Mr. Peay’s Horses: The Federal Response to Mormon Polygamy, 1854 – 1887

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I. INTRODUCTION

Mr. Peay was a family man. From a legal standpoint, he was also a man with a problem. The 1872 Edmunds Act had recently criminalized bigamy, polygamy, and unlawful cohabitation, leaving Mr. Peay in a bind. Peay had married his first wife in 1860, his second wife in 1862, and his third wife in 1867. He had sired numerous children by each of these women, all of whom bore his last name. Although Mr. Peay provided a home for each wife and her children, the Peays worked the family farm communally, often taking their meals together on the compound. How could Mr. Peay abide by the Act without abandoning the women and children whom he had promised to support?

Hedging his bets, Mr. Peay moved in exclusively with his first wife. Under the assumption that “cohabitation” required living together, he ceased to spend the night with his other families, although he continued to care for them. After a jury convicted him of unlawful cohabitation in 1887, he argued his assumption to the Utah Supreme Court. As defense counsel asserted, “the gist of the offense is to ‘ostensibly’ live with [more than one woman.]” In Mr. Peay’s view, he no longer lived with his plural wives. The court emphatically rejected this interpretation of “cohabitation,” declaring that “[a]ny more preposterous idea could not well be conceived.” The use of the word “ostensibly” appeared to irritate the court. It noted that:

[i]t is the same thought which has been frequently presented to the district courts, by polygamists asking how they can act towards their polygamous wives and not lay themselves liable to conviction for unlawful cohabitation. With the same propriety might a man who steals a horse ask how he can act in regard to other men’s horses and not lay

† J.D., 2001, Yale Law School. The author would like to thank her grandmother, Mona Campbell, for her contributions to this article.
2. United States v. Peay, 14 P. 342, 343 (Utah 1887).
3. Id.
4. Id.
5. Id. at 344.
6. Id.
7. Id. at 343.
8. Id.
9. Id.
himself liable to conviction for larceny. To tell him that he must simply cease stealing would not be at all satisfactory to him.\textsuperscript{10}

Contemporary debates about polygamy wrestle with modern justifications for outlawing plural marriage. Various scholars have argued that it is sexist, antithetical to romantic love, and that it violates the central tenets of an egalitarian society. The Peay court had a much starker rationale: polygamists were thieves. In the eyes of the court, Mr. Peay had absconded with other men's chattel, and continued contact with his plural families only perpetuated the offense. The court was not alone in its conclusion. This paper examines the anti-polygamy legislation and caselaw from 1854 to 1890 and finds that, quite simply, the polygamy statutes criminalized theft. Admittedly, Congress and the courts relied upon the language of companionate marriage and the protection of women to do so. From the beginning, polygamy was a woman's issue. This paper argues that it was a very particular kind of woman's issue, however—namely, an allocation issue. The federal government mandated monogamy in order to distribute women equitably among men. Before we dismiss polygamy as repulsive and embrace monogamy as wholesome, we should recognize the fundamental conception of women as property that originally supported both regimes.

II. BACKGROUND: A BRIEF HISTORY OF EARLY MORMONISM AND MORMON POLYGAMY

A. Little Tales

Joseph Smith believed in secrets. On May 26, 1842, Smith warned his congregation, “[t]he tongue is an unruly member - [h]old your tongue about things of no moment, a little tale will set the world on fire.”\textsuperscript{11} Arguably, Smith had much to fear from “little tales” by that point. He addressed his cautioning remarks to the Relief Society, a Mormon women's group dedicated to supervising the social and spiritual well-being of the community.\textsuperscript{12} The Society's first president was Smith's own wife of thirteen years, Emma.\textsuperscript{13} Unbeknownst to Emma, however, she was not Smith's only wife. Her husband had recently married her Relief Society treasurer, her secretary, and her first counselor.\textsuperscript{14}

\textsuperscript{10} Id. at 343.
\textsuperscript{11} ANDREW F. EHAT & LYNDON W. COOK, THE WORDS OF JOSEPH SMITH 121 (1980).
\textsuperscript{12} Dan Vogel, The Prophet Puzzle Revisited, in THE PROPHET PUZZLE, INTERPRETIVE ESSAYS ON JOSEPH SMITH 49, 128 (Bryan Waterman ed., 1999) [hereinafter THE PROPHET PUZZLE].
\textsuperscript{13} Id.
\textsuperscript{14} Susan Staker, “The Lord Said, Thy Wife Is a Very Fair Woman to Look Upon”: The Book of Abraham, Secrets, and Lying for the Lord, in THE PROPHET PUZZLE, supra note 12, at 300 n. 25. Unfortunately for Smith, Emma had a different reaction to the little tales. Staunchly anti-polygamous, she used her role as Relief Society President to track down and stamp out all rumors of her husband's adventures in plural marriage. Id. at 300. During the Society's second meeting, for example, she insisted that Miss Clarissa Marvel be brought "to repentance" for spreading "scandalous falsehoods on the character of Prest. Joseph Smith without the least provocation." Id. Two members were assigned for the task, forcing Clarissa to sign a statement that she had
daughter of Emma's second counselor had also followed suit. All in all, Smith had surreptitiously married or proposed to just under half of his May audience. Without a doubt, unruly tongues possessed an unlimited capacity to set Smith's personal world on fire in the spring of 1842. They would do more than that, however. Over the next fifty years, stories of Mormon polygamy would spread throughout the country, igniting the larger realms of American social, political and legal thought. And in the process, these little tales would incite Congress to strip Mormons of their First, Fifth, and Sixth Amendment rights.

B. Early Mormon Doctrine: the Burned-Over Religion

What inspires a Victorian man to advocate polygamy? Clearly, at the time of his comments to the Relief Society, Smith had yet to announce plural marriage as Church doctrine. To the contrary, Smith issued numerous formal statements throughout the 1840's denying that the Church of Latter-day Saints condoned polygamy. Smith did like secrets, however. Historical evidence suggests that he had begun taking multiple wives as early as 1835, encouraging an elite circle of friends to join him shortly thereafter. Smith recorded the key never heard nor repeated any gossip that Joseph Smith had more than one wife. Id. at 301. This seemed to assuage Emma temporarily. Of course, she did not know that both of her volunteers were themselves married to her husband. Id. at 300.

15. Id. at 300.
16. Id.
17. Technically, the term "polygamy" encompasses both "polygyny," the marriage of one man to many women, and "polyandry," the marriage of one woman to multiple men. MARTIN DALY & MARGO WILSON, SEX, EVOLUTION, AND BEHAVIOR 79 (1983). Throughout this paper, however, I use "polygamy" in its common, polygynous sense.
18. In fact, Smith would never make such an announcement. Rather, Mormon leaders waited until 1852 before revealing "the Principle," as polygamy came to be called, to the entire congregation. JESSIE L. EMBRY, LIFE IN THE PRINCIPLE 7-9 (1987). This was eight years after the Mormons' arrival in Utah, and five years after Smith's assassination in Carthage, Illinois. Id. The Book of Mormon itself contains five separate injunctions against polygamy, linking the practice to fornication, whoredom, and familial chaos. See Jacob 1: 5 (Book of Mormon) ("And now it came to pass that the people of Nephi, . . . began to grow hear in their hears, and indulge themselves somewhat in wicked practices, such as like unto David of old desiring many wives and concubines, and also Solomon, his son.").
19. EMBRY, supra note 18, at 7.
20. RICHARD S. VAN WAGONER, MORMON POLYGAMY: A HISTORY, 3-4, 6 (1986). Estimates of the number of wives Smith ultimately took vary widely. The 1996 LDS Ancestral file gives a relatively restrained tally of twenty official marriages, with an additional twelve women sealed to Smith after his death. D. MICHAEL QUINN, THE MORMON HIERARCHY: EXTENSIONS OF POWER 179 (1997). Michael Quinn, however, places the ultimate figure closer to forty-six. Id. Equally ambiguous is the nature of the relationship that Smith enjoyed with each of his wives. Reports affiliated with the Church tend to downplay the sexual implications of Smith's multiple alliances, suggesting that Smith viewed his plural wives as strictly spiritual companions. See, e.g., JAMES B. ALLEN & GLEN M. LEONARD, THE STORY OF THE LATTER-DAY SAINTS 171 (1976) ("It is not clear whether Joseph Smith lived as husband with any of his plural wives or whether they were only sealed to him as he attempted to introduce the principle."). Other sources imply otherwise. Asked if she remained "a virgin" during her marriage to the Prophet, plural wife Eliza Snow replied, "I thought you knew Joseph Smith better than that." QUINN, supra note 20, at 189.
21. EMBRY, supra note 18, at 7.
revelation on polygamy in 1842, nearly a decade before it became official Church practice.\textsuperscript{22} Despite its early secrecy, polygamy thus formed one of the central tenets of early Mormon doctrine. One wonders what motivated Smith to champion a practice so seemingly alien to the Victorian faith in monogamous marriage. The nineteenth century’s idealization of exclusive, companionate love has been documented extensively. As B. Carmon Hardy writes, “[b]y mid-century, attention to romantic companionship and transformation of the home into an affective, sentimental nest was elevating monogamy to a near religion.”\textsuperscript{23} The principle of plural marriage flouted this concept entirely. Had Joseph Smith somehow avoided absorbing the fundamental social beliefs of his day? To the contrary, a closer examination of the mid-1800’s reveals that Smith and the religion he founded were both products of their time. The larger American culture might have reviled the Mormon practice of polygamy, but accusations that the Church was fundamentally un-American ignored the larger social realities of the time.

Any discussion of the origins of Mormon polygamy should begin with a simple fact: Joseph Smith was from the Burned-Over District.\textsuperscript{24} The term refers to the geographical bull’s eye of a religion fervor that swept through the northern United States during the first half of the nineteenth century.\textsuperscript{25} This “Second Great Awakening”\textsuperscript{26} of American evangelicalism attained a fever pitch in Smith’s hometown of Palmyra, New York, galvanizing an entire generation of fire-and-brimstone preachers.\textsuperscript{27} Despite their differences, the Palmyra congregations typically shared a belief that the Second Coming of Christ was upon them. In their eyes, Christ’s imminent arrival necessitated a return to the ancient practices of the New Testament.\textsuperscript{28} This desire to create an older social order was not necessarily unique to the evangelical community. A profound yearning to return to tradition provided a low but constant counterpoint to the social and industrial revolutions that shaped the Victorian era.\textsuperscript{29}

\textsuperscript{22} Doctrine and Covenants 132: 3, 61 (“Prepare they heart to receive and obey the instructions which I am about to give unto you; for all those who have this law revealed unto them must obey the same . . . . [I]f any man espouse a virgin, and desire to espouse another, and the first give her consent, and if he espouse the second, and they are virgins, and have vowed to no other man, then he is justified; ... he cannot commit adultery with that that belongeth unto him and to no one else.”).


\textsuperscript{24} ALLEN & LEONARD, supra note 20, at 11(1976).

\textsuperscript{25} Id.

\textsuperscript{26} The First Great Awakening burned through America in the Eighteenth Century, reaching its zenith between 1730 and 1740. Like its sequel, the First Great Awakening was a religious movement that sought to return the country to traditional piety. Id. at 10.

\textsuperscript{27} Id. at 11. The Burned-Over District produced a staggering array of religious beliefs. In the Palmyra region, for example, one could practice Spiritualism with the Fox Sisters, Millennialism with William Miller, or Perfection with John Humphrey. Jan Shipp, “The Prophet Puzzle” Revisited, in THE PROPHET PUZZLE, supra note 12, at 31. Each creed dictated its own lifestyle, requiring, among other things, vegetarianism, communism, abstinence, or plural marriage. Id.

\textsuperscript{28} Id.

\textsuperscript{29} See IRWIN ALTMAN & JOSEPH GINAT, POLYGAMOUS FAMILIES IN CONTEMPORARY SOCIETY 21-22 (1996). Despite the strictures of nineteenth century society, Victorian culture placed increasing emphasis upon
Despite their fervor, nearly all of the faiths preached during the Second Great Awakening died with their prophets. Of all the Burned-Over beliefs, only Mormonism survived to become a major American religion.  This was a surprising turn of events, given that Joseph Smith showed little early promise of becoming one of the great figures of U.S. religious history. Poor and poorly-educated, Smith watched the Second Great Awakening with some interest. He declined, however, to join any particular denomination. Although he studied the Bible at home with his father, his interest in the afterlife appears to have run more towards the paranormal. Before becoming a prophet, Smith worked as a money-digger, using a “peepstone” to locate buried treasure. At the time, digging was a common form of folk magic practiced by the lower classes in western New York and New England. Smith seems to have practiced the art with mixed success. In 1826, he was brought to trial for breaching a contract to find a silver mine.

Smith’s luck changed profoundly in 1827, however. Only a year after the silver mine debacle, twenty-two year-old Smith announced that he had discovered something infinitely more valuable in the earth. He claimed to have found golden plates recounting the history of the Native Americans’ ancestors. According to Smith, he had experienced a series of revelations from the time that he was eighteen. During these revelations, the angel Moroni had appeared to him and led him to a set of ancient tablets written in “reformed Egyptian” and buried in a hillside not far from Smith’s family’s farm. The angel gave Smith two stones, the Urim and Thummin, which would allow him to translate the plates. Smith declared that the records:

were engraved [sic] on plates which had the appearance of gold, each plate was six inches wide and eight inches long, and not quite so thick as common tin. They were filled with engravings, in Egyptian characters, and bound together in a volume as the leaves of a book, with three rings running through the whole. The volume was something near six inches in thickness, a part of which was sealed. The characters on the unsealed part were small, and beautifully engraved. The whole book exhibited many marks of antiquity in its construction, and much skill in the art of engraving.

romantic love and sexual freedom. Divorce laws relaxed, women began to seek individual and political independence, and urbanization led to decreased familial control over the individual. Id.

30. Shipps, supra note 27, at 25.
31. Id. at 31.
32. Id. at 35.
33. Vogel, supra note 12, at 53.
34. Shipps, supra note 27, at 35.
35. Id. at 35.
36. Id.
37. Id. at 40-41.
38. JOSEPH SMITH, HISTORY OF THE CHURCH (1843). The construction of Smith’s book has puzzled Church historians for over a century. Pure gold is extremely heavy. If the tablets were solid gold, Smith never would have been able to carry them home. This had led various researchers to assert that “[t]he implication . . .
With Emma acting as scribe, Smith translated Moroni’s plates into *The Book of Mormon*. This translation did nothing less than provide America with a pre-Columbian history completely independent of Europe. According to *The Book of Mormon*, Native Americans descended directly from Hebrews who traveled to the continent in 600 B.C. These voyagers subsequently split into two tribes, the Lamanites and the Nephites, and warred viciously with each other for the next six hundred years. After the Crucifixion, Christ came to America and restored peace between the factions. The truce did not hold, however, and within two hundred years, the Lamanite tribe eradicated the Nephites. The angel Moroni was the son of the Nephites’ last historian, Mormon. Moroni finished his father’s records and buried them in the hillside where Smith eventually discovered them. On the basis of this history, Joseph Smith founded the Church of Jesus Christ of the Latter-day Saints, commonly known as Mormonism.

Contrary to much popular thought, Mormonism is not a cult. In its modern incarnation, the LDS Church resembles most Protestant religions. It teaches faith, repentance, and baptism, rejecting Calvinist principles of predestination in favor of salvation through good works. Mormonism does bear clear marks of its prophet’s Burned-Over origins, however. *The Book of Mormon* revolves around the imminence of the Second Coming. Mormons believe that Christ’s arrival is nearly upon them and that they must prepare His Kingdom. Nineteenth-century polygamy formed an integral part of this “restoration of all things” by reestablishing biblical social relationships. Academics also argue that this return to an older, patriarchal regime sought to curtail the growing emphasis on romantic love.

Certainly, the ideology supporting polygamy was nothing if not patriarchal. By advocating plural marriage, early Church leaders sought to emulate God—literally. This god was humanoid, male, and polygamous. He wanted his male progeny to become gods in their own right, ruling over their own planets in the

40. For a discussion of the American desire to break free from European religious history, see Shipps, *supra* note 27, at 40.
42. *Id.* at 23.
43. ALLEN & LEONARD, *supra* note 20, at 57. “Good works” is not a hollow concept in most Mormon communities. Quick to ridicule Mormonism for polygamy and missionaries, popular culture often losessight of Mormons’ tremendous willingness to care for one another. The Church’s formal welfare system is without parallel in the U.S., and this community ethic trickles down through Mormon society as a whole. A member experiencing financial or familial problems can expect a wide range of support, including everything from childcare to housing to substantial monetary assistance.
44. *Id.* at 18.
45. QUINN, *supra* note 20, at 178.
company of multiple wives and children. Early Mormons sought to attain this ideal on earth. As Jedediah M. Grant preached in 1854, "[if] you want a heaven, go to and make it." In this earth-bound heaven, the polygamous family became the microcosm of divinity, a kingdom in miniature that a man had to rule well in order to prove himself worthy of becoming a god. Women filled the role of queen. Mormonism recognized no queen without a king, however, and a woman depended upon her husband to attain the highest levels of heaven. When Orson Pratt lectured the Saints that God commanded obedience to the Principle so that a man and his wives could "attain their exaltation" and "be counted worthy to hold the scepter of power over a numerous progeny," he did not need to specify which pair of hands would be doing the holding. Plural wives might have been queens, but they were also a resource to be earned by righteous men.

Polygamy appears to have invoked an additional, less divine, rationale: reproductive privilege. As one son of a polygamous family ventured, "[t]he controlling factor in the Lord's establishing the principle of polygamy at that time [was] . . . to get additional spirits here and to get them through certain family lines." Mormon polygamy endowed certain men with the prodigious reproductive advantage that multiple female partners necessarily provided; plural marriage allowed certain men to populate the Utah valley with a disproportionate number of their kin. Orson Pratt’s query must have rung loud and clear in the ears of the male Saints: "Why not look upon Abraham’s blessings as your own, for the Lord blessed him with a promise of seed as numerous as the sand upon the seashore, so will you be blessed . . . ." Unfortunately for Pratt, this proclamation jangled in other ears as well. Congress and the courts would spend the next fifty years providing the legal "why not" to Pratt’s rhetorical inquiry. Their answer was hysterical, violent, and only questionably constitutional. It was also unnervingly concise. No man would have "seed as numerous as sand upon the seashore" because the federal government was willing to sacrifice anything to prevent it.

48. Id.
51. Id.
52. Elizabeth Harmer-Dionne, Note, Once a Peculiar People: Cognitive Dissonance and the Suppression of Mormon Polygamy as a Case Study Negating the Belief-Action Distinction, 50 STAN. L. REV. 1295, 1320 (1998). This ideology furnished another justification for polygamy. If women relied upon righteous men to fully attain heaven, it would be have been more advantageous for a woman to secure a partial share in one spiritually-upright husband than to settle for the undivided attention of a morally-deficient man.
53. EMBRY, supra note 18, at 16.
54. Id. at 45 (interview with Joseph Donald Earl) (emphasis added).
55. The effects of polygamy’s reproductive privilege persist to this day in Utah. The Salt Lake City phone book contains a disproportionate number of Smiths, Youngs, Bensons, and Kimballs.
56. EMBRY, supra note 18, at 45.
III. THE LEGAL RESPONSE TO POLYGAMY.

A. Contemporary Debates: Polygamy and Gay Marriage.\textsuperscript{57}

The polygamy cases have never been fashionable. Neglected by law school curricula, they spent the majority of the twentieth century in an obscure corner of constitutional jurisprudence. Ironically, it took a gay rights case to draw plural marriage into the national spotlight. In \textit{Romer v. Evans},\textsuperscript{58} a dissenting Justice Scalia cited an 1890 polygamy case, \textit{Davis v. Beason},\textsuperscript{59} as precedent for upholding an amendment to the Colorado state constitution.\textsuperscript{60} The amendment in question would have repealed various local ordinances prohibiting discrimination on the basis of non-heterosexual orientation.\textsuperscript{61} In the majority opinion, Justice Kennedy struck down the amendment on the ground that "a bare ... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."\textsuperscript{62} Scalia took a different view, however. In the opening paragraph of his dissent, Scalia argued that "[t]he Court has mistaken a Kulterkampf for a fit of spite."\textsuperscript{63} According to Scalia, the Colorado amendment sought merely to "preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through the use of the laws."\textsuperscript{64} Scalia relied on \textit{Davis} for the principle that not only was this kulterkampf constitutionally-sound, but that it had "been specifically approved by the Congress of the United States and by this Court."\textsuperscript{65} According to Scalia, \textit{Beason} allowed a powerful majority to block a minority group from seeking legal protection through the political process.

\textit{Kulterkampf}, or "culture struggle," is a nebulous, many-layered word.\textsuperscript{66} It refers to Prussian prime minister and German chancellor Otto von Bismarck's war on the Catholic Church.\textsuperscript{67} In an attempt to hobble the Church's influence in Germany, Bismarck instituted harsh measures such as the May Laws and the

\textsuperscript{57} The pairing seems incongruous, as does Justice Scalia's critical role in bringing the two together. Antonin Scalia, Roy Romer, and Joseph Smith -- the original (plural) odd couple.
\textsuperscript{58} 517 U.S. 620 (1996) (Scalia, J., dissenting).
\textsuperscript{59} 133 U.S. 333 (1890).
\textsuperscript{60} Romer v. Evans, 517 U.S. at 649.
\textsuperscript{61} See id. at 624. Amendment 2 to the Colorado Constitution would have repealed and prohibited any legislation outlawing discrimination on the basis of "homosexual, lesbian or bisexual orientation, conduct, practices, or relationships." \textit{Id.} The Amendment would thus have struck down any statute barring an employer from firing an employee for not being straight. It remained uncertain, however, whether the Amendment would have left such a statute intact to the extent that it protected heterosexual workers. Amendment 2's failure to include "heterosexual" in its list of orientations suggests that it would have allowed Barnes and Noble to fire a gay man while prohibiting A Different Light Bookstore from terminating a straight woman.
\textsuperscript{62} Id. at 634, (citing Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973)) (Scalia, J., dissenting).
\textsuperscript{63} Id. at 636.
\textsuperscript{64} Id.
\textsuperscript{65} Id.
\textsuperscript{67} Id.
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School Inspection Laws. He also indulged in general persecution of the clergy. As such, Scalia’s approving use of the word in the context of anti-gay legislation appears at best misguided and at worst malicious. In the context of Davis, however, it was absolutely accurate. From 1860 to 1890, Congress and the state legislatures passed a series of acts that constituted nothing less than a kulterkampf on polygamy specifically and Mormonism in general. The Davis decision, for example, upheld an Idaho statute stripping Mormons of the right to vote and to hold public office. Not simply polygamists - all Mormons. Such legislation was extreme but not unusual. Indeed, the legal response to plural marriage was sufficiently draconian to invoke that other linguistic remnant of World War II, blitzkrieg.

B. The Early Anti-Polygamy Response: the Morrill Act, the Poland Act, and Reynolds v. United States.

In Romer, Justice Scalia sought to conscript the nineteenth-century polygamy cases into twentieth-century service. His dissent sent lawyers, law professors, and law students scuttling back to the library to research an obscure line of legal history. America had forgotten what Congress did to the Mormons—if it ever really understood. A brief reminder is in order.

68. Id.
69. Id.
70. Davis v. Beason, 133 U.S. 333 (1890). The Court held that “[I]n our judgment, Section 501 of the Revised Statutes of Idaho Territory, which provides that ‘no person . . . who is a bigamist or polygamist, or who teaches, advises, counsels, or encourages any person or persons to become bigamists or polygamists . . . or to enter into what is known as plural or celestial marriage, or who is a member of any order, organization or association which teaches, advises, counsels, or encourages its members or devotees or any other persons to commit the crime of bigamy or polygamy . . . either as a rite or ceremony of such order, organization, or association or otherwise, is permitted to vote at any election, or to hold any position or office of honor, trust, or profit within this Territory,’ - is not open to any constitutional or legal objection.” Id. at 346-47 (emphasis added).
71. The polygamy question has recently become an integral part of the gay marriage debate. In his article, Polygamy and Same-Sex Marriage, David L. Chambers recounts how the legislative hearings surrounding the 1996 Defense of Marriage Act devolved into an analysis of plural marriage. David L. Chambers, Polygamy and Same-Sex Marriage, 26 Hofstra L. Rev. 53 (1997). Numerous Congressmen perceived an inherent connection between gay and plural marriage and grilled witnesses opposing the DOMA about their views on polygamy. Congressman Bob Inglis of South Carolina demanded, if someone possessed “an ‘insatiable desire’ to marry more than one wife, . . . what argument did gay activists have to deny him a legal, polygamous marriage?” Id. at 57. Similarly, Congressman Stephen Largent of Oklahoma queried “[w]hat logical reason is there to keep us from stopping expansion of that definition [of marriage] to include three people or an adult and a child, or any other odd combination . . . ? There really is no logical reason why we could not also include polygamy . . . .” Id. at 58. Or as Professor Hadley Arkes of Amherst College questioned, “[o]n what ground would the law say no to people who profess that their love is not confined to coupling” if the government condoned gay unions? Id. at 57.

While the focus of this paper is not gay marriage, it does answer Professor Arkes’s question. I argue that Congress and the courts perceived a very specific harm to flow from polygamy—a harm that had nothing to do with the sex of the parties involved. The argument that gay marriage creates a slippery slope ending in polygamy ignores the Congressional rationale for outlawing plural marriage. While this rationale was anything but benign, it does eliminate polygamy from the Right’s rhetorical arsenal in the gay marriage debate.
1. 1862: The Morrill Act

Polygamy first came to congressional attention in 1854. A bill introduced at the 33d Congress proposed to allow the surveyor general to grant a substantial acreage of land to any man except he who “shall now, or at any time hereafter, be the husband of more than one wife.”\textsuperscript{72} The bill eventually failed, perhaps due to Southern concerns about expanding federal power in relation to slavery.\textsuperscript{73} Even these reservations could not forestall government action indefinitely, however. Eight years later, Congress passed the Morrill Act.\textsuperscript{74}

The 1862 Morrill Act criminalized bigamy.\textsuperscript{75} Under the Act, no married individual could “marry any other person, whether married or single, in a Territory of the United States.”\textsuperscript{76} Multiple marriages subjected the offender to a five hundred dollar fine, five years in prison, or both.\textsuperscript{77} The Act also attacked various laws passed by the Utah Territorial Legislature. It revoked the statute incorporating the Church and annulled all other laws that functioned to “establish, support, maintain, shield, or countenance polygamy . . . .”\textsuperscript{78} Finally, the Morrill Act targeted plural marriage indirectly by weakening the Church’s financial base. Section Three prohibited any religious organization from “acquir[ing] or hol[ding] real estate” worth in excess of fifty thousand dollars.\textsuperscript{79} Although this provision did not apply retroactively, it did require that all future holdings above the statutory amount escheat to the federal government.\textsuperscript{80}

The Morrill Act might have been draconian if it had been enforceable. The statute contained a central weakness, however: it required predominantly Mormon juries to convict their own.\textsuperscript{81} Additionally, the Act crippled itself by relying upon a formal definition of marriage and bigamy. The Morrill Act required prosecutors to prove that a defendant had married twice – a massive

\begin{itemize}
  \item \textsuperscript{72} CONG. GLOBE, 33rd Cong., 1st Sess. (app. 1) 603 (1854).
  \item \textsuperscript{73} See discussion of the connection between slavery and polygamy as “domestic institutions” infra.
  \item \textsuperscript{74} The Morrill Act, ch. 125, § 1, 12 Stat. 501 (1862) (codified at Rev. Stat. § 5352).
  \item \textsuperscript{75} Id.
  \item \textsuperscript{76} Id.
  \item \textsuperscript{77} Id.
  \item \textsuperscript{78} Id. § 2.
  \item \textsuperscript{79} Id. § 3.
  \item \textsuperscript{80} Id. During the Morrill debates, Congress avoided the bill’s Free Exercise implications by claiming that polygamy was not a true religious practice, see infra note 89, and by asserting that the government had always regulated marriage. See 1833-1873 CONG. GLOBE, 36th Cong., 1st Sess. 1494 (1860) (statement of Rep. Millson) (“The law everywhere interferes with [marital] relations! . . . Marriage has always been a subject of regulation by the State. . . . Away, then, with this argument of the free-love school!”).
  \item \textsuperscript{81} Early Mormons struck a delicate balance between church law and the territorial and federal court systems. Fearing the divisive effect that formal legal proceedings could have upon the community, church leaders required members to resolve their civil disputes in its ecclesiastical courts. FIRMAGE & MANGRUM, supra note 49. Brigham Young rebuked litigious Saints with the declaration that “[t]here is not a righteous person in this community who will have difficulties that cannot be settled by arbitrators, the Bishop’s Court, the High Council, or by the 12 Referees . . . .” Id. at 14. According to Young, this was “far better. . . . than to contend with each other in law courts, which directly tends to destroy the best interest of the community, and to lead scores of men away from their duties, as good and industrious citizens . . . .” Id. Young himself appears to have harbored a personal distaste for lawyers, opinning that “[t]o sit among them is like sitting in the depths of hell, for they are as corrupt as the bowels of hell . . . . [T]hey are a stink in the nostrils of God and the angels . . . .” Id. at 17.
\end{itemize}
hurdle in a territory that lacked both marriage laws and civil marriage records.\textsuperscript{82} At the time, most Utah marriages were either common law or ecclesiastical, and Mormon temple ordinances swore all participants to secrecy.\textsuperscript{83} These facts alone promised to reduce Morrill trials to an evidentiary nightmare of conflicting testimony.\textsuperscript{84} As a result, the statute languished, unused, for over a decade. When the federal government finally did indict its first polygamist in 1871, it ignored the Morrill Act, choosing instead to indict the defendant for having adulterous relations with his plural wife.\textsuperscript{85}

2. The Poland Act: 1874

Recognizing the Morrill Act's limitations, Congress passed the Poland Act in 1874.\textsuperscript{86} The Poland Act was essentially a list of jurisdictional and procedural amendments. It sought to facilitate polygamy convictions by transferring plural marriage cases from the Mormon-controlled probate courts to the non-Mormon federal system.\textsuperscript{87} In addition to assigning criminal jurisdiction to the federal judiciary,\textsuperscript{88} the statute authorized the federal marshal to serve all process for the district courts and the Supreme Court.\textsuperscript{89} The Act also gave the United States Attorney power to prosecute any criminal offense.\textsuperscript{90} The Act further cemented federal involvement in polygamy prosecutions by creating new jury selection procedures that relied heavily upon the district court clerk.\textsuperscript{91} Finally, the Act attempted to limit Mormon involvement in the legal system by annulling various territorial acts that structured Utah's courts. As it stated, "the act of the territorial legislature of the Territory of Utah entitled 'An act in relation to marshals and

\begin{itemize}
  \item \textsuperscript{82} HARDY, supra note 23, at 44.
  \item \textsuperscript{83} FIRMAGE & MANGRUM, supra note 49, at 149. It appears that Congress recognized the limitations inherent in Representative Morrill's bill. Representative Hindman objected that he would not vote for the bill because "it would be a dead letter on the statute-book; for while it imposes penalties, it leaves their enforcement to Mormon juries, acting under Mormon law." 1833-1873 CONG. GLOBE, 36th Cong., 1st Sess. 1411 (1860) (discussing the Poland bill). Similarly Representative McClemand protested:
  \begin{quote}
    [t]his is the whole extent of the remedy proposed by the committee's bill—a bill which assumes and relies upon Mormons-polygamists themselves, to execute its provisions. Does not everyone know that the Mormons will not enforce such a law against themselves? [A]nd that a petty jury of polygamists will not convict a brother polygamist? Does not every sane man know that? Id. at 1514.
  \end{quote}
  The bill's lack of teeth was not fatal, however. As Representative Millson asserted, by simply passing the bill, "we shall have acquitted ourselves of our duty. We shall have wiped away a reproach from the national reputation. We shall have put upon the statute-book our condemnation of this crime." 1833-1873 CONG. GLOBE, 36th Cong., 1st Sess. 1494 (1860). For him, as for a majority of the Congress in 1860, symbolic protest would suffice. This leniency would not last.
  \item \textsuperscript{84} FIRMAGE & MANGRUM, supra note 49, at 137.
  \item \textsuperscript{85} Id. It is doubtful that this legal distinction made much difference to one Mr. Thomas Hawkins, adulterer. The court still saw fit to sentence him to a five hundred dollar fine and three years of hard labor. Id.
  \item \textsuperscript{86} The Poland Act, ch. 469, Part X, 13 Stat. 253 (1874).
  \item \textsuperscript{87} Id.
  \item \textsuperscript{88} Id. § 3.
  \item \textsuperscript{89} Id. § 1.
  \item \textsuperscript{90} Id. § 2.
  \item \textsuperscript{91} Id. § 4.
\end{itemize}
attorneys,' . . . and all laws of said Territory inconsistent with the provisions of this act, are hereby disapproved."92

3. Reynolds v. United States: 1878

Despite the Poland Act's procedural revampings, it was ironically the ineffective Morrill Act that dealt polygamy its first and fatal blow. Admittedly, prosecutors encountered nearly insurmountable obstacles when they attempted to convict polygamists under the earlier statute.93 The Act gave rise to the Reynolds litigation, however, thereby drawing the Supreme Court into the polygamy debate. Throughout the Morrill and Poland legislation, Mormons had remained confident that the First Amendment would guarantee their Free Exercise right to practice the religion of their choice in the manner dictated by their god.94 In 1852, Brigham Young was sufficiently sure of this outcome to proclaim, "there is not a single constitution of any single state, much less the constitution of the Federal Government, that hinders a man from having two wives, and I defy all the lawyers of the United States to prove the contrary."95 Reynolds v. United States accepted this challenge, and in 1878, it proved Young wrong.96

Reynolds laid the legal bedrock for all future discussions of polygamy and the First Amendment.97 Lawyers and academics typically invoke Reynolds for the principle that the First Amendment recognizes a divide between religious belief and religious action. As Laurence Tribe writes, "[t]he Court has often indicated that 'free exercise' protects religious beliefs absolutely, but religious actions only qualifiedly. The Court first expounded the distinction in Reynolds v. United States . . . ."98 Such assertions generally rely on Reynolds's famous statement that "[l]aws are made for the government of action, and while they cannot interfere with mere religious belief and opinions, they may with practices."99 Under this interpretation, the Supreme Court simply held that the

92. Id. § 7. Even more disturbing are the provisions struck by Congress, specifically proposed Section 32. This section would have authorized the president to raise war against the Mormons if they protested the Act, allocating forty thousand troops to the cause. CONG. GLOBE, 41st Cong., 1st Sess. 1369 (1870). Congress also saw fit to strike proposed Section 31, which would have reserved one hundred thousand dollars to provide for the Mormon women and children left destitute when the federal courts incarcerated their husbands and fathers. Id. Not that one hundred thousand dollars would have provided much for the Utah territory's polygamous wives. As Representative Fitch observed, "A munificent appropriation! Enough, with economy, to give them about three days' rations each!." CONG. GLOBE, 41st Cong., 1st Sess. 1519 (1870).
94. Id. at 159.
95. Id.
96. Reynolds v. United States, 98 U.S. 145 (1878)
97. Sources disagree as to whether George Reynolds voluntarily agreed to become the test case for American polygamy. FIRMAGE & MANGRUM, supra note 49, at 151 (1988). Several facts are uncontested, however. Mr. Reynolds was an English emigrant and Brigham Young's personal secretary. Id. More than four years after his original indictment, he was sentenced to two years in prison. Id. at 156. After an early release for good behavior, he took his place as a "living martyr" in the Mormon community. Id.
98. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1183 (2d ed. 1988).
First Amendment guaranteed Mr. Reynolds the right to believe in his religion without giving him carte blanche to practice it in any fashion he desired.

Certainly, the Reynolds Court structured its opinion around a fundamental belief-action distinction. According to the Court, under the First Amendment, "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."\footnote{Id. at 164.} The problem with the typical reading of Reynolds, however, is that it ignores this last clause. Reynolds does not allow Congress to prohibit all religious action, only that which is in violation of social duties or subversive of good order.

On a practical level, we understand this qualification instinctively. A reading of Reynolds that did not account, at least implicitly, for some qualifying test would effectively eviscerate the Free Exercise clause. Religion and belief are not identical. While belief forms an essential part of religion, it does not necessarily require religion’s social and performative elements. One can believe in God without being religious. Very few attorneys would honestly attempt to argue that a statute prohibiting Catholics from taking the Sacrament did not violate the First Amendment. We accept that the belief (faith in transubstantiation) remains somehow incomplete without the action (swallowing); we believe that the First Amendment protects religious opinion in its concrete, expressive form unless some other value dictates otherwise. The critical element of Reynolds is not the distinction that it drew between opinion and action. Rather, it is the value that the Court relied upon to limit Mr. Reynolds’s free exercise: social obligations.

References to social obligations run throughout the heart of the Reynolds opinion. The Court grounded most of them in the writings of James Madison. The Court relied heavily upon Madison’s statement that, although “religion is a matter which lies solely between man and his God, [man] has no natural right in opposition to his social duties.”\footnote{Id.} By anchoring its opinion in Madison’s distinction between divine and civil obligations, the Court could affirm that “the duty we owe the Creator” was not within the cognizance of civil government,\footnote{Id. at 163.} while insisting that the duties that citizens owed one another certainly were. Under this interpretation, the First Amendment allowed Congress to prohibit religious-based actions as long as those actions subverted the social order.

The Court had no problem finding that Mr. Reynolds’s multiple marriages did precisely that. As it stated, “there never has been a time in any State of the Union when polygamy has not been an offense against society. . . .”\footnote{Id. at 165.} The Court characterized plural marriage as a sort of malum in se social crime, a status that stripped polygamy of any free exercise protection. The Court did not rely solely on tradition to arrive at this holding. Instead, it proposed its own rationale for why polygamy constituted “an offense against society,” namely despotism. As
the Court stated, "[u]pon [marriage] society may said to be built [and] . . . according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or lesser extent, rests." This convoluted connection between marriage and government allowed the Court to assert that "polygamy leads to the patriarchal principle, and . . . applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy." In short, Reynolds held that Congress could outlaw polygamy because polygamous marriages would lead to a despotic government. Monogamy, on the other hand, nurtured democracy.

C. The Edmunds Act

1. The Legislative History of the Edmunds Act.

The immediate effect of Reynolds was to give Congress the go-ahead to legislate more aggressively against polygamy. Congress did not decline. In 1882, it passed the Edmunds Act. If the Morrill Act cut deeply into the Mormons' religious freedom, the Edmunds Act took aim at the Saints' political rights. The statute vacated Utah's registration and election offices and created a five-man commission to oversee elections in the Territory. Under the commission, no current or past polygamist was allowed to vote. The Edmunds Act also shaved away at the Sixth Amendment right to be tried by a jury of one’s peers. Under the Act, prosecutors in polygamy, bigamy and cohabitation trials could strike a potential juror for cause if he "[was] or had been living in the practice of bigamy, polygamy, or unlawful cohabitation with more than one woman . . ." They could also strike venire men who refused to answer questions about their marital status or who simply believed "it right for a man to have more than one living and undivorced wife."

104. Id. at 165-66.  
105. Id. at 166.  
106. As discussed below, the Reynolds Court provided sparse support for this assertion.  
108. Id. § 9.  
109. Id. § 8.  
110. Id. § 8.  
111. Id. § 5.  
112. Id. It is critical to note that the Edmunds Act did not represent a straightforward exercise of Congress’s authority to strip convicted felons of particular political rights. Rather, it sought to inflict massive civil punishments upon the Mormon community as a whole. For example, the Act did not simply prohibit convicted polygamists from voting – it decreed that "no polygamist, bigamist, or any persons cohabiting with more than one woman . . . shall be entitled to vote or other place, or be eligible for election or be entitled to hold any office or place of public trust . . . ." Id. § 8. It remains unclear from the Act’s language who was to determine whether a particular individual was currently living with multiple women. The use of the present tense, however, suggests that a conviction was thus not necessarily required for disqualification. See 47 CONG. REC. 13,1196 (remarks of Senator Morgan from Alabama on the Edmunds Bill) ("I notice that the language of the bill operates in presenti. It speaks of a certain existing condition of men and things . . . . From the moment that this enactment is signed by the President of the United States, after it has passed the two houses of Congress, it will operate upon these classes of people . . . .")
The Edmunds Act also circumvented the fundamental problem plaguing the Morrill Act: definition. In order to dispense with the difficulties of proving legal marriages in a territorial community, the Edmunds Act created the crime of cohabitation. As defined, cohabitation was a misdemeanor subject to a three hundred dollar fine, six months in prison, or both. As discussed below, a cohabitation conviction required a much lower evidentiary standard. This proved a boon to prosecutors, particularly since they could charge a defendant with both polygamy and cohabitation in a single indictment.

Due to the extremity of its measures, the Edmunds Bill provoked significant controversy in Congress. Numerous Senators argued that the Bill inflicted criminal punishment upon polygamists without due process of law. As Senator Brown from Georgia asserted, “you have a right to punish a Mormon for adultery or fornication or bigamy. I make no issue with you there. But you have no right to punish him for it till you have legally convicted him of the crime . . . .” Others denounced the Bill’s juror provisions. Senator Call of Florida objected that:

>[if] there be anything sacred in the history of American jurisprudence and American liberty it is that a person charged with crime shall have a fair and an impartial trial by a jury of his peers, and not by a packed jury selected of men known to be opposed to him and prejudiced against him, and a religious test imposed upon them for their qualification as jurors.

Still others argued that the Edmunds Bill punished polygamy in an impermissibly retroactive manner. In short, opposition to the Bill was abundant and vehement. As one Senator proclaimed, “[w]hether it is regarded in the whole or in its details, it is a bill, I think, that will long stand as a monument of the invasion upon the Constitution, of the disregard of personal rights, of the

Similarly, the Act authorized prosecutors to voir dire potential jurors about their religious convictions and to strike those who believed that polygamy was acceptable. Edmunds Act § 5. This represented a flagrant violation of Reynolds’ distinction between First Amendment belief and action. Given the Church’s insistence that its members adhere to its views, section five effectively exposed all faithful Mormons to disqualification—and all polygamist defendants to juries intentionally not composed of their peers.

113. Edmunds Act § 3.
114. Id. § 4.
115. 47 CONG. RECORD 13, 1204. See also, id. at 1157 (remarks of Senator Vest of Mississippi) ("If there is one single clause in our Constitution or Bill of Rights dear to the American heart, it is that no citizen shall be deprived of life, liberty, or property without the judgment of his peers or of a competent tribunal . . . . The seventh section of this bill takes away from a citizen of the United States the right to vote or hold office before conviction by his peers of any crime."); id. at 1197 (remarks of Senator Morgan of Alabama) ("[i] his bill deprives a citizen in the Territory of Utah of [the right to vote]; this bill enables five commissioners appointed by the President and confirmed by the Senate, without any trial or hearing at all, without information, without indictment, without summoning a witness, to institute an inquiry and to arrive at a conclusion that a person, a citizen of the United States in the Territory of Utah, has violated this law, and that in consequence of his violation of it he must be disfranchised as a punishment.")
116. 47 CONG. RECORD 13, 1207.
117. Id. at 1210 (remarks of Senator Pendleton of Ohio) ("Did you ever know a jury law which went back to the whole course of a man’s life and disqualified him for sitting upon a jury unless he would swear that he is not now, and never has been guilty of any of the acts defined as crimes in the laws?").
violation of every essential principle contained in our form of government and in our institutions."\textsuperscript{118}

The opposition was abundant and vehement, but not unanimous. Numerous congressmen argued that the realities of plural marriage necessitated the Edmunds Bill's severe legislative response. Senator Bayard of Delaware conceded that the Bill represented "an unrepublican theory of proceeding in regard to elections," but concluded that nothing else would break the equally unrepublican theocracy that ruled Utah.\textsuperscript{119} Similarly, Senator Sherman of Ohio argued that "the only remedy for this evil, which the people of the United States will grapple with and will end some of these days, is to place in power there a government that is not controlled by Mormon votes. . . ."\textsuperscript{120} Senator Garland acknowledged the Bill's extremity, justifying it with the assertion that "[d]esperate cases need desperate remedies . . . ."\textsuperscript{121} Congress saw a direct link between Mormon marriage and Mormon politics that needed to be broken as cleanly and as quickly as possible, regardless of the constitutional costs. As such, Congress appeared to extend Reynolds' "social order" exception to the First Amendment, using it to circumvent the Mormons' Fifth and Sixth Amendment rights.\textsuperscript{122}

Despite the controversy, the Edmunds Act cleared both Houses with a healthy majority.\textsuperscript{123} Its passage wrought immediate havoc upon the Mormon community. On the political front, the Utah Commission disenfranchised twelve thousand Church members by the end of 1883-nearly five times the number of polygamists estimated to have been practicing in Utah at the time.\textsuperscript{124} In the courts, prosecutors secured over a thousand convictions for cohabitation by 1893.\textsuperscript{125} By June of 1887 alone, "cohabs," as they were called, comprised over

\begin{footnotesize}

\textsuperscript{118} Id. at 1207.

\textsuperscript{119} Id. at 1156.

\textsuperscript{120} Id. at 1212.

\textsuperscript{121} Id. at 1158.

\textsuperscript{122} The Fifth Amendment provides, in relevant part, that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . . ." U.S. CONST. amend. VI.

\textsuperscript{123} See FIRMAGE & MANGRUM, supra note 49, at 166. After passing the Senate, the Bill cleared the House 199 to 42, with 51 not voting.

\textsuperscript{124} Id. at 167.

\textsuperscript{125} Id. at 168. My own great-great-great grandfather, William Flake, was convicted of cohabitation. Like other cohabiters and polygamists, he was subjected to the hideous conditions of frontier prisons. Prisoners slept two to a four-foot by six-inch bed - close quarters for men allowed to shower once a week during the summer and once every two weeks during the winter. Prison food was no better than the lodgings. Inmates were often served rotten meat. Upon complaining about the taste of the coffee, one cohabiter was informed that carbolic acid had been dropped into it, but that the situation had been rectified. Prison guards administered justice through "the sweatbox," an iron cage so small that it barely allowed a six-foot man to stand up or lie down. Perhaps enjoying the irony, guards also strapped polygamous men and cohabers to the twenty-pound "ball and chain." PRISONER FOR POLYGAMY: THE LETTERS AND MEMOIRS OF RUDGER CLAWSON AT THE UTAH TERRITORIAL PENITENTIARY, 1884-87, 8-10 (Stan Larson ed. 1993).
\end{footnotesize}
half of the prison population in the Territory,\textsuperscript{126} forcing officials to begin construction on new bunkhouses.\textsuperscript{127}

2. \textit{Plural Marriage Under the Edmunds Act}

a. A Crime of Appearance

Arguably, the greatest harms to the Mormon population resulted from the federal courts' liberal interpretation of "cohabitation" under the Edmunds Act. Congress had learned its lesson with the Morrill Act; precise definitions of "polygamy" and "marriage" had sunk Morrill trials in evidentiary quagmires. In contrast, the Edmunds Act employed a fundamentally overbroad definition of cohabitation, criminalizing the Act of living "with more than one woman."\textsuperscript{128} Clearly the statute did not intend to target men living with adult daughters, widowed mothers, or other extended family. Instead, Congress must have assumed that a territorial judge or juror would recognize an illegal cohabitation when he saw one. Congress might not have been able to define the offending relationship, but it placed deep faith in the existence of a shared sense of what that relationship entailed.

Before progressing to the case law, it is worth taking a moment to consider the implications of this "I know it when I see it" approach to criminalizing polygamy. Specifically, it is critical to note what Congress did not do with the Edmunds Act, or with any of the anti-polygamy statutes. It did not simply refuse to recognize plural marriage. It did not tailor inheritance laws to penalize the children of polygamous relationships\textsuperscript{129} It did not pass legislation limiting a man's inheritance to one widow.\textsuperscript{130} Rather, Congress explicitly recognized plural relationships \textit{in order} to criminalize them.\textsuperscript{131} This suggests that Congress viewed

\begin{itemize}
\item \textsuperscript{126} Larson, \textit{supra} note 125, at 6.
\item \textsuperscript{127} \textit{Id.} at 71.
\item \textsuperscript{128} Edmunds Act § 3.
\item \textsuperscript{129} To the contrary, section seven of the Edmunds Act legitimated all children of bigamous and polygamous marriages born before January 1, 1883. Edmunds Act § 7.
\item \textsuperscript{130} The Edmunds-Tucker Act would subsequently do both of these things. See The Edmunds-Tucker Act, ch. 397, 24 Stat. 635 §§ 17, 18 (1887) (codified at 28 U.S.C. § 633, 660) (repealed 1978). The Edmunds-Tucker Act represented Congress's final all-out assault on polygamy, however. As such, they may be seen as Congress's attempt to use every weapon as its disposal.
\item \textsuperscript{131} Certain congressmen recognized the illogical aspects of recognizing plural marriages in order to criminalize them. As Representative Keitt asserted, "polygamy presupposes a legal recognition of more than one wife . . . . I am denying the fact that there is any law in Utah that recognizes the marriage relation between a man and more than one woman; and I say that, unless that law does exist, it is no polygamy in the sense in which the term is known to lawyers." CONG. GLOBE, 36\textsuperscript{th} Cong., 1\textsuperscript{st} Sess. 1522 (1860) (discussing the Poland bill).
\end{itemize}
the act of simultaneously taking multiple women as a sort of *malum in se* crime. Polygamous unions were assumed to cause damage whether or not the state validated them; polygamy was not a symbolic crime.

Contrast this with the congressional response to gay marriage a century later. When the federal government sought to oppose same-sex unions in 1996, it passed the Defense of Marriage Act, or DOMA. The DOMA provides that: (1) no state need recognize a same-sex marriage validated in another state; and (2) all federal statutes and regulations referring to married persons apply only to spouses in opposite-sex marriages. The Act does *not* criminalize gay marriage. It does not need to. Without legal recognition, same-sex marriage does not, on a fundamental level, exist. Criminal sanctions of gay marriage would be unconstitutional and unseemly, but more than that, they would be *unnecessary*. Unlike anti-polygamy laws, the DOMA assumes that gay marriage would need to be a creation of the state; without state recognition, no harm occurs. The ultimate Congressional weapon against same-sex unions is thus the refusal to see them.

Perhaps the difference between the DOMA and the Edmunds Act simply reflects a change in time and circumstance. One would not expect legislation for a nineteenth-century territory to resemble that of the contemporary regulatory state. State recognition of relationships has become increasingly important in the twentieth and twenty-first centuries. Tax exemptions, insurance rates, medical consent — in these arenas and others, modern government enjoys virtually exclusive opportunities to determine who is married and who is not that it lacked a century ago. Additionally, as marriage becomes increasingly secular, many people rely to an unprecedented extent upon the state for symbolic validation of their relationships. This gives the government unprecedented power to regulate marriage via recognition.

If the difference is merely one of centuries, however, why does Utah continue to criminalize polygamy and bigamy? And why does it continue to prosecute the offense? In May of 2000, Juab County charged Thomas Green with four counts of bigamy. Green lives in Nephi, Utah with five women. Although he admits to having married each of them, Green argues that he carefully avoided the Utah bigamy statute by divorcing each wife before he married the next. Local prosecutors have characterized Green’s actions as a “systematic scheme” to take more than one wife. They argue that Green

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133. DOMA § 1738
135. UTAH CONST. art. III, § 1 (“polygamous or plural marriages are forever prohibited”).
138. Green officially married and divorced three of his five wives; he never formally married the other two. See Burton, supra note 136, at B1.
committed bigamy despite his legal acrobatics because "[i]n his heart he was married as much as any man." 140 The heart is a nebulous standard for criminal conviction, especially when it contradicts the statutory language. How does one "scheme" to take multiple wives when marriage depends upon state recognition? And more fundamentally, what is the true harm of such a scheme? Why do both the state and federal governments apparently continue to believe that a DOMA-like approach to straight, plural marriage would be insufficient? The federal courts’ interpretation of the Edmunds Act first brought these questions to the fore, and the final sections of this paper seek to provide an answer.

3. The Edmunds Act in the Federal Courts

Regardless of the nebulous definition provided by Congress, one would assume that cohabitation under the Edmunds Act required at least one element: living, and thus presumably sleeping, together. As Mr. Peay discovered, this was not the case. In Cannon v. United States,141 the Supreme Court held that cohabitation was not a sexual crime.142 This ruling encouraged the lower courts to allow increasingly sparse evidence to sustain cohabitation convictions. By the time the Mormon Church renounced polygamy in 1890,143 any contact with a woman deemed to be a plural wife or former cohabitant exposed a man to conviction.144

The rationale behind the Cannon case warrants close examination. The facts of Cannon are straightforward. A grand jury indicted Mr. Cannon in 1885 for allegedly cohabitating with two women, Amanda and Clara Cannon.145 Cannon pleaded not guilty and, pursuant to conviction, was sentenced to the maximum punishment of six months in prison and a three hundred dollar fine.146 The twist came with Cannon’s defense. Rather than claiming that the defendant did not live with Amanda and Clara, counsel argued that Cannon did not engage in sexual relations with them. Counsel sought to prove that, before the passage of the Act, Cannon had taken both of his wives aside and informed them that he would continue to support them, share a house with them, and eat with them, but that they could no longer sleep together, in any sense of the word.147 In a line of questioning that must have scandalized and titillated the jury, Cannon’s attorney asked Clara:

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140. Burton, supra note 137, at C8
141. 116 U.S. 55 (1885).
142. Id. at 71.
143. See FIRMAGE & MANGRUM, supra note 49, at 205 (discussing Mormon abandonment of polygamy after the 1890 Manifesto).
144. Determining that a man had in fact married or lived with multiple women of course entailed its own legal difficulties. For the most part, the courts simply ignored them. I discuss this legal elision in depth below.
146. Id. at 60.
147. See id. at 62-63.
[w]hat had been the habit of defendant prior to [the passage of the Act],
as to his occupation of your room and bed, and the room and bed of
Amanda Cannon?

... .

After March 22nd, 1882, has the defendant at any time occupied your
room or bed, or has he had any sexual intercourse with you?148

The prosecutor objected to these queries on the ground that they were
irrelevant, and the district court sustained the objection.149 Rather than insisting
on proof that the defendant had engaged in "marital relations" with the sisters,
the court instructed the jury to convict if it found that Cannon lived in the same
house with the two women, ate at their respective tables one-third of the time,
and "held them out to the world, by his language or his conduct, or by both, as
his wives . . . ."150

The Supreme Court upheld this non-sexual characterization of cohabitation.
According to the Court, cohabitation sought not to punish sex with multiple
women but rather "to prevent a man from flaunting in the face of the world the
ostentation and opportunities of a bigamous household . . . ."151 Cohabitation
was thus not an act per se, but rather an appearance. The Court implied that with
the Edmunds Act, Congress sought to establish monogamy as the norm; any
relationship that resembled polygamy too closely would thus fall within the
ambit of cohabitation. "Compacts for sexual non-intercourse . . . is [sic] not a
lawful substitute for the monogamous family which alone the statute
tolerates."152 The Court explicitly recognized that classifying cohabitation as
presentation in this manner altered the definition of the word as it appeared in the
dictionary.153 It insisted, however, that "[t]he context in which it is found, and the
manifest evils which gave rise to the special enactments in regard to
'cohabitation,' require that the word should have the meaning which we have
assigned to it."154

By defining cohabitation as a crime of appearance rather than action, the
Cannon Court created a distinct conundrum: how could a man cease
cohabitating with his plural wives? How does one appear to no longer be
married when marriages are unofficial, ecclesiastical, and highly secret, thus
leaving little room for divorce? Unfortunately for Mr. Cannon and numerous
other polygamists, Papachristou v. City of Jacksonville155 was nearly a century

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148. Id. at 63.
149. Id. at 63.
150. Id. at 66.
151. Id. at 72.
152. Id. at 72.
153. Id. at 74.
154. Id. at 74-75.
155. Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). In Papachristou, the Supreme Court
found that a statute penalizing, among others, "dissolute persons who go about begging," "common night
walkers," "habitual loafers," and "persons neglecting all lawful business" violates due process. Id. at 156-57.
away. As such, they had no argument that the Edmunds Act was unconstitutionally vague and were instead left to guess at what conduct might violate the statute.\textsuperscript{156} Clearly, refraining from sex with plural wives would not suffice. Similarly, the \textit{Peay} case would soon reveal that simply moving out would not rupture “the exhibition of all the indicia of a marriage, a household, and a family, twice repeated”\textsuperscript{157} criminalized under \textit{Cannon}. The Court itself was singularly unhelpful on this score, stating only that a man “must not cohabit with more than one woman, in the sense of the word ‘cohabit,’ as hereinbefore defined.”\textsuperscript{158}

The lower courts quickly filled the definitional gap left by \textit{Cannon}. They held that the Edmunds Act obligated a polygamist husband to terminate \textit{all} contact with his plural families in order to avoid conviction. In \textit{United States v. Smith}, for example, the appellate court affirmed the trial court’s instruction that the Act “punished conduct between the accused and his two wives which presented the appearance and semblance of polygamous living—that exhibition to the world of polygamous example.”\textsuperscript{159} If the \textit{Smith} ruling does not sound extreme, consider the facts: the defendant had been married to his first wife for thirty-five years and to his second wife for thirty years. At the time of trial, he had lived with his second wife exclusively for seven years.\textsuperscript{160} He had visited his first wife’s house exactly once in the two years preceding the action — for a funeral.\textsuperscript{161} What appears to have been particularly damning in the eyes of the jury, however, was testimony that the defendant had been spotted in his first wife’s yard, at her well, and in her doorway.\textsuperscript{162} Additionally, his blacksmith shop was located less than fifty feet from her house.\textsuperscript{163} With these facts on the record, the appellate court held that “we are of the opinion that the evidence was sufficient to show cohabitation as to her.”\textsuperscript{164}

Subsequent cases reveal that \textit{Smith} did not employ an unusually low evidentiary standard. In \textit{Snow v. United States}, for example, the court instructed the jury that it could find the defendant guilty if the prosecution had proved that he and his plural wives “were living in the habit and repute of marriage, and to all outward appearance they were living and associating together as man and wife . . . .”\textsuperscript{165} According to the court, “it was not necessary to show that they occupied the same bed, slept in the same room, dwelt under the same roof, or

\textit{Papachristou} is commonly read to support the proposition that the legislature may only criminalize actions, not status or appearance.

\textsuperscript{156} The \textit{Peay} court would later state, “if the defendant has been unable to find out any way to cease living with his polygamous women, it is not the fault of the law that he suffers for his imperfect knowledge.” \textit{United States v. Peay}, 14 P. 342, 346-47 (1887).
\textsuperscript{157} \textit{Cannon v. United States}, 116 U.S. 55, 75.
\textsuperscript{158} \textit{Id.} at 79.
\textsuperscript{159} \textit{United States v. Smith}, 14 P. 291, 292-93 (1887).
\textsuperscript{160} \textit{Id.} at 293.
\textsuperscript{161} \textit{Id.} at 294.
\textsuperscript{162} \textit{Id.}
\textsuperscript{163} \textit{Id.}
\textsuperscript{164} \textit{Id.}
\textsuperscript{165} \textit{United States v. Snow}, 9 P. 501, 506 (Utah 1886).
that they were guilty of sexual intercourse . . . ."

By the time the Utah Supreme Court accused Mr. Peay of behaving like a horse thief, cohabitation jurisprudence allowed a judge to admonish a defendant to "simply cease living with his polygamous wives" in one breath and chastise him for making "a pretense of living with his legal wife" in the next. Apparently Cannon's appearance-based definition of cohabitation only recognized certain presentations. The Peay court was apparently outraged by evidence suggesting that Mr. Peay had continued to support his multiple families while living exclusively with his first wife. The court insisted that he could only avoid conviction via one route: "He must lay aside all indicia of the crime. He must act in good faith, and separate himself entirely from his polygamous women." The court declined to designate the object of that requisite "good faith." Clearly Mr. Peay had erred by directing it at the Misses Peay and their children.

Under the courts' interpretation, the Edmunds Act provided no alternative and no period of grace: a polygamist man could abandon his family entirely, or he could go to prison. As the Supreme Court recognized in Murphy v. Ramsey, a polygamist "might in fact abstain from actual cohabitation with all, and be still as much as ever a bigamist or a polygamist. He can only cease to be such when he has finally and fully dissolved in some effective manner, which we are not called on here to point out, the very relation of husband to several wives, which constitutes the forbidden status he has previously assumed."

D. The Edmunds-Tucker Act

Congress dealt Mormon polygamy its fatal blow with the 1887 Edmunds-Tucker Act. Edmunds-Tucker strengthened the Edmunds Act through a host of procedural and substantive provisions. Among other things, the Act: permitted a wife to testify against her husband; allowed a third party to bring charges of adultery; authorized the courts to compel a witness to appear without a

166. Id.
168. Id. at 344.
169. Id.
170. Id.
171. Or he could run. Unrepentant polygamists spent years dodging the federal marshals. Utah's governor during the polygamy prosecutions emphasized that the critical requirement for catching a polygamist was to surround his house at night and then show tremendous ability as a sprinter and a hurdler. HARDY, supra note 23, at 50. These track and field pursuits produced great family stories in the Mormon community. Hardy recounts one story of a polygamist bishop who hid in a music store. His relatives reported with amusement that he was subsequently crated up as an organ and delivered to freedom in a box marked "Handle with Care." Id. at 49. Hardy also writes of a polygamist, surprised at home by the federal deputy, who bolted out into a blizzard wearing nothing but a shirt. Lucky for him, the Lord was feeling beneficent that day. According to the story, God left him a pair of pants on a desert shrub and dropped three pairs of warm, woolen socks from the sky. Id. Hardy does not specify, however, whether God declined to provide shoes intentionally or by oversight.
174. Id. § 1.
175. Id. § 3.
subpoena;\textsuperscript{176} required the probate courts to certify all marriages;\textsuperscript{177} dissolved the fund dedicated to financing Mormon converts' emigration to Utah;\textsuperscript{178} abolished the territorial militia;\textsuperscript{179} disenfranchised women;\textsuperscript{180} initiated forfeiture proceedings against the Church;\textsuperscript{181} affirmed the Morrill Act's property limitation for religious organizations;\textsuperscript{182} and reaffirmed the disincorporation of the Church.\textsuperscript{183}

Mormon polygamy did not last long under these additional strictures. On September 24, 1890, the President of the Church, Woodruff Wilson, issued the First Manifesto.\textsuperscript{184} The Manifesto declares that Wilson's "advice to the Latter-Day Saints is to refrain from contracting any marriages forbidden by the law of the land."\textsuperscript{185} Although most Mormons accepted the Manifesto, the exact status of plural marriage remained unclear.\textsuperscript{186} Many Church members assumed that the Manifesto only applied to new marriages, and reports circulated that Mormon leaders continued to take polygamous wives.\textsuperscript{187} This ambiguity persisted until the Church issued the Second Manifesto in 1904.\textsuperscript{188} This declaration appears to have brought Mormon polygamy to its official end.\textsuperscript{189}

IV. POSSIBLE RATIONALES

Congress and the courts waged a \textit{blitzkrieg} on polygamy. And they won. However, one question remains: Why? Clearly, the federal government believed it necessary to rip polygamy out by the roots, even if it took the Mormon's constitutional rights with it.\textsuperscript{190} As Representative Lyon declared during an early polygamy debate, "Sir, there is but one way to kill the cockatrice. It is to break the egg. \textit{It is to break the egg.}\textsuperscript{191} The academic literature does not provide a satisfying answer for why the polygamous egg required such a thorough

\begin{itemize}
\item \textsuperscript{176} Id. § 2.
\item \textsuperscript{177} Id. § 9.
\item \textsuperscript{178} Id. § 17. Given Congress's problems with domestic Mormons, it certainly did not want them enlarging their ranks from abroad.
\item \textsuperscript{179} Id. § 27.
\item \textsuperscript{180} Id. § 20.
\item \textsuperscript{181} Id. § 14.
\item \textsuperscript{182} Id. § 16.
\item \textsuperscript{183} Id. § 13.
\item \textsuperscript{184} FIRMAGE \& MANGRUM, supra note 49, at 205.
\item \textsuperscript{185} EMBRY, supra note 18, at 12. Wilson did not make this announcement without misgivings, but the federal onslaught was simply too much. His journal entry for September 25th reads, "I have arrived at a point in the history of the Church of Jesus Christ of Latter-Day Saints where I am under the necessity of acting for the temporal salvation of the Church." Id.
\item \textsuperscript{186} Id. at 12-14.
\item \textsuperscript{187} Id.
\item \textsuperscript{188} Id. at 15-16.
\item \textsuperscript{189} Id. at 16.
\item \textsuperscript{190} 48 CONG. REC. 15, 5249 (1884) (remarks of Senator Morgan of Alabama on the Edmunds-Tucker bill) ("Mr. President, the extirpation of polygamy will be a good thing if we succeed in accomplishing it by this measure, but there has been an uprooting of the Constitution of the United States to do it.").
\item \textsuperscript{191} CONG. GLOBE, 33rd Cong., Appendix to the 1st Sess. 603 (1854) (discussing the bill to exclude bigamous and polygamous men from the surveyor general's grant of one hundred and sixty acres of land).
\end{itemize}
crushing—particularly at such constitutional expense. The next section of this paper examines the common explanations for the legal response to polygamy, rejecting them in favor of a different theory. In brief, I argue that one need look no further than the Supreme Court's original ruling in *Reynolds*. The federal government viewed polygamy as inherently undemocratic; eradicating this threat to liberal government justified any cost. The ramifications of this theory extend beyond the polygamy cases. The vehemence of the anti-polygamy campaign emphasizes the central role that marriage is forced to play in the public order. More than this, it reveals the way in which stable political relationships between men require tight control of female sexuality. This control can be exerted through polygamy or monogamy, patriarchy or the ideology of companionate love. Our government chose the later.

A. Too Much Patriarchy

The simplest explanation for the government’s vehement reaction to polygamy is also the shortest: too much patriarchy. According to this theory, Mormon polygamy was simply too harmful to women, too blatantly damaging, for the larger culture to allow. As Sarah Barringer Gordon writes, “Polygamy became a by-word for the abuse of women . . . .”

192 Barringer Gordon argues that the anti-polygamy literature of the mid-1850’s fundamentally affected the way that America viewed polygamy.193 Fueled by sentimentalist writers’ tales of Mormon wives brutalized by polygamy, plural marriage came to be seen as a practice that degraded both women and the home.194 According to Barringer Gordon, the anti-polygamy statutes were Congress’s response to the literature’s call for “the protection of women as the solution to abuses of male power in a federal system.”195 Barringer Gordon concedes the difficulty of pointing to any concrete connection between this literature and the polygamy legislation.196 She asserts, however, that the anti-polygamy literature “precede[d] by so short a timespan [sic] the shift from a more generalized condemnation of Mormon rebelliousness to a highly focused anti-polygamy among politicians, that the relationship is at a fundamental level indisputable, however imprecise.”

Despite the modern appeal of Barringer Gordon’s argument, it fails to contend with several key aspects of the polygamy debate. Most notably, her quasi-feminist thesis198 ignores the social realities of the nineteenth century, as

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193. Id. at 307 n.42.
194. See id.
195. Id. at 300. See also id. at 342 (“Anti-polygamy authors in the 1850’s thus championed a far more supervisory state, based on a peculiarly sentimental logic of woman’s emotional nature and moral jurisdiction, all in the interests of protecting wives’ power to control marital relations and the home.”).
196. Id. at 307, n.42 (“[T]here is no conclusive proof that anti-polygamy fiction ‘caused’ the political anti-polygamy campaign in a simple or tangible sense.”).
197. Id.
198. See id. at 343-44 (“Here, indeed, was a recipe for women’s power as wives, a subversive potential that traveled underneath and parallel to explicit advocacy of legal reform to protect women.”).
well as the tremendous harm that the polygamy legislation inflicted upon Mormon women. Barringer Gordon's reasoning depends upon the assumption that overt displays of female subordination would have angered Victorian culture to the point of congressional action. For this reason alone, it rings false. Barringer Gordon's argument also fails to recognize the enormous hardship that the anti-polygamy laws visited upon women. We should not forget that it was the Edmunds-Tucker Act that stripped Utah women of the right to vote. Congress initially lauded female suffrage, believing that it would encourage the "downtrodden women of Salt Lake City [to] seize the opportunity to regain their liberty." Its approval disintegrated as soon as it became evident that Mormon women would support polygamist men in the political arena, however. Congress did not value female equality as a good in itself but rather as a means to an end. From 1862 until 1890, this end justified subjecting polygamous wives to grave deprivations. As discussed below, Congress and the courts struggled to couch the anti-polygamy laws in the rhetoric of protecting women and upholding the family. Despite this language, however, the harshest costs of eradicating polygamy often fell directly upon Mormon women.

B. The Language of Companionship Marriage and Democracy

Barringer is correct when she states that Congress linked polygamy's societal harm to its degradation of women. As Representative Ward stated "[w]henever

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199. Barringer Gordon's women's rights rationale also tends to imply that Mormon wives suffered exclusions from civil society not shared by their eastern counterparts. To the contrary, Mormon women in general appear to have experienced conditions similar to those throughout the country. In fact, some historians argue that the exigencies of frontier life provided Mormon women with a measure of equality unheard of on the East Coast. As D. Michael Quinn writes, "[a]lmost from the its settlement in 1847, Utah's women enjoyed equal access with men to institutions of higher education, the right to file for divorce on grounds of incompatibility, the right to own property, the right to engage in business, official encouragement to be trained as bookkeepers and to take care of family finances if husbands were inefficient, and official instruction to seek medical treatment from other women rather than from men." Quinn, supra note 20, at 373. Quinn also notes that during the 1870s, Mormon women graduated from medical school and were admitted to the Utah bar. Id. But see Embry, supra note 18, at 95-96, 104. Embry argues that polygamy rarely gave Victorian women financial independence. During her interviews with numerous children of polygamous families, Embry found that nineteenth-century polygamist women who worked outside the home took sex-stereotyped jobs such as teaching, housekeeping, and midwifery. According to Embry, none of the women worked continually, preferring instead to return to more traditional roles when family finances permitted.

It is difficult to reconcile the argument that sex discrimination sparked the anti-polygamy legislation when Utah women gained the right to vote in 1890, thirty years before the Nineteenth Amendment granted female suffrage. Allen & Leonard, supra note 20, at 345. Or with the fact that in 1896, a Mormon woman became the first female ever elected to a state senate. Quinn, supra note 20, at 373.


202. Id. See also 47 Cong. Rec. 14, 3057 (1883) (statement of Sen. Edmunds of Vermont on the Edmunds-Tucker bill) ("According to the information that we received . . . the females [in the Utah Territory] vote exactly as their lords and masters require them to do . . . and that counts to keep up in this hierarchy and polygamist so governed Territory as it has been, the power of those guilty of the crimes that we wish to repress. Accordingly, we felt justified . . . in proposing that for the time being female suffrage exercised as it is in that Territory should be suspended.").
you degrade women you degrade all." In the Senate and the House, an explicit connection existed between the debasement of women, symbol of the home, and the disintegration of good government:

That institution which debauches the mother, which dishonors the wife, which disgraces the daughter and sister, strikes at the foundation of all just government and free institutions. Say what you may of your great Republic . . . it all rests upon home virtue. It rests upon the love, it rests upon the integrity of the mother and wife; and whenever you debauch the home and household you corrupt all.

With such language, Congress presented polygamy as a public harm that weakened political structures via the private avenue of the family. The touchstone of this family was, of course, the monogamous woman. Her degradation through polygamy degraded the larger civic society.

This rhetoric is virtually identical to the language the Supreme Court adopted in *Reynolds v. United States.* As discussed above, *Reynolds* upheld the Morrill Act on the basis of a perceived connection between the monogamous family and solid political institutions. "Upon [marriage] society may said to be built [and]. . . according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests." Much as the Mormons envisioned the polygamous family as a microcosm of the heavenly order, so nineteenth-century legal institutions saw the one man-one woman relationship as a fractal of political society. According to Mormonism, polygamy created heaven on earth; according to the federal government, it led to despotism. Though radically different results, both views posited male relationships with women as a central organizing force in society. As the Supreme Court later stated in *Murphy v. Ramsey*:

Certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth . . . than that which seeks [sic] to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent

203. CONG. GLOBE, 41st Cong., 1st Sess. 2143 (1870) (discussing the Poland bill).
204. Id. See also 48 CONG. REC. 15, 5242 (1884) (remarks of Senator Bayard on the Edmunds-Tucker bill): ("I say that the institution of polygamy is inconsistent with a republican form of government as expressed under our system. It necessarily involves the degradation of one of the sexes . . . it would destroy the equality of the sexes, which is the basis of marriage as understood by the universal law of this country and that from which we mainly draw our institutions. Matrimony is an institution of society, and it is regulated by the laws of the Government.").
205. 98 U.S. 145 (1878).
206. Id. at 165-66.
207. See discussion supra Part II.B.
morality which is the source of all beneficent progress in social and political improvement. 208

What Barringer Gordon's thesis fails to acknowledge, however, is the hypocrisy of this sort of language. Both the courts and Congress painted a glorified picture of female identity, but they exhibited little concern for individual polygamist wives. As Representative Blair stated, "we cannot forget the fact that [polygamous wives] went [to Utah] voluntarily; that, if they are concubines, they are concubines voluntarily . . . . [I]f, when things come to be broken up, they find themselves unfortunately circumstanced it is only the common case of persons who go into evil courses and find the outcome not to their minds." 209 When asked what should be done with the abandoned women left in the Edmunds Act's wake, Representative Blair responded:

as it seems to me, Cromwell adopted the right rule when he broke up the convent. Stamping his foot upon the floor, he said, as he thrust the nuns out of doors, "Go spin, you jades; go spin!" I would be in favor of pursuing this method first in the Territory of Utah . . . . 210

Undeniably, women constituted a key element of the anti-polygamy discourse. This does not mean, however, that a concern for women motivated that discourse. Similarly, even as the courts espoused their family-stable society discourse, they interpreted the federal anti-polygamy acts in a manner that tore polygamist families apart. Cannon dictated that compliance with the Edmunds Act required polygamist men to abandon their plural families completely. If, as in Smith, 211 evidence that a defendant had been seen at a woman's well was sufficient to prove cohabitation, there was no way for a man to provide any sort of financial or emotional care for the women he had promised to support. Despite the federal rhetoric, more often than not, it was plural wives who paid the price of mandatory monogamy.

209. CONG. GLOBE, 41st Cong., 1st Sess. 2149 (1870) (discussing the Poland bill).
210. Id. Certain congressmen did protest that, convictions aside, the federal acts punished plural wives more than their husbands. Representative Noel from Missouri, for example, argued that if punishment "falls upon anybody, it will fall upon those poor deluded women who have been induced to go to Utah. They may feel its force, in being deprived of a home for themselves and their children. There is where the punishment will fall . . . ." CONG. GLOBE, 36th Cong., 1st Sess. 1516 (1860) (discussing the Morrill bill). See also Representative Fitch of Nevada ("[a]nd, sir, what will you make of these forty thousand women whom it is proposed by this bill to take from those who now support and protect them? Which of you will open your doors to them or invite them to sit by your firesides or even labor in your kitchens?") CONG. GLOBE, 41st Cong., 1st Sess. 2149 (1870) (discussing the Poland bill).

The rest of Congress seemed to take a different view, however. Representative Etheridge of Tennessee, for example, sarcastically observed that the Utah representative's "sensibilities must be touched at the prospect of passing a measure, the effect of which will be to drive many a wife and matron from homes which are endeared by an exuberance of conjugal love, and thus cause them to sorrow alone in the face of an unsympathetic world." CONG. GLOBE, 36th Cong., 1st Sess. 1516 (1860) (discussing the Morrill bill). His comments provoked a round of laughter from the House. Id.
211. United States v. Smith, 5 Utah 232, 236 (1887).
C. The Political Argument

Edwin Brown Firmage and Richard Collin Mangrum propose an alternative explanation for the violent legal response to Mormon polygamy. According to Firmage and Mangrum, the polygamy debates served as cover for what was essentially a political struggle. As they write, “attacks on the political rights of Mormons were deemed acceptable if done in the guise of stamping out polygamy, whereas such acts might have been found constitutionally unacceptable had they been framed simply as attacks on Mormons.”

Under this rationale, the specter of polygamy provided an effective hook rather than an ultimate goal. In order to eradicate the threat of Mormon political dominance, Congress and the courts played upon the country’s disgust for plural marriage. This repugnance allowed the government to strip Mormons of their Constitutional rights with little resistance. Polygamy “was a practice so abhorrent to most nineteenth-century Americans that sophisticated constitutional arguments were not required to justify its eradication.”

A full discussion of the political influence of the Mormon Church falls outside the scope of this paper. Suffice it to say that the congressional debates and the caselaw provide much support for Firmage and Mangrum’s political thesis. Congress referred repeatedly to the necessity of breaking the Mormon stronghold on territorial government. As Representative Cullom asserted during the Poland debate, “it is a well-known fact that the power of [the Mormon] people rests in the leading men of the Mormon organization . . . . It is necessary that this power shall be absolutely destroyed and broken up. Or else it is useless to attempt to regulate and reform the present condition of things.”

According to this view, the Poland bill had a single objective: to “overtur[n] the present church rule, depriving the Mormon leaders of their present enormous influence in all matters of State and political questions . . . .” Congress saw Church political power as the central problem; it characterized Mormon adherence to a higher authority as “the source, the root of the whole Mormon trouble . . . .” During the debates on the Morrill Bill, Representative McClemand read a letter from the late justice of the Utah Territory, W.W. Drummond. Drummond avowed that “the Mormons look to [Brigham Young], and to him alone, for the law by which they are to be governed; therefore no law of Congress is by them

212. FIRMAGE & MANGRUM, supra note 49, at 226.
213. Id. at 129. See also QUINN, supra note 20, at 329 (arguing that polygamy was “an easy target and rallying cry against everything non-Mormons detested about Mormonism, especially its political power.”).
214. CONG. GLOBE, 41st Cong., 1st Sess. 1371 (1870) (discussing the Poland bill).
215. Id. See also 47 CONG. REC.13, 1159 (1882) (remarks of Senator Garland) (“The difficulty is not because a man has one, two, three, four, five, or tens wives or more; it arises not merely upon the morality or the virtue of that peculiar proceeding; but it is because he has a government there at war with the spirit and theory of the Government under which we live; but he has a government there that bids defiance and stands not in awe of the laws passed by the Congress of the United States.”).
217. Id.
considered binding in any manner.\textsuperscript{218} The implications were clear: in order to institute monogamy, the federal government would have to break the Mormon political machine.\textsuperscript{219} According to Firmage and Mangrum, however, the government valued the means more than the end.\textsuperscript{220}

Undoubtedly, Congress was correct in its assessment of LDS political alliances. The Mormons were, at base, a millennial community. As such, they believed that Christ would soon return and destroy the secular society of man, including his political institutions and laws. The \textit{Doctrine and Covenants} boldly announces, “[w]herefore, hear my voice and follow me, and you shall be a free people, and ye shall have no laws but my law when I come, for I am your law giver, and what can stay my hand?”\textsuperscript{221} The Mormons took this declaration literally. By the time Congress passed the Morrill Act in 1862, the Church had developed an ecclesiastical court system separate from the territorial legal courts. Mormons submitted to the “exclusive jurisdiction” of these ecclesiastical tribunals, resolving all civil disputes between members in an extra-legal fashion.\textsuperscript{222} Church law came first for Mormons. As polygamist Rudger Clawson informed Judge Zane at his sentencing, “I regret very much that the laws of my Country come in conflict with the laws of God, but whenever they do, I shall invariably choose to obey the latter.”\textsuperscript{223}

Such extra-governmental allegiances on the part of a large, industrious community would have inevitably disquieted the federal government. Mormon political beliefs amplified this disquiet into outright fear. Mormons advocated significant social, political, and economic reforms that clashed violently with the American ideal. Religious historians have observed that:

\textsuperscript{218} \textit{Id.}

\textsuperscript{219} Congress eventually did so by stripping the Mormons of their civil liberties. It did, however, propose alternative means. Numerous congressmen supported the idea of dividing the Utah Territory into several parts and attaching these fragments to other territories. \textit{Id.} “What, then, is the remedy for this cancering evil? It is . . . to repeal their territorial charter, and to merge them in more wholesome social elements.” \textit{Id.} at 1514-15. Congress hoped that by “dividing out the Territory of Utah . . . this unhappy and deluded people can be put under other jurisdiction, and made subservient to the standard of Christian morality, as well as the legal authority of the Constitution . . . .” \textit{Id.} at 1515 (statement of Representative Clark).

\textsuperscript{220} In \textit{People v. Woody}, the California Supreme Court struck down a statute criminalizing the use of peyote to the extent that it applied to Native American religious ceremonies. 61 Cal. 2d 716 (1964). The \textit{Woody} court held the hallucinogenic statute unconstitutional on the ground that it ripped out “the theological heart of Peyotism.” \textit{Id.} at 722. In so holding, the court was forced to distinguish the case from \textit{Reynolds}. It did so on the basis of importance. The court wrote that whereas polygamy was ancillary to Mormon doctrine, peyote played a fundamental role in Native American religious practice. “Polygamy, although a basic tenet in the theology of Mormonism, is not essential to the practice of the religion; peyote, on the other hand, is the \textit{sine qua non} of the defendants’ faith.” \textit{Id.} at 725. This assertion seems disingenuous. At trial, Mr. Reynolds had proved that a central tenet of Mormonism was the belief that “failure and refusal [to practice polygamy] would be damnation in the life to come.” \textit{Reynolds v. United States}, 98 U.S. 146, 161 (1878). Firmage and Mangrum would likely argue that the anti-polygamy statutes sought precisely what the \textit{Woody} court refused to recognize: a means to rip out the “theological heart” of Mormonism. By destroying a central element of the Church’s theological structure, the federal government hoped to undercut Mormonism’s political force. \textit{See generally Firmage & Mangrum, supra note 49}.

\textsuperscript{221} \textit{Doctrine & Covenants} 38:22.

\textsuperscript{222} \textit{See discussion, supra} note 81.

\textsuperscript{223} Larson, \textit{supra} note 125, at 41.
the single most striking theme in the Book [of Mormon] is that it is the rich, the proud and the learned who find themselves in the hands of an angry God. Throughout the book, evil is most often depicted as the result of pride and worldliness that come from economic success and results in oppression of the poor.\textsuperscript{224}

Similarly, the Book of Mormon speaks of a “golden age” when men “had all things common among them; therefore there were not rich and poor, bound and free, but they were all made free, and partaken of the heavenly gift.”\textsuperscript{225} This quasi-Socialist stance threatened the central tenets of America’s capitalist regime.

If the Mormons had been a quiet, insular sect, content to practice their beliefs on a limited scale, Congress might not have paid them much notice. Instead, they moved across the desert and created their own society—a society governed to a great extent by its own laws and motivated by religious aspirations. And if this were not bad enough, the Utah territory stood directly between the East Coast and California. The Mormon’s strategic location unnerved Congress as early as 1860. As Representative McClemand argued:

[Their location there was no doubt influenced by military as well as other considerations. It is in the midst of the Rocky Mountains, and in the heart of the continent, remote from any Power capable of molesting them. It is a position easy of defense by a small force against a great one. It is upon the great line of emigration from east to west—from the Atlantic to the Pacific. It is a commanding military position, giving them the control of the lives and property of the teeming thousands passing through their jurisdiction.\textsuperscript{226}]

\textsuperscript{225} BOOK OF MORMON, 4 Nephi 1: 3.
\textsuperscript{226} CONG. GLOBE, 36th Cong., 1st Sess., 1514 (1860). As Representative Fitch asserted:
Sir, [the Mormons] are a practical people. Independently of their peculiar religious views they are perhaps the most practical people on earth. They have made social science a study; their industries are cooperative; their self-abnegation and voluntary submission to discipline are unparalleled; their organization and aptitude for toil are only equaled by the honey-makers, whose dwelling-place and whose habits furnish the symbol and the motto for their territorial coat of arms—a bee-hive, with the legend, “By industry we thrive.”
CONG. GLOBE, 41st Cong., 1st Sess. 1517 (1870).

It is interesting to consider the way in which polygamy extended the Mormon hive. Rather than dividing their society according to the Victorian dictates of public market and private home, the Saints encouraged the two spheres to blend. Private relationships became inherently public—and political. As D. Michael Quinn writes, “polygamous marriage allowed a man within his lifetime to become aligned to an entire community.” QUINN, supra note 20, at 187. A polygamous patriarch like Brigham Young would likely have several hundred in-laws. Id. By way of illustration, Quinn provides a fascinating table listing the percentage of Church leaders related by kinship or marriage between 1833 and 1932; the figure ranges from a low of 65.4% in 1921 to a high of 100% in 1877. Id. at 192. Plural marriage structured society according to alliances that were fundamentally alien to modern liberal culture.
Congress wasn’t dealing with the Amish, and it knew it.\textsuperscript{227} The year of his assassination, Joseph Smith had a sufficient following to run for President.\textsuperscript{228} Small wonder that the federal government sought to crush the Mormon political machine as it eradicated polygamy.

Despite the strength of Firmage and Mangrum’s theory, however, it fails to explain precisely why polygamy provided such an effective hook for crushing Mormon political power. As early as 1860, Representative Thayer observed “[t]here is a Spasm, sir, of morality, or a paroxysm, or a panic, or something that seems to impel certain men to feel the necessity of voting, and of voting \textit{now}, against polygamy at all hazards.”\textsuperscript{229} Firmage and Mangrum explain the results of this spasm, but they do not truly account for its origins. Nor do they account for its force. The assertion that polygamy provided a convenient mechanism for inflaming the country’s passions in order to pass constitutionally-questionable legislation ignores the emotional heat of the response.

V. \textsc{The Sacrifice}

Congress and the courts exhibited few qualms about sacrificing the Mormon’s First, Fifth, Fourth, and Sixth Amendment rights to the monogamous cause. From 1854 to 1890, the anti-polygamy legislation stripped them of the freedom to practice their religion as a lifestyle, to vote, to serve as jurors, to be tried by a jury of their peers, to be free of unreasonable searches and seizures at the hands of federal marshals, and, to a certain extent, to hold property. The polygamy acts exacted a higher toll than this, however. They required Southern congressmen to vote to increase federal power immediately before the Civil War. They required a fractured country to commit to going to war again. And they forced Congress to consent to grind all industry in Utah, and possibly the West, to a halt if the Mormons refused to obey. Congress acknowledged all of these costs, and it accepted.

One of the most striking aspects of polygamy is the way that it unified the House and the Senate. As one representative stated, “[e]very member from every section of the Union is ready to assert the odious criminality of polygamy. It is encouraging, it is refreshing, to know that there is at least one subject on which there is no sectionalism . . . .”\textsuperscript{230} Encouraging and refreshing as it may have been, this lack of sectionalism is also slightly shocking, particularly considering the ramifications that the anti-polygamy legislation carried for the South. Nineteenth-century America perceived an inherent connection between

\textsuperscript{227} Cf. Wisconsin v. Yoder, 406 U.S. 205 (1972) (deciding that the state violated Amish parents’ Free Exercise rights when it forced them to send their children to public school). But cf. Potter v. Murray City, 760 F.2d 1065 (1985) (ruling that \textit{Yoder} does not overrule \textit{Reynolds}).

\textsuperscript{228} For a discussion of Smith’s presidential campaign, see \textsc{Allen \\& Leonard, supra} note 20, at 185-90.

\textsuperscript{229} \textsc{Cong. Globe}, 36th Cong., 1st Sess. 1520 (1860) (discussing the Morrill Bill).

\textsuperscript{230} Id.
polygamy and slavery. Any power given to Congress to eradicate polygamy could thus easily serve as authority for the federal abolition of slavery.

Southern congressmen explicitly recognized the anti-slavery potential inherent in the polygamy legislation. Slavery and polygamy were commonly viewed as being closely intertwined. In 1856, the new Republican Party entered its first presidential race on a platform that “it is both the right and the imperative duty that Congress prohibit in the Territories those twin relics of barbarism – Polygamy and Slavery.”231 The connection between the two probably lay in the fact that both dealt with “domestic institutions.”232 During the Morrill debates, for example, Representative Etheridge from Tennessee queried, “[n]ow, sir, what are domestic institutions? They consist simply of husband and wife, parent and child, guardian and ward, master and servant, and master and slave.” 233 This definition forced him to concede that “[w]hoever votes for this bill must, therefore, do so with the express or implied admission that Congress has power to punish all offenses of this kind in the Territories, without reference to the persons who may be found guilty of the offense . . . . [T]his is a concession of the power of Congress to interdict slavery in the Territories . . . .”234 Mr. Etheridge voted for the bill anyway, on the ground that it would “drive this nauseating and disgusting crime of polygamy from the face of the earth.”235 Mangrum and Firmage’s theory—that Congress exploited popular disgust at the idea of polygamy in order to clip Mormon political power—does not account for the Southern willingness to sacrifice, or at least severely cripple, one “barbarism” at the altar of the other one year before the Civil War.236

Nor does it explain the sacrifices that Northern and Western congressmen were willing to make. As early as the Poland Act, much of the House and the Senate believed that its legislation would provoke a Mormon War. As Representative Fitch asserted, “the people of Utah would regard the passage of this bill as a declaration of war, and would prepare with all the fury and earnestness and zeal of fanatics to enter upon a contest most bitter, protracted,

231. 1 NATIONAL PARTY PLATFORMS 1840-1956, at 27 (Donald B. Johnson & Kirk H. Porter, eds., 1973). Cf. HENRY CHARLES LEA, BIBLE VIEW OF POLYGAMY BY MIZPAH 1 (n.d.) (asserting the American liberty to possess “as many slaves as Abraham, and as many wives as Solomon.”).
232. Akhil Amar also argues that the Republicans viewed slavery as a literal form of polygamy, “giving southern white slave masters access to black women as concubines and mistresses.” Akhil Amar, Race, Religion, Gender, and Interstate Federalism: Some Notes from History, 16 QUINNIPIAC L. REV. 19 (1996).
233. Id.
234. Id. at 1499-1500.
235. Id. at 1500.
236. Not all Southern congressmen agreed to this sacrifice. During the 1860 debates on the Morrill Act, for example, Representative Whiteley of North Carolina refused to vote for a general law against polygamy. “[I]f we can render polygamy criminal, it may be claimed that we can also render criminal that other ‘twin relic of barbarism, slavery, as it is called in the Republican platform of 1865. I therefore cannot vote for any provision that will make a general law in regard to polygamy applicable to all the Territories.” CONG. GLOBE, 36th Cong., 1st Sess. 1410 (1860) (discussing the Morrill bill). Instead, Representative Whiteley proposed pruning the bill to include only those provisions that would annul territorial laws recognizing and permitting polygamy. Id. Representative Taylor of Louisiana took a similar view, stating, “I shall most cheerfully go for the amendment proposed by my friend from North Carolina.” Id.
This prophecy was not rhetorical flourish. Supporters of the Act conceded that the Mormons might wage war against the federal government; they simply believed that monogamy was worth the fight. Representative Cullom conceded that he was “constantly in receipt of letters telling me that the passage of this bill will result in another great war.” He defended his position with the assertion that “the military strength of [the Mormons] cannot possibly be magnified to a greater number than eight thousand men. . . . It can be but a small affair in any event.” Regardless of the size of the ensuring war, Cullom was willing to head back into battle. “[A]re we to be deterred by any such considerations from enforcing a law enacted by the people, which has been so long violated and set at naught by a people who use as a pretense for their crimes the garb of religion?” By passing the Act, Congress signaled that it would not.

Similarly, the potential destruction of Western industry served as no deterrent to the anti-polygamy legislation. Representative McClernand was accurate when he described the strategic advantages enjoyed by the Utah Territory. As discussed above, Utah’s location on the route from the East Coast to California provided it with a unique capacity to destroy significant sections of the new Pacific Railroad and to disrupt American commerce. When Representative Fitch warned that the Mormons would regard the passage of the Act as a declaration of war, he predicted that “[t]hey will promptly proceed to cut off all means of communication with the outside world. With their facilities for organization they could destroy hundreds of miles of the great overland railroad in a week. They could maintain a contest for months, perhaps for years. Of course we could finally conquer them, because we could exterminate them . . . .”

For the majority of Congress, however, the promised result justified the potential sacrifice. In his inaugural address, President Garfield declared that by sanctioning polygamy, the Mormon Church “offends the moral sense of manhood.” During the later half of the nineteenth century, Congress never encountered a price that it would not pay to reestablish its masculinity. As Representative Ward demanded of the House, “in obedience to the dictates of the age and the civilization of the times and the common humanity of our people, are you disposed now to take this monster by the throat and crush it out?” A desire to curb Mormon political power fails to explain the monster, or specifically the monstrous, that Congress perceived in polygamy.

237. CONG. GLOBE, 41\textsuperscript{st} Cong., 1\textsuperscript{st} Sess. 1517 (1870) (discussing the Poland bill).
238. CONG. GLOBE, 41\textsuperscript{st} Cong., 1\textsuperscript{st} Sess. 1372 (1870) (discussing the Poland bill).
239. Id.
240. Id.
241. CONG. GLOBE, 41\textsuperscript{st} Cong., 1\textsuperscript{st} Sess. 1517 (1870) (discussing the Poland bill).
242. ALLEN & LEONARD, supra note 20, at 393.
243. CONG. GLOBE, 41\textsuperscript{st} Cong., 1\textsuperscript{st} Sess. 2142 (1870) (discussing the Poland bill).
VI. AN ALTERNATIVE EXPLANATION

During the Poland debate, Representative Fitch put the following query to the House:

"I ask gentlemen now the question, with which the country will vex them, when through the operations of this bill a Mormon war shall have been precipitated upon us: what is there in such a contest appealing to either the judgment, the conscience, or the patriotism of the people? Does it not lack all the elements which inspire men to go forth to battle?"

*Does it not lack all the elements which inspire men to go forth to battle?* In a word, no. For a majority of Congress, polygamy possessed precisely those elements sufficient to drive a man to a fight. For the Southern congressman, the specter of plural marriage justified congressional encroachment on the right to hold slaves. For others, it merited war. Industry, communication with the West, the Pacific Railroad—all dispensable. What was it about polygamy that justified these sacrifices? In a vain attempt to avert congressional action, Representative Fitch argued that polygamy "assails no human right; it assaults no human privilege." But clearly it did. The final section of this paper seeks to explore the precise nature of the "human privilege" affronted by polygamy. I begin with the *Reynolds* assertion that polygamy was a fundamentally undemocratic institution that violated the social order. From there, I move to the conclusion that the privilege plural marriage assailed was not human but rather male.

*Reynolds* provided slim explanation for its holding. The heart of the opinion lies in the assertion that "polygamy leads to the patriarchal principle . . . which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy." The court attributed this position to the writings of the nineteenth-century legal philosopher Francis Lieber. According to the court's interpretation of Lieber, a society based in polygamy would lead to despotic government, whereas a society grounded in monogamy provided fertile ground for the growth of democracy. In short, polygamy undermined democracy. The court declined to elaborate on its marriage-based view of democracy, and subsequent cases cited *Reynolds*'s political theory without additional interpretation.

Contemporary scholars have attempted to give the *Reynolds* rationale a modern spin. In her article, "Distinctions of Form or Substance: Monogamy,

\[\text{References:}\]

245. *Id.*
247. *Id.*
248. *Id.* at 165-66 ("stationary despotism cannot long exist in connection with monogamy").
Polygamy and Same Sex Marriage,"²⁴⁹ Maura Strassberg defends Reynolds's holding on Hegelian grounds. Strassberg relies upon Hegel's theories of marriage and the state to assert that "polygamy was accurately perceived as a threat to fundamental American political ideals and was, therefore, a legitimate federal and state target."²⁵⁰ According to Strassberg's reading of Hegel, the love experienced in monogamous families elevates individuals above their inherently self-centered natures: "[l]ove means in general terms the consciousness of my unity with another, so that I am not in selfish isolation but win my self-consciousness only as the renunciation of my independence and through knowing myself as the unity of myself with another and of the other with me."²⁵¹ In this manner, Strassberg argues, the monogamous family prepares its members to function as moral, unselfish subjects of the state.²⁵² "The importance of this experience was such that Hegel viewed [monogamous] marriage as not only a right, but a 'socio-ethical duty.'"²⁵³ The competition and jealousy experienced by polygamous wives and children, however, teaches them to submit to harsh, unloving power.²⁵⁴ As such, polygamy preconditions individuals to accept patriarchy.²⁵⁵ "Societies built on the patriarchal principle cannot partake of the love, confidence, and trust of the monogamous family, or the freedom of the modern state."²⁵⁶

Strassberg extends Hegel's theories of the family to arrive at her own conclusions. Primarily, she asserts that, unlike polygamy, monogamous marriage contributes to the equality of women. "[M]onogamous marriage acknowledges the human equality of men and women . . . . [M]onogamous marriage provides women with a sphere in which their equality can be protected and nurtured through love and care . . . . Monogamous marriage is therefore peculiarly suited to cultivate the freedom to pursue particular ends and the freedom of self-governance by rational and ethical principles, which must be characteristic of citizens of a free state."²⁵⁷ In Strassberg's view, monogamy and polygamy have radically different ramifications for women. Whereas polygamy traps women in patriarchal social structures, monogamy nourishes and shelters them, encouraging their growth into equal citizens within the democratic state.

In all likelihood, twentieth-century monogamy does foster the individual and political equality of women in a way that polygamy curtails.²⁵⁸ This does not mean, however, that nineteenth-century monogamy had this effect nor, more

²⁴⁹. Maura I. Strassberg, Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage, 75 N.C. L. REV. 1501 (1997).
²⁵⁰. Id. at 1510.
²⁵¹. Id. at 1527.
²⁵². Id. at 1537.
²⁵³. Id. at 1527-28.
²⁵⁴. Id. at 1533.
²⁵⁵. Id.
²⁵⁶. Id. at 1532.
²⁵⁷. Id. at 1536-37.
importantly, that it was intended to. "[P]olygamy leads to the patriarchal principle"259 - the 1878 declaration rings too well in the ears of contemporary liberal feminists. We should be careful to examine what the court truly meant when it gave Congress the go-ahead to mandate monogamy as a social norm in the name of democracy. Strassberg glosses over the nineteenth-century meaning of this assertion in order to arrive at a modern justification for mandatory monogamy. Closer examination reveals that the court's concerns about polygamous patriarchy had little to do with women and everything to do with relationships between men.

The Supreme Court never fully explained why plural marriage threatened democracy. It never fully articulated polygamy's harm. Congress did not remain so sphinx-like, however. Unlike the Reynolds Court, various congressmen provided an explanation for the link they perceived between polygamy and despotic government. For a good number of them, it came down to demographics. According to Congress, polygamy and democracy could never coexist because there simply were not enough women. "Every man who knows anything, even without reading history, would decide beforehand that [polygamy] never could exist under [a democratic] form of government while the sexes continue to be equal in numbers."260 Or, as Representative Lyon of New York argued, "[it] has been demonstrated clearly by all political economists . . . that one man is just enough for one woman . . . that there should be no monopoly of the fair sex."261 For Congress, polygamy threatened democracy because it led to an unequal allocation of women. Strassberg might be correct in arguing that monogamy promotes the personal and political growth of women, but such concerns did not occupy Congress at the time. Rather, compulsory monogamy sought to prevent Mormon men from "fill[ing] their houses with the blooming beauties of the North, and the witching women of the South . . . ."262 Or, in the language of the Peay court, from absconding with their chattel. "With the same propriety might a man who steals a horse ask how he can act in regard to other men's horses and not lay himself liable to conviction for larceny. To tell him that he must simply cease stealing would not be at all satisfactory to him."263 The polygamy acts mandated monogamy in order to prevent stealing. This is what the Supreme Court upheld, and this is what the lower courts enforced. Any theory that lauds women's political equality under a monogamous regime must contend with that fact. The federal government

260. CONG. GLOBE, 36th Cong., 1st Sess. 1520 (1860) (Representative Thayer discussing the Morrill bill).
261. CONG. GLOBE, 33rd Cong., Appendix to the 1st Sess. 603 (1854) (discussing bill excluding bigamous and polygamous men from surveyor general's land grant).
262. Id. (Mr. Lyon discussing bill excluding bigamous and polygamous men from surveyor general's land grant). When asked how many wives he had, one Mormon polygamist replied "I have such a plenty of my own that I have no occasion to trouble my neighbors." HARDY, supra note 23, at 89. Congress, however, would likely have taken the opinion that this husband had already bothered his neighbors by precluding their chances of finding a mate.
263. United States v. Peay, 14 P. 342, 343 (Utah 1887).
viewed both polygamy and monogamy as a means of distributing women between men; it simply preferred the monogamous allocation.\textsuperscript{264}

Any theory glorifying monogamy should also examine the fundamental importance that Congress and the courts attributed to this allocation. As discussed above, Congress never encountered a barrier it would not jump in the name of compulsory monogamy: the Bill of Rights, the right to hold slaves, peace, the Pacific Railroad, communication with California . . . . And Congress saw no hypocrisy in employing the most tyrannical means to safeguard the American right to democracy. "Desperate cases need desperate remedies . . . ."\textsuperscript{265} The desperation that polygamy provoked, and Congress's willingness to sacrifice the Mormon's civil rights to the cause, suggest that the distribution of women constituted a sort of precursor to democratic relationships between men.

In 1860, Representative Hooper from Utah joked, "I know, Sir, that the report accompanying the [Morrill] bill . . . . informs us that polygamy is contrary to the divine economy . . . . [A]s for the illustrious example quoted of our first parents, all that can be said of their marriage is that it was exhaustive. Adam married all the women in the world . . . ."\textsuperscript{266} No one laughed. Clearly, the House did not take the allocation of women lightly. As, perhaps, it should not have. Representative Thayer argued that "even without reading history,"\textsuperscript{267} any man would know that democracy and polygamy could not exist. Although he overstated the case, the science of reproduction and evolution supports Representative Thayer's intuitive argument.

Sociobiologists have observed that "in a polygynous breeding system, not all males can be harem-holders. Those who are must constantly guard against attacks and raids by the bachelors."\textsuperscript{268} Sociobiology seeks to explain human activity in terms of Darwinian evolution; according to sociobiologists, male and female behavior is driven by an unconscious desire to pass one's genes into the next generation.\textsuperscript{269} Women possess a limited capacity to reproduce due to the requirements of pregnancy and lactation.\textsuperscript{270} As such, reproductive success requires them to maximize each opportunity by seeking out the food and shelter necessary to raise their young, as well as fit mates to impregnate them.\textsuperscript{271} According to the sociobiologists, however, successful males seek out a single primary commodity: females.\textsuperscript{272} Sperm is a virtually inexhaustible resource. As

\textsuperscript{264} I am not the first to posit this explanation for institutionalized monogamy. In The Moral Animal, Robert Wright describes monogamy as "the grand, historic compromise . . . cut between more fortunate and less fortunate men." Wright, supra note 258, at 98. According to Wright, monogamy is thus "a divvying up of sexual property among men," effected because "it is men who usually control sheery political power, and men who, historically, have cut most of the big political deals." Id. Wright states that "[t]his thesis remains only a thesis." Id. I argue that the federal response to polygamy tends to prove it.


\textsuperscript{266} Cong. Globe, 41st Cong., 2d Sess. Appendix 176 (1871) (discussing the Poland bill).

\textsuperscript{267} Cong. Globe, 36th Cong., 1st Sess. 1520 (1860) (discussing the Morrill bill).

\textsuperscript{268} Daly & Wilson, supra note 17, at 90.

\textsuperscript{269} Id. at 14-19.

\textsuperscript{270} Id. at 78.

\textsuperscript{271} Id. at 91-92, 110.

\textsuperscript{272} Id. at 82.
such, a superior male can theoretically dominate the reproductive opportunities of numerous females, ensuring that his genes alone survive in the next generation. In the elephant seal population, for example, the top five bulls sire eighty-five percent of the pups each year.\textsuperscript{273}

Examples of such reproductive dominance exist in human societies as well. The Forbidden City in Imperial China provides a particularly striking example. Of the six thousand inhabitants located within the City's walls, the Emperor was the only adult male allowed to remain after dark.\textsuperscript{274} As the Son of Heaven, he possessed sole access to an enormous harem of concubines\textsuperscript{275} selected from the elite Manchu, Mongol, and Muslim tribes.\textsuperscript{276} Female supervisors, or \textit{n"{u} shih}, rotated the concubines on a tight schedule dictated by their menstrual cycles and rank,\textsuperscript{277} and emperors are reported to have complained about the lack of respite.\textsuperscript{278} The goal was conception, nothing more and nothing less.\textsuperscript{279} The punishment for female adultery was summary execution.\textsuperscript{280}

Undoubtedly, a certain amount of exoticism fuels these reports of Chinese sexual practices, and they should be regarded with a healthy does of skepticism. The West's insatiable appetite for these orientalist accounts suggests that they reverberate deeply in our culture, however. After all, men charged with killing their wives or their wives' lovers continue to invoke the "heat of passion" defense.\textsuperscript{281} This defense requires a husband to prove that he acted in the grip of an uncontrollable rage induced by "adequate provocation."\textsuperscript{282} If successful, a "heat of passion" claim reduces homicide charges to manslaughter.\textsuperscript{283} In her analysis of the defense, Deborah E. Milgate writes:

\textsuperscript{273} Id. at 83-84. \\
\textsuperscript{274} STERLING SEAGRAVE, DRAGON LADY: THE LIFE AND LEGEND OF THE LAST EMPRESS OF CHINA 31 (1992) ("[T]he only males allowed to remain inside [the Forbidden City's] walls overnight were the reigning emperor and his unmarried sons under the age of fifteen. All the rest were 'semi-men,' the three thousand imperial eunuchs. The chief reason was to avoid any possibility of cuckoldry.") \\
\textsuperscript{275} Id. at 33. Ideally, an emperor would have 121 women. In addition to three primary consorts, he would have nine second-tier wives, twenty-seven wives of the third, fourth, and fifth tiers, and eighty-one concubines of the sixth, seventh, and eighth tiers. \textit{Id. See also} ROBERT VAN GULIK, SEXUAL LIFE IN ANCIENT CHINA 17 (1961). \\
\textsuperscript{276} Id. at 30. \\
\textsuperscript{277} Id. at 17. \\
\textsuperscript{278} DALY & WILSON, supra note 17, at 285. \\
\textsuperscript{279} SEAGRAVE, supra note 274, at 33-35. Of the one hundred and twenty-one women at his disposal, the Emperor was only intended to have children with three: his empress and two consorts. \textit{Id. at} 33-34. The thirty-six women of the second through fifth rank contributed to this goal, however. According to Taoist theory, emperors needed to achieve a balance between the female \textit{yin} energy and the male \textit{yang} in order to conceive a Son of Heaven. \textit{Id. at} 34. While \textit{yin} was thought to be inexhaustible, \textit{yang} forces were considered easily depleted. \textit{Id. As a result, the emperor needed to have sex with as many wives and concubines in order to generate sufficient \textit{yang}. \textit{Id. Taoist practices thus dictated that the emperor engage in repeated, non-ejaculatory sex with his concubines in order to prepare for his monthly interlude with the empress. \textit{Id. at} 34-35. \\
\textsuperscript{280} VAN GULIK, supra note 275, at 107. \\
\textsuperscript{282} Id. at 193. \\
\textsuperscript{283} Id. at 197.
Early in the defense's history, the sight of the wife in bed with another man was candidly categorized as the greatest 'invasion of (his) property.' It was widely accepted that the man's natural reaction to the sight of his wife in bed with another man was a total loss of control. As late as the 1970s, at least one state considered an act committed to prevent the adultery from taking place not only "passionate," but also fully justified.\footnote{284} Clearly, a strong argument exists that men attribute the utmost importance to the distribution of reproductive privileges. Small wonder that the House refused to laugh at Representative Hooper's joke.

From a sociobiological perspective, the interesting thing about human males is their ability to get along with one another. In most other primate species, extraordinary competition for females often precludes male bonding.\footnote{285} Hence, one sees gorilla troupes dominated by a single Silver Back male or the intensely hierarchical in-fighting observed among chimpanzees.\footnote{286} The violence of this reproductive struggle only increases as one descends the evolutionary chain. For example, certain male worms use special cement glands to glue their rivals' sexual organs shut.\footnote{287}

Clearly, society would not function smoothly if men took to gluing each other shut. Taming the disruptive forces of sexual competition constitutes the first step towards forming organized, efficient communities. The French never would have fought the English if both groups were too busy brawling over the local girls to look across the Channel. Raping and pillaging is best reserved for away games. Sociobiologists have explored the disruptive effects polygamy can have upon society. Discussing the Nizam of Hyderabad, Daly and Wilson write:

One consequence of [his] exaggerated polygyny was the creation of large numbers of disenfranchised celibate men consigned to life as soldiers, brigands, monks, and the like. Their existence must have provided a constant wellspring of disgruntlement and revolutionary potential, to be exploited by the various grass-roots religious and democratic movements that advocated limits on polygamy. The spread of legislated monogamy in recent history may likewise be attributable in part to the relative

\footnote{284}{Id.}

\footnote{285}{See Wright, supra note 258, at 33-34 ("Males not hereditarily equipped for combat with other males have been excluded from sex, and their traits have thus been discarded by natural selection."); Daly & Wilson, supra note 17, at 81-82 (noting that whereas female reproductive capacity is typically limited by physiology, "[m]ales, by contrast are limited not so much by their physiology as by their competitors."). Male survival, in the Darwinian sense requires combat, literal or figurative, with other males.}

\footnote{286}{See Wright, supra note 258, at 50, 245.}

\footnote{287}{Daly & Wilson, supra note 17, at 109. This reproductive violence can also acquire a certain masochistic edge. The Johanseniella nitida fly, for example, commits sexual suicide. After copulation, he leaves his genitals inside his partner as a barrier to insemination by other males and allows her to eat the rest of his body as a post-coital, pre-natal snack. Id. Undeniably, women constituted a key element of the anti-polygamy discourse. This does not mean, however, that a concern for women motivated that discourse.}
inability of intensely polygynous systems to command the loyalty of their foot soldiers. It is not farfetched to suggest that much of history may be interpreted as the effects of reproductive competition among men.\textsuperscript{288}

Nineteenth-century Mormons managed to balance polygamy and stable social relations in the context of intense religious belief. Even in this theocracy, however, Mormon leaders were careful about the demographic question. In her studies of Mormon polygamous families, Jessie Embry found that the male population in the Utah territory typically equaled that of the females.\textsuperscript{289} For example, in Cache Valley, an intensely polygamist settlement, there were slightly more men than women in 1860, and a few more women than men in 1870.\textsuperscript{290} Despite this, early Mormons frequently cited shortages of women as a secular justification for polygamy.\textsuperscript{291} Rumors circulated that more women than men had traveled across the plains from Nauvoo, that the federal government had snatched up unmarried Mormon men to fight in the Mexican-American war, that the Utes, Paiutes, and Navahos had seriously depleted the bachelor pool during the Black Hawk skirmishes\textsuperscript{292} - anything to suggest that Mormons society suffered from a surfeit of women. As one plural wife recalled, "[t]hey were all preaching to the men to marry the girls and I guess it was very useful. You look around you nowadays and see plenty of unmarried young girls and old maids but not in those days."\textsuperscript{293} When all else failed, scripture stepped in. According to Mormon doctrine, a woman needed to marry a righteous man to reach heaven.\textsuperscript{294} With many young men "partaking of the habits of the world . . . what were the pure daughters of Israel going to do for good LDS husband?"\textsuperscript{295} The answer was obvious: share. As such, Mormon leaders managed to diffuse polygamy's explosive reality - that feast for some means famine for others.

It is unlikely that a less religious, more heterogeneous community could have attained this delicate balance. One begins to understand why no one in the House laughed at the idea that Adam had married all the women in the world. In a society that requires men to interact without killing, castrating, or maiming one another, it behooves them to share the sexual resources. As such, mandatory monogamy forms an integral part of male political order. Monogamy might, as

\textsuperscript{288} DALY \& WILSON, supra note 17, at 286. See also, WRIGHT, supra note 258, at 98 (noting that "[f]ew things are more anxiety-producing for an elite governing class than gobs of sex-starved and childless men with at least a modicum of political power").

\textsuperscript{289} EMBRY, supra note 18, at 48.

\textsuperscript{290} Id. at 49.

\textsuperscript{291} This folk justification persists today. I cannot convince my own grandmother, a descendant of a convicted polygamist, that polygamy did not work to the advantage of numerous young girls who would have been left spinster in a monogamous society.

\textsuperscript{292} EMBRY, supra note 18, at 47. In fact, although Brigham Young agreed to send Mormon men to the Mexican-American war, these men were never involved in the fighting. Id. Similarly, the Black Hawk war left the soldier population intact. Id.

\textsuperscript{293} Id. at 48.

\textsuperscript{294} See discussion, supra note 52.

\textsuperscript{295} EMBRY, supra note 18, at 48.
Strassberg argues, foster female equality, but this equality is a modern by-product of a much older, more fundamental system.  

VII. CONCLUSION

Strassberg writes that “[m]onogamous marriage is . . . the foundation of the critical distinction between private and public, which is central to the liberal state. The private sphere of the monogamous marriage is sufficiently limited and non-political that sexual and emotional feelings, which may be highly destructive in the public sphere, may be given free reign.” Both the polygamy legislation and the sociobiology literature reveal, however, that monogamous marriage emphatically does not reside in the private sphere of non-political emotion described above. Rather, any marriage regime plays an inherently public, political role by directing the allocation of women; marriage structures social relationships between men. Strassberg’s distinctions between public and private, political and emotional prove false. Undoubtedly, polygamy makes male commodification of women explicit by allowing men to accrue wives in direct relation to their financial and social resources. This allowed Congress and the courts to wax eloquent about the way that monogamy elevated women and the family above sexual desire while polygamous marriages degraded the home. As Representative Fitch asserted, polygamy “ignores and repudiates that holiest impulse of our nature, that sweetest gift of God, that sacred passion which no man can been at once for two women, which no woman can entertain for him she does not believe to be exclusively her own.”

To a large extent, however, such justifications were pure rhetorical gloss. “[T]he sweetest impulse of our nature” allowed the federal government to dominate and distribute female sexuality according to the dictates of male society. The monogamous and polygamous economies might have been different, but the resource was the same. The ideology of romantic, monogamous marriage sought to control women as surely as polygamy’s “patriarchal principle.” For this reason, we should reflect before accepting Strassberg’s

296. This observation is not new. Claude Lévi-Strauss, for example, argues that marriage is universally a contract between men, a formalized exchange of women as commodities. CLAUDE LEVI-STRAUSS, THE ELEMENTARY STRUCTURES OF KINSHIP 478-85 (James Harle Bell et al., trans., 1969).

297. Strassberg, supra note 249, at 1577.

298. CONG. GLOBE, 41st Cong., 1st Sess. 1517 (1870) (discussing the Poland bill).

299. In this way, the ideology of monogamous, companionate marriage provides another example of the sort of “preservation through transformation” that Reva Siegel writes about. Reva B. Siegel, The Rule of Love: Wife Beating as Prerogative and Privacy, 105 YALE L.J. 2117 (1996). In her article, Siegel takes the example of chastisement, the common-law doctrine legitimizing wife beating, in order to illustrate how civil rights reform often functions to reinforce old legal regimes under a modern rationale. According to Siegel, nineteenth century courts formally repudiated wife beating, but continued to allow men to abuse their spouses. Id. at 2118. Rather than relying upon the doctrine of chastisement, however, modern courts invoked ideas of “domestic harmony” and “marital privacy” in order to shield wife beaters from the law. Id. By employing these modern justifications rather than relying upon culturally-outmoded rationales, the courts “breathed new life into a body of status law . . . .” Id. Similarly, Congress and the courts emphasized romantic love and denounced the polygamous “patriarchal principle” in order to commodify women according to the requirements of male political society.
wholehearted glorification of monogamy. Polygamy might strike us an inherently repugnant, but we should consider the deeper sources of this reaction.

300. Laurence Tribe writes that *Reynolds* revealed the Supreme Court's willingness to accept principles as nebulous as "the preservation of monogamous marriage" as sufficient justification for Congressional Action. Tribe, supra note 98, at 1271. According to Tribe, this acceptance "in turn amounted to a recognition that the preservation of an "aspirational aspect of morality" may be essential to society. Id., citing Gianella, *Religious Liberty, Non-Establishment, and Doctrinal Development: Part I, The Religious Liberty Guarantees*, 80 Harv. L. Rev. 1381, 1403 (1967). We should pay close attention to the aspirations that we support when we accept monogamy without a second thought. Are they truly "moral"? Do we really want to preserve them?