NATURAL LAW AND THE RHETORIC OF EMPIRE: *REYNOLDS V. UNITED STATES*, POLYGAMY, AND IMPERIALISM

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ABSTRACT

In 1879, the U.S. Supreme Court construed the Free Exercise Clause for the first time, holding in Reynolds v. United States *that Congress could punish Mormon polygamy. Historians have interpreted* Reynolds*, and the anti-polygamy legislation and litigation that it midwifed, as an extension of Reconstruction into the American West. This Article offers a new historical interpretation, one that places the birth of Free Exercise jurisprudence in* Reynolds *within an international context of Great Power imperialism and American international expansion at the end of the nineteenth century. It does this by recovering the lost theory of religious freedom that the Mormons offered in* Reynolds*, a theory grounded in the natural law tradition. It then shows how the Court rejected this theory by using British imperial law to interpret the scope of the First Amendment. Unraveling the work done by these international analogies reveals how the legal debates in* Reynolds *reached back to natural law theorists of the seventeenth century, such as Hugo Grotius, and forward to* fin de siècle *imperialists, such as Theodore Roosevelt. By analogizing the federal government to the British Raj,* Reynolds *provided a framework for national politicians in the 1880s to employ the supposedly discredited tactics of Reconstruction against the Mormons. Embedded in imperialist analogies,* Reynolds *and its progeny thus formed a prelude to the constitutional battles over American imperialism in the wake of the Spanish-American War. These constitutional debates reached their denouement in the* Insular Cases*, where* Reynolds *and its progeny appeared not as Free Exercise cases but as precedents on the scope of*

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American imperial power. This Article thus remaps key events in late-nineteenth-century constitutional history, showing how the birth of Free Exercise jurisprudence in Reynolds *must be understood as part of America's engagement with Great Power imperialism and the ideologies that sustained it.*

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INTRODUCTION

On January 6, 1879, the U.S. Supreme Court handed down its decision in *Reynolds v. United States*.[1] The decision affirmed the bigamy conviction of George Reynolds, a Mormon polygamist. In doing so, the Court for the first time construed the meaning of the Free Exercise Clause of the First Amendment,[2] earning *Reynolds* a place in the constitutional law canon.[3] Reading the case in historical context, however, reveals it as

1. 98 U.S. 145 (1878).

2. Prior to its incorporation against the states under the Fourteenth Amendment, the Free Exercise Clause applied only to action by the federal government. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (holding that the Fourteenth Amendment's Due Process Clause prohibits state governments from abridging the free exercise of religion under the First Amendment). During the course of the nineteenth century, cases reached the Supreme Court from state courts alleging violations of the Free Exercise clause, and, in each of these cases, the Court ruled that the First Amendment did not apply to the states. *See, e.g.*, City of New Orleans v. Permoli, 44 U.S. 589, 606 (1845) (holding that the Free Exercise Clause did not apply to activities of the states). *See generally* Michael W. McConnell, *The Supreme Court's Earliest Church-State Cases: Windows on Religious-Cultural-Political Conflict in the Early Republic*, 37 TULSA L. REV. 7 (2002) (discussing pre-*Reynolds* church-state cases).

3. For a modern overview of the discussion of *Reynolds*, see MICHAEL S. ARIENS & ROBERT A. DESTRO, RELIGIOUS LIBERTY IN A PLURALISTIC SOCIETY 186–96 (2d ed. 2002) (discussing *Reynolds v. United States* and later polygamy cases); MICHAEL W. MCCONNELL, JOHN H. GARVEY & THOMAS C. BERG, RELIGION AND THE CONSTITUTION 139–42 (2002) (same); JOHN T. NOONAN, JR. & EDWARD MCGLYNN GAFFNEY, JR., RELIGIOUS FREEDOM: HISTORY, CASES, AND OTHER MATERIALS

far more than a hoary chestnut from the birth of Free Exercise jurisprudence. Legal historians have tended to place *Reynolds* in the context of what came immediately before it.[4] Sarah Barringer Gordon, for example, has persuasively demonstrated the deep affinities between the anti-polygamy jurisprudence[5] midwifed by *Reynolds* and the anti-slavery movement.[6] In her telling, *Reynolds* is an extension of the constitutional debates sparked by abolitionism, debates dominated by domestic narratives of federal versus local power and the social preconditions for American democracy.[7] The decision in *Reynolds*, however, also drew on international narratives, using analogies to British imperial law to interpret

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ON THE INTERACTION OF RELIGION AND GOVERNMENT 289–307 (2001) (same). In addition, the case remains a staple in the teaching of constitutional law. *See, e.g.*, WILLIAM W. VAN ALSTYNE, THE AMERICAN FIRST AMENDMENT IN THE TWENTY-FIRST CENTURY: CASES AND MATERIALS 991–95 (3d ed. 2002) (placing the *Reynolds* case at the beginning of the Free Exercise chapter). The discussion of *Reynolds* in the law reviews has also been extensive. *See, e.g.*, Todd M. Gillett, *The Absolution of* Reynolds*: The Constitutionality of Religious Polygamy*, 8 WM. & MARY BILL RTS. J. 497 (2000) (arguing that *Reynolds* should be overturned); Elizabeth Harmer-Dionne, *Once a Peculiar People: Cognitive Dissonance and the Suppression of Mormon Polygamy as a Case Study Negating the Belief-Action Distinction*, 50 STAN. L. REV. 1295 (1998) (criticizing *Reynolds*); Shayna M. Sigman, *Everything Lawyers Know About Polygamy is Wrong*, CORNELL J.L. & PUB. POL'Y 101 (2006); Richard A. Vazquez, *The Practice of Polygamy: Legitimate Free Exercise of Religion or Legitimate Public Menace? Revisiting* Reynolds *in Light of Modern Constitutional Jurisprudence*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 225 (2001) (arguing for the continuing vitality of *Reynolds*).

4. *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, at 151–59 (1988) (discussing *Reynolds v. United States* within the context of Mormon legal history); SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH CENTURY AMERICA 119–45 (2002) (discussing *Reynolds v. United States* within the context of nineteenth-century legal thought); Mary K. Campbell, *Mr. Peay's Horses: The Federal Response to Mormon Polygamy, 1854–1887*, 13 YALE J.L. & FEMINISM 29 (2001) (discussing the history of anti-polygamy laws and the *Reynolds* case); Ray Jay Davis, *Plural Marriage and Religious Freedom: The Impact of* Reynolds v. United States, 15 ARIZ. L. REV. 287 (1973); Sarah Barringer Gordon, *"Our National Hearthstone": Anti-Polygamy Fiction and the Sentimental Campaign Against Moral Diversity in Antebellum America*, 8 YALE J.L. & HUMAN. 295 (1996) (discussing the anti-polygamy politics leading to *Reynolds*); Orma Lindford, *The Mormons and the Law: The Polygamy Cases*, 9 UTAH L. REV. 308 (1964) (discussing the history of *Reynolds* and the other anti-polygamy cases).

5. *See* United States v. Late Corp. of the Church of Jesus Christ of Latter-day Saints, 150 U.S. 145 (1893); Late Corp. of the Church of Jesus Christ of Latter-day Saints v. United States, 140 U.S. 665 (1891); Late Corp. of the Church of Jesus Christ of Latter-day Saints v. United States, 136 U.S. 1 (1890); Davis v. Beason, 133 U.S. 333 (1890); *Ex Parte* Snow, 120 U.S. 274 (1887); Cannon v. United States, 116 U.S. 55 (1885); Clawson v. United States, 114 U.S. 477 (1885); Murphy v. Ramsey, 114 U.S. 15 (1885); Clawson v. United States, 113 U.S. 143 (1885); Miles v. United States, 103 U.S. 304 (1880).

6. *See* GORDON, *supra* note 4, at 55–83 (discussing the relationship between anti-polygamy jurisprudence and the anti-slavery movements).

7. *See id.* at 6–7 (summarizing strands of argument in the anti-polygamy battles and how they contributed to the founding of First Amendment jurisprudence); *see also* Nathan B. Oman, *The Story of a Forgotten Battle*, 2002 BYU L. REV. 745 (reviewing Sarah Barringer Gordon, *The Mormon Question*, and summarizing her key arguments).

the scope of the First Amendment. This Article unravels the work done by these international analogies, revealing how the legal debates in *Reynolds* reached back to natural law theorists of the seventeenth century, such as Samuel Pufendorf and Hugo Grotius, and forward to *fin de siècle* imperialists, such as Henry Cabot Lodge and Theodore Roosevelt. At the center of this debate lay the Mormons, who were defined by nineteenth-century Americans as not only religious but also racial—and thus imperial—outsiders.

The Court heard oral arguments in *Reynolds* in November 1878.[8] Reconstructing the now-forgotten theory of the First Amendment advanced by the Mormons' lawyers shows that the Mormons had a nuanced account of religious freedom quite different than the caricature attributed to them by the Court's opinion. Contrary to the common perception, they did not claim that the Free Exercise Clause was a trump card exempting any religiously motivated action—regardless of its nature—from the criminal law. Rather, they sought to provide a workable theory of religious freedom that defined those religious actions entitled to constitutional protection and those acts that could be criminalized regardless of their religious motivation.[9] Their argument hinged on the distinction between actions that are *mala in se* versus merely *mala prohibita*.[10] The First Amendment, they claimed, protected only criminalized religious acts that were *mala prohibita* but did not extend to acts that were *mala in se*.[11] Acts could be sorted into one category rather than the other by appeal to a series of arguments drawn from the natural law tradition, arguments that depended on analogies to non-Western legal systems.[12]

The Court's implicit response to the natural law reasoning of the Mormons' lawyers in *Reynolds* was an appeal to the nineteenth-century ideals of progress and imperialism that were displacing the earlier, eighteenth-century ideals of universal reason and natural law.[13] The Justices analogized Mormons to "the Asiatic and African races"[14] that, at the time, were being subjected to the supposedly benign and progressive influence of imperial legal systems. They went on to implicitly liken the

8. SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH CENTURY AMERICA 116 (2002)
9. *See infra* Part I.B.
10. *See infra* Part I.B.
11. *See infra* Part I.B.
12. *See infra* Part I.B.
13. *See infra* Part II.
14. *See* Reynolds v. United States, 98 U.S. 145, 150 (1878).

federal government to the British Raj, bringing civilization through law to a benighted race.[15] It is well known that in the wake of the Spanish-American War in 1898, American legal thinkers turned to imperial models abroad for analogies with which to interpret the U.S. Constitution, culminating in the Supreme Court's 1901 decisions in the *Insular Cases*.[16] Historians have also increasingly rejected an exceptionalist interpretation of the United States' expansion across North America, seeing it instead as a local manifestation of the international spread of imperial ambitions in the nineteenth century.[17] A fuller understanding of *Reynolds* reveals how the apparently domestic battles over polygamy from the 1860s to the 1880s were also part of this international story of American imperial expansion, forming a legal prelude to its constitutional denouement in the *Insular Cases*.

The Court's racial analogy also foreshadowed the aggressive legal tactics employed against the Mormons in the wake of *Reynolds*. Originally, anti-polygamy politics was associated with anti-slavery Republicanism.[18] By the late 1870s, however, the federal government had abandoned African Americans to the tender mercies of newly resurgent state governments in the South in return for national reconciliation and an end to the bitter sectional politics surrounding the Civil War.[19] In *Reynolds*, the Court adopted the rhetorical roadmap that allowed Republicans in the decade after the decision to employ the tactics of Reconstruction against the Mormons without reopening the bitter political battles of the late-1860s.[20] It did this by associating the suppression of polygamy with the control—rather than the liberation—of racial minorities, a stance that allowed the condemnation of polygamy without an implicit condemnation of the emerging system of postemancipation

15. *See infra* Part II.

16. *See generally* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION (Christina Duffy Burnett & Burke Marshall eds., 2001) (discussing the legal debates over imperialism sparked by the Spanish-American War); JAMES EDWARD KERR, THE *INSULAR CASES*: THE ROLE OF THE JUDICIARY IN AMERICAN EXPANSIONISM (1982) (discussing the constitutional debates over the status of the territory acquired from Spain in the Spanish-American War); BARTHOLOMEW H. SPARROW, THE *INSULAR CASES* AND THE EMERGENCE OF AMERICAN EMPIRE (2006) (same).

17. *See, e.g.*, DAVID C. HENDRICKSON, UNION, NATION, OR EMPIRE: THE AMERICAN DEBATE OVER INTERNATIONAL RELATIONS, 1789–1941 (2009).

18. The most dramatic pairing of the two came in the 1856 Republican Party Platform, which called for the exclusion of the "twin relics of barbarism"—slavery and polygamy—from the territories. *See* C. Peter Magrath, *Chief Justice Waite and the "Twin Relic":* Reynolds v. United States, 18 VAND. L. REV. 507, 518 (1965) (quoting the 1856 Republican platform).

19. *See infra* Part III.A.

20. *See infra* Part III.A.

racial subordination in the South.[21] While historians rightly tend to interpret the federal government's anti-polygamy crusade in the 1880s as an extension of Reconstruction into the West, the interplay of natural law and imperialism in *Reynolds* reveals the way that crusade also acted as a prelude to imperial adventures at the turn of the century.[22] Indeed, the rhetorical association of anti-polygamy with imperialism abroad rather than Reconstruction at home was part of what made employing the unpopular legal tactics of Reconstruction in Utah palatable to national politicians in the 1880s.[23]

All of these rhetorical moves were part of a much deeper intellectual shift that occurred over the course of the nineteenth century. Writing a generation ago, Christopher Lasch captured that shift in terms of the fault line running through the debates over American expansion after the Spanish-American War of 1898:

> [American imperialists] substituted for the Jeffersonian proposition that the right to liberty is "natural"—hence universal—the proposition that rights depend on environment: on "civilization," of which there were now seen to be many stages of development; on race; even on climate. A pseudo-Darwinian hierarchy of cultural stages, unequal in the capacity for enjoyment of the rights associated with self-government, replaced the simpler and more liberal theory of the Enlightenment, which recognized only the distinction between society and nature. "Rights," as absolutes, lost their meaning by becoming relative to time and place. Rights now depended on a people's "readiness" to enjoy them.[24]

A recovery of the lost debates over natural law and imperialism in *Reynolds* shows this shift from Enlightenment reason to nineteenth-

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21. *See infra* Part III.A.

22. *See generally* ROBERT JOSEPH DWYER, THE GENTILE COMES TO UTAH: A STUDY IN RELIGIOUS AND SOCIAL CONFLICT: 1862–1890 (1971) (discussing the place of "The Mormon Question" in post–Civil War politics); GORDON, *supra* note 4 (same); GUSTIVE O. LARSON, THE "AMERICANIZATION" OF UTAH FOR STATEHOOD (1971) (same); EDWARD LEO LYMAN, POLITICAL DELIVERANCE: THE MORMON QUEST FOR UTAH STATEHOOD (1986) (same); W. Paul Reeve, Address at the Western History Association Conference: Reconstructing the West: James M. Ashley's Answer to the Mormon Question (Oct. 2007) (discussing the politics of Reconstruction in the West).

23. *See infra* Part III.A.

24. CHRISTOPHER LASCH, THE WORLD OF NATIONS: REFLECTIONS ON AMERICAN HISTORY, POLITICS, AND CULTURE 73 (1973). Interestingly, in the chapter immediately preceding his discussion of the arguments over imperialism and anti-imperialism in the wake of the Spanish-American War, Lasch has a prolonged discussion of Mormonism in which he fails to recognize the connection between the anti-Mormon crusades of the 1880s and the debates over imperialism a decade later. *See id.* at 56–69 (discussing the place of Mormonism in American history).

century progress playing out in the hard-fought anti-polygamy battles of the 1860s, 1870s, and 1880s.

This Article proceeds as follows. Part I recounts the birth of the *Reynolds* litigation and the natural law arguments that the Mormons' lawyers offered before the Supreme Court. Part II shows how the Court used the rhetoric of imperialism to reject those arguments, tapping into international narratives of racial hierarchy and the progress of civilization. Part III reconstructs the afterlife of the imperial analogies in *Reynolds*, showing first how they formed a bridge between the decline of Radical Reconstruction and the anti-polygamy crusade of the 1880s, and second how *Reynolds* prefigured the constitutional analogies to British imperialism in the debates over American expansion at the end of the 1890s that ultimately culminated in the 1901 *Insular Cases*.

I. MORMON POLYGAMY AND NATURAL LAW AT THE SUPREME COURT

To see how a fuller understanding of *Reynolds* recasts standard narratives about the politics of polygamy and the role of imperialism in late-nineteenth-century constitutional interpretation, we must first reconstruct the litigation that led to the decision. This allows us to recover the now-forgotten theory of religious freedom put before the Court in 1878, a theory grounded in the natural law tradition and based on a series of analogies to non-Western legal systems.

A. *The Origins of the* Reynolds *Litigation*

In 1847, Mormon refugees under church leader Brigham Young arrived in the wastes of the Great Basin, fleeing more than a decade of intermittent mob violence in the East.[25] At the time, what would become Utah was beyond the borders of the United States in Mexico. In 1848, however, Mexico ceded the entire region to a victorious United States under the Treaty of Guadalupe Hidalgo, and, in 1850, Congress created the territory of Utah to govern the newly conquered community.[26] By 1852, Mormon

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25. *See* DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848, at 726–31 (2009) (discussing the Mormon migration in the late 1840s). The migration occurred in two stages. In 1846, the Mormons established a settlement in present day Nebraska on the far western border of the United States. In 1847, they began moving the people in this settlement to their final destination in the Great Basin. *See generally* RICHARD E. BENNETT, WE'LL FIND THE PLACE: THE MORMON EXODUS, 1846–1848 (1997) (discussing the Mormon migration to the American west).

26. *See* LYMAN, *supra* note 22, at 7–40 (discussing the establishment of the Utah Territory in 1850).

leaders felt confident enough in their independence to publicly announce the doctrine of plural marriage, which had been practiced clandestinely by elite Mormons for over a decade, and went so far as to send a high church leader to Washington, D.C., to preach the doctrine.[27]

Four years later, in the 1856 presidential election, the Republican Party burst on the national scene dedicated to the eradication of "the twin relics of barbarism" in the territories: slavery and polygamy.[28] By 1862, the Republicans were in control of Congress and passed their first anti-polygamy law, the Morrill Act.[29] The law, however, was ineffective, and an attempt to prosecute Brigham Young ended in failure when the U.S. Supreme Court ruled that federal officials had exceeded their authority in order to bring the case.[30] Congress responded in 1874 with the Poland Act, which firmly placed criminal prosecution in Utah in non-Mormon hands.[31] However, the willingness of Utah jurors to find Mormons guilty of a crime for "living their religion" and the constitutionality of the Morrill Act's prohibition on polygamy under the Free Exercise Clause remained in doubt.[32]

Both federal officials and Mormon leaders wanted to test the validity of the Morrill Act. The Mormons wished to vindicate their belief that the law was unconstitutional, and federal officials jaded by years of unsuccessful legal wrangling against church leaders were eager to grasp any opportunity to prosecute a high-profile polygamy case and lay Mormon arguments to rest.[33] In addition, George Q. Cannon, one of Young's counselors and the political mastermind of Mormon resistance, turned to the law as part of a high-stakes political game in Congress.[34] As Utah's nonvoting territorial

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27. *See* Orson Pratt, *Celestial Marriage*, *in* 1 J. DISCOURSES 53 (1854–1886) (the sermon publicly announcing polygamy); *see also* BRECK ENGLAND, THE LIFE AND THOUGHT OF ORSON PRATT 175–76 (1985) (discussing Orson Pratt's mission to Washington, D.C., after the announcement of polygamy); RICHARD VAN WAGONER, MORMON POLYGAMY: A HISTORY 84 (3d ed. 1992) (same). The most detailed account of the lived experience of nineteenth-century Mormon polygamy is KATHRYN M. DAYNES, MORE WIVES THAN ONE: TRANSFORMATION OF THE MORMON MARRIAGE SYSTEM, 1840–1910 (2001).

28. *See* Magrath, *supra* note 18, at 518 (quoting the 1856 Republican platform).

29. *See id.* at 520.

30. *See generally* Clinton v. Englebrecht, 80 U.S. 434 (1872) (declaring that grand juries in the Utah Territory had been illegally impanelled using the procedure for Article III courts rather than the procedure for Territorial courts); FIRMAGE & MANGRUM, *supra* note 4, at 138 (discussing how *Englebrecht* ended the prosecution of Brigham Young).

31. *See* FIRMAGE & MANGRUM, *supra* note 4, at 148–49. The Poland Act did this by giving control over juries to the federally appointed (and non-Mormon) U.S. Marshal rather than the locally appointed (and Mormon) Territorial Marshal. *See id.*

32. *See* GORDON, *supra* note 4, at 83 (discussing the ineffectiveness of the Morrill Act).

33. *See id.* at 111–16 (discussing the maneuvering that led to the *Reynolds* litigation).

34. *See id.* at 149.

delegate, Cannon fought in Washington, D.C., to delay new proposals dealing with "The Mormon Question" and hoped to create a favorable Supreme Court precedent.[35] For their part, federal officials in Utah despaired of ever enforcing the anti-polygamy laws because, as one Utah lawyer put it in a letter to the Attorney General, "[t]he sympathy of the great mass of the people here is with the parties to be prosecuted."[36] A deal was struck: Mormon leaders would provide a defendant for a test case.[37] Cannon picked a loyal English convert—and recently married polygamist—named George Reynolds, and the Mormons provided the federal prosecutors with a list of witnesses.[38]

On October 23, 1874, Reynolds was indicted for bigamy under the Morrill Act.[39] The U.S. Attorney explained the deal to the grand jury. He later wrote the Attorney General:

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35. *See* DAVIS BITTON, GEORGE Q. CANNON: A BIOGRAPHY 169–96 (1999) (detailing Cannon's political activities in the early 1870s).

36. Letter from J.S. Wiekizer to A.J. Ackerman, U.S. Attorney Gen. (Oct. 9, 1871) (on file with the National Archives, College Park, Maryland).

37. ORSON F. WHITNEY, 3 HISTORY OF UTAH 46–47 (1893). According to Whitney, a partisan Mormon, the terms of the deal were as follows: "It was stipulated that the defendant in the case should produce the evidence for his own indictment and conviction, and it was generally understood that the infliction of punishment in this instance would be waived. Only the first half of the arrangement was realized." *Id.* However, Robert N. Baskin, who consulted with the U.S. Attorney in the case, denied that any such deal was struck. *See* ROBERT N. BASKIN, REMINISCENCES OF EARLY UTAH 61–62 (1914). Baskin's blanket denial cannot be correct in light of the overwhelming contemporary evidence that Reynolds was a preselected and (initially, at least) willing defendant. *See* BITTON, *supra* note 35, at 218–24 (discussing Cannon's conversation with Reynolds and the initial stages of the litigation); BRUCE A. VAN ORDEN, PRISONER FOR CONSCIENCE' SAKE: THE LIFE OF GEORGE REYNOLDS 61–62 (1992) (same). One likely explanation, in light of the rapid break down of relations, is that an agreement was made but that its precise terms were left vague. Cannon and the other Mormon leaders do not seem to have had any legal counsel in their negotiations with the U.S. Attorney. Very likely, the Mormons did not play out the "end game" with sufficient detail ahead of time to nail down specifics with the federal officials. As the full implications of the deal became apparent, they understood the ambiguity in the terms outlined by Whitney, namely, that Reynolds would not be punished if he was found guilty. This theory is also consistent with Whitney's equivocal language—"it was generally understood that"—about the precise contours of the deal. *See* WHITNEY, *supra*, at 47. However, there is at least some semicontemporaneous evidence to suggest that, as part of the deal, federal officials affirmatively agreed that Reynolds would not be punished. In 1878, while Reynolds's case was pending before the U.S. Supreme Court, James Horrocks, one of the members of the grand jury that indicted Reynolds, told a journalist that there was an agreement not to inflict punishment. HISTORY OF THE BENCH AND BAR OF UTAH 48 (C.C. Goodwin ed., 1913). According to the journalist: "'He said without equivocation that the jurors were instructed, or at least advised, that there was no disposition to inflict punishment, but merely a design on the part of the Government's representatives to make sure of their ground before going further.'" *Id.* (quoting journalist S.A. Kenner). James Horrocks was a Mormon who was born in England in 1835 and immigrated to Utah with his father and mother. *See* Mormon family history records (on file with author), *available at* http://www.new. familysearch.org (last visited Jan. 3. 2011).

38. *See* VAN ORDEN, *supra* note 37, at 61–62.

39. *Id*. at 62.

> I told them my plan of operations, that crime must be punished &c and that there were questions here that had divided the people and caused bitter animosities for many years: that the sooner these questions were settled the better, and that I purposed to make some test cases and let the highest tribunal of the country settle them, if all parties felt disposed so to do.[40]

Reynolds was found guilty, and, after an initially successful appeal to the Territorial Supreme Court and a retrial,[41] he ultimately appealed to the U.S. Supreme Court, where his case was argued in November 1878.[42]

B. The Natural Law Argument in Reynolds

Reynolds's lawyers defended polygamy by situating the Free Exercise Clause within the natural law tradition. The bare bones of their position can be seen in the *U.S. Reports*' summary of the arguments presented before the Court. According to that truncated report, they argued that:

> The offence prohibited by [the anti-polygamy laws] is not *malum in se*; it is not prohibited by the decalogue [i.e. the ten commandments]; and, if it be said that its prohibition is to be found in the teachings of the New Testament, we know that a majority of the people of [the Territory of Utah] deny that the Christian law contains any such prohibition.[43]

By invoking the distinction between actions that are *mala in se* and *mala prohibita*, Reynolds's lawyers built on a theory that saw certain actions as inherently subject to prohibition. Furthermore, by turning to the Bible and the opinions of the majority of the people, they were adopting two forms of argument with deep roots in Blackstone, Grotius, and the natural law tradition.

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40. Letter from William Carey, U.S. Dist. Attorney, to George H. Williams, U.S. Attorney Gen. (Dec. 29, 1874) (on file with the National Archives, College Park, Maryland).

41. *See generally* United States v. Reynolds, 1 Utah 226 (1875) (Reynolds's first, successful appeal to the Territorial Supreme Court); United States v. Reynolds, 1 Utah 319 (1876) (Reynolds's second, unsuccessful appeal to the Territorial Supreme Court). The Territorial Supreme Court dismissed Reynolds's First Amendment claim without argument: "The Appellant assigns as error the rejection of evidence offered by him to show that plural or polygamous marriage was part of his religion. This objection of the Appellant, is, as we conceive, based upon neither reason, justice nor law, and therefore we dismiss it without further notice." *Reynolds*, 1 Utah 226, at 227.

42. *See The Utah Polygamy Case*, N.Y. TIMES, Nov. 16, 1878, at 2 (describing oral argument in the case).

43. Reynolds v. United States, 98 U.S. 145, 152–53 (1878).

A key source for understanding the natural law theory presented to the Court in *Reynolds* is *A Review of the Decision of the Supreme Court of the United States, in the Case of George Reynolds vs. the United States*, a short book responding to the decision that was penned by George Q. Cannon, the moving force behind the Mormon legal strategy, shortly after the opinion came down.[44] Cannon had no legal training, and Reynolds's lawyers—George Biddle, a former Attorney General in the Buchanan administration, and Benjamin Sheeks, local trial counsel in the case—almost certainly assisted in preparing the pamphlet.[45] In their brief to the Court, Reynolds's lawyers focused overwhelmingly on technical objections unrelated to his First Amendment claim.[46] At oral argument, however, the Justices were more interested in the Free Exercise Clause.[47] Biddle, who argued the case, was clearly prepared with a theory of the amendment, but because there is no transcript of the oral argument, we must piece the argument together from a variety of sources. The arguments in Cannon's *Review* enlarge on the truncated descriptions of the oral arguments that have survived, and it likely reflects in detail the theory offered to the Court by Biddle.

The problem of creating a workable regime of religious freedom is ultimately one of baselines. If any religiously motivated action forbidden by the law is *ipso facto* unprotected because it is a "crime," then there are no meaningful restrictions on the state's ability to criminalize religious practices. Such prohibitions will tautologically justify themselves. On the other hand, if any religious claim can vitiate the requirements of any criminal statute, then the law would be fully exposed to the anarchic claims of religious conscience. In order to create a workable system of

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44. *See* BITTON, *supra* note 35, at 226. Cannon's *Review* is, in many ways, a remarkable document. Coming out as it did between the time of the *Reynolds* decision and the Court's disposition of the petition for rehearing, Cannon prepared it in a relatively short period—no more than a few months—during which time he was busy with other duties. Nevertheless, it evidences a great deal of research and careful thought. Cannon's sources range from Blackstone (three separate American editions were consulted) to Justinian and St. Ambrose. In short, of the contemporary Mormon writings on the *Reynolds* decision, Cannon's *Review* is far and away the most legally and philosophically sophisticated. *See generally* GEORGE Q. CANNON, A REVIEW OF THE DECISION OF THE SUPREME COURT OF THE UNITED STATES, IN THE CASE OF GEORGE REYNOLDS VS. THE UNITED STATES (1879).

45. *See* GORDON, *supra* note 4, at 123 (discussing George Biddle's political and professional background and his retention in the *Reynolds* case); VAN ORDEN, *supra* note 37, at 85 (discussing Benjamin Sheeks's role in Reynolds's appeals).

46. *See generally* Brief of the Plaintiff in Error, Reynolds v. United States, 98 U.S. 145 (1978) (No. 108) [hereinafter Reynolds Brief] (focusing on the admissibility of transcripts of prior oral testimony in lieu of live testimony by absent witnesses and the proper number of grand jurors under federal statutes governing the territorial judiciary).

47. *The Utah Polygamy Case*, *supra* note 42 (describing oral argument in the case).

religious freedom, we need some baseline of acceptable regulation from which deviations—while perhaps normally tolerable—will not be permitted in the case of religious objections. The Court in *Reynolds* ultimately resolved the issue by finding a baseline in the definition of religion. "Congress cannot pass a law . . . which shall prohibit the free exercise of religion,"[48] it argued, but religiously inspired conduct (as opposed to religious belief) did not count as "religion" within the meaning of the First Amendment.[49] Such a regime provided a coherent and workable solution to the baseline problem of religious liberty by separating protected "religion" (belief) from unprotected "religion" (action).

Reynolds's lawyers resolved the baseline issue by, in effect, giving a natural-law gloss to the Free Exercise Clause's use of the word "law." The natural law tradition on which they drew did not deny that the legal enactments of human governments are always law in some sense.[50] What it affirmed was that some laws are qualitatively different than others because they conform to the eternal law of nature. Blackstone gave a crude and absolutist version of this position when he wrote, "no human laws are of any validity, if contrary to [natural law]; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original."[51] Biddle and Sheeks, however, did not take this extreme position. Rather, by invoking the distinction between actions that are *mala in se* and those that are merely *mala prohibita*, they played on the discontinuous character of law in the natural law perspective. Even if one did not believe that natural law exempted one from positive law by its own force, some laws were still more truly "law" than others.[52] Cannon and the lawyers who advised Reynolds did not maintain any illusions that—as the Supreme Court caricatured their argument—"the professed doctrines of

48. *Reynolds*, 98 U.S. at 162.

49. *Id.* at 164 ("'[T]he legislative powers of the government reach actions only, and not opinions. . . .'" (quoting Thomas Jefferson)).

50. Brian Bix, *Natural Law Theory*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 223, 226 (Dennis Patterson ed., 1996).

51. *Id.* It is important to note that Blackstone did not believe that natural law justified judicial review and invalidation of legislation.

> Contrary to the perceptions of modern critics . . . Blackstone did not believe that judges or legislators could use the principles of natural law to derive appropriate answers to all or even most legal questions. . . . As Blackstone observed, God was not concerned with whether English law forbade or permitted the export of wool.

Albert Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 24–25 (1996).

52. *See* Bix, *supra* note 50, at 226 (discussing Aquinas's claim that an unjust law is not truly a law at all).

religious belief [should be] superior to the law of the land, and every citizen [should be permitted] to become a law unto himself."[53] Rather, they offered a carefully worked-out limiting principle to their claim, implicitly appealing to natural law for a baseline that could arbitrate the claims of both church and state.[54]

According to Reynolds's brief, the Bill of Rights limited congressional authority over the territories.[55] Although it did not explicitly cite the First Amendment, it in effect argued that Congress could not forbid religious behavior that was not *malum in se*. Thus, the key question was whether polygamy was *malum in se*. The brief argued:

> Bigamy is not prohibited by the general moral code. There is no command against it in the decalogue. Its prohibition may, perhaps, be said to be found in the teachings of the New Testament. Granted, for the purpose of the argument. But a majority of the inhabitants might be persons not recognizing the binding force of this dispensation. In point of fact, we know that a majority of the people of this particular Territory deny that the Christian law makes any such prohibition. We are therefore led to the assertion that as to the people of this Territory the supposed offence is a creature of positive enactment.[56]

In oral argument, Biddle hammered away at this point, claiming that polygamy "is an artificial crime, created by legislative enactment, and involving, when practiced as a religious duty, no moral guilt."[57] In his *Review*, Cannon amplified on the argument. Polygamy, he claimed, as a crime was merely *malum prohibitum.*[58] Unlike crimes that are *mala in se*, which he argued "cannot be committed under the name of religion without exposing the perpetrator to the just punishment of the laws," a crime that

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53. *Id.* at 167.

54. It was a move with antecedents in earlier American legal thought. For example, a review in an 1830 American law journal asked rhetorically, "How else than by principles of the natural law, are we to discuss the questions of religious toleration [and] the obligation of mere positive laws, with the distinction between *mala prohibita and malum in se* . . .?" *Jus Naturae et Gentium, A Review*, 1830 N. AM. REV. 135, *reprinted in* THE GOLDEN AGE OF AMERICAN LAW 490 (Charles M. Haar ed., 1965).

55. Reynolds Brief, *supra* note 46, at 53–55. Interestingly, the only provision of the Bill of Rights that Reynolds did explicitly cite in this part of his argument was the Second Amendment. *See id.* at 53.

56. *Id.* at 54–55.

57. *The Utah Polygamy Case*, *supra* note 42 (quoting Biddle in oral argument).

58. *See* CANNON, *supra* note 44, at 33 (referring to polygamy as a crime created entirely by statute).

"depends entirely for its existence upon statute" is different when the underlying activity is motivated by religion.[59]

> When it is a religious belief and ordinance, and men and women believe their future salvation and happiness are intimately interwoven with and dependent upon its correct and virtuous observance, it is beyond the reach of the legislative arm . . . . The first amendment of the Constitution protects it.[60]

The concept of *malum in se* was linked—as the brief's reference to "the general moral code" suggests[61]—to natural law. Blackstone provides a useful elaboration on the distinction used by Reynolds's lawyers. He spoke of "crimes that are *malum in se* [sic] and prohibited by the law of nature, such as murder and the like."[62] He also distinguished acts that are *mala in se* (contrary to natural law) from those that were *mala prohibita*. He wrote that "things in themselves indifferent become either right or wrong, just or unjust, duties or misdemeanors according as the municipal legislator sees proper for promoting the welfare of the society and more effectually carrying on the purposes of civil life."[63] The distinction thus drew the line between rules rooted in the law of nature and those that resulted from decisions of mere convenience or expedience by lawmakers.

By invoking the Bible and the opinions of the people of the territory, Cannon and the brief were making two independent arguments about how one discovers natural law. First, natural law was thought to coincide with divine law. Quoting Grotius, Cannon argued that "[w]hen God permits a thing in certain cases, and to certain persons, or in regard to certain nations, it may be inferred, that the thing is not evil in its own nature."[64] Although Grotius argued that natural law would be valid "even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to him," he insisted that "the law of nature . . . can nevertheless

59. CANNON, *supra* note 44, at 33.

60. *Id.* at 33–34.

61. Reynolds Brief, *supra* note 46, at 54.

62. 4 WILLIAM BLACKSTONE, COMMENTARIES *29. Blackstone was speaking here of the rule of criminal law that a woman who committed a crime in the presence of her husband was presumed to have acted under coercion, except in the cases that were *mala in se. See id.* The rule was followed in the United States at the time of the *Reynolds* decision. *See, e.g.*, Hensly v. State, 52 Ala. 10 (1875); State v. Williams, 65 N.C. 398 (1871).

63. Alschuler, *supra* note 51, at 25 (internal citations omitted).

64. CANNON, *supra* note 44, at 37 (quoting HUGO GROTIUS, ON THE LAW OF WAR AND PEACE bk. I, ch. 2, § 17 (1625)).

rightly be attributed to God."[65] The link between divine and natural law also emerges in Blackstone, who argued that the fallen state of man's reason

> has given manifold occasion for the benign interposition of divine providence; which, in compassion to the frailty, the imperfection, and the blindness of human reason, hath been pleased, at sundry times and in divers manners, to discover and enforce its laws by an immediate and direct revelation. The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the holy scriptures. These precepts, when revealed, are found upon comparison to be really a part of the original law of nature, as they tend in all their consequences to man's felicity.[66]

The claim put forward by Grotius and Blackstone was not that the Bible could be applied as a source of law in and of itself. Rather, it was that the revealed word of God provided evidence as to the content of natural law, although there were other admitted sources of evidence for such law. Following this tradition, nineteenth-century American courts routinely referred to the Decalogue as a standard for discovering natural law.[67] These judges did not claim that the Ten Commandments were legally binding in themselves. Rather, they used the Ten Commandments as one of several baselines from which natural law might be deduced.[68] In pointing to the absence of a prohibition against polygamy in the scriptures, Reynolds's defenders were explicitly invoking this conventional legal argument. Because polygamy was not forbidden by revelation in the Bible, they argued with Grotius that "it cannot be inferred that the thing [polygamy] is evil in itself, according to the law of nature."[69]

The second line of reasoning implicitly invoked by Cannon and the brief is what was called the *consensus gentium*. According to this argument, things such as murder, which are universally forbidden by all

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65. *See* HUGO GROTIUS, PROLEGOMENA TO THE LAW OF WAR AND PEACE 10–11 (Francis W. Kelsey trans., 1957) (1625).

66. 1 BLACKSTONE, *supra* note 62, at *41–42.

67. *See, e.g.*, Stramler v. Coe, 15 Tex. 211, 215 (1855) ("'Honor thy father and mother' is a command not only of the decalogue, but of nature . . . ."); Caldwell v. Hennen, 5 Rob. 20, 26 (La. 1843) (same); State v. Foreman, 16 Tenn. 256, 284 (1835) (referring to "the law of God and nature contained in the decalogue").

68. *See, e.g.*, *Foreman*, 16 Tenn. at 284 (referring to "the law of God and nature contained in the decalogue").

69. CANNON, *supra* note 44, at 37 (quoting HUGO GROTIUS, ON THE LAW OF WAR AND PEACE bk. II, ch. 5, § 9 (1625)).

legal systems, violate natural law.[70] On the other hand, things that are not universally forbidden, such as polygamy, do not violate natural law.[71] The appeal to comparative law had deep roots in natural law theorizing. Grotius regularly cited "scores of examples and arguments taken from the writings of ancient philosophers, historians, poets, rhetoricians, and theologians, as well as from the Bible."[72] Such examples constituted proof of a principle of natural law. "[W]hen so many learned and wise men, who also happen to represent different nations . . . affirm the same principles as being true or certain," he in effect argued, "it must be due to the operation of a 'universal cause.'"[73]

The concept of *consensus gentium* also found its way into Blackstone, although he did not use the term. Rather, he constantly invoked historical and comparative analogies to defend and justify English law. For example, Blackstone described the way that English judicial power flowed from the king as the highest judge into a myriad of lower courts.[74] He then explicitly linked this process of delegation of authority with natural law, citing the laws of different nations as a justification. Such an arrangement, he said, is:

> An institution that seems highly agreeable to the dictates of natural reason, as well as of more enlightened policy; being equally familiar to that which prevailed in Mexico and Peru before they were discovered by the Spaniards; and that which was established in the Jewish republic of Moses.[75]

Agreement across cultures and times—including Biblical history—suggested "the dictates of natural reason." This mode of comparative argument is ubiquitous in the *Commentaries*. For example, on the subject of testamentary succession, he argued that "the universal law of almost every nation (which is a kind of secondary law of nature) has . . . given the dying person a power of continuing his property, by disposing of his possessions by will."[76] Note the link between "the universal law of almost every nation" and the "law of nature."

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70. *See* Richard H. Cox, *Hugo Grotius*, *in* A HISTORY OF POLITICAL PHILOSOPHY 386, 389 (Leo Strauss et al. eds., 3d ed. 1987) (discussing Grotius's use of the *consensus gentium*).

71. *See id.*

72. *Id.*

73. *Id.*

74. 2 BLACKSTONE, *supra* note 62, at *30–31.

75. *Id.* at *31.

76. *Id.* at *10. For additional examples of this kind of argument in Blackstone, see *id.* at *311 ("In all well-governed nations some notoriety of this kind [investiture] has been ever held requisite . . . ."); 3 *id.* at *350 (explaining that the jury trial "was ever esteemed, in all countries, a privilege of

To be sure, it is easy to overstate the respect accorded to non-Western legal systems by natural law writers. These authors generally appealed to the *consensus gentium* as a way of bolstering the claim that their own legal systems corresponded to natural law. Blackstone's appeals to non-Western legal systems, for example, always take the form of an apologetic for the common law, showing its conformity with universal reason.[77] He never uses the conflict between common law rules and non-Western legal practices as evidence that English law did not emanate from the law of nature. Indeed, the usual absence of any critical bite to the *consensus gentium* might lead to the conclusion that, in practice, it was more of a *consensus occidorum* with a few exotic examples thrown in as rhetorical window dressing. It would be a mistake, however, to dismiss the argument as entirely ephemeral. For example, Hugo Grotius, operating in the firmly monogamous context of early-seventeenth-century Holland, nevertheless concluded that the natural law permitted polygamy, in part on the basis of the laws of the ancient Hebrews.[78]

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the highest and most beneficial nature"); *id.* at *384 ("All over the world, actions transitory follow the person of the defendant, territorial suits must be discussed in the territorial tribunal."); 4 *id.* at *3 ("[T]he criminal law is in every country of Europe more rude and imperfect than the civil."); *id.* at *104 (explaining that those objecting to the Church of England were "encroaching on those rights which reason and the original contract of every free state in the universe have vested in the sovereign power"); *id.* at *181 (stating, "through our own, and all other laws" there is "the one uniform principle . . . that where a crime, in itself capital, is endeavored to be committed by force, it is lawful to repel that force by the death of the party attempting"); *id.* at *194 ("[W]illful *murder*; a crime at which human nature starts, and which is I believe punished almost universally throughout the world with death.").

77. Daniel Boorstin summed up the approach, writing that for Blackstone:

> From the uniformity of man's nature and the constancy of God's purposes arises the uniformity of the laws of nature which makes relevant all information about the past of English law and the analogous institutions of ancient Rome and the distant kingdom of Widdah. It would be impossible to conceive of a country or an epoch whose experience could not illuminate these eternal, universal laws.

DANIEL J. BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW: AN ESSAY ON BLACKSTONE'S COMMENTARIES 47 (1996).

78. *See* HUGO GROTIUS, ON THE LAW OF WAR AND PEACE bk. I, ch. 2, § 6.2, at *31 ("And those, who are of that Opinion, are strangely embarrassed to prove, that certain Things which are forbid by the Gospel, as *Concubinage*, *Divorce*, *Polygamy*, are likewise condemned by the Law of Nature. Indeed these are such that Reason itself informs us it is more Decent to refrain from them, but yet not such, as (*without* the Divine Law) would be criminal. The Christian Religion commands, that we should lay down our Lives one for another; but who will pretend to say, that we are obliged to this by the Law of Nature. *Justin Martyr* says, *To live only according to the Law of Nature, is to live like an Infidel.*"). Grotius's argument over polygamy, however, is also thoroughly embedded in debates over the relationship between divine law and natural law. He uses the example of polygamy mainly to drive a wedge between the notion that the commands of natural law are identical with the commands of the Christian Gospel. Hence, his argument has as much to do with Biblical interpretation as with the *consensus gentium*. *See generally id.* at *32–35.

Seen in this light, the Mormon reference to the Decalogue fits into a familiar pattern of comparative argument. The absence of a prohibition on polygamy in ancient Israel, in the New Testament, or among the Mormons themselves suggested that—unlike murder—there is no universal consensus against polygamy. In support of this claim, Cannon marshaled not only the support of the Bible and Mormon legal experience, but also early Church Fathers and non-Western legal systems.[79] For example, he acknowledged that traditional bigamy, in which a husband abandoned his wife and remarried a second woman without informing her of the previous marriage, "is a wrong of the most grave and damning character."[80] The universal condemnation of this crime, however, did not extend, he argued, to "the patriarchal marriage of the Latter-day Saints, or even the marriages of Mohammedans and other Asiatics," because in such cases there is no deception or abandonment.[81] If this sort of polygamy was *malum in se*, Reynolds's defenders in effect argued, there should be a universal consensus against it. The absence of such a consensus suggested that it was merely *malum prohibitum* and therefore protected by the First Amendment when done as a religious ordinance.[82]

The natural law authorities and the style of argument used by Biddle before the Court in 1878 was a common part of American legal discourse in the first half of the nineteenth century.[83] For most of the nineteenth century, apprenticeship and an informal program of "reading law" in an established attorney's office was the dominant model of legal education.[84] Of the books available to nineteenth-century American lawyers, Blackstone was by far the most widely read.[85] However, the classic natural law treatises of the seventeenth and eighteenth centuries—Grotius, Pufendorf, and Vattel—remained an important part of the standard law books that an aspiring lawyer might study.[86] In addition, writers such as

79. *See* CANNON, *supra* note 44, at 37–38.

80. *Id.* at 31.

81. *See id.* at 29.

82. *See id.* at 34.

83. *See* Hugh C. MacGill & R. Kent Newmyer, *Legal Education and Legal Thought, 1790–1920*, *in* THE CAMBRIDGE HISTORY OF LAW IN AMERICA: VOLUME II, THE LONG NINETEENTH CENTURY (1790–1920) 41 (Michael Grossberg & Christopher Tomlins eds., 2008) ("Among the synthetic works consulted by American students during the late eighteenth and early nineteenth centuries were . . . Rutherford's *Institutes of Natural Law* (1754–56).").

84. *See id.* at 36 (discussing legal education in the nineteenth century).

85. *Id.* at 40 ("[U]ntil the 1870s, Blackstone's *Commentaries* did more to shape American legal education and thought than any other single work.").

86. *Id.* at 41 (stating that the works of Grotius, Pufendorf, and Vattel were among the most widely used continental works "frequently consulted for specific doctrines and for general ideas about

James Kent and St. George Tucker produced treatises on American law with a natural law bent that became standard works for several generations.[87] For example, Kent opens his 1826 *Commentaries on American Law* with a discussion of the relationship between natural law and the law of nations, insisting that

> it would be improper to separate this law entirely from natural jurisprudence, and not to consider it as deriving much of its force, and dignity, and sanction, from the same principles of right reason, and the same view of the nature and constitution of man, from which the science of morality is deduced.[88]

He likewise identifies the foundations of the common law with "the application of the dictates of natural justice, and of cultivated reason, to particular cases."[89] Perhaps more importantly, throughout the nineteenth century, the American courts regularly referred to "natural law" or "natural justice" either as a source of law or else, more frequently, as a justification for a particular rule or interpretation.[90]

By the time Biddle invoked this style of argument in November 1878, however, newer narratives of race, progress, and imperialism were replacing the earlier ideal of natural reason based on a universal human nature.[91] It was to these narratives that the Court turned in rejecting the arguments put forward by the Mormons' lawyers.

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law"); *see also* ROSCOE POUND, THE FORMATIVE ERA OF AMERICAN LAW 23–26 (1938) (discussing the use of Grotius, Pufendorf, and Vattel as early American legal textbooks).

87. *See generally* BLACKSTONE, *supra* note 62; JAMES KENT, COMMENTARIES ON AMERICAN LAW (1826); ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA (1803).

88. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 2 (1826).

89. *Id.* at 439.

90. *See, e.g.*, Windsor v. McVeigh, 93 U.S. 274, 277 (1876) (describing the right to defense of person and property as "a principle of natural justice"); *Ex parte* Robinson, 86 U.S. 505, 512 (1873) (describing an attorney's right to receive notice of the grounds for disbarment and an ample opportunity for defense as "a rule of natural justice"); Ogden v. Saunders, 25 U.S. 213, 221 (1827) (describing retroactive laws as "contrary to the first principles of natural justice"); Vowles v. Craig, 12 U.S. (8 Cranch) 371, 376 (1814) (appealing to the writers of "natural law" as a source of law).

91. *See* CHRISTOPHER LASCH, THE WORLD OF NATIONS: REFLECTIONS ON AMERICAN HISTORY, POLITICS, AND CULTURE 73 (1973) (discussing the shift in intellectual emphasis from human nature and natural law to race and civilization).

II. IMPERIALISM AND THE REJECTION OF NATURAL LAW IN *REYNOLDS*

The Court's opinion was silent with respect to Reynolds's natural law arguments. It implicitly responded to them, however, by noting that "[p]olygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people."[92] In contrast to the argument from a *consensus gentium*, however, with its essentially positive attitude toward non-Western legal systems, in the Court's reasoning this comparative link became a damning indictment of the Mormon legal claim. The reasons for this shift lie at least in part in the different jurisprudential universe in which the Court's opinion moves, a universe animated by Victorian ideas of civilization, barbarism, and progress, rather than seventeenth- and eighteenth-century ideas of natural reason.

If the discussion of religious freedom in the brief for Reynolds was truncated, the discussion of the same issue in the brief for the United States was virtually nonexistent. The Attorney General's only reference to the issue of whether "the circumstance that polygamy was a *matter of religion* with the church to which the defendant belonged, was a defense"[93] was a curt dismissal. "None of these last mentioned exceptions," he wrote, "call for any remark."[94] Nevertheless, in oral argument, the government did deal with the issue of religious freedom by presenting a parade of horribles that would ensue if the Mormon position was adopted. The Attorney General argued that "under this rigid interpretation of the Constitution, a sect of East Indian Thugs who should settle in the Territories might commit murder with impunity, on the ground that it was sanctioned and enjoined by their system of religious belief."[95] He amplified on the Indian parallel, citing "the burning of widows in India as [a crime] committed in the name of religion, to which he compared plural marriage."[96] By invoking examples from India, the government implicitly responded to the natural law arguments of the

92. Reynolds v. United States, 98 U.S. 145, 164 (1878).

93. Brief for the United States at 8, Reynolds v. United States, 98 U.S. 145 (1878) (No. 180).

94. *Id.*

95. *Is Polygamy a Crime?*, N.Y. TIMES, Nov. 15, 1878, at 4.

96. *See* CANNON, *supra* note 44, at 34. In his *Review*, Cannon gives vent to his exasperation with this exceedingly common comparison, writing: "Respect for his position as Attorney-General of the United States, prevents me from characterizing this argument as it deserves." *Id.* at 34–35. He also notes the surprise "that lawyers and men of sense would use it." *Id.* at 35.

Mormons by inviting the Court to equate federal suppression of polygamy with the British Raj's suppression of similar barbarisms in India.

The Court accepted this invitation, writing that "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[97] It went on to ask rhetorically, "if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?"[98] The Court's reference was more than simply an unflattering comparison of Mormon polygamy to the Hindu practice of "suttee." It was a jurisprudential reference with a long history in the anti-polygamy battles. At the heart of this reference was a two-step move. First, the Mormons were conceptualized as a foreign race akin to the inhabitants of the Indian subcontinent, and second, the federal rule in territorial Utah was likened to the British Raj in India, bringing civilization through law to the benighted masses over whom it ruled.

After the Mormon exodus to the Great Basin, Americans came to see Mormons—the majority of whom were either displaced Yankees or converts from Northern Europe—as a foreign race. For example, in 1858, Roberts Bartholow, an assistant surgeon attached to the U.S. Army, wrote a report for the War Department on conditions in Utah. After discussing the exotic flora and fauna of the remote territory, he wrote, "The Mormon, of all human animals now walking this globe, is the most curious in every relation."[99] According to Bartholow, the practice of polygamy had given rise to a physiologically distinct race.

> Isolated in the narrow valleys of Utah, and practising the rites of a religion grossly material, of which polygamy is the main element and cohesive force, the Mormon people have arrived at a physical and mental condition, in a few years of growth, such as densely-populated communities in the older parts of the world, hereditary victims of all the vices of civilization, have been ages in reaching. This condition is shown by the preponderance of female births, by the mortality in infantine life, by the large proportion of the albuminous and gelatinous types of constitution, and by the striking

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97. *Reynolds*, 98 U.S. at 166.

98. *Id.*

99. U.S. WAR DEP'T, STATISTICAL REPORT ON THE SICKNESS AND MORTALITY IN THE ARMY OF THE UNITED STATES, S. EXEC. DOC. No. 36-52, at 301 (1860) (containing information compiled from a period of five years, from January 1855 to January 1860).

> uniformity in facial expression and in physical conformation of the younger portion of the community.[100]

The rise of this new race resulted, according to Bartholow, from two causes. First, he claimed that the insatiable lust of Mormon patriarchs interfered with the ordinary sexual development of girls, resulting in racial degradation.[101] "To sustain the system," he wrote, "girls are 'sealed' at the earliest manifestations of puberty, and I am credibly informed, that means are not unfrequently made use of to hasten the period."[102] This interference with the proper course of nature resulted in an anemic offspring. In particular, he noted that "[o]ne of the most deplorable effects of polygamy is shown in the genital weakness of the boys and young men, the progeny of the 'peculiar institution.'"[103] This "sexual debility" was compounded by the fact that, among the Mormons, "[t]he sexual desires are stimulated to an unnatural degree at a very early age, and as female virtue is easy, opportunities are not wanting for their gratification."[104]

The accuracy of Bartholow's claims regarding Mormon sexual habits, organs, and general anatomy is doubtful. He was an army surgeon in a camp located some distance from any of the major Mormon settlements.[105] His report, however, is a striking example of how the nineteenth-century American imagination racialized Mormons using Asian stereotypes. The image of the indolent Oriental, descended from an anemic racial stock and made effete by sexual excess was a standard trope in contemporary treatments of Asians ranging from Turks to Chinese.[106] Likewise, according to Bartholow:

> [The Mormon expression is] compounded of sensuality, cunning, suspicion, and a smirking self-conceit. The yellow, sunken, cadaverous visage; the greenish-colored eyes; the thick, protuberant lips; the low forehead; the light, yellowish hair; and the lank, angular person, constitute an appearance so characteristic of the

100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* at 302.
105. *See* Eugene E. Campbell, *Governmental Beginnings*, *in* UTAH'S HISTORY 153, 170 (Richard D. Poll, Thomas G. Alexander, Eugene E. Campbell & David E. Miller eds., 1978) ("The army moved quietly through abandoned and silent Great Salt Lake City on June 26 and soon established itself forty miles to the southwest in Cedar Valley; the post was named *Camp Floyd*.").
106. *See, e.g.*, JOHN MCLEOD, BEGINNING POSTCOLONIALISM 46 (2000) ("Compositely, Oriental stereotypes fixed typical weaknesses as (amongst others) cowardliness, laziness, untrustworthiness, fickleness, laxity, violence, and lust.").

> new race, the production of polygamy, as to distinguish them at a glance.[107]

Tellingly, however, it was precisely its proximity to Christian civilization that made the degradation of the new Mormon race especially acute:

> In eastern life, where [polygamy] has been a recognized domestic institution for ages, women are prepared for its continuance, and do not feel degraded by their association with it. The women of this Territory, how fanatical and ignorant soever, recognize their wide departure from the normal standard in all Christian countries; and from the degradation of the mother follows that of the child, and physical degeneracy is not a remote consequence of moral depravity.[108]

While to modern racial sensibilities, it may seem odd that a group as Yankee and European as nineteenth-century Mormons should be considered a race distinct from white Americans, at the time it was common for ethnic groups we now think of as prototypically white to be classified as nonwhite. Noel Ignatiev, for example, has shown how the Irish were classified by nineteenth-century Anglo-Americans as nonwhite.[109] Rather, they were members of the separate Celtic race, with its own characteristic propensities toward drunkenness, crime, indolence, and stupidity.[110] The logic of Mormon racial identity, however, was slightly different. According to the standard racial logic, behavior resulted from racial identity.[111] Orientals were indolent and sensual because indolence and sensuality were the natural condition of the Oriental race.[112] For Mormons, however, the logic moved in the opposite direction. A new race arose precisely because of the unnatural behaviors of the Latter-day Saints. For example, Bartholow's description of the new race in Utah

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107. U.S. WAR DEP'T, *supra* note 99, at 302.

108. *Id.*

109. *See generally* NOEL IGNATIEV, HOW THE IRISH BECAME WHITE (1995).

110. *See, e.g.*, THOMAS F. GOSSETT, RACE: THE HISTORY OF AN IDEA IN AMERICAN HISTORY 96 (Oxford Univ. Press rev. ed. 1997) (1963) ("The elements of Celtic character are 'furious fanaticism: a love of war and disorder; a hatred of order and patient industry; no accumulative habits; restless, treacherous, uncertain: look at Ireland." (quoting a nineteenth-century racial theorist)).

111. *See id.* at 144 ("Races were thought to represent different stages of the evolutionary scale with the white race—or sometimes a subdivision of the white race—at the top. Accordingly, any given society represented the power and influce of its various racial stocks and the amount and quality of the intermixture among them. Heredity was considered immensely more important than enviroment in condition the development of society, and to many of the social theorists heredity meant mainly race.").

112. *See, e.g.*, MCLEOD, *supra* note 106, at 46.

became the subject of debate before the New Orleans Academy of Science in 1860.[113] According to one member of the Academy, "the whole of Mohammedan polygamy" differs from Mormonism because "[i]t is not a violation of natural law, where the natural instincts of the normal condition of the race do not forbid it."[114] In contrast, for a white man, polygamy is "contrary to his nature and his instincts."[115] The unnatural polygamy of the Mormons thus led to degradation similar to miscegenation, another supposedly unnatural practice. "[T]he Mormon type, is . . . the violation of natural law, which all men read in the instinctive aversion of *different* races, [and] degrades the offspring and commences the process of a certain extinction."[116] Thus, the Mormon racial identity, rather than arising from "natural or second causes,"[117] was defined by what Martha Ertman has aptly described as "race treason."[118] Whatever the complexities of racial theorizing, however, in the popular imagination, Mormons were associated with Asians and Africans.[119]

While Bartholow thought of himself as a "medical philosopher,"[120] the creation of a Mormon race had legal implications.[121] Their status as a degenerate people justified imperial control, hence the common equation of federal rule in Utah with the British Empire in India. For example, the Court in *Reynolds* used virtually the same arguments that Grant's vice president, Schulyer Colfax, had advanced nine years earlier in a widely reported speech and newspaper article in the *New York Independent*.[122] In

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113. *See* C.G. Forshey, *Hereditary Descent; or Depravity of the Offspring of Polygamy Among the Mormons*, 30 DE BOW'S REV. 206, 210 (1861).

114. *Id.* at 211.

115. *Id.* at 210.

116. *Id.* at 211.

117. *Id.* at 213.

118. *See generally* Martha M. Ertman, *Race Treason: The Untold Story of America's Ban on Polygamy*, 19 COLUM. J. GENDER & L. 287 (2010).

119. Ertman powerfully illustrates this popular perception through an analysis of Mormons in nineteenth-century political cartoons. Her research reveals that Mormon polygamists were routinely associated visually with blacks and Asians. The implication was that Mormons constituted a foreign agent of miscegenation within the American polity. *See id.* at 304–06 (discussing the presentation of Mormon polygamists in nineteenth-century cartoons); *see also* Nathan B. Oman, *Preaching to the Court House and Judging in the Temple*, 2009 BYU L. REV. 157, 213–14 (discussing the analogy made between Mormon ecclesiastical courts and private dispute resolution among Chinese immigrants).

120. Roberts Bartholow, *Hereditary Descent; or Depravity of the Offspring of Polygamy Among the Mormons*, 30 DEBOW'S REV. 206, 208 (1861).

121. *Cf.* IAN F. HANEY-LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996) (showing how race was used as a justification for legal coercion and how legal coercion was used to define and police the boundaries of race in nineteenth-century America).

122. *See generally* Schulyer Colfax, *The Mormon Question*, N.Y. INDEP., *reprinted in* SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN

those materials, Colfax made the comparison between the federal government and the British Raj explicit. "The Brahmins claimed," he wrote, "as the Mormons do now in regard to their institution, that it [i.e. "suttee"] was taught in their sacred books, and conferred the highest merit on both husband and wife."[123] He went on to laud the English imperial authorities for disregarding Indian objections to their efforts to suppress "suttee."

> This, history tells us, created much excitement in Bengal, and, indeed, all over India, the Brahmins denouncing it with great violence (as the Mormons denounce our anti-polygamy law of 1862) as an "interference with their religion." . . . But England disregarded their "religious" arguments, and stood as one man, with the whole power of the kingdom . . . and wherever English power is recognized, there, this so-called religious rite is now sternly forbidden and prevented. England, with united voice, said "Stop!" and India obeyed.[124]

In the wake of Colfax's attacks on Mormon polygamy, the church-owned *Deseret News* immediately picked up on the allusion, writing that "Mr. Colfax and his ilk . . . insist that the United States government should extirpate the marriage sacrament of the 'Mormons,' as the British government abolished the religious widow-burning of the Hindoos."[125] Indeed, although it does not appear in the Court's discussion of the issue, during Reynolds's second trial, the judge in charging the jury also compared the suppression of polygamy to the suppression of "suttee."[126] Not surprisingly, in the wake of *Reynolds*, Cannon wrote, "For thirty years the people of Utah have been forced to think upon and argue this subject [i.e. "suttee"] in all its bearings."[127] Thus, the Court's opinion drew on a well-worn rhetorical image that explicitly linked the suppression of polygamy to British legal policy in India.

NINETEENTH CENTURY AMERICA 11, 15 (1870); *see also* WILLARD H. SMITH, SCHUYLER COLFAX: THE CHANGING FORTUNES OF A POLITICAL IDOL 219–31 (1952) (discussing Colfax's newspaper debate with Taylor).

123. Colfax, *supra* note 122, at 15.

124. *Id.*

125. A.M.M., *Suttee and Polygamy*, DESERET NEWS (undated reprint, L. Tom Perry Special Collections, Brigham Young University) (on file with author).

126. *See* VAN ORDEN, *supra* note 37, at 78 (discussing the Mormon newspaper response to the judge's comments).

127. CANNON, *supra* note 44, at 35.

"Suttee" is the nineteenth-century Anglicization of the Sanskrit word *sati*, which refers to the ritual suicide of a Hindu widow.[128] Victorian British were horrified by the practice.[129] Lurid pamphlets sold in England described "suttee" and called for its abolition.[130] However, decisive legal action was slow in coming. During the eighteenth century, British legal influence in India was weak, extending only to disputes involving Englishmen in a few narrowly circumscribed port towns.[131] As conquest and intrigue carried British authority into the interior of the subcontinent, they expanded their legal jurisdiction.[132] Initially, however, the English adopted an essentially positive attitude toward indigenous law and made little attempt to use imperial law to impose their cultural norms on Indians.[133] Rather, as much as possible, they left existing legal structures intact.[134]

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128. *Sati* became a part of Hinduism in the fourth century and continued until the British occupation of India in the eighteenth and nineteenth centuries. *See* Marilyn J. Harran, *Suicide*, *in* 14 THE ENCYCLOPEDIA OF RELIGION 125, 128–29 (Mircea Eliade ed., 1984) [hereinafter ENCYCLOPEDIA]. Although widow burning took the form of *sati* only in medieval Hinduism, evidence suggests that the practice may have much, much more ancient roots in the pre-Hindu cult of the earliest Indo-European fire gods. *See* Ellison Banks Findly, *Agni*, *in* 1 ENCYCLOPEDIA, *supra*, at 133, 134. Ancient and medieval Hinduism had several forms of religious suicide. Harran, *supra*, at 128. Most of these were associated with the ideal of renouncing completely the desires of the world in order to commune with the absolute or *brahman*. *See id.*; Jan Gonda, *Indian Religions*, *in* 7 ENCYCLOPEDIA, *supra*, at 168, 170. For such seekers, known as *samsāra*, suicide was an act of extreme piety that crowned a long process of intense religious preparation and purification. *See* Harran, *supra*, at 128. As such, it was forbidden to those of lesser spiritual attainment. *See id.* At least in theory, *sati* was entirely voluntary. It took two forms. In the first, called *sahamarana*, the widow ascended her husband's funeral pyre and burned to death with his body. *Id.* at 129. In the second, called *anumarana*, a widow who was not present at her husband's cremation would lie down and die either with his ashes or with one of his possessions. *Id.* at 129. Her death "both achieved an honored status for herself and atoned for the sins and misdeeds of herself and her husband." *Id.* at 125. Widows who immolated themselves were held in extremely high regard. *See* JANAKI NAIR, WOMEN AND LAW IN COLONIAL INDIA 55 (2000). Whether a curse or a blessing, such a woman on the way to her pyre had special power. Harran, *supra*, at 129. Nevertheless, the practice remained quite rare during the time of the British occupation. "By its very definition, *sati* could neither be common nor widespread since its very moral force was derived from it being heroic or exceptional." NAIR, *supra*, at 55. In 1824, just a few years before the British banned the practice, only 0.2% of all widows committed *sati*. *Id.*

129. *See* NIALL FERGUSON, EMPIRE: THE RISE AND DEMISE OF THE BRITISH WORLD ORDER AND THE LESSONS FOR GLOBAL POWER 117–20 (2002) (briefly recounting the Victorian movement against *sati*).

130. *See, e.g.*, JAMES PEGGS, INDIA'S CRIES TO BRITISH HUMANITY (1832) (a pamphlet containing thoughts "relative to the Suttee, infanticide, British connection with idolatry, ghaut murders, and slavery in India: to which is added humane hints for the melioration of the state of society in British India").

131. *See* 2 M. RAMA JOIS, LEGAL AND CONSTITUTIONAL HISTORY OF INDIA 103–18 (1984) (recounting early British administration in Madras, Bombay, and Calcutta).

132. *See id*. at 245.

133. *See id.* at 31 ("[T]he whole of Hindu Law and Mohamedan Law concerning family and religious usages was fully respected by the Courts."); *see also* NIALL FERGUSON, EMPIRE: THE RISE

Strikingly, the vestiges of this more relaxed, eighteenth-century attitude toward imperial government in India also made a brief appearance in the anti-polygamy battles. In 1872, Representative James Blair, a Liberal Republican from Missouri, made a quixotic attempt to repeal the Morrill Act, thus legalizing polygamy in the territories.[135] In India, he noted, the British Raj had taken a tolerant attitude toward polygamy, with English missionaries in India going so far as to argue that polygamy did not contravene divine law.[136] "Shall England be more regardful of the obligations imposed upon her by the law of nations and public policy than the United States," he asked rhetorically, "or shall England be more generous and indulgent to her polygamous citizens in India than the United States to her polygamous citizens in Utah?"[137]

Blair bolstered his argument by appealing to American cases that had looked to the treatment of marriage by non-Western legal systems as evidence of a natural law unopposed to polygamy.[138] In the years before the Civil War, a number of state courts had grappled with the legal status of Native American marriages, which courts regarded as potentially polygamous.[139] While Indian tribes were in theory sovereign nations, the judges concluded that Native American marriages were entered into in "a state of nature," and the civil law would recognize them only so long as they did not violate natural law.[140] Faced with a claim that the ease of

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AND DEMISE OF THE BRITISH WORLD ORDER AND THE LESSONS FOR GLOBAL POWER 118 (2002) (describing the relatively laissez-faire attitude that the British initially took toward *sati*).

134. *See* JOIS, *supra note* 131, at 31 ("[T]he whole of Hindu Law and Mohamedan Law concerning family and religious usages was fully respected by the Courts.").

135. CONG. GLOBE, 42D CONG., 2D SESS. 1096–1100 (1872); *see* Kelly Elizabeth Phipps, *Marriage and Redemption: Mormon Polygamy in the Congressional Imagination, 1862–1887*, 95 VA. L. REV. 435, 483 (2009) (discussing Blair's political background).

136. *See* CONG. GLOBE, 42D CONG., 2D SESS. 1097 (1872) (Rep. Blair) (discussing British imperial policy in India toward polygamy).

137. *Id.* British missionaries in India were eager to baptize Indians into Christianity. *See* FERGUSON, *supra* note 129, at 112–15 (recounting the genesis of missionary work by British Protestants in India). They seemed to realize, however, that given the widespread practice of polygamy on the subcontinent, requiring monogamy of all Indian Christians would reduce their pool of potential converts. Accordingly, they concluded on the basis of the Bible that polygamy was not inconsistent with Christianity. *See* CONG. GLOBE, 42D CONG., 2D SESS. 1097 (1872) (discussing a meeting of Protestant ministers in Calcutta that concluded that polygamy did not violate the Bible or Christianity).

138. *See id.* at 1098 (citing state court cases dealing with Native American weddings).

139. *See* Johnson v. Johnson's Adm'r, 30 Mo. 72, 86 (1860) ("[An Indian marriage] is also disannulled and the wife dismissed from the wigwam whenever the husband pleases, or the marital state is continued under the evils of discord or a state of polygamy." (emphasis omitted) (quoting WILLIAM ROBERTSON, THE HISTORY OF AMERICA bk. 4 (1777))); Wall v. Williams, 11 Ala. 826, 828 (1847) ("The [Choctaw] tribe had no written laws. They married and unmarried at pleasure—a man frequently having several wives.").

140. *See Wall*, 11 Ala. at 839 ("Marriages among the Indian tribes must be regarded as taking place in a state of nature . . . ."); Morgan v. M'Ghee, 24 Tenn. (5 Hum.) 13, note (1844) ("The contract

divorce among Native Americans meant that their unions could not be recognized as binding as a matter of natural law, the Missouri Supreme Court asked rhetorically, "To what quarter shall we look for proofs of the law of nature, if we exclude the manners and customs of the American aborigines?"[141] To be sure, these cases take a disparaging tone toward Native American customs, but in their willingness to see in them an instantiation of natural law, they hark back to the older tradition on which Reynolds's lawyers relied. Such arguments, however, proved to have little traction in the Mormon context, and Blair's bill attracted so little attention that no one even bothered to speak in opposition to it.[142] It died without ever coming to a vote.[143]

The more tolerant legal sensibility invoked by Blair was already anachronistic when he referenced it in 1872. From the early nineteenth century on, the English approach to the polyglot legal environment of India bears the stamp of progressive, reform-minded thinkers in England who saw law as an instrument through which they could "civilize" Indian society.[144] In 1833, Thomas Babington Macaulay was appointed as the Law Member of the Governor-General's Council and given the task of preparing a criminal code for India.[145] The military chaos of the Great Mutiny delayed its final passage, but in 1860, the code was adopted.[146] It played a key part in the campaign to eliminate "suttee" and other forms of Indian "barbarism."[147]

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of marriage is a stable and sacred contract of natural, as well as municipal, law.").

141. *Johnson*, 30 Mo. at 88.

142. *See* CONG. GLOBE, 42D CONG., 2D SESS. 1097 (1872) (reproducing Blair's speech in support of his bill with no response from other members of Congress).

143. *See* Phipps, *supra* note 135, at 484–87 (discussing the failure of Blair's bill).

144. V.D. KULSHRESHTHA, LANDMARKS IN INDIAN LEGAL AND CONSTITUTIONAL HISTORY 226 (B.M. Gandhi ed., 1995); *see also, e.g.*, A.C. BANERJEE, ENGLISH LAW IN INDIA 169–70 (1984) (discussing Macaulay's complex relationship with Bentham and other English reformers).

145. *See* KULSHRESHTHA, *supra* note 144, at 226 (discussing the consolidation of British rule in India and the appointment of Macaulay). Prior to Macaulay's work, the criminal law administered in India was mainly of Muslim origin. *Id.* at 215–16. There were some areas of India that were not governed by Muslim law. *See id.* at 217–19. Prior to Macaulay's code the British had made piecemeal reforms of various aspects of the existing Muslim criminal law, generally by choosing to enforce rules espoused by minority Muslim jurisprudential schools rather than through outright legislation. *See id.* at 221–24.

146. *See* PEN. CODE, No. 45 of 1860 (India).

147. According to one Indian commentator:

> [I]t . . . abated, if not extirpated, the crimes peculiar to India, such as *thuggee*, professional sodomy, dedicating girls to a life of temple-harlotry, human sacrifices, exposing infants, *burning widows*, burying lepers alive, gang robbery, torturing peasants and witnesses and sitting *dharna*.

KULSHRESHTHA, *supra* note 144, at 227 (emphasis added).

In comparing "suttee" to polygamy and the Mormons to Indians, the Court cast the federal government as an agent of civilization against barbarism, akin to the civilizing British imperialism under Macaulay in India. Within this imperialist jurisprudence, Reynolds's natural law arguments became incoherent and invisible, "exceptions [not calling] for any remark."[148] The arguments from the *consensus gentium*, on which his lawyers rested their claim that polygamy was not *malum in se*, looked to non-Western societies and legal systems as evidence of natural laws or their absence. In this sense, they took an optimistic and universalist view of human reason in which all societies, regardless of their cultural differences, would converge on eternal moral laws.[149] In contrast to these earlier arguments, the Court laid emphasis on the concept of "civilization," understood in terms of the particular cultural apogee reached by the "the northern and western nations of Europe," in contrast to "African and Asiatic" practices.[150]

This racially charged rhetoric was typical of an age where "Progress" had replaced "Reason" as an ideological talisman and where imperialism was in full swing. It is not that the Court rejected the universalist aspirations of the earlier natural law tradition. Rather, those aspirations were transferred from a static vision of natural law to a more dynamic and aggressive vision of progressive civilization pitted against the forces of barbarism. In this narrative of violent evolution from barbarism to civilization, Mormons were cast—along with "Asiatic and African"[151] peoples—as a benighted race in need of civilizing imperial masters.

III. THE AFTERLIFE OF THE IMPERIAL RHETORIC IN *REYNOLDS*

Understanding the shift to imperial rhetoric in response to the natural law arguments in *Reynolds* sheds light on two major legal debates in the last quarter of the nineteenth century. Historians have long recognized that *Reynolds* ushered in successive rounds of increasingly harsh anti-polygamy legislation in the 1880s, which ultimately culminated in the

148. *Cf.* Brief for the United States at 8, Reynolds v. United States, 98 U.S. 145 (1878) (No. 108).

149. *Cf.* CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 38–39 (1973) ("The notion of a *consensus gentium* (a consensus of all mankind)—the notion that there are some things that all men will be found to agree upon as right, real, just, or attractive and that these things are, therefore, in fact right, real, just, or attractive—was present in the Enlightenment and probably has been present in some form or another in all ages and climes.").

150. *Cf. Reynolds*, 98 U.S. at 164.

151. *See Reynolds*, 98 U.S. at 150.

Mormon Church's public abandonment of polygamy in 1890.[152] This story has been told most powerfully by Sarah Barringer Gordon, who interprets it as a final extension of the politics of anti-slavery and Reconstruction into the American West.[153] The imperialist rhetoric in *Reynolds*, however, represented a strand of anti-polygamy rhetoric largely divorced from the humanitarian politics of anti-slavery. It was this rhetoric that allowed anti-polygamy activists in the 1880s to negotiate the ultimate exhaustion of anti-slavery politics and the decline of Radical Reconstruction. The prominence of imperial analogies in the anti-polygamy debates of the 1880s suggests that the federal suppression of polygamy can be seen not only as an extension of Reconstruction, but also as a harbinger of American imperial adventures in the final decade of the century. When America conquered Cuba, Puerto Rico, and the Philippines from Spain in 1898, legal intellectuals grappled with the constitutional questions presented by the new territories by using analogies to British imperialism.[154] In this debate, *Reynolds* and its progeny emerged as important precedents illustrating the extent of the Republic's imperial power.

A. *Imperialism and the Anti-Polygamy Crusade of the 1880s*

The Court's turn to imperialist imagery reflected shifting attitudes toward race within the Republican Party from which Chief Justice Waite and the other members of the Court were drawn.[155] The Republican Party originally formed in the 1850s around the issue of excluding slavery from the territories.[156] After the election of 1860 and the Civil War, Radicals within the party gained the upper hand and passed sweeping amendments

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152. *See, e.g.*, GORDON, *supra* note 4, at 119–46 (discussing *Reynolds* and its aftermath); EDWARD LEO LYMAN, POLITICAL DELIVERANCE: THE MORMON QUEST FOR STATEHOOD 120–26 (1986) (same).

153. *See generally* GORDON, *supra* note 4.

154. *See generally* Christina Duffy Burnett & Burke Marshall, *Between the Foreign and the Domestic: The Doctrine of Territorial Incorporation, Invented and Reinvented*, *in* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSIONISM, AND THE CONSTITUTION 1 (Christina Duffy Burnett & Burke Marshall eds., 2001).

155. At the time of *Reynolds*, seven of the nine Justices (Swayn, Miller, Strong, Bradley, Hunt, Waite, and Harlan) were Republicans, and of the two Democrats, one (Stephen Field) was a westerner appointed by Lincoln. *See* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 81–82, 361–63, 417, 547–48, 845–46, 850–51, 906–07 (Kermit L. Hall et al. eds., 2d ed. 2005) (providing short biographies of the Justices). *See generally* PETER CHARLES HOFFER, WILLIAM JAMES HULL HOFFER & N.E.H. HULL, THE SUPREME COURT: AN ESSENTIAL HISTORY 131–58 (2007) (discussing the political make up of the Waite Court and its place in the politics of the 1870s).

156. *See generally* ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR (1970).

to the Constitution, designed to eliminate slavery and ensure the equal rights of newly freed African Americans.[157] After the war, the Radicals sought to ensure the reality of these goals by using federal power to suppress the political power of ex-Confederates and other whites hostile to racial equality in the South. [158] The central thrust of this movement was humanitarian. The Radical Republicans saw African Americans as victims of oppression to be saved by the federal government.[159] In tandem with the politics of anti-slavery, anti-polygamy was initially another humanitarian mission aimed at the rescue of Mormon plural wives from the domineering force of their husbands, who were seen as akin to white slave owners.[160]

The initial efforts to suppress polygamy, however, were anemic and ineffective. In 1870, the Radicals sought to put real teeth into federal anti-polygamy policy in the Cullom Bill, which would have applied the tactics of Reconstruction to Utah.[161] Participants in the debates over the bill explicitly located the issues within domestic narratives of rebellion and Reconstruction. For example, one opponent of the bill worried that "[The Mormons] would regard the passage of this bill as a declaration of war . . . . Of course we could finally conquer them, because we could exterminate them. But it would cost us millions upon millions of treasure; it would cost us thousands upon thousands of lives."[162] He went on:

> The truth is that our system of government is unfit to deal with a problem such as the Mormon question presents. . . . If the people of any county tacitly agree that a particular crime shall not be considered a crime if committed within that county, what is to be done about it? . . . Cases of this character can be reached only by . . .

157. *See* U.S. CONST. amend. XIII; U.S. CONST. amend. XIV; U.S. CONST. amend. XV. *See generally* MICHAEL VORENBERG, FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT (2001).

158. *See generally* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877 (1989); Nathan B. Oman, *Specific Performance and the Thirteenth Amendment*, 93 MINN. L. REV. 2020, 2060–64 (2009) (discussing some of the implementing legislation adopted by Congress to enforce the Reconstruction amendments).

159. *See* FONER, *supra* note 158, at 68 ("[T]he creation of the Freedmen's Bureau in March 1865 symbolized the widespread belief among Republicans that the federal government must shoulder broad responsibility for the emancipated slaves, including offering them some kind of access to land.").

160. *See* GORDON, *supra* note 4, at 55–58 (cataloging political efforts to draw parallels between slavery and polygamy, which Republicans deemed the "twin relics of barbarism").

161. *See* H.R. REP. NO. 41-21 (1870); CONG. GLOBE, 41ST CONG., 2D SESS. 1367 (1870); *see also* Phipps, *supra* note 135, at 452–54 (discussing the legislative history and politics of the Cullom Bill).

162. CONG. GLOBE, 41ST CONG., 2D SESS. 1517 (1870) (Rep. Fitch).

> the interposition of military rule. The remedy is expensive, and its frequent use most dangerous to republican government.[163]

All of these arguments, of course, were being used at this time to justify the abandonment of Radical Republicanism. With his concern for the local power, the need to respect "republican" practices, and the specter of military law in place of civil law, Representative Fitch might have been condemning Union practices in the defeated Confederacy rather than proposed federal policy in far-off Utah.[164]

Proponents of the bill insisted that Utah deserved such tactics precisely because of the Mormon similarity to the defeated South. Utah, one congressman insisted, was like the territory "south of Mason and Dixon's line" before "slavery was abolished."[165] He went on to insist that reluctance to use harsh measures against Mormon polygamists was part of a more general softening of attitudes toward the defeated South:

> I am sorry to see in this country the signs of a sickly sentimentality which proposes to punish nobody, which proposes to hang nobody, which proposes to let all the unchained passions of the human heart become free to prey upon mankind. We have seen too much of that in this day and generation. Had you hung one hundred traitors you would not have had rebellion in North Carolina and Tennessee to-day.[166]

By 1870, however, Radical Reconstruction was a waning political force, and the bill failed.[167] Two years later, the Republican Party would split over the politics of Reconstruction, with the so-called Liberal Republicans nominating Horace Greely to run against Grant.[168] While Grant was able to fend off Greely's challenge, "[t]he 1872 campaign spelled the final collapse of Republican radicalism."[169]

Nevertheless, anti-polygamy legislation thrived in the period following the decline of Radical Republicanism at least in part by abandoning domestic political narratives tied to the debates over slavery in favor of

163. *Id.* at 1518.

164. *Cf.* FONER, *supra* note 158, at 242–43 (discussing arguments employed by Democrats and moderate Republicans against the reconstruction tactics of the Radical Republicans in the defeated Confederacy).

165. CONG. GLOBE, 41ST CONG., 2D SESS. 2143 (1870) (Rep. Ward).

166. *Id.* at 2144.

167. *See* Phipps, *supra* note 135, at 461–64 (discussing the failure of the Cullom Bill to pass).

168. *See* FONER, *supra* note 158, at 499–511 (recounting the election of 1872).

169. DAVID W. BLIGHT, RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY 127 (2001).

international, imperial analogies. During the campaign of 1872, for example, E.L. Godkin, the editor of *The Nation* and a leading voice of the Liberal Republicans, declared that "'Reconstruction . . . seems to be morally a more disastrous process than rebellion.'"[170] Anti-polygamy legislation, however, managed to escape an analogous indictment of moral disaster, despite employing many of the same legal tactics as Reconstruction.[171] The rhetoric exemplified in Vice President Colfax's speeches and the *Reynolds* decision helped to articulate a new vision of anti-polygamy for these post-Radical politics. Unlike the humanitarian rhetoric that first galvanized the Republican response to Mormonism, Colfax's narrative of polygamy did not center on the plural wife as a victim.[172] Indeed, in contrast to the earlier vision of women as victims of fraud and kidnapping, Colfax brushed aside the question of whether plural wives consented to polygamy as essentially irrelevant.[173] Rather, he insisted on the analogy to the British Raj where one nation exercised a right to dominate and coerce another nation by virtue of its superior civilization and the barbarism of the subordinate people.[174] By nesting anti-polygamy in the international but nevertheless racialist narrative of imperialism, the Mormons could be subject to legal coercion without reopening the explosive domestic issue of race relations in the South, to say nothing of the delicate issue of the former Confederacy's status as a conquered territory.[175]

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170. *Id.* at 123.

171. For the anti-polygamy legislation of the 1880s see Edmunds Act, ch. 47, 22 Stat. 30 (1882); Edmunds-Tucker Act, ch. 397, 24 Stat. 635 (1887); *see also* FIRMAGE & MANGRUM, *supra* note 4, at 161–67, 197–209 (discussing the passage and effects of the Edmunds Act and the Edmunds-Tucker Act); GORDON, *supra* note 4, at 151–55, 164–67 (same).

172. Colfax, *supra* note 122, at 15 ("I pass over the obvious argument that wherever polygamy prevails in the world woman occupies necessarily a degraded and inferior condition . . . .").

173. *Id.* ("The Brahmin reasoning that the woman consented (akin as it is to the Mormon argument now) had no effect. For England understood the power of religious fanaticism; of assumed revelation, of a potential public opinion.").

174. *See generally* Colfax, *supra* note 122.

175. Accompanying the attack on Radical Reconstruction was a set of racial narratives that replaced the domestic story of enslavement and emancipation with an international conception of barbarism and imperial civilization. In 1874, for example, the *Shreveport Times* attacked the political power that Radical Reconstruction conferred on freed blacks by appealing to the "negro" tendency to "barbarism." Citing English explorers in the vanguard of Victorian imperialism as authority, the paper argued for white supremacy:

> These plantation negroes, who to-day control the destiny of Louisiana, are *fac similes* of the natives of Central Africa, as described by Sir Samuel Baker . . . . This Englishman is the special friend of the negro and an advocate for universal emancipation. He informs the world that the negro is incapable of self-government; that he is constantly on the retrograde to barbarism, unless supported and upheld by the white man, and that a certain amount of compulsion is necessary to make him a useful member of society . . . .

The debates over the Edmunds Act of 1882[176] illustrate the way that the imperial rhetoric invoked in *Reynolds* helped to midwife a new, harsher anti-polygamy policy. The Edmunds Act was important because it was the first anti-polygamy law that went beyond criminalizing Mormon marital and sexual conduct.[177] Rather, it struck directly at Mormon political power in Utah by placing the territorial electoral machinery under the control of a presidentially appointed commission and excluding all polygamists from voting or holding public office.[178] It thus represented the crossing of a threshold with important connections to the recent past of Reconstruction, when the federal government also aggressively intervened in local elections across the defeated Confederacy.[179] The strength of the imperial analogy, however, proved sufficient to overcome any tainted association with the rejected politics of Radical Reconstruction. The potency of the imperialist rhetoric invoked by the Court in *Reynolds* is perhaps best illustrated by the person of Augustus Hill Garland.

In 1866, Garland brought one of the earliest legal challenges to Reconstruction policies.[180] Garland was a former member of the Confederate Senate, and a congressional act designed to exclude ex-Confederates from public life through loyalty oaths kept him from returning to the practice of law.[181] After a pardon by President Johnson in 1865, he fought a case to the U.S. Supreme Court successfully challenging his continued exclusion from the bar.[182] Notwithstanding this experience,

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Who Shall Deliver Us from the Body of Death?, SHREVEPORT TIMES, Sept. 14, 1874, *reprinted in* PRESIDENT OF THE UNITED STATES, USE OF THE ARMY IN CERTAIN SOUTHERN STATES, H.R. EXEC. DOC. NO. 44-30, at 372 (1953). The article goes on to discuss the racial views of Stanley and other famous explorers and agents of the British Empire. *See id.* at 372–74. Such attitudes gradually came to dominate in the North as well, where African Americans came to be seen as an "un-American" intrusion into the body politic. *See* HEATHER COX RICHARDSON, THE DEATH OF RECONSTRUCTION: RACE, LABOR, AND POLITICS IN THE POST-CIVIL WAR NORTH, 1865–1901, at 183–224 (2001) (discussing the widespread perception in the closing decades of the nineteenth century of African American laborers as un-American).

176. *See* Edmunds Act, ch. 47, 22 Stat. 30 (1882).

177. *Compare* Morrill Act, ch. 12, 12 Stat. 501 (1862) (making bigamy a crime in federal territories), *with* Edmunds Act, ch. 47, 22 Stat. 30 (1882) (defining the crime of unlawful cohabitation).

178. Edmunds Act, ch. 47, 22 Stat. 30 (1882) (restricting the voting and political rights of polygamists).

179. *See generally* David Buice, *A Stench in the Nostrils of Honest Men: Southern Democrats and the Edmunds Act of 1882*, DIALOGUE: J. MORMON THOUGHT, Autumn 1988, at 100 (discussing ideological origins of opposition to the Edmunds Act by ex-Confederates and other Southerners).

180. *See Ex Parte* Garland, 71 U.S. 333 (1866).

181. *See id.* at 336 ("Having taken part in the Rebellion against the United States . . . Mr. Garland could not take the oath prescribed by the acts of Congress before mentioned, and the rule of the court of March, 1865.").

182. *See id.* at 340 ("The President has fully pardoned him for this offence; and the constitutional

sixteen years later, Garland, now the U.S. Senator from Arkansas, took to the Senate floor to defend the Edmunds Act, emphatically endorsing complete federal control of the elective machinery in Utah.[183] Senator Call of Florida objected to the bill using themes drawn from the Southern critique of Reconstruction.[184] Senator Garland's reply is telling. His response to these politically potent post-Reconstruction claims was to explicitly invoke the Supreme Court's reasoning in *Reynolds*, insisting that Congress must suppress "crimes which the civilized world denounces."[185] He went on to bolster his argument with references to "Professor Heeren's Historical Researches."[186] The professor had "published some seven volumes of his own travels and researches in Asia and other countries" that discussed, "under the head of 'Asia,'" the evils of polygamy.[187] In short, he rejected Senator Call's domestic objections based on local self-government by appealing to a global imperial narrative about the superiority of the white race and the depraved practices of Asiatics. This imperial story proved powerful enough to displace his own vivid experience on the receiving end of similar tactics by the federal government.

Interestingly, even those who attacked the Edmunds Bill did so using imperial analogies. For example, in contrast to Senator Call, who implicitly placed "The Mormon Question" within a domestic framework of concern over the distribution of local and federal power, Senator Brown of Georgia saw the issue in terms of the dangers of imperial overreach and the need for civilized masters to accommodate the barbaric practices of their subjects, citing sources on how British authorities in India were forced to tolerate polygamy by the limits of imperial power.[188] The

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effect of that pardon is to restore him to all his rights, civil and political, including the capacity or qualification to hold office, as fully in every respect as though he had never committed the offence.").

183. *See* 13 CONG. REC. 1159 (1882) (statement of Sen. Garland).

184. *Id.* at 1156 (statement of Sen. Call) ("[The bill] is an act which virtually declares that the President may give the whole political power of elections in the Territory of Utah to five persons nominated by himself and confirmed by the Senate. It seems to me that if there is anything in the institutions of this country and in the idea of self-government, that is a proposition which destroys the whole of it.").

185. *Id.* at 1159 (statement of Sen. Garland).

186. *Id.*

187. *Id.*

188. *Id.* at 1202 (statement of Sen. Brown) ("England has had this same question to deal with. When she assumed the dominion of India she found polygamy there, and it has been there from time immemorial. They did not do what popular sentiment seeks to compel us now to do. The English people did not attempt to crush it out by law, but the British Parliament and the British courts recognize it in India on assuming control and recognize it to-day. Indeed they dare not do otherwise. They can enforce no law in India that proposes to exterminate polygamy.").

response of Senator Edmunds, the bill's sponsor, was to note limits to the tolerance of even the over-extended British. "May I ask the Senator," Edmunds interjected, "if the same book contains a statement of the laws of Thibet, where one woman may lawfully marry several husbands, and all of them be bound to the marital relation?"[189] Even the Raj balked at tolerating polyandry, and the United States, he implicitly claimed, ought to have higher standards.

Later, Edmunds enlarged on the imperial example by deliberately posing a hypothetical designed to distance the situation in Utah from that in the South:

> Would the Senator really object to a law, supposing it were not unconstitutional, (which is another question,) which said that no man should be entitled to participate in the government of the State of Georgia that was in the practice of having all his father's wives, one or more, burned, Hindoo fashion, when his father died?[190]

Edmunds's rhetoric in this passage was subtle. It drew the sting of objections based on local self-government by raising the exotic hypothetical of "suttee" in Georgia. So outlandish and foreign an image was meant to lay to rest concerns that heavy-handed federal tactics in Utah had anything to do with the now legitimized concern for local self-government in the South. Utah was akin to India, not Georgia. To be sure, there continued to be some Southern opposition to deploying federal power against the Mormons, but unlike the Cullom Bill of 1870, the anti-Mormon legislation of the 1880s—particularly after the successful passage of the Edmunds Act in 1882—was able to employ the legal tactics of Reconstruction without upsetting the consensus against the politics of Radical Republicanism.[191] *Reynolds* thus represented the triumph of a set of rhetorical moves that situated polygamy in a global narrative of racial superiority that accommodated the rising force of Jim Crow by exoticizing the problem of Mormon polygamy, portraying its suppression as part of the onward march of the "northern and western nations of Europe."[192]

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189. *Id.* (statement of Sen. Edmunds).

190. *Id.* at 1204 (statement of Sen. Edmunds).

191. *See* Phipps, *supra* note 135, at 480 ("Republicans in the 1880s displaced the sectionalism entrenched in earlier forms of anti-polygamy activism by claiming that a shared tradition of monogamy united the North and South.").

192. Reynolds v. United States, 98 U.S. 145, 164 (1879).

B. Reynolds *and* Fin de Siècle *American Imperialism*

Historians have traditionally ended the story of the anti-polygamy crusades in 1890, when the Mormon Church publicly abandoned plural marriage.[193] The jurisprudential dialogue with international imperialism at work in *Reynolds* and the subsequent debates over the suppression of polygamy, however, continued in the final decade of the century. On February 15, 1898, the U.S.S. Maine exploded in Havana Harbor.[194] Two months later, Congress declared war on Spain.[195] Within six days, the American Asiatic Squadron under George Dewey engaged a Spanish squadron in Manila Bay.[196] Within a month, American forces had occupied the archipelago, and on August 12, 1898, the United States and Spain agreed to a cease-fire.[197] By that time, American forces had occupied not only the Philippines, but also Guam, Cuba, and Puerto Rico.[198] All of these territories were subsequently ceded to the United States by Spain in the Treaty of Paris.[199]

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193. As more recent historians have made clear, however, the 1890 cutoff date for battles over Mormon polygamy is not quite correct. The Church of Jesus Christ of Latter-day Saints continued the limited and clandestine practice of plural marriage until the first decade of the twentieth century, when the threat of renewed prosecutions during the controversy over the seating of Senator Reed Smoot, a monogamist Mormon leader, led the church's leadership to act decisively to end all new plural marriages. *See generally* KATHLEEN FLAKE, THE POLITICS OF AMERICAN RELIGIOUS IDENTITY: THE SEATING OF SENATOR REED SMOOT, MORMON APOSTLE (2004); D. Michael Quinn, *LDS Church Authority and New Plural Marriages, 1890–1904*, DIALOGUE: J. MORMON THOUGHT, Spring 1985, at 9. Since 1904, the church has automatically excommunicated any member who enters into a plural marriage. *See* Danel W. Bachman & Ronald K. Esplin, *Plural Marriage*, *in* 3 ENCYCLOPEDIA OF MORMONISM 1091, 1095 (Daniel H. Ludlow ed., 1992). Even thereafter, however, schismatic groups that repudiated the church's stance on plural marriage continued to practice polygamy. These schismatic groups, often referred to as "Mormon fundamentalists," continue today, over a century after the Mormon Church itself rejected the practice. *See generally* CARMON HARDY, SOLEMN COVENANT: THE MORMON POLYGAMOUS PASSAGE (1992) (discussing the roots and development of twentieth-century polygamy in the western United States).

194. *See* DAVID TRAXEL, 1898: THE BIRTH OF THE AMERICAN CENTURY 117–119 (1998) (discussing the sinking of the U.S.S. Maine).

195. *See id.* at 122 (discussing the congressional declaration of war against Spain).

196. *See* CRAIG L. SYMONDS, DECISION AT SEA: FIVE NAVAL BATTLES THAT SHAPED AMERICA 141–95 (2006) (discussing the Battle of Manila Bay); Paul A. Kramer, *Empires, Exceptions, and Anglo-Saxons: Race and Rule between the British and United States Empires, 1880-1910*, 8 J. AM. HIST. 1315, 1331 (2002) (discussing how the members of Manila's English Club watched the battle from the veranda of their clubhouse).

197. *See* Paul G. Pierpaoli, Jr., *Peace, Protocol of*, *in* THE ENCYCLOPEDIA OF THE SPANISH-AMERICAN AND PHILLIPINE-AMERICAN WARS 467 (Spencer C. Tucker ed., 2009) (discussing the cessation of hostilities between Spain and the United States).

198. *See id.* (discussing the territory that the United States took from Spain at the end of hostilities).

199. *See* Treaty of Peace Between the United States and Spain, U.S.-Spain, Dec. 10, 1898, S. EXEC. DOC. No. 55-62, pt. 1 (1899); *see also* Paolo E. Coletta, *McKinley, the Peace Negotiations, and*

Just as American victory over a Spanish-speaking power had sparked an intense round of constitutional debate in the wake of the Mexican-American War, the Spanish-American War launched an intense conversation over the nature of American expansion.[200] The Treaty of Guadalupe Hidalgo had left the United States with sovereignty over a community—the Mormons—enmeshed in barbaric and "Asiatic" practices that rendered them unfit for democratic self-government. The result was the transnational dialogue reflected in *Reynolds*. In the Mormon case, the "Asiatic" practice of polygamy had to be shed as a precondition for full integration into the American Union.[201] The Spanish-American War confronted American law with a similar question but on a much larger scale.[202] What was to be the status of the newly conquered Spanish colonies? Were they to be governed by the territorial model begun with the Northwest Ordinance of 1787, granted limited self-government, and admitted to the Union as states at some future point?[203] Were they colonies of the American Republic, subject to the plenary authority of Congress for as long as it wished to exercise it?[204] Did the Constitution "follow the flag" into Cuba, Puerto Rico, Guam, and the Philippines?[205] Once again, American legal intellectuals looked to British imperial models.[206]

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the Acquisition of the Philippines, 30 PAC. HIST. REV. 341, 348 (1961) (discussing the negotiations over the Treaty of Paris of 1898).

200. *See* Burnett & Marshall, *supra* note 154, at 3–17 (recounting the constitutional debate in the wake of the Spanish-American War).

201. Utah was admitted to the Union in 1896, decades after it had reached the level of population at which other territories were admitted as states. The reason for the delay, of course, was federal hostility to polygamy and other distinctive Mormon practices. *See generally* EDWARD LEO LYMAN, POLITICAL DELIVERANCE: THE MORMON QUEST FOR UTAH STATEHOOD (1986).

202. For a succinct summary of the debates, see Burnett & Marshall, *supra* note 154. *See generally* KERR, *supra* note 16 (discussing the constitutional debates over the status of the territory acquired from Spain in the Spanish-American War); SPARROW, *supra* note 16 (same).

203. *See* Burnett & Marshall, *supra* note 154, at 12 (discussing debates over the status of Puerto Rico in the context of the Northwest Ordinance).

204. *See id.* (discussing debates over Congress's claimed plenary authority over the newly acquired territories).

205. *See* Brook Thomas, *A Constitution Led By the Flag: The* Insular Cases *and the Metaphor of Incorporation*, *in* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 82, 85 (Christina Duffy Burnett & Burke Marshall eds., 2001) (discussing the argument that "the constitution follows the flag").

206. *See, e.g.*, Lebbeus R. Wilfley, *How Great Britain Governs Her Colonies*, 9 YALE L.J. 207 (1900) (examining the administration of the British Empire as a model for American law). According to Wilfley:

> The peculiar interest which attaches to the study of the Colonial Empire of Great Britain at the present time arises . . . . because the United States have recently acquired possessions, some of which are so far removed from our shores and are surrounded by such climatic, social, racial and religious conditions that they will have to be treated, for a time at least, as dependencies, before they can be incorporated into the Federal Union.

The debate began first in the pages of the then recently launched *Harvard Law Review*.[207] Christopher Columbus Langdell and James Bradley Thayer argued that Congress could rule the new territories as subject colonies.[208] They were opposed by Simeon Baldwin and Carman F. Randolph, who insisted that annexing Spanish possessions would necessarily entitle their inhabitants to all of the rights of United States citizens.[209] Finally, Abbot Lawrence Lowell proposed an intermediate position, in which territories enjoyed more rights than those bestowed on European colonies, but not the full protection of the U.S. Constitution.[210] All of the protagonists examined the issues through the lens of British imperialism, and both sides invoked the legal suppression of polygamy in Utah as a precedent revealing the true nature of American power over conquered peoples.

For example, Randolph insisted that plenary congressional authority over territories not incorporated into a state would unacceptably leave American "'colonists . . . in a state of the most complete subordination, and as dependent upon the will of Congress as the people of this country would have been upon the king and parliament of Great Britain, if they could have sustained their claim to bind us in all cases whatsoever.'"[211] Thayer's argument was equally nested in imperial narratives. The nation, he argued, could "govern these islands as colonies, substantially as England might govern them; that we have the same power that other nations have."[212] He went on to pair "the entire recent history of England and of the United States" as examples of benevolent imperial administration.[213] Strikingly, Thayer gave as examples of the "wise and free colonial administration"[214] of the United States its control of the

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Id. at 207. He went on to gush that "[t]he record of the Colonial Empire of Great Britain is a wonderful record; a tale of peace and war, of change, of enlargement, of unparalleled growth." *Id.*

207. *See* Burnett & Marshall, *supra* note 154, at 5–7 (discussing the debates in the *Harvard Law Review* prior to the decision of the Court in the *Insular Cases*).

208. *See generally* C.C. Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365 (1899); James Bradley Thayer, *Our New Possessions*, 12 HARV. L. REV. 464 (1899).

209. *See generally* Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393 (1899); Carman F. Randolph, *Constitutional Aspects of Annexation*, 12 HARV. L. REV. 291 (1898).

210. *See generally* Abbott Lawrence Lowell, *The Status of Our New Possessions—A Third View*, 13 HARV. L. REV. 155 (1899).

211. Randolph, *supra* note 209, at 303 (quoting 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 360–61 (1826)).

212. Thayer, *supra* note 208, at 467.

213. *Id.* at 475.

214. *Id*.

territory conquered from Mexico.[215] Here, he noted that "[w]hatever restraints may be imposed on our congress and executive by the Constitution of the United States, they have not made impossible a firm and vigorous administration of government in the territories. Witness especially the case of . . . the Territory of Utah."[216]

Lowell also conceptualized the nineteenth-century expansion of the United States across the continent in imperial terms. Writing in *The Atlantic Monthly*, he argued, "there has never been a time, since the adoption of the first ordinance for the government of the Northwest Territory in 1784, when the United States has not had colonies."[217] This fact was obscured for some, he went on to argue, because America's control over her colonies had been smooth and benign, "[w]ith the exception of . . . the disturbances in Utah, where polygamy was a rock of offense."[218] Like Thayer, he saw American westward expansion as a local species of the global genus of imperialism, with the Mormons serving as one of the points of contention that revealed the true relationship between the metropolitan center and its colonial periphery. The shift in anti-polygamy politics midwifed by the imperial rhetoric in *Reynolds* lay just below the surface of these allusions. Thus, notably absent from this imperial conceptualization of the history of federal power was any discussion of Reconstruction. The exercise of federal authority in Utah was a form of benign imperialism, while the exercise of federal authority in the defeated South was passed over in discreet silence.

Eventually, the argument shifted to the judiciary. In 1901, a series of disputes, collectively dubbed the *Insular Cases*, reached the U.S. Supreme Court.[219] Although the facts and issues in the cases varied, they forced the Court to address the constitutional status of the new possessions conquered from Spain. The intricacies of the Court's reasoning and holding are beyond the scope of this Article.[220] Suffice it to say that the intermediate position of Lowell triumphed in the Court's confused formulation that Puerto Rico and the other territories were "foreign in a

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215. *Id.* at 476.

216. *Id.* at 478.

217. A. Lawrence Lowell, *The Colonial Expansion of the United States*, ATLANTIC MONTHLY, Feb. 1899, at 145, 145.

218. *Id.* at 146.

219. *See* Fourteen Diamond Rings v. United States, 183 U.S. 176 (1901); Dooley v. United States, 183 U.S. 151 (1901); Huus v. New York, 182 U.S. 392 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Goetze v. United States, 182 U.S. 221 (1901); De Lima v. Bidwell, 182 U.S. 1 (1901).

220. For a fuller discussion of the cases, see sources cited *supra* notes 16, 202.

domestic sense."[221] Tellingly, *Reynolds v. United States* made an appearance in the arguments to the Court, where it was seen not as a precedent over the scope of religious freedom but rather as a case defining the scope of American imperial power.[222]

Proponents of the theory that the Constitution applies fully and of its own force in all American territories looked to *Reynolds* as an example of the Bill of Rights's control, even over Congress's authority, beyond the territory of the organized states.[223] In contrast, the Attorney General insisted that the Constitution had applied in *Reynolds* only because Congress had, in the exercise of its plenary power over conquered territories, chosen to extend its protections by statute in 1850.[224] Relying on language from one of *Reynolds*'s progeny, the Attorney General told the Court in oral argument:

> We plant ourselves squarely on the statement of this court in the Mormon Church case . . . that in legislating for Territories, Congress would be subject . . . [rather] by . . . the general spirit of the Constitution than by any express and direct application of its provisions."[225]

To be sure, *Reynolds* and the other cases spawned by the anti-polygamy battles were not a major, let alone a causal, force in resolving the constitutional debates precipitated by the Spanish-American War. Their cameo appearance, however, shows the continuity between the earlier battles over polygamy and *fin de siècle* arguments over imperialism.

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221. *Downes*, 182 U.S. at 341.

222. *See* Brief for Appellant, Armstrong v. United States, 182 U.S. 143 (1900) (No. 509), *in* THE INSULAR CASES, COMPRISING THE RECORDS, BRIEFS, AND ARGUMENTS OF COUNSEL IN THE INSULAR CASES OF THE OCTOBER TERM, 1900, IN THE SUPREME COURT OF THE UNITED STATES, INCLUDING THE APPENDIXES THERETO, H.R. DOC. NO. 56-4171, at 890 (1901) ("Congress is not omnipotent as to the Territories, We have in the Reynolds case, 98 U.S., 162, a decision of the Supreme Court that it is not omnipotent."); *see also* Brief for the United States, Goetze v United States, 182 U.S. 221 (1900) (No. 340), *in* THE INSULAR CASES, COMPRISING THE RECORDS, BRIEFS, AND ARGUMENTS OF COUNSEL IN THE INSULAR CASES OF THE OCTOBER TERM, 1900, IN THE SUPREME COURT OF THE UNITED STATES, INCLUDING THE APPENDIXES THERETO, H.R. DOC. 56-4171, at 220 (1901) ("[In *Reynolds v. United States*], Chief Justice Waite said: 'By the Constitution of the United States (amendment 6), the accused was entitled to a trial by an impartial jury.' This was correct, in view of the fact that in 1850 the Constitution and laws of the United States, so far as applicable, were extended to the Territory of Utah.").

223. *See* Brief for Appellant, *supra* note 222, at 890.

224. *See* Brief for the United States, *supra* note 222, at 220.

225. Argument of the Attorney General, De Lima v. Bidwell, 182 U.S. 1 (1900) (No. 456), *in* THE INSULAR CASES, COMPRISING THE RECORDS, BRIEFS, AND ARGUMENTS OF COUNSEL IN THE INSULAR CASES OF THE OCTOBER TERM, 1900, IN THE SUPREME COURT OF THE UNITED STATES, INCLUDING THE APPENDIXES THERETO, H.R. DOC. 56-4171, at 345 (1901).

The invocation of imperial models in both *Reynolds* and the *Insular Cases* was part of a much broader shift in late-nineteenth-century thinking, in which eighteenth-century narratives of universal rights were replaced by imperial narratives that centered on the potent ideas of race and progress. Early-nineteenth-century statesmen such as Thomas Jefferson and John Quincy Adams had contrasted the virtue of republican America with the grasping European empires, while aggressively pushing the territorial expansion of the United States at the expense of Indian tribes and rival powers such as Spain, France, Britain, and Mexico.[226] Late-nineteenth-century Americans, however, were more willing to explicitly identify with Great Power imperialism.[227] As the United States' commercial and military power expanded outward in the years after the Civil War, Americans increasingly found themselves in a world dominated by British imperialism.[228] In the liminal spaces of empire such as the Philippines (a nominally Spanish colony dominated by English commercial interests) or Burma (a newly acquired frontier of the Indian Raj where American engineers successfully bid for government contracts), Americans abroad began identifying themselves with the triumphant Britons.[229]

At home, many Americans came to see their own expansion as an expression of the wider story of European—and especially Anglo-Saxon—migration to, and benign domination of, foreign territories and peoples.[230] In his 1889 book, *The Winning of the West*, for example, Theodore Roosevelt told the story of westward expansion in the context of global Anglo-Saxon colonization.[231] His book literally opens with the expansion of English legal models:

> During the past three centuries the spread of the English-speaking peoples over the world's waste spaces has been not only the most striking feature in the world's history, but also the event of all others most far-reaching in its effects and its importance.

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226. *See, e.g.*, HOWE, *supra* note 25, at 111–16 (discussing John Quincy Adams's role in the acquisition of Florida and the promulgation of the Monroe Doctrine).

227. *See generally* Kramer, *supra* note 196 (discussing American encounters with the British Empire and the effect on American understanding of American experience).

228. *Id.*

229. *Id.*

230. *Id.* at 1315 ("Along different timelines, pursuing varied agendas, and mobilizing diverse discourses to defend them, Americans from varied political backgrounds came to recognize that the United States' new colonial empire—part of its much vaster commercial, territorial, and military empires—operated within a larger network of imperial thought and practice.").

231. *See generally* 1 THEODORE ROOSEVELT, THE WINNING OF THE WEST 1–31 (1889). *See also* Kramer, *supra* note 196, at 1325 (discussing the *Winning of the West* in the context of a broader stream of trans-Atlantic borrowing of imperialist ideologies).

> . . . The Common Law which Coke jealously upheld in the southern half of a single European island, is now the law of the land throughout the vast regions of Australasia, and of America north of the Rio Grande.[232]

To be sure, Roosevelt insisted on a certain amount of American exceptionalism, but it was defined in relation to other imperial adventures.[233] Likewise, under the influence of Harvard historian Henry Adams and European scholars like Henry Maine, Roosevelt's chief political ally, Senator Henry Cabot Lodge, came to believe that the origins of American constitutionalism could be traced back through the story of the Anglo-Saxons to the tribes of ancient Germania.[234] According to Lodge, the unique talent of the Anglo-Saxon race was their aptitude for law and self-government.[235]

A corollary of this theory was that races unblessed with the Teutonic gift for administration were in need of benign Anglo-Saxon domination. Indeed, they were congenitally unfit for self-government without a long period of tutelage. Lodge insisted:

> You can not change race tendencies in a moment . . . . [The] theory, that you could make a Hottentot into a European if you only took possession of him in infancy and gave him a European education among suitable surroundings, has been abandoned alike by science and history as grotesquely false. . . . We know what sort of government the Malay makes when he is left to himself.[236]

His conclusion was that the United States should exercise imperial control over "lower" peoples without legal or constitutional scruple.[237] Such

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232. 1 ROOSEVELT, *supra* note 231, at 1.

233. For example, he noted with a touch of national pride that the Native Americans were "the most formidable savage foes ever encountered by colonists of European stock. Relatively to their numbers, they have shown themselves far more to be dreaded than the Zulus or even the Maoris." *Id.* at 17.

234. *See* Mark S. Weiner, *Teutonic Constitutionalism: The Role of Ethno-Juridical Discourse in the Spanish-American War*, *in* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSIONISM, AND THE CONSTITUTION 48 (Christina Duffy Burnett & Burke Marshall eds., 2001) (discussing Lodge's constitutional views).

235. *Id.* at 57 ("'[T]he laws and institutions of the ancient German tribes flourished and waxed strong on the soil of England. . . . Strong enough to resist the power of the church in infancy, stronger still to resist the shock of the Norman invasion, crushed then, but not destroyed, by foreign influence, the great principles of Anglo-Saxon law, ever changing and assimilating, have survived in the noblest work of the race—the English common law.'" (quoting WAI-CHEE DIMOCK, EMPIRE FOR LIBERTY: MELVILLE AND THE POETICS OF INDIVIDUALISM 9 (1989)).

236. *Id.* at 62 (internal quotation marks omitted) (quoting 33 CONG. REC. 2621 (1900)).

237. *Id.* at 63–75 (discussing the "Progressive Anglo-Saxon Interpretation of the *Insular Cases*").

control was nothing more than the working out of America's destined part in the global and historical process of applying the Anglo-Saxon genius for government to a benighted world, a genius embodied in the United States Constitution.[238] In this racially and historically charged vision of the Constitution, however, Mormons, Filipinos, and others who stood outside the story of Anglo-Saxon progress occupied a decidedly second-class status.[239]

CONCLUSION

As the *Insular Cases* were making their way to the Supreme Court, the popular *McClure's Magazine* published an appeal by the poet laureate of British imperialism.[240] Lest anyone mistake the topic of his poem, Rudyard Kipling subtitled it, "The United States in the Philippine's Islands."[241] "Take up the White Man's burden," he implored, calling on Americans, "To wait, in heavy harness, / On fluttered folk and wild— / Your new-caught sullen peoples, / Half devil and half child."[242] The rhetorical invitation of the poem was clear. America, Kipling in effect argued, needed to see itself in modern imperial terms and adopt the "dear-bought wisdom" of its international peers.[243] The poetic appeal, however, had already been foreshadowed in a legal appeal more than twenty years

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238. *Id.*

239. In this regard, it is worth noting that one of the "bones of contention" between the Mormons and the federal government was the Latter-day Saints' hostility to the common law courts. Nineteenth-century Mormons sought to bypass these courts by resolving their civil disputes in ecclesiastical courts. *See generally* Oman, *supra* note 119, at 212–14. One anti-Mormon critic writing in 1904 compared the Mormons to the "Chinese highbinders of San Francisco" who similarly eschewed the common law courts because "[t]hey . . . could not more appreciate what we think is civilization than they could fly." *See id.* at 218 (internal quotation marks omitted) (quoting *Public Against Apostle Smoot: Opposed by Sentiment of Country*, SALT LAKE TRIB., Dec. 20, 1904, at 2).

240. *See* Rudyard Kipling, *The White Man's Burden: The United States and the Philippines Islands*, MCCLURE'S MAG., Feb. 1899, at 4; *see also* THE COLLECTED POEMS OF RUDYARD KIPLING 334 (Wordsworth Editions Ltd. 1994) (containing Kipling's subtitle to the work).

241. *Id.*

242. *Id.*

243. The final stanza of the poem reads:

Take up the White Man's burden!
Have done with childish days—
The lightly-proffered laurel,
The easy ungrudged praise:
Comes now, to search your manhood
Through all the thankless years,
Cold, edged with dear-bought wisdom,
The judgment of your peers.

Id.

earlier, when Reynolds's lawyers rose before the Court armed with arguments about natural law, only to be defeated by the more powerful, progressive myth that Kipling ultimately set to verse. Where Reynolds's lawyers had seen in the diversity and unity of human laws an organon for discovering immutable natural laws, the Court saw barbarism. In the Justices' vision, the Mormons were among the "sullen peoples, / Half Devil and half child," who, like "African and Asiatic"[244] populations, needed a firm imperial hand. The appeal to non-Western culture had gone from defense to indictment.

As the voice of the losers in the case, it is fitting to close this Article by returning to George Q. Cannon. While the arguments that he penned in his *Review* almost certainly had their genesis with the decidedly non-Mormon George Biddle, Cannon adopted them into the narrative that he directed inward, toward the Mormon community that would shortly reap the whirlwind of their 1879 defeat in *Reynolds*. He wrote:

> Not the least of the considerations which prompt me in this review, is that I desire that all the people of my faith may know that we have not been deceived in our ideas respecting the Constitution and our rights under it; that if we are to be stricken down . . . it shall not be in ignorance nor in doubt as to the wrongfulness of the blows from which we suffer; that our children may know that we fell contending for constitutional rights, liberty of conscience for ourselves and all others . . . .[245]

The Court's appeal to imperial models did not go unnoticed. Cannon was born an Englishman. He immigrated to America after joining the Mormon Church, and, at one point, his political opponents dogged him with the accusation that he was never naturalized as a U.S. citizen and remained a British subject, making him ineligible for his office as territorial delegate.[246] There is thus a biographical irony in his response to the Court's invocation of the British Raj. After recounting the Court's reliance on analogies to "Suttee" and "Thugee," Cannon turned to a different story about British imperial power:

> I was taught to look upon the experience which the [American] colonies underwent in the suffering of wrongs, in the endurance of

244. Reynolds v. United States, 98 U.S. 145, 164 (1879).
245. CANNON, *supra* note 44, at 6.
246. *See* BITTON, *supra* note 35, at 241–50 (recounting the controversy regarding Cannon's citizenship).

> oppression, in the struggles for religious and political liberty, as a preparatory training to enable them to value, contend for and achieve independence. I was taught that the firmness, valor and undaunted cheerfulness, hope and confidence of Washington, and . . . the Adamses, Franklin, Jefferson, and Madison . . . were due to the direct blessing and inspiration of Heaven bestowed upon them.[247]

Against the Court's admiring analogy to nineteenth-century British imperialism, Cannon thus responded with the story of eighteenth-century British imperialism and the divine sanction for its defeat. As the Court's opinion in *Reynolds* itself demonstrates, Jefferson and Madison were names to conjure with, but in Cannon's argument, they proved insufficient. The eighteenth-century imperialism on whose opprobrium he traded lacked a connection to the potent contemporary rhetoric of race and barbarism. Universal reason had been replaced by progress and the white man's burden.

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247. CANNON, *supra* note 44, at 5.