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## Mormon Profit: Brigham Young, Tithing, and the Bureau of Internal Revenue

Samuel D. Brunson

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# Mormon Profit: Brigham Young, Tithing, and the Bureau of Internal Revenue

Samuel D. Brunson\*

*Since the enactment of the modern federal income tax, churches have been exempt from taxation. But that exemption is neither necessary nor inevitable. In fact, at the end of the 1860s, the Bureau of Internal Revenue decided that tithing received by the Mormon church was taxable under the Civil War income tax.*

*At the time, Mormons distrusted the federal government and the federal government, in turn, distrusted the Mormons. The question of taxation was a small part of a larger legal and existential battle between the Mormons and the government. This Article situates the question of the taxability of tithing in the broader legal and relational conflict. More important, it tells the story of how the income tax threatened to fundamentally change the Mormon church and how Mormon leaders reacted to that threat, both with increasingly sophisticated legal arguments and, in the event their legal argumentation failed, with plans to take the tax law into account.*

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\* Georgia Reithal Professor of Law, Loyola University Chicago School of Law. I am grateful for comments from David J. Herzig, Jeffrey L. Kwall, Nathan B. Oman, Anne-Marie E. Rhodes, and Jonathan Stapley. I appreciate the comments I received at the 2018 Church History Symposium. I am also grateful to Thomas Keefe of the Loyola University Chicago Law Library for helping me navigate the world of microfiche, to Clint Pumphrey at the Special Collections and Archives department of Utah State University for providing me with the picture of John P. Taggart, and the various librarians at the LDS Church History Library and the Bancroft Library at U.C. Berkeley for allowing access to the letters and other documentation I used in this Article. I would also like to thank the Loyola University Chicago School of Law for a summer research stipend. Additional thanks to Jamie Brunson for her support.

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## INTRODUCTION

A little more than a century after the enactment of the modern income tax, the idea that churches are exempt from taxation seems inevitable. After all, “[c]hurches have been wholly or partially exempt from secular taxes since the time of Constantine at least.”<sup>1</sup> And, some assert, “[e]ver since our founding fathers, it’s hands-off for federal income taxes, property taxes and more.”<sup>2</sup>

In recent years, churches’ exemptions have grown more politically polarizing. Critics of certain church actions have demanded that the churches’ exemptions be revoked.<sup>3</sup> Churches’ defenders have demanded even more protection for church

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1. Robert E. Rodes, Jr., *The Last Days of Erastianism: Forms in the American Church-State Nexus*, 62 HARV. THEOLOGICAL REV. 301, 317 (1969).

2. Robert W. Wood, *Should America Tax Churches?*, FORBES (July 28, 2015, 8:43 AM), <https://www.forbes.com/sites/robertwood/2015/07/28/should-america-tax-churches/#5a716e7c1b8d> [https://perma.cc/R2DK-GUMG].

3. Richard W. Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. REV. 771, 781–82 (2001).

tax exemptions.<sup>4</sup> But debates over the appropriate tax treatment of churches are stymied by the apparent inevitability of their exempt status.

This apparent inevitability of exempting churches from taxation elides the deliberate choices lawmakers and executive agencies have made, however. In fact, at the end of the 1860s and the beginning of the 1870s, a dispute arose over whether the government could tax the Mormon church.<sup>5</sup> This dispute, largely forgotten today, made headlines in American papers when it happened.<sup>6</sup> It demonstrates that there was no firm agreement that churches were inherently exempt from income taxation. The tax dispute between Mormon Prophet Brigham Young and the Bureau of Internal Revenue may provide a bridge underscoring both the power of religious tax exemptions and the fact that their status was a political choice, rather than a legal requirement.

On January 3, 1871, Brigham Young, president and trustee-in-trust<sup>7</sup> of the Mormon church, sent a telegram to Daniel H. Wells,<sup>8</sup>

4. Notably, President Donald Trump has worked to eliminate the Johnson Amendment, which prohibits churches and other tax-exempt public charities from endorsing or opposing candidates for office. On May 4, 2017, he signed an executive order, which purported to prevent the Treasury Secretary from taking adverse actions against religious organizations that intervened in political campaigns. Exec. Order No. 13798, 82 Fed. Reg. 21675 (May 9, 2017). The following year, the House of Representatives passed a bill that would have effectively prevented the IRS from revoking a church's tax exemption for politicking. Financial Services and General Government Appropriations Act, 2019, H.R. 6258, 115th Cong. § 112 (2018).

5. See *infra* Part III. The Church of Jesus Christ of Latter-day Saints, commonly known as the Mormon church, updated its style guide and requested that people use its full name instead of using "Mormon." *Style Guide—The Name of the Church*, CHURCH JESUS CHRIST LATTER-DAY SAINTS NEWSROOM, <https://www.mormonnewsroom.org/style-guide> [<https://perma.cc/3Q9G-KF6X>]. In spite of the church's request, I have chosen to refer to the church as the "Mormon church" and to its members as "Mormons" in this article. "Mormon" is both more familiar and less unwieldy than the church's full name. Moreover, in historical context, references to the "Mormon church" make the most sense.

6. See *infra* notes 325–326 and accompanying text.

7. The term "trustee-in-trust" seems to have been unique to Mormonism. The position was created in 1841 and occupied by church founder Joseph Smith. Young took over after Smith's death. The trustee-in-trust had the power to acquire, manage, and sell property for the benefit of the church. LEONARD J. ARRINGTON, *GREAT BASIN KINGDOM: AN ECONOMIC HISTORY OF THE LATTER-DAY SAINTS, 1830–1900*, at 431 n.103 (1958).

8. Wells, a confidante of Young, was an important figure in both the religious and political life of Salt Lake City, the capital of the Territory of Utah and the administrative center of the Mormon church. When Wells received the telegram, he was mayor of Salt Lake City. Leonard J. Arrington, *The Settlement of the Brigham Young Estate, 1877–1879*, 21 PAC.

telling Wells that it would be “wisdom for the Latter Day Saints to omit paying tithing.”<sup>9</sup> That telegram must have come as a shock, reversing a three-decade-old practice that both provided a sizeable portion of the Church’s revenue and represented an important religious obligation of church members.<sup>10</sup> What would induce Young to take such a drastic step? According to Young, tithing was no longer sustainable because some federal officers wanted to “rob us of our hard earnings which are donated to sustain the poor and other charitable purposes.”<sup>11</sup>

The robbery Young saw was not surreptitious. Rather, Young saw the government using the law itself to accomplish this robbery. Specifically, it planned on using the relatively young federal income tax. And the first salvo in this robbery was a letter—dated August 18, 1869—from John P. Taggart, Internal Revenue Assessor for the Territory of Utah, to Francis M. Lyman, an assistant assessor. In the letter, Taggart told Lyman to “make an annual return” of the profits, gains, and incomes that had accrued to the Mormon church in 1868 and 1869.<sup>12</sup> That letter launched a battle between Taggart and Young that would encompass the next year and a half, as Taggart pursued Young for taxes on tithing members had paid to the church, while Young argued that tithing was not taxable income.

Neither the tax assessment nor Young’s reaction to the assessment happened in a context-free vacuum. Young’s suspicion of the government’s motives was compounded by the general level of distrust between the Mormons in Utah and the federal government in the East. After winning the Civil War and ending

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HIST. REV. 1, 5 n.16 (1952). He was also the second counselor in the Mormon church’s First Presidency, which put him third in the church’s hierarchy. QUENTIN THOMAS WELLS, DEFENDER: THE LIFE OF DANIEL H. WELLS 168 (2016).

9. Letter from unknown sender [probably Brigham Young, President of The Church of Jesus Christ of Latter-day Saints], to Daniel H. Wells, Second Counselor to the First Presidency, The Church of Jesus Christ of Latter-day Saints (Jan. 3, 1871) (on file with the Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah).

10. See *infra* notes 296–300 and accompanying text.

11. Letter from unknown sender, *supra* note 9.

12. Letter from John P. Taggart, Internal Revenue Assessor for the Territory of Utah, to Francis M. Lyman, Assistant Internal Revenue Assessor (Aug. 18, 1869) (on file with the Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah).

slavery, the Republican Party turned its eye toward slavery's twin relic of barbarism: Mormon polygamy.<sup>13</sup> Young believed that Taggart's attempt to tax Mormon tithing was part of the larger assault the federal government had been waging against the Mormon church. In January 1871, at the tail end of the dispute, Young wrote to Horace S. Eldredge, the president of the church's European Mission,<sup>14</sup> and said:

Never were the emissaries of and agents of the Evil one more thoroughly awake and restlessly active than now. They can scarcely eat, sleep or do any thing except plan and plot for the overthrow of the kingdom of God . . . .

Amongst other despicable attempts to rob us of our means has been that made by Dr Taggart, Assessor of Internal Revenue, to compel the Church to pay an enormous tax on the tithing donated by the saints.<sup>15</sup>

Though Young did not explicitly reference the Supreme Court's 1819 statement that the "unlimited power to tax involves, necessarily, a power to destroy[.]"<sup>16</sup> he seemed to intuitively grasp the destructive potential of the income tax.

Ultimately, Taggart's attempt to tax the Mormon church on tithing it received represents a relatively small skirmish in the war between the federal government and the Mormons. In the immediate post-Civil War era, the story of Mormonism and Utah is largely a story of conflict over polygamy and the exercise of local sovereignty.<sup>17</sup> But while the question of taxation plays out on that canvas—and may have motivated some of the actors—the narrow story of the attempt to tax tithing received by the Mormon church is not the story either of polygamy or sovereignty. Rather, it is the

13. SARAH BARRINGER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA* 13 (2002).

14. Zachary R. Jones, "War and Confusion in Babylon": *Mormon Reaction to German Unification, 1864–80*, 37 J. MORMON HIST. 115, 135 (2011).

15. Letter from Brigham Young, President of The Church of Jesus Christ of Latter-day Saints, to H.S. Eldredge, President of the Church's European Mission (Jan. 24, 1871) (on file with the Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah).

16. *M'Culloch v. Maryland*, 17 U.S. (1 Wheat.) 316, 327 (1819).

17. CHRISTINE TALBOT, *A FOREIGN KINGDOM: MORMONS AND POLYGAMY IN AMERICAN POLITICAL CULTURE, 1852–1890*, at 60 (2013).

story of the application of a novel legal regime to a novel social and economic situation.

This Article proceeds in several parts. Part I will introduce the Civil War income tax and the Bureau of Internal Revenue. While the Civil War income tax was simple in comparison with the modern income tax, it was a new type of law, asking questions that had not yet been answered.<sup>18</sup> Part I discusses what the tax law did, as well as how it was interpreted and administered. In addition, Part I will explain the structure of the Bureau of Internal Revenue, a new executive agency created to administer the new tax. It will go on to explain the duties and obligations of different people in the Bureau.

Part II will provide context for the conflict between the Mormons in Utah and the federal government. It will give context for what appears to be overreaction on both Young's and Taggart's part, and will discuss the macro issues—especially polygamy and territorial self-government—that drove the distrust between the Mormons and the federal government. It will then begin to bring together the relationship of the Mormon church and federal income taxation by focusing on John P. Taggart, Assessor of Internal Revenue for the Territory of Utah. Mormons had strong feelings about Taggart, and Taggart had strong feelings about the Mormons, and none of those feelings were complimentary. Part II ends describing how Taggart viewed the Mormons and how the Mormons viewed Taggart.

Those readers who are familiar with the Civil War income tax, mid-nineteenth-century Mormon history, or both (or are not interested in them) can skip to Part III. Part III provides the narrative of the year and a half in which the government attempted to tax the Mormon church on its tithing. The Part begins by discussing Taggart's assessment of the church's income. He then handed the assessment off to O.J. Hollister, Collector of Internal Revenue for the Territory of Utah. Hollister was responsible both to collect the assessed tax and to help Young request remission of the tax. The section on collection will describe how Hollister attempted to meet those dual mandates. Part III then describes the

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18. Britain's first national income tax had only been enacted about sixty years earlier, and the U.S. income tax was at least influenced by that British tax. PETER HARRIS, *INCOME TAX IN COMMON LAW JURISDICTIONS: FROM THE ORIGINS TO 1820*, at 1 (2006).

legal and factual arguments Young made in requesting remission of the income tax.

While Young argued that Mormon tithing did not represent taxable income, he did not count on winning. As a result, simultaneously with requesting remission, he made plans for how to reduce or eliminate taxation in the future if he lost on his argument. Part IV will initially focus on this early example of income tax distortions. Young's plans provide a window into how the specter of taxation affected Young's—and the Mormon church's—economic decision-making and, more broadly, how law can change religious practice.

Part IV provides a coda to the year and a half of the income tax skirmish. It lays out how the Commissioner of Internal Revenue ended up deciding on the church's tax liability, as well as the twists and turns it took in arriving at its conclusion. Finally, Part V discusses how similar interactions between religious practice and tax obligations play out in the modern world, with its more sophisticated and longer-lived tax law. Part V explores what lessons we can learn from Taggart and Young.

## I. THE DEVELOPMENT OF THE FEDERAL INCOME TAX

The conflict between the Mormon church and the federal income tax illustrates some of the growing pains a new legal regime faces. In 1869, both the federal income tax and the Bureau of Internal Revenue, the agency charged with administering the tax, were less than a decade old.<sup>19</sup> The government was still experimenting with the scope and application of the tax and how it applied to different kinds of taxpayers. As part of these growing pains, this relatively new federal revenue regime would become an important locus in the conflict between Mormons and the federal government.

### A. *The Civil War Income Tax*

Although it would expire by its own terms two years later, in 1870 the federal income tax, and for that matter the idea of an

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19. Bryan T. Camp, *Theory and Practice in Tax Administration*, 29 VA. TAX REV. 227, 229 (2009).



income tax, was still relatively young. During the seventeenth and eighteenth centuries, a number of colonies—most prominently in New England but also in the southern and middle colonies—imposed “faculty taxes.”<sup>20</sup> Faculty taxes were forerunners to the modern income tax but were not precisely income taxes. Without any kind of income reporting, individuals paid taxes on assumed income and profits.<sup>21</sup> For example, in 1725, Connecticut law provided that “the least” attorneys would be treated as earning fifty pounds and “the others in proportion to their practice.”<sup>22</sup> Half a century later, the law provided that traders or shopkeepers would be deemed to have income equal to ten percent of their cost of goods, while others would be deemed to earn whatever the government’s best estimate of their income was.<sup>23</sup>

While these faculty taxes set some precedent for the Civil War income tax, it can also trace its roots to Great Britain. In 1799, Great Britain enacted the first modern income tax;<sup>24</sup> that tax finally arrived on the shores of the United States in 1862, when the U.S. federal government needed revenue to fight the Civil War.<sup>25</sup> And even with the burdens of the Civil War, the Union tried to find other revenue sources before taxing citizens on their income.

Compared with the complexity and specificity of today’s federal income tax, the Civil War income tax was simplicity itself. The Revenue Act of 1862 taxed the annual “gains, profits, or income” of U.S. residents.<sup>26</sup> As today, the Civil War income tax was progressive, with two marginal brackets: a three-percent rate and a five-percent rate. After an exemption for income of \$600 or less, taxpayers paid taxes on income above \$600 but less than \$10,000 at

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20. Edwin R.A. Seligman, *THE INCOME TAX: A STUDY OF THE HISTORY, THEORY, AND PRACTICE OF INCOME TAXATION AT HOME AND ABROAD* 36–87 (1911).

21. Joe Thorndike, *An Army of Officials: The Civil War Bureau of Internal Revenue*, 93 *TAX NOTES* 1739, 1740 (2001). This idea that assumed profits were an appropriate measure of the tax base may have led directly to Taggart’s assessment of the Mormon church’s income. See *infra* notes 186–88 and accompanying text.

22. Seligman, *supra* note 20, at 374.

23. *Id.* at 374–75.

24. Assaf Likhovski, *Chasing Ghosts: On Writing Cultural Histories of Tax Law*, 1 *U.C. IRVINE L. REV.* 843, 875–76 (2011).

25. STEVEN A. BANK ET AL., *WAR AND TAXES* 36 (2008) (“The income tax had been used as early as 1799 in England during the Napoleonic wars, thus providing a model for [Union] income tax proponents.”).

26. Revenue Act of 1862, ch. 119, § 90, 12 Stat. 432, 473.

the three-percent rate, and on income of \$10,000 or more at the five-percent rate.<sup>27</sup> Two years later, Congress substantially increased the progressivity of the income tax.<sup>28</sup> The Act of June 30, 1864, increased the number of brackets from two to three; taxpayers still did not pay any taxes on income up to \$600, but between \$600 and \$5000 they paid taxes at a five-percent rate. Between \$5000 and \$10,000, they paid taxes at a 7.5% rate, and on income in excess of \$10,000, they paid at a ten-percent rate.<sup>29</sup> Congress immediately recognized that these new rates would prove insufficient to raise the revenue it needed.<sup>30</sup> Four days later, Congress imposed an additional five-percent income tax on taxpayers' 1863 income in excess of \$600.<sup>31</sup>

### *B. The Bureau of Internal Revenue*

Prior to its enactment of the new income tax, the federal government had relied almost exclusively on tariffs to provide the revenue it needed.<sup>32</sup> Tariffs are taxes imposed on imported goods, and throughout the nineteenth century the government collected the tariffs at customs houses.<sup>33</sup> To collect tariffs, the government established customs houses at various ports and staffed those customs houses with customs agents. The agents were responsible for inspecting ships and collecting tariffs on the goods being imported.<sup>34</sup> While the collection actions were far from perfect – customs houses were understaffed and overworked, and when the government stepped up enforcement at one port, merchants could shift their importing to another<sup>35</sup> – they were not difficult to administer. Merchants who owed tariffs came to the collector,

27. *Id.*

28. BANK ET AL., *supra* note 25, at 40–41 (2008).

29. Revenue Act of 1864, ch. 173, § 116, 13 Stat. 223, 281.

30. BANK ET AL., *supra* note 25, at 41.

31. Joint Resolution Imposing a Special Income Duty, No. 77, 13 Stat. 417 (July 4, 1864).

32. JOHN C. CHOMMIE, *THE INTERNAL REVENUE SERVICE* 8 (1970). In fact, the Tariff Act of 1789, which provided revenue to the federal government, was the first substantive piece of legislation Congress passed under the Constitution. David E. Birenbaum, *The Omnibus Trade Act of 1988: Trade Law Dialectics*, 10 U. PA. J. INT'L BUS. L. 653, 655 (1988). Congress also raised some revenue through the sale of federal land, but very little from taxing its own citizens and residents directly. CHOMMIE, *supra* at 8.

33. JOHN M. DOBSON, *TWO CENTURIES OF TARIFFS: THE BACKGROUND AND EMERGENCE OF THE U.S. INTERNATIONAL TRADE COMMISSION* 1 (1976).

34. PETER ANDREAS, *SMUGGLER NATION: HOW ILLICIT TRADE MADE AMERICA* 17 (2013).

35. *Id.* at 76.

who was able to see and inspect the taxable property. Moreover, the government understood how to collect tariffs, which had been providing the bulk of its revenue since the beginning of the United States.<sup>36</sup>

The government's reliance on tariffs and excise taxes did not preclude it from imposing internal taxes prior to the Civil War. At various times, the government imposed excise taxes on whisky, salt, investments, sugar refining, and carriages and imposed a direct tax on land, houses, and slaves.<sup>37</sup> These internal taxes required a collection mechanism; to collect them, the government established the office of Commissioner of Revenue in 1792.<sup>38</sup> Most of these internal taxes proved ephemeral though and, in any event, only raised a fraction of the federal government's revenue.<sup>39</sup>

The new federal income tax demanded a different collection mechanism than that which had collected the tariffs and the occasional internal taxes. Administering the income tax "presumed an administration built around personal contact within limited geographic space[]." <sup>40</sup> To allow the personal contact necessary to assess and collect the federal income tax, Congress created the Bureau of Internal Revenue.<sup>41</sup>

The Bureau of Internal Revenue faced significant criticism almost immediately after its creation. Critics claimed that the Bureau's uneven collection efforts meant that only honest taxpayers paid their income tax; dishonest citizens could—and did—easily evade it.<sup>42</sup> With no apparent irony or self-awareness, critics also argued that the Bureau had too much power, and that power allowed it to use "strong arm tactics to collect the income tax."<sup>43</sup>

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36. CHOMMIE, *supra* note 32, at 7.

37. *Id.* at 8.

38. *Id.*

39. In 1800, internal revenue provided \$400,000, as opposed to tariffs, which raised \$5 million. By 1850, internal revenue yields had dropped to \$50,000, while revenue from tariffs had grown more than five-fold to \$25.6 million. *Id.*

40. Camp, *supra* note 19.

41. Revenue Act of 1862, ch. 119, § 1, 1213 Stat. 432, 432 (creating Office of the Commissioner of Internal Revenue); Thorndike, *supra* note 21, at 1739 ("To collect the income tax and other internal levies, Congress created the Bureau of Internal Revenue.").

42. Thorndike, *supra* note 21.

43. *Id.*

Part of the country's unease with the Bureau of Internal Revenue can probably be explained by the fact that, throughout history, nobody liked the tax collector.<sup>44</sup> After all, the tax collector takes citizens' money from them, and while the tax revenue funds governmentally provided services, it is easy enough to ignore the link between taxes paid and benefits received.<sup>45</sup>

The country's distrust of the Bureau did not rest solely on a general, timeless dislike of tax collectors, though. The Bureau did, in fact, have "broad and often intrusive powers."<sup>46</sup> To effectively collect the income tax, tax collectors had to explore Americans' private financial lives in a much more intimate manner than the collection of property or excise taxes required.<sup>47</sup> Facing such a new and intimate invasion of their financial privacy, it is no surprise that Americans disliked the Bureau.

Congress legislated the contours of how the Bureau of Internal Revenue would collect taxes. Congress charged the President with dividing the country into collection districts and, with advice and consent of the Senate, appointing a principal assessor and principal collector for each district.<sup>48</sup> With the Revenue Act's 1862 passage, the president established 185 such collection districts, with a principal assessor and collector in each.<sup>49</sup>

After their presidential appointments, the principal assessors and collectors were able to appoint assistant assessors and deputies, respectively. Each assessor had the authority to divide his collection district into as many assessment districts as he felt necessary and to appoint an assistant assessor for each such district.<sup>50</sup> Each assistant assessor had to live in the district to which

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44. See Samuel D. Brunson, *Watching the Watchers: Preventing I.R.S. Abuse of the Tax System*, 14 FLA. TAX REV. 223, 224 (2013) (detailing examples throughout history of prejudice against tax collectors).

45. In fact, this disconnect is almost central to the definition of a tax. A tax is a compulsory payment to the government, without respect to a citizen's individual identity; moreover, if the government provides economic benefit to the taxpayer in exchange for the compulsory payment, that payment is not a tax. See Treas. Reg. § 1.901-2(a)(2) (as amended in 2013).

46. Thorndike, *supra* note 21.

47. *Id.*

48. Revenue Act of 1862, ch. 119, § 2, 12 Stat. 432, 433; Joseph J. Thorndike, *When Treasury Refused to Collect the Income Tax*, 149 TAX NOTES 1108, 1108 (2015).

49. Thorndike, *supra* note 21, at 1752.

50. Revenue Act of 1862, ch. 119, § 3, 12 Stat. 432, 433.

he was appointed.<sup>51</sup> Similarly, each principal collector could appoint as many deputy collectors as he thought proper.<sup>52</sup>

While the Bureau started in July 1862 with three clerks, by January it had ballooned to almost 4000 employees. The vast majority of these employees—all but sixty, in fact—worked in the field.<sup>53</sup> These field employees did the majority of the work in collecting tax. Each taxpayer was required to make an annual list or return laying out her annual income, as well as any other taxable property she owned.<sup>54</sup> Under the Revenue Act of 1864, assessments were due on May 1, and taxpayers had to pay their income taxes by June 30.<sup>55</sup> In 1867, Congress pushed the annual assessments forward from May to March, and the payment deadline from June 30 to April 30.<sup>56</sup> Unlike the modern income tax, the assessment and payment deadlines were not for the prior year's income. By March 1, 1867, a taxpayer was assessed on her income from January 1 through December 31, 1867, and by April 30, 1867, she had to pay the assessed taxes for that year.<sup>57</sup> How did the tax law expect a taxpayer to know how much income she would earn in the following ten months? It required her to estimate her "annual gains, profits, or income."<sup>58</sup>

After she estimated her income, the law required her to deliver her return to the local assistant assessor.<sup>59</sup> The assistant assessor then had the responsibility to use that return (as well as other records, documents, and other information gathered "by all other lawful ways and means") to determine how much the taxpayer owed in taxes.<sup>60</sup> And what if the taxpayer did not file a list or return? The assessor was permitted to estimate the amount the

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51. *Id.*

52. *Id.* § 5, 12 Stat. at 434.

53. Thorndike, *supra* note 21, at 1752.

54. Revenue Act of 1862, ch. 119, § 6, 12 Stat. 432, 434.

55. Revenue Act of 1864, ch. 173, § 119, 13 Stat. 223, 283.

56. Act of Mar. 2, 1867, ch. 169, § 1, 14 Stat. 471, 471.

57. *Id.*; Revenue Act of 1864, ch. 173, § 116, 13 Stat. 223, 281.

58. Revenue Act of 1864, ch. 173, § 117, 13 Stat. 223, 281.

59. Revenue Act of 1862, ch. 119, § 6, 12 Stat. 432, 434.

60. *Id.* § 7, 12 Stat. at 434–35.

taxpayer owed in taxes and then add a fifty-percent penalty to that amount.<sup>61</sup>

Taxpayers who disagreed with the assessment levied could appeal the assessment, and the assessor had the authority to reexamine the assessment.<sup>62</sup> By 1864, Congress had explicitly provided that the appeal process could include witnesses, as well as the reexamination of various records.<sup>63</sup> The assessor's decision on appeal was final, though.<sup>64</sup> Within ten days after the assessor ruled on the appeal or the window for appeal closed, the law required him to send the assessment list to the collector.<sup>65</sup> Once the assessor had transmitted the assessment list to the collector, taxpayers could no longer appeal the assessment.<sup>66</sup>

Once the collector received the assessment list, it was his responsibility to "demand payment" of the taxes due.<sup>67</sup> If a taxpayer did not pay her tax liability within ten days of the demand, the law authorized collectors or their deputies to seize and sell property with a value equal to 110% of the tax due.<sup>68</sup>

Congress had hoped that appointing local assessors and collectors, as well as assistants and deputies, would help smooth the transition into the new, invasive tax.<sup>69</sup> And in theory, it may have. In practice, though, some number of the appointees were patronage appointments, some of whom proved unworthy or incompetent, exasperating the public's distrust of the new bureaucracy.<sup>70</sup>

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61. Revenue Act of 1864, ch. 173, § 14, 13 Stat. 223, 227. This fifty-percent penalty becomes important in Assessor Taggart's assessment of the Mormon church's income. See *infra* notes 189–91 and accompanying text.

62. Revenue Act of 1862, ch. 119, § 15, 12 Stat. 432, 437.

63. Revenue Act of 1864, ch. 173, § 19, 13 Stat. 223, 228–29. The Revenue Act of 1864 was similar to the Revenue Act of 1862. While the Revenue Act of 1862 set up the structure of the Bureau of Internal Revenue, the 1864 Act governed the assessment and attempts to collect taxes from the Mormon church. Because the 1864 Act governed the government's attempt to tax the Mormon church, the Article will use the 1864 Act going forward.

64. Thorndike, *supra* note 21, at 1753.

65. Revenue Act of 1864, ch. 173, § 20, 13 Stat. 223, 229.

66. *Id.* § 19, at 228.

67. *Id.* § 28, at 233.

68. *Id.*

69. Thorndike, *supra* note 21, at 1752.

70. See *id.*

Those unworthy and incompetent appointees helped the Bureau of Internal Revenue earn at least part of the public's distrust. While the Bureau needed employees "of intelligent business capacity and unfaltering integrity[.]" the Commissioner of Internal Revenue argued to Congress that the Bureau paid its assessors and collectors inadequately.<sup>71</sup> Principal assessors and principal collectors earned base salaries of \$1500 per year.<sup>72</sup> Assistant assessors received \$4 per day that they collected lists and made valuations, plus \$3 per 100 people they assessed.<sup>73</sup> As a result, businesses looking for tax expertise could easily hire competent Bureau employees away.<sup>74</sup>

Attempts to ameliorate the Bureau's loss of talent did little to improve its standing with the public. Commissioner Joseph J. Lewis, the second commissioner of the Bureau, tried to supplement the Bureau's abilities by hiring private collectors to collect delinquent tax accounts.<sup>75</sup> These collectors earned commissions of up to fifty percent of the amounts they collected.<sup>76</sup> Some of the private collectors proved unscrupulous, though, and after collecting on the accounts, they continued west with their and the government's money.<sup>77</sup>

In spite of the Bureau's underpaid and undertrained staff, its employees had broad powers in an invasive and contentious tax regime.<sup>78</sup> They could "compel the production of records and interrogate taxpayers," and the Bureau encouraged them to investigate questionable returns aggressively.<sup>79</sup> Commissioner Lewis reminded his assistant assessors that "[a]ny tax-payer who renders untrue returns commits a triple offence."<sup>80</sup> The Bureau

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71. OFFICE OF INTERNAL REVENUE, TREASURY DEP'T, REPORT FROM COMMISSIONER GEORGE S. BOUTWELL TO SECRETARY S. P. CHASE (1863), reprinted in *Commissioner Boutwell's First Report*, N.Y. TIMES, Jan. 22, 1863, at 2; Thorndike, *supra* note 21, at 1753.

72. Revenue Act of 1864, ch. 173, §§ 22, 25, 13 Stat. 223, 230-32.

73. *Id.* § 22, 13 Stat. at 230. Every ten hours of partial days were treated as the equivalent of a day for compensation purposes. *Id.* § 24, 13 Stat. at 231.

74. Thorndike, *supra* note 21, at 1753.

75. CHOMMIE, *supra* note 32, at 10.

76. *Id.*

77. *Id.*

78. Thorndike, *supra* note 21, at 1754-55.

79. *Id.* at 1755.

80. OFFICE OF INTERNAL REVENUE, TREASURY DEP'T, COMMISSIONER JOS. J. LEWIS CIRCULAR (1865), reprinted in *The Special Income Tax*, N.Y. TIMES, Jan. 26, 1865, at 2. The three

wanted assessors to lay aside any delicacy, taking instead a tough and confrontational stance with taxpayers.<sup>81</sup> They were to view reluctance on the part of taxpayers as indicative of taxpayer dishonesty;<sup>82</sup> failure by the taxpayer to produce the records an assessor demanded was an especially serious red flag.<sup>83</sup>

While assessors were instructed to view the taxpaying public with skepticism, if not outright hostility, assessors were also under tremendous pressure. In spite of their low pay, they were required to keep their offices constantly open. Moreover, they were required to assess taxes even though rulings from the Commissioner often conflicted with field interpretations of the tax law.<sup>84</sup>

In addition, the way the law structured assessors' and collectors' pay, even if inadequate, may have roused distrust in the public. On top of the base salary, assessors and collectors received a portion of the amounts collected in their districts. Assessors received 0.5% of collections between \$100,000 and \$400,000, 0.2% of collections between \$400,000 and \$600,000, and 0.1% of collections in excess of \$600,000.<sup>85</sup> Meanwhile, collectors received a commission of 3% of the first \$100,000 they collected, 1% of amounts collected between \$100,000 and \$400,000, and 0.5% of any amounts collected in excess of \$400,000.<sup>86</sup> The law provided economic incentives for assessors and collectors to maximize the amount that taxpayers owed and paid in taxes. And if the assessor got a taxpayer's liability wrong? Appealing an assessment often proved difficult, if not impossible.<sup>87</sup>

In spite of the unpopularity of both the federal income tax and the Bureau of Internal Revenue, most Americans tolerated the

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offenses Commissioner Lewis referred to were offenses against country, neighbor, and the law. *Id.*

81. *Id.*

82. *See id.*

83. Thorndike, *supra* note 21, at 1755. This is another presumption that proved important as Assessor Taggart dealt with Brigham Young. *See infra* notes 183–89 and accompanying text.

84. CHOMMIE, *supra* note 32, at 10.

85. Revenue Act of 1864, ch. 173, § 22, 13 Stat. 223, 230. The maximum salary an assessor could earn was \$4000. *Id.*

86. *Id.* § 25, 13 Stat. at 231–32. The maximum salary a collector could earn was \$10,000. *Id.* at 232.

87. Thorndike, *supra* note 21, at 1755.



Bureau's broad administrative reach and its intrusive and confrontational techniques during the Civil War.<sup>88</sup> In 1866, the Bureau collected \$311 million in taxes, a high-water mark not to be met again for forty-five years.<sup>89</sup> As the Civil War ended, though, so did the public's patience with the tax and the Bureau.<sup>90</sup>

In response, in 1867, Congress eliminated the income tax's progressive rate structure, replacing it with a flat five-percent tax on income in excess of \$1000.<sup>91</sup> In 1870, Congress again reduced the tax rate, this time to 2.5%, while raising the exemption amount to \$2000.<sup>92</sup> Finally, Congress allowed the income tax to lapse under its own terms after 1871.<sup>93</sup>

At the same time, Congress made some effort to address complaints from and about the Bureau of Internal Revenue. In the mid-1860s, it provided for a "modest reorganization" of the Bureau, including providing the Bureau with its own administrative employees.<sup>94</sup> It also established a three-person Revenue Commission, charged with making recommendations for the future of the Bureau.<sup>95</sup>

The lapse of the income tax did not kill the Bureau; it did, however, coincide with a significant change to the Bureau's organization, a change recommended both by the Revenue Commission's report and Commissioner John W. Douglass.<sup>96</sup> In 1872, in response to "the widespread complaints about assessors[.]" Congress eliminated the position of assessor entirely.<sup>97</sup> It divided the assessors' former responsibilities between district collectors, revenue agents, and the Commissioner.<sup>98</sup>

The new federal income tax, and the new bureaucracy created to collect that tax, were inherently invasive. At the same time, taxpayers felt that invasiveness in the form of Bureau of Internal

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88. *Id.*

89. CHOMMIE, *supra* note 32, at 11.

90. Thorndike, *supra* note 21, at 1755.

91. *Id.* at 1759.

92. Revenue Act of 1870, ch. 255, §§ 6, 8, 16 Stat. 256, 257-58.

93. David J. Herzig & Samuel D. Brunson, *Let Prophets Be (Non) Profits*, 52 WAKE FOREST L. REV. 1111, 1128 (2017).

94. Thorndike, *supra* note 21, at 1759.

95. CHOMMIE, *supra* note 32, at 11.

96. *Id.*

97. Thorndike, *supra* note 21, at 1759.

98. CHOMMIE, *supra* note 32, at 11; Thorndike, *supra* note 21, at 1759.

Revenue employees, who were not always well trained or competent. This young and growing bureaucracy engendered distrust in the best situations, and that distrust proved almost explosive in the Utah territory, piling, as it did, on top of other layers of conflict between the federal government and the Mormons who lived there.

## II. CONFLICT BETWEEN THE MORMONS AND THE FEDERAL GOVERNMENT

The year 1869, when Taggart assessed the Mormon church for income tax, proved an important year for Utah and for the Mormons who lived there. The Mormons had initially moved west to escape persecution and to establish a relatively autonomous, isolated homeland.<sup>99</sup> But by 1869, the world the Mormons had left had definitely begun encroaching on their Zion in the desert. On May 10, 1869, the transcontinental railroad was finished at Promontory, near Ogden, Utah.<sup>100</sup> The railroad promised an end to the relative isolation of Utah and portended change, for good or for ill.<sup>101</sup>

In the meantime, the Mormon church was facing internal dissent. Rumors circulated of a possible division in the church.<sup>102</sup> And federal pressure began bearing down on the Mormons.<sup>103</sup> These pressures did not emerge from nothing, though. By 1869, the Mormon church had a long history of conflict with the federal government; 1869 was only the culmination (so far, at least) of that history.

### A. Sovereignty and Polygamy

After being driven out of Illinois, Brigham Young arrived in Utah in 1847, and the Mormons began gathering and colonizing the territory.<sup>104</sup> By the 1850s, they had become comfortable enough in

99. JOHN G. TURNER, *BRIGHAM YOUNG: PIONEER PROPHET* 142, 170 (2012).

100. ARRINGTON, *supra* note 7, at 235.

101. *Id.* at 239.

102. RONALD W. WALKER, *WAYWARD SAINTS: THE GODBEITES AND BRIGHAM YOUNG* 149 (1998).

103. See *infra* notes 133–42 and accompanying text.

104. TURNER, *supra* note 99, at 168.

their new home to make a shocking announcement. While some Mormons had been covertly engaging in polygamy since the 1830s, in 1852 the church made the practice public.<sup>105</sup>

In addition to their rejection of American marital norms, by the 1850s the Mormons had become openly hostile to the federal government, and the government returned that hostility. Throughout the 1850s, visitors to Utah reported that the Mormons spoke of overthrowing the U.S. government.<sup>106</sup>

In 1856, the anti-federal government rhetoric became action. At the end of that year, Mormons broke into the office of one of the two federal judges appointed to the Utah territory and burned his books and stole his records.<sup>107</sup> By the middle of 1857, all but one of the federal appointees in Utah had left the territory.<sup>108</sup> In response to reports from these appointees, newly inaugurated President James Buchanan appointed Alfred Cummings to replace Young as governor of the Utah territory.<sup>109</sup> While Buchanan may have been willing to ignore the Mormons' practice of polygamy, he could not countenance Young's "absolute [power] over both Church and State[,]” Young's "despotism[,]” and his disregard for the supremacy of the Constitution.<sup>110</sup> Buchanan also appointed a number of other non-Mormons to judicial and administrative posts in the territory.<sup>111</sup> The President sent General Sidney Johnston and

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105. IRWIN ALTMAN & JOSEPH GINAT, *POLYGAMOUS FAMILIES IN CONTEMPORARY SOCIETY* 32 (1996).

106. See JOHN GARY MAXWELL, *THE CIVIL WAR YEARS IN UTAH: THE KINGDOM OF GOD AND THE TERRITORY THAT DID NOT FIGHT* 7 (2016). Their impression was not unfounded; in an August 26, 1849, sermon, Young said, "The very days that we are now experiencing have been told you in the United States for the last eighteen years—God Almighty will give the United States a pill that will puke them to death and that is worse than a lobelia—and I am a prophet enough to prophesy the downfall of the government that has driven us out . . . ." 1 *THE COMPLETE DISCOURSES OF BRIGHAM YOUNG: 1832 TO 1852*, at 348 (Richard S. Van Wagoner ed., 2009).

107. Shayna M. Sigman, *Everything Lawyers Know About Polygamy Is Wrong*, 16 *CORNELL J.L. & PUB. POL'Y* 101, 116 (2006).

108. *Id.*

109. MAXWELL, *supra* note 106, at 8.

110. Stephen Eliot Smith, *Barbarians Within the Gates: Congressional Debates on Mormon Polygamy, 1850–1879*, 51 *J. CHURCH & ST.* 587, 599–600 (2009) (quoting *CONG. GLOBE*, 35th Cong., 1st Sess., 763 (1858)).

111. Sigman, *supra* note 107.

2500 troops to protect these appointees and reestablish federal control over the Mormons and the Utah territory.<sup>112</sup>

In response to the approaching army, Young declared martial law in Utah, forbade armed forces from entering the territory, and told Utah's residents to prepare to repel any invasion.<sup>113</sup> Young even sent a message to the approaching troops, forbidding them from entering Utah and instructing them to return east.<sup>114</sup> The army ignored Young's order but viewed it, and the declaration of martial law, as evidence that Utah's Mormons were in "open rebellion."<sup>115</sup>

Even after the army arrived in Utah, the Mormons and the army avoided major battles. But the Mormon militia harassed the army, stampeding its livestock, burning foraging lands, and attempting to cut off or destroy the army's provisions.<sup>116</sup> When reports of these Mormon tactics reached the East, they "further enflamed popular opinion that the Mormons existed in a state of rebellion against the United States."<sup>117</sup> When Cumming arrived in Utah in November 1857, he worked to quickly establish himself and his administration and begin his tenure as territorial governor.<sup>118</sup> The so-called Utah War ended in mid-1858, when President Buchanan pardoned Mormon leaders, provided they would submit to the federal government, and they accepted the pardon.<sup>119</sup>

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112. MAXWELL, *supra* note 106, at 8; Sigman, *supra* note 107. This state of tension and conflict erupted into violence in southern Utah. On September 11, 1857, Mormon settlers, possibly with the help of some local Native Americans, killed about 120 men, women, and children emigrating from Missouri and Arkansas, sparing only 17 children they deemed too young to talk about it. This event came to be known as the "Mountain Meadows Massacre." Shannon A. Novak & Derinna Kopp, *To Feed a Tree in Zion: Osteological Analysis of the 1857 Mountain Meadows Massacre*, 37 HIST. ARCHAEOLOGY 85, 85 (2003).

113. BRENT M. ROGERS, UNPOPULAR SOVEREIGNTY: MORMONS AND THE FEDERAL MANAGEMENT OF EARLY UTAH TERRITORY 190 (2017).

114. *Id.* at 193.

115. *Id.* at 194.

116. *Id.* at 194-95.

117. *Id.* at 196.

118. *Id.* at 197.

119. THE PROPHET AND THE REFORMER: THE LETTERS OF BRIGHAM YOUNG AND THOMAS L. KANE 271 (Matthew J. Grow & Ronald W. Walker eds., 2015) [hereinafter PROPHET AND THE REFORMER].

While that ended the Utah War, it did not eliminate eastern suspicion of Mormons.<sup>120</sup> Up to 3000 troops initially remained encamped about thirty miles from Salt Lake.<sup>121</sup> Still, with the country's entrance into civil war, the question of what to do about Mormonism and the Utah territory became temporarily less important. A year after the army's arrival in Salt Lake, it started disposing of equipment it had in Utah and, a year later, reduced the number of soldiers stationed in Salt Lake.<sup>122</sup> In 1861, a month after the Civil War began, the War Department ordered the soldiers who remained in Utah to dispose of the remainder of the equipment and to leave the territory.<sup>123</sup>

Even the Civil War did not entirely turn the gaze of the government away from Utah. Though the government believed it had quashed the Mormons' theocratic and rebellious government in the West, Mormons practiced polygamy, a practice deeply antithetical to the "white, single-household, Christian, monogamous family model" Americans privileged as the "core of national identity."<sup>124</sup> As early as 1856, Republican Representative Justin S. Morrill drafted legislation to ban polygamy in the territories.<sup>125</sup> Congress failed to enact Morrill's bill, though, as it fell victim to debates about slavery and self-government in the territories.<sup>126</sup>

With the election of Abraham Lincoln, a Republican, in 1860 and with the beginning of the Civil War a year later, Congress began to actively assert federal authority over the western territories. In 1862, Utah petitioned Congress for statehood.<sup>127</sup> With the Southern Democrats gone from Congress, the House

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120. In fact, the Mountain Meadows Massacre alone "came to symbolize Mormon savagery in the national media in the years and decades following the Utah War." ROGERS, *supra* note 113, at 188.

121. E.B. LONG, *THE SAINTS AND THE UNION: UTAH TERRITORY DURING THE CIVIL WAR* 7 (1981).

122. *Id.*

123. *Id.*

124. TALBOT, *supra* note 17, at 84.

125. *Id.* at 60.

126. ROGERS, *supra* note 113, at 283.

127. PROPHET AND THE REFORMER, *supra* note 119, at 381.

Committee on Territories unanimously rejected the application, with concerns about polygamy at the forefront of that decision.<sup>128</sup>

At around the same time, Lincoln signed a series of laws expanding federal power, including the Morrill Anti-Bigamy Act, a bill that had been floating around Congress for six years before its 1862 enactment.<sup>129</sup> The core of the Act provided that any individual found guilty of entering into a bigamous marriage in a U.S. territory would face a fine of up to \$500 and imprisonment for up to five years.<sup>130</sup>

Though the criminalization of territorial bigamy was perhaps the most salient part of the Morrill Anti-Bigamy Act, the Act did two other things, both of which are more important to the story of taxing the Mormon church. First, it annulled the Mormon church's incorporation.<sup>131</sup> Second, it prevented religious and charitable associations from acquiring or holding real property in any territory if that real property had a value in excess of \$50,000.<sup>132</sup>

Although the Morrill Anti-Bigamy Act putatively targeted Mormons in the Utah territory, in fact, it had little bite for the first decade it was on the books.<sup>133</sup> While Lincoln signed the bill, he did not enforce it, in hopes that the lack of enforcement would encourage Utah to stay loyal to the Union.<sup>134</sup> Lincoln had no desire to provoke the Mormons, and "tensions between Utah and the national government eased for the remainder of the Civil War."<sup>135</sup>

The Civil War ended in 1865.<sup>136</sup> Almost immediately, the country's attention moved to Reconstruction, which attempted to bring the Confederate states back into the Union.<sup>137</sup> Initially,

128. *Id.*

129. ROGERS, *supra* note 113, at 285.

130. Morrill Anti-Bigamy Act of 1862, ch. 126, § 1, 12 Stat. 501, 501.

131. *Id.* § 2, 12 Stat. at 501. The Act did allow the unincorporated Mormon church to keep property it had previously legally acquired. *Id.*

132. *Id.* § 3, 12 Stat. at 501-02. Again, the Act did not impair the rights of religious and charitable organizations to keep real property they had already acquired.

133. PROPHET AND THE REFORMER, *supra* note 119, at 381; ROGERS, *supra* note 113, at 288-89.

134. WELLS, *supra* note 8, at 359.

135. TURNER, *supra* note 99, at 329.

136. See JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 850 (1988).

137. JOSEPH A. RANNEY, IN THE WAKE OF SLAVERY: CIVIL WAR, CIVIL RIGHTS, AND THE RECONSTRUCTION OF SOUTHERN LAW 5 (2006).

Congress enacted laws that required the transformation of Southern states' governments; to be readmitted to the Union, states needed new constitutions, framed by individuals who took a loyalty oath, and the constitutions had to provide for African American suffrage.<sup>138</sup> While the federal government was intensely involved in the processes during the early years of Reconstruction, by the early 1870s, it had lifted voting restrictions on ex-Confederates, and its attention to and engagement with the Reconstruction process had begun to wane.<sup>139</sup>

As the country's focus on the South waned, the federal government began again to pay attention to Utah and to Mormon polygamy.<sup>140</sup> Speaking in Salt Lake City in October 1869, Vice President Schuyler Colfax told the assembled audience that the country was governed by law and that religious belief did not justify violating the law.<sup>141</sup>

Congressman Shelby M. Cullom agreed with Colfax's assessment and introduced a bill that would bring the fight back to the Mormons. Among other things, it imposed heavy fines and imprisonment for polygamists and made the crime of polygamy easier to prove.<sup>142</sup> It disenfranchised men not only for practicing polygamy but for believing in it.<sup>143</sup> It prevented foreign-born polygamists from becoming citizens and denied Mormons who practiced polygamy access to the Homestead Act or to preemption laws.<sup>144</sup> It also included a number of measures that would otherwise proscribe Mormon polygamists from finding "shelter in local government."<sup>145</sup> Cullom's bill passed the House, but it ultimately failed to pass the Senate.<sup>146</sup>

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138. *Id.* at 6.

139. *Id.* at 8.

140. GORDON, *supra* note 13, at 120.

141. WALKER, *supra* note 102, at 212-13.

142. *Id.* at 214.

143. *Id.*

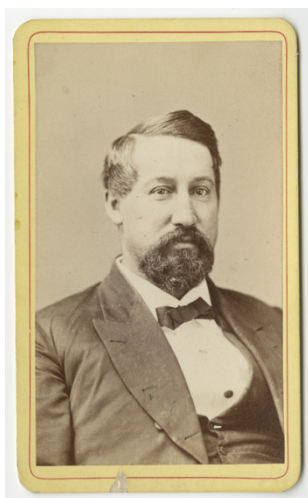
144. *Id.*

145. GORDON, *supra* note 13, at 274 n.6.

146. *Id.* During its pendency, Mormons were understandably concerned about the bill. In May 1870, Young wrote to Hooper asking whether he could "get Judge Black or some other influential friend" to find out whether, if the Cullom bill became law, it was possible to get an injunction against President Grant and Congress or, if not, whether the Supreme Court could issue a temporary injunction preventing federal officers in Utah from enforcing the bill. Letter from Brigham Young, President, The Church of Jesus Christ of Latter-day

In spite of the failure of the Cullom bill, the federal government began to work to reassert control over Mormon Utah. That goal was epitomized by the 1870 appointment of James B. McKean as the chief judge in Utah.<sup>147</sup> McKean asserted that he had a divinely commissioned duty to subjugate the Mormon-run Utah government.<sup>148</sup> As part of this reassertion of federal control over Utah, John P. Taggart entered into the story of Mormon Utah and its relations with the federal government as the Assessor of Internal Revenue for the district of Utah.<sup>149</sup>

*B. Taggart vs. the Mormons*



*John P. Taggart*

Taggart<sup>150</sup> almost instantly proved unpopular among the Mormons in Utah, and Taggart returned the Mormons' dislike in kind. While unpopularity may have been the rule for Internal

Saints to W.H. Hooper (May 26, 1870) (on file with the Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah).

147. WELLS, *supra* note 8, at 300.

148. *Id.*

149. *See infra* notes 152–54 and accompanying text.

150. Photo of John P. Taggart, John P. Taggart Papers (USU\_COLL MSS 520, Box 1, Folder 1, Special Collections and Archives, Utah State University Merrill-Cazier Library, Logan, Utah).



Revenue assessors,<sup>151</sup> Taggart's unpopularity exceeded that of a mere tax collector. His unpopularity reflected the 1869 distrust between Mormons and the federal government.

During the 1869 Senate recess, President Ulysses S. Grant appointed a number of Internal Revenue assessors, including Taggart as the assessor for the Utah territory.<sup>152</sup> On December 6, 1869, President Grant formally nominated Taggart to that position.<sup>153</sup> Taggart replaced Augustus L. Chetlain, who had been appointed by President Andrew Johnson three years earlier.<sup>154</sup> Taggart, a native of Pennsylvania, had served on Grant's Civil War staff as an assistant surgeon.<sup>155</sup> On December 23, 1861, Taggart had become the medical purveyor for the District of Cairo, which encompassed southern Illinois, western Kentucky, and southern Missouri.<sup>156</sup>

Within months of Taggart's appointment, animosity flared between him and the Utahns he had been charged with assessing. In February 1870, the House of Representative held hearings on how to best enforce anti-polygamy laws in the Territory of Utah.<sup>157</sup> Taggart was called to testify, and the Chairman asked him what he knew of matters in the territory. Taggart responded that "Mormons recognize and observe no law except such as they are compelled to observe. So far as my own department is concerned, I know they do not scruple at any means they can to contrive to evade the revenue law."<sup>158</sup> He further testified that, when he arrived, six of his assistant assessors had been Mormons. His investigations

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151. Tax assessors were so unpopular among taxpayers that, in 1872, Congress eliminated the position entirely, shifting the assessor's duties to district collectors and revenue agents. Thorndike, *supra* note 21, at 1759.

152. 17 J. EXECUTIVE PROC. SENATE U.S. 256 (1901).

153. *Id.*

154. 15 J. EXECUTIVE PROC. SENATE U.S. 57 (1887).

155. YDA ADDIS STORKE, A MEMORIAL AND BIOGRAPHICAL HISTORY OF THE COUNTIES OF SANTA BARBARA, SAN LUIS OBISPO AND VENTURA, CALIFORNIA 541 (1891).

156. THE PAPERS OF ULYSSES S. GRANT 330 n.1 (John Y. Simon ed., 1970).

157. COMM. ON THE TERRITORIES, EXECUTION OF LAWS IN UTAH, H.R. REP. NO. 41-21, pt. 1, at 3 (1870).

158. COMM. ON THE TERRITORIES, EXECUTION OF LAWS IN UTAH, JOHN TAGGART, TESTIMONY, H.R. REP. NO. 41-21, pt. 2, at 1 (1870) [hereinafter JOHN TAGGART, TESTIMONY].

forced him to conclude that these Mormon assistant assessors “used partiality in behalf of Mormons,” and he soon fired them.<sup>159</sup>

The Mormons returned Taggart’s disdain.<sup>160</sup> In a letter to Internal Revenue Commissioner Columbus Delano, Brigham Young wrote:

Mr Taggart, I regret to say, had already made himself extremely unpopular among our citizens. They judged him as actuated not by the just and gentlemanly motives which characterized his predecessors, but by a bitter & deeply prejudiced animosity against the Latter-day Saints & their Institutions, in short, that he was an officious meddler in this & other matters with which he had no legitimate concern.<sup>161</sup>

The shared animosity reflected a broader distrust between non-Mormons and Mormons, and it spilled out beyond merely the realm of taxation. In May 1870, Young situated Taggart in “the ‘ring’” of anti-Mormon federal officials, alongside Judge Wilson, Robert N. Baskin, and “others of a like ilk.”<sup>162</sup> As part of that ring,

159. *Id.* The accusation is probably not unfounded; when Assistant Assessor Lyman informed Young of Taggart’s initial inquiry into Mormon finances, he also explained how he had responded in a manner that avoided providing Taggart with substantive information. Lyman ended with the hope that “I have not done wrong in this matter.” Letter from Francis M. Lyman, Assistant Assessor, to Brigham Young, President, The Church of Jesus Christ of Latter-day Saints (Aug. 27, 1869) (on file with the Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah).

160. In fact, the *Deseret News*, reporting on Taggart’s testimony before Congress, wrote, “[Taggart] despises the Mormons, religiously and every other way. And the Mormons, by his own showing, as cordially despise him.” *An Act to Replenish Brothels*, *DESERET NEWS*, Mar. 2, 1870, at 12.

161. Letter from Brigham Young, President, The Church of Jesus Christ of Latter-day Saints, to Columbus Delano, Internal Revenue Comm’r (Mar. 18, 1870) (on file with the Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah).

162. Letter from Brigham Young to W.H. Hooper (May 26, 1870), *supra* note 146. In describing Taggart, Wilson, Baskin, and others as a “ring,” Young “borrowed from the slang sometimes used to describe the urban political machines of the era.” *PROPHET AND THE REFORMER*, *supra* note 119, at 420. Baskin, a non-Mormon living in Utah, was so opposed to Mormon polygamy and self-government that he drafted the Cullom bill. *ROBERT NEWTON BASKIN, REMINISCENCES OF EARLY UTAH* 28 (1914). And, while Judge Wilson was originally a favorable appointment for the Mormons, *PROPHET AND THE REFORMER* *supra* note 119, at 283, he ultimately let Young down, determining that he lacked jurisdiction to hear appeals from the probate court in civil cases. Letter from Brigham Young to W.H. Hooper (May 26, 1870) *supra* note 146. Later, Young would elevate Judge James McKean (who had not yet arrived in Utah when Young penned his letter) to “acknowledged standard bearer” of “the ring.” *PROPHET AND THE REFORMER*, *supra* note 119, at 424.

Taggart could only be trusted to persecute Mormons. That inimical attitude can be illustrated by the different ways Mormons and non-Mormons reported an 1870 attack on Taggart.

On February 12, 1870, the *Internal Revenue Record and Customs Journal* reported that Taggart had been “attacked by three ruffians” outside his Salt Lake home.<sup>163</sup> He suffered a knife wound in his arm.<sup>164</sup> The author of the article went on to assert that Taggart had “offended the ‘Saints’ [Mormons] by his fidelity to the interests of the Government; and the immediate cause of this attack was an assessment he had lately made on their so-called church property.”<sup>165</sup>

The distrust and hostility the *Record* article evinced toward the Mormons was returned by the Mormon view of the assault. Young wrote to William H. Hooper, one of Utah’s territorial delegates to Congress,<sup>166</sup> mocking the idea that Taggart had been attacked:

By the way, have you heard of the attempted assassination of Dr. Taggart, our Assessor of Internal Revenue? Three villains! & one bloody knife! & the Dr.’s hand lacerated!

It appears that the Dr. while amusing himself in play with a dog, had one of his hands bitten. & shortly afterwards he resolved to play, as he intended, a joke upon his friends & informed some of them, that an attempt had been made upon his life, by some parties—Mormons of course—but this joke was received in earnest, & it was extensively circulated, that a diabolical attempt, had been made to murder a U.S. official, in Utah by the d--d Mormons!<sup>167</sup>

Young was, it turned out, relaying a version of events that had appeared two days earlier in a deeply sarcastic article in the Mormon-owned *Deseret News*.<sup>168</sup> Moreover, this story of an

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163. THE INTERNAL REVENUE RECORD AND CUSTOMS JOURNAL, Feb. 12, 1870, at 51.

164. *Id.*

165. *Id.*

166. Robert R. King & Kay Atkinson King, *Mormons in Congress, 1851-2000*, 26 J. MORMON HIST. 1, 10 (2000).

167. Letter from Brigham Young, President, The Church of Jesus Christ of Latter-day Saints, to W.H. Hooper (Feb. 4, 1870) (on file with the Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah).

168. *Rumored Assassination!!!*, DESERET NEWS, Feb. 2, 1870, at 1. The *Deseret News* was the Mormon church’s Salt Lake-based newspaper. ROGERS, *supra* note 113, at 185.

allegedly disgraced and disgraceful Internal Revenue assessor was salient enough that the *Deseret News* stayed with it, alternately bemused and angry, over the next month and a half.<sup>169</sup>

The story of the (alleged) assault was about more than merely Taggart's well-being. The *Record* used this attack, and a similar one in Philadelphia, to call on Congress to enact laws that would better protect assessors and other revenue officials.<sup>170</sup> The *Deseret News*, on the other hand, argued that not only had no assault happened, but that the reportage was a "fair sample of the way in which stories of 'Mormon outrages' and 'attempted assassinations' in Utah are manufactured."<sup>171</sup>

While tax assessors were generally unpopular, Taggart proved particularly unpopular among the taxpayers he assessed. And, in fact, he was assessing taxes for a government already locked in a wide-ranging dispute over sovereignty and religious autonomy. Against this background, Taggart attempted to fulfil his duty, assessing tax not only on individuals in the Utah territory but on tithing they paid to the Mormon church. This assessment put him on the front lines of the battle between the federal government and Mormon leadership, including the outspoken Brigham Young.

### III. THE TAXATION OF MORMON TITHING

The story of the Bureau of Internal Revenue's attempt to tax Mormon tithing has three main acts, plus a coda, that occurred between 1869 and 1871. The three acts of the story follow the procedures laid out in the Revenue Acts in effect. First, Taggart assessed the income of the Mormon church. Next, he delivered that income to the Collector of Internal Revenue. After the Collector received the assessment, the amount due was fixed by law, and it

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169. On March 21, 1870, Taggart wrote to the *Deseret News* to dispute its assertion that he had characterized the assault as an assassination attempt. The *Deseret News* took the opportunity to demand a grand jury investigation into Taggart himself for making a "grave charge" against the Mormon community. *The Assessor of Internal Revenue Before the Grand Jury*, DESERET NEWS, Mar. 30, 1870, at 89. Two weeks later, the *Deseret News* was still hectoring "Assassinated" Taggart about the assault. *The Latest Mormon Martyr*, DESERET NEWS, Apr. 13, 1870, at 111.

170. INTERNAL REVENUE REC. & CUSTOMS J., Feb. 12, 1870, at 51.

171. *Rumored Assassination!!!*, *supra* note 168, at 1.

was the Collector's job to get the money from Brigham Young. Finally, facing collection, Young requested that the tax be abated.

*A. Act 1: Assessment*

In this milieu of long-standing general animosity between Mormons and the U.S. government—and specific animosity between Taggart and the Mormons—Taggart raised the stakes. On August 18, 1869, Taggart wrote to Assistant Assessor Francis Lyman, instructing him to assess the income of the Mormon church for 1868 and 1869.<sup>172</sup> Lyman, likely one of the Mormon assistant assessors Taggart soon fired, wrote to Young, alerting him to Taggart's instructions and interest in church income.<sup>173</sup>

About a month later, Taggart wrote directly to Young. Taggart informed Young that the Commissioner of Internal Revenue had given him permission to go ahead with his assessment of the income of the "Society of Latter[-]day Saints." As Young had failed to comply with Taggart's instructions, Taggart instructed him to appear at the assessor's office with the church's books and records so that Taggart could accurately assess the church's income.<sup>174</sup>

Four days later, Young responded to Taggart. He had, he said, made a return for the church's income and had delivered it to Assistant Assessor Richard V. Morris the month before. Young assured Taggart that the return "was correct and I trust will be

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172. Letter from John P. Taggart to Francis M. Lyman (Aug. 18, 1869), *supra* note 12. The Civil War income tax required taxpayers to make their own returns, effectively assessing their own income tax liability. Bernhard Grossfeld & James D. Bryce, *A Brief Comparative History of the Origins of the Income Tax in Great Britain, Germany and the United States*, 2 AM. J. TAX POL'Y 211, 239 (1983). If the taxpayer failed to do so—a failure Taggart claimed the Mormon church was guilty of—or underreported her income, the Assessor could make his own assessment of the taxpayer's income. *Id.* The modern federal income tax follows a similar pattern of assessment: taxpayers are responsible for filing tax returns that assess their tax liability. Treas. Reg. § 1.6011-1(a) (as amended in 1967). The IRS also has authority to assess tax liability, I.R.C. § 6201(a) (2012), and, where it finds a taxpayer deficient, can notify the taxpayer of her deficiency and request payment. *Id.* § 6212(a).

173. Letter from Francis M. Lyman to Brigham Young (Aug. 27, 1869), *supra* note 159.

174. Letter from John P. Taggart, Internal Revenue Assessor for the Territory of Utah, to Brigham Young, President, The Church of Jesus Christ of Latter-day Saints (Sept. 25, 1869) (on file with the Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah).

satisfactory to you.”<sup>175</sup> In a subsequent letter, Young reasserted that he had received the “form of Return” from Taggart on August 19, 1869, had “filled and returned [it] in the usual matter,” and had, to his knowledge and understanding, filled the form correctly.<sup>176</sup>

Young’s response proved unsatisfactory to Taggart. Taggart informed Young that his office had no knowledge of any return being made by Young on behalf of the Mormon church. True, Young’s bookkeeper handed a document to the assistant assessor.<sup>177</sup> But according to an affidavit from the assistant assessor, the document did not constitute a return. Rather, Young’s bookkeeper’s reply said:

We, the government of the United States, have no knowledge of any such person as the trustee in trust of the Church of Jesus Christ of Latter-day Saints, nor of any such organization as the Church of Jesus Christ of Latter-day Saints. If there ever was such an officer, or such an organization, we, the government of the United States, have obliterated them out of existence by legal enactment.<sup>178</sup>

This response to Taggart’s request is clearly referencing the federal government’s annulment of the Mormon church’s incorporation.<sup>179</sup> While wry and combative (and not entirely inaccurate), it may be that Young and Assistant Assessor Morris were talking past each other. The bookkeeper’s statement was dated August 20, 1869, and Morris swore three days later that he “verily believe[d]” that it was in response to his request for a

175. Letter from Brigham Young, President, The Church of Jesus Christ of Latter-day Saints, to John P. Taggart, Internal Revenue Assessor for the Territory of Utah (Sept. 29, 1869) (on file with the Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah).

176. Letter from Brigham Young, President, The Church of Jesus Christ of Latter-day Saints, to Columbus Delano, Internal Revenue Comm’r (Jan. 24, 1870) (on file with the Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah).

177. Letter from John P. Taggart, Internal Revenue Assessor for the Territory of Utah, to Brigham Young, President, The Church of Jesus Christ of Latter-day Saints (Oct. 1, 1869) (on file with the Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah).

178. JOHN TAGGART, TESTIMONY, *supra* note 158, at 1–2.

179. See *supra* note 131 and accompanying text.

return.<sup>180</sup> Young, however, reported delivering his return on August 26, three days after Morris's affidavit.<sup>181</sup>

Although the August 26, 1869, return no longer appears to exist, further discussions—both by Young and by Collector Hollister—shed some light on why Taggart denied the existence of a return. Hollister appears to acknowledge that Young *did* file a return but that he considered the return fraudulent. The 1868 return reported less income than the church had brought in from tithing in 1850, “although the population & resources of the Church are assuredly five to ten fold what they were then.”<sup>182</sup> Because the profits, gains, and income Young reported appeared too small, it is possible that Taggart dismissed the return.

This is bolstered by Young's recital of what happened. In a conversation with the former assistant assessor of the Eighth Division, District of Utah, Young asserted that, under his reading of the Internal Revenue law, charitable donations were not taxable to the donee.<sup>183</sup> Understandably, then, the amount of income he reported would have been less than the tithing the church had received twenty years earlier, because Young was not reporting that amount on the tax return. Young further mentioned that after Morris had provided him with a blank return, his chief clerk had filled it out and returned it to the assessor's office. The assessor, however, had refused to accept the return.<sup>184</sup>

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180. COMM. ON THE TERRITORIES, EXECUTION OF LAWS IN UTAH, RICHARD V. MORRIS, AFFIDAVIT, H.R. REP. NO. 41-21, pt. 2, at 2 (1870).

181. Letter from Brigham Young to John P. Taggart (Sept. 29, 1869), *supra* note 175.

182. Letter (unsent) from O.J. Hollister, Collector of Internal Revenue for the Territory of Utah, to Columbus Delano, Internal Revenue Comm'r (Mar. 1, 1870) (on file with the Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah).

183. Conversation between the former assistant Assessor of 8th Division District of Utah and Brigham Young, President, The Church of Jesus Christ of Latter-day Saints, on the subject of the Government taxing the Tithing or donations paid by the people called Latter day Saints (Dec. 31, 1870) (Box 49, Folder 32, Brigham Young office files: 1870 July -1871, Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah).

184. *Id.*

Because Young refused to make a return—or at least to make a return that satisfied Taggart—Taggart’s son Edwin<sup>185</sup> (who was also one of his assistant assessors) reported that he was “finally compelled to make the assessment myself.”<sup>186</sup> The tax law allowed assessors to fill in a return for taxpayers if they refused to do so.<sup>187</sup> Because the Taggarts did not accept whatever Young filed as a return, Edwin did make a return on behalf of the Mormon church. According to Edwin, the church received between \$2 million and \$3 million in tithing annually.<sup>188</sup>

Notwithstanding Edwin’s initial estimate, he ultimately assessed the church for just under \$60,000 of income tax due. As part of their calculations, the Taggarts estimated that, for income tax purposes, the Mormon church had taxable income of \$791,180.22. At a five-percent tax rate, that meant the church owed \$39,559.01 in taxes. In addition, because Taggart believed Young had failed to file an honest return, he added a fifty-percent penalty, thus arriving at the \$59,338.51 liability he assessed.<sup>189</sup>

As Trustee-in-Trust of the church, Young was personally liable for the church’s taxes.<sup>190</sup> And although he knew some tax assessment was coming, the sheer amount must have come as a shock. The 1868 assessment list provides that Young owed income taxes of \$1000.25 on an income of \$20,000.05.<sup>191</sup> A year earlier, he had paid income taxes of \$920 on \$18,400 of income, and in 1866, he paid \$220 of income tax on an income of \$4,400. The nearly \$60,000 with which Taggart assessed the Mormon church represented a nearly sixty-fold increase in Young’s 1868 income tax.

185. STORKE, *supra* note 155, at 541. The Bureau of Internal Revenue was plagued by patronage appointees. Thorndike, *supra* note 21, at 1754. There is no reason to believe that such a system would have looked askance at nepotism.

186. COMM. ON THE TERRITORIES, EXECUTION OF LAWS IN UTAH, EDWIN TAGGART, TESTIMONY, H.R. REP. NO. 41-21, pt. 2, at 2 (1870) [hereinafter EDWIN TAGGART, TESTIMONY].

187. See *supra* note 63 and accompanying text.

188. *Id.*

189. Tax Return, signed by Taggart on behalf of Young, for 1868 (Box 49, Folder 31, Brigham Young office files: 1869–1870 MarchMar., Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah).

190. Letter from Brigham Young to Columbus Delano (Mar. 18, 1870), *supra* note 161.

191. Tax lists, alphabetical, May 1864–Apr. 1873 (marked vols II–V, VIII, F-F304-308, Bancroft Library). The March 1867 assessment list shows Young with income of \$18,400 and an income tax liability of \$920. In May 1866, the assistant assessor recorded \$4400 of income for Young and an income tax liability of \$220. *Id.*



And even the fact of assessing a tax on church income would have been unexpected. The Civil War income tax had no explicit exemption for churches, but that did not mean churches generally paid taxes. With few exceptions, the Civil War income tax only applied to the income of natural persons. And those exceptions were not really exceptions; rather, where the income tax applied to entities, it functioned essentially like a withholding tax, using corporate income as a proxy for the shareholders' income.<sup>192</sup>

Moreover, the tax law did not lay out every detail about how the income tax would be collected. Rather, the Secretary of the Treasury had authority to "devise any regulations necessary for the collection of the new income tax."<sup>193</sup> And in May 1863, the Secretary issued Treasury Decision No. 110. The Decision clarified a number of specifics about the application of the income tax. Among the clarifications was this: "The income of literary, scientific or other charitable institutions, in the hands of trustees or others, are not subject to income tax."<sup>194</sup> Churches fell within the definition of charitable institutions.<sup>195</sup>

If the Secretary of the Treasury explicitly exempted charitable institutions from taxation, how did Taggart come to the conclusion that the Mormon church should pay taxes on its tithing? He testified that "on seeing the decision of the Commissioner in regard to the property of a religious society in Ohio, deciding that the income of their church was taxable for revenue purposes, I became convinced that the Mormon church would come under the same rule."<sup>196</sup>

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192. Herzig & Brunson, *supra* note 93, at 1130.

193. Thorndike, *supra* note 48.

194. AMASA A. REDFIELD, A HAND-BOOK OF THE U.S. TAX LAW, (APPROVED JULY 1, 1862) WITH ALL THE AMENDMENTS, TO MARCH 4, 1863: COMPRISING THE DECISIONS OF THE COMMISSIONER OF INTERNAL REVENUE, TOGETHER WITH COPIOUS NOTES AND EXPLANATIONS. FOR THE USE OF TAX-PAYERS OF EVERY CLASS, AND THE OFFICERS OF THE REVENUE OF ALL THE STATES AND TERRITORIES 326 (5th ed. 1863).

195. See, e.g., Jackson v. Phillips, 96 Mass. 539, 556 (1867) ("A charity, in the legal sense, may be more fully defined as a gift . . . for the benefit of an indefinite number of persons . . . by [among other things] bringing their minds or hearts under the influence of education or religion . . ."); Rupert Sargent Holland, *The Modern Law of Charities as Derived from the Statute of Charitable Uses*, 52 AM. L. REG. 201, 201 (1904).

196. JOHN TAGGART, TESTIMONY, *supra* note 158, at 1.

The Commissioner of Internal Revenue was charged with interpreting the tax law.<sup>197</sup> On July 27, 1869, in the decision Taggart alluded to, Commissioner Delano had reviewed the tax return of the Shaker community at New Lebanon, Ohio.<sup>198</sup> The Shaker religion mandated communal ownership of property.<sup>199</sup> Because Shakers did not hold property individually, they included all of the community's income on a single tax return, "made for it and on its behalf by one Boyd."<sup>200</sup>

While the community filed a single return, it deducted \$46,000, representing the \$1000 exemption for each of the community's forty-six "covenanting male members."<sup>201</sup> Commissioner Delano determined that the \$46,000 deduction was inappropriate. Essentially, he said, while corporate entities were not generally taxable, "person" in the tax law could be read broadly enough to encompass entities. While that reading was exceptional, Delano determined that the "whole purpose and intent of the law is to collect a tax upon the income of every citizen[,] of every resident, and from all business carried on in the United States."<sup>202</sup> Exempting the Shaker community, where individual Shakers had no claim on the money, would run contrary to the spirit of the tax law.<sup>203</sup>

Having determined that the Shaker community was subject to the tax law, Commissioner Delano turned to the question of the \$46,000 deduction. That, he determined, was inappropriate. Though the form on which taxpayers filed their returns included a \$1000 deduction, the putative deduction was for administrative convenience. In truth, the tax law required each taxpayer to pay taxes of five percent on income in excess of \$1000. Because the Shaker community was the taxpayer in this case, the \$1000 exemption belonged to the Shaker community, not to each

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197. Thorndike, *supra* note 21, at 1752.

198. *Returns of Incomes of Shaker and Other Like Communities – Basis of Taxation – New Rule Governing \$1000 Exemption*, 10 INTERNAL REVENUE REC. & CUSTOMS J. 39 (1869) [hereinafter *Returns of Incomes*].

199. Samuel D. Brunson, *Taxing Utopia*, 47 SETON HALL L. REV. 137, 139 (2016).

200. *Returns of Incomes*, *supra* note 198, at 39. Peter Boyd served as a trustee of the Shaker community for over thirty years, transacting business with both the outside world and other Shaker communities. CHERYL BAUER, *THE SHAKERS OF UNION VILLAGE* 25 (2007).

201. *Returns of Incomes*, *supra* note 198, at 39.

202. *Id.*

203. *Id.*

individual Shaker. As a result, the Shaker community had to pay taxes on all of its income in excess of \$1000.<sup>204</sup>

The Shaker determination provided the precedent necessary for Taggart to treat the Mormon church as a taxpayer, even though the tax law at the time generally excluded religious societies. It also appeared to set a precedent for treating an individual—in that case, Boyd, and in the case of the Mormons, Young—as the proper taxpayer. Still, the Shaker decision was not entirely apposite to the situation of the Mormons. There was no indication, for example, that the Shakers' taxable income was, in fact, tithing and other donations. The income Taggart assessed to the Mormon church was made up principally of tithes and offerings.<sup>205</sup>

Still, Taggart saw the Shaker determination reflected in the Mormon church's receipt of tithing. He read the Commissioner's determination more broadly than the language comfortably permits; according to his reading, the determination "requires all religious Associations to make an annual return of all profits, gains, and incomes accruing to such Association."<sup>206</sup> The actual determination was more nuanced than Taggart's interpretation; the Commissioner found that a religious association could be a person for tax purposes, and thus taxable. Still, Taggart's reading allowed him to assess tax on the Mormon church's "profits, gains, and incomes."<sup>207</sup>

Of course, the fact that Taggart saw an opening—and perhaps a legal obligation—to assess taxes against the Mormon church on its income did not mean that the church owed income tax. To be taxable, the church had to have profits, gains, or incomes. Again,

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204. *Id.*

205. Edwin Taggart testified that he "assessed the tithes, which amount to two or three millions [sic] per annum." EDWIN TAGGART, TESTIMONY, *supra* note 186, at 2.

206. Letter from John P. Taggart to Francis M. Lyman (Aug. 18, 1869), *supra* note 12.

207. Under the modern federal income tax, there would be no question about the tax consequences to a church for receiving tithing. Churches qualify as tax-exempt organizations and thus generally do not pay taxes on their income. I.R.C. § 501(c)(3) (2012). Even if a church were not exempt, though, it would generally not owe taxes on tithing it received. Recipients of gifts do not have to include the gifts in their gross income. *Id.* § 102(a) (2012). For tax purposes, a gift is something given out of "disinterested generosity" and other charitable impulses. *Comm'r v. Duberstein*, 363 U.S. 278, 285 (1960). As a result, under current law, the Mormon church would not pay taxes on its tithing, even if the church were a taxable entity. *But see infra* note 240.

though, Taggart was willing to elide the details. Rather than exploring what constituted profits, gains, or incomes, he asserted that it was a “well established fact that the society of Mormons have large profits, gains, and incomes arising [sic] from certain systems adopted among them and large amounts of property held by them in trust as an association.”<sup>208</sup> Ultimately, Taggart’s analysis was circular: the church had large profits, gains, and incomes, and the evidence of that was that it held significant property.

While there is no clear explanation of Taggart’s analysis of why Mormon tithes and offerings fit within the contours of the Shaker decision, at least two factors likely play in. First was the relative novelty of tithing as a church funding mechanism. In 1870, the practice of churches using tithing to fund church operations was relatively new; it was only in the post-Civil War era that American Protestant churches began moving to such offerings as an important source of church revenue.<sup>209</sup> True, American churches had collected offerings before, but such collections did not fund the ordinary operations of the church; rather, those funds were used primarily to care for the poor.<sup>210</sup> Churches had previously funded themselves through pew rents and other support from wealthy congregants.<sup>211</sup>

The Mormon church, on the other hand, had experimented with tithing as early as 1837.<sup>212</sup> In 1838, Joseph Smith, the church’s founder and prophet, declared that tithing—paying “one-tenth of [members’] interest annually”—would be a “standing law unto [church members] forever.”<sup>213</sup> Young and Taggart both faced the

208. Letter from John P. Taggart to Francis M. Lyman (Aug. 18, 1869), *supra* note 12.

209. JAMES HUDNUT-BEUMLER, IN PURSUIT OF THE ALMIGHTY’S DOLLAR: A HISTORY OF MONEY AND AMERICAN PROTESTANTISM 50–51 (2007).

210. *Id.* at 55.

211. *Id.* at 11–12.

212. D. Michael Quinn, *LDS Church Finances from the 1830s to the 1990s*, SUNSTONE, June 1996, at 18. This first iteration of Mormon tithing required members to pay two percent of their net worth annually. *Id.*

213. THE DOCTRINE AND COVENANTS 119:4. The use of the word “interest” has created a significant level of ambiguity about the base on which Mormon tithing is paid. While today the church equates “interest” with “income,” at least one influential early Mormon understood it to be a type of imputed income. That is, in his understanding, a person’s “interest” was six percent of the value of the assets she owned. See Sam Brunson, *Understanding “Interest” in Joseph Smith’s Original Tithing Revelation*, JUVENILE

burden of trying to fit this (relatively) new church funding mechanism within the similarly new income tax regime.

Second was the pressing nature of making the assessment. When Taggart saw the Commissioner's Shaker decision, it occurred to him that the Mormon church might be similarly taxable.<sup>214</sup> It was less immediately important whether he was right. Rather, he needed to make the assessment first and later its accuracy could be straightened out.

The Commissioner of Internal Revenue highlighted the urgent nature of making an assessment. After it occurred to Taggart that the Shaker decision might provide precedent for taxing Mormon tithing, he wrote to the Commissioner. The Commissioner instructed him to make an assessment on the church's income.<sup>215</sup> The Commissioner did not instruct Taggart to assess the Mormon church either out of animosity or out of certainty that it owed income tax, though. Rather, Taggart was

directed to make the assessment so as to prevent any claim the United States might have from being barred by the Statute of Limitations, but [was] at the same time told that the question would be more fully and carefully considered on the claim for abatement, which [Taggart was] instructed to prepare and forward.<sup>216</sup>

The Commissioner authorized Taggart to assess the Mormon church's income, in other words, not because he believed it was taxable but because he was worried that the statute of limitations would run and that the government would be precluded from taxing Mormon tithing if it were taxable. The Commissioner wanted to ensure the government had time to determine whether this new tithing was taxable.

And the statute of limitations that Congress had introduced in 1866 was fifteen months.<sup>217</sup> If Taggart believed that the Mormon

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INSTRUCTOR (Feb. 2, 2016), <http://juvenileinstructor.org/understanding-interest-in-joseph-smiths-original-tithing-revelation/>.

214. See *supra* note 196 and accompanying text.

215. JOHN TAGGART, TESTIMONY, *supra* note 158, at 1.

216. Letter from J.W. Douglass, Comm'r of Internal Revenue, to John P. Taggart, Internal Revenue Assessor for the Territory of Utah (July 26, 1870) (on file with the Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah).

217. Revenue Act of 1866, ch. 184, § 9, 14 Stat. 104 (amending section 20 of the 1864 Act).

church's failure to file a return for 1868 represented an omission, he had to assess it within fifteen months of delivering his assessment list to the Collector of Internal Revenue.<sup>218</sup> By the time the Commissioner's Shaker decision came out at the end of July 1869, Taggart's fifteen-month window would have been nearly closed for 1868. That meant that, if he believed the Mormon church owed income taxes for 1868, Taggart had to move quickly.

It also shifted the burden from the government to the Mormon church. Once the statute of limitations expired, Taggart's assessment was presumptively correct and he had no ability to change it.<sup>219</sup> His responsibility was to ensure that returns were correct before he made the assessment.<sup>220</sup> On January 15, 1870, Taggart delivered his \$59,338.51 assessment of the Mormon church to O.J. Hollister, Collector of Internal Revenue for the Territory of Utah.<sup>221</sup> The question of the church's 1868 tax liability was now out of Taggart's hands.<sup>222</sup>

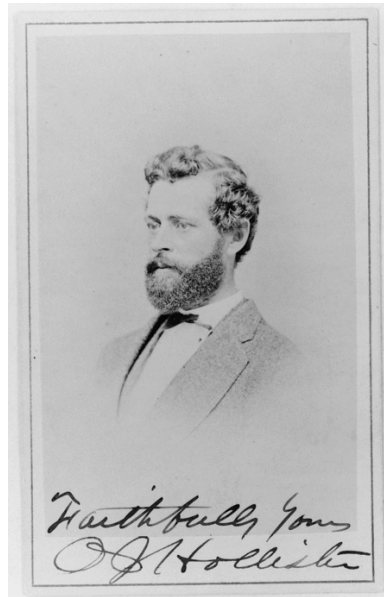
218. *Id.* The original assessment was due in March. *See supra* note 191. Assistant assessors had to put all of their assessments into a formal list within thirty days after the date the assessment was due and deliver that list to the assessor. Revenue Act of 1864, ch. 173, § 18, 13 Stat. 228. The assessor had to then allow at least ten days for taxpayers to appeal the assessment. *Id.* § 19, Stat. at 228–29. Where there was no appeal, the assessor was to immediately send the lists for collection, and where there was an appeal, the assessor was to send the list to the collector within ten days of the end of the appeal. *Id.* § 20, Stat. at 229.

219. Camp, *supra* note 19, at 230–31.

220. *Id.* at 231.

221. Letter from O.J. Hollister, Collector of Internal Revenue for the Territory of Utah, to Brigham Young, President, The Church of Jesus Christ of Latter-day Saints (Feb. 18, 1870) (on file with the Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah).

222. Although this Article focuses on Taggart's attempt to tax the Mormon church on its tithing, that was not the only tax controversy between Mormon leaders and Taggart. He also attempted to tax the city of Salt Lake for issuing currency, under the theory that issuing currency transformed the city into a bank. Mormon leaders argued that the putative currency was, in fact, IOUs and that the city could not be held responsible if Utahns circulated those IOUs as if they were currency. Letter from Daniel H. Wells, Second Counselor to the First Presidency, The Church of Jesus Christ of Latter-day Saints, to W.H. Hooper, Representative for the Territory of Utah (Jan. 30, 1871) (on file with the Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah).

*B. Act 2: Collection**O.J. Hollister*

The contrast between the way Mormon leaders viewed Taggart and the way they viewed Hollister<sup>223</sup> could not have been starker. A meeting with Taggart reportedly went so badly that it ended with Taggart "heaping upon us some of his vile insults [then] he finally left in a rage. Afterwards met with Hollister who to say the least was gentlemanly."<sup>224</sup>

But although Hollister was primarily responsible for collecting the income tax, this did not mean that Taggart had no further part regarding the taxability of Mormon tithing. On January 21, 1870, less than a week after Taggart delivered the assessment to Hollister, Young wrote to Hollister requesting an extension of time to pay the assessed tax. Young explained that he did not understand *why*

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223. Photo of O.J. Hollister, Prints and Photographs Division, Library of Congress, LC-USZ62-130758.

224. Letter from Daniel H. Wells, Second Counselor to the First Presidency, The Church of Jesus Christ of Latter-day Saints, to Brigham Young, President, The Church of Jesus Christ of Latter-day Saints (Jan. 1, 1871 [misdated as 1870]) (on file with the Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah).

tithing was taxable and that he wanted time to hear from the Commissioner.<sup>225</sup> True to his word, Young wrote to Commissioner Delano three days later describing the steps that had led up to the assessment as well as providing a primer in the contours of Mormon tithing.<sup>226</sup> The Commissioner replied with a form letter, referring Young back to Taggart.<sup>227</sup> Hollister granted the extension and promised not to move forward with collection without first notifying Young.<sup>228</sup>

Hollister could not have granted the extension lightly. The eyes of the country were on this tax controversy. Shortly after Hollister granted the initial extension, the *Chicago Tribune* ran an article dealing with Utah and the Mormons. The article highlighted various controversies raised by the Mormons, including the future of polygamy and legislation aimed at curbing it. Wedged between questions of polygamy and federal control of the territory, though, it addressed the taxation controversy, asking, "Is Collector Hollister going to seize Mormon property if they do not pay the Federal taxes?"<sup>229</sup>

Moreover, the tax law made collectors personally liable for the amount of taxes on the assessment lists they received.<sup>230</sup> Unless a collector could provide evidence to the government that a taxpayer was unable to pay the full assessment (because, for example, the taxpayer had died, had become insolvent, or had insufficient property to cover the assessment), the collector would have to pay any amount he failed to collect.<sup>231</sup>

225. Letter from Brigham Young, President, The Church of Jesus Christ of Latter-day Saints, to O.J. Hollister, Collector of Internal Revenue for the Territory of Utah (Jan. 21, 1870) (on file with the Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah).

226. Letter from Brigham Young to Columbus Delano (Jan. 24, 1870), *supra* note 176.

227. Letter from Columbus Delano, Internal Revenue Comm'r to Brigham Young, President, The Church of Jesus Christ of Latter-day Saints (Feb. 2, 1870) (on file with the Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah).

228. Letter from O.J. Hollister, Collector of Internal Revenue for the Territory of Utah, to Brigham Young, President, the Church of Jesus Christ of Latter-day Saints (Jan. 22, 1870) (on file with the Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah).

229. Aaron About, *What Shall Be Done with the Mormons?*, CHI. TRIB., Feb. 15, 1870, at 2.

230. Revenue Act of 1862, ch. 119, § 24, 12 Stat. 442.

231. Camp, *supra* note 19, at 231-32.



Giving Young an extension to pay his taxes would potentially risk Hollister's ability to collect the tax. After all, with time, a taxpayer can spend or hide assets. Why, then, would Hollister agree to the extension? Remember, the Commissioner instructed Taggart to make the assessment so that the government had time to "more fully and carefully" consider whether the income tax applied to Mormon tithing.<sup>232</sup> The Commissioner similarly instructed Hollister to consider whether granting Young's request for an extension would prejudice the government's interest. If not, he instructed Hollister to suspend collection and to assist Young in making a claim for abatement of the tax.<sup>233</sup>

Hollister decided that granting Young's request for a suspension would not prejudice the government's interest. He did, however, remind Young that, in granting the extension, Hollister was putting himself in financial risk. As such, he requested that Young make his claim for abatement quickly.<sup>234</sup> Young complied with the request and, on February 23, 1870, signed Form 47 ("Claim under Circular No. 21 for Remission of Taxes Improperly Assessed").<sup>235</sup> The form required Young to explain why he believed the assessment against church income was improper. He gave two reasons why the Commissioner should abate the income tax.

First, he said, the return he had made on August 26, 1868, had been "true and correct without fraud or under estimate." Taggart's assessment, by contrast, had been "unjust," and Young believed Edwin had created his assessment "without having a proper knowledge of the subject-matter." No income tax had been due for 1868, and the assessment that claimed nearly \$60,000 was, simply, wrong.<sup>236</sup>

Second, Young explained "[t]hat what is called Tithing is a free gift or donation by the members of the Church of Jesus Christ of Latter-day Saints to no person but to a Trust." Agents of the trust, he continued, used that money to help the poor, to build places of

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232. Letter from J.W. Douglass to John P. Taggart (July 26, 1870), *supra* note 216.

233. Letter from O.J. Hollister to Brigham Young (Feb. 18, 1870), *supra* note 221.

234. *Id.*

235. Form 47, 23 Feb. 1870 (Box 49, Folder 31, Brigham Young Office Files: 1869-1870 Mar., Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah).

236. *Id.*

worship, and to do other “charitable and benevolent” things. Tithing did not represent any kind of quid pro quo, and the Mormon church received no “pecuniary profits or gain” from it. Finally, Young said, he had never used, nor permitted anybody else to use, tithing monies for speculative purposes. Thus, the tithing the Mormon church had received was not taxable.<sup>237</sup>

While Hollister notarized the form, he did not sign the accompanying certificate testifying that he believed “the statements to be in all respects, just and true.”<sup>238</sup> Wells explained that Hollister’s failure to sign was “not because he doubted them particularly” but because the certificate was labeled the “Assistant Assessor’s Certificate.” Inasmuch as Hollister was the Collector of Internal Revenue, not an assistant assessor, it was not for him to sign, and “he did not wish to volunteer an opinion unasked.”<sup>239</sup>

Wells appears to have been wrong about Hollister’s view of Young’s claims. Hollister, while agreeable and available to Young, disagreed with both Young’s assertion that tithing was a free-will offering by Mormons to the church and with his assertion that it did not represent gain or profit to the church:

I believe, from all I can see & learn, that the tithing has been devoted to laudable enterprises in general, perhaps always, saving & excepting, begging your pardon the perverting of Christians to Mormonism. But I cannot see it to be in the nature of a voluntary contribution, nor a fund from which neither the Church nor individuals derive gain or profit.<sup>240</sup>

237. *Id.*

238. *Id.*

239. Letter from Brigham Young (per Daniel H. Wells), President, The Church of Jesus Christ of Latter-day Saints, to W.H. Hooper, Representative of the Territory of Utah (Mar. 15, 1870) (on file with the Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah).

240. Letter from O.J. Hollister, Collector of Internal Revenue for the Territory of Utah, to Brigham Young, President, The Church of Jesus Christ of Latter-day Saints (Mar. 2, 1870) (on file with the Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah). Hollister’s view of tithing resonates with more-contemporary controversies. Most notably, in 1989 the Supreme Court found that the amount Scientologists pay for auditing was not a deductible charitable contribution. *Hernandez v. Comm’r*, 490 U.S. 680, 694 (1989). The Court held that the payments were part of a quid pro quo exchange, which disqualified them from being contributions or gifts. *Id.* at 692. The IRS eventually allowed Scientologists to deduct their auditing payments, notwithstanding the Supreme Court’s ruling. See SAMUEL D. BRUNSON, GOD AND THE IRS: ACCOMMODATING RELIGIOUS

Hollister was unflaggingly polite in his correspondence with Mormon leaders,<sup>241</sup> even while he firmly rejected their arguments. He explained to Young that, while he had nothing to do with making the tax law and did not hold the office of Collector by choice, he felt obligated to do his duty within that office. And in the course of his duty, he was “dissatisfied with your explanation & statements, even your depositions.”<sup>242</sup>

His dissatisfaction, he explained, arose from two problems. First, he believed that Young’s explanations and statements had been partial at best. For instance, he said, Young had never shown him the tithing accounts from 1868. Second, he did not believe that Mormon tithing was a voluntary contribution based on “statements I find in your Church history.”<sup>243</sup>

By the time Hollister wrote to the Commissioner, Young had resolved Hollister’s first concern. Young had invited him to the Tithing Office and allowed him to examine the tithing accounts for 1868. But Hollister was still unconvinced that tithing was a voluntary contribution. In his opinion, it could be called “voluntary” only in “a guarded sense if at all.”<sup>244</sup> Both Mormon scripture, and Young speaking in his capacity as president of the church, referred to tithing as a law, binding on the Mormon people. He explained that Mormons’ tithing obligations were treated by the

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PRACTICE IN UNITED STATES TAX LAW 125–26 (2018). Still, the Court’s *Hernandez* holding – that quid pro quo payments, even where the return benefit is only religious, do not qualify as deductible donations – is still good law. See *Sklar v. Comm’r*, 549 F.3d 1252, 1262 (9th Cir. 2008) (“[N]either the plain language of the 1993 amendments nor the accompanying legislative history indicates any substantive change to *Hernandez*’s holding that payment for religious education to religious organizations is not deductible.”).

It is worth noting that in her *Hernandez* dissent, Justice O’Connor pointed out that many deductible religious donations have an implicit quid pro quo. She expressly pointed out that Mormon tithing has its own quid pro quo: “Mormons must tithe their income as a necessary but not sufficient condition to obtaining a ‘temple recommend,’ i.e., the right to be admitted into the temple.” *Hernandez*, 490 U.S. at 709 (O’Connor, J., dissenting). That is not to say that the government is likely to eliminate the deductibility of Mormon tithing. Still, the discomfort Hollister felt about tithing’s voluntary and altruistic nature has not entirely evaporated.

241. His general politeness may be why, even as he tried to collect income taxes from Young, Mormon leaders never placed him in the “ring” that was out to get the Mormons.

242. Letter from O.J. Hollister to Brigham Young (Mar. 2, 1870), *supra* note 240.

243. *Id.*

244. Letter from O.J. Hollister, Collector of Internal Revenue for the Territory of Utah, to Columbus Delano, Internal Revenue Comm’r (Mar. 7, 1870) (on file with the Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah).

church as an account due, and that account ran with them throughout their lives.<sup>245</sup>

Perhaps the most compelling reason tithing was not voluntary, according to Hollister, was that Mormons who did not pay faced significant penalties.<sup>246</sup> Notably, he claimed, nonpayment of tithing could lead to excommunication from the Mormon church. And excommunication was not merely inconvenient.<sup>247</sup> According to Hollister, excommunication “involves, from the peculiar nature of the association & the (former) isolation of Utah, the theatre of its action, temporal as well as spiritual ruin if not loss of life.”<sup>248</sup> But Hollister did not rest his assertion that tithing was not voluntary on the excommunication of nonpayers. While he asserted that at least some individuals who failed to pay had been excommunicated, he also claimed that the enforcement or nonenforcement of tithe paying was immaterial. Whether or not it was externally enforced, “the payment of tithing has been enforced upon the people at large by their own conscience, pricked thereto by the unflagging efforts of their priesthood for whose maintenance tithing was instituted of, according to the law (Mormon) & the prophets.”<sup>249</sup> Tithing was obligatory, if not in the legal sense, at least in the moral and practical sense.

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245. *Id.* In fact, in an earlier, unsent, draft of the letter, Hollister put particular emphasis on the treatment of tithing as an account due, writing that it was “a matter of book a/c [account] running from year to year through the Mormon’s life, to be settled the same as any a/c & not as a gift, & offering, or a donation.” Letter (unsent) from O.J. Hollister to Columbus Delano (Mar. 1, 1870), *supra* note 182. In fact, at least in 1852, the Mormon church literally had a ledger that listed each member’s name and marked whether they had paid their property tithing, produce tithing, labor tithing, and extra property tithing. Box 79, Folder 10, Brigham Young office files: President’s Office Files, 1843–1877, Office Memorandum Books, 1852–1871, Names of persons who have paid their tithing, 1852, Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah.

246. Letter from O.J. Hollister to Columbus Delano (Mar. 7, 1870), *supra* note 244.

247. *Id.*

248. *Id.* In the unsent draft, Hollister emphasized that nonpayment of tithing led to excommunication and that Young had suggested that apostates—including those who had been excommunicated—should be killed. Perhaps he moderated that point because, as he explained in the unsent draft letter, “I do not believe, myself, that as a rule the law has been enforced to the letter that men have been cut off from the Church for not settling their tithing & then killed for being apostates.” Letter (unsent) from O.J. Hollister to Columbus Delano (Mar. 1, 1870), *supra* note 182.

249. Letter from O.J. Hollister to Columbus Delano (Mar. 7, 1870), *supra* note 244.

In writing to the Commissioner, Hollister raised one final objection to Mormon tithing escaping taxes—it was used in “what I regard as purposes of General Speculation, such as the construction of Canals, Railroads, and Public Buildings, Establishing Manufactures, Publishing Books and newspapers, improving if not acquiring farms & city-lots, sustaining a vast system of proselytizing and immigrations, &c &c.”<sup>250</sup> The important question was not whether these various enterprises were laudable, Hollister continued. The question was whether tithing represented “a source of profit or gain to the church or to individuals.” Hollister affirmed that it did and was thus taxable.<sup>251</sup>

Hollister dismissed out of hand the idea that the disincorporation of the Mormon church had any impact on whether it owed taxes. Certainly, he acknowledged, Congress may have annulled the territorial incorporation of the Mormon church, but the church had continued to act in the same manner in which it had acted when it had legal existence.<sup>252</sup> Moreover, the church annually reelected Young as Trustee-in-Trust, and he was empowered to manage church property and did in fact manage it.<sup>253</sup> As a result, for tax purposes, the church existed.<sup>254</sup>

Still, Hollister’s conclusions were not entirely unfavorable to the church. In examining the tithing accounts (and corroborating those numbers with various other balance sheets he had seen), he calculated that the church actually had about \$85,058 of net income (that is, receipts reduced by costs associated with those receipts) in 1868. He recommended that, after a \$1000 exemption, the church be assessed a tax of five percent of that amount, plus an additional fifty-percent penalty for “not making returns as required by law.”<sup>255</sup> Although Hollister concluded that tithing represented taxable income to the Mormon church, Hollister believed that the church should only pay about \$6300, rather than the almost \$60,000 Taggart had assessed.<sup>256</sup>

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250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

*C. Act 3: Request for Abatement**Brigham Young*

Church leaders were happy about Hollister's recommendation for a reduced assessment. Although he had not accepted their argument that tithing was a voluntary donation not subject to taxation, he had accepted the accuracy of the tithing numbers they had presented to him.<sup>257</sup> Still, this significant reduction did not fully placate them, and Young<sup>258</sup> pressed for the government to abate his tax liability.

After all, as Wells pointed out, other churches also raised money. A Reverend Foote, for instance, had raised money to build a church in Salt Lake City. And other churches raised money to support the poor, publish tracts, and provide for missionaries. Did they pay taxes on donations they received?, Wells asked. No, "and

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257. Letter from Daniel H. Wells to W.H. Hooper (Mar. 15, 1870), *supra* note 239.

258. Photo of Brigham Young, Brigham Young Photographs: Portraits 5, circa 1860–1875, Young, Brigham Heber (Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah).

our Revenue Officers know it.”<sup>259</sup> How, then, was it fair to tax the Mormon church on donations it received?

Both the amount of tax assessed and the idea that tithing represented taxable income troubled church leaders. But while both of those objections to the assessment were of grave concern to the Mormons, the imposition of the income tax posed at least one other significant problem for the church: the majority of tithing the church received was paid in-kind.<sup>260</sup> Cash was scarce in Utah, and Mormons had little opportunity to earn cash before the early 1870s.<sup>261</sup> In fact, of the \$143,372.77 that the Tithing Office received in 1868, only \$25,114.12 was in cash.<sup>262</sup> The rest was paid in labor or in goods.<sup>263</sup> Young explained to Commissioner Delano that tithing donations were nearly always received in-kind.<sup>264</sup>

Mormon leaders believed that, in large part, the tax system was incompatible with the way they collected tithes. Young’s clerk balked at the idea that in-kind goods could even constitute income subject to taxation. However, if in-kind donations were subject to taxation, he asked Representative Hooper ironically,

upon what principle should a money income tax be paid thereon? If such free will offerings must be taxed, it will be necessary for Government to build store houses as they will have to receive such tax in kind — there is no other way to pay such a tax, there is not money enough in the country to do it with.<sup>265</sup>

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259. Letter from Daniel H. Wells, Second Counselor to the First Presidency, The Church of Jesus Christ of Latter-day Saints, to W.H. Hooper, Representative for the Territory of Utah (Jan. 2, 1871) (on file with the Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah).

260. Moreover, the in-kind tithing was not always worth its purported value. One bishop received a letter telling him the eggs he sent to the tithing office “were all rotten. The butter too was in a terrible state and had to be retubbed [sic] before reaching the city. Please don’t forward any more rotten eggs, and butter put up so poorly.” Letter from A. Milton Musser to Daniel Daniels (Aug. 17, 1870) (on file with the Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah).

261. ARRINGTON, *supra* note 7, at 139.

262. *Id.*

263. *Id.*

264. Letter from Brigham Young to Columbus Delano (Jan. 24, 1870), *supra* note 176.

265. Letter from T.W. Ellerbeck, Clerk to Brigham Young, to W.H. Hooper, Representative for the Territory of Utah (Jan. 20, 1870) (on file with the Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah).

Later, he posed this precise argument to Hollister, contending “that if delivering potatoes to the Church was Church income – then the tax should be paid in potatoes, as they were disbursed to the poor & the work-men in kind & no money was realized at all.”<sup>266</sup>

Even if non-cash donations represented income, Mormon leaders believed it was unfair as applied to the church. Wells explained that the “labor, produce, merchandize &c. in which tithing is paid, if reduced to a cash basis for any one year, would scarcely pay the tax for that same year as now assessed.”<sup>267</sup> Ultimately, their argument that in-kind receipts could not constitute income proved unavailing, however, and Young had to convince the Commissioner that tithing was not income, irrespective of the form in which it was paid.

### *1. Tithing is not income*

Young made five substantive arguments for why the 1868 tax should be abated. First was a legal argument. He quoted the instructions provided to assessors, which said that gifts of money were not taxable income.<sup>268</sup> He assumed that if gifts of money were exempted from taxation, so were gifts of goods.<sup>269</sup>

And were tithe-payers making gifts to the church? Absolutely, said Young. He disputed the affidavits Taggart had collected from nonpayers who claimed that enforcement of tithe-paying led to “‘temporal as well as spiritual ruin, if not the loss of life.’ I totally deny their veracity, and brand the latter assertion as a malicious

266. Letter from T.W. Ellerbeck, Clerk to Brigham Young, to W.H. Hooper, Representative for the Territory of Utah (Dec. 17, 1870) (on file with the Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah). To the extent that it is important, there is no question under the modern federal income tax that income received in kind is subject to taxation. See Treas. Reg. § 1.61-1(a) (1954) (“Gross income includes income realized in any form, whether in money, property, or services.”).

267. Letter from Daniel H. Wells, Second Counselor to the First Presidency, The Church of Jesus Christ of Latter-day Saints, to H.S. Eldredge (Jan. 24, 1871) (on file with the Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah).

268. Letter from Brigham Young, President, The Church of Jesus Christ of Latter-day Saints, to Columbus Delano, Internal Revenue Comm’r (Sept. 29, 1870) (on file with the Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah).

269. Letter from Brigham Young to Columbus Delano (Mar. 18, 1870), *supra* note 161.



insinuation (as black as the soul that invented it.)”<sup>270</sup> While nonpayment of tithing may have been an additional factor in the excommunication of certain individuals, it had rarely, if ever, been the sole cause of excommunication.<sup>271</sup> He doubted that half the members of the church paid tithing, and he himself “sometimes [paid] a little, but not as much as I should.”<sup>272</sup> And in any event, Young denied excommunication was as ruinous as Taggart and Hollister believed—he knew of individuals who had joined the Mormon church for financial advantage and others who had left it for the same reason.<sup>273</sup>

Second, he made a tax policy argument against taxing tithing received by the church. The money used to pay tithing, he said, was both taxable and taxed in the hands of the donors.<sup>274</sup> They did not get to deduct the amount they paid in tithing, so taxing their donations to the Mormon church would represent double taxation.<sup>275</sup>

Third, he argued, Taggart’s assessment had been excessive. As evidence, he pointed to Hollister’s recalculation of church

270. *Id.* Young’s clerk ironically emphasized the implausibility of the argument that nonpayment of tithing would lead to spiritual and temporal ruin, given the fact that the Mormon church did not receive ten percent of the territorial income. He wrote that

Mr Taggarts [sic] report to the dept. concerning the tithing sets forth the terrible threats that are used to extort the tithing & how it is forced out of the people under threats of eternal damnation or something of that kind. Well now – if his statement of what the tithing would be is correct—how does it comport with what was actually received? There can be no manner of doubt as to the correctness of the Statement of the tithing products received by the Trustee in Trust at his office & the Genl Tithing Store, as set forth in the first statement, and it knocks into pie his statement about the full tithing be forced out of the people.

Letter from T.W. Ellerbeck, Clerk to Brigham Young, to W.H. Hooper, Second Counselor to the Presidency of the Church of Jesus Christ of Latter-day Saints (Jan. 2, 1871) (on file with the Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah).

271. Letter from Brigham Young to Columbus Delano (Mar. 18, 1870), *supra* note 161.

272. Conversation between the former assistant Assessor of 8th Division District of Utah and Brigham Young (Dec. 31, 1870), *supra* note 183.

273. Letter from Brigham Young to Columbus Delano (Mar. 18, 1870), *supra* note 161.

274. While theoretically Young is correct, in fact, it is unlikely that most donors to the Mormon church paid taxes on their income. As a result of Congress’s raising the exemption amount to \$1000 in 1867, only 0.7% of the population paid the federal income tax. *BANK ET AL.*, *supra* note 25, at 48. While the incomes of the Mormon population likely did not mirror that of the country at large, it still seems likely that approximately 99% of Mormons did not pay any income tax, whether or not they paid the required tithes.

275. Letter from Brigham Young to Columbus Delano (Sept. 29, 1870), *supra* note 268.

income.<sup>276</sup> Mormon leaders also believed it was excessive because of the nature of in-kind tithing and the decentralized nature of collecting and remitting it. A bishop, Young's clerk explained, might collect twenty gallons of molasses as tithing, which would be recorded as a \$40 tithe, meaning the church would owe \$2 of taxes on the tithing. But it would cost the church \$13.20 to transport it to Salt Lake, and its market price would be between 75 and 90 cents per gallon. At the low end, then, the twenty gallons would bring in \$15, and the church would have net revenue of \$1.80.<sup>277</sup> If the assessor used church records to determine income, then it was possible for the assessed tax to exceed the church's net revenue on the tithing.

Young's fourth and fifth arguments were that Taggart's facts were wrong. Taggart believed that tithing was used for speculation. Young denied that this was the case.<sup>278</sup> Tithing was used primarily to build houses of worship and to pay clerks and other employees of the church. These individuals "of course pay their individual tax on their salaries [sic]."<sup>279</sup> In fact, an 1868 circular the church had sent to local bishops explained how the church used tithing: "The Tithing and offerings due the Church, if punctually paid, will enable us to carry on the Public Works, do the Church business, and sustain the poor."<sup>280</sup>

He also believed that the penalty for failure to file was inappropriate because he had, in fact, made a return within the

276. *Id.* Young's clerk asserted that Taggart's assessment was "enormously exaggerated." Letter from T.W. Ellerbeck, Clerk to Brigham Young, to W.H. Hooper, Second Counselor to the Presidency of the Church of Jesus Christ of Latter-day Saints (Jan. 8, 1871) (on file with the Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah).

277. *Id.*

278. Even if it were, his clerk argued, the tithing would not represent income; the church should only pay taxes on *returns* from the speculative investments, not the capital it invested. Letter from T.W. Ellerbeck to W.H. Hooper (Dec. 17, 1870), *supra* note 266. Ellerbeck's argument misapprehends the government's position here: the government is arguing that, even if tithing donations to the Mormon church were free-will offerings, they would only be exempt from taxation if they were used for charitable purposes. Ellerbeck, in contrast, assumes that tithing is not income. *Id.*

279. *Id.*

280. Letter from Edward Hunter et al. to the bishops of The Church of Jesus Christ of Latter-day Saints (Nov. 1, 1868) (on file with the Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah).

requisite ten days.<sup>281</sup> Young's clerk and two other Mormons were willing to testify that the return had been delivered and that Taggart received it, put it "in a drawer, or receptacle, & said 'I shall take no notice of that,'"<sup>282</sup> insinuating, perhaps, misfeasance by Taggart.

## 2. "Family" for tax purposes

In addition to his substantive arguments for why the Mormon church should not owe taxes on tithing, Young made one final argument for why the tax should be remitted. This final argument did not depend upon the tax being wrongfully assessed; even if tithing was income, subject to taxation, the Mormon church should owe no taxes. In July of 1870, Congress had amended the income tax. As part of the emendation, Congress increased the exemption amount from \$1000 to \$2000.<sup>283</sup> It also provided that each family would only get a single exemption.<sup>284</sup> Finally, the new provision provided that religious societies that held all of their property jointly and severally were to treat every five people in the society as a family.<sup>285</sup>

At various times in its history, members of the Mormon church did hold all of their property jointly and severally.<sup>286</sup> As such, Young believed that the exemption applied to the Mormon church.<sup>287</sup> Provisionally, Commissioner Douglass agreed; in July 1870, he instructed Hollister to "ascertain the number of persons belonging to the Society." Unless the tax liability exceeded \$1000 for every five members, Hollister was to help prepare the church's claim for abatement.<sup>288</sup>

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281. Letter from Brigham Young to Columbus Delano (Sept. 29, 1870), *supra* note 268.

282. Letter from T.W. Ellerbeck to W.H. Hooper (Dec. 17, 1870), *supra* note 266.

283. Revenue Act of 1870, ch. 255, § 8, 16 Stat. 258.

284. *Id.*

285. *Id.* The part of the provision applying to communitarian religious societies was apparently meant to be retroactive, except that the exemption amount was \$1000 per five members prior to 1870. *Id.*

286. Brunson, *supra* note 199, at 139.

287. Letter from Brigham Young to Columbus Delano (Sept. 29, 1870), *supra* note 268.

288. Letter from J.W. Douglass, Internal Revenue Comm'r, to John P. Taggart (July 29, 1870) (on file with the Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah).

A month later, Taggart wrote to Young, asking him how many members the church had.<sup>289</sup> Young reported that there were about 50,000 members of the Mormon church.<sup>290</sup> If the exemption for communitarian religious societies applied, then, the church would only be liable for income tax in excess of \$10 million. The \$60,000 assessment fell far below that exemption amount. Based on this exemption amount and his instructions, Taggart reported to Young that he stood ready to help prepare a claim for abatement, based on the recently passed law applying to communitarian religious societies.<sup>291</sup>

Somewhere, though, there was a disconnect between Taggart and Hollister. Even though the assessment was far lower than the exemption amount Young had calculated, Young reported that Hollister had not stopped his collection efforts, either because he “has no knowledge of this, or does not consider himself released from his responsibility as Collector therein.”<sup>292</sup> In fact, Hollister wrote to Young that on July 15 he had received notice from the Bureau of Internal Revenue that he had ninety days to collect all of the tax assessments that had been delivered to him through January 1 of that year. The Bureau further informed him that all suspensions were lifted, unless they were actively renewed. If he failed to collect the nearly \$60,000 owed by the Mormon church, the government could come against him for that amount.<sup>293</sup> The church would have to pay its tax bill by mid-October.

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289. Letter from John P. Taggart, Internal Revenue Assessor for the Territory of Utah, to Brigham Young, President, The Church of Jesus Christ of Latter-day Saints (Aug. 11, 1870) (on file with the Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah).

290. Letter from Brigham Young to Columbus Delano (Sept. 29, 1870), *supra* note 268.

291. John P. Taggart, Internal Revenue Assessor for the Territory of Utah, to Brigham Young, President, The Church of Jesus Christ of Latter-day Saints (Aug. 19, 1870) (on file with the Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah).

292. Letter from Brigham Young to Columbus Delano (Sept. 29, 1870), *supra* note 268.

293. Letter from O.J. Hollister, Collector of Internal Revenue for the Territory of Utah, to Brigham Young, President, The Church of Jesus Christ of Latter-day Saints (Sept. 26, 1870) (on file with the Church History Library, The Church of Jesus Christ of Latter-day Saints).

Two weeks later, Young got a reprieve. Hollister wrote to inform him that the Bureau had reinstated the suspension.<sup>294</sup> The Bureau's reprieve did not, however, mean that it would apply the exemption for communitarian religious societies. In the end, the government determined that Mormons did not hold their property in common, which meant that they were not permitted to treat every group of five individuals as a family.<sup>295</sup> And the government's conclusion was almost certainly correct. While the Mormon church had at times held property communally, in the late 1860s, it was experimenting with cooperatives.<sup>296</sup> It was not until after the Panic of 1873 that the church began again experimenting with members holding all property in common.<sup>297</sup> To the extent that tithing represented taxable income to the Mormon church, then, the church would get but a single \$1000 exemption.

#### IV. PLANS FOR AN UNFAVORABLE OUTCOME

Although Young requested abatement of the Mormon church's tax liability, he did not rely on the government to grant the abatement. Simultaneously with his arguments to the Bureau of Internal Revenue, he developed contingency plans in the event that his request for abatement was denied. If it turned out that the Bureau upheld the assessment of Mormon tithing as taxable income, Young intended to reduce or eliminate that liability in the future. This Part will begin by discussing his contingency plans. Finally, this Part will discuss, as a coda to the three acts of the story, how the Commissioner ultimately ruled on the question of the taxability of Mormon tithing.

##### *A. Contingency Plans*

At the same time Young was appealing the assessment, he was also making contingency plans in case the Commissioner upheld Taggart's determination that Mormon tithing represented taxable

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294. Letter from O.J. Hollister, Collector of Internal Revenue for the Territory of Utah to Brigham Young, President, The Church of Jesus Christ of Latter-day Saints (Oct. 7, 1870) (on file with the Church History Library, The Church of Jesus Christ of Latter-day Saints).

295. *Brigham Young's Income Tax: The Income from Mormon Church Property Decided to Be Taxable – Brigham Young's Points Overruled*, N.Y. TIMES, Dec. 3, 1870, at 1.

296. ARRINGTON, *supra* note 7, at 297.

297. *Id.* at 324.

income. To limit the future harm to the Mormon church of such a conclusion, Young pursued two paths. On the one hand, he lobbied the government for relief. On the other hand, he looked at other ways he could structure the receipt of tithing to eliminate or reduce the amount of taxes owed on tithing receipts.

### 1. Lobbying Congress

Young frequently wrote about the income tax issue to William H. Hooper, Utah's territorial delegate to Congress.<sup>298</sup> Hooper, a merchant who had converted to Mormonism,<sup>299</sup> was charming and could often win over even those most opposed to the Mormon church.<sup>300</sup>

The church did not immediately ask Hooper for his help in dealing with the tax assessment, but it brought him into the loop early in the process. On January 20, 1870—mere days after Taggart delivered his assessment to Hollister—T.W. Ellerbeck, one of Young's clerks, wrote Hooper with details both about the tax assessment and about the nature and uses of tithing. Young, Ellerbeck assured Hooper, had not spoken to him about the notice from Hollister, "but I thought I would let you know that you may have the facts before you."<sup>301</sup>

Mormon leaders in Utah continued to keep Hooper in the loop throughout the tax collection process. In March, Wells wrote to Hooper, updating him on both Hollister's actions and on claims made by the Mormon church.<sup>302</sup> Wells offered to send copies of various documents and affidavits the church had provided to the government in contesting the tax assessment; again, Wells did not ask for any particular help with the issue but did meticulously keep Hooper informed.<sup>303</sup>

By May, church leaders began to request Hooper's help. Young asked Hooper to examine Internal Revenue returns to discover the

298. WELLS, *supra* note 8, at 237. Several of these letters are discussed *infra* notes 301–15 and accompanying text.

299. WALKER, *supra* note 102, at 93.

300. *Id.* at 221.

301. Letter from T.W. Ellerbeck to W.H. Hooper (Jan. 20, 1870), *supra* note 265.

302. Letter from Daniel H. Wells to W.H. Hooper (Mar. 15, 1870), *supra* note 239.

303. *Id.*

tax paid by Utah liquor manufacturers. He explained conspiratorially that “I should not like to affirm that Mr Taggart [sic] is in partnership here in that business, but from what has been presented to my notice I have no doubt of such being the case.”<sup>304</sup> By December, rumors had reached Utah that John W. Douglass, who had recently succeeded Delano as the Commissioner of Internal Revenue, had instructed Hollister to collect the assessment Taggart had made against Young, while dropping the penalties.<sup>305</sup> The Mormon leaders requested that Hooper find out if it were true and, if so, to find out whether they could appeal the Commissioner’s decision to the Secretary of the Treasury “in the same way as in land cases, where an appeal can be taken from the Commissioner to the Sec. of the Interior.”<sup>306</sup>

At the end of 1870, Young decided to take advantage of Hooper’s position as a representative of Utah and (indirectly) of the Mormon church. Even still, Young did not request any particular action from Hooper. Rather, church leaders provided him with explanations and suggestions in hopes that “you will get them presented at the proper place at the proper time.”<sup>307</sup>

Hooper seems to have found the proper place and time in mid-December of 1870, when he reported that he had spoken with Senator John Sherman on the Senate Committee on Finance. Hooper argued—apparently unsuccessfully—that recent legislation<sup>308</sup> provided an exemption to the Mormon church from paying taxes on their income. He also argued for the suspension of collection.<sup>309</sup>

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304. Letter from Brigham Young to W.H. Hooper (May 26, 1870), *supra* note 146. Whether or not Taggart was “in partnership” with liquor manufacturers, the accusation was not necessarily unfounded. The Bureau of Internal Revenue suffered from significant corruption surrounding the evasion of liquor taxes, including the so-called “Whiskey Ring,” formed and led by Internal Revenue agents. Thorndike, *supra* note 21, at 1754.

305. Letter from Daniel H. Wells, Second Counselor to the First Presidency, The Church of Jesus Christ of Latter-day Saints, to W.H. Hooper, Representative for the Territory of Utah (Dec. 8, 1870) (on file with the Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah).

306. *Id.*

307. *Id.*

308. See *supra* notes 285–93 and accompanying text.

309. Letter from W.H. Hooper, Representative for the Territory of Utah, to a “Friend,” (Dec. 19, 1870) (on file with the Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah) (this “Friend” was likely Brigham Young).

To further provide Hooper with a rhetorically powerful position, Young decided against providing Hollister with a security interest in property while he waited to collect the income tax, and instead, “to show him and let Hollister take property, but this we do under protest.” Young believed that if Hollister started seizing property belonging to the Mormon church, it would raise immediate questions in Congress and “give Capt Hooper a far better opportunity of showing how matters are in Utah than if we give security.”<sup>310</sup> The idea of the government seizing assets from a church—even if it were the Mormon church—would be offensive enough to Congress, Young believed, that it would highlight the injustice of taxing Mormon tithing.

Hollister appears to have agreed with Young’s assessment of the optics of seizing church property. Two days after Young suggested that Hollister be forced to seize property of the Mormon church, Wells reported that he had declined to give Hollister security and offered instead to show him church property, telling Hollister he “should not resist his taking it but did solemnly protest against it.” Hollister asked him what type of property the church owned, and Wells responded that it had, among other things, two tabernacles and an organ. Hollister replied that he “did not wish to take the Tabernacles or organs as it would raise a howl about persecution that they would not get over for 50 years.”<sup>311</sup>

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310. Letter from Brigham Young, President, The Church of Jesus Christ of Latter-day Saints, to Daniel H. Wells, Second Counselor to the First Presidency, The Church of Jesus Christ of Latter-day Saints (Dec. 30, 1870) (on file with the Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah). While this Article invokes Hooper mostly with respect to Young’s tentative interest in using his influence to help the Mormon church win its income tax dispute, Young was not always tentative in deploying Hooper. At the same time Young was fighting this income tax battle, the Cullom Act, an anti-polygamy bill, was moving through Congress, and Young used every tool he had, including the influence of Hooper, to try to prevent the Cullom bill from becoming law. Young requested that Hooper get an injunction against the President or Congress in case the bill became law. See *supra* note 146. Hooper gave a memorial of protest to members of Congress, delivered a speech asserting the Mormons’ right to practice polygamy, and even met with the President. By the end of July, Young believed that the opposition to the bill—including Hooper’s lobbying—had weakened the will of Congress to enact it. PROPHET AND THE REFORMER, *supra* note 119, at 414–15.

311. Letter from Daniel H. Wells to Brigham Young (Jan. 1, 1871 [misdated as 1870]), *supra* note 224.



Hollister asked if the Mormon church owned any property outside of the Temple block, where the explicitly religious property was located.<sup>312</sup> Wells took him to the tithing office buildings.<sup>313</sup> Before he went though, he wanted to know whether Young held title to the land in his capacity as Trustee-in-Trust of the church. Wells replied “that the law of 1862 was supposed to repeal the legal organization of the church. I believed but did not know not having seen the record that the title of the lot stood in the name of Brigham Young.”<sup>314</sup> Hollister considered it a “farce” to show him land that Young held directly and not on behalf of the church. Wells assured him that, to the extent the church held other property, the title to that property was unclear as a result of the 1862 disincorporation of the church, and Hollister appears to have given up on seizing property belonging to the Mormon church.<sup>315</sup>

Ultimately, Hollister’s decision to refrain from seizing that property could not have disappointed Young too significantly. Although he initially believed that the optics of Hollister seizing church property to pay the tax assessment would be favorable to the church, he appears to have changed his mind. A week and a half after suggesting that Wells allow Hollister to seize property, Young wrote that “they have no right to assess tithing property and I certainly shan’t pay the assessment and if they get anything they will have to find church property and get it out of that.”<sup>316</sup>

## *2. Rethinking church revenue*

In case Young’s arguments proved unavailing and Hooper’s influence failed to convince the government that the income tax did not reach tithing, Young and other Mormon leaders began to think about how they could minimize the effects of income tax on tithing in the future. Ultimately, Young came up with two ideas, and appeared ready to institute either or both of them.

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312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

316. Letter from Brigham Young, President, The Church of Jesus Christ of Latter-day Saints, to Daniel H. Wells, Second Counselor to the First Presidency, The Church of Jesus Christ of Latter-day Saints (Jan. 9, 1871) (on file with the Church History Library, The Church of Jesus Christ of Latter-day Saints).

First, as he pointed out to other Mormon leaders, the various bishops of the church collected much of the tithing. Moreover, in many cases, they dispersed the tithing receipts themselves. Young argued that, because they were responsible for tithing and “often disburse it at their own discretion, in fact, they are local Trustees-in-Trust.”<sup>317</sup> If tithing was taxable, Young wanted the bishops outside of Salt Lake County to be assessed on the tithing they received and pay the income tax on it themselves. This wasn’t merely to reduce Young’s personal tax bill. The income-tax law provided a \$1000 exemption for each taxpayer; taxpayers only paid taxes on their income in excess of the exemption amount.<sup>318</sup> If each bishop were to pay taxes on the amount of tithing he received, Young reasoned, each bishop would get the \$1000 exemption.<sup>319</sup> Effectively, in Taggart’s assessment of the church for 1868, he permitted Young a single \$1000 exemption. In 1870, the Mormon church had 195 wards, led by 195 bishops.<sup>320</sup> If tithing were assessed separately to each bishop, that would reduce the amount of tithing on which the Mormon church owed taxes by up to \$195,000. Strategically, then, if tithing represented taxable income to the church, spreading it out among more taxpayers made significant sense.

Second, Young was prepared to invoke a nuclear option: ending tithing altogether. Rather than allowing the government to “rob us of our hard earnings which are donated to sustain the poor and other charitable purposes[,]” the church would have to “carry on our public works and assist the poor by some other method.”<sup>321</sup> The day after Young proposed to end tithing, Wells replied that he thought it was a good idea, and that he was preparing to publish a notice announcing the new no-tithing policy.<sup>322</sup> That same day,

317. Letter from Brigham Young (per Daniel H. Wells) to W.H. Hooper (Mar. 15, 1870), *supra* note 239.

318. Revenue Act of 1867, ch. 169, § 13, 14 Stat. 477, 477–81.

319. Letter from Brigham Young (per Daniel H. Wells) to W.H. Hooper (Mar. 15, 1870), *supra* note 239.

320. DESERET MORNING NEWS, 2007 CHURCH ALMANAC 634 (2006).

321. Letter from unknown sender [probably Brigham Young] to Daniel H. Wells (Jan. 3, 1871), *supra* note 9.

322. Letter from Brigham Young, President, The Church of Jesus Christ of Latter-day Saints, to Daniel H. Wells, Second Counselor to the First Presidency, The Church of Jesus Christ of Latter-day Saints (Jan. 4, 1871) (on file with the Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah).

Young wrote a letter to the bishops throughout Utah, in which he said that church leaders “wish the people to pay no more tithing, nor you [bishops] to make any more returns to the General Tithing Office, until further notice.”<sup>323</sup>

Dropping tithing would have been a significant move, both religiously and financially. In Mormon scripture, God declared tithing “a standing law unto [my people] forever.”<sup>324</sup> Moving away from tithing would belie this divine declaration.

Financially, moving away from tithing would also represent a significant sacrifice and challenge to the church. Tithing made up a significant portion of the Mormon church’s revenue—a decade after Young proposed ending tithing, it represented about \$540,000 of the church’s \$1 million revenue.<sup>325</sup> If the Mormon church were to give up tithing, it would have to replace at least half of its revenue, with no guarantee that the Bureau of Internal Revenue would not treat the replacement as taxable as well.

*B. Coda: Commissioner Pleasonton vs. the Income Tax*

In the end, after nearly a year and a half of battle between the Mormon church and Taggart over the taxability of tithing revenue, Young and the Mormon church proved victorious. Their victory, though, represented a sudden and unexpected reversal, the kind of *deus ex machina* that would grace the ending of a poorly written play.

On December 3, 1870, *The New York Times* reported what it believed to be the end of the battle. John W. Douglass, Acting Commissioner of Internal Revenue, had (mostly) found for the government.<sup>326</sup> The Mormon church owed taxes on its tithing revenue, as assessed by Taggart. *Harper’s Weekly* reported gleefully to a national audience that “Brigham Young thought his income tax too large last year. He declared it was erroneous and asked to have it abated. Not being so successful as he desired, the venerable

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323. Letter from Brigham Young, President, The Church of Jesus Christ of Latter-day Saints, to the Bishops throughout the territory (Jan. 4, 1871) (on file with the Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah).

324. THE DOCTRINE AND COVENANTS 119:4.

325. ARRINGTON, *supra* note 7, at 353.

326. *Brigham Young’s Income Tax*, *supra* note 295, at 1.

householder revenges himself by complaining of the extravagance of his family.”<sup>327</sup>

Although Douglass found the Mormon church liable for taxes on its tithing revenue, his decision did not represent a complete loss for the church.<sup>328</sup> He determined that Young had neither failed to file a return nor filed a fraudulent one.<sup>329</sup> As a result, he relieved Young of the fifty-percent penalty. Hollister had immediate permission, though, to collect the \$39,559 the church owed.<sup>330</sup>

About two weeks after Douglass’s decision, Young received a telegram informing him that collection would be postponed for ninety days.<sup>331</sup> (There seems to have been some confusion on this point: about a week later, Hollister received a telegram from Acting Commissioner Douglass instructing him to not “postpone collection of income tax assessed against Brigham Young if you think the change of final collection will be thereby in any degree lessened.”<sup>332</sup>) As Young raced to figure out what to do,<sup>333</sup> perhaps the most consequential occurrence in the question of the taxability of Mormon tithing happened: on December 14, 1870, Grant nominated Alfred Pleasonton as Commissioner of Internal Revenue.<sup>334</sup> The next day, the Senate consented to his appointment,<sup>335</sup> and he was appointed effective January 3, 1871.<sup>336</sup>

327. *Home and Foreign Gossip*, HARPER’S WKLY., Jan. 14, 1871, at 35. The *Harper’s Weekly* article continued with a fictional dialogue between Young and an interlocutor, before explicitly making a connection between Young’s endeavor to have the income tax abated and polygamy. After the fictionalized Young complains about the expenses women cause him to incur, the writer asks, “If women make all this expense and annoyance, why in the world does the gentleman trouble himself with so many of them?” *Id.*

328. *Brigham Young’s Income Tax*, *supra* note 295, at 1.

329. *Id.*

330. *Id.*

331. Letter from Brigham Young, President, The Church of Jesus Christ of Latter-day Saints, to Daniel H. Wells, Second Counselor to the First Presidency, The Church of Jesus Christ of Latter-day Saints (Dec. 14, 1870) (on file with the Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah).

332. Letter from J.W. Douglass, Comm’r of Internal Revenue, to O.J. Hollister, Collector of Internal Revenue for the Territory of Utah (Dec. 20, 1870) (on file with the Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah).

333. See *supra* notes 305–316 and accompanying text.

334. 17 J. EXECUTIVE PROC. SENATE U.S. 581 (1901).

335. *Id.* at 587.

336. ROMAIN D. HURET, AMERICAN TAX RESISTERS 42 (2014).

Pleasanton had served as a general in the Civil War and had been an Internal Revenue collector in New York.<sup>337</sup> He also fiercely opposed the income tax. Shortly after his appointment as Commissioner, Pleasanton wrote to the Committee on Ways and Means. In his letter, he said that he considered the income tax to be “mos[t] obnoxious to the genius of our people, being inquisitorial in its nature and, dragging into public view an exposition of the most private affairs of the citizen.”<sup>338</sup> In light of the fact that, in his opinion, “the evils more than counterbalance the benefits from its longer retention,” he recommended “its unconditional repeal.”<sup>339</sup>

At roughly the same time Pleasanton argued for the repeal of the income tax, he also looked at Young’s appeal of his tax assessment. He concluded that, while income the Mormon church received from speculative investments was taxable income, “the tithes collected by said Church from its members were voluntary donations and as such not subject to an income tax.”<sup>340</sup> Therefore, he ordered Taggart to make a new assessment consonant with his guidance and to notify him so that he could abate the previous assessment.<sup>341</sup>

In the immediate aftermath of Pleasanton’s decision, Mormon leaders celebrated. Optimistically, Wells reported to Young that “Taggart is rather abandoning the tithing matters.”<sup>342</sup> The Mormon church would no longer have to rethink how it would raise revenue and would no longer have to abandon their eternal “standing law.”<sup>343</sup> Young wrote that “[t]he Commissioner of Internal Revenue has decided that our Tithing is not taxable and we shall arrange our

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337. *Id.*

338. *Letters from Commissioner Pleasanton [sic] on the Income Tax*, CHI. TRIB., Jan. 27, 1871, at 1.

339. *Id.*

340. Letter from Alfred Pleasanton, Comm’r of Internal Revenue, to John P. Taggart, Assessor of Internal Revenue for the Territory of Utah (Jan. 13, 1871) (on file with the Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah).

341. *Id.*

342. Letter from Daniel H. Wells, Second Counselor to the First Presidency, The Church of Jesus Christ of Latter-day Saints, to Brigham Young, President, The Church of Jesus Christ of Latter-day Saints (Jan. 14, 1871) (on file with the Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah).

343. THE DOCTRINE AND COVENANTS 119:4. *See supra* note 324 and accompanying text.

affairs so that those who desire, will have the privilege of paying their Tithing & donations."<sup>344</sup>

This optimism proved unfounded, though. Even after Pleasonton's determination, Taggart was unsatisfied. Mormon leaders reported that Taggart "affirms that his office is loaded down with the weight of evidence contrary to the commissioner's ruling that tithing is a free donation."<sup>345</sup> They also reported that he intended to collect affidavits to prove that "[Commissioner] Pleasanton's [sic] decision regarding the income tax on tithing is erroneous; that tithing is not voluntary, &c."<sup>346</sup>

In spite of Taggart's continued insistence that tithing represented taxable income, Mormon leaders took advantage of Pleasonton's decision. In response to Edwin Taggart's request that the Mormon church file a return for 1870, Young responded that he could not, asserting that

I have made diligent examination of the facts, and cannot find that any of the free donations of tithes received by the Church of Jesus Christ of Latter-day Saints have been used in any way so as to produce any income whatever for the year aforesaid, and I am therefore unable to make out any return of income for said Church for said year[.]<sup>347</sup>

After this, questions of the taxability of Mormon tithing largely disappeared from Mormon leaders' correspondence. Even Pleasonton's suspension as Commissioner in the middle of 1871,<sup>348</sup>

344. Letter from Brigham Young, President, The Church of Jesus Christ of Latter-day Saints, to John McCarthy (Jan. 23, 1871) (on file with the Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah).

345. Letter from Daniel H. Wells to W.H. Hooper (Jan. 30, 1871), *supra* note 222. Disagreements between rulings issued by the Commissioner of Internal Revenue and interpretations of the tax law in the field were not unique to Taggart; they appeared to be symptomatic of the "growing pains" of the Civil War income tax. CHOMMIE, *supra* note 32, at 10-11.

346. Letter from T.W. Ellerbeck, Clerk to Brigham Young, to W.H. Hooper, Representative for the Territory of Utah (Feb. 14, 1871) (on file with the Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah).

347. Letter from Brigham Young, President, The Church of Jesus Christ of Latter-day Saints, to Edwin Taggart (Mar. 23, 1871) (on file with the Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah).

348. Pleasanton quickly clashed with Treasury Secretary George S. Boutwell, developing a view on the income tax that conflicted with Boutwell's and publicly arguing his case in front of Congressional committees. *Abolition of the Revenue*

and his replacement by Douglass that December,<sup>349</sup> did not bring back their concerns about the income tax.

## V. WHAT TAGGART'S ASSESSMENT MEANS TODAY

The year and a half of tax controversy between August 1869 and January 1871 have little direct bearing on contemporary questions of church and tax. The modern federal income tax, as well as the IRS's administration of the tax, are far more sophisticated and nuanced today. Questions about the taxability of church revenue is relatively settled, with marginal cases few and far between. In fact, the federal government has largely elected to leave religion alone for tax purposes. Unlike other tax-exempt organizations, churches do not need to apply with the IRS for their tax exemptions,<sup>350</sup> nor do they need to file annual information returns.<sup>351</sup>

And perhaps most importantly for the separation of church and tax, Congress has made the procedure for auditing a church tremendously burdensome on the IRS.<sup>352</sup> To even initiate an audit, a sufficiently high-level Treasury official must reasonably believe that the church is not, in fact, exempt or that it has unrelated business taxable income.<sup>353</sup> The IRS must then provide the church with relatively detailed written notice about the audit.<sup>354</sup>

Congress also imposed strict limitations on the actual audit. For instance, a church audit must be completed within two years.<sup>355</sup> If the IRS auditor determines that the church owes additional taxes or should lose its exemption, the regional counsel must approve the determination in writing.<sup>356</sup> And if the audit does not result in a

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*Commissionership—Why?*, CHI. TRIB., Dec. 23, 1871, at 4. The August 1871 news was filled with stories of the so-called “Boutwell-Pleasanton Imbroglio.” *The Boutwell-Pleasanton Difficulty Still Unadjusted*, N.Y. HERALD, Aug. 3, 1871, at 10. On August 8, 1871, President Grant suspended Pleasanton against Pleasanton's will. *Forty-Second Congress*, CONG. GLOBE, Dec. 4, 1871, at 2.

349. 18 J. EXECUTIVE PROC. SENATE U.S. 137 (1901).

350. I.R.C. § 508(a), (c) (2012).

351. *Id.* § 6033(a).

352. Samuel D. Brunson, *Dear IRS, It Is Time to Enforce the Campaigning Prohibition. Even Against Churches*, 87 U. COLO. L. REV. 143, 168 (2016).

353. I.R.C. § 7611(a)(1)–(2) (2012).

354. *Id.* § 7611(a)(3).

355. *Id.* § 7611(c)(1).

356. *Id.* § 7611(d)(1).

deficiency or loss of exemption, the IRS cannot examine the church again within a five-year period.<sup>357</sup>

With all of these impediments and hoops, it is deeply unlikely that Taggart could have assessed taxes on Mormon tithing today. And yet the story of his assessment of tithing, and the ways the Mormon church responded, is more than merely a historical curiosity. Rather, it illustrates how the law “not only reacts to religion, but . . . also shapes it.”<sup>358</sup>

That shaping can be deliberate. Congress decided that it did not want tax-exempt organizations, including churches, to endorse or oppose candidates for office, so it provided that doing so would cost an organization its exemption.<sup>359</sup> While certain pastors kick against this limitation,<sup>360</sup> others embrace it, using it to create a sanctuary from “the partisanship that is bedeviling [the] country.”<sup>361</sup>

Sometimes, though, the shaping is inadvertent. For example, while the tax law generally assigned income to the person whose efforts created that income, until the late 1970s, the IRS exempted clergy who had taken a vow of poverty from this treatment.<sup>362</sup> They were treated as agents for their religious orders, which meant the tax law attributed the income to the order, not the individual.<sup>363</sup> Because the religious order was tax-exempt, ultimately nobody would pay taxes on the income.

In the 1960s and 1970s, some tax protestors took advantage of the availability of mail-order ordinations. They obtained an ordination, declared that their homes were their church, and took a putative vow of poverty, assigning their salaries to their

357. *Id.* § 7611(f)(1).

358. Nathan B. Oman, *International Legal Experience and the Mormon Theology of the State, 1945–2012*, 100 IOWA L. REV. 715, 717 (2015).

359. I.R.C. § 501(c)(3) (2012).

360. See Samuel D. Brunson, *Reigning in Charities: Using an Intermediate Penalty to Enforce the Campaigning Prohibition*, 8 PITT. TAX REV. 125, 150 (2011).

361. Rev. Carol McEntyre, *Johnson Amendment Is Good for Churches*, ST. LOUIS POST-DISPATCH (Sept. 4, 2018), [https://www.stltoday.com/opinion/columnists/johnson-amendment-is-good-for-churches/article\\_95e89a75-e5e8-5ed9-bad4-de45b56eb300.html](https://www.stltoday.com/opinion/columnists/johnson-amendment-is-good-for-churches/article_95e89a75-e5e8-5ed9-bad4-de45b56eb300.html) [<https://perma.cc/8G8J-8UN7>].

362. BRUNSON, *supra* note 240, at 53.

363. *Id.*



churches.<sup>364</sup> Their churches, in exchange, paid for all of their expenses, which came as no surprise, considering the “ministers” exercised full control over their home-churches.<sup>365</sup>

The inadvertent potential consequences of Taggart’s attempt to tax tithing illustrates this dynamic in a non-abusive context. As a result of the taxation, Mormon leaders were willing to give up tithing—both a religious and a financial imperative—and search for an alternative means to fund the church. That change would have represented a radical shift, both practically and religiously, for Mormonism. And while none of the letters from employees of the Bureau of Internal Revenue discuss it, there is no reason to believe that they anticipated or desired that the church would end its tithing.

If law will affect religion (and it will), lawmakers should consider the potential consequences of the laws they enact. That does not mean that lawmakers should only enact laws that will not affect churches. Such laws are likely nonexistent. But at the same time, lawmakers cannot use the formal constitutional separation of church and state as an excuse to ignore these eventual impacts. While it is, in some circumstances, permissible for law to burden religious practice,<sup>366</sup> those burdens should be imposed thoughtfully and deliberately, not accidentally.

### CONCLUSION

Although Douglass had previously determined that the Mormon church had to pay income tax on its receipt of tithes, by 1872, his determination no longer mattered. Even if Taggart wanted to press the issue, the federal income tax expired by its own terms on December 31, 1871.<sup>367</sup> It would not return for another two decades and would not return permanently until the early twentieth century.<sup>368</sup> After nearly a year and a half of conflict over

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364. *Id.*

365. *Id.* at 53–54.

366. *See, e.g., United States v. Robel*, 389 U.S. 258, 267–68 (1967) (“Our decision today simply recognizes that, when legitimate legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have a ‘less drastic’ impact on the continued vitality of First Amendment freedoms.”).

367. Revenue Act of 1870, ch. 255, § 6, 16 Stat. 257, 260–61.

368. Herzig & Brunson, *supra* note 93, at 1130.

the taxability of tithing, the question had become moot. The Mormon church continued to collect tithing and discarded the various contingency plans Young had considered.

That the question of taxing tithing became moot does not, however, mean that this episode is merely a footnote to history, subsumed by the larger questions of polygamy and sovereignty. Commissioner Pleasonton's decision did not dispute the possibility that the Mormon church could be taxed. Rather, the Commissioner found, as a factual matter, that tithing did not fit within the definition of *profits, gains, or incomes*. As voluntary donations, tithing was not the kind of revenue the government taxed. Had Pleasonton determined that tithing was profit, gain, or income, though, there is no reason to believe he would have granted Young's appeal. The status of the Mormon church as a church did not inevitably shield it from the income tax.

The tax dispute between Young and the Bureau of Internal Revenue also illustrates how administrative agencies fill holes in legislation. The Civil War income tax was designed primarily to raise the revenue needed for the Union to pay for the war.<sup>369</sup> The law's drafters did not think about how the tax would interact with charities or churches, leaving those questions to the Bureau of Internal Revenue itself. And even the Bureau's ultimate decision left significant discretion to assessors, who were not necessarily experts in questions of taxation themselves. Thus, with a minimum of guidance, Taggart tried to apply the new law to the unique situation of Mormon tithing, a revenue source that apparently did not fit categories Congress had anticipated.

While the tax law is no longer new and has better-developed categories today, churches cannot and will not exist in a space unaffected by law. Instead of pretending that they are totally separate, then, as legislators recognize that our legal and administrative systems will impact how churches function, perhaps they will pay attention to what the consequences will be.

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369. BANK ET AL., *supra* note 25, at 36–37.