

# *Windsor* and the Legalization of Polygamy – A Slippery Slope?



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- Many opposed to the ruling in *Windsor* cited a slippery slope to the legalization of other types of marriage – like polygamy
- In *Brown v. Buhman*, 947 F. Supp. 2d 1170 (D. Utah 2013), the star of the TLC show sister wives filed a lawsuit challenging the constitutionality of Utah's ban on polygamy citing a right to privacy and due process
- In a decision dated December 18, 2013, the federal judge in that case struck down part of Utah's statute prohibiting polygamy.
- So is this decision a result of a “slippery slope” in the aftermath of *Windsor*?

# *Windsor* and the Legalization of Polygamy – A Not-So Slippery Slope

- Brown, on the legal merits, has no direct reliance or citation to *Windsor* or *Hollingsworth*
- The statute, [Utah Code Ann. § 76-7-101](#), provides: (1) A person is guilty of bigamy when, knowing he has a husband or wife or knowing the other person has a husband or wife, the person purports to marry another person or cohabits with another person.
- Brown struck down the part of Utah's statute that barred "religious cohabitation"

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- *Brown* held that Utah can still limit one marriage to one license; it just cannot keep married people from living with others in "personal relationship[s] that they knew would not be legally recognized as marriage."
- The Utah Attorney General is appealing the decision

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- Is there any connection to *Windsor*?
- The *Brown* court cited *Lawrence v. Texas* (the famous sodomy case studied in all 1<sup>st</sup> year con law classes) – holding that before *Lawrence*, "[T]he good order and morals of society' served as an acceptable basis for a legislature, it was believed, to identify 'fundamental values' through a religious or other perceived ethical or moral consensus, enact criminal laws to force compliance with these values, and enforce those laws against a targeted group." *Lawrence* shattered that belief: what consenting adults do in the bedroom is their own business, provided it harms nobody else. *Lawrence* established "a fundamental liberty interest in sexual conduct."

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- Whereas both *Windsor* and *Brown* find parentage in *Lawrence*, it cannot be argued that *Brown* was based upon the Supreme Court's decision in *Windsor* because it did not open up the definition of marriage to more than one legal married partner.
- Rather it is *Lawrence v. Texas* that, if anything, created a legal rationale for other various decisions, including both *Windsor* and *Brown* recognizing a person's privacy interest
- Interestingly, over ten years ago, Justice Scalia predicted in such a "slippery slope" in his dissent in *Lawrence*, stating that state laws prohibiting bigamy and other prohibited sexual relationships would be permitted in the future: "every single one of these laws is called into question by today's decision that the Supreme Court majority."