Once a Peculiar People: Cognitive Dissonance and the Suppression of Mormon Polygamy As a Case Study Negating the Belief-Action Distinction

Author(s): Elizabeth Harmer-Dionne

Source: *Stanford Law Review*, Apr., 1998, Vol. 50, No. 4 (Apr., 1998), pp. 1295-1347

Published by: Stanford Law Review

Stable URL: https://www.jstor.org/stable/1229287

REFERENCES
Linked references are available on JSTOR for this article:
https://www.jstor.org/stable/1229287?seq=1&cid=pdf-reference#references_tab_contents
You may need to log in to JSTOR to access the linked references.

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at https://about.jstor.org/terms



is collaborating with JSTOR to digitize, preserve and extend access to *Stanford Law Review*

This content downloaded from
132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

NOTES

Once a Peculiar People: Cognitive Dissonance and the Suppression of Mormon Polygamy As a Case Study Negating the Belief-Action Distinction

Elizabeth Harmer-Dionne*

In this note, Elizabeth Harmer-Dionne argues that the suppression of religious practice, under the guise of the Smith *neutrality principle, actually changes belief and that this comes dangerously close to violating the Free Exercise Clause, which purportedly holds belief sacrosanct. Ms. Harmer-Dionne reviews the history of Mormon polygamy and contrasts the once prominent position of polygamy with current Latter-day Saint theology, which largely ignores the practice. According to Ms. Harmer-Dionne, this change accords with predictions made by cognitive dissonance theory and law and economics as to the effects of external sanctions and pressures on belief. Consequently, she argues that meaningful free exercise requires strict scrutiny of governmental actions that outlaw unpopular religious behavior, particularly when that behavior has no demonstrably detrimental societal effects.*

To some extent this is a personal essay. I am a practicing Mormon whose grandmother regaled me with stories of the polygamous ancestors who peopled her childhood. Like most Mormons, I have a general sense of the early history of the Church of Jesus Christ of Latter-day Saints (the "LDS Church"): its founders, forced removal to Mexican territory (now Utah), and ultimate survival. Like most Mormons, I had no idea how central polygamy[1]

* Associate, Testa, Hurwitz & Thibeault in Boston, Mass. J.D., Stanford Law School, 1998; M.Phil., University of Cambridge, 1994; B.A., Wellesley College, 1992. I would like to thank Professor Thomas Grey and the members of the Stanford Legal Studies Colloquium, and Professor Mitch Polinsky and the members of his Law and Economics Seminar, all of whom offered useful criticism of the ideas contained in this note; Matthew Werdeger, Erica Franklin, Jessica Gonzalez, and the members of the *Stanford Law Review* for their editing and research assistance; the many Latter-day Saints who have informed and nurtured my faith; John and Carolyn Harmer and Keith Dionne for their unfailing support; and finally, Claudia Cannon Jonas, in whose memory I write this.

1. *Webster's Third New International Dictionary* defines "polygamy" as "a marriage form in which a spouse of either sex may possess a plurality of mates at the same time." WEBSTER'S THIRD

This content downloaded from
132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

once was to the theology of the LDS Church or of the civil disabilities imposed on its practitioners, persecutions which fully matched those that drove the Latter-day Saints from the United States in the first place.[2]

As I have studied law and economics, American legal history, the sociology of religion, and the First Amendment, the distinction made by the United States Supreme Court between belief and action in the practice of religion has appeared to me to be increasingly untenable. Many scholars have written about both *Reynolds v. United States*[3] and the belief-action distinction,[4] but few outside the Mormon community can truly appreciate the impact that decision has had on Mormon belief. As a Mormon practitioner studying my own religion, I ponder how the Supreme Court's role in Mormon history influences its present theology. This essay represents my attempt to highlight an inherent conflict at the root of much free exercise jurisprudence. To paraphrase Jonathan Boyarin,[5] this note also represents an attempt both to be a practicing Mormon and to practice being a Mormon—to consider my beliefs in a systematic way.

INTRODUCTION

I was not alone in feeling palpable shock that the United States Supreme Court favorably cited *Reynolds* in its controversial decision in *Employment Division v. Smith*.[6] In a written statement to the House committee consider-

---

NEW INTERNATIONAL DICTIONARY 1758 (1993). The relevant cases and literature actually use the term "polygamy" to refer to marriage between one man and multiple women. I will use the term accordingly.

2. The official name of the Mormon Church is the Church of Jesus Christ of Latter-day Saints. The term "saint" indicates "one who would follow Christ," much as Paul used the term in the New Testament. *See Romans* 1:7; 1 *Corinthians* 1:2 (King James). Members of the LDS Church prefer to be known as Latter-day Saints. We are known colloquially as "Mormons," a name derived from one of our books of scripture, *The Book of Mormon*. I will use Mormon and Latter-day Saint interchangeably throughout this paper.

3. 98 U.S. 145 (1878) (denying Mormons an exemption from a federal law prohibiting polygamy).

4. *See id.* at 166 ("Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.").

5. *See* JONATHAN BOYARIN, STORM FROM PARADISE: THE POLITICS OF JEWISH MEMORY at ix (1992).

6. 494 U.S. 872 (1990) (holding that the Free Exercise Clause did not mandate an exception from a generally applicable Oregon drug law for the sacramental use of peyote). The history of and decision in *Reynolds* are discussed in greater detail in text accompanying notes 202-231 *infra*. In general, scholars have roundly criticized the decision. *See, e.g.*, Keith Jaasma, Note, *The Religious Freedom Restoration Act: Responding to* Smith*; Reconsidering* Reynolds, 16 WHITTIER L. REV. 211, 251-54 (1995) (summarizing the criticism and judicial undermining of the *Reynolds* decision); Orma Linford, *The Mormons and the Law: The Polygamy Cases*, 9 UTAH L. REV. 308, 340-41 (1964) (criticizing the *Reynolds* decision for its lack of balance and failure to adequately justify secular rationales for banning polygamy); Jeremy M. Miller, *A Critique of the* Reynolds *Decision*, 11 W. ST. U. L. REV. 165, 165 (1984) (arguing that Reynolds' actions were exactly the types of behavior that should be protected by the Free Exercise Clause); Rodney K. Smith, *Getting Off on*

This content downloaded from
132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

ing the Religious Freedom Restoration Act in 1991, Edward Gaffney, Jr., Dean of Valparaiso University School of Law, compared the government's treatment of the Mormons to "the sort of dictatorial rule that one associates with Henry VIII's dissolution of the monasteries in sixteenth century England, . . . not with the spirit of the First Amendment."[7] Professor Douglas Laycock has written that the antipolygamy laws were central to one "of the worst persecutions in our Nation's history."[8] Even Justice Souter has questioned the historical understanding of the Free Exercise Clause adopted by the Court in *Smith* and *Reynolds*.[9] And yet the Court in *Smith* affirmatively approved a decision that upheld an oppressive law.

The First Amendment to the United States Constitution states, in part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[10] The meaning of the second clause has fueled many First Amendment debates. According to Professor Michael McConnell, the free exercise debate divides between two different conceptions of what religious freedom requires.[11] The first—the no-exemption position—argues that the Free Exercise Clause requires only that society and the law not single out religion for discriminatory or oppressive treatment.[12] In other words, formal neutrality satisfies free exercise demands. The second—a position favoring exemptions for religions—insists that formal neutrality may mask de facto discrimination: "The evil includes not only active hostility, but also majoritarian presuppositions, ignorance, and indifference. The remedy generally is to leave the government policy in place, but to carve out an exemption when the application of the policy impinges on religious practices without adequate justification."[13] This position favors strict scrutiny of laws that burden religion and requires the government to justify a compelling interest before the particular law is upheld.

Caught in the midst of this debate are the religious practitioners whose fundamental beliefs and religious practices become entangled in free exercise

---

the Wrong Foot and Back on Again: A Reexamination of the History of the Framing of the Religion Clauses of the First Amendment and a Critique of the Reynolds *and* Everson *Decisions*, 20 WAKE FOREST L. REV. 569, 635-36 (1984) (stating that the *Reynolds* decision misconstrued the intentions of the framers of the First Amendment).

7. *Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong. 153 (testimony of Edward McGlynn Gaffney, Jr.).

8. *The Religious Freedom Restoration Act: Hearings on S. 2969 Before the Senate Comm. on the Judiciary*, 102d Cong. 63 (1993) (statement of Prof. Douglas Laycock).

9. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 571-77 (1993) (Souter, J., concurring).

10. U.S. CONST. amend I.

11. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1418 (1990).

12. *See id.*

13. *Id.*

This content downloaded from
132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

theory. When constitutional winds blow adversely, they wreak havoc with civil liberties and individual lives. Among the most severely abused victims of the free exercise debate were the nineteenth-century Mormons who attempted to build a latter-day Zion—survivors of an ambitious but ultimately doomed attempt to circumvent the state and establish a religiously based system of substantive justice.[14] Their history illustrates how a hostile legal environment can suppress a minority community that attempts to establish a distinctive social structure.[15] Establishing Zion included restoring polygamy, an ancient order of marriage in which one man took several wives.[16] Despite contemporaneous arguments to the contrary, polygamy met any measure or test of religious belief. Yet to gentiles[17] polygamy represented a bizarre reversion to barbarism and provided a powerful justification for stamping out the secular power of the LDS Church.

The question of polygamy is not merely a historical one. Both African Christians and Moslems may currently engage in the practice.[18] But, despite religious motivations for practicing polygamy, they enjoy no constitutional protection in this country for doing so. As recently as 1984, a United States district court ruled that the Free Exercise Clause does not protect the practice of polygamy. In *Potter v. Murray City*,[19] the court upheld a Utah city's discharge of a policeman for violating the state's antibigamy law.[20] The court noted "a vast and convoluted network of other laws clearly establishing [Utah's] compelling state interest in and commitment to a system of domestic relations based exclusively upon the practice of monogamy as opposed to plural marriage."[21] For good measure, the court reaffirmed the belief-action distinction first enunciated in *Reynolds*: "Freedom to believe or not to believe is absolute. Freedom to act, however, is not absolute but limited or qualified by the power of the state within reasonable limits to protect society

14. *See* text accompanying notes 190-201 *infra*.

15. *See* EDWIN BROWN FIRMAGE & RICHARD COLLIN MANGRUM, ZION IN THE COURTS: A LEGAL HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, 1830-1900 at xiv-xv (1988).

16. *See* text accompanying notes 159-179 *infra*.

17. Mormons use the term "gentile" much as Jews do—namely, to identify those not considered to be covenant children of God.

18. *See* JOHN CAIRNCROSS, AFTER POLYGAMY WAS MADE A SIN: THE SOCIAL HISTORY OF CHRISTIAN POLYGAMY 213 (1974). According to the *Koran*, a man may marry up to four women, so long as he treats them all equally. *See* Miller, *supra* note 6, at 179. The *Manusmriti*, the book of Hindu laws, also allows polygamy. *See id.* For a discussion of the problems faced by non-Western immigrants confronting Protestant American culture, see generally Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CAL. L. REV. 863 (1993).

19. 585 F. Supp. 1126 (D. Utah 1984), *aff'd*, 760 F.2d 1065 (10th Cir. 1985).

20. *See id.* at 1142-43.

21. *Id.* at 1138. The court did not address the circularity of the argument that declaratory laws establish a compelling state interest, thereby permitting similar laws to pass constitutional review.

This content downloaded from
132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

pursuant to a compelling state interest."[22] On appeal, the Tenth Circuit found that monogamy met the compelling interest test and affirmed the lower court's grant of summary judgment in favor of the city.[23] The court offered no explanation as to why particularized free exercise exemptions would have endangered the state interest in monogamy or why there was not a less burdensome way to achieve this interest.[24]

From its inception in *Sherbert v. Verner*,[25] the compelling interest doctrine has faced a strong challenge in free exercise cases.[26] Recently, the Supreme Court has in principal opposed religious exemptions from neutral, generally applicable laws. Since 1972, the Supreme Court has rejected all claims for free exercise exemptions outside the context of unemployment benefits as addressed in *Sherbert*.[27] In 1990, the Court formalized its objection to religious exemptions, ruling in *Smith* that a neutral, generally applicable law that incidentally forbids the performance of a religiously required act—in this case, the sacramental ingestion of peyote—does not violate the Free Exercise Clause of the First Amendment.[28]

Nonetheless, proponents of religious exemptions and a vigorous Free Exercise Clause press forward. One argument favoring exemptions from neutral, generally applicable laws is that such was the understanding of the framers of the First Amendment. Professor McConnell notes, "Even opponents of originalism generally agree that the historical understanding is relevant . . . ."[29] He admits that the historical evidence around an interpretation of the Free Exercise Clause favoring exemptions is not entirely dispositive,

22. *Id.* at 1137.

23. *See* Potter v. Murray City, 760 F.2d 1065, 1071 (10th Cir. 1985).

24. *See* Penelope W. Saltzman, Potter v. Murray City*: Another Interpretation of Polygamy and the First Amendment*, 1986 UTAH L. REV. 345, 352. *But see* Barlow v. Blackburn, 798 P.2d 1360, 1365-67 (Ariz. Ct. App. 1990) (recognizing a free exercise interest in the practice of polygamy, but holding that a state's interest in ensuring that its police officers uphold the laws and Constitution overrides that interest). Some modern courts are sufficiently broad-minded to believe that the practice of polygamy does not handicap all civil rights. *See* Johnson v. Fischer (*In re* Adoption of W.A.T.), 808 P.2d 1083, 1086 (Utah 1991) (suggesting that polygamous parents may at times be an appropriate adoption placement choice and holding that the practice of polygamy by a potential adoptive couple was an insufficient basis for denying a hearing on an adoption petition); Sanderson v. Tryon, 739 P.2d 623, 627 (Utah 1987) (holding that the practice of polygamy alone was an insufficient ground for deciding a custody issue).

25. 374 U.S. 398 (1963).

26. *See id.* at 403 (adopting the compelling interest doctrine, which mandates that the government prove a compelling state interest that cannot be achieved by less burdensome means before implementing governmental action that effectively suppresses religious practice).

27. *See* McConnell, *supra* note 11, at 1417; *see also* Marci A. Hamilton, *The Belief/Conduct Paradigm in the Supreme Court's Free Exercise Jurisprudence: A Theological Account of the Failure to Protect Religious Conduct*, 54 OHIO ST. L.J. 713, 714, 770 (1993) (depicting the Supreme Court's vision of the religious experience as one involving faith, not action, and therefore justifying the suppression of religious action in favor of social cohesion).

28. *See* Employment Div. v. Smith, 494 U.S. 872, 878 (1990).

29. McConnell, *supra* note 11, at 1415.

This content downloaded from
132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

but insists that the evidence supports an interpretation that protects religious conduct.[30]

One may also make a libertarian argument for a vigorous Free Exercise Clause.[31] A significant reason for incorporating the Bill of Rights into the Constitution was to protect religionists from the very oppression a neutral, generally applicable law may impose. One may disagree with the practice of polygamy, consider it irrational and even immoral, and still remain committed to an individual's freedom to practice it.

A third argument—and the one advanced by this note—follows from the libertarian argument. The state should allow religious exemptions not only because freedom to practice one's religion is a fundamental right, but also because a refusal to do so has detrimental effects on belief—belief being the one religious freedom the Supreme Court has consistently regarded as sacrosanct. In *Reynolds* and other religion cases, federal courts have reiterated their commitment to freedom of belief.[32] If restrictions on religious practice actually change religious beliefs, then the Supreme Court must consider, more seriously than it recently has, the protection accorded those practices.

To support this contention, this note offers two different lines of argument. After a review of the genesis of the belief-action distinction in Part I, Part II invokes the literature of psychology and the sociology of religion to argue that external coercion does indeed impact religious belief. In particular, Leon Festinger's theory of cognitive dissonance discounts the constitutional distinction made between action and belief. In Part III, I present the history of Mormon polygamy as a case study on the effects of suppressing religious practice. Polygamy was once central to Mormon theology, a cornerstone in the reestablishment of Zion. The modern Church has abandoned polygamy, both in practice and in theology. Such a change may have occurred regardless, as the LDS Church attempted to expand its reach and influence.[33] However, that is not a cogent point in the theory of the free exer-

---

30. *See id.*

31. *See* Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 478 (1991) (arguing for a "holistic, structural" approach to the Court's church/state jurisprudence); John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 376 (1996) (calling for "an integrated framework of religious liberty in America").

32. *See* Watson v. Jones, 80 U.S. 679, 728 (1871) ("The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."). This case involved a dispute as to which side of a divided congregation owned the land occupied by the congregation. The Supreme Court deferred to the judgment of the church hierarchy as to ownership. Subsequent Supreme Court cases have quoted with approval *Watson*'s statement regarding heresy. *See* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 710 (1976); Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 446 (1969); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 114-15 (1952); United States v. Ballard, 322 U.S. 78, 86 (1944).

33. *See* Peter Steinfels, *Despite Growth, Mormons Find New Hurdles*, N.Y. TIMES, Sept. 15, 1991, at A1 (noting the phenomenal growth of the LDS Church in recent decades). *See generally*

This content downloaded from
132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

cise of religion. Polygamy died an unnatural death, not one which proceeded from the organic evolution of Mormon belief. After repeated legal attacks and decades of relentless persecution, the LDS Church literally and spiritually abandoned plural marriage. The Mormon experience indicates that not only may laws "interfere with mere religious belief and opinions,"[34] but that such laws may fundamentally change them. For the doctrine of free exercise to have substantive meaning, it must account for this fact, a topic further explored in Part IV.

I. THE SUPREME COURT'S FREE EXERCISE CASES: FORGING A BELIEF-ACTION DISTINCTION

In 1878, the United States Supreme Court ruled that the Free Exercise Clause did not exempt polygamists from a federal law that criminalized the practice of plural marriage.[35] George Reynolds, a Mormon polygamist, appealed his conviction for polygamy on several grounds.[36] His central claim was that he could not be found guilty of violating the law against polygamy because he was practicing plural marriage as a sincere belief, central to his religious observance. Reynolds contended that the penalty for noncompliance would be "damnation in the life to come."[37]

The Court based its decision in *Reynolds* on several grounds. Under the guise of originalism, the Court turned to the history of the Free Exercise Clause and read into it a general proscription against legislating opinions or religious belief.[38] Quoting Thomas Jefferson, the Court stated that "the legislative powers of the government reach actions only, and not opinions,"[39]

Donald Bowen, *The Church Abroad*, DIALOGUE: JOURNAL OF MORMON THOUGHT, Winter 1970, at 66 [hereinafter DIALOGUE]; Garth N. Jones, *Expanding LDS Church Abroad: Old Realities Compounded*, DIALOGUE, Spring 1980, at 8; Garth N. Jones, *Spiritual Searchings: The Church on Its International Mission*, DIALOGUE, Summer 1987, at 58.

34. Reynolds v. United States, 98 U.S. 145, 166 (1878) ("Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.").

35. The historical background to *Reynolds* is discussed at text accompanying notes 202-231 *infra*.

36. One of Reynolds' arguments on appeal was that the instructions given the jury were prejudicial. These jury instructions read as follows:

> I think it not improper, in the discharge of your duties in this case, that you should consider what are to be the consequences to the innocent victims of this delusion. As this contest goes on, they multiply, and there are pure-minded women and there are innocent children,— innocent in a sense even beyond the degree of the innocence of childhood itself. These are to be the sufferers; and as jurors fail to do their duty, and as these cases come up in the Territory of Utah, just so do these victims multiply and spread themselves over the land.

Reynolds, 98 U.S. at 167-68. The Court found that Judge White had merely called "the attention of the jury to the peculiar character of the crime." *Id.* at 168.

37. *Id.* at 161; *see also* text accompanying notes 159-179 *infra*.

38. *See Reynolds*, 98 U.S. at 162.

39. *Id.* at 164 (quoting Jefferson in reply to an address to him by a religious organization).

This content downloaded from 132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

but that man "has no natural right in opposition to his social duties."[40] Although the Court concluded that "Congress was deprived of all legislative power over mere opinion," Congress "was left free to reach actions which were in violation of social duties or subversive of good order."[41] In other words, the Court concluded that the Free Exercise Clause protects religious belief, but that it offers no guarantees for religious action.

The Court disallowed the polygamy exemption for two other reasons: the opprobrium with which American society viewed polygamy and its supposedly deleterious moral effects. The Court considered the practice immoral, barbaric, and contrary to civilized marital norms.[42] Under the laws of both Great Britain and the prerevolutionary American colonies, punishment for the practice purportedly included death.[43] Given polygamy's history, the Court found it "impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life."[44]

However, the most significant rationale the Court offered for its ruling was its belief that polygamy subverts democratic ideals.[45] The Court referred to polygamy as an institution that "fetters the people in stationary despotism"[46] and declared that polygamy could not coexist with monogamy.[47] Faced with this threat to its civil ideals, the government could favor monogamy.[48] Ignoring any ability of the courts to make analytical distinctions, the Court asserted that if the government could not outlaw polygamy, then it likewise could not prohibit human sacrifice or the actions of "a wife . . . [who] believed it was her duty to burn herself upon the funeral pile [sic] of her dead husband."[49] The Court added that to permit polygamy "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. Government could exist only in name under such circumstances."[50]

---

40. *Id.*

41. *Id.*

42. *See id.*

43. *See id.* at 165.

44. *Id.*

45. *See* text accompanying notes 190-201 *infra* (discussing the political conflict between the United States government and the LDS Church). Polygamy became a symbol of this conflict. By suppressing polygamy, the government believed it could also suppress the secular power of the LDS Church.

46. *Reynolds*, 98 U.S. at 166.

47. *See id.*

48. *See id.*

49. *Id.*

50. *Id.* at 167.

This content downloaded from
132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

Consequently, the Supreme Court denied Reynolds' free exercise claim and upheld his conviction under the antibigamy law.[51] In doing so, the Court reacted to a concern that likewise informed the decision of the Court in *Smith*—namely, how a nation maintains the rule of law in the face of a Free Exercise Clause that may demand exemptions from the law. The concern is a worthy one, but the Court in *Reynolds* and *Smith* answered it in an inappropriate way, one which needlessly impinges on religious freedom and individual rights. The rule of law does not demand suppression of religious liberties. In fact, it often dictates precisely the opposite result. Although the balance between majoritarian law and the rights of minority religions may not be an easy one, the Supreme Court has made some meaningful attempts to mediate between the two.

A. *Cases Recognizing Exemptions for Some Religiously Based Actions*

In 1940, the Supreme Court for the first time recognized that the Free Exercise Clause may actually protect some religiously motivated actions. In *Cantwell v. Connecticut*,[52] the Court held that an ordinance requiring religious groups to obtain permission from a designated official before distributing religious literature was an invalid restraint on free exercise.[53] Some critics have suggested that this case effectively overturned the distinction made in *Reynolds* between belief and action. However, because the action in this case involved freedom of speech as much as the free exercise of religion, it is difficult to argue that the Court in fact recognized a constitutional exemption for purely religious action.

The decision in *Sherbert* came closer to granting an exemption for religiously motivated action. In this case, Oregon denied unemployment compensation benefits to a Seventh-day Adventist who refused to accept employment on Saturday, her religiously required Sabbath.[54] The Supreme Court agreed that to force her to choose between disobeying her religion and forfeiting state benefits violated her religious liberty under the Free Exercise Clause.[55] The case is most famous for its enunciation of the compelling interest test, a four-part test for determining when a free exercise violation has occurred. To make a prima facie free exercise argument, an individual must show that she has a sincere and truly religious practice and that the contemplated governmental action would truly injure that practice. The burden then shifts to the state to show, first, that a compelling state interest necessitates the state action and, second, that it has no alternative means, less burdensome

51. *See id.* at 168.
52. 310 U.S. 296 (1940).
53. *See id.* at 303-04.
54. *See* Sherbert v. Verner, 374 U.S. 398, 401 (1963).
55. *See id.* at 403-04.

This content downloaded from 132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

to religious liberty, for accomplishing that interest.[56] The Court held that the state's interests in limiting false unemployment benefit claims and not discouraging Saturday work were not sufficiently compelling to justify the burden on religion.[57]

The decision in *Wisconsin v. Yoder*[58] marked the pinnacle of judicial recognition of free exercise exemptions. Here the Court held that the state could not compel Amish parents to send their children to school beyond the eighth grade.[59] The Court recognized the state's strong interest in educating children, but stated that the interest must be balanced against the fundamental right to practice one's religion and the liberty interest of parents in the upbringing of their children.[60] Citing *Sherbert* and *Cantwell*, Justice Burger implicitly overruled *Reynolds*—at least in part—when he recognized that the Free Exercise Clause does protect at least some religious action:

> [T]o agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability. This case, therefore, does not become easier because respondents were convicted for their "actions" in refusing to send their children to the public high school; in this context belief and action cannot be neatly confined in logic-tight compartments.[61]

Justice Burger further suggested that forced action (and perhaps forced inaction) can affect religious belief. He wrote that to apply compulsory education laws to the Amish would seriously endanger their religious beliefs by exposing their children to antithetical values.[62] This would unjustly interfere with the religious development of the children and their integration into the Amish community.[63]

---

56. *See id.* at 406-07.

57. *See id.* at 407.

58. 406 U.S. 205 (1972).

59. *See id.* at 214, 234.

60. *See id.* at 214.

61. *Id.* at 220 (citations omitted).

62. *See id.* at 219.

63. *See id.* at 218; *see also* George W. Dent, Jr., *Of God and Caesar: The Free Exercise Rights of Public School Students*, 43 CASE W. RES. L. REV. 707, 713 (1993) ("The most common religious objection to public schooling is that it subjects students to indoctrination hostile to their faith."); Stanley Ingber, *Religious Children and the Inevitable Compulsion of Public Schools*, 43 CASE W. RES. L. REV. 773, 775 (1993) ("State compulsion to participate in a curriculum supporting or even simply proposing religiously objectionable perspectives may undermine religious values.").

This content downloaded from
132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

B. *The Supreme Court's Retreat from Compelling Interest to the Neutrality Test*

After the decision in *Yoder*, the Supreme Court refused to grant further exemptions under the Free Exercise Clause for religious practices outside the context of unemployment compensation.[64] In 1990, the Court retreated even further, holding in *Smith* that if a law is rational, facially neutral, and generally applicable, then the state need not carve out a religious exemption.[65]

Alfred Smith and Galen Black, both members of the Native American Church, lost their jobs as drug counselors for ingesting sacramental peyote at a church ceremony. The Oregon Department of Human Resources found them ineligible for unemployment benefits because they had been dismissed for work-related misconduct.[66] The Oregon Court of Appeals overturned the decision, declaring that the state had failed to show a compelling state interest in withholding benefits from those who ingested peyote for religious reasons.[67] The Oregon Supreme Court affirmed.[68] The United States Supreme Court overruled the Oregon Supreme Court's decision[69] and, in the process, changed its doctrinal approach to free exercise.

One of the most startling aspects of Justice Scalia's opinion in *Smith* is the enthusiasm with which he cites *Minersville School District Board of Education v. Gobitis*[70] and *Reynolds*, two cases at the nadir of American religious tolerance. In doing so, he resoundingly restated a constitutional distinction between belief and action:

> As described succinctly by Justice Frankfurter in *Minersville School Dist. Bd. of Ed. v. Gobitis*: "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns

---

64. *See* text accompanying note 27 *supra*. *Compare* Bowen v. Roy, 476 U.S. 693, 712 (1986) (holding that a government requirement that applicants for social benefits obtain social security numbers did not violate the Free Exercise Clause); Goldman v. Weinberger, 475 U.S. 503, 509-10 (1986) (rejecting an Orthodox Jewish officer's contention that Air Force regulations that prohibited him from wearing a yarmulke violated his free exercise rights); *and* United States v. Lee, 455 U.S. 252, 260-61 (1982) (holding that the state's overriding interest in maintaining a nationwide social security system outweighed the burdens placed upon an Amish employer's religious beliefs), *with* Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707, 720 (1981) (holding that the denial of unemployment compensation to a Jehovah's Witness whose religious beliefs prohibited him from working in a munitions factory was a violation of his free exercise rights).

65. *See* Employment Div. v. Smith, 494 U.S. 872, 876-90 (1990).

66. *See id.* at 874.

67. *See* Black v. Employment Div., 707 P.2d 1274, 1278 (Or. Ct. App. 1985), *aff'd sub nom.* Smith v. Employment Div., 721 P.2d 445 (Or. 1986), *overruled by* 494 U.S. 872 (1990).

68. *See* Smith v. Employment Div., 721 P.2d 445, 449-50 (Or. 1986), *overruled by* 494 U.S. 872 (1990).

69. *See Smith*, 494 U.S. at 890.

70. 310 U.S. 586 (1940).

This content downloaded from 132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

> of a political society does not relieve the citizen from the discharge of political responsibilities . . . ." We first had occasion to assert that principle in *Reynolds v. United States*. . . . "Laws," we said, "are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . ."[71]

Justice Scalia claimed that this distinction between belief and action and the application of a neutrality standard had been reaffirmed in numerous other decisions.[72] He distinguished *Smith* from the exemptions granted in *Sherbert*,[73] *Thomas v. Review Board of the Indiana Employment Security Division*,[74] and *Hobbie v. Unemployment Appeals Commission*[75] by noting that none of these cases involved conduct prohibited by law.[76] He distinguished cases granting exemptions outside the unemployment context as involving a hybrid of rights, including speech, press, and parental rights.[77] Finally, Justice Scalia rejected the contention that the claim for a religious exemption must be evaluated under the compelling interest test of *Sherbert*.[78] Noting how rarely this test is applied, he concluded that the compelling interest test is inapplicable to free exercise challenges to neutral, generally applicable laws, lest everyone with a religious objection to government laws and regulations "become a law unto himself."[79]

---

71. *Smith*, 494 U.S. at 879 (citations omitted).

72. *See id.* at 879-80 (citing Hernandez v. Commissioner, 490 U.S. 680 (1989); United States v. Lee, 455 U.S. 252 (1982) (Stevens, J., concurring); Gillette v. United States, 401 U.S. 437 (1971); Braunfeld v. Brown, 366 U.S. 599 (1961); and Prince v. Massachusetts, 321 U.S. 158 (1944)).

73. *See* Sherbert v. Verner, 374 U.S. 398, 410 (1963) (holding that South Carolina could not deny unemployment benefits to a member of the Seventh-day Adventist Church who was discharged from her job because she would not work on Saturday).

74. 450 U.S. 707, 720 (1981) (holding that Indiana could not deny unemployment benefits to a Jehovah's Witness who quit his job at a munitions factory because of his religious objections to war).

75. 480 U.S. 136, 146 (1987) (holding that Florida could not deny unemployment benefits to a Seventh-day Adventist who refused to work on Saturdays in order to observe the Sabbath).

76. *See Smith*, 494 U.S. at 876.

77. *See id.* at 881.

78. *See id.* at 883-84.

79. *Id.* at 885 (quoting Reynolds v. United States, 98 U.S. 145, 167 (1878)). The *Smith* opinion produced an immediate academic outcry. More than 100 constitutional law scholars joined in a petition for rehearing. The Supreme Court denied the petition in *Employment Division v. Smith*, 496 U.S. 913 (1990). *See* GERALD GUNTHER, CONSTITUTIONAL LAW 1584 n.1 (12th ed. 1991). Many of the scholars supported the petition because none of the briefs submitted to the Supreme Court in the *Smith* case suggested that the Court change its free exercise doctrine. *See* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1113 (1990). Numerous law review articles roundly condemned the Court's retreat from the compelling interest test. *See, e.g.*, James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91, 114-16 (1991); Danielle A. Hess, Note, *The Undoing of Mandatory Free Exercise Accommodation*, 66 WASH. L. REV. 587, 595-96 (1991); Karin M. Rebescher, Note, *The Illusory Enforcement of First Amendment Freedom:* Employment Division, Department of Human Resources v. Smith *and the Abandonment of the Compelling Governmental Interest Test*, 69 N.C. L. REV. 1332, 1353-56 (1991); Richard K. Sherwin, *Rhetorical Pluralism and the Discourse Ideal: Countering* Division

This content downloaded from 132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

At the heart of Justice Scalia's *Smith* opinion is a fear that very much echoes that expressed in *Reynolds*—namely, that to give full force to the Free Exercise Clause would negate the rule of law. Justice Scalia first suggests that perhaps the political process will rectify shortcomings in his very narrow interpretation of the Free Exercise Clause,[80] but then acknowledges the flaw at the heart of this argument: "It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself . . . ."[81] Justice Scalia fails to recognize that there is a middle ground between the extremes of absolute accommodation of religious practice and absolute supremacy of popular legislation. This middle ground would recognize exemptions for religious practice, unless doing so caused measurable harm to other individuals or the body politic.

As Justice Scalia predicted, a nation solicitous of the First Amendment did pass legislation in an attempt to give it greater force.[82] The Religious Freedom Restoration Act of 1993 ("RFRA") was designed "to restore the compelling interest test as set forth in Sherbert v. Verner and Wisconsin v. Yoder and to guarantee its application in all cases where free exercise of religion is substantially burdened."[83] RFRA declares that the government can-

---

of Employment v. Smith, *A Parable of Pagans, Politics, and Majoritarian Rule*, 85 NW. U. L. REV. 388, 393, 439-41 (1991). William P. Marshall is unusual in arguing against religious exemptions from facially neutral laws and is one of the few scholars who favor many of the arguments made in *Smith*. *See* William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357, 411-12 (1990).

80. *See Smith*, 494 U.S. at 890. Professor McConnell criticizes Justice Scalia's refusal to look at the original meaning of the First Amendment and calls his use of precedent "troubling, bordering on the shocking," suggesting that Justice Scalia invented constitutional theory and misused precedent to distinguish contrary cases. McConnell, *supra* note 79, at 1120-21; *see also* note 330 *infra*. In particular, McConnell suggests that Justice Scalia ignored the following declaration in *Yoder*: "A regulation neutral on its face, may in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion." McConnell, *supra* note 79, at 1120 (quoting Wisconsin v. Yoder, 406 U.S. 205, 220 (1972)).

81. *Smith*, 494 U.S. at 890.

82. At least one state court has disregarded the *Smith* decision and has interpreted a free exercise case under the more stringent requirements of its state constitution. In *Minnesota v. Hershberger*, 495 U.S. 901 (1990), the Supreme Court vacated *State v. Hershberger*, 444 N.W.2d 282 (Minn. 1989), and remanded the case for further consideration in light of *Smith*. The state decision upheld the right of the Amish under the Free Exercise Clause not to display triangular emblems offensive to their religious beliefs on their vehicles. On remand, the Minnesota Supreme Court upheld the religious exemption for the Amish under the state constitution. *See* State v. Hershberger, 462 N.W.2d 393, 399 (Minn. 1990).

83. Pub. L. No. 103-141, § 2(b)(1), 107 Stat. 1488, 1488 (codified at 42 U.S.C. § 2000bb (1994)) (citations omitted). For a more complete discussion of the goals of and legislative intent behind RFRA, see generally Jaasma, *supra* note 6; Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 FORDHAM L. REV. 883 (1994); Michelle L. Stuart, Note, *The Religious Freedom Restoration Act of 1993: Restoring Religious Freedom After the Destruction of the Free Exercise Clause*, 20 DAYTON L. REV. 383 (1994).

This content downloaded from
132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

not substantially burden freedom of religion, even by neutral, generally applicable laws.[84] The only exception to this rule is that the government may burden an individual's "exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[85]

The sentiment behind RFRA is commendable, but RFRA is a legislative guarantee of rights, not a constitutional one. A mere statutory protection, RFRA has no binding authority should Congress change its mind and either repeal the statute or override it. In addition, in *City of Boerne v. Flores*[86] the Supreme Court recently limited RFRA's application to federal statutes only, holding that Congress cannot mandate that states protect free exercise rights the Supreme Court does not recognize.[87] The Court's opinion in *City of Boerne* seriously discounts the burdens on minority religions of neutral, generally applicable laws. It is legislative compulsion that sends religionists to the courts in the first place. Considering the sometimes unfortunate history of deviant religious groups in this country, it is disingenuously optimistic to suppose that misperceptions and bias will not once again influence legislation on both state and federal levels. Under the Supreme Court's current interpretation of free exercise rights, religious practitioners have no safe harbor for their religiously motivated actions.

RFRA also suffers from a definitional problem. The compelling interest test of *Sherbert* and the pre-*Smith* level of free exercise protection are not one and the same.[88] Consequently, RFRA remains susceptible to different interpretations by various courts. In *City of Boerne*, however, the Court attempted to clarify this confusion by insisting that the compelling interest doctrine did not govern pre-*Smith* jurisprudence.[89] Although the Court may be correct in its interpretation of the division of powers among state legislatures, Congress, and the Supreme Court, this is cold comfort for those disturbed by the Court's callous attitude toward minority and marginal religions. If nothing else, the *City of Boerne* opinion has highlighted the desperate need for more vigilant judicial guardianship of the Free Exercise Clause.

Although the Supreme Court's recent free exercise jurisprudence disheartens religionists, some of its actual holdings have been less harmful than expected. And, given the outcomes in *Smith* and the more recent case of

84. *See* Pub. L. No. 103-141, § 3(a), 107 Stat. at 1488 (codified at 42 U.S.C. § 2000bb).
85. *Id.* § 3(b), 107 Stat. at 1488-89 (codified at 42 U.S.C. § 2000bb-1).
86. 117 S. Ct. 2157 (1997).
87. *See id.* at 2170-72.
88. *See* McConnell, *supra* note 79, at 1127.
89. *See City of Boerne*, 117 S. Ct. at 2160-62.

This content downloaded from
132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,[90] *Reynolds* may well have been decided much differently today. In *Lukumi Babalu Aye*, the Court delved behind the surface of purportedly neutral city ordinances and, on the basis of legislative history and particular terminology, determined that ordinances banning religiously motivated animal sacrifice had discriminatory intent.[91] Likewise, if one delves behind the 1862 Anti-Bigamy Act, one soon realizes that it was neither neutral nor generally applicable.[92] The House report for an 1860 version of the Anti-Bigamy Act read as follows:

> [T]he moral sense of our own people, as well as of every refined and intelligent community upon the habitable earth, has been shocked by the open and defiant license which, under the name of religion and a latitudinous interpretation of our Constitution, has been given to this crime in one of our Territories. . . . [T]he citizens of Utah, "with a high hand and an outstretched arm," laugh to scorn the sacredness of the Bible and the majesty of our laws . . . . It would, perhaps, require no elaborate statement to demonstrate that the framers of the Constitution, . . . when they declared "Congress shall make no law respecting the establishment of religion or the free exercise thereof," they did not mean to dignify with the name of religion a tribe of Latter Day Saints disgracing that hallowed name . . . . [I]t is more than probable that by the term religion they meant only to convey the idea of a belief founded upon the precepts of the Bible; . . . surely they never intended that the wild vagaries of the Hindoo or the ridiculous mummeries of the Hottentot should be ennobled by so honored and sacred a name.[93]

More than a century later, we indeed dignify the LDS Church with the name of religion. Considering that such bias formed the basis of the belief-action distinction, it is appropriate to reconsider the validity of that distinction.

II. SOCIOLOGICAL ARGUMENTS AGAINST THE BELIEF-ACTION DISTINCTION

Students of law and economics, sociology, and psychology have long pondered the incentives behind religious belief and action. Contrary to ordinary expectations, external challenge and resistance may actually strengthen an adherent's commitment to a particular religious creed. Such challenges

---

90. 508 U.S. 520 (1993). The Court in *Lakumi Babalu Aye* held that a city ordinance prohibiting the ritual killing of animals within the city boundaries for purposes other than consumption violated the First Amendment rights of members of the Santeria religion. *See id.* at 547.

91. *See id.* at 534-38. The Court looked behind the facially neutral language of the ordinance to the legislative history and held that the main object of the ordinance was not animal welfare, but "suppression of the central element of the Santeria worship service." *Id.* at 534. Consequently, the Court ruled that the ordinances were neither neutral nor of general applicability and were therefore subject to strict scrutiny. *See id.* at 546-47. Because the true purpose of the ordinances was the suppression of First Amendment rights, the ordinances did not pass the compelling state interest test. *See id.*

92. *See* Jaasma, *supra* note 6, at 262-66.

93. HOUSE COMM. ON THE JUDICIARY, POLYGAMY IN THE TERRITORIES OF THE UNITED STATES, H.R. REP. NO. 36-83, at 2 (1860).

This content downloaded from
132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

are a means of solidifying group cohesiveness and allow adherents to differentiate themselves from those outside the sect. However, at a certain critical juncture, the opposition becomes too great. The costs of compliance force the believer to make a choice between conformity and continued observance in the face of adversity. This juncture falls at different points, depending on the strength of the group and the individuals within it. Some conform quickly. Others offer impressive resistance, but at some point they too must conform or be pushed to the brink of social and civil annihilation.

A. *The Effects of Positive and Negative Incentives on Religious Practice and Belief*

1. *The mainstream response to marginal religious movements.*

A marginal religious movement ("MRM") is one which challenges the social and theological norms of the dominant culture to such a degree that the dominant culture feels compelled to marginalize and sanction it, often with startling severity. In the face of mainstream opposition, MRMs tend to follow one of two paths. On the first path, they may continue to defy the dominant culture, in which case they remain in small enclaves and face continued persecution, often leading to obliteration. If MRMs follow the second path, they eventually capitulate to mainstream pressure and incorporate dominant norms to a sufficient degree to survive as viable entities. The timing and degree of capitulation depend very much on the commitment of the MRM to its deviant practices and the external costs imposed by the outside culture.[94] According to Charles Harper and Bryan LeBeau, a pattern of "stormy, conflict-ridden beginnings and subsequent accommodation" describes many religious groups—including Mormons, Quakers, Shakers, and Roman Catholics—that had marginal beginnings, but that eventually gained acceptance in the dominant culture.[95]

Sociologist Armand Mauss notes similarities between the early history of the Mormon Church and the legal challenges that have more recently faced conspicuous and unpopular religions such as the Moonies or Hare Krishnas, two groups which certainly challenge the normative order of American society.[96] The more serious and militant the deviant movement, writes Mauss, the harder society will work to domesticate it. If the group does not sufficiently assimilate, the host society resorts to persecution and repression,[97]

---

94. *See* Charles L. Harper & Bryan F. LeBeau, *The Social Adaptation of Marginal Religious Movements in America*, 54 SOC. OF RELIGION 171, 173 (1993).

95. *Id.* at 175.

96. *See* ARMAND L. MAUSS, THE ANGEL AND THE BEEHIVE: THE MORMON STRUGGLE WITH ASSIMILATION 4 (1994).

97. *See id.*

This content downloaded from 132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

behavior which mirrors the nineteenth-century American struggle with the Mormons.

Sociologists Harper and LeBeau have identified an interesting phenomenon in the persecution of MRMs. The degree of accommodation demanded by the dominant culture depends less on the supposed heterodoxy of the MRM's religious beliefs and more on the extent to which the MRM apparently threatens national, secular values.[98] A group's religious beliefs may incite popular opposition, but this opposition will generally not rise to the level of effective, official, and civil persecution unless the group's theology and beliefs challenge the current social order.[99] Mormon polygamy provides a pertinent example of this phenomenon. Although Americans waged an intense legal and social battle over polygamy, their real concern was the perceived power of the Mormon Church and the belief that Mormons wished to establish a neotheocracy.[100]

2. *Religious responses to positive and negative incentives.*

Law and economics scholar Laurence Iannaccone has noted one of the elements of religion that greatly interests economists.[101] To the outside observer, the stigma and sacrifice associated with membership in a marginal religious group should render membership more costly and therefore less desirable.[102] However, these apparently gratuitous costs serve a valuable purpose in that they mitigate free-rider problems by encouraging half-hearted members to leave the group and inducing even greater involvement from more committed members.[103] In other words, religion is an ideal example of "nonmarket" behavior, behavior which responds to beliefs and norms rather than to unmitigated personal advantage.[104]

Critics of the application of law and economics to religion seize on nonmarket, religious behavior as a basis for discounting the study of incentives in religion. According to Steve Bruce, religion cannot be economic in nature because religions themselves are not alternatives to one another.[105] Each re-

98. *See* Harper & LeBeau, *supra* note 94, at 178-80.

99. *See id.*

100. *See id.* at 187; *see also* text accompanying notes 190-201 *infra*.

101. *See* Laurence A. Iannaccone, *Progress in the Economics of Religion*, 150 J. INSTITUTIONAL & THEORETICAL ECON. 737, 740-42 (1994).

102. *See id.* at 740.

103. *See id.*

104. *See id.* at 740-41.

105. *See* Steve Bruce, *Religion and Rational Choice: A Critique of Economic Explanations of Religious Behavior*, 54 SOC. OF RELIGION 193, 202-03 (1993). Paul Diesling writes:

> Salvation is a definite end, so it can have means and a technique of achievement; but it is not alternative to any other end. It is priceless. The technical question, "What must I do to be saved?" makes sense and can be answered; but the economic question, "How much is salvation worth to you?" does not.

This content downloaded from 132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

ligion claims a unique grasp of salvational truth. Salvation, being infinite in value, is not subject to cost-benefit analysis and therefore not subject to rational economic choice.[106]

If religious choices are not subject to economic analysis, then we may naively assume that the penalties society and government impose on a practitioner for her religious beliefs will in fact have no effect on those beliefs. If salvation is of infinite worth, then a person should be willing to pay any price for it, regardless of the penalties imposed by mainstream society. In fact, such a conclusion ignores two realities. The first is that both positive and negative incentives do impact people's religious commitments, regardless of their salvational beliefs. At the extremes, religious norms and actions do respond to economic pressures. The second reality, discussed in Part II.B, is that not only do religious actions correspond to incentives, but that religious beliefs do so as well. According to the psychological theory of cognitive dissonance, people both act and believe in order to minimize the divergence between action and belief.[107] This has serious implications for the Supreme Court's assumption in free exercise cases that action and belief are separable.

A similar assumption has long influenced various analyses of religious change that posit that religious change occurs in response to the shifting desires of religious consumers.[108] In contrast, Roger Finke and Laurence Iannaccone argue that religious developments mirror the changes in incentives and opportunities facing the producers of religion.[109] They chart how legal restrictions have ended various religious movements, such as the First Great Awakening in the eighteenth century, and how easing legal restrictions has correspondingly allowed various religious movements to flourish.[110] Finke and Iannaccone note with concern recent attempts to regulate religion through litigation regarding purported kidnapping, fraud, tax evasion, brainwashing, and clergy malpractice.[111] They posit that, in the post-*Smith* era, the government may pass "any number of 'formally neutral' and 'generally applicable' regulations that seriously constrain the activities of specific religions" without regard to their detrimental effects on some religions.[112]

Likewise, Michael McConnell and Richard Posner, arguing for an economic approach to religious issues, offer an effective rebuttal to those who

---

PAUL DIESING, REASON IN SOCIETY: FIVE TYPES OF DECISIONS AND THEIR SOCIAL CONDITIONS 63 (1962).

106. *See* Bruce, *supra* note 105, at 202-03.

107. *See* text accompanying notes 131-140 *infra*.

108. *See* Roger Finke & Laurence R. Iannaccone, *Supply-Side Explanations for Religious Change*, 527 ANNALS AM. ACAD. POL. & SOC. SCI. 27, 28 (1993).

109. *See id.*

110. *See id.* at 32-36.

111. *See id.* at 37-38.

112. *Id.* at 38.

This content downloaded from
132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

believe that religious belief and behavior defy rational analysis: "Positive economics is a science of means and not of ends. It does not tell us what to value, but it can tell us the most efficient way to obtain what we value."[113] In other words, a religious adherent's beliefs and preferences may not be objectively rational, but she will attempt to fulfill those beliefs and achieve those preferences through rational means. Because religious institutions require money and members, both limited resources, they compete among themselves and also with secular institutions. Therefore, they are affected by government policies that either tax or subsidize particular actions. Accordingly, governmental actions may inadvertently or purposely favor or disfavor certain denominations.[114]

Costs imposed on religious groups may therefore affect their membership. If an individual member can more easily realize her beliefs through another religious organization, she may have an incentive to switch her allegiance. If no other religious organization satisfies the beliefs of the member, she faces at least three choices: She may remain a faithful adherent and suffer increased costs; she may forsake practice of her beliefs, but suffer guilt for doing so; or she may change her beliefs entirely in order to avoid both increased costs and the psychological discomfort of guilt. Depending on the nature of the belief, any one of these outcomes is plausible. Religions sometimes derive positive benefit from moderate persecution in that the faithful adherents gain the satisfaction of proving their loyalty—hence, the first option. As for the second option, people often live in some discord with their beliefs. The greater the discrepancy between belief and action, however, the greater the associated psychological pain.[115] This increases the incentive to pursue the third option—an actual change in belief.

Apart from concerns with one's ultimate salvation, there are a number of positive reasons, both physical and psychological, for membership in particular religious groups.[116] In particular, religious belief allows one to identify with or against various social groups. Edward Tiryakian notes that fundamentalist movements have a sense of collective purpose and being called

113. Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 59 (1989).

114. *See id.* at 5.

115. *See* text accompanying notes 131-158 *infra*.

116. Such benefits may include increased endorphin levels in the brain. Membership in particular religious groups also correlates with superior physical health. *See* VERNON REYNOLDS & RALPH TANNER, THE SOCIAL ECOLOGY OF RELIGION 6, 9, 17, 204, 288-96 (1995) (noting that Mormons have a 35-38% lower mortality rate from cardiovascular disease than the non-Mormon population and that Mormons tend to live longer and healthier lives than the general population); *see also* ROBERT H. THOULESS, AN INTRODUCTION TO THE PSYCHOLOGY OF RELIGION 58 (1971) (discussing incomplete social satisfaction as an impetus for religious life).

This content downloaded from
132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

either to flee from or redeem corrupt civilization.[117] According to Robert Higgs, as people internalize "the values and precepts of their communities of shared belief, [they] not only feel better about themselves but become trustworthy adherents who will act in accordance with their ideology without, or even in opposition to, external material enticement,"[118] a state of being which provides even greater self-esteem. The social isolation of ideologically homogeneous groups ultimately produces extralegal cooperation and allows these groups to produce collective benefits not otherwise available.[119] Timur Kuran has noted that fundamentalist movements allow their adherents to identify the failures of secular politics and sociology and to posit that such failures would be mitigated by a return to religion.[120]

Accordingly, increased costs do not always correspond to decreased religious adherence. Rather, costs may actually be a positive indicator that an individual is part of a select or chosen group.[121] Members may associate other costs—such as attending services, participating in functions, serving on committees, or paying tithes and offerings—with corresponding benefits, such as peace of conscience and spiritual fellowship.[122] As long as the expected and perceived benefits exceed the actual costs, these costs will not hinder membership. Again, they may actually encourage it.

Social psychology partially explains this seemingly irrational response to increased costs. People commit themselves to causes for which they are required to sacrifice.[123] In fact, once MRMs enter the mainstream, the most successful ones maintain an "optimum tension between the two opposing strains" of assimilation/respectability and peculiarity/militance.[124] They selectively adopt traits that make them more palatable to the mainstream, but that do not abrogate their fundamental distinctiveness.[125]

Nonetheless, even religious beliefs ultimately respond to rational incentives and cost-benefit analysis. Although some social costs lead to an increased commitment by the faithful, at a certain critical point the costs associated with social marginalization become too great to bear. Contrary to the views of those who regard salvational belief as sacrosanct and beyond

117. *See* Edward A. Tiryakian, *American Religious Exceptionalism: A Reconsideration*, 527 ANNALS AM. ACAD. POL. & SOC. SCI. 40, 46-52 (1993) (observing this trend from a historical study of the Protestant, Catholic, and Jewish experiences in America).

118. ROBERT HIGGS, CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT 43 (1987).

119. *See id.*

120. *See* Timur Kuran, *Religious Economics and the Economics of Religion*, 150 J. INSTITUTIONAL & THEORETICAL ECON. 769, 770 (1994).

121. *See* text accompanying notes 101-104 *supra*.

122. *See* Iannaccone, *supra* note 101, at 740.

123. *See* MAUSS, *supra* note 96, at 6.

124. *Id.* at 6 (citations omitted).

125. *See id.* at 5-6.

This content downloaded from
132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

evaluation,[126] religious adherents continually calibrate their degree of adherence to accord with their perceptions of what salvation requires. Ultimately, belief does respond to market forces, a powerful argument against the distinction drawn between action and belief. The Mormon experience, discussed in Part III, provides a well-documented example of both adherence to polygamy in the face of social costs and ultimate abandonment of polygamy when the costs threatened the very survival of the LDS Church.

As the persecutions associated with polygamy intensified, Mormons became a more cohesive, insular community. To them, legal and social persecution indicated that they were on the path to sanctification.[127] Opposition hardened their resolve, uniting them even further in defense of their marital practices.[128] In fact, one Mormon historian has suggested that the opposition to polygamy actually lengthened its survival by endowing it with greater theological import.[129] Nonetheless, the persecution ultimately shifted the balance from proud defiance to crushed capitulation. The United States government punished Mormons for their mass violation of marital norms by suspending their civil rights and effectively dismantling their Church. To save their Church, regain their civil rights, and obtain statehood, the Mormons abandoned plural marriage. They assimilated in order to survive.[130]

To Mormons, polygamy was a belief and practice fundamental to their salvation. Government persecution, however, caused Mormons to forsake polygamy. I argue that such abandonment ultimately resulted in a fundamental change in Mormon belief, such that polygamy no longer plays a significant role in Mormon notions of salvation.

B. *Cognitive Dissonance and Change in Belief*

1. *An outline of cognitive dissonance theory.*

Previously, this note suggested three options faced by a religionist when persecution finally forces a change in religious practice: she may convert to another faith that largely fulfills her particular belief; she may cease to practice the belief, but still retain it; or she may altogether relinquish the belief. In the event another religion does not practice the belief, the first option is not possible. If the belief is deeply held, then the second option will be a painful and difficult one.

---

126. *See* note 105 *supra*.

127. *See* FIRMAGE & MANGRUM, *supra* note 15, at xiii.

128. *See* RICHARD S. VAN WAGONER, MORMON POLYGAMY: A HISTORY 103, 109 (1986).

129. *See* B. CARMON HARDY, SOLEMN COVENANT: THE MORMON POLYGAMOUS PASSAGE at xviii (1992).

130. *See* FIRMAGE & MANGRUM, *supra* note 15, at xiv-xv.

This content downloaded from 132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

Should the person choose the third option, abandoning the belief entirely, she would act in accordance with what psychologists have termed the "theory of cognitive dissonance." Defining cognitive elements as thoughts, attitudes, and beliefs, this theory "assumes that a person behaves in a way which will maximize the internal consistency of his or her cognitive system."[131] If any of the elements of a person's cognitive system are in conflict with one another, then the person is in cognitive dissonance. "Because dissonance is psychologically uncomfortable, its existence will motivate a person to reduce it and achieve consonance."[132] The theory of cognitive dissonance has sufficient predictive ability[133] to bolster the argument that one cannot claim a meaningful distinction between suppression of action and belief in free exercise questions.

Leon Festinger first outlined the theory of cognitive dissonance in 1957.[134] Stating that "the individual strives toward consistency within himself," Festinger noted a general consistency among one's knowledge, attitudes, beliefs, and actions.[135] Inconsistency among any of these elements results in psychological discomfort, motivating the person to reduce the dissonance.[136] As the importance of the dissonant elements increases, so too does the magnitude of the dissonance the person feels.[137] Accordingly, the person will work harder to reduce the dissonance and avoid situations that might increase it.[138] Festinger posited that, to reduce dissonance, one may change one's own behavior, change one's environment,[139] or most drastically, change the very cognition (i.e., belief or opinion) that is in conflict with the behavior or the environment: "The dissonance may be reduced, or perhaps even eliminated completely, by changing one's own opinion so that it corresponds more closely with one's knowledge of what others believe."[140]

Once one has made a particularly important decision, she may reduce cognitive dissonance through several means. She may reevaluate the alter-

131. ENCYCLOPEDIC DICTIONARY OF PSYCHOLOGY 93 (Rom Marre & Roger Lamb eds., 1983).

132. *Id.*

133. *See* Russell H. Fazio, Mark P. Zanna & Joel Cooper, *Dissonance and Self-Perception: An Integrative View of Each Theory's Proper Domain of Application*, 13 J. EXPERIMENTAL SOC. PSYCHOL. 464, 465-66 (1977) (stating that cognitive dissonance theory accurately characterizes attitude change in the context of attitude-discrepant behavior). *See generally* JACK W. BREHM & ARTHUR R. COHEN, EXPLORATIONS IN COGNITIVE DISSONANCE (1962); LEON FESTINGER, COGNITIVE DISSONANCE (1962); LEON FESTINGER, CONFLICT, DECISION, AND DISSONANCE (1964).

134. *See generally* LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957).

135. *Id.* at 1.

136. *See id.* at 2-3.

137. *See id.* at 16.

138. *See id.* at 18.

139. *See id.* at 18-20, 34.

140. *Id.* at 182.

This content downloaded from 132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

natives to reinforce the decision she made, deemphasizing some and reemphasizing others. She may also add elements to the entire decisionmaking process that cast it in a broader light, such that elements that seemed to conflict with one another actually become part of a compatible whole.[141] Festinger termed this latter technique "cognitive overlap."[142]

Cognitive dissonance addresses the issue of coerced behavior, an issue of particular interest in considering the belief-action distinction. According to Festinger, "Dissonance almost always exists after an attempt has been made, by offering rewards or threatening punishment, to elicit overt behavior that is at variance with private opinion. If the overt behavior is successfully elicited, the person's private opinion is dissonant with his knowledge concerning his behavior . . . ."[143] Significant reward or punishment decreases the dissonance associated with the behavior because it offers external justification for acting in a particular manner. Still, if forced compliance has caused dissonance, one may reduce the dissonance by changing her private opinion to accord with her overt behavior.[144]

Finally, group dynamics likewise involve cognitive dissonance. When in disagreement with others, one tends to reject those with whom one disagrees and seek out those who share similar cognitions. This social support, on an immediate level, tends to block the discomfort produced by dissonance with the larger society.[145]

Robert Wicklund and Jack Brehm have refined Festinger's original theory. They note that taking an overt position at odds with an earlier position is "a form of conversion."[146] Following such a conversion, there is deep reluctance to reconvert for fear of appearing hypocritical or indecisive. Also, once one has made a behavioral commitment, one tends to filter out information that would lead to a different commitment.[147] Finally, if one has made a cognitive commitment prior to experiencing dissonance, changing that commitment is more difficult.[148]

---

141. *See id.* at 44-46.

142. *Id.* at 44.

143. *Id.* at 261.

144. *See id.* at 263-64.

145. *See id.* at 265.

146. ROBERT A. WICKLUND & JACK W. BREHM, PERSPECTIVES ON COGNITIVE DISSONANCE 6 (1976).

147. *See id.* at 6-8.

148. *See id.* at 23-24.

This content downloaded from 132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

2. *Applying cognitive dissonance theory to the Mormon experience.*

The stark contrast between the gentile rejection of polygamy and the lengths to which Mormons went to defend and practice it[149] suggests a large degree of cognitive dissonance between the Mormon community and mainstream society. Before persecution forced the Mormons to concede defeat, the disparity between their beliefs and that of American society increased the cohesiveness of their community and actually deepened their commitment to polygamy.[150] Once they succumbed to persecution and abandoned polygamy, the Mormons were able to retain an active belief in polygamy for about fifteen years.[151] Despite their inability to practice plural marriage, they could point to external coercion as justification for their behavior and thus minimize any dissonance they felt. However, as the United States Senate conducted hearings on the continued practice of polygamy, hearings which threatened to penalize Mormons once again by denying office to their elected representatives,[152] Mormons felt increased pressure to bring their actions and beliefs into conformity with one another. By 1920, they had largely done so.[153] Because the final push to conform came from within the Mormon community rather than from without,[154] Mormons could no longer point to outside forces for this change in belief. They had become converts to monogamy and would now find it very difficult to reconvert to plural marriage.

To decrease the cognitive dissonance of such a drastic shift in action and belief, Mormons went through a series of adjustments that allowed for cognitive overlap. The initial reason for abandoning polygamy was to ensure the continued existence of the LDS Church and enable members to practice other aspects of their religion. Mormons regarded the renewed commitment to monogamy during the early part of this century as a necessary step to becoming good citizens and full members of the polity. With the passage of time, polygamy has become a historical and cultural phenomenon rather than a current theological reality. Mormons now explain polygamy as a practice that was necessary for a time, but one the Lord no longer requires of his people.[155]

As predicted by Wicklund and Brehm, there is no adherent like a convert. Having converted to monogamy, Mormons are in no danger of reverting to polygamous life. If anything, Mormon moral strictures against sexual experience outside the bounds of monogamous marriage are far more strict

149. *See* texts accompanying notes 159-179 & 264-326 *infra*.
150. *See* text accompanying notes 127-129 *supra*.
151. *See* text accompanying notes 272-303 *infra*.
152. *See* text accompanying notes 295-299 *infra*.
153. *See* HARDY, *supra* note 129, at 284.
154. *See* text accompanying notes 300-303 *infra*.
155. *See* text accompanying notes 304-316 *infra*.

This content downloaded from
132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

than that of the general population.[156] Mormons have committed themselves to monogamy. Should cognitive dissonance once again visit this issue, Mormons would have deep psychological incentives for remaining monogamous.

Currently, Mormons follow one last mode of dissonance reduction predicted by Wicklund and Brehm. As much as possible, Mormons simply ignore the question of polygamy because, "[i]ndependent of adding consonant elements, removing dissonant ones, or lowering the importance of either, there is a mode of coping with dissonance that simply involves not thinking about the dissonant relations."[157] For decades, Mormons have largely ignored the issue of polygamy; it is simply not a current question.[158]

III. THE MORMON POLYGAMOUS EXPERIENCE: A CASE STUDY OF SUPPRESSED ACTION AND ITS EFFECTS ON BELIEF

Although polygamy is not part of current mainstream Mormon culture, it certainly is a part of historical Mormonism. At one point, Mormon theology maintained that polygamy was a necessary—in fact, the central—practice for eternal salvation. This vast evolution between past and present belief, the result of suppressed religious practice, undermines the jurisprudential distinction between belief and action.

A. *The Theological Foundations of Mormon Polygamy*

Mormons were not the first or only ones to practice polygamy.[159] However, Mormons endowed polygamy with unprecedented moral attributes by incorporating it into their eschatology.[160] Perhaps the most radical doctrinal

156. *See generally* Elizabeth Harmer-Dionne, Optimal Enforcement in the Disciplinary Proceedings of the Church of Jesus Christ of Latter-day Saints (1996) (unpublished paper, on file with author) (examining the 1991 LDS Bishop's Handbook and discussing the Church's disciplinary system—including excommunications—to punish transgressions). *See also* Florence Williams, *A House, 10 Wives: Polygamy in Suburbia*, N.Y. TIMES, Dec. 11, 1997, at F1 (noting that the LDS Church currently sanctions the practice of polygamy through excommunication).

157. WICKLUND & BREHM, *supra* note 146, at 138.

158. A review of several decades of the Church's official magazine (the *Ensign*), official weekly paper (the *LDS Church News*), and the 1991 edition of the LDS Bishop's Handbook indicates that the subject of polygamy is largely ignored by the hierarchy of the LDS Church. In fact, the LDS Bishop's Handbook does not even mention polygamy by name, instead merely referring to any relationship outside of monogamous marriage as adulterous. Unofficial Mormon publications, such as *Sunstone* and *Dialogue*, more frequently address polygamy, but even these publications tend to focus on historical rather than current aspects of plural marriage. For examples, see note 32 *supra*, notes 255 & 256 *infra*, and *Dialogue* articles referenced therein.

159. Eighteenth-century treatises refuting plural marriage indicate some popular advocacy of polygamy both for philosophical reasons and as antidotes to social ills. *See* HARDY, *supra* note 129, at 2; *see also* VAN WAGONER, *supra* note 128, at 38.

160. *See* HARDY, *supra* note 129, at 9-11.

This content downloaded from 132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

tenet of Mormonism is that mankind can achieve godhood and that God himself was once a mere mortal.[161] The Prophet Joseph Smith explicitly taught that a man would progress through eternity in proportion to the magnitude of his posterity on earth and that polygamy was a central part of the pursuit of godhood. More wives ensured both increased progeny and greater future glory.[162] Men who rejected the practice of polygamy not only forfeited godhood, but were damned. Accordingly, the salvation of women depended on their union with a righteous—by definition, polygamous—man.[163]

Joseph Smith evidently considered polygamy during the early 1830s and began to practice it himself in 1841.[164] Publicly the leaders of the young Church denounced plural marriage, but privately they practiced it and began to test the reactions of a select group exposed to it.[165] Confronted by a public stance that contradicted widespread rumors of polygamy, members of the LDS Church were understandably confused. In 1843, Joseph Smith resolved the confusion by announcing the receipt of two revelations, now incorporated into the *Doctrine and Covenants* as sections 131 and 132,[166] that called for the restoration of biblical polygamy within the framework of marriage to be solemnized—or "sealed," in Mormon terminology—for eternity.[167] Al-

---

161. *See* note 320 *infra*.

162. *See* VAN WAGONER, *supra* note 128, at 54. As Mormon historian Richard Van Wagoner states:

> This emphasis on procreation became the basis for the Mormon concept of man's progress to divinity. All of Joseph's Nauvoo doctrinal innovations fell into place around this new teaching. The prophet explained that God was an exalted man and that mortal existence was a testing ground for men to begin progress toward exalted godhood. Salvation became a family affair revolving around a husband whose plural wives and children were sealed to him for eternity under the "new and everlasting covenant."

Id.; *see also* JESSIE L. EMBRY, MORMON POLYGAMOUS FAMILIES: LIFE IN THE PRINCIPLE 41-42 (1987).

163. *See* VAN WAGONER, *supra* note 128, at 45.

164. *See Preface* to DOCTRINE AND COVENANTS § 132; VAN WAGONER, *supra* note 128, at 7.

165. *See* EUGENE E. CAMPBELL, ESTABLISHING ZION: THE MORMON CHURCH IN THE AMERICAN WEST, 1847-1869, at 164 (1988). Less than 100 men took plural wives during the period the Mormons were based in Nauvoo, Illinois, and they did so only at the Prophet's instruction. *See id.* Generally, these men were LDS Church leaders with at least five years of membership. *See id.* This was consistent with the general instruction given in the *Book of Mormon*, another book of Mormon scripture, that polygamy is not pleasing to the Lord unless done at his express command: "For there shall not any man among you have save it be one wife; and concubines he shall have none; . . . For if I will, saith the Lord of Hosts, raise up seed unto me, I will command my people; otherwise they shall hearken unto these things." THE BOOK OF MORMON, *Jacob* 2:27, 2:30.

166. In addition to the *Bible*, Latter-day Saints accept three other books as scripture: *The Book of Mormon*, *The Pearl of Great Price*, and *Doctrine and Covenants*. *Doctrine and Covenants* contains revelations received from around the time of the founding of the LDS Church to the present day. Joseph Smith penned the vast majority of the revelations contained in the current version of the book.

167. *See* HARDY, *supra* note 129, at 9-10. Charles Smith, an elder during the Church's residency in Nauvoo, Illinois, reported that Joseph Smith's revelations came as a result of his brother Hyrum Smith's insistence:

This content downloaded from
132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

though rumors circulated outside the LDS Church regarding Mormon marital practices, the Church did not publicly declare its acceptance of polygamy until 1852, when Brigham Young[168] accepted Joseph Smith's 1843 revelations as part of the Church's scriptural canon.[169]

Once the LDS Church took a public stance on polygamy, vigorous apologetics followed. Partially in response to persecution of the Mormons, polygamy became the defining characteristic of faithful Latter-day Saints. Orson Pratt, the foremost apologist for the polygamous cause, declared that damnation followed rejection of the practice.[170] The practice of polygamy was necessary to achieve godhood, a condition to which devout Latter-day Saints aspired.[171] LDS Church leaders presented polygamists as true Saints, an elite cadre establishing a model by which other Saints should conduct their lives. It quickly became clear that polygamous marriage benefited men who wished to advance through the LDS Church hierarchy.[172] On a more spiritual plane, LDS Church leaders taught that the choicest spirituals awaiting mortal existence would come to polygamous families.[173] During the Mormon Reformation of 1856-1857, Jedediah M. Grant, a counselor to Brigham Young, stressed spiritual cleanliness, confession, repentance, self-sufficiency, and a commitment to plural marriage.[174] As a result, couples married in droves.[175]

Both my maternal and paternal family histories provide anecdotal support for the temporal and spiritual benefits of plural marriage. George Q. Cannon, my great-great-great-grandfather, was an apostle and a first counselor to several LDS Church presidents. His youngest brother, Angus Munn Cannon, also my great-great-great-grandfather,[176] was president of the Salt Lake City Stake for decades. Both were polygamists. Abraham H. Cannon, George's son, Angus' son-in-law, and my great-great-grandfather, was also

---

> [T]he doctrine of Plurality of Wives had bothered him considerably and he felt constrained to ask wherein Abraham, Moses, David & others could be justified before God in practicing this to him repugnant doctrine—He asked his brother the Prophet Joseph to ask the question of the Lord—Joseph did so and the Revelation given 12 July 1843 was the answer.

VAN WAGONER, *supra* note 128, at 53.

168. After Joseph Smith's martyrdom at the hands of a mob in Carthage, Illinois, Brigham Young assumed leadership of the young Church. *See* LEONARD J. ARRINGTON, BRIGHAM YOUNG: AMERICAN MOSES 3 (1985); HARDY, *supra* note 129, at 11.

169. *See* HARDY, *supra* note 129, at 15; VAN WAGONER, *supra* note 128, at 84.

170. *See* HARDY, *supra* note 129, at 19.

171. *See id.* at 51, 54.

172. *See id.* at 19; VAN WAGONER, *supra* note 128, at 97.

173. *See* HARDY, *supra* note 129, at 15; Bruce A. Van Orden, George Reynolds: Secretary, Sacrificial Lamb, and Seventy 304 (1986) (unpublished Ph.D. dissertation, Brigham Young University) (on file with the Stanford Law School Library).

174. *See* VAN WAGONER, *supra* note 128, at 91.

175. *See id.* at 91-92.

176. *See* note 258 *infra* and accompanying text.

This content downloaded from 132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

an apostle who entered into polygamous marriages, one of them after the *Manifesto* purportedly abolished the practice. According to family tradition, George Cannon, father of George Q. and Angus, was concerned that the once prominent Cannon name would become extinct. He and his wife, Anne Quayle, signed a prenuptial agreement that would have dissolved their marriage had there been no issue. One reward for converting to Mormonism and leaving his beloved England in 1843 is the existence of over 21,000 Cannon descendants currently living in the United States, a testament to the power of polygamy in ensuring progeny.[177]

Another ancestor, Loren Hannibal Harmer, was a bishop in Springville, Utah, for six years before being convicted of polygamy and imprisoned for several years. He too engaged in a post-*Manifesto* marriage and fathered many children. He later testified in the 1903 Smoot Senate Hearings[178] about his conviction and imprisonment, declaring that he had committed adultery rather than admitting to the Senate that he had practiced polygamy. By doing so, he hoped to avoid impugning the LDS Church for the continued practice of polygamy.[179] The Harmer name still dots the Mormon congregations and graveyards of Springville.

B. *A Peculiar People: Fears of Mormon Political Dominance*

1. *The initial public reaction.*

When the LDS Church made its 1852 announcement regarding polygamy, public opposition to the practice quickly coalesced. Clergymen, women's leaders, and newspaper editors all called on national leaders to wipe out the practice.[180] In 1856, the newly formed Republican Party called for the eradication of polygamy and slavery, the "twin relics of barbarism."[181] In 1857, President Buchanan authorized a $15 million invasion of Utah intended to intimidate the Mormon leadership and cause them to revoke the practice.[182] In the face of Mormon quiescence, the invasion floundered, earning the name "Buchanan's Blunder."[183] Soon thereafter, Congress passed the 1862 Morrill Anti-Bigamy Act.[184] Yet, despite a series of bills

177. *See* CANNON FAMILY HISTORICAL TREASURY 13-45 (Beatrice Cannon Evans & Janath Russell Cannon eds., 1967) (discussing the lives of the major figures in the Cannon family history).

178. *See generally* S. DOC. NO. 59-486 (1906).

179. *See* John L. Harmer, Elias Harmer Family History 88-100 (1959) (unpublished manuscript, on file with author).

180. *See* VAN WAGONER, *supra* note 128, at 105.

181. *Id.* at 85; *see also* FIRMAGE & MANGRUM, *supra* note 15, at 129.

182. *See* VAN WAGONER, *supra* note 128, at 86-87; *see also* CAMPBELL, *supra* note 165, at 233-52.

183. VAN WAGONER, *supra* note 128, at 87.

184. Act of July 1, 1862, ch. 126, § 1, 12 Stat. 501, 501-502 (1862) (repealed 1910).

This content downloaded from 132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

passed in the late 1860s that attempted to strengthen the Anti-Bigamy Act, lax judicial enforcement enervated the law.[185]

After the Civil War, the conflict between Mormons and gentiles intensified. On January 13, 1870, three thousand Mormon women gathered in the Salt Lake City Tabernacle to protest the proposed Cullom Bill,[186] which would have vastly curtailed the civil liberties of polygamists. Sanctions for the practice included suspension of the rights to sit on juries, hold public office, vote, or become a naturalized citizen.[187] When the Cullom Bill passed the house, citizens of Salt Lake City sent a desperate message to the Senate: "We . . . are believers in the principle of plural marriage or polygamy . . . not simply as an elevating social relationship and a preventive of many terrible evils which afflict our race, but as a principle revealed by god [sic], underlying our every hope of eternal salvation and happiness in heaven."[188] Miraculously, the bill was kept from the Senate floor.[189]

2. *Establishing a literal, millennial Zion.*

To judge the persecutors of Mormonism fairly, one must recognize the nineteenth-century perception of Mormonism and the challenge posed by the Latter-day Saints to governmental authority. Mormons were an incredibly cohesive group, one which voted as a political block and which answered first to their ecclesiastical leaders.[190] Passionately committed to their cause, Mormons quickly established themselves wherever they settled. They were not loathe to announce that they had come to establish a new Zion—a city and people devoted to God and committed to the establishment of justice, social and economic equality, and spiritual purity.[191] The 1844 martyrdom

---

185. *See* VAN WAGONER, *supra* note 128, at 108.

186. *See id.* at 109.

187. *See id.* at 108-09. The bill also would have lifted the prohibition against women testifying against their husbands. *See id.* at 109.

188. *Id.* at 109 (first alteration in original).

189. *See id.* at 110.

190. *See* BERNARD DEVOTO, THE YEAR OF DECISION: 1846, at 84-85 (1943); *see also* LAWRENCE FOSTER, RELIGION AND SEXUALITY: THREE AMERICAN COMMUNAL EXPERIMENTS OF THE NINETEENTH CENTURY 242 (1981).

191. *See* FIRMAGE & MANGRUM, *supra* note 15, at xii. After an extensive study of Mormon legal history, Firmage and Mangrum concluded that one must understand the concept of Zion to understand Mormon motivations:

> Mormonism was devoted to the ideal of Zion, a perfected community of Saints organized in economic, political, and social affairs by priesthood direction and united by love of God and expectation of his Second Coming. This theological commitment decisively influenced Mormon legal conflicts with the state and Mormon efforts to operate a church court system with broad jurisdictional powers.

Id. at ix.

After their forced removal to Utah, Mormons once again set about establishing Zion, this time in the Rocky Mountains. Tens of thousands of converts from around the world poured into the Salt

This content downloaded from 132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

of Joseph Smith was, in large part, the result of fears regarding the extraordinary powers granted to Nauvoo, Illinois, in its city charter, including the establishment of an independent militia of which Smith was the head.[192] Nonbelievers viewed this Mormon quasi-theocracy as dictatorial.[193] In contrast, Mormons embraced "the Lord's right to rule through his priesthood leaders" and assumed that part of their democratic rights included their right, as believers, to accept or reject divine guidance.[194]

Despite their strong sense of being a people apart, the Latter-day Saints had a staunch belief in and commitment to the rule of law and the Constitution. They passionately maintained that polygamy, as a tenet of their religion and an express command from God, enjoyed constitutional protection.[195] In a *New York Herald* article published on July 15, 1852, W.W. Phelps, a Mormon editor, insisted that neither the United States government nor the Utah territorial congress had control over religion, morality, or polygamy.[196] Matters of conscience answered solely to "the word of the Lord."[197] Thus, LDS Church leaders denounced the 1862 Morrill Anti-Bigamy Act as a patently unconstitutional abrogation of their First Amendment rights.[198]

United States authorities were not convinced. In 1856, while the Republican Party denounced polygamy by equating it with slavery, the real concern of both Republicans and Democrats was the secular power of the LDS Church. According to Idaho Senator Frederick Dubois:

> Those of us who understand the situation were not nearly so much opposed to polygamy as we were to the political domination of the Church. . . . There was a universal detestation of polygamy, and inasmuch as the Mormons openly defended it we were given a very effective weapon with which to attack.[199]

Hoping to attain statehood and its concomitant privileges and powers for their territory, Latter-day Saints sided with the Democratic Party, which strongly advocated states' rights. However, Stephen A. Douglas, then Democratic Chair of the Senate Committee on Territories, laid to rest Mormon hopes of Democratic support by declaring that Mormons "were a traitorous group whose allegiance to Brigham Young superseded their commit-

---

Lake Valley. *See* CAMPBELL, *supra* note 165, at 3. From there, Brigham Young sent them out to California, Nevada, Colorado, Wyoming, and Idaho to colonize the West. *See id.* at 73.

192. *See* DALLIN H. OAKS & MARVIN S. HILL, CARTHAGE CONSPIRACY: THE TRIAL OF THE ACCUSED ASSASSINS OF JOSEPH SMITH 6-23 (1975).

193. *See id.* at 11.

194. FIRMAGE & MANGRUM, *supra* note 15, at x, 12.

195. *See* HARDY, *supra* note 129, at 14.

196. *See* VAN WAGONER, *supra* note 128, at 83.

197. *Id.*

198. *See id.* at 108.

199. KLAUS J. HANSEN, QUEST FOR EMPIRE: THE POLITICAL KINGDOM OF GOD AND THE COUNCIL OF FIFTY IN MORMON HISTORY 170 (1967).

This content downloaded from
132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

ment to the country."[200] Brigham Young did little to defuse this statement. He retorted that neither the President nor Congress had any business meddling with polygamy and that Mormons would become "a sovereign State in the Union, or an independent nation by ourselves."[201]

3. *The Supreme Court's distinction between belief and action.*

In 1874, George Reynolds, Brigham Young's personal secretary, agreed to be tried in a test case of the Morrill Anti-Bigamy Act.[202] An English convert to Mormonism, Reynolds spent his life serving the LDS Church as a scholar, theologian, author, missionary, and cofounder of its Sunday school program.[203] He was also a devoted father and, at the time of his trial, husband to two women.[204] Reynolds stated that he entered plural marriage "most thoroughly convinced" that it was "the Law of the Lord" and that he had an affirmative obligation to do so in order to "escape condemnation and [God's] displeasure."[205] Polygamy was an expression of his "most deep seated religious convictions."[206] Early on, federal prosecutors agreed to drop charges against LDS Church leaders in exchange for Reynolds' cooperation in the test case.[207] Convinced that the Constitution would protect their peculiar institution, LDS Church leaders encouraged the trial to go forward.[208] They believed they would win on the basis of their sincere religious belief in the centrality of polygamy to their eternal salvation.

After his initial conviction was overturned on jury irregularities, Reynolds was again found guilty in a second trial one year later.[209] Judge Alexander White's charge to the jury presaged the Supreme Court's ultimate ruling against Reynolds: "In matters of opinion, and especially in matters of religious belief, . . . all men are free. But parallel with and dominating over this is the obligation which every member of society owes to that society; that is, obedience to the law."[210] The United States Supreme Court affirmed in 1878, upholding the Morrill Anti-Bigamy Act.[211]

---

200. VAN WAGONER, *supra* note 128, at 85.

201. *Id.* at 86.

202. *See* Van Orden, *supra* note 173, at 53; *see also* VAN WAGONER, *supra* note 128, at 110-11.

203. *See* Van Orden, *supra* note 173, at vi-ix, 281-323.

204. *See id.* at 284.

205. *Id.* at 58.

206. *Id.* at 59.

207. *See id.* at 57-58.

208. *See* VAN WAGONER, *supra* note 128, at 110-11.

209. *See id.* at 111.

210. *Id.*

211. *See* text accompanying notes 35-51 *supra*.

This content downloaded from 132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

In each of Reynolds' prosecutions, the defense relied on the argument that Reynolds should be acquitted because he married a second wife out of religious duty.[212] Chief Justice Morrison R. Waite rejected this argument, writing that the monogamous family is the basis of Western society and that, in the interest of social order, the government has the power to preserve it by suppressing polygamy.[213] Religious conviction did not give one the right to defy the law and violate one's "social duties."[214] Mormons greeted the Court's decision with shock. George Reynolds' words reflected the feelings of his community:

> I regard [the decision] a nullification of the Constitution, so far as religious liberty is concerned. To say the Constitution simply grants freedom of religious opinion but not the exercise of that opinion is twaddle . . . . I should never have taken a second wife had I not considered that in so doing I was obeying a law of God, which I could not evade without just condemnation.[215]

Congress read the *Reynolds* decision as tacit permission to impose more stringent antipolygamy legislation and acted accordingly. The 1882 Edmunds Act[216] facilitated prosecution of polygamy by creating a new offense—unlawful cohabitation—that required no proof of marriage and thus closed a loophole in the Morrill Act.[217] The Edmunds Act also imposed civil disabilities on polygamists, canceling their rights to vote, hold public office, and serve on juries.[218] After a marked increase in polygamy prosecutions, Mormon polygamists accounted for most of the Utah prison population. Those lucky enough to escape imprisonment went into hiding.[219]

---

212. *See* Reynolds v. United States, 98 U.S. 145, 161 (1878).

213. *See id.* at 166-67. The Supreme Court's decision effectively upheld Reynolds' sentence of two years at hard labor and fine of $500. *See* Linford, *supra* note 6, at 334.

214. *Reynolds*, 98 U.S. at 164; *see also* Van Orden, *supra* note 173, at 73-82 (discussing the defense's testimony at trial and the oral arguments before the Utah and United States Supreme Courts).

215. Van Orden, *supra* note 173, at 83 (first alteration in original).

216. Act of Mar. 22, 1882, ch. 47, § 8, 22 Stat. 30 (1882) (repealed 1983). The Supreme Court upheld the Act in *Murphy v. Ramsey*, 114 U.S. 15 (1885). For a review of anti-Mormon legislation and court decisions upholding those laws, see R. Michael Otto, Comment, *"Wait 'Til Your Mothers Get Home": Assessing the Rights of Polygamists As Custodial and Adoptive Parents*, 1991 UTAH L. REV. 881, 888-94.

Further challenges to polygamy laws followed *Reynolds*. None were successful. *See* Late Corp. of the Church of Jesus Christ of Latter-day Saints v. United States, 136 U.S. 1, 45, 64-65 (1890); Davis v. Beason, 133 U.S. 333, 341, 345-47 (1890); *In re* Snow, 120 U.S. 274, 285-86 (1887); Cannon v. United States, 116 U.S. 55, 79 (1885); Clawson v. United States, 114 U.S. 477, 482 (1885); Murphy v. Ramsey, 114 U.S. 15, 40-42, 45 (1885).

217. *See* Act of July 1, 1862, ch. 126, § 1, 12 Stat. 501, 501 (1862) (repealed 1910).

218. *See* FIRMAGE & MANGRUM, *supra* note 15, at 161-62; VAN WAGONER, *supra* note 128, at 117.

219. *See* HARDY, *supra* note 129, at 49. The threat of imprisonment was real. To this day, two houses stand kitty-cornered in Kayesville, Utah. Family tradition has it that my great-great-grandfather, John R. Barnes, used a secret tunnel that ran beneath the intersection to both house so that he could pass back-and-forth between two of his families.

This content downloaded from
132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

The 1887 Edmunds-Tucker Act[220] drove the knife deeper. It disenfranchised women under the assumption that they would vote only according to their husbands' dictates.[221] The Act disincorporated the LDS Church, transferred all its property to the government, and dissolved the company that had funded and overseen all Mormon emigration to Utah.[222] Voters had to swear to uphold the 1882 Edmunds Act before they were registered.[223] Witnesses had to attend trials without benefit of subpoena.[224] Federal officials could prosecute adultery whether or not a spouse filed a complaint.[225] Wives could be called to testify against their husbands.[226] Some have called this the most intense campaign against any outlawed religious group in American history.[227] In 1885, President Cleveland recommended that Congress prohibit foreign-born Mormons from entering the United States.[228] Several years later, Congress proposed the Cullom-Strubble Bill, which would have stripped Utah Mormons of their rights as American citizens.[229] The 1890 bill was a response to a Supreme Court decision that upheld the constitutionality of the Idaho test oath, which disfranchised Idaho Mormons.[230] The LDS Church was exhausted; that same year, it capitulated and issued the *Manifesto*, commencing the gradual eradication of polygamy.[231]

C. *A Peculiar People: Pseudo-Scientific Claims in the Polygamy Debate*

Mormons and gentiles alike voiced exaggerated claims regarding polygamy. Mormons claimed that it would ameliorate social ills. Gentiles insisted that, to the contrary, polygamy was at the root of social ills and threatened democratic government. According to legal scholar Robert Dyer, the latter view prevailed when the Supreme Court upheld *Reynolds* and allowed the suppression of polygamy.[232] He contrasts the conclusory statements in the *Reynolds* opinion with the detailed psychological studies that frequently accompany modern briefs. Considering the lack of evidence regarding the supposedly deleterious effects of polygamy, it is difficult to argue that it un-

220. Act of Mar. 3, 1887, ch. 397, §§ 13, 17, 24 Stat. 635, 637, 638 (1887) (repealed 1978).
221. *See id.*
222. *See* FIRMAGE & MANGRUM, *supra* note 15, at 201-02.
223. *See id.* at 200.
224. *See id.* at 198.
225. *See* HARDY, *supra* note 129, at 49.
226. *See id.*
227. *See* Linford, *supra* note 6, at 370.
228. *See* FIRMAGE & MANGRUM, *supra* note 15, at 202, 242.
229. *See* VAN WAGONER, *supra* note 128, at 139.
230. *See* Davis v. Beason, 133 U.S. 333, 346-48 (1890).
231. *See* FIRMAGE & MANGRUM, *supra* note 15, at 205.
232. *See* Robert G. Dyer, *The Evolution of Social and Judicial Attitudes Towards Polygamy*, 5 UTAH B.J. 35, 35 (1977). Dyer, of course, wrote his article before the decision in *Smith*.

This content downloaded from 132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

dermines societal order.[233] Noting more tolerant attitudes toward sexual practices, Dyer implies that a later Supreme Court might have decided *Reynolds* differently.[234] Dyer notes that during the second half of the eighteenth century, Americans viewed polygamy as both a physical and spiritual blight.[235] In 1860, Illinois Congressman McClernand echoed the sentiments of much of the country: "As to polygamy, . . . I charge it to be a crying evil; sapping not only the physical constitution of the people practicing it, dwarfing their physical proportions and emasculating their energies, but at the same time perverting the social virtues, and vitiating the morals of its victims."[236] Voicing concerns about the Church's political dominance, McClernand equated polygamy with political despotism and further stated that it "invariably begets among the people who practice it the extremes of brutal bloodthirstiness or timid and mean prevarication," attributes in opposition to vigorous democracy.[237]

Despite sensational descriptions of polygamy, Mormon polygamy was essentially a puritanical system introduced to people raised in a framework of monogamy.[238] One demographic study suggests that, at most, twenty percent of Mormon families practiced polygamy and that of those, the vast majority (roughly two-thirds) involved only two wives.[239] Brigham Young wrote that when Joseph Smith first revealed the practice to him, he "desired the grave."[240] However, by 1865, he wrote, "God never introduced the Patriarchal order of marriage [polygamy] with a view to please man in his carnal desires, nor to punish females for anything which they had done; but He introduced it for the express purpose of raising up to His name a royal Priesthood, a peculiar people."[241] It is a truism among Mormons that the most faithful members of the early Church came from polygamous families and

233. Maura I. Strassberg has made a rather odd argument that polygamy should be outlawed, but that same-sex marriages should not. She bases this conclusion on a Hegelian argument that polygamy results in despotism to the individual. Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy, and Same-Sex Marriage*, 75 N.C. L. Rev. 1501, 1532-36 (1997). However, in making this argument, Professor Strassberg overstates the degree to which Mormons rely on authority for truth and appears to be ignorant of the strongly individualistic tendencies in much Mormon theology.

234. *See* Dyer, *supra* note 232, at 41-45.

235. *See id.* at 37-38.

236. VAN WAGONER, *supra* note 128, at 106.

237. *Id.*

238. *See id.* at 89; Stanley S. Ivins, *Notes on Mormon Polygamy*, 10 W. HUMAN. REV. 229, 229 (1956). Even modern commentators will focus on the sensually exciting aspects of polygamy. *See* EINAR ANDERSON, HISTORY AND BELIEFS OF MORMONISM 35 (1981).

239. *See* Ivins, *supra* note 238, at 230.

240. VAN WAGONER, *supra* note 128, at 89.

241. *Id.* Mormons still cling to the notion of being a "peculiar people," a people set apart from the world by their observance of a stringent, personal moral and dietary code.

This content downloaded from
132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

that polygamists comprised a disproportionate number of the leaders of the LDS Church.[242]

American society became aware of Mormon polygamy just as monogamy took root as the supposed pillar of Western civilization.[243] Victorian norms placed a female-centered home at the root of juvenile moral guidance, female purity, and male citizenship and sexual self-restraint.[244] Threatening monogamy threatened the nation's homes and thus its very foundations, putting civilization itself in peril.[245] The preoccupation was not with sexual behavior or deviance per se.[246] Despite Mormon cries of hypocrisy in regards to gentile attitudes toward adultery and prostitution, there was no analogous attack on these behaviors. Antipolygamy laws did not criminalize informal sexual relations between men and women, nor did they require any proof of sexual intimacy for criminal conviction. Rather, the laws attacked a marital system that prima facie challenged the notion that monogamy was the only acceptable social form of marriage.[247]

Just as the gentiles used social arguments to attack polygamy, Mormons used social arguments to defend it. Among the more hyperbolic were that polygamous men were more vigorous and produced healthier offspring and that more valiant spirits came to polygamous homes.[248] Other arguments sound more persuasive to modern ears. Traditional marriages were frequently unhappy. Why not allow the Mormons to attempt an improvement by experimenting with a different form of marriage? Historically, many nations of the world have practiced some form of plural marriage.[249] Why then is polygamy not the natural social order? Where there is a surplus of women and their status depends very much on being a wife and mother, why not provide them with such status? Would this not eliminate the evils of adultery and prostitution?[250] In fact, the Mormon women who married into polygamy often did enjoy a higher social status than those in monogamous situations.[251]

The reality of polygamy very much reflected the reality of monogamy: Sometimes it worked, and sometimes it didn't. It did provide a social network and welfare system.[252] Often the women who married into polygamy

242. *See* JESSIE L. EMBRY, MORMON POLYGAMOUS FAMILIES: LIFE IN THE PRINCIPLE 8, 62-65 (1987).

243. *See* HARDY, *supra* note 129, at 41-42.

244. *See id.*

245. *See id.*

246. *See id.* at 60.

247. *See id.* at 41-42, 59-60; *see also* FIRMAGE & MANGRUM, *supra* note 15, at 129.

248. *See* HARDY, *supra* note 129, at 85.

249. *See id.* at 86.

250. *See id.* at xviii, 16, 56.

251. *See* KIMBALL YOUNG, ISN'T ONE WIFE ENOUGH? 105 (1954).

252. *See* FIRMAGE & MANGRUM, *supra* note 15, at 175.

This content downloaded from 132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

were immigrants, widows, or spinsters.[253] Ideally, only men morally worthy and financially able took plural wives, and then only with the permission of their first wives and LDS Church leaders.[254] However, there were no established rules. The manner of courtship, the number of wives, and the manner of support all varied, as did the happiness of the participants in these arrangements.[255] Many wives were very close, with well-adjusted children who considered themselves part of the general family.[256] According to Martha Cragun Cox, she and her two "sister wives" "loved each other more than sisters, children of one mother love . . . . We enjoyed many privileges that single wifery never knew," such as sharing childcare and housekeeping duties.[257]

My own grandmother, Claudia Cannon Jonas, often spoke of the closeness between her grandmother, Wilhelmina Mousely Cannon Cannon ("Grandma Miney"),[258] and her sister wives (collectively referred to by the various grandchildren as the "aunt grandmas"). Long after their common husband had died, the women visited back-and-forth, caring for one another during illness, mourning together in the face of death, and rejoicing together during holidays and joyful times. On the other hand, other women endured dreadful situations, ridden with strife and jealousy, from which their children bore sensitive scars.[259] And much as Grandma Miney loved the other aunt grandmas, it is telling that, after the death of her first husband, she chose to marry a gentile.

---

253. *See id.*

254. *See* LAWRENCE FOSTER, RELIGION AND SEXUALITY: THREE AMERICAN COMMUNAL EXPERIMENTS OF THE NINETEENTH CENTURY 204 (1981) (noting that the President of the LDS Church had to approve all plural marriages); *id.* at 209 (noting the great demands placed upon men by polygamy and the sincere commitment required to practice it).

255. *See generally* IRWIN ALTMAN & JOSEPH GINAT, POLYGAMOUS FAMILIES IN CONTEMPORARY SOCIETY (1996) (contrasting the experiences of contemporary families with those of nineteenth-century Mormons); Marie Cornwall, Camela Courtright & Laga Van Beek, *How Common the Principle? Women As Plural Wives in 1860*, DIALOGUE, Summer 1993, at 139 (comparing and contrasting various norms for household establishment and customs among women in polygamous marriages in the Salt Lake Valley); Jeffery Ogden Johnson, *Determining and Defining "Wife": The Brigham Young Households*, DIALOGUE, Fall 1987, at 57.

256. *See* CLARISSA YOUNG SPENSE & MABEL HARMER, BRIGHAM YOUNG AT HOME 65-86 (1940) (describing the relations and household arrangements among Brigham Young's various wives). *See generally* Julie Hemming Savage, *Hannah Grover Hegsted and Post-Manifesto Plural Marriage*, DIALOGUE, Fall 1993, at 101 (describing one woman's experience with post-*Manifesto* polygamy).

257. KENNETH W. GODFREY, AUDREY M. GODFREY & JILL MULVAY DERR, WOMEN'S VOICES: AN UNTOLD HISTORY OF THE LATTER-DAY SAINTS, 1830-1900, at 15-16 (1982).

258. She was the daughter of Angus M. Cannon, wife of Abraham H. Cannon, and daughter-in-law of George Q. Cannon.

259. *See* ANNIE CLARK TANNER, A MORMON MOTHER: AN AUTOBIOGRAPHY BY ANNIE CLARK TANNER 220-56 (1969); *see also* CAMPBELL, *supra* note 165, at 167-68.

This content downloaded from
132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

Women in polygamous situations truly did threaten the domestic ideal in that, by necessity, they had far greater independence. Many pursued careers in business, medicine, politics, journalism, and writing.[260] Emmeline B. Wells declared that polygamy "gives women the highest opportunities for self-development, exercise of judgment, and arouses latent faculties, making them more truly cultivated in the actual realities of life, more independent in thought and mind, noble and unselfish."[261] As Martha Cannon, third wife of Angus M. Cannon, more bluntly put it, "If [a woman's] husband has four wives, . . . she has three weeks of freedom every month."[262]

Nonetheless, polygamy required extraordinary dedication from the women who practiced it, a deliberate suppression of monogamous expectations for the sake of religious conviction. Zina D. Jacobs Smith Young, a plural wife of Brigham Young, speaking in 1869 and then 1876, described polygamy as follows:

> Much of the unhappiness found in polygamous families is due to the women themselves . . . . They expect too much attention from the husband, and because they do not get it, or see a little attention bestowed upon one of the other wives, they become sullen and morose . . . . [A] successful polygamous wife must regard her husband with indifference, and with no other feeling than that of reverence, for love we regard as a false sentiment; a feeling which should have no existence in polygamy.[263]

Thus, in sum, polygamy was not the depraved and sensuous institution envisioned by the United States, and there was insufficient evidence of its detrimental effects to justify the very real civil disabilities and personal persecutions visited on its Mormon adherents. Polygamy did challenge the monogamous ideal, but it required such religious commitment and suppression of traditional desires from those willing to enter into it that it posed little threat of supplanting traditional marital norms.

D. *The Victory of Forced Inaction over Belief*

1. *The necessary abandonment of plural marriage.*

There is some evidence that Brigham Young began to back away from polygamy during the 1870s.[264] However, Young died in 1877 and was suc-

---

260. *See* FOSTER, *supra* note 254, at 214-16 (noting Mormon women's professionalism, fiscal independence, educational opportunities, and support for polygamy as a fundamentally liberating institution); *see also* MARILYN WARENSKI, PATRIARCHS AND POLITICS: THE PLIGHT OF THE MORMON WOMAN 153, 156-57, 170-72 (1978).

261. Emmeline B. Wells, *Woman Against Woman*, WOMAN'S EXPONENT, May 1, 1879, at 284.

262. VAN WAGONER, *supra* note 128, at 103.

263. *Id.* at 102.

264. *See id.* at 113.

This content downloaded from 132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

ceeded as President of the LDS Church by John Taylor,[265] an ardent supporter of polygamy who defied all pressure to abandon it. In 1885, George Q. Cannon, First Counselor to President Taylor and considered by many to be the real leader of the LDS Church, invoked God's wrath as the reason for rejecting the Cleveland administration's call for a public statement abandoning polygamy.[266] A wanted man, Cannon finally turned himself over to authorities in 1888 to demonstrate his commitment to the cause of polygamy.[267] Not everyone was so hardy, however. With LDS Church leaders in hiding or imprisoned, the organized LDS Church outlawed, and federal agents on the prowl, many polygamists either abandoned the practice, fled the United States, or faced jail time themselves.[268] Others chose to forsake polygamy altogether.[269]

In 1888, Wilford Woodruff succeeded John Taylor as President of the LDS Church. Woodruff, in contrast to Taylor, had a conciliatory attitude toward the government, and George Q. Cannon had likewise begun to see the necessity of capitulation. By April 1889, the First Presidency[270] began to deny permission for plural marriages.[271] By September 1890, Woodruff was prepared to abandon the practice altogether.[272] On September 24, 1890, Woodruff met with Cannon, Joseph F. Smith, and three other members of the Council of the Twelve Apostles.[273] Woodruff asked the Council to accept and abide by the *Manifesto*, the document he had penned that announced his intention to abandon polygamy.[274] Cannon argued that Mormons were ultimately required to obey the nation's laws and that they had exhausted every means of salvaging polygamy for the LDS Church.[275] Cannon declared himself "willing to do the will of the Lord. And since the Prophet of God, after long season of prayer, had submitted this revelation as the will of the Lord, he was ready for the sacrifice."[276] The next day, Woodruff wrote in his journal:

---

265. *See id.*

266. *See id.* at 126.

267. *See id.* at 123.

268. *See* LEONARD J. ARRINGTON & DAVIS BITTON, THE MORMON EXPERIENCE: A HISTORY OF THE LATTER-DAY SAINTS 181-83 (1979); FIRMAGE & MANGRUM, *supra* note 15, at 168-169; VAN WAGONER, *supra* note 128, at 125-28.

269. *See* ANDERSON, *supra* note 238, at 37-38; VAN WAGONER, *supra* note 128, at 122-26.

270. To this day, the LDS Church has two governing bodies that act in conjunction with one another: the Council of the Twelve Apostles and the First Presidency. The latter is composed of the President of the Church and two counselors, both apostles and formerly members of the Council.

271. *See* VAN WAGONER, *supra* 128, at 137-38.

272. *See id.* at 141-43.

273. *See id.* at 141.

274. *See id.* at 143.

275. *See id.*

276. *Id.*

This content downloaded from
132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

> I have arrived at a point in the History of my life as the President of the Church of Jesus Christ of Latter Day Saints where I am under the necessity of acting for the Temporal Salvation of the Church. The United State[s] Gover[n]ment has taken a Stand & passed Laws to destroy the Latter day Saints upon the Subje[c]t of poligamy [sic] . . . . And after praying to the Lord & feeling inspired by his spirit I have issued the [*Manifesto*] which is sustained by My Councillors and the 12 Apostles.[277]

In reality, Cannon and Woodruff forced the *Manifesto* through the Council. Five of the apostles learned of the *Manifesto* only through its publication in newspapers to which it had been distributed.[278] In pertinent part, the *Manifesto* read:

> Inasmuch as laws have been enacted by Congress forbidding plural marriages, which laws have been pronounced constitutional by the court of the last resort, I hereby declare my intention to submit to those laws, and to use my influence with the members of the Church over which I preside to have them do likewise. . . . And now I publicly declare that my advice to the Latter-day Saints is to refrain from contracting any marriage forbidden by the laws of the land.[279]

Gentiles correctly perceived that unless the LDS Church claimed an unqualified, revelatory origin for the *Manifesto*, it would carry no weight against the 1843 and 1882 revelations. Consequently, federal officials and the notoriously anti-Mormon *Salt Lake Tribune* called for presentation of the *Manifesto* to and approval by the entire LDS Church body.[280] The government refused to accept the *Manifesto* unless the First Presidency did so.[281] Ultimately, the First Presidency again capitulated. They presented the *Manifesto* to a formal General Conference and claimed unanimous approval for it.[282] In reality, many LDS Church members abstained from voting.[283] Although some felt relief that the Church had finally agreed to abandon this troublesome practice, others felt tremendous grief at relinquishing a belief for which they had sacrificed so much.[284] In the short term, gentiles rewarded Mormons for accepting the *Manifesto*. The LDS Church was reincorporated and its property returned.[285] In 1896, Utah achieved Brigham Young's goal of admission to the Union, an admission conditioned on a provision in the Utah Constitution that Utah would never approve the practice of polygamy.[286]

---

277. *Id.* at 146 (alterations in original).

278. *See* HARDY, *supra* note 129, at 131-32.

279. DOCTRINE AND COVENANTS official declaration 1.

280. *See* HARDY, *supra* note 129, at 134-35, 148-49.

281. *See id.* at 134.

282. *See id.* at 134-35.

283. *See id.* at 135.

284. *See id.* at 135-37.

285. *See* FIRMAGE & MANGRUM, *supra* note 15, at 205.

286. *See id.*; HARDY, *supra* note 129, at 152. The Enabling Act providing for Utah's statehood instructed the Utah Constitutional Convention to

This content downloaded from 132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

In fact, Mormons did not immediately abandon polygamy. Many Mormons viewed the *Manifesto* as a purely political proclamation that was not morally binding.[287] The *Manifesto* falsely claimed that plural marriages were no longer being performed.[288] Also, it was ambiguous on the status of future cohabitation with spouses who had already entered into polygamy.[289] Finally, the First Presidency itself sent a thinly veiled message that what it said to the United States and its public advice to LDS Church members did not necessarily govern their private behavior.[290] A surprising number of plural marriages—at least 262 documented between 1890 and 1910—occurred after publication of the *Manifesto*.[291] Lorenzo Snow, who succeeded Woodruff as President of the LDS Church, was willing to draw a line between LDS Church policy and private activity: He personally submitted to the law of the land, but did not insist that LDS Church policy should govern private conscience, particularly in reference to cohabitation with families already in existence.[292] George Q. Cannon, still a member of the First Presidency, authorized a number of post-*Manifesto* marriages while Snow observed a tacit policy of neither asking about them nor forbidding them.[293] Faced with this contradiction between public pronouncement and private action, most Mormons were confused about the official policy of the Church regarding polygamy.[294]

The American public was justifiably skeptical of Mormon assertions that the practice of polygamy had ceased. When polygamist Brigham H. Roberts was elected to Congress in the late 1890s, more than seven million people signed a petition demanding that he be denied his seat.[295] The House of Rep-

---

provide, by ordinance irrevocable without the consent of the United States and the people of said State—First. That perfect toleration of religious sentiment shall be secured, and that no inhabitant of said State shall ever be molested in person or property on account of his or her mode of religious worship: *Provided*, That polygamous or plural marriages are forever prohibited.

Act of July 16, 1894, ch. 138, § 3, 28 Stat. 107, 108 (1894). Article III of the Utah Constitution provides: "Perfect toleration of religious sentiment is guaranteed. No inhabitant of this State shall ever be molested in person or property on account of his or her mode of religious worship; but polygamous or plural marriages are forever prohibited." UTAH CONST. art. III, § 1. The Utah Code declares bigamy to be a felony of the third degree: "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." UTAH CODE ANN. § 76-7-101(1), (2) (1997).

287. *See* HARDY, *supra* note 129, at 139-41.

288. *See id.*

289. *See id.*

290. *See id.* at 144-45.

291. *See id.* app. II at 392.

292. *See id.* at 139-41.

293. *See id.* at 187-88.

294. *See id.* at 190.

295. *See id.* at 249.

This content downloaded from
132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

resentatives voted accordingly.[296] In 1903, Reed Smoot was elected to the Senate.[297] He was not a polygamist, but the public objected to his election on the basis of his membership in a church that still countenanced an illegal practice. For three years, the Senate held hearings that generated more than 3000 pages of printed testimony regarding the history, teleology, and culture of Mormonism.[298] One commentator has called the Smoot hearings the most searching and bigoted congressional investigation of any religious body in American history.[299]

On the whole, LDS Church leaders performed badly during the Smoot hearings. As it became clear that the Church had indeed not abandoned polygamy,[300] the subsequent embarrassment prompted the LDS Church leadership to eradicate the practice once and for all.[301] By 1906, polygamists began to experience persecution both within and outside their Church. Two polygamists, Matthias F. Cowley and John W. Taylor, were expelled from the Council of the Twelve Apostles.[302] The Church's efforts ensured that the next generation of Mormons, those that came of age in the twentieth century, were firmly committed to monogamy.[303] Polygamy, once the cornerstone of the Mormon faith—the mark of a proudly peculiar people—had finally been obliterated.

2. *A practical change in Mormon theology.*

Devotees of plural marriage today consider themselves Mormon fundamentalists—the faithful few who continue to practice the patriarchal order of marriage, following the divine mandate and everlasting covenant revealed through Joseph Smith and confirmed by later prophets.[304] As such, they place themselves in a tiny minority. Critics of the LDS Church insist that polygamy is still central to Mormon theology. One such critic, Einar Anderson, wrote, "The importance of Joseph Smith's polygamy revelation is such that it is not possible to properly evaluate the doctrines of this church without studying this teaching."[305] This may be true of a few fundamentalists who

296. *See id.* at 249-50.
297. *See id.* at 250-51.
298. *See id.* at 251.
299. *See id.* at 251-52.
300. *See id.* at 252-53.
301. *See id.* at 253-64.
302. *See id.* at 264.
303. *See id.* at 253-64, 286.
304. *See* text accompanying notes 159-179 *supra*; *see also* Elizabeth Joseph, *With Polygamy, Lawyer-Moms Can Have It All*, L.A. DAILY J., May 28, 1991, at 6; Williams, *supra* note 156, at F1.
305. ANDERSON, *supra* note 238, at 35.

This content downloaded from 132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

cling to plural marriage, but the large and growing body of the LDS Church left polygamy behind decades ago.[306]

In general, years of Sunday school and seminary render Mormons well-versed in LDS Church history and doctrine. Yet most Mormons do not fully appreciate the centrality of polygamy to early Mormon notions of salvation and the imminent establishment of Zion, God's holy city and people.[307] If anything, Mormons now define themselves in opposition to polygamy rather than in conjunction with it. In my experience with Mormonism, polygamy is a historical issue—and a difficult one to explain away—rather than a motivating factor for belief. For decades, polygamy has been, as it continues to be, an offense meriting excommunication.[308] Part of Mormon worship involves reiteration of a covenant to be faithful to one's single, lawful spouse. The Mormon focus on and enforcement of sexual abstinence, monogamy, and fidelity now set Mormons apart from their contemporary environment as surely as polygamy did a century ago.

The purpose of this note is not to defend polygamy, but rather to highlight the very real effect suppression of religious practice has on belief. After decades of persecution, Mormons abandoned their notions of polygamy and Zion and instead turned to a radical program of assimilation. By 1922, Mormon philosopher and sociologist E.E. Ericksen could conclude that the repeated conflicts with non-Mormons during the nineteenth century had reshaped Mormonism's theology and social aspirations.[309] Historians have noted that once the LDS Church made this massive switch, Mormons epitomized the progressive family ideals of the early twentieth century: They were monogamous, patriarchal, thrifty, and fertile.[310]

Moreover, the LDS Church actually joined forces with gentiles to suppress polygamy. In 1918, Heber J. Grant, himself a former polygamist who once attempted to take a post-*Manifesto* wife, began an effort to uproot polygamy once and for all.[311] In 1933, he issued a document reaffirming the *Manifesto*, reiterating LDS Church support for governmental actions against polygamy and distinguishing between polygamy and celestial or eternal mar-

306. *See* CAIRNCROSS, *supra* note 18, at 215-18.

307. *See* HAROLD BLOOM, THE AMERICAN RELIGION: THE EMERGENCE OF THE POST-CHRISTIAN NATION 77-128 (1992) (identifying Mormonism as a uniquely American religion and polygamy as uniquely Mormon).

308. *See* Ken Driggs, *After the Manifesto: Modern Polygamy and Fundamentalist Mormons*, 32 J. CHURCH & STATE 367, 374, 388 (1990) (discussing the Church's response to polygamy).

309. *See* O. KENDALL WHITE, JR., MORMON NEO-ORTHODOXY: A CRISIS THEOLOGY at xv (1987).

310. *See, e.g.*, HARDY, *supra* note 129, at 301; MAUSS, *supra* note 96, at 22.

311. *See, e.g.*, HARDY, *supra* note 129, at 341.

This content downloaded from
132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

riage.[312] During the 1940s, the Church actively supported government attempts to suppress polygamy in Utah, which resulted in the forced separation of polygamous families.[313]

In my experience of over two decades of Mormon Sunday School, the popular interpretation of the *Manifesto* is that it was a necessary and divinely inspired response to circumstances beyond the control of the LDS Church. The Twelfth Article of Faith lists being subject to "kings, presidents, rulers, and magistrates" and "obeying, honoring, and sustaining the law" as central tenets of Mormon theology.[314] Accordingly, this forms the basis of an official resolution between the divine revelation of polygamy and a current practice very much at odds with it. In 1922, President Joseph Fielding Smith wrote that the antipolygamy legislation was a restriction of religious rights to which the LDS Church had been forced to submit. He maintained, however, that no amount of legislation could invalidate a "commandment given to them by revelation from the Lord."[315] In 1937, despite his declared cooperation with the government, President Heber J. Grant could still say, "We never believed polygamy was wrong and never will . . . . [O]ne of the cardinal rules of the Church is to obey the law. So long as polygamy is illegal we ourselves will strictly enforce the law."[316]

It is difficult to measure how this division between belief and action impacted Mormon theology. The radical assimilation and accommodation necessitated by the struggle over polygamy has had ramifications far beyond merely forsaking the practice of plural marriage. Kendall White has argued that repeated conflicts with society and the government secularized Mormon theology, turning it toward Protestant neoorthodoxy.[317] Mormons are generally regarded as a very conservative religious sect. To appreciate the significance of this turn to orthodoxy, one must understand the liberalism and optimism at the core of Mormon theology. It completely rejects the notion of the helpless, depraved humanity presented by Calvinism in favor of the ra-

312. *See id.* at 342. Mormons now interpret the "new and everlasting covenants of marriage" to mean a marriage sealed in an LDS Church temple by proper priesthood authority. DOCTRINE AND COVENANTS §§ 131-132.

313. *See* HARDY, *supra* note 129, at 343-45.

314. 4 HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 541 (1908). Joseph Smith penned 13 Articles of Faith. Commonly reprinted at the end of *Doctrine and Covenants*, they are also found in *History of the Church*. *See id.* at 540-41.

315. JOSEPH FIELDING SMITH, ESSENTIALS IN CHURCH HISTORY 606 (1937).

316. Van Wagoner, *supra* note 128, at 192. Considering the struggle the United States government had in enforcing the antipolygamy laws, to claim that the LDS Church teaches its members to obey the law seems disingenuous. However, when one considers that Mormons firmly believed the antipolygamy laws to be unconstitutional and that they exhausted every legal resource in arguing this (itself an indication that they accepted the legitimacy of the American legal system), their commitment to the law seems more credible.

317. *See* WHITE, *supra* note 309, at xiv, 159-60.

This content downloaded from
132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

tional, liberal humanity that engendered the American founding.[318] It not only accepts but actively promotes the notion that man can change both himself and the world for good—hence the attempt by the early Saints to establish a temporal Zion and their fierce resistance to the injustice inflicted upon them. At the same time, there is a strongly arational element to Mormon theology, an emphasis on the emotional and supernatural in the form of faith, personal revelation, and reliance on biblical and prophetic teachings.[319] Thoughtful Mormons spend their lives navigating the uneasy tension between the humanistic and the divine.[320] According to White, Mormons now emphasize the importance of the divine at the expense of valuing the knowledge and capacity of the human. He attributes this movement, in large part, to the repeated clashes with secular authorities and social norms, the same clashes which forced the LDS Church to abandon polygamy.

White acknowledges that during the middle part of the twentieth century, the LDS Church embarked on a worldwide quest for converts and that this may explain its conservative shift.[321] However, worldwide acceptance followed conformity, not vice versa, particularly in the case of polygamy. Interestingly, in recent decades Mormonism has once again become a distinctive religion based on its declared beliefs and indices of the commitment of its members, but this is more a reflection of a shift by other religions rather than a shift in Mormon theology. As other religions have relaxed their moral codes and theologies and have eased their efforts at proselytizing, the LDS Church has held firm on such issues.[322]

There are many explanations for Mormon assimilation and conservatism, but the suppression of polygamy still stands as an obvious and central cause. Once Mormons forsook their peculiar institution and their corresponding

---

318. Mormonism places great teleological significance on Christ's Atonement. It not only freed man from original sin, but also allows him to pursue deification. *See* DOCTRINE AND COVENANTS §§ 76, 93, 132. *See generally* Blake T. Ostler, *The Development of the Mormon Concept of Grace*, DIALOGUE, Spring 1991, at 57.

According to philosopher Sterling W. McMurrin, "The most interesting thing about Mormon theology is that it incorporates a liberal doctrine of man and a radically unorthodox concept of God within the general framework of historic Christian fundamentalism." STERLING M. MCMURRIN, *Foreword* to THE THEOLOGICAL FOUNDATIONS OF THE MORMON RELIGION (1965). In contrast to the changeless and omnipotent God of classical theism, the Mormon God is anthropomorphic, all good, but subject to universal laws and—like man himself—capable of continued growth. *See id.* at 14; *see also* FRANCIS J. BECKWITH & STEPHEN E. PARRISH, THE MORMON CONCEPT OF GOD: A PHILOSOPHICAL ANALYSIS 35-39 (1991); WHITE, *supra* note 309, at 59-67.

319. For a discussion of these aspects of Mormon theology, see WHITE, *supra* note 309, at xi-xxv, 57-58, 68-80, 159-64.

320. A quote from *The Pearl of Great Price* aptly illustrates this point. Pondering the fall, Eve exclaims, "Were it not for our transgression we never should have had seed, and never should have known good and evil, and the joy of our redemption, and the eternal life which God giveth unto all the obedient." THE PEARL OF GREAT PRICE, *Moses* 5:11.

321. *See* WHITE, *supra* note 309, at 174-75.

322. *See* MAUSS, *supra* note 96, at 15-16, 199.

This content downloaded from
132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

dreams of Zion and kingdom building, they became models of patriotic, law-abiding citizenship.[323] Mormon leadership was no longer composed of radical visionaries, but rather was drawn from the ranks of successful businessmen, attorneys, scholars, and LDS Church bureaucrats.[324] Accordingly, sociologist Armand Mauss has noted a steady decline in the theological themes of polygamy, Zion, kingdom building, and Mormon distinctiveness.[325]

None of these developments are inherently negative, and most of them may have been necessary for a church that, from its inception, had visions of rolling forward like the stone of Daniel to cover the earth.[326] However, for a liberal polity such as the United States that purports to value freedom of religion, speech, and conscience, there is a marked philosophical difference between theological developments that result from organic evolution and those that result from massive persecution and forced cessation of social customs and marital practices. The sharp divide between the Church's historical and current conceptions of both Zion and polygamy has unquestionably impacted Mormon theology and belief. Rather than reaching independent theological conclusions, the young Church was forced to accept laws in opposition to its then current beliefs and practices. The issue of polygamy has never reached a natural conclusion.

A strange tension colors modern Mormon discussions of polygamy. Some Mormons view it as a huge mistake and would leave the Church rather than resume the practice. Some choose not to consider polygamy at all, expressing the view that it is a historical issue and not one that reflects the current direction of the Church. Finally, some Mormons express their willingness to practice it should God once again command His people to do so, and others have left the fold of the official Mormon Church to do just that. I might fall somewhere between the latter two camps. To practice plural marriage would require me to uproot my deep-seated emotional preferences and conceptions of happiness in marriage; yet my religious convictions would require me to seriously consider the advice of a prophet asserting God's will regarding my eternal salvation and happiness. Polygamy is not central to my beliefs, nor is it a factor in my current reasons for belonging to the LDS Church. However, it was a significant part of the Church's past, and it remains a live theological issue, if only an academic one. As such, any thoughtful Mormon must consider it.

---

323. *See id.* at 22; *see also* Peter Steinfels, *supra* note 33, at A1 (noting the conservative norms by which Mormons conduct their personal lives).

324. *See* MAUSS, *supra* note 96, at 23.

325. *See id.* at 24.

326. *See Daniel* 2:34-35 (King James) (recounting the Prophet Daniel's interpretation of King Nebuchadnezzar's dream of the statue and the stone rolling forth to cover the earth); DOCTRINE AND COVENANTS § 65 (relating the story of the stone to the establishment of the LDS Church).

This content downloaded from
132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

The presence of theological tension is certainly not an issue exclusive to Mormonism. However, the extent of the Supreme Court's contribution in heightening or diminishing this tension is probably unique in the case of Mormon polygamy. Both the Court and public sentiment irremediably impacted the practices and beliefs of an entire religious body. This is a legacy with which any devotee of the Free Exercise Clause—or general freedom of conscience and belief—must grapple.

IV. IMPLICATIONS FOR JUDICIAL REVIEW OF CASES BURDENING RELIGIOUS ACTION

The purpose of this note is to highlight the flaw at the heart of the judicial distinction between belief and action. Yet the argument is incomplete without some consideration of its ramifications. Despite the current state of Supreme Court free exercise jurisprudence,[327] discrediting the belief-action distinction may encourage a return to a compelling interest standard capable of affording genuine protection to religious belief. I would advocate a return to the compelling interest test as presented in *Sherbert*.[328] However, I offer the following refinement: Before the government may suppress or force any action that would violate the salvational beliefs of a particular religion, it must provide compelling proof that the practice harms an individual or society in a quantifiable way. In other words, as in the instance of polygamy, the religious practice cannot merely offend public morals or norms. It must cause sufficient damage to justify the state's abrogation of the Free Exercise Clause and the suppression of someone's religious beliefs.

To prove a compelling interest in suppressing religious action or taking action that violates religious beliefs, the government should have to prove one of three things. In some way, it must show that the action (1) significantly infringes on another's right to exercise her civil liberties, (2) presents a meaningful threat to democratic liberty or social welfare rather than merely threatening or offending mainstream society's moral preferences, or (3) causes actual physical or psychological harm to another person. Under this test, for example, the government may certainly disregard religious justifications for abrogating another's civil rights, attempting to overthrow democratic ideals, destroying property, or subjecting children to malnutrition, sexual abuse, or medical neglect.

To meet this compelling interest standard, the government could not rely on groundless assertions. For instance, it would not be sufficient to compare polygamy to human sacrifice and suttee. Rather, the state would have to prove that the religious practice inherently involved the verifiable abuse of

327. *See* text accompanying notes 64-93 *supra*.

328. *See* text accompanying notes 52-63 *supra*.

This content downloaded from
132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

women and children. In addition, should the government yield to parental concerns and sanction the abduction and "deprogramming" of Scientologists or Moonies, it would have to do more than assert that adult children had been brainwashed. The standard would require some antecedent proof that such individuals had not joined these groups of their own free will before the government could abrogate their rights of religious observance and association.

This expansion of free exercise protection has a familiar philosophical basis. We live in a polity founded on the notion that conscience and belief are free, that the law knows no heresy. Action is a central part of belief because suppressing the former may well change the latter.[329] Continuing to distinguish between belief and action—and allowing suppression of the latter—violates our historical commitment to individual liberty.[330] Furthermore, this distinction favors one version of religion over another. Marci Hamilton has argued that the belief-action distinction reflects a tendency of the Supreme Court to define religion as an internal, purely intellectual experience rather than as an experience that permeates the lives, choices, and actions of its adherents.[331]

That the belief-action distinction exists is certainly understandable. From the inception of the Christian church, Paul and James argued over the merits of faith versus action. Paul wrote that "by the deeds of the law there shall no flesh be justified in his sight: . . . . Therefore we conclude that a man is justified by faith without the deeds of the law."[332] James tersely retorted that "faith without works is dead."[333] Surely this debate over belief and action is not confined to Christianity alone. In favoring belief, the Supreme Court prefers one side of a religious debate. Taking sides in this manner exceeds the Court's institutional competence and violates our notions of civil freedom.

In an expansive interpretation of the First Amendment, Professor Jesse H. Choper proffers a rule of legislative review and religious exemptions entitled the "burdensome effect principle":

---

329. *See* text accompanying notes 131-158 *supra*.

330. Professor McConnell has stated that, at the time of the American founding, the term "free exercise" was intended to protect "religiously motivated conduct as well as belief." McConnell, *supra* note 11, at 1488. During the ratification of the Bill of Rights, Congress considered two different versions of the First Amendment: One protected "rights of conscience" while the other protected the "free exercise of religion." *Id. But see generally* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992). The choice of the latter phrase strongly suggests that Congress intended the free exercise of religion to encompass action as well as belief. *See* McConnell, *supra* note 11, at 1489-90; Smith, *supra* note 6, at 635-36.

331. *See* Hamilton, *supra* note 27, at 791-96.

332. *Romans* 3:20, 3:28 (King James).

333. *James* 2:26 (King James).

This content downloaded from
132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

> If government regulations of conduct that are generally applicable and enacted for secular/neutral purposes . . . conflict with action or inaction pursuant to the tenets of a particular religion, the Free Exercise Clause should be held to require an exemption under the following circumstances: the claimant has suffered cognizable injury; the exemption does not violate the Establishment Clause; the exemption does not require the government to abandon its entire regulatory program; the individual's beliefs are sincerely held; violation of those beliefs entails extratemporal consequences; . . . and the government cannot demonstrate that denial of the exemption is necessary to a compelling interest.[334]

Choper's principle is open to debate, but it provides a useful starting point to evaluate an expanded compelling interest test. The main argument against strict scrutiny—and one emphasized by the Court in both *Reynolds* and *Smith*—is that requiring religious exemptions from neutral, generally applicable laws would negate the rule of law altogether and instigate social chaos.[335] This is a specious argument. First, laws with little social benefit may impose serious burdens on religion.[336] Yet if the laws have little social benefit, providing exemptions to them will probably not upset the entire social order. Second, there are sufficient limiting factors to prevent wholesale social upheaval: Recognizing the religious rights of some does not require society to sanction religiously motivated conduct that sacrifices the civil rights of others. For example, when the physical safety of abortion doctors and patients conflict with religiously based attempts to stop abortions, protecting the civil rights of the former justifies suppressing the religiously motivated conduct of the latter.[337] The Supreme Court has proved capable of protecting such civil rights. The Court, however, has not shown itself to be as capable of defending religious rights. Meaningful free exercise of religion requires that when the rights and well-being of individuals or society are not at stake, the beliefs of religionists be accommodated.

The Constitution itself provides the first limiting factor to an expansive interpretation of the Free Exercise Clause: the Establishment Clause. The two clauses distinguish between an accommodation of religion and the affirmative support of it. In other words, free exercise is a negative right. The fact that the government cannot compel or suppress religious action in no way requires certain governmental actions in support of religious practices. Under this interpretation of the Free Exercise Clause, the government would not have to recognize polygamy or give it equal status with monogamy. It simply could not criminalize or otherwise attempt to suppress the practice.

---

334. JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES 54 (1995).

335. *See* texts accompanying notes 49-51 & 80-81 *supra*.

336. *See* CHOPER, *supra* note 334, at 21.

337. *See, e.g.*, American Life League, Inc. v. Reno, 855 F. Supp. 137 (E.D. Va. 1994) (upholding the Freedom of Access to Clinic Entrances Act of 1994).

This content downloaded from
132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

Although the government could still require anyone seeking social security benefits to secure a social security number,[338] it could not force those who had religious objections to a social security number, and who sought no welfare or social security benefits from the government, to obtain such a number. Moreover, the government could still build a road on property that it owns[339] because the people who wish to worship on it have no legal right to the land. Consequently, despite real spiritual suffering, the religionists in question cannot compel the government to grant them an affirmative religious benefit. On the other hand, governmental entities could not suppress the use of sacramental wine or peyote, mandate education that hinders religious belief, or prohibit the wearing of religious clothing, symbols, or accessories because these activities generally do not cause quantifiable societal harm, nor do they require the government to confer a positive benefit.

By strictly defining religion in the context of free exercise, one may impose a second limiting factor on the compelling interest test. Professor Choper sensibly notes that expansive interpretations of constitutional rights require some limiting principles, lest exemptions protecting those rights be abused. The broader the protection in theory, the more restrictive it should be in application.[340] Hence, he proposes limiting the definition of religion for free exercise purposes. To claim an exemption under the Free Exercise Clause, a religious adherent must show that the belief in question has salvational or extratemporal consequences, that violating this belief involves supernatural punishment.[341] Unfortunately, this restriction would discriminate against those who merely have strong moral scruples. But to allow everyone an exemption from any law on the basis of moral scruples really would abrogate the rule of law. Because moral scruples potentially have a more expansive scope than religious belief, they are less amenable to limiting principles.[342]

Choper offers several other justifications for a salvational definition of religion. First, he notes that the religion clauses do favor religion over other systems of moral belief, thus justifying discrimination in favor of religious belief. To limit this preference, the definition of religion must have some substantive content.[343] Second, Choper notes that religious imperatives hold unique sway over believers: "This makes it particularly cruel for the gov-

338. *See* Bowen v. Roy, 476 U.S. 693 (1986) (holding that the statutory requirement that a state agency utilize social security numbers in administering its programs does not violate the Free Exercise Clause).

339. *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (holding that the First Amendment does not preclude the government from building a road or authorizing timber harvesting on land that it owns, but that has traditionally been used for worship).

340. *See* CHOPER, *supra* note 334, at 62-63.

341. *See id.* at 74.

342. *See id.* at 75.

343. *See id.* at 78.

This content downloaded from 132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

ernment to require them to choose between violating those dictates and suffering meaningful tangible disabilities."[344] Finally, Choper suggests that the concept of supernatural punishment is a flexible standard that can incorporate both nontraditional and emerging religions.[345]

By defining free exercise rights in the context of a religion's extratemporal consequences, the Supreme Court could impose meaningful limits in free exercise cases. For example, it could have reached the same decision in *City of Boerne* while still maintaining a vigorous free exercise doctrine. The issue in *City of Boerne* was whether or not a city had to grant a church an exemption from historical district guidelines.[346] The location of a particular church site is probably not a salvational issue. Therefore, the Court would not have had to apply strict scrutiny in declaring RFRA—the statutory protection under which the church brought suit—unconstitutional and could have still required the church to submit to a neutral, generally applicable zoning law.[347]

One argument against defining "religion" for the purpose of free exercise exemptions is the difficulty of doing just that. Courts have traditionally avoided judging the content of religious beliefs,[348] the centrality of particular religious beliefs to the person professing them,[349] or whether the beliefs correspond to those of a particular religious organization.[350] Consequently, some worry that unscrupulous individuals will profess religious beliefs to gain the benefits of a free exercise exemption. This fear, however, should not be dispositive. Courts are capable of recognizing false assertions of religious beliefs and judging them accordingly. One district court denied a religious exemption for marijuana possession and trafficking to a man who

344. *Id.* at 74.

345. *See id.* at 78.

346. *See* City of Boerne v. Flores, 117 S. Ct. 2157, 2160 (1997).

347. A case involving similar zoning issues is *Western Presbyterian Church v. Board of Zoning Adjustment*, 849 F. Supp. 77 (D.D.C. 1994). In this case, the church argued that feeding the homeless was a central requirement of its theology. *See id.* at 79. However, there was no doctrinal requirement that it feed the homeless from a particular building—merely that it feed the homeless. The free exercise doctrine proposed in this note would not require the government to forbid feeding the homeless altogether, but neither does it require the government to provide special zoning exemptions if there are other places where the church may reasonably carry out its mission in compliance with city laws.

348. *See, e.g.*, United States v. Ballard, 322 U.S. 78, 86 (1944) ("[W]e do not agree that the truth or verity of respondents' religious doctrines or beliefs should have been submitted to the jury.").

349. *See, e.g.*, Employment Div. v. Smith, 494 U.S. 872, 886-87 (1990) ("It is no more appropriate for judges to determine the 'centrality' of religious beliefs before applying a 'compelling interest' test in the free exercise field, than it would be for them to determine the 'importance' of ideas before applying the 'compelling interest' test in the free speech field.").

350. *See, e.g.*, Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829, 834 (1989) ("[W]e reject the notion that to claim protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization.").

This content downloaded from
132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

claimed to be a Reverend of the Church of Marijuana.[351] The court offered the following explanation:

> While it is difficult for the courts to establish precise standards by which the bona fides of a religion may be judged, such difficulties have proved to be no hindrance to denials of First Amendment protection to so-called religions which tend to mock established institutions and are obviously shams and absurdities and whose members are patently devoid of religious sincerity.[352]

After considering such factors as metaphysical beliefs, the moral and ethical system, teleology, and the accouterments of religion—including holy teachers, important writings, and ceremony and ritual—the court concluded that the Church of Marijuana was in fact a sham and denied it free exercise protection.[353]

Another argument against defining religion for the purpose of free exercise exemptions is that people will join a bona fide religion for insincere or opportunistic purposes. For instance, the court in *Potter* posited that an exemption for polygamy would lead to "false assertion[s] of religious motivation for physical gratification."[354] Frankly, I find this argument less than convincing. If a man wants to satisfy his libido, he can surely find easier ways of doing so than entering into a formal relationship that will expose him to significant social censure. Despite the centrality of polygamy to early Mormon theology, it seems unlikely that it was a motivating factor behind most conversions, particularly given the persecutions its practitioners suffered. Likewise, an exemption for peyote would probably not inspire drug addicts to join the Native American Church. As noted by Justice Blackmun in his *Smith* dissent, the carefully circumscribed use of peyote "is far removed from the irresponsible and unrestricted recreational use of unlawful drugs."[355] Moreover, during Prohibition, Congress enacted a statutory exemption for the use of wine for Eucharist.[356] I would be surprised to learn that this boosted attendance at the local Catholic mass. Active religious observance generally imposes sufficient costs to counter any incentives offered by particular exemptions.[357]

Even if exemptions provide some motivation to join a particular religion, the impact would likely be minimal. By definition, minority and/or marginal religions are relatively small in number. They also have less political clout

---

351. *See* United States v. Meyers, 906 F. Supp. 1494 (1995).

352. *Id.* at 1498 (quoting Theriault v. Carlson, 495 F.2d 390, 395 (5th Cir. 1974)).

353. *See id.* at 1505-09.

354. Potter v. Murray City, 585 F. Supp. 1126, 1139 (D. Utah 1984), *aff'd*, 760 F.2d 1065 (10th Cir. 1985).

355. Employment Div. v. Smith, 494 U.S. 872, 913 (1990).

356. *See* National Prohibition Act of 1919, ch. 85, tit. II, § 3, 41 Stat. 305, 308-09 (1919).

357. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980) (discussing the importance of constitutional protections to discrete and insular minorities in a majority-rule democracy).

This content downloaded from
132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

than mainstream religions. Consequently, they have a greater need for the constitutional protections of the Free Exercise Clause, as they are less able to influence legislation that might negatively impact them. Accordingly, providing minority religions with certain exemptions is not likely to have a widespread impact on the general population.

A final, admittedly troublesome, argument against a strong free exercise doctrine is that it could actually encourage rather than discourage belief—potentially a violation of the Establishment Clause. This quandary does not have a clear answer. Either religionists must conform to laws or enjoy an exemption. This means that the government, purposefully or not, will either discourage belief or encourage it. There are strong arguments that the Constitution, although a secular, humanistic document, nonetheless favors individual belief and the "freedom to pursue (or not to choose) a religious faith."[358] As long as the government does not proscribe particular beliefs, it seems entirely legitimate and within the reading of the religion clauses for the government to favor belief in general.

CONCLUSION

Given the current climate of constitutional jurisprudence, I fully appreciate the improbability of an expansion of free exercise protections. Nonetheless, I hope that highlighting the flaws at the root of the belief-action distinction will promote discussion in furtherance of this end. Many have attacked the belief-action distinction and others have discussed the centrality of action to religious belief, but to my knowledge no one has highlighted how governmental implementation of the belief-action doctrine has fundamentally changed religious belief.

Consequently, I have argued that suppression of religious practice, under the guise of the *Smith* neutrality principle, actually changes belief and that this comes dangerously close to violating the Free Exercise Clause. This is particularly true for churches that place as much or greater emphasis on action as on faith. For them, to act is to believe.

The United States Supreme Court's current separation of belief and action inadequately protects the free exercise of religion, particularly in light of the absolute protection supposedly given to belief. Adequate protection of both religious belief and action requires the reinstatement of a strict scrutiny standard where government regulations impose a significant burden on central religious practices, even if those regulations are facially neutral ones. To prevent majoritarian biases against minority religions, I propose that the government can only meet the compelling interest test when it affirmatively demonstrates significant threats to individual or democratic liberties. Ex-

358. CHOPER, *supra* note 334, at 11.

This content downloaded from
132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms

emptions granted under this compelling interest test would not require the government to affirmatively support particular religious practices or institutions. Rather, these exemptions would merely prevent the government from suppressing such practices. In other words, this is not an argument for positive rights, but rather for the right of religionists to be left alone.

As a believer, I can attest that religious life is a far from costless system. Nonetheless, I recognize that all choices entail some cost, and it is legitimate for religious choices to bear a cost as well. It is not, however, legitimate for religious choices to bear a disproportionate cost, particularly when the cost is the suppression of religious belief and action. Current tensions within Mormon theology may no longer be a pressing concern of free exercise jurisprudence, but governmental interference that imposes similar tensions on other religions should be. In the absence of a natural evolution, I am curious as to what contemporary Mormonism would have to say regarding polygamy and why it would say so. Because of past governmental interference, this is not an answerable question.

When I step back from the morass of competing free exercise tests, I feel both pride in and compassion for my pioneer ancestors. Committed to the rule of law myself, I nevertheless admire the conviction that caused them to push the law to its limits and their ultimate resilience in submitting to it. I have a much greater understanding than I once did for what that surrender cost them. A verse of an old Mormon hymn reads:

> We'll find the place which God for us prepared, Far away in the West,
> Where none shall come to hurt or make afraid; There the Saints will be blessed.
> We'll make the air with music ring, Shout praises to our God and King;
> Above the rest, these words we'll tell—all is well, all is well.[359]

The struggle over polygamy negated the optimism and hope that the Latter-day Saints felt in journeying to Utah. Nonetheless, they survived and continue to praise their God. Perhaps retelling the history of their persecution will discourage government oppression of other religious sects, through a heightened understanding of the inseparable relation between belief and action. Then, indeed, would much be well.

359. William Clayton, *Come, Come Ye Saints*, HYMNS OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 30 (1985).

This content downloaded from
132.174.252.174 on Sun, 20 Sep 2026 18:00:28 UTC
All use subject to https://about.jstor.org/terms