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The “Embarrassing” Section 134

*Frederick Mark Gedicks**

Some years ago Sanford Levinson published an essay entitled, *The Embarrassing Second Amendment*.¹ A well-known scholar of the left, Levinson regretfully concluded that the Framers understood the Second Amendment to protect precisely what the National Rifle Association has long maintained—an individual right to own weapons for the purpose of resisting violations of liberty by the federal government.² This is “embarrassing” to gun-control liberals and others who argue that the Second Amendment protects a collective right that applies only in the context of state-controlled armed forces like the National Guard.³

It is in this spirit that I have entitled my comments “The ‘Embarrassing’ Section 134.” I agree with Professor Smith that section 134 seems to reflect much of the thought of James Madison and the general spirit of his time,⁴ which is precisely the problem. There appear to be serious discontinuities between the Madisonian

* Professor of Law, J. Reuben Clark Law School, Brigham Young University. I am grateful to Kif Augustine-Adams, Alan Keele, Lance Long, and (especially) Jack Welch for comments and criticisms of an earlier version of this essay. Kim Pearson, Shima Baradaran-Robison, and Wade Taylor provided helpful research assistance. The views expressed herein do not necessarily reflect the views of the Church of Jesus Christ of Latter-day Saints, the J. Reuben Clark Law School, or the Brigham Young University Law Review.

1. Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989). The Second Amendment declares, “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II.

2. See Levinson, *supra* note 1, at 650–51 (arguing that the Second Amendment reflects a “republican political order” which provides for “ordinary citizens [to] participate in the process of law enforcement and defense of liberty rather than rely on professionalized peacekeepers, whether we call them standing armies or police”).

3. See, e.g., *id.* at 644 (observing that liberal interest groups like the American Civil Liberties Union read the Second Amendment as protecting “only a state’s right,” and further maintain that “[e]xcept for lawful police and military purposes, the possession of weapons by individuals is not constitutionally protected”) (citations omitted).

4. Rodney K. Smith, *James Madison, John Witherspoon, and Oliver Cowdery: The First Amendment and the 134th Section of the Doctrine and Covenants*, 2003 BYU L. REV. 891, 934–40. (concluding that Madison and Cowdery shared similar views on the nature of religious conscience, its precedence to governmental obligations, the circumstances in which it may properly be restricted, and its violation by the mingling of religious and civil authority).

understanding of conscience, which Professor Smith argues is evident in section 134, and the status of conscience among contemporary members of the Church of Jesus Christ of Latter-day Saints. I will briefly discuss three: the contemporary church's teaching that Latter-day Saints owe an unqualified allegiance to the law of the land, the general antipathy of Latter-day Saint (or "LDS") lawyers toward the use of natural law and natural rights reasoning in interpreting the Constitution, and the contemporary church's insistence that individual religious conscience be subordinated to the church's institutional interests. Given the un-Madisonian view of individual conscience apparently reflected in the practices and attitudes of the contemporary church, Professor Smith's demonstration of Madisonian influence on section 134 may be more cause for chagrin than celebration.

1.

The Twelfth Article of Faith declares that Latter-day Saints "believe in being subject to kings, presidents, rulers, and magistrates, in obeying, honoring and sustaining the law."⁵ Section 58 of the *Doctrine and Covenants* is even more emphatic: "Let no man break the laws of the land, for he that keepeth the laws of God hath no need to break the laws of the land. Wherefore, be subject to the powers that be"⁶

At least since World War II, these scriptures have been understood to encourage, if not to command, an unqualified obedience to the law by Latter-day Saints, even when the law is deeply unjust. Helmuth Hübener, for example, was a Latter-day Saint teenager who was both executed by the Gestapo and excommunicated by German LDS authorities for anti-Nazi resistance activities.⁷ More than a half century later, Hübener is celebrated in

5. *Articles of Faith* 12 (Pearl of Great Price).

6. *Doctrine and Covenants* 58:21–22. See also Mark W. Cannon, *Civic Duties*, in 1 ENCYCLOPEDIA OF MORMONISM 285 (Daniel H. Ludlow ed., 1992) ("Members [of the LDS church] are obligated to respect governmental authority."); *accord Matt.* 22:21 (King James) ("Render therefore unto Caesar the things which are Caesar's."); *Titus* 3:1 (King James) (counseling Christians to "be subject to principalities and powers," and to "obey magistrates"); 1 *Pet.* 2:13 (King James) ("Submit yourselves to every ordinance of man").

7. For accounts of Hübener's arrest and execution by the Nazis and his summary excommunication from the LDS Church, see KARL SCHNIBBE, *WHEN TRUTH WAS TREASON: GERMAN YOUTH AGAINST HITLER* (Blair R. Holmes & Alan F. Keele eds., 1995); Alan F.

Germany as a hero of the resistance,⁸ while LDS church leaders remain ambivalent about his actions.⁹ Similarly, during the 1960s, the civil disobedience of antiwar and civil rights activists was criticized by LDS leaders and members because it entailed conscious lawbreaking, although leaders did not disapprove of reform efforts

Keele & Douglas F. Tobler, *The Führer's New Clothes: Helmuth Hübener and the Mormons in the Third Reich*, SUNSTONE, Nov.–Dec. 1980, at 20.

8. Keele and Tobler report that because he was neither an adult intellectual nor a member of an anti-fascist organization, Hübener has come to symbolize among post-war German writers the “nonviolent, democratic, individual political initiative” and “personal moral responsibility” that could have prevented or terminated the Nazi regime. Keele & Tobler, *supra* note 7, at 26; *see also id.* (“If Hübeners are common in post-war German literature, it is precisely because there were so few in real life before.”); *id.* at 29 n.24 (noting that Hübener or “Hübener-types” occur in works by Böll, Grass, Hochhuth, Schallück, “and others”). In 1985, the city of Hamburg, Hübener’s birthplace, held a weeklong commemoration of his resistance activities in celebration of the sixtieth anniversary of his birth. *See Hübener Group Lauded in Hamburg*, SUNSTONE, Mar. 1985, at 48 [hereinafter *Hübener Group*].

9. Although the First Presidency approved the posthumous restoration of Hübener’s membership by German LDS leaders following the war, *see* Keele & Tobler, *supra* note 7, at 23–24, church authorities have declined to endorse the morality of his anti-Nazi resistance and seem uncomfortable with publicity given to Hübener in that respect. For example, BYU Professor Thomas Rogers was pressured by church leaders not to allow further production of his play dramatizing Hübener’s resistance activities following its initial successful run at Brigham Young University in 1977. *See Hübener Group*, *supra* note 8, at 49; Cecilia Warner, *Helmuth Hübener: Antagonist or Protagonist?*, SUNSTONE REV., Mar. 1984, at 3. When asked to comment on the incident, Elder Thomas S. Monson of the church’s governing Council of the Twelve is reported to have questioned the wisdom of examining Hübener’s life at all: “Who knows what was right or wrong then? I don’t know what we accomplish by dredging these things up and trying to sort them out.” *Hübener Group*, *supra* note 8, at 49. When a different play portraying Hübener was produced in Salt Lake City by an independent theater group, the LDS-Church-owned *Deseret News* declined to review it on “editorial” grounds, although it did publish two pre-production stories. *See* Warner, *supra*, at 4.

Some of the official church reticence about Hübener may stem from the possibility that his anti-Nazi activities, however heroic and courageous, nevertheless put other Latter-day Saints at greater risk of persecution by the Nazi regime. Official discomfort with Hübener might also be attributed to fear that sensitive negotiations relating to recognition of the LDS Church by the former German Democratic Republic in the late 1970s might have been jeopardized by publicity about Latter-day Saint resistance to an earlier totalitarian regime. (Church leaders seem unconvinced that the anti-fascist character of Hübener’s resistance activities would have prevented the GDR from perceiving him as a subversive.) Even after the fall of communism, however, the church has been slow to embrace Hübener as part of its history. Hübener’s story is not related in any LDS church instruction manual, and has apparently never been recounted in a general conference talk or in another authoritative setting by church leaders. A recent notice in the church’s official newsweekly announcing a new film documentary about Hübener’s resistance activities may portend greater willingness on the part of the church to acknowledge Hübener and his story as a positive part of its heritage. *See* Sarah Jane Weaver, *Documentary Reveals “Truth and Conviction,”* CHURCH NEWS, Dec. 14, 2002, at 5.

undertaken through legal channels.¹⁰ Before the Berlin Wall fell in 1989, Latter-day Saints trapped behind the Iron Curtain were counseled to obey the laws of the totalitarian regimes under which they lived, and similar counsel is given today to those who live under dictatorships and other authoritarian regimes that do not respect basic human rights.¹¹

All this is in stark contrast to Madisonian political thought and, indeed, to some readings of section 134 itself. Latter-day Saints honor Madison and the other Founders as patriots—among the Saints the Constitution is equivalent to scripture, and the Founders enjoy a close-to-prophetic status.¹² Like all revolutionaries, however,

10. For official disapproval of anti-war activism entailing civil disobedience, see, for example, Mary Jane Woodger, *Commentary of the Leadership of the Church of Jesus Christ of Latter-Day Saints During the Vietnam War*, 23 J. AM. & COMP. CULTURES 53 (Spring 2000) (recounting condemnation of draft resistance and criticism of pacifism and conscientious objection by the First Presidency and other general authorities). See also Knud S. Larsen & Gary Schwendiman, *The Vietnam War Through the Eyes of a Mormon Subculture*, 3 DIALOGUE: J. MORMON THOUGHT 152, 156 (Autumn 1968) (reporting that BYU students surveyed in 1967 were evenly split on whether anti-war demonstrations should be prohibited because they gave aid and comfort to North Vietnam). For disapproval of civil rights activism entailing civil disobedience, see Dallin H. Oaks, *Law and Order—A Two-Way Street*, 3 DIALOGUE: J. MORMON THOUGHT 59 (Winter 1968) (endorsing lawful demonstrations, but condemning all forms of civil disobedience except those designed to test the validity of a law whose constitutionality is in doubt). Letters to the editor published in the two major Salt Lake City dailies in the aftermath of the assassination of the Reverend Martin Luther King Jr. often blamed Rev. King and the civil rights movement for racial violence. See, e.g., David A. King, *Integration Takes Time*, SALT LAKE TRIB., Apr. 6, 1968, at A16; Budd Iverson, *Leader of Violence*, DESERET NEWS, Apr. 10, 1968, at 16A; Lillian Williams, *Day of Mourning*, DESERET NEWS, Apr. 11, 1968, at 22A; Leland S. Edwards, *Benson for President?*, DESERET NEWS, Apr. 12, 1968, at 18A; see also Owen Olpin, Letter to the Editor, 3 DIALOGUE: J. MORMON THOUGHT 6 (Summer 1968).

11. For a summary and discussion of such counsel, see Frederick Mark Gedicks, *Towards an LDS Understanding of Church Autonomy*, in CHURCH AUTONOMY: A COMPARATIVE SURVEY 251, 255–59 (Gerhard Robbers ed., 2001).

12. See, e.g., President Ezra Taft Benson, *The Constitution—A Glorious Standard*, ENSIGN, May 1976, at 91, 93 (“I reverence the Constitution of the United States as a sacred document. To me its words are akin to the revelations of God, for God has placed his stamp of approval on the Constitution of this land. I testify that the God of heaven selected and sent some of his choicest spirits to lay the foundation of this government as a prologue to the restoration of the gospel and the second coming of our Savior.”); Elder Dallin H. Oaks, *The Divinely Inspired Constitution*, ENSIGN, Feb. 1992, at 68, 71 (“This inspired Constitution was established to provide a practical guarantee of these God-given rights [enumerated in the Bill of Rights], and the language implementing that godly objective is scriptural to me.”); President George Albert Smith, CONF. REP., Apr. 1948, at 182 (“[T]o me the Constitution of the United States of America is just as much from my Heavenly Father as the Ten Commandments.”). The principal scriptural warrant for treating the Constitution as having a

Madison and the Founders were traitors to their country. They justified rebellion against Great Britain because its king had failed to respect the “inalienable” or natural rights of the colonists, as the *Declaration of Independence* clearly sets forth. Section 134 endorses this same justification. It states that “no government can exist in peace” unless it protects natural rights—namely, “the free exercise of conscience, the right and control of property, and the protection of life.”¹³ It further declares that “all men are bound to sustain and uphold” the government where they live, but only “while protected in their inherent and inalienable rights” by such governments.¹⁴ It goes on to condemn “sedition and rebellion,” but again, only when undertaken by citizens “thus protected”¹⁵—that is, by citizens whose natural rights are respected by the government.¹⁶

In short, while section 134 does establish that citizens are obligated to sustain the laws of governments that protect religious free exercise, property, life, and other natural rights, it seems purposefully to refrain from condemning revolt by those whose natural rights are not respected by government, observing that such governments are condemned to endure agitation and rebellion. Madison and section 134 thus sound a discordant note against the contemporary LDS practice of honoring and obeying even unjust and repressive laws.

2.

The terms “natural law” and “natural rights” point to the projects of identifying and justifying universal moral principles and

divine origin is *Doctrine and Covenants* 101:80, which declares that the Constitution was established “by the hands of wise men whom [God] raised up unto this very purpose.”

13. *Doctrine and Covenants* 134:2.

14. *Id.* at 134:5.

15. *Id.*

16. *See also id.* at 98:5 (“[T]hat law of the land which is constitutional, supporting that principle of freedom in maintaining rights and privileges, belongs to all mankind, and is justifiable before me.”), 134:7 (“[W]e do not believe that [rulers, states, and governments] have a right in justice to deprive citizens of [the free exercise of their religious belief], or proscribe them in their opinions, so long as a regard and reverence are shown to the laws and such religious opinions do not justify sedition nor conspiracy.”), 134:11 (stating that people “should appeal to the civil law for redress of all wrongs and grievances . . . where such laws exist as will protect the same,” but asserting that people “are justified in defending themselves, their friends, and property, and the government, from the unlawful assaults and encroachments of all persons in times of exigency”).

human rights on the basis of human reason and instinct.¹⁷ Some constitutional theorists have argued that judges may properly invalidate government action that violates natural laws or rights, even when such laws or rights are not set forth in the Constitution. Although a few of these theorists are politically conservative,¹⁸ most are associated with the left.¹⁹ Indeed, most contemporary conservatives have rejected natural law and natural rights jurisprudence.²⁰ In contemporary constitutional discourse, “natural law” and “natural rights” are conservative code for unrestrained

17. Though often used synonymously, “natural law” and “natural rights” are conceptually distinct. Natural law reasoning refers to a moral theory that seeks to demonstrate universal moral laws by the exercise of human reason. *See, e.g.*, “Natural law,” SIMON BLACKBURN, *THE OXFORD DICTIONARY OF PHILOSOPHY* 256 (1996) (defining natural law theory as “any attempt to cement the moral and legal order together with the nature of the cosmos or the nature of human beings,” in which “[l]aw stands above and apart from the activities of human law-makers” and “constitutes an objective set of principles that can be seen true by ‘natural right’ or reason”); NORMAN DOE, *FUNDAMENTAL AUTHORITY IN LATE MEDIEVAL ENGLISH LAW* 60–61 (2000) (defining natural law as “a system of precepts and prohibitions created by God,” which are “accessible to humankind through human reason, through revelation, and through instinct”). For a succinct survey of the classical to the contemporary in natural law theory, see Kenneth Einar Himma, *Natural Law*, *INTERNET ENCYCLOPEDIA OF PHILOSOPHY*, at <http://www.utm.edu/research/iep/n/natlaw.htm> (last visited July 30, 2002).

Natural rights reasoning is a species of political theory which identifies human rights against government by the exercise of human reason. *See, e.g.*, ROBERTO MANGABEIRA UNGER, *KNOWLEDGE AND POLITICS* 72 (1984):

The natural rights theorist . . . claims to discover an intrinsic order in social relations . . . For him the universals that describe this order—rights, rules, and institutional categories—have an existence and a worth quite independent of the particular interests that may take advantage of them. Thus, the natural rights thinker treats the system of private law concepts of contract and property or the doctrine of separation of powers in public law as if they had an autonomous logic that survived in all their transmutations.

18. *See, e.g.*, Edward S. Corwin, *The “Higher Law” Background of American Constitutional Law*, 42 *HARV. L. REV.* 149 (1928); Robert P. George, *Colloquium, Natural Law, the Constitution, and the Theory and Practice of Judicial Review*, 69 *FORDHAM L. REV.* 2269 (2001).

19. *See, e.g.*, RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); JOHN RAWLS, *A THEORY OF JUSTICE* (1971); Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 *STAN. L. REV.* 843 (1978); Suzanna Sherry, *The Founders’ Unwritten Constitution*, 54 *U. CHI. L. REV.* 1127 (1987).

20. HADLEY ARKES, *THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS* 28 (1994) (observing that Justice Black’s rejection of natural rights and substantive due process “has found disciples in our own time mainly among conservative jurists like William Rehnquist”). Arkes himself is a supporter of natural rights.

judicial activism, especially by the Supreme Court.²¹ Such activism has historically borne conservative blame for the widely-condemned *Lochner* doctrine that blocked some social welfare legislation and other progressive initiatives in the early twentieth century.²² More recently, it has been the perceived source of aggressive judicial interpretations of the Due Process and Equal Protection Clauses of the Fourteenth Amendment that constitutionalized individual privacy rights to unmarried sexual activity and largely unrestricted access to abortion;²³ Latter-day Saint scholars have joined in these conservative criticisms.²⁴ One suspects that, given the predominance

21. See ROBERT H. BORK, *THE TEMPTING OF AMERICA* 66 (1990) (arguing that the Supreme Court’s fundamental rights jurisprudence “is indistinguishable from a power to say what the natural law is and, in addition, to assume the power to enforce the judge’s version of that natural law against the people’s elected representatives”).

22. See *Lochner v. New York*, 198 U.S. 45, 57–58 (1905) (striking down state maximum-hour legislation as infringing upon the natural right of an individual to be “free in his person and in his power to contract in relation to his own labor”); see also *Allgeyer v. Louisiana*, 165 U.S. 578, 589–90 (1897) (construing the Due Process Clause of the Fourteenth Amendment as protecting “not only the right of the citizen to be free from the mere physical restraint of his person,” but also “the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned”).

23. See BORK, *supra* note 21, at 110–26 *passim* (cataloguing alleged interpretive excesses of the Warren and Burger Courts); see also *Lawrence v. Texas*, 123 S. Ct. 2472, 2497 (2003) (Scalia, J., dissenting) (rejecting the majority’s conclusion that state anti-sodomy laws lack a rational basis under the Due Process Clause of the Fourteenth Amendment, on grounds that such laws fall “well within the range of traditional democratic action,” and “should not be stayed through the invention of a brand-new ‘constitutional right’ by a Court that is impatient of democratic change”); *Planned Parenthood of S.E. Penn. v. Casey*, 505 U.S. 833, 998 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (arguing that the constitutional right to abort one’s pregnancy rests on a “principle of *Realpolitik*” rather than a principle of law).

24. *E.g.*, REX E. LEE, *A LAWYER LOOKS AT THE CONSTITUTION* 188 (1981) (“[The privacy cases] and the abortion cases represent a resurrection of *Lochner* because they vest in the judiciary the license to roam at will through the territory of legislative policymaking. If an unmentioned constitutional right can be pieced together by the judiciary out of bits and scraps that bear some resemblance to a variety of other provisions in the Constitution, then there is little limit to the extent to which judges can substitute their own judgment for that of the legislature.”); LYNN D. WARDLE & MARY ANNE Q. WOOD, *A LAWYER LOOKS AT ABORTION* 51 (1982) (criticizing the Court’s opinion in *Roe v. Wade* for having relied on substantive due process analysis despite its discredited doctrinal pedigree and the severe academic and political criticism to which it has been subjected); see also LEE, *supra*, at 161 (calling the Due Process Clause the “wild card in the Supreme Court’s deck” because it “affords the most open-ended opportunity for judicial policymaking”); cf. Louis Midgley, *The Search for Love: Lessons from the Catholic Debate over Moral Philosophy*, 11 *BYU STUD.* 188 (Winter 1971) (arguing that the

of political conservatism among Latter-day Saints in general²⁵ and BYU students in particular,²⁶ most LDS lawyers and BYU law students understand “natural law” and “natural rights” reasoning as the foundation of a misguided and illegitimate jurisprudence that has ended in constitutional protection for morally problematic practices.

Madison and the Framers, on the other hand, lived in a political culture in which the existence and binding force of natural law and natural rights reasoning were taken for granted.²⁷ The *Declaration of Independence*, for example, can only be read as a natural rights argument.²⁸ The anti-Federalists opposed the Constitution because it left natural rights without explicit textual protection,²⁹ and there are

Roman Catholic tradition of identifying the good through natural law reasoning is no longer an adequate response to the challenges of contemporary life). For a sympathetic use of natural law reasoning in Mormon theology, see Nathan Oman, *Intelligences and Zion: An Essay in Mormon Political Philosophy* (2003) (unpublished manuscript, on file with author).

25. See, e.g., Dan Harrie, *Mormon, GOP Link Doomed Democrats*, SALT LAKE TRIB., Dec. 6, 2002, at C1 (reporting that the “overwhelming majority” of Utah Latter-day Saints voted Republican in the 2002 election, and that 56 percent of Utah voters polled identified themselves as Republicans, while only 19 percent identified themselves as Democrats), available at <http://www.sltrib.com/2002/dec/12062002/utah/8688.htm> (last visited Mar. 10, 2003).

26. See Steve Hasson & Ken Meyers, *How BYU Students Voted*, DAILY UNIVERSE, Nov. 5, 1992, at 1 (reporting that data from eight voting districts “predominantly populated by BYU students” showed that in the Election of 1992, 73 percent of those voting in the districts voted for George Bush, 17 percent for Ross Perot, 7 percent for Bill Clinton, and 3 percent for Bo Gritz). In a blind survey of a forty-two-student BYU jurisprudence class conducted by a member of the Law School faculty in January 2003, thirty-five students reported having voted for George Bush in the Election of 2000, three for Ralph Nader, and two for Al Gore, with two not reporting a choice. Cheryl B. Preston, *Survey of Brigham Young University Law Students Enrolled in “Contemporary Jurisprudence Theory”* (Jan. 2003) (on file with author).

27. See, e.g., H. JEFFERSON POWELL, *THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM* 91–92 (1993); CLINTON ROSSITER, *1787: THE GRAND CONVENTION* 60–61 (1966); Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 *YALE L.J.* 907 (1993). Professor Hamburger cautions, however, that natural law and natural rights had more precise meanings and implied a more constrained understanding of liberty in the eighteenth century than they do today. See *id.* at 908. According to Hamburger, the Founders understood natural law to consist “of reasoning about how to exercise and preserve natural liberty,” which was the “freedom an individual could enjoy as a human in the absence of government.” *Id.* at 918, 922. Natural rights were “portion[s] of this undifferentiated natural liberty.” *Id.* at 919; accord *id.* at 908. The Founders, therefore, understood natural rights to be subject to natural law. *Id.* at 908–09; see also *id.* at 923 (“Natural law, according to [late eighteenth century] Americans, was a type of reasoning about how individuals should use their freedom.”).

28. See, e.g., Steven D. Smith, *Nonsense and Natural Law*, 4 *S. CAL. INTERDISC. L.J.* 583, 593 (1996).

29. See, e.g., MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE* 20 (1986); I MELVIN I. UROFSKY & PAUL FINKELMAN, *A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF*

strong historical arguments that various clauses of the Constitution and the Bill of Rights were understood at the time they were enacted to recognize or refer to unenumerated rights, including natural rights.³⁰

The natural rights tradition continued unbroken from the founding era into the nineteenth century. In 1798, Justices Chase and Iredell carried on a spirited debate over the place of natural rights in the new constitutional order.³¹ In 1810, Justice Johnson declined to join the majority opinion upholding the validity of a land sale contract by reference to fundamental principles of common law and the Contracts Clause,³² insisting instead that such validity rested solely upon “a general principle, on the reason and nature of things: a principle which will impose laws even on the deity.”³³ In 1823, Justice Washington, riding circuit, held that the Privileges and Immunities Clause of Article IV protected those rights “which are . . . fundamental; which belong, of right, to the citizens of all free governments.”³⁴ Justice Story’s monumental treatise on American constitutional law, published only two years before section 134 was canonized by the Latter-day Saints as scripture in 1835, presupposes

THE UNITED STATES 112 (2d ed. 2002); *see also* 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 301, at 274 (Rothman 1991) (1833) (“Among the defects [of the Constitution] which were enumerated, none attracted more attention, or were urged with more zeal, than the want of a distinct bill of rights, which should recognize the fundamental principles of a free republican government, and the right of the people to the enjoyment of life, liberty, property, and the pursuit of happiness.”); Hamburger, *supra* note 27, at 934–35 (“[A]ccording to Anti-Federalists, individuals had a legal right to the freedom of speech and press and their other natural liberties only to the degree they reserved these rights in their constitution or, less securely, provided for them in other civil law.”).

30. *E.g.*, 1 STORY, *supra* note 29, § 506, at 486 (Preamble); Randy E. Barnett, *Introduction: James Madison’s Ninth Amendment*, in THE RIGHTS RETAINED BY THE PEOPLE 1 (Randy E. Barnett ed., 1989) (Ninth Amendment); James W. Ely, *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 322–27 (1999) (Due Process Clause of the Fifth Amendment); *see also* CURTIS, *supra* note 29, at 18 (“According to the Declaration [of Independence], people have unalienable rights to liberty. The ideology of the revolutionary generation shaped the later American Bill of Rights. This revolutionary ideology combined and wove together both the natural rights of man and the historic rights of Englishmen.”).

31. *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798).

32. *See Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810) (majority opinion of Marshall, C.J.).

33. *Id.* at 143 (opinion of Johnson, J.).

34. *Corfield v. Coryell*, 6 F. Cas. 546, 551 (E.D. Pa. 1823) (No. 3,230).

the existence of natural rights and their enforceability against the federal government as constitutional law.³⁵

It is no surprise, then, that natural rights find their way into section 134. I have already discussed some of the natural rights mentioned in section 134.³⁶ The section also enjoins government officials to enforce the law “in equity and justice,”³⁷ and proclaims the government’s lack of authority to interfere with the “freedom of the soul.”³⁸ Section 134 even replicates one of the Founders’ mistakes of natural rights reasoning, observing that it was “unlawful and unjust” to interfere in a slave-owner’s control of his property by preaching the Gospel to slaves, thereby conceding that black African slaves were not entitled to freedom of conscience and the other natural rights enjoyed by whites.³⁹

There is deep irony in the indifference of politically conservative Latter-day Saints to natural law and natural rights jurisprudence. It is true that most contemporary heirs to the natural rights tradition are committed to left-leaning politics that conservative Latter-day Saints do not find congenial. But there is a vibrant conservative natural rights tradition that is equally ignored by LDS lawyers.⁴⁰ Indeed, one

35. For example, Justice Story argues that one of the principle points of contention between Great Britain and the colonists was the former’s refusal to grant the latter all of the “privileges and immunities” of Englishmen, 1 STORY, *supra* note 29, § 156, at 139, including rights at English common law, 1 *id.* § 157, at 140, “the inherent rights and liberties of . . . natural born subjects,” 1 *id.* § 190, at 175 (citations omitted), and “essential rights,” 1 *id.* § 191, at 176. He further suggests that this refusal was corrected by colonial independence and the eventual adoption of a Constitution and Bill of Rights that protected those very “fundamental” rights that the British had refused to recognize in the colonies. *See* 1 *id.* §§ 304–05, at 277–78.

36. *See supra* text preceding and accompanying note 16.

37. *Doctrine and Covenants* 134:3. Although these terms sound in natural law and natural rights, it is possible that they referred only to the traditional division between law and equity in Anglo-American jurisprudence.

38. *Id.* at 134:4.

39. *Id.* at 134:12. Although slavery itself is condemned elsewhere in Mormon scripture, *see id.* at 101:79, the LDS Church subsequently formalized a policy of denying priesthood ordination to those of black African descent. First articulated by Brigham Young in 1852, this policy was observed until 1978. *See id.* Off. Decl. 2. For a detailed account of the origins of this policy, see Lester E. Bush Jr., *Mormonism’s Negro Doctrine: An Historical Overview*, 8 DIALOGUE: J. MORMON THOUGHT 11 (1973).

40. *See, e.g.*, HADLEY ARKES, *BEYOND THE CONSTITUTION* (1990); JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980); GERMAIN GRISEZ & RUSSELL SHAW, *BEYOND THE NEW MORALITY* (3d ed. 1988); *NATURAL LAW THEORY* (Robert George ed., 1992). The authors of one basic jurisprudence text believe that a connection between natural law reasoning

of the most prominent LDS conservatives of the mid-twentieth century, J. Reuben Clark, was committed to a natural rights jurisprudence.⁴¹ Nevertheless, though LDS scripture teaches that the Framers were divinely inspired in their drafting of the Constitution and recognizes the existence of natural law and natural rights, the LDS response to natural law and natural rights jurisprudence is silence.

3.

I do not know if the LDS general authorities ever gave passionate sermons on “holding sacred the freedom of conscience,” as it is characterized by section 134,⁴² but they do not give such talks today. As Latter-day Saints know, contemporary general authority sermons emphasize obedience to ecclesiastical authority and loyalty to the institutional church above virtually every other value.⁴³

and political conservatism is so widely assumed that it must be expressly disclaimed. See GEORGE C. CHRISTIE & PATRICK H. MARTIN, *JURISPRUDENCE* 119 (2d ed. 1995).

41. See Robert S. Wood & Stan A. Taylor, *J. Reuben Clark, Jr., and the American Approach to Foreign Policy*, 13 *BYU STUD.* 441, 443 (1973) (arguing that President Clark’s political thought was “but a variation” of a distinctly American view in which “politics is seen as being based on the postulate of a common human reason and universally and naturally-based precepts of right”); FRANK W. FOX, J. REUBEN CLARK: THE PUBLIC YEARS 294 (1980) (quoting President Clark’s declaration, “I am a member of that class . . . that believes, if you will, that we the American people are the chosen of God for the perpetuation of a government which holds sacred those great fundamental inalienable rights of life, liberty, and the pursuit of happiness.”); see generally G. Homer Durham, *The Protection of All Flesh*, *ENSIGN*, June 1976, at 42, 44–45 (arguing that the Constitution is a continuation of the natural law tradition of Aristotle, Augustine, and Aquinas).

42. *Doctrine and Covenants* 134:5.

43. See, e.g., Elder M. Russell Ballard, *Beware of False Prophets and False Teachers*, *ENSIGN*, Nov. 1999, at 62, 64 (“[I]n the Lord’s Church there is no such thing as a ‘loyal opposition.’ One is either for the kingdom of God and stands in defense of God’s prophets and apostles, or one stands opposed.”); Elder R. Conrad Schultz, *Faith Obedience*, *ENSIGN*, May 2002, at 29, 31 (declaring that no doctrine “is more critical to our well-being in this life and the next” than “unquestioning obedience” to the commandments of God as revealed through his prophets); Elder H. Ross Workman, *Beware of Murmuring*, *ENSIGN*, Nov. 2001, at 85 (“Obedience is essential to realize the blessings of the Lord, even if the purpose of the commandments is not understood.”); see also President Ezra Taft Benson, *Fourteen Fundamentals in Following the Prophet*, *BYU Devotional Address* (Feb. 26, 1980), available at [http://library.lds.org/nxt/gateway.dll?f=templates\\$fn=default.htm](http://library.lds.org/nxt/gateway.dll?f=templates$fn=default.htm) (declaring that the pronouncements of the Prophet preempt scripture, the pronouncements of past prophets, and human reason; that the pronouncements of the Prophet are necessarily true and correct; and that failure to follow the Prophet’s teachings amounts to serious sin); Elder Boyd K. Packer, *Follow the Brethren*, in *SPEECHES OF THE YEAR 1* (1965) (“Avoid being critical of those serving in responsible priesthood callings. Show yourself to be loyal. Cultivate the disposition

The emphasis on loyalty to the leaders of the church and its institutional interests over reliance on individual conscience is wholly consistent with section 134, but not with Madisonian thought. Though it was often not explicitly stated, the Founders understood “freedom of conscience” to mean freedom of *religious* conscience.⁴⁴ Section 134 is thus directed primarily to the infringement of individual religious conscience by government and has little to say about rights of conscience against private organizations. Section 134 rejects any right of religious associations to discipline their members by inflicting physical punishment or interfering with their property or other natural or civil rights, but it nevertheless affirms the right of such associations to expel nonconforming members.⁴⁵ Madison, on the other hand, believed that individual conscience was prior to the demands of “civil society,” and not merely to those of government *simpliciter*.⁴⁶ He clearly valued individual conscience over loyalty to

to sustain and to bless. . . . Pray continually for your leaders. Never say ‘No’ to an opportunity to serve in the Church. If you are called to an assignment by one who has authority, there is but one answer. It is, of course, expected that you set forth clearly what your circumstances are, but any assignment that comes under call from your bishop or your stake president is a call that comes from the Lord.”), *available at* [http://library.lds.org/nxt/gateway.dll?f=templates\\$fn=default.htm](http://library.lds.org/nxt/gateway.dll?f=templates$fn=default.htm). Although Latter-day Saints generally disclaim that God requires “blind” obedience to the church and its leaders, a basic doctrinal tenet of the church holds that members should comply with the directions and teachings of the church and its leaders, even when one disagrees with them or does not understand the reason for them. *See, e.g.*, Cheryl Brown, *Obedience*, in 3 *ENCYCLOPEDIA OF MORMONISM*, *supra* note 6, at 1021. Frequently cited as authority for this doctrine is an LDS scripture in which Adam is praised for performing ordinances despite being ignorant of their meaning and significance. *See Moses 5:6* (Pearl of Great Price) (“And after many days an angel of the Lord appeared unto Adam, saying: Why dost thou offer sacrifices unto the Lord? And Adam said unto him: I know not, save the Lord commanded me.”).

44. *See, e.g.*, Hamburger, *supra* note 27, at 919 & nn.38–39 (summarizing founding-era statements which tended to conflate the free exercise of religion and the freedom of conscience, but which tended to distinguish both from the freedoms of speech and press).

45. *Doctrine and Covenants* 134:10.

46. *See, e.g.*, James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), *reprinted in* 5 *THE FOUNDERS’ CONSTITUTION* 82 ¶ 1 (Philip B. Kurland & Ralph Lerner eds. 1987):

It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. . . . [E]very man who becomes a member of any particular Civil Society [must] do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no mans [sic] right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance.

the collective, whether it was public or private.⁴⁷ Indeed, the church that the Framers viewed with the most suspicion, with even greater suspicion than the Church of England, was the Roman Catholic Church—precisely that church which demanded unquestioning obedience to a hierarchical leader.⁴⁸ That Joseph Smith himself was accused of “popery”⁴⁹ only underlines the distance that Joseph’s contemporaries perceived between Madisonian thought, on the one hand, and the attitudes of the LDS Church, on the other.

I am not suggesting that the priority of institutional loyalty to individual conscience is necessarily wrong, insofar as it describes the contemporary LDS Church. One of the points of having a living prophet is that he will presumably declare things that past prophets did not. And part of being a Latter-day Saint is accepting that we have a hierarchical governing structure that requires obedience to the President of the church, the First Presidency, and the Twelve Apostles as prophets, seers, and revelators of the divine will.⁵⁰ Given the challenges of accelerated and international growth in the church, in the face of much cultural, political, and legal hostility, it is a

47. See Dante Germino, *James Madison: Philosophical Pluralist*, 27 MOD. AGE 42 (1983) (arguing that the theory of pluralism argued by Madison, see THE FEDERALIST NO. 10, sought to preserve the uniqueness of individual thought from the pressure towards group conformity exerted by collective notions like “public interest” and “public vision”); see also I UROFSKY & FINKELMAN, *supra* note 29, at 182–86 (contrasting Federalist and Republican reactions to the Sedition Act of 1798 and the Presidential Election of 1800).

48. See, e.g., JAMES HENNESEY, AMERICAN CATHOLICS 56 (1981) (quoting Samuel Adams as having declared that “much more is to be dreaded from the growth of Popery in America than from the Stamp Act”); see also Letter from James Madison to Rev. Adams (1832) (“In the Papal system, Government and Religion are in a manner consolidated, & that is found to be the worst of Govts [sic].”), reprinted in 5 THE FOUNDERS’ CONSTITUTION 107 (Philip B. Kurland & Ralph Lerner eds., 1987); cf. JOHN LOCKE, A LETTER CONCERNING TOLERATION 50 (James H. Tully ed., 1983) (1689) (“That Church can have no right to be tolerated by the Magistrate, which is constituted upon such a bottom, that all those who enter into it, do thereby, *ipso facto*, deliver themselves up to the Protection and Service of another Prince. For by this means the Magistrate would give way to the settling of a foreign [sic] Jurisdiction in his own Country . . .”).

The imposition of civil disabilities on Anglicans was rare following the Revolutionary War, whereas political and civil restrictions on Roman Catholics proliferated. See MARTIN MARTY, AN INVITATION TO AMERICAN CATHOLIC HISTORY 71–77 (1986); Stephen Vicchio, *The Origins and Development of Anti-Catholicism in America*, in PERSPECTIVES ON THE AMERICAN CATHOLIC CHURCH 85 (1989).

49. Roger Barrus, *Politics: Political History*, in 3 ENCYCLOPEDIA OF MORMONISM, *supra* note 6, at 1099.

50. JOHN A. WIDTSOE, PRIESTHOOD AND CHURCH GOVERNMENT IN THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 262 (rev. ed. 1954).

reasonable judgment, to say the least, that obedience and loyalty are more important than individual conscience, religious or otherwise. What we must recognize in this regard, however, and what I would suggest to Professor Smith, is that this subordination of individual conscience to church collective is anti-Madisonian.

* * *

Given the LDS belief in an inspired Constitution, the tendency of Latter-day Saints to adopt the framers' views as their own is understandable. But the framers were a diverse lot, and many of their beliefs, including their religious beliefs, are not compatible with contemporary LDS beliefs and practices. Before we as a church celebrate any discovery of Madisonian principles in section 134, perhaps we ought first to think carefully about whether we actually believe them.