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# The First Disestablishment: Limits on Church Power and Property Before the Civil War

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THE FIRST DISESTABLISHMENT: LIMITS ON  
CHURCH POWER AND PROPERTY  
BEFORE THE CIVIL WAR

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SARAH BARRINGER GORDON<sup>†</sup>

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## INTRODUCTION

The rights and responsibilities of religious institutions are hotly debated in the early twenty-first century. Liberal separationists argue that religious organizations should be subject to secular laws regarding labor, health care (including access to birth control), child protection, and more.<sup>1</sup> Their opponents counter that the ideals of “church autonomy” or “the freedom of the church” exempt religious organizations from legal, administrative, or legislative oversight.<sup>2</sup> The standoff is exacerbated by the opposing interpretations of history on offer.<sup>3</sup> Former presidential candidate, talk show host

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<sup>1</sup> For litigation and political controversy surrounding such claims, see *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012) (rejecting an employment discrimination claim based on the “ministerial exception”); *Doe v. Holy See*, 557 F.3d 1066, 1069 (9th Cir. 2009) (upholding jurisdiction over the Vatican under the Foreign Sovereign Immunities Act); *Moses v. Diocese of Colorado*, 863 P.2d 310, 319, 331 (Colo. 1993) (upholding tort damages for clergy against First Amendment defense); *Fortin v. Roman Catholic Bishop of Portland*, 871 A.2d 1208, 1232 (Me. 2005) (affirming diocese’s duty to protect against the tortious acts of its clergy); John Eligon & Laurie Goodstein, *Kansas City Bishop Convicted of Shielding Pedophile Priest*, N.Y. TIMES (Sept. 6, 2012), <http://www.nytimes.com/2012/09/07/us/kansas-city-bishop-convicted-of-shielding-pedophile-priest.html> (reporting on the first American Catholic bishop criminally convicted for failure to report child abuse); Robert Pear, *Bishops Reject Birth Control Compromise*, N.Y. TIMES (Feb. 7, 2013), <http://www.nytimes.com/2013/02/08/health/bishops-reject-white-house-proposal-on-contraceptive-coverage.html> (describing the fight over whether religious employers should be exempt from laws requiring insurance coverage for contraception).

<sup>2</sup> See Richard W. Garnett, *Religious Liberty, Church Autonomy, and the Structure of Freedom*, in CHRISTIANITY AND HUMAN RIGHTS: AN INTRODUCTION 267 (John Witte, Jr. & Frank S. Alexander eds., 2010) (arguing that religious communities should enjoy autonomy and freedom from state intervention); see also Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273, 295 (2008) (“[T]he existence and independence of religious institutions—self-defining, self-governing, self-directing institutions—are needed . . . to check . . . secular power” (internal quotation marks omitted)); Richard W. Garnett, *The Freedom of the Church*, 4 J. CATH. SOC. THOUGHT 59, 61 (2007) (suggesting that the *libertas ecclesiae* principle of freedom of the church is essential for understanding the First Amendment); Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79, 107 (2009) (arguing that religious institutions embody their own “spheres” of autonomy while still recognizing the “fundamental importance of the state”).

<sup>3</sup> Compare Steven D. Smith, *Freedom of Religion or Freedom of the Church?* 23-27, 34-38 (Univ. of San Diego Sch. of Law Legal Studies Research Paper Series, Paper No. 11-061, 2011) (arguing that the religion clauses commonly credited actually refer only to religious organizations), with

(and historian) Newt Gingrich has called the Affordable Care Act's requirement that all secular employers—regardless of their owners' religious affiliations and convictions—provide birth control insurance coverage for employees “the most outrageous assault on religious freedom in American history” and asserted that “every time you turn around the secular government is shrinking the rights of religious institutions in America.”<sup>4</sup>

From the other side of the spectrum, the invocation of history is equally strident. For example, Americans United for Separation of Church and State has battled against the claim that the government has undermined church autonomy. From this group's perspective, strict separation of church and state is “good for America” and “good for religion” because it prohibits government involvement with religious organizations.<sup>5</sup> American history, they argue, demonstrates that Presidents and right-thinking Americans alike have always supported their interpretation of disestablishment.<sup>6</sup>

This back-and-forth highlights the sharply differing views among activists, scholars, and politicians regarding the tradition of special deference (or lack thereof) given to religious organizations. The *Hobby Lobby* case, set for argument at the Supreme Court in early spring 2014, is just the latest incarnation of these battles.<sup>7</sup> The question is as old as the nation, however. The rights of individuals versus organizational rights have been essential to the development of the law of religion in America. The place of religious organizations was keenly debated as a key component of disestablishment. Yet we know almost nothing about the experience of such organizations in our nation's history.

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Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917, 969 (2013) (“[R]ights of conscience . . . could account for most of the pressing issues involving religious groups, without any reference to church or religion.”).

<sup>4</sup> Amy Bingham, *Gingrich Blasts Obama's Birth Control Policy as “Outrageous Assault” on Religion*, ABC NEWS (Feb. 5, 2012), <http://abcnews.go.com/blogs/politics/2012/02/gingrich-blasts-obamas-birth-control-policy-as-outrageous-assault-on-religion>.

<sup>5</sup> *America's Legacy of Religious Liberty—Pass It On*, AMS. UNITED, <https://www.au.org/files/americas-legacy-of-religious.pdf> (last visited Dec. 6, 2013).

<sup>6</sup> See Rob Boston, *Falsehoods, By George!: Religious Right Seeks Retroactive Baptism of America's First President*, WALL OF SEPARATION (Apr. 16, 2013), <https://www.au.org/blogs/wall-of-separation/falsehoods-by-george-religious-right-seeks-retroactive-baptism-of-america-s> (claiming that no evidence supports the assertion that George Washington worked to connect church and state); Rob Boston, *Freedom from Foolishness?: Texas Gov. Misconstrues Religious Liberty*, WALL OF SEPARATION (June 14, 2013), <https://www.au.org/blogs/wall-of-separation/freedom-from-foolishness-texas-gov-misconstrues-religious-liberty> (arguing that Thomas Jefferson and other early American leaders drafted the First Amendment to protect freedom, not religious organizations).

<sup>7</sup> See *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (holding that employer retail chain may invoke a religious objection to the Affordable Care Act's birth control provisions), *cert. granted*, No. 13-354, 2013 WL 5297798 (U.S. Nov. 26, 2013).

Surprisingly enough, scholars have not studied how disestablishment actually worked in its first decades. What did it mean for a state to be disestablished, rather than just to announce that religious establishment was now prohibited? That question animates this Article, which builds on the prior work of scholars in the field of church and state, but also looks for answers in places others have ignored. The gradual commitment to disestablish by the states, for example, has been the subject of extensive and impressive scholarly research for at least the past century.<sup>8</sup> We have long known in detail the stories of Virginia and Massachusetts, the former as an exemplar of a particularly clear commitment to disestablish early in 1786, and the latter as the last holdout, disestablishing only in 1833.<sup>9</sup> The relationship of the federal religion clauses to the experience of the states has also been the object of considerable scholarly and judicial attention.<sup>10</sup> Scholars disagree over what the states' experiences in the lead-up to disestablishment tell us about current conflicts.<sup>11</sup> But few researchers have probed what religious liberty meant on the ground in the states that carried it out,<sup>12</sup> and none have

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<sup>8</sup> See generally THOMAS E. BUCKLEY, *CHURCH AND STATE IN REVOLUTIONARY VIRGINIA, 1776-1787* (1977); SANFORD H. COBB, *THE RISE OF RELIGIOUS LIBERTY IN AMERICA: A HISTORY* (1902); THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* (1986); M. LOUISE GREENE, *THE DEVELOPMENT OF RELIGIOUS LIBERTY IN CONNECTICUT* (1970); MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* (1965); MARK DOUGLAS MCGARVIE, *ONE NATION UNDER LAW: AMERICA'S EARLY NATIONAL STRUGGLES TO SEPARATE CHURCH AND STATE* (2004).

<sup>9</sup> See generally BUCKLEY, *supra* note 8; 2 WILLIAM G. MCLOUGHLIN, *NEW ENGLAND DISSENT, 1630-1883: THE BAPTISTS AND THE SEPARATION OF CHURCH AND STATE* (1971) (tracing the opposition to religious establishment in New England).

<sup>10</sup> See, e.g., *Everson v. Bd. of Educ.*, 330 U.S. 1, 17-18 (1947) (incorporating the Establishment Clause into the Due Process Clause and holding that history dictates state payment for transportation of parochial school students was constitutional); *id.* at 33-44 (Rutledge, J., dissenting) (arguing that history directly prohibited such payments); *Reynolds v. United States*, 98 U.S. 145, 162-64 (1879) (relying on the history of Virginia to determine the scope of protection for religiously inspired behavior); HOWE, *supra* note 8.

<sup>11</sup> There is no clear consensus regarding the Establishment Clause's intended meaning when it was ratified in 1791—a factor that continues to fuel debate today. Compare DANIEL L. DREISBACH, *THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE* (2002) (arguing that Thomas Jefferson's "wall of separation" did not contemplate a complete barrier of church and state), with LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* (2d ed., rev. 1994) (arguing that history reveals that the Establishment Clause prohibits all public support for religion).

<sup>12</sup> Virginia is the exception to the rule and has received scholarly treatment in this area. See generally, e.g., DREISBACH, *supra* note 11; Thomas E. Buckley, *Evangelicals Triumphant: The Baptists' Assault on the Virginia Glebes, 1786-1801*, 45 WM. & MARY Q. 33 (1988) (examining Virginia politics in the period after disestablishment). For a broader perspective on what free exercise

assembled an overview of the widespread legal powers and limitations imposed on churches by states once they had officially severed church and state.

One explanation for the dearth of scholarship is that we have overlooked the implementation of disestablishment. The decision to disestablish represented an end in some ways but a beginning in many others.<sup>13</sup> It was the prelude to a gradual yet broad-ranging, nationwide attempt to limit the ability of religious organizations to acquire and hold wealth. Equally important, states imposed strict controls on church governance,<sup>14</sup> mandating the election of lay trustees to hold and manage church property. The desire to keep religious organizations both limited in size and firmly under lay control was key to the ongoing administration of disestablishment in the states. The rules were by no means identical, but they resembled each other enough to create a rough system. This first system of disestablishment imposed discipline on religious institutions, especially in terms of property and internal governance, based on concerns for individual conscience and lay control.

Ironically, then, disestablishment set the stage for extensive legislative and judicial oversight of churches and other religious organizations. Even a brief review reveals an astonishing array of government regulation in the period between the end of formal establishment and the Civil War. Disestablishment, it seems, was not widely understood as a mandate for government deference to religious institutions or the separation of those institutions from government, at least according to today's understanding of those terms. Quite the opposite—during the foundational period of American law, deep government involvement in religious institutions, rather than strict separation or respectful support, was characteristic and widely accepted.

This Article excavates this first system of disestablishment, recovering and analyzing what has long been hidden in plain sight in state statutes and related judicial decisions. The most startling aspect of this history is the

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meant in the states, see Sarah Barringer Gordon, *Blasphemy and the Law of Religious Liberty in Nineteenth-Century America*, 52 AM. Q. 682 (2000).

<sup>13</sup> The great evangelist Charles Grandison Finney made a similar point about religion, focusing on salvation not as an end but as a beginning. GILBERT HOBBS BARNES, *THE ANTISLAVERY IMPULSE: 1830–1844*, at 9–12 (reprint 1957) (1933).

<sup>14</sup> In two states, the legislatures went further, actively declaring much religious land forfeited to the state. Virginia's Glebe Act of 1802 has long been known to specialists. See generally Buckley, *supra* note 12. Vermont's 1805 decision to redirect all unoccupied glebe lands to the public schools lay buried in the archives until recently, however. See Sarah Barringer Gordon, *The Landscape of Faith: Religious Property and Confiscation in the Early Republic*, in *MAKING LEGAL HISTORY: ESSAYS IN HONOR OF WILLIAM E. NELSON* 13, 30 (Daniel J. Hulsebosch & R.B. Bernstein eds., 2013).

direct control states exercised over religious organizations' property and power through statutes allowing "religious societies" (as they were commonly called) to incorporate. Consider, for example, the limitations on wealth imposed by most states, which capped real property acreage: two acres in Virginia, Maryland, and the congressionally governed District of Columbia; four acres in Kentucky; and five acres in Pennsylvania, Georgia, and Tennessee.<sup>15</sup> Limits were also imposed on total annual income: \$1000 in New Hampshire; \$2000 in Maryland; and \$3000 in Maine, Wisconsin, and Minnesota.<sup>16</sup> Similar restrictions were enacted around the country,<sup>17</sup> revealing that the practice was neither regional nor tied to the religious convictions of legislators in particular jurisdictions. Instead, the pattern reveals something much more interesting: a system constructed by states to meet an unprecedented development—that is, the need to manage disestablishment.

Part I details the background of this process. It first investigates the precedents for state restrictions and the pressures disestablishment placed on legislatures. It then discusses statutory and constitutional limits imposed on church property and income after formal disestablishment in return for the privilege of incorporation, and explores the ways courts interpreted these restrictions. Part II focuses on how disestablishment in the states also empowered the laity, giving congregants new power to control church assets, and thus to dictate church policy. Bitter disputes over slavery, personal morality, and individual conscience enmeshed religious organizations in litigation, as these newly empowered congregants fought with each other over the demands of faith. Part III probes the ways in which fractious groups of lay members challenged the role of clergy in religious life and practice—especially, but not only, in Roman Catholic communities. Clerics and religious hierarchies came under fire, as trustees and their supporters argued that lay governance meant pastors now served at the pleasure of the congregation. The empowerment of the laity and incorporation of religious organizations also meant that once-internal disputes, such as arguments over the "souls of black folk,"<sup>18</sup> now had legal as well as religious salience. Part IV examines how slavery fractured religious life along regional lines. Disestablishment, in this history, was critical—first to the flourishing of pluralism and then to the collapse of religious denominations, which were torn apart by the strident new powers of their congregants.

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<sup>15</sup> See *infra* notes 61, 63 & 64 and accompanying text.

<sup>16</sup> See *infra* notes 73-75 and accompanying text.

<sup>17</sup> See *infra* notes 60-79 and accompanying text.

<sup>18</sup> W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* (reprint 1973) (1953).

The restrictions imposed on church wealth and power before 1860 and the law of disestablishment as developed in state courts challenge the notion that institutional autonomy was a meaningful or common concern among early Americans or their governments. The lessons of this history are many, but none sustains the notion that either strict separationism or “the freedom of the church” accurately accounts for how disestablishment was understood and implemented from the Revolution to the Civil War. Present-day activists from both sides of the debate who seek to ground their claims in tradition must instead grapple with a much different, more surprising legacy.

### I. THE CHALLENGES OF DISESTABLISHMENT

By the early 1830s, all states—the original thirteen colonies and new states admitted after independence—were formally disestablished via constitutional provision. States admitted thereafter included such provisions in their initial constitutions.<sup>19</sup> The process was not identical in each state: some of the original states and many of the new ones had never had formal establishments. But the movement was powerful, and within a generation after the Revolution, the idea of an established religion seemed to be a fundamental denial of liberty and corruption of genuine faith.<sup>20</sup> Those who implemented disestablishment reflected similar attitudes toward liberty and

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<sup>19</sup> See, e.g., ALA. CONST. of 1819, art. I, § 7; CAL. CONST. of 1849, art. I, § 4; CONN. CONST. of 1818, art. 1, § 3; DEL. CONST. of 1792, art. I, § 1; FLA. CONST. of 1838, art. I, § 3; GA. CONST. of 1798, art. IV, § 10; ILL. CONST. of 1818, art. VII, § 3; IND. CONST. of 1816, art. I, § 3; IOWA CONST. of 1846, art. I, § 3; KAN. BILL OF RIGHTS § 7 (1859); KY. CONST. of 1792, art. XII, § 3; ME. CONST. of 1819, art. I, § 3; MD. DECLARATION OF RIGHTS of 1776, art. XXXIII; MASS. CONST. amend. 11 (1833); MICH. CONST. of 1835, art. I, §§ 4–6; MINN. CONST. of 1857, art. I, § 16; MISS. CONST. of 1817, art. I, § 4; MO. CONST. of 1820, art. XIII, § 5; N.H. CONST. of 1792, pt. I, art. VI; N.J. CONST. of 1776, art. XIX; N.Y. CONST. of 1777, art. XXXVIII; N.C. CONST. of 1776, art. XXXIV; OHIO CONST. of 1802, art. VIII, § 3; OR. CONST. of 1857, art. I, §§ 2–5; PA. CONST. of 1776, art. II; R.I. CONST. of 1842, art. I, § 3; S.C. CONST. of 1790, art. VIII; TENN. CONST. of 1796, art. XI, § 3; TEX. CONST. of 1845, art. I, § 4; VT. CONST. of 1793, ch.1, art. III; VA. CONST. of 1830, art. III, § 11; WIS. CONST. art. I, § 18. Louisiana is the sole exception to this constitutional rule. The Louisiana Constitution of 1812 did not include a specific disestablishment clause. However, Congress voted to admit the new state because the enabling act of February 1811 instructed the Orleans Territory drafting convention that its proposed constitution must contain “the fundamental principles of civil and religious liberty.” When considering the proposed constitution for the State of Louisiana, Congress stipulated that the requirements of the 1811 act were “deemed” to be part of the constitution. Thus Congress expressly concluded that Louisiana was a disestablished polity. See generally ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES 156 (rev. ed. 1964) (1950). Only in 1921 did Louisiana amend its constitution to prohibit an establishment of religion, making explicit what had been required by Congress all along. LA. CONST. of 1921, art. I, § 4.

<sup>20</sup> See, e.g., MCGARVIE, *supra* note 8, at 3–20.



religious freedom. Regulating religious institutions, in other words, was a practice widely believed to serve individual conscience.

Few scholars have investigated the history of disestablishment beyond the moment at which it took effect, and most have relied on a smattering of cases or the high-flown rhetoric of national leaders.<sup>21</sup> Careful attention to the statutory record, however, reveals a great deal of activity, most of it aimed at carefully limiting the powers of religious organizations and empowering their individual members. As a result, these statutes focused chiefly on congregants, not clerics. This is a forgotten world, buried in part by time, but also by determined opposition.

To recover this world, we must peel back the layers to expose the interests of those who helped paper over the truth. By the late nineteenth century, for example, proponents of increased wealth and power for religious institutions had decided that disestablishmentarian restrictions were best undermined by painting them as foreign. In 1875, U.S. Supreme Court Justice William Strong conceded to an audience at Union Theological Seminary that religious organizations' power to acquire wealth was sharply limited.<sup>22</sup> Strong claimed that these limitations were imposed by state legislatures motivated by "inherit[ed] . . . jealousy" of extensive landholding by "ecclesiastical persons and religious houses" in Britain.<sup>23</sup> Known as mortmain laws, these medieval statutes restricted the capacity of religious institutions to acquire property by taking gifts of land from feudal lords and thus revenue from the king (in the form of taxes on a lord's death or a ward's marriage—levies never recoverable from religious organizations that neither died nor married).<sup>24</sup>

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<sup>21</sup> Even Carl Zollman, the most serious student of the law of religion after disestablishment, apparently never read a statute. His chapter on religious corporations notes that a few mortmain statutes limited real property, but fails to recognize most of these, and entirely misses income limits. See CARL ZOLLMAN, *AMERICAN CIVIL CHURCH LAW* 80-110 (1917).

<sup>22</sup> WILLIAM STRONG, *TWO LECTURES UPON THE RELATIONS OF CIVIL LAW TO CHURCH POLITY, DISCIPLINE AND PROPERTY* 69 (N.Y., Dodd & Mead 1875).

<sup>23</sup> *Id.*

<sup>24</sup> The mortmain statute of Edward I, known as "statutum de viris religiosis," declared that "religious men have entered as well into their own fees as into the fees of other men . . . [and those] services that are due . . . and which at the beginning were provided for the defence of the realm are wrongfully withdrawn" and the escheats lost. RICHARD WHALLEY BRIDGMAN, *THE LAW OF CHARITABLE USES, AS LAID DOWN AND DIGESTED BY GEORGE DUKE, ESQ. IN 1676, TOGETHER WITH THE LEARNED READINGS OF SIR FRANCIS MOORE* 193 (London, W. Clarke & Sons 1805). Feudal law favored ownership by a natural person, subject to death as well as forfeiture for crime or treason. Mortmain statutes restricted the creation of new mortmains and allowed the king and his lords to effect seizures for violations thereof. See Charles W. Sloane, *Mortmain*, in 10 *THE CATHOLIC ENCYCLOPEDIA* 579, 580 (Charles G. Herbermann et al. eds., The Encyclopedia Press 1913) (1911). Edward's statute was vigorously enforced by mesne lords and

As a result of this English heritage, Strong observed complacently, statutes in some states provided that “no religious society shall be incorporated, with power to hold property yielding a greater annual income than a specified sum.”<sup>25</sup> Strong had a dog in the fight: he supported reestablishing Christianity as the country’s religion.<sup>26</sup> But his backhanded dismissal of restrictions on church property as leftover gasps of mortmain in the New World apparently discouraged subsequent researchers. During the century and more since Strong’s speech, scholars have assumed his credibility on this subject. It is high time to correct the record.

Indeed, Justice Strong was mistaken—restrictions on church property holding in America took many different forms, including constitutional provisions as well as legislation. The breadth and variety of such restrictions make it clear that something more than “inherited jealousy” was at work. The motivations for these restrictions also differed sharply from the British monarch’s desire for tax revenue, which undergirded English mortmain. In the new United States, state statutes and constitutional provisions governing religious institutions accomplished two related but distinct objectives. On the one hand, they imposed limits on religious authority, and on the other, protection for individual religious decisions and sensibilities. In other words, religious liberty was tightly bound up with institutional discipline. To protect individual liberty, churches were constrained in their capacities to acquire wealth and broadly subjected to lay control.

American mortmain differed from its English ancestor in key respects, therefore, as it embodied the desire to empower individual choice rather than secular government or its officials. The individual states now administered a landscape in which the effects of an earlier establishment were still visible and questions about how to address the wealth of religious organization—in terms of land and money—became pressing.<sup>27</sup> The King’s church no longer had an official role in an independent America, and consequently

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the crown, at least through the end of the fourteenth century. *See generally* SANDRA RABAN, *MORTMAIN LEGISLATION AND THE ENGLISH CHURCH, 1279–1500*, at 72–101 (1982).

<sup>25</sup> STRONG, *supra* note 22, at 69.

<sup>26</sup> For example, he campaigned for a “Christian Amendment” to the Constitution, which ultimately failed. *See* Morton Borden, *The Christian Amendment*, 25 *CIV. WAR HIST.* 156, 160–61 (1979) (detailing Strong’s support of a constitutional amendment declaring the United States a Christian nation).

<sup>27</sup> States struggled with these challenges to a greater extent than the federal government, which controlled only the District of Columbia and eventually the territories. When confronted with this issue, however, the federal government also struggled. *See, e.g.*, An Ordinance for the Government of the Territory of the United States North West of the River Ohio, 32 *J. CONT’L CONG.* 334, 339–41 (U.S. Gov’t Printing Office 1936) (1787) (protecting religious liberty in federal territory).

the notion that property regulation was the surest route to achieve individual liberty was understood as a distinct product of independence from Britain. In this sense, ancient English property restrictions were repurposed in a new environment, salvaged from the remembered law of Britain, but grafted onto a new set of distinctly American structures and concerns.

At the same time, however, American jurists and legislators used the vocabulary of the older legal regime. They called religious organizations “mortmain institutions”<sup>28</sup> and noted that religious property “subtracted from the mass of transmissible wealth.”<sup>29</sup> According to an early legal treatise on American corporate law, the ecclesiastical interests that had so frustrated Henry VIII were antithetical to a republican government.<sup>30</sup> Yet religious institutions adapted quickly and successfully to the new environment—so successfully, in fact, that states granted them significant benefits, while also imposing significant restraints.

The key to the change was the corporation. Long before businesses were granted the privilege of incorporation, religious societies popularized the corporate form for Americans.<sup>31</sup> In most American jurisdictions, religious corporations were ubiquitous by the early nineteenth century, flourishing in the new regime of disestablishment. In Pennsylvania, for example, religious societies dominated the list of corporations formed between 1777 and 1791, when Pennsylvania enacted a general incorporation statute (fifty separate bills of incorporation, out of seventy-seven bills total).<sup>32</sup> Even including townships and other private institutions, then, religious societies made up almost two-thirds of all new ventures. The preamble to the 1791 legislation explained that the representatives of the Commonwealth found their energies were taxed by the onslaught of such bills.<sup>33</sup> Early on, special

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<sup>28</sup> DAVID HENSHAW, REMARKS UPON THE RIGHTS AND POWERS OF CORPORATIONS, AND OF THE RIGHTS, POWERS, AND DUTIES OF THE LEGISLATURE TOWARD THEM 14 (Bos., Beals & Greene 1837).

<sup>29</sup> Gov. Levi Lincoln, *Veto Message, 16 February 1827*, in RESOLVES OF THE GENERAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS, 1824–1828, at 475 (Bos., Dutton & Wentworth 1828).

<sup>30</sup> See JOSEPH K. ANGELL & SAMUEL AMES, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE 129–31, 148–51 (Bos., Hilliard, Gray, Little & Wilkins 1832).

<sup>31</sup> See, e.g., Pauline Maier, *The Revolutionary Origins of the American Corporation*, 50 WM. & MARY Q. 51, 53 (1993) (noting Massachusetts’s large number of corporate charters for religious organizations in the 1780s and 1790s); see also Paul G. Kauper & Stephen C. Ellis, *Religious Corporations and the Law*, 71 MICH. L. REV. 1499, 1505–09 (1973) (reviewing briefly the incorporation of religious organizations in colonial America).

<sup>32</sup> See 3 PROCEEDINGS AND DEBATES OF THE CONVENTION OF THE COMMONWEALTH OF PENNSYLVANIA 213–23 (Harrisburg, Packer, Barrett & Parks 1837) [hereinafter PROCEEDINGS AND DEBATES OF PA.] (listing corporations formed from 1777 to 1791).

<sup>33</sup> Act of April 6, 1791, pmbll., PA. DIGEST OF LAWS 181 (Stroud 1841).

incorporation acts in Pennsylvania limited the amount of property that a given religious corporation could own, frequently in terms of annual income calculated in bushels of wheat.<sup>34</sup> By the time the general incorporation legislation was enacted, these limits were phrased in monetary terms—almost always £500.<sup>35</sup>

A. *Seeing Like a Disestablished State: Regulation  
Through Incorporation*

Religious societies became the quintessential private associations, simultaneously supported and disciplined by states. As in Pennsylvania, other state legislatures gradually developed a template for the formation of such institutions and, in the process, set the tone for disestablishment. The private law of religion—that is, the world of contracts, deeds, donations, mortgages, bank accounts, and so on, all owned and managed in corporations—thus became the source of the ongoing management of disestablishment. In this sense, the religious corporation was not an element of establishment, but rather a manifestation of the people’s religious liberty. Such a corporation, at least in theory, reflected the integration of shared political and social interests in religion, tucked under the enabling authority of state legislatures and enforced by the judiciary.<sup>36</sup>

In the service of a genuinely radical departure from tradition, then, disestablishment forced states to articulate the principles of a political world without the mainstay of divine sanction. In the 1790s, the French Revolution provided a cautionary tale of disestablishment run amok; most Americans found themselves more sanguine than the French *citoyens*.<sup>37</sup> In many jurisdictions, Americans had distanced themselves from the Church of England by the opening days of the Revolution; in some colonies, the rejection came considerably earlier.<sup>38</sup> Patriots in the Revolutionary era nonetheless found attacks on the role of the King’s church in oppressing

<sup>34</sup> See 3 PROCEEDINGS AND DEBATES OF PA., *supra* note 32, at 213.

<sup>35</sup> See *id.* at 214–22.

<sup>36</sup> See Maier, *supra* note 31, at 82 (examining one perspective regarding “the proliferation of corporations”). For a claim that incorporation itself was a form of establishment, see Douglas G. Smith, *The Establishment Clause: Corollary of Eighteenth-Century Corporate Law?*, 98 NW. U. L. REV. 239, 241 (2003).

<sup>37</sup> The violent secularism of the French Revolution had less purchase in the American context, despite avid support for disestablishment. See *People v. Ruggles*, 8 Johns. 290, 294 (N.Y. Sup. Ct. 1811) (declaring that the United States would not follow France by defaming or oppressing religion).

<sup>38</sup> For example, the colony of Georgia did not establish the Church of England in its initial charter. Joel A. Nichols, *Religious Liberty in the Thirteenth Colony: Church–State Relations in Colonial and Early National Georgia*, 80 N.Y.U. L. REV. 1693, 1704–05 (2005).

colonists to be a handy tool, first in rebellion and then in arguing for disestablishment.<sup>39</sup> The arrival of formal disestablishment, therefore, was in one sense a settling device—rendering official and mandatory a religious compromise based on the erosion of the official power of the King’s church, which at base had been associated with the King’s blessing. In other ways, disestablishment was unsettling, for it did not spell out what should happen after the rupture with longstanding tradition. To fill the yawning gap between the ideology of disestablishment and the need for organization, American legislatures did what they often did—they “borrowed” English precedent, but they modified the tradition, molding it to their own tastes and interests.<sup>40</sup>

Disestablishment thus generally had a more benign aspect in America than in France. This was in part due to the relative weakness of establishment in some colonies even before the Revolution, and in part due to the citation to ancient limits on religious property in English law. In America, one could be a loyal congregant of an existing and flourishing church and a keen supporter of disestablishment. Isaac Backus of Massachusetts, a Baptist, saw disestablishment as the only way to be a true Christian, and advocated for that position through decades of activism and commentary in the late eighteenth and early nineteenth centuries.<sup>41</sup>

It is worth noting, however, that powerful corporations were not widely admired in the Revolutionary era or after. Anticorporate feeling—grounded not only in mortmain but also in the traditional monopolies accorded to religious and lay corporations under English law—survived well into the nineteenth century.<sup>42</sup> During the same period, the incorporation of religious societies of small means and deeply local scope became a way for state legislators to serve their constituents, who were members of these new societies. These relatively nonthreatening organizations stood in sharp contrast to more dangerous corporations. Banks, including the Second Bank of the United States and predecessor organizations, bribed and substantially rewarded supportive legislators. The backlash against financial corporations,

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<sup>39</sup> For a discussion of anti-Church of England rhetoric in the buildup to the American Revolution, see Gordon, *supra* note 14, at 13-19. For treatments characterizing the French Revolution as more radical, especially with regard to religion (but also to corporations), see generally NIGEL ASTON, *RELIGION AND REVOLUTION IN FRANCE, 1780-1804* (2000); WILLIAM H. SEWELL, JR., *WORK AND REVOLUTION IN FRANCE: THE LANGUAGE OF LABOR FROM THE OLD REGIME TO 1848* (1980).

<sup>40</sup> For other examples of such borrowing, see Gordon, *supra* note 12, at 683, 696, on the United States’ adoption of English blasphemy jurisprudence.

<sup>41</sup> William G. McLoughlin, *Isaac Backus and the Separation of Church and State in America*, 73 *AM. HIST. REV.* 1392, 1403-04 (1968).

<sup>42</sup> See generally Maier, *supra* note 31, at 58-64.

especially after the Panic of 1837, portrayed banks as great sources of tyranny and corruption.<sup>43</sup> By the 1830s, railroads joined banks as targets of anticorporate tirades, which centered on the erosion of democracy at the hands of moneyed interests.<sup>44</sup>

The focus on the corruption of wealth and the dangers of concentrated authority in corporations found some adherents, even when applied to churches instead of banks. In Virginia, anticorporate and antiecclesiastical sentiments blended so thoroughly that, between 1790 and 2002, religious organizations were formally prohibited from incorporating.<sup>45</sup> James Madison was especially virulent on the question; while President, Madison vetoed a special bill to incorporate a church in Washington.<sup>46</sup> Most states did not follow Virginia's lead, however.<sup>47</sup> Instead, they adapted the corporate form to empower the laity, giving congregants the right to control

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<sup>43</sup> See DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848*, at 503 (2007) (noting the Democrats publicly blamed the banks for the Panic of 1837); JAMES WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780–1970*, at 32–44 (1970) (documenting nineteenth-century fears that corporations would upset the balance of power in the markets); Maier, *supra* note 31, at 71–72 (“Charges that corporations corrupted the political system became commonplace during the 1830s after the Second Bank of the United States bestowed substantial favors on Congressmen in an effort to have its charter renewed.”).

<sup>44</sup> See, e.g., 6 *DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA* 554 (Harrisburg, Benjamin Singerly 1873) (statement of Rep. Kaine) (remarking that railroads are chartered to serve the people, yet operate for “the exclusive benefit of the corporations themselves”); 7 *PROCEEDINGS AND DEBATES OF THE CONVENTION OF THE COMMONWEALTH OF PENNSYLVANIA* 87–90 (Harrisburg, Packer, Barrett & Parks 1838) (statement of Rep. Ingersoll) (blaming banks for social ills such as class division and rural poverty); Maier, *supra* note 31, at 68 (summarizing criticisms of corporations as destructive to democracy).

<sup>45</sup> See Gordon, *supra* note 14, at 23–27; An Act to Repeal the Act for Incorporating the Protestant Episcopal Church and for Other Purposes, 12 VA. STAT. ch. 12, at 266–67 (1786) (Hening 1823); see also VA. CONST. art. IV, § 14 (repealed 2006) (“The General Assembly shall not grant a charter of incorporation to any church or religious denomination, but may secure the title to church property to an extent to be limited by law.”); H.J. ECKENRODE, *SEPARATION OF CHURCH AND STATE IN VIRGINIA* 129 (1910) (“The repeal of the incorporation act definitely marks the separation of church and state in Virginia.”). See generally BUCKLEY, *supra* note 8, at 144–72; G. MacLaren Brydon, *The Antiecclesiastical Laws of Virginia*, 64 VA. MAG. HIST. & BIOGRAPHY 259 (1956). A federal lawsuit by the Reverend Jerry Falwell finally toppled the old rule, although the teeth of the prohibition had long been pulled by judicial doctrine recognizing trustees as empowered to control the property of unincorporated religious organizations. *Falwell v. Miller*, 203 F. Supp. 2d 624, 632 (W.D. Va. 2002).

<sup>46</sup> For Madison's veto message overturning “An Act Incorporating the Protestant Episcopal Church,” see H. JOURNAL, 11th Cong., 3d Sess. 566–67 (1811).

<sup>47</sup> Justice Joseph Story criticized Virginia's disestablishmentarian excesses, stating that the influence of French radicalism in the state legislature had led to dangerous denials of all religious property, a precedent that could be (but fortunately had not been) extended to undermine title to all property. *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 50–52 (1815).

religious societies through incorporation statutes that secured property (in limited amounts) and required the election of trustees to manage all corporate assets.

The first disestablishment, therefore, featured state imposition of stringent economic discipline on clerics and denominations. This was matched by deference to individual religious choices and a relative disregard in the broader society for the ways that religious authority and wealth had traditionally worked together. The combination of both discipline and privilege through incorporation often resulted in unexpected and, to modern eyes, shockingly invasive practices. Frequent judicial interpretation of those laws meant that the internal workings of religious organizations were exposed to scrutiny and judgment in thousands of conflicts that pitted the faithful against each other and against their ministers and priests.<sup>48</sup> In the nineteenth century, judges were heard to remark blithely that “mere money” should not concern a minister or his congregation. In comparison to the immeasurable value of freedom of conscience, the inconvenience of, say, losing a church building was a minor affair, observed the Massachusetts Supreme Judicial Court.<sup>49</sup> Furthermore, judges often inquired into religious doctrine to decide questions of church polity, all in the interests of managing the boundaries of religious property in a disestablished world. As Justice Strong noted, entirely without irony, almost all cases of note involved “church property,” which required courts to decide on the proper disposition of disputed land and monies.<sup>50</sup>

Attention to this extensive legal record reveals the tracks of religious life left in law, as well as the state’s imposition of discipline on religious actors. Vibrant religious communities flourished, paradoxically enough, in these highly regulated and even brittle institutions. In quotidian and often bitter controversies over church property and identity, Americans delineated what disestablishment meant (and did not mean) in practice. These battles pitted believers against each other; the byproduct was a jurisprudence of disestablishment created through, rather than in opposition to, the legal system.

The first system of disestablishment thus involved extensive government regulation. Recent historical work on state and local governments in the early nineteenth century has challenged earlier historians’ claims that there

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<sup>48</sup> THOMAS E. BUCKLEY, *ESTABLISHING RELIGIOUS FREEDOM: JEFFERSON’S STATUTE IN VIRGINIA* 117, 128, 141-43 (2013); *cf.* PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* 130 (2002) (arguing that supporters of disestablishment elevated politics to the level of religion).

<sup>49</sup> *See Baker v. Fales*, 16 Mass. 488, 521-22 (1820) (“[A]n inconvenience of this [financial] sort will never be felt, when a case of conscience is in question.”).

<sup>50</sup> STRONG, *supra* note 22, at 40.

was a vacuum of authority.<sup>51</sup> The historiography of religion has been less attentive to the role of the state, but both legislation and litigation reveal active government intervention. Connecting this pattern of regulation and oversight to religious institutions and their congregants allows religious historians to see a different landscape, one that reflects American political and legal development more generally. In addition, attention to the early implementation of disestablishment gives legal scholars of religion a new vantage point. Instead of relying on abstract statements in congressional debates or at the national constitutional convention, we can study the actual practice of disestablishment in the states. The resulting portrait of the protection and regulation of religious institutions is both unexpected and far more wide-ranging than we knew.

Disestablishment in early America was the result of innovation and adaptation. State legislatures did not import the world of the Henrician reformation when they established property limits for religion, *pace* Justice Strong.<sup>52</sup> Instead, states blended provisions for general incorporation with property limitations and lay governance. Strong addressed his lectures to an audience in New York City, where the Episcopalian Trinity Church of Wall Street was (and still is) a major landholder.<sup>53</sup> In 1875 New York, religious corporations were allowed to hold land for “pious uses” only and, for most religious denominations, the annual income from both real and personal

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<sup>51</sup> William J. Novak, *The Myth of the “Weak” American State*, 113 AM. HIST. REV. 752, 766-67 (2008), argues that government in America has been sprawling yet intensely localistic, a pattern that broadly fits disestablishment and the incorporation statutes this Article examines, but that does not capture the partial delegation of authority contained in general incorporation statutes. It is also worth noting that, over time, the discipline eroded and the privilege extended, especially for religious corporations. See Sarah Barringer Gordon, *Antidisestablishmentarianism: Tax Exemptions and the Growth of Government Support for Religion in the Late Nineteenth Century* (n.d.) (unpublished manuscript) (on file with author) (documenting the rapid increase in church wealth and power after the Civil War). Yet Novak’s central claim is a valuable corrective. For a related qualification of Novak’s argument, see generally Gary Gerstle, *A State Both Strong and Weak*, 115 AM. HIST. REV. 779 (2010), which argues that the U.S. government’s reluctance to restrict the influence of corporations and markets is as characteristic of U.S. history as the assertion of state power. In addition, see generally LAURA F. EDWARDS, *THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH* (2009), which asserts that localism survived without substantial change into the third decade of the nineteenth century. Edwards’s study, however, does not address the key role of religion in the maintenance of social discipline.

<sup>52</sup> See STRONG, *supra* note 22, at 17-21.

<sup>53</sup> See Gordon, *supra* note 14, at 17; Elizabeth Mensch, *Religion, Revival, and the Ruling Class: A Critical History of Trinity Church*, 36 BUFF. L. REV. 427, 429, 566 (1987). For Trinity Church’s current holdings, see TRINITY WALL STREET, <http://www.trinitywallstreet.org/about/realstate> (last visited Dec. 6, 2013).



property was limited to \$3000 per church.<sup>54</sup> Individual Presbyterian and Episcopal churches in New York City, whose congregants hailed from the higher reaches of society, were allowed incomes of \$6000.<sup>55</sup> These income limits varied considerably: in New York in 1784, each church was allotted £1200; in Pennsylvania in 1791, the limit was £500; in North Carolina in 1796, £200.<sup>56</sup> Yet the ubiquity and longevity of such restrictions reflected a political consensus.

This consensus was reached in response to the quandaries created by disestablishment. After deciding to disestablish, states faced a central question: What to do with religious wealth, property, and institutional forms after religious groups ceased to be either part of the broader apparatus of government or more or less unwelcome dissenters? Following the pioneering work of anthropologist and political scientist James Scott, we can understand how states sought to make religious life “legible” at the outset of an unprecedented era of disestablishment.<sup>57</sup> What did it mean to “see” the religious landscape from the perspective of a disestablished state?<sup>58</sup> What map would allow government both to describe and regulate its constituents and territory?<sup>59</sup> In our case, the question is further complicated by the fact that federalism consigned such questions to the states rather than the national government; each state wrestled with similar but separate questions about the meaning of disestablishment. The states’ commitment to disestablish meant that the ground had shifted, and governments adapted to account for and, in turn, manage the change.

Recognizing the rough outlines of the religious uses of the landscape provided young state governments with a roadmap, as it were. They had enough information to construct a regulatory regime that we know in retrospect was at once grossly inadequate and deeply productive. Inadequate, because a one-size-fits-all regime of property and governance could not account for the many differing ways of observing and anchoring faith in American society. Productive, paradoxically enough, because the one-size-fits-all structure was deployed so widely and frequently that most religious

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<sup>54</sup> R.H. TYLER, *AMERICAN ECCLESIASTICAL LAW: THE LAW OF RELIGIOUS SOCIETIES, CHURCH GOVERNMENT AND CREEDS, DISTURBING RELIGIOUS MEETINGS, AND THE LAW OF BURIAL GROUNDS IN THE UNITED STATES* 112 (Albany, William Gould 1866).

<sup>55</sup> *Id.*

<sup>56</sup> Act of Apr. 6, 1784, 1784 N.Y. LAWS ch. 18, at 613-18; N.C. ACTS ch. 11, at 93 (1796); Act of Apr. 6, 1791, § 4, 1790-1791 PA. ACTS ch. 27, at 42-43.

<sup>57</sup> JAMES C. SCOTT, *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* 49-51 (1998).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

groups adjusted their expectations; many new congregations emerged and then resided in a legal world where they expected religious organizations to fit the regulatory structures imposed by the disestablished state.

Limitations on total acreage or value of property (or annual income for a religious corporation) were common elements of this new regulatory map. Both kinds of allowances gradually became more generous—permitting larger acreage, especially in newer western states, or greater income in later decades—but the desirability of these restrictions was widely accepted. Such limitations varied: one acre,<sup>60</sup> two acres,<sup>61</sup> three acres,<sup>62</sup> four acres,<sup>63</sup> five acres,<sup>64</sup> ten acres,<sup>65</sup> twenty acres,<sup>66</sup> and forty acres.<sup>67</sup> Other jurisdictions simply restricted religious organizations to as much property as was used for the purpose of “public worship”<sup>68</sup> or “for the use of the society,”<sup>69</sup> or else mandated that the property be used “for no secular purposes.”<sup>70</sup> In addition, especially later in the antebellum period, some states added limits on the maximum annual income produced by real or personal property, such as \$400,<sup>71</sup> \$900,<sup>72</sup> \$1000,<sup>73</sup> \$2000,<sup>74</sup> \$3000,<sup>75</sup> \$5000,<sup>76</sup> \$6000,<sup>77</sup> \$20,000,<sup>78</sup> or on the total value of real property, such as \$50,000.<sup>79</sup>

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<sup>60</sup> See Act of Dec. 22, 1840, § 1, 1840 IOWA LAWS 9, 9-10. California allowed religious organizations to hold four lots in a town or city and twenty acres in the country. Act of April 22, 1850, CAL. DIGEST OF LAWS ch. 6, § 182, at 57 (Wood 1857).

<sup>61</sup> See Act of Jan. 8, 1803, § 8, 1802-1803 MD. LAWS ch. 111; 1854 N.C. REV. CODE ch. 97, § 2, at 500 (Moore & Biggs 1855); VA. CODE tit. 22, ch. 77, § 12, at 363 (1849); see also D.C. Organic Act of 1801, § 1, 2 STAT. 103, 103-05 (incorporating the laws of Virginia and Maryland respectively).

<sup>62</sup> An Act to Secure Religious Societies Within this Territory in the Possession of Their Churches, and Other Property, § 2, 1838-1839 WIS. STAT. 136, 136.

<sup>63</sup> Act of Feb. 1, 1814, 1813-1814 KY. ACTS ch. 164, at 211-12.

<sup>64</sup> GA. DIGEST OF LAWS 1070 (Cobb 1851); Act effective Mar. 1, 1835, § 1, 1834-1835 ILL. LAWS 147, 147; Acts of Apr. 16, 1838, and July 2, 1839, PA. LAWS. §§ 73-74, at 942 (Purdon & Brightly 1862); Act of Jan. 17, 1844, 1843-1844 TENN. ACTS ch. 110, at 138.

<sup>65</sup> 1846-1847 FLA. ACTS ch. 84, § 38, at 36; see also Act of Jan. 30, 1845, § 5, TEX. DIGEST OF GEN. STAT. LAWS, art. 2066, at 444 (Oldham & White 1859) (exempting up to ten acres from taxation).

<sup>66</sup> Act of Feb. 5, 1819, § 3, 1818-1819 OHIO ACTS ch. 54, at 121.

<sup>67</sup> Act of Dec. 7, 1837, § 1, 1837 ARK. REV. STAT. 657, 657-58 (Ball & Roane 1838).

<sup>68</sup> Act of Feb. 12, 1858, § 4, 1858 KAN. LAWS ch. 66, at 350; see also Act of Apr. 1, 1834, 1834 MASS. LAWS ch. 183, § 7, at 268; 1839 VT. REV. STAT. ch. 81, § 13, at 394.

<sup>69</sup> 1854 N.C. REV. CODE ch. 97, § 2, at 500 (Moore & Biggs 1855).

<sup>70</sup> 1 MICH. COMP. LAWS ch. 68, § 9, at 662 (Cooley 1857).

<sup>71</sup> *Id.* § 3, at 500 (setting limit for any single church).

<sup>72</sup> DEL. REV. STAT. ch. 39, § 11, at 106 (1852).

<sup>73</sup> Act of Dec. 22, 1840, § 1, 1840 IOWA LAWS 9, 9-10; Act of July 3, 1827, 1827 N.H. LAWS ch. 36, at 186.

<sup>74</sup> 1860 MD. CODE art. 26, § 89, at 116.

<sup>75</sup> 1857 ME. REV. STAT. ch. 12, § 3, at 196; MINN. PUB. STAT. ch. 17, § 21, at 280 (Sherburne & Hollinshead 1859); 1858 WIS. REV. STAT. ch. 66, § 8, at 419.

In return for the protections of the corporate form, these statutes paired such limits on wealth and land with other forms of regulation, especially mandatory forms for internal governance. Like the property restrictions, the legislative stipulations for church polity were simple and followed a rough pattern. In virtually all statutes, state legislatures imposed regimes of lay governance. Control of all property and funds was placed in the hands of congregants, not clergy. New Jersey's 1786 statute, for example, required religious societies to elect up to seven trustees, selected by and from the congregation of the organization.<sup>80</sup> Other states varied the number of trustees, ranging from three to fifteen in most cases.<sup>81</sup> Some states, such as New York, limited the vote for trustees to adult men.<sup>82</sup> The key goal, clearly, was to place control in those who were elected by their fellow church members, thereby implicitly limiting the power of clergy, and even denominations, to impose on congregations conditions to which they had not agreed. By passing general incorporation statutes for religious societies, states forcibly democratized and laicized church governance.

### B. *Incorporated Societies*

From one perspective, the regulation imposed on religious societies in return for incorporation was overwhelmingly restrictive, emanating from mistrust of mortmain institutions. Equally important, however, was the empowerment of institutional life associated with the corporate form. Religious corporation statutes were not restricted as to faith tradition or denomination; instead, they extended security of property and state recognition in return for material restrictions. The effects of disestablishment occurred not just in such statutes, but also in the very forms that religious organizations took under the new laws.

In some ways, religious corporations were the wave of the future for all of corporate law. Long before other private groups were allowed the privilege, religious societies were offered incorporation under general statutes. Such legislation provided a simple means of securing corporate status,

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<sup>76</sup> PA. DIGEST OF LAWS 145-46 (Purdon & Brightly 1862).

<sup>77</sup> 1854 N.C. REV. CODE ch. 97, § 3, at 500 (Moore & Biggs 1855) (setting limit for churches or denominations).

<sup>78</sup> Act of Apr. 22, 1850, CAL. DIGEST OF LAWS ch. 6, § 182, at 57 (Wood 1857).

<sup>79</sup> Act of July 1, 1862, § 3, 12 Stat. 501, 501-02 (1862) (imposing the limit on federal territories); ALA. CODE § 1262, at 275 (Ormond, Bagby & Goldthwaite 1852); 1857-1858 TENN. CODE § 1472, at 319 (Meigs & Cooper 1858).

<sup>80</sup> Act of Mar. 16, 1786, § 1, 1785-1786 N.J. ACTS ch. 129, § 1, at 255-56.

<sup>81</sup> See *infra* note 136.

<sup>82</sup> Act of Apr. 5, 1813, § 1, 3 N.Y. REV. STAT. 292, 292-93 (1829).

whereas incorporation for turnpikes, bridges, canals, and—eventually—early railroads, as well as all business, manufacturing, and financial ventures, was obtainable by special legislative charter only. General incorporation statutes for religious organizations dating from the late eighteenth century have led some business law scholars to claim that business corporations as we know them today are the descendants of the 1784 New York statute, for example.<sup>83</sup>

Through incorporation, separation of church and state (if the phrase is anywhere appropriate) entailed freedom of conscience from state control, not freedom of institutional religion from state oversight. Matters of the spirit were no longer within the purview of the government, but things of the world that belonged to churches—land, money, and control over both—remained of deep interest to disestablished states. And the corporate form itself also affected the development of American religion.<sup>84</sup> Corporations became vectors for the channeling of religious energies, imposing structure, procedures, and privileges (as well as discipline) on religious societies. The prospect of such protection drew religious institutions and their members to the law and the powers it promised, as the new legal world for religious organizations meshed with and ultimately directed the course of religious life. As one corporate law scholar noted in another context, “[T]he law provided leverage at points critical to other development, and its marginal effects could determine the balance . . . to fix our direction and the pace at which we moved.”<sup>85</sup> Among the most important of these leverage points was the power to hold property and the duty to use it in carefully confined ways.

### 1. The Nature of “Religious Property”

In the name of disestablishment, general incorporation laws imposed property restrictions on all denominations, not just those that had enjoyed the King’s favor before independence. State statutes limiting religious property tended to be written simply, focusing on total accumulation, rather than the niceties of religious doctrine. These new laws thus generated

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<sup>83</sup> See Act of Apr. 6, 1784, 1784 N.Y. LAWS ch. 18, at 613; RONALD E. SEAVOY, *THE ORIGINS OF THE AMERICAN BUSINESS CORPORATION, 1784–1855*, at 6 (1982); Liam Séamus O’Melinn, *Neither Contract nor Concession: The Public Personality of the Corporation*, 74 GEO. WASH. L. REV. 201, 216–20 (2006); Kellen Funk, *This Stone Which I Erect Shall Be a House of God: Disestablishment and Religious Corporations in New York, 1784–1854*, at 4, 8–10 (June 15, 2013) (unpublished manuscript) (on file with author).

<sup>84</sup> Chief Justice John Marshall wrote that a corporation is “invisible, intangible, and existing only in contemplation of law.” *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819). Yet the corporation and its relationship to public, as well as private, religious life was ubiquitous and influenced government in visible and tangible ways.

<sup>85</sup> HURST, *supra* note 43, at 11–12.

another layer of state involvement, as state judiciaries were called upon to fill in the details of the law of religious corporations, as well as to decide how and when trustees had exceeded their power to control church polity. State judges decided cases that grew out of squabbles among congregants, many of which devolved into litigation and, with distressing predictability, into outright schism. Such lawsuits generally pitted the self-proclaimed “orthodox” members of a congregation (or an entire denomination) against reformers of one stripe or another. In these cases, judges tackled the question head-on with surprising alacrity, deciding whether a given body had betrayed the fundamental precepts of the underlying faith and awarding the property to the party they found most deserving. When religious doctrine conflicted with state legislation limiting religious property, however, judges often did not hesitate to invalidate deeds of transfer, no matter what the faith demanded.

North Carolina, for example, enacted legislation in 1796 that provided for incorporation and continuity of property ownership for religious institutions; that is, current property, including glebe lands, could be retained.<sup>86</sup> But looking forward, North Carolina imposed a stricter discipline. In addition to total limits on property (which could not generate income above £200 annually),<sup>87</sup> the statute prohibited religious societies and their trustees from acquiring any property unless it was “for the sole use” of the society.<sup>88</sup> In other words, North Carolina limited religious societies’ ability to accumulate wealth even as it empowered their formation.

In 1827, the North Carolina Supreme Court held that this limitation invalidated the purchase of slaves by a religious society.<sup>89</sup> It was most certainly not the case that North Carolina prohibited a religious entity from owning slaves; the problem here was that the alleged “purchaser” was the corporation known as the Trustees of the Quaker Society of Contentnea, and the seller was a member of the congregation. The agreement of sale was designed as a means of emancipation (or at least of allowing slaves to live in a condition of substantial freedom and security until they might be manumitted legally).<sup>90</sup> Because a religious association was only allowed to hold property by grace of the state’s 1796 statute, the court held, it was also

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<sup>86</sup> Act of 1796, 2 N.C. PUB. ACTS ch. 11, at 93 (Martin 1804).

<sup>87</sup> *Id.* § 1, at 93.

<sup>88</sup> *Id.* § 2, at 93.

<sup>89</sup> *Trs. of the Quaker Soc’y of Contentnea v. Dickenson*, 12 N.C. (1 Dev.) 189 (1827). The case actually began at least five years earlier. John Spencer Bassett, *Slavery in the State of North Carolina*, in 17 ECONOMIC HISTORY—MARYLAND AND THE SOUTH 317, 384 n.1 (Herbert B. Adams ed., Baltimore, Johns Hopkins Press 1899).

<sup>90</sup> *Dickenson*, 12 N.C. (1 Dev.) at 190.

constrained by the mandate outlined in that legislation—religious societies could only hold property for their own “*use and benefit*.”<sup>91</sup> In a similar case, a bequest in 1799 left slaves to four trustees, one of whom was a Methodist minister.<sup>92</sup> The slaves were to be kept “for the glory of God, and good of said slaves.”<sup>93</sup> When more than two decades later the court determined that the bequest was actually a veiled emancipation device, it was voided as contrary to law.<sup>94</sup>

In *Trustees of the Quaker Society of Contentnea v. Dickenson*, the Quaker Society’s evident desire to emancipate the slaves whenever possible—and to pay them wages in the meantime—meant that this property was held for the benefit of the property itself (that is, the slaves), rather than for the society’s use. The conveyance was voided,<sup>95</sup> and the “sale” for manumission soon atrophied as a Quaker antislavery strategy. In 1830, some 652 slaves had been freed by this device, and 402 more were under Quaker trustees’ care.<sup>96</sup> But by 1856, thanks in large part to litigation surrounding the practice, Quakers had reduced their investment in trustee purchases to a tiny fraction of the sums spent a generation earlier, and only eighteen slaves were under Quaker care.<sup>97</sup>

As the lone dissenting judge in *Dickenson* noted, it was extraordinary to inquire into what a private purchaser intended to do with property that an owner had a legal right to sell.<sup>98</sup> Such an inquiry was an offense against the rights of property owners and purchasers. The corporate form established for religious societies, however, allowed the North Carolina court to probe purchases, sales, and donations in religious institutions more deeply than elsewhere in the antebellum economy. The mandate to limit property only to that used for “religious” purposes—worship, interment, the support of a minister, assistance to impoverished members, and the like—became the catalyst for decisions denying property rights to religious organizations

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<sup>91</sup> *Id.* at 200.

<sup>92</sup> *Huckaby v. Jones*, 9 N.C. (2 Hawks) 120, 120-21 (1822).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*; see also *Thompson v. Newlin*, 38 N.C. 388 (3 Ired. Eq.) 338, 340-41 (1844) (voiding as against public policy deeds and wills which attempted to emancipate slaves); *Stevens v. Ely*, 16 N.C. (1 Dev. Eq.) 493, 493-94, 497-98 (1830) (voiding a contract to sell slaves into partial slavery); *Haywood v. Craven’s Ex’rs*, 4 N.C. (Car. L. Rep.) 360, 367 (1816) (voiding a bequest that contemplated emancipation); THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW, 1619-1860*, at 400-02 (1996) (describing North Carolina courts’ hostility to “quasi-emancipation”).

<sup>95</sup> *Dickenson*, 12 N.C. (1 Dev.) at 190-91, 203.

<sup>96</sup> STEPHEN B. WEEKS, *SOUTHERN QUAKERS AND SLAVERY: A STUDY IN INSTITUTIONAL HISTORY* 228 (Baltimore, Johns Hopkins Press 1896).

<sup>97</sup> *Id.*

<sup>98</sup> 12 N.C. (1 Dev.) at 206-07 (Hall, J., dissenting).

under a variety of different statutory schemes. Freedom of religion thus went hand-in-hand with widespread denial of the capacity of religious organizations to acquire the wealth that had sustained traditional forms of religious authority. In return for incorporation, the state demanded that religious societies bow to the state's policies through the mechanism of property limitations. Such mechanisms, the Quakers learned, could be punitive.

Admittedly, Quakers were small and embattled in North Carolina when *Dickenson* was decided in 1827, and so an invasive judicial decision might not be felt among more popular groups. But the growth among Baptists in the early Republic was stunning. Between 1775 and 1825, Baptists went from dissenting minority to powerful evangelical mainstay.<sup>99</sup> They too found that property limits imposed by statute constrained their liberty. In Maryland, the first state constitution in 1776 disestablished the Church of England (and preserved its current property), but also provided that the legislature had to approve all sales or donations of land to religious organizations.<sup>100</sup> Furthermore, all such property had to be smaller than two acres in size and explicitly dedicated only "for a church, meeting, or other house of worship [or] for a burying ground."<sup>101</sup> In *Grove v. Trustees of the Congregation of the Disciples of Jesus Christ*, a sale of just under two acres of land in trust for "the only proper use and behoof of the said German Baptist Society" (also known as the "Brethren" or simply the "Dunkers") in 1787 resulted in the

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<sup>99</sup> HOWE, *supra* note 43, at 180-82.

<sup>100</sup> MD. DECLARATION OF RIGHTS of 1776, arts. XXXIII & XXXIV.

<sup>101</sup> *Id.* art. XXXIV; *see also* Beatty v. Kurtz, 27 U.S. (2 Pet.) 566, 583 (1829) (noting Maryland's two-acre maximum). The amount was raised to five acres in the 1867 Maryland constitution's Declaration of Rights, eventually vacated in 1948, and repealed entirely in 1977. MD. DECLARATION OF RIGHTS of 1867, art. XXXVIII (repealed 1977). Several states also imposed limits on the percentage of a decedent's estate that could be left to a religious institution and the length of time that must have elapsed between the execution of a will and the time of death. *See, e.g.*, Act of Mar. 22, 1858, § 6, IOWA REV. STAT. § 1198, at 203 (1860) (setting a maximum contribution of twenty-five percent of the estate for decedents leaving a surviving wife, child, or parent); Act of April 26, 1855, 1855 PA. LAWS ch. 347, § 11, at 332 (requiring completion of will or deed at least one month before death). Such statutes generally were defended as means to protect families against "improvident" or "enfeebled" testators. Such bequests were not automatically void, but could be challenged at the election of heirs or next of kin. Kristine S. Knaplund, *Charity for the "Death Tax": The Impact of Legislation on Charitable Bequests*, 45 GONZ. L. REV. 713, 726-28 (2010). Yet the message, especially when paired with widespread property restrictions, was one grounded in suspicion of the actions and motives of churchmen.

Scholars specializing in trust and estate law frequently and mistakenly assume that the category "mortmain" is composed entirely of such testamentary restrictions. *See, e.g.*, John R. Cunningham, *Mortmain Statutes: The Dead Hand Still Survives*, 27 IDAHO L. REV. 49, 49 (1990) ("Mortmain statutes . . . limit testamentary transfers to religious and charitable organizations."); Shirley Norwood Jones, *The Demise of Mortmain in the United States*, 12 MISS. C. L. REV. 407, 408 (1992).

establishment of a cemetery on the land and intermittent worship.<sup>102</sup> But in 1808, the same grantor rewrote the deed, allowing the trustees at their discretion to permit members of other sects to be buried there in addition to Dunkers, and to permit members of other faiths to use the site for worship either together with or in place of the Dunkers.<sup>103</sup>

The whole thing blew up when a rival evangelical group, the Disciples of Christ—which began as a movement within the Baptist tradition but split off in the late 1820s amid growing tension with more mainstream Baptists<sup>104</sup>—laid claim to the land.<sup>105</sup> The Disciples had leased the land from the trustees in return for the promise to build a church; eventually they decided that sharing space with the Dunkers no longer suited their interests. The issue was joined as antagonism between the older, more traditional group and the newcomers boiled over.<sup>106</sup>

The Maryland Court of Appeals held that the initial grant was void: even though the Dunkers had used the land for more than twenty years, the gift had not vested, because they had not sought the approval of the legislature.<sup>107</sup> The court then decided that the lessee religious corporation had acted in good faith reliance on the subsequent grant—they had built a solid house of worship and a brick vault for interment of the dead, and they had paid all taxes and assessments.<sup>108</sup> Thus the Disciples' interest had ripened into a relationship that equity would not disturb.<sup>109</sup> As in this case, the uncertainty of title, where legislative approval was technically required for each sale or lease, made for constant litigation, and courts struggled to untangle often well-meaning but clumsy attempts to satisfy (or circumvent) the law.<sup>110</sup>

Some states focused more on the ways that religious organizations might abuse the generosity of donors to the detriment of the congregation and therefore regulated how church property could be sold or mortgaged. Maine

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<sup>102</sup> 33 Md. 451, 452 (1871). See generally DONALD B. KRAYBILL & CARL F. BOWMAN, *ON THE BACKROAD TO HEAVEN: OLD ORDER HUTTERITES, MENNONITES, AMISH, AND BRETHREN* (2001).

<sup>103</sup> *Grove*, 33 Md. at 454-55.

<sup>104</sup> See generally M.M. DAVIS, *HOW THE DISCIPLES BEGAN AND GREW: A SHORT HISTORY OF THE CHRISTIAN CHURCH* (1915).

<sup>105</sup> *Grove*, 33 Md. at 452-53.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 454.

<sup>108</sup> *Id.* at 456-58.

<sup>109</sup> *Id.*

<sup>110</sup> *E.g.*, *Rogers v. Sisters of Charity of St. Joseph*, 97 Md. 550, 554 (1903) (holding that the establishment of a trust in a religious society to benefit an orphan asylum, where no trustee duties were specified, actually vested fee simple in the asylum).



stipulated that prior appraisal “by three discreet persons under oath, to be elected by ballot at any legal meeting of [the] owners or proprietors” was required before a religious corporation could sell any assets.<sup>111</sup> In *Warren v. Inhabitants of Stetson*, the Supreme Judicial Court of Maine invalidated a transfer of land that had only two of three required signers on the deed.<sup>112</sup> Michigan placed no formal limit on the amount of land, but mandated judicial approval of any sale by a religious group.<sup>113</sup> Georgia set a cap on total property and further limited property ownership to what was “absolutely necessary to carry into effect the objects of [a group’s] incorporation.”<sup>114</sup>

New York State was the largest jurisdiction to require ongoing judicial administration of religious property. The state provided particular rules for individual denominations, including Episcopal, Presbyterian, Reformed Dutch, Dutch Reformed, Free, Quaker, Roman Catholic, and Shaker, together with elaborate rules for the election of trustees by these and other, smaller religious groups, hiring and firing of ministers and priests, purchase of real estate (overseen by courts), the mandate that all title to property vested in the corporation rather than individuals, and so on. Many smaller societies in the state were limited to a maximum income of \$1000 per year as late as the 1840s.<sup>115</sup> New York also required court approval for any sale or mortgage of real property, an onerous impediment designed to protect the wishes of donors against the machinations of clerics, and productive of much litigation.<sup>116</sup>

## 2. The Law of Religious Property and Lay Governance

The new law of religion nourished and channeled enormous change in the American legal system and religious life. For the most part, this was private law, tucked into state codes and worked out in case law by state judges. The results varied, but most state judiciaries, like their legislative counterparts, found themselves addressing questions of ownership, control,

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<sup>111</sup> Act of March 16, 1855, § 2, 1855 ME. ACTS 196, 197.

<sup>112</sup> 30 Me. 231, 235 (1849).

<sup>113</sup> Act of Feb. 13, 1855, § 19, 1855 MICH. LAWS 313, 317.

<sup>114</sup> Act of Dec. 28, 1843, §§ 1–2, 1843 GA. ACTS 108, 108.

<sup>115</sup> For a useful summary of regulations imposed by New York State on specific denominations, see TYLER, *supra* note 54, at 59–90. For current regulation by denomination, see N.Y. RELIG. CORP. LAW §§ 40–437 (McKinney 1990 & Supp. 2012).

<sup>116</sup> See, e.g., *De Ruyter v. St. Peter’s Church*, 3 N.Y. 238, 239, 243 (1850) (holding that vice-chancellor’s approval of a mortgage meant that the church was liable for the debt); *Freligh v. Platt*, 5 Cow. 494, 496 (N.Y. Sup. Ct. 1826) (holding that a sale of pews was not a sale of real estate and did not require court approval); TYLER, *supra* note 54, at 59–140 (detailing New York’s religious laws). By the mid-twentieth century, specific statutory language existed for thirty-five separate denominations. Kauper & Ellis, *supra* note 31, at 1534.

and dissolution for religious corporations. For religious societies in the few states that disallowed incorporation, judge-made doctrines of trust law followed the rough patterns laid out by states with formal incorporation statutes.

This ongoing judicial management was as important as the legislation governing it. The rules that courts developed to guide religious institutions differed on some issues but agreed on many others. Courts disagreed, for example, over whether a donation or purchase in excess of an allowed amount was automatically void or merely voidable if the transaction was challenged.<sup>117</sup> Regardless, the existence of such restrictions must have discouraged many potential donors, especially those who sought legal advice.

Less sophisticated actors frequently were frustrated when they tried to use the law to accomplish their own objectives. For instance, Illinois limited religious corporations to a total of five acres of real property in the mid-1830s.<sup>118</sup> Mormon Church founder Joseph Smith, who together with his followers had established the city of Nauvoo on the banks of the Mississippi River near Carthage in 1839, took advantage of Illinois's 1835 "Act Concerning Religious Societies," which set the five-acre limit on church property in the state.<sup>119</sup> In an effort to disentangle his personal finances from those of the church he led, Smith was named "trustee in trust" and empowered to acquire, manage, and dispose of all real and personal property for the Church of Latter-day Saints.<sup>120</sup> Smith and his wife then transferred from his personal accounts about 240 city lots, totaling 300 acres, to himself as trustee.<sup>121</sup>

At roughly the same time, Smith declared bankruptcy.<sup>122</sup> He listed among his debts a sum of roughly \$5000 to the U.S. government, representing a note on which he stood as surety for the purchase of a steamboat on which the principals had defaulted.<sup>123</sup> Litigation on both the bankruptcy and

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<sup>117</sup> See *infra* notes 125-132 and accompanying text.

<sup>118</sup> Act of Feb. 6, 1835, § 1, 1835 ILL. LAWS 147, 147.

<sup>119</sup> *Id.*

<sup>120</sup> Dallin H. Oaks & Joseph I. Bentley, *Joseph Smith and Legal Process: In the Wake of the Steamboat Nauvoo*, 1976 BYU L. REV. 735, 745-46.

<sup>121</sup> *Id.* at 749.

<sup>122</sup> GLEN M. LEONARD, NAUVOO: A PLACE OF PEACE, A PEOPLE OF PROMISE 168-69 (2002).

<sup>123</sup> See FAWN MCKAY BRODIE, NO MAN KNOWS MY HISTORY: THE LIFE OF JOSEPH SMITH 266 (2d ed. 1971) (listing Smith's debts upon his declaration of bankruptcy in 1842); RICHARD LYMAN BUSHMAN, JOSEPH SMITH: ROUGH STONE ROLLING 433-34 (2005). See generally ROBERT BRUCE FLANDERS, NAUVOO: KINGDOM ON THE MISSISSIPPI 168-71

the note had not been resolved by the time Smith was murdered in 1844.<sup>124</sup> After years of wrangling, a federal court held that the transfer of anything in excess of ten acres from Smith to the church was void under Illinois law.<sup>125</sup> Hundreds of acres thus stayed in Smith's estate and could be seized for satisfaction of the debt, subject only to his widow's dower interest.<sup>126</sup>

Three decades later, Catharine Germain donated her eighty-acre farm in St. Clair County, Illinois, to St. Peter's Roman Catholic Congregation.<sup>127</sup> Her son Nicholas refused to leave the valuable tract of land, and the church brought suit to eject him as a trespasser.<sup>128</sup> At the Illinois Supreme Court, the majority held that ownership of the land had never changed hands because the church already owned the maximum ten acres before Catharine's gift<sup>129</sup>: "[A]ll conveyances . . . made in violation of this prohibition, are absolutely void."<sup>130</sup>

By the middle decades of the nineteenth century, a minority of state courts, beginning with Pennsylvania in 1821, held that title to property acquired in excess of statutory maximums was good against everyone but the state.<sup>131</sup> Justice Craig, dissenting in *St. Peter's Roman Catholic Congregation v. Germain*, argued that the question of whether a religious corporation had exceeded its power when accepting land was one for the state alone, and that an injured relative such as Nicholas had no interest in the farm: "The question is one between the corporation and the sovereign power, in which individuals have no concern."<sup>132</sup>

The issue, of course, was whether the restrictions on property ownership imposed on religious organizations were undertaken fundamentally to

(1965); M. Hamlin Cannon, *Bankruptcy Proceedings against Joseph Smith in Illinois*, 14 PAC. HIST. REV. 425 (1945) (collecting correspondence detailing Smith's bankruptcy proceedings).

<sup>124</sup> See generally JOHN C. BENNETT, *THE HISTORY OF THE SAINTS: OR, AN EXPOSÉ OF JOE SMITH AND MORMONISM* 96-98 (Univ. of Illinois Press 3d ed. 2000) (1842) (providing additional background on the bankruptcy litigation).

<sup>125</sup> Oaks & Bentley, *supra* note 120, at 773-78. By 1845, the state had increased the amount of property a church could hold to ten acres. Act of Mar. 3, 1845, § 44, 1844-1845 ILL. REV. STAT. 111, 120.

<sup>126</sup> *Id.*

<sup>127</sup> *St. Peter's Roman Catholic Congregation v. Germain*, 104 Ill. 440, 443 (1882).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 447.

<sup>130</sup> *Id.* at 446.

<sup>131</sup> See, e.g., *Leazure v. Hillegas*, 7 Serg. & Rawle 313, 318-22 (Pa. 1821). For analogous reasoning regarding secular organizations, see generally Arthur M. Alger, *Consequences of Illegal or Ultra Vires Acquisition of Real Estate by a Corporation*, 8 HARV. L. REV. 15 (1894).

<sup>132</sup> *Germain*, 104 Ill. at 448 (Craig, J., dissenting); see also *De Camp v. Dobbins*, 31 N.J. Eq. 671, 688-96 (1879) (holding religious society that already held maximum amount of property allowed by statute could not receive a charitable bequest).

protect individual rights of conscience against religious orthodoxies, or instead were designed to protect the secular state against a potentially dangerous rival bolstered by claims of divine authority. As one scholar described it, traditionally “[m]ortmain is the composite legislative response to attacks upon the viability of the state from within from institutions that would compete with the lawful government for control.”<sup>133</sup> By the early decades of the nineteenth century in America, however, both liberal Protestants in the North and conservative Southerners (except in cases involving slavery) generally privileged the individualized interpretation. They elevated personal belief and conscientious scruple above organized religion. In so doing, they limited the power of religious leaders and the organizations they led, to allow free entrance and exit for members, and to protect individuals against new incarnations of religious authority.<sup>134</sup>

State statutes also provided for lay management of religious corporations as part of the system of disestablishment. Acting like a disestablished state meant mandating the protection of individual citizens—giving them the power not only to choose a religion, but also to control it. In a study of how corporations became a means of organizing communities and enterprises, one scholar noted that the imposition of democratic rule on corporations through legislative mandates reflected republican ideals: “The corporation . . . became, and remains, a child of the American Revolution and a testament to its enduring impact, for good and for ill, on the political and social structure . . . of the United States.”<sup>135</sup> In the story of the gradual embrace of the corporation, this article suggests, we should recognize that religious corporations were the first major private associations to incorporate. Equally important, religious corporations were key players in achieving the acceptance of the corporate form, bound up with the commitment to disestablish, on the one hand, and the protection of individual conscience, on the other.

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<sup>133</sup> See A.H. Oosterhoff, *The Law of Mortmain: An Historical and Comparative Review*, 27 U. TORONTO L.J. 257, 257 (1977).

<sup>134</sup> See *Scott v. Thompson*, 21 Iowa 599 (1866) (requiring a “fraudulent” prophet to return property donated by followers, because he had abused their trust); *Gass & Bonta v. Wilhite*, 32 Ky. (2 Dana) 170 (1834) (upholding Shaker contract against seceding members, because they had full notice of terms and chose to join the religious society); CAROL WEISBROD, *THE BOUNDARIES OF UTOPIA* 79, 115-61 (1980) (noting that state, not divine, law controlled in antebellum America); *Judicial Decision—On Community*, DAILY NAT’L INTELLIGENCER, Dec. 19, 1827, at 3 (reporting on the 1820 New Hampshire Superior Court case, *Heath v. Draper*, which rejected the claim of a former member of the Society of Shakers, on the ground that standard law of contract, not evaluation of the truth of the underlying religion, governed the dispute).

<sup>135</sup> See Maier, *supra* note 31, at 84; see also HURST, *supra* note 43, at 11.

Trustees were the bridge between the congregation and the state. Trustees, chosen democratically and ruling by majority vote, became the recognized and legitimate embodiment of a religious society. In order to hold property securely, general incorporation statutes required religious institutions to elect trustees from among their members,<sup>136</sup> blending traditional charitable concepts of trust law and trusteeship with religious institutions. In this way as well, states adapted traditional categories to suit a new environment, blending older concepts to generate a roadmap for the ongoing management of religious corporations. Some statutes included rules for voting, specifying in certain cases that all white male members were enfranchised.<sup>137</sup> The minimum number of trustees was often three, and the maximum ranged from five up to fifteen.<sup>138</sup> Once elected, trustees were incorporated as a unit and took control of all church property.<sup>139</sup> Thereafter, they held title to land and financial assets, and managed the affairs of the church.<sup>140</sup> In Kansas, the state constitution even required that all religious property be held by trustees elected by the membership.<sup>141</sup> Even those states

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<sup>136</sup> See, e.g., ALA. CODE § 1257, at 274 (Ormond, Bagby & Goldthwaite 1852) (allowing three to nine trustees); Act of Dec. 7, 1837, ARK. DIGEST OF STAT. ch. 144, § 1, at 899 (Gould 1858) (unspecified number of trustees); Act of Apr. 22, 1850, CAL. DIGEST OF LAWS ch. 6, § 175, at 56 (Wood 1857) (three to fifteen trustees); CONN. GEN. STAT. § 206, at 133 (1866) (at least three trustees); DEL. REV. STAT. ch. 39, §§ 1-2, at 105 (1852) (three to twelve trustees); 1846-1847 FLA. ACTS ch. 84, § 38, at 36 (up to ten trustees); Act of Dec. 3, 1805, GA. DIGEST OF LAWS 899 (Cobb 1851) (unspecified number of trustees); Act of 1845, § 44, ILL. STAT. 979, 980 (Treat, Scates & Blackwell 1858) (up to ten trustees); Act of June 17, 1852, 1 IND. REV. STAT. ch. 101, §§ 1, 9, at 459-60 (1852) (three to five trustees); Act of Mar. 22, 1858, § 6, IOWA REV. STAT. § 1195, at 202 (1860) (unspecified number of trustees); Act of Feb. 1, 1814, 1813-1814 KY. ACTS ch. 164, at 211-12 ("not exceeding five" trustees); 1860 MD. CODE art. 26, § 88, at 165 (five to thirteen trustees); 1 MICH. COMP. LAWS ch. 68, § 2, at 660 (Cooley 1857) (three to nine trustees); MINN. PUB. STAT. ch. 17, § 15, at 279 (Sherburne & Hollinshead) (three to nine trustees); Act of Mar. 16, 1786, § 1, 1785-1786 N.J. ACTS ch. 129, § 1, at 255-56 (up to seven trustees); 1854 N.C. REV. CODE ch. 97, § 3, at 500 (Moore & Biggs 1855) (a "suitable number" of trustees); 1 OHIO REV. STAT. ch. 29, § 83, at 305-06 (Swan 1860) (at least three trustees); Act of Oct. 24, 1864, § 2, OR. GEN. LAWS ch. 4, at 633 (Deady 1866) (at least three trustees); PA. DIGEST OF LAWS 866 (Purdon & Brightly 1862) (unspecified number of trustees); 1857-1858 TENN. CODE § 1467, at 318 (Meigs & Cooper 1858) (three to nine trustees); TEX. DIGEST OF LAWS art. 2063, at 443 (Oldham & White 1859) (three to nine trustees).

<sup>137</sup> See, e.g., Act of Apr. 6, 1784, 1784 N.Y. LAWS ch. 18, at 614.

<sup>138</sup> See *supra* note 136.

<sup>139</sup> See Act of Apr. 6, 1784, 1784 N.Y. LAWS ch. 18, at 614-15; *Trs. of Ministerial Fund and School Fund in Levant v. Parks*, 10 Me. 441 (1833) (holding that an action could be brought by the trustees of a corporation as a group).

<sup>140</sup> ZOLLMAN, *supra* note 21, at 49-53 (discussing the role of trustees empowered to control property); Kauper & Ellis, *supra* note 31, at 1509-12.

<sup>141</sup> KAN. CONST. art. XII, § 3 (1859) (repealed 1974); see also KAN. GEN. LAWS ch. 44, § 38 (1862) (requiring a minimum of three trustees). Some lay trustee control, even among Catholics, is still present in America. See, e.g., *Krauze v. Polish Roman Catholic St. Stanislaus Parish*, No. 0822-

(e.g., Virginia, West Virginia, Arkansas, Rhode Island) that did not allow churches to incorporate still allowed trustees to manage church property, generally as a matter of judge-made common law.<sup>142</sup> Yet the key to all such property holding was lay control.

One might assume that this deference to individual interests would prove an unwelcoming environment for the development of powerful religious institutions. The assumption would be mistaken, however, especially because fast-paced growth in religious communities accompanied the discipline of disestablishment. Popular religious leaders (as opposed to the old fogies) found themselves empowered by the new regime. These upstarts changed forever the way we think about religious life in America, invigorating religious institutions, especially new ones.<sup>143</sup> It is a remarkable story, one in which a vigorous “market” in religion flourished amid sharp restrictions on institutional liberty.<sup>144</sup>

## II. ENTHUSIASM AND REGULATION

The generation that came of age around the turn of the nineteenth century participated in one of the largest revivals of religion in history, known to posterity as the Second Great Awakening. This generation inherited a world in which traditional authority had been overturned. The Revolution and its aftermath plunged the nation into bitter controversies over religion and its place in the new nation, as well as the relationship between individuals and God. As we have seen, disestablishment was felt at the local level

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CC07847, at 33 (Mo. Cir. Ct. 2012), available at [http://piotr.sabrestlouis.com/2012\\_03\\_15\\_JUDGMENT\\_St.Stanislaus.pdf](http://piotr.sabrestlouis.com/2012_03_15_JUDGMENT_St.Stanislaus.pdf) (holding in favor of the independent operation of a parish); Tim Townsend, *St. Louis Archdiocese and St. Stanislaus Reach Settlement that Makes Church Independent*, ST. LOUIS POST-DISPATCH (Feb. 14, 2013), [http://www.stltoday.com/lifestyles/faith-and-values/st-louis-archdiocese-and-st-stanislaus-reach-settlement-that-makes/article\\_c876ca45-4999-5a2b-8b5b-03a7a48ab145.html](http://www.stltoday.com/lifestyles/faith-and-values/st-louis-archdiocese-and-st-stanislaus-reach-settlement-that-makes/article_c876ca45-4999-5a2b-8b5b-03a7a48ab145.html) (describing the St. Louis Archdiocese’s settlement with the local parish).

<sup>142</sup> See Act of Dec. 7, 1837, § 1, ARK. DIGEST OF STAT. 899, 899 (Gould 1858) (enabling trustees to hold and manage lands for religious societies); VA. CODE tit. 22, ch. 77, §§ 8–9, 362-63 (1849) (enabling Circuit Court–appointed trustees to manage religious congregations’ property). For the laws of Rhode Island and West Virginia, see TYLER, *supra* note 54, at 344-49.

<sup>143</sup> Several of early America’s powerful national religious leaders appear in this study. See, for example, *infra* notes 157, 175 & 192, for references to, respectively, Charles Grandison Finney, Richard Allen, and John England, and *supra* notes 119-126, for Joseph Smith. There are many hundreds of others whose inspiration changed the lives of those around them. See generally WHITNEY R. CROSS, *THE BURNED-OVER DISTRICT: THE SOCIAL AND INTELLECTUAL HISTORY OF ENTHUSIASTIC RELIGION IN WESTERN NEW YORK, 1800–1850* (Harper & Row 1965) (1950).

<sup>144</sup> For an exploration of religious markets and marketing in the early national period, see R. LAURENCE MOORE, *SELLING GOD: AMERICAN RELIGION IN THE MARKETPLACE OF CULTURE* 12-65 (1994).

far more poignantly than in, for example, Congress as it debated the Establishment and Free Exercise Clauses of the Bill of Rights.<sup>145</sup> It also played out in individual lives, as Americans in the early nineteenth century wrestled with the ways that religious authority was reconfigured and limited after the demise of state-supported religion. As one outraged but now-marginalized Connecticut minister lamented after the vote in 1818 to disestablish the state's Standing Order, "It was as dark a day as ever I saw. The odium thrown upon the ministry was inconceivable."<sup>146</sup>

Legislatures' eroding respect for churchmen reflected the prevailing political sentiment, but also had roots in religious life. The rejection of involuntary religious practice that underpinned disestablishment accelerated developments already underway in Protestant thought and among more free-thinking Catholics. Historians of religion disagree about the root causes of the changes in religious life that followed disestablishment: some claim the outpouring of religious fervor of the Second Great Awakening was a reflection of the energies unleashed by religious liberty, while others claim religious communities became refuges from the disaster of early national American political life. From one perspective, the explosion of popular religious enthusiasm was itself a democratization of American Christianity, rooted in the new freedom to express and embrace heartfelt piety.<sup>147</sup> Viewed from a different angle, the same liberation of religious life fed into a vacuum of authority—the chaos and destructive tenor of early national politics, so the argument goes, backlit the civilizing benefits of religious community.<sup>148</sup> Instead of embracing the democratic virtues of American politics, one recent work charges, religious leaders often traded in fear and condemnation rather than joy and liberation.<sup>149</sup>

Whether condemned for entrenching the "blinding mistrust of secular politics"<sup>150</sup> or celebrated as embracing the "aspirations of society's outsiders,"<sup>151</sup> the Second Great Awakening was powered by disestablishment.

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<sup>145</sup> See generally Kenneth R. Bowling, *"A Tub to the Whale": The Founding Fathers and Adoption of the Federal Bill of Rights*, 8 J. EARLY REPUBLIC 223 (1988) (detailing the highly political history of the passage of the Bill of Rights).

<sup>146</sup> 1 THE AUTOBIOGRAPHY OF LYMAN BEECHER 252 (Barbara M. Cross ed., 1961) (1864).

<sup>147</sup> See generally NATHAN O. HATCH, THE DEMOCRATIZATION OF AMERICAN CHRISTIANITY (1989).

<sup>148</sup> See AMANDA PORTERFIELD, CONCEIVED IN DOUBT: RELIGION AND POLITICS IN THE NEW AMERICAN NATION 5-13 (2012).

<sup>149</sup> See *id.* at 2, 11, 106, 130 (showing that, by cultivating mistrust and fear of chaos, religious leaders taught Americans to value faith over reason).

<sup>150</sup> *Id.* at 11.

<sup>151</sup> HATCH, *supra* note 147, at 226.

Liberty from government-controlled religion upended some forms of traditional authority, creating space for great innovation. Yet the state did not bow out of the equation. Instead, it reconfigured its approach, ceding some organizational authority, but imposing limits on wealth and requiring lay control. In this light, an appreciation of the tenor of disestablishment brings the state back in to the narrative of religious revival.<sup>152</sup> Paying close attention to how disestablishment was implemented teaches us not only about religion, but also about how the state (or states, as this study demonstrates) made sense of a new politics of religion.

From this more complete vantage point, it is clear that historical works that treat the Awakening either as the product of individual enthusiasm or as an outgrowth of political failure implicitly assume a separation of government from religious life that never really happened. Instead, disestablishment greatly changed—but did not destroy—the relationship between religion and government. The new regime included substantial independence, but also significant regulation. Rather than being a “free market” in religion, this was an administered market, where interactions often took place without direct government intervention, but still within the broad parameters set by state laws on religious societies. The legal regime profoundly affected religious communities and the resolution of disagreements therein. The new discipline restricted wealth and imposed lay control, creating new arenas for activity by many groups, but also setting limits that generated new stresses.

#### A. *A Regulated Market for Faith*

As disestablishment took root, denominations competed for members. Mobility in the population and among preachers made for great excitement, especially when a revivalist came to town or camp meetings drew worshippers from afar. As the capacity to choose among denominations or ministers settled in to common experience, the focus on individual moral capacity grew commensurately. Debate grew hot over the moral responsibility of individuals and their ability to experience God’s grace directly. Fervent abolitionism was one aspect of such debates, but others also erupted after believers had been freed from the restraints imposed by established

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<sup>152</sup> See THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* 525-40 (1992) (arguing that protective social legislation in the late nineteenth century establishes the value of “bringing the state back in” as a subject of historical inquiry).



religion.<sup>153</sup> In cultural and spiritual terms, the one-size-fits-all approach to disestablishment produced a (very) rough equality of opportunity among religious actors. With no official machinery dedicated to advancing or hindering individual faith and practice, the growth in new voices, new methods, new doctrines, and, especially, popular appeals to individual conscience, all meant stunning change.

Parishioners felt new power to vote not only with their feet, but also with lawsuits. When they left, fired a minister, or split into factions, the resulting legal battles echoed the waves of conversions that characterized the Awakening. What the contestants may not have recognized at the time, but is evident in retrospect, is that disestablishment created space for growth, but also set limits on how much wealth and power a religious organization could acquire. General incorporation statutes imposed boundaries on real and personal property, while lay control of church corporations undercut the power of the clergy. Together, these new rules sculpted both the fabulous growth in popular religious life and the way that disputes were conceived and resolved. In what follows, I focus on just the most prominent examples of the relationship between religious enthusiasm and disestablishment.<sup>154</sup>

Religious developments also focused on lay empowerment. Baptist and Methodist preachers, many of them appealing to common people in simple language, reaped a rich harvest in the South and West in the early nineteenth century. Across the North, evangelicals, Unitarians, transcendentalists, and liberal Protestants elevated individual religious experience. Upstate New York was so afire with successive waves of popular religious enthusiasm that it became known as the “burned-over” district.<sup>155</sup>

Evangelical preacher and recovering lawyer Charles Grandison Finney, for one, claimed that individual Christians were capable of achieving their own salvation without the aid of clerics. In theological terms, they were charged with the individual duty to experience holiness, rather than a collective mandate to obey doctrine.<sup>156</sup> Personally, when faced with a difficult question, Finney “spread the subject before God, and soon made up

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<sup>153</sup> On the early national and antebellum eras as blending spiritual with political focus on individual perfectibility and abolitionism, see generally ROBERT H. ABZUG, *COSMOS CRUMBING: AMERICAN REFORM AND THE RELIGIOUS IMAGINATION* (1994); RICHARD J. CARWARDINE, *EVANGELICALS AND POLITICS IN ANTEBELLUM AMERICA 199-234* (1993).

<sup>154</sup> The field is ripe for additional research, which will provide vital insights into the relationship of law and religion in this formative era of American law.

<sup>155</sup> See generally CROSS, *supra* note 143; HATCH, *supra* note 147, at 162-89; PORTERFIELD, *supra* note 148, at 78-112.

<sup>156</sup> ROBERT H. ABZUG, *PASSIONATE LIBERATOR: THEODORE DWIGHT WELD AND THE DILEMMA OF REFORM 245-58* (1980).

[his] mind what to do.”<sup>157</sup> He threw out the collected wisdom of the fathers, in other words, in favor of his own inspiration. Like the Presbyterian Finney, most Baptists and many Methodists also trusted individual conscience over the collected wisdom of elders, be they religious or political.<sup>158</sup> As one scholar put it, “humans [now] had a direct channel to God, unmediated by civil or ecclesiastical authorities.”<sup>159</sup>

To this generation, intellect seemed a poor substitute for intuition; genuine and unscripted experience occurred outside the purview of scholars. Access to the spirit was the key, rather than immersion in theological debates or learned discourse. Enthusiastic preaching, dreams, visions, and long-suppressed folk beliefs and practices all sustained the conversions of everyday folk, no matter how rough their education: “[L]arnin’ [sic] isn’t religion, and eddication [sic] don’t give a man the power of the Spirit,” declared one anonymous evangelist.<sup>160</sup> The phenomenally successful Methodist itinerant Lorenzo Dow exemplified the popular spirit; he preached anywhere and everywhere—shaking, crying, pleading—in ragged clothing and with wild gesticulations and frequent convulsions.<sup>161</sup>

Thanks to general incorporation statutes in many states, religious communities did not need sophistication or political influence to acquire legal protection. All they needed was a simple form, and generally a small sum to defray filing costs, in order to achieve legal recognition as an incorporated society. The power of the corporate form allowed untutored leaders such as Lorenzo Dow (or Joseph Smith, for that matter) to organize existing believers and new converts, and to win the same level of legal recognition that went to more established religious bodies. The simplicity of the system appealed to ordinary folk because of the ease with which the statutory provisions could be satisfied. The efflorescence of such organizations

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<sup>157</sup> See CHARLES E. HAMBRICK-STOWE, *CHARLES G. FINNEY AND THE SPIRIT OF AMERICAN EVANGELICALISM* 92-93 (1996) (noting that, for Finney, individual capacity meant salvation was a moral and spiritual choice); see also CHARLES G. FINNEY: *AN AUTOBIOGRAPHY* 304 (Fleming H. Revell Co. 1908) (1876); Elizabeth B. Clark, *Anticlericalism and Antistatism* 4-5 (n.d.) (unpublished manuscript) (on file with author).

<sup>158</sup> See ABZUG, *supra* note 156 at 127-62; WILLIAM G. MCLOUGHLIN, *REVIVALS, AWAKENINGS AND REFORM: AN ESSAY ON RELIGION AND SOCIAL CHANGE IN AMERICA, 1607-1977*, at 98-140 (1978).

<sup>159</sup> Clark, *supra* note 157, at 7.

<sup>160</sup> 1 SAMUEL G. GOODRICH, *RECOLLECTIONS OF A LIFETIME* 196 (N.Y., Miller, Orton & Co. 1856).

<sup>161</sup> LORENZO DOW, *HISTORY OF COSMOPOLITE; OR JOURNAL OF LORENZO DOW* 176, 202 (Pittsburgh, Israel Rees 1849).

testifies both to the effectiveness of the new preaching and the appeal of the roughly level playing field achieved by incorporation.<sup>162</sup>

The power to choose, therefore, was expressed in both religious doctrines and corporate organization. Each affected the other, bringing the new corporations into immediate engagement with the aspirations of congregants. Religious doctrine and congregants' own convictions were united in the new organizations; or, if a group disagreed about what its goals and commitments truly were, then the power to leave and create a new corporation came quickly into play, bringing with it a destructive potential. Churches, like the new country, found themselves pulled apart by the great religious and political questions of the age.<sup>163</sup>

The power of the common people to decide their own religious allegiances implied that slavery—to name the most hotly and frequently debated question—was a violation of God's law of freedom of conscience. "[P]rofessed piety toward God is . . . base and spurious," proclaimed one abolitionist minister in 1832, "[if] not united with benevolence for men."<sup>164</sup> At the same time, the presence of enslaved persons in the pews highlighted and challenged the antiauthoritarian assumptions of lay empowerment.

The contrast between what disestablishment accomplished and what it left untouched was stark: legal constraints on the body to coerce belief were eliminated, yet coercion of the body in slavery survived and eventually deepened and spread. The disparity was a matter of deep religious import.<sup>165</sup> As one dedicated abolitionist put it in language drawn directly from political life, a true church in America had to embrace freedom for all: "[A] church *ought* to be an anti slavery Society (for certainly [the bible] is both an Anti Slavery Constitution and Declaration of Sentiments) . . . ."<sup>166</sup>

<sup>162</sup> CROSS, *supra* note 143, at 3-4; Sidney E. Mead, *American Protestantism During the Revolutionary Epoch*, in RELIGION IN AMERICAN HISTORY: INTERPRETIVE ESSAYS 166-67 (John M. Mulder & John F. Wilson eds., 1978).

<sup>163</sup> See *infra* text accompanying notes 191-241.

<sup>164</sup> BERIAH GREEN, FOUR SERMONS, PREACHED IN THE CHAPEL OF THE WESTERN RESERVE COLLEGE 41 (Cleveland, Office of the Herald 1833) (emphasis omitted).

<sup>165</sup> Some observers have made similar points. See, e.g., Rhys Isaac, "The Rage of Malice of the Old Serpent Devil": The Dissenters and the Making and Remaking of the Virginia Statute for Religious Freedom, in THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM: ITS EVOLUTION AND CONSEQUENCES IN AMERICAN HISTORY 139, 163 (Merrill D. Peterson & Robert C. Vaughan eds., 1988).

<sup>166</sup> Letter from J.A. Thome to Theodore Dwight Weld (Feb. 7, 1839), in 2 LETTERS OF THEODORE DWIGHT WELD, ANGELINA GRIMKÉ WELD AND SARAH GRIMKÉ, 1822-1844, at 750, 751 (Gilbert H. Barnes & Dwight L. Dumond eds., De Capo Press 1970) (1934). See generally GEORGE BOURNE, THE BOOK AND SLAVERY IRRECONCILABLE (Phila., J.M. Sanderson & Co. 1816); David Brion Davis, *The Emergence of Immediatism in British and American*

With escalating virulence, slaveholders fought back against such emancipatory religious theories and their proponents; by the second quarter of the nineteenth century, slave revolts had been kindled in the pews of new evangelical movements, which were then brutally suppressed in reprisal.<sup>167</sup> Across the South, especially in Virginia, lay control had been common even before disestablishment. After the Revolution, the slaveholding laity recreated religious authority by encouraging “voluntary” submission to divine governance. Virginia slaveholders, that is, deployed their reconstituted power within a disestablished church to ensure that older patterns of dominance were reinscribed and updated. In this way, slaveholders and their supporters ostensibly catered to the egalitarian aura of disestablishment, while also providing a familiar protective privilege for slaveholding.<sup>168</sup>

Yet the direct connection between God and the individual had other more genuinely equalizing, even antiauthoritarian, effects. The religious experience of farmers or laborers—as opposed to the abstractions of elite clerics—gained credence in disestablishment. The common people, explained one radical evangelist, had followed Jesus even as “the *monarchical, aristocratical* and *priestly* authorities cried ‘crucify him!’”<sup>169</sup> When individual spirituality acquired pride of place, traditional clerical authority, much like traditional modes of funding for religious institutions, became vulnerable to a more popular model. The emerging relationship between disestablishment and individual religious experience generated support for lay stewardship of religious organizations, especially because ordinary people could be trusted to recognize the divine in their lives.

This focus on individual capacity to discern God’s will also played out in attacks on civil commands. The potential for anarchy was evident even among highly educated young men such as Ralph Waldo Emerson. As Emerson’s compatriot Bronson Alcott said,

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*Antislavery Thought*, 49 *MISS. VALLEY HIST. REV.* 209 (1962); Anne C. Loveland, *Evangelicalism and “Immediate Emancipation” in American Antislavery Thought*, 32 *J.S. HIST.* 172 (1966).

<sup>167</sup> See, e.g., DOUGLAS R. EGERTON, *HE SHALL GO OUT FREE: THE LIVES OF DENMARK VESEY* 154-74 (Rowman & Littlefield rev. ed. 2004) (1999) (discussing the response to Denmark Vesey’s planned slave rebellion in Charleston, South Carolina, in 1822). For a detailed account of the Vesey rebellion, see Thomas Wentworth Higginson, *Denmark Vesey*, 7 *ATLANTIC MONTHLY* 728 (1861), available at <http://www.theatlantic.com/past/issues/1861jun/higgin.htm>. White authorities destroyed the African Methodist Episcopal Church there when they discovered the plot, convinced that the church had been at the center of the rebellion.

<sup>168</sup> See BUCKLEY, *supra* note 48, at 7-54, 141-43; PORTERFIELD, *supra* note 148, at 172-75.

<sup>169</sup> BENJAMIN AUSTIN, *CONSTITUTIONAL REPUBLICANISM, IN OPPOSITION TO FALACIOUS FEDERALISM* 213-14 (Bos., Adams & Rhoades 1803).

Church and State are responsible to me; not I to them. They cease to deserve our veneration from the moment they violate our consciences. . . . Why would I employ a church to write my creed or a state to govern me? Why not write my own creed? Why not govern myself?<sup>170</sup>

Contests between anarchy and government in religion (as well as politics) found expression in both legal disputes and judicial resolution of such conflicts. Often, courts privileged individual conscience by upholding the actions of lay trustees, even against long-established religious traditions.

### B. *Going to Law*

Creating a legal framework for religious institutions meant that law in turn became fundamental to the understanding of what it meant to be a religious institution. This shift occurred in litigation as well as through legislation. Litigation over new methods and unorthodox beliefs wracked churches across the new nation. Lay control of church property meant that disagreements over individual conscience often migrated into courtrooms, where judges faced bitter fights between congregations and their ministers, fights between two (or more) factions in a congregation, or even challenges from one or more congregations to a bishop or general conference. In courtrooms, the regulations imposed by state legislatures were interpreted and applied, deepening the relationship between the system of disestablishment and the course of religious life. Religious societies had been explicitly recognized and limited by positive state laws: determining the contours of these laws drew litigants to the state venue for finding such meaning—that is, to the courts.

Ironically, then, popular religious enthusiasm and official disestablishment drew courts and legislatures more rather than less deeply into religious life. Often, members or former members asked courts to endorse doctrinal changes and increased power for individuals against opposition, or they opposed such change against new heresies. The amount of litigation is staggering. At every turn, quarrels devolved into arguments over church polity, the rights of congregants, the disposition of church property, and the

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<sup>170</sup> Richard O. Curry & Lawrence B. Goodheart, *Individualism in Trans-National Context*, in *AMERICAN CHAMELEON: INDIVIDUALISM IN TRANS-NATIONAL CONTEXT* 1, 8 (Richard O. Curry & Lawrence B. Goodheart eds., 1991) (citing Lewis Perry, *Versions of Anarchism in the Antislavery Movement*, 20 *AM. Q.* 768, 771 (1968)).

standing of ministers.<sup>171</sup> State reports of cases are littered with such disputes,<sup>172</sup> but none were as all-consuming as battles over slavery.

There were rough differences in legal strategy and outcome by region and denomination, as well as many similarities. Abolitionists from New England, New York, and Pennsylvania challenged religious orthodoxy in part because they were so convinced that slavery violated essential Christian mandates. By the 1830s, they were disillusioned by religious organizations' silence on the question. Many advocated nonsectarian "come-outerism," and by the tens of thousands left traditional denominations in the interest of "Christian fellowship" over "[corrupt] church connection[s]."<sup>173</sup> Even those who remained behind felt the pull of conscience so deeply that cracks began to appear in many Protestant denominations over the issue of slavery, widening within a decade into wrenching schisms.<sup>174</sup>

Such movements deepened the fission within religious groups, which were already riven by the empowerment of the laity. By the late 1790s, Richard Allen in Philadelphia and other African American religious leaders from Baltimore, New York, and New Jersey reacted to increasing racism by withdrawing from interracial churches and starting down the path that led in 1816 to founding their own denomination, the African Methodist Episcopal Church (AME). A long and bitter legal controversy over church property finally vindicated the claims of the AME Church and its members to the property of Bethel Church and the right to choose their own preachers.<sup>175</sup>

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<sup>171</sup> See generally BUCKLEY, *supra* note 48, at 116-43.

<sup>172</sup> See, for example, the series of cases that surrounded the formation and early years of separate "African" churches, such as the churches known as Mother Bethel and St. Thomas's African Episcopal Church. *Commonwealth v. Cain*, 5 Serg. & Rawle 510 (Pa. 1820) (holding trustees could alter articles of incorporation to exclude those in arrears on pew rents from voting in trustee elections); *Green v. African Methodist Episcopal Soc'y*, 1 Serg. & Rawle 254 (Pa. 1815) (holding disaffected member could not be ejected without majority vote of trustees).

<sup>173</sup> WILLIAM GOODELL, *COME-OUTERISM: THE DUTY OF SECESSION FROM A CORRUPT CHURCH* 36 (N.Y., Am. Anti-Slavery Soc'y 1845); RONALD G. WALTERS, *THE ANTI-SLAVERY APPEAL: AMERICAN ABOLITIONISM AFTER 1830*, at 48-49 (1976). See generally John R. McKivigan, *The Antislavery "Comeouter" Sects: A Neglected Dimension of the Abolitionist Movement*, 26 *CIV. WAR HIST.* 142 (1980).

<sup>174</sup> See generally CARWARDINE, *supra* note 153, at 199-234; C.C. GOEN, *BROKEN CHURCHES, BROKEN NATION: DENOMINATIONAL SCHISMS AND THE COMING OF THE AMERICAN CIVIL WAR* (1985).

<sup>175</sup> For additional information on this controversy, see Sarah Barringer Gordon, *The African Supplement: Religion, Race, and Corporate Law in Early National America* (2013) (unpublished manuscript) (on file with author). See also generally CAROL V.R. GEORGE, *SEGREGATED SABBATHS: RICHARD ALLEN AND THE EMERGENCE OF INDEPENDENT BLACK CHURCHES, 1760-1840* (1973); GARY B. NASH, *FORGING FREEDOM: THE FORMATION OF PHILADELPHIA'S BLACK COMMUNITY, 1720-1840*, at 227-33 (1988); RICHARD S. NEWMAN, *FREEDOM'S PROPHET: BISHOP RICHARD ALLEN, THE AME CHURCH, AND THE BLACK FOUNDING*

The Methodist Episcopal Church was itself a new denomination in the late eighteenth century, founded only in 1784 as the former Church of England devolved into a more conservative and restrained Episcopal Church.<sup>176</sup> The Methodists were a tiny new group, followers of John Wesley's "methodistical" (and far more raucous and expressive) approach to worship.<sup>177</sup> Lay exhorters and itinerant preachers—few of whom were formally educated in the faith—led meetings and love feasts that yielded a rich harvest of converts, especially along the fringes of society. Methodism's adherents numbered a negligible 1000 in 1776, but swelled to 250,000 by 1820 and 500,000 by 1830.<sup>178</sup> Hidden in these phenomenal increases, however, lay conflict—especially over race and slavery. Because such conflict took place within and between corporations, resolution generally turned on the powers of trustees, the scope of religious authority, and, of course, the control of church property.

### C. *The Trouble with Conscience*

Schism, the bane of organization, became a constant in American religious life within a generation of disestablishment. With incorporation statutes, states had created a template for organization, but they did not provide for continuity. To do so would have meant privileging authority in a more traditional sense, denying the power of congregants to change and to reflect that change in institutional structures. And change they did: especially on issues of race and slavery, religious societies became sites of fierce and divisive conflict. The danger of lay empowerment was revealed in the brittleness of religious societies. Fracture became a byproduct of the legal structures imposed on religious corporations, combined with the great tension that flowed from vibrant religious practice among diverse and divergent American communities, on the one hand, and slavery, on the other.

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FATHERS (2008); Will B. Gravely, *African Methodisms and the Rise of Black Denominationalism*, in *RETHINKING METHODIST HISTORY: A BICENTENNIAL HISTORICAL CONSULTATION* 111 (Russell E. Richey & Kenneth E. Rowe eds., 1985).

<sup>176</sup> See 2 WILLIAM STEVENS PERRY, *THE HISTORY OF THE AMERICAN EPISCOPAL CHURCH: 1587–1883*, at 35–48 (Bos., James R. Osgood & Co. 1885); Norman W. Spellmann, *The Formation of the Methodist Episcopal Church*, in 1 *THE HISTORY OF AMERICAN METHODISM* 185 (Emory Stevens Bucke ed., 1964).

<sup>177</sup> See 1 ANSON PHELPS STOKES, *CHURCH AND STATE IN THE UNITED STATES* 723–26 (1950).

<sup>178</sup> See JOHN H. WIGGER, *TAKING HEAVEN BY STORM: METHODISM AND THE RISE OF POPULAR CHRISTIANITY IN AMERICA* 3 (1998).

The power of religious conviction led American believers in diametrically opposed directions over slavery and the religious status of enslaved persons, drawing state and local governments, and eventually the national government, into the fractures that followed. Like the divisions already discussed in cases arising in Philadelphia, race and individualism played a commensurately vital role in southern masters' eventual embrace of evangelical Christianity. The story has everything to do with slavery, reflecting the uneasy and changeable nature of religious organizations and their intimate connection to coercion in the antebellum South.

As with disestablishment, the churching of southern white men played out over time. At the turn of the nineteenth century, slaveholders across the South were fiercely independent in their religious opinions. As one scholar put it, "[A]ll Baptists and Methodists whose ministries straddled the turn of the century came to realize[ that] the South's masters knew how to resist being thus mastered" by preachers.<sup>179</sup> Itinerant ministers—especially if their services incorporated the testimonies of enslaved persons and white women—were often treated violently. Methodist camp meetings proved particularly tempting targets for bands of rowdy skeptics,<sup>180</sup> because their preachers seemed to lack manly control over their congregants.

By the 1820s, however, white Methodist and Baptist ministers in the South had reworked their antislavery image and their interracial preaching and worship services.<sup>181</sup> They began to downplay the role of African Americans in church services by restricting the texts on which they could preach and the places where they could speak.<sup>182</sup> White Methodist memoirists even downplayed the power and significance of black preachers by dismissing them as "good old uncles."<sup>183</sup>

<sup>179</sup> CHRISTINE LEIGH HEYRMAN, *SOUTHERN CROSS: THE BEGINNINGS OF THE BIBLE BELT* 208 (1997).

<sup>180</sup> DEE E. ANDREWS, *THE METHODISTS AND REVOLUTIONARY AMERICA, 1760–1800: THE SHAPING OF AN EVANGELICAL CULTURE* 58–59 (2000); see also Keith Mason, *Localism, Evangelicalism, and Loyalism: The Sources of Discontent in the Revolutionary Chesapeake*, 56 *J.S. HIST.* 23, 40 (1990) ("[M]any Eastern Shore leaders [during the Revolutionary era], alarmed by this gulf, came to believe that Methodism was largely responsible for the region's wartime disaffection.").

<sup>181</sup> They stressed their patriotic roots and the fact that their fathers and uncles fought Indians and hunted; one minister even claimed his father had worked alongside Daniel Boone. See JAMES B. FINLEY, *AUTOBIOGRAPHY OF REV. JAMES B. FINLEY; OR, PIONEER LIFE IN THE WEST* 20–25 (Cincinnati, Methodist Book Concern 1853).

<sup>182</sup> See MECHAL SOBEL, *THE WORLD THEY MADE TOGETHER: BLACK AND WHITE VALUES IN EIGHTEENTH-CENTURY VIRGINIA* 207–12 (1987); Jewel L. Spangler, *Salvation Was Not Liberty: Baptists and Slavery in Revolutionary Virginia*, 13 *AM. BAPTIST Q.* 221, 229 (1994).

<sup>183</sup> HEYRMAN, *supra* note 179, at 225.



Despite the efforts of white Southerners, however, the South saw a spectacular rise of black preachers and spiritual exhorters, especially among Baptists and Methodists. These new preachers reflected the promise of freedom of conscience. At the same time, they tested the commitment of popular denominations to a unified vision of human moral potential. In Charleston, South Carolina, for example, a separate African Church was created when white Methodists tried to abolish a blacks-only quarterly conference and announced a plan to construct a new building on the black Methodist graveyard.<sup>184</sup> Other African American Methodist and Baptist organizations emerged in Maryland, Virginia, Kentucky, Tennessee, and Georgia.<sup>185</sup> There were likely others whose legacy has not survived. The Charleston African Church was destroyed in 1822 when white residents discovered that its members included the antislavery rebel Denmark Vesey, a former slave who preached that the Bible said slavery was wrong, and many of his followers.<sup>186</sup> Thereafter, such religious independence was strictly prohibited (and punished).<sup>187</sup> In several jurisdictions, organized worship among slaves without white supervision was made illegal under state law.<sup>188</sup> Nevertheless, the spread of Christian exhortation among enslaved persons carried the same message of liberty of belief and moral capacity that so galvanized the revolution against religious authority among ordinary folk everywhere in antebellum America.

After the Vesey rebellion, religious services among white Southerners no longer challenged the racial code of slavery, and white ministers consistently catered to the world of masters. Preachers developed a theory of spiritual warfare that cast them as martial leaders, and white church members as “the army of Jesus.”<sup>189</sup> Spiritual and military weapons thus blended together in preachers’ appeals to white men. Later, young male congregants were

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<sup>184</sup> ALBERT J. RABOTEAU, *SLAVE RELIGION: THE “INVISIBLE INSTITUTION” IN THE ANTEBELLUM SOUTH* 204-05 (1978). See also generally EGERTON, *supra* note 167, at 101-25.

<sup>185</sup> SYLVIA R. FREY & BETTY WOOD, *COME SHOUTING TO ZION: AFRICAN AMERICAN PROTESTANTISM IN THE AMERICAN SOUTH AND BRITISH CARIBBEAN TO 1830*, at 100-58 (1998). Georgia’s First African Baptist Church, founded in Savannah in 1787, may have been the first independent black church. See *id.* See also generally Julia Floyd Smith, *Marching to Zion: The Religion of Black Baptists in Coastal Georgia Prior to 1865*, 6 GA. BAPTIST HIST. SOC’Y 47 (1978).

<sup>186</sup> RABOTEAU, *supra* note 184, at 163, 204-05.

<sup>187</sup> See EDWARD J. BLUM, *W.E.B. DU BOIS: AMERICAN PROPHET* 100-01 (2007) (drawing connections between religion and slave insurrections, including both Vesey’s and Nat Turner’s); see also RABOTEAU, *supra* note 184, at 205. See generally DU BOIS, *supra* note 18.

<sup>188</sup> MORRIS, *supra* note 94, at 346-47; RABOTEAU, *supra* note 184, at 146-47.

<sup>189</sup> HEYRMAN, *supra* note 179, at 234 (citation omitted); see also CHARLES D. MALLARY, *MEMOIRS OF ELDER EDMUND BOTSFORD* 103 (Charleston, W. Riley 1832) (referring to church members as “spiritual warriors”).

enlisted to “guard” camp meetings, enforcing strict decorum. In this newly militarized religious culture, white men were told they had become warriors for Jesus, “yielding victories that equaled if not exceeded the triumphs of their fathers” on battlefields that featured sinners rather than the soldiers of the British king and his allies.<sup>190</sup>

Baptist and Methodist ministers thus adopted and adapted the culture of racial mastery that sustained slavery in the antebellum South. By embracing the sensibilities of masters, southern white evangelical preachers catered to the southern masters’ individual authority and spiritual capacity. As in the North, religious authority shifted from the pulpit to the pew, but in the South the shift deferred to slaveholders—reinforcing rather than challenging their authority to coerce. The embrace of slavery brought many converts to white Protestant churches by 1830. The shift to lay empowerment in a slave culture laid the groundwork for later confrontations over the spiritual status of slavery by region. But in the meantime, confrontations over the powers of laypersons traveled far and wide.

### III. THE CONTAGION OF LAY EMPOWERMENT

One might assume that the wrestling over local lay control was a Protestants-only tourney. Scholars sometimes refer to the “de facto” establishment of Protestantism after formal disestablishment.<sup>191</sup> Yet the system of disestablishment imposed by states affected all religious communities, often disrupting patterns of governance and expressions of faith. Such reconstruction of traditional patterns was often welcomed by congregants but resisted by clergy and religious hierarchies.

Catholics were a crucial part of this story, especially in the antebellum period. Their history also featured a revolt against authority, fought bitterly around the country. Thanks to the tools provided to them by state legislation, individual Catholics were armed with new means of conceiving their place in the faith. The attack on Catholic clerical authority thus came from within, buoyed by the contagion of lay empowerment that was so central to the first system of disestablishment. Prominent members of the Catholic laity, as well as a group of Americanized priests—even a bishop or two—and

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<sup>190</sup> HEYRMAN, *supra* note 179, at 245.

<sup>191</sup> For recent examples, see STEVEN K. GREEN, *THE SECOND DISESTABLISHMENT: CHURCH AND STATE IN NINETEENTH-CENTURY AMERICA* (2010), and DAVID SEHAT, *THE MYTH OF AMERICAN RELIGIOUS FREEDOM* (2011).

their supporters among the Protestants all challenged the Catholic hierarchy, using the powers entrusted to lay trustees.<sup>192</sup>

Like Protestants of the same period, American Catholics built on traditions of lay control that originated even before disestablishment. The trustee system imposed by state incorporation statutes, also called “trusteeism” by its detractors (in particular, by more hierarchically minded Catholic bishops and the Vatican), was embraced especially by the French, Spanish, and German Catholics in America. Many of these immigrants recalled substantial localism in their churches in Europe or had ancestors who told them about the powers of local laities in their home countries.<sup>193</sup> In the United States, however, Catholic bishops set themselves against such inroads, asserting their episcopal authority with new vigor. The resulting controversies lasted from the turn of the nineteenth century through the 1850s and beyond. The conflict affected large portions of the laity, and dogged bishops who struggled to stem the tide of schism. The bitterness of these internal battles was expressed in newspaper and pamphlet wars, fisticuffs, riots, the burning of one bishop in effigy, and, frequently, in litigation.<sup>194</sup>

Backed by state laws, lay trustees asserted widespread control over Catholic congregational life and church property by the second decade of the nineteenth century. The contagion spread rapidly. As one shocked Catholic scholar wrote in the early twentieth century, lay trustees a century earlier had acquired “gradually the fatal tendency of regarding their priests as ‘servants to perform religious services,’” and even “dismiss[ed] any priest who attacked the system [of lay control] and . . . select[ed] clergymen who were amenable to dictation from themselves.”<sup>195</sup> Such attacks on episcopal power were not unique to Catholicism. Methodists underwent a reformation

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<sup>192</sup> Archbishop Ambrose Maréchal of Baltimore and other French American Bishops, as well as Irish immigrant John England, Bishop of Charleston, all favored some form of democratic governance in the early nineteenth century. PATRICK W. CAREY, *CATHOLICS IN AMERICA: A HISTORY* 28 (2004); 1 PETER GUILDAY, *THE LIFE AND TIMES OF JOHN ENGLAND, FIRST BISHOP OF CHARLESTON (1786–1842)*, at 362 (1927).

<sup>193</sup> PATRICK W. CAREY, *PEOPLE, PRIESTS AND PRELATES: ECCLESIASTICAL DEMOCRACY AND THE TENSIONS OF TRUSTEEISM* 31–34 (1987).

<sup>194</sup> See Alfonso Comeau, *A Study of the Trustee Problem in the St. Louis Cathedral Church of New Orleans, Louisiana, 1842–1844*, 31 *LA. HIST. Q.* 897, 923–40 (1948) (detailing a series of articles on schism printed by the Catholic clergy in their periodical, *Le Propagateur Catholique*). See generally Peter Guilday, *Trusteeism*, in 18 *U.S. CATHOLIC HIST. SOC’Y, HISTORICAL RECORDS AND STUDIES* 7 (Thomas F. Meehan, Percy J. King & Henry Ridder eds., 1928).

<sup>195</sup> PETER GUILDAY, *THE CATHOLIC CHURCH IN VIRGINIA (1815–1822)*, at 6–7 (1924); see also *id.* at 7 (noting the laymen sought to relieve “the clergy . . . of all the worries and anxieties attendant upon the temporal management of church affairs,” which led them to exclude the clergy “from all control”).

in 1824, when laypersons sought equal access to central governing structures. The resulting schism moved the main church to explain that its bishops did not rule the church, but were benign and noninterfering “superintendents.”<sup>196</sup> Among Episcopalians, the role of the bishop was explained as exactly like that of parish-level priests, only with the added power of ordination and representation of local interests in synods.<sup>197</sup>

While the Catholic Church was not the only denomination to experience rebellion from within the ranks, it felt the challenge most deeply. The assertion of American Catholic lay control in the early nineteenth century threatened ancient and powerful lines of religious authority in Rome that had barely noticed the American Revolution, but that nevertheless soon felt its effects.

#### A. *Trusteeism*

The challenge to the hierarchy of the Catholic Church by its American laity extended from New York to New Orleans—a “dreary struggle,” as one Catholic priest later lamented, which “showed the legal helplessness” of a bishop when confronted by a determined body of trustees backed by law.<sup>198</sup> In the hands of lay Catholics, “trusteeism” disturbed the rule of an increasingly embattled coterie of American bishops.<sup>199</sup>

Warring factions erupted into open conflict in New York City in 1817 when the trustees of St. Peter’s and St. Patrick’s, the two Catholic churches in the city at the time, divided over whether to fund the debt incurred in building St. Patrick’s.<sup>200</sup> After Bishop John Connolly installed his supporter, the Dominican Father Charles Ffrench, as a priest at St. Peter’s, his opponents campaigned openly to defy the bishop. They claimed Ffrench was guilty of “serious charges of unclerical conduct,”<sup>201</sup> including alleged carnal relations with a woman, licentiousness, and profligacy during an earlier assignment in Canada.<sup>202</sup> He had reportedly been suspended by his superiors

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<sup>196</sup> ABEL STEVENS, SUPPLEMENTARY HISTORY OF AMERICAN METHODISM 148-49 (N.Y., Eaton & Mains 1899).

<sup>197</sup> WILLIAM WILSON MANROSS, THE EPISCOPAL CHURCH IN THE UNITED STATES, 1800-1840: A STUDY IN CHURCH LIFE 41 (1938) (quoting Episcopal Church founder William Smith).

<sup>198</sup> PATRICK J. DIGNAN, A HISTORY OF THE LEGAL INCORPORATION OF CATHOLIC CHURCH PROPERTY IN THE UNITED STATES (1784-1932), at 96 (1933).

<sup>199</sup> CAREY, *supra* note 193, at 107-08. See generally Guilday, *supra* note 194.

<sup>200</sup> DIGNAN, *supra* note 198, at 97-99.

<sup>201</sup> *Id.* at 99.

<sup>202</sup> CAREY, *supra* note 193, at 113-14.

for these very sins.<sup>203</sup> And in New York in 1819, said his detractors, Ffrench assembled a mob of fellow Irishmen and invaded the trustees' meeting, roughing up and forcibly ejecting the Spanish Consul, a leader of the trustees.<sup>204</sup> Ffrench sued one of the New York trustees for defamation. The trustee defended himself by airing in open court the scandal of Ffrench's Canadian escapades and his American thuggery, to the delight of the local press.<sup>205</sup> Ffrench's suit eventually was dismissed on the ground that the role of a church trustee included the responsibility to investigate the pastor's conduct and character.<sup>206</sup> The court thus upheld the right of trustees to pry into their priests' private lives and pasts. "[H]onest Catholics," reported one ally of the trustees, now "refuse[] to hear [Ffrench's] Mass and receive Sacraments from his ugly hands."<sup>207</sup>

In other cities, explosive conflicts between the princes of the church and elected trustees with republican ideas convinced Rome that matters in America had descended into unseemly "discord and dissensions."<sup>208</sup> A Papal Bull was issued in 1822 to quell the lay rebellion in America,<sup>209</sup> but it failed dismally—especially in Philadelphia. In that city, the trustees of the "miserably distracted"<sup>210</sup> St. Mary's Church on Fourth Street attempted to oust the bishop's man, one Father Cumiskey, and install the Reverend Willam Hogan in his stead.<sup>211</sup> In response, the bishop of Philadelphia excommunicated Hogan, a move that was upheld on appeal to Rome.<sup>212</sup>

The entire battle was brought to court, where secular judges were empowered under Pennsylvania law to decide vital questions of church polity.<sup>213</sup> Equally sensational, Hogan—and, by implication, Catholic clergy more generally—was accused of making sexual advances and then beating and stabbing a congregant when she was hired to help him with housework and

<sup>203</sup> *Id.* at 114.

<sup>204</sup> DIGNAN, *supra* note 198, at 99-100; Guilday, *supra* note 194, at 53-73.

<sup>205</sup> CAREY, *supra* note 193, at 114.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 114-15 (quoting William Taylor) (citation omitted).

<sup>208</sup> Letter from Pope Pius VII to Archbishop Maréchal (Aug. 24, 1822), in 25 RECORDS OF THE AMERICAN CATHOLIC HISTORICAL SOCIETY OF PHILADELPHIA 325, 325 (1914) [hereinafter Letter from Pope Pius VII]; see also Margaret Wilson Gillikin, *Competing Loyalties: Nationality, Church Governance, and the Development of an American Catholic Identity*, 11 EARLY AM. STUD. 146, 153 (2013).

<sup>209</sup> Letter from Pope Pius VII, *supra* note 208, at 325-30.

<sup>210</sup> *In re St. Mary's Church*, 7 Serg. & Rawle 517, 555 (Pa. 1822) (opinion of Duncan, J.).

<sup>211</sup> See generally *id.* at 517-66.

<sup>212</sup> See Form of Excommunication Against William Hogan, Read in St. Augustine's Church, Philadelphia—May 27, 1821, reprinted in FRANCIS E. TOURSCHER, THE HOGAN SCHISM AND TRUSTEE TROUBLES IN ST. MARY'S CHURCH, PHILADELPHIA, 1820-1829, at 204-06 (1930).

<sup>213</sup> *Id.*

errands. He was eventually acquitted of the charges, but not before a long trial and extensive (often contradictory) testimony revealed the fissure within the Catholic community.<sup>214</sup>

In these ways, trusteeism created a challenge to Rome that was distinctly American, but also fed into other early nineteenth-century conflicts that troubled the Vatican. The prospect of trustee control over American churches compelled Rome to label trusteeism a heresy, a category reserved for the most dangerous violations and a justification, for example, for the *Inquisitio Haereticae Pravitatis*—the Inquisition. Trusteeism remains the only heresy ever to emerge from the United States; the ripples of the controversy it caused within Catholicism are still felt by American Catholics today.<sup>215</sup>

In Pennsylvania, the Church won a Pyrrhic victory. Amendments to the St. Mary's articles of incorporation drafted by the trustees to cement their power over the church and its ministers were eventually rejected by the Pennsylvania Supreme Court.<sup>216</sup> The defeat was a close call. In the end, the court held that trustees held power over all temporal assets of local Catholic churches, but that appointment of priests by bishops was a signal feature of ecclesiastical structure.<sup>217</sup> The writ of disestablishment did not invade this final refuge of church polity.

The raw fact of the power of clerical appointment, the court stressed, was of necessity exercised in sharply reduced circumstances. Chief Justice William Tilghman noted that trustees in other denominations had attempted similar coups.<sup>218</sup> The Presbyterians in particular were mired in controversy over the right of lay vestries to dismiss controversial clerics.<sup>219</sup> As in those cases, the court held in the St. Mary's case that preexisting church governance stipulated that only bishops had the power to remove local priests.<sup>220</sup>

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<sup>214</sup> THE TRIAL OF THE REV. WILLIAM HOGAN, FOR AN ASSAULT AND BATTERY ON MARY CONNELL (Phila., R. Desilver 1822); Jennifer Schaaf, "With a Pure Intention of Pleasing and Honouring God": How the Philadelphia Laity Created American Catholicism, 1785–1850, at 118–35 (2013) (unpublished Ph.D. dissertation, University of Pennsylvania) (on file with author).

<sup>215</sup> For one recent controversy, see *supra* note 141.

<sup>216</sup> *In re St. Mary's Church*, 7 Serg. & Rawle at 566.

<sup>217</sup> *Id.* at 528–40 (opinion of Tilghman, C.J.), 553–66 (opinion of Duncan, J.).

<sup>218</sup> *Id.* at 535 (opinion of Tilghman, C.J.) (citing cases involving "the rights of the Presbyterian clergy").

<sup>219</sup> See, e.g., *Riddle v. Stevens*, 2 Serg. & Rawle 537, 543 (Pa. 1816) (opinion of Tilghman, C.J.) ("[I]t was not in the power of the [lay leaders] to remove the [pastor]. The Presbytery alone could do it, with a right of appeal, first to the Synod, and in the last resort to the General Assembly."); *M'Millan v. Birch*, 1 Binn. 178, 187–88 (Pa. 1806) (opinion of Tilghman, C.J.) (holding that internal church discipline proceedings between two Presbyterian clergymen would not give rise to a claim for slander in secular court because discipline of clerics within the denomination is essential to spiritual, not temporal, governance).

<sup>220</sup> *In re St. Mary's Church*, 7 Serg. & Rawle at 535–36 (opinion of Tilghman, C.J.).

But Tilghman's opinion also stressed that the church itself had no power beyond this. In light of the limits on internal control imposed by the state through the lay trustee system, Tilghman noted that the church's power to name a priest meant precious little without the power of the purse, which had been transferred to lay trustees. The bishop might have the power to appoint a priest, but he would not be paid without trustee approval, making the power of appointment more symbolic than actual. In light of this partial authority, the court advised the bishop to tread carefully:

It is scarcely possible that the Roman Catholics of the United States of America, should not imbibe some of that spirit of religious freedom which is diffused throughout the country. If those who govern that church . . . consult the reasonable desires of the laity both in the appointment, and the removal of pastors, they may long retain their dominion. . . . But if things are carried with a high hand . . . , it is easy to foresee how the matter will end. That church possesses neither property nor temporal power in this country. The laity have both.<sup>221</sup>

Indeed, the trouble with the laity in Philadelphia and elsewhere was too tempestuous and wide-ranging to resolve with a single line of court decisions or even a Papal Bull, however emphatic. The election of trustees held only months later sparked a riot in the St. Mary's churchyard, in which clubs, bricks, and even repurposed iron railings left hundreds wounded.<sup>222</sup> The Pennsylvania legislature responded to the state supreme court by passing a bill that would allow precisely the amendment maneuver that the court had struck down. The governor, acting on the advice of the attorney general, vetoed the bill, but even then the Reverend Hogan held forth at St. Mary's. The local bishop finally surrendered in 1826 and abandoned his attempt to oust Hogan, but the bishop's retreat was vetoed by Rome in 1827 and the standoff continued for the rest of the decade.<sup>223</sup> As one outraged traditionalist described Hogan and his trustees, "This may be *republicanism*, but it is not *catholicism*."<sup>224</sup>

Similar battles in Charleston, St. Louis, Cincinnati, Buffalo, Rochester, Detroit, Baltimore, and Norfolk, Virginia, illustrate how widespread the pattern was.<sup>225</sup> In New Orleans, the city was consumed by decades of

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<sup>221</sup> *Id.* at 539-40.

<sup>222</sup> TOURSCHER, *supra* note 212, at 83-84; Schaaf, *supra* note 214, at ix-x.

<sup>223</sup> See generally TOURSCHER, *supra* note 212, at 162-70.

<sup>224</sup> DALE B. LIGHT, *ROME AND THE NEW REPUBLIC: CONFLICT AND COMMUNITY IN PHILADELPHIA CATHOLICISM BETWEEN THE REVOLUTION AND THE CIVIL WAR* 140 (1996) (citation omitted).

<sup>225</sup> CAREY, *supra* note 193, at 107-32.

raucous conflict that pitted Creole leaders and their allies against a harried and miserable French native, Bishop Blanc. The local laity were accustomed to substantial local control, especially under Spanish and then, briefly, French imperial governments. After Louisiana joined the United States in 1803, Catholics in New Orleans successfully defended their beloved pastor, Père Antoine, against the Church hierarchy, despite the fact that he lived openly with a mulatto concubine, criticized slavery, supported Freemasonry and the French Revolution, and publicly defied the Pope and episcopacy.<sup>226</sup>

In 1844, the decades-long conflict between Catholic prelates reached the Louisiana Supreme Court, which produced a result much like the Pennsylvania Supreme Court's twenty years earlier. The Louisiana court held that trustees retained the right to refuse to pay the salary of a priest appointed by the bishop, even if they did not have the power to choose their own priest over the bishop's objection.<sup>227</sup> A related attack on the power of the trustees under state law failed in the U.S. Supreme Court when the Justices unanimously held that state and local laws were not subject to review under the religion clauses of the U.S. Constitution.<sup>228</sup> Thus survived a New Orleans ordinance mandating that all Catholic funerals be held at a chapel controlled by the trustees—guaranteeing that the lucrative funeral trade would remain under lay control.<sup>229</sup>

For their part, Catholic bishops had attempted to reassert their power after the first American provincial council in 1829.<sup>230</sup> Meeting in Baltimore, exhausted and exasperated bishops legislated against lay organizations holding title to church property and reaffirmed their right to select and remove priests. They then lobbied state legislatures to allow bishops to hold

<sup>226</sup> Michael W. McConnell, *Schism, Plague, and Last Rites in the French Quarter: The Strange Story Behind the Supreme Court's First Free Exercise Case*, in *FIRST AMENDMENT STORIES* 39, 48-49 (Richard W. Garnett & Andrew Koppelman eds., 2012). For additional background, see ROGER BAUDIER, *THE CATHOLIC CHURCH IN LOUISIANA* 269 (reprint 1972) (1939), and Comeau, *supra* note 194, at 903-06.

<sup>227</sup> *Wardens of the Church of St. Louis v. Blanc*, 8 Rob. 51, 91 (La. 1844).

<sup>228</sup> *Permolli v. Municipality No. 1 of New Orleans*, 44 U.S. (3 How.) 589, 609 (1845).

<sup>229</sup> McConnell, *supra* note 226, at 43-46, 57-59.

<sup>230</sup> The success of the bishops' strategy was partial at best, as the experience of St. Augustine, Florida, illustrates. In 1830, Catholic lay trustees refused to "receive" the priest sent by the Church's Administrator General of Florida. In response to a suit brought by the aggrieved priest, the federal court in Florida held that the "right of presentation vested in the congregation," and upheld the trustees. 3 JOHN GILMARY SHEA, *HISTORY OF THE CATHOLIC CHURCH IN THE UNITED STATES* 698 (N.Y., John G. Shea 1890). When the Bishop of the Vicariate Apostolic of Alabama and the Floridas traveled to St. Augustine to "heal the schism," the trustees refused his overtures. DIGNAN, *supra* note 198, at 157.



title to property in their episcopal offices, as corporations sole, and were successful in a few states.<sup>231</sup>

In other jurisdictions, however, bishops were greeted with skepticism. Instead of accommodating Catholic canon law or similar authorities in Protestant denominations, these states increased lay control. In 1845, for example, a New York chancery court upheld the decision of a majority of trustees to abandon the Calvinist doctrines of the Reformed Dutch Church and instead become an independent congregation with more liberal "Arminian" leanings that empowered individuals to take control of their own salvation.<sup>232</sup>

Eventually, trustees achieved significant power to appoint or remove clergy, even in hierarchical denominations. In 1854, the New York Court of Appeals construed the state's corporation law to allow congregations to entirely and directly control church property. The court held that a Presbyterian minister could be retained by a congregation even after he had been excommunicated by the presbytery and synod, in the interests of "the entire separation of the functions of the ecclesiastical and temporal judicatories."<sup>233</sup> The next year, a new state statute prohibited conveyance of all real and personal property "for the benefit of any person and his successor or successors in any ecclesiastical office."<sup>234</sup> In other words, New York prohibited the corporation sole, a central feature of American Catholic bishops' attempt to reassert control. Michigan, Ohio, and Pennsylvania followed suit,<sup>235</sup> and other states debated similar legislation.<sup>236</sup>

The attempted recovery of episcopal authority, in other words, was met with a backlash of outsize proportions. One historian of Catholicism even blames the infamous anti-Catholic nativism of the 1840s and '50s on the new American "episcopalism."<sup>237</sup> The vigorous defense of Church authority gradually took root among postfamine Irish immigrants to America, however,

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<sup>231</sup> Maryland, Illinois, and California each passed such legislation. Act of Apr. 22, 1850, CAL. DIGEST OF LAWS ch. 6, § 184, at 57 (Wood 1857); Act of Feb. 24, 1845, § 1, ILL. STAT. 983, 984 (Treat, Scates & Blackwell 1858); Act of Mar. 23, 1833, § 1, 1832-1833 MD. LAWS ch. 308.

<sup>232</sup> Gable v. Miller, 10 Paige Ch. 627, 645-49 (N.Y. Ch. 1844), *rev'd*, 2 Denio 492 (N.Y. 1845).

<sup>233</sup> Robertson v. Bullions, 11 N.Y. 243, 264-65 (1854) (opinion of Selden, J.); *see also, e.g.*, Petty v. Tooker, 21 N.Y. 267 (1860) (holding that a majority of trustees could call a meeting of the congregation, and that a majority of the congregation could then validly decide to affiliate with another denomination).

<sup>234</sup> Act of Apr. 9, 1855, § 1, 1855 N.Y. LAWS 338, 338.

<sup>235</sup> MICH. COMP. LAWS ch. 68, § 22 (1855); Act of Apr. 14, 1857, 1857 OHIO LAWS 110 (repealed 1858); Act of Apr. 26, 1855, PA. DIGEST OF LAWS 865 (Purdon & Brightly 1862).

<sup>236</sup> For example, Massachusetts and Missouri debated legislation prohibiting corporations sole. *See* DIGNAN, *supra* note 198, at 200-201.

<sup>237</sup> CAREY, *supra* note 192, at 29.

as they connected their faith and national allegiance to resistance against British tyranny.<sup>238</sup> In this view, the blending of anti-Irish sentiment with more general anti-Catholicism has obscured the origins of nativism in support for democracy and lay control. The recovery of ecclesiastical power came at a steep price, if we credit the claim that anti-Catholic nativists were motivated to pillage and plunder in part by the bishops' suppression of democratically chosen trustees.<sup>239</sup>

The entrenched antiauthoritarianism of trusteeism and local control did not devolve into secularism, despite the dire predictions of orthodox clerics—and the hopes of late eighteenth-century rationalists.<sup>240</sup> Instead, anything that came between the people and their faith—including priests, presbyters, synods, dioceses, doctrines, and creeds—came under attack. In this way, clerical and denominational power drew down, often despite litigation to protect orthodoxy and traditional authority. The result had democratic features, to be sure. But taking law into account shows us something subtler and less governable. A given congregation might well make democratic decisions, but no dissenter was bound to respect them. The right of exit was always present, even if it might be expensive. The focus on individual freedom of conscience unleashed emotion, enthusiasm, creativity, legal conflict, and eventually legal power. The retreat of the old ways was accomplished with breathtaking speed over the course of just a generation or two.<sup>241</sup>

### B. *Conscience over Clergy*

The commitment to protect individual conscience and to connect that protection to disestablishment traveled as far as the U.S. Supreme Court. In 1844, the Justices considered a case that originated in Philadelphia but implicated many of the questions of lay control and structural limits on religious authority that accompanied disestablishment in the states.<sup>242</sup> In

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<sup>238</sup> *Id.* at 29-31, 49-50.

<sup>239</sup> *Id.* at 27-29.

<sup>240</sup> See GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815*, at 589-91 (2009) (noting that many elite American thinkers at the time “privately scorned Christianity [but] accommodated their outward behavior to the religiosity of the general populace”).

<sup>241</sup> See, e.g., WALTERS, *supra* note 173, at 52 (evaluating 1830s-era antislavery as a means of revolt against clerical authority and sectarian narrowness).

<sup>242</sup> See *Vidal v. Girard's Ex'rs*, 43 U.S. (2 How.) 127, 197-201 (1844) (upholding Stephen Girard's bequest to Philadelphia to establish a college that excluded “all ecclesiastics, missionaries, and ministers of any sect” from any position—“or even [from] visiting” the college—as well as “all instruction in the Christian religion”).

this case, the relationship of disestablishment to secularism was the central question: Did a state without an official posture of deference to religious authority become an opponent of religion, or was it just disestablished?<sup>243</sup> Here again, the question was not separation. This time, the issue was outright opposition to religious authority, as it was in many contemporaneous trusteeism cases. Hostility to religion, a central fear of conservative clerics such as Lyman Beecher in 1818,<sup>244</sup> thus lurked in the interstices of debates over the wealth and management of religious corporations decades after formal disestablishment.

The estate of Philadelphian Stephen Girard, French-born financier of the War of 1812 and the richest American of his day (and one of the richest of any day, according to recent estimates)<sup>245</sup> raised just such thorny questions after he died in 1831. Girard's will left almost his entire estate to municipal and charitable institutions in Philadelphia and New Orleans.<sup>246</sup> Girard had directed that a substantial portion of his estate be dedicated to the education of poor, white, male orphans.<sup>247</sup> The future Girard College of Philadelphia was also subject to a restriction that reflected Girard's complex relationship with the Catholic Church of his youth: no minister was ever allowed to teach on the grounds of the school.<sup>248</sup>

Girard's will was challenged by his French relatives.<sup>249</sup> Given the sums at stake, the family retained the services of the noted orator Daniel Webster, whose core argument was based on the will's insult to religion.<sup>250</sup> Webster, who twenty-five years earlier had argued against religious authority over education in *Trustees of Dartmouth College v. Woodward*,<sup>251</sup> now sought refuge in piety. When the Girard lawsuit came to the U.S. Supreme Court in 1843, Webster proclaimed, "[T]here can be no charity where the authority of God is derided and his word rejected."<sup>252</sup> Webster's change in focus reflected his

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<sup>243</sup> See *id.* at 198.

<sup>244</sup> See 1 BEECHER, *supra* note 146, at 252.

<sup>245</sup> MICHAEL KLEPPER & ROBERT GUNTHER, *THE WEALTHY 100: FROM BENJAMIN FRANKLIN TO BILL GATES—A RANKING OF THE RICHEST AMERICANS, PAST AND PRESENT* xi (1996) (ranking Stephen Girard as the fourth wealthiest American, relative to the U.S. Gross National Product at the time of his death).

<sup>246</sup> See *Vidal*, 43 U.S. (2 How.) at 183-86.

<sup>247</sup> *Id.* at 129.

<sup>248</sup> *Id.* at 133.

<sup>249</sup> *Id.* at 186.

<sup>250</sup> See *id.* at 175 ("The reasons which the testator gives [in support of the conditions on his bequest] are objectionable and derogatory to Christianity . . .").

<sup>251</sup> 17 U.S. (4 Wheat.) 518 (1819). For Webster's role in the *Dartmouth College* case, see Gordon, *supra* note 14.

<sup>252</sup> *Vidal*, 43 U.S. (2 How.) at 174. Webster's argument is also discussed at length in 2 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 398-407 (1922).

sense of prevailing political forces as well as the interests of his clients. He was at that time a candidate for President, and his oral argument was attended by a large crowd.<sup>253</sup>

The Girard case, therefore, though orthogonal to the statutes imposing property restrictions and lay empowerment, raised the implied (and inevitable) question of hostility to religion in a disestablished polity. Justice Joseph Story decided against Girard's French relatives and Webster, but not because the law would tolerate anything that smacked of hostility to religion. Instead, Story was persuaded by the arguments of Horace Binney, who appeared for the City of Philadelphia. Binney maintained that orphans at Girard College should be trusted to follow their own consciences.<sup>254</sup> Story agreed; he held that there was nothing truly anti-Christian about the will's prohibition of ministers teaching at the school. The exclusion of clerics, Story reasoned, did not entail the exclusion of Christianity: "What is there to prevent a work, not sectarian, upon the general evidences of Christianity, from being read and taught in the college by lay-teachers?"<sup>255</sup> The will did require that students be instructed in morality.<sup>256</sup> As Story interpreted this instruction, all morality was grounded in the Bible, and because the authority of clerics was not necessary for a Christian to study the Bible and come to God, the will was not an anti-Christian document.<sup>257</sup> Leading legal minds of the day admired Story's analysis.<sup>258</sup> The French relatives lost the fortune and Girard College opened in 1848.<sup>259</sup>

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After attending the argument, one congressman remarked, "There is no use for ministers now. Daniel Webster is down in the Supreme Court room eclipsing them all by a defence of the Christian religion. Hereafter we are to have the gospel according to Webster." ROBERT V. REMINI, DANIEL WEBSTER: THE MAN AND HIS TIME 589 (1997) (quoting Rep. John Wentworth of Illinois reporting the words of an unnamed congressman).

<sup>253</sup> Justice Joseph Story wrote to his wife on the sixth day of arguments in the case that "the Court-room was crowded, almost to suffocation, with ladies and gentlemen to hear [Webster]. Even the space behind the Judges, close home to their chairs, presented a dense mass of listeners." Letter from Joseph Story to Sarah Story (Feb. 7, 1844), in 2 LIFE AND LETTERS OF JOSEPH STORY 467, 468 (William W. Story ed., Bos., Charles C. Little & James Brown 1851).

<sup>254</sup> *Vidal*, 43 U.S. (2 How.) at 154.

<sup>255</sup> *Id.* at 200.

<sup>256</sup> *See id.* at 133 ("[A]ll the instructors and teachers in the college shall take pains to instil [sic] into the minds of the scholars the purest principles of morality . . .").

<sup>257</sup> *Id.* at 199-200.

<sup>258</sup> James Kent, author of a leading legal treatise of the day, *Commentaries on American Law*, wrote to Story to praise the reasoning and result of the Girard will case. Gordon, *supra* note 12, at 704 & 717 n.45 (citing JAMES McCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION: A STUDY IN POLITICAL AND LEGAL THOUGHT 371 (1971)).

<sup>259</sup> *See generally* CHEESMAN ABIAH HERRICK, HISTORY OF GIRARD COLLEGE (1935); THOMAS U. WALTER, A DESCRIPTION OF THE GIRARD COLLEGE FOR ORPHANS (Phila., Girard Coll. 1848).

Individual religious experience was thus protected in state statutes, as well as in their courts and in the U.S. Supreme Court. Religion, in this new legal landscape, was no longer dependent on clerical authority. Yet the system of disestablishment imposed by states in the early nineteenth century was dangerous to religious community, if not hostile to all religion. At that time and since, the fragility of religious organizations has been a remarkable, if little remarked upon, feature of American religious liberty.

#### IV. THE GREAT DIVIDES

The integral relationship in America between disestablishment (the sundering of official ties to government) and schism (the sundering of ties between believers), rather than the imposition of secularism or hostility to religion, is the real story in American church and state before the Civil War. These battles were fought not just over how to define property in secular society, but also over how to conceive of religious property when believers divided. The focus on property was caused not only by limitations set by legislatures and then enforced in courts, but also by the fragmentation of religious organizations as they competed for members. Scholars of religion used to argue that the antebellum religious revivals created an “evangelical united front,” which emphasized social control and respectability.<sup>260</sup> No longer. Legal disputes reveal constant warfare over limited resources, as well as cracks in even the most successful denominations—especially in disputes over individual liberty and equality. The greatest battles were those arising out of schisms: the fracturing of community.

Religious groups learned that the greatest danger often came from within the ranks. The communion of believers, protected by incorporation but also subject to lay control, was at once powerful and intensely vulnerable. In these battles, each side fought for the right to retain church property, and thus be considered the “true” society in both legal and religious terms. Congregationalists lost property to Unitarians, Methodists to the breakaway African Methodist Episcopal Church and then the Methodist Episcopal Church South, Baptists to the Southern Baptist Convention, and so on, down to micro-level fractures. State law reports are full of such disputes.<sup>261</sup>

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<sup>260</sup> SYDNEY E. AHLSTROM, *A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE* 657-59 (1972). See generally CHARLES I. FOSTER, *AN ERRAND OF MERCY: THE EVANGELICAL UNITED FRONT, 1790-1837* (1960).

<sup>261</sup> In Massachusetts alone, more than eighty cases featured Unitarian majorities against Trinitarian Congregationalist minorities. WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830*, at 127-28 (1975); *The Exiled Churches of Massachusetts*, 5 *CONGREGATIONAL Q.* 216, 233

Schism was everywhere. The Catholic hierarchy struggled to cement its authority among the laity by suppressing trusteeism; Protestants broke apart. The “moral ability” of the individual, which caused such excitement and innovation in religious life as well as frequent conflict between clergy and laity, finally became the mallet that fractured the leading Protestant denominations. Conflicts over slavery sundered these denominations a full twenty-five years before the nation followed suit. By the late 1830s, church life became increasingly polarized, as the sinfulness (or divine approbation) of slavery drew church members into debates over the Old Testament, the Ten Commandments, and political quietism, on the one hand, and the humanity of slaves and the perfectibility of American society, on the other.<sup>262</sup>

The Presbyterians came asunder first, with New School synods in New York and Ohio (read Finney) accused of enthusiasm, revivalism, and liberalism by their more orthodox Old School (read Calvinist) brethren.<sup>263</sup> Four liberal synods were excluded from the General Assembly in 1837 and refused readmission the following year.<sup>264</sup> Southern Presbyterians treated abolition as the redheaded stepchild of New School heresies.<sup>265</sup> Finney and his ilk focused on individual investment in salvation, praying salvation up, rather than focusing on helpless believers who depended on the grace of an inscrutable God. The implications for human freedom are obvious, even if the debate among Presbyterians in the late 1830s turned primarily on the theological, rather than the humanitarian, consequences of individualism.<sup>266</sup>

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(1863). The “Unitarian Controversy” revealed how deeply democratic inclinations could contradict doctrinal orthodoxy, yet still be endorsed as consistent with establishment, thus undermining public support, even in the Bay State, for a divided religious polity. See LEONARD W. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* 29-42 (1957) (discussing the role of the courts in the controversies, and their support for the more liberal Unitarians).

<sup>262</sup> WALTERS, *supra* note 173, at 47-57; see also Loveland, *supra* note 166, at 183.

<sup>263</sup> Catherine Glennan Borchert, *Excinded!: The Schism of 1837 in the Presbyterian Church in the United States of America and the Role of Slavery* 22 n.18 (May 2009) (unpublished Ph.D. dissertation, Case Western Reserve University), available at [http://rave.ohiolink.edu/etdc/view?acc\\_num=cas1236819487](http://rave.ohiolink.edu/etdc/view?acc_num=cas1236819487) (click “View” or “Download”).

<sup>264</sup> See generally *id.* at 185-290 (providing a detailed account of the 1837 schism).

<sup>265</sup> CARWARDINE, *supra* note 153, at 158-59, 166-67; GEORGE M. MARSDEN, *THE EVANGELICAL MIND AND THE NEW SCHOOL PRESBYTERIAN EXPERIENCE: A CASE STUDY OF THOUGHT AND THEOLOGY IN NINETEENTH-CENTURY AMERICA* 97 (Wipf & Stock Publishers 2003) (1970); Borchert, *supra* note 263, at 321-24, 328-29, 339-43.

<sup>266</sup> See C. Bruce Staiger, *Abolitionism and the Presbyterian Schism of 1837-1838*, 36 *MISS. VALLEY HIST. REV.* 391, 393 (1949) (“[T]he essential difference between the two schools lay in their conceptions of man’s nature. Was man by nature evil and ‘born in sin,’ or basically good and free of sin at birth? Was his will in bondage, and salvation a matter only for the elect, or did he possess a free will through which every man might win his own salvation?”).

In the resulting litigation over property between New and Old School Presbyterians, Pennsylvania Supreme Court Chief Justice John Gibson imposed a democratic solution to the conflict in 1841. He held that the most numerous group in the state would have the right to the property—"not because [the majority] was more Presbyterian than the [minority], but because it was stronger" in numbers and thus able to claim the property in a democratic polity.<sup>267</sup> In 1845, the conservative-dominated Old School confirmed the suspicions of New School adherents about the unacknowledged relationship between slavery and the schism. The conservatives now declared that slaveholding would not preclude any person from membership, and that the church did not opine on political debates (although it also conceded that there were "evils" connected with slavery).<sup>268</sup> Even with this concession to slaveholders, the Old School conservatives split again into southern and northern sections in 1861.

Baptists fractured, too, in the mid-1840s, with cries from Southerners charging that northern abolitionists undermined the faith when they refused to commission a slaveholding missionary in 1844. After the formation of the Southern Baptist Convention in 1845 (still the largest Baptist communion), conflict between northern and southern branches did not subside. But the story of the Methodists truly marked the nadir, in part because they had so far to fall.<sup>269</sup>

#### A. *Troubled by Conscience*

The Methodist Episcopal Church had a stunning record in antebellum America. Its itinerant ministers ranged far and wide, evangelizing along the frontier and deep into rural backwaters. In camp meetings and love feasts, at firesides, and on street corners, the faith grew by leaps and bounds. By the 1840s, the departure of many free blacks to their own denominations allowed white Southerners to worship without the embarrassment of black virtuosity. Methodists remained so powerful among whites across the South that they could still justifiably claim to be a coherent body of the church,

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<sup>267</sup> *Presbyterian Congregation v. Johnston*, 1 Watts & Serg. 9, 38-39 (Pa. 1841); see also A HISTORY OF THE DIVISION OF THE PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA BY A COMMITTEE OF THE SYNOD OF NEW YORK AND NEW JERSEY 202-04 (N.Y., M.W. Dodd 1852).

<sup>268</sup> CARWARDINE, *supra* note 153, at 167; MARSDEN, *supra* note 265, at 128-41. For Presbyterians the most painful split came with the war itself. See *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 684-86 (1871); ROBERT ELLIS THOMPSON, A HISTORY OF THE PRESBYTERIAN CHURCHES IN THE UNITED STATES 160 (N.Y., The Christian Literature Co. 1895).

<sup>269</sup> WIGGER, *supra* note 178, at 3-7.

representing almost forty percent of the entire national membership.<sup>270</sup> In the North, Methodists had grown even faster, but lost many members in the late 1830s to the “comeouter” antislavery movement. And from 1842 to 1843, a powerful new “abolitionized” schism drew 15,000 dedicated Methodists into a breakaway “Wesleyan Methodist Connection.”<sup>271</sup>

In 1844, just as Methodists became the single largest American denomination—with well over a million members—long-simmering debates over the sinfulness of slavery rocked their General Conference in New York City.<sup>272</sup> Alarmed by the success of the comeouter movement, New England delegates had threatened for almost a decade to secede unless slavery was openly declared a sin. Even among less radical northern conferences, antislavery feeling mushroomed as opposition to the expansion of slavery erupted in the acrid debates over the annexation of Texas, as well as theological disputes over sin and salvation.<sup>273</sup> Northerners and Southerners each hardened their stances, reacting increasingly virulently against perceived attacks from the other side. Responding to Southerners’ uncompromising rejection of any middle ground, moderates who had long criticized abolitionists as fanatics now found their own “abhorrence of slavery grow[ing] apace.”<sup>274</sup>

Debate at the convention waxed heated and long, eventually attracting crowds of those curious to see a live debate over slavery, rather than just reading about such things in the papers.<sup>275</sup> The central question was whether Bishop James Andrew of Georgia should resign because of his recent marriage to a slaveholding widow.<sup>276</sup> Northerners argued that a slaveholding episcopacy would violate the governing antislavery doctrine of the church

<sup>270</sup> JOHN R. MCKIVIGAN, *THE WAR AGAINST PROSLAVERY RELIGION: ABOLITIONISM AND THE NORTHERN CHURCHES, 1830–1865*, at 92 (reprint 2009) (1984); *see also* DONALD G. MATHEWS, *SLAVERY AND METHODISM: A CHAPTER IN AMERICAN MORALITY, 1780–1845*, at 23–29 (1965); WIGGER, *supra* note 178, at 3–13.

<sup>271</sup> McKivigan, *supra* note 173, at 146–47; *see also* LUCIUS C. MATLACK, *THE LIFE OF REV. ORANGE SCOTT* 213 (N.Y., C. Prindle & L.C. Matlack 1847) (reprinting Scott’s May 1843 speech defending secession at the General Convention in Utica, New York); Chris Padgett, *Hearing the Antislavery Rank-and-File: The Wesleyan Methodist Schism of 1843*, 12 *J. EARLY REPUBLIC* 63, 66 n.4 (1992) (estimating 20,000 Wesleyan Methodists by 1849).

<sup>272</sup> 3 *MINUTES OF THE ANNUAL CONFERENCES OF THE METHODIST EPISCOPAL CHURCH, FOR THE YEARS 1839–1845*, at 477 (N.Y., T. Mason & G. Lane n.d.) (noting that, as of 1844, Methodists included approximately 1 million “Whites,” 145,000 “Coloured,” and 4000 “Indians”); JOHN NELSON NORWOOD, *THE SCHISM IN THE METHODIST EPISCOPAL CHURCH, 1844: A STUDY OF SLAVERY AND ECCLESIASTICAL POLITICS* 177 (Porcupine Press 1976) (1923).

<sup>273</sup> *See* MATHEWS, *supra* note 270, at 246–48.

<sup>274</sup> CARWARDINE, *supra* note 153, at 142 (quoting John McClintock).

<sup>275</sup> MATHEWS, *supra* note 270, at 260–61.

<sup>276</sup> *Id.* at 256–64.



Discipline, drafted decades earlier before the stunning growth of Methodism in the South, and certainly before Methodist exhorters had recrafted their approach to slavery or become rich enough to own slaves.<sup>277</sup> Finally, after two painful weeks of talk, a vote of 110 yeas to 69 nays signaled the “sense” of the conference that Bishop Andrew must “‘desist from the exercise of his office’ so long as he remained ‘connected with slavery.’”<sup>278</sup> All but one of the affirmative votes came from nonslaveholding local jurisdictions, and seventy-five percent of the negative votes came from slaveholding counterparts.<sup>279</sup>

Immediately, Southerners began a campaign to separate from the main body of the church. In response, the General Conference delegated the question to a committee, which drafted a “Plan of Separation” (the “Plan”) over three momentous days “to meet the emergency with christian kindness and the strictest equity.”<sup>280</sup> The idea was to produce a mechanism for each side to withdraw gracefully from the now bitter and public fight.<sup>281</sup> Generous concessions of land and money, the delegates concluded, would ensure a peaceful future.<sup>282</sup> The Plan hewed a rough—and, it turned out, clumsy and controversial—path for conferences in the border states to determine their allegiances between the two Methodisms.<sup>283</sup> The Plan also proposed the formation of a committee, composed of three northern and three southern church leaders, charged with equitably dividing the income and property of the “Book Concerns” based in New York and Cincinnati, including existing copyrights.<sup>284</sup> This publishing house, the first American church publishing venture, had been founded in 1789 to print and promote Methodist sermons, tracts, and memoirs. The Book Concerns became the central feature in protracted litigation over the schism.

After the Plan was approved by the convention in June 1844, the “southern section” moved quickly to call regional conferences for Southerners to

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<sup>277</sup> *Id.* at 263. The Discipline, however, required ministers to emancipate slaves “only when practicable and where liberated persons could ‘enjoy their freedom.’” *Id.* at 252.

<sup>278</sup> *Id.* at 264.

<sup>279</sup> NORWOOD, *supra* note 272, at 80-81.

<sup>280</sup> Plan of Separation (June 8, 1844), in HENRY WALLER, FRANCIS T. HORD & RICHARD H. STANTON, *THE METHODIST CHURCH CASE, AT MAYSVILLE KENTUCKY* 13, 13 (Maysville, Eagle Office 1848).

<sup>281</sup> MATHEWS, *supra* note 270, at 268.

<sup>282</sup> See JOURNAL OF THE GENERAL CONFERENCE OF THE METHODIST EPISCOPAL CHURCH, HELD IN THE CITY OF NEW-YORK, 1844, at 85-88 (N.Y., Carlton & Phillips 1856) [hereinafter JOURNAL OF THE GENERAL CONFERENCE].

<sup>283</sup> See, e.g., *Gibson v. Armstrong*, 46 Ky. (7 B. Mon.) 481 (1847) (awarding the entire property of a local Methodist church in Maysville to the southern branch, based on majority rule).

<sup>284</sup> JOURNAL OF THE GENERAL CONFERENCE, *supra* note 282, at 137.

consider their options locally, and then to send delegates to a convention in Louisville, Kentucky, to begin on May 1, 1845, exactly one year after the General Conference.<sup>285</sup> Initial support for separation in local conferences was particularly strong in low-lying areas where slavery was most profitable, but by the time of the 1845 Louisville convention, the vote of all southern conferences was ninety-five to two in favor of separation.<sup>286</sup> The Methodist Episcopal Church, South (MECS) was born. Southern reliance on the Plan as the charter for achieving such a division was unanimous. “The Methodist Episcopal Church,” pronounced one scholar, “was no longer a national institution.”<sup>287</sup> Many studies of the schism end here.<sup>288</sup>

### B. *The Question of Localism*

Or maybe not so fast. The Plan that had been crafted in 1844 was designed to calm the waters, but Southerners’ adoption of the template occurred just as northern delegates learned that many of their constituents were outraged at the thought that the church could be split. Methodists married a centralized formal structure of governance with deep localism and local power: “[T]he bone and sinew of American Methodism was its local cast, its face-to-face exhortations, its communitarian quality,” wrote one scholar of antebellum Methodism and its many divisions over slavery.<sup>289</sup>

The tension between the localized and centralized aspects of the denomination exploded into full view after 1844. Local Methodist groups in the North argued trenchantly that their own church constitution was one of limited powers and that the General Conference had no capacity to divide what had been created as an indivisible community of faith. To them, the process of salvation was conducted locally, one soul at a time, based on individual conscience and local communities of belief. Across the North, the argument that the General Conference had acted contrary to the denomination’s founding constitution gained adherents in late 1844 and early 1845.<sup>290</sup> In Illinois and elsewhere, local conferences decided first that they had final authority and then voted to declare the Plan invalid.<sup>291</sup> Even former supporters began to waver, in light of the “bad temper and unchristian spirit of

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<sup>285</sup> NORWOOD, *supra* note 272, at 96-97.

<sup>286</sup> *Id.* at 100. Some accounts of the dissolution of the South’s connection with the North record the vote as ninety-four to three. See, e.g., MATHEWS, *supra* note 270, at 279.

<sup>287</sup> MATHEWS, *supra* note 270, at 279.

<sup>288</sup> See, e.g., *id.*

<sup>289</sup> Padgett, *supra* note 271, at 72.

<sup>290</sup> See *Resolutions of the Illinois Conference*, CHRISTIAN ADVOC. & J., Oct. 15, 1845, at 39 (resolving that the creation of the MECS was a “direct contravention of . . . the Discipline”).

<sup>291</sup> *Id.*

the South” during and after the Louisville convention.<sup>292</sup> Momentum built in opposition to the Plan first in Ohio, then in Illinois, Baltimore, Philadelphia, and New Jersey, where delegates overwhelmingly voted no.<sup>293</sup>

Especially important, given the rapidity of the response in the South, the issue of property rights in the Book Concerns provided a crucial battleground for Northerners who sought to defend the purity of the church against southern aggression. By the late 1840s, the combined Methodist Book Concerns was the largest publishing organization in the world. The Plan had urged local northern conferences to amend the denominational constitution to allow division of the property. In the northern conferences, a bare majority had endorsed the Plan—mostly in votes taken before the months of debate that fleshed out constitutional objections. Adding in the overwhelming approval of southern conferences only raised the vote to two-to-one in favor. But the church constitution required a three-fourths majority for any constitutional change, so the proposed amendment technically had been defeated by mid-1845. In 1848, the next quadrennial General Conference—minus the “southern section,” which by then considered itself a separate Methodism—repudiated the action of 1844 by a large majority and declared all separatist actions taken according to the Plan to be null and void.<sup>294</sup>

The notion that separation would reduce tension was utterly discredited by this controversy. Southerners called their northern brethren hypocrites and liars.<sup>295</sup> Most scholarship on the schism is of considerable vintage. As late as 1923, the most thorough study of the events of the late 1840s sympathized with the South: “[S]peaking in all charity, we cannot help feeling that it was a mistake to repudiate the Plan of Separation.”<sup>296</sup> Revisiting the battles in the twenty-first century, it is clear that the relationship between slavery and salvation could not be resolved by a simple “plan.” Equally important, the issue of local power and individual religious experience was wrapped up in these debates, making race a key component of politics as

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<sup>292</sup> NORWOOD, *supra* note 272, at 109.

<sup>293</sup> *Id.* at 117 n.53 (providing the breakdown of votes for and against the Plan at conferences in Ohio, Illinois, Baltimore, Philadelphia, and New Jersey).

<sup>294</sup> See generally Richard J. Carwardine, *Methodists, Politics, and the Coming of the American Civil War*, in *METHODISM AND THE SHAPING OF AMERICAN CULTURE* 309, 331-34 (Nathan O. Hatch & John H. Wigger eds., 2001); Arthur E. Jones, Jr., *The Years of Disagreement, 1844-61*, in 2 *THE HISTORY OF AMERICAN METHODISM*, *supra* note 176, at 144, 168-76.

<sup>295</sup> See RAY HOLDER, *WILLIAM WINANS: METHODIST LEADER IN ANTEBELLUM MISSISSIPPI* 193 (1977) (“[Northerners had] shown an utter contempt for public opinion, which must and will take account of this reckless disregard of consistency, solemn engagements and common justice.” (quoting William Winans)).

<sup>296</sup> NORWOOD, *supra* note 272, at 125.

well as faith. Northern Methodists were convinced that concession on such matters was fundamentally contrary to Methodism itself.

Although some desultory correspondence occurred between the North and South after the 1848 General Conference, it produced nothing to appease the South: in June 1849, the MECS commissioners filed suits in federal courts in Cincinnati and New York.<sup>297</sup> Suddenly but predictably, arguments over the schism were channeled into the courts. Given the Pennsylvania Supreme Court's 1841 decision in *Presbyterian Congregation v. Johnston* that the majority rules,<sup>298</sup> Northerners might well have hoped that their greater numbers would be a bulwark against MECS's claims to the Book Concerns. The litigation pitted the largest denomination in the country against its dissenting former members—a painful and public airing of the long-simmering conflict over the relationship between local control and human rights, on the one hand, and the untouchable issue of slavery, on the other.

The New York case, where the most money was at stake, featured a lineup of leading members of the New York and Boston bars and was tried before U.S. Supreme Court Justice Samuel Nelson, riding circuit, and District Court Judge Samuel Betts.<sup>299</sup> Representing MECS, Daniel Lord (founder of the law firm Lord, Day & Lord) argued that anything not explicitly forbidden by the church constitution should be left to the discretion of the General Conference.<sup>300</sup> In other words, the South argued for a presumption of power in the central government of the church and that local jurisdictions should be powerless to override this government, including even the decision whether to separate or not—a striking departure from traditional associations with southern localism.<sup>301</sup> Learned counsel for the opposition, the well-known litigator Rufus Choate of Boston, argued that even if the Conference had the power to enact the Plan of Separation, it was now void because the stipulated conditions had not been met.<sup>302</sup> The implication was that the MECS had lost all rights to the Book Concern property by severing itself from the only valid American Methodist church.

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<sup>297</sup> *Smith v. Swormstedt*, 22 F. Cas. 663 (C.C.D. Ohio 1852) (No. 13,112), *rev'd*, 57 U.S. (16 How.) 288 (1854); *Bascom v. Lane*, 2 F. Cas. 994 (C.C.D.N.Y. 1851) (No. 1089).

<sup>298</sup> 1 Watts & Serg. 9, 38-39 (Pa. 1841).

<sup>299</sup> *Bascom*, 2 F. Cas. 994. For a full transcript of all nine days of trial, including the lawyers' arguments, see ROBERT SUTTON, *THE METHODIST CHURCH PROPERTY CASE* (Richmond & Louisville, John Early 1851).

<sup>300</sup> Lord's arguments are reprinted in SUTTON, *supra* note 299, at 149-209.

<sup>301</sup> *Id.*

<sup>302</sup> Choate's arguments are reprinted in *id.* at 231-91.

C. *Mere Money*

The New York case excited widespread press attention and oft-repeated “regrets” that men of God should be battling so vigorously over funds (a central feature, of course, of the many cases that featured battles over worldly goods). And apparently there were substantial sums at stake. Although no formal valuation appears in the record, the capital of Book Concern in New York was placed at “nearly a million of dollars” by Justice Nelson, writing for the Court in the *Swormstedt* appeal.<sup>303</sup> The MECS newspaper, *Christian Advocate and Journal*, squirmed at the publicity: “The idea of a litigation between two religious bodies, in relation to money, has a rather bad appearance, and always gives occasion for scandal.”<sup>304</sup> Even the judges and lawyers advised the litigants to settle the case rather than expose themselves further. As Justice Nelson put it at the close of the trial but before issuing his opinion, “[T]he good feeling and Christian fellowship of the different sections of the Church will be much better [served] by an amicable and friendly adjustment of this controversy than by any legal disposition of it by the Court.”<sup>305</sup> But when they met to discuss the case, the two sides were so far apart that negotiations proved fruitless.<sup>306</sup>

Justice Nelson’s opinion was a resounding victory for the South. He had long been known as a supporter of the South and slavery, and his opinion confirmed this predisposition.<sup>307</sup> The “action of the several annual conferences in the slave-holding states,” Nelson held, was the only requirement under the Plan of Separation to establish “an absolute division of the church organization” into “two separate bodies.”<sup>308</sup> The General Conference, in this view, was the plenary authority. The annual, local meetings were essentially dependent upon the general convention, which “from time to time” conferred authority and power on the local bodies, such as the power conferred on the southern section to determine whether division was required because of the “deep and irreconcilable” opinions of the two sections regarding the ownership of slaves by the ministry.<sup>309</sup> The moment the decision to separate was taken at Louisville, Nelson held, division of the property became operative: “[T]he division of the property was but a consequence of separa-

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<sup>303</sup> *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 304 (1854), *rev’d* 22 F. Cas. 663 (C.C.D. Ohio 1852) (No. 13,112).

<sup>304</sup> *Upshot of the Arbitration Measure*, CHRISTIAN ADVOC. & J., July 17, 1851, at 26.

<sup>305</sup> SUTTON, *supra* note 299, at 368.

<sup>306</sup> Jones, *supra* note 294, at 178.

<sup>307</sup> On attacks from northern abolitionists directed against Nelson and other proslavery Justices in the early 1850s, see 2 WARREN, *supra* note 252, at 503, 543, 547.

<sup>308</sup> *Bascom v. Lane*, 2 F. Cas. 994, 999 (C.C.D.N.Y. 1851) (No. 1089).

<sup>309</sup> *Id.* at 1000-01.

tion, subordinate, and of comparative insignificance. Instead of the division of the church depending upon the division of the common property, the very reverse is the result of the true construction of the plan of separation.”<sup>310</sup> And then, because the northern church could not apportion the property without amending the church constitution, “[t]he law steps in and enforces the right.”<sup>311</sup>

In this way, the court forcibly amended the constitution of the Methodist Church, an extraordinary step, even for antebellum judges. Justice Nelson was firm in his assertion that principles of law and equity required judicial interference to ensure that the fund was properly divided. The issue was far from over, however. Nelson’s opinion was attacked in the northern press, in part on the ground that his reasoning and language so closely mirrored Lord’s pro-southern argument.<sup>312</sup>

The following year in Cincinnati, Circuit Judge Humphrey Leavitt reached the opposite conclusion in a long and painstaking opinion, evidently written despite some trepidation that he was flouting the opinion of a sitting U.S. Supreme Court Justice.<sup>313</sup> The Cincinnati branch of the Book Concern was founded in 1820 and incorporated by an act of the Ohio legislature in 1839 expressly to “conduct the business of the Concern in conformity with the rules and regulations of the said general conference.”<sup>314</sup> Like the New York Concern, it had grown in value, and its profits were dedicated entirely to the relief of traveling preachers who were “superannuated, and the widows and orphans of those who were deceased.”<sup>315</sup> The “unfortunate controversy” between the two Methodisms in this case was identical to the New York battle.<sup>316</sup>

Judge Leavitt’s interpretation of the powers delegated to the General Conference in the church constitution directly contradicted Nelson’s: Leavitt stressed that the Conference’s authority was enumerated rather than plenary. He held, “The power of change—of destruction itself—doubtless exists somewhere; but, if it has not been expressly delegated, it remains with those who are the original depositaries of all power”—that is, with the membership.<sup>317</sup> Such a construction, Leavitt maintained, was mandated by

<sup>310</sup> *Id.* at 1000.

<sup>311</sup> *Id.* at 1003.

<sup>312</sup> Jones, *supra* note 294, at 179.

<sup>313</sup> Smith v. Swormstedt, 22 F. Cas. 663 (C.C.D. Ohio 1852) (No. 13,112), *rev’d*, 57 U.S. (16 How.) 288 (1854).

<sup>314</sup> *Id.* at 664 (quoting the act of incorporation).

<sup>315</sup> *Id.* at 665.

<sup>316</sup> *Id.* at 664-65.

<sup>317</sup> *Id.* at 667.

the restrictions on the General Conference (such as the requirement that any alteration of the beneficiaries of the Book Concern must be approved by a two-thirds vote of a General Conference and then a three-fourths vote of the local annual conferences). This conclusion was also supported by democratic principles and “our republican institutions,” which Leavitt found to be consistent with a local form of governance rather than a centralized, plenary authority.<sup>318</sup>

Even southern partisans had conceded this point in their objections to the treatment of Bishop Andrew in 1844 at the General Conference, Leavitt pointed out. At that time, outraged Southerners argued that the General Conference had no power to “represent” the church as a whole, because it only had “limited powers to do its business in the discharge of a delegated trust.”<sup>319</sup> And while the southern section certainly had the power to “withdraw” from the church, it could not negotiate terms for division, which the General Conference had no power to promise on its own, and which the annual conferences had repudiated.<sup>320</sup> Instead, what happened at the General Conference reflected only the “collisions of a warm discussion of [slavery] in the conference, [which threw off] some sparks of unholy fire,”<sup>321</sup> not a legally cognizable contract to divide the property.

The federal courts, then, disagreed over the question, just as the nation had done. Southerners argued for strong centralized church governance and were sustained by a New York judge who was a northern man with southern principles. In Ohio, Judge Leavitt, a Whig (who was no radical—he later refused to join the Republican Party)<sup>322</sup> decided in favor of individualism and localism. The New York case was never appealed, in part because negotiations between the parties were revived after the decision was handed down. But the Ohio case went up to the U.S. Supreme Court, where none other than Justice Nelson reversed the decision below.<sup>323</sup> Given that he wrote the opinion below in the companion case, his participation in the appeal would today be considered an obvious violation of judicial ethics. Writing such an opinion would have been untoward even in the mid-nineteenth century, when sitting senators routinely argued Supreme Court cases and trial judges commonly sat on appeals in their own or companion cases in territorial supreme courts.

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<sup>318</sup> *Id.* at 670.

<sup>319</sup> *Id.* at 671 (quoting trial document).

<sup>320</sup> *Id.* at 672-74.

<sup>321</sup> *Id.* at 673.

<sup>322</sup> Richard L. Aynes, *Humphrey Howe Leavitt*, AM. NAT'L BIOGRAPHY ONLINE, <http://www.anb.org/articles/11/11-00512.html> (last visited Nov. 26, 2013).

<sup>323</sup> *Smith v. Swormstedt*, 57 U.S. (16 How.) 288 (1854).

Perhaps because of such lapses in judgment, Samuel Nelson never became a revered jurist.<sup>324</sup> He is obscure today, known primarily as the author of the original majority opinion in the Dred Scott case. Nelson's draft became a separate concurrence after Chief Justice Taney decided that he would write a far more broad-ranging and powerfully worded opinion, which catered to southern sentiment.<sup>325</sup>

In *Smith v. Swormstedt*,<sup>326</sup> Nelson copied whole sections of his opinion from the earlier New York circuit court opinion.<sup>327</sup> He also avoided the substance of the dispute at the 1844 General Conference that triggered the Plan of Separation and all subsequent litigation, concluding implausibly that the "causes" of the schism were "not important particularly to refer to."<sup>328</sup> The opinion did not mention slavery or slaveholding by members of the Methodist clergy.<sup>329</sup> Instead, Nelson focused on the powers of the General Conference, which he held to be the "highest authority" in Methodism, and which had divided itself voluntarily into two new and distinct bodies, neither of which was the same as the national church before 1844.<sup>330</sup> The pro rata division of the property followed "as a matter of law," Nelson intoned once again, despite the objection that the church constitution explicitly required local conferences to approve changes in distribution.<sup>331</sup> After this crushing defeat at the hands of Justice Nelson, delegates from the southern and northern Methodisms finally agreed on the payment of \$251,000 from North to South.<sup>332</sup>

Scholars have long argued that the schisms in the churches foreshadowed the political schism that rent the country after 1860. Some have even implied that the secessions of southern churches were critical to the erosion

<sup>324</sup> He was nominated to the U.S. Supreme Court in the closing days of the Tyler administration, in February 1845; several prior nominees had been rejected by the Senate. Nelson's confirmation was a surprise to Court watchers: though regarded as uncontroversial and careful, he was still a Democrat. *Samuel Nelson*, 13 *DICTIONARY OF AMERICAN BIOGRAPHY* 422-23 (Dumas Malone ed., 1934).

<sup>325</sup> *Scott v. Sandford*, 60 U.S. (19 How.) 393, 457-69 (1857) (Nelson, J., concurring), *superseded* by U.S. CONST. amend. XIV; DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 391 (1978); 3 WARREN, *supra* note 252, at 15-16.

<sup>326</sup> 57 U.S. (16 How.) 288.

<sup>327</sup> Compare *Bascom v. Lane*, 2 F. Cas. 994, 994 (C.C.D.N.Y. 1851) (No. 1089), *with Swormstedt*, 57 U.S. (16 How.) at 299-300.

<sup>328</sup> *Swormstedt*, 57 U.S. (16 How.) at 304.

<sup>329</sup> Nelson did concede that separate "ecclesiastical organizations" were created by the "slaveholding States," *id.* at 304-05, but the entire argument of the northern church is omitted. *Id.* at 298-309.

<sup>330</sup> *Id.* at 304-05.

<sup>331</sup> *Id.* at 308-09.

<sup>332</sup> *The Methodist Church Property*, N.Y. TIMES, Dec. 3, 1853, at 4; *see also The Methodist Book Concern*, N.Y. TIMES, May 8, 1854, at 4 (discussing the background of the dispute).



of national loyalty that led to the political secessions of 1861 and the onset of civil war.<sup>333</sup> Certainly President Lincoln viewed the northern Methodists' support as vital to the war effort. In 1864, he wrote to thank that church in particular, for it sent "more soldiers to the field, more nurses to the hospitals, and more prayers to Heaven than any."<sup>334</sup>

Yet all overlooked the relationship between disestablishment, legal restrictions on religious organizations, and schism in pre-Civil War America. Justice Joseph Story wrote in the 1830s that disestablishment had the goal of eliminating "all rivalry among Christian sects."<sup>335</sup> In reality, the discipline imposed on churches after disestablishment undergirded the development of a fiercely competitive religious culture based on the commitment to uncoerced liberty of belief. The protection of individual conscience, however, did not end conflict and division over religious questions. Despite the claims of Americans that they had "solved" the great problem of church and state,<sup>336</sup> the truth on the ground was far less rosy.

Disestablishment raised the issue of the moral ability of all individuals, enslaved or free, but the same focus on individual conscience made religious organizations more vulnerable to fracture. Paradoxically, this weakness was integrally related to the strength and vibrancy of religious life in antebellum America. It also coexisted with significant state oversight of religious organizations and limitations on their power to hold and control wealth. Viewed from up close, the first system of disestablishment was turbulent, messy, and often intrusive.

### CONCLUSION

The most poignant lesson of this story is that individual empowerment in religious life was a key component of disestablishment—an essential complement to the limits on wealth and power imposed on religious

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<sup>333</sup> See GOEN, *supra* note 174, 65-107; MATHEWS, *supra* note 270, at 290 ("In the dissolution of a national identity within the churches, the moral disjunction of the United States was institutionalized.").

<sup>334</sup> Letter from Abraham Lincoln to the Methodist Episcopal Church (May 18, 1864), in 2 STOKES, *supra* note 177, at illus. following p. 410.

<sup>335</sup> 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 728 (Boston, Hilliard, Gray & Co. 1833). On Story's concept of the proper relationship between Christianity and the U.S. governments (state and federal), see MCCLELLAN, *supra* note 258, at 118-59.

<sup>336</sup> See, e.g., PHILIP SCHAFF, CHURCH AND STATE IN THE UNITED STATES 23 (N.Y., G.P. Putnam's Sons 1888).

institutions.<sup>337</sup> This new American landscape consisted primarily of three components: government protection through the corporate form, limitations on wealth, and imposition of lay control.

Many Americans, especially those of the Tea Party persuasion, venerate “Christian” liberty (together with small government) as a central pillar of an inspired national Constitution.<sup>338</sup> In this story, they overlook the key features of legislation and the judicial management of disestablishment. In reality, this world was built just as much from political, legal, and religious furnishings of state legislation in the early nineteenth century as from the convictions of individual believers. Regulation, in the form of property limitations and lay control, both imposed by states, was widely understood as the surest means of protecting individual liberty to believe.

To the extent that history should govern our understanding of contemporary debates, this Article establishes that protection of the individual against the power of religious organizations was the central preoccupation of those charged with implementing the new law of religious liberty. Refusal to provide birth control to employees, campaigns against marriage equality, protection of religious organizations whose officials have sexually abused vulnerable parishioners, and even tax exemptions for religious property (not to mention tax-exempt bond funding) all look different when viewed through this lens. Seeing like a state in the first era of disestablishment means attending to the sovereign people, allowing them to choose, and allowing them to change their minds. This regime was a difficult one with respect to the stability of religious organizations, but a productive one nonetheless.

Equally important, church property cases are widespread again in a new age of schism. A growing number of states have embraced the Supreme Court’s most recent case on the question, *Jones v. Wolf*.<sup>339</sup> In that case—which arose when conservatives sought to leave a Presbyterian church in Georgia after the national denomination approved the ordination of women—the Court held that states may validly use “neutral principles of law” to

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<sup>337</sup> Supreme Court Justice Clarence Thomas has argued that “the Establishment Clause is best understood as a federalism provision—it protects state establishments from federal interference but does not protect any individual right.” *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 50 (2004) (Thomas, J., concurring); see also *Cutter v. Wilkinson*, 544 U.S. 709, 726 (2005) (Thomas, J., concurring) (same). To the extent that state experience is relevant, however, disestablishment was a vitally important protection of individual rights in early America.

<sup>338</sup> See generally JILL LEPORE, *THE WHITES OF THEIR EYES: THE TEA PARTY’S REVOLUTION AND THE BATTLE OVER AMERICAN HISTORY* 98-125 (2010).

<sup>339</sup> 443 U.S. 595 (1979).

decide such disputes.<sup>340</sup> Courts may impose secular standards where cases arise out of disputes that begin in doctrine and practice of the faith but involve temporal assets.<sup>341</sup> This standard, which was first adopted by the Court in the late 1970s, has proven difficult to apply, but more reliable than a standard of deference to religious hierarchy.<sup>342</sup> Those who defend “church autonomy” or “the freedom of the church” oppose the *Wolf* standard vigorously, often on historical grounds that appear unsustainable in light of the research presented here.<sup>343</sup>

When church autonomy and separation are out of the picture, the landscape shifts: just as it was at the inception, state protection of the rights of individual believers, rather than institutions, becomes the central focus of disestablishment. Government involvement in disputes over the rights of religious institutions traditionally protected individual conscience rather than institutional autonomy. In this light, disestablishment has a powerful moral core, one which has had great influence in religious life and law, but which has been too often overlooked.

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<sup>340</sup> *Id.* at 602-06. Justice Powell dissented, arguing that such an approach would increase court involvement in church controversies. *Id.* at 610 (Powell, J., dissenting). However, courts were already involved to a far greater extent than previously known—a circumstance that was widely tolerated.

<sup>341</sup> *Id.* at 602-06.

<sup>342</sup> Such a standard of deference was first imposed by the Supreme Court after the Civil War in *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871), a case arising out of the schisms over slavery. The standard was not reliably applied in state courts for many decades; even Justice Strong, who had sat on the *Watson* Court, did not think to mention the case in his lectures on law and religion in 1875. STRONG, *supra* note 22.

<sup>343</sup> See *supra* note 2 and accompanying text.