

RELIGION & THE LAW: THE MORMON EXPERIENCE IN THE NINETEENTH CENTURY*

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The Mormon cases present a fascinating study of diversity and conformity in the nineteenth century United States. From their beginning the Mormons were a gathered people. Almost immediately, from the time of their origin in New York, the Mormons challenged national and state legal systems to protect or at least tolerate their idiosyncracies. Mormon belief and practice came to include communal economics, theocratic government, and most challenging and offensive of all to the larger national community, a radically different marital and social practice—polygamous marriage.

Mormon history began in New York and continued briefly in Ohio where Mormons first gathered. Mormons experienced their most savage suppression in Missouri, where the Governor, Lilburn Boggs, issued an extermination order and where the “Mormon war” saw Mormons driven into Illinois to seek refuge and a new community. Illinois initially welcomed Mormon refugees, but the abrasiveness of a people who were so incapable of assimilation into the existing society again led to conflict resulting in the murder of the founder of Mormonism, Joseph Smith and his brother Hyrum. The Mormon exodus to the Great Basin of the American West followed, under the direction of Brigham Young, one of this nation’s leading colonizers.

After they migrated to the deserts of the Great Basin, the Saints¹ pursued their radical theory of Zion as an alternative to the social

* Presented at A Conference on Religious Law & Legal Pluralism sponsored by Benjamin N. Cardozo School of Law, Yeshiva University, New York, New York, on September 17-18, 1989. Major parts of the argument of this paper were presented in the first legal history of the Mormon experience, E. Firmage & R. Mangrum, *Zion in the Courts: A Legal History of the Church of Jesus Christ of Latter-day Saints 1830-1900* (University of Illinois Press, 1988), in Firmage, *The Judicial Campaign Against Polygamy and the Enduring Legal Questions*, 27 *B.Y.U. Studies* 91 (1988), and before the Bicentennial Conference on Religion and the Constitution at Georgetown University Law Center, April 14, 1989. While Professor R. Collin Mangrum did not participate in this conference, or in the preparation of this paper, the two of us collaborated on *Zion in the Courts*, the research upon which this paper is based.

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Erik Christiansen, my friend and research assistant, helped edit this paper from my earlier writings.

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experiment of pluralistic America. A critical part of this effort was the establishment and maintenance of their own court system. Through their ecclesiastical courts, Mormons were able to offer an alternative to the divisive influence of the adversarial legal system with its technical pleadings, rules of evidence, and pettifogging lawyers. More importantly, Mormons were able to interject their own notions of community and temporal affairs into the resolution of social conflict. The ecclesiastical court system facilitated radical changes in the laws governing the distribution of land, water, and other natural resources. Church courts also permitted religious perspectives to be determinative in conflicts arising out of contractual or tortious disputes. Finally, the courts provided forums for the mediation of conflicts in polygamous families. In each of these substantive law areas, the existence of the Church courts enhanced the independence of the church from the state, thereby lending credibility to the theological concept of Zion.

I. THE NINETEENTH-CENTURY CLIMATE

Nineteenth-century frontier America was a radically different place from the world we know today. Many Americans, and American courts for that matter, thought that Americans shared a common understanding of God and religion.² While professing a belief in the free exercise of religion, many courts "assumed that America was a Christian country, and more particularly, a Protestant Christian country."³ In 1854, for example, the Supreme Court of Maine upheld a decision to expel an Irish Catholic child from school for refusing to participate in a Protestant religious exercise.⁴ In 1811, the highest state court in New York upheld an indictment for blasphemy and stated that, "[W]e are a christian people, and the morality of the country is deeply ingrafted upon christianity."⁵ Sunday closing laws

² See, e.g., *North v. Board of Trustees*, 137 Ill. 296, 305, 27 N.E. 54, 59 (1891) (University of Illinois did not violate state constitution in requiring daily chapel exercises because nothing prevents state colleges from adopting "all reasonable regulations for the inculcation of moral and religious principles in those attending them.").

³ See Berman, *Religion and Law: The First Amendment in Historical Perspective*, 35 *Emory L.J.* 777, 783 (1986); W. Torpey, *Judicial Doctrines of Religious Rights in America* 16 (1948); see also *Ferriter v. Tyler*, 48 Vt. 444 (1876) (150 Catholic students expelled by Protestant school board and not readmitted until they vowed that they would not miss school for Catholic religious ceremonies again). But see *State ex rel. Weiss v. District School Bd.*, 44 N.W. 967 (Wis. 1890) (Bible readings in state schools banned as violative of state's constitution).

⁴ See *Donahoe v. Richards*, 38 Me. 379 (1854).

⁵ *People v. Ruggles*, 8 Johns. 290, 295 (N.Y. 1811). For other cases and discussions of early blasphemy prosecutions, see L. Levy, *Blasphemy in Massachusetts* (1973); *Zeisweiss v. James*, 63 Pa. 465 (1870); *Commonwealth v. Kneeland*, 20 Pick. 206 (Mass. 1838); *State v.*

were also regularly upheld by a majority of state courts⁶ and by the United States Supreme Court.⁷

This Christian nation attitude permeated the judiciary and sustained the religious views of the majority. In 1843, Justice Joseph Story, for example, in the famous case of *Vidal v. Girard's Executors*,⁸ went as far as to assert that Christianity was part of the common law of the United States.⁹ Similarly, after compiling a long list of historical antecedents, in 1882 Justice David Brewer, in the case of *Holy Trinity Church v. United States*¹⁰ declared, "[T]his is a Christian nation."¹¹ Thus, the early Mormon Church had to contend not only with a judiciary comfortable with intruding into the most sensitive aspects of church-state relations, but also with a body of law shaped by the popular sentiment of America's Christian attitude. The result was a judiciary with both the power and the impetus to resolve legal disputes within the sphere of majoritarian religious values.

For Latter-day Saints in the nineteenth century, the civil courts, lawyers, and the law represented an inadequate and frequently corrupt system that worked against the establishment of Zion. For non-Mormons, such peculiar Mormon practices as polygamy and communal economic practices were so threatening to the larger community that suspending the normal operation of the law seemed justified. Mobs, frequently headed by respectable members of their communities, often law enforcement officials acting outside of the law, forcibly expelled Mormons from legally purchased homes and lands. The federal government restructured the concepts of due process and religious freedom to compel Mormon conformity with the larger community, the best known example being the government's attack on polygamy. Prior to the judicial attack on polygamy, however, the Mormons endured several decades of litigation in New York, Ohio, Missouri, and Illinois. This early persecution undoubtedly fueled the Saints' later desire to establish an ecclesiastical court system apart

Chandler, 2 Harr. 553 (Del. 1838); *Updegraph v. Commonwealth*, 11 Serg. & Rawle 394 (Pa. 1824); *Delaware v. Chandler*, 3 Harr. 553 (Del. 1837); *W. Torpey*, supra note 3, at 58-60.

⁶ See, e.g., *Elden v. People*, 161 Ill. 296, 43 N.E. 1108 (1896); *Lindenmuller v. People*, 33 Barb. 548 (N.Y. 1861); *Missouri v. Ambs*, 20 Mo. 214 (1854); *Specht v. Commonwealth*, 8 Pa. 312 (1848); *Commonwealth v. Wolf*, 3 Serg. & Rawle 48 (Pa. 1817). But see *State v. Baltimore & O.R.R.*, 15 W. Va. 362 (1879).

⁷ See, e.g., *Hennington v. Georgia*, 163 U.S. 299 (1896); *Ball v. United States*, 140 U.S. 118 (1891); *Bucher v. Cheshire R.R.*, 125 U.S. 555 (1888); *Gibbs & Sterret Mfg. Co. v. Brucker*, 111 U.S. 597 (1884); *Pence v. Langdon*, 99 U.S. 578 (1878).

⁸ 43 U.S. (2 How.) 127 (1844).

⁹ *Id.* at 198.

¹⁰ 143 U.S. 457 (1892).

¹¹ *Id.* at 471.

from the corrupt influences of the secular world. The persecution that ultimately turned the Saints against the gentile law began in New York.

The earliest trials involving Joseph Smith occurred in New York in 1826 and 1830. In each instance, Smith was charged with vagrancy in connection with his money-digging activities.¹² Although apparently he was acquitted,¹³ to avoid further harassment Smith left New York and fled to Ohio in February 1831.¹⁴ The litigation continued in Ohio. Unlike the New York experience, however, the Ohio litigation did not stem from the Mormons' belief in the "Golden Bible,"¹⁵ but rather from a self-inflicted commercial disaster—the failure of the Kirtland Safety Society.

When Ohio failed to grant the Kirtland Safety Society a state banking charter, the Saints issued their own notes to pay for large quantities of merchandise that had been purchased on credit.¹⁶ Within six months of the Safety Society's formation, however, the financial panic of 1837 swept the nation, taking down the Society along with thousands of other over-subscribed banks.¹⁷ The Society episode embarrassed Joseph Smith and cost him many of his closest supporters. But with the exodus of 1838, Church leadership and the majority of the Saints left financial disaster in Ohio only to face state supported militant hostilities in Missouri.

Early Mormons regarded Missouri, specifically Jackson County, as the divinely revealed site for the establishment of Zion.¹⁸ Soon after the first Mormons arrived at Independence, Missouri on January 13, 1831, however, a "secret constitution" was entered into in July 1833 by many of the prominent men of the county.¹⁹ On July 20, 1833, the pledgees of the "secret constitution" gathered at the courthouse in Independence to ask the Mormons to leave Jackson

¹² See Walters, *Joseph Smith's Bainbridge, New York, Court Trials*, 36 *Westminster Theological J.* 123, 129 (1974).

¹³ See R. Bushman, *Joseph Smith and the Beginnings of Mormonism* 162 (1984); 1 J. Smith, *History of the Church of Jesus Christ of Latter-day Saints* 96 (rev. ed. 1978).

¹⁴ See 1 J. Smith, *supra* note 13, at 39-45; 1 B. Roberts, *Comprehensive History of the Church of Jesus Christ of Latter-day Saints* 240-41 (1965).

¹⁵ See M. Parkin, *Conflict in Kirtland: A Study of the Nature and Causes of External and Internal Conflict of the Mormons in Ohio Between 1830 and 1838*, 263-73 (M.A. thesis, Brigham Young University 1966).

¹⁶ See Hanson, *Money of the Mountains*, 64 *Improvement Era* 158, 158-59 (1961).

¹⁷ See 1 B. Roberts, *supra* note 14, at 402; Hill, Rooker & Wimmer, *The Kirtland Economy Revisited: A Market Critique of Sectarian Economics*, in 3 *Stud. in Mormon Hist.* 81 (1977).

¹⁸ See *Doctrine & Covenants of the Church of Jesus Christ of Latter-day Saints* 57:3 (1835) [hereinafter *Doctrine & Covenants*].

¹⁹ See 1 J. Smith, *supra* note 13, at 374-76.

County.²⁰ The Mormons, however, declined to leave their appointed place of gathering, and violence soon followed.

As the violence escalated, the Mormons sought relief from Missouri Governor Daniel Dunklin on September 28, asking for military protection so that they might defend their rights by suing for their loss of property.²¹ The governor, in a response dated October 19, 1833, advised the Mormons to file civil actions before the local circuit judges and justices of the peace.²² The local magistrates, however, refused to punish the mob leaders who had demolished and destroyed Mormons' houses and stores, and the violence continued. Finally, after the Mormons had been driven from their homes and forced to escape across the Missouri River on November 7,²³ a petition containing 114 signatures was sent to President Andrew Jackson.²⁴ The petition asked that federal troops restore the Saints to their homes and thereafter maintain peace until civil order could be restored. President Jackson's formal reply, however, stated that he had no authority to call out the military to enforce state laws.²⁵

Thereafter, many of the Mormons who fled Jackson County settled in Caldwell County, Missouri. Although the Saints anticipated peace in their new settlement, the rapid influx of Mormons again agitated the local settlers to violence.²⁶ This time, however, as the number of assaults on Mormons increased, the Saints began to fight back.²⁷ When reports reached Governor Lilburn Boggs that the Mormons were arming themselves and committing acts of violence, he issued his now infamous order of extermination.²⁸ Three days after this order was given, on October 30, 1838, eighteen or nineteen Mormons, including children, were massacred at Haun's Mill in Caldwell County.²⁹ The following day a mob, led by state militia, surrounded the Mormons gathered at Far West in Caldwell County, and arrested and imprisoned their leaders.³⁰ Under these ominous circumstances and without many of their leaders, the Mormons retreated to Quincy, Illinois.

²⁰ Id. at 395-99.

²¹ Id. at 410-15.

²² Id. at 423-24.

²³ Id. at 437.

²⁴ Id. at 483-85.

²⁵ Id. at 493.

²⁶ See 3 J. Smith, *supra* note 13, at 57.

²⁷ See B. Roberts, *The Missouri Persecutions* 214-15 (1900).

²⁸ The order of extermination directed the state militia to treat the Mormons as enemies who "must be exterminated or driven from the state." 3 J. Smith, *supra* note 13, at 175.

²⁹ Id. at 183-86, 212.

³⁰ Id. at 192.

When Church leaders later arrived in Illinois in the spring of 1839, they realized the futility of efforts to secure redress from either the courts or legislature for the property and lives lost in Missouri. The Church leadership, therefore, began looking elsewhere for money and protection. The Mormons' first plan of attack was to have the governor of each state petition Congress to impeach the State of Missouri for not guaranteeing a republican form of government.³¹ A group of the Church leaders left for Washington in November 1839 with a petition claiming redress from the national government.³² The day after their arrival, they were introduced to President Van Buren, who frankly stated that although their cause was just, he could do nothing for them because he would "come in contact with the whole state of Missouri."³³ The "Mormon problem" perplexed the congressmen whom the Saints next petitioned. Although the Senate Judiciary Committee debated the Mormons' petition,³⁴ the question of the Senate's jurisdiction, and the political undesirability of siding with the Mormons resulted in an unfavorable disposition by the committee.³⁵

The disheartening Missouri episode led the Mormons to conclude that the political branches of the federal government, as well as each branch of the Missouri state government, were incapable, incompetent, or at least disinclined to offer either protection or redress. As a result, the Mormons turned inward, forging a new society in Nauvoo, Illinois that combined democratic and theocratic elements of government to provide for substantial autonomy, insularity, and self-sufficiency.

With Nauvoo's government in place, Joseph Smith and the Nauvoo City Council attempted to insulate themselves from what the Mormons saw as continuing harassment through vexatious lawsuits.³⁶ To accomplish these ends, the council passed numerous ordinances increasingly expanding its power. Eventually, these ordinances gave the council a virtual *carte blanche* to declare any writ issued by any other court valid or invalid, and if necessary, examine the merits of the case.³⁷

The greatest abuse of the council's power, however, occurred

³¹ *Id.* at 310-11.

³² See 4 J. Smith, *supra* note 13, at 24-38.

³³ *Id.* at 40; 5 J. Smith, *supra* note 13, at 393; 6 J. Smith, *supra* note 13, at 203.

³⁴ See 57 Niles Nat'l Register 398 (1840) (LDS Church Archives); Cong. Globe, 26th Cong. 1st Sess., at 185 (1840).

³⁵ *Id.*

³⁶ See Kimball, A Wall to Defend Zion: The Nauvoo Charter, 15 B.Y.U. Stud. 491, 496 (1975).

³⁷ See 5 J. Smith, *supra* note 13, at 185-92; Oaks, The Suppression of the Nauvoo Expositor, 9 Utah L. Rev. 862, 880 n.116 (1965).

with the destruction of the *Nauvoo Expositor*. During the Spring of 1844, a group of influential Nauvoo citizens became disaffected from the Church and particularly from its prophet.³⁸ Alarmed that Joseph Smith had cloaked himself with both religious and temporal power, the group published a newspaper on June 7, 1844, containing bristling editorials about the integrity and morality of Nauvoo's leaders.³⁹ The Nauvoo City Council met the following day and passed an ordinance declaring the paper a public nuisance and ordering its destruction.⁴⁰ The destruction of the *Nauvoo Expositor* was more than the citizens could bear. The threat of the "Mormon Kingdom" under the cover of the Nauvoo Charter led to the murders of Joseph and Hyrum Smith before the month was out, and ultimately to the Mormon migration to the Great Basin.⁴¹

II. THE JUDICIAL CAMPAIGN AGAINST POLYGAMY

The Mormons moved to the Great Basin desert to find the autonomy that would allow them to build Zion unimpeded by religious persecution. The choice of a largely uninhabited desert as the center place for the kingdom was motivated primarily by the Saints' desire to be left alone to freely establish a distinctive way of life that other communities had found so threatening and offensive. Instead, they now had to deal with the federal government, initially cautious and soon hostile and bent on eradicating Mormon distinctiveness.

A. *Early Judicial Attacks on Polygamy*

Officially acknowledged as part of Latter-Day Saints Church doctrine in 1852, polygamy soon became a national issue. Congress's first attempt to deal with polygamy was the Morrill Act.⁴² It was not passed until 1862, ten years after the Church first announced its practice of polygamy, and then went largely unenforced for the next thirteen years.

Because of various defects in the statute, however, the first attempts to prosecute polygamists were not brought under the Morrill Act. In 1871 Thomas Hawkins was indicted for and convicted of having adulterous relations with his polygamous wife.⁴³ Indictments

³⁸ See 6 J. Smith, *supra* note 13, at 344-51, 405, 412-13.

³⁹ See L. Newell & V. Avery, *Mormon Enigma: Emma Hale Smith* 181 (1984).

⁴⁰ See 6 J. Smith, *supra* note 13, at 448.

⁴¹ See L. Arrington & D. Bitton, *The Mormon Experience* 65-82 (1979).

⁴² Morrill Act, ch. 126, §§ 1-3, 12 Stat. 501-02 (1862).

⁴³ See Linford, *The Mormons and the Law: The Polygamy Cases*, 9 Utah L. Rev. 308, 330 (1964).

immediately followed against a number of leading Church officials (including Brigham Young) under a Utah statute prohibiting lewd and lascivious cohabitation.⁴⁴ By indicting the Church's leading figures, the government sought to set a vivid example for rank and file members, paralyze the Church's leadership, and cow the Mormon populace into submission to federal policy.

The government's plan, however, was not to be realized. In *Clinton v. Englebrecht*,⁴⁵ the United States Supreme Court ruled that in his efforts to purge juries of Mormons and secure the conviction of polygamists, Judge McKean, a rabid anti-Mormon, had improperly ignored Utah's jury selection procedures. As a result, Hawkins's conviction for adultery was overturned, and the indictments against Young and the others were dismissed.⁴⁶ The prosecution of polygamy thus was halted until 1875 and the *Reynolds* case.

B. *The Reynolds Decision*

George Reynolds was an English immigrant, private secretary to Brigham Young, and a polygamist.⁴⁷ In October 1874, he was indicted under the Morrill Act,⁴⁸ and subsequently convicted of polygamy on the testimony of his polygamous wife. On appeal to the Utah Supreme Court, Reynolds argued that the grand jury that had indicted him had been constituted improperly.⁴⁹ The Utah Supreme Court agreed and reversed Reynolds's conviction because the trial court followed federal rather than territorial law in fixing the size of the grand jury.⁵⁰

In October 1875, Reynolds was indicted again for violating the Morrill Act. This time, in accordance with Utah law, the indictment was handed down by a grand jury of fifteen men, seven Mormons and eight non-Mormons.⁵¹ Reynolds was convicted again and sentenced to two years' hard labor and a \$500 fine. The Utah Supreme Court sustained his conviction.⁵²

With but one avenue of appeal remaining, Reynolds turned to the United States Supreme Court.⁵³ The Court affirmed the territorial

⁴⁴ See 5 B. Roberts, *supra* note 14, at 395 (1965).

⁴⁵ 80 U.S. (13 Wall.) 434 (1871).

⁴⁶ See Linford, *supra* note 43, at 331.

⁴⁷ See Davis, *Plural Marriage and Religious Freedom: The Impact of Reynolds v. United States*, 15 *Ariz. L. Rev.* 287, 287-88 (1973).

⁴⁸ See 5 B. Roberts, *supra* note 14, at 469.

⁴⁹ *United States v. Reynolds*, 1 *Utah* 226 (1875).

⁵⁰ *Id.*

⁵¹ See Linford, *supra* note 43, at 333.

⁵² *United States v. Reynolds*, 1 *Utah* 319 (1876), *aff'd*, 98 U.S. 145 (1878).

⁵³ *Reynolds v. United States*, 98 U.S. 145 (1878).

court's rejection of Reynolds's challenges to the grand jury's size, improprieties in jury selection, and prejudicial jury instruction. But the bulk of the Court's opinion was devoted to Reynolds's claim that the trial court improperly failed to instruct the jury that a finding that Reynolds engaged in polygamy as a result of a sincere religious conviction would justify his acquittal.⁵⁴ Reynolds argued that the first amendment's guarantee of the free exercise of religion can excuse conduct that would otherwise be criminal.⁵⁵ The Court's analysis of that issue made *Reynolds* a landmark case.

The Court first attempted to define how the word *religion* fell within the ambit of the free exercise clause.⁵⁶ Finding no guide to the definition of the term *religion* in the Constitution itself, the Court turned to the writings of Madison and Jefferson, sources contemporary with the adoption of the first amendment. The Court quoted from Jefferson to the effect that "religion is a matter which lies solely between man and his God; . . . the legislative powers of the government reach actions only, and not opinions."⁵⁷ Adopting this demarcation, the Court concluded that "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."⁵⁸

In arriving at the conclusion that "laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices,"⁵⁹ the Court grasped one-half of a profound dilemma posed by the first amendment's protection of religion. The Court recognized that the first amendment could not be read so broadly that any conduct asserted to be an exercise of religion would be immune from state regulation.⁶⁰ But the Court wrongly concluded that because not all religious conduct reasonably could be exempted from civil control, no religious conduct was protected by the first amendment. By so concluding, the Court ignored the express terms of the Constitution which protect the "free

⁵⁴ *Id.* at 150.

⁵⁵ *Id.* at 161-68.

⁵⁶ U.S. Const. amend. I.

⁵⁷ *Reynolds*, 98 U.S. at 164; see also T. Jefferson, *The Complete Jefferson* 518-19 (S. Pado-ver ed. 1943).

⁵⁸ See *Reynolds*, 98 U.S. at 164.

⁵⁹ *Id.* at 166.

⁶⁰ "To permit this," the Court reasoned, "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." *Id.* at 167. To illustrate this point, the Court produced a parade of horrors, examples of religiously inspired conduct that no civilized society could abide, such as human sacrifice. *Id.* at 166.

exercise" of religion.⁶¹ Moreover, the Court overlooked the other side of the first amendment dilemma. Religion is as much conduct as it is belief. The two cannot be disentangled. It is the religious practices of unpopular minorities that are most likely to be restricted by the state and thus are most in need of protection. The free speech clause of the first amendment fully protects the freedom of belief. Thus, unless the free exercise clause protects at least some practices that are offensive to the majority, that provision is devoid of any practical content. Yet the *Reynolds* decision forecloses such an application of the first amendment.

Having established the belief-conduct distinction and determined that the first amendment was no bar to outlawing religiously inspired conduct, the Court next concluded that polygamy was sufficiently "subversive of good order"⁶² to be formally criminalized. This second conclusion is also troublesome. As Linford notes, "[T]he Court never quite explained *why* plural marriage was a threat to the public well-being."⁶³ No victim of Reynolds's conduct was produced, it was conceded that polygamous sects might be well ordered, and the Court never examined whether polygamy degraded women. Instead, the Court found subversion of the social order on the basis of an abstract syllogism that polygamy meant patriarchy, which meant despotism.⁶⁴ To avoid this amorphous social evil, the Court invaded the right to religious freedom and limited the right to marry, a core element of personhood. Nevertheless, Reynolds's conviction was unanimously affirmed.⁶⁵

C. *The Prosecution of Cohabitation Under the Edmunds Act*

Although the *Reynolds* decision was a saddening blow to the Mormons, the immediate impact of the decision was limited. *Reyn-*

⁶¹ In the face of this language, the Court's attempt to define constitutionally protected religion as belief, as one constitutional scholar concludes, "is at best an oversimplification." See L. Tribe, *American Constitutional Law* 184 (2d ed. 1988); see also Freeman, *A Remonstrance for Conscience*, 106 U. Pa. L. Rev. 806, 826 (1958) (dismissing the freedom to believe-freedom to act dichotomy and arguing instead that the protection of "free exercise" necessarily protects religious action).

⁶² *Reynolds*, 98 U.S. at 164.

⁶³ See Linford, *supra* note 43, at 341.

⁶⁴ *Reynolds*, 98 U.S. at 166.

⁶⁵ On a petition for rehearing, it was pointed out that Reynolds's sentence to hard labor had been improper because the statute provided only for imprisonment. The Court, therefore, reversed the lower court's judgment in this respect and remanded the case so that the district court could impose proper punishment. See *Id.* at 168-69. Reynolds was resentenced to two years in prison and was released five months early for good behavior. He was received as a "living martyr" and ultimately became a General Authority of the Church. See Davis, *supra* note 47, at 291 & n.24.

olds established that Congress had the power to punish polygamy, but the Morrill Act was a cumbersome weapon with which to do so. The period in which the Mormons effectively would resist Washington's mandate, however, was rapidly ending. By 1880, the tone of congressional debate indicated that the government not only had the power to outlaw polygamy but also had the will to act. The peaceful machinery of the state again was used to punish the practitioners of an unpopular religious belief.

In 1882 Congress adopted the Edmunds Act, which gave federal officials an efficient weapon for the prosecution of polygamists.⁶⁶ It created the new offense of unlawful cohabitation (relieving prosecutors of the burden of proving polygamous marriages), allowed joinder of polygamy and cohabitation charges, and effectively eliminated all Mormons as jurors in polygamy cases. The new law proved an effective tool in the hands of the Church's opponents. By 1893, after the Church had renounced polygamy and prosecutions had largely ceased, there had been 1004 convictions for unlawful cohabitation and thirty-one for polygamy.⁶⁷ The number of polygamy and cohabitation convictions, however, understates the impact of "the raid" on Mormon society. Not just any Mormon male was allowed to practice polygamy; only those who were morally worthy and financially able were permitted to take plural wives. Thus, by and large, the polygamists were also the Mormons' leaders.⁶⁸ The conviction and imprisonment of polygamists served to paralyze Mormon society by removing its leadership.

To simplify polygamy prosecution, the Edmunds Act provided that men who "cohabit with more than one woman" would be guilty of a misdemeanor.⁶⁹ The Act, however, did not say what conduct constituted cohabitation, nor does the *Congressional Record* offer any evidence that Congress considered the question. The Mormons argued that the benchmark of "cohabitation" should be sexual intercourse. The courts first confronted the issue of what constituted cohabitation in *United States v. Cannon*.⁷⁰ Angus Cannon, president of the Salt Lake Stake, had married three wives prior to passage of the Edmunds Act.⁷¹ Two of these wives, Clara and Amanda, lived with

⁶⁶ Edmunds Act, ch. 47, §§ 1-9, 22 Stat. 30-32 (1882) (amended 1887, repealed 1909).

⁶⁷ See L. Arrington, *Great Basin Kingdom: An Economic History of the Latter-day Saints 1830-1900*, at 359 (1958).

⁶⁸ During this period, no General Authority and few bishops, stake presidents, or their counselors were monogamists. See L. Arrington & D. Bitton, *supra* note 41, at 204.

⁶⁹ Edmunds Act, ch. 47, § 3, 22 Stat. 30, 31.

⁷⁰ 4 Utah 122, 7 P. 369, *aff'd*, 116 U.S. 55 (1885), *vacated*, 118 U.S. 355 (1886).

⁷¹ See Linford, *supra* note 43, at 351.

him in separate quarters in the same home. The third lived in a house nearby.⁷²

Cannon was indicted for cohabiting with Amanda and Clara after passage of the Edmunds Act. At trial, Cannon offered to prove that, after Congress had passed the Edmunds Act, he had told Clara, Amanda, and their families that he did not intend to violate the law, and thereafter "did not occupy the rooms or bed of or have any sexual intercourse with" Clara. Unfortunately he could not afford to provide a separate house for Clara and her family. The court excluded the evidence as irrelevant, and Cannon was convicted.⁷³

Cannon appealed to the Utah Supreme Court.⁷⁴ His main objections were that "all cohabitation which the laws deals [sic] with is sexual cohabitation,"⁷⁵ of which he was innocent, and that his proffered evidence was wrongly excluded. The court, however, rejected this interpretation of the Edmunds Act. It concluded that "cohabitation" meant dwelling together and not sexual intercourse.⁷⁶ The United States Supreme Court affirmed the decision.⁷⁷ Consequently, proving cohabitation became ridiculously easy for federal prosecutors. As one scholar concluded, "[to] be tried was, in effect, to be convicted."⁷⁸

As the pace of polygamy prosecutions accelerated, the thought occurred to some eager prosecutor that the cohabitation statute would be more fearsome if every defendant faced not one cohabitation charge but many. Such would be the case if each year, month, or day that a man cohabited illegally could be the basis of a separate offense. A judicial test of this theory was attempted in the case of *Lorenzo Snow*.⁷⁹ Snow was charged with cohabitation in three separate indictments, each one charging the same offense with the same women, but

⁷² See *Cannon*, 116 U.S. at 60-61, 65.

⁷³ *Id.* at 71.

⁷⁴ In May 1885, instructions came from the underground headquarters of the Church to defend every case "with all zeal and energy possible." See G. Larson, *The "Americanization" of Utah for Statehood* 133-34 (1971).

⁷⁵ *Cannon*, 4 Utah 122, 141, 7 P. 369, 381, *aff'd*, 116 U.S. 55 (1885), *vacated*, 118 U.S. 355 (1886).

⁷⁶ *Id.* at 133, 7 P. at 374-76. A companion case to *Cannon* reaffirmed that evidence of sexual conduct was irrelevant. See *United States v. Musser*, 4 Utah 153, 156, 7 P. 389, 390 (1885). *Musser* was a stronger case for a finding of no cohabitation because the defendant had established each of his wives in a separate house. In sustaining *Musser's* conviction, the Utah court noted that one of Congress's purposes in passing the Edmunds Act was to reach prominent Church leaders who had escaped prosecution under the Morrill Act's three-year statute of limitations. *Id.* at 157-58, 7 P. at 391.

⁷⁷ 116 U.S. 55 (1885), *vacated*, 118 U.S. 355 (1886).

⁷⁸ Linford, *supra* note 43, at 348.

⁷⁹ *United States v. Snow*, 4 Utah 280, 9 P. 501 (1886).

for different years. In separate trials, Snow was convicted on each indictment and given the maximum sentence for each conviction.⁸⁰ Thus, by segregating the charges against Snow, the prosecution was able to triple his punishment. The Utah Supreme Court affirmed the convictions.⁸¹ The United States Supreme Court dismissed Snow's appeal on the ground that it did not have jurisdiction to hear it, because Snow did not question the validity of the statute but its application.⁸²

With the principle of segregation having been approved by the Utah Supreme Court and the possibility of further review seemingly precluded by the United States Supreme Court's decision in *Snow*, federal prosecutors swiftly began expanding their use of the segregation of offenses, testing how far the principle could be pushed. In *United States v. Groesbeck*,⁸³ the prosecution cut in half the period of each offense, charging the defendant with two counts of cohabitation, one for each six-month period.⁸⁴ Unlike the *Snow* case, the trials of the two charges were consolidated. On appeal, the Utah Supreme Court sustained both of these innovations.⁸⁵ The court dismissed the argument that a single trial of the defendant on both charges allowed the jury to improperly consider Groesbeck's first conviction in determining his guilt on the second charge. The court noted that consolidation of offenses into a single trial saved the state the burden and expense, and the defendant the harassment, of multiple litigation.⁸⁶

Meanwhile, Lorenzo Snow had served his first six-month sentence. He then applied to the United States Supreme Court for a writ of habeas corpus, claiming that his further detention was unlawful because the two remaining sentences were the result of an unlawful segregation of a single offense. As before, the government contended that the Court lacked jurisdiction, but this time the Court held that it had jurisdiction.⁸⁷ Cohabitation, the Court stated, was "inherently a continuous offense, having duration; and not an offense consisting of

⁸⁰ *Id.*

⁸¹ *Id.* at 280, 295, 313, 9 P. at 501, 686, 697 (1886), appeal dismissed, 118 U.S. 346 (1886).

⁸² *Snow v. United States*, 118 U.S. 346 (1886). Realizing that it had already decided one other cohabitation case, *Cannon v. United States*, 116 U.S. 55 (1885), the Court vacated its decision in that case as having been issued without jurisdiction. See *Snow*, 118 U.S. at 355. Other courts continued to cite *Cannon* as an authoritative interpretation of the Edmunds Act, even though it no longer was binding precedent. See, e.g., *United States v. Clark*, 6 Utah 120, 126, 21 P. 463, 464 (1889); *United States v. Kuntze*, 2 Idaho 80, 21 P. 407 (1889); *United States v. Peay*, 5 Utah 263, 269 14 P. 342, 345 (1887).

⁸³ 4 Utah 487, 11 P. 542 (1886).

⁸⁴ *Id.* at 492, 11 P. at 542.

⁸⁵ *Id.* at 496, 11 P. at 544.

⁸⁶ *Id.* at 494, 11 P. at 543.

⁸⁷ *In re Snow*, 120 U.S. 274, 285 (1887).

an isolated act."⁸⁸

Even after *In re Snow*, the courts could still impose multiple punishments for what was in reality one offense. The Edmunds Act specifically allowed the combination of polygamy and cohabitation charges.⁸⁹ Because the definitions of the offenses were different, a man could be convicted of marrying a polygamous wife and then convicted again for living with her.⁹⁰ The Supreme Court set limits on the combination of different offenses in *In re Nielsen*.⁹¹ Nielsen was indicted for adultery and cohabitation. Both charges were directed at his conduct with his polygamous wife, Caroline. Nielsen pleaded guilty to the charge of cohabitation and was sentenced to three months' imprisonment. When arraigned on the adultery charge, Nielsen claimed his conviction for cohabitation barred his further prosecution. After serving his sentence for cohabitation, Nielsen was tried and convicted for adultery and sentenced to an additional 125 days' imprisonment.⁹² The United States Supreme Court granted Nielsen's petition for a writ of habeas corpus.⁹³

The Court managed to arrive at a sensible result. It reasoned that proof that Nielsen and Caroline lived together as husband and wife carried with it the assumption of intercourse that was the essential element of the adultery charge. Thus, when Nielsen was convicted of cohabitation, he was convicted of all the elements of adultery and could not be convicted separately for that offense.⁹⁴ *In re Nielsen* put an end to attempts to make the polygamy laws more savage by piling offenses together or fracturing a single act into many separate offenses.

D. *Witnesses to Cohabitation*

To convict Mormon men of polygamy offenses, certainly no more effective and knowledgeable witnesses could be found than their wives. Two obstacles, however, appeared to bar use of this pool of witnesses. First, most Mormon wives were unwilling to testify against their husbands. Second, even if they were willing to testify, at com-

⁸⁸ *Id.* at 281.

⁸⁹ See Edmunds Act, ch. 47, § 4, 22 Stat. 30, 31 (1882) (amended 1887, repealed 1909).

⁹⁰ For example, in *Clawson v. United States*, 113 U.S. 143 (1885), the defendant was convicted of polygamy for marrying a second wife and sentenced to three-and-one-half years' imprisonment and a \$500 fine. He also was convicted of cohabiting with that wife and sentenced to six months and a \$300 fine.

⁹¹ *In re Nielsen*, 131 U.S. 176 (1889).

⁹² *Id.*

⁹³ *Id.* at 191.

⁹⁴ *Id.* at 187.

mon law a person could not testify against his or her spouse.⁹⁵ These problems were first confronted in *Miles v. United States*,⁹⁶ the only other Morrill Act case to reach the United States Supreme Court besides *Reynolds*.

From the evidence at trial, it appeared that John Miles had married three women on the same day. Because Miles was charged with bigamy under the Morrill Act, it was necessary to prove his marriages to the three women. Therein lay the difficulty, for the marriage ceremony was shrouded in secrecy. Miles's wife, Caroline, however, was willing to testify against him. Miles conceded his marriage to Caroline but denied his marriage to his first wife. Caroline's testimony was essential to the state's case; but if Caroline was Miles's lawful wife, under the common law rule, her testimony was inadmissible. But her testimony helped establish that at the time Miles married her he already had a lawful wife. And if Miles had a wife when he married Caroline, his marriage to her was invalid, and she was a competent witness. The trial court resolved this perplexing question by throwing the whole matter to the jury. Caroline was allowed to testify.

On appeal, the United States Supreme Court rejected the trial court's ingenious labor-saving device. The Court concluded that a defendant's witness-wife must be treated *prima facie* as his lawful wife.⁹⁷ The principle behind this ruling was the old rule that a witness that is "*prima facie* incompetent" cannot give evidence "to establish his competency, and at the same time prove the issue."⁹⁸ The Court reached this ruling with apparent regret, for in doing so it recognized that it was disabling almost all witnesses to polygamous unions. The Court, however, recommended two escapes from this predicament. First, eyewitnesses to a marriage were not necessary. Polygamous marriages could be proven like any other fact, by admissions of the defendant or by circumstantial evidence.⁹⁹ Second, if under existing laws it was too difficult to prove polygamy, Congress could always change the law. Because it was based on the testimony of an incompetent witness, Miles's conviction was reversed.¹⁰⁰

Nearly seven years after the United States Supreme Court decision in *Miles* excluded the testimony of wives in polygamy trials, Congress provided in the Edmunds-Tucker Act that a wife was a competent witness in polygamy, bigamy, and cohabitation trials and

⁹⁵ *Commonwealth v. Allen*, 191 Ky. 624, 231 S.W. 41, 42 (1921).

⁹⁶ 103 U.S. 304 (1880).

⁹⁷ *Id.* at 315.

⁹⁸ *Id.* at 314.

⁹⁹ *Id.* at 311.

¹⁰⁰ *Id.* at 315-16.

required that records be kept of weddings in the territories.¹⁰¹ These provisions still retained one restraint on spousal testimony, however; they provided that only a willing wife be allowed to testify.¹⁰² Utah's judges did not always follow the law, however. A number of Mormon women were required to testify against their husbands or face contempt charges. Judicial use of the contempt power in the polygamy cases thus presented many Mormon families with a cruel dilemma. If the wife called as a witness submitted and testified, her husband would almost surely be convicted and imprisoned. If she refused, her husband might escape conviction, but she would be imprisoned. Perhaps the most egregious case of judicial conduct in this regard was that of Belle Harris.¹⁰³ Mrs. Harris and her infant son ultimately spent three and one-half months in prison for her refusal to testify before a grand jury investigating polygamy charges against her husband.¹⁰⁴

In retrospect, it is difficult to offer any explanation for this judicial conduct toward Mormon wives other than a spirit of vindictiveness. Courts had reduced the quantum of evidence required to establish polygamy or cohabitation to such a low level that in almost any case ample alternate sources of proof must have been available. Utah's courts could not have believed that they needed to compel Mormon women to testify in order to convict their polygamous husbands.

The legislative and judicial war on polygamy ultimately was successful. The Church officially abandoned the practice in 1890.¹⁰⁵ The war, however, was not without its casualties. The Court's decision in *Reynolds* was a good example of "a situation where the social import of the issue outstrips the political and legal resources of the time."¹⁰⁶ The Court's overly restrictive view of the free exercise clause virtually read it out of the Constitution for over sixty years. The anti-polygamy sentiment of the day reached beyond its historical context and changed the course and development of constitutional law.

III. THE WAR AGAINST MORMON SOCIETY

During the period of conflict between the Mormons and the federal government, Congress never actually passed a law depriving

¹⁰¹ 35 Stat. 1148-50 (1909).

¹⁰² *Id.* at 636.

¹⁰³ *Id.* See *Ex parte Harris*, 4 Utah 5, 5 P. 129 (1884).

¹⁰⁴ *Id.*

¹⁰⁵ See S. Sperry, *Doctrine and Covenants Compendium* 752-62 (1960).

¹⁰⁶ Keller, *Book Review*, 85 Harv. L. Rev. 1082, 1086 (1972) (referring to a different issue—municipal railroad bonding).

Mormons of their civil rights simply because they were Mormons, but as applied by hostile federal judges and officials, some laws came close to that result. Nevertheless, throughout the polygamy prosecutions, federal attempts to simplify and expedite the conviction of polygamists routinely denied Mormons many of their fundamental rights. Done under the guise of stamping out polygamy, the Mormons' civil rights were abridged in five significant and specific respects: Mormons were denied the right to serve as jurors; Mormons were denied the right to hold elective and public offices; Mormons were denied their franchise; children of polygamous marriages were denied inheritance rights; and the immigration of Mormons into the United States was obstructed, and foreign-born Mormons were denied citizenship.

A. *The Exclusion of Mormons as Jurors*

In response to repeated calls by President Rutherford B. Hayes to withdraw the privileges of citizenship from Mormons in Utah,¹⁰⁷ Congress passed the Edmunds Act in 1882.¹⁰⁸ The Act broadly provided that past or present polygamists and those who believed in polygamy could be excluded from jury duty.¹⁰⁹ Potential jurors could be questioned further under oath regarding their polygamous activities or beliefs and could be rejected for failing to answer such questions.¹¹⁰ Supporters of the Act claimed, of course, that the measure was necessary to ensure the effective prosecution of polygamists.¹¹¹ As disabling as the law was, however, the Edmunds Act only ratified a position already adopted by the United States Supreme Court two years earlier in *Miles v. United States*.¹¹²

Convicted of polygamy under the Morrill Act, Miles argued on appeal that a large number of potential jurors had been excluded improperly because they had testified that they believed in polygamy. Miles argued that the examination of the proposed jurors showed that the court, in effect, had administered an unlawful religious test to exclude all Mormons from the jury. In upholding the Utah court, however, the Supreme Court relied on an 1878 territorial statute that

¹⁰⁷ See 7 J. Richardson, *A Compilation of the Messages and Papers of the Presidents, 1789-1897*, at 559-60 (1896-1899).

¹⁰⁸ Ch. 47, 22 Stat 30 (1882) (amended 1887, repealed 1909).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* § 5.

¹¹¹ See 7 J. Richardson, *supra* note 107, at 606; R. Dwyer, *The Gentile Comes to Utah: A Study in Religious and Social Conflict* 42-43 (1971).

¹¹² 103 U.S. 304 (1880).

provided that a juror could be disqualified for partiality.¹¹³ Although the Supreme Court upheld the procedure based on the Utah statute, it also noted that it would have reached the same result even without the statute because, under common law, a juror could be excluded for actual bias.¹¹⁴

Because the Supreme Court had upheld the exclusion of Mormon jurors on the basis of Utah statute and common law principles, the provision of the Edmunds Act excluding Mormon jurors was predictably sustained in *Clawson v. United States*.¹¹⁵ Clawson was indicted for cohabitation and polygamy by a grand jury from which Mormons had been excluded systematically.¹¹⁶ Although the Edmunds Act effectively excluded Mormons as "jurors" in polygamy cases, Clawson argued that this exclusion did not extend to *grand juries*.¹¹⁷ The Supreme Court, however, without considering the unique role of the grand jury in society, held that the term *juror* encompassed both grand and petit juries and that the Edmunds Act therefore must be read broadly to disable Mormons from service on any juries.¹¹⁸

B. *The Exclusion of Mormons as Voters*

While the Edmunds Act exclusion of the Mormons from polygamy trial juries was rationally related to the federal government's goal of eliminating polygamy, other "anti-polygamy" measures of that Act were aimed directly at Mormon political power. Another provision of the Edmunds Act denied polygamists the right to vote.¹¹⁹ To enforce this provision, Utah's registration and election offices were declared vacant, and a five-man commission was appointed to oversee Utah elections.¹²⁰ During its first year, the Utah Commission barred over 12,000 Mormons from voting in Utah. This was nearly one-fourth of eligible Mormon voters, and far exceeded the number of polygamists in Utah.¹²¹

The Utah Commission's exclusion of Mormon voters met an immediate judicial challenge. In *Murphy v. Ramsey*,¹²² the United

¹¹³ *Id.* at 305.

¹¹⁴ *Id.* at 310.

¹¹⁵ 114 U.S. 477 (1885).

¹¹⁶ *Id.* at 480.

¹¹⁷ *Id.* at 483-84.

¹¹⁸ *Id.*

¹¹⁹ Ch. 47, § 8, 22 Stat. 30, 31 (1882) (amended 1887, repealed 1909).

¹²⁰ *Id.* § 9, 22 Stat. 30, 32.

¹²¹ See J. Allen & G. Leonard, *The Story of the Latter-day Saints* 395 (1976).

¹²² 114 U.S. 15 (1885).

States Supreme Court rebuked the commission, but its decision had mixed results for the Mormons. The Court held that the powers of the Utah Commission were restricted to ensuring that elections in Utah were fairly and properly conducted, and that the commission had no further power to establish voter qualifications or to administer a voter's oath. On the other hand, the Court held that because the commission was legally powerless to exclude voters, it was not legally liable for the acts of voting officials who wrongfully obeyed the commission excluding the Mormons.¹²³

On the substantive question of the scope of the Edmunds Act's disenfranchisement of polygamists, the *Murphy* Court again ruled against the Mormons. Because the Act's provisions extended to all cohabitants and polygamists, it barred those who became polygamists before the Act's passage as well as those who did so after 1882.¹²⁴ Nor was the statute an ex post facto law. The Act applied only to those who continued to practice polygamy and not to those who had abandoned it.¹²⁵ The Court did not question whether other constitutional provisions, such as the first amendment, might impose some rational restrictions on Congress's power to set voter qualifications.¹²⁶

C. *The Exclusion of Mormons From Public Office*

To the extent that Mormons were excluded from the vote, they were also and quite logically excluded from all elective and other public offices. The Edmunds Act, in creating the Utah Commission to oversee Utah's elections, mandated that no election could take place without the commission's supervision.¹²⁷ Because the commission was unable to arrive in Utah in time, no election was possible in 1882.¹²⁸ So that elective offices would not stay vacant pending the next election, Congress hastily passed the Hoar Amendment allowing Utah's governor to appoint officials to fill vacant elective offices until the next election.¹²⁹

Some disagreement arose regarding the effect of the Hoar Amendment. The Mormons maintained that under Utah law, when an election was not held, incumbent officials simply retained their offices. Thus the governor had no appointments to make, for no offices were vacant. Utah's governor, Eli H. Murray, a gentile who was hos-

¹²³ *Id.* at 36-37.

¹²⁴ *Id.* at 42.

¹²⁵ *Id.* at 43.

¹²⁶ *Id.* at 45.

¹²⁷ See ch. 47, § 8, 22 Stat. 30, 31 (1887).

¹²⁸ *Wenner v. Smith*, 4 Utah 238, 9 P. 293 (Utah 1886).

¹²⁹ 22 Stat. 313 (1882).

tile to the Mormons and frustrated by their political obstructionism, decided that in spite of contrary Utah law, the offices were vacant. In September and October of 1882, he appointed a total of 174 replacements to public office, almost all gentiles.¹³⁰

Mormons reacted angrily to this attempted ouster, and many refused to surrender their offices. Others instituted actions to validate their claim that no offices had been vacated due to the failure to hold elections when scheduled. In an unreported case, *Kimball v. Richards*,¹³¹ the Utah Supreme Court held that the Hoar Amendment, in fact, had vacated Utah's elective offices, despite the amendment's failure to specifically state this. Despite this judicial setback, some Mormon officials still refused to relinquish their offices. The 1886 case of *Wenner v. Smith*¹³² illustrates this continuing resistance. Defendant Smith had been elected probate judge of Salt Lake County in 1880. By virtue of the Hoar Amendment, the governor considered Smith's office to be vacant and appointed Uriah J. Wenner as his successor in September 1882 to serve for eight months. Smith, however, refused to turn over the office and continued to receive the fees and salary of the judgeship. Wenner sued to recover those sums.

On appeal, the Utah Supreme Court concluded that Wenner's appointment was lawful.¹³³ Moreover, because the Edmunds Act declared polygamists unfit to hold public office and because Smith was a polygamist, the court concluded his judgeship had been vacated by the Edmunds Act without reference to the Hoar Amendment. Thus, Wenner had been wrongfully denied the office and was entitled to recover the fees.¹³⁴

D. *The Laws of Inheritance*

Under common law, illegitimate children, if recognized by the law at all, could inherit property only from their mothers.¹³⁵ Utah's territorial legislature reversed this common law rule and provided in 1852 that "illegitimate children and their mothers inherit in like manner from the father."¹³⁶ It is, of course, a rather fine question whether

¹³⁰ See 6 B. Roberts, *supra* note 14, at 65-66.

¹³¹ See *Wenner v. Smith*, 4 Utah 238, 245, 9 P. 293, 297-98 (1886) (discussing *Kimball v. Richards*).

¹³² *Id.*

¹³³ *Id.* at 247, 9 P. at 296.

¹³⁴ *Id.*

¹³⁵ See J. Ritchie, N. Alford & R. Effland, *Cases and Materials on Decedents' Estates and Trusts* 71-72 (5th ed. 1977).

¹³⁶ 1876 Comp. Laws § 677, at 268. Utah's present law, like that of many states, similarly provides that an illegitimate child may inherit from his father if he has been acknowledged by his father, if the natural parents participated in a marriage ceremony before or after the birth,

the children of polygamous Mormon marriages were illegitimate. Under common law and federal law after passage of the Morrill Act, polygamous marriages were unlawful, and the offspring of such unions presumably were illegitimate. In Utah, when such marriages were recognized, the children were not illegitimate.

This state of affairs presented Congress with a problem. Clearly, it was the nation's policy to forbid polygamy and crush institutions that supported and furthered the practice. Utah's law allowing wives and children of a polygamous man to inherit in the same manner as heirs of a monogamous man arguably furthered the practice of polygamy. On the other hand, to overturn Utah's laws and prohibit the children of polygamous marriages from inheriting property was equally clearly a cruel punishment that would be levied primarily against innocent children. Sensibly, Congress simply left the issue alone in 1887.

The continued Mormon resistance to enforcement of the polygamy laws, however, finally eroded Congress's moderate attitude toward children of polygamy. In the Edmunds-Tucker Act, Congress annulled the Utah statute by providing that no illegitimate children shall be entitled to inherit from their father.¹³⁷ As might be expected, the legislation spawned litigation. The question of the status of polygamous children first came before the Utah Supreme Court in the case of *Chapman v. Handley*¹³⁸ in 1890. George Handley died intestate in 1874, leaving an estate of \$25,000, a surviving widow, and eight children, four of them the offspring of a then deceased plural wife. These children of polygamy claimed an interest in Handley's estate under the Utah statute allowing illegitimate children to inherit from their parents. Handley's other children invoked the Morrill Act to block their claim. Their argument was that the Utah law violated public policy in general by supporting polygamy. More specifically, because Utah's statute supported polygamy, the Morrill Act had expressly annulled it.¹³⁹

The court expressed no doubt that the statute "was intended to, and did tend to, support, maintain, and countenance polygamy."¹⁴⁰ Although the court recognized that its conclusion punished the innocent children of polygamy, it noted that "Congress has recognized the potency of denying illegitimate children the rights of legitimacy and

or if paternity has been otherwise satisfactorily established. See Utah Code Ann. § 75-2-109(b) (1988).

¹³⁷ See § 11, 24 Stat. 637 (1887).

¹³⁸ 7 Utah 49, 24 P. 673 (1890).

¹³⁹ *Id.* at 51-52, 24 P. at 674.

¹⁴⁰ *Id.* at 55, 24 P. at 675.

inheritance as a means of breaking up and discouraging polygamy in the acts of 1882 and 1887."¹⁴¹

In 1891, the year after the decision in *Chapman v. Handley*, another case involving the same issues and similar facts was brought before the United States Supreme Court. In *Cope v. Cope*,¹⁴² however, the Supreme Court arrived at a different conclusion: "Legislation for the protection of children born in polygamy is not necessarily legislation favorable to polygamy. There is no inconsistency in shielding the one and in denouncing the other as a crime."¹⁴³ Utah's act, rather than promoting polygamy, simply protected the children of polygamy.¹⁴⁴ Further, Utah's statute was not implicitly annulled by the Morrill Act in 1862. Rather, all of Congress's acts relating to illegitimate children should be read together, and "the later acts should also be regarded as legislative interpretations of the prior ones."¹⁴⁵ In 1882 Congress had explicitly legitimated the children of polygamous marriages, and not until 1887 did it specifically bar their inheritance rights. These later actions demonstrated that in 1862 Congress had not meant to annul the Utah statute allowing illegitimate children to inherit.¹⁴⁶

After 1890, when the Mormon Church formally renounced plural marriage, Utah again adopted a statute entitling the children of polygamous marriages to inherit property. The legislature further provided that any heir who previously had been denied an inheritance on the basis of his polygamous lineage could petition the courts for a redistribution of the estate.¹⁴⁷ On the strength of this provision and in the wake of the favorable ruling in *Cope*, the children of George Handley's polygamous marriage petitioned Utah's courts to award them their rightful share of their father's estate.

Apparently in a vengeful mood, Utah's Supreme Court declined to redistribute the estate. Instead, the court struck down the statute. The court reasoned that the Utah Act reopened cases that had been resolved by the judiciary, thus second-guessing judicial judgment. Under the separation of powers, this interference with the judicial process was unconstitutional.¹⁴⁸ Curiously, the court did not mention the United States Supreme Court's decision in *Cope v. Cope* as a basis

¹⁴¹ *Id.*

¹⁴² 137 U.S. 682 (1891).

¹⁴³ *Id.* at 687.

¹⁴⁴ *Id.* at 685-86.

¹⁴⁵ *Id.* at 688.

¹⁴⁶ *Id.* at 689.

¹⁴⁷ See ch. 41, 1896 Utah Laws 128-29.

¹⁴⁸ *Cope*, 137 U.S. at 689.

for its reconsideration of this case, even though that decision in effect overruled the territorial court's decision in *Handley*.

The court's action was a bitter but somewhat empty gesture. Because the Edmunds Act in 1882 legitimated children of polygamous marriages, the court's ruling affected only the estates of those polygamists who had died prior to passage of the Edmunds Act.

E. *Immigration Laws*

For the Mormons, Utah became the point from which they would carry the word of their gospel throughout the world and in which Mormon converts from around the world would gather. Spiritually, immigration was the gathering of the Saints into the Mormon community. Economically, the immigrants brought the skills and hands needed to settle the wilderness.

With typical initiative, the Mormons organized the immigration of large numbers of converts through the Perpetual Emigrating Fund Company.¹⁴⁹ This church-sponsored company provided agents to arrange the converts' passage from Europe to the East Coast of America, and from there to Utah. It also paid passage for those too poor to pay their own way. By 1870, the year after the transcontinental railroad was completed, the Perpetual Emigrating Fund Company had helped over 51,000 Mormon immigrants reach Utah.¹⁵⁰

This large scale flow of new, foreign Mormons into Utah naturally alarmed the Church's enemies, who feared that the faith of the converts would revitalize the Church's doctrines.¹⁵¹ The point was made more luridly by fictionalized reports that the Mormons imported young, innocent girls to become polygamous wives in a sort of religious slavery.¹⁵² President Ulysses S. Grant reflected on this view when he recommended to Congress in his annual message on December 7, 1885 that it "drive out licensed immorality, such as polygamy and the importation of women for illegitimate purposes."¹⁵³ Congress acted, in part, on this advice when it adopted the Edmunds-Tucker Act in 1887. Section 15 of that Act dissolved the Perpetual Emigrating Fund Company and forbade the territorial legislature from acting

¹⁴⁹ See L. Arrington & D. Bitton, *supra* note 41, at 97-108.

¹⁵⁰ *Id.* at 99.

¹⁵¹ An 1881 essay in Harper's Magazine stated that Mormonism "is an institution so absolutely un-American in all its requirements that it would die of its own infamies within twenty years, except for the yearly infusion of fresh serf blood from abroad." See Mulder, *Immigration and the "Mormon Question": An International Episode*, 9 W. Pol. Q. 416, 423-24 (1956).

¹⁵² See Mulder, *supra* note 151, at 428.

¹⁵³ 7 J. Richardson, *supra* note 107, at 356.

in any fashion to encourage immigration into Utah.¹⁵⁴ In 1891 Congress added polygamists to the list of classes excluded from the country.¹⁵⁵ In 1895, President Grover Cleveland recommended to Congress that it prevent the immigration of Mormons into the country.¹⁵⁶

V. THE DEVELOPMENT OF THE ECCLESIASTICAL COURT SYSTEM IN THE UTAH GREAT BASIN

The Mormon legal experience suggests that a subculture's judicial systems often arise from its efforts to create and maintain a separate identity. The Mormon ecclesiastical court system emerged during the early years of the Church's existence to delineate the boundaries of what it meant to be Mormon. The Mormon court system did not hold itself out to Church members simply as an alternative to the civil system. Instead it actively competed with the civil system as Mormonism transcended the place usually accorded religion and became an all-encompassing social regulator. Conversely, the Mormon legal experience suggests that the greater the state intrusiveness, the greater the insularity of the religion. The more the Saints suffered from abuse of the federal, state and constitutional systems, the more developed their ecclesiastical court systems became. Finally, as political, economic, and social circumstances forced the Latter-day Saints to abandon their most distinctive practices, the involvement of Church courts in temporal matters became increasingly anachronistic. The gradual acceptance of American political pluralism in place of the Mormon concept of Zion marked the end of an era for the Mormon ecclesiastical court system.

A. *The Structure of the Mormon Ecclesiastical Court System*

The Mormon court system, which developed along priesthood lines,¹⁵⁷ provided an institutional forum for authoritatively resolving issues ranging from petty quarrels to succession crises. Formalization of an elaborate church court system introduced a legalistic overlay in a rapidly expanding religious body paradoxically known for its anti-legalistic sentiments. The church courts contributed to the stability of a church often under siege from outside opponents and inside dissenters.

¹⁵⁴ See Edmunds-Tucker Act, ch. 397, § 15, 24 Stat. 637 (1887).

¹⁵⁵ See ch. 551, § 1, 26 Stat. 1084 (1891); Mulder, *supra* note 151, at 427.

¹⁵⁶ *Id.* at 362.

¹⁵⁷ See J. Widstoe, *Priesthood and Church Government* 32-37 (1939); R. Cowan, *Doctrine and Covenants: Our Modern Scripture* 50-53 (1978).

The formal structure of the church courts replicated, in part, the rule of law model of American constitutional democracy, whereby checks and balances preserved the Union against the exercise of prerogative and unlawful excesses. As long as the institutions generally, and the members ultimately, reserved checks over leaders, uncontrolled excesses on the part of the priesthood could be sanctioned without undermining the sanctity of the church. Accordingly, the church courts were organized in a hierarchical progression from trial courts to courts of final review.

Basically there were three courts in the Mormon ecclesiastical court system: the Bishop's Court, the High Council Court, and the Court of the First Presidency. The Bishop's Court was established as the basic ecclesiastical forum in the Mormon judicial system on August 1, 1831.¹⁵⁸ While "[t]he proceedings in the Bishop's Court have never been uniform in the church,"¹⁵⁹ general norms of procedure emerged out of the early courts. Written complaints, often a mere note on a scrap of paper, normally commenced an action, although the courts also received oral complaints. Any member acquainted directly or even indirectly with the offense could file a complaint, but teachers provided special services as complaining witnesses. After receiving the complaint, the bishop generally had his clerk prepare and deliver a summons, giving notice to the person accused of the charges and the time appointed for the hearing.

The bishop and his two counselors presided over the trial. The trial commenced with prayer, song, and scripture reading, followed by an exhortation to the parties to repent and to seek forgiveness or reconciliation. If the conflict could not be settled amicably, or the parties were unwilling to fully repent, the trial commenced. The parties represented themselves throughout the proceedings; the absence of technical rules of evidence or pleading aided in the exclusion of attorneys. After hearing the testimony and any closing remarks, the bishop would seek the advice of his counselors before rendering a decision.

The High Council Court also emerged early in the history of the Church and soon provided the court system with an appellate level of review that became increasingly necessary if the Saints were to remain unified. Like the Bishop's Court, the High Council Court continues to the present in close proximity to its original form. The High Council Court consists of a standing body of twelve high priests called high

¹⁵⁸ See Doctrine & Covenants, supra note 18, 58:17.

¹⁵⁹ J. Keeler, *The Bishop's Court, Its History and Proceedings*, lecture delivered before the High Council of the Utah State of Zion 5 (1902).

councilors.¹⁶⁰

High councils were made responsible for the “settling [of] important difficulties which might arise in the church, which could not be settled by the church or the bishop’s council to the satisfaction of the parties.”¹⁶¹ Thus high councils ensured hierarchical control of local church courts.

After the High Council Court reaches a decision, the council submits a copy of the proceeding to the Quorum of the First Presidency of the Church, which, after reviewing the transcript, decides the case without regard to the previous high council decision.¹⁶² If the First Presidency has been dissolved following the death of a prophet, an Apostle Court, made up of the Quorum of the Twelve, sits as the final court of appeal. If both the First Presidency and the Quorum of the Twelve are not in existence, the First Quorum of Seventy has authority to act as the final court of appeals for the Church.¹⁶³

Scripture provides a final assurance that even these final courts of appeal will not misuse their authority with impunity by stating that if any of their decisions are made “in unrighteousness, it may be brought before a general assembly of the several quorums, which constitute the spiritual authorities of the church; otherwise there can be no appeal from their decision.”¹⁶⁴ In this democratizing of church court proceedings, scripture has affirmed the ultimate control of the members over the Church.

The Presiding Bishop’s Court, which consists of the presiding bishop assisted by twelve high priests specifically chosen to sit as a court, completed the early church court system. This court has exclusive jurisdiction to try members of the First Presidency if it should become necessary; it was called into session to excommunicate Oliver Cowdery and Sidney Rigdon.¹⁶⁵

B. *The Exclusive Jurisdiction of the Mormon Ecclesiastical Court System*

Mormon general authorities publicly condemned members from suing other Saints “before the ungodly” and frequently extolled the comparative advantages of resolving disputes within the church court

¹⁶⁰ Doctrine and Covenants, supra note 18, 102:1 (1965).

¹⁶¹ Id. at 102:2.

¹⁶² Id. at 102:26-27.

¹⁶³ Id. at 107:26.

¹⁶⁴ Id. at 102:26-27.

¹⁶⁵ Id. at 107:32.

system. This counsel was not purely advisory. The "exclusive jurisdiction" rule ensured that members would not vacillate between church and civil courts, depending on the advantages of each given different circumstances. If they valued church membership, they had to order their personal and financial affairs with other members in accordance with religious norms and precepts, rather than secular alternatives.

The few historians who have written on the subject assumed that Mormons looked to their own courts only when civil alternatives were unavailable or only so long as the Mormons maintained an independent and self-sufficient economy.¹⁶⁶ Both of these assumptions are historically inaccurate and misinterpret the purposes and effects of the church courts' jurisdiction over civil disputes between members. Church leaders persisted throughout most of the nineteenth century in their efforts to maintain an exclusive jurisdiction rule in civil matters because Mormon legal processes and results accorded better with their vision of Zion. Although exceptions were occasionally recognized, the real force of the rule abated only when, under federal government pressure, the Church renounced plural marriage and political direction of its members in the 1890s, both key elements in the cause of Zion. Records of church court intervention in a court dispute between Judge Zerubbabel Snow and a local constable filed in the early 1880s provide an informative overview of the exclusive jurisdiction rule. Judge Snow was a highly influential Mormon attorney and was appointed as one of the first associate justices of the federal court in Utah on September 2, 1850. In early 1874, Congress abolished the territorial offices by enactment of the Poland Act, and Snow was sent back into private practice.

Unintimidated by Judge Snow's legal credentials, a Mormon constable, CC, on January 19, 1880, filed an action against Judge Snow for his un-Christianlike conduct in suing the constable before the United States Third District Court for the Territory of Utah. There was no particular Latter-day Saint issue that would have made church court jurisdiction absolutely necessary.¹⁶⁷ Snow had sued CC in federal district court for misfeasance in his capacity as constable. Snow received a judgment for \$182.60, \$132.60 of which was for court costs and attorney fees assessed against the constable as the losing party.

¹⁶⁶ See Swenson, *Resolution of Civil Disputes by Mormon Ecclesiastical Courts*, 1978 Utah L. Rev. 573, 594; M. Leone, *Roots of Modern Mormonism* 120 (1979).

¹⁶⁷ See *Ecclesiastical Court Cases Collection, General Court Trials 1832-1963*, LDS Church Archives (cited by folder number and year in notes 168-74).

CC consulted with the ward teachers and then filed a complaint against Snow in Bishop's Court, charging un-Christianlike conduct. After hearing the evidence, the bishop censured both parties: the constable for misfeasance and Judge Snow for his un-Christianlike conduct in suing the constable before the district court. Because both had acted improperly, he ordered Snow to repay \$100 of the \$182.60 that he had recovered from the constable.

By 1884 the exclusive jurisdiction rule had been Church policy for more than forty years. Although it became increasingly anachronistic, the Church delayed laying it aside. Church court records indicate few conflicts over the jurisdiction issue in hearings held after statehood was granted. However, at least some priesthood courts sanctioned members for suing other members in the civil courts as late as 1900.

C. *Mormon Opposition to Lawyers and Technicalities*

Lawyers were in a precarious position in the early decades of Mormon history. Priesthood leaders consistently condemned them for urging vexatious lawsuits, for charging exorbitant fees in a cash-poor frontier economy, for the subordination of "truth" to the adversary ethic, and for their use of legal technicalities. The Church, therefore, banned lawyers from church courts, although lawyers involved in previous civil litigation of a case occasionally appeared as witnesses. Presumably Mormon lawyers earned their fees representing Mormons in criminal actions and suits against either apostates or non-Mormons, and by representing nonmembers.

The propriety of lawyers representing members in civil suits against other Mormons, therefore, was a matter of concern for faithful Mormon attorneys. If it was un-Christian for a member to sue another member in the civil courts, what about the Mormon lawyer who represented a civil complainant? For example, in an 1882 case heard by the Box Elder High Council, Mormon attorney George Marsh found his own membership in question for "wrongful [sic] counselling, aiding and abetting" a Mormon plaintiff in a civil suit.

In defense of his action, Marsh explained that "he was a counselor at law; had taken the oath to that effect [he had been admitted to the Utah bar in 1877 after studying law at home]—and had no business to ask parties whether they were Mormon or gentiles." The speaker for CR (plaintiff) stated that he believed Brother Marsh "has not acted wisely in laboring to aid a wicked man in evading rights and justice." The speaker for Marsh agreed! The stake president, "after listening attentively to all decided that Brother Marsh had acted un-

wisely in this matter.” Accordingly, “as a partial reimbursement for the losses and damage sustained through prosecution of this case,” Marsh was ordered to pay the civil defendant fifty dollars.¹⁶⁸

Mormon judges, whether sitting as bishoprics, on high councils, or on courts of appeal, deemed gentile law largely irrelevant; they fashioned decisions to fit the needs and circumstances of citizens of Zion. In 1852, for example, five years after the Mormons arrived in the Great Basin, the Salt Lake High Council heard a dispute over the ownership of a cow. One party objected to the evidence proffered by the other party as inadmissible in a court of law, but a speaker for the other party responded:

This is a court got up by Divine Revelation to adjust difficulties among members of the Church, and we occupy the position of servants also to those passing through here, who put themselves under our protection. We wish it understood that technicalities that are taken advantage of elsewhere are laid aside here and all we wish is to get all the truth and justice of the case agreeable to the Revelations.¹⁶⁹

The evidence in this case did not establish clear ownership by either party.¹⁷⁰ In a court of law, the plaintiff would have lost because he had not met the burden of persuasion, but the church courts applied different rules. After acknowledging the failure to arrive at a clear resolution, the high council asked the stake president for a decision feeling that it “would be full of light according to the office upon him.”

Although the church courts felt unhampered by civil rules, they occasionally considered them if they served the best interest of the community. In one interesting 1873 case involving the computation of interest on a contract, the Salt Lake High Council permitted the parties to be represented by counsel, who were to argue the “law” because the high council thought Zion would be better served by following the relevant civil rule.¹⁷¹ The high council undoubtedly hoped to establish consistency in commercial business practices, a necessary virtue even in Zion. The case represents an exception to the usual practice, not a move toward “economic assimilation.” In other areas of law, church courts routinely excluded attorneys, disregarded legal precedent, and fashioned decisions as required by the equities of the particular case.

¹⁶⁸ Folder 9 (1852).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at folder 10 (1873).

D. *The Mormon Preference for Arbitration*

After their arrival in Utah, the Saints frequently relied on arbitration to resolve difficulties. Each party would select a referee, and the referees would select a tie-breaking referee. The referees would investigate the matter and then meet together for an arbitrated resolution. Occasionally the arbitrators simply served as expert witnesses in church court proceedings.

Arbitration was especially useful in cases requiring extensive accounting analysis, such as construction contract disputes. For example, in 1869, the Salt Lake High Council assigned arbitrators to a case involving a complex set of contracts extending over a number of years. The high council authorized the arbitrators to make a recommendation subject to the superior wisdom of the council, rather than to make a final decision. Bishops and stake presidents occasionally used arbitration where a hearing before the regular court raised a conflict of interest. For example, when a party had a contractual claim against the Church and sought redress in the church courts, arbitration provided a solution that would prevent a conflict of interest.¹⁷² Church officials also used arbitration in suits against political subdivisions¹⁷³ and city councils.¹⁷⁴ It is apparent that church tribunals gave substantial deference to the findings of arbitrators even though their recommendations were not binding.

E. *Decisional Standards*

Transgressions against basic social standards, including adultery, theft, murder, and lying posed no special problems for church courts. But where a case involved property, contracts, torts, or domestic disputes, the appropriate decisional standard was less clear. The courts justified whatever decisions they made less on arguments of formal justice than the inspired "higher law" of Zion.

One scholar who investigated the ecclesiastical courts of a single Mormon stake in Arizona between 1884 and 1896 argued that these "processes predisposed Mormons to adjust, adapt, and continually change the meanings and definitions that they applied to the whole of life By not using precedent, or not considering the context of any past event used as a citation, or not having lawyers . . . a government that used sanctity to rule forgot its own history."¹⁷⁵

This observation is empirically inaccurate. Mormon communi-

¹⁷² *Id.* at folder 9 (1878).

¹⁷³ *Id.* at folder 6 (1866).

¹⁷⁴ *Id.* at folder 7 (1864).

¹⁷⁵ See M. Leone, *supra* note 166, at 117, 146.

ties, comprised largely of members from widely varying backgrounds, accepted the need to adapt to their new community, and church court rules often reflected these changes. But past events were critical in the process of adaptation. High councils did not make ad hoc decisions in each case. Instead they relied extensively on scripture and instructions from Church leaders, which were soon embodied in local customs. In fact, the decisions are remarkably uniform, whether in land and water disputes, contracts, sexual morality, or plural marriages. Although any customary rule or past experience was subject to adjustment through inspiration, aberrations could always be appealed. In short, although precedent never controlled church court decisions, and canon law never developed as a limitation on the discretion of local leaders, church court decisions were broadly consistent throughout the period.

F. *Mormon Substantive Law*

As might be expected, the substantive law applied in the ecclesiastical Mormon courts both followed and departed from the secular law developing in the civil courts of nineteenth-century America. In the area of tort law, for example, the Mormons' decisions paralleled the development of tort law in the secular system. In other areas, such as in the acquisition and transfer of land and water rights, the church courts applied a distinctively Mormon approach to the law. In all areas of the law, the interrelationship of Mormon belief and civil law influenced and controlled the outcome of disputes in Mormon courts.

The Church's innovative land distribution policy, for example, permitted the systematic and relatively harmonious colonization of the Great Basin, encouraged cooperative fencing and irrigation, and reinforced the role of church courts in resolving economic conflicts. The Mormons, of course, were not the only settlers in the Great Basin, so they soon reinforced the ecclesiastical land policy with territorial legislation. Unfortunately, the Saints had no legal authority to legitimize land grants, and in 1869, when the first land office opened, the federal government insisted on applying its own homestead and preemption rules.

It is clear that church courts, as long as they decided land disputes, applied a distinctively Mormon approach to land ownership issues. Beneficial use, prior occupancy, and community harmony, not legal rights, were the guiding principles. In addition to modifying the substantive rules on land distribution, church courts encouraged compromise, made settlements on the basis of equity, emphasized collec-

tive concerns over private interests, and reminded members that Zion had a higher law than the surrounding society. Although nonmembers and dissidents resisted the exclusive jurisdiction of church courts, the Church's actual withdrawal from those cases came long after federal courts were in place. Church courts finally stepped back from land disputes as part of the Church's redefinition of Zion.

Mormon water law is another example of an area where Mormon substantive law diverged from the standards of the civil system. Soon after the Saints entered the Salt Lake Valley, Brigham Young announced three basic principles that were to control Mormon water law. The first addressed public ownership of natural resources, disclaiming private ownership of the streams, and declaring that these belonged to the people.¹⁷⁶ By ignoring riparian landowner entitlements, the Church was able to control the distribution of a limited water supply and increase the habitability of land that did not abut rivers and streams. If settlers who were miles away from the water source could obtain water for domestic and agricultural purposes by public grant, then entire valleys could be settled rather than just the river banks. This policy, therefore, was an important alternative to the common law principle of riparian rights.

The second principle of Mormon water law involved entitlement rules directed by the priesthood.¹⁷⁷ Initially equal distribution was applied. Soon priesthood rules of priority and beneficial use emerged. Priority provided a standard for mediating between claims of equivalent beneficial use, while beneficial use limited water claims to those based on need and use rather than property rights. These principles provided a standard for evaluating public applications and mediating conflicts. They also prevented monopoly control, speculation, and hoarding of water supplies.

The third principle of Mormon water law, cooperative irrigation,¹⁷⁸ was followed by communities throughout the Great Basin. Early high councils directed the construction of canals and ditches to carry water from canyon rivers and streams to the various wards in the valleys. The bishops then directed the division of these ditches to each block in their wards, and ultimately to each user. The users were responsible for maintaining that part of the ditch, depending on the acreage held and the intended use. A watermaster, originally the bishop but later a full-time officer, regulated the use and maintenance of the local irrigation system. Eventually the irrigation cooperatives

¹⁷⁶ See 3 B. Roberts, *supra* note 14, at 269.

¹⁷⁷ See generally G. Thomas, *The Development of Institutions Under Irrigation* (1920).

¹⁷⁸ *Id.*

were organized into self-contained companies and then nonprofit corporations.¹⁷⁹

The importance of the ecclesiastical court system cannot be over-emphasized. Through these courts, a policy of public control over water resources was substituted for the common law doctrine of riparian rights. The Mormons applied an innovative doctrine of beneficial use and assisted cooperative irrigation companies in working for the more efficient and equitable distribution of limited water resources. The church courts enforced each of these policy objectives for many years, despite the availability of alternative civil forums.

Contract disputes raised special theological and historical problems for church courts. Doctrinally the Mormon liturgy of covenants bears close resemblance to contract. Baptism, sacrament, and temple ordinances, for example, all specify reciprocal blessings in exchange for obedience. Accountability for covenants teaches moral responsibility while reinforcing human agency. In temporal affairs, enforcing contracts likewise teaches responsibility while respecting the freedom of the contracting parties. Nevertheless, Mormon theology also teaches an ethic of responsibility for others, freely accepted by covenant at the time of baptism. The familiar antinomies of justice and mercy represented by these opposing views raised difficult issues for Mormon adjudicators considering contractual disputes.

Church courts in contract cases recognized civil rules as relevant, although not necessarily binding. The civil rules were considered helpful because they reflected normal commercial practices and would help make business practices in the Great Basin more consistent. A claimant who felt he had contract law on his side, however, could not be absolutely sure that a church court would see it the same way. This was especially true when a point of contractual law contained technicalities or subtleties that might offend an ecclesiastical court's sense of substantive justice.

By accepting contract law as relevant, the church courts made the Latter-day Saint economy efficient and responsive to the national economy; by retaining the power to go beyond legal technicalities, they continued to affirm the overriding importance of building the Kingdom of God. By providing a forum without court costs, legal fees, or the divisive influence of "gentile" lawyers, the Latter-day Saints effectively maintained a separate community throughout the nineteenth century.

Tort claims in Mormon courts similarly exhibit the close rela-

¹⁷⁹ See generally, Swenson, *A primer of Utah Law: Part I*, 5 *J. Energy & Pol'y* 165, 166-69 (1984); E. Mead, *Irrigation Institutions* 220-46 (1903).

tionship between religious duties and social obligations. By requiring members to bring these claims to church courts rather than civil courts, the ecclesiastical structure could accommodate both of these standards. Members were encouraged to seek amicable settlement; but failing that, they would bring complaints to the church courts, where they would be heard in a religious environment of shared rights and duties. As members of the religious community, they had distinctive moral standards, which they defined and refined through their own court system. They did not use the terminology of tort law, but their decisions paralleled the development of tort law in late nineteenth-century American courts.

V. THE COUNTER-USE OF THE LAW: DISESTABLISHMENT OF THE CHURCH

After enduring such a tortured process of legislative and judicial persecution, it is not surprising that the Church's leaders harbored a deep distrust of lawyers and the formalities of the law. In the Great Basin, Church leaders attempted to neutralize harassment through a counter-use of the law. In 1851, the Assembly of the State of Deseret passed an ordinance incorporating the Church of Jesus Christ of Latter-day Saints.¹⁸⁰ By the terms of this charter, the Church was granted vast powers.¹⁸¹ It could acquire and sell property, regulate marriages, register births and deaths, and make all laws, rules, and adjudications it deemed necessary. It was also not subject to legal review.¹⁸²

Having been legally endowed with all necessary powers, the Church was presumably freed from petty legal challenges. Armed with these powers, it became deeply involved in members' economic lives. It established itself as a major business interest in Utah, and consistent with the Church's communal doctrines, held a major portion of the Mormons' collective wealth. These policies made the Church quite vulnerable to federal pressure. The seizure of Church property would be a devastating blow to the entire Mormon community. The federal government did not hesitate long before it used this ultimate weapon. The Morrill Act of 1862 revoked the charter incorporating the Mormon Church, at least insofar as that charter sup-

¹⁸⁰ See 6 B. Roberts, *A Comprehensive History of the Arrival of Jesus Christ of Latter-Day Saints* 193-94 (1930).

¹⁸¹ *Id.*

¹⁸² *United States v. Church of Jesus Christ of Latter-day Saints*, 5 Utah 361, 363-65, 15 P. 473, 474-75 (1887).

ported or aided polygamy.¹⁸³

No attempt was made to enforce the forfeiture of Church property, but the Church took this warning seriously even though the Act was generally believed to be unconstitutional. To bring themselves into what they believed to be technical compliance with the Act, the Mormons initiated a policy of placing property in the hands of individual Church leaders as trustees-in-trust.¹⁸⁴

With the 1887 Edmunds-Tucker Act,¹⁸⁵ Congress told the Church to abandon the practice of plural marriage or face destruction. The mechanism of destruction would be confiscation of Church property. Section 13 of the Act directed the Attorney General of the United States to institute proceedings pursuant to the Morrill Act of 1862 to confiscate all Church real estate in excess of \$50,000 in value.¹⁸⁶ Congressional legislation specified that only the Church's real property was subject to seizure; but because the Morrill Act arguably revoked the Church's charter in its entirety, the Church no longer existed as a body capable of holding property in the eyes of the law. Thus, such personal property as stocks, livestock, and furniture were left ownerless and forfeited to the state. Anticipating passage of the Edmunds-Tucker Act, Mormon leaders increased their efforts to place the Church's property beyond the reach of the federal government. On July 30, 1887, the United States Attorney for Utah initiated proceedings before the territorial supreme court to dissolve the Church corporation and to recover all property held by the Church except for any real property acquired prior to 1862 and valued at less than \$50,000.¹⁸⁷ As in the *Reynolds* polygamy trial, the Mormons overestimated the readiness of the courts to accept their legal arguments. But unlike the consequences of *Reynolds*, the property confiscations were a death blow.

In the first challenge to the Edmunds-Tucker Act's seizure provisions, *United States v. Church of Jesus Christ of Latter-day Saints*,¹⁸⁸ the Mormons argued that the territorial charter given to the Church constituted a right that Congress could not constitutionally nullify. Relying on the landmark case of *Dartmouth College v. Woodward*¹⁸⁹ for the proposition that the charter of a private corporation was a contract between the state and the corporation, the Mormons argued

¹⁸³ See Morrill Act, ch. 126, § 2, 12 Stat. 501 (1862).

¹⁸⁴ L. Arrington & D. Bitton, *supra* note 41, at 356.

¹⁸⁵ Edmunds Act, ch. 47, §§ 1-9, 22 Stat. 30-32 (1882) (amended 1887, repealed 1909).

¹⁸⁶ 24 Stat. 637 (1862).

¹⁸⁷ See 6 B. Roberts, *supra* note 14, at 219-21.

¹⁸⁸ 5 Utah 361, 15 P. 473 (Utah 1887).

¹⁸⁹ 17 U.S. (4 Wheat.) 518 (1819).

that their right to acquire and hold property was a vested, contractual right that could not be impaired. This argument was rejected. The court rather vaguely suggested that a legislature could not properly delegate so broad a range of powers as the Mormon Church was granted in its charter.

More convincingly, Dartmouth College had concerned the inviolability of contracts made by states as sovereign authorities. Utah was not a state. Under its enabling act, Utah's territorial legislature acted subject to Congress's acquiescence. Congress could nullify any act of the territorial legislature. Thus, the court concluded, the charter gave the Church no vested rights but merely allowed it to exercise the enumerated powers "during the pleasure of Congress."¹⁹⁰

Against this, the Mormons raised an ingenious argument. In the Morrill Act in 1862, of course, Congress annulled the Church's charter; but, the Mormons argued, only insofar as it furthered or supported polygamy. By implication, therefore, Congress approved of all portions of the Church's charter that did not support polygamy.¹⁹¹ The court rejected this analysis and held that any corporate powers of the Church not negated by the Morrill Act were nullified by section 17 of the Edmunds-Tucker Act.¹⁹²

In 1889, an appeal of the validity of the Edmunds-Tucker Act's provisions for dissolving the Church and seizing its property reached the United States Supreme Court.¹⁹³ The arguments of the Church's attorneys displayed a clear political realism. They made no arguments based on the free exercise of religion. Instead the Mormons argued for the sanctity of contract: the Church's charter was a contract that Congress could not lawfully break by revocation. In the Morrill Act and before, Congress implicitly recognized that charter. Even if Congress were allowed to wrongfully break that contract, no precedent or rationale existed for seizing the Church property. Instead, if the corporation were to be dissolved, its property rightfully reverted to the Church's membership.¹⁹⁴

The Court rejected each piece of the argument in turn. Congress's power to legislate for the territories was reaffirmed. Although the grant of powers to the Church was lawful when made by the Utah Legislature, it remained so only as long as Congress acquiesced. The property held by the Church was, or should have been, donated for

¹⁹⁰ See *Church of Jesus Christ of Latter-day Saints*, 5 Utah at 371, 15 P. at 478.

¹⁹¹ *Id.* at 372-73, 15 P. at 478-79.

¹⁹² 5 Utah at 374-75, 15 P. at 479-81.

¹⁹³ See *The Late Corporation of the Church of Jesus Christ of Latter-day Saints v. United States*, 136 U.S. 1 (1890).

¹⁹⁴ *Id.* at 10-11.

public and charitable purposes. Instead, the Church employed it to promote polygamy. By depriving the Church of its property, then, Congress directed that property to its proper end and furthered Congress's policy of blocking the spread of polygamy.¹⁹⁵ As legal precedent, the Court elaborately outlined the ancient doctrine of *cy pres*. Under this legal principle, if a charitable trust could not be fulfilled according to its terms, the state would apply the trust property to those charitable uses that most nearly approximated the original purpose of the grant.¹⁹⁶ By analogy, the Mormons' continued unlawful adherence to polygamy made a return of Church property to the members improper. Because the original purpose of Church donations could not be accomplished lawfully, the property should then be applied to other charitable goals.¹⁹⁷

Although rejected, the Mormons' arguments were not without effect. The Court's decision was a close one, with four justices dissenting. Accepting that Congress had the power to legislate for the territories, the dissenters argued that Congress "is not authorized under the cover of that power to seize and confiscate the property of persons, individuals, or corporations, without office found, because they may have been guilty of criminal practices."¹⁹⁸

Recognizing that the original decree might need to be modified slightly, the Supreme Court remanded the case to the territorial court for further consideration. The Utah Supreme Court undertook to determine specifically how to dispose of the property, but before this issue could be resolved, the Church officially renounced polygamy in October 1890.¹⁹⁹ That action created a powerful claim for the courts to abandon a meaningless effort to seize Church property. However, despite a vigorous dissenting opinion, the Utah Supreme Court refused to abandon the forfeiture proceedings and created a trustee to apply Church property "to the support and aid of the poor of the church, and to the building and repairing of its houses of worship."²⁰⁰

With the judiciary unable and unwilling to return most Church property, Congress finally closed the book on federal efforts to destroy the Mormon religion. In 1893, Utah's congressional delegate, Joseph L. Rawlins, introduced a resolution directing the return of the Church's personal property. With minor amendments the resolution

¹⁹⁵ Id. at 43-50.

¹⁹⁶ Id. at 50-52, 67.

¹⁹⁷ Id. at 64.

¹⁹⁸ Id. at 67 (Fuller, C.J., dissenting).

¹⁹⁹ See 6 B. Roberts, *supra* note 14, at 219-21.

²⁰⁰ *United States v. The Late Corporation of the Church of Jesus Christ of Latter-day Saints v. United States*, 8 Utah 310, 31 P. 436 (1890).

passed Congress, and on January 10, 1894, what was left of the Church's personal property was returned. On June 8, 1896, the Church's real estate was returned.²⁰¹

In the battle of wills between the Church and the federal government, the government was victorious. It suppressed polygamy and crippled the Church's political, social, and economic power in the territory. Faced with a choice between a principled commitment to polygamy and survival as an organization, the Church chose to survive.

VI. CONCLUSION

A central feature of the nineteenth-century Mormon experience was its concept of Zion, a community of Saints where God and His people could dwell together in harmony. The Mormons were from the beginning a gathered people. Identifying powerfully with ancient Israel of the Old Testament, Mormons "gathered" first to Kirtland, Ohio; later to Jackson County, Missouri; and then to Nauvoo, Illinois. They finally found sanctuary in the Great Basin. Protected by the Rocky Mountains, their society followed a unique path of development until the world caught up with them and then swallowed and assimilated them.

The changed relationships between Mormons and non-Mormons since the turn of the century demonstrate that with assimilation comes a reversal of behavior in some of the members of the competing communities. Non-Mormons became more tolerant of Mormon religious beliefs as soon as Mormons relegated religion to a limited sphere of belief and conformed to more traditional conduct. Mormons came to appreciate lawyers and the law, although they remained wary of possible corruption in each. Political and social pluralism came to be seen as the flowering of the doctrine of free agency. This particular history, of course, explains why a Mormon community today will express, in religious concepts and terms, those issues that in other communities are considered secular. The division between church and state is balanced differently, in favor of the church, in the Mormon community. A recent and intense religiously motivated colonization would hardly be expected to produce a different situation. But then, colonization of the West produced the Mormons' own vision of society—Zion. This assured profound effects on the nature of that society far into its future.

For the Mormon in the twentieth century—indeed, for the religiously committed person of any tradition—the question still remains

²⁰¹ See L. Arrington & D. Bitton, *supra* note 41, at 378.

whether intense religious experience can be had outside community. If the Mormons of the nineteenth century were right, then indeed the pilgrim's path continues, searching with St. Paul and St. Augustine—and with Joseph and Brigham—for the City of God.

