Christ and the Constitution: Toward a Mormon Jurisprudence

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In 1987 Americans celebrated the 200th anniversary of the United States Constitution. Topics previously confined to legal and philosophical journals became the subject of more common discourse. Nowhere was this development more evident than in sermons from the Mormon pulpit. The Mormon celebration of the anniversary of the Constitution was led by a prophet whose ministry has hailed the divinity of constitutional government in America. In a series of speeches and publications, President Ezra Taft Benson offered his view of the proper role of government under the Constitution, a view which purports to use gospel principles as an interpretive theory. He called upon the Saints to prepare for an impending constitutional crisis.

Accepting President Benson's injunction to read and ponder the Constitution and abide by its precepts, in this article we explore the application of gospel principles to constitutional interpretation. We believe the Constitution provides a liberating means of self-government which, like its religious counterpart, encourages progression through transcending limiting contexts. We reject the notion that it is a rigid, doctrinal ediface, forever projecting predetermined rules of human association. Although our view of the Constitution differs from that of President Benson in certain fundamental respects, by exploring these ideas, we hope to contribute to the dialogue that President Benson began toward a Mormon jurisprudence.

Who are we, and how should we live? These questions are not only at the core of philosophy, ethics, and religion, but also at the core of law. In a society such as ours that aspires to balance order and freedom through established processes, law both institutionalizes and facilitates changes in the way we view

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ourselves and others and the way we choose to live. However, these questions generally do not arise — at least, as such — in modern legal discourse, or "jurisprudence." Rather, we tend to distinguish between legal discourse and the more open-ended discourse that characterizes philosophy, ethics, and religion.[1]

If the model of legal reasoning is one of rigid deduction from neutral, determinate rules through objectively ascertainable facts to *a fortiori* conclusions, then distinguishing between jurisprudence and other forms of philosophical and religious discourse may seem natural.[2] But ever since the so-called Legal Realists revealed the discretion inherent in every deductive step and showed that legal reasoning is an infinitely more complex process than the deductive model would suggest, the distinction between law and other types of dialogue has appeared less clear.[3] Indeed, much jurisprudential debate now centers not on whether such a distinction exists, but on whether the distinction should even be indulged.[4]

The erosion of the distinction has had its greatest impact in the area of constitutional law. The Constitution purports to be the "supreme law of the land"; any law that contravenes the Constitution must fall — even if such a law has been duly enacted by elected representatives through fair democratic processes. The problem is that the answer to the question of whether a law contravenes the Constitution is not always readily apparent. In many of its most important provisions, the Constitution speaks in broad terms that do not incontrovertibly determine outcomes given a context of facts. In other words, although the Constitution means what it says, it does not always say what it means.[5]

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[1] Indeed, according to *Black's Law Dictionary*, " 'jurisprudence' is the *science* of law, namely, that science which has for its function to ascertain the principles on which legal rules are based, so as not only to classify those rules in their proper order, and show the relation in which they stand to one another, but also to settle the manner in which new or doubtful cases should be brought under the appropriate rules" (emphasis added).

[2] For example, Hans Kelsen proposed a deductive, value-free model:

> The Pure Theory of Law is a theory of the positive law. As a theory it is exclusively concerned with the accurate definition of its subject-matter. It endeavors to answer the question, What is the law? but not the question, What ought it to be? It is a science and not a politics of law. . . . Legal theory thus becomes a structural analysis, as exact as possible, of the positive law, an analysis free of all ethical or political judgments of value. (1934, 477, 498)

[3] Felix S. Cohen observed that "in the orthodox juristic tradition there is some sort of boundary between the realm of law and the realm of morality or ethics," but he argued that the boundary is artificial at best — that law "is just as much a part of the domain of morality as any other phase of human custom and conduct" (Cohen 1931, 201, 220). He urged his contemporaries to "shift the focus of [their] vision from a stage where social and professional prejudices wear the terrible armor of Pure Reason to an arena where human hopes and expectations wrestle naked for supremacy" (1931, 217).

[4] Picking up, in a sense, where the Legal Realists left off, a new school of jurisprudence called Critical Legal Studies not only asserts as fact but openly embraces the notion that law is indistinguishable from moral/social/political/religious dialogue. See Unger (1975, 1983) and Singer (1984). For a good survey of the Critical Legal Studies movement from both inside and out, see "Critical Legal Studies Symposium" (1984).

[5] Thus H. L. A. Hart, a preeminent legal scholar, recognized that in "every legal system a large and important field is left open for the exercise of discretion by courts and other

Ever since Chief Justice John Marshall in *Marbury v. Madison* established the principle of judicial review in 1803, the United States Supreme Court has served as final arbiter of whether a law contravenes the Constitution. Thus, it ultimately rests on nine non-elected judges to limit the majority's power to govern — often in areas that involve the ultimate questions of human existence. This creates a powerful tension in a society fundamentally based on principles of representative democracy. That tension is greatly heightened if judges are perceived to be roaming at will over the legal landscape, relying only on their own moral views (or, according to one colorful but apocryphal saying of the Legal Realists, on "what they had for breakfast") for interpretive guidance.

The challenge of modern constitutional jurisprudence has been to come up with a neutral, objective interpretive model to channel judicial discretion. Judges and legal scholars have taken a variety of approaches in developing such an interpretive model. Some suggest that courts should look only to the language or structure of the Constitution. For example, Robert Bork, a former federal judge whose nomination to the United States Supreme Court was rejected by the Senate, maintains that "courts must accept any value choice the legislature makes unless it clearly runs contrary to a choice made in the framing of the Constitution" (Bork 1971, 10–11), and whether such a choice was made "must be fairly derived by standard modes of legal interpretation from the text, structure, and history of the Constitution" (*Dronenburg v. Zech* [741 F. 2d 1388, 1396 n. 5 (1984)]). John Hart Ely, another adherent of this school of thought, argues that, by the framers' design, the Constitution is largely concerned with ensuring the fairness of the democratic process, so that a court reviewing majority action "can appropriately concern itself only with questions of participation" (Ely 1980, 181).

Others suggest that courts must (at least in some cases) and properly can look beyond the language and structure of the Constitution. Thus members of the "law and economics" school look to principles of allocative efficiency to supply a neutral standard to guide judicial discretion (Posner 1977, 1981). And proponents of what might be called "law and morality" attempt to discover the fundamental rights inherent in an open, orderly society by looking to history, precedent, and changes in society and its values (Ackerman 1980; Dworkin 1977, 1985, 1986; Rawls 1971).

In a booklet published and distributed in 1986 for the recent bicentennial of the Constitution, President Ezra Taft Benson added his voice to this ongoing debate, offering in concise form his "jurisprudence" — his personal view of the appropriate backdrop to the interpretation of the Constitution.[6] Not surpris-

officials in rendering initially vague standards determinate, in resolving the uncertainties of statutes, or in developing and qualifying rules only broadly communicated by authoritative precedents" (1961, 132).

[6] *The Constitution: A Heavenly Banner* contains the following disclaimer: "The author wishes to make clear that this is not a Church publication, and the opinions and views expressed by him in this publication are those for which he alone is responsible."

The views in this booklet are not new to President Benson or his ministry. A comparison of the 1986 booklet with his 1974 book, *God, Family, Country: Our Three Great*

ingly, he looks to the gospel of Jesus Christ. According to Latter-day Saint belief, the Constitution is inspired — a literal as well as a political miracle — and President Benson consequently believes that it ought to be interpreted in light of the inspired principles of the gospel.

We are intrigued by President Benson's thesis; it suggests the possibility that legal principles are and perhaps ought to be based ultimately on moral and ethical principles, that law is but another form of dialogue about the ultimate questions of human existence. However, we must confess that we are troubled by his development of that thesis. In our view, President Benson's jurisprudence is driven not by gospel principles, or even by any necessary or uncontroversial interpretation of the Constitution. Instead, it is driven chiefly by the principle of laissez-faire economics and thus misses the rich opportunities for insight and transformation his thesis suggests.

President Benson's professional career and religious ministry have centered on what he calls "our three great loyalties": God, family, and country. As articulated in *The Constitution: A Heavenly Banner*, President Benson's jurisprudence purports to be informed by "basic, eternal principles." The first principle is agency. In the primordial council in heaven, the "central issue" was whether the children of God would have "untrammeled agency" or be "forced to be obedient." Satan stood for forced obedience and was cast out. He continues to "foster the same plan" on earth, primarily "through the power of earthly governments" (Benson 1986, 2–3).

The second principle is based on part of the "Declaration of Belief regarding Governments and Laws," canonized as Section 134 of the Doctrine and Covenants. President Benson quotes from verses 1, 2, and 5, stressing that the function and proper role of government is "to secure the rights and freedoms of individual citizens," including the "free exercise of conscience, the right and control of property, and the protection of life" (pp. 4–5). Third, God is the source of basic human rights; therefore, government cannot rightfully infringe upon those rights (pp. 5–6). Fourth, the people are superior to the governments they form; government's "only source of authority and power is from the people who have created it" (p. 7). Finally, governmental powers are limited to those properly belonging "to each and every person in the absence of and prior to the establishment of any organized form of government. . . . The proper function of government, then, is limited to those spheres of activity within which the individual citizen has the right to act" (pp. 7–9).

Because President Benson uses this final principle to support his conclusion as to the proper role of government, buttressing it by quoting the Alabama constitution, we include his elaboration of it:

> In a primitive state, there is no doubt that every individual would be justified in using force, if necessary, for defense against physical harm, against theft of the fruits

Loyalties, published when he was president of the Quorum of the Twelve, reveals that most of the booklet's contents were taken without significant change from the "Country" section of the 1974 book (pp. 275–400). This section develops notions of "true Americanism" and "Christian constitutionalism" that are related to the theory of constitutional interpretation expressed in the 1986 booklet. The 1974 book contains a more complete exposition of President Benson's ideas.

> of his labor, and against enslavement by another. . . . By deriving its just powers from the governed, government becomes primarily a mechanism for defense against bodily harm, theft, and involuntary servitude. It cannot claim the power to redistribute money or property nor to force reluctant citizens to perform acts of charity against their will. . . . No individual possesses the power to take another's wealth or to force others to do good, so no government has the right to such things either. . . . "The sole object and only legitimate end of government is to protect the citizen in the enjoyment of life, liberty, and property, and when the government assumes other functions it is usurpation and oppression." (Benson 1986, 9–10)

President Benson then examines the "major provisions" of the Constitution that he considers "crucial to the preservation of our freedom" (1986, 18). First, sovereignty lies in the people themselves. "The Founding Fathers," President Benson states, "believed in common law, which holds that true sovereignty rests with the people." Therefore, they recognized that government, in the words of the Declaration of Independence (which he quotes), derives its "just powers from the consent of the governed" (1986, 18–19). Second, to safeguard inalienable or God-given rights, the Constitution separates the powers and responsibilities of government into three branches — executive, legislative, and judicial — and provides checks and balances "to make it difficult for a minority of the people to control government" and "to place restraint on the government itself" (pp. 19–20).

Third, to avoid the tyranny of unrighteous dominion — the tendency of individuals or institutions given a little authority — the Constitution "originally" granted few powers to the federal government. Specifically, President Benson emphasizes (quoting Thomas Jefferson) that the federal government was to be entrusted with " 'the defence of the nation, and its foreign and federal relations,' " leaving to the states such things as civil rights (pp. 20–21). Fourth, the Constitution provides for a representative form of government — delegating powers to elected officials who represent the electorate. As an example, President Benson notes that the Senate originally was to be elected by the state legislatures. He suggests that the intent was "to protect the individual's and the minority's rights to life, liberty, and the fruits of their labors — property" (pp. 21–22). Fifth, the Constitution is an expression of "higher law," God's law, and only a moral and righteous people can acknowledge and apply such preexisting law (p. 23).

According to President Benson, our God-given freedoms, as embodied in eternal gospel principles and the major provisions of the Constitution, have been eroded by "those who do not prize freedom" (p. 25). As an example of this, President Benson claims that, over the last thirty years, the Supreme Court has "usurped" legislative prerogative in areas such as abortion, capital punishment, pornography, school prayer and Bible-reading, criminal rights of appeal, and public demonstrations (pp. 26–27). Consequently, he warns, a crisis of great dimensions looms: "Once fundamental principles are abandoned, the republican form of government established by our noble forefathers cannot long endure" (p. 27). Because they will be the ones who, in the words of Joseph Smith, will "bear the Constitution away from the very verge of destruction" (p. 28), President Benson encourages the Saints to be righteous and

moral, to study the Constitution and abide by its precepts, to become involved in civic affairs, and to make their influence felt (pp. 28–31).

President Benson's jurisprudence is not only based on a rich intellectual and philosophical tradition, which includes the ideas of Adam Smith, John Locke, and Thomas Jefferson, among others, but his position as prophet, seer, and revelator for the Church gives his views authority, particularly since he grounds them in part on gospel principles. We do not doubt President Benson's patriotism, sincerity, and good faith in suggesting an approach to constitutional interpretation, but we do not agree with his conclusions as to the proper role of government, nor can we accept the implication that those conclusions are the only ones acceptable to God or permissible under the Constitution. Indeed, it seems to us that President Benson's conclusions are less consistent with the fundamental principles on which he purports to rely than some other conclusion might be. More alarming, they could be interpreted as providing unintended support for those who appeal to fear rather than trust, to selfishness rather than altruism, to differences rather than similarities, to hatred rather than love.[7]

President Benson posits that government can rightfully possess only those powers individuals have "in the absence of and prior to the establishment of any organized form of government" (p. 8). He then argues that, in a pre-government condition, an individual's rights unquestionably include defense of his person and property; therefore, government can legitimately perform those functions. But since "no individual possesses the power to take another's wealth or to force others to do good" (p. 9), it is emphatically not within government's power to redistribute wealth.

This line of argument is arbitrary at best. It ignores the fact that, in modern society, government must "take another's wealth" and "force others" to provide for the defense of person and property, just as it must do so to provide for the needy. The question, therefore, is whether the power of government can be brought to bear, through taxation, to coerce individuals against their will to contribute either to the national defense or to social programs. That is a question of ends, not of means. In terms of impact on agency and the free exercise of conscience, forcing one to take up a sword is the same as forcing another to give up a loaf of bread.[8]

One might argue that "We the People" agreed in the Constitution that government could provide for the national defense but not redistribute wealth. That argument, however, begs the central question of constitutional jurispru-

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[7] An embarrassing example is former Arizona Governor Evan Mecham's slighting the extraordinary accomplishments of Dr. Martin Luther King and otherwise needlessly offending gays, Jews, and other minorities.

[8] Our discussion here intentionally says nothing about the relative morality of these coercive actions. In our view, when allocating scarce resources, it is not a close moral question whether to build new and ever more destabilizing weapons systems in the name of "national defense" or whether to feed the hungry, clothe the naked, house the homeless, educate the illiterate, treat the sick, and otherwise pursue the "general welfare." We find some support for the latter choice in Judeo-Christian principles, as well as in the Book of Mormon, as does Nibley (1988).

dence — how to determine by some neutral, objective means whether something contravenes the Constitution. As in many other cases, the answer is not obvious in the key wording of the Constitution itself (which, curiously, President Benson never quotes in his discussion of its "major provisions"). Article I section 8 of the Constitution provides in part: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." In the case of *United States v. Butler*, the United States Supreme Court stated:

> Since the foundation of the Nation, sharp differences of opinion have persisted as to the true interpretation of [this clause]. Madison asserted it amounted to no more than a reference to the other powers enumerated in the subsequent clauses of the same section; that, as the United States is a government of limited and enumerated powers, the grant of power to tax and spend for the general national welfare must be confined to the enumerated legislative fields committed to the Congress. In this view the phrase is mere tautology, for taxation and appropriation are or may be necessary incidents of the exercise of any of the enumerated legislative powers. Hamilton, on the other hand, maintained the clause confers a power separate and distinct from those later enumerated, is not restricted in meaning by the grant of them, and Congress consequently has a susbtantive power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States. (297 U.S. 1 [1930], 65–66)

The Court adopted Hamilton's view but decided the case without discussing the scope of the phrase "the general welfare of the United States" (p. 68). Nevertheless, it requires neither ingenuity nor violence to semantics to argue that the "general welfare" clause can be interpreted as empowering the federal government to lay and collect taxes for the purpose of providing for the needy. The contrary argument — that that particular interpretation of the general welfare clause is not a proper interpretation — cannot be derived solely from the language of the Constitution. Thus President Benson's view that government can tax and spend to provide for defense but not to provide for the needy is not supported solely by the principles on which he purports to rely.

We can find further illustration that some other principle underlies President Benson's view of the proper role of government. President Benson defines certain areas in which government ought to have binding, coercive authority. Indeed, the inability of government to act in these areas because of Supreme Court activism rises to the level of a "constitutional crisis" (Benson 1986, 23–25). President Benson thus urges the reversal of a half-century of Supreme Court decisions that forbid the majority to mandate school prayer and Bible-reading, or to prohibit the distribution, sale, and exhibition of what the majority considers obscene, or to curtail expression that offends their moral sensitivities.

This position, however, is patently inconsistent with the argument that government possesses only those powers that individuals possess in a pregovernment condition. If, as President Benson says, "No individual possesses the power to take another's wealth or to force others to do good" (p. 9), then it would seem that no individual possesses the power to impair another's exercise

of conscience in deciding questions of personal morality and expression — decisions that seem central to the notions of free agency and freedom of conscience.[9] To decide what to do with the fruit of one's labor is no more personal or important to the free exercise of conscience — and indeed seems less central to that important freedom — than to decide what to read, whether and to whom to pray, what to say or not to say, and where and how to say or not to say it.

Again, one might seek guidance in the "major provisions" of the Constitution, but they are indeterminate in many cases. For example, the First Amendment protects the "free exercise" of religion, while at the same time forbidding laws "respecting an establishment of religion." As the Supreme Court has recently discussed in two cases, the important values underlying the free exercise clause and the establishment clause are not easily reconciled in many cases. Similarly, the Fifth and Fourteenth Amendments prohibit government from depriving any person of "liberty" without "due process of law." These important provisions, as well as others, have been interpreted to embody a notion of "ordered liberty" (*Palko v. Connecticut*, 302 U.S. 319 [1937]) that seeks to balance the competing values that notion itself represents. The jurisprudence that President Benson attacks thus reflects the Supreme Court's best attempt to balance and harmonize competing values in difficult and novel cases.

In summary, President Benson's jurisprudence purports to be based on gospel and constitutional principles, but those principles alone do not support his conclusions about the proper role of government. What underlying theory then has not been made explicit? To determine what that theory might be, we must look to President Benson's 1974 book, where he more fully explicates the principles that inform his jurisprudence. In it he discusses "the clash between communism and freedom" and defines and denounces "socialistic communism" as "the earthly image of the plan Satan presented in the preexistence" (Benson 1974, 346). The following statements typify President Benson's alarmist views:

> The fight against Godless communism is a very real part of the duty of every man who holds the Priesthood. It is the fight against slavery, immorality, atheism, terrorism, cruelty, barbarism, deceit and the destruction of human life through a kind of tyranny unsurpassed by anything in human history. Here is a struggle against the evil, satanical priestcraft of Lucifer. Truly it can be called "a continuation of the war in heaven." . . . Today the devil as a wolf in a supposedly new suit of sheep's clothing is enticing some men, both in and out of the Church, to parrot his line by advocating planned government-guaranteed security programs at the expense of our liberties. Latter-day Saints should be reminded how and why they voted as they did in heaven. If some have decided to change their votes, they should repent — throw their support on the side of freedom — and cease promoting this subversion. (Benson 1974, 347–48)

[9] In this vein, President Benson significantly omitted verse 4 when he quoted Section 134 of the Doctrine and Covenants:

> We believe that religion is instituted of God; and that men are amenable to him, and to him only, for the exercise of it, unless their religious opinions prompt them to infringe upon the rights and liberties of others; but we do not believe that human law has a right to interfere in prescribing rules of worship to bind the consciences of men, nor dictate forms for public devotion; that the magistrate should restrain crime, but never control conscience; should punish guilt, but never suppress the freedom of the soul.

The "orthodox" jurisprudence thus equates the restored gospel, Americanism, and economic and political conservatism:

> The best way — the American way — is still maximum freedom for the individual guaranteed by a wise government that establishes and enforces the rules of the game. . . . Our way of life is based upon eternal principles. It rests upon a deep spiritual foundation established by inspired instruments of an all-wise Providence. . . .
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> As American citizens, as citizens of the nations of the free world, we need to rouse ourselves for the problems which confront us as great Christian nations. We must recognize that these fundamental basic principles — moral and spiritual — lay at the very foundation of our past achievements. To continue to enjoy present blessings, we must return to these basic and fundamental principles. Economics and morals are both part of one inseparable body of truth. They must be in harmony. We need to square our actions with these eternal verities. (Benson 1974, 315, 364)

In his chapter, "Survival of the American Way of Life," President Benson discusses what are, in his view, our most cherished, priceless rights, interests, and blessings — those the Constitution was designed to protect — and the clear emphasis again is on things economic:

> The evidence clearly indicates that our most cherished rights and interests are all a part of the American way of life. Can communism, socialism, fascism, or any other coercive system provide these priceless blessings which flow to us as part of our American way of life? The common denominator of all these coercive systems is the curtailment of individual liberty. Surely we will all agree that our Constitution provides the basis for the only *economic* system acceptable to true Americans. (Benson 1974, 311, emphasis added)

Those with different views are unfaithful and unpatriotic:[10] "No true Latter-day Saint and no true American can be a socialist or a communist *or support programs leading in that direction.* These evil philosophies are incompatible with Mormonism, the true gospel of Jesus Christ" (Benson 1974, 353–54, emphasis added). If President Benson has moderated his tone in the recent pamphlet, he has not modified the idea. For example, in exhorting the Saints to be righteous and moral, President Benson states: "To live a higher law means that we will not seek to receive what we have not earned by our own labor" (Benson 1974, 28). This comes close to calling the beggar a sinner.

It seems clear that the underlying theory for President Benson's jurisprudence is laissez-faire economics — the view that government ought not to interfere in economic affairs beyond the minimum necessary to allow free enterprise to operate according to its own laws.[11] In his book, President Benson

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[10] The same equation was used in Washington during the Reagan administration to dismiss as "unpatriotic" those who did not support the policies of the president.

[11] There is some recognition in President Benson's writings that the free exercise of conscience extends beyond decisions about accumulating and disposing of material wealth. For example, freedom of religious expression is important. However, the following statement by "a few [unidentified] American patriots" reveals the limited notions of civil liberties President Benson appears to value most highly: "I am hereby resolved that under no circumstances shall the freedoms guaranteed by the Bill of Rights be infringed. *In particular* I am opposed to any attempt on the part of the *federal government* to deny the people their right to bear arms, to worship, and to pray when and where they choose, or to own and control private property" (Benson 1974, 300, emphasis added).

makes certain pragmatic arguments for laissez-faire economics. Maximum economic freedom, he suggests, encourages competition, which in turn stimulates efficient production, which increases the availability of goods and services, which raises most people's standard of living, which makes America great (Benson 1974, 305–15). We do not quarrel here with such pragmatic arguments (although one might be able to do so in light of the increased gulf between the rich and the poor under the Reagan administration). But we do question whether laissez-faire economics ought to be the guiding principle of a Mormon jurisprudence.

The scriptures teach that God's purpose is "to bring to pass the immortality and eternal life of man" (Moses 1:39). God's plan for accomplishing that purpose empowered his children to gain knowledge and understanding, to progress eternally, and eventually to become as God. Both Satan and Christ recognized the risks of this plan: given unfettered choice, God's children would sometimes choose evil and thereby be lost to God. Satan proposed that humans be saved from the consequences of choosing evil by preventing choice. Thus he thought all would be saved, and the glory would be his. God knew, however, that his plan could succeed only through providing choices. Christ proposed not to prevent choice, but through his atoning sacrifice, to redeem God's children from the consequences of choosing evil. Some would still choose to follow Satan and would thereby be lost to God. But some would choose to accept Christ's sacrifice through repentance and would thereby gain eternal life.

Christ's life and teachings were difficult to understand for those steeped in the religious culture and traditions of the time. He taught them to love their enemies, and by turning the other cheek, to accommodate those who would harm person or property. He taught them not to turn away the beggar, but to give freely because all of us are beggars, dependent upon God for substance. He exposed the evils of idolatry and taught the greatest motivation for good in people's lives. He encouraged purity of heart and mind in the struggle to reach divine potential.

What light do these principles shed on constitutional interpretation? In our view, it is difficult to derive from Christian principles a jurisprudence based on the pursuit of economic gain. Indeed, such a view seems inimical in many ways to a religious tradition that, while acknowledging materialistic tendencies, urges overcoming them. To say that God smiles upon a system that primarily promotes economic gain serves only to justify selfishness and greed. It also precludes efforts to create a system more in line with Judeo-Christian values.

Although this statement acknowledges the Bill of Rights, it does not recognize that these valuable rights (perhaps the least of which is the antiquated "right to bear arms") are also protected against intrusions by state governments under the Fourteenth Amendment. Indeed, President Benson appears to suggest that the Bill of Rights ought to apply only to the federal government, since he emphasizes that it is up to the states to determine and protect civil rights (Benson 1986, 21).

This view of the Fourteenth Amendment implies less than fervent commitment to basic civil rights, including racial justice and equality. Utah jurisprudence has been blemished by *State v. Phillips*, a 1974 Utah Supreme Court decision holding — contrary to decades of thoughtful and sensible precent — that the Bill of Rights does not apply to the states (Firmage 1975). Mormon jurisprudence ought not to perpetuate that mistaken view.

Only when the present system is revealed as utterly contingent — one of many possible answers to who we are and how we should live — can we consider the possibilities for transforming and improving our situation.

Contrary to President Benson's suggestion, the Constitution is broad enough to permit such transforming possibilities. Just as Christ's law transcended the Mosaic law, the Constitution transcended all previous charters of self-government. The most remarkable aspect of the Constitution is that, like the gospel, it transcends even itself. The framers' inspiration was not in prescribing for all successive generations their vision of constitutional self-government, which was necessarily bound by their own experience and imaginations. Nor was it in codifying specific economic or social systems. Rather, the framers' inspiration was in institutionalizing their own revolutionary spirit. They recognized that each generation, in order to work out its own political salvation, would have to decide for itself the important questions of human existence and association.

Perhaps they did not believe or understand that the same agonizing responsibility is essential to the individual's spiritual salvation. Nevertheless, they crafted a constitution that permitted, indeed required, a constant reevaluation of tradition in light of experience. We believe they intentionally (and wisely) used such open-ended phrases as "liberty" and "equal protection," the precise contents of which are not susceptible to facile interpretation, but which permit continuing dialogue about who we are and how we should live.

In a work of extraordinary significance and insight, several social researchers conducted a five-year study of both communities and individuals and concluded that Americans have become trapped and alienated by economic individualism (Bellah et al. 1985). They observe that "we have been embarked on a great effort to increase our freedom, wealth, and power" and that, as a result, we have "committed what to the republican founders of our nation was the cardinal sin: we have put our own good, as individuals, as groups, as a nation, ahead of the common good" (pp. 284–85). We have failed, moreover, what they call the "litmus test that both the biblical and republican traditions give us for assaying the health of a society . . . how it deals with the problem of wealth and poverty":

> The Hebrew prophets took their stand by the *'anawim*, the poor and oppressed, and condemned the rich and powerful who exploited them. The New Testament shows us a Jesus who lived among the *'anawim* of his day and who recognized the difficulty the rich would have in responding to his call. Both testaments make it clear that societies sharply divided between rich and poor are not in accord with the will of God. (p. 285)

Recent experience confirms that our society is failing this test. But a new political administration promises a "kinder, gentler America," perhaps one characterized by less emphasis on selfishness and more emphasis on sensitivity to the needs of our brothers and sisters. We may yet realize that "our common life requires more than an exclusive concern for material accumulation" (Bellah et al. 1985, 295). If we can transcend the notions that God has willed the status quo or that we can return to some idealized and nonexistent past,

perhaps we will be able to transform our persuasions and practices to better conform with our ideals.

The civil rights movement is a concrete example of how individuals and society can be transformed, and of how the Constitution allows such a transformation to take shape. It is also an example of the salutary role an antimajoritarian institution like the Supreme Court can play in the process. The mentality that prevailed at the beginning of the struggle for human dignity and equality is now, for most of us, difficult to imagine:

> [African blacks and their progeny] had for more than a century before been regarded as beings of an inferior order; and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. (*Dred Scott v. Sanford*, 19 How. 393, 407 [1857])

This view, ironically, was often justified by references to God and the Bible, as well as to the "framers' intent." It was institutionalized by an interpretation of the Constitution that permitted "separate but equal" facilities for blacks and whites (*Plessy v. Ferguson*, 163 U.S. 537 [1896]). But like those noble and courageous forefathers who challenged the oppressive rule of a distant, unsympathetic government, civil rights activists in this century struggled against widespread ignorance and moral blindness to revolutionize a political process that had denied blacks entry and had effectively insulated itself from democratic change. In 1954 the Supreme Court overturned the "separate but equal" doctrine of racial segregation in *Brown v. Board of Education* (347 U.S. 483 [1954]). By recognizing that the "pursuit of happiness" and "liberty and justice for all" are more than rhetoric, the Court shook the foundations of a received tradition and helped raise individual and collective consciousness.

Unfortunately, we as a Church followed, rather than led, that transformation. Only in 1978 did President Spencer W. Kimball extend the priesthood to all worthy males in the Church, thus ending a century and a half of exclusion. As a society and as a church, we would do well to learn from this painful example. When our political and religious practices are incongruent with our ideals, we need to avoid freezing into place similarly contingent, unjustifiable beliefs.[12]

In short, concrete possibilities exist for transforming society. We cannot even begin to see them, however, unless we resist the notion that things must be the way they are. We must open a dialogue about our political, social, and economic beliefs and practices which, like their religious counterparts, too often are encrusted with tradition that makes them appear much more natural and

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[12] For example, perhaps in the light of 2 Nephi 26:33, we should reexamine our beliefs and practices regarding women:

> For none of these iniquities come of the Lord; for he doeth that which is good among the children of men; and he doeth nothing save it be plain unto the children of men; and he inviteth them all to come unto him and partake of his goodness; and he denieth none that come unto him black and white, bond and free, male and female; and he remembereth the heathen and all are alike unto God, both Jew and Gentile.

necessary than they are. We must be willing to challenge that tradition and ultimately to trust our own instincts. Indeed, "if we had the courage to face our deepening political and economic difficulties, we might find that there is more basic agreement than we had imagined. Certainly, the only way to find out is to raise the level of public political discourse so that the fundamental problems are addressed rather than obscured" (Bellah et al. 1985, 287).

The gospel teaches that the salient characteristic of human beings — children of God — is their ability to transcend the limited and limiting contexts in which they find themselves. That is eternal progression. In our view, the dialogue toward a Mormon jurisprudence should seek to embody in political and economic institutions and practices the self-revising and transcendent qualities that characterize us as individuals. The role of constitutional government should be to create and sustain an environment in which God's children are exposed, with all the risks such exposure entails, to their own limitless potential — not only through the exercise of economic agency, but also through the exercise of moral agency, which may ultimately determine whether we are capable of the charity that characterizes the true saints.

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