and ... African people," who also practiced barbarous acts. Firmage & Mangrum, supra note 56, at 134. While the Court cited American and British societies as examples of good law, the Mormon society, practicing polygamy, was locked in "stationary despotism." *Reynolds*, at 164. Although the Court did not give the name of the despot in question, readers of the opinion probably recognized the figure as Brigham Young, holder of "'an absolute temporal and spiritual power.'" Firmage & Mangrum, supra note 56, at 132. While *Reynolds* influenced later decisions, it contained "the same undercurrent of hysteria that pervades" the remarks of the Justices' political contemporaries. Linford, Part I, supra note 137, at 340-41.

In 1890, the polygamy question again reached the Supreme Court. In *Davis v. Beason*, 133 U.S. 333 (1890), the Court upheld the conviction of an Idaho citizen who was denied the

right to vote because of his affiliation with the Mormon Church. *Id*. at 334-35. In 1888, Idaho passed a provision, ordering all citizens who wished to vote to take an oath. The oath, intended to disenfranchise Mormons, withheld voting privileges from anyone belonging to a group that practiced plural or "celestial marriage," Mormon terms for polygamy. Van Wagoner, supra note 7, at 53. Police arrested Samuel Davis, the defendant, after he took the required oath. *Davis*, 133 U.S. at 335. Davis argued that, although he had been a member of the Mormon Church, he had resigned his church membership before taking the oath. Firmage & Mangrum, supra note 56, at 234. The Court did not consider this fact in its decision, choosing instead to decide Davis' fate on the basis of the statute's constitutionality. The Court ruled that the statute was constitutional, characterizing polygamy as an uncivilized and un-Christian practice. *Davis*, 133 U.S. at 341.

The language in the decision, as in *Reynolds*, was openly hostile toward Mormons and their beliefs. The Court characterized polygamy, in one statement, “as destructive, disturbing, degrading, and debasing,” without offering any evidence to support its claims. *Id.* More disturbing was the effect of the Court's judgment. By allowing the government to disenfranchise voters because of their religious affiliation, the Court restricted the right to vote on the basis of belief. Firmage & Mangrum, supra note 56, at 234-35. Recognizing this problem, the modern Court declared this element of Davis void in 1996. *Romer v. Evans*, 517 U.S. 620, 634 (1996).

In addition to making polygamy a criminal offense, the Morrill Act of 1862 also revoked the Mormon Church's organizational charter and confiscated all of the church's real estate holdings in excess of $50,000. See Morrill Act, ch. 126, 12 Stat. 501 (1862). In a proviso, the congressional majority noted that the sole purpose behind the confiscation of property was to end the church's practice of polygamy. Id. Even though officials did not enforce the statute immediately, the church hierarchy dissolved all the church's holdings and placed them in trusts

held by individual church members. Firmage & Mangrum, supra note 56, at 252. After its 1862 passage, the church leaders openly advocated defying the Morrill Act, placing heavenly doctrine above the will of the federal government. Van Wagoner, supra note 7, at 113-14.

In 1887, the government responded by passing the Edmunds-Tucker Act. See Edmunds-Tucker Act, ch. 397, 24 Stat. 635 (1887). The Act contained a provision calling for all real properties of the church held in violation of the Morrill Act to be confiscated and sold to pay for public schooling in the territories. Id. sec. 13.

In *Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890) the Court ruled on the constitutionality of the Edmunds-Tucker Act's confiscatory provisions. Because territories were still under federal jurisdiction, the Court decided that Congress had the power to dissolve contracts existing between private entities and the territorial governments. *Church*, 136 U.S. at 44. Further, the Court found that the assets of a charitable organization, once dissolved and having no rightful owner, would naturally escheat to the federal government. *Id.* at 59.

When identifying a reason for the dissolution of the church, the majority opinion reiterated the Court's previous attacks on polygamy. The Court claimed that, if the church held the property in question, it would use it to spread the Mormon doctrines, a "distinguishing feature[ ] of which is the practice of polygamy." *Id.* at 48. After characterizing the practice as offensive to the precepts of enlightened society, *Id*., the Court condemned the church for its promotion of the belief, authorizing Congress' retaliatory taking of Mormon property. *Id*. at 49. Although the question was not before the Court, the majority reiterated its conclusion that plural marriage was not a religious practice, "being against the enlightened sentiment of mankind." *Id*. at 50.

In a dissent signed by three of the justices, Chief Justice Fuller stated that the Constitution did not grant Congress absolute power over the territories. *Id*. at 67-68. While the legislature had the power to criminalize polygamy, the dissent claimed that it did not have the right to seize the property of individuals suspected of being polygamists. *Id*.

In this case, the Court allowed the federal government to seize an organization's property because of its espousal of an unpopular belief. *Id.* at 48-49. Because the confiscations burdened the Mormons, who were an unpopular class of people because of the widespread disapproval of their actions, the legislation would be considered unconstitutional today. *Romer v. Evans*, 517 U.S. 620, 633 (1996). The Court in *Reynolds*, citing Jefferson, noted that the First Amendment should create a "wall of separation between Church and State." *Reynolds*, 98 U.S. 145, 164. Yet, the majority in *Late Corporation of the Church of Jesus Christ of Latter-Day Saints* allowed the federal government to dissolve a church, an unprecedented event in American history. See Orma Linford, *The Mormons and the Law: The Polygamy Cases*, 9 UTAH L. REV. 543, 581-82 (1965). After this ruling, the Court ordered a receiver to oversee the church's property, clearly violating the separation of church and state. See id. at 581.

The issue of polygamy did not reach the Supreme Court again until 1946, in the case of *Cleveland v. United States*, 329 U.S. 14 (1946). The defendants in *Cleveland* were a group of fundamentalist Mormons, convicted in the lower courts of transporting one of their respective plural wives across state lines for immoral purposes, namely cohabitation, in violation of the Mann Act. *Id*. at 17. The defendants argued that polygamy was "a form of marriage and ... has as its object parenthood and the creation and maintenance of family life." *Id*. at 19 (quoting *Church v. United States*, 136 U.S. 1, 49 (1890).

The Court rejected this argument, admonishing: "The organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism. It is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world." *Id*. Calling a polygamous household "a notorious example of promiscuity," *Id*. at 20, the Court found the defendants guilty of violating the Mann Act. *Id*. at 26 (Murphy, J., dissenting). One Justice, however, did not follow the opinion of the majority, which condemned the defendants for their "barbarous" practices. Justice Murphy agreed with the defendants, referring to polygamy as "one of the basic forms of marriage," more common "[h]istorically ... [than] any other form." *Id*. (Murphy, J., dissenting). His opinion was remarkable, because it was the first time that a Supreme Court Justice, confronted with the problem of polygamy, asked his colleagues to understand the people who practiced it:

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

The prohibition of polygamy is merely a remnant of the United States' undeclared war on the Mormon Church. The Morrill Act was a thinly veiled salvo on the structure of the Mormon Church itself. Professor Garrett Epps argues that although the Morrill Act was neutral, applying equally to secular polygamists, the law obviously was passed to burden the Mormons unfairly. See Garrett Epps, *What We Talk About When We Talk About Free Exercise*, 30 ARIZ. ST. L.J. 563, 597-98 (1998).

The most recent cases involving polygamy failed to reach the United States Supreme Court. In *Sanderson v. Tryon*, 739 P.2d 623 (Utah 1987), the Utah Supreme Court allowed a

known polygamist to retain custody of her children in a custody dispute. *Id.* at 624. The parties in the matter had lived in a polygamous marriage between June 1975 and April 1982. *Id*. They had three children, but were never formally married according to state law. *Id*. Sanderson, the mother, took the children and entered another polygamous relationship. *Id*. Tyron, the father, abandoned polygamy as a practice and sought custody of the children. *Id*. at 627. While the court found that polygamy was evidence of Sanderson's "[m]oral character," *Id*., moral character was only one factor the court considered in awarding custody. The practice of polygamy was not enough by itself to make Sanderson an unfit parent. Sanderson retained custody of the children. *Id*.

In *Potter v. Murray City*, 585 F. Supp. 1126 (D. Utah 1984), aff'd modified, 760 F. 2d 1065 (1985), cert. denied, 474 U.S. 849 (1985), a police officer, dismissed because of his polygamous lifestyle, sued to be reinstated, arguing that the government's prohibition of polygamy violated his free exercise of religion. *Id*. at 1128. In this matter, the Utah district court chose to follow Reynolds, stating that the government already had proscribed the practice. *Id*. at 1138. However, rather than characterizing the practice of polygamy as "barbarous," the Utah court determined that the government could ban polygamy to maintain the "system of domestic relations based exclusively upon the practice of monogamy as opposed to plural marriage." *Id*. at 1130. The court rejected *Reynolds*' assumption that polygamy was as harmful to society as human sacrifice, its over-simplification of the belief/action analysis in Free Exercise claims, and its "seeming insensitivity in passing moral judgment on the sincerity of religious belief." *Id.*

C. Anti-Polygamy Laws Place a Substantial Burden on Religion

Justice Scalia argues that it is impossible to determine whether a certain belief is central to a religion, asking, "What principle of law or logic can be brought to bear to contradict a

believer's assertion that a particular act is 'central' to his personal faith?" *Emp. Div., Dept. of Human Res. V. Smith*, 494 U.S. 872, 887 (1990). Justice O'Connor, however, posits that "the distinction between questions of centrality and questions of sincerity and burden is admittedly fine, but it is one that is an established part of our free exercise doctrine and one that courts are capable of making." *Id*. at 907 (O'Connor, J., concurring)(citing *United States v. Ballard*, 322 U.S. 78, 85-88; *Tony & Susan Alamo Found. V. Sec'y of Labor*, 471 U.S. 290, 303-05 (1985)).

To Fundamentalist Mormons, plural marriage is an integral and necessary part of their religion. Joseph Smith linked eternal marriage to celestial exultation. Because wives can only get into heaven through the intercession of their husbands, a surplus of more women than men necessitated the institution of plural marriage. Further, a plurality allowed for more children-vessels for unborn souls in heaven. Any law prohibiting polygamy places a substantial burden on a religion that views polygamy as a requirement of its faith.

D. No Compelling Government Interest Justifies the Anti- Polygamy Provisions

That a modern nation can allow polygamy within its borders and survive is demonstrated by the English experience. Faced with large numbers of polygamous immigrants from former colonies where polygamy is legal, England relied upon the lex loci celebrationis principle of conflict of laws (a marriage is generally valid everywhere if it is valid in the place where it was celebrated) to reverse its common law rule based upon Christian matrimonial principles. (See generally Martin. Professor Martin reports that England applies the lex loci celebrationis conflict of laws theory and honors polygamous marriages valid in the place of celebration, e.g., from Pakistan under Islamic law. See id. at 424. The change was a necessary adaptation to the influx of polygamous immigrants from former colonies where local law and religion allowed polygamy.

See id. at 423. In so doing, the English courts moved away from a public policy of adhering to Christian matrimonial principles and toward a conflict of laws principle. See id. at 438-39. The same issue may soon be faced with Brazilian immigrant same-sex couples to the United States. See Larry Rohler, Brazil Grants Rights to Gay Couples, Atlanta J. & Const., June 10, 2000, at A7. Brazil now allows the survivor of a same- sex union to inherit pensions and social security entitlements. See id.)

The Supreme Court has never offered any empirical support for a compelling government interests that would be necessary to justify a ban on religiously motivated polygamy under the First Amendment. Instead, as was done in *Potter v. Murray City*, 585 F. Supp. 1126 (D. Utah 1984), the Court simply assumes that the mass of marriage-related laws makes dealing with multiple wives (or husbands) overly burdensome.

III. As it has been applied to Tom Green, Utah's Bigamy Statute Violates the Substantive Due Process Clause Fourteenth Amendment.

As it relates to this case, two aspects of the Fourteenth Amendment seem settled and serve as a useful starting point: First, that the United States Supreme Court has clearly held that the Due Process Clause found therein establishes and protects a class of substantive rights; it's protection is not merely procedural. See *Foucha v. Louisiana*, 504 U.S. 71, 80, 118 L. Ed. 2d 437, 112 S. Ct. 1780 (1992); *United States v. Salerno*, 481 U.S. 739, 746, 95 L. Ed. 2d 697, 107 S. Ct. 2095 (1987); *Daniels v. Williams*, 474 U.S. 327, 331, 88 L. Ed. 662, 106 S. Ct. 662 (1986). This idea of "substantive" due process "... imposes limits on what a state may do regardless of what procedural protection is provided." *Pittsley v. Warish*, 927 F.2d 3, 6 (1st Cir.)(Cert. denied.), prohibiting state intrusion into "fundamental aspects of personal liberty." *Mangels v. Pena* 789

F.2d 836, 839 (10th Cir. 1986) citing *Roe v. Wade*, 410 U.S. 113, 152 (1973). And, the second relevant aspect of the Fourteenth Amendment, is that ikts substantive protection extends to the fundamental right of an individual to marry.

However, the Court has stopped short of reaching what some argue is a logical conclusion of the merging of these two points, that an individual should be free to define, configure, and enter into a marriage relationship of his or her choosing. Instead, the Court's holdings protect from a state's interference only those individuals who choose heterosexual, monogamous partnerships. Such a limit on substantive due process has been justified in previous cases by citing the state's interest in promoting only as narrow range of possible marriages. This brief argues that an individual's right to marry free of state intrusion should not be limited to monogamous marriages, and that the individual's right to marry is sufficiently fundamental to include any marriage that does not produce legitimate, negative secondary effects against a compelling state interest. In other words, that an individual's right to marry shouldn't be infringed simply by a state saying that the marriage itself offends some public interest, but only upon a showing of the negative effects a particular marriage configuration has on a compelling state interest. This standard is analogous to that found in Free Speech cases, which require a state to show any infringement on an individual's expression is not aimed at the expression itself, but at negative secondary effects of that expression.

A. A HISTORY OF SUBSTANTIVE DUE PROCESS AND THE EVOLUTION OF THE CONSTITUTIONAL RIGHT OF PRIVACY: Contraception and abortion.

The Due Process Clause of the Fourteenth Amendment states, "nor shall any State deprive any person of life, liberty, or property, without due process of law ..." The most obvious

interpretation of this amendment is that a state must use fair and just procedures (such as fair notice and hearing) whenever it deprives an individual of her life, freedom or property and possessions. In a few cases earlier this century, the Supreme Court experimented with the idea that this amendment also had a substantive component, that certain aspects of "life, liberty, or property" were beyond government interference. Certain economic rights, such as the right to contract, were protected in this manner during what is referred to as the Lochner Era. However, these holdings never congealed into significant or permanent fixture of constitutional law. Then, beginning just 30 years ago, in *Griswold v. Connecticut*, 381 U.S. 479 (1965), the U.S. Supreme Court held that within the concept of the "liberty" referenced in the Fourteenth Amendment are certain rights and decisions that are so fundamentally important to the individual that no amount of process justifies governmental interference with them. The Court has since called this protection "substantive due process," and has set itself to the task of identifying the substantive rights it finds so basic, natural and fundamental that they must be protected even without reliance on any particular provision of the Constitution. In subsequent cases, courts have held that these rights are fundamental because they are "implicit in the concept of liberty." *Palko v. Connecticut*, (cite); or, are "deeply rooted in this nation's history and tradition." *Moore v. East Cleveland*, (cite).

Using *Griswold* to announce what is also known as the constitutional right of privacy, the Court marked a watershed in the evolution of an area of law that was born just 75 years earlier, in a famous Harvard Law Review article in 1890. The authors of that article, Samuel D. Warren and Louis D. Brandeis, began:

> That the individual shall have full protection in person and property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its

> eternal youth, grows to meet the new demands of society. Thus, in very early times, the law gave a remedy only for physical interference with life and property .... Later, there came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these rights broadened; and now the right to life has come to mean the right to enjoy life – the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and term "property" has grown to comprise every form of possession – intangible as well as tangible. *The Right to Privacy*, Harvard Law Review, Vol. IV December 15, 1890. No. 5

Beginning with this formal introduction, the "right to privacy" has taken root and evolved at, by legal standards, an impressive rate, with most of development taking place in the past 30 years. In *Griswold*, although there was no explicit use of the substantive due process clause, the Court held that Connecticut's birth-control law (criminalizing the distribution of information and instructions on the use of birth control devices) violated the notions of a "zone" of privacy that "is protected from governmental intrusion." Justice Douglas, writing for a majority, justified this idea by stating that some of the expressed rights in the Constitution had "emanations" that create a "penumbra" in which he found the notion of privacy. After citing a number of cases, he wrote:

> The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against quartering soldiers "in any house" ... is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." ...
>
> We have had many controversies over these penumbral rights of "privacy and repose." These cases bear witness that the right of privacy which presses for recognition here is a legitimate one. *Griswold* at ___.

After validating the right of privacy, the *Griswold* Court found that the marriage relationship fell within this right.

> We deal with a right of privacy older than the Bill of Rights – older than our political parties, older than our school system. Marriage is a coming together for better of for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

While Justice Douglas focused on what could be called marital privacy's geographic aspect ("Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship." *Griswold* at ___.), and Justice Harlan's concurrence noted that only "marital privacy" gave rise to a right to practice informed contraception, *Griswold* was soon used as the foundation on which to build an expanding right of privacy that went well beyond marital privacy being limited to the bedroom, or the right to contraception belonging only to married couples. Each addition to this right comes from the process of identifying the fundamental personal rights that receive special protection under the Due Process Clause. It is one of the most elusive concepts in constitutional law, and one of the most decisive. If a right is considered fundamental, it triggers strict scrutiny and a presumption of constitutional invalidity applied to any state intrusion. For this reason, a court's determination of what rights are fundamental is usually dispositive because to pass strict scrutiny, a state must show that its intrusive law serves a compelling state interest, and is the least intrusive way to meet that state interest.

Just a few years after *Griswold*, the Court decided *Eisenstadt v. Baird* (1972), in which the Court invalidated a statute that required contraceptives to be distributed only by registered physicians and pharmacists and only to married couples. The Court's opnion made it clear that:

> Whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and married alike .... If the right of privacy means anything, it is the right of the individual, married or single, to be free from

> unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt* at ___.

In *Carey v. Population Services Int'l*, 431 U.S. 678 (1977), another significant contraception case, the Court expanded this right once again, striking down a New York statute similar to that in *Eisenstadt*, with one significant difference. The statute in *Carey* entirely prohibited the sale or distribution of contraceptives to minors under the age of 16, except by prescription. In once again strengthening an individual's right to make fundamental decisions free from government interference, the Court stated such protection "is not just concerned with a particular place, but with a protected intimate relationship. Such protected privacy extends to the doctor's office, the hospital, the hotel room or as otherwise required to safeguard the right to intimacy involved." *Carey* at ___.

This line of cases took its most controversial turn in 1973, when the Supreme Court held the right of privacy protects a woman's choice to abort a pregnancy. In *Roe v. Wade* (1973), the Court created a scheme that used the viability of the fetus as a standard, holding that a state's interest in protecting life and potential life of its citizens would be balanced against the woman's substantive due process rights, and would only be compelling after the viability of the fetus.

In the years after the Court decided *Roe*, it looked at a number of state statutes regulating abortion. A look at these cases show the ebb and flow of the efforts to define an individual's fundamental right, a state's compelling interests, and how the two intersect. Ultimately, in 1992, the Court decided *Planned Parenthood v. Casey.* Justice O'Connor, writing the Court's opinion, stated:

> It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter .... At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the state.

How does this examination of the protection of an individual's right of privacy, as applied to contraception and abortion, support the idea that the right of privacy should also protect an individual's right to marry outside a state's narrow definition of marriage? First, it provides a good counter-example to the argument that substantive due process does not protect "nontraditional" marriages such as polygamy because they are not "deeply rooted in this nation's history and tradition." Few propose the idea that contraception and abortion are deeply rooted in history and tradition; indeed, while there are ancient examples of both contraception and abortion, the proliferation and acceptance of these practices is relatively new even considering this nation's short history. However, the individual's right to make choices so fundamental as those involved in contraception and abortion does have a strong history and tradition in America. The same is true of polygamy, which has both ancient examples and a more recent history of intolerance and persecution. It's proliferation and practice is relatively new and emerging in this nation. However, the individual's right to make such a fundamental choice as marriage is traditional in this country.

With reason, courts have called the determination of substantive due process "an area of law 'famous for controversy, and not known for simplicity'," *DeBlasio v. Zoning Bd. Of Adjustment*, 53 F. 3d 592, 598 (3d Cir. 1995) (quoting *Schaper v. City of Huntsville*, 813 F. 2d 709, 715 (5th Cir. 1987)); and that "guideposts for responsible decision making in this unchartered area are scarce and open-ended," *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992). As in the introduction to Warren and Brandeis' law review article, it is a privacy id a right that is in constant need of new, expanding definitions to meet the new demands of society.

A second reason an examination of the contraception and abortion cases is helpful to our present case, is that it shows just how dynamic the Balance between an individual's right and the state's interest in intruding upon that right can be. In just a few years, marital privacy evolved from a geographic right contained in the bedroom, to a personal right of intimacy belonging each member of the marriage. The right to make decisions about contraception evolved from one that belonged only to marital couples to a personal right that even minors possessed in the face of countervailing state interests, and expanded to include the right to choose abortion as a means to end unwanted pregnancies. As we begin looking at the right of privacy as it pertains to family and marriage– rights far less controversial, it would seem–thinking about extending a person's right to choose a nontraditional marriage seems like a small legal step.

Beginning early in the 1900s, the Supreme Court began recognizing an individual's fundamental right to make decisions about raising and educating his ore her children. In *Meyer v. Nebraska* (1923), the Court struck down a state law prohibiting the teaching of foreign languages to students, holding that the rights of teachers to teach and students to acquire knowledge were included in the Fourteenth Amendment's liberty. The right of a parent to make choices regarding a child's education was made explicit in *Pierce v. Society of Sisters* (1925), when the Court struck down a state law requiring children to attend public schools. The Court held that the Fourteenth Amendment's "liberty" included the right of "parents and guardians to direct the upbringing and education of children under their control" and denied states the power to "standardize its children." This idea is echoed in *Wisconsin v. Yoder*.

In other cases, the Court augmented the idea of parental and familial rights being fundamental. In *Skinner v. Oklahoma* (1942), the Court struck down a three-

strikes-and-you're-sterilized punishment for crimes of moral turpitude. In doing so, the opinion of the Court relied, in part, on the idea that "marriage and procreation are fundamental to the very existence and survival of the race." In a number of cases, the Court has held that a state's interest in regulating zoning and welfare could not include narrow definitions of what constituted a family. See *Moore v. East Cleveland* (striking down a zoning ordinance that disallowed members of extended family as part of a single family unit) and *Anderson v. Edwards* (striking down welfare regulations that narrowly defined single family groups).

The right to marry has been found to be fundamental by the Supreme Court. In *Loving v. Virginia*, (1967), the Court overturned a law prohibiting interracial marriages that forced Virginia residents Richard and Mildred Loving to marry in Washington D.C. because their home state of Virginia upheld antimiscegenation laws. In 1959 they were prosecuted and convicted of violated the state law and sentenced one year in jail, suspended on the promise the Lovings would leave the state and not return for 25 years. Forced to move, they returned to Washington D.C. where, in 1963, they initiated a suit challenging the constitutionality of the antimiscegenation law. In March of 1966, the Virginia Supreme Court of Appeals upheld the law, but in June of 1967, the U.S. Supreme Court unanimously ruled the law unconstitutional. Thus, in 1967 the 16 states which still had antimiscegenation laws on their books were forced to erase them.

Zablocki v. Redhail, (1978) ... the Court finds a law unconstitutional that prohibits "deadbeat dads" from remarrying.

These cases that find the right to marry and configure a family beg a question: Why, then, have court stopped short of protecting an individual's right to define and configure his or her marriage relationship when it includes the decision to enter into an open, consensual plural

marriage? If the state can't force parents to "standardize (their) children," how can it standardize marriages?

One argument is that a state's compelling interest of protecting traditional values outweighs a person's right to enter into a nontraditional marriage. However, as it was discussed above in relation to freedom of religion, "tradition" can be wrong-thinking, and corrected.

One example of a state court making such a correction is the Georgia Supreme Court's reaction to *Bowers v. Hardwick*, 478 U.S. 186 (1986), in which the U.S. Supreme Court upheld the state law prohibiting sodomy, holding that _____.

However, the dissent argued that:

> This case is no more about the right to engage in sodomy than about a fundamental right to watch an obscene movie or place a bet from a telephone booth. It is instead about the most comprehensive of rights – the right to be left alone. How a person engages in sex should be irrelevant as a matter of law. Sexual intimacy is a sensitive, key relationship of human existence and the development of human personality. In a diverse nation such as ours, we must preserve the individuals freedom to choose, and not imply that there are any 'right' ways of conducting relationships." (BLACKMUN, with whom Brennan, Marshall and Stevens joined in dissent.)

Just a few years ago, when the Georgia Supreme Court had a chance to revisit the constitutionality of its antisodomy statute, in *Powell v. State*, 510 SE.2d 18 (Ga. 1998), it agreed with the dissenting opinion in *Bowers*:

> Today we are faced with whether the constitutional right to privacy screens from governmental interference a non-commercial sexual act that occurs without force in a private home between persons legally capable of consenting to the act. While *Pavasich* and its progeny do not set out the full scope of the right of privacy in connection with sexual behavior, it is clear that unforced sexual behavior conducted in private between adults is covered by the principles espoused in *Pavasich* since such behavior between adults in private is recognized by '(a)ny person whose intellect is in normal condition ...' ... We cannot think of any other activity that reasonable persons would rank as more private and deserving protection

> from governmental interference than unforced, private, adult, sexual activity. We conclude that such activity is at the heart of the Georgia Constitution's protection of the right of privacy. (Internal citations omitted) 510 SE.2d at 23-4.

(NEW ALABAMA DILDO CASE)

In addition, while polygamy is not widespread, it certainly exists in a greater amount than what some people think. The fundamentalist Mormons are not the only groups to espouse polygamist beliefs. Another polygamist group, the Biblical Patriarchal Christian Fellowship of God's Free Men and Women, also resides in Salt Lake City. See Peg McEntee, Why Do People Practice Polygamy? Polygamists Cite Theological Roots, SALT LAKE TRIB., Sept. 20, 1998, at A1. The group leader claims to have three wives and 1400 members in his congregation. *Id.* In Africa, where polygamist marriages have been practiced in tribes for generations, the Anglican church has acknowledged that polygamist marriages still exist amongst its members. See Stack, Why, supra note 33, at A1. One South African Anglican archbishop recently went so far as to say that "polygamy in parts of Africa genuinely has features of both faithfulness and righteousness." *Id.* In 1998, fearing that sanctions had hurt recruitment, the church also lifted a "100-year-old ban on permitting polygamists to join the church." Peggy Fletcher Stack, Utah Bishop Heads to World Conference, SALT LAKE TRIB., July 18, 1998, at C1.

Some polygamous marriages in America are already legal. Native Americans are allowed to marry according to their customs as long as they "are members of a tribe recognized and treated with as such by the United States government." *Hallowell v. Commons*, 210 F. 793, 800 (8th Cir. 1914) (quoting *Ortley v. Ross*, 110 N.W. 982, 983 (Neb. 1907)). If a tribe has a recognized custom of polygamy a Native American of that tribe may enter into such a polygamous marriage, even if it conflicts with state law. *Id.* The preceding scenario is true even

when the marriage involves a Native American and a person entirely of another race. See 52 AM. JUR. 2D Marriage § 98 (1970). The Blackfeet tribe practiced polygamy for generations. Because the male population often was decimated by warfare, the female population of the Blackfeet often outnumbered the male. Polygamy maintained the Blackfeet social order based on the tribe's concept of marriage, allowing several females to marry a single male. See WALTER MCCLINTOCK, THE OLD NORTH TRAIL 185-91 (1992).

Islam allows the practice of polygamy, permitting a husband to have multiple wives as long as he can "treat them with equal fairness." ASHGAR ALI ENGINEER, THE RIGHTS OF WOMEN IN ISLAM 22 (1992) (quoting THE KORAN 4:3). The tradition of Islamic polygamy dates back to the Prophet Mohammad, who had many wives. See Phillip K. Hitti, Mohammed, in 19 ENCYCLOPEDIA AMERICANA 314, 315 (Int'l Ed. 1999). Estimates suggest that, although relatively few polygamous families exist, up to "a third of the world's population belongs to a community that allows [polygamy]." Stack, Why, note 33, at A1.

Islam has an estimated six million practitioners in the United States and is growing rapidly. See Marc Ramirez, Islam on the Rise: Muslim in America, SEATTLE TIMES, Jan. 24, 1999, at A1. According to current figures, the polygamous population of Utah is also growing. *See* Brooke, supra note 4, at A12. Polygamy may very well be a permanent part of underground American culture and likely will grow as time passes. *See* Joe Costanzo, Polygamy Here to Stay, Scholar Says, DESERET NEWS (Salt Lake City), Mar. 23, 1999, at B5.

Also, the right to decide, free of government intrusion, who to marry, how to marry, and the details of your marital relationship is precursor right to the other fundamental rights having to do with family. It is prerequisite to the exercise of other privacy right that the Supreme Court has clearly said is beyond the grasp of government interference, such as decisions regarding child

conception and rearing. These subsequent rights have little meaning, or at least diminished meaning, if individuals are not free to configure the foundational marital relationship. These include the right to conceive and bear children, and the right to raise and educate children.

Indeed, some have argued for a broad "Free Right to Family" or the freedom to choose family forms. In the context of civil liberties, the question becomes how much freedom should individuals, separately and together, have to form their own families, and in so doing, receive constitutional protection against intrusive state regulations? What is the scope of an individual's right to express familial preferences? Rooted in substantive due process, freedom of association and exercise of religion.

Harvard Professor Barbara XXX, recently argued that the "freedom to choose and maintain family forms and family practices based on conscience – or on preference – but most importantly, expressed regardless of the orthodoxy or standardization of families pursued by the government." In making this argument, XXX relies on the cases such as *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), analogizing from the idea that children cannot be seen as mere creatures of the state to that of the family not being seen as such.

Once a right to marry is seen as fundamental, how can it be protected by a state pursuing an interest that limits how an individual can exercise that right? This balance is supposed to be found in the application strict scrutiny. In other words, if a right is considered fundamental, it triggers strict scrutiny and a presumption of constitutional invalidity applied to any state intrusion, thereby disavowing legislative judgment. However, in the area of nontraditional marriages, the state has been given a pass, taking the teeth out of this highest level of scrutiny.

Quote from U of U law review re Potter

How do you balance the fundamental right against a state interest that has never been adequately articulated? At the very least, the government should be held to its burden. The government should be forced to show that it is not suppressing the religious activity or fundamental right for its own sake, but that it is combating secondary effects of the activity. (Parallel to First Amendment speech cases.)

"In fundamental rights cases, this interest analysis involves the concept of the 'compelling' interest. Although this concept plays a critical role in modern substantive due process–as well as in equal protection, free speech and press, and free exercise of religion–the Supreme Court has provided little guidance on how to differentiate compelling interests from the range of other legitimate interests possessed by government ... analysis must proceed by analogy."

In free speech cases in which symbolic speech is infringed because the government is trying to stop, not the speech itself, but some evil that is cause by the speech (sounds familiar?), the Court has developed the doctrine of negative secondary effects:

In O'Brien, the court held that the public nudity law did not target erotic dancing but the "evil" of "public nudity."

"The secondary effects doctrine provides that government officials may regulate nude dancing as long as their reason for regulation is to combat harmful effects allegedly associated with adult businesses, such as increased crime or decreased property values. Souter reasoned that the nudity ban advanced the government's interest in combating harmful secondary effects allegedly associated with adult businesses."

IV. Utah's Bigamy Statute, as Applied to Tom Green, Violates the Equal Protection Clause of the U.S. Constitution

An amendment to Colorado constitution was adopted in statewide referendum. The amendment repealed ordinances that prohibited discrimination based on sexual orientation to the extent they prohibited discrimination based on "homosexual, lesbian or bisexual orientation, conduct, practices or relationships." The Supreme Court held amendment unconstitutional because it violates homosexual's right to equal protection.

Scalia dissents saying that we have every right to discriminate against people who engage in conduct that the majority finds morally reprehensible and claims that the Court is elevating homosexuals to protected class status and that it is ridiculous to say that Colorado cannot discriminate against homosexuals when Bowers says it is okay for other states to put people in jail for the same thing and surely we can discriminate against felons.

When we think of polygamists we don't naturally think of homosexuals, but there is a connection when you think about nontraditional marriages. In *Bowers v. Hardwick*, 478 U.S. 186 (1986) the Court decided that the state of Georgia could criminalize certain sexual activities. *Id*. at 196. In detailing the decision, the majority opinion conveyed the impression that the Court's only goal in the case was to deny constitutional protection to homosexual sodomy. *Id.* at 191. Justice Blackmun's dissent, however, noted correctly that the statute actually made all sodomy illegal, even when practiced by heterosexual couples. *Id*. at 200.

The decision in *Romer v. Evans*, 517 U.S. 620 (1996) destroyed some of the force Bowers once carried, as did the Georgia Supreme Court in 1998, when, on state constitutional grounds, held that the state's sodomy law violated Georgians right of privacy. See *Powell v. State,* 510 SE.2d 18 (Ga. 1998). In *Romer*, the Court struck down an amendment to the Colorado state

constitution that repealed any local statutes protecting citizens from discrimination on the basis of their homosexual relationships. See *Romer*, 517 U.S. at 624. *Bowers* deemed homosexuality as a conduct that could be proscribed. See *Bowers*, 478 U.S. at 196-97 (Burger, J., concurring)(characterizing the act of homosexual sodomy as historically prohibited and worse than rape). The Court in *Bowers* determined that such acts, like most activities, could be prohibited by the state simply on any rational basis, such as moral outrage. *Id*. at 196. *Romer* adopted the concept of homosexuals as a separate class of people defined by their sexual preference. *Romer*, 517 U.S. at 641. Besides making homosexuals a class, the Court acknowledged that anti-homosexual laws are often motivated by hatred of the minority and required that all reasons used for discriminating against homosexuals meet a heightened standard of justification. *Id*. at 634-35.

Justice Scalia made the obvious connection between polygamy and homosexuality. In his dissent in *Romer*, Scalia used the potential legalization of polygamy as a worst-case scenario to deride the majority's opinion. *Id*. at 644 (Scalia, J., dissenting). Arguing in favor of the Colorado amendment, Scalia claimed that citizens had the right to "consider certain conduct reprehensible--murder, for example, or polygamy, or cruelty to animals." *Id.* (Scalia, J., dissenting). Justice Scalia went further, arguing that, under the Court's rationale, polygamists could assert that they had been "singl[ed] out" by unfair laws and ask for their revocation. *Id*., at 649 (Scalia, J., dissenting). Eventually, Scalia queried how the Court could believe that the "perceived social harm of polygamy" was a "'legitimate concern of government,' and the perceived social harm of homosexuality [was] not?" *Id*. at 651 (Scalia, J., dissenting)(quoting *Church of Lukimi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 535 (1993)). If a polygamist were to have argued before the Court, he might very well have asked the same question.

Apparently, many homosexual rights activists feel the same way. See Katha Pollitt, *Polymaritally Perverse*, THE NATION, Oct. 4, 1999. Some advocates of gay marriage believe that, for the practice to be legalized, polygamous marriages should also be allowed. Some have suggested that the legalization of polygamous unions would be "the price of gay marriage." Id.

In *Romer v. Evans*, Justice Kennedy affirmed the opinion of the Colorado Supreme Court, *Evans v. Romer*, 882 P. 2d 1335 (Colo. 1994), that Colorado's Amendment 2, which declared all existing local legislation providing protections to homosexuals unconstitutional and required a constitutional amendment to adopt any new local legislation protective of gays, violated the federal Constitution. Justice Kennedy found that Amendment 2 failed even the rational relationship test because it imposed "a broad and undifferentiated disability on a single named group" and seemed "inexplicable by anything but animus toward the class." *Romer*, 517 U.S. at 632 (cf. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985)(holding that the city's denial of a permit was motivated by irrational animus toward the mentally retarded and, thus, failed the rational relationship test).

Justice Kennedy, although writing the majority opinion, was actually responding to Justice Scalia's dissent, which discussed *Davis v. Beason*. Justice Kennedy noted that to the extent *Davis* held that a person may be denied the right to vote because he advocated a certain practice, *Davis* had been overruled by *Brandenburg v. Ohio*. See *Romer*, 517 U.S., at 634 (citing *Brandenburg v. Ohio*, 395 U.S. 444 (1969)(per curium)). Further, to the extent that *Davis* stood for the proposition that a convicted felon may be denied the right to vote, "its holding is not implicated by [the Court's] decision and is unexceptionable." *Id*. (citing *Richardson v. Ramirez*, 418 U.S. 24 (1974). Most importantly, Justice Kennedy argued: "To the extent [Davis] held that the groups designated in the statute may be deprived of the right to vote because of their status,

its ruling could not stand without surviving strict scrutiny, a most doubtful outcome." *Id*. (citing *Dunn v. Blumstein*, 405 U.S. 330 (1972). Justice Kennedy did not specify why strict scrutiny was appropriate. Clearly, polygamists as a group were not per se entitled to strict scrutiny. Had Justice Kennedy adopted the Colorado Supreme Court's reasoning, one could infer that Mormon polygamists were entitled to strict scrutiny because they had been denied the right to fair participation in the political process. We are left with the conclusion that strict scrutiny would be appropriate because voting is a fundamental right. Overall, Justice Kennedy did little to rebut Justice Scalia's argument that the Mormon polygamy cases support the constitutionality of Colorado's Amendment 2.

Justice Scalia's arguments in reliance upon Mormon cases came in the context of a harshly critical dissent in which he challenged that "the Court has mistaken a Kulturkampf for a fit of spite." *Romer*, 517 U.S at 636 (Scalia, J., dissenting). Justice Scalia wrote: "[T]here is a much closer analogy, one that involves precisely the effort by the majority of citizens to preserve its view of sexual morality statewide, against the efforts of a geographically concentrated and politically powerful minority to undermine it." *Id*. at 648.

Justice Scalia assumed that the anti-polygamy provisions in the Utah, Oklahoma, Idaho, and New Mexico state constitutions are constitutional. *Id*. at 648 (Scalia, J., dissenting). Justice Scalia then wrote: "The Court's disposition today suggests that these provisions are unconstitutional, and that polygamy must be permitted in these States on a state- legislated, or perhaps even local-option, basis-unless, of course, polygamists for some reason have fewer constitutional rights than homosexuals." *Id*. (Scalia, J., dissenting).

Of course, Justice Scalia's aim was not to provide support for polygamists, but rather to discredit the majority opinion with a parade of "horribles." However, Justice Scalia succeeded in

removing the anti-polygamy provisions he cited from the generally applicable law of his heavily criticized Smith holding, and by showing that the provisions were aimed against a particular group, placing them in the Church of the Lukumi Babalu Aye category.

Turning to *Davis v. Beason*, 133 U.S. 333 (1890), Justice Scalia described the Idaho provision at issue in that case as depriving polygamists of the ability to achieve their political goal of making polygamy legal by effectuating a state constitutional amendment. Specifically, by depriving polygamists of the power to vote, they were prevented from voting to amend their state's constitution. *Romer*, 517 U.S. at 649 (Scalia, J., dissenting). Further, the fact that one could be denied the right to vote because he had been convicted of the felony of polygamy begs the question of whether making polygamy a felony withstands constitutional scrutiny. However, according to Justice Scalia, it is still good law that polygamy can be criminalized. *Id*. at 650. Further, Justice Scalia explained that the *Beason* Court considered and rejected the Equal Protection Clause argument. *Id*., at 649-650 (Scalia, J., dissenting). Finally, Justice Scalia noted that Justice Kennedy had cited *Beason* with approval in his 1993 Church of the Lukumi Babalu Aye opinion. Thus, Justice Scalia concluded, the Court could only reconcile the two cases if the perceived social harm of polygamy was a legitimate government concern and the perceived social harm of homosexuality was not. *Id*. at 651 (Scalia, J., dissenting).

Justice Scalia then concluded his review of the polygamy analogy with a lengthy quote from *Murphy v. Ramsey*, 114 U.S. 15 (1885), which is a paean to heterosexual monogamy and which suggests that adherence to monogamy is a necessary precursor to worthiness for admission to the Union as a state. The quote demonstrated to Justice Scalia the differing levels of animosity the Court would allow on the issues of polygamy and homosexuality. *Romer*, 517 U.S. at 651 (Scalia, J., dissenting).