

Faith in Law

A VIEW OF THE UTAH STATE CAPITOL AND THE
TEMPLE OF THE CHURCH OF JESUS CHRIST OF
LATTER-DAY SAINTS IN SALT LAKE CITY. (ISTOCK.COM)

David F. Levi interviews Dallin H. Oaks, a leader of The Church of Jesus Christ of Latter-day Saints and former justice of the Utah Supreme Court, on faith, democracy, and how believers and nonbelievers can work together toward a more free and fair society for all.

At a time when Americans seem so divided on many issues, including issues related to religious belief and practice, the perspectives of faith leaders who can guide the words and actions of followers are especially important to the public discourse. Dallin H. Oaks is first counselor in the presidency and president of the Quorum of the Twelve Apostles of The Church of Jesus Christ of Latter-day Saints, and — as a former lawyer, law professor, university president, and state supreme court justice — he offers unique insight on the role of faith in public life and service.

Born in Utah in 1932, Oaks has had two long careers — one in the law, and one as a leader of his church. Today, he is second in seniority among his church's ordained apostles and is very active in leading The Church of Jesus Christ of Latter-day Saints, which has more than 17 million members in 208 nations and territories. (The church

has been colloquially referred to as the Mormon Church, though that is not the church's preferred name.) A graduate of Brigham Young University and of The University of Chicago Law School, Oaks practiced law and was a professor at The University of Chicago before becoming president of Brigham Young University (BYU) in Provo, Utah, in 1971. In 1973, he established the J. Reuben Clark Law School at BYU. He served as a justice of the Utah Supreme Court from 1980 until his resignation in 1984 to accept a calling to church leadership.

David F. Levi, the James B. Duke and Benjamin N. Duke Dean Emeritus of Law at Duke Law School and director emeritus of the Bolch Judicial Institute, interviewed Oaks as part of his *Judgment Calls* series, which highlights the personal lives and careers of distinguished judges. This interview was conducted in late 2022 for publication in *Judicature*. It has been lightly edited for style.

As you look back on your legal career, might you reflect on what stands out to you now — what was most challenging and what was most satisfying to you?

The most satisfying parts of my 30 years in the legal profession — the things I remember most vividly and recall with the greatest pleasure — were circumstances where I related to and helped individual persons. This was mostly where I was fulfilling a court-imposed responsibility to represent an indigent client. Practicing, as I did, in a large law firm with mostly corporate clients, the most unfavorable experiences were those where I was being consumed by legal drudgery — preparing for or responding to discovery efforts in large corporate litigation.

Many of our readers are judges, and I am sure that they would be interested in any reflections you have on your time as a justice of the Utah Supreme Court. Did you enjoy that work?

In general, I enjoyed my three-and-a-half years on the Utah Supreme Court more than any time in the rest of my 30 years in the legal profession. Why was this? Partly because this was a time of great learning, since the cases in that court mostly involved areas of the law with which I was not familiar from my earlier activities or were matters of first impression in the law. I felt that my personal desires and experi- ▶



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ences matched best with the writing activities of an appellate judge. I loved writing opinions that would clarify the law in a doubtful area, improving lawyers' abilities to help their clients avoid expensive litigation.

You are a person of deep faith. Can you speak about how your faith and work in the legal profession came together or might have been in conflict?

As a person of faith, I believe in God and his laws. The idea of obedience to law is ingrained in Latter-day Saints. An important divine revelation through Joseph Smith, the founding prophet of The Church of Jesus Christ of Latter-day Saints, declares that

“There is a law, irrevocably decreed in heaven before the foundations of this world, upon which all blessings are predicated —

“And when we obtain any blessing from God, it is by obedience to that law upon which it is predicated.”¹

As to possible conflict between my religious faith and my legal work, I was fortunate that, in my 30 years in the legal profession (as a law student, practicing lawyer, professor of law, president of a university establishing a new law school, and justice on the Utah Supreme Court), I rarely experienced any such conflict. Instead, I was blessed with associates who respected my faith, and I encountered no circumstances that pressured me to compromise my ideas of right and wrong as I represented clients or taught or sought to improve the law. My personal experiences almost always affirmed my belief that our legal profession was generally committed to its highest goals of working within the Constitution and

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laws of the United States to serve the needs of its citizens and residents. Thus, my religious faith, which taught me the importance of service, affirmed the highest ideals of my work in the legal profession.

In your talk, “The Beginning and End of a Lawyer,” you speak about your mentors in the law. You have highlighted four “fathers” in the law, each of whom taught you something that cannot be learned any other way. Those four are my father, your dean and colleague, Edward H. Levi; your stake president [regional church leader], John K. Edmunds; Chief Justice Warren, for whom you clerked; and Justice Lewis F. Powell, with whom you worked before he was a justice, when he was president of the American Bar Association. Could you speak to the impact each of these men had on your development?

I have publicly recognized these four men as my earliest mentors in the law — “fathers in the law,” I termed them.

In the order that they taught me, my first father in the law was Dean Edward

H. Levi of The University of Chicago Law School. By example and precept, he introduced me to the goodness of the law and the legal profession: The law is generally founded on what is right and good and workable; the legal profession is not just engaged in earning a living; and lawyers and judges should be engaged in making the law and its administration what it ought to be for the good of the people and the country.

I saw Dean Levi as a man without self-promotion who was fundamentally grounded in what he believed to be right. He was a superb teacher, not just concerned with the content of the ever-changing law, but primarily with teaching law students and the profession how to think straight, on sound principles. He was my mentor, beginning with his positive recommendation that secured me a clerkship in the U.S. Supreme Court as I graduated from law school. Later, when he proposed that I leave the practice of law and join his University of Chicago law faculty, he spoke respectfully of my religious faith and belief in personal revelation when he said, “I know you will want to pray about this decision.”

John K. Edmunds was my stake president (regional leader) in The Church of Jesus Christ of Latter-day Saints during the first eight years of my residence in Chicago. He was both an outstanding lawyer and an exemplary Latter-day Saint. I came to know him better than any practicing lawyer to that point in my life. This remarkable man had a profound influence on my spiritual growth. His example and his sermons inspired and motivated me and had a uniquely powerful influence in helping me keep my feet unwaveringly on the path of faith during the often-troubling years of graduate study. He was my spiritual role model.

My first employer in the law was Chief Justice Earl Warren of the United States Supreme Court, for whom I clerked from 1957 to 1958. I loved clerking for him. He was a kind and considerate employer, friendly, and utterly without guile. I developed a profound affection and respect for him. He was a mentor whose association has benefited me to this day.

From his long public service, notably as attorney general and governor of California, Earl Warren was well-experienced and mature in judgments about the operations of government. He was impressive as the presiding officer of the nation's highest court and of the judicial branch. With youthful arrogance, I once confided to my journal that "the Chief isn't much on splitting hairs with a fine legal distinction, but he's long on good old common sense." He was an exemplary public servant. Even when my conservative inclinations sometimes put me at odds with some of his judicial approaches, my experience with the Chief taught me how persons of differing opinions, such as different lawyers or lawyers and their clients, can work side by side with respect and even affection.

The fourth of my fathers in the law was Lewis F. Powell, a Virginia lawyer and former president of the American Bar Association [ABA], who later became a justice of the United States Supreme Court. During the course of my career as a law professor, Powell hired me to be the executive director of the American Bar Foundation, the ABA's legal research arm, for which he was chairman of the board. I esteemed him for his many great qualities, but the thing that makes him one of my foremost mentors was what he taught me about the respective roles and functions of a chairman of the board and the chief executive officer of an organization. I had never served on a board or worked under the direction of a board, so this was an entirely new experience for me.

I could not have had a better teacher than Lewis Powell. He was brilliant in defining the respective responsibilities of chairman, chief executive, and staff. He was also a persuasive teacher of how to present matters to obtain fruitful discussions in the board and to create clear board decisions to guide the staff. Each of those roles provided valuable preparation for my future service. To cite only two examples, I was later to work with a board of trustees when I was president of Brigham Young University, and I served as chairman of the board of the Public Broadcasting Service.

In the same talk, you also speak about the continued importance of your legal experience and understanding of the ways of the law, even after you were no longer a lawyer. Do you still find this to be true almost 40 years later? Has your career in the law informed your church service?

Since graduating from law school, I have had 65 years of full-time employ-

ment; less than half of that has been as an active member of the legal profession. However, all of my employment has been significantly enhanced by my legal training, and that has rarely been because of my knowledge of some contents of the law.

Legal training is valuable for other reasons. It teaches how to analyze and approach problems — how to identify and focus on the important issues and how to separate what is important from what is unimportant. One learns to identify which facts are relevant to resolving issues in the context of laws or policies and how those facts can be proven. Legal training also teaches the importance of "due process" (to use the legal term) to enhance the likelihood that a decision will be fair, and will be seen as fair, to persons and organizations who relate to one another in a society governed by laws and policies. Finally, I have learned that the practice of law offers insights and opportunities to reduce strife and serve mercy as well as justice. This is of special benefit in my church service.

Last year you gave an important talk to American members of your church on "The Divinely Inspired Constitution."² As the title suggests, you, like others before you, including George Washington, consider that the U.S. Constitution is divinely inspired. You point to the many compromises and difficulties in both its drafting and ratification, as well as the perilous position of the country in those early days. I learned from your talk that it is part of the scripture of your church that the U.S. Constitution was established "by the hands of wise men whom [the Lord] raised up unto this very purpose" (Doctrine & Covenants 101:80). Could you speak about your constitutional scholar- ▶

ship and your religious belief that the Constitution is divinely inspired?

Our Constitution has served us well, enhancing freedom and prosperity during the changed conditions of nearly 250 years. As a student of history, I am impressed that the United States Constitution is the oldest written constitution still in force today. At a time when all the world's peoples were ruled by kings or tyrants, the Framers had the unique opportunity to establish a constitutional government founded on the sovereignty of the people. The various colonies were so deeply divided on fundamental issues that the success of their effort was "little short of a miracle," according to George Washington.³

I consider the United States Constitution to be inspired because God has declared it so, as I explain later, and because its many wise principles reflect God's guiding revelation to its Framers. The doctrine of the church I represent and the beliefs of many other religious people maintain that believers must have the freedom and protection of the law to make choices and carry out the activities required by God's plan for the salvation of his children. That is why the United States Constitution and its modeling influence on the constitutions of so many other nations is so meaningful to the worldwide Church of Jesus Christ of Latter-day Saints.

Our doctrinal position that the United States Constitution is divinely inspired comes from an 1833 revelation to Joseph Smith, our founding prophet. To guide the members of our church in how they should react to the losses suffered when mobs expelled them from Jackson County, Mo., the Lord directed them to continue to seek redress from government authority:

Constitutional rights are not absolute. ... Advocates for religious freedom should yield to the reality that in a nation with citizens of many different religious beliefs or disbeliefs, the government must sometimes limit the right of some to *act* upon their beliefs when it is necessary to protect the health, safety, and welfare of all.

"according to the laws and constitution of the people, which I have suffered to be established, and should be maintained for the rights and protection of all flesh, according to just and holy principles;

"That every man may act in doctrine and principle . . . according to the moral agency which I have given unto him, that every man may be accountable for his own sins in the day of judgment.

"Therefore, it is not right that any man should be in bondage one to another.

"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."⁴

This revelation teaches us great truths. *First*, we learn that God grants us moral agency and, consequently, we are not only free to choose and to act according to our choices, but we are also accountable to God for those choices. *Second*, the most desirable political condition for the exercise of agency is maximum freedom for persons to act personally without tyrannical dictate. *Third*, we

are instructed that slavery or human bondage in any form is an evil that interferes with the God-given right to exercise moral agency. *Finally*, the revelation explains that God "suffered to be established" the United States Constitution "by the hands of wise men" raised up for this purpose, which he identified as the maintenance of "the rights and protection of all flesh, according to just and holy principles." For all the above reasons, the members of the Church of Jesus Christ honor the United States Constitution and seek to establish and apply its inspired principles in all the nations in which they reside.

In the same talk, you say that the Constitution is always a work in progress, and that not every provision is divinely inspired and sanctioned. You note some of the glaring imperfections in the original Constitution, primarily its tolerance of slavery. You identify certain fundamental principles in the Constitution that are divinely inspired. Could you explain?

Our belief that the United States Constitution was divinely inspired

does not cause us to believe that God revealed every word and phrase. The Constitution was not perfect in its first iteration and, through persistent application of its inspired principles, has had to be strengthened and corrected over time. Examples include the amendments abolishing slavery and giving women the right to vote.

By my own scholarship I have identified five principles of constitutional government that I deem divinely inspired:

1. The source of government power is the people, not a king or queen ruling by divine right.
2. Delegated power divided between the nation and its subsidiary states.
3. The separation of powers among independent executive, legislative, and judicial branches of government.
4. The cluster of vital guarantees of individual rights and specific limits on government authority in the Bill of Rights, adopted by amendment just three years after the Constitution went into force.
5. The vital purpose of the entire Constitution, that the people are to be governed by *law* and not by *individuals*, so that our loyalty is to the *Constitution* and its principles and processes, not to any *office holder*.

Your talk emphasizes the importance of compromise even on matters of great importance. Can you expand on that point?

How do we live through this time of toxic political partisanship? *Compromise* must obviously be sought, but that is not a good label for our goal, because it seems to focus on what is given up, not what is gained. “*Principled accommodation*” is a better

label. We approach this by seeking an accommodation under which contending parties identify and preserve the deepest interests of the greatest number of parties through mutual respect, principled toleration of differences, and shared commitment to the common good.

For example, our country is still painfully unsettled in attempting to manage the relationship between religious freedom and nondiscrimination. We need to seek a better way for the respective advocates of religious freedom on the one hand and nondiscrimination regarding sexual identity and sexual orientation on the other to relate to one another as fellow citizens dedicated to maintaining a civil society. We need each other. We need a more workable balance between these important rights. Our common goal should be laws that serve the rights of all: “one nation under God, indivisible, with liberty and justice for all.”

I advocated such a position in a recent talk at the University of Virginia.⁵ There, I spoke hopefully of the possibility of reconciling existing conflicts between the proponents of religious freedom and nondiscrimination — two competing constitutional rights. I tried to chart a way that honors both the free exercise of religion and the equal protection of the law. I have been gratified that others, such as Professor William Eskridge of Yale Law School, have expressed interest in pursuing the possibility of principled negotiation and peaceful settlement of these painful contests.⁶

In this effort, we should be especially wary of the idea that one set of rights should thoroughly trump another in all circumstances. We should not expect or seek total dominance for our own positions. Constitutional rights are not absolute. For example, even though

the First Amendment obviously guarantees the right to *exercise* or practice religious beliefs and affiliations, that vital right is not absolute. Advocates for religious freedom should yield to the reality that in a nation with citizens of many different religious beliefs or disbeliefs, the government must sometimes limit the right of some to *act* upon their beliefs when it is necessary to protect the health, safety, and welfare of all.

Where there is genuine conflict, one constitutional right should not be invoked to try to cancel another constitutional right. Both need to be balanced legally and negotiated politically in a way that upholds both essential rights to the greatest extent possible and, thereby, serves the common good.

Our federal courts have had almost a century of trying to develop a principled standard for balancing conflicts between the competing constitutional rights of free exercise and nondiscrimination. This commendable effort has not succeeded. Most legal scholars have criticized the workability of the resulting body of case law. Some even doubt whether it is possible to articulate an overall principle for resolving these competing rights.

Perhaps we must continue with the current state of dissatisfying uncertainty, resolving prime conflicts mostly on an individual basis. But perhaps litigation should not continue to be the first recourse in seeking to resolve these conflicts. What is needed is not a declaration of the winner in a legal contest, but a body of wise public policy. Courts are constitutionally limited to resolving the specific cases before them. They are ill-suited to resolving the overarching, complex, and comprehensive policy-making that is required when there are conflicts between various great values in a pluralistic society. ►

This was illustrated in Utah’s success in resolving a head-to-head conflict between free exercise of religion and nondiscrimination in housing and employment. This effort began with a Salt Lake City ordinance that was first proposed in 2009 and finally more broadly resolved in a state law passed in 2015.⁷ It took about six years to work out the reconciliations that granted both sides significant benefits — a win-win outcome — that could not have been obtained without the balancing of interests made possible by the dynamics of principled negotiations in the legislative process.

Toward the end of the talk, you speak about a citizen’s responsibilities under an inspired constitution. You note that the Founders often spoke of the need for virtue in the citizenry. What are these responsibilities, and what is the nature of this virtue in our time?

The Church of Jesus Christ of Latter-day Saints’ official declaration of belief regarding governments and laws in general gives Latter-day Saints an increased responsibility to uphold and defend the United States Constitution and its principles of constitutionalism. It declares that “governments were instituted of God for the benefit of man; . . . that he holds men accountable for their acts in relation to them,” and that all are “bound to sustain and uphold the respective governments in which they reside.”⁸

Consequently, Latter-day Saints are committed to be law-abiding citizens, supportive of their national, state, and local governments. We believe that God charges us to exercise our influence within the framework of our national constitutions and laws and, on contested issues, to act civ-

Religious ideals struggle to be taught and practiced in a hostile or repressive environment. Religious faith and practice need religious freedom, and I believe that this freedom is most secure if it is defined to protect nonbelievers as well as believers.

ily and peacefully to moderate and to unify. Our members are also responsible to seek out and support wise and good political leaders who will further inspired principles in their public actions.

The late Jonathan Sacks, the chief rabbi of the United Kingdom, in writing about the need for faith, including religious faith, said: “Without faith in our fellow citizens, we could not have a free society.” Do you agree? How do we maintain, support, and recover this kind of faith “in one another” in such a diverse country with so many perspectives and experiences, so much history, and so many points of possible friction?

We surely need faith to strengthen and ensure our free society. Religious faith — with its teachings of accountability to God — is a most effective instrument for that purpose. In addition to making this point, the late Rabbi Sacks also taught that religion is “the most powerful community builder the world has known. . . . [T]he best antidote to the individualism of the consumer age.”⁹ The Latter-day Saint belief that we are all children of God is the reason for our desire to use our

religious freedom to help the communities in which we live while seeking to interact peacefully with the culture and religious differences of others. And because we believe in individual repentance, through which people can abandon past misdeeds and truly change, we are better situated to live with shortcomings in how the children of God — ourselves included — treat one another.

Of course, religious ideals struggle to be taught and practiced in a hostile or repressive environment. Religious faith and practice need religious freedom, and I believe that this freedom is most secure if it is defined to protect nonbelievers as well as believers.

People without religious faith can have other means to encourage the kind of confidence and trust in one another that will unite us to work for a free society.

President Oaks, thank you very much for sharing your reflections on your life of service in the law and in your church. I so appreciate your thoughtful assessment of the role of religious communities in upholding and sustaining our democracy and our Constitution and your hopeful view that people of different faiths and

beliefs can come together to ensure that we all benefit from the promises and rights in our Constitution. It is an honor to be in discussion with you in the pages of *Judicature*.

Thank you for the significant questions you have posed. I hope our discussion is useful to many others who are also committed to the wise and inspired principles in our Constitution: individual freedoms and separated powers of governance.

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- ¹ THE DOCTRINE AND COVENANTS OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, 130:20-21, <https://www.churchofjesuschrist.org/study/scriptures/dc-testament/dc/130?lang=eng>.
- ² Dallin H. Oaks, *Defending Our Divinely Inspired Constitution*, LIAHONA, May 2021, 105 at 108, <https://www.churchofjesuschrist.org/study/liahona/2021/05/51oaks?lang=eng>.
- ³ George Washington to Lafayette, 7 February 1788 at <https://founders.archives.gov/documents/Washington/04-06-02-0079>.
- ⁴ DOCTRINE AND COVENANTS 101: 77-80, <https://www.churchofjesuschrist.org/study/scriptures/dc-testament/dc/101?lang=eng>.
- ⁵ Dallin H. Oaks, "Going Forward with Religious Freedom and Non-Discrimination," University of Virginia, Nov. 12, 2021, at <https://mormonstudies.as.virginia.edu/event/dallin-h-oaks-going-forward-with-religious-freedom-nondiscrimination/>.
- ⁶ See William K. Eskridge, "Mediating LGBTQ Equality & Religious Liberty Clashes," at <https://mormonstudies.as.virginia.edu/event/william-eskridge-mediating-lgbtq-equality-religious-liberty-clashes/>.
- ⁷ Oaks, *supra* note 5.
- ⁸ DOCTRINE AND COVENANTS 134:1, 5, <https://www.churchofjesuschrist.org/study/scriptures/dc-testament/dc/134?lang=eng>.
- ⁹ Jonathan Sacks, *The Moral Animal*, THE NEW YORK TIMES (Dec. 23, 2012), <https://www.nytimes.com/2012/12/24/opinion/the-moral-animal.html>.



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