The Constitution and the Restoration

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This morning I want to talk to you about a very important relationship that exists between, on the one hand, our lives, our practices, and our beliefs as participants in the restored gospel of Jesus Christ and, on the other, the Constitution of the United States. In one sense, this topic is a timeless one, because the Restoration and the Constitution trace their beginnings almost to the same point in time, and over the intervening two centuries have grown and flourished side by side.

And yet, in another sense, the subject is not only timely, but also time-driven. Today's devotional is the last one that will occur during the fifteen-year period from 1976 through the summer of 1991 that Congress officially designated as our bicentennial. Bicentennial! Over the past fifteen years—for most of you, the majority of your conscious years—this word has virtually acquired a secondary meaning. Viewed narrowly, it has been a ceremonial observance of the most remarkable period in the history of our nation, and perhaps in the history of the world. From a broader perspective, the bicentennial has symbolized patriotism and liberty and has served as a valuable reminder that the unique blessings we enjoy as Americans are largely attributable to a document that has proven to be, notwithstanding some flaws, probably the most successful governmental undertaking in the history of civilized life on this planet.

Constitutional principles and constitutional issues continually bear on our day-to-day activities. This very day, January 15, 1991—President Bush's deadline for the withdrawal of Iraqi troops from Kuwait provides an excellent example. It is an event and a day of obvious significance and concern to every American and to the world. Surrounding it on all sides is a constitutional issue. I'll say more about what that issue is in a moment. But at the outset I want you to understand that constitutional questions enter into a spectrum of our interests ranging from global war to nude dancing to non-returnable soft-drink containers.

A Dramatic Story

The two-hundred-year anniversary that we have been observing was a fifteen-year period that began with the Declaration of Independence and ended with the adoption

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Rex E. Lee was president of Brigham Young University when this devotional address was given on 15 January 1991.

of the Bill of Rights by the first Congress in the summer of 1791. The constitution-making portions of that decade and a half lasted only four years and consisted, in my view, of three basic phases. The first was the famous Philadelphia Convention in the summer of 1787. That story has been told several times and in several ways, but nowhere more interestingly nor more accurately than by our own BYU film production *A More Perfect Union.* The convention was conducted in secret and represented several struggles of epic proportions among the delegates, ultimately resolved by a series of compromises. Someday someone should make another movie like *A More Perfect Union,* telling the story of the second and third phases, which were ratification and the adoption of the Bill of Rights. Chronologically, ratification and the Bill of Rights adoption occurred in successive time periods, but they ended up being linked to each other. Their story is just as dramatic, and the process came just as perilously close to failure as did the Constitutional Convention itself. Let me explain.

The crucial time period for ratification lasted from late 1787 through the events of the summer of 1788. Formally and technically, the number of states required was nine, but everyone knew that if the new republic was to have a chance, the Constitution would have to be ratified by certain key states, including New York, Massachusetts, and Virginia. Very quickly, national leaders divided into two camps: the Federalists who supported the new Constitution, and the anti-Federalists who opposed it. The anti-Federalists included such luminaries as George Mason, Patrick Henry, and Richard Henry Lee of Virginia; Samuel Adams and Eldridge Gerry of Massachusetts; and Luther Martin of Maryland. They were distressed over the fact that this secret convention, authorized only to modify the Articles of Confederation, had instead established an entirely new form of government. Worse yet, it was a national government—with some of the very centralizing features and powers that the Articles of Confederation just a few years before had been deliberately designed to avoid. Indeed, many felt that this new document would lead us back on a path to monarchy.

The Federalists' efforts to secure ratification were led principally by Madison and Hamilton, who, with some help from John Jay, published under the pseudonym "Publius" a series of eighty-five essays entitled "The Federalist." Those essays are today not only the most authoritative sources for determining the original intent of the Founding Fathers, they are also part of our national literary treasure store.

The anti-Federalists rather quickly focused their attack on the lack of a "bill of rights." For both sides, the bill of rights issue was more tactical than substantive. All assumed that if the anti-Federalists succeeded in sending the entire Consitution into a second convention to consider including a bill of rights, a second convention would not have the advantage of secrecy that the first had enjoyed, and the proponents of a new constitution could therefore probably not duplicate the series of compromises on which their work of the summer 1787 had depended. In short, a new convention would mean no constitution at all, and both sides understood that the battle over a bill of rights was really a battle over the Constitution itself.

Once again, it was a compromise that carried the day, but this time a procedural one. Following the Massachusetts lead in early 1788, the crucial state conventions ratified the Constitution as it stood, but accompanied it with the addition of some proposed bill of rights amendments that Congress could consider *after* ratification. Given the closeness of the votes in Massachusetts, New York, and Virginia, it is quite clear that without this ratification—now Bill of Rights—later compromise, our Constitution would never have come into

existence. And yet when the first Congress convened in April of 1789, most of its members were inclined to consider virtually any matter of business other than the Bill of Rights. If not for the constant pressure of one man, James Madison, then a member of the House of Representatives, the first Congress might never have enacted a bill of rights. (Ironically, Madison had been defeated for the Senate by Richard Henry Lee, who had opposed the Constitution.) Therefore, in all three phases of our constitution-making—drafting, ratification, and adding the Bill of Rights—Madison was the central figure. He truly deserves his title, the Father of our Constitution.

The Limitation of Government

What, then, is this Constitution that Madison and Hamilton and others labored so diligently and precariously to bring about, and whose bicentennial we have been celebrating over the past four years? In the most elementary sense, the answer is that it is a part of our American body of laws, and laws are the rules by which we govern ourselves. But out of all the rules of conduct that rise to the level of law in our society, the Constitution is different in several respects. I will mention just two, and they are interrelated.

First, the Constitution is supreme over all other law. That means that in the event there is any inconsistency between the provisions of the Constitution and law that stems from any other source, the other law is invalid for that reason alone. That is what we mean when we say that laws are "unconstitutional."

The second distinction is one that is not often talked about but is very important and is related to the first. As compared to any other kind of law—including statutory, regulatory, or judge-made common law—constitutional law (at least by the formal processes specified by the Constitution itself) is very difficult to make or change. Consider this: In two hundred years we have added only twenty-six amendments. The first ten, which include a large share of our most important constitutional provisions, were enacted in just a little over two years. But since that time, of the literally thousands of constitutional amendments that have been proposed, only sixteen—an average of eight per century—have actually become part of our constitutional law. And of those sixteen, two have canceled each other out, the majority have dealt with relatively unimportant matters, and only one, the Fourteenth, has an importance comparable to some of the provisions that were adopted between 1787 and 1791.

The central feature of the American Constitution is that with only one exception, its provisions are confined to limiting the powers of government. The single exception is the Thirteenth Amendment, which prohibits slavery and involuntary servitude and therefore necessarily governs relationships between private, nongovernmental people and entities. With that single exception, the Constitution leaves untouched those vast bodies of other law that regulate the rights and obligations that individuals, groups, and institutions owe to and enjoy from each other. I suspect that the great majority of Americans don't know that. It follows that when we speak of our constitutional rights, we are necessarily speaking of rights that we enjoy vis-a-vis government, either national, state, or local. The Constitution is silent with respect to rights that we might enjoy vis-a-vis our employer, our neighbor, or any other nongovernmental person or entity who infringes on our interests in any way other than the imposition of slavery or involuntary servitude, neither of which has been a terribly pressing issue over the past century and a quarter.

The Constitution is, in short, a limitation on government. It accomplishes its governmental-authority-confining mission in two basic ways, and, with the exception of the Thirteenth Amendment, every provision of

the Constitution, in my opinion, falls into either one or the other of these two categories of limitations on governmental power.

The first category is the obvious one. The Constitution contains some fairly obvious, though not always specific, prohibitions concerning what government—federal, state, or local—can do to its citizens. Some of the most prominent are protections for the criminally accused, such as the privilege against self-incrimination, protection against unreasonable searches and seizures, the right to counsel, and jury trial. The best known of the noncriminal protections are contained in the First Amendment, most of whose guarantees pertain to some form of free expression, and include freedom of speech and press, freedom of assembly, and the free exercise of religion. (Interestingly enough, the only nonexpression right contained in the First Amendment is a structural provision, the so-called establishment clause, which deals with relationships between governments and religious organizations.) And although the original Constitution was criticized by the anti-Federalists for its lack of a bill of rights, it actually contained several important limitations on government designed solely to protect individual rights, such as the prohibitions against bills of attainder and ex post facto laws, the habeas corpus guarantee, and the contracts clause.

The other way that the Constitution limits governmental powers is more subtle, not as well known, but equally important and equally effective. It consists of a combination of two separate structural provisions. They are structural provisions in that they protect the individual against governmental power not by overtly prescribing what government cannot do, but rather by creating separate governmental units that compete for government power. By spreading the powers of government among several separate entities and by making each a competitor with the others, there is a lesser likelihood that any of those entities can ever acquire power in sufficient measure to become oppressive. The Constitution accomplishes this division of power along two dimensions: one horizontal, and one vertical.

First, it divides powers horizontally among three separate branches of the federal government. This breaking up of governmental authority among separate branches of the federal government was, in a very real sense, the first order of business for the 1787 Constitution makers. Thus, in Article I they created a legislative branch (Congress) and gave it the power to make laws; Article II created an executive branch (the president), charged with the responsibility "that the laws be faithfully executed"; and then Article III created the third branch (the federal courts), whose duty it is to interpret the laws.

The Constitution also divides power in a quite different way—vertically—between the federal government on the one hand and the various state governments on the other. Moreover, it gives each of these competitors a power feature that the other does not have. That is, the law-making authority of the states (a larger circle) is broader because the powers of the federal government (a smaller, included circle) are confined to those that the Constitution itself specifically authorizes any of the three branches to exercise, or powers that can be fairly implied by those specifically enumerated powers. But within its narrower sphere, federal law trumps state law whenever the two come into conflict. In summary, therefore, under this constitutional vertical division of authority, which we call federalism, the federal law is more potent, and within its confined sphere prevails when, as very frequently happens, the two come into conflict, but the total package of state powers is larger.

Genius Features

All of this talk about structure and competition for power in government may sound terribly boring to some of you, maybe even

irrelevant. Let me tell you why I get so excited about it. It is not just my natural affinity for esoteric things. I believe that these interlocking structural features, separation of powers and federalism, lie at the core of why our constitutional system of government has survived and served us so well over two centuries. Both are simple in their basic precepts. But in their actual operation they can only be described as genius features. Over the long run of our nation's history, they have managed to maintain a balance of power both within the federal government and also between our two systems of government that has effectively protected our individual liberties in ways that are more subtle, but in my view just as effective, as the better-known guarantees contained in the Bill of Rights.

And they do so in ways that affect all of us. Just ask yourselves, for example, what single issue have you been most concerned about over the last several weeks? I would guess that for most of you, number one on your worry list has been the possibility of war. Did you know that at the bottom of the tussle between Congress and the president over the past several weeks, culminating in last weekend's congressional debate and resolution, is a rock-solid separation of powers issue? Among the powers that the Constitution splits up among different governmental entities are those that pertain to our ability to make war. In Iraq, Saddam Hussein can call all the shots by himself. But in this country, it takes some cooperative effort between at least two governmental competitors. Iraq's system is more efficient, but ours is better designed to assure against arbitrary and tyrannical government. And that's why I conclude that these structural features really amount to a genius system.

One of the most important features of the American Constitution, both in theory and in practice, is the magnificent breadth of its most important provisions—notably the commerce clause, most of the Bill of Rights guarantees, and the Fourteenth Amendment's due process and equal protection clauses. The lack of specificity of these and other provisions has almost certainly been essential to the ability of this document drafted in 1787 to survive over 200 years of the largest and most unanticipated change that any country at any time has ever experienced.

And yet there is another edge to this generality. Someone has to be vested with the final authority to determine what the Constitution means when its provisions are applied to concrete practical facts, many of which were totally unanticipated at the time of the Constitutional Convention. For example, how, if at all, is the authority of the states to regulate the lengths and weights of trucks on interstate highways precluded by Congress's constitutional authority "to regulate commerce . . . among the several states"? In 1787 few people were thinking about interstate highways or trucks. Similarly, the Constitution guarantees against infringements on free speech. What does that guarantee do, if anything, to state laws providing recovery for libel and slander? And what is speech? Any form of expression? Does it include flag burning? If so, is there a difference between burning flags and burning draft cards? Or sleeping in tents as a protest against homelessness? And what about the recent controversy over the refusal of the National Endowment for the Arts to give grants to projects or works that it considers obscene? Does the Constitution require that so long as NEA gives grants to anyone, it not exclude those that it considers objectionable?

You can read the Constitution very carefully and not find, even in a footnote or an annotated version, any answer to any of those questions. Each of these is a form of expression, and yet none of them uses words. Speech or not? First Amendment protected or not? Different people would give different answers to those questions.

And even where the text is more specific, questions of interpretation still remain. For example, with respect to the issue that is very

much at the forefront of all of our minds today, how much could President Bush have done in the Persian Gulf without a formal congressional declaration? In this case, Congress acted, but in other crucial instances, such as the Civil War, Korea, and Vietnam, congressional action was either absent or less decisive. The Constitution states unequivocally, and quite specifically, that "the Congress shall have power . . . to declare war." Yet in language that is equally unequivocal and equally precise, Article II states that "the President shall be Commander-in-Chief of the Army and Navy of the United States." Did Presidents Lincoln, Truman, Johnson, and Nixon act unconstitutionally, or were they within their Article II powers?

Nothing in the text of the Constitution, and nothing in its history, provides the answer to those and many other practical questions that arise every day. But if our nation is to survive as a functioning constitutional republic, someone has to say what these broad, general provisions of the Constitution really mean. Since the issue is one of interpretation, common sense tells us that the Constitution is among the laws that the courts interpret, and that commonsense view is supported both by 187 years of actual practice and also by the most authoritative piece of constitutional history on this issue, Number 78 of the *Federalist Papers*, authored by Hamilton.

There are some consequences of this judicial power to interpret the Constitution that are a concern to many people, including your speaker. It means that five people—a majority of the Supreme Court—have the power not only to interpret the Constitution, but also effectively to amend it if they choose to do so, with little effective power for Congress, the president, or the people to reverse what the Court does in any particular case.

As large and as real as that concern is, it needs to be tempered by two facts. The first is that it is fairly clear to me that this power of judicial review—the authority of the courts to have the last word on constitutionality—was intended by the 1787 framers, though they did not explicitly say so. By combining the power of judicial review (which, as Hamilton says, they probably did intend) with the very broad language that the Founding Fathers used in the Constitution's most important provisions, the expansive judicial power that comes from judicial review was, in a sense, part of the "original intent" of the 1787 framers.

Second, there is, over the long run, a responsiveness between the will of the people and the content of our constitutional law. This comes about through the power of the president to appoint members of the federal judiciary. Indeed, as every recent president since Eisenhower has explicitly observed, one of the most important acts of any president—some have said the most important—is to appoint members of the Supreme Court, whose average tenure has been several times that of our presidents.

Therefore, over the decades of your future careers as voting Americans, just remember that when you vote for a president, you are doing more than picking the person who will lead us in war and peace and have access to Camp David and Air Force One. You are also in effect making a decision as to what kind of person you want on the Supreme Court. Our nation's history over the last half century demonstrates this fact. Particularly illustrative are the eight Roosevelt appointments in the late 1930s and early 1940s, and Nixon's four appointments between 1969 and 1972. While both of these presidents, and others, were probably disappointed in some of their appointees, as a group, those appointed by Roosevelt and also Nixon reflected the views of the president who appointed them, and presumably the people who elected the president. Most important of all, both the Roosevelt and the Nixon appointees have had large effects on all of us that will last for decades and, in many instances, forever.

The Constitution's Significance for Latter-day Saints

The constitutional principles and features that we have discussed thus far are relevant to every American citizen, and indeed to every person who enjoys the benefits of our constitutional system of government. For those of us who are members of The Church of Jesus Christ of Latter-day Saints, the study of the Constitution offers at least three other pluses, and they are unique to us.

The first is that the Restoration itself probably could not have survived if 200 years ago the anti-Federalists had prevailed. The events of the Restoration all occurred in this country. The message that it brought back to the world was highly controversial and provocative. Even with such protections as separation of powers and federalism and the explicit religion guarantees of the First Amendment, our early survival was as miraculous as that of the Constitution itself. Without those protections, we likely would not have survived at all.

It is, at the least, a remarkable coincidence—and in my view, no coincidence at all—that Joseph Smith was born less than fifteen years after the Bill of Rights became part of the Constitution. It's easy to forget that. The establishment of our Constitution by the hands of wise men occurred in the eighteenth century, and the birth of Joseph Smith and the First Vision in the nineteenth, but they actually took place only a few years apart. President Wilford Woodruff observed that the United States was the only place on earth where the Lord could have established his church and kingdom. And in more recent times, President David O. McKay in the dedicatory prayer for the Los Angeles Temple expressed gratitude for the Constitution and for the fact that it made the Restoration possible. How important, then, has the Constitution been for us? Without it, we probably would not have the gospel.

And this brings me to the second unique relationship between our American Constitution and our religion. We know that in fact the events whose two-hundredth birthday we observe did not come about just by chance. The descriptive phrase most commonly used by many members of the Church is that our Constitution was "divinely inspired." Unfortunately, some Church members have deduced from that general, nonscriptural description more than the scriptures or the Constitution or common sense will sustain.

That is, from the general label "divinely inspired ," some assume that the Constitution is tantamount to scripture, and therefore perfect in every respect, reflecting in every provision and every sentence the will of our Heavenly Father, just as is true of the Book of Mormon or the Doctrine and Covenants. That view cannot withstand analysis. Our Constitution has some provisions that are not only *not* divine, they are positively repulsive. The classic example is contained in Article V, which guaranteed as a matter of constitutional right that the slave trade would continue through at least the year 1808. There are other provisions that are not as offensive as the slavery guarantee, but they were quite clearly bad policy, and certainly were not divinely inspired in the same sense as are the scriptures. Moreover, regarding the Constitution as tantamount to scripture is difficult to square with the fact that our republic has functioned very well, probably even better, after at least one of its original provisions (requiring United States senators to be elected by their respective state legislatures rather than by the people at large) was amended out of existence by the Seventeenth Amendment.

In my own view, this whole issue is resolved simply by examining what the scriptures say, rather than resorting to the generality "divinely inspired," which you will not find anywhere in the standard works. Probably the most helpful statement is contained in section 101, verse 80 of the Doctrine and Covenants: "And for this purpose have I established the

Constitution of this land, by the hands of wise men whom I raised up unto this very purpose." I submit that this scripture makes it very clear that our Heavenly Father's involvement in the bringing forth of our Constitution was more an involvement in process than in end result. As President Benson has stated, "It is my firm belief that the God of Heaven raised up the Founding Fathers and inspired them to establish the Constitution of this land." His focus, and the focus of the Doctrine and Covenants, frees us of the burden of trying to equate the Constitution with scripture and, therefore, to justify every part. And a focus on process reaffirms the fact that the Constitution did not just come about by chance. Our Heavenly Father did play an active and essential role. That role was not the revelation to a prophet of infallible truth, perfect and reliable in every aspect. Rather, what the Lord did was to raise up at just the right time and in just the right combination people who could and predictably would produce a document that is, on balance, the most remarkable ever struck by human hands. Interestingly enough, James Madison himself in Number 37 of the *Federalist Papers* also expressed the view that "it is impossible for the man of pious reflection not to perceive in it [referring to the Constitution] a finger of that Almighty hand which has been so frequently and signally extended to our relief in the critical state of the Revolution." Statements similar to that of Madison can be found in the writings of others of the Founding Fathers.

A final area of constitutional interest unique to Latter-day Saints finds its source in the well-known "hanging by a thread" statements by the Prophet Joseph Smith. Similar statements have been reiterated by no fewer than six of his successors, including the current prophet. In a forthcoming book to be published by the Religious Studies Center, Professor Donald Cannon lists over forty instances in which these seven presidents have either used the "thread" metaphor or something like it. But in none of those quotations cited by Professor Cannon has any Church leader ever been very specific as to the metaphor's meaning.

Unfortunately, some members of the Church have been all too ready to offer their own explanations. The only thing consistent about these explanations is that in each instance, it was the Church member's own unresolved, often very private, grievance that supplied evidence that the thread was beginning to fray, sometimes beyond repair. Among some people, any problem from a tax increase to a failure to collect the garbage on time to a boundary dispute with one's neighbor is likely to call forth the observation that it is certainly easy to see how the Constitution is hanging by a thread. A companion assertion is that the election or appointment of certain persons, often the person making the assertion, to designated positions provides the key to preventing the demise of our constitutional system.

In my view, this is another instance in which going beyond what our leaders have said can be misleading at best, and potentially fraught with mischief. Even though we have not been given the exact meaning of the prophets' statements about the Constitution hanging by a thread, the scriptures do define the conditions on which freedom in the land of America ultimately depends. I am satisfied that whatever else may eventually hang in the constitutional balance, this much is clear: The continuation of the blessings of liberty depends finally on our spiritual righteousness. As the Lord told the Jaredites in the Book of Ether, this is a "land of promise." And "whatsoever nation shall possess it shall be free from bondage, and from captivity, . . . if they will but serve the God of the land, who is Jesus Christ." If the people fail to keep this covenant, they "shall be swept off when the fulness of his wrath shall come upon them. And the fulness of his wrath cometh upon them when they are ripened in iniquity" (Ether 2:9–12).

I hope that after this morning's discussion you will have a better understanding not only of what the Constitution is and how it works, but also of what it does not do. As Paul Martin Wolff, a prominent Washington, D.C., lawyer, has observed:

The Constitution has too often been misused for personal gain. Individual desires have been palmed off as scholarship. Politicians have pandered to the public by compounding misunderstandings of Supreme Court decisions, not correcting them. Constitutional pronouncements appear everywhere, from bumper stickers to talk shows. Too many people appear in classrooms, pulpits, campaign platforms, and mass circulation magazines, telling us not what they believe the Constitution means, but what they insist it says, giving every appearance that they are the sole heirs of James Madison's wisdom. [Paul Martin Wolff, *Legal Times of Washington,* November 9, 1981]

Necessarily, today's discussion has been very summary in its content. I cannot hope to give you in thirty-five minutes a constitutional law course that either in our political science or our law school curriculum would occupy a full year, or that for more serious students of this fascinating subject can consume a lifetime and still leave many questions unanswered. What I hope we have been able to accomplish is two things. The first is to give you a basic understanding of what the Constitution is and is not, how it operates, and its particular significance for you. Second, I hope that you now have an interest in learning more as an enduring, continuing part of your overall learning processes. The Lord's caution about the relationship between our righteousness and our liberties has been reiterated over the centuries from Jaredite days to Nephite days to our own. Scriptures ancient and modern tell us that there is something we can do to contribute to the cause of freedom in this land governed by a constitution whose bicentennial we celebrate—a constitution established by the hands of wise men raised up by God for that very purpose. That each of us may make that contribution through the lives we lead, by keeping our Heavenly Father's commandments, and striving to be more like his Son is my prayer, in the name of his Son, Jesus Christ. Amen.