Sarah Barringer Gordon. *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America.*
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Reviewed by Nathan B. Oman

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 of most. Yet Latter-day Saints venturing into the volumes of United States Supreme Court decisions from the closing decades of the nineteenth century may well be surprised by what they find. For example, in 1890 the Court suggested that The Church of Jesus Christ of Latter-day Saints was not entitled to constitutional protection because Mormonism was not really a religion.[1] In another case, the Court held that states could (and they did) pass laws denying the vote to any who believed in "the doctrine of celestial marriage."[2] 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.

When I first read these cases in college, as a Latter-day Saint I had a visceral, tribal reaction. Notwithstanding the passage of time and the change of practice,[3] I felt betrayed by America and the Constitution. And I was disappointed at the scholarly treatment of the Church's early legal struggles. Despite the evocative power of these decisions, Mormon historians have written comparatively little on polygamy and antipolygamy from a legal perspective.[4] Law, it seems, has remained a relatively neglected field within Mormon studies. This omission 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,* Susan 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,[5] *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 antipolygamist 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 antipolygamists in harsh terms, painting them as hypocrites more interested in scoring cheap political points than in earnestly protecting hearth and home. B. H. Roberts summed up this view, writing:

> 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 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."*[6]

Modern Mormon historians may lack Roberts's stridency, but they often agree in substance with his views.[7] Gordon, in contrast, argues that concern with polygamy was actually central to the federal government's crusade and formed an important part of the "cosmology" of the GOP politicians who dominated post–Civil War politics.

According to Gordon, the roots of the crusade lie in the sentimental antipolygamy novels of the 1850s and 1860s. Written by middle-class women, these novels appealed to a middle-class audience, portraying polygamy as a barbaric and soul-destroying despotism. Often sensationalistic and having "little basis in fact" (30), the novels served an explicit political function. They were meant to excite their readers to action. Accordingly, they belong to the same genre as antislavery novels such as *Uncle Tom's Cabin,* which were meant to encourage participation in abolitionist politics. In this sense, whatever their limitations as literature or history, the antipolygamy novels were wildly successful, as were the antislavery novels (32).

The sentimental and reformist calls of the antipolygamy 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 antipolygamy theorists of the 1860s and 1870s, man had passed from a primordial sexual promiscuity, to an ancient polygamy, and finally to modern monogamy. 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. Like slavery, polygamy produced a stagnant despotism inconsistent with the dynamism of a free and democratic society. Accordingly, in the minds of antipolygamy 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.

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, culminating in a massive wave of prosecutions in the 1880s and the financial and corporate dismemberment of the Church. Gordon records that during the territorial period, the federal government prosecuted over two thousand criminal cases in Utah, and fully 95 percent of these were for sexual crimes—polygamy, unlawful cohabitation, and fornication. The sheer volume of prosecutions for sexual offenses, she notes, "is, literally, unique in American legal history" (156). 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 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 the First Presidency and the Quorum of the Twelve. In order to accomplish that aim, prosecutors first needed to catch the leaders and next persuade the courts to "segregate" offenses. 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. Thus, 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. For example, one year of plural marriage could be divided in 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 only a misdemeanor, into a major criminal offense. However, the Mormons successfully stymied the initial federal strategy. First, Mormon leaders went on the "underground," an elaborate system of safe houses and hiding places that allowed them to avoid arrest. Second, the Church's lawyers succeeded in persuading the U.S. Supreme Court to strike down the practice of segregation.[8] 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.

The Mormons responded by resisting. While most of the fighting involved "the bloodless tourney of lawyers" (156), 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" (156). Most Mormons, however, resisted through perjury and concealment: many—especially women—were sent to prison for contempt of court when they refused to answer questions implicating family members and fellow Saints.

Gordon also documents how this Mormon resistance frustrated antipolygamists, who responded with harsher legislation. In addition, the legalization of the antipolygamy movement in the late 1870s and especially in the 1880s marked a masculinization of the process. While the chief figures in antipolygamy 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 antipolygamists faded, reinforcing a harsher, more punitive attitude. Thus, the political support for the Edmunds-Tucker Act—which dismembered the institutional Church, confiscating its property—was generated in part by the fortitude of the Mormon response to federal prosecutions. Yet despite the ultimately self-defeating logic of Mormon resistance, Gordon praises the political and legal sophistication of the polygamist resisters. 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 all the way to the Supreme Court. Her discussion of

the landmark decision in *Reynolds v. United States*[9] provides an example of her analysis. The *Reynolds* decision, handed down in 1878, 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* goes something like this: In the mid-1870s, Mormon leaders decided to test the constitutional validity of antipolygamy laws. 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. The Court responded by ruling that the term "free exercise" in the First Amendment referred only to religious belief and did not cover religious action.

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. President George Q. Cannon, who was 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" (149). In fact, prior to *Reynolds* there had been no polygamy convictions for the simple reason that proving polygamous marriages was nearly impossible. 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. 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.

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*[10] decision.[11] In *Dred Scott,* the Supreme Court overturned the Missouri Compromise (and by implication the Compromise of 1850) and held that the federal government could not forbid slavery in the territories. Most modern lawyers assume that the Civil War Amendments, which outlawed slavery and granted constitutional protection to freed slaves, overturned *Dred Scott,* eviscerating any precedential value it might have. 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. 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 or not the First Amendment protected polygamy. In reality, the power of the federal government over the territories was still an open question in 1878, 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 also points out that Reynolds presented an argument that was as much an Establishment Clause argument 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. 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. The Supreme Court did not apply the religion clauses of the First Amendment to the states until well into the twentieth century.[12] Even then, the religion clauses were not applied directly but rather were applied as part of the Supreme Court's evolving interpretation of the concept of "due process" under the Fourteenth Amendment. In contrast, during the nineteenth century, lawyers conceptualized the religion clauses in terms of jurisdiction. The First Amendment allocated power over religion by forbidding any federal action on the issue. Reynolds argued that these limitations protected local autonomy in matters of faith. Because Mormonism was, in a sense, the "established" church in Utah, the *federal* government was forbidden from intervening with it through antipolygamy legislation.

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 it to early legislation in Virginia sponsored by Thomas Jefferson and James Madison. This legislation had provided for some measure of local religious toleration and had weakened the established Episcopal Church in Virginia. 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. "This jurisprudential sleight of hand," Gordon notes, "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" (134).

Gordon also, almost grudgingly, acknowledges that "prejudice against Mormons and their alternative faith played a role in the decision" (142). 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 peoples" (142). 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" [13] and the supposed Asiatic predilection for despotism.

On the whole, this is an excellent book. I would have enjoyed a more detailed, blow-by-blow account of the Raid and more of Gordon's detailed analysis of judicial decisions. Others may wish that the discussion of antipolygamy fiction were longer. This tension between the discussion of legal issues and the discussion of social context, however, is inherent to contemporary 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.[14] In response to this insularity, modern legal historians have focused on the ways in which the law reflects and interacts with its social context.[15] On this spectrum, Gordon has put more weight on the social side and less on the legal side.

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, provides a powerful reminder of the importance of this period for modern Latter-day Saints. As 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 polygamy is gratefully behind us now, we still live on the strength of its legacy.[16]

To her credit, Gordon has the sensitivity to understand this connection to the past, 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" (222). Thus, despite the oft-repeated identification of Mormonism as the quintessentially "American religion,"[17] 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 failure is something that most American Latter-day Saints, who take an unabashedly celebratory attitude towards the Constitution, seem to have forgotten.[18]

Second, the ultimate failure of the Constitution to protect Zion from her attackers gives Latter-day Saints a unique position from which to critically understand the current legal system, even while Mormon scripture forecloses a complete break with constituted legal authority.[19] Mormons today tend to place almost exclusive emphasis on "being subject to kings, presidents, rulers, and magistrates, in obeying, honoring, and sustaining the law" (A of F 12). 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 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.[20]

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

2. *Davis v. Beason,* 133 U.S. 333 (1890) (upholding an Idaho test oath disenfranchising Mormons).

3. See Doctrine and Covenants, Official Declaration 1 (the "Manifesto" by the Church renouncing plural marriage).

4. There are, of course, important exceptions to this claim. See, for example, Edwin Brown Firmage and Richard Collin Mangrum, *Zion in the Courts: A Legal History of The Church of Jesus Christ of Latter-day Saints, 1830–1900* (Urbana: University of Illinois Press, 1988).

5. See, for example, Sarah Barringer Gordon, "'Our National Hearthstone': Anti-Polygamy Fiction and the Sentimental Campaign against Moral Diversity in Antebellum America," *Yale Journal of Law and the Humanities* 8 (summer 1996): 295–350; "'The Liberty of Self-Degredation': Polygamy, Woman Suffrage, and Consent in Nineteenth-Century America," *Journal of American History* 83 (December 1996): 815–47. In addition, Mormon historians have used Gordon's Ph.D. dissertation, "The Twin Relic of Barbarism: The Judicial Campaign against Polygamy in Nineteenth Century America" (Ph.D. diss., Princeton University, 1995). See, for example, Davis Bitton, *George Q. Cannon: A Biography* (Salt Lake City: Deseret Book, 1999), 123.

6. B. H. Roberts, *A Comprehensive History of The Church of Jesus Christ of Latter-day Saints, Century One,* 6 vols. (Provo, Utah: Corporation of the President, The Church of Jesus Christ of Latter-day Saints, 1965), 6:135 (italics in original).

7. See, for example, Firmage and Mangrum, *Zion in the Courts,* chapter 8, "The War against Mormon Society." Firmage and Mangrum argue that eradicating polygamy was secondary to the goal of dismantling the unique social and economic institutions of the Mormon commonwealth.

8. See Ex Parte Snow, 120 U.S. 274 (1887).

9. 98 U.S. 145 (1878).

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

11. Gordon, however, is not the first writer to notice the role of *Dred Scott* in the *Reynolds* case. See Randall D. Guynn and Gene C. Schaerr, "The Mormon Polygamy Cases," *Sunstone* 11 (September 1987): 8–17, especially 9–10.

12. See *Cantwell v. Connecticut,* 310 U.S. 296 (1939) (applying the Free Exercise Clause to the states under the Fourteenth Amendment) and *Everson v. Board of Education,* 330 U.S. 1 (1947) (applying the Establishment Clause to the states under the Fourteenth Amendment). However, as late as 1963, the application of the Establishment Clause to the states remained controversial enough on the Supreme Court that Justice Brennan felt called upon to write a concurrence defending the idea. See *Abington School District v. Schemp,* 374 U.S. 203, 230 (1963) (Brennan, J., concurring).

13. Gordon, *Mormon Question,* 142, citing Nancy F. Cott, *Public Vows: A History of Marriage and the Nation,* Cambridge, Mass., 2000, 88, which in turn is citing "Negro Suffrage and Polygamy," *New York World,* October 12, 1865.

14. 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,* 2d ed. [New York: Simon and Schuster, 1985], 11–12)

15. For an influential example of this modern approach, see Morton J. Horowitz, *The Transformation of American Law, 1780–1860* (Cambridge, Mass.: Harvard University Press, 1977).

16. Orson Scott Card, *Saints* (New York: TOR Books, 1984), 627.

17. See, for example, Harold Bloom, *The American Religion: The Emergence of the Post-Christian Nation* (New York: Simon and Schuster, 1992). For Bloom, of course, there is "The American Religion"—a single form of Gnostic spirituality native to the United States—of which Mormonism is the quintessential expression.

18. But see R. Collin Mangrum, "Mormonism, Philosophical Liberalism, and the Constitution," *BYU Studies* 27, no. 3 (1987): 119–37. 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?" Mangrum, "Mormonism, Philosophical Liberalism, and the Constitution," 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.

19. See, especially, Doctrine and Covenants 134 and Article of Faith 12.

20. Fortunately, there seems to be a recent increase in interest in discussions of law and Mormonism. The J. Reuben Clark Society (at the J. Reuben Clark Law School, Brigham Young University) hosted a conference in October 2001 entitled "LDS Perspectives on the Law." Articles from this conference are being printed in *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, for example, Michael W. McConnell, Robert F. Cochran Jr., and Angela C. Camella, eds., *Christian Perspectives on Legal Thought* (New Haven, Conn.: Yale University Press, 2001) and Harold J. Berman, *Faith and Order: The Reconciliation of Law and Religion* (Atlanta: Scholars Press, 1993).