"However free the exercise of religion may be, it must be subordinate to the criminal laws of the country. . . . "

Davis v. Beason

133 U.S. 333, 10 S.Ct. 299, 33 L.Ed. 637 (1890)

As part of a continuing campaign against Mormons—most of whom had migrated to Utah under Brigham Young—Congress forbade polygamy in the territories. Reynolds v. United States (1878) unanimously sustained this statute, as applied to the Territory of Utah, against Mormons' claims that it interfered with their free exercise of religion. Branding polygamy "odious" to western culture, the Court said:

> Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order. . . . Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice?

Later, the Territory of Idaho limited the right to vote to adult males of sound mind who had not been convicted of treason, bribery, or other felonies, and who would swear not only that they were not personally practicing polygamy, but also that they were not members of an organization that "advises, counsels, or encourages" anyone "to commit the crime of bigamy or polygamy." Samuel Davis, a Mormon, was convicted for conspiring with others to swear falsely to this oath. He appealed to the Supreme Court.

■ MR. JUSTICE **FIELD**, after stating the case, delivered the opinion of the Court.

. . . Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. They are crimes by the laws of the United States, and they are crimes by the laws of Idaho. They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman and to debase man. Few crimes are more pernicious to the best interests of society and receive more general or more deserved punishment. To extend exemption from punishment for such crimes would be to shock the moral judgment of the community. To call their advocacy a tenet of religion is to offend the common sense of mankind. . . .

The term "religion" has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with the *cultus* or form of worship of a particular sect, but is distinguishable from the latter. The first amendment to the Constitution . . . was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect. . . . It was never intended or supposed that the amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with. However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation. There have been sects which denied as a part of their religious tenets that there should be any marriage tie, and advocated promiscuous intercourse of the sexes as prompted by the

passions of its members. And history discloses the fact that the necessity of human sacrifices, on special occasions, has been a tenet of many sects. Should a sect of either of these kinds ever find its way into this country, swift punishment would follow the carrying into effect of its doctrines, and no heed would be given to the pretence that, as religious beliefs, their supporters could be protected in their exercise by the Constitution of the United States. Probably never before in the history of this country has it been seriously contended that the whole punitive power of the government for acts, recognized by the general consent of the Christian world in modern times as proper matters for prohibitory legislation, must be suspended in order that the tenets of a religious sect encouraging crime may be carried out without hindrance. . . .

. . . Whilst legislation for the establishment of a religion is forbidden, and its free exercise permitted, it does not follow that everything which may be so called can be tolerated. Crime is not the less odious because sanctioned by what any particular sect may designate as religion. . . .

EDITORS' NOTES

(1) **Query:** What was Field's conception of WHAT the Constitution includes? What approach or approaches to constitutional interpretation did he follow?

(2) **Query:** *Davis* raises two questions, which apparently did not occur to Field, who considered himself a great defender of constitutional rights. First, what did it leave of a constitutionalist right to free exercise (as contrasted with a democratic right to participate in the political processes and to share in the community's judgment about what is or is not objectionable)? Put in terms of *Carolene Products*, what protections did Field leave to "discrete and insular" religious minorities against the prejudices of hostile majorities? And second, what democratic rights did Mormons have under this law? Once it was in place, they lost the right to vote. How could they retrieve that right? (The Court stated in Romer v. Evans (1996; reprinted above, p. **Error! Bookmark not defined.**): "To the extent *Davis* held that persons advocating a certain practice [polygamy] may be denied the right to vote, it is no longer good law.")

(3) Even after the Mormons fled to Utah, laws against the practice of their religion followed them. In 1882, Congress denied the right to vote to any citizen in the territories (Utah was not yet a state) who practiced polygamy. Five years later, Congress annulled the Church of Jesus Christ of Latter–Day Saints' corporate charter and declared most of its property forfeit. Referring to polygamy as a "barbarous practice" and a "nefarious" doctrine "contrary to the spirit of Christianity," the justices (speaking through Field's nephew, Justice Brewer) ruled the government's action constitutional (The Late Corporation of the Church of Jesus Christ of Latter Day Saints v. United States [1890]). They abruptly dismissed the Mormons' claim to freedom of religion as a "sophistical plea": "No doubt the Thugs of India imagined that their belief in the right of assassination was a religious belief; but their thinking did not make it so."

In 1890, the Church of Jesus Christ of Latter–Day Saints abandoned the teaching and practice of polygamy, but some fundamentalist groups (with an estimated 50,000 adherents) broke with the church and have refused to accept the change. Occasional legal problems still arise. As recently as 1946, the Supreme Court sustained the conviction of a Mormon who traveled on a vacation with several of his wives under the Mann Act, which outlaws transporting women across state lines for "immoral" purposes. Cleveland v. United States.

In 2001, a member of a so-called Mormon fundamentalist group became the first man in fifty years to be convicted on bigamy charges by the State of Utah. The husband of ten women and father to twenty-six children was sentenced to five years in prison by a Utah judge who told the defendant, "Religious beliefs are not a defense for a criminal act." See Michael Janofsky, "Utahan Is Sentenced to 5 Years in Prison in Polygamy Case," *N.Y. Times*, Aug. 25, 2001, p. A9.

(4) For scholarly studies of the Mormons' travails, see, e.g., Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth–Century America* (Chapel Hill: University of North Carolina Press, 2002); Klaus J. Hansen, *Mormonism and the American Experience*

(Chicago: University of Chicago Press, 1981); and Marvin S. Hill and James B. Allen, eds., *Mormonism and American Culture* (New York: Harper & Row, 1972).

(5) In keeping with its general jurisprudence, the Court has largely given up the role of Grand Inquisitor and no longer uses "the spirit of Christianity" as a criterion for judging rights protected under the First Amendment. See, for example, Thomas v. Review Bd. (1981; reprinted below, p. **Error! Bookmark not defined.**): "[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection. . . . Courts are not arbiters of scriptural interpretation."