

Book Reviews

HOW MANY SPOUSES DOES THE CONSTITUTION ALLOW ONE TO HAVE?

THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH CENTURY AMERICA. By Sarah Barringer Gordon.¹ University of North Carolina, Chapel Hill. 2002. Pp. xiv, 337. \$49.95 (hard); \$19.95 (paper).

*David R. Dow*² and *Jose I. Maldonado, Jr.*³

*"By convention, and perhaps out of psychological need, we too often interpret the bizarre facts of our universe as mere farce, beneath belief."*⁴

Thomas Green will never be mistaken for Martin Luther King, Jr. He has sparked no national movement. Historians will not write books about him. It is even doubtful that very many people will remember his name a century hence. Like King, however, he is someone who has lived his life in a manner dictated by his moral code; like King, he did so despite the risk that living in accordance with his values would lead him to prison. Thomas Green is in fact in prison, sentenced to a term of five years. Waiting for him to be freed are his five wives and twenty-nine children. Green is a polygamist. He is one of some 30,000 people living in Utah who, calling themselves Mormons, live in

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4. TIM O'BRIEN, JULY, JULY 90 (2002).

polygamous families. He was sentenced in August 2002 for violating Utah's anti-polygamy statute.

For most Americans, polygamy is a bizarre fact. What type of man would want such a family, and what type of woman would agree to such a relationship? Polygamy is a bizarre fact because the lifestyle is abhorrent to some and unfathomable to most. But the fact that something is different does not mean that it warrants vilification. Obviously, not all eccentricity is valuable, but neither is all eccentricity malignant. For reasons rooted in the First Amendment as well as the due process clause, Americans remain indifferent to most eccentricities. Increasingly, unconventional lifestyles are common, uncontroversial, and accepted by mainstream culture. Arrangements that once turned heads—married couples that elect not to have children, unmarried couples that together do have children, interracial and same-sex civil unions—are now unremarkable. Polygamy, however, is an exception. It is a form of domesticity that is not accepted, a mode of living that the government has criminalized. Polygamy is a form of eccentricity that has been singled out for eradication in America—singled out a century ago, and singled out again today.

Polygamy strikes many people as somewhere between abhorrent and laughable. But if it does not cause loud and acrimonious debate any longer, it is perhaps because so few Americans practice it, and because few are aware of it. Indeed, to the extent people are aware of polygamy at all, they treat it as a perverse curiosity, not a problem of national import. Polygamy is irrelevant, because it is rare. It is not nonexistent, however, and because it is not, the constitutionality of measures that purport to criminalize it merit attention.

Sarah Barringer Gordon's book, *The Mormon Question*,⁵ is not about contemporary polygamy; it instead addresses the federal effort to exterminate the practice. The success of the federal effort is one reason for polygamy's current rarity: In the nineteenth century, Congress, the Executive, and the judicial branch, successfully attacked it. No one can know whether polygamy would have thrived in the American West had it not been largely eradicated by the federal government, but Gordon, as an historian, shows carefully and dispassionately how the federal government conducted its campaign.

5. SARAH BARRINGER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH CENTURY AMERICA* (2002).

Gordon's book is a volume of history, not an ideological or argumentative tome, but the history she delineates exposes the outline of a constitutional argument. In her historical narrative lurks a simple constitutional proposition: Laws prohibiting polygamy rest on tenuous constitutional ground.

The structure of this Review is as follows. In Part I, we summarize Gordon's conclusions and review her examination of the practice of polygamy as well as the origin of the federal government's efforts to eradicate it. In Part II we initially discuss the concept of authority in establishment clause and free exercise jurisprudence. Our objective is to develop an approach to establishment and free exercise issues that focuses on the authority that underlies the legislation that is the subject of constitutional challenge. Then, using data that Gordon has presented (as well as some that she has not), we argue that under the approach to the religion clauses that we have delineated, the effort to rid Utah of polygamy violates the essential value of the establishment clause.

I. THE CHRISTIAN CAMPAIGN AGAINST POLYGAMY

In *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America*, Professor Sarah Barringer Gordon traces the historical development, socially and legally, of the Church of Jesus Christ of Latter-Day Saints (better known as the Mormon Church) from its inception and foundation by Joseph Smith in 1830, to its adoption and eventual renunciation of the so-called *Principle*: the practice of polygamy. As Gordon observes, the Mormon religion began without the practice of polygamy. Founded in 1830 by the Church's first president, Joseph Smith, the Church of Latter Day Saints (LDS) began because it satisfied the spiritual yearnings of an identifiable community (p. 19). Indeed, the expressed desire of the early Mormons is reminiscent of contemporary critics of American culture.⁶ The LDS Church preached commitment to morals, val-

6. See, e.g., ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* (1996); WILLIAM J. BENNETT, *THE DEATH OF OUTRAGE* (1998); see also *Barnes v. Glen Theater*, 501 U.S. 560, 575 (1991) (Scalia, J., concurring) ("Our society prohibits . . . certain activities not because they harm others but because they are considered . . . immoral. In American society, such prohibitions have included, for example, sadomasochism . . . suicide, drug use, prostitution, and sodomy."). For a superb critique of the thesis exemplified in the Bork book, see Richard Delgado, *Rodrigo's Bookbag*, 50 STAN. L. REV. 1929 (1998).

ues, and sanctity in a nation that the early Mormons perceived as corrupt, greedy, and selfish (p. 19).

According to Mormon tradition, Joseph Smith was a Moses-like figure, but instead of receiving ten commandments at Sinai, Smith received the “golden plates,” through which developed the cornerstone of the Mormon faith (p. 19). Central beliefs of the Mormon faith include the notion that God is a physical being, who began as a human and became a god through “celestial living”; that Jesus was not immaculately conceived; and that the site of salvation would be North America, because that is where the true believers, or Saints, gathered (p. 21). Above all, Mormons believe that following God’s laws—even if these laws are contrary to the laws of civil society—will elevate a person into eventual godhood (p. 22).

When, in 1843, Smith purportedly received the “Revelation on Celestial Marriage,” the LDS Church for the first time officially endorsed polygamy (p. 22). Initially, only the truly faithful, which meant only the highest-ranking church officials, were allowed to practice polygamy (p. 27). Polygamy was regarded as a serious responsibility, one that only those sufficiently committed and disciplined would be able to undertake; “ordinary” men did not possess the character to manage more than one wife (p. 27). In the LDS faith, the ability to take more than one wife showed true commitment to the faith, and the polygamous lifestyle was accordingly regarded as congruous with sanctity (p. 22).

In a formal sense, a woman’s consent to polygamous marriage was required. By living in such a relationship, women received the opportunity to live a holy life. Yet it should also be noted that, although women had the power to refuse to enter such marriages, LDS doctrine held that were they to so refuse, they would be forever damned for the selfish act of depriving their husbands of true faith (p. 22).

Polygamy therefore established itself in the LDS community, and reports of polygamous relationships quickly spread beyond Mormon communities. As stories of this unorthodox lifestyle reached non-Mormons in Illinois, Missouri, and Ohio, persecution soon followed, both verbal and physical. Most dramatically, after Joseph Smith was arrested and imprisoned for ordering the destruction of printing presses that had been used to criticize his policies, a mob raided the prison where he was housed and murdered him (pp. 23-25). Mormons realized that the state would not protect them, if it even could, and they began

their westward trek under the leadership of Brigham Young (pp. 25-26).

In what would become the Utah territory, Mormons settled and thrived, with Brigham Young himself presiding as the first governor of the Territory (pp. 26-27). The tranquility ended in 1852, when Orson Pratt announced the *Principle* to the nation. The reaction was furious. Opponents of polygamy compared the relationship to slavery (p. 55), the great moral issue of the time, insisting that women were coerced into such marriages, just as slaves were coerced into bondage; they characterized polygamous culture as violent, promiscuous, and exploitative (pp. 27-35). In turn, animosity toward polygamy reinvented itself as hostility toward the LDS Church (p. 57). Opponents of polygamy outside of Utah correctly perceived that the secular and religious authorities were entangled in the Utah Territory, and they insisted that the church be separated from the state (e.g., pp. 57, 63).

As this animus toward polygamy and the Mormons was developing, American courts began to draw on Christian doctrine as they explicated principles of common law (e.g., pp. 66-75). At the same time, Mormons questioned whether common law principles were binding, a questioning that intensified as the line between common law and Protestant principles grew more blurry. In turn, this Mormon questioning intensified hostility toward the LDS in the states. Professor Gordon paints a picture of a cycle which, once begun, was truly endless.

People outside of Utah worried, in short, that the territory was establishing a church, and that the church it was establishing endorsed practices that were anathema. This worry was heightened precisely because the LDS church was organized and efficient, and largely beyond the control of outside governmental influence (p. 77). Members of Congress decided that it was time for the federal government to exert some control.

In 1862, Congress enacted the Morrill Act for the Suppression of Polygamy. The Act "outlawed bigamy in the territories; . . . annulled the Utah territorial legislature's incorporation of the Church of Jesus Christ of Latter-day Saints; and prohibited any religious organization from owning real estate valued at more than \$50,000" (p. 81). Of course, enacting the statute was one thing, enforcing it quite another. As it happened, grand juries in Utah would not indict Mormons for violating the statute,

and so, just five years after its enactment, the statute was characterized by a judiciary committee report as a dead letter (p. 83).

The political tide began to turn when one of the wives of Brigham Young, the president and prophet of the Church, filed for divorce. In seeking divorce, Eliza Young claimed that polygamy constituted a "systematic torture of women, riven by jealousies, violence, and deception." (p. 112). She spoke out against polygamy in Washington, D.C., in 1874, to an audience that included members of Congress as well as President Grant. Shortly thereafter, Congress enacted the Poland Act of 1874 (p. 112-13). Responsibility for enforcing federal antipolygamy law was taken from territorial judges and given to U.S. Marshals. With these changes, the Morrill Act finally yielded a conviction.

The indictment and eventual conviction of George Reynolds for polygamy was contrived as a test case, and it finally reached the Supreme Court in 1878.⁷ George Washington Biddle argued for the Church, and he insisted that the Morrill Act was unconstitutional because, by seeking to control the laws of marriage, Congress had invaded a domain of sovereignty reserved to the states (p. 123). Arguments based on the free exercise or establishment clauses were largely absent, in large part because the Fourteenth Amendment was still relatively new (p. 124).

In an opinion that teems with hostility toward Mormonism, the Court upheld the conviction, and the constitutionality of the statute. As Chief Justice Waite explained, "Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people."⁸ The opinion in *Reynolds* reads like a nineteenth-century version of *Bowers v. Hardwick*,⁹ rejecting a lifestyle because the individual Justices were repulsed by it, and because they could shroud that repulsion with millennia of similar sentiment. Justice

7. *Reynolds v. United States*, 98 U.S. 145 (1879).

8. *Id.* at 164.

9. 478 U.S. 186 (1986). Compare *id.* at 192-94 ("Sodomy was a criminal offense at common law and was forbidden by the laws of the original thirteen States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. In fact, until 1961, all 50 States outlawed sodomy, and today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults. . . . Against this background, to claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious.") (footnotes and citations omitted), with *Reynolds*, 98 U.S. at 165 ("From that day to this we think it may safely be said there never has been a time in any State of the Union when polygamy has not been an offence against society.").

Stevens observed in *Boy Scouts of America v. Dale*¹⁰ that the Court's hostility to homosexuals, like its hostility a generation before to racial minorities, takes the form of "atavistic opinions," the roots of which "have been nourished by sectarian doctrine."¹¹ Exactly the same could be said for the Court's opinion in *Reynolds*. The Justices viewed Mormonism as a patriarchic despotism, comparable in odiousness to human sacrifice.¹² The Court was happy to help Congress and the President force the LDS to submit to the will of the secular sovereign. Congress has the power to eliminate practices that are "subversive of good order,"¹³ and allowing religious exemptions to permissible laws would "permit every citizen to become a law unto himself."¹⁴ Under such circumstances, government would continue to exist "only in name."¹⁵

Once the Court had sanctioned federal efforts to deracinate polygamy, those very efforts proliferated (pp. 148-49). Notably, for example, Congress enacted the Edmunds Act, which criminalized unlawful cohabitation, even in the absence of formal marriage. The statute also excluded from juries individuals who believed in polygamy, and it disfranchised all polygamists (pp. 151-53). The authority of the state to disenfranchise was upheld by the Court.¹⁶ Without the power to vote, it was impossible for proponents of polygamy to prevail.

Of course, as long as women refused to testify against their "husbands," the federal laws were practically toothless. Consequently, Congress aimed at the female collaborationists with the passage in 1887 of the Edmunds-Tucker Act, which imposed penalties against women as well as men (pp. 180-81). Few women were convicted, but the tactic of arresting and indicting them generated leverage that was used to compel them to testify against their husbands (p. 181).

When the Supreme Court upheld the constitutionality of the Edmunds-Tucker Act,¹⁷ which had also divested the LDS church

10. 530 U.S. 640 (2000).

11. *Id.* at 699 (Stevens, J., dissenting).

12. 98 U.S. at 166.

13. *Id.* at 164.

14. *Id.* at 167.

15. *Id.*

16. *Davis v. Beason*, 133 U.S. 333 (1890). The authority of the state to rest legislation on moral disapprobation of polygamy was recently highlighted in *Romer v. Evans*, 517 U.S. 620 (1996), which we discuss below in the conclusion.

17. *Late Corp. of the Church of Jesus Christ of Later-Day Saints v. United States*, 136 U.S. 1 (1890).

of most of its property (p. 185), the war was over (p. 219). Justice Bradley's majority opinion acknowledged that the consequence of the federal power was to dissolve the Mormon Church, but he found that objective worthy, noting that the LDS endorsement of polygamy was "nefarious" and "a return to barbarism."¹⁸ (pp. 214-15).

Finally, in September 1890, Wilford Woodruff, the last of the Mormon presidents to have made the great journey westward with Brigham Young, capitulated. After much prayer, Woodruff claimed to have received a communication from God that counseled abandoning the legal claim to practice the Principle; this retreat was necessary in order to ensure the survival of the Church (p. 220).

And indeed, the Church does survive. No longer does the official LDS Church endorse polygamy, though practicing polygamists continue to regard themselves as Mormons. Whether polygamists are or are not Mormons is a question that seems beside the point, for the one thing that is clear is that but for federal coercion, the official church would not have renounced the practice.

II. THE ESTABLISHMENT CLAUSE AND THE QUESTION OF LEGITIMATE AUTHORITY

Neutrality is the basic value that animates the Establishment Clause,¹⁹ but neutrality is a value that is germane in a multitude of constitutional contexts.²⁰ The most useful way for thinking about how this value works in the context of religion is by focusing on the issue of authority.²¹

18. *Id.* at 49.

19. See, e.g. *Zelman v. Simmons-Harris*, 563 U.S. 639 (2002); *Mitchell v. Helms*, 530 U.S. 793, 809 (2000); *id.* at 838 (O'Connor, J., concurring); *Lynch v. Donnelly*, 465 U.S. 668, 687-90 (1984) (O'Connor, J., concurring); *Mueller v. Allen*, 463 U.S. 388 (1983); see also Kathleen M. Sullivan, *Parades, Public Squares and Voucher Payments: Problems of Government Neutrality*, 28 CONN. L. REV. 243 (1996); David R. Dow, *Toward a Theory of the Establishment Clause*, 56 UMKC L. REV. 491 (1988).

20. Most famously, of course, the equal protection context. See, e.g. *United States v. Virginia*, 518 U.S. 515 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); see also Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 21-22 (1976); Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951 (2002).

21. I discuss the concept of authority in a preliminary fashion in David R. Dow, *The End of Religion*, 16 J.L. & RELIGION 877, 882-85 (2001) (reviewing RONALD F. THIEMANN, *RELIGION IN PUBLIC LIFE: A DILEMMA FOR DEMOCRACY* (1996)).

A. AUTHORITY, CONFLICT, AND THE
FREE EXERCISE CLAUSE

Conflict between the state and religion increases as religious heterogeneity increases. When the legislators and the citizens all share the same faith, then conflict between faith and positive law will be rare. However, as the number of religions increases, the variety of religious *observances* increases as well, and with this increase in the variety of observance is an increased likelihood of conflict between religious ritual and secular law. Simply put, the more religions there are, the greater the likelihood that some law or regulation will interfere with some observance.

The history of the United States demonstrates the proposition: When the nation's population was almost entirely Protestant,²² there was no federal or state interference with Protestant observance or ritual, probably because legislators were either practicing Protestants themselves or were at least familiar with Protestant ritual. Indeed, there was no free exercise or establishment clause challenge levied against federal law until *Reynolds*, and no challenge levied against a state law until the twentieth century.²³

Today the United States is dramatically more heterogeneous from the standpoint of religious affiliation than it was at the founding.²⁴ Indeed, as America became increasingly religiously diverse, beginning with significant Catholic and Jewish immigration in the mid-nineteenth century, resistance to Protestant control of public education began to manifest itself.²⁵ The tension between religious groups that emerged in the context of public education arose in other contexts as well. Catholics and Jews, for example, were not permitted to serve as governor or state legis-

22. At the time of the founding, Catholics constituted less than two percent of the American population. See *Zelman v. Simmons-Harris*, 563 U.S. 639, 720 (2002) (Breyer, J., dissenting) (citing BARRY KOSMIN & SEYMOUR LACHMAN, *ONE NATION UNDER GOD* 45 (1993)). Jews and other religions represented an even smaller percentage. See generally Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409 (1986); Douglas Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875, 919 (1986).

23. The establishment clause was not applied to the states until 1947. See *Everson v. Board of Educ.*, 330 U.S. 1 (1947). The free exercise clause was incorporated several years earlier. See *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

24. See generally SYDNEY E. AHLSTROM, *A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE* 731-1039 (1972).

25. *Zelman*, 563 U.S. at 720 (citing John C. Jeffries & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 299-300 (2001)); KOSMIN & LACHMAN, *supra* note 22, at 45-46; PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* 219 (2002).

lators in New Hampshire in the 1870s, and in the 1930s, pacifists were barred from acquiring citizenship.²⁶ Prohibition of alcohol, embodied in the Eighteenth Amendment, was pursued largely by a handful of religious groups.²⁷ Laws that criminalize suicide have clearly discernible religious roots.²⁸ And of course, laws forcing certain businesses to close on Sunday and prohibiting the sale of particular items on Sunday are rooted in the Christian observance of Sabbath.²⁹

Conceptually and historically, it is plain that conflict between religion and the state arises only after the state is sufficiently heterogeneous religiously. The explanation for this phenomenon does not necessarily have anything to do with hostility toward members of one religion by members of another. Instead, the explanation is a straightforward matter of organizational complexity: Until the state is religiously heterogeneous, the state itself shares the legislative preferences of the overwhelmingly dominant religion, so interference with the rituals of that religion is unlikely and acts that tend to establish that religion will be unnoticed. Once there is no overwhelmingly dominant religion, this dynamic undergoes radical upheaval.

In a religiously diverse state, conflict between the state and one or more religious groups can arise for two distinct reasons. First, at times, legislators will target a specific religion or religious practice, because they regard the targeted practice as contemptible. This type of targeting is rare,³⁰ and when it does arise, it presents an easy constitutional case. The First Amendment prohibits the government from persecuting members of a religious group,³¹ and laws that target are a form of persecution. Despite the fact that there is some confusion as to precisely which

26. See JOHN T. NOONAN, JR. & EDWARD MCGLYNN GAFFNEY, JR., *RELIGIOUS FREEDOM* at xii (2001).

27. *Id.* at 323-34.

28. See David R. Dow, *The Establishment Clause Argument for Choice*, 20 *GOLDEN GATE U. L. REV.* 479, 486 n.38 (1990). See generally George P. Smith, *All's Well that Ends Well*, 22 *U.C. DAVIS L. REV.* 275, 285 (1989); see also L.D. Hankoff, *Judaic Origins of the Suicide Prohibition*, in *SUICIDE: THEORY AND CLINICAL ASPECTS* 20 (L.D. Hankoff & Bernice Einsidler eds., 1979).

29. *McGowan v. Maryland*, 366 U.S. 420 (1961). Of course, the Court in *McGowan* held that Sunday closing laws had outgrown their religious origins, a conclusion that is criticized in Dow, *supra* note 19, at 500-01.

30. As Justice O'Connor has observed, "few States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such." *Employment Div. v. Smith*, 494 U.S. 872, 894 (1990) (O'Connor, J., concurring).

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

constitutional provision such a practice violates,³² there is little doubt that it is constitutionally intolerable.

For example, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,³³ the Court confronted a municipal ordinance that aimed at eliminating a religious ritual engaged in by members of the Santeria religion, a sect that fused elements of Roman Catholicism with aspects of the Cuban Yoruba.³⁴ In particular, members of the Santeria religion continue the ancient practice of animal sacrifice.³⁵ Santeria adherents sacrifice animals to celebrate birth and marriage, to grieve deaths, and to ward off sickness. They sacrifice chickens, pigeons, doves, ducks, guinea pigs, goats, sheep, and turtles by cutting the carotid arteries, in a manner reminiscent of kosher slaughtering.³⁶ In 1987, a Santeria church established itself in the city of Hialeah, Florida. Months later, the Hialeah city council met in emergency session and enacted a law that criminalized animal sacrifice.³⁷ The Supreme Court unanimously found the ordinance impermissible. As Justice Kennedy's opinion stressed, "a law targeting religious beliefs as such is never permissible"; "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral," and it is therefore unconstitutional.³⁸ The City of Hialeah, of course, did proffer a neutral, secular basis for the law: The city argued that the ordinance aimed to prohibit animal cruelty.³⁹ But the fit between that asserted objective and the means was so imperfect, that the Court easily dismissed it as pretextual.⁴⁰ Just as Justice Harlan "knew" that the real purpose of segregated railroad cars in nineteenth century Louisiana was to keep blacks out of the white cars, rather than vice versa,⁴¹ the Justices in *Lukumi Babalu* all under-

32. The violation can be expressed as an equal protection violation, a free exercise violation, or, as we will argue below, as an establishment clause violation. See, e.g., Kenneth L. Karst, *Religious Freedom and Equal Citizenship: Reflections on Lukumi*, 69 TUL. L. REV. 335 (1994).

33. 508 U.S. 520 (1993). There were a variety of opinions, however. Justice Kennedy wrote for the Court, but Justices Scalia (joined by Chief Justice Rehnquist), Souter, and Blackmun (joined by Justice O'Connor) wrote separately. Justice Souter in particular noted that the City's ordinance exhibited "a rare example of a law [that] actually aimed at suppressing religious exercise." *Id.* at 564 (Souter, J., concurring).

34. 508 U.S. at 524-25.

35. *Id.* at 525.

36. *Id.*

37. *Id.* at 526-27.

38. *Id.* at 533.

39. *Id.* at 537.

40. *Id.* at 537-39.

41. *Plessy v. Ferguson*, 163 U.S. 537, 557 (1896) (Harlan, J., dissenting) ("Every one

stood that the Hialeah city council was not concerned with animal welfare at all.

Conversely, where the state does have a legitimate secular purpose that is not serving simply to mask naked hostility toward difference, its laws will survive First Amendment scrutiny even if they have a uniquely burdensome impact of members of a discrete religion. For example, in *Employment Division v. Smith*,⁴² the Court confronted an Oregon law that prohibited the use of peyote. The prohibition fell disproportionately harshly on members of the Native American Church, because that church prescribes the sacramental use of peyote. None of the Justices, however, perceived that the State was aiming at a religious practice. Justice Scalia's opinion reasoned that, at least in the absence of evidence indicating that the state was using a law as a pretext to eradicate a religious sect, the free exercise clause does not create an exception to "generally applicable criminal laws."⁴³ Allowing individuals to escape from the consequences of laws that they objected to on religious grounds would make each individual "a law unto himself"⁴⁴—a phrase that echoed Justice Waite's opinion in *Reynolds*. Of course, it is nothing short of bizarre that Justice Scalia chose to cite *Reynolds* for this proposition, in that the anti-polygamy statutes *did* target a specific religion in a way that Oregon's anti-narcotics statute did not, but the basic point—that there is not a religious exemption from law on the basis of the free exercise clause—is a perfectly sound understanding of that constitutional provision.⁴⁵

Although it may be quite rare for a government to take aim at a particular religious practice, it is not at all uncommon for a state law to have some unintended impact on religious observance. Laws that require citizens to be available to work in order to be entitled to unemployment benefits, for example, may penalize citizens whose inability to gain employment results from their religious practices.⁴⁶ Similarly, Sunday closing laws placed

knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons.").

42. 494 U.S. 872 (1990).

43. *Id.* at 884-85.

44. *Id.* at 885.

45. Justice O'Connor's concurring opinion took a quite different view, arguing that the free exercise clause indeed creates *some* exemptions for religious citizens from facially neutral laws. *See id.* at 891-95 (O'Connor, J., concurring).

46. In a line of cases commencing with *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court held that citizens could not be disqualified from receiving unemployment benefits when their refusal to work was a consequence of their religious observance. The Court

an economic cost on Jews, Muslims, and Seventh Day Adventists that they did not impose on other Christians by requiring members of those faiths to close their businesses on the Christian Sabbath, though they were already compelled by their faiths to close on their own Sabbaths.⁴⁷

Conflicts like the one exemplified in the Sunday closing cases arise because some laws that have a legitimate secular purpose nonetheless interfere uniquely with one religion (or a small number of religions). Laws that require parents to seek medical care for their sick children interfere uniquely (or nearly so) with Christian Scientists.⁴⁸ Laws that prohibit consumption of peyote interfere uniquely (or nearly so) with certain Native American religions.⁴⁹

In cases where the state enacts a measure that has a legitimate secular purpose, and that measure happens to interfere uniquely (or more substantially) with one or a limited number of religions, the Court has, since *Employment Division v. Smith*,⁵⁰ used a rational relation test to evaluate the permissibility of the state's enactment. Consequently, if the state has a legitimate purpose for the measure's enactment, the measure will survive, notwithstanding the impact it has on religious observance. Moreover, unless the state is targeting a particular religious practice for the sake of such targeting, its purpose will be deemed legitimate—meaning that outside of rare instances like those at issue in the *Hialeah* case, the free exercise clause will nullify very little state action.

The approach embraced in *Smith* makes sense for two reasons, one practical and one conceptual. The practical reason is that were the test anything other than rational relation analysis, any individual could challenge any criminal statute, arguing that

reasoned that the contrary result would violate the free exercise clause. Although this line of cases has not been repudiated, see *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987), its doctrinal footing is exceedingly tenuous, and the principle has been narrowly cabined to the employment context. See, e.g., *Trans World Airlines v. Hardison*, 432 U.S. 63 (1967); *Dow*, *supra* note 19, at 505-10.

47. *McGowan v. Maryland*, 366 U.S. 420 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961).

48. See NOONAN & GAFFNEY, *supra* note 26, at 555-56.

49. See OMER C. STEWART, PEYOTE RELIGION 327-36 (1987).

50. 494 U.S. 872 (1990). Further, in *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court made it clear that Congress lacks the power to compel the Court to evaluate free exercise challenges using a compelling state interest test instead of rationality review. Various states, however, have substituted a compelling state interest test for the rational basis test as a matter of state law. See Gary S. Gildin, *Coda to William Penn's Overture*, 4 U. PA. J. CONST. L. 81, 124-27 (2001) (collecting state laws).

the statute interferes with her religious exercise, and the state would then have the burden of showing that the statute was narrowly tailored to achieve a compelling end—a burden that is often difficult for a state to meet.⁵¹ Precisely because the variety of religions represented in America is so broad, the result of using anything other than the rational basis test would be either that many state criminal statutes would be deemed facially unconstitutional, or they would be applicable to everyone other than people whose religious observance was burdened. Criminal law would resemble a patchwork quilt. Put simply, the diversity of religions in America makes it untenable, as a practical matter, for free exercise challenges to trigger any standard of review other than rationality review.

There is also a conceptual basis for using the rational basis test in free exercise cases that has nothing to do with the diversity of religions in America. This conceptual reason is that many religious practices may involve moral choices that the state is permitted to prohibit. A religion may permit men to engage in sexual relationships with thirteen-year-old girls, but the state is permitted to prohibit such unions regardless of whether a religion endorses them. For this reason, the federal government was rightly concerned about reports that David Koresh, the leader of the Branch Davidian movement, was engaging in sexual relations with underage girls, even if that practice was permitted by the members and the norms of the sect.⁵² A religion may encourage parents not to seek medical attention for their sick children, and to rely solely on prayer to accomplish healing, but the state is permitted to compel parents to seek medical attention for their children, or be subject to imprisonment. For this reason, the state is permitted to prosecute Christian Scientist parents whose children die or suffer serious injury when medical help is withheld from them, even though the reason for withholding the medical assistance is rooted in religious belief.⁵³

51. It is as true now as it was a generation ago when Professor Gunther pointed it out that testing a challenge to a fundamental right with strict scrutiny almost always means that the rights claim prevails. Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 21 (1972); see also Dorf, *supra* note 20, at 964-65.

52. At the time of the federal siege of the Branch Davidian compound in Waco, Texas, reports emerged that Koresh engaged in sexual activity with young girls. See, e.g., Sara Rimer & Sam Howe Verhovek, *Growing Up Under Koresh: Cult Children Tell of Abuses*, N.Y. TIMES, May 4, 1993, at A3; Deborah Tedford, *For CPS Workers, Cult Still Mystery; State Found No Proof of Child Abuse*, HOUSTON CHRON., May 10, 1993, at A14.

53. See Wendy Kaminer, *Sectual Discrimination*, AM. PROSPECT, Mar. 11, 2002, at 9

State criminal laws often embody moral premises.⁵⁴ Those premises may occasionally be at odds with the practices of religious groups. Yet characterizing opposition to a state's criminal laws as "religious" does not permit the opponent of the laws to ignore them. That is one idea that the Court in *Reynolds* got exactly right. The universe of norms that animate state action may not overlap precisely with the universe of norms that define a given religion, which means that state action may compel action that a religion forbids or prohibit conduct that a religion requires. In such circumstances, the religious citizen is required to conform her conduct to the secular law. The Court in *Smith*, in concluding that the rational relation test is appropriate in the face of free exercise challenges to neutrally applicable criminal laws, recognized this simple point.

Under the free exercise clause, therefore, if the state has targeted a particular practice for reasons not immediately and obviously connected to a legitimate state end, then the state's action is unconstitutional. Where the state has not singled out a particular religious practice but instead enacts a law that has the consequence of burdening a religious practice, its action is subject to rationality review—meaning that it will ordinarily survive constitutional challenge.

B. AUTHORITY, CONFLICT, AND THE ESTABLISHMENT CLAUSE

In theory, establishment of religion can occur in two ways. First, a state might "establish" a particular church as the official church, and thereby bestow that church with various privileges. We are accustomed to thinking of this type of establishment as equivalent to a theocracy. In so-called Muslim countries, for example, Islam is the official state religion, and we correctly regard such countries as inherently undemocratic.⁵⁵

(discussing the prosecution in Massachusetts of David and Ginger Twitchell, whose son Robyn died after they refused to call a doctor, preferring instead to rely on a faith healer). This Christian Scientist paradigm is widely discussed in the literature. See, e.g., Daniel Billent, *The Prosecution of Christian Scientists: A Needed Protection for Children or Insult Added to Injury*, 48 CLEV. ST. L. REV. 479 (2000); James G. Dwyer, *Spiritual Treatment Exemptions to Child Medical Neglect Laws*, 76 NOTRE DAME L. REV. 147 (2000); Jacqueline B. Tomasso, Note, *Separation of the Conjoined Twins*, 54 RUTGERS L. REV. 771, 790-91 (2002); Scott E. Williams, Note, *Religious Exemptions and the Limits of Neutrality*, 74 TEX. L. REV. 119 (1995).

54. Criminal laws, however, nearly always aspire to protect some members of society from injury caused by others; the moral premises of these laws are not ordinarily "naked" moral preferences, a term we develop below.

55. A distinction should be drawn between a democratic state that has a state relig-

But there is a second, more subtle—and more insidious—form of establishment. It occurs when a particular church (or group of churches) is *nonofficially* privileged or deemed authoritative. This form of establishment is more difficult to identify, but no less antithetic to democracy. Examples of this form of establishment are not uncommon. Sunday closing laws are perhaps the most egregious illustration. Notwithstanding Chief Justice Warren's view that Sunday has become a secular, as well as a religious, day of rest for most Americans,⁵⁶ the original impetus for these laws was indisputably the religious command that Sunday be observed as the Christian Sabbath. The laws therefore privileged the Christian Sabbath *vis-à-vis* the Muslim or Jewish Sabbath, and further privileged Sabbath observers *vis-à-vis* non-Sabbath observers, regardless of their religiosity. Similarly, the prohibition on the use of contraception even by married couples, which was struck down by the Supreme Court in *Griswold v. Connecticut*,⁵⁷ was enacted by a legislature dominated by Catholics, who opposed for religious reasons the use of contraception.⁵⁸

The reason that legislatures are not permitted to require that citizens rest on the Sabbath, or to prohibit citizens from using contraception, is that the establishment clause forbids legislatures from enacting laws on the basis of wholly sectarian authority. A legislature is not permitted, for example, to say that *because* the Old Testament mandates that fields lie fallow every seven years, that farmers are therefore required to let their fields lie fallow every seven years. A legislature is not permitted to say that *because* the Koran forbids consumption of pork, that restaurants are forbidden from serving pork. It would be possible, of course, to locate a secular basis for either of these injunctions. A legislature might conclude that a sound environmental policy mandates periodic resting of farmland, and a legislature might have at one time concluded that public health concerns warranted a prohibition on the sale of pork. The fact that the same statute can either be upheld or struck down, depending on facts

ion (such as England or Ireland) and a sectarian state where religious law is supreme. As I have argued elsewhere, the critical difference between religious law and secular law is that religious law, insofar as it is deemed to embody the word of God, is not changeable through majoritarian politics. See Dow, *supra* note 21, at 882-88, 893-95.

56. *McGowan v. Maryland*, 366 U.S. 420 (1961).

57. 381 U.S. 479 (1965).

58. See, e.g., Mary L. Dudziak, *Just Say No*, 75 IOWA L. REV. 915, 927-31 (1990) (discussing the role of the Catholic Church in preventing the repeal of Connecticut's contraception statute).

unrelated to what the statute does, reveals an important point: A law can be unconstitutional not because of what the law *does*, but because of its origin.⁵⁹

Every culture has certain sources that are legitimate authority within that culture. These sources, in turn, often have roots in authorities that antedate the culture itself, but that are then absorbed into the culture. The norm proscribing the abetment of suicide has biblical roots, for example, but has (at least arguably) been absorbed into the realm of secular authority as well.⁶⁰ Conversely, cultures have certain sources that are not legitimate authority. Rabbis engaged in a debate would not consult Buddhist texts, and mullahs sitting as judges would not examine Catholic encyclicals. Legal cultures include legitimate authorities, and the list of included authorities excludes everything else.⁶¹

It is important not to confuse the concept of a discrete legal culture with the concept of norms. For norms are not necessarily limited to a particular legal culture. Virtually all legal cultures share the norm proscribing murder, for example, although the exceptions to this norm vary somewhat. Moreover, the precise content of legal norms is dynamic. Nevertheless, it is useful, for establishment clause purposes, to recognize that some norms do inhere in identifiable legal cultures—which is to say that they are embedded in the legal authorities of a specific culture and absent from authorities outside that culture. The norm that prohibits the consumption of pork inheres in the Muslim and Jewish legal cultures; the norm that stresses saving all beings from suffering inheres in the Buddhist legal culture.⁶² The norm that requires

59. There is an obvious similarity here to the strand of equal protection doctrine that holds that impermissible motive can invalidate state action that is not inherently violative of the Constitution. *See, e.g.,* *Washington v. Davis*, 426 U.S. 229 (1976) (disapproving the suggestion in *Palmer v. Thompson*, 403 U.S. 217 (1971), that motive is insufficient to establish constitutional violation)); *see also* *Rogers v. Lodge*, 458 U.S. 613 (1982) (holding that at-large voting systems can be deemed unconstitutional if they are maintained to dilute minority voting strength).

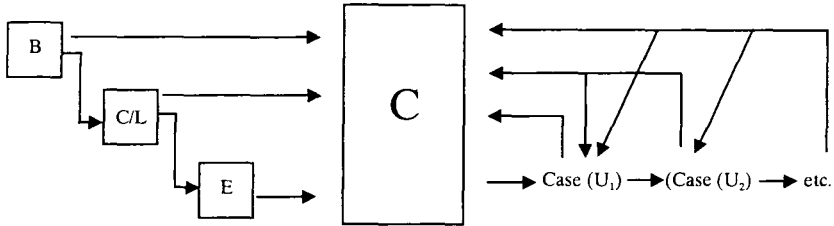
60. *See, e.g.,* *Washington v. Glucksberg*, 521 U.S. 702 (1997).

61. In a sense, the Court's death penalty jurisprudence is both an exception to this proposition while identifying it as the rule, because the Court majority examines texts and norms outside our culture in seeking to ascertain whether the evolving standards of decency proscribe capital punishment, whereas the Justices most inclined to defer to state court judgments in the death penalty area criticize these inquiries into foreign sources of authority. *Compare* *Thompson v. Oklahoma*, 487 U.S. 815, 830-31 (1988) (noting the policies of foreign governments) *with id.* at 868-69 (Scalia, J., dissenting) (rejecting the pertinence of foreign choices).

62. It may be problematic to refer to Buddhism as a legal culture; I do so with some reluctance, though the usage seems to me warranted. *See* HYON GAK SUNIM, ONLY DON'T KNOW: SELECTED TEACHING LETTERS OF ZEN MASTER SEUNG SAHN (1999).

the state to provide its citizens with equal protection resides in the American legal culture.

Diagrammatically, the relationship between laws and norms can be represented as follows:



In the diagram, the box with the large “C” in the middle represents the Constitution; it may also be thought of as representing any discrete constitutional provision (such as the first amendment, or the free exercise or establishment clause). Some aspects of the Constitution are historically unique (which is to say revolutionary);⁶³ however, most of the norms embodied in the Constitution have historical precursors. The norms that lie at the foundation of our form of government exist, in one iteration or another, in most all democratic cultures. To the left of the “C” the diagram reflects three major sources of constitutional values. The box with the “B” represents the Bible;⁶⁴ the box with the “C/L” represents the common law;⁶⁵ the box with the “E” repre-

63. The very concept of divided sovereignty is perhaps the most revolutionary feature. See David R. Dow, *When Words Mean What We Believe They Say*, 76 IOWA L. REV. 1, 56-61 (1990).

64. See, e.g., Patrick M. O’Neil, *Bible in American Constitution*, in RELIGION AND AMERICAN LAW: AN ENCYCLOPEDIA 29 (Paul Finkelman ed., 2000); Edward McGlynn Gaffney, Jr., *The Interaction of Biblical Religion and American Constitutional Law*, in THE BIBLE IN AMERICAN LAW, POLITICS, AND POLITICAL RHETORIC 89 (James Turner Johnson ed., 1985); Andrew C. Skinner, *The Influence of the Hebrew Bible on the Founders of the American Republic*, in SACRED TEXT, SECULAR TIMES: THE HEBREW BIBLE IN THE MODERN WORLD 13 (Leonard Jay Greenspoon & Bryan F. LeBeau eds., 2000); Bernard Meislin, *The Role of the Ten Commandments in American Judicial Decisions*, in JEWISH LAW ASSOCIATION STUDIES III 187 (A.M. Fuss ed., 1987).

65. The list of examples of this influence is close to endless, but representative areas would include *United States v. Dixon*, 509 U.S. 688 (1993) (discussing common law for purposes of understanding double-jeopardy clause); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 210-15 (2000) (Scalia, J., dissenting) (discussing the common law roots of standing and mootness). See generally Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173; Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978); EDWARD S. CORWIN, THE “HIGHER LAW” BACKGROUND OF AMERICAN CONSTITUTIONAL LAW (1955).

sents the Enlightenment.⁶⁶ The diagram is not intended to imply that the Constitution absorbs the norms wholesale from these other cultures, nor is it intended to imply that constitutional values have been influenced solely by the other cultures that I have identified. Rather, the diagram simply means to reflect the obvious point that the framers were influenced by these (as well as other) intellectual strands. That this point is obvious, however, does not diminish from its significance. Indeed, the significance of acknowledging and understanding this dynamic is that it indicates that it is appropriate, when seeking to understand constitutional language, to understand the relevant roots of constitutional norms in antecedent cultures. In seeking to understand the meaning of religious liberty, for example, it is illuminating (which is not to say determinative) to understand the idea of religious liberty in those antecedent legal systems that help make up our own legal and cultural bedrock.⁶⁷

The right side of the "C" reflects the process of interpretation. A case arises. A case is essentially a dispute where the parties disagree on either the relevant principle that should be used to resolve the dispute, or on the correct application of a principle (or both). They therefore submit their dispute to a person or institution that is acknowledged to be an authoritative interpreter. (One way in which cultures differ is in whom or what they regard as authoritative interpreters.)⁶⁸ In resolving the dispute—i.e., in deciding the case—the authoritative interpreter (i.e., the judge in our culture) looks back to the Constitution to locate the applicable norm, the norm that is germane to resolving the dispute. In applying the norm to the facts of the case, the judge generates an understanding (U_1), or interpretation, of that norm. The interpretation also has an effect on the content of the norm itself; in applying the norm, in other words, the norm is moderately altered. Put differently, the process of implementing the norm si-

66. See, e.g., BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* (1969); Harold J. Berman, *The Impact of the Enlightenment on American Constitutional Law*, 4 *YALE J.L. & HUMAN.* 311 (1992).

67. The idea of cultural bedrock is discussed in Dow, *supra* note 65, at 11-29.

68. It may well be possible to define a culture strictly in terms of a set of legal norms. Dow, *supra* note 21, at 882-84, 893-94; David R. Dow, *On Reading Stephen Carter's The Culture of Disbelief—A Dissenting Opinion*, 11 *J. L. & RELIGION* 417, 436-439 (1995). The rise of the nation-state in European history, where the state has roots in uniform language and traditions, seems consistent with this suggestion. See, e.g., Martin Bernal, *Race, Class, and Gender in the Formation of the Aryan Model of Greek Origins*, in *NATIONS, IDENTITIES, CULTURES* 7-28 (V.Y. Mudimbe ed., 1997).

multaneously shapes the norm.⁶⁹ In the next case, the judge will look back to the Constitution, the locus of the norm, but will also examine U_1 to better understand how the contemporary legal culture has understood the pertinent norm. This interpretation, as well, affects the content of the norm itself. This process continues indefinitely, for as long as the legal culture survives.

For purposes of our discussion of the religion clauses, this diagram illustrates two salient features of any legal culture: (i) a legal culture has authoritative texts, and (ii) those authoritative texts in turn have antecedents in other texts, which themselves reside in different legal cultures. The role of a culture's official interpreters is to resolve disputes on the basis of *that* culture's authoritative texts, and the role of a culture's legislators is to legislate on the basis of norms embodied in *that* culture's authoritative texts. As our diagram indicates, our culture's resolvers of disputes—judges—look to our culture's authoritative texts when applying and interpreting the law. The authoritative text is the Constitution. The Constitution has antecedents, but they lose their authority at the moment that C emerges. When judges examine the Constitution, they are certainly aware of its antecedents, and they may well examine those antecedents to better their understanding of this culture's authoritative texts, but they must also be aware that those antecedent texts do not have any independent authority in our legal culture. It would be as wrong for a judge in our legal culture to rest a ruling on the Bible as it would be for the Pope to rest a ruling on the Koran.

Similarly, it would be inappropriate for Congress to mandate that restaurants not serve pork, because the prohibition on the consumption of pork is not present in any authority that forms a legitimate basis for legislation (principally Article I); that is, the prohibition on the consumption of pork is not part of recognized authority in American legal culture. In contrast, the prohibition against murder is part of the fabric of American legal culture, notwithstanding its origins, and notwithstanding that the same norm may also be present in certain religious legal cultures.⁷⁰

69. Our understanding of the relationship between adjudication (whether formal or informal) and the evolution of norms has been enriched by MARK TUNICK, *PRACTICES AND PRINCIPLES* 34-40 (1998) (discussing Hegel's notion of social practice); and ROY A. RAPOPORT, *RITUAL AND RELIGION IN THE MAKING OF HUMANITY* 124-34, 190-96, 453-61 (1999).

70. In *Harris v. McRae*, 448 U.S. 297 (1980), the Court, in upholding the Hyde Amendment, observed that the fact that certain ethical principles are present in the Judeo-Christian tradition does not necessarily entail that they are not also part of the

The philosophical premise of our argument seems uncontroversial; indeed, the Supreme Court's recent decision in *Lawrence v. Texas*⁷¹ illustrates that the Court appreciates the distinction between a norm rooted in religious bedrock and one that is part of the secular culture. In overruling *Bowers v. Hardwick*⁷² and holding that the constitutional right to privacy encompasses consensual homosexual conduct, Justice Kennedy's opinion recognized that the *Bowers* Court had in effect recognized as authoritative a religiously rooted norm.⁷³ As the Court in *Lawrence* apprehended, the *Bowers* Court correctly ascertained the content of certain religious norms; its mistake was in concluding that those same norms resided independently in American cultural bedrock.⁷⁴

It is possible to make certain general observations concerning the norms that reside in sources of authority that provide a legitimate basis for legislation and adjudication in America.⁷⁵ Most generally, the state and federal legislatures have an interest in providing for the health and safety of their citizens,⁷⁶ but no interest in making them "holy." The state's interest is limited to the here-and-now, so to speak, as distinguished from the hereafter. Accordingly, coercive measures enacted by the government must satisfy this general interest. Viewed from this perspective, very few laws are inherently problematical. Even Sunday closing laws are not necessarily unconstitutional, because the state may well have legitimate reasons for wanting citizens not to be seven-day-a-week workaholics. Consequently, establishment clause

broader secular culture. *See id.* at 319.

71. 123 S. Ct. 2472 (2003).

72. 478 U.S. 186 (1986).

73. *See* 123 S. Ct. at 2479-80.

74. *See also* 123 S. Ct. at 2484 (endorsing Justice Stevens's view in *Bowers*, 478 U.S. at 217 (Stevens, J., dissenting), which concluded that even a moral view endorsed by a secular majority cannot be enforced if it is at odds with a constitutional value that is part of the "American heritage of freedom."). This view seems extremely close to what we refer to below as the strong form of our thesis.

75. More generally, a recent examination of constitutional norms that is consistent with the analysis presented here can be found in Robert P. George, *Natural Law, the Constitution, and the Theory and Practice of Judicial Review*, 69 *FORDHAM L. REV.* 2269 (2001).

76. *See, e.g., Pennsylvania Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 125 (1978) (noting that where State "reasonably conclude[s] that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land," compensation need not accompany prohibition). *See generally* *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834-835 (1987) ("Our cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest[.]' [but] [t]hey have made clear . . . that a broad range of governmental purposes and regulations satisfy these requirements.").

suspicions *may* be triggered by the content of a law, but often the establishment clause violation will depend on an assessment of the state's objective in enacting the law, which is perforce an inquiry into legislative purpose.⁷⁷

The salience of legislative motive in establishment clause analysis has been recognized for many years. The *Lemon* test,⁷⁸ by examining both the purpose as well as the effect of enactments challenged as violating the establishment clause, acknowledges that states can violate the clause both by *what* they do and by *why* they do it. Motive matters, because the fundamental establishment clause value is neutrality, and the requirement of neutrality can be violated by both actions as well as motivations.

The neutrality norm of the establishment clause has two dimensions: First, it requires that the government be neutral as among religions (for example, it cannot prefer Christians to Jews, Protestants to Catholics, Muslims to Hindus, and so on); second, it requires that the government be neutral as between religion and nonreligion (for example, it cannot prefer churchgoers to atheists). Actions that target a specific religious practice are thus coherently analyzed as establishment clause cases, because they exhibit non-neutrality between the targeted and non-targeted religions. The neutrality norm of the establishment clause therefore explains why criminal laws that target a particular religious practice are unconstitutional: because the government has disfavored the practitioners of the targeted religion and favored practitioners of more dominant religions, *for reasons that have no basis in the legitimate sources of secular authority*.⁷⁹

77. Most famously, the Court's decision in *Edwards v. Aguillard*, 482 U.S. 578 (1987), which struck down a Louisiana law that required the teaching of "creation science," rested entirely on an assessment of legislative motive. More generally, the *Lemon* test, traditionally used to evaluate Establishment Clause challenges, seeks to identify legislative intent. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The literature on legislative motive is voluminous, but nothing surpasses Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95. We should perhaps stress, however, that the fact that illicit motive is sufficient to constitute an Establishment Clause violation does not mean that it is necessary, and a state can violate the Clause in other manners. See, e.g., *Lynch v. Donnelly*, 465 U.S. 688 (1984) (O'Connor, J., concurring) (noting that establishment clause is violated when state action causes a reasonable observer to feel like an outsider).

78. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

79. The law challenged in *City of Hialeah* exemplifies a law that targets in this fashion.

When the Court struck down the City of Hialeah's prohibition on the Santeria sect's practice of animal sacrifice,⁸⁰ it did not rest its decision on establishment clause grounds,⁸¹ but it could have. The Court recognized that the City's action was intended to target—and succeeded in targeting—the practice of an identifiable religious group; and that the city had no legitimate interest in prohibiting the practice other than its naked disagreement with that form of religious expression. Precisely the same conclusions pertain to the prohibition against polygamy.

Laws violate the establishment clause when they prefer religion in general to nonreligion, or when they prefer certain religions over others.⁸² The first dimension of the neutrality principle is more controversial than the second, but it is by now well-established. Although advocates of the so-called nonpreferentialist position have argued in recent years that the establishment clause does not prevent the government from preferring religion generally to nonreligion,⁸³ the nonpreferentialist view is untenable as an historical matter and unsound as a doctrinal proposition.⁸⁴ The government cannot prefer a father who wants to have a day off on Sunday so that he can go to church with his children over a mother who wants to have a day off on Sunday so that she can walk with her children in the woods.

This dimension of the neutrality principle is reflected in decades of establishment clause jurisprudence.⁸⁵ It is ultimately rooted, of course, in Madison's notion that the government cannot provide benefits to the religious at the expense of the nonreligious (or the differently religious). Following Madison, the Court has held (for example) that, if the government is to provide a conscientious objector exception to conscription, it must be available to all who have a philosophical objection to warfare, not simply to those who have a religious objection.⁸⁶ Similarly, the Court has held that laws that give religious employees certain rights *vis-à-vis* their employers must also extend to nonreli-

80. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

81. *Id.* at 532 (noting that establishment clause forbids official disapproval of a religion, but purporting to rest decision on free exercise grounds).

82. *See, e.g.*, *Board of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 702 (1994); *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985); *Epperson v. Arkansas*, 393 U.S. 97, 106-107 (1968).

83. *See, e.g.*, *Wallace*, 472 U.S. 91-114 (Rehnquist, J., dissenting).

84. Laycock, *supra* note 22, at 875.

85. *See, e.g.*, *Lee v. Weisman*, 505 U.S. 577, 612-16 (1992) (Souter, J., concurring).

86. *Gillette v. United States*, 401 U.S. 437 (1971).

gious workers who have coherent, albeit nonreligious, bases for their conduct.⁸⁷

It should go without saying that the requirement of neutrality between religion and nonreligion does not require that the state be morally agnostic. The state is entitled to embrace, and to legislate on the basis of, moral norms.⁸⁸ Indeed, in certain respects it makes sense to think of a state as a collection of certain norms.⁸⁹ Those very norms can certainly underlie anything the state does—and may even do so as an ontological matter. The point, for establishment clause purposes, is that those norms must rest on a secular, moral bedrock—that is, they must rest on a moral structure independent of any particular creed and indeed of religion in general.⁹⁰

Such an independent moral bedrock is simple to identify, for it includes the *raison d'être* of the modern state: the protection of the health, safety, and welfare of the citizenry. Thus, for example, laws that prohibit the use of narcotics, while perhaps ill-advised and at variance with certain values of libertarianism, are well within this bedrock. Similarly, laws that compel parents to provide for the welfare of their children, including laws that require that parents seek medical attention for their seriously ill children, are within this moral bedrock. Laws that forbid sexual relations between men and underage girls (or between women and underage boys) are within the state's power to prevent vulnerable citizens from having their wills overborne.

Each of these examples of state action is a permissible exercise of legislative power notwithstanding the fact that the legislation may intrude on the sincerely held beliefs of certain religious citizens. For the state's rationale for acting is not to single out a religious practice, but instead to further a secular objective. Where the state prohibits (or compels) conduct, it must have a secular basis for doing so; if it lacks a secular basis, the reasonable inference is that it is seeking to undermine a religious practice.

87. *E.g.*, *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985).

88. However, as we discuss in the following section, there are constitutional constraints on precisely which norms can form the basis of state action.

89. On this point, we have profited greatly from reading many so-called social practice theorists, including particularly TUNICK, *supra* note 69.

90. This point is discussed in greater detail in Dow, *supra* note 68.

C. LOCATING THE BEDROCK: WHICH MORAL VALUES CAN THE STATE IMPOSE?

Our thesis is that laws prohibiting polygamy are unconstitutional, because they seek to codify a religiously rooted norm. The corollary of this thesis is that laws that seek to codify a norm that is rooted in the secular culture are permissible under the establishment clause. Under this approach to the establishment clause, it is necessary to ascertain where the roots of a moral prescription lie; we must be able to tell whether a given norm is limited to a discrete religious culture (or group of religious cultures), or whether instead it is present in the culture's secular bedrock.

There are two coherent conceptual approaches to resolving this issue. One, which we denominate the strong form of our thesis, has the virtue of greater conceptual coherence, but the disadvantage of being somewhat implausible as a doctrinal matter (at least in the near term). The second approach, which we refer to as the weak form of the thesis, has the virtue of being perfectly consistent with existing doctrine, but the disadvantage of greater epistemic complexity.

We discuss these two approaches in turn

1. The Strong Form

The strong form holds that all naked moral legislation is impermissible under the establishment clause.⁹¹ If the prohibition against polygamy qualifies as a naked moral enactment, it would therefore be unconstitutional.

Central to the argument that the establishment clause forbids naked moral legislation is an appreciation of the perceived interconnectedness between religion and morality in the late eighteenth and early nineteenth centuries (and earlier). Religion and religious ideology and culture were understood at the time of the framing of the Constitution, and are largely understood today, as systems that combine ritual with belief. Some of these beliefs have no moral content, but many do. As de Tocqueville, the greatest observer of nineteenth century America trenchantly put it, "the great severity of mores which one notices in the United States has its primary origin in [religious] beliefs."⁹² Re-

91. The term is explicated below in this section.

92. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 291 (J.P. Mayer ed., 1969).

ligion, which is to say Christianity, was viewed as interconnected with the values underlying the republican form of government and America's democratic values. Again de Tocqueville: "I do not know if all Americans have faith in their religion—for who can read the secrets of the heart?—but I am sure that they think it is necessary to the maintenance of republican institutions."⁹³

Tocqueville was wrong about many things,⁹⁴ but not about the relationship in the early republic between religion and value. The country was religiously homogeneous, which meant that there was no conflict between the two domains. Beliefs held by Americans as Christians were held by legislators as Americans.⁹⁵ The relationship between religious virtue and political virtue was, if not embraced by American political thinkers, at least not forthrightly attacked (with the defining exception, of course, of Tom Paine). The beliefs associated with any religion are not necessarily limited to moral propositions;⁹⁶ nevertheless, there is no system known as a religion that does not include some moral propositions.⁹⁷

There is a sense, therefore, in which many Americans in the eighteenth and nineteenth centuries, and many today, regard religion as the source of morality. This view is clearly unsound as a matter of intellectual history—utopian and godless communities have had fully developed moral frameworks—but the persistence of this viewpoint is illuminating because it suggests that one purpose of the establishment clause is to prevent the imposition not simply of the ritualistic behavior associated with a certain religion, but also to prevent the codification of a moral code

93. *Id.* at 293. See generally *id.* at 294-300.

94. For example, de Tocqueville says, "America has had only a very small number of noteworthy writers, . . . [and t]he spirit of the Americans is averse to general ideas." *Id.* at 301. De Tocqueville's first volume was published in 1835; the second in 1840. It is hard to conceive how someone could both admire the Constitution and simultaneously perceive an aversion to general ideas.

With respect to his literary taste, as de Tocqueville was going into print the following American authors, to name just a few, were entering or were at their literary primes: Ralph Waldo Emerson (b. 1803), Walt Whitman (b. 1819), Nathaniel Hawthorne (b. 1804), Herman Melville (b. 1819), Edgar Allan Poe (b. 1809), Henry David Thoreau (b. 1817), Henry Wadsworth Longfellow (b. 1807), Sarah Grimke (b. 1792), Angelina Grimke (b. 1805), and others.

95. An instructive discussion of this issue in the context of the ideology of the Protestant Reformation can be found in AHLSTROM, *supra* note 24, at 81-83, 425-27.

96. The belief that Jesus is the son of God, or that God spoke to Moses from a burning bush, or that Allah or the Buddha went on a certain journey do not involve a moral proposition.

97. See, e.g., JACK MILES, *GOD: A BIOGRAPHY* 110-11 (1995) (noting the origin of Hebrew Bible's God's interest in ethics); *id.* at 123.

associated with a particular religion. Jefferson's defense of religious liberty, for example, was inseparable from his view that the government could not interfere with freedom of the mind, and he expected that the separation between church and state would necessarily entail greater social tolerance.⁹⁸

To the extent, however, that moral codes are part of the ontology of any known religion,⁹⁹ then it is sensible to view the establishment clause as preventing the enactment of any purely moral laws. A purely moral law we can define as a law that seeks to control the behavior or activity of a moral agent, without there being any connection between the behavior of that agent and any consequence to anyone other than that agent.¹⁰⁰ Such a law reflects a naked moral preference.¹⁰¹ In the criminal law literature, this concept is referred to as "victimless crimes." Whether a given crime is in fact victimless is obviously an empirical question. But, unless one accepts that internal angst caused by what others are doing is the sort of harm that the state is permitted to remediate, then the category of victimless crimes is clearly sound. (By "internal angst," I have in mind Mencken's quip that a Puritan is deathly afraid that someone somewhere is having a good time.)

A law, for example, that prohibited masturbation or fasting would violate the establishment clause, under this approach, because such a law would express a naked moral preference (that masturbation or fasting is bad), without linking that preference to the prevention of harm or injury to someone else. Naked

98. Dozens of sources could be cited here. See, e.g., DUMAS MALONE, *JEFFERSON AND THE RIGHTS OF MAN* 106-11 (1951); JOSEPH J. ELLIS, *AMERICAN SPHINX* 283-84 (1997). For suggestions that the Constitution embodies precisely this value, see, for example, DAVID A.J. RICHARDS, *TOLERATION AND THE CONSTITUTION* 103-162 (1986).

99. We have profited greatly on understanding the relationship between ritual and preservation of any religion's beliefs from RAPPAPORT, *supra* note 69; on the point in the text, see *id.* at 124-138.

100. As Brian Bix pointed out to us, there may be a salient distinction between laws that seek to prevent physical injury to an actor and laws that seek to avoid injury to an actor's moral character or "soul." Mandatory seatbelt and helmet laws, drug laws, and perhaps restrictions on prostitution would fall into the former category. It is also possible, however, that the distinction between these two classes of harm is less a function of the nature of the harm to the individual than it is a function of the costs borne by the state. Thus, the state itself may have an economic interest in preventing some harms but not others; the economic interest will tend to be present in cases of physical harm.

101. The term is of course borrowed from Cass Sunstein, *Naked Preferences and the Constitution*, 84 *COLUM. L. REV.* 1689 (1984). Sunstein uses the phrase to refer to the distribution of resources to a limited group, rather than across the social spectrum, merely because of the favored group's political power. Our use of the term is similar: the politically dominant group seeks to codify its moral inclinations, even where the behaviors it deems immoral do not cause injury to nonconsenting individuals.

moral preferences interfere with the liberty protected by the Fourteenth Amendment precisely because they exemplify a form of establishment.

This approach to the establishment clause is not inconsistent with establishment clause case law so much as it is in tension with language in many cases suggesting the existence of state power to regulate morality *per se*. For example, in a multitude of obscenity cases, the Court has recited the platitude that the state can regulate morals.¹⁰² It merits emphasis, however, that with the possible exception of the sodomy¹⁰³ and assisted suicide cases,¹⁰⁴ so-called moral legislation that is implicated in cases that have reached the Supreme Court always aims at preventing a harm to someone other than a volitional participant in assertedly immoral behavior.¹⁰⁵ Thus, laws prohibiting prostitution and drug use, as well as laws regulating obscenity, all seek to address a harm that the legislature believes befalls innocent members of society. Prostitution and obscenity, for example, coerce women or children, and may lead to disease or economic ruination of neighborhoods. Drug use creates social medical costs and leads to secondary criminal activity. Whether these beliefs concerning the consequences of these activities are sound, or whether they are pretextual, is an issue that, for the moment, is besides the point. What is important is that the legislature itself recognizes that a naked moral preference is not a permissible subject of legislation.¹⁰⁶

A number of leading academicians have embraced what we refer to as the strong form of the thesis, and have argued for it in both general terms and in the context of specific legal proscriptions.¹⁰⁷ We are subscribers to this strong view, and under it, laws

102. See, e.g., *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) (noting that public indecency statutes were designed to protect morals and public order and that the traditional police power of the States is defined as the authority to provide for the public health, safety, and morals).

103. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

104. *Vacco v. Quill*, 521 U.S. 793 (1997); *Washington v. Glucksberg*, 521 U.S. 702 (1997).

105. See, e.g., *Barnes*, 501 U.S. 560. See generally Peter M. Cicchino, *Reason and the Rule of Law: Should Bare Assertions of "Public Morality" Qualify as Legitimate Government Interests for the Purposes of Equal Protection Review?*, 87 GEO. L.J. 139 (1998).

106. The distinction between a naked moral preference and a moral preference that aims at protecting innocent members of society is salient in the Court's welfare cases. Compare *Lewis v. Martin*, 397 U.S. 552 (1970) and *King v. Smith*, 392 U.S. 309 (1968) (striking down regulations that aimed at or had the effect of penalizing nonmarital cohabitation) with *Dandridge v. Williams*, 397 U.S. 471 (1970) (upholding a cap on welfare benefits that aimed to provide incentives for family planning).

107. See, e.g., Steven G. Gey, *Is Moral Relativism a Constitutional Command?*, 70

prohibiting polygamy cannot survive establishment clause scrutiny, because they express a naked moral preference for a traditional form of marital relationship.¹⁰⁸ They are no more defensible than would be a law that compelled women to be subservient to their husbands, or that prevented racial intermarriage. In our view, however, even if one is disinclined to embrace the strong view, the same conclusion holds, because the weaker form as well undermines laws prohibiting polygamy. In the following section we therefore turn to the weaker form.

2. The Weaker Form

The virtue of the weaker form of the argument is that it assumes that naked morals legislation is permissible, thereby avoiding the difficult doctrinal matter that is associated with proving the contrary. However, even one who is inclined to cling tenaciously to the view that the state has the power to legislate on the basis of naked moral preferences would be compelled to acknowledge that not all naked moral preferences are permissible bases for legislation. The state could not require individuals to rest on the Sabbath. The state could not force individuals to tithe, or to avoid sexual intercourse when women are menstruating, or to eschew contraception. The reason is *not* that these laws reflect no moral component. Quite the contrary is the case: they are emphatically moral. Rather, the reason the state cannot require conduct in accordance with these moral propositions is that they are not rooted in the broader cultural bedrock; instead, they are rooted in a discrete religious culture.

Yet many moral propositions are present in a wide array of cultures, while other moral propositions may begin in one culture and then move to others. The command to observe the Sabbath began in ancient Judaism, but is also present in Christianity and Islam. Proscriptions against nonjustifiable homicide are pre-

IND. L.J. 331 (1995); *see also* MICHAEL J. PERRY, *RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES* (1997) (arguing that laws prohibiting homosexual activity are unconstitutional because they embody a purely religious preference). Justice Stevens articulated a closely related argument in his dissent in *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 560, 566-68 (1989) (Stevens, J., dissenting) (arguing that portions of the challenged law reflected tenets of Christian faith but lacked secular purpose).

108. Mary Anne Case has argued in private conversation that there is an administrative (which is to say economic) basis for such laws. Perhaps, but it seems more probable that this ostensible economic justification is in fact pretextual, particularly inasmuch as the origin of these laws appears to have nothing to do with economics or administrative efficiency.

sent in every known human culture.¹⁰⁹ Consequently, if the establishment clause prevents the state from codifying only those moral values that are not present in the secular cultural bedrock, the critical question is how one determines where a norm is rooted.

The inquiry that must be made to answer this question is more art than science. It is not, however, an inquiry that is unique to our conception of the establishment clause. Rather, it is precisely the inquiry that the Court makes in the due process context in determining whether an asserted right is within the meaning of the word liberty. Hegel had an idea of “objective ethical order,” and the role of the judge in the context of both the due process and establishment clauses is to apprehend that order.¹¹⁰

In the due process context, if a plaintiff asserts that a law interferes with her right to do something, the first question is whether she in fact has such a protected right. For example, if a plaintiff argues that laws prohibiting the use of contraception interfere with her rights under the Fourteenth Amendment, the Court begins by asking whether the right to use contraception is within the meaning of the word liberty. The various formulae used to resolve this issue are well known. Is the right asserted by the plaintiff within the meaning of ordered liberty?¹¹¹ Is the claimed right one that has traditionally been protected by society?¹¹² Is the asserted right closely related to something that the Court has already recognized as within the meaning of the word?¹¹³ The various iterations of this question have great practical significance; what all versions of the question have in common, however, is that they are historically oriented: The judge answers the question by examining what society has done over a given time.

109. Cf. RAPPAPORT, *supra* note 69, at 132 (noting that homicide is sometimes required, which is true, but not inconsistent with the assertion in the text). Rappaport argues at a somewhat higher level of generality, insisting that every culture has a restriction against breaching obligation, which obligations are defined by that culture.

110. Hegel is quoted in TUNICK, *supra* note 69, at 35. As Tunick explains, Hegel's idea here is that the culture's ethical principles are part of our individual identities. Hegel acknowledges that the ethical practices of a given legal culture form part of the identity of the members of that culture, but he also understands that ethical practices are subject to rational critique. *Id.* at 37.

111. *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937).

112. *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (Scalia, J.).

113. *Id.* at 137-41 (Brennan, J., dissenting). Justice Scalia's approach to this issue has been, I think, fatally criticized by Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990).

Replicating this inquiry in a slightly different context is how it is possible to determine the source of a given moral value.¹¹⁴ Whereas, in the due process context, the court asks whether a given iteration of a right is inherent in the idea of ordered liberty or “deeply rooted” in the nation’s traditions and values, it would ask, in the establishment clause context, whether a given moral value has historically been the subject of secular legislation or whether, on the contrary, it has been limited to sectarian domains. As is the case in the due process context, there will be disputes as to the appropriate level of generality at which the question should be articulated in the establishment clause context. Moreover, just as it is true that articulating the question at a higher level of generality in the due process context will tend to favor the individual (*vis-à-vis* the state), articulating the question at a high level of generality in the establishment clause context will tend to favor the state.

Whether one is inclined to ask the relevant question at a high or a low level of generality is partly an aesthetic matter and partly related to one’s view of what a constitution is. Nevertheless, three general observations suggest that a relatively low level of generality is more appropriate.¹¹⁵ First, it is a mistake in the establishment clause area to ask questions at a relatively high level of generality, because at a high level of generality, the role of both the secular state and religious institutions is the same: namely, to provide for the welfare of their members. Accordingly, insofar as the Constitution presupposes that these institutions are to occupy discrete domains, one must articulate the question at a low enough level of generality to account for the conceptual (and constitutional) distinction between these human institutions. Second, although both the secular state and religious institutions have conventions, the concept of ritual and of liturgy are present only in the religious domain. All societies have conventions but only religious institutions have liturgy or rituals. Any practice, therefore, that is intertwined with ritual or liturgy is a practice the roots of which are limited to the religious sphere. Finally, rituals and liturgy aim to protect the institution of which they are part from dissolution or entropy. The secular

114. There is a well-developed strand of the philosophical literature that looks to social practice to reach conclusions concerning ethical requirements. Hundreds of citations could be offered, but for a sample, see TUNICK, *supra* note 69; MICHAEL WALZER, *SPHERES OF JUSTICE* (1983); J.L. MACKIE, *ETHICS: INVENTING RIGHT AND WRONG* (1977); MARTHA NUSSBAUM, *LOVE’S KNOWLEDGE* (1990); MARTHA NUSSBAUM, *POETIC JUSTICE* (1995).

115. This paragraph draws on RAPPAPORT, *supra* note 69, at 127-93.

state, however, does not merit preservation as an end in itself; its preservation is justified only as long as it is preserving the welfare of its citizens.

With these considerations in mind, we can turn to the concrete issue of polygamy and ask whether the prohibition against it has an historical secular basis. As indicated above, the choice of level of generality can prove dispositive. Thus, if we ask whether there is a deeply rooted tradition whereby the state regulates marriage, the answer would of course be yes.¹¹⁶ However, if we were to ask more specific questions, such as whether the state has traditionally regulated *whom* one may marry, the answer would be negative.¹¹⁷ Indeed, if we were to have asked at the time Congress first prohibited polygamy whether there was a *secular* tradition of regulating marriage by controlling the number of spouses one could have, the answer would be no.¹¹⁸

116. See, e.g., Brian H. Bix, *State of the Union: The States' Interest in the Marital Status of Their Citizens*, 55 U. MIAMI L. REV. 1, 6 (2000) ("The legal regulation of marriage is usually uncontroversial and given little attention within family law."); see also Brian H. Bix, *Choice of Law and Marriage: A Proposal*, 36 FAM. L. Q. 255, 256-63 (2002) (cataloguing state regulations).

117. See, e.g., Bix, *Choice of Law*, *supra* note 116, at 257 & nn.3, 4 (noting that state law typically does not require that both prospective spouses have a connection to the state where the marriage will be performed and effected). The state has traditionally prohibited incestuous relationships. To the extent there is a medical or anti-coercion basis for these restrictions, then they are supported by an independent secular rationale. However, it is also possible that they too reflect a naked moral preference, in which case they are constitutionally suspect. The lack of consistency concerning the meaning of incest tends to suggest the thinness of any legitimate secular interest. See Martha Mahoney, *A Legal Definition of the Stepfamily: The Example of Incest Regulation*, 8 BYU J. PUB. L. 21 (1993); Christine McNiece Metteer, *Some "Incest" Is Harmless Incest: Determining the Fundamental Right to Marry of Adults Related by Affinity Without Resorting to State Incest Statutes*, 10 KAN. J.L. & PUB. POL'Y 262, 263-65 (2000).

Of course, it is also important to mention that there is in fact some history in America of regulating who may marry whom, and that history is shameful. I have in mind, of course, anti-miscegenation laws—themselves defended on religious grounds—which were not struck down until the second half of the twentieth century. See *Loving v. Virginia*, 388 U.S. 1 (1967). The Virginia trial judge who presided over the criminal trial of the parties took the position that "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix." *Id.* at 3.

118. Although at the time of the framing secular prohibitions on bigamy or polygamy existed, these laws reflect the perceived biblical prohibition on multiple wives. Interestingly, however, neither the Hebrew Bible nor the New Testament, the norms of which the Mormons were said to have offended with their practice of polygamy, prohibits polygamy. Not until the eleventh century was polygamy prohibited among Ashkenazic Jews, and Sephardic Jewry did not prohibit polygamy until much later. The New Testament's statement "husband of one wife" (I *Timothy* 3:2) can be read as a prohibition on polygamy, yet through the time of the Reformation polygamy was not uncommon in Christianity. Nevertheless, in the contemporary Judeo-Christian world, the ban on polygamy is identified as a religious command. As the Court observed in *Reynolds*, the

History does not answer questions directly. Even so, it seems fairly clear as an historical matter that the regulation of whom one may marry is an issue that has been quintessentially within the domain of religious authority.¹¹⁹ An institution that includes rituals that are needed to preserve the institution from decay must perforce be concerned with the identity of the parties to a marital relationship. The very concept of intermarriage reflects the extent to which restrictions on marriage are rooted in discrete religious cultures. Religious rules establish who may marry within that church, what the conditions of that marriage will be, and whether and under what circumstances divorce will be permissible. The point of these restrictions is to control and define the family unit per se, and the point of defining the family unit is to preserve the religious institution itself.

The state, however, has no independent interest in defining this unit, or even in preserving itself.¹²⁰ Unless the state can identify a harm that is traditionally within the province of the state to eradicate, then laws controlling the marital relationship are impermissible. It is therefore to that issue that we now turn.

C. POLYGAMY AND AUTHORITY

The City of Hialeah was not permitted to prohibit animal sacrifice because an examination of what the city was doing and why the city was doing it revealed that there was no legitimate state interest in the prohibition. Accordingly, the prohibition was revealed as an impermissible targeting of a religious practice. The key questions, therefore, for purposes of examining the

English prohibition was enforced by the ecclesiastical courts, for marriage and its rudiments had (and has) a sacramental dimension. Teasing apart the secular injunction from the ostensible religious command is beyond the scope of this essay, and beyond my expertise. Suffice it to say that the prohibition is identified as a religious (or quasireligious) command. In contrast, in the non-industrialized, non-Judeo-Christian world, polygamy is the accepted norm. See RICHARD A. POSNER, *SEX AND REASON* 69 (1992).

119. There has also been something of a nationalistic element to these laws. For example, British prohibitions on polygamy, and the refusal to recognize the legality of polygamous relationships, emerged as immigrants who practiced polygamy entered the country in significant numbers. See Prakash Shah, *Attitudes to Polygamy in English Law*, 52 *INT'L & COMP. L.Q.* 369-400 (2002) available at <http://www.art.man.ac.uk/CASAS/pages/papers.htm> (last visited Aug. 13, 2003). Professor Shah argues that in denying the validity of polygamous marriages, English courts "upheld a self-consciously Christian viewpoint." *Id.* at 374 & n.18.

120. See *supra* note 106 (discussing attempts to use welfare laws to control cohabitation); see also *Moore v. City of E. Cleveland*, 431 U.S. 494, 502 (1977); *Zablocki v. Redhail*, 434 U.S. 374, 386-87 (1978) (noting that the right to marry is fundamental but declining to conclude that any restriction on marital freedom is therefore subject to strict scrutiny).

state's prohibition of polygamous unions are: What is the independent secular basis for prohibiting such unions, and is that basis sound?

There are three conceivable justifications for such a prohibition:¹²¹ to prevent betrothal of minors, to protect women from entering into relationships of dramatically unequal power, and to protect the children, both emotionally and economically. As the data reveal, however, none of these justifications is empirically or conceptually sound.¹²²

At the outset, however, a word should be added about the attractiveness of these rationales, as well as the breadth of power they would support. The state assuredly has a compelling interest in preventing minors, generally, from committing themselves to marriage; and the state has a perhaps more weighty interest in protecting children from emotional and financial hardship. But the former interest is easily achieved without prohibiting polygamy, and the latter interest is not uniquely implicated in the context of polygamy.

We can begin with the issue of minor children being coerced in certain sects to enter marriage. This phenomenon undoubtedly occurs,¹²³ and it occurs in both the polygamous and monogamous marital contexts. There are no reported studies and no reliable data that suggest that minor children are coerced into marriage in a polygamous society in any greater numbers than they are in monogamous cultures.¹²⁴

121. I do not consider the ostensible administrative basis for these laws, because it strikes me as pretextual. See *supra* note 108.

122. The most thorough study of polygamous households found, among other things, that (i) the man's various wives established harmonious relationships among themselves, (ii) the relationship between children and father was not significantly different from the father-child relationship in nonpolygamous households, (iii) the children established relationships both with their own mothers and their father's other wives, and (iv) women entered these relationships not because they felt coerced but because of their religious inclinations. See JESSIE L. EMBRY, *MORMON POLYGAMOUS FAMILIES* (1987).

123. See, e.g., Adam Liptak, *Polygamist's Custody Fight Raises Many Issues*, N.Y. TIMES, June 16, 2002, at A14.

124. For insightful discussions of arranged marriage, see, for example, Margaret F. Brinig, *Troxel and the Limits of Community*, 32 RUTGERS L. J. 733, 752-61 (2001); Margaret F. Brinig, *In Search of Prince Charming*, 4 J. GENDER, RACE & JUST. 321, 331-36 (2001); Samuel Pyeatt Menefee, *The "Sealed Knot": A Preliminary Bibliography of "Covenant Marriage"*, 12 REGENT U. L. REV. 145 (1999-2000). For comprehensive discussions of the variety of cohabitative forms, see, for example, David D. Meyer, *Self-Definition in the Constitution of Faith and Family*, 86 MINN. L. REV. 791 (2002); Carol Weisbrod, *Universals and Particulars: A Comment of Women's Human Rights and Religious Marriage Contracts*, 9 S. CAL. REV. L. & WOMEN'S STUD. 77 (1999).

Moreover, the solution to underage marriages is enforcement of existing laws prohibiting men and women below a certain age from marrying. This is the solution employed by nearly every state.¹²⁵ Further, to the extent there is a concern that these laws are ineffective because they proscribe marriage but are circumvented by nonmarital cohabitation, the obvious solution is to prohibit cohabitation as well.

In other words, and in sum, the state's interest in preventing coercion of minors is far better served by means other than the prohibition against polygamy. Before turning to the state's more general interest in protecting children from economic and emotional hardship, we can quickly dispense with the asserted interest in preventing women from entering relationships of dramatically disparate power. In the commercial context, the state surely has the power to prohibit certain relationships in view of the unequal bargaining power of the parties.¹²⁶ But in the domain of human (as distinguished from commercial) relationships, the state's power is necessarily far more constrained. What strikes some people as an abhorrent domestic relationship is, for others, marital bliss. It seems likely that there are women who enter polygamous marriages simply because their own mothers did, but it seems just as likely that women enter what might be referred to as sexist marriages inside the Christian, Jewish, and Muslim traditions as well. Orthodox Jews, for example, permit the man to divorce his wife but require that the man assent if the woman seeks to divorce. A similar imbalance inheres in traditional Muslim marriage, and the Southern Baptist movement recently reaffirmed that the wife's role is to be subservient to her husband. More generally, the problem of children doing what their parents do, and thereby being deprived of information concerning alternatives, is in part a problem of the status of children as quasi-property¹²⁷ and in part a problem of religion generally.¹²⁸ Polygamy may well be offensive from the point of the view of ad-

125. See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 246-48 (2002) (noting that 48 states permit those under the age of 17 to marry only with parental consent, and that in 39 states, the age for consent to sexual relationships is 16 or younger) (citations omitted).

126. For example, laws prohibiting voluntary servitude and prohibitions on unconscionable contracts. See, e.g., Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

127. Barbara Bennett Woodhouse, "Who Owns the Child?": Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995 (1992).

128. Justice Douglas's dissent in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), which upheld on Free Exercise grounds the right of the Amish not to send their children to public school, emphasized precisely this point. *Id.* at 241 (Douglas, J., dissenting).

vocates of gender equality, but it is not uniquely offensive, and so its prohibition cannot reasonably be explained as an effort to eradicate sexual inequality.

What remains to be discussed is the state's interest in protecting children from emotional and economic deprivation. Clearly the state has a compelling interest in protecting children from these and other hardships.¹²⁹ But the mere existence of this interest does not automatically sustain anything that the state does under its aegis. The Court, for example, has struck down parental notification laws in the abortion context, despite the assertion of a state interest in protecting the minors' emotional well-being.¹³⁰ The Court has recently struck down provisions of the Child Pornography Prevention Act, despite similar assertions.¹³¹

The state may prefer that all children grow up in homes where there is no economic privation, but it is clear that a state cannot remove a child from a home simply because of poverty.¹³² Indeed, as a general matter, despite the state's compelling interest in the welfare of children, the law recognizes that that welfare is ordinarily best served by decisions made by the child's parents.¹³³ Accordingly, although a state has an interest in the welfare of the children, before it can interfere with the fundamental rights of the parents, the evidence establishing that interest must be clear, and the link between the interest and the interference with the parents must be certain.¹³⁴

129. See, e.g., *Ginsberg v. United States*, 390 U.S. 629, 636 (1968) ("The well-being of its children is of course a subject within the State's constitutional power to regulate."); *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (affirming that states have a legitimate interest in the welfare of minors); *Osborne v. Ohio*, 495 U.S. 103 (1990) (asserting that states have a compelling interest in protecting the physical and psychological well-being of minors and in destroying the exploitation of children by punishing those who possess and view child pornography); cf. James Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CAL. L. REV. 1371, 1372 (1994) (arguing that any attempt by the state to improve the lives of children is restricted by parents' fundamental rights).

130. E.g., *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

131. *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389 (2002); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997).

132. *Santosky v. Kramer*, 455 U.S. 745 (1982). See generally Paul Anthony Wilhelm, *Permanency at What Cost?*, 16 NOTRE DAME J. L. ETHICS & PUB. POL'Y. 617, 636 (2002).

133. Emily Buss, *The Adolescent's Stake in the Allocation of Educational Control Between Parent and State*, U. CHI. L. REV. 1233, 1240 (2000).

134. *Santosky*, 455 U.S. at 766; *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944). See generally THEODORE J. STEIN, *CHILD WELFARE AND THE LAW* 26-27 (1991).

Applying these principles in the context of polygamy does the state no good, for there are no reliable, reported data suggesting that children of polygamous families are uniquely and significantly disadvantaged from an economic or emotional standpoint. A recent examination of children in polygamous families in Muslim households in the Middle East indicated that although the academic achievement of children in polygamous households was lower than the achievement of children from monogamous homes, the educational achievement of the parents in polygamous households was also lower than the achievement of parents in monogamous homes, leading to the possible conclusion that it is the parents' achievement that is the critical factor.¹³⁵ The same study indicates that the children's mental health is more significantly affected by socioeconomic status and parental educational achievement than by their parents' marital status.¹³⁶ Indeed, the best predictor of mental health is family functioning—without regard to whether the family is monogamous or polygamous (and the study found no link between family functioning and polygamy or monogamy).¹³⁷

In short, therefore, while some might advocate a role for the state in inquiring carefully into the conditions of households to determine whether children should be removed, such advocates would not be able to use polygamy as a reliable proxy for identifying the conditions that would warrant removal of the child from the home. Dysfunctional households are not disproportionately polygamous households, and households suffering economic privation are as often single-parent homes as they are multiple-parent homes. The ban on polygamy simply cannot be justified by the interests of the children.

CONCLUSION

Getting the right answer in constitutional law does not always require an understanding of history, but history is often useful, and occasionally indispensable. When the Supreme Court infamously upheld a Louisiana law requiring blacks and whites to ride in separate train cars, the majority held, formalistically,

135. Alean Al-Krenawi, John R. Graham, & Vered Slonim-Nevo, *Mental Health Aspects of Arab-Israeli Adolescents from Polygamous Versus Monogamous Families*, 142 J. SOC. PSYCH. 446 (2002).

136. *Id.*

137. *Id.*

that the law did not discriminate against blacks.¹³⁸ It took Justice Harlan's dissent to note the crucial historical point: that the law "had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people" from cars occupied by whites.¹³⁹ It would have been possible for the Court to have gotten the right answer even without Harlan's implicit understanding of the relevant history, but had the Court shared his understanding, it would have been impossible to get it wrong.

Professor Gordon has now provided the meticulous history that illuminates the nation's laws prohibiting polygamy. It is possible, of course, that there has developed a secular basis for these laws, but if there is such a basis, it as yet remains undisclosed. The origin of the prohibition lay in the endorsement of a distinctly western, or Judeo-Christian form of marriage. Professor Gordon's history reveals that the criminalization of polygamy and the divesting of polygamists of their civil rights lay simply in a religiously-rooted abhorrence of an unusual form of family.

Irony begets irony. More than a century after the LDS church renounced polygamy once the federal government placed a gun to its head, that same church has become a leading antagonist of efforts to recognize same-sex unions.¹⁴⁰ And this very effort suggests an answer as to why those who can usually be counted on to defend religious liberty have, in the domain of polygamy, remained distinctly silent: because if polygamy is constitutionally protected, then so too must be same-sex marriage—a proposition the Christian right refuses to endorse.¹⁴¹

The outlines of this dynamic were revealed in the Court's opinion in *Romer v. Evans*,¹⁴² which struck down a Colorado measure that purported to preclude gays from bringing equal protection challenges to discrimination on the basis of sexual orientation. Justice Scalia's dissent characterized abhorrence of

138. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

139. *Id.* at 557 (Harlan, J., dissenting).

140. See Robert J. Morris, *What Though Our Rights Have Been Assailed*, 18 WOMEN'S RTS. L. RPT. 129 (1997).

141. For an analysis of how polygamy and same-sex marriage were linked by proponents of the so-called Defense of Marriage Act, see David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53 (1997).

142. 517 U.S. 620 (1996). The secondary literature on *Romer* is vast. Particularly worthwhile are Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257 (1996); Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 MICH. L. REV. 203 (1996); and Jay Michaelson, *On Listening to the Kulturkampf*, 49 DUKE L.J. 1559 (2000).

polygamy as tantamount to hatred of murder and disdain for animal cruelty—and he suggested that hostility toward homosexuality is similarly legitimate.¹⁴³ In so arguing, Justice Scalia's approach asked simply whether a given view exists, without inquiring into its origin. It is a form of analysis that Justice Harlan rejected in his *Plessy* dissent, and a form of analysis that is incompatible with the core value of the establishment clause. That discrimination exists—that it has always existed and will always exist—hardly immunizes such prejudice from constitutional attack. Yet, despite these shortcomings in Justice Scalia's methodology, his argument explains why no one is speaking up for Thomas Green: because to speak up for him is to speak up for others whose form of eccentricity defenders of religious liberty do not want to defend.

Whatever the reason that no one seems willing to speak very loudly on behalf of polygamists, the fact remains that a politically powerless and fringe group has had a defining characteristic of its lifestyle prohibited for no good reason, other than that a political majority finds it inconsistent with the traditional Judeo-Christian conception of marriage. There could hardly be a more egregious singling out of a religious practice, and there could therefore hardly be a more straightforward violation of the establishment clause.

Discrimination against gays and lesbians—not discrimination against polygamists—is the civil rights issue of the modern generation. But that civil rights movement will not prevail until legal and political institutions acknowledge that liberty perishes when a moral orthodoxy grounded in the majority's traditional religion is imposed upon all by the state.

143. *Romer*, 517 U.S. at 642-45 (Scalia, J., dissenting).