POLYGAMY IN THE MODERN CONSTITUTIONAL SCHEME: COULD HYBRID RIGHTS BE THE ANSWER?

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I. BACKGROUND

One of the first cases about Free Exercise of Religion is the rather shrewd opinion of *Reynolds v. United States*, which began a long history of fearful jurisprudence meant to criminalize polygamy, due to courts being openly fearful about its threat to American democracy.[1] However, developments in the Supreme Court's case law over the last twenty-five years in both free exercise and substantive due process have led courts to re-evaluate the definition of marriage and the interaction of law and religion.[2] While Courts have allowed the expansion of marriage to include homosexual couples, they have also struggled to balance restrictions on religious practices with allowing free exercise of deeply held religious beliefs.[3] This note will work through free exercise and substantive due process to see whether these developments lend themselves to a legalization of polygamy in the modern constitutional scheme.

The Supreme Court has applied various forms of judicial scrutiny to analyze the validity of laws affecting these constitutional rights. Which scrutiny, or determinative balancing test that weighs the government's interest against the challenger's, gets applied for free exercise often depends on whether an alleged infraction on religious belief implicates federal or state law. When applied to the States individually, a test closest to the form of rational basis (a low standard with deferential review in favor of the government where they only need to merely show that the law/regulation in question is

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[1] Brown v. Buhman, 947 F.Supp.2d 1170, 1203 (D. Utah 2013) (citing State v. Holm, 137 P.3d 726, 771 (Utah 2006) (Durham, J., dissenting)).

[2] *See generally* Employment Division v. Smith, 494 U.S. 872 (1990); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014); Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

[3] *See supra* note 2.

rationally related to a government interest) should apply. This is due to the ruling in *Boerne v. Flores*, where the Court held that the Religious Freedom Restoration Act (RFRA) only applied to the federal government.[4] *Boerne* invalidated RFRA's desire to increase the scrutiny up from rational basis to something more critical of the government's interest and protective of individual liberty.[5] Essentially, free exercise jurisprudence is now split between whether or not the alleged infraction is a result of federal or state law, because federal law goes down the path of applying a stricter scrutiny on the government post-RFRA, while state law reverted to the standard of rational basis review after *Boerne*.[6] Because marriage is within the state's rights domain, it would seem that the rational basis test remains the prevalent analysis for polygamous couples to use to try to accomplish their objective. In other words, all that matters is whether or not the law in question is rationally related to the state's objective.

Polygamous couples have failed to win on a free-exercise approach alone. [7] However, the Court in *Employment Division v. Smith*, perhaps in dicta, gave us a brand new approach to consider such cases, now known as the hybrid-rights paradigm. A few of the circuits have allowed a raising of scrutiny from the deferential rational basis review to a stricter scrutiny with a higher burden on the State in analyzing free exercise cases, when a free exercise claim is coupled with an independent constitutional claim (thus the 'hybrid rights' name).[8] This multi-faceted analysis is easy to raise first for free exercise because polygamy is a classic part of the Mormon faith, but in order to raise the scrutiny, polygamous challengers would need to find a "colorable" claim that needs to have a "fair probability or likelihood" of success on the individual merits.[9]

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[4] Boerne v. Flores, 521 U.S. 507 (1997) (holding that the Religious Freedom Restoration Act's purpose of re-upping the judicial scrutiny applied to free exercise claims should only apply to the Federal Government, thus leaving the "neutral law" of "general application" language of *Smith* intact).
[5] *See Id.*
[6] *Id.*
[7] *Buhman*, 947 F. Supp. 2d at 1222.
[8] Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 655 (10th Cir. 2006) (holding that a party could establish a violation of the free exercise clause even in the case of a neutral law of general applicability by showing that the challenged governmental action compromised both the right to free exercise of religion and an independent constitutional right).
[9] Axson-Flynn v. Johnson, 356 F.3d 1277, 1296-97 (10th Cir. 2004).

The colorable claim which could be used to merge with a free exercise claim to accomplish polygamous marriage under state law finally arose in the context of substantive due process. When the Court held in *Obergefell* that there's a fundamental right to marriage, that right then became an independent constitutional right that can be applied into the hybrid rights framework.[10] A long line of cases led to the development of this fundamental right, developing out of a respect or an individual's privacy or autonomy.[11] This Note will make the case that the only way for polygamous families to reach their end goal is to use the hybrid rights paradigm by blending free exercise with the fundamental right to marry under substantive due process. If successful, this would force polygamy bans to be subject to a stricter scrutiny that the government may not be able to satisfy.

First, we will consider the background of the LDS Church and their belief in polygamy, then delve into the lead-up to *Smith* and the various different forms of scrutiny the Supreme Court has applied. Then, we will look into the *Smith* holding and how the hybrid rights approach has developed. Then, the same will be done for the fundamental right to marry, before then making the analysis whether both claims, when combined, would be cognizable and able to survive a prosecution for something such as bigamy.

Finally, the question begs to be asked: why does this matter? In 2013, the district court in Utah handled a case that was brought about after the TLC show "Sister Wives" grew in popularity and offered insight into the polygamous lifestyle.[12] There, the Court not only considered the hybrid rights approach, but also the various free exercise Constitutional doctrines that would apply, before settling on the fact that the limit on co-habitation was not neutral/generally applicable to all, but rather facially targeted toward the religious practice of polygamy.[13] With this step in the direction toward allowing a co-habitation, perhaps reminding one of the steps taken in cases like *Lawrence* or *Windsor* before *Obergefell*, and the popularity of the "Sister Wives" television show in normalizing the lifestyle, activists toward

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[10] Obergefell v. Hodges, 135 S.Ct 2584, 2598 (2015) (affirming a previous suspicion that the Supreme Court made marriage a fundamental right).
[11] *Id*.
[12] *See Buhman*, 947 F. Supp. 2d at 1178 (where the Court averred that the prosecution felt the exposure of the lifestyle on the television show made prosecution easier).
[13] *See Id*. at 1176.

polygamy may have a window to act, and the hybrid rights approach is a potentially successful way of doing it.[14]

II. THE REASON FOR POLYGAMY

The official position of the LDS, Jesus Christ of Latter-Day Saints, Church is that polygamy has been disavowed and the practice will end in ex-communication, coming into compliance with the massive statutory scheme against polygamy, where it is illegal in all fifty states.[15] While the short answer to the question of whether Mormons still practice polygamy is "no," there are several offshoots of the faith that still promote and advocate for a return to the practice.[16] The emergence of small sects from within the Mormon faith has given an inconsistent view of the true principles to follow, but one of the largest sects, The Fundamentalist LDS Church, still advocates for polygamy.[17] Further, although the mainstream branch of the church has disavowed polygamy, many still believe it is a practice widespread in the afterlife.[18] In sum, despite some resistance within the Mormon community, polygamy is still a relevant enough topic in that it's still be challenged in the Court systems and still has sects of the Mormon religion who believe in its necessity; as such, it's a worthwhile analysis to consider a possible avenue in the world of Constitutional Law to determine whether or not polygamy will ever become legalized.

The reason the fundamentalist sects continue to practice polygamy despite the disavowing from the central church is due to its initial acceptance and practice in the Mormon community.[19] Founder Joseph Smith, after seeing a vision of recently deceased brother in heaven, began believing in a familial act of religious

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[14] Lawrence v. Texas, 539 U.S. 558 (2003); United States v. Windsor, 570 U.S. 744 (2013).

[15] *Plural Marriage in the Church of Jesus Christ of Latter-Day Saints,* LDS (Mar. 4, 2018, 10:56 AM), https://www.lds.org/topics/plural-marriage-in-the-church-of-jesus-christ-of-latter-day-saints?lang=eng; *Is Polygamy Illegal in the United States,* HG (Mar. 4, 2018, 10:57 AM), https://www.hg.org/article.asp?id=31807.

[16] Mette Ivie Harrison, *Do Mormons Still Practice Polygamy,* Huffington Post (Mar. 4, 2018, 11:30 AM), https://www.huffingtonpost.com/mette-ivie-harrison/do-mormons-still-practice-polygamy_b_9518584.html.

[17] *Id.*

[18] *Id*.

[19] Joanna Brooks, *Explaining Polygamy and its History in the Mormon Church*, Salon (Mar. 4, 2018, 11:42 AM), https://www.salon.com/2017/08/27/explaining-polygamy-and-its-history-in-the-mormon-church_partner/ (explaining the term fundamentalist to describe these sects).

conversion known as "sealing," where men guaranteed a place in heaven for their families.[20] After some time, and through this act of sealing, the size of Mormon families began to increase because a sealed, plural family could include several women and children at one time.[21] After Smith's death, his successor Brigham Young "brought the practice of polygamy out of the shadows," and polygamy became among the central practices of the LDS church in 1852.[22] Between twenty and thirty percent of Mormon families practiced polygamy during that time.[23]

It was soon after this time when the *Reynolds* opinion came out, encapsulating a societal dislike of polygamy, describing it as an "odious" practice and an "offense to society."[24] The pressure of societal backlash led Wilford Woodruff, the LDS leader at that time, to take polygamy off of the church's official practices platform.[25] The fundamentalist groups then began popping up in the shadows, especially in Utah where polygamy is still a desired practice, due to the vast legislation that makes it remain illegal.[26] Even non-fundamentalist members believe it could be a practice of the afterlife, with tension continuing to exist among its members about its prevalence.[27] In addition to the *Buhman* case and the exposure on television, studies have been done about polygamy's genetic effect on children of close-knit, rural communities in Utah that practice it, as well as being in the news due to last summer's arrest of leader Lyle Jeffs.[28]

III. THE LEAD-UP TO *SMITH* AND ITS IMPORTANCE (FREE EXERCISE)

Reynolds was not only one of the first seminal cases that dealt with free exercise of religion, but was also a criminal case about polygamy. It handled a knowing attempt to marry a second wife while the challenger's first wife was still living.[29] Although *Reynolds* seemed like a statutory interpretation case at the outset, a specific line in the opinion led to a long history of debates about

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[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] Reynolds v. United States, 98 U.S. 145, 164 (1878).
[25] Brooks, *supra* note 19.
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Reynolds*, 98 U.S. 145 at 162.

the government/legislature's ability to act when their actions are incidental to religious practices.[30] The Court held that "laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[31]

By separating out the difference between having religious belief and religious expression through practices, the Court created a deferential style of review that favored the government's policy of determining "the law of social life under its dominion," and thus upholding restrictions on polygamy.[32] This remained in place until 1963 in *Sherbert v. Verner*, when the Court created a new standard for determining the constitutionality of a piece of legislation that affects an "overt act" done in furtherance of one's religious belief.[33] In *Sherbert*, the South Carolina legislature would allow workers to object to working on a Sunday for the purposes of Christianity, but withheld unemployment compensation from the petitioner when she refused to work on her day of worship, a Saturday.[34] The Court carved into this dichotomy created by the *Reynolds* opinion between religious belief and religious practices by stating that the analysis should not be predicated on inquiring into the overt acts done by the religious tenant, but rather whether the legislation has a purpose that is meant to "impede the observance" of one's religion, regardless of whether or not the effect is direct or indirect on the religion itself.[35] Because the legislative impediment can be either direct on the religion, or indirect in affecting its practice, the amount of conduct that can be considered in a free exercise claim was broadened, and thus any substantial burden on practices could be considered a violation due to this expanded protection of free exercise.[36]

In addition to broadening the potential amount of free exercise claims because of the expanded view mentioned above, the *Sherbert* Court also changed the standard of reviewing laws that had a burden on free exercise, because it's a "highly sensitive

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[30] *Id.* at 166.
[31] *Id.*
[32] *Id.*
[33] *See* Sherbert v. Verner, 374 U.S. 398, 403 (1963).
[34] *Id.* at 399.
[35] *Id.* at 404 (citing Braunfeld v. Brown, 366 U.S. 599, 607 (1961) (which stands for the overall observance of religious faith instead of creating a divide between overt acts and mere belief)).
[36] *Id.* at 403 (discussing the test to use when analyzing even an "incidental burden").

Constitutional area."[37] The new test resembled what we now know as strict scrutiny (that the law needs to further a compelling government interest), because a mere showing of a rational relationship between the legislature's goals is not enough to justify the infringement into religious liberty.[38]

The post-*Sherbert* standard was later expanded to directly address laws that were neutral on their face and did not have disparate impacts on different religions.[39] Later, in *Wisconsin v. Yoder*, the statute in question was a state compulsory education requirement that all children attend school until the age of 16, challenged by a group of Amish citizens who believed that secondary education was not only unnecessary, but also that the "worldly" influences in their curriculum were at odds with the Amish practice.[40] The State admitted an impact on the petitioner's religious beliefs, but argued that the minimum age law stemmed from the police power of the state and their interest in education.[41] The State argued two principle points: that they could regulate "practices" instead of beliefs (which the Court knew was incorrect from *Sherbert*), and that the general application of law was uniform amongst all citizens and not targeted against one religious faith.[42] The Court addresses this general application argument by saying that the intent of the law is not what matters, but what matters is the effect on the religious individual; stating that "a regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."[43] The Court accepted the Amish challenger's desire to limit these worldly influences as a constitutionally protected interest, then putting the compulsory education statute through the higher standard of strict scrutiny.[44] With mere rationality not enough to satisfy the stricter requirements of *Sherbert*, the government's interest of promoting education was not enough to overcome the protected religious interests of the Amish challengers.[45] This strict scrutiny standard

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[37] *Id.* at 406.
[38] *Id.*
[39] *See* Wisconsin v. Yoder, 406 U.S. 205, 219-221 (1972).
[40] *Id.* at 210.
[41] *Id.* at 220.
[42] *Id.* at 219-21 (attempting to distinguish the case from *Sherbert* by stating that this was a general application, while the employment issues in *Sherbert* favored a Sunday objection to labor over a Saturday one).
[43] *Id.* at 220.
[44] *Id.* at 221.
[45] *Id.* at 234.

from *Sherbert* and *Yoder* stood until the *Smith* decision in the 1990s.

While the *Smith* holding will be discussed at length later in this note, it did change the Constitutional standard on how these free exercise cases are analyzed down from strict scrutiny to something closer to the *Reynolds* rationality review.[46] This strict scrutiny test is still important, however, because although *Smith* does change the standard of review back to rational basis, Congress soon responded to *Smith* by passing the Religious Freedom Restoration Act (RFRA), which imposed a higher scrutiny by statute and brought back the *Sherbert* test: that the law must serve the compelling government interest, that the law must be narrowly tailored, and that the law must be effectuated through the least restrictive means.[47]

However, due to *Boerne v. Flores*, RFRA was soon held to only apply to the Federal Government.[48] In *Boerne*, a local church attempted to use the higher deference to religious organizations from RFRA to appeal a decision from zoning authorities denying them a building permit.[49] The Court acknowledges that Congress enacted RFRA in order to undo the standards from *Smith*, but that the federal government is one of limited power, and that RFRA applying to the states overextends that power.[50] This means, now, that states are subject to the *Smith* analysis and can use the hybrid-rights framework, as discussed later, and the federal courts are still beholden to RFRA. Either way, because polygamy deals with marriage and criminal law, it would be within the states' prerogative, anyway. One final note on this is that some states have passed state versions of RFRA to protect religious interests after *Boerne* was decided.[51] It is unclear how a polygamy challenge would work in these states because it would depend on how the state courts would determine the correct scrutiny.

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[46] *Boerne,* 521 U.S. 507 at 512-14.
[47] 42 U.S.C. § 2000bb(a).
[48] *Boerne,* 521 U.S. 507. (This isn't to suggest that the First Amendment free exercise of religion isn't applicable to the States, it's that the holding in *Boerne* creates a tiered system where we have a higher scrutiny in federal free exercise cases, and lower, pursuant to *Smith*, when applied to the states, *see also* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940)).
[49] *Boerne*, 521 U.S. at 511.
[50] *Id*. at 536.
[51] *State Religious Freedom Restoration Acts,* NCSL (Mar. 4, 2018 12:13 PM) http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx.

For the purposes of this note and using the hybrid-rights analysis as the best possible avenue, let's assume (like in the majority of states) that *Smith* controls and there's been no state version of RFRA in place. So, if *Smith* is going to be our governing analysis for State courts because of the partial overturning of RFRA, then the way to a legalization of polygamy is largely through a hybrid-rights analysis, where we start at rational basis and attempt to raise the scrutiny though the hybrid-rights paradigm. The importance of *Sherbert*, and some of its pitfalls, is what led Justice Scalia to a much different result in *Smith*, and this subsequent change in the legal standard makes a huge difference in how a Court would analyze a challenge to an anti-polygamy/bigamy statute. Rather than just use free exercise, which would likely be unsuccessful based on history and an on-point decision already on the books in *Reynolds*, a challenger in state court can rely on a mix of free exercise and substantive due process, as discussed above. This hybrid-rights analysis is the best way to accomplish this goal because of the potential for combining claims into a raised scrutiny.

A. THE *SMITH* HOLDING:

Smith has a long procedural history which started when the Respondents were denied unemployment benefits because of their consumption of peyote for sacramental use.[52] Their claim for relief was based very much on the stricter standards set forth in *Sherbert*, and they wanted strict scrutiny applied to make the state's restriction of religious use of peyote uncognizable.[53] At that time, the *Sherbert* standard was still the correct one to use for such a claim. The Court revisited the old dichotomy from *Reynolds* in making a distinction between a law's interaction with a religious belief versus a religious practice, specifically addressing the respondent's claim that "their religious motivation for using peyote puts them beyond the reach of a criminal law that is not specifically directed at their religious practice."[54] The Court explicitly rejected the more petitioner-favorable approach of *Sherbert* which gave a cause of action for indirect effects on

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[52] Employment Division v. Smith, 494 U.S. 872, 874 (1990).
[53] *Id.* at 876 (pointing out the Respondent's comparison of the withholding of unemployment benefits in *Sherbert* to be directly similar to the present case.).
[54] *Id.* at 878. (It's worth noting that this claim from the Respondents was very similar to the "indirect" effect on a religious practice that the *Sherbert* court meant to protect. This is a first inkling in the opinion that Justice Scalia is going to change the scope of free exercise jurisprudence.).

religious practice, and instead shifted the focus back to the law's intent, holding that religious belief cannot exonerate a citizen from obeying a valid law which prohibits conduct that a State is normally free to regulate.[55] When discussing the ability of the Courts to allow specific exemptions from a normally valid law due to an incidental effect on religious practices, Justice Scalia used a quote from *Reynolds*, stating "to permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[56]

The reason the Court dismisses the *Sherbert* test is because of that dichotomy between religious belief and religious practices, that is, the strict scrutiny applied in *Sherbert* was based on an individualized assessment of each type of conduct against a legal scheme, which worked well for something as personal and particular as individual unemployment benefits, but doesn't fit for "across the board" prohibitions on certain types of conduct.[57] By making the standard focused on the law's intent instead of incidental effect on religious practices, the Court concludes that the "neutral law of general application" standard is a "sounder approach" because it correctly allows the government to widely enforce "prohibitions of socially harmful conduct" instead of "measuring the effects of governmental action on a religious objector's spiritual development," and it doesn't allow the clear lack of common sense in allowing obeyance of a law to be contingent upon its coinciding with an objector's religious beliefs.[58] As noted by Justice Scalia, strict scrutiny is normally used in cases such as race or free speech to ensure equal treatment, to use it for a private right to ignore generally applicable laws would be a constitutional anomaly.[59] This higher standard applied to all religious practices would be a big problem for many different types of laws that could have that aforementioned incidental affect.[60]

The decision then reaffirms the Court's opinion that a "neutral law of general applicability" that compels either an action or abstention from an action creates a "political responsibility" that cannot be subverted due to the relevant concerns of a

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[55] *Id.* at 879.
[56] *Id.* at 879 (quoting *Reynolds*, 98 U.S. at 166-67).
[57] *Id.* at 884.
[58] *Id.* at 885.
[59] *Id.* at 886.
[60] *See Id.* at 888-89 (where Scalia mentions many statutes that could be implicated).

"political society," regardless of the "mere possession of religious convictions."[61] A neutral law of general application, therefore, will subvert an indirect effect on religious practices because of this social responsibility, but it cannot survive an attack on a specific religious belief because it would no longer be "neutral" or "generally applicable" if targeting a specific religion. The Court cites a few cases to buttress this point about the difference between such a targeted law or just a neutral, generally applicable statute. Among them is *United States v. Lee*, where the Court did not allow an exemption for Amish individuals who felt that paying into social security was against their religious belief.[62] Because this systemic set-up through a federal statute was generally applicable to all individuals, they couldn't subvert the law's requirement due to concerns in their religion; that is, the law didn't restrict their ability to believe or exercise their religion, it just created a valid affirmative duty in the law.[63] This analysis is an implicit overruling of the standards the Warren Court set forth in *Sherbert*.

The catch of the opinion for our purposes, however, is when Scalia begins writing about the hybrid-rights approach. He states his basis for possibly creating a new standard of review for free exercise claims: "the only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have not involved the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections."[64] He goes on to cite classic cases such as *Cantwell v. Connecticut*, *Wisconsin v. Yoder*, and *Pierce v. Society of Sisters*, for this combination-of-provisions approach, and most notably, *Roberts v. United States Jaycees*, for this quote: "an individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State if a correlative freedom to engage in group effort toward those ends were not also guaranteed," thus showing that the right to association means nothing without the right to free speech and

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[61] *Id.* at 879-880 (changing the Court's focus to the law's intent and application instead of effect on a religious individual, thus lowering the standard of review to something that resembles rational basis).
[62] *Id.* at 880 (citing United States v. Lee, 455 U.S. 252, 258-61 (1982)).
[63] *Id.*
[64] *Id.* at 881.

vice-versa.[65] The same would apply in free-exercise cases, needing to couple a free exercise claim with something like a "communicative activity or parental right" to justify subverting a neutral, generally applicable law.[66] While in *Smith*, there was no hybrid right to attach to the sacramental peyote use so the claim failed, Scalia's hybrid rights option has presented an excellent analytical lens to handle cases involving polygamy bans. Again, this is due to a centuries-long failure of polygamists to advance their interests through a traditional Constitutional framework. This hybrid-rights approach is unusual, but could be a the best way to argue such a case.

B. THE HYBRID-RIGHTS APPROACH IN THE CIRCUIT COURTS

Although not technically binding authority in the States, the Circuit Courts provide good insight into the different approaches taken with hybrid rights because they may still apply state law, depending on the circumstances. Three approaches have been made relevant in attempting to analyze Scalia's hybrid rights framework.[67] The first approach is an outright rejection of hybrid rights, where it's been claimed that the hybrid rights approach is impractical and usually unable to coincide with the holding in *Yoder*.[68] The second approach is the independent viability approach, which calls for a hybrid rights analysis in cases where, in addition to the free exercise claim, the second claim must be proven on its own. This means we only invoke strict scrutiny only if the companion claim works by itself, thus giving the Plaintiff a very high burden of actually proving both components.[69] The third approach, and the most viable for polygamists because of a decreased burden, is the colorable claim approach.[70] Here, the second claim need only be "colorable," in that it doesn't need to be

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[65] *Id.* at 881-82 (citing Cantwell v. Connecticut, 310 U.S. 296, 304-07 (1940); Wisconsin v.Yoder, 406 U.S. 205 (1972); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984)).
[66] *Id.* at 882.
[67] David L. Hudson, Jr. and Emily H. Harvey, *Dissecting the Hybrid Rights Exception: Should it be Accepted or Rejected?*, 38 Ark. Little Rock L. Rev. 449, 456-57 (2016) (adding a Fourth option of 'cabining,' which has only been discussed in scholarly work and not specifically upheld), *see also* Timothy J. Santoli, *A Decade After Employment Division v. Smith: Examining How Courts are Still Grappling with the Hybrid-Rights Exception to the Free Exercise Clause of the First Amendment*, 34 Suffolk U. L. Rev. 649, 668-69 (2001).
[68] *Id.* at 458.
[69] *Id.* at 460-61.
[70] *Id.* at 463-64.

proven, but only have a likelihood of success on the merits.[71] Once both claims are implicated, the court will increase up to strict scrutiny.[72] Finally, an approach argued by some scholars as a fourth option is known as "cabining," which only allows for a hybrid-rights approach in cases with a similar fact pattern to *Yoder*.[73]

I will now discuss each in turn, and keep in mind this quote from *Smith* to guide our analysis:

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have not involved the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections.[74]

The next section will discuss the three approaches that would be more difficult for polygamist plaintiffs and then discuss the "colorable claim" approach, which is the best and most plaintiff-friendly.

IV. THE OTHER THREE APPROACHES: REJECTION, INDEPENDENT VIABILITY, AND CABINING

A. THE REJECTION APPROACH:

The Second, Third, and Sixth Circuits have adopted the rejection approach, refusing to accept the hybrid-rights frame of analysis, instead focusing on *Smith's* neutral and generally applicable law standard, regardless of any other rights asserted.[75]

In *Leebart v. Harrington*, the Second Circuit handled a case where the challenger felt that his free exercise rights, in conjunction with First and Fourteenth Amendment parenting rights under *Pierce* and *Yoder*, were implicated when his son was forced to take a health education class that included information

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[71] *Id.*
[72] *Id.*
[73] *Id.* at 468.
[74] *Smith*, *supra*, note 52.
[75] *Id.* at 458.

about sex.[76] The Court's analysis called for a rejection of the hybrid-rights approach, and also rejected raising the scrutiny because the facts were somewhat dissimilar to dissimilar to *Yoder*. (*Yoder*'s facts will be further explained in the "cabining" section below.) Either way, the Court did not raise the scrutiny and the claim failed.[77] The challenger attempted to use a parental rights approach from cases like *Pierce* and *Meyer* to blend with a free exercise approach in an attempt to raise the scrutiny.[78] The Court was very clear about being part of the rejection approach to hybrid rights, stating: "we have held, by contrast, in the context of claims involving free exercise and free speech, that *Smith's* language relating to hybrid claims is dicta and not binding on this court."[79] They also justified this by saying "we […] can think of no good reason for the standard of review to vary simply with the number of constitutional rights that the plaintiff asserts have been violated."[80]

The Third Circuit, in *McTernan v. City of York*, handled a case about a challenger being told to leave a back alley of a Planned Parenthood because he was lingering there distributing pro-life literature.[81] The Court held that the free exercise and free speech mixes did not raise the scrutiny, and sent the case to the jury on a "neutral, generally applicable" standard.[82] The free exercise rights had to do with the Planned Parenthood protests and religious belief, while the alleged first amendment violation dealt with the right to assemble.[83] The Third Circuit didn't even join the leagues of courts trying to unpack the meaning behind hybrid rights and instead stuck with the "general application" standard from *Smith*.[84] They didn't even mention hybrid rights.

Finally, the Sixth Circuit, in *Kissinger v. Board of Trustees,* handled a case about a veterinary student challenging a surgical course requirement which indirectly involved the killing of

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[76] Leebart v. Harrington, 332 F.3d 134, 137 (2d. Cir. 2003).
[77] *Id*. (where the argument about *Yoder* has led some scholars to box this case also in the 'cabining' approach to hybrid rights).
[78] *Leebart*, 332 F.3d at 143, (*See* Pierce v. Soc'y of Sisters 268 U.S. 510 (1925); *See also* Meyer v. Nebraska, 262 U.S. 390 (1923)).
[79] *Id*. (citing Knight v. Conn. Dep't of Pub. Health, 275 F.3d 156, 167 (2d. Cir. 2001)).
[80] *Id*. at 144.
[81] McTernan v. City of York, Pa., 564 F.3d 636, 641 (3d. Cir. 2009).
[82] *Id*. at 647.
[83] *Id*.
[84] *Id*.

animals, alleging that this would violate her religious beliefs.[85] The university had stated that use of live animals was essential to the learning process, and that objection to this would not be enough for an excuse from class.[86] Kissinger, on the other hand, wanted an alternate curriculum.[87] In attempting to avail herself of a hybrid-rights approach, Kissinger attempted to connect freedom of religion with a myriad of other potential sticking points, including freedom of speech, freedom of association, and equal protection, among others.[88] Because the curriculum was "not intended to prohibit any particular religious practice or belief," it satisfies the neutral and generally applicable standard from *Smith*.[89] This led Kissinger to argue the hybrid-rights approach to raise the scrutiny, citing *Vandiver v. Harvin County Bd. of Educ.* from the Sixth Circuit which seemingly approved it.[90] The most cutting statement the Court makes, and also why they end up in the rejection approach, is as follows: "we do not see how a state regulation would violate the free exercise clause if it implicates other constitutional rights but would not violate the free exercise clause if it did not implicate other constitutional rights."[91] The Court also said that it would be "illogical" to have the validity of a free exercise claim dependent on an outside right, and that the petitioner's claim should fail because she was aware of the requirement when she enrolled in the school.[92]

It is clear that the rejection approach would not help polygamous challengers because they would not be able to use the hybrid-rights approach if the court rejects it. That would be completely counter-intuitive.

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[85] Kissinger v. Board of Trustees of Ohio State University, 5 F.3d 177, 178 (6th Cir. 1993).
[86] *Id*.
[87] *Id*.
[88] *Id*. at 179.
[89] *Id*. (addressing when the "generally applicable" standard isn't mentioned, like when a law targets a certain religious belief or practice; *see also Church of the* Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S.Ct. 2217 (1992) (giving the example of when a law was held to target a specific religious belief or practice)).
[90] *Id*. at 180 (citing Vandiver v. Hardin County Bd. of Educ., 925 F.2d 927 (6th Cir. 1991), focusing on the following statement which Kissinger relied on: "the challenge coupled with other constitutional concerns remain subject to strict scrutiny").
[91] *Id*.
[92] *Id*.

B. THE INDEPENDENT VIABILITY APPROACH:

The Supreme Court of New Mexico and the D.C. Circuit have adopted the independent viability approach, which requires that each companion right in the hybrid-rights approach be proven individually.[93] First, in *EEOC v. Catholic University of America*, the Court required independent viability of an establishment clause violation in addition to free exercise in an unconventional case involving tenure for a nun at a catholic school.[94] When the nun applied for tenure, she first alleged sex discrimination under Title VII, but when that failed, the Court turned to the religion clauses of the first amendment to determine the outcome.[95] While unrelated to this specific paper, a doctrine called the "ministerial exception" hurt her free exercise claim, but the court soon pivoted to the establishment clause connecting to free exercise, leaving scholars to determine that this opinion supports the independent viability approach.[96] The opinion compares the E.E.O.C's Title VII holding and investigation to the type of "excessive entanglement" that the *Lemon* test for the establishment clause was designed to avoid.[97] Once the establishment clause claim failed, the entire hybrid rights challenge fell apart, with the Court finding for the Respondents.[98]

The other case cited for the independent viability approach occurred when the New Mexico State Supreme Court handled *Elane Photography, LLC v. Willock*, a case involving New Mexico's own state statute regarding human rights when a photography business refused to shoot a same-sex commitment ceremony.[99] The state statute from New Mexico had recently included sexual orientation as a protected class under an anti-discrimination statute that covers public accommodations.[100] Public accommodations, through this statute, included businesses such as challenger Elane Photography, whose lead photographer felt that shooting a same-sex commitment ceremony conflicted with her religious beliefs.[101] The respondent, one of the members of the

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[93] Hudson and Harvey, *supra* note 93, at 460.
[94] *See* E.E.O.C. v. Catholic Univ. of Am., 83 F.3d 455, 457 (D.C. Cir. 1996).
[95] *Id.* at 466-67.
[96] *See* Hudson and Harvey, *supra* note 93; *See also* E.E.O.C. v. Catholic Univ. of Am., 83 F.3d at 465.
[97] *Id*. at 467; *see also* Lemon v. Kurtzman, 403 U.S. 609 (1971).
[98] *Id*. at 470.
[99] Elane Photography, LLC v. Willock, 309 P.3d 53, 59 (N.M. 2013).
[100] *Id*.
[101] *Id*.

same-sex couple, filed an anti-discrimination action against the business, and Elane Photography responded by asserting they were exempt from this portion of the statute because of constitutional protections.[102] The hybrid-rights claim asserted by the challengers was a mix of free exercise with a compelled speech claim, to which the Court found that because the speech claim was not independently viable, they were not able to raise the scrutiny and their free exercise claim failed on the neutral law standard from *Smith*.[103]

According to the Court, having the issues be independently viable would mean an adequate argument that the hybrid claims are "more than a sum of their parts," which the Court concludes is not, as both individual claims fail.[104] The case goes much further into how the free speech claim fails, but it's not important for the analysis of this note. For us, we just need to acknowledge that the Court held it as not independently viable.

The main issue with the independently viable standard is that polygamy challenges, obviously, have not succeeded on their individual merits yet, or this note would have no purpose. Challengers have not yet been able to prove that each independent component is viable, making it more than a sum of its parts. This standard of needing facial viability on either of the claims means that there would be no need for the hybrid rights analysis; it would swallow the rule. Why would such challenger need to establish more than one viable claim if they could work independently? The argument in response to this would be that the courts that many scholars believe fit into the "independent viability" approach likely are closer to a full rejection of the hybrid-rights approach, because they don't really embrace the formula behind it. The idea behind having a hybrid-rights framework is to mold two separate Constitutional challenges together. If one of the claims has independent viability, then the reason for molding them disappears. This is what could be called "swallowing the rule." Either way, it would not be a winning argument.

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[102] *Id*. at 60.
[103] *Id*. at 75.
[104] *Id*. at 75-76.

C. THE CABINING APPROACH:

This takes us to the approach that is argued by some to be the addition to the three: cabining. This approach raises the scrutiny when the fact pattern in the case is similar to *Yoder*, that is, raising the scrutiny when the case "embodies judicial protection for social and religious 'sub-groups from the public cultivation of liberal tolerance,'" like the parents in *Yoder*.[105]

Although this is a pretty identical analysis to the Second Circuit's analysis in *Leebart*, Hunter and Harvey argue that it is the fourth approach.[106] As stated previously, *Leebart* involved a father concerned for his son's educational development when he was unable to opt out of a health-education class that contained information about underage drinking, sex, and drug use.[107] The Second Circuit rejected the hybrid rights approach, but also dove into the petitioner's argument that his situation (mixing free exercise with parental rights under due process) was similar to *Yoder* because of *Yoder's* invalidation of a compulsory school attendance statute to Amish citizens who wanted to keep their kids out of higher level learning.[108] The idea that this could fit into a hybrid-rights scenario of raising the judicial scrutiny from rational basis (essentially the neutral law standard) to something higher comes from this quote: "the Court (in *Yoder*) held that "when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a 'reasonable relation to some purpose within the competency of the State is required to sustain the validity of the State's requirement under the First Amendment.'"[109] The Court in *Yoder* did attempt to keep its ruling rather narrow by saying that such a free exercise claim is one that "few other religious groups or sects could make," leading the Second Circuit to hold that the challengers in *Leebaert* did not have the "comparative breadth" of the claim in *Yoder*.[110]

The same can be said for the Sixth Circuit and their approach, when in *Kissinger*, the Court's final point is attempting to distinguish the current case with *Yoder*.[111] The Sixth Circuit is

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[105] Parker v. Hurley, 514 F.3d 87, 100 (1st Cir. 2008).
[106] Hudson and Harvey, *supra* not 67, at 471; *See* notes 76-80 for the details of *Leebaert*.
[107] *See, supra* note 76; *Leebaert*, 332 F.3d at 136-37.
[108] *See*, *supra* notes 38-44; *Leebaert*, 332 F.3d at 144.
[109] *Id*.
[110] *Id*.
[111] *Kissinger*, 5 F.3d at 180-81.

able to easily distinguish the veterinary school issues about live animals with the Amish-friendly holding in *Yoder*, saying that the challenger clearly was not "compelled" to attending the educational program as the challengers in *Yoder* were by the attendance law.[112] This type of analysis (that is, using *Yoder*'s facts to navigate the hybrid-rights approach) is what made 'cabining' a separate approach from just rejection or independent viability.

Initially, the First Circuit's approach was in doubt about whether they'd fall into the independent viability camp or what scholars argue is the 'cabining' camp. The Court handled a common fact pattern for the hybrid-rights cases in *Brown v. Hot, Sexy, Safer Productions*, a situation where the individual hybrid claims were free exercise and parental rights under substantive due process.[113] In that case, the parents and students of a local high school challenged the school's assembly production of a sexual awareness program from an outside company owned by the respondents.[114] This sexual awareness program included crude and profane material designed around the students having a "group sexual experience" in learning about things such as contraception.[115] The Court does mention tying the fact pattern to *Yoder*, but bases its decision on the petitioners not "stating a privacy or substantive due process claim," such that "their free exercise challenge is thus not conjoined with an independently protected constitutional protection."[116] The use of the word "independently" in the opinion's telling line led scholars to believe that this would be in the independent viability approach, but the First Circuit left the door open by using an explicit comparison to *Yoder* and stating "the plaintiffs do not allege that the one-time compulsory attendance at the program threatened their entire way of life."[117] At this point, it was unclear whether they would be considered independent viability or something else.

The First Circuit later clarified its position in *Parker v. Hurley*, a case involving parents who attempted to excuse their children in classes where the children would read books containing gay marriage and relationships.[118] The Court attempted to avoid

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[112] *Id.*
[113] Brown v. Hot, Sexy, and Safer Prods, 68 F.3d 525, 539 (1st Cir. 1995), *cert. denied* 516 U.S. 1159 (1996).
[114] *Id.* at 529.
[115] *Id.*
[116] *Id.* at 539.
[117] *Id.*; *see also* Hudson and Harvey, *supra* note 67, at 469.
[118] Parker v. Hurley, 514 F.3d 87, 90 (1st Cir. 2008).

"entering the fray" in the debate over hybrid rights, instead opting to "approach the parents' claims as the Court did in *Yoder*."[119] This puts the Court in the 'cabining' approach, only using strict scrutiny in lieu of the *Smith* standard if the case conforms to the facts of *Yoder*, and here, the Court held that it did not.[120] Like in the preceding cases, the Court does not view the protecting of a religious group like the Amish can compare to the challengers in *Parker* because their entire way of life was not challenged, or put in the court's words: "they retain options, unlike the parents in *Yoder*."[121]

In terms of this paper, it would be counter-intuitive to support the first category (a rejection of the hybrid-rights standard), as it would lead polygamists back to where they started: relying on free exercise alone. It would also be counter-intuitive to rely on the second category of the independent viability approach because if the second claim is viable on its own, it would swallow the rule whole, and resemble rejection more than a hybrid-rights analysis. Cabining being considered an independent analysis, as stated above, is questionable at best, and making an argument that polygamists are in a fact pattern similar to the *Yoder* case is tenuous due to the debate within the community about polygamy; it may or may not be essential to their lifestyle. This leads us to the most viable approach for our analysis: the colorable claim category.

D. THE MORE FAVORABLE COLORABLE CLAIM APPROACH:

The colorable claim approach is the best option for polygamist challengers because it allows the challenger to assert multiple constitutional violations through the hybrid rights framework, but contains a lower burden on a challenger than the independent viability approach. It's similar to independent viability in that any constitutional challenge can combine with free exercise to form the hybrid.[122] The difference is the standard that applies to the non-free exercise claim. As stated above, the independent viability approach requires the second claim to be proven by the challenger by showing exactly what the title would suggest, that it's independently viable.[123] The colorable claim

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[119] *Id*. at 98.
[120] *Id*. at 99.
[121] *Id*. at 100.
[122] Hudson and Harvey, *supra* note 67, at 463-64.
[123] Hudson and Harvey, *supra* note 67, at 460.

approach only requires a "likelihood of success on the merits."[124] Basically, the challenger needs to prove that the non-free exercise claim is "colorable" by proving a fair probability of success.[125] This is good for a polygamist challenger because they would assume a lesser burden than on independent viability. A few circuits have supported being placed in the colorable claim camp.

Interestingly, the Tenth Circuit, in *Axson-Flynn v. Johnson*, decided a case with a Mormon challenger, who argued that her free exercise and free speech rights were violated during acting classes she was taking at the University of Utah.[126] Certain scripts she was asked to perform had profane language that the challenger objected to, as well as words that involved "taking the Lord's name in vain."[127] During a review of her performance for the semester, the respondents expressed concern about her unwillingness to perform certain scenes and that this requested accommodation was unacceptable.[128] Eventually, the challenger left the program and filed a suit partially relying on a hybrid-rights analysis of free exercise and free speech.[129] The Court cites a previous case involving hybrid rights under *Smith*, where it previously put itself in the colorable claim camp by stating "the hybrid-rights theory 'at least requires a colorable showing' of infringement of a companion constitutional right."[130] As discussed later in this section, the Tenth Circuit attempts to define the term "colorable" by looking to the Ninth Circuit's definition of the term, settling on the companion claim being "colorable" when the challenger establishes a "fair probability or likelihood" of success on the companion claim.[131] Because the free exercise challenge could possibly be subject to the neutral law standard, as the scripts and curriculum were likely evenly applied to everyone, the challenger would need to have the free speech claim be colorable to raise the judicial scrutiny. Then, the Court justifies its placement in the colorable claim camp by saying that their definition of 'colorable' "strikes a middle ground between the two extremes of painting hybrid-rights too generously and construing them too narrowly," not allowing only "non-frivolous" companion claims and

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[124] Hudson and Harvey, *supra* note 67, at 463-64.
[125] *Id*.
[126] Axson-Flynn v. Johnson, 356 F.3d 1277, 1280 (10th Cir. 2004).
[127] *Id*. at 1281.
[128] *Id*. at 1282.
[129] *Id*. at 1283.
[130] *Id*. at 1295.
[131] *Id*. (likening the "success on the merits" standard for hybrid rights to the standard for preliminary injunctions at the outset of a case.)

opening the door to a litany of additional challenges, but also not requiring actual *success* in the companion claim because it would swallow the rule, as discussed with the independent viability approach.[132] This middle ground requires a case-by-case basis of review and the challenger was actually able to survive summary judgment.[133]

As referenced in *Axson-Flynn*, the Ninth Circuit is also considered part of the colorable claim camp. Although the opinion in *Thomas v. Anchorage Equal Rights Com'n* was later withdrawn for an unrelated reason, the case dealt with challengers who did not want to rent out properties to unmarried couples, in violation of an Alaska anti-discrimination law.[134] They sued the Anchorage Equal Rights Commission (the respondents), alleging that the housing law violated their free exercise rights in combination with a companion claim of either Fifth Amendment eminent domain or First Amendment free speech.[135] When the Court determined that the Fifth Amendment claim was colorable due to the restriction on the challenger's property rights was a regulatory taking, the Court raised the scrutiny to strict scrutiny and found Alaska's interest to not be compelling or sufficiently narrowly tailored.[136] This is the classic example of when the hybrid analysis works for a challenger.

Essentially, the colorable claim standard makes it so that the challenger bears a lesser burden on the companion claim. Initially, they will assert free exercise and be subject to the neutral law standard for *Smith*, as bans on polygamy apply evenly to everyone.[137] This means they need to only prove the companion claim to be colorable, a much lower standard than independent viability. By showing it could be colorable, a challenger could raise the scrutiny and force the government to prove a compelling interest. In our polygamy hypothetical, it would be free exercise as the base line, and then using the substantive due process/fundamental right to marry under *Obergefell*. As we will see, asserting a fundamental right to marry may be enough to

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[132] *Id*. at 1295-97.
[133] *Id*. at 1301.
[134] Thomas v. Anchorage Equal Rights Comn'n, 165 F.3d 692, 696-97, *reh'g granted, opinion withdrawn*, 192 F.3d 1208 (9th Cir. 1999).
[135] *Id*.
[136] *Id*. at 708-710.
[137] With the one carve out being the need to prove that the law is facially affecting one religious group, like the Court held in *Hileah*. That is an issue for a different paper because it involves a different free exercise argument than a hybrid-rights one.

satisfy the claim being colorable, as it's a due process right recently recognized by the Court. Now, you're familiar with how the hybrid rights framework works, and why the scrutiny starts at a low point and eventually gets raised for free exercise challenges. In the next section, this paper will discuss the development of the substantive due process right to marry.

V. THE FUNDAMENTAL RIGHT TO MARRY

This next section shows the history of what many call substantive due process, where the fundamental right to marry was established. The first part will be a lead up to *Obergefell*, while the second part will describe the *Obergefell* holding and show why the fundamental right to marry under the Fourteenth Amendment, as the companion to free exercise, could be enough to satisfy the colorable claim standard for the hybrid rights framework. It's worth mentioning that a few different Constitutional law concepts brush up against each other in establishing the fundamental right to marry from *Obergefell*. At the outset, the Supreme Court needed a way for the Fourteenth Amendment to protect these certain (or "fundamental") rights, and once they began reading the Fourteenth Amendment through a substantive lens, it took a while for the rights not actually listed in the Constitution to develop. First, the Fourteenth Amendment was read to start incorporating rights from the Bill of Rights that the Court felt were "fundamental" from the federal government to the states. Then, the Court needed to find a general right of privacy to be free of government interference in making personal decisions, with this "privacy" right coming from outside the Bill or Rights. Finally, the expansion of privacy rights led the Court to deem the right to marry as "fundamental." If the right is fundamental and deserves higher scrutiny, it will be a worthwhile one to plug into the hybrid rights analysis alongside free exercise. Let's start at the beginning, as history ends up being a big part of the "what makes a fundamental right?" question.

A. THE HISTORY OF FUNDAMENTAL RIGHTS

The history of reading a substantive approach into the Fourteenth Amendment is a troubled one. For years, the Supreme Court refused to extend the provisions in the Bill of Rights to the

States, only referencing them in federal cases.[138] The *Barron* case signified over eighty years of a clear separation between State and Federal constitutional law. When the Fourteenth amendment was ratified in 1868, it was largely concerned with affecting State practices post-Civil War. There were four main clauses drafted into the first section of the Amendment, all with varying degrees of importance throughout history.

The Fourteenth Amendment contains both the citizenship clause and privileges and immunities clause, which state, in turn, that "all persons born or naturalized in the United States […] are citizens of the United States and the State wherein they reside," and "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[139] The citizenship clause overruled *Dred Scott v. Sandford* where the Court held that African Americans sold as slaves were not citizens for the purposes of the Constitution and thus had no standing to sue.[140] While important, the citizenship clause does not have a bearing on our fundamental right analysis, nor does the privileges and immunities clause. Further, although the language which restricts State action by preventing a law that abridges the privileges or immunities of United States citizens is promising, a largely untouched series of cases known as *The Slaughter-House Cases* have effectively rendered this clause unworkable for a fundamental rights analysis.[141]

This led the Court to instead using a combination of the Fourteenth Amendment's due process clause and the equal protection clause to protect citizens' rights and privacy from government action. Equal Protection will play a role in the way privacy rights really come about in the 20th Century, but the primary focus will be on Due Process. After *Slaughter-House*, the Court needed a new way to read certain substantive protections

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[138] Barron v. Baltimore, 32 U.S. 243 (1833) (holding that a State institution taking property from the challenger without just compensation didn't violate the Fifth Amendment's takings clause). This case was later reaffirmed years later with United States v. Cruikshank, 92 U.S. 542 (1876), but ironically, the "takings clause" is often argued to be the first Bill of Rights provision enforced against the states during the era of incorporation. *See* Chicago, Burlington & Quincy Railroad Co. v. City of Chicago, 166 U.S. 226 (1897).

[139] U.S. CONST. AMEND. 14.

[140] Dred Scott v. Sandford, 60 U.S. 393 (1857).

[141] *The Slaughter-House Cases*, 83 U.S. 36 (1873) (holding it to only protect what was covered in the federal privileges and immunities clause under Article IV, and thus giving the amendment a very limited scope.) This is similar to how the *Barron* case limited the federal bill of rights provisions; both cases invoke narrow views.

into the Fourteenth Amendment. They began using the Due Process clause by defining the concept of "due process" in two ways. First, the Court began reading a procedural stance into the concept of due process by defining it hand-in-hand with the Bill of Rights provisions that had "been specifically and expressly provided for."[142] This allowed the Court to selectively incorporate specific rights deemed "fundamental" to the concepts of liberty and justice, that is, the new definition of procedural due process meant enforcing the federal Bill of Rights provisions one by one against the States. Most of the famous clauses contained in the Bill of Rights have been held to be fundamental and are now applied to the States through Fourteenth Amendment incorporation doctrine.[143] Once the Court started recognizing certain rights that are fundamental, they began steering toward expanding this view by recognizing certain rights as fundamental that weren't expressly provided for in the Bill of Rights.

While the Fourteenth Amendment due process clause has long been given substantive meaning, its implication on privacy rights are mostly a late 20th Century phenomenon. Initially, Courts were hesitant to read a substantive approach into the due process clause because of the New Deal rejection of the *Lochner* era.[144] The *Lochner* era consisted of a few decades where the Court held that the freedom to contract was a substantive right that could impede any attempts at government regulation.[145] The long

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[142] Hurtado v. California, 110 U.S. 516, 548 (1884) (Harlan, J. dissenting).
[143] See Everson v. Board of Education, 330 U.S. 1 (1947) (incorporating the establishment clause); Cantwell v. Connecticut, 310 U.S. 296 (1940) (incorporating the free exercise clause); Gitlow v. New York, 268 U.S. 652 (1925) (incorporating freedom of speech); Near v. Minnesota, 283 U.S. 697 (1931) (incorporating freedom of the press); McDonald v. City of Chicago, 561 U.S. 742 (2010) (incorporating the right to bear arms); Mapp v. Ohio, 367 U.S. 643 (1961) (incorporating the right against unreasonable search and seizure); Miranda v. Arizona, 348 U.S. 436 (1966) (incorporating the right against self-incrimination); Duncan v. Louisiana, 391 U.S. 145 (1968) (incorporating the right to trial by jury in criminal cases); Benton v. Maryland, 395 U.S. 784 (1969) (incorporating the right against double jeopardy); Gideon v. Wainwright, 372 U.S. 784 (1963) (incorporating the right to assistance of counsel); Pointer v. Texas, 380 U.S. 400 (1965); and Bolling v. Sharpe, 347 U.S. 497 (1954) (holding that the equal protection right contained in the Fourteenth Amendment can be reversely incorporated through Fifth Amendment due process).
[144] Lochner v. New York, 198 U.S. 45 (1905) (holding that the freedom to contract can be read into the Fourteenth Amendment, and also striking down restrictive regulation/legislation on state businesses).
[145] *See generally* Allegeyer v. Louisiana, 165 U.S. 578 (1897) (where the Court struck down a Louisiana statute that prevented an out-of-state insurance company from doing in-state business); Adair v. United States, 208 U.S. 161

line of cases stemming from *Lochner* prevented most attempts at government regulation of business, but this changed in the 1930s with the Roosevelt administration's New Deal policies. The New Deal was a series of fiscal policies and programs implemented to stabilize the economy after the crippling Great Depression.[146] As the Court became more accepting of federal regulation of business, partially due to Roosevelt's threat of packing the bench with his sympathizers, the due process clause ceased to be a justification for economic freedom.[147] The *Lochner* era ended around this time, where the Court expanded the commerce clause to enable federal economic regulation.[148]

It wasn't long after the abandonment of *Lochner* until the Court began looking at different ways to enforce an individual's personal privacy, rather than this idea of economic freedom. The first inkling that the Court was heading in this direction was another economic case known as *United States v. Carolene Products, Co.*[149] The opinion, written by Justice Harlan, gave regulatory statutes a presumption of validity, resembling what is considered rational basis review.[150] The Court then, in possibly the most famous footnote of Constitutional law, lays the groundwork for what ended up becoming the justification for raising judicial scrutiny under the due process clause, stating as follows:[151]

> *There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a*

(1908) (where the Court struck down a federal statute prohibiting employers from firing employees associated with labor unions); Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922) (where the Court struck down a federal statute which imposed an additional tax on businesses using child labor); Adkins v. Children's Hospital, 261 U.S. 525 (1923) (where the Court struck down a statute guaranteeing a mandatory minimum wage to women and children working in Washington D.C.); Carter v. Carter Coal Co., 298 U.S. 238 (1936) (where the Court struck down a statute that was meant to regulate the coal industry with labor prices, labor hours, and general fair practices).

[146] *New Deal*, History; Great Depression; Topics (Mar. 4, 5:07 PM) http://www.history.com/topics/new-deal.

[147] *Id*.

[148] *See generally* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (overruling *Adkins* and stating that a minimum wage for women was permissible); Nebbia v. New York, 291 U.S. 502 (1934) (upholding a statute regulating milk prices).

[149] United States v. Carolene Products Co., 304 U.S. 144 (1938).

[150] *Id*. at 152-53.

[151] *Id*. at 152.

> *specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, . . . or national, . . . or racial minorities, . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.*

In the first section cited above, the Court embraces the due process clause incorporating the Bill of Rights. In the second section cited above, dealing with "discrete and insular minorities" shows the Court's willingness to pursue a different form of scrutiny when certain classes of people, or certain specific rights, are implicated. The footnote also sees the holdings in *Pierce v. Society of Sisters* and *Meyer v. Nebraska* in the type of light they are often now cited for: establishing a higher burden on the government to justify intrusion into certain private decisions.[152] In those cases, it was the privacy rights of parents. The footnote, and the eventual larger meaning given to *Pierce* and *Meyer*, set the stage for the growth of individual privacy and autonomy to be read substantively into the due process clause.

B. THE RIGHT TO PRIVACY AND THE LEAD UP TO *OBERGEFELL*

This trend in the law toward a substantive reading of due process came to a head in the decision of *Griswold v.*

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[152] Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (holding that a statute requiring children to attend public school interfered with parental rights); Meyer v. Nebraska, 262 U.S. 390 (1923) (holding that a Nebraska statute restricting the right of teachers to teach the German language interfered with the educational process).

Connecticut.[153] In *Griswold*, the Court handled a case where the Connecticut director of Planned Parenthood was distributing "information, instruction, and medical advice to married persons as to the means of preventing conception."[154] The director was arrested and charged under a Connecticut statute which criminalized any instrument used in the purpose of preventing conception.[155] Justice Douglas, who wrote the majority opinion, is unwilling to pin this right to privacy to the due process clause, mainly because he seemingly wants to avoid the negative shroud of *Lochner*.[156] He instead works through different recognized rights under the Constitution that are not specifically provided for, such as the parental rights discussed above with *Pierce* and *Meyer,* and the right to association, and describes them as "penumbras."[157] The metaphor about penumbras essentially means that there's a zone of privacy which emanates from each substantive provision in the bill of rights wherein which the government cannot enter.[158] The inner-workings of a marriage, and the private decisions made therein, should therefore be exempt from government regulation, and the *Griswold* majority says as much.[159]

While the majority holding did point the Court in the right direction, it's Justice Harlan's concurrence which actually established the guidelines for how future cases like *Griswold* would work. Instead of the "penumbra" analogy, Harlan accepts the idea of defining the fundamental rights that are "implicit in the concept of ordered liberty" through the due process clause in a scheme which resembles the incorporation doctrine's use of the Bill of Rights provisions, but does not make that list exhaustive.[160] He reads the due process clause substantively, rather than just limiting it to the incorporation regime, and points the Court forward to using history, societal values, and Constitutional concepts such as separation of powers and federalism to create a fluid test where we determine fundamental rights through a case-by-case basis.[161] Later, in *Eisenstadt v. Baird*, an equal protection approach was used to expand the holding in *Griswold* to protect

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[153] 381 U.S. 479 (1965).
[154] *Id*. at 480.
[155] *Id*.
[156] *Id*. at 481-82.
[157] Griswold v. Connecticut*,* 381 U.S. 479, 482-84 (1965).
[158] *Id*. at 485.
[159] *Id*. at 486.
[160] *Id*. at 500 (tying the privacy right to the 14th Amendment instead of the penumbras existing outside specific provisions).
[161] *Id*. at 501.

unmarried persons' privacy interest in contraception, and ended up leading to the controversial decision of *Roe v. Wade.*[162] As the Court said in *Skinner v. Oklahoma*, "marriage and procreation are fundamental to the very existence and survival of the race."[163] This statement has remained a very intriguing part of the lead up to the fundamental right to marry argument.

By the 1960s, the Court had expressed its view about the importance of marriage and procreation in *Skinner* and also established the idea of this right to privacy in *Griswold*. While the Court did initially fall short in merging these into a true fundamental right to marry, they did take a step in that direction with *Loving v. Virginia.*[164] The Lovings were brought up under criminal charges for their interracial marriage, against Virginia law.[165] While the main justification given by the State for such a law was based in what the state court called preventing "the corruption of blood," the State also tried to use the idea of equal application of punishment to justify the statute's language: if black and white citizens both were penalized equally for marrying each other, it withstands an equal protection analysis.[166] The Court rejects this argument, saying that as long as there is a "racial foundation" within the statute, it goes against the Fourteenth Amendment's central purpose of eliminating state sources of racial discrimination.[167] Because the statute is clearly based on a racial foundation, it violates the equal protection clause, and interracial couples should be able to marry the same as non-interracial.[168] While the equal protection argument was sufficient to ensure the *Lovings*' marriage being upheld, especially after the Court made race a protected classification in *Brown v. Board of Education*, the Court stopped short of using substantive due process to make marriage a fundamental right.[169] They say marriage is a "basic civil right of man," pursuant to *Skinner*, and that a denial of such

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[162] *See* Eisenstadt v. Baird, 405 U.S. 438 (1972) (expanding Griswold to unmarried persons through the equal protection clause); Carey v. Population Services, 431 U.S. 678 (1977) (truly establishing the fundamental right to contraception); Roe v. Wade, 410 U.S. 113 (1973) (holding that there's a fundamental right to have an abortion, subject to some timeframe limitations).
[163] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (where the Court took issue with a forced sterilization on certain categories of criminal defendants).
[164] Loving v. Virginia, 388 U.S. 1 (1967).
[165] *Id.* at 6.
[166] *Id.* at 7-8.
[167] *Id.* at 9-10.
[168] *Id.* at 12.
[169] *Id.* at 9-12; Brown v. Board of Education, 347 U.S. 483, 489 (1954).

would be a denial of the right to due process of law, but they do not go to the extent of creating a new class of fundamental rights.[170] While *Loving* is a well-reasoned equal protection case, the section about substantive due process is only contained in a short paragraph at the end. While *Loving* and *Griswold* are persuasive starting points to making a fundamental right to marry, the Court waited to declare marriage as fundamental in the context of the gay rights cases in the next section.

C. THE GAY RIGHTS CASES AND WHY THEY MATTER

By this point, the Fourteenth Amendment's substantive reading had given us a general right to privacy based on the ability to make private, intimate choices free of government regulation. The contraception and abortion cases had stated as much, but we had also recognized parental rights free of interference. Marriage clearly fit into this framework slightly, because of *Skinner* and *Loving*, but the Court had not gone to the proper lengths in declaring it as a fundamental right in the same way as the contraception or parenting cases had. The Court's evolution toward the eventual conclusion that there's a fundamental right to marry may have really gotten on track with *Loving*, but it actually didn't happen until after the Court had some inner-turmoil from cases about gay rights.

This line of cases about gay rights under substantive due process started with *Bowers v. Hardwick*, a case where a homosexual petitioner challenged the constitutionality of an anti-sodomy statute under the idea that it's a consensual, sexual, private act that should be protected as the type of intimate choice provided for in *Griswold* and its progeny.[171] The Court's rationale for its decision against the petitioner is an extremely narrow reading into what he believed was his fundamental right to engage in intimate choices freely; instead, the Court weighs the question of "whether the Constitution confers a fundamental right upon homosexuals to engage in sodomy."[172] The Court agrees that the line of cases flowing from *Pierce, Meyer, Griswold,* and *Skinner* are relevant, but asserts that the petitioner's claim to engage in homosexual acts bears "no connection between family, marriage, or procreation."[173] Then, just as Justice Harlan mentioned in his

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[170] *Id*. at 12.
[171] Bowers v. Hardwick, 478 U.S. 186, 188-90 (1986).
[172] *Id*. at 190.
[173] *Id*. at 191.

concurrence in *Griswold*, the Court states that our historical values play a huge role in defining what rights are fundamental, and that intimate homosexual acts are not "deeply rooted in this Nation's history and tradition."[174]

Justice Blackmun's dissent disagrees with the narrow interpretation of the petitioner's argument, and stated that it is more about a general privacy right to be left alone than specifically about the sexual acts.[175] This argument ended up winning the day years later. The first chink in the armor occurred when the Equal Protection clause invalidated an anti-sodomy petition that specifically targeted people who were gay.[176] Although based on a separate portion of the Fourteenth Amendment, this win for gay rights in the equal protection framework may have paved the way for more important cases down the line.

Then, the Court readdressed the central holding in *Bowers*, as the slow change in the law toward a more sweeping protection of an individual's ability to be free of interference when making certain intimate choices began to bump up against gay rights once again. In *Lawrence v. Texas*, with facts essentially identical to *Bowers*, the two petitioners were charged with "deviant sexual intercourse" when it was discovered they were having relations as a homosexual couple.[177] The Court essentially handled three (mostly) identical questions in ruling on the case, asking whether or not the intimate conduct engaged in by the Petitioners was covered by 14th Amendment Equal Protection or Substantive Due Process, and in asking that, whether *Bowers* should be overruled.[178] Even though the statute facially stated that it only applied to homosexual individuals, the Court moved further than just reaffirming *Romer*. Instead, they state the danger of just ruling that it violated Equal Protection because the statute could be drawn differently; the Court makes clear that they want to fit the facts of *Lawrence* into the substantive due process framework.[179] The issue from *Bowers* lies with how the Court in that case failed to appreciate the extent of the liberty interest at

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[174] *Id*. at 192 (Citing Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977), which used this historical look at substantive due process to determine that a city's definition of family for its zoning statute was too narrow to stand because it didn't include grandparents).
[175] *Bowers*, 478 U.S. at 199.
[176] Romer v. Evans, 517 U.S. 620 (1996).
[177] Lawrence v. Texas, 539 U.S. 558, 563 (2003).
[178] *Id*. at 564.
[179] *Id*. at 574-75.

stake.[180] It wasn't about the right of homosexual individuals to engage in deviant intercourse, it was about the right of individuals to make sexual choices in their own homes free of government interference.[181] In reversing the holding in *Bowers*, the Court in *Lawrence* acknowledged that the historical part of the substantive due process analysis did not favor the petitioners, as this conduct had been long prohibited, but the societal values and easy fit for this conduct into the protections of cases like *Griswold* and *Roe* work in their favor.[182] The Court ends up overruling *Bowers* and affirming the petitioner's right to engage in these private acts.[183]

The last case prior to *Obergefell's* establishment of the fundamental right to marry came in the context of another gay rights case, *United States v. Windsor*.[184] In *Windsor*, the petitioner was a widow, previously and lawfully living in New York as a married couple with her lesbian partner. While certain States had begun to recognize gay marriage, Congress, in 1996, passed the Defense of Marriage Act, containing a provision which made a definition of marriage for the purposes of federal law.[185] This definition under federal law excluded gay couples, and thus prevented any widow from a same-sex marriage to avail themselves of the marital exemption on the federal estate tax.[186] The Court goes through a long-winded discussion on why state law tends to be the guiding force of domestic relations, and then positively cites to *Lawrence*, as the Defense of Marriage Act does affect the type of intimate relations previously discussed.[187] Although this was a positive case in the gay rights movement, the Court stops short of declaring marriage a fundamental right, instead stating that statute clearly demeaned gay couples and definitely violated equal protection and due process of law.[188] Any type of analysis through a constitutional scrutiny or fitting it into previous structured doctrines is absent. This is why the Court took the issue up again, only a few years later, in *Obergefell*.

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[180] *Id*. at 567.
[181] Lawrence v. Texas, 539 U.S. 558, 567 (2003).
[182] *Id*. at 567-73.
[183] *Id*. at 578.
[184] United States v. Windsor, 133 S.Ct. 2675 (2013).
[185] *Id*. at 2679.
[186] *Id*.
[187] *Id*. at 2689-92.
[188] *Id*. at 2693-96.

I. THE *OBERGEFELL* HOLDING

The *Obergefell* ruling came close on the heels of *Windsor*, where the Court again addressed an obstruction to marriage for gay couples.[189] The *Obergefell* case was a consolidation of cases from several states around the County, as the individual states had continuously differed on whether or not they wanted same sex marriage to be legal, and also, whether states which don't provide same-sex marriage will recognize such a marriage from another state.[190] The case dealt with fourteen same-sex couples and two same-sex widowers, arguing that they have a right to marry under the fourteenth amendment.[191] The Court, before going through the line of substantive due process decisions cited at length within this paper, attempts to look at the history and social change throughout the institution of marriage to determine whether it deserved to be classified as "fundamental." They acknowledge the "transcendent importance of marriage," and discuss "the centrality of marriage to the human condition."[192] The argument made by the Respondents essentially says that the gay couples want to demean the traditional practice of marriage, while the petitioners argue that they respect and need the institution of marriage.[193] For the sake of context, one of the widowers brought the suit only to be listed on his dead partner's death certificate, an entirely symbolic gesture.[194] While the Court does admit that the historical practice of marriage was between a man and a woman, they also state that the institution has "evolved over time," reinforcing this dichotomy between classifying fundamental rights through history or through concerns about social change.[195]

As stated above, the Court begins by citing to the long line of substantive due process cases, clearly putting this into the category of cases that deal with "intimate choices that define personal identity and beliefs."[196] They also state that "history and tradition guide and discipline this inquiry but do not set its outer boundaries," acknowledging, like Harlan's concurrence did in *Griswold*, that fundamental rights come from more than just

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[189] Obergefell v. Hodges, 135 S.Ct. 2584 (2015).
[190] *Id*. at 2593.
[191] *Id*.
[192] *Id*. at 2594.
[193] *Id*.
[194] Obergefell v. Hodges, 135 S.Ct. 2584, 2595 (2015).
[195] *Id*. at 2595.
[196] *Id*. at 2597.

historical practice.[197] As stated by Justice Kennedy in *Obergefell's* majority, the Court has long held that the right to marry is protected by the Constitution, citing to both *Loving* and a case called *Zablocki v. Redhail*, where the Court struck down a statute which would've allowed a State to deny an individual a marriage license if he had a substantial outstanding child support obligation.[198] Using these cases, the *Obergefell* Court's analysis "compels the conclusion that same-sex couples may exercise the right to marry."[199]

The Court's ruling explicitly states that marriage is a fundamental right under the Constitution, and also forces other states to recognize marriage licenses performed in other states.[200] Two additional things should be noted, as well. First, now that all states must acknowledge the right of same-sex couples to marry, the piece of the opinion about forcing states to recognize same-sex marriage license from outside states really only works to validate licenses granted retroactive to *Obergefell* because of the now wide-spread acceptance, and also that the Court recognizes the similarities between liberty and equality to also grant the petitioners the right to marry under the Equal Protection clause.[201]

Finally, rather than just stopping by expanding the previous case law, Justice Kennedy goes through four specific reasons why marriage should be classified as a fundamental right. First, he declares that marriage is inherent in individual autonomy, citing to the rights of the *Lovings* to have their marriage recognized or the rights of the fathers in *Zablocki* to not have an unnatural impediment to their ability to marry.[202] Second, he declares that marriage is a two-person union unlike any other, recognizing the intimate rights contained in *Griswold* and *Lawrence*.[203] Third, he declares that marriage safeguards children and families, citing to the parents' rights in *Pierce* and *Meyer* to help their children's education and stability, recognizing there are same-sex parents to families, and wants to encourage them to get married.[204] Fourth and finally, he declares that marriage is a

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[197] *Id*. at 2598; *See, supra,* note 162.
[198] *Obergefell*, 135 S.Ct. at 2598; *See also* Zablocki v. Redhail, 434 U.S. 374, 384 (1978).
[199] *Obergefell*, 135 S.Ct. at 2599.
[200] *Id*. at 2604-05.
[201] *Id*. at 2602-03, 2607.
[202] *Id*. at 2599.
[203] Obergefell v. Hodges, 135 S.Ct. 2584, 2599-600 (2015).
[204] *Id*. at 2600-01.

keystone to our social order, citing to the rights contained in *Windsor* as a reason to give petitioners the ability to access all of the perks of marriage.[205] The above reasons given by Justice Kennedy, which all cite to previous Fourteenth Amendment case law, reinforce the conclusion that it was time for the Court to recognize marriage as a fundamental right.

VI. CONCLUSION:

For the purposes of our hybrid rights analysis, we now have our framework established by *Smith*, relying on polygamy enforcing the free exercise of religion. We also have *Obergefell*, holding that there's a due process fundamental right to marry. With both of these provisions, a petitioner would be able to claim the right to polygamous marriage by using free exercise to anchor the claim, with the due process clause as the colorable claim to raise the judicial scrutiny. As our cases in both free exercise and substantive due process tell us, strict scrutiny will be a problem for the government to satisfy. It's extremely rare, and a high burden for a state to justify an anti-polygamous marriage statute, which all fifty states have in their criminal codes. Further, although the various frameworks for hybrid rights have mostly been ruled on by the circuit courts, the Supreme Court has given us the majority of our rulings on free exercise and substantive due process, as you can see from the discussions above. Because of these cases being binding on the States, the only piece of this that could be problematic in State court is just getting them to accept the framework from *Smith*. If the case stays in State Court, great, but they have to accept the hybrid rights doctrine as more than just dicta, and then have them apply the colorable claim approach, which as discussed above, is more plaintiff friendly.

If that goal is reached, this hybrid rights analysis of using two separate, cognizable rights under the Constitution is inherently more convincing than isolated claims, because it carries with it the possibility of raising the judicial scrutiny from a deferential rationality approach to a strict scrutiny with the burden on the government.

The way hybrid rights often get applied is really a retroactive analysis. Before analyzing the free exercise claim, the Court must determine which scrutiny is appropriate. This means the challenger bears the burden of showing that the companion

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[205] *Id*. at 2601.

right is "colorable." In this instance, the language of *Obergefell* really helps polygamists for more than just the establishment of the fundamental right to marry. The analysis also separates the historical component of fundamental rights from the societal considerations. There was clearly a negative history behind gay marriage in America, and yet the Court moves away from just pegging fundamental rights in history and looks toward society's growing acceptance. The fact that polygamy has now become such a cultural phenomenon on television may actually influence a Court as much as the negative connotations from *Reynolds* would. Although the "fundamental right to marry" may clearly imply a singular spouse, there appears to be no reason why there can't be a likelihood of success on the merits just based on the plain-language alone. If there's a likelihood of success with the colorable claim, the scrutiny can get raised, and subject the statute to strict scrutiny against the petitioner's free exercise interests. If a strict scrutiny analysis, like in *Sherbert*, the Court will no longer give deferential review to the government, and these incidental burdens all the sudden become much tougher for the government to justify. Strict scrutiny is very rarely passed by the government, and they'd have a hard time saying that the statute furthers a compelling government interest, because bigamy statutes are facially meant to stop polygamy. The statute is targeted toward the practice of marrying more than one person, and it would need to further a compelling government interest over the objection of fundamentalist members of the LDS Church who believe that they are saving the souls of the women they marry. Once the scrutiny is raised, the prospects for legalization look a lot different.

The challengers should look at the court's analysis in the Ninth Circuit's *Thomas* case, as it perfectly lays out the types of arguments they have to make. In light of *Obergefell*, the colorable claim looks like it has a solid basis to then reinforce the free exercise claim. It may seem like an odd combination, but presenting two realistically successful claims together seems better than doing one at a time. The hybrid-rights analysis serves the purpose of actually raising the scrutiny due to how the paradigm itself works, but it also gives the claims more of a weighty appeal because there are two potentially successful claims contained in one argument.

The modern Constitutional scheme has leant itself to some significant changes, and *Obergefell* is just one example. There's no reason, if this framework is used correctly, why polygamists can't be the next successful group.