Loving v. Utah and Mormonism's Embarrassing Saga of Marital Policy

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1. Kitchen v. Herbert

> The State's prohibition of the Plaintiffs' right to choose a same-sex marriage partner renders their fundamental right to marry as meaningless as if the State recognized the Plaintiffs' right to bear arms but not their right to buy bullets.

— Judge Robert Shelby *Kitchen v. Herbert*

April 10 was the 47th anniversary of the date *Loving v. Virginia*[1] was argued before the U.S. Supreme Court. *Loving* was the landmark case which found miscegenation laws (those laws which prohibited interracial marriages) to be unconstitutional. April 10 also happened to be the date the Tenth Circuit Court of Appeals heard arguments in *Kitchen v. Herbert*,[2] the case challenging Utah's constitutional prohibition of same-sex marriages.

Almost 66% of Utah's voters approved Amendment 3 in 2004. The amendment defines marriage as consisting "only of the legal union between a man and a woman," as a preemptive measure to defend the state's marriage statutes against constitutional challenge. On December 20, 2013, a Federal District Court ruled in *Kitchen* that the amendment violated the rights to due process and equal protection under the law as guaranteed by the Fourteenth Amendment, on a rational basis alone.

In the conclusion of his ruling, Judge Robert Shelby found the state's contentions in *Loving* to be "almost identical to the assertions made by the State of Utah in support of Utah's laws prohibiting same-sex marriage." He found those assertions to be unconvincing:

> Anti-miscegenation laws in Virginia and elsewhere were designed to, and did, deprive a targeted minority of the full measure of human dignity and liberty by denying them the freedom to marry the partner of their choice. Utah's Amendment 3 achieves the same result.
>
> Rather than protecting or supporting the families of opposite-sex couples, Amendment

[1] *Loving v. Virginia*, 388 U.S. 1 (1967)
[2] *Kitchen v. Herbert*, 961 F.Supp.2d 1181 (D. Utah 2013), _affirmed_ 755 F.3d 1193 (10th Cir. 2014); *stay granted*, 134 S.Ct. 893 (2014); *petition for certiorari denied*, No. 14-124, 2014 WL 3841263 (Oct. 6, 2014)

> 3 perpetuates inequality by holding that the families and relationships of same-sex couples are not now, nor ever will be, worthy of recognition. Amendment 3 does not thereby elevate the status of opposite-sex marriage; it merely demeans the dignity of same-sex couples.

Judge Shelby's ruling was appealed, and the parties are currently waiting on the Tenth Circuit Court in Denver to make a decision. If it is appealed again, there is a chance that the case will be selected to be heard by the U.S. Supreme Court which could finally establish some national precedent on the matter.

Judge Shelby's ruling was appealed, providing an opportunity for the Tenth Circuit Court in Denver to consider the validity of marriage bans for the first time. That court found the appellants' justifications to fail the strict scrutiny test, affirming the district court's ruling "that Amendment 3 and similar statutory enactments do not withstand constitutional scrutiny." In October, the Supreme Court denied without comment the writ of certiorari leaving the appellate court's mandate in effect: same-sex marriages are valid and must be recognized in the State of Utah. (On June 26, 2015, in *Obergefell v. Hodges*, the Supreme Court found it to be unconstitutional to deny marriages to same-sex couples making such marriages available and recognized throughout the union.)

Legal analogies between interracial couples' right to marry and same-sex couples' right to marry have been made almost since the Supreme Court ruled on *Loving* in 1967. In her celebrated and comprehensive history of miscegenation law, *What Comes Naturally*, Peggy Pascoe mentioned such an analogy being dismissed by the Minnesota Supreme Court in 1971. It wasn't until a ruling by the Hawaii Supreme Court in 1993 that courts began taking the same-sex analogy to *Loving* seriously:

> "After the Hawaii ruling, both the energy of the campaign to legalize same-sex marriage and the number of court cases that accompanied it grew by leaps and bounds. Over the next decade, several judges issued rulings overturning state bans, and they used the parallel to *Loving v. Virginia* to do so." (299-300)

In an essay she wrote for *History News Network*, "Why the Ugly Rhetoric Against Gay Marriage Is Familiar to this Historian of Miscegenation," Pascoe argued that in order to understand the current debate over same-sex marriage it is first necessary to understand the history of American miscegenation laws, "because both supporters and opponents of same-sex marriage come to this debate, knowing or unknowingly, wielding rhetorical tools forged during the history of miscegenation law." She also noted that, "The arguments white supremacists used to justify for miscegenation laws—that interracial marriages were contrary to God's will or somehow unnatural—are echoed today by the most conservative opponents of same-sex marriage."

2. Heteronormativity for Time and All Eternity

And indeed the opponents of same-sex marriage are almost invariably religious and motivated by an adherence to what they believe to be divine revelations and/or a philosophy of natural law. In the *Kitchen* appeal, a coalition of Christian churches filed a 42-page amicus brief in support of the state.[3]

[3]The brief is available in several formats at archive.org: "Brief if Amici Curiae United States Conference of Catholic Bishops; National Association of Evangelicals; The Church of Jesus Christ of Latter-day Saints; The Ethics

The brief represents something of an ecumenical wonder, bringing together in the battle against same-sex marriage the United States Conference of Catholic Bishops, the National Association of Evangelicals, The Church of Jesus Christ of Latter-day Saints, the Southern Baptist Convention, and the Lutheran Church—Missouri Synod.

Apparently if there is anything Catholics, Mormons, Evangelicals, Lutherans, and Southern Baptists all agree on, it is that the sexes of would-be spouses are important and should be regulated by the state.

The Church of Jesus Christ of Latter-day Saints (Mormons) appears to have the strongest motivation to preserve a traditional definition of marriage in Utah. Not only because of that church's deep ties to Utah, but also because family occupies an unusually important position in Mormon thought. Unlike other Christian sects who marry "until death do us part," Mormon couples partake in an ordinance of "celestial marriage" in which they are sealed during a temple ceremony "for time and eternity."

To Mormons, family is not merely the fundamental unit of society here on earth. It is also an everlasting institution, a cosmic matrix underlying the very purpose of life and eternal progression: we were spirit children of Heavenly Father and Mother in our pre-earth existence; we gain physical bodies, faith, and families in this, our mortal life; after physical death, our bodies and families will be raised into exalted existence, like God was in his body, at the time of the resurrection to progress evermore and perhaps begin the cycle anew.[4]

& Religious Liberty Commission of the Southern Baptist Convention; and Lutheran Church—Missouri Synod In Support of Defendants-Appellants and Supporting Reversal, Case Nos. 13-4178, 14-5003, 14-5006, United States Court of Appeals for the Tenth Circuit (February 10, 2014)"

[4]For an example of teaching on these topics, see the 1909 statement issued by the First Presidency, "The Origin of Man", in which President Joseph F. Smith taught that "man, as a spirit, was begotten and born of heavenly parents, and reared to maturity in the eternal mansions of the Father, prior to coming upon the earth in a temporal body to undergo an experience in mortality."

In 1995, the LDS First Presidency released a statement reaffirming the importance of the family and emphasizing that marriage is between a man and a woman ("The family is ordained of God. Marriage between man and woman is essential to His eternal plan"). That statement, titled "The Family: A Proclamation to the World", is cited on page 10 of the amicus brief filed in the *Kitchen* appeal to demonstrate, strangely enough, that for Mormons "homosexuality is remote from teachings about marriage and family" in order to argue against "the suggestion that religious support for husband-wife marriage is rooted in anti-homosexual animus."

The Church's interest in the state definition and regulation of marriage may be explained by a fear expressed succinctly on page 19 of the religious brief: "if the meaning of marriage is changed in concept, the cultural significance attached to marriage will also change in practice."

3. Freedoms and Restrictions in the History of Mormon Marriage

But there was a time when the Mormons were condemned for having too liberal a view of marriage and family. In nineteenth-century Utah "celestial marriage" was a euphemism for "plural marriage," a practice in which some Mormon men would take multiple wives. At that time, plural marriage was taught as being essential to eternal progression, just as opposite-sex marriage is proclaimed by the Church to be essential today.

In 1866 Brigham Young, the second president of the LDS Church and himself a great fan of the doctrine of plural marriage, delivered a brief defense of polygamy in which he stated, "The only men who become gods, even the Sons of God, are those who enter into polygamy." In that same sermon, Young declared that if Utah was not admitted as a

state to the union until it outlawed polygamy "then, we shall never be admitted."[5]

Faced with increasing social pressure and ruinous repression by the federal government (particularly the Edmunds-Tucker Act of 1887), the Church leaders' courageous defiance was set aside in favor of practicality. In 1890 Wilford Woodruff, the fourth president of the Church, after claiming to have received a revelation from Jesus Christ on the matter, issued `The Manifesto' which ended the practice of plural marriage by the Church. Utah was admitted as the 45th U.S. state a little over five years after the manifesto was issued.

While the LDS Church experimented with marriage freedoms in the number of wives, it also historically restricted freedoms based on race. From the presidency of Brigham Young until 1978, the Church did not ordain black men to its priesthood or allow black members to participate in temple sealing ordinances — blacks were excluded from celestial marriage and the postmortal exaltation for which it is essential.

Nineteenth- and early twentieth-century Mormons combined contemporary justifications for slavery and apartheid, such as the theory that black skin was a divine curse marking out the descendants of Cain, with their own doctrine of premortal existence and agency to develop an especially vicious justification for racism: blacks were to be disenfranchised, and it was their own fault by their own choosing.[6]

The Church's race realism, while tenuously implementable in the United States, was completely useless when the Church began proselytizing in ethnically mixed populations such as in Brazil. This practical difficulty combined with increasing political pressure since the Civil Rights Movement forced the Church to abandon its racist policies. In June 1978, the Church leadership received a revelation which removed the

[5]Young, "Beneficial Effects of Polygamy," 269.
[6]For many quotations by Mormon leaders on the curse of Cain and the premortal justification of racism, see Tanner, *Curse of Cain?*

racial restrictions on priesthood membership and access to the temple including celestial marriage — over ten years after *Loving v. Virginia*.[7]

4. Conclusion

With their efforts to exclude same-sex couples from both celestial and mortal marriage (the 1995 Proclamation, California's Proposition 8, Utah's Amendment 3, etc.), the men who lead the LDS Church today seem determined to continue the Mormon tradition of teaching divine principles of marriage which it is later forced to rescind.

If I were a Mormon, the thing that would frustrate me the most is how completely unnecessary the emphasis on heteronormative marriage is to the doctrine of celestial marriage. It would be much less painful (and more consistent with the Church's pro-family rhetoric) to make room in the Celestial Kingdom for same-sex families than it is to kick against the goads of a changing culture. It is embarrassing for an organization lead by purported prophets, seers, and revelators to repeatedly exhibit such shortsightedness.

5. References and Notes

Pascoe, Peggy. *What Comes Naturally: Miscegenation Law and the Making of Race in America*. Oxford: Oxford University Press, 2009.

Tanner, Jerald, and Sandra Tanner. *Curse of Cain?: Racism in the Mormon Church*. Salt Lake City, UT: Utah Lighthouse Ministry, 2004. http://www.utlm.org/onlinebooks/curseofcain_contents.htm

[7] "Race and Priesthood."

The Church of Jesus Christ of Latter-day Saints. "Race and Priesthood". https://www.lds.org/topics/race-and-the-priesthood?lang=eng

Young, Brigham. "Delegate Hooper—Beneficial Effects of Polygamy—Final Redemption of Cain". *Journal of Discourses* 11 (1866): 266-272. http://jod.mrm.org/11/266