"THE TWIN RELIC OF BARBARISM":
A LEGAL HISTORY OFANTI-POLYGAMY
IN NINETEENTH-CENTURY AMERICA

Volume 1

Sarah Barringer Gordon

A DISSERTATION
PRESENTED TO THE FACULTY
OF PRINCETON UNIVERSITY
IN CANDIDACY FOR THE DEGREE
OF DOCTOR OF PHILOSOPHY

RECOMMENDED FOR ACCEPTANCE
BY THE DEPARTMENT OF HISTORY

JUNE 1995
Dissertation Abstract

The "twin relics of barbarism" were the 1856 Republican party platform's label for polygamy and slavery. Republicans called for the prohibition by the national government of both the peculiar domestic relations of Mormon Utah and of slaveholding territories. Anti-polygamy was thus profoundly related to anti-slavery in its origin, yet followed a very different trajectory.

The anti-polygamy campaign brought together diverse, divergent and shifting constituencies in the second half of the nineteenth century, including novelists, congressmen, lecturers, territorial officials, lawyers, and Supreme Court Justices. Above all, anti-polygamists were troubled by a perceived crisis in marriage. Mormon polygamy provided a meeting ground, a place for debating the political importance of marriage, the role of women in politics, the interdependence of monogamy, democracy and civilization. Anti-polygamists not only criminalized plural marriage in the territories in 1862, they also redefined the role of religion in political life. The evils of a union of church and state were manifest in Utah, they claimed. The second wave of disestablishment, now at the federal level and as a matter of constitutional principle, sharply curtailed the institutional power of churches, all, paradoxically, in the interests of Christian marriage.

Mormon resistance to anti-polygamy legislation and disestablishment frustrated their opponents. Polygamists claimed they had access to a higher law than anything Congress could enact (or enforce). The challenge to national authority was palpable, and largely successful until the mid-1880s. The turn to coercion added new levels of
punishment, both political and property-based. Polygamists were disqualified from voting and sitting on juries; their church was dispossessed of many of its assets.

The Supreme Court, to which the Mormons turned with some confidence, given the Court's record on the other relic of barbarism, not only sustained anti-polygamy legislation, but created a jursiprudence of family, church-state relations, and federal power. In 1890, the Mormons formally abandoned claims of right to disobey positive law. The victory was largely symbolic; yet it also represented the culmination of four decades of sustained ideological work, the sorting out of the role of marriage as a constituent element of national identity.
CONTENTS

Acknowledgments vii

Introduction 1

Chapter 1: "Exterminating this Curse": Anti-Polygamy in Nineteenth-Century American Legal Culture 5

PART I: "ALL THAT IS PURE AND SAVING IN THE MIDST OF THE SELFISHNESS OF MAN": ANTI-POLYGAMY FICTION AND WOMEN'S LEGAL ADVOCACY IN THE 1850'S 49

1. "The Man Who had Dared to Trample the Heart of a Woman Under his Foot": Women, Fiction and Reform in the 1850s 52

2. "My Spirit Shall Burn in Defense of the Purity of Womanhood": Anti-Polygamy Novels as Advocacy 73

3. "Those Who made Their Own Laws to Suit Their Own Purposes": The Legal Vision of Anti-Polygamy Fiction 95

PART II: "THE TWIN RELIC OF BARBARISM": ANTI-POLYGAMY, WOMAN'S RIGHTS AND CHURCH-STATE RELATIONS IN THE THIRD PARTY SYSTEM 113


2. "Not a Crusade of Arms, but a Crusade of Law": Anti-Polygamy, the Political Importance of Marriage and Contract in the post-Civil War Era 162

3. "The Dynamite of Law": Anti-Polygamy, Anti-Suffrage and the Law of Marriage and Divorce 207
PART III: THE BUSINESS OF PUNISHING POLYGAMY: THE TERRITORIAL JUDICIARY AND LAWYERS IN UTAH TERRITORY 256

1. "Federal Authority versus Polygamic Theocracy": Judge McKean and the Anti-Polygamy Women of Utah 262

2. "That Troublesome Period": The Bench and Bar of Territorial Utah 286

3. The Territorial Courts, the Raid, and Legal Strategy 302

PART IV: "CRIMES BY THE LAWS OF ALL CIVILIZED AND CHRISTIAN COUNTRIES": ANTI-POLYGAMY, FREE EXERCISE AND SOVEREIGNTY IN SUPREME COURT JURISPRUDENCE 339

1. The "Fetters [of] Stationary Despotism": Chief Justice Waite, the Protection of Women, and the Religion Clauses 348

2. "The Sure Foundation of All that is Stable and Noble in our Civilization": Justice Matthews, Territorial Sovereignty, and the Politics of Marriage 382

3. "[T]o the Detriment of the True Interests of Civil Society": Competition, Property, and the Second American Disestablishment 406

Conclusion 452

Bibliographic Essay 458

Bibliography 469
Acknowledgments

As a student at Yale Law School in 1985, I went to see Professor Robert Cover, to ask him whether the talk of "stationary despotism" and "relics of barbarism" in the Supreme Court's polygamy decisions might not be an indirect way of talking about slavery. Bob sent me to David Brion Davis in the History Department, who graciously allowed me to take his graduate history seminar to explore the topic in the spring of 1986. Never in my education had I read so much, struggled so hard to understand, and found so few answers. Although I only realize it in retrospect, that semester was a conversion experience. Legal historians, however, are made and not born. Most of the labor and doubt have come at Princeton in later years. The topic that so intrigued me then, continues to bedevil me as I write these acknowledgments, and will no doubt do so for many years to come.

Bob Cover's sudden death in the summer of 1986 has left an aching hole in many hearts. At Bob's memorial service, David Davis described a seder the two families shared, and their exploration of slavery and freedom in the past.¹ As he spoke, I understood that I, too, had been lucky enough to learn from two great teachers about how to ask difficult questions.

Two years later, living in Philadelphia, practicing law, suffering terribly in early pregnancy, and unable to forget the joys of learning and reading history, I went to see Stan Katz at Princeton. Among other things, Stan sent me to see Betsy Clark, whose

friendship, scholarship, and Property notes have been invaluable guides through the thickets. Stan has a long list of grateful students; it is a pleasure to add my name, to thank him for his unf: ...g support, and even to admit that those long reading lists paid off in the end. Stan knew better than to let me get away with lawyer’s glibness. For life at Princeton was not easy for a litigator, someone schooled in quick study, and quick repartee.

Those years of coursework were also difficult because my young son refused to eat when I was out of the house. Thanks to John Murrin and James McPherson, I was able to get through an agonizing first semester. Daniel Rodgers, who helped me get through the tough times and pushed me hard whenever I got lazy or antiquarian or legalistic, knows, I think, how very much his judgment means to me, how much I trust his historian’s instincts, his scholarly insights. He warned me that this dissertation would prove to be a tough one to manage, and so it has. Yet he also let me try, and gave me invaluable suggestions for taming the topic. My own long-windedness has produced a dissertation of such length, but his critique has given it depth.

Once I started in on research, the true difficulty of writing a dissertation began to sink in. Fortunately, William Nelson, John Reid and the members of the NYU Legal History Consortium provided support, companionship, and suggestions with a Golieb Fellowship to NYU law school. Their collegiality has been a sustaining force for the past three years. During my year at NYU, I also worked as a research assistant for Norman Dorsen, whose continuing friendship and guidance have meant a great deal. Part III was first written at his house on Sanibel Island, in 1994, and revised there a year later.
Dirk Hartog, who arrived at Princeton two years ago, has become a good friend, a tennis foe (he always wins), and the person to whom I turn first for advice on strategy, and questions about marriage in the nineteenth century. I had special pleasure in being a preceptor for his legal history course. Thanks go also to Nancy Cott, whose work has long been an inspiration.

Research and writing support from the Charlotte Newcombe Dissertation Fellowships, and the University of Pennsylvania Law School, and a travel grant from the Littleton-Griswold Fund of the American Historical Association, were provided at crucial times. Librarians and archivists, including but not limited to Alfred Bush, Curator of Western Americana at Princeton’s Firestone Library, Catharine Krieps of the University of Pennsylvania’s Biddle Law Library, Eileen Bolger, Assistant Director of the National Archives—Rocky Mountain West Region, Ron Barney, Senior Archivist of the Historical Department of the Church of Jesus Christ of Latter-day Saints, and Janet Ellingson of Utah’s Living History Museum, all went out of their way to ease the burden of research.

And along the way, many scholars provided critiques, and strategies for survival. Davis Bitton has been a loyal friend, mentor, and perceptive critic. Bruce Mann, now my colleague at Penn Law School, and one of my teachers at Princeton, has been extraordinarily generous, providing food as well as friendship and advice. Lola Van Wagenen, Michael Quinn, and Ken Driggs, all working on related topics, have become friends and colleagues. Sharon Block, Jacob Cogan, Michael Millender, Walter Johnson, Steve Kantowitz, Elspeth Carruthers, Tony Echevarria, Gary Hewitt, Henry Yu, Alastair Bellany, and many other friends made the Princeton graduate program a far more humane
experience. Michael Grossberg advised me last fall to start getting up at 5:30 a.m. to write. Christopher Tomlins countered that he gets up at 3:00. I have settled on 4:15, but look forward to revising my schedule. Lori Ginzberg and Simon Newman, two new friends this year, have helped as I careen toward the end of this project, and plan for life after.

Paul Barringer, Princeton '24, took me to many pleasant lunches, and exemplifies intellectual curiosity. Bridget Crawford's interest in legal history made my first year of teaching particularly wonderful. Last but by no means least, I must thank my husband, Dan Gordon, whose patience, childcare (did I mention that we had a second child somewhere along the way?), support, good sense, and last-minute typing literally made it all possible. This dissertation is dedicated to the memory of two friends, Edward Peters (1940-1994) and Phyllis Pinch (1975-1995).
Polygamy is only the marriage question in disguise, than which few others stand more in need of searching analysis at this day. Monogamy I believe to be the true relation of the sexes, the ideal of an advancing civilization; and polygamy but a transitional form of marriage, which it is to be hoped the world has passed by. But other questions are embraced in the discussion, as essential and not incidental factors, such as the relations of the Government to the Territories, State Rights, Woman's Rights, Church and State, &c.

T.W. Curtis, The Mormon Problem, the Nation's Dilemma (New Haven, 1885), vi-vii.

Wild Oats, 13 March 1873, 13
Introduction

In the mid-nineteenth century, an extraordinary legal campaign took shape--its ramifications only dimly apparent to those who participated in one or another of its phases; considerably muddied, even forgotten, by their successors and those of us who study nineteenth-century legal history. For four decades in the mid and late nineteenth century, champions of monogamous marriage throughout America waged a campaign to eradicate polygamy in Mormon Utah.

We have lost sight of the landscape as it existed for legal reformers in the nineteenth century. So foreign, indeed, is this terrain that many twentieth-century legal scholars question the very premise of anti-polygamy: that is, they do not believe that a particular form of marriage, even if it involves the marriage of multiple women to a single man, will erode the self-respect and dignity of the participants, corrupt the legal system of which it is a constituent part, or undermine republicanism and democracy. Nineteenth-century anti-polygamists, by contrast, believed all of these things, and persuaded most Americans of the interdependence of marital structure, women’s power, justice, and freedom. The national regulation of marital structure they championed, enacted, and enforced was based on this belief.

This dissertation is in one sense, therefore, a recovery of an overlooked piece of nineteenth-century legal development. It is also an explication of why the movement was so successful at uniting diverse concerns and constituencies under the anti-polygamy
banner. The breadth of issues that anti-polygamists addressed is astounding — sexuality, slavery, justice, freedom, consent, democracy, and many other topics of intense interest to nineteenth-century Americans lurked in the undercurrents, sometimes bursting into full view in anti-polygamy rhetoric and reasoning.

The richness of the subjects of anti-polygamy is matched by the variety of its sources. The legal history of anti-polygamy in nineteenth-century America occurred on multiple cultural, social, political and jurisprudential levels. The various levels, never as distinct at the time as we have construed them in retrospect, were permeable over time and among actors, as anti-polygamists crossed boundaries, just to give one example, between writing fiction, lobbying Congress, and practicing law.

There was a rough shape to the movement, however, which proceeds in an unsteady crescendo in time and through genres. From the articulation and justification of an anti-polygamy ideology in print or in speeches (novels, newspaper stories, sermons, lectures, congressional speeches, political cartoons, and so on), anti-polygamy moved on to enforcement mechanisms (legislation, courts, prisons, and so on), albeit mechanisms that were themselves continuously re-articulated and justified by many of the same actors who were involved in the articulation phase. The intensity and pace of anti-polygamy rose and fell over time, yet its variety and density were also cumulative, tending to become more rather than less intricate, nuanced, and wide-ranging.

Perhaps the most useful analogy is to a piece of music, in which anti-polygamy formed a separate strain, and to which instruments were gradually added over time, so that the first was still playing as the last entered with its own distinct tone and melody.
It is not that anti-polygamy was a separate or separable score from the complex structure of the whole, but that it was part of that complexity, intricately tied to its surrounding orchestra -- the notes jarring or harmonizing only in relation to other instruments and melodic structures.

The dissertation that follows is an attempt to portray with some fidelity the incremental nature of the anti-polygamy movement, respecting its different strains yet acknowledging their profound inter-relation. Beginning with a brief introductory chapter on the place of Mormonism in nineteenth-century America, and the place of polygamy in Mormonism, as well as on the broad theoretical implications of the anti-polygamy movement itself, Part I then moves on to the early sources of anti-polygamy -- popular novels written by eastern women in the 1850s, and the visions of the nature and importance of marriage, and the power of legal reform that emerges from their work. Part II is a study first of the politicization and recalibration of many of these ideas in the late 1850s and early 1860s in the first and foundational anti-polygamy statute (and the role of the debate over polygamy in the third party system). Part II then examines the turn to enforcement, as Congress tinkered with its own handywork in subsequent decades, tightening federal control over the territories, and imposing new national standards in marital structure, church-state relations, and economic competition, all in the name (if not always in the interests) of the protection of women in Utah and elsewhere.

Part III studies the experience of anti-polygamy legislation, as it was administered in Utah, and the growth of a local anti-polygamy industry, as non-Mormons and apostates combined with federal officials and their families into a (more or less well-defined) local
anti-polygamy minority population. This sub-group in Mormon Utah was delineated in
many senses by the effectiveness of Mormon resistance to legal reform from without their
jurisdiction, their culture -- their very ways of thinking about the world. Through the
administration of anti-polygamy legislation, and always conditioned by Mormon strategies
of resistance, the territorial anti-polygamists helped recreate Utah, reforming (at least to
outward appearance) myriad aspects of society and politics in Utah -- legalizing, as it
were, the power structure of the territory, which emerged from the anti-polygamy
campaign in the traditional American pattern, dominated, that is, by lawyers at all levels
of government.

The fourth and final Part examines in depth the polygamy cases of the Supreme
Court from first and most famous, Reynolds v. United States, through the tortured and
contentious opinion upholding the forfeiture of church property. By examining the
culture of legal practice in the Court, as well as by close analysis of the opinions
themselves, this Part places the polygamy cases in their proper setting. These cases are
best understood as a jurisprudential vehicle for the articulation of a new understanding
of the law of domestic relations, the law of church-state relations, and federalism in a
moral framework governed by the beliefs and presumptions of the anti-polygamy
movement.
1. "Exterminating this Curse": Anti-Polygamy in Nineteenth-Century American Legal Culture

In the early 1880s, a young man read a novel about Mormon polygamy in Utah. So moved was he by the story of woman's suffering and man's corruption in this renegade territory, that he wrote a note to himself on the blank page opposite the title page of Cornelia Paddock's *The Fate of Madame La Tour*: "Resolved - That if I ever become a statesman I will use whatever influence I have in exterminating this curse. A. Reader."¹

Two aspects of "A. Reader's" resolution stand out to the legal historian. First, is his conviction that deviant marriage in Utah was a matter of concern to the rest of the nation. In other words, this anonymous young man believed that the consequences of an aberrant marital structure were not confined to the household, or even to the region where polygamy was actually practiced. Instead, he (and others like him) bought and read anti-polygamy fiction designed for eastern audiences; most readers in the East had only the vaguest notions of what Mormonism actually was, but the vast majority knew that polygamy was one of its tenets. Polygamy, for Mr. "Reader" and for most Americans, became the defining feature of Mormonism, the sine qua non of what could happen a religious fraud allowed brutish and brutal men to enslave gullible women in a remote and barren western territory.

Second, and as important as the sense that polygamy was a valid subject of concern for all Americans, was Reader's determination to attack the problem of polygamy

---
¹ Mrs. A.G. Paddock, *The Fate of Madame La Tour: A Tale of Great Salt Lake* (New York, 1881). Copy in Firestone Library, Princeton University. Beneath the first note there is another; "I second this resolve. B. Reader."
through political channels. As a legislator, not as a soldier (nor, for that matter, as a preacher), Reader envisioned himself acting effectively to eradicate polygamy. Law-making, and the enforcement of legal sanctions, was the means by which anti-polygamists eventually brought Utah to heel. Legal reform gradually assumed first place in all anti-polygamist advocacy, whether produced by women fiction writers, male clergy, or a host of other actors ranging from public lecturers to legal treatise writers to preachers to politicians to judges.

We will never know whether Reader ever did enter politics, but his interest in anti-polygamy was widely shared. His sentiments were echoed by the vast majority of articulate Americans, most of whom were appalled by -- and fearful of -- the existence of an alternative marital structure in the West and its zealous Mormon proponents. At approximately the same time that Madame La Tour sold a hundred thousand copies, some 12,000 people marched in Chicago to protest polygamy in a rally organized by Protestant clergy. One anti-polygamy lecturer demanded -- and got -- $150 for nightly two-hour talks on the "Mormon Monster."2 Abraham Lincoln, Ulysses Grant, Rutherford Hayes, James Garfield and even Grover Cleveland (notorious himself as the father of an illegitimate child) were all vocal opponents of polygamy. Congressmen delivered lengthy, impassioned speeches about the evils of plural marriage. Lobbyists, whether

---

2 Reviews of Madame La Tour appeared in major newspapers, including the New York Tribune, The Critic (New York), and The Christian Register (Boston). For a collection of published reviews of the book, see Anti-Polygamy Standard (January, 1882), 2:73. Kate Field's "Mormon Monster" lecture was widely attended, and her influence in political circles was considerable. For a full explanation of her significance in the anti-polygamy movement, see part II, chap. 3, below.
eastern activists or non-Mormons from Utah (often territorial officials or Mormon apostates), testified about the degradation of women in polygamous Utah, and the ruinous consequences of tolerating such an abuse of liberty.

Even though concentrated in a remote territory peopled largely by the Mormon faithful, polygamy loomed large in political consciousness, especially because Mormon leaders defied the rest of the nation, challenging Washington to test the mettle of their new religion. For forty years, from the 1850s through the 1890s, Mormon polygamy was among the most talked-about of social and political conundrums.

This dissertation is a study of why so many people thought polygamy was a problem, and what they did about it. As a legal history of anti-polygamy, it analyzes the words and deeds of those dedicated to eradicating polygamy, rather than the experiences of those who lived what Mormons called the "Patriarchal Principle." Recently, there has been a flowering of scholarship on polygamy itself, from studies of theoretical and theological justifications for the practice, to demographic and fertility patterns, to social and family histories. Anti-polygamy, however, has received no such sustained treatment.

---


4 Anti-polygamy, I should note here, has not been altogether ignored. Many of the studies of Utah and Mormonism cited herein are valuable also for their investigation of
The topic is one that touches on the most fundamental political and moral concerns of the nineteenth century. Indeed, the opponents of polygamy were conditioned more by the larger questions of life in a burgeoning democratic republic than they were by Mormonism. Polygamy became such a vital concern to political and legal thinkers not only because it was practiced by Mormons (although its espousal by a group already despised for other reasons certainly didn't hurt), but because it was a lightning rod for the trouble spots in American culture. So useful was polygamy as a tool for explication and argumentation about gnawing problems in the larger society, that the realities of Mormonism in Utah hardly interested most Americans. What they wanted to read and talk about was polygamy and the presumed consequences of such a "barbarous" marital practice. So handy was polygamy as a vehicle for resolving underlying questions about anti-polygamy, for much of Mormon life in the nineteenth century was conditioned by the campaign. Yet anti-polygamy has never been studied in its entirety, with attention to contemporary thought on law, marriage, religion, and government. This may change in the near future, not only with this study, but with the work of Joan Smyth Iversen, who is studying anti-polygamy sentiment among eastern and mid-western women’s groups from 1880 through Utah statehood and beyond. Most work on anti-polygamy to date has been done by historians of Mormonism, who moonlight, as it were, on anti-polygamy. This by no means discredits their work (on which I have drawn repeatedly although not, I hope, uncritically), but inevitably anti-polygamy appears as a side act -- monochromatic, sometimes even demonic -- rather than as an intricate, often conflicted moral reform campaign.

Polygamy so dominated thinking about Mormons and Mormonism after the mid-1850s, that other issues were given short shrift, according to some critics. Methodist missionary the Rev. C.P. Lyford, for example, long an opponent of the Mormon Church, complained bitterly that polygamy had captured public attention, and that he could not convince the nation to focus on the Mormon priesthood, which he considered the real threat to "Christianity and civilization." "Our public men can only pronounce against the crime of polygamy; the press can see only polygamy in Utah; the public mind is impressed with only the heinousness of polygamy.... [But] the prolific cause of so many and so great evils in Utah...is that arbitrary, despotic, and absolute hierarchy known as
marriage, law and authority in nineteenth-century America, that its presence (or something very like it) was invaluable.⁴

Anti-polygamists, however, were not forced to come up with a model on their own — they had Mormon polygamy on which to hone their weapons. Several interrelated concerns fueled their drive to "exterminate this curse," as A. Reader put it. First and foremost was a widely perceived "crisis" in marriage. The understanding of what it meant to be a wife or a husband, of how marriage supported the state as an essential precondition to political participation, of the role of religion in marriage, all were the subject of prolonged and profound critique by mid-century. Into waters already stirred by evangelicalism, abolitionism, woman's rights activism, utopianism, and a host of otherisms in the 1830s and 1840s, Mormon polygamy added a new and explosive element in the 1850s. The chemical reaction that resulted, the force of which created and sustained the anti-polygamy campaign, was far more powerful than the plural marriage that was its proximate cause.

Using the language of abolitionists and woman's rights advocates, opponents of polygamy called it a second form of slavery -- the systematic sexual exploitation of women. Anti-polygamists refused to concede even that polygamy was a form of marriage, labelling it instead with value-laden epithets such as "institutionalized debauchery," or "organized licentiousness." The very definition of marriage was thus at

the Mormon Priesthood." The Northern Christian Advocate, 18 February 1881.

⁴ If Mormon polygamy had not existed, as one scholar commented recently, someone would have had to invent it. Hendrik Hartog, telephone conversation with author, 20 August 1994.
issue in anti-polygamy, even as the country struggled to settle the precise boundaries of marriage in law and society. So central was the problem of polygamy to the understanding of marriage, that the definition of marriage most commonly cited by English and American courts and treatise writers in the nineteenth century was itself drawn from a case holding that no marriage, even a monogamous one, celebrated in a jurisdiction in which polygamy was legal, would be recognized in English courts. The anti-polygamy movement forced its proponents to articulate and defend a politics of marriage as a matter of federal law.

Added to the already troublesome issue of marriage in political consciousness, was polygamy's challenge to the ability of the national government to structure national policy in a large and growing federal republic. The Mormons in Utah posed a fundamental problem for the rest of the nation: how to assert and impose a national political morality in areas of law traditionally reserved for the states. The process was long and painful, as anti-polygamists struggled to craft a national marital identity, and Mormons struggled to defend their peculiar domestic institution.

The "Mormon Question," as it was commonly called, thus created knotty problems for the opponents of plural marriage, at the same time as it opened new arenas for debate about the importance of marriage to the political order. Even after the basic precepts of anti-polygamy had been enacted into a new federal law of the family in the early 1860s,

---

Mormon resistance and legal strategy forced anti-polygamists in the late 1860s, 1870s and 1880s to confront and justify the undeniably coercive elements of both government and marriage. The force that underlay the restructuring of the family in Utah resembled in legal and political thought the forcible defense of the Union. There were certain kinds of relationships to which consent (whether of women to marriage, or men to governments) was both indispensable and irrevocable, according to anti-polygamists in Congress. No woman, they argued, would consent to such exploitation, such unprecedented diminution of female worth. Such "marriages," therefore, were void a fortiori, despite Mormon claims that plural marriage was voluntary. Valid marriages, by contrast, were based on consent at entry, which was transformed into an irrevocable union once the marriage ceremony had been celebrated. The Mormons, according to their opponents, had gotten both elements of the equation wrong: not only did polygamy make a mockery of the consent principle, but the Mormons were notoriously liberal on divorce.

In the Civil War era, politicians were especially well schooled in these lessons: unionism versus secessionism, marriage versus divorce, monogamy versus polygamy -- such pairings highlighted not only the consent that was essential to the formation of governing structures, but also the practical irrelevance of consent once the relationship had been established. The ubiquitousness of the equation in anti-polygamtist rhetoric of Utah with the South, of polygamy with divorce, and finally of Mormonism with fraudulent exploitation of women, illustrates the complex relationship between consent and coercion in the politics of the family (be the family the federal or the marital union).
These issues played themselves out at many levels, forcing both Congress and Presidents to grapple with questions such as the proper relationship between church and state in a pluralistic democracy, the appropriate degree of federal control over the daily lives of territorial residents, the moral qualifications for statehood, and the financial and political cost of implementing the legal restructuring of an entire population. In the process, anti-polygamists articulated and implemented a new vision of the proper allocation of power between the federal government and local populations, one in which the territorial status of Utah was a handy shield, but which implicitly yet sharply curtailed the ability of states to establish religions within their borders, or institute cooperative (rather than competitive) economic regimes, or -- most important of all -- alter marriage, now widely understood as the basic unit of all civilization, and of American democracy in particular.

Anti-polygamy was the mechanism through which legal reform of the family at the federal level assumed its most ambitious stance: through anti-polygamy, nineteenth-century Americans reconceived and implemented a new politics of marriage. The success of the movement rests on that achievement. By 1890, anti-polygamists had created and codified a sustainable legal ideology of marriage, together with the institutional support such an ideology required to achieve credibility as a matter of national identity. This accomplishment -- the crafting of plausible national authority over marital structure, a national identity in monogamy -- as much as the Mormons' formal abandonment of the
legal claim to practice polygamy in 1890, marks the end of the anti-polygamy era at the close of the nineteenth century.  

(a) Mormonism, Polygamy and the Early Republic

_Madame La Tour_ was a best-seller when it was published, one of some fourscore anti-polygamy novels that sold well from the 1850s through the end of the century.  

The topic was of such interest to the American reading public in part because the United States was home to a well-organized and geographically concentrated colony of polygamists in one of its western territories. Faithful members of the Church of Jesus Christ of Latter-day Saints (then, as now, commonly known as "Mormons") migrated to the Great Salt Lake Basin with their leader, Brigham Young, in 1847. Their trek westward, remarkable both for its organization and its destination -- an arid, remote and forbidding area that at the time belonged to Mexico and could only be reached by an arduous trip across plains, deserts and mountains -- was motivated primarily by the persecution the sect had endured wherever it settled.

Founded in 1830, the same year as the first publication of its new scripture, _The Book of Mormon_, the Mormon Church was both peculiar, and peculiarly of its time and

---

8 Although anti-polygamy certainly did not end entirely by 1900 (the Reed Smoot hearings are a notable exception), the enemy had conceded the field. Thus despite the fact that the church tolerated plural marriage into the second decade of the twentieth century, no genuine debate on the issue was possible. There was no claim that such marriages were anything other than illegal -- nobody was willing to fight for polygamy, even if opponents of plural marriage still had lingering doubts about Mormon sincerity.

9 For a more complete analysis of anti-polygamy fiction, and its social and cultural role, see part I, below.
place. Joseph Smith was the sect's founder, first president, prophet, and translator of the "golden plates" he reported were revealed to him by an angel (the plates were removed to heaven by the same emissary after translation had been completed). He was not only a visionary, who had a reputation in the upstate New York town where he lived as a fortune teller and treasure hunter, but also a poor farmer's son, whose family was as keen on finding religious truth as they were on eking out a living from the poor farmland they had paid a boom price for. Through its leader, the church made extraordinary gains almost from the moment of its birth, and extraordinary claims. Polygamy was not one of the original tenets of the faith, but several other unusual features bear mention, including the intense materialism and profound faith in progress that characterized all aspects of Mormon life and ritual. Mormons believed that God is a material being, who himself progressed from his original manhood to godhood through gradual stages, that Jesus was sired by a physical act, and that Jesus appeared in the New World as well as the Old. They also believed in continuous revelation, that is, that God is as likely to communicate with believers in these "latter days" as in biblical times, and that the new Zion, the site of the millennium, would be in North America, wherever the Mormons "gathered" the faithful.

---


11 Richard Bushman, Joseph Smith and the Beginnings of Mormonism (Urbana, Ill., 1984).

12 Shipps, Mormonism, 52.
Mormonism was not only a start-up religion, a new faith, it was also, at least at its inception, an up-start religion. Smith, while by no means illiterate as some of his enemies charged, was the son of impoverished farmers; his prospects were bleak, his reputation shaky. Instead of languishing in obscurity, however, "Joe" Smith became one of the most notorious men of his day. He founded a religion in which every adult male was a priest, with newly minted scriptural authority and supplementary revelations to back them up. Smith also instituted a finely gradated system of authority within the new sect, erecting a hierarchy on top of the democratic priesthood. He imposed a strict communal ethic on the faithful -- they acted as one in all things, because they were following divine command through God's prophet, Joseph Smith.

Early Mormonism has been widely studied. Ralph Waldo Emerson called the faith "an afterclap of Puritanism." Twentieth century scholars have explored this insight, and added new ones. Mormonism has been analyzed as a rejection of the market revolution, a product of democracy, a gigantic adolescent rebellion, and the apotheosis of revivalism. It was also, and was overwhelmingly so understood by its contemporaries, a challenge to the emerging order of gender relations in the 1830s and 1840s, exacerbating tensions produced by the very forces (revolutions -- political and economic -

---

democracy, mobility, and so on) that created the atmosphere in which Mormonism itself was born.¹⁴

In Ohio, Missouri and Illinois, neighbors who initially had welcomed the Mormons (it was in the interest of all frontier areas to attract as many settlers, as quickly as possible, so that land values would rise, markets prosper, and native populations be sufficiently intimidated not to defend their interests in land) soon became their enemies. The Mormons’ bloc voting, their private militia, their failed bank and economic exclusivity, combined with rumors of sexual irregularities, aggressive proselytizing, and unquestioning and instant obedience to Smith, all exacerbate relations with nearby residents everywhere they went. Mormons were derided, ridiculed, harassed, and sometimes killed. After he ordered a printing press destroyed when its owner published a story critical of his policies, Joseph Smith was arrested by Illinois law enforcement officials. While in jail, and despite promises by local leaders to protect him, Smith and his brother were murdered by a mob of anti-Mormons.¹⁵

The Mormons, therefore, had good reason to flee. They needed isolation to ensure peace for their members. They also needed space, for their membership grew

---


exponentially throughout the nineteenth century.¹⁶ Both through their early and constant missionary work, and through an organization known as the Perpetual Emigrating Fund (which financed the migration of converts to Zion until it was abolished by Congress in 1887), a constant flow of immigrants swelled the Mormon population in Utah, Arizona, Idaho and California. Brigham Young, one of the earliest converts to the faith, and an able if rough-hewn man, emerged (after a tussle) as Smith’s successor, and led the church westward and onward, as he consolidated his own authority and cemented the hierarchical church organization that administered to all the needs, spiritual and physical, of the faithful, and ordered their lives, their settlement patterns, and even their style of dress.¹⁷

It is testimony to the power of the popular reaction to polygamy, that Brigham Young (known in the press as "Bigamy" Young, or, as Artemus Ward put it, "Bigamy, Trigamy and Brigham") and his church were known far and wide as deceivers of young women.¹⁸ Indeed, Mormonism was widely perceived as little more than a gloss on

¹⁶ The church remains one of the fastest growing religions in the world. Due to a large and highly structured missionary program that trains young Mormon men (and in recent decades, Mormon women as well) and sends them all over the world on two-year missions, church membership in South America and the South Pacific (including Polynesia and the Philippines) has grown steadily, and the demographic make-up of the church (once primarily Yankee, English, and Scandinavian) has changed dramatically. Leonard Arrington & Davis Bitton, The Mormon Experience: A History of the Latter-Day Saints (New York, 1979), 285-86.

¹⁷ Leonard Arrington, Brigham Young, American Moses (Chicago, 1986), passim.

You may perhaps be astonished that I, a rather fascinating bachelor, escaped from Salt Lake City without the loss of my innocence. Well I will confess, confidentially, that was only by the skin of my teeth, and thanks to the virtuous lecturing of my friend Hingston, whose British prejudices against Bighamy, Trigamy, and Brighamy, saying nothing of Ninnygavigamy, could not be
polygamy, an attempt to clothe iniquity in religious garb. The identification of Mormons with licentiousness and the abuse of women persists into the twentieth century - many people still believe that Mormons marry more than one wife, despite the sustained, often active, efforts of the church leadership since the 1920s to distance themselves and their church from the taint of polygamy. The association of polygamy and Mormonism is commonly dated to a revelation received by Smith in the year before his death, despite persistent rumors at even earlier dates. Known as the "Revelation on Celestial Marriage," and still the basic Mormon text on the importance of marriage and the family, the 1843 document was dictated to his private secretary by Smith at


19 In his Congressional report on polygamy in the territory of Utah, for example, Justin Morrill commented:
There is no purpose to interfere with the most absolute freedom of religion, nor to intermeddle with the rights of conscience; but the sole design is to punish gross offenses, whether in secular or ecclesiastical garb; to prevent practices which outrage the moral sense of the civilized world, and to reach even those who "steal the livery of the court of Heaven to serve the Devil in."
Congressional Globe, 34th Cong., 2 sess., 1491 (23 February 1857).

20 On the role of the church in both discrediting contemporary polygamists and aiding law enforcement officials in the capture and dismemberment of polygamous families see Marth Sonntag Bradley, Kidnapped from that Land: The Government Raids on the Short Creek Polygamists (Salt Lake, 1993).

21 For an exhaustive review of all the evidence of polygamy prior to 1843 (and after 1890) see D. Michael Quinn, "LDS Church Authority and the New Plural Marriages, 1890-1904," Dialogue, 18 (Spring, 1985): 9-105.

22 The Revelation on Celestial Marriage requires that "the first [wife] give her consent" to a plural marriage. Doctrine and Covenants (Salt Lake, 1981), Section 132, para. 61.
roughly the same time that he married (over the strenuous objections of his first wife, Emma, who despite harsh divine command was never reconciled to plural marriage) a young woman who had been living with the family in Nauvoo.

At the time, and for almost a decade afterwards, polygamy remained a closely kept secret, revealed to a few trusted church leaders, and of course to the select women who married Smith and his lieutenants, and were sworn to secrecy. In public, Smith before his death, and Young and other leaders after Smith's lynching, uniformly and repeatedly denied rumors of plural marriage. Missionaries in England, for example, published tracts denying polygamy, and quoting passages from the Book of Mormon that condemned the taking of more than one wife. Polygamy remained only one of a litany of real and imagined Mormon iniquities.

---

23 Linda King Newell & Valeen Tippets Avery, Mormon Enigma: Emma Hale Smith, 2d ed. (Urbana, Ill., 1994).


25 David J. Whittaker, "The Bone in the Throat: Orson Pratt and the Public Announcement of Plural Marriage," Western Historical Quarterly, 18 (July, 1987): 293-314; Latter Day Saints Millennial Star, 15 (Supplement, 1853): 18-23; Deseret News 2, Extra (14 September 1852); Journal of Discourses 1 (Liverpool, 1854): 53-66; St. Louis Luminary 1 (17 and 24 February 1855): 49-53. According to The Book of Mormon, "Behold, David and Solomon had many wives and concubines, which thing was abominable before me saith the Lord." Jacob 2: 24. "Wherefore, my brethren, hear me, and hearken to the word of the Lord: For there shall not any man among you save it be one wife; and concubines he shall have none." Jacob 2: 27. The Book of Mormon, Another Testament of Jesus Christ (Salt Lake, 1989). Theologically, the revelation given to Smith in 1843 superseded earlier commands.

26 For example, only one of the hundred or so anti-Mormon books and pamphlets published prior to 1852 was primarily an anti-polygamy tract. Published privately by the author in 1847 in Lynn, Massachusetts, the pamphlet appears not to have been widely
After the Mormon exodus to the Great Salt Lake Basin in 1847, Brigham Young and other leaders relaxed their restrictions on polygamy, and the reality of plural marriage became ever more difficult to deny. Travelers passing through Salt Lake reported that Mormon men openly flaunted multiple wives. At a special conference called in August, 1852, the church acknowledged what had long been rumored. Elder Orson Pratt read the 1843 revelation aloud to the congregation, and delivered a lengthy sermon on the religious and social superiority of polygamy.

Many Mormons were shocked and dismayed by the announcement. As historians of Mormonism have pointed out, for the first twenty years or so of its practice, polygamy was as much contrary to the up-bringing and cultural traditions of Mormons as of the rest of the country. Clearly the practice required a significant amount of discipline, especially for the women. Brigham Young’s frequent sermons on the topic, exhorting women to bear their burdens cheerfully — even challenging his own wives to "round up their shoulders to endure the afflictions of this world and live their religion, or ... leave" —

circulated. See generally Chad Flake, A Mormon Bibliography, 1830 - 1930: Books, Pamphlets, Periodicals, and Broadsides Relating to the First Century of Mormonism (Salt Lake, 1978), and, A Mormon bibliography: Ten Year Supplement (Salt Lake, 1989).

27 See, for example, John Gunnison, who wrote of his stay in Salt Lake in 1850: "That many [Mormon leaders] have a large number of wives in Deseret is perfectly manifest to anyone residing among them...." The Mormons, or, Latter-day Saints in the Valley of the Great Salt Lake (Philadelphia, 1852), 66.

28 The proceedings of the entire conference were published in the September, 1852 edition of the Latter-day Saints Millennial Star.

29 Journal of Discourses, 26 vols. (London, 1854-86), 4:50 (sermon of 21 September 1856). Twenty years after this sermon, Ann Eliza Young took Brigham up on his challenged, and divorced him. An expose of her marriage as a plural wife, and bitter divorce battle, appeared in several editions. Wife No. 19, or the Story of a Life in
are evidence of some friction. The fact that most Mormon men married only one wife, despite the divine command to participate in plural marriage, is evidence, some scholars maintain, that even among the faithful polygamy was effectively if quietly disapproved. If so, we must infer their disapproval from silence, for public dissent went hand-in-hand with excommunication.

Whatever the opinion of the rank-and-file, every Mormon leader practiced polygamy for at least a half-century. Plural marriage was an essential prerequisite to spiritual (and often temporal) success in Mormon Utah. The ecclesiastical elite was vigorous in its defense of polygamy, claiming among other things that celestial marriage was a fundamental element of the Mormon religion -- a domestic relation that was

---

Bondage, Being a Complete Expose of Mormonism (Hartford, 1876).

30 Especially during the 1850s, Young’s fiery sermons goaded faithful men to marry multiple wives, and faithful women to encourage their husbands’ polygamy. Such sermons were widely circulated in the East, and reappeared for decades in anti-polygamy stories, books, and congressional speeches. In 1870, just to give one example, a leading anti-polygamist senator from New York dredged up the 1850s sermons in support of legislation that would have limited the jurisdiction of Mormon-controlled courts and juries. See Congressional Globe, 41 Cong., 2 sess., 2144 (22 March 1870) (quoting sermon of Brigham Young on 21 September 1856), and id., 3575 (23 March 1870) (quoting discourse of Heber Kimball on 9 November 1856).


32 Apostates, especially women, tended to make anti-polygamy a central feature of their lives after excommunication. Mrs. T.B.H. (Fanny) Stenhouse, A Lady’s Life Among the Mormons (New York, 1872); Young, Wife No. 19.

protected by the federal Constitution just as slavery, the peculiar domestic institution of
the South, was shielded from outside interference. 24

(b) Marriage, Authority, and Anti-Polygamy: A Brief Narrative

Mormon leaders clearly recognized that they would not win many friends by their
announcement. They did not anticipate the extent of the opprobrium they would
encounter, however. Southerners quickly distanced themselves from their putative allies;
one southern Democrat argued that he saw a vast difference between sanctioning crime
in the territories (that is, allowing the Mormons to practice polygamy) and excluding
property from the territories (by prohibiting the importation of slaves). 25 Others
condemned polygamy even as they claimed the Constitution did not authorize federal
regulation of domestic relations in the territories.

Critics in the North reacted with a virulence that may well have seemed out of all
proportion to the Mormons’ small numbers and isolated locale. Polygamy became a by-
word for the abuse of women, the standard of all that was objectionable about
Mormonism. From just one of a number of Mormon perfidies, polygamy in the space
of a few years was transformed into a potent symbol of the oppression of women by a

24 Davis Bitton, chap. 2, "Polygamy Defended: One Side of a Nineteenth-Century
Polemic," in The Ritualization of Mormon History and Other Essays (Urbana, Ill., 1994),
44. Southerners, it should be noted here, while they expressed outrage by the attempt
to compare polygamy and slavery, nonetheless defended the Mormons’ right to govern
their own peculiar domestic relations. See Part II, chap. 1, below.

25 Representative Barksdale, in a congressional debate in 1860, as quoted in Daniel
Gooch, Polygamy in Utah, A Speech Delivered in the House of Representatives, April
backward-looking religious cult in Utah, an invidious attempt to insinuate slavery in a new guise on free American soil. By 1856, when the Republican Party first called in its national platform for the federal prohibition of "those twin relics of barbarism — Polygamy and Slavery," in the territories, the ideological foundation had been laid for a sustained legal campaign that was to last four decades, and to end in what was apparently total victory for anti-polygamists.

Utah, of course, was a territory throughout the anti-polygamy period. Polygamy, and the legal fruits of the anti-polygamy campaign, thus were matters of national concern, just as slavery in the territories had been a question of congressional import before the Civil War. The Dred Scott decision, and even the war, left unanswered many questions about the nature and degree of Congress's power to govern the territories. It is no coincidence that marriage, like slavery, should creep into national politics from the West. The potential for federal oversight in the western territories was both greater than in the states (all involved agreed that if Utah achieved statehood with polygamy intact, the national government would be powerless under the Constitution to interfere), and more difficult (because the distance of Salt Lake from Washington and because the distances between settlements in Utah itself made information-gathering and enforcement truly monumental tasks).

It was western vastness that sheltered and promoted alternative, "peculiar" domestic institutions far from the moral oversight of the East, and long after eastern utopian groups had atrophied. Only in the West could a small sect like the Mormons

---

seek out and establish their patriarchy -- a place where the word of their God was law, and congressional mandates just so much political noise.

The West was also the place where men were most likely to go when they "disappeared." The transience of American society in the nineteenth century, the ease of slipping away to the West to start a new life, to leave behind debts, moral standards, and especially wives, was a perennial concern of anti-polygamists. The flip side of this distrust of transient husbands was the condemnation of a system that by definition excluded some men from the duties and privileges of marriage. The problem of the unmarried man, permanent (and potentially dangerous) member of an underclass, like the problem of the adulterous or much-married man, found a tangible focus in anti-polygamy.37

37 As one anti-polygamist put it, polygamy by its very structure created such an underclass, a group of men who "reduced to an inferior position" through their lack of access to marriage. John Marchmont, An Appeal to the American Congress: The Bible Law of Marriage Against Mormonism (Philadelphia? 1873), 7. In contrast to the findings of Mary Ryan and Christine Stansell in their research, however, laments on the unmarried state of young Mormon men did not dominate the anti-polygamy literature. Mary P. Ryan, Cradle of the Middle Class: The Family in Oneida County, New York, 1790-1865 (Cambridge, 1981), Christine Stansell, City of Women: Sex and Class in New York, 1789-1860 (Urbana, Ill., 1987). There are several possible explanations for the relative lack of focus on the rogue male as the crux of the problem. First, unmarried Mormon men were extremely difficult to find in Utah throughout the territorial period, despite the fact that the numbers of men and women migrating to and living in the territory were roughly equal. And although I have searched for them, I have yet to find groups of unmarried Mormon men elsewhere, other than missionaries. It may be, as one scholar speculated, that those Mormon men who failed to find wives left voluntarily or were ordered to the goldfields. Ken Driggs, conversation with the author, 23 November 1994. Perhaps the very fluidity of life in the far southwest in the late nineteenth century provided cover for the disappearing dangerous young man.

Or it may be that the fears easterners associated with unmarried men were particularly keyed to an urban, or at least a thickly settled, environment, such as Oneida County or New York City. On the other hand, one could also argue that the entire anti-
Often reflected and reinforced by just the kind of fictional treatment that so moved Reader, anti-polygamy had many additional permutations and incarnations. Its appeal waxed and waned as other factors contributed to its relative prominence or obscurity at a particular time. The completion of the transcontinental railroad in 1869, for example, made Salt Lake accessible to the waves of summer travellers who made the Great Basin a favorite stop on a transcontinental rail journey. Calculated to heighten the new focus on Utah was the fact that the "Golden Spike" completing the road was driven in Ogden, just an hour north of Salt Lake by the new road the Mormons had built with volunteer labor to connect their largest city with the revolution in transportation. By the hundreds, visitors from the East (and from Europe) came, saw, and condemned.38

Issues also came and went. Late in the movement, just to give one important example, the economics of polygamy assumed primacy of place as anti-polygamists argued that the church corporation itself was evil, and should be dismantled. Just as fear of corporate concentration and domination of markets by a few giants became widespread in the 1880s,39 as concern grew that rogue corporations in the hands of unscrupulous

polygamy movement was itself an attack on the unmarried man, since anti-polygamists believed that all marriages in Utah were challenged, even discredited, by the presence of polygamy. Those Mormon polygamists who referred to themselves as "married," were perceived as talking nonsense.

38 See generally John Graham Brooks, As Others See Us (New York, 1908); Earl S. Pomery, In Search of the Golden West: The Tourist in Western America, 2d ed. (Lincoln, Nb., 1990).

men might have the power to undermine the moral economy of the country, similar
cconcerns were expressed by anti-polygamists. Especially among the clergy, the claim that
Mormons did not compete for souls on a level playing field⁴⁰ -- that a few men had
monopolized all the power and all the women in the territory -- allied anti-polygamists
with the classical economic thought of the period.

Yet there were also certain constant themes, which underlay anti-polygamy, gave
it focus and meaning, even while other ingredients came and went. Dominating all other
aspects of anti-polygamy was a profound belief in the political importance of marriage.
There are several components to such a belief, all of which were deeply conditioned by
the heady atmosphere of mid-nineteenth century America. By 1850, as woman's rights
activists raised and defended the analogy of marriage to slavery,⁴¹ marriage became ever

⁴⁰ The defiant practice of polygamy, and the economic, and political power of the
Mormon church, were linked in many church petitions. As the memorial of the Baptist
Home Mission Society, submitted to Congress on 12 February 1882, put it, "it is our
pride to have been among the foremost champions of religious liberty. But the book from
which we draw our inspiration and our warrant for maintaining the freedom of the human
conscience, teach us submission to righteous authority [in contrast to Mormon defiance
of law]." The General Assembly of the Presbyterian Church of the United States,
presented on 11 January 1882, argued that the Mormon church had "organized itself into
a government for its own defense, ... until it has gained sufficient force to defy the
legislative and executive power together, [growing ever more] hostile to the law of
Christianity, to the instincts of morality, to the essential principles of civilization, and to
the existence of liberty for the people." Quoted in Ansen Phelps Stokes, Church and State

⁴¹ Coverture, the notion that the husband "covered" -- and obliterated -- his wife's
legal existence during marriage, was especially controversial, as woman's rights activists
argued that married women and slaves shared the distinction of having no legal
personhood, but were presumed to exist only through their master's representation.
Angelina Grimke, John Stuart Mill, Elizabeth Cady Stanton, and Susan B. Anthony,
among others, were well-known and passionate critics of coverture. Some of their
writings on the topic are collected in Alice S. Rossi, ed., The Feminist Papers: From
more tinged with politics. By the late 1850s, as the anti-polygamy campaign spread into the halls of Congress, politics was tinged with talk about marriage.

Anti-polygamists responded to their own confusion about the definition of marriage (and avoiding other tough questions) by drawing a line in the sand, and claiming that polygamy fell on the other side of the divide. Polygamy was a handy foil in an era of profound flux. However vigorously they might debate what a proper marriage should look like, virtually everybody united in agreeing that the Mormons had gotten it wrong. Although Elizabeth Cady Stanton disagreed with Horace Greeley about many aspects of marriage, for example, both agreed that Mormon polygamy was too much patriarchy.

Adams to de Beauvoir (New York, 1973).


Stanton, for example, argued that polygamy was one logical (if extreme) product of traditional subordination of women to men in religious doctrine:

Polygamy is but one development of the doctrine of woman's created inferiority, the constant tendency of which is to make her a mere slave, under every form of religion extant, and of which the complex marriage of the Oneida Community was but another logical result.

When woman interprets the Bible for herself, it will be in the interest of a higher morality, a purer home. Monogamy is woman's doctrine, as polygamy is man's.


Horace Greeley, in a commentary on an interview with Brigham Young published in the New York Tribune, 20 August 1859, observed that the spirit with regard to Woman, of the entire Mormon, as of all other polygamic systems, [entails the degradation of Woman]. Let any such system become established and prevalent, and woman will soon be confined to the harem, and her appearance in the street with unveiled face will be accounted immodest. I joyfully trust that the genius of the Nineteenth Century tends to a solution of the problem of Woman's sphere and destiny radically different from this.
By the time anti-polygamist Republicans compared polygamy to slavery in the "twin relics of barbarism" platform of 1856, the legal categories "husband" and "wife" were already widely debated in literature, sermons, letters, and periodicals. Women's rights within marriage -- rights to control of income, to limit children, even to separate from abusive or neglectful husbands were openly discussed as never before.

The very power structure of marriage, long presumed to be a constant, seemed on the verge of crumbling. The prospect was exhilarating to some, frightening to many other nineteenth-century Americans. But whatever their position on woman's rights, everybody agreed that the Mormons' explicitly male-centered marital structure went too far in the other direction. "Patriarchal marriage," as the Mormons themselves called it, was a giant step, a leap back beyond the legal regime attacked by woman's rights advocates, to the days of biblical patriarchs and their many wives. From the perspective of the nineteenth century, polygamy looked unChristian, barbaric, and above all cruel to women.

Anti-polygamy was thus by no means the cause of the politicization of marriage, but it was one of the central avenues along which the process travelled. Opposition to polygamy was in part a foil (not so much for an anti-Mormonism that had little or nothing


"Sarah Kimball, first wife of Hiram Kimball, spoke of polygamy as a question of "men's rights" at a rally in 1870. Her phrase was picked up and reprinted by several eastern newspapers. The novelty of the idea of men's rights needing protection made for good sport, as well as outrage, depending on the tenor of the publication. Lola Van Wagenen, "In Their Own Behalf: The Politicization of Mormon Women and the 1870 Franchise," Dialogue, 24 (Winter, 1991), 38."
to do with the peculiar domestic relations in Utah), but for concerns, hopes, and ambiguous feelings about marriage that arose from currents already existing in American society at mid-century. Anti-polygamy reflected, focused and magnified the vague but inescapable conviction that marriage, especially the role of women in marriage, was somehow vital to the proper functioning of society -- to political peace, legal order, and material prosperity.

Anti-polygamy played a key role in this debate over the sources of authority over and within marriage, and in the perceived national political importance of marriage. Of course, most anti-polygamists saw themselves primarily as preservers of the status quo, guardians of the traditional homestead, where the wife was "queen" of the hearth and guardian angel of the spiritual life of the family, and the husband deferential to his wife's guidance in most things familial. Yet their vision was hardly "traditional," but a distinctly nineteenth-century product -- in part a source of, and in part a product of the destabilization of marital relations that historians in recent years have focused on in ever greater depth.4 The defense of this new vision, not surprisingly, also took novel forms, even while pursued in the name of tradition and continuity.

---

There is irony here, of course. In many senses, both Mormon polygamists and their most dedicated opponents were fighting for the same thing -- the elevation and preservation of marriage and the family. Both saw structural defects in the system. Where they parted company was on the solution. Anti-polygamists and polygamists shared a fundamental belief in the essentially monogamous sexual nature of women, and the (at least potentially) polygamous sexuality of men. Mormons in effect constructed their marital structure according to their conception of male sexuality. In an indirect acknowledgment that presumptions about men's penchant for "variety" was satisfied by polygamy, for example, one Mormon leader even argued that Utah's peculiar domestic institution rejuvenated aging men, that a man "confined to one woman is small business," while a "man who goes into plurality looks fresh, young, and sprightly."46

Anti-polygamists of all stripes argued (often obliquely, but unmistakably) that male restraint in deference to women's nature was the essence of marriage. Rejecting the practices of ancient Hebrews as a guide for modern sexual relations, they often took the New Testament as their guide -- quoting Matthew's injunction that to each man their should be one woman, and to each woman a man.47 Equally prevalent, however, was


47. "Let every Man have his own Wife, and Let every Woman have her own Husband." 1 Cor. 7.2. This passage, for example, was printed in every issue of the Anti-Polygamy Standard, a periodical published monthly in the early 1800s by anti-polygamy women in Utah, among whom was included Cornelia Paddock, author of The Fate of Madame La Tour.
the rejection of polygamy based on natural law, and a profoundly progressive view of
history, sometimes but by no means always jumbled up with Christian cosmology. For
the most part, such arguments against polygamy relied on the ever more refined quality
of human life over the course of history, with marital patterns keyed to progressive
stages. In the earliest human history, for example, theorists as diverse as Francis Lieber
and Frederick Engels assumed that promiscuity dominated sexual relations, and that
polygamy was an advance from promiscuity. In Lieber's political theory, and
according to many theoretical constructs of nineteenth-century academic and social
thought, the next major step forward occurred with the rejection of polygamy in ancient
Greece and Rome (or in Christian teaching, depending on the religious proclivities of the
scholar)."

A common assumption underlying all these historical interpretations is that sexual
relations were more closely confined and protected -- more beneficial to women --

Francis Lieber, Manual of Political Ethics: Designed for Colleges and Students at
Law, 2d ed., Theodore D. Woolsey, ed. (Philadelphia, 1874) 9, 13; Frederick Engels,
The Origins of the Family, Private Property and the State in the Light of the Researches

Monogamian Family," in Ancient Society: Researches in the Lines of Human Progress
From Savagery Through Barbarism to Civilization, ed. Eleanor Burke Leacock (1877;
New York, 1963); St. George Tucker, ed., Blackstone's Commentaries on the Laws of
England, 5 vols. (Philadelphia, 1803); Thomas M. Cooley, A Treatise on the
Constitutional Limitations Which Rest Upon the Legislative Power of the States of the
American Union, 4th ed. (Boston, 1878), 588; James Schouler, A Treatise on the Law
of Domestic Relations (Boston, 1870); Engels, of course, argued that the abandonment
of polygamy was the first step down the road to capitalism, a regrettable but indispensable
prerequisite to socialism, where property in women, like other forms of property, would
be redefined and refined in preparation for communism.
through increasingly restrictive marital practices. There are several different ways to interpret such a claim, especially the idea that quantitatively less sex occurs in one form of relationship than in another. One can discern hints of what would become Freudian theory -- that all civilization depends upon and is primarily concerned with the proper channeling and regulation of primordial sexual urges.\textsuperscript{50} One could also emphasize the inherent prudery of a social analysis that, among other things, posits a relative decline of sexual variety as the key to advancement. This has been a constant theme of Mormon historians, who have quite properly understood that anti-polygamists objected (at least in part) to the amount of sex that Mormon men were having with plural wives.\textsuperscript{51}

Yet prudery is by no means the only possible source of such theories. As historians of women have argued, the theory that women were "passionless" (or at least passionate only within the clear confines of a marital relationship), and that sexual behavior should be limited according to female desires and biological routines, was a nineteenth-century innovation that had distinct advantages for women.\textsuperscript{52} Both in terms


of family size and bodily integrity, the idea that husbands should respect wives' interest in the frequency of sexual contact itself constituted a powerful retooling of marital politics. According to one prominent social historian, the new theory of passionlessness was an effective method of birth control (contrary to the argument of many sexual educators today that preaching abstinence never works).²

Sexual restrictiveness (even passionless sex) may not have been the hallmark of mid-nineteenth century America that some historians have believed. Instead, it was sexual expression strictly confined to the marital relationship, and preserved in all its privacy and inherent mystery, that was central to ideas of the meaning and value of marriage. Trust, openness, self-revelation, as one historian has put it, were "meant to be completely revealed to one person only..., [reserved] for a single beloved."³ It was more than the thought of Mormon men's sexual activity that irked so many anti-polygamists. It was the conviction that such relationships were impossible in the context of multiple others.

Polygamy, in the eyes of its critics, was a violation of woman's nature, and of the basic condition of love and privacy -- the sharing of the most intimate thoughts and feelings with another soul. Presumptions about male sexuality were a constant threat to this ethic of mutual intimacy based on trust. According to anti-polygamists, each woman naturally loved only one man, to whom she gave her entire affection, sacrificed her

---


independence through marriage, and from whom she deserved nothing less than the utmost respect and protection. The introduction of plural wives into this picture -- the central dramatic element in anti-polygamy novels and sermons -- was a fundamental violation of the nature and meaning of wifely status. Of course, what it meant to be a wife was itself in some turmoil, as the boundaries of marriage and non-marriage were called into question by legal and social practices and ideas, including separation, divorce, "disappearing" men (and women?), common law marriage, and a host of other possible examples.

Seen in this light, the very term "plural wife" is an oxymoron, an attempt to multiply what is by definition singular. Thus the Mormons' claim that sexual activity with plural wives was "within" marriage looked like nothing so much as sophistry, and adulterous sophistry at that, all at the expense of women. The consequences of such a transgression of the unalterable nature of women were profound, anti-polygamists argued, especially in America.

Monogamy, according to its nineteenth-century defenders, was both essential to civilization, and the only possible marital form in a democracy. The argument was relatively simple, although it appeared in many different guises, and with differing

55 There is a saying "Higamous, hogomous, woman's monogamous/ Hogamous, higamous, man is polygamous." Dorothy Dinnerstein, The Mermaid and the Minotaur: Sexual Arrangements and Human Malaise (New York, 1976), 38-75, devotes an entire chapter to an analysis of the psychological and social price paid by women for such assumptions. This belief was widely shared in the nineteenth century, as the quote from History of Woman Suffrage, footnote 43, above, shows. The presumed predilection of men for "variety" also deeply troubled anti-polygamist novelists of the 1850s, see Part 1, chap. 3.
emphases on one or another variable. Because the nations of Western Europe were the most civilized on earth, and because monogamy was uniformly the only legitimate form of marriage in those countries, theorists such as the influential anthropologist Henry Lewis Morgan argued that monogamy was a key component of civilized life.  

The argument for the relationship between democracy and monogamy mirrors the traditional argument that the state reflects and is dependent upon the individual families that make up its constituents. In this view, a tyrannical husband (like a slaveholder, a man who has too much power over those dependent upon him) would be unfit to participate in the reasoned debate of democratic politics, but would instead constantly seek to replicate the tyrannical policies of his home in the political arena.  

56 Ancient Society, 505-15.

57 Politics in Utah were often used to illustrate the anti-democratic tendencies of polygamy. According to his opponents, polygamists were dictators, whose iron fists kept their families in subjection, both physical and spiritual. This tyranny was based in large part on polygamy, so the argument went, which enabled a few men to control all of life in Utah. A memorial to Congress from John Marchmont in 1873 makes this point:

Polygamy destroys the fundamental principle of Democratic liberty, by annihilating the right of the wife to her husband equally with the right of the husband to his wife. The free women citizens of the United States are thus disfranchised of the most important right, natural and political, that they hold. Therefore the State that permits polygamy is not Republican. Therefore, in every Territory polygamy should be made an offence, amenable to the laws of the United States, as piracy is.

No sane man can deny that monogamy is the true basis of all Democratic Institutions. The right of the child to freedom rests on the condition of the mother. The woman is the root of humanity. If that root is rendered corrupt, the whole fabric of society becomes polluted. Liberty cannot live in an atmosphere of moral death.

An Appeal to the American Congress, 6.
There were distinct economic elements to this political theory, as well. For example, one current of anti-polygamy thought stressed the inevitable creation of an underclass of unmarried men, to whom the joys of full citizenship and family life were denied by the greed of a few wealthy men who were enabled by an unequal marital structure to monopolize more than their fair share of women. Polygamy, so the argument went, was like slavery, in that it was by its very nature reserved for an aristocratic group of men, at the same time that it reduced the potential wealth of the humbler sort. Polygamy was thus undemocratic because it restricted marriage, one of the basic rights of a republican polity, to a privileged few, rather than granting the equivalent of universal male suffrage to each man as husband.

Anti-polygamists made all of these points, and many more besides, as they explained to themselves and others why Mormon polygamy destroyed the happiness of the women (and the self-respect of the men) involved in plural marriage. As vital as understanding the content of their claims, however, is understanding the changing and changeable strategies behind the claims. The men and women who became anti-

---
58 Anna Dickinson wrote, "'Tis a general theory that the women here far outnumber the men,--'tis not the case. Many of the men have but one wife,--and the young men, in thousands of cases have none at all. They all believe in the theory of polygamy, but they are not at all able to practice." "Whited Sepulchres," in Papers of Anna E. Dickinson, Manuscript Division, Library of Congress, Container 15; see also Marchmont, An Appeal to the American Congress, 7 (emphasis in original):

Polygamy leads to the concentration of power and privilege in the hands of the few, and is thus the cause and instrument of tyranny. If one man be permitted to have four wives, three other men in the world are deprived of their natural rights to one wife each. The man with four wives must have means of supporting them; he must monopolize power, property, and privilege; while the man not permitted to marry one wife is deprived of other rights and reduced to an inferior position. He is not a man; he is only a soldier, sailor, servant, eunuch!
polygamists in the nineteenth century were genuinely opposed to polygamy as a phenomenon in Utah. But they were conditioned by their experiences at home. They drew on their own experiences as husbands and wives, as citizens and political actors, to formulate their opposition to a form of marriage they conceived as essentially exploitive of women. In the process, anti-polygamists without exception argued that marriage was vital to the functioning of the state, that family structure was a matter of national concern, and that the sexual relations between men and women were the basic condition upon which all of social and political life depended. Despite the explicit decision to leave matters of domestic relations to the individual states in the post Civil War era,\(^5^9\) anti-polygamy (and its proponents in Congress and the executive branch, as well as their supporters among newspaper editors, lobbyists and public lecturers) constituted a major political arena for the discussion of marriage and marital policy at the national level, and as a matter of national identity. Openly and in some depth, they explored the relationship of marriage to democracy, economics, and justice, concluding that the very basis of American politics rested on marital structure. They also used law (and legal strategies) in creative ways, adopting state criminal policies at the national level, reformulating traditional prosecutorial practices, and establishing new connections between marriage and political participation.

\(^{59}\) For discussions of suffragists' unsuccessful struggle to be included in the Republican agenda for Reconstruction see, Ellen Carol DuBois, Feminism and Suffrage, the Emergence of an Independent Women's Movement in America 1848-1869 (Ithaca, 1978), 53-78; Stanley, "Conjugal Bonds and Wage Labor," 471-500.
One example illustrates the use of law in innovative ways. The outrage against polygamy swelled drastically in the early 1880s, the product not only of a broad-based and continuing sense that polygamy was the degradation of women, but also in response to the re-election of an admitted and unrepentant (even boastful) polygamist as the territorial delegate to Congress from Utah. The presence of George Q. Cannon -- portly, self-educated English convert to Mormonism, husband of four wives and one of Brigham Young's most trusted advisers -- in the halls of Congress was a goad to members and their constituents. The result was the passage of legislation that (among other penalties imposed on men involved in plural marriages) prohibited all polygamists from voting or holding office. The connection between monogamous marriage and republican competence could hardly be made more concrete.

Which brings us now, as it brought anti-polygamists then, to the next major hurdle. As they articulated and defended the politicization of marriage, anti-polygamists also were confronted by another problem endemic to nineteenth-century America. The question of how to impose authority (or, as they were more likely to put it, to preserve...

---

60 George A. Cannon, overwhelmingly elected as territorial delegate to Congress in 1880, was not certified by Utah Governor Arthur Thomas. Instead, Thomas certified Cannon's non-Mormon opponent, Liberal Allen G. Campbell. Cannon contested the certification, but his challenge was foreclosed by the Edmunds Act, a consequence that Southern Democrats claimed was blatantly undemocratic. Congressional Record, 47 Cong., 1 sess., 1214, 1866-67 (16 February 1882). See also Mark W. Cannon, "The Mormon Issue in Congress, 1872-1882: Drawing on the Experience of Territorial Delegate George Q. Cannon," (Ph.D. diss., Harvard University, 1960), 72-85; Lyman, Political Deliverance, 22-23.

61 For a more complete discussions of the history and provisions of the Edmunds Act of 1882, see part II, chap. 4, and part IV, chap. 2, below.
order and decency) in a large, culturally diverse, geographically unwieldy, and economically burgeoning country bedeviled statesmen, husbands, ministers, parents, slaveholders, and so on, throughout the early national period, and well into the post-Civil War era. The West was an especially troublesome ingredient in this goulash.\(^2\) If the West was the tinderbox that ignited the Civil War,\(^3\) it was also the refuge to which Mormons fled, and where Brigham Young defied the nation to dislodge him from his position of supreme authority in the mountain fastness of his Great Basin Kingdom.\(^4\)

Indeed, just as polygamy can in one sense be seen as the Mormon answer to questions raised by the dislocation of husbands' traditional authority within marriage, so the Mormon faith as a whole has sometimes been explained as one possible approach to the problem of eroding authority in the early national period. Liberal democratization and social dislocation were not boons to all members of American society, as the Smith family's struggles illustrate.\(^5\) In Mormon theology and polity these concerns were

---

\(^2\) Josiah Strong's *Our Country: Its Possible Future and Its Present Crisis* (New York, 1885) is an excellent illustration of the problem the West posed, as is Horace Bushnell's sermon, "Barbarism the First Danger," reprinted in *Horace Bushnell, Selected Writings on Language, Religion, and American Culture* David L. Smith, ed. (Chico, Ca., 1984), 155-63. See also Henry Nash Smith, *Virgin Land: The American West as Culture and Myth* (195: Cambridge, Ma., 1970).


\(^4\) On the political ambitions of Young and other Mormon leaders, see Klaus G. Hansen, *Quest for Empire: The Political Kingdom of God and the Council of Fifty in Mormon History*, 2d ed. (Lincoln, Nb., 1974).

reflected and reconfigured in innovative ways. Hierarchical, authoritative, yet peculiarly American in its extreme materialism, Mormonism's doctrine of continuing revelation, and New World focus for cosmic history, located divine authority clearly with church leaders, and through the universal male priesthood to all individual male heads of households.66

It was God's voice that Mormons heard in the latter-day era, and God's law that they obeyed.

Needless to say, this was not an acceptable answer to most Americans, many of whom in the 1830s and 1840s viewed Mormons as nothing more than recycled Catholics - secretive, fanatical, untrustworthy, in short unAmerican.67 These anti-Mormons generally had a more difficult time locating the exact source of moral and legal authority. Often it came down to a muddy and undifferentiated mixture of natural law, common law, constitutional authority, and biblical command.68 Whatever the precise recipe, most


66 Sellers, *Market Revolution*, 225, paints the universal male priesthood in stark contrast to the powerlessness of women in Mormonism: "To males demoralized by powerlessness and failure [in the broader American society], the Mormon Zion offered ... a hierarchy of gratifying offices and roles in a spiritual army destined for cosmic victory. Male converts were immediately appointed teachers, deacons, or missionaries and soon ordained to the priesthood, which enabled them to preach, baptize, and ordain. Women, by contrast, were not even eligible for conversion unless married or related to a male Saint."


68 As David Davis pointed out, in a free and diverse society, the problem of authority and unity is a profound one, which they struggled to overcome through appeals to vague causes (always noble) and sacred traditions (always Christian). Yet the very emphasis on
anti-Mormons understood that their authority was grounded as much in this world, as in
divine injunctions that could be challenged by anti-nomian groups, of whom the Mormons
were only the most well-known. 49

After 1852, when the Mormons made their public announcement of the practice
of polygamy, and defense of its legality in Utah, the problem of authority became more
immediate, more important, and more focused. No other religious group claimed (or
wielded) such political and legal power. Far more than prior to the announcement,
Mormonism (now inextricably identified with plural marriage) threatened the basic legal
fabric of American society, in much the same way that slavery did. Mormons, after all,
claimed by their dispensation to practice polygamy that they could alter the governing
legal structure of gender relations — that they had a source of authority over the most
basic social (and newly political) laws, in ways that were directly contrary to the sense
of order and justice prevailing in the rest of the nation. 70 For a full decade, polygamy
was the official marital policy of a portion of the United States. Even after the federal
government outlawed polygamy in the territories, church leaders openly continued the

authority was itself a partial sacrifice of the freedom nativists thought they were fighting

49 For interesting explorations of anti-nomianism among other religious groups, see,
e.g., Paul E. Johnson & Sean Wilentz, The Kingdom of Matthias: A Story of Sex and
Salvation In Nineteenth-Century America (New York, 1994); Carol Weisbrod, The
Boundaries of Utopia (New York, 1986).

70 Laurence Moore makes this point, but more as a matter of self-definition by
opposition, rebellion against an established order. Religious Outsiders 41-44. By 1852,
however, Mormonism was no longer a rebellion, but a newly minted religion, complete
with alternative sources of legal authority and a distinctly middle-aged management. By
1880, it had become a gerontocracy. Howard R. Lamar, The Far Southwest, 1846-1912:
A Territorial History (New Haven, Ct., 1966), 399-400.
practice for thirty years, arguing that they obeyed a higher law than anything Congress could enact.\textsuperscript{71} The Mormons' claim to legal authority thus at one level conditioned the response; at the same time, it fed into and accelerated the crisis in moral authority, and the already existing American predilection to transform such problems into legal disputes.\textsuperscript{72}

And anti-polygamy did flow into legal channels, not without a few digressions (of which the so-called "Mormon War" of 1857-58 is the most notable),\textsuperscript{73} but nonetheless steadily, even inexorably. As a question of legal authority, anti-polygamy was the occasion of at least two major innovations in American jurisprudence, in addition to the creation of a new federal law of the family. Both jurisprudential innovations were deeply connected to distinct but related legal phenomena of the post-Civil War era. First, and most obvious, was the validation of national legal authority in the territories. The role of the federal government in the domestic affairs of its constituent parts was gradually yet inexorably increased as politicians articulated the necessity for oversight of marriage in Utah. The Supreme Court, of course, sustained the constitutionality of most major anti-polygamy legislation, justifying and reinterpreting anew the legal structure of marriage, and the role of the federal government in the maintenance of national marital uniformity.

\textsuperscript{71} For a good overview of the Mormons' claim to legal authority, see T.W. Curtis, The Mormon Problem, The Nation's Dilemma: A New Data, New Method Involving Legal Questions of the Day (New Haven, 1885).


\textsuperscript{73} See generally part 2, chap. 1; Norman Furniss, The Mormon Conflict, 1850-1859 (New Haven, Ct., 1966).
The explicit connections between slavery and polygamy in both pre- and post-Civil War anti-polygamy political thought made the eradication of polygamy a more straightforward juridical matter than, say, interference with labor relations in a purportedly free society. The "twin relics of barbarism," after all, were far more widely accepted as parallels than either the analogy between monogamous marriage and slavery, or between wage labor and involuntary servitude. One could oppose polygamy in Utah without supporting equal rights for women at home, just as one could oppose slavery in the South without delving into the niceties of equitable wage labor in the North. 24

The assertion of national authority over polygamous territorial Utah thus more closely resembled the assertion of federal authority over slaveholding in the territories (the question that finally sparked the Civil War, and in which the Supreme Court's part was particularly controversial, if not outright ignoble) than the assertion of equal rights for women, or of a federal right to pursue a profession or trade. In upholding anti-polygamy legislation, therefore, the Supreme Court could both distance itself from the legacy of the Dred Scott decision, and avoid raising the spectre of radical intervention that would affect existing relationships in the rest of society. From the perspective of Congress, the ability to stamp out deviance through legislative reform provided a valuable counterpoint to the failures of Reconstruction. National authority, and national identity

24 As David Davis has persuasively argued, anti-slavery thought and activity was an effective means of evading potentially difficult topics, such as materialism and the inequities of labor in market capitalism, in both its English and American manifestations. David Brion Davis, The Problem of Slavery in Western Culture (New York, 1967), 325-26, 338-340, 409-10; Davis, The Problem of Slavery in the Age of Revolution 1770-1823 (Ithaca, 1975), 350.
through marriage, could indeed be molded in Washington, however problematic race had become. The Supreme Court also used anti-polygamy in ways that ratified (and increased) its own national presence. From a jurisprudential perspective, anti-polygamy provided an opportunity for the Court to assert national authority over a deviant territory in the name of the protection of women, without undermining its own conservative interpretation of the Civil War amendments. And while this was a far tamer version of authority than some anti-polygamists and abolitionists hoped for, it was nonetheless a sea-change in American federalism.

Also vital to this reconfiguration of federalism, although far less visible, were the territorial courts, charged with enforcing anti-polygamy laws in a hostile (sometimes even dangerous) environment. It was at the trial level that the difficulties and costs (both financial and emotional) of effecting legal reform were most evident. Territorial judges and prosecutors -- alternately infuriated by their repeated frustration at the hands of Mormon legal strategists, and dazed (sometimes defensive) by the evident suffering imposed on Mormon families by polygamy prosecutions -- were first-hand witnesses to the messiness of legal reform on the ground, as it were.

The second major innovation in federal jurisprudence, the recalibration of the law of church-state relations, has been widely studied, but rarely in its anti-polygamy context.⁷⁹ Prior to the anti-polygamy campaign, separation of church and state at the

⁷⁹ Indeed, the polygamy cases are both widely known, and poorly understood, at least from the perspective of the legal historian. Reynolds, for example, is generally cited as the foundational free exercise case. And while it is certainly true that it is a free exercise case, it is also an establishment clause case -- the Mormon defendant claimed, for example, that the federal government had no jurisdiction to interfere with Utah's plural
local (as opposed to the national) level, had become a practice in all states and territories (except Utah), but had never been imposed from without on a population whose majority was satisfied with an established church. From Virginia's Statute for Religious Freedom in 1785, to the final act of disestablishment (Massachusetts in 1833), the decision to disestablish was in each case internally and democratically driven by varying combinations of religious dissent and diversity, deism, political maneuvering and opportunism, and residual fears of established churches after the Revolution. Confronted with Mormon Utah, what had been politically desirable was translated (by politicians and clergy, and most important, the Supreme Court) into a constitutional mandate. Applied against the Mormon Church, the theory that American constitutional democracy rested in part on disestablishment was welcomed alike by clerical and legal authorities. Almost imperceptibly, the judiciary assumed the role of policeman, patrolling the borders of church and state in the interests of national morality.

This second disestablishment, complementing and merging with the second reconstruction that redistributed power and marriage in Utah, was the first major interpretation of the Bill of Rights by the Supreme Court, crafted through opinions in polygamy cases over a dozen years. Fueled by anti-polygamy ideology, and cobbled together from state doctrine and the Court's own constitutional historiography, the justices

marriage structure, because polygamy was the preferred marital institution of the established religion in the territory, Mormonism. It is in Reynolds, after all, that Jefferson's "wall of separation" metaphor was first cited by the Court to explain why the Mormon Church had no constitutional right to control the marriage law of Utah territory. For a fuller explanation of the establishment origins of the Reynolds opinion, see Part 4, chap. 1, below.
crafted a jurisprudence of the religion clauses that aggregated to themselves the power to decide as a matter of law questions that previously had been matters reserved for democratic political processes at the state level. The shift, when it was noticed at all, was welcomed as the appropriate solution to the Mormon Question. The Protestant clergy, whose interests were most affected by the change, focused more on clipping the wings of Mormon leaders and on the Court's validation of monogamy as the only form of marriage permissible in "civilized and Christian countries," than on the future implications of the caselaw that flowed from anti-polygamy campaigning. Anti-polygamy legislation made inroads into the authority of Protestant clergy in the nineteenth century not because it challenged their worldview, but because it replicated their vision so closely, absorbing their assumptions about the sanctity of marriage, and translating them into political and legal mandates. Disestablishment in Utah, then, is properly understood not merely as the disaggregation of power from the Mormon Church, but also as the absorption of clerical power into law.

Conclusion

It had been in the Supreme Court that the Mormon leadership hoped (not without reason, given the Court's antebellum jurisprudence) for protection from federal anti-polygamy legislation. The results were devastating, as in case after case the Court sustained the extension of federal authority into the territories. Federal power over the

* For a more detailed analysis of the major polygamy decisions, see part 4, below.
territories waxed in direction proportion to the waning of Mormon political and legal clout.

In 1890, forty years after the church announced its practice of plural marriage, it formally abandoned "the Principle," at least as a claim of legal authority to structure marriage according to the peculiar dictates of the Mormon faith.\(^7\) By the time the "Manifesto" was issued by the church, all Utah was in shambles -- everyone in the territory was involved in the prosecution or evasion of polygamy charges, streets went unpaved, almost every business and political leader was in jail or in hiding.\(^8\) This capitulation to the overwhelming force generated by the proponents of anti-polygamy reflected the acknowledgment that the legal landscape of the United States had changed drastically over the nineteenth century. To survive was to capitulate, as the Mormon leadership acknowledged. Once the claim that polygamy was lawful had been abandoned, life in Utah quickly settled into a less turbulent stream -- and the Mormon church retooled


\(^8\) For example, Robert Baskin, long-time resident of Utah and vocal opponent of polygamy and the Mormon church, commented on the deplorable state of Salt Lake’s infrastructure when he took office as mayor in the 1890s. For an entire decade, all of Utah’s resources had been plowed into the "raid." Reminiscences of Early Utah (Salt Lake, 1914), 26-27.
itself and its power base accordingly, surviving, nay flourishing, in its new streamlined and accommodationist incarnation.

Yet it bears emphasizing here that it was polygamy that was the center of the controversy, not Mormonism. And it was in the law of domestic relations -- master and slave, husband and wife -- that the national government acquired the voice of authority in the latter half of the nineteenth century. Through the assertion of the political centrality of these everyday relationships, the American legal system was reconfigured as a mechanism highly sensitive to formal inequities, even in "private" relations such as marriage.

Before concluding that the legal history of anti-polygamy is a neat or happy tale, however, it is worth noting here that the Mormon Church (despite protestations to the contrary) continued to sanction polygamous unions for decades after the formal disavowal of the practice. Furthermore, and far more important for most American women, the social inequities of monogamy (like those of labor relations in the post-Civil War era) became all but invisible to the American legal system, obscured in part by the attack on the inequities of polygamy.

The story of how the public law of marriage came to occupy so much political and jurisprudential space in the nineteenth century begins in the 1850s. The coalescence of women's legal consciousness and skills as popular novelists, print technology, and Mormon polygamy produced groundbreaking works of anti-polygamy fiction, direct forebears of Madame La Tour the source of young Reader's resolve to do his part in the legal war against the twin relic of barbarism.
PART I: "ALL THAT IS PURE AND SAVING IN THE MIDST OF THE SELFISHNESS OF MAN": ANTI-POLYGAMY FICTION AND WOMEN'S LEGAL ADVOCACY IN THE 1850'S

Introduction

1. "The Man Who had Dared to Trample the Heart of a Woman Under his Foot": Women, Fiction and Reform in the 1850s
   (a) The Cultural Work of Anti-Polygamy Novels
   (b) The Cultural Work of Anti-Polygamy Novelists

2. "My Spirit Shall Burn in Defense of the Purity of Womanhood": Anti-Polygamy Novels as Advocacy
   (a) Death, Escape and Redemption: Anti-Polygamy as the Reclamation of Freedom
   (b) Slavery and Aristocracy: Anti-Polygamy as the Protection of the Middle Class

3. "Those Who made Their Own Laws to Suit Their Own Purposes": The Legal Vision of Anti-Polygamy Fiction
   (a) Anarchy and Theocracy: Anti-Polygamy and the Law of the Land
   (b) Anti-Polygamy and the Appeal to Male Legal Authority
Introduction

Metta Victor, anti-polygamy novelist, explained to her readers in 1856 that monogamous marriage was "all that is pure and saving in the midst of the selfishness of man: one abiding love, one hearth, one home."1 This was a big claim, but one that anti-polygamist writers in the 1850s made incessantly; marriage was their touchstone, the sun around which all other institutions (and their novels) revolved. Theirs was the initial foray into the realm of popular anti-polygamy; their stamp endured for decades, even as the prime focus of anti-polygamy activity was diverted from its original grounding in literature to more traditionally recognized forms of political and legal organizing.

The story of how anti-polygamy sentiment grew in the mid-1850s, how it achieved such persuasiveness that plural marriage in Utah became politically indefensible, is in part the story of stories. Anti-polygamists developed story-lines that explained both the causes and consequences of polygamy in comprehensible, if conclusory, terms. Indisputably, this story-line had little basis in what we refer to in the late twentieth century as "fact." Yet its pertinence to nineteenth-century beliefs about the political and moral value of monogamy for women, and for the state as a whole, is incontestable. Mr. Reader, and thousands like him, were moved by the stories they read, and they were convinced of the importance of the public role of marriage in part because these stories were so deeply grounded in (and manipulative of) emotional fact.

1 Metta Victoria Fuller Victor, Mormon Wives, A Narrative of Facts Stranger than Fiction (New York, 1856), 199.
The inquiry that follows traces the early development of persuasive prose dedicated to the probing the pain and politics of polygamy. Four novels, each written in the mid-1850s, are the nucleus of the first wave of anti-polygamy, and the subject of this Part. Metta Victor’s *Mormon Wives*, Maria Ward’s *Female Life Among the Mormons*, Orvilla Belisle’s *Mormon Unveiled*, and Alfreda Eva Bell’s *Boadicea*, cornerstones of the new anti-polygamy genre, all placed ordinary women in extraordinarily difficult circumstances, challenging them to suffer with sanctity, on the one hand, and to reclaim authority over marriage on the other. The trials of these women, their sufferings at the hands of lascivious Mormon men, and their ultimate triumph, even though that victory be through a dignified and honorable death, exemplify the fictional treatment of a political philosophy of marriage that gauged the progress of civilization according to the protection and veneration of women in each age.²

In their day, the novels of the 1850s were both entertaining and energizing. They were also connected the crisis in marriage to the politics of class, immigration, westward expansion, and moral diversity. They explored questions of voluntarism, clericalism, and the limits of freedom on the one hand, and domestic violence, child-rearing, and house-keeping on the other. These issues were all part of the anti-polygamy package, tied to

² Catharine Beecher, for example, in common with many of her contemporaries, divided human history into distinct stages, each one associated with progress: infancy, barbarism, heathenism, civilization, and Christianity. *Common Sense*, 37. Quoted in Kathryn Kish Sklar, *Catharine Beecher: A Study in American Domesticity* (New Haven, 1973), 249. Dr. Elizabeth Blackwell went further, arguing that the very essence of Christianity was the advancement of women: “The regulation of sexual intercourse in the best interest of womanhood is the hitherto unrecognized truth of Christianity, towards which we are slowly groping.” *Essays in Medical Sociology*, 2 vols. (London, 1902), 1:253-54. Quoted in Degler, *At Odds*, 272.
the distribution of power within the legal relationship called marriage. In the nineteenth century, marriage was the key to women's legal experience, the fundamental component of both social power and political disability. Marriage was central to women's lives; the experiences of wives were central to their novels.

Anti-polygamy novelists used stories about marriage as their medium; prose as their primary means of persuasion. Novel-writing in this branch of the sentimental tradition was designed to arouse active sympathy, ultimately to inspire activism for legal change.3 The subversive potential of such sympathy was first obscured by its conventional literary package, and eventually appropriated (and sublimated) by the very political and legal forces novelists accused of shirking their duty to women. In the 1850s, however, before the politics of anti-polygamy assumed formal institutional shape, anti-polygamy polemics were crafted by women whose anger at men's power to destroy women's happiness in marriage was evident on every page. It was to save marriage from corruption and abuse at the hands of men that these novelists used their story-telling art. Marriage was both the apogee of women's potential, the single most important human endeavor, and the most fragile, exposed, as Metta Victor put it, to "chance and change."4

Mormon Wives, Victor's anti-polygamy story, played on the themes of danger and degradation of women in marriage that were essential to the very premise of anti-polygamy.

---


4 Id., 315.
1. "The Man Who had Dared to Trample the Heart of a Woman Under his Foot": Women, Fiction and Reform in the 1850s

Margaret Wilde died a lingering and pathetic death in Utah, far from her loving family and her native New England soil. She was killed by her husband's polygamy; her will to live sapped by the barbarism of a bizarre new cult. Margaret's husband Richard "dared to trample the heart of a woman under his foot."¹ Lured by promises of wealth and power to convert to Mormonism and to emigrate with his young bride, he succumbed to the temptations of polygamy after only two years in Utah. Making the betrayal even more poignant, the other woman in the story was Sarah Irving, Margaret's childhood friend. The dark, tempestuous Sarah had hoped to be Richard's first choice; she assuaged her conscience with pamphlets by free love advocates who argued that monogamy was contrary to man's primitive nature. She followed the Wildes to Utah, and there seduced Richard. When told of Richard's perfidy, Margaret developed a fatal brain fever.

On her deathbed, Margaret blessed and forgave her killers, requesting only that Richard remain true to Sarah for the rest of their lives. Sarah was willing, but Richard blanched. He had taken a third wife only that morning. Sarah, devastated as much by the death of her friend as by Richard's duplicity, immediately saw the error of her ways. She vowed on Margaret's grave to return to the East, and there to devote herself to anti-polygamy advocacy: "Always, always, my voice shall rise in defense of one love,

¹ *Mormon Wives*, 226.
constant through life, and faithful in death -- one home -- one father and mother for the children -- one joy on earth -- one hope in heaven."²

Despite its claim to a factual basis, *Mormon Wives* clearly is fiction -- one of the earliest anti-polygamy novels, a genre that eventually saw publication of some 80 full-length novels by the early twentieth century.³ Contributors included Arthur Conan Doyle, whose first Sherlock Holmes story, *A Study in Scarlet*, opened with a blood-curdling murder in London, fulfilling the murderer's long quest for revenge against Mormons who had captured his young fiancee for the seraglio of an elder.⁴ By the time Conan Doyle took up his pen in the 1880s, anti-Mormon fiction was a well-known literary device in both the United States and England.⁵ In the mid-1850s, however, anti-polygamy fiction was a new phenomenon, the exclusive preserve of women authors, themselves a recent (and extremely profitable) addition to the publishing repertoire.

² *Id.*, 316.


⁵ Michael W. Homer, "Sir Arthur Conan Doyle: Spiritualism and 'New Religions,'" *Dialogue* 23 (Spring, 1990): 97-121,101, and Jack Tracy, *Conan Doyle and the Latter-day Saints* (Bloomington, In., 1978), 10-14, point out that several fictional and non-fictional accounts of Mormonism were widely available in London in the 1880s. Conan Doyle appears to have read one or more of these accounts.
Metta Victor and her fellow anti-polygamist novelists in the 1850s invigorated and redirected anti-Mormonism. For a variety of reasons, anti-polygamist authors were an integral part of what might be termed the feminization of anti-Mormonism in the 1850s - by which I mean not that anti-Mormonism became the preserve of women, but that anti-Mormonism was translated into a campaign about the proper treatment of women in marriage. The story of how this campaign for the protection of monogamy got under way is in significant part the story of how women in the 1850s perceived plural marriage, and the narrative weapons they employed to combat it.

During the 1850s, while a clearly defined anti-polygamy "movement" was still a decade away, several factors combined to make abhorrence of polygamy a widespread and ultimately a politically powerful phenomenon. Primarily through fiction, women authors in the mid-1850s created an image of Mormon polygamy that stuck like a burr. Four novelists, all of whose books were published in more than one edition, created and satisfied a significant market for antipolygamy fiction; two (including Metta Victor) saw sales of at least 40,000 copies each during the 1850s alone. Maria Ward, Orvilia Belisle, and Alfreda Bell, together with Metta Victor seized upon polygamous marriage as a threat to all women, a menace to the "purity of womanhood," as Metta Victor put it. They were convinced that polygamy undermined the dignity and power of women, corrupting marriage by catering to an inherently male sensuality that was contradictory to all that was sacred, moral, and female. Their literary campaign against plural marriage compared polygamy to slavery, argued that conjugal and parental feelings were destroyed in plural households, and advocated political and legal action against the Mormon church in the
defense of women. They appealed to the sympathies of their audience through tales of women's suffering at the hands of men whose power in marriage had been artificially and unjustifiably increased, at the direct expense of women.

Anti-polygamy novelists were remarkably successful, in part because social and economic conditions created a ready market for their books, and in part because the message they sent to legislators was politically palatable. They helped create an intellectual climate in which the punishment of polygamous Mormons was embraced as an essential component of national pride and morality -- even national survival -- all based on the defense of monogamous marriage, and the power relations within monogamy. The work of Metta Victor and her fellow authors fueled a new politics of marriage, the state, and the family, which flowered in the fiction of the 1850s, and was translated into positive legislative action during and after the Civil War. Anti-polygamy polemic was, in this sense, a component part of the engine that powered government into the position of marital watchdog and legal guardian, displacing the oversight of churches and private institutions in the process.

(a) The Cultural Work of Anti-Polygamy Novels

I should note here that there is no conclusive proof that anti-polygamy fiction "caused" the political anti-polygamy campaign in a simple or tangible sense. Yet the worldview, the emotive style, the cadences of anti-polygamy fiction, first coined in the mid-1850s, recur throughout subsequent decades -- in congressional speeches, public lectures, newspaper editorials, sermons, and dozens more novels and hundreds of
periodical stories. The publication of these four novels in the mid-1850s precedes by so short a timespan the shift from a more generalized condemnation of Mormon rebelliousness, to a highly focused anti-polygamy among politicians, that the relationship is at a fundamental level indisputable, however imprecise.

There were several other aspects of affairs in Utah that troubled the statesmen concerned with territorial administration in Utah in the 1850s. More than one federal official fled the territory, complaining that Brigham Young and his cohorts had no respect for territorial law, and even less for the hapless official charged with protecting the interests of the federal government. As early as 1850, Young petitioned for admission of the state of "Deseret" to the union, boldly claiming for himself and his fellow Mormons all the power and dignity of sovereignty. And the infamous Mountain Meadows Massacre, in which several Mormons dressed as Indians participated in the grisly slaughter of a wagon train of some 140 emigrants who were traveling through northern Utah, followed by a cover-up by church officials, did little to endear the Mormons to the rest of the nation.⁴ President Buchanan even hoped to divert attention from the powder keg of slavery by sending troops to quell what he called a state of rebellion in the territory -- the so-called "Mormon War" of 1857.⁷

By 1860, however, none of these issues could hold a candle to the emotional power of polygamy. Indeed, they were often described as derivative evils that flowed


from the practice of plural marriage. From 1862 through 1890, all federal actions taken
to enact and enforce legislation in Utah were based on the perceived need to eradicate
plural marriage. The first instruments of this recalibration and acceleration of anti-
Mormonism were the anti-polygamy novels that are the subject of this part. The picture
they painted of the abominations of polygamy sold well not only in the mid-1850s -- they
sold well for decades. Edition after edition of Maria Ward's *Female Life Among the
Mormons* (nineteen separate entries appear in the National Union Catalog of pre-1955
imprints) was issued from its first publication 1855 until the final version in 1913.
Equally important is the fact that much of the subsequent flood of anti-polygamy fiction
(the 1870s and 1880s were particularly fruitful decades)⁸ were largely derivative of the
first texts that appeared in the mid-1850s. The same stories appear in countless different
guises, and in many different formats.⁹ It was in this atmosphere -- in a nation saturated
with the ideas first advanced in the 1850s -- that the legal campaign against Mormon
polygamy took root and thrived. For all these reasons, understanding the context and
content of the anti-polygamy fiction of the 1850s is an essential first step in exploring the
legal history of anti-polygamy.¹⁰

---

⁸ For lists of anti-polygamy novels (newspaper and magazine serials are not included,
but were plentiful) see Arrington & Haupt, "Intolerable Zion," 257-60, and Karen Lynn,
"Sensational Virtues," 110-12.

⁹ See, for example, Mrs. Cornelia Paddock, *In the Toils; or, Martyrs of the Latter
Days* (Chicago, 1879); Mrs. Jennie Anderson Froiseth, ed., *The Women of Mormondom*
(Detroit, 1882); [Mrs. Rosetta Luce Gilchrist], *Apples of Sodom: A Story of Mormon
Life* (Cleveland, 1885), which replicate the literature of the 1850s in many essentials.

¹⁰ I am not the first to argue that novels set the stage for legal reform. The notion
of a fictive blueprint for subsequent moral legislation is fundamental to the work of John
Bender, who argues that "attitudes toward prison which were formulated between 1719
When Metta Victor arrived in New York City in the late 1840s to pursue a career as a novelist and poet, she was part of a trend. By mid-century, just as the Mormons solidified and publicly defended their polygamous practices in Utah, women authors (and their readers) firmly established female prominence in the literary market. And a burgeoning market it was: women and young people bought and read books as they never had before. The power of the printed word was extended far beyond the male elite that traditionally had controlled literary taste and output.

Publishers' marketing practices improved rapidly in the late 1840s and early 1850s. Closely tracking the transportation and mechanical revolutions, book jobbers travelled thousands of miles by rail, peddling cheap books churned out by steam presses.11 At the same time, cultural forces influenced the content of those books. The intellectual tolerance of the South eroded just at the moment when northern publishers began to send their agents as far as the railroads would reach. Even if the South had continued to welcome books on a variety of potentially troublesome topics, the greater stratification of wealth, not to mention the less developed transportation system of the South, ensured that southern sensitivities would not impinge substantially on the

---

11 See generally the work of William Charvat, who studied the invoice books and correspondence of several publishing houses, tracking the increasing professionalization both of authors and booksellers in the first three-quarters of the nineteenth century. The Profession of Authorship in America, 1800-1870, Matthew J. Bruccoli, ed. (Athens, Oh., 1968).
profitability of books and magazines advocating abolition, temperance, or other reforms. The spectacular success of Susan Warner's *Wide, Wide World* and Harriet Beecher Stowe's *Uncle Tom's Cabin* taught the publishing world a lesson it would not soon forget.\(^\text{12}\)

Equally important was the educational level of women: by 1850, the great majority of northern women were literate.\(^\text{13}\) For many, reading had long been a salient feature of their personal, religious, and political lives. And women also wrote. Through letters, diaries, books and magazines, women spoke to each other of their fears and triumphs, their daily lives and lifelong struggles. In the process, they explained, organized and transformed the world they inhabited.\(^\text{14}\)

In much sentimental and reform fiction, the threat to women from evils brought home by their husbands (a key component in nineteenth-century reform movements) was


\(^\text{13}\) Carl N. Degler, *At Odds: Women and the Family in America from the Revolution to the Present* (New York, 1980), 308, notes that by 1850, when the census first recorded figures on literacy, over 87% of all white women in America could read and write. By 1860, 91% of farm wives were literate. See also Helen Waite Papashvily, *All the Happy Endings: A Study of the Domestic Novel in America, the Women Who Wrote It, the Women Who Read It, in the Nineteenth Century* (New York, 1956), 35-38.

the central dramatic element. Mormon polygamy was just one of their targets: Victor, for example, wrote temperance and anti-slavery novels, as well as anti-polygamy fiction, all during the 1850s. Another anti-polygamy author wrote an anti-Catholic novel shortly before her anti-polygamy book was published. Harriet Beecher Stowe was well known as an anti-polygamist, as well as an anti-slavery writer. The "abominations of polygamy," to use their most common label, was so much grist for their publishing mill.

And they sold remarkably well. Recent work by literary historians has established the cultural centrality (and the historical importance) of women's fiction. To date, there has been no corresponding rediscovery of the anti-polygamy branch of women's fiction. Over the past 25 years, scholars fiction have concluded that these novels were "vehicles of erotica," or products of a widespread "fear of sexuality," or of deeply suppressed rape fantasies on the part of authors and readers. Other standard works of Mormon historiography attribute the success of anti-polygamy fiction to non-Mormons' "palpitating desire to be shocked by the hideous aspects of Mormondom," or simply to non-Mormon "fantasy." The content of anti-polygamy fiction, these scholars agree,

---


reveals more about the views of the authors than actual Mormon practices. Yet the relationship of anti-polygamy novels to the broader culture -- their focus on marriage as the key to happiness, peace, and social stability -- remains unexplored.

The publication of four novels in the mid-1850s places the foundational texts of anti-polygamy fiction squarely within what might be called the "domestic decade." While a detailed analysis of what was a complex and conflicted worldview (itself the subject of lively historiographic debate) is beyond the scope of this dissertation, several distinguishing features of mid-nineteenth-century domesticity and sentimentalism provide clues both to why polygamy was so galling to a large segment of the American public, and to the weapons anti-polygamy novelists had at hand in their self-proclaimed battle against the degradation of wives. Briefly stated, the philosophy was grounded in the conviction that women constituted a bulwark of stability and morality against a world in which change was the only other constant. Domesticity ratcheted up the importance of household responsibilities and relationships, to the point where they became the key to national survival or doom, all under the aegis of women. Blending family, church and home in the person of the housewife, popular writers such as Harriet Beecher Stowe and

---


18 In this sense, domesticity was a rationalization and organization of the forces of brought on by a market-oriented society and the onset of industrial capitalism. See generally Sklar, Catharine Beecher; Charles Sellers, chap. 8, "Eros vs. Eros," in The Market Revolution: Jacksonian America, 1815 - 1846 (New York, 1991). See also Nancy F. Cott, The Bonds of Womanhood: "Woman's Sphere" in New England, 1780-1835 (New Haven, 1977) for analysis of changes in the lives of middle-class women during this period.
her older sister Catharine Beecher advocated wifely control of the household. The glue that held the whole structure together was emotion -- love of a husband for his wife, love of children for their mother, and the returning love for them both from a devoted woman, whose innate morality and wisdom made her God's representative in the family. The marital home, as Metta Victor said in her anti-polygamy novel, became the "sacred circle," the wife its guardian angel.\(^{19}\)

Sexuality, especially the redefinition of female sexuality, was an essential component of the new politics of marriage. Women, in this ethic, were less likely than men to crave extra-marital or improper sexual intercourse, less likely to fall victim to the penalties of "overindulgence." According to many mid-century treatise writers, male and female alike, woman's natural state, contrary to earlier conceptions of rampant female sexuality, was one of moderation, even lack of interest in matters sexual.\(^{20}\) Men were urged, for their own health as well as for the health of their wives, to allow women to dictate the frequency and timing of intimate marital relations. Even more important, both women and men were assured (by the same treatise writers) that purification of sexual mores was contingent on this ethic of deference to wives.\(^{21}\) Women's innate virtue made

\(^{19}\) For example, see Mary P. Ryan, Cradle of the Middle Class: The Family in Oneida County, New York, 1790 - 1865 (Cambridge, 1981); Barbara L. Epstein, The Politics of Domesticity: Women, Evangelism, and Temperance in Nineteenth-Century America (Middletown, Ct., 1981).

\(^{20}\) See generally, Degler, At Odds, 253-63, Sellers, Market Revolution, 242-45.

them reliable guides to proper sexual behavior within marriage, which men were urged to accept and respect for the superior spirituality it symbolized.

The advocacy of sexual restraint (or at least reallocation of sexual power from husbands to wives) was connected in part to a broad-based, and in many senses intensely conflicted, adaptation to the market revolution -- the explosion of economic forces in the early nineteenth century that redirected myriad aspects of Americans' personal as well as their work lives. To accommodate to a market-based economy, and to abandon sexual habits developed when large families were an economic boon, required long and painstaking intellectual and behavioral modifications. Sexual deference to wives, at least in part, was a reaction to forces that were outside the control of women.²²

But the new politics of marriage was more than just damage control. The reconfiguration of power within the household, and the modifications of sexual behavior that went along with it, allowed American women to control as never before the number

²² Some scholars argue that domestic ideology was the product of a relative deterioration in the status of women caused by industrialization. Sklar, Catharine Beecher, 162-66; Barbara Welter, Dimity Convictions: The American Woman in the Nineteenth Century (Athens, Oh., 1976), 85-86; Epstein, Politics of Domesticity, 73-75. See also Linda K. Kerber, Women of the Republic: Intellect and Ideology in Revolutionary America (Chapel Hill, N.C., 1980). Domesticity was an effort to compensate for economic irrelevance, by positing an alternative to the market economy that was in the process of devouring women's traditional economic role. This alternative, based on sentiment rather than money, sought the return to a more equitable, communal ethic. Given the ultimate, and indisputable, triumph of market capitalism, these historians maintain, domesticity was doomed to failure. This view was the central thesis of the analysis by Ann Douglas of the work of a group of some 60 middle-class women and Protestant clergymen in the mid-nineteenth century. According to Douglas, both women and clerics were hopelessly marginalized by secular economic activity, and they were active participants in their own downfall through their embrace of sentimentality and narcissism, which led ineluctably down the slippery slope to consumerism. The Feminization of American Culture (New York, 1977).
of children they bore, the management of the household, and the familial consumption of goods -- literary as well as more conventional commodities. Wives were awarded a new jurisdiction, the home, in which they exercised oversight and emotional power to an unprecedented degree. Women had good reason to welcome -- even to embrace -- the market revolution.\textsuperscript{23}

The market for domestic fiction in the 1850s lends further ammunition to the contention that women were active participants in parts of the marketplace, and were essential to the formation of at least one component of national economic and political development. By 1850, publishing was a $12 million dollar-a-year business. Clever publishers made it their business to court women authors, and paid them handsomely. The popular Fanny Fern received the princely sum of $100 per column from the enterprising Robert Bonner of the \textit{New York Ledger}, a story paper that serialized her novels.\textsuperscript{24} Metta Victor, according to several sources, was offered a contract of $25,000

\textsuperscript{23} There is a growing scholarship that posits women as the progenitors of the market revolution. According to this thesis, women's desire for consumer goods propelled the traditional subsistence and barter economy toward a cash-based market. See, for example, Allan Kulikoff, "The Transition to Capitalism in Rural America," \textit{William & Mary Quarterly}, 46 (January, 1989): 120-44, 137-40; Christopher Clark, \textit{The Roots of Rural Capitalism: Western Massachusetts, 1780-1860} (Ithaca, N.Y., 1990). Whether or not women were the unwitting cause of capitalism, they consistently sought to replicate the conditions produced by the market, even on the frontier. As Julie Roy Jeffrey found in her study, women on the frontier, including plural wives, wanted more than anything to recreate the domestic environment of the East. \textit{Frontier Women: The Trans-Mississippi West, 1840-1880} (New York, 1979).

\textsuperscript{24} Papashvily, \textit{All the Happy Endings}, 125.
in 1856 by the New York Weekly for the exclusive right to serialize her stories for five years in their pages.23

The reconstitution of marital relations also had a significant legal-political dimension, even if one considers household management and sexual behavior non-political. Anti-polygamy was just one of the bundle of issues that domestic writers tackled in the 1850s. Alcohol, slavery, women's property, and even (with many caveats and much backing and filling and circumlocution) separation and divorce, were treated widely by women authors (and activists) as issues peculiarly suited to women's superior morality and emotional understanding. Universal white male suffrage may have cut into women's traditional informal political voice by the 1850s, but they found other routes to political influence, if not raw power.26

The writing and reading of sentimental literature was at the cutting edge of intellectual and political developments in the 1850s. Domestic fiction, despite its reputation among some twentieth-century scholars, was not an escape from commitment to social change.27 Women wrote seriously: they believed in the power of books to


26 For the erosion of the political power of women and other non-voting groups in Jacksonian America, see Harry L. Watson, Liberty and Power: The Politics of Jacksonian America (New York, 1990), 51-53.

27 Henry Nash Smith, "Scribbling Women and the Cosmic Success Story," Critical Inquiry, 1 (1974), 51, calls domestic fiction "conformist." Ann Douglas argued that the saccharine sentimentality of women and clergymen precluded any meaningful critique of
change lives, and to influence political and legal development at both the state and national levels. Their novels were filled with realistic details, with characters and events that were at least plausible, if not always likely. And their work was saturated with the political agenda that fueled both moral reform and benevolence: virtually without exception, women were portrayed as the sole reliable source of true purity and virtue. In the name of the protection of women, and thus of the salvation of the nation, women authors campaigned for greater social and legal recognition of their interests — especially their interests in marriage. The language they used was that of sentiment and emotion, but this language was by no means a hallmark of unreality.

By the 1850s, domestic fiction, even more than advice books or sermons, communicated this political agenda for marriage, generally through stories with women as central figures whose greatest achievement was the fusion of their inborn spirituality with household duties to create a home in which female affection controlled the thoughts and actions of the entire family (especially the husband). Threats to the formation or maintenance of such a home life were the source of action and drama. In many cases, the threat came from an individual man (and sometimes women) rather than a social ill: but in many others, inherently exploitative social practices and regulations, whether it be

society. The Feminization of American Culture, 17-78.

28 See generally Sicherman, "Sense and Sensibility," 216.

29 As David Reynolds showed in Beneath the American Renaissance: The Subversive Imagination in the Age of Emerson and Melville (New York, 1988), sensationalism was ubiquitous in the most influential rhetorical devices of the mid-century, including sermons and religious writing generally. The sensationalism of domestic fiction, therefore, was consistent with widely-accepted modes of persuasion in its day.
the widespread availability of alcohol, the system of chattel slavery, or Mormon polygamy, lured men who might otherwise have been model husbands into vice and destruction of the home.

The authors who championed the protection of marriage, and the readers who made their work so popular, thus had a powerful vision, one that required the state to intervene in behalf of women when male-dominated institutions and practices created an atmosphere in which marriage was distorted, to the detriment of women. Young Mr. Reader, whose resolve on reading an anti-polygamy novel demonstrates both that readers were moved by what they read, and that men as well as women read anti-polygamy fiction and affirmed its political mandate, was only one of many thousands of consumers of fiction whose hearts were touched by tales of suffering women in Utah, and whose political commitments were formed as they read.⁵⁰

(b) The Cultural Work of Anti-Polygamy Novelists

A closer look at the four major anti-polygamy novelists of the mid-1850s and their novels reveals how authors expressed their new vision of the state, and how their advocacy helped transform the national perception of Mormonism from a minor if annoying and fanatical sect into an ominous contamination of the national moral character through the degradation of its most important resource, women. These novelists wrote

⁵⁰ On the overlap reading patterns among men and women, at least in the middle classes, see Ronald Zboray, "Reading Patterns in Antebellum America: Evidence in the Charge Records of the New York Society Library," Libraries and Culture, 26 (Spring, 1991): 301-33.
about power—the moral power of women and the threat they faced from abusive men. Their craft was the study of the tragic power differential in marriage, expressed in its most extreme and legally protracted form—Mormon polygamy.\footnote{For an explanation of the centrality of relationships of power in the work of other domestic novelists in the 1850s, see Joanne Dobson, "The Hidden Hand: Subversion of Cultural Ideology in Three Nineteenth-Century American Women's Novels," \textit{American Quarterly}, 38 (Summer, 1986): 223-42.}

The best known, and the most wide-ranging, of the four novelists is Metta Fuller Victor, whose \textit{Mormon Wives} was first published in 1856. Her work was well known, if not always widely admired, by the publishing world. Victor grew up in Ohio, began writing poetry and stories for magazines at thirteen, and according to one source she and her sister Frances moved to New York in the late 1840s in search of literary fortune and fame.\footnote{"Metta Victoria Fuller Victor," Stanley J. Kunitz & Howard Haycraft, eds., \textit{American Authors, 1600-1900: A Biographical Dictionary of American Literature} (New York, 1938), 773.} In 1853 \textit{The Senator's Son}, her first novel and part of a growing temperance literature, was published. Shortly after the publication of \textit{Mormon Wives} she married Orville Victor of Sandusky, Ohio, editor of Beadle & Adams, soon famous for its yellow-jacketed "dime novels." Victor was one of the series' most productive authors. Her anti-slavery novel, \textit{Maum Guinea and her Plantation "Children:” or, Holiday Week on a Louisiana Estate}, was dime novel number 33. \textit{Maum Guinea} sold over 100,000 copies in the United States (500,000, according to one source), and an unspecified number in England.\footnote{Edmund Pearson, \textit{Dime Novels; or, Following and Old Trail in Popular Literature} (Boston, 1929), 56. Arrington & Haupt, "Intolerable Zion," put the sales at 500,000.} It is also credited with having elicited a favorable (although unsubstantiated)
comment from President Lincoln, who reportedly said "it is as absorbing as Uncle Tom's Cabin."  

James Cephas Derby, whose company Derby & Jackson published several of Victor's works, reported decades later in his memoirs that Victor gave lots of parties. She was, Derby claimed, shy and retiring, except among "the select circle who had the entree to her pretty home."  

This circle, apparently was wide enough to include many of the popular literary figures of the day. She and her husband were regulars in the literary social scene; Victor was successful as an author and a hostess. In her social life, as in her work, Victor combined professionalism and wifeliness.

This does not mean that domestic novelists were any less practical or market-oriented than their non-domestic, largely male professional counterparts. Many women authors took an active interest in the sales of their books, and in publishers' marketing techniques. Harriet Beecher Stowe wrote often to her publishers from Maine, discussing both critical reaction (often negative) to her books, and ways of making them sell even better. Stowe also represented a colossal failure in copyright laws: spectacular sales

---

34 Charles Harvey, "The Dime Novel in American Life," Atlantic Monthly, 104 (July, 1907), 39. Dime novels, for the first decade or so of their existence, were as likely to be written and read by women as by men. By 1870, however, the dime novel had become an almost exclusively male enterprise. Nina Baym, "The Rise of the Woman Author," in Columbia Literary History of the United States, Emory Elliott, ed. (New York, 1988), 295.

35 J.C. Derby, Fifty Years Among Authors, Books and Publishers (New York, 1889), 268.

of *Uncle Tom's Cabin* in England brought Stowe not a cent in royalties. After this episode, sales in England apparently became a sort of badge of honor for an author. One could not only claim to have been wronged by "piratical publishers," but also convey indirectly the satisfying news that one's book had swum against the tide of literature flowing west over the Atlantic, and made its mark in the land of American cultural ancestry, still regarded in many ways as its most important literary arbiter.

Metta Victor was careful to include herself in this select group of American authors in a short biographical article (probably written under her supervision or even by herself -- she was the editor of the magazine in which it appeared). She claimed one of her novels was "republished in England and thirty thousand copies sold; though, like a great many other authors whose works the English press appropriates, [Victor] received no material benefit from the large sale."37

Novelists like Victor not only helped create, codify and market their political vision of marriage, they also brought the world of work squarely into the domestic realm. Writing professionalized women's special calling as wives. As Victor claimed in the preface to her temperance novel, the "captivating garb" of fiction could only be safely

---

used in the cause of "human improvement." And since it was a commonplace of domestic fiction that women were the natural improvers of humanity, the inexorable subtext of Victor's message was that only women could be trusted to handle such a dangerous weapon safely. Given the growing market for fiction in the 1850s, Victor and her fellow domestic authors laid claim to significant economic territory, all in the name of preserving women's "natural" domestic function, and their proper role in marriage.

The connection between authorship as a profession especially suited to women, and marital life was made explicit in the publication in 1865 of Victor's Housewife's Manual. Her advice, she said in the introduction, was based on her own experience in household matters. Victor was not the only one to connect her home life to her professional life in profitable ways. In their best-selling American Woman's Home, Catharine Beecher and Harriet Beecher Stowe made the connection between professionalism and wifehood explicit:

It is the aim of this volume to elevate both the honor and the remuneration of all the employments that sustain the many difficult and sacred duties of the family state, and thus to render each department of woman's true profession as much desired and respected as are the most honored professions of men."

A more direct statement of the authors' political aims for American womanhood is difficult to imagine; Beecher and Stowe confidently equated domestic "science," the

---

38 Metta Victoria Fuller, Parke Madison; or, Fashion the Father of Intemperance, as Shown in the Life of the Senator's Son, A Plea for the Maine Law, a Last Refuge (Philadelphia, 1853), iv.

province of wives, with the most important political and economic activities reserved for men.\(^6\) Victor’s work falls squarely within this expansive domestic vision of the political worth of marriage and homemaking.

Little wonder, then, that Victor and her colleagues were determined to protect their marital domain. In their eyes, polygamy represented a deliberate, even drastic, restriction of the new-found powers of women. The threat, one might counter, was remote indeed, given the isolation of Mormons in Utah. But anti-polygamist writers were convinced that the threat was real -- they did not trust men to sense the danger to their own spiritual and moral welfare. The result would be the demise of decency, the collapse of civilization. It is to the anti-polygamists' portrait of the causes and consequences of polygamy, and their prescription for its cure, that we now turn.

---

\(^6\) Jane Tompkins, criticizing the work of Ann Douglas, makes this point forcefully: "The imperialistic drive behind the encyclopedism and determined practicality of [American Woman's Home] flatly contradicts the traditional derogations of the American cult of domesticity as a 'mirror-phenomenon,' 'self-immersed,' and 'self-congratulatory.'" Sensational Designs, 143.
2. "My Spirit Shall Burn in Defense of the Purity of Womanhood": Anti-Polygamy as Advocacy

Anti-polygamist authors did not play on the emotional response of readers as an end in itself, despite the evident value they placed on the reaction of pure and noble minds to the tales they told. While Metta Victor’s heroine was trampled underneath the system of polygamy, another woman, one whose spirit had been corrupted but not broken by the same system, rose up to a life of anti-polygamy advocacy. Sarah dedicated her life to a "defense of the purity of womanhood," galvanized by her understanding of women’s suffering in polygamy.¹ Underlying each of the novels is the conviction that the very nature of womanhood was jeopardized by polygamy, and that when women realized the danger, they would act positively to redress the wrong. Advocacy was the logical outcome of the sympathy created by the existence of the suffering of women.

The formulaic qualities of anti-polygamy fiction thus have an indisputably political basis; there was method to the sameness. While it would nonetheless be an oversimplification to treat these four novels as an undifferentiated mass, several common features gave coherence to the sentiment-to-activism progression. Domestic fiction in general, as well as its anti-polygamy sub-group, has often been criticized for their predictability. The characters, according to traditional critics, are stereotypical, without depth or originality. The plots are improbable, the action stilted. It is true that domestic fiction followed predictable patterns, but that is precisely what made it so persuasive.

¹ *Mormon Wives*, 316.
Like the blurring of the boundaries between fact and fiction, stereotypicality was a hallmark of reality, or at least of realism, for author and reader alike.

Recognizable characters and predictable plots were what made anti-polygamy fiction effective for readers. Authors employed their talents not so much in the interests of originality, but as means of persuasion. According to one modern scholar, a domestic novel should be read "not as an artifice of eternity answerable to certain formal criteria and to certain psychological and philosophical concerns, but as a political enterprise, halfway between sermon and social theory, that both codifies and attempts to mold the values of its time."¹ Fiction, the argument goes, is as historically constructed and contextualized as any other form of human endeavor.

The seamlessness of the depiction of Mormons in a variety of literary formats is not surprising in an age when events were sensationalized in political speeches, newspapers, and even sermons.² The identifiability or style of a given author was far less instrumental in determining the persuasive power of an anti-polygamy novel, than the recognizability of its characters. By far the most popular of all anti-polygamy novels, Female Life Among the Mormons, first published in 1855, was issued in its first editions anonymously "by the wife of a Mormon elder," and subsequently attributed to the pseudonym "Maria Ward."³ The very elusiveness of the author may help to explain how

¹ Tompkins, Sensational Designs, 126.


³ Several sources attribute the authorship of Female Life Among the Mormons to Mrs. Cornelia Ferris. Joseph Sabin confidently states that Mrs. Ferris is the author, and that later works by the same author have been omitted because they were published after
Female Life Among the Mormons was so adept at both reflecting and refracting public opinion. The stories sounded true, whether or not there was a factual basis for the drama. They were expressions of what all right-thinking women would feel, were they faced with the horrors of plural marriage. The indeterminacy of Maria Ward's identity is thus not an argument for her social and literary irrelevance: her achievement was based on an ability to merge her message with the prevailing cultural and political climate, rather than to assert her individuality and nonconformity. Her work was accessible -- and available -- to an audience of many thousands.

(a) Death, Escape and Redemption: Anti-Polygamy as the Reclamation of Freedom

Ward's novel, like many other anti-polygamy novels, was a series of stories, each with its own internal plot, designed to highlight one or another of the abominations of polygamy. The tableaux were strung together by a tenuous but ubiquitous plotline; that is, the marriage of the heroine to a Mormon, and their migration westward to Utah. On

the time period addressed by the bibliography. Biblioteca Americana: A Dictionary of Books Relating to America from its Discovery to the Present Time, 29 vols. (New York, 1936), 27:319. Neither Sabin nor any of his successors give any documentation for their assertion, nor even any reason for assuming that Maria Ward and Mrs. Benjamin Ferris are one and the same. The only obvious justification for the assumption is the similarity of the titles of the book and Ferris's article. The former, "Female Life Among the Mormons" is strikingly similar to the latter, "Life Among the Mormons." Ferris did write an article that appeared in serial form in several issues of Putnam’s Monthly Magazine. "Life Among the Mormons," Putnam’s Monthly Magazine of American Literature, Science and Art, 6 (1855), 144, 262, 376, 501, 602. Written ostensibly as letters to the magazine from Utah in 1853, the article is unsigned, but is undisputably from the pen of Mrs. Ferris, given that the author several times refers to Mr. Ferris as her husband. The National Union Catalog, however, lists only one book by Ferris, The Mormons at Home, an account of her experiences in Utah published in 1856.
the long voyage, Mrs. Ward, as she called herself throughout the novel, gradually uncovered the truth about Mormonism. Unlike Metta Victor's Margaret, the knowledge did not kill her; Mrs. Ward took the only other avenue open to virtuous women in Utah - she escaped. But her life was forever changed by her experience; her book was the product of her conviction that the world had to be told of a "Truth stranger than Fiction":

Knowing, as I do, the evils and horrors and abominations of the Mormon system, the degradation it imposes on females, and the consequent vices which extend through all the ramifications of the society, a sense of duty to the world has induced me to prepare the following narrative, for the public eye.4

This sense of duty to engage in anti-polygamy activism is explained by the tale of suffering that follows Ward's statement of purpose. The degradation of women, as her introduction suggests, was Ward's most persistent theme, in marriage, and in all aspects of Mormon life. Wives were relegated to an ever more marginal position, as the primitive nature of polygamy eroded the veneer of civilization: "As the principles of Mormonism developed, it became evident that the females were to be regarded as an inferior order of beings. One by one the rights to which they had been accustomed, as well as the courtesies generally conceded to them, were taken away."5 Faced with the unsavory prospect of polygamy, women took two approaches: the virtuous suffered, even died, while the turpitudinous descended into coarseness and vulgarity.

First wives tended overwhelmingly to fall into the former category; the fatal blow was administered by a callous husband, who brought home a second wife. These first

4 Female Life Among the Mormons, iii-iv.

5 Id., 321.
wives never died of any very specific disease (one author did kill off her heroine with "latent consumption"); they simply could not bear the pain of life any longer. An example gives the flavor of the deadly consequences of Mormon polygamy. Mrs. Murray, a patient wife and devoted mother, learned that her husband had taken a second wife. Shortly thereafter, her children sickened and died of dysentery on the long march to Utah. She called Mrs. Ward to be with her at her deathbed:

"I wished that you should be present with me, Mrs. Ward, in this, which I firmly believe to be my last hour. I have long had a presentiment that my death was near, and the thought was one of rejoicing. I had nothing on earth to live for but my children, and now they are removed, and I thank God -- I thank God!"

She lay still a moment and then resumed: "You have sympathized with me in my great affliction, an affliction which has been sanctified to my soul's eternal interest; once I believed in Mormonism; once I forsook the faith of my father, and forgot the dying admonitions of my mother. But the estrangement of my husband opened my eyes, and I felt -- I knew -- that a belief which sanctioned and promoted such sinful practices, must be of the Evil One; and then I said, in the language of the patriarch, 'Oh, my soul! come not into their secret; to their assembly, my honor, be thou not united.' But circumstance forbade my return to the friends of my youth, for I must be weaned from my idols."

"You weary yourself, Mrs. Murray," I said; "her, take this," and I administered a pleasant cordial.

"Feel my pulse," she said.

I did so; there was not the least perceptible flutter. I saw that she was sinking rapidly.

"Joy! Joy!" she said. "I go."*

If the scene seems lachrymose, it was supposed to. Such scenes occur throughout anti-polygamy fiction, and domestic writing in general. The deaths of young women and children, and the tears of release and regret that accompanied an untimely death, were a special language in domesticity. The virtuous died young in a cruel world, because

---

* Female Life Among the Mormons, 172.
heaven was where they belonged. Domestic writers advocated the recreation of that heaven on earth through marriage -- in the "sacred circle of home," as Metta Victor put it. Destruction of marital happiness (through polygamy or other means, such as slavery or alcoholism) meant that angels could not long survive.

The deaths of broken-hearted wives were never entirely wasted, even if their redemptive effect was not immediately apparent. Margaret Wilde in Mormon Wives, for example, converted her former enemy Sarah Irving to a life of anti-polygamy activism. Death, in this sense, was not defeat, but an exercise in reformation. By dying, Margaret forever escaped the power of her husband to harm her further, and provided a compelling example to those left behind of the price paid by women for male depredation. Margaret, in short, was the real victor, although she died to win her point.7

Second wives did not always receive such sympathetic treatment. Ward described one aspiring plural wife as a "coquette," who was in part culpable "for the continuation of polygamy, because [she] preferred a rich man, with a dozen wives, to a poor one without any, and, though repentance must inevitably ensue, it would be too late."8 First

---

7 Jane Tompkins makes this point eloquently in her analysis of Uncle Tom's Cabin: "Stories like the death of little Eva are compelling for the same reason that the story of Christ's death is compelling; they enact a philosophy, as much political as religious, in which the pure and powerless die to save the powerful and corrupt, and thereby show themselves more powerful than those they save." Sensational Designs, 127-28.

8 Id., 224, 319.
wives were terrorized by such jades, who ruled with rods of iron, usurping wifely authority, and destroying "all domestic peace ... and all household affection." 

Despite the presence of a few bad apples, however, most women shunned polygamy in all its aspects. How, then, could one explain the presence of women in Mormonism in the first place? How could they accede to their own degradation? All the novelists agreed that women whose husbands converted to Mormonism had little choice but to follow them to Utah, especially given that the doctrine of polygamy was carefully concealed until escape was virtually out of the question. But what about those who actually converted, and those who remained in Utah despite the practice of plural marriage?

9 "Discord, confusion and misery reigned supreme" in polygamous families, Ward claimed. Wives refused to work in harmony with one another; one put the cutlery away as soon as another set the table. She described the household of Brigham Young, whose wives were consumed with jealousy of one another:

[Each one wishes to take precedence of the others. The eldest fancies that her age entitles her to the place of honor. The youngest, because she is a beauty, and a favorite; and the middle-aged, on account of her wealth. They will not eat together, because each one wishes to sit at the head of the table; each one also aspires to superintend and direct the affairs of the household, while the others perform the labor.

Id., 410, 387, 300-01.

10 There is an interesting subcurrent to this line of argument, which indirectly encouraged women not to follow their husbands into a faith (and perhaps into anything else) that did not appeal to their own sense of what was right. The justification for challenging the authority of husbands was usually based on a reference to an external power figure, be it a mother or a clergyman (note, however, that the appeal was made to a "female" personage, rather than a father or brother). In Ward's novel, for example, as one woman lay dying of a broken heart, she lamented that she had "forgot[ten] the dying admonitions of my mother." On occasion, women openly defied authority when commanded to enter plural marriage. "I dare to disobey any man, who seeks to make me a slave, and whose tyranny would embitter my whole life," declared a spirited young woman to her father. Female Life Among the Mormons, 172, 358.
Ward gave two alternative explanations, both of which were widely advanced in later novels and magazine literature. The first described how single women were recruited, and the second focused on the apparent acquiescence of women in Utah. Beautiful Ellen's description of her seduction is illustrative of the first category. Joseph Smith used the extraordinary hypnotic power of "ANIMAL MAGNETISM":

His presence was of the basilisk. He exerted a mystical magical influence over me -- a sort of sorcery that deprived me of the unrestricted exercise of free will. It never entered into my brain that he could cherish impure motives; that one professing such sainted holiness could seek the gratification of lawless passions. No friendly voice was near to warn me, and I fell.¹¹

Once in Utah, a far less mystical power kept women docile. The great difficulty of escape, and the brutality of retaliations against dissent, prevented women from voicing their opinions. As Ward put it, "The most, in fact the utmost, that a woman can do, is to conform to her circumstances, and be satisfied with her lot. Who would complain, when conscious that the complaint would only make matters worse?" According to an anonymous plural wife of Brigham Young, one of Ward's most fruitful informants, wives were confined in cellars for revealing any information "that can have a tendency to bring the institution of polygamy into disrepute." One wife threatened to run away if her husband brought home a second wife. He was not impressed: "No, madam, you won't

¹¹ Smith then murdered the product of their union -- his own child -- and commanded Ellen to become the plural wife of another man, "who, to excessive boorishness of manner united a most repulsive countenance and forbidding disposition." Ellen's suicide came as no surprise to Mrs. Ward, who accused Smith of her murder: "Whose fanaticism blighted the hopes of that pure spirit, degraded her aspirations for love and truth, and turned the sweetness of her life to gall and wormwood?" Female Life Among the Mormons, 65, 79, 80.
Among the Mormons, husbands are lords. They have the privilege of punishing disobedient wives, and enforcing their homage. Ward even accused the Mormons of instituting their own version of the "Lynch law" of which "women were mostly the victims" for daring to "expose the weakness or sensuality of an elder." Wives were trapped in Utah, Ward claimed, and her book was dedicated to publicizing their plight.

Ward also explained why men participated in the system. More explicitly than the other novelists, Ward attributed polygamy to men's natural "passion for variety." The same plural wife who revealed the draconian punishments inflicted on dissenting wives, explained that her husband had no affection for her: "He is for ever smitten with new faces; and that is the abomination of polygamy. Men are naturally inclined to variety, but habit, public opinion, everything, tends to restrain that inclination, in most communities. Among us, however, polygamy gratifies and encourages it."

An equally pervasive theme was that greed -- lust for money, for power, for women -- was the primary motivation for men's conversion to Mormonism. In Metta Victor's Mormon Wives, for example, Margaret Wilde's faithless husband Richard abandoned his native soil in search of easy wealth. Attempting to persuade her to join him in converting to Mormonism and emigrating to Utah, Richard "painted their future success and prosperity in almost too glowing terms; for Margaret apprehended that his

---

12 Id., 313-14

13 Id., 90, 219, 312, 428.
mind was more captivated by the projected splendor of their worldly enterprises, than by
their religion."14

The same was true for Arthur Guilford in Orvilla Belisle's *Mormonism Unveiled*; after losing an ill-conceived and poorly-run race for governor, Arthur fled to Mormonism as a means of recovering his lost wealth and self-esteem. Greed for money soon evolved into greed for women, as Mormon converts lost control over their sense of what was right. Once he left the East, Arthur careened downward morally, finally killing his wife by his cruel treatment of her.

Belisle also claimed that Mormon converts were failed men. Mormonism welcomed with open arms those who enjoyed little respect at home; Belisle argued that these were the very people whose ability to convert to strange new religions should be circumscribed. Ward put Mormonism's appeal to outcasts in an unflattering light; "'The way of the truth is so plain,' said [Joseph] Smith, 'that a fool can point it out just as well as anybody. Let those who are considered fools by their neighbors and relations come to us -- we will make them kings and priests.' And certainly a multitude of fools accepted the invitation." Last but not least Mormonism appealed to "thieves, cut-throats and swindlers," whose sins were forgiven by the Prophet, and whose conversion brought them "riches, honors, and all the wives [they] wish for in this world, and in the next, life everlasting."15

14 *Mormon Wives*, 103.
15 *Female Life*, 101.
Belisle picked up on the idea that criminals were more likely to convert to Mormonism, and that Mormon leaders sanctioned criminal behavior. Mormon men, she claimed, were "steeped in crime." Mormon husbands were freed by their creed from the martial rules that protected women; and thus all other rules crumbled, too. They were not troubled by adultery or other misdeeds, Belisle claimed, because Mormon leaders assured that no crime could undermine the power of a Mormon baptism: "'If you have murdered all your days, committed all the sins the devil could prompt you to commit, you would arise at the resurrection and your spirit be restored to your body, because you have received the baptism which cleanseth from sin. A Mormon can no more be lost than a [non-Mormon] unbaptized saved.'"16

This theme of violence, of antinomianism, was the special favorite of Alfreda Eva Bell, author of Boadicea: the Mormon Wife. Life Scenes in Utah.17 A particularly gruesome scene dramatized the violence Bell argued was inherent in polygamy. Mary

16 Mormonism Unveiled, 145, 149-50.

17 Bell also wrote an anti-slavery (and anti-Confederacy) novel in 1864. The Rebel Cousins: or Life in Secession: The Autobiography of the Beautiful Bertha Stephens, the Accomplished Niece of the Hon. Alexander Hamilton Stephens, Vice-President of the Southern Confederacy. Written by herself, and prepared for Publication by Her Friend, Alfreda Eva Bell. (Philadelphia, 1864). As the only scholarly discussion of Bell's two novels correctly points out, "[e]ach book pretends to be based on fact, but neither is factual; each has a good deal of moralizing; each is filled with fantastic tales calculated to promote disgust and hatred of a way of life regarded as contrary to the accepted (New England) brand of Christianity." Arrington & Haupt, "Intolerable Zion," 249. It is not at all clear, however, that Bell was a native of New England, or that she was a Congregationalist. Indeed, the publication of her books by printers in Philadelphia and Baltimore, but not in Boston or Hartford, supports a mid-Atlantic residence and allegiance.
Maxwell, a plural wife of Bernard Yale (a euphemism for Brigham Young) was on the verge of giving birth when Yale caught up with her in Boadicea’s home:

"Will you go with me?" asked he.
"No," answered the dying woman.
"Then you are done for," said Yale; and deliberately, before my very eyes, in spite of my wild screams for his mercy, he fired at her, and scattered her brains over the floor. I fell down in a death-like swoon.

Boadicea herself was the victim of physical abuse by her husband’s second wife, poisoning, and even an attempted assassination at a fancy dress ball. The assassin struck the "lovely Spanish wife" of Bernard Yale instead: "With a loud cry her partner dropped her, and she fell dead upon the floor of the ballroom -- her brains spattering the garments of the women near her." Boadicea was a survivor, however; disguised as a man, she escaped to tell her shocking tale in the East.\footnote{Boadicea, 49, 70.}

It is possible that Bell was a simple sensationalist -- that the spattered brains of plural wives were designed to sell books, not to make any deeper point.\footnote{This is a common accusation by Mormon scholars against anti-polygamists. Karen Lynn, for example, argues in her analysis of anti-polygamy polemics that self-serving profession of sincerity by authors were unconvinving disclaimers of a more mercenary purpose: selling books. "Sensational Virtue," 110 n.8.} Certainly anti-polygamist authors were as likely as other writers to hope their books would be lucrative. But a profit motive, shared by domestic authors dedicated to social reform as well as by authors whose work we are accustomed to take seriously, need not be inconsistent with a genuine belief in the evils of the marital system equated with violence and immorality, at least in the mind of the writer. Even more to the point, curbing violence against wives
was a ubiquitous, if subtle and often veiled, concern among proponents of the new
domestic ideology.\textsuperscript{20} Anti-polygamists, by stressing the violence they believed was
inherent in plural marriage, equated abuse with abusive social systems. The same
intellectual maneuver occurred throughout reform fiction. In her temperance novel, for
example, Metta Victor included a scene in which an otherwise mild and loving husband
beat his wife in a drunken rage.

In the work of Orvilla Belisle, the connection between sensuality, violence and
westward migration took on a nativist tinge. Belisle, about whom little can be
ascertained, except that she was a native of Camden, New Jersey, and wrote an anti-
Catholic novel shortly before trying her hand at anti-polygamy fiction.\textsuperscript{21} Both her anti-
catholic and her anti-polygamy fiction accuse priests and Mormons of essentially the same
litany of crimes: rape, abduction, and murder of young women figure large in both
books. Her nativism, which resurfaces at several points in Mormonism Unveiled, and
her intolerance of religious beliefs that subordinate the interests of individual adherents

\textsuperscript{20} As Mary Ryan noted in her study of families in Oneida County in the mid-
nineteenth century, "then, as now, wife beating was the most common crime." \textit{Cradle of the Middle Class}, 148.

\textsuperscript{21} \textit{The Arch Bishop; or, Romanism in the United States} (Philadelphia, 1855). This
is the only edition listed in the National Union Catalogue. The book was copyrighted by
Orvilla Belisle in 1854, however, and William White Smith, the publisher, styled this as
the "fourth edition," indicating that the book probably published before Belisle's anti-
polygamy novel.
to a complex and exclusively male hierarchy, run like a sub-theme throughout domestic literature.\textsuperscript{22}

Belisle, like many women authors of the 1850s, partook wholeheartedly in the widespread invocation of cultural and geographic manifest destiny that brought Utah territory under United States’ control in the first place, and that had little tolerance for what were perceived as undemocratic departures from republican ideals disguised as religion.\textsuperscript{23} Yet her work also explored the danger from absorbing potentially disruptive influences into the household or the nation. The foreign influence in marriage -- the purported religion based on the degradation of women -- was thus in some senses parallel to Belisle’s fear of foreigners in Philadelphia, whose customs (and religions) threatened the well-being of women. Especially in marriage, secrecy, duplicity, variety were at war with the interests of wives, and with the interests of patriotism.

\textsuperscript{22} As David Brion Davis pointed out some thirty years ago in a study of anti-Masonic, anti-Catholic and anti-Mormon literature, nativist writers of all stripes expressed profound fear of subversion of liberty, individuality and prosperity at the hands of single-minded fanatics. In their defense of unsullied Americanism, nativist authors not only contributed to a sense of national identity and purpose, they also took on some of the very traits they sought to exclude from American soil. As Davis argues, nativists ultimately advocated curtailing liberty for the sake of liberty, an awkward position philosophically, even if libertarianism was not part of the intellectual landscape. "Some Themes of Counter-Subversion: An Analysis of Anti-Masonic, Anti-Catholic, and Anti-Mormon Literature," \textit{Mississippi Valley Historical Review}, 47 (1960), 205, 222.

\textsuperscript{23} Maria Ward drew an explicit connection between Catholicism and Mormonism: "The church government of the Mormons resembles that of the Catholic hierarchy, in many respects. Smith, while he lived, was pope." \textit{Female Life Among the Mormons}, 99.
(b) Slavery and Aristocracy: Anti-Polygamy as the Protection of the Middle Class

The relationship between conversion to Mormonism, westward migration, and cupidity in anti-polygamy fiction was a subtle and pervasive one, laced with class as well as nativist anxieties. Anti-polygamy authors drew a sharp distinction between the husbands (however faithless) of their heroines, and run-of-the-mill Mormon recruits. Belisle was especially straightforward in her depiction of the lower class elements of Mormonism, and her heroine's distaste for their vulgarity and levelling tendencies:

"[Margaret's] only hope now was, that [her husband Arthur's] refined education and early associations would revolt in disgust against the ignorant, vulgar mass of humanity admitted in [Mormonism's] pale; but in this, too, she was disappointed, and, to her consternation, her high-born, elegant refined husband became also an adherent of the Prophet." Once removed from the "most intellectual and refined circles" of the East where his fatal moral flaw was restrained by civilization, Arthur succumbed to the "mystic vapors" of Mormonism.

In part because the familiar restraints of class structure were removed in the West, Mormonism ensnared those men who wished to rise above their origins. But the real danger, which was apparent from the beginning to both Margarets (that is, the heroine of Mormon Wives as well as the heroine of Mormonism Unveiled), was that instead of raising themselves in the world, Mormons would in fact drag everyone down to their level. Belisle even accused Joseph Smith of being motivated by a "levelling" desire.24

---

24 Mormonism Unveiled, 65-66, 70.
Anti-polygamy writing, and domestic writing in general, was infused with an impassioned defense of the middle ground. Extremes of wealth and poverty were anathema to these women. Not only were native-born Americans who converted to Mormonism likely to aspire to more wealth than was good for them in these novels, but even more ominous, foreigners, especially the English poor, recruited in the slums of cities such as Liverpool and Birmingham with promises of great riches for little labor, came to Utah in droves, where they swelled the ranks of uneducated and undemocratic Mormonism.\textsuperscript{25} As Belisle put it, sounding a theme that resonated in much of anti-polygamy fiction, "[immigrants] with no other naturalization than that of a Mormon baptism, being permitted to vote, ... were even admitted into the Legislative body to make laws to govern free-born Americans." Metta Victor, in an appendix to Mormon Wives that quoted newspaper articles to drive home the point that Mormonism threatened to pollute the entire nation, included the following description of a boat-load of emigrants newly arrived from Liverpool: "They all belong to the lower, almost to the lowest classes of society. [ ] Their countenances were imbruted with ignorance and dirt -- not the material dirt of a sea voyage, but the moral dirt of a life of imbecility and indolence.

\textsuperscript{25} This theme is repeated several times in Cornelia Ferris's "Life Among the Mormons," 378-79, as well as in book-length treatments:
[An Englishwoman from Bath] went on to narrate, in a simple artless way, how happily she and her husband had lived together -- how they were anxious to emigrate to this country -- how they had been told that the valley of Salt Lake was a paradise, that her husband could have land for nothing, and earn $5 a day -- how their expenses had been defrayed by the Mormon agents, to be refunded by her husband's labor here on public works. And then, with tears streaming down her face, she said her husband, about three months since, had been persuaded to marry another wife, and how badly she felt when she first heard of his resolution.
The Apostles of Joe Smith and Brigham Young found them an easy prey, although, as our reporter was told, they were quite above the average of Mormon respectability."

The domestic culture of class at mid-century was sustained not only by the contempt of women like Metta Victor for both wealthy and impoverished Mormon converts, but also by their veneration of the material trappings of middle-class wifehood. Victor's heroine, for example, uncorrupted by the influences of "fashion," was married in a dress she made herself, of simple white lawn, scented only with rose petals. No French perfumes or frills detracted from Margaret's purity of body and soul. All was clean, neat, simple. Nothing in Margaret's appearance or demeanor conveyed a sense of want or penury. Through these details of appearance and housekeeping -- tablecloths were always "snowy white," food simple but flavorful, and gardens orderly and blooming -- domestic authors conveyed a gendered class message to their readers.

This celebration of the economic middle ground as the special purview of wives was threatened directly and immediately, anti-polygamists were convinced, by plural marriage, which denied women control over home and hearth. The inevitable consequence would be the division of society into rich and poor, with a few men enjoying great luxury at the expense of all women and most men. Orvilia Belisle made the connection between polygamy and stark class divisions explicit:

[In Utah] with thirty thousand subjects, [Brigham Young] reigned supreme autocrat, holding the wealth, labor, liberty and lives of his followers at his own mercy, which was swayed by the passions that held him in bondage, and whose slave he had become. The infatuation of his subjects could not hide from them

the imposition and enormities of their leader; and the burdens cast upon the
labourers, to wring from them the means to support the largely stocked harems
were more than they could bear."

Ironically, then, in anti-polygamy fiction converts lured by promises of wealth and social
prominence under Mormonism were themselves exploited by the polygamous Mormon
elite.

The division of society into a pampered and much-married male aristocracy at one
end, and oppressed wives and poor men at the other, the licentiousness and violence of
plural husbands, and the death of those wronged by an abusive social and sexual system,
all point to a connection that anti-polygamist authors drew early and often -- polygamy,
they claimed, was a form of slavery. Both systems, they claimed, were based on
uncontrolled male sensuality, on the betrayal of wives, and both were fundamentally
contrary to the redemptive potential of female-centered morality.

The language and imagery of slavery saturated their work. Alfreda Bell, for
example, describing the lot of women in Utah, claimed that "they are in fact white slaves;
are required to do all the most servile drudgery; are painfully impressed with their
nothingness and utter inferiority, in divers ways and at all seasons; and are frequently ...
subjected to personal violence and various modes of corporeal punishment." Like
southern slaveholders, Bell argued, Mormon men bought and sold women -- even their


28 Boadicea, 54.
own daughters -- and were "to the last degree demoralized, effeminate, and lazy." Maria Ward maintained that surveillance in Utah was fully as "cruel and remorseless" as the "bloodhounds" who tracked "runaway slave[s]." Ward told of seeing "[Mormon Prophet Joseph Smith] sitting lazily on the door-stone, basking in the sun, while [two of his wives] were at work in the neighboring corn field."

The connection between the enslavement of women in polygamy, the tyranny of Mormon men, and social regression generally, was a constant theme. Plural marriage, argued the anti-polygamy novelists, was a return to barbarism, a step backwards for women, and thus a threat to the stability and freedom of the entire nation. Like slavery, polygamy could not be tolerated in a civilized country. Metta Victor, in the introduction to the second edition of *Mormon Wives*, highlighted the connections between polygamy, slavery and intemperance as threats to national survival:

Repulsive as slavery appears to us, we can but deem polygamy a thing more loathsome and poisonous to social and political purity. Half-civilized States have ceased its practice as dangerous to happiness, and as outraging every instinct of the better nature within every breast; and as ages rolled away they left the institution behind as one of the relics of barbarism which marked the half-developed state of man as a social being.... [ ] [A]s citizens of this country, we owe it as a duty, not only to the Constitution, but to humanity, that we sternly oppose slavery in all its forms -- intemperance and its hideous deformities, and

---

29 *Id.*, 34. Bell also described a callous father who sold his daughter to a Mormon elder. The girl was beaten to death after she refused to become the elder’s plural wife:

"But then you’ve cheated me," answered old Boisrouge; "it is not so much la fille, se girl heroel! it is mine monish, mine monish, vat you did promish me for her, if I did try for make her be our vife; vat you did promish me, scelerat!"

"None of that eternal gibberish," answered Holmes. "I don’t like it, and I won’t stand it, -- no, I won’t. She’s dead, and I’m sorry for it; but a bargain’s a bargain. I bargained for a live girl, and not a dead girl, Boisrouge!"

30 *Female Life Among the Mormons*, 438.
polygamy with its train of evils which no man can truly conceive, but which surely will end in animalizing man, in corrupting the very founts of virtue and purity, and, finally, in barbarism.\textsuperscript{31}

Slavery and polygamy -- "animality," as Victor put it -- were only possible where society was "uncivilized," where men could make marriage laws to suit themselves, without the restraints of Christian custom and the Constitution.

As in abolitionist literature, the role of the West, of the territories in the perpetuation and spread of polygamy, was a constant concern. The sectionalism of much of anti-polygamy rhetoric is especially evident in the work of Maria Ward:

Doubtless, the Mormon exodus was a matter of rejoicing to the enemies of that people, or it may be that they regarded the matter with absolute indifference: though to that very fact, is owing their unaccountable prosperity and rapid increase.... They were at liberty to form such laws as suited them, to establish precedents and decisions, conformable to their own views; and, above all, the utter impossibility of escape or appeal, exercised a wonderful influence over the dissatisfied, and aided, more than anything else, in causing them to abide by their fate, and conform to the circumstances in which they were placed. Had injured wives possessed the chance of redress by law, or even the opportunity of flying from the scene of such licentious habits, polygamy, even in its infancy, would have received a death-blow; but these, the ones most interested in its suppression, and upon whom fell the burdens of its intolerable evils, were constrained to abide by it, and, in most cases, without murmur or complaint.\textsuperscript{32}

The male world of the western frontier, outside the female-controlled environment of the East, was portrayed as an especially dangerous place for morality, for stable class structure, and, dearest of all to domestic authors, for women. The farther they travelled from the eastern seaboard, the more likely men were to lose sound judgment about matters of marriage. Arthur Guildford in \textit{Mormonism Unveiled}, for example, began to

\textsuperscript{31} \textit{Mormon Wives}, vi-viii.

\textsuperscript{32} \textit{Female Life Among the Mormons}, 294-95.
decline in Nauvoo, but his freefall from grace only occurred once he had arrived in Utah. The farther the wagon train travelled, the more precarious the position of women, until finally in Utah their enslavement was revealed in all its horror.33

Clearly, domestic authors were ambivalent about the role and value of the West in American culture and politics. None of the novelists explicitly condemned the expansionism that brought Utah under the jurisdiction of the United States in the first place, but they were all deeply concerned with the maintenance of order and civilization - of marriage, even in areas of new settlement. Most disturbing was the absence of an established legal system, under which wives would be protected from the depredations of their husbands. As in abolitionist polemics, it was the inability of plural wives to seek the protection of the law that was especially galling. The lack of an enforcement mechanism to restrain male sensuality and violence, they maintained, destroyed marriage and the family, and transformed wives into slaves.

The negative consequences of polygamy and slavery made for a more dramatic, but also for a more easily distanced, explanation of the physical abuse of wives by

33 On the other hand, Orvilla Belisle, although she labelled the Mormon settlement in the West a "modern Sodom," was quick to distance the Mormon character from western Americans in general: "The western borderer may not be able to compete with their eastern brothers in the code of etiquette which hems them in, until it is impossible to see a glance of their real natures peeping out, but he can, and does excel in the keen perception of what is, and what is not, honorable and manly. Generous, brave, and possessed of indomitable energy -- he forgets and forgives conditionally; firstly, that no such wrongs again occur — secondly, that those who have outraged justice leave the district to ensure obedience to the first condition." Mormonism Unveiled, 132. In this view, westerners were for the most part admirable, perhaps even superior to their more polished eastern countrymen at recognizing and punishing transgressions of the natural order of things.
husbands. The flip side of an argument that polygamy encouraged domestic violence, of course, was the presumption that monogamy promoted domestic peace. Herein lies an essential nub of all anti-polygamy fiction (and of domestic reform fiction generally); by dramatizing the evils of polygamy, anti-polygamist authors validated monogamous marriage, basing their approval on the premise that women were the natural leaders (if not the titular heads) of monogamous households. At the same time, of course, anti-polygamist women indirectly condemned all violence against women, and all unhappy marriages.

The connection to anti-slavery also provided a blueprint for activism, especially for women’s activism based on an appeal to the emotional suffering created by a system of oppression. Anti-polygamist authors were in this sense part of a tradition of reform-oriented didacticism. But (like anti-slavery activists before them) anti-polygamist novelists were not mere didacts, exhorting the men of Utah to reform their polygamous ways. They invoked the legal system for protection.
3. "Those Who Make Their Own Laws to Suit Their Own Purposes": The Legal Vision of Anti-Polygamy Fiction

Meta Victor made no bones about what she thought was wrong with Utah: legal power had been vested in "those who made their own laws to suit their own purposes, who brought strange doctrines out of the depths of their own foul imaginations and called them revelations."¹ The legal definition of marriage was the root of the problem, and the power to redefine marriage in the interests of women was the solution. In part the corruption of law had been achieved by toleration of moral diversity based on geographic distance, in part by the domination of statecraft in Utah by the priesthood, and in part, of course, by self-deception mixed with outright fraud. Victor understood that polygamy had a legal foundation, and would require positive legal action to destroy.

This realization brings us directly to the issue that dominates the history of anti-polygamy over the next four decades: the role of legislation, and its enforcement in the court system, in bringing what most Americans considered a barbaric social system into line with the rest of the country. The anti-polygamist authors of the 1850s advocated stringent federal oversight of territorial lands, clear and readily enforceable laws, and unequivocal punishment of wrongdoers, all to protect women from the corruption of marriage, the degradation of polygamy. Ultimately, an entire statutory scheme was constructed, and a slew of federal officials hired and sent to Utah, codifying (and inevitably recalibrating) the mandate spelled out in the anti-polygamy writing of the 1850s.

¹ *Mormon Wives*, 198.
The legal consciousness of these authors, the understanding that laws were needed to protect wives from husbands who indulged their inclination to "variety," pervades the novels of the 1850s. It would be an exaggeration, however, to assert that anti-polygamist authors had a detailed understanding of how federal enforcement of anti-polygamy legislation would or could be carried out. What they were interested in exploring at length and in depth, was the nature of power within marriage, and the relationship between women's power and marital structure.

Anti-polygamist authors were passionate students of injustice, dedicated analysts of the consequences of unequal distribution of power between husbands and wives. By changing the rules, tinkering with the law of marriage, anti-polygamist novelists charged, Mormons had opened Pandora's box. The final extinguishing of wives' selves, the betrayal of women's sacrifice of self, even in monogamous marriage, by the abolition of the protective law of marriage, was the central crime of Mormonism, for which women in Utah had no legal remedy. The only immediate solution to the problem of plural marriage was death or dissolution through escape. Of the four heroines, two died of grief and sorrow, and two fled from Utah to the safety of the East. The long-term solution, however, and the one that was championed more or less openly in all of the novels, was legal reform for the protection of women. Only by forcibly preventing men from indulging their baser proclivities could women assume their rightful place in society, domestic authors argued.

Metta Victor, for example, believed that when positive legislation to protect wives was in place, behavior would actually change. In her temperance novel, she pleaded for
enactment of the Maine Law in all states, arguing that human nature alone could not accomplish the reform of society. "As long as men must be governed, let them have as many laws as are necessary and just. If this was the millenium [sic] reign of love, when the lion and the lamb are to lie down together, we should not need those restrictions. Now they are wholesome, necessary and wise."\(^2\)

(a) Anarchy and Theocracy: Anti-Polygamy and the Law of the Land

Anti-polygamists believed deeply that the absence of laws, the fact that women had no "redress by law," as Maria Ward put it, was the linchpin in the perpetuation of polygamy. Mormons had escaped the ambit of the "laws of the land." This antinomian potential reached its most dangerous manifestation in Brigham Young, who bragged to a beautiful young woman of his total power over her, power to make whatever laws he wished:

Laws of the land! now that is too good -- laws of the land! indeed, what laws of the land are there, but my will? what State? what government has power or authority? No! my beauty, set your heart at rest in that quarter. Here I do as I please with my own. I consider myself amenable to no law, but the code of Mormon, and that places all authority in my hands.\(^3\)

The notion that law could be created by one man for his own benefit, that the sovereign could not step in to protect women from abuse, meant not only that all women were at risk in Utah, but that law itself could not survive.

\(^2\) The Senator's Son, 44.

\(^3\) Female Life Among the Mormons, 292.
It was only a small step from the lawless abuse of wives, anti-polygamists believed, to loss of respect for all law. Orvilla Belisle claimed that Mormons stole grain, horses and merchandise as readily as they did daughters and sisters.\(^4\) Rape, kidnapping, even murder was sanctioned by Mormonism, Belisle maintained.\(^5\) All because Mormons had attempted to separate vice from crime, by calling a virtue what everyone knew to be a sin, they had started down the slippery slope to utter lawlessness, even while preserving a veneer of order. Right-thinking women, even those who were thrust into the midst of Mormondom, knew the true nature of plural marriage, despite whatever specious arguments its proponents might advance. Polygamy was, plain and simple, a crime, but one that was going unpunished daily in Utah. Belisle’s heroine Margaret Guilford, for example, raised in the tender bosom of civilization, recognized immediately the fundamental falsity of Mormon claims to be law-abiding citizens. "She knew vice under

\(^4\) Belisle, it should in fairness be acknowledged, was no advocate of scrupulous adherence to the letter of the law, especially where the British, Mormons or Catholics were concerned. Her description of anti-Mormon riots reveals her own predilections: "I am no apologist for lynch or mob law, but there have occasions occurred, and may again, when the people have arisen in their might and bade the tyrant’s vice and oppression begone. So they did at Lexington and New Orleans, and so they did at Philadelphia in 1844, and so they were doing in Missouri now." *Mormonism Unveiled*, 132, 133.

\(^5\) The "Danites," or "Sons of Dan," were, according to many anti-polygamists, a group of Mormon vigilantes who hunted down and brutally murdered both non-Mormons and Mormons who dared to stray from the path of strict obedience to the leadership. The role of the Danites, and whether their activities were supported by church officials, remains a topic of debate among Mormon historians. See, e.g., Klaus J. Hansen, *Quest for Empire: The Political Kingdom of God and the Council of Fifty in Mormon History* (Lincoln, Nb., 1974), 57-58; Leonard J. Arrington & Davis Bitton, *The Mormon Experience: A History of the Latter-day Saints* (New York, 1980), 54, 353 n.45; Leland H. Gentry, "The Danite Band of 1838," *Brigham Young University Studies*, 14 (Summer, 1974): 421-50.
no other name than crime, every grade of which she had been taught to abhor and call by its right name, lest in softening it she apologized for the act by misnaming the criminal."

The connection between abuse of women and crime was played more than one way. Anti-polygamy authors drew the parallel that must have been obvious to everyone in the 1850s. Not only did they compare the moral effects of polygamy to those of slavery, they also clearly understood the political and legal similarities between the South’s defense of its peculiar institution, and the institution of polygamy in Utah. Orvella Belisle described a Mormon missionary attempting to seduce a virtuous young English girl. When the young woman demurred on the ground that polygamy was illegal, the missionary hastened to point out that in America there was no such thing as a uniform legal code:

The Union is made up of distinct States, which make the laws that govern their own territory; and whatever laws the people of any one State construct for their own government, the other States have no right to interfere with; therefore, it is not necessary for the whole Union to give their assent to any custom to make it legal, or to have custom sanction it; if one State sanctions it within her territory, it is both legal and right."

This is a reprise (and targeted critique) of the territorial sovereignty argument current among many Democrats in the 1850s. It was a familiar attempt by self-styled pragmatists to remove slavery from debate at the national level. Territorial (and even state) sovereignty in matters of moral welfare was anathema to anti-polygamists, of course, just

---

6 Mormonism Unveiled, 95.
7 Id., 91-92.
as it was to abolitionists. Metta Victor even argued that such "squatter sovereignty" was contrary to the fundamental constitutional design of the Union.

Reject [polygamy], and we accomplish the first step in a reform which shall restore our country to its once proud purity, and give to it a new character for moral and intellectual grandeur. Under its laws we ought to be the best, the purest, the wisest, the bravest people on earth; and this we shall be are we but true to the first principles laid down by our Revolutionary fathers -- the nobility of man. Whatever degrades him -- whatever corrupts and injures his moral, intellectual, and physical well-being is inimical to the well-being of society, to the State, to the whole country; consequently, to the spirit and intent of that Constitution which is to perpetuate the republic, and render it, in truth, the refuge for the oppressed, the home of liberty.  

To Metta Victor and her fellow anti-polygamist novelists, as well as to domestic thinkers generally, the government had no business sanctioning immorality and antinomianism in the name of localism. On the contrary, argued Victor, legislators had a positive duty to enforce the morality that was the bedrock of the Constitution. It was an easy transition from a claim that the federal government should not remain passive in the face of moral transgression to a claim that government must actively promote and enforce the morality of all its citizens. With regard to polygamy, as opposed to the more troublesome case of slavery, anti-polygamists generally found a receptive audience.

Anti-polygamist writers also reframed the traditional condemnation of Mormon theocracy in terms of the consequences of the political power of the Mormon priesthood for women. As a lecherous old man, who had just concluded the purchase (for two horses and a cow) of two beautiful young women from their greedy father explained: "Polygamy, as I take it, is the legitimate offspring of the union of Church and State. The

---

Church is more careful and tender of the interests of believers, than the State, when divorced from her, could ever be." Plural marriage, he claimed, was "the chieffest of our blessings, and that will be what the heathen will attempt to root out and destroy."9

The presumed evil flowing from an established church was still a relatively unsettled issue throughout most of the states in the mid-nineteenth century. Massachusetts was the last to formally disestablish in 1833, but considerable confusion about the relationship of church and state was still apparent. Several years after disestablishment, for example, the Massachusetts Supreme Judicial Court sustained a blasphemy conviction.10 The use of the coercive powers of the state on behalf of explicitly religious interests was still a relatively common occurrence. In one sense, therefore, anti-Mormonism was a unique and convenient forum for separationist sentiment to be formed and expressed. In Utah, the purported evils of an established church were easily spotted, especially in Mormons' religiously-based legal claim to practice the barbaric institution of "celestial marriage." Anti-polygamous authors argued that polygamy (and Mormonism) could flourish only in a theocracy.

The advocacy of strict separation of church and state thus became an additional weapon in the domestic arsenal, the legal application of the political belief in women as the core of spirituality. If the informal, home-based religion of individual wives was the true source of faith and virtue, this argument went, then any overtly political (and

9 Maria Ward, Female Life Among the Mormons, 325.

therefore male) institutionalization of religion was in fact the degradation of religion, and, not surprisingly, of women. This religious corollary to the new politics of marriage, according to which women as wives had primary jurisdiction over whatever affected the marital relationship and the family homestead, while clearly anti-clerical, also contains interesting seeds of anti-statism in a philosophy that was otherwise profoundly committed to state intervention on behalf of women. Only certain kinds of state actors, those who came to their posts without any explicit religious affiliation, were qualified to legislate the protection of women.

Utah, in this view, was not only over-governed (by the highly interventionist priesthood), but also under-governed (by the absence of laws on the books). The simultaneous existence of anarchy and theocracy was comprehensible, in anti-polygamists' eyes. Mormonism, they charged, which placed priests in charge of legislatures and in charge of households, had gotten the source of morally valid government wrong. By undermining the distinctions between church and state, and between church and home, Mormon's jeopardized all three. The condemnation of Mormon lawlessness and Mormon theocracy, simultaneously posited a contrast between the plight of women in Utah and the protection of women in the East. By arguing that wives were not sufficiently valued in Mormonism, anti-polygamists indirectly claimed that married women were better protected in states and territories that outlawed polygamy. Implicit in anti-polygamist authors' portrayal of the pain inflicted by the sexual infidelities of polygamous husbands, was the message to readers that adultery was less frequent where monogamy was the only lawful form of marriage.
(b) Anti-Polygamy and the Appeal to Male Legal Authority

All legislators had to do to meet the demands of anti-polygamists was impose on Mormons the same standards they themselves observed. This was a far easier pill to swallow than the claims of radical abolitionist women that marriage -- even the monogamous marriage of the States -- was a form of enslavement for women. According to Angelina Grimke, for example, her investigation of the disabilities of the slave had led her to the realization that women endured many of the same handicaps, and suffered from a similar invisibility politically and legally.\textsuperscript{11} Woman's rights advocates in the 1850s, like anti-polygamists, thus drew inspiration from abolitionism.\textsuperscript{12}

But anti-polygamists showed an abiding faith in the ability of traditional marriage (and traditional marriage laws, especially those that mandated monogamy) to protect and advance women, while their more radical counterparts rejected existing social and legal practices as part and parcel of the enslavement of women. The radical interpretation has captured the attention of twentieth-century feminists, even if they reject the easy parallel between monogamous marriage and chattel slavery.

Indeed, anti-polygamy writers' confidence that legislation mandating monogamy would ensure the implementation of their political agenda for women in marriage, was unbearably naive. Certainly the lessons of antebellum prohibition, the so-called Maine


Law that was enacted in several states, and for which Metta Victor was a prominent advocate, were disappointing.\(^\text{13}\) After an initial period of apparent success, compliance with teetotaling legislation steadily eroded. But temperance activists, temporarily set back after the failure of Maine Laws, re-emerged in the early 1870s with new vigor and an even more explicitly gendered program. The "moral eye of the state," as one historian put it, was focused on issues of concern to women.\(^\text{14}\) Temperance became by and large a woman's issue, a matter, as Frances Willard claimed, of "home protection" through legislation.\(^\text{13}\) Given the rights laws, anti-polygamists and their fellow travellers believed, they could reform behavior. Trust in the power of government to create and police a more moral society ran deep in domestic veins.

Anti-polygamists deployed their legal arsenal in the interests of the new politics of marriage. Indeed, anti-polygamy may well have been the single most successful nineteenth-century political and legal campaigns for reform. For Congress did enact ever more stringent laws against polygamy during and after the Civil War, eventually even confiscating most of the property owned by the church. And the church finally capitulated in 1890. Alcohol, pornography, domestic violence, prostitution, poverty, and


a host of other ills still plague us today. Yet polygamy has, for most intents and purposes, been eradicated.\footnote{Stubborn (and routinely excommunicated) polygamous contingents survive in Salt Lake, and in rural pockets of Utah, Arizona and Wyoming. These dissidents are an embarrassment to many orthodox Mormons, but little more than a curiosity to the rest of the country, the subject of People magazine articles and the occasional New York Times story. See, e.g., Elizabeth Joseph, "My Husband's Nine Wives," New York Times, 23 May 1991, 31, col. 5; "Ex-Cop Royston Potter Runs Afoot of Utah Law But Not His Three Wives," People Magazine, 22 November 1983, 83.}

How did anti-polygamist writers achieve such persuasiveness? Part of their success may be attributable to the very naïveté that seems so striking to twentieth-century readers of anti-polygamy novels. The legal history of women who worked within the system, of indirect political and legal agitation and effective legislative lobbying, is largely unexplored. Women's political campaigns for legal reform provide insight into the reasons that the vision of anti-polygamist authors was so widely appealing, while more radical activists, including those who campaigned for the vote and easy divorce, were not.\footnote{One such reform movement, with which anti-polygamy shared some fundamental assumptions about the importance of legal protections for married women, is illustrated in the career of Elizabeth Packard, a woman whose husband had committed her to an insane asylum. After her release, Mrs. Packard testified in front of mid-western state legislatures, arguing that women should be protected from the kinds of abuse she herself had suffered. Mrs. Packard was on the whole well received, and her advocacy helped promote to the loosening of married women's property acts, revised custody legislation, and personal liberty laws in several states. Hendrik Hartog, "Mrs. Packard on Dependency," Yale Journal of Law & the Humanities, 1 (1988): 70-103, 85.}

Anti-polygamists did not directly challenge legislators' views of themselves or their relationship with their own wives and families. Metta Victor never questioned male political authority, or claimed equal political status for women; rather, she asked
legislators to recognize the rights of women in an explicitly female realm, the home. Only state intervention, they argued, could adequately protect women from an entire system that tyrannized wives. They helped get the legal system involved in the moral evaluation of marriage by insisting that most marriages would not be subject to scrutiny.\(^\text{18}\)

Anti-polygamists appealed to what they presumed were legislators' deeply felt obligation to protect and cherish their wives as autonomous beings, whose reign over the home provided their husbands with all the comfort and happiness of domestic bliss.\(^\text{19}\) Men might technically have the legal power to rule their wives with rods of iron; monogamous men were restrained by the very structure of marriage. But the existence of deviant men, men like the Mormons, provided women with a powerful argument for a reform that could be enacted by legislators without seeming to affect their own lives.\(^\text{20}\)

\(^{18}\) Hartog notes that his study of the career of Mrs. Packard "suggests the need for a rethinking of domestic feminism and its relationship to its supposed opponent, political feminism," a point that bears emphasis in the anti-polygamy context. "Mrs. Packard on Dependency," 94 n.50.


\(^{20}\) Hartog put it well: "It is important to note how strategically effective such a line of argument would be in lobbying legislators. They could view reformed marriage laws as necessary and good, as helping solve a 'problem' in society, and still avoid thinking about the reforms in terms of their own relationships with their own wives. Both as legislators and as husbands, they could feel confirmed in their manliness." "Mrs. Packard on Dependency," 101 n.68.
The subtext, of course, was profound distrust of most (if not all) men. Anti-polygamists never argued outright that all men were nascent polygamists, although they came perilously close to such an assertion from time to time. In each of the novels, at least one male character remained constant to his wife throughout, naturally abjuring a marital system that did not respect the feelings and dignity of wives. These men, the natural protectors of women, were lionized as embodying all that was appealing, trustworthy, restrained, manly. They were the ideal men whom authors urged eastern men to identify with.²¹

Further, anti-polygamists never argued that laws to protect wives must be enacted or administered by women. Their very validation of monogamy as it existed in the States was a refutation of claims that marriage itself was inherently unjust to women. Instead, they attacked a perverse form of marriage, which catered to the base interests of men who had forsaken their manliness through the quest for sensual gratification, material wealth and power, all at the hands of a corrupt religious system. It was easy for legislators, for American men in general, to distance themselves from Mormon men. Mormons, after all, were geographically concentrated in Utah and believers in a bizarre religion. Congressmen could also comfortably view polygamy as a gross transgression of marital vows, without having to confront unpalatable facts of their potential or actual sexual transgressions at home. One could safely inveigh against polygamy, and many in

²¹ In Metta Victor's novel, for example, the heroine's brother Harry remains noble and loyal throughout, despite the temptations of iniquity, wealth, and beauty: "The natural purity of his heart had not been polluted by fashionable dissipations; his keen sense of honor was such as sometimes to reflect upon the less scrupulous impulses of his brother-in-law." Mormon Wives, 52.
Congress and the White House did, almost with impunity. Anti-polygamist authors gave legislators an issue they embrace, because they did not have to examine their own behavior in the course of enacting legislation that effectively involved the state in marital relationships.

Anti-polygamists also indirectly provided legislators with a means of distancing the rumblings of women in the East. By focusing attention on Mormon Utah, monogamous marriage was insulated to some degree from attack at home. Although feminist abolitionists were a small minority, even within the abolitionist community in the late 1840s and 1850s, they were noisy, and prone to make telling arguments about the uncanny resemblance of the laws of marriage and slavery that threatened to unsettle all of society. Polygamy gave legislators a handy counter -- here was a form of marriage that truly replicated slavery for white women. By enacting laws to punish the enslavement of women in Utah, congressmen could redirect attention away from domestic relations in their own states, and toward a rebellious territory. In this sense, Utah was indeed a handy foil.

Second, anti-polygamist writers of the 1850s were deeply involved in what would emerge as the moral governance movement after the Civil War. In contrast to more radical feminists, such as Elizabeth Cady Stanton, anti-polygamist women were not engaged in a struggle for wives to be allowed to assume individual control of their own economic and political destinies. Like anti-polygamists, most domestic authors were more at ease talking about obligations than rights; they distanced themselves early and often
from classical laissez-faire economic and political theory.21 Anti-polygamist writers were, like the members of the Woman’s Christian Temperance Union, deeply committed to the legal protections of monogamy as the only valid form of marital structure. The connection was often explicit, especially after the Civil War. Frances Willard, head of the WCTU, wrote an impassioned introduction to a compendium of anti-polygamy stories published in the early 1880s:

Who will lead us along of path of high endeavor which this thoughtful volume indicates, until the Book of Mormon is burned in the fierce blaze of Christian manhood’s indignation and woman’s righteous wrath, and the Gospel of Him who came not only to redeem the world but to restore to woman her lost inheritance, “the equality of equals,” is the beloved Home Religion in every Home?22

Wives and mothers, in this view of family polity, were at the center of political life as well as of personal life, even if they trusted manly legislators to ensure their continued centrality. The state was transformed by this philosophy into an appendage of the family, especially in areas that involved morality and the protection of women.

Anti-polygamy authors in the 1850s thus championed a far more supervisory state, based on a peculiarly feminine ethic of love and human connectedness, all in the interests of protecting wives’ power to control marriage and the home. Wherever they saw these ties of connectedness interrupted by selfish action -- in slavery, in polygamy, in alcoholism -- they campaigned for state intervention. Polygamy, of the many issues raised by this evangelical view of domesticity, was the easiest case. Not only were


\[22\] "Introduction," in The Women of Mormonism, Mrs. Jennie Anderson Froiseth, ed. (Detroit, 1882), xviii.
Mormons comfortably distant geographically and insignificant demographically, but their very religion was anathema to the Protestantism many women believed was their greatest ally in their battle to save the world through mother love.\textsuperscript{24} Homogeneity, not diversity, was their aspiration.

Implicit in the condemnation of moral diversity, of priestly authority, of male violence and faithlessness, of course, was a profound critique of all husbands. Men, whose passion, or ambition, or greed, or selfishness led them westward, or just away from the "sacred circle of house," where purity and moderation and selflessness were enshrined in the daily tasks of housekeeping, were different only in degree from the men of Mormonism. "Redress by law" in such circumstances, although more elusive than the call for government eradication of polygamy, nonetheless ran through the subtext of the novels. Husbands' abuse of power, their moral failure, absolved wives of marital obligations. Phrased sometimes in terms of "divorce," more often as sundering or separating, expressed as the consequence of failure to respect women's superior moral sense, was grounds for separation -- for reclamation of the self by the wife. As one woman put it to her faithless husband, "You have placed an insurmountable barrier between us; be it so. Henceforth we are as strangers to each other!"\textsuperscript{25}

This was dangerous stuff; not pro-divorce, precisely, but something more complex, perhaps in the long run more invasive, certainly more threatening, to the power of men as husbands. If wives could decide unilaterally when to treat their husbands as

\textsuperscript{24} Tompkins, \textit{Sensational Designs}, 164-65.

\textsuperscript{25} \textit{Mormonism Unveiled}, 114.
"strangers," when a man had crossed the moral threshold that compromised his wife’s respect, then women had arrogated to themselves the power to describe the boundaries of marriage on a case-by-case basis, even as they called simultaneously for uniform legal definition of marital structure. Here, indeed, was a recipe for women’s power as wives, a subversive potential that travelled underneath and parallel to explicit advocacy of legal reform to protect women.

This advocacy of moral governance by the state in regulating marital structure, and by wives in regulating individual marriages, had broad appeal at mid-century. It coincided with and helped fuel expansion of state and national powers in the Civil War era. The politicization of marriage, underlying and fueling the moral governance movement, gradually but inexorably turned into a justification for intervention in marriage by the state. The turn to state power as the most effective means of policing marital relations was conceived and nurtured during the 1850s. And legislators were quick to pick up on the implications of domestic anti-polygamy. Whatever other reasons the federal government had for intervention in what the Mormons always called the internal affairs of Utah, after the outcry of women authors against plural marriage in the 1850s, anti-Mormon legislative rhetoric and statutory action were framed primarily in terms of the need to dismantle the lecherous system of Mormon polygamy.  

Congressman Justin Morrill, Vermont Republican, ardent abolitionist and teetotaler, successfully shepherded the first anti-polygamy legislation through Congress.  

26 See, for example, William E. Nelson, The Roots of American Bureaucracy, 1830-1900 (Cambridge, Ma., 1982) arguing that antebellum reform associations were the direct ancestors of the more interventionist state that emerged after the Civil War.
in 1862. Polygamy, he argued, outraged the "moral sense of our own people, as well as of every refined and intelligent community upon the habitable earth." Predictably, in the hands of the federal legislature the anti-polygamy agenda was itself transformed and molded to suit the needs and proclivities of the national government, party politics, and individual legislators. A whole array of concerns was funneled through the "twin relic of barbarism." The tale of how statutory codification (and eventual judicial interpretation) subtly redirected and even undermined the political goals of domestic anti-polygamy takes us out of the 1850s, and straight into the political maelstrom of the 1860s, the second phase in the legal history of anti-polygamy, and the subject of the next part.
PART II: "THE TWIN RELIC OF BARBARISM": ANTI-POLYGAMY, WOMAN'S RIGHTS AND CHURCH-STATE RELATIONS IN THE THIRD PARTY SYSTEM

Introduction

   (a) Of Wars, Women, and the West: The Mormon War, the Civil War, and Anti-Polygamy
   (b) Civilization and its Contents: The Republican Party, the Political Theory of Barbarism and Congressional Anti-polygamy in the Civil War Years
   (c) "The Foundation of Modern Society": Contract, Consent and the Political Importance of Marriage
   (d) Christianity, Moral Constitutionalism, and the Redefinition of Church and State in the Anti-Polygamy Era

2. "Not a Crusade of Arms, but a Crusade of Law": Anti-Polygamy, the Political Importance of Marriage and Contract in the post-Civil War Era
   (a) "The Foundation of Modern Society": Marriage, Politics and the Lackluster Enforcement of Anti-Polygamy Legislation after the Civil War
   (b) "No Assumed Revelation Justifies Anyone in Trampling on the Law": An Elusive National Identity in Monogamy
   (c) "The Irrepressible Conflict between Polygamous Mormonism and the United States": The Triumph of Anti-Polygamy Politics
   (d) "A House Divided Against Itself Cannot Stand": Consent, Power, and Contract
3. "The Dynamite of Law": Anti-Polygamy, Anti-Suffrage and the Law of Marriage and Divorce

(a) "The Mormon Monster": Marketing Anti-Polygamy in the Post-Civil War Era

(b) "The Rocky Mountains [have] Taken Poison": Connecting Anti-Polygamy to Divorce and Woman Suffrage

(c) "Truly a Matter for Astonishment": Woman Suffrage in Mormon Utah

(d) Freeing the Happy Slave: Anti-Suffrage and Anti-Polygamy in Washington

(e) Consent, Divorce and "Union": Suffrage and the Law of Marriage in Post-Civil War Political Debate
Introduction

Beginning in the second half of the 1850s, as anti-slavery constitutionalism penetrated national political consciousness, anti-polygamy rhetoric became the standard form of political anti-Mormonism. Indeed, by the 1860s, one could fairly describe the popular congressional depiction of Mormonism as synonymous with polygamy; Utah became the geographical locus classicus of the abuse of women. Anti-polygamy so overwhelmed other forms of anti-Mormonism that it subsumed them almost entirely: Brigham Young’s centralized control of Utah’s economy, for example, was widely viewed as an incident of his monopolization of women.

The reasons behind the waxing importance of polygamy in the national political consciousness are profoundly connected to the evolution of the Republican party and its anti-slavery ideology. At the first Republican convention in 1856, the new party adopted a radically reformative platform. Included in the list of desired reforms was an explicitly anti-polygamy and anti-slavery provision -- a call for the abolition of the "twin relics of barbarism" in the territories.¹ The connection between polygamy and slavery, of course, was familiar to readers of anti-polygamy fiction. Its usefulness as a political tool, however, took on a life of its own, as reformers in the nascent Republican Party made the two domestic relations issues peculiarly their own.

Twentieth-century legal developments notwithstanding, at the time the propriety of outlawing polygamy was far more widely accepted than the constitutionality of

prohibiting slavery. Anti-slavery, one might say, was given a boost through its association with anti-polygamy. Even fire-eating Southerners disclaimed any admiration for polygamy in the same breath that they asserted the utter inability of Congress to legislate on the question. Even fire-eating Southerners disclaimed any admiration for polygamy in the same breath that they asserted the utter inability of Congress to legislate on the question.

2 Stephen Douglas, for example, argued that popular sovereignty did not sanction polygamy, which was a crime, while slavery was a custom. Douglas Democrats nonetheless opposed anti-polygamy legislation in Congress, complaining that the Republicans engaged in egregious maneuvering. Illinois State Register, 17 April, 23 March 1860. See also Vern L. Bullough, "Polygamy: An Issue in the Election of 1860?" Utah Historical Quarterly, 29 (Spring, 1961): 119-26, 125. As anti-polygamist Representative Thomas Nelson of Tennessee put it in a debate on an early version of the Morrill Act, "There is [a] distinction between the power of Congress over the subject of slavery in the Territories, and the power of Congress over the subject of crime. One involves the rights of property, with which Congress cannot interfere; the other involves a matter within the jurisdiction of Congress, as has always been held...." Congressional Globe, 36 Cong., 1 sess., 192 (5 April 1860).

3 Representative Laurence Keitt, Democrat of South Carolina framed his comments in these terms:

With me it is mainly a question of power. I know that the instincts of the American people revolt against polygamy; I know that we, in this House, abhor and detest it; but our condemnation of it should not hurry us into usurpation of power. If I can be satisfied of the power of Congress in the premises, I shall not hesitate to use it; for I believe that polygamy is flagitious in its influence upon society, and that it corrupts and debases wherever it exists.... I abhor and detest polygamy, because it violates the sanctities of the household, and abuses the holiest relations of life. But my detestation is no criterion of my power. Congressional Globe, 36 Cong., 1 sess., 195 (5 April 1860).

4 Representative Laurence Keitt, Democrat of South Carolina framed his comments in these terms:

With me it is mainly a question of power. I know that the instincts of the American people revolt against polygamy; I know that we, in this House, abhor and detest it; but our condemnation of it should not hurry us into usurpation of power. Congressional Globe, 36 Cong., 1 sess., 195 (5 April 1860).
The partisan divisions on polygamy, like those on states' rights and local autonomy generally, remained relatively constant throughout pre-Civil War period. Republicans predictably argued that moral deviance in Utah was a threat to national security -- the fostering of tyranny in a land of freedom. Northern Democrats squirmed. Their southern colleagues were less discomfited. Southerners, and some western Democrats, countered that dictation from the center was itself tyrannical, a violation of the federalism on which the Constitution was based. Unconvinced, Republicans replied that the essence of freedom -- voluntary consent -- was lacking in Utah. Women, they claimed, were kidnapped or duped or coerced or even brainwashed into entering a marital system that was the functional equivalent of slavery.

This part explores the evolution of anti-polygamy thought in Congress, focusing first on the shift from anti-Mormonism to anti-polygamy, and the significance of that shift in constitutional theory and legal thought. The second chapter examines another shift -- the move from articulation and definition of the problem (that is, from the criminalization of polygamy) to the enforcement of criminal sanctions against an unyielding and distant population. The turn to criminal enforcement was in part the refinement of ideas developed in the earlier phase of anti-polygamy politics. It also entailed the recalibration, the modification, of ideas of consent and their relationship to federalism, to marriage, and to politics more generally. The third chapter refines these themes, focusing on the permutations of anti-polygamy politics in one particularly troublesome setting -- that of woman suffrage and the questions of the political power of women within their families and the larger society.
This part is not a narrative history of the enactment, or even the provisions of individual pieces of anti-polygamy legislation, a subject that has received sustained treatment in Mormon historiography. Instead, my primary goal has been to lay the intellectual groundwork for the political innovations that made anti-polygamy such a vital part of national political debate for more than three decades, spanning the years 1856 (which saw the drafting of the first Republican national party platform) to 1890 (when the church officially abandoned its policy of counseling the faithful to engage in polygamy) and beyond. As with writers of anti-polygamy fiction, a close examination of polygamy as it was actually experienced by Mormons in Utah was not a major factor in the development of anti-polygamy thought in Congress. To the extent that life as it was lived in Utah penetrated the consciousness of politicians in Washington, it was almost exclusively as described by disgruntled territorial officials, or the "kiss and tell" work of Mormon apostates.

Most of the time, legislators and other political actors talked to each other about their own views on the subject and their own assumptions of what was most conducive to the well-being of Utah's inhabitants. The body of laws they proposed, debated and eventually enacted were drawn largely from the domestic relations laws of the states, and the political restructuring of the southern states (temporarily, as it turned out) after the

---

Civil War known as Reconstruction. The main provisions of anti-polygamy legislation are relatively easily explained; virtually all had some precedent in prior state or federal legislation. Together, they created something unprecedented -- a national law of marriage, as one anti-polygamist put it; a national identity in monogamy, complete with criminal sanctions, economic incentives, and political credentials.

The first piece of anti-polygamy legislation, the Morrill Act (the build-up to, and the implications of which, are discussed at length in the following chapter), made all plural marriage in the territories a crime, annulled the territorial statute that incorporated the Mormon church, and established strict limits on the amount of real property any religious body could own in the territories. Subsequent legislation, enacted primarily to fill in the loopholes left by the sweeping but ineffective provisions of the Morrill Act, gradually increased the enforcement powers of territorial officials. In 1874, the Poland Act expanded the jurisdiction of the federal courts in Utah, enabling them to try federal crimes, and to empanel grand and petit juries composed of at least half non-Mormons. In 1882 the Edmunds Act disfranchised all voters who could not swear they were monogamists, allowed federal prosecutors to challenge for cause jurors who believed in the righteousness of polygamy, and established the new offense of "unlawful cohabitation," or living with more than one woman at a time in an apparent marital relationship. In 1887 the Edmunds-Tucker Act directed the Attorney General to enforce the provisions of the Morrill Act annulling the church corporation and limiting Mormon property holdings (by instituting forfeiture proceedings), disfranchised the women of the territory, and added the crimes of adultery, incest and fornication to the federal prosecutorial
arsenal. In 1890, the Manifesto successfully forestalled the progress of a pending piece of legislation, known as the Cullom-Struble Bill, which would have placed the entire government of Utah in the hands of a federally-appointed commission.

The substantive federal law of marriage created by this network of legislation was not original, but was drawn entirely from state laws of marriage, which in turn was based (at some distance, by the mid-nineteenth century) on English family law. Virtually every state outlawed bigamy, adultery and fornication, as well as "lewd and lascivious" or "unlawful" cohabitation. Of course, the fact that criminal penalties existed for violation of the rules of marriage did not mean that the rules were observed in anything like a regular fashion. If marital practices in England are comparable to levels of irregularity in the United States (where, given the greater transience of the population in general, one would imagine that established -- or even newly imposed -- rules of marital entrance and exit were even less likely to be observed), something in the neighborhood of forty percent of all unions were suspect, void, or voidable at mid-century. The nineteenth-century law of the family, therefore, may have had far less impact on the life of the family than we generally give it credit for, at least in most of the country.

---


7 The differential enforcement of sex crime legislation -- with Utah standing out at one end of the spectrum for several years in the late 1880s -- may thus have less to do with levels of actual offenses, than with the claim made by Mormons that they had a legal right to create their own family law based on a radically divergent morality. Utah may be the exception that proves the rule that family law is as much a hortatory, as a prescriptive, enterprise.
The political restructuring of Utah -- primarily via voting restrictions, loyalty oaths and expanded jurisdiction for federal courts -- was also recycled from another regulatory arena, the Reconstruction South. That the reconstruction of Utah got underway in earnest (the expansion of federal jurisdiction and jury selection procedures in 1874 marks the real beginning of anti-polygamy enforcement) just as the reconstruction of the South was disintegrating is instructive: not only was the legal cleansing of Mormon Utah a less onerous financial burden than parallel enforcement in the South, but the appeal -- and the perceived helplessness -- of white women in Utah had more staying power than that of freed slaves in the South. One need not conclude, however, that politicized Americans were any less sexist than they were racist. They were, after all, "saving" Mormon women for all the joys and freedoms of nineteenth-century monogamy.

Nor did anti-polygamist politicians concern themselves often with the expressed wishes of their target population. Indeed, Mormon women, in contrast to freed slaves, never appealed to the federal government for intervention -- quite the opposite. They voted in open elections for loyal Mormon candidates; they held "mass meetings" in Salt Lake to protest the stigma attached to the marriage dictated by their faith; they sent delegations to meet with politicians in Washington, to show Easterners that Mormon women were as articulate, educated, and respectable as the wives of monogamous Protestants.\(^8\)

\(^8\) For general histories of the experience of Mormon women in polygamy, see Richard S. Van Wagoner, *Mormon Polygamy* and Lawrence Foster, *Religion and Sexuality*. 
None of this made any appreciable difference to the determination of anti-polygamists. On the contrary, the evident determination of Mormon women to defend their peculiar domestic institution backfired; sympathy for Mormon women, so evident in the debates and tracts of the 1850s, 1860s, and even the early 1870s, eventually turned to resentment. This turn did not so much undermine the desire to punish polygamists as add in a new desire to punish their wives. The realities of political anti-polygamy, therefore, are first, that it was premised on the necessity of uniform observance of a form of marriage that in all probability was not in fact observed with any degree of regularity, and second, that its ostensible beneficiaries -- Mormon women -- perceived themselves more as its victims.  

Yet it is true nonetheless that the creation of the new federal law of marriage was a vitally important development in both politics and law. One way of assessing its role in nineteenth-century life is in its hortatory, educational meaning. The law of marriage taught attentive, law-abiding Americans how they should think about and structure their relationships. The very existence of the new federal marriage law was a landmark in the legal landscape -- the result of significant developments in the understanding of the role of the national government and the substance of federalism, church-state relations, the place of morality in the constitution, and, last but by no means least, the political importance of women and marriage. It was understood, in its day, as the codification of

---

9 The divergence between anti-polygamy rhetoric and the realities of family life, both in the East and in Utah, has long opened anti-polygamists to charges of officious intermeddling, insincerity, and even gratuitous cruelty. For a more complete analysis of the merits of such charges, see part 3, chap. 1.
progress, the protection of women, and the guarantee of religious freedom. How such a remarkable understanding of law and its relationship to society came to be included in the federal criminal code, is the subject of the following chapters.

(a) Of Wars, Women and the West: The Mormon War, the Civil War, and Domestic Relations

The late 1850s were extraordinarily turbulent times religiously, economically, and politically. The flux produced by financial panic, religious revival, and the realignment of political forces into what would emerge as the third party system, swirled around Utah as it did around the rest of the nation. Indeed, Utah was, at least for the initial stages, a focal point of national interest. The causes and the aftermath of the "Mormon War" of 1857 are an apt illustration of how the tradition of anti-Mormonism that flourished in the 1840s, and was directed primarily against the Mormons' tight-knit society and supposed anti-slavery and pro-Indian proclivities, was replaced by an anti-polygamy ethic by the late 1850s. The narrative is one that is familiar to students of Mormon history, but one that has received less attention from political historians of the Civil War era.

The Mormon War was in several senses a prelude to the Civil War. As tensions over Bleeding Kansas and popular sovereignty grew in 1856 and 1857, Mormon Utah experienced a searingly intense religious revival. The Reformation, as it is commonly termed by historians of Mormonism, was a massive recommitment by the faithful, who examined their own lives and those of their fellows, and found them wanting. As one Mormon put it in early 1857, "Misdeeds are not only publicly denounced, but the doers and their misdeeds are named before the public congregations. The arrows of the
Almighty are with President [Brigham Young]. The terrors of the Lord are upon them, and are coming upon the people."¹

The feverish atmosphere in Utah was matched by a different, but no less ominous sense of sinfulness and retribution in the East. The territories, especially Kansas, were exploding under the strain of trying to maintain popular sovereignty without popular concord on vital questions of social organization.² The combination of the Reformation in Utah and the bloodshed in Kansas was volatile -- the Reformation increased the Mormons' moral isolation from the rest of the country (both of the self-imposed and of the more external variety). Sermons preached by Mormons were hyperbolic, featuring topics such as the infamous doctrine of blood atonement,³ predictions of victory over the forces of Babylon (that is, of the rest of the nation), and even killing of non-Mormons.⁴

Inflamed rhetoric in turn encouraged acts of insubordination, if not outright rebelliousness, against officials sent by Washington to govern Utah Territory. One federal judge, after challenging Mormon officials, saw his office "raided," and the records of the court confiscated and presumably burned.⁵ Another federal agent left the

¹ Latter-day Saints Millennial Star, 14 February 1857.
³ The concept that some sins are so grievous that they can only be cleansed by the blood of the sinner, shed by loyal Mormon elders, was the subject of much speculation and condemnation in the nineteenth century. See, e.g., Kate Field, "Mormon Blood Atonement," North American Review, 143 (September, 1886). See also Klaus Hansen, Quest for Empire, 69-71. D. Michael Quinn, Mormon Heirarchy, 112-13.
⁵ Id., 57-59.
territory shortly after lecturing the Mormons, among other things, on their moral laxness, claiming that his life had been threatened.⁶

In Washington, the stories told by such aggrieved bureaucrats carried far more weight than they might otherwise have done. The question of rebelliousness in Utah was intimately related to the question of rebelliousness in slave states and territories — bleeding Kansas was an example that few eastern politicians contemplated with any equanimity. Without a doubt, President James Buchanan was alive to the potential political value of both deflecting attention from slavery, and promoting union by meeting rebellion would be met with swift and sure federal reprisal.

Equally important, by quelling insubordination in Utah, Democrats could distance themselves from the more unsettling aspects of popular sovereignty, the beleaguered notion that questions of "domestic" government (that is, slavery) should be left to the majority will of the population. One of the most obvious uses of the "twin relics" label was as an attack on northern Democracy's most powerful theorist — Stephen A. Douglas. Among other things, Douglas was charged with being inordinately fond of Mormons,⁷

⁶ Perry Brocchus claimed that the crowd was "ready to spring upon me like hyenas and destroy me." His letter is reprinted in Congressional Globe, 32 Cong., 1 sess., Appendix, 25, and excerpted in Among the Mormons, Mulder & Mortensen, eds., 250-53.

⁷ See Robert W. Johanssen, Stephen A. Douglas (New York, 1973), 104-10, 149-50. Douglas had been a vigorous defender of the Mormons during the 1840s, and had been instrumental in securing independence from state government for Nauvoo. Douglas, and the Democrats, who had thereby won the allegiance of the Mormons, at the same time lost the support of anti-Mormons, who by 1843 constituted a substantial portion of the regional population. According to one source, Douglas and others were suspected of being covert members of the Mormon church during the 1844 campaign. See J.T. Fleharty, Glimpses of the Life of Rev. A.E. Phelps and his Co-Laborers (Cincinnati,
a group still hated by Illinois residents who remembered Nauvoo with bitterness. Applied to Utah, Douglas’s popular sovereignty theory implicitly validated polygamy, given that plural marriage clearly was supported by an overwhelming majority of territorial residents, and that marriage, like slavery, was quintessentially a "domestic relation."

Alive to the political costs of the identification between polygamy and slavery, Douglas made haste to distinguish himself from the Mormons, arguing in a speech in 1857 that his pet doctrine no more supported Mormonism than it did any other kind of rebelliousness; he declared himself convinced that the Mormons in Utah were in a state of rebellion that merited swift and sure punishment. Swift intervention in Utah would undermine the "twin relics" argument, showing Republicans (and Democrats) that protecting slavery did not mean countenancing polygamy.

The potential windfall from a confrontation in Utah -- and the usefulness of the messages it would send to North and South alike, were too much for Buchanan. With uncharacteristic firmness and decision, he despatched fully one-sixth of all federal troops to Utah in late 1857. His timing was off -- it was far too late in the season to send an army over the Rocky Mountains -- and his investigation of the state of affairs in Utah was sketchy at best -- he credited the most extreme claims of Mormon treason made by


former territorial officials and Mormon apostates. The army foundered in the snow, and Buchanan's hopes for swift action against upstarts in the West foundered, too, as Congress refused to fund the now extremely expensive expedition.

For their part, the Mormons in Utah also experienced significant fizzle of combative rhetoric and millennial hopes. As one historian put it, by early 1858 Young had so modified his tone that he sounded more like "an extreme states-righter ... than a ruler of an independent country."9 The conduit for uneasy reconciliation was Democrat Thomas L. Kane, an excitable, even neurotic, but undeniably well-intentioned Philadelphia lawyer and business-man, respectable enough to win a grudging mandate from Buchanan to sue for peace, and, much more unusual (even unique), a man trusted by the Mormons as their "Little Friend," their "Sentinel in the East."10

The truce Kane negotiated was hardly a final resolution of the conflict, but it did avoid bloodshed, both in 1858 and for decades to come. Fort Douglas, established high in the hills above Salt Lake, and with a few well-placed cannon, became an effective deterrent against both armed resistance on the part of the Mormons, and armed interference from the East on the part of anti-Mormons. Instead, the conflict flowed into political channels -- Brigham Young talked the language of states' rights and popular

---

9 Lamar, The Far Southwest, 349.

sovereignty, and eastern Republicans capitalized on the inevitable connections between such talk and slavery.

The end of the "Mormon War," then, set the stage for polygamy to assume center stage in the drama that was the contest for control of the territories, just as slavery dominated the contest for control of the Union. Democrats as well as Republicans understood the connection both before and after the Civil War; the interplay between anti-polygamy and anti-slavery politics was profound and persistent. But there is one difference that bears emphasizing: although the attack on polygamy closely resembled and drew strength from the analogy to slavery, and although the defense of polygamy in Utah took on many of the essential characteristics of the defense of slavery in the South,¹¹ abusive (even violent) rhetoric on both sides almost never resulted in violent behavior. Neither side in the polygamy controversy had a taste for blood.

The result was that the battles were fought throughout in peculiarly political and legal, rather than military, terms. The primary goal of Republicans in the East was to produce, through legislation, a legal system in Utah that replicated in its essentials the family law and church-state relations of the states and other territories.

Justin Morrill was the most articulate spokesman of this predominant strand of the Republican politics of marriage. Morrill's approach presupposed that meaningful consent by women was lacking in all polygamous marriages. In 1857, in one of his first and most important anti-polygamy speeches, Morrill stressed that the question of the

¹¹ David Bitton, "Mormon Defense of Polygamy," in The Ritualization of Mormon History makes this point about the similarity between southern defenses of slavery and Mormon defenses of polygamy.
Mormons' peculiar institution "seems to acquire greater gravity in each successive year." He connected the issue of polygamy to that of slavery in overt and implicit ways, arguing among other things that the Mormons in Utah, who believed that "bondage [and] polygamy are Bible doctrines," not only had imported black servants and enslaved Indians, but had also reduced white women to the level of beasts: "mak[ing] woman no longer an equal and man the tyrant, ... tear[ing] the endearing passion of love from the heart, and install[ing] in its place the rage of jealousy; ... and degrad[ing] her to the level of a mere animal."\(^\text{12}\)

Soon after the war began, Morrill was able to push through his long-delayed anti-polygamy legislation, primarily due to the fact that southern opposition had been removed. The Morrill Act, passed with perfunctory debate in the spring of 1862, was signed into law on July 1 by President Lincoln. Despite its ineffectiveness as written, the Morrill Act formed the basis for almost every legislative innovation that followed, and it crystallized the underlying presuppositions of the anti-polygamy movement in its congressional incarnation. As one historian has pointed out in his analysis of American Victorianism at mid-century, didacticism, moral uplift through hortatorical lectures, books, sermons, editorials, and so on "harnessed the Victorian communication system to the Victorian value system."\(^\text{13}\) In the Morrill Act, the monogamous value system (and

---


\(^{13}\) Daniel Walker Howe, "American Victorianism as a Culture," American Quarterly, 27 (December, 1975); 507-32, 527.
all the baggage that went along with it) was harnessed to the political system, and through a particularly appropriate mechanism, legal reform.

But this was reform with a new flavor, law-making based on sympathy for women whose lives were made miserable by a legal system that allowed -- even mandated -- their suffering. Herein lay the barbarism, according to the reformers of the day, the submerged foundation of cruelty upon which the flogging of the slave's back or of the Mormon woman's soul was based. Republican speeches in Congress dwelled on this suffering, pointing to Utah as a place of systematic misery for women:

To suppose that polygamy conduces to happiness is to suppose a total subversion of woman's nature.... The little home, which ought to be her throne and her empire, is lost to her. They are jealously watched, and dreadfully abused if they are seen to show, by even so much as a glance, that they are unhappy. But the long and anxious countenances of the 'mothers of Israel' proclaim too plainly their entire misery.¹⁴

Establishing the "entire misery" of wives in Utah did not by itself solve the problem for legislators, however. Two vital steps remained: the assumption of responsibility for women in such a remote and arguably unimportant territory, and the conviction that reform was, in fact, achievable.

By the 1860s, reformers in their anti-polygamy incarnation were convinced of both. The similar process by which anti-slavery activists (who were also often anti-polygamy activists) came to such extraordinary confidence in their own abilities to restructure social relations has been the subject of intense scholarly debate. One analysis of the evolution of the cognitive style before the Civil War argues that the most salient

feature in the origins of humanitarian sensibility, was the gradual yet inescapable acceptance by individuals that they had some social responsibility for the suffering of others. Combined with an equally pervasive belief that they could do something effective to alleviate suffering, this social conscience was a powerful mechanism for reform.15

Translated into the political vocabulary of the Republican Party, barbarism dwelling in the midst of civilization was intolerable, unnecessary -- and dangerous.

(b) Civilization and its Contents: The Republican Party, the Political Theory of Barbarism and Anti-polygamy in Congress in the Civil War Years

Even before the Mormon War, the connections between polygamy and slavery did not remain confined to novels and magazine stories. The parallel was picked up and made overtly political by the founders of the Republican party in their "twin relics" platform of 1856. The association between Mormon men in Utah (the perceived enslavers of women) and white Southern men (the enslavers of Africans) served many purposes for Northerners, some of which were local and explicitly partisan. Others were grander in tone, part of a theory of government and personhood that was based on an intellectual compound, a mixture of notions of freedom of contract and economic competition, on the one hand, and Christianity and "civilization" on the other. These broad themes, both of which appear in varying strength and more or less coherence throughout the political culture of the late antebellum and postwar eras, form the nub of

anti-polygamy in Congress, and help explain its connection to partisan politics, its peculiarly legal slant, and the jurisdictional and sectional interests that the anti-polygamy campaign implicated.

As the tentative conglomeration of former Whigs, free soilers, nativists and sprinklings of Democrats settled into the third party system as Republicans in the late 1850s, their distinctive brand of political rhetoric took shape. One scholar has described this retooling of politics as a fundamental precondition to accommodating the conviction that self-improvement was a universal norm." Put slightly differently, the Republican party was, at least in significant part, the political manifestation of a new cognitive style - - the institutional response to the development of humanitarian sensibilities."

Anti-slavery was, of course, the main conduit for the unification of such diverse elements into a new party system," but anti-polygamy was more than just a side-show. Through anti-polygamy rhetoric and legislation, elected officials of the federal government defined and debated marriage, and thereby ineluctably heightened its perceived importance. This is not to say that congressional mandates necessarily changed the political structure of marriage as it was experienced by individual participants in marriage (in other words, by husbands and wives), in Utah or elsewhere -- at least not directly or unproblematically. Rather, congressmen, lobbyists, clergymen and other

---


17 Haskell, "Capitalism and the Origins of the Humanitarian Sensibility."

legislative actors talked primarily to themselves about the importance of marriage to the political scene.

Historians of Mormonism are familiar with the 1856 Republican Party platform; many political historians miss the part that bears emphasizing here. The platform, platitudinous and multi-layered as all such texts are, contains the kernel of the new politics of race, gender and progress that would solidify over the next four years. In a calculated and clever maneuver, Republicans capitalized on the popular identification of polygamy and slavery. They called both the "twin relics of barbarism," and advocated their abolition in the territories.19

The phrase has many possible meanings, and many innuendoes. The term "twin," for example, implies that both spring from the same root, that they are siblings -- brother and sister. "Relic" conveys a sense of anachronism, a useless (even harmful) vestige of a by-gone age, vigorous perhaps in its day, but decrepit, backward, isolated in modern times. "Barbarism" also carries a host of possible interpretations, freighted with cruelty, savagery, animalism. It is this final label -- that of barbarism -- that resonated so deeply with American thought generally, and political thought in particular.

Barbarism was an extraordinarily rich concept at mid-century. In American thought, barbarism occupied a special, and dreaded place. It posed a threat to the fundamental order of the age, according to its expounders. To understand the nature of

19 Proceedings of the First Three Republican National Conventions (Minneapolis, Mn., n.d.), 44. That produced the "twin relics" language, but reports that there was "tremendous" applause at the convention following a reading of "The resolution condemning Polygamy and Slavery."
the threat, it is necessary to explore briefly the relationship of barbarism to popular understandings of its successor, civilization. The terms were often understood both historically and cosmologically, as reflections of the quality of human progress and development over time. In this view, the course of history reflected in more or less accurate ways a linear course of progress, with ever more refined and sophisticated societies succeeding primitive forebears. This did not mean, however, that cultural or moral relativism should govern human behavior, but that accessibility to eternal moral truths tended to be greater in later ages than in earlier. Extraordinary moments of insight did exist -- Christian revelation, for example, was considered by many theorists a breakthrough whose deepest meanings became apparent only after many centuries. And the framers of the constitution were often regarded as men whose greatness transcended their age, whose inspiration had created a document that was the perfection of human political understanding. Like the Christian Bible, the sublime truths of the constitution were unfolded over time, as the implications of freedom were ever more widely disseminated. A similar interpretation fueled much of legal analysis, according to which laws (especially Magna Charta) reflected the accumulated wisdom of a given age,


and the common law both literally and figuratively was the distillation of human perceptions of truth over the centuries.\footnote{22}

This much many Northerners and Southerners could agree upon, even in the contentious years before the Civil War. What they disagreed about -- the role of slavery in civilization, among other things -- was as important, of course, as the common vocabulary they used to describe themselves and their world. Yet the labels politicians applied to given social systems is illustrative of the battles they understood themselves to be waging: theirs was a contest to be included (and to exclude opposing systems) in the pantheon of things "civilized." The language of civilization and barbarism saturates the pages of the Congressional Globe in the late 1850s: the party that identified itself successfully as the protector and progenitor of civilization (and the vanquisher of barbarism) acquired significant strategic advantage.

The new-born Republican coalition married itself early to the idea that civilization was the goal of all politics, persuading northern voters that it alone could effectively combat barbaric social systems. Once it had done so, a whole host of related assumptions slid into place, identifying Republicans with reform, with progress, and with personal achievement.

\footnote{22} Blackstone's Commentaries, Thomas Lee, ed., 2 vols. (New York, 1850); James Kent, Commentaries on American Law, 5th ed. (New York, 1844).

\footnote{23} Charles Sumner's "Barbarism of Slavery" speech is perhaps the best known example of this genre, which appeared in countless other forms. The Barbarism of Slavery: Speech of Hon. Charles Sumner, on the Admission of Kansas as a Free State, in the United States Senate, June 4, 1860 (Washington, D.C., 1860).
The doctrine of gradual and (almost) inevitable forward movement was attributed in Republican thought to individuals, as well. As the tools for right living -- including personal responsibility, devotion to family and religious faith of whatever Protestant stripe, self-control, and orderly adherence to the rules of society -- were perceived to be realizable across the social and political spectrum, American political and social thought (particularly in its Republican incarnation) applied the doctrine of progress to persons as well as to peoples.\textsuperscript{24} In the process, they translated the theory into a seamless history, a scientific analysis of the laws of being in both the individual and collective senses.\textsuperscript{25}

This was a bold move -- at once inclusive of all persons and imperialistic in its inability to account sympathetically for failures or disagreements, be they economic, social, or moral. As one historian has explained it, many Americans at mid-century were whiggish interpreters of history, self-righteous and highly conscious defenders of their society.\textsuperscript{26}

The relationship between progress as a result of accumulated wisdom and sustained effort was intimately related, in this view, to individual and social freedom. Liberty, however, was not the same thing as license, as countless moral didacts were careful to point out.\textsuperscript{27} The greater each person's liberty, the more room for the

\textsuperscript{24} Greenstone, \textit{Lincoln Persuasion} 24-26.


\textsuperscript{26} Howe, "American Victorianism," 510-11.

\textsuperscript{27} See, for example, Christopher L. Tomlins, "Law and Authority as Subjects in Labor History," (American Bar Foundation Working Paper #9312), 44-46.
development and refinement of those internal restraints that made foresight possible.\textsuperscript{28}

Restraint, in this particularly nineteenth-century formulation, was joined with liberty in creative tension; the one making the other's existence possible.\textsuperscript{29}

Historians have long recognized that the concept of progress was an organizing principle of American thought at mid-century, and that the concept was (at least in theory) a conservative one, implying that progress was predictable and particularly American.\textsuperscript{30}

It was also simultaneously idealistic and self-interested, providing essential ideological support for theories of expansion such as "manifest destiny" and missionary movements

\textsuperscript{28} Thomas Haskell makes this point in economic terms: The premium the market paid for accurate forecasts was readily visible to anyone routinely involved in market transactions. Where direct experience with the market was lacking, the same lesson, suitably draped in a moral and religious vocabulary, was driven home by numerous Victorian moralists. Anticipating the remote consequences of one's actions was thought to require not only concentrated attention but also self-restraint and a capacity to delay gratification that the middle class found lamentably lacking in criminals, paupers, madmen, children ... and others who became objects of humanitarian concern. "Capitalism and the Origin of Humanitarian Sensibility," (Part II) American Historical Review 90 (June, 1985), 561.

\textsuperscript{29} Often restraint and liberty were portrayed as in titanic competition. Competitiveness, both internal (what a young Abraham Lincoln called "[t]he eternal antagonism within the human soul of reason and passion") and external, was thus both a result and a cause of progress, an essential element of civilization in all its material, moral and religious fullness. Mark E. Neely, Jr., The Last Best Hope of Earth: Abraham Lincoln and the Promise of America (Cambridge, Ma., 1993), 16-17; Abraham Lincoln, "The Perpetration of Our Political Institutions," Collected Works of Abraham Lincoln, 9 vols. (New Brunswick, N.J., 1953-55), 1: 108-15.

\textsuperscript{30} Rush Welter, "The Idea of Progress in America," Journal of the History of Ideas 26 (June, 1955): 401-15, 404: "Americans believed that Progress was to be sought in a continued unfolding of the benefits which the inhabitants of the United States increasingly became sure were unique in their continent. Progress, that is, would be a continuation of the present. [I]t would have forward movement but not upward; it would be horizontal, not vertical."
at home and abroad. A level of complacency, celebrating the accomplishments of civilization, is clearly discernable in the thought of innumerable didactic tracts and speeches lauding the many virtues of American freedoms.

Even if we accept that a relatively wide-ranging sense of the importance of progress existed, however, it is worth noting here that the contents of the idea of progress were widely disputed. Some Southerners, for example, argued that African slavery was the apogee of progress, the elevation of a backward race by exposure to the accomplishments of those whose ancestors authored the constitution, helped distill the common law, and worshipped Jesus.

More to the point, a well-developed notion of progress only makes sense if it stands in contrast to an opposite notion -- a sense of what existed before progress, and which conditions had changed to make progress both possible and probable. This is

---


33 As Representative William Simms, Democrat of Kentucky put it, "[Slavery in America]" has been the lever by which five million human beings have been elevated from the degraded and bighted condition of savage life, ... to a knowledge of their responsibilities to God and their relations to society." Congressional Globe, 36th Cong., 1 sess., 1860, Appendix, 200.

where the concept of barbarism becomes a useful contrast -- a description of what has been left behind in the interests of civilization. So systematic, so "scientific" had such categorization become by mid-century, that it appeared in all kinds of analytical thinking - religious, political, legal, economic, philosophical. The use of the concept of barbarism in the Republican party platform of 1856 (and in many platforms thereafter) to describe and decry polygamy, therefore, was calculated to reverberate politically and culturally, to connect with and augment existing understandings of the nature of civilization.

Barbarism was at once an essential precondition for civilization, and its doctrinal counterpoint. In the systematic formula that characterized much Republican thinking in the Civil War era, barbarism was the middle level of human development, following upon savagery. This theory found support in many of the new social sciences, including political science and anthropology. Barbarism was characterized by "tribal" societies, rudimentary governmental structures, and a low level of technological expertise. The quantum leap forward into civilization, exemplified temporarily at least by the Greeks and Romans, was accomplished through the invention of the alphabet, sophisticated governmental institutions based not on inherited status, but on territory and property, and recognition of individual worth. According to many of civilization's interpreters, Christian revelation was the final ingredient in the mix.34 While progress toward

civilization was clearly possible, it was by no means inevitable, as Lewis Henry Morgan argued in his landmark anthropological treatise in 1877; many humans remained barbarous, even savage.  

It was also possible, according to this theory, to slip back from civilization into barbarism. Failure to progress was a sure sign of danger. As one leading exponent of Christian progress put it, barbarism was essentially static. Horace Bushnell, labelling slavery a "barbarous institution" in 1857, explained that one of the hallmarks of slavery was "the perpetual distinction of barbarism, that it has no law of progress. The highest level it reaches is that at which it begins." By contrast, "education, law, manners [and] religion" were the essence of progress, and of the results of progress -- civilization.

Bushnell, Morgan and their confreres, although they were confident of civilization's benefits, and were sure they knew civilization when they saw it, also knew that there were competing social systems, competing understandings of human nature, both at home and abroad. As a particularly sensitive portrait of American thought put it, nineteenth-century pundits "responded to this diversity with a cultural competitiveness fully worthy of their other modes of competitiveness." One pervasive response was the articulation of theories of civilization and barbarism -- especially through "scientific" analyses of the indicia of both in new academic disciplines such as anthropology and

36 Lewis Henry Morgan, Ancient Society: or, Researches in the Lines of Human Progress from Savagery through Barbarism to Civilization (Cleveland, 1877), 7.

37 From "Barbarism the First Danger" (1847) in David L. Smith, ed., Horace Bushnell: Selected Writings on Language, Religion, and American Culture (Chico, Ca., 1984), 157.

political science -- and their gradual incorporation into political and legal rhetoric, and eventually into federal law.

The anti-slavery and anti-polygamy campaigns were the political vehicles for much of this thought. Anti-polygamy, in particular, was also the occasion for the elaboration of a gendered theory of civilization, one in which marriage and the treatment of women were key to the advancement -- even the survival -- of civilized society. Two speeches delivered by a member of the House judiciary committee early in 1860 illustrate the political uses of this theory. Representative Nelson of Tennessee, reporting out of committee an early version of what eventually would become the Morrill Act of 1862, explained to his colleagues that polygamy was condemned by "the universal concurrence of the christian and civilized world." Monogamous marriage, he assured the House, "is the foundation of civil society.... Barbarians may disown it, but enlightened nations everywhere respect and encourage it." And while there might be great difference of opinion -- "vexed questions," as Nelson put it -- over the exact extent of congressional power to define property in the territories (that is, to prohibit slavery), polygamy was so clearly the product of "vile superstition, which is antagonistic alike to the laws of God and man, and disgraceful to the spirit of the age in which we live," that its abolition was constitutionally permissible under any reading of that document.39

As debate over the proposed legislation heated up over the next month (especially as Southerners argued against any congressional right to interfere with domestic relations

in the territories), Nelson further developed and explained his analysis of the role of marriage and the treatment of women to the progress of civilization. "Enthroned in the domestic circle," Nelson maintained, women in the United States were treated with unequaled and "universal respect and deference." This respect was the product of equality and happiness in marriage, in direct contrast to the misery "[a]mong barbarians [where woman] is treated as an inferior." Only in America, where "the Constitution of the country" and the "laws of theBeing who created us" united to assure that women would be protected by men who were mindful of their "legal and moral duty" to "cherish and preserve" the "respectable and virtuous women of the United States" had civilization reached its peak. At least until polygamy made its appearance in Utah, outraging the moral sense of the entire population, and insulting "our own wives and daughters, and the wives and daughters of our constituents." If Congress failed to protect the female character by criminalizing polygamy, Nelson admonished, the "'slow, unmoving finger of scorn' will be pointed at us by the civilized world."^40

Nelson's rhetoric did not persuade his southern colleagues, who (correctly) smelled anti-slavery in such an equation of morality and congressional power. Representative Keitt of South Carolina, for example, distanced his abhorrence of polygamy and belief in its deleterious consequences for civilization ("Impair the household obligations [through the practice of polygamy], and you weaken the ties of the State; stain the virtues of the family, and you attain the civilization of a people."), from his assessment of the constitutionality of legislation interfering with the peculiar domestic

^40 36 Cong. 1 Sess., 194-95 (5 April 1860).
institution of Utah ("I abhor and detest polygamy.... But my detestation is no criterion of my power."). Slaveholding Southerners, as Keitt's speech suggests, were as alive as their abolitionist foes to the heightened sense among politicians that marriage played a vital role in the maintenance and progress of the state.

Monogamy was the most important element of this theory in the political science of the day, a necessary (but not always sufficient) ingredient of civilization. Morgan, for example, attributed the decline of Greece and Rome, both of which were characterized by an early form of what he called "the monogamiam family," to the lack of respect for women in both cultures. Both lapsed back into barbarism after a brief period of civilization. True monogamy, on the other hand, binding on husbands as well as wives, was a distinctly "modern" innovation, and heralded the onset of sustained civilization. The "law of progress revealed by the [successive] forms of marriage," according to Morgan, "yield[s] nearly the exact line of demarkation between the barbarous and civilized nations." That civilization was the product of Western European societies, and of their American progeny, was a key element of much of this theory. Moral

---

41 Id., 195.

42 "The premature destruction of the ethnic life of these remarkable races is due in no small measure to their failure to develop and utilize the mental, moral and conservative forces of the female intellect, which were not less essential than their own corresponding forces to their progress and preservation." Morgan, Ancient Society, 487.

43 Id., 407.
philosopher Francis Lieber, for example, openly condemned Mormon plural marriage, calling it a violation of the very spirit of the teutonic races."

The importance of "true" monogamy, its elevation of women and morality generally, grew in proportion to its usefulness as a political tool. Modern society, agreed the anti-polygamist commentators, was founded on monogamous marriage.4 Personal accountability, individual freedom, protection of property and social stability all could be traced to their roots in monogamy.44 Seen in this light, Morgan's theory of "true monogamy" incorporated and validated the charges of anti-polygamy novelists that polygamy was destructive not only to the happiness of individual wives, but to the very maintenance of civilization.

Francis Lieber explained why polygamy was so dangerous. In his Political Ethics, a defining work of the new science of politics, Lieber described the problem: "polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot exist long in monogamy."47 Polygamy, in other words, was a form of tyranny (note the assumed


45 It is interesting to note here that Carole Pateman's argument that the sexual contract precedes and underlies the social contract was well developed and widely accepted in nineteenth century sociological thought. While this broad-based recognition of the importance of marriage to society challenges her portrait of the "silencing" of marriage, it does not undermine her basic insight -- that the private is in virtually every sense inextricable from the public. The Sexual Contract (Stanford, Ca., 1988), 1-18.

46 Morgan, for example, assumed that slavery and true monogamy could not co-exist in the same society, Ancient Society, 512.

congruence of patriarchy and despotism), whose influence spread far beyond the confines of marriage, to "fetter" the "people" in a static and barbaric relationship. Lieber's writings carried enormous weight well into the late nineteenth century — they were standard political treatises in many college courses for decades."

An inveterate categorizer and line-drawer among races, countries and individuals, Lieber grafted the theory of the progressive improvement of human society onto an elaborate analysis of the role of marriage and women in American politics. Progress (and thus civilization), Lieber believed, was inextricably tied to the advancement of women in dignity, in education, and even in occupations that formerly were closed to women. But Lieber was no proponent of suffrage for women, or of any other activity that would violate woman's "natural character" by embroiling her in public debate and the hurly-burly of man's world. Women were suited by nature for the "sacred duties" of wifely and motherly care." Clearly Lieber and many other theorists of barbarism and civilization, had conflicting and conflicted notions of the proper place of women within the political and social system. Yet they used the language of civilization to describe what they aspired to, and barbarism to portray what they condemned. And while polygamy and slavery were the loci classici of barbarism in much of early Republican thought, virtually every political campaign for reform was tinged with claims that it

---

" Judge Russell Thayer, described the admiration of Chancellor Kent, Justice Story and Rufus Choate for Lieber's work, and quotes George Bancroft as saying of Lieber's work that "it entitles him to the honors of a defender of liberty." Thayer's "The Life, Character, and Writings of Francis Lieber, A Discourse Delivered before the Historical Society of Pennsylvania, January 13, 1873." (Philadelphia, 1873), 21 - 28.

" Lieber, Political Ethics, 2: 124-25.
would advance civilization or prevent barbarism. Sunday closing laws, school prayer, the common law, westward migration and geographic expansion, partisan politics, and prostitution, all were subjects of analysis to determine what their impacts were on the advancement of civilization and the protection of women.  

The balance between respect for women, and thus the progress of civilization, and the forces of disorder that threatened to elevate wives too high by transgressing the natural boundaries between husbands’ and wives’ lives and virtues, on the one hand, and those that threatened to degrade women by reducing them to a former condition of servility, on the other, was a delicate one, which Lieber and his colleagues labored to maintain. The danger from the one, in his view, was as almost as great as the danger from the other. Notions of barbarism and civilization, seen from this perspective, were as convenient for limiting the understanding of the role of women, as for expanding it.

(c) "A Barbarism Revolting to the Civilized World": The Politics of Civilization, and the Limits of Reform

Factored into this maneuvering around gender, of course, was the underlying and inescapable aura of slavery. All this talk of the barbarism of polygamy, of moral stewardship of the territories, was anathema to southerners. They heard the veiled threat to slavery in such proposals, and they responded virulently. "If there is power in Congress to inspect the morals of a nascent political community," queried Keitt in a speech condemning proposed anti-polygamy legislation, "and of its own autocratic will

\[\text{See Elizabeth Batelle Clark, "The Politics of God and The Women's Vote;" Ginzberg, Women and the Work of Benevolence.}\]
to decree this and prohibit that, may they not declare slaveholding a crime? To allow this power is to consolidate the Government."

Keitt was joined by other fire eaters, including Lucius Quintus Cincinnatus Lamar of Mississippi, and Douglas Democrats, effectively preventing the enactment of anti-polygamy legislation until the onset of the Civil War.

Indeed, the 1860 presidential campaign only hardened the party divisions on the polygamy question, as Lincoln and his supporters taunted Douglas with advocating immorality through the doctrine of popular sovereignty, "which permit[s] the people to do as they please, and sanctions, not only slavery, but polygamy, piracy, and whatever else is revolting and monstrous." One historian has even speculated that the polygamy issue made the critical difference in Lincoln’s narrow victory in Illinois, making polygamy more than just a tangential factor in the Republican revolution of 1860, and thus in the coming of the Civil War.

So profoundly tied to the slavery question were all proposals regarding polygamy, that it was only after outbreak of war and the dissolution of Congress in 1861 that anti-polygamy legislation was finally passed. Once southern Democrats were removed from

---

31 36 Cong., 1 Sess., 197 (4 April 1860).


34 Bullough, "Polygamy," 126.
the picture, legislation outlawing polygamy passed almost without discussion in early 1862. Justin Morrill had introduced legislation outlawing polygamy and slavery in the territories as early as his first term in Congress. Like Abraham Lincoln and many other former Whig members of the early Republican party, Morrill combined a vision of economic and social regulation that facilitated human ingenuity without catering to human foibles. Morrill was as well known for his financial skills as for his dedication to eradicating structural social inequities such as slavery and polygamy. A profound believer in the American System, Morrill was the sponsor both of protective tariffs and of land grant colleges, as well as anti-slavery measures.

The only objection to the proposed legislation came from Californians, who feared that it might so alienate the Mormons that they would attempt to interfere with Union communications in the West. James McDougall and Milton Latham, Democrats of California, were the only two opponents of the legislation. Congressional Globe, 38th Cong., 1 sess., 1862, Appendix, 2507. Indeed, Mormon loyalty was the subject of much speculation, especially early in the war, as Brigham Young and other leaders used states' rights language and predicted that the war was the conflagration prophesied in Mormon scripture as the end of all human government, the onset of latter-day domination of the world. Alan E. Haynes, "The Federal Government and Its Policies Regarding the Frontier Era of Utah Territory, 1850-1877" (Ph.D. diss., Catholic University, 1968).

Morrill, a native of Vermont, was elected to Congress as an Anti-Slavery Whig in 1854. After the collapse of the party, he helped organize the Vermont Republican Party in 1855. He introduced the first anti-polygamy bill in 1856, and helped lead the charge against polygamy throughout his career in the House (he was elected to the Senate in 1866 — by the late 1870s, his junior colleague from Vermont, Senator George Edmunds, assumed the leadership in the congressional anti-polygamy campaign).

See Greenstone, "The Lincoln Myth Reconsidered," chap. 1 in The Lincoln Persuasion, 9-34; Neely, The Last Best Hope of Earth, 139.

The Mormon system of polygamy, Morrill charged in language fast becoming familiar to all, was a "barbarism revolting to the civilized world." It came as no surprise to Morrill and his Republican colleagues, given the nature of the system of polygamy, that the Mormons had "already sought shelter in the bosom of the Democratic party," the natural home for tyrants. Thus Morrill laid out the problem in language that resonated with the partisanship of the "twin relics" platform: Mormon polygamy was barbaric -- a system of involuntary sexual servitude from which women would escape if they could, a system that indulged aristocratic and libertine tendencies among Mormon men who were empowered by Utah law to disregard the humanity of their wives. Added to this was the unfortunate political company the Mormons kept: not only did the entire structure resemble the slave system of the South, but found its natural allies among the members of the southern party.

The Republicans' answer to the problem was the legal redefinition of marriage under Utah law. The legislation proposed by Morrill was brief, but unprecedented. It would alter the Utah's law of marriage (which carefully protected, but did not mention, polygamy -- much as the federal constitution was protective but silent on slavery). As Daniel Gooch of Massachusetts put it in 1860, "we should adopt the same policy that a judicious parent pursues with reference to this child. He permits the child to regulate and govern his own conduct so long as he applies wholesome and salutary rules to himself; but when he fails to do that, the parent again resumes the exercise of control over his

59 Parker, Life and Services of Justin Smith Morrill, 10.
own offspring." In its role as custodial parent of Utah, the government, according to Republican sponsors of anti-polygamy legislation, should criminalize all plural marriage, retooling the popular image of Mormons as rebels, to Mormons as sexual criminals.

The Morrill Act was sweeping, although by no means lengthy. It consisted of three sections, each one designed to attack a distinct component of the Mormon-controlled legal system in Utah: it outlawed bigamy in the territories, providing for a prison sentence of up to five years, and a fine of $500; it annulled the Utah territorial legislature’s incorporation of the Church of Jesus Christ of Latter Day Saints; and it prohibited any religious organization from owning real estate valued at more than $50,000.\(^6\)

Never before had the federal government assumed such supervisory power. The Morrill Act was unprecedented, especially in light of the majority opinion in the Dred Scott case, which only five years before had invalidated attempts to ban the other relic of barbarism from the territories.\(^6\) As Southerners had feared (and many Northerners hoped), federal legislation on marriage was a prelude to action against slavery. Three months later, Lincoln resolved that slaves in the border states should be emancipated at the first opportune moment.

Among the most fascinating, and most conceptually complex, aspects of the Morrill Act was its articulation of an interest of the federal government in the religious

---


\(^6\) 12 Stat. 501 (1862).

as well as the marital structure of its constituent parts. Only seventy years earlier, after all, the first Congress had proposed, and the states had ratified, a constitutional amendment that flatly prohibited such national intervention in local religious affairs. In the late eighteenth century, local control over religion was a component of liberty, a defense against tyranny from the center; by the mid-nineteenth century, by contrast, Morrill and his fellow Republicans argued that federal control was a component of liberty, a defense against the tyranny of men over women, of priests over people. How did such a remarkable shift occur? Was this just rank anti-Mormonism (the compromise of principle, that is, in the interests of expediency), or had the role of religion in local government itself undergone a metamorphosis?

(d) Christianity, Moral Constitutionalism, and the Redefinition of Church and State in the Anti-Polygamy Era

By its very breadth and uncompromising restructuring of Utah’s marital and religious corporation law, the Morrill Act was in effect a second disestablishment in the territories, a fundamental reordering of a society based on religious law, to one based on the humanitarian impulses of a competing legal system, all to protect marriage. This is not to say, of course, that Justin Morrill and his Radical Republican allies were not themselves profoundly religious men, and that the anti-polygamy rhetoric they transformed into formal political and legal structures was not itself connected to the work of anti-polygamist women, many of whom conceived of their mission as the defense of Christian wifehood against a fraudulent masquerade.
The defense of true religion against false was an essential element of the anti-polygamy campaign in general; but by 1860 the defense mechanism of choice was the formal disempowerment of religion as a constitutive legal force in Utah. In other words, Republicans like Morrill enacted legislation designed to protect Mormon women against polygamy by rendering all religion (including the Protestant Christianity they understood themselves to be promoting by the very same mechanism) politically and legally powerless in the territories. The result was a regime in which the establishment clause was applied uniformly, and across the board, but the free exercise clause was limited to members of Christian faiths.

They had substantial precedent for their action, at the state level. Despite their fundamentally different motivation, the Republicans who championed anti-polygamy legislation replicated as a matter of federal territorial law the disestablishmentarian plan of the Virginia Statute of Religious Freedom. As Thomas Jefferson explained the import of the statute in his first draft, disestablishment was designed to protect freedom of opinion for all, even members of dissenting sects.\(^3\)

The apparent benignity of such a redefinition of church-state relations should not obscure that it was in fact a double-edged sword. As one historian of Virginia put it recently:

Religion was no longer, as it had been for all preceding human history, a legitimate principle for determining social organization and obligation. The

---

\(^3\) For an extensive discussion of the legal analysis of the protection of religious opinion — and the development of a doctrinal distinction between the constitutional treatment of religious belief as opposed to religiously motivated action — in the polygamy context, see pt. 4, chap. 1, below.
converse of this, however, was true to only a limited extent. Constraints on the body designed to coerce the mind were expressly outlawed where they arose from "opinion," from religious principle. But where coercion arose from social relationships, from the forms of civil society, the law was silent on them. Thus the Statute of Virginia could promise freedom of religion in a slaveholding society.44

In Virginia, religion ceased to be understood, as a political and legal matter, as social struggle. When James Madison, Jefferson’s co-author and philosophical and political ally, shepherded the religion clauses of the first amendment through Congress only four years later, he reproduced at the federal level the same protection of belief (and silence on action) that had been codified in the Virginia act.45 In both cases, disestablishment implied political disability, and outright competition, for religious groups. There was a vital difference between the Virginia’s (and other states’) disestablishment, and the religion clauses of the first amendment, however. The former restructured the relationship between church and state in a given region, while the latter was understood as a formal statement of the federal government’s lack of power to restructure those very relations at the state or local level.46 It is only in the twentieth century that the constitutional distinction between local and national establishment, homogenized by


45 For a general history of church-state relations in the colonial period, see Thomas J. Curry, The First Freedoms: Church and State in America to the Passage of the First Amendment (New York, 1986).

"incorporation" (the judicial doctrine that the fourteenth amendment broadened the application of many of the provisions of the bill of rights to be as binding on the states as on the federal government) has finally evaporated. In 1789, and on into the nineteenth century, the religion clauses were part of the vocabulary of states' rights, rather than federal control.

That the states maintained a sense of independent control over the religious life of their inhabitants is reflected not only by the various state establishments, but also by the trend toward disestablishment in the late eighteenth and early nineteenth centuries. Freedom from state intervention in and support for religious interests was a "gift" of state governments, a political decision rather than a right imposed from above. Those states that maintained their religious establishments, ranging in form from as vague an endorsement as North Carolina's statement that the Protestant Christian religion is hereby established, to Connecticut's more thorough-going Congregationalism, succumbed one by one to the prevailing political winds, amending their constitutions, and throwing distraught ministers onto the mercy of their parishioners.68

Furthermore, there is substantial evidence that many religious groups (including many dissenters), while they may have embraced disestablishment at a formal level, were as committed to social struggle as before disestablishment. As one legal historian has

---


analyzed the politics and policies of religious organizations in the nineteenth century, many were more likely to demand the reordering of society to fit their faith, than sought to isolate and insulate themselves, or to ensure "freedom" for rival sects. In other words, the Mormons, although their peculiar domestic institution was unique, and the level of political power they achieved exceeded that of any other dissenting sect, were not alone in their vision of the reformative mission of their faith.

This paradoxical relationship -- the flourishing of vibrant popular religious politics in an ostensibly secular republic -- was thus vital to disestablishment at the state level. The ubiquitousness of profound religious faith also was in tension with the goals of disestablishment, even at its inception. As Alexis de Tocqueville noticed in the 1830s, the public influence of religion in America was undeniable, despite the purported secular rationality of the government. The informal political influence of religious thought, and religious thinkers, was almost inversely related to their formal political disabilities. Religious enthusiasm, religious commitments, prospered even as tangible strings between church and state were cut.

Like so many other chinks in the constitutional armor of the United States before 1860, the controversy over slavery exacerbated the underlying tension. Radical

---


abolitionist William Lloyd Garrison actually burned a copy of the Constitution on Boston Common in 1854, a dramatic gesture designed to show his contempt for a pro-slavery document, a "covenant with death," as he put it.\textsuperscript{71} By the 1850s, extra-constitutional arguments for the illegality of slavery, based for the most part on religious conviction, were widespread in the North.

Anti-polygamy drew strength from such arguments; it also provided a handy tool for refining them in. The relationship is a complex one, involving not only the shift to an active reformist constitutionalism, but the fundamental realignment of the relationship of church and state -- all mixed up with the changeable and at times tense connections between anti-slavery and anti-polygamy politics.

New York Whig (and future Republican) William Seward, was renowned for his claim that a "higher law even the Constitution," the law of God, openly challenged the legality of slavery in Congress during the debates over the Compromise of 1850.\textsuperscript{72} His claim, although repudiated at the time by many politicians, resonated with large numbers of people in the upper North. They, too, believed that a higher law condemned slavery as sinful, and that moral regeneration was essential to the nation as a whole.\textsuperscript{73} This was


dangerous talk; there was no controlling such supra-constitutional appeals to divine law. However much such language appealed to anti-slavery evangelicals, its destabilizing tendencies were recognized by most professional politicians.\textsuperscript{74}

Mormons were themselves an illustration of the problem: they too claimed access to a higher law, which authorized (nay commanded) them to take several wives. They argued that they should have the right to decide what morality they would obey, and that the constitution protected such decisions. This, they argued, was a matter for local governments to decide, free from outside influence or control: such anti-nomian tendencies in the rhetoric of higher law naturally made northern politicians squirm. Yet they, too, were convinced that a country must have a moral basis for its law -- or it would slip back into barbarism.

The genius of the Republican Party, reaching its zenith in Lincoln, was the realignment of this higher law argument, the "reconstitution" of the relationship of human law and morality, in quite a literal sense. Republicans, Lincoln and Salmon Chase foremost among them, were committed to a union of morality and constitutionality.\textsuperscript{75} They recrafted the higher law claims of anti-slavery activists into a constitutional theory,

\textsuperscript{74} See the reactions to the speech published in Allan Nevins, Ordeal of the Union, 2 vols. (New York, 1947), 1: 301-02. See also McPherson, Battle Cry of Freedom, 72-73.

\textsuperscript{75} For an analysis of anti-slavery constitutionalism generally, see William M. Wieck, The Sources of Antislavery Constitutionalism in America, 1760-1848 (Ithaca, N.Y. 1977).
incorporating God's law into the Constitution as a means of salvaging its essential moral character. As Thomas Nelson put it in his anti-polygamy speech in 1860:

[O]ur fathers, in the days of the Revolution, were not afraid or ashamed to acknowledge that the Almighty hand led them in that fearful and unequal struggle, and enabled them to establish the best and greatest Government that has ever existed since the world began. Let us endeavor to cherish and preserve it in the same spirit in which they were led to establish it.... we will yet endeavor ... to show our abhorrence of institutions that are not authorized by the Constitution of the country, and that are contrary to the laws of the Being who created us.  

Anti-polygamist Republicans were dedicated to an interpretation of the Constitution that was not only consisent with, but expressive of, the higher moral law that they saw as the basis for all human and humane action. Gooch implied, even, that government must do what is moral. And they were crystal clear on the immorality of polygamy.

In one sense, therefore, the Morrill Act was among the earliest national legislative moves to domesticate the higher law rhetoric of the anti-slavery movement. As Morrill himself put it, constitutional formalism of the sort that protected peculiar domestic institutions was too expansive for northern tastes: "[W]e are told, because our constitution declares that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' that we must tamely submit to any burlesque, outrage, or indecency which artful men may seek to hide under the name of religion!" Republicans were opposed to "latitudinous" interpretations of the Constitution

---


77 Appendix to the Congressional Globe, 36 Cong., 1 sess., 195 (4 April 1860).
in general; such states' rights approaches invariably disarmed anti-slavery and anti-polygamy claims.\textsuperscript{78}

In the place of such artfulness, anti-polygamists promoted criminal legislation to protect the higher law: "In prohibiting polygamy," argued Thomas Nelson, an anti-slavery congressman from Tennessee, "we shall act only 'in subordination to the great Lawgiver, transcribing and publishing His precepts.' He has said, 'Thou shalt not commit adultery.' He has authorized marriage alone with one person at the same time, and when the relation is extended further against His law, it becomes adulterous."\textsuperscript{79} Mormons, of course, countered that the Lawgiver had given them special dispensation through revelation, and that theirs was an institution well known in the Old Testament, practiced by Abraham. Republicans, under the leadership of the new Abraham, had little patience for such moral exceptionalism.

They even historicized their claims, arguing that the constitution only protected Christianity:

[It is more than probable that by the term religion [the distinguished men who framed the constitution] meant only to convey the idea of a belief founded upon the precepts of the Bible; and holding it to be a common and established standard of faith, they did not design that any discrimination should be made in favor of one denomination of Christians over another, but surely they never intended that the wild vagaries of the Hindoo or the ridiculous mummeries of the Hotteniot should be ennobled by so honored and sacred a name.\textsuperscript{80}

\footnote{Justin Morrill, \textit{Polygamy and Its License, A Speech Delivered in The House of Representatives on February 23, 1857} (Washington, DC, 1857), 10.}

\footnote{Appendix to the Congressional Globe, 36 Cong., 1 sess., 193 (5 April 1860).}

In its bare essentials, such a position (a common one among anti-polygamist politicians) amounted to a claim that all faiths were disestablished, while the free exercise clause protected only Christians. When factored into the understanding that religious opinions only, rather than social structures (i.e., slavery and polygamy), were proper subjects of free exercise, it becomes evident that the common legislative understanding of the scope of the first amendment was narrow indeed. Yet it would be a mistake to assume that the dissociation of religion from government was more complete during the anti-polygamy era than at other times. This was disestablishment not in the service of diversity, but of uniformity -- uniform Christianity, uniform monogamy.

Chase, Lincoln, Morrill and Gooch all understood themselves as participating in the elimination of state-supported barbarisms, the gradual release of all fetters on human progress, the onward march of civilization through the purification of marriage (of which Christianity was an inseparable and foundational, if indefinable, part) toward freedom, democracy and equality. Theirs was a grand vision. It contemplated the perfection of society through the reformatory powers of the state, which in turn had been reformed by the moral retooling of politicians in religious enthusiasm. The heady mix of a commitment to universal social progress with the belief that individuals could purge themselves of vice if only given the proper instruction (and incentives), made humanitarian politicians like Justin Morrill a force to be reckoned with in the Civil War era.

\[81\] Haskell, "Capitalist Origins of Humanitarian Sensibilities" and Howe, "American Victorianism." On Morrill's force of moral character, his unswerving commitment to what he believed was right, his deeply held religious faith, and on his ability to work for
Their achievement should not blind us to the fact that, in the very act of
disestablishing the Mormon Church in Utah, they brought into being a new form of
establishment. In a handy coincidence of doctrine and inclination, they also understood
themselves as protecting true religion against corruption, for they believed that formal
separation of religion from government was essential to the purification of both. Without
the protection afforded by establishment, anti-polygamists were convinced, the Mormon
church would be revealed in all its moral weakness. Its strength, they believed, rested
not on genuine faith, but on the fear produced by naked power.

With the broad support of Republicans from across the North, the Morrill Act
revoked the legislative incorporation of the Mormon church, together with its statutory
powers to control and discipline its members, and its jurisdiction over marriage in the
territory. The Act went even further; drawing on the provisions of mortmain laws across
the country and in English history, it limited the amount of real property the church could
acquire as a means of controlling "ecclesiastical domination." It is thus worth
emphasizing here that anti-polygamist Congressmen, while acting on explicitly higher law
principles, used traditional lower law methods, such as mortmain statutes (which were

long hours to achieve his political goals, see William Belmont Parker, The Life and
Public Services of Justin Smith Morrill (New York, 1924), 349 - 357.

Speech of Hon. Daniel W. Gooch, of Massachusetts, House of Representative,
April 4, 1860 (Washington, D.C., 1860), 8. There is no study of mortmain laws in the
United States, but such legislative limitations on the powers of churches to acquire and
hold real property were common. Delaware, Illinois, Iowa, Kentucky, Maryland,
Michigan, New Jersey, New York, and Ohio, according to one source, all had published
caselaw construing mortmain statutes in the late nineteenth century. Carl Zollman,
American Civil Church Law (New York, 1917), 89-93.
themselves pointedly hostile to religion, at least in origin), to police the new boundaries between church and state. In part, then, the tradition of disestablishment (the hobbling of institutional power in the interests of the flourishing of dissenting groups) was translated in the mid-nineteenth century into a drive for religious uniformity.

Law, Reality, and the Failure of Reform

But despite the ground-swell of political support for the bill, and the fascinating theoretical implications of its passage, the Morrill Act was not an effective means of prohibiting polygamy in Utah, or ensuring the disestablishment of the Mormon Church. The act was unenforceable, in large part because a grand jury of their peers would not indict Mormon leaders for obeying the commands of their religion. As one Judiciary Committee report lamented five years after polygamy was outlawed, the Morrill Act was a "dead letter."\(^3\) Mormon leaders even petitioned for repeal of the statute in 1867, claiming that its ineffectuality had been conclusively demonstrated by the absence of convictions under the act.\(^4\)

---

\(^3\) Report from the Committee on the Judiciary, February 28, 1867, responding to the "Memorial of the Legislative Assembly of the Territory of Utah, Praying for the Repeal of [the 1862 Act].", 3.

\(^4\) The petition, and the proposed state constitution that accompanied it, are detailed in Orson F. Whitney, History of Utah, 4 vols. (Salt Lake, 1892-1904), 2: 172-75.
2. "Not a Crusade of Arms, but a Crusade of Law": Anti-Polygamy, the Political Importance of Marriage and Contract in the post-Civil War Era

Anti-polygamists in the post-war era, like their abolitionist fellow travelers, were forced to confront the theoretical and practical difficulties of implementing their newfound authority, even as they refined their notions of the politics and political importance of marriage. This problem had been anticipated, even by those who supported the Morrill Act. Even before the war, there was some sense that merely declaring the criminality of polygamy might not in and of itself spell the end of the practice.

For the most part, however, anti-polygamists predicted that the Morrill Act at the very least would create an environment in which polygamy could not long survive. Some argued that the criminalization of plural marriage would tend to encourage non-Mormon immigration to Utah, solving the dilemma by diversifying the population of the territory. Others maintained that the criminal label would affect the behavior of Mormons themselves -- and that, if it did not, then the full force of the law would be brought to bear against them.¹

Both predictions were realized to some extent, although neither as completely nor as swiftly as Republicans anticipated. One complicating factor was an effective and

¹ Answering charges of unenforceability, Representative Gooch of Massachusetts said:

So far as I am concerned, and so far as I understand the feeling of those who support this bill, they are prepared to enact it into a law; and having enacted it into a law, they are ready to treat this law as they do all other laws, and to use all the power and force of the Government necessary to enforce it. And if all the force and power of the Government are not sufficient to accomplish the objective, so far as this matter is concerned, the Government is simply impotent, and not able to carry out its own acts.

organized Mormon immigration system, which maintained a predominantly Mormon population, despite a growing non-Mormon minority which was concentrated in mining areas and railroad towns, as well as Salt Lake City.²

The second factor was the continued ability of Mormons to withstand, even welcome, the condemnations of their countrymen, and their national government. Their resistance to pressure was calculated to fall just short of provoking an armed response -- and, if possible, to avoid further legislation and obtain statehood as a means of protecting their church and its practices. Through Utah's territorial delegate in Washington (always a hand-picked defender of the Mormon majority and its hierarchy), the Mormons were able to play on party and philosophical differences, appealing primarily to the states'-rights Democrats of the Old South, and now and again attempting to out-fox Republican humanitarians (such as through the enfranchisement of women in the territory, the subject of the next chapter). From time to time, the Mormons appeared close to achieving their goal -- they could promise (and could deliver) a solid block of votes from the faithful to

² William Mulder, *Homeward to Zion: The Mormon Migration from Scandinavia* (Minneapolis, Mn., 1957), ix-x. Many government officials were convinced that immigration was a key component of the Mormons' policy of resistance and defiance of federal anti-polygamy legislation. The State Department sought commitments in 1870 from England and European nations that they would not allow Mormon converts to emigrate to the United States, where they would be likely to become polygamists. Diplomatic Correspondence, Circular No. 10, 9 August 1879, *Papers Relating to the Foreign Relations of the United States 1879* (Washington, D.C., 1879), 11-12. Quoted in William Mulder, "Immigration and the 'Mormon Question': An International Episode," *Western Political Quarterly* 9 (Fall, 1956): 416-33, 423. Since that date, all immigrants to the United States have been required to swear that they are not polygamists. On occasion, this provision still has bite. World Trade Center bombing plot suspect, Sheik Omar Abdel-Rahman was first arrested not as a terrorist, but as a polygamist. "Give This Sheik the Gates," *Chicago Tribune* 3 July 1993, 18; "The Islamic Connection: Religious Fundamentalism and Terrorism," *Security Management* (July, 1993) 37:4.
whichever party would engineer the admittance of Utah as a state. Periodically, the Democrats were tempted, but Republicans successfully prevented such parliamentary deal-making.

Instead, a coalition of anti-polygamy congressmen, supported by an expanding contingent of lobbyists, women's groups, clergymen, newspaper editors (supported by presidential pontificating in annual messages to Congress), gradually but unsteadily filled in the procedural holes in the Morrill Act, eventually supplementing the procedural measures with political disabilities for polygamists. The anti-polygamy issue remained a staple of Republican party politics, appearing again and again in post-war platforms under the familiar "relic of barbarism" label.

Ineluctably, this web of anti-polygamy legislation played on many of the major political and economic themes of their day. It also highlighted -- always hinting at and sometimes screaming aloud -- the relationship between race and gender in the national political consciousness. This was true especially after the war, when Republicans in Congress enacted anti-polygamy legislation that replicated in crucial ways penalties imposed on the slaveholding South and former Confederates after Appomattox. There was in a very real sense, a second, and long ignored, Reconstruction in the West. But

---


the perceived identification in eastern minds between women in Utah and African-Americans in the South tended to bend under pressure -- at times it cracked. At some points the race connection threatened to defeat anti-polygamy legislation; at other times it was essential to its passage. In 1860, for example, a Massachusetts Republican, arguing for the passage of stringent criminal penalties for sexual crimes in Utah, conceded that "twin relics" language of the 1856 Republican party platform went too far -- he would not have claimed that slavery could be outlawed in the territories, but would never make such a concession to polygamy.⁵

The turn to active enforcement of anti-polygamy laws on a reluctant population was gradual, hesitant, unsteady. By the late 1860s, anti-polygamists were forced to confront a situation in which the great majority of the population of Utah, people who for the most part spoke English, were industrious and peaceable, who regularly participated in the political process, nonetheless employed all these indicia of liberty in the service of license. The question thus became whether the privileges of citizenship -- suffrage, protection of property, equality of opportunity -- were the cause or the result of moral qualifications. Put in the context of anti-polygamy, the question was whether exposure to American law and political institutions would rehabilitate Mormon men (and possibly Mormon women, although their depravity was not yet a given), or whether American law and institutions must be actively recalibrated to provide a rehabilitative mechanism.

In the vocabulary of post-war legal and political thought, particularly of the Republican sort, the continuation of polygamy was an "insult" to the "majesty of the laws

of the Union." As Senator Allen Thurman of Ohio, put it in 1873, the polygamy question challenged the national government to effect reform without recourse to bloodshed, to create a "crusade of law."

(a) "The Foundation of Modern Society": Marriage, Politics and the Lackluster Enforcement of Anti-Polygamy Legislation after the Civil War

Yet it took Republicans twenty years to formulate an effective mechanism for enforcement. Despite loud cries of persecution from Mormon Utah, and enforcement-type noises from the Republican side of the aisle, territorial officials did not receive significant powers to punish polygamy until 1882, when the Edmunds Act ushered in what Mormons called "the Raid," and non-Mormons called "the Crusade." Tough talk did not translate into actual legal mandates until several factors combined to invigorate anti-polygamy politics. In part, Republicans hoped the Morrill Act and the forces of progress would combine to enlighten Mormon Utah. In part they were stymied by endless and effective Mormon delay tactics. And in part they were disabled by their own reluctance to engage in coercion, to make the turn to outright punitive tactics.

Despite the relatively lackluster record in positive achievements, however, the 1860s and 1870s were not without successes from the anti-polygamists' perspective. Primary among them was prevention; that is, the effective denial of statehood for Utah as long as polygamy was part of the package. Furthermore, anti-polygamy thought, although it generally did not produce tangible results, developed significantly in the post-war period, especially in the decade after the war. The campaign gathered seriousness, if not weight.
Before the Civil War, Southerners tended to make light of the problem, making jokes about polygamy as commonly practiced by those in the "naval profession" as much as by Mormons.⁶ After the war, however, and with the political ascendancy of the Republican Party and its avowedly anti-polygamy platform, jokes were heard much less often. Utah's territorial delegate did venture, in reply to a query from Grover Cleveland (then a congressional representative) about the widely rumored disappearance of dissident Mormons at the hands of avenging "Danites," that even supposing men did disappear from Utah, "[d]o not men disappear everywhere?" "[Laughter]," recorded the congressional clerk in the space following these remarks.⁷

For the most part, however, congressmen of both parties responded to charges of hypocrisy and double standards by arguing that the Mormons had tried to transform vice into virtue. It was the attempt to legalize what was by nature illegal, they charged, that distinguished Mormon polygamy from the less pernicious vices such as disappearing men, and even prostitution:

I can see a wide difference between a thing which hides itself in holes and corners, and keeps out of sight, defying all law and decency, but without setting itself up as a rule to follow, and a community which organizes lechery; that sets up a State founded upon it; that fulminates its decrees in favor of it; which makes the law itself speak for polygamy; which erects this everlasting nastiness in Utah, and adorns it with the mantle of religion and law.⁸

---

⁶ Representative William Smith of Virginia, Congressional Globe, 35 Cong., 1 sess., 185 (22 January 1858).

⁷ William Hooper, Congressional Globe, 41 Cong., 2 sess., 2151 (22 March 1870).

⁸ Representative Austin Blair, Republican, of Michigan, id., 2149.
The tautology of this argument (the claim that something that called itself marriage could not be marriage because it was not within the nineteenth century's accepted definition of marriage) did not trouble most anti-polygamists. Instead, they focused on the presumed impossibility of women's genuine consent to polygamy, highlighting the perceived overlap between slavery (a system that denied the right to a marriage contract altogether), and polygamy (a system that denied wives the right to a marriage contract consistent with political freedom). One congressman even sarcastically proposed turning over the care and protection of plural wives to the Freedmen's Bureau, given that the experience of slaves was so often compared to that of Mormon women. 9

This proposal went nowhere, but polygamy gradually assumed the status of a "problem," or "question" -- the labels given to issues that demanded sustained and serious attention, and, virtually by definition, cried out for discussion, debate, action. Prevention of statehood for Utah was thus the floor, but the ceiling moved considerably in the 1860s and 1870s. By the early 1880s, anti-polygamists had articulated a political theory that was both coherent, and (given the changed political and legal climate) frankly coercive. But before the heady days of the anti-polygamy revival, there was lots of hard work to be done. The story begins at the end of the Civil War.

Schuyler Colfax, first as Speaker of the House, and then as vice-president, made two visits to Utah in the 1860s. On both occasions he gave speeches; the first, in 1865, was neutral, even congratulatory -- but in private Colfax urged Brigham Young "to have

9 Representative William Niblack, Democrat of Indiana, ibid.
a new revelation on the subject [of polygamy], which should put a stop to the practice."\(^{10}\) Without such a change, Colfax assured Young, statehood was a virtual impossibility; polygamy was the real stumbling block.\(^{11}\) When he returned in 1869, Colfax was far less tactful and conciliatory. In a speech from a balcony in downtown Salt Lake in late 1869, Colfax explained in exasperated tones that further disobedience would not be countenanced:

[O]ur country is governed by law, and no assumed revelation justifies anyone in trampling on the law.... The Constitution declares, in the most emphatic language, that that instrument and the laws made in conformity thereto, shall be the supreme law of the land. Whether liked or disliked, they bind the forty millions of people who are subject to the supreme law.... [The law] is not obeyed here, and though you often speak of the persecutions to which you were subject in the earlier years of your church, you cannot but acknowledge, that the conduct of the government towards you, in your later years, has been one of toleration, which you could not have realized in any other of the civilized nations of the world.\(^{12}\)

What remained unclear for the next decade was how best to vindicate that supremacy of law, whether time and progress would take care of the situation, whether refinements in legal process might be enough, or whether polygamy had metastasized,

---

\(^{10}\) As reported in Orson F. Whitney, *History of Utah*, 4 vols. (Salt Lake City, 1892-1904), 2:133.

\(^{11}\) "Mr. Colfax and his friends stated in conclusion that they hoped the polygamic question might be removed from existence, and thus all objection to the admission of Utah as a State be taken away; but that until it was, no such admission was possible, and the Government could not continue to look indifferently upon the enlargement of so offensive a practice." Whitney, *History of Utah*, 2:133.

\(^{12}\) Speech delivered 5 October 1869, reprinted as *The Mormon Question* (Salt Lake, 1870), 2. For a description of Colfax’s visits to Salt Lake from a non-Mormon perspective, see Ovando James Hollister, *Life of Schuyler Colfax* (New York, 1886). Hollister, who was married to a step-sister of Colfax, was collector of taxes in Utah, a federal patronage appointment.
contaminating the political culture to such an extent that more systemic remedies were required. By the end of the 1870s, anti-polygamists in Congress were convinced that only a thorough overhaul would suffice, that polygamous men must be forcibly taught to obey, and that their wives were victims of false consciousness, a by-product of their religious fanaticism. The turn to coercion, the creation and deployment of national authority to punish those who first openly challenged and eventually covertly evaded the reconstruction of Mormon Utah, involved substantial national attention to matters of marriage, sexuality, family permanence, and local control -- all wrapped up with partisan politics at the national level, liberal contract theory, and Reconstruction.

These underlying (and by no means consistent or cohesive) issues make anti-polygamy an interesting puzzle for the legal historian; they also led the federal government into the action based on the theory that marital relations are both politically relevant and based on a power structure that affects far more than the individual household. Even if anti-polygamy was the occasion for limiting as well as raising the rights of women, therefore, it was part of the process by which women (and legislators and judges) came to think of themselves as rights bearers, whose claim to an intrinsically fair and mutual marital structure would be vindicated through a series of ever more complex and invasive legal techniques.  

It is to the initial stages of this enforcement process that we now turn, a process that involved federal appropriation of

---

the substantive marriage law of the states, and their application to Utah Territory by procedures drawn from the reconstruction of the South.

(b) "No Assumed Revelation Justifies Anyone in Trampling on the Law": An Elusive National Identity in Monogamy

Throughout the first half of the nineteenth century, the law of marital formation was profoundly associated with the establishment and maintenance of male citizenship. This focus on political ability based on marital status did not necessarily translate into barriers to marriage; rather, as in the acceptance of "common law" marriages and greater latitude for celebration of marriages in unorthodox settings, government support for marriage-like relationships allowed the state to shore up with the legal paraphernalia of marriage a wider array of familial arrangements. The expansion of marriage, one might say, was an attempt to allow opportunity for virtue, to take arguably irregular relationships and clothe them with political legitimacy. Utah Territory was an implicit challenge to this new legitimacy for formerly questionable sexual arrangements, because in Utah men whose domestic lives were by definition illegitimate claimed (and wielded) political and legal power.

The Morrill Act was designed to change all that. But those who predicted the speedy demise of Mormon polygamy were doomed to disappointment. During the war,

---

military officers stationed in Utah reported that the Morrill Act only seemed to harden Mormon attitudes, and that Brigham Young was as defiant as ever. Immediately after the war, the House Committee on Territories conducted an investigation into the "Condition of Utah." The resulting report included extensive testimony from non-Mormon residents, soldiers and military chaplains, as well as liberal quotations from the most hyperbolic of Brigham Young's sermons admonishing the faithful to practice polygamy. It concluded that "the laws of the United States are openly and defiantly violated throughout the Territory" and that a "practical solution to the evils and abuses complained of" had not been found.

The anti-polygamy law had not been enforced, but neither the committee nor the Congress as a whole had yet developed a theory to explain why the law was so ineffectual. Hamilton Ward of New York and Shelby Cullom of Illinois, among others, were determined to ferret out the answer. Most Congressmen (Blair of Missouri is an exception18) were not persuaded by the Mormons' arguments the lack of enforcement

17 "The Condition of Utah," *Congressional Globe*, 39 Cong., 1 sess., H. Rep. No. 96, 1 (23 July 1866): "The committee ... regret to state that they have been unable to agree upon and submit for the action of the House any plan which seemed to them to promise a practical solution of the abuses and evils complained of, and which are admitted to exist. They do not deem it advisable either to divide the Territory and annex it to Nevada and the territories adjacent, nor do they favor the establishment of a military government."

18 Representative James Blair, one-term Republican of Missouri, actually introduced legislation to legalize polygamy. House Bill No. 721, 42 Cong. 2 sess., 1096-1101 (17 February 1872). The bill was never debated. As one contemporary observer put it, "Mr. Blair ... had the distinction of standing alone among the members of the house in advocacy of his measure." B.H. Roberts, *Comprehensive History of the Church of Jesus Christ of Latter-Day Saints*, 6 vols. (Salt Lake, 1930), 5:439.
demonstrated the law's inherent unenforceability. Some, like suffragist George Julian, argued that woman suffrage in Utah (the subject of the following chapter) would solve the problem of polygamy. Others concluded that the legal system was the prime source of the trouble, and that the Mormons had systematically violated the "majesty of the laws of the United States" by corrupting the courts and juries of Utah.

Within months of the committee report anti-polygamists in Congress had reconceived their strategy. Now their energies were focused on undermining Mormon domination and control of the criminal justice system in Utah, as well as imposing political disabilities on those who maintained they were above the new federal law of marriage. The Mormon "question" more than ever resembled the "problem" posed by the post-war South. The goal in both cases was the rehabilitation of political actors, the restructuring of legal relationships (slavery and polygamy) that disqualified the participants from a voice in the republic.

Policing the boundaries of legitimacy became the job of the courts, in both the Reconstruction South and territorial Utah. The federal judiciary, federal process, was the most obvious answer, and the one to which anti-polygamists turned early and often. They also attempted to link anti-polygamy to political process in ways similar to measures imposed on the South during Reconstruction, including test oaths, election commissions, federal appointment of most offices, and so on.

---

The Cullom Bill, introduced by Shelby Cullom in 1869, and debated extensively in 1870 (it passed the House, but failed in the Senate) embodied this turn to the legal reconstruction of Utah to protect marriage. Cullom drew connections between the legal system of Utah as a whole, and the punishment of polygamy in particular. His bill made the essential connection, the ideological turn to the use of coercion in the service of monogamous marriage as an incident of freedom in the post-war era. An impossibly long bill, the forty one sections were a hodge-podge of procedural and political measures, each one eating away at the ability of polygamists and their church to find shelter in local government. From jury trial to the franchise, the incidents of citizenship were to be suspended in the interests of eradicating the "foul blot on our national escutcheon," as one anti-polygamist put it. One measure even required financial disclosure by the church. Taken as a whole, the Cullom Bill contained the germs of virtually all subsequent anti-polygamy legislation. "Slavery!" cried one Mormon editor; slavehood imposed on "white" men of "Anglo-Saxon descent," the "equals--the peers, in birth, breeding, education, and every quality of manhood, shall we not say ... superiors [to the sponsors of the bill] in our conception of the rights of American citizenship?"

---

20 Earlier legislation, introduced in 1868 by Senator Cragin, was also targeted at the legal system -- it would have abolished trial by jury in polygamy cases. The Cragin Bill, however, did not make it past the initial introductory stages, and so debate was minimal (and thus less useful than the Cullom Bill as a guide to the thinking of congressmen).

21 Representative Hamilton Ward, Congressional Globe, 41 Cong., 2 sess., 2145 (22 March 1870).


The parallels to race were indeed undeniable, but for anti-polygamists, of course, Mormon men more closely resembled slaveholders than slaves. Control of courts and the franchise were two staples of Reconstruction in the South. But in Utah there was an added wrinkle — Mormon women, especially plural wives, apparently did not embrace their freedom. They even held a mass demonstration in Salt Lake City after news of the proposed Cullom Bill reached the territory, to protest the bill, and publicly announce to the world their acceptance of plural marriage.

Forced to articulate an explanation for how women could apparently support a system based on their own degradation, Republicans added to their earlier claims that polygamy was by definition non-consensual, giving the first indications of what would eventually become wholesale disdain for the women of Utah. Anti-polygamist Republicans argued first that "these unfortunate women were operated upon by the tyrants that control them to make this demonstration," adding, however, that the existence of some "depraved and dishonored" women should not undermine the moral code of the

---


25 The "indignation meeting," estimated at 3,000 women, was held in the Tabernacle (a large hall where Mormon weekly worship services were held, as well as annual conferences, and the like) in Salt Lake on 13 January 1870. For a general description of the "remarkable meeting," see The New York Times, 14 February 1870, p. 4, col. 4. One historian has concluded that this meeting provided sufficient evidence of Mormon women's potential usefulness in the defense of polygamy to encourage Brigham Young and other leaders to give women in Utah the franchise. Lola Van Wagenen, "In Their Own Behalf: The Politicization of Mormon Women and the 1870 Franchise," Dialogue: A Journal of Mormon Thought 24 (Winter, 1991): 31-43. See also Whitney, History of Utah, 2:395-402.
country. One representative even made an argument that Mormon women should not evoke the sympathy of Congress; "we cannot forget the fact that they went there voluntarily: that, if they are concubines, they are concubines voluntarily.... [I]f, when this thing comes to be broken up, they find themselves unfortunately circumstanced it is only the common case of persons who go into evil courses and find the outcome not to their minds." Enforcement, argued Representative Hamilton Ward, Republican of New York and commissioner of troops for New York state during the war, should be swift, severe, punitive:

Had you hung one hundred traitors you would not have had rebellion in North Carolina and Tennessee to-day. Had you enforced the laws of the country against Utah years ago you would not have had this terrible power confronting you at this moment. If this thing has succeeded and thriven by your neglect, if it has been fostered and strengthened by your procrastination, you have only yourselves to find fault with. It is time you should retrace your steps and see the laws of your Government are enforced.

And shall it be said of the American name and of the honor of the Republic that after blotting out slavery, redeeming itself from the stain of human slavery, it had not the courage, it had not the manhood, it had not the nobility to put out its helping hands to the fifty thousand women and children in a far-off Territory and protect them by the national laws?²⁷

---
²⁶ Representative Blair of Michigan, *Congressional Globe*, 41 Cong., 2 sess., 2149 (22 March 1870). This was, in 1870, an extraordinarily punitive attitude toward Mormon women, who were still generally portrayed as slaves rather than criminals, as victims rather than agents. Far more common was the opinion of Senator Cragin, who referred to Mormon women as "bound slaves," who were kept "as submissive and as miserable, and some of them as ignorant, as the Indian squaws around them." *Ibid*, 3575 (18 May 1870). Representative Judd of Illinois, for example, proposed an amendment to the Culom Bill that would confiscate the property of polygamists for the support of their wives and children, whether or not "concubines" or "illegitimate." *Ibid*, 2180 (23 March 1870).

²⁷ *Congressional Globe*, 41 Cong., 2 sess., 2143 (22 March 1870).
The "majesty of the laws of the Union," argued anti-polygamists, had been insulted by a system that took the maintenance of "harems," "a thing which hides itself in holes and corners, defying all law and decency, [and made concubinage into] a State founded upon it; which makes the law itself speak for polygamy; which erects this everlasting nastiness in Utah, and adorns it with the mantle of religion and law...."28 The Republican party, according to one senator who spoke in favor of the bill, was "already glorious and immortal, but its mission is not yet completed," as long as the "other 'twin relic of barbarism' still remains, and even openly denounces the Government and defies its power."29 The answer was to "grasp [control of the situation] with a firm and strong hand," bringing Mormons to heel, punishing them for "insults and defiance of law."30

All this talk of defiance, insult, on the one hand, and majesty, glory, on the other, reveals a subtle shift in the relationship of Republicans to positive law. If the Morrill Act had codified a piece of the same kind of higher law thought that dared to challenge the legality of slavery, debates in Congress after the war grounded the potentially subversive trajectory of such higher law theories, bringing the debate (on the government side, at least) firmly down to earth. From then on, anti-polygamy was tied to positive legal doctrine. Some Republicans even (hesitantly, tentatively, but nonetheless openly) re-evaluated their own anti-slavery activities before the war. Blair was the most frank,

28 Representative Blair of Michigan, id., 2149.

29 Senator Cragin of New Hampshire, id., 3574 (18 May 1870).

30 Ibid., 3579.
conceding in open debate that anti-slavery activists had been wrong to evade the legal mandates of the Fugitive Slave Act.\textsuperscript{31} Citizens did not, he argued, have the right to evaluate the constitutionality of any given law for themselves -- instead they must obey the law, trusting to the courts and Congress to rule wisely.

The Cullom Bill, despite the efforts of its supporters, atrophied in the Senate after passage in the House, dying as the session ended with no action on the bill. A group of Mormon apostates later took credit for defeating the bill, claiming that they had impressed Colfax with the need to avoid anything that looked “punitive,” and that Brigham Young’s power was waning as old age and tyrannical policies alienated his most elite and educated followers. At least as likely is that the bill simply lost momentum as it crossed the hall to the Senate. It is possible, too, that Senators were convinced by lobbyists’ arguments that the railroad, the mining industry, and the cleansing action of time would combine to solve the problem painlessly, by luring good citizens to Utah, by exposing hidden practices to examination by light of day, and by the natural atrophy of a social system that was openly and unabashedly “backward” in an age of progress.\textsuperscript{32}

For whatever reasons, the Cullom Bill died, and with it the best chance for decisive action against polygamy for years to come. The Republican party’s domination

\textsuperscript{31} “[W]hen I was engaged ... in an association which complained of the hardships of the fugitive slave law and of its execution we complained because we wanted to defeat the law. We hated the law itself.... But such was the law; and I believe I may now safely say that under that law no jury ever found a verdict which the facts did not justify....” \textit{Id.}, 2148 (22 March 1870).

\textsuperscript{32} See, for example, \textit{Congressional Globe}, 41 Cong., 2 sess., 2143-45 (22 March 1870).
of the political agenda waned; scandals, internecine strife, and general disarray characterized the early 1870s, building to the disastrous mid-term election of 1874, when Republicans lost control of Congress for the first time in fourteen years, and many a loyal anti-polygamist dropped from national political radar.

Although bills to enforce anti-polygamy legislation, primarily through tighter control of the judicial system and increased federal appointment powers were introduced at almost every session, they were consistently opposed by southerners as violative of the new spirit of reconciliation, and failed to win the level of support from Republicans that might have made for interesting debate. John Sherman, powerful Republican Senator from Ohio, for example, undermined the proposed anti-polygamy bill introduced by Frederick Frelinghuysen of New Jersey, arguing that Mormons were "misguided," rather than immoral, and that "[t]hey have done the country great good in the physical development of the western portion of our continent."33 The embattled President Grant, long a foe of polygamy, made impassioned pleas for the "ultimate extinguishment of polygamy,"34 but disaffected Republicans in Congress, especially House Speaker James Blaine, were more susceptible (according to Grant's allies) to Mormon bribes than women's lives.35

33 Congressional Globe, 42 Cong., 3 sess., 1790 (26 February 1873).

34 James D. Richardson, comp., Compilation of the Messages and Papers of the Presidents 1789-1897, 10 vols. (Washington, D.C., 1897), 7:203-04.

35 The "Halfbreeds," as they were known, were accused of corruption, especially after the failure of the Frelinghuysen bill. See Roberts, Comprehensive History, 5:437, quoting Delegate Cannon's journal for 4 March, 1872, the day after the bill was defeated: "Our enemies were raging.... Claggett asserted that we had spent $200,000 on the judiciary committee, and Merritt swore that there had been treachery, and we had bribed
Vermonters stayed the course. Home of the most radical abolitionist population before the war, and equally important source of anti-polygamy politics for the next twenty years, Vermont's Republicans, led by Justin Morrill for four decades, were consistent and persistent. Before he, too, lost a bid for re-election in 1874, Luke Poland, a member of the Committee on Territories, proposed legislation that, as he himself put it, was milder than anything introduced since the war.66 The bill, which passed the House by a comfortable margin but ran into trouble in the Senate (predictably, by this time, California's railroad man, Aaron Sargent, threatened to filibuster), expanded the jurisdiction of the federal courts and prosecutors in the territory, and changed the rules of jury selection. For the first time, the United States was to have a voice in the selection of jurors; the Poland Act provided for both the clerk of the district court and the local probate court judge to contribute 100 names each to the pool.67 The bill also provided for dismissal for cause of any juror who practiced or believed in polygamy when the case to be decided involved polygamy. Only by giving some teeth to the courts, Poland argued, would the national government begin to recover from "the disgrace of having congress. But I praised and thanked God, who was our friend and mightier than they all. By seemingly small and insignificant means he had brought to pass marvelous results, and to him all the glory was due."

66 "This bill," claimed Poland, "is remarkable for its moderation toward this people," especially in contrast to the much sterner provisions of the Cullom Bill. Congressional Record, 43 Cong. 1 sess., 4474 (2 June 1874).

67 Section 4. The Act also reduced the jurisdiction of the probate courts to matters of estate, guardianship, and so on. Divorce cases could be filed in either court, but were removable to the federal court. Section 3. The bill is reprinted in ibid, 4466.
upon our statute-books a law of Congress, that has been there for twelve years, openly and avowedly disobeyed by those people."

Yet even this watered-down version of anti-polygamy enforcement did not survive in the Senate. The provision removing polygamists from juries in trials was stricken from the legislation, leaving juries evenly divided, and thus (argued anti-polygamist federal officials in Utah) hopelessly deadlocked. Credit for mobilization of Democrats, and the disaffection of Republicans on the polygamy question, belongs in part to George Cannon, Utah's delegate to Congress, a tireless advocate and shrewd parliamentarian. Cannon was the tangible personification of the politics of polygamy. Urbane, corpulent, second in command only to the prophet himself, Cannon's stature made him the prime target of anti-polygamists in Washington and Utah alike. Federal officials in Salt Lake had more than once attempted to collar Cannon on polygamy charges, but each time he had slipped from their grasp. One of his enemies credited Cannon's success to corruption: "The Mormon delegate to Congress, who carries a hundred thousand votes in one hand, and millions of corruption money in the other, will prove a dangerous man

---

38 Ibid, 4474.

39 For a discussion of the effort to hobble the Poland Act in the Senate, see Cannon, "The Mormon Issue in Congress," 57-59.

40 It was the first of these attempts, the arrest of Cannon on polygamy charges in October 1874, however, that eventually produced the landmark Reynolds decision, the Supreme Court's first polygamy case. The story of how Cannon evaded the charges, and Reynolds came to be the first polygamy defendant, is told at length in Part IV, chap. 1.
in Washington, unless politicians grow strangely virtuous, and there are fewer itching
palms twenty years hence."

Cannon's effectiveness is indisputable. From 1874 to 1882, Cannon was "able
to stifle literally all of a substantial amount of legislative proposals deemed to be inimical
to church interests." In addition to the local government proclivities of Democrats,
Cannon played constantly on the theme of mutual co-existence, arguing to whomever
would listen that if only Congress would leave Utah alone, the Mormons would make few
demands on the government. In stark contrast to other territorial delegates, Cannon never
asked for money (indeed, there is some evidence that his opponents, although they
exaggerated his power and his purse, were not far off the mark when they attributed his
success to Mormon bloc voting and generous lobbying). Cannon's mission was to
make Utah all but invisible politically, until an opportune moment arrived to insinuate yet
another petition for statehood, which might slip through if only the political stars would
once align in just the right order." One such opening, the election dispute of 1876,

---

Josiah Strong, Our Country: Its Possible Future and Its Present Crisis (New York,
1985), 65.

Lyman, Political Deliverance, 19.

Id., 69-95.

" See generally Lyman, Political Deliverance; Lamar, The Far Southwest, 383:
"Utah had a shrewd diplomatic minister who advocated a nineteenth-century policy of
mutual co-existence by constantly persuading Congress either to leave Utah alone or to
give her home rule through statehood. While most territorial delegates were busy
scrounging for appropriations, the Utah representative was busy defeating anti-polygamy
bills.... As a result, Utah got a minimum of federal funds throughout the territorial
period." See also Frank J. Cannon & Harvey J. O'Higgins, Under the Prophet in Utah:
The National Menace of a Political Priest Craft (Boston, 1911), 85-91.
backfired when Democrat Samuel Tilden, to whom Cannon had confidentially promised "the gratitude of the [Mormon] people," lost the bitter battle for the presidency to Rutherford Hayes.  

Hayes, predictably, was a dedicated opponent of polygamy. He and his wife travelled to Utah in late 1880, and after returning he called, more forcefully and directly than any president before him, for legislation to impose monogamy on Utah; he denied that time and civilization were eroding polygamy; he charged that polygamy had inevitable and deleterious political consequences; he outlined a political program for anti-polygamists to follow:

The political power of the Mormon sect is increasing. It now controls one of our wealthiest and most populous Territories, and is extending steadily into other Territories. Wherever it goes it establishes polygamy and sectarian political power.... [I]t is recommended that the government of the Territory of Utah be reorganized.... I recommend that the right to vote, hold office and sit as jurors ... be confined to those who neither practice nor uphold polygamy."

Hayes had an effective ally in Congress, the man who finally designed a law to exclude Cannon and other men like him from the political pantheon. George Franklin Edmunds, yet another Republican of Vermont, Chairman of the Senate Judiciary Committee for two decades, was not a man to suffer moral deviance gladly. Edmunds took control of the politics of anti-polygamy in 1880, ushering in a decade of increasingly and incrementally burdensome anti-polygamy legislation, finally sending Cannon himself to jail for "unlawful cohabitation" in 1887. The dismantling of the political power of

---


46 Richardson, Messages and Papers of the Presidents, 10:4458.
polygamists and their church, in Edmunds's vision, was intimately connected to their punishment as criminals. The Edmunds Act of 1882 was a giant leap forward for anti-polygamy, and the beginning of the end for Mormon moral exceptionalism.

(c) "The Irrepressible Conflict between Polygamous Mormonism and the United States": The Triumph of Anti-Polygamy Politics

By 1882, George Edmunds was a political veteran. He entered the Senate as a Radical at the close of the Civil War, was a key supporter of the Ku Klux Klan Act and the second Civil Rights Act of 1875, and member of the committee that tried Andrew Johnson for impeachment. This was not a man who flinched at political danger, nor one who could be charmed by Cannon's urbanity or any other Mormon entreaty. Known as the "Iceberg of the Senate," Edmunds was as impervious to criticism as he was devastating in debate. His mind worked like a steel trap, and he never hesitated to spring the jaws on sloppy or unprepared opponents.47

Edmunds began his attack in the fashion now so familiar to students of the American political scene; that is, he took his case to the people via the press. In an article on the "Political Aspects of Mormonism," Edmunds stated the problem baldly. "Public opinion, acts of Congress, and decisions of the Supreme Court" had uniformly rejected the theory that polygamy was entitled to protection as a religious belief. But this unanimity in moral and legal doctrine was not enough, because the Mormons had shown

47 The best thumbnail sketch of Edmunds is Howard Lamar, "Political Patterns in New Mexico and Utah," Utah Historical Quarterly, 28 (Summer, 1960), 384-85. See also "George F. Edmunds," Dictionary of American Biography, 6:24-27.
themselves utterly impervious to any will but their own. Not only did they assert the rightfulness of polygamy, but they "set up for themselves and maintain[ed] an exclusive political domination in the Territory of Utah, and ... so frame[d] and administer[ed] laws as to encourage rather repress polygamy." One out of every three Mormon men, he charged, had multiple wives; not only had the system not declined over time, it had positively mushroomed. The result was a system that was "a crime against the political institutions of our country," an offense against "civilization, morality and progress."

Edmunds drew a line in the sand -- either Congress must act decisively to shore up and strengthen anti-polygamy laws and their enforcement in the territory, or it should acknowledge its utter defeat, and admit Utah as a "State controlled by a hierarchy, and ... including polygamy and every revolting practice which [Mormons] might choose to set up." Edmonds had no illusions about the Mormons' desire for statehood as the best means of protecting their domination of Utah and its peculiar domestic institution; he detailed no fewer than four formal attempts to win statehood, all efforts, he charged, to place polygamy "absolutely beyond the legal reach of the people of the other States."

Gone entirely were theories of the beneficent effect of railroads (Edmunds was notoriously tight-fisted when it came to railroad subsidies) or of the cleansing effect of time or public opinion or even civilization. Gone too were any references to likely Mormon up-risings or violence if polygamy was finally punished. To the contrary, Edmunds painted the enforcement picture as a simple correction in two points of legal

---

1 Id., 286.
2 Ibid.
procedure — the constitution of juries (that is, keeping those who believe in polygamy off grand and petit juries in polygamy cases) and proof of polygamy (because the secrecy of polygamous marriages meant that Mormon witnesses had "no scruple" in denying any knowledge of a given marriage ceremony).

Once procedure mirrored substance, Edmunds argued, the rest would be easy, salutary, rehabilitative of the majesty of the law and of the Mormon people: "If we really mean to exterminate polygamy in Utah, it can easily be done by lawful and just means, and without doing any injury even (but rather a good) to the morally innocent persons involved in its practice, and their children."

Put this way, there really was little choice; even the most partisan Democrats were chary of giving statehood to Utah in all but their weakest moments. Indeed, George Cannon railed against the entire party as "tender footed," cowardly, disorganized on the Mormon question. Public opinion and political tides running against them, many Democrats, including some Southern Democrats by the early 1880s, embraced anti-polygamy politics, arguing that federal oversight of territories was complete; unrestrained even by constitutional limitations. This theory, of course, had a strategic pay-off — the

50 Id., 287.

51 "[T]here is strong reason to believe that the institution has been more and more promoted by the Mormon leaders, and has become almost a cardinal test of Mormon faith." George F. Edmunds, "Political Aspects of Mormonism," Harper's Magazine, 64 (January, 1882): 285-88.

52 Lyman, Political Deliverance, 20; Cannon, "Mormon Issue," 167.

53 According to Senator Garland of Arkansas, "Desperate cases need desperate remedies, and I am of the opinion that every provision in this bill is well sanctioned by the organic law and precedents under the organic law of this country as any bill that has ever received the sanction of Congress." Id., 1158.
implicit (sometimes expressly stated) contrast between federal power to intervene in the
domestic relations of the territories and federal powerlessness to interfere in similar
matters in states was itself a shield against scrutiny of the hardening lines of Jim Crow.
Legal and political disabilities imposed on former slaves, just as the re-invigorated law
and politics of anti-polygamy took shape, were thus screened as Southerners added their
voices to the anti-polygamy chorus.

Edmunds was attuned both to the timing of the bill, and to the importance of his
tutelage. He used both to expand significantly -- and pointedly -- the scope of the
legislation he outlined in his Harper's article. Edmunds aimed directly at the political
power of polygamists, and their most visible personification at the capitol, namely George
Cannon. In addition to provisions that would create the new offense of "unlawful
cohabitation" (living simultaneously with more than one woman as wives, a misdemeanor
punishable by six months in prison and a $300 fine), and would exclude all who believed
in the rightfulness of plural marriage from juries in polygamy prosecutions, Edmunds
proposed to disfranchise all polygamists -- to strip them of the voice, the right to hold
office or "place of public trust, honor, or emolument." (The most immediate consequence
of this provision, of course, was the end of Cannon's tenure in Congress. As an admitted
polygamist, he was disqualified from office.) To supervise the new political order, a
five-person board would register qualified voters, and certify elections.

Virtually none of these proposals was unprecedented; they had all, for example,
been contained in significant part in the failed Cullom Bill of 1870. They were packaged
now in a leaner, meaner format. And they were received in a far more welcoming
political climate. By early 1882, even the former officers of the Confederacy counted themselves among the ranks of anti-polygamists. John Morgan of Alabama (a brigadier-general in the Confederate Army), Wilkinson Call of Florida (adjutant general), George Graham Vest of Missouri (member of the Confederate Senate), and even the notoriously unreliable Joseph Brown of Georgia (advocate of secession, troublesome governor of Georgia during the rebellion, one-time Republican and now in the Senate as a Redeemer), all declared that they supported increased enforcement powers for Utah and the expansion of sexual crimes in the territory, including the unlawful cohabitation measure.

What they objected to most strenuously, and what in actuality least affected the course of events in Utah (given the overwhelming majority of loyal Mormon voters), was the suffrage provision, the disqualification of polygamists (male and female) from voting, or holding office.44 Linking suffrage to the structure of domestic relations, to loyalty to law dictated from the center, struck close to home. States'-rights southerners smelled Reconstruction here, especially in the five-man board that would register voters and

44 Senator Morgan of Alabama, for example, called polygamy the "bane of all civil society," which cast "the pall of destruction and despair" over Utah. But he also maintained that the franchise could only be revoked if polygamists had been tried "according to the due process of law and through the judicial tribunals of the country." Congressional Record, 47 Cong., 1 sess., 1198 (16 February 1882). See also the comments of Senators Vest of Missouri, id., 1200 ("[w]ile abhor polygamy, while I have denounced it, [but]...I revere the Constitution of my country and the rights of personal liberty guaranteed to every American citizen.), and Brown of Georgia id., 1202 ("I am no advocate of polygamy. I deprecate and denounce it as one of the greatest social evil...and yet I am obliged to admit...that it is practiced and popular sentiment sustains it among three-fourths of the whole population of the globe.")There was some (rather perfunctory) waffling on the provision that would disqualify those who believed in polygamy from juries. See, for example, Vest, at 1201, Pendleton, 1210. But this discussion was far less pointed and acrimonious, than the debate over the political disabilities provisions.
certify elections. Joseph Brown made the connection early in the debates on the bill, condemning the board as "virtually a returning board, and I have always found in the South that the returning board is the government of the State." During Reconstruction, Brown said, he had "a little taste of the rule that we now propose to apply to Utah. I stood by the polls, disfranchised and not permitted to vote, while my former slaves, emancipated, walked up and deposited their ballots." 55

Bitter memories rose to the surface, resentments thinly veiled burst into the open as southerners charged northerners with oppression, duplicity, deceit. Wilkinson Call hammered Edmunds:

[H]ere is the Constitution of the United States, and here is the fourteenth amendment which the honorable Senator from Vermont was himself largely instrumental is passing, which declares that every person subject to the jurisdiction of the United States is a citizen and entitled to the equal protection of the laws. What equal protection of the laws is it between those men in Utah when five men say that 'We believe, without evidence, without trial, without notice, without hearing, that you have been guilty of an act of impropiety with a female, and we deny you the right to that franchise that eligibility to office which you now possess.' 56

Not only was the political right taken away for matters that were "judicial," as opponents of the bill labelled them (that is, polygamists were disfranchised whether or not they had been tried and convicted of the underlying crime), but the problem was "impropriety with a female," an act of marriage, not of politics — subject only to local oversight, if any. Morgan of Alabama elaborated on this point. "A man who has been guilty of polygamy or bigamy may still have a large proprietary interest in the country; he may have and

55 Id., 1156, 1205.
56 Id., 1208.
ought to have a very numerous family to protect by his ballot.... It is scarcely to be
supposed that a man by a course of conduct of this character has disqualified himself in
any essential way from casting an intelligent vote....

The political consequences of polygamy, the essential first step in creating an
explicit connection between the right kind of marriage and political participation, were
on the table, and finally achieved viability in these debates. Not one inch did Edmunds
concede. He embraced the implicit allusion to slavery, and hurled the charge of
hypocrisy right back, accusing Brown and his cohorts of claiming to believe that
polygamy was fundamentally inconsistent with republican government, while maintaining
simultaneously that polygamists should not be denied the right to participate in republican
government. His southern opponents, Edmunds claimed, were too trapped in their own
unhappy past to be clear-headed about the present. He, on the other hand, was crystal

57 Id., 1198.

58 Edmunds made his points obliquely but unmistakably, his contempt for such
backwardness screaming out from between the lines:

It is true that [polygamy] is something like what the Senator from Georgia and
some other people have alluded to indirectly; it is one of the "twin relics of
barbarism;" and it is true that it may seem to people who still have failed to
forget, as I hope most of us have forgotten, that political differences have led to
what appeared to be harsh measures, that they are committing themselves to a
principle that they had denied before in saying that they will not allow people who
practice this unchristian, unrepbraican, destructive thing, to carry on a government
over which we have control; and they may think this involves them in a
contradiction about something that is past. I do not think it does; but I cannot fail
to see, nobody can fail to see from what some Senators have said, that the chief
opposition to this bill has grown out of a sentiment of co-ordination, if I may use
that phrase, with something that has gone by and that had existed and that led to
particular events.

Id., 1212.
clear about the national importance of marital structure, and the government's ability (nay, duty) to bring about change in marriage through legislation that undercut the political power of polygamists by wiping clean the slate of Utah. The Mormons, Edmunds charged, had created a government that was infected "from top to bottom" with men whose moral character rendered them incapable of providing meaningful guidance to their constituents.

This, then, was the irrepresible conflict, the notion that the polis was constituted by marriage as much as by labor, that monogamy was the only form of marriage consistent with republican liberties, that the presence of George Cannon in the United States Congress was therefore seditious. Edmunds acknowledged that the measure was in large part symbolic: that the disfranchisement of polygamists, while it would seriously reduce the Mormon majority, would not translate into an anti-polygamist local government in Utah. It was, he said, "the mildest of measures," designed only to ensure that polygamists did not hold the actual reins of power." He had other measures in mind for the future, measures that would supplement the initial political action. (Of which more in the following chapter, and the final chapter of Part IV).

In the meantime, the only open question was whether Congress would face the "fact of a polygamous government in a Territory of the United States over which ... the United States has supreme control as to its political character." In other words, Edmunds implied, failure to take responsibility for the political reconstruction of Utah would violate the guarantee clause. To begin the process of "making the practice of the government

---

39 Id., 1212-1213.
of the Territory of Utah and of its inhabitants conformable to what is essential to the republican safety of every one of the States of this Union and the republican safety of them all under the Union of the United States" the open acknowledgment of the political importance of marriage was the vital first step. "That is all there is to it." 40

The positive politics of monogamy, breathed into life by Republicans in the Senate, and quickly seconded by the House, 41 were far more complex than this relatively straightforward narrative account of their enactment can convey. For the immediate consequence of the disfranchisement of polygamists was not so much aimed at Utah, as at Washington, at cleaning house in the literal sense of getting rid of George Cannon once and for all. (A proposed amendment to the bill, which would have exempted anyone currently holding office from ejection until expiration of his term, was overwhelmingly defeated. 42) But such cleansing action was itself unprecedented, certainly where matters of marriage were concerned, and only very recently (and temporarily) undertaken as a means of punishing the defenders of the other twin relic of barbarism.

With the Edmunds Act, as in the reconstruction amendments, Congress refined and added to the national identity of citizenship, this time undeniably as that identity affected women, and marriage, and the power of men over women. Because their domestic relations were built on lack of consent, the argument went, polygamists were

40 Id. 1213.

41 See, for example, the report of the House Committee on the Judiciary, 47 Cong. 1 sess., 1882, H.Rep. No. 386. (calling office-holding in Utah and in Congress by a polygamist delegate "a just reproach to our nation.").

42 Congressional Record, 47 Cong. 1 sess., 1214 (16 February 1882).
incapable of providing meaningful consent, of representing the consent of their wives, in
the political arena. At this level, it was all about consent. Yet in anti-polygamy politics,
as in anti-slavery politics, the role of consent took on different hues, sometimes fading
under the pressure of anti-polygamy sentiment, sometimes almost disappearing as a
relevant construct. Swirling around the politics of consent, were confused and shifting
ideas about consent in contractual relations, whether and to what extent marriage was a
contract, and what kinds of power relations could be created through consent.

(d) "A House Divided Against Itself Cannot Stand": Consent, Power, and Contract

Contractarian language saturated political debate about Utah, as it did many of the
most potent "questions" of the day. It is a commonplace of legal historical scholarship
that the nineteenth century was the "age of contract," when consent -- to marriage, to
employment, to government -- governed the creation of relationships of authority.\(^6\)
Certainly from the perspective of the twentieth century, Henry Sumner Maine's famous
"Status" to "Contract" formula seems at a fundamental level to describe our sense of the
individual legal personhood of family members, employees, citizens. As Maine put it in
his treatise (in a chapter on slavery, the condition of women, parental powers and "the
disintegration of the family"):

\(^6\) On the importance of the will theory of contract in American legal and social life,
see J. Willard Hurst, *Law and the Conditions of Freedom*, 18, 75, 103 (Madison, Wis.,
1955); Morton J. Horwitz, *The Transformation of American Law, 1790-1860*
(Cambridge, Ma., 1977), 160-210; Michael Grossberg, *Governing the Hearth: Law and
the Family in Nineteenth-Century America* (Chapel Hill, N.C., 1985), 20; Amy Dru
Stanley, "Contract Rights in the Age of Emancipation: Wage Labor and Marriage after
the Civil War" (Ph.D. diss., Yale University, 1990), 3-8.
Starting, as from one terminus of history, from a condition of society in which all the relations of Persons are summed up in the relations of Family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of individuals. '[T]he movement of the progressive societies has hitherto been a movement from Status to Contract."\(^4\)

The Civil War, in this view, was America's paroxysm in an otherwise largely peaceful and gradual (although by no means uniform or free from conflict) move toward greater respect for individuality through the expansion of Contract (Maine always capitalized the word). There is much to be said for this view; historians have shown that free labor ideology was profoundly committed not only to consent-based employment, but to equal opportunity, geographic and social mobility, and economic independence.\(^5\)

Yet it was never simple, never easy to determine when encouragement to work (or to marry) shaded into coercion.\(^6\) Nor was it easy to explain why certain kinds of work (or marriage) agreements were by definition coercive, even if the participants gave all the outward indicia of consent. Anti-polygamists, like other reformers, grappled perforce with such questions, intensely if not always successfully.

Among the thorniest questions raised by the anti-polygamy movement were the role of the will theory of contract in marriage law. During and immediately after the war, emancipation and the Reconstruction amendments gave reformers and Republicans


a sense of power to dismantle old oppressions. The debate over marriage invaded all levels of political life, examining the previously inchoate theory of the role of marriage in the state, and the dependence of republicanism on monogamy.

Concern over the public role of marriage contracts was endemic to both anti-slavery and anti-polygamy. Indeed, in this as in so many other ways, abolitionists and anti-polygamists made analytically similar arguments about what was wrong with slavery and polygamy. Their attack on the implications of slavery for marriage are familiar; the denial of legal recognition for the marriage of slaves was a basic component in the systematic denial of the civic personhood of enslaved people. Because slaves could not enter into contracts, especially marriage, the most fundamental of all contracts, abolitionists argued, they were denied the right to improve themselves, to assume the rights (for men) and acquire the protections (for women) associated exclusively with marriage.67 In this sense, slaves were denied the right to participate in the social contract, because of their inability to participate in the sexual contract.

Anti-polygamists made similar arguments about the role of the marriage contract in Mormon polygamy. Once again, the emphasis was on the essential inability of Mormon wives to structure marital relationships that provided them with the legal protection due married women. Because of Utah’s local deviation from universal moral norms, the argument went, Mormon women were denied the right to self-improvement,

to representation, deprived of the right to ally themselves through marriage with men who were themselves participants in the republican polity.

Their husbands, so the argument went, had forfeited any claim to political participation by their attempt to aggrandize themselves by taking more than one wife, and by their lack of self-control (an essential prerequisite for self-improvement) in indulging their taste for sexual variety.\textsuperscript{64} Such men were adulterers, a category particularly troublesome for a country that believed in marriage as an essential attribute of republican citizenship, and was at the same time plagued by unprecedented levels of transience, especially among men. Husbands who migrated westward often turned up in new states or territories with new wives; women who were left behind existed in a kind of marital limbo between wifehood, widowhood, and single status.\textsuperscript{65}

But whatever uncertainty and unease floated around the marital irregularities associated with westward migration and those who remained at home, virtually everyone could agree that the Mormons had gone too far west, as it were, claiming to admire and glorify with the legal label "marriage" what others at worst ignored and at best punished

\textsuperscript{64} See, for example, George F. Edmunds, "Political Aspects of Mormonism"; C.C. Goodwin, "The Political Attitude of the Mormons," North American Review, 132 (1881), 277.

\textsuperscript{65} Maynard v. Hill, 125 U.S. 190 (1888), a lawsuit brought by the children of a woman, whose husband had deserted her in 1850, is a classic example of the legal confusion that accompanied migration. The children claimed that their father's estate in Washington Territory should pass to them, rather than to the woman he had married in 1833, because his first wife never received notice of a divorce granted by the territorial legislature. See also Hendrik Hartog, "Marital Exits and Marital Expectations in Nineteenth-Century America, Georgetown Law Journal, 80 (October, 1991): 95-128, 97-109.
as crimes. This was more than irregularity; it was a travesty of marriage. Opposition
to polygamy, in this sense, provided an oasis of agreement in an otherwise troubled and
contentious landscape.

Consent theory also played a vital role in the early development of anti-polygamy.
In the 1850s and 1860s, novelists, newspaper editors, clerics, and congressmen all argued
that women did not consent to polygamous marriage -- that such a competitive
relationship among women was antithetical to their very nature. Women naturally gave
their heart to one man for life, according to these early critics of polygamy; they were
duped, or hypnotized, or brutalized into polygamy -- never were they voluntary
participants in what was essentially their own degradation. Justin Morrill of Vermont
sounded these themes in an important pre-Civil War anti-polygamy address:

That the women in Utah would escape from their miserable fate, if it were in their
power, is shown by the escape of the 14 traitors to polygamy who fled [with an
army officer], and also by reported cases where women have preferred -- "a
dinner of herbs rather than the stalled ox" -- to seek the protection and undivided
affection of the Indian rather than to remain in Mormon seraglios.⁷⁰

Yet it may also be worth exploring the contours -- and limits -- of contractualism
in the Civil War era, a war that was fought, after all, to preserve a union created by the
consent of the parties, and from which one half sought to withdraw, arguing that it no
longer consented to the marriage. Unionists argued, and eventually fought for, the
proposition that a constitution, like a marriage, was more than a compact formed with the
possibility of dissolution in view. As President Buchanan put it bluntly in his final

address to Congress in 1860, the Union was not "a mere voluntary association of States, to be dissolved at pleasure by any one of the contracting parties."\(^7\)

Abraham Lincoln explained the problem posed by fundamental moral and social divisions between slave and free states, using terms as applicable to a marriage as to a government: "a house divided against itself cannot stand."\(^7\) The Confederacy, by attempting to divide what was by nature indivisible, to create separate identities for the members of the relationship, would destroy the whole. Like the marital union, the "house" that became such a powerful metaphor for political union had been built by the voluntary association of citizens, whose consent transformed the nature of their relationship. There was no going back again, according to Unionists, no matter whether the initial consent had evaporated -- the "bonds of affection" could not be sundered.\(^7\) The war was in this sense profoundly and openly anti-contractual.

And yet, of course, the relationship between coercion and consent in the Civil War era was complex in the extreme, for it was the viability (or at least the confinement, at the outset) of involuntary servitude that formed the basis of the controversy between North and South. Southerners argued they had not consented to play by the North's rules. Northerners countered that ratification of the Constitution had created a permanent


union. Once again, consent was vital, but governed *entrance*, rather than *continuance* of political union, martial union, and in some cases even labor union.

From this perspective, both the North and the South could plausibly claim they based their political theories on contract; they were fighting for essentially the same principles, as it were. The South’s argument, like that of libertarians in the twentieth century, was that the union was binding only so long as its constituent members consented to be bound, that the North had breached the terms, that the contract was no longer valid. The North deployed a more nuanced notion of consent, a notion that was as readily used in talk about marriage or work, as in high constitutional theory. Consent to some kinds of relationships of authority, they argued, was irrevocable.

The idea that voluntary private decisions could create irrevocable relations of power between people, just as voluntary entry into the Union subordinated individual states to the relationship of the whole, was both deeply ingrained in the law of marriage, and deeply challenged by wives (and husbands) who felt the ground shifting underneath them. Catharine Beecher, writing shortly before the war, put the whole problem succinctly, when she charged that unhappy wives and employees would do better to choose husbands and masters more carefully, for their own voluntary actions had placed them in subordination to unworthy men. 

74

74 [N]o woman is forced to obey any husband but the one she chooses for herself; nor is she obliged to take a husband, if she prefers to remain single. So every domestic, and every artisan or laborer, after passing from parental control, can choose the employer to whom he is to accord obedience, or, if he prefers to relinquish certain advantages, he can remain without taking a subordinate place to any employer.
Choice of a husband or a wife, indeed, became a national metaphor of reunion after the War. The constitutional crisis of the 1860s and 1870s -- the question of how to explain the realignment of power relations between states and the national government -- was frequently dramatized in romances, love stories in which lovers bridged political divisions, uniting and creating anew in their marriage cross-sectional loyalties in the post-war configuration of federalism. "Submission," as one recent analysis put it, coded as gender roles, was "made 'graceful,'" as Northern men won Southern women, or even (less frequently, but still possible) vice versa. The "national household" became a "rhetorical commonplace" in debates over the Reconstruction amendments in Congress, shading into demands for wifely subordination on the part of Southern states, but constantly treating the national union as explicable in terms of marriage.

Where was consent theory, the evolution "from Status to Contract" in all this back-peddling? Did anti-polygamists simply cave in to reactionary ideas, blind (or, worse yet, duplicitous) in their refusal to extend the benefits of contractualism to women, to the


72 Kathleen Diffley, Where My Heart is Turning Ever: Civil War Stories and Constitutional Reform, 1861-1876 (Athens, Ga., 1992), 63.

73 For example, George Julian (the same Congressman who first sponsored legislation to enfranchise the women of Utah) warned against welcoming the southern states back into the union on equal terms too quickly, "pollut[ing] the very fountains of our national life by the unnatural marriage of the Constitution to the foul heresy of State rights." Congressional Globe, 39 Cong., 2 sess., #80 (28 January 1867). Cited in Diffley, Where My Heart is Turning Ever, 71.
South, to Utah? This may be part of the answer. Certainly persuasive arguments have been made for the idea that "consent" in the work of the classic theorists of social contract was always highly gendered; that the critique of fatherly authority in Locke, Hobbes and Rousseau was based from its inception on a fundamental distinction between the consent of men (to their government) and of women (to their husbands), even as both were labelled matters of "individual" choice.  

The role of consent in on-going relationships was always contested. At the congressional level, for example, feminists' talk about the "slavery of woman" in marriage (a claim made with even more urgency and frequency after the war than in the 1850s?) was given a lukewarm reception at best. Yet at the same time liberal politicians and women's rights advocates were committed to a legal structure in which entrance into relationships of dependency (that is, marriage and employment) was voluntary. The language of theorists such as Elizabeth Cady Stanton, however, who argued passionately that marriage should be nothing more (or less) than a "mere legal contract, ... subject to

77 For explorations of this theme, see Stanley, "Conjugal Bonds and Wage Labor," and "Beggars Can't Be Choosers."


79 For an analysis of slave imagery in the post-war rhetoric of liberal feminists such as Elizabeth Cady Stanton, see Elizabeth Batelle Clark, "Matrimonial Bonds: Slavery and Divorce in Nineteenth-Century America," Law and History Review 8 (1990): 25-54.
the restraints and privileges of all other contracts," nonetheless resonated deeply with the emphasis on consensualism that was among the most powerful doctrinal afterbirths of slavery. Most Americans, even most woman's rights activists, did not believe that absolute freedom from all legal entanglements (freedom to divorce as well as to marry at will) was essential to the protection of women. But they did agree that polygamous marriages were by their very nature corrupt, that polygamy and slavery shared some of the same objectionable features, the same violation of the rules of consent. In the 1860s and 1870s, freedom of contract was a heady idea, a far cry from our twentieth-century perceptions of contract as a tool used as often for exploitation as for expression of individual will.\footnote{80} Consent, needless to say, was an extraordinarily rich concept, imbued with religious as well contractarian flavors. The choice of a spouse, the decision to subsume one's identity as well as one's property with another person, was, as advice book writers stressed to their readers, an act of will in which voluntariness was the key to future happiness.\footnote{81} Especially for women, whose role as wife demanded "submission" and "sacrifice," the decision to marry was portrayed (and, among the middle class, at least, seems to have been experienced) as one of great delicacy. According to one recent

\footnote{80} "Mrs. Elizabeth Cady Stanton's Address at the Decade Meeting, on Marriage and Divorce (1870)," in History of Woman Suffrage. 6 vols., Elizabeth Cady Stanton, Susan B. Anthony & Matilda Joslyn Gage, eds. (Rochester, N.Y., 1889), 1:718.

\footnote{81} On the importance of contractual language at all levels of political and legal thought, see Stanley, "Conjugal Bonds and Wage Labor," 471-500; Horwitz, "The Triumph of Contract," Chap. 6 in Transformation of American Law.

history of courtship, women ritually tested their lovers before agreeing to marry, assuring themselves that the relationship was in fact based on "true love." 83 Heightened emotional (and erotic) expectations from marriage led many commentators (and lovers) to agree with Stanton that a loveless union was a violation of the "sacrament of love." 84

But apart from the followers of Stanton and a smattering of free lovers, most activists, and politicians virtually without exception, did not equate the informed consent essential to the formation of a valid marriage contract with a requirement of continuing consent once the marriage had been celebrated. 85 On the surface, at least, the notion that the decision to marry was voluntary, while the resulting relationship was not equally voluntary, seems contradictory. Yet such thinking was commonplace. Similar inconsistencies dominate Civil War nationalism, as well as benevolent reforms undertaken on behalf of freedmen, beggars, and so on -- levels of coercion that apparently belied the otherwise uncritical embrace of contractarian ideals and structures. 86


84 Contrast this vision with contemporary Mormon accounts of courtship, in which potential wives, especially those contemplating a plural marriage, assured themselves more of salvation than satisfaction, particularly if they acted according to the advice of senior Mormon women. See Richard S. Van Wagoner, Mormon Polygamy, A History, 2 ed. (Salt Lake, 1989), 90, 92.

85 For the classic statement of three leading positions on divorce, see the debate between Horace Greeley, Stephen Pearl Andrews, and Henry James, Sr. Love, Marriage, and Divorce and the Sovereignty of the Individual (1853: New York, 1972).

Voluntariness was certainly one key component of this transformative relationship, but not in the bland, almost superficial sense that we understand consent in the twentieth century. Instead, voluntary association into a political or a domestic union was a decision of great moment, not to be undertaken lightly, precisely because of its permanence. Herein lies the drama of constitution-making, of marriage ceremonies -- the transformative nature of the agreement, voluntarily conceived coercion.

So intricately and intimately connected were the ideas of consent and permanence, that many Northerners struggled on the eve of the Civil War to explain their unionism in terms that dodged the whole question of coercion. They did not want to "coerce" the South, they argued; instead, they only sought to hold the South to a bargain formed by open and consensual action -- the ratification of the Constitution.17

George Edmunds explained his own turn to coercion in the 1882 Act in similar terms. There was no question of violating anyone's rights, he argued. On the contrary, Mormon Utah, which was and would remain part of the United States, had vitiating the republican contract, by instituting a second form of slavery in the West. A constitutional majority had outlawed polygamy, just as a constitutional majority had elected Abraham Lincoln; dislike of the consequences was not a valid basis or excuse for evasion, subversion of the supreme law of the land. Even though Mormon polygamists might muster the support of the majority of the inhabitants of Utah, the terms of the constitution itself dictated that local proclivities, local terms, must give way when countermanded from the center.

17 McPherson, Battle Cry of Freedom 239-41, 246-52.
The revocation of the franchise for polygamists, Edmunds assured his colleagues, was not punitive, it was rehabilitative, a means of reclaiming the essential republican character of the territory, vindicating the "majesty of the law" in the truest sense of the word. "The committee proposes here one single thing… [I]t is to take the political power in the Territory out of the hands of this body of tyrants which, in spite of the laws of the United States, and against every republican idea that anybody believes in, they have held for so many years."  

Conclusion

At the passage of the Edmunds Act, according to the Congressional Record, "there were demonstrations of applause in various portions of the galleries." The President pro tempore remarked on the hub-bub: "The Chair is amazed at this noise in the galleries, but he will not order the galleries cleared at the present time, for they are clearing themselves." Who was so interested in the passage of the Edmunds Act that they stayed late into the night to watch the debate in the middle of the winter of 1882?

The role of external actors in the formation of anti-polygamy political thought and congressional legislation is an intriguing subject. The influence and tactics of anti-polygamy lecturers and lobbyists, among the most interesting of whom were women, was a significant component of anti-polygamy activism. Their packaging and marketing of anti-polygamy ideas to audiences across the country was an essential complement to

---

88 Congressional Record, 47 Cong. 1 sess., 1213 (16 February 1882).

89 Id., 1217.
congressional anti-polygamy, solidifying the political value of monogamous marriage as the best protection for women, and for civilization. Not all these ideas followed a simple or easily recognizable woman’s rights agenda. As the decades after 1860 eroded the sympathies and optimism of many northern reformers, for example, anti-polygamists gradually turned their fire against Mormon women as well as Mormon men.

Yet the presence (and the influence) of such political satellites demonstrates that national politics was never an entirely male enterprise. Through the relatively constant, and often intense, public attention devoted to marriage and the treatment of women in Utah, American political culture in the Civil War era grappled at multiple levels with the political importance of marriage as the basic constitutive relationship of political authority, upon which all others were at some level dependent. The following chapter investigates the evolving political culture of the 1880s, focusing on one of the most intriguing twists in the legal history of anti-polygamy -- the revocation of woman suffrage for Utah in the Edmunds-Tucker Act of 1887. For George Edmunds, as he telegraphed in debates on the 1882 Act, did indeed have other cards up his sleeve. The development of anti-suffrage sentiment among anti-polygamists, and the codification of such sentiment in the 1887 Act, provides a window into some of the debates about the role of politics in marriage, and the role of marriage in politics, that permeated political culture -- and that could support such remarkable political inversions as the redemption of the woman’s franchise to prevent plural wives from committing the political equivalent of suttee (a comparison often made in anti-polygamy speeches) -- voting, that is, for their own enslavement to Mormon men.
3. "The Dynamite of Law": Anti-Polygamy, Anti-Suffrage and the Law of Marriage and Divorce

The only vote taken by the full Congress on woman suffrage in the nineteenth century was negative: in early 1887, the Edmunds-Tucker Act disfranchised the women of Utah as part of a multi-faceted attempt to dismantle the financial and political power of the Mormon Church). The bill, including the anti-suffrage plank, received such widespread support that the Mormon-owned Deseret News conceded ruefully that the measure passed without serious opposition. How did such an extraordinary statute, a blatant intervention in areas (such as domestic relations and suffrage) receive such unqualified approval? Polygamy had already been made the occasion for political disabilities in the Edmunds Act of 1882. Why push further, disfranchising all the women of the territory, no matter what their marital status?

The solution to the puzzle lies in the complex congruence of three analytically distinct, but often politically indistinguishable, strands of legal reform and reaction in the late nineteenth century. Anti-polygamy, anti-divorce, and anti-suffrage converged in the Edmunds-Tucker Act. Woman suffrage, so unproblematic in twentieth-century retrospect, was deeply tied to debates about the political meaning of union and the perceived inconsistencies between marriage and freedom of contract.

---

1 Section 20 of the Edmunds-Tucker Act provided: "That it shall not be lawful for any female to vote at any election hereafter held in the Territory of Utah for any public purpose whatever, and no such vote shall be received or counted or given effect in any manner whatever; and any and every act of the Legislative Assembly of the Territory of Utah providing for or allowing the registration or voting by females is hereby annulled."

2 Deseret Evening News, 13 January 1887. Reprinted in the Journal History, a scrapbook kept by Mormon church officials, 13 January 1887, 12. Historical Department, LDS Archives, Salt Lake, Utah. (Hereinafter "Journal History").
This chapter investigates the context of legal and political regulation of marriage in its Edmunds-Tucker incarnation, a subject that fascinated the American public. People wanted to know how women could vote for the very men who degraded them. Nobody was more successful at satisfying the craving to know about Mormon Utah than Katherine Mary Keemle Field. She made a career of describing problems and proposing solutions; her unique formula was never more effective, or more popular, than in her "Mormon Monster" lectures. Her blend of politics and entertainment was an immediate marketing success, a fitting context in which to situate an investigation of the ideas that swirled around woman suffrage, polygamy and divorce in the late nineteenth century.

(a) "The Mormon Monster": Marketing Anti-Polygamy in the Post-Civil War Era

Kate Field was an exemplar of one of the nineteenth century's most innovative methods of spinning the news. Field was a public lecturer, one of the lyceum circuit's most popular speakers. She spoke on a variety of topics, ranging from travel in Italy to the novels of Charles Dickens; but her favorite arena was politics. She had opinions on everything from cremation to immigration; she was as adept at writing essays and book reviews, and even acted in several plays in England and America during the 1870s. Field was the darling of expatriate literati in Italy when she visited there as a young woman on the Grand Tour in the early 1860s. She was beautiful, fashionable, and forceful. Field carved out a place for herself as America's first woman professional public figure; she lived by her wits, ever conscious that to be "fashionable," to mold public taste and

3 "Woman in the Lyceum," The Nation, 8 (13 May 1869), 371-72.
conscience, required constant self-discipline, and self-promotion. She made a business out of telling people what to think about a whole array of apparently unconnected topics, a process which we are as accustomed to today in sports broadcasts as in analysis of political debates, but which in the nineteenth century was an innovation whose spin powers were just beginning to be felt.\(^4\)

Field's most famous lecture series, given hundreds of times from 1884 through 1886 to large and appreciative audiences, was called "The Mormon Monster."\(^5\) For two hours, Field held forth on the challenge to the nation posed by the Church of Latter-day

---


\(^5\) Although lengthy newspaper accounts and private notes taken at Field's Mormon Monster lectures give us a relatively good idea of the content of her talks, the text of the lectures themselves has not survived. See Roberta Zonghi, Curator of Rare Books, Boston Public Library, letter to author, 14 October 1993, reviewing contents of Kate Field collection.

There appears to have been more than one lecture in the initial series, at least. See Edward Increase Mather, "Kate Field's New Departure," *Bay State Monthly*, 3 (November, 1885), 433, describing how Field, after giving a "course of three lectures" in Boston to "spellbound" audiences, was invited "by Governor Robinson, the Mayor and a number of distinguished citizens," to repeat one of them in the Tremont Temple. Field then moved on to Brooklyn, Philadelphia, and Washington, according to the article; it was to her lectures, reported the author, "more than to any other cause, that the present disintegration of Mormons treason is due."

At a lecture given in December 1886 in Washington, Field described her "original lecture" as "six hours long." See "The Mormon Monster" Lecture, delivered by Kate Field, in the Congregational Church, corner of 10th and G Streets, Washington, D.C., Wednesday evening, December 15, 1886, reported by John Irvine. Unpublished manuscript, LDS Church Archives, Salt Lake. (Hereinafter, "The Mormon Monster").
Saints in Utah. Her ringing voice, her physical beauty (and stylish wardrobe), and her obvious intelligence made her a desirable member of any lecture team.

Field also had a cause: she warned the nation against Mormon lechery, and Mormon treachery. She condemned polygamy and Mormonism as practically synonymous, calling on the national government to deal with such traitorous marital practices with the "dynamite of law." Her lecture was carefully crafted to appeal to the broadest possible spectrum of listeners, guiding their thinking while entertaining them with her unrelenting and unembarrassed discussion of a slightly naughty topic.

---

6 The lecture (or lectures) appear to have changed over time, as Field emphasized one or another aspect of the tale to suit her audience in a particular locale. Mather, for example, alluded to but did not give details on an intriguing story in which "Governor Harding of Utah, Brigham Young, Benjamin Halliday, Postmaster General Blair, Abraham Lincoln and William H. Seward were the characters." This story does not appear in other accounts of the lecture. Mather also described Field's closing admonition to the "Men and women of New England! You who forge public opinion; you who sounded the death knell of slavery, what are you going to do about it!" "Kate Field's New Departure," 433. Such a charge would hardly appeal to audiences in Philadelphia or Washington, and was altered in lectures given outside New England. Charles A. Dana, editor of The Sun, reporting on Field giving her talks in New York, described her dress and jewelry in minute detail, summing up with her closing remarks to her audience: "In concluding, Miss Field dropped her voice and spoke to her hearers as to an individual, face to face: 'Men and women of the great Empire State, you who do so much to make public opinion, what are you going to do about it?'" Charles Dana, "Miss Kate Field as a Model of Self-Possession and Enduring Interest," The Sun (New York) (n.d.). Quoted in Lilian Whiting, Kate Field, a Record, 446.

7 According to Charles Dana, Field condemned "polygamy and Mormonism [as] practically synonymous, and, therefore Mormons [as] criminal and traitors, [who] should be dealt with by force of arms if necessary." Dana, "Miss Kate Field," quoted in Kate Field, A Record, 443.

8 See "Kate and the Mormons: Miss Field's Arraignment of the Apostolic Women of Utah," The Chicago Tribune, 6 June, 1886, p. 2, col 5.
Together with her fellows on the annual Chautauqua circuit, Field addressed many thousands of listeners across the country on speaking tours booked by agencies that managed personalities as diverse as Oliver Wendell Holmes Sr. and Sylvester Graham. Theirs was a profession made possible by the advent of the railroad. Popular lecturers traveled as many as 20,000 miles a year, packaging politics, science, and culture in a format designed to be both instructive and entertaining. In the process, Field and her fellow lecturers were part of a travelling cultural knitting mill. As one respected social commentator put it at the time, the peripatetic lecturer, "moving to and fro [acted as] a living shuttle, to weave together this new web of national civilization." One of the most blatant challenges to that civilization was Mormon polygamy in Utah, a perennial topic of interest by the 1880s.

---


12 Field was not the first non-Mormon woman to use the lectern as a means of anti-polygamy agitation. Anna Dickinson, famous today as a woman suffrage advocate, was also a well-known anti-polygamist lecturer in the late 1860s and early 1870s. Her "Whited Sepulchres" speech, reported one Mormon man who attended a lecture in Connecticut, was booked solid up and down the east coast. Latter-Days Saints Millennial Star (October 1869) 683, quoted in Beverly Beeton, "Woman Suffrage in Territorial Utah," Utah Historical Quarterly 47 (Winter, 1979): 100-20, 104.
(b) "The Rocky Mountains [have] Taken Poison": Connecting Anti-Polygamy to Divorce and Woman Suffrage

Her interest piqued by the negative publicity, Field went to investigate the Mormons. She spent eight months in Utah in 1884 and 1885, interviewing hundreds of women, visiting at least one jailed plural wife, talking to Mormon leaders, and attending Mormon religious services, concerts, plays and lectures. Her hosts recognized the importance of her researches, and spared no effort to impress her with the virtues of their peculiar domestic institution. Once back in the East on the lecture circuit, Field's indictment of polygamy showed no trace of conciliation. She painted life for women in Utah as an unmitigated horror, rejecting Mormon claims of industriousness, loyalty and thrift with attacks on the high percentage of foreign-born women in Utah and their lack of education. Their marital system undermined any claim to morality, she charged, and their western isolation was a transparent attempt to obscure the threat such abuse posed to families throughout the nation.

---

13 See Carolyn J. Moss, "Kate Field: The Story of a Once-Famous St. Louisan," Missouri Historical Review 58 (January, 1994), 106; Leonard J. Arrington, "Kate Field and J.H. Beadle: Manipulators of the Mormon task," (lecture delivered at the University of Utah, Salt Lake, 31 March 1971), 8, both of whom set Field's stay at eight months. Field herself claimed at one point to have spend a year in Utah. "The Mormon Monster," reported by John Irvine, 2, and later in the same lecture that she had "lived in Utah for nearly two years...." Id., at 11.

14 For a description of Field's visit to Nellie White, see Whitney, History of Utah, 3:281-82.

Field’s former hosts in Utah felt the sting of her invective. They called her a
vixen and a busy-body; they derided her as a "spinster," and sent married women
from Utah to Washington to counter her claim that Mormon women were sexual slaves.
Both Field and her Mormon opponents understood that theirs was a contest for public
opinion, and that Field’s lectures had the potential for significant political impact.

The influence of these anti-polygamy women was indeed considerable. Supreme
Court Justice Stephen Field, for example, wrote to Kate Field (no relation), thanking her
for the invitation to one of her Washington lectures, and suggesting that she also invite
the other justices, as "just at this time the condition of things in Utah excites much
interest in them." Field also met with President Cleveland, counseled him on the

---


17 At least one anonymous Mormon historian has also recently accused Field of being a lesbian. Although he did not name his source, Leonard Arrington did say that the claim that Field was homosexual was made in a letter he had received while researching a speech on Field. Arrington also argued that lesbianism was a possible explanation for Field’s profound anti-polygamy, although he did not explain why monogamy would be more likely to appeal to gay women than polygamy. "Field and Beadle," 5 n.4.

18 Whiting, Kate Field, 477. By the time Justice Field wrote to Lecturer Field in February 1886, the Court had considered two polygamy cases; Reynolds v. United States, holding that polygamy was not protected by the religion clauses, and Miles v. United States, holding that an alleged plural wife could not testify against her putative husband (thus violating the traditional rule of spousal immunity) without proof of a prior marriage. Most important for the Court, Murphy v. Ramsey, a case involving the right of Congress to disfranchise admitted polygamists even if they had not been convicted of any crime, had been argued just one month before Kate Field came to town.
appointment of federal officials in Utah, and advised him that "if Mormon agitation can be made fashionable, matters can be expedited...."  

Her lectures were endorsed by the leaders of the influential organization of Civil War veterans known as the Grand Army of the Republic, as well as members of the territorial judiciary.

One way that Field made anti-polygamy fashionable was by tying it to other major issues of the day, especially divorce reform and woman suffrage. The intellectual connection between prohibition of polygamy and stringent divorce laws was widely accepted; one well-known family protection advocate called divorce "the polygamic principle," equating divorce with sexual promiscuity and attendant vices, and all with the disintegration of civilization. Field capitalized on concern for growing divorce rates

---

19 The quote is from Field's letter to Cleveland, thanking him for the meeting, and sending him newspaper clippings reporting her favorable impression of him. Whiting, 442.

20 See the account of support received by Field from both local and national officers of the G.A.R. in "Field-Marshel Field," Deseret Evening News, 3 December 1886. On the G.A.R., see Theda Skocpol, Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States (Cambridge, Ma., 1992), 111-12 & passim.

21 See the report of Field's talk in Kansas City by Royal B. Young, who, upon his return to Utah, himself gave an anti-Field talk. After detailing several items in her lecture that "he knew personally to be false," Young said that "[t]he most astonishing part of it, was that when she was through, our old Judge Twiss got up in the congregation and bore his testimony to the truth of her remarks...." "Miss Field and Mr. Young," Salt Lake Daily Herald, 14 May 1887. The reference is to Stephen P. Twiss, who served as a member of the territorial judiciary from 1881 to 1885.

22 E.P.W. Packard, Modern Persecution, or Married Women's Liabilities, as Demonstrated by the Actions of the Illinois Legislature, 2 vols. (Hartford, Ct., 1875), 2:396: "Our divorce laws are destroying the very structure of civilized society. Yes, the monogamic principle of Christianity and civilization is being rapidly supplanted by the polygamic principle of barbarism." Quoted in Hendrik Hartog, "Mrs. Packard on Dependency," Yale Journal of Law & the Humanities 1 (1988), 95 n. 53.
as a national issue, equating it with polygamy, and calling upon Congress to deal with both. "The cure for the disease," Field argued, "is [a] United States marriage law."23

Field had good reason to play the divorce card: it was one of the most potent arguments she had. In fact, divorce was increasing rapidly, far more quickly than, say, woman suffrage.24 So alarming was the sense that marriage was crumbling under the pressure, that several states repealed their omnibus divorce clauses in the 1870s in an attempt to stay the tide.25 Yet, as influential theologian and social theorist Washington Gladden documented in an article in the early 1880s, the rate of divorce had continued to rise nonetheless, climbing exponentially over the past two decades.26

23 Dana quoting Field in, "Miss Field as a Model of Self-Possession and Enduring Interest," quoted in Whiting, 446.

24 Wherever woman suffrage was submitted to a popular vote in the post-Civil War period, it was defeated. Kansas, of course, was the most notorious example. A referendum on woman suffrage, as well as a companion referendum on black suffrage, was defeated after a hard-fought campaign that pitted suffragists against Republicans, and often against advocates of black male suffrage. For a retrospective analysis of the campaign, see "The Kansas Campaign -- 1867," in History of Woman Suffrage. See also DuBois, Feminism and Suffrage, 79-104.

25 Indiana (1873), Connecticut (1878), Maine (1883), Louisiana (1877) and Arizona (1877) all repealed those portions of their divorce codes that allowed judges to grant divorces whenever they perceived it to be, as the Indiana statute put it, "reasonable and proper that a divorce should be granted." Laws of Indiana, 1831, c. 31. See generally Michael S. Hussein and Lynne E. Withey, "The Law of Husband and Wife in Nineteenth-Century America: Changing View of Divorce," in Women and the Law: The Social Historical Perspective, D. Kelly Weisberg, ed., 2 vols. (Cambridge, Ma., 1982) 2:133-53.

Concern over divorce melded with worries about suffrage. Horace Bushnell, in an anti-woman suffrage book written just before women were given the franchise in Utah, made the connections explicit. Bushnell condemned suffrage for women as tending toward a "relaxation of the just bonds of marriage, and a greatly increased tendency ... to obtain divorce." A separate political identity for women, according to Bushnell as his fellow anti-suffragists, was tantamount to "discontent with marriage, and ... legislation to facilitate divorce." Equality in politics, argued Bushnell, was based on a pernicious theory of equality in marriage, the reduction of marriage "to a mere partnership contract." Inevitably, such contractarian notions privatized and marginalized the marriage relationship, removing it from the realm of public regulation -- virtually ensuring dissolution of marriages at unprecedented rates by spouses who conceived of themselves as discontented. As one petition submitted to Congress by anti-divorce activist, novelist and political hostess Madeline Vinton Dahlgren in 1878 put it, suffrage "must introduce a fruitful element of discord in the existing marriage relation[ship] ... and [would] increase the already alarming prevalence of divorce throughout the land."
Civilization, argued anti-divorce theorists, could not long tolerate such decay. Theodore Woolsey, President of Yale, explained the historical effects of rising divorce and marital infidelity on one flourishing civilization, Rome. Woolsey’s theory that the Roman Empire perished from within, eroded by divorce, provided a powerful historical example of the price paid by a politics that downplayed the importance of family life. His argument was repeated by other anti-divorce activists; it was challenged only indirectly, by suffragists and a sprinkling of social scientists, virtually none of whom advocated divorce as a positive good, but argued instead that divorce was a reflection of other causes of social decay, such as inequities in marriage, or that informal divorce, especially separation, had always existed, and that the new statistics only reflected more accurately a rate of marital failure that had only been formalized, not necessarily augmented, by legal divorce.

Despite the existence of such counter-arguments, however, it was far more popular to bewail mounting divorce rates as evidence of increasing immorality and disloyalty

---

novels, including one devoted explicitly to her anti-divorce views: Divorced (Chicago, 1887). For a particularly searching analysis of popular literature on divorce and its relationship to the debates over the role of contract in marriage, see George R. Uba, "Status and Contract: The Divorce Dispute of the 'Eighties and Howells' A Modern Instance," Colby Library Quarterly, 19 (Summer, 1983), 78-89.


among spouses than to talk about marriage as an institution with built-in flaws. The West was an especially troublesome factor for those concerned about the breakdown of marriage. The ease of migratory divorce in western states was a constant theme of critics. Indiana, of course, was the first western "divorce mill;" non-residents flocked to Indianapolis in the 1860s seeking quick release from marital bonds. But the problem was not confined to Indiana -- several other western states and territories had lax residency requirements and omnibus divorce clauses in the 1870s and 1880s.

Utah was the worst case example, from this perspective. The territorial legislature in 1852 enacted a divorce statute that only required the petitioner to demonstrate that he or she was "a resident or wishes to become one." Coupled with an omnibus clause that allowed judges to dissolve a marriage "when if shall appear to the satisfaction and conviction of the Court, that the parties cannot live in peace and union together, and that their welfare requires a separation," Utah's divorce statute was the most permissive of all. Designed in all likelihood as a device to allow new converts whose spouses did not become Mormons to obtain a quick civil divorce and remarry within the faith, according

---


35 Nebraska, Idaho and Nevada, for example, had six-month residency requirements, while South Dakota had a mere 90-day residency requirement. George E. Howard, A History of Matrimonial Institutions, 3 vols. (Chicago 1904), 3:131-32; Roderick Phillips, Putting Asunder: A History of Divorce in Western Society (Cambridge, Ma., 1988), 455.

36 Act in Relation to Bills of Divorce (approved March 6, 1852); Utah Territorial Laws, 1851-1870, section 2, 82-84.
to its critics, the statute was yet more evidence of Mormon disregard for the integrity of marriage. As one commentator put it, the divorce statute alone gained "instant notoriety" for the territory "among Americans concerned about the decline of marriage and the family." Justin Morrill drew the inevitable connections:

Under the guise of religion, this people has established, and seek to maintain and perpetuate, a Mohammedan barbarism revolting to the civilized world. It is polygamy in its most disgusting form, including in its slimy folds sisters, mothers, and daughters; and in order that no element of cruelty and loathsomeness may be wanting, it includes facility of divorce .... As well might religion be invoked to protect cannibalism or infanticide.9

Travelers to Utah commented on the ease of divorce in the territory, implying that divorce, like polygamy, was a peculiarity of the Mormon faith.0 Indeed, divorce was apparently a far more common practice among nineteenth-century Mormons in Utah than in other jurisdictions. Especially when figures for divorces in polygamous marriages (granted exclusively by ecclesiastical courts because of the illegality of plural marriage

---


39 *Polygamy and its License*, 10.

40 See, for example, J. Remy & J. Brenchley, *A Journey to Great Salt Lake City* (London, 1861), 149:

> Divorce, which is everywhere else had recourse to as an antidote—a very problematical one indeed—against ill-assorted unions, is easily obtained amongst the Mormons, and does not turn out to be more effectual than elsewhere. The case of a woman is cited, who has been married six times, and who has four husbands still living in Utah. Quoted in Aaron, "Mormon Divorce," 14 n.36.

after 1862) are included in the total, the rate of divorce in Utah seems to have been extraordinary. As one contemporary commentator put it, Utah was a "consent divorce" jurisdiction. (Consensual divorce -- treating marriage like nothing more than a contract terminable by either party at will -- was by no means uncontroversial in the rest of the nation, however, of which more later.)

The problem was exacerbated in the 1870s, when the difficulty and time it took to get to Utah were vastly reduced by the completion of the transcontinental railroad in 1869. Even worse, Utah's lax residency standard, which required only that a petitioner be a resident "or intend to become one," allowed lawyers from places as far away as New York, Cincinnati and Chicago to flood the local courts with divorce petitions. So common was the practice, according to labor commissioner Carroll Wright, that lawyers

---

2 Bruce Campbell & Eugene Campbell, "Divorce Among Mormon Polygamists: Extent and Explanations," Utah Historical Quarterly 46 (1978): 4-24, reporting on some 2,000 divorces granted to polygamists in church courts. See also Leonard Arrington, Brigham Young, American Moses (New York, 1985), 318-20, pointing out that Brigham Young frequently granted divorce petitions, especially in plural marriage cases, despite claiming not to advocate divorce as a solution to unhappy marriages. Edwin Brown Firmage & Richard Collin Mangrum, Zion in the Courts: A Legal History of the Church of Jesus Christ of Latter-day Saints, 1830-1900 (Urbana, Ill., 1988), 325-27, whose work, like that of the Campbells and Arrington, is based on church court files housed at the LDS archives in Salt Lake that were open to church members conducting research for a short window, and have since been closed, imply that the total numbers reported by Wright in the first systematic survey of civil divorce in the territory, and the Campbells in their analysis of divorces granted to plural marriages, significantly underestimate the real figures. Arrington concluded that after 1870, Brigham Young consigned non-plural divorce cases to civil probate courts. American Moses, at 138. Firmage and Mangrum, however, found that divorces were routinely granted by church courts long after 1870; and that church courts punished members who filed for civil divorce as late as 1893. Printed forms were even available to members to expedite uncontested divorces.

generally made use of pre-printed forms, in which intention to become a resident and incompatibility allegations were already printed on the page, requiring only names, dates, and localities to be filled in.44 Tales of abuse of process flowed into the press and courts outside Utah.44

Field made much of the fact that divorce was far easier to obtain in Utah than elsewhere, flinging back arguments made by Mormons that "consecutive polygamy" was practiced by Easterners who divorced and then remarried, as opposed to Mormon society, where divorces were "unknown." Au contraire, charged Field, telling the story of an "excellent, kind hearted woman," whose husband "got a divorce without my knowledge" from the Probate Court.45 Not only were the courts corrupt, but the church itself

44 Wright, Report on Marriage and Divorce, 203-06.

45 Several cases, including one decided in her home state of Massachusetts shortly before Field began her lecture tour, involved prosecutions for polygamy, bigamy and fornication, convictions in all of which were upheld despite the defendants' claims that they had been divorced in Utah. The Supreme court of Indiana, for example, showing a level of outrage that is testimony to just how quickly a jurisdiction could evolve from a divorce haven into a divorce watchdog, condemned Utah's divorce statute as a "palpable case of the exercise of extra-territorial jurisdiction," adding for good measure that "'[m]arriage is more than a contract. It is not a mere matter of pecuniary consideration. It is a great public institution, giving character to our whole civil polity.'" Hood v. State, 56 Ind. 263, 272-73 (1877) (quoting Noel v. Ewing, 9 Ind. 37). See also Hardy v. Smith, 136 Mass. 328 (1884); State v. Armington, 25 Minn. 29 (1878); Davis v. Commonwealth, 13 Bush 318 (Ky. 1877).

46 "The Mormon Monster," 12. According to Field, the woman challenged the probate judge, claiming that her husband had fabricated stories about her to obtain the divorce. The judge replied "he did not believe these stories, but knew that I would be well rid of my husband." Id., 14-15.
profited handsomely by granting divorces. Brigham Young, Field claimed, "drove a thriving business by untying his own people."\footnote{Ibid.}

Further evidence that marriage was not respected by men who practiced polygamy, Field charged, was supplied by the astonishing number of Mormons who were unfaithful to their wives, even though their taste for variety was indulged through plural marriage. At one meeting, Field reported "[Brigham Young] asked all present -- they were all priests -- who had been unfaithful to their wives to stand up. Between three and four hundred stood up!"\footnote{Id., 17.} Thus handily (and indirectly) did Field dispose of the Mormon claim, supported from time to time by radical suffragists such as Sara Spencer,\footnote{See Woman's Journal, 8 February 1878, reporting on Spencer's testimony to the effect that polygamy protected the territory from the "social evil." Cited in Lola Van Wagenen, "Sister-Wives and Suffragists: Polygamy and the Politics of Woman Suffrage 1870-1896." (Ph.D. diss., New York University, 1974), 189.} that polygamy was the only reliable antidote for prostitution.\footnote{Bitton, "Polygamy Defended," 38.} In case anyone in the audience did not understand what she was talking about, Field brought in mining camps, those notorious cesspools of sexual license, to hammer home her point that, due to polygamy, divorce and their attendant vices, Salt Lake was "worse than [the] mining camps and that is saying a great deal."\footnote{"The Mormon Monster," 17.}
"[I]t is time for us to realize," Field argued, "that when the Rocky Mountains take poison the Atlantic seaboard must call in a doctor."\textsuperscript{22} The cure, according to Field, was a "United States marriage law."\textsuperscript{23} Her sentiments were echoed by Horace Greeley in a famous Tribune editorial, calling for uniform marriage and divorce laws to protect American society from corruption from within. Divorce was sapping the nation's moral strength, Greeley charged, and the source of the corrosion was in the West, where free love advocate Robert Dale Owen had turned Indiana into a divorce mill, and in Utah where both polygamy and divorce were widely available.\textsuperscript{24} Novelists, lawyers, clerics, and politicians condemned the legal diversity that allowed migratory divorce.\textsuperscript{25}

The call for uniform laws, of course, was not simply reactionary. Proponents of such nationalized domestic relations law recognized that divorce would be more widely available in some jurisdictions -- Greeley's own New York, for example, allowed divorce only for adultery throughout this period, while uniform marriage law advocates eventually

\begin{quote}
\textsuperscript{22} Id., 2.
\end{quote}

\begin{quote}
\textsuperscript{23} Dana, "Miss Kate Field," quoted in Whiting, Kate Field, 443.
\end{quote}

\begin{quote}
\textsuperscript{24} "Dakota Divorce Law," New York Tribune, 28 July 1879, p. 4, col. 3. Greeley labelled Utah the most corrupt of all, for allowing divorce when the parties cannot "live together in peace and union." See also Glenda Riley, Divorce, an American Tradition (New York, 1991), 108.
\end{quote}

\begin{quote}
\end{quote}
would have included bigamy, habitual intemperance, desertion, and intolerable cruelty. 56 What they opposed without compromise, what they condemned in Utah, was the idea that divorce was a matter of the parties’ pleasure, rather than the state’s interest.

The powers of states in domestic relations law in even the watered-down post-war version of federalism, however, convinced Greeley that only federal legislation could curb the tendency of western states to cater to baser instincts, and to attract (mostly) men who sought such easy exits from marriage. 57 Nor did many migrants even seek actual legal dissolution of marriages celebrated in one (often eastern or midwestern) jurisdiction, before they contracted additional marriages in the west. Although no statistics are available to show the degree of irregularity in marital relations, state reporters are full of cases of bigamy involving a marriage celebrated in one state, and a second (often without benefit of even a "sham" divorce) celebrated in another. 58 Whether or not formal legal rules permitted them to, many Americans treated their marriages as dissolvable at will; Utah virtually codified that desire with its permissive and expeditious divorce policy. Critics like Greeley saw in the west -- and particularly in Utah -- the source of the decay in marriage, and by implication in civilization.

---

56 See the description of sometimes bitter debates between delegates to a national convention on divorce reform in William O'Neill, *Divorce in the Progressive Era* (New Haven, Ct., 1967), 254-73.

57 Greeley, lamenting that the full faith and credit clause precluded New York and South Carolina from recognizing a Utah divorce if the defendant had been given a notice and a hearing, even if the proceeding was a collusive "sham," concluded that the best remedy was a "uniform, National law." "Dakota Divorce law," p. 5, col. 3.

58 For a description of some of these cases and their (generally tolerant) treatment in the courts, see Hartog, "Marital Exits and Marital Expectations," 122, n.106.
Field and her conferees on the popular lecture circuit picked up these themes. They argued that strict laws were essential to the maintenance of the family, and through the family, the protection of women. The most blatant illustration of the problem with relying on men rather than government to shield women and thus preserve civilization, of course, was the existence of polygamy in Utah. "[Mormonism's] degradation of woman and ... brutalization of man," Field argued in terms that resonated with three decades of anti-polygamy rhetoric, was treasonous. It was a threat to the entire country, because it was the betrayal of women.

The argument was repeated in various forms in thousands of pamphlets, newspaper stories, sermons, petitions to Congress, and, of course, lectures. The people responded. At one anti-polygamy demonstration in Chicago in 1882, an estimated 12,000 people marched to protest the abuse of women in Utah. The National Anti-Polygamy Standard, the official newspaper of anti-polygamy women in Utah, claimed that hundreds of anti-polygamy societies had formed across the nation. Whether or not one credits the self-interested claims of anti-polygamists to extraordinary levels of active support for their cause in the years after the Civil War, there is no doubt that polygamy in Utah was widely considered a significant threat to the stability of the entire nation.

---


60 The protests were reported in Utah newspapers, and recorded in the Journal History, 4 February 1882. A clipping from the Ogden Daily Herald, for example, reported that speeches were delivered by "bishops, judges, generals, colonels, journalists, [and] Indian agents," all of whom gave vent to "the bitterest feelings of the human heart."

61 See Part 3, chap. 1 for a discussion of the Anti-Polygamy Standard, and its claim to large membership.
These demonstrations in support of legal reform were in part conservative, appealing to the national legislature to preserve the family from invasive forces, to surround the homes with laws that ensured its sanctity — to some extent preserve women from the invasion of politics. But it was also potentially subversive of the legal order, invoking the power of law — federal law at that — to define and structure what had previously been trusted to men individually to govern in large measure as they saw fit.7 The use of the coercive power of law, especially the criminal law, to police the boundaries of marital relations, sounded less threatening in the work of Willard or Field than it did coming from, say, Elizabeth Cady Stanton,6 because it was just the codification of "natural" law, fully consistent with a broadly-defined Christianity, and, of course, civilization.

But while by the 1880s there was widespread acceptance of such reliance on law for the protection of morality, the objects of this legal reform still refused to concede the field. The right to decide what constituted natural law was just what the Mormons disputed most hotly. They claimed that theirs was the higher law, and that despite any positive law to the contrary, their right to "live their religion" entitled them to determine for themselves the proper role for women in their society, no matter what the written law said. Their defiance of federal statutes outlawing polygamy was open and unabashed. Ineffective laws and law enforcement were the only viable explanation for such

---

6 Hartog, "Mrs. Packard on Dependency," 99-101, and Grossberg, Governing the Hearth, 289-304, make this point in other related contexts.

recalcitrance, Field maintained. She left no doubt about where the fault lay: "Think of it!" she said. "New York and Utah under the same flag! We ought to be ashamed of ourselves. That is, those of us who vote."

But there was the rub. The vote, and thus the power to make law, was granted to women in Utah by the Mormon-controlled territorial legislature in 1870. By the time Field took center stage in the mid-1880s, therefore, women in Utah had voted for over a decade. Part of the cure for the disease afflicting American women's lives, the "cancer of polygamy," as Field put it, was the revocation of woman suffrage in Utah.

The disastrous experience of woman suffrage in Utah may help explain why the 1880s are traditionally regarded as the nadir of the woman suffrage movement. The failure of Mormon women to free themselves from their own fetters (at least from the perspective of anti-polygamists, among whom must be counted not only anti-suffragists, but also the vast majority of suffragists), may also provide a clue to how women in Utah, and by extension in the rest of the nation, came to be regarded as part of the problem, rather than part of the solution to social problems such as prostitution, polygamy, and even divorce. Field and others treated Utah as a test case for the political and legal value of suffrage. Women in Utah were to prove to the rest of the nation that their votes would be more thoughtfully cast than those of their husbands. They must legislate their own freedom and moral redemption.

" Dana, "Miss Kate Field," quoted in Whiting, Kate Field, 445. Frances Willard made the connection between the lack of women's political power and the existence of polygamy explicit: "Were women in the House of Representatives, the disgraceful record that must go down in history would not be even thinkable." "Introduction," xvi.
But women in Utah did not vote in the way that had been predicted by the very suffrage supporters who subsequently were forced to lead the disfranchisement movement. Field could safely condemn woman suffrage in Utah, and by implication woman suffrage everywhere, because almost everyone was agreed that it was a failure. One of the quickest ways to eliminate the widespread negative publicity generated by critics like Field, and repeated in both the American and the British press, was simply to do away with it. How did things come to such a pass?

(c) "Truly a Matter for Astonishment": Woman Suffrage in Mormon Utah

The idea of giving women in Utah the franchise emerged shortly after the Civil War, just as Anna Dickinson, Elizabeth Cady Stanton, and George Francis Train stumped around Kansas, advocating woman suffrage to whomever would listen. That unsuccessful campaign in Kansas not only highlighted the difficulties of expanding the franchise by popular vote in any settled area. It also exposed and deepened the fissure within the woman’s movement itself. The more moderate wing of the movement accepted the Republican compromise and endorsed the fourteenth and fifteenth amendments, and the more radical, New York-based group led by Stanton and Susan B. Anthony, refused to countenance any delay in woman suffrage, arguing that only national legislation in the form of a constitutional amendment would satisfy their demands.66

63 For a review of the difficulties faced by suffragists in Kansas, see History of Women Suffrage, 2:229-68.

As the conflict between suffragists of various stripes heated up in the late 1860s, reformers began to toss out the idea of enfranchising the women of the territories as a useful means of experimenting in a relatively cost-free manner with the woman's vote. After all, it was in the territories that the freedmen had first been granted the franchise. Suffrage for the enslaved women of at least one territory (and possibly several more, given the widely lamented expansion of Mormonism into Idaho, Nevada, Wyoming, Arizona, and even California) paralleled the course of negro suffrage.

George Julian, a Radical Republican and dedicated advocate of universal suffrage, introduced three bills in Congress in 1867 and 68; two to enfranchise women in all territories, and one aimed specifically at Utah. Hamilton Willcox, president of the

---

67 Scholars disagree about who first came up with the idea of enfranchising the women of the territories. Ellen DuBois credits the moderate New England suffragists of the American Woman Suffrage Association. Because they accepted the argument that black male enfranchisement was the first and most urgent project, they proposed an alternative model for women, based on the progress of black suffrage, that would have enfranchised the women of the District of Columbia and the territories first, with a constitutional amendment to follow at some unspecified future date. DuBois, Feminism and Suffrage, 170.

Universal Suffrage Association, testified in Congress that the franchise for the women of Utah would be the demise of polygamy. The New York Times echoed his sentiments, arguing in an editorial that the franchise for women would likely spell the end of polygamy, and perhaps even of Mormonism in general.  

There was little chance, however, that any bill providing for woman suffrage, even in Utah, would pass any national or state legislature -- even black male suffrage was by no means unproblematic; it had failed to pass in every local referendum in the North.  But in the territorial Rocky Mountain West, politics had an unreal cast to begin with. The political limbo that was territorial status meant that every local action was taken with one eye on Washington. If anything, this proclivity was exacerbated in Utah, where Mormon separatism (a product of persecution as much as predilection) had flowered in isolation.

Young and the Mormons watched the completion of the transcontinental railroad with some trepidation. Better communication with the rest of the world meant quicker and safer travel for the Mormon converts and improved control of the network of missionaries sent out from Utah each year. But the road also threatened to bring an influx of unwanted non-Mormon settlers -- notably miners, Protestant clergy, journalists and lawyers. Added to the threat of outsiders was a rebellion from within. The New Movement movement of the late 1860s, a group of prominent Mormon entrepreneurs who objected to Young's micro-management of the economic development (especially his ban

---

\* New York Times, 17 February 1867, p. 6, col. 5.

on mining), posed a potentially serious challenge to his hegemony.70 The members of
the New Movement joined the small but growing non-Mormon professional community,
helping to establish the anti-Mormon Liberal Party in 1869, perennially unsuccessful
opponent to the Mormon People's Party.71

Young and the Mormon leadership took several steps to combat the threatened
contamination of Utah by outside ideas and capital. First, they excommunicated
dissenters, then adopted a resolution advising all loyal members to boycott all non-
Mormon businesses, and set up the School of the Prophets, a centralized economic
steering committee. Young also created the United Order of Enoch, a communal system
of settlement under which settlers deeded all their property to the community, and shared
resources according to need.72

Last but not least, Mormons gave women the vote. According to Utah's territorial
delegate to Congress William Hooper (a loyal Mormon), Young, when told of the bills
for woman suffrage in Washington, immediately "saw the point," and planned to give
women the franchise at an opportune moment.73 Only a few months later, the New
Movement fielded a rival candidate for mayor of Salt Lake on the new Liberal Party

70 Lamar, The Far Southwest, 361-62, 375-76; Mrs. T.B.H. Stenhouse, A Lady's
Life Among The Mormons, 29-62.

71 G. Homer Durham, "The Development of Political Parties in Utah: The First

72 See generally Arrington, Great Basin Kingdom, 322-349; Whitney, History of
Utah, 2:276-94.

73 See S.R. Wells, "William H. Hooper, The Utah Delegate and Woman Suffrage
ticket. Added to this threat, Congress began debate on the Cullom Bill (which, in addition to its other features, would have ended Utah's "marked ballot" system.\textsuperscript{34}

In the event, neither the local nor the national threat proved as dangerous as some in Utah feared, but the dual prospect prompted church leaders to introduce the "Female Suffrage Bill" into the territorial legislature in early 1870. Young's motives have been debated in the historical literature, as they were in local and national newspapers at the time. Non-Mormons in Utah (and some non-Mormon historians) argued that the Mormons desired only to ensure their own political domination of the territory by "voting their wives," doubling their own constituency while the largely male non-Mormon voting pool remained static.\textsuperscript{75} The Mormon leadership (and at least one Mormon historian) claimed that Mormonism was fully consistent with woman suffrage, and women's rights generally.\textsuperscript{76} As one Mormon proponent of woman suffrage put it, demonstrating that all could use the vocabulary of civilization, if civilization measured the success of a

\textsuperscript{34} According to local Utah law, each voter was assigned a number, which was then marked on the back of the voter's ballot, thus making it possible to determine how each person had voted. For an attack on this system, see Robert N. Baskin, "Marked Ballots and the Absurd Election Law," chap. 9 in Reminiscences of Early Utah, (Salt Lake City, 1914), 73-82. In their defense, Mormons claimed that, while it was theoretically possible to ascertain the votes of individuals, the marked ballot system was simply a means of controlling voter fraud by enabling registration officials to match up names and numbers, and that they never actually inquired into the political choices cast of legitimate voters.


society by the respect accorded to women, then the franchise demonstrated that the women in Utah were blessed by an extraordinarily high degree of civilization.  77

This comment leads to the third motive for the enfranchisement of women: deflection of criticism away from polygamy in Utah. Given the widespread correlation between polygamy and slavery, on the one hand, and the presumption (among many woman’s rights activists) that the franchise was the most important of all rights denied to women, on the other, giving polygamous wives a political voice denied to monogamous women in the East was a handy means of calling the bluff of reformers. 78 Press reaction to the idea confirms this hypothesis. “Was there ever a greater anomaly known in the history of society?” queried the editor of the Phrenological Journal. “[T]hat the women of Utah, who have been considered representatives of womanhood in its degradation, should suddenly be found on the same platform with John Stuart Mill and his sisterhood, is truly a matter for astonishment.” 79

The Female Suffrage Bill was passed unanimously and apparently without significant debate, 80 an unprecedented event in the annals of woman suffrage. The


78 Van Wagenen, “In Their Own Behalf,” 31-43, argues that Mormon women were themselves instrumental in the church leadership’s assessment of the utility of woman suffrage in the defense of polygamy. Her research shows that Mormon women’s political activism, especially a “great indignation meeting” in Salt Lake City, called to protest the proposed Cullom Bill in January 1870.


80 For a discussion of the passage of the act, see generally Alexander, “An Experiment in Progressive Legislation,” 25-26, describing passage of the Female Suffrage Act by the territorial legislature, its signing by Governor S.A. Mann, despite “very grave
statute itself was also unusual, in that it granted the vote to almost every female in the territory, whether or not she was twenty-one years of age or even a citizen: in addition to all female citizens over 21, suffrage was also extended to all those who were the wives, widows, or daughters of native born or naturalized men.

Suffragists in the East were ecstatic. One activist, disheartened by the repeated failures to enact woman suffrage at the state and national level in the 1860s, described the jubilation of suffragists at the news from the West: "[i]n the midst of the baffling discouragement politics had wrought, a tiny flickering star of victory arose out in the great mysterious West."

Young had won the approbation of many suffragists in the East, for the time being at least. Susan B. Anthony and Elizabeth Cady Stanton made trips to Utah, to congratulate the women on their political good fortune, and to discuss other reforms for the matrons of Utah, including birth control and equal legal rights.

As anti-polygamist women in Utah pointed out to them, however, suffragists in the East did not understand Utah. Mormons were among the most democratic of all American groups, putting everything from the management of church funds to choice of

and serious doubts of the wisdom and soundness of that political economy which makes the act a law of this Territory, and its subsequent ritual re-enactment by the Ghost Government of the Ghost State of Deseret, based on Utah Territorial Legislature, MS, Manuscript Section, File Box on Utah Territory, Legislature (Church of Jesus Christ of Latter-day Saints Historians’s Library, Salt Lake City).


bishops up to the vote. Women generally participated in such church polity. But the
church was also hierarchical in the extreme, creating something of a contrast between
democratic practices and autocratic leadership. Its opponents (and twentieth century
historians) commonly referred to territorial Utah as a "theocracy;" a better term, one used
by a Mormon leader in the nineteenth century, is "theodemocracy." As George Smith
saw it, God spoke (through revelation to the Mormon prophet) and the people had the
right (through the vote) to consent to God's will or refuse, as they saw fit. George
Cannon, Utah's delegate to Congress from 1872 to 1882, made a similar point: "It is not
vox populi vox Dei, but vox Dei vox populi -- from God downward to the people, and
not from the people upwards to God." Once the will of God was clear, assent tended
to be unanimous, as in the case of the territorial legislature and woman suffrage. The
vote was taken only after the issue had been decided as a matter of church policy.

Exacerbating this general proclivity toward unanimity was the absence of a truly
secret ballot. Until 1878, when adverse publicity prompted the territorial legislature to
eliminate the practice, each ballot was numbered, and the number recorded in the registry
next to the voter's name. In response to charges of manipulating the vote, Mormon
authorities replied that they only intended to reduce fraud by assuring that each voter cast

---


" Journal History, 12 July 1865. Quoted in Hansen, Quest for Empire, 40. On
Theodemocracy in early Mormonism generally, see Edward A. Warner, "Mormon
Theodemocracy: Theocratic and Democratic Elements in Early Latter-day Saint
ideology" (Ph.D. diss., University of Iowa, 1973), 315-392.

" Kate Field quoted this pronouncement as evidence of Mormon treason, arguing
that after such a statement, it would be hypocritical for Mormons "to assert that they
a single ballot. Subsequent historical research has confirmed, however, that "casting a vote in opposition to approved candidates was severely frowned upon."  

The woman's vote, despite the hopes of reformers, followed the standard Mormon pattern, increasing the Mormon majority to more than 95% in territory-wide elections for delegates to Congress. Non-Mormons in the territory cried foul as whatever remote chance they had to achieve local political power evaporated with the woman's vote. Thus began a campaign that culminated in 1887 with the Edmunds-Tucker Act, and the repeal of suffrage for Utah's women.

(d) Freeing the Happy Slave: Anti-Suffrage and Anti-Polygamy in Washington

Virtually as soon as Utah gave the franchise to women, there was opposition in Washington. The same Republicans who had supported the forcing enfranchisement on the territory, were discomfited by Mormon appropriation of the idea. Several newspapers

56 Hansen, Quest for Empire, 137-38.

57 For an analysis of Mormon voting patterns see Stanley S. Ivins, "The Moses Thatcher Case," (MS, Utah State Historical Society), 3 ("[O]f the 96,107 votes cast [from 1852-1870] 96 per cent went to the [church-approved] candidate. And if the known [non-Mormon] ballots are eliminated, the percentage rises to 97.4.").

Non-Mormons regularly contested the victories of People's Party candidates, but it was not until 1882 that the Congress voted to oust a member elected by such an overwhelming majority. Even then, the House refused to seat either Mormon George Q. Cannon, the People's Party candidate, or Allen Campbell, of the Liberal Party, and the territorial seat was declared vacant; Whitney, History of Utah, 3: 130-94.

58 See, for example, an editorial in the Salt Lake Tribune, 16 February 1872, arguing that woman suffrage in the territory allowed "[w]omen, who have not other right than being the duplicate or triplicate, and consequently illegal, wives of some man, attend the polls in numbers." The editor then appended a charge of fraud: "Wives are allowed to vote by proxy for their absent husbands, and children for their mothers. While [sic] non-age or non-residence, among our opponents, is no bar to the privilege."
echoed their fears, arguing that the women in Utah could not be trusted to vote against their husbands. In full retreat from its former support of the woman's vote in Utah, the *New York Times* argued that "the downfall of polygamy is too important to be imperiled by experiments in woman suffrage." Bills and resolutions calling for the revocation of woman suffrage, often styled as "purification" of elections in Utah, were introduced at almost every session.

Woman's rights advocates argued at first that such measures were calculated to perpetuate, rather than curb, polygamy. The National Woman Suffrage Association, for example, attacked an attempt in the Senate in 1870 to "disfranchise the women of Utah, as a movement in aid of polygamy, against justice, and a flagrant violation of a vested right." In 1873, the New York Woman Suffrage Society protested Republican Senator Frelinghuysen's bill to disfranchise the women of Utah, arguing that "the vote of the women will be found a powerful aid in doing away with the horrible institution of polygamy."

But by 1874, even the most ardent suffragists acknowledged that woman suffrage had not produced the hoped-for results. They blamed the failure, however, on the lack

---


90 See, for example, the Resolution introduced in 1882 by Senator John Tyler Morgan, Democrat of Alabama, calling for the immediate investigation of female suffrage in Utah, and speedy revocation of the woman's vote. *Congressional Globe*, 47 Cong., 1 sess. Misc. Doc. No. 34. (11 January 1882).

91 *History of Woman Suffrage*, 2:780 (resolution adopted at annual meeting, May 1870).

92 *Congressional Record*, 42 Cong. 3 sess., Misc. Doc. No. 95 (25 February 1873).
of a fully secret ballot, which, they argued, prevented Mormon women from voting their consciences.\textsuperscript{93} Most reactions were not so charitable. Instead of serving as an example of the benefits of woman suffrage for society, the vote for women in Utah played into the hands of those who opposed suffrage as an attack on the family. Indeed, both Wyoming and Utah were treated in the American (and to some extent the English) press as evidence of the disintegrating force of woman suffrage on civilization. Tales of gun-slinging Amazons in Wyoming, and degraded wretches driven to the polls by the wagon-load in Utah catered to stereotypes, rather than serving as support for the dignity of women as voters.\textsuperscript{94} Women in Utah had "no adequate political expression," charged opponents of woman suffrage, they were the mere "cat's paw of the priesthood."\textsuperscript{95}

Anti-polygamist rhetoric shifted from the condemnation of the enslavement of all women in Utah, to a new emphasis on various "classes" of women. One of the most

\textsuperscript{93} See the NY Suffrage Society's memorial, claiming that if "a free expression by the ballot is secured to all citizens," women, as "the principal sufferers from this cruel custom, ... [would be the first to cast their votes for] its suppression." Misc. Doc. no. 95.

\textsuperscript{94} Fanny Stenhouse described the practice of Mormon men when faced with a contested election in Utah: "I have often seen one solitary man driving into the city a whole wagon load of women of all ages and sizes. They were going to the polls and their vote would be one. Many have voted two or three times.... It is easy to see how the influence of the priesthood has been exerted and the women themselves have been made the instruments for riveting still more firmly their own fetters." Quoted in the Petition of Mrs. Angie F. Newman, 49 Congress, 1 sess., Sen. Misc. Document No. 122 (8 June 1886). See also Ross Evans Paulson, \textit{Woman's Suffrage and Prohibition: A Comparative Study of Equality and Social Control} (Glenside, Ill., 1973). 90 (citing newspapers stories from U.S., England, and Canada that derided woman suffrage in Wyoming and Utah).

\textsuperscript{95} John W. Kingman, testifying before the Joint Special Committee on Woman Suffrage of the Massachusetts Legislature, reported in the \textit{Woman's Journal}, 26 January, 1876. Cited in Van Wagenen, "Sister-Wives and Suffragists," 182.
common themes was the foreign birth of plural wives, recruited from the slums of Europe, "wholly ignorant of our language or laws, or the significance of the franchise, with the odor of the emigrant ship still upon their clothing."* The plural wives of a prominent polygamous household she visited, Kate Field claimed, were all "Danes, and as far removed from our idea of womanhood as the earth is removed from the sun. They were beasts of burden."7 Articles on the hypocrisy of Mormon women began to appear; others attacking their fanaticism were evidence of eroding sympathy. Always there was the charge of voter fraud, based in part on the fact that Utah's suffrage statute did not establish age or property qualifications for women, and in part on the charge that the women were forced to vote to sustain the unlawful power of Mormon men.** The New York Times also accused Mormons of forging signatures on petitions sent to Congress in support of woman suffrage.***

Utah's reform of its election laws in 1878, guaranteeing the secret ballot, only heightened the criticism, for the Mormon women (like Mormon men) still voted as a bloc. Mormon rhetoric hardly helped the situation. A widely publicized interview given

* Petition of Mrs. Angie F. Newman, 4.


* Jennie Anderson Froiseth, ed., The Women of Mormonism (Detroit, 1882), a collection of anti-polygamy speeches, articles and stories, is a good example of attacks on the integrity of Mormon women.

*** See, for example, "The Woman Suffrage Law," Salt Lake Tribune, 23 December 1877, at p. 2, col. 2: "[T]he Saintsesses vote at the dictation of the anointed masters, and thus perpetuate the misrule which holds them in ignorance and degradation."
to a San Francisco newspaper by a Mormon bishop played on eastern fears of the monolithic Mormon vote:

The women of Utah vote, and they never desert the colors of the church; they vote for the tried friends of the church .... In some great political crisis the two present political parties will bid for our support. Utah will be admitted as a polygamous State, and the other Territories we have peacefully subjugated will be admitted also. We will then hold the balance of power, and will dictate to the country. We possess the ability to turn the political scale in any particular community we desire.100

Easterners heard the threat, and condemned woman suffrage in Utah. One prominent member of the National Woman's Suffrage Association pronounced herself "reconciled" to the disfranchisement of women in Utah, because of the "anomalous condition of affairs" there.101 Even Susan B. Anthony, testifying in favor of a constitutional amendment on woman suffrage, was reduced to arguing that "suffrage is as much of a success for the Mormon women as for the men."102

By the time Anthony spoke, the image of Mormon women had come almost full circle. From the likely sources of a new law for Utah based on civilized monogamy, Mormon women as voters had become no better than the men, at best unwitting dupes in their own enslavement, and at worst zealots willing to participate in the subornation of the laws of the United States.103 The fact that Mormon women were active in their

100 Quoted in Petition of Mrs. Angie F. Newman, 5.

101 The statement is attributed to Mrs. Lily Devereux-Blake, Vice-President for New York of the NWSA, and is quoted in the Salt Lake Tribune, 11 August 1888.

102 Testimony reported at Senate Report 70, 49 Cong. 1 sess., 2 February 1886.

103 The Salt Lake Tribune, run by non-Mormons, was (not unexpectedly) the most vigorous critic of Mormon women: Rather than sympathizing with Mormon women, the paper claimed, it would make more sense to "put a few score in the penitentiary," to
own defense was also turned against them. As Kate Field put it, "Mormon women hold mass-meetings in Salt Lake City that are engineered by the church and assert that they are perfectly satisfied with their condition. Before the abolition of slavery the world was assured that negroes were happy in their chains, and individual slaves may have said as much."

Frances Willard, through her deputy in the West Angelina French Newman, leant her considerable political clout to the growing clamor against suffrage for Mormon women. In 1884, Newman submitted a petition that had been circulated among the home missionary societies of the Methodist church, the denomination to which she and Willard

---

"cool their religious ardor," treating them in the only "way that would carry conviction to their vacant breasts." 31 October 1873. Quoted in Van Wagenen, "Sister-Wives and Suffragists," 185-86.

The overlap between plural marriage and activism in woman suffrage organizations, of course, was grist for the mill of anti-suffragists. So deep was the abhorrence of polygamy, that the perceived connection between the suffrage and plural marriage even convinced some anti polygamists who had themselves been pro-suffrage to alter their stance outright. A prime example is Jennie Anderson Froiseth, whose pro-suffrage politics may have contributed to the failure of the Anti-Polygamy Standard in 1883. By 1889, Froiseth refused to join a woman suffrage organization formed by both monogamist and polygamist Mormon women. Froiseth declared that she opposed woman suffrage for the territory, because of "the anomalous condition of affairs here," adding that she would not work with women who believed in polygamy. "The Gulf Between Them," Salt Lake Tribune, 11 January 1889. Quoted in Van Wagenen, "Sister-Wives and Suffragists," 416. See also Van Wagenen, 390, for this intriguing speculative stab at explaining the failure of the Standard.

"Kate and the Mormons," Chicago Tribune, 6 June 1886, p.15, col.3.
belonged. The petition, which called for the revocation of woman suffrage, received an astronomical 250,000 signatures of women outraged by the vote of women in Utah.\textsuperscript{106}

Even woman suffrage organizations abandoned the hapless Mormon women. By the late 1870s, openly hostile reporting on the Mormon question dominated the \textit{Woman's Journal}, as moderate suffragists became increasingly skeptical about the efficacy of the woman's vote.\textsuperscript{107} Mary Livermore, a prominent temperance activist in Massachusetts and dedicated anti-polygamist, argued at a convention of the New England Woman Suffrage Association that Mormon women's votes were dictated by their husbands.\textsuperscript{108}

The problem for suffragists became acute by 1880, when anti-polygamy women in Utah formed the Anti-Polygamy Society, and began publishing the \textit{Anti-Polygamy Standard}, a monthly newspaper dedicated to "every happy wife and mother," and asking

\textsuperscript{106} Petition of Mrs. Angie F. Newman, 9. This petition, although signed by an extraordinarily large number of women, was not extraordinary as a political matter. Throughout the anti-polygamy era, hundreds of petitions, sometimes signed exclusively by women, in other cases signed by women and men, protested officially to Congress the existence of polygamy in Utah, and called for legal reform of everything from adultery to real estate development as means of eradicating polygamy and curbing the political power of the "polygamic theocracy" in the territory.

\textsuperscript{107} A prime example is an article written in 1879 by Amanda E. Dickinson in the \textit{Journal}, criticizing the National for associating with polygamist women, singled out the claim that "polygamy is better than prostitution" for special opprobrium: "Prostitution only degrades its victims, and the men who associate with them; but where polygamy is the rule all women are essentially degraded." The "mischief already done" by the "appearance of an affiliation' between a suffrage organization and a system which "plunges [woman] into the lowest depths of degradation," Dickinson argued, could not be remedied by the National's attempt to deny such an association. "Polygamy Degrades Womanhood," \textit{Woman's Journal} 29 March 1879.

for "sympathy, prayers and efforts to free her sisters from this degrading bondage."\textsuperscript{109}

The paper, which took its name from the famous \textit{Anti-Slavery Standard} of the pre-Civil War era, took an early editorial position against woman suffrage for the territory, proclaiming that while most non-Mormon women of Utah were suffragists, they believed that "moral and mental liberty should take precedence [over] political enfranchisement."\textsuperscript{110} In Utah, the franchise for Mormon women had only tightened their bonds, "increas[ing] the spread of polygamy and the consequent degradation of woman, to make them, if possible, greater slaves than before, and to enhance the power of the Mormon priesthood." There was a price to be paid for such enslavement, not only by women in Utah, but by suffragists everywhere who defended the franchise: "We venture to assert that the suffrage movement has received a blow from which it will not recover for years, in virtually recognizing Mormon polygamy. The loyal wives and mothers of the United States in vindication of their own honor, should ignore the very existence [of the National Woman Suffrage Association.]."\textsuperscript{111}

By 1884, three members of the Anti-Polygamy Society were listed as the National's officers from Utah. By 1886, when the Edmunds-Tucker Act was gathering support in Congress, suffrage organizations opposed the clause providing for the disfranchisement of all women. But as a student of woman suffrage in Utah pointed out

\textsuperscript{109} Harriet Beecher Stowe wrote the dedicatory statement, which was reprinted at the top of the first page of every issue.

\textsuperscript{110} \textit{Anti-Polygamy Standard} (September, 1880), 74.

\textsuperscript{111} "Polygamy and Woman Suffrage," \textit{Anti-Polygamy Standard} (June, 1880), 20.
recently, their opposition was lukewarm at best. Even when they formally protested the anti-suffrage clause of the Edmunds-Tucker Act, suffragists moved on quickly to ever harsher condemnations of polygamy, and complementary encomiums to monogamy as the source of woman's equality. The Woman's Journal echoed the sentiment of much of the country, when it labelled the franchise in Utah "only a semblance and sham of freedom among the Mormons."

The support of suffrage organizations gone, woman suffrage in Utah was nothing but an embarrassment. Republican politicians, most notably Schuyler Colfax and Shelby Cullom of Illinois in the House, and Justin Morrill and George Edmunds of Vermont in the Senate, led the redemption campaign. The Edmunds-Tucker act kicked around for several years in the halls of Congress, gradually gathering support through external supporters such as Willard and Field.

A few pro-suffrage Republicans argued against sacrificing principle to expediency. A few Southern Democrats, all of whom opposed woman suffrage as a


113 Henry Blackwell, in a particularly hard-hitting editorial, claimed that "monogamy is the rock upon which the church of Woman's Equality is founded, whereas the "unscrupulous [Mormon] priesthood" had outraged civilized morals by establishing the "twin relic of barbarism" on freedom's shores. Woman's Journal, 21 June 1879.

114 Woman's Journal, 24 May 1884.

115 The objections of Representative Reed, Republican of Massachusetts, were typically perfunctory. In debate in the House on the proposed bill, he declared that, while he saw "no reason for incorporating [disenfranchisement] into the bill," nonetheless "the advantage of [the proposed legislation as a whole] under the circumstances constrains
matter of policy, nonetheless argued that suffrage was a local matter -- a question of states' rights -- and should be left to states and territories to deal with as they saw fit.116 But the overwhelming sentiment was in favor of the bill. As Bishop Wiley put it in a phrase that was picked up by anti-polygamists across the country: "Woman Suffrage in Utah is woman suffering."117

By January, 1886, when the Senate debated the revocation provision, George Edmunds had translated the franchise into a form of bondage, from which Mormon women, if their true voices could be heard, would beg to be freed. His bill, Edmunds said, was designed "to relieve the Mormon women of Utah from the slavehood of being obliged to exercise a political function which is to keep her [sic] in a state of degradation...."118 The "slavehood" of the franchise -- the idea that political responsibility and power were translated into lack of power -- was a remarkable concept. The implication, of course, was that virtuous women did not exercise such a function willingly, and that those who lacked virtue did not deserve to exercise it. Such an argument raises interesting questions about the role of consent in political (and marital)

116 Wilkinson Call, Democrat of Florida, pointed out with no small satisfaction the fact that "[t]wenty Senators voted here the other day, who will vote for this bill, to submit an amendment of the Constitution to the people of the United States as to whether there should be discrimination against women in reference to their right to vote. Id., 1903.


118 Congressional Record, 49 Cong., 1 sess., 406 (5 January 1887).
unions, and the role of women in consent -- both of which were the subject of considerable debate during and after the Civil War.

(e) Consent, Divorce and "Union": Suffrage and the Law of Marriage in Post-Civil War Political Debate

Kate Field argued that women were frightened into polygamy by the threat of damnation: "If a woman refuses to give other wives to her husband, it shall be lawful for him to take them without her consent, and she shall be destroyed for her disobedience." Is it likely that a woman will refuse consent under such circumstances? Even with such theological weapons at their disposal, Mormon men often dispensed with the "pretense" of consent, especially from the first wife, knowing that women could not willingly agree to their own degradation. ¹¹⁹

Yet consent to marriage, as we have seen -- voluntarism in the entry into the relationship -- should not be confused with rights, political or otherwise, within the relationship.¹²⁰ Anti-polygamists and their anti-divorce allies were as critical of the notion that one could revoke consent to an on-going marriage, as they were of the fraudulent procurement of consent in the first place. Thus Justin Morrill could follow his

¹¹⁹ "The Mormon Monster" Lecture, 5, 6, 9.

¹²⁰ Nor should consent to marriage be construed as implying consent in any full-bodied sense of the term. Even if free from the taint attached to the presumptively invalid consent of plural wives to polygamy, spouses (especially wives) were by no means free to structure the resulting relationship according their own negotiations. Instead, the definitions of husband and wife were essentially "prefabricated," rather than created by the parties to a marriage, or to an employment relationship. See Christopher L. Tomlins, "Law and Authority as Subjects in Labor History," (American Bar Foundation Working Paper #9312), 31.
condemnation of polygamy as involuntary, with a equally outraged quotation from a sermon delivered by Brigham Young in 1856:

'My wives have got to do one of two things--either round up their shoulders and endure the afflictions of this world and live their religion, or they may leave; for I will not have them about me. I will go into heaven alone, rather than have scratching and fighting around me. I will set all at liberty. What! first wife too? Yes, I will liberate you all.'

The Mormon system, this "Mohammedan barbarism revolting to the civilized world," with its forced entry (polygamy), and lax exit (divorce), was thus seen as a coherent whole, two sides of the same corrupt coin. The one was as bad as the other -- both were intolerable in a civilized republic.

The connections between the two were often explicitly drawn. Anti-polygamists recognized, for example, that the modern concept of "serial polygamy" -- the marrying of multiple wives in succession over time -- was the logical result of easy divorce.

---


122 Id., 10.


124 Defenders of polygamy constantly played this theme, charging, for example, that "polygamy" in New England was countenanced through divorce, while it was condemned in Utah, even though women were far more secure in Utah than in the northeast. See for example "Polygamy in Utah and New England Contrasted." Speech of Hon. Joseph E. Brown of Georgia. Delivered in the Senate of the United States, Tuesday, May 27, 1884 (Washington, D.C., 1884). Field nipped this sophistry in the bud, arguing that Mormons had no ground to stand on, given that both polygamy and the most lax divorce were the order of the day in Utah. "I have often heard of consecutive polygamy among [non-Mormons], and of easy divorces, and that divorces are unknown among the saints. Now, [my lecture] disproves any such supposition; and as for Brigham Young, during his dispensation he drove a thriving business by untieing his own people." "The Mormon Monster," 12.
Indeed, they often referred to divorce as the "polygamic principle," arguing that polygamy in its serial guise smelled just as foul as the Mormon variety. That the two forms of polygamy (simultaneous and serial) were both widely available in Utah was hardly a surprise to anti-divorce activist Samuel Dike, president of the National Divorce Reform League, who argued that the "curse of Mormonism [has] come upon us in part, at least," from allowing divorce "for numerous and trivial causes," thus "[cheapening] the bond of marriage."  

Was it not coercion to require spouses to remain together in an unhappy marriage? Here battle was joined in earnest between those who argued that contractualism was irrelevant to an on-going union, and those, especially woman suffragists, who argued that marriage (in all its phases) should be understood as nothing more, and nothing less, than a contract. Anti-divorce theorists, and their anti-polygamy allies, were crystal clear on this point. Notions of contract and consent, they said again and again, were inapplicable to marriage, except as the only valid means of signifying the formation of a valid union. Noah Davis, just to give one example, gave the usual prelude on freedom of contract at the outset: 

"[The State] should require nothing but the one essential element; and that is,

---

125 Theodore Woolsey, for example, condemned divorce as a concession to polygamy, Essay on Divorce, 49; and Mrs. Packard called divorce the "polygamic principle." Modern Persecution, 396. Quoted in Hartog, "Mrs. Packard on Dependency," 95 n.53.

the consent to the matrimonial contract of parties capable in law of making it."^{127} In the next breath, Davis explained that consent of the parties to end a valid marriage was not enough; "they have no power or right to annul [the contract] without the consent of the State." Furthermore, the state had a vital interest in on-going marriage, in the "life-unity of one man and one woman," contrary to the spurious claims of advocates of easy divorce:

They [divorce activists] ignore the family and exaggerate the individual, and wholly discard the claims of the State. This [individualism] is no new idea. It has always been a central idea of barbarism. It has prevailed through the most licentious eras of all peoples. It is the culminating thought of the harem. It has been the curse and degradation of woman, making her the slave and man the master, a creature for the shambles, bought and sold at the price of lust -- higher in bloom, lower in decay, than "the dumb driven cattle."^{128}

Elizabeth Cady Stanton, for many years the president of the National Woman Suffrage Association and a passionate defender of easy divorce, was not convinced. She inveighed against "marriage as a compulsory bond enforced by law and rendered perpetual by that means," charging that all forms of coercion simply replicated slavery.\(^{129}\) All force was incompatible with democracy, she argued, be it in government

---

\(^{127}\) "Marriage and Divorce," \textit{North American Review}, 139 (July, 1884): 31. Davis was a state court judge in New York for more than 25 years. "Noah Davis," \textit{Dictionary of American Biography}, 5:140-41. He peppered his anti-divorce article with stories from the bench of divorce decrees he had annulled, separation agreements he had refused to enforce, and thus public order he had preserved.

\(^{128}\) "Marriage and Divorce," 34.

of the nation or of the family. As one scholar has put it, "[e]ntract provided women both with a theory of equal and reciprocal duties within an ongoing relation and also with a model for breaking that relation when the bargain went sour.")

Stanton made the connections between marriage and slavery, divorce and freedom explicit in a letter to powerful New York Tribune editor Horace Greeley, whose anti-divorce and anti-suffrage views galled especially the members of the more radical NWSA:

"We decide the whole question of slavery by settling the sacred rights of the individual. We assert that man can not hold property in man, and reject the whole code of laws that conflicts with the self-evident truth of that assertion. [Yet in marriage a woman is denied] her rights to person, children, property, wages, life, liberty and the pursuit of happiness."

Most suffragists avoided the questions raised by Stanton and her radical supporters, for both strategic and philosophical reasons. Especially after the Civil War, the political price of the "anti-marriage" label, always substantial, became virtually unbearable. By the 1880s, the NWSA determined that "side issues" (polygamy, divorce, and so on) were detracting from the effectiveness of the organization. A new "suffrage-first" focus, and an alliance with the Woman's Christian Temperance Union, spelled the

120 For an exploration of suffragists' arguments about the contradictions between notion of government based on force, on the one hand, and democracy, on the other, see Aileen S. Kraditor, The Ideas of the Woman Suffrage Movement, 1890-1920, 2d ed. (New York, 1981), 249-57.

121 Clark, "Matrimonial Bonds," 36.

end of radical discussions of the contractual nature of marriage, or defenses of polygamy and divorce.\textsuperscript{133} Even Susan Anthony and Belva Lockwood, two of the most outspoken leaders of the most liberal wing of the movement, became, as one Mormon adviser put it, "very defensive about their loyalty to monogamy."\textsuperscript{134}

Anti-suffrage politics reeked of coverture, of course -- the legal union of husband and wife through marriage in the person of the husband.\textsuperscript{135} The presumption that a separate political identity (for women, or for regions) would undermine the unity, the necessary submersion of the self in the relationship, was the rallying cry of conservative theorists of marriage. They argued, for example, that the relationship of a husband and wife replicated that of a government and its citizens; neither pair could be sundered on any but the most extreme forms of betrayal of trust -- never on whim or caprice.\textsuperscript{136}

\textsuperscript{133} On Stanton's dismay at the new narrower focus, see generally Elizabeth Griffin, \textit{In Her Own Right: The Life of Elizabeth Cady Stanton} (New York, 1984), 156-60.


\textsuperscript{135} The classic definition of coverture in Blackstone's: "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband;... her condition during her marriage is called her coverture. Upon this principle, of an union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage." Blackstone's Commentaries, St. George Tucker, ed., 5 vols. (Philadelphia, 1803), 1:441.

\textsuperscript{136} Catharine Beecher made this argument shortly after the Civil War: "[I]t is not true that women are and should be treated as the equals of men in every respect. They are certainly not his equals in physical power, which is the final resort in government of both the family and the State. And it is owing to this fact that she is placed as a subordinate both in the family and the State. At the same time it is required of man who is holding 'the higher powers' so to administer that woman shall have equal advantages for usefulness and happiness." \textit{Woman Suffrage and Woman's Profession} (Hartford,
Noah Davis, comparing degrees of laxity in divorce legislation in the various states, lauded South Carolina for its refusal to countenance any form of divorce, claiming at the same time, however, that "by strange political perversion that State has never been over-attached or faithful to another union." As one anti-divorce activist pithily explained her opposition to divorce: "I am a Unionist, not a secessionist."

Kate Field was not likely to let such a plum pass unnoticed. Renowned for her "patriotism," including long-standing pro-Union sentiments, Field did not hesitate to draw the political connections between the peculiar domestic institution of Utah and disloyalty to the central government. Mormonism, she charged, "is death to patriotism."

All Mormons were required to pledge their loyalty first to the church. "'We must obey as mules and horses obey,' declared an authority in 1869, "even unto 'treason.'" With such loyalties, Field charged, "is it not hypocritical for Mormons to declare their...

1871), 186.

And although Lincoln certainly did not deny the right of revolution, he and his fellow travellers denied that right "except when exercised for a morally justifiable cause," decidedly not when a president had been elected by a constitutional majority, no matter what southerners thought of his politics. As a Philadelphia newspaper put it in language that was echoed after the war by anti-divorce theorists, there was no "right of revolution at pleasure." *Philadelphia Ledger*, 26 December 1860, quoted in Kenneth M. Stampp, *And the War Came: The North and the Secession Crisis, 1860-61* (Baton Rouge, La., 1950), 34. Cited in McPherson, *Battle Cry of Freedom*, 247-48.

177 Clark, "Marriage and Divorce," 35.


139 See, for example, W.J. McGee, "Memorial of Kate Field," *Records of the Columbia Historical Society*, 1 (1897), 174; "Who Was Kate Field?" *St. Louis American*, 22 September 1964 (discussing Field’s efforts supporting the preservation of two John Brown landmarks, including the engine house he used as a fort in the famous Harpers Ferry raid), cited in Carolyn J. Moss, "Kate Field: The Story of a Once-Famous St. Louisan," *Missouri Historical Review*, 58 (January, 1994): 157.
allegiance to the United States?" Such people, said Field, using language that appealed to the Civil War veterans she addressed, were nothing less than "nullifiers," undeserving of political privileges, anti-republican, "rebellious."¹⁴⁰

"Polygamy is wrong," she concluded; national standards, including uniformity in voting, were the only solution. Field rode the crest of a wave of popular sentiment, capitalizing on (and augmenting) the sense of her audiences that politics and marriage were somehow mixed up together in unprecedented ways, and that whatever the proper solution, the "Mormon Monster" had gotten the formula terribly wrong. The politics of Utah, and the marital system on which politics must rest, were the expression of what could happen if Americans compromised their commitment to the politics of consent, monogamy, coverture, permanence -- union.

Conclusion

Mormon women were not the only group to lose the franchise soon after winning it. President Grant told his cabinet in 1876 that the Fifteenth Amendment had also been a mistake: "It had done the Negro no good, and had been a hindrance to the South, and by no means a political advantage to the North."¹⁴¹ The analogy between polygamy and slavery thus played itself out in subtle and sometimes uncomfortable ways -- the redemption of the franchise in Utah followed close upon the heels of redemption of black votes in the South.

¹⁴¹ Quoted in Foner, Reconstruction, 577.
An additional feature of the Edmunds-Tucker act bears mentioning here. The law also contained elements of a national law of marriage. For the first time in federal law, the Edmunds-Tucker act defined and punished adultery, fornication, and incest, allowed plural wives to testify against their husbands in polygamy cases, and abolished the husband's traditional spousal immunity in polygamy cases, and established a right of dower for first wives.¹⁴

All of these provisions, this new national law of marriage, were designed to shore up the institution of monogamy, to protect women from the legal disabilities (the "degradation," as Field put it) that were associated popularly with polygamy. Yet there was also a punitive odor to the new regime, as the anti-suffrage campaign demonstrates. Lurking behind stories designed to provoke pity for the victims of polygamy, were jabs at Mormon women's foreignness, their failure to escape their bondage, their fanatical faith. If women in general were unsuited to political responsibility, Field and her anti-polygamist colleagues implied, Mormon women were especially incapable of giving meaningful consent to government -- they had not even proven themselves competent in giving real consent to marriage.

It was a sign of the times that prosecutors in Utah used the statute to indict almost 200 plural wives for fornication over the next three years. The legal system, consistent with national sentiment generally, had translated their understanding of women as the

¹⁴ Prior legislation had provided for alimony for plural wives divorced in federal court prompted by publicity following the Ann Eliza Young case, and punishment of unlawful cohabitation, allowing for prosecution of polygamy without having to prove an plural marriage ceremony.
victims of polygamy, to holding them responsible as criminal participants in a victimless crime. The "dynamite of law" is a dangerous weapon in the fight to protect women, a lesson we are only beginning to learn a century after the Mormon monster faded from public view.

The deployment of these tactics of coercion in the service of consent, the dynamics of the legal reconstruction of Utah, takes us into the territory itself. In Utah, especially in Salt Lake city, reform, resistance, and retribution created a heady atmosphere of drama, coloring the lives of virtually all inhabitants. In this maelstrom of legal change, political activism was the order of the day, lawyers were forged and tested, and some two thousand polygamists were punished. The story begins with the career of a flamboyant and controversial federal judge, whose career (and whose political alliances) set the stage for the whirlwind that was to follow.
"THE TWIN RELIC OF BARBARISM":
A LEGAL HISTORY OF ANTI-POLYGAMY
IN NINETEENTH-CENTURY AMERICA

Volume 2

Sarah Barringer Gordon

A DISSERTATION
PRESENTED TO THE FACULTY
OF PRINCETON UNIVERSITY
IN CANDIDACY FOR THE DEGREE
OF DOCTOR OF PHILOSOPHY

RECOMMENDED FOR ACCEPTANCE
BY THE DEPARTMENT OF HISTORY

JUNE 1995
PART III: THE BUSINESS OF PUNISHING POLYGAMY:
THE TERRITORIAL JUDICIARY AND LAWYERS IN UTAH TERRITORY

Introduction

1: "Federal Authority versus Polygamic Theocracy": Judge McKean and the Anti-Polygamy Women of Utah
   (a) The Battle for Credibility and the Courts in Utah
   (b) The Anti-Polygamy Women of Utah and Women’s Power

2: "That Troublesome Period": The Bench and Bar of Territorial Utah
   (a) Lawyering and Judging in the Anti-Polygamy Period
   (b) The Professionalization of Utah for Statehood

3. The Territorial Courts, the Raid, and Legal Strategy
   (a) "Every Civilized Country on Earth": Judge Zane, the Underground, and the Evolution of Legal Strategy
   (b) "To Protect Themselves In this Class of Cases": Mormon Women, Defense Strategy, and the Criminalization of the Victim
Introduction

Although initially anti-polygamy sentiment flowed from the East toward the West, non-Mormons already in Utah welcomed its advent. They used anti-polygamy rhetoric and legislation not only to critique Mormon society, but to enhance their own cultural and political weight in Utah. Anti-polygamy, along with mining and army service, became a major non-Mormon business, supporting printing establishments, keeping territorial officials busy, and generally giving definition and cohesion to a community whose population remained a small minority.

This is not to imply that anti-polygamists in Utah were hypocrites; the vast majority deeply opposed polygamy, and believed that Mormon plural marriage was inextricably connected to Mormon central economic planning, church-controlled territorial politics, and hierarchical leadership. Many prominent anti-polygamists in Utah in the 1870s and 1880s arrived in the decade or so after the Civil War, often drawn by the lure of the silver mines north of Salt Lake, and to some extent brought their anti-polygamy leanings with them as they migrated. It is also true, however, that their anti-polygamy grew more virulent once they arrived in Utah, and were confronted with the uncomfortable realities of life as a despised and distrusted minority.

Other anti-polygamists were home-grown, so to speak. Apostates, a constant problem for the Mormons, were as prevalent in the decade after the Civil War as ever. Several members of the new movement, notably Fanny Stenhouse and her husband T.B.H., became active anti-polygamists, publishing exposes of the plural marriage system (in which they themselves had been participants), and lobbying for federal anti-polygamy legislation. Still other anti-polygamists were sent to Utah on an expressly anti-polygamy
platform. Missionaries from the East, generally Presbyterian and Congregationalist, were a small but growing source of anti-polygamy rhetoric by the early 1870s.

The most prolific anti-polygamists, however, and those whose livelihood depended on the enactment and enforcement of federal anti-polygamy legislation, were territorial officials -- federal employees whose job it was to enforce federal law. These men (and their families, who often migrated with them to Utah) were natural conduits for anti-polygamy; their presence in Utah was both a result of anti-polygamy in the East, and a cause of the growth of anti-polygamy in Utah, which in turn fed anti-polygamy in the East, and so on.

This Part tackles the role of anti-polygamy in Utah, as the territorial courts assumed an ever greater and more exclusive jurisdiction over the course of events. In one sense, therefore, this is a story of legal institutions elbowing competing forces out of the way; not just Mormon forces, but also other anti-polygamy interests in Utah. The debate over polygamy had always been one element of the more general question of who gets to define what law is; in Utah the territorial judiciary and other law enforcement personnel, piggybacking on their institutional competence, gradually assumed the definitional prerogative as well.

The following chapters, more the story of the unfolding institutionalization of anti-polygamy as a peculiarly legal (and lawyers') problem than a straightforward narrative history, are nonetheless roughly chronological. Beginning in 1870 with the arrival of the first effective, and one of the most flamboyant, of the territorial judges, the first chapter tracks the initial concord, and eventual discord, between men's and women's anti-
polygamy groups. It was in the 1870s that the first major polygamy cases were tried, and that the basic legal postures of both prosecution and defense were defined. This distinctively legal process eventually pushed female anti-polygamy off center stage, as male lawyers and judges translated what had begun as a campaign to rescue women into a campaign to punish polygamous men.

The second chapter is devoted to the professional culture of lawyers in the territory, both Mormon and non-Mormon. One of the unanticipated by-products of the polygamy prosecutions was the creation of a predominantly Mormon defense bar. These Mormon lawyers eventually made peace with the opposition, and they all settled down to running the new state that emerged from the truce.

The final chapter is based on the records of the territorial courts from 1870 to 1896, extraordinarily busy years for the courts in Utah, and expensive ones for the federal government. Although prosecution was slow and often unsuccessful throughout the 1870s and early 1880s, effective widespread prosecution was made possible by both the Edmunds Act in 1882. For the first time, jurors who believed in the rightfulness of polygamy could be challenged for cause. Equally important, prosecutors could now indict for "unlawful cohabitation," a crime whose elements were far easier to prove than the elements of a plural marriage. By 1885, the territorial courts were awash in indictments, arraignments, trials, and appeals. Hidden in the ebb and flow of some 2,500 criminal cases are the legal arguments deployed by polygamist and anti-polygamist in the contest for control of Utah. These strategic choices help explain both the scope and the
tone of the legal campaign. Most important, they reveal how what was essentially a war over women was fought not on the battlefield, but in the courts.

The larger legal scene, the tenor of change and counterchange, is consistent with the stylized and bloodless tourney of lawyers. This is not, of course, to deny that what the government was doing in prosecuting polygamists was itself a form of legitimized violence, as are all judicial processes.¹ But most of the time most of the people involved did not employ guns, hatchets, or other paraphernalia of all-out war. Their weapons of choice were subterfuge and legal process. The players from time to time broke the rules of the morality play and 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 plural wives, the shooting of polygamist Edward Dalton, and the highly volatile McMurrin situation, of which more later. For the most part, however, both sides remained true to their strategic choices, with violence an exceptional and painful reminder that bloodshed lay just around the corner from litigation. Indeed, lurking in the background of all the court records is the presence of the army. It was in the interests of both the subjects and the objects of the court system to keep levels of violence to a minimum. Territorial court personnel had little interest in turning their jobs over to the army; their continued employment, their very importance as a presence in the territory depended upon the

perception that the court system was the most effective means of dealing with widespread defiance of federal legislation in Utah.²

Mormon defendants, and the church as a whole, had long been committed to a policy of resistance calculated to fall just short of provoking martial law. The Mormon war in the late 1850s had been a painful lesson for the army as well as for the Mormon residents of Utah, but it at least made clear to all concerned, especially after the intense military build-up of the Civil War era, that even a guerilla war was unwinnable. A far more realistic solution was statehood, the prize most desired by Mormon statesmen, and of course most feared by court personnel and other territorial employees.³

The anti-polygamy campaign was conditioned by law and legal rhetoric at every stage. In Utah itself, the battle was fought not only in legal terms, but through legal institutions. The territorial bench and bar were responsible for an extraordinarily consistent translation of questions of moral governance into litigable issues. In Utah, as nowhere else, the very definition of marriage received sustained, and more or less thoughtful, attention in the courts. In the territory as in the rest of the nation, debate over polygamy involved a real conflict between two competing visions of society. These visions differed sharply in the relative place they accorded religion and centralized economic planning, and, above all for the anti-polygamists, in the role of women. In

² For an overview of federal as opposed to local interests in territorial governments, see Thomas G. Alexander, A Clash of Interests: Interior Department and Mountain West, 1863-96 (Provo, Utah, 1977).

³ Edward Leo Lyman, Political Deliverance: The Mormon Quest for Utah Statehood (Urbana, Ill., 1986), 7-40.
Utah, these questions were hardly abstractions, but the stuff of everyday life and law. An entire way of life was at stake. This was not a simple battle for economic control of the territory by interested individuals, although control was certainly one ingredient in the mix. But even in the territory economic imperialism was not the only, or even the dominant, element of a wide-ranging attempt to articulate the reasons why the treatment of women was important to politics, religion, civilization, and law.

The Mormon side of the argument was both articulate and meaningful in judicial terms. In territorial courts as in Congress, Mormons claimed first that there is a higher law-giver to which they alone had access through the doctrine of continuous revelation. They made several different legal arguments about why it matters. Most often the arguments invoked jurisdictional theories about the right to local self-government, and secondarily about the religion clauses of the first amendment. A variety of other claims were put forward from time to time, depending on the circumstances, including vested rights to property and the franchise. For much of the time, however, Mormons attacked their local officials, charging hypocrisy, short-sightedness, cruelty, and prejudice.

As the contestants reached the height of their form in the mid-1880s, so did the importance of the legal definition of the family. Legal maneuvering swirled around this vortex, with the threat (or temptation, depending upon your perspective) of statehood and the army lying at the outer reaches of the continuum along which maneuvering proceeded. The story begins with the appointment of one of Utah's most colorful, controversial, and creative territorial judges. His legal battles with Brigham Young are the foundation stones of anti-polygamy jurisprudence in Utah.
1. "Federal Authority versus Polygamic Theocracy": Judge McKean, The "Ring," and the Anti-Polygamy Women of Utah

James Bedell McKean, loyal Republican, Union soldier, devout Methodist, natty dresser, and judge of the third territorial district court in Utah (the district that included SaltLake City), was just one in a long line of federal judges who openly and repeatedly attacked the Mormon establishment. But McKean’s tenure was a watershed in the history of the territorial judiciary in Utah. For almost two decades before McKean was appointed by President Ulysses Grant in 1870, the judiciary had complained that Mormons in general, and Brigham Young in particular, obstructed the administration of federal justice in every possible way.¹

For their part, the Latter-day Saints were none too satisfied with the tenor and caliber of the federal judiciary. The judges sent to Utah were recycled political hacks, according to their Mormon subjects. To the insult of incompetence, claimed the Mormons, the judiciary added the injury of impertinence. One judge reputedly made advances to a Mormon woman, another drank openly on the bench, a third was accused of taking opium.²

The differences between the federal judiciary and Mormon authorities were more profound than quibbles about districting and drinking, however. When the first judges arrived in Utah in the early 1850s, they found themselves in a society governed by

¹ See pages 123-24, above.

² Hubert H. Bancroft summarized neatly the Mormon view of the territorial judiciary in his History of Utah (San Francisco, Cal., 1886), 492: "If it was true that the magistrates appointed by the United States were held in contempt, there was sufficient provocation. Two of them ... deserted their post, a third was probably an opium-eater, a fourth a drunkard, a fifth a gambler and a lecher."
religious principles -- not only that, but the religion itself was anti-legislative. Brigham Young was deeply opposed to lawyers, litigation, and especially to the common law. Lawsuits between Mormons were strongly discouraged. Young condemned litigation as an evil that "opens a wide door, when indulged in, for the admission of every unclean spirit." Among the first acts of the Deseret legislature (the Mormons called Utah "Deseret" when they first settled there) was the passage of a statute forbidding collection of lawyers' fees. Mormons, if they valued their church membership, brought their disputes to their local bishop, who would resolve the disagreement, or send the parties on to the ecclesiastical courts, a ghost court system run by the church that handled the nuts and bolts of internal dispute resolution throughout the territorial period, and beyond. Litigation between Mormons and non-Mormons was handled by the local probate courts, whose jurisdiction was extensive: instead of being confined to questions of estate, guardianship and the like, probate courts were granted "original jurisdiction both civil and criminal, as well in Chancery as at Common Law" by an early act of the

---


7 "No person or persons, employing counsel in any of the courts of this Territory, shall be compelled by any process of law to pay the counsel so employed, for any services rendered as counsel, before or after, or during the process of trial in the case." Utah Laws, 1851, 55, Section 1. Quoted in Orma Linford, "The Mormons, the Law, and the Territory of Utah," American Journal of Legal History 23 (1979), 229-30.

8 The records of the ecclesiastical courts are closed to researchers. For the most complete report available on the legal system of the church, see Edwin Brown Firmage & Richard Collin Mangrum, Zion in the Courts: A Legal History of the Church of Jesus Christ of Latter-day Saints, 1830-1900 (Urbana, Ill., 1988).
Deseret legislature. Probate judges were elected to four-year terms, and to the probate courts was given the responsibility of drawing up jury lists. Furthermore, all courts were flatly prohibited from citing precedents from courts in other jurisdictions. Instead, they were ordered to rely exclusively on the statutes of the territory, or of Congress "when applicable."

Legal technicalities were especially singled out for opprobrium. Brigham Young had little use for pettifoggers, whose "specious and unmeaning pretences, servile and absurd acquiescence in the whims, caprices, dictation of profound ignoramuses" rendered them perpetuators of the "musty rubbish of ages gone."

The extraordinary powers of the probate courts were a recipe for conflict between local and federal authorities, and between Mormons and Gentiles. In practice, the election of probate judges ensured they were loyal Mormons, almost always the local bishop, the judge to whom Mormons were required to turn first in the ecclesiastical court system. The selection of juries through the probate courts also guaranteed that no jury

---

9 Acts and Resolutions passed at the Second Annual Session of the Legislative Assembly of the Territory of Utah, 1852 (Great Salt Lake City, 1853), 43, Section 10. Quoted in James B. Allen, "The Unusual Jurisdiction of County Probate Courts in the Territory of Utah," Utah Historical Quarterly 36 (Spring, 1968), 133.

10 1853-54 Utah Laws, 16, Section 1.

11 Millennial Star 14 (19 May 1852), 215-16. This diatribe against lawyers (only one among many in Young's works and sermons) was written in reply to an ostensible letter from a potential immigrant to Utah from Illinois in 1851. As Young remarked elsewhere, "I had rather have a six shooter than all the Lawyers in Illinois." Quoted in Samuel W. Taylor, Nightfall at Nauvoo (New York, 1971), 202.
would stray outside the bounds of propriety as it was understood in early Utah. Non-Mormons were convinced that they could not hope for justice in such a partisan forum.

Whether or not the law dealt by the probate courts was pro-Mormon, grand juries most definitely were. The utter futility of attempting to prosecute violations of the anti-polygamy law, first passed by Congress in 1862, was a common complaint of federal judges and the non-Mormon population in Utah, especially lawyers. The anti-polygamy law was, as the federal judges acknowledged, a "dead letter." It came as no surprise to men like James McKeen that Mormon grand jurors could not be brought to indict their leaders. Even if there had been an indictment, proof of a second marriage would be almost impossible -- weddings performed in the "Endowment House" next to the temple in Salt Lake were shrouded in secrecy, and no record of the marriage was filed with local government authorities. As the Mormons explained it, they were convinced the law

---


13 Robert N. Baskin, in testimony to the Committee on Territories in 1870, argued that "the existing law against polygamy is perfectly a dead letter, by reason of the utter inability of the authorities, under the existing condition of affairs and system of legislation in Utah, to enforce that law." "Execution of the Laws in Utah," Congressional Record, 41 Cong., 2d sess., H. Rep. No. 21, (3 February 1867) 11. See also Report from the Committee on the Judiciary, 28 February 1867.

14 Utah was unique in the virtual absence of a codified law of domestic relations, which would have established rules, for example, for the solemnization and recordation of marriages. Polygamy made such codification undesirable. Under the local law of Utah Territory, the Mormon Church was given complete control over the law of marriage for all church members. The statute incorporating the church granted the new corporations the "power and authority to ... establish ordinances, laws, customs and criterion ... [which] may not be legally questioned." 1851 Deseret Laws 66, section 3.
itself was unconstitutional; lack of enforcement was evidence, they claimed, of the law's fundamental invalidity.\textsuperscript{15}

(a) The Battle for Credibility and the Courts in Utah

Such an argument was guaranteed to inflame the federal judiciary and growing non-Mormon bar. James McKeen was just the man to meet the challenge. A Civil War hero and Republican activist in New York state, McKeen importuned his former commanding officer, now occupying the White House, for a patronage appointment.\textsuperscript{16} He arrived in Utah, in his own words,

[i]mpressed from the first that my duties involved consideration of public policy greater than those which usually devolve upon a judge. I have constantly asked myself the question, -- how can a hundred thousand deluded, [illegible],

\textsuperscript{15} The memorial for repeal is paraphrased and discussed at length in Whitney, \textit{History of Utah}, 2:173-77. This bold move drew a swift response from the Committee on the Judiciary, which urged the Congress to assure "in the most certain and authoritative manne, that the law will be enforced, that the ...a relic of barbarism destructive alike to the family and the state, and utterly abhorrent to the moral sense of the nation .. be followed by the punishment prescribed...." Mr. [Burton C.] Cook, "Report from the Committee on the Judiciary, February 28, 1867 responding to the "Memorial of the Legislative Assembly of Utah, Praying for the Repeal of [1862 Act]." (Washington, D.C., 1867), 3.

\textsuperscript{16} See generally Alan E. Haynes, "The Federal Government and Its Policies Regarding the Frontier Era of Utah Territory, 1850-1877" (Ph.D. diss., Catholic University, 1968), 197-98; Knecht, "The Federal Judges of Utah Territory from a Lawyer's Point of View," 117-18: "Judge McKeen always used to say that he had not asked for the job, but since President Grant needed a faithful servant to enforce the laws, he accepted the assignment to Utah. The Archives records show that McKeen flooded the church executive with pleas over a period of years for an appointment. (citing Applications and Recommendations for Public Office, 1797-1901, 331, McKeen, RG 59, National Archives). It could be to the Banana Republics, to anywhere -- but somewhere, because the faithful ex-soldier could not earn his living at 'lawyering.'"
oppressed, alien people, be disabused liberated and brought into harmony with American ideas and institutions?" 

McKean was not at a loss for long. Only months after taking the oath of office, he teamed up with Robert N. Baskin, a young lawyer who had arrived in the territory in 1865. A native of Ohio and Harvard Law School graduate, Baskin was the best legal mind in Utah. He was the leading light of a small but growing coterie of non-Mormon lawyers, drawn to the territory by the discovery of silver in 1863, who hoped to build a lucrative mining law practice. What he found was a singularly inhospitable environment for a self-making young litigator. Not only were lawyers of any stripe unwelcome in Utah, but those with political ambitions were doubly unwanted. To a man of Baskin's peppery personality, the legal climate in Utah was a goad rather than a discouragement. When Judge McKean arrived in 1870, Baskin found a partner of his own caliber. The two men remained fast friends, and firm allies, for the remainder of McKean's life. One of their first joint ventures was the creative use of local law.


18 Robert N. Baskin, Reminiscences of Early Utah (Salt Lake, 1914), 5: "After [a] visit [to the silver mines] I changed my intention of going on to California, and concluded to settle in Salt Lake City. I secured an office and began to study the statutes of the Territory and inquire into its existent political and social conditions." What Baskin found, of course, was a singularly inhospitable environment for a self-making young mining lawyer.

19 The Mormons believed deeply in the Constitution, but strongly discouraged the two-party system that had evolved under the Constitution. Like the revolutionary generation, Mormon leaders railed against "factions," preferring political unity to the wrangling of party politics. See Klaus Hansen, Quest for Empire: The Political Kingdom of God and the Council of Fifty in Mormon History (Lincoln, Neb., 1967), 43-44.
Together they hatched a scheme that combined federal procedure with territorial law, and indicted their most bitter enemy, Brigham Young.20 Young's indictment for "lewd and luscious cohabitation" set the tone for what followed. Beginning in the 1870s, an increasingly effective federal judiciary undercut Mormon control and political power.21

With Baskin as his prosecuting attorney, McKean empanelled a grand jury according to a procedure known as "open venire," in which the United States Marshal, after exhausting an original venire list of jurors, walked into the street and asked questions of passers-by to establish their competency to serve. According to one Mormon contemporary, the only question the marshal really cared about was whether the potential juror was a Mormon or not.22 This procedure was eventually overruled by the Supreme

20 Robert Baskin described the indictment in 1871 with some satisfaction in his memoirs. Reminiscences of Early Utah, 54-57. The indictment does not appear in the official records of the territorial courts.

21 Thomas G. Alexander, Things in Heaven and Earth: The Life and Times of Wilford Woodruff, a Mormon Prophet (Salt Lake, 1993), 234, makes the interesting point that the discovery of silver, the arrival of the railroad and telegraph, and above all the federal judiciary, helped create a complex society, in which "church leaders [were] unable to subdivide their private interests to the community."

22 One Mormon observer described the scene in graphic terms:
"'Are you citizens of the United States?' was asked of each man in the latest lot brought in.
'Yes,' was the answer.
'Are you members of the Mormon Church?'
'No.'
'You'll do,' said the interrogator, and finally the Grand Jury was complete...[]
The packing of the Grand Jury -- for packing is the only word that properly describes the process -- was finally completed, not a Mormon finding place upon the panel, and the work of grinding out indictments, was at once begun." Whitney, History of Utah, 2:588.
Court, and has been attacked by historians, although there was arguably precedent for the open venire. But by far the most controversial aspect of this particular grand jury was not the manner of its selection. The indictments that the jury found against Brigham Young, and members of the Mormon top brass, Salt Lake City Mayor Daniel H. Wells, and Apostle George Q. Cannon and Henry W. Lawrence, a local merchant and member of the New Movement group of Mormon apostates, were denounced as unfair dealing by the Mormon press, and even by some non-Mormons. The use of local Utah statutes, rather than the federal anti-bigamy law, to indict Young et al, added fuel to the fire raging in Mormon circles. Baskin and McKean, they charged, were "co-conspirators," who headed a malicious "Ring," the sole purpose of which was to grasp the reins of power for themselves. According to the Mormon targets of the Ring, polygamy was just the shield behind which unscrupulous anti-Mormons hid their real designs.

There were three main components of the Mormon attack on the Ring. First, they argued that federal officials and local non-Mormons actually aimed to wrest power from

\[^{23}\text{Indeed, McKean was not the first judge in Utah to use the open venire. Judge Obed F. Strickland, briefly occupied the bench in Salt Lake while the Third District was vacant after the resignation of McKean's predecessor, but before McKean's arrival in the territory.}^{23}\]

\[^{24}\text{According to Orson Whitney, who quoted from several newspaper accounts of the incident, General Patrick Connor and even U.S. Attorney (and soon to be Mormon defense lawyer) George Bates opposed the indictments.}^{24}\]

\[^{25}\text{Roberts, } Comprehensive History, 5:394-98.\]
an essentially innocent majority, to assume a degree of political control far beyond that warranted by their comparatively small numbers. As one Mormon spokesman reported the Utah scene, non-Mormons in fact were hardly the rescuers of damsels in distress they claimed to be in public. "'We care nothing for your polygamy,' the [non-Mormons] were wont to say in private, to individual Mormons. 'It's a good war-cry and serves our purpose by enlisting sympathy for our cause; but it's a mere bagatelle compared with other issues in the irrepressible conflict between our parties. What we most object to is your unity; your political and commercial solidarity; the obedience you render to your spiritual leaders in temporal affairs. We want you to throw off the yoke of the Priesthood, to do as we do, and be Americans in deed as well as name.'"26 In this light, the entire campaign against polygamy was rank persecution, a hypocritical end-run around majority rule, "one of the most serious legal chess games ever indulged in by the Bench and Bar of any State or Territory within the confines of the Union. A game that meant everything to the defense if the prosecution won, and almost nothing to the prosecution, win or lose."27

Those few non-Mormons credited with sincerity, among whom must be counted, first and foremost, Judge McKean, were themselves accused of religious fanaticism. Contemporaries made much of the fact, for example, that McKean was the son of a Methodist minister. One oft-quoted newspaper story that first appeared in the Cincinnati Commercial in 1871 described McKean as a "trim apprehensive, not unsagacious man,

26 Whitney, History of Utah, 3:547-48, gives no source for this quote.
27 History of the Bench and Bar of Utah (Salt Lake, 1913), 36-37.
with a great burning mission to exalt the horn of his favorite denomination upon the ruins of the Mormon bishopric."\textsuperscript{28} It was not political and economic power that these few fanatics sought, but the actual demise of Mormonism, according to their purported victims. The charge of religious partiality was one means of accusing anti-Mormon federal officials of falling into the very pitfall often associated with Mormonism -- the use of secular power for illicit sectarian purposes.

Last but not least was the charge that federal officials were incompetent. This complaint, common among all territorial governments and Southern states during Reconstruction, was especially virulently made in Utah, where by the 1870s every federal official was either the darling of the Mormons, or (much more likely) of the non-Mormons. Mormons complained that Utah was a "dumping ground for all kinds of political garbage."\textsuperscript{29} Neutrality was impossible where hyperbola was the standard form of rhetoric, and good and evil were so sharply delineated (and so contradictory, depending on who was doing the talking). As the federal judiciary increased in effectiveness (which translates into increased enforcement of laws against polygamy) the pain it inflicted on the Mormon hierarchy increased proportionally.

\textsuperscript{28} Quoted in History of the Bench and Bar, 39.

\textsuperscript{29} Deseret Evening News, 21 December 1882, reprinted in Journal History, 21 December 1882, 4. See also Deseret Evening News, 20 January 1874, reprinted in Journal History, 21 January 1874: "How is it that, of the dozen or so federal officials, appointed for Utah, some of them are the head and foot of the rabid minority element, and the majority of them are clearly on its side, in its fanatical opposition to the people here, and its endeavors to overthrow constitution, law, peace, good order and every distinctively American and republican feature in the government of this territory. Rather curious isn't it? But is it not consistent with the low, corrupt grade to which public official service in these United States has sunk?"
There is some validity to the Mormon attacks on the motivation and competence of non-Mormons in territorial Utah. There can be no doubt that many of the young lawyers (topping the list is Robert Baskin) who came to Salt Lake to practice were attracted by the prospects for economic growth in the territory, and that Baskin and his ilk soon learned that the Mormons posed a substantial obstacle to their ambition. It is also true that the Mormons were most vulnerable on the polygamy question. But in Utah, as opposed to the rest of the nation, the vigorous punishment of polygamy was likely to redound to the immediate benefit of non-Mormons. Not only did lawyers like Baskin and his colleague, United States Marshal George Maxwell, find work as federal employees charged with enforcing anti-polygamy legislation; they also saw vast increases in their practice as the jurisdiction of the probate courts was reduced, and business in federal courts increased, not only for polygamy cases, but for all kinds of criminal and civil litigation. Indeed, with each successive blow at the Mormon leadership, the non-Mormons’ power waxed — economically as well as politically and legally.

Small wonder, then, that their opponents were quick to charge non-Mormons with impure motives. Lawyers, especially, took the lead in the attack on polygamy, fulfilling Brigham Young’s prophecy of the deliterious effect of the members of the bar on the cohesion of Mormon society. James McKean and his successors on the federal bench, United States Attorneys, United States Marshals, and private non-Mormon lawyers formed a persistent and effective lobbying bloc, writing letters and traveling to Washington, drafting legislation, fielding candidates to oppose the monolithic Mormon
People's Party, and dreaming up new ways of undermining the "polygamic theocracy" of Utah.

It would be a mistake, however, to assume that the fact that non-Mormons increased their power through anti-polygamy agitation and prosecution, they were necessarily hypocritical.\textsuperscript{30} Despite what Mormon publicist, historian (and polygamist)\textsuperscript{31} Orson Whitney reports non-Mormons to have said anonymously and in private, there is little evidence that the members of the "Ring" were any less likely than the vast majority of Americans to believe that polygamy was detrimental to society as a whole, because it undervalued women, and encouraged tyrannical and bestial tendencies in men. As Robert Baskin put it in testimony to Congress, the Mormon system of polygamy was a "bold and defiant iniquity, ... in violation of human and divine laws, cloaked by ... a pretended system of religion."\textsuperscript{32}

Nonetheless, for non-Mormons in territorial Utah the mixture of self-interest and societal interest was a heady one. According to their own perspective, by vigorously pursuing Mormon polygamists, Gentile lawyers could do good and do well. It is also true that Gentiles spent almost as much time complaining about the Mormon priesthood's

\textsuperscript{30} This is a charge frequently made by historians, as it was by contemporary Mormons. See, for example, Gustive O. Larson, The "Americanization" of Utah for Statehood (San Marino, Cal., 1971), 62, arguing that real issue was not polygamy, but rather political domination of the territory and its resources.


\textsuperscript{32} Reminiscences of Early Utah, 31.
control of the political machinery of the territory, as of their polygamous marital practices. Baskin, for example, shortly after the testimony quoted above, charged the Mormons with political corruption through the "marked ballot" system of voting. Baskin's Liberal party, with its anti-polygamy and free market platform, would have had a majority in Salt Lake City, he claimed, but for the marked ballot: "A number of Liberal Mormons, especially among the younger members, from time to time expressed to me a desire to vote the Liberal ticket, but refrained from doing so because their marked ballots would disclose the fact and subject them to discipline or expulsion from the Mormon church, and injure their business in a way they could not afford."

The charge of religious partiality also has some substance, although not generally in the way Mormon accusers meant it to. There never was, for example, any concerted effort among Protestant denominations to destroy the Mormon Church, although there certainly was plenty of anti-Mormon rhetoric in home missionary publications, testimony in Congress, and lectures and sermons by well-known prelates. The one issue that united the various Protestants in Utah was polygamy -- and it was Protestant women, rather than their husbands, who in 1878 formed the first trans-denominational organization in the territory, the Anti-Polygamy Society.44 Influential non-Mormon women in the territory proved a timely impetus to the fight against polygamy.

43 Ibid.

Non-Mormon women, and a sprinkling of Mormon apostates, were organized, and effective, advocates of moral purity for Utah. Their passionate anti-polygamy has not been subjected to the same kind of criticism that has been leveled at their male counterparts. Female anti-polygamists in Utah (and, for that matter, in the rest of the nation) have been charged with prudery, even prurience, but not with power-grabbing.\textsuperscript{33} There was, however, a seamlessness between the early anti-polygamy of male and female non-Mormons in Utah that is worth probing. Both genuinely opposed polygamy on moral and social grounds; equally important, both men and women opposed polygamy for its political and legal consequences. The union of church and state in Utah, of which polygamy was considered the most obvious and pernicious manifestation, not only curtailed the ability of men like Robert Baskin to get ahead in the legal marketplace, it also sharply reduced the power of women to constitute themselves (both individually and collectively) moral arbiters in Utah. Mormon men, most especially Brigham Young, were patriarchs of the household, as well as temporal rulers.

(b) The Anti-Polygamy Women of Utah and Women's Power

In territorial Utah, Mormonism was a total religion, intruding as much into private as public life, and leaving little room for women to govern their husbands and families. The women who campaigned against polygamy, therefore, were more than mere prudes;

they sought the disentanglement of the Mormon church from the private and quasi-
governmental structures that were the loci of female power in the mid- and late
nineteenth century. Mormon women, they claimed, were confined to household drudgery
of the most degrading and exhausting kind, because Mormon men felt virtually no
obligation to support their numerous wives. Plural wives, reported the shocked anti-
polygamy women of Utah, were regarded more as sources than dispensers of income.
Even those few women who were fortunate enough to be the wives of wealthy Mormons,
were treated as little more than the occupants of a harem, constantly worried that a new
woman might displace them in the affections of their husband, rather than guiding him
to ever greater morality and respect for his wife and family.36

Women were also excluded from the semi-public forms of organizing and
voluntary activity that a stricter separation of church and state made possible. Women
and their relief organizations that filled much of the power vacuum created by
disestablishment. But in Utah Brigham Young kept a strict eye on all goings-on,
including those of the women. Young understood that polygamy was a gall to many
Mormon women, borne for the sake of their exaltation in the afterlife. He exhorted
husbands not to let their wives rule the home; he lashed out at women who complained
that they had not had a happy moment since their husbands brought home additional
wives; he directed the activities of the Female Relief Society just as minutely as he did

36 The work of Fanny Stenhouse, A Lady's Life Among the Mormons is exemplary
of this kind of attack on polygamy, as is Jennie Anderson Froiseth, ed., The Women of
Mormonism.
all affairs in Utah. Small wonder, then, that Young himself was the target of many of the barbs of anti-polygamists. 37

Like their male counterparts, non-Mormon women in Utah achieved real effectiveness only in the early 1870s, just as Young lost some of his edge to old age. Especially damaging were the widely publicized divorce suit brought against Young in 1873 by an apostate plural wife, and a series of exposes of plural marriage written by apostates and non-Mormon women residents of Utah. Ann Eliza Young, whose Wife No. 19, or the Story of a Life in Bondage detailed her courtship, marriage, and eventual separation from Young, was encouraged by McKean and private lawyers in Salt Lake to abandon polygamy. With the help of McKean and a reporter for the Salt Lake Tribune, 38 "The Rebel of the Harem" not only sued Brigham for divorce, she undertook one of the most spectacularly successful lecture tours of the nineteenth century. Her anti-polygamy lectures, which combined an unflinching and personal attack on Young and the whole system of polygamy with an appealing yet demure and lady-like demeanor, were an overnight sensation. 39 In the spring of 1874, her tour took her to Washington, where

37 Van Wagoner, Mormon Polygamy, 91-92, 97-98, 102; Arrington, American Moses, 323.

38 The newspaper was first published by loyal Mormons in the late 1860s, but which had become an explicitly anti-Mormon paper by the early 1870s. See generally J. Cecil Alter, Early Utah Journalism: A Half Century of Warfare Waged by the West’s Most Militant Press (Salt Lake, 1938).

the President and his wife, as well as numerous Congressmen, went to hear her speak. The ground swell of anti-polygamy sentiment generated by Young's story was instrumental in the passage of an important piece of anti-polygamy legislation, for which McKean and others in Utah had long been asking. The Poland Act sharply reduced the jurisdiction of the probate courts, and provided for juries on which half the names were drawn from lists generated by the United States Marshal, thus ending the sway of the Mormon-controlled jury, and opening a wedge in the flank of the polygamous Mormon leadership. It also allowed divorced plural wives to claim alimony from their husbands, a subject of special concern to the anti-polygamist women of Utah.

Young was not alone, although her work was certainly among the most effective; she was joined by several other Utah women, including apostate Fanny Stenhouse, whose A Lady's Life Among the Mormons first appeared in 1872, and sold well for decades. A third, and extremely influential Utah-based author and lobbyist was Cornelia Paddock, whose novels so moved Mr. Reader, and were the first anti-polygamy fiction to emerge from Utah itself. Paddock's work contains testimonials by federal officials, including


Governor Eli Murray, and Judge Jacob Boreman, both of whom assured the reading public that Mrs. Paddock had access to a "vast storehouse of information" about the true lives of Mormons.⁴

In style, these books follow the pattern set before the Civil War in anti-polygamy fiction, right down to lachrymose death scenes, blood curdling massacres, and eventual repentance by selfish husbands. But the books that emerged from the pens of women in Utah itself tended to have one significant addition -- they were addressed directly to the national legislature, and included specific proposals for stringent and enforceable statutes to control the lawlessness of Mormons. Fanny Stenhouse, for example, called upon the Honourable Senators and Representatives of the United States that, in the abolition of Polygamy ... let no compromise be made where subtilty [sic] can bind the woman now living in Polygamy to remain in that condition. Legalize, if Congress will, the marriages that have been made, and legitimatize [sic] the children born in that wedlock, if such can be done, for the women and children are innocent; but let one proviso ever remain, that any wife living in Polygamy, at the time of the passage of that Act of Congress, shall be then and ever afterwards free to abandon the relationship when her conscience shall so dictate, without legal hindrance and that she and her children shall be provided for as if she had been his first and legal wife whom the court of law had separated "for cause."⁵

The anti-polygamist women of Utah understood clearly that federal legislation was the quickest way to abolish polygamy, and they used every means at their disposal to promote and publicize their cause. Their legal sophistication is attributable, it seems

---

⁴ Testimonials of Eli H. Murray and Jacob S. Boreman, in Cornelia Paddock, The Fate of Madame La Tour, v, x.

⁵ A Lady's Life Among The Mormons, 206.
likely, not only to their own education and, in one case at least, legal training, "but also to their intimate alliance with the federal judiciary. In the small (but growing) non-Mormon world of Utah in the 1870s, the women who led the charge against polygamy were often the wives of those whose business it was to enforce anti-polygamy legislation. Not only was Cornelia Paddock married to a member of the Utah Commission, but the founders of the Anti-Polygamy Society included the wives of Judge McKean and other federal and territorial officials.

The Society complemented the work of territorial judges like McKean. Together, the Gentile women and the federal judiciary campaigned for vigorous enforcement of existing legislation, for more severe punishment of polygamists, and for the enhancement of federal powers in the territory. All of which leads to a third benefit achieved by anti-polygamy women -- not only did they enhance their own notoriety and influence in the nation and in the territory, and ensure the marital structure that they believed would enhance the prospects for all women in Utah (even browbeaten and deluded Mormon women), they also advanced their husbands' careers (and thereby their own prospects for material and social well-being).

There is irony in the success stories of women like Cornelia Paddock and Ann Eliza Young, however. The achievement of their goal -- the enactment and vigorous

---

enforcement of anti-polygamy legislation -- spelled the end of their prominence. As
Young discovered in the early 1880s, the popularity of her lectures decreased in
proportion to the punishment of polygamists. When her erstwhile husband and his
followers were flaunting their peculiar institutions in the collective face of the nation, she
was a much sought-after speaker and writer. But once the prosecutions began in earnest,
Young's career took a nose-dive. She fell into ever greater obscurity, her date and place
of death are unknown.

Other anti-polygamy women in Utah experienced a similar, although less dramatic,
decline in public attention. The National Anti-Polygamy Society, for example, claimed
in 1880 in its newspaper, The Anti-Polygamy Standard, that it had "thousands" of
branches throughout the nation. But the paper folded in 1883, after importuning
subscribers to send in dues and donations. By the mid-1880s, the courts had taken the
wind out of the anti-polygamy society's sails, capitalizing on the intellectual and
jurisprudential foundations laid in the 1870s, using federal statutes effectively for the first
time to punish hundreds of polygamists for a variety of offenses.

* The editors of the Anti-Polygamy Standard reported that many satellite groups had
formed around the nation, including in New York and Brooklyn. Anti-Polygamy
Standard, 2 (January, 1882), 76. There is no readily available documentation for the
assertion, however. The newspaper itself published instructions for how to start up
branch organizations, including draft by-laws, and addressed editorial comments to
questions submitted by groups in major cities. It seems reasonable to assume, therefore,
that there were formal anti-polygamy organizations in large cities, and probably in many
more rural locations. There was, of course, a strong motive for self-aggrandizement by
the editors of the Standard. By claiming a vast audience, they both appealed to
advertisers, and gave existing supporters and potential recruits the sense of being part of
a large and important network.
The anti-polygamy women did not give up without a fight, however. Non-Mormon women attempted unsuccessfully to replicate in Utah the kind of charitable institution that served women's interests so well elsewhere in the country.46 They were sensitive to the charge that the enforcement of federal law was in effect the punishment of women. Members and supporters of the Anti-Polygamy Society, with the aid and tireless lobbying of Angie F. Newman, a Nebraska resident and temperance activist, campaigned for the establishment of an "Industrial Christian Home" in Salt Lake in the early 1880s. Financed primarily by federal funds, although supplemented by donations from Women's Home Missionary Societies in the East and Midwest, the home was designed to be a haven for destitute plural wives and their children.

In a letter to the Senate signed by Cornelia Paddock and Mrs. Jacob Boreman, among others, and accompanied by letters in support of their cause from both the Utah Commission (of which Algernon Paddock was a member) and the territorial judiciary (signed by Chief Judge Charles Zane, U.S. Attorney William Dickson and U.S. Marshal Elwin Ireland) in 1886, the anti-polygamy women argued that justice must be tempered with mercy: "[I]t is futile to legislate against existing relations and make no provision for the terrible exigencies which arise in the execution of the law."47 Plural wives,

46 For an overview and description of such benevolent institutions, including Salt Lake's Industrial Christian Home, in the West, see Peggy Pascoe, Relations of Rescue: The Search for Female Moral Authority in the American West, 1874-1939 (New York, 1990). For a searching analysis of women's charitable activities, see Ginzberg, Women and the Work of Benevolence.

argued Paddock and her colleagues, would "voluntarily abandon" their illicit relations "if facilities for self-support were provided."

Combined with the salutary effects of a morally sound education and training, were the possibilities for employment. According to the incorporators of the Industrial Home Association, "[p]upils from the domestic department will find immediate employment in the Gentile homes of Utah." Given the perennial shortage of servants in the far southwest, the prospect of an influx of destitute young women to the industrial home satisfied both the charitable instincts of non-Mormon women, and their patent need for more servant girls.

Congress eventually appropriated more than $110,000 for the Home, beginning in 1886 with $40,000 to start the project. Governance of the home was placed not in the hands of the Gentile women, or even of the incorporators who formed the Industrial Christian Home Association. Instead, Congress established a Board of Control for the home, headed by newly appointed Governor Caleb West, a Democrat and far less supportive of the non-Mormon women than his predecessor had been, with the three territorial judges and the district attorney also serving on the board. Angie Newmar was outraged. In a letter to Grover Cleveland, she protested the removal of control from the

---

44 Ferry, Industrial Christian Home, 10. The incorporators of the industrial home association include several familiar names, including Henry W. Lawrence (a member of the New Movement and a former polygamist who had been indicted in 1871 for "lascivious cohabitation" under the local statute at the same time that Brigham Young and Daniel Wells were indicted), Margaret D. Zane, Fanny Stenhouse, Governor Eli H. Murray, and Mrs. Jacob S. Boreman. Id., 206-07 n.39.
women who conceived the idea: "President Cleveland, this enterprise is women's work for her suffering sex. It was projected by a Society of which Mrs. Rutherford B. Hayes is the President.... To have the enterprise entirely withdrawn from those who originated it -- and won the victory, is certainly not just." ⁹

The home was a failure. Total occupants never climbed anywhere near the predictions of hopeful non-Mormon women, despite additional federal funding for an elaborate brick and stone building and annual operating expenses, and liberalization of entry rules that allowed legal wives and girls in danger of being lured into polygamy, in addition to plural wives, to take up residence. The home became something of a joke among Mormons, who claimed there were no "homeless and destitute" women seeking shelter. By 1890 it had degenerated into a poorhouse, according to critics. ¹⁰ Gentile women fought back, arguing that "[o]pposition has been systematic and relentless," and that Mormon leaders forbade women to apply to the Home, and pressured them mercilessly not to enter the Home even if accepted. ¹¹ After 1890 and the issuance of the Manifesto, conditions deteriorated even further, with a monthly average of fewer than

---

⁹ Territorial Papers, Record Group 60, Polygamy File, P. & M., National Archives. Quoted in Larson, "An Industrial Home for Polygamous Wives," 269. Larson does not give a date for this letter, which presumably was written in August or September 1886, as the appropriation was made, and the Board of Control established, by Congress on August 4, 1886. Control of the institution was eventually transferred to the Utah Commission, but the point remains the same: the women who conceived the idea of the Home did not control its actual operation.


¹¹ Ferry, Industrial Christian Home, 18.
twenty occupants. The Home was closed in 1893 on the recommendation of its all-male board of directors, despite the pleas of Newman and others.22

The history of the Industrial Home -- from its conception in 1880 in Salt Lake among an active and organized group of Gentile women, to its opening in 1886 with much fanfare but under male direction, to its floundering by 1887 and admitted troubles by 1888, to its perceived obsolescence by 1890, and its final closure in 1893 at the request of the men who ran it -- mirrors the history of anti-polygamy in the 1880s generally. At the beginning of the decade, women set the agenda; their appeals touched the public heart, and made it politically desirable to enact stringent laws against polygamy, and to establish institutions such as the Home to protect innocent women. But as the laws began to operate, as the wheels of the judicial bureaucracy in Utah began to turn, the focus changed. The emphasis shifted from a desire to protect women from the ravages of male debauchery, to a commitment to punish polygamy. Polygamists, rather than their wives, became the central target of federal action. In the process, non-Mormon women gradually lost control of the issue, and the rescue and rehabilitation of Mormon women faded from the public view. As is often the case in litigation, the only ones who really benefited from the process were the lawyers.

22 For several years, the building housed the Utah Commission. It was sold at auction in 1899. See Larson, "An Industrial Home for Polygamous Wives," 274-75.
2. "That Troublesome Period": The Bench and Bar of Territorial Utah

Could it be represented in moving pictures, [the legal history of Utah] would be a panorama of enchantment, for through the earthy pictures would shine out the majestic statues of Truth, of Liberty, of Faith, of Justice, and of Mercy, all in tears but with the dissolving view at the close, all would be smiling.

Throughout all would be seen stately forms of devoted men, in the court of the bench and the bar, and Progress would be seen waiting and trembling at times; at other times advancing and jubilant and the closing scene would be one of peace and full enlightenment.¹

In his preface to the History of the Bench and Bar in Utah, Charles Goodwin conveyed the sense of high drama experienced by the participants in the legal battles of the 1870s and 1880s. During these two decades, the territorial judiciary conducted an unprecedented, and unrelenting, campaign to reform marriage in Mormon Utah. The saga played out in the courtrooms of the territory, Goodwin claimed, was a titanic battle in which the rule of law triumphed over the forces of disorder. Writing in 1913, some thirty years after the most heated phase of the federal battle against Mormon polygamy, and without mentioning "polygamy" (or even "Mormons"), Goodwin made plain his deep satisfaction with the outcome of the conflict.

The reality, however, was by no means as neat and panoramic as Goodwin claimed. Goodwin himself had reason to know that the prosecution of polygamists was often not the stuff of high drama. For the great majority of cases, the collection of information was routine. As a United States Commissioner in the busy first judicial district in the 1880s, Goodwin was in charge of taking the preliminary testimony of defendants and witnesses in hundreds of polygamy cases, processing bail applications, and

¹ C.C. Goodwin, "The Bench and Bar," in History of the Bench and Bar of Utah (Salt Lake, 1913), 3.
reporting to the United States Attorneys in charge of the prosecutions. The commissioner's job was a patronage appointment, presumably granted to Goodwin not only because he was a lawyer who had served as a district judge in Nevada, but also because of his unvarying and constant support for anti-polygamy legislation. As editor of the Salt Lake Tribune from 1880 to 1901, Goodwin had great influence over the course of events in Utah. The editorial policy of the Tribune was crystal clear. Goodwin and his staff were tireless advocates of stringent anti-polygamy laws. They were as vilified by the Mormon-run press as Mormon leaders were in the pages of the Tribune. But with a few notable exceptions, this war of words remained just that; hyperbolic rhetoric did not, on the whole, escalate into violence. Mormons were not willing to die for polygamy, and non-Mormons, even those like Goodwin who were virulent anti-polygamists in print and at lecterns across the country, showed no inclination to throw the first punch.

Thus Goodwin's movie analogy is, in one sense at least, an apt one. To the extent that cinema harmlessly recreates on film a violent reality, the prosecutions of Mormon leaders for the perceived sexual enslavement of women through plural marriage re-

---

2 Goodwin's tenure as a commissioner is not mentioned in any of the histories of territorial Utah, or even in the History of the Bench and Bar. That he served is apparent, however, from the many transcripts of proceedings in front of the grand jury in the first district written in his handwriting, and over his signature.

3 The McMurrin incident, discussed infra at pages 341-42, and the shooting death of Edward M. Dalton, a polygamist attempting to escape from a deputy marshal, are two notable exceptions to the rule. The Dalton incident is described in Roberts, Comprehensive History, 6:116-20. Deputy Marshal William Thompson was tried for manslaughter, and acquitted after a jury trial. Whitney, History of Utah, 3:525-37. The case does not appear in the records of the territorial courts.
enacted, in a far less bloody manner, the national fratricide of the Civil War. The successful implementation of federal legislation against polygamy fell to the territorial judiciary, which was charged with enforcing the law under extremely difficult circumstances.

By 1880, Utah had a population of approximately 140,000, only 14,000 of whom were non-Mormons, heavily concentrated in Salt Lake, a few mining towns, and at Fort Douglas, the army post just outside Salt Lake. The Mormon majority was highly organized and tightly knit, in part through extensive kinship networks created by polygamy. The local Mormon bishop was likely to be the probate judge, and his son-in-law to be the sheriff, his sister the plural wife of a prominent local businessman, and so on. The Mormons were also hostile. They had learned bitter lessons prior to their migration to Utah about their likely treatment at the hands of non-Mormons. Their experiences in Missouri and Illinois had prompted Mormon leaders to seek isolation in the Great Basin in the late 1840s. They did not want outside interference as they built up the Kingdom of Zion in preparation for the millennium, they did not trust the federal government, and they were committed to doing all in their power to obstruct the judges and the prosecutors in the arrest and punishment of polygamists. It was these people that so irritated Judge McKeen and his brethren, and that the judiciary was ordered to bring into harmony with the moral standards of the rest of the nation.

---

4 Arrington & Bitton, The Mormon Experience, 204-05.

5 For a description of the Mormon attitude toward outsiders during this period, especially those with governmental authority, see Klaus Hansen, "The Kingdom of God vs. The Kingdoms of the World," in Quest for Empire, 147-79.
(a) **Lawyering and Judging in the Anti-Polygamy Period**

In general, the territorial judiciary has not been admired, by contemporaries or historians.\(^6\) Judges were appointed by the President, and confirmed by the Senate, but only to four-year terms. The result had a distinctly political flavor; judges served with one eye on Washington, careful to please those in positions to promote reappointment. Conversely, those whom they were charged with governing knew all too well that judges were vulnerable to political attack. Exacerbating the uncertainty of tenure was what one resigning judge called the "smallness of the salary."\(^7\)

Nonetheless, there were substantial benefits to employment -- even temporarily -- as a federal judge in the western territories. The list of applicants for these patronage

\(^6\) Traditionally, most historians agreed that the territories were the victims of an out-and-out spoils system, according to which the party in power rewarded loyalty by parceling out lucrative jobs to politically connected hacks, regardless of competence. Earl S. Pomeroy, *The Territories and the United States, 1861-1890: Studies in Colonial Administration* (Philadelphia, 1947); William Lee Knecht, "The Federal Judges of the Utah Territory from a Lawyer's Point of View," in John Porter Bloom, ed., *The American Territorial System* (Athens, Ohio, 1963). This carpet-bagger image has only relatively recently come under attack, most notably for the judiciary in the work of John John D.W. Guice, *The Rocky Mountain Bench: The Territorial Supreme Court of Colorado, Montana and Wyoming, 1861-1890* (New Haven, 1972). For an overview of the entire territorial judiciary for two centuries, see Kermit L. Hall, "Hacks and Derelicts Revisited: American Territorial Judiciary, 1789-1959," *Western Historical Quarterly, 12* (1981): 273-89. Hall takes something of a middle ground, arguing both that the great majority of territorial judges were at least well-meaning, and often qualified, at least according to the levels of legal education of their day, but that in the late nineteenth century (the operative period for polygamy prosecutions) the relative quality of the territorial judiciary dipped significantly.

\(^7\) David Lowe of Kansas resigned after less than six months on the territorial bench in Utah. The *Salt Lake Herald*, a Mormon paper that reported his resignation, hinted that the real reason for Lowe's departure may have been the tension of presiding over a court in Utah, "with her contending and strife creating elements." *Salt Lake Herald*, 18 August 1875, reprinted in *Journal History*, 18 August 1875, 3.
appointments was always far longer than the list of available posts. Even if one did not get rich in the job (only the corrupt did that), there was an all-expense paid trip out west for the judge and his family. Add to this the fact that a judgeship would give an ambitious lawyer a unique vantage-point for reconnoitering future prospects in the territory, and plenty of political visibility that could well come in handy in local elections after statehood, and a territorial judgeship began to look attractive.

Utah was not the destination of first choice in many cases. Despite its mineral wealth, the hostility of the local population (more profound in Utah than in most other territories, where federal officials also were often coolly received) and the politically charged nature of almost any criminal prosecution in the territory, made the job an arduous one. Few turned down an offer, however (although many did not last long, either because they resigned or were removed for any one of a number of reasons, including failure to win confirmation by the Senate). At the time, of course, Mormons complained that the patronage system meant that Utah got the dregs of the applicant pool. Non-Mormons defended the judiciary with equal ferocity.*

Whatever their relative judicial skills, the men appointed to the bench in territorial Utah had a monumental task. They also had considerable patronage of their own to hand out. The federal courts not only were the primary means of eradicating plural marriage, they also created a professional coterie of law enforcement officials. Many of these

* Robert Baskin, for example, charged that Judge McKeen had been unfairly maligned: "Judge McKeen was both upright and intelligent, and has been derided by [Orson] Whitney and other fanatical polygamists because ... they could no longer violate with impunity the law of Congress against polygamy." Reminiscences of Early Utah, 52.
officials, such as clerks of court and assisant United States Attorneys, were the sons, perhaps even the nephews, of the federal judiciary. Not only did Edward McKean, Hiram Henderson and John Zane serve as their fathers' clerks of court, but Kenner Boreman and Charles Zane were federal prosecutors.

Equally important, is the fact that through the polygamy prosecutions, the bench created a bar. A whole flock of lawyers plied their trade through the polygamy cases. Non-Mormons were not the only winners in this game; Mormon lawyers also did well. Brigham Young, whose opposition to lawsuits in general and lawyers in particular had long deterred young Mormon men from pursuing careers in the law, acknowledged in the mid-1870s that a group of loyal Mormon lawyers would be handy for defense of the faithful. The career of Franklin Richards is illustrative of the potential (and the perils for Mormon unity on the polygamy question) created by this new mandate. He studied law, as his biography in the History of the Bench and Bar of Utah put it, "alone," and was admitted to the bar of Utah in 1874. Richards served as general counsel to the church for thirty years, and was perennial co-counsel on briefs to the United States Supreme Court, often even appearing at oral argument as back-up to the high-profile

---

9 See, for example, the experience of Franklin S. Richards, who reported in a speech some 60 years later that he was told by Young to study law, because "the time will come when the Latter-day Saints will need lawyers of their own to defend them in the courts...." Quoted in Ken Driggs, "The Legal Career of Franklin Snyder Richards" (forthcoming, Journal of Mormon History), 6. See also Larson, The "Americanization" of Utah for Statehood, 107.
lawyer hired to argue the case in Washington. His law firm defended prominent Mormons at trial in Salt Lake and Ogden.  

Richards never took a plural wife, and consistently (although never rebelliously enough to provoke retaliation from superiors in the church) opposed continuation of a practice that, he was convinced, hampered the development of the territory and prevented its admission to the union. So successful was Richards at mediating the dispute between Mormons and federal officials over polygamy, that he eventually became the partner of former prosecutor Charles S. Varian, originator of the infamous multiple-count indictment for unlawful cohabitation.  

Other lawyers followed a similar professional path. Joseph L. Rawlins, another young Mormon lawyer who hung out his shingle in the 1870s, and who with his partner Ben Sheeks handled many of the most complex and delicate legal problems for the church (including the Reynolds litigation), took the leading role in the establishment of the

\[\text{__________________________}\]

\[10\] Richards apparently was retained by the church to defend individual polygamists. Jensen, LDS Biographical Encyclopedia, 4:56-57. This representation of individuals by a church-retained lawyer created a potential conflict of interest between the church, which strongly opposed promises by church members to obey anti-polygamy laws in the future, and criminal defendants, who may have wished to avoid prison terms by making such promises. For an account of the conflict, see Whitney, History of Utah, 3:358-59.

\[11\] History of the Bench and Bar, 190.

\[12\] Rawlins also worked on the prolonged and bitter litigation surrounding the estate of Brigham Young. For an overview of the litigation, see Leonard J. Arrington, "The Settlement of the Brigham Young Estate, 1877-1879," Pacific Historical Review 21 (1952): 1-20.
Democratic Club of Utah in 1884.\textsuperscript{13} Several other young lawyers, among whom were Richards and many whose names appear frequently as defense counsel in the records of the polygamy prosecutions, were prominent members of the club, which included in its initial platform the following provision: "We firmly repudiate the idea that any citizen is under obligation to take his political counsel from those whose avowed purpose is a continued violation of law."\textsuperscript{14} Rawlins, together with Richards and other prominent lawyers, appeared in Judge Zane's courtroom in 1884, at the invitation of the judge himself, to debate whether the open venire policy instituted by Zane was a departure from established legal procedures. The Mormons' lawyers lost this crucial battle, exposing polygamists to a vastly increased level of grand jury activity, but creating as a by-product a significant increase in their own business as criminal defense attorneys.

Yet another exemplary career is that of Samuel R. Thurman, the leading lawyer in Provo, and one of the up-and-coming young attorneys within the Mormon church. He was a member of the territorial legislature from 1882 to 1890, when he left on a two year mission to England. Thurman was also a monogamist, placing him in the cadre of young Mormon lawyers who, while they were still loyal on many levels, refused to participate in -- even quietly opposed -- a marital system that was openly proud of its backwardness. His monogamy, as well as his early membership in the Democratic Party, were key

\textsuperscript{13} Edward W. Tullidge, History of Salt Lake City (Salt Lake, 1886), 858. Rawlins, although a member of a devout Mormon family, was alienated from the church by this time, according to his autobiography. "The Unfavored Few": The Autobiography of Joseph L. Rawling, Alta Rawlins Jensen, ed. (n.p., 1956).

\textsuperscript{14} Quoted in Tullidge, History of Salt Lake, 858.
elements in his selection as U.S. Attorney for Utah in the second Cleveland administration, the first time in 40 years a Mormon had held the post.\textsuperscript{15} Thurman, and his legal colleagues, many of them educated at eastern law schools, were politically astute.\textsuperscript{16} They knew a losing battle when they saw one; they also were committed to achieving statehood for Utah (in part, no doubt, as a means of increasing legal business).

The irony of the situation for these young lawyers was that their own prominence within their profession was achieved through defending in the public forum of the courtroom a practice they eschewed in their private lives.\textsuperscript{17} Like the trained

\textsuperscript{15} History of the Bench and Bar, 211-12. Zerubabbel Snow was United States Attorney during Brigham Young's governorship in the 1850s. His removal was part of the general federal assertion of authority over the territory.

\textsuperscript{16} The University of Michigan was the school of choice for many of these young lawyers. Thurman, for example, received his LL.B. from Michigan in 1880, as did his junior partner, George Sutherland, in 1882. The Richards family, of which F.S. was the scion by the 1880s, also attended Michigan, as did several Tanners. See generally Biographical Section, History of the Bench and Bar.

\textsuperscript{17} In his study of the territorial southwest, Lamar, The Far Southwest, 399-400, explored the generational tensions of the late 1880s: Mormonism, once ruled by a physically powerful and fairly youthful set of leaders, now depended on patriarchal wisdom rather than vigor. Wilford Woodruff, the senior Apostle and the heir designate to Taylor, was turning eighty. Still waiting in the wings was George Q. Cannon, the perennially energetic member of the First Presidency and often expeditor of Church policy. He was a full twenty years younger than Woodruff. In Cannon's generation could be found John Sharp, W.W. Ritter, and the Utah delegate John T. Caine, an active, effervescent official who loved amateur acting. As close as they were to Taylor and Woodruff, they were men of a railroad age, familiar with big business, and aware of the national scene. Still a generation behind these men were two promising young lawyers, Franklin S. Richards and Joseph L. Rawlins, and a journalist, Frank J. Cannon, the son of George Q. Cannon. All of them were under forty and were specialists with a profession rather than able frontier jacks-of-all-trades.
professionals they were, however, Thurman, Richards, and their co-counsel crafted plausible legal arguments in defense of their clients.

Non-Mormon lawyers also did well. Robert Baskin, although he never made the fortune he hoped for in mining litigation, found that being a non-Mormon lawyer in Utah was profitable nonetheless. His political and lobbying efforts paid off not only in anti-polygamy legislation, but also in his election to the office of mayor of Salt Lake in 1892 and 1894, and after statehood, to the Supreme Court of Utah.¹⁸ Joseph Rawlins rose to the United States Senate; many other lawyers served in the territorial and state legislatures, gradually replicating the lawyer-dominated government familiar in other parts of the country.¹⁹

Even the federal judiciary benefited; judges often stayed on in private practice after their tenure had expired or they had been removed from office. Judge McKean was the first to hang out his shingle; but many others followed, including Judges Boreman, Emerson and Powers, as well as lower level officials, among whom George Maxwell, William Dickson and Charles Varian are the most prominent. Some even defended Mormons accused of sex crimes. William Griffin's appeal from his conviction for

¹⁸ Reminiscences of Early Utah, 26-27, and History of Bench and Bar, 113.

¹⁹ "Joseph La Fayette Rawlins," in History of the Bench and Bar of Utah, 186-87, Presley Denney of Ogden, for example, a familiar name from the case records, became Utah's first speaker of the house. Arthur Brown, another lawyer, became one of Utah's first United States Senators. His opponent, C. W. Bennett, was also an attorney. History of the Bench and Bar, 63-64.
polygamy in 1887 was argued by former judge P.H. Emerson. Griffin's trial had been conducted in front of Henry Henderson, who also stayed on after leaving the bench, establishing "one of the strongest firms in the state, [which] enjoyed an extensive clientele in adjoining states." Judge John Judd stayed on in Utah as a prosecutor in the 1890s. Judge Zane joined Baskin on the bench of the Supreme Court after...Not all members of the bar were beneficiaries of the enforcement system, nor did all Mormon lawyers oppose plural marriage. At least two of the group were themselves convicted of unlawful cohabitation. Aurelius Miner shared with Zerubabel Snow the limited amount of legal work done in the territory before the advent of effective federal law enforcement. According to one reporter, Miner was despised by Judge McKean, who berated him for all the faults of his people. Miner was found guilty in 1885 after a jury trial of one count of unlawful cohabitation, and was sentenced by Judge Zane to six months in prison, a $300 fine, and $158.30 in court costs, which included the cost of serving process, transporting witness, and so on. Because of his open declaration

---

20 Territorial court, case file #876. See also unlawful cohabitation charge against Severence N. Lee, also in 1887, in which Emerson filed a motion to quash the indictment. There is no record of what happened to the case after the motion was filed. Case file #1440.

21 History of the Bench and Bar, 95.

22 See, for example, Judd's prosecutions of several polygamists. Territorial court, case files ## 736, 775 & 776.

23 The story, from the Cincinnati Inquirer in October 1871, was reprinted in Whitney, History of Utah, 2:622-24.

24 Territorial court, case file #1575. While the imposition of a fine and costs appears in the official record, the prison sentence does not. Orson Whitney, however, includes several pages of quotations from the sentencing colloquy, during which Zane and Miner
that he had determined that laws against polygamy were unconstitutional, and that he did not intend to obey them, Miner was also disbarred from legal practice, and was reinstated only in 1894. 25

The second conviction, this time the result of a guilty plea, was of Nathaniel V. Jones in 1890. 26 Jones was indicted both for adultery, and for unlawful cohabitation; he pled guilty to the latter charge in return for dismissal of the potentially more serious adultery count. Jones was sentenced in 1891 (after the Manifesto) to a $200 fine and costs by Judge Zane. 27 This was not Jones's first brush with the law. In 1886, Jones and one Frank Treseder were accused of attempted bribery of a federal official. According to the testimony of Deputy Marshal Edward Franks, Treseder offered him $100 per month for advance information on planned arrests, especially if the raid involved the first presidency (the president of the church and his two primary advisers). Treseder, who claimed that $100 was just an opening bid, and that he could "get any amount of money that is needed," was apparently only a go-between. Jones was the biggest fish the government caught when, in an effort to find out who was bankrolling Treseder, the marshal set up a meeting in a private room over a saloon. Over a glass of apparently debated Miner's right to decide which laws he would obey, and which he considered private matters only. See Whitney, History of Utah, 3: 433-438.

25 Whitney, History of Utah, 3: 438. Miner's posthumous biography in a bar association publication does not mention his conviction, nor does it explain in the biography of Miner's son Lawrence, also a lawyer in Salt Lake, that he was the son of the second wife. History of the Bench and Bar. 124.

26 Jones was not admitted to the bar until 1895. History of the Bench and Bar, 103.

27 Territorial court, case files # 1327 (adultery) and 1328 (unlawful cohabitation).
beer, Jones and Treseder assured the marshal that he would be well paid for any information, a conversation that was partially overheard by deputies listening through a poorly placed hole outside the room. After a comic series of errors on both sides, Jones and Treseder were caught attempting to escape over a wall behind the saloon.\textsuperscript{28}

The entrapment of Jones, who at the time was both tax collector and a deputy sheriff for Salt Lake County, was in part a pay-back for a scheme by members of the all-Mormon Salt Lake City police, who set up a brothel for the sole purpose of entrapping federal officials, even importing prostitutes, and successfully catching Deputy Marshal Oscar Vandercook in flagrante delicto.\textsuperscript{29} Brigham Y. Hampton, collector of licenses for Salt Lake City and a member of the police, was eventually convicted of conspiracy for his part in the scheme.\textsuperscript{30}

(b) The Professionalization of Utah for Statehood

Aside from these few incidents, however, the members of the bar (even the Mormons) benefited professionally from the prosecution of polygamists. Distinguished

\textsuperscript{28} Territorial court, case file #1258.

\textsuperscript{29} This famous incident, which Whitney defended as a justifiable attempt to ensure that Gentiles were punished for their sexual transgressions as vigorously as Mormons were punished for doing what their religion commanded, was strongly disapproved of by B.H. Roberts, who called it "regrettable," classing it only slightly above the "execrable" [sic] occasion in which pots of human excrement were hurled through the windows of U.S. Attorney William Dickson and his assistant Charles Varian. Comprehensive History, 6: 157-58.

\textsuperscript{30} This case does not appear in the official records. For a detailed account of the prosecution, see "C.S. Varian's Statement," in Baskin, Reminiscences of Early Utah, 223-29.
careers were made prosecuting and defending Mormon men. Even more important, at least from the perspective of the bench and bar, was the professionalization of Utah's political and legal structure. From a territory in which lawyers' influence was statutorily banished in 1850, Utah (both Mormon and non-Mormon) was translated into a territory in which lawyers called many of the shots. The pattern is a familiar one to students of American history: John Murrin's study of colonial Massachusetts, for example, reveals a roughly parallel track for legal culture, and for the culture of legalism. Lawyers increasingly dominated late territorial society, until by 1895, when the last constitutional convention convened to draft the document that would finally admit Utah into the Union as a state, Franklin Richards, Samuel Thurman, Charles Goodwin, and Charles Vanon formally buried the ideological and religious differences that were so divisive only two decades earlier. As a group, with a shared vocabulary and shared goals, they figured prominently at the convention, drafting a constitutional document that codified their professional dominance of Utah's political structure, in ways that replicated in most essentials those of other governmental entities, both state and federal. They also included in the draft constitution the provision that was at once Utah's ticket for


32 As Joseph Rawlins described it in his memoirs, the obedience to law that he and other founding members of the Democratic Club had long soughts was finally accepted and codified at the convention, in which he and other lawyers played leading roles. "The Unfavored Few," 170-74.
admission to the Union, and the end result of the battle that had created the bench and bar itself: polygamy was made forever a felony.\textsuperscript{33}

One well-known historian of Mormonism has called the anti-polygamy period the "Americanization" of Utah for statehood.\textsuperscript{34} An examination of the role of lawyers in the final achievement of statehood suggests another characterization; that is, the "professionalization" of Utah for statehood. The profession (as Brigham Young had predicted) was a precipitator of fundamental change in the governing principles of the social and political life of the territory. As advocates, lawyers on both sides were the conduits of church policy and government strategy. As politicians, they led the move to compromise, to fuse their interests with former foes, to structure a new state. their versatility made lawyers, in Utah as elsewhere, natural choices for office on assumption of state power.

Truly the anti-polygamy campaign provided opportunities for advancement that lawyers were quick to seize: "Throughout all," as Charles Goodwin pointed out with such satisfaction in 1913, "would be seen stately forms of devoted men, in the court of the bench and the bar, ... advancing and jubilant...."\textsuperscript{35}

But if lawyers in particular and the legal profession in general were beneficiaries of the campaign, the conduct of the campaign also had clear losers, even if their losses have been obscured by time. Indeed, it was through the prosecutions that the focus of

\textsuperscript{33} Constitution of Utah, Article III.

\textsuperscript{34} Larson, The "Americanization" of Utah for Statehood.

\textsuperscript{35} Goodwin, "The Bench and Bar," 3.
anti-polygamy changed, inevitably and ineluctably, from a campaign to rescue women, to a crusade to punish law-breakers. As is so often the case in criminal trials, the victim gradually faded from public view. The dramatis personae of the polygamy prosecutions were almost exclusively male. It was men who accused, tried, and defended other men. From time to time a plural wife was jailed for contempt of court for refusing to testify, but these instances were rare. For the great majority of cases, Mormon women (both legal and plural wives) were relegated to a distinctly secondary role -- a masculinization, if you will, of anti-polygamy. It is to the records of those prosecutions, and to the stories that are contained in them, that we know turn.

---

"Other common grounds for prosecution of women included perjury for swearing that her child was older than three -- the statute of limitations was three years for polygamy prosecutions -- or that she had been married more than three years before a criminal complaint was filed. 226 women in all were prosecuted for polygamy-related offenses, according to the records."
3. **The Territorial Courts, The Raid, and Legal Strategy**

By the mid-1880s, Congress had enacted effective anti-polygamy legislation, staffed the federal courts in Utah, and built a prison just outside Salt Lake. The criminal prosecution of Mormon polygamists, little more than a threat before 1884 or so, got under way in earnest after that date. The following sections are based on the trial court records of these prosecutions. From the perspective of the legal historian, the records are a treasure trove. Not only are many records goldmines of information about the tenor of the prosecutions, but they also reveal the ebb and flow of legal argument, plea bargaining, and strategizing in general. Behind the individual cases and the general numbers, one can discern the outlines of moves and responses by both sides. The strategic choices made by both sides, each attempting to outwit and outplan the other, help provide the answers to two of the most basic questions posed by the records. First, why were there so many cases? Second, what was the role of women in the prosecution of sex crimes in territorial Utah?

First, some numbers and some caveats, both to give a sense of the sheer size of what Mormons called the "Raid," and of the limitations of the records themselves. The official case files of Utah’s territorial district courts from 1870 to 1896 (when the territory finally achieved statehood), some 14 cubic feet of material ranging from pre-printed criminal complaint forms from H.H. Bancroft's printing company in San Francisco with the offense "unlawful cohabitation" or "adultery" stamped on the cover, to stained and often illegible scraps of paper with scribbled jury verdicts in faded ink, are housed in the National Archives in Denver. The records have been microfilmed (36 reels) and indexed (they are arranged, very roughly, in alphabetical order, and
secondarily, also very roughly, by district and by year).\footnote{1} Criminal prosecutions, which outnumber civil cases by more than 20 to one, precede the civil records.

It should also be noted at the outset that the records are not complete. To take just one example, the indictment of Brigham Young and other leading Mormons on charges of "lascivious cohabitation" in 1871 (engineered by the McKean-Baskin partnership) is not included in the criminal files, nor is Ann Eliza's divorce suit in 1873 included in the civil records. But these are by far the most complete set of records available to students of anti-polygamy, and are an invaluable resource for assessing both the run-of-the-mill and many of the more spectacular polygamy prosecutions.\footnote{2}

Of the approximately 2,500 criminal cases in the court records, more than 95% are for sexual crimes, ranging from fornication to bigamy. All in all, this level of judicial attention to sexual conduct is unique in American legal history, far exceeding, for example, the enforcement of sexual mores in seventeenth century Massachusetts.\footnote{3} Prior

\footnote{1} The index is a list of the names of the defendants, but does not contain further information that could be of use to historians, rather than to genealogists. The index does not, for example, tell the researcher what the case was about, or what result, if any, is contained in the records.

\footnote{2} In addition to several cases mentioned in the text and footnotes of this chapter, D. Michael Quinn, an independent scholar working on Mormon history and author of several books and articles, including his most recent publication, The Mormon Hierarchy: Origins of Power (Salt Lake, 1994), has noted some 30 cases reported in the Deseret Evening News that do not appear in the records. Letter from D. Michael Quinn, 3 August 1993.

\footnote{3} See, e.g., David Flaherty, "Law and the Enforcement of Morals in Early America," in Law in American History, Donald Fleming & Bernard Bailyn, eds. (Boston, 1971): 203-53. Although Flaherty does not give percentages for the records he studied, he cites a study of Virginia as following the typical pattern for prosecution of sexual crimes. Out of 490 cases, approximately 125 involved sexual offenses. See Arthur P. Scott, Criminal Law in Colonial Virginia (Chicago, 1930), 281.
to 1891 (the Mormon Church formally renounced polygamy in September 1890, and counseled its members to obey monogamous marriage laws) almost every sex offense, and many non-sexual prosecutions for crimes like "illegal voting" and "perjury," involved plural marriage in one way or another.

The prosecutions of several men (it is not clear from the record whether they were Mormon or non-Mormon) for fornication with one "Estella Pueblo," and the eventual prosecution of Pueblo herself on the same charge, are among the few exceptions. It seems likely that Pueblo was a prostitute whose regular line of business resulted in pregnancies and their attendant costs. One hapless non-Mormon was charged with bigamy. He wrote an irate letter to the Court, complaining that he was constantly harassed by his Mormon neighbors, and that this prosecution was the latest in a series of attempts by his enemies to discredit him. There is no record of what happened to the case after the indictment was handed down by the grand jury.

A typical case record contains a complaint, arrest warrant, bail record, and indictment. The latter generally gives quite a bit of information, including the names and residences of wives, the government's witnesses, and so on. Multi-count indictments, or

---

4 Case file #1967 (David Potter convicted of fornication with Pueblo after jury trial in 1889); Case file #1809 (Pueblo charged with fornication with A.M. Rhodes in 1891); Case #1757 (A.M. Rhodes and Estella Pueblo both charged with fornication); Case file #1561 (Hank Mikesell convicted of fornication with "Stella" Pueblo after jury trial in 1893).

5 When he was prosecuted for adultery in Salt Lake in 1888, William Sheen complained that he and the woman he was living with had not intentionally violated the law, and that this prosecution was just an attempt to harass him because he was not a Mormon. Territorial Court, Case File #2242.
separate indictments included in the same case file, are common; I have treated all such
indictments as a single prosecution. Many of the cases include other interesting tidbits.
One judge, for example, required his clerk to note the result of a prosecution, including
any sentence, on the back of the indictment. If one looks carefully, therefore, there is
a great deal of information to be gleaned even from an apparently sparse record. There
is some information about the final result (e.g., a guilty plea, jury verdict, or dismissal)
in about 50% of the unlawful cohabitation cases; the precise sentence is included in the
record of about half those cases. One can get, therefore, a pretty good idea from the
records of the big picture of the Raid.

Some cases are full of interesting material, with page after page of requested jury
instructions in lawyers' handwriting, and "given" or "refused" noted by the charging
judge at the bottom or on the side. Better still, in some cases the sentencing colloquy is
reprinted. Chief Judge Charles Zane, for example, lectured William Felstead in 1886,
after Felstead pled guilty to both polygamy and unlawful cohabitation. Felstead admitted
that he had married two plural wives without his first wife's consent, but argued that he
had made a covenant "with my Father in heaven, ... that I would keep his law and obey
his commandments," and that his first wife refused to come from Detroit to Utah: "I
didn't like to live a bachelor's life; it is not good for a man to live alone; I had no one
to cook my food, and no one to take care of me." He also argued that he had injured
noone, and that he would gladly defend his country against invasion. Judge Zane's
response admirably sums up the position of the territorial judiciary:

Well, the man who commits adultery, or keeps a bawdy house, sells liquor
without a license, he always says he has wronged no one, but it is a wrong to
society.... These convenants you speak of, -- a man has no right to enter into any supposed covenant to violate the law of his country.... These laws against polygamy and unlawful cohabitation are such in substance as exist in all of the states and in every civilized country on earth, and you cannot say that you enter into some supposed covenant to violate the laws of your country, which all other people are bound to obey and respect.... When this country shall be involved in war, why, you may show your patriotism ... by shouldering your musket. You would show it much better now by simply obeying the laws of your country, ... not claiming to belong to some organization whose laws are paramount to the laws of your country....

Zane, of course, presumed a great deal in such a statement. He implied not only that polygamy was a harm to society of the same ilk as prostitution, but also that local customs in sexual matters are subject to the homogenizing effects of the laws of "every civilized country on earth."

The assumption that there is some stable body of rules governing human behavior, which both constitute civilization and prohibit deviations such as polygamy, was not admitted by the Mormon defendants in Zane’s courtroom, however. The process by which they battled for legal supremacy -- the strategies the Mormons chose in the fight to preserve their peculiar domestic institution -- and the response of the government’s legal machinery, are the subject of the following section.

(a) "Every Civilized Country on Earth": Judge Zane, the Underground, and the Evolution of Legal Strategy in Polygamy Prosecutions

Charles Schuster Zane, chief judge of the territory and judge of the third judicial district, was appointed in 1884 by President Chester Arthur on the recommendation of his partner, Senator Shelby Cullom of Illinois. Zane had an impeccable Republican

6 Territorial court, case file #761.
lineage -- he was among the earliest supporters of Abraham Lincoln, becoming William Herndon's law partner (and the husband of Margaret Maxcy, Herndon's niece) after Lincoln was elected. He served as county attorney, and then as a circuit judge. When he was appointed to the bench in Utah to enforce the Edmunds Law, therefore, Zane had more than 25 years of experience as a lawyer, and ten as a judge. He was known for his energy, his lucidity, and his simplicity. His bearing was upright, his eye piercing, and his manner always rigidly correct, even distant. Despite presiding over an extremely busy court, Zane never had a backlog of undecided cases. While a judge in Illinois he began the practice that he would continue throughout his tenure on the federal bench in Utah -- from 1884 to 1888, and again from 1889 to 1894 -- he always delivered oral opinions. According to his son, who also served as his clerk of court, "[c]ases were decided when they were argued, or immediately thereafter."

Zane decided many hundreds of cases. It is his stamp, more than that of any other judge, that dominates the records of the territorial courts. By his own estimation,

---


8 John M. Zane, "A Rare Judicial Service, Charles S. Zane," Journal of the Illinois State Historical Society, 19 (1926-27), 37: "His appearance begat confidence and respect. All things moved with deliberation and order. He had the reserve and dignity that belong to the office. No one became familiar with him. He had no confidants. No lawyers ventured to impose upon his indulgence." Whether or not one entirely credits this filial accolade, Zane was indeed widely respected in Washington, in Utah, and in Illinois.

9 Only Judge Henry P. Henderson of the first district was busier. Although a competent and hard-working judge, Henderson did not have the legal mind, the organizational skills, or the national reputation that Zane enjoyed. Orson Whitney's description of Henderson as conservative, even harsh to Mormons, yet "urbane and gentlemanly ... [with an] even tenor," is typical of the encomiums to Henderson. History of Utah, 3: 503-04.
Zane alone was responsible for the imprisonment of as many as a third of the 1,300 men he reported had been incarcerated by 1890 for violation of anti-polygamy laws.\footnote{Charles S. Zane, "The Death of Polygamy in Utah," \textit{Forum}, 12 (1891-92), 368. Other estimates of the total number of prison sentences are slightly lower. Stewart L. Grow, "A Study of the Utah Commission" (Ph.D. diss., University of Utah, 1954), 268, basing his numbers on the reports of the Utah Commission, says that there were 33 convictions for polygamy, and 1,004 for unlawful cohabitation. See also Richard D. Poll, "The Twin Relic: A Study of Mormon Polygamy and the Campaign of the U.S. Government for its Abolition, 1852-1890" (M.A. Thesis, Texas Christian University, 1938), 206-24, claims that there were "1,004 convictions for unlawful cohabitation under the Edmunds Act between 1884 and 1893, and another 31 for polygamy." Rosa Mae McClellan Evans, based on the lists of prisoners at the Utah prison, concludes that 780 men did time for unlawful cohabitation between 1884 and 1895, 146 for adultery, 13 for polygamy, and one for incest. "Judicial Prosecution of Prisoners for LDS Plural Marriage: Prison Sentences, 1884-1895" (M.A. Thesis, Brigham Young University, 1986). Gustive Larson, without citation to sources, says that "over twelve hundred Mormon polygamists" were housed in the penitentiary in the last half of the 1880s. The "Americanization" of Utah for Statehood, 183. My own numbers are slightly different, and, of course, admittedly incomplete. The total number of indictments for polygamy, including those for unlawful cohabitation, polygamy and bigamy, adultery, fornication, and incest, and with the odd prosecution for illegal voting, bribery, perjury, and resisting officers, is in the neighborhood of 2,300. Estimating the total number of convictions is more difficult. The record contains convictions in approximately 935 cases, acquittals in 135, and dismissals in 112, for a total of results in 1182 cases, roughly 50\%. For unlawful cohabitation I find some 1,400 indictments, with a record of convictions in 711.} His tenure has been described as a "judicial reign of terror," in which "Abandon hope, all ye who enter here" was the appropriate phrase for anyone accused of polygamy.\footnote{B.H. Roberts, \textit{Comprehensive History}, 6: 114; \textit{History of the Bench and Bar of Utah}, 49 (The quote from Dante is Kenner's description of the tenor of Zane's judgeship). Zane was vigorously defended by Baskin in his memoirs. \textit{Reminiscences of Early Utah}, 52-53. More recently, Zane's image has been rehabilitated by the work of Thomas Alexander. After studying Zane's supreme court opinions, Alexander concluded that Zane was "basically fair in his decisions but as he himself admitted, ruling on polygamy caused much suffering." "Charles S. Zane ... Apostle of the New Era," \textit{Utah Historical Quarterly} 34 (Summer, 1966), 314.}
capacity for hard work was matched by his conviction of the rightfulness of the laws. The church never had a worthier opponent.

Of all the many cases decided by Zane over the years, none was more important than that of Rudger Clawson, convicted of polygamy and unlawful cohabitation in 1884. Not only was the Clawson case the first prosecution using a jury in which those who practiced or believed in polygamy had been struck from the jury for cause, but it was the first major polygamy trial in five years.12 It was in this case, especially at sentencing, that Zane, newly arrived in Utah territory, revealed his determination to bring Utah to heel. Clawson's first trial ended in a mistrial; the jury could not agree, largely because the witnesses in the case, including Mormon President John Taylor, were uncooperative (Taylor could not remember, for example, whether the church kept any record of

12 Two vital procedural innovations, which made the widespread indictment and conviction of polygamists possible, were employed in the prosecution of Rudger Clawson for polygamy and unlawful cohabitation in 1884. First, Clawson was indicted by a grand jury on which jurors who could not swear they were not living in polygamy and did not believe in the rightfulness of polygamy were challenged for cause. The Edmunds Act of 1882 allowed challenges to jurors on just these grounds. The Mormons argued that the law was directed only at petit jurors, while the grand jurors who indicted Clawson had been questioned about their relation to polygamy. The second procedural innovation came at Clawson's trial, when the challenge for cause exhausted the jury list provided under the Poland Law. Judge Zane, who conducted the Clawson trial, issued an open venire, according to which Marshal Elwin Ireland brought in six men off the street to complete the jury. Clawson was convicted on both counts, and sentenced by Judge Zane to three years and six months and a $500 fine on the polygamy count, and six months and a $300 fine on the unlawful cohabitation count. Territorial court, case files #425. See also the discussion of the trial in Whitney, History of Utah 3: 293-314. Appealed to the United States Supreme Court after the territorial supreme court affirmed, Clawson's conviction, and the grand and petit jury procedures that secured, were upheld unanimously. Clawson v. United States, 114 U.S. 477 (1885). On the trial and Clawson's experiences in prison, see Prisoner for Polygamy: The Memoirs and Letters of Rudger Clawson at the Utah Territorial Penitentiary, 1884-1887, Stan Larson, ed. (Urbana, Ill., 1993).
marriages) or missing (both Clawson's mother and his plural wife, Lydia Spencer, could
not be found before the trial). Shortly after the mistrial, however, deputies found
Spencer by following Clawson to her rooms in a boarding house, and a convicted was
secured.

At sentencing, Zane asked Clawson the familiar question about whether he knew
of any reason why judgment should not be pronounced. Clawson responded by declaring
that the laws of his country had come into conflict with the laws of his God, and that he
would always choose the latter, soon to become the classic Mormon position in sentencing
colloquies. Zane's response was also formulaic, a reprise of the Republican cosmology.
The first humans, Zane said, had engaged in uncontrolled promiscuity, until they had
gradually progressed to polyandry and polygyny, and finally to monogamy, which marked
the transition from barbarism and superstition to civilization. He sentenced Clawson to
a total of four years in prison, and fines of $800, among the most severe sentences
imposed in the Raid. The sentence was made harsher, Zane said, because of Clawson's
open defiance of the law, and refusal to promise to obey the law in the future.\(^{13}\) The
Clawson case marked the beginning of an all-out judicial war against polygamy.

By far the greatest number of indictments over the next decade was for unlawful
cohabitation, a crime that only a man could commit, given that it was created and defined
by Congress as a crime for "any male person, in a Territory or other place over which
the United States have exclusive jurisdiction, hereafter [to] cohabit with more than one

\(^{13}\) Zane's speech is paraphrased in Whitney, History of Utah, 3: 318.
woman."* According to the records, there were 1401 (more than half the total number of criminal cases in the records for a 26 year period) indictments for unlawful cohabitation from the time the Edmunds Law was enacted in 1882, through the close of the territorial period in 1896. The prosecutions are heavily concentrated in the years 1886 to 1889 - only one indictment each was handed down in 1882, 1883 and 1884. The numbers begin to climb in 1885, with 136 indictments, 46 convictions after jury trial, 35 guilty pleas, three acquittals after trial, and eleven dismissals. *Insert unlawful chaos graph here.

The reaction of the church was swift. Shortly after the Clawson case, church officials decided that flight was their best option. Church leaders went on the "Underground," yet another term borrowed from the great anti-slavery crusade (this time by those who were understood in the popular imagination, at least, as corresponding more to slaveholder than escaped slave), in early 1885 to escape prosecution.

The Underground was a terrible blow to the prosecution’s strategy. Just as the prospect of jailing the entire First Presidency appeared to be within their grasp, the leadership disappeared from view. The records are full of indictments against leaders, followed by arrest warrants on the back of which is written in painful deputies’ scrawl that the defendant could not be located after a diligent search. Church leaders (and many of the lesser lights) led a fly-by-night existence, rarely sleeping two nights in the same place, hiding under floor-boards or in hay ricks, conducting church business far from Salt Lake. According to one polygamist’s diary, those on the Underground (and those who

* Edmunds Act, Section 3, codified at 22 Stat. 30 (1882).
helped them, among which must be counted the vast majority of faithful Mormons, which translates into the vast majority of territorial residents) developed a code, according to which they could communicate with each another about the presence of deputies, or likely indictments. The code name for Judge Zane was Nero; Judge Boreman was Herod.15 The game of hide-and-seek was conducted on a massive scale; federal prosecutors complained that the Mormons controlled the railroad and telegraph systems so completely that their every move was known as soon as they made it, and their best-laid plans failed to net the fugitives they sought.16

George Q. Cannon, to give only the most dramatic example, escaped from federal officials briefly after jumping (he claimed he had fallen) from a train bringing him from Nevada back to Utah. He was recaptured and brought to Salt Lake under military guard, only to forfeit the astronomical $25,000 bail bond set by Judge Zane, and disappear once again.17 Aside from Cannon’s brief custody, most of the higher echelon church officials remained on the Underground for several years. President Taylor, for example, died on the Underground, despite the best efforts of Marshal Ireland and his boys.18


16 For example, P.T. Van Zile, Assistant District Attorney for Utah, fulminated against the conspiracy to prevent the capture of polygamists. His speech to the Michigan State Association of Congregational churches, 21 May, 1880, is reprinted in The Women of Mormonism, 312-36.

17 Cannon surrendered in 1888, evidently in return for a promise of leniency. He was sent to the "pent," the federal prison just outside Salt Lake; one of the most commonly reprinted photographs of the 1880s shows Cannon seated at the center of a group of patriarchs in striped suits.

18 The indictment of Taylor is another item missing from the official records.
The exception was Apostle Lorenzo Snow, who was captured in November, 1885, hiding in a specially constructed room concealed by a trap door underneath the living room carpet. Snow's trial records include testimony by Deputy Marshal Oscar Vandercook, who captured Snow:

I had made inquiries of Minnie Snow [the youngest of seven wives, and the one who currently lived with Snow] before discovering the trap door, as to whether he was there. We had previously made a thorough search of the house from garret to cellar, going through it room by room.... We noticed the carpet was ripped, and underneath it found this trap door. When I called to him to come out, ... he says, "All right, I am comming out;" and when he came out he says, "That is all right, boys, you have done your duty, come and take a drink with me," or something to that effect.  

Snow was tried (and convicted) for three separate indictments for the same offense (unlawful cohabitation) each count for a calendar year. This practice, which greatly increased the potential punishment for unlawful cohabitation, was apparently the brainchild of Judge Zane and William H. Dickson, long-time U.S. Attorney for the Third District, and extremely successful prosecutor of polygamists. The policy was consistent with the instructions received by federal prosecutors, who were told by Attorney General Augustus Hill Garland that "[p]erhaps the practice of polygamy may be more successfully met by the conviction of large offenders than by the conviction of every offender in the community."  

This policy of dividing cohabitation into discreet periods was popularly

---

19 Territorial court, case file #2237.

known as "segregation," and allowed for multiple count indictments (and thus for the lengthy punishment of notorious offenders).

As a legal strategy, segregation was a counter to the Underground; even if the government could not effectively prosecute the entire church leadership, segregation allowed prosecutors to seek severe penalties for those unlucky few who were caught. Segregation, therefore, recaptured some of the initiative lost after the Underground stymied prosecution efforts. Predictably, segregation was decried by the Mormons as "absurd, illegal and cruel."21 According to Orson Whitney, segregation was conceived necessary because the "administrators of the law, like the enactors of the law, had not given the Mormons sufficient credit for sincerity," and had assumed that six months in prison and a $300 fine would be sufficient punishment to deter polygamists. In fact, Whitney claimed, Mormons preferred "fine and imprisonment to freedom conditioned on obedience to a statute aimed at a principle of their religion...."22

In 1885, when segregation was instituted by the territorial courts, however, the number of indictments was still low. Segregation quickly became the preferred prosecutorial modus operandi; some U.S. attorneys, such as Charles Varian, used the multi-count indictment, others procured separate indictments for each 6, 9, or 12-month period. In 1886, several sentences were handed out to defendants who were convicted of multiple counts of unlawful cohabitation. While it lasted, segregation looked as if it

---


could recoup the losses caused by the Underground. One unlucky "cohab" received a 19-month sentence, while five (including Snow) were given 18 months, one 15 months, and two 12 months.

These sentences, and the practice upon which they were based, were invalidated by the Supreme Court's second decision in the Snow case in early 1887. The first, in which the Court decided that defendants in unlawful cohabitation cases had no right of appeal to Washington, was succeeded by a habeas corpus proceeding, in which Snow challenged his 18-month sentence. The Court agreed with Snow's lawyers, and held that unlawful cohabitation is a continuous offense. As Whitney put it, the decision "fell like a funeral pall upon the crusaders." Certainly, the failure of segregation was a significant setback for prosecution. Judge Zane, however, "submitted gracefully to the decision, as did U.S. Attorney Dickson. No factious opposition was offered to the release of the prisoners unlawfully detained, and as soon as the proper forms could be observed, they were set at liberty."

Thereafter, most of the prosecutions were of less notorious polygamists. This population was both more vulnerable to arrest and prosecution, because less able to call upon the machinery of the church to help in escape, and more likely to be distressed by serving time in prison and fines. Federal officials set to work on these men, bringing almost 900 indictments for unlawful cohabitation alone (that is, not counting indictments

---

23 In re Snow, 120 U.S. 274 (1887). For an overview of the Supreme Court decision and the briefs in the case, see Ken Driggs, "Lorenzo Snow's Appellate Court Victory," Utah Historical Quarterly 58 (1990): 81-93.

24 History of Utah, 3: 543-44.
for polygamy, adultery, fornication, and miscellaneous offenses such as perjury and illegal voting) between 1886 and 1888. The policy behind the wholesale prosecution is evident; if the government could not have spectacular trials of church leaders, and could not sentence the most infamous polygamists to long jail terms, it would grind down the practice by caching every fish in the pond, however small and obscure. Not only were church leaders forced to conduct their business on the lamb (in itself a significant inconvenience), but the small time patriarch, the farmer with two or three wives, was now fully exposed to the machinery of federal justice.

This was a far more time-consuming, difficult (and costly) method of enforcing the anti-polygamy laws than sensational multi-count trials of the most prominent church leaders would have been. Big fish like George Cannon and Lorenzo Snow, both among the highest echelon of Mormon management, not only had several wives, elaborate domestic establishments, and positions of authority in many of the most prosperous Mormon-run businesses, all of which made them especially desirable defendants. They also were geographically accessible; the most important church officials lived near the central headquarters of the church in Salt Lake. The combined effects of the Underground, and the Supreme Court’s disapproval of the practice of segregation, meant that federal officials had to cast their nets over a much broader terrain, into scattered (and remote) Mormon settlements where outsiders (especially federal marshals) were unwelcome intruders. P.T. Van Zile, U.S. Attorney for Utah for the first half of the 1880s, explained the difficulties of his job to an audience of anti-polygamists in Michigan:

This vast Territory is divided into three judicial districts, and for each of these districts the United States appoints a District Judge. In these
District Courts this crime must be prosecuted. This means bringing witnesses and jurors one hundred and fifty miles out of a country where there are no railroads. Add to this the fact that most of the people in the Territory are opposed to this law, and will do everything they can do to defeat its execution. Over this large area of country this "Church of Jesus Christ of Latter-day Saints," as they call themselves, with polygamy as one of its cornerstones, has complete sway, and is continually reaching out into adjoining Territories, and attempting to fasten its poisonous fangs upon them and bring them under its control.²⁵

Beginning in 1886 after Mormon leaders went on the Underground, but not hitting its most intense phase until 1887 when segregation was prohibited, federal officials began the process of rooting out polygamists in these nooks and crannies, as well as in the most densely populated areas around Salt Lake. This was tedious work, given the distances between settlements and the hostility of the Mormon majority. But it was a less costly process than might be expected at first sight, because convicted "cohabs," as they were commonly called, were generally required to pay the costs of their own prosecution (including marshal's fees for serving process and attorney's docket fees) as well as fines. Costs ranged from $25 or so up to $175, and maximum fines from $300 for unlawful cohabitation, to $500 for polygamy (adultery and fornication were not punishable by fine). According to figures sent by U.S. Attorneys in Utah to Washington in late 1888, a total of $45,956.90 had been collected from "polygs" and cohabs in costs and fines.²⁶


²⁶ Letter from Acting-Attorney General G.A. Jenks to the House Judiciary Committee, September 13, 1888. Reprinted in Whitney, History of Utah, 3: 462. Jenks also mentions a $25,000 forfeiture (George Cannon's bail, which he forfeited in 1886), which is not included in the above total.
More often than not, however, fines and the costs of prosecution were not paid.\(^7\) Nor did the system of fines, even if they were collected, come close to matching the actual cost to the government of the Raid.\(^8\) Not only were the salaries of the regular employees paid out of the federal fisc, but additional deputies, essential to investigation and service of process in the more rural areas, were expensive.\(^9\) The cost of running the courts in 1887 alone was $63,000.\(^10\) Correspondence between U.S. Attorneys in Utah and the Attorney General in Washington are replete with requests for additional funds. In the early 1870s, at the very beginning of an effective federal judiciary in the territory, one federal marshal, exasperated by the lack of funds that prevented prosecution of polygamists, temporarily financed the courts out of his own pocket. Financial crises were annual events throughout the 1870s and 1880s.

\(^7\) Although he does not provide a total for the judiciary committee, the information provided by Jenks, when examined case-by-case, reveals that $64,027.57 in fines and costs had been assessed against convicted polygamists, but had not been paid.

\(^8\) According to Thomas Alexander, the cost of territorial government averaged $130,000 annually between 1887 and 1891, excluding all expenses associated with land surveys and Indian affairs. *A Clash of Interests: Interior Department and Mountain West* (Provo, Ut., 1977), 135. Alexander gives no sources for these numbers.

\(^9\) Congress did set aside $5,000 for the "more effective prosecution of crimes in Utah" in 1886, most of which was used to hire special deputies to travel into remote areas, after Marshal Elwin Ireland reported that his efforts were constantly thwarted by a hostile local populace that used "every means short of violence" to "aid criminals and witnesses in escaping." Even the local police and telegraph and railroad employees were enlisted to prevent the service of process by warning polygamists and their families when the marshals were approaching. E.A. Ireland to Attorney General Brewster, 26 August 1885; Ireland to [Judge] O.W. Powers, 4 August 1885, Year Files, Records of the Dept. of Justice, Record Group 60, National Archives. Quoted in Cresswell, *Mormons, Moonshiners, Cowboys & Klansmen*, 112.

The prosecution of polygamists across the social spectrum, rather than at the upper levels only, therefore, was slow and painful. Often it was unsuccessful. If the "cohab" held out long enough, there was a good chance after 1890 that the indictment would be dismissed. Lot Darney's case, for example, was dismissed in 1892, along with 19 others, on the motion of the prosecution. Darney, who had been indicted for unlawful cohabitation in 1886, was formally discharged "for the reason that in each [of the 20 cases dismissed that day] it is impossible to secure evidence sufficient to justify a conviction, and because, in the judgment of said District Attorney, the ends of justice do not require the trial thereof."31

In retrospect, therefore, it is apparent that the Underground, as an extra-legal legal strategy, was effective in many cases. At the same time, however, it also exposed the less mobile to prosecution and incarceration in large numbers. It is possible, of course, that such an increase in prosecutions was anticipated by the leadership when it decided on a policy of flight. Many Mormon leaders argued that theirs was a crime of conscience, for which punishment was inappropriate in the first place, and prison sentences a patent violation of justice. Given this attitude, it is plausible to think that the leadership might have assumed that public opinion would be outraged at the sight of prisons peopled by comparatively low-ranking and otherwise law-abiding men. It is also possible, of course, that the Mormons counted on winning a war of attrition, forcing the government to engage in expensive and prolonged prosecutions while the church

31 Territorial court, case file #640.
leadership watched and waited from its hiding places, holding out until the public and the federal government grew weary of this kind of legal guerilla war.

A second defense strategy, which spanned the spectrum from "forgetfulness" to actual falsehood, was also widely practiced. It is this practice, and the reactions to it, that are the subject of the next section.

(b) "To Protect Themselves in this Class of Cases": Mormon Women, Defense Strategy, and the Criminalization of the Victim

The effect of [testifying in polygamy cases] upon the minds of modest wives and maidens may readily be imagined. That they should be averse to appearing in this class of cases, and seek to protect themselves with hatchets or any other weapons against those who came to drag them before courts and juries to be interrogated upon subjects of this kind, is not surprising.\(^{12}\)

Here in a nutshell is the contemporary Mormon spin on the treatment of women by the federal courts; a claim on the one hand that the abuse of women was a product rather than a cause of the polygamy prosecutions, and a justification on the other for evasive, even violent tactics by women when confronted with federal law enforcement personnel.

This approach was, in effect, an adaptation of the Underground’s policy of flight. Those who could not hide, lied. Mormon witnesses, especially plural wives and local leaders who were suspected of having performed or witnessed plural marriage ceremonies, would not provide meaningful testimony in polygamy cases. In a few early cases, plural wives were jailed for contempt of court after they point blank refused to

---

answer questions. John Zane described the scene involving just such a contempt situation
in his father's courtroom:

The witness was an innocent-faced, ox-eyed, red-cheeked, buxom looking young
woman, who had been told what she must do…. [T]he judge turned to the witness
and talked to her with all possible kindness and indulgence…. His firm and
solemn words had something of the inexorability of fate, as he told her how idle
it was for her to suppose that she could defy the court or her country's laws. The
witness was now in tears. Then, as much for the Mormons present as for the
defendant, he referred in scathing language to a man who would lead a young and
innocent woman into such a forlorn situation in life that she could not state
whether she was married or not, and would be willing to induce her to take a
position, where she must suffer imprisonment in order to shield him from the
consequences of his crime, that such conduct showed a moral cowardice that
would be disgraceful to any man of correct feeling. 33

The description is interesting in part because it shows how an anti-polygamist
interpreted the situation, placing the blame for the misery of the woman on Mormon men,
in stark contrast to the Mormons' interpretation of the same course of events. However
one characterizes it, outright refusal to testify was an expensive strategy, both for the
government (which had to house female prisoners, and had no suitable space) and also
for Mormon men and women (for obvious reasons).

Within months after his episode in Judge Zane's courtroom case, Mormon
witnesses, especially plural wives, resurrected a practice first tried in the Reynolds trial
in the mid-1870s. Instead of refusing to answer questions, witnesses simply "forgot" the
material elements of crimes associated with plural marriage. The records are full of
testimony that meets this description, in all kinds of cases. Members of an accused
polygamist's family would deny all knowledge of their husband's or father's plural wives,

33 "A Rare Judicial Service," 43-44.
could not remember the last time they had seen him, and would not know where the other families were living, even if they all resided in a tiny village. Bishops forgot whether they had performed any marriage ceremonies, and could not remember whether they had ever heard that records were kept of marriages. Frustrated federal prosecutors railed against this annoyingly effective means of derailing polygamy cases:

[F]alsifying among the leaders has been cultivated as a fine art. They study the art of forgetting what they have seen and heard, and so it often happens that a Mormon, perhaps one of the everlasting priesthood, as they call them, goes upon the witness stand, and testifies that he cannot remember having performed a marriage ceremony that took place within a week past. He will not swear that he did not, but he has no recollection on the subject. They all have wonderful powers of forgetting -- I have never found one who had a retentive memory when a polygamy case was on trial.\(^4\)

In legal terms, this kind of forgetfulness is perjury. Like the Underground, it was an extra-legal legal strategy; but it was certainly successful in many cases. Polygamy prosecutions were especially unworkable with forgetful witnesses undermining the government’s ability to prove a marriage had taken place. In the 26 years covered by the records, only 78 polygamy indictments were brought, and conviction rate was far lower than in any other form of prosecution. There was an additional payoff for forgetful witnesses: even if obfuscation did not result in the dismissal of charges against the defendant, his families (or his friends) were not implicated in his conviction.

In a few such cases, however, witnesses were prosecuted for perjury. Marinha Loveridge, for example, was charged with perjury in 1887, after she testified at her father’s trial for unlawful cohabitation that she could not remember ever meeting his

plural wife, and had never heard it reported in the family that he had a plural wife.\textsuperscript{35}

In a smattering of cases, prosecutors claimed that actual falsehoods, rather than just creative forgetfulness, was involved. Several of these cases involved attempts by plural wives to exonerate their husbands by claiming that the illegal act at issue (either a marriage ceremony or unlawful cohabitation), had occurred more than three years before the initiation of the prosecution, and thus was barred by the statute of limitations. Often the question was the age of the youngest child. A child born two years and three months before the date of an indictment would allow the plural wife to claim plausibly that she had had no contact with her husband for three years. There are many cases in which the age of the youngest child was predictably three years old, although noone, even the mother, could ever remember precisely. One woman who made such a claim was actually convicted of perjury after a jury trial, although there is no record of a sentence in her case.\textsuperscript{36}

\textsuperscript{35} Territorial court, case file #1465. Loveridge pled not guilty. There is no record of what happened after the arraignment. Her husband, Ledru was charged with unlawful cohabitation in 1886, and again in 1887. He pled not guilty at his first arraignment, but the record in the second case against him shows him changing his plea to guilty. There is no record of any sentence. Case files #1460, 1461.

\textsuperscript{36} Susan Parry was convicted of perjury in 1886, for swearing that her child was over three years old. Given that the statute of limitations was three years for unlawful cohabitation, Joseph Parry (who eventually pled guilty) could have argued that he had not cohabited with his plural wife within the operative time. Although it is evident from the record that Susan was tried to a jury in front of Judge Henderson, there is no record of any sentence. Territorial court, case files #1864 and 1865.

Fanny Whiting, plural wife of Lucius Whiting, was also indicted in 1889 for perjury, for swearing that she had not seen her husband for the two months prior to the time he was sent to prison. Fanny had been indicted one year earlier for fornication (and a complaint for unlawful cohabitation against Lucius was changed to adultery in the indictment), a sure sign that she had conceived. It appears from the record that Fanny
A second case illustrates the danger of such evasive or untruthful answers for women, and the fragility of the uneasy truce that existed for decades between the Mormons and the territorial officials charged with executing federal law. Agnes McMurrin, plural wife of Royal B. Young, claimed in 1885 that she had married him in 1881, rather than 1882. The three-year statute of limitations would have precluded Young’s punishment for polygamy if McMurrin’s testimony was correct. One contemporary Mormon observer claimed that McMurrin was charged with perjury in part because the prosecutor was convinced she had lied to the grand jury, but primarily because she and another witness “with hatchet in hand” (thus the reference to hatchets in the quote that opened this section) had resisted arrest until her husband had arrived and counseled her to submit.\footnote{Case file #1490.} Her husband, Royal B. Young, was convicted of both polygamy and unlawful cohabitation after a jury trial in 1885. He was convicted again of three counts unlawful cohabitation in 1886.\footnote{McMurrin’s brother Joseph was also involved. At the time the subpoena was served on Agnes, Joseph had exchanged “warm words” with deputy marshal Henry Collin. Some time later, Joseph was wounded by two shot gun blasts in the stomach. He claimed, with what many believed to be his dying breath, that Collin was the one who had shot him. Salt Lake City soon seethed with tension, Mormons charging that Collin had attempted to murder McMurrin for his resistance at the time of his sister’s arrest, and many non-Mormons countering that Collin was a victim rather than an aggressor, and that a riot was imminent. The situation was diffused after McMurrin fled to Europe; Collin eventually was discharged after a grand jury investigation. Whitney, History of Utah, 3: 345-48.}
The perjury case against Agnes McMurrin reveals the peculiar danger of these prosecutions for women. At one level, the requirement that they appear in court, and testify about the intimate details of their married lives threatened their very self-identity as respectable women of the nineteenth century. Yet, their resistance brought them into even greater danger. The actions of these women, courageous from the perspective of their co-religionists, but contemptible in the eyes of everyone else, effectively challenged their categorization as passive victims. Given that Mormon women were revealed as active participants in the perpetuation of polygamy and its attendant vices (untruthfulness, for example, was widely perceived to be characteristic of both Mormons and Chinese), they could hardly be treated as innocent victims. Their very evasiveness, both physical (running away) and verbal (perjury, "forgetting"), simultaneously translated Mormon women from victims into moral agents, and, thus, into criminals.

Federal officials soon began to importune Congress for tools to punish women, claiming that the women were the linch-pin of the system, that women lied and cheated and ran away just as often as the men; that they were complicitous, in other words, in their own sexual enslavement. Given the tools to begin prosecuting women in 1887 by a new statute outlawing adultery (sexual intercourse by a married person with someone other than a spouse -- in polygamy prosecutions, a plural wife was not, of course, considered a "spouse") and fornication (sexual intercourse by an unmarried person -- sexual intercourse between a plural wife and her husband was adultery on his part, and fornication on hers), federal law enforcement officials for the first time began the wholesale indictment of Mormon women as fornicators. Almost 200 women were
indicted between 1887 and 1890, a stunning transformation in their perceived status as victims of Mormon men. The symbolic message was devastating. Added to the fact that women were also disenfranchised by the same legislation, it is apparent that the federal government had finally accepted the truth of what Mormons had been saying all along—that plural wives would not voluntarily abandon their religion, even if given the vote, or provided with an "industrial" haven. Prosecuted as fornicators, with no vote, plural wives had gone in less than a decade from being the perceived victims of polygamy, to being tainted with the brush of criminality themselves.

Whatever its symbolic significance, however, the prosecution of women was more bark than bite. Whether out of their own compunction, or because there was no prison space available to house females (much less pregnant ones or nursing mothers), prosecutors rarely pursued fornication charges against plural wives beyond the indictment and arraignment stage. In contrast to the men, women rarely pled guilty, and often pled not guilty if they were arraigned at all. Of the 188 fornication indictments against women for fornication brought between 1887 and 1890, for example, only one woman was found guilty after a jury trial, four were acquitted, and four women pled guilty, one of whom was given a suspended sentence. There is no record of any woman incarcerated for fornication. The main reason for arrest and indictment of women appears to have been as a means of securing their testimony against their husbands (although one cannot be positive of this just from reading the record).

The stigma attached to the fornicator label apparently was deeply felt, however. In none of the contemporary histories are such indictments discussed. And while women
who were jailed for contempt for refusing to testify appear in the press and histories as heroines, women indicted for fornication receive no such play. The victims were criminalized, and then forgotten. It seems likely that it was the acceptance of the essentially criminal nature of plural wives -- their transformation into the legal equivalents of prostitutes like Estella Pueblo -- that reconciled Eastern anti-polygamists to a legal vicotry that in fact had little effect on many Mormon women's lives.

In some cases, it was the defendant's legal strategy that exposed women to opprobrium. As one Mormon lawyer interpreted the statutes, Congress intended to punish polygamous men, rather than rescue legal wives. Samuel Thurman, counsel for Joseph Clark, argued that he should not be prosecuted for unlawful cohabitation, because he only lived with one of his wives, although she was his third, rather than his legal wife. Clark testified in his own defense:

[I determined] when the prosecutions commenced at Salt Lake [Clark was a resident of Provo, in the first judicial district] that I couldn't live with but one [wife].... I told them [his three wives] I would have to live with one woman, and asked the question "Where shall I live?" says I, "Must I leave that woman with 7 small children and go and live with the first wife?" and she [apparently referring to the first wife] says "No; go and take care of your children."

Thurman argued (and even temporarily persuaded the territorial supreme court) that in unlawful cohabitation cases, the presumption that a man cohabited with his first wife was rebuttable. In other words, if Clark could show that he held himself out as the husband

39 Territorial court, case file #484.

40 The rebuttable presumption argument was not entirely original to the Clark litigation, but was a rehashing of an issue that had been raised, but not finally decided, in the Snow case. During Snow's trial, F.S. Richards argued that Snow lived only with his seventh and youngest wife, and should not be prosecuted for the mere
of only one woman, Thurman argued, even if she was a plural wife, he should not be subjected to punishment as a cohab. In this case, as in others, the tenuous legal position of wives in polygamous Utah is apparent. Congress did not intend to protect first wives, Thurman claimed, but to punish men who cohabited with more than one woman:

"[W]e contend that the objective point of Congress was not to protect the lawful wife, who may be regarded as a particeps criminis, but rather to break up and destroy cohabitation with a plurality of wives, and limit a man to cohabitation with one woman only."  

Acknowledgment of his marital status with regard to the six other women to whom he was married. The question whether cohabitation with the legal wife should be assumed was briefed and argued by Richards and George Ticknor Curtis in the United States Supreme Court, which never reached the merits of the issue. Snow v. United States, 118 U.S. 346 (1886).

Curtis and Richards then brought a habeas corpus action on the segregation question. Ex parte Snow, 120 U.S. 274 (1887). It was this action that was decided in Snow's favor, and that ended the policy of segregation early in 1887. The question whether the presumption of cohabitation with the first wife could be rebutted remained an open one, therefore, even though it became clear in later cases that Snow himself could not have rebutted the presumption, given that he still acknowledged all seven women as his wives. Clark, on the other hand (one wonders whether he was acting on the advice of counsel), had repudiated all but the third wife. It was this thread that Thurman picked up on, and that almost won the acquittal of his client.

41 I am not the first to notice this uncertain legal status. See Carol Cornwall Madsen, "At Their Peril": Utah Law and the Case of Plural Wives, 1850-1900," Western Historical Quarterly 21 (1990): 425-43. Thomas Alexander also noted in his discussion of the jurisprudence of the 1870s that the Mormon church never bothered (perhaps it did not have time) to define the legal status of wives under polygamy. Brigham Young, for example, claimed that his admitted marriage to Ann Eliza Young had no validity whatsoever, and thus could not be the basis of a divorce suit. George Q. Cannon, by contrast, claimed that each of his four wives were "legal" wives. Thomas G. Alexander, "Federal Authority Versus Polygamic Theocracy," 92.

42 Territorial court, case file #484, record at 1-2.
Given that the Edmunds Act of 1882 specifically prohibited cohabitation "with more than one woman," this argument complied at least with the letter of the law. It also dovetailed neatly with the implications of wholesale prosecutions of Mormon men, which, Mormons claimed, forced them to abandon wives whom they had promised to cherish and protect. Clark's open disavowal of his other wives, especially of his first wife, Thurman claimed, removed Clark from the purview of the statute. At his initial trial, Clark was successful. But on appeal, Judge Judd recognized the danger inherent in this argument:

If we are to resort to mere presumptions that a man bears the relation to his wife that the law[,] morality, society and our great master himself commanded that we should bear, and if that presumption is a rebuttable presumption, then it would seem that it was an open question in every case, to be decided according as the facts may appear.

Under these circumstances, as Judd pointed out, a polygamist might "cohabit with Sarah [the name of Clark's first wife] for any such time as suits his purpose, and then abandon her; he can then go and cohabit with Frances [the second wife] for such time as may suit his purpose, and then abandon her; and then go and cohabit with Hannah [the third wife]... and can thus keep going around the circle ad nauseum, and yet not be guilty of any offense because he is cohabiting with but one woman as his wife at the same time...."* Judd's opinion denying Clark's motion for a new trial spelled the end of the rebuttable presumption doctrine, but the very use of the argument by a Mormon defendant, and its initial acceptance by the federal courts, illustrates the growing

---

* Id., 6-7, 9-10.
confusion in legal circles about whether the law was designed to punish men, or protect women."

In another case, Barnard White's lawyers were successful. White was indicted in January 1886 for two counts of unlawful cohabitation, charging him with cohabiting unlawfully with Diana White, his legal wife, and Jane Fyfe White, his plural wife.46 Later that same month, White's legal wife died. Shortly before White's case came on for trial (and undoubtedly on the advice of counsel),47 B.D. Madsen of Box Elder County performed a marriage ceremony, at which White married his plural wife of ten years. To quote the opinion of the territorial supreme court reversing White's conviction, "[i]t transpired from the testimony that the sole object in having the marriage ceremony performed was to close the mouth of the witness and to prevent the Government from obtaining her testimony."47 The motive for the marriage, the frustrated prosecutor's pleas to the contrary notwithstanding, was irrelevant. The traditional common law

44 In United States v. Clark, 6 Utah 120 (1889) the territorial supreme court overturned its former rebuttable presumption doctrine for cohabitation cases, holding that Clark's "status" as a husband was created by a lawful marriage, and could not be altered except by law.

45 Territorial court, case file #2461 and 2462.

46 Although it is clear from the record, which includes proposed jury instructions and a notice of intent to appeal, that White was represented, the record does not reveal exactly who White's lawyer was. A similar story was told [anonymously] in "For Living With His Wife: A Most Unusual Case Told by a Utah Lawyer," in History of the Bench and Bar of Utah, 70-73.

47 From the text of the supreme court opinion, which was published in an unidentified newspaper, a clipping of which is included at the back of the record in the case.
immunity between spouses would apply to the new wife, no matter that the plural marriage was made legal solely to evade prosecution.

By the late 1880s, the legal strategies pursued by both sides had resulted in the worst of all possible worlds. Mormon men were sent to jail by the hundreds, Mormon women were stigmatized by criminal process. The economy of Utah lay in shambles, as more and more energy was devoted to pursuing polygamists, evading prosecution, or serving prison time. Within 18 months of the trial of Lorenzo Snow, signs that the Mormon people were weary of the fight began to emerge. Joseph Rawlins's Democratic Club was only one of several signs. After the death of ultra-conservative Mormon President John Taylor in 1887, compromise slowly seeped into Mormon-non-Mormon relations.

---

* Historians disagree about whether there was a prevailing anti-polygamy sentiment among the non-polygamous majority and the younger generation of monogamous professional men. Robert Dwyer maintains that "the bulk of the Mormon people were ready and anxious for the Manifesto of 1890 which relieved their consciences of the obligation of the divine injunction concerning patriarchal marriage. Sentiment, indeed, had been growing for some years that the revelation was permissive rather than obligatory...." *The Gentile Comes to Utah,* 228. Gustive Larson, on the other hand, argues that support for polygamy remained strong at all levels of Mormon society, that "instead of accomplishing its objective of abolishing polygamy, [the Raid] drove all of the elements of Mormondom into a unity of resistance to the invasion of their American freedoms." *The "Americanization" of Utah for Statehood,* 278.

* The church itself was in substantial disarray, plagued both by the difficulties of running an enormous bureaucracy from hidden command posts, and by the dissension surrounding the succession. According to Michael Quinn, George Cannon had made enough enemies to delay the affirming vote that named Woodruff the president (with Cannon and Smith as first and second counselor respectively) for a full 18 months. *LDS Church Authority and New Plural Marriages,* 30-37.
The "fusion" movement, as it was known, included young and middle-aged Mormons, and non-Mormons interested more in developing the territory and finally achieving statehood, than in squabbling over polygamy. Lawyers dominated the movement. Franklin Richards, Samuel Thurman, and Joseph Rawlins all were leaders in the nascent party, as were former prosecutor Charles Varian and apostate Henry Lawrence. In 1887, Utah submitted a proposed state constitution to Congress, which included a provision outlawing bigamy and polygamy. The constitution was supported by a referendum of 13,195 votes in favor, and only 504 against (all polygamists, of course, were disfranchised in 1882, so this total presumably would not include the elite polygamous minority). B.H. Roberts, himself a polygamist and a fugitive from justice on the Underground from 1886 to 1889, referred elliptically to "murmurings and

50 Roberts, Comprehensive History, 6: 217.

51 Roberts's domestic arrangements, as well as his brush with the law, were fully vetted after Roberts was elected to Congress in 1898 on the Democratic ticket. Roberts was arrested in late 1886 for unlawful cohabitation. As his biography phrased it, "[i]t was thought, both by his bondsmen and friends, that it would be better to forfeit the bond than to appear in court under the then very severe regime that obtained in the administration of the anti-polygamy laws. The very same day, therefore, that he was arrested he departed for England, where, for nearly two years, he labored in the ministry, chiefly in the "Millennial Star" office as assistant editor." LDS Biographical Encyclopedia, 1: 205. Several months after his return to Utah, Roberts turned himself in to authorities, pled guilty, and was sentenced to 4 months, a $200 fine and costs. Case #1772. According to the records of the Utah Penitentiary, the fine and costs were not paid, and Roberts is shown as serving an extra two weeks, undoubtedly as punishment for refusal to pay the fine. Utah Prison Admission Records, reprinted in Evans, "Judicial Prosecution of Prisoners for LDS Plural Marriage," 128.

Roberts was never seated in the House of Representatives, however; the public outcry against the presence of a polygamist in Congress demonstrated that the issue was not forgotten, despite the claims of fusionists in Utah that polygamy was all ancient history after 1890. Davis Bitton, "The Exclusion of B.H. Roberts from Congress," in The Ritualization of Mormon History: 150-70; William Griffin White, Jr., "The Feminist
complainings among the people" in the late 1880s, as well as "the number of those who were willing, against the general policy of the church leaders, to promise obedience to the anti-polygamy laws for the future and thus escape punishment...."\(^5^2\)

Conclusion

When Wilford Woodruff finally sought the mind of the Lord in 1890 and learned that he need not force his people to endure more prosecutions for the "Principle," many Mormons, and the majority of non-Mormons, were relieved. Not in the same class as a revelation, according to Mormon belief, but still authoritative enough for the purpose, the Manifesto was issued by the church in September 1890 and adopted unanimously (although not without considerable behind-the-scenes rancor and dissent) at the October conference in Salt Lake two weeks later.\(^5^3\) The carefully-worded document was the product of feverish negotiations between Mormon leaders and members of the Senate Judiciary Committee, who were considering a piece of legislation known as the Cullom-Struble Bill, which would have disfranchised all Mormons, and abolished the territorial legislature.

---

\(^5^2\) Comprehensive History, 6: 217. The high divorce rate among polygamists has been cited by one historian as additional evidence of dissatisfaction with polygamy. Van Wagoner, Mormon Polygamy, A History, 113. It might be argued, however, that dissatisfaction with a particular marriage does not necessarily imply dissatisfaction with the kind of marriage that was dissolved.

\(^5^3\) On the Conference and the behind-the-scenes reactions of the faithful, see generally Quinn, "LDS Church Authority and New Plural Marriages," 45-49.
But even as Congress debated the most drastic action yet for Utah, there were signs in the territory itself that the war was all but over. The Manifesto came as no great surprise to men like Franklin Richards and Samuel Thurman, or even, it seems, to Judge Zane and Charles Goodwin. All were poised to take advantage of the phenomenal growth in economic activity that the end of the prosecutions would usher in: development of the territory had been artifically slowed by exclusive concentration on the one great issue. Richards made the motion that officially dissolved the People's Party, to which all good Mormons had belonged: he then joined Thurman and Rawlins in the Democratic party.

Judge Zane lent his considerable political weight to the fusion movement, publicly declaring his belief in the sincerity of the Mormons. His national reputation for absolute correctness and perspicacity made his endorsement a valuable stamp of approval. "[T]he face of Utah is toward the sun," he wrote in an influential article that appeared in *Forum* magazine in 1891. "The darkness is at her back.... We are climbing the hills of progress; higher plains and brighter lights are ahead, and I trust we shall all get a clearer and better view of human duty."

In the final analysis, the Manifesto was the most effective legal strategy of all. As historians have recently pointed out, while the Manifesto relinquished public church advocacy of plural marriage, behind the scenes life went on much as usual. George Cannon continued to sanction plural marriages, many of which were celebrated in Canada or Mexico. Existing plural relationships continued generally without interruption.

---

54 "Death of Polygamy," 375.

Flagrant violations were punished in the federal courts before statehood in 1896, but at sharply reduced rates, and with much shortened sentences and smaller fines. After statehood was finally achieved, prosecutions ceased altogether. Reconciliation was the order of the day.

The rejoicing was not universal, however. Robert Baskin, the feisty lawyer whose alliance with Judge McKean had been instrumental in demonstrating the potential efficacy of the federal courts as engines of social change, could not bear to bury the hatchet. He led a group of disaffected non-Mormons (including former judge Orlando W. Powers) who opposed the formation of the Republican Party in the territory, maintaining that the church was deceiving the rest of the nation, and that their own Liberal Party, which no Mormon could be seen to support, was the only sure means of eliminating the theocracy that was Utah. Writing 15 years after the Manifesto was issued, Baskin charged the "priesthood" with virtual monopolies of most profitable businesses in Utah, and complete control of the state government.°

These dissenting voices, and the fact that polygamy by no means ceased after 1890, were drowned in the tide of general relief that swept the territory. As the History of the Bench and Bar of Utah reported with no little pride, "the fields of brilliant achievement in the arenas offered by courts of law" lured men of talent and ambition to the territorial bar, and thereafter to the government of the state of Utah. Mormon leaders learned that their effectiveness did not cease with their acceptance of the law of marriage of the rest of the nation.

° Reminiscences of Early Utah, 208.
Nor, as Baskin was all too ready to point out, did Mormon control of the economy and polity of Utah experience a drastic decline. Instead, the church essentially replicated after 1890 the position it had taken before 1852 -- denying polygamy in public while continuing its practice in private." This is not to say, however, that polygamy remained the required form of marriage for all church leaders. As monogamists like Richards, Rawlins and Thurman rose up the political ladder, they and their contemporaries made peace with the members of the other side of the bar, and polygamy slowly was marginalized in Utah, as it had once been in the nation as a whole. The practice did gradually become less and less common, and the church stopped sanctioning such marriages altogether (even those celebrated in Mexico) in 1904 after Reed Smoot, elected by the Utah legislature to the United States Senate, came close to losing his seat because polygamy was so thinly veiled in Utah. Today, "fundamentalist" Mormons, who cling to practices formally (if not immediately) abandoned by the mother church a century ago, are excommunicated, shunned, and profoundly mistrusted.

It could be argued, therefore, that despite the Raid, nothing much changed for the better in the lives of the Mormon women the campaign was ostensibly designed to benefit. Indeed, plural wives were first criminalized by the Raid, and then forgotten altogether in the era of good feelings ushered in after 1890. Nor were the lives of non-Mormon women in Utah materially improved. The experiment in woman suffrage and the Industrial Christian Home failed in their objectives. Nobody ever bothered to ask the

57 For an explanation of the tactics behind the Manifesto and its eventual effect on support for polygamy among church leaders, see Hardy, *Solemn Covenant*, 127-166.
anti-polygamy women of Utah what they thought of the result of their efforts. If they had been asked, they might well have sounded like Angie Newman in her letter of protest to Grover Cleveland in 1886, distraught that what they hard worked so hard to achieve was removed from their control at the last minute.

The subtext of the failure of anti-polygamy women to make a long-lasting impression on the lives of women in Utah, of course, was the essential lack of interest of most eastern anti-polygamists in the lives of women in Utah (analogous to the lack of interest in the lives of former slaves, once the peculiar institution itself had been abolished). Anti-polygamy was in this sense narcissistic -- it was aimed at Utah, but was not driven by any genuine interest in Utah.

In hindsight, then, it is evident that the government’s dedication to eradicating a marital structure that was widely believed to involve the systematic and pervasive devaluation of women did not remedy less overt forms of devaluation. In some senses, the anti-polygamy campaign was a handy means of addressing a ubiquitous and polymorphous inequality in a sharply limited fashion. In other words, as several Mormon apologists for polygamy and some non-Mormon free love advocates pointed out at the time, if anti-polygamists were genuinely interested in controlling male power, or protecting the sanctity of the home, or even protecting women from physical abuse at the hands of their husbands, there was plenty of work to be done in the East.38

38 Bitton, "Polygamy Defended," 35-36. A very few non-Mormons also attacked anti-polygamists as hypocrites. Most notable is Gertrude Kelly, an advocate of free love, who charged that polygamy was the moral equivalent of monogamy (and that therefore both were equally contemptible): "If the degradation of woman were the subject that fired the enthusiasm of the crusaders against Mormonism, there would be no need to go
Instead of triggering a vigorous examination of the politics of marriage as they were experienced by husbands and wives in the East, however, polygamous Utah became a trope for abuses in marriage generally, obscuring the perception of the gravity of abuse in monogamous marriage, or in the social status of women. 99 Nowhere was the formal structure of marriage, the technical ingredients necessary to the formation of a permanent relation of authority and subordination, more highly theorized than in the Supreme Court -- the constitutional place of last resort, key player in the legal history of anti-polygamy. The justices' polygamy jurisprudence both shored up the politics of anti-polygamy, and diffused its potential for a through-going critique of marriage. In a decade-long string of polygamy cases, the Court translated the federal law of marriage into a jurisprudential mandate, the ultimate vindication of the "majesty of the law" congressmen were so fond of invoking in their anti-polygamy speeches. None of the justices was more successful at appropriating and making the ethic of anti-polygamy (or at least substantial portions of it) peculiarly his own, than the quixotic Stephen Field. It is to the Court that we now turn, as the Mormons did, for the final word on the source of authority over marriage.

99 David Brion Davis makes this point in connection with anti-slavery; that the condemnation of an evil abroad also serves to obscure a similar evil at home. The Problem of Slavery in Western Culture (New York, 1966), 335-37.
PART IV: "CRIMES BY THE LAWS OF ALL CIVILIZED AND CHRISTIAN COUNTRIES": ANTI-POLYGAMY, FREE EXERCISE AND SOVEREIGNTY IN SUPREME COURT JURISPRUDENCE

Introduction

1. The "Fetters [of] Stationary Despotism": Chief Justice Waite, the Protection of Women, and the Religion Clauses
   (a) The Reynolds Case and Constitutional Litigation in the Waite Court
   (b) Historiography, Legal Theory and the Constitutional Authority of the Supreme Court

2. "The Sure Foundation of All that is Stable and Noble in our Civilization": Justice Matthews, Territorial Sovereignty, and the Politics of Marriage
   (a) The Political Reconstruction of Utah in Supreme Court Doctrine
   (b) The "Mormon Question" in England: The Challenge of English Marriage Law to American Courts and Commentators

3. "To the Detriment of the True Interests of Civil Society": Competition, Property, and the Second American Disestablishment
   (a) Anti-Polygamy and Corporate Law in the Age of Monopoly Capitalism
   (b) Theories of Church, State and Property in the Anti-Polygamy Context
   (c) Justice Bradley, Marriage, and Civilization
Labelling bigamy and polygamy "crimes by the laws of all civilized and Christian countries," Justice Stephen Field summarized neatly the legal status of polygamy, the course of its treatment by the Court, and the relationship of polygamy jurisprudence to the broader legal restructuring of the federal law of marriage. The Court upheld virtually every major congressional action against polygamy,¹ in a series of some dozen cases that spanned eleven years, and that constitute the first Supreme Court pronouncements on the law of the family and the relation of religion to the state.

Writing for a unanimous Supreme Court in Davis v. Beason in 1890, Field sustained test oaths in Idaho Territory that restricted the franchise to those who could swear they did not adhere to any group that advocated plural marriage. He expressed the outrage of the justices as a group when confronted with recalcitrant Mormon polygamists. The depth of Field's contempt for polygamy was evident: "Few crimes are more pernicious to the best interests of society and receive more general or more deserved punishment."²

Justice Field, a peppery and often bitter old man in 1890, is better known to posterity as a reactionary defender of the property rights of big business, the father of the

¹ Compare the uniform approval of congressional action, with the relatively unsuccessful record of the territorial courts when attempting innovations in legal procedure on review in the Supreme Court. In addition to Clinton v. Englebrecht, discussed in chap. 1 below, cases invalidating convictions for polygamy-related offenses include, Miles v. United States, 103 U.S. 304 (1880)(overturning conviction based on compelled testimony of plural wife); Ex parte Snow, 120 U.S. 274 (1887)(crime of cohabitation is a continuous offense and may not be segregated into multiple counts); Ex parte Nielsen, 131 U.S. 176 (1889)(overturning separate convictions for adultery and unlawful cohabitation with same woman); Bassett v. United States, 137 U.S. 496 (1890)(overturning conviction based on voluntary testimony of first wife).

² 133 U.S. 333, 341 (1890).
law of substantive due process, than as defender of monogamy. Field’s tenure on the Court was extraordinarily long and prolific — he wrote some 640 opinions in 36 years, two of them in polygamy cases. His jurisprudence is notable both for its acerbic tone, and for its self-confidence. By 1890 when he wrote the opinion in Davis v. Beason, Field was at the zenith of his powers, influential among his brethren, and a powerful advocate for his doctrinal innovations. Field was not a reticent man; his tendency to make sweeping assumptions about the merits of any given problem was never more telling than in Davis. Field’s opinion reveals much about the institutional agenda of the Court and the morality of the family that the Court envisioned and articulated, in large measure through the polygamy cases. More than any other Justice, Field is credited with guiding, even controlling, the jurisprudence of the Court in the late nineteenth century.

For most legal historians in the twentieth century, the Supreme Court from about 1850 onward was an institution that sold out. First there were the cases, decided in the 1850s, that consistently upheld the rights of slaveholders against those of slaves, and even of those residents and officials of free states who wished to help fugitive slaves avoid

---


4 McCloskey, "Stephen J. Field," 1089. Field’s polygamy opinions include a short partial dissent from the result in Reynolds on evidentiary grounds, and the majority opinion in Davis v. Beason. Field also concurred in Chief Justice Fuller’s dissent in Late Corporation of the Church of Latter-day Saints v. United States, 136 U.S. 1, 66 (1890) (Fuller, C.J., dissenting).
recapture. Reaching its highest expression in the infamous Dred Scott case, the Court's proslavery stance prior to the Civil War has earned it the opprobrium of virtually every student of the period.⁵ Nor did the Court fare much better at the time. Many contemporaries actually blamed the onset of the Civil War on the decision.⁶ And, while historians are agreed that it did not precipitate the war, they also agree that the Dred Scott decision did drastically undermine the prestige (even the power) of the Court for an entire

---


⁶ See the newspaper and other sources quoted in Warren, Supreme Court, 3:37-40.
generation. As this study shows, however, many legislators in the 1870s and 1880s regarded the opinion as good law.

Nor, until recently, has the postwar Court been viewed as any great improvement over what came before. Traditionally described as a shill for big business, the Supreme Court in the late nineteenth century has, at least since Progressive historians began to criticize them in the early twentieth century, been portrayed as reactionary, mercenary, even

7 "[T]he really serious effect of this fatal decision by the Court was that which was foretold by a writer in the North American Review, as early as October, 1857: 'The country will feel the consequences of the decision more deeply and more permanently, in the loss of confidence in the sound judicial integrity and strictly legal character of their tribunals, than in anything beside; and this, perhaps, may well be accounted the greatest political calamity which this country, under our forms of government, could sustain.'" Timothy Farrar, "The Dred Scott Case," North American Review 85 (1857). Quoted in Warren, Supreme Court 3:38. See also Maxwell Bloomfield, "The Supreme Court in American Popular Culture," Journal of American Culture, 4 (1982), 3: "[J]udicial credibility sank to an all-time low with the announcement of the Dred Scott decision in 1857." William Nelson argues that the derision extended beyond the federal courts, prompting the judiciary in general to act with "extreme caution." Harper's Weekly, April 16, 1870. Quoted in Nelson, "Impact of the Antislavery Movement," 549.

There is some disagreement about the extent (and even the existence) of the loss of judicial prestige in the Civil War era. See Stanley I. Kutler, The Judicial Power and Reconstruction Politics (Chicago, 1968).

8 The term "good law," as used here, does not necessarily imply any particularly admirable moral quality, but means that the holding still governs the outcome of the same or analytically similar situations until formally or informally rejected. Nonetheless, it is also true that if a given holding was universally denigrated as contrary to fundamental moral principles, it could not be called "good law."
cowardly. Certainly most Mormons at the time, and most legal historians of Mormonism since, have echoed those sentiments.

In the last decade or so, the historiographic tide has turned; revisionist legal historians have reassessed in some measure the content of late nineteenth-century jurisprudence. There was in fact a moral value (or a spectrum of moral values) that underlay the Supreme Court's apparent rigidity and class bias. However unsuccessful the justices may have been at achieving their goal in the long run, the bench and bar believed deeply in the proposition that government should neither be in the business of handing out favors to any one group (including corporations) nor of interfering in private arrangements that were not themselves based on the fruits of government intervention.

---


10 For example, Henry Reed, *Bigamy and Polygamy: Review of Reynolds v. U.S.* (New York, 1879), 20, argued that the opinion was an example of "popular passion and sentimental fanaticism." Edwin Firmage and Richard Mangrum maintain that the decision was misguided, and shortsighted. *Zion in the Courts*, 153-56.

They also believed that lawyers and judges were especially qualified to police the boundaries between public and private activity.\textsuperscript{12}

The jurisprudential harvest of the polygamy cases lends support to a claim that there was an additional element (thus far unexplored in the historiography, but there in the Supreme Court reports) in late nineteenth-century moral philosophy of law. The Court, and most of the bar, was committed to an ideology of marriage that presumed a fundamental division of labor (and of power) between men and women. At the Court, as in the country, this ideology of marriage was conditioned by the broader precepts of anti-polygamy politics.

Field’s opinion in \textit{Davis v. Beason}, for example, stressed the degradation of women, and the debasement of men in polygamy, in much the same way that abolitionists charged that slaves were degraded and their owners debased.\textsuperscript{13} If the Court had suffered in prestige and influence by its interpretation of the Constitution as a proslavery document before the war; it would not make the same mistake twice. The polygamy cases were an opportunity to develop a national legal morality of marriage, based on the proper treatment of women, the slaves in the anti-polygamy equation. But just as anti-slavery did not necessarily imply egalitarianism, so anti-polygamy did not imply an abandonment

\begin{itemize}
\item \textsuperscript{12} Horwitz, \textit{The Transformation}, 1870-1960, 9-33.
\item \textsuperscript{13} "[Bigamy and polygamy] tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman and to debase man.... To extend exemption from punishment for such crimes would be to shock the moral judgment of the community." 133 U.S. at 341.
\end{itemize}
of patriarchy. Justice Bradley, for example, could be both profoundly anti-polygamist, and profoundly sexist.

There was more to the question than the perceived sexual enslavement of women. The Mormons defended their peculiar domestic institution as a religious principle -- one that could not be outlawed without violating their right to freedom of religion. Once again, higher law arguments, this time raised in the interests of moral difference, challenged the authority of the national government. In the polygamy cases, the Court developed a free exercise jurisprudence that stifled the antinomian potential of higher law. As the title of this Part suggests, the relationship between church and state in the late nineteenth century was still very much a mixed bag. Justice Field’s outrage at polygamy was at least in part based on his conviction that plural marriage violated the precepts of Christianity, and that Christianity was in some way related to the American legal system. Squaring this conviction with disestablishment and free exercise required jurisprudential contortions that make for interesting reading.

The Court also had to confront the unanswerable old question of how much liberty is enough, and when and where government may draw lines that exclude certain kinds of admittedly voluntary behavior. The Mormons cried loud and long that they were on the right side of the legal equation, familiar from the thought of Locke, Mill, Spencer and their American counterparts, that any behavior was legally permissible, provided it did not infringe the rights of others. This claim presumed, of course, either that the rights of women were not infringed by polygamy because they had consented to the relationship,
or that there was no such thing as a right to a monogamous marriage. The Mormons made both arguments, sometimes separately, sometimes together, but always to no avail.

To overcome this hurdle, the Justices repeatedly invoked strong and direct connections between two areas of life that we think of as separate and distinct in the thought of the late nineteenth century; that is, the state and marriage. Put another way, the Court, in the polygamy cases at least, consistently crossed the vaunted divide between public and private spheres. In doing so, the Court drew new bright lines -- for example, between "belief," which is beyond the scope of governmental supervision, and "action," which has no special claim to protection. The Court also adopted the slogans of the anti-polygamy campaign, sometimes virtually without alteration. The polygamy opinions, for example, stressed the divide between "civilization and Christianity" on the one hand, which were intimately connected to manly Europe and America and monogamous marriage, and "barbarism" on the other, evoking images of "effeminate" Asian countries and the slavery (sexual and otherwise) that flourished in such societies.

The federal government, and its judicial branch, were, it is plain, embarrassed by the presence of an upstart bunch of polygamists in their midst. Americans had long bragged that while England and Europe could at best claim religious toleration, true religious liberty was available only in the United States. But with the advent of Mormon polygamy, the worm had turned; religious liberty seemed to produce not enlightenment and advancement but backwardness and licentiousness. Add into the equation the fact that the Mormons had secreted themselves firmly in the inaccessible (and often ungovernable) West, and polygamy assumed an even greater potential for annoyance. The polygamy
cases, in dealing with the thorny issues of religion and marriage, inevitably also contributed significantly to the law of federal-territorial relations. By putting its institutional foot firmly on the neck of the Mormon priesthood, the Court could claim victory in the battle to convince itself -- if not the rest of the world -- of America's membership in the select community of "civilized" nations.

The polygamy cases thus served an array of institutional and jurisprudential interests for the Court, some of which were complementary to those of Congress and social reformers; others were primarily of internal significance. Along the way, the personalities and political predilections of the Justices and the Supreme Court bar provided the context that anchors a story otherwise predominately jurisprudential. The following chapters are thus an essay on the peculiar legal culture of the Court in the post-war era, as well as an exploration of the contours of anti-polygamy legal thought.

The analysis that follows is based on a sampling (of the most important, if not necessarily the best written or argued) of the dozen or so polygamy cases that were decided by the Court between 1879 and 1890. Three major opinions, Reynolds v. United States, Murphy v. Ramsey, and Late Corporation of the Church of Latter-day Saints v. United States exemplify the constitutional law of marriage and church-state relations that grew out of the polygamy cases, and provide a window into the interstices of constitutional jurisprudence in the late nineteenth century.¹⁴

¹⁴ Justice Field's Davis v. Beason, eminently quotable, and also notable for the fact that Field had some two decades earlier led the judicial charge against test oaths for citizens (even leaders) of the Confederacy, is not included in the cases analyzed at length here. For one thing, the statute upheld in Davis v. Beason was local rather than national. Idaho Territory, bordering on Utah and the object of concerted Mormon expansion in the
1. The "Fetters of Stationary Despotism": Chief Justice Waite, the Protection of Women, and the Religion Clauses

Decided in 1879, Reynolds v. United States is the foundation of the federal jurisprudence of the religion clauses. Unlike most late nineteenth-century caselaw involving a basic question of civil rights, Reynolds is still good law. It was the Court, rather than the litigants, that first invoked the free exercise clause, only to reject its applicability to the question of Mormon plural marriage. Over more than a decade of litigation challenging virtually every piece of anti-polygamy legislation, the Mormons (and their lawyers, among whom were prominent members of the Supreme Court bar) had based their claims primarily on jurisdictional, rather than free exercise, arguments.

This divergence between the arguments of Mormon litigants, and the opinions that issued from the Supreme Court, does not mean that the Mormons got bad lawyering. Instead, the Mormons, and their legal counsel, relied upon a vision of constitutional adjudication that was gradually and unevenly losing ground. Beginning in the 1870s, the Supreme Court moved away from its pre-Civil War deference to regional difference, based on a concept of a central government of minimal powers, even in the territories. Diversity by region, after all, had been the rallying cry of the "slave power." And the tenuous line of compromise drawn between regions had collapsed under the pressure of 1870s and 1880s, was virulently anti-Mormon. Inspired by Congress's disfranchisement of polygamists in the Edmunds Law of 1882, the Idaho legislature in 1885 adopted a statute disfranchising all those who belonged to any organization that advocated polygamy. Field's opinion upholding the statute cleared the way for the admission of Idaho as a state with an explicitly anti-Mormon constitution. See generally, Merle W. Wells, Anti-Mormonism in Idaho, 1872-92 (Provo, Ut., 1978).

1 98 U.S. 145 (1879).
geographic expansion. The conflict that followed not only was the bloodiest war in history; it changed fundamentally the relative power of the central government. It also cemented the conviction of reformers (and those influenced by reformers) that moral diversity was the equivalent of moral decay -- that those who refused to acquiesce in the moral judgments of civilization threatened the peace and prosperity of all.

Traditionally, the Supreme Court has been viewed as a reactionary force, slowing, diverting the forces that pushed for change. The years of Morrison Remick Waite's Chief Justiceship (1874-1888) have not generally been renowned for their championship of civil liberties. Indeed, the Waite Court, and particularly Chief Justice "Mott" Waite, have long been regarded as reactionaries who hobbled Reconstruction, denied important civil rights to African Americans and women, and pandered to big business.

The Court, and the Chief Justice, have been partially rehabilitated in recent decades by a wave of scholarship that has effectively distanced the Waite years from the perceived nadir of the Lochner decision. It is fair to say that, in a minor way, Morrison

---


5 First among the rehabilitators was Peter Magrath, whose biography of Waite, while acknowledging Waite's obscurity and even the ordinariness of his mind, painted the Chief Justice as an honorable and effective leader in turbulent times. C. Peter Magrath, *Morrison R. Waite: The Triumph of Character* (New York, 1963). Harry Scheiber's "The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts," *Perspectives in American History* 5 (1971), 329, argues that Waite's opinion, traditionally derided as an anomaly that died a long-overdue death in the New Deal, was
Waite has enjoyed something of a renaissance. Encomiums to his ability to achieve consensus, his straightforwardness, his calm and even retiring style of leadership, have replaced the vituperation of his colleagues on the Court (Justice Miller, for example, called him a "sow's ear") and in the press (the Nation called Waite a "second-rate lawyer").

When Waite was appointed, according to his biographer, both the Court and the country were still conscious of the Supreme Court's precipitous loss of prestige after the Dred Scott case. The spectre of Roger Brooke Taney, defiantly prowling the streets of a capital at war with his native South, hung heavy over the Court's institutional image. Waite, according to recent scholarship, helped eliminate the lingering odor of disaster. He quietly and calmly steered his colleagues to an impressively accurate jurisprudential

in fact grounded in the legal thought of the day, and was a logical and reasonable, if awkwardly phrased and inelegantly argued, application of recognized principles. And Michael Les Benedict defended the Waite Court's record in an article describing the "dual federalism" of the nineteenth century, and arguing that from the twentieth century's "national sovereignty" perspective, the Waite Court's decisions have been unfairly criticized. Michael Les Benedict, "Preserving Federalism: Reconstruction and the Waite Court," Supreme Court Review 1978, 39. See also Charles W. McCurdy, "Justice Field and the Jurisprudence of Government-Business Relations," 1001. On Lochner, see note 79, below.

6 According to one recent article, "[Waite] proved to be an excellent manager and harmonizing leader. In few eras has the High Court been as immune from political and personal attack as it was for 1874 through 1888." Morris, "Morrison Waite," 45. "Mr. Waite stands in the front rank of second-rank lawyers." The Nation, 22 January 1874, quoted in D. Grier Stephenson, "The Chief Justice as Leader: The Case of Morrison Remick Waite," William & Mary Law Review, 14 (Summer, 1987): 899-927, 904.

7 Magrath, Morrison R. Waite, 4-5.
replica of moderate Republican policies that dominated anti-polygamy politics in Congress. He ran an orderly and congenial court.

Waite also ran an extraordinarily busy court. The federal courts experienced a litigation explosion in the 1870s. A combination of factors produced a broadbased increase in all types of federal litigation. The Fourteenth Amendment is only the most obvious of these factors, but perhaps also the most productive of a fundamental shift in the perception of the role of the federal courts in policing the relationship between government and individual citizens and businesses. By the late 1870s, the Supreme Court had reined in the Fourteenth Amendment's applicability to the daily lives of both women and African Americans. But the evolution of the constitutional doctrine of substantive due process was still a decade away.

(a) The Reynolds Case and Constitutional Litigation in the Waite Court

The Supreme Court, therefore, was at something of a jurisprudential turning point in 1879 when Reynolds v. United States was decided. One category of radically transformative rights had recently been rejected, and the development of an alternative (and eventually radically conservative) body of rights, lay in the future. Reynolds lies

---


9 Morris, "Morrison Waite," 43. Also included in the factors that spurred the growth in the workload of the federal courts was the Removal Act of 1875, and increased economic activity across the nation.

10 Bradwell v. Illinois, and the Slaughter-house Cases, decided on the same day, decimated the content of the privileges and immunities clause, 16 Wall. 36, 130 (1872).
on this fault line. It is the first case to construe a provision of the Bill of Rights,11 and it did so in a way that rejected outright the invocation of the Constitution to protect a marital system that was perceived by the majority of the nation as a sexual analogue to slavery. Yet at the same time the very fact that the Court decided the case on First Amendment grounds indicates not only that Waite and his brethren were attempting to cure the wounds left by Dred Scott, but that they were beginning to think of the amendments to the Constitution as entailing potential controls on government behavior. Reynolds was innovative as well as retrospective.

The tale of Reynolds v. United States, therefore is at one level a story of substitutes: Mormon women played the part of slaves, while Mormon men were punished as surrogate slaveholders in a country that was busy plastering over the holes left by the imperfect emancipation of African slaves; the Supreme Court of 1879 substituted its own version of the constitutionality of slavery for the Taney Court's infamous opinion. Yet by virtue of the facts that Mormon polygamy and African slavery were not synonymous, and that the leading parts in the drama were played by individuals who had their own unique constellations of interests and ideologies at stake in the litigation, Reynolds inevitably has taken on a life of its own. Almost unnoticed, the Court stepped onto the primrose path that has led it in the twentieth century into an arguably unsalvageable

---

11 In Barron v. Mayor and City of Baltimore, 7 Pet. 243 (1833), Chief Justice Marshall held that the Bill of Rights did not apply to disputes between individuals and states, thus effectively shutting down litigation on questions involving the first nine amendments to the constitution until after the Civil War. See also Permoli v. Municipality No. 1 of New Orleans, 44 U.S. (3 How.) 589 (1845) (applying holding of Barron to religion clauses of the first amendment).
morass of constitutional jurisprudence. For in Reynolds the Supreme Court undertook to define religion.\textsuperscript{12} Although its history has moldered in relative obscurity for fourscore and twenty years, the holding of Reynolds has become the cornerstone of the federal jurisprudence of the religion clauses, frequently cited in free exercise cases for the proposition that religious belief will not excuse criminal behavior. Reynolds is also something of a jurisprudential embarrassment, however. Its analysis is considered ham-fisted; legal historians have rarely studied Reynolds, despite its foundational stature. At the time, the opinion was broadly popular.\textsuperscript{13}

The vast majority of Americans, who profoundly opposed polygamous Utah, were unaware that there was any downside to punishment of polygamists (and it is by no means clear that they would have altered their views if the precedent set by legal intervention in family structure in Utah were obvious at the time, so committed were they to the eradication of polygamy). The clear winners were Congress and the Court, for both capitalized on (and participated in) that national mood in favor of centralization of moral and legal authority; and they reaped distinct institutional rewards for their efforts. Congress, as we have seen, used the anti-polygamy campaign (among other things) as a


\textsuperscript{13} Apart from Mormons, reviews of the opinion were (with one or two obscure exceptions) all favorable. Henry Blackwell, for example, writing in the Woman's Journal, 21 June 1879, noted with evident satisfaction that the decision was a step toward completion of the Republican mission to eradicate the twin relic of barbarism.
handy means of distancing its own problems with Reconstruction in the South, at the same time increasing its power in the territories. The Court made it clear in the polygamy cases that moral deviance no longer had sanctuary in the court of last resort, and simultaneously crafting an entirely new area of jurisprudence, a federal law of religion, and of marriage.

But the Supreme Court was almost the last piece of the anti-polygamy puzzle to fall into place. By 1878, women, the clergy, the Congress and a succession of Presidents were already avowedly (if ineffectively) anti-polygamist. The Court had not yet had the opportunity to tip its hand, and it was to the Justices that the increasingly beleaguered Mormons turned as other national -- and local -- forces lined up against them.

The Mormon leadership claimed to be hopeful, even confident, that the Supreme Court would vindicate its right to engage in their peculiar marital practices. In the mid-1870s, as the national government struggled to articulate a coherent anti-polygamy strategy, the growing hostility of territorial officials convinced the Mormon leadership that this was a proptitious moment to test the constitutionality of federal anti-polygamy legislation. The Morrill Act of 1862 had never been tested, partly because local courts refused to indict their leaders, and partly because territorial officials had little hope of securing a conviction even if they could procure an indictment -- Mormon petit juries were just as loyal as their grand counterparts. The procedural reforms contained in the Poland Act of 1874 (which provided for federal jurisdiction over Morrill Act cases, and federal control over half of all jurors selected to try cases in the territorial courts), provided a brief window of opportunity for territorial prosecutors to make their mark.
The atmosphere in Utah heated up quickly. Territorial officials arrested Mormon leader George Q. Cannon, already Utah's territorial delegate to Congress, and widely regarded as the most important man to beat, late in 1874. The next day, Cannon selected his protege, George Reynolds, as his substitute in a case designed to present the question to the Supreme Court.

On the evening of October 21, 1874, as Reynolds and his new plural wife Amelia Jane (Schofield) Reynolds were strolling along the south side of Temple Square, Cannon met them, and informed Reynolds "that it had been decided among the brethren of the Presidents council to bring a test case of the law of 1862 (Anti-polygamy Act) before the court and that it had been decided to present my name before the grand jury." The next morning, Reynolds reported, he visited Cannon, and gave the names of "those who I thought could answer as witnesses in the case." Cannon must have passed on the information to federal authorities, for Reynolds was indicted a few days later. Reynolds, who had been warned to be in court bright and early Monday morning, was released on $2,500 bail.

---

14 Diary of George Reynolds, vol. 5, October, 1874. LDS Church Archives, Salt Lake. (hereinafter, Reynolds Diary). This strategy -- the decision to submit to trial the constitutionality of the Morrill Act -- may well have been part of the Mormons' constant search for new means of achieving statehood. By the mid-1870s, polygamy was undeniably the stumbling-block to statehood, and the gamble (that is, the decision to risk putting the question to the federal judiciary) might pay off, removing the obnoxious law, and clearing the path for protection of polygamy through statehood. Biographical information on Reynolds is found in Latter-day Saints Biographical Encyclopedia, 1:206-10; Tullidge, Part II (biographical) History of Salt Lake City, 145-48, and Van Orden, Prisoner for Conscience' Sake.

15 Reynolds Diary, vol. 5, October 1874.
So began Reynolds's odyssey in the federal courts. A mild and obedient member of what might be called Mormon middle-management, George Reynolds was an English immigrant whose fortunes, like those of so many other Mormon converts, had risen steadily after his arrival in Utah at the age of twenty-three in 1865.¹⁴ His ready compliance with Cannon's directive was typical of his unquestioning obedience to superiors. Yet it is clear that Reynolds also had little notion of precisely what had been asked of him that evening on Temple Square. He became the center of a veritable storm of activity, and the object of the Supreme Court's first major opinion construing the religion clauses. Most of this activity, all of the law, he understood only dimly.

By the time of his trial in the spring of 1875, whatever agreement (if any) had existed between territorial officials and Mormon leaders had long since evaporated. Relations were tense, as Mormon witnesses refused to cooperate. Only the surprise subpoena of Reynolds's second wife, Amelia Jane Schofield, who naively testified that she had become his second wife less than a year earlier, produced a conviction. On appeal, the conviction was overturned on technical grounds. At the retrial (the very attempt to prosecute for a second time was decried in the Mormon press as a cruel violation of the original test case agreement), Schofield was nowhere to be found; her testimony was read into the record, and Reynolds was convicted for a second time. This time the conviction held up on review in the territorial Supreme Court, and only appeal

¹⁴ Reynolds's penmanship was good and he had a flair for didactic writing. For most of his life he was a private secretary to a succession of Mormon church presidents, and wrote devotional literature, often directed at young men, in his spare time.
to the United States Supreme Court stood between Reynolds and the "pent." As
Reynolds recorded it in his diary, Cannon was sure, he said, that the conviction "will be
overturned in any event." In November 1878, the Supreme Court heard arguments in
Reynolds v. United States.

There was good reason for Cannon's optimism. Two prior Supreme Court
decisions seemed to augur well. Most recent, the Engelbrecht case of 1872, had brought
joy to the hearts of Mormons and confounded their enemies. To make a long story short,
that case involved assessment of treble damages against a group of Mormons who had
destroyed the liquor supply of a non-Mormon merchant they claimed had violated a local
anti-saloon keeping ordinance. Judge McKean was the trial judge in the case brought by
the owners of the liquor against the Mormons. When impanelling the jury to hear the
case, McKean ignored local territorial law, passed by the Mormon-controlled legislature
in 1859. Instead of drawing the jury from a list drawn up by the local probate court
(Mormon-controlled, of course), McKean and the federal marshall virtually hand picked
a panel of non-Mormons and apostate Mormons.

In Engelbrecht v. Clinton, the Supreme Court reversed the territorial court,
holding that territorial courts, despite being staffed by officials appointed by the federal
executive and confirmed by the Senate, are not federal district courts. Instead, they are
governed by local law, unless Congress has legislated specifically in the area. 19

17 Van Orden, Prisoner for Conscience' Sake, 58-73.

18 "Extract from a letter of brother Geo Q. Cannon to Pres J. Taylor dated

19 80 U.S.(13 Wall.) 434 (1872).
According to one Mormon observer of the reaction in Utah to the decision by the high court, "joy...filled the hearts of the citizens of Utah generally," while "deep chagrin and disappointment" bedeviled the heart of Judge McKean and his "scheming ring ...over the disastrous failure of their unfair and iniquitous efforts to ... persecute and enslave" the Mormons. The Supreme Court, Mormons hymned after Engelbrecht, would not abandon them to their foes.

The second case also involved local (as opposed to federal) control of the contours of society in the territories. But this case was much older, and had a far more electric effect on the nation as a whole when it was decided. It was none other than the infamous Dred Scott. In his opinion for the majority, Chief Justice Roger Brooke Taney in 1857 held not only that African-Americans were not citizens of the United States, but also that the Constitution prohibited the federal government from interfering in the local affairs of a territory any more than it could in the domestic concerns of the individual states. It was, of course, the expansion of slavery into the territories that Taney declared was unreachable by the national government. And it was the combination of the growth of the geographic mass of the nation, coupled with the growth, both geographic and numerical, of the peculiar domestic institution, that ignited the irrespressible conflict between North and South, and was only resolved by the bloodiest war the world had ever seen.

---


The citizenship of African-Americans was made indisputable by the Fourteenth Amendment (although the meaning of citizenship remained a subject of debate). But the applicability of the amendment to disputes that did not directly involve African-Americans who had been enslaved, was severely undermined by the *Slaughterhouse Cases* and *Bradwell v. Illinois*, both of which were decided in 1872. If the right to work in a chosen field was not an element of federal citizenship (the holding of both the *Slaughterhouse* and *Bradwell* opinions), then, one might argue, marriage was not subject to federal oversight either.

Furthermore, the law of federal-territorial relations in 1878 (when the *Reynolds* case finally reached the Supreme Court) was still, for all intents and purposes, what Justice Taney had declared it to be in *Dred Scott*. Lawyers for the Mormons were well aware of the potential usefulness of the decision. George Bates, one-time United States attorney under Judge McKeen, and partner in Sutherland and Bates, the firm that defended George Reynolds in his first trial for polygamy, wrote a critique of McKeen’s professional conduct shortly after McKeen had been dismissed in 1875.² Not only was McKeen "jesuitical" and "despotic," according to Bates, he had also violated the law "as expounded by the Supreme Court of the United States."

The law Bates relied upon was that of the *Dred Scott* case, from which he quoted extensively. Elaborating on the proper relationship of the federal government to the

---
² The review, without a reference to where it was first published, is reprinted in Whitney’s *History of Utah*, 2 :547-49. Although no date is given for the original publication, the text refers to a statute enacted in 1852 as "over twenty-two years" ago, and also refers to McKeen's "downfall," placing the review as written sometime in 1875.
territories, Chief Justice Taney in his opinion for the Court had said: "For example, no
one, we presume, will contend that Congress can make any law for a Territory,
respecting the establishment of religion or the free exercise thereof, or abridging the
freedom of speech or of the press, or the right of the people of the Territory peaceably
to assemble, and to petition the government for a redress of grievances." 20

The implication of this statement for Mormon Utah, which Bates was at pains to
point out, was that the federal government had no more power to regulate religious
behavior in the territories than it did in the states. Because Congress, according to the
First Amendment, had no power to interfere with established religions in the states, it was
equally powerless to regulate Mormonism in Utah Territory, in this view. Given
Engelbrecht and Scott, Mormons were publicly optimistic that they would get a warmer
reception in Washington than they had in the courtrooms of territorial judges.

Notwithstanding their public statements, however, privately Mormon officials were
far from sanguine. As the correspondence of George Cannon reveals, he was convinced
that the government would attempt to accelerate the case in an effort to "create excitement
and agitate the public mind." He determined that "we should have strong counsell
[sic]." 21 Cannon asked someone he referred to as "our Friend" for a recommendation
of "first class and at the same time moderate [sic] priced lawyer." 22 Almost certainly

(emphasis added by Bates)


this friend was Philadelphian Thomas L. Kane, long-time ally of the Mormons, negotiator of the truce in the Mormon War.\footnote{Thomas Kane, who often appears like a ray of sunshine in otherwise dismal Mormon relations with Gentiles, remains an obscure figure. His eclectic taste in friends apparently did not affect his relations with more orthodox Philadelphians. Albert L. Zobell, Jr., Sentinel in the East: A Biography of Thomas L. Kane (Salt Lake: Nicholas G. Morgan, Sr., 1965), a biography published at the dedication of a statue of Kane in the state capitol in Salt Lake in 1959, describes Kane's long and friendly relationship with the Mormons, but does not deal with his life outside his contacts with Mormonism. A brief sketch of Kane's life is found in the Dictionary of American Biography, 10: 258-59.} Kane recommended George Washington Biddle, dean of the Philadelphia bar, and member of the wealthy and aristocratic Philadelphia Biddles.

Thus began the Mormon practice of hiring distinguished members of the bar (although, like George Biddle, usually not the most highly regarded -- and expensive -- advocates) to litigate their cause in the Supreme Court. Democrats to a man in a broadly Republican era, the lawyers hired by the Mormons to defend them against an irate nation tended to be senior statesmen, whose training was traditional (reading in a lawyer's office, rather than attending a formal law school), and whose legal memories extended back to the days before the Civil War, when states' rights and territorial sovereignty arguments had real teeth.

In 1878 Biddle was 60 years old, and at the height of his legal career. Biddle was learned in all the ways that a patrician lawyer was expected to be in the early nineteenth century: he had read and appreciated the classics, he approached his craft and his fellow lawyers with the dignified reserve of an old-fashioned legist. As a member of the Pennsylvania Supreme Court said at a memorial meeting of the Philadelphia Bar held
in Biddle's honor in 1897, "I never knew him to indulge in any appeals to the prejudices or passions of those whom he desired to influence.... If he could not win by [the law as he knew it and understood it], he was content to lose." 27 Biddle lost the Reynolds case. 28

In his brief for the church, only five of 63 pages addressed the constitutionality of the anti-polygamy act. The bulk of the argument was devoted to the procedural claims addressed by the court below. But Biddle's constitutional argument is a classic restatement of the theory of popular sovereignty so dear to Northern Democrats before the Civil War: "[T]here is always an excess of power, when any attempt is made by the Federal Legislature to provide for more than the assertion and preservation of the right of the General Government over a Territory, leaving necessarily the enactment of all laws relating to the social and domestic life of its inhabitants, as well as its internal police, to the people dwelling in the Territory." 29 Before an overwhelmingly Republican Supreme Court, especially a Republican court dealing with questions of federal control over the domestic relations of the territories in one of the first major cases dealing with federal-territorial relations since the Civil War, such an argument, while clearly available as a

27 Honorable M. Russell Thayer, quoted in The Legal Intelligencer, 21 May 1897, 220.

28 Biddle's old-fashioned lawyerly reserve and Democratic leanings characterized his advocacy. The New York Times, 16 November 1878, p. 2, col. 1, reported Biddle's oral argument: "He contended that the Federal Government has no right to interfere with the purely domestic relations of the inhabitants of a State or Territory; that it is not the custodian of the morals of a country, and can no more rightfully proscribe a certain form of marriage than it can instruct parents in their duties and relations to their children."

29 Brief of the Plaintiff in Error, Reynolds v. United States, 55.
matter of doctrine, was not likely to persuade as a matter of politics. Biddle truly was willing to lose if the arguments he chose to make did not appeal to his hearers.

But, as it turned out, this was more than just a losing argument. It was also a dangerous one. For the explicit invocation of popular sovereignty, widely identified with pro-slavery proclivities, ineluctably highlighted the parallels between slavery and polygamy. Biddle's advocacy of popular sovereignty for Utah may have been the red flag that alerted the Supreme Court to the jurisprudential possibilities of Reynolds as a curative for the institutional loss of face experienced by the post-Dred Scott Court.²⁰

Biddle's opponent, Attorney General Charles Devens, could (within the limited variety of upper-middle class white males who staffed the federal government and constituted the Supreme Court bar) hardly have been more different. Devens was born in Worcester, Massachusetts, of solid but hardly distinguished parents.³¹

Devens, it is fair to say, was something of a self-made man. He had none of Biddle's erucition or family connections. His approach to advocacy was also far less formal than Biddle's. Devens made a point of appealing to the emotions of his audience. According to one contemporary, Devens was not only "[o]f commanding presence and fine figure, a notably handsome man at all periods of his life, possessed of a strong and flexible voice," he also "always carried his audience with him. He knew instinctively

³⁰ As one scholar has pointed out "[Chief Justice Waite] had been a Republican since the days when the 'twin relic' first became a party issue.... Within the context of Waite's value system, the attempt to crush polygamy was unquestionably a progressive reform." Magrath, "Chief Justice Waite and the Twin Relic," 525.

³¹ See John Codman Ropes, "Introductory Memoir," in Charles Devens, Orations and Addresses on Various Occasions Civil and Military (Boston, 1891), 2.
how to reach their hearts…. His language, strong though restrained, his evident deep feeling, kept always sufficiently in check, but yet by degrees infusing itself into the minds of his hearers, his ability to seize on the telling points of the topic to which he was addressing himself, and his evident sincerity and patriotic fervor constituted him one of the most brilliant and effective of our public orators." This was no cold logician, willing to accept defeat if he could not prevail by reason alone.  

Devens was also a staunch Republican, who had never forgiven the northern Democrats for their lukewarm support of the Union. In October, 1880, he attacked the Democrats as traitors to their country during a speech in Philadelphia, Biddle's home town.  

Devens, who had revived the dormant practice of the Attorney General personally arguing all important cases for the government in the Supreme Court, did not even mention the Constitution in his brief. At oral argument, however, Devens

---

32 Ropes, "Introductory Memoir," 21-22. Chief Justice Reid of the Supreme Judicial Court of Massachusetts, in his eulogy of his colleague, made it plain that he thought Devens was no great intellect: Devens's mind, according to Reid, was "not originally much inclined to analysis and directness," and "[h]e spoke so easily and so well that there was some danger of sacrificing substance to form...." Obituary, 152 Massachusetts Reports (1891), 608.

33 While he gave credit to the men of the Democratic Party who, during the war, were willing to break the shackles of party, he could not forget that were it not for the Democratic Party of the North, the war would have been crushed within a year. That party, in 1864, had declared the war a failure, and that peace ought to be made at any price, thereby giving courage to the heart and strength to the hand of every man in arms against the United States. He could forgive the money, but he could not forget the lives that that declaration cost. New York Times, 24 October 1880, p. 1, col. 6.

played to his audience as he always did in public speaking. He made mincemeat of Biddle’s advocacy of moral abstention. Where Biddle avoided all mention of the potential human cost of polygamy, Devens dredged up a series of analogies that had played to good effect in Congress and the press for two decades, and that would reappear in only slightly altered form in the Reynolds opinion.

Not only did the federal government have the power to outlaw polygamy, Devens claimed, a parade of horribles would be unleashed by a finding that the Mormon religion excused polygamists from ordinary criminal laws. The territories would soon be the scene of gory religious rituals. Hindu widows would hurl themselves on the funeral pyres of their husbands, East Islanders would expose their newborn babes, Thugs would commit gruesome murders, all in the name of religion. Human sacrifice was only one step away. Devens closed with what the New York Times called a “moving reference” to the Mountain Meadows massacre, thereby implying that Mormons themselves had proven that their marital system so freed them from civilized restraint that the slaughter of innocents was the inevitable consequence.35

Devens was undeniably interested in the human element of this courtroom drama. His argument insinuated that Mormon wives were a downtrodden lot, victims of a deluded religion that had little respect for their human worth. Whether they knew it or not, whether they entered polygamy "voluntarily" or not, Mormon women were sexual slaves in the eyes of the country, and they would be emancipated willy-nilly. Given the sorry state of womanhood in Utah, one might expect Devens to point to Reynolds’s plural

wife as a victim of this pernicious system. According to reports of his oral argument, however, Devens never mentioned Amelia Jane Schofield by name, and never even referred to Mormon women or plural wives.

This silence was not due to a lack of available material, of course. Rather, it was Schofield's reluctance to cooperate with the prosecution that contributed to her anonymity, and that produced the real sticking point at the Supreme Court. According to one historian, Waite and three other Justices originally voted to reverse Reynolds's conviction. They did so on the ground that a proper foundation had not been laid at the second trial for the introduction of Schofield's prior testimony. The strange concurrence by Justice Field, in which he stated that he agreed with all points in the majority opinion except the introduction of Schofield's testimony at the second trial, combined with the hoops Waite jumped through to uphold the introduction of the evidence, seem to support this theory.36

Fortunately for historians, Waite kept a meticulous docket book, in which he recorded conference room votes and assignments of opinions. From his record of the vote taken on November 16, after two full days of argument that were well attended by the press, Waite recorded a narrow vote to affirm Judge Boreman's opinion for the court below.37 Waite himself was among the four Justices who voted to reverse.

36 Magrath, "Chief Justice Waite and the Twin Relic," 523; 98 U.S. (8 Otto) at 168 (Field, J., concurring)("[The evidentiary decision of the court below] should not be disturbed unless the error is manifest.").

37 Justices Miller Swayne, Strong, Hunt, and Harlan voted to affirm, while the Chief Justice, and Justices Clifford, Field, and Bradley voted to reverse. Magrath, "Chief Justice Waite and the 'Twin Relic'," 523.
The most extraordinary aspect of the opinion, however, is its analysis of Reynolds's constitutional claim. Biddle, it will be recalled, argued that Congress had no power to interfere with the domestic institutions prevailing in the territories. He did not base this argument on the First Amendment, or on any other provision of the Bill of Rights. Rather Biddle claimed that the Morrill Act was unconstitutional on its face because it violated article 4, § 3, giving Congress "power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." This was the constitutional provision on which the Missouri Compromise was based, until it was held unconstitutional in Scott v. Sandford.

The majority opinion recast the argument as follows: "The inquiry is not as to the power of congress to prescribe criminal laws for the Territories, but as to the guilt of one who knowingly violates a law which has been properly enacted, if he entertains a religious belief that the law is wrong." 38 In other words, the Court reconstructed Reynolds's claim, retooling the jurisdictional argument into a claim that the statute was unconstitutional only as applied, based on his right to free exercise of his religion.

Waite thus engaged in an elaborate maneuver to avoid addressing the constitutional argument that Biddle did make, and constructed an alternative one that Biddle did not advance, only to reject it. 39 And Waite devoted a full half of his opinion to the analysis of the constitutional protection of religion. As an exercise in constitutional jurisprudence

38 98 U.S. (8 Otto), at 162.

39 This move raises all sorts of interest questions. By evading the art. 4, § 3 dilemma, Waite eluded one of the nastier kinds of judicial review from the institutional Court perspective -- namely, that of overruling all or part of a prior case.
Reynolds, like the miserable defendant whose conviction was sustained by the opinion, had greatness thrust upon it. What can account for Waite's opinion upholding Reynolds's conviction?

(b) Historiography, Legal Theory and the Constitutional Authority of the Supreme Court

Reynolds is an elaborate exercise in constitutional historiography. Waite began by noting, in what sounds like blithe confidence in light of subsequent herculean attempts to define religion for constitutional purposes, that "the word 'religion' is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted." So began the judicial designation of Thomas Jefferson as the source of meaning for the religion clauses. Waite first gave a thumbnail sketch of disestablishment in Virginia in 1785 as the paradigm for the federal religion clauses enacted several years later. The preamble to the Virginia Act, Waite stressed, declared "that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order." Here Waite found the belief-action distinction that forms the cornerstone of the Reynolds opinion. Even more vital, in this analysis, was Jefferson's "Letter to the Danbury Baptists," written in 1801, in which Jefferson hymned his praise for the First Amendment:

---

40 98 U.S. (8 Otto) at 162.

41 98 U.S. (8 Otto) at 162 (quoting 12 Hening's Stat. 84).
'Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions, -- I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and State.\(^a\)

Because this letter was written after the adoption of the Bill of Rights, and by a man so vital to their enactment, Waite said, Jefferson's description of the extent of the protections provided by the religion clauses was "almost an authoritative declaration of the scope and effect of the amendment thus secured." Applied to the federal context, Jefferson's declaration meant that Congress was prohibited from legislating on questions of "mere opinion," but was free to address overt actions if they violated "social duties" or were "subversive of good order."\(^b\)

The question thus became whether polygamy was violative of social duties or subversive of good order. Here Waite had a battery of evidence to hand. First arrow in his quiver was the fact that the Virginia legislature passed a statute imposing the death penalty for bigamy and polygamy three years after enacting Jefferson's bill. If Jefferson's own legislature saw no inconsistency between punishing polygamy as a crime that subverted the peace and good order of society, on the one hand, and perfect freedom of religion, on the other, Waite claimed, it was too late in the day to argue plausibly to the contrary.

\(^a\) 98 U.S. (8 Otto) at 164 (quoting Works of Thomas Jefferson 8:113).

\(^b\) 98 U.S. (8 Otto) at 164.
According to one scholar, Waite owed these historical references to a "creative collaboration" with none other than George Bancroft. By 1879, Bancroft was the aging stylist of American historians; he was also Waite's next door neighbor in Washington. Bancroft was well ahead of his time in the early and mid-nineteenth century. He was trained in history in Germany, and read far more voluminously than the average antiquarian of his day. Bancroft, one could say, was a professional American historian before the profession itself existed. He was also a successful businessman and Democratic politician, who had a genius for telling Americans what they wanted to hear. In his hey-day, Bancroft's volumes sold phenomenally well, and were still the way most Americans learned the history of their country in 1879. Bancroft relished the drama of fast-paced events and high-flown ideals. His view of American history has since been labelled "romantic": he believed profoundly in the moral force of America, in its linear progression toward liberty, justice, and humanity under the careful tutelage of divine (but distant) providence. A New England Unitarian with strong Puritanical roots, Bancroft

---

44 Magrath, "Chief Justice Waite and the Twin Relic," 513-14. Magrath, although he points out that Bancroft may well have supplied Waite with references, does not speculate on whether Bancroft might have influenced the outcome, or even the tone, of the decision.

45 Bancroft, a wealthy New Engander, spent lavishly of his own fortune to support his research, even to the extent of employing a full-time clerk to copy primary sources in England. According to Bancroft's own estimate, he was $75,000 out of pocket by 1872. John Franklin Jameson, The History of Historical Writing in America (Boston, 1891), 103; Richard Hofstadter, The Progressive Historians: Turner, Beard, Parrington (New York, 1968), 14.


47 Hofstadter, The Progressive Historians, 14.
had little tolerance for so openly backward-looking a theocracy as that of the Mormons in Utah (or, indeed, for anything that smacked of zealotry), let alone for their bizarre marital practices. Bancroft was also a genial host, fond of convivial dinner parties in his luxurious Washington home. Waite was a frequent guest, and evidently a close friend of Bancroft’s.44 It would not be surprising that Waite, painfully aware of his newcomer status on the Court and in Washington society and, as always, eager to please and impress the public with the wisdom of the Court, should consult his friend Bancroft, who was at that time preparing the final volume of his massive works on American history, on the framing of the Constitution and the Bill of Rights.

A word of caution is perhaps advisable here. As a great legal historian pointed out more than two decades ago, the Supreme Court not only has the power to interpret history, it also has the power to make it.45 Waite’s own correspondence attests that he at least discussed the Reynolds opinion with Bancroft.46 But Waite’s jurisprudence, as Harry Scheiber demonstrated conclusively for the Munn case, may have been more the product of his own thinking and of legal precedent than historians traditionally have been willing to give him credit for.47 Part of the renaissance of Waite’s image has been the


45 The Garden and the Wilderness, 3.


47 The Munn opinion had long been credited to Bradley, who was supposed to have told Waite what to write, and supplied him with handy references for the purpose. But as Harry Scheiber makes clear, Waite’s opinion was based on his own reading of extensive state court precedents and legal theory. “The Road to Munn,” 334-39.
recognition that he was more than a puppet in the hands of fellow justices, businessmen and politicians.

A review of the state cases addressing the relationship of law and religion reveals that the belief-action distinction for analyzing questions of church-state relations in Reynolds, like the public-private corporation distinction in Munn, has a clearly discernible ancestry. Also like Munn, the forerunners of Reynolds were state cases. Waite, it seems, had a habit of adopting familiar state law doctrines in federal cases. In the process, he ratcheted these doctrines up a vital notch in the ladder. They went from being the laws of particular states, to being the supreme law of the land.

By 1879, state courts had on several occasions grappled with the relationship of law and religion, typically in prosecutions for blasphemy. The first time the Supreme Court had occasion to consider the question of the relationship of Christianity to civil law was in the Girard Will case. Daniel Webster, perhaps the country’s single most influential lawyer in the pre-Civil War era, argued for the widely-accepted premise that Christianity was part of the common law of Pennsylvania. Justice Story, writing for the Court, waffled. Although Christianity is part of the common law of the state, he said, it is only so in a qualified sense. The divine origin and truth of Christianity are protected from blasphemy, Story said, but the positive precepts of the religion, such as the injunction to love one’s neighbor, are not.53

52 See especially the opinions of James Kent in People v. Ruggles, 8 Johns. 291 (New York, 1811), and Lemuel Shaw in Commonwealth v. Kneeland, 20 Pick. 203 (Mass., 1833).

The influential jurist and treatise writer Thomas Cooley, synthesized and explained the existing law coherently, declaring in the 1878 edition of his famous treatise Constitutional Limitations that Christianity was the fundamental law of the various states, but only for some purposes, most particularly in the law of marriage: "The best features of the common law, and especially those which regard the family and social relations; which compel the parent to support the child, the husband to support the wife; which make the marriage-tie permanent and forbid polygamy, -- if not derived from, have at least been improved and strengthened by, the prevailing religion and the teachings of its sacred Book."  

Cooley was at pains, however, to argue that the punishment of blasphemy, the enforcement of Sabbatariian laws, and (by implication) the law of domestic relations, were all justifiable on independent grounds, such as the enforcement of the common morals of the people, or the provision of a uniform day of rest for the population to recuperate the strength of body and mind lost during the hustle and bustle of the rest of the week. Christianity, Cooley argued, affected the heart and the conscience in ways that the state is not competent to address. "[T]he laws of the State can regard the outward conduct only," Cooley said, while the conscientious precepts of Christianity cannot be enforced by positive laws. 

---

4 Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union, 4th ed. (Boston, 1878), 588.

5 Id., 595.
Herein lies the famous belief-action distinction, which generations of legal scholars have blamed on a bumbling Chief Justice, but which was in fact developed at the state court level in the half century before Reynolds. Yet Waite's opinion also added in some elements of its own. In light of the vague yet pervasive belief (for example, in the Griard Will case, and in Cooley's treatise) that Christianity was part of the common law and also by osmosis of the Constitution, it is remarkable that Waite's definition omitted all mention of Christianity. Religious opinions, in the Reynolds version, need not be Christian to be protected from governmental interference. Indeed, to use Jefferson as the source for the meaning of the First Amendment was to allow a notorious deist to dictate the meaning of an article that he himself had not drafted. The profound secularizing implications of this move have only recently been apprehended by scholars and judges.\footnote{Litigants, legal scholars, and religious believers, have argued in recent decades that disestablishment is a cloak that hides substantial discrimination against all forms of religious belief. Edwards v. Aguillard, 482 U.S. 578 (1987); Peloza v. Capistrano; Unified School District, 37 F.3d 517 (9th Cir. 1994); Horn, "Secularism and Pluralism in Public Education," Harvard Journal of Law & Public Policy, 7 (1984); Donald Oppewal, "Humanism as the Religion of Public Education: Textbook Evidence," Christian Legal Society Quarterly, 2 (1981), 7-9, 31-33; Richard J. Neuhaus, The Naked Public Square: Religion and Democracy in America, 2d ed. (Grand Rapids, Mi, 1986).}

But Waite did not stop with the definition of religion. He moved on to an equally ambitious analysis of the reasons why polygamy could not be tolerated even in a nation that was not explicitly Christian. Here, too, Waite relied upon the work of a path-breaking scholar. "Professor Lieber says," Waite wrote, "polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people
in stationary despotism, while that principle cannot exist long in monogamy."” Waite, in other words, borrowed the legal and political theories of leading anti-polygamy thinkers, grafting them onto his constitutional analysis. Contrary to the progress that George Bancroft discerned in American history, that Francis Lieber found in American political structure, and that Thomas Cooley lauded in American law, polygamy produced stasis, by "fettering" the people in a static and barbaric relationship.

By the mid-nineteenth century, Lieber's Political Ethics had become the standard work cited in legal treatises and lawyers' briefs on the correct respect for, and restriction of, women in politics and law. Indeed, it was from Chancellor Kent's Commentaries that Waite drew his reference to Lieber's works. Polygamy was contrary to progress, Waite wrote, condemning the people who practiced it to "stationary despotism," and America was a nation dedicated to progress. The "twin relic of barbarism" had no place in such a society. Reynolds, one might say, was an opinion dedicated the progress.

Press reaction to the Reynolds decision was immediate and, for the most part, predictable. The New York Times and other eastern papers trumpeted the news with

---

98 U.S. (8 Otto), 166.

Lieber's work was cited with approval in Chancellor Kent's influential Commentaries on American Law, Oliver Wendell Holmes, ed. (New York, 1870), 45, and James Schouler's A Treatise on the Law of Domestic Relations (Boston, 1870), 188, for the proposition that polygamy is inconsistent with Christianity, civilization, and the Germanic races. Lieber was also relied on extensively by the State of Illinois in its brief opposing Myra Bradwell's Fourteenth Amendment claim that women should be allowed to practice law. See Brief of the Plaintiff in Error, Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872), 2. I owe this cite to Carol Weisbrod & Pamela Sheingorn, "Reynolds v. United States: Nineteenth-Century Forms of Marriage and the Status of Women," Connecticut Law Review 10 (1978), 838 n.50.
headlines such as "Death Blow Struck at Polygamy!" The Salt Lake Tribune, striking a more person note, crowed with delight that "Little George" Reynolds would go to jail. Across the country, the majority of Americans drew a sigh of relief at the news: the Supreme Court had done the right thing. Most writers recognized, however, that Reynolds did not by itself win the war against the Mormon menace. The Latter-day Saints, for one thing, by no means conceded defeat.

The cry that went up from the Mormon press after news of the decision reached Salt Lake by telegraph on January 6 was loud and long. Mormons claimed they had been betrayed by the Supreme Court. The perfidy of the Reynolds decision was the subject of many a Deseret News editorial. George Cannon, who as both the most articulate Mormon spokesman and as the man responsible for the difficulties George Reynolds now found himself in, hastened to put pen to paper to demonstrate to the world why Reynolds had been incorrectly decided. He began with a veiled reference to Dred Scott, as an illustration of his claim that the Supreme Court had made mistakes before in cases involving peculiar institutions. Given the subtext of the Reynolds decision as a curative for the damage done by Scott v. Sandford, this was a low blow. Cannon in effect used Dred Scott to argue that the Court's most unpopular decision undermined the validity of

99 "[T]hat the decisions of the Supreme Court have not always been infallible, the history of the nation clearly establishes. It requires no great age, no venerable experience, to remind citizens of this fact; men of middle age have but to contrast the present with the past, which they can recollect, to convince themselves of it." George Q. Cannon, A Review of the Decision of the Supreme Court of the United States, in the Case of George Reynolds vs. United States (Salt Lake, 1879), 4.
one of its most popular decisions. Truly the worm turned; the legacy of Dred Scott could be twisted to almost any purpose.

The bulk of Cannon's argument, however, was devoted to an attack on the Supreme Court's definition of religion. First and foremost, Cannon objected to the fact that the legal definition of religion announced by the Court removed control over the content of religion from individual believers, and placed it in the hands of potentially ungodly and irreligious civil judges. Essentially, Cannon claimed for religious practice the same localism that he argued should govern marital practice -- the center should not dictate what qualified as religion or marriage, but should allow the edges to decide for themselves what to include in their pantheon of practices.60 Cannon also made an essentially liberal plea for the free play of religious beliefs and practices, claiming that "truth and reason" would expose and undermine "erroneous" religions more effectively than government coercion could ever hope to do.61

These arguments were repeated in the popular Mormon press. Reynolds, said the Latter-day Saints' Millennial Star, was "the product of base cowardice, [and] pandering

60 Cannon, Review, 39, 10-14. He made this argument on several different levels, including an argument that James Madison (arguably a more devout man), rather than Jefferson, was the framer of the Bill of Rights, and thus the most appropriate source of any definition of religion.

61 Id., 34-44. This legal philosophy, which was an important aspect of the ideology of disestablishment in the late eighteenth and early nineteenth centuries, only received judicial endorsement in the early twentieth century, when Justice Holmes, dissenting in a landmark free speech case, argued that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." Abrams v. United States, 250 U.S. 616, 630 (1919).
to anti-Mormon fanaticism." Why should the court define religion, asked the *Millennial Star*, when any schoolboy could find a more sensible definition in his dictionary? Reynolds, as the Mormons clearly understood, took constitutional interpretation out of the hands of the people, elevating it to an exercise of erudite constitutional historiography and philosophy far beyond the reach of the ordinary citizen. The Mormon press also made a telling point, one that had been overlooked by the state courts that developed the belief-action distinction, the Supreme Court that adopted the doctrine, and even George Cannon: the common understanding of "exercise," as in the "free exercise of religion," includes action. The force of this hermeneutical insight, although it was ignored at the time, has haunted the Supreme Court's religion opinions in the twentieth century, as the Court has struggled to articulate some sensible dividing line between the absolute protection it avowedly accords to religious beliefs, and the regulation it permits of actions that are themselves the manifestations of belief.

---

42 *Latter-day Saints' Millennial Star*, 3 February 1879, 73. See also Editorial, *Deseret News*, 7 January 1879, 7: "We regret the ruling more because it is an undignified submission to popular prejudice than from any apprehension of its effects upon our people."

43 "Unless the party imbibing and practicing principles of religion is left the sole judge as to what they shall constitute, farewell to religious toleration and liberty." *Latter-day Saints' Millennial Star*, 13 January 1879, 25.

44 "Who does not know that exercise signifies activity, or practice?" *Latter-day Saints' Millennial Star*, 3 February 1879, 73.

45 See, for example, the line of cases decided in the 1930s involving Jehovah's Witnesses, whose beliefs prompted them both to proselytize in ways offensive to a large portion of their potential audience, and to refrain from saluting the flag. Cantwell v. Connecticut, 310 U.S. 296 (1940) (religiously-motivated activity -- proselytizing -- protected by free exercise and speech clauses); Minersville School District v. Gobitis, 310 U.S. 586 (1940) (religious objection does not excuse refusal to salute flag); Board of
It is worth noting here that Reynolds accomplished two vital ideological objectives. First, the Justices, who were after all, unanimously agreed on the constitutional portions of the decision, made use of the "twin relic" as a means of distancing the post-war Court from Dred Scott, their institutional bête noire. Barbarism, however cleverly it may have been shielded by the Taney Court, had no place on Waite's bench. While the intimate connection between polygamy and slavery was apparent to contemporary observers, it has been lost in the subsequent century of Supreme Court history. In a sense, Reynolds accomplished its objective: institutional prestige recovered quickly in the 1880s and 1890s. And when the next great crisis occurred in the twentieth century, it had nothing to do with Dred Scott. The very obscurity of the ties between Reynolds and Scott v. Sandford suggests that Waite's rehabilitative effort was remarkably -- and quietly -- successful.

The second objective is more difficult to pin down, and highlights the notorious difficulty of finding a coherent pattern in the decisions of the late nineteenth-century Court. Although the standard "laissez-faire" label has been effectively discredited by recent scholarship,6 no new vision of the Court's broad ideological motives has emerged. Daniel Rodgers has offered a possible alternative, arguing that there is good reason that the void left by the laissez-faire stereotype has not been filled. How is it that the Supreme Court, a relatively isolated and discredited institution in 1865, could by 1900

---


so dominate constitutional interpretation that the *Lochner* decision paralyzed opponents at both the state and federal levels? The really significant innovation of the post-Civil war Court, Rodgers claims, was what lawyers label a jurisdictional shift: the Court systematically hoisted issues that formerly had been left to the hurly-burly of the political process into its own inner sanctum.\(^{67}\)

Reynolds both is an example of this procedural boot-strapping, and suggests how the court's power play could be accomplished with minimal internecine squabbling between state and federal courts, at least in the northern states. The basic holding of Reynolds, that beliefs are never subject to governmental interference while actions may not be excused on religious grounds, was widely recognized at the state level, endorsed by the likes of Chancellor Kent long before Reynolds was decided. Like the public-private distinction adopted in Munn, the belief-action dichotomy was comfortably familiar, and was undoubtedly flattering to state court judges and lawyers, who saw their pet theories adopted at the federal level. The familiarity of the basic rule in both cases suggests that the process of power-grabbing by the federal courts began almost painlessly: the Supreme Court quietly slid its feet into the well-worn shoes of state constitutional law.

\(^{67}\) *Lochner v. New York*, 198 U.S. 45 (1905) invalidated a New York labor law that set maximum work hours for bakers on the ground that the regulation interfered with the liberty of bakers and bakery owners to negotiate freely for labor. On the Supreme Court in the Lochner era, as it has become known to succeeding generations, see Owen M. Fiss, *The Troubled Beginnings of the Modern State, 1888-1910* (New York, 1993).

\(^{68}\) Daniel T. Rodgers, *Contested Truths: Keywords in American Politics Since Independence* (New York, 1987), 147-56.
Conclusion

As the tone of the Mormon attacks on Reynolds indicates, however, the church was well aware that it had been sand-bagged, and was not about to take its defeat quietly. As one prominent polygamist put it in a sermon delivered only a few months after the Reynolds decision was handed down, "I will not desert my wives and my children and disobey the commandments of God for the sake of accommodating the public clamor of a nation steeped in sin and ripened for the damnation of hell." With the battle lines drawn, the Supreme Court was called upon again and again to decide how much control the federal government could exert of its most troublesome Territory, and to give ever clearer expression to the legal consequences of polygamy.

The second major polygamy case required the Court to determine whether Congress had usurped the judicial function when it disfranchised polygamists in the Edmunds Act of 1882. Once again, the connections to race, this time to Reconstruction and its aftermath, were undeniable. Mormons, aided by conservative Southern Senators who had themselves once been disfranchised for their own actions in defense of a peculiar domestic institution, turned again to the Court, this time arguing that the Court's own post-war jurisprudence protected the political rights of avowed polygamists.

69 Wilford Woodruff, June, 1879, quoted in Young, Isn't One Wife Enough? 354.
2. "The Sure Foundation of All that is Stable and Noble in our Civilization": Justice Matthews, Territorial Sovereignty, and the Politics of Marriage

George Edmunds, by the early 1880s the leader of a re-invigorated and focused anti-polygamy movement in the Senate, vehemently opposed the nomination of Stanley Matthews to the Supreme Court in 1881. Matthews owed the nomination to his adroit - even slippery -- arguments and actions on behalf of his old friend Rutherford B. Hayes in the contested election of 1876. As one of the counsel retained by the Republicans to argue their case before the Electoral Commission, Matthews devoted his considerable rhetorical skills to claims that were inconsistent, if not downright contradictory, to persuade the commission first that the Florida results must have been certified by a pre-existing procedure to be valid, and then that the Oregon procedure, although pre-existing, was subject to independent evaluation by the electors.¹ Matthews is also credited with a significant role in the infamous Compromise of 1877, through which Hayes cemented his victory. The compromise, in effect, abandoned the African-Americans of the South; in return for southern cooperation in the decision of the Electoral Commission to award the presidency to Hayes, federal troops were withdrawn from South Carolina and Louisiana. Matthews co-authored the letter to southern congressmen which outlined the terms of the agreement.²

¹ For a description of Matthews's role in the Electoral Commission, see Louis Filler, "Stanley Matthews," Friedman & Israel, eds., The Justices of the United States Supreme Court, 3:1354-55.

² As an adulatory biographer put it, the letter "was the occasion of much discussion, in the course of which the success of Mr. Hayes was attributed to it." Charles Theodore Greve, "Stanley Matthews, 1824 - 1889," in William Draper Lewis, ed., Great American Lawyers. A History of the Legal Profession in America 7 vols. (Philadelphia, 1909), 416. Greve defended Matthews's action, both by claiming that the letter was written after the decision of the Electoral Commission, which the losing party was pledged in advance
Matthews had also earned the hatred of many abolitionists by his assiduous prosecution of a journalist in Cincinnati for helping two fugitive slaves escape. Although he was an anti-slavery Democrat before the war, he nonetheless used the post of United States Attorney for the Southern District of Ohio (to which he was appointed by President James Buchanan in 1858) to conduct the extremely unpopular prosecution. The reporter, one Connelly, was given a fine and a jail sentence, and became a local hero; ministers and schoolchildren visited his cell. A torch-light procession of prominent Cincinnatans escorted Connelly to a celebration and speech-making in a local hall upon his release.

This affair, together with Matthews's skullduggery in '76, was dredged up by his many enemies after Hayes submitted his name to the Senate. As his biographer portrayed the firestorm of condemnation that followed the Matthews nomination, "[T]he malignity of political and personal opponents who refused to distinguish between the position of an officer charged with the enforcement of an obnoxious law and sympathy with the law"3 made the nomination a problematic one. Matthews's representation of powerful railroad and corporate interests added fuel to the fire. The nomination seemed dead after Edmunds's Judiciary Committee pigeon-holed it. Only when Garfield resubmitted Matthews's name after assuming the presidency from Hayes, did the Senate finally vote

---

on the nomination: Matthews squeaked through by one vote in May 1881 after sixteen Democrats paid off their political debt and voted to confirm. 4

But Matthews soon earned the approbation of many who had opposed him. Matthews’s fame as a Supreme Court justice never matched his infamy as a political maneuverer extraordinaire, but his jurisprudence was cautious and conservative, if not brilliant. As a colleague, he was steady and congenial; he was admired by the caustic Stephen Field as well as Field’s ideological opposite number, John Marshall Harlan. Even George Edmunds openly acknowledged that Matthews had performed far better than he, for one, had hoped: "[Matthews’s] opinions delivered in this court and his assent to opinions upon that class of questions delivered by other judges, justified the President of the United States in insisting upon his appointment and convinced me, and I think no doubt all the other senators who were opposed to him at the time, that it was our mistake and not that of the President of the United States." 1

(a) The Political Reconstruction of Utah in Supreme Court Doctrine

Edmunds had good reason to be pleased. In Murphy v. Ramsey in 1885, 6 Matthews upheld the anti-polygamy legislation drafted by Edmunds and enacted in 1882. The Edmunds Act, as we have seen, established what was for anti-polygamist legislators a crucial link, the connection between polygamous marriage and political disability. Anti-

4 See Filler, "Stanley Matthews." 1357.

5 Quoted in Greve, "Stanley Matthews," 420.

6 114 U.S. 15 (1885).
polygamists had long been arguing that there was a direct link between the political despotism of the Mormon church and its endorsement practice of polygamy.7

The trick for Matthews and his brethren on the Court was how to square such legislation with the invalidation of test oaths enacted shortly after the end of the Civil War and designed to weed out former rebels. The Supreme Court, with Justice Field taking a leading role, struck down test oaths a decade earlier in two important cases, Ex parte Garland and Cummings v. Missouri.8 Known popularly as the "test oath cases," involved state and federal oaths of loyalty for Southerners after the Civil War. In both cases, the claimant was required to swear that he had never been hostile to the Union as a condition for restoration of full citizenship rights, including the privilege of serving as a clergyman, corporate officer, or state official in Cummings, and to practice law in the federal courts in Garland. The decisions, written by Justice Field for a narrow 5-4 majority, held that the oaths were unconstitutional, both as bills of attainder, and on ex post facto grounds. Both were 5-4 majority opinions issued on the same day by Justice

7 The Edmunds Law, discussed at length in Part II, chapter 2, disfranchised all polygamists (and their wives), whether or not they had been convicted of that or any other crime.

8 Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867) and Ex parte Garland, 71 U.S. (4 Wall.) 333 (1867). It is interesting to note that Augustus Garland, the plaintiff in the case challenging the test oath for practice in the Supreme Court, did not join his fellow former-confederates in opposition to anti-polygamy legislation. By 1882, Garland was was a Senator from Arkansas, as well as a member of the Supreme Court bar. As a fellow member of the Judiciary Committee, Garland was a strong supporter of the Edmunds Law. He labelled the proposed legislation as "well-sanctioned by the organic law ... as any bill that has ever received the sanction of Congress." Congressional Record, 47 Cong., 1 sess, 1158 (1882). Quoted in M. Paul Holsinger, "Senator George Graham Vest and the 'Menace' of Mormonism, 1882-1887," Missouri Historical Review, 65 (October, 1970): 23-36, 28 n.10.
Field in 1867 (all Democrats, and, with the exception of Field, all appointed before the war), over the vigorous dissent of Miller and three other justices (all Lincoln appointees) The opinions were immediately unpopular when announced. Together with *Ex parte Milligan,* the test oath cases prompted the greatest outcry against the Court since *Dred Scott,* as Radical Republicans argued that the Court must be brought in line with the sentiments of the country. In response to the mandate of the Edmunds Act, territorial election officers in Utah had devised an oath that required all male voters to swear that they were not polygamists, and all female voters to swear that they were not wives of polygamists. Anyone who would not swear to the exact wording of the oath was automatically denied the vote; several (among them the widow of Orson Pratt, who took the oath, but who was denied anyway) challenged both the law and the oath.

As their advocate in the Supreme Court, the Mormons hired a man who might be expected to deal effectively with test oaths, and who, moreover, had spoken out forcefully against the Edmunds Law during the debates prior to its passage. Senator George Graham Vest of Missouri was a passionate advocate of states rights; he had been a senator in the Confederate Congress, and was the probable author of Missouri's "Ordinance of Secession." Known popularly as "Missouri's Little Giant," the diminutive Vest was a firebrand. Born in Kentucky, Vest's father was a carpenter who once hocked his watch to pay his son's school fees. Vest owed his legal -- and much of his political -- success to his skill as an orator. Not only did he not subscribe to Biddle's

---

9 71 U.S. (4 Wall.) 2 (1866).

aristocratic disinclination to appeal to the emotions of an audience, Vest positively gloried in the evocation of sentiment. His arguments in the Supreme Court (he appeared there frequently — much more often, in fact, than Mr. Biddle) were filled with colorful language. He was a skillful raconteur: as one biographer put it, "The attention of jury and court never flagged while he held the floor." Vest's most famous argument, and one of his most notable victories, was his plea that a dog by the name of "Old Drum" was worth far more to his owner than mere market value might indicate. Vest's tribute to Old Drum brought tears to the eyes of judge and jury, and a tidy sum to his client.12

Vest's talent as a pleader made him a formidable opponent in front of a jury. But at the Supreme Court it was a different matter. Vest had a penchant for picking the losing side in political battles and constitutional cases. In the Senate and at the Supreme Court Bar, he was an ardent states'-rights man of the old school, a defender of slavery as well as polygamy, and an opponent of prohibition, woman suffrage and direct election of senators.13 He was also something of a civil libertarian, and was an admirer of the writings of John Stuart Mill.14 Himself widely known as a heavy drinker,15 Vest's


12 See generally Walter L. Chaney, "The True Story of 'Old Drum,'" Missouri Historical Review, 19 (April, 1925), 313-24; Edwin M.C. French, Senator Vest, Champion of the Dog (Boston, 1930).

13 As Edward Nettles, author of the Vest biography in the Dictionary of American Biography, 19: 260, put it: "[Vest's] senatorial career, in the main, was characterized by a disinclination to recognize new developments and new issues in American life; he adhered largely to bygone principles and precedents."

14 Vest relied heavily on "On Liberty" in his brief opposing the Kansas prohibition statute in Mugler v. Kansas, 123 U.S. 633, 638 (1887).
argument in the Supreme Court on behalf of a brewer whose business was destroyed by prohibition in Kansas was filled with references to the "slavery" imposed on purveyors and consumers of liquor by a law that prohibited the sale of alcohol in the state.

Vest's arguments in defense of polygamy, both on the Senate floor and at much greater length in the Supreme Court, were based on this combination of states' rights and libertarian predilections. Reynolds notwithstanding, Vest relied heavily on Scott v. Sandford. Congress may establish a territorial government, Vest conceded, and could even specify in advance that all local laws must be federally approved to be valid. But there was a world of difference between federal oversight powers, and direct federal interference in territorial affairs. The Edmunds Act, Vest argued, was a violation of the principle of self-government that underlies the Constitution. Taney's opinion in Dred Scott was unequivocal on this point, and Vest made the most of it: "[T]he recognition of a plenary power in Congress to dispose of the public domain or to organize a Government on it, does not imply a corresponding authority to determine the internal polity, or to adjust the domestic relations, of the persons who may lawfully inhabit the Territory in which it is situated." Taney's opinion, as Vest had argued elsewhere, was written in "letters of gold; letters which declare the essence of the Constitution and the rights of every American citizen." Vest's argument, like Biddle's before him, was

---


16 Brief of Appellant, 40, quoting Scott v. Sandford, 60 U.S. at 393.

essentially a jurisdictional one: the Constitution, Vest maintained, did not grant authority
over internal matters, even in territories.

Congressional legislation relating to the domestic affairs of territories, Vest cried, was tantamount to the creation of permanent political dependencies, instead of independent, self-governing states in the American tradition. In language that harked back to the rhetoric of the revolutionary era, Vest accused Congress of delegating the territory to the status of a colony, "curst[ing] the whole people of Utah with political slavery." Political slavery, in Vest's analysis, was strictly forbidden by the Constitution; and control at home (for white males) was the most fundamental criterion of freedom.18

Vest had gone to war to defend this proposition. His side lost the war, but Vest was committed to the battle for local autonomy on whatever front he could still fight. The correlation between the defenders of slavery and the defenders of polygamy thus migrated into legal rhetoric, as it had political debate. Vest's alternative argument, and the one that received most of the Court's attention, was also deeply connected to the law and politics of the aftermath of slavery and the war. He claimed in the Supreme Court, as he had in the Senate, that the Edmunds Law violated the constitutional prohibition of ex post facto laws. The requirement that all voters in Utah swear that they were not bigamists or polygamists, Vest argued, replicated the test oaths imposed on the inhabitants

18 We deny that Congress has the power to hold the Territories of the United States as provinces, with all powers, legislative, judicial and executive, vested in Commissioners. The underlying principle of the Constitution is self-government, and Congress can make no rules or regulations which ignore this great doctrine and convert the Territories into colonies.

Brief for Appellant, 41.
of the former confederate states, which were struck down in Cummings v. Missouri and Ex parte Garland.

In both those cases, one of which involved the right to practice law in federal courts and the other the right to preach, the disqualification was imposed for past acts; that is, for participating in the secession and eventual confederate government, or for evading the draft into Union forces. Justice Field, rejecting the attempt to clothe loyalty with such far-reaching consequences, held that the linkage between insurrection and professional competence (or even, by implication, the linkage between rebellion and voting, in the Missouri case, which imposed political disabilities as well as the professional ones challenged by Cummings), descended beneath the clearcut, self-evident connections that could be drawn between, say, the learning and character necessary to practice law, and that required of officers of the United States. The Constitution's ex post facto and bill of attainder clauses, Field wrote, were designed to protect against just such "excited action" motivated by "influences" of passion.19

The reaction to these opinions in the press was, as one student of the period put it, "of the most violent character."20 The partisan divisions on the result were predictable, especially given the fact that southerners were overwhelmingly Democratic.

---

19 "There can be no connection between the fact that Mr. Cummings entered or left the State of Missouri to avoid enrolment or draft in the military service of the United States and his fitness to teach the doctrines or administer the sacraments of his church; nor can a fact of this kind or the expression of words of sympathy with some of the persons drawn into the Rebellion constitute any evidence of the unfitness of the attorney or counsellor to practice his profession...." 71 U.S. 319, 378.

20 Warren, Supreme Court, 3: 173.
Harper's Weekly, for example, accused the justices of producing "proof of the disposition of the Court to withstand the National will and reverse the results of the war." One Democratic Congressman even warned that the court was in "irreconcilable conflict with all the leading measures and policies of the dominant party in Congress," and could expect more confrontation to come. A Massachusetts Republican introduced legislation to provide as a matter of federal law that no rebel would be allowed to practice in any federal court. The bill did not receive widespread support, but it did portend trouble for the future, warned several commentators, should the court continue on its pro-Southern path.

By the time Vest argued the polygamy disfranchisement case before the Supreme Court, the fires had cooled, but the test oath cases were by no means highly regarded. Not all Southerners were willing to concede that the Edmunds Act was analytically similar to the test oath cases. Indeed, most telling was that the petitioner in Ex parte Garland, by 1882 risen to Democratic Senator Augustus Hill Garland of Arkansas, was a strong supporter of the disfranchisement of polygamists in debate. "[M]y education, as well as my personal experience which has been sad and bitter," Garland said, had made him sensitive to "measures of tyranny and measures that are rough and severe." But Utah was

22 Congressional Globe, 39 Cong., 2 sess., 646-73 (22 January 1867).
23 See, for example, a Philadelphia Inquirer editorial, counselling the justices "to succumb, or to take the high ground that it is beyond Congressional control in matters of detail and practices connected with the organization of the Court. It would be of dangerous consequence for the Judges to assume any such view; as the Court is, as to administration, constituents, and regulation, entirely within the authority of Congress and the laws." 24 January 1867. Quoted in Warren, Supreme Court, 3: 176.
unique, and "desperate remedies," which would have been inappropriate in "reconstruct[ing] a State" were necessary, even desirable.

Polygamy, Garland emphasized, "at once produces domestic tyranny, by making woman a slave and man a tyrant; and society at large thus becomes a combination, not of fathers of families, but of household tyrants, who, by the practice of tyranny, have been fitted to endure it."24 This was orthodox anti-polygamy politics, employed for a novel purpose -- to distinguish between the powers of states (which Garland argued were far more extensive than had been respected in the confiscation acts during the Civil War years) to control their own domestic relations, from those of territories, where federal "power is unlimited."25 By 1882, when Garland supported the Edmunds Act, redemption in the southern states was well under way (and his own political career had been revived by redemptionist machinations in Arkansas26); Garland stressed the power over territories, highlighting thereby his theory of the inability of the federal government to intervene in voting in the states.

When Murphy v. Ramsey was decided, Garland had risen to Attorney General in the first Cleveland administration; his opposition to polygamy only increased as he supervised the implementation of the act he helped pass in Utah, and superintended its defense at the Supreme Court in Washington. Democrats were unable to divert attention

24 Congressional Record, 47 Cong., 1 sess., 1158-59 (15 February 1882). Quoting "Professor Heeren's Historical Researches."

25 Id., 1159.

26 See Foner, Reconstruction, 528; Kaczorowski, Politics of Judicial Interpretation, 105-13.
from slavery with the Mormon War in the 1850s, but were far more successful (and were in part playing the Republicans' own game) when diverting attention from redemption with the anti-polygamy campaign.

George Graham Vest, however, was no prisoner of the political moment. He (and his fellow conservative southern Democrats) were tangible remnants of the old South, even as the new South took shape under the tutelage of men like Augustus Garland. Vest returned to the arguments that had won the day in the test oath cases, claiming that the difference between Mormon polygamists and their opponents had no political ramifications; that the linkage between martial structure and political competence was as much of a stretch as that between professional and political life.

He also made a related plea for diversity by region. The "social or religious opinions" of the people of Utah, Vest pleaded, were safe only "[i]n this temple of refuge, where the clamor of passion and prejudice cannot be heard...."³⁷ Vest, undoubtedly well aware of the criticism levelled at the Court for its role in the slavery and test oath cases, urged the Court to don its blinders once again, this time in the name of the "twin relic." Vest's was a plea for the protection of local habits, of moral relativism; in twentieth-century terms, he weighed in on the side of diversity.

The arguments of the champion of liberty to misbehave, however, were no better received in the Supreme Court as the Mormons' representative, than they had been as the brewers'. His opponent at the Supreme Court bar, Attorney General Benjamin Harris

³⁷ Brief of Appellant, 39, 41-42.
Brewster, made short work of Vest's libertarian arguments. Opening his brief with lengthy discussion of the embarrassing Hyde case, Brewster played on the transatlantic dimensions of Mormon polygamy.

(b) The "Mormon Question" in England: The Challenge of English Marriage Law to American Courts and Commentators

There were two sides to this transatlantic connection; first, Mormon missionaries were extraordinarily successful in England. Many of the church's most prominent men, including George Q. Cannon, were English natives, whose conversion to Mormonism was just the first step in a journey that took them westward physically, and, for many, upward economically. The success of the Latter-day Saints' English operation had caused tension on both sides of the Atlantic. Not only were English travelers liable to write revealing (and supercilious) accounts of their visits to the Great Basin, but, more awkwardly, many British people were scandalized that so many of their own were duped, as they put it, into following the Mormon Mohammed. Predictably, there were class elements involved; in 1854 in Liverpool, for example, a newspaper reported a "riot" as masters protested the embarkation of servant girls for Utah.

For their part, American officials claimed that polygamy was, to some extent at least, a foreign creature. The theory that polygamy only survived because of the constant

---

²⁶ Garland took over as Attorney General from Brewster on March 6, 1885. The case was argued in January, and decided in late March.


²⁸ The riot is referred to in a newspaper story quoted by Metta Victor in the appendix to her Mormon Wives, 326.
influx of new women from foreign lands (especially England), was widely accepted.\textsuperscript{31} In the late 1870s, the state department went so far as to request the English government not to allow any Mormon converts to emigrate.\textsuperscript{32} For the most part, however, both sides acknowledged that Mormonism and polygamy were peculiarly American concerns. The Hyde case was yet another black eye, this time from a judicial perspective.

Englishman John Hyde, like many other Mormon converts, joined the church at fifteen in a flush of enthusiasm. Within a few years, his faith shattered, Hyde apostasized. He began a campaign against his former church.\textsuperscript{33} His wife, also a convert from England, stayed behind in Utah. After Hyde's book *Mormonism: Its Leaders and Designs* was published in 1857, Mormon Elder Heber C. Kimball delivered a fiery anti-Hyde sermon that fanned the flames of the Mormon "Reformation" of the late 1850s, when plural marriages were solemnized at a rate that reflected many Mormons' conviction that they truly were entering the latter days of history. In the course of the sermon, Kimball declared that the Hydes were divorced: "The limb she was connected to is cut

\textsuperscript{31} See, for example, territorial Governor Eli H. Murray, "Governor's Report," 16 September 1883, *Messages and Documents*, Dept. of the Interior, 2: 636; and President Grover Cleveland's annual address to Congress, 8 December 1885, Richardson, *Messages and Papers of the Presidents*, 7: 362.

\textsuperscript{32} The proposal was ridiculed in the English and European press. The London *Examiner*, for example, dismissed the "plaintive appeal," as morally "admirable," but logically "lamentable." 16 August 1879, quoted in *New York Times*, 30 August 1879. I owe this cite to Mulder, "Immigration and the 'Mormon Question,'" 424 n.35.

off, and she must again be grafted into the tree, if she wishes to be saved...."34 The former Mrs. Hyde did as she was told, and remarried one Joseph Woodmansee in 1859. Her first husband returned to England, where he devoted himself to Swedenborgianism and edited a small newspaper.35

Several years later, Hyde sued his wife for divorce in the English courts. Ironically enough, then, the English legal system got the first crack at Mormon polygamy. In Hyde v. Hyde, decided in 1866, Sir James Wilde denied Hyde's petition. The future Lord Penzance held not only that polygamy was fundamentally inconsistent with "Christian marriage," but also that the recognition of polygamy in Utah at the time of Hyde's marriage (the first federal prohibition of polygamy was not enacted until 1862; Hyde was married in the early 1850s)36 meant that all marriages celebrated in Utah were invalid, because "potentially polygamous."

The fate of women in polygamy, Wilde wrote, was in no way comparable to the Christian wife: "In some [polygamous societies] they are slaves, in others perhaps not; in none do they stand, as in Christendom, upon the same level with the man under whose protection they live."37 In any case, English law absolutely did not countenance any

---


36 According to Hyde's own account, he was married in Salt Lake in late 1853 or early 1854. Mormonism, 20.

tinge of polygamy; Christendom had long ago advanced beyond such primitive practices.

The decision was popular in England. As The Times put it: "So many young women have been tempted or entrapped into abandoning English homes for the half or third part of a husband at Salt Lake City, and have since found reason to rue their infatuation," that the only surprise was that there had not been more cases brought by disgruntled English women.38 The holding was also immediately influential in the United States, as legal treatise writers picked up on the case, citing it for the proposition that the validity of a marriage is inextricably bound up with the validity of the legal order in which it is celebrated.39 The case was an implicit challenge to American jurisprudes, a holding that a marriage celebrated in a territory of the United States was not "entitled to the remedies, the adjudication, or the relief of the matrimonial law of England," because the legal system there did not meet the basic requirements of the "Institution" (the word is capitalized throughout the opinion) of marriage, "as understood in Christendom."40

38 The Times, 22 March 1866, 9. The English press, like its American counterpart, struggled to explain the fact that most women who converted to Mormonism and emigrated to Utah remained. The presumption was that the journey back to England, "across the wastes that divide the Mormon paradise from Christendom," was too long and perilous for a woman to face. Ibid. The outcome in Hyde sent mixed messages to any woman planning to return to England (in the unlikely event that in Utah she would be aware of a precedent in the English courts). While she could take comfort in the thought that she would not need to initiate divorce proceedings once she arrived back on English soil, she also would be faced with the knowledge that any union celebrated in Utah was void ab initio. Even if she had been her husband's first "wife," therefore, in English law she was nothing more than a concubine.


40 1 P. & D., 133, 137.
Brewster danced on Hyde, labelling the opinion a "thoughtful disquisition on the topic of Mormon marriage,"" and calling the attention of the Court to the fact that Hyde was quoted at length in the most recent edition of Story's Conflict of Laws.² Both in principle and in practice, Brewster argued, polygamy was "wholly destructive" of the institution of "marriage in a true sense."³ America could not do less than Great Britain, he implied; to strike down political disabilities imposed on polygamists would be to fall short of the morality the English courts had already determined was essential to the well-being of women.

To a Court already sensitized to the international embarrassment caused to the United States by the existence of polygamy, especially in comparison to England's treatment of morally reprehensible religious practices in its colonies, the Hyde case was a challenge to American jurists. To accede to a claim that religious freedom mandated the protection of polygamy in Utah would be to acknowledge that the Constitution shielded immorality. In the cultural competition that was characterized transatlantic relations in the Victorian era, such an acknowledgment would be a decided point in England's favor.⁴

---

¹ Murphy v. Ramsey, Brief for the United States, 9.

² See Joseph Story, Commentaries on the Conflict of Laws, 8th ed., Melvin M. Bigelow, ed. (Boston, 1883), 184 & n.(a).

³ Brief for the United States, 9.

⁴ See generally "American Victorianism as a Culture," 515-18, on the profound competitiveness of Victorians.
Brewster had more trouble dealing with the test oath cases. After some preliminary quotes from the dissents in the Dred Scott case, to the effect that Congress may decide how much local control a given territory should have, he argued that the voting restrictions imposed in Utah "avoid the difficulties presented" in the voting rights cases. "[T]he present right, ... being one which, according to American ideas, owes its very existence to constitutions, while the statute which is supposed improperly to affect it is organic, and, therefore, by nature free to deal with such creations." Not only was the argument grammatically unsound, it is incomprehensible.

Benjamin Harris Brewster was a remarkable character -- but his skills as a lawyer appear to have been quite ordinary. Brewster combined the flamboyant dress of a dandy of the 1830s (complete with ruffles and ornate waistcoats) and "fastidious social habits," with a painfully scarred face (he was badly burned as a child), to create a persona that challenged others to look beyond outward appearances. His private wealth and idiosyncrasies ensured that he was often the center of attention. But his most important case, the prosecution of the Star Route frauds, which involved an assistant postmaster-general and secretary of the Republican National Committee as well as other highly placed officials in the traffic of mail contracts for the West, was a flop. As one biographer put it, Brewster was out-lawyered: "Robert G. Ingersoll, chief counsel for

45 Brief for the United States, 13.

the various defendants, was at the top of his power as a lawyer, and convictions could not be secured." The acquittal was costly politically -- President Chester Arthur was not renominated in 1884, in part because of the outcry that followed the failure to convict. 47

Murphy v. Ramsey, argued in January, 1885, was one of Brewster's last cases before he disappeared to retirement in Philadelphia.

Fortunately for the government's case, Justice Matthews did not rely upon Brewster's arguments. Instead, Matthews distinguished the test oath cases by holding that "[i]he disfranchisement [of polygamists in Utah] operates upon the existing state and condition of the person, and not upon a past offence. It is, therefore, not retrospective."48 Truth be told, the distinction was not so clear cut. Several plaintiffs were involved in the Murphy litigation, including one Barlow, who swore that he had not married polygamously since the Act of 1862, and thus was not guilty of bigamy. But Matthews countered that commission of a crime for which prosecution could be instituted was not necessary to sustain the validity of the act: it was Barlow's "status" of being married to more than one woman that was the object of the statute, no matter when the marriage was celebrated, and no matter what his current living arrangements -- even if he lived with none, or only one of his wives. "He can only cease to be [a polygamist] when he has finally and fully dissolved in some effective manner, which we are not called on here to point out, the very relation of husband to several wives, which constitutes the


48 114 U.S. at 43.
forbidden status he has previously assumed. This is a potentially dangerous argument, for the recognition of multiple marriages as creating a status, rather than as simply the commission of a crime, implies that at some level, the court recognized that there was marriage at the heart of the problem, that the Mormon claim that polygamy was a form of marriage had some bite.

In other words, the act of marrying created a status (in the nineteenth century still a common way to refer to marriage) that had an effect that continued on in time until it was dissolved by unspecified means. "It is precisely similar to an inquiry into the fact of nativity, of age, or of any other status made necessary by law as a condition of the elective franchise." But here, of course, was the rub. Was marriage a "status," as Matthews said, or did Sir Henry Maine's "Contract" have more descriptive power? The evolving constitutional law of anti-polygamy provides part of the answer. The notion that marriage created an immutable state of being was certainly bloodied, but powerful nonetheless. The resurgence of political and legal faith in (and support for) monogamy was, in Matthews's opinion for the court, anchored firmly in the theory that marriage created a state of being, a legal alloy of two persons as fundamental, as non-negotiable and fixed, as age or national origin.

The opinion belies a legal literature that was deeply conflicted. There were those who argued that divorce should almost never be available, and that the law should not be

---

49 "He might in fact abstain from actual cohabitation with all [his wives], and be still as much as ever a bigamist or a polygamist." 114 U.S. at 42.

50 114 U.S. at 43.
allowed to intervene in household relations, lest it undermine the deference paid to the power of the husband, canonized in the rules of coverture.\textsuperscript{51} For the most part, however, legal commentators and activists argued that the changes they saw around them, and the laws they proposed to supplement and support the legal rights of married women, did not undermine the traditional balance of power in marriage.\textsuperscript{52} Even those who campaigned for the protection of married women from those husbands who had proven themselves unworthy of the right to control their wives, claimed that their proposals were designed to preserve, rather than undermine, the legal strength of marriage.

Yet the use of legal constraints to police the behavior of husbands opened a wedge, confirming the trends that gave the state an increasing say in the definition of what constituted marriage, and how unhappy marriages should be treated. In the late nineteenth century, the Supreme Court confirmed and augmented this gradual incursion, through the polygamy cases, as well as through opinions dealing with divorce.

At the same time that government presence in marriages grew, the importance of protecting marriage gained political weight. In other words, as advocates of marital law reform articulated justifications for state interference to protect women, the protection of marriages (and through marriages, of women) assumed political importance in the rhetoric of judges, including -- but by no means limited to -- the justices of the Supreme Court.

\textsuperscript{51} For example, see Joel P. Bishop, \textit{Commentaries on the Law of Marriage and Divorce under the Statutes of the Several States, and at Common Law and in Equity}, 2 vols., 5th ed. (Boston, 1873), 2: 43-44, 77.

\textsuperscript{52} On the theories and activities of divorce reform advocates, see Part III, chap. 3, above.
The sense that marriage was essential to the functioning of democracy found its way into judicial opinions in the late antebellum and and Civil War periods, laying the groundwork for decisions later in the century that upheld state regulation of marital affairs. Only if women were properly respected by law, this line of thinking went, could they perform their vital function of civilizing their children (and, by implication, their husbands), rendering them fit to participate in the polity. It was an almost painless step from adulatory language about the role of the women and marriage in "human progress," to judicial support for legal restraints on male behavior that was widely perceived to be contrary to the welfare of women.

The legal analysis of the crusade to disfranchise Mormon polygamists played on the heightened political value of the family; the Supreme Court's opinion in *Murphy v. Ramsey* reiterated the basic premises of the connection between civilization and democracy on the one hand, and women and marriage on the other:

[N]o legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man

---

53 See, for example, the opinion of Chief Justice John Appleton of the Supreme Court of Maine in *Adams v. Palmer*, 51 Me. 480, 485 (1863): "[Marriage is] a relation the most important as affecting the happiness of individuals, the first step from barbarism to incipient civilization, the purest tie of social life, and the true basis of human progress."

54 Advocates of prohibition, for example, argued that women and children bore the brunt of abuse from alcoholic men who would not (or could not) control their drinking. It should come as no surprise, given his lifelong commitment to the prevention of governmental interference in "domestic affairs," that George Graham Vest was hired to champion the interests of purveyors of alcohol against the forces of prohibition in *Mugler*, or that the same Court that upheld prohibition, would sustain the disenfranchisement of polygamists in Utah.
and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement. And to this end, no means are more directly and immediately suitable than those provided by this act, which endeavors to withdraw all political influence from those who are practically hostile to its attainment.

The Court held that disfranchisement was an appropriate penalty for what was an ongoing state (that is, the status of being married to more than one woman at a one). As Matthews emphasized, "It would be quite competent for the sovereign power to declare that no one but a married person shall be entitled to vote; and in that event the election officers would be authorized to determine ... the fact of marriage as a continuing status." This statute was not an ex post facto law, but a valid inquiry into marital status, a permanent condition that is created at the moment of a polygamous marriage, and that cannot be confined thereafter. The first of Vest's arguments, therefore, was rejected.33

His plea for regional diversity also failed. "[I]n ordaining government for the Territories, and the people who inhabit them, all the descretion which belongs to legislative power is vested in Congress; and that extends, beyond all controversy, to determining by law, from time to time, the form of the local government in a particular Territory, and the qualification of those who shall administer it." Only by exercising this discretion, by tutoring the residents of Utah in the importance of marital structure to political participation, Matthews emphasized, could Congress "prepare the people" to achieve responsibility in the future. By disfranchising them now, the court implied, might polygamists in future become rehabilitated to such an extent that political privileges would

33 114 U.S. at 43, 45.
once again be conferred upon them, but only after Congress had decided that their status had been reconstructed by dissolution of "the very relation of husband to several wives, which constitutes the forbidden status."\textsuperscript{56}

After Reynolds and Murphy, anti-polygamists had achieved two of their most fundamental political and legal goals -- the criminal punishment of moral deviance, and the connection of moral behavior to political power, all in the name of the protection of marriage and (through women) the safekeeping of civilization. The third, and final, major step was one of institutional, rather than individual, dimensions. Polygamy, after all, was not just the practice of individual Mormons, it was the marital policy of the Church of Jesus Christ of Latter-day Saints, the single most powerful institution in Utah, and the next target of anti-polygamist agitation. The Supreme Court decision that upheld the dismantling of the church's financial power yields a new harvest of constitutional doctrine, and highlights the vital role that marriage and the Mormon Question played in the second American disestablishment.

\textsuperscript{56} Id., 42, 44.
3. "To the Detriment of the True Interests of Civil Society": Competition, Property, and the Second American Disestablishment

By 1887, when Congress passed the Edmunds-Tucker Law, the stakes of the anti-polygamy crusade were high indeed. For the Church's part, its leaders were in hiding or in jail. George Cannon, for example, had once again been arrested, but had forfeited $45,000 bail, rather than face trial. Mormon President John Taylor, one of the last of the generation that had followed Brigham Young across the desert to the Great Basin, traveled from one safe house to another, constantly on the move to avoid arrest.

For the most part, defiance was the order of the day. From his secret hiding place, Mormon President John Taylor issued warning against the "plotting of Christian nations ... against the welfare of Zion," and called upon his people to take whatever measures would protect them against "the aggression of the ungodly and lawless...."

From the government's perspective, things were going relatively well, but the price was steep. With the entire Mormon leadership subject to arrest, there was plenty for local law enforcement officials to do. Federal marshals, attorneys, and judges were busy filling the local jail with bearded patriarchs, and hunting others who had escaped their nets. But the whole process -- the barrage of indictments, arrests, trials, and jail terms -- not only had something of a circus air about it, it was pricy. Even more to the point, it was not getting the job done quickly enough to satisfy public opinion.

The next -- and arguably most problematic -- connection was that between polygamy and property.

---

1 Quoted in Arrington, Great Basin Kingdom, 362 (no cite given).
Two aspects of the Corporation of the Church of Jesus Christ of Latter-day Saints, as its generous legal charter (passed by the territorial legislature in 1851, long before federal officials arrived, and a good decade before the first anti-polygamy legislation) described it, were particularly galling to observers in the East. The first was that the Mormons had set up a legal entity, the corporation, empowered to own unlimited amounts of personal and real property.

Anti-polygamists claimed that the church was in fact a sham corporation whose purpose, ostensibly harmless, was in reality the nefarious designs of evildoers. Here was a species of fraud, fraud of a sort that preoccupied much of late nineteenth century politics. The political power of corporations at the state (and even the federal) level, their ability to control entire legislatures, was unprecedented, and intimately connected to new and growing fears of monopoly. The wealth and influence of a corrupt Mormon lobby was a constant hobby horse in anti-polygamy rhetoric; subsequent research into the

---

2 The Star Route fraud was a key factor in toppling the presidency of Chester Arthur and his idealistic attorney general, Benjamin Harris Brewster; the Credit Mobilier scandal, Tammany Hall and other sinkholes of urban politics, and the ability of railroads and robber barons to buy entire state legislatures, also scandalized the nation on a daily basis. See Margaret Susan Thompson, The "Spider Web": Congress and Lobbying in the Age of Grant (Ithaca, 1985). See also Joseph Frazier Wall, Andrew Carnegie (New York, 1970); Thomas C. Cochran, Railroad Leaders, 1845-1890 (Princeton, N.J., 1953), and "The Paradox of American Economic Growth," Journal of American History, 61 (1975): 925-42; Seymour J. Mandelbaum, Boss Tweed's New York (New York, 1965).

3 On the transformation in Americans' understanding of the sources of monopolistic corruption from a focus on government-sponsored inequalities to private monopolies that it was the duty of government to dismantle, see James L. Huston, "The American Revolutionaries, the Political Economy of Aristocracy, and the American Concept of the Distribution of Wealth, 1765-1900," American Historical Review, 98 (October, 1993): 1079-1105, 1102-05.
relationship of the Mormons to railroad interests (including California Senator Leland Stanford) reveals that significant amounts of money changed hands, as Mormons attempted to buy better press, and better political results.⁴

As robber barons organized themselves behind seemingly innocuous corporate facades, their foes lobbied for new methods of dealing with business practices that in the late twentieth century we call "white collar crime." Anti-polygamists were deeply involved in policing the boundaries of corporate behavior. George Edmunds, for example, was a perennial opponent of the railroad lobby, as well as "the true father of the Sherman Anti-Trust Act of 1890."⁵ As one senator put it, "The sentiment of the Senate will be that every corporation should have some limit to the amount of property that it may acquire, and particularly a religious corporation."⁶ In part, the threat to freedom flowed from the wealth and power of the corporation that sponsored and shielded the religious equivalent of the rapacious railroad speculator.

Second, was the widespread condemnation of the structural connections between the practice of polygamy, mandatory tithing by all faithful Mormons, and the wealth of the church corporation, were the subject of numerous attacks in anti-polygamy fiction, in Congress, the popular press, the Supreme Court, and, last but by no means least, Protestant pulpits. From this constant stream of attacks on the "theocracy" in Utah, there


⁵ Howard R. Lamar, "Political Patterns in New Mexico and Utah Territories, 1850-1900," Utah Historical Quarterly 28 (Summer, 1960), 385.

emerged a new concept of the proper relationship of church to the state. The most striking illustration of the shift in thinking on this topic, of course, is that in the 1870s Mormons in Utah could argue plausibly that the Morrill Act was unconstitutional because it interfered with an established religion; while Augustus Garland, the attorney general and author of the government's brief in the final polygamy case, argued that the Edmunds-Tucker Act was valid as an exercise of the constitutional mandate against established religions. In less than a generation, the understanding of the place of religion in the state had been revolutionized: from a plausible argument that the federal government had no business interfering with a local decision to establish a given faith, the notion that government must actively intervene to disestablish an entrenched religion.

The story of how these disparate intellectual innovations took hold in the law is the tale of *Late Corporation of the Church of Jesus Christ of Latter-day Saints v. United States.* The briefs and arguments of counsel in the case, and Justice Joseph Bradley's majority opinion for the Court, upholding the Edmunds-Tucker law of 1887, are superb examples of the legal developments undergirding the anti-polygamy movement's achievement of the last of its most fundamental goals -- the dismantling of the extraordinary financial power of the church in Utah. Among other things, the Edmunds

---

7 See, for example, Deseret News, 5 November 1878, 6: "The subject hinges upon the question whether or not [plural] marriage is an 'establishment of religion.' If it is, then the controversy upon monogamic versus plural marriage is one for the theologians rather than the lawyers, and the regulations thereof for the churches, instead of the legislatures and congresses." Reprinted in *Journal History*, 5 November 1878.

8 Brief for the United States, 15-22.

9 136 U.S. 1 (1890).
Tucker law disincorporated the Mormon church, by disapproving the corporate charter that had first been enacted some 36 years earlier. The law, quite simply, declared that "the said corporation, in so far as it may now have, or pretend to have, any legal existence, is hereby dissolved." In part, the new law was merely the legislative enforcement of a provision of the Morrill Act of 1862. That act, in addition to outlawing plural marriage in the territories, "disapproved and annulled" all acts of the territorial legislature, including but not limited to the incorporation of the church, that "establish, support, maintain, shield or countenance polygamy."

The Morrill Act also provided that no religious or charitable association in the territories could acquire real estate of greater value than $50,000. Although the limitation on property looks punitive from a twentieth-century perspective, such provisions were not unusual in the nineteenth century, and generally were considered part of the broader climate of religious freedom. The presumption in favor of the validity of such

---


11 Such restrictions would not work great hardships on religious groups whose authority was decentralized to begin with. Congregationalists, for example, traditionally considered each parish a separate corporation or association. Thus each the Congregational Church in each town could own real property to the full value allowed by such laws. Religious groups with strict central hierarchies, however, apparently were more likely to suffer. Even then, the logical answer was to incorporate small units separately, or treat smaller unincorporated units as distinct entities, and thus avoid the problem. The Roman Catholic Church seems to have pursued this course in several states, with each bishop treated by the law as a corporation sole. See Argument of Joseph E. McDonald for the Appellant, 2-3. The Mormon leadership did not realize the danger of leaving its extensive real estate, cash and stock portfolio in the hands of one corporation until it was too late. Although the church had traditionally used "trustees in trust" to manage many church assets, it was clear that the property belonged to the central corporation. About a week after the Edmunds Tucker law was passed by Congress on February 19, 1887 (but before the act took effect on March 3), Mormon President John
legislation was so strong that none of the lawyers who argued *Late Corporation* even addressed the question of the constitutionality of the restriction.\(^{12}\)

Despite this presumption, however, the property limitation went unenforced from 1862 to 1887, when the Edmunds-Tucker law explicitly directed the Attorney General to begin proceedings to escheat all property held in violation of the 1862 law, and to dispose of the property for the benefit of local public schools. The only exception was for property used exclusively for religious worship, parsonages, and burial grounds.

Thus began the last major legal battle over polygamy. For the Mormons, their very survival was at issue. Dire threats of the punishment that an angry God would rain down on the heads of evil non-Mormons began to have a hollow ring. As he had been instructed, the Attorney General ordered a bill filed in the territorial supreme court, asking for the appointment of a receiver to hold and manage all the property of the dissolved corporation. The court did appoint a receiver, the disreputable Frank Dyer, whose management style brought maximum benefit to his own pocket book.\(^{13}\) Their

Taylor transferred to several newly-created religious corporations much of the personal property of the existing corporation.

\(^{12}\) The lawyers for the church, for example, cited an Illinois statute that prohibited any religious corporation from acquiring more \(\textit{without} \) 10 acres of real estate, whether by "gift, devise or purchase." The law was enforced against a church whose corporate charter had no express limitation. St. Peter's Catholic Congregation v. The German Catholic Congregation, 104 Ill. 440 (1876). All involved simply assumed that such a law was constitutional.

\(^{13}\) Dyer's conduct as receiver was widely criticized. After he was replaced as receiver in early 1890, he asked the court for $25,000 to compensate him for his troubles. He was widely criticized for this exhorbitant request, and eventually was awarded $10,000. Mormons, both at the time and more recently, have also accused Dyer of wasting assets during his receivership. See, e.g., Linford, "The Mormons and the Law. Part II, Civil Disabilities," 582: "[T]he property was taken, and then, after much
leaders in jail or on the lamb, their political power eroding fast as non-Mormons swelled the ranks of legal voters, and their financial power abolished at one fell swoop, the Mormons spared no expense — and little time — perfecting their appeal to the Supreme Court.  

James Overton Broadhead, like Vest a self-made man who went to Missouri to seek his fortune as a lawyer, was retained to argue the case. Unlike Vest, Broadhead had been a staunch Unionist in the Civil War, despite Virginia roots. Like other lawyers hired by the Mormons, however, "Colonel Broadhead," as he called himself, was a loyal Democrat. He had served briefly in Congress. But the scandal that erupted during his

of it had been dissipated, it was returend. The Church has always maintained that the Government took a full purse and returned an empty one." The Mormons may also have benefited from Dyer's iniquity, however. Wilford Woodruff, future President of the church and author of the Manifesto that announced the church's abandonment of polygamy, recorded his impressions of Dyer in a letter to a friend: "Well[,] lightning has just struck; Dyer the marshal came and turned us all out.... They demand our Money, our Bank Notes, but miss much — as they are on the warpath they must find those if they can." Wilford Woodruff to William Atkin, 24 November 1887. Quoted in Cresswell, Mormons, Cowboys, Moonshiners & Klansmen, 104.

14 It is not clear precisely how much property was in the hands of the receiver by the time the case reached the Supreme Court. The government claimed that the church owned at least $2,000,000 in real property, and $1,000,000 in personal property. According to one source, Dyer managed to locate over $1,000,000 in combined assets. Arrington, Great Basin Kingdom, 365-79; another source claims that the government had seized only $381,812, mostly cash on hand. Thomas E. Kauper & Stephen C. Ellis, "Religious Corporations and the Law," Michigan Law Review 71 (1973): 1499-1574, 1517. See also John Noonan, The Believer and the Powers that Are: Cases, History, and other Data Bearing on the Relation of Religion and Government (New York, 1987), 203-04. The receiver himself claimed to have confiscated some $750,000 worth of property, in addition to the Temple Block. Late Corporation v. United States, 136 U.S. at 15. The million dollar figure, therefore, seems roughly accurate, although the receiver's records were spotty.

election campaign in 1882 has overshadowed the fact that Broadhead was highly respected as a lawyer in his day. It seems that Broadhead and his law partner represented the city of St. Louis in negotiations with a gas company in 1872, and then several years later argued successfully in the Missouri Supreme Court that the agreement should be interpreted in favor of the gas company. Broadhead "planted himself upon the doctrine of vested rights," as one biographer put it, a doctrine that he would use once again, although less successfully, in his defense of the Mormon church.

At the time, the argument cost him a vote in the House of Representatives. John Cockerill, highly influential editor of the sensational St. Louis Post-Dispatch, charged that Broadhead was unfit for public office, because he had played both sides of the fence, first representing the city, and then the gas company, in different phases of the same on-going dispute. "James O. Weakhead," Cockerill claimed, was the puppet of robber barons and their mammoth corporations. Charges flew back and forth between pro-Broadhead forces and Cockerill -- eventually, Cockerill fatally shot Broadhead's junior partner, one Alonzo W. Slayback, after the latter stormed into his office in a fury.

There was something of a cloud over Broadhead when he argued on behalf of the Mormon church corporation in January, 1889, therefore. According to his biographer,

---


18 The grand jury that investigated the killing refused to indict. Cockerill claimed that he fired in self-defense. Some of Slayback's friends argued that Cockerill had planted a gun on Slayback after he was dead. The scandal was heatedly debated for years. Rammelkamp, Pulitzer's Post-Dispatch, 287-89.
he was nonetheless the most renowned lawyer in Missouri, and appeared "in many important controversies in the federal Supreme Court." 19 Late Corporation certainly numbers among the most politically charged cases of the decade, and Broadhead devoted considerable energy to his brief, and subsequent oral argument, on behalf of the church. 20

He made essentially three arguments; first, that the Edmunds-Tucker law was an unconstitutional repudiation of an executed contract; second, that even if Congress did have the power to dissolve a corporation by disapproving the legislation that created the charter, the time lag between the date of incorporation and the date of disapproval created a presumptive approval of the incorporation, which could not thereafter be revoked by the government; and finally, that by directing the attorney general to institute proceedings against the former corporation, ordering the territorial court to decide the case, and specifying the manner in which the assets of the corporation were to be administered and disbursed, Congress had crossed the bounds of its proper authority, and had engaged in "judicial legislation." 21


20 With him on the brief was Joseph E. McDonald, one-time Democratic Senator from Indiana, who had earned a national reputation defending the Democratic position before the electoral commission in the Hayes-Tilden dispute. After his defeat in 1881 by Benjamin Harrison, he dropped out of politics and resumed private practice. Like other lawyers involved in the Mormon church cases, McDonald was a self-made man. He began his career as an apprentice to a saddle-maker; and was fond of calling himself "Old Saddle Bags" to stress his humble origins. "Joseph Ewing McDonald," National Cyclopaedia of American Biography, 11: 504, "Joseph Ewing McDonald," Dictionary of American Biography, 12: 17-18.

21 Brief for Appellants, passim.
The first argument was Broadhead's strongest, and he came back to it again and again. In brief, Broadhead claimed that the rule of Dartmouth College case applied to the church corporation in Utah. In other words, Congress could not dissolve the church corporation (or, for that matter, alter the charter of incorporation as the act of 1862 attempted to do, by limiting church real property to a total value of $50,000) without violating the federal constitutional requirement that states not impair the obligation of contracts.

Here the argument gets a bit tricky, given that the contracts clause is directed at states, rather than at the federal government. Further complicating matters was the fact that the Court had already held in Murphy v. Ramsey, to use Broadhead's own words, that "the people of the Territories have no political rights," and that Congress was not required to treat the various territories equally. That said, Broadhead maintained, there were nonetheless certain fundamental constitutional rights that could not be abrogated in the territories -- viz., "PERSONAL and CIVIL rights" which "are secured to them as to other citizens by the principles of constitutional liberty, which restrain all the agencies of government, state and national."

And then Broadhead made an early form of select incorporation argument, claiming that some forms of government action are so "repugnant to the spirit of our

---


23 Brief for Appellants, 49-50.

24 Id., 50 (quoting Murphy v. Ramsey, 114 U.S. at 44).
institutions" that they could never be valid, even in the constitutional netherworld that was the territories. Among these fundamental civil (as opposed to political) liberties Broadhead named many of the provisions of the bill of rights, including trial by jury, freedom of speech and press, due process, equal protection, and even freedom of religion and nonestablishment. But it was not to the religion clauses that Broadhead turned for protection from the Edmunds-Tucker law, but to an amorphous amalgamation of "principles of government which underlie our whole political system," and which extrude the rule that "Congress can pass no law impairing the obligation of contracts, or legislate back to the Government property that has been given away by acts of Congress." 27

Again and again, both in his brief and at oral argument, Broadhead came back to this fundamental point. He quoted English law, the Declaration of Independence, and anything else that came to hand, drawing on the wisdom of "the barons at Runnymede, ... the forests of Germany, [and] the teachings of Greek philosophers of an earlier age." 28 He acknowledged that the case law had not been static after the Dartmouth College case, and that significant modification of corporate rights had been upheld by the Court. But, Broadhead argued, in each case that chipped away at the Dartmouth College rule, either the charter itself, or some more general legislation (still targeted

25 Id., 51.

26 As one contemporary commentator put it, "Of course, Broadhead made no sort of defense,--for Christian man as he was he could not,--of polygamy itself." Hagerman, Great American Lawyers, 7: 297.

27 Brief for Appellants, 51.

exclusively at corporations) had reserved the power to amend. Utah's organic act, on the other hand, passed by Congress in 1850, did reserve the right to disapprove acts of the territorial legislature, but made no specific mention of any reservation of the power to alter or amend corporate charters. Even if Congress did have a reserved right to disapprove of a corporate charter such as that granted the Church of Latter-day Saints, Broadhead maintained, the time had long since passed to do so: the charter was granted in 1851 -- it was not revoked until 1887, creating an "implicit sanction." 30

Finally, Broadhead argued that the Edmunds-Tucker law was a form of "judicial legislation," an improper invasion of the judicial sphere. Assuming arguendo that the disapproval of the corporate charter was constitutional, this argument ran, the 1887 act vested equity jurisdiction in the territorial supreme court to wind up the affairs of the corporation, and dictated that the court should take charge of corporate property. "What is this but a judicial determination on the part of the law-making power that all this property belongs to the Government?" queried Broadhead. 31 Such legislative invasions of the judicial sphere are nothing less that despotism, albeit despotism of the majority.

Broadhead concluded with the inevitable reference to Dred Scott, quoting at length Taney's shop-worn analysis of the relationship of the federal government to the territories

---

29 "[I]n order to give the Legislature the power to repeal, alter, or amend a charter of incorporation, there must be either an express reservation in the charter itself, or some provision of the general law or of the Constitution on the subject of corporations which reserves this power to the Legislature, and, so far as we have been able to discover, there is no case which maintains a contrary doctrine." Brief for Appellants, 67.

30 Brief for Appellants, 73-74.

31 Brief for Appellants, 89.
-- hoping against hope that the glory days of territorial sovereignty might return to rescue his beleaguered client, and make "Old Saddlebags" a legendary lawyer in his own time.

For the United States, Attorney General Augustus Garland defended the Edmunds Tucker law. If James Broadhead came to Washington under something of a cloud, Augustus Garland was eventually tarred by much the same brush. In 1886, Garland as attorney general presided over an important case testing the validity of the patent held by Alexander Graham Bell on the telephone. At the same time, Garland (and others in the Cleveland administration) held stock in the rival Pan-Electric Telephone Company, and stood to profit handsomely if Bell lost. Newspaper editorials, hints from Grover Cleveland, and congressional investigations notwithstanding, Garland refused to resign his post, even though uncertain health would have provided a convenient excuse.\footnote{See generally Leonard Schlup, ed., "Augustus Hill Garland: Gilded Age Democrat," \textit{Arkansas Historical Quarterly} 40 (Fall, 1981): 338-46; Cresswell, \textit{Mormons, Cowboys, Moonshiners \\& Klansmen}, 10 \& n.23.}

In his brief for the government, Garland devoted considerable attention to the question of the validity of the Edmunds-Tucker law, at the same time taking repeated jabs at the obduracy of the Mormon church, the distastefulness of its morals, and -- most important -- at the financial and legal power it wielded in the territory.\footnote{Solicitor General George A. Jenks argued the case. There is no reported transcript of the argument, but according to newspaper accounts, it was entirely derivative of Garland’s brief. \textit{New York Times}, 21 January 1889.} All this, Garland claimed, was the nefarious network woven around the spread and practice of polygamy. These were the consequences of an aberrant marital structure.
Garland made short work of the power to dissolve territorial corporations. Arguing that the reservation of power to annul territorial legislation empowered Congress to act at any time, Garland did not even address the church's strained theory that an amorphous spirit of liberty applied the contracts clause to the federal government.

What Garland focused on, instead, was the nature of the charter itself. In other words, Garland first claimed that Congress had already reserved the same kind of power that allowed states to modify or abolish corporations, and then argued that corporation was in a sense void ab initio: the very charter violated the constitution, Garland claimed, because it granted a religious organization the right to make laws that affect society, most conspicuous among them the doctrine of polygamy, and the right to tax citizens, through the power to enforce tithing regulations of the church. Such powers, according to Garland, violated the establishment clause; not since the Inquisition had a church obtained such open-ended power to define (and execute) the laws.  

By any reading of the charter itself, this is an exaggeration of the powers granted to the church. As a matter of fact, however, Garland was not all that far off the mark. The Mormon Church did exercise extraordinary influence over the temporal lives of its members, and over all of life in Utah. The Church was the banker, the retailer, the publisher, the educator, the town planner, the entrepreneur and the marketer of Utah.

The church controlled the legislature, the Courts and the police; it relieved the poor, it financed the immigration of thousands upon thousands of new converts from Europe. Brigham Young created hundreds of enterprises -- from cotton and silk farms

\[\text{Brief for the United States, 19.}\]
to theatre companies to railroads -- all of which were owned and managed by the church, often in Brigham Young's name. In this sense, the establishment of the Mormon Church was of a far more thorough-going sort than ever Massachusetts or Virginia had known. The Church of Latter-day Saints was not merely an established church; it was an entrepreneurial establishment. It combined the Yankee fever to experiment with both new technology and organizational forms, with religious belief. Salt Lake was a company town, and in this town the corporate religion really was religion.

What Garland was attempting to do, therefore, was to ratchet up a concededly unprecedented de facto establishment into a de jure one; and then argue that de jure establishments in the territories violated the federal establishment clause. The wisdom of the principle of non-establishment, Garland claimed, was amply illustrated by the horrors of polygamy. Monogamous marriage, the very foundation of order, of property, of government, had been subverted by the evil corporation. Nobody was safe, he argued, when a group of men who formed a company, and called themselves a religion, could exercise such legal control over the personal and financial lives of their unfortunate adherents. The two problems (the power of the church in general and its polygamous leaders in particular) were melded in Garland's argument as in much anti-polygamy thought.

This position was widely accepted by contemporary treatise writers (and rarely challenged, even by those who argued in defense of the Mormons -- instead, they tended

---

35 See generally Arrington, Great Basin Kingdom, passim, and "The Settlement of the Brigham Young Estate, 1877-1879," 2-10.
to focus on the voluntary choice of individual believers, whose commitment led them to support their ecclesiastical leaders as men of wisdom, rather than simply as men of faith). Across the spectrum, from well-known constitutional theorists to jurists who dabbled in legal writing only as a side-line, the overwhelming majority roundly condemned the situation in Utah as an unconstitutional establishment, and polygamy as the essence of the problem. Thomas Cooley and Christopher Tiedemann, just to name the most prominent, all commented on the legal and political power of the Mormon church as a violation of the precepts of common law and constitution alike (which together had produced, for the first time in human history, true religious liberty), and the morality represented by both.

Equally prominent are tracts on church and state written by clergymen in the late nineteenth century. To a man, they argued that true liberty was only possible under the most complete separation of church and state. Some even argued against school prayer, Sunday closing laws, and the like. All weighed in against the Mormon Church, arguing that to allow religious belief to serve as the justification for moral deviance would be to

---

* "These [state and federal] constitutions, therefore, have not established religious toleration merely, but religious equality; in that particular being far in advance ... of the mother country...." Cooley, *Constitutional Limitations* (1890 ed.), 572-73. "[A] prohibition of all State interference in matters of religion [is] the foundation for the development of a complete and universal religious liberty, a liberty enjoyed alike by all, whatever may be their faith or creed. Thus and then, for the first time in the history of the world, was there a complete divorce of church and State." Christopher G. Tiedeman, *A Treatise on the Limitations of the Police Power in the United States* (St. Louis, Mo. 1886), 159, section 70.
violate the spirit of the Constitution. Henry Ward Beecher, for example, charged Utah with "treason," with seeking to undermine all that was free in the United States, by establishing the Mormon Church as a front for a polygamous aristocracy of priests:

It is a union of church and state, which we fear, and to prevent which we lift up our voice: a union which never existed without corrupting the church and enslaving the people, by making the ministry independent of them and dependent on the state, and to a great extent a sinecure aristocracy of indolence and secular ambition, auxiliary to the throne and inimical to liberty.  

They also said in a myriad different ways that the exercise of political, legal and entrepreneurial power by a religion was antithetical to everything the country stood for, especially equality and democracy. "The passion for equality in religion as well as secular matters is everywhere in America far too strong to be braved, and nothing excites more general disapprobation than any attempt by an ecclesiastical organization to interfere in politics."  

"The doctrine of democracy," according to Samuel Spear, Doctor of Divinity and frequent contributor to the Independent, a liberal New York newspaper, "is that the ruler represents the sovereignty of the people. The doctrine of theocracy is that

---

37 As the Reverend Joseph Parrish Thompson, pastor of the popular Broadway Tabernacle Church of New York and author of some 15 books on religious topics, explained to his readers, "[T]he plea of conscience or of religious liberty cannot be used to cover offenses against the moral sense of the community, or against the peace and order of the family and of society.... [Thus] the State can deal with bigamy and polygamy as offenses against the well-being of society; though the Mormons have sought to cover them with sanctions of religion." Church and State in the United States (Boston, 1873), 126.


he represents the sovereignty of God. The former, and not the latter, is the doctrine upon
which the civil and political institutions of this country are founded." The union of
church and state, in their eyes, was itself unChristian. As the Supreme Court of Ohio
put it in 1872:

Legal Christianity is a solecism; a contradiction of terms. When Christianity asks
the aid of government beyond mere impartial protection it disowns itself. Its
essential interests lie beyond the reach and range of human government. United
with government religion never rises above the merest superstition; united with
religion government never rises above the merest despotism; and all history shows
us that the more widely and completely they are separated the better it is for
both."

It was this liberty, this equality among religions, that treatise writers and jurists,
as well as clerics, were so passionate about. The contours of this liberty, however, are
worth exploring. As one student of Cooley's work put it, his treatise was an "ethical and
moral tract," a meditation "written in legal language on human freedom and the
connection between human action and [its moral and material] consequences." In
Cooley's work, as in Tiedemann's, the morality of law, the duty of law, and the limits
of law, were wrapped up together in a mandate to create structures that would allow the
widest range of human activity possible, liberty to reveal, to realize the moral content of
individual effort.

---

40 Samuel T. Spear, Religion and the State, or, the Bible and Public Schools (New
York, 1876), 184-85. Even Spear was compelled, however, to acknowledge that the
principle of separation, although absolutely fundamental, was not consistently observed,
even in the enlightened nineteenth century. But "]a]ny divergence from this great
principle, as is the fact in some of the State constitutions, is merely exceptional to the
general spirit and purpose of our governmental system." Id., 380.

41 Board of Education v. Minor, 23 Ohio 211, 248 (1872).

One side of this legal coin, of course, was what we call (generally pejoratively) "laissez-faire." But for Cooley, as for many nineteenth-century legal thinkers, including the Supreme Court in its polygamy decisions, the range of human latitude was not limitless, but carefully defined and crafted to preserve the essential morality that undergirded the entire legal edifice. It is in the discussion of the (generally unenumerated) moral qualities of the American system, that religion slid in to the equation sideways, revealing itself as an essential component of the constitutional order through its function as the indispensable conduit of morality. As Tiedemann put it, "[a] high morality is inconsistent with a state of chronic irreligiousness."\footnote{A Treatise on the Limits of the Police Power, 167.} Freedom of belief, therefore, did not necessarily imply freedom not to believe.

Here the argument gets tangled, and complete religious liberty is followed with statements such as Tiedemann's that "Christianity is essentially the religion of this country."\footnote{Ibid.} The sense that the United States was irrevocably, and necessarily, a "Christian nation,"\footnote{Church of the Holy Trinity v. United States, 143 U.S. 457, 471 (1892) ("This is a Christian Nation."). See also David J. Brewer, The United States: A Christian Nation (Philadelphia, 1905) (Justice Brewer also was the author of the opinion in 

Holy Trinity). For an thoughtful analysis of "Christian Nation" rhetoric in the late nineteenth century, see Carol Weisbrot, "Charles Guiteau and the Christian Nation," Journal of Law & Religion 7 (1987): 187-233. As Weisbrot points out, there was a common perception that Guiteau's fanaticism was similar to the zeal of the Mormons. Guiteau was even accused in the popular press of being a Mormon. His violent antinomianism, Weisbrot points out, was "associated in the minds of contemporary observers with a number of crimes and immoralities [such as those perpetrated by the Mormons and Oneida Perfectionists ] of which the assassination of President Garfield was the latest and most terrible example." Id., 233.} and that Christianity underlay the moral precepts of the
Constitution, remained widespread -- often even proclaimed as the essence of true separation of church and state. Recognition that Christianity was in fact the national religion, even though, so they said, in law and in politics perfect freedom obtained, allowed treatise writers and judges to square the punishment of blasphemy with their sense of the separation of church and state. Blasphemy, argued Cooley and Tiedemann, was no so much an offense against Christianity, as against the sensibilities, the sense of order, of Christians, who made up the polis.

The place of Christianity in legal thinking in the decade since Reynolds was decided had grown fuzzier, although perhaps no less powerful. One was less likely to read that Christianity was incorporated into domestic law through the reception of the common law, but no less likely to hear that the moral precepts of Christianity (in the most general sense of the term "Christian," which was broadly understood to include all

\[4\] Sanford H. Cobb, *The Rise of Religious Liberty in America, A History* (1902: New York, 1968), 20-21: "From the nature of the case the problem of Church and State is entirely Christian. It could arise only within the pale of a Christian society, more or less civilized and advanced. To the Hebrew cultus it was unknown, and its propositions would be unintelligible. The Hebrew State and Church were one, merged together, not as by union of two distinct entities, but as the component factors of one substance, neither of which could exist without the other."

\[5\] Tiedeman had little trouble endorsing the punishment of blasphemers against Christianity, but only those blasphemers. Because Christianity was "essentially the religion of this country," defamation of "its founder or of its institutions, must and can be prohibited." "[N]o one can claim, under the constitution, the right of indulgence in offensive levity, or scurrilous and opprobrious language, which serves no good purpose, and, when done in public, is likely to bring about more or less disturbance of the public order. Such actions and such language, whether written or spoken, constitute a nuisance, which comes within the jurisdiction of law. It is legal blasphemy." *A Treatise on the Limits of the Police Power*, 167, 170. Cooley also argued that the punishment of blasphemy was a permissible prevention of public disturbances. *Constitutional Limitations*, 598.
Protestant denominations, and to exclude Mormonism and Islam, with Catholics trapped somewhere between the two) were the foundation of political as well as personal morality. But as the campaign against polygamy hurtled into its final stages, it became clear to those who thought about church-state relations that one of the fundamental moral precepts of Christianity was that church and state must always be separate.

Second, legal thinkers argued that churches should partake in a broad-based competition for converts, as businesses competed for customers. The Supreme Court of Ohio is once again a good source for articulation of this development:

Let religious doctrines have a fair field, and a free, intellectual, moral and spiritual conflict. The weakest -- that is, the intellectually, morally, and spiritually weakest -- will go to the wall, and the best will triumph in the end. This is the golden truth which it has taken the world eighteen centuries to learn, and which has at last solved the terrible enigma of "church and state."*  

Here was a handy solution to two contemporary quandaries, and by the way of the Mormon Question. On the one hand, the theory that competition would winnow out the unworthy, rather than the weak (but very possibly deserving), resolved the moral dilemma raised by social Darwinism." In this view of natural selection of religion through competition among religious denominations, the prize would always go to the most morally advanced, rather than the strongest, or the slickest, or the loudest. On the

* Board of Education v. Minor, 23 Ohio at 250.

Put in its simplest terms, the acceptance of the theory that an endless struggle for existence was the motivating factor for all of history, and that the weak and unfit must be left to perish, seemed to contradict the most basic Christian ethics, as well as democratic and humanitarian theories. See, for example, Richard Hofstadter's chapter on "Evolution, Ethics, and Society," in Social Darwinism in American Thought, rev. ed. (Boston, 1955), 85-104.
other hand, the notion that religious organizations, like their commercial cousins, should participate in the free-for-all of the market, albeit a spiritual rather than material market, fit in nicely with a capitalist political economy.\footnote{I am not the first person to notice the connection. See, for example, Peter Berger, \textit{The Sacred Canopy} (New York, 1965), 130: "The state now takes a role \textit{vis-a-vis} the competing religious groups that is strikingly reminiscent of its role in \textit{laissez-faire} capitalism -- basically, that of impartial guardian of order between independent and uncoerced competitors.... [T]his analogy between economic and religious 'free enterprise' is far from accidental."}

It is a nice question whether those who espoused this theory, and who at the same time proudly acknowledged the overwhelmingly "Christian" character of the population of the United States, were conscious at any level that the kind of pure, decentralized capitalism they advocated for religious groups was rapidly declining, as monopoly capitalism replaced the small-time entrepreneurs so dear to contemporary economic theory. The idea that moral uniformity would be the inevitable product of religious competition may have seemed more plausible in an era when economic competition was giving way to centralization. In any event, the Mormons violated the religious competition precept at every level. Not only was the Mormon Church in Utah a powerful anti-competitive force, but the polygamous family was also a fundamental challenge to monogamous marital structure in which no one man was allowed more than his share of women.\footnote{According to one historian, the non-capitalist nature of the pre-1890 Mormon Church that was its most distinctive feature. Arrington, \textit{Great Basin Kingdom}, 380-412.}

Polygamy, and the Mormon Church, also violated the Darwinist angle. The argument runs something like this -- because the Mormon Church intervened in the
personal marital (and financial) decisions of its members, it was not allowing nature to take its course, and it was at the same time creating an artificial elite. The leaders of the Mormon church consistently denied that they were pre-selecting males to reward with multiple women, and that the men who married plural wives were undeserving.\footnote{Indeed, the Mormons themselves made arguments in defense of polygamy that were very close to social Darwinism. For example, Orson Pratt argued that polygamy was the preferred marital structure of the majority of the world’s population. \textit{Latter-day Saints’ Millennial Star}, September, 1852. Quoted in Whitaker, “The Bone in the Throat,” 303. Further, George Cannon claimed that polygamy allowed women to ally themselves with a man who had already proven his worth -- who had, in essence, shown himself to be more fit than other men. “Utah and its People,” \textit{North American Review}, 130 (1881): 451-66, 463.} There is no question, however, that the practice of polygamy did create an elite in the classic sense of the term -- a network that was both social and financial, held together by ties of kinship and religion as well as economic interest.

Mormonism was widely believed to stifle healthy competition on several levels, therefore, and Attorney General Garland tapped into a powerful vein of anti-Mormon feeling by highlighting the connections between the corporate structure and the property of the corporation, and the maintenance of polygamy. Polygamy, Garland argued, was integral to Mormon corporate power; destroy that inordinate power, and polygamy would fall as well. This was an argument with wide popular appeal, a reference to the seamlessness of power relations across the political, legal and economic spectrum -- the misappropriation of power and protection for wives affected all areas of political and legal life in Utah. Garland argued, and anti-polygamists believed, that the cure for the disease of polygamy required the nation to treat the related symptoms (political monopoly of the
government of the territory, economic monopoly of the resources of the territory) as well as the core (husbands' monopoly of power within marriage). Counsel for the church was sensitive to this point, and hastened to reply in a supplemental brief that essentially claimed that (even if valid in other respects) the punishment inflicted was disproportionate to the crime. At the forfeiture proceedings, the territorial supreme court found as a matter of fact that approximately 20% of the adult Mormon population was directly involved in polygamy. To confiscate most of the property of an organization as penalty for the crimes of only a few, the church argued, was unwarranted. 53

The majority of the Supreme Court did not see it that way. Justice Joseph Bradley, by 1890 every bit as much the Great Old Man as Stephen Field, shared some of Field's characteristics, however much the two disagreed from time to time on points of law. Bradley's biographer describes his temper in terms that are reminiscent of Field's own short fuse: "A man of such pronounced characteristics as Justice Bradley was bound

53 Supplemental Brief for Appellants, 107-08:
Will it do to enter upon a system of general confiscation and forfeiture of all Church funds, and of all charitable funds, wherever it can be found that one out of five of the Church members, or one out of five of the beneficiaries of the charitable fund, is unworthy and immoral? If that were the law, and if it were strictly enforced, it would soon bankrupt many Churches and close up many charitable institutions and asylums by confiscation of their property and funds. No one can abhor and detest the doctrine and practice of polygamy more than the writer of this brief, but at the same time love of justice, equity and fair dealing, and a firm belief in the rights of property and the protection of all persons in their rights to acquire and use and enjoy their property, compels the severest criticism and strongest condemnation of the high-handed acts of confiscation and spoliation attempted by the act of March 3, 1887 and by the decree appealed therefrom. Even if the statute abolishing the corporation was valid, the church argued, the fact that only a minority of the corporation's beneficiaries participated in an illegal activity dictated that the corporation's property should not be confiscated and devoted to new uses, but should be granted to church members. Id., 95-97.
to display the incidents of his strong qualities.... He could not endure stupidity, least of all when it resulted in inconvenience to himself."

The unfortunate Mrs. Bradley reportedly "devoted her life to protecting the Justice from irritation."  

The eldest of twelve children of a subsistence farmer in upstate New York, Bradley burned so to get an education that he set off for Rutgers in a homespun suit, nary a sou in his pocket, well knowing that the loss of a strong back was a heavy blow for a small farm. Like many other self-made young lawyers (including, of course, the first Republican President), Bradley became a "railroad lawyer," representing the notoriously corrupt "Camden & Amboy" road, which had (and fought fiercely to maintain, with Bradley as its spokesperson before congressional committees and in courts) a monopoly over New Jersey portion of the New York-Washington corridor. So bitter was the contest over access to the road, and so blatant was the C & A’s ownership of the New Jersey legislature, that Senator Cameron of Pennsylvania (himself the shill of the Pennsylvania Railroad, and mastermind of a corrupt political machine) voted against Bradley’s nomination to the Supreme Court.


55 Charles Fairman, "Mr. Justice Bradley," in Allison Dunham and Philip Kurland, eds., Mr. Justice (Chicago, 1955), 85. Bradley married up in the social scale -- Mary, the youngest daughter of Joseph C. Hornblower, Chief Justice of the Supreme Court of New Jersey, dedicated herself to making the Bradley home "a refuge from the world's striving," id., 78, freeing the future justice to pursue an increasingly successful professional career in Newark, then a booming manufacturing, financial, and transportation center.

56 As Charles Fairman put it, "Bradley ... made his own way in the age of individualism." "Education of a Justice," 73.
In addition to the odor left by Bradley’s railroad shenanigans, there was also a question about a rumored deal Bradley reached with Republican Party leaders, committing himself to over-ruling the highly controversial Legal Tender Cases, which had infuriated Radical Republicans (and many of the moderates as well).\footnote{In Hepburn v. Griswold, 75 U.S. (8 Wall.) 603, decided on February 7, 1870, only weeks before Bradley’s nomination, Chief Justice Chase, writing for a 4 - 3 majority on a understaffed Court, held that the government’s issuance of paper money as legal tender was not a valid war-time measure. The political controversy that swirled around the Court after this decision was announced is well-documented in Warren, Supreme Court, 3: 220-38.} Only four days after his nomination was confirmed, Bradley voted with a new majority to re-open the question, and concurred in the eventual opinion that reversed the earlier decision.\footnote{Knox v. Lee, 81 U.S. (12 Wall.) 457 (1871). Modern scholars have generally dismissed the claim that, with Bradley and Strong’s nominations, President Grant “packed” the Court. See Warren, The Supreme Court, 3: 239, and Charles Fairman, "Mr. Justice Bradley’s Appointment to the Supreme Court and the Legal Tender Cases," Harvard Law Review 54 (1941), 977-1034, 1128-1155.} Thus controversially began a judicial career that was unflinchingly nationalistic. Joseph Bradley voted with the majority to deny habeas corpus power to the states that questioned the incarceration of citizens by military tribunals; he dissented vigorously in the Slaughterhouse Cases; and he upheld the expansion of federal criminal jurisdiction and penalties.\footnote{Ex parte Siebold, 100 U.S. 371 (1880), and Tennessee v. Davis, 100 U.S. 257 (1880).} Further, despite his railroad-lawyer background, Bradley consistently voted
to uphold regulation of railroads and other monopoly corporations, and in favor of both state and federal police power to combat corruption.\textsuperscript{60}

Justice Bradley also had pronounced views on the proper treatment of women. Not only did the Justice expect his wife to cater to his every need, he was profoundly committed to a worldview that presumed that all women were suited to such ministrations. This assumption was consistent with his profound belief that human nature was established at the Creation, and that that law was best that most effectively followed (and disciplined) human nature, while allowing "all the liberty compatible with mutual security."\textsuperscript{61} Bradley's concurrence in \textit{Bradwell v. Illinois}, decided the same day as the \textit{Slaughterhouse Cases}, is infamous in the annals of feminism.\textsuperscript{62}

His opinion was a disquisition on marriage, and the relations of power within marriage. It was not, Bradley made clear, that the privileges and immunities clause did not apply to women as well as men, but that the privileges and immunities of women were different than those of men. Bradley did not consign women to utter powerlessness; instead, he maintained that women reigned in their appropriate place -- the home.

\textsuperscript{60} For example, Bradley voted with the majority in (and was long credited with being the virtual author of) \textit{Munn v. Illinois}, 1877, upholding the regulation of prices charged by the operators of grain elevators. In the same year that he wrote the majority opinion in \textit{Late Corporation}, Bradley also dissented from the first substantive due process case. \textit{Chicago, Milwaukee & St. Paul Railway v. Minnesota}, 134 U.S. 418 (1890).

\textsuperscript{61} Address by Joseph P. Bradley at Newark, New Jersey, 4 July 1848, quoted in Charles Fairman, "Mr. Justice Bradley," in \textit{Mr. Justice}, 78. See also William E. Nelson, "The Impact of the Antislavery Movement Upon Style of Judicial Reasoning in Nineteenth Century America," 552.

\textsuperscript{62} 83 U.S. (16 Wall.) 130, 139 (1873) (Bradley, J., concurring).
[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender.... The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.... This is the law of the Creator.  

This vision of complementary separateness, of the difference between men and women, was fundamental to the power relations of marriage as Bradley knew it -- the simultaneous moral superiority and "delicacy" of women, and their essential dependence on male strength for protection. Like most conservative legal thinkers, Bradley was not totally blind to the potential for abuse of male legal power -- the protection and defense of women, he claimed, was a male duty, but one that he feared was not always honored.

Bradley was worried about marriage, worried about women who tried to circumvent the rules of coverture, of subordination. But he was also worried about the possibility that unworthy, or intemperate or violent men might betray the trust confided in them by law. Despite these concerns, Bradley, like his fellow justices, was more a critic of marriages, than of marriage -- certainly he partook of the same legal world as Thomas Cooley, for both described the traditional common law of coverture as the legal

---

83 U.S. (16 Wall.) at 141.

On the discourse of manliness in late nineteenth-century legal rhetoric, see Hartog, "Mrs. Packard on Dependency," 92-97.

Man "is, or should be" the protector of woman, Bradley wrote, highlighting a basic anxiety in the legal philosophy of marriage; viz., that men would not keep their part of the bargain. It is also interesting to note that in Bradley's own marriage, it was apparently the woman who did most of the protecting, ensuring that her husband's fragile equilibrium was not disturbed by the world around him.
manifestation of divine law, an understanding from time immemorial that women as wives operated in a fundamentally different (which need not necessarily imply inferior) capacity than men as husbands in the eyes of the law.

This ideology of marriage, which was, of course, by no means universally held or uncontested (the very presence of the Bradwell case at the Supreme Court is evidence that constitutional litigants saw an opening in marital rules, just as suffragists, free lovers, and, of course, those who opposed them, did). But the essential law of marriage, the theory that husband and wife were united for life in a relationship that was for most purposes private, but that had profound and undeniable public dimensions, remained remarkably stable through all the sturm und drang.

Anti-polygamy, and the federal law of marriage that emerged from Congress and was upheld against constitutional challenge (and thus itself inevitably constitutionalized) was no small part of this legal continuity in the midst of social debate. The very existence of so broadly abhorrent a marital system as Mormon polygamy, created a meeting ground in law (as it did in politics, religion and economics), neutral territory, where Joseph Bradley and Myra Bradwell could agree that something was terribly wrong in Utah. Traditional rules of monogamy -- coverture, legal and political disabilities for women in marriage -- could even acquire a progressive tinge, when stacked up alongside the patriarchal prospects of polygamy. Even to critics of the law of traditional monogamy, such as Susan B. Anthony, polygamy was to the highest degree distasteful. 66

66 See Van Wagenen, "Sister Wives and Suffragists," 44: "Although Anthony asked for sympathy for polygamists, she had none for polygamy.... In one letter she claimed that the 'sad spectacle' of Mormon women was attributable to the 'life of dependence' ...
Truly, one might say Myra Bradwell and Joseph Bradley could agree on one thing: that polygamy was too much patriarchy. The legal rules that punished polygamy (and shored up monogamy), the Morrill Act and the Reynolds decision, the Edmunds Act and Murphy v. Ramsey, and finally the Edmunds-Tucker Act and Late Corporation, in this sense relieved the pressure for legal change, even as the public law of marriage grew into space it had never before occupied. Anti-polygamy was the primary (but not the only) vehicle for this growth, this change in the interests of preservation and conservation -- for a national legal identity in monogamy, as the basis of marital, political, economic and religious life.

Given Justice Bradley's basic predilections -- nationalistic, pro-regulatory, anti-corruption, and conservative, all key ingredients in anti-polygamy legal thought -- Late Corporation was so much grist for his judicial mill. The opinion is a tour de force in the best Bradley style, drawing on sources as diverse as the Panedicts of Justinian, the Spanish law of religious donations, and even Lord Bacon. Bradley's intellect was nothing if not wide-ranging. As his fellow Justice (and frequent opponent), Samuel Miller put it, "If there is a principle on which a case can be decided that no one else has thought of it has for that reason a charm for him." And so it was here. Bradley quickly disposed of the claim that the dissolution of its corporate charter violated the church's fifth amendment right to due process. Such an argument only allowed Bradley in polygamy...." Quoting Anthony to Lucy Read Anthony, 5 July 1871, Susan B. Anthony Papers.

67 136 U.S. at 52-53.

68 Quoted in Fairman, "Education of a Justice," 221.
to put the final nail in the coffin that contained whatever was left of territorial sovereignty. Not only did Congress, by its express reservation of the power to disapprove territorial legislation, and by implication through its ultimate sovereignty, have the right to alter, amend or abolish a corporate charter in the territories at any time, Bradley held, but the occupants of the territories had no concrete constitutional rights:

Doubtless Congress, in legislating for the Territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress dervies all its powers, than by any express and direct application of its provisions. 69

_Dred Scott_ was dead; the national law of marriage, the anti-polygamy campaign, had killed it.

Bradley then moved on to his main theme, and his trademark innovative analysis. Given that the charter could constitutionally be dissolved, the question became the proper treatment of the property of the defunct corporation. Here Bradley hit his stride, devising a solution that neatly tied up all the troublesome by-products of dissolution. The church’s constant refrain was that it was a "religious or charitable organization." Bradley accepted this characterization, and then deftly turned it against the church.

The "ancient and established rule" of charities, Bradley purred, was "not confined to a particular people or nation, but prevail[ed] in all civilized countries pervaded by the spirit of Christianity." 70 In all Christendom, the rule was that when a charity failed, its personal property reverted to the state; its real property to the grantor. In this case, the

---

69 136 U.S. at 44.

70 Id., 51.
grantor was also the state, through which the church had acquired title to lands it had occupied prior to the organization of the territory.

The law, then, was clear: all Congress had done in the Edmunds-Tucker act was codify a pre-existing, universal rule of the law of philanthropy. The next question to be answered was, had this particular charity failed? Here, too, the answer was drawn from all Christendom: "[i]t is a matter of public notoriety, that the religious and charitable uses intended to be subserved are the inculcation and spread of the doctrines and usages of the Mormon Church, ... one of the distinguishing features of which is the practice of polygamy -- a crime against the laws, and abhorrent to the sentiments and feelings of the civilized world." Like his brother Justices Field and Matthews, Bradley was sensitive to the international embarrassment occasioned by the existence of a polygamous sect in Utah:

[I]ts emissaries are engaged in many countries in propagating this nefarious doctrine [of polygamy], and urging its converts to join the community in Utah. The existence of such a propaganda is a blot on our civilization. The organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism. It is contrary to the spirit of Christianity and of the civilization which Christianity had produced in the Western world.71

There was more than mere embarrassment at issue, however; there was also a repeated emphasis on the "spread" of polygamy. And whatever may be the twentieth century's assessment of the gravity of the threat, "spread" was the operative word.

71 Id., 48, 49.
Between 1886 and 1889, the church organized more than 100 communities for settlement outside Utah. Not only in Idaho, but also in Arizona, New Mexico, Colorado and Wyoming, colonies of Mormons sprouted up overnight. There was a simple explanation for expansion: Mormon missionaries had been so successful, and Mormon women were having so many babies, that in only 40 years the population had outgrown Utah, and was overflowing in all directions.

Given polygamy's obnoxiousness, and its growth, Bradley queried, is "the promotion of such a nefarious system and practice, so repugnant to our laws and to the principles of our civilization, ... to be allowed to continue by the sanction of the government itself?" In good lawyerly style, Bradley had turned the question into one that had the Mormons asking the federal government, through the maintenance of the corporate form, for official support for criminal activity. Here Bradley showed some of his famous impatience; for the intended answer to his rhetorical question so plainly was "no," that it raised the issue of why this rogue sect's corporation had been allowed to exist for so long:

It is unnecessary here to refer to the past history of the sect, to their defiance of the government authorities, to the attempt to establish an independent community, to their efforts to drive from the territory all who were not connected with them in communion and sympathy. The tale is one of patience on the part of the American government and people, and of contempt of authority and resistance to law on the part of the Mormons. Whatever persecutions they may have suffered in the early part of their existence, in Missouri and Illinois, they have no excuse for their persistent defiance of law of the government of the United States.\footnote{Arrington, \textit{Great Basin Kingdom}, 382-84.}

\footnote{136 U.S. at 49. Immediately following this passage, the Court once again raised a free exercise defense (one which the church had not claimed), only to reject it:}
Bradley closed with a final reference to the threat posed by the corporate form in the hands of the undeserving. The Mormon Church, he said, had no respect for law, and no respect for civilization -- the Mormons, Bradley said in so many words, were deceitful, dishonest, dangerous. In a country preoccupied with organized corruption, the existence in Utah of a "contumacious organization," a community dedicated to the overthrow of civilization through the degradation of women in corrupted marriages was the epitome of corporate crime, properly treated on a national scale.

Bradley did not persuade all his brethren. For the first time in a polygamy case, there was a dissent on the merits. Chief Justice Melville Westin Fuller, far younger than Bradley, and, according to his biographer, often intimidated by the older man's brilliance and arrogance, was joined in dissent by Stephen Field and Lucius Quintius Cincinnatus.

One pretense for this obstinate course is, that their belief in the practice of polygamy, or in the right to indulge it, is a religious belief, and, therefore, under the protection of the constitutional guaranty of religious freedom. This is altogether 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. The practice of Suttee by the Hindu widows may have sprung from a supposed religious conviction. The offering of human sacrifice by our own ancestors in Britain was no doubt sanctioned by an equally conscientious impulse, but no one, on that account, would hesitate to brand these practices, now, as crimes against society, and obnoxious to condemnation and punishment by the civil authority.

Id., 49-50. It is possible to read the above quotation two ways. Bradley may have intended simply to reiterate the belief-action distinction first articulated by Chief Justice Waite in Reynolds. It is also possible, especially given Bradley's firm commitment to the law of "all civilized countries pervaded by the spirit of Christianity," that any religion that fell outside that "spirit" did not qualify for protection under the federal Constitution. In other words, Bradley may have been narrowing the absolute protection of belief to Christianity understood in broad terms. This goes further than Reynolds, and picks up on a similar statement by Justice Field in Davis v. Beason, to the effect that the "pretense" of religion, however sincere, did not raise superstition to the level of Christianity in the eyes of the law.
Lamar (himself a relic of the Old South, and an opponent of anti-polygamy legislation during his tenure in the Senate).

Although one source described the brief dissent as motivated by old-fashioned states' rights doctrines, the dissenters were in fact more solicitous of private property and of the corporate veil, than territorial sovereignty. The corporation, they argued, should not be punished for the actions of its members. Corporations, they pointed out, could not be guilty of polygamy, no matter how undesirable the conduct of some individual members of the corporate whole.39

Had they but had the ability to see, say, fifteen years into the future, the Justices would have realized that the dissenters had the better of the argument, at least until the New Deal forever changed the attitude of the Court. In the 1890s, substantive due process, the doctrine that the due process clause limited state government from interfering with the liberty and property interests of citizens (especially corporate citizens) emerged as the Supreme Court's jurisprudential answer to redistributive politics of the sort at issue in *Late Corporation*. But in 1890, Joseph Bradley's moral vision still held sway, levelling the financial empire of the church with a single blow.

Congress had intended that the Edmunds-Tucker act should extirpate polygamy at last, and so it was. The decision in *Late Corporation* was announced in late May, 1890, more than a year after the case was argued. According to several sources, the delay was


35 136 U.S. at 67-68.

designed to give the church time to abandon polygamy before the axe fell. There was considerable debate among the Mormon leadership; the ever-present George Q. Cannon (who by the way was campaigning hard -- and unsuccessfully -- to be named president after John Taylor died in mid-1887) took the lead in advocating the disavowal of "the Principle," although he was himself a "much-married man," as anti-polygamist wits put it.

The Mormons did publicize that no new polygamous marriages were authorized in 1888 and 1889, but there were two problems with this claim. First, there was evidence that plural marriages did in fact take place, whether or not specific approval had been granted. Second, the church did not promise (and the government was insisting upon) a commitment to prohibit polygamy forever. A mere cease-fire would not satisfy Congress, the Court, or the country; they wanted to win the war for monogamy outright.

And so they did, although not without considerable backsliding from time to time. In September, 1890, Wilford Woodruff, the last of the Mormon presidents to have made the great journey westward with Brigham Young, bit the bullet. After much prayer, he said, he had received a revelation that counseled abandoning the legal claim to practice the Principle to ensure the survival of the church. Issued as a "manifesto," Woodruff's revelation assured all concerned that he would no longer advise the faithful to engage in unlawful practices.

---


Within months, as anti-polygamists grew more confident of their victory, the stranglehold on the church was relaxed; all personal property of the church that had been confiscated in 1887 was returned in 1891; real property in 1894. Clean-up operations against vocally defiant -- and now deviant -- Mormons continued for a couple of years in the territorial courts, but hundreds of pending cases were dismissed on the motion of the prosecutors, sometimes "in the interests of justice," but usually for the more noncommittal "for reasons on file."

Anti-polygamy rhetoric continued, especially among women’s groups dedicated to support of the home missionary movement, and the missionaries they funded, and from time to time in Congress. But the enemy had formally conceded the field -- once they abandoned the claim to a higher law of marriage than any the federal government could produce, the Mormons ceased to pose a threat to the law of the center. Some Mormons might still practice polygamy (and many did, although never so openly or unabashedly as before 1890), but they never again openly claimed they had a legal right to do so.⁷

The de facto continuation of plural marriage, with implicit church approval and support until the early twentieth century, provoked sporadic outbursts of anti-polygamy (even keeping B.H. Roberts out of Congress under the Edmunds-Tucker Act in 1898), but it was the abandonment of the claim to a higher marriage law that resulted almost

immediately in a relaxation of enmity between anti-polygamists and Mormons.\textsuperscript{80} The church continued its extensive economic activity, and regained its corporate stature, plural marriages were not dissolved, and nonetheless statehood was granted in 1896.

Law, the law of marriage, was what anti-polygamists fought for, and what they won. They were content, in the end, with an essentially formal, symbolic victory, much as northerners had settled for the symbolic victory of Reconstruction in the mid-1870s. Once the higher law claim had been abandoned, mere contrary social fact, while uncomfortable, was by and large invisible at the national level.

Conclusion

From the Supreme Court's perspective, the "manifesto" signaled the victory of civilization over barbarism, of equality over patriarchy, of purity over corruption, and of nationalism over localism. The Justices were proud of their role in the campaign against polygamy. Chief Justice Waite, long sympathetic to the moderate features of the woman's rights movement, described a trip to Utah in 1886, some seven years after the Reynolds decision. A young Mormon woman spoke to him privately of the unhappiness of women in polygamy.\textsuperscript{81} Legal treatises and the popular press alike broadly supported

\textsuperscript{80} Lyman argues that not only was polygamy the main thing, it was the only thing -- that church-state relations were far less objectionable to government officials of both parties, than polygamy. \textit{Political Deliverance}, 2-6.

\textsuperscript{81} In a letter to his wife, Waite described the meeting:
One of the ladies in my carriage was the daughter of a polygamist. She is now the wife of a leading lawyer and a very intelligent and interesting woman. Her father has been a Bishop, and is now one of the firectors of the Union Pacific Railroad. He is also the manager of the Utah Central and a man of wealth. He
the decisions. As late as 1946, the Supreme Court quoted the condemnations of

lives, however, in obedience to the present laws of Congress, and has been
repudiated by the Mormon hierarchy. The dauther spoke freely of the situation,
and her brothers and half brothers. She did not, however, attempt to conceal her
dislike of the system, and said it was a disturbing element, whenever it appeared.
She did not say so in so many words, but it was clear she knew all was not as
smooth as it might be inside the polygamous households. I was very glad I had
the opportunity of seeing her.

Morrison Waite to Amelia Waite, 19 September 1886. Quoted in Magrath, "Chief Justice
Waite and the Twin Relic," 539.

[[2]] Edition after edition (the last was issued in 1911) of Cooley's Constitutional
Limitations, for example, quoted Reynolds with approval. Carl Zollman, whose
American Church Law (New York, 1931) is still the best work on the private and public
law of church corporations, praised Late Corporation as the only possible result in an
enlightened and Christian country. Id., 41. Periodicals across a wide political and
intellectual spectrum, including the New York Times, Century, the North American
Review, and the Independent, supported the decisions.

There were non-Mormon opponents, although they were few and far between,
and, with one notable exception, obscure or partial. See Henry Reed, Bigamy and
Polygamy By an old lawyer. [New York, 1879]; [Alfred E. Giles], Marriage,
Monogamy and Polygamy on the Basis of Divine Law, of Natural Law, and
Constitutional Law. (Boston, 1882); James W. Stillman, The Constitutional and Legal
Aspect of the Mormon Question (Boston, 1882); Richard W. Young, Mormonism
Ticknor Curtis, in A Plea for Religious Liberty (Boston, 1886), published the argument
he made in Snow v. United States, 118 U.S. 346 (1886), a case that was decided on
jurisdictional grounds.

The exception is John Stuart Mill. In On Liberty, in a section that has been
quoted repeatedly by Mormons and their advocates (George Graham Vest was an
admirer), Mill argued that the punishment of Mormon polygamists was hypocritical:
"The article of the Mormonite doctrine which is the chief provocative to the antipathy
which thus breaks through the ordinary restraints of religious tolerance, is its sanction of
polygamy; which, though permitted to Malmedans, and Hindoos, and Chinese, seems
to excite unquenchable animosity when practised by persons who speak English, and
proffes to be a kind of Christians." On Liberty (Boston, 1863), p. 177. Mill hastened
to add, however, that he deeply disapproved of polygamy, "both for other reasons, and
because, far from being in any way countenanced by the principle of liberty, it is a direct
infraction of that principle, being a mere riveting of the chains of one half of the
community, and an emancipation of the other from reciprocity of obligation towards
them." Id. The only reason he could tolerate the practice of polygamy, Mill said, was
that "it is as much voluntary on the part of the women concerned in it, and who may be
polygamy in Reynolds and Late Corporation with approval, and held that the Mann Act, targeted at the "white slave business and related vices," applied to Mormon polygamists as well as pimps and libertines: "The establishment or maintenance of polygamous households is a notorious example of promiscuity."\(^5\) The White Slave Traffic Act, the Court held, was designed to protect the victims of polygamy, just as much as those of commercialized debauchery.

But cracks have appeared. Justice Murphy's dissent in the same case argued that polygamy was simply another form of marriage, however much the beliefs and mores of modern society might condemn it. Even though one might well believe (as he did) that monogamy was morally superior to polygamy, Murphy argued, plural marriage was a far cry from sexual enslavement.\(^4\) The analogy of polygamy to slavery was wearing thin, although the next step, the shift to regarding Mormon polygamy as a question of the religious rights of Mormons, rather than the civil rights of women, was still more than a decade away. It occurred in 1959 in a lone law review article which stated baldly that

\[^{5}\text{Id., 177-78.}\]

\[^{4}\text{Id., 198-99. I owe this insight to Sarah Buss of the Princeton Philosophy Department.}\]

\[^{3}\text{Cleveland v. United States, 329 U.S. 14, 19 (1946).}\]

\[^{2}\text{329 U.S. 14, 26 (Murphy, J., dissenting).}\]
"[The Reynolds case is wrong." The author did not believe that polygamy was the moral equivalent of monogamy, but that polygamy was authorized by "great religions" (including Islam, Hinduism and Buddhism), and was therefore within the purview of the free exercise clause."

In 1964, a Mormon legal scholar added to a small but growing reinterpretation of the polygamy cases, publishing the first full description of all the polygamy cases, and attacking the Court as an institution where "neither balance nor measurement" of the merits of polygamy was attempted. Marriage had all but disappeared from the picture as the focal point of the cases -- now they began to be described as more anti-Mormon, than anti-polygamy.

In 1972, the trickle of criticism became a flood. In Wisconsin v. Yoder, the Supreme Court, over a dissent by Justice Douglas, held that children might be withdrawn from school before they reached the age prescribed in the state education statute, because their parents, members of the Old Order Amish church, demonstrated that continued

---


86 Freeman based his argument on an originalist analysis, claiming that James Madison and Thomas Jefferson intended to include the beliefs of all "great religions" within the ambit of the free exercise clause. (Although he did not include Mormonism within his category of "great religions," he nonetheless implied that, because Mormon polygamy was not materially different than that practiced by, say Islam, that it should be protected). Further he insisted that polygamy was not a real threat, because "polygamy is fast disappearing even under such religions as sanction it." Id., 865.

education would undermine the order's ability to survive. \footnote{405 U.S. 205 (1972).} Douglas, author of the majority opinion in \textit{Cleveland v. United States}, and believer in the analogy of polygamy to slavery, argued that \textit{Yoder} implicitly over-ruled \textit{Reynolds}, implying that it was only a question of time before polygamy would reappear in America.

polygamists degraded the oppressor -- the federal government -- and chilled the freedoms and slowed the social advance of all Americans.90

Yet another tack was taken by the only women to study the polygamy cases. Carol Weisbrod and Pamela Sheingorn, argued that Reynolds was all of a piece with the arrogant paternalism of the late nineteenth-century Supreme Court, which denied women the right to vote with one hand, while ostensibly protecting them from their own voluntary marital decisions on the other.91 Among modern scholars, only Philip Kurland (and his followers, among whom are included Waite's biographer) argues that the first amendment requires government to be neutral in all matters dealing with religion. Any exemption founded on religious belief from an otherwise valid statute is unconstitutional, therefore. Kurland is entirely comfortable Reynolds (although not with the later polygamy cases).92

The federal judiciary, despite predictions to the contrary, has not wavered. Rejecting a self-styled "fundamentalist" Mormon's argument that the nineteenth-century

90 Firmage & Mangnum, Zion in the Courts, 130: "Imposing conformity on a group of sincerely dedicated dissenters almost inevitably requires a level of force that debases the oppressor. In a sory cycle, resistance breeds repression that calls forth yet more resistance and yet more savage repression. In the case of polygamy, it may be questioned whether the price was worth the price."

91 Weisbrod and Sheingorn claim that suffragists were ambivalent about Reynolds, and that the decision was "consistent with the most conservative and paternalistic of contemporary theories of women's rights." "Nineteenth-Century Forms of Marriage," 851. My own research, of course, leads me to a different conclusion; that woman's rights activists were deeply opposed to polygamy, and that there was broad support among the suffrage movement for the Reynolds decision.

Mormon cases are no longer good law in today's promiscuous society, the Tenth Circuit Court of Appeals held in 1985 that "monogamy is inextricably woven into the fabric of our society. It is the bedrock upon which our culture is built."93 And in 1990, in language that would have warmed the cockles of Chief Justice Waite's heart, Justice Scalia resurrected the belief-action distinction in resounding terms, placing it once again at the nub of free exercise jurisprudence, and by the way denying the religious freedom claims of the twentieth century's moral deviants -- drug users.94

A counter-trend (in support of the polygamy cases) among some Mormon legal scholars is also discernible. "The Manifesto was a Victory," is the title of one recent article that celebrates the integration of Mormons into the broader American culture. A second, tackling libertarianism head-on, argued that "legalizing polygamy would signal a deterioration of traditional values," and that the polygamy cases are based on beliefs about the family that most Mormons now subscribe to, even as social acceptance of "unrighteous lifestyles" has infected the rest of the country.95

On this ironic note, it seems appropriate to end; observing only that the polygamy cases, decided in large part on the theory that the uniform protection of women through

---


monogamous marriage was the best means of ensuring the survival and advancement of
civilization, are now treated in the legal literature as a gross violation of the rights of
Mormon men (women, for the most part, have fallen out of the picture). And Mormon
leaders are now known as vocal opponents both of polygamy and of equal rights for
women.

The legal landscape has been so drastically altered, marriage and its legal incidents
so vastly reconfigured as to render the anti-polygamy worldview all but unrecognizable.
Or perhaps I should say "all but unrecognized," given that legal scholars and historians
of Mormonism are certainly aware of the anti-polygamy campaign, and its final resolution
in the Supreme Court. But the sense of the broader context, the wide-ranging and deeply
theoretical debates about the role of marriage in civilization, role of husbands in politics,
the role of wives in marriage, and their relation to justice, democracy, religion and
national survival, has fallen away. A shallower understanding of marriage as choice,
even "lifestyle choice," has papered over the nineteenth century's richer understanding
(and embrace) of power relations within marriage.

Coercion, coverture, consent -- concepts that meant so much to anti-polygamists,
woman's rights activists, politicians and judges, have fallen out of the vocabulary used
to describe the everyday legal incidents of marriage (long before, one suspects, their
actual effects have dissipated). It may well be that anti-polygamy is part of the cause --
that it not only helps explain how the law of marriage survived its nineteenth-century
battering relatively intact, but is also part of the explanation for how the coercive aspects
of monogamy slid underneath the horizon of legal thought. For it was quintessentially
in anti-polygamy that the coercive aspects of monogamy were downplayed, that equality, respect, democracy were so consistently (and so popularly) portrayed as elements of monogamous marriage.

And it was peculiarly the law of marriage -- the national law of marriage -- rather than the particulars of the experience of marriage, that was the motivating force behind anti-polygamy. This emphasis on the public aspects of marriage, on equality and justice and democracy as most fruitfully assured through formal legal structure, may have obscured the less public injustices and inequities of marriage. Once more the analogy of anti-polygamy to anti-slavery provides insight; if one focuses extensively on the gross facts of institutionalized, legally supported involuntary servitude, perhaps the subtler features of unfair bargaining conditions may be rendered invisible. There indeed may be a discernible anti-slavery ancestry in the holding of the Lochner case.

Yet the changes in the legal landscape, the antiquity of legal concepts such as coverture, do not in and of themselves explain why anti-polygamy could have been so thoroughly "disappeared" from historical consciousness. We remember the temperance movement, the woman suffrage campaign, social purity crusaders and, above all, abolition. Anti-polygamy numbers among these campaigns, in duration, in importance, in legal significance. The following conclusion speculates about why anti-polygamy in the late twentieth century has become an historical backwater, albeit one that has sustained four years of research and writing.
Conclusion

Anti-polygamy, when studied in its context and with an appreciation for its pretensions, accomplishments and aspirations, assumes great importance in nineteenth-century legal development, both as an arena for struggle over what marriage should look like, and as a mechanism for asserting authority over dissident members of society. Despite its centrality, however, anti-polygamy as a legal reform movement has been all but forgotten, the preserve of historians of Mormonism, rather than a subject of scholarship in its own right, alongside such parallel movements as abolitionism and temperance.

There are several possible reasons for this dearth of scholarly attention, some admixture of which probably accounts for anti-polygamy's relative obscurity in the late twentieth century. The most obvious explanation is that anti-polygamy was extraordinarily successful. The abolition and temperance movements were both more controversial than anti-polygamy, and hardly resolved questions of race and substance abuse. At the most superficial level, anti-polygamy solved its immediate dilemma -- monogamy became the only legally recognized form of marriage in every jurisdiction in the United States.¹

Of course, the anti-polygamy campaign was no more successful at finally resolving questions of gender relations than abolition was in solving the inter-related questions of race and labor - but anti-polygamy was by far the most effective legal reform of the

¹ Inroads into the elaborate legal protections surrounding monogamy, such as New York City's Sexual Partners Act, and the likely passage of Hawaii's same-sex marriage statute, are small but potentially significant challenges to the definition of marriage as an exclusively heterosexual legal creation.
three. Its very success may account to some extent for its obscurity: anti-polygamy, which at the time was a far more important and wide-ranging phenomenon than polygamy, has become so much a part of the legal landscape that its presence is scarcely noticed, indeed, sometimes even doubted. A recent study of American sexual patterns excited much comment among reviewers in the press. Among other things, the researchers concluded that Americans are overwhelmingly monogamous.² That result came as no surprise to this student of anti-polygamy.

A second possible explanation lies in twentieth-century legal culture's embrace of civil libertarianism. In contrast to their nineteenth-century counterparts, who almost without exception focused on the presumed inequities for women in polygamous relationships, twentieth-century legal scholars tend to emphasize the consensual and private nature of sex and marriage as the relevant factors in legal analysis.³ So paradigmatic has this libertarian legal perspective become, that the anti-polygamists, rather than the polygamists, look like villains to modern eyes. Today many liberals, and all thorough-going libertarians, believe that alternative marital structures, including polygamy, homosexual marriage, and non-marital partnerships, should receive legal recognition commensurate with that given heterosexual monogamy. Such policies would have been inconceivable to the nineteenth-century legal mind.

³ For a sampling of such scholarship, see the works cited at 447-48, n.89, above.
A third explanation, in some ways connected to the first and second, but nonetheless with its own teleology, is the prevalence of socially-acceptable forms of polygamy in contemporary American society. Commonly referred to in the legal literature as "serial polygamy," the practice of divorce and remarriage has become so quotidian as to occasion little remark. Especially given the tendency of divorced men to remarry women relatively younger than themselves with each successive divorce, and given that the most married are (in popular thought, at least) the most wealthy, their resemblance to the polygamists of the nineteenth century becomes uncanny. A recent article drew the conclusion that nineteenth-century anti-polygamists would have recognized instantly. Polygamy and divorce are parallel threats to monogamy. "When a Donald Trump [follows the universal 'male urge to be polygamous'] and deserts his wife for a woman almost twenty years his junior, he is obviously violating monogamy's implicit understanding ... he is also limiting the mating possibilities of younger men."4

Opposition to serial polygamy is far less common, however, in the twentieth century than it was in the nineteenth. The "trophy wife," as one law school dean remarked, is as well-known among lawyers as among real estate tycoons and movie moguls. The ubiquitousness and respectability of such contemporary serial polygamists renders the opposition to their nineteenth-century forebears less admirable -- at some level less credible, even less visible.

Another possibility is the erosion of the importance of marriage itself as a legal category in the mid and late twentieth century. Termed the "withering away of marriage" by one prominent legal scholar, this phenomenon (perhaps more legal than social?) has gradually and almost imperceptibly occurred just as individual right to marriage, and rights within marriage, assumed unprecedented constitutional status. At roughly the same time that divorce reform made serial polygamy a possibility in many states, marriage as a status, a legal category with clear and widely understood consequences and boundaries, disappeared.⁵

As the transience of marriage (which may well have been true for much of American history as a social matter, if not legally) assumed primacy of place at mid-century, monogamy in law and society has become less a legal expression of indissoluble and fundamental sexual relationships that underlie and support political relationships, than an elaborate legal mechanism for the dismantlement of what was originally designed to last a lifetime.⁶ Although it is by no means clear that most Americans are satisfied with the current situation, marriage and divorce have become matters more of individual choice, than a basic and virtually unalterable legal status.⁷


⁶ According to modern studies, approximately 50% of all marriages now end in divorce. Given the presumption of such data that divorce is the only way to end a marriage, hidden (and perhaps long-standing) means of temporarily or permanently absenting oneself from marital relationships may inflate such statistics, as the relative ease of divorce has cut into traditional separation practices. See Riley, "The Revolving Door," chap. 7 in Divorce.

⁷ Hartog, "Marital Expectations," 95-96 makes this point.
Anti-polygamists, therefore, lived in a different legal landscape. Although anti-polygamists and their compatriots in the temperance and abolition movements (and their successors in progressive social reform campaigns after the turn of the century) were as much a part of the process that created a society in which the divorce revolution became a possibility, they themselves took the monogamous mandate seriously. They were deeply troubled by the existence of polygamy in Utah, they were committed to eradicating plural marriage, and they mobilized politically. Their concerns reflected their aspirations for marriage and the law of husband and wife, and their conviction that individuals (especially of the zealous, hierarchical and immigrant sort that made up Mormon Utah) not be allowed to create marital structures that were inconsistent with respect for women, the proper allocation of power within marriage, and thus with all the benefits of civilization.

A comparable analogy in twentieth-century terms might be the reaction of many Americans (especially those who, like anti-polygamists, tended to be involved in the liberal politics of their day) to apartheid in South Africa -- while tolerating, perhaps even perpetuating, significant levels of discrimination at home. Americans who were active in or sympathized with anti-apartheid activities were outraged by the existence of a legal regime that codified injustice, and that was countenanced, even supported, by the American government. By tying the perceived consequences of immorality in a remote area to morality at home, anti-apartheid activists, like anti-polygamy activists, forced those who would ignore or even tolerate legalized injustice onto the defensive by
providing a recipe for caring, and eventually curing the perceived injustice. Once the legal structure was gone, interest in punishing those who had maintained it evaporated.

Last, but not least, is the possibility that the obscurity of anti-polygamy is socially constructed in another way. That marriage, and the history of the law of marriage, have not been subjects that have excited sustained examination in legal historical scholarship, have not until recently received the kind of attention that allows us to fill in some of the pieces of the puzzle -- to explain to ourselves some of the reasons for how we are the way we are today, and how the past is different territory, and how the campaign to "exterminate this curse" sounded important and and resonant notes that reverberated in the music of the nineteenth century.

---

Haskell, "The Capitalist Origin of Humanitarian Sensibility," makes this point in relatively monochromatic terms. Clark, "'The Sacred Rights of the Weak,'" gives a more nuanced version.
Bibliographic Essay

Researching a dissertation on a subject as broad-ranging as the anti-polygamy movement has required reading many of the classic texts of American history. It has also led me into myriad less well-traveled by-ways of nineteenth-century legal history. What follows is not so much an attempt to list, or even to describe selectively, the sources that I read or cited in the text or footnotes. Instead, I have tried to give the flavor of the scholarship on the various major themes that underlie the anti-polygamy movement, to give a sense (always more coherent in retrospect than in the more chaotic environment of on-going research) of the trails that I followed, of the questions that intrigued me and that lie at the center of the problems that Mormon polygamy posed for its opponents.

The best place to start, of course, is with the works of anti-polygamists themselves. A novel, or an editorial, or a sermon, or a petition to Congress, or a presidential message, or a charge to a grand jury, or a Supreme Court opinion, can be wonderful fun to read. There are quite literally mountains of sources available to the student of anti-polygamy. Taking these sources seriously has been the motivating principle of this project. Many are readily available in college and university libraries. I have found anti-polygamy novels at rummage sales and in the catalogs of rare book dealers. The Historical Department of the Church of Jesus Christ of Latter-day Saints, in downtown Salt Lake, has the single most comprehensive collection of anti-polygamy materials, and welcomes researchers in all areas except what is considered private church history. Thanks to the assiduous and far-sighted collecting of Alfred Bush, curator of Princeton's Western Americana, Firestone Library may well be the single most important repository of anti-polygamy material outside Utah. Yale's collection is superb; Widener
Library at Harvard has more anti-polygamy novels than any other library. The
Congressional Globe (and eventually the Congressional Record), together with
supplementary volumes that include committee reports and recorded testimony, are the
single best guide to political thought and debate. The Messages and Papers of the
Presidents make less lively reading, but are useful for formulaic condemnations of
polygamy. The records of the territorial courts are housed in the Denver Branch of the
National Archives, Rocky Mountain Region. Fourteen cubic feet of material, reproduced
on 36 reels of microfilm, are a goldmine of information -- much more information, both
statistical and narrative, than could productively be included in this dissertation. The
briefs and records of the Supreme Court are available on microfiche, and are useful
guides to the spectrum of jurisprudential arguments deployed in the polygamy cases, as
are the many legal treatises, from Blackstone to Bishop to Tiedemann, that discussed and
justified the criminal punishment of polygamy.

Although this dissertation is the first sustained look at anti-polygamy as a distinct
category of nineteenth-century legal history, my work has nonetheless drawn significantly
on the research undertaken by many scholars before me. Historians of Mormonism have
written extensively about anti-Mormonism. My work should be read first as a
complement to their perspective, and (in many cases) as a challenge to their conclusions
about the motives and meaning of anti-polygamy. Two early multi-volume histories are
still the basic texts, unmatched for detail, valuable as primary documents in themselves
(both were written by polygamists, one of whom was punished criminally). Orson F.
Whitney's four-volume History of Utah (Salt Lake, 1890-1904) is an impassioned defense
of Mormon integrity, Mormon polygamy, and Mormon faith, and a blistering attack on
the opponents of polygamy, combined with an almost day-by-day description of events
in Utah, and extensive quotes from contemporary sources. B.H. Roberts's six-volume
A Comprehensive History of the Church of Jesus Christ of Latter-day Saints: Century I
(Salt Lake, '1930), while more measured in its cadences, remains an official history, a
defense of the faith, albeit one replete with information. H.H. Bancroft's Utah volume
(San Francisco, '1890), is based more or less faithfully on thousands of interviews with
survivors of the anti-polygamy wars (no one has yet re-examined the written product of
those interviews, a potentially rich primary source). More recent single-volume histories
of Utah have for the most part focused on particular aspects of anti-polygamy, especially
those that happened within territorial borders. Robert Dwyer's The Gentile Comes to
Utah: A Study in Religious and Social Conflict (1862-1890) (Washington, '1941), and
Gustive O. Larson's The "Americanization" of Utah for Statehood (San Marino, Calif.,
'1971), are prime examples of scholarship that focuses on the local manifestation of what
was essentially a national phenomenon. Edward Leo Lyman, Political Deliverance: The
Mormon Quest for Utah Statehood (Urbana, Ill., 1986) is an important addition to the
field. Lyman not only challenges the traditional historiography, arguing that polygamy
was in fact central to the Mormons' political difficulties, and details activities of church
leaders in its defense, including a fascinating chapter on the relationship between the
church and the California-based railroad lobby.

The real action, of course, was in the East, and the mid-West, and sometimes even
on the West coast; Utah was in many instances the direct object, rather than the subject,
of the anti-polygamy predicate. The secondary sources discussed below helped me
develop the big picture in which anti-polygamy was situated. Sometimes my primary
research led me to qualify or even question the conclusions of these sources, but always
they pushed me to make the connections that fuel historiographic debate, and keep history
among the lively arts.

**Fiction.** Anti-polygamists, like so many nineteenth-century actors, used the power
of words to convey their outrage at polygamy. They organized their thoughts, they honed
their emotional appeal, through persuasive prose of various sorts. The novels that form
the centerpiece of Part I were written in an atmosphere chock full of didactic messages.
This atmosphere has received significant scholarly attention in the last several decades,
as historians and literary critics have grappled with the emotive power of stories at mid-
century. One of the most detailed and persuasive accounts of the sentimental tradition
Tompkins' *Sensational Designs: The Cultural Work of American Fiction, 1790-1860*
(New York, 1985), especially her chapter on *Uncle Tom's Cabin*, makes the turn to
gender that is so vital to understanding both anti-slavery and anti-polygamy fiction. The
and several spin-off articles sparked much debate, is among the most beautifully written,
and emotionally charged, in the field. The burgeoning publishing industry placed novels
in the hands of readers in innovative ways. William Charvat, *Literary Publishing in
America, 1790-1850* (Philadelphia, 1959) and *The Profession of Authorship in America,*
Matthew J. Bruccoli, ed. (Columbus, Oh., 1968) traces the technological and marketing innovations that brought books to people. Ronald J. Zboray, *A Fictive People: Antebellum Economic Development and the American Reading Public* (New York, 1993) also places reading and writing at center stage, an essential step in showing how stories became political capital at mid-century. What is missing from this scholarship, my research has convinced me, is attention to the persistent appearance of marriage as the central problem in mid-nineteenth century novels—unhappy marriages, invalid marriages, unstable marriages, loveless marriages, adulterous and abusive husbands, flighty and profligate wives; the dramatic element, the appeal to sentiment, is through a crisis in marriage.

**National Politics.** Anti-polygamy was an integral part of the Third Party System, both in its formative and its more established stages. The political culture, and the political structure of the Civil War era has been the subject truly massive sustained amounts of scholarly inquiry. A divide between what is known in the field as the ethno-cultural school (that is, those scholars who believe that ethnic and cultural affiliations determined voter preferences) and those scholars who argue that slavery was the cause of the Civil War, has produced some bitter fights and some wonderful scholarship. For a handy summary of the differences between the two schools, and a devastating critique of the ethno-cultural perspective, see Don Fehrenbacher’s "The New Political History and the Coming of the Civil War," *Pacific Historical Review,* 54 (1985): 117-42. Michael F. Holt’s *Political Parties and American Political Development: From the Age of Jackson*
to the Age of Lincoln (Baton Rouge, 1992) and Robert Kelley The Cultural Pattern in American Politics: The First Century (Lanham, Md., 1979) are exemplars of the insights generated by the ethno-cultural school. For the addition of gender to the pool, see Paula Baker's The Moral Frameworks of Public Life: Gender, Politics and the State in Rural New York, 1870-1930 (New York, 1991). The overriding importance of slavery is the central claim of Eric Foner's Free Soil, Free Labor, Free Men: The ideology of the Republican Party before the Civil War (New York, 1970) and James McPherson's wonderfully readable Battle Cry of Freedom: The Civil War Era (New York, 1988). As a matter of history, it seems to me, the tremendous power of slavery (both pro and con) in American politics is indisputable; Fehrenbacher, Foner and McPherson have the better of the argument.

My own research as led me not so much to question the importance of slavery as the progenitor of the third party system and ultimately as the cause of the Civil War, as to connect anti-slavery to a whole host of other attitudes, of which anti-polygamy was among the most important, in what was essentially a big Republican tent. This fundamentally Weberian theory has appeared in different guises in Thomas Haskell's "Capitalism and the Origins of Humanitarian Sensibility," American Historical Review 90 (April, 1985): 339-61, and J. David Greenstone's eclectic The Lincoln Persuasion: Remaking American Liberalism (Princeton, 1993). My permutation, of course, is one that connects the crisis in marriage to the crisis in labor.

The post-war era is less contested, perhaps because somewhat less studied. Here, too, Eric Foner is a dominant presence. His Reconstruction: America's Unfinished
Revolution, 1863-1877 (New York, 1988) and Robert Wiebe's *The Search for Order, 1877-1920* (New York, 1967) are both essential texts in the field. As Mormon resistance to anti-polygamy legislation provoked ever stricter enforcement mechanisms, presumptions about marriage and law in other areas of political activity were imported to the anti-polygamy context. Suffrage, divorce, and coverture have been the subjects of varying levels of scholarly attention. Ellen DuBois's *Feminism and Suffrage: The Emergence of an Independent Women's Movement in America, 1848-1869* (Ithaca, 1978) and Ross Evans Paulson, *Women's Suffrage and Prohibition: A Comparative Study of Equality and Social Control* (Glenview, Ill., 1973) are two basic texts in suffrage; Lori D. Ginzberg, *Women and the Work of Benevolence: Morality, Politics and Class in the 10th-Century United States* (New Haven, 1990) is helpful on the culture of reform more generally.

Legislative reform to preserve marriage and coverture is less well covered, with Hendrik Hartog's "Mrs. Packard on Dependency," *Yale Journal of Law & the Humanities*, 1 (1988): 79-103, standing out as among the best treatments in the field. Michael Grossberg's *Governing the Hearth: Law and the Family in Nineteenth-Century America* (Chapel Hill, N.C., 1985) is the single best treatment of family law, but there is lots of work left to do. Hartog's on-going work on marital separation is likely to give us a clearer picture of the crisis in marriage in the nineteenth century, its legal and social causes and consequences. Other gaps include a dearth of historical attention to church-state relations and federal control over territories in the period. Earl Pomeroy's *The Territories and the United States, 1861-1890: Studies in Colonial Administration*

**Territorial Enforcement.** Fortunately, studies of federal-territorial relations in Utah have been undertaken, and several works have been extremely helpful for situating anti-polygamy in Utah itself. Norman Furniss's *The Mormon Conflict, 1859-1859* (New Haven, 1960) and Howard Lamar's *The Far Southwest, 1846-1912: A Territorial History* (New Haven, 1966) are exemplary studies of the interaction between federal officials and Mormon residents in the stormy territorial period. The legal aspects of enforcement have not received sustained attention, although portions of Edwin Firmage and Richard Mangrum's flawed but fascinating *Zion in the Courts: A Legal History of the Church of Jesus Christ of Latter-day Saints, 1830-1900* (Urbana, 1988) and Orma Linford's two-part series, "The Mormons and the Law," *Utah Law Review* 9 (1964-65): 308-70, 543-91, discuss some of the thousands of federal prosecutions for polygamy and related offenses.

Less visible, but also vital to the enforcement campaign were prosecutors, marshals, deputies, and clerks. Little has been written on these lower level officials in Utah. Stephen Cresswell's *Mormons, Moonshiners, Cowboys & Klansmen: Federal Law*
Enforcement in the South & West, 1870-1893 (Tuscaloosa, Ala., 1991) devotes a chapter to the anti-polygamy campaign, but little has been done of a systematic nature. The defense bar is almost entirely unplumbed; diaries and reminiscences, supplemented by references in the multi-volume histories of the territorial period, are all there is to go on. Federal prosecutor and eventually mayor of Salt Lake Robert N. Baskin's Reminiscences of Early Utah (Salt Lake, 1913) written in large measure to contradict Orson Whitney's History of Utah, stands out as among the most useful. The territorial judiciary has fared only somewhat better. Kermit Hall's "Hacks and Derelicts Revisited: American Territorial Judiciary, 1789-1959," Western Historical Quarterly 12 (1981): 273-89, barely scratches the surface. Two articles by Thomas Alexander are a starting point for Utah. "Federal Authority Versus Polygamic Theocracy: James B. McKean and the Mormons, 1870-1875," Dialogue 1 (1966): 85-100, and "Charles S. Zane, Apostle of the New Era," Utah Historical Quarterly 34 (1966): 290-314. Legal practice in the territorial period is another field ripe for scholarly investigation. The long historical introduction to The History of the Bench and Bar of Utah (Salt Lake, 1913) must be read as a primary document.

Supreme Court. As in the political field, the Supreme Court has continuously been the object of copious study. Elite (that is, Supreme Court) legal doctrine is virtually always regarded as of central importance to American history, even if, as my research has convinced me, substantial pockets of even the most elite of all jurisprudences remain unplumbed.
For most of the twentieth century, studies of the post-war court have characterized the period as both "formalist" and "laissez-faire." From the Slaughterhouse Cases to Plessy to Lochner, legal scholars have found a relatively continuous downhill trend, a descent into social and political obsolence from which the justices emerged only with the judicial revolution of 1937. Arnold Paul's Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895 (Ithaca, 1960) is exemplary of this line of scholarship, as is Owen Fiss's Holmes devise volume, Troubled Beginnings of the Modern State, 1888-1910 (New York, 1993). A major exception is Charles Warren's wonderfully useful three-volume The Supreme Court in United States History (Cambridge, Ma., 1923), which embraced the Slaughterhouse Cases, for example, as rightly decided.

jurisprudence of marriage, however. Nancy Cott's on-going investigation into "The Public Law of Marriage" promises to be the first critical look at the topic as a whole.

Private legal practice, a field of endeavor subject to radical change in the late century, is still largely unplowed, apart from the appearance in the last decade or so of large numbers of commissioned law firm histories. Robert Gordon's "Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920," in Professions and Professional Ideologies in America, Gerald Geison, ed. (Chapel Hill, 1983) stands out as the single best treatment of professional ideology and professional practice for the period. The Supreme Court bar, a potentially fruitful topic for study, is virtually a blank slate. There is no corresponding treatment for the late nineteenth century to G. Edward White's intriguing portrait of early nineteenth-century pleaders in his Holmes devise volume, The Marshall Court and Cultural Change, 1815-1835 (New York, 1988).

Another major gap, legal treatises and treatise-writing, is long over-due for sustained scholarly attention. The late nineteenth century was the blutezeit of treatise-writing; authoritative legal voices, those of Thomas Cooley and many others, dominated the bookshelves of judges, lawyers and law professors. Drawers full of microfilmed treatises have yet to receive attention as a phenomenon unto themselves.
Bibliography

Primary Sources

Manuscripts, Journals, and Papers


Kate Field Papers, Boston Public Library, Boston, Ma.


"Prisoners for Conscience' Sake." Typescript compilation of interviews and journal entries of Mormon men imprisoned for polygamy-related offenses. LDS Church Historical Archives, Salt Lake, Utah.


Newspapers and Periodicals

Anti-Polygamy Standard. 1880-1883.

Bay State Monthly. 1885.

Chicago Tribune. 1882, 1883, 1886.

Deseret Evening News. 1852-1896.


Journal History. Compilation of newspaper articles and historical statements on a daily basis. LDS Church Archives, Salt Lake, Utah. 1850-1892.

Latter-day Saints' Millennial Star (Liverpool). 1852-57, 1870-1879.
The Legal Intelligencer. 1897.

The Nation. 1865-95.

National Republican. 1886-88.


Ogden Daily Herald. 1882.


Salt Lake Herald. 1875-1890.

Salt Lake Tribune. 1880-1895.

The Times (London). 1866.

Woman's Journal. 1878-79.

Woman's Tribune. 1879, 1886.

Public Documents

Applications and Recommendations for Public Office, 1797-1901, Record Group #59, National Archives, Washington, D.C..


——. Congressional Record. [Forty-second through Fifty-second Congress.] 1873-1890.


U.S. Senate. *Miscellaneous Documents.* [Forty-ninth Congress.]


Utah Territorial Laws, 1851-1890.

Utah (Territory). *Governor's Message and Accompanying Documents.* 1888.


Utah (Territory). Records of the District Court of Utah, 1870-1896. Record Group #21, United States of America, District of Utah. National Archives, Rocky Mountain West Division, Denver Branch.

Utah (Territory). Territorial Papers, Polygamy File, Record Group #60. National Archives, Washington, D.C.

Cases


Adams v. Palmer, 51 Me. 480 (1863).

Barron v. Mayor and City of Baltimore, 7 Pet. 243 (1833).

Bassett v. United States, 137 U.S. 496 (1890).


Board of Education v. Minor, 23 Ohio 211, 248 (1872).


Church of the Holy Trinity v. United States, 143 U.S. 457, 471 (1892).

Clawson v. United States, 114 U.S. 477 (1885).


Davis v. Beason, 133 U.S. 333 (1890).

Davis v. Commonwealth, 13 Bush. 318 (Ky. 1877).


Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866).

Ex parte Nielsen, 131 U.S. 176 (1889).

Ex parte Siebold, 100 U.S. 371 (1880).

Ex parte Snow, 120 U.S. 274 (1887).


Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870).

Hood v. State, 56 Ind. 263, 272-73 (1877).


Late Corporation of the Church of Latter-day Saints v. United States, 136 U.S. 1 (1890).
Miles v. United States, 103 U.S. 304 (1880).
Murphy v. Ramsey, 114 U.S. 15 (1885).
Peloza v. Capistrano Unified School District, 37 F.3d 517 (9th Cir. 1994).
People v. Ruggles, 8 Johns. 291 (New York, 1811).
Permoli v. Municipality No. 1 of New Orleans, 44 U.S. (3 How.) 589 (1845).
Reynolds v. United States, 98 U.S. 145 (1879).
St. Peter’s Catholic Congregation v. The German Catholic Congregation, 104 Ill. 440 (1876).
Snow v. United States, 118 U.S. 346 (1886).
State v. Armington, 25 Minn. 29 (1878).
Tennessee v. Davis, 100 U.S. 257 (1880).
United States v. Clark, 6 Utah 120 (1889).
Printed Sources


Vice-President of the Southern Confederacy. Written by herself, and prepared for
Publication by Her Friend, Alfreda Eva Bell. Philadelphia: Barclay, 1864.

Bishop, Joel P. Commentaries on the Law of Marriage and Divorce under the Statutes
of the Several States, and at Common Law and in Equity. 2 vols. 5th ed. Boston:
Little, Brown, 1873.


Bollman, Calvin P. Religious Liberty and the Mormon Question. Battle Creek, Mi.:
International Religious Liberty Association, 1893.

The Book of Mormon, Another Testament of Jesus Christ. Salt Lake: Church of Jesus
Christ of Latter-day Saints, 1989.


New York: Macmillan, 1908.

Joseph E. Brown of Georgia. Delivered in the Senate of the United States, Tuesday,

Browne, Charles F. The Complete Works of Charles F. Browne, Better Known as


Bushnell, Horace. Selected Writings on Language, Religion, and American Culture.

______. Woman's Suffrage; the Reform against Nature. New York: Charles Scribner,
1870.

Cannon, Frank J. & Harvey O'Higgins. Under the Prophet in Utah: The National

Cannon, George Q. A Review of the Decision of the Supreme Court of the United
States, in the Case of George Reynolds vs. United States. Salt Lake: Deseret News
Press, 1879.


Cullom, Shelby M. Fifty Years of Public Service; Personal Recollections of Shelby M. Cullom. Chicago: A.C. McClurg, 1911.


Doctrine and Covenants. Salt Lake: Church of Jesus Christ of Latter-day Saints, 1981.


Fuller, Metta Victoria. *Parke Madison; or, Fashion the Father of Intemperance, as Shown in the Life of the Senator's Son, A Plea for the Maine Law, a Last Refuge.* Philadelphia: J.B. Lippincott, 1853.


[Gilchrist, Rosetta Luce.] *Apples of Sodom; A Story of Mormon Life.* Cleveland: William W. Williams, 1885.


_____. "The Mormons: Shall Utah Be Admitted Into the Union?" Putnam's Monthly 5 (July 1855).


"Metta Victoria Victor." The Home: A Monthly for the Wife, the Mother, the Sister, and the Daughter 6 (December, 1858).


Morgan, Lewis Henry. Ancient Society; or, Researches in the Lines of Human Progress from Savagery through Barbarism to Civilization. Eleanor Burke Leacock, ed. 1877; Cleveland, Oh.: Meridian Books, 1967.


Noble, Frederick A., the Rev. The Mormon Iniquity. A Discourse before the New West Education Commission. Chicago: Jameson & Morse, 1884.


Spear, Samuel T. Religion and the State, or, the Bible and Public Schools. New York: Dodd, Mead, 1876.


Waite, Catherine V. *The Mormon Prophet and his Harem: An Authentic History of Brigham Young, His Numerous Wives and Children.* Cambridge, Ma.: Riverside Press, 1866.

[Ward, Maria, pseud.]. *Female Life Among the Mormons: A Narrative of Many Years' Personal Experience.* Philadelphia: J. Edwin Potter, 1863.


Young, Ann Eliza. *Wife No. 19, or the Story of a Life in Bondage, Being a Complete Expose of Mormonism.* Hartford: Dustin, Gilman, 1876.


**Secondary Sources**

**Printed Sources**


Alexander, Thomas G. "Charles S. Zane ... Apostle of the New Era." *Utah Historical Quarterly* 34 (Fall, 1966).


Allen, James B. "'Good Guys' vs. 'Good Guys': Rudger Clawson, John Sharp and Civil Disobedience in Nineteenth-century Utah." *Utah Historical Quarterly* 34 (Fall, 1966).

_________. "The Unusual Jurisdiction of County Probate Courts in the Territory of Utah." *Utah Historical Quarterly* 36 (Spring, 1968).


______. "Preserving Federalism: Reconstruction and the Waite Court." Supreme Court Review 1978.


"Beyond the Manifesto: Polygamous Cohabitation among LDS General Authorities after 1890." Utah Historical Quarterly 46 (Spring, 1978).


Chaney, Walter L. "The True Story of 'Old Drum'." Missouri Historical Review 19 (April, 1925).


Firmage, Edwin B. "The Judicial Campaign against Polygamy and the Enduring Legal Questions." Brigham Young University Studies 27 (Fall, 1987).


Gentry, Leland H. "The Danite Band of 1838." Brigham Young University Studies, 14 (Summer, 1974).


Hansen, Klaus G. Quest for Empire: The Political Kingdom of God and the Council of Fifty in Mormon History. 2d ed. Lincoln, Nb.: University of Nebraska Press, 1974.


Hubbard, George U. "Abraham Lincoln as Seen by the Saints." *Utah Historical Quarterly* 31 (Spring, 1963).


______. "Notes on Mormon Polygamy." *Western Humanities Review* 10 (Summer, 1956).


Lamar, Howard R. "Political Patterns in New Mexico and Utah Territories, 1850-1900". *Utah Historical Quarterly* 28 (Summer, 1960).


Larson, T.A. "Woman Suffrage in Western America." *Utah Historical Quarterly* 38 (Spring, 1970).


Madsen, Carol Cornwall. '"At Their Peril": Utah Law and the Case of Plural Wives, 1850-1900”. *Western Historical Quarterly* 21 (1990).


______. "We, the Family: Constitutional Rights and American Families." Journal of American History 74 (December, 1987).


Moss, Carolyn J. "Kate Field: The Story of a Once-Famous St. Louisan." Missouri Historical Review 58 (January, 1994).


Panek, Tracey E.  "Search and Seizure in Utah: Recounting the Antipolygamy Raids."  *Utah Historical Quarterly* 63 (Fall, 1994).


Paul, Rodman W. "Mormons as a Theme in Western Historical Writing." *Journal of American History* 54 (December, 1967).


Uba, George R. "Status and Contract: The Divorce Dispute of the 'Eighties and Howells' A Modern Instance." *Colby Library Quarterly* 19 (Summer, 1983).


--. "An Irrepressible Conflict (Book Review)." *Dialogue* 6 (Spring, 1971).


Unpublished Sources, Theses and Dissertations

"Kate Field and J.H. Beadle: Manipulators of the Mormon Task," (lecture delivered at the University of Utah, Salt Lake, 31 March 1971).


Casterline, Gail Farr. "'In the Toils' or 'Onward for Zion': Images of Mormon Women, 1852-1890." M.A. Thesis, Utah State University, 1974.


