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Why should a Mormon celebrate the bicentennial of a secular constitution? Wouldn't any such reverence contradict the injunction against idolatry? Doesn't the first commandment's demand that we give our complete fidelity to God rule out our allegiance to any other nomos? What about our constitutional history as a persecuted religious minority? The Constitution provided no solace when vigilantes expelled the Saints from Missouri and Nauvoo in the 1830s and 1840s. Similarly, constitutional pleas went unheeded when the nineteenth-century Mormons in the Great Basin were disfranchised, denied naturalization, refused statehood, prevented from serving on the bench or on juries, and refused governmental appointments to high political offices despite their majoritarian status.[1] Polygamy, a practice Mormons in the nineteenth century associated with exaltation but others found abhorrent, received no constitutional protection. The Supreme Court held that the First Amendment protected beliefs, not practices.[2] More recently, the Constitution has been interpreted as protecting the practice of abortion despite *belief* by many of its immorality.[3] Why then Mormon hoopla over what could be characterized as political degeneracy?

Mormons have traditionally expressed allegiance to the Constitution, even while they have condemned abuses suffered in consequence of its misinterpretation. In part, this allegiance derives from the providential history view that the Lord prepared this land for the restoration of the gospel and inspired the Founding Fathers so that the gospel might roll forth. Yet surely this view would not justify constitutional flag waving in the face of manifest injustice. Ultimately any justification for the celebration rests upon the compatibility of Mormon theology with the liberal foundations of constitutional government.

Liberalism is a word charged with emotional meaning. For many Mormons, the word serves as a pejorative epithet symbolizing ungodliness. This mischaracterization, however, confuses the relative roles served by "world-maintaining," as compared with "world-creating," normative universes.[4] The Constitution deserves the fidelity of Mormons because as a world-maintaining nomos it protects the world-creating nomos of the gospel of Jesus Christ.

World-creating normative universes, such as Christian communities, cohere around shared commitments, ritual, common meaning, and close interpersonal relationships. Their psychological motif is unity. Unswerving adherence to tradition, orthodox readings of sacral texts, or the inspiration of priestly directives provides the centripetal force that keeps such communities from fragmenting into disparate groups.

Diversity, on the other hand, serves as the motivating theme for a world-maintaining nomos, such as the civil community. The centrifugal force generated by legitimizing diversity always threatens the very existence of such communities. Karl Barth, comparing unfavorably the civil to the Christian community, observes, "The civil community as such is spiritually blind and ignorant. It has neither faith nor love nor hope. It has no creed and no gospel. Prayer is not part of its life, and its members are not brothers and sisters."[5] Coherence and stability are preserved by either coercion or rational principles delineating minimal obligations. Classical liberalism, historically and philosophically, seeks to ensure that the world-maintaining nomos of the state prefers rational principles over coercion. Briefly stated, each individual is entitled to pursue whatever his or her individual nomos requires, subject to the equal right of others to do the same. An understanding of the historical and philosophical foundations of this liberal thesis and its relation to Mormon theology may provide insight into a justification of the Mormon celebration of the bicentennial of the Constitution.

Liberalism and the Constitution

Liberalism's claim that each individual possesses basic human rights that even the public interest of society cannot morally override is a battle cry from the eighteenth-century Enlightenment. The Enlightenment was no friend to organized religion; nonetheless important antecedents in the history of religion bear on the question at hand.

The Reformation contributed significantly to embryonic liberal theory. The medieval church by the sixteenth century had seemingly implanted strict orthodoxy in religious belief and conduct. Common liturgy, ritual, language, and canon law had removed any hint of choice in religious affairs. The world-creating nomos of the church had thrown its tent over politics, as expressed in the theory of ecclesiastical and secular swords. Obedience to the prince who had been given the imprimatur of ecclesiastical investiture received clerical affirmation with few exceptions. The priesthood legitimized even those political acts that seemingly conflicted with religious norms. Believers had no more fight to dissent from political than from religious directives. While John of Salisbury in the twelfth century wrote of a right of tyrannicide whenever a prince commands contrary to the religious obligations of his subjects, and Thomas Aquinas in the thirteenth century

suggested, following Aristotle, that the obedience required by positive law was conditional upon its correspondence with natural law, the overwhelming tenor of the Medieval church favored patience, long-suffering, and obedience to political authority.

The priesthood shouldered the burden of reforming the prince. As long as the Augustinian belief that political society constituted "divinely ordained order imposed on fallen men as a remedy for their sins" refused to give way for the more Aristotelian view (noted by Aquinas) of the "polis as a purely human creation, designed to fulfill mundane ends," liberal belief systems were unlikely to take hold.[6] The Reformation, however, shattered the unity of the world-creating nomos of the Medieval church, bringing both skepticism of priestly directives in spiritual affairs, and an end to unquestioned deference to the prince in political affairs.[7] With the disintegration of the Medieval nomos, the search was launched for a world-maintaining nomos that would allow disparate views to coexist.

Reformation leaders increasingly recognized political responsibility as a Christian calling. Calvinists everywhere, taking Calvin's reformist Geneva as their model, sought to reform politics as well as religion. Covenant theology justified the church's organization along politically independent congregational lines; a democracy of the visible saints thereby replaced priesthood authoritarianism. Seventeenth-century England and New England witnessed Calvinists seeking to replicate the reformed ecclesiastical institution in politics. In England, Calvinistic Puritans resisted the Elizabethan Settlement, which had imposed the Book of Common Prayer, Anglican episcopacy, and excessive ritualism on the established Church of England. They also followed radical Whig politics that cost Charles I his head in 1646 and the Catholic James II a throne in 1688 when Protestantism was constitutionalized with the Glorious Revolution. John Locke transferred Calvin's covenant theology to social contract theory in politics: individuals are entitled to consensual government and the rule of law as God-given rights.

On the American side of the Atlantic, Puritanism also heavily influenced religious and political development. Calvin's politically independent congregationalism was the norm in New England from the very beginning. The Mayflower Compact, the Massachusetts Bay Charter, and distance from king and Parliament all furthered the cause of consensual government. The Puritan colonies in New England, however, were anything but liberal. Calvinistic belief in the depravity of man, predestination, and prevenient grace called for strict conformity to puritanical standards that were incorporated into the "blue laws" of every Calvinist-influenced colony. A new world-creating nomos of the visible saints had simply replaced the degenerate medieval alternative. Governors such as John Winthrop and

ministers such as John Cotton justified on biblical grounds the right and obligation of the community to banish seditious radicals such as Roger Williams who pied the cause of liberty of conscience.[8] Freedom of religion rightfully existed for these Puritans who had left England to avoid the persecution of Archbishop Laud; others who refused to accept true religion's sway over church and state, however, could not be tolerated. Christian civil magistrates, in their capacity as members of the General Court, were to promote the cause of civic harmony as well as avoid the wrath of God, and were empowered to punish or remove any and all dissenters.[9]

The suffering of dissenters prepared the way for the religious liberty that would a century later provide the foundation for the religious clauses of the Constitution. Roger Williams established Rhode Island in 1636 as a haven for Baptists, Quakers, and other malcontents. There Williams stressed religious diversity while preserving the garden of true religion unspoiled by compromises to the state.[10] Williams's religious radicalism, rather than Cotton's strict Calvinism, became the Enlightenment norm a century and a half later for a number of reasons. First, the multiplicity of established and disestablished religions in America (Congregationalism in New England, Catholicism in Maryland, Quakerism in Pennsylvania, Anglicanism in the southern colonies, and Presbyterianism in the middle colonies) made problematic any national establishment of religion; second, the Great Awakening of the mid-eighteenth century had emphasized spiritual fervor over orthodox beliefs; third, Arminian influence over such important ministers as Jonathan Mayhew in New England emphasized human potentiality over pessimistic Calvinism; fourth, Deistic teachings of Enlightenment thinkers labeled sectarian beliefs as mere opinions that detracted from the social usefulness of religion; fifth, oppressive parliamentary acts, such as the Stamp Act of 1765, highlighted the oppressive potential of nonconsensual government; and finally, the natural rights rhetoric of the religious John Locke—and later the godless Thomas Paine—became fashionable as a defense for revolutionary causes.

Thus, when Jefferson penned the Declaration of Independence he brought into national prominence the embryonic natural rights tradition (a world-maintaining nomos) that all men are created equal and endowed by their creator with certain inalienable rights, including the rights to life, liberty, and the pursuit of happiness. This Calvinistic-premised and Lockean-inspired pronouncement repudiated the notion of an all-encompassing nomos.[11] It followed English radical Whig history of the seventeenth century, when religious zealots inspired by Calvin had denounced government by royal prerogative,[12] but went even beyond Locke's defense of the Glorious Revolution and the notion of parliamentary supremacy. The individual's normative entitlement was seen as being protected by natural

rights, common law, or constitutional fights. No political organization, not even a religiously inspired democratic state, could justifiably violate the natural rights man brings with him as he leaves the state of nature and enters society: individual rights preexist, both temporally and logically, the state. Indeed, the state receives its legitimacy and purpose in the rational accommodation of the rights of its inhabitants. Each individual, in effect, creates his own normative world subject only to the minimal constraints necessary to maintain society. Whenever the state presumes more extensive authority, civil disobedience and revolution, if necessary, become morally justifiable. This liberal paradigm, opposing normative absolutism on the part of the state, became the thesis of the Declaration of Independence and the underlying rationale of the American Constitution.[13]

While the Protestant Reformation, radical Whig history, and Lockean natural rights reasoning may be properly characterized as the historical antecedents of the liberal constitutional perspective, eighteenth-century Enlightenment ideas furthered the rationalistic notion that the state's coercive authority ought to be exercised only upon the basis of rational principles. Kant, writing during the same age that produced the Declaration of Independence and the United States Constitution, explained that a priori moral principles are capable of providing rational constraints for man in his interrelationships with other autonomous beings.[14] The beginning idea for Kant is that men are free and equal rational beings. This natural equality in moral capacity enables each to pursue his or her own particular sense of the good, subject only to the limiting principle of the right: "Freedom (independence from the constraint of another's will), insofar as it is compatible with the freedom of everyone else in accordance with a universal law, is the one sole and original right that belongs to every human being by virtue of his humanity."[15] What is often overlooked in Kantian analysis is that individuals, after seeing that they do no moral wrong to others, are free to select their own final ends or their own life plans. Developing one's own conception of the good (creating one's own nomos) is the object of freedom; allowing others to pursue their own particular sense of good is required by the moral constraint of the right. This deontological approach to ethics exhibits a strong commitment to equal respect and the autonomy of the individual over and above any utilitarian calculus of the public interest.

The extent to which the framers adopted as their explanatory paradigm of the Constitution a liberal notion of government limited by rational principles is a controversial historical and theoretical issue. Madison's *Federalist* number ten discusses the world-maintaining role of the state as the arbitrator of ever-changing factions. Federalism, separation of powers, checks and balances all reflect the theory of limited government. Perhaps most importantly, the Bill of Rights, especially the First Amendment, preserves

individual rights of speech, conscience, religion, and association even above the clamor of factions. These foundational limitations evidence a clear choice of a world-maintaining over a world-creating nomos. At a minimum, the founders recognized that diversity would persist regardless of our efforts. Thus government's role in providing centripetal constraints against centrifugal forces must be affirmed in government's coercive structure.

The working out of the world-maintaining normative rule of the state has since become the interpretivist responsibility of not only the Supreme Court but all freedom-loving people. Whether rational principles can reasonably circumscribe the state's normative limits is a matter of much dispute. John Stuart Mill, writing during the mid-nineteenth century, and with the Mormon polygamy issue clearly in mind, announced the "harm-to-others" limiting principle:

> That principle is that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.[16]

This principle, which has since, for good or ill, had a pervasive influence on American constitutional legal thought, is supportive of the liberal-inspired ethical premise that equal respect ought to be afforded each person in his or her pursuit of particular life plans: individual freedom ought to be limited only by a coequal right of others to be free. Although Mill may have advanced this liberal principle for utilitarian and teleological reasons (social progress), liberals find intrinsic value in the underlying autonomy emanating from the principle. On the liberal view, a world-maintaining nomos not only furthers the public interest but is morally required as a matter of our very humanity.

Several utilitarian justifications for state intervention, however, have since challenged the simplicity or coherence of the Millian harm principle. Lord Devlin, responding to the 1957 Wolfenden Report recommending that self-regarding acts such as homosexual practices be decriminalized in England, claimed that the sovereign has a right to enforce common morality as a matter of self-preservation to prevent social disintegration.[17] This "disintegration thesis" challenges the very notion of self-regarding acts. In a reply to Devlin, H. L. A. Hart suggested further paternalistic qualification of the Millian principle, arguing that the state may intervene paternalistically to protect the individual against himself, in terms of the norms the individual already has or would likely upon detached reflection come to recognize.[18] Thus the state may clearly protect the young and the mentally infirm against their temporary or inherent irrationality. In other cases

where overwhelming evidence exists that rational beings commonly act contrary to their own self-interest (for example, by not wearing seat belts or motorcycle helmets), the state may justifiably enact paternalistic legislation.[19] Of course these qualifications, if accepted, make the enforcement of the Millian principle problematic. Who bears the burden of proving that a nonconformist normative perspective threatens the very existence of the society? How do we know that the individual, upon calm reflection, really would choose to act rationally? Under our constitutional government, the courts, having history and philosophy in mind, adjudicate the boundaries of the state's world-maintaining nomos. Each person, however, retains some interpretivist responsibility. Each exercising his or her democratic preferences should take great care that his or her expressed preferences do not infringe the basic rights of others. Each must also monitor the state's intrusions on personal choice.

If the state's infringement of rights becomes persistent, then those whose creative nomos suffers as a result are faced with various prudential alternatives. The Founding Fathers, taking Locke, English constitutional history, and Enlightenment reasoning as their guide, justified revolution as a legitimate moral reaction to any state's systematic deprivation of inalienable rights. Where the state accommodates most of the rights of its citizens, on the other hand, isolated infringements of specific rights may authorize and require more restrained responses. The contemporary liberal writer Ronald Dworkin argues that civil disobedience may be morally as well as legally justified where particular laws do not afford the citizens the equal concern and respect called for by the political morality of the regime.[20] John Rawls, another contemporary liberal advocate, similarly characterizes civil disobedience as morally permissible when it aims to move the society to an increased appreciation of individual rights. He defines civil disobedience as

> a public, nonviolent conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of government. By acting in this way one addresses the sense of justice of the majority of the community and declares that in one's considered opinion the principles of social cooperation among free and equal men are not being respected.[21]

Rawls also identifies conscientious refusal as morally acceptable in those instances where the law requires an act that offends one's conscience. Simply refusing to comply is different from civil disobedience in that it need not be addressed to the public for the purpose of causing change.

This brief sketch of the intellectual foundation of constitutional liberalism viewed as a world-maintaining nomos suggests the following principles:

(1) Individuals have natural rights arising out of their shared humanity.

(2) Although the reach and range of rights are somewhat problematic, the state must at least respect freedom of conscience, speech, religion,

and association. Although other rights, including property and juridical rights, are frequently mentioned, they are more controversial. The European emphasis on the right to equal property is supportive of welfare liberalism favoring the regulatory state. This form of liberalism is what most modern readers identify as "liberalism." The laissez-faire alternative of what has become fashionable to characterize as libertarian thought stresses property rights over welfare rights. Thus libertarians object to taxation for welfare purposes on the grounds that property rights are fundamental, not conventional.

(3) The principle of individual freedom can only be properly constrained by the equal freedom of others. Stated differently, public interest (utilitarian) arguments cannot morally override individual rights.

(4) Once the individual has taken care not to infringe the rights of others, he or she ought to be free to pursue a personal sense of the good. People ought to be free to create or adopt a normative system stronger than liberalism so long as they respect the minimalist constraints required by a nomos of individual rights.

(5) Whenever the state presumes to hold basic human rights in abeyance, moral obligations to obey its laws diminish, raising the moral possibility of civil disobedience, conscientious refusal, and perhaps revolution.

Each of these postulates, taken individually, is somewhat controversial, but as a package they fairly capture the essence of philosophical liberalism, which, it is argued herein, provides the intellectual foundation for American constitutionalism. What needs to be emphasized is that liberalism (American constitutionalism) offers principled restrictions on the coercive authority of the state but says nothing about the ends that individuals within the state ought to be preoccupied with after they have taken care not to violate the rights of others. It is a world-maintaining, not a world-creating nomos.

Critics of liberalism often misunderstand or mischaracterize the liberal posture of neutrality towards ends. A common mistake is to link liberalism with the radical skepticism of Hume and the debate over moral relativism. The priority given by liberalism to certain values (human rights) belies this conclusion. Although the charge seems more apropos when liberals discuss the domain of the good, liberals could nonetheless honestly plead not guilty. There is substantial difference between *knowing* what theory of the good corresponds to truth, and being willing to coerce others to follow it. A liberal convinced that he or she has found truth may

attempt to persuade others where to dig in search of pay dirt; however, the principle of equal respect forbids any coercive measures that would demand others work the diggings for a share of the gold, or, for that matter, any obligation that others should accept the intrinsic value of gold.

Another point of confusion requires clarification. Although oriented around the autonomy of the individual, a liberal society need not be purely atomistic. If members of society freely choose a collectivistic social order as an expression of their theory of the good, there is nothing in liberalism that would compel fragmentation and dissolution.[22] The Puritan's city on the hill is possible if freely chosen. Rawls, for example, acknowledges that communitarian values would possibly flourish in a liberal society:

> There is no reason why a well-ordered society should encourage primarily individualistic values if this means ways of life that lead individuals to pursue their own way and to have no concern for the interest of others (although respecting their rights and liberties). Normally one would expect most people to belong to one or more associations and to have at least some collective ends in this sense. The basic liberties are not intended to keep persons in isolation from one another, or to persuade them to live private lives, even though some no doubt will, but to secure the right of free movement between associations and smaller communities.[23]

Liberal theory thus demands only maintenance of the conditions of free choice for those individuals participating within the group and restrictions on the ability of the group to violate the equal rights of nonparticipants. While the collectivistic impulse seems to run counter to the individualism pervading liberal thought, it is only because collectivism is so often closely associated with authoritarian tendencies. As long as the communitarian view limits its nomos to those voluntarily choosing its strictures, no necessary conflict with the liberal state need occur. Liberalism would allow freely chosen strong normative universes to coexist in the pluralistic state so long as each respected the priority of the right (the "weak" liberal nomos) to the good (the "strong" religious nomos). Priority used in this sense does not relate to importance but to the lexical ordering of moral duties. We are first obligated to respect the rights of others; once we have taken care to do that, we can freely choose a distinctive life plan, or religious community.

The Relationship of Mormon Theology to Liberal Constitutionalism

With a working model of liberalism in hand and some familiarity with supportive religious history in mind, a comparison of Mormon theology, liberalism, and constitutionalism is possible. First, the doctrine of individual rights finds theological support in the Mormon concept of free agency, the belief in eternal progression, and the affirmation of human perfectibility. The problem of free will occupies center stage in the play of Mormon

theology.[24] Against the tenets that propelled the Calvinists of the seventeenth century—predestination, original sin, salvation by grace, and denial of free will—looms Mormon belief in free agency. This doctrine, of course, was not original with Mormonism. The Dutch theologian Jacobus Arminius (1560–1609) had opposed the Calvinist doctrine of predestination at the turn of the seventeenth century. His teachings, later adopted by John Wesley, influenced American theologians such as Jonathan Mayhew and found their way into the Methodist movement. The transformation in this country of Puritan Calvinism into Evangelical Protestantism created the intellectual climate out of which Mormon perfectionism emerged.[25] Whereas Protestant political radicalism, burdened with the Calvinistic views of original sin, had to back into the notion of moral responsibility, Mormonism as a non-Protestant, restored church could announce the true gospel unfettered by the intellectual baggage of the Reformation.

The Mormon "Articles of Faith" succinctly state a radical theological perspective grounded on belief in free will and denial of original sin. The second article denies the doctrine of original sin: "We believe that men will be punished for their own sins, and not for Adam's transgression." The third article, while accepting the necessity of the atonement, adds that salvation (exaltation) is not strictly a free gift of God but is conditional upon obedience to gospel principles: "We believe that through the Atonement of Christ, all mankind may be saved, by obedience to the laws and ordinances of the Gospel." With moral responsibility affirmed, the conditions of freedom become critical. That is, if man is basically perverse and his salvation or damnation determined irrespective of any personal conduct, then a coercive state would pose no theological barrier and may even be required in a Hobbesian sense to make society possible.[26]

Calvinists, historically troubled over this dilemma, eventually justified consensual government under the hands of visible saints. These "elect" individuals were to act as responsible lesser magistrates as a matter of religious calling on the reasoning that by multiplying the sources of responsibility individual depravity could better be held in check. Where, on the other hand, man's salvation is partially dependent on obedience to God's laws, natural rights, especially religious liberty, become not only preferable but critical. Man must be allowed to act in accordance with the dictates of God. If the state asserts too strong a normative claim, jeopardizing obedience to God, then civil disobedience or conscientious refusal become necessary. The eleventh Articles of Faith proclaims Mormon justification for both free exercise and disestablishment: "We claim the privilege of worshipping Almighty God according to the dictates of our own conscience, and allow all men the same privilege, let them worship how, where, or what they may." Finally, a distinctively non-Calvinistic faith in the nobility of man is

expressed in the thirteenth article's bold assertion: "We believe in being honest, true, chaste, benevolent, virtuous, and in doing good to all men."

If we are to capture the essence of Mormon theological radicalism, however, we must go beyond the Articles of Faith. For Mormons it has become idiomatic that "As man is God once was; as God is man may become." This couplet expresses the Mormon notion of eternal progression, or the perfectibility of man. The narrative begins with an account of premortal existence and the coeternality of God and man. God did not create man *ex nihilo,* out of nothing. Man existed forever as an intelligence possessing identity and free will or agency. It was Satan's willful effort to destroy the agency of man that merited his expulsion from God's presence and the termination of his eternal progression. Satan, in effect, proposed a dictatorial normative universe in which human choice was totally eliminated. Mormon theological narrative, therefore, teaches against coercion and in favor of freedom. Man chose to retain his agency and accept full responsibility for his actions, upon condition that his elder brother, Christ, offer himself as an atonement for man's sins. Through faith and willful obedience, we become, with Christ's nurturing aid, increasingly like God. Freedom, therefore, is the foundational right originating temporally and logically independent of the state's recognition.

Moreover, Mormonism proclaims that "governments were instituted of God for the benefit of man; and that he holds men accountable for their acts in relation to them" (D&C 134:1). Of course, consensual government provides the norm. The Prophet Joseph Smith expressed his confidence in the principle of self-governance when he stated that man, if taught correct principles, would govern himself.[27]

With the religious necessity of moral freedom established and the principal of consensual government affirmed, the rights of conscience, expression, and association, even where contrary to majoritarian preferences, become paramount. The early Saints advanced the cause of freedom of conscience against coerced religious orthodoxy. The Mormon declaration of political beliefs clearly identifies "the free exercise of conscience" as one of the preeminent "inherent and inalienable rights" (D&C 134:2, 5). The same section of the Doctrine and Covenants argues it would be unjust to "mingle religious influence with the civil government, whereby one religious society is fostered and another proscribed in its spiritual privileges" (D&C 134:9).[28] This is a sharp break from Calvin's Geneva experiences that the New England Puritans tried to replicate. Indeed the repeated references by various Church leaders, including every prophet since Joseph Smith, to the inspiration reflected in the United States Constitution largely focuses on the Constitution's rights orientation, especially the right of religious freedom.[29] It was with impassioned appeal, in the face of religious

persecution, that Joseph Smith announced, "I am the greatest advocate of the Constitution of the United States there is on the earth."[30]

Mormon commitment to religious freedom made American constitutional history in the *Reynolds* case, the first free exercise pronouncement made by the United States Supreme Court. The Court in dicta in *Reynolds* agreed with the liberal Mormon position that with the First Amendment "Congress was deprived of all legislative power over mere opinion." The Court, however, had a different perspective as to where the lines of protected religious practices ought to be drawn. Whereas the liberal view held by Mormons placed the religious practice of polygamy within the protected sphere, the Court adopted a narrow belief-conduct dichotomy that has troubled legal scholars ever since, concluding that the practice of polygamy could be made illegal.[31]

The Court's reasoning process followed a shallow syllogistic analysis: all religious conduct (unlike beliefs) cannot be immune from civil control (human sacrifice has to be impermissible by any standard); the practice of polygamy represents conduct rather than belief; therefore, the state can legitimately proscribe the practice of (even if not the belief in) polygamy. The Court's "strange" reading of the First Amendment largely eviscerates the essence of "free exercise."[32] Nearly a century later the Court recognized that they had painted themselves into a corner with the belief-conduct dichotomy: "[To] agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct . . . beyond the power of the State to control. . . . [I]n this context belief and action cannot be neatly confined in logic-tight compartments."[33] The question then is not whether some religious conduct is beyond public regulation; it is how do we draw meaningful lines when a religion erects "Keep Out, No Trespassing" signs around their religious activities? The Court in *Yoder* recognized religious-community rights: the Amish were permitted to refuse to send their children to high school so they could remain distinctive.

Mormon theology offers a liberal answer to the where-do-you-draw-the-line question: the free exercise of religion ought to be limited only where religious activities infringe upon the equal rights of others. Majoritarian preferences by themselves cannot outweigh rights associated with religious freedom. Again, the declaration of political belief published by the Saints in 1835 adopts this liberal principle:

> 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 the right to interfere in prescribing rules of worship to bind the consciences of men, nor dictate forms for public or private devotion; that the civil magistrate should restrain crime, but never

> control conscience, should punish guilt, but never suppress the freedom of the soul, (D&C 134:4)

According to this perspective, religiously inspired practices are exempt from the state's regulatory power unless they violate the "rights and liberties of others"; whereupon they potentially become legitimate crimes (fall within the world-maintaining nomos of the state), which religion cannot protect. Unless we are to fall into circular reasoning, the concepts of "rights and liberties" must be given some workable meaning. Although the boundaries of individual moral rights are complex and controversial, as we have seen, vague notions of public interest cannot be relied upon in a utilitarian sense to extinguish individual rights.

It is difficult to find, for example, the "rights and liberties" of others threatened by the Mormon practice of polygamy. Assuming fully voluntary involvement on the part of all parties, marriage and personal family relationships seem to fit into the zone of privacy necessary for the dignity of the individual. (Mill even used the Mormon polygamy example to argue the cause of liberty in his essay *On Liberty.*) While the majority of the community may find polygamous marriage relationships repugnant, repugnancy unassociated with entitlement claims cannot invalidate the rights of believers to practice polygamy, if liberalism has any validity. Mormons have expressed no sympathy for either a "social disintegration" or a "paternalism" argument favoring restrictions on such religious practices.

Mormon theology teaches that once the Saints have taken care not to infringe the rights of others, they are free to pursue their own normative perspective: believers, though in the world, are entitled to act as if they were not of the world so long as they avoid infringing the rights of others. Mormon attempts to realize Zion during the nineteenth century represent their pursuit of the good within the constraint of the right. Thus nineteenth-century efforts to implement the law of consecration in economic affairs, the law of polygamy in domestic relations, theo-democracy in political activities representing the group, and exclusive reliance on ecclesiastical courts in resolving conflicts within the group, all constituted protected religious conduct because each activity emanated from religious belief and jeopardized no one's rights.[34] In brief, Mormon commitment to religious freedom defends a liberal civil government despite the theocratic nature of the Church. The legitimacy of Mormonism's world-creating nomos within Zion is affirmed by Mormon disinterest in coercively imposing that nomos outside the community.

Whenever the state illegitimately proscribes religious belief or protected conduct, Mormon theology speaks of moral, religious, and, in some instances, constitutional rights of its members to either civilly disobey or conscientiously refuse compliance with the laws of man. The declaration,

"We believe that no government can exist in peace, except such laws are framed and held inviolate as will secure to each individual the free exercise of conscience, the right and control of property, and the protection of life" (D&C 134:2), is not merely a descriptive statement of political realities. The parallels in wording and implication with the Declaration of Independence are not purely coincidental. Mormon teachings give priority to religious (world-creating) over civil (world-maintaining) obligations, and expect the moral (inspired) state to accommodate that preference.

The polygamy era provides an example of the priority given by Mormons to God's laws over civil obligation. Many polygamists went to prison rather than abandon their commitment to the practice of polygamy. At the same time, the Saints continued to claim that anti-polygamy statutes were immoral and unconstitutional. Elder Nicholson, for example, speaking "for himself" in 1881, succinctly stated the orthodox Mormon view: "I lay it down as a proposition that any law that infringes upon my religious rights cannot be a constitutional law, if all the courts in the world decide that it is of that character."[35] Moses Thatcher went even further in suggesting that Mormon civil disobedience or conscientious refusal would ultimately inure to the benefit of all freedom-seeking people. In justifying the Mormons' continuing to practice polygamy despite its illegality, Elder Thatcher noted the logical weakness of the Court's belief-conduct dichotomy:

> I am not so blind that I cannot see that anything which you or I may do may be made contrary to law, and may be called unconstitutional. . . . [I]f Congress has a right to enact a law in relation to marriage, it might just as consistently make a law affecting baptism, or prescribing the manner, if allowed at all, the sacrament of the Lord's supper should be administered. "What will you do about it?" says one. I do not pretend to give advice . . . but . . . we will continue to love our country, defend its interests, and be free men in these mountains. If we were ought else, if we could be bound hand and foot as abject slaves, we should be unworthy to be citizens of so great a Republic. . . . [T]he very acts of persecution and unfairness that will be directed against us, will bring out and develop the elements of excellency that will make them lovers and defenders of right and liberty, until, in due time of the Lord, there will grow up in these mountains a race of people that will not only defend the Constitution, but defend the flag of the nation, and at the same time be willing to extend the principles of freedom to all who desire to receive them. . . . We expect to defend our rights as American Citizens, and to do less than this would be unworthy of free people.[36]

Although the Church eventually capitulated, the principle remains the same: religious obligations that respect the rights of others and yet are made illegal are the proper subject of civil disobedience or conscientious refusal.

Thus, Mormon theological views of the rights of man follow the tradition of radical Protestantism, track quite closely the tenets of philosophical liberalism, and are supportive of American constitutionalism. Man is entitled to basic human rights that cannot be overridden by the public interest of

society. Preeminent among these are the rights pertaining to religious freedom. While not absolute, religious liberty ought to be circumscribed only by the equal rights of others. After taking care not to infringe the equal rights of others, religious communities (individuals) ought to be afforded the right to pursue their sense of the good. And whenever the state interferes with its citizens' religious freedoms, civil disobedience or conscientious refusal may be morally justified.

Tension in Maintaining Normative Boundaries

The boundaries between the world-maintaining nomos of the state and the world-creating nomos of the gospel are not always apparent. Tension persists despite analytical distinctiveness. Christ offered direction in his personal response to the problem. When the Pharisees "took counsel how they might entangle him in his talk" (Matt. 22:15), they hit upon the tax conundrum: "Is it lawful to give tribute unto Caesar, or not?" (Matt. 22:17). Of course if the religious nomos is exhaustive, no outside allegiances are appropriate. The Pharisees suggested this seditious, but preferred, religious position to Christ in their prefatory remarks: "We know that thou art true, and teachest the way of God in truth, neither carest thou for any man: for thou regardest not the person of men" (Matt. 22:16). They evidently expected Christ to deny the responsibility of Jews to pay taxes, which would have made him an open enemy of Rome. Instead, Christ affirmed a limited jurisdiction for the state while remaining ultimately committed to God: "Render therefore unto Caesar the things which are Caesar's; and unto God the things that are God's" (Matt. 22:21).

Understanding those things that are properly under Caesar's jurisdiction is our religious as well as political responsibility. Prayer, for example, is part of our religious nomos. The scriptures teach us to "pray always, that [we] may be accounted worthy to escape all these things that shall come to pass, and to stand before the Son of man" (Luke 21:36). Does this admonition extend to public school prayers? What about our belief that it would be inappropriate to "mingle religious influence with civil government, whereby one religious society is fostered and another proscribed in its spiritual privileges" (D&C 134:9)? It could be argued that while we insist on the right to pray with our children in the morning before school, as well as the right of our children to pray personally while in school, the state's world-maintaining normative responsibilities preclude a state-required prayer in school.[37] Even though we believe a prayer would benefit the nonbeliever, our religious nomos may properly be circumscribed by world-maintaining rights of others. At a minimum, we must address the strong moral claims of others that by imposing a prayer in a public educational setting we are undermining their creative nomos.

Conversely, religious participation in politics cannot always be proscribed under a world-maintaining normative argument. Thus, religious beliefs regarding feeding the poor and clothing the naked provide a basis for democratic preferences in legislation unless a libertarian property right argument is persuasive. So, too, religious views may properly inform us regarding the sanctity of life when the propriety of abortion is at issue. Against arguments of privacy rights, the immorality of killing the unborn can be argued with religious fervor. Notice that the antiabortion argument cannot be predicated on public interest grounds if we acknowledge a right of privacy, but rather on the rights of the unborn, which we understand more clearly because of our religious perspective.

Of course, whenever religious views are introduced into the political forum there exists the possibility of violating the Third Commandment's prohibition against taking the Lord's name in vain.[38] That is, religious leaders or members may inappropriately speak for God. This is the real threat to the purity of religion that Roger Williams feared when he urged the separation of church and state. If religion becomes too politicized, it will less likely serve as a garden in the wilderness. The possibility of misspeaking for God, however, cannot vitiate our right and responsibility to engage in political dialogue over the proper boundaries of our rights.

This raises a final problem for those who would maintain the integrity of the two-normative-universe theory. Each system contains the seeds of erosion if not absorption of the competing system. Liberalism legitimizes, if it does not enshrine, diversity. Once religion acknowledges a proper role for a world-maintaining nomos, the possibility of it taking on world-creating attributes looms large. If choice is the appropriate paradigm in politics, why not politicize religion? If the Constitution is embraced as properly capturing the proper nomos for political affairs, why should undemocratic tendencies prevail within the gospel? Why should women, for example, be denied the priesthood? Why not elect bishops, or any other priesthood leader, by popular vote? Why not choose, some suggest by majoritarian preferences, those commandments members feel are appropriate for a religious creed? Why not, in effect, do away with the world-creating nomos of the church in favor of the philosophies of men? On the other extreme, others urge the projection of the world-creating nomos of the church upon the state in a puritanical tradition. Why not make all political decisions issues of faith? Mormonism, instead, coherently embraces the unity, oneness, and togetherness of a revealed Zion while cherishing a constitutional heritage that preserves the right of others to choose Babylon.

While Mormon social radicalism has largely dissipated and Mormon communities have come to embrace traditional values and institutions, in this the bicentennial year of the Constitution we need to rekindle our

awareness of human rights. As religious people with political clout, we ought to repress the tendency to rely on our increasingly majoritarian status to trample the rights of others in the name of public interest. This is not to offer glib answers—nor necessarily politically liberal answers—to difficult moral issues, but to reawaken the need for principled dialogue and analysis of political decisions that threaten to affect the rights of others. Even as we claim entitlement to the right to choose Zion, we must cultivate our sensitivities to the rights of others; even as we attempt to persuade others of the beauty, warmth, and peace found within Zion, we need to remember that coercion is inimical to the Zion we would build.

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1. See Edwin B. Firmage and R. Collin Mangrum, *Zion in the Courts: A Legal History of The Church of Jesus Christ of Latter-day Saints, 1830–1900,* forthcoming.

2. United States vs. Reynolds, 49 U.S. (Otto) 145, 164 (1878).

3. Roe vs. Wade, 410 U.S. 113 (1973).

4. I have borrowed the terms and concept of "world-maintaining" and "world-creating" normative universes from Robert Cover, "The Supreme Court 1982 Term, Forward: Nomos and Narrative," *Harvard Law Review* 97 (November 1983): 4. Cover builds on the terms used by Chief Justice Burger in his opinion in Bob Jones University vs. United States, 102 S. Ct. 2017 (1983). Cover is concerned with the same normative problem of allowing distinctive worldviews to coexist peacefully within a pluralistic society.

For an account of liberalism that confuses the roles of these two normative universes, see Hyrum Andrus, *Descriptions of Zion: Liberalism, Conservativism, and Mormonism* (Salt Lake City: Hawkes Publications, 1972).

5. Karl Barth, "The Christian Community and the Civil Community," in *Community, State, and Church* (Garden City, N.Y.: Anchor Books, 1960), 151.

6. Quentin Skinner, *The Foundations of Modern Political Thought,* 2 vols. (New York: Cambridge University Press, 1978), 1:50.

7. See Guido de Ruggiero, *The History of European Liberalism,* trans. Robin George Collingwood (Boston: Beacon Press, 1967), 17.

8. See George L. Haskins, *Law and Authority in Early Massachusetts* (Hamdon, Conn.: Archon Books, 1960), 47–51.

9. For an account of the separatist controversy between Roger Williams and John Cotton as expressed in their published responses to one another and resulting in Williams's forced exile from Massachusetts, see William Lee Miller, *The First Liberty* (New York: Alfred A. Knopf, 1986), 161–64.

10. Mark Antony de Wolfe Howe, *The Garden and the Wilderness: Religion and Government in American Constitutional History* (Chicago: University of Chicago Press, 1965), 7–8.

11. Bernard Bailyn observes, "In pamphlet after pamphlet the American writers cited Locke on the social and governmental contract" (*The Ideological Origins of the American Revolution* [Cambridge: Belknap Press, 1967], 27). For an argument that American liberalism is Lockean in nature, see Louis Hartz, *The Liberal Tradition in America* (New York: Harcourt Brace, 1955), 3–14.

12. Seventeenth-century English Whig history generally stood for parliamentary power against royal prerogative. The Whigs during this century were radicals, as evidenced by their part in the English Civil War and the Glorious Revolution. Most Whigs were placated by the Act of Settlement, which firmly established parliamentary supremacy in England. In subsequent centuries, the majority of Whigs became more conservative. Radical Whigs, nonetheless, continued to express their concerns over political despotism (even parliamentary absolutism) in favor of English liberties. These radical Whigs inspired the American revolutionaries who believed that their English (natural) rights were being trampled by parliamentary fiat. For a discussion of seventeenth-century English Whig radicalism and its contribution to American revolutionary thought, see Bailyn, *Ideological Origins,* 34–54.

13. Hanz argues that the "master assumption of American political thought" is "the reality of" the Lockeian notion of "atomistic social freedom" in this country. He suggests that it is "instinctive to the American mind, as in a sense the concept of the polls was instinctive to Platonic Athens or the concept of the church to the mind of the middle ages" (Hartz, *Liberal Tradition,* 62).

14. Whereas Locke grounds his social contract theory on the laws of nature and inalienable rights bestowed on man by God, Kant appeals to idealist metaphysics. According to Kant's deontological ethics, the principle of the right comes not from nature but from pure reason. Thus Locke's natural law liberalism is often characterized as a precursor of Kant's deontological liberalism. For a historical account of the liberal tradition that is largely unfavorable to the possibility or desirability of rationally ordering society along liberal principles, see Michael J. Sandel, *Liberalism and the Principles of Justice* (Cambridge: Cambridge University Press, 1982), 117–19.

15. Immanuel Kant, "The Metaphysical Elements of Justice," pt. 1 of *Metaphysics of Morals* [1797], trans. John Ladd (Indianapolis: Bobbs-Merrill, 1965), 43. Kant is concerned with moral, not political, freedom, but his deontological ethics have become the foundation of liberal political arguments.

16. John Stuart Mill, *On Liberty* [1859] (Indianapolis: Liberal Arts Press, 1956), 13.

17. Patrick Devlin, "Morals and the Criminal Law," in *The Enforcement of Morals* (London: Oxford University Press, 1968), 1.

18. Herbert L. A. Hart, *Law, Liberty, and Morality* (Stanford: Stanford University Press, 1963), 22–23.

19. For a discussion of the debate in the context of the enforcement of morals generally, see Noel B. Reynolds, "The Enforcement of Morals and the Rule of Law," in *Perspectives in Mormon Ethics.* ed. Donald G. Hill, Jr. (Salt Lake City: Publishers Press, 1983), 113–44.

20. Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), 206–22.

21. John Rawls, *Theory of Justice* (Cambridge: Harvard University Press, 1971), 364.

22. Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 165–68.

23. Rawls, *Theory of Justice,* 550.

24. For a discussion of Mormon theological ideas on free will, see Sterling W. McMurrin, *The Theological Foundations of the Mormon Religion* (Salt Lake City: University of Utah Press, 1965), 77–82.

25. For an account of how Charles Grandison Finney's revivalism of the Second Great Awakening contributed to transformation of Calvinistic pessimism into "the Arminianized Calvinism called evangelicalism" with an emphasis on human perfectibility, see

Klaus Hansen, *Mormonism and the American Experience* (Chicago: University of Chicago Press, 1981), 54–68.

26. More than half of Hobbes's *Leviathan* (1651) is devoted to justifying sovereign control over religious matters.

27. *Journal of Discourses* 10:57–58.

28. Thomas O'Dea argues that the Mormon position on church and state was Lockean in orientation even as it was theocratic internally. O'Dea claims that even though Mormon leaders were "permeated by the democratic notion of government characteristic of their time and place," they "never worked out consistently the political implication of their religious philosophy" (*The Mormons* [Chicago: University of Chicago Press, 1957], 168–71). I believe O'Dea's transferred confusion comes from the seeming paradox of reconciling a theocratic community within, with a liberal society without. If the reach and limits of these different normative systems is understood, apparent antinomies, although difficult, become resolvable. For a related discussion of the problem of congruity between utopian thinking and liberal traditions, with Joseph Smith viewed as an example of a leader faced with this dilemma, see Crane Brinton, "Utopia and Democracy," *Daedalus* 94 (Spring 1965), 348–66.

29. See, for example, *History of the Church* 3:304, 5:289–90, 6:56–57 (Joseph Smith); and *Journal of Discourses* 3:71 (Orson Pratt), 24:67 (Erastus Snow), 21:31 (John Taylor). See also President Ezra Taft Benson, "The Constitution: A Glorious Standard," *Ensign* 17 (September 1987), 6–11; and Jay M. Todd, "A Standard of Freedom for This Dispensation: An Appreciative View of the U.S. Constitution in its 200th Anniversary Year," *Ensign* 17 (September 1987), 12–19.

30. *History of the Church* 6:57.

31. Reynolds vs. United States, 98 U.S. (Otto) 145, 164, 165 (1878).

32. Lawrence Tribe, *American Constitutional Law* (Mineola, N.Y.: Foundation Press, 1978), 838 n. 13. See also Edwin B. Firmage, "The Judicial Campaign against Polygamy and the Enduring Legal Questions," in this issue of *BYU Studies,* 91–117.

33. Wisconsin vs. Yoder, 406 U.S. 205, 220 (1977).

34. See R. Collin Mangrum, "Furthering the Cause of Zion: An Overview of the Mormon Ecclesiastical Court System in Early Utah," *Journal of Mormon History* 10 (1983): 79; and Firmage and Mangrum, *Zion in the Courts.*

35. *Journal of Discourses* 22:186.

36. Ibid. 22:115.

37. See Wallace vs. Jaffree, 472 U.S. 381 (1985) as the most recent of a long line of school prayer (moment of silence) cases,

38. See Edwin B. Firmage, "Religion and Politics: The First Amendment and the Third Commandment," (Address delivered at Bryant College, Smithfield, Rhode Island, 29 March 1986).