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A Judge Weakened Utah's Anti-Polygamy Law. What Does This Say About Sex, Race, and Religion?

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(AP Photo/Las Vegas Review-Journal, Jerry Henkel)

Americans have always found polygamy fascinating, even entertaining. In the nineteenth century, Mormons were stock villains in a plethora of now mercifully forgotten Victorian novels. Today, the Mormon Church has long since abandoned polygamy, but its fundamentalist offshoots have captured audiences in HBO's fictionalized *Big Love* and TLC's *Sister Wives*, a reality TV show centered on the plural marriages of the Brown family.

Last Friday, the Browns added judicial fame to their pop culture standing. In *Brown v. Buhman* a federal district court in Utah declared portions of the state's anti-polygamy law unconstitutional. Since the Supreme Court's 1879 decision in *Reynolds v. United States*, courts have consistently refused to grant polygamy constitutional protection. Yet in Friday's decision, Judge Clark Waddoups, a George W. Bush appointee, declared, "*Reynolds* is not, or should no longer be considered, good law."

Understanding how he reached this conclusion reveals much about the place of religion, sex, and—perhaps surprisingly—race in contemporary America.

Nineteenth-century Mormons were adamant that polygamy was not about sex. Polygamy, they insisted, was a matter of religious conscience. They were following the example of the biblical patriarchs and the

revelations of their own modern prophets. Sex had nothing to do with it. The Supreme Court was not persuaded.

In *Reynolds v. United States*, the Court ruled that while the First Amendment protected a right to believe as one pleased, it afforded no protection to religious conduct. If there was one kind of conduct that Victorian America had no doubt as to its right to regulate, it was sex. Polygamy, insisted the Court, was a degenerate practice "of Asiatic and of African people" that the state could eradicate.

Over the next decade, Congress passed ever-harsher laws aimed at the Latter-day Saints. New crimes to facilitate conviction were created. Hundreds of Mormons were sent to prison, and hundreds of others went into hiding as federal agents poured into Utah. The Supreme Court upheld laws depriving Mormons of the right to vote, and Congress dissolved the Mormon Church as a legal entity, confiscating its property.

Faced with mass incarceration, permanent political subjugation, and institutional annihilation, in 1890 Mormon Church President Wilford Woodruff issued the so-called "Manifesto" abandoning plural marriage. Even so, Latter-day Saints continued to sporadically practice clandestine plural marriage until the first decade of the twentieth century, when the Mormon Church moved decisively to stamp out polygamy among its members. The Browns and other "fundamentalist Mormons" are the spiritual—and often literal—descendants of diehard polygamists that broke with the Mormon Church in these years.

While the technicalities differ, the Supreme Court's current interpretation of the free exercise clause is not dramatically more generous than was its 1879 decision in *Reynolds*. In 1990, it held in *Employment Division v. Smith* that the government may criminalize religious practices so long as it doesn't single them out because they are religious. Justice Scalia's opinion for the Court relies on *Reynolds*.

So what has changed?

In his opinion, Judge Waddoups makes two basic moves. First, he discredits *Reynolds* by emphasizing the undercurrent of racial animus in the opinion. Second, he insists that polygamy is about sex after all.

The decision in *Brown v. Buhman* is a 91-page behemoth of a judicial opinion. It begins with a detailed historical summary of Utah's anti-polygamy law that relies heavily on the so-called New Mormon History, a scholarly movement that began in the 1950s to disentangle the Mormon past from hagiography and polemic. Not surprisingly, it has produced a mountainous literature on plural marriage.

Judge Waddoups is not the only one that has been reading the New Mormon History. Three days after he issued his opinion, the LDS Church published a paper for its members on the history of polygamy that draws extensively on the same scholarship. According to sources, the Church's statement has been in the works for a long time and is unrelated to the suit, but the paper does show the influence this work has had on the understanding of nineteenth-century polygamy.

Particularly in the last generation, scholars have offered a new picture of the anti-polygamy crusades of the nineteenth century. Sarah Barringer Gordon of the University of Pennsylvania, for example, has shown the way in which debates over polygamy were tied up in the mid-nineteenth century with debates over federal power and slavery. The work of other scholars, including my own, has focused on the way that nineteenth-century Americans viewed Mormons as a distinct race, one particularly prone to the sexual vices of "Asiatic" and "African" races.

The striking feature of this scholarship is that it shows that far from being exclusively about religion, the anti-polygamy crusades after the Civil War were part of a broader legal effort to maintain America's racial purity. To think of nineteenth-century Mormons as anything other than "white" seems strange to us now,

but for Victorian Americans Irish, Italians, Jews, and Frenchmen were all regarded as less than fully "white," a term that tended to be restricted to the "Teutonic" and "Anglo-Saxon" races. The Celtic, Latin, and Semitic peoples sat lower down in the ethnic hierarchy. Mormons occupied a similar inferior position in the nineteenth-century racial imagination.

Judge Waddoups' opinion cites and discusses all of this work. In part this is to make the technical point that under current Supreme Court doctrine the law at issue in *Reynolds* was not a "neutral law of general applicability." The court, however, did not need a 91-page historical opus to make this point. Judge Waddoups' larger rhetorical agenda is to discredit *Reynolds* by tying it to the history of legalized racism in the United States.

Although the opinion never cites it, *Plessy v. Ferguson*, the notorious case in which the Supreme Court upheld the racial doctrine of "separate but equal," sits in the background of Judge Waddoups' decision. His extensive historical discussion is clearly meant to consign *Reynolds* to the rogues' gallery of American law presided over by *Plessy*. It will be interesting to see if this recasting of *Reynolds* sticks.

And then there is sex.

For much of American history, courts have taken it as axiomatic that states may regulate the morals of their citizens. Beginning in the 1960s, however, that assumption began to shift when the Supreme Court struck down a law banning the sale of contraception in *Griswold v. Connecticut*.

The Court's jurisprudence since that time has not been a model of consistency and coherence, but the general trend has been toward greater protection for private sexual conduct and greater suspicion of government efforts to legislate sexual morality. Hence, in 2003, the Court reversed its earlier position and held in *Texas v. Lawrence* that states could not criminalize homosexual relations between consenting adults.

The precise meaning of *Lawrence* for the rest of constitutional doctrine is not entirely clear. Justice Kennedy's opinion declines to answer the kind of technical questions that would make it easy for lower courts to apply the precedent to new cases. The tenor of the opinion, however, is easy to grasp. Justice Kennedy wrote, "The issue is whether the majority may use the power of the State to enforce [their moral] views on the whole society through operation of the criminal law." The answer given by the Court was no.

Commentators often claim that *Lawrence* rejected the idea that morality can justify legislation. This isn't quite right. Clearly the government retains the power to legislate against many things because the majority regards them as wrong. The long line of cases from *Griswold* to *Lawrence*, however, suggests that sexual morality is no longer a legitimate basis for legislation in the eyes of the Supreme Court.

Like the nineteenth-century Mormons that litigated to the Supreme Court in *Reynolds*, there is no reason to doubt the religious sincerity of the Brown family. Unlike nineteenth-century Latter-day Saints, however, they have a legal incentive to insist that polygamy is about sex. This is precisely what they did, and Judge Waddoups accepted their argument, ruling that Utah's anti-polygamy law was unconstitutional under *Texas v. Lawrence*.

It's very difficult to know what the legal significance of *Brown v. Buhman* will be. The state of Utah can appeal the ruling to the Tenth Circuit Court of Appeals, where it may well be overturned. The losing party at the Tenth Circuit could ask the Supreme Court to consider the case, but the Supreme Court rejects most such requests. We'll have to wait to see what happens.

Judge Waddoups' decision, however, is a careful and well-crafted piece of legal writing that uses all of the legal, historical, and rhetorical resources at its disposal to advance its argument. That argument reveals three basic things about our constitutional and political culture.

First, after over a century of development, American constitutional law today is not dramatically more protective of religious freedom than it was in 1879. In the last century, for example, the scope of constitutional protection for the freedom of speech has massively expanded. Not so for freedom of religion. The Browns' legal team had to struggle to find a way of using the First Amendment to attack the state's law, and this is perhaps the shakiest part of their victory.

Second, in many ways race has become a more potent concept than religion. For more than a century after *Reynolds*, religious polygamists have been unable to convince a court that laws against plural marriage were constitutionally suspect. *Brown v. Buhman* suggests that it may be more rhetorically powerful to discredit *Reynolds* as a defense of racial purity than as a burden on religious conscience.

Finally, there is the power of sexuality in our political and legal culture. In the nineteenth century, it was far more rhetorically powerful for Mormon polygamists to define their struggle in terms of religious freedom. The Browns have found that today's constitutional doctrine is more likely to be hospitable to claims of sexual freedom. Sexuality has always been central to human identity. It has not, however, always been central the idea of liberty. The triumph of *Lawrence* over *Reynolds* in Utah suggests that, increasingly, sexuality lies close to the core of constitutionally protected freedoms.

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