"ESTABLISHED AGREEABLE TO THE LAWS OF OUR COUNTRY": MORMONISM, CHURCH CORPORATIONS, AND THE LONG LEGACY OF AMERICA'S FIRST DISESTABLISHMENT

NATHAN B. OMAN

William & Mary Law School

JOURNAL OF LAW & RELIGION (FORTHCOMING)

William & Mary Law School Research Paper No. 09-436

"Established Agreeable to the Laws of Our Country": Mormonism, Church Corporations, and the Long Legacy of America's First Disestablishment

Nathan B. Oman

Rollins Professor of Law, William & Mary Law School

Abstract:
This article provides the first history of the Church of Jesus Christ of Latter-day Saints as a legal entity. It makes two contributions. First, this history recasts the story of the so-called "first disestablishment," revealing that it was longer and more contentious than is often assumed. Disestablishment produced a body of corporate law encoded with strong theological assumptions. Because corporate law was the primary mechanism for regulating churches, this created problems for groups like Roman Catholics and Latter-day Saints who did not share the law's theological commitments. Far from being settled in the early 1830s, the first disestablishment continued to spawn bitter legal battles into the late-nineteenth and early-twentieth centuries. Second, this article reveals legal personality as one of the key points of conflict between the Latter-day Saints and American society. This is a useful corrective to accounts that emphasize polygamy and theocracy as the points of legal contention. An understanding of the history of the Church as a legal entity supplements these stories by revealing how the hard-fought legal battles of the late-nineteenth century can be seen as an extension of the process of legal disestablishment that began during the American Revolution.

Introduction

The early American republic saw the disestablishment of government-supported churches in the original colonies. This was a decentralized process, one that in the ordinary telling began during the American Revolution and was completed by the early 1830s. According to the traditional story, the body of law produced by this so-called first disestablishment fostered freedom and religious pluralism in the new republic. On this view, the first disestablishment ended just at the height of the so-called Second Great Awakening, a religious upheaval that produced a welter of new sects and resulted in various forms of evangelical Protestantism becoming the dominant religion in the United States.[1] It also spawned a host of new sects. Among the new religious

[1] *See generally* Roger Finke & Rodney Stark, *How the Upstart Sects Won America: 1776-1850*, 28 J. SCIENTIFIC STUD. REL. 27 (1989).

movements that emerged from the Second Great Awakening, perhaps none has proven as successful as Mormonism.[2] Indeed, one might point to the rise of the Church of Jesus Christ of Latter-day Saints (hereafter the Church) as one of the fruits of the religious freedom vouchsafed by the first disestablishment. This article, however, tells a different story, one that recasts America's first disestablishment as a much longer process involving continuing controversy throughout the nineteenth century. Far from being triumphantly concluded by the early 1830s, for the remainder of the nineteenth century government actors targeted churches that rejected the congregational ecclesiology and limited sphere imposed on them by the legal regime of the first disestablishment.

The scriptures of the Church mark its beginning with a legal event. They speak of "The rise of the Church of Christ in these last days . . . it being regularly organized and established agreeable to the laws of our country; by the will and commandments of God."[3] From its legal beginnings in April 1830, the Church struggled to find a legal personality. In the lifetime of Church founder Joseph Smith, it was incorporated under the laws of two states—and perhaps a third—in an unsuccessful effort to find a legal model that would accommodate its ecclesiastical ambitions. After the murder of Smith in 1844, the Latter-day Saints emigrated en masse beyond the borders of the United States to Utah, in what was then Mexican territory. Once there, they organized a government that provided a more congenial legal existence for the Church. However, with the integration of Mormon country into the United States these legal structures drew the ire of Congress, which wished to impose the legal model of the first disestablishment on the Latter-day Saints. Thus, began a three-

[2] There are several excellent introductions to the origins and history of Mormonism. *See generally* JAN SHIPPS, MORMONISM: THE STORY OF A NEW RELIGIOUS TRADITION (1985); MATTHEW BOWMAN, THE MORMON PEOPLE: THE MAKING OF AN AMERICAN FAITH (2012); CLAUDIA BUSHMAN & RICHARD L. BUSHMAN, BUILDING THE KINGDOM : A HISTORY OF MORMONS IN AMERICA (2001); RICHARD L. BUSHMAN, JOSEPH SMITH AND THE BEGINNINGS OF MORMONISM (1985); THE OXFORD HANDBOOK OF MORMONISM (Terryl Givens & Philip L. Barlow eds., 2015); RICHARD LYMAN BUSHMAN, MORMONISM: A VERY SHORT INTRODUCTION (2008).

[3] DOCTRINE & COVENANTS OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 20:1 (2013) (hereinafter D&C). The Church of Jesus Christ of Latter-day Saints accepts three volumes of scripture in addition to the Bible: The *Book of Mormon*, the *Pearl of Great Price*, and the *Doctrine & Covenants*. The latter is a collection of "revelations" published by Joseph Smith and his successors. In the modern edition, each revelation is designated as a numbered "section" with verses. The revelations in the D&C can have very complicated textual histories as they were often revised by Smith and his successors over a period of several years. Unless otherwise noted, all references are to section and verse numbers in the 2013 edition published by the Church.

decade-long battle between the federal government and the Latter-day Saints over the nature of their legal personality. The final skirmishes in this legal war were not completed until the opening decade of the twentieth century. At the heart of these battles was a fundamental disagreement between the Latter-day Saints and the broader currents of American law over what it meant to be a church.

This article provides a history of the Church of Jesus Christ of Latter-day Saints as a legal entity.[4] In so doing, it makes two contributions to our understanding of legal history. First, it recasts the story of the first disestablishment, revealing that it was longer lasting and more contentious that has often been assumed.[5] The first disestablishment produced a body of law governing churches encoded with largely congregationalist, Protestant assumptions about church government and the role of religion in society. In this context, "congregationalist" is not a denominational term but rather refers to a broadly Reform ecclesiology centered on individual, lay-controlled congregations.[6] Unsurprisingly, these

[4] This is not the first article to take the approach of a case study of a church corporation as lens for examining disestablishment and its legacies. *See generally* Elizabeth Mensch, *Religion, Revival, and the Ruling Class: A Critical History of Trinity Church*, 36 BUFF. L. REV. 427 (1987).

[5] For discussion of the history of the first disestablishment, see MARK D. MCGARVIE, ONE NATION UNDER LAW: AMERICA'S EARLY NATIONAL STRUGGLES TO SEPARATE CHURCH AND STATE (2004); STEVEN GREEN, THE SECOND DISESTABLISHMENT: CHURCH AND STATE IN NINETEENTH-CENTURY AMERICA (2010); DISESTABLISHMENT AND RELIGIOUS DISSENT: CHURCH-STATE RELATIONS IN THE NEW AMERICAN STATES, 1776-1833 (Carl H. Esbeck & Jonathan J. Den Hartog eds., 2019); PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (rev. ed. 2004); Sarah Barringer Gordon, *The Landscape of Faith: Religious Property and Confiscation in the Early Republic*, *in* MAKING LEGAL HISTORY: ESSAYS IN HONOR OF WILLIAM E. NELSON 13–48 (Daniel J. Hulsebosch & R. B. Bernstein eds., 2013); Sarah Barringer Gordon, *The First Disestablishment: Limits on Church Power and Property Before the Civil War*, 162 U. PA. L. REV. 307 (2014); John D. Cushing, *Notes on Disestablishment in Massachusetts, 1780-1833*, 26 WM. & MARY Q. 170 (1969); Sarah Barringer Gordon, *The African Supplement: Religion, Race, and Corporate Law in Early National America*, 72 WM. & MARY Q. 385 (2015).

[6] "Reformed" refers to the Calvinist as opposed to the Lutheran and Anglican wings of the Protestant Reformation. In its various permutations, it was arguably the dominant theological tradition in the early Republic. As one historian has remarked, "A substantial part of the history of theology in early America was an extended debate, stretching over more than two centuries, about the meaning and truth of Calvinism." E. BROOKS HOLIFIELD, THEOLOGY IN AMERICA: CHRISTIAN THOUGHT FROM THE AGE OF THE PURITANS TO THE CIVIL WAR 10 (2003). Among other differences, the Reformed tradition tended to emphasize a congregational approach to ecclesiology at the expense of hierarchical authority. The most extreme version of this approach to church government emerged among New England Puritans:

assumptions created problems for the Latter-day Saints, who did not share the law's ecclesiological commitments. The history of the Church's corporate existence is thus a useful corrective to whiggish stories that emphasize religious freedom and fail to recognize how the first disestablishment created mechanisms for controlling and coercing churches that strayed too far from its basically Reformed assumptions. This history also illustrates the ways in which, far from being settled in the early 1830s, the legal structures of the first disestablishment continued to spawn hard-fought battles into the late nineteenth and even early twentieth centuries.

The Latter-day Saints were not the only religious group that struggled against nineteenth-century corporate law. The Roman Catholic hierarchy found American law uncongenial as well. Controversies involving Catholics, however, tended to center on questions of internal church governance with lay Catholics wielding American law against the bishops in battles over control of parish affairs, whereas the Latter-day Saints found restrictions on property and corporate purposes more irksome.[7] Finally, there were some Protestants who felt that American law did not go far enough in disestablishing religion because it continued to allow churches to incorporate at all.[8]

> The heart of the church theory was the church covenant. Regenerate men, the theory ran, acquire a liberty to observe God's commanding will, and when a company of them are met together and can satisfy each other that they are men of faith, they covenant together, and out of their compact create a church. Therefore each society is an autonomous unit, and no bishops and archbishops, no synods and assemblies, have any power, either from the Bible or from nature, to dictate to an independent and holy congregation.

PERRY MILLER, THE NEW ENGLAND MIND: THE SEVENTEENTH CENTURY 435 (1983). Many of the particulars of Puritan ecclesiology were controversial within the Reformed tradition, but their emphasis on lay control and hostility to ecclesiastical hierarchy was typical.

[7] *See generally* PATRICK J. DIGNAN, A HISTORY OF THE LEGAL INCORPORATION OF CATHOLIC CHURCH PROPERTY IN THE UNITED STATES (1784-1932) (1933) (recounting the legal controversies surrounding Catholic property and organizations in the United States during the 19th century); *See also* Gordon, *The First Disestablishment*, *supra* note 5 at 319–320 (recounting legal conflicts between lay Catholics and bishops over the control of parishes).

[8] *See, e.g.*, Carl H. Esbeck, *Disestablishment in Virginia*, in DISESTABLISHMENT AND RELIGIOUS DISSENT: CHURCH-STATE RELATIONS IN THE NEW AMERICAN STATES, 1776-1833 at 139-180 (Carl H. Esbeck & Jonathan J. Den Hartog eds., 2019) (discussing the disincorporation of churches in Virginia).

Second, this article contributes to our understanding of Mormon history by providing the first comprehensive history of the Church as a legal institution. This story reveals legal personality as one of the points of legal conflict between the Latter-day Saints and American society. This insight, in turn, is a useful corrective to narratives that emphasize polygamy and theocracy as the points of legal contention.[9] An understanding of the history of the Church as a legal entity, however, supplements these stories by revealing how the hard-fought legal battles of the late nineteenth century can be seen as an extension of the process of legal disestablishment that began during the American Revolution.

The Legacy of America's First Disestablishment

In 1774, nine of the thirteen colonies had established churches.[10] What precisely establishment meant as a legal matter varied from colony to colony. In all of these colonies, established churches benefited from tax revenues, grants of valuable land, or both. In some colonies, established churches had a monopoly on certain activities, such as poor relief or the performance of legally valid marriages.[11] The most commonly established denomination was Anglicanism, while in New England, Congregationalists dominated, although in theory the principle of local church governance meant that multiple establishments were possible. In early nineteenth-century Massachusetts, this structure of local options led to intense legal battles when Unitarianism divided old-line Congregationalist churches across New England.[12] All colonies regulated religion to a greater or lesser extent to support Protestant Christianity. Blasphemy laws restricted religious speech, preaching without a license

[9] *See* KLAUS J. HANSEN, QUEST FOR EMPIRE: THE POLITICAL KINGDOM OF GOD AND THE COUNCIL OF FIFTY IN MORMON HISTORY (1974) (arguing for the primacy of theocracy as a point of contention); 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 (same) (1988); SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA (2002) (arguing for the primacy of polygamy as a point of contention); ROBERT JOSEPH DWYER, THE GENTILE COMES TO UTAH: A STUDY OF RELIGIOUS AND SOCIAL CONFLICT, 1862-1890 (1941) (discussing social, political, and legal tensions between Latter-day Saints and non-Mormons in territorial Utah).

[10] *See* MCGARVIE, *supra* note 5 at 41.

[11] *See generally* Marcus Wilson Jernegan, *The Development of Poor Relief in Colonial Virginia*, 3 SOC. SERV. REV. 1 (1929).

[12] *See* LEONARD W. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 29–42 (1957) (discussing the legal controversy over Unitarianism).

was an offense in some jurisdictions, and voting and holding public office were often contingent on subscribing to some version of Christianity.[13]

States began disestablishing churches during the Revolution and continued this long process in a variety of ways until formally completing it in the 1830s. Prior to the passage of the Civil War amendments and their interpretation in the twentieth century, the Establishment Clause of the First Amendment to the U.S. Constitution, which provided that "Congress shall make no law respecting an establishment of religion,"[14] applied only to the federal government.[15] Disestablishment was thus a matter of state corporate law rather than federal constitutional law.[16] This was because incorporation had been, in large part, the mechanism for establishment. The corporation did not become the dominant form of private business organization in America until after the Civil War, and in the early republic corporations were thought of as public institutions whose primary role was to serve the common good. As one Virginia judge put it in the early nineteenth century, a legitimate corporation could not have a purpose that was "merely private or selfish, if it is detrimental to, or not promotive of the public good."[17] Incorporation also required a special act of the legislature. Thus, for a church to be incorporated marked it out as the recipient of special favor from the state in view of the church's presumed promotion of the public good.

Broadly speaking, states took two approaches to disestablishment. Some states simply disincorporated all churches, while others made the corporate form available to all churches.[18] Both approaches sought to diminish the social power of religious institutions by limiting the amount of property they could hold.[19] These so-called mortmain provisions assumed that churches were essentially congregational structures and needed no more than a meeting house, a parsonage, and a small glebe (an

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[13] *See generally* Sarah Barringer Gordon, *Blasphemy and the Law of Religious Liberty in Nineteenth-Century America*, 52 AM. Q. 682 (2000) (discussing blasphemy laws and restrictions on religious speech).
[14] U.S. Const. amend. I.
[15] *See* Everson v. Board of Education, 330 U.S. 1 (1947) (incorporating the Establishment Clause against the states under the 14th Amendment); *cf.* Permoli v. City of New Orleans, 44 U.S. 589 (1844) (holding that the first amendment did not apply to the states).
[16] *See generally* Gordon, *The First Disestablishment*, *supra* note 5.
[17] *Quoted in* MCGARVIE, *supra* note 5 at 131.
[18] *See id.* at 67–96. (recounting the story of disestablishment in New York); THOMAS E. BUCKLEY, CHURCH AND STATE IN REVOLUTIONARY VIRGINIA, 1776-1787 (1977) (discussing disestablishment in Virginia).
[19] *See* Gordon, *The First Disestablishment*, *supra* note 5 at 323.

income-producing parcel of land with which to pay the minister).[20] In addition, general incorporation statutes created mandatory governance structures for churches.[21] These rules followed broadly Reformed, congregational assumptions about church government. Each incorporated congregation was legally independent of any denominational or supra-congregational structure. Ultimate power was conferred on the laity rather than the clergy, who were to be treated as employees of the corporation and subject to the control of a lay board of trustees.[22] The result was a legal regime shaped by strong ecclesiological assumptions that were congenial to Calvinists and evangelical Protestants but more difficult for hierarchical bodies, such as the Roman Catholic and the Episcopal churches.[23] This preference was not accidental. In the early republic, both Catholicism, with its ties to Rome, and Anglicanism, with its ties to England, were seen as threats to republican government that should be either suppressed or sharply limited. Indeed, in 1779 the New York legislature went so far as to adopt a bill of attainder sentencing the royalist Anglican rector of Trinity Church in New York and his wife to death.[24]

Joseph Smith and the Search for Legal Personality

The Church of Jesus Christ of Latter-day Saints was thus born into a world in which the corporate personality of churches was both a chief site of legal conflict over disestablishment and the primary mechanism by which the state regulated religious communities. During the lifetime of Joseph Smith, the Church spanned four different American jurisdictions: New York, Ohio, Missouri, and Illinois. Each of these states took a somewhat different approach to disestablishment, and in all of them the nascent Mormon movement struggled to find a workable legal personality. There were two basic problems. First, Latter-day Saints gathered to specific locations to create godly communities, a process they referred to as "building Zion." Not only did these utopian ambitions generate at times deadly hostility from neighbors, Zion building deeply involved the Church in community-building projects far beyond the ken of the first disestablishment's legal regime. Second, the Church gradually developed an ecclesiology focused on hierarchical rather than lay control, and, in

[20] *See* Paul G. Kauper & Stephen C. Ellis, *Religious Corporations and the Law*, 71 MICHIGAN LAW REVIEW 1499 (1973).
[21] *See* Gordon, *The First Disestablishment*, *supra* note 5at 330–335.
[22] *See id.* at 334–335.
[23] *See* DIGNAN, *supra* note 7 at 46–66 (discussing the Catholic experience).
[24] *See* MCGARVIE, *supra* note 5 at 111.

Smith's lifetime, it had relatively ill-defined congregational structures, making it a poor fit with the law's vision of ecclesiastical structure and government.

New York

The New York statute of which Joseph Smith and his associates availed themselves in 1830 was the result of more than a century of conflict over the legal status of churches under New York law.[25] The colony of New Amsterdam, founded by the Dutch West India Company in 1625 consistently subordinated its nominal support for the Dutch Reformed Church to commercial expediency by adopting a tolerant stance toward religion. In 1664, the English acquired the colony in the Second Anglo-Dutch War and renamed it New York. In the late seventeenth and early eighteenth centuries, when royal officials sought to create an established Anglican church in the colony, their efforts met resistance from largely secular commercial interests and dissenting sects. Nevertheless, royal charters and provincial legislation granted benefits to the Church of England, including the incorporation of Trinity Church in New York City, the wealthiest and most important Anglican congregation in the colony. Whether or not Anglicanism was in fact the established church of the colony, however, was hotly contested until the Revolution.[26] The state's 1777 constitution provided that "the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed within this State to all mankind,"[27] and the state constitutional convention published a statement that the new constitution rejected "all such . . . statutes and acts . . . as may be construed to establish or maintain any particular denomination of Christians or their ministers."[28] In 1784, the legislature abrogated the provisions in previously granted corporate charters that had given

[25] *See id.* at 97–130.; Mensch, *supra* note 4.
[26] The so-called "Duke's Laws" promulgated immediately after the English takeover of New Amsterdam required local parishes to elect overseers who could then choose any ordained Protestant minister for the local church, who was paid from taxes collected by the local courts. This system was later codified in 1693 Ministry Act, which decreed that in each parish "there shall be called, inducted, and established, a good sufficient Protestant Ministry." *Quoted in id.* at 444. The dispute over whether there was a single established church in the colony centered on whether this law, which was silent on the question, required that the minister be Anglican.
[27] N.Y. CONST. of 1777, art. XXXVIII.
[28] *Quoted in* MCGARVIE, *supra* note 5 at 111.

churches taxing authority.[29] The New York legislature also took the radical step of allowing any religious society to incorporate without legislative action merely by electing trustees and filing a certificate containing their names and the name of the church with local officials.[30] This law was repeatedly amended in succeeding decades, but it provided the basic framework under which Smith organized his new church in 1830.

The traditional date and place for the incorporation of the Church of Christ, later renamed the Church of Jesus Christ of Latter-day Saints, is April 6, 1830, in Fayette, New York. Because no documents from 1830 attesting this event have survived, some writers have suggested that no such legal organization ever occurred.[31] A revelation purportedly given to Joseph Smith on April 6, 1830, declares that the Church was organized "agreeable to the laws of our country,"[32] but the original document has not survived, and the earliest extant copy of the revelation dates from March 1831.[33] It is possible that the certificate of incorporation was filed and

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[29] *See* Act of Mar. 17, 1784, ch. 9, 1784 N.Y. Laws 597, 598 (removing taxing power from the Reformed Protestant Dutch Church of the city of New York); Act of Apr. 17, 1784, ch. 33, 1784 N.Y. Laws 646, 646 (removing taxing power from Trinity Church).

[30] *See* Act of Apr. 6, 1784, ch. 18, 1784 N.Y. Laws 613 ("An Act to enable all religious denominations in this State to appoint trustees who shall be a body corporate, for the purpose for taking care of the temporalities of their respective congregations, and for other purposes therein mentioned").

[31] *See, e.g.*, David Keith Stott, *Organizing the Church as a Religious Association in 1830*, *in* SUSTAINING THE LAW: JOSEPH SMITH'S LEGAL ENCOUNTERS 113 (Gordon A. Madsen, Jeffrey N. Walker, & John W Welch eds., 2014); H. Michael Marquardt, *An Appraisal of Manchester as Location for the Organization of the Church*, SUNSTONE, 1992, at 49. Despite extensive searches by multiple researchers, no certificate filed with the county clerk to organize as a religious corporation, as required by the 1813 New York law, has ever been located in New York for Joseph Smith's Church of Christ. *See* LARRY C. PORTER, A STUDY OF THE ORIGINS OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS IN THE STATES OF NEW YORK AND PENNSYLVANIA 155–160 (reprint edition ed. 2000) (recounting an exhaustive archival search for the document). According to Marquardt, no legal organization was attempted in New York and the alleged incorporation was a later invention designed to fool creditors in Ohio. However, Marquardt, who is not a lawyer, fails to explain how an earlier Church incorporation would have frustrated collection efforts against the Church or Church officers in Ohio. Nor does his article point to any legal proceedings in Ohio in which the New York incorporation was invoked to shield Latter-day Saint debtors, although there were numerous collection actions brought against Joseph Smith in the wake of the failure of the Kirtland Safety Society.

[32] D&C 20:1.

[33] JSP, MRB:3–391 (reproducing the earliest extant version of what became D&C 20). The Joseph Smith Papers Project is in the process of publishing a scholarly edition of all of Joseph Smith's known papers. The volumes are divided into various series – Documents, Journals, Administrative Records, Revelations and Translations, Histories,

subsequently lost or destroyed. It is also possible that Smith sought to incorporate his church but, through ignorance or oversight, never filed the required paperwork. Nevertheless, there is evidence that at least an attempt at incorporation was made in New York. Later records insist that there were six original "members" of the Church, although more than six people had been baptized into the movement.[34] The number makes sense, however, if it refers not to baptized members but to the trustees required by New York law.[35] It is entirely possible that Smith and his associates failed to comply with New York law, but the best evidence suggests that they were attempting to do so.[36] David Whitmer, who was present, insisted that, "On the 6th of April, 1830, the church was called together and the elders acknowledged according to the laws of New York."[37]

Legal Records, and Financial Records. Following the convention in Mormon Studies, I cite to documents with JSP followed by the series acronym, the volume number, and the page number.

[34] *See* JSP, H1:197 ("<We> made known also to the <those> members who had already been baptized, that we had received commandment to organize the Church: and according to accordingly <we> met to together, <(being about 30 <six> in number) besides a number who were beleiving —met with us> on Tuesday the Sixth day of Aprile in the year of our A.D. A thousand & One thousand, Eight hundred and thirty").

[35] *See* Act of Apr. 5, 1813, ch. 60, sec. III, 1813 N.Y. LAWS 212, 214 (stating that any church or religious society may "elect any number of discreet persons of their church, congregation or society, not less than three, nor exceeding nine in number, as trustees"). Notice that the number chosen by Smith, six, exactly splits the statutory range of 3 and 9.

[36] David Keith Stott suggests that rather than trying to incorporate Smith and his associates were deliberately creating an unincorporated association. However, it is anachronistic to imagine that an unincorporated association was a particular legal status that would have been aimed at in the April 6, 1830 meeting. Unincorporated association was simply the default legal treatment for any religious group. Thus the nascent Mormon movement was already an unincorporated association prior to April 6, 1830. Stott reads subsequent references to being organized under New York law as referring to the deliberate invoking of unincorporated association as a distinct legal status, but all of the sources he cites that discuss unincorporated association in this way are from the second half of the 19th century when ideas of corporate law were far more developed. The concept was not used this way in New York in the 1820s and 1830s.

[37] David Whitmer, *Mormonism*, KANSAS CITY JOURNAL, June 5, 1881, at 1. It is worth noting that Whitmer was hostile to the retroactive alteration of earlier sources. A close early supporter of Joseph Smith, he objected to the increasing institutionalization of the Mormon movement and later broke with Joseph Smith in part over this issue. He was also scathing in his criticisms of retroactive editing of Smith's revelations. Nevertheless, in later reminiscences he insisted that a legal incorporation occurred on April 6, 1830. He was also the scribe who recorded the earliest extant copy of D&C 20, containing the "agreeable to the laws of our country" language. *See* JSP, MRB:3–391.

In 1830, incorporation conferred three concrete legal benefits on New York churches. The first was legal personality, which simplified the process of obtaining property and incurring debts. The second was the clear segregation of the church's assets from those of its members and officers. The third was perpetual succession, which avoided conflicts with heirs and creditors upon the death of a trustee.[38] In 1830, however, Joseph Smith's nascent Church held no property. Its only real economic activity was the effort to publish the Book of Mormon by means of a formal business partnership between Smith and his associate Martin Harris.[39] The New York organization of the Church thus presents a puzzle. What were the movement's problems for which incorporation would have been a solution? Why did the Church seek a legal existence rather than simply operate as an unincorporated religious society? Indeed, prior to April 6, 1830, this is precisely what Smith and his followers had been doing. In Smith's revelations speak of a "church" as early as March 1829,[40] he began performing baptisms by May 1829, and in June his associate Oliver Cowdrey drew up "Articles of the Church of Christ"[41] to provide a governing structure. As David Whitmer later wrote, "we were as fully *organized*—spiritually—before April 6th as we were on that day."[42] Why, then, incorporate?

The most likely reason is that the attempted incorporation was expressive. Gaining legal status was less a matter of solving concrete problems than using the law to define the new Church in the minds of both believers and outsiders. Smith's first revelations about a church spoke of

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[38] In addition, ordinary trusts could run afoul of the rule against perpetuities, which could make it impossible for a trust to survive for the benefit of later church members. This problem, however, could be circumvented through a so-called charitable trust, which lacks specific beneficiaries.

[39] Under the terms of the agreement, Harris mortgaged his farm to finance the publication of the Book of Mormon and was then entitled to sell the Book of Mormon, to which Joseph Smith held the copyright, until the debt was repaid. Ultimately, Harris lost his farm, although he insisted that he eventually recouped his money through later sales of the Book of Mormon. *See* "Agreement with Martin Harris, 16 January 1830," JSP, D1:104–108.

[40] *See* D&C 5:14. *See also* TERRYL L. GIVENS, WRESTLING THE ANGEL: THE FOUNDATIONS OF MORMON THOUGHT: COSMOS, GOD, HUMANITY 34–37 (2014) (discussing the use of the term "church" within the Mormon movement prior to the formal organization on April 6, 1830); D. MICHAEL QUINN, THE MORMON HIERARCHY: ORIGINS OF POWER 5 (1994) (same).

[41] JSP, D1:368–377. *See* Scott H. Faulring, *An Examination of the 1829 "Articles of the Church of Christ" in Relation to Section 20 of the Doctrine and Covenants*, BYU STUD., no. 4, 2004, at 57.

[42] DAVID WHITMER, AN ADDRESS TO ALL BELIEVERS IN CHRIST 33 (1887).

an entity that already existed, and they suggested the universal Christian church rather than a particular denomination or institution.[43] These earliest revelations, however, predated the 1830 publication of the Book of Mormon, which contains a more concrete vision of an institutionalized church. Indeed, Oliver Cowdery's 1829 articles quote extensively from the Book of Mormon and take it as an ecclesiological model. Thus, between 1828 and 1830, what had begun as a diffuse, prophetic movement centered on Smith increasingly defined itself as an institutionalized church. The act of incorporation in 1830 would have signaled to believers this shift. This is how David Whitmer, who came to regard the institutionalization of the Church as a spiritual disaster, saw the April 6, 1830, organization.[44]

Incorporation also lent respectability to the movement. Mormonism had begun life as a legally disfavored variety of religion. Smith, his family, and his closest earliest associates were all deeply involved in so-called "folk magic."[45] While Smith later tried to distance himself from these practices, in reality they were integral to a spiritual life that included his visions and the translation of the Book of Mormon. His use of a "seer stone" in 1826 to find lost treasure had resulted in being charged as a "disorderly person," although he seems to have been found not guilty.[46] The 1788 New York law under which he was prosecuted was based on the English Witchcraft Act of 1735 and applied to "all persons

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[43] *See* GIVENS, *supra* note 40 at 34–37; TERRYL L. GIVENS, FEEDING THE FLOCK: THE FOUNDATIONS OF MORMON THOUGHT: CHURCH AND PRAXIS 22–23 (2017) (discussing the development of the idea of a church and its link to Joseph Smith's evolving covenant theology).

[44] *See* WHITMER, *supra* note 42 at 33.

[45] The seminal scholarly studies are D. MICHAEL QUINN, EARLY MORMONISM AND THE MAGIC WORLD VIEW (revised 2nd ed. ed. 1998); BUSHMAN, *supra* note 2. While I use the term "folk magic" in the text, the term is deeply problematic as it lacks any clear meaning and has generally been used as a derogatory term for disfavored spiritual practices. *See generally* RANDALL STYERS, MAKING MAGIC: RELIGION, MAGIC, AND SCIENCE IN THE MODERN WORLD (2004). I choose to use the term because in the context of Joseph Smith's use of legal formalities, it is precisely the elite disdain and hostility conveyed by the term "magic" that is important. Other writers on Mormon history, however, have used alternative terms such as "cunning-folk traditions." *See* JONATHAN STAPLEY, THE POWER OF GODLINESS: MORMON LITURGY AND COSMOLOGY 105 (2018); *See also* SAMUEL MORRIS BROWN, JOSEPH SMITH'S TRANSLATION: THE WORDS AND WORLDS OF EARLY MORMONISM 25 (2020) (discussing the terminological difficulties with "magic" in the Mormon context).

[46] *See* Gordon A. Madsen, *Joseph Smith's 1826 Trial: The Legal Setting*, BYU STUD., no. 2, 1990 at 91; Marvin S. Hill, *Joseph Smith and the 1826 Trial: New Evidence and New Difficulties*, BYU STUD., no. 2, 1972, at 223.

pretending to have skill in . . . crafty science . . . to discover where lost goods may be found."[47] While such folk magic drew the scorn of elites as well as possible legal censure, for many believers it marked the return of spiritual gifts and revelation.[48] Nevertheless, Smith was in search of religious respectability. Incorporation had been a mark of religious establishment in New York before the Revolution, and when the New York legislature threw open the doors of establishment to all religious societies in 1784, incorporation offered Smith's nascent movement legal respectability.

Finally, the Church of Christ was contemplating the legal benefits conferred by the State of New York. Under New York law, property could be held in trust without a corporation, and marriages could be performed by "ministers of the gospel and priests of every denomination."[49] But since it was not precisely clear what was necessary to be recognized as a minister of the gospel, formal incorporation would provide evidence for that recognition. Nor were the benefits of being a recognized minister entirely hypothetical. On July 7, 1830, the *Palmyra Reflector* reported:

> A disciple of the "Gold Bible," lately called on an assessor and demanded an exemption from taxation, to the amount of $1500—alleging that he was a Minister of the Gospel, at the same time producing a certificate, signed by Jo. Smith,

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[47] *See* LAWS OF NEW YORK Ch. XXXI (1813). *Compare* The Witchcraft Act, 9 Geo. 2 c. 5, §IV ("[I]f any Person shall…use any kind of Witchcraft, Sorcery, Inchantment, or Conjuration, or undertake to tell Fortunes, or pretend, from his or her Skill or Knowledge in any occult or crafty Science, to discover where or in what manner any Goods or Chattels, supposed to have been stolen or lost, may be found, every Person, so offending, being thereof lawfully convicted on Indictment or Information in that part of *Great Britain* called *England*, or on Indictment or Libel in that part of *Great Britain* called *Scotland*, shall, for every such Offence, suffer Imprisonment by the Space of one whole Year without Bail or Mainprize"). *See also* Christine A. Corcos, *The Scrying Game: The First Amendment, the Rise of Spiritualism, and the state Prohibition and Regulation of the Crafty Sciences, 1848-1944*, 38 WHITTIER L. REV. 59, 72-76 (2017) (discussing the regulation of "crafty sciences" in the early Republic); L. Arthur Wilder, *Legal Status of Seers and Necromancers*, 21 CASE & COMMENT 445 (1915) (discussing the legal regulation of folk magic in the United States).

[48] Indeed, David Whitmer became increasingly disillusioned with Joseph Smith's revelations in part because he ceased to use his seer stone and simply spoke the revelations as a "mouthpiece." *See* WHITMER, *supra* note 42 at 36.

[49] N.Y. DOM. REL. LAW § 8(1) (1829) (amended 1888).

> and Oliver Cowdry, by way of proof—the course to be taken in this matter has not as yet transpired.[50]

New York exempted the property of "every minister of the gospel, or priest, of any denomination" from taxation up to the value of fifteen-hundred dollars.[51] Again, while the statute is silent on incorporation, legal formality would have strengthened the claim to be a minister or priest.[52]

Prior to the Revolution, incorporation was the chief legal vehicle of religious establishment. Rather than dispense with incorporation, New York disestablished its church by making the mechanism of establishment available to all. In effect, all religions could obtain the special recognition that had previously been available only to favored denominations. For a widely disparaged and struggling religious group such as the followers of Joseph Smith, disestablishment thus provided a legal mechanism for claiming respectability. Because in 1830 Smith's movement had yet to articulate a hierarchical ecclesiastical structure or any wide-ranging social ambitions, the price of respectability in terms of legal restrictions was not yet apparent. The narrow field of operations that the law created for legally incorporated churches, however, would become apparent as the Church moved west and pursued increasingly grandiose ecclesiastical projects.

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[50] PALMYRA REFLECTOR, July 7, 1830 *reprinted in* 2 EARLY MORMON DOCUMENTS 237 (Dan Vogel, ed. 1998).

[51] N.Y. TAX LAW § 4(8) (1829) (amended 1884).

[52] Tellingly, on June 9, 1830, Joseph Smith and Oliver Cowdry issued written licenses "signifying & proveing that [the holder] is a Priest of this Church of Christ established & regularly Organized in these last days AD 1830 on the 6th. day of April." JSP, D1:146–148. *See generally* Donald Q. Cannon, *Licensing in the Early Church*, BYU STUD., no.1, 1982, at 96. These seem to be the documents referred to by the *Palmyra Reflector*. Three licenses from the June 1830 conference survive. They belong to Joseph Smith, Sr., John Whitmer, and Christian Whitmer. Each references a different office. John Whitmer is an "an Apostle of Jesus Christ, an Elder of this Church of Christ;" Christian Whitmer is "a Teacher;" and, Joseph Smith Sr. is a "priest." It is possible that the designation of a "priest" was done in part so that licenses would use the title contained in the New York tax statute. Other licenses issued at the June 1830 conference do not survive, but surviving documents suggest that a license as a "priest" was issued to Hyrum Smith, Joseph Smith's brother, who at the time had been assessed for taxes on a shop that he was renting. It is possible that he was the person who applied for tax exemption. Mark Staker, Historical Department, The Church of Jesus Christ of Latter-day Saints, to Nathan B. Oman, William & Mary Law School, E-mail Correspondence, August 28, 2019 (copy in the author's possession). Unfortunately, other than the notice in the *Palmyra Reflector*, not other documents regarding this petition seem to have survived.

Ohio

Early in 1831, Smith relocated the headquarters of the Church to Kirtland, Ohio, where missionaries had baptized a large number of converts the previous year. In Ohio, the Church's legal affairs became far more complicated than in New York. The governing structures and activities of the Latter-day Saints conformed with Reformed models in some ways but, more importantly, began to depart from them. This divergence resulted in a series of unstable legal entities, none of which used the corporate model that Smith and his associates had used in New York.

For the first time, the Church in Ohio engaged in the prototypical legal transaction for a church: the purchase of real property and the construction of a meetinghouse, namely, the Kirtland Temple. The Latter-day Saints acquired the property on which the Temple was to be built through a confused series of transactions,[53] which included the execution of a deed in May 1834 by John and Elsey Johnson, a Latter-day Saints couple, conveying the temple site to Joseph Smith as "President of the Church of Christ."[54] In 1819, Ohio had passed a general incorporation statute for churches modeled on New York's law.[55] There is no evidence that the Church sought to avail itself of this law. In 1824, however, Ohio passed a second law providing that any property deeded to "any person as trustee or trustee in trust for any religious society"[56] should be held in perpetual succession by the religious society and that the trustee "shall have the same power to defend and prosecute suits . . . and do all other acts . . . as individuals may do in relation to their individual property."[57] In effect, this law meant that property held in trust for an otherwise unincorporated religious society would be treated as though it were held by a corporation. In 1834, the Ohio Supreme Court treated the conveyance of property under this law to a Baptist congregation in Dayton as creating a corporation.[58] Although the meaning of the deed to Smith was never

[53] *See generally* Kim L. Loving, *Ownership of the Kirtland Temple: Legends, Lies, and Misunderstandings*, J. MORMON HIST., no. 2, 2004, at 1.
[54] *Id.* at 5.
[55] Act of Feb. 5, 1819, ch. 54, 1818 Ohio Laws 120 ("An act for the incorporation of religious societies").
[56] Act of Jan. 3, 1825, §1, 1824 Ohio Laws 9, 9 ("securing to religious societies a perpetuity of title to lands and tenements, conveyed in trust for meeting houses, burying grounds of residence for preachers").
[57] *Id.* § 2.
[58] *See* Keyser v. Stansifer, 6 Ohio 363 (1834).

ultimately decided in court,[59] in all likelihood the deed inadvertently created a corporation under Ohio law at the time.[60]

Kirtland also saw the divergence of Smith's religious vision from that encoded within the law of religious corporations. Smith had begun to proclaim that the children of God would be gathered and that Zion was to be built in Jackson County, Missouri. The Church's conception of its own mission thus expanded beyond congregational structures devoted to maintaining houses of worship.[61] Rather, the Church became involved in defining a new people and creating economically viable communities in which to build the city of God. Thus, the most important manifestations of the Church's legal personality in Ohio were a business partnership and a bank rather than a religious corporation.

The business partnership was called the United Firm.[62] In New York, Smith had already revealed a preference for pursuing religious missions outside of religious corporate law, when he formed a business partnership with Martin Harris to publish the Book of Mormon. Smith massively expanded this model in Ohio, forming a partnership with the leaders of the nascent Church that encompassed three "firms." The first of

[59] Years after Smith's death, the Reorganized Church of Jesus Christ of Latter-day Saints, now known as the Community of Christ, unsuccessfully brought suit to quiet title to the temple in an effort to establish itself as the legitimate successor to Smith's church. In the end, the court, after adopting a proposed finding of fact by the Reorganized Church's counsel as *obitur dicta*, denied relief on the grounds that the plaintiff was not in possession of the property. Eventually, the Reorganized Church quieted title by adverse possession. For many years, the leaders of the Reorganized Church claimed that the court in the Kirtland Temple Suit had declared the Reorganized Church of Jesus Christ of Latter-day Saints to be the legitimate successor to the Church of Jesus Christ of Latter-day Saints founded by Joseph Smith, Jr., although ultimately the Ohio court made no such holding. The litigation is recounted in detail in Loving, *supra* note 53. While the Church of Jesus Christ of Latter-day Saints did not participate in the litigation over the Kirtland Temple, members of the Church eventually became aware of the Reorganized Church's legal claims and produced their own rebuttal. *See* PAUL E. REIMANN, THE REORGANIZED CHURCH AND THE CIVIL COURTS (1961).

[60] The 1824 statute was not raised in the litigation by the Reorganized Church. Its applicability to the Church was first suggested by Jesse St. Cyr, "A Brief Corporate History of The Church of Jesus Christ of Latter-Day Saints, 1829-1901" (Paper Delivered at the Mormon History Association, May 24, 2008).

[61] On the Latter-day Saints efforts to create ideal communities, what they called Zion, see generally LEONARD J. ARRINGTON, FERAMORZ Y. FOX & DEAN L. MAY, BUILDING THE CITY OF GOD: COMMUNITY AND COOPERATION AMONG THE MORMONS (2nd ed. 1992).

[62] The most extensive treatment of the United Firm can be found in Max H. Parkin, *Joseph Smith and the United Firm: The Growth and Decline of the Church's First Master Plan of Business and Finance, Ohio and Missouri, 1832-1834*, BYU STUD., no. 3, 2007, at 5.

these was centered on the Newel K. Whitney store in Kirtland and focused on the economic development of the town for the benefit of the Latter-day Saints. The second firm was located in Jackson County, Missouri, and served similar purposes. Finally, the "literary firm" was devoted to the publication of Church newspapers and a collection of Smith's revelations. At the time, neither Ohio nor Missouri law allowed for general incorporation of business enterprises, so as a legal matter these firms were part of a single general partnership. The partners drew up a bond or contract to govern the business.[63] By 1834, however, in large part because of the violent expulsion of the Saints from Jackson County, the United Firm had failed as a business entity. It was dissolved, internal debts among the partners were cancelled, and the remaining property was distributed to its members.[64]

In Kirtland, the Church also sought to organize a bank, the Kirtland Safety Society,[65] to assist with gathering the Latter-day Saints by providing credit and liquidity and assisting in financing construction of the Kirtland Temple. Ohio law required that banks receive a charter of incorporation from the state legislature to issue notes, and initially Smith and his associates took this route. They drew up a constitution for their

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[63] *See id.* at 13–14. Unfortunately, this document does not seem to have survived.

[64] This business partnership found its way into Latter-day Saints scripture in a way that would have lasting effects on the movement. During his time in Kirtland, Smith received a number of revelations relating to the affairs of the United Firm. *See* D&C 78, D&C 82, D&C 92, D&C 104. *See* MARK LYMAN STAKER, HEARKEN, O YE PEOPLE: THE HISTORICAL SETTING OF JOSEPH SMITH'S OHIO REVELATIONS 230–237 (2010) (discussing the context for some of these revelations). When these revelations were subsequently published, however, they were edited. The term "United Firm" was replaced with the term "united order," and references to the Firm's "mercantile and publishing establishments" were changed to "the affairs of the storehouse of the poor." *See* Parkin, *supra* note 62 at 37–53. Thus, what began as a series of revelations about a business partnership became a set of texts about a more cosmic and utopian scheme. Drawing on these texts a generation later, Brigham Young would use the term "united orders" for Latter-day Saints cooperatives aimed at establishing the autarky of the Great Basin Zion against the integrating force of American capitalism after the Civil War. *See* LEONARD ARRINGTON, GREAT BASIN KINGDOM: AN ECONOMIC HISTORY OF THE LATTER-DAY SAINTS, 1830-1900 at 323–352 (1958) (recounting Brigham Young's efforts to create the "United Order of Enoch" in Utah territory). From there, the term "united order" has passed into Mormon thought and language as a shorthand reference to an ideal community marked by righteousness, economic egalitarianism, and cooperation for the common good. What began as a religiously directed business firm became central to Mormonism's utopian imagination.

[65] *See generally* STAKER, *supra* note 64 at 391–548; Marvin S. Hill, C. Keith Rooker & Larry T. Wimmer, *The Kirtland Economy Revisited: A Market Critique of Sectarian Economics*, BYU STUD., no. 4, 1977, at 391.

bank and petitioned the legislature for a charter.[66] When this effort proved unsuccessful, Latter-day Saints leaders organized the Kirtland Safety Society as a joint-stock company, drawing up a new set of "articles of agreement."[67] This unincorporated entity functioned much like a partnership, with unlimited liability for the stockholders and no separate legal personality for the bank.[68] While it initially sold stock and issued notes backed by the resulting capital and loans, the Safety Society rapidly ran into trouble. In part, the bank was built on the expectation of increasing land prices, an expectation disappointed by the Panic of 1837, when land prices became depressed. More importantly, however, there was a serious question under Ohio law about the legal enforceability of the notes that the Society had issued as a joint-stock company.[69] As a result, the notes rapidly traded at a steep discount, which made it difficult for the Society to build up its asset book by issuing loans. In the wake of the bank's failure, Joseph Smith and his associates were swamped in lawsuits.[70]

The Mormon experience in Ohio is striking in that the Latter-day Saints abandoned the legal regime that they had previously used in New

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[66] *See* JSP, D5:299–306.

[67] *See* JSP, D5:324–331. This was also when the "Kirtland Safety Society" was renamed the "Kirtland Safety Society Anti-Banking Company."

[68] *See* Jeffrey N. Walker, *The Kirtland Safety Society and the Fraud of Grandison Newell: A Legal Examination*, BYU STUD. Q., no. 3, 2015, at 32, 44–49. The Latter-day Saints also acquired a controlling interest in the Bank of Monroe, which was incorporated under Michigan law. They then set up the Kirtland Safety Society as a branch of the Michigan bank. Ohio law allowed "foreign" banks to operate branches in the state. This effort to circumvent Ohio's antibanking laws, however, proved ineffective when the Bank of Monroe was forced to close in the Panic of 1837. *See id.* at 50–57.

[69] In 1816, Ohio passed "An act to prohibit the issuing and circulating of unauthorized bank paper." Act of Jan. 27, 1816, ch. 4, 1815 Ohio Laws 10. Section 9 of the law provided that "all bonds, bills, notes, or contracts" of unincorporated banks "are hereby declared null and void." *Id.* at § 9. However, sections 11 and section 12 of the act went on to declare that "every stockholder" and "the persons who were interested in such bank" were "jointly and severally answerable, in their individual capacity, for the whole amount of the bonds, bills notes, and contracts of such bank." *See id.* at §§ 11-12. The contradiction between these two sections left the enforceability of the Kirtland Safety Society notes in doubt. The uncertainty was further exacerbated by the fact that the validity of the 1816 law was itself open to doubt. In 1824, the Ohio legislature passed a further law that declared, "no action shall be brought upon any notes, or bills hereafter issued by any bank…unless such bank…. Shall be incorporated and authorized by the laws of this state to issue such bills and notes." *See* Act of Jan. 28, 1824, §23, 1823 Ohio Laws 358, 365-66; *See also* Hill et. al., *supra* note 65 at 437–441 (discussing the effect of legal uncertainty on the value of Kirtland Safety Society paper).

[70] *See* Walker, *supra* note 68 at 60–98 (recounting the litigation against Smith and his closest counselor Sidney Rigdon).

York. Ohio law closely tracked New York law, and Smith could have sought incorporation in Kirtland. Church corporations, however, simply could not engage in the kind of economic development that, because of Latter-day Saints efforts to "build Zion," became central to Mormon religion in this period. Thus, rather than using the legal regime created by the first disestablishment, the Latter-day Saints tried to use and sanctify the legal mechanisms of commerce: the business partnership, the banking corporation, and the joint stock company.

Missouri and Illinois

In Missouri, the Church had no legal personality for the simple reason that the Missouri Constitution explicitly provided that "no religious corporation can ever be established in this state."[71] As we have seen, in New York, disestablishment after the Revolution took the path of opening the corporate form to all comers. In Virginia, however, disestablishment had taken a different route, one that became the model for Missouri. In 1786, the Virginia Statute for religious freedom, authored by Thomas Jefferson, abolished tax support for churches.[72] The following decade, the Virginia legislature repealed laws that had established or incorporated religious sects, "all of which is inconsistent with the principles of the constitution, and of religious freedom, and manifestly tends to the re-establishment of a national church."[73] Accordingly, disestablishment in Virginia meant that churches had to be organized as a trust and lacked any distinct legal personality, with all church property held by trustees. This, was the model for Missouri law. It would be an oversimplification to call this a "southern" model of disestablishment, as some southern states did allow churches to incorporate.[74] This different approach, however, does mark the difference in legal culture between New York, where the Church emerged, and Missouri. The goal of Missouri law, following Virginia, was to keep churches even more institutionally weak than they were in New York—more disestablished, as it were. Coupled with the experience in Ohio, this meant that for most of Joseph Smith's career after 1831, there was no effort to create a legal entity for the Church as such. Legally, the temporal affairs of the Church were managed either by leaders acting

[71] MO. CONST. of 1820, art. XIII, §5.
[72] *See generally* THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM: ITS EVOLUTION AND CONSEQUENCES IN AMERICAN HISTORY (Merrill D. Peterson & Robert C. Vaughan eds., 1988).
[73] Act of Jan. 24, 1799, ch. 9, 1798 Va. Laws 8.
[74] *See, e.g.*, MCGARVIE, *supra* note 5 at 131–151 (discussing general incorporation statutes for churches in South Carolina).

individually or through business partnerships. That changed when the Latter-day Saints founded their city of Nauvoo in Illinois.

The Latter-day Saints arrived in Illinois in 1839 as refugees from Missouri.[75] Eventually they settled on the tiny village of Commerce, Illinois, as their gathering place. Renamed Nauvoo, it would be the headquarters of the Church until the Saints abandoned the city in 1846. During the final stages of their Missouri sojourn, the Latter-day Saints sought to acquire title to land by settling on public land and making improvements. Technically they were squatters, but following a well-established American pattern, they expected the federal government to pass a preemption statute that would allow them to purchase the public land at favorable prices because of their improvements. Indeed, one of the factors motivating those who ultimately drove the Saints from northern Missouri was a desire to take possession of improved Latter-day Saints land and thereby acquire the favorable preemption rights, something that the leaders of the mob that drove out the Mormons were ultimately able to do.[76] In contrast, the Mormons acquired their real property in Illinois by purchase. They bought large tracts of land on and near Nauvoo on credit, mainly from land speculators.[77] These large lots of land were then to be subdivided into small parcels and sold to the gathering Saints so that the original debt could be repaid.

The purchases were made through agents acting on behalf of the Church.[78] The Church, however, lacked any legal existence under Illinois law, and eventually much of this property was titled in the name of Joseph Smith, who found himself exposed to massive liability on the debt used to purchase the land. Beginning in 1840, the leaders of the Church made efforts to create a more formal legal existence for the Church. The state legislature that year considered a slew of bills related to the Latter-day Saints, including passage of the Nauvoo charter incorporating the Mormon

[75] There are several excellent histories of the Latter-day Saint experience in Nauvoo. *See* BENJAMIN E. PARK, KINGDOM OF NAUVOO: THE RISE AND FALL OF A RELIGIOUS EMPIRE ON THE AMERICAN FRONTIER (2020); GLEN M. LEONARD, NAUVOO: PLACE OF PEACE PEOPLE OF PROMISE (2002); ROBERT BRUCE FLANDERS, NAUVOO: KINGDOM ON THE MISSISSIPPI (1975).

[76] This story is recounted in detail in Jeffrey N. Walker, *Losing Land Claims and the Missouri Conflict of 1838*, *in* SUSTAINING THE LAW: JOSEPH SMITH'S LEGAL ENCOUNTERS 247 (Gordon A. Madsen, Jeffrey N. Walker, & John W Welch eds., 2014).

[77] *See* LEONARD, *supra* note 75 at 47–61.

[78] *See* JSP, D7: 534-538; *see* LEONARD, *supra* note 75 at 58–59.

city rising on the banks of the Mississippi.[79] On December 14, state senator Sidney Little, who represented Hancock County, where Nauvoo was located, introduced a "Bill to Incorporate the Church of Jesus Christ of Latter-Day Saints."[80] The bill listed the names of Smith and a number of other Church leaders and declared that they and "members of the Church of Jesus Christ of Latter Day Saints, commonly called Mormons, are hereby created, constituted, and declared to be a body corporate and politic."[81] The law would have made the First Presidency, the senior governing council of the Church, "in conjunction with the General Assembly of said church, or the general Conference of said church . . . the law-making department of such corporation for all secular purposes."[82] The First Presidency was to comprise "trustees in trust for the church, for the acquisition, regulation, and disposal of" Church property. The corporation was given "full power and authority to do all such acts as they may consider necessary for the welfare and prosperity of said church," with the proviso that "no act shall be done repugnant to, or inconsistent with, the Constitution of the United States, or the constitution and laws of this state."[83]

The bill was never passed, and the absence of any documents discussing the proposal make it difficult to interpret its significance.[84] In 1835, Illinois had passed a general incorporation statute for churches, and some historians have speculated that the incorporation bill was dropped when this earlier statute was brought to the sponsors' attention.[85] This explanation, however, overlooks the importance of the distinctions between the 1840 bill and the kind of corporation permitted by the 1835 law. Under the 1835 law, religious corporations could own no more than five acres, and the property had to be used "for the purposes of religious worship."[86] In contrast, the proposed incorporation of the Church would

[79] *See* JSP, D7: 472-488; James L. Kimball Jr., "Protecting Nauvoo by Illinois Charter in 1840," in SUSTAINING THE LAW: JOSEPH SMITH'S LEGAL ENCOUNTERS 297 (Gordon A. Madsen, Jeffrey N. Walker, and John W Welch, eds., 2014).
[80] *See* JSP, D7: 450-455.
[81] *Id.* at 454.
[82] *Id*.
[83] *Id*.
[84] Procedurally, the state Senate approved an amendment that completely deleted the content of the bill, replacing it with a proposal that the governor appoint a notary public for Nauvoo. This amended bill was then passed. *See id.* at 452.
[85] This is the explanation offered by the Joseph Smith Papers Project, which first published the bill. *See id.* at 453-454.
[86] Act of Feb. 6, 1835, 1834 Ill. Laws 147, 147 ("An Act concerning Religious Societies"). Earlier scholars have suggested that during his life-time Joseph Smith and

have allowed it to hold unlimited amounts of property for any purpose not otherwise prohibited by law. It is worth noting that under Illinois law, the uses to which religious corporations could put their property were sufficiently restricted that a few years later, in 1845, the legislature felt it necessary to explicitly authorize religious societies to lease their property if they found "it more convenient to occupy for worship some other lot or building."[87] It is possible, of course, that the very broad powers that would have been granted to the Church by the proposed incorporation were accidental, arising from the legal ignorance of those who drafted the bill.[88] However, it is striking that at the time, Smith and the Church were involved in what amounted to a massive real estate development of Nauvoo. Such a project would have been clearly beyond the legal power of a corporation created under the 1835 act, but the proposed law would have provided the Church with precisely the legal powers it needed.

The proposed incorporation also raises another intriguing possibility. Prior to the passage of the 1835 act, the Illinois legislature had not granted a special act of incorporation to any church. In New York, however, such special acts were not unknown, even after the passage of the first general incorporation statute for churches in 1784. Thus, in 1830, when Smith first attempted to legally incorporate his movement, there continued to be a de facto legal hierarchy among New York's churches. Most religious corporations, for example, were limited to holding three thousand dollars' worth of property;[89] however, a number of powerful

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his associates were unaware on the restrictions on the ability of church corporations to own more than 5 acres (later increased to 10 acres) under Illinois law. *See* Dallin H. Oaks & Joseph I. Bentley, *Joseph Smith and Legal Process: In the Wake of the Steamboat Nauvoo*, 1976 BYU L. REV. 735, 776 (1976) ("There is no evidence that Joseph Smith or other Church leaders were ever aware of this 10-acre limitation on Church ownership of land."). However, Oaks and Bentley wrote prior to the discovery of the proposed incorporation by special statute. If one assumes that this statute was deliberately drafted, then it suggests that as early as 1840, Joseph Smith and his associates were likely aware of the mortmain provision in the Illinois general incorporation statute.

[87] Act of Feb. 28, 1845, 1844 Ill. Laws 272, 272. That act had to be further amended in 1847 to allow churches to sell certain real property. *See* Act of Feb. 26, 1847, 1846 Ill. Laws 25, 25. While not directly applicable to all property that a church might own, these laws illustrate the assumption that the power of religious corporations to use or dispose of real property was limited.

[88] This seems to be the position of the Joseph Smith Papers Project, which does not discuss the exceptional nature of the broad powers that the proposed incorporation would have granted to the Church. *See* JSP, D7: 453-454 (providing historical commentary on the proposed incorporation of the Church).

[89] Act of Mar. 27, 1801, ch. 79, 1801 N.Y. Laws 161, 164 (comprehensive "An act to provide for the incorporation of religious societies" establishing $3000 maximum annual

congregations had obtained special statutes allowing them to hold as much as three times that amount of property.[90] Likewise, an 1813 act for religious incorporation contained special procedures to accommodate the operations of the powerful Episcopal and Dutch Reformed churches.[91] It is possible that by seeking a special act of incorporation in 1840, rather than using the general Illinois general incorporation statute, Smith and his followers were trying to signal Mormonism's status as a similarly special and preferred religion, at least in Nauvoo. This might also explain why the state legislature refused to pass the law. The preamble to the 1835 law suggests that the Illinois legislature was sensitive to the kind of special privileges common in New York, which could be seen as a kind of quasi-establishment. "All religious societies," said the preamble to the Illinois law, "of every denomination, should receive equal protection and encouragement from the legislature, and no one society be granted exclusive privileges."[92] Exclusive privileges, however, are precisely what the proposed incorporation would have granted to the Church.

After the failure of these efforts, the Church availed itself of the general Illinois incorporation statute. At a special conference of the Church held on January 30, 1841, the membership voted to elect Smith as sole trustee for the Church. A week later, Smith filed a certificate of incorporation with the Hancock County clerk. In the document, Smith

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income for all churches except the Reformed Protestant Dutch Church in New York City and the First Presbyterian Church in New York City); Act of Apr. 5, 1813, ch. 60, 1813 N.Y. Laws 212, 215 (revised "Act to provide for the Incorporation of Religious Societies" reiterating $3000 maximum annual income for all churches except the two exempted by the 1801 Act and further exempting St. George's Episcopal Church of New York and the Reformed Protestant Dutch Church of Albany from the limit).

[90] *See* Act of Mar. 27, 1801, ch. 79, 1801 N.Y. Laws 161, 164 (Reformed Protestant Dutch Church in New York City could lease property up to $9000 in value and the First Presbyterian Church in New York City, up to $6000); Act of Apr. 5, 1813, ch. 60, 1813 N.Y. Laws 212, 215 (same exceptions as the 1801 Act, as well as allowances for St. George's Episcopal Church of New York to hold up to $6000 worth of property and the Reformed Protestant Dutch Church of Albany to hold up to $10,000). *See* also Act of Mar. 5, 1819, ch. 33, § 3, 1819 N.Y. Laws 34, 34 (all churches in New York City were permitted an annual income of $6000).

[91] By the early 19th century much of the Revolutionary era hostility to Episcopal tension in New York has dissipated, in part because of Alexander Hamilton's successful attack on anti-Tory confiscation statutes, which among other things were aimed at Trinity Church, before the state courts immediately after the Revolution. *See* Mensch, *supra* note 4 at 475–476.

[92] Act of Feb. 6, 1835, 1834 Ill. Laws 147, 147 ("Act concerning Religious Societies").

declared himself to have been elected the sole trustee of the Church during his life and vested with plenary powers.[93]

Illinois law, following New York and that of most other jurisdictions, sought to enshrine the principle of lay control over ecclesiastical government while limiting the ability of ecclesiastical corporations to own property. In this it followed the largely congregational assumptions about church government that lay behind the first disestablishment's legal regime. To a certain extent, Latter-day Saints ecclesiology, as it developed during Smith's lifetime, contained echoes of this assumption. In particular, the authority of the general conference of the Church to ratify or veto actions by the Church hierarchy was largely consistent with this approach to church government. By the Nauvoo period, however, Smith and his inner circle were developing a vision of ecclesiastical power increasingly centered on priestly authority rather than lay supremacy.[94] In addition, the Church continued to sit at the heart of the real estate transactions that formed the life blood of Nauvoo's economy. As a result, the newly incorporated Church almost immediately began taking actions that exceeded its authority under Illinois law.

The 1835 act provided that "Every society . . . shall have the power to provide for filling vacancies which may happen in the office of trustee and also to remove trustees from office."[95] The certificate filed by Joseph Smith, however, purported to remove this power from the general membership, ensuring that succession as trustee would be confined to the First Presidency. More important, Joseph and Emma Smith began executing deeds to transfer real property that he had held as an individual to himself as trustee for the Church. Emma's signature was likely required to extinguish her dower rights to the property.[96] As a result, the Church

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[93] "Appointment as Trustee, 2 February 1841," Hancock County Bonds and Mortgages, V]vol. 1, p. 95. This document has not yet been published by the Joseph Smith Papers Project, but a photograph and transcript are available online through the JSP website. *See* The Joseph Smith Papers, https://www.josephsmithpapers.org/paper-summary/appointment-as-trustee-2february-1841/1 (accessed July 16, 2020).

[94] At the heart of this ecclesiology were temple rituals and the developing idea of "priesthood keys," both of which tended to centralize authority within the highest councils of the Church rather than in the membership. *See*, *e.g.*, STAPLEY, *supra* note 45 at 34–56 (discussing the development of Mormon ideas of priesthood and the liturgy associated with the temple).

[95] Act of Feb. 6, 1835, 1834 Ill. Laws 147, 149.

[96] Dower is a common-law doctrine giving a widow the right during her lifetime to occupy some portion of the real property owned by her husband upon his death. Traditionally, the common law did not allow the husband to extinguish these rights unilaterally.

soon purported to own real property far in excess of the five-acre limit contained in the 1835 statute. Furthermore, this property was being held for sale rather than "for the purposes of religious worship" as provided for by the statute.

The 1841 incorporation also gave birth to a quasi-religious office later retained in the Mormon movement: the trustee-in-trust. At common law, it is unexceptional to convey property to "A, as trustee, in trust for B." Such a deed splits legal and equitable ownership of the property, creating a trust in which A has title to the property but is required to manage it exclusively for B's benefit. General incorporation statutes borrowed concepts from trust law. Thus, the 1835 Illinois statute explicitly referred to the agents of a religious corporation as "trustees." However, the idea of "trustee-in-trust" as a distinct office was a Mormon neologism, a truncating of the traditional conveyancing language of trusts into something new.[97] The trustee-in-trust became a quasi-ecclesiastical office designating the person with ultimate control over Church assets. This can be seen, for example, in the fact that the term "trustee-in-trust," as an office or legal status, never appears in American case law except in reference to the Latter-day Saints.[98] In the early twentieth century, the laws of Utah and surrounding states in the west with large Mormon populations would treat the term as referring to a religious rather than a legal office.[99]

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[97] *See* Samuel D. Brunson, *Mormon Profit: Brigham Young, Tithing, and the Bureau of Internal Revenue*, 2019 BYU L. REV. 41, 43 n.7 (2019) ("The term 'trustee-in-trust' seems to have been unique to Mormonism"); Loving, *supra* note 53 at 11 (speculating that the term "trustee-in-trust" in both the LDS and RLDS context referred to the religious rather than a legal office).

[98] Interestingly, the term is used by both the Church of Jesus Christ of Latter-day Saints and the Community of Christ, formerly the Reorganized Church of Jesus Christ of Latter-day Saints. No non-Mormon denominations use the term.

[99] *See, e.g.*, Incorporation of Churches and Religious Societies, ch. 73, 1903 Utah Laws 62, 62 (allowing a "bishop, president, trustee in trust, [or] president of stake" to organize as a corporation sole). *See also* text accompanying infra notes 147-149. In the succession crisis after the murder of Joseph Smith in 1844, the office of trustee-in-trust proved important. At the time of his death, there were a half dozen or more different theories about who was to succeed him as leader of the Church. *See generally* D. Michael Quinn, *The Mormon Succession Crisis of 1844*, BYU STUD., no. 2, 1976, at 187. Ultimately, Brigham Young and the Quorum of the Twelve persuaded the bulk of the Latter-day Saints to accept their claim to carry forward Smith's work. However, while Young and the Twelve succeeded in defeating the claims of Smith's counselor, Sidney Rigdon, at a conference in August 1844, it was not until December 27, 1847, that the First Presidency, the senior governing council of the Church, was formally reorganized. *See* Ronald W. Walker, *Six Days in August: Brigham Young and the Succession Crisis of 1844*, *in* A FIRM FOUNDATION: CHURCH ORGANIZATION AND ADMINISTRATION 161 (David J.

The legal structure created in 1841 ultimately proved ineffective. Matters came to a head when a Nauvoo-based steamboat sank.[100] Joseph Smith had guaranteed a loan to the ship's promoters, and after the steamboat sank, Smith became liable on the note. In 1842, Congress passed one of its recurrent nineteenth-century bankruptcy laws, and Smith sought to take advantage of the law.[101] At the time of his death, his bankruptcy petition was languishing in federal court and would not be finally resolved until the 1850s. The court ultimately found that the efforts to segregate Smith's personal property from the property of the Church had been unsuccessful because of the mortmain provision in the 1835 statute. The chief beneficiary of this failure was his widow, Emma Smith. Because the conveyances from Joseph Smith as an individual to Joseph Smith as trustee for the Church were found to be invalid, Emma Smith could assert her dower rights against the subsequent transferees of the property. Had Smith not been murdered, it is unlikely that the legal structure under which the Church sought to promote the gathering to Nauvoo by selling real estate to new immigrants could have continued. Ultimately, Illinois law simply would not permit a church to engage in such expansive activity. Churches were to confine their activities to Sunday worship. They could dream of Zion, but church corporations could not implement that theology by building new cities of God in the wilderness.

Whittaker & Arnold K. Garr eds., 2011); Quinn, *supra*. While Brigham Young was signing letters as "Prest. of the Church of L.D.S." as early as December 1844, his precise ecclesiastical authority beyond his undoubted title as president of the Quorum of the Twelve Apostles, a secondary governing council, remained ambiguous for over three years. *See id.* at 216. However, the office of trustee-in-trust allowed Young and the Quorum of the Twelve to gain control of Church assets without resolving the question of their precise ecclesiastical authority. Likely based on the certificate of incorporation filed by Joseph Smith, at his death many Latter-day Saints, including his widow, Emma Smith, assumed that only the president of the Church could act as trustee-in-trust. Young and his associates, however, rejected this position, and they succeeded in having a series of loyal, lesser church officials appointed to this office. Brigham Young thus used the office of trustee-in-trust to control Church assets prior to settling the precise nature of the succession to the First Presidency.

[100] *See* Oaks and Bentley, *supra* note 86.

[101] Prior to 1898, the United States had no permanent bankruptcy legislation. Rather, Congress periodically passed bankruptcy laws in response to financial down turns only to repeal them a few years later. *See* DAVID A. SKEEL, DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA (2004).

Legal Personality and the Battle with the Federal Government

In 1851, the legislature of the State of Deseret, the de facto government created by the Latter-day Saints upon their arrival in the Great Basin, granted the Church a corporate charter that eliminated the issues that had bedeviled it for the previous two decades.[102] It gave the Church unlimited ability to hold property but did not break completely with American church law of the time. It conceptualized the Church as the corporate expression of the Church's members and contemplated ultimate lay control. Church officers in control of Church property were required to post bonds, and "said trustee and assistant trustees shall continue in office during the pleasure of said church."[103] At the same time, the statute was unique. It provided that the Church could "solemnize marriages compatible with the revelations of Jesus Christ," a sly way of providing legal recognition to polygamous unions.[104] It went on to provide that the Church's power for "the pursuit of bliss, and the enjoyment of life, in every capacity of public association, and domestic happiness; temporal expansion; or spiritual increase upon the earth, may not legally be questioned."[105] This exuberantly broad grant of powers seems to have carried forward and expanded the vision of the Church's legal capacity first sketched out in the failed 1840 proposal to the Illinois state senate.

After Congress organized Utah Territory as part of the Compromise of 1850, the territorial legislature adopted the previous statutes of the now defunct State of Deseret, thus incorporating the Church under American law.[106] With this act, the Latter-day Saints escaped the legal structures of the first disestablishment. Indeed, the legal position of the Church in the first years of Utah Territory most resembled the position of New York's established church before 1784, although it lacked the taxing authority of the colonial establishment.

This escape, however, was only temporary. In 1860, the Republican Party—founded to rid the territories of the twin relics of barbarism: slavery and polygamy—came to power, and in 1862 Congress passed the Morrill Anti-Bigamy Act.[107] The centerpiece of the act, section

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[102] *See* DALE MORGAN, THE STATE OF DESERET 185 (1987) (reproducing the statute).
[103] *Id.* at 186.
[104] *Id.* at 186.
[105] *Id.* at 186.
[106] Joint Resolution Legalizing the Laws of the Provisional Government of the State of Deseret, 1851 Utah Laws 205.
[107] Morill Anti-Bigamy Act, ch. 126, 12 Stat. 501 (1862).

1, made bigamy a crime in the territories.[108] However, the law contained two other provisions aimed at the Church's legal personality. Section 2 invalidated the charter issued by the territorial legislature.[109] However, the law stated that "this act shall be so limited . . . as not to affect or interfere with the right of property legally acquired under [the Church's charter] . . . but only annul such acts and laws which establish, maintain, protect, or countenance the practice of polygamy."[110] Section 3 went on to state that "it shall not be lawful for any corporation . . . for religious purposes to acquire or hold real estate . . . of a greater value than fifty thousand dollars."[111] Property "acquired or held" in violation of the act was to escheat to the United States, but "existing vested rights in real estate shall not be impaired by the provisions of this section." As the manager of the bill in the Senate explained, "the third section . . . is in the nature of a mortmain law."[112] He went on:

> The object is to prevent the accumulation of real estate in the hands of ecclesiastical corporations in Utah. … [T]he object of the section is to prevent the accumulation of … property and wealth of the community in the hands of what may be called theocratic institutions, inconsistent with our form of government.[113]

Interestingly, the House sponsor was careful to note that, while the law applied on its face to all territories, it would have no impact on the large Catholic establishments in New Mexico, as those religious institutions were protected under the 1848 Treaty of Guadalupe Hidalgo, which had ceded northern Mexico to the United States.[114] Left unexplained was why the Church, which, though not incorporated at the time, was settled in Mexican territory in 1847, did not receive protection under the Treaty.

Whether the Church continued to have a legal existence was unclear, as the Morrill Act could be construed to repeal only those portions of its charter that directly supported polygamy. Brigham Young responded to this uncertainty by claiming to hold Church property as trustee-in-trust, regardless of the status of the Church as a legal entity. Unsurprisingly, upon his death, in 1877, a bitter property dispute between the Church and

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[108] *Id.* at § 1.
[109] *Id.* at § 2.
[110] Id.
[111] *Id.* at § 3.
[112] CONG. GLOBE, 37th Cong., 2d. Sess. 2506 (1862) (statement of Sen. Bayard).
[113] *Id*.
[114] CONG. GLOBE, 37th Cong., 2d. Sess. 2906 (1862) (statement of Rep. Morrill).

his heirs took place in the courts.[115] His successors continued to hold Church property personally. In the early 1880s, Franklin S. Richards, the Church's legal counsel, foreseeing that the government would move against Church property, urged the creation of corporations for regional organizations (called "stakes") and local congregations (called "wards") to hold Church assets.[116] It was difficult for him to persuade Church president John Taylor to adopt the plan, but this was finally done around 1884. The law used was an 1878 territorial statute modeled on mainstream American corporate law. It allowed for corporations of "persons associated together for religious, social, scientific, benevolent or other purposes"[117] but limited their ability to hold property. "[N]o such corporation," the statute read, "must own or hold more real estate than may be necessary for the business and objects of the association."[118]

As Richards had predicted, Congress moved decisively against the Church with the Edmunds-Tucker Act of 1887.[119] That law entirely

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[115] *See* Leonard J. Arrington, *The Settlement of the Brigham Young Estate, 1877-1879*, 21 PACIFIC HISTORICAL REVIEW 1 (1952).

[116] *See* Ken Driggs, *"Lawyers of Their Own to Defend Them": The Legal Career of Franklin Snyder Richards*, 21 J. MORMON HIST. 84, 104 (1995)..

[117] Act of Feb. 22, 1878, ch. 18, § 1, 1878 Utah Laws 46, 46 ("Act supplemental to An Act providing for Incorporating Associations for Mining, Manufacturing, Commercial and other Industrial Pursuits").

[118] *Id.* at § 3. The 1878 statute was silent on many issues and there was never any case law construing it. Still, one may speculate about the legal risks in Richards's proposal. First, relatively complex corporate formalities had to be maintained, or the wards and stakes may have risked losing their corporate existence. Second, the acquisition and transfer of property required that the complex internal governance procedures of the corporations be followed, lest the transfers be subject to later challenges. Third, upon the death or release of ward or stake officers serving as corporate trustees, relatively complex legal formalities had to be observed to replace them. Finally, because the corporations were self-governing entities, the Church hierarchy risked losing control over Church property if enough local congregants wished to go their own way. All of these factors likely contributed to John Taylor's hesitancy in forming such corporations in the early 1880s, and his insistence that the governing board of trustees be as large as possible under then existing Utah law, likely reflected concern about concentrating power over Church property in the hands of local leaders. *See* Franklin S. Richards, "Reminiscences," Church History Library, Salt Lake City, Utah (discussing Taylor's response to the proposal). Records of these local corporations housed in the Church archives reveal relatively complex minutes and procedures, and efforts by Church headquarters to assist with the legal formalities by producing pre-printed articles of incorporations for use by wards and stakes. *See, e.g.*, By-Laws Of the Corporation of the Members of the Church of Jesus Christ of Latter-day Saints, residing in the Panguitch second ecclesiastical Ward of the Panguitch Stake of Zion, Church History Library, Salt Lake City, Utah. (a pre-printed set of by-laws for ward corporation).

[119] Edmunds-Tucker Act, ch. 397, 24 Stat. 635 (1887) (repealed 1978).

revoked the 1851 charter and dissolved the Church as a corporation. Proponents of the bill justified it using the language of disestablishment, insisting that the purpose of the law was "to amend the incorporation of the church, so as to divorce it from the state."[120] The House sponsor of the bill, John Randolph Tucker of Virginia, saw the disincorporation of the Church as the final chapter in the process of disestablishment begun by "the immortal Thomas Jefferson in the immortal act for religious freedom of the people of the State of Virginia."[121] For Tucker, disincorporation was a way to "disestablish the civil establishment" of the Church.[122] He said, "I have in reality attempted to engraft the polity of old Virginia upon the polity of Utah. In old Virginia we do not allow the church to have any property except the property upon which the church building stands and that upon which the parsonage for its pastor is erected."[123] In his posthumously published treatise on constitutional law, Tucker characterized the act in terms of disestablishment, stating that it repealed "[a]ll laws giving special privileges to the Mormon Church."[124]

By the 1880s, however, Tucker's approach to disestablishment was increasingly anachronistic. The Jeffersonian attack on religious corporations in Virginia took place in a world where the creation of corporate entities was cumbersome, and the idea of incorporation was closely tied to the agency of the state. New York began chipping away at this idea with its 1784 general incorporation statute, and a century later the legal landscape had shifted dramatically. In particular, in the decades after the Civil War, the corporate form had been thrown open not only to

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[120] 49 CONG. REC. 584 (1887) (statement of Rep. Taylor).

[121] 49 CONG. REC. 593 (1887) (statement of Rep. Tucker).

[122] Furthermore, according to Tucker, because territories were governed by Congress, they were subject to the full force of the Establishment Clause of the First Amendment, unlike state governments. He thus saw the Edmunds-Tucker Act as implementing the Establishment Clause. *See id.* at 595 (statement of Rep. Tucker).

[123] *Id.* at 594 (statement of Rep. Tucker). Tucker's Virginia-centric view of the issues was not accidental. He was the scion of an important Virginia legal family. His grandfather was St. George Tucker, Professor of Law at the College of William & Mary, and the author of a highly influential edition of Blackstone's Commentaries. JohnTucker served as attorney general of Virginia under the Confederacy and later became a professor of constitutional law at Washington and Lee Law School. *See* John W. Davis, *John Randolph Tucker: The Man and His Work*, *in* THE JOHN RANDOLPH TUCKER LECTURES DELIVERED BEFORE THE SCHOOL OF LAW OF WASHINGTON AND LEE UNIVERSITY 11 (1949).

[124] John Randolph Tucker, Constitution of the United States: A Critical Discussion of Its Genesis, Development, and Interpretation 668 (Henry St. George Tucker ed., 1899).

churches but also to private businesses and other enterprises.[125] Tucker insisted that the Church as an "ecclesiastical organism is a menace to the civil power" because of "the influence which concentrated and corporate wealth always acquires."[126] By 1887, however, it was relatively easy for Franklin S. Richards to fragment the legal personality of the Church and scatter the bulk of its property across dozens of corporate entities. As a result, by the time the Edmunds-Tucker Act was passed, the corporate entity that it dissolved ironically enough owned comparatively little property.

Richards's strategy paid off when the solicitor general of the United States ruled that property held by stake and ward corporations was not subject to the Edmunds-Tucker Act.[127] Accordingly, federal officials made no effort to move against property held by those entities. The federal receiver, however, did take control of property not held by stake or ward corporations, including, for a brief period, the Salt Lake Temple.[128] Richards challenged the constitutionality of the Edmunds-Tucker Act in court, arguing that it violated the Contracts Clause of the U.S. Constitution under the *Dartmouth College Case*.[129] In addition, a group of Church tithe payers intervened in the case, arguing that if the Church were to be dissolved, its property should go to the original donors, rather than to the territorial schools as provided by the act.[130] During the debates over the act, its supporters in Congress had claimed that church property should be returned to the original donors if possible, and only the residue would be escheated for the benefit of public schools.[131]

Both the Utah Territorial Supreme Court and the U.S. Supreme Court rejected all of these arguments, affirming the federal government's plenary authority over the territories and its ability to direct the Church assets to public purposes if it so chose.[132] Three members of the U.S. Supreme Court dissented in a brief opinion by Chief Justice Fuller. While

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[125] *See* HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836-1937 at 11–67 (2013) (discussing the rise of the business corporation after the Civil War).
[126] 49 CONG. REC. 594 (1887) (statement of Rep. Tucker).
[127] *See* Richards, *supra* note 118.
[128] See *id*.
[129] *See* United States v. Church of Jesus Christ of Latter-day Saints, 5 Utah 361, 369 (Utah) (rejecting the argument based on *Dartmouth College*); *See also* Richards, *supra* note 118.
[130] *See id.*
[131] 49 CONG. REC. 1898 (1887) (statement of Sen. Edmunds).
[132] *See* United States v. Church of Jesus Christ of Latter-day Saints, 15 Pac. 473 (Utah 1887); Late Corporation of the Church of Jesus Christ of Latter-day Saints v. United States, 136 U.S. 1 (1890).

acknowledging the power of Congress to criminalize polygamy in Utah, the dissenting justices insisted that Congress "is not authorized, under the cover of that power, to seize and confiscate the property of persons, individuals, and corporations, without office found, because they may have been guilty of criminal practices."[133] Shortly after the constitutionality of the Edmunds-Tucker Act was upheld by the U.S. Supreme Court in 1890, Church president Wilford Woodruff issued the Manifesto, which stated that the Church would no longer perform plural marriages.[134] In response, the Utah Territorial Supreme Court, administering the case, ruled that property should be returned to the trustee-in-trust to advance the legal, non-polygamous goals of the Church.[135]

Legal Personality in the Twentieth Century

The federal government's legal crusade against the Latter-day Saints in the 1870s and 1880s centered on polygamy and the political power of the Church in Utah and the Intermountain West. The complex and decisive legal maneuvering over the Church's property, however, reveals that the conflict also centered on the nature of the Church's legal personality. Church corporate law was one of the primary legal mechanisms by which American governments disestablished religion and enforced their vision of proper religious conduct by churches. Unsurprisingly, the legal personality that the Latter-day Saints initially created for their church in Utah sought to escape that regime, just as their vision of religion transgressed the boundaries of religious respectability set down by the American Protestants for whom that regime was created. By the 1890s, the Church had succeeded in preserving itself by adopting a Reformed-style legal personality, with property held in a system of decentralized, congregational corporations that were under nominal lay control. The federal government had very pointedly decided not to move against those portions of the Church organized legally according to the ecclesiological norms of congregational Protestantism. This legal structure, however, was fundamentally at odds with Mormon ecclesiology, and as the intensity of the anti-polygamy crusade receded,

[133] *Late Corporation*, 136 U.S. at 267 (Fuller, C.J. dissenting).
[134] *See* Late Corporation of the Church of Jesus Christ of Latter-day Saints v. United States, 136 U.S. 1 (1890). *See* also Driggs, *supra* note 116 (discussing the relationship between the Supreme Court's decision and the Manifesto).
[135] *See* United States v. Late Corporation of the Church of Jesus Christ of Latter-day Saints, 8 Utah 310 (1892).

Franklin S. Richards sought a legal personality for the Church that would accommodate its actual hierarchical structure without reigniting legal attacks on the Latter-day Saints

Utah became a state in 1896, and the legislature adopted a law allowing for the incorporation of religious societies.[136] The Church, however, chose not to avail itself of this law. Most local meetinghouses continued to be held by stake and ward corporations. The remainder of Church property was held by the president of the Church as trustee-in-trust. By 1901, Richards had hit upon a new mechanism for holding Church property.[137] He proposed that stake and ward corporations be reorganized as corporations sole. Most corporations are fictitious persons who legally represent some collective of natural persons, such as members of a church or shareholders in a company. A corporation sole, however, is the legal instantiation of an office—such as the king of England or the archbishop of Canterbury—that has but a single occupant.[138] Crucially, however, the corporation sole is distinct from the natural person who occupies the office, and it thus persists when that person dies or when a new person takes office. Richards likely took his inspiration from the Catholic hierarchy in the United States. Throughout the nineteenth century, American bishops fought legal battles with lay Catholics over the control of church property and the appointment of parish priests, matters that American corporate law committed to lay rather than clerical control. During the 1870s and the 1880s, however, numerous states adopted corporation sole statutes.[139] In 1884, the Third Baltimore Plenary Council of American Bishops declared:

> In the states in which civil legal incorporation of parishes of ecclesiastical congregations, in harmony with ecclesiastical laws, does not exist, the bishop himself, by law to be passed in the assemblies may become a public

[136] *See* UTAH REV. STAT. §§ 343-46 (1898).
[137] *See generally* Franklin S. Richards, "Corporations and Land Titles," Memorandum to the Presiding Bishop and the First Presidency, Nov. 2, 1931, Church History Library, Salt Lake City, Utah.
[138] *See generally* F. W. Maitland, *Corporation Sole*, 17 L. Q. REV. 335 (1900) (discussing the history of the corporation sole); M. W. S., *The Corporation Sole*, 5 MICH. L. REV. 545 (1928) (discussing the corporation sole under American law).
[139] *See* DIGAN, supra note 7, at 215-16 (discussing the passage of such laws in the context of Catholic bishops' search for a method of holing property under American law that was consisting with Roman Catholic Canon Law).

> corporation or moral person (Corporation sole) to hold and administer the goods of the entire diocese.[140]

In 1895, Idaho passed "An Act Providing for the Incorporation of Churches and Religious Societies," which seems to have been aimed at accommodating the Catholic hierarchy, and which allowed any duly chosen bishop to form a corporation sole.[141] Richards did not mention the Idaho law as his inspiration, but, given the large Latter-day Saints presence in the state, he almost certainly would have been aware of Idaho law as Church general counsel.

Under a 1901 Utah law, a corporation sole could consist of a single person—either the stake president or bishop.[142] Furthermore, the identity of this person would be defined in terms of ecclesiastical status. For example, a stake president whose term of office concluded or who died would automatically cease to be the occupant of the corporation, which would continue to exist until his successor was chosen by the Church hierarchy. This eliminated the risk of title to Church property passing by operation of law to the heirs of Church leaders or the possibility of rogue congregations taking control of Church assets. Richards later wrote:

> It occurred to me that this system was admirably adapted to our condition, and after giving the matter careful consideration, I suggested it . . . to the First Presidency. After much deliberation they decided to adopt this plan, which involved the necessity of getting the legislatures of states where our wards and stakes were located to enact laws providing for the creation of corporations sole to hold title to church property. We finally succeeded, after much effort and persuasion in getting laws passed in Idaho, Utah, Nevada, Arizona, and Wyoming providing for corporations sole.[143]

In 1901, Rulon S. Wells, a member of the Church's First Council of the Seventy then serving in the Utah House of Representatives, introduced the

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[140] Quoted in *id.* at 223.

[141] *See* GENERAL LAWS OF THE STATE OF IDAHO 24 (1895) (reproducing the text of the statute).

[142] Church and Charitable Incorporations § 2. Somewhat confusingly, among Latter-day Saints a "bishop" is the leader of a local congregation or ward, while the leader of a stake, who is analogous to a Catholic bishop, is called a "stake president."

[143] Franklin S. Richards, "Corporations and Land Titles," Memorandum to the Presiding Bishop and the First Presidency, Nov. 2, 1931, Church History Library, Salt Lake City, Utah.

bill providing for the creation of corporations sole, which passed unanimously.[144] Originally this statute was intended only for the use of wards and stakes. Thus, while only an "arch-bishop, bishop, overseer, presiding elder, rabbi or clergyman"[145] could formally be a member of the corporation, the corporation could not dispose of property without "the consent of the majority of the members of the church or religious society present at a meeting duly called for that purpose."[146] Such a procedure would clearly be too cumbersome for use by the president of the Church.

However, Richards's thinking on this topic was continuing to develop. In 1903, almost certainly at the discreet request of the Church, the Utah legislature replaced the 1901 statute with a new law governing corporations sole.[147] By this point, Richards seems to have been thinking of providing a corporate existence above the stake and ward level. The religious officials allowed to incorporate as a corporation sole now included "bishop, president, trustee in trust, [and] president of stake."[148] The inclusion of the term "trustee in trust" is particularly telling, because, as we have seen, this term was a Mormon neologism coined in Nauvoo. It is also clear, however, that the Church hierarchy had not yet decided to avail itself of incorporation for the Church as a whole. The evidence for this can be seen in the statute.

Incorporating the trustee-in-trust as a corporation sole would eliminate the possibility of a dispute between the Church and the heirs of a deceased president of the kind that had broken out upon the deaths of

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[144] *See* Church and Charitable Incorporations, ch. 80, 1901 Utah Laws 78; *See* also Andrew Jenson, *Wells, Rulon Seymour*, 1 LATTER-DAY SAINT BIOGRAPHICAL ENCYCLOPEDIA 212 (1901).

[145] Church and Charitable Incorporations § 2.

[146] *Id.* at § 4.

[147] *See* Incorporation of Churches and Religious Societies, ch. 73, 1903 Utah Laws 62. While Richards did not explicitly claim authorship of the 1903 law, he did claim authorship of the 1901 law. *See* Franklin S. Richards, "Corporations and Land Titles," Memorandum to the Presiding Bishop and the First Presidency, Nov. 2, 1931, Church History Library, Salt Lake City, Utah. There is, however, very good reason to suppose that the 1903 law was authored and introduced in the state legislature at his request. The law was introduced by William Newjent Williams, an English convert to the Church who was married to Clarissa W. Smith, a daughter of apostle and counselor to Brigham Young George A. Smith. Williams served as a missionary in Australia and at the time he introduced the law was a high priest. Clarissa was the Treasurer of the Church-wide Relief Society organization. In short, he was precisely the kind of loyal and well-connected Latter-day Saint that the Church would have used to get the law introduced. It was passed unanimously by the legislature. *See* Utah Senate Journal, 1903; BIOGRAPHICAL RECORD OF SALT LAKE CITY AND VICINITY, 279–81 (1902).

[148] Incorporation of Churches and Religious Societies § 2.

Joseph Smith and Brigham Young. Richards, however, inserted a provision in the law providing that:

> [In the case of a] trustee in trust . . . who at the time of his death . . . was holding the title to trust property for the use or benefit of any church . . . and not incorporated as a corporation sole, the title to any and all such property . . . shall not revert to the donor, nor vest in the heirs of such deceased person, but shall . . . vest in the person appointed to fill such vacancy.[149]

In other words, the statute solved this problem without requiring the hierarchy to decide on whether to incorporate. Likewise, the 1901 provision requiring a vote by church members prior to the conveyancing of church property was eliminated. In 1903, Church headquarters began instructing bishops to avail themselves of the new law to incorporate as corporations sole.[150] These corporations would hold title to ward property, but all conveyancing of real property was centralized in the Church counsel's office, "as complications may arise that will be difficult to overcome."[151]

Before Richards's plan was fully implemented, however, there was a final effort to wield the regime of the first disestablishment against the Church in court. In 1906, Charles Smurthwaite, a disgruntled Latter-day Saint, sued then Church president Joseph F. Smith, alleging that he was misappropriating tithing funds by investing them in for-profit enterprises.[152] Drawing on over a century of American law, Smurthwaite's lawyer argued that as an ecclesiastical corporation, the law placed tight controls on Church affairs and any investments were ultra vires.[153] The

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[149] *Id.* § 9.

[150] *See* CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, ANNUAL INSTRUCTIONS TO PRESIDENTS OF STAKES AND COUNSELORS, HIGH COUNSELORS, BISHOPS AND COUNSELORS AND STAKE TITHING CLERKS OF ZION 10–12 (1903).

[151] CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, ANNUAL INSTRUCTIONS TO PRESIDENTS OF STAKES AND COUNSELORS, BISHOPS AND COUNSELORS STAKE CLERKS AND GENERAL AUTHORITIES OF ZION 14–15 (1906).

[152] *See* Nathan B. Oman, *Salt, Smurthwaite, and Smith: Litigation and the Legal Identity of the Church of Jesus Christ of Latter-day Saints*, J. MORMON HIST., Oct. 2021 (forthcoming). Smurthwaite was joined in his suit by Don Carlos Musser, the scion of a prominent Mormon family. The origins of their disaffection were complicated. Both men objected to the Church's political and economic influence, as well the practice of polygamists continuing to live with plural families after the Manifesto. In addition, Smurthwaite's salt business was in direct competition with a Church-owned enterprise.

[153] *Id.*

problem with this argument was that the Church as such had not been incorporated under state law. He then argued that the Church president received all tithing as a trustee for individual church members.[154] Representing the Church, Franklin S. Richards argued that Smurthwaite needed to prove the individual intentions of tithe payers to establish the scope of any trust-based obligations applying to Smith as trustee-in-trust.[155] Finally, Smurthwaite's attorney argued that there was a public policy against churches investing in for-profit businesses.[156] He was unable, however, to point toward any Utah authority supporting his position.[157] Ultimately, the non-Mormon judge in the case dismissed Smurthwaite's lawsuit.[158] The case became part of the national agitation over the election and seating of apostle Reed Smoot to the U.S. Senate, which resulted in a Senate investigation that dragged on for years.[159] Controversy centered on the continuing divergence between the Church and broader American norms about proper ecclesiastical conduct. Eventually, Smurthwaite's case became a focus of the Senate hearings, evidence of the Latter-day Saints refusal to abide by American legal norms for churches.[160]

The corporate law developed in the first disestablishment a century before, with its assumptions about Church government and actions, was essentially hostile to the hierarchical priesthood of Latter-day Saints ecclesiology. In particular, the law's emphasis on congregational structure worked at best awkwardly for holding denominational—rather than congregational—buildings such as the temples or missionary housing around the world. Likewise, the law's emphasis on lay control created a system in which ecclesiastical disputes could be refought in the courts, as happened repeatedly in other denominations during the nineteenth century.[161] *Smurthwaite* was an unsuccessful effort to apply this basic

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[154] *Id*.
[155] *Id*.
[156] *Id*.
[157] *Id*.
[158] *Id*.
[159] *See generally* KATHLEEN FLAKE, THE POLITICS OF AMERICAN RELIGIOUS IDENTITY: THE SEATING OF SENATOR REED SMOOT, MORMON APOSTLE (2004).
[160] See *Proceedings Before the Committee on Privileges and Elections of the United States Senate in the Matter of the Protests Against the Right of Hon. Reed Smoot, a Senator from the State of Utah, to Hold His Seat*, 59th Cong. (1906) 4:78 *et seq.* (hearings on the Smurthwaite case before the Senate Committee on Privileges and Elections).
[161] *See generally* Gordon, *The First Disestablishment*, *supra* note 5; Kellen Funk, *Church Corporations and the Conflict of Laws in Antebellum America*, 32 J. LAW & REL. 263 (2017).

framework to the Church. It thus represented the final parting shot in the battle over the Church's legal personality that began with the passage of the Morrill Act in 1862.

Ten years after *Smurthwaite*, in 1916, the solution that had been latent in Utah law since 1903 was adopted when the Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints was organized.[162] Seven years later, in 1923, Richards organized the Corporation of the President of the Church of Jesus Christ of Latter-day Saints, finally creating a formal legal structure for the Church completely independent of the personal identity of the hierarchy.[163] For most of the next century, this dual structure of corporations sole provided the legal framework for the Church.[164]

The policy of widespread local incorporations begun in the 1880s, however, persisted. In 1909, property held by local Relief Societies, the Latter-day Saints' women's organization, was transferred to the bishops' corporations sole.[165] During this period the incorporation of stake presidents as corporations sole was left to the discretion of local leaders.[166] By the 1920s, however, the Church was organizing wards and stakes beyond the Mormon heartland.[167] In California, for example, Latter-day Saints lacked the political power to pass the kind of bespoke legislation that the Church had obtained in Utah and the surrounding states.

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[162] *See* Franklin S. Richards, "Corporations and Land Titles," Memorandum to the Presiding Bishop and the First Presidency, Nov. 2, 1931, Church History Library, Salt Lake City, Utah.

[163] See *id*.

[164] In 2019, the Corporation of the President was merged into the Corporation of the Presiding Bishop, which has been renamed The Church of Jesus Christ of Latter-day Saints, and Church President Russell M. Nelson became the new incumbent of the corporation. *See* Human Resources Department, The Church of Jesus Christ of Latter-day Saints, "Further Changes to Emphasize the Correct Name of the Church of Jesus Christ," June 19, 2019 (email in the author's possession). Thus, for the first time since 1862, there is a legal entity bearing that name. However, The Church of Jesus Christ of Latter-day Saints as a legal matter remains a corporation sole, meaning that as of 2019 it has but a single member, Church president Russell M. Nelson. This odd structure is a legacy of Mormonism's effort to find a legal structure less infected with Reform ecclesiology than that which was on offer in the legal world in which it was born.

[165] *See* CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, ANNUAL INSTRUCTIONS, 1909 at 28 (1909).

[166] *See* CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, ANNUAL INSTRUCTIONS TO PRESIDENTS OF STAKES AND COUNSELORS, BISHOPS AND COUNSELORS STAKE CLERKS AND GENERAL AUTHORITIES OF ZION 33 (1910).

[167] *See* CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, HANDBOOK OF INSTRUCTIONS FOR BISHOPS AND COUNSELORS STAKE AND WARD CLERKS 57–58 (1928).

Accordingly, other legal mechanisms for holding Church property had to be found. [168] By the mid-twentieth century, however, the relaxation of the ultra vires doctrine and the increasing flexibility of the corporate form had rendered anachronistic the Church's earlier difficulties. Property could be held directly by the Corporation of the Presiding Bishop and the Corporation of the President, and the legal management of property had passed into the hands of the general counsel's office decades earlier. By the late 1960s, except where required by local law, the Church had dispensed with ward and stake corporations, the final legal vestige of the Latter-day Saints' long conflict with the legacy of America's first disestablishment.[169]

Conclusion

Since its formal organization in April 1830, the Church of Jesus Christ of Latter-day Saints has sought a legal personality, both as a way of solving concrete legal problems, such as the disposition of Church property upon the death of Church leaders, and as an expressive mechanism for gaining public legitimacy. However, the law created by America's first disestablishment was encoded with very definite ideas about what constituted legitimate activity for religious organizations. The law took what amounted to a Reformed Protestant positions on church structure and government, insisting that church corporations should limit their activity to weekly worship services and remain firmly under lay control. The Latter-day Saints, in contrast, saw their Church primarily as a mechanism for establishing Zion. In concrete terms, this meant that they needed mechanisms for their Church to establish religiously inspired settlements on the American frontier under the hierarchical control of Mormon priesthood leaders. The conflict between these differing visions of a church provided grist for legal conflicts throughout the nineteenth century. These conflicts in turn illustrate the ways that governments sought to establish certain forms of religion while restraining others.

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[168] *See* CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, HANDBOOK OF INSTRUCTIONS FOR BISHOPS AND COUNSELORS STAKE AND WARD CLERKS 57 (1928) ("In some states, such as California, Colorado, New Mexico, Oregon, Montana, and a number of others, titles may be held by the 'Corporation of the Presiding Bishop' under varying conditions.").

[169] The 1963 edition of the handbook issued to bishops and stake presidents is the last one to include specific instructions about local church corporations sole. *See* CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, GENERAL HANDBOOK OF INSTRUCTIONS 93 (1963).

Ultimately, Mormon conflicts over the legacy of the first disestablishment point to deeper issues in the relationship between religion and the state. Governments will always have their own vision of the proper role for religious institutions, and that vision often does not coincide with believers' own conception of their mission in the world. The result is legal conflict. Ironically, at the very moment when the Church had finally found a congenial form under American law, it faced new versions of its old problems as it expanded beyond the borders of the United States.[170] As early as 1913, the Church ran into difficulties in pursuing its nineteenth-century strategy of having property outside the United States held by the president of the Church as trustee-in-trust.[171] Mexico, for example, has long placed legal restrictions on the ability of foreigners to own land.[172] Furthermore, successive waves of Mexican reform in the nineteenth and early twentieth centuries directed at the land holdings of the Catholic Church resulted in mortmain provisions complicating the ecclesiastical ownership of land.[173] Again and again, over the course of the Church's international expansion in the second half of the twentieth century, the Latter-day Saints found themselves facing the same issue that bedeviled their movement from its legal beginnings in 1830: how to accommodate law and religious practice when law and religion offer conflicting visions of what it is proper for a church to do.

Acknowledgments: I am grateful for comments and suggestions on earlier drafts of this article from Stephen Bainbridge, Sam Brunson, Evan Criddle, Mark McGarvie, Tom McSweeney, Ben Park, Alex Smith, and Mark Staker. In addition, I benefited from discussions with Sally Gordon and Kathleen Flake, as well as comments from the editors and anonymous peer reviewers for the Journal of Law & Religion. *Julie Borzage and*

[170] *See generally* Nathan B. Oman, *International Legal Experience and the Mormon Theology of the State*, 1945-2012, 100 IOWA L. REV. 715 (2015).
[171] *See* CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, CIRCULAR OF INSTRUCTIONS 44 (1913) ("Title to mission property should be vested in the name of Joseph F. Smith, Trustee-in-Trust for the Church of Jesus Christ of Latter-day Saints, except in countries where a foreign trustee is barred by statute.").
[172] *See* Constitución Política de los Estados Unidos Mexicanos art. 27(I), Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 20-12-2019 (Mex.) ("For no reason may foreigners acquire the direct ownership of lands or waters within a zone of one hundred kilometers along the frontiers and of fifty along the shores ....").
[173] William D. Signet, *Grading a Revolution: 100 Years of Mexican Land Reform*, 16 L. & BUS. REV. OF THE AMERICAS 481, 487–493 (2010).

Katey Naef provided excellent research assistance. As always, I thank Heather.