COMMENT

"WHY JUST HAVE ONE?":[1] AN EVALUATION OF THE ANTI-POLYGAMY LAWS UNDER THE ESTABLISHMENT CLAUSE

TABLE OF CONTENTS

1. Michael McCarthy, *Local Ads Stir Up Utah Controversy*, USA TODAY, Jan. 2, 2002, at 7B (describing a beer advertisement that ran in Utah for Wasatch Beer entitled "Polygamy Porter").

I. INTRODUCTION

The 2002 Winter Olympics once again brought attention to the State of Utah and the practice of polygamy.[2] While the Mormon Church outlawed polygamy in 1890,[3] there are still tens of thousands of people in Utah and around the United States who practice polygamy.[4] Those that continue this practice are commonly referred to as fundamentalist Mormons who profess to follow the early doctrines of the Church of Jesus Christ of Latter-day Saints and the teachings of Joseph Smith.[5]

Polygamy is defined as having a plurality of wives or husbands at the same time; usually, the marriage of a man to more than one woman.[6] The offense of marrying one person when already legally married to another is known as bigamy.[7] In 1862, the Morrill Anti-Bigamy Act officially criminalized bigamy in the territories of the United States.[8] Subsequently, in 1878, the Supreme Court upheld the Morrill Act in *Reynolds v. United States*.[9] The effect was to eradicate polygamy.[10]

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2. *Id*. (noting that the practice of polygamy in Utah is a very controversial issue). Several local brewing companies and ski resorts added to the controversy just months before the 2002 Winter Olympics with ad campaigns poking fun at polygamy, causing many to revisit the renunciation and criminalization of polygamy. *Id*.

3. *See* Jessie L. Embry, *Polygamy*, in UTAH HISTORY ENCYCLOPEDIA (Allen Kent Powell ed.), *at* http://www.media.utah.edu/UHE/p/POLYGAMY.html (last visited Jan. 17, 2003) (reporting that, in 1890, Mormon Church President Wilford Woodruff ordered Mormons to refrain from "contracting any marriage forbidden by the law of the Land").

4. Tapestry Against Polygamy, *Frequently Asked Questions*, *at* http://www.polygamy.org/faq.shtml (last visited Jan. 17, 2003). Tapestry Against Polygamy, the leading anti-polygamy group, estimates that there are 100,000 polygamists in Utah alone. *Id*.

5. *Id*. (noting that Joseph Smith was a polygamist). Joseph Smith was the founder of the Mormon Church, and the Mormon faith is based on the belief that Smith was a prophet of God. KATHLEEN TRACY, THE SECRET STORY OF POLYGAMY 19 (2002). Smith officially established the Mormon Church in Fayette, New York, in 1830. *Id*. at 23.

6. BLACK'S LAW DICTIONARY 1180 (7th ed. 1999).

7. *Id*. at 154.

8. Morrill Anti-Bigamy Act, ch. 126, 12 Stat. 501 (1862) (punishing polygamy with a fine up to $500 and a maximum five-year prison sentence).

9. 98 U.S. 145, 166 (1878). The original statute, however, was amended to include both plural marriage and cohabitation under the definition of bigamy. *See* State v. Barlow, 153 P.2d 647, 650 (Utah 1944) (describing the process leading to the 1892 amendment). *But see* Polygamy.com, *Polygamy 101*, *at* http://www.polygamy.com/101.htm (last visited Jan. 17, 2003) (advocating that polygamy can be practiced without breaking the law simply by registering no more than one of the marriages with the state).

10. Morrill Anti-Bigamy Act, ch. 126 (stating that every person who is married and marries again will be "adjudged guilty of bigamy").

Tom Green, a fundamentalist in Utah, recently challenged the *Reynolds* decision.[11] Green, like other fundamentalists who oppose the basic tenets of the *Reynolds* decision,[12] argued that he simply acted within his religious beliefs, which are protected by the First Amendment of the U.S. Constitution.[13]

The Establishment Clause of the First Amendment reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[14] The *Reynolds* decision, which upheld an anti-polygamy statute, is the result of the U.S. Supreme Court's nineteenth century interpretation of the First Amendment.[15] The Court's interpretation has changed a great deal since 1878, reflecting the changing atmosphere and social mores of the nation.

This Comment proposes that the anti-polygamy statute upheld in *Reynolds v. United States*[16] would not survive the neutrality and general applicability analyses applied by the Supreme Court in modern Establishment Clause cases.[17] In order to withstand scrutiny under the Establishment Clause, the statute must be facially neutral and must not be the result of "[o]fficial action that targets religious conduct for distinctive treatment."[18] Part II of this Comment explores the history of the

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11. *See* Henry Mark Holzer, *Prosecution of Utah Polygamist May Endanger Religious Liberty of All*, INSIGHT MAG., June 18, 2001, at 45 (questioning whether members of a free society can "engage in any conduct they wish until their actions collide with the rights of others" and whether it is the government's role to stand aside until the rights of others are violated); Guy R. Burningham, *Sentencing Statement Read by Judge Burningham at the Trial of Bigamy Against Tom Green* (Aug. 24, 2001) (stating that it is the duty of the State of Utah to regulate the conduct of its people for the common good), *available at* http://www.polygamyinfo.com/judgestmt.htm (last visited Jan. 17, 2003).

12. *Reynolds*, 98 U.S. at 166–67 (holding that a party's religious beliefs cannot be accepted as a justification for committing an act made criminal by the law of the land).

13. Greg Burton, *Bigamy: End of Honeymoon?*, SALT LAKE TRIB., Apr. 23, 2000, at B1 (quoting Tom Green as saying, "'I am not afraid to go to jail or prison for my religious beliefs[;] . . . to do so would be to follow in the footsteps of some noble men'"), *available at* http://www.polygamy.com/News/Honeymoon.htm (last visited Jan. 17, 2003); *see also* U.S. CONST. amend. I.

14. U.S. CONST. amend. I.

15. *Reynolds*, 98 U.S. at 161–64 (noting that Congress was left "free to reach actions which were in violation of social duties or subversive of good order").

16. *Id.* at 167. The Court summarized the Reynolds situation as follows:

> Here the accused knew he had been once married, and that his first wife was living. He also knew that his second marriage was forbidden by law. When, therefore, he married the second time, he is presumed to have intended to break the law. And the breaking of the law is the crime.

Id.

17. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993) (concluding that the ordinance at issue clearly was passed to target a certain religion and was neither facially neutral nor passed under the guise of neutrality).

18. *Id.*

anti-polygamy statute and Utah's bid for statehood. Part III explains the purpose of the Establishment Clause and the setting in which it was passed. Part IV explores the neutrality principle embodied in the Establishment Clause as it applies to anti-polygamy statutes. Part V encompasses a discussion of the Sunday closing laws, demonstrating how a once religiously motivated law can evolve into a law with a secular purpose, thereby surviving constitutional scrutiny.[19] This Comment proposes that, like the Sunday closing laws, the anti-polygamy laws were religiously motivated.[20] But unlike the Sunday closing laws, the anti-polygamy laws do not have a secular purpose. Part VI delves into the question of whether there is an existing secular purpose for the anti-polygamy laws. While no secular purpose can be found to continue to uphold the laws banning polygamy, this Comment proposes that there are actually many societal benefits to polygamous relationships. Part VII concludes that *Reynolds* should be overturned and polygamists allowed to practice their age-old beliefs as long as those individuals are not a threat to society.

II. HISTORY OF THE MORRILL ANTI-BIGAMY ACT AND UTAH'S BID FOR STATEHOOD

It is imperative to understand the history and motivations for the anti-polygamy acts of the nineteenth century and Utah's struggle for statehood recognition from the U. S. government in order to comprehend that these laws were not passed with a neutral purpose, but rather were specifically aimed at eradicating polygamy and the Mormon Church.

In 1843, Joseph Smith[21] recorded section 132 of the *Doctrine and Covenants*,[22] a revelation that he received in the 1830s, which defended polygamy as a tenet of the Church of Jesus Christ of Latter-day Saints.[23] Section 132 begins with Joseph Smith addressing the doctrine of having "many wives and concubines."[24]

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19. *See* McGowan v. Maryland, 366 U.S. 420, 444 (1961) (holding that while religious in origin, the Sunday closing laws have a secular purpose today).

20. *See id.*

21. Refer to note 5 *supra* (discussing Joseph Smith's role as president and founder of the Mormon Church).

22. *Doctrine and Covenants* is the second edition of the *Book of Commandments* and contains revelations that Smith had after the *Book of Mormon* was originally published. TRACY, *supra* note 5, at 24–25.

23. *But see* Embry, *supra* note 3 (explaining that the majority of Latter-day Saints never practiced polygamy).

24. Church of Jesus Christ of Latter-day Saints, *Doctrine and Covenants, Section 132*, ¶ 1, *available at* http://scriptures.lds.org/dc/132/61-62 (last visited Jan. 17, 2003).

Paragraphs 61 and 62 of section 132 condone the practice of polygamy:[25]

> And again, as pertaining to the law of the priesthood—if any man espouse a virgin, and desire to espouse another, and the first give her consent, and if he espouse the second, and they are virgins, and have vowed to no other man, then is he justified; he cannot commit adultery for they are given unto him; for he cannot commit adultery with that that belongeth unto him and to no one else.[26]

Polygamy, however, was not openly practiced in the Mormon Church until 1852, when the Church preached and encouraged its followers to marry additional wives.[27] In 1852, Apostle Orson Pratt made the public speech defending polygamy at a time when there was no federal law prohibiting the practice.[28] It was after this speech that the anti-polygamy sentiment in the United States began to spread.

Despite growing opposition to polygamy, the Territory of Utah convened a constitutional convention to try to obtain statehood.[29] However, with growing anti-Mormon sentiment from the Republican Party, the delegates from the Utah territory decided against the petition for statehood at that time.[30] Congress's distaste for both the Mormons and the practice of polygamy became evident when it moved to outlaw polygamy in the territories in 1860 with a House Report on anti-polygamy.[31]

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25. *Id*. ¶¶ 61–62.

26. *Id*. ¶ 61. *But see* Church of Jesus Christ of Latter-day Saints, *Official Declaration-1,* [hereinafter *Official Declaration-1*] (repealing the part of section 132 that condones polygamy), *available at* http://scriptures.lds.org/od/1 (last visited Jan. 17, 2003). Official Declaration-1 was given by Wilford Woodruff, then-President of the Church of Jesus Christ of Latter-day Saints, who wrote:

> There is nothing in my teachings to the Church or in those of my associates . . . which can be reasonably construed to inculcate or encourage polygamy. . . . And I now publicly declare that my advice to the Latter-day Saints is to refrain from contracting any marriage forbidden by the law of the land.

Id.

27. Embry, *supra* note 3.

28. *Id*. (explaining that although a majority of Latter-day Saints never lived in polygamous relationships, those that held leadership positions in the community and the Church were encouraged to marry additional wives).

29. Soc'y of Separationists, Inc. v. Whitehead, 870 P.2d 916, 923, 926 (Utah 1993) (recognizing that the people of Utah were anxious to become a state because they thought they would be free from judicial interpretation of the First Amendment as the First Amendment had not yet been extended to the states through the Fourteenth Amendment).

30. *Id*. at 923.

31. CONG. GLOBE, 36th Cong., 1st Sess. 1409–10 (1860); *see also* Keith Jaasma, Note & Comment, *The Religious Freedom Restoration Act: Responding to Smith; Reconsidering* Reynolds, 16 WHITTIER L. REV. 211, 263 (1995) (noting the fact that

During the debate, many Congressmen expressed a similar sentiment against plural marriage.[32] Congressman John McClernand of Illinois remarked that plural marriage "is a reproach to the Christian civilization; and deserves to be blotted out."[33] According to Congressman McClernand, the sentiment of the majority was that Congress had a duty "to overrule and correct Mormon abuses and vices—to enforce among them the canons of an approved and Christian morality."[34] Congressman McClernand argued that Mormons should be "made subservient to the standard of Christian morality, as well as the legal authority of the Constitution."[35]

It was not until the Republican government of Abraham Lincoln took office that Congress was able to pass the first of many anti-polygamy laws.[36] In 1862, Congress passed a bill drafted by Vermont Congressman Justin Morrill.[37] The Morrill Anti-Bigamy Act was designed to "punish and prevent the Practice of Polygamy in the Territories of the United States."[38] The legislation prohibited plural marriage in the territories and disincorporated the Mormon Church—restricting the Church's ownership of property to $50,000.[39]

The Mormon Church wanted more desperately than ever for Utah to be admitted to the Union, because once Utah obtained statehood, the Mormon Church would not be governed by legislation aimed at the territories.[40] While it seemed that the

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polygamy was not outlawed everywhere within the United States leads to a stronger argument that Congress directed their legislation toward the Mormon Church).

32. CONG. GLOBE, 36th Cong., 1st Sess. 1514 (1860) (expressing trepidation toward the Mormon Church and Brigham Young). Referring to the Mormon Church, Representative McClernand stated that "[t]he civil authorities kept up there by [the U.S.] Government are powerless . . . and must continue to be so until a new and controlling social element is infused into Mormon society." *Id*.

33. *Id*. (adding that polygamy was a "scarlet whore").

34. *Id*. at 1515.

35. *Id*. (remarks of Representative Clark from Missouri). Representative Clark advocated putting the "unhappy and deluded" Mormon people under the control of another jurisdiction—"the standard of Christian morality, as well as the legal authority of the Constitution." *Id*.

36. RICHARD S. VAN WAGONER, MORMON POLYGAMY: A HISTORY 106–07 (2d ed. 1989) (proposing that President Lincoln was not interested in destroying the Mormon people but was simply interested in eradicating polygamy).

37. *Id*. at 107 (observing that the Morrill Act was signed into law on July 1, 1892); *see also* Louis Fisher, *Nonjudicial Safeguards for Religious Liberty*, 70 U. CIN. L. REV. 31, 38–39 (2001) (describing the passage of the Morrill Act in both the House and the Senate).

38. Morrill Anti-Bigamy Act, ch. 126, 12 Stat. 501 (1862).

39. *Id*.; *see also* Jaasma, *supra* note 31, at 267 (arguing that land ownership was reduced in order to prevent the Mormon Church from becoming more powerful).

40. Soc'y of Separationists, Inc. v. Whitehead, 870 P.2d 916, 926 (Utah 1993) (emphasizing that the Morrill Act was specifically aimed at the territories).

principal aim of the federal government was to eradicate polygamy, it was evident that the government had a growing disdain for the Mormon Church and its allegiance to church leaders.[41]

In 1867, the delegates from the Utah territory amended its 1862 constitution and introduced a bill in Congress in an effort to become part of the Union.[42] This draft amendment was a replica of the Nevada constitution; however, it did not purport to abolish polygamy.[43] Once again, admission to the Union was denied.[44]

In 1874, Congress passed the Poland Act[45] in response to the failure of judges in Utah to enforce the anti-polygamy acts.[46] The Poland Act shifted enforcement of the Morrill Act from local, predominantly Mormon judges to federal appointees.[47] However, the Mormons continued to practice polygamy, and in 1879, they sought to test the constitutionality of the anti-polygamy laws in *Reynolds v. United States*.[48] In *Reynolds*, the Supreme Court disagreed with the Mormon Church and declared that Congress had the right to legislate territorial law, upholding the 1862 Morrill Act.[49]

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41. VAN WAGONER, *supra* note 36, at 108 (quoting Vice President Schuyler Colfax as saying, "it is time to understand whether the authority of the nation or the authority of Brigham Young is the supreme power in Utah").

42. *Society of Separationists*, 870 P.2d at 924 (noting that the bill did not even make it past the House Committee on Territories).

43. John J. Flynn, *Federalism and Viable State Government—The History of Utah's Constitution*, 1966 UTAH L. REV. 311, 317–18 (noting that Congress had recently accepted the Nevada constitution, clearing the way for Nevada's admission to the Union).

44. *Society of Separationists*, 870 P.2d at 925 (stating that this attempt, like previous bids for statehood, failed in the House Committee on Territories).

45. Embry, *supra* note 3 (articulating that the Poland Act limited the probate courts to matters of estate settlement, guardianship, and divorce).

46. VAN WAGONER, *supra* note 36, at 107–08, 110.

47. Keith E. Sealing, *Polygamists Out of the Closet: Statutory and State Constitutional Prohibitions Against Polygamy Are Unconstitutional Under the Free Exercise Clause*, 17 GA. ST. U. L. REV. 691, 702–03 (2001) (noting that the anti-polygamy laws were not being enforced due to the number of Mormon judges who were turning their heads away from the issue).

48. 98 U.S. 145, 164 (1878) (upholding the criminalization of polygamy as against western religious ideals). George Reynolds, personal secretary to Brigham Young, offered to test the constitutionality of the anti-polygamy statute and married his second wife. Embry, *supra* note 3. Reynolds's conviction was upheld by the Utah Supreme Court and, in turn, by the U.S. Supreme Court. *Id.*

49. *Reynolds*, 98 U.S. at 162–68. *But see* VAN WAGONER, *supra* note 36, at 111 (explaining that although the Supreme Court upheld the constitutionality of the Morrill Act, members of the Mormon Church continued their practice of polygamy). Wilford Woodruff, then President of the Church of Latter-day Saints, asked, "what are we going to do under the circumstances? . . . God says, 'we shall be damned if we do not obey the law.' Congress says 'we shall be damned if we do' . . . Now who shall we obey? God or man? My voice is that we will obey God." *Id.* (quotation marks omitted).

As Utah's bid for statehood intensified, so did anti-polygamy sentiment in Congress.[50] Congress passed the Edmunds Act in 1882, which made convicted polygamists ineligible for public office and jury duty and deemed "unlawful cohabitation" a criminal offense.[51] However, the Edmunds Act proved ineffective in abolishing polygamy; in response, Congress enacted the Edmunds-Tucker Act in 1887.[52] The Edmunds-Tucker Act required plural wives to testify against their husbands, erased the loan institution that helped members of the Mormon Church immigrate to the United States from Europe, and provided a mechanism for the government to acquire property of the Church.[53] Following the enactment of the Edmunds-Tucker Act, the President of the Mormon Church said he would deny recommendations for plural marriages.[54]

Soon thereafter, pressure began mounting from Congress as well as the Supreme Court. In May of 1890, the Supreme Court upheld the government's seizure of church property in *Late Corp. of the Church of Jesus Christ of Latter-day Saints v. United States*, which required Mormon land to escheat to the United States.[55]

The next giant blow to the Mormon Church came legislatively with the pending passage of the Cullom-Strubble Bill, designed to strip all Utah Mormons of U.S. citizenship.[56] In light of the mounting legislation, the new church president, Wilford Woodruff, issued a press release in 1890 outlawing polygamy.[57]

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50. *See* VAN WAGONER, *supra* note 36, at 117.

51. Embry, *supra* note 3 (explaining that cohabitation was easier to establish because the prosecutor only had to prove that the couple lived together rather than that the couple was married).

52. *Id*.; *see also* Soc'y of Separationists, Inc. v. Whitehead, 870 P.2d 916, 927 n.22 (Utah 1993).

> [The Edmunds-Tucker Act provided] for the annulment of the charter of incorporation of the Church of Jesus Christ of Latter-day Saints and for the appointment of trustees to care for the property of the Church. All property not exclusively devoted to the worship of God was to be sold and the proceeds used for the support of the common schools in the territory.

Id.

53. Embry, *supra* note 3.

54. *But see* VAN WAGONER, *supra* note 36, at 129 (noting that President Grover Cleveland liked the Mormon people and on many occasions tried to resolve the polygamy issue).

55. 136 U.S. 1, 47 (1890) (holding that the Mormon Church was in violation of the Act that prohibited having real estate in excess of $50,000 and that therefore it was proper to return their land to the U.S. Government).

56. VAN WAGONER, *supra* note 36, at 137.

57. *Official Declaration-1*, *supra* note 26 (explaining that the Official Declaration provided that the Mormon Church would no longer teach plural marriage).

This Comment proposes that the nineteenth century legislative action examined above and the anti-polygamy laws resulting therefrom are unlikely to withstand twenty-first century Establishment Clause scrutiny.

III. THE ESTABLISHMENT CLAUSE

The Establishment Clause[58] was inspired by the lesson that, in the hands of government, what might begin as tolerant expression of religious views may end in indoctrination and coercion.[59] The Founding Fathers rejected the European legacy of preferring certain religious denominations and applied "secular liberty to the condition of religion and the churches."[60] Inherent in the thinking of the Revolutionary age was the idea that newly independent states should be powerless to tax their citizens for the support of a religious denomination to which the citizens did not belong.[61] In *The Federalist No. 51*, James Madison clearly dictated that freedom for all religions is best guaranteed by free competition between religions.[62] Madison advocated that freedom of religion can only be accomplished when legislators are required "to accord to their own religions the very same treatment given to small, new, or unpopular denominations."[63]

Under this historical pretext, the Supreme Court has clearly commanded that one religious denomination cannot be officially preferred over another.[64] When any type of government activity infringes on religion, it must be "secular in purpose, evenhanded in operation, and neutral in primary impact."[65] In *Lemon v.*

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58. U.S. CONST. amend. I (stating that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof").

59. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993) (articulating that even a "subtle departure[]" from neutrality constitutes a violation of the Establishment Clause and that the "Court must survey meticulously the circumstances of governmental categories to eliminate . . . religious gerrymanders" (quotation marks omitted)); Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 217 (1948) (stating that each individual retains the power to choose a religion free from governmental interference or coercion).

60. Larson v. Valente, 456 U.S. 228, 244–45 (1982) (revealing that most states abolished denominational establishment following the leaders of the American Revolutionary War).

61. *Id.* at 244.

62. *See id.* at 245 (interpreting *The Federalist No. 51* as assuming that every denomination would be equally free to practice its beliefs). *See generally* THE FEDERALIST NO. 51 (James Madison).

63. *Larson*, 456 U.S. at 245.

64. Sch. Dist. v. Schempp, 374 U.S. 203, 222 (1963) (emphasizing that the Establishment Clause prevents powerful sects from bringing about a fusion of government and religion).

65. Gillette v. United States, 401 U.S. 437, 450 (1971) (noting that the Court must

Kurtzman,[66] the Supreme Court promulgated a three-prong test for the courts to follow when determining whether a state action impinges upon the right of freedom from establishment.[67] In order to withstand constitutional scrutiny under *Lemon*, the challenged regulation must satisfy the following three requirements: (1) it must have a secular purpose; (2) its primary effect must neither advance nor inhibit religion; and (3) it must not create excessive government entanglement with religion.[68] The appropriate application of the *Lemon* test ensures that "[n]either a state nor the Federal Government can set up a church . . . , pass laws which aid one religion, . . . prefer one religion over another," or punish a person "for entertaining or professing religious beliefs or disbeliefs."[69] The Establishment Clause is intended to erect "a wall of separation between church and State."[70]

The Establishment Clause is grounded in a concern over a merger between governmental and religious powers.[71] Its deeply rooted jurisprudence provides that no state may pass laws that aid one religion or prefer one religion over another.[72] The country was founded upon the ideal that there should be no favoritism amongst the different sects of religion.[73] The first prong of the *Lemon* test is the threshold issue in any Establishment Clause analysis.[74] Consequently, if the Supreme Court is confronted with a challenge to the deeply rooted principle of government

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"draw lines" to indicate the boundaries of the Establishment Clause).

66. 403 U.S. 602 (1971).

67. *Id*. at 612–13.

68. *Id*.

69. Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947) (reaffirming that the "structure of our government has . . . . secured religious liberty from the invasions of the civil authorit[ies]").

70. Reynolds v. United States, 98 U.S. 145, 164 (1878) (describing the adoption process of the First Amendment of the Constitution).

71. Marci A. Hamilton, *The First Amendment's Challenge Function and the Confusion in the Supreme Court's Contemporary Free Exercise Jurisprudence*, 29 GA. L. REV. 81, 119 (1994) (arguing that the Establishment Clause contemplates a balanced division between people, religion, and government).

72. *Everson*, 330 U.S. at 15 (explaining that no person can be forced by the government to believe in a certain religion or to abandon their respective religious beliefs).

73. Gillette v. United States, 401 U.S. 437, 450 (1971) (describing that government is prohibited from "abandoning secular purposes in order to put an imprimatur on one religion").

74. *See* Sch. Dist. v. Schempp, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring) (asserting that there should be no favoritism among the sects of religion); *see also Everson*, 330 U.S. at 15 (commenting that the structure of the government, in order to preserve civil liberties, necessitates religious liberty being free of interference from government).

neutrality in the religious arena, the Court will treat the law as suspect and will strictly apply the neutrality principle.[75]

IV. NEUTRALITY ANALYSIS

The concept of neutrality, as it applies to polygamy, centers around a strict application of the first prong of the *Lemon* test—the challenged regulation must have a secular purpose.[76] A thorough analysis begins with facial neutrality; however, this is not a dispositive inquiry, as an "official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality."[77] Therefore, the analysis must go beyond facial neutrality and consider the object of the legislation in question.[78] If the object of a law is to infringe upon a group because of its religious motivation, the law is not neutral.[79]

A. Facial Neutrality

The first consideration in a neutrality analysis is facial neutrality.[80] A law is not facially neutral if it refers to a religious practice without secular meaning.[81]

The Morrill Act, which was upheld by the Supreme Court in *Reynolds v. United States*,[82] specifically makes reference to the Church of Jesus Christ of Latter-day Saints and the practice of polygamy.[83] It nullifies any acts passed by the legislative assembly of the Territory of Utah that "establish, support, maintain, [or] shield . . . polygamy."[84]

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75. Larson v. Valente, 456 U.S. 228, 246 (1982) (holding that this strict scrutiny standard must be used in order to have true religious liberty).

76. *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

77. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993) (explaining that the Court must look to any "departure from neutrality" in the application of the particular statute).

78. Bd. of Westside Cmty. Schs. v. Mergens, 496 U.S. 226, 248 (1990) (holding that the law must be neutral and not endorse one religion over another).

79. *Lukumi*, 508 U.S. at 540–42.

80. *See id.* at 533.

81. *Id.*

82. 98 U.S. 145, 164–66 (1878). This holding is rather ironic because it appears the Court was motivated to eradicate polygamy based upon established Christian principles.

83. Morrill Anti-Bigamy Act, ch. 126, 12 Stat. 501 (1862) (providing in section 2 that any act passed by the Church of Jesus Christ of Latter-day Saints that allows polygamy will be annulled). President Lincoln signed the bill into law on July 1, 1862, in an effort to prevent and punish the practice of polygamy. VAN WAGONER, *supra* note 36, at 107.

84. Morrill Anti-Bigamy Act, ch. 126, § 2.

The very language used in the text of the Act is a violation on its face of the first prong of the *Lemon* test.[85] While the first section of the statute refers to any person and generally to any jurisdiction of the United States,[86] the second section strictly targets Utah and the Mormon Church.[87] Further, section 3 of the Act restricts the amount of property that any religious group may hold in any of the territories.[88] While section 1 alone could be viewed as secular, when viewed as a whole with sections 2 and 3, it is clearly suspect. If the Court does not view this statutory language as conclusive evidence of facial discrimination, it must look beyond the text to determine whether the object of the Act was to prefer one religion to another.[89]

B. A Look Beyond Facial Neutrality: The Modern Supreme Court's Neutrality Application

As discussed previously, mere compliance with facial neutrality will not shield a regulation from constitutional scrutiny; rather, it is necessary to explore beyond facial neutrality.[90] Facial neutrality is not determinative in an Establishment Clause analysis,[91] as the Establishment Clause is aimed at restricting even "subtle departures from neutrality."[92]

Modern Supreme Court decisions are particularly instructive as to which factors to consider in determining whether a statute was created for the purpose of religious gerrymanders.[93]

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85. *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

86. Morrill Anti-Bigamy Act, ch. 126.

87. *Id.* § 2.

88. *Id.* § 3; *see also* CONG. GLOBE, 37th Cong., 2d Sess. 2769 (1862) (recognizing that Missouri Senator John Phelps had serious misgivings about limiting the amount of real estate that a religious organization could own because he was certain that other religious organizations throughout the country owned large amounts of real estate). Senator Phelps stated, "I think . . . that this is rather hasty legislation. I should not be at all surprised if it were ascertained that the Catholic Church in the city of Santa Fe owns real estate to the amount of more than fifty thousand dollars." *Id.*

89. Gillette v. United States, 401 U.S. 437, 452 (1971) (explaining that "[t]he question of governmental neutrality is not concluded by the observation that [the statute] on its face makes no discrimination between religions, for the Establishment Clause forbids subtle departures from neutrality, 'religious gerrymanders,' as well as obvious abuses").

90. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993) (disposing of the defendant's argument that the inquiry of the Establishment Clause must end with the text of the law at issue).

91. *Id.*

92. *Id.* (holding that governmental neutrality is not concluded by looking at the statute on its face; rather, the Court must look at "religious gerrymanders," and obvious abuses).

93. Walz v. Tax Comm'n, 397 U.S. 664, 696 (1970) (holding that in determining whether a statute satisfies the neutrality requirement, the court must look to all

Neutrality requires an "equal protection mode of analysis."[94] In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Supreme Court outlined some relevant factors to consider when determining the governmental objective of particular legislation.[95] These factors include the historical background, events leading to the enactment or official policy in question, and any legislative or administrative history, including statements made by the decisionmaking body.[96] Beyond the facial examination of the text, each one of these factors is designed to aid in determining if the object of the regulation or ordinance is discriminatory.[97]

1. The Supreme Court's Neutrality Analysis in Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah. In *Lukumi*, the Supreme Court analyzed an ordinance passed by the City of Hialeah, Florida, in order to determine whether the ordinance departed from neutrality and targeted religious conduct for distinctive treatment.[98] While the Court ultimately chose to analyze the ordinance under the Free Exercise Clause, it specifically noted that the neutrality analysis under both the Free Exercise Clause and the Establishment Clause is the same.[99]

In *Lukumi*, the Santeria religious group announced its plan to open a church in Hialeah in April of 1987.[100] The basis of the Santeria religion is the "nurture of a personal relation with the *orishas*, and one of the principal forms of devotion is an animal sacrifice."[101] Subsequently, the city council passed four ordinances in which it addressed the issue of animal cruelty.[102] The first

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circumstances pertaining to the particular legislation to determine if it creates religious gerrymanders).

94. *Id.*

95. *Lukumi*, 508 U.S. at 540 (using both direct and circumstantial evidence to determine whether the ordinance had a discriminatory object).

96. *Id.*; *see also* Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977) (detailing that regardless of facial neutrality, a statute might have a discriminatory purpose if it is evident from the state action).

97. *Lukumi*, 508 U.S. at 540.

98. *Id.* at 534–35.

99. *Id.* at 531–32 (explaining that both the Free Exercise Clause and the Establishment Clause require an equal protection mode of analysis).

100. *Id.* at 525–26 (revealing that it was the president of the Santeria church, Ernesto Pichardo, who wanted to bring the practice of the Santeria faith to the public's attention).

101. *Id.* at 524. Orishas are Santerian spirits. *Id.*

102. *Id.* at 527–28. The city council initiated an emergency session in response to the concerns held by many Hialeah residents toward the potential opening of a Santeria church. *Id.* at 526.

ordinance defined "sacrifice" and restricted its application to any individual or group that "kills, slaughters or sacrifices animals for any type of ritual, regardless of whether or not the flesh or blood of the animal is to be consumed."[103] The ordinance contained an exemption for licensed establishments that specifically raise animals for food purposes.[104] The second ordinance made it unlawful for any "person, persons, corporations or associations to sacrifice any animal within the corporate limits of the City of Hialeah, Florida."[105] The third ordinance prohibited the slaughter of animals outside the areas zoned for slaughterhouses.[106] Finally, the fourth ordinance incorporated the Florida animal cruelty statute that punishes the unnecessary killing of animals.[107]

The Supreme Court determined that these ordinances were enacted "because of" their suppression of the Santeria religion.[108] The Court found that the city had made no attempt to pass such laws until June 1987—just two short months after the church announced its plans to open a worship center in Hialeah.[109] The minutes and taped excerpts from the June session indicated hostility from residents, members of the city council, and other city officials toward the Santeria religion and the practice of animal sacrifice.[110] Furthermore, a member of the city council was quoted as saying that, in pre-revolution Cuba, "people were put in jail for practicing this religion."[111] The councilman added that if the Santeria religion could not be practiced in Cuba, "why bring it to this country?"[112] Various other Hialeah officials made similar comments.[113] The chaplain of the Hialeah Police Department described the Santeria religion as "an abomination to the Lord"

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103. *Id*. at 527 (defining sacrifice as "to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption").

104. *Id*. at 527–28.

105. *Id*. at 528.

106. *Id*. at 528, 539–40 (acknowledging that this particular ordinance applied to a substantial amount of non-religious conduct). While the Court did not find ordinance 87-72 to be overbroad, it treated all the ordinances as a group. *Id*. at 539–40.

107. *Id*. at 537 (explaining that the killing of animals for religious reasons is unnecessary, whereas other animal killings are not included in the prohibition). The Court found this ordinance suspect because it required individual governmental inquiry into every type of animal killing. *Id*.

108. *Id*. at 540.

109. *Id*. at 540–41.

110. *Id*. at 541 (noting that the crowd at the public session applauded when council members criticized the Santeria religion).

111. *Id*.

112. *Id*. (remarks of Councilman Martinez).

113. *Id*.

and recommended that the city council "not . . . permit this Church to exist."[114]

After completing its neutrality inquiry, the Supreme Court determined that the object of the ordinances was to suppress the Santeria religion.[115] The actions of the legislative body and the historical context in which the ordinances were passed disclosed animosity towards Santeria religious practices.[116] Thus, the Supreme Court held that the ordinances were not neutral and struck them down as unconstitutional.[117]

2. The Lukumi *Neutrality Analysis as It Applies to the Anti-Polygamy Acts*. The climate of hostility that existed between the City of Hialeah and the Santeria religion is very similar to that between the U.S. government and the Mormon Church. The anti-polygamy Morrill Act, like the ordinances in Hialeah, was enacted "because of," not "in spite of," its suppression of religious beliefs.[118] It is evident from the historical background, legislative history, and statements by members of the decisionmaking body that the anti-polygamy laws were not passed under a guise of neutrality. Arguably, if the present Supreme Court were to evaluate the *Reynolds* decision and the anti-polygamy acts in light of the analysis used in *Lukumi*,[119] the acts in *Reynolds*[120] likewise would have been found unconstitutional.

Each anti-polygamy statute passed by Congress specifically targeted Utah and the Mormon Church. It is evident that Congress passed such acts in response to the Mormon Church's public acknowledgement of polygamy in 1854,[121] much like the ordinances in Hialeah were passed in response to the announcement that a Santeria church was being established in Hialeah.[122] Congress's views towards polygamy and the Mormon

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114. *Id.* at 541–42. The chaplain also maintained that the practice of Santeria was "foolishness" and the worship of "demons." *Id.*

115. *Id.* at 542.

116. *Id.* (noting that the city attorney commented that the community would not "tolerate religious practices which are abhorrent to its citizens").

117. *Id.*

118. *See id.* at 540 (discounting the respondents' argument that they were having considerable problems with animal sacrifices prior to the decision to open a Santeria church in Hialeah).

119. Refer to notes 91–97 *supra* and accompanying text (using an equal protection mode of analysis consisting of both direct and circumstantial evidence to evaluate "neutrality in its application").

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

121. Refer to note 28 *supra* and accompanying text (explaining that in 1852, Apostle Orson Pratt made a speech defending the practice of polygamy).

122. Refer to notes 108–09 *supra* and accompanying text (recounting how the City of Hialeah failed to pass any such ordinances until the Church of the Lukumi Babalu Aye

Church became apparent when it moved to outlaw polygamy in the territories and disincorporate the Mormon Church.[123]

The non-neutral purpose of the anti-polygamy acts can be deciphered from the legislative history just as the Supreme Court did in *Lukumi*.[124] The Court in *Lukumi* was motivated by the events leading up to the enactment of the ordinances.[125] The minutes of the city council sessions detailed the hostility of residents and members of the city council.[126] Specifically, one city council member was quoted as saying, "the Santeria are in violation of everything this country stands for."[127] Other city officials made similar comments and offered to help the people of the Santeria religion find Jesus Christ.[128]

The Court found this pattern of "animosity" toward Santeria as evidence that the city targeted the Santeria religion.[129] The comments by city officials showed an intent to proscribe a certain religion and to effectively denounce the Santeria faith, referring specifically to the Santeria religion as being abhorrent to the Bible and teachings of Jesus Christ.[130] These comments clearly evidenced a preference against the Santeria faith. The law was passed solely to stop Santeria followers from slaughtering animals during their religious ceremonies.[131] The ordinances were enacted "because of" religious motivation.[132]

Comparably, Congress passed the anti-polygamy Morrill Act in response to Utah's bid for statehood. Congress would not

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announced its plans to open a church in Hialeah).

123. *See* Morrill Anti-Bigamy Act, ch. 126, § 2, 12 Stat. 501 (1862).

124. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 540–41 (1993).

125. *Id.* at 540–43.

126. *Id.* at 541 (explaining that the historical background preceding the enactment of the Hialeah ordinance served as circumstantial evidence of a hostility toward the Santeria religion).

127. *Id.* Refer to notes 111–14 *supra* and accompanying text (noting that some Hialeah city officials believed that the Santeria religion should not have been legal in the United States because it was not legal in Cuba).

128. *Lukumi*, 508 U.S. at 542 (demonstrating the imposition of several city officials' personal religious views in an effort to criminalize the Santeria religious practice).

129. *Id.* (holding that the neutrality inquiry led to the conclusion that "[t]he ordinances had as their object the suppression of religion").

130. *Id.* at 541 (quoting one councilman as saying that "[t]he Bible says we are allowed to sacrifice an animal for consumption . . . but for any other purposes, I don't believe that the Bible allows that").

131. *See* Todd M. Gillett, Note, *The Absolution of* Reynolds*: The Constitutionality of Religious Polygamy*, 8 WM. & MARY BILL RTS. J. 497, 525 (2000) (declaring that in *Lukumi*, "[t]he Court based its decision on the fact that the law was passed in response to the church's rituals and burdened Santeria adherents but almost no others" (quotation marks omitted)).

132. *Lukumi*, 508 U.S. at 540.

approve Utah's constitution unless the territory agreed to outlaw polygamy.[133] Numerous comments by lawmakers evidenced a distaste for polygamous relationships and a general feeling that plural marriage "is a reproach to the Christian civilization."[134] Members of Congress argued vociferously to "overrule and correct Mormon abuses and vices" in order "to enforce . . . Christian morality."[135] The acts Congress passed to outlaw polygamy were carefully drafted so as to proscribe one of the basic tenets of the fundamentalist Mormon religion—polygamy.

Sections 2 and 3 of the Morrill Act provide further evidence of a congressional intent to strike at the heart of the Mormon Church and the practice of polygamy.[136] Section 2 not only makes the practice of polygamy illegal in the territories, but also disincorporates the Church of Jesus Christ of Latter-day Saints.[137] This action, like that of the ordinances in *Lukumi*, might be viewed as overbroad.

In *Lukumi*, the Supreme Court found that the ordinances prohibited all animal sacrifices, including those that occurred in licensed, inspected, and zoned slaughterhouses, thus prohibiting activity even when it would not affect private health.[138] The Court did not focus on the "harm to private health" that came from the alleged sacrifices, but instead prohibited all Santeria rituals.[139] Similarly, section 2 of the Morrill Act not only outlawed polygamy—the harm with which Congress was concerned—but also unnecessarily disincorporated the Church of Jesus Christ of Latter-day Saints.[140] This section of the Act would certainly not survive the same neutrality analysis promulgated in *Lukumi*.[141]

Section 3 was an attempt to undermine the influence of the Mormon Church by restricting the amount of land that it could acquire.[142] The Act specifically provided that a "corporation or

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133. Refer to note 43 *supra* and accompanying text (noting that Utah tried to submit a constitution comparable to the recently adopted Nevada constitution; however, this new constitution did not purport to eradicate polygamy).

134. CONG. GLOBE, 36th Cong., 1st Sess. 1514 (1860) (remarks of Illinois Representative John McClernand).

135. *Id.* at 1515.

136. Morrill Anti-Bigamy Act, ch. 126, §§ 2–3, 12 Stat. 501–02 (1862).

137. *Id.* § 2.

138. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542 (1993) (rejecting the district court's conclusion that the ordinance could not be drawn any more narrowly).

139. *Id.* at 538–39 (asserting that if improper disposal of organic garbage was the city's concern, then it could have adopted a general regulation instead of opting to tailor its ordinance to target the Santeria faith).

140. Morrill Anti-Bigamy Act, ch. 126, § 2.

141. *See Lukumi*, 508 U.S. at 542.

142. Morrill Anti-Bigamy Act, ch. 126, § 3.

association for religious or charitable purposes" was not allowed to "acquire or hold real estate in any Territory of the United States during the existence of the territorial government of a greater value than fifty thousand dollars."[143] The object of this legislation was to prevent the accumulation of wealth in theocratic institutions, further evidencing the animosity Congress held against the Mormon Church.[144] Under the analysis promulgated in *Lukumi*, restricting churches from acquiring property in the territories in response to a religious practice would likely be viewed as non-neutral and as directly targeting Mormon religious practices.[145] Further, when all the sections of the Act are taken together, just as the ordinances were in *Lukumi*, they clearly show disdain for the Mormon Church.

The Supreme Court in *Reynolds v. United States*, after a long historical survey of polygamy, concluded that polygamy had always been "an offence against society, cognizable by the civil courts and punishable with more or less severity."[146] The Court concluded with the following slippery slope argument to bolster its decision to uphold the Morrill Act: "Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice?"[147] But the Court's analysis is flawed. If the purpose of the law is to outlaw a religious activity, then the purpose cannot be ignored. Murder, unlike polygamy, is the most heinous crime and is illegal in every society. The Court in *Lukumi* had occasion to evaluate the odious crime of animal sacrifice.[148] Irrespective of how offensive the sacrifice of animals is to society, the Court looked

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143. *Id*. (detailing that all property acquired in violation of the Act would be forfeited).

144. Jaasma, *supra* note 31, at 266–67 (advocating that the purpose of the Act was to undermine the influence of the Mormon Church and was not religiously neutral because the Catholic Church in Santa Fe owned more than $50,000 in property).

145. *Lukumi*, 508 U.S. at 542 (holding that the ordinances enacted in Hialeah were not secular in their purpose and had as their object the suppression of religion).

146. Reynolds v. United States, 98 U.S. 145, 164–65 (1878) (finding that polygamy has always been "odious" in the northern and western European nations and, until the formation of the Mormon Church, was only practiced by Asiatic and African people). This finding is rather ironic due to the fact that there are now millions of both Asiatic and African people living within the borders of the United States.

147. *Id.* at 165–66 (advocating that marriage is contractual and hence governable by civil law). The Court finished this slippery slope argument with a second question: "If a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of civil government to prevent her [from] carrying her belief into practice?" *Id.* at 166.

148. *Lukumi*, 508 U.S. at 535 (noting that the regulation of animal sacrifices dealt with many societal concerns unrelated to "religious animosity" but that, when viewed together, all the ordinances revealed an "object remote from these legitimate concerns").

solely at the law and determined that it was not neutral, but rather specifically aimed at the Santeria religion.[149]

Polygamy, on the other hand, is legal in many countries and practiced by many religions.[150] Both the legislative history and historical evidence clearly establish that the anti-polygamy laws were particularly aimed at the Mormon Church.[151] Following the principles outlined in *Lukumi*,[152] the present Supreme Court would be inclined to hold that the Morrill Act was not passed under a guise of neutrality. If the law was enacted to target religion, the Court would be compelled to find that the statute fails the neutrality requirement and is not secular in purpose.

While it is evident that the anti-polygamy laws were not enacted with a secular purpose, this is not conclusive evidence of an Establishment Clause violation. If the government can show that the challenged regulation advances a legitimate secular interest, apart from discrimination, then the regulation may be enforced over an Establishment Clause challenge.[153]

The Sunday closing laws provide an example of religiously motivated regulation that was found to advance a secular purpose, thereby ensuring enforceability against a constitutional challenge.[154]

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149. *Id.* at 542 (holding that the neutrality analysis led to the conclusion that the ordinances were drafted to suppress religion).

150. *See* Jaasma, *supra* note 31, at 263 n.351 (advocating that at the time the anti-polygamy acts were passed, polygamy was not prohibited by New York law because adultery was not a crime); *see also* Zeeshan Hasan, *Polygamy, Slavery and Qur'anic Sexual Ethics*, STAR WEEKEND MAG., Aug. 30, 1996 (explaining that the Koran allows up to four wives and arguing that polygamy is unquestionably moral, but cautioning that a man should take no more wives than he can treat with equity), *available at* http://www.shobak.org/islam/polygamy.html (last visited Jan. 17, 2003). Islam does not outlaw polygamy; however, it regulates and restricts its use. *Id.* In 2001, the Colombian government made polygamy legal. B.A. Robinson, *The Mormon Church: Polygamy*, *at* http://www.religioustolerance.org/lds_poly.htm (last visited Jan. 17, 2003). There is speculation that followers of the Mormon Church in Colombia will begin to take multiple wives. *Id.*

151. *See* VAN WAGONER, *supra* note 36, at 116 (noting that in President Arthur's first annual message to Congress, he denounced the Mormon Church and polygamy as "revolting to the moral sense of Christendom").

152. *Lukumi*, 508 U.S. at 540 (explaining that a relevant neutrality inquiry examines the historical background and the specific acts leading up to the challenged legislation).

153. McGowan v. Maryland, 366 U.S. 420, 462 (1961) (holding that many civil regulations "harmonize[] with religious canons" and serve a secular interest enforceable against those who proceed against them).

154. *Id.* at 473–74 (declaring that the Sunday laws were products of the English establishment and their religious inspiration, but noting that there are modern justifications for the once religiously motivated laws).

V. SUNDAY CLOSING LAWS

Sunday closing laws, or "blue laws,"[155] are a collection of statutes aimed at regulating public and private conduct relating to Sabbath observance.[156] The first Sunday regulation was promulgated in 1448 by Henry VI, giving the people one day of the week to repent for the lying and cheating that took place in business transactions during the regular working days.[157] Edward VI enacted an ordinance one hundred years later that provided for a day in which the people would pray to God.[158] Similarly, Charles I announced that the "Lord's Day" was a principal part of service to God and that nothing was more holy than sincere worship to God.[159]

These laws demonstrated the English interest in preserving the doctrines of the Christian church and allowed its people a mandatory day of mental and physical rejuvenation.[160] However, careful study of the development of the American colonies reveals that these considerations of relaxation and mental health days were not truly the driving force behind the Sunday statutes.[161]

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155. Most scholars have determined that the term "blue law" referred to the color of the paper upon which the laws were printed. DAVID N. LABAND & DEBORAH HENDRY HEINBUCH, BLUE LAWS: THE HISTORY, ECONOMICS, AND POLITICS OF SUNDAY-CLOSING LAWS 8 (1987) (explaining that at the time of the enactment, there were no printing presses and the citizens were given written copies of the laws). Other scholars believe that the term "blue laws" refers to the strictness with which the laws were to be observed and that "blue" referred to something that was rigidly moral. *Id.*

156. Andrew J. King, *Sunday Law in the Nineteenth Century*, 64 ALB. L. REV. 675, 676 (2000) (detailing that "blue laws" banned Sunday work, travel, and recreation).

157. *McGowan*, 366 U.S. at 470–71 (Frankfurter, J., concurring) (explaining that the Sunday laws were invoked so that citizens could repent for the offenses done to the "Almighty God" during the other days of the week).

158. *Id.* at 471.

159. *Id.* at 471–73. In 1677, the Restoration Parliament adopted the statute of Charles II. *See* King, *supra* note 156, at 683 (noting that the statute promulgated by Charles II became what is still the Sunday law of Britain and the model for the eighteenth century Sunday laws). The statute provided:

> no Tradesman, Artificer, Workman, Labourer or other Person whatsoever, shall do or exercise any worldly Labour, Business or Work of their ordinary Callings, upon the Lord's Day, or any part thereof . . . and that no Person or Persons whatsoever, shall publickly cry, shew forth, or expose to Sale, any Wares, Merchandizes, Fruit, Herbs, Goods or Chattels whatsoever, upon the Lord's Day.

McGowan, 366 U.S. at 472 (quotation marks omitted).

160. *McGowan*, 366 U.S. at 483 (Frankfurter, J., concurring) (arguing that Sundays had been set apart by religion long before the establishment of modern governments).

161. Susane B. Berger, *The Less We Emphasize the Christian Religion, the Further We Fall into the Abyss of Poor Character and Chaos*, 22 T. MARSHALL L. REV. 233, 236 (1997) (noting that after Virginia's prohibition of Sunday labor in 1610, most American colonies soon followed suit).

In the seventeenth and early eighteenth centuries, the Sunday closing laws were enacted for religious purposes.[162] As the American colonial settlements developed, Sunday regulations became commonplace.[163] The Sunday legislation enacted by Charles II remained in effect in the colonies until the American Revolution.[164] After the American Revolution, many states enacted statutes to control vices and immorality.[165] In many instances, Sunday closing laws were combined with these vice statutes in order to maintain a "pure" society based on Christian principles.[166]

The Sunday closing laws were seriously enforced, and the punishments were severe.[167] Even President George Washington was charged with violating the law for traveling on a Sunday.[168] Willfully profaning the Lord's Day carried a maximum penalty of death.[169] Despite the severe punishments, many citizens continued to disobey the Sunday laws.[170] The text of the laws indicated a religiously motivated purpose and an intent to impose Christian principles and observances—mainly the Sabbath—upon the communities.[171]

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162. *McGowan*, 366 U.S. at 487. The preambles to the early Sunday laws recited that profaning the Lord's Day must be suppressed and that keeping the Lord's Day is a "principal part of true service of God." *Id.* The New Haven Code of 1656 provided that anyone who "prophane[d] the Lord's Day" was subject to a fine, imprisonment, or corporal punishment. *Id.* at 488 n.52. The corresponding Pennsylvania statute declared that "[e]very first day of the week, called the Lord's day, People shall abstain from their usual . . . labour." *Id.* at 488 n.51.

163. *Id.* at 484 (revealing that eventually every colony had a law banning labor on Sundays).

164. King, *supra* note 156, at 683 (illustrating that the Sunday regulations were as religiously motivated in the colonies as they were in England); *see also* LABAND & HEINBUCH, *supra* note 155, at 29–30 (noting that the statute enacted by Charles II provided the basis for most Sunday legislation in the United States).

165. King, *supra* note 156, at 683–84 (observing that less than half of the colonies exempted religious groups that observed a Saturday Sabbath from their newly enacted Sunday laws).

166. *Id.* at 683 & n.61 (noting that the Pennsylvania Sunday law was lumped together with other statutes outlawing socially deviant crimes). *But see McGowan*, 366 U.S. at 486 & n.44 (noting that by 1789, Rhode Island and Virginia were the only states to recognize the complete separation of church and state).

167. LABAND & HEINBUCH, *supra* note 155, at 37–39.

168. *Id.* at 38.

169. *Id.*

170. *Id.* at 37–38 (listing various offenses for which citizens were convicted for violating the Sunday laws). Examples included activities such as "digging potatoes in [their] field[s]," "working in [the] garden," "gathering early peaches which were overripe and were in danger of spoiling," and "painting the railroad bridge." *Id.*

171. *Id.* at 39 (addressing the irony associated with the colonists' desire to be free from the establishment of the Church of England while harboring intolerance for any religion other than their own). For example, the relevant New Jersey statute stated, "it hath been the practice of all societies of Christian professors to set aside one day in the

The Supreme Court first considered the constitutionality of the Sunday closing laws in 1885 in *Soon Hing v. Crowley*.[172] However, it was not until May of 1961 that the Court ruled decisively on the issue when it decided *Two Guys from Harrison-Allentown, Inc. v. McGinley*[173] and *McGowan v. Maryland*,[174] two very important historic decisions.

In both *McGowan* and *McGinley*, Sunday retailers challenged statutes that banned certain activities on Sunday.[175] The retailers asserted that the statutes had no purpose other than to consecrate a day that most Christians observed as the Sabbath.[176] Primarily, they viewed the statutes as having a religious purpose.[177] After engaging in a long historical diatribe, the Court acknowledged the religious origins of these laws but indicated that the statutes had lost much of their religious "flavor" over time.[178] Specifically, the Court stated:

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week for the worship and service of God." *Id*. at 36. The Georgia statute provided that, "nothing [is] more acceptable to God than the true and sincere worship and service . . . and every person . . . shall on every Lord's day, apply themselves to the observation of the same." *Id*. at 34. Further, the Pennsylvania statute stated that "according to the example of the primitive Christians, and for the ease of the Creation, Every first day of the week, called the Lord's day, People shall abstain from . . . labour." *Id.* at 33.

172. 113 U.S. 703, 710 (1885) (finding that Sunday regulations are important to protect against the "moral debasement" that comes from working all week with no rest). The Court in *Soon Hing* did not directly rule on the prohibition of labor on Sunday. *Id*. at 707–08.

173. 366 U.S. 582 (1961).

174. 366 U.S. 420 (1961).

175. *See id*. at 469 (revealing that the retailers opposed the Sunday statute because it inevitably discriminated between religions by choosing a day in which Christians worship and do not work). In *McGowan*, the employees of a Maryland department store were fined for selling on Sunday goods that were not included in the limited group of items that could be sold on that day. *Id*. The items exempted from the statute included tobacco products, milk, bread, fruit, gasoline, oils, greases, drugs, medicines, newspapers, and periodicals. *Id*. at 535–36. In *McGinley*, the plaintiffs operated a large discount department store. *McGinley*, 366 U.S. at 585. The county district attorney prosecuted several of the plaintiff's employees for violating the statute's prohibition of working on Sunday. *Id*.

176. *See McGowan*, 366 U.S. at 467–68 (arguing that the Sunday statutes are prejudicial because Orthodox Jewish retailers close their businesses on Saturday in observance of their faith while they are compelled to close again on Sunday in compliance with the law).

177. *Id*. at 513 (noting the litigants' argument that the statutory reference to the terms "Lord's Day" and "Sabbath" showed that religion was apparent on the face of the statute).

178. *Id*. at 434. The *McGowan* Court recognized the existence of "further secular justifications . . . for making Sunday a day of rest, a day when people may recover from the labors of the week just passed" and allowing them to "physically and mentally prepare for the week's work to come." In *McGinley*, the Court relied on its reasoning in *McGowan* to fully develop its analysis, writing a separate opinion solely to highlight the differences between the Pennsylvania and Maryland statutes at issue. *See McGinley*, 366 U.S. at 584–85. The statutes in *McGowan* and *McGinley* differed mainly in non-substantive ways; however, the religiously oriented backgrounds of both statutes were very similar. *See id*.

> In light of the evolution of our Sunday Closing Laws through the centuries, and of their more or less recent emphasis upon secular considerations, it is not difficult to discern that as presently written and administered, most of them, at least, are of a secular rather than of a religious character, and that presently they bear no relationship to establishment of religion as those words are used in the Constitution of the United States.
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> . . . The present purpose and effect of most of them is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals. To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and State.[179]

Further support for Sunday closing laws came from both non-religious and economic groups.[180] Many states had also changed, amended, and struck down numerous portions of their Sunday laws to incorporate non-religious motivations for maintaining Sunday legislation.[181] This evidence bolstered the Court's argument that the Sunday closing laws had evolved from entirely religious sanctions into laws furthering secular ends.[182]

The legal analysis the Supreme Court undertook in reviewing the Sunday closing laws should be the same analysis applied in determining the constitutionality of the anti-polygamy laws at issue in *Reynolds*.[183] The rationale for this proposition lies in the undeniable similarity between the anti-polygamy statutes and the blue laws, both of which were religiously motivated. The legislative history of the anti-polygamy laws and the history of Utah's bid for statehood are conclusive evidence of religious motivation.

The major difference between the two opinions concerned exemptions from the general proscription of Sunday activities. *See id*. at 595. The Pennsylvania statute permitted all recreational exercises, which the Court viewed as inconsistent with church attendance and therefore a step away from religious motivation. *Id*.

179. *McGowan*, 366 U.S. at 444–45.

180. *Id*. at 435 (emphasizing that support from labor groups and trade associations such as the National Federation of Grocers and the National Chamber of Trade bolstered the argument that the Sunday laws were no longer religious in nature).

181. *Id*.

182. *Id*. at 520–21 (concluding that the purpose of the legislation is the preservation of a time of relaxation for the community).

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

Tom Green and other advocates of polygamy face the challenge of convincing the Court that the once religiously motivated laws have not evolved into furthering a secular interest. If a secular interest can be determined, the laws eradicating polygamy will survive constitutional challenges and continue to be enforced.

VI. SECULAR PURPOSE

The threshold question in this Establishment Clause debate is whether the anti-polygamy laws have a secular purpose, thereby sparing them from being struck down as unconstitutional. The Church of Jesus Christ of Latter-day Saints and the Utah government have chosen to take a "hands off" approach to the issue of polygamy.[184] The state has not actively chosen to prosecute polygamists, and the Church has not encouraged the authorities to do so.[185] Although many Utahns still believe in and practice polygamy, the governmental authorities turn a blind eye.[186] On the other hand, the governor of Utah has expressed that plural marriage may be protected by the First Amendment of the Constitution.[187]

In light of growing tolerance by mainstream society for other diverse lifestyles such as homosexuality, single parenthood, and communal living,[188] and the general "hands off" approach taken by Utah state officials, it seems that a truly secular reason for perpetuating anti-polygamy laws simply does not exist. This position is buttressed by two central, recurring themes that have woven their way into this debate: women's rights and children's welfare.

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184. IRWIN ALTMAN & JOSEPH GINAT, POLYGAMOUS FAMILIES IN CONTEMPORARY SOCIETY 57–58 (1996). The Mormon Church does not comment on criminal or civil suits involving fundamentalist Mormons. *Id.* at 57.

185. *Id.* at 57–58; *see also* Judy Fahys, *Prosecuting Polygamists Not a Priority; But Leavitt Says the State Will Not Tolerate Civil Rights Abuses; Leavitt Says Polygamy Might Be Constitutional*, SALT LAKE TRIB., July 24, 1998, at A1 (noting that the Utah Governor does not want to actively prosecute potential polygamists but does intend to prosecute polygamists who commit other crimes), *available at* http://www.polygamy.com/Legal/Leavitt-Says-Polygamy-Might-Be-Constitutional.htm (last visited Jan. 17, 2003); Katy McColl, *Honey, Meet Our New Wife*, JANE MAG., Feb. 2002, at 91 (noting that the Utah attorney general's office considers polygamy a "religious freedom" that can't be prosecuted because most of the families "don't seek multiple marriage certificates").

186. McColl, *supra* note 185, at 91.

187. TRACY, *supra* note 5, at 185.

188. *See id.* at 184 (expressing concern that if prosecutors prosecute polygamy, they may be compelled to prosecute other unconventional lifestyles).

A. Women's Rights

Pro-polygamous organizations, comprised mostly of women currently participating in polygamous relationships, argue vociferously that polygamous relationships praise and empower women rather than exploit or degrade them.[189] These groups insist that polygamous women are able to achieve more freedom than they would in a monogamous relationship.[190] Polygamists contend that polygamy is the "ultimate feminist lifestyle."[191] In fact, they argue, women's independence historically has been encouraged in polygamous relationships.[192] Mormon women in the early pioneer days were often left alone with their children while the men went on church missions.[193] This encouraged women to make use of their resources and become self-supportive. One woman stated that she became "freer and [could] do herself individually things she never could have attempted before; and work out her individual character as separate from her husband."[194]

This sense of independence has resurfaced in modern polygamous relationships. A woman involved in a polygamous relationship must have a very strong sense of identity.[195] A

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189. Cala Byram, *Women Defending Polygamy*, *at* http://members.ozemail.com.au/~robinsmith/poly1.html (last visited Jan. 11, 2002) (detailing Mary Potter's leadership of a new group that wants to repeal the ban on polygamy in Utah). Mary Potter is the founder and president of Women's Religious Liberties Union. She founded the organization after her husband was fired from the police department because he was a practicing polygamist. *See* Potter v. Murray City, 585 F. Supp. 1126 (D. Utah 1984) (noting that Mr. Potter brought suit against the Murray City Police Department alleging that he was fired because of his plural marriage, thereby violating his right to freedom of religion).

190. Mary Ben David, *From a Woman's Place: The Case for Polygamy*, *at* http://www.polygamy.com/Practical/From-A-Woman-Place.htm (last visited Jan. 17, 2003) (arguing that there are many myths and untruths about polygamous lifestyles); *see also* TRACY, *supra* note 5, at 138–39 (suggesting that polygamy is a great idea for professional women because "[i]t solves the day care problem").

191. Elizabeth Joseph, *Polygamy: The Ultimate Feminist Lifestyle*, *at* http://www.polygamy.com/Practical/Ultimate.htm (last visited Jan. 7, 2003); *see also* PHILIP L. KILBRIDE, PLURAL MARRIAGE FOR OUR TIMES 84, 88 (1994) (advocating the position that polygamy allows autonomy for women). "If polygamy didn't exist, the modern American woman would have invented it." TRACY, *supra* note 5, at 138–39.

192. LAWRENCE FOSTER, RELIGION AND SEXUALITY 213–14 (1981) (explaining that with husbands "away on church missions," Mormon wives relied on their own abilities).

193. *Id.* at 213 (describing social conditions in Utah that required Mormon women in frontier Utah to be strongly independent).

194. *Id.* at 214 (quoting Mrs. Joseph Horne, in MIGRATION AND SETTLEMENT OF THE LATTER DAY SAINTS 34–35 (1884)).

195. *See* McColl, *supra* note 185, at 90 (suggesting that strong feelings of jealousy require women in polygamous relationships to work through those feelings, thereby making them stronger-minded individuals); *see also* TRACY, *supra* note 5, at 140 (quoting polygamist Elsie Allred, wife of Owen Allred, the prophet of the Apostolic United Brethren, as saying, "You find you [sic] faults, your jealousies, your feelings but it helps

polygamous woman must maintain an identity apart from her husband's identity because her husband is often absent from the home for long periods of time or is with another one of his wives.[196] These women advocate that this separate identity bolsters their case for independence because they are unlike women in monogamous relationships who become entangled in their husband's identity.[197]

Polygamy encourages independence and freedom. Women involved in polygamous relationships have more free time than other women.[198] There are more people to share household chores such as cooking, cleaning, and child rearing.[199] Women can work long hours if they choose, knowing that another wife will take care of the household duties.[200] Further, women can travel for extended periods of time without worrying about the care of their children.[201] When asked what the best thing is about polygamy, one woman replied, "I like the free time it gives me . . . . [I]f I want to go away for a week, I won't have to worry about who's going to feed [my husband] or wait on him."[202] Even groups such as the National Organization of Women have publicly noted that polygamy can offer benefits to women who want to have careers.[203]

In a case study involving the Harker polygamist group, it was found that the female network that develops among polygamous wives has economic as well as social benefits.[204] Polygamous women, unlike monogamous women, are compelled to have strong relations with other women for economic support.[205] They also have a built-in support network in the event

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you learn how to control them, how to understand them. And it's beautiful when you learn to overcome it").

196. *See* Ben David, *supra* note 190 (arguing that a polygamous lifestyle empowers women to speak their minds); *see also* FOSTER, *supra* note 192, at 213–14.

197. Ben David, *supra* note 190.

198. *Id.*; *see also* McColl, *supra* note 185, at 92.

199. *See* Ben David, *supra* note 190.

200. Refer to note 190 *supra* and accompanying text.

201. McColl, *supra* note 185, at 92.

202. *Id.*

203. Joyce Price, *Polygamy Could Help Moms Who Work, Says Utah's NOW*, WASH. TIMES (explaining that although the National Organization of Women does not outwardly support polygamy, it recognizes the benefits of a polygamous lifestyle), *available at* http://www.polygamy.com/Practical/Polygamy-Could-Help-Moms-Who-Work.htm (last visited Jan. 17, 2003).

204. Janet Bennion conducted a case study involving the Harker and Allred polygamist groups that eventually became the subject of her book, *Women of Principle*. *See generally* JANET BENNION, WOMEN OF PRINCIPLE (1998).

205. *Id.* at 139 (detailing the strong unions that develop among the sister-wives involved in polygamous relationships); *see also* Joseph, *supra* note 191 (opining that women in polygamous relationships have unique opportunities to develop wonderful

there is trouble or abuse in the household.[206] In some situations, the wives can bind together and express collective displeasure as to their husband's actions.[207]

Further evidence suggests that women in polygamous relationships are more secure and less concerned about adultery and divorce than women in monogamous relationships.[208] Historically, the Mormon Church has been officially opposed to divorce.[209] Mormon men were under a lifetime obligation to care for their wives.[210] Conversely, Mormon women were advised to stay with their husbands as long as they could stand the marriage, but once a woman became alienated, it was the man's duty to set her free.[211]

Modern fundamentalist groups have carried forth these teachings.[212] Therefore, if a man is unsatisfied with his wife and wants another woman, he cannot legitimately divorce her; he must enter into a plural marriage.[213] While at first glance this does not seem like a benefit to any woman, it eases many women's fears about adultery. Additionally, a woman would not need to worry about losing her husband or her income.[214] The mandatory nature of plural marriage also helps erase the detrimental effects that divorce may on children. Women who have suffered in other marital relationships seek comfort in this aspect of polygamy.[215]

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friendships).

206. BENNION, *supra* note 204, at 139 (contrasting a polygamous wife's ability to communicate with her sister-wives with a monogamous woman's interactions with her husband).

207. *Id*. (illustrating that a woman in a polygamous relationship is far less coerced or dominated by her husband than outsiders would perceive).

208. *See id*. at 145 (demonstrating that women who cannot find a suitable man in the mainstream Mormon Church seek solace in polygamy); *see also* Samuel Chapman, *Practical Aspects of Polygamy*, *at* http://www.polygamy.com/Practical/Practical-Aspects-of-Polygamy.htm (last visited Jan. 17, 2003) (detailing the benefits polygamy offers for women).

209. VAN WAGONER, *supra* note 36, at 92. In 1858, Brigham Young addressed the Mormon Church regarding his concern of divorce. *Id*.

210. *Id*. at 93.

211. *Id*.

212. TRACY, *supra* note 5, at 79–80.

213. KILBRIDE, *supra* note 191, at 79–80 (demonstrating that a man who seeks a divorce is very rare in Mormon society).

214. Chapman, *supra* note 208; *see also* KILBRIDE, *supra* note 191, at 118 (suggesting that plural marriage might serve as an alternative to combat the rampant divorce rate in the United States).

215. BENNION, *supra* note 204, at 139 (proposing that women turn to a fundamentalist society in order to alleviate the "deprivations experienced in the larger culture"). Refer to note 208 *supra* and accompanying text.

B. Children's Welfare

Mormon children are incredibly important to mainstream Mormon society and to the Mormon fundamentalist culture.[216] Children symbolize "premortal spirits who must enter human bodies and pass through earthly life before entering the hereafter."[217] In addition to their religious importance, children are important status symbols for women.[218]

Polygamous family life provides a very effective social re-enforcement for children.[219] Having multiple wives allows for increased supervision of young children.[220] It is a mother's duty to nurture her children, and fundamentalist women make that a primary goal each day.[221] There is never a concern that the children will not have day care or sufficient attention.[222] Arguably, there is better supervision and care for children in polygamous families than for children in single-parent households.

A recent study revealed that children of polygamous families are taught obedience at a very early age.[223] The children in this study were taught at an early age to sit still, listen to their elders, take their studies seriously and, of course, be attentive to the sermon.[224] While child rearing in a fundamentalist society is predominantly driven by religious principles, these lessons in obedience are qualities that each member of society should revere.

Those who oppose polygamy say that it denies children their rights.[225] These opponents assert that when a teenage girl

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216. ALTMAN & GINAT, *supra* note 184, at 373 (emphasizing the important religious role that children maintain in a fundamentalist Mormon society).

217. *Id*.

218. *Id*. (illustrating that children can often lead to competition between the different wives).

219. B. CAMRON HARDY, SOLEMN COVENANT: THE MORMON POLYGAMOUS PASSAGE 17 (1992) (discussing some scholars' findings that Mormon polygamous families have certain advantages over monogamous families).

220. *See* Joseph, *supra* note 191 (explaining that when working late, the author does not have to worry about her daughter, who is supervised by eight other wives).

221. *See* FOSTER, *supra* note 192, at 212–13 (revealing the "extreme importance" placed on child rearing and child bearing).

222. *See* Joseph, *supra* note 191.

223. *See* BENNION, *supra* note 204, at 83 (noting that when a child turns five he is expected to begin learning the tenets of the Mormon Church and conform to the rituals of the community).

224. *Id*.

225. *See* Douglas F. White, *Legalizing Polygamy Would Deny Rights of Children, Change a Crime*, SALT LAKE TRIB., May 7, 2000 (rejecting the idea that polygamy should be legal), *available at* http://www.polygamyinfo.com/plygmedia%2000%2053sltrib.htm (last visited Jan. 17, 2003). Douglas White is the attorney for Tapestry Against Polygamy,

marries an older man, she is essentially being killed off and deprived of a normal childhood.[226] This argument fails on many grounds. First, polygamous families do not advocate marrying prior to the age when a parent can consent to the child's marriage.[227] Second, polygamous teens who marry older men do so primarily because of their strong religious beliefs.[228] Fundamentalist Mormons believe that unmarried women are the grunts of the afterlife.[229] For this reason, many young women are eager to marry and encourage their new husbands to take additional wives.[230] In this ever-changing society, people should be able to practice their religion the way that they have been taught to believe, and not be required to conform to what mainstream society believes is the appropriate way of life.

Those opposing polygamy further argue that children should not be exposed to an environment the opponents view as a breeding ground for incest.[231] While there is evidence of incest in some polygamous families,[232] most polygamists do not advocate this practice. Every type of marriage is subject to certain abuses. Polygamists argue that it is not the type of marriage, but the people involved, that determine where those abuses will arise.[233] Incest occurs in monogamous families just as it occurs in

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the leading anti-polygamy group. *Id*.

226. *Id*. (noting that polygamous children grow up without a birth certificate, an education, a job, money, or community involvement).

227. *See* Valerie Richardson, *Too Many Wives Flaunting Polygamy as the Law Gets Tough*, WASH. TIMES, Mar. 25, 2001, at A1 (noting that one of Utah's largest polygamous families advocates waiting for marriage until the woman turns twenty).

228. *See* McColl, *supra* note 185, at 90 (reporting that fundamentalist Mormons believe the only way that men and women can reach exalted status after death is by living the principle of plural marriage).

229. *See id*. (emphasizing the importance of finding a husband in the fundamentalist Mormon culture); *see also* KILBRIDE, *supra* note 191, at 76 (noting that fundamentalist women feel that plural marriage is ordained by God and necessary for salvation).

230. *See* FOSTER, *supra* note 192, at 79 (revealing that many nineteenth-century Mormon women wanted their husbands to take additional wives so that they could reach exaltation in the afterlife and alleviate economic burdens); *see also* Joseph, *supra* note 191 (detailing how one Mormon woman encouraged her husband to marry her secretary because she was "smart" and "beautiful" and would make an excellent addition to their family).

231. *See* Ray Rivera, *Utah Attorneys Key Figures in Polygamist Kingston Clan: Both Are Members of State Bar and Handle Legal Affairs for the Order: Former Associates Say One of Them Has Fifty Children*, SALT LAKE TRIB., July 19, 1998, at B4 (detailing how John Daniel Kingston, a Mormon fundamentalist, was convicted for beating his sixteen-year-old daughter after she tried to escape a marriage to her uncle), *available at* http://www.polygamy.com/News/Utah-Attorneys-Key-Figures-in-Polygamist-Kingston-Clan.htm (last visited Jan. 17, 2003).

232. *Id*.

233. *See* Byram, *supra* note 189 (quoting Mary Potter as saying, "abuses that go on in polygamous relationships are as individual as those that happen in monogamous ones").

polygamous families; in fact, there is no substantial evidence to support the contention that incest occurs at a higher rate in polygamous families.[234]

Conversely, many children thrive in polygamous families. Children are never without a play group and might not face some of the ordinary social problems that children in mainstream society face. Children of polygamous families build strong bonds with their sisters and brothers, and with other polygamous children.

VII. CONCLUSION

The purpose of the American Revolution was to gain freedom from English control and the tenets of the Church of England. The colonists did not want to have an official religion and wanted religion and government to be entirely separate. However, the existing anti-polygamy laws are an example of a departure from this proposition.

The Mormon people were clearly coerced by the U.S. Government to abandon one of their religious beliefs—polygamy.[235] The legislators responsible for passing anti-polygamy legislation clearly felt threatened by the Mormon Church and were vehemently opposed to the practice of polygamy.[236] This legislation would not survive a modern day Establishment Clause analysis. In effect, such legislation is "[o]fficial action that targets religious conduct for distinctive treatment."[237]

The decision reached by the Supreme Court in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* is particularly instructive for determining whether a statute is neutral on its face or in its application.[238] The anti-polygamy laws, when evaluated under the same analysis used in *Lukumi*, are clearly not neutral and were passed directly in response to the Mormon Church's public announcement of its intent to practice polygamy.[239] The U.S. Government interfered with the Mormon Church by passing numerous anti-polygamy laws, none of which

234. *See id.*

235. Refer to notes 56–57 *supra* and accompanying text (explaining that instead of being stripped of their U.S. citizenship, some fundamentalist Mormons chose to abandon polygamy).

236. Refer to notes 30–35 *supra* and accompanying text.

237. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993).

238. *Id.* at 531–34.

239. Refer to notes 21–28 *supra* and accompanying text.

had a secular purpose. The comments by the legislators during the congressional debates evidenced their preference for Christianity over the Mormon faith. This is the exact type of legislative action that led the Court in *Lukumi* to strike down the ordinances as non-neutral and therefore unconstitutional.[240]

It is evident from the discussion above that if a religiously motivated law has lost much of its religious "flavor" over time and has evolved to have a secular purpose, it will survive a constitutional challenge.[241] However, unlike the Sunday closing laws, the anti-polygamy laws have yet to experience such an evolution.

Polygamists are not harming society and are trying to live their lives according to their religious beliefs. While there are abuses that occur in polygamous relationships, those same abuses occur in monogamous relationships as well.[242] There are bad seeds in every aspect of American society, and an entire religious belief should not be suppressed simply because of a few bad actors.

Mainstream society has recently begun to respect many unorthodox and alternative lifestyles. Some states have extended legal rights to homosexuals, unmarried cohabitants, and single mothers.[243] The line between acceptable and unacceptable behavior is incredibly blurred. If the anti-polygamy laws are upheld, the government should be prepared to review the legality of other alternative lifestyles. There is no secular purpose for continuing to outlaw polygamy. The United States was founded on religious freedom and the freedom from interference with religion. Polygamists should finally be able to fully realize this freedom.

Stephanie Forbes

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240. *Lukumi*, 508 U.S. at 542.

241. *See* McGowan v. Maryland, 366 U.S. 420, 433–34 (1961) (giving examples of Sunday closing laws that have secular purposes).

242. Byram, *supra* note 189.

243. For example, Vermont created the status of civil unions in order that homosexuals could receive some of the benefits that married couples enjoy.