

Mormon Property

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For most of the latter half of the nineteenth century, the American government fought desperately to rein in the Mormons in Utah. Narratives about this conflict generally treat it as one centered on polygamy or tensions between religion and the state. This paper, however, considers the central role of competing visions of property and property law in the Mormon-American conflict.

It explores how the Mormon property system was not only a driver of the conflict but also one of the Mormons' most important tools in attempting to subvert and overcome the American legal system. In particular, it outlines how the Mormons treated group identity and community standing as a property asset in order to govern through ecclesiastical structures independent of state authority. This historical context offers three advantages.

(I) First, a framing centered on competing visions of property law sheds new light on the historical causes and drivers of the Mormon-American conflict and the drastic legal actions of the federal government, including those of the Supreme Court in several prominent decisions.

(II) Second, this novel historical framing provides a new throughline for understanding the evolution of the Mormon property system and underscores an overlooked irony in the development of Mormon history: in attempting to subvert "sole and despotic" Anglo-American property norms, the Mormons ultimately succumbed to the American property logic under increasingly elaborate property arrangements.

(II) Third, exploring the Mormon property system as one of law rather than merely religion inspires new appreciation for the role of non-state institutions in private ordering and enforcing property systems. At this level, this paper attempts to flesh out the story of the administration of property in Territorial Utah, under the law of consecration, as a case study in law without violence.

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INTRODUCTION

The Mormon-American conflict of the mid- to late-nineteenth century was a battle over competing visions *property* and *property law* just as much as it was about polygamy or the appropriate boundaries of Christianity.¹ Rather than an individualistic, “sole and despotic” Blackstonian understanding of property,² Mormons sought to impose a highly centralized and communitarian ideology onto property law, where “property and human effort [would] have but one purpose, the establishment of Zion.”³

¹ Nathan B. Oman, “*Established Agreeable the Laws of Our Country*”: *Mormonism, Church Corporations, and the Long Legacy of America’s First Disestablishment*, 36 J. L. & RELIGION 202, 203, 220 (2021) [hereinafter *Established Agreeable*] (regarding the 1862 Morrill Act sponsor’s statement: “As the manager of the bill in the Senate explained, ‘the third section . . . is in the nature of a mortmain law.’ 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.’”).

² See 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 2 (facsimile ed. 1979) (1765-69).

³ EDWARD J. ALLEN, THE SECOND UNITED ORDER AMONG THE MORMONS 25 (1936). The practical administration and further discussion of the First United Order continues below in

To do so, the Mormons explicitly integrated *identity* and *community standing*—adjudicable only by the Church hierarchy—into a range of property transactions, from life estates subject to condition subsequent to contracts and corporate charters. Ironically, however, the Mormons’ increasingly elaborate attempts to master and outmaneuver property law inadvertently entrenched the Mormon property system within the very legal forms and instruments they sought to overcome. Rather than defeating American property law, the law of consecration instead facilitated the Mormons’ economic submission to American law and corporate capitalism.

Not only was using identity as property the Mormons’ means of negotiating with and innovating upon American property law, but it was also, at a broader level, how the Mormons competed with the American legal order absent the credible threat of legal violence and without demanding sacrifice.⁴ Thus, not only was property a driver of the tensions, it was also one of the primary means by which the Mormons engaged in the *legal* and ideological dimensions of the Mormon-American conflict.

By turning group belonging and identity claims into collateral and, at times, a very literal form of consideration in transactions, Mormon property systems and market exclusivity enabled the ecclesiastical courts to govern Mormon property and relationships without direct recourse to violence in competition with American courts. Mormon identity, as a property form, was both cultivated and controlled by the property and adjudicatory systems simultaneously, each designed to legitimate the other and enable regulation in the absence of the state. Identity was cultivated to generate buy-in to these systems, and these systems, in turn, effectuated the identity. Property rules and adjudication, both mutually reinforcing under the auspices of priesthood authority, mediated what it meant to be Mormon.

* * *

In three parts, this paper seeks to draw out (i) the historical significance of *property* and *property law* in driving the Mormon-American conflict; (ii) the substantive doctrines and administration of Mormon property law, including their value as a form of law without violence; and (iii) the importance of jurisdictional battles in waging the war over property in Territorial Utah.

Thus, Part I provides background and context for the Mormon project and beliefs. It explores the Mormons’ property ideals and guiding principles in the settlement of Territorial Utah before outlining the federal government’s

Section II.A.

⁴ See Steven D. Fraade, “Enjoin Them upon Your Children to Keep (*Deuteronomy 32:46*): Law as Commandment and Legacy, or, Robert Cover Meets Midrash, IN *LAW AS RELIGION, RELIGION AS LAW* 275 (David C. Flatto & Benjamin Porat eds., 2022); Stine Holte, *Legal, Mythic, and Divine Violence*, 36 *LITERATURE & THEOLOGY* 316, 331 (2022).

successive waves of legal action against the Mormons, with special attention paid to the government's *property motivations*. Section I.B then explores the role of the Supreme Court in this conflict, exploring how the Court rationalized the legal violence wielded against the Mormons and the ways in which anxieties about the Mormon property order laid under the surface of the Court's opinions.

Part II then turns to consider the practical administration of the Mormon property system, that is, the law of consecration. It outlines three distinct periods in the evolution of the law of consecration, highlighting the irony mentioned above. This Part also considers how the Mormon property system turned identity into a property asset—contracted for, offered as consideration, and later woven into corporate structures. It outlines how the more-and-more complex iterations of the law of consecration schooled the Mormons in corporate governance and facilitated their entrance into the American market.

Part III explores the law-versus-law nature of the Mormon-American conflict at a broader level. In order to realize their own competing vision of property norms, Mormons fought with the federal government to establish exclusive jurisdiction in Territorial Utah. This Part outlines one of the fronts on which this battle occurred: Church courts. After outlining the structure of the Church courts, this Part considers how the Mormon-American episode represents a case study in law and property regulation without violence: by subjecting community identity to the property logic (as discussed in Part II), the ecclesiastical courts functioned without the threat of recourse to legal violence.

I. THE MORMON PROPERTY ETHOS IN CONFLICT

The Foundations of Mormon Property Ideals and Prelude to Conflict

In Territorial Utah, the Church of Jesus Christ of Latter-day Saints developed formal institutions to regulate and manage property, develop natural resources, and resolve disputes between community members. These doctrinal and adjudicatory systems were at their most mature during the Presidency of Brigham Young, who used these organs of Mormon law to entrench Mormon independence from federal influence. But the foundations of Mormon law (including the ideological roots of the law of consecration as it would develop in Territorial Utah) were laid in the early 1830s under the charismatic leadership of Joseph Smith, Jr. in the American Northeast. Smith's production of the Book of Mormon and foundation of the Church, together known within Mormonism as the Restoration, is the keystone of the grounding narrative of Mormon law—the "scripture" to Mormon law's "decalogue," to borrow from Robert Cover.⁵

⁵ *Nomos and Narrative*, *supra* note Error: Reference source not found, at 4.

Joseph Smith, Jr. and the Beginnings of Mormon Property

Smith's Mormonism began as a millenarian sect which resembled other popular religious and utopian movements of the early nineteenth century. Per historian Hans A. Baer, Mormonism "emerged as an attempt by its initial members to adjust to the social strain and dislocation that existed within a certain segment of the new American republic."⁶ This pre-Utah period of Mormonism created the base identity and value-set on which the Utah innovations were later layered.

Although the doctrinal and organization tenets of Mormonism would shift both during Joseph Smith's life and as of result of the succession crisis following Smith's assassination, the basic foundation for Mormon law as it would evolve in Utah was laid in the Midwest by the early 1840s—namely, centralized authority in an all-male, lay clergy called the priesthood. Critically, both Mormon substantive legal systems (particularly property norms) *and* adjudicatory-enforcement mechanisms must be understood by reference to the broad structure (and concept) of *priesthood*.⁷

Priesthood authority represents an inherent authorization to act in the name of God as His agent, and it is through the priesthood that "the utopian values of order and centralized control of group cooperation have found expression" in Mormon history.⁸ The priesthood remains through the current day the central logic of Mormon organization. The focus on priesthood authority and top-down leadership contrasts with the Protestant republicanism and congregationalism otherwise dominant in Smith's era.⁹ As described by prominent Mormon scholar, Terryl Givens, the priesthood paints Mormonism as "one of the most centralized, hierarchical, authoritarian churches in American to come out of the era famous for the 'democratization of religion.'"¹⁰

⁶ HANS A. BAER, *RECREATING UTOPIA IN THE DESERT: A SECTARIAN CHALLENGE TO MODERN MORMONISM* xii (1988). Ralph Waldo Emerson, for example, wrote in 1840 of the millenarian spirit: "We are all a little wild here with numberless projects in social reform. Not a reading man but has a draft of a New Community in his waistcoat pocket." Leonard J. Arrington, *Early Mormon Communitarianism: The Law of Consecration and Stewardship*, 7 W. HUMANITIES REV. 341, 348 (1953) [hereinafter *Early Mormon Communitarianism*].

⁷ See LEONARD J. ARRINGTON, *GREAT BASIN KINGDOM: ECONOMIC HISTORY OF THE LATTER-DAY SAINTS, 1830-1900*, at 28-33 (1966) [hereinafter *GREAT BASIN KINGDOM*]. Mormon law generally might be more accurately described as *the law of the priesthood*.

⁸ KINGDOM TRANSFORMED, *supra* note Error: Reference source not found, at 53; see ALSO JAMES B. ALLEN & GLEN B. ALLEN, *THE STORY OF THE LATTER-DAY SAINTS* 272-73 (2d ed. 1992) ("[T]he unique Mormon commonwealth was the result of careful economic planning by Church leaders, authoritative direction in carrying out the plan, and the willing cooperation of members.") [hereinafter *STORY*].

⁹ See *Established Agreeable*, *supra* note Error: Reference source not found.

¹⁰ TERRY L. GIVENS, *PEOPLE OF PARADOX: A HISTORY OF MORMON CULTURE* 8-9 (2007).

Like many other groups of this sort, Smith's Mormonism experimented with non-traditional or "biblical" property regimes, pointing to the description of early Christian organization in Acts of the Apostles.¹¹ A rudimentary first step towards the sort of coherent property-legal order developed in later decades emerged as the First United Order, which existed during the period of 1831-34, while the Mormons were in Jackson County, Missouri, and involved the central distribution of land parcels within an organized city plat to every family (including land outside the city allocated to farmers) and the centrally planned distribution of trade goods.¹²

This First United Order followed the pattern of various religious communitarian sects of the day, even drawing in prominent members of these groups, some of whom later became thought leaders in the Mormon community.¹³ The First United Order served to provide "a religious incentive" for early Mormons "to divide their farming lands, building lots, and other property" and to accumulate funds to promote Church causes.¹⁴

Both through the First United Order and more generally under Smith's evolving understanding of priesthood authority, members' property (like virtually every other aspect of their lives) was controlled or affected by ecclesiastical structures. In justifying the earliest Mormon property regime and the broader project of creating a communitarian and theocratic community, Joseph subjected all property to the logic of religion and within the jurisdiction of the priesthood. For example, one early member of the Church was commanded in canonical scripture to "not covet [his] *own* property, but impart it freely" to the ends of the Church.¹⁵

Thus, "being a Latter-day Saint meant full engagement in a life of resettlement, community building, temple construction, economic communalism, and millenarian preparation."¹⁶ To the Latter-day Saints, "property and human

¹¹ See Acts 2:42-47, 4:32-35 (" . . . And all that believed were together, and had all things common; And sold their possessions and goods, and parted them to all men, as every man had need . . . And the multitude of them that believed were of one heart and of one soul: neither said any of them that ought of the things which he possessed was his own; but they had all things common. Neither was there any among them that lacked: for as many as were possessors of lands or houses sold them, and brought the prices of the things that were sold, [a]nd laid them down at the apostles' feet: and distribution was made unto every man according as he had need.").

¹² *Early Mormon Communitarianism*, *supra* note Error: Reference source not found, at 349-50; GREAT BASIN KINGDOM, *supra* note Error: Reference source not found, at 24-25.

¹³ *Early Mormon Communitarianism*, *supra* note Error: Reference source not found, at 347; Hamilton Gardner, *Communism Among the Mormons*, 37 Q.J. ECON. 134, 152-55 (1922).

¹⁴ *Early Mormon Communitarianism*, *supra* note Error: Reference source not found, at 347.

¹⁵ D&C 19:26 (emphasis added); see also Givens, *supra* note Error: Reference source not found, at 11-12. This may have been so because, in the logic of Mormonism, there are no temporal commandments—everything the church does is calculated towards the eternal. See D&C 29:34-35.

¹⁶ Givens, *supra* note Error: Reference source not found, at 13.

effort have but one purpose, the establishment of Zion.”¹⁷ The influential Orson Pratt described the distinction in Mormon philosophy between the “Gentile” practice of dividing property with “God’s plan of making His Saints equal in property” through uniting property and acting in concert.¹⁸

Brigham Young and the Mormon Exodus

After the 1844 martyrdom of Joseph Smith and an ensuing succession crisis, Brigham Young assumed leadership of the largest segment of the Church’s remaining adherents, grounding his authority by his association to Smith and the Church’s Quorum of the Twelve Apostles. Smith’s killing led to tremendous and lasting anxiety among the Mormons, who ritualistically vowed to avenge the late Prophet’s death, which they blamed on the American nation broadly.¹⁹ Like Smith before him, Brigham Young sought to move the Mormon project further from liberal American society, viewed as a modern Babylon facing imminent destruction, in an attempt to gain greater control over Mormon affairs and to establish Zion.

Drawn to positive reports of the region’s fecundity and waterways, Young coordinated the Westward exodus of the Mormon population to the Eastern rim of the Great Basin, including what is now known the Salt Lake and Utah valleys, and the surrounding region. Despite the area’s relative resource-richness, typified, for example, in Utah Lake’s then-abundant fisheries, the area was generally arid, especially in comparison with the group’s previous centers of settlement in the Northeast and Midwest.

Arriving in Utah forced the transformation of Smith’s earlier Mormon property ethic and communitarianism into a meaningful solution to a survival dilemma: “essential to group survival in a hostile desert environment.”²⁰ Or, in the words of one prominent Mormon scholar, Mormon economic and property

¹⁷ EDWARD J. ALLEN, *THE SECOND UNITED ORDER AMONG THE MORMONS* 25 (1936). The practical administration and further discussion of the First United Order continues below in Section II.A.

¹⁸ *Early Mormon Communitarianism*, *supra* note Error: Reference source not found, at 345.

¹⁹ David John Buerger, *The Development of the Mormon Temple Endowment Ceremony*, 20 *DIALOGUE* 33, 52-56 (1987); James Wilford Garner, *The Case of Senator Smoot and the Mormon Church*, 184 *N. AM. REV.* 46, 52 (1907); Matthew C. Godfrey, *Review of The Mormon Church on Trial: Transcripts of the Reed Smoot Hearings by Michael Harold Paulos*, 29 *JOHN WHITMER HIST. ASS’N J.* 201, 201-03 (2009).

²⁰ GORDON SHEPHERD & GARY SHEPHERD, *A KINGDOM TRANSFORMED: THEMES IN THE DEVELOPMENT OF MORMONISM* 54 (1984) [hereinafter *KINGDOM TRANSFORMED*]; Leonard J. Arrington, *Economic Historic of a Mormon Valley*, 46 *PACIFIC N.W. Q.* 97, 97 (1955); *see also* L. Dwight Israelson, *An Economic Analysis of the United Order*, 18 *BYU Studies* 536, 538 (1978) (“If economic self-sufficiency was desirable prior to 1847, it was essential in the years following the arrival of the Mormons in the Great Basin.”).

policies were crafted because the Mormons were forced to “take care of their own people.”²¹ Novel property systems regulating the distribution, ownership, and consecration of resources, coupled with dispute-resolution mechanisms, were developed as a conscious, top-down effort to develop group solidarity and allow the Mormon settlers to survive in the Great Basin without significant existing capital or access to developed markets.²²

Significantly, Young wanted to retain central authority and rigid theocratic control over the Mormon settlement project and to minimize “Gentile” influence over the Saints, even resisting Mormon settlement where non-Mormons were then or might be expected to settle in the foreseeable future.²³ In short, a secluded homeland was more important to Young than economic boon.²⁴ In governing the tens of thousands of Mormons in the Utah territory, Brigham Young operated as a quasi-sovereign: “Whatever Mormonism was in the East or Middlewest under the leadership of Joseph Smith. . . it was a planned and rigidly controlled enterprise in the West under Brigham Young.”²⁵

Upon the Saints’ arrival in the Salt Lake Valley in 1847, Brigham Young introduced a property ethos, inspired by the foundations laid by Joseph Smith, that was very much in conflict with liberal American ideals, emphasizing the authority of God, as determined by His priesthood-wielding prophets and seers, to direct material affairs:

If the Lord had set apart, and consecrated, and given a certain portion of the earth to any individual with a deed and covenant, he might with some propriety call it his own; *but all other deeds that are according to Gentile laws*, and the institutions of the nations of the earth, *do not, according to the laws and revelations of heaven, give to men the exclusive right to the things of this world, as their own.*²⁶

That is, the basic ideological foundation for Mormon property law was the rejection of human ownership or dominion over “things”—land in particular

²¹ Arrington, *supra* note Error: Reference source not found, at 97.

²² EDWIN BROWN FIRMAGE & RICHARD COLLIN MANGRUM, ZION IN THE COURTS: A LEGAL HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, 1830-1900, at 293-97 (1988) [hereinafter ZION IN THE COURTS]; MILTON R. HUNTER, BRIGHAM YOUNG THE COLONIZER 157 (1941).

²³ Kenneth Owens, *Far From Zion: The Frayed Ties Between California’s Gold Rush Saints and LDS President Brigham Young*, 89 CALIFORNIA HIST. 5, 9-10, 19 (2012); GREAT BASIN KINGDOM, *supra* note Error: Reference source not found, at 34-35.

²⁴ Owens, *supra* note Error: Reference source not found, at 10.

²⁵ ALLEN, *supra* note Error: Reference source not found, at 27.

²⁶ Orson Pratt, *Consecration*, 2 JOURNAL OF DISCOURSES 21 (September 10, 1854), available at <https://journalofdiscourses.com/2/21>.

—and a commitment to property allocation by means of the priesthood, which allowed divination of God’s will for property.

In Zion, Brigham asserted, it would be the law of the priesthood, rather than the laws of America, that would govern Mormon property. The day after he arrived in the Valley, Brigham Young declared that “[n]o man should buy or sell land,” but instead be given a free “inheritance”²⁷ by priesthood leaders, limited to “what he could till” and therefore use beneficially.²⁸ This subjection of one’s own ability to hold property to the direction of the priesthood (not to mention the use of the term “inheritance” itself represented the consecratory ideal, underpinning all eras of consecration movements.²⁹

The Mormon Property Ethic in Early Utah

The “first principle” of Brigham’s agrarian³⁰ land policy was that “no man should hold more land than he can cultivate; [] if a man would not till his land, it should be taken from him.”³¹ This was more than an idle threat: those who did not use their land did, in some cases, have it taken from them and transferred to someone who *would* use it.³² Although working the land was a necessary precondition to maintaining possession, every man’s labor was not considered his own,³³ and working the land itself was no grounds for Lockean entitlement.

From the group’s epicenter of Salt Lake City to the strung-out settlements reaching into the deserts of Southern Utah, immigration and development were centrally directed by Young and the church hierarchy to expand the footprint of Mormon influence and to maintain control over the region.³⁴ Mormon towns and villages were established throughout modern Utah and into what is now Idaho, Nevada, and Arizona: the modern “Mormon Corridor.”³⁵

By the 1850s, the Mormons had become openly hostile to the federal government, and the government returned that hostility. Throughout the decade, visitors to Utah reported that the Mormons spoke of overthrowing the U.S. government.³⁶ Governed first as the autonomous “State of Deseret” until 1850, and subsequently the Territory of Utah (with Brigham Young as the first

²⁷ IN THE COURTS, *supra* note Error: Reference source not found, at 297.

²⁸ *Id.* at 294.

²⁹ *See infra* Part II.

³⁰ STORY, *supra* note Error: Reference source not found, at 273, 330; *see also* KINGDOM TRANSFORMED, *supra* note Error: Reference source not found, at 58.

³¹ IN THE COURTS, *supra* note Error: Reference source not found, at 295-96.

³² STORY, *supra* note Error: Reference source not found, at 278-79.

³³ GREAT BASIN KINGDOM, *supra* note Error: Reference source not found, at 27; KINGDOM TRANSFORMED, *supra* note Error: Reference source not found, at 55.

³⁴ EDWARD J. ALLEN, THE SECOND UNITED ORDER AMONG THE MORMONS 26-28 (1936); STORY, *supra* note Error: Reference source not found, at 277-79.

³⁵ STORY, *supra* note Error: Reference source not found, at 273-75.

Territorial Governor), which adopted the provisional laws of Deseret,³⁷ the Church captured and control the organs of apparent-state power—controlling county probate judges (given general jurisdiction to compete with federal courts, as discussed below in Part III) and even going so far as confirming members of the legislature in their role through special baptism and the Mormon ritual of the laying on of hands.³⁸

But Deseret and the Territory of Utah (after the form of secular, American government), despite their near-complete capture by the Mormon hierarchy, were not the locus of Mormon law or governance in Territorial Utah. Instead, it was the Church *itself*—along with the Church court system it generated—that operated as the primary vehicle of Mormon law.³⁹

Before any act of Congress permitted or recognized legal landholding in the area, property rights in Mormon villages were allocated and regulated by the Mormon priesthood,⁴⁰ and use rights to land and water were conditioned by the priesthood on beneficial use and natural resources were declared the domain of the public.⁴¹ The Mormon resource allocation system was designed to be an explicit rejection of property and civil law themselves, which eventually imploded when subjected to the force of the expanding American state. Rooted in Brigham Young’s property ethic,⁴² tracts of land larger than twenty acres could thus only be acquired by consent of the priesthood.⁴³ The Church was thus assumed to have claim to all lands in the Mormon sphere, which priesthood leaders (organized in stakes⁴⁴) were empowered to distribute to settling members on an equitable basis according to a central developmental plan.⁴⁵

³⁶ Samuel D. Brunson, *Mormon Profit: Brigham Young, Tithing, and the Bureau of Internal Revenue*, 2019 BYU L. REV. 41, 58 (2019).

³⁷ *Id.* at 268.

³⁸ *Id.* at 288.

³⁹ See *infra* Part III. To point to the apparent-state apparatuses of Deseret or Utah (or their laws, courts, constitutions, or other analogues of civil law) is to fundamentally misunderstand both the nature of Mormon law as rejecting the forms of American law (such as the state itself) and the ways in which the Territory of Utah and its courts were quasi-colonial outposts of Americanism within Utah. It’s was not Young’s governorship in the Territory of Utah from 1851-58 that legitimizes his role in Mormon law, for example, but rather his ecclesiastical role as the head of the priesthood and ecclesiastical structures. See D&C 132:7.

⁴⁰ Building the City, *supra* note Error: Reference source not found, at 71. See also *supra* note Error: Reference source not found.

⁴¹ Arrington, *supra* note Error: Reference source not found, at 99; STORY, *supra* note Error: Reference source not found, at 272-73, 279.

⁴² See *supra* notes Error: Reference source not found-Error: Reference source not found and accompanying text.

⁴³ IN THE COURTS, *supra* note Error: Reference source not found, at 296.

⁴⁴ See IN THE COURTS, *supra* note Error: Reference source not found, at 294.

⁴⁵ *Id.* at 294. Inheritances were distributed on a plat grid pattern, originating with a revelation of Joseph Smith’s. *Id.* at 297; see also STORY, *supra* note Error: Reference source not found, at 278. In addition to allocating housing lots in the city, Mormons drew for assignments in the “Big Fields” that surrounded the residential plats, where they would raise crops for the

It was a central tenet in the early Mormon economy that there was no private ownership of natural resources such as timber, water, and mineral resources; instead, these were presumed to belong to all the people and managed by the priesthood.⁴⁶ With regard to water, this meant a refutation of the riparian rights doctrine and the groundwork for the prior appropriation-beneficial use ethos pioneered by Brigham Young.⁴⁷ The general rule with water, as with everything else, was “let the Priesthood rule,”⁴⁸ and church courts exerted the priesthood’s hegemony.⁴⁹

The American Response to Mormon Property in Utah

But even after legal groundwork was laid for property claims to be recognized by the American state, Mormons “subvert[ed] the federal regulations” by continuing to rely on Church hierarchy and Priesthood structures to distribute and control land and manage disputes, superseding and overriding legal entitlements.⁵⁰ When, in 1869, the Homestead Act was expanded by Congress to cover the Great Basin, the Mormon hierarchy complied with the federal laws only on paper⁵¹ by appointing “trustees” to undergo the land patent process, using church funds for the application process, before transferring their “legally” acquired land parcels to the claimants under the direction of the priesthood.⁵² Adherence to American law was necessary as a means to an end, that is, the operation of Mormon law and priesthood-directed property allocation.

The Mormon settlement pattern was thus not displaced by the entrance of federal homesteading laws, and the Church retained strong control over land allocation to incoming Mormon settlers⁵³ in addition to infrastructure development.⁵⁴ The Church even had a large, formal Public Works Department to provide supplemental labor and means when necessary.⁵⁵ Mormon-drawn surveys always superseded federal surveys in church courts,⁵⁶ and at times in

community. Additionally, outside of the city centers were open-access, priesthood-regulated commons for livestock. *See* STORY, *supra* note Error: Reference source not found, at 278.

⁴⁶ GREAT BASIN KINGDOM, *supra* note Error: Reference source not found, at 52-53.

⁴⁷ *Id.* at 52-53.

⁴⁸ *Id.* at 54.

⁴⁹ *See id.* at 54-56 (discussing Church members seeking Mormon hierarchy’s permission before beginning private business ventures). *See also infra* Part III.

⁵⁰ *Id.* at 300, 304.

⁵¹ IN THE COURTS, *supra* note Error: Reference source not found, at 293.

⁵² *Id.* at 296.

⁵³ *Id.* at 296-97, 300, 304; GREAT BASIN KINGDOM, *supra* note Error: Reference source not found, at 51.

⁵⁴ GREAT BASIN KINGDOM, *supra* note Error: Reference source not found, at 51-52; STORY, *supra* note Error: Reference source not found, at 270.

⁵⁵ STORY, *supra* note Error: Reference source not found, at 283.

⁵⁶ IN THE COURTS, *supra* note Error: Reference source not found, at 305.

federal district court.⁵⁷ Being a Mormon, in short, meant accepting the Mormon property system as preempting property law, as was sometimes articulated explicitly by the hierarchy.⁵⁸

Mormon settlement patterns and tendencies towards coordinating property and resource allocation through the infrastructure of the Church and priesthood led to significant resource centralization that concerned federal lawmakers and made the American government eager to rein in Brigham Young, even through violent force if necessary,⁵⁹ and unravel the Church's growing resources. Before the American government took the extreme steps of disestablishing the Church and expropriating its assets through the 1884 Edmunds-Tucker Act,⁶⁰ for example, it sought to tax the Church (and other religious organizations with communitarian and nontraditional property regimes),⁶¹ which Brigham Young saw as a "plot for the overthrow of the kingdom of God."⁶²

The federal government's actions revealed deep hostility towards the Church's ownership and management of property "arrising [sic] from certain systems adopted among them and large amounts of property held by them."⁶³ The government, in combating the Mormon property regime through its wielding of the tax power, apparently justified its actions as paternalistic protection of individual Mormons, whom the state believed were coerced into giving their property involuntarily to the Church.⁶⁴

Similarly, while the 1862 Morrill Anti-Bigamy (the subject of *Reynolds v. United States*, discussed below in Section I.B) is best known for its criminal penalties for bigamy, the bill's Senate manager said that one object of the bill was to prevent the *accumulation of real estate* in the hands of ecclesiastical corporations in Utah. . . . [T]he object of [one] 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."⁶⁵

Even more on-the-nose, the 1884 Edmund-Tucker Act, which revoked the 1851 charter of the Church of Jesus Christ of Latter-day Saints, disestablished the Church and allowed the government, by escheat, to assume

⁵⁷ *Id.* at 306.

⁵⁸ *See id.* at 305.

⁵⁹ *See generally* Richard D. Poll & William P. Mackinnon, *Causes of the Utah War Reconsidered*, 20 J. MORMON HISTORY 16 (1994).

⁶⁰ *Established Agreeable, supra*, at 221.

⁶¹ Samuel D. Brunson, *Mormon Profit: Brigham Young, Tithing, and the Bureau of Internal Revenue*, 2019 BYU L. REV. 41, 72-74, 85-86 (2019).

⁶² *Id.* at 45.

⁶³ *Id.* at 75.

⁶⁴ *Id.* at 81.

⁶⁵ *Established Agreeable, supra*, at 220.

nearly *all* of its \$3m in real property and assets. Proponents of the Act designed it to “divorce” the Church’s powers from the state and to tame its “corporate wealth” in the form of what they saw as excessive control over real property in the Territory.⁶⁶

The conflict ultimately ended when, in late 1870s to the early 1890s, the Supreme Court of the United States endorsed the American government’s campaign of state violence against Territorial Utah, made possible by, among other things, disenfranchising Mormons and excluding them from serving in juries.⁶⁷ These “Mormon” cases ultimate climaxed with the Court’s decision, in *Late Corporation of the Church of Jesus Christ of Latter-day Saints v. United States*⁶⁸ that the Edmund-Tucker Act was a lawful exercise of congressional power.⁶⁹

Later that same year, the Mormon Prophet Wilford Woodruff acknowledged that the threat of the forceful confiscation of *property*, especially the Salt Lake Temple, along with the legal violence of imprisonment, forced the Mormon people to “*submit*” to the law.⁷⁰ But the Prophet’s submission to the “law of the land” did not negate or contradict the Mormons’ canonical, scriptural expectation that, in the future, “the kingdoms of this world” will eventually be constrained to become subject unto the laws of Zion,⁷¹ chiefly the properly law system called the law of consecration.⁷²

Thus, underlying the American government’s legal campaign against the Mormons is a constant *nomos* of reining in the Church’s control over *property*, made possible by the Mormon law of consecration, for the ultimate end of reasserting the “supremacy of the Constitution.”⁷³ Beyond the issue of polygamy or religious deviance, competing ideas of *property* and anxieties about an aberrant property regime undergirded increasingly drastic restricts of Mormon self-government throughout the nineteenth century—sometimes explicitly, sometimes implicitly. More than a battle for religion, the Mormon-American

⁶⁶ *Id.* at 222.

⁶⁷ *Reynolds v. United States*, 98 U.S. 145 (1878); *Davis v. Beason*, 133 U.S. 333 (1890); *Late Corp. of Church of Jesus Christ v. United States*, 136 U.S. 1 (1890); *see also* *Miles v. United States*, 103 U.S. 304 (1881); *Cannon v. United States*, 116 U.S. 55, 58-59 (1885); *Snow v. United States*, 118 U.S. 346 (1886).

⁶⁸ 136 U.S. 1 (1890).

⁶⁹ *Id.* The Church eventually conceded and abandoned polygamy, explicitly recognizing that its submission to American law was, in large part, based on concern over its ability to hold property, especially the Salt Lake Temple. Wilford Woodruff, Official Declaration – 1 and Excerpts from Three Addresses by President Wilford Woodruff Regarding the Manifesto (1893 (canonized in Latter-day Saint scripture in 1908).

⁷⁰ *Id.* (emphasis added).

⁷¹ DOCTRINE AND COVENANTS 105:32 [hereinafter D&C].

⁷² *See* D&C 105:4-5.

⁷³ *Mormon Profits, supra*, at 58.

conflict was a war over what property *means* and *should mean* in American society, and over the acceptable boundaries of property pluralism.

The Mormon Cases Reconsidered

These federal action against the Mormons was affirmed and solemnized by the United States Supreme Court in a series of decisions, collectively the “Mormon” cases.⁷⁴ In these cases, the United States Supreme Court engaged with the Congress in constitutional dialogue, endorsing the use of legal violence against the Mormons and rationalizing to itself the state’s actions. To do so, the Supreme Court repudiated Mormonism as an aberrant, illegitimate religion founded for the propagation of polygamy—an “odious”⁷⁵ practice unbecoming of western- and northern-European peoples and “abhorrent to the sentiments and feelings of the civilized world.”⁷⁶

That is, the Supreme Court, on its face, apparently believed itself to be policing the boundaries of acceptable practices of religion (and therefore the appropriate limits of religious pluralism), drawing on its imagination of civilized European Christianity and the traditions of English law as they should be practiced in America.⁷⁷ The Mormons’ quest for refuge, it was imagined, turned on a *nomos* of religious refuge and association,⁷⁸ which conflicted with the normative universe of monogamous European Christianity.⁷⁹

The *Reynolds* Court, in particular, voiced concern that religious exercise might serve as a pretext for lawless *individualism*: that “professed doctrines of religious belief” would “permit every citizen to become a law unto himself.”⁸⁰ This anxiety, in turn, came to define both the legacy of *Reynolds* and the Court’s memory of the Mormon-American conflict: a matter of law versus religion. It is this framing—the Court’s delineation of the appropriate boundaries of religion, or the government’s rejection of the Mormon project *qua religion*—that dominates academic and popular perception of these cases and, more broadly, the

⁷⁴ *Reynolds v. United States*, 98 U.S. 145 (1878); *Davis v. Beason*, 133 U.S. 333 (1890); *Late Corp. of Church of Jesus Christ v. United States*, 136 U.S. 1 (1890); *see also* *Miles v. United States*, 103 U.S. 304 (1881); *Cannon v. United States*, 116 U.S. 55, 58-59 (1885); *Snow v. United States*, 118 U.S. 346 (1886).

⁷⁵ *Reynolds*, *supra* note Error: Reference source not found, 98 U.S. at 164.

⁷⁶ *Late Corp.*, *supra* note Error: Reference source not found, 136 U.S. at 48.

⁷⁷ *Reynolds*, *supra* note Error: Reference source not found, 98 U.S. at 165.

⁷⁸ Robert M. Cover, *The Supreme Court, 1982 Term – Foreword: Nomos and Narrative* 97 HARV. L. REV. 4, 31, 51-52 (1983) [hereinafter *Nomos and Narrative*].

⁷⁹ *Id.* at 4-7; Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 74 (“Law in this sense is not, or rather is not only, the rules that the state is prepared to enforce through violence, but refers to a legal meaning particular to a community’s normative universe, or *nomos*.”).

⁸⁰ *Reynolds*, *supra* note 1, at 167.

Mormon War and conflicts of the nineteenth century: what it means to be a *church* in America and the appropriate extent of the religious congregation.⁸¹

But the story of the Mormon conflict is, of course, far from one of lawless individualism or the anxieties between the state and the church. Instead, it is the story of violence emerging in the wide chasm between two competing notions of law, order, and *property*.

The Mormon project was more than merely religious, instead properly understood as a social and legal project, complete with substantive doctrinal rules and a coherent, multi-tiered adjudicatory system designed for self-government. The historical record reveals that the Mormon effort was not merely to enforce norms or adjudicate disputes “in the shadow of law,”⁸² but rather to *displace* and *replace* American law.

Similarly, while the Court’s Mormon cases speak most clearly about refusing Mormons’ *religious* expressions of identity, under the surface lies the Court’s rejection of Mormon legal ideals, particularly in relation to property. It is in *Late Corporation* that the Court’s mask comes off the most, as the Court finds itself disestablishing the Church structure, brushing aside the Mormons’ claims to legal authority⁸³ and expropriating Mormon collective property. The American

⁸¹ Nathan B. Oman, “Established Agreeable the Laws of Our Country”: Mormonism, Church Corporations, and the Long Legacy of America’s First Disestablishment, 36 J. L. & RELIGION 202, 203, 219 (2021) [hereinafter *Established Agreeable*] (“[Churches] could dream of Zion, but church corporations could not implement that theology by building new cities of God in the wilderness.”); *id.* at 227-28:

The law took what amounted to 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.

⁸² See, e.g., Robert M. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1978); ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTE* (1991); Mauro Bussani & Marta Infantino, Tort Law and Legal Cultures, 63 Am. J. Comp. L. 77, 83-87. Unlike the systems described in Bussani & Infantino, *supra*, however, the Mormon legal system was not designed nor intended to be a “layer” of law, neither was it supposed to “coexist” with American law. See *id.* at 84.

⁸³ There is a consistent temptation to tell a story of America versus Deseret—or the American *state* against the Mormon *state*, which was itself formed as a vehicle to represent the Saints’ political ideals, including the incorporation of the Church on terms that reflected the Mormon image of ecclesiastical organization. See *id.* at 203 (“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 LDS Church.”). However, focusing on Deseret obscures that the

government even celebrated its feat in “obliterate[ing] [the Church of Jesus Christ of Latter-day Saints] out of existence by legal enactment.”⁸⁴

More than polygamy (as in *Reynolds*), the *Late Corporation* Court makes clear that the nadir of the Mormon-American conflict (the 1884 Edmund Tucker Act) was a result of the Church’s *ambitions to law and property*, as the Church was “a contumacious organization, wielding by its resources an immense power in the Territory of Utah . . . constantly attempting to oppose, thwart and subvert the . . . will of the government of the United States.”⁸⁵ *Late Corporation* waves away the idea of Deseret and otherwise fails to grapple with the depth of the Mormons’ aspirations to establish a legal order. *Late Corporation* similarly fails to recognize that Mormonism was not just about the church’s “legal personality”⁸⁶ or the “accommodat[ion]” of religious practice,⁸⁷ but American law’s supplantation.

Critical analysis of the “Mormon” cases in context, then, reveals not just an exercise in adjudicating the appropriate moral boundaries of religious exercise, but also in “choos[ing] between two or more laws [and the] impos[ition] upon laws a hierarchy”:⁸⁸ the construction of constitutional destiny.⁸⁹ Seemingly unawares, and under the guise of regulating polygamy, the Court was engaged not only in “justifying [the state’s] repression [of the Mormons] to itself,”⁹⁰ but in exercising its narrative powers to destroy the *nomos* of Mormonism, including its core—the law consecratory property order.

Thus, in enforcing the “hierarchy”⁹¹ of laws and sources of legal authority (on property as well as polygamy, or against Mormon Law writ large), the Court exercises *mythical* violence, that is, law wielding the threat of state violence,

Mormon image of government was not centered in the state, but the *Church itself*—including its inherent authority and adjudicatory system.

⁸⁴ Samuel D. Brunson, *Mormon Profit: Brigham Young, Tithing, and the Bureau of Internal Revenue*, 2019 *BYU L. Rev.* 41, 69 (2019).

⁸⁵ *Late Corp. of Church of Jesus Christ v. United States*, 136 U.S. 1, 63-64 (1890).

⁸⁶ *Established Agreeable*, *supra* note Error: Reference source not found, at 223 (“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.”).

⁸⁷ *Id.* at 229 (“Again and again, over the course of the LDS 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.”)

⁸⁸ *Nomos and Narrative*, *supra* note Error: Reference source not found, at 40 (“It is the multiplicity of laws, the fecundity of the jurisgenerative principle, that creates the problem to which the court and the state are the solution.”).

⁸⁹ *Id.* at 29.

⁹⁰ *Id.* at 52.

⁹¹ *Id.* at 40.

propagating and preserving itself (as if as a matter of fate)⁹² by conquering non-violent law (that is, divine violence).⁹³

This context and significance of the “Mormon” cases is generally overlooked, and their legacy has been flattened to thin propositions about the regulation of religion, particularly in the context of criminal law. This is not because of any perceived irrelevance, however—*Reynolds*, in particular, lies at the foundation of Free Exercise doctrine, but is invoked for little more than the meager proposition that religion should not allow individuals to “become a law unto [themselves].”⁹⁴ Considered together and in fuller historical context, however, the “Mormon” cases reveal a much deeper story about the role of competition between incompatible legal ideals and the limits of property pluralism.

II. THE EVOLUTION OF THE LAW OF CONSECRATION

With the historical outline provided in Part I, this Part seeks to elaborate on the administration and practical realities of Mormon property law as it evolved from Joseph Smith’s First United Order to the more mature United Order of Enoch under Brigham Young. It considers the Mormons’ evolving dialogue with American law and legal forms, ultimately seen by the Mormon hierarchy as a stumbling block in the path towards building Zion. To do so, this Part outlines three distinct periods in the evolution of Mormonism’s experimentation with property-legal orders competing with the American property regime. What begins as an attempt to work at the boundaries of law transforms into refusal of the American property law ethos and, later, an attempt to *overcome* the constraints of Anglo-American notions of ownership.

Throughout the early Mormons’ experiment with property law, the primary tool used to impose their communitarian, priesthood-oriented values onto otherwise-libertarian and individualistic American notions of property law was the use of *identity as property*. Because the priesthood and Church hierarchy alone could adjudicate identity and good standing within the group, and because this identity and good standing were integrated into property transactions, the

⁹² Catherine Kellogg, *Walter Benjamin and the Ethics of Violence*, 9 LAW, CULTURE & HUMANITIES 71, 76 (2011); Roger Sinnerbrink, *Deconstructive Justice and the ‘Critique of Violence’*: *On Derrida and Benjamin*, 16 SOC. SEMIOTICS 485, 495 (2006); Stine Holte, *Legal, Mythic, and Divine Violence*, 36 LITERATURE & THEOLOGY 316, 329-30 (“The threatening character of mythic violence comes to expression in Benjamin’s description of law-preserving violence as ‘threatening, like fate’. This threatening fatefulness is not only present in the ambiguous power of the police force, but also in the practice of death penalty, whose aim is not to protect specific aims of law, but the law itself.”).

⁹³ See WALTER BEJAMIN, TOWARD THE CRITIQUE OF VIOLENCE 60 (2021); Holte, *supra* note Error: Reference source not found, at 326, 329.

⁹⁴ *Emp’t Div. v. Smith*, 494 U.S. 872, 885, 110 S. Ct. 1595, 1603 (1990).

Church retained at all times either direct or indirect control over property under the law of consecration.

In turn, each phase reveals increasingly complex adoption of American legal tools and instruments to integrate *identity as property* into transactions and property arrangements. Thus, this Part considers the ways in which individuals' relationship to groups (and group identities) can itself be subjected to the logic of property—bargained for, collateralized, and integrated into corporate charters. And so, not only were consecratory property values the source of the Mormon conflict, they were also tools by which the Mormons waged ideological combat.

Ultimately, this story, taken together, reveals a sort of irony in the history of the Mormon project: although the Mormons attempted to outsmart and outmaneuver American property law in order to impose a fundamentally different value set (and thereby *negate*) the legal order, they ultimately succumbed to the very property logic and instruments they sought to conquer. In other words, the Mormons' increasingly elaborate iterations of the law of consecration the law of consecration inadvertently facilitated the Mormons' economic submission to the American state and market.

First United Order (1831-34)

The first era of Mormon property doctrine and practice, the First United Order, initially existed independent of the church court system. As Mormons expanded in the West, however, the church court apparatus described in the preceding Part became a vehicle for propagating Mormon law. Still, this Section begins with the pre-Utah property-doctrinal development to demonstrate how Mormon law's property governance norms and consecration itself exemplifies Mormon law's competition and negotiation with American law. As discussed above in Part I, the foundation of Mormon law and legitimacy is rooted in the model of Joseph Smith and the earliest days of the Mormon church, as the first iteration of property-pooling in the First United Order emerged in 1831.⁹⁵

This First United Order served as the philosophical underpinnings for various recreations of the consecratory order, both in the mainline Mormon movement (described below in latter Sections) as well as in other Mormon lineages.⁹⁶ The basic pattern of the ideal law of consecration consists of a three-

⁹⁵ Some controversy exists as to whether the first united order was intended to be a general commandment or order for the church, or specific to named parties invited. Kent W. Huff, *The United Order of Joseph Smith's Time*, 19 DIALOGUE 146, 146-47 (1986). In any case, it was to be "everlasting." D&C 82:20; 104:1.

⁹⁶ See, e.g., W. Grant McMurray, *American Values for a "New Jerusalem": Formations of the First United Order of Enoch, 1860-71*, 8 JOHN WHITMER HIST. ASS'N J. 30 (1988) (describing the United Order experiments among the Reorganized Church of Jesus Christ of Latter-day Saints who remained in the Midwest following Joseph Smith's death).

step pattern: first, a complete⁹⁷ transfer of a members' property to the Church or its trustee; second, the measuring of families' needs by priesthood leaders and the allotment of "stewardships" (to be used "according as the law directs"⁹⁸); and third, the periodic consecration of surpluses, profits, beneficial waste,⁹⁹ and additional gains exceeding family needs stemming from the stewardship analogous to the doctrine of accession.¹⁰⁰

Under this prototype model of consecration, Joseph Smith's scriptural revelations prescribe a sort of general partnership for common holding of individual partners' (here, code-named church leaders') properties.¹⁰¹ Common holding and management of property by church leaders permitted the discreet coordination of Mormon business fronts and allowed the nascent Mormon community to access otherwise-unavailable credit.¹⁰²

However, initially designed within the constraints of American law (or, dressed in the garb of American law), the consecration deeds ostensibly granted the Church fee simple title to consecrated lands, granting to "stewards" a life estate subject to condition subsequent. In particular, the consecration deeds' condition subsequent made the steward's interest in the land contingent on maintaining good standing within the community (that is, continually owning and being owned by the Mormon identity), sufficiently working the land, and not being a troublemaker.¹⁰³

Most fundamental of these conditions subsequent was the condition to "belong to the Church," and it was to be understood by both contracting parties that the land tenure was only "during the continued faithfulness of the member."¹⁰⁴ Even during their good standing, and notwithstanding their conditional interest in the property, the Lord commanded "let not any among you say that it is his own; for it shall not be called his, nor any part of it."¹⁰⁵

Joseph Smith's revelations that formed the basis for the consecratory practice explained that, by divine mandate, "he that sinneth and repenteth not shall be cast out, and shall not receive again that which he has

⁹⁷ See D&C 104:70 ("And let not any among you say that it is his own; for it shall not be called his, nor any part of it.").

⁹⁸ See D&C 58:36 ("And also, this is a law unto every man that cometh unto this land to receive an inheritance; and he shall do with his moneys according as the law directs."). This description of the operation of the consecratory order as "the law" is supported by D&C 85:1, which dictates that inheritances are to be received "legally."

⁹⁹ See D&C 104:68.

¹⁰⁰ GREAT BASIN KINGDOM, *supra* note Error: Reference source not found, at 11.

¹⁰¹ Huff, *supra* note Error: Reference source not found, at 147; D&C 82: 11-20, 27; D&C 104:62, 72-73, 67-77.

¹⁰² Huff, *supra* note Error: Reference source not found, at 148.

¹⁰³ *Id.*; JOSEPH SMITH, 1 HISTORY OF THE CHURCH ch. 26, 365-67 (1833), available at <https://byustudies.byu.edu/online-chapters/volume-1-chapter-26/>.

¹⁰⁴ BUILDING THE CITY, *supra* note Error: Reference source not found, at 366.

¹⁰⁵ D&C 104:70.

consecrated . . . unto me,” thus sacralizing and canonizing the condition subsequent relationship between stewards and consecrated property.¹⁰⁶ This seemed to have been calculated, at least in part, to prevent opportunistic conversion and apostasy, and instead conditioned retention of land use rights on sustained engagement with the group—in other words, adoption of the group identity.¹⁰⁷ Similarly, Smith imagined that one’s *family* would only succeed the head of household in interest in the land provided the steward died in good standing. Otherwise, interest would revert to the Church.¹⁰⁸

Elsewhere, the scriptural description of the order dictates that an apostate “shall not retain the gift, but shall only have claim on that portion that is deeded unto him. And thus all things shall be made sure, according to the laws of the land,”¹⁰⁹ seeming to suggest that the apostate stood only to lose their portion of the community’s profit or their non-stewarded consecration. This language also reflects the early consecratory order’s apparent aspirations to operate within the perceived boundaries of civil law.

This is reflected in the language of the contracts used to effectuate the transfer of lands to the Church and the leaseback subject to condition subsequent. After granting title to his property to the Church by means of its agent, Edward Partridge,¹¹⁰ one member, Titus Billings, entered into the following stewardship arrangement, evidencing the principles outlined above:

¹⁰⁶ *Id.*; cf. D&C 42:37; 82:20.

¹⁰⁷ *Early Mormon Communitarianism*, *supra* note Error: Reference source not found, at 351-52.

¹⁰⁸ *Id.* at 352. Although “the laws of the land” forced the Church’s hand and widows were given inheritance rights. *Id.* at 353 n.41.

¹⁰⁹ D&C 51: 5-6.

¹¹⁰ In language as follows:

Be It Known, That I, Titus Billings of Jackson county, and the state of Missouri, having become a member of the Church of Christ, organized according to law, and established by the revelations of the Lord, on the 6th day of April 1830, do, of my own free will and accord, having first paid my just debts, *grant and hereby give* unto Edward Partridge of Jackson county, and state of Missouri, Bishop of said Church, the following described property, viz.:—sundry articles of furniture valued fifty-five dollars twenty-seven cents; also two beds, bedding and extra clothing valued seventy-three dollars twenty-five cents; also farming utensils valued forty-one dollars; also one horse, two wagons, two cows and two calves, valued one hundred forty-seven dollars.

For the purpose of purchasing lands in Jackson county, Mo., and building up the New Jerusalem, even Zion, and for relieving the wants of the poor and needy. For which I, the said Titus Billings, do covenant and bind myself and my heirs forever, to release all my right and interest to the above described property, unto him, the said Edward Partridge, Bishop of said Church.

Be It Known That I, Edward Partridge, of Jackson county, state of Missouri, Bishop of the Church of Christ, organized according to law,¹¹¹ and established by the revelations of the Lord, on the 6th day of April, 1830, have leased and by these presents do lease unto Titus Billings of Jackson county, and state of Missouri, a member of said Church the following described piece or parcel of land . . . And also have loaned the following described property [enumerating various chattel property] . . . to have and to hold the above described property, by him the said Titus Billings, to be used and occupied as to him shall seem meet and proper.

And as a consideration for the use of the above described property I, the said Titus Billings, do bind myself to pay the taxes, and also to pay yearly unto the said Edward Partridge, Bishop of said Church, or his successor in office, *for the benefit of said Church, all that I shall make or accumulate more than is needful for the support and comfort of myself and family*. And it is agreed by the parties that this lease and loan shall be binding during the life of the said Titus Billings, *unless he transgresses and is not deemed worthy by the authority of the Church, according to its laws, to belong to the Church*. And in that case I, the said Titus Billings, do acknowledge that I *forfeit all claim to the above described leased and loaned property*, and hereby bind myself to give back the lease, and also pay an equivalent, for the loaned [articles] for the benefit of said Church . . .¹¹²

Joseph Smith, 1 History of the Church ch. 26 n.1 (1833), available at <https://byustudies.byu.edu/further-study-lesson/volume-1-chapter-26/>; *Early Mormon Communitarianism*, supra note Error: Reference source not found, at 352.

¹¹¹ See *Established Agreeable*, supra note Error: Reference source not found, for commentary on this and similar claims by early Church leaders regarding the time and manner of the Church's incorporation.

¹¹² JOSEPH SMITH, I HISTORY OF THE CHURCH ch. 26, n.1 (1833), available at <https://byustudies.byu.edu/further-study-lesson/volume-1-chapter-26/>. It continued:

And further, in case of said Titus Billings' or family's inability in consequence of infirmity or old age to provide for themselves while members of this Church, I, the said Edward Partridge Bishop of said Church, do bind myself to administer to their necessities out of any fund in my hands appropriated for that purpose, not otherwise disposed of, to the satisfaction of the Church. And further, in case of the death of the said Titus Billings, his wife or widow, being at the time a member of said Church, has claim upon the above described leased and loaned property, upon precisely the same conditions that her said husband had them, as above described; and the children

In evidence of the widespread practice of the First United Order (as well as its non-symbolic nature), Edward Partridge, the church's agent in the transactions, appears to have been the only individual Mormon to have been registered with the state as owning lands (or at least lands granted in inheritance), thus signifying that the first consecratory order was intended to effectuate literal and *legal* transfer of land title.¹¹³ Both doctrinal theory and demonstrated practice, according to Leonard Arrington, the "dean of LDS historians,"¹¹⁴ show that transfers of stewardship by those bound by the consecration arrangement, even to family, were disallowed, thus subjecting consecrated properties to a non-marketability and non-alienability regime.¹¹⁵

Arrington reports that, in at least one case under the First United Order, a wealthy member did, in 1833, successfully sue in civil court to void the consecratory agreement for the return of their consecrated property.¹¹⁶ As a result of early legal difficulties, Smith ceded that transgressors "should be cut off, out of the church," but that "his inheritance" would be "his still, and he is delivered over to the buffetings of Satan till the day of redemption."¹¹⁷ Thus, by 1833, largely due to conflicts with state property law and American judges' apparent distaste for Mormon consecration-trust holding, the First United Order policy was changed within the church to allow a fee simple deed to be offered to stewards, and the consecratory order thus downshifted towards symbolic, religious practice.¹¹⁸ Mormon scripture describing the practice was subsequently retconned to conform to this new, less-toothy view of consecration.¹¹⁹

In the end, though, although the Lord chided the Saints for their "transgressions" and failure to obey the consecratory demands to "impart of their

of the said Titus Billings, in case of the death of both their parents, also have claim upon the above described property, for their support, until they shall become of age, and no longer; subject to the same conditions yearly that their parents were; provided, however, should the parents not be members of said Church, and in possession of the above described property at the time of their deaths, the claim of the children as above described, is null and void.

Another deed-form lacks the estate language and suggests an unconditional transfer with no vested life estate.

¹¹³ BUILDING THE CITY, *supra* note Error: Reference source not found, at 366.

¹¹⁴ Owens, *supra* note Error: Reference source not found, at 18.

¹¹⁵ *Early Mormon Communitarianism*, *supra* note Error: Reference source not found, at 346.

¹¹⁶ *Early Mormon Communitarianism*, *supra* note Error: Reference source not found, at 349, 353; *see also* STORY, *supra* note Error: Reference source not found, at 86.

¹¹⁷ *Early Mormon Communitarianism*, *supra* note Error: Reference source not found, at 353 (citing Orson F. Whitney, *The Aaronic Priesthood*, 6 CONTRIBUTOR 7 (Oct. 1884).

¹¹⁸ GREAT BASIN KINGDOM, *supra* note Error: Reference source not found, at 11.

¹¹⁹ *Early Mormon Communitarianism*, *supra* note Error: Reference source not found, at 354.

substance, as becometh saints,”¹²⁰ a “great majority” of Saints present probably participated in the Jackson County-era consecration order,¹²¹ the property-specific aspects of the system failed, and Brigham Young claimed there were no profits generated from the trust system.¹²² It was replaced with the inferior law of tithing in 1838, which obviated the transfer and reverse transfer and donate surplus,¹²³ and the general leadership functions of the order were transferred to the church hierarchy.¹²⁴

The First United Order was thus defeated by an American legal order unwilling to recognize property interests contingent on community identity and orthodoxy such as the consecratory deeds demanded. Because of this failure to operate consecration within the boundaries of American law, Smith sought to cultivate an adjudicatory system within the church itself to make the system work, seeking to innovate the practice by obliging stewards to “reasonably show to the Bishop that they need as much as they claim” when requesting “inheritances” from profits, with a priesthood tribunal arbitrating inheritance disputes.¹²⁵ But Mormon law would continue to develop as a competing vision of legal order in later years as Smith’s successor, Brigham Young, was more willing to innovate and create a governance system more independent from American legal systems and norms. In other words, Young’s aspirations would later turn towards *overcoming* American law rather than attempting to comply with it.

The Consecration Movement of the 1850s

In the 1850s, Brigham Young, now governing the Mormons in territorial Utah and far from federal oversight, sought to invoke principles of consecration to bring Mormon communities into economic solidarity and temporal “unity,”¹²⁶ believing that this would stimulate the sort of social and spiritual unity requisite to approximate the celestial order. Anxious to strengthen Mormon identarian ties, Brigham Young and members of the Mormon hierarchy sought to generate a property regime centered around priesthood coordination and communalistic, non-capitalist principles.¹²⁷

¹²⁰ D&C 105:2-4.

¹²¹ Gardner, *supra* note Error: Reference source not found, at 147.

¹²² *Id.* at 150 (citing 16 JOURNAL OF DISCOURSES 11 (Apr. 7, 1873)).

¹²³ *Early Mormon Communitarianism*, *supra* note Error: Reference source not found, at 359; D&C 119.

¹²⁴ Huff, *supra* note Error: Reference source not found, at 149.

¹²⁵ Joseph Smith, *supra* note Error: Reference source not found, at 364-65; *Early Mormon Communitarianism*, *supra* note Error: Reference source not found, at 355. Gardner, *supra* note Error: Reference source not found, at 143 argues that the bishop was to be the arbiter of individuals’ wants and needs.

¹²⁶ BUILDING THE CITY, *supra* note Error: Reference source not found, at 68.

In Brigham's Mormonism, like Smith's, the boundaries between the temporal and spiritual were blurred and "principles of equality in regard to property," including "joint possession [] under strict and impartial laws" was a necessary pre-requisite to satisfying the will of the Lord.¹²⁸ After all, in Mormon theology, all property was the Lord's and to withhold any part of it was ignorance of one's relationship with the Divine.¹²⁹

Coordinated by the Church hierarchy and spearheaded by Young himself, a lesser-known,¹³⁰ second consecration movement was thus mobilized, eventually generating thousands¹³¹ of deeds and occupying the Church's institutional limelight for several years. The first public announcement of the initiative was made in the Church's general conference in Salt Lake City on April 8, 1854 by Brigham Young, and expounded on in the following day's session.¹³²

A general epistle was circulated to all Mormon congregations emphasizing the need for temporal unity among the Saints, invoking the authority of Joseph Smith by explaining the practice as a fulfillment of and "sequel" to the First United Order,¹³³ claiming that the Saints were already "flocking by the hundreds and thousands to give in their names, devoting and deeding all and everything which they possess, unto the Church, receiving their inheritances, and so much of their property as is needful for them from the hands

¹²⁷ Interestingly, Orson Pratt imagined the law of consecration as encompassing both real and intellectual property, sermonizing in 1854, for example, that he "long[ed] for the time to come when I can consecrate everything I have got; all the cattle I have; . . . also my books, and the right and title I have to publish my works, also my wearing apparel, and my houses." Orson Pratt sermon, 2 JOURNAL OF DISCOURSES 104 (Sept. 10, 1854); *see also* Orson Pratt sermon, *id.* at 259-66.

¹²⁸ Orson Pratt, The Equality and Oneness of the Saints, 2 JOURNAL OF DISCOURSES 289-300 (Jan. 7, 1855); BUILDING THE CITY, *supra* note Error: Reference source not found, at 70; *see also id.* at 89-90; D&C 49:20; 78:5; 51:9; 70:14; 82:17.

¹²⁹ Orson Pratt, *Consecration*, 2 JOURNAL OF DISCOURSES 96 (Sept. 10, 1854) ("Then in consecrating that which we have been in the habit of calling our own, we are only returning to the Lord His own property—that which we became legally possessed of according to the laws of man, but not according to the laws of God."); Brigham Young, *Consecration*, 2 JOURNAL OF DISCOURSES 298 (June 3, 1855) ("The Lord has not called for one farthing's worth which is not His own. The people could not own it, and if they did, have they power to preserve it? No.").

¹³⁰ *See* BUILDING THE CITY, *supra* note Error: Reference source not found, at 63.

¹³¹ *See id.* at 66.

¹³² *Id.* at 68.

¹³³ Thus rooting the practice in the sacred origin point of Joseph Smith's revelations. *See* MIRCEA ELIADE, THE MYTH OF THE ETERNAL RETURN OR COSMOS AND HISTORY 34 (Princeton Univ. Press 2d ed. 1965); *accord* D&C 105:3-5; Brigham Young, *The United Order is the Order of the Kingdom Where God and Christ Dwell—The Law of the Kingdom of Heaven Protects All People in Their Religious Worship—In Obeying Counsel There is Salvation*, 17 JOURNAL OF DISCOURSES 154 (Aug. 9, 1874) ("[The United Order] is the order of the kingdom where God and Christ dwell; D&C 76:112 it has been from eternity and will be to eternity, without end, consequently we have nothing particularly new to offer you, but we have the commandments that have been from the beginning.").

of the Bishop.”¹³⁴ Finally, the epistle celebrated, there “were *no obstacles* to a full and frank compliance with the law of consecration as first given to Brother Joseph.”¹³⁵

In other words, the Mormons were now significantly more independent of American law, the victor of the First United Order, and Brigham believed that Mormon law could be practiced as a coherent system of property governance through mastery and taming of legal instruments. During the 1850s, however, the consecratory instruments chosen were much more tame *negotiations* with American law.

Much like the general principle of beneficial use articulated by Brigham Young when the priesthood made initial property allocations upon the Saints’ arrival in Utah, the consecratory order would have the Saints endowed only with so much property “as he was able to take care of.”¹³⁶

Brigham not only sought to reintroduce the consecratory order without the threat of intervention by American courts, he believed that the more-autonomous Mormon order in Utah could innovate and refine the system: Brigham believed that Smith’s earlier, more individualistic iteration of consecration, because it permitted participating members to determine their own surplus, was “laughable.”¹³⁷ Brigham sought to eliminate unnecessary, decentralized discretion and more directly subject property to the control of the priesthood and, relatedly, church courts—the locus of Mormon law.

As a result, the machinery of administering the consecration movement of the 1850s can be summarized as follows: family heads were asked to consecrate all of their belongings, along with their annual surplus to centralized “storehouses” managed by bishops. The surplus was used to distribute to the impoverished to those that failed to provide for themselves or their families, as well as for the good of the Church, including the production of church materials, meetinghouses, education, and generating credit.¹³⁸ The model consecration deed appeared as follows:

Be it known by these presents that I, ----, of ----, in the County of ----, and Territory of Utah; *for and in consideration of the good will which I have to the Church of Jesus Christ of Latter Day [sic] Saints*, give and convey unto Brigham Young, Trustee-in-Trust for said Church, his successors in office and assigns, all my claim to, and ownership of the following described property . . . Together with all the rights, privileges and appurtenances thereunto belonging or appertaining. I also covenant and agree

¹³⁴ BUILDING THE CITY, *supra* note Error: Reference source not found, at 68-69.

¹³⁵ *Id.* at 69 (emphasis added).

¹³⁶ *Id.* at 68.

¹³⁷ Brigham Young, *supra* note Error: Reference source not found.

¹³⁸ GREAT BASIN KINGDOM, *supra* note Error: Reference source not found, at 9.

that I am the lawful claimant and owner of said property and will warrant and forever defend the same unto the said Trustee-in-Trust, his successors in office and assigns, against the claims of my heirs, assigns, or any person whomsoever.¹³⁹

The legalistic language in the consecration deeds of the 1850s movement, much like the beginnings of Joseph Smith's First United Order, evidences that deed parties seemed to have intended these deeds to be legitimate, rather than merely symbolic gestures of religious faith, as Arrington argues.¹⁴⁰ As such, the deeds were recorded and treated not as religious artifacts, but legal instruments under what was to be the Mormon society's independent legal system.

That the deeds were intended to be *legal* in the literal sense—operative and part of the Mormon legal order, if even disconnected from (or innovative upon) American law—can also be seen in the way that the Mormon hierarchy outlined and described the consecration plan: Orson Pratt, in his watershed sermon on the topic delivered at Brigham's request to the general assembly of the Church, indicated that the deeding systems was intended to be a covenant “according to the law of God *and* man, and if it is made according to the law of God in all respects, and also according to the law of the land in which we live, it will be in the situation the Lord wants it in, even the whole property of the Church.”¹⁴¹

Pratt further clarified that the Lord anticipated a full consecration in fulfillment of the oath of consecration: “If the whole Church were to consecrate in this way they would have nothing left of their own. Then, it would all be the Lord's, and it has to be consecrated too, says the revelation, with a covenant and a deed that cannot be broken.”¹⁴² In the April 1855 general epistle to the Church announcing the consecration movement, Brigham rationalized the delay in implementing the law of consecration until “the form of a deed” could be

¹³⁹ BUILDING THE CITY, *supra* note Error: Reference source not found, at 64; GREAT BASIN KINGDOM, *supra* note Error: Reference source not found, at 146.

¹⁴⁰ BUILDING THE CITY, *supra* note Error: Reference source not found, at 366.

¹⁴¹ Orson Pratt, *supra* note Error: Reference source not found.

¹⁴² *Id.* Brigham Young seemed to learn after the 1850s consecration movement experiment, however, that this was not so. Brigham Young, *The United Order is the Order of the Kingdom Where God and Christ Dwell—The Law of the Kingdom of Heaven Protects All People in Their Religious Worship—In Obeying Counsel There is Salvation*, 17 JOURNAL OF DISCOURSES 154 (Aug. 9, 1874) (“We regret that we are not in a capacity to make our own laws pertaining to our domestic affairs as we choose; if we were in a State capacity we could do so. The legislature could then pass laws by which we would have the right to deed our property to the Church, to the Trustee-in-Trust, if we chose, or in any other way the people would like to deed their property to God and his kingdom. But we cannot do this now, we are not a State. We are in the capacity of servants now, where we have to bow to the whims and caprices of the ignorant, and to the prejudice of willful, ignorant sectarianism.”).

formulated which would be “legal in accordance with the laws of this Territory.”¹⁴³

Mormon visions of property law under the consecratory order, like American law generally,¹⁴⁴ was unfortunately used as a tool of conquest by law: Mormon settlers in Manti, Utah, upon converting and baptizing some Indigenous inhabitants of Sanpete County, persuaded one Native leader, Siegenerouch (Aropeen), to deed all tribal ownership of lands to the Church, naming “[t]he portion of land and country known as Sanpete County together with all timber and material on the same” along with Aropeen’s horses, cattle, and personal tools.¹⁴⁵ In this case, the consecration deed was utilized as a means of bypassing American-legal mechanisms of treaty, facilitating the legal expansion of Mormon claims into Indian country.

Revealingly, T.B.H. Stenhouse, an anti-Mormon writer and historian who made note of the consecration movement in his history of Utah, characterized the order “as a machination of Brigham Young to aggrandize himself at the expense of the his credulous followers.”¹⁴⁶ In his work *The Rocky Mountain Saints*, Stenhouse surreptitiously inserted into the deed language an additional clause in the consideration element of the contract: “. . .for and in consideration of *the sum of one hundred (\$100) dollars and the good will which I have to the Church of Jesus Christ of Latter Day Saints. . .*”¹⁴⁷

This addition is extremely illuminating as it demonstrates the ideological outsider’s fundamental misapprehension of the value of group identity to in-group individuals in the Mormon order. In order to dress the contract in *American* legal forms, Stenhouse sought to make the consideration clause appear legitimate by appending some sum of value (to avoid nominal consideration or a *nudum pactum*). What he failed to understand, however, is that good will and belonging in the community of the Church is *itself* the most valuable ‘thing’ participants could contract for, and thus certainly met the standards of consideration within the group, at least in the increasingly-divergent Mormon legal order.

This mistake also reveals a failure to understand the Mormon order’s attempt at overcoming the established boundaries of law, including the conditions of contract formation. This second era of the law of consecration saw the Mormons take the templates and basic instruments of American law and overlay a different vision of value and property. Relatedly, Stenhouse’s editorial decision (certainly unbecoming of a historian or anthropologist) also invites

¹⁴³ BUILDING THE CITY, *supra* note Error: Reference source not found, at 69.

¹⁴⁴ See generally LINDSAY G. ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS (2007).

¹⁴⁵ BUILDING THE CITY, *supra* note Error: Reference source not found, at 67

¹⁴⁶ *Id.* at 63-64.

¹⁴⁷ T.B.H. STENHOUSE, THE ROCKY MOUNTAIN SAINTS 501-02 (New York, 1873); BUILDING THE CITY, *supra* note Error: Reference source not found, at 63-64.

contemplation of something fundamental about conceptions of group identity which persist to this day: that belonging to a group can be leveraged as a sort of valuable, possessed thing and offered as consideration just like anything else subjected to the logic of property in the first place.

Approximately forty percent of the roughly forty-thousand¹⁴⁸ Saints in the Mormon commonwealth offered consecration deeds, but the movement's inertia died largely as a result of the Mormon War and the Army's occupation of Salt Lake City (and the resulting reconfiguration of Utah's population distribution).¹⁴⁹ That is, it was American legal violence against the Saints that put a halt to the budding consecratory order and redirected ecclesiastical and political resources elsewhere.¹⁵⁰

Brigham's declaration of Mormon independence, like his hopes to realize the ideals of the consecratory movement, were thus premature. As a result, the consecration movement of the 1850s probably failed to fundamentally change how land was used as intended;¹⁵¹ still, it served as a tool to secure buy-in to church authority in resource-allocation decisions and church court dispute resolution system. It's a mistake to claim that the transfers were merely symbolic, as some have,¹⁵² since the *purpose* of the deeds went beyond effectuating different land-use policies or transferring possession, as is described below in Part III.

*The United Order of Enoch*¹⁵³

Brigham lamented the failure of the straightforward consecratory deeds. While Orson Pratt claimed the movement's failure was a result of Saints worshipping "the Gentile god of *property*,"¹⁵⁴ Brigham blamed the Territory's limited power to regulate itself and its property laws¹⁵⁵ and turned instead to a novel approach to the consecratory order: corporate law. In the 1870s, the

¹⁴⁸ See STORY, *supra* note Error: Reference source not found, at 294.

¹⁴⁹ See *id.* at 305-18.

¹⁵⁰ See, e.g., Shirley Greenwood Jones, Brigham Young's Rhetoric: A Critical and Cultural Analysis of Key Sermons in Five Rhetorical Events 270 (Ph.D. dissertation, University of Utah, 1992).

¹⁵¹ Although intended to "bring about economic equality," THOMAS F. O'DEA, THE MORMONS 189 (1970), individual ownership and management of property essentially persevered. KINGDOM TRANSFORMED, *supra* note Error: Reference source not found, at 55.

¹⁵² See, e.g., BUILDING THE CITY, *supra* note Error: Reference source not found, at 69-70.

¹⁵³ The name of the system comes from the Biblical "Enoch, the seventh patriarch in descent from Adam" who, according to Mormon theology, realized the consecratory order in ancient times." JAMES E. TALMAGE, THE ARTICLES OF FAITH 358, 362, 450 (1901); see also Gardner, *supra* note Error: Reference source not found, at 142.

¹⁵⁴ BUILDING THE CITY, *supra* note Error: Reference source not found, at 75 (emphasis added).

¹⁵⁵ Brigham Young, *supra* note Error: Reference source not found.

Brigham Young took a second swing at creating a Zion-like economic order, aligning Mormon identity with communalistic property regimes and priesthood government over the whole of Mormon society, this time calling the initiative the “United Order of Enoch.”

The essence of the United Order would be the organization of each Mormon town or village (or, in the case of larger cities, each ward) a public corporation that would coordinate and direct all commerce, with Mormon residents being given voting shares reflecting their capital inputs. Rather than deed all property to the trustee-in-trust for the Church (as in the First United Order and the consecration movement of the 1850s), members would instead transfer real and chattel property to the United Order, which would be guided by local priesthood leadership.

Although Brigham invoked the ethos of Joseph Smith’s earlier First United Order by dusting off the name, Brigham Young’s United Order (that is, the Second United Order), should by no means be thought of as a historical continuation or simple rehashing of Joseph Smith’s united order¹⁵⁶ (which may be truer of the consecration movement of the 1850s), but rather a reimagining of the Mormon property ideal through creative use of corporate legal structures. Whereas in-group status was offered explicitly as consideration under Joseph Smith’s United Order and the consecration movement of the 1850s (subjecting belonging to property logic), such status was further law-logicized in the latter part of the nineteenth century under the Second United Order, when Mormon communities were reconstituted as corporations, and belonging was reissued as shares.

1. *Precursors to The United Order of Enoch*

The general principles and functionality of a corporate or cooperative system of ordering Zion’s affairs had been battle-tested and proven to the satisfaction of the Mormon hierarchy by the success of various producer cooperatives,¹⁵⁷ for example the Brigham City Mercantile and Manufacturing Association¹⁵⁸ and stock-pooling among Mormon ranchers¹⁵⁹ (many of which outlasted the broader consecratory United Order¹⁶⁰).

¹⁵⁶ Huff, *supra* note Error: Reference source not found, at 147.

¹⁵⁷ See STORY, *supra* note Error: Reference source not found, at 366; *see also* Early Mormon communitarianism 361-62 (exploring some apparent precedent for corporate organizations prior to Utah, as early as 1838, although unrealized due to expulsion from Missouri).

¹⁵⁸ See Building the City, *supra* note Error: Reference source not found, at 79-93, 100-109, 111-33, 120; Story 366; Brigham said of the Brigham City co-op that “President Brother Snow has led the people along, and got them into the United Order without their knowing it.” See ALLEN, *supra* note Error: Reference source not found, at 36-37.

¹⁵⁹ Building the City, *supra* note Error: Reference source not found, at 108-10, 113-15.

¹⁶⁰ Building the City, *supra* note Error: Reference source not found, at 132-33.

A stopover until requisite faith for the “more perfect order” was generated,¹⁶¹ these early manufacturer cooperatives’ boon redirected Church leaders’ attention towards more corporatized models of property governance¹⁶² and promised greater economic independence for the Saints. Turning to a corporatist model also, it was hoped, would prepare the Saints to resist the encroaching American capitalist market and economic order.¹⁶³ Given the sense of urgency,¹⁶⁴ cooperative frameworks for the order of consecration seemed responsive to Brigham’s fears of capital accumulation among a sharply-divided capitalist class or material divisions leading to schisms within the Church,¹⁶⁵ reflecting Brigham’s broader, fundamental rejection of capitalism, private holding and wealth-accumulation and economic efficiency.¹⁶⁶ Under the United Order, church leaders hoped, there would be no “temptation” to seek profits in commerce with fellow Mormons, which was even characterized as theft,¹⁶⁷ and “perfect submission” would be more attainable.¹⁶⁸

Chief among these early Mormon cooperatives was Zion’s Co-operative Mercantile Institution (ZCMI), incorporated in 1870.¹⁶⁹ ZCMI allowed Mormon merchants to pool resources, coordinate overland importation of expensive goods, and compete with non-Mormon merchants by banding together. In fact, due to downward pressures from the hierarchy to boycott “gentile” merchants, it became “dangerous” for a Mormon to purchase goods elsewhere,¹⁷⁰ and non-Mormon competitors’ businesses contracted.¹⁷¹ Shareholding in ZCMI limited to Mormons through a charter provision restricting membership to those who paid tithing¹⁷²), and ZCMI itself paid a tithe on its profits before distributing dividends to stockholders.¹⁷³

¹⁶¹ Building the City, *supra* note Error: Reference source not found, at 135; Story 366

¹⁶² See Building the City, *supra* note Error: Reference source not found, at 88-92. This even though these earlier coops didn’t consecrate profits. Second united order 34-37; communism among the Mormons 163

¹⁶³ Story 365-66.

¹⁶⁴ See ALLEN, *supra* note Error: Reference source not found, at 44

¹⁶⁵ ALLEN, *supra* note Error: Reference source not found, at 37-38

¹⁶⁶ ALLEN, *supra* note Error: Reference source not found, at 45; 16 JD June 29, 1873 (George Q Cannon)

¹⁶⁷ ALLEN, *supra* note Error: Reference source not found, at 45; 16 JD June 29, 1873 (George Q Cannon)

¹⁶⁸ ALLEN, *supra* note Error: Reference source not found, at 47; 16 JD oct 7, 1873

¹⁶⁹ Which lasted into the twenty-first century as a sort of chain of department stores in the Mormon corridor (for reference, I have conscious memories of being in a ZCMI)

¹⁷⁰ ALLEN, *supra* note Error: Reference source not found, at 38-39

¹⁷¹ ALLEN, *supra* note Error: Reference source not found, at 39-40 (citing, for example, the case of the “chief gentile store” whose sales declined from \$60k/m to \$5k/m).

¹⁷² Second united order 39, Building the City 91. Tithing being a one-tenth “partial consecration” explained by Orson Pratt to be a temporary substitute for consecration after the failure of the first united order under Joseph Smith. Second united order 43-44.

¹⁷³ See STORY, *supra* note Error: Reference source not found, at 342.

Brigham considered these sorts of business-coordinating cooperatives merely a “stepping stone to what is called the Order of Enoch,”¹⁷⁴ and discussion of second united order began as early as one month after the chartering of ZCMI.¹⁷⁵ But in the legal corporate structure of the cooperatives, Brigham celebrated what he saw as a new way for the Mormon people to live their higher economic law “under the laws of the United States”¹⁷⁶ without threat of hostile land reforms from Congress and the federal government¹⁷⁷ or crafty gentile lawyering—the sort that made the First United Order and the consecration deeds impracticable and unworkable under the law of the land. To Brigham and the Mormons on the road to consecration, law was not an enabling force but an obstacle to be overcome through mastery and out-manuevring.

In one address to Mormons in Northern Utah in 1873 that “the only reason why we do not . . . enter into the organization of Enoch . . . is simply because we have not yet been able to find every item of law bearing on this matter, so as to organize in a way that apostates cannot trouble us” so that “lawyers cannot pick to pieces and destroy, and apostates afflict us.”¹⁷⁸ Now the Mormons could be finally “put [their] means and labor together and join as one family”¹⁷⁹ by a charter that would “allow [them] to deed every particle of property that we have got to this cooperative institution—our houses, farms, sheep, cattle, horses, our labor, our railroad stock, bank stock, factories, and everything that we have we can deed to the trustees of this association.”¹⁸⁰

Like the consecration deeds, the United Order corporate charters were seen by church leaders as legitimate, non-symbolic legal documents, as Brigham explained the united order corporations as a means to:

[J]oin ourselves together in this city, do it legally—according to the laws of the land—and enter into a covenant with each other by a firm agreement that we will live as a family, that we will put

¹⁷⁴ ALLEN, *supra* note Error: Reference source not found, at 40-41; 7 journal of discourses, sept 21, 1878; gates and widstoe, the life story of brigham young 204 (1930); Story 366.

¹⁷⁵ ALLEN, *supra* note Error: Reference source not found, at 40; 8 journal of discourses, April 7 1869.

¹⁷⁶ Brigham Young Sermon, June 29, 1873, JD 6:122.

¹⁷⁷ Building the City, *supra* note Error: Reference source not found, at 136-37.

¹⁷⁸ Brigham Young Sermon, June 29, 1873, JD 6:122

¹⁷⁹ Brigham Young Sermon, June 29, 1873, JD 6:122; *see also* Great Basin Kingdom 26-28

¹⁸⁰ The United Order is the Order of the Kingdom Where God and Christ Dwell—The Law of the Kingdom of Heaven Protects All People in Their Religious Worship—In Obeying Counsel There is Salvation. Discourse by President Brigham Young, delivered in the Meetinghouse, at Lehi City, Sunday Afternoon, August 9, 1874.

our property into the hands of a committee of trustees, who shall dictate the affairs of this society.¹⁸¹

2. *The “Spiritual Charter”*

Beginning in 1874 with the United Order of St. George, incorporated on February 9th of that year,¹⁸² nearly every Mormon community saw the formation of United Order corporations¹⁸³ in an attempt to ameliorate significant disparities in the Saints’ wealth.¹⁸⁴ The first iteration of the United Order charter—the “spiritual charter” was first adopted by the United Order of St. George (Brigham Young’s winter home)¹⁸⁵ and spread outwards throughout the state. A preamble to the spiritual charter expressed the dangers of strife between Capital and Labor, the hazards and abusive nature of the credit system, and commented on the need to “become the friends and helpers of each other, in a common bond of brotherhood” to be the friends of God and become prosperous.¹⁸⁶

The St. George-modeled Order featured a 2/3rds elected Board¹⁸⁷ (in reality, made up of appointed ecclesiastical leaders¹⁸⁸) authorized to direct members’ labor,¹⁸⁹ create binding by-laws, and buy and sell real estate.¹⁹⁰ Article 9 indicated that Capital stock was distributed to members in proportion to the property invested at the time of their joining the Order (as valued by an elected appraisal committee),¹⁹¹ which would be used to calculate dividends.¹⁹² If entrants attempted to withdraw from the Order within the first five years, they agreed to halve any dividends they’d otherwise be entitled to.¹⁹³

¹⁸¹ ALLEN, *supra* note Error: Reference source not found, at 41; 16 journal of discourses; April 7, 1873.

¹⁸² Building the City 140-41.

¹⁸³ People on the Mormon Frontier 170.

¹⁸⁴ People on the Mormon Frontier 181.

¹⁸⁵ See Building the City, *supra* note Error: Reference source not found, at 138-39.

¹⁸⁶ Building the City, *supra* note Error: Reference source not found, at 387.

¹⁸⁷ Building the City, *supra* note Error: Reference source not found, at 388.

¹⁸⁸ Communism among the Mormons 162-63.

¹⁸⁹ Building the City, *supra* note Error: Reference source not found, at 389.

¹⁹⁰ Building the City, *supra* note Error: Reference source not found, at 389-90, 396.

¹⁹¹ Building the City, *supra* note Error: Reference source not found, at 389, 396

¹⁹² Building the City, *supra* note Error: Reference source not found, at 389-90.

¹⁹³ Building the City, *supra* note Error: Reference source not found, at 390. Orderville charter (later): Article 12 provides that a member may withdraw what he had previously donated to the company after payment of any indebtedness and after deducting as tithing 10 per cent of the yearly increase in his holdings and 10 per cent of his annual labor for the corporation. Under the terms of Article 13, new members might be added by a two-thirds vote of the existing owners. Communism among the Mormons 167. The Orderville charter included an additional requirement that each member contribute "for church purposes" one-tenth of the annual increase of his holdings and one-tenth of his labor. Communism among the Mormons 167-68.

Article 10 outlined a labor currency system: foremen were elected to oversee various “branches of business” and to distribute credits for rendered labor contributed to Order projects which could be used as a sort of currency to “charge” and call in labor for their benefit.¹⁹⁴ Labor was thus coordinated to manage commons resources such as grazing management (for example, in the literal commons in the Big Fields), operating mills, and gathering public, unowned open-access resources like timber from nearby canyons.¹⁹⁵ Commons resources like timber were, in turn, distributed on a per capita basis “on the assumption that the needs of all members were substantially similar,” not according to services rendered, as directed by Church leadership.¹⁹⁶

Importantly, Article 12 incorporated into the Agreement a somewhat-diluted consecration-oath proxy, indicating that entrants were expected “to place in this Order, fully and entirely subject to these Articles of Agreement . . . all our time, labor, energy, and ability, and such property as we may feel disposed to transfer to the Order, to be controlled in the interest of the Order. . . .”¹⁹⁷ While the property transfer is blunted, there is no qualification for members’ time, labor, energy, or ability. Further emphasizing the expectation of complete transfer in the spirit of consecration,¹⁹⁸ Brigham taught that the charter was explicitly designed to permit complete transfer.¹⁹⁹

Perhaps even more significantly, entrance into the Order came with the covenant “not to patronize in [] business relations, those who are not members of the Order, unless absolutely compelled by our necessities.”²⁰⁰ Trading with Mormons in the Northern part of Utah was also discouraged, being seen as not economical in a broader sense.²⁰¹ Thus the United Order, even if temporary, served to entrench norms of a Mormons-only, closed market. This rule for members codified one of Brigham’s consistent teachings regarding the market—exhorting all “Latter-day Saints . . . [to] decree in their hearts that they will buy of nobody else but their own faithful brethren”²⁰² that was emphasized from 1868 until 1882.²⁰³ Brigham detested non-Mormon merchants, whom he saw as a

¹⁹⁴ Building the City, *supra* note Error: Reference source not found, at 389.

¹⁹⁵ Communism among the Mormons 162-63.

¹⁹⁶ Communism among the Mormons 162-63.

¹⁹⁷ Building the City, *supra* note Error: Reference source not found, at 141-42, 389.

¹⁹⁸ Perhaps the language of the charter was diluted to seem more “legal,” and thus a concession to fear of the system’s defeat to litigation?

¹⁹⁹ The United Order is the Order of the Kingdom Where God and Christ Dwell—The Law of the Kingdom of Heaven Protects All People in Their Religious Worship—In Obeying Counsel There is Salvation. Discourse by President Brigham Young, delivered in the Meetinghouse, at Lehi City, Sunday Afternoon, August 9, 1874.

²⁰⁰ Building the City, *supra* note Error: Reference source not found, at 390; *see also* Story 368.

²⁰¹ Building the City, *supra* note Error: Reference source not found, at 391.

²⁰² Brigham Young sermon, Oct. 9 1865, JD 11:139.

²⁰³ *See* STORY, *supra* note Error: Reference source not found, at 341.

parasitic force draining Mormon resources.²⁰⁴ Patronizing non-Mormons alone risked severance from the Church.²⁰⁵

In presenting the charter to the Saints around St. George, Brigham Young included a circular letter which admonished the Saints to be faithful to the Order in fulfillment of their religious obligations, repeating the Mormon teaching imputed to Jesus: “If ye are not one, ye are not mine” and invoking community memories of Joseph’s United Order.²⁰⁶ Other rules regulating membership were also circulated in the form of pledges for prospective shareholders/co-partners and generally resembled basic Mormon teachings on appropriate behavior: not to take the name of Deity in vain, to pray with one’s families, observe the Sabbath day, and so on.²⁰⁷

3. The “Legal Plan”

Eventually, the “spiritual charter” was replaced by “the legal plan”: uniform article of incorporation for branches of the United Order, including general instructions and rules. This second incorporation template—this one prepared in Salt Lake City—replaced²⁰⁸ the first in an attempt to conform the Orders’ practices to legal standards of corporate law (explicitly citing conformance to the Constitution of the United States and the laws of the Territory of Utah)²⁰⁹.

Unlike the “spiritual” charter, the legal plan for the United Order actually doubled down on the consecratory oath; rather than a bifurcated covenant to cede “all our time, labor, energy, and ability, and such property as we may feel disposed to transfer to the Order,” the formalized “Rules that should be observed by members of the United Order” (appended to the Order by-laws and published Church-wide in the *Deseret News*²¹⁰) included as a final stipulation that “[w]e will honestly and diligently labor, and devote ourselves *and all we have* to the Order, and the building up the kingdom of God.”²¹¹

Order membership rules also sought to delineate Mormon religious traits and practices such as prayer requirements, dietary restrictions (the Word of Wisdom), and mandates to “seek . . . the salvation of mankind” and against selfishness, thus mapping Mormon identity onto Order shareholding

²⁰⁴ Building the City, *supra* note Error: Reference source not found, at 86-88, 90-91.

²⁰⁵ Building the City, *supra* note Error: Reference source not found, at 91.

²⁰⁶ Building the City, *supra* note Error: Reference source not found, at 391.

²⁰⁷ Building the City, *supra* note Error: Reference source not found, at 142-43.

²⁰⁸ See Building the City, *supra* note Error: Reference source not found, at 401.

²⁰⁹ Building the City, *supra* note Error: Reference source not found, at 394.

²¹⁰ See Building the City, *supra* note Error: Reference source not found, at 235.

²¹¹ Building the City, *supra* note Error: Reference source not found, at 405 (Attached Q&A stipulates that after transferring houses and city lots, transferring shareholders could request that said properties be held in trust by the Order).

requirements. In addition to a series of rules which generally approximate the Church's honor system,²¹² the "Rules that should be observed" include provisions admonishing the cancellation of personal debts and an admonishment not to contract any debts "contrary to the wishes of the Board of Directors"²¹³; requiring that members "only patronize our brethren who are in the Order" (or, alternatively, mandating that member-shareholders "not knowingly patronize any person . . . who is not a member of the Order" unless necessary)²¹⁴ and, more broadly, "combine our labor for mutual benefit, sustain with our faith, prayers and works, those whom we have elected to take the management . . . and be subject to them"²¹⁵

United Orders varied regionally in their strictness and the degree of property that was transferred—in some Orders, fully property transfer to the Order was the norm; in others, Orders acted as commercial and industrial co-ops, but did not regulate members' daily lives to nearly the same degree (these being "not a system of communistic property holding, but a plan of common, united effort with a supervised division of labor and distribution of proceeds"²¹⁶); others, still, went far beyond even the terms of the charter and saw members living and eating communally, dressed in the same homespun clothing and owning *no* property whatsoever.²¹⁷

The United Orders throughout the Mormon corridor varied greatly in terms of lifespan;²¹⁸ but, in any case, they owed their downfall largely to pressures from the federal government's renewed crusade against polygamy in the latter part of the nineteenth century, which resulted in members of the priesthood hierarchy being arrested, forced into hiding, or otherwise unable to oversee the complex work of managing Mormon enterprises under the centralized United Orders.²¹⁹

It is often claimed that these myriad communal property arrangements "failed economically"²²⁰ and, in a way, this is true on its face (although the highly systematized Orderville, where the Order lasted significantly longer, may have achieved greater wealth equality²²¹). The consecration movement and the bulk of the united orders did not operate very long, and there is reason to doubt that they stimulated dramatic economic development. However, to measure the meaning

²¹² Building the City, *supra* note Error: Reference source not found, at 404.

²¹³ Building the City, *supra* note Error: Reference source not found, at 404.

²¹⁴ Building the City, *supra* note Error: Reference source not found, at 405.

²¹⁵ Building the City, *supra* note Error: Reference source not found, at 405.

²¹⁶ Communism among 163

²¹⁷ Story 369-71; *see also* Communism among the Mormons 164-66

²¹⁸ Communism among the Mormons 165-69

²¹⁹ *See* STORY, *supra* note Error: Reference source not found, at 371.

²²⁰ Nate Oman, *Mormons and Markets II*,

<https://www.timesandseasons.org/harchive/2005/05/mormons-and-markets-ii-information-and-the-failure-of-the-united-order/>.

²²¹ People on the Frontier Kanab 181 n.11

of these property arrangements purely in direct economic terms might miss the point.

Rather, the systems worked to cultivate collective identity, and their value in generating group cohesion was more than symbolic by generating buy-in for the community's other norm-enforcing systems. That is, the value of the consecration deeds or the United Order wasn't true communal property sharing, but in being property forms that doubled as instruments of labor-coordination and identity-building, that is, community cohesiveness sufficient to overcome resource pressures.²²²

The competitive nature of Mormon legal ideals with American law is made clear, for example, by reference to still-canonical scriptures: in D&C 105, for example, the Lord commands the Mormons to acquire lands and possess them “*according to the laws of consecration which I [the Lord] have given*”²²³—to which the “kingdoms of this world” will eventually agree to subject themselves.²²⁴ Despite its attempts to distinguish itself from technical, lawyer-dependent, capitalist forms of law, ownership, and public administration, however, the Mormons, in reality, adopted increasingly capitalistic and technical images of consecration. The final iteration of the consecratory movement was, in a sense, corporatized and subjected to the logic of the very system the movement sought to replace.

III. JURISDICTIONAL CONFLICT AND LAW WITHOUT VIOLENCE

In order to realize their own competing vision of property norms, Mormons fought with the federal government to establish *jurisdiction* in Territorial Utah. To do so, the Utah territorial legislature sought to siphon control over dispute resolution away from federal courts and towards local- and Mormon-controlled probate courts endowed with general jurisdiction (including over criminal claims).²²⁵ But the Church *itself* also served as a vehicle for dispute resolution, independent of the state's authority, which the priesthood hierarchy sought to establish as superior to *any* civil courts for resolving issues (including arising from the ownership and management of property) in the region. The primacy of Church courts—even their *exclusive jurisdiction*—was significant because these ecclesiastical courts, unlike their civil counterparts, accepted the logic of Mormon property law. For example, Church courts would accept identity and group standing as consideration in a contract where a civil court would not, allowing the identity as property logic explored in Part II to *work*.

²²² People on the Frontier Kanab 187; People on the Frontier Kanab 187 remarks on town cohesiveness & says we should figure out what caused it – overlooked that the property systems *were* what caused it. *See also* Kingdom Transformed 53-59

²²³ D&C 105:29 (emphasis added); *cf.* D&C 105:4-5.

²²⁴ D&C 105:32. *See also* D&C 105:30, 32; D&C 103:22, 29, 29; D&C 45:74-75.

²²⁵ *See* CLIFFORD L. ASHTON, THE FEDERAL JUDICIARY IN UTAH (1988).

Thus, this Part pays particular attention to these Church courts and their role in both furthering the battle for jurisdiction and cementing the priesthood at the center of property management under the law of consecration. This Part ultimately seeks to underscore that the Mormon-American conflict was one of fundamentally competing visions of (a sort of law versus law), not merely law versus religion, and that jurisdiction over property claims was central to property's role in escalating tensions between the two legal orders.

A. Church Courts and Their Organization

Mormon efforts to assert jurisdiction were highly successful, even to a degree that would surprise many Mormon history buffs. Whereas Congress established Territorial Courts in Utah in 1852 and provided a legal basis for landholding in the Great Basin in 1869 by expanding homesteading laws,²²⁶ Mormons' parallel ecclesiastical legal system that survived into the early twentieth century.²²⁷ Although Mormons could invoke state-sanctioned violence and a broader range of penalties through the American legal system after their establishment in the Territory (and later the State) of Utah, their continued reliance on priesthood authority demonstrates the bite that controlling personal identity had in Mormon society as a key element of the property regime.

The consecratory property system, along with a developed set of tort, natural resource, and other substantive doctrines, were supported by what the Mormon hierarchy referred to at the time as its "exclusive jurisdiction," that is, the priesthood's exclusive authority to adjudicate disputes between members of the community, even when the subject matter was by no means ecclesiastical.²²⁸ Substantive doctrines and adjudicatory systems mutually reinforced one another in creating general, comprehensive control over the community and community members' relationships both to one another and to scarce natural resources.²²⁹

As a preliminary matter, church courts claimed exclusive jurisdiction over civil claims between Mormons and generated written opinions.²³⁰ But

²²⁶ ZION IN THE COURTS, *supra* note Error: Reference source not found, at 293; *id.* at 295-96; *id.* at 300; LEONARD J. ARRINGTON, BUILDING THE CITY OF GOD: COMMUNITY & COOPERATION AMONG THE MORMONS 77 (1976) [hereinafter BUILDING THE CITY].

²²⁷ IN THE COURTS, *supra* note Error: Reference source not found, at 298, 313.

²²⁸ And, at times, between non-Mormons willing to subject themselves to the court's authority and provide a sufficient bond. IN THE COURTS, *supra* note Error: Reference source not found, at 267-68.

²²⁹ See STORY, *supra* note Error: Reference source not found, at 271.

²³⁰ Mormon courts only rarely and in limited cases heard criminal matters. IN THE COURTS, *supra* note Error: Reference source not found, at 267. But it's worth noting that criminal matters were heard in county probate courts which, in turn, were in most cases led by local bishops or other Church leaders, STORY, *supra* note Error: Reference source not found, at 270, until 1874, when exclusive jurisdiction was taken by federal courts to rein in Mormon self-governance. *Id.* at 271, 363.

church courts' exclusive jurisdiction was guarded zealously: if Mormons resorted to lawyers or "gentile"²³¹ civil legal systems—the federally controlled territorial district courts in Utah—by "going to the law," they could be found liable of "unchristianlike conduct" in violation of "the laws of [the] Church" and excommunicated.²³²

A churchwide emphasis on exclusive jurisdiction,²³³ and accompanying penalties for invoking the American legal system, began shortly before the Mormons' arrival in the Great Basin and continued until the end of the nineteenth century, with scattered sanctions on members lasting into the twentieth century.²³⁴ To enforce Mormons' abstinence from civil law, Mormon lawyers were prohibited from representing Mormons in cases against fellow Mormons, and stood to lose their membership for "aiding and abetting" adversarial Mormons who disrupted community unity by resorting to gentile law.²³⁵

²³¹ Jedediah M. Grant, *Exposing Wickedness Among the Saints—Corrupt Men Threatening the Saints With United States' Troops – The Laws of Utah Set Aside in the Courts*, 3 JOURNAL OF DISCOURSES 232 (Mar. 2, 1856), available at scriptures.byu.edu ("Several had got into the fog to suck and eat the filth of a Gentile law court, ostensibly a court of Utah, though I call it a Gentile court.").

²³² IN THE COURTS, *supra* note Error: Reference source not found, at 264; ALLEN, *supra* note Error: Reference source not found, at 34; Brigham Young, *Advice to Lawyers – Royal Polygamy in Europe – Polygamy Revealed From Heaven*, 11 JOURNAL OF DISCOURSES 257 (Aug. 12, 1866), available at scriptures.byu.edu ("Now, I ask every man and woman who wishes an honorable name in the Church and kingdom of God upon the earth, if they have entertained any idea of going to law, to banish it from their minds at once. We have our Bishop's courts; they can tell us what is right. We have our High Councils, and we have also our Selectmen here who are sustained by the suffrages of the people."); John Taylor, *The Perpetual Emigrating Fund—How to Settle Difficulties—Should Be Governed By the Laws of God—Cooperation and Brotherly Kindness—The Proper Training of Children*, 20 JOURNAL OF DISCOURSES 102 (Dec. 8, 1878), available at scriptures.byu.edu ("I tell you what you should do, whenever a man would attempt to 'pop' you through the courts of the law of the land, you should 'pop' him through the courts of our Church; you should bring him up for violating the laws of the Church, for going to law before the ungodly, instead of using means that God has appointed . . . You have agreed to be governed by the laws of the Church, and I mention this to show you what would be right in regard to principles of that kind. And if after summoning the parties referred to before the Bishop's Court, and from there the case be carried before the High Council, and then he would not do right, the consequence would be that he would be cut off from the Church.").

²³³ See, e.g., Brigham Young, *School of The Prophets—Improvement of Provo City—Litigation—Injudicious Trading*, 12 JOURNAL OF DISCOURSES 157 (Feb. 8, 1868), available at scriptures.byu.edu ("We should have very little use for anything else in the shape of Government but the Priesthood, which is after the order of the Son of God. . . This is a step in the right direction—to settle all matters without having recourse to law, which would do away with the necessity of employing and paying lawyers, court fees, etc.").

²³⁴ IN THE COURTS, *supra* note Error: Reference source not found, at 266-67, 313.

²³⁵ *Id.* at 271.

Mormon church courts were modeled after an image of Christian community. In most cases, lawyers—for whom Brigham had choice language²³⁶—were banned from representing parties in hearings before church tribunals. In order to aid members acting without trained counsel, as well as to promote a general spirit of equity and revelation (rather than formal legalism²³⁷), Mormon trial proceedings were generally stripped of technicalities and legal formalisms²³⁸ such as standing, pleading standards, and *stare decisis* (although judgments were rendered and written).²³⁹

Compromise was encouraged, if not mandated, and Mormons found to be in violation of community norms were invited to repentance; church tribunals were likely to decide against stubborn or non-compromising parties, regardless of fault.²⁴⁰ As a result of the courts' less formal nature and focus on equity, members sometimes conceded, for example, to “avoid hard feelings.”²⁴¹ In other words, the value of adjudication laid in “rebuilding the spiritual harmony of the community” (with the community being the primary unit of concern) rather than merely replacing individual persons' losses, or pain.²⁴²

Apparently modeled to some extent after American courts, Mormon ecclesiastical courts were three-tiered: after a general encouragement to resolve

²³⁶ Brigham Young, *Lawyers, and Those Who Practice Attending Law Courts, Rebuked—a Curse Pronounced Upon All Who Love Litigation and Do not Repent*, 3 JOURNAL OF DISCOURSES 236 (Feb. 24, 1856), available at scriptures.byu.edu (“[Lawyers] love sin, and roll it under their tongues as a sweet morsel, and will creep around like wolves in sheep's clothing, and fill their pocket's with the fair earnings of their neighbors, and devise every artifice in their power to reach the property of the honest, and that is what has caused these courts . . . Men who love corruption, contention, and broils, and who seek to make them, I curse you in the name of the Lord Jesus Christ; I curse you, and the fruits of your lands shall be smitten with mildew, your children shall sicken and die, your cattle shall waste away, and I pray God to root you out from the society of the Saints. To observe such conduct as many lawyers are guilty of, stirring up strife among peaceable men, is an outrage upon the feelings of every honest, law-abiding man.”); Reid L. Neilson & Nathan N. Waite, *Settling the Valley, Proclaiming the Gospel: The General Epistles of the Mormon First Presidency* 269 (2017).

²³⁷ See, e.g., IN THE COURTS, *supra* note Error: Reference source not found, at 312-13

²³⁸ STORY, *supra* note Error: Reference source not found, at 271

²³⁹ See IN THE COURTS, *supra* note Error: Reference source not found, at 274-76, 283-87

²⁴⁰ See *Id.* at 306-07; Bussani & Infantino, *supra* note Error: Reference source not found, at 98-99.

²⁴¹ IN THE COURTS, *supra* note Error: Reference source not found, at 310.

²⁴² Bussani & Infantino, *supra* note Error: Reference source not found, at 104 (“The [] beliefs—that money can replace persons, losses, and pain, and that compensation may result from pursuing aggressively a remedy against the wrongdoer through litigation—are alien, or even offensive to other legal cultures. We do not find those beliefs, for instance, in societies where the very idea that money can be used as a depersonalized toll for bad behavior to be quantified by courts is completely foreign to the local legal tradition. This is the case for societies in which remedying the tort implies rebuilding the spiritual harmony of the community to which the victim belongs.”); see also *id.* at 101-103.

disputes informally by mediation overseen by lower priesthood holders,²⁴³ bishops heard and resolved cases first, presiding as a judge in Israel under the Aaronic Priesthood.²⁴⁴ Either party could seek discretionary appeal to the stake High Council, presiding under the authority of the Melchizedek Priesthood, which could re-hear party testimony, seek new evidence, and generally hear the case “as though it had not been heard, and without reference to previous trials.”²⁴⁵ In every case, the priesthood was governed by revelation, and rendered decisions by spiritual prompting.²⁴⁶ The highest tier in the Mormon ecclesiastical system was the First Presidency (aided by the Quorum of the Twelve apostles), which reviewed only the written records created by the earlier trials.²⁴⁷

Not only were church courts imagined to be in competition with American courts, they were imagined to *preempt* American courts by virtue of their exclusive jurisdiction. Although Mormons faced sanction for re-litigating church-decided matters in civil courts, the church courts themselves heard “appeals” from civil courts, re-litigating legally resolved matters and modifying judgments entered by civil judges.²⁴⁸ Also demonstrating the Mormon order’s refusal to subject itself to American law, even Mormon civil officials embedded in American territorial government were prone to ecclesiastical reprimand for acting towards other Mormons in a way that the church courts deemed unbecoming,²⁴⁹ or for regulating natural resources in a way that did not seem to comport with the Mormon communitarian property ethic (for example, by granting a fishing monopoly over the massively important Utah Lake).²⁵⁰

B. Law Without Violence in Mormon Law

Although there were claims of violence wielded against dissidents,²⁵¹ church courts exercised their control over membership status in the church, and therefore in the community, as the primary axis of punishment.²⁵² Largely due to

²⁴³ IN THE COURTS, *supra* note Error: Reference source not found, at 279-283.

²⁴⁴ *Id.* at 285-86.

²⁴⁵ *Id.* at 286-87; *see also* D&C 102:27, 30-31.

²⁴⁶ *See* IN THE COURTS, *supra* note Error: Reference source not found, at 309.

²⁴⁷ *Id.* at 287.

²⁴⁸ *Id.* at 278.

²⁴⁹ *Id.* at 276.

²⁵⁰ *Id.* at 276-77.

²⁵¹ *See, e.g.,* Robert H. Briggs, *The Mountain Meadows Massacre: An Analytical Narrative Based on Participant Confessions*, 74 UTAH HISTORICAL QUARTERLY 320 n.26 (2006).

²⁵² *See* IN THE COURTS, *supra* note Error: Reference source not found, at 263; Samuel D. Brunson, *Mormon Profit: Brigham Young, Tithing, and the Bureau of Internal Revenue*, 2019 BYU L. REV. 41, 83 (2019) (“Notably, [Mr. Hollister, Utah’s revenue collector from federal Bureau of Internal Revenue] claimed, nonpayment of tithing could lead to excommunication from the Mormon church. And excommunication was not merely inconvenient. According to Hollister, excommunication ‘involves, from the peculiar nature of the association & the (former) isolation of Utah, the theatre of its action, temporal as well as spiritual ruin if not loss of life.’”);

early canonical statements by Joseph Smith,²⁵³ church courts rarely handed down direct penalties beyond disfellowship or excommunication from the Mormon body.²⁵⁴ But the courts *did*, in fact, actively wield the weapon of church standing and group identity in ensuring equitable resolution to property disputes.²⁵⁵

When Mormons failed to compensate their community members for beneficial waste,²⁵⁶ registered land with the federal government that the Church claimed through Mormon norms (and failed to consult with the priesthood before seeking legal land entitlements),²⁵⁷ sought to claim their neighbors' land from the law "in breach of community harmony,"²⁵⁸ were willing to transfer land against priesthood command "to anyone that came along[,] Mormon, Jew, or Gentile, Enemy or friend,"²⁵⁹ or showed "contempt . . . of the Holy Priesthood,"²⁶⁰ they faced disfellowship or excommunication. Adjudicating claims in the spirit of the laws of Zion²⁶¹ often meant debating what it *meant* to be a Latter-day Saint, as well as the implications of the Mormon identity in belonging to a community of property-owners.²⁶² The same *identity* injected into property transactions under the law of consecration thus became the Church courts' primary collateral in regulating party behavior.

The reach and gravity of the church courts' authority cannot be understood without reference to the comprehensive economic system of the Mormons which gave control over community standing its bite. Most significantly, it was the Mormon economic system's ethic of market exclusivity, especially non-patronage teachings (later integrated into United Order corporate governance²⁶³) that made Mormon court judgments more than merely hortatory.

Overall, it was in concert with Mormon property systems and economic ordering, such as the United Order, that converted these membership penalties

cf. id. at 88.

²⁵³ See D&C 134:10.

²⁵⁴ IN THE COURTS, *supra* note Error: Reference source not found, at 287-88.

²⁵⁵ Bussani & Infantino, *supra* note Error: Reference source not found, at 106 ("Notwithstanding the absence of an "official," State-driven enforcement machinery, unofficial mechanisms for remedies enforcement—from the blame of the community to the fear of supernatural reaction—usually operate well in ensuring that injurers and victims follow customary procedures.").

²⁵⁶ See, e.g., IN THE COURTS, *supra* note Error: Reference source not found, at 300.

²⁵⁷ *Id.* at 301.

²⁵⁸ *Id.* at 302.

²⁵⁹ *Id.* at 309.

²⁶⁰ *Id.* at 304.

²⁶¹ *Id.* at 313.

²⁶² See *id.* at 303; Bussani & Infantino, *supra* note Error: Reference source not found, at 106 ("Notwithstanding the absence of an "official," State-driven enforcement machinery, unofficial mechanisms for remedies enforcement—from the blame of the community to the fear of supernatural reaction—usually operate well in ensuring that injurers and victims follow customary procedures."); *id.* at 101.

²⁶³ See *supra* Section II.C.

into the sorts of severe, non-symbolic sanctions that could regulate even recalcitrant members' behavior: Mormon United Order covenants to deal only with Mormons in good-standing meant "economic privation" to expelled members, who may have also lost access to markets in the highly isolated and Mormon-controlled Great Basin.²⁶⁴ These punishments were made *especially* sharp by the fact that the Church controlled land and water distribution flexibly and according to community needs (in which the community was defined solely by Mormon members).

The United Order of Enoch, as a regulatory system that could cover every aspect of members' economic and religious lives, necessarily subject to the steering hand of Priesthood leadership, thus represented the zenith of Mormon law's effort to govern *without even vestiges* or forms of the American legal order. Representing, perhaps, a religious analog of anarcho-syndicalism (complete with the Mormon image of Walter Benjamin's stateless, bloodless,²⁶⁵ divine violence wrought by coordination of labor²⁶⁶ and homogenization²⁶⁷), the United Order demonstrates that consecration and the consecratory order were not *merely* property regimes, but the basis for a coherent legal order—government without the state, society without state violence—accepting complete sacrifice *without* demanding it by force.²⁶⁸

Theory aside, however, that the church courts remained the dominant means of conflict resolution, especially over property, into the early twentieth century, demonstrates the grip that identity-centered property systems could exert. The threat of disfellowship or failing to abide church court judgments apparently offered superior value to the remedies of the territorial district courts. The utility of the church courts was not only in their convenience, simplicity, or legitimacy derived from participants' religious zeal. They not only reduced costs of dispute resolution,²⁶⁹ but also created additional value by fostering in-group identification and promoted buy-in to the priesthood's authority and the legitimacy of its property system itself. That is, Mormon dispute resolution served not only as a transaction cost in managing property, but an affirmative means of social structuring and fostering community norms necessary to

²⁶⁴ IN THE COURTS, *supra* note Error: Reference source not found, at 288.

²⁶⁵ WALTER BENJAMIN, CRITIQUE OF VIOLENCE IN REFLECTIONS 300 (P. Demetz ed. 1978); Dominick LaCapra, *Violence, Justice, and the Force of Law*, 11 CARDOZO L. REV. 1065, 1073-74 (1990).

²⁶⁶ See Duncan Stuart, *Walter Benjamin's "Critique of Violence" Is a Revolutionary Call to Arms*, JACOBIN (August 19, 2021), <https://jacobin.com/2021/08/walter-benjamin-critique-of-violence-revolution-working-class-kapp-putsch>.

²⁶⁷ Dominick LaCapra, *Violence, Justice, and the Force of Law*, 11 CARDOZO L. REV. 1065, 1072 (1990).

²⁶⁸ See WALTER BENJAMIN, CRITIQUE OF VIOLENCE IN REFLECTIONS 297 (P. Demetz ed. 1978).

²⁶⁹ See ELLICKSON, *supra* note Error: Reference source not found, at 281-82.

overcome collective action dilemmas (the sort that made the Mormon legal system work in the absence of the threat of state violence, as discussed below).

Thus, by turning group belonging and identity claims into collateral and, at times, a very literal form of consideration in transactions, Mormon property systems and market exclusivity enabled the ecclesiastical courts to govern Mormon property and relationships without direct recourse to violence and in competition with American law. Mormon identity, as a property form, was both cultivated and controlled by the property and property-adjudicating systems simultaneously, each designed to enforce the other and enable regulation in the absence of the state. Identity was cultivated to generate buy-in to these systems, and these systems, in turn, effectuated the identity.²⁷⁰ Property rules and adjudication, both under the auspices of the priesthood and mediated by what it meant to be Mormon, were necessarily coupled and mutually reinforcing.²⁷¹ The Mormon property system worked by regulating “bonds of solidarity”²⁷² and “collective self-understanding”²⁷³ bloodlessly through the identity-as-property model.

CONCLUSION

To this day, Mormons are initiated into the consecratory order. As a part of the Endowment ceremony performed in the temples of the Church of Jesus Christ of Latter-day Saints, new initiates agree to a series of escalating promises, the law of which demands that members “[k]eep the law of consecration, which means that members dedicate their time, talents, and everything with which the Lord has blessed them to building up Jesus Christ’s Church on the earth.”²⁷⁴

Although the Church does not currently require that members *observe* the law of consecration (merely that they accept it), the Church maintains that the consecratory order “defines the correct socio-economic systems for the Kingdom of God and is anticipated to be reinstated when the millennium comes.”²⁷⁵ While relegated to a symbolic representation of devotion to the Church today (and largely forgotten by the Church’s membership), the law of consecration—once a “unique species of religious communitarianism”²⁷⁶—was, in the nineteenth

²⁷⁰ See Israelson, *supra* note Error: Reference source not found, at 538 (“The establishment of the United Order, then, can be seen as an effort to maintain group self-sufficiency and to preserve group identity in the face of increased pressures toward assimilation.”).

²⁷¹ Bussani & Infantino, *supra* note Error: Reference source not found, at 101.

²⁷² See Fraade, *supra* note Error: Reference source not found, at 289.

²⁷³ See *id.* at 275.

²⁷⁴ GENERAL HANDBOOK: SERVING IN THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS § 27.2 (August 2022), <https://www.churchofjesuschrist.org/study/manual/general-handbook>.

²⁷⁵ KINGDOM TRANSFORMED, *supra* note Error: Reference source not found, at 48.

²⁷⁶ BAER, *supra* note Error: Reference source not found, at xii, xiv.

century, “of profound significance” to Mormon culture and have shaped the development of Mormonism’s footprint in the West.²⁷⁷

The Mormon-American conflict was motivated in large part by fundamentally incompatible notions of property, ownership, and natural resource management. Operating at the fringes of American geography, the Mormon people found themselves subject to American legal violence for straying too far beyond the limits of American legal pluralism, particularly property pluralism.

But the conflict was not only waged *because* of property, it was also waged *by means of* property. The Mormon legal project subjected community identity and standing within the Church to the logic of property, which was then used to establish ecclesiastical courts as cogent competitors of the federal court system. Wielding identity as property made the Mormon project work, both in the allocation of property (including at the climax of the Mormon consecratory order under the Order of Enoch) *and* in the resolution of disputes. However, the increasingly elaborate legal forms of the law of consecration, designed to overcome the dominant American legal order and norms, ultimately represented the Mormon concession to and adoption of American property law and corporate governance.

The ultimate end of the conflict came when the United States Supreme Court upheld the legality of extreme legal violence against the Mormons, including congressional actions which disenfranchised the Mormon people and expropriated the property of the Church. In so doing, the Court not only completed the subjection of the Mormons to American law, but also the American *market* and property logic.

But the Mormons believe that this subjection of the law of consecration to American property law is temporary. Mormons anticipate the eventual re-establishment of the law of consecration when “the kingdoms of this world [are] constrained to acknowledge that the kingdom of Zion is in very deed the kingdom of our God and his Christ.”²⁷⁸ As stated by the influential Mormon leader and Apostle James E. Talmage:

The Saints confidently await the day in which they will devote, not merely a tithe of their substance, but all that they have, and all that they are, to the service of their God; a day in which no man will speak of mine and thine, but all things shall be theirs and the Lord’s.²⁷⁹

²⁷⁷ Martha Bradley, *Cultural Configurations of Mormon Fundamentalist Polygamous Communities*, 8 NOVA RELIGIO: J. ALT. & EMERGENT RELIGIONS 5, 12-13 (2004).

²⁷⁸ D&C 105:32.

²⁷⁹ JAMES E. TALMAGE, THE ARTICLES OF FAITH 451-42 (1899).