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FREE EXERCISE OF RELIGION IN NINETEENTH CENTURY AMERICA: THE MORMON CASES*

*Edwin B. Firmage***

The Mormon cases present a fascinating study of diversity and conformity in the United States in the nineteenth century. From their beginning the Mormons were a gathered people. Almost immediately, from their origins in New York, the Mormons challenged the legal systems in the nation and the states where they resided to protect or at least tolerate their idiosyncracies. Mormon belief and practice came to include communal economics, theocratic government, and most challenging and offensive of all to the larger national community, a radically different marital and social practice—polygamous marriage.

Mormon history began in New York and continued briefly in Ohio where Mormons first gathered. Mormons experienced their most savage suppression in Missouri, where the Governor, Lilburn Boggs, finally issued an extermination order and the “Mormon war” finally saw Mormons driven into Illinois to seek refuge and a new community. After the community initially welcomed Mormon refugees, the abrasiveness of a people who were so incapable of assimilation into the existing society led to conflict again, culminating in the murder of Joseph Smith, the founder of Mormonism, and his brother Hyrum. The Mormon exodus to the Great Basin of the American West followed, under the direction of Brigham Young, one of this nation’s leading colonizers. But the story of free exercise of religion among the Mormons in nineteenth century America had just begun.

* Major parts of the argument of this paper were first presented in the first legal history of the Mormon experience, done with my friend and colleague, Professor E. Collin Mangrum *ZION IN THE COURTS: A LEGAL HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 1830-1900* (University of Illinois Press, 1988), and in Firmage, *The Judicial Campaign Against Polygamy and the Enduring Legal Questions*, 27 *BYU STUDIES* 91 (1988).

Significant portions of this paper were also presented at the Conference on Religious Law and Legal Pluralism, sponsored by the Benjamin Cardozo School of Law, Yeshiva University, New York, New York, September 17-18, 1989. That paper, entitled *Religion and the Law: The Mormon Experience in the Nineteenth Century*, was published in 12 *CARDOZO L. REV.* 805 (1991).

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I. THE NINETEENTH CENTURY CLIMATE

Nineteenth-century frontier America was radically different from the world we know today. Many Americans, and American courts for that matter, thought that Americans shared a common understanding of God and religion.¹ While they professed a belief in the free exercise of religion, many courts assumed that America was a Christian country, and more particularly, a Protestant Christian country.² In 1854, for example, the Supreme Court of Maine upheld a decision to expel an Irish Catholic child from school for refusing to participate in a Protestant religious exercise.³ In 1811, the highest state court in New York upheld an indictment for blasphemy and stated that "[W]e are a Christian people, and the morality of the country is deeply ingrafted upon Christianity."⁴ Sunday closing laws were also upheld regularly by the majority of state courts⁵ and by the United States Supreme Court.⁶

This Christian nation attitude permeated the judiciary and sustained the religious views of the majority. In 1843, for example, Justice Joseph Story, in the famous case of *Vidal v. Girard's Executor*,⁷ went as far as to assert that Christianity was part of the common law of the United States.⁸ Similarly, after compiling a long list of histori-

1. See, e.g., *North v. Board of Trustees*, 137 Ill. 296, 305, 27 N.E. 54, 59 (1891) (University of Illinois did not violate state constitution in requiring daily chapel exercise, because nothing prevents state colleges from adopting "all reasonable regulations for the inculcation of moral and religious principles in those attending them.")

2. See Berman, *Religion and Law: The First Amendment in Historical Perspective*, 35 EMORY L.J. 777, 783 (1986); W. TORPEY, *JUDICIAL DOCTRINES OF RELIGIOUS RIGHTS IN AMERICA* 16 (1948); see also *Ferriter v. Tyler*, 48 Vt. 444 (1876) (150 Catholic students expelled by Protestant school board and not readmitted until they vowed that they would not miss school for Catholic religious ceremonies again). *But see State ex rel. Weiss v. District School Bd.*, 44 N.W. 967 (Wis. 1890) (Bible readings in state schools banned as violative of state's constitution).

3. See *Donahoe v. Richards*, 38 Me. 379 (1854).

4. *People v. Ruggles*, 8 Johns. 290, 295 (N.Y. 1811). For other cases and discussions of early blasphemy prosecutions, see L. LEVY, *BLASPHEMY IN MASSACHUSETTS* (1973); *Zeisweiss v. James*, 63 Pa. 465 (1870); *Commonwealth v. Kneeland*, 20 Pick. 206 (Mass. 1838); *State v. Chandler*, 2 Harr. 553 (Del. 1838); *Upedegraph v. Commonwealth*, 11 Serg. & R. 394 (Pa. 1832); *Delaware v. Chandler*, 3 Harr. 553 (1837); W. TORPEY, *supra* note 2, at 58-60.

5. See, e.g., *Elden v. People*, 161 Ill. 296, 43 N.E. 1108 (1896); *Lindenmuller v. People*, 33 Barb. 548 (N.Y. 1861); *Missouri v. Ambs*, 20 Mo. 214 (1854); *Specht v. Commonwealth*, 8 Pa. 312 (1848); *Commonwealth v. Wolf*, 3 Pa. 48 (Serg. & Rawle) (1817). *But see State v. Baltimore & Ohio R.R.*, 15 W.Va. 362 (1879).

6. See, e.g., *Stone v. United States*, 167 U.S. 178 (1897); *Hennington v. Georgia*, 163 U.S. 299 (1896); *Ball v. United States*, 140 U.S. 118 (1891); *Bucher v. Chesire R.R.*, 125 U.S. 555 (1888); *Gibbs & Sterret Mfg. Co. v. Brucker*, 111 U.S. 595 (1884); *Pence v. Langdon*, 99 U.S. 578 (1878).

7. 43 U.S. 127 (1844).

8. *Id.* at 198.

cal antecedents, Justice David Brewer, writing *Holy Trinity Church v. United States*⁹ in 1882 declared: "[T]his is a Christian nation."¹⁰ Thus, the early Mormon Church had to contend not only with a national Christian attitude defining America's religion by popular sentiment, but also with a judiciary used to intruding into the most sensitive aspects of church-state relations. The result was a judiciary with both the power and the impetus to define religion by presently existing values.

Prior to the judicial attack on polygamy, the Mormons endured a variety of litigation in New York in 1826 and 1830. In each instance, Smith was charged with vagrancy in connection with his money-digging activities.¹¹ Although he was apparently acquitted,¹² to avoid further harassment Smith left New York and fled to Ohio in February 1831.¹³ The litigation that began in New York continued in Ohio. Unlike the New York experience, however, the Ohio litigation did not stem from the Mormons' belief in the "Golden Bible,"¹⁴ but rather from a self-inflicted commercial disaster—the failure of the Kirtland Safety Society.

When Ohio failed to grant the Kirtland Safety Society a state banking charter, the Saints issued their own notes to pay for large quantities of merchandise that had been purchased on credit.¹⁵ Within six months of its formation, however, the financial panic of 1837 swept the nation, taking down the Society along with thousands of other over-subscribed banks.¹⁶ The Society episode embarrassed Joseph Smith and cost him many of his closest supporters. But with the exodus of 1838, Church leadership and the majority of the Saints left financial disaster in Ohio only to face militant hostilities in Missouri.

9. 143 U.S. 457 (1892).

10. *Id.* at 471.

11. See Walters, *Joseph Smith's Bainbridge, New York Court Trials*, WESTMINSTER THEOLOGICAL J. 123, 129 (1974).

12. See 1 J. SMITH, HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 96 (rev. ed. 1978); R. BUSHMAN, JOSEPH SMITH AND THE BEGINNINGS OF MORMONISM 162 (1984).

13. See 1 J. SMITH, *supra* note 12, at 39-45; 1 B. ROBERTS, COMPREHENSIVE HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 240 (1930).

14. See M. Parkin, Conflict in Kirtland: A Study of the Nature and Causes of External and Internal Conflict of the Mormons in Ohio Between 1830 and 1838, 263-73 (M.A. thesis, Brigham Young University 1966).

15. See Hanson, *Money of the Mountains*, 64 IMPROVEMENT ERA 158, 158-59 (1961).

16. See 1 B. ROBERTS, *supra* note 13, at 402; Hill, Rooker & Wimmer, *The Kirtland Economy Revisited: A Market Critique of Sectarian Economics*, in 3 STUD. IN MORMON HIST. 81 (1977).

Early Mormons regarded Missouri, specifically Jackson County, as the divinely revealed site for the establishment of Zion.¹⁷ Soon after the first Mormons arrived at Independence, Missouri, on January 13, 1831, however, many of the prominent men of the county entered into a "secret constitution" in July 1833.¹⁸ On July 20, 1833, the pledges of the "secret constitution" gathered at the courthouse in Independence to ask the Mormons to leave Jackson County.¹⁹ The Mormons, however, declined to leave their appointed place of gathering and violence soon followed.

As the violence escalated, the Mormons sought relief from Missouri Governor Daniel Dunklin on September 28, asking for military protection so that they might defend their rights by suing for their loss of property.²⁰ The governor, in a response dated October 19, 1833, advised the Mormons to file civil actions before the local circuit judges and justices of the peace.²¹ The local magistrates, however, refused to punish the mob leaders who had demolished and destroyed Mormons' houses and stores, and the violence continued. Finally, after the Mormons had been driven from their homes and forced to escape across the Missouri River on November 7-8,²² a petition containing 114 signatures was sent to President Andrew Jackson.²³ The petition asked that federal troops restore the Saints to their homes and thereafter maintain peace until civil order could be restored. President Jackson's formal reply, however, stated that he had no authority to call out the military to enforce state laws.²⁴

Thereafter, many of the Mormons who fled Jackson County settled in Caldwell County, Missouri. Although the Saints anticipated peace in their new settlement, the rapid influx of Mormons agitated the local settlers and violence again soon followed.²⁵ This time, however, as the number of assaults on Mormons increased, the Saints began to fight back.²⁶ As a result, when reports reached Governor Lilburn Boggs that the Mormons were arming themselves and com-

17. See DOCTRINE & COVENANTS OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 57:3 (1981 printing).

18. See 1 J. SMITH, *supra* note 12, at 374-76.

19. *Id.* at 395-99.

20. *Id.* at 410-15.

21. *Id.* at 423-24.

22. *Id.* at 437.

23. *Id.* at 483-85.

24. *Id.* at 493.

25. See 3 J. SMITH, *supra* note 12, at 57.

26. See B. ROBERTS, THE MISSOURI PERSECUTIONS 214 (1900 & reprint 1965).

mitting acts of violence, he issued an order of extermination.²⁷ Three days after this order was given, on October 30, 1838, eighteen or nineteen Mormons, including children, were massacred at Haun's Mill in Caldwell County.²⁸ The following day a mob, led by state militia, surrounded the Mormons gathered at Far West in Caldwell County, and arrested and imprisoned their leaders.²⁹ Under these ominous circumstances and without many of their leaders, the Mormons retreated to Quincy, Illinois.

When Church leaders later arrived in Illinois in the spring of 1839, they realized that efforts to secure redress from either the courts or the legislature for the property and lives lost in Missouri were an exercise in futility. The Church leadership, therefore, began looking elsewhere for money and protection. The Mormons' first plan of attack was to have the governor of each state petition Congress to impeach the State of Missouri for not guaranteeing a republic form of government.³⁰ A group of the Church leaders left for Washington in October 1839 with a petition claiming redress from the national government.³¹ The day after their arrival, they were introduced to President Van Buren, who frankly stated that although their cause was just, he could do nothing for them because he would "come in contact with the whole state of Missouri."³² The "Mormon problem" perplexed the congressmen whom the Saints next petitioned. Although the Senate Judiciary Committee debated the Mormons' petition for three days,³³ the question of the Senate's jurisdiction, and the political undesirability of siding with the Mormons, resulted in an unfavorable disposition by the committee.

The disheartening Missouri episode led the Mormons to conclude that the political branches of the federal government, as well as the branches of Missouri state government, were incapable, incompetent, or at least disinclined to offer either protection or redress. As a result, the Mormons turned inward, forging a new society in Nauvoo, Illinois, that combined democratic and theocratic elements of govern-

27. The order of extermination directed the state militia to treat the Mormons as enemies who "must be exterminated or driven from the state." 3 J. SMITH, *supra* note 12, at 175.

28. *Id.* at 183-86, 212.

29. *Id.* at 192.

30. *Id.* at 311.

31. See 4 J. SMITH, *supra* note 12, at 24-38.

32. *Id.* at 40, 5:393, 6:203.

33. See 57 Niles Nat'l Register 398 (1840) (LDS Church Archives); CONG. GLOBE, Feb. 12, at 185 (1840).

ment to provide for substantial autonomy, insularity, and self-sufficiency.

With Nauvoo's government in place, Joseph Smith and the Nauvoo city council attempted to insulate themselves from what the Mormons saw as continuing harassment through vexatious lawsuits.³⁴ To accomplish these ends, the council passed numerous ordinances, which increasingly expanded the power of the city council. Eventually, these ordinances gave the council a virtual *carte blanche* to declare any writ issued by any other court valid or invalid and, if necessary, examine the merits of the case.³⁵

The greatest abuse of the council's power, however, occurred with the destruction of the Nauvoo Expositor. During the Spring of 1844, a group of influential Nauvoo citizens became disaffected with the Church and particularly its prophet.³⁶ Alarmed that Joseph Smith had cloaked himself with both religious and temporal power, the group published a newspaper on June 7, 1844, containing bristling editorials about the integrity and morality of Nauvoo's leaders.³⁷ The Nauvoo City Council met the following day and passed an ordinance declaring the paper a public nuisance and ordering its destruction.³⁸ The destruction of the Nauvoo Expositor was more than the citizens could bear. The threat of the "Mormon Kingdom" under the cover of the Nauvoo Charter led to the murders of Joseph and Hyrum Smith before the month was out, and ultimately to the Mormon migration to the Great Basin.

II. THE JUDICIAL CAMPAIGN AGAINST POLYGAMY

The Mormons moved to the Great Basin desert to find the autonomy that would allow them to build Zion unimpeded by religious persecution. The choice of a largely uninhabited desert as the center place for the kingdom was primarily motivated by the Saints' desire to be left alone so they could freely establish a distinctive way of life that other communities had found so threatening and offensive. Instead, they now had to deal with the federal government, initially cautious but soon hostile and bent on eradicating Mormon distinctiveness.

34. See Kimball, *A Wall to Defend Zion: The Nauvoo Charter*, 15 *BYU STUD.* 491 (1975).

35. See 5 J. SMITH, *supra* note 12, at 185-92; Oaks, *The Suppression of the Nauvoo Expositor*, 9 *UTAH L. REV.* 862, 888 (1965).

36. See 6 J. SMITH, *supra* note 12, at 344-51, 405, 412-13.

37. See L. NEWELL & V. AVERY, *MORMON ENIGMA: EMMA HALE SMITH* (1985).

38. See 6 J. SMITH, *supra* note 12, at 448.

A. Early Judicial Attacks on Polygamy

Officially acknowledged as part of LDS Church doctrine in 1852, polygamy soon became a national issue. Congress' first attempt to deal with polygamy was the Morrill Act.³⁹ It was not passed until 1862, ten years after the Church first announced its practice of polygamy, and then it largely went unenforced for the next thirteen years.

Because of various defects in the statute, however, the first attempts to prosecute polygamists were not brought under the Morrill Act at all. In 1871, Thomas Hawkins was indicted for and convicted of having adulterous relations with his polygamous wife.⁴⁰ Indictments immediately followed against a number of leading Church officials (including Brigham Young) under a Utah statute prohibiting lewd and lascivious cohabitation.⁴¹ By indicting the Church's leading figures, the government sought to set a vivid example for rank and file members, paralyze the Church's leadership, and cow the Mormon populace into submission to federal policy.

The government's plan, however, was not to be realized. In *Clin-ton v. Englebrecht*,⁴² the United States Supreme Court ruled that in his efforts to purge juries of Mormons and secure the conviction of polygamists, Judge McKean, a rabid anti-Mormon, had improperly ignored Utah's jury selection procedures. As a result, Hawkins' conviction for adultery was overturned, and the indictments against Young and the others were dismissed.⁴³ The prosecution of polygamy thus was halted until 1875 and the *Reynolds* case. Even after the *Reynolds* decision upheld the Morrill Act, that statute remained "constitutionally pure, but practically worthless,"⁴⁴ and only two Morrill Act cases ever reached the Supreme Court.⁴⁵

B. The Reynolds Decision

George Reynolds was an English immigrant, private secretary to

39. Morrill Act, ch. 126, 1-03, 12 Stat. 501-02 (1862).

40. See Linford, *The Mormons and the Law: The Polygamy Cases*, 9 UTAH L. REV. 308, 330 (1964).

41. See 5 B. ROBERTS, *COMPREHENSIVE HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS* 395 (1930).

42. 80 U.S. (13 Wall.) 434 (1871).

43. See Linford, *supra* note 40, at 331.

44. See Davis, *The Polygamous Prelude*, 7 AM. J. LEGAL HIST. 1, 9-10 (1962).

45. *Miles v. United States* 103 U.S. 304 (1880); *Reynolds v. United States*, 198 U.S. 145 (1878).

Brigham Young, and a polygamist.⁴⁶ In October 1874, he was indicted under the Morrill Act,⁴⁷ and subsequently convicted of polygamy on the testimony of his polygamous wife. On appeal to the Utah Supreme Court, Reynolds argued that the grand jury that had indicted him had been improperly constituted.⁴⁸ The Utah Supreme Court agreed and reversed Reynolds' conviction because the trial court had followed federal rather than territorial law in fixing the size of the grand jury.

In October 1875 Reynolds was indicted again for violating the Morrill Act. This time, in accordance with Utah law, the indictment was handed down by a grand jury of fifteen men, seven Mormons and eight non-Mormons.⁴⁹ Again, Reynolds was convicted and sentenced to two years' hard labor and a \$500 fine. The Utah Supreme Court sustained his conviction.⁵⁰

With but one avenue of appeal remaining, Reynolds turned to the United States Supreme Court,⁵¹ which affirmed the territorial court's rejection of Reynolds' challenges to the grand jury's size, improprieties in jury selection and prejudicial jury instruction. But the bulk of the Court's opinion was devoted to Reynolds' claim that the trial court improperly failed to instruct the jury that a finding that Reynolds engaged in polygamy as a result of a sincere religious conviction would justify his acquittal. Reynolds argued that the first amendment's guarantee of the free exercise of religion can excuse conduct that would otherwise be criminal. The Court's analysis of that issue made *Reynolds* a landmark case.

The *Reynolds* Court first attempted to define how the word *religion* fell within the ambit of the free exercise clause.⁵² Finding no guide to the definition of the term *religion* in the Constitution itself, the Court turned to the writings of Madison and Jefferson, sources contemporary with the adoption of the first amendment. The Court quoted from Jefferson to the effect that "religion is a matter which lies solely between man and his God; . . . the legislative powers of the

46. See Davis, *Plural Marriage and Religious Freedom: The Impact of Reynolds v. United States*, 15 ARIZ. L. REV. 287, 287-88 (1973).

47. See 5 B. ROBERTS, *supra* note 41, at 469.

48. *United States v. Reynolds*, 1 Utah 226 (1875).

49. See Linford, *supra* note 40, at 333.

50. *United States v. Reynolds*, 1 Utah 319 (1876), *aff'd*, 98 U.S. 145 (1878).

51. *Reynolds v. United States*, 98 U.S. 145 (1878).

52. U.S. CONST. amend. I.

government reach actions only, and not opinions.”⁵³ Adopting this demarcation, the Court concluded that “Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.”⁵⁴

In arriving at the conclusion that “laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices,”⁵⁵ the Court grasped one-half of a profound dilemma posed by the first amendment’s protection of religion. The Court recognized that the first amendment could not be read so broadly that any conduct asserted to be an exercise of religion would be immune from state regulation.⁵⁶ But the Court wrongly concluded that, because not all religious conduct reasonably could be exempted from civil control, no religious conduct was protected by the first amendment. By so concluding, the Court ignored the express terms of the Constitution, which protect the “free exercise” of religion.⁵⁷ Moreover, the Court overlooked the other side of the first amendment dilemma. Religion is as much conduct as it is belief. The two cannot be disentangled. It is the religious practice of unpopular minorities that are most likely to be restricted by the state and thus are most in need of protection. The free speech clause of the first amendment fully protects the freedom of belief. Thus, unless the free exercise clause protects at least some practices that are offensive to the majority, that provision is devoid of any practical content. Yet, the *Reynolds* decision forecloses such an application of the first amendment.

Having established the belief-conduct distinction and determined that the first amendment was no bar to outlawing religiously inspired conduct, the Court next concluded that polygamy was sufficiently “subversive of good order” as to be made a crime properly. This sec-

53. *Reynolds v. United States*, 98 U.S. 145, 164 (1878); see also T. JEFFERSON, *THE COMPLETE JEFFERSON* 518-19 (S. Padover ed. 1943).

54. See *Reynolds*, 98 U.S. at 164.

55. *Id.* at 166.

56. “To permit this,” the Court reasoned, “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.” *Id.* at 167. To illustrate this point, the Court produced a parade of horrors, examples of religiously inspired conduct that no civilized society could abide, such as human sacrifice.

57. In the face of this language, the Court’s attempt to define constitutionally protected religion as belief, as one constitutional scholar concludes, “is peculiar.” See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 838 n.1 (1978); see also Freeman, *A Remonstrance for Conscience*, 106 U. PA. L. REV. 802, 826 (1958).

ond conclusion is also troublesome. As Linford notes, “[T]he Court never quite explained *why* plural marriage was a threat to the public well-being.”⁵⁸ Laurence Tribe suggests that *Reynolds* was wrongly decided because the Court overrode core personal rights of privacy and religious expression for the sake of diffuse social goals.⁵⁹ No victim of Reynolds’ conduct was produced, it was conceded that polygamous sects might be well-ordered, and the Court never examined whether polygamy degraded women. Instead, the Court found subversion of the social order on the basis of an abstract syllogism that polygamy meant patriarchy, which meant despotism. To avoid this amorphous social evil, the Court invaded the right to marry, a core element of personhood. Nevertheless, Reynolds’ conviction was unanimously affirmed.⁶⁰

C. The Prosecution of Cohabitation Under the Edmunds Act

Although the *Reynolds* decision was a saddening blow to the Mormons, the immediate impact of the decision was limited. Reynolds established that Congress had the power to punish polygamy, but the Morrill Act was a cumbersome weapon with which to do so. However, the period in which the Mormons would effectively resist Washington’s mandate was rapidly ending. By 1880, the tone of congressional debate indicated that the government not only had the power to outlaw polygamy but also had the will to act.

In 1882 Congress adopted the Edmunds Act, which gave federal officials an efficient weapon for the prosecution of polygamists.⁶¹ It created the new offense of unlawful cohabitation (relieving prosecutors of the burden of proving polygamous marriages), allowed joinder of polygamy and cohabitation charges, and effectively eliminated all Mormons as jurors in polygamy cases. The new law proved an effective tool in the hands of the Church’s opponents. By 1893, after the Church had renounced polygamy and prosecutions largely ceased, there had been 1004 convictions for unlawful cohabitation and thirty-

58. See Linford, *supra* note 40, at 341.

59. See L. TRIBE, *supra* note 57, at 838, n.15.

60. On a petition for rehearing, it was pointed out that Reynolds’ sentence to hard labor had been improper because the statute provided only for imprisonment. The Court, therefore, reversed the lower court’s judgment in this respect and remanded the case so that the district court could impose proper punishment. See *Reynolds*, 98 U.S. at 168-89. Reynolds was resented to two years in prison and was released five months early for good behavior. He was received as a “living martyr” and ultimately became a General Authority of the Church. See Davis, *supra* note 46, at 291, 291 n.24.

61. Edmunds Act, ch. 47, 1-9, 22 Stat. 30-32 (1882).

one for polygamy.⁶² The number of polygamy and cohabitation convictions, however, understates the impact of "the raid" on Mormon society. Not just any Mormon male was allowed to practice polygamy; only those who were morally worthy and financially able were permitted to take plural wives. Thus, by and large, the polygamists were also the Mormons' leaders.⁶³ The conviction and imprisonment of polygamists served to paralyze Mormon society by removing its leadership.

To simplify polygamy prosecution, the Edmunds Act provided that men who "cohabit with more than one woman" would be guilty of a misdemeanor.⁶⁴ The Act, however, did not say that conduct constituted cohabitation, nor does the *Congressional Record* offer any evidence that Congress considered the question. The Mormons argued that the benchmark of "cohabitation" should be sexual intercourse. The courts first confronted the issue of what constituted cohabitation in *United States v. Cannon*.⁶⁵ Angus Cannon, president of the Salt Lake Stake, had married three wives prior to passage of the Edmunds Act.⁶⁶ Two of these wives, Clara and Amanda, lived with him in separate quarters in the same home. The third lived in a house nearby.⁶⁷ Cannon was indicted for cohabiting with Amanda and Clara after passage of the Edmunds Act. At trial, Cannon offered to prove that, after Congress had passed the Edmunds Act, he had told Clara, Amanda, and their families that he did not intend to violate the law and thereafter "did not occupy the rooms or bed of, or have any sexual intercourse with" Clara but he could not afford to provide a separate house for Clara and her family. The court excluded the evidence as irrelevant, and Cannon was convicted.

Cannon appealed to the Utah Supreme Court.⁶⁸ His main objections were that "all cohabitation which the laws deals with is sexual cohabitation," of which he was innocent, and that his proffered evidence was wrongly excluded. The court, however, rejected this inter-

62. See L. ARRINGTON, *GREAT BASIN KINGDOM: AN ECONOMIC HISTORY OF THE LATTER-DAY SAINTS* 359 (1958).

63. During this period, no General Authority and few bishops, stake presidents, or their counselors were monogamists. See L. ARRINGTON & D. BITTON, *THE MORMON EXPERIENCE* 204 (1979).

64. Edmunds Act, section 3, 22 Stat. 30,31 (1882).

65. 4 Utah 122, 76 P. 369 (Utah), *aff'd*, 116 U.S. 55 (1885), *vacated*, 118 U.S. 355 (1886).

66. See Linford, *supra* note 40, at 351.

67. See Cannon, 116 U.S. at 60-61, 65.

68. In May 1885 instructions came from the underground headquarters of the Church to defend every case "with all zeal and energy possible." See G. LARSON, *THE AMERICANIZATION OF UTAH FOR STATEHOOD* 133-34 (1971).

pretation of the Edmunds Act. It concluded that "cohabitation" meant dwelling together and not sexual intercourse.⁶⁹ The United States Supreme Court affirmed the decision.⁷⁰ Adopting much of the reasoning of the Utah court, the Supreme Court concluded that cohabitation was established if Cannon "held [the two women] out to the world, by his language or conduct, or both, as his wives." Cannon's agreement to abstain from sexual relations with his plural wives was dismissed with the comment that "compacts for sexual non-intercourse, easily made and easily broken, when the prior marriage relations continue to exist . . . [are] not a lawful substitute for the monogamous family which alone the statute tolerates."⁷¹ Consequently, proving cohabitation became ridiculously easy for federal prosecutors. As one scholar concluded, "To be tried was, in effect, to be convicted."⁷²

As the pace of polygamy prosecutions accelerated, the thought occurred to some eager prosecutor that the cohabitation statute would be more fearsome if every defendant faced not one cohabitation charge but many. Such would be the case if each year, month, or day that a man cohabited illegally could be the basis of a separate offense. A judicial test of this theory was attempted in the case of Lorenzo Snow. Snow was charged with cohabitation in three separate indictments, each one charging the same offense with the same women, only for different years. In separate trials, Snow was convicted on each indictment and given the maximum sentence for each conviction. Thus, by segregating the charges against Snow, the prosecution was able to triple his punishment. The Utah Supreme Court affirmed the convictions.⁷³ The United States Supreme Court dismissed Snow's appeal on the ground that it did not have jurisdiction to hear it, because Snow did not question the validity of the statute but only its application.⁷⁴

69. A companion case to *Cannon* reaffirmed that evidence of sexual conduct was irrelevant. See *United States v. Musser*, 4 Utah 153, 7 P. 389 (1885). *Musser* was a stronger case for a finding of no cohabitation because the defendant had established each of his plural wives in a separate house. In sustaining *Musser's* conviction, the Utah court noted that one of Congress' purposes in passing the Edmunds Act was to reach prominent Church leaders who had escaped prosecution under the Morrill Act's three-year statute of limitations. *Id.* at 157-58, 7 P. at 391.

70. 116 U.S. 74 (1885), *vacated*, 118 U.S. 355 (1886).

71. *Id.* at 71-72. Justices Field and Miller dissented, arguing that the prohibition of cohabitation should be interpreted to mean "unlawful habitual sexual intercourse." The dissent termed the majority's holding "a strained construction of a highly penal statute." *Id.* at 79-80.

72. Linford, *supra* note 40, at 348.

73. 4 Utah 280, 295, 313, 9 P. 501, 686, 697, *appeals dismissed*, 118 U.S. 346 (1886).

74. *Snow v. United States*, 118 U.S. 346 (1886). Realizing that it had already decided one

With the principle of segregation having been approved by the Utah Supreme Court and the possibility of further review seemingly precluded by the United States Supreme Court's decision in *Snow*, federal prosecutors swiftly began expanding their use of the segregation of offenses, testing how far the principle could be pushed. In *United States v. Groesbeck*,⁷⁵ the prosecution cut in half the period of each offense, charging the defendant with two counts of cohabitation, one for each of two six-month periods. Unlike the *Snow* case, the trial of the two charges was consolidated. On appeal, the Utah Supreme Court sustained both of these innovations.⁷⁶ The court dismissed the argument that a single trial of the defendant on both charges allowed the jury improperly to consider Groesbeck's first conviction in determining his guilt on the second charge. The court noted that consolidation of offenses into a single trial saved the state the burden and expenses, and the defendant the harassment, of multiple litigation.

Meanwhile, Lorenzo Snow had served his first six-month sentence. He then applied to the United States Supreme Court for a writ of habeas corpus, claiming that his further detention was unlawful because the two remaining sentences were the result of an unlawful segregation of a single offense. As before, the government contended that the Court lacked jurisdiction, but this time the Court held that it had jurisdiction.⁷⁷ Cohabitation, the Court stated, was "inherently a continuous offense, having duration; and not an offense consisting of an isolated act."⁷⁸

Even after *In re Snow*, the courts could still impose multiple punishments for what was in reality but one offense. The Edmunds Act specifically allowed polygamy and cohabitation charges to be combined.⁷⁹ Because the definitions of the offenses were different, a man could be convicted of marrying a polygamous wife and then convicted again for living with her.⁸⁰ The Supreme Court set limits on the com-

other cohabitation case, *Cannon v. United States*, 116 U.S. 55 (1885), the Court vacated its decision in that case as having been issued without jurisdiction. See *Snow*, 118 U.S. at 355. Other courts continued to cite *Cannon* as an authoritative interpretation of the Edmunds Act, even though it no longer was binding precedent. See, e.g., *United States v. Clark*, 6 Utah 120, 125, 21 P. 463 (1889); *United States v. Kuntz*, 2 Idaho 446, 21 P. 407 (1889); *United States v. Peay*, 5 Utah 263, 14 P. 342, 345 (1887).

75. 4 Utah 487, 11 P. 542 (1886).

76. *Id.*

77. *In re Snow*, 120 U.S. 274, 285 (1887).

78. *Id.* at 281.

79. See Edmunds Act, section 4, 22 Stat. 30, 31 (1882).

80. For example, in *Clawson v. United States*, 113 U.S. 143 (1885), the defendant was convicted of polygamy for marrying a second wife and sentenced to three-and-one-half years'

bination of different offenses in *Hans Nielsen*.⁸¹ Nielsen was indicted for adultery and cohabitation. Both charges were directed at his conduct with his polygamous wife, Caroline. Nielsen pleaded guilty to the charge of cohabitation and was sentenced to three months' imprisonment. When arraigned on the adultery charge, Nielsen claimed his conviction for cohabitation barred his further prosecution. After serving his sentence for cohabitation, Nielsen was tried and convicted for adultery and sentenced to an additional 125 days' imprisonment. The United States Supreme Court granted Nielsen's petition for a writ of habeas corpus.

The Court managed to arrive at a sensible result. It reasoned that proof that Nielsen and Caroline live together as husband and wife carried with it the assumption of intercourse that was the essential element of the adultery charge. Thus, when Nielsen was convicted of cohabitation, he was convicted of all the elements of adultery and could not be convicted separately for that offense. With *Hans Nielsen*, attempts to make the polygamy laws more savage by piling offenses together or fracturing a single act into many separate offenses ceased.

The Edmunds Act prosecutions also saw a distortion of the rules of evidence, in part due to the same vindictive spirit that animated the harsh application of the polygamy laws, but in part the result of that same vagueness and emphasis on appearance that afflicted the substantive provisions of the Edmunds Act. Because the offense of cohabitation consisted of appearing to consort with two or more women, as long as a man cohabited with only one woman, he would seem to be in compliance with the law, regardless of whether that woman was the man's lawful wife. Thus, a polygamist seemingly could abandon his legally recognized wife, live exclusively with a later plural wife, and not be guilty of cohabitation.⁸² The judicial solution to this problem was a presumption, first announced in *United States v. Snow*, that a man cohabited with his legal wife.⁸³

imprisonment and a \$500 fine. He was also convicted of cohabiting with that wife and sentenced to six months and a \$300 fine.

81. 131 U.S. 176 (1889).

82. A construction of the Edmunds Act that allowed a polygamist to retain whichever one of his wives he wished to long as he retained only one, however, was not well received by the courts. The Utah Supreme Court suggested that if the act were to have that effect it should have been entitled "An Act to enable a man to forsake his lawful wife, and fly to the arms of his concubine." *United States v. Snow*, 4 Utah 313, 9 P. 697-701, *appeal dismissed*, 118 U.S. 346 (1886).

83. *United States v. Snow*, 4 Utah 280, 9 P. 501, 504, *appeal dismissed*, 118 U.S. 346 (1886).

To comply with the law, Lorenzo Snow had set each of his older wives up in a separate household and refrained from almost all contact with them. He lived solely with his last wife, who still had infant children to raise. Nevertheless, he was convicted of cohabitation. The Utah Supreme Court upheld the conviction, not because he was cohabiting with more than one wife, but because he was with the wrong wife. The court reasoned that the Edmunds Act, like prior acts, was intended to protect the institution of monogamous marriage and should be construed liberally to achieve that intent. Thus, the court presumed that a man cohabited with his lawful wife. At first this was offered as a rebuttable presumption, justified by society's policy of encouraging marital fidelity and by common experience as a factual generalization. The *Snow* court still appeared to require at least some evidence of actual cohabitation. Clever polygamists were able to get around the presumption by demonstrating that, in their case, it was incorrect. Thus, courts very quickly deemphasized the factual rationale for the presumption and instead emphasized its legal and social policy rationale. As they did, the strength of the presumption increased, and the extent to which it could be refuted by contrary evidence diminished.⁸⁴

Finally, in 1888 the Utah Supreme Court so diluted the amount of evidence required to render the presumption of cohabitation with a legal wife conclusive that, in effect, the presumption became a conclusive presumption of law. In *United States v. Harris*,⁸⁵ the court approved jury instructions to the effect that if "the legal wife of the defendant lives in the same vicinity with him, bearing his name, in a household maintained in part by him; that is . . . absolutely and conclusively cohabitation with his legal wife."⁸⁶ Under such a standard, it seemed unlikely that any polygamist could insulate himself from all contact with his lawful wife sufficiently to avoid a finding of cohabitation. In effect, then, the offenses of polygamy and cohabitation became identical in terms of the proof required for each: each could be proven by evidence that a couple associated so as to appear to be married. Statements by a defendant that a woman was his wife, made out of court and before any charges had been made against him, could be introduced at trial to prove his marriage,⁸⁷ or to prove cohabitation.⁸⁸

84. See, e.g., *United States v. Snow*, 4 Utah 295, 9 P. 686, 688, *appeal dismissed*, 118 U.S. 346 (1886); *United States v. Clark*, 5 Utah 226, 14 P. 288, 291 (1887).

85. 5 Utah 436, 17 P. 75 (1888).

86. *Id.*

87. *United States v. Simpson*, 4 Utah 227, 228, 7 P. 257, 258 (1885).

88. *United States v. Schow*, 6 Utah 381, 24 P. 30 (1890).

In loosening the rules of evidence to serve Congress' policy of ensuring the punishment of polygamy, the courts undermined the elemental bases of judicial procedure and due process of law. The most basic assumption that an accused is presumed innocent and must be found guilty beyond a reasonable doubt by competent evidence was sapped of all strength. The courts were indeed accurate when they identified cohabitation as an offense of appearance or reputation, for under such evidentiary standards an accused's actual conduct seemed largely irrelevant.

D. Witnesses to Cohabitation

To convict Mormon men of polygamy offenses, certainly no more effective and knowledgeable witnesses could be found than their wives. Two obstacles, however, appeared to bar use of this pool of witnesses. First, most Mormon wives were unwilling to testify against their husbands. Second, even if they were willing to testify, at common law a person could not testify against his or her spouse. These problems were first confronted in *United States v. Miles*,⁸⁹ the only other Morrill Act case to reach the United States Supreme Court besides *Reynolds*.

From the evidence at trial, it appeared that John Miles had married three women on the same day. Because Miles was charged with bigamy, under the Morrill Act, it was necessary to prove his marriages to the three women. Therein lay the difficulty, for the marriage ceremony was shrouded in secrecy. Miles' wife, Caroline, however, was willing to testify against him. Miles conceded his marriage to Caroline but denied his marriage to his first wife. Caroline's testimony was essential to the state's case; but if Caroline was Miles' lawful wife, under the common law rule her testimony was inadmissible. But her testimony helped establish that at the time Miles married her he already had a lawful wife. And if Miles had a wife when he married Caroline, his marriage to her was invalid, and she was a competent witness. The trial court resolved this perplexing question by throwing the whole matter to the jury. Caroline was allowed to testify.

On appeal, the United States Supreme Court rejected the trial court's ingenious labor-saving device. It concluded that a defendant's witness-wife must be treated *prima facie* as his lawful wife.⁹⁰ The

89. 103 U.S. 304 (1881), *rev'd*, 2 Utah 19 (1887).

90. *Id.* at 315.

principle behind this ruling was the old rule that a witness that is “*prima facie* incompetent” cannot give evidence “to establish his competency, and at the same time prove the issue.”⁹¹ The Court reached this ruling with apparent regret, for in doing so it recognized that it was disabling almost all witnesses to polygamous unions. However, the Court recommended two escapes from this predicament. First, eyewitnesses to a marriage were not necessary. Polygamous marriages could be proven like any other fact, by admissions of the defendant or by circumstantial evidence.⁹² Second, if under existing laws it was too difficult to prove polygamy, Congress could always change the law. Because it was based on the testimony of an incompetent witness, *Miles*’ conviction was reversed.⁹³

Miles did not end the issue of a wife’s competency to testify against her husband. The general rule that a wife was not a competent witness against her husband was subject, under common law and the Utah statute, to several exceptions. A Utah statute, for example, provided that a wife could testify against her husband in a criminal action for a crime committed by one against the other.⁹⁴ In *United States v. Bassett*⁹⁵, the Utah Supreme Court concluded that polygamy, in fact, was an offense by the husband against his lawful wife. Thus, the rule of spousal disability did not apply, and the wife was a competent witness.⁹⁶ Again, however, the United States Supreme Court rejected the territorial court’s analysis.⁹⁷ First, the Court concluded that the Utah courts had applied the wrong statute. Less technically, the Court concluded that even under the statute employed by the Utah courts, polygamy could not be properly viewed as an offense against the wife.⁹⁸

Nearly seven years after the United States Supreme Court decision in *Miles* excluded the testimony of polygamous wives in polygamy trials, in the Edmunds-Tucker Act, Congress provided that a wife was a competent witness in polygamy, bigamy, and cohabitation trials and required that records be kept of weddings in the territo-

91. *Id.* at 314.

92. *Id.* at 311.

93. *Id.* at 315-16.

94. *United States v. Bassett*, 5 Utah 131, 13 P. 237, 240 (1887), *rev'd*, 137 U.S. 496 (1890).

95. 5 Utah 131, 13 p. 237 (1887), *rev'd*, 137 U.S. 496 (1890).

96. For other early efforts by the Utah Supreme Court to deal with the problem of polygamous wives’ testimony, see *United States v. Kershaw*, 5 Utah 618, 19 P. 194 (1888); *United States v. Cutler*, 5 Utah 608, 19 P. 145 (1888); *United States v. White*, 4 Utah 499, 11 P. 570 (1886).

97. See *Bassett*, 137 U.S. 496 (1890).

98. *Id.* at 506.

ries.⁹⁹ These provisions still retained one restraint on spousal testimony, however; they provided only that a willing wife would be allowed to testify. Utah's judges did not always follow the law, however. A number of Mormon women were required to testify against their husbands or face contempt charges. Judicial use of the contempt power in the polygamy cases thus presented many Mormon families with a cruel dilemma. If the wife called as a witness submitted and testified, her husband would almost surely be convicted and imprisoned. If she refused, her husband might escape conviction, but the wife would be imprisoned. Perhaps the most egregious case of judicial conduct in this regard was that of Belle Harris. Mrs. Harris and her infant son ultimately spent three and one-half months in prison for her refusal to testify before a grand jury investigating polygamy charges against her husband.¹⁰⁰

In retrospect, it is difficult to offer any explanation for this judicial conduct toward Mormon wives other than a spirit of vindictiveness. Courts had reduced the quantum of evidence required to establish polygamy or cohabitation to such a low level that in almost any case, ample alternate sources of proof must have been available. Utah's courts could not have believed that they needed to compel Mormon women to testify in order to convict their polygamous husbands.

E. The Vitality of *Reynolds* Today

The legislative and judicial war on polygamy was ultimately successful. The Church officially abandoned the practice in 1890. The war, however, was not without its casualties. The Court's decision in *Reynolds* was a good example of "a situation where the social import of the issue outstrips the political and legal resources of the time."¹⁰¹ The Court's overly restrictive view of the free exercise clause virtually read it out of the Constitution for over sixty years. [For discussions of the present state of the law, see Pepper and Marshall, this issue.]

The belief-conduct distinction of *Reynolds* has been largely jettisoned by later cases. Substantial protection of religious practice as well as belief is now accepted under the free exercise clause. Because belief has long been protected under the speech clause, this development is logical, historically correct, and beneficial to society. Never-

99. See sections 1, 9, 24 Stat. 635, 636 (1887).

100. See *In re Harris*, 4 Utah 5, 5 P. 129 (1884).

101. Keller, Book Review, 85 HARV. L. REV. 1082, 1086 (1972) (referring to a different issue—municipal railroad bonding).

theless, it would be unrealistic to expect a Supreme Court as socially conservative as this, or for that matter, any Court likely to exist in the near future, to overturn *Reynolds* formally and sanction the practice of polygamy.¹⁰² Nor, for that matter would it be likely that the Mormon Church would enter into that practice ever again, even if the law permitted it. What might have been expected, however, is that the emergence of the free exercise clause as a vibrant base for civil libertarian protection of rights of conscience under *Sherbert* and *Yoder* would be strengthened and expanded.

III. THE WAR AGAINST MORMON SOCIETY

Public debate on the "Mormon issue" and the legal conflict between the Mormons and the federal government largely centered on the issue of polygamy. But there were other points of conflict between the Mormons and the rest of the nation. Most aspects of Mormon life that made the Mormons distinctive came under attack by the federal government. For the more farsighted critics, the Church's economic, social, and political power were more significant than the issue of polygamy, and the curtailment of the Church's political and economic activities by the federal government may have had a more enduring impact on Mormonism than the prohibition of polygamy.

A. Civil Rights Violations: The Assault on Mormon Political Power

During the period of conflict between the Mormons and the federal government, Congress never directly passed a law depriving Mormons of their civil rights simply because they were Mormons, even though, as applied by hostile federal judges and officials, some laws came close to that result. Nevertheless, throughout the polygamy prosecutions, federal attempts to simplify and expedite the conviction of polygamists routinely denied Mormons many of their fundamental rights. Done under the guise of stamping out polygamy, the Mormons' civil rights were abridged in five significant and specific respects: Mormons were denied the right to serve as jurors; Mormons were denied the right to hold elective and public offices; Mormons were denied their franchise; children of polygamous marriages were denied inheritance rights; and the immigration of Mormons into the United States was obstructed and foreign-born Mormons were denied citizenship.

102. *Wisconsin v. Yoder*, 406 U.S. at 247 (1972) (Douglas, J., dissenting in part).

1. The Exclusion of Mormons as Jurors

In response to repeated calls by President Rutherford B. Hayes to withdraw the privileges of citizenship from Mormons in Utah,¹⁰³ Congress passed the Edmunds Act in 1882. The act broadly provided that past or present polygamists and those who believed in polygamy could be excluded from jury duty. Potential jurors could further be questioned under oath regarding their polygamous activities or beliefs and could be rejected for failing to answer such questions.¹⁰⁴ Supporters of the Act claimed, of course, that the measure was necessary to ensure the effective prosecution of polygamists.¹⁰⁵ As disabling as the law was, however, the Edmunds Act only ratified a position already adopted by the United States Supreme Court two years earlier, in *Miles v. United States*.¹⁰⁶

Convicted of polygamy under the Morrill Act, Miles argued on appeal that a large number of potential jurors had been improperly excluded because they had testified that they believed in polygamy. Miles argued that the examination of the proposed jurors showed that the court, in effect, had administered an unlawful religious test to exclude all Mormons from the jury. In upholding the Utah court, however, the Supreme Court relied on an 1878 territorial statute that provided that a juror could be disqualified for partiality.¹⁰⁷ Although the Supreme Court upheld the procedure based on the Utah statute, it also noted that it would have reached the same result even without the statute because, under common law, a juror could be excluded for actual bias.¹⁰⁸

Because the Supreme Court had upheld the exclusion of Mormon jurors on the basis of Utah statute and common law principles, the provision of the Edmunds Act excluding Mormon jurors was predictably sustained in *Clawson v. United States*.¹⁰⁹ Clawson was indicted for cohabitation and polygamy by a grand jury from which Mormons had been systematically excluded. Although the Edmunds Act effectively excluded Mormons as "jurors" in polygamy cases,

103. See 7 J. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897 559 (1896-1899).

104. See section 5, 22 Stat. 31 (1882).

105. See 7 J. RICHARDSON, *supra* note 103, at 606; R. DWYER, THE GENTILE COMES TO UTAH: A STUDY IN RELIGIOUS AND SOCIAL CONFLICT 42-43 (1971).

106. 103 U.S. 304 (1880).

107. *Id.* at 305.

108. *Id.* at 310.

109. 114 U.S. 477 (1885).

Clawson argued that this exclusion did not extend to *grand* juries.¹¹⁰ The Supreme Court, however, without considering the unique role of the grand jury in society, held that the term *juror* encompassed both grand and petit juries and that the Edmunds Act therefore must be read broadly to disable Mormons from service on any juries.¹¹¹

In theory, Mormons were thus prohibited from serving as jurors only in polygamy trials. Idaho, a hotbed of anti-Mormon sentiment, carried Congress' efforts a step further. An Idaho statute provided that only qualified electors could serve as jurors. Because Idaho law excluded Mormons from the vote, they were automatically barred from jury service as well. Even this draconian, blanket disability was upheld by the courts. In *Territory v. Evans*,¹¹² the Idaho Supreme Court conceded that the law, in some counties, would exclude so many citizens that juries could not be selected but still upheld the exclusion of Mormons.¹¹³

2. The Exclusion of Mormons as Voters

While the Edmunds Act excluding the Mormons from polygamy trial juries was rationally related to the federal government's goal of eliminating polygamy, other "anti-polygamy" measures of that Act were directly aimed at Mormon political power. One provision denied polygamists the right to vote.¹¹⁴ To enforce this provision, Utah's registration and election offices were declared vacant, and a five-man commission was appointed to oversee Utah elections.¹¹⁵ During its first year the Utah Commission barred over 12,000 Mormons from voting in Utah. This was nearly one-fourth of eligible Mormon voters, and far exceeded the number of polygamists in Utah.¹¹⁶

The Utah Commission's exclusion of Mormon voters met an immediate judicial challenge. In *Murphy v. Ramsey*,¹¹⁷ the United States Supreme Court rebuked the Commission, but its decision had mixed results for the Mormons. The Court did hold that the powers of the Utah Commission were restricted to ensuring that elections in Utah were fairly and properly conducted, and that the Commission had no

110. *Id.* at 483-84.

111. *Id.*

112. 23 P. 232 (1890).

113. *Id.* at 233.

114. See section 8, 22 Stat. 31 (1882).

115. See section 9, 22 Stat. 32 (1882).

116. See J. ALLEN & G. LEONARD, *THE STORY OF THE LATTER-DAY SAINTS* 395 (1976).

117. 114 U.S. 15 (1884).

further power to establish voter qualifications or to administer a voter's oath. On the other hand, the Court held that because the Commission was legally powerless to exclude voters, it was not legally liable for the acts of voting officials who wrongfully obeyed the Commission excluding the Mormons.¹¹⁸

On the substantive question of the scope of the Edmunds Act's disenfranchisement of polygamists, the *Murphy* Court again ruled against the Mormons. Because the Act's provisions extended to cohabitants and polygamists without exclusion, it barred those who became polygamists before the Act's passage as well as those who did so after 1882.¹¹⁹ Nor was the statute an *ex post facto* law. The Act applied only to those who continued to practice polygamy and not to those who had abandoned that practice.¹²⁰ The Court did not question whether other constitutional provisions, such as the first amendment, might impose some rational restrictions on Congress' power to set voter qualifications.¹²¹

Following several decisions in Idaho¹²² and Nevada¹²³ upholding further restrictions on the right of Mormons to vote, and following the United States Supreme Court's use of an Idaho voting case as a soapbox for an extended diatribe on polygamy,¹²⁴ Congress passed the Edmunds-Tucker Act in 1887, disenfranchising Mormon women and ending one of Utah's most significant advances in civil rights.¹²⁵ In 1870, Utah's territorial legislature had granted women the right to vote.¹²⁶ Initially, Utah's action won support even among the Mormons' enemies, who believed Mormon women would swiftly use their new political power to end polygamy. The Mormons, conversely, may have granted women the vote to demonstrate that polygamy and Mormon society in general did not oppress Mormon

118. *Id.* at 36-37.

119. *Id.* at 42.

120. *Id.* at 43.

121. *Id.* at 45.

122. *Innis v. Bolton*, 17 P. 264 (1888) (upheld an Idaho law excluding all Mormons from voting).

123. *State v. Findley*, 19 P. 241 (1888) (held invalid a law excluding all Mormons from voting, holding elective office, and serving on juries).

124. *Davis v. Beason*, 133 U.S. 333 (1890) (upheld the denial of the vote to an ex-Mormon in Idaho).

125. The Edmunds-Tucker Act provided "that it shall not be lawful for any female to vote at any election hereafter held in the Territory of Utah for any public purpose whatever, and no such vote shall be received or counted or given effect in any manner whatever." *Id.* at section 20, 24 Stat. 639 (1887).

126. Weisbrod & Sheingorn, *Reynolds v. United States: Nineteenth-Century Forms of Marriage and the Status of Women*, 10 CONN. L. REV. 828, 828 n.3 (1978).

women.¹²⁷

Mormon women did not use their votes to end polygamy, so Mormonism's critics reversed their position. Enfranchised Mormon women came to be seen as an impediment to the elimination of polygamy and the destruction of the Mormons' political power.

Given the judicial conclusion that the franchise in territories was a privilege that Congress could arbitrarily restrict, Congress' disenfranchisement of Utah's women was legal. Its efficacy in hastening the end of polygamy, however, may be doubted.

3. The Exclusion of Mormons From Public Office

To the extent that Mormons were excluded from the vote, they were also and quite logically excluded from all elective and other public offices. The Edmunds Act, in creating the Utah Commission to oversee Utah's elections, mandated that no election could take place without the Commission's supervision.¹²⁸ Because the commission was unable to arrive in Utah in time, no election was possible in 1882.¹²⁹ So that elective offices would not stay vacant pending the next election, Congress hastily passed the Hoar Amendment allowing Utah's governor to appoint officials to fill vacant elective offices until the next election.¹³⁰

Some disagreement arose regarding the effect of the Hoar Amendment. The Mormons maintained that under Utah law, when an election was not held, incumbent officials simply retained their office. Thus, the governor had no appointments to make, for no offices were vacant. Utah's governor, Eli H. Murray, a gentile who was hostile to the Mormons and frustrated by their political obstructionism, decided that in spite of contrary Utah law, the offices were vacant. In September and October of 1882, he appointed a total of 174 replacements to public office, almost all gentiles.¹³¹

Mormons reacted angrily to this attempted ouster, and many refused to surrender their offices. Others instituted actions to validate their claim that no offices had been vacated due to the failure to hold elections when scheduled. In an unreported case, *Kimball v. Richards*,¹³² the Utah Supreme Court held that the Hoar Amendment, in

127. *Id.* at 853-54 n.134, 852-53 n.130.

128. *See* section 8, 22 Stat. 31 (1887).

129. *Wenner v. Smith*, 9 P. 293 (Utah 1886).

130. *See* 22 Stat. 313 (1882).

131. *See* 5 B. ROBERTS, *supra* note 41, at 65-66.

132. *See* *Wenner v. Smith*, 9 P. 293, 297-98 (Utah 1886) (discussing *Kimball v. Richards*).

fact, had vacated Utah's elective offices, despite the amendment's failure specifically to state this.

Despite this judicial setback, some Mormon officials still refused to relinquish their offices. The 1886 case of *Wenner v. Smith*¹³³ illustrates this continuing resistance. Defendant Smith had been elected probate judge of Salt Lake County in 1880. By virtue of the Hoar Amendment, the governor considered Smith's office to be vacant and appointed Uriah J. Wenner as his successor in September 1882 to serve for eight months. Smith, however, refused to turn over the office and continued to receive the fees and salary of the judgeship. Wenner sued to recover those sums.

On appeal, the Utah Supreme Court concluded that Wenner's appointment was lawful. Moreover, because the Edmunds Act declared polygamists unfit to hold public office and because Smith was a polygamist, the court concluded his judgeship had been vacated by the Edmunds Act without reference to the Hoar Amendment. Thus, Wenner had been wrongfully denied the office and was entitled to recover the fees.

4. The Laws of Inheritance

Under common law, illegitimate children, if recognized by the law at all, could inherit property only from their mothers.¹³⁴ Utah's territorial legislature reversed this common law rule, and provided in 1852 that "illegitimate children and their mothers inherit in like manner from the father."¹³⁵ It is, of course, a rather fine question whether the children of polygamous Mormon marriages were illegitimate. Under common law and federal law after passage of the Morrill Act, polygamous marriages were unlawful, and the offspring of such unions were presumably illegitimate. In Utah, when such marriages were recognized, the children were not illegitimate.

This state of affairs presented Congress with a problem. Clearly, it was the nation's policy to forbid polygamy and crush institutions that supported and furthered the practice. Utah's law allowing polygamous wives and children to inherit in the same manner as monoga-

133. 9 P. 293 (Utah 1886).

134. See J. RITCHIE, N. ALFORD & R. EFFLAND, *CASES AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS* 71-72 (5th ed. 1977).

135. 1876 Comp. Laws section 677, at 268. Utah's present law, like that of many states, similarly provides that an illegitimate child may inherit from his father if he has been acknowledged by his father, if the natural parents participated in a marriage ceremony before or after the birth, or if paternity has been otherwise satisfactorily established. See UTAH CODE ANN. section 75-2-109(b) (1953).

mous heirs arguably furthered the practice of polygamy. On the other hand, to overturn Utah's laws and prohibit the children of polygamous marriages from inheriting property was equally clearly a cruel punishment that would be levied primarily against innocent children. Sensibly, Congress simply left the issue alone in 1887.

The continued Mormon resistance to enforcement of the polygamy laws, however, finally eroded Congress' moderate attitude toward children of polygamy. In the Edmunds-Tucker Act, Congress annulled the Utah statute by providing that no illegitimate child shall be entitled to inherit from their father.¹³⁶ As might be expected, the legislation spawned litigation. The question of the status of polygamous children first came before the Utah Supreme Court in the case of *Chapman v. Handley*¹³⁷ in 1890. George Handley died intestate in 1874, leaving an estate of \$25,000, a surviving widow, and eight children, four of them the offspring of a then deceased plural wife. These polygamous children claimed an interest in Handley's estate under the Utah statute allowing illegitimate children to inherit from their parents. Handley's other children invoked the Morrill Act to block their claim. Their argument was that the Utah law violated public policy in general by supporting polygamy. More specifically, because Utah's statute supported polygamy, the Morrill Act had expressly annulled it.

The court expressed no doubt that the statute "was intended to, and did tend to, support, maintain, and countenance polygamy."¹³⁸ Although the court recognized that its conclusion punished the innocent children of polygamy, it noted that "Congress has recognized the potency of denying to illegitimate children the rights of legitimacy and inheritance as a means of breaking up and discouraging polygamy in the acts of 1882 and 1887."¹³⁹

In 1891, the year after the decision in *Chapman v. Handley*, another case involving the same issues and similar facts was brought before the United States Supreme Court. In *Cope v. Cope*,¹⁴⁰ however, the Supreme Court arrived at a different conclusion: "Legislation for the protection of children born in polygamy is not necessarily legislation favorable to polygamy. There is no inconsistency in shielding the

136. See section 11, 24 Stat. 637 (1887).

137. 24 P. 673 (Utah 1890).

138. *Id.* at 675.

139. *Id.*

140. 137 U.S. 682 (1891).

one and in denouncing the other as a crime.”¹⁴¹ Utah’s act, rather than promoting polygamy, simply protected the children of polygamy.¹⁴² Further, Utah’s statute was not implicitly annulled by the Morrill Act in 1862. Rather, all of Congress’ acts relating to illegitimate children should be read together, and “the later acts should also be regarded as legislative interpretations of the prior ones.”¹⁴³ In 1882 Congress had explicitly legitimated the children of polygamous marriages, and not until 1887 did it specifically bar their inheritance rights. These later actions demonstrated that in 1862 Congress had not meant to annul the Utah statute allowing illegitimate children to inherit.¹⁴⁴

After 1890, when the Mormon Church formally renounced plural marriage, Utah again adopted a statute entitling the children of polygamous marriages to inherit property. The legislature further provided that any heir who had been previously denied an inheritance on the basis of his polygamous lineage could petition the courts for a redistribution of the estate.¹⁴⁵ On the strength of this provision and in the wake of the favorable ruling in *Cope*, George Handley’s polygamous children petitioned Utah’s courts to award them their rightful share of their father’s estate.

Apparently in a vengeful mood, Utah’s Supreme Court declined to redistribute the estate. Instead, the court struck down the statute. The court reasoned that the Utah Act reopened cases that had been resolved by the judiciary, thus second-guessing judicial judgment. Under the separation of powers, this interference with the judicial process was unconstitutional.¹⁴⁶ Curiously, the court did not mention the United States Supreme Court’s decision in *Cope v. Cope* as a basis for its reconsideration of this case, even though that decision in effect overruled the territorial court’s decision in *Handley*.

The court’s action was a bitter but somewhat empty gesture. Because the Edmunds Act in 1882 legitimated polygamous children, the court’s ruling affected only the estates of those polygamists who had died prior to passage of the Edmunds Act.

141. *Id.* at 687.

142. *Id.* at 685.

143. *Id.* at 688.

144. *Id.* at 689.

145. See ch. 41, 1896 Utah Laws 128-29.

146. See *In re Handley’s Estate*, 48 P. 832 (Utah 1897).

5. Immigration Laws

For the Mormons, Utah became the point from which they would carry the word of their gospel throughout the world and to which Mormon converts from around the world would gather. Spiritually, immigration was the gathering of the Saints into the Mormon community. Economically, the immigrants brought the skills and hands needed to settle the wilderness.

With typical initiative, the Mormons organized the immigration of large numbers of converts through the Perpetual Emigrating Fund Company.¹⁴⁷ This church-sponsored company provided agents to arrange the converts' passage from Europe to the east coast of the United States, and from there to Utah. It also paid passage for those too poor to pay their own way. By 1870, the year after the transcontinental railroad was completed, the Perpetual Emigrating Fund Company had helped over 51,000 Mormon immigrants reach Utah.¹⁴⁸

This large scale flow of new, foreign Mormons into Utah naturally alarmed the Church's enemies, who feared that the faith of the converts would revitalize the Church's doctrines.¹⁴⁹ The point was made more luridly by fictionalized reports that the Mormons imported young, innocent girls to become polygamous wives in a sort of religious slavery.¹⁵⁰ President Ulysses S. Grant reflected on this view when he recommended to Congress in his annual message on December 7, 1875 that it "drive out licensed immorality, such as polygamy and the importation of women for illegitimate purposes."¹⁵¹

A decade later, in 1885, President Grover Cleveland recommended to Congress that it prevent the immigration of Mormons into the country.¹⁵² Congress acted, in part, on this advice when it adopted the Edmunds-Tucker Act in 1887. Section 15 of that Act dissolved the Perpetual Emigrating Fund Company and forbade the territorial legislature from acting in any fashion to encourage immigration into Utah.¹⁵³ In 1891 Congress again acted, adding

147. See L. ARRINGTON, *supra* note 62, at 97-108.

148. *Id.* at 99.

149. An 1881 essay in *Harper's Magazine* stated that Mormonism "is an institution so absolutely un-American in all its requirements that it would die of its own infamies within twenty years, except for the yearly infusion of fresh serf blood from abroad." See Mulder, *Immigration and the "Mormon Question": An International Episode*, 9 W. POL. Q. 416, 423-24 (1956).

150. See Mulder, *supra* note 149, at 428.

151. 7 J. RICHARDSON, *supra* note 103, at 356.

152. *Id.* at 362.

153. See 24 Stat. 637 (1887).

polygamists to the list of classes excluded from the country.¹⁵⁴

Congressional legislation, however, was only one of many tools used to discourage Mormon immigration. In Utah, the Mormon controlled probate courts freely granted naturalization to immigrants. In 1886, Thomas J. Drake, an Associate Justice of the Utah Supreme Court sitting as a district court judge in Provo, Utah, barred this procedure. He further ruled that all prior naturalizations granted by the probate courts were null and void.¹⁵⁵

Similarly, in 1870 Chief Justice James B. McKean, presiding over the district court in Salt Lake City, ruled that a mere belief in polygamy was sufficient grounds for refusing to naturalize an alien regardless of whether the applicant was involved in its practice.¹⁵⁶ McKean failed to cite any precedent for his arbitrary holding, basing his decision on his interpretation of the naturalization statute. But McKean's ruling required more of applicants than was required of natural born citizens, an open denial of belief in polygamy.

Finally, in 1889 Justice Thomas J. Anderson denied citizenship to foreign-born Mormons because the religious covenants administered for the Endowment House required them to pledge allegiance to the Mormon Church's laws above and against those of the United States.¹⁵⁷ After the Church renounced polygamy in 1890, Chief Justice Charles S. Zane ruled that foreign-born Mormons could be naturalized.¹⁵⁸

B. Disestablishment of the Church: The Assault on Mormon Economic Power

In its early years, the Church's leaders harbored a deep distrust of lawyers and the formalities of the law. In Utah, Church leaders attempted to neutralize harassment through counter-use of the law. In 1851, the Assembly of the State of Deseret passed an ordinance incorporating the Church of Jesus Christ of Latter-day Saints. By the terms of this charter, the Church was granted vast powers. It could acquire and sell property, regulate marriages, register births and deaths, and make all laws, rules, and adjudications it deemed neces-

154. See section 1, ch. 551, 26 Stat. 1084 (1891); Mulder, *supra* note 149, at 427.

155. See Mulder, *supra* note 149, at 429.

156. See *In re Sandberg & Horsley*, reported in *Deseret News*, Oct. 19, 1870, at 436; 5 B. ROBERTS, *supra* note 41, at 386-87.

157. See Mulder, *supra* note 149, at 431.

158. *Id.* at 432.

sary. It was also not subject to legal review.¹⁵⁹

Having been legally endowed with all necessary powers, the Church was presumably freed from petty legal challenges. Armed with these powers, it became deeply involved in members' economic lives. It established itself as a major business interest in Utah, and consistent with the Church's communal doctrines, held a major portion of the Mormons' collective wealth. These policies made the Church quite vulnerable to federal pressure. The seizure of Church property would be a devastating blow to the entire Mormon community. The federal government did not hesitate long before it used this ultimate weapon. The Morrill Act of 1862 revoked the charter incorporating the Mormon Church, at least insofar as that charter supported or aided polygamy.¹⁶⁰

No attempt was made to enforce the forfeiture of Church property, but the Church took this warning seriously even though the Act was generally believed unconstitutional. To bring themselves into what they believed to be a technical compliance with the Act, the Mormons initiated a policy of placing property in the hands of individual Church leaders as trustees-in-trust.¹⁶¹

With the 1887 Edmunds-Tucker Act, Congress told the Church to abandon the practice of plural marriage or face destruction. The mechanism of destruction was to be confiscation of Church property. Section 13 of the Act directed the Attorney General of the United States to institute proceedings pursuant to the Morrill Act of 1862 to confiscate all Church real estate in excess of \$50,000 in value.¹⁶² Congressional legislation specified that only the Church's real property was subject to seizure; but because the Morrill Act arguably revoked the Church's charter in its entirety, the Church no longer existed as a body capable of holding property in the eyes of the law. Thus, such personal property as stocks, livestock, and furniture were left ownerless and forfeited to the state. Anticipating passage of the Edmunds-Tucker Act, Mormon leaders increased their efforts to place the Church's property beyond the reach of the federal government. On July 30, 1887, the United States Attorney for Utah initiated proceedings before the territorial supreme court to dissolve the Church corporation and to recover all property held by the Church except for

159. *United States v. Church of Jesus Christ of Latter-day Saints*, 15 P. 473, 474-75 (Utah 1887).

160. *See* section 2, 12 Stat. 501 (1862).

161. *See* L. ARRINGTON, *supra* note 62, at 356.

162. *See* 24 Stat. 637 (1862).

any real property acquired prior to 1862 and valued at less than \$50,000. As in the *Reynolds* polygamy trial, the Mormons overestimated the readiness of the courts to accept their legal arguments. But unlike the consequences of *Reynolds*, the property confiscations were a death blow.

In the first challenge to the Edmunds-Tucker Act's seizure provisions, *United States v. Church of Jesus Christ of Latter-day Saints*,¹⁶³ the Mormons argued that the territorial charter given to the Church constituted a right that Congress could not constitutionally nullify. Relying on the landmark case of *Dartmouth College v. Woodward*¹⁶⁴ for the proposition that the charter of a private corporation was a contract between the state and the corporation, the Mormons argued that their right to acquire and hold property was a vested, contractual right that could not be impaired. This argument was rejected. The court rather vaguely suggested that a legislature could not properly delegate so broad a range of powers as the Mormon Church was granted in its charter.

More convincingly, *Dartmouth College* had concerned the inviolability of contracts made by states as sovereign authorities. Utah was not a state. Under its enabling act, Utah's territorial legislature acted subject to Congress' acquiescence. Congress could nullify any act of the territorial legislature. Thus, the court concluded, the charter gave the Church no vested rights but merely allowed it to exercise the enumerated powers "during the pleasure of Congress."¹⁶⁵

Against this, the Mormons raised an ingenious argument. In the Morrill Act in 1862, of course, Congress annulled the Church's charter; but, the Mormons argued, only insofar as it furthered or supported polygamy. By implication, therefore, Congress approved of all portions of the Church's charter that did not support polygamy.¹⁶⁶ The court rejected this analysis and held that any corporate powers of the Church not negated by the Morrill Act were nullified by section 17 of the Edmunds-Tucker Act.¹⁶⁷

The court also noted that under common law rules, a corporation's officers and agents cease to have any right to the use or benefit of corporate property when the corporation is dissolved. The court therefore appointed Frank H. Dyer, United States Marshall in Utah,

163. 15 P. 473 (Utah 1887).

164. 17 U.S. 518 (1819).

165. See *Church of Jesus Christ of Latter-day Saints*, 15 P. at 478.

166. *Id.* at 478-79.

167. *Id.* at 479-81.

as receiver to take control of and manage the Church's assets.¹⁶⁸ Not surprisingly, Dyer's tenure was stormy. Dyer vigorously pursued hidden Mormon assets, and the Mormons resisted. Many of the receiver's claims were compromised; and in lieu of surrendering property, the Church agreed to pay the receiver nearly a quarter of a million dollars.¹⁶⁹ What Dyer recovered represented only about one-third of the Church's total assets.¹⁷⁰

In 1889, an appeal of the validity of the Edmunds-Tucker Act's provisions for dissolving the Church and seizing its property reached the United States Supreme Court.¹⁷¹ The arguments of the Church's attorneys displayed a clear political realism. They made no arguments based on the free exercise of religion. Instead, the Mormons argued for the sanctity of contract: the Church's charter was a contract that Congress could not lawfully break by revoking the charter. In the Morrill Act and before, Congress implicitly recognized that charter. Even if Congress were allowed to wrongfully break that contract, no precedent or rationale existed for seizing the Church property. Instead, if the corporation were to be dissolved, its property rightfully reverted to the Church's membership.

The Court rejected each piece of the argument in turn. Congress' power to legislate for the territories was reaffirmed. Although the grant of powers to the Church was lawful when made by the Utah Legislature, it remained so only as long as Congress acquiesced. The property held by the Church was, or should have been, donated for public and charitable purposes. Instead, the Church employed it to promote polygamy. By depriving the Church of its property, then, Congress directed that property to its proper end, and furthered Congress' policy of blocking the spread of polygamy.¹⁷² As legal precedent, the Court elaborately outlined the ancient doctrine of cy pres. Under this legal principle, if a charitable trust could not be fulfilled according to its terms, the state would apply the trust property to those charitable uses that most nearly approximated the original purpose of the grant. By analogy, the Mormons' continued unlawful adherence to polygamy made a return of Church property to the members improper. Because the original purpose of Church dona-

168. *Id.* at 482-83; L. ARRINGTON, *supra* note 62, at 368.

169. *See* L. ARRINGTON, *supra* note 62, at 371.

170. *Id.*

171. *See* *The Late Corporation of the Church of Jesus Christ of Latter-day Saints v. United States*, 136 U.S. 1 (1890).

172. *Id.* at 43-50.

tions could not be accomplished lawfully, the property should then be applied to other charitable goals.

Although rejected, the Mormons' arguments were not without effect. The Court's decision was a close one, with four justices dissenting. Accepting that Congress had the power to legislate for the territories, the dissenters argued that Congress "is not authorized under the cover of that power to seize and confiscate the property of persons, individuals, or corporations, without office found, because they may have been guilty of criminal practices."¹⁷³

Recognizing that the original decree might need to be modified slightly, the Supreme Court remanded the case to the territorial court for further consideration. The Utah Supreme Court undertook to determine specifically how to dispose of the property, but before this issue could be resolved, the Church officially renounced polygamy in October 1890. That action created a powerful claim for the courts to abandon a meaningless effort to seize Church property. However, despite a vigorous dissenting opinion, the Utah Supreme Court refused to abandon the forfeiture proceedings and created a trustee to apply Church property "to the support and aid of the poor of the church, and to the building and repairing of its house of worship."¹⁷⁴

With the judiciary unable and unwilling to return most Church property, Congress finally closed the book on federal efforts to destroy the Mormon religion. In 1893, Utah's congressional delegate, Joseph L. Rawlins, introduced a resolution directing the return of the Church's personal property. With minor amendments the resolution passed Congress, and on January 10, 1894, what was left of the Church's personal property was returned. On June 8, 1896, the Church's real estate was returned.¹⁷⁵

In the battle of wills between the Church and the federal government, the government was victorious. It suppressed polygamy and crippled the Church's political, social, and economic power in the territory. Faced with a choice between a principled commitment to polygamy and survival as an organization, the Church chose to survive.

IV. CONCLUSION

A central feature of the nineteenth century Mormon experience

173. *Id.* at 67.

174. *The Late Corporation of the Church of Jesus Christ of Latter-day Saints v. United States*, 31 P. 436 (Utah 1890).

175. See L. ARRINGTON, *supra* note 62, at 378.

was its concept of Zion, a community of Saints where God and His people could dwell together in harmony. The Mormons were from the beginning a gathered people. Identifying powerfully with ancient Israel of the Old Testament, Mormons "gathered" first to Kirtland, Ohio; later to Jackson County, Missouri; and then Nauvoo, Illinois. They finally found sanctuary in the Great Basin. Protected by the Rocky Mountains, their society followed a unique path of development until the world caught up with them and then swallowed and assimilated them.