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BLAINE AMENDMENTS AND POLYGAMY LAWS: THE CONSTITUTIONALITY OF ANTI-POLYGAMY LAWS TARGETING RELIGION

ELIJAH L. MILNE*

INTRODUCTION

The purpose of this article is to conduct a constitutional comparison of legislation and court decisions from nineteenth-century America that targeted the Mormon practice of polygamy with state Blaine Amendments. State Blaine Amendments are provisions in various state constitutions that prohibit government support for "sectarian" schools. Many commentators believe that these amendments are a byproduct of the federal government’s discrimination against Catholics during the nineteenth century, and argue that they are unconstitutional because of the animus they embody against the Catholic Church. This argument has come to the fore

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1. Although members of The Church of Jesus Christ of Latter-day Saints are commonly known as "Mormons," church members prefer to be called "Latter-day Saints." See The Church of Jesus Christ of Latter-day Saints, Quick Facts, Glossary, Mormons http://www.lds.org/newsroom/glossary/0,15400,3904-1-M,00.html (last visited Mar. 27, 2006). This article will use, for the most part, the preferred terminology, referring to the Church generally as the "LDS Church."

2. Polygamy is the practice of allowing either partner in a marriage to have more than one spouse. See polygamy, MERRIAM-WEBSTER ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/polygamy. Polygyny, however, is where only the male partner in a marriage has additional spouses. See polygyny, MERRIAM-WEBSTER ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/polygyny. The practice among early Latter-day Saints was in fact polygyny, not polygamy. Because the term polygamy is commonly viewed as synonymous with polygyny, this article will follow the more common usage. For consistency’s sake, this article will also generally use the term polygamy instead of bigamy.


4. See infra Parts I, III.B.

5. See, e.g., Steven K. Green, The Blaine Amendment Reconsidered, 36 AM. J.
particularly in the ongoing debate over government vouchers for private schools. Building upon the arguments of anti-Blaine Amendment commentators, this article suggests that if the Supreme Court ever holds state Blaine Amendments unconstitutional, laws targeting Mormon polygamy may also be unconstitutional. This suggestion is founded upon the premise that, like state Blaine Amendments, nineteenth-century anti-polygamy laws were based primarily on religious prejudice.  

Part I of this article sets out the history and circumstances surrounding the enactment of state Blaine Amendments. Part II provides a history of early prejudice against Mormons, followed by a discussion of early laws directly targeting the Mormon practice of polygamy. Part III examines state Blaine Amendments and early anti-polygamy laws under the Supreme Court’s current First and Fourteenth Amendment jurisprudence. Finally, Part IV presents potential arguments both in support of and against the constitutionality of anti-polygamy laws and state Blaine Amendments.

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6. For further information about the history of government vouchers for “school-choice” programs, see Private Education in the United States, MSN Encarta, http://encarta.msn.com/encyclopedia_1741500929_3/Private_Education_in_the_United_States.html#p29. The debate over government vouchers has been somewhat silenced by the Supreme Court’s adoption of the concept of “formal neutrality” in Zelman v. Simmons-Harris, 536 U.S. 639 (2002). In Zelman, the Supreme Court allowed states to fund sectarian schools if the government’s program was facially “neutral” and accompanied by a private-choice factor. Id. at 652-53. But see, e.g., House Set to Vote on Ill-Conceived, Divisive School Voucher Plan for Gulf Coast, U.S. Fed. News, Dec. 18, 2005; Supporters Rally Behind School Vouchers for Poor, N.J. Record, Dec. 6, 2005, at A23.

7. This suggestion has also been made by Frank S. Ravitch in his article titled Locke v. Davey and the Lose-Lose Scenario: What Davey Could Have Said, But Didn’t, 40 Tulsa L. Rev. 255, 264 (2004) (noting that laws targeting Mormon polygamy are unconstitutional to the extent that state Blaine Amendments are unconstitutional).


9. This article specifically addresses “early” (nineteenth-century) anti-polygamy laws because of their apparent prejudice against the LDS Church and its members. Only to the extent that the justification for these laws was religious animus may they be compared to the so-called Blaine Amendments. Modern anti-polygamy laws may or may not be based upon religious prejudice. To the extent that modern laws have “purer purposes,” as explained in Part IV, they may well be constitutional.
I. HISTORY OF STATE BLAINE AMENDMENTS

A. Early Anti-Catholic Sentiment

A basic understanding of the Blaine Amendment’s history is necessary to reveal the prejudice against Catholics that is embodied in state Blaine Amendments. Blaine Amendments were the product of “two related controversies: the public funding of sectarian education and the issue of religious exercises in the public schools.” In the 1830s, immigration to the United States from predominantly Catholic countries rapidly increased. Fearful of the increasing presence of foreign-born Catholics, many Anglo-Saxon Protestants considered Catholicism a threat to American democracy and national identity. In reaction to this perceived threat, Protestants burned Catholic churches, raised mobs, and organized nativist political movements. One such nativist movement involved the establishment of public schools.

Seeking to use public schools as a means of assimilating immigrants through compulsory school attendance, the Protestant majority required school children to read the King James Version of the Bible, sing hymns, and recite Protestant prayers—practices that many Catholics opposed. But “[b]y the middle of the Nineteenth Century, the Catholic population in America had increased sufficiently to demand an alternative.” In time, Catholics’ petitions to

10. Green, supra note 5, at 42.
11. Id. One estimate states that more than 2.7 million immigrants from Ireland, most of whom were Catholic, entered the United States during the period of 1850 to 1890. Richard G. Bacon, Rum, Romanism and Romer: Equal Protection and the Blaine Amendment in State Constitutions, 6 DEL. L. REV. 1, 2 (2003) (citing Kerby A. Miller, Emigrants and Exiles: Ireland and the Irish Exodus to North America 569 (1985)).
13. Id. at 416. “[I]n the mid-1850s, Protestants burned a dozen churches in different towns. In Sidney, Ohio, and Dorchester, Massachusetts, enterprising Protestants blew up churches with gunpowder. Riots between nativists and Catholic immigrants ... left numerous injured and dead in the streets.” Philip Hamburger, Separation of Church and State 217 (2002) [hereinafter Hamburger, Church and State].
14. Nativist movements organized in the 1840s and 1850s (such as the “Know-Nothings”) were essentially “groups opposed to the presence of foreigners and immigrants.” Immigration, MSN Encarta, http://encarta.msn.com/encyclopedia_761566973_3/Immigration.html#p29.
15. Gall, supra note 12, at 416.
17. Id. at 669.
state legislatures for funding of private Catholic schools achieved recognition and the government began to provide some funding. Such grants, however, “provoked a display of majoritarian politics of unprecedented brutality—all under the inverted banner of religious freedom.” In time, politicians throughout the country joined the anti-Catholic bandwagon.

B. The Federal Blaine Amendment

Following the Civil War, many nativist and Protestant activist who were alarmed by Catholic “challenges to the cultural and religious hegemony in America,” united in protesting all forms of government aid to Catholic schools. In response to pressure from these activists, on September 30, 1875, President Ulysses S. Grant called for an end to all “support of any sectarian schools.” By so doing, President Grant “clearly aligned the Republican Party with the Protestant cause.”

In response to President Grant’s invitation to end government aid to “sectarian” schools—an understood codeword for “Catholic”—Congressman James G. Blaine volunteered to further the President’s stated objectives. With full cognizance of the Presi-

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18. Gall, supra note 12, at 421.
19. Viteritti, Blaine’s Wake, supra note 5, at 669 (“When Bishop Hughes of New York entered the fray in 1842 to demand public support for Catholic schools, his residence was destroyed . . . . When Catholics in Michigan proposed a similar school bill in 1853, opponents portrayed their plan as a nation-wide plot hatched by Jesuits . . . .”).
20. Id.
21. Green, supra note 5, at 47.
23. Green, supra note 5, at 47 (emphasis added).
24. Id. at 48. “The Blaine Amendment was the direct result of Republican attempts to gain political mileage from a growing public concern over Catholic and immigrant inroads into American culture.” Id. at 69.
25. Mitchell v. Helms, 530 U.S. 793, 828-29 (2000) (At the time the federal Blaine Amendment was considered, “it was an open secret that ‘sectarian’ was code for ‘Catholic.’ . . . [T]he term ‘pervasively sectarian’ . . . at that time, could be applied almost exclusively to Catholic parochial schools . . . .”).
26. Blaine drafted and submitted his proposed amendment to Congress within a matter of weeks after Grant had invited listeners to [e]ncourage free schools, and resolve that not one dollar, appropriated for their support, shall be appropriated to the support of any sectarian schools. Resolve that neither the State nor Nation, nor both combined shall support institutions of learning other than those sufficient to afford to every child
dent's motives, and in an effort to strengthen his own future bid for the Republican Party's presidential nomination as a candidate opposed to "Rum, Romanism, and Rebellion," Blaine drafted the following proposed amendment to the U.S. Constitution:

No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect or denomination; nor shall any money so raised or lands so devoted be divided between religious sects or denominations. 28

While the Blaine Amendment easily passed the House by a vote of 180 to 7, the Senate subsequently criticized the Amendment as being founded on fears of "imperial papacy." Although the Senate Judiciary Committee revised the proposed Amendment so that it would "not be construed to prohibit the reading of the Bible in any school or institution," the Amendment failed by a mere two votes. 32

C. State Blaine Amendments

After the defeat of the federal Blaine Amendment on the Senate floor, proponents of the Blaine Amendment looked to the states for assistance. Because of the prevalent anti-Catholic sentiment at the time, nativist Protestants succeeded in securing versions growing up in the land the opportunity of a good common school education, unmixed with sectarian, pagan, or atheistical dogmas.

Green, supra note 5, at 47 (emphasis added).

27. Coincidentally, some historians say Blaine initially believed his party's platform in 1884 was opposed to "Rum, Mormonism, and Rebellion." Mark W. Summers, Rum, Romanism, & Rebellion: The Making of a President, 1884 58 (2000). In all fairness to Blaine, however, it must be said that in 1890, while serving as Secretary of State for President Benjamin Harrison, Blaine was friendly toward the Latter-day Saints and urged politicians to "not try to stamp out individual belief through persecution." Thomas G. Alexander, Things in Heaven and Earth: The Life and Times of Wilford Woodruff, A Mormon Prophet 251, 265 (1991).

28. Meyer, supra note 3, at 941 (citing 4 Cong. Rec. 5580 (1876)).

29. Hamburger, Church and State, supra note 13, at 325.

30. Green, supra note 5, at 67.

31. Id. at 60. The fact that the Blaine Amendment was revised so as to not prohibit the reading of the Bible in public schools serves as further evidence that the real purpose of the Amendment was not to protect the separation of church and state, but rather to protect the state from a specific church (the Catholic Church), while still allowing Protestantism to permeate public schools.

32. Hamburger, Church and State, supra note 13, at 325.

33. See id. at 338-39.
of the Blaine Amendment in a majority of state constitutions.\textsuperscript{34} While some states voluntarily added “baby Blaine” provisions to their constitutions, the federal government forced many states to adopt Blaine-like Amendments as a prerequisite for obtaining statehood.\textsuperscript{35}

Today, forms of the Blaine Amendment exist in most state constitutions, but state Blaine Amendments differ in restrictiveness.\textsuperscript{36} At least twenty-seven states still explicitly bar government aid to “sectarian” institutions.\textsuperscript{37} Not only do Blaine-like provisions continue to inhibit the ability of Catholics to send their children to Catholic-owned schools, they also serve as a powerful roadblock to all advocates of “school choice.”\textsuperscript{38}

\textsuperscript{34} Id. In 1941, it was reported that “[t]he constitutions of forty-six of the United States, thirty-seven of them by explicit reference to sectarian institutions, prohibit the appropriation of public money to schools controlled by religious organizations.” Note, Catholic Schools and Public Money, 50 YALE L.J. 917, 917 (1941) (emphasis added).


\textsuperscript{36} See state constitutional provisions cited infra note 37.

\textsuperscript{37} But see The Becket Fund for Religious Liberty, supra note 34 (claiming there are thirty-seven states with such explicit prohibitions). While the current state constitutions of Florida, Indiana, Iowa, Kansas, Massachusetts, Michigan, New Hampshire, New York, Ohio, Oregon, South Carolina, and Utah each contain Blaine-like provisions (inasmuch as they prevent funding for religious organizations), they do not expressly discriminate against “sectarian” groups. See FLA. CONST. art I, § 3; IND. CONST. art I, § 6; IOWA CONST. art I, § 3; KAN. CONST. art 6, § 6(c); MASS. CONST. art XVIII, § 2; MICH. CONST. art VIII, § 2; N.H. CONST. art 83; N.Y. CONST. art XI, § 3; OHIO CONST. art 6, § 2; OR. CONST. art I, § 5; S.C. CONST. art XI, § 4; UTAH CONST. art X, § 9. However, the constitutions of Florida, Kansas, Massachusetts, New Hampshire, and Ohio do mention aid to “sects.”

\textsuperscript{38} Gall, supra note 12, at 414; see supra note 5 and accompanying text (discussing government vouchers for private schools); George F. Will, Choice Under Fire, Yet Again, NEWSWEEK, June 20, 2005, at 74. This article employs the term “school choice” throughout solely in the context of voucher programs by which public funds may be used at private schools. Although the Supreme Court recently held that the Establishment Clause does not necessarily prevent states from providing funds to private religious schools, state courts have held that their Blaine-like Amendments provide added
II. History of Mormon Polygamy

A. Early Anti-Mormon Sentiment

Like Catholicism, early Mormonism faced vigorous opposition. Outsiders regularly viewed Latter-day Saints and their Catholic counterparts with disdain. Unlike Catholics, Latter-day Saints were often persecuted for engaging in polygamy. Polygamy, however, was not the sole basis of animosity against the Church of Jesus Christ of Latter-day Saints ("LDS Church"). In fact, Latter-day Saints were persecuted long before the LDS Church adopted the practice of polygamy.

Soon after the LDS Church's organization in upstate New York on April 6, 1830, early adherents of the Mormon faith, unable to endure the prejudices of their neighbors, sought refuge in Ohio and Jackson County, Missouri. The Latter-day Saints' stay in Ohio and Jackson County, Missouri was short-lived, however. Within a period of eight years, persecutions drove the entire body of the Church temporarily into northwestern Missouri.

Within approximately one year of their arrival in northwestern Missouri, Governor Lilburn W. Boggs issued the following order to the state's militia: “The Mormons must be treated as enemies, and must be exterminated or driven from the State if necessary for the public good.” Authorities in Missouri complied with the Gover-
nor's "extermination order" by forcing the Latter-day Saints out of Missouri and into Illinois in the midst of winter. Hostile vigilantes and state militias burned the Saints' Missouri homes and fields, massacred their people, violated their women and children, and imprisoned their leaders. Just five short years after driving the Latter-day Saints from Missouri to Illinois, similar mobs forced the Latter-day Saints out of Illinois. In 1846, after concluding that the federal government and the various states were unwilling to offer them any protection, the Latter-day Saints, led by Brigham Young, commenced the arduous trek west to the Rocky Mountains. On July 24, 1847, the first Mormon caravan entered what was then a part of northern Mexico, but is today Salt Lake City, Utah.

B. State and Federal Attacks on Mormon Polygamy

In October 1843, less than a year before his death, Joseph Smith Jr., founder of the LDS Church, taught Latter-day Saints that "[n]o man shall have but one wife at a time, unless the Lord directs otherwise." In spite of these teachings, Smith and other prominent leaders of the Church had already secretly entered into "plural marriages." Indeed, on July 12, 1843, Smith had received an "in-
spired revelation” justifying the practice.\textsuperscript{53} Church leaders, however, did not share this revelation with the Church’s general membership until several years after Smith presented it.\textsuperscript{54} In fact, the Church did not officially announce its belief in polygamy until August 29, 1852—over five years after the Mormon pioneers had become established in present-day Utah.\textsuperscript{55}

Despite widespread belief, “the Mormon harem, dominated by lascivious males with hyperactive libidos, did not exist.”\textsuperscript{56} While most male Latter-day Saints remained monogamous,\textsuperscript{57} those who practiced polygamy generally married only one additional wife.\textsuperscript{58} As one commentator observed, “Mormon plural marriage, dedicated to propagating the species righteously and dispassionately, proved to be a rather drab lifestyle compared to the imaginative tales of polygamy, dripping with sensationalism, demanded by a scandal-hungry eastern media market.”\textsuperscript{59} In contrast to the widespread perception to the contrary, Latter-day Saints saw plural marriage not as a means of “pleas[ing] man in his carnal desires,” but rather as a divine commandment.\textsuperscript{60} Evidence of polygamy in the Old Testament, as well as a reverence for the teachings of the Latter-day Saints’ modern prophets formed the basis of this belief.\textsuperscript{61}

While no federal anti-polygamy law existed prior to the time the LDS Church announced its belief in polygamy, opposition to the practice quickly grew.\textsuperscript{62} In 1856, four years after the LDS Church endorsed polygamy, the Republican Party called for the abolition of “those twin relics of barbarism—Polygamy and Slavery” in the territories.\textsuperscript{63} Nevertheless, it was not until July 1, 1862, that

\begin{footnotes}
\footnotetext[53]{See Doctrine and Covenants 132:1-66.}
\footnotetext[54]{See Gordon B. Hinckley, Truth Restored: A Short History of The Church of Jesus Christ of Latter-day Saints 129 (1979).}
\footnotetext[55]{Van Wagoner, supra note 52, at 85.}
\footnotetext[56]{Id. at 89.}
\footnotetext[57]{One source estimates that only five percent of male Latter-day Saints (most of whom were church leaders) maintained polygamous households. Id. at 103. Other sources suggest that the number may have been as low as three percent. Id.}
\footnotetext[58]{Id. at 91.}
\footnotetext[59]{Id.}
\footnotetext[60]{Id. at 89 (quoting Brigham Young).}
\footnotetext[62]{Van Wagoner, supra note 52, at 105.}
\footnotetext[63]{James B. Allen & Glen M. Leonard, The Story of the Latter-day

Congress enacted the first federal legislation prohibiting polygamy: the Morrill Anti-Bigamy Act. Under the Morrill Act, the formation of polygamous relationships was a federal crime, punishable by imprisonment for up to five years. The Act also annulled all laws of the Territory of Utah that countenanced polygamy or “spiritual marriage, however disguised by ... ecclesiastical solemnities, sacraments, ceremonies, [or] consecrations.” Thus, the Act expressly targeted, inter alia, “spiritual marriage.”

Although the Civil War and Reconstruction delayed enforcement of the Morrill Act, Congress passed the Poland Act on June 23, 1874, “which set the stage for enforcement of the anti-polygamy law by making procedural adjustments in the territorial judiciary.” Soon thereafter, George Reynolds, Brigham Young's
personal secretary, was indicted for, and convicted of, bigamy under the Morrill Act. In 1878, Reynolds’s case came before the U.S. Supreme Court for consideration.

Upholding both Reynolds’s conviction and the constitutionality of the Morrill Act, the Supreme Court stated in dicta that “[p]olygamy 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.” In addition to its opinion about the geographic and racial origins of polygamy, the Court explained, “Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.” Thus, in Reynolds, the Court first articulated the belief/practice dichotomy that continues to dominate its free-exercise jurisprudence.

Despite the Supreme Court’s ruling in Reynolds, the Morrill Act had little effect on the Latter-day Saints beyond strengthening their resolve to obey the laws of their religion before those of their country. To add teeth to the Morrill Act, on March 22, 1882, Congress passed the Edmunds Act. The Edmunds Act laid “legal groundwork for court action against Mormons not only for the difficult-to-prosecute offense of polygamy but also for the more easily
substantiated 'unlawful cohabitation.'”

78. VAN WAGONER, supra note 52, at 117; see also ALEXANDER, supra note 27, at 235-36, 239 (explaining the objectives and ramifications of the Edmunds Act).

79. See 22 Stat. at 31 (“[I]f any male person . . . cohabits with more than one woman, he shall be deemed guilty of a misdemeanor.”). Today such a provision might be in violation of modern interpretations of the Equal Protection Clause inasmuch as it only targets males who cohabit, rather than females, or the people with whom they cohabit.

80. Id. (emphasis added).

81. Id.

82. Harmer-Dionne, supra note 63, at 1329. As a result of the Edmunds Act, the Utah territorial penitentiary was “filled to overflowing with unrepentant polygamists,” LDS leaders were forced into hiding, and other church members fled to Chihuahua, Mexico to seek asylum. ALEXANDER, supra note 27, at 240.


84. VAN WAGONER, supra note 52, at 133.

85. See 24 Stat. at 636.

86. VAN WAGONER, supra note 52, at 133; see 24 Stat. at 637-40 (“The ordinance of the so-called general assembly of the State of Deseret [Utah Territory] incorporating the Church of Jesus Christ of Latter-Day Saints . . . [is] hereby disapproved and annulled, and the said corporation . . . is hereby dissolved.”).
ernment began to dissolve the LDS Church and to take possession of its assets.87 Litigation over the legality of the Edmunds-Tucker Act ensued. In Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, the Supreme Court upheld the Edmunds-Tucker Act and declared, in dicta, that the LDS Church was a sect "contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world."88 The Court also branded religious polygamy a "barbarous practice" and a "nefarious doctrine" that was "abhorrent to the sentiments and feelings of the civilized world."89

Shortly after its decision in Late Corp. of the Church of Jesus Christ,90 the Supreme Court decided Davis v. Beason.91 In Davis, the Court declared the LDS Church to be a "cultus" whose belief in polygamy as a "tenet of religion . . . offend[ed] the common sense of mankind."92 The Davis Court further held that an oath mandated by the laws of the Territory of Idaho as a prerequisite for voting in Idaho was constitutional, even though it disfranchised all Latter-day Saints, regardless of whether they practiced, or even believed in, polygamy.93 As part of the Idaho oath, potential voters

87. Van Wagoner, supra note 52, at 133.
88. 136 U.S. 1, 49 (1890) (this case is often referred to as Mormon Church v. United States). But see Cleveland v. United States, 329 U.S. 14, 26 (1946) (Murphy, J., dissenting) (arguing that the use of polygamy has historically "far exceeded" other forms of marriage). "We must recognize, then," wrote Justice Murphy, "that polygyny, like other forms of marriage, is basically a cultural institution rooted deeply in the religious beliefs and social mores of those societies in which it appears." Id. at 26. Indeed, one source states that "[a] large majority—980 of the 1,154 past or present societies for which anthropologists have data—have allowed a man to have more than one wife . . . . [M]ore than 65 percent of today's world populations belong to a community that allows polygamy . . . .." Andrea Moore-Emmett, God's Brothel 39 (2004) (citations omitted).
89. Late Corp. of the Church of Jesus Christ, 136 U.S. at 48-49.
90. According to one observer, the Court's action in Late Corp. of the Church of Jesus Christ allowing the federal government to dissolve a church was "an unprecedented event in American history." Gillett, supra note 74, at 518.
91. Davis v. Beason, 133 U.S. 333 (1890), overruled by Romer v. Evans, 517 U.S. 620, 634 (1996) (holding that Davis is no longer good law to the extent it "held that persons advocating a certain practice may be denied the right to vote," or to the extent "it held that the groups designated in the statute may be deprived of the right to vote because of their status").
92. Davis, 133 U.S. at 341-42. But see Harmer-Dionne, supra note 63, at 1298 ("Despite contemporaneous arguments to the contrary, polygamy met any measure or test of religious belief.").
93. Davis, 133 U.S. at 348. After Idaho became a state in 1890, its newly written constitution contained the following Anti-Mormon provision:

No person is permitted to vote . . . who is . . . a bigamist or polygamist, or is living in what is known as patriarchal or celestial marriage, . . . or who in any
had to swear that they were "not a member of any order, organization or association which teaches" that polygamy is "a duty" or which "practices bigamy, polygamy or plural or celestial marriage as a doctrinal rite." 94

Although the Edmunds-Tucker Act, reinforced by the Supreme Court's subsequent decisions in Davis and Late Corp. of the Church of Jesus Christ, dissolved the LDS Church, confiscated its assets, and imprisoned its leaders,95 the final blow to Mormon polygamy came when Congress threatened to enact the Cullom-Struble Bill.96 The Cullom-Struble Bill "was intended to strip all Utah Mormons of their rights as American citizens."97 According to one of its drafters, the primary purpose of the Cullom-Struble Bill was "to wrest from the hands of the priesthood the political power which it had so long wrongfully usurped and shamefully abused."98

On September 24, 1890, Wilford Woodruff, the President of the LDS Church, issued a "Manifesto," which officially ended the LDS Church's practice of polygamy.99 "Inasmuch as laws have been enacted by Congress forbidding plural marriages," Woodruff wrote, "which laws have been pronounced constitutional by the court of last resort, I hereby declare my intention to submit to those laws,

94. IDAHO TERR. REV. STAT. § 504 (1887) (emphasis added). Note that the statute specifically targeted "celestial" marriage. This language is significant because Latter-day Saints believe that marriages ("sealings"—all of which are monogamous today) performed within their temples may entitle them to live in the "celestial kingdom." DOCTRINE AND COVENANTS 131:1-4.
95. Sarah Barringer Gordon, The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America, 28 J. SUP. CT. HIST. 14, 25 (2003) (stating that more than 1,000 male Latter-day Saints were imprisoned).
96. Id. (emphasis added).
97. Id. (emphasis added).
99. Wilford Woodruff, Official Declaration—I, in DOCTRINE AND COVENANTS. For more detailed information about the Manifesto, see ALEXANDER, supra note 27, at 267-75.
and to use my influence with the members of the Church over which I preside to have them do likewise." \(^{100}\) Today, the LDS Church excommunicates members who themselves engage in or encourage others to engage in polygamy. \(^{101}\) Nevertheless, various individuals who are unaffiliated with the LDS Church continue to practice polygamy in Utah, \(^{102}\) despite state laws that prohibit the practice. \(^{103}\)

### III. **Current First and Fourteenth Amendment Jurisprudence**

As previously stated, the purpose of this article is to examine laws and court opinions from nineteenth-century America that targeted Mormon polygamy. By adding consideration of state Blaine Amendments to this examination, a more accurate understanding of the constitutionality of these anti-polygamy laws may be attained. Early anti-polygamy laws, like state Blaine Amendments, were the product of religious prejudice and intolerance. Thus, this article suggests that early anti-polygamy laws should be considered bad law today to the same extent that Blaine Amendments are so considered.

To understand more fully the legal and factual bases behind this suggestion, the remainder of this section will probe current First and Fourteenth Amendment jurisprudence. This study will first briefly examine the First Amendment’s Free Exercise and Establishment Clauses, and will then look at the Fourteenth Amendment’s Equal Protection and Due Process Clauses. Finally, this

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100. See Woodruff, *supra* note 99.

101. See Gordon B. Hinckley, *What Are People Asking About Us?*, *Ensign*, Nov. 1998, at 70 (affirming that the modern LDS Church “has nothing to do with those practicing polygamy”).

102. See *infra* Part IV; see also *Moore-Emmett, supra* note 88 (describing many non-Mormon groups that continue to practice polygamy in Utah and surrounding areas). Perhaps the most well-known polygamist group in Utah today is the Fundamentalist Church of Jesus Christ of Latter Day Saints (“FLDS”). See Nancy Perkins & Wendy Leonard, *FLDS Leader Indicted on 2 Felony Counts: Did Jeffs Arrange Marriage of Girl to a Married Man?, Deseret Morning News*, June 11, 2005, at B1 (stating that “[s]ome 10,000 FLDS members practice plural marriage as a central tenet” of their religion).

103. *Utah Code Ann.* § 76-7-101 (2005) (making bigamy a third-degree felony); see also *State v. Green*, 99 P.3d 820 (Utah 2004) (upholding constitutionality of bigamy conviction). As a condition for obtaining statehood on January 4, 1896, Utah’s newly enacted constitution was required to provide that “[p]olygamous or plural marriages are forever prohibited.” *Utah Const.* art. III (emphasis added). Note that this provision expressly singles out “plural marriages,” a phrase the LDS Church coined.
study addresses the applicability these Clauses (except the Due Process Clause)\(^{104}\) to early anti-polygamy laws and contemporaneous state Blaine Amendments.

A. The Free Exercise Clause: The Smith and Hialeah Decisions

1. Employment Division, Department of Human Resources of Oregon v. Smith

Although the Supreme Court has constructed different tests over time for determining the constitutionality of laws under the Free Exercise Clause, the Court’s decision in Employment Division, Department of Human Resources of Oregon v. Smith embodies the current test.\(^{105}\) In Smith, the Court upheld an Oregon statute that criminalized the use of peyote\(^{106}\) for any purpose, including for “religiously inspired” sacramental uses by Native Americans.\(^{107}\) The Smith Court held the Oregon statute to be constitutional because it was a law of general applicability that was neutral toward religion and did not present a “hybrid situation” involving the Free Exercise Clause in conjunction with another constitutional protection.\(^{108}\) “We have never held,” the Court explained, “that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.”\(^{109}\) As a result of the Court’s decision in Smith, with the exception of

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\(^{104}\) Because the applicability of the Due Process Clause to state Blaine Amendments is not readily apparent, this article will not address the constitutionality of Blaine Amendments under that clause.


\(^{107}\) Smith, 494 U.S. at 874.

\(^{108}\) Id. at 878-79, 881-82.

\(^{109}\) Id. at 878-79. Contrary to the Smith Court’s assertion, in Wisconsin v. Yoder, the Court held that an otherwise valid statute violated the Free Exercise Clause because the statute required all children—including Amish children—to attend school until age sixteen. Wisconsin v. Yoder, 406 U.S. 205, 207 (1972). Although the statute was one of general applicability and was neutral on its face, the Court held the statute to be unconstitutional because it affected a “sincere” and “fundamental belief” held by Amish people “that salvation requires life in a church community separate and apart from the world and worldly influence.” Id. at 209-10, 235. Interestingly, Justice Douglas dissented in Yoder, arguing that the majority’s opinion was contrary to the Court’s decision in Reynolds. Id. at 247 (Douglas, J., dissenting). “What we do today,” wrote Jus-
“hybrid situations” involving the Free-Exercise Clause and another constitutional right, the Free Exercise Clause is no longer a valid basis (assuming it ever was) for claiming a religious exemption from a facially neutral law of general applicability.

2. **Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah**

Soon after its decision in *Smith*, the Supreme Court revisited and explained *Smith* in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*. *Hialeah* involved ordinances passed by a Florida municipality that prohibited practitioners of the Santería religion from practicing their faith within city limits. One of the principal forms of Santería worship is the offering of animal sacrifices. To inhibit the performance of such sacrifices, the city adopted ordinances that effectively criminalized the killing of animals for ritualistic sacrifices, but permitted animal slaughter for purposes that the city considered to be more consistent “‘with public morals, peace or safety.’” According to the Supreme Court, these ordinances were unconstitutional because they were neither facially neutral nor generally applicable, as required by *Smith*. Instead of being facially neutral and of general applicability, the ordinances impermissibly discriminated against the Santería religion and “were pursued only with respect to conduct motivated by religious beliefs.”

“If the object of a law is to infringe upon or restrict practices because of their religious motivation,” the Court explained, “the law is not neutral, and it is invalid unless it is justified by a compelling interest.”

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10. Douglas, “opens the way to give organized religion a broader base than it has ever enjoyed; and it even promises that in time *Reynolds* will be overruled.” *Id.*
16. *Id.* at 524. Followers of Santería sacrifice “chickens, pigeons, doves, ducks, guinea pigs, goats, sheep, and turtles . . . by the cutting of the carotid arteries . . . The sacrificed animal is cooked and eaten, except after healing and death rituals.” *Id.* at 525.
17. *Id.* at 526-27 (quoting the City of Hialeah, Florida’s Resolution 87-66 (June 9, 1987)).
18. *Id.*
interest and is narrowly tailored to advance that interest."^{119}

3. Implications of the Supreme Court's Decisions in *Smith* and *Hialeah*

In analyzing the constitutionality of early anti-polygamy laws under the Free Exercise Clause, it is first necessary, according to *Smith*, to determine whether such laws are neutral and of general applicability.^{120} This determination, according to *Hialeah*, is made, at least in part, by looking at the laws' object and purpose.^{121} If the object and purpose of a law is to target a practice because of its religious motivation, as in *Hialeah*, then the law is neither neutral nor of general applicability.^{122} Where a law is neither neutral nor of general applicability, strict scrutiny applies because the requirements of *Smith* are not satisfied.^{123}

A brief study of each of the anti-polygamy laws discussed in Part II.B suggests that these laws were neither neutral nor of general applicability.^{124} Although one purpose of early anti-polygamy laws was no doubt to prevent *everyone* from practicing polygamy, the laws particularly targeted members of the LDS Church.^{125} For example, the Morrill Anti-Bigamy Act, which was the first federal law criminalizing polygamy, expressly targeted "spiritual marriage"—a term often used by early Latter-day Saints to refer to polygamy.^{126} In addition, the Morrill Act only applied to individuals living "in a *Territory* [rather than in a State] of the United States," which happened to be where most Latter-day Saints resided.^{127} Although the Edmunds Act ignored married individuals living in adultery, it attacked those who "believe[d] it right" to have more than

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119. *Id.* at 533 (citations omitted).
121. *See Hialeah*, 508 U.S. at 547.
122. *Id.* at 533, 547.
123. *Id.* at 533 (requiring that a law be narrowly tailored to a compelling governmental interest).
124. *Id.*
125. Indeed, before the Latter-day Saints announced their approval of polygamy, no federal anti-polygamy law ever existed. Thus, it appears that "[t]he anti-polygamy laws . . . were passed directly in response to the Mormon Church's public announcement of its intent to practice polygamy." Stephanie Forbes, Comment, "Why Just Have One?": An Evaluation of the Anti-Polygamy Laws Under the Establishment Clause, 39 *Hous. L. Rev.* 1517, 1546 (2003).
126. Ch. 126, § 2, 12 Stat. 501 (1862); *see supra* text accompanying notes 64-67.
127. 12 Stat. at 501 (emphasis added).
one living spouse at the same time. The Edmunds-Tucker Act made it a crime to fail to record a marriage publicly and expressly dissolved the LDS Church because it was "contrary to the spirit of Christianity." The Idaho oath upheld in Davis v. Beason punished members of organizations that practiced "plural or celestial marriage as a doctrinal rite." The Idaho Constitution prohibited all people, regardless of whether they were polygamists, from voting if they belonged to an organization that encouraged "patriarchal, plural, or celestial marriage"—all terms coined by the Latter-day Saints. Similarly, the Cullom-Struble Bill would have disfranchised all Utah Mormons, regardless of whether they believed in or practiced polygamy.

Thus, although the Morrill Act, the Edmunds Act, the Edmunds-Tucker Act, and similar statutory provisions may have affected all people to some extent, they expressly targeted belief-based polygamy and cohabitation. Because these laws "stem[med] from animosity to religion or distrust of its practices," they must, pursuant to Smith and Hialeah, undergo strict scrutiny. To pass strict scrutiny, a law must be "justified by a compelling [governmental] interest and [be] narrowly tailored to advance that interest." If the governmental interests were chastity and the protection of morals, then these laws fail under a strict scrutiny test because lawmakers did not narrowly tailor the laws to those interests.

128. Ch. 47, § 5, 22 Stat. 30, 31 (1882); see supra text accompanying notes 80-82.
129. The Late Corp. of the Church of Jesus Christ v. United States, 136 U.S. 1, 49 (1890); see also Ch. 397, § 17, 24 Stat. 635, 638 (1887); Van Wagoner, supra note 52, at 117. Such a statement by the High Court not only has the practical effect of giving Christianity favored treatment, but also of portraying the Court as a theological body competent of determining what is, and is not, in accord with "the spirit of Christianity" (or of any other religion for that matter). Id.
133. Idaho Const. art. VI, § 3 (amended 1982).
134. See Van Wagoner, supra note 52, at 137. By stripping both monogamous and polygamous Latter-day Saints of their vote, anti-Mormon politicians would have been able to dominate elections in areas of heavy Mormon population. Id. Although the Cullom-Struble Bill was not passed, it likely would have passed had the Manifesto not been issued in 1890. See Baskin, supra note 96. "Evidently [the Collum-Struble Bill's] pendency forced the issuance of the manifesto." Id.
135. Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 547 (1993); see also Sealing, supra note 61, at 753 ("[T]heir practices were oriented around a particular religious practice and therefore should be subject to strict scrutiny.").
Rather, the laws only punished individuals who had, for religious reasons, more than one wife, while effectively ignoring those men who were married to one woman but were unfaithful to that woman.\footnote{137}{See Sealing, supra note 61, at 736 ("[T]he various anti-polygamy statutes and constitutional provisions attack only the religiously based practice of polygamy but ignore a host of threats to the supposedly compelling interest of maintaining the traditional Christian monogamous family unit as the basic building block of society.").}

Likewise, if the government's interest in enacting the anti-polygamy laws was administrative in nature, such as for taxation, probate, or other estate planning purposes, these laws still fail strict scrutiny because they in no way helped to advance that interest.\footnote{138}{See infra text accompanying notes 209-12.}

The Latter-day Saints who entered into polygamous marriages did so in secret religious ceremonies that were not legally recorded or governmentally sanctioned; therefore, they did not receive or seek any governmental benefit.\footnote{139}{As observed by one commentator, "[p]eople living in polygamous relationships do not gain benefits from the government due to their status. The existence of marriages that exist only in the eyes of God does not harm or burden society." Gillett, supra note 74, at 531. "According to the United States government, the marriages do not exist." Id. at 532.}

Even if the Latter-day Saints' polygamous marriages were legally recognized, there still were no tax benefits. First, Utah was only a territory at the time Mormon polygamy existed, and thus under the federal government's exclusive control.\footnote{140}{U.S. CONST. art. IV, § 3, cl. 2(2).}

Second, the Sixteenth Amendment, which empowered Congress to tax income, was not ratified until 1913, twenty-three years after the LDS Church stopped advocating polygamy.\footnote{141}{U.S. CONST. amend. XVI; see also Taxation, MSN Encarta, http://encarta.msn.com/encyclopedia_761573037_/Taxation.html#p87.}

Further, it was not until 1935, long after Woodruff issued his Manifesto, that Congress passed the Social Security Act.\footnote{142}{Ch. 531, 49 Stat. 620 (1935) (current version at 42 U.S.C. §§ 301-1397jj (2000)); see text accompanying note 97.}

Therefore, because these nineteenth-century anti-polygamy laws were neither based upon a compelling governmental interest, nor narrowly tailored to advance that interest, they are constitutionally invalid under strict scrutiny.\footnote{143}{That is not to say that modern anti-polygamy laws could not survive strict scrutiny. See infra Part IV.}

Although the applicability of the Free Exercise Clause to Blaine Amendments is somewhat more tenuous than that of early anti-polygamy laws, to the extent that the Blaine Amendments can
be shown to inhibit modern Catholics from freely practicing their religious beliefs, they may be unconstitutional as well. Assuming that the Blaine Amendments are state-imposed impediments to Catholics’ free-exercise rights, under Smith and Hialeah, the Amendments must undergo strict scrutiny if they are not neutral and of general applicability.\textsuperscript{144} A brief glance at the history of Blaine Amendments shows that they were not neutral, because they targeted “sectarian” (or Catholic) schools.\textsuperscript{145} Like the city ordinances struck down in Hialeah, Blaine Amendments originally lacked general applicability; that is, they were under-inclusive because they only affected Catholic influence in public schools while Protestant influence was unrestricted.\textsuperscript{146} Thus, under strict scrutiny analysis, Blaine Amendments must be narrowly tailored to advance a compelling governmental interest.\textsuperscript{147}

Arguably the states’ interest in enacting Blaine Amendments was to guard against the establishment of a religion under the Establishment Clause. While “[t]here is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to” satisfy the requirements of strict scrutiny, Blaine Amendments fail strict scrutiny because they are not narrowly tailored to advance that interest.\textsuperscript{148} Additionally, because the states’ real interest in enacting Blaine Amendments appears to have been to prevent the spread of Catholicism in the United States, the government’s interest is not compelling.\textsuperscript{149}

B. The Establishment Clause: Mitchell, Locke, and Lemon

1. Mitchell v. Helms

In Mitchell v. Helms,\textsuperscript{150} the Supreme Court held that a federal program that channeled funds to both public and private schools


\textsuperscript{145} See supra notes 25 and accompanying text.

\textsuperscript{146} See supra notes 16, 31, and 32 and accompanying text; see also Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 543-45 (1993) (explaining that the city of Hialeah’s ordinances restricting animal sacrifice were not laws of general applicability because they were under-inclusive).

\textsuperscript{147} See Hialeah, 508 U.S. at 533.


\textsuperscript{149} See supra Part I.

\textsuperscript{150} 530 U.S. 793 (2000).
did not violate the Establishment Clause. 151 Although there was no majority opinion, the plurality in Mitchell acknowledged that "there was a period when ['whether a school that receives aid . . . is pervasively sectarian'] mattered, particularly if the pervasively sectarian school was a primary or secondary school. But that period is one that the Court should regret, and it is thankfully long past." 152 In further referring to this period in history, the plurality mentioned the federal Blaine Amendment and said, "[H]ostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow . . . . Consideration of the [Blaine] Amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general . . . . This doctrine, born of bigotry, should be buried now." 153 As far as the Mitchell plurality was concerned, further propagation of the religious animus embodied within the Blaine Amendment should be prevented. 154

2. Locke v. Davey

Although the plurality opinion in Mitchell failed to command a majority, a majority of the Court in Locke v. Davey subsequently suggested that "baby Blaine [A]mendments" might be unconstitutional. 155 In Locke, the Court considered whether the State of Washington could constitutionally "assist academically gifted students with postsecondary education expenses," while, in accordance with the state's constitution, prohibiting assistance to students seeking a degree in devotional theology. 156 While the Locke Court held that "such an exclusion from an otherwise inclusive aid program" did not violate the federal Constitution, the Court alluded to the possibility that its holding may have been otherwise had the plaintiff established "a credible connection between the Blaine Amendment and . . . the relevant [state] constitutional provision." 157 Because the plaintiff had failed to make such a connection, and be-

151. Id. at 801.
152. Id. at 826 (citation omitted). The plurality's position, however, lacks precedential value. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)).
153. Id. at 828-29.
154. Id. at 829.
156. Id. at 715.
157. Id. at 723 n.7. For additional commentary on the Blaine Amendment and the Washington Constitution, see Mark Edward DeForrest, Locke v. Davey: The Con-
cause the Court could not find "in the history or text of" the state constitutional provision "anything that suggests animus towards religion," the *Locke* Court decided that "the provision in question [was] not a Blaine Amendment."\(^{158}\) The Court declined further consideration of the issue because "the Blaine Amendment's history [was] simply not before" the Court at that time.\(^{159}\)

3. Implications of *Mitchell* and *Locke*

Explicitly in *Mitchell* and implicitly in *Locke*, the Supreme Court acknowledged that the motivation behind the Blaine Amendments was animosity against Catholics.\(^{160}\) Although the *Locke* Court was not as emphatic in denouncing Blaine Amendments as was the plurality in *Mitchell*, the *Locke* Court's dicta appears to have recognized that Blaine Amendments may merit special attention if properly presented to the Court for consideration.\(^{161}\) In both *Mitchell* and *Locke* the Court recognized that animosity toward religion is key to any constitutional analysis of state Blaine Amendments.\(^{162}\) According to *Locke*, such animosity may be found in either the history or the text of Blaine Amendment provisions.\(^{163}\) Thus, when looking at the history surrounding the federal Blaine Amendment, the *Mitchell* plurality suggested that state Blaine Amendments should be disfavored because they sprang from "a shameful pedigree" that was "born of bigotry" and hostility against the Catholic Church.\(^{164}\)

Early anti-polygamy laws should be struck down for the same reasons that certain Justices in *Mitchell* and *Locke* criticized state Blaine Amendments. This is because early anti-polygamy laws, like state Blaine Amendments, were also "born of bigotry" and "a shameful pedigree."\(^{165}\) As explained in Parts II and III.A.3, the historical record suggests that early anti-polygamy laws may not have arisen so much out of a dislike for polygamy as out of a hatred for

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\(^{158}\) *Locke*, 540 U.S. at 725, 723 n.7.

\(^{159}\) *Id.*


\(^{161}\) *See Locke*, 540 U.S. at 723 n.7.

\(^{162}\) *See id.; Mitchell*, 530 U.S. at 828-29.

\(^{163}\) *Locke*, 540 U.S. at 725.

\(^{164}\) *Mitchell*, 530 U.S. at 828-29 (citing Green, *supra* note 5, for historical support).

\(^{165}\) *Id.*
the LDS Church and its leaders.\textsuperscript{166} For example, long before the Church adopted polygamy, Latter-day Saints in Missouri and Illinois were murdered, raped, and exiled by neighbors and government officials.\textsuperscript{167} With approval from federal and state governments alike in 1846, early Latter-day Saints were forced to leave the then-existing confines of the United States to seek refuge in what was then a part of Mexico.\textsuperscript{168} Unwilling to leave the beleaguered group alone, President James Buchanan later sent 2,500 troops to the Utah Territory to put down a Mormon "insurrection" that, in fact, never existed.\textsuperscript{169} Furthermore, before the Latter-day Saints announced their practice of polygamy, no federal anti-polygamy law existed.\textsuperscript{170} Indeed, nearly ten years passed from the time the LDS Church officially adopted polygamy and the time the federal government enacted the first anti-polygamy law.\textsuperscript{171} As explained in Part III.A.3, subsequent federal statutes made it clear that the government's interest in prohibiting polygamy was not motivated so much by concern for public chastity and morals, but was instead based upon an intense desire to destroy an unruly and politically unpopular religion.\textsuperscript{172} Therefore, to the extent that early anti-polygamy laws really were the product of animus against the LDS Church, they, like state Blaine Amendments, "should be buried now" for the reasons explained in \textit{Mitchell} and hinted at in \textit{Locke}.\textsuperscript{173}

4. The \textit{Lemon} Test

Although the vitality and relevance of the \textit{Lemon}\textsuperscript{174} test has been questioned almost since its inception in 1971,\textsuperscript{175} "[l]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, \textit{Lemon} [continues to] stalk[ ] Establishment Clause jurispru-

\begin{itemize}
  \item \textsuperscript{166} See infra Parts II, III.A.3.
  \item \textsuperscript{167} See infra Part II.A.
  \item \textsuperscript{168} See infra text accompanying notes 47-50.
  \item \textsuperscript{169} For more on the so-called "Mormon War" and "Buchanan's Blunder," see supra note 63.
  \item \textsuperscript{170} See supra notes 55, 64 and accompanying text.
  \item \textsuperscript{171} See supra notes 63-64 and accompanying text.
  \item \textsuperscript{172} See supra Part III.A.3.
  \item \textsuperscript{174} See Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).
  \item \textsuperscript{175} See, e.g., Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (White, J., dissenting).\end{itemize}
Under the traditional Lemon test, state action violates the Establishment Clause unless it 1) has a secular purpose, 2) has a principal or primary effect "that neither advances nor inhibits religion," and 3) does "not foster 'an excessive government entanglement with religion.'" Although an in-depth analysis of the constitutionality of state Blaine Amendments and early anti-polygamy laws under the Lemon test is beyond the scope of this article, both types of legislative enactments appear to be in violation of the Lemon Court's "effect" prong.

In recent years, a majority of the Supreme Court has reformulated the Lemon's "effect" prong as precluding the "endorsement or disapproval" of religion. A determination of impermissible government endorsement depends upon whether a reasonable observer would view the government as conveying a "message that religion or a particular religious belief is favored or preferred." In light of the above analysis of the state Blaine Amendments and early anti-polygamy laws, a reasonable observer would likely view both types of laws as disfavoring Catholicism and Mormonism, respectively, while at the same time favoring and endorsing mainstream Protestantism. Religious prejudice motivated both types of laws, and had the effect of impeding the progress of the Catholic and LDS churches. For these reasons, it is likely that state Blaine Amendments and early anti-polygamy laws violate modern interpretations of the Establishment Clause under both the Lemon and "endorsement" tests.

C. The Equal Protection Clause: Romer v. Evans

The Supreme Court in Romer v. Evans struck down an amendment to Colorado's state constitution because it violated the

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177. Lemon, 403 U.S. at 612-13 (citation omitted).
178. See id. at 612. For an in-depth look at the Supreme Court's current Establishment Clause jurisprudence, see Elijah L. Milne, Protecting Islam's Garden from the Wilderness: Halal Fraud Statutes and the First Amendment, 2 J. FOOD L. & POL'y (forthcoming June 2006).
180. ACLU Greater Pittsburgh Chapter, 492 U.S. at 593 (citations omitted).
181. See supra Part III.B.3.
Equal Protection Clause of the Fourteenth Amendment. The Colorado legislature adopted the amendment, which was the product of a statewide referendum, to repeal certain city ordinances that forbade discrimination on the basis of sexual orientation. According to the Court, the amendment also "prohibit[ed] all legislative, executive or judicial action at any level of state or local government designed to protect [homosexuals]." Because the Romer Court viewed the amendment as "inexplicable by anything but animus toward the class it affects," and because "it lack[ed] a rational relationship to legitimate state interests," the amendment was struck down for singling out individuals by a "single trait and then deny[ing] them protection across the board." Equal Protection, the Court explained, "at the very least mean[s] that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."  

According to one commentator, "the Supreme Court's decision in Romer suggests that at a minimum any Blaine Amendment is constitutionally suspect." Based on the Romer Court's reasoning, state Blaine Amendments are in violation of the Equal Protection Clause because the amendment is based upon a "desire to harm a politically unpopular group." To the extent that such an amendment is "inexplicable by anything but animus," the state amendment is unconstitutional.

According to the historical record, the federal Blaine Amendment surfaced during an era in which many considered "Rum, Romanism, and Rebellion" to be contrary to the nation's spirit, religion, and morals. Although the federal Blaine Amendment merely sought to distance the government from sectarianism, it was no secret at that time that "sectarian" only meant Catholic. Indeed, while the federal Blaine Amendment decried the use of state funds in connection with private schools, Congress drafted the Amendment in such a manner as to protect Protestant prayers,

183. Id. at 623.
184. Id.
185. Id. at 623-24.
186. Id. at 633.
187. Id. at 634 (emphasis in original) (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).
188. Bacon, supra note 11, at 34.
189. Romer, 517 U.S. at 634 (quoting Moreno, 413 U.S. at 534).
190. Id. at 632.
191. See supra Part II.
hymns, and Bible reading in public schools.\textsuperscript{193} In other words, while separation of church and state may have been the banner around which proponents of the national Blaine Amendment rallied, suppression of the Catholic Church was the predominant purpose.

Therefore, to the extent that it can be established from the history of Blaine Amendments that animus against a particular religion, i.e., Catholicism, was the primary motivation for their enactment, "the rational relationship test cannot be properly applied to [state] Blaine Amendment[s], based as [they are] on the religious nature of the schools affected thereby."\textsuperscript{194} Rather, strict scrutiny applies when reviewing state Blaine Amendments, according to the Court's combined holdings in \textit{Smith} and \textit{Hialeah}, because a law is not neutral and of general applicability if suppression of religion is the law's object and target.\textsuperscript{195} And, as explained in Part III.A.3, that standard cannot be satisfied here because Blaine Amendments are not narrowly tailored to compelling government interests.\textsuperscript{196}

Under \textit{Romer}, the prohibition of religiously motivated polygamy may be a violation of the Equal Protection Clause, as are the state Blaine Amendments and the Colorado amendment. Anti-polygamy laws almost exclusively affected Latter-day Saints because individuals living in other adulterous situations were left largely unhampere by the laws, and thus, the laws were "born of animosity toward the class of persons affected."\textsuperscript{197} These laws made a legal distinction between the unrecorded "spiritual"\textsuperscript{198} or "celestial"\textsuperscript{199} marriages of Latter-day Saints, and the cohabitation of persons with someone other than a legal spouse.\textsuperscript{200} To the extent anti-polygamy laws made this distinction, they, like state Blaine Amendments, violate the Equal Protection Clause.

D. \textit{The Due Process Clause: Lawrence}

In \textit{Lawrence v. Texas}, the Supreme Court held that private,
consensual sodomy among homosexual adults is a form of liberty that, based upon the Due Process Clause of the Fourteenth Amendment, is entitled to protection from criminal prosecution.201 "[L]iberty," the Court affirmed, "gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex,"202 marriage, and family relationships.203 Because the Texas statute in Lawrence only criminalized homosexual sodomy performed by consenting adults, the Court held the statute to be in violation of the Due Process Clause.204 "The State cannot demean [homosexuals'] existence or control their destiny by making their private sexual conduct a crime," the Court explained.205 "Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government."206

Although Lawrence did not address the right of individuals to marry, the application of Lawrence to early anti-polygamy laws is both readily apparent and controversial.207 If homosexuals have a liberty interest under the Due Process Clause in not being criminally prosecuted for their sexual conduct, it would seem that consenting adults desiring to engage in religious polygamy also should be entitled to such a liberty interest. Nevertheless, for some people,
"[t]he comparison [of polygamy] to same sex couples remains a bizarre juxtaposition."\textsuperscript{208} As one commentator has written, "Polygamy is about one powerful man collecting a submissive harem of women as property," while "[h]omosexuality is about the sexual orientation of two committed equal partners asking for the same rights . . . as are given to . . . heterosexual couples."\textsuperscript{209} Other commentators concede, however, that "there is a justifiable question as to where polygamy statutes stand after Lawrence,"\textsuperscript{210} yet argue nonetheless that there are additional reasons for outlawing polygamy.\textsuperscript{211} For example, commentators often state that by legalizing polygamy, polygamyists would receive added governmental benefits, such as those relating to estate planning issues, which are not otherwise available to monogamous persons.\textsuperscript{212} But, as was explained in Part III.A.3, most polygamyists are not seeking state recognition of their relationships.\textsuperscript{213} Instead, most polygamyists merely desire to be left alone to live their lives and their religions as they please.\textsuperscript{214} Because unrecorded polygamous marriages "exist only in the eyes of God," they neither "harm [n]or burden society."\textsuperscript{215}

Recognizing the similarities between homosexual and polygamous relationships, Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, dissented in Lawrence, arguing that "laws against bigamy" were "called into question by" the Court’s decision in Lawrence.\textsuperscript{216} "If, as the Court asserts," Justice Scalia wrote, "the promotion of majoritarian sexual morality is not even a legitimate state interest," then laws against polygamy cannot even "survive rational-basis review."\textsuperscript{217} Despite Justice Scalia’s observations con-

\textsuperscript{208} Moore-Emmett, supra note 88, at 38.
\textsuperscript{209} Id.
\textsuperscript{211} Id. at 431-33.
\textsuperscript{212} See supra Part III.A.3.
\textsuperscript{213} See supra notes 135-136 and accompanying text. This does not necessarily mean that polyamyists would not like state recognition of their relationships, but that they are generally indifferent to the matter as long as they may live as they please, free of governmental intrusions. See infra note 211 and accompanying text.
\textsuperscript{214} See, e.g., Petti Fong, Utah Pushes B.C. to Act on Polygamous Group: Flow of Women to Bountiful Sparks Concern, GLOBE & MAIL (Toronto), Dec. 2, 2005, at A1, A12 (stating that many polygamyists "just want to be left alone").
\textsuperscript{215} Gillett, supra note 74, at 531-32.
\textsuperscript{217} Lawrence, 539 U.S. at 599 (Scalia, J., dissenting) (emphasis in original).
cerning the similarities between laws prohibiting homosexuality and those prohibiting polygamy, at least one important difference exists: laws forbidding polygamy can also prevent polygamists from practicing their religious beliefs. Indeed, in the nineteenth-century, anti-polygamy laws expressly targeted individuals who lived the polygamous lifestyle because of their religious beliefs. Thus, regardless of the similar liberty interests shared by homosexuals and polygamists, people practicing polygamy for religious purposes arguably have not only a liberty interest under the Due Process Clause in matters pertaining to sex, but also an additional liberty interest in matters of religious belief. This observation is not meant to infer that polygamists' religious beliefs alone would allow them to trump the states' interests in regulating marriage, but rather to demonstrate the existence of polygamists' multiple interests that hang in the constitutional balance. Not only are these multiple interests worthy of substantial weight in any due process analysis; they may also constitute a "hybrid situation" justifying the application of strict scrutiny under the Free Exercise Clause, as explained in Smith.

IV. ADDITIONAL ARGUMENTS FOR AND AGAINST ANTI-POLYGAMY LAWS

A. Arguments For Anti-Polygamy Laws

Regardless of the animosity and bigotry which may have inspired early anti-polygamy laws, today, there are many valid reasons for upholding and sustaining these laws—especially in light of the fact that any alleged animosity against the LDS Church has lessened. The same is true of state Blaine Amendments. Referring

218. See supra Part III.A.3.


220. See David Van Biema, Kingdom Come: Salt Lake City Was Just for Starters—The Mormons' True Great Trek Has Been to Social Acceptance and a $30 Billion Church Empire, TIME, Aug. 4, 1997 (stating that "although the Mormon faith remains unique, the land in which it was born has come to accept—no, to lionize—its adherents as
to these Amendments, one scholar noted:

[T]oday there are other principles [besides hostility towards Catholicism] that may support the substance of the so-called Blaine Amendments . . . . The motivations of . . . parties who sue to prevent government funding of religious entities, may have nothing to do with enmity or hostility toward religion . . . .

. . . Unless the government entity . . . demonstrates a negative intent or attitude toward religion . . . there is no proof of hostility toward religion. Disparate treatment in this context does not equate to hostility [toward religion] because those engaging in that treatment are often motivated by constitutional concerns or concerns for avoiding divisiveness in the community, rather than hostility toward religion.221

In other words, despite any earlier motivations for the enactment of Blaine Amendments, today there are purer reasons for upholding those Amendments, such as interests in the separation of church and state as well as concerns about religious tolerance and respect. While laws based upon bigotry should be constitutionally suspect, to the extent that they are purged of biases and clothed with other secular, impartial purposes, such laws need not be cast aside.

Likewise, today there are many legitimate reasons for upholding the substance of federal and state anti-polygamy laws.222 Mod-
ern anti-polygamy statutes *that were not motivated* by religious bias, but by purer principles, should be able to withstand even the strictest form of constitutional scrutiny.\(^{223}\) For example, laws that target societal problems that some polygamous societies allegedly condone and perpetuate, such as crimes against women, children, and nonbelievers,\(^{224}\) should be constitutional to the extent that the object of such laws is not to "restrict [these] practices because of their religious motivation."\(^{225}\) Because such laws are of general applicability (i.e., they encompass both religionists and nonbelievers) and are in fact neutral toward religion, as required by *Smith*,\(^{226}\) they should be constitutional because states have a compelling interest in protecting their citizenry and advancing important societal purposes. In sum, the government's motivation in enacting laws prohibiting polygamy is key: while bigotry should be disallowed, religious tolerance should be embraced.

\(^{223}\) The determination of whether the justification for a particular state or federal statute is one of "purer principles," as opposed to religious bias, is very fact-specific and turns largely upon the history and circumstances surrounding enactment and enforcement of the statute. To the extent that a court determines that the basis of a particular statute is that of religious animus, as were state Blaine Amendments, it should be invalidated.


\(^{226}\) See *supra* Part III.A.1.
B. Arguments Against Anti-Polygamy Laws

Despite the government's present motivations and interests in enacting laws prohibiting polygamy, early anti-polygamy laws still extant today, including provisions of Utah's state constitution and the United States Supreme Court decisions in Reynolds and Late Corp. of the Church of Jesus Christ, continue to demean the lives of Latter-day Saints. The history of these early laws helps explain why.

"[T]he history of prejudice in matters of religion," wrote one commentator, "is analogous to . . . such history in matters of race." Early anti-polygamy laws, as well as state Blaine Amendments, were an outgrowth of the same era as the Supreme Court's now-derided decision in Plessy v. Ferguson. In Plessy, the Court expressly upheld the doctrine of "separate but equal" as applied to racial segregation in the states. The one-eighth African American petitioner in Plessy had been imprisoned for refusing to vacate a seat on a train where only white passengers were to be accommodated. He argued that the law under which he had been imprisoned was a violation of the Thirteenth Amendment, abolishing slavery, because the Louisiana law "implied a legal inferiority" of African Americans and thereby imposed a "badge of slavery or servitude" on them. Rejecting this argument, the Plessy Court instead declared that "[i]f this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."

Building upon this idea of "badge[s] of inferiority" described in

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227. See supra note 103.
228. United States v. Late Corp. of the Church of Jesus Christ, 150 U.S. 145 (1893); Reynolds v. United States, 98 U.S. 145 (1878).
233. Id. at 538-39.
234. Id. at 542, 545.
235. Id. at 551. Dissenting in Plessy, Justice Harlan argued that "if this statute of Louisiana is consistent with the personal liberty of citizens, why may not the State require the separation in railroad coaches of . . . Protestants and Roman Catholics?" Id. at 558 (Harlan, J., dissenting) (emphasis added).
Plessy, the Court in Lawrence recognized that laws criminalizing homosexual sodomy likely violate the Equal Protection Clause, even if those laws are not enforced, because they "demean[ ] the lives of homosexual[s]" and impose upon them a criminal "stigma" which "is not trivial." Like the stigmas discussed in Plessy and Lawrence, Catholics and Latter-day Saints are stigmatized by the continued existence and application of laws that were originally motivated by hatred for them and their faith. This is so because, "where improper animus seems to have contributed to the initial drawing of the line, it is at least fair to argue that the line would not be where it is but for that animus."

State Blaine Amendments, by their very existence, continue to demean the lives of Catholics. Although the animus embodied within those amendments may no longer exist, their "history shows that the adoption of separation as a constitutional standard was the product of deep-seated prejudice." The prejudice embodied in Blaine Amendments is still propagated by them, even though "separation is today typically supported by persons without animus toward Catholic or other ecclesiastical authority." This is the case because "the separation of church and state still imposes elements of an historical discrimination." Therefore, to the extent that the state Blaine Amendments continue to impose stigmatic badges of bigotry upon Catholics, those Amendments should now be wholly discarded and replaced with laws untainted by discrimination.

The same should also be done with the existing remnants of the government's attack against early Latter-day Saints. Although "polygamists [today] do not face the same animus that their predecessors did," the present existence of laws that were inspired by that original animus demeans the lives of Latter-day Saints by perpetuating the idea that they are a disfavored organization. The continued viability of Supreme Court decisions such as Reynolds serve as a reminder to all modern-day Mormons that theirs is a despised
religion, even though the LDS Church now eschews polygamy.\textsuperscript{243} The continued citation of these decisions as precedent,\textsuperscript{244} based as they were upon animosity and bigotry, is a blight upon democratic ideals and enlightened concepts of tolerance and individual/religious liberty. To the extent that decisions such as \textit{Reynolds} and \textit{Late Corp. of the Church of Jesus Christ} were motivated by animosity against a particular religion, and continue to perpetuate that animosity, those holdings, like \textit{Plessy}, should be overruled or struck down. Instead of favorably citing these opinions in free-exercise cases, the Court could instead, on its own initiative as it did with the \textit{Davis} case in \textit{Romer v. Evans},\textsuperscript{245} invalidate their precedential value to the extent the decisions target a particular religion. "A Supreme Court case born of prejudice is equally wrong whether it is based upon the racism of the era, as was, for example, \textit{Plessy v. Ferguson}, or of anti-Mormon near-hysteria, as [were] \textit{Reynolds}" and \textit{Late Corp. of the Church of Jesus Christ}.\textsuperscript{246}

\textbf{Conclusion}

The purpose of this article was to examine state and federal laws and court decisions from nineteenth-century America that directly target Mormon polygamy. By adding to this examination consideration of state Blaine Amendments, a greater understanding of the constitutionality of these anti-polygamy laws hopefully has


\textsuperscript{244} See supra note 241.

\textsuperscript{245} See supra note 91.

\textsuperscript{246} Sealing, supra note 61, at 758.
been achieved. Nineteenth-century anti-polygamy laws, like state Blaine Amendments, were motivated primarily by religious prejudice and intolerance. So, "[i]f the history of the Blaine [A]mendments renders them unconstitutional regardless of any nondiscriminatory purposes they may currently serve, then surely the history of the anti-polygamy laws would render them unconstitutional as well."247 Both types of laws were arguably the product of the same prejudice, the same bigotry, and the same thinly clad animosity. As such, neither type of law can survive strict scrutiny. To the extent that the motivation for the passage of these laws was animus, and due to the fact that the laws continue to stigmatize modern Catholics and Latter-day Saints, the time has now come for both types of laws to be forsaken.

247. Ravitch, supra note 7, at 264.