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Perspectives on the Constitution— Origins, Development, Philosophy, and Contemporary Applications

Thomas B. McAfee

It is fitting that *BYU Studies* should publish a special issue on the United States Constitution in connection with the nation's bicentennial celebration. As a group, Latter-day Saints are part of a perhaps increasingly small minority that continues to see the hand of divinity in the founding of this nation and the coming forth of the Constitution. This fact not only suggests that the Constitution's bicentennial should be observed at Brigham Young University, but that it ought to be observed in a way that takes the document seriously, not merely as a symbol of the nation but also as an instrument that seeks to ensure effective government while preserving human rights and the rule of law.

In the effort to take the Constitution seriously in 1987, our solicitation for this issue was deliberately cast broadly. We sought the widest range of thoughtful perspectives on the Constitution by individuals whose scholarly interests tied into the Constitution. And this effort yielded essays and articles that range from the origins of the Constitution to the most controversial issues of the present day. Within this range of methods and disciplines, however, there is significant unity of purpose—every author, whether explicitly or implicitly, offers us a perspective on the nature of our constitutional system and insight that may contribute to our own attempts to confront competing conceptions of its central elements.

Ask typical American students about the intellectual origins of the Constitution and, based on their exposure to the materials in undergraduate courses in history, political science, or philosophy, many would mention social contract political theory and most of those would associate that theory with the writings of John Locke. Lynn D. Wardle's "The Constitution as Covenant" confirms the centrality of social contract theory to understanding the Constitution while providing the reader with an understanding of the origins of this kind of political thought in the covenant theology that dominated American colonial religion.

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In fairness, the theological origins of the social compact view of government are generally mentioned in undergraduate texts that treat the origins of the Constitution. The real problem, in addition to the compressed nature of the treatment required in light of the scope of such courses, is that we tend to see the Constitution through the filter of an increasingly secular society that confronts religion awkwardly in almost every context. Obviously the theoretical writing of John Locke is the most convenient starting point for discussion of modern (mainly secular) theories of individual rights. But if what is learned is more important than what is taught, the religious underpinnings of a good deal of our constitutional thought is given short shrift in the teaching of constitutional history just as it is in teaching the modern Civil Rights movement and other subjects as well.

The most surprising revelation in Wardle's treatment is the powerful influence of the clergy and their decidedly religious views, rooted in covenant theology, right down to and including the years of the nation's founding. The reader will also be surprised to discover the range and depth of the influence of covenant theology on the basic assumptions about government that animated the framers. At the very least, these materials strongly suggest that the framers of our constitutional system would have been startled by the modern suggestions that uniquely religious perspectives on public questions should be viewed with suspicion, or even with constitutional doubt when those perspectives influence law or policy.

Perhaps the most important development in modern historiography of the founding period is the renewal of emphasis on the theme of republican virtue and its importance in preserving republican forms of government. Wardle links this preoccupation with republican virtue with covenant theology in ways that are likely to ignite sparks of recognition in those familiar with the Book of Mormon's promises concerning this land and its explicit linkage of righteousness and freedom. The far-ranging connections between the founding generation's thinking about public virtue and constitutional government are explored in depth by Richard Vetterli and Gary Bryner in "Public Virtue and the Roots of American Government." Vetterli and Bryner develop the connections between republican thought and the concept of public virtue with a number of the central issues confronting the founders. An important issue, for example, is the extent to which Madison and other key figures abandoned reliance on public virtue as the key to republican government in favor of institutional safeguards designed to set the self-interested actions of individuals and groups against each other to the ends of avoiding tyranny and generating something approaching the common good. Vetterli and Bryner develop the case for the view that Madison's defense of the concept of an extended republic, which may have been his

most original contribution to the theory of government, sought both to promote and supplement the possibility of public virtue.

In short, our constitutional system may not rest wholly on either classical republicanism or on some variation of interest-group pluralism. Madison's argument was that the federal system would both promote selection of men of virtue and provide a check against the tendencies toward faction and oppression. Similar analysis sheds light on the balanced assessment of human nature that animated the founders' reliance on separation of powers and checks and balances within the national government. Vetterli and Bryner demonstrate that a proper understanding of the evolving concept of public virtue sheds light on the entire constitutional design, as well as on such ancillary questions as the extent to which the Constitution represented a new synthesis that rejected republicanism in favor of an emerging "liberal" conception of government.

The modern tendency to see the Constitution almost exclusively as an embodiment of eighteenth-century political philosophy, and perhaps in particular of the political liberalism of John Locke, receives another sort of critique in Mel Bradford's "The Best Constitution in Existence: The Influence of the British Example on the Framers of Our Fundamental Law." Bradford traces the extent to which the founders looked primarily to the traditions they saw embodied in Great Britain's unwritten constitution, right down to a number of the specific rights set forth in the Bill of Rights that was added to the Constitution drafted in Philadelphia. For Bradford, this preference for the lessons of experience under the British constitution overshadowed reliance on philosophical conceptions of natural law and justice and represents the more reliable guide to understanding the 1787 Constitution as we seek to give it effect in our own day.

Forrest McDonald observed that the only problem with various ingredients that contributed to our constitutionalism—the commitment to individual rights and republicanism, the sense of history, and a large (and largely common) storehouse of political theory—was that it was not entirely clear that they were compatible. The task of harmonizing the tensions within these ingredients, as well as brokering the conflicting interests of the nation's diverse regions, fell upon the delegates from the states who met in Philadelphia in 1787. While the story has been told before, it bears repeating here both for the sense of history and drama it provides, as well as for the light it sheds on the finished product. J. D. Williams's treatment of the Great Convention, "The Summer of 1787: Getting a Constitution," conveys both the historical drama and the critical governmental elements it generated. In reading this treatment, we experience the tenuous nature of the enterprise of reaching agreement on the terms of a national compact and learn of crucial compromises that

saved the effort. While being introduced to the critical elements of the constitutional government agreed upon, we also obtain one thoughtful commentator's perspective as to precisely where the "miracles" occurred at Philadelphia.

It is not enough to frame a government dedicated to avoiding tyranny and protecting individual rights. The promise of freedom must be delivered over an extended period of time. The Mormons learned this early, as the Prophet Joseph Smith once remarked that the only weakness he perceived in the Constitution was its failure to provide effective means to compel executive compliance with its mandates. Another sticking point, of course, can be the willingness of the judiciary to defer to the majoritarian sentiments of the day. Edwin B. Firmage's "The Judicial Campaign against Polygamy and the Enduring Legal Questions" builds the case that the judicial deference paid to antipolygamy legislation represented this sort of abdication of the judicial function to protect the constitutional rights of individuals. This abdication presented itself most clearly and forcefully as the courts manipulated traditional standards of notice, proof, and due process to sustain convictions under vaguely-worded criminal statutes. Arguably, the upholding of traditional rule of law requirements is among the most important duties of courts, inasmuch as substance follows form and the values of fair procedures are among those most likely to go unappreciated by an aroused public or legislature. Firmage also criticizes, however, the Supreme Court's restrictive interpretation of the free exercise of religion guaranteed by the First Amendment.

The Supreme Court's constitutional standard as to free exercise, which has been implicitly rejected as insufficiently protective by the modern Court, gave almost no protection to religious conviction as it moved along the continuum from belief to conduct. In failing to confront the central value of religious freedom or to distinguish truly harmful conduct from the merely disfavored, the Court diluted the significance of the First Amendment as a bulwark against the persecution of disfavored minorities. While Firmage concludes that there is perhaps not a definitive answer as to how the modern Supreme Court would rule on the precise issue presented in the original polygamy case, this treatment of the historical materials at least demonstrates that individual freedom is not a meaningful concept if courts are willing to calibrate the scales of freedom by reference only to the majority's preferences.

The Mormon experience squarely raises the issue as to the nature and justification of the commitment to individual rights embodied in the Constitution. For many Latter-day Saints, this constitutional commitment to the sanctity of individual rights may seem anomalous, particularly when it offers protection to conduct or the promulgation of ideas that run counter to the standards they accept as part of the gospel

of Jesus Christ. Collin Mangrum suggests that we might best understand our individual rights commitment and tradition in terms of liberal political theory; and that, in turn, we might best understand our religious commitment to acceptance of diversity through protection of rights as a reflection of the different roles that government and theology play in our lives. Mangrum shows that philosophical liberalism, with its emphasis on tolerance and individual autonomy, can be seen as a natural outgrowth of the Reformation and the intellectual justification of religious tolerance. America's tradition of religious dissent and toleration of religious diversity, the growth of religious and philosophical outlooks that emphasized moral freedom and responsibility, and Enlightenment perspectives that challenged the authority of traditional religious dogma, all contributed to the acceptance of natural rights theory as embodied, for example, in the Declaration of Independence.

While acknowledging that liberalism's historical connection to the Constitution is controversial, Mangrum suggests that the history and structure of our constitutional system is at least harmonious with liberal theory's emphasis on the moral equality of individuals and the limited nature of adequate justifications for overriding individual choice. Whether the framers were philosophical liberals or not, liberalism may be the most adequate system of thought for explicating the Constitution's clear commitment to individual rights. On this view, the State's role is to preserve a system of ordered liberty that permits all individuals, including Latter-day Saints, to pursue their respective visions of the good life while permitting others the same privilege.

If the Constitution reflects or embodies currents of philosophical thought, it is also a system of law. Indeed, as I observe in "Constitutional Interpretation and the American Tradition of Individual Rights," it is the Constitution's status as law, enforceable in courts as the supreme law of the land, that is perhaps its most important, and distinguishing, feature. The Supreme Court's controversial role as the arbiter of constitutional meaning has prompted an engaging modern debate over whether the constitutional text does (or should) constrain authoritative decision-makers. Some see the modern Court as a usurper of constitutional authority in ignoring the original intentions behind constitutional texts; others see the text as almost infinitely malleable and the notion of binding intent chimerical. I seek a middle ground that acknowledges the judicial duty to be bound by the text read in a relevant context, but also the legitimacy (and inevitability) of a creative judicial role where the application of constitutional language requires supplementation or calls for gap-filling where the search for meaning has been exhausted.

On this view, when courts confront the Constitution's most general and vague texts, their role in giving them effect becomes largely a matter of constitutional (and therefore political) theory—a theory that

individuals bring to the text at least as much as they take from it. The debate over the judicial role in constitutional decision-making has become most pronounced in the boundary between government power and individual rights. Indeed, in the individual rights context there is even debate as to whether the source of constitutional law is limited to the written text of the document we call the Constitution. This article contrasts competing views that the Constitution is a system of limited government that implicitly protects all the natural rights that people bring with them to the social contract, whether specified in text or not; or, alternatively, that the written Constitution *embodies* the social contract, with the implication that rights not reasonably found in the text itself are not constitutional in nature and may not be enforced by any court.

An equally fundamental division contrasts the view that individual rights form a normative system by which law and culture may be judged with the conception that rights arise from within human culture and embody what text, history, or consensus have established as the basic claims of individuals. Collin Mangrum's treatment of philosophical liberalism is suggestive of the first view, while Mel Bradford's emphasis on the framers' commitment to British constitutional tradition reflects the latter conception. In many respects, this debate over the nature of our constitutional order parallels the historical debate as to whether the founding generation was more committed to classical republican ideals or to liberal political theory.

Even when we confront the most immediate and pressing problems of constitutional decision-making, these fundamental questions about the nature of the Constitution are never far from the surface. Bruce C. Hafen's essay, "Bicentennial Reflections on the Media and the First Amendment," for example, combines respectful reflection on the Lord's affirmation of the inspiration underlying protection of freedom of conscience with an analysis of the Constitution's commitment to freedom of speech and press that emphasizes their contribution to the public interest in our democratic system of government. In emphasizing this connection, Hafen sees room for recognizing rational limits to free speech rights, such as the traditional exclusion of obscenity from free speech protection, as well as for the exercise of restraint by a judiciary charged with enforcing these rights. At risk of overinterpreting a brief essay, Hafen's thesis seems comfortably at home within the nonliberal legal and political tradition that harks back to the emphasis on self-discipline and public virtue that represents one strand of our constitutional origins.

In "One Moment, Please: Private Devotion in the Public Schools," Richard G. Wilkins takes on one of the vexing areas of modern constitutional adjudication—the proper constitutional relationship between church and state and the connection between church and state issues and

religious freedom. Wilkins concludes that the modern Supreme Court's construction of the establishment clause of the First Amendment would flunk any "strict historical test" that looked to the intentions of the founders. More centrally, however, he defends the view that the modern Court's establishment clause formulations have not been adequately linked up with the questions that should dominate church and state issues—the problem of coercion of individual right of conscience and the potential for debilitation of government and religion. Wilkins concludes that to interpret the Court's tests in the light of these central purposes is to perceive that schools might properly facilitate private religious devotion through sponsoring moments of silence because to do so enhances religious freedom without risking coercion of religious belief (however subtle) or mixing the proper functions of church and state.

Finally, Christopher L. Blakesley turns our attention back to the structure of the Constitution and the concept of the rule of law in "Terrorism and the Constitution." In the context of the frighteningly relevant problem of the growth of international terrorism, Blakesley addresses the question of whether traditional constitutional limitations and, indeed, the very notion of principled application of law, can control executive conduct in confronting the threat posed by our international enemies in a dangerous world. The affirmative answer developed in his essay reminds one of St. Thomas More's famous speech in Bolt's *A Man for All Seasons* in which he confirms that he would give the devil the benefit of the laws because they are the source of our protection from the howling winds of oppression. (It should be noted that Blakesley and I were taught constitutional law by the same teacher, Ed Firmage, who was known to cite Bolt's play alongside the United States Reports.)

If we trample over constitutional and international legal norms to combat terrorism, we undercut the system that has provided the greatest amount of personal freedom the world has known. Blakesley reminds us of our constitutional heritage and asks us to consider the values that are most easily left behind in the passion for immediate results in addressing vexing and serious problems. Whether or not one concurs in all of Blakesley's particular conclusions, such thoughtful consideration of fundamental questions is what constitutionalism is all about. This being so, the readers of this special issue will be better constitutionalists for having considered the essays contained herein.