

2003

A Tale of Two Epochs and a Threat That May Still Run True

Anthony S. Winer

Mitchell Hamline School of Law, anthony.winer@mitchellhamline.edu

Follow this and additional works at: <http://open.mitchellhamline.edu/wmlr>

Recommended Citation

Winer, Anthony S. (2003) "A Tale of Two Epochs and a Threat That May Still Run True," *William Mitchell Law Review*: Vol. 29: Iss. 4, Article 9.

Available at: <http://open.mitchellhamline.edu/wmlr/vol29/iss4/9>

This Book Review is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in William Mitchell Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.

© Mitchell Hamline School of Law

**A TALE OF TWO EPOCHS
AND A THREAD THAT MAY STILL RUN TRUE**

Anthony S. Winer[†]

I. A PARTICULARIZED SCOPE FOR PROFESSOR GORDON’S NARRATIVE	1520
II. POTENTIAL APPLICATIONS OF A BROADER PERSPECTIVE	1523
III. TWO DISTINCT EPOCHS	1525
IV. CONTRASTING CONSTITUTIONAL DOCTRINE OF THE TWO EPOCHS	1531
V. A POSSIBLE THREAD CONNECTING TWO EPOCHS.....	1533

The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America. By Sarah Barringer Gordon. University of North Carolina Press, 2002. 337 pages. \$19.95.

Sarah Barringer Gordon has written a balanced and readable history. There are, as expected, descriptions of key events in the development of the Mormon church. We are reminded of the founding of the church by Joseph Smith in 1830.¹ There is a brief recounting of the tensions that arose between the early Mormons and their neighbors in certain Midwestern states, culminating in Smith’s murder by an angry mob in 1844.² The ensuing migration to the Great Salt Lake Basin under the leadership of Brigham Young was followed by the “Mormon Reformation” circa 1857, during which the doctrine of blood atonement was espoused and

[†] Anthony S. Winer is a Professor at William Mitchell College of Law.

1. SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH CENTURY AMERICA 19-22 (2002) (hereinafter “GORDON”).

2. *Id.* at 24-25 (“In Ohio, Missouri and Illinois, neighbors who initially welcomed the Mormons soon became their enemies. . . . [B]loc voting, forming a private militia, and dealing exclusively with approved merchants . . . , combined with rumors of sexual irregularities, Mormons’ aggressive proselytizing, and their apparently unquestioning obedience to Smith, made Mormon settlements unpopular with nearby residents.”).

Mormon convictions grew more intense.³ Through it all, Professor Gordon's primary emphasis is focused with admirable concentration on the institution of polygamy, or "plural marriage" as practiced by the 19th century Mormons.

Professor Gordon's research is detailed and impeccable. Her narrative evokes, without succumbing to, the passions raised on all sides of the various controversies involved. She induces the reader to experience the emotional reality of much that occurred, while maintaining a significant degree of even-handedness in her descriptions.

Still, after having finished reading this excellent narrative, it is fair for one to ask oneself, "Exactly *what* is this a history of?"

I. A PARTICULARIZED SCOPE FOR PROFESSOR GORDON'S NARRATIVE

This is not a general history of Mormon polygamy, or even a legal or political history of Mormon polygamy. This is because a key and paramount element of any such history is intentionally left substantially uncovered. Professor Gordon's narrative basically ends with the Supreme Court's decision in *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*,⁴ which upheld the so-called Edmunds-Tucker Act,⁵ directing the federal escheat of substantially all the property of the Mormon church. The book briefly mentions, but does not give any substantial attention to, the ensuing events,⁶ in which the entering State of Utah "forever prohibited" the practice of polygamy as a condition for its admission into the union.⁷

3. *Id.* at 58-59 ("The 'Reformation', as it is commonly termed, entailed a massive (re)commitment by the faithful . . . Mormon sermons grew hyperbolic, some even including topics such as the infamous doctrine of 'blood atonement' (or the theory that only the shedding of the sinner's blood could atone for some sins).").

4. 136 U.S. 1 (1890).

5. Ch. 397, 24 Stat. 635 (1887).

6. After having discussed the first *Late Corporation* case at length, Gordon briefly describes the 1890 "Manifesto" issued by Wilford Woodruff, whom she characterizes as "the last of the Mormon presidents to have made the great journey with Brigham Young." GORDON, *supra* note 1, at 220. According to Gordon, Woodruff's statement was a capitulation on the subject of polygamy, which "assured all concerned that he would no longer advise the faithful to engage in unlawful practices." *Id.* There is no substantial further development of how this "capitulation" was effectuated, ensuing political developments regarding the admission of Utah as a state, or the resulting effects on Mormon doctrine.

7. The Act of Congress that enabled the admission of Utah into the union as a state contained as one of its conditions a requirement that in Utah "polygamous

A complete political and legal history of Mormon polygamy would address this ultimate phase of the institution in detail. As Gordon acknowledges, prior to 1890, there had been many attempts by the federal authorities and others to expunge polygamy in the Mormon territories, but all had failed.⁸ There must have been factors at work regarding the ultimate renunciation that were not present in the earlier efforts that caused the capitulation to be eventually effective. Perhaps there were elements of Mormon life and culture that facilitated the ultimate renunciation of polygamy in spite of the pain and disruption that it no doubt caused. These, however, are not treated at length in this narrative.⁹

All this is understandable when one realizes that the intended scope of this book is somewhat narrower than a complete legal history of Mormon polygamy. Instead, Professor Gordon's enterprise is more subtle. She includes in the opening paragraphs of the book a brief description of her focus, but the busy reader might well pass over it without realizing its significance in delineating the scope of what is to follow. Professor Gordon states that her book is "about the efforts of the 18th century participants in the battle over Mormon polygamy (or plural marriage) to explain 'why the practice of polygamy . . . created a constitutional conflict over the meaning and scope of democracy in the United States.'"¹⁰

That is, her subject is the legal and political battle of words and ideas that surrounded the practice of Mormon polygamy, and in particular the effects of this battle of words on constitutional doctrine, while the institution of polygamy was in effect. She wants

or plural marriages are forever prohibited." Utah Enabling Act, Ch. 138, § 3 (First), 28 Stat. 107, 108 (1894).

8. Gordon describes various strategies used by polygamous Mormons to defeat the attempted enforcement of anti-polygamist laws and policies. Chief among them were the practice of defendants' going "Underground," which (according to Gordon) amounted to massive games of hide-and-seek, in which the Mormon faithful would assist in secretly sheltering accused polygamists. GORDON, *supra* note 1, at 158-59. Another "defense strategy" was the resort to "forgetfulness" by witnesses in legal proceedings, particularly Mormon women. *Id.* at 161.

9. Gordon discusses isolated factors, such as the controversy that she describes as involving the seating of Mormon Senator Reed Smoot in 1907, as contributing to a process in which "Mormon leaders gradually, but with increasing conviction, internalized an anti-polygamous ethic." GORDON, *supra* note 1, at 136-37. These are particular incidents, however, rather than part of a comprehensive overview.

10. GORDON, *supra* note 1, at 1.

to focus on the rhetorical and strategic argumentation, abroad in the land but also specifically in the Supreme Court, through which the polygamy battle was fought. Her interest is the impact of the debate on the language and ideas of the Constitution, rather than the entire legal ramifications of Mormon polygamy per se. This is a reasonable focus of attention, and it affords several interesting observations about the development of constitutional doctrine.

For example, lay readers may not be fully familiar with the predicament of federalism in which the early Saints found themselves. Professor Gordon reports that while the early Mormons were still residents largely of the Midwestern states, they seized on the First Amendment Free Exercise Clause to shield them from the depredations of hostile state governments. They were disappointed to learn, however, that at the time the clause was held only to limit the federal government and not the states. They learned first-hand the limitations of a federal structure, in which an oppressed minority could look only to its own local state government for the protection of local civil rights.¹¹

Then, upon the migration to the Great Salt Lake Basin, the early Saints surely felt that they could develop their own local religious culture free from interference.¹² However, in their particular local circumstances, they were residents of an as-yet unincorporated federal territory, rather than a fully sovereign state. The Constitution is quite explicit that the federal Congress has substantial authority over the governance of federal territories.¹³ Additionally, at the time of the Mormon migration, the Reconstruction Congresses contained ample quantities of legislators hostile to the Mormon cause.

As Professor Gordon tells the story, it must have been especially frustrating for the newly-settled Mormons to learn that whereas they had earlier been subject to the disfavor of hostile state governments, constitutional federalism was not to spare them from

11. GORDON, *supra* note 1, at 8-9 ("Mormons... did not have a clear understanding of state constitutional law... They were amazed and mortified that the Constitution failed to protect them or to avenge their suffering at the hands of local populations.")

12. GORDON, *supra* note 1, at 9 ("After they fled westward in the late 1840s, Mormon leaders claimed that the same principles that left them exposed to the vicissitudes of local majority rule in the states, dictated that they had the same rights to self-governance in their own jurisdiction - the Territory of Utah.")

13. U.S. CONST., art. IV, § 3 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.")

a hostile federal Congress even as they attempted to establish their own territory.¹⁴ Later critics would call situations such as this a “double bind.”¹⁵

Professor Gordon’s work is especially valuable in describing dynamics such as these. The emphasis on constitutional discourse permeates much of the book. Indeed, most of the substantive discussion in the volume addresses one point or another relevant to two key Supreme Court cases and the statutes they addressed. The later of these two, already referenced,¹⁶ was the *Late Corp. of the Church of Jesus Christ of Latter-Day Saints* case, addressing the constitutionality of the Edmunds-Tucker Act.¹⁷ The earlier was the more broadly famous, *Reynolds v. United States*,¹⁸ addressing the constitutionality of the Morrill Act,¹⁹ Congress’s first attempt to outlaw polygamy in the Mormon territories.²⁰

II. POTENTIAL APPLICATIONS OF A BROADER PERSPECTIVE

As valuable as the particularized focus of the volume is, it has several shortcomings. The first such shortcoming was suggested earlier,²¹ and can be addressed in the terms of Gordon’s own enterprise. Since the book does not cover the eventual retraction of polygamy as an institution, no insight is gained concerning

14. GORDON, *supra* note 1, at 9 (“And yet Utah was a territory, and thus neither a state nor entirely under federal control. Territories occupied an ambiguous and changeable place in the legal order, for although they clearly were not states (yet), they also were presumed to have the power to become states. Territories were subject to federal organization as political entities. But it was not clear how much of the states’ power to govern themselves they acquired after organization but before statehood.”).

15. *E.g.*, EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 58 (1990) (referencing a literary and cultural tradition that, by incorporating at the same time elements that are simultaneously homophobic and homoerotic, partakes of a “double-binding” character).

16. *See supra* notes at notes 4-5 and accompanying text (briefly describing the Edmunds-Tucker Act).

17. The *Late Corporation* case, and the relationship between the 19th century Mormon church and the ownership and management of property, which the case chiefly involves, are the primary topics in Chapter 6 of Gordon’s Book, titled “*The Marital Economy*.” (GORDON, at 183-220.)

18. 98 U.S. 145 (1878).

19. Ch. 126, 12 Stat. 501 (1862).

20. The *Reynolds* decision is the primary focus of Chapter 4 of Gordon’s book, titled “*Law and Patriarchy at the Supreme Court*.” GORDON, *supra* note 1, at 119-45.

21. *See supra* note 9 and accompanying text (noting the possibility that elements of Mormon perspectives might have facilitated the ultimate renunciation of polygamy).

whatever changes the retraction might have worked in Mormon legal and political attitudes. Further, no points are made regarding any underlying aspects of the earlier Mormon cause that might have presaged or facilitated the ultimate retraction.

There are two additional shortcomings, however, that arise out of the slightly insular nature of the book's focus. Broadly stated, Professor Gordon's narrative does not address any connection that the Mormon polygamy controversy might have with contemporary concerns in the current political life of the United States. More specifically, there are at least two significant issues in modern American political and legal life to which the historical question of Mormon polygamy might well be relevant. Professor Gordon steers substantially clear of both of them.

The first of these is the current controversy over same-sex marriage. This dispute is now being argued in courtrooms and state legislatures all over the country, and has many of the same emotional, moral, sexual and political connotations that the Mormon polygamy dispute engendered. It is somewhat remarkable that a book about Mormon polygamy published in 2002 has no substantive discussion of these parallels, or the same-sex marriage issue at all.²²

The second is the residual controversy over renegade Mormon polygamy itself. Disaffected bands of religious families who consider themselves Mormons are continuing to practice polygamy in Utah and surrounding states. They are not part of the mainstream Mormon church, and are in fact disavowed by the church.

Occasionally news reports surface regarding young women who "escape" from these polygamist households, and such stories cause consternation.²³ However, the consternation is usually based

22. Gordon includes a small handful of brief mentions of same-sex marriage. GORDON, *supra* note 1 at 233, 234, 237. These are fairly summary references, however, and appear in the final five pages of the narrative.

23. See, e.g., Michael Janofsky, *Young Brides Stir New Outcry on Utah Polygamy*, N.Y. TIMES, February 28, 2003, at A1 (detailing the case of Lu Ann Kingston, who was assertedly married at age 15 and left her polygamous household with a police escort five years later). During March 2003, a particularly harrowing set of facts was disclosed in the national press regarding the abduction of a 15-year-old Salt Lake City girl. She was assertedly taken from her family's home at night by a crazed vagrant who made his way into the house by cutting through a window screen. Nick Madigan, *Kidnap Suspect is Cited in Plan for Eight Wives*, N.Y. TIMES, March 15, 2003, at A1, A13. The alleged abductor and his wife kept the child for nine months, before they were apprehended and the child was returned to her

on the age of these young women, and centers on ideas of child protection against abuse. From reading the news reports, one gets the idea that the concerns might be different, and less intense, if the complaining women were in their late twenties or early thirties.

In the modern U.S. jurisprudential world, a household composed of mutually-consenting adults engaged in private, non-violent and non-commercial sexual relations as part of an established pattern of family life might receive a more favorable reception than it did in the mid-19th century. This is in substantial part because in the last thirty-five years the Supreme Court has developed a constitutional right to privacy concerning matters of marriage, procreation and family life.

If the practice of Mormon polygamy in the 19th century were judged against the privacy line of cases that are authoritative today, Mormon polygamy might have fared somewhat better in popular perceptions, and even in the courts. And, indeed, it is conceivable that at some point in the future a modern renegade Mormon polygamous family might successfully challenge state polygamy laws on the basis of the federal right to constitutional privacy. Gordon makes no substantial mention of the modern constitutional right to privacy or its potential application in this context.

The remainder of this Review will focus primarily on developing the first of these extrinsic comparisons, that having to do with same-sex marriage. However, at the end of the discussion it will become apparent that many of the ideas that have been generated in this connection relate also to the issue of modern polygamy. It is hoped that a connecting thread will be discerned between these two extrinsic points, and that a degree of coherence and rationality can be observed as a result of the impassioned and dedicated labors of so many people for so many years.

III. TWO DISTINCT EPOCHS

Contrasting the 19th century Mormon polygamy debate with

family. The wife of the accused perpetrator asserted in press reports that the girl had been taken to serve as the first of her husband's next eight wives. The man involved claimed to be following in the line of the Mormon prophets. However, it seems clear that, assuming the truth of the allegations, the couple involved was psychologically deranged. It would be unfair to regard their behavior as representative or characteristic of all modern polygamists claiming to be Mormons. Modern polygamous unions most often take place with the consent and wish of the families involved; violent abductions and kidnappings from family homes are not characteristic of the practice.

the current debate about same-sex marriage makes one aware of the different historical epochs in which these debates were carried out. The differing epochs might be defined in the following terms.

The first epoch was that inhabited by the Latter-Day Saints, as described in part by Professor Gordon. It would have begun at least by 1843 with Joseph Smith's receipt of the "Revelation on Celestial Marriage,"²⁴ continuing through the public proclamation of that imperative in 1852, continuing with the *Reynolds* decision in 1862, and ending (as Gordon might see it) with the decision in the *Late Corp.* case.

The epoch inhabited by the advocates of same-sex marriage would be seen as beginning in the late 1960's or early 1970's, with state cases such as the Minnesota Supreme Court's 1971 decision in *Baker v. Nelson*,²⁵ denying a marriage license to a same-sex couple. It would continue through the issuance of more sympathetic state-court cases, such as *Baehr v. Lewin*²⁶ and *Baker v. State*,²⁷ the first state high-court decisions finding favorably for the prospect of same-sex marriage. It would also pass through the DOMA movement, in which many state governments, and the federal government, passed legislation in the mold of "Defense of Marriage Acts."²⁸ Then, it would end at some undetermined point in the future, when the same-sex marriage controversy is resolved.

An explicit comparison between the Mormon attempts to preserve polygamy and modern attempts to establish recognition for same-sex marriage may strike some readers as far-fetched, and perhaps insensitive to those sympathetic with the Mormon cause. It is true that there are significant differences between the circumstances of Mormon polygamy in the 19th century and those of the modern activists for same-sex marriage, and some of these will be discussed below. However, there are also many similarities.

The first and most direct similarity is that the Mormon polygamists, like the modern activists, were espousing a form of sexual union that was non-conformist, and involved sexual practices that, at least among those of European ancestry in North America, were innovative. It is true that there were examples of

24. Professor Gordon adds that "[r]umors at the time, and evidence of experimentation disclosed by subsequent research, date the practice considerably earlier than 1843 . . ." GORDON, *supra* note 1, at 22.

25. 191 N.W.2d 185 (Minn. 1971).

26. 852 P.2d 44 (Haw. 1993).

27. 744 A.2d 864 (Vt. 1999).

28. Pub. L. No. 104-199, 110 Stat. 2419 (1996) (the Federal "DOMA").

polygamy in other cultures, and in Biblical texts. But, the practice of more or less open polygamy among Anglo-European settlers on this continent was something new. Similarly, the open assertion that same-sex couples should be permitted to marry legally is characteristic of a non-conformist approach to sexual behavior and, upon adoption, would amount to an innovation in the relationship of law and sexuality.

Related to this similarity, but distinct from it, is the observation that, beyond the sexual aspect of polygamous relations, the early Mormons were taking a different view from society of what could constitute the legally-sanctioned structure of a marriage. Whereas prior to their arrival on the scene, marriage in the United States was viewed virtually universally as the union of one man and one woman, most Mormons during the relevant period viewed marriage also as something that could take place between one man and two or more women. Their view amounted to a re-definition of the structure of marriage. This, of course, could also be said of modern advocates of same-sex marriage.

Another area of similarity concerns the passionate hostility that both sets of non-conformists have met. As noted earlier, Professor Gordon's narrative includes descriptions of the hostility, including armed violence, with which early Mormons were met in the Midwest.²⁹ Her recounting also contains substantial descriptions of the popular literature of the time, chiefly novels, which expressed the most vituperative moral condemnation against Mormon polygamy and the Mormons themselves. A veritable stable of woman authors of the late 19th century seem to have made careers out of publishing pulp novels excoriating Mormon polygamy and the Mormon faith in general.³⁰ These works appear to have been taken seriously, and Professor Gordon's work tends to indicate that much serious political and public discourse was in the same vein.

Similarly, of course, the modern cause of same-sex marriage has been roundly condemned on moral grounds. The success of the DOMA legislation in various states and the federal Congress and the vigorous denunciations that accompanied activism in

29. See *supra* note 2 and accompanying text (describing the reception of the early Mormons in some Midwestern states and the murder of Joseph Smith).

30. Professor Gordon highlights in particular the work of four female novelists: METTA VICTOR, *MORMON WIVES* (1856), MARIA WARD, *FEMALE LIFE AMONG THE MORMONS* (1855); ORVILLA BELISLE, *MORMONISM UNVEILED* (1855); and ALFREDA EVA BELL, *BOADICEA* (1855). GORDON, *supra* note 1, at 29-32.

Hawaii and Vermont when the supreme courts of those states ruled favorably regarding same-sex unions are merely some of the most concrete examples. Indeed, of course, one of the ironies in this area is that the modern Mormon church has been one of the most dedicated opponents to the cause of same-sex marriage in both of these states.³¹

Perhaps most tellingly, both sets of non-conformists were viewed by many of their antagonists solely in sexual terms. The 19th century critics of Mormon polygamy included many who lumped the Mormons in with Fanny Wright, and other contemporary promoters of “free love.”³² They assumed that because many Mormon men engaged in polygamy, the men were motivated primarily by licentiousness and a libidinous desire for multiple sexual partners.³³ It seems far more likely that most polygamous husbands among the 19th century Mormons approached polygamous relations with a strong sense of duty and responsibility, and that common sexual avarice would have been quite remote from their dominant motivations.

Similarly, opponents of same-sex marriage tend to essentialize the gay men and lesbians who would be the most common participants in such marriages according to sexual behavior. One can form the impression that some critics of same-sex marriage believe that the only thing a married same-sex couple would ever do together would be to have sex, and that the only reason that legal sanction is desired is to validate homosexual relations. Once again, it is more likely that most same-sex couples approach their unions with a sense of duty and responsibility. They want the benefits of marriage to promote the security and stability of their

31. Professor Gordon acknowledges as much during her brief references to the same-sex marriage issue. GORDON, *supra* note 1, at 234 (“The abiding sense of pain and persecution that many Mormons bring to the study of their past does not . . . make them sympathetic to others’ arguments for reshaping the structure of marriage. In response to the gay marriage movement, for example, the church strongly supported the federal Defense of Marriage Act . . .”); GORDON, *supra* note 1, at 237 (“Mormon leaders are now commonly known as vocal opponents of polygamy, feminism and gay rights.”).

32. Professor Gordon recounts that Fanny Wright was known as the “Red Harlot of Infidelity” for her philosophy of “free love.” GORDON, *supra* note 1, at 38. She notes that at least one influential contemporary writer alluded to Wright’s doctrines when attacking Mormon polygamy. *Id.* at 43.

33. GORDON, *supra* note 1, at 37 (“Exploring the sensual excesses of dissidents, sensational writers and lecturers satisfied the urge to probe and expose the sexual consequences of religious lapse.”).

relations with each other and their children, quite the opposite of a desire to facilitate irresponsibility.

Furthermore, both sets of non-conformists, although the basis of their non-conformity is rooted in an area of legal responsibility allocated to state governments (marriage and family life), have been the subject of oppressive legislation at the federal level. The early Mormons were plagued with the Morrill Act and the Edmunds-Tucker Act, as noted above.³⁴ The modern advocates of same-sex marriage have been saddled with DOMA's, not only in numerous state jurisdictions, but in the federal Congress as well.³⁵ In all cases, the federal legislation was meant, not merely to obstruct the disfavored practices, but to obliterate them as completely as it was felt the restrictions of federalism would permit.

Finally, the reception of the Supreme Court to practitioners of these kinds of non-conformity (until recently in the case of the modern activists) has been fairly contemptuous. Professor Gordon's narrative demonstrates that the Mormons received callously unfavorable treatment from the Court in the two cases on which she concentrates: *Reynolds v. United States*³⁶ and *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*.³⁷ Similarly, the callous reception of gay men and lesbians in the case of *Bowers v. Hardwick*³⁸ has long been evident. (Only recently, with the Court's decision in *Romer v. Evans*,³⁹ has the Court's attitude been less dismissive, and that development is somewhat

34. See *supra* notes 5 & 19 and accompanying text respectively (briefly describing the effects of the legislation).

35. See *supra* note 28 and accompanying text (referencing the state and federal DOMAs as an element of the modern Epoch describing the progress of the cause of same-sex marriage).

36. Professor Gordon seems at least mildly exasperated that in the *Reynolds* decision the Court virtually ignored the arguments of the Mormons' attorneys, which were based on the limited scope of federal jurisdiction, and focused instead on the extent of the Religion Clauses. She notes that the "carefully crafted. . . arguments of the Mormons evaporated in Chief Justice Waite's analysis for the Court." GORDON, *supra* note 1, at 130. She maintains that the Court's treatment of the Mormons' argument "misconstrued" their "central constitutional claim." *Id.* at 132.

37. Regarding the *Late Corporation* case, Professor Gordon seems justifiably skeptical of the Court's reliance on the doctrine of "*cy pres*", citing the checkered history of the doctrine's application. GORDON, *supra* note 1, at 216. She also reports with some apparent sympathy the view of the dissenting justices, who believed that *cy pres* should be a solely judicial remedy, rather than a basis for Congressional enactment through the Edmunds-Tucker Act. *Id.* at 218.

38. 478 U.S. 186 (1986).

39. 517 U.S. 620 (1996).

counterbalanced by Justice Scalia's fire-breathing dissent⁴⁰ in the case.)

On the other hand, it is true that there are significant differences between the two sets of non-conformists. First and foremost, the Mormon non-conformists were motivated by the dictates of a formal organized religion. The modern non-conformists do not operate from a common religious base, although some religious groups have evinced substantial support for their cause. It is also true that the desire for legal sanction for one's deepest personal commitment strikes chords of spirituality and inner meaning that can be religious in character. However, it must be conceded that these dimensions of spirituality and meaning are not the same social phenomenon as a formal organized religion.

A major historical distinction would also be that the early polygamous Mormons inhabited an area of territory that was substantially geographically segregated. The modern activists for same-sex marriage are to be found virtually everywhere, in most every state in the union, in rural and urban communities alike. This factor was material in that geographic isolation helped concentrate the 19th century Mormon community and strengthen its ability to resist hostile government and judicial action. While modern gay and lesbian couples do lead lives together, raise children, and in other respects behave as though they were married, they do not have a broad expanse of isolated territory to inhabit in which their alternative family structures could solidify across a large and insular society.

40. 517 U.S. at 636 (Scalia, J., dissenting). Justice Scalia incredulously exclaims near the beginning of his dissent that the Court's opinion "places the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias." *Id.* He later seems to criticize the Court for favoring "special treatment for homosexuals." *Id.* at 638. He maintains that the Court's perception of the Colorado constitutional amendment there at issue to be "gay-bashing" is "so false as to be comical." *Id.* at 645. It is especially ironic in the context of this Review that Justice Scalia also attached substantial weight to the case of *Davis v. Beason*, 133 U.S. 333 (1890), in which the Court upheld a "test oath" requirement imposed by the Idaho territorial legislature, intended to exclude polygamous Mormons from voting. *See also* GORDON, *supra* note 1, at 225-28 (discussing *Davis* in terms that clearly illustrate the intolerance and hostility toward polygamous Mormons evident at the time).

IV. CONTRASTING CONSTITUTIONAL DOCTRINE OF THE TWO EPOCHS

In addition to the factual and experiential distinctions described above, the rhetorical dynamics regarding the U.S. Constitution have differed substantially between the two Epochs. Although their causes were structurally similar, partisans on each side of the debate in each Epoch had different views of the Federal Constitution and federal power than partisans of that “side” in the other Epoch.

One such distinction involved the textual scope of the Constitution as viewed by defenders of convention. Influential defenders of sexual convention during the Epoch of Mormon polygamy discerned in the text of the Constitution a particularized notion of marriage that was hostile to the non-conformists.⁴¹

According to Professor Gordon’s account, the need for this approach was occasioned in part by the fact of Mormon hegemony over the Western territories the Mormons occupied. Since a certain degree of local autonomy needed to be conceded to the territorial residents, opponents of polygamy needed to find a basis in the Federal Constitution for denying the territorial residents their freedom on this point. The assertion was that inherent in the Federal Constitution was the idea of the family as a fundamental bulwark of political society, and that our Federal Constitution was conceived in and built on a particular, monogamous idea of the family. Any state or territory that deviated from this norm would be behaving in a way antithetical to the Constitution.⁴²

By contrast, many defenders of sexual convention during the modern Epoch are required to perceive the Constitution as being

41. Professor Gordon describes the position of the novelist Metta Victor. “The welfare of the country, claimed Victor, depended on Christian monogamy and its attendant protection of women in marriage. The Constitution, she argued, was infused with the Christian faith of its founders.” GORDON, *supra* note 1, at 30. Professor Gordon also explains, more generally: “The moral compass of the state, as anti-polygamist novelists described it, rested on the private relations of husband and wife. . . .” *Id.* at 31. Professor Gordon also summarizes: “Metta Victor and other early anti-polygamists relied on the national Constitution to shield them from the power of latter-day revelation and practice.” *Id.*

42. See GORDON, *supra* note 1, at 65 (“Utah’s status as a territory provided the opportunity to explore and expand federal power, because territories were technically subject to federal control. And yet everybody knew that domestic relations were matters of local constitutional practice. . . . Republicans cast around for suitable theories to justify intervention.”). See also *supra* note 41 (describing the connection in the view of some anti-polygamists between conventional morality and precepts of the Federal Constitution).

morally neutral on questions of marriage, procreation and family life. That is because the line of privacy-rights cases⁴³ created a jurisprudence that already establishes a dimension of individual rights in this area. Modern defenders of sexual convention tend to disapprove of the privacy line of cases. They tend to argue that the Constitution does not by its terms contain a substantive protection of procreational privacy, and that therefore the Constitution must be viewed as neutral on the subject. Accordingly, this preserves the field of private relations in each state to its legislature, and the privacy line of cases was largely (if not totally) in their view wrongly decided. However, in taking this approach, modern defenders of sexual convention are using an approach essentially opposite to that used against the 19th century Mormons.

Another contrast in preferred Constitutional doctrine between these Epochs is the “flip side” of the first contrast described above. This contrast involved the proper role of federalism. The advocates of the early Mormon non-conformists viewed the Federal Constitution as a force that should allow for substantial state and territorial autonomy. That is, in their view the Constitution rightly would remain neutral in areas of marriage and allow the Western territories in which the Mormons lived to adopt for themselves their own legal structures regarding marriage and family life.

The non-conformists of the modern Epoch, on the other hand, tend to use the Federal Constitution as a “sword,” rather than a “shield.” They view that document as a tool with which to advance their conception of individual rights. From their perspective, the values of the Constitution are anything but neutral on questions of marriage and family life.

Part of the explanation for this difference is traceable to the control that the 19th century Mormons had over their Western territories. Since they had effective control over this land area, they

43. The modern privacy line of cases began, of course, with *Griswold v. Connecticut*, 381 U.S. 479 (1965), invalidating a state statute that prohibited the use of certain contraceptives as violative of “a right of privacy older than the Bill of Rights” that protected the marital decision to use contraceptives. 381 U.S. at 486. The applicability of the right of privacy to other situations involving contraceptives was extended in cases such as *Eisenstadt v. Baird*, 405 U.S. 438 (1972) and *Carey v. Population Services*, 431 U.S. 678 (1977). It was also extended to decisions regarding abortion in *Roe v. Wade*, 410 U.S. 113 (1973). An early opinion that serves as a precursor to this line of cases was *Skinner v. Oklahoma*, 316 U.S. 535 (1942), in which the Court asserted that “Marriage and procreation are fundamental to the very existence and survival of the race,” and characterized this interest as “one of the basic civil rights of man.” 316 U.S. at 541.

2003]

A TALE OF TWO EPOCHS

1533

were in a position to assert the virtues of a federalism that left authority over marriage and family life with states or local governments. The activists of the later Epoch, having no geographic localization, are not able to use that argument.

The primary part of the explanation for this contrast in Constitutional perspective is the intervening development of the privacy-rights doctrine itself. It is because the modern Supreme Court has developed the privacy line of cases that the non-conformists of the two Epochs have such divergent views of the values of the Constitution. The modern non-conformists tend to view the Constitution as a safeguard of individual liberty because the Court has established that a right to privacy protects individual choices regarding marriage, procreation and family life.

The Mormon non-conformists of the earlier Epoch did not experience a Constitution interpreted by this line of cases, so they were not able to use the document as a positive enforcer of individual liberty in the area of marital and family privacy. They instead could assert that then-dominant notions of federalism should keep the federal government out of local decisions about marriage and family. They could perceive the value of the Constitution in this respect as being largely a bulwark against federal involvement.

V. A POSSIBLE THREAD CONNECTING TWO EPOCHS

If the privacy line of cases is the primary basis for this difference in favored Constitutional doctrines, how might the arguments of the earlier Mormons have changed if the privacy line of cases had been decided during, or prior to, their Epoch? This is something we cannot know, given the mutual interdependence of historical and cultural events. However, a far more concrete question might well be, given the privacy line of cases, at some point could a group of modern renegade Mormons assert the privacy line of cases against a state prosecution under bigamy or polygamy statutes? These cases have been decided during their era, and are completely available to them, unlike the 19th century Mormons.

Initially, the question may strike some as fanciful. It is not unusual, for example, for Supreme Court justices to use polygamy or bigamy statutes as examples of still-permissible state regulations of marriage when discussing the modern privacy right. However, no Supreme Court decision since the privacy line was developed

has squarely held that statutes against polygamy are necessarily valid as against a privacy challenge.

There is of course the adverse precedent in *Reynolds v. United States*.⁴⁴ However, the *Reynolds* decision held only that Mormon polygamy was not protected by the First Amendment Free Exercise Clause. That issue might even be viewed today as having been correctly decided, in light of the modern Court's holding in *Employment Division v. Smith*.⁴⁵ Assuming that the Morrill Act's terms were neutral and generally applicable, there might well be a strong argument even today that such a federal statute should survive a Free-Exercise challenge, at least as long as *Employment Division v. Smith* remains the law.

However, the mere possibility that the Free-Exercise analysis in *Reynolds* arrived at a correct result does not mean that the same result should be reached if the same facts are analyzed on the basis of the Due-Process right to privacy. The hypothetical modern renegade group of polygamous Mormons would not succeed under a Free-Exercise challenge to the enforcement of a bigamy statute against them. This does not necessarily mean they would, or should, be unsuccessful with a 14th Amendment Due Process argument.

If the privacy line of cases was correctly decided, it must be because there is something basic and fundamentally important about the individual's autonomy over his or her familial relationships. The State cannot generally decide for a person whether to have children, whether to maintain or curtail fertility or virility, and what kinds of extended family relationships can constitute a household. This fundamental interest in autonomy is something that is constant, as true for one Epoch as for another. To be sure, social and political circumstances may change and be very different from one period to another. Perhaps considerations of social stability prevent the individual's interest in autonomy from being completely free during certain epochs, but that does not mean that the interest in freedom is less strong.

It certainly appears that certain state governments are acknowledging expanded applications of the individual's right to make his or her own choices in the areas of marriage, procreation and family life. In some cases, there is and no doubt will be, legal

44. 98 U.S. 145 (1878).

45. 494 U.S. 872 (1990).

2003]

A TALE OF TWO EPOCHS

1535

recognition of the right of a person to marry, or effectively marry, another person of the same sex.

This is to some degree a revolutionary development, given the hostility in governmental circles that would until recently, and in some cases still, greets the idea of serious same-sex relationships. But at least some states have acknowledged, and more will, the basic human need to live in marital and family structures that are meaningful and fulfilling to those who inhabit them. This is beginning to be accepted now for those in same-sex relationships. It was not accepted in the 19th century for the early Mormons. This may have been because the dominant political and social visions of the time could not conceive of countenancing their structures without threatening the larger society.

However, there are now states and localities wherein large numbers of adult gay men and lesbians are living openly as marital or quasi-marital couples with families, and these states and localities are continuing to thrive. Their example may, and perhaps should, cause a re-examination of the extent to which plural marriage among adults actually does threaten civil society. The tenacity of that institution over time may speak to the sincerity and personal commitment in which it is rooted, at least in the hearts of many. While the basis for choosing this familial structure can be grounded in religion, it is by no means necessary for one's idea of one's own family to be religiously based in order for that idea to be of fundamental importance in defining one's own life.

Professor Gordon's narrative leaves no doubt as to the sincerity and commitment of the early Mormon practitioners of polygamy. It is difficult to read Professor Gordon's account without experiencing some degree of sympathy for the Mormon population that was so pervasively the object of scorn and condemnation from much of the rest of the country. After all, this was a population that had deep convictions about their relationships with one another and their God, and most today would not doubt their sincerity or integrity in attempting to live their ideals. If the societal restrictions of their time forbade their living according to their chosen precepts, perhaps as those restrictions change character, those choosing potentially analogous precepts can be accorded a more welcoming treatment in the future.

The thread of respect for individual autonomy in defining one's marital and family relationships seems to be extending into new areas in the modern American legal landscape. A perspective

1536

WILLIAM MITCHELL LAW REVIEW

[Vol. 29:4

of understanding could well ensue for practitioners of a form of plural marriage as a result of this development, providing that others can view them with a sympathetic perspective. It is the sympathy that one can experience for the early Saints from reading Professor Gordon's book that may be one of its most significant values.