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In the landmark case of Reynolds v. United States, the United States Supreme Court held that a general law prohibiting polygamy did not abridge the religious freedom of members of the Mormon faith guaranteed by the first amendment. The author here explores the background of Chief Justice Waite's opinion in Reynolds v. United States: the tenets and development of the Mormon faith in the United States, the character of the Waite Court, and the sources and development of Chief Justice Waite's opinion in the case.

I. The Waite Court

Chief Justice Waite is an unknown man in popular history, but his term as Chief Justice from 1874 to 1888 was a significant one in our judicial history, spanning the end of Reconstruction and the beginning of the first attempts to regulate the untamed forces of American capitalism. Few men, however, have come to the Supreme Court under less favorable circumstances than did Morrison Remick Waite. On the day of his appointment as Chief Justice, January 19, 1874, Waite was an obscure Ohio attorney whose most newsworthy accomplishment had been his service as the junior American counsel in the Geneva Arbitration of 1872. Safely Republican in his politics, Waite's primary qualification for the chief justiceship was precisely his obscurity. Because unknown, he was uncontroversial, and the pathetically miscast President Grant chose Waite in desperation after a series of political blunders that had left the post vacant for over eight months.[1]

The new Chief Justice faced a formidable challenge. Dubbed a "respectable mediocrity" by the nation's press,[2] Waite took his seat on an exceptionally able Court. Two members, Samuel F. Miller and Noah H. Swayne, had themselves schemed for the appointment. Resentment against "His Accidency" was thinly veiled. Miller spoke of Waite as a "sow's ear." Stephen J. Field described him as a "man that would never have been thought of for the position by any person except President Grant." Nathan Clifford treated him as an inter-

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1. Magrath, Morrison R. Waite: The Triumph of Character 2-22 (1963).
2. *Id.* at 17.

loper who had no right to manage the Court.[3] Other colleagues included Joseph P. Bradley, one of the most learned of the nineteenth-century judges; and, later, Horace Gray, an experienced Massachusetts judge; John Marshall Harlan, the reconstructed ex-slaveholder; and Stanley Matthews, a neglected figure who played a significent role in the Abolitionist movement, Republican politics, and corporate expansion. Whatever one's evaluation of individual judges, Bradley, Field, Gray, Harlan, and Miller were a remarkably able collection of strong-minded men—able and also easily unmanageable. Field especially, who believed his judicial views were divinely ordained, could be intensely wearing. As an exasperated Justice Gray once put it, Field often acted like "a wild bull."[4] Bradley too could be terrible-tempered,[5] and Miller's personality was marred by an overdose of egotism.

Morrison Waite overcame his initial handicaps and quickly established himself as the undisputed master of his Court. This is not the place to retell the story of how effectively the onetime "respectable mediocrity" managed his brethren. It is, however, fair to point out that when he became ill for a brief period and Samuel Miller—Waite's most severe critic—had an opportunity to run the Court as the senior Associate Justice, he could not control Bradley and Field; Waite's colleagues looked forward to the return of their chief.[6] Not only did Waite manage to lead his potentially quarrelsome judicial family with high skill, but he did so at a time when the Supreme Court was first encountering many of the divisive problems of modern constitutional law. With the frequent exceptions of Field and Harlan, the Waite Court displayed unanimity on the major questions of the day. It consistently upheld both state and federal power to regulate the new capitalism[7] it decided a long line of difficult commerce clause cases with a pragmatic respect for local regulatory needs as

3. *Id.* at 7, 107, 271.

4. KING, MELVILLE WESTON FULLER 222 (1950).

5. Bradley's temper was sometimes monumental. One morning while dressing, he was mulling over a problem in higher mathematics (a hobby with Bradley). Thus preoccupied he pulled on his trousers with the opening to the back; unable to find the buttons with which to close the fly, he became enraged and tore his trousers apart. Letter of Benjamin Gross, Nov. 13, 1963, recalling an anecdote told by a nephew of Bradley, Judge Eugene Stevenson of the New Jersey Court of Chancery. On another occasion, after missing a train because of his wife's insistence that he change into a new suit of clothes, Bradley slashed the trousers into shreds with a penknife, muttering, "you will never compel me to miss another train." Fairman, *Mr. Justice Bradley*, in MR. JUSTICE 81 (Dunham & Kurland 1964).

6. MAGRATH, *op. cit. supra* note 1, at 272-74. See generally *Id.* at 251-75.

7. *E.g.*, Railroad Commission Cases, 116 U.S. 307 (1886); Stone v. Mississippi, 101 U.S. 814 (1880); Sinking Fund Cases, 99 U.S. 700 (1879); Munn v. Illinois, 94 U.S. 113 (1877).

well as for the requirements of a national market;[8] and, less wisely perhaps, its narrow interpretation of the fourteenth amendment seriously weakened federal power to protect civil rights and placed the Negro's destiny temporarily in the often unsympathetic hands of the states.[9]

An interesting index of the Waite Court's essential unity is revealed by the low incidence of public dissents by the Justices. Supreme Court conference room votes are secret, and only rarely do even prying historians penetrate the purple curtain which masks the judges' voting from public view. Fortunately, however, Chief Justice Waite's personal docket books, covering the October terms 1875-1886, have been retained within his papers. They provide a fascinating set of statistics: during these twelve terms the official United States Reports contain 2,956 decisions with full opinions of which only 285—9.7 per cent—resulted in a *public* recording of dissent by at least one Justice. But the docket books' record of conference room votes show approximately 1,317 cases—44 per cent—in which at least one Justice disagreed with the *private* majority judgment.[10]

Obviously, judges may withhold dissent for any number of reasons. They may be so heavily outvoted that they believe it futile to register a dissenting protest. "I see nothing wrong in this except the *law* it announces," Harlan jauntily noted on one of the Chief Justice's opinions. He and Field had disagreed with the majority in conference, but both withheld dissents.[11] On another occasion Bradley reluctantly subscribed to one of Waite's opinions. "As the Court is all against me in this view, and will probably be against me until some English court takes the lead on the subject, I shall waive my views for the present, leaving it to Congress to introduce such improvement of the law as it may deem expedient."[12] The conference

8. *E.g.*, Wabash, St. L. & Pac. Ry. v. Illinois, 118 U.S. 557 (1886); Newport & Cincinnati Bridge Co. v. United States, 105 U.S. 470 (1882); Pensacola Tel. Co. v. W. Union Tel. Co., 96 U.S. 1 (1878); Welton v. Missouri, 91 U.S. 275 (1876). See generally, FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WAITE (1937).

9. *E.g.*, Civil Rights Cases, 109 U.S. 3 (1883); United States v. Harris, 106 U.S. 629 (1883); United States v. Cruikshank, 92 U.S. 542 (1876); United States v. Reese, 92 U.S. 214 (1876).

10. Docket Books, Oct. Terms 1875-1886, in Legal File, "Waite Papers," Library of Congress. These figures are approximate. My counting may be slightly inaccurate, and the tabulation includes votes on a number of motions which the Court entertained. Moreover, in the 1870's and 1880's, cases in which the Court divided evenly sometimes went unreported. It should also be noted that judges occasionally change their minds between the time of a conference vote and the public announcement of a decision.

11. Legal File, Oct. Term 1886. Unless otherwise indicated, all communications to and from Waite are located in the "Waite Papers." The opinion Harlan referred to was prepared for Wildenhus's Case, 120 U.S. 1 (1887), involving questions of international law.

12. Legal File, Oct. Term 1886. The decision was in an admiralty suit, The

dissent may be over a relatively unimportant point that is not worth the bother of a public dissent. Or the judges may be so pressed for time that they cannot prepare a proper dissent, while concluding that a mere notation of dissent is ineffectual. In fact, because the nineteenth-century Court could not control the flow of business onto its docket, it was forced to give much of its time to minor private law cases which literally swamped the Justices. The judges very likely had less incentive for dissenting in many of these cases: they were all busy writing majority opinions. In a typical term a Waite Court Justice could expect to be assigned as many as thirty opinions; in some terms Waite assigned himself over forty opinions.[13] By contrast, last term the judges on the Warren Court wrote an average of twelve opinions each, but they found time to write an average of 3.7 concurring, 7.5 dissenting, and 1.4 separate opinions.[14] Today's Supreme Court Justice is also far more self-conscious about his "place" in history and much more anxious than his nineteenth-century predecessor to record his precise judicial position in cases that come before him. Nonethless, the substantial reduction in his opinion assignments makes the proliferation of concurring and dissenting opinions functionally possible.

These considerations undoubtedly account for much of the disparity between the Waite Court's conference room votes and the public record in the United States Reports. Even so, it seems reasonable to conclude that the Chief Justice enjoyed marked success in holding down the number of dissents. He deliberately sought to promote a public image of the Supreme Court as a great and impartial forum of justice.[15] When important questions of law were at stake, Waite was anxious to have "the unanimous judgment of the court,"[16] and he especially disliked affirming cases on an evenly divided vote. Thus, to break a four-to-four deadlock in a case interpreting an insurance contract, he shifted his conference room vote. "By shutting my eyes just a little," he wrote Bradley to whom he assigned the opinion, "I think the judgment may appear good enough."[17] The Chief Justice himself rarely dissented; indeed, at times he apparently shifted his vote so that he could control the assignment of an important opinion.[18]

Harrisburg, 119 U.S. 199 (1886). It interpreted the common law as barring recovery of damages for death due to negligence on the high seas or on the navigable waters of the United States.

13. Docket Books, Oct. Terms 1875-1886, Legal File.

14. 33 U.S.L. Week 3026 (1964).

15. MAGRATH, *op. cit. supra* note 1, at 277-84.

16. Draft of a Letter From Waite to Bradley, Dec. 11, 1883.

17. Waite to Bradley, March 17, 1878. The case was Insurance Co. v. Eggleston, 96 U.S. 572 (1878).

18. See text accompanying note 75 *infra*.

A. *Rights and Liberties in the Age of Enterprise*

The historic significance of the Waite Court rests with its decisions in two major areas of public interest, those involving public regulation of business and those involving civil rights. In the former the Court, led by Waite, Bradley, and Miller, sustained the power of government to regulate business in the public interest, refusing to read constitutional limitations into the vague words of the commerce and due process clauses. Waite's opinion in *Munn v. Illinois*[19] was the landmark decision. Despite its *de facto* reversal when a new Court majority took over in the 1890's, the *Munn* case and its explicit statement of judicial self-restraint re-emerged in the 1930's as the governing precedent in economic regulation cases.[20]

If the Waite Court proved hostile to the claims of business, it was equally unsympathetic to those of Negroes who sought judicial recognition of their national civil rights. The opinions of Waite and Bradley squarely aligned the Court with the pro-Southern policies of President Rutherford B. Hayes; only Justice Harlan dissented from the Court's dilution of the fourteenth amendment's libertarian guarantees.[21] Today, a radically different judicial and political climate has in effect overturned the Waite Court's civil rights rulings, even though the "state action" theory of the fourteenth amendment expressed in the *Civil Rights Cases*[22] continues to show vitality.[23]

19. *Supra* note 7.

20. McCLOSKEY, THE AMERICAN SUPREME COURT 111-35 (1960), and Book Review, 77 HARV. L. REV. 1171, 1173-74 (1964), presents a contrary—and widespread—view of the Waite Court's attitude toward business. MAGRATH, *op. cit. supra* note 1, at 173-249, is an attempt to rebut those constitutional historians who view the Waite Court as a tool of post-Civil War capitalism. See also Graham, *The Waite Court and the Fourteenth Amendment*, 17 VAND. L. REV. 525 (1964).

21. Judicial, no less than political, history requires its folk heroes, and Harlan's colorful personality, his argument for full incorporation of the Bill of Rights into the fourteenth amendment, Maxwell v. Dow, 176 U.S. 581, 605-17 (1900), and his memorable words in Plessy v. Ferguson, 163 U.S. 537 (1896), qualify him for this role. In a very real sense Harlan is the honored prophet of the Warren Court. But, for scholars at least, admiration should not obscure reality. Harlan fully accepted the "Negro race" theory, as his comments in Plessy, 163 U.S. at 559, reveal; he joined Field's opinion in the miscegenation case, Pace v. Alabama, 106 U.S. 583 (1883), which established the legal category of "Negro" as an object of "reasonable" state regulation; he voted with a unanimous Court in Virginia v. Rives, 100 U.S. 313 (1880), a decision which guaranteed the Southern states all-white juries as long as they were not foolish enough to make it a matter of *official* public policy; and he spoke for the Court in Cumming v. Board of Education, 175 U.S. 528 (1899), which tacitly sustained the right of states to segregate public schools. In his private correspondence Harlan revealed his nineteenth-century Southern heritage: he loved to recount racial anecdotes, and he felt no compunction about using the word "nigger." Harlan to Waite, Aug. 5, 1885 and July 18, 1887; comment on printed proof of an opinion, Legal File, Oct. Terms 1886-87. For an analysis of Harlan see Westin, *John Marshall Harlan and the Constitutional Rights of Negroes*, 66 YALE L.J. 637 (1957).

22. *Supra* note 9.

23. Dissenting opinion of Justice Black in Bell v. Maryland, 378 U.S. 226, 318-46

For all its progressiveness in certain respects, the Waite Court had little interest in the type of civil rights and liberties problem that concerns us in the 1960's. Each age, as John P. Roche has recently argued, defines the content of "liberty" to suit its own needs and preconceptions.[24] In the Age of Enterprise, when most persons thought of liberty they thought of property rights. Although Waite and his Court believed in property rights, they emphatically rejected Stephen J. Field's view of constitutional liberty espoused in his sulphuric dissents from Waite's opinions upholding business regulation. Justice Field was sincerely convinced that he stood at the ramparts, defending constitutional liberty against the assaults of socialism. "All history," he wrote in one opinion, "shows that rights of persons are unsafe where property is insecure. Protection to one goes with protection to the other; and there can be neither prosperity nor progress where this foundation of all just government is unsettled."[25] Field was a dissenter on the Waite Court, but after 1895 his views—or, more accurately, those of George Spencer and William Graham Sumner—became the views of most Americans. Not until the 1930's was the content of "liberty" redefined: the impact of a disastrous economic depression resulted in a re-evaluation of Fieldian laissez faire. At the same time, the activities of dedicated organizations like the American Civil Liberties Union gave an entirely new meaning to the notion of individual liberty.[26]

The Waite Court showed scant interest in such modern civil liberty questions as those involving the fairness of trials,[27] the constitutionality of anti-miscegenation laws,[28] and the extent of voting rights.[29] In a few instances, it is true, the Court rendered judgments that by modern standards are libertarian,[30] but these decisions had small

(1964), a case in which the majority of the Court rejected invitations to either reverse the *Civil Rights Cases* or to expand broadly the definition of "state action." See generally, Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960), and Lewis, *The Sit-In Cases: Great Expectations*, in THE SUPREME COURT REVIEW 1963 101-51 (Kurland ed. 1963).

24. ROCHE, THE QUEST FOR THE DREAM, THE DEVELOPMENT OF CIVIL RIGHTS AND HUMAN RELATIONS IN MODERN AMERICA (1963).

25. Dissenting in Sinking Fund Cases, *supra* note 7, at 767.

26. ROCHE, *op. cit. supra* note 24, at 142-51, 158-83.

27. Walker v. Sauvinet, 92 U.S. 90 (1875); Hurtado v. California, 110 U.S. 516 (1884); Spies v. Illinois, 123 U.S. 131 (1887).

28. Pace v. Alabama, *supra* note 21.

29. Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875); United States v. Reese, *supra* note 9.

30. Kilbourn v. Thompson, 103 U.S. 168, 190 (1881), limited Congress' power of "making inquiry into the private affairs of the citizen." Its force has been largely vitiated by the ruling in McGrain v. Daugherty, 273 U.S. 135 (1927), that Congress has broad authority to conduct legislative investigations. *Ex parte* Yarbrough, 110 U.S. 651 (1884), upheld a federal prosecution against a conspiracy to prevent Negroes from voting in a congressional election; in Strauder v. Virginia, 100 U.S. 303 (1880),

significance in the political context of late nineteenth-century America. The Waite Court, in short, was consistently inhospitable to the liberty claims that came before it—whether made by corporations, Negroes, or individuals who alleged governmental violations of their personal liberties. Because the modern constitutional temper is strikingly different—so self-consciously libertarian—most of the Waite Court's civil rights and liberties decisions are primarily interesting as museum pieces, judicial dinosaurs that belong to a pre-modern era.

There is, however, one major exception, and it forms the main subject of this essay. In *Reynolds v. United States*,[31] the Court, speaking through its Chief Justice, handed down a leading civil liberties precedent, the Supreme Court's first interpretation of the freedom of religion clause in the first amendment. Since the decision sustained federal power to punish polygamous behavior, despite the defense of religious freedom, the *Reynolds* opinion is hardly regarded as a civil liberties monument by those who find constitutional comfort in the position of Justice Hugo L. Black. Yet it introduced to American constitutional law one of its most famous metaphors, Jefferson's "wall of separation" between church and state; and it has won its judicial spurs as the leading precedent on the power of public authorities to prohibit socially deviant religious practices. It has been relied upon by Justice Douglas,[32] cited approvingly by Chief Justice Warren[33] and Justices Brennan[34] and Frankfurter,[35] and endorsed by scholars as sensitive to questions of human liberty as Philip Kurland[36] and Eugene Rostow.[37] Moreover, for a number of reasons the *Reynolds* decision is of historic interest. Waite assigned himself the opinion after he and apparently Bradley and Clifford shifted from a dissenting position in the conference room vote. In preparing it, the Chief Justice engaged in an imaginative collaboration with George Bancroft, the

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and *Ex parte* Virginia, 100 U.S. 339 (1880), the Court barred the states from *overtly* excluding Negroes from jury service—decisions that were seriously compromised by Virginia v. Rives, *supra* note 21, which allowed covert discrimination. In Yick Wo v. Hopkins, 118 U.S. 356 (1886), the Court used the equal protection clause of the fourteenth amendment to invalidate a San Francisco ordinance that discriminated against the owners of Chinese laundries (and of course interfered with their property rights); and in Boyd v. United States, 116 U.S. 616 (1886), it used the fourth and fifth amendments to invalidate a section of a congressional act which forced defeudants accused of violating the customs laws to incriminate themselves.

31. 98 U.S. 145 (1879).

32. Cleveland v. United States, 329 U.S. 14, 20 (1946).

33. McGowan v. Maryland, 366 U.S. 420, 442 (1961); Braunfeld v. Brown, 366 U.S. 559, 603-05 (1961).

34. Braunfeld v. Brown, *supra* note 33, at 613 (concurring and dissenting opinion).

35. McGowan v. Maryland, *supra* note 33, at 462 (special opinion).

36. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 8 (1961).

37. ROSTOW, THE SOVEREIGN PREROGATIVE 68-69 (1962).

great nineteenth-century historian. *Reynolds v. United States* and the subsequent Mormon cases were part of a truly remarkable chapter in American constitutional history.

II. THE MORMON QUESTION: SAINTS OR SINNERS?

The *Reynolds* decision cannot be understood apart from its unique background. Today the Church of Jesus Christ of Latter-Day Saints—the faith is unofficially called Mormon after one of its holy books—is one of America's thriving minority religions. It is strongest in its Utah base, but Mormonism has a significant following in other states and in foreign countries as well. Two words, "Mormon respectability," probably best describe its public image. Most Americans understand little about the teachings of Prophets Joseph Smith and Brigham Young, but they accept Mormonism as a legitimate religion whose members are honest, peaceful, frugal, hard-working, and prosperous. Nothing better illustrates its present status than the fact that during the 1950's a leading figure in the Mormon Church served as Secretary of Agriculture. Indeed, at the President's request, Cabinet meetings in the Eisenhower era were opened with a short prayer by Apostle Ezra Taft Benson.

It was not always so. To most nineteenth-century Americans, Mormonism was a strange and dangerous cult of religious fanatics. Many would have agreed with Francis Lieber, a father of American political science, who in 1859 denounced Mormonism as a "repulsive fraud" and "a wicked idea."[38] "Mormonism," a fashionable Chicago preacher declared a few years later, "ought to be dynamited."[39] The causes behind such attitudes are not mysterious: within the context of traditional Christianity, Mormonism *was* a strange cult. Its followers believed that beginning in 1820 God had periodically communicated with Joseph Smith. In 1827, according to Mormon belief, an angel led Smith to a set of thin golden sheets secretly buried in the mountains of upstate New York; Smith recorded their contents in the Book of Mormon. Divine revelation was scarcely new, but the messages which Prophet Smith passed on were. They need not be discussed here,[40] except to note that Mormons rejected the established churches as evil corruptions of true Christianity. They saw in the teachings of Smith and his successor Prophet, Brigham Young, the only path to the highest forms of heavenly salvation and labelled as "Gentiles" all non-believers.

The revelation on plural marriage, which was not openly proclaimed

38. LIEBER, ON CIVIL LIBERTY AND SELF-GOVERNMENT 320 (2d ed. 1859).
39. WEST, KINGDOM OF THE SAINTS 322 (1957).
40. A good account may be found in O'DEA, THE MORMONS 22-40, 53-63 (1957).

until 1852 when the Mormons were settled in Utah, best reveals the exotic nature of Mormonism. It explains, too, why the Mormon contact with American culture was so abrasive. According to the Mormon faith, life on earth is a transitional stage where man, who has a pre-worldly existence as a spirit, takes possession of his human body. If he leads a holy life, he can look forward to afterlife in a resurrected body containing a clean spirit. Heaven in the Mormon view is made up of millions of worlds, and each man who attains godhood may aspire to inhabiting his own world solely with the members of his family. But before a spirit can make the migration from pre-existence to a heavenly state, it must first be brought to earth—hence the biblical command to "replenish the earth." As a consequence, there exists a sort of reverse population pressure: the devout Mormon desires many children (large families are still encouraged), since he can thereby provide more earthly bodies for the spirits and at the same time guarantee himself many heavenly companions in his future world. Obviously, the more wives one had, the more children one could father: polygamy was part of God's grand design. A polygamous marriage, which had to be sanctioned by the higher Mormon priesthood, was no casual affair. The ceremony was a solemn church rite that "sealed" a man and woman in a "celestial marriage" which joined them not "till death do us part," but for all eternity.

Mormons put forward other justifications for polygamy. They argued that it had been practiced by the Hebrew patriarchs and even by God and Jesus, a shocking blasphemy to most Christians. It was also, they claimed, valuable in a household economy. They deeply resented the common Gentile charge that the Mormon Church was a society for the seduction of young virgins, and, as one critic put it, Salt Lake City "the biggest whorehouse in the world."[41] "God," Brigham Young insisted, "never introduced the patriarchical order of marriage with a view to please man in his carnal desires, but He introduced it for the express purpose of raising up to His name royal priesthood, a peculiar people."[42] With much force, Mormons further retorted that polygamy ended spinsterhood and stopped prostitution; a mere adulterer, they pointed out, would scarcely take on the burdensome responsibility of additional wives and children. Above all, however, the Mormons practiced and defended polygamy because they believed it to be an integral part of their religion. They had no

41. Quoted in WALLACE, THE TWENTY-SEVENTH WIFE 15 (1961), a popular biography of Ann Eliza Young, the stormy and apostate twenty-seventh wife of Brigham Young. The best study of Mormon polygamy, marred only by its lack of documentation, is by Kimball Young, a professional sociologist who is a direct descendant of Brigham Young. YOUNG, ISN'T ONE WIFE ENOUGH? (1954).

42. WALLACE, *op. cit. supra* note 41, at 13.

doubt about the legality of their behavior. "The constitution and laws of the United States being founded upon the principles of freedom," a Mormon publicist wrote, "do not interfere with marriage relations, but leave the nation free to believe in and practice the doctrine of a plurality of wives, or to confine themselves to the one wife system, just as they choose."[43]

Polygamy made Mormonism sensational, doubly so in a Victorian age. Their creed, to paraphrase a popular quip, was singular and their wives plural.[44] Books and lectures about the evils of polygamy were a source of national titillation; a concern with polygamy was a respectable way in which Americans could indulge in sexual daydreams by learning the intimate details—so they fancied it—of life in the mysteriously exciting Mormon harems.[45] But polygamy was not the sole cause of Mormon difficulties. Even before they embraced it, they were victims of popular prejudice and outright persecution, first in Missouri and later in Illinois and Utah. They also had a knack for contributing to their misfortunes. Under a special dispensation from the Illinois government, the Mormons during the late 1830's were allowed to run their settlement of Nauvoo as a semi-sovereign city-state. Joseph Smith combined in his person the roles of military commander-in-chief, mayor, and chief judge. When a dissident group dared to publish a newspaper, *The Nauvoo Expositor*, challenging some of Smith's actions, the Mayor had the City Council issue orders condemning the *Expositor* as a "nuisance." It was enjoined from further publishing, and the injunction was made operative in a most effective way: Smith's army, the Nauvoo Legion, burned all the copies of the *Expositor* they could find, destroyed the printing plant, and smashed its type.[46]

In 1857 at Mountain Meadows, Utah, a Mormon band, encouraged though not directly incited by the Church leadership, led an Indian party in a brutal raid on a wagon train passing through the Utah Territory. The Mormons induced the defenders to surrender under a flag of truce, and then they and their Indian allies murdered nearly one hundred and fifty men and women. In their defense one might say that the Mormons had learned the harsh lessons taught them by their tormentors. More specifically, the Mountain Meadows

43. YOUNG, *op. cit. supra* note 41, at 45-46.

44. O'DEA, *op. cit. supra* note 40, at 75.

45. Especially popular were the accounts of ex-Mormon women who had abandoned their polygamous marriages. Fanny Stenhouse's TELL IT ALL, THE STORY OF A WOMAN'S LIFE IN POLYGAMY (1890), was a big success. So also was Ann Eliza Young's WIFE No. 19 (1876), an account of her marriage to Brigham Young. Between 1873 and 1883 Ann Eliza delivered nearly 2,000 lectures, sometimes earning as much as $20,000 a year. WALLACE, *op. cit. supra* note 41, at 332-95.

46. ANDERSON, DESERT SAINTS 38 (1942); O'DEA, *op. cit. supra* note 40, at 65-66.

Massacre occurred on the eve of the "Utah War," a time of great Mormon-Gentile tension, when federal troops were "invading" the territory in an attempt to establish national authority.[47] Such an explanation, however, misses the point: neither Mormon nor Gentile accepted the niceties of the first amendment as part of their day-to-day operational code. Fortunately, nineteenth-century Americans still had plenty of room in which to spread out, leaving each group relatively free to practice its own brand of intolerance with a minimum impact on other intolerants.

The Mormons themselves had finally settled in the remote desert of Utah. Their patriarch was Brigham Young, and under his iron-willed leadership a theocracy was established. The Mormons were God's chosen saints and the desert was their Zion: between 1847 and the mid-1880's the Utah Territory—its economic, social, and political life—was under the nearly absolute domination of the centralized hierarchy of the Church of Jesus Christ of Latter-Day Saints. For a few years Young was the federally-appointed Territorial Governor. Later, President Buchanan refused to reappoint him, and the official administration was turned over to non-Mormons. (Their status in the Territory was something like that of Massachusetts Republicans in Mississippi after 1865.) None of this really mattered. The real, if unofficial, government remained securely in the hands of a priestly "ghost government."

Mormons outnumbered Gentiles by better than five-to-one, and election contests were never in doubt. Ballots were marked with a voter's registration number, making it easy for the hierarchy to check on the political behavior of their flock. This control was probably unnecessary anyway: the devout Mormons were more than willing to vote as their religious leaders desired. Not surprisingly, the Territorial Legislature and the local courts were controlled by the Church. Each year until 1870 the ghost government conducted a one-day session after the official legislature had adjourned, listening to a message from "Governor" Young and ratifying the laws passed during the session! After 1862 small contingents of federal troops were permanently stationed in Utah. But even this reminder of Washington's authority was challenged, for until 1870 the Church had its own army—the 13,000 member Nauvoo Legion. An uneasy truce prevailed, though as a Mormon writer tactfully phrases it, "the Gentiles did not feel secure with an army of thirteen thousand under control of the priesthood."[48]

With the end of Reconstruction in the mid-eighteen-seventies, "the

47. BROOKS, THE MOUNTAIN MEADOWS MASSACRE (1950).
48. ANDERSON, *op. cit. supra* note 46, at 273.

Mormon Question" replaced "the Negro Question" as one of the nation's political centerpieces. As with the slavery issue, though with lesser consequences, the conflict between Mormon polygamy and theocracy and American society was "irrepressible." In fact, most non-Mormons regarded polygamy as a form of slavery. As early as 1856 the first Republican platform affirmed that "it is both the right and the imperative duty of Congress to prohibit in the Territories those twin relics of barbarism—Polygamy and Slavery."[49]

Polygamy, like slavery, was spreading in the territories and it was in fundamental conflict with American culture. Regardless of Mormon justification as a God-given plan, most Americans saw polygamy as an imitation of the Oriental concubines in which the women were near-slaves. Mormon theology contributed to this impression by frankly elevating the men to a patriarchical position. In the words of the leading Mormon defense of polygamy:

> The husband is the head of the family, and it is his duty to govern his wife or wives, and the children, according to the laws of righteousness; and it is the duty of his wife to be subject unto him in all things, even as the chureh is subject unto Christ . . . . Each wife should seek counsel from her husband, and obey the same with all meekness and all patience in all things.[50]

True, a patriarchical marriage system was not the same as slavery: Mormon women like Eliza Young were free to quit and to make a lucrative career out of their exposes; Southern slaves like Nat Turner had never been quite so fortunate. Such distinctions were lost on non-Mormons. Harriet Beecher Stowe condemned the "degrading bondage" of polygamy as vigorously as she once blasted Negro slavery. It was, she declared, "a cruel slavery whose chains have cut into the very hearts of thousands of our sisters"; and, like slavery, it was doomed to perish before the forces of enlightenment.[51]

Mormons had a point when they scored those "who brand our wives as prostitutes, children as bastards, while at the same time they themselves are supporters of harlots."[52] In Utah the brothels, gambling dens, and saloons were owned and patronized by Gentiles—in whose morality the federal government was quite uninterested. Yet, for all

49. PORTER & JOHNSON, NATIONAL PARTY PLATFORMS 1840-1960 27 (1961). The denunciation of polygamy reappeared in the 1876 platform. By 1880 the Republican platform was calling for both the suppression of polygamy and the divorce of "the political power from the ecclesiastical power of the so-called Mormon church"—to be enforced, if necessary, by "military authorities." *Id.* at 74.

50. YOUNG, *op. cit. supra* note 41, at 50, quoting "Celestial Marriage," a long defense of polygamy prepared by Orson Pratt in 1852 at the request of Brigham Young.

51. Preface to STENHOUSE, *op. cit. supra* note 45, at vi.

52. Quoted in YOUNG, *op. cit. supra* note 41, at 55.

the Gentile hypocrisy, American social and religious morality *did* strongly condemn extra-marital sexual relations and it was a violation of the deepest cultural and legal mores of European and Anglo-American civilization for a man to have more than one wife at one time. As a matter of fact, while most Mormons defended polygamy, the vast majority of them lived in monogamy. Many could not afford more than one wife, but, either consciously or unconsciously, many who could have taken on additional wives used the economic excuse to remain monogamous.[53] Kimball Young in his study also found that many polygamous Mormons had suppressed guilt feelings about their plural marriages, reflecting the moral values of American culture at large. And in most polygamous households the first wife—the legal wife by American standards—enjoyed a higher status than the plural wives.[54]

If polygamy was at war with some of our deepest cultural instincts, theocracy was irreconcilable with American democracy. When the Mormons migrated to Utah, they mistakenly believed they were going into uncontrolled Mexican territory where they would be free to govern themselves. Instead, they soon learned that the treaties which ended the Mexican War again placed them under the jurisdiction of the United States. Nor—apart from their desire to run Zion according to the *Book of Mormon*—did they really want to cut themselves off from the United States. By reasons of culture, tradition, and economic self-interest the Mormons were Americans. They remained neutral during the Civil War, but the Mormons duly celebrated American independence every Fourth of July; and they joyfully welcomed the completion in 1869 of the transcontinental railroad at Promontory Point, Utah, which linked them to the national markets to their east and west. They acted like typical Americans, too, when they defended their right to practice polygamy by invoking the Constitution as well as the laws of God.

Still, their polygamy and the semi-theocracy under which they lived

53. Accurate statistics on the number of polygamists are not available, but the number was comparatively low. O'DEA, *op. cit. supra* note 40, at 246, estimates that about eight per cent of the Mormon men had plural wives. (The Mormon population of Utah in the 1870's was 120,000.) ANDERSON, *op. cit. supra* note 46, at 394-98, studied United States Census Bureau records for selected southern Utah counties, concluding that there was "but a small number of polygamists" in that remote area—perhaps one polygamous family to every ten monogamous ones.

54. YOUNG, *op. cit. supra* note 41, at 291-93. Young also shows that many Mormon men and women had difficulty in adjusting to a passionless polygamy. It conflicted with the American notion of romantic love in which a single man and woman are the central objects of each others' attention. The suceessful polygamous marriages were those in which the husband and his plural wives were able to replace the ideal of romantic love with that of a strong religious faith in the ideals and purposes of Mormon "celestial marriage."

placed the Mormons beyond the cultural and political tolerance of their fellow Americans. Six times between 1859 and 1887 they petitioned for statehood; six times they were rejected. Enough has been written to sketch the dimensions of the "Mormon Question." As gentle a man as President Rutherford B. Hayes could enter these words in his diary on January 13, 1880:

> Now the [Utah] Territory is virtually under the theocratic government of the Mormon Church. The union of church and state is complete. The result is the usual one, the usurpation or absorption of all temporal authority and power by the church. Polygamy and every other evil sanctioned by the church is safe. To destroy the temporal power of the Mormon Church is the end in view. This requires agitation. The people of the United States must be made to appreciate, to understand, the situation. Laws must be enacted which will take from the Mormon Church its temporal power. Mormonism as a sectarian idea is nothing, but as a system of government it is our duty to deal with it as an enemy to our institutions, and its supporters and leaders as criminals.[55]

Destruction of the "enemy" was in fact just around the corner; within precisely ten years polygamy would be repudiated and the political power of the priesthood crushed. The first blow had already been struck just one year before. In 1879 in *Reynolds v. United States* the Supreme Court denied constitutional sanction to the "twin relic" and cleared the decks for an all-out federal assault against the Church of Jesus Christ of Latter-Day Saints.

A. *The Reynolds Decision: One Man, One Woman*

The federal government began its campaign against Mormon polygamy as far back as 1862. Asserting its power to govern the territories, Congress in that year passed the Morrill Act which invalidated all Utah laws that "establish, support, maintain, shield, or countenance polygamy." The act further provided that:

> Every person having a husband or wife living, who shall marry any other person, whether married or single, in a Territory . . . or other place over which the United States have exclusive jurisdiction, shall . . . be adjudged guilty of bigamy, and shall be punished by a fine not exceeding five hundred dollars, and by imprisonment for a term of not exceeding five years. . . .[56]

For over a decade the Morrill Act went unenforced as Washington preoccupied itself with the Civil War and Reconstruction; there was not a single prosecution for polygamy. But by the 1870's President

55. 3 HAYES, DIARY AND LETTERS OF RUTHERFORD RIRCHARD HAYES 584 (Williams ed. 1924).

56. Act of July 1, 1862, ch. 126, § 1, 12 Stat. 501.

Grant was asking for new legislation against the "remnant of barbarism, repugnant to civilization, decency, and to the law of the United States."[57] Congress responded with the Poland Act of 1874 which divested the Mormon-controlled probate courts of their power to hear civil, chancery, and criminal actions; it transfered jurisdiction over all important cases to the federal territorial courts.[58]

Because both sides were eager to determine the effectiveness of the anti-polygamy law, federal and Mormon officials informally agreed to a test case.[59] George Reynolds, personal secretary to Brigham Young, was chosen as the guinea pig. He had recently taken a second wife and in October, 1874, was indicted for bigamy. Reynolds was convicted, but the Utah Territorial Supreme Court voided the conviction on the ground that the grand jury which indicted him had been improperly constituted.[60] He was retried, again convicted, and sentenced to a five hundred dollar fine and to two years at hard labor. This time the Territorial Supreme Court upheld the conviction;[61] on October 4, 1876, Reynolds appealed to the United States Supreme Court.

Throughout the proceedings Reynolds' attorneys set up two broad defenses. The first was procedural, and it is evident that it—not the religious question—gave the federal courts the most difficulty. The essence of the procedural argument was that the methods by which Reynolds was convicted violated federal law. In particular, in both the first and second trials, he claimed that the size and composition of the grand and petit juries were illegal (the trial judge had sustained all prosecution motions to disqualify Mormon veniremen for bias); and he claimed that the prosecution had been improperly allowed to introduce the evidence which proved the second and bigamous marriage. Reynolds also insisted that the trial judge exceeded his powers when he charged the jury to "consider what are to be the consequences to the innocent victims of this [polygamous] delusion." The "innocent children" and "pure-minded women," he charged, were the real "sufferers" and the suffering would increase if polygamy were not checked.[62]

Reynolds' second defense was religious. His Church credentials were impeccable: he had been a Mormon for twelve years, and his second marriage had been approved by the hierarchy. His wituesses

57. YOUNG, *op. cit. supra* note 41, at 348.
58. Act of June 23, 1874, ch. 469, § 3, 18 Stat. 253.
59. The first *Reynolds* case was a pre-arranged affair; the secoud one was not. 5 ROBERTS, A COMPREHENSIVE HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 468-70 (1930).
60. United States v. Reynolds, 1 Utah 226 (1874).
61. United States v. Reynolds, 1 Utah 319 (1876).
62. Record pp. 28-29, United States v. Reynolds, *supra* note 31.

included Orson Pratt, the author of "Celestial Marriage," and Daniel H. Wells, a prominent Mormon who once commanded the Nauvoo Legion. These Church leaders testified that the failure of male members, when circumstances permitted, to practice polygamy—a command of God—would lead to punishment and "damnation in the life to come."[63] Reynolds tacitly accepted the constitutionality of the Morrill Act, but denied that it could be applied to him:

> A person *non compos mentis* can have no guilty intention. One who does the act involuntarily is free from criminality. One who commits or abstains from an act under a belief that it is God's will that he should do so, is free from guilt. So here, one who contracts the relation forbidden by statute, in the belief that it is not only pleasing to the Almighty, but that it is positively commanded, cannot have the guilty mind which is essential to the commission of a crime. . . . [He] cannot be CRIMINALLY responsible, since guilty intent is not only consciously absent, but there is present a positive belief that the act complained of is lawful, and even acceptable to the Deity.[64]

The argument concluded with the disarming statement that, while "this line of reasoning may make it difficult to deal criminally with certain (supposed) infractions of the moral law . . . it is none the less logical and convincing."[65]

It is, of course, the problem of religious freedom, so starkly presented by the *Reynolds* case, which interests us most; in any similar case today it would be one of the central issues.[66] But until Chief Justice Waite wrote his opinion, the religious freedom question was muted—a good indication of how unaccustomed most nineteenth-century Americans were to thinking in terms of the first amendment. In the first *Reynolds* case the Utah Supreme Court brusquely announced that the religious plea was "based upon neither reason, justice nor law, and therefore we dismiss it without further notice."[67] True to its promise, the territorial court completely ignored that issue the second time the case was before it.[68] In his brief to the Supreme Court the Solicitor General of the United States revealed how much weight he assigned to the religious freedom question: he lumped it together with three other minor exceptions which "do not call for any

63. *Id.* pp. 18-19.
64. Brief of Plaintiff-in-Error pp. 56-57, United States v. Reynolds, *supra* note 31.
65. *Id.* at p. 57.
66. See Cleveland v. United States, *supra* note 32 (Mann Act prosecution of Fundamentalist Mormons for practicing polygamy); Musser v. Utah, 333 U.S. 95 (1948) (state prosecution for advocating polygamy); and People v. Woody, 40 Cal. Rptr. 69, 394 P.2d 813 (1964) (state prosecution of members of a sect which uses mescaline as an essential part of religious ceremony).
67. United States v. Reynolds, 1 Utah 226 (1874).
68. United States v. Reynolds, 1 Utah 319 (1876).

remark."[69]

On the other side, the attorneys for Reynolds directed almost all of their fire to alleged errors in the trial. In a brief of sixty-three pages they gave little more than five to the question of religious freedom. The first amendment is nowhere mentioned, nor is there any discussion of the meaning of religious freedom under the Constitution. There is only the assertion that "the genius of the Constitution" forbids Congress to enact "arbitrary" territorial legislation, an argument in behalf of self-government in the territories, and the defense that Reynolds' religious convictions immunized his actions from the evil intent needed to sustain a conviction.[70]

Under these circumstances it is nothing but remarkable that in *Reynolds v. United States* the Supreme Court produced what has become the leading constitutional precedent on the free exercise clause of the first amendment. While the reasons are not certain in every detail, much of the answer is supplied by the Waite Papers. The *Reynolds* case was argued on November 14 and 15, 1878, and it was followed by an extremely close conference room vote on the sixteenth. Justices Miller, Swayne, Strong, Hunt, and Harlan voted to affirm the Utah court; the Chief Justice, Clifford, Field, and Bradley voted to reverse.[71] Yet the Chief Justice's docket book lists him as the one assigned to prepare the opinion, and it further notes that on January 4, 1879, the Court approved his opinion affirming Reynolds' conviction. It was announced on January 6, with only Justice Field dissenting from one of the points in Waite's opinion.

It is almost certain that the four votes to reverse cast on November 16 were motivated by doubts that the Reynolds trial had violated federal law. It was these questions which attracted almost all of the attention in the courts below and in the briefs presented by the opposing sides. This conclusion is reinforced by the fact that Justice Field, the only one of the four conference room dissenters to note publicly his disagreement, based his partial dissent from the *Reynolds* judgment solely on a question as to the admissibility of some of the testimony. He uttered not a word on the religious issue.[72] Equally suggestive is the fact that in none of the subsequent Mormon cases to reach the Court during the next decade did any one of the Justices show the slightest concern about possible violations of the first amendment, even though the questions presented by some of these cases were far graver than those in *Reynolds*.[73]

69. Brief for the United States p. 8, United States v. Reynolds, *supra* note 31.
70. Brief of Plaintiff-in-Error pp. 52-57, United States v. Reynolds, *supra* note 31.
71. Docket Book, Oct. Term 1878.
72. *Supra* note 31, at 168.
73. *Infra*, 49-54. This was particularly true in Davis v. Beason, 133 U.S. 333 (1890),

We cannot know why Bradley and Clifford shifted (or, alternatively, why they silently acquiesced in the judgment), but Waite very likely shifted because of a combination of reasons. Quite possibly his friendship with George Bancroft sparked his interest in the religious issue.[74] The most likely causes, however, were probably his dislike of close decisions and the fact that he felt an especially strong responsibility in the assignment of opinions in constitutional cases. In 1881 he compiled a memorandum of significant constitutional cases that had been decided since his appointment: of the seventy-two cases he listed Waite aligned himself with the majority—and thus controlled the assignment of opinion—in all but six. The assignments, moreover, were consistently given to the Court's strongest members.[75] *Reynolds* was one of the significant cases.

However troubled he may have been at first, the Chief Justice's opinion disposed of the procedural issues to the satisfaction of all the brethren except Justice Field. Perhaps by "shutting" his "eyes just a little"[76] Waite felt that the disputed points could be resolved in favor of the United States. In any event *Reynolds v. United States* accepted the legality of the Utah territorial law which limited grand juries to fifteen members, instead of the sixteen to twenty-three required in the courts of the United States.[77] It sustained the composition of the petit jury, including the government's challenges for cause against all jurors who were living or had lived in polygamy.[78] It ruled that the vital testimony establishing the fact of Reynolds' first marriage, given by his second and "illegal" wife in the first trial, could be admitted in the second trial. The record showed that the accused was responsible for the disappearance of Mrs. Reynolds number two. Waite declared that there was no unfairness in the admission of her testimony; the governing maxim, he wrote, was that "no one shall be permitted to take advantage of his wrong. . . ."[79] Finally, the Court saw "no just cause for complaint" in that part of the trial judge's charge which directed the jury to keep in mind the effects of polygamy. Congress, he said, believed that polygamy had "evil consequences," and all that the judge did "was to call the attention of the jury to the peculiar character of the crime for which the accused was on trial, and to

and Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890). It is worth noting that the Court opinions in these cases were delivered by Justices Field and Bradley, two of the conference room dissenters in the *Reynolds* case.

74. See pp. 525-29 *infra.*

75. MACRATH, *op. cit. supra* note 1, at 263.

76. See text accompanying notes 17 & 18 *supra.*

77. *Supra* note 31, at 154.

78. *Id.* at 154-57.

79. *Id.* at 159. This was the point on which Justice Field dissented.

remind them of the duty they had to perform."[80]

Although there is no specific proof, the circumstantial evidence strongly suggests that the Chief Justice was deeply interested in the religious questions raised by the trial of George Reynolds. Fully half of Waite's *Reynolds* opinion was devoted to an examination of the meaning of religious freedom under the Constitution, a sharp contrast with the casual treatment of this question at all other stages of the proceedings.[81] Waite's discussion of the first amendment was not, however, obiter dicta: the religious question was squarely in the record, and it was after all at the root of the case. To Mormons the practice of polygamy was an integral part of their theology. The claim that the Constitution gave them the right to live in conformity with the laws of God was their most popular defense. As one Mormon spokesman said, "The controversy is with God, not us."[82]

Morrison Waite himself was a God-fearing man and active in the Episcopal Church, yet he made little show of his beliefs and was tolerant of those of others. On the other hand, every facet of his value system and political background pointed to his hostility toward Mormon polygamy. He had been a Republican since the days when the "twin relic" first became a party issue. He was a friend and political admirer of President Rutherford Hayes, whose views of Reconstruction and the corrupting effect of unchecked corporate power he broadly shared.[83] One doubts that he felt very differently about polygamy and theocracy. Strongly sympathetic to the cause of equal treatment for women, the Chief Justice unquestionably took a dim view of the subservient status of women in Mormon society.[84] Within the context of Waite's value system, the attempt to crush polygamy was unquestionably a progressive reform.

Apart from these background influences, the immediate direction of Waite's handling of the religious question was shaped by his friendship with the American historian, George Bancroft. Bancroft was a nineteenth-century Arthur Schlesinger, Jr.: in the course of a long and eventful career he had written a monumental ten volume history of the United States,[85] played a leading part in Jacksonian Democratic politics, and served as Secretary of the Navy under Polk and as John-

80. *Id.* at 168.

81. One could argue that Waite's discussion of the free exercise clause reflected his own initial doubts as to the legitimacy of the federal prosecution, that he was arguing to convince himself. For the reasons indicated in this paragraph and the next, I do not believe this would be a reasonable inference.

82. WALLACE, *op. cit. supra* note 41, at 13.

83. MAGRATH, *op. cit. supra* note 1, at 151-71, 206-08.

84. *Id.* at 119.

85. BANCROFT, HISTORY OF THE UNITED STATES FROM THE DISCOVERY OF THE CONTINENT (1834-1875). The *History* went through twenty-five various editions.

son's and Grant's Minister to Prussia. In the seventies and eighties he lived in semi-retirement in Washington, preparing a history of the American Constitution.[86] His prestige was enormous, his presence at dinner gatherings a coup for any host: in an unprecedented gesture the Senate in 1879 voted him the full privileges of the Senate floor.[87]

During his first years on the Court Waite lived on H Street next door to the elder statesman. He leased the home of J. C. B. Davis, Bancroft's nephew who was an intimate friend of the Chief Justice and who later became the Court Reporter. Before long the historian was describing himself as on "the most friendly terms" with Waite; the Chief Justice spoke of Bancroft as "the greatest of favorites" in Washington society.[88] Bancroft himself entertained freely. For instance, President Hayes recorded in his diary "a delightful dinner party" at the historian's home in which eighteen guests, including Waite, listened as Bancroft "spoke of Washington's love of the Union, his support of John Adams in preference to Thomas Jefferson because of his Union sentiments."[89]

When Waite began preparing the *Reynolds* opinion, he turned to Bancroft for information about the original intent behind the religion clause of the first amendment—still constitutional *terra incognita* in the 1870's.[90] On December 2, 1878, Bancroft responded with two pieces of information. The first was a copy of a letter from Joseph Hawley to the Massachusetts Senate in 1780, declining the seat to which he had been elected. While a devout Congregationalist, Hawley was a genuine eighteenth century libertarian, and he repudiated as "absurd," "impolitick," "unrighteous," "unconscionable," and "dishonorable," a provision in the Massachusetts Constitution of 1780 which required members of the General Court to make a profession of their Christian faith before taking their seats.[91] The second place of information that Bancroft passed on to Waite was a reference to Jefferson's Statute on Religious Freedom:

86. BANCROFT, HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA (6th ed. 1893).

87. NYE, GEORGE BANCROFT, BRAHMIN REBEL 294 (1944).

88. Bancroft to Davis, 1875, undated, "J. C. Bancroft Davis Papers," Library of Congress; Waite to Davis, May 24, 1875.

89. Feb. 23, 1878. 3 HAYES, *op. cit. supra* note 55, at 461.

90. The request must have been oral; there is no Waite to Bancroft letter in the file of outgoing correspondence which is complete for this period.

91. Hawley's classic rejoinder deserves to be quoted: "Did our Father Confessors imagine, that a man who had not so much fear of God in his heart, as to restrain him from acting dishonestly and knavishly in the trust of a Senator or Representative would hesitate a moment to subscribe that declaration? *Cui bono* then is the Declaration?" *Joseph Hawley's Criticism of the Constitution of Massachusetts,* in 3 SMITH COLLEGE STUDIES IN HISTORY 53 (Clune ed. 1917). Hawley was a figure of some importance in his day. See BROWN, JOSEPH HAWLEY, COLONIAL RADICAL (1931).

> The Virginia law, which guided the Virginia members of the convention,[92] shows the opinion of the leading American Statesmen in 1785. It is found in Hening's Virginia Statutes at large XII. 84-86. It was accepted alike by the friends of Jefferson, and the Presbyterians of Virginia.[93]

Bancroft covered these events in his history of the Constitution which he was then writing. He praised Hawley's letter and discussed the disestablishment of religion in Virginia during the 1780's, showing his great sympathy for the concept of religious liberty represented by Jefferson's statute.[94] Bancroft, who was a Unitarian transcendentalist, made clear his own view on the meaning of religious freedom. It meant the separation of church and state and "the management of temporal things" by "the temporal power."[95] But it also meant absolute liberty for "the citadel of conscience, the sanctuary of the soul." In America, he wrote, the church member was to be "subject to no supervision but of those with whom he had entered into covenant. The temporal power might punish the evil deed, but not punish or even search after the thought of the mind."[96]

Waite's discussion of the free exercise clause did not refer to Hawley, but the *Reynolds* opinion shows his indebtedness to Bancroft. The Chief Justice warmly acknowledged his neighbor's aid. Writing to him on January 4, 1879, he "again" expressed "my thanks for the information given as to the history of the free religion clause in the constitution." "With your assistance," he continued, "I have been able to set forth, somewhat clearly I hope, the scope and effect of that provision."[97] It would, however, be wrong in the extreme to conclude that Bancroft dictated the Chief Justice's opinion. Waite characteristically sought assistance from any possibly useful source. Thus, in preparing an opinion in a case involving matters of international law, he asked questions of John Bassett Moore, then an assistant in the State Department, examined twenty-two scholarly authorities, and looked at twenty United States treaties with foreign nations.[98] He also went to

92. A reference to the Virginia convention of 1788, which ratified the new federal constitution but proposed its amendment by the addition of a twenty-section bill of rights.

93. Bancroft to Waite, Dec. 2, 1878.

94. 1 BANCROFT, *op. cit. supra* note 86, at 210-217.

95. 2 *Id.* at 326.

96. 1 *Id.* at 212.

97. Waite to Bancroft, Jan. 4, 1879. Massachusetts Historical Society.

98. Moore to Waite, Dec. 8, 28, 1886, and a memorandum on the case, all in Legal File, Oct. Terms 1886-87. The case was Wildenhus's Case, 120 U.S. 1 (1887). Waite's last opinion, which dealt with the exceedingly complex and technical questions raised by the suits over the infringements of the Bell telephone patents, is similarly a model of responsible scholarship. The Telephone Cases, 126 U.S. 1 (1888). He spent months working on the opinion and educated himself on the principles of electricity. See MAGRATH, *op. cit. supra* note 1, at 309, and the Letter From Ainsworth R.

persons whom he respected. He was a good lawyer and a literate man,[99] and he was intelligent—intelligent enough to consult able people when he prepared opinions on unfamiliar subjects. He was particularly close to Justice Bradley, the Court's most learned member, whose suggestions appear in many of Waite's opinions: *Munn v. Illinois*[100] was as much Bradley's as Waite's opinion.[101]

But Waite was no man's puppet. Others came to him as well. Harlan, for example, did in 1881 when he was writing an opinion in what he described as a "grave" municipal bond case. "You are often very happy," the Justice wrote him, "in stating concisely a rule or principle, and if it occurs to you, without taking much time, how the rule should be stated in this case, I would be glad to have your views."[102] Waite, moreover, used the information he acquired as *he* saw fit. "I send you a copy of the [*Reynolds*] opinion," he told Bancroft, "that you may see what use has been made of your facts."[103] Facts and opinions, we know, are rarely wholly separable, but the Chief Justice put his own imprint on the materials supplied to him.

On another occasion Waite rejected Bancroft's advice, despite the historian's passionate conviction, that the Constitution, if "rightly interpreted," forbade the federal government from making paper money legal tender.[104] Under the skin Bancroft was still a states' rights Democrat, and he had always been a hard-money man. The Waite Court's ruling in *Julliard v. Greenman*[105] that Congress had the implied power to make Treasury notes legal tender in times of peace as well as of war aroused the old historian. Waite had arranged for him to be in Court the day that the *Julliard* opinion was announced.

Spofford, the Librarian of Congress, Jan. 7, 1888, informing Waite that he will, if necessary, order a copy of "Ferguson's Electricity" from New York.

99. He regularly requested such books as CURTIS, HISTORY OF THE ORIGIN, FORMATION AND ADOPTION OF THE CONSTITUTION (1854-1858); HOLST, THE CONSTITUTIONAL AND POLITICAL HISTORY OF THE UNITED STATES (1877-1892); TOCQUEVILLE, DEMOCRACY IN AMERICA (various editions since 1838). Waite to Spofford, May 16, 1878, is typical.

100. 94 U.S. 113 (1877).

101. MAGRATH, *op. cit. supra* note 1, at 182-84.

102. Harlan to Waite, Aug. 20, 1881. The case, Insurance Co. v. Bruce, 105 U.S. 328 (1882), was eventually decided on narrower grounds than Harlan had originally indicated in his letter to Waite.

103. Waite to Bancroft, Jan. 17, 1879.

104. 2 BANCROFT, *op. cit. supra* note 86, at 132-139. Paper money "is the favorite of those who seek gain without willingness to toil; it is the deadly foe of industry." *Id.* at 135. Bancroft's evidence showed only that under the Constitution, article I, section 10, the states were forbidden to issue "bills of credit"; his argument against federal power to issue paper money was based solely on implication. Since, Bancroft implied, the framers regarded paper money as a "ruinous expedient," they could not have intended to give this power to Congress. See also, NYE, *op. cit. supra* note 87, at 294-95.

105. 110 U.S. 421 (1884).

The result was a shock: "I never in my life," he wrote Waite, "have been so surprised as when I caught the nature of the decision of the Court." He was especially chagrined because the Court rejected the conclusions which he expressed in his *History of the Constitution.* "[T]he ground which I took," he informed Waite,

> is the only correct one. The historian like the judge must strive for impartiality, and the only way in which impartiality can be obtained is to seek the truth for the sake of truth. The historian like the judge must be superior to prepossession and to pride of opinion. . . . I do not myself think there is any doubt whatever about the meaning of the constitution [on the subject of paper money] . . . .[106]

Bancroft and Waite, however, shared the same "truth"—or was it the same "prepossession?"—in *Reynolds v. United States.* In rejecting the religious defense of George Reynolds, the Chief Justice first paraphrased the first amendment, noting that the word "religion" is not defined. Unable to define the indefinable, he in effect shifted his inquiry to an examination of "religious freedom" whose meaning he sought in "the history of the times in the midst of which the provision was adopted."[107] Waite briefly noted the old colonial practices which mingled state and church—public taxation for religious purposes and punishment of heretics—and cited their demise in the post-Revolutionary period. The Virginia experience, Waite argued, was typical, and he quoted Madison's statement in his famous "Memorial and Remonstrance Against Religious Assessments" that "religion, or the duty we owe the Creator," was beyond the power of the civil authority.[108]

In addition, Waite discussed two of Jefferson's contributions which indicate "the true distinction between what properly belongs to the church and what to the State."[109] One was the preamble to the Virginia Statute on Religious Freedom which he quoted:

> That to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty . . . . [I]t is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order.[110]

106. Bancroft to Waite, May 6, 1884, in HOWE, THE LIFE AND LETTERS OF GEORGE BANCROFT 298-99 (1908). Although he and the Chief Justice remained friends, Bancroft was really exorcised; two years later he published a pamphlet severely criticizing the Court's opinion. BANCROFT, A PLEA FOR THE CONSTITUTION OF THE UNITED STATES, WOUNDED IN THE HOUSE OF ITS GUARDIANS (1886).

107. 98 U.S. at 162.

108. *Id.* at 163.

109. *Ibid.*

110. *Ibid.*

After tracing the demands by Jefferson and others for a religious guarantee in the federal constitution, Waite again quoted the Sage of Monticello, turning to the letter of 1802 to the Danbury Baptists. In it Jefferson contemplated "with sovereign reverence" the first amendment because it built "a wall of separation between Church and State." "[R]eligion," Jefferson further declared, "is a matter which lies solely between man and his God"; as for "the legislative powers of government," these "reach actions only, and not opinions."[111] These words, Waite added, "may be accepted as almost an authoritative declaration of the scope and effect" of the free exercise clause of the first amendment. "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."[112]

The framework was now erected and the categories—"mere opinion" versus "subversive actions"—set; all that remained was to fit Reynolds' behavior into the proper slot. The Chief Justice had little difficulty in assigning polygamous marriage to the second category. Polygamy, Waite argued, was "odius" to Western nations. The taking of a second wife—bigamy—had long been a serious crime under the English common law.[113] It was forbidden in all of the American states; the Virginia legislature, for example, soon after enacting Jefferson's Statute on Religious Freedom made bigamy a crime punishable by death.[114] But the state, Waite went on, had an even more fundamental claim: not only was marriage a civil contract that could be regulated by law, but the form of marriage within a society determined its political structure. Here Waite was following the political "science" of his day, in particular Francis Lieber, from whom he drew the conclusion that "polygamy leads to the patriarchal principle" and "when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy."[115] Indeed! One almost wishes this were true—that democracy flourishes where monogamy prevails—and that the Soviet Union, and the United States were sister democracies. Yet Waite was not entirely wrong either: Mormon women were in a subservient status, and the quasi-

111. *Id.* at 164. Exactly how Waite came across the letter to the Danbury Baptists is not clear. Bancroft may have referred him to it in a conversation, or Waite, who worked very systematically, may have decided to track down Jefferson's later statements on the first amendment once he had looked at the Virginia Statute on Religious Freedom.

112. *Ibid.*

113. *Id.* at 164-65.

114. *Id.* at 165; Act of Dec. 8, 1788, 12 Hening's Stat. 691.

115. 98 U.S. at 166. Waite was paraphrasing Lieber. On Lieber see text accompanying note 38 *supra*. His belief that monogamous marriage is the seedbed of the civilized democratic state is developed in 1 LIEBER, MANUAL OF POLITICAL ETHICS 155-60 (1838). See also FRIEDEL, FRANCIS LIEBER 155-56 (1947).

theocracy in Utah was scarcely attuned to the American system of government.

Insofar as *Reynolds* distinguishes mere "opinion" from "action," it is a weak analysis of free exercise problems. Almost all significant religious expression is related to action of some kind—the conduct of ceremonies, the printing and distribution of tracts, or the operation of church day or Sunday schools. But the opinion, a libertarian one in many respects, assures freedom to religious beliefs *and* to religious actions, except where the latter conflict with *general* public regulations. The laws against bigamy were of uniform and general application, and no one really challenged their validity. Could, Waite asked, "those who make polygamy a part of their religion" be exempted from their operation? His answer needs to be quoted in full:

> If they are [exempted], then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do, must be acquitted and go free. This would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worsbip, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or 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 the civil government to prevent her carrying her belief into practice?
>
> So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this 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.[116]

Philip Kurland has made the point—correctly—that the *Reynolds* doctrine, while basically sound, is "tainted" by an untenable dichotomy between "action" and "belief."[117] Nevertheless, the entire context of the *Reynolds* opinion, the fact that the statute against bigamy can be defended as a general regulation well within the traditional legislative power, and the care with which Waite chose his illustrations makes the core logic of *Reynolds v. United States* irrefutable: religious "opinion" is not subject to Caesar's command; religious "action" is, but only when it runs afoul of otherwise valid nondiscriminatory general public laws—that is, laws which do not intentionally discriminate against either all churches or against a

116. 98 U.S. 166-67.

117. KURLAND, *op. cit. supra* note 36, at 78.

specific sect.[118] Any other alternative would produce chaos. Perhaps our legislatures should not pass laws that embody certain moral judgments—that bigamy and murder are wrong, that citizens must pay taxes to provide a minimum level of social welfare, or that to deny Negroes their civil rights is a crime. As individuals we may dislike some of the particular moral judgments embodied in legislation and in the common law, but we cannot escape the fact that much of our law will reflect the moral judgments of our society. Dean Rostow, moreover, is surely correct when he argues that "the common morality of a society at any time is a blend of custom and conviction, or reason and feeling, of experience and prejudice. . . . [I]n the life of the law, especially in a common law country, the customs, the common views, and the habitual patterns of the people's behavior properly count for much."[119] Furthermore, so long as government is conceded the power to govern meaningfully, its general laws must be applicable to all. The Amish must pay Social Security taxes,[120] Christian Scientists must submit to public health laws designed to limit the spread of contagious diseases,[121] Jehovah's Witnesses can be given blood transfusions against their will to save their lives or those of their unborn children,[122] and Orthodox Jews, whose religion forbids them to work on Saturday, can be compelled to close their business establishments on Sunday—the common day of rest—despite the burden this imposes on them.[123]

118. It is evident that the anti-bigamy Morrill Act was aimed at Mormon polygamy, but the law embodied the general social and legal mores of American society. In immediate intent it was discriminatory; in broad cause and effect it was not.

119. ROSTOW, *op. cit. supra* note 37, at 78.

120. Cited in Roche, Book Review, 30 U. CHI. L. REV. 406, 413 n.18 (1963).

121. 2 STOKES, CHURCH AND STATE IN THE UNITED STATES 323-25 (1950).

122. N.Y. Times, June 5, 1962, p. 43, col. 3; June 18, p. 1, col. 3; 19, p. 33, col. 7; 1964; 32 U.S.L. WEEK 2389-90 (1964).

123. Braunfeld v. Brown, 366 U.S. 599 (1961). While it is my belief that the *Braunfeld* ruling is constitutionally correct, the wisest public policy is that which more and more states are adopting—to exempt from the Sunday laws merchants whose shops are closed on *their* Sabbath. The near impossibility of developing a satisfactory constitutional theology in this area has recently been again demonstrated by the disposition of the peyote cases in the California courts. Peyote, a non-habit forming drug composesd primarily of mescaline, plays a central role in the religious ceremonies of the Native American Church, an Indian sect whose membership ranges from 30,000 to 250,000 members. Its members believe that the taking of peyote, which produces hallucinations, puts them into direct contact with God. The federal government does not classify peyote as a narcotic, but a few states, including California, forbid its use. Religious News Service, N.Y. Times, Sept. 12, 1964, p. 16, col. 3. In People v. Woody, *supra* note 66, the California Supreme Court overturned the conviction of three Navajo Indians who used peyote because the state failed to show a "compelling state interest" sufficient to justify infringement of "the theological heart of the Indians' religion." *Id.* at 76, 394 P.2d at 820. The compelling-state-interest test was used by the United States Supreme Court, two Justices dissenting, to exempt a Seventh Day Adventist from one of the requirements of a state unemployment compensation law. Sherbert v. Verner, 374 U.S. 398 (1963). The same logic presumably governed

The immediate consequence of *Reynolds v. United States*[124] was a two-year prison sentence for George Reynolds. Four months after the decision, on a petition for rehearing, the Supreme Court ordered the Utah courts to adjust Reynolds' sentence; he had been wrongly sentenced to imprisonment at hard labor in spite of the fact that the only penalties of the Morrill Act were fines and imprisonment. In 1888 Reynolds, who died in 1909 at the age of sixty-seven, published a book on the subject of his holy scripture, *The Story of the Book of Mormon.* Only eight years ago, a publisher in Salt Lake City—the earthly Zion of Elder George Reynolds—reissued the book in a new edition.[125]

On his part, Chief Justice Waite took pride in the *Reynolds* opinion. writing to a cleric friend he described it as "my sermon on the religion of polygamy," adding tongue-in-cheek, "I hope you will not find it poisoned with heterdoxy."[126] Justice Harlan told him, "It suits me as it is," and he complimented the Chief Justice for an opinion "creditable to you and to the court."[127] The *New York Times,* reflecting a common sentiment, hailed *Reynolds v. United States* as "A Blow At Polygamy," the last of "the twin relics of barbarism." "A great gain," said the *Times,* "has been secured in the organized effort to crush out polygamy in Utah."[128] The Supreme Court and the nation were

the Supreme Court's per curiam reversal of a Minnesota criminal contempt conviction of a woman who refused to serve on a jury because of religious objections. *In re* Jenison, 375 U.S. 14 (1963), remanding the case to the Minnesota Supreme Court "for further consideration in the light of *Sherbert v. Verner.*" The state court subsequently reversed the conviction. Even those who find these two decisions correct—and I do not—might agree that People v. Woody, *supra* note 66, raises problems because of the way in which it distinguishes Reynolds v. United States, 98 U.S. 145 (1879). Polygamy, said the California Supreme Court, had more serious consequences than peyote, and it was not essential to the *practice* of the religion—a valid assertion only if one thinks of religion in the narrowest sense of the physical ceremonies. Furthermore, the California court reserves peyote only for true believers. In a companion habeas corpus case, *In re* Grady, 39 Cal. Rptr. 912, 394 P.2d 728 (1964), it ruled that before a white "self-styled peyote preacher" and "way shower" can be exempted from the drug law he must prove that "his asserted belief was an honest and bona fide one." Since a "factual question remains as to whether defendant actually engaged in good faith in the practice of a religion," the court remanded the case to the superior court for a trial on this question. *Id.* at 913, 394 P.2d at 729. The California court is skating on thin constitutional ice: contrary to *Reynolds,* it allows a religious claim to win exemption from otherwise illegal behavior; and it compounds the error by ordering an examination into one of the most illusive topics in the world—the sincerity of another man's religious beliefs. As Justice Jackson argued in his compelling dissent in Ballard v. United States, 322 U.S. 79, 92-95 (1944), "this business of judicially examining other people's faiths" raises insoluble problems.

124. 98 U.S. 168-69.

125. REYNOLDS, THE STORY OF THE BOOK OF MORMON (1957).

126. Waite to Rev. Dr. Walbridge, Jan. 20, 1879.

127. Harlan to Waite, undated, Legal File, Oct. Term 1878.

128. N.Y. Times, Jan. 8, 1879, p. 4, col. 4.

committed to an unambiguous constitutional principle: one man, one woman.

III. THE AFTERMATH: THE MORMON CONTROL ACTS

George Reynolds was one of the few men ever convicted under the Morrill Act. Anti-polygamy laws encountered the same sort of reaction in the Utah Territory that federal civil rights laws encounter today in the Mississippi delta. The fiery John Taylor, who succeeded Brigham Young to the Presidency of the Church in 1880, counseled a policy of resistance. Typical of the hierarchy's reaction to *Reynolds* was the statement of Apostle Wilford Woodruff. "I will not," he announced in June, 1879, "desert my wives and my children and disobey the commandments of God for the sake of accommodating the public clamor of a nation steeped in sin and ripened for the damnation of hell. I would rather go to prison and to death."[129] In a territory where three-quarters of the population were Mormon, bigamy prosecution became a farce: polygamists went into hiding in the "Underground," key witnesses disappeared, plural wives refused to testify against their husbands, and sympathetic juries would not convict.

But ultimately the Mormon resistance was no match for the federal government. Congress, Court, and President had equal determination and incomparably greater power. At almost the same moment that "states' rights" was raising an impenetrable barrier to the enforcement of Negro civil rights, "territorial" and "religious rights" crumbled before the national determination to exterminate polygamy and the would-be theocracy that had spawned it. An index of the intensity of the federal commitment was the unprecedented action of President Hayes' Secretary of State (and Morrison Waite's close friend) William M. Evarts, in asking foreign governments to discourage Mormonism and to prevent Mormon migration to America—one of the two occasions that the United States has sought to interfere with the religious practices of people living beyond its shores.[130] Congress' specific response to Mormon nullification of the Morrill Act was to enact two pieces of legislation which in their harshness are reminiscent of the anti-Communist laws of our generation; they are best described as the Mormon Control Acts.[131]

129. YOUNG, *op. cit. supra* note 41, at 367.

130. 5 ROBERTS, *op. cit. supra* note 59, at 550-55. The other obvious instance was the demand by United States military authorities at the end of World War II that the Japanese disestablish their state religion, Shintoism, and that the Emperor renounce his divine status.

131. A good summary of the nineteenth-century anti-polygamy laws, which notes their similarity to the post-World War II anti-Communist legislation, may be found in Davis. *The Polygamous Prelude,* 6 AMER. J. LEGAL HIST. 1, 5-23 (1962).

The Edmunds Act of 1882[132] made it easier to secure bigamy convictions by making it a crime for any male in the United States territory merely to cohabit—not marry—with more than one woman. It disqualified from jury service in bigamy and cohabitation prosecutions all who believed in or practiced either polygamy or unlawful cohabitation. In addition, convicted bigamists and "cohabs," as they were quickly dubbed, lost their eligibility to vote and to hold public office. Even more uncompromising was the Edmunds-Tucker Act of 1887:[133] it revoked the Utah law incorporating the Church of Jesus Christ of Latter-Day Saints and dissolved the corporation; and it escheated—confiscated—almost all of the Church's property except that used solely for places of worship, parsonages, and graveyards. The Edmunds-Tucker Act also repealed the Utah legislation granting women the right to vote.[134] Unlike the Civil Rights Enforcement Acts of the previous decade, which, despite their name, went largely unenforced, the federal government enforced the Mormon Control Acts with dedication. Nor, again unlike the case of the post-war civil rights legislation, did the judiciary stand in the way.

Reynolds v. United States,[135] with its unequivocal rejection of the religious defense made of polygamy and its subsurface hostility to Mormon theocracy, made the judicial outcome predictable. In fact, in none of the eight Mormon cases to reach the Court between 1881 and 1890 were first amendment questions seriously examined. They were not even hinted at in most cases, despite the fact that with our libertarian assumptions we see the questions as literally screaming for answers: generations do indeed differ. In *Miles v. United States,*[136] the Mormons won one of their rare victories in the Supreme Court. It unanimously ruled that the old common law rule (codified in the Utah law) forbidding a wife to testify against her husband barred the admitted and hence legal second wife of an alleged polygamist from testifying with regard to his first and disputed marriage. The Edmunds Act of 1882, requiring only proof of cohabitation, cleared up this minor obstacle to effective prosecution of Mormon polygamists.

Almost all of the other decisions went against the Mormons.

132. Act of March 22, 1882, 22 Stat. 31.

133. Act of March 3, 1887, 24 Stat. 635.

134. Since Mormon women voted at the Church's dictation, this was an obvious attempt to weaken its political power. This action led to the kind of delicious ironies which make American politics so fascinating: the Mormons, who kept their women in a generally subservient status, loudly protested this blow at women's rights; Eastern suffragists, who also opposed polygamy, joined anti-polygamy forces in demanding the disfranchisement of Mormon women. Apparently they were not exercising their newly-won right in a "responsible" manner. O'DEA, *op. cit. supra* note 40, at 249.

135. *Supra* note 124.

136. 103 U.S. 304 (1881).

Murphy v. Ramsey[137] unanimously upheld the Edmunds Act's disfranchisement of polygamists. Voting in the territories, the Court solemnly intoned, was a "privilege" to be granted or denied within "the legislative discretion of the Congress of the United States."[138] That the United States had sovereign dominion over the territories—which the antebellum South had so vehemently denied—was a question "no longer open to discussion":

> For certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement. And to this end, no means are more directly and immediately suitable than those provided by this act, which endeavors to withdraw all political influence from those who are practically hostile to its attainment.[139]

In this case the language was that of Justice Matthews, the reasoning was that of *Reynolds*, but the Chief Justice never had the gift of an artistic style. Waite could implicitly and dryly state the rule of "one man, one woman"; Matthews could make it seem like a thing of poetic beauty.

Clawson v. United States[140] sustained the provision in the Edmunds Act which excluded polygamists and believers in polygamy from grand juries in polygamy and cohabitation cases. *Cannon v. United States*[141] presented a fascinating question: in Edmunds Act prosecutions did the offense necessarily include sexual intercourse? Some polygamists suspended sexual relations with their plural wives after the act was passed. The Court answered no, saying that a Mormon man had engaged in illicit cohabitation when he lived with two women, even though he did not sleep with them. As long, said the Court, as he ate with each of them one-third of the time and held them out to the world as his wives he was in violation of the law. Mormons were quick to point out that interpretations such as this punished them for practicing their religion and morally looking after their wives; a Gentile who merely engaged in casual adultery or who

137. 114 U.S. 15 (1885).

138. *Id.* at 45 (Matthews, J.). In this case the Court did invalidate certain election regulations issued by the federal commission which had been appointed to implement the voting provisions of the Edmunds Act; the Court ruled that the commissioners had exceeded their statutory authority. *Id.* at 37.

139. *Id.* at 45.

140. 114 U.S. 477 (1885).

141. 116 U.S. 55 (1886).

retained a separate mistress was not covered by the Edmunds Act. Two Justices, Miller and Field, dissented, arguing that sexual intercourse was a necessary element of guilt in cohabitation cases.[142] The Miller-Field dissent was based on common law views, not libertarian sentiment. If adopted by the majority, it would have led to a grossly illiberal end: to enforce the Edmunds Act federal police would have had to extend their investigative work into Mormon bedrooms.

Snow v. United States[143] was an unanimous decision that Congress intended to foreclose direct Supreme Court review of territorial supreme court rulings in cohabitation cases. In *In re Snow*,[144] however, the entire Court agreed to issue writs of habeas corpus on questions of personal freedom. It then held that the offense of cohabitation is a continuous one, not a series of isolated acts, and ordered the release from prison of a prominent Church leader who had been given three separate consecutive sentences on the basis of one continuous cohabitation. What little comfort this decision gave the harrassed Mormons was dashed in 1890 by the Fuller Court. In *Davis v. Beason*[145] not a single judge dissented from Justice Field's opinion upholding the sanctions of the notorious Idaho Test Oath Act which required all prospective voters to swear that they were not members of any organization teaching or practicing polygamy.

More immediately disastrous to the Mormons, however, was the decision in *The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States*[146] which sustained the constitutionality of the Edmunds-Tucker Act escheating most of the Church's property. For probably the first time in his brilliant career Justice Bradley, who spoke for the Court, allowed his fierce temper to spill over into a judicial opinion. Polygamy, he declared, was a "barbarous practice" and a "nefarious doctrine." The Mormon Church, as he saw it, was an organized conspiracy to promote barbarism, spreading propaganda that is "a blot on our civilization," "contrary to the spirit of Christianity," and contrary to "the enlightened sentiment of mankind." As for the Mormons:

> It is unnecessary here to refer to the past history of the sect, to their defiance of the government authorities, to their attempt to establish an independent community, to their efforts to drive from the territory all who were not connected with them in communion and sympathy. The tale is one of patience on the part of the American government and people, and

142. *Id.* at 71.

143. 118 U.S. 346 (1886). The Court also noted that it had erroneously overlooked the jurisdictional question in Cannon v. United States, 116 U.S. 55 (1885), and it vacated its judgment and recalled its mandate in that case.

144. 120 U.S. 274 (1887).

145. 133 U.S. 333 (1890).

146. 136 U.S. 1 (1890).

> of contempt of authority and resistance to law on the part of the Mormons. Whatever persecutions they may have suffered in the early part of their history, in Missouri and Illinois, they have no excuse for their persistent defiance of law under the government of the United States.[147]

This time three Justices, including Stephen J. Field, dissented. The Edmunds-Tucker Act hit Field at his most sensitive point: property rights. As much as he despised Mormon polygamy, he could not endorse a precedent which dissolved a corporation with vested rights and turned its property over to the government.[148]

By the late 1880's the Mormon question was nearing its final solution, or rather, resolution by *force majeure*. Mormon women could no longer vote. Twelve thousand men had been disfranchised under the Edmunds Act.[149] Something like six hundred to thirteen hundred cohabs, numbering many Church leaders, had been sentenced to prison terms.[150] Hundreds of other cohabs were leading an uncertain existence as fugitives in the Underground.[151] In 1885 President Cleveland strengthened the federal garrison in Salt Lake City, and shortly afterwards many of the Church's valuable properties—perhaps worth one million dollars[152]—were in federal hands under the provisions of the Edmunds-Tucker Act.

In the midst of these developments Morrison R. Waite made a summer vacation trip to the West that eventually took him to Utah. Since the health of Amelia Waite, the Chief Justice's wife, was poor, Waite frequently traveled alone or with his adult daughter, sending Amelia detailed letters about his experiences. His summer trip in 1885 took him first to Oregon and Alaska, then to California; on his return East he stopped for visits in Utah and Colorado. While in California he called on an old friend from his boyhood days, William Hill, who was a minor official in the California State Prison at San Quentin. After Waite's departure, Hill sent him a letter urging him to make sure that he visited Salt Lake City on a Sunday: "You will learn more of the so-called religious aspects of Mormonism, by attending one of their afternoon services at the Tabernacle, and seeing and hearing their performances, than by a week's talk with both Mormons and Gentiles." If possible," his friend cautioned, "attend *incog.*, for if they knew the Chief Justice were present, their speakers

147. *Id.* at 49.
148. *Id.* at 66-68.
149. BANCROFT, HISTORY OF UTAH, 1540-1886, 688-89 (1889).
150. Estimates on the number of convicted offenders vary. O'DEA, *op. cit. supra* note 40, at 111; *cf.* 6 ROBERTS, *op. cit. supra* note 59, at 211.
151. YOUNG, *op. cit. supra* note 41, at 380-409, gives a vivid description of the Mormon Underground.
152. Only estimates are available. ANDERSON, *op. cit. supra* note 46, at 333 n.18; O'DEA, *op. cit. supra* note 40, at 111.

might restrain some of their fanatical and treasonable utterances. . . . They are a strange people."[153]

Whether or not Waite visited the main Mormon Tabernacle is not clear, but he did visit Utah with observant eyes. He could not help raising his eyebrows at the thought of polygamous marriages, but the letter he sent to his wife reveals the fair man he was. Waite painted an honest picture of what he saw during his short visit: it was factual and unadorned, much like his judicial opinions. He reported that following some semi-official dinners and a reception given him by the Territorial Governor,

> Mr. Richards, a Mormon lawyer, and Mr. Caine,[154] the delegate from Utah, drove us around the city and got us admission to the Mormon churches. Then we drove out to Fort Douglass,[155] where I was saluted and lunched. . . . The next day we left a little after 11. This was altogether as pleasant a visit as we have made. Everybody was cordial and the city was pleasant in every respect. In our ride to Fort Douglass we took in the penitentiary which is a disgrace to humanity. The prisoners are herded in a pen and are not kept at work at all. There are a good many of the Mormon dignitaries confined there for a violation of the laws against polygamy. I saw and had a talk with the Apostle Snow.[156] One of the ladies in my carriage was a daughter of a polygamist. She is now the wife of a leading lawyer and a very intelligent and interesting woman. Her father[157] has been a Bishop, and is now one of the directors of the Union Pacific R. R. He is also the manager of the Utah Central and a man of wealth. He lives, however, in obedience to the present laws of Congress, and has been repudiated by the Mormon Hierarchy. The daughter spoke freely of the situation, and her brothers and *half* brothers. She did not, however, attempt to conceal her dislike of the system, and said it was a disturbing element, whenever it appeared. She did not say so in so many words, but it was clear she knew all was not as smooth as it might be inside the polygamous households. I was very glad I had the opportunity of seeing her.[158]

The author of the *Reynolds* opinion was not a hater, and he showed no animus against the Mormon people. Quite the contrary, his attitude was one of interest and of genuine sympathy.

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153. William Hill to Waite, Aug. 28, 1886.

154. John T. Caine, a Mormon who was the Utah delegate to Congress.

155. A misspelling of Fort Douglas, a federal army post on the eastern side of Salt Lake City.

156. Lorenzo Snow, who between 1898 and 1901 served as the fifth president of the Church. In 1887 the Waite Court ordered Snow's release from prison. See text accompanying note 144 *supra*. One wonders if the Chief Justice in conference described to his colleagues the "disgrace" at Fort Douglas when they discussed the *Snow* case.

157. Almost certainly Bishop John Sharp of Salt Lake City, who in 1885 confessed his guilt as a polygamist, promised to obey the federal laws, and was let off with a mild sentence. See ANDERSON, *op. cit. supra* note 46, at 275 n.11, 317; YOUNG, op. cit. *supra* note 41, at 360-61.

158. Waite to Amelia Waite, Sept. 19, 1886.

Within four years of Chief Justice Waite's visit the Mormon hierarchy raised the flag of surrender. Church President John Taylor, the bitter-end resister who had stood in the Illinois jail with Joseph Smith when the Prophet was murdered, died in 1887. The uncompromising federal campaign, as Waite's letter suggested, was bringing results. By the mid-eighties a growing number of Mormons were defecting on the polygamy issue; and Taylor's passing hastened the process. The final Mormon hopes died with the Supreme Court decision sustaining the confiscatory Edmunds-Tucker Act.[159] On September 24, 1890, Wilford Woodruff, the new President of the Church of Jesus Christ of Latter-Day Saints—who only eleven years earlier had said he preferred death to abandoning polygamy—issued a "Manifesto":

> In as much as laws have been enacted by Congress forbidding plural marriages, which laws have been pronounced constitutional by the court of last resort, I hereby declare my intention to submit to those laws and to use my influence with the members of the Church over which I preside to have them do likewise. . . . 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.[160]

The hierarchy unanimously supported this move, and three years later Woodruff declared that the Manifesto was divinely inspired. God, he claimed, had shown him a vision (a vision which certainly comported with reality!) portraying the dire consequences that would befall the Church if it did not abandon polygamy.[161]

The pieces now fell together in quick order. Despite the suspicion of the more rabid anti-Mormon Gentiles in Utah, who argued that the Manifesto was a trick, both sides were ready to compromise. Upon becoming Church President, Woodruff had sent emissaries to Washington to sound out congressmen and executive officials on the possibilities of a bargain in which the Church would renounce polygamy. While there was no official agreement, the Church and the federal government clearly reached an informal understanding.[162] Woodruff released his Manifesto, and in 1893 and 1894 Presidents Harrison and Cleveland issued proclamations of amnesty and pardon that ended the punishment of the convicted polygamists. Meanwhile, the Utah Territorial Assembly had in 1892 passed an anti-cohabitation law, and the Mormon-controlled convention, which drafted a proposed state constitution, adopted irrevocable provisions forever outlawing

159. The Late Corporation of The Church of Jesus Christ of Latter-Day Saints v. United States, *supra* note 146.

160. YOUNG, *op. cit. supra* note 41, at 376-77.

161. *Id.* at 377.

162. WEST, *op. cit. supra* note 39, at 340-41.

polygamy in Utah. Congress passed joint resolutions returning the Church's real estate; the territorial courts cooperated by interpreting the Edmunds-Tucker Act in such a way as to facilitate the return of other Mormon properties now that the remaining purposes of the Church were lawful.[163]

On its seventh application, in 1896, Utah was granted statehood. Although there were some minor difficulties for a few years,[164] the settlement was genuine. The Church gave up polygamy and its dream of a theocracy in the desert; in turn it was left free to prosper in the twentieth century in ways that must surely please the departed spirits of Joseph Smith and Brigham Young. The Mormons still remained a religiously distinctive and "peculiar people," yet in one crucial respect they revealed how thoroughly American they really were: the Mormons knew how to strike a political compromise before it became too late—prudence triumphed over principle, so that other religious principles might survive.

The conflict had been a bitter one, doubly so because the libertarian habits which today tend to civilize struggles between groups were often unpracticed by nineteenth-century Americans. Rights and wrongs need not be—and probably cannot be—tallied. If one concedes the power of society to legislate effectively general moral standards that reflect the deepest instincts of its people and their culture, then theocracy and Mormon polygamy, to borrow a recently popular expression, were simply outside the "mainstream" of American life. The theocracy was short-lived; its demise began in 1857 when Brigham Young was ousted as Governor, though theocratic elements were strongly evident for a long time thereafter. It was polygamy which proved to be the real sticking point in the Mormon relationship with their Gentile antagonists. Like slavery, it was a peculiar institution, and like slavery it became morally intolerable to the cultural, religious, and political leaders of America. The methods used to eradicate polygamy were not pretty; neither were the ones used by Lincoln to save the Union and end slavery. Lincoln, it needs to be added, once said of the Mormons, "Let them alone."[165] He hoped to do as he did when, as a boy in Illinois, he had farmed in a clearing with occasional tree stumps: "I plow around them."[166] But Lincoln too later favored "somehow" calling the Mormons into "obedience," and as President he signed the anti-polygamy Morrill Act.[167]

163. DAVIS, *op. cit. supra* note 131, at 17-18.
164. See YOUNG, *op. cit. supra* note 41, at 378-79, 410-42.
165. 5 ROBERTS, *op. cit. supra* note 59, at 70.
166. AMONG THE MORMONS viii (Mulder & Mortensen eds. 1958).
167. ANDERSON, *op. cit. supra* note 46, at 167. Although he fails to document the assertion, WEST, *op. cit. supra* note 39, states that Lincoln believed the anti-polygamy bill to be unconstitutional.

Utah aspired to statehood, and her geographic location, her economic relationships, and most of her cultural values placed her in the Union. She could not be plowed around. That polygamy was the obstructive stump is made clear by the speedy settlement that followed the Manifesto. Once polygamy was uprooted, the Mormons were free to take their full and rightful place within American society. It also needs to be added that, for all their unhappy early history, the Mormons did flourish in the United States. They now count in their ranks nearly one-and-a-half million saints,[168] many of whom live outside of Utah and in foreign lands where an active missionary movement carries the messages of Joseph Smith and Brigham Young.

Within the loose framework of restrictions set by a minimum common morality embodied in our laws and public health and welfare regulations, there is, after all, extraordinary religious freedom in America for a truly amazing variety of sects, creeds—and religious practices. In the nineteenth century it took sixty years for Mormons and Gentiles to learn how to accommodate themselves to each other. By contrast, in the twentieth century the process of mutual adjustment between society and new and "heretical" creeds has been far less painful. The Christian Scientists[169] and especially the Jehovah's Witnesses[170] faced harrassment and a sort of local option persecution in their first two or three decades. Even so, their general experiences were much less trying than those of the Mormons, and today both sects are well integrated into American life. Even Elijah Muhammad's Black Muslims—many of whose values and practices reek of the bourgeois pieties—need not be permanently estranged from their surroundings.[171] A long range improvement in Negro-white relations would likely bring a decline or "re-interpretation" of the Muslims' exotic eschatology (no more exotic than that of the Mormons

168. *Id.* at 354.

169. BRADEN, CHRISTIAN SCIENCE TODAY, POWER, POLICY, PRACTICE 3-11, 250-66 (1958).

170. MANWARING, RENDER UNTO CAESAR, THE FLAG-SALUTE CONTROVERSY (1962).

171. See generally the excellent study, ESSIEN-UDOM, BLACK NATIONALISM, A SEARCH FOR AN IDENTITY IN AMERICA (paperbound ed. 1964). The Muslims and the federal government have clashed over the question of military service. *Id.* at 292-95. Some state prisons have denied prisoners the right to purchase Black Muslim religious publications or to conduct services. Judicial decisions so far have sustained these highly dubious rulings. See *In re* Ferguson, 55 Cal. 2d 663, 12 Cal. Rptr. 753, 361 P.2d 417 (1961); Cooper v. Pate, 324 F.2d 165 (1963). The N.Y. Times, May 18, 1963, p. 13, col. 5, reported that five Negro pupils were suspended from a public school in Elizabeth, N.J., for three months because, as followers of "Islamic teachings," they refused to salute the United States flag. After a few days, the pupils were apparently reinstated. The ruling in the second flag salute case, West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943), leaves little doubt that the first amendment's guarantee of freedom of political expression (and thus of non-expression as well) bars states from requiring a compulsory flag salute.

once appeared) and an accommodation with the only society in which they have a realistic future.

In the making of these adjustments between religious sects and secular society Chief Justice Waite's opinion in *Reynolds v. United States* serves as one of the guiding constitutional and political principles: a religious claim under the free exercise clause of the first amendment is not necessarily a bar to the enforcement of general social and political regulations. But the Waite opinion, though written in a pre-libertarian era and despite its undercurrent of hostility to Mormon polygamy, is not illiberal. Certainly in its sober discussion of the issues and in its moderate conclusions, it is an opinion notably superior to those of Bradley and Field—two judges commonly ranked as "greater" than their chief—in the Mormon cases of 1890. Thanks to the Chief Justice's common sense use of the materials given him by an eminent historian, George Bancroft, the *Reynolds* opinion has stature as a leading judicial precedent. While safeguarding broad social interests, it emphasizes with equal force the values of religious liberty which Jefferson and Madison represented, and it endorses their sensible insistence that church and state be separated. In its immediate effect the decision removed the constitutional underpinning from the last of the "twin relics of barbarism." It has a broader significance however: Waite's opinion in *Reynolds v. United States* does justice to the claims of Caesar and to the claims of God.