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Reynolds v. United States, Rewritten

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Abstract

In *Reynolds v. United States*, 98 U.S. 145 (1878), Chief Justice Morrison Waite, writing for a unanimous Supreme Court, upheld the federal Morrill Anti-Bigamy Act outlawing polygamy in the federal territories and providing criminal penalties for it. This is a re-writing of that opinion, presented in the form of a dissent, available in *Feminist Judgments: Family Law Opinions Rewritten* (Cambridge University Press, forthcoming 2020). Unlike the Court's opinion, this dissent concludes that religious practice, as well as belief, is protected by the First Amendment. It therefore holds that a religious duty to engage in an unlawful practice may be a defense to a criminal charge absent evidence of harm to others or disruption of the public order. It further demonstrates that the common law crime of polygamy was intended to penalize fraud and deception rather than consensual conduct. Finally, the opinion addresses head-on the implicit religious freedom claims of the wives of the defendant. It finds that polygamy is no better and no worse for women than monogamous marriage under coverture and that overturning the defendant's conviction would further the religious freedom and equality of the defendant's wives and the female citizens in the Territory of Utah. The aims of the dissent are to make visible the women erased by the Court's opinion and to create a more free and egalitarian law of marriage for all women in the United States in the late 19th century.

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98 U.S. 145 (1878)
Supreme Court of the United States

Reynolds
v.
United States

October Term, 1878

MS. JUSTICE KESSLER, **dissenting.**[1]

I do not propose to go into the subject of all of the evidentiary and procedural objections, as they involve mainly technicalities, but rather will make such observations as appear to me proper for consideration on the heart of this controversy; to wit, the general question of the scope and nature of the first amendment's protections of polygamy from the power of Congress.

[1] In order to remain true to the period in which *Reynolds* was decided, this opinion substantially adopts the style, grammar, punctuation, and citation conventions of 19th century judicial opinions, and in some places, borrows phraseology from 19th century Supreme Court opinions and legal sources.

The opinion in this case proceeds, as it seems to me, upon grounds entirely too narrow. The substance and spirit of the first amendment of the Constitution have been sacrificed by an altogether crude distinction: 'Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.' I agree with the majority opinion that the first amendment cannot be read so broadly that any conduct asserted to be religion should be immune from regulation. I have no doubt of the power of the Congress to provide for general criminal laws and to protect public peace and safety. A believer has no right to invade the private rights of others or to disturb public peace and order, no matter how conscientious the belief or how trivial the private right on the other side. The majority opinion appears to me to go altogether too far, however, in concluding that, because not all religious conduct is exempted from civil control, no religious practice is protected by the first amendment. A constitutional provision, adopted in the interest of religious freedom, and for the purpose of securing, rights inhering in a state of freedom, and belonging to American citizenship, has been so construed by the majority as to defeat the ends the provision is apparently intended to accomplish. By this I do not mean that the determination of this case should be controlled by considerations of mere expediency or policy. I mean only to express an earnest conviction that the court has, in the interpretation of the constitutional provision, misread the history of the provision and thereby the intent with which it was adopted.

I. The First Amendment Protects Religious Practice

The Constitution of the United States (Amend. I) declares that 'Congress shall make no law prohibiting the free exercise of religion.' The majority quite rightly looks to the history of the times in the midst of which the provision was adopted to ascertain its meaning. Yet with all the light shed upon the history of the first amendment by the elaborate opinion of the majority, I am not persuaded that its narrow construction is evident in the provision's history.

Both Mr. Jefferson and Mr. Madison played vital roles in formulating the first amendment of the federal Constitution, and Mr. Madison's views can be distinguished from those of his fellow Virginian.

I shall begin with the Virginia religious freedom bill, for this bill is central to the history of the federal provision's formation. Precisely, the first amendment has the same objective and was intended to provide the same protection against government intrusion on religious liberty as this bill. The Bill for Establishing Religious Freedom was introduced in Virginia in 1779, whereupon it faced great opposition by religious officials, and was not adopted. The cause was reinvigorated in 1784, when Patrick Henry proposed a general tax in Virginia called the Bill Establishing a Provision for Teachers [Ministers] of the Christian Religion. Citizens would choose which Christian church received their support, or the money could go to a general fund to be distributed by the state legislature. Mr. Madison was a vocal opponent of the bill, publishing his 'Memorial and Remonstrance against Religious Assessments,' which asserted: 'The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate . . . . It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This

duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. . . . [I]n matters of Religion, no man's right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance.' It is to be observed, from this statement, that Mr. Madison felt it necessary, to the harmonious equality of all the contending sects, that some denominations receive exemption of previous legal duties and the benefit of some degree of forbearance. Coming as this does from the drafter of the first amendment, one year before the first Congress met to prepare the Constitution, it may be accepted as a more authoritative declaration of the intended scope and effect of the amendment thus secured than a single letter written by Mr. Jefferson in 1820, twenty years after the provision's enactment. Mr. Madison's pamphlet, with its arguments against even the weak form of establishment proposed in the Henry bill, was circulated throughout the state of Virginia and garnered thousands of signatures. With the overwhelming opposition of the people, the proposed plan for general assessment was crushed under it, and advantage taken of the crisis to carry through Virginia's religious freedom bill. The resulting law, An Act for Establishing Religious Freedom (12 Hening's 84-86), as the majority opinion concedes, is the original foundation of the first amendment.

Subsequently, at the first session of the first Congress, significant debate ensued, during which several versions of the amendment containing the words 'rights of conscience' were considered and rejected. I Annals Cong. 451, 757-759, 796 (1789); S. Leg. J., Sept. 3, 1789; Aug. 25, 1789; H. Leg. J., Aug. 21, 1789. The substitution of the words 'free exercise' for 'rights of conscience' is to me a persuasive argument that those who framed it, and the legislatures of the states which adopted it, contemplated that the provision was to be construed more broadly than a mere protection of religious belief, especially in view of the distinctly plain meaning of the words 'free exercise' in the period when the amendment was debated, adopted, and ratified. Samuel Johnson's dictionary defined 'exercise' as 'practice; outward performance.' S. Johnson, A Dictionary of the English Language (London 1785). 'Conscience' was understood as opinion or belief, which Johnson's dictionary defined as 'knowledge or faculty by which we judge.' *Id.* Noah Webster's American dictionary defined 'exercise' as 'employment.' In contrast, Mr. Webster defined 'conscience' as 'natural knowledge, or the faculty that decides on the right or wrong of actions.' N. Webster, A Compendious Dictionary of the English Language (New Haven1806). It shall also be noted that several versions of the provision proposed, and ultimately rejected, contained protections for both 'rights of conscience' and 'free exercise,' leaving the matter in no doubt, so far as it relates to the intentions of the founders, that the words 'free exercise' are imbued with a distinct and broader meaning than mere belief.

Further, it is reasonable to infer that those who drafted and adopted the first amendment assumed the term 'free exercise' meant what it had meant in their states, therefore, the wording of state constitutions, existing at the time, also provide evidence of the most satisfactory character of the original understanding of the scope of the provision. With the exception of Connecticut, every state had a constitutional provision protecting religious freedom by 1789. Although differing in their particulars, none of the provisions confined the protection to beliefs and opinions. Maryland's constitution, for example, prohibited punishment of any person 'on account of his religious persuasion or

profession, or for *his religious practice*.' Md. Decl. Rts.1776, art. XXXIII. The Virginia Bill of Rights defined 'religion' as 'the duty which we owe to our Creator, and *the manner of discharging it*.' Va. Bill Rts. 1776, § 16. Although several states confined their protections to 'worship,' it should be observed, that this limitation was not carried over to the first amendment. The federal provision followed the most expansive models among the state constitutions.

A brief reference to actual free exercise controversies in the period before the adoption of the Constitution will also serve to place the provision's meaning in clearer light. In most colonies, Quakers and certain other Protestant sects, who conscientiously refused to take oaths, were excepted from oath requirements, for example, by permitting objectors to testify by affirmation in civil court or to vote by affirmation instead of oath. See, e.g., Mass. Acts & Res. 305. Jews, who held their own usages and rites, were exempted from Rhode Island's statute governing marriage ceremonies and from the operation of state incest law, 'within the degrees of affinity or consanguinity allowed by their religion,' and their marriages, solemnized according to Jewish forms and ceremonies, were treated as binding as if actually celebrated *in facie ecclesiae,* in the face of the church, because Jewish law was understood to recommend marriage between uncle and niece, a relationship otherwise illegal under Rhode Island law and subject to severe penalties. An Act Regulating Marriage and Divorce, 1798 R.I. Pub. Laws § 7. Quakers in some colonies were exempted from the requirement of removing their hats in court, which they considered a form of obeisance to secular authority forbidden by their religion. See, e.g., An Act to prescribe the Affirmation of Allegiance and Fidelity to this State to be taken by the People called Quakers, and for granting them certain indulgences therein mentioned, 1784 N.C. Laws ch. 209, at 488. These examples show that religion-specific exemptions from civil law, accommodating otherwise loyal and law-abiding citizens who were bound by religious duty not to comply with civil law, should have been familiar to the framers and ratifiers of the free exercise clause. It would have been strange for them to have imbued the Constitution with a narrower protection than provided in the states, when the very purpose of the provision was to ensure that Congress would not go outside its legitimate domain, and encroach upon freedom of exercise of religion, as they understood this right to exist at the time.

The assertion by the majority that, in the western and northern nations of Europe, polygamy has always been recognized as an offence against society and punished as a crime with more or less severity, is, I think, also not strictly accurate. Though it be true that no person can marry while a former husband or wife is living, such second marriage being absolutely null and void according the common law, as found in *Riddelsen v. Wogen*, Cro. Eliz. 858 and many other cases, bigamy was not a criminal offense in England before the Bigamy Act of 1604. 1 Jac. ch. 11. The main purpose of the criminal statute in England was to protect a spouse from harm, especially the wife, for in most cases, the two spouses of the bigamist were unaware of each other, and the husband was deserting or failing to support his prior spouse as well as defrauding his new one. And so, it is to be noted without surprise, given this purpose, that bigamy is placed in 18th-century treatises in chapters on offenses against women, alongside offenses such as underage marriage without a father's consent and rape. See, e.g., Baron and Feme. A Treatise of the Common Law Concerning Husbands and Wives 383-394 (1st ed. 1700). In the greater

number of cases in which the Bigamy Act was invoked, moreover, the bigamous marriages were ultimately not adjudged in violation of the Act, the courts routinely deciding, rather, that the marriage was void but not within the criminal statute, because the wife had not been abandoned, or deceived without her knowledge, but rather there being only a technical failure of the divorce from the first wife (or, in some cases, there having been granted *a divorce et mensa thoro* from the first wife, which, though not *a divorce a vinculo matrimonii*, was a formal separation providing legal rights and protections for the first wife). *Id.* at 384-386. These cases make it difficult to conclude, as do my brethren in the majority, that England approved of a general rigorous and systematic criminal punishment of polygamy. The alleged longstanding criminal prohibition of polygamy upon which majority opinion places such reliance, is as consistent with a general condemnation of deceit and nonsupport of an innocent wife, as it is with an established tradition of prosecuting polygamy because it is an offense to society. Further, Chancellor Kent, on whom the majority relies, states in his treatise that the civil code of France, adopted in 1804, did not criminalize polygamy, only rendering the second marriage unlawful, without annexing any penalty for the offense. 2 Kent, Com. 81, note (*e*).

In summary, the historical grounds relied upon in the majority opinion are more complex than indicated. The singular reference by the majority opinion to the views of Mr. Jefferson—whose position on free exercise was extraordinarily restrictive for his day, unsupported by the express terms of the Constitution, and out of step with the views of the drafter of the first amendment—and the majority's sweeping references to the general abhorrence of polygamy in the northern and western nations of Europe, do not take account of other authorities pointing in the opposite direction. Indeed, a careful examination of the relevant history of the first amendment throws serious doubt upon the majority's narrow construction of the provision, and the majority's application of it, in this case.

It would be unjust to the memory of the distinguished individuals who framed the Constitution, to suppose that it was designed to protect a mere barren and abstract right of religious belief, without any practical operation upon the actual business of religious practice. The first amendment was undoubtedly adopted as part of the Constitution's great and useful purpose. It was to maintain the full freedom of religion, in all its forms and operations, by placing religion under the protection of the Constitution. And it would but ill become this Court, under any circumstances, to depart from the plain meaning of the words used, and to sanction a distinction between belief and practice, which would render the provision illusive and nugatory, mere words in form, to those who are most in need of its protections, for it is the religious practice of unpopular sects that are most likely to be restricted and persecuted. There can be no such thing as freedom of conscience without freedom to act.

II. Religious Duty or Belief May Serve as a Defense to the Morrill Act

Because I am convinced that the first amendment was intended to protect more than mere belief, and that polygamous marriages were not universally defined or adjudged as criminal at common law, I am compelled to consider whether the religious duty or belief of the accused can be accepted as a justification of his polygamous marriage, an act made

criminal by Congress. I emphasize, again, that I am in full agreement with the majority opinion that Congress has the power to prescribe criminal laws, *McCulloch v. Maryland*, 4 Wheat. 428-429. This power extends to the Territories. *Loughborough v. Blake*, 5 Wheat. 319. The claim of the accused for general invalidation of Section 5352 of the Revised Statutes is without any legal validity; the weakness of this claim may explain Mr. Biddle's abbreviated and undeveloped statement of it in his brief for the plaintiff in error. The request by the accused for exemption from the statute, however, requires our consideration in light of the proper construction of the constitutional provision protecting free exercise of religion. In order to undertake this inquiry, a fuller evaluation of the personal circumstances of the accused and the situation of his wives, as well as the conditions prevailing in the Territory of Utah in relation to the practice of polygamy, including any injury or outward disturbance of others caused by polygamy, is required.

The accused is personal secretary to Brigham Young, the former editor of the *Millennial Star*, and, except for his polygamous inclinations, otherwise of the most upstanding kind of citizen. Based on these circumstances, there is reason to suspect that the indictment was founded on his association with the leader of the Mormon Church, who openly espouses and promotes the practice of polygamy among its members, rather than due to any injury or outward disturbance of others. The record shows only that his second wife, having been subpoenaed by the marshal, admitted her marriage to the him. That is all. No wife of the accused was complaining to the federal marshals about her miserable life; no evidence of despotic behavior by the accused is before this court. The government has utterly failed to present evidence that the polygamous acts in question caused any physical harm or psychological injury to the spouses of the accused, any physical or psychological harm to his children, or any physical or economic harm to other people. Further, much confusion is perpetuated by the majority opinion's comparison of polygamy to human sacrifice and suttee. Polygamy does not pose a physical threat to the participants, much less involve a termination of a human life.

Yet it is asserted in the majority opinion that polygamy is inherently despotic, and on this basis, that religious belief cannot be accepted as a justification of the peculiar marriage of the accused, which has been determined to be a crime by Congress. In support of this theory, the majority opinion relies on Professor Lieber, who asserts in his treatise that polygamy almost irresistibly leads to despotism. 2 Lieber, Manual of Political Ethics, bk. iii, ch. 1, at 9 (1839). It is worth pausing here to examine Professor Lieber's theory more closely, for it is the foundation upon which the majority's whole reasoning seems to rest, rather than any evidence in the record as to the immediate effects of the acts of the accused.

A. Marriage and Society

According to Mr. Lieber, marriage is the foundation of society, the family the first school of moral cultivation. It is in the family, through the strong affections of husband and wife, mother and child, where the vital regard of man to man, social duty, and love of country are born and nourished, and it is the family that creates social relations and abilities essential for the existence of a society larger than the family. 1 Lieber, Man. Pol. Ethics, bk. ii, ch. 3, at 147 (1st ed. 1838). So has this Court observed, *Randall v. Kreiger*,

23 Wall. 137, 147, and Mr. Story also says, in his 1834 treatise, Commentaries on the Conflict of Laws (§ 109), that 'the contract of marriage is the most important of all human transactions. It is the very basis of the whole fabric of civilized society.' Without for a moment doubting the correctness of these observations, neither Mr. Lieber nor the majority opinion explain precisely how polygamy inevitably leads to a state of despotism. The theory seems to rest on a chain of reasoning that, there being more adults and children in polygamous marriages, they are more prone to conflict and competition than monogamous marriages; that a longstanding, unselfish interest in another person and in shared children are less likely to develop in such families; and that because of these conditions, affection and altruistic family relationships are less likely to flourish in polygamous families. It is said that this, in turn, stunts the development of moral capacity for sympathy and thereby leads to a less civilized society. Perhaps there is truth in these ideas about social and political relations; they are at least plausible. Yet with all due respect for Professor Lieber's theory, it has no place in this Court's consideration of the precise question presented here—which is not whether Congress had the power to make polygamous marriage a crime—but having done so, whether the law must be applied without exception to an individual who practices polygamy because it is an accepted doctrine of his church and a duty he believes of divine origin. And to this question, the answer must be no, for the constitutional provision protecting free exercise of religion, which the founders intended to be given a liberal construction, must take precedence over a political theory on the connections between polygamy and historically despotic structures. It would be a perversion of justice to hold that the acts of the accused are unjustified as a matter of law on the basis of such a general proposition.

Further, I cannot agree that polygamy leads to despotism, any more or less than monogamy leads to despotism. Professor Lieber admitted as much, when he observed in his treatise that the essential characteristic of monogamous marriage is the discarding of mutual right. By custom and law, monogamous marriage encourages forgetfulness of separate individual interest, and is based on kindness and forbearance of the husband. The authority of the father, too, is neither motivated nor legitimated by ideals of equality and justice; it is restricted only by personal attachment. Unlike the state, whose essential ideas are consent and the equal right which exists between person and person, monogamous marriage demands one-sided obligation, and knows not mutuality. *Id.* at 152. These principles of monogamy, if applied to the state, would also inevitably lead to absolutism and tyranny. The observation is echoed by Mr. Mill in his 1869 essay on marriage as it stood in England at the common law, which authorities everywhere agree is the basis of our country's marriage law. He said, 'The family is a school of despotism, in which the virtues of despotism, but all its vices, are nourished.' Mill, 81. Indeed, in monogamy, the wife is the bond servant of her husband: no less so, as far as her legal status, than the polygamous wife. The monogamous wife owes lifelong obedience to the husband. *Id.* at 55. Marriage allows men, without labor, to live on the labor and property of women. After marriage, the man is entitled to all of his wife's property of every kind, her moral existence is merged in his, and his will is her rule of action. E.P. Hurlbut, 1848 Ess. Hum. Rts., 115. If she proves refractory, he has the power of moderate correction and chastisement. She is presumed by the law to be so much under his dominion as to be incapable of free moral action, insomuch that she is excused for any crime committed in his presence. No degree of drunkenness or low brutality on his part frees her from the

yoke of marriage to him. *Id.* On the theory that, through marriage, her interests are represented, women are excluded from all active participation in government, notwithstanding their ability for clear intellectual perceptions and their consequent ability to perceive the wisdom and expediency of the laws. *Id.* at 120-122. She vows a livelong obedience to him at the altar, and is held to it all through her life by law. The obligation of obedience stops short of participation in crime, but it certainly extends to everything else. She can do no act whatever but by his permission, at least tacit. She can acquire no property but for him; the instant it becomes hers, even if by inheritance, it becomes 'ipso facto' his. Mill, 55. It is relevant, also, to the majority's conclusion that polygamy threatens the freedom of those around it, while monogamy inhibits such evils, that the monogamous wife's position in most states is worse than the polygamous wife in Territorial Utah, where, at least, women have been included in the elective franchise since 1870. And it must also not be forgotten that enslaved persons were formally prohibited from marrying in Southern states before the Civil War, even though it is suggested by the majority that, because monogamy is so integral to the best interests of society, no state has ever departed from its ideal model of social life. From this examination of the law governing monogamous marriage both past and present, I am constrained to conclude, notwithstanding some recent modifications of the civil law in a different direction in some states, that monogamy, no less than polygamy, is a great engine of despotism.

B. The Women of Utah Support Polygamy

And how have the presumably enslaved women of Utah responded to their condition? However the polygamous wife might seek to maintain her social status, however religious convictions might impel her, or iron circumstances restrain her, however ignorant or poor she might be, sooner or later, one should expect, if the majority is right about her condition, that the assaulted, imprisoned, outraged instincts of human nature would arise and vindicate themselves, and that Mormon women would exercise the ballot to overturn the practice of polygamy. But this has not occurred. Enfranchised and exercising their political equality, and having the greatest rights of all citizens—the ballot—they have demonstrated determined opposition to Section 5352. Not without substantial pressure from federal marshals who subpoena them and compel them to testify against their husbands in violation of the law of unity; from prosecutors and judges who invade their privacy with all manner of questions about the intimate details of their home life, including sleeping arrangements and dates and times of the last sexual intercourse with their husbands; from federal officials who have brought indictments against them for sexual crimes such as fornication, transforming them into the legal equivalent of prostitutes; and from East Coast suffragist activists who visit their territory to admonish them to 'wake up,' establish 'their own constitutions, creeds, and codes, and customs' unmediated by man, and to advise them that they would not be in their current state of dependence and degradation 'but by man's free and fraudulent use of the authoritative 'Thus saith the Lord" (Stanton, Revolution, July 13, 1871), the polygamous wives in the Utah Territories, and Mormon women more generally, have employed their recently elevated political position in support of polygamy, not against it. For, like the accused in this case, they believe that its justification lays in theological doctrine, despite its hardships.

Indeed, one may attribute the unusual equality of rights that women in Utah enjoy to their desire to stand up and defend polygamy. When Congress attempted, in 1870, to further facilitate its decade-long purpose to stamp out polygamy in the Territory of Utah by a proposed federal statute that would have denied citizenship, public office, the franchise, or any homestead benefit to anyone practicing polygamy (Cullum Bill), Mormon women were at the forefront of organized efforts to defeat it. They held a mass meeting, gathering some 3,000 to 4,000 women, to advocate the claims of polygamy and defend the men who practice it. Great Indignation Meeting, Deseret Evening News, Jan. 14, 1870, at 2 & Jan. 15, 1870, at 2. They also held meetings in fifty-eight towns, large and small, at which as many as 25,000 women attacked the proposed legislation and defended polygamy. Deseret News, Mar. 9, 1870, at 49. Shortly thereafter, the legislature of the Utah Territory granted women there the right to vote, in recognition of their confidence in their wives and sisters, and in response to the women's demand for the right of franchise. From this history, it is apparent that Utah has a more thoroughgoing structure of consent to their peculiar domestic form of marriage than all the states and territories that embrace monogamous marriage, except the Wyoming Territory, which enfranchised women in 1869.

It is undoubtably true that many polygamous wives, like many monogamous wives, are victims of husbands who, without being in a legal sense malefactors in any other respect, indulge the utmost habitual excesses of bodily violence toward their unhappy wives, or toward whom the excesses of their wives' dependence inspires mean and savage natures, or who do not practice the consideration toward their wives which is required of them toward everybody else. The extensive record of women's political empowerment in the Utah Territories, however, and their unwavering defense of polygamy, may be accepted as authoritative evidence that the constitutional guarantee of religious freedom, while not prohibiting federal legislation making polygamy a crime, requires an exception from the operation of Section 5352 in this case, there not being any evidence in the record of specific harm to wives or children of the accused, injury of the equal rights of others, or evidence of disturbance of the general public order in the Territory of Utah, there being evidence, rather, that the practice is generally consensual and supported by polygamous wives. Such a disposition in this case, would not only properly reflect the founders' intentions with respect to scope of the Constitution's protections of religion, but would also, by its effect, further the parallel interests in religious freedom and equality of female citizens in the Territory of Utah.

III. Congressional Power Under the 13th and 14th Amendments to Outlaw Racial and Sexual Discrimination

Finally, in order that there may be no misapprehension of the views which I entertain in regard to the power of Congress to govern the Territory of Utah, I wish to be clear that my reasoning does not rest on the general proposition, promoted by the Southern States in defense of slavery, and rejected explicitly by the thirteenth and fourteenth amendments to the Constitution, that a state or territory has a right to regulate its own domestic affairs, and to mold the law of domestic relations to their own customs and usages, even if in conflict with federal law or the inherent rights of others. As Justice Curtis reasoned in his dissent in *Dred Scott v. Sandford*, 19 How. 693, 611 (Curtis, J., dissenting), it would be

absurd to assert that the United States has the power to acquire a territory, and no power to govern it when acquired. I am in agreement with the majority opinion on this point. Yet how such a proposition is so elementary and self-evident as to require no argument by the majority of this Court to support it utterly confounds me, especially when delivering an opinion so pregnant with vital consequences for United States citizens of African descent and persons of color. Just three years ago, the majority of this court was faced with a very similar question in *United States v. Cruikshank et al.*, 92 U.S. 542, which concerned the constitutionality of the convictions of several white men under the federal Enforcement Act of 1870, for conspiring to falsely imprison and murder an estimated 105 citizens of African descent in a dispute over the results of the 1872 gubernatorial election in Louisiana, *id.* at 548-49, much graver offenses than polygamy. Overturning the convictions of the white men, the majority opinion reasoned on the rights of the negro persons conspired against: 'The Government of the United States, although it is, within the scope of its powers, supreme and beyond the states, can neither grant nor secure to its citizens rights or privileges which are not expressly or by implication placed under its jurisdiction,' for the Constitution 'adds nothing to the rights of one citizen as against another.' *Id.* at 550, 542. The Constitution, said the Court, 'secures the individual from the arbitrary exercise of the powers of government,' *id.* at 554, but not from private action. Therefore, citizens of African descent must look to 'municipal legislation' for protection from violence when other citizens deprive them of their inherent rights of peaceable assembly for lawful purposes, and of life and personal liberty. *Id.* at 553. Nor, according to recent decisions, does the fourteenth amendment of the Constitution apply to a woman in Illinois who wanted to practice law but was disabled by coverture, *Bradwell v. State*, 16 Wall. 130 or immunize from criminal prosecution a suffragist woman in Missouri who voted knowing that the local law restricted the franchise to men. *Minor v. Happersett*, 88 21 Wall. 162. Were today's majority to endeavor to reconcile its reasoning with these decisions, the effort would be involved in great difficulty.

It is heartening that my brethren are starting to think of the Constitution as entailing a positive vision of moral limits in our federal system. Yet I cannot help but observe that the majority has arrived at this sea change in its understanding of the Constitution, and the humanitarian precepts embedded in it, only upon consideration of a form of marriage that they propose sacrifices the sensibilities of women who are members of the white race. Are not men and women of African descent equally included in the Constitution's protections? In our system of government, is not a woman's right to pursue her true and substantial happiness as her own conscience shall dictate, as sacred a right guaranteed by the Constitution, as her right, implicitly protected by the court's decision today, to maintain a specific station in the domestic sphere and society? Although these questions go beyond what is required for this decision, I can only hope that the majority opinion's expansive view of the constitutionally implied powers of Congress to legislate for the greater good, which I share, will be maintained going forward when presented with questions of Congress's power to secure individuals' right to personal security, personal liberty, and private property, whether such rights are threatened by hostile state legislation or personal prejudice, and whether the individuals be men or women, of African or European descent.

I **dissent**, therefore—First, because I think the first amendment protects religious practice from the dictates of general law, so long as the practice does not invade the private rights of others or disturb public peace and order, and, secondly, because no such invasion or disturbance has been shown in this case. I am of the opinion that the judgment of the Supreme Court of the Territory of Utah should be reversed.

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