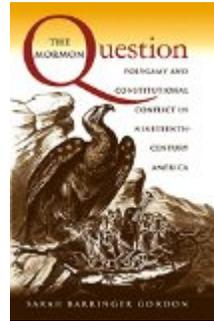


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A Battle Over Sex and Religion that Shaped the American Nation

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The Mormon conflict is a neglected episode in American constitutional development. Many constitutional historians, if they think about “the Mormon Question” at all, remember it only as the provocation for the Supreme Court’s first Free Exercise decision, *Reynolds v. United States*.^[1] Others recall it as a curious nineteenth-century morality play provoked by the eccentric sexual practices of a limited sect that later renounced polygamy and evolved into a flourishing, worldwide religion.

There was more to it, as is ably demonstrated in this superb book by Sarah Barringer Gordon, a professor of law and history at the University of Pennsylvania. *The Mormon Question* makes clear that America’s battles over Mormonism and polygamy shook the nation to its constitutional foundations. Anti-polygamists viewed the practice and the Mormon church as threats to civilization. In zealous pursuit of their target, they pushed the limits of national legislative and executive power. They developed new doctrines about the territories, statehood, and individual liberties. Rhetoric of the day linked polygamy and slavery as the “twin relics of barbarism” (p. 55). The pairing communicates the intensity of the battle: though it stopped short of full-fledged civil war, this was a violent sectional conflict, drenched with moral fervor and fought with guns as well as words and laws.

Gordon’s narrative gracefully integrates a wide range

of sources. The first chapter, “The Power of the Word(s),” culls novels and other popular literature for images of Mormonism and polygamy. In later chapters, Gordon continues to pursue cultural themes, but shifts her attention in the direction of law and politics. She describes the innovative, and sometimes radical, policies the national government used to attack polygamy; the strategies the Mormons used to resist successfully for many years; and the developments and counterstrikes that eventually rendered Mormon resistance futile.

Few authors could deal so adeptly with such diverse cultural, legal, and political materials. There is accordingly much to praise about Gordon’s book. From my standpoint as a constitutional theorist, one measure of the book’s success is its capacity to enrich our thinking about major constitutional problems. Remarkably, the book illuminates at least four such issues. The first is the constitutional status of the territories. The Utah Mormons insisted that the federal government’s power to govern the territories was limited. They also demanded the right to enter the Union as a state on their own terms. (See, e.g., pp. 9-10, 109-111.) The debate over what to do in Utah accordingly can deepen our comprehension of what is at stake in arguments about the constitutional status of American territories.

In this regard, Gordon’s book makes a valuable contribution indeed: constitutional theorists have more or less ignored the territories, but that is a mistake. As is ev-

ident from the excellent recent collection of essays edited by Christina Burnett and Burke Marshall, constitutional questions about Puerto Rico and other territories are theoretically vexing and practically important.[2] Gordon's book will be a valuable resource for those who want to begin thinking seriously about the territories in historical context.

The second issue is polygamy itself. In many ways, the moral context for the nineteenth-century polygamy debate seems dated. Supreme Court doctrine and liberal political theory now allow for rights of sexual autonomy that would have been unthinkable not only to the opponents of polygamy but also (perhaps especially!) to its Mormon defenders. Yet even today there is no constitutional right to polygamous marriage, and very liberal political theorists are reluctant to say anything good about it. Why is that so? Should not competent adults be free to choose whether to enter plural marriages? The assumption seems to be that such marriages would be bad for the women who entered them. But then why not permit women to be judges of their own interests (as we do with regard to, say, abortion)? The Utah episode puts the question especially starkly, since, as Gordon points out, the Mormons allowed women to vote, unlike other states that (according to anti-Mormon and anti-polygamy rhetoric) supposedly were more solicitous of state's rights (pp. 97, 167-171).

If there is a connection between polygamy and the oppression of women, the connection must be empirical and contingent, rather than logical and necessary. The Utah example is therefore an interesting source of relevant evidence. Gordon's treatment of polygamy in *The Mormon Question* explores the issue but does not put it to rest. Gordon gives us portrayals of polygamy from both sides of the nineteenth-century divide. Some of the anti-polygamy rhetoric, about the importance of marital monogamy to civilization, now seems bombastic and unpersuasive. Nineteenth-century outrage over polygamy seems to have been fueled at least partly by religious intolerance and personal distaste, and it is natural to wonder whether our own, contemporary doubts about polygamy might flow from similar sources.

But not all nineteenth-century anti-polygamy arguments ring hollow today. Some critics of the practice offered evidence that Mormon women were, in fact, being treated badly in plural marriages. There is a lingering question about the truth of these claims—and about whether, even if the claims are true, monogamous marriage was any better.

The third issue pertains to the complexities of religious conflict. The nineteenth-century Mormon conflict bears some surprising resemblances to the confrontation between the United States and radical Islamic groups (including the coincidence that Islam recognizes plural marriages). That may seem utterly implausible to anybody familiar with Mormonism today. After all, as Gordon points out, conservative columnist George Will has hailed Mormonism as the “‘most American’ of religions” (p. 234). How could anybody compare Mormonism to radical Islam?

Matters were different in the nineteenth century. Brigham Young prophesied that the North and South would destroy each other during the Civil War. He welcomed this possibility because “[t]he Latter-Day Saints, whose existence outside the Union would protect them from the coming implosion, would fill the vacuum” (p. 90). Some extreme Mormon sermons during 1856 and 1857 seemed to endorse the killing of non-Mormons (pp. 58-59). In the 1840s, before leaving for Utah, the Mormons had flexed their political muscle in Illinois through bloc voting and the formation of a private militia (p. 24). The government they established in Utah had substantial theocratic elements (p. 196).

Today many Americans are trying to figure out whether Islam is a “great religion that has been hijacked by terrorists” or whether it is (in some forms) genuinely antagonistic and threatening to the American way of life. Gordon's readers may thus be able to sympathize with nineteenth-century Christians, who had to ask similar questions about the Mormon settlement on their western border. And Americans today may be able to learn something about the possibilities for religious understanding and misunderstanding by reading Gordon's book.

The fourth issue pertains to the constitutional structure of religious freedom in the United States. I have already mentioned that, among constitutional lawyers, the Mormon controversy is remembered almost exclusively in terms of the *Reynolds* decision, which held that the Free Exercise Clause of the First Amendment did not preclude Congress from criminalizing religiously motivated polygamy. *Reynolds* gets plenty of criticism from modern lawyers, but the result is hardly surprising. As the recent events in New York City make tragically clear, religion cannot be a blanket excuse for non-compliance with the law. Nineteenth-century Americans believed that polygamy threatened the very foundations of their civilization, and, if one believed (rightly or wrongly) that polygamy was so dangerous, it would be unimaginable

that religiously motivated instances of it should be exempt from the criminal law.

Yet judicial enforcement of the Free Exercise Clause has never been the only, or the most important, source for religious freedom in the American constitutional system. Religious freedom draws strength from individual rights not specific to religion—rights such as property rights, speech rights, and procedural rights, which enhance the autonomy of all Americans, including religious Americans. Religious freedom also benefits from the dispersion of power among multiple branches of the federal government and state and local communities. This dispersion of power both makes it more difficult for the federal government to bring the full force of its power to bear against any religious group, and enables such groups to move from one jurisdiction to another more favorable one—which is exactly what the Mormons tried to do when they moved west to Utah.

Of course, if the federal government gets sufficiently excited, its power is awesome, and it has resources sufficient to suppress religious activity it dislikes. The war on Mormon polygamy is one important instance in which the federal government mobilized its power to transform a faith, and succeeded. In that regard, it is the exception that proves the rule.

But that is not merely a trite phrase: this exception really does prove the rule, for it is telling how the federal government managed to transform Mormonism and with what consequences. The consequences are not really part of Gordon's book, but are common knowledge. The American government transformed Mormonism but did not abolish it. It is today among the fastest-growing religions in the United States, and, although it accounts for only around 2 percent of the national population, it still claims more than 70 percent of the population of Utah among its adherents, and so has considerable political clout.[3]

Gordon has a great deal to say about how the transformation took place, and that story is perhaps the most interesting part of a very interesting book. The Morrill Act of 1862, which banned polygamy, was for many years ineffective not because of the Free Exercise Clause, but because Mormon defendants were entitled to a jury of their peers in Utah, and “no grand jury of their peers would indict Mormon leaders” (p. 83). Congress therefore had to supplement the Morrill Act with the Poland

Act of 1874, which gave federal marshals a role in selecting jury pools (pp. 111-112). That statute did not fully solve the problem, so in 1882 Congress passed the Edmunds Act, which disqualified prospective jurors who supported polygamy (pp. 151-154). To transform the Mormon religion, Congress had to restrict rights related to legal process and free speech.

The Edmunds Act led to “the Raid,” federal prosecutorial activity for polygamy-related crimes that Gordon describes as “unique in American history” (p. 155). So, in other words, in addition to banning polygamy, Congress had to muster the will to create and finance an unprecedented law-enforcement campaign. Even this was not enough to bring down the church or its commitment to polygamy. What finally did the trick, it seems, was the dissolution of the church's corporate charter and the consequent escheatment of church property to the state under the Edmunds-Tucker Act of 1887 (pp. 185, 219-220). What finished the church was a blunt and highly unusual (if not unconstitutional) violation of property rights.

Gordon's book thus makes a major contribution to four significant constitutional issues and spins a good yarn to boot. Indeed, her narrative has everything that you're not supposed to talk about in polite society (sex, religion, and politics), mixed together in heady proportion. Readers will delight in Gordon's renditions of courtroom drama, military tactics, and a colorful cast of characters. There are roughly fifty photographs and political cartoons accompanying her rich prose. As a result, the book is not only an important contribution to the scholarly literature, but a pleasure to read. Now that Gordon has given us this superb book, constitutional thinkers no longer will have any excuse for ignoring a conflict that played a crucial role in America's development.

Notes

[1]. *Reynolds v. United States*, 98 U.S. 145 (1879).

[2]. Christina Duffy Burnett and Burke Marshall, eds., *Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution* (Durham and London: Duke University Press, 2002).

[3]. The statistics are from Martin B. Bradley, et al., eds., *Churches and Church Membership in the United States, 1990: An Enumeration by Region, State, and County, Based on Data Reported for 133 Church Groupings* (Atlanta: Glenmary Research Center, 1992).

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