

9-1-2002

## The Story of a Forgotten Battle: Reviewing The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America

Nathan B. Oman

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>



Part of the [Civil Rights and Discrimination Commons](#), and the [Religion Law Commons](#)

---

### Recommended Citation

Nathan B. Oman, *The Story of a Forgotten Battle: Reviewing The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America*, 2002 BYU L. Rev. 745 (2002).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol2002/iss3/5>

This Book Review is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

---

## Book Review

---

### The Story of a Forgotten Battle: Reviewing *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America*

Law libraries are generally boring places to outsiders (and to many insiders). Row upon row of identically bound books containing the arguments of long dead judges hardly make the blood boil or excite the imagination. Yet, a Latter-day Saint<sup>1</sup> venturing into the volumes of United States Supreme Court decisions from the closing decades of the nineteenth century may well be surprised by what she finds. For example, in 1890 the Court suggested that The Church of Jesus Christ of Latter-day Saints (“the Church”) was not entitled to constitutional protection because Mormonism was not really a religion.<sup>2</sup> In another case, the Court held that states could (and they did) pass laws denying the vote to any who belonged to an organization that taught the doctrine of “celestial marriage.”<sup>3</sup> Such cases are the dusty remains of the massive legal war waged by the federal government against the Church over the practice of plural marriage. As a Latter-day Saint, I had a visceral, tribal reaction when I first encountered these cases. Notwithstanding the passage of time and the Church’s change of practice,<sup>4</sup> I felt betrayed by America and the Constitution.

---

1. Throughout this essay, I use the terms “Latter-day Saint,” “Mormon,” and “Saint” interchangeably. They all refer to a member of The Church of Jesus Christ of Latter-day Saints, known colloquially as “The Mormon Church” or “LDS Church.” Unlike Roman Catholic parlance, in Mormon terminology “Saint” does not denote any special spiritual merit, rather it is used in the New Testament sense to refer to any person baptized into the Church. See, e.g., *Ephesians* 2:19 (King James) (“Now therefore ye are no more strangers and foreigners, but fellowcitizens with the saints, and of the household of God.”).

2. See *Late Corp. of The Church of Jesus Christ of Latter-day Saints v. United States*, 136 U.S. 1 (1890) (upholding the disincorporation of the Church under the Edmunds-Tucker Act).

3. See *Davis v. Beason*, 133 U.S. 333 (1890) (upholding an Idaho test oath for voters aimed at disenfranchising Mormons).

4. See THE DOCTRINE AND COVENANTS OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS [hereinafter DOCTRINE AND COVENANTS], *Official Declaration—1* (1990) (renouncing plural marriage in 1890). This document is also known as the “Manifesto.” See *id.*

The scholarly treatment of the Church's early legal struggles has been disappointing. While Mormon historians have frequently dealt with polygamy and anti-polygamy, they have written comparatively little on these subjects from a legal perspective.<sup>5</sup> Law, it seems, has remained a relatively neglected field within Mormon studies, and legal scholars have had little interest in Mormon thought or experience. This is unfortunate because the legal history of the Church is a fascinating story that touches on many of the most fundamental questions in American jurisprudence. In particular, the legal war waged over polygamy was one of the titanic—and largely unstudied—struggles of American legal history.

In *The Mormon Question*, Sarah Barringer Gordon tackles this particular story. Currently on the history and law faculties of the University of Pennsylvania, she specializes in the history of church-state relations in nineteenth-century America. Although she has published articles related to Mormon history and church-state issues,<sup>6</sup> *The Mormon Question* is her first book. It has three main strengths: It offers a much more nuanced and sympathetic portrayal of the ideology of anti-polygamist activists than one generally finds in Mormon history; it offers insights culled from the vast records of the Utah territorial courts; and it places the Supreme Court's polygamy cases in their legal and historical contexts.

Mormon writers have often described nineteenth-century anti-polygamists in harsh terms, painting them as hypocrites more interested in scoring cheap political points than the earnest protectors of hearth and home they pretended to be. B.H. Roberts, a very influential Mormon intellectual and historian, summed up this view, writing in 1930 the following:

Honorable individual exceptions to this arraignment of the anti-  
"Mormon" "crusaders" are cheerfully and gladly conceded; but  
they are exceptions. For the rest, the indictment for hypocrisy, sex

---

5. There are, of course, important exceptions to this claim. See, e.g., EDWIN BROWN FIRMAGE & RICHARD COLLIN MANGRUM, *ZION IN THE COURTS* (1988).

6. See, e.g., Sarah Barringer Gordon, "Our National Hearthstone": *Anti-Polygamy Fiction and the Sentimental Campaign Against Moral Diversity in Antebellum America*, 8 *YALE J.L. & HUMAN.* 295 (1996); Sarah Barringer Gordon, "The Liberty of Self-Degradation": *Polygamy, Woman Suffrage, and Consent in Nineteenth-Century America*, 83 *J. AM. HIST.* 815 (1996). In addition, Mormon historians have used Gordon's Ph.D. dissertation, "The Twin Relic of Barbarism": A Legal History of Anti-Polygamy in Nineteenth Century America (1995) (unpublished Ph.D. dissertation, Princeton University) (on file with UMI Dissertation Services). See, e.g., DAVIS BITTON, *GEORGE Q. CANNON: A BIOGRAPHY* 123 (1999).

immorality, indifference to the purity of the home, on the part of the “crusaders,” stands. Their concern about the alleged evils of polygamy was mere pretense.

*The real cause of this anti-“Mormon” crusade was a fight for the political control of Utah on the part of the “crusaders.”*<sup>7</sup>

Modern Mormon historians may lack Roberts’s strident tone, but they often agree in substance with his views.<sup>8</sup> Gordon, in contrast, argues that concern with polygamy was actually central to the federal government’s legal campaign against the Mormons and formed an important part of the ideology of the GOP politicians who dominated post-Civil War politics.

According to Gordon, the roots of the crusade lie in the sentimental anti-polygamy novels of the 1850s and 1860s.<sup>9</sup> Written by reform-minded, middle-class women, these novels portrayed polygamy as a barbaric and soul-destroying despotism. Often sensationalistic and having “little basis in fact,”<sup>10</sup> they served an explicit political function. They were meant to excite their readers to action. Accordingly, they belong to the same genre as anti-slavery novels like *Uncle Tom’s Cabin*, which were meant to mobilize (Protestant) reformers into abolitionist politics.<sup>11</sup> In this sense, whatever their limitations as literature or history, the anti-polygamy novels were wildly successful.

The sentimental and reformist calls of the anti-polygamy novels combined with a Republican ideology, dominated by ideas of human progress and the social preconditions of democracy, to form a powerful and coherent attack on Mormons’ peculiar institution. In this “cosmology,” it was progress that had brought man to the point where he was fit for self-government. According to the anti-polygamy theorists of the mid-nineteenth century, man had passed from a primordial sexual promiscuity, to an ancient polygamy, and

---

7. 6 B.H. ROBERTS, A COMPREHENSIVE HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS CENTURY I, at 135 (1930) (emphasis in original).

8. *See, e.g.*, FIRMAGE & MANGRUM, *supra* note 5, 210–60 (“The War on Mormon Society”). Firmage and Mangrum argue that anti-polygamy was secondary to the goal of dismantling the unique social and economic institutions of the Mormon commonwealth in the American West.

9. SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH CENTURY AMERICA 30 (2002).

10. *Id.*

11. *Id.*

finally, to modern monogamy.<sup>12</sup> It went without saying, of course, that the movement was from bad to good, from barbarism to civilization. Thus, polygamy represented a form of sexual regression against the evolutionary progress of history. However, this was not all. It also rendered its practitioners unfit for the task of self-government.<sup>13</sup> Like slavery, polygamy produced a stagnant despotism inconsistent with the dynamism of a free and democratic society.<sup>14</sup> Accordingly, in the minds of anti-polygamy activists, Mormons could not be allowed to govern themselves until they had abandoned their “relic of barbarism” and progressed to the point already reached by the rest of the country.<sup>15</sup>

Gordon chronicles the increasingly harsh measures that this ideology justified against Mormons. Beginning in the 1860s, successive Republican Congresses passed laws punishing polygamy in the territories. The pace and severity of these laws increased after the Civil War, as penalties were ratcheted up and procedures to facilitate conviction were devised.<sup>16</sup> They finally culminated in a massive wave of prosecutions in the 1880s, the disincorporation of the Church, and the government’s confiscation of all of its assets. Gordon records that during the territorial period, the federal government prosecuted over two thousand criminal cases in Utah, and fully ninety-five percent of these were for sexual crimes—polygamy, unlawful cohabitation, and fornication.<sup>17</sup> The sheer volume of prosecutions for sexual offenses, she notes, “is, literally, unique in American legal history, far exceeding, for example, that of seventeenth-century Massachusetts.”<sup>18</sup> Virtually all of the prosecutions for sex crimes were tied to plural marriage.

The massive scale of prosecutions resulted from two factors: the success of the Church’s leaders in evading arrest and the success of Mormon lawyers in defeating overreaching prosecutorial legal theories. Initially, federal officials hoped to crush plural marriage by imposing very long sentences on a few prominent leaders, such as members of the Church’s two governing councils, the First

---

12. *Id.* at 157.

13. *Id.* at 142.

14. *Id.*

15. *See id.* at 157.

16. *Id.*

17. *Id.* at 155.

18. *Id.* at 156.

Presidency and the Quorum of the Twelve Apostles.<sup>19</sup> In order to do this, prosecutors first needed to catch the leaders and next persuade the courts to “segregate” offenses.<sup>20</sup> Because of the difficulty of proving multiple marriage ceremonies, federal officials relied on the offense of unlawful cohabitation, the crime of actually living with more than one woman as a wife. Ingenious prosecutors piled on the punishment by segregating the offense temporally.<sup>21</sup> Thus, Mormon Apostle Lorenzo Snow was prosecuted for three counts of unlawful cohabitation—one count for each of three successive years. In theory, the offenses could be infinitely segregated.<sup>22</sup> For example, one year of plural marriage could be divided into 365 separate counts of unlawful cohabitation, one count for each day. This allowed prosecutors to pile very large fines and long prison sentences on targeted defendants. In effect, segregation transformed unlawful cohabitation, which was technically a minor misdemeanor, into a major criminal offense. However, Mormon success stymied the federal strategy. First, Mormon leaders went into the Underground, an elaborate system of safe houses and hiding places that allowed them to avoid arrest.<sup>23</sup> Second, the Church’s lawyers succeeded in persuading the Supreme Court to strike down the practice of segregation.<sup>24</sup> The federal prosecutors responded by shifting to a strategy of wider, but less dramatic, convictions. The result was an all-out effort to prosecute and jail every polygamist that federal marshals could arrest, regardless of prominence.<sup>25</sup>

The Mormons responded by resisting. While most of the fighting involved “the bloodless tourney of lawyers,”<sup>26</sup> Gordon notes that “some players descended into violence, as in 1885 when Sarah Nelson beat two deputies with a broomstick as they attempted to serve process on her husband’s other wives.”<sup>27</sup> Most Mormons, however, resisted through perjury and concealment, many—

---

19. *Id.* at 158.

20. *Id.* at 152.

21. *Id.*

22. *Id.* at 159.

23. *Id.* at 158–59.

24. *See In re Snow*, 120 U.S. 274 (1887) (overturning the practice of segregating offenses).

25. GORDON, *supra* note 9, at 160.

26. *Id.* at 156.

27. *Id.*

especially women—being sent to prison for contempt of court when they refused to answer questions implicating family members and fellow Saints.<sup>28</sup>

Gordon also documents how Mormon resistance frustrated anti-polygamists, who responded with harsher legislation.<sup>29</sup> In addition, the legalization of the anti-polygamy movement in the late 1870s and especially in the 1880s marked a masculinization of the process. While the chief figures in anti-polygamy politics during the 1850s and 1860s had been female novelists and lecturers, in the 1870s and 1880s these women were increasingly marginalized, as male legislators, lawyers, and judges emerged as the key players. Also, as it became apparent that Latter-day Saint women were partners in resistance—rather than the imagined passive victims of domineering and lascivious Mormon patriarchs—sympathy for them among eastern anti-polygamists faded, reinforcing a harsher, more punitive attitude.<sup>30</sup> Thus, the political support for the Edmunds-Tucker Act—which disincorporated the Church and confiscated its property—was generated in part by the fortitude of the Mormon response to federal prosecutions.<sup>31</sup> Yet despite the ultimately self-defeating logic of Mormon resistance, Gordon praises the political and legal sophistication of the polygamist resisters.<sup>32</sup> Indeed, despite continual legislative defeats from 1882 on, Mormon lawyers were able to score some notable victories in court and, at the very least, forced federal attorneys to fight for each conviction.

Gordon's book shines brightest in its treatment of the cases that the Church fought to the Supreme Court. Her discussion of the landmark decision in *Reynolds v. United States*<sup>33</sup> provides an example of her analysis. The *Reynolds* decision, handed down in 1879, is generally acknowledged as a seminal case because, for the first time, the Supreme Court positively interpreted the content of the First Amendment's religion clauses. The traditional account of *Reynolds* can be summarized in this way: In the mid-1870s, Mormon leaders decided to test the constitutional validity of anti-polygamy laws.<sup>34</sup>

---

28. *Id.* at 161.

29. *Id.* at 164–66.

30. *Id.* at 149, 181.

31. *Id.* at 164–66.

32. *Id.* at 155.

33. 98 U.S. 145 (1879).

34. FIRMAGE & MANGRUM, *supra* note 5, at 151.

George Reynolds provided the information necessary to convict himself, appealed to the Supreme Court, and argued that the law violated his right to the free exercise of his religion.<sup>35</sup> The Court responded by ruling that the term “Free Exercise” in the First Amendment referred to only religious belief and did not cover religious action.<sup>36</sup>

According to Gordon, this account is overly simplistic and largely misses the main issues in the case. She argues that *Reynolds* was not simply a “test-case” in which the Mormons turned to the courts for protection. Rather, it was part of a broader political strategy aimed primarily at Congress. George Q. Cannon, a member of the Church’s governing First Presidency who also served as Utah’s delegate to the House of Representatives, instigated the suit as part of a “costly strategy . . . to turn to law in the hope of tying up Republicans in the tangles of Supreme Court doctrine.”<sup>37</sup> In fact, prior to *Reynolds* there had been no polygamy convictions for the simple reason that proving polygamous marriages was nearly impossible.<sup>38</sup> It was only *after* the Court’s decision that Congress responded with unlawful cohabitation statutes that allowed, for the first time, wholesale prosecution of polygamists. Thus, *Reynolds* was aimed not at halting federal law enforcement but at providing Cannon with constitutional arguments that he could use with political fence-sitters in Congress.<sup>39</sup> Ultimately, Cannon’s strategy backfired not only because it cleared the constitutional road for convictions but also because it provided the political impetus to pass laws facilitating them.<sup>40</sup>

Gordon also attacks the simple jurisprudential account of the traditional *Reynolds* story. She notes that Reynolds’s attorneys actually directed most of their attention not to the First Amendment but to the continuing vitality of the *Dred Scott*<sup>41</sup> decision.<sup>42</sup> In *Dred*

---

35. *Id.*

36. *Id.* at 155.

37. GORDON, *supra* note 9, at 149.

38. See FIRMAGE & MANGRUM, *supra* note 5, at 149–51 (discussing early prosecutions against polygamists).

39. GORDON, *supra* note 9, at 149.

40. *Id.*

41. *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

42. Gordon, however, is not the first writer to notice the role of *Dred Scott* in the *Reynolds* case. See Randall D. Guynn & Gene C. Schaerr, *The Mormon Polygamy Cases*, SUNSTONE, Sept. 1987, at 8, 9–10.

*Scott* the Supreme Court overturned the Missouri Compromise (and by implication the Compromise of 1850), holding that the federal government could not forbid slavery in the territories.<sup>43</sup> Many modern lawyers assume that the Civil War amendments outlawing slavery and granting constitutional protection to freed slaves overturned *Dred Scott*, eviscerating any precedential value it might have.<sup>44</sup> However, as Gordon demonstrates, in the years following the Civil War many lawyers assumed that while the Thirteenth Amendment banned slavery, *Dred Scott* continued to be good law to the extent that it limited the power of the federal government to regulate “domestic” issues in the territories.<sup>45</sup> The traditional account of *Reynolds* thus assumes—mistakenly—that the federal government had an unquestioned right to legislate for the territories and that the only issue was whether the First Amendment protected polygamy. In reality, the power of the federal government over the territories was still an open question in 1879, and notwithstanding the Court’s silent rejection of his arguments, Reynolds had good reasons for believing that Congress did not have the power to legislate on “domestic” issues such as marriage.

Gordon’s account also suggests that *Reynolds* presented an Establishment Clause argument as much as a Free Exercise Clause argument. Today, at least in part because of the *Reynolds* decision, lawyers tend to think of the First Amendment’s religion clauses as two parts of a single national law of religion. Simply stated, the Free Exercise Clause protects private religious conduct from the government, while the Establishment Clause forbids religious activity by the state. Gordon, however, shows that imposing such an understanding on the *Reynolds* decision is anachronistic. During the nineteenth century, lawyers conceptualized the religion clauses in terms of jurisdiction.<sup>46</sup> The First Amendment allocated power over religion by forbidding any federal action on the issue. The Mormons argued in effect that these limitations protected local autonomy in matters of faith. Because Mormonism was, in a sense, the

---

43. *Dred Scott*, 60 U.S. at 452 (“[I]t is the opinion of the court that [the Missouri Compromise] . . . is not warranted by the Constitution, and is therefore void.”).

44. See, e.g., 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 309 n.19 (3d ed. 2000) (noting that the Thirteenth Amendment reversed *Dred Scott*).

45. GORDON, *supra* note 9, at 124.

46. *Id.* at 6–7.

“established” church in Utah, the *federal* government was forbidden from intervening with it through anti-polygamy legislation.<sup>47</sup>

The Court brushed all of these issues aside through a simple move: it used *state* law to interpret the *federal* constitution. Thus, rather than viewing the First Amendment as allocating power over religion to various levels of government, the Court analogized the First Amendment to early legislation in Virginia sponsored by Thomas Jefferson and James Madison.<sup>48</sup> This legislation had provided for some measure of local religious toleration and had weakened the established Episcopal Church in Virginia.<sup>49</sup> The Court then applied this analysis to the First Amendment, arguing that it too was a general mandate of religious toleration. Having created a substantive rather than jurisdictional law of religion using the First Amendment, the Court ruled that this national law provided no protection for the *practice of* (as opposed to *belief in*) plural marriage.<sup>50</sup> “This jurisprudential sleight of hand substituted the democratic experience of one jurisdiction—Virginia—for a process that would have allowed each jurisdiction to determine for itself the meaning and scope of the law of religion within its boundaries. This substitution was profoundly nationalizing.”<sup>51</sup>

Gordon also, almost grudgingly, acknowledges that “prejudice against Mormons and their alternative faith played a role in the decision.”<sup>52</sup> She notes that the Court used racist arguments to support its conclusion, placing the Mormons outside of its nationally homogenous sphere of protection in part by analogizing them to “the Asiatic and . . . African people.”<sup>53</sup> Both of these groups, in turn, were identified in the nineteenth-century white American imagination with sexual immorality and anti-democratic indolence. The Court thus implied that Mormons shared what one nineteenth-century writer called the “[Negroes’] ungovernable propensity to miscellaneous sexual indulgence”<sup>54</sup> and the supposed Asiatic predilection for despotism.

---

47. *See id.* at 5.

48. *Reynolds v. United States*, 98 U.S. 145, 162–63 (1879).

49. *Id.* at 163.

50. *Id.* at 164–65.

51. GORDON, *supra* note 9, at 134.

52. *Id.* at 142.

53. *Id.*

54. *Id.*

On the whole, this is an excellent book. I would have enjoyed a more detailed, blow-by-blow account of the legal maneuverings and more of Gordon's close analysis of judicial decisions. Others may wish that the discussion of anti-polygamy fiction were longer. This tension, however, is inherent to legal history. For many years, Anglo-American legal historians wrote about the law as though it were a self-contained social phenomenon. Their work tended to focus almost exclusively on the development of legal doctrine, with occasional side notes on the life of the bench and bar.<sup>55</sup> In response to this insularity, modern legal historians have focused on the ways in which the law reflects and interacts with its social context.<sup>56</sup> On this spectrum, Gordon has put more weight on the social side and less on the legal side of the scale.

*The Mormon Question* contains possibilities for a broad range of scholars. Those interested in the politics of marriage in the nineteenth century will be intrigued by Gordon's description of the intersection of sexual, familial, and political ideology in the anti-polygamy crusade. Scholars interested in church-state issues will appreciate her nuanced legal account of what was the largest, longest, and most intense confrontation between law and religion in American history. In addition, she offers a fascinating story of how faith, politics, and the law can interact to create new bodies of legal precedent and transform religious practices. Finally, Gordon's book should appeal to another group: Latter-day Saint legal scholars and those interested in Mormonism's relation to law.

Hitherto, Mormonism as a potential perspective on the law has been relatively invisible in the legal academy.<sup>57</sup> This is unfortunate

---

55. Professor Lawrence Friedman of Stanford Law School has graphically characterized the early stages of American legal historiography:

Legal scholars and lawyers were interested in precedents, but not in history; they twisted and used the past, but rarely treated it with the rigor that history demands. Historians, for their part, were not aware of the richness and importance of legal history; the lawyers, jealous of their area showed them only a dreary battlefield of concepts; historians were unwelcome there; the landscape was technical and strewn with corpses and mines.

LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 11–12 (2d ed. 1985).

56. For an influential example of this modern approach, see MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860* (1977).

57. *But see* Kif Augustine-Adams, *The Web of Membership: The Consonance and Conflict of Being American and Latter-day Saint*, 13 *J.L. & RELIGION* 567 (1999); Frederick Mark Gedicks, *The Integrity of Survival: A Mormon Response to Stanley Hauerwas*, 42 *DEPAUL L. REV.* 167 (1992); James T. McHugh, *A Liberal Theocracy: Philosophy, Theology, and Utah*

given the Latter-day Saints' fascinating legal history, and the presence of other religious perspectives within legal scholarship.<sup>58</sup> Gordon's book, however, provides a useful place to begin for scholars interested in offering such a perspective. The value of such a perspective lies not only in the increasing demographic and political significance of Mormonism,<sup>59</sup> but also in the possibility that it may offer unique insights on persistent issues.<sup>60</sup>

Reflection on the legal storm recorded by Gordon gives Latter-day Saint scholars two valuable opportunities. First, the tenacity and commitment of nineteenth-century Mormons, which Gordon details, provide a powerful reminder of the importance of this period for modern Latter-day Saints. As Mormon novelist and essayist Orson Scott Card has written:

Mormons still treasure the myth of persecution: abuse a Mormon because of his beliefs, and he is almost grateful for the chance to bravely resist you, for it proves that he is worthy of the sacrifices of his ancestors. Polygamy named us as a people, and though

---

*Constitutional Law*, 60 ALB. L. REV. 1515 (1997); Cheryl B. Preston, *Feminism and Faith: Reflections on the Mormon Heavenly Mother*, 2 TEX. J. WOMEN & L. 337 (1993).

58. See, e.g., R.J. Arango, *Thomas Aquinas: Prudence, Justice, and the Law*, 40 LOY. L. REV. 897 (1995) (Catholic); Harold J. Berman, *The Spiritualization of Secular Law: The Impact of the Lutheran Reformation*, 14 J.L. & RELIGION 313 (2000) (Protestant); David A. Funk, *Traditional Islamic Jurisprudence: Justifying Islamic Law and Government*, 20 S.U. L. REV. 213 (1993) (Islamic); Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813 (1993) (Jewish).

59. With 4.9 million American adherents, Mormonism is now one of the six or seven largest religious groups in the country. THE WORLD BOOK ALMANAC 2001 at 689 (William A. McGeverran ed., 2001). By contrast there are about 4.1 million Jews in the United States and 2.3 million Episcopalians. *Id.* The largest single religious group in the United States is the Roman Catholic church with 62 million members. *Id.* at 690. However, demographic trends indicate that Mormonism is fated to be much more than simply a sizeable religious minority in the United States. Assuming that LDS growth rates remain constant into the next century, there will be 100 million Mormons worldwide by 2040. See Tim B. Heaton, *Vital Statistics*, 4 THE ENCYCLOPEDIA OF MORMONISM 1518, 1520 (Victor Ludlow ed., 1992). Given the possibility of this kind of future growth, sociologist Rodney Stark argues that in Mormonism we are witnessing one of the rare events in human history: the rise of a new world religion. See Rodney Stark, *The Rise of a New World Faith*, 26 REV. REL. RES. 18 (1984).

60. See, e.g., Drew Clark, *The Mormon Stem-Cell Choir*, SLATE, Aug. 3, 2001, at <http://slate.msn.com/?id=112974> (visited on December 12, 2001) (detailing the way in which LDS theology allowed Mormon senators to broker a compromise on stem-cell research). An informal measure of the potential interest of such a perspective is the fact that this article generated more email responses than any other recent *Slate* article. Interview with Drew Clark (Aug. 25, 2002).

polygamy is gratefully behind us now, we still live on the strength of its legacy.<sup>61</sup>

To her credit, Gordon has the sensitivity to understand this, writing that the “loss of the battle for polygamy was bitter and still resonates in Mormons’ historical scholarship. The authority of the Constitution . . . reflected the interest of the enemies of Zion.”<sup>62</sup> Thus, despite the oft repeated identification of Mormonism as the quintessentially “American religion,”<sup>63</sup> the relationship of the Saints to the legal ideology of the United States is ambiguous. It is worth remembering that at the supreme moment of confrontation between Mormonism and the state, the Constitution and its institutions failed the Saints. Ironically, this is something that many American Latter-day Saints, who take an unabashedly triumphalist attitude towards the Constitution, seem to have forgotten.<sup>64</sup>

Second, the ultimate failure of the Constitution to protect the Mormon Zion from her attackers gives Latter-day Saints a unique position from which to critically explore the current legal system, even while Mormon theology forecloses a complete break with constituted legal authority.<sup>65</sup> Mormons today tend to place almost exclusive emphasis on “being subject to kings, presidents, rulers, and magistrates, in obeying, honoring, and sustaining the law.”<sup>66</sup> Gordon’s work, however, provides a powerful reminder that there are other possibilities within Mormon theology and experience. Confronting the tenacious, powerful, and at times radical arguments offered by Mormonism’s legal defenders in the nineteenth century contains a promise for Latter-day Saints who care about

---

61. ORSON SCOTT CARD, SAINTS 627 (1984).

62. GORDON, *supra* note 9, at 222.

63. *See, e.g.*, HAROLD BLOOM, THE AMERICAN RELIGION: THE EMERGENCE OF THE POST-CHRISTIAN NATION 77–128 (1992). For Bloom, there is “The American Religion”—a single form of Gnostic spirituality native to the United States—of which Mormonism is the quintessential expression.

64. *But see* R. Collin Mangrum, *Mormonism, Philosophical Liberalism, and the Constitution*, BYU STUD., Summer 1987, at 119. Writing during the celebration of the Constitution’s Bicentennial, Mangrum, after noting the historically shabby treatment of Mormons and their values by the Constitution, posed the question: “Why then Mormon hoopla over what could be characterized as political degeneracy?” *Id.* at 119. Mangrum goes on to argue that the answer to this question can be found in the congruence of Mormon theology with the classical liberal political ideas embodied in the Constitution. *Id.*

65. *See* DOCTRINE AND COVENANTS, *supra* note 4, § 134; *The Articles of Faith of The Church of Jesus Christ of Latter-day Saints*, in THE PEARL OF GREAT PRICE ¶ 12 (1990).

66. *Id.*

jurisprudence in the twenty-first century. Law requires that we work out the limits of collective, government authority and the strength of the claims of faith to individual and communal self-definition. This constant negotiation and confrontation between God and Caesar is a central question of legal theory. Gordon's book illustrates Mormonism's past ability to provide valuable perspectives on that question, perspectives that powerfully question the law's claims to authority. More generally, her work suggests that Mormon thought and experience contain rich opportunities for Latter-day Saints who have the luxury of thinking about such problems in less troubled times.<sup>67</sup>

*Nathan B. Oman\**

---

67. Fortunately, there seems to be a recent increase in interest in discussions of law and Mormonism. BYU Law School's J. Reuben Clark Society hosted a conference in October 2001 on "LDS Perspectives on the Law." See generally the articles forthcoming in the 2003 *Brigham Young University Law Review*. In addition, Latter-day Saint legal scholars interested in using their religion as a lens for the study of the law can look to recent examples by traditional Christian scholars. See, e.g., HAROLD J. BERMAN, *FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION* (1993); *CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT* (Michael W. McConnell et al. eds., 2001).

\* Nathan B. Oman (noman@law.harvard.edu) is an Articles Editor on the *Harvard Law Review*. He also moderates an email discussion list (ldslaw@lists.law.harvard.edu) hosted by Harvard Law School on the topic of law and Mormonism. The author would like to thank Allison Tirres and Frederick M. Gedicks for commenting on an earlier draft of this review. All the standard disclaimers apply.

