

Property, Contract, and the Market: A Mormon Perspective

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Introduction

Numerous contemporary polysyllables claim to capture some essence of the current human condition. Among the competitors is “globalization,” a nebulous term that refers to the acceleration of international commerce, the decreasing importance of national borders, and the increasing power of the market over the state.¹ Large swaths of the globe and of human activity are increasingly governed less by the political ideologies of the past – nationalism, communism, socialism, etc. – and more by the demands of a global marketplace. Of course, this transformation can be seen as the triumph of one ideology in particular: free-market capitalism. What, if anything, does Mormonism have to say to its followers – and those interested in their thinking – about the role of the market in the modern world? It has been observed that “Mormonism is less a set of doctrines than a collection of stories.”² Accordingly, debates about proper Mormon attitudes toward the market frequently hinge on the normative implications of Latter-day Saint history, which – given theological commitments to continuing revelation and divine intervention in the Mormon restoration – is seen at least in part as a working out of God’s purposes in the world. Adopting this model, Mormon progressives have offered powerful criticisms of free-market capitalism. These arguments, however, rest in part on an incomplete view of Mormon economic history. Mormon experience can be mined for a very different approach to markets, one that maintains a distinctive set of economic commitments, responds to the progressive Mormon critique, and allows Mormons to appreciate the considerable virtues of modern markets.

As an empirical matter, the vast majority of American Mormons are enthusiastic supporters of free-market capitalism. Mormon executives inhabit top corporate board rooms and Mormon academics teach at leading business schools, while books with titles such as *The Mormon Way of*

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¹ See Thomas L. Friedman, *The Lexus and the Olive Tree: Understanding Globalization*, rev. ed. (New York: Farrar, Straus and Giroux, 2000), Thomas L. Friedman, *The World is Flat: A Brief History of the 21st Century* (New York: Farrar, Straus and Giroux, 2005).

² Richard Lyman Bushman, “What’s New in Mormon History: A Response to Jan Shipp,” *The Journal of American History* 94/2 (2007): 517-521, 518.

*Doing Business*³ testify to the wide-spread participation of Mormons in the modern marketplace. For some thinkers, however, this fact is something of a historical irony, if not evidence of a Mormon apostasy on questions of economics. After all, in the nineteenth century Mormons were noted for their apparent rejection of free-market capitalism in favor of communitarian forms of economic production and egalitarian attitudes toward the distribution of economic wealth, a vision of the godly community that they called Zion. Writing shortly after the fall of communism, noted Mormon historian Richard Bushman sought to temper Latter-day Saint enthusiasm for the market by invoking this past:

Zion was firmly rooted in freedom and individual initiative, but not in selfishness. Joseph Smith envisioned stewardship to be at the heart of the new order. In Joseph's Zion, men and women did not receive wealth or authority for their own gain and glory. The Lord granted them stewardships for the good of others – their families first, and then the larger community. A steward's chief responsibility was to bless others. That sense of working for the good of all underlies the description of Book of Mormon society after Christ's visit. "They had all things common among them; therefore there were not rich and poor, bond and free, but they were all made free, and partakers of the heavenly gift" (4 Ne 1:3). The clash of social classes disappears when the common good governs.⁴

In contrast, writes Bushman, "Capitalism is merciless in its treatment of people."⁵ Other Mormon social critics – most notably Hugh Nibley – have been even harsher, insisting that modern Mormon allegiance to free-market capitalism runs counter to the fundamental message of the Mormon restoration.⁶ The Mormon mainstream in the United States has been largely indifferent to these progressive critics, and Mormon apologists for free-market capitalism have made little sustained effort to draw from the Mormon historical experience. Rather they have simply noted that contemporary Mormon prophets have failed to offer the same condemnation of free-market capitalism and that nineteenth-century Mormon leaders criticized various forms of secular socialism.⁷

³ Jeff Benedict, *The Mormon Way of Doing Business: Leadership and Success Through Faith and Family* (New York: Warner Business Books, 2007).

⁴ Richard Lyman Bushman, *Believing History: Latter-day Saint Essays*, Reid L. Neilson & Jed Woodworth eds. (New York: Columbia University Press, 2004) 171.

⁵ *Ibid* 170.

⁶ See Hugh Nibley, *Approaching Zion* (Salt Lake City: Deseret Book, 1989).

⁷ See Phillip J. Bryson, "In Defense of Capitalism: Church Leaders on Property, Wealth, and the Economic Order," *BYU Studies* 38/3 (1999): 89-107.

Whatever the substantive merits of their arguments, the progressive Mormon critics are surely correct when they point out the apparent disconnect between current Mormon attitudes and Mormon historical experience. Indeed, it is striking the extent to which Mormon apologists for the market treat the nineteenth-century economic experience of the Latter-day Saints as of little more than antiquarian interest. The result is a theological orientation toward the market that is deeply unsatisfying both because it treats many of the core historical narratives of Mormonism as essentially meaningless – thereby undermining Mormon spirituality, which necessarily revolves in part around stories of revelation, restoration and Zion building in the nineteenth century – and because it stifles Mormon discussions by cutting them off from a rich vein of Mormon thinking about political and economic issues. Some, of course, have suggested that Mormonism would benefit from a repudiation of its radical past. Such an attitude, however, is mistaken. As Bushman has observed, that past “is a cultural resource that can be drawn on in times of need a mine of possibilities.”⁸ This mine of possibilities, however, contains resources for a positive assessment of markets that nevertheless takes seriously the normative legacy of the nineteenth-century quest for Zion.

Mormon Economic History

According to the standard story of Mormon economic history, nineteenth-century Mormons sought an alternative to free-market capitalism in collective economic institutions and cooperative economic practices. During the lifetime of Joseph Smith organizations such as the United Firm carried forward communal economic objectives such as publishing church materials and overseeing the pooling and redistribution of property among Latter-day Saints. A generation later, Brigham Young created even more ambitious collective enterprises in the Great Basin, pushing economic cooperatives known as United Orders and providing centralized economic planning through organizations such as the later School of the Prophets, Zion’s Central Board of Trade, and Zion’s Co-operative Mercantile Institution (ZCMI). The American public, however, associated Mormon economic communitarianism with theocratic political practices and plural marriage, making it an object of the massive federal crusade against the

⁸ Event Transcript, Mormonism and Democratic Politics: Are They Compatible?, Monday, May 14, 2007, Key West, Florida, Pew Forum on Religion & Public Life, available online at <http://pewforum.org/events/?EventID=148> (accessed June 16, 2007)

church in the 1880s. As a result, Mormons abandoned their communitarian economic ambitions at the close of the nineteenth century.⁹

This self-conception of the Mormon past has been sharply influenced by the fact that the dean of Mormon economic history, Leonard Arrington, was trained as an economist in the 1930s and cut his intellectual teeth working in New Deal-era price-control bureaucracies.¹⁰ Given the dominance of neoclassical ideas in the profession today, it is easy to forget that in the 1930s and 1940s economists were staunch defenders of forceful intervention in the economy. Far from producing free-market evangelists, economics departments saw their role as producing the technocrats who would tame the excesses of the business cycle through the enlightened management of powerful bureaucracies both government and private. Given this intellectual milieu, it is not surprising that when Arrington turned his attention to Mormon history he was most fascinated by its centralizing economic institutions. To read Arrington is to conceptualize the economic experience of the Latter-day Saints in the nineteenth-century as a series of centrally planned economic enterprises presided over by benevolent and powerful priesthood leaders.¹¹ In this narrative – much like the Progressive and New Deal historical narratives that decisively influenced it – the market becomes either invisible or else a realm of greed and random force from which one seeks redemption. This is the narrative on which Mormon critics of free-market capitalism draw. It is possible, however, to tell the economic story of Mormonism in different, more market-friendly terms. To do so, however, requires an appreciation of the role of Mormon law in nineteenth-century Mormon economic experience.

Mormon Law

The collective economic experiments lionized by Mormon progressives were in many ways a rather minor part of Mormon economic experience. For example, the United Orders pushed by Brigham Young were generally very short-lived. Most of them rapidly folded or else transformed themselves into for-profit corporate enterprises with controlling church ownership. In other words, the United Orders were the exception rather than the rule in the economic experience of building Zion in the

⁹ See generally Leonard J. Arrington, *Great Basin Kingdom: An Economic History of the Latter-day Saints, 1830-1900*, new ed. (Urbana: University of Illinois Press, 2004), Leonard J. Arrington, Feramorz Fox & Dean May, *Building the City of God: Community and Cooperation Among the Mormons*, 2nd ed. (Urbana: University of Illinois Press, 1994).

¹⁰ See Leonard J. Arrington, *Adventures of a Church Historian* (Urbana: University of Illinois Press, 1998), 27.

¹¹ See generally Arrington, *Great Basin Kingdom*; Arrington, Fox & May, *Building the City of God*.

nineteenth century. The same was true of other centralized Mormon economic institutions such as Zion's Central Board of Trade.

This does not mean, of course, that the economic experience of nineteenth-century Mormons was without religious content, simply mirroring developments in the non-Mormon world; far from it. Economics was central to nineteenth-century Mormonism. Strikingly, however, the most successful Mormon economic institutions in the nineteenth century facilitated markets rather than rejecting them. The system of tithing is an excellent example of this. A revelation published by Joseph Smith in 1838 declared that all Latter-day Saints "shall pay one-tenth of all their interest annually; and this shall be a standing law unto them forever . . . saith the Lord." (D&C 119:4) Members of the church made in-kind donations to their local "bishop's storehouse." Those working on church projects such as the construction of the Salt Lake Temple were paid with "tithing scrip" that could be redeemed for merchandise at the storehouse. This scrip then circulated as money. The presence of a relatively stable currency (something generally not available in the cash-starved economies of frontier America) facilitated the development of market exchange by lowering transaction costs. It is easier to purchase something with scrip than to barter with a wagon load of grain. Currency thus encouraged markets. Furthermore, in contrast to the system of United Orders, tithing scrip was an economic institution that endured for decades.

One of the chief examples of a market-facilitating Mormon institution was the church court system.¹² Nineteenth-century Latter-day Saints were expected to resolve their civil disputes in the church judiciary. Not surprisingly, most of these disputes involved economic issues of property and contract. This legal system facilitated economic exchange. Effective markets are made possible by legal entitlements. There are few exchanges of property without property rights. There are few long term contracts without contract rights. By pushing disputes over such things into church courts, however, Mormonism arrogated to itself the task of defining these central market institutions. Again, in contrast to the United Orders, the expansive jurisdiction of the ecclesiastical courts was extremely long lived, lasting for nearly 90 years. For example, the first contract case decided by a Mormon court was in December, 1831 and as late as 1918 Mormon Apostle James E. Talmage was urging the Saints in the pages of

¹² For a summary of civil dispute resolution in nineteenth-century Mormon courts see Nathan Oman, "Preaching in the Courthouse and Judging in the Temple," forthcoming and Part III ("The Mormon Ecclesiastical Court System") in Edwin Brown Firmage & Richard Collin Mangrum, *Zion in the Courts: A Legal History of the Latter-day Saints, 1830-1900* (Urbana: University of Illinois Press, 1989).

the church-owned *Improvement Era* to foreswear secular courts for church tribunals.¹³ The church court system is a particularly rich place to think about Mormonism and markets because the resolution of contract and property disputes is ultimately about conduct *within markets*. Rather than jeremiads against capitalism, the records of the church courts show a much more nuanced picture of people struggling to make sense of how a worker, merchant, or banker in Zion should act.

Often, discussions of capitalism proceed at a very high level of generality, speaking of entire social systems. Looking at the issue through the lens of the law, however, allows us to approach it from the opposite direction, denaturing the question of capitalism into the concrete legal institutions that make markets possible. Most people — including those who think deeply about economics — have a tendency to assume that property and contract are static, simple institutions and hence are unlikely to see the ways in which Mormon adjudication tracks and departs from secular regimes. The reality, of course, is that what we mean by property and contract changes from place to place and epoch to epoch. Hence, for example, it makes sense to think about Anglo-American ideas of contract versus Roman or Civilian ideas of contract. Likewise, it makes sense to think about Mormon concepts of property and contract. Frequently, differing legal regimes rest on differing normative commitments. Legal theory consists in part of a kind of interpretive archeology of legal institutions whereby the normative commitments imminent in legal practice are made explicit. This process of interpretive reconstruction allows us to mine Mormon legal experience for a set of normative commitments about property and contract. Therein lies a useful way of thinking about Mormonism and the market. Two concrete disputes – one over property and one over a contract – provide illustrations.

Property

In 1831, Joseph Smith received a revelation setting forth what became known as the “Law of Consecration and Stewardship” (See D&C 42). All members of the new church were to “consecrate” their property to the Lord. This was done by executing a deed transferring land and other assets to the church. Each member then received in return a parcel of property as their particular “stewardship.” In Jackson County, Missouri, which an earlier revelation had designated as the location of the New Jerusalem to be founded by the saints, members received their stewardships as part an effort to build up Zion. In 1833, after growing tensions with the

¹³ Oman, “Preaching and Judging,” ____, ____.

original settlers in the county, an ad hoc militia violently expelled the Mormons from the area. The loss of Jackson County precipitated a crisis for many Latter-day Saints. How were they to build up Zion if the revealed location of the New Jerusalem was held by “the Gentiles”? Eventually, they transferred their efforts to build Zion to other locations, first to Far West, Missouri and later to Nauvoo, Illinois and the Great Basin of the American West. In the years immediately after their expulsion from Jackson County, however, the tears wept for the loss of Zion were still wet on the cheeks of the Saints.

Coupled with other events, the loss of the Jackson County Zion also caused a leadership crisis within the church that came to a head in 1838. In the resulting struggle one of Joseph Smith’s closest early associates, Oliver Cowdery, found himself on trial before a church court. Among the charges leveled against him was that he had denied the faith and abandoned Zion by selling his stewardship in Jackson County. Oliver responded with a lengthy letter in which he refused to submit to the jurisdiction of the high council that was trying his case, insisting that no church court could interfere in his “temporal affairs.” The letter contained the following, revealing passage on property rights:

Now sir the lands in our Country are allodial in the strictest construction of the term, and have not the least shadow of feudal tenours attached to them, consequently, they may be disposed of by deeds of conveyance without the consent or even approbation of a superior.¹⁴

Scholars have found his reference to “allodial” land puzzling. Mormon law professor Steven D. Smith, for example, has written:

Oliver’s position seems a bit bizarre. . . . I admit to being in sympathy with some of Oliver’s concerns. Even from a distance, though, I think we can say that on this specific issue of property, Oliver seemed confused. . . . Why would the fact that in this country property is allodial rather than feudal (whatever that means) preclude a church from giving direction to those who choose to belong to it, even in temporal affairs?¹⁵

The reference to allodial land and feudal tenures, however, goes at the heart of how property gets conceptualized within Mormonism.

Feudal tenures refer to medieval doctrines in the common law of property by which the ownership of land created certain kinds of reciprocal

¹⁴ *Far West Record: Minutes of the Church of Jesus Christ of Latter-day Saints, 1830-1842*, Donald Q. Cannon & Lyndon W. Cook eds. (Salt Lake City: Deseret Book, 1983), 164.

¹⁵ Steven D. Smith, “The Promise and Perils of Conscience,” *Brigham Young University Law Review* 2003/3 (2003): 1057, 1065-66.

social obligations. The way in which one owned property defined one's place in the social system. Every freeman "held his land of" someone else. A deed, for example, might specify that Sir Cedric held Blackacre "in knight's service" of Lord Lothgar. What this meant was that Sir Cedric's ownership of Blackacre created an obligation on his part of loyalty and military service to Lord Lothgar. In turn, Lord Lothgar – at least in theory – had obligations to protect Sir Cedric and provide him with justice in disputes with his neighbors. As one legal historian has written:

When feudalism was at full tide, it was clearly much more than a system of providing legal title in land; indeed, the sense of mutual personal obligation between lord and vassal may have been even more essential than the granting of fiefs in return for promises of services.¹⁶

Legally speaking, however, these were not free-floating rights or obligations. They inhered in the concept of property itself. To own Blackacre meant to have a certain set of obligations in the community where Blackacre was located. By contrast, holders of allodial land "were free from the exactions and burdens to which the holders of fiefs were subject, yet they did not enjoy the protection of a superior."¹⁷ Hence, allodial land had no "feudal tenures," rendering its owner free of both the social obligations and the social benefits inherent in the lord-vassal relationship.

During the period prior to his church trial, Oliver was following an informal course of reading of the kind standard among would-be frontier attorneys.¹⁸ In the perennial manner of law students, he was no doubt eager to show off newly mastered jargon, but his appeal to allodial property and feudal tenures recognized that the church was asking him to fundamentally reconceptualize property in terms very different than those that prevailed in American culture. Following the formulation given by Locke a century earlier, the American Revolution had rallied around the vindication of rights to "life, liberty, and property." In this trinity of values, however, property had a particular meaning, one mediated in part through the legal concepts that Oliver invoked. For example in 1765, John Adams attacked the Stamp Act in an essay entitled *A Dissertation on the Canon and Feudal Law* that identified the tyranny of Parliament as the latest chapter in a story of

¹⁶ Arthur R. Hogue, *The Origins of the Common Law* (Indianapolis: Liberty Fund, 1984), 94.

¹⁷ George W. Thompson, *Commentaries on the Modern Law of Real Property*, John S. Grimes, ed. 14 vols. (New York: The Bobbs-Merrill Company, Inc., 1980) 1:168-169.

¹⁸ See Stanley R. Gunn, *Oliver Cowdery, Second Elder and Scribe* (Salt Lake City: Bookcraft, 1962), Richard Llyod Anderson, "Oliver Cowdery, Esq.: His non-Mormon Career," *Proceedings of Utah Academy of Science, Arts & Letters* 45/1 (1968): 66-80.

repression with its roots in feudal tenures. “[A]ll ranks and degrees held their lands by a variety of duties and services, all tending to bind the chains the faster on every order of mankind,” Adams noted.¹⁹ The dire result of this system was “a state of total ignorance of every thing divine and human.”²⁰ In contrast, among those who “holden their lands allodially,” a man was “the sovereign lord and proprietor of the ground he occupied.”²¹ A generation later, in his widely used American edition of Blackstone’s *Commentaries*, College of William and Mary law professor St. George Tucker noted with pride that due to the “republican spirit” feudal tenures had been abolished by statute in America, and “[i]t was expected that every trace of that system would have been abolished in this country when the republic was established.”²² Likewise, in his 1828 *Commentaries on American Law*, Chancellor James Kent traced in detail the end of feudal tenures in America and the rise of allodial holding, marking it as a restoration of ancient lost liberties. “Thus, by one of those singular revolutions incident to human affairs,” he wrote, “allodial estates . . . regained their primitive estimation in the minds of freemen.”²³ As an aspiring attorney, Oliver was well aware of such standard legal texts as Tucker’s and Kent’s commentaries, and his rhetorical fillip on allodial land was likely a deliberate allusion to this line of thinking.²⁴

The most salient feature of this “republican” vision of ownership was that it constituted a sharp limit on social obligation. Whatever a man’s obligations in the public realm, once within the private space of his allodial castle, he could do as he wished. Blackstone, the most important reference work for generations of American attorneys, insisted:

So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no not even for the general good of

¹⁹ John Adams, *The Revolutionary Writings of John Adams*, C. Bradley Thompson, ed. (Indianapolis: Liberty Fund, 2000), 23.

²⁰ *Ibid.*

²¹ *Ibid.* 27.

²² St. George Tucker, *Blackstone’s Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia*, 5 vols. (Philadelphia: William Young Birch & Abraham Small Pubs., 1803), 3:44.

²³ James Kent, *Commentaries on American Law*, 4 vols. (New York: O. Halsted Pub., 1828), 3:412.

²⁴ In an 1837 letter setting forth the books necessary for his study of the law, Oliver listed both St. George Tucker’s edition of Blackstone and Kent’s *Commentaries*. See Gunn, *Oliver Cowdery, Second Elder and Scribe*, ____.

the whole community. . . . In vain may it be urged, that the good of the individual ought to yield to that of the community.²⁵

Nor were these merely “legal” categories. For a lawyer of Oliver’s generation legal positivism had not yet shattered the identification of the common law with natural law. Accordingly, this absolutist conception of property marked off more than simply the positive law of the land. It represented a fundamental feature of moral reality. In effect, to own property was to have a sphere, however limited, beyond the reach of the community.

Mormonism did not try to reinstitute feudal tenures. It did, however, reject the notion of property as a boundary or limit of communal duties. Furthermore, in common with the feudal system, it fragmented the moral concept of ownership and transformed property into a nexus of obligations to others. In Joseph Smith’s revelations nobody owns property in the absolutist way championed by Blackstone.²⁶ Rather, one 1834 revelation declared, “I, the Lord, stretched out the heavens, and built the earth, my very handiwork; all things therein are mine” (D&C 104:14). The institutions of consecrated properties and stewardships served not only to redistribute wealth amongst the saints, but also to redefine their relationship to property. In the same revelation, God declared that property is given to the saints “[t]hat every man may give an account unto me of the stewardship which is appointed unto him” (D&C 104:12). One did not hold property as a way of creating a private sphere free of communal obligations. Rather the purpose of property was to create obligations to others, to become accountable to God (See also D&C 42:32). Obligations associated with ownership included the duty to “administer to the poor and needy” (D&C 42:34), assisting to purchase property “for the public benefit of the church” (D&C 42:35), and most inclusively the “the building up of the New Jerusalem” (D&C 42:35).

The concrete institutional arrangements of “the law of consecration and stewardship” were short lived, but the underlying approach to property continues within Mormonism. For example, in 1838 Joseph Smith

²⁵ William Blackstone, *Commentaries on the Laws of England*, 4 vols. (Oxford: Clarendon Press, 1765), 1:135.

²⁶ Interestingly, however, section 134 of the *Doctrine & Covenants* takes a somewhat different attitude toward property, insisting that “we do not believe that any religious society has authority to try men on the right of property” (v. 10) and insisting that “we believe that all men are justified in defending . . . their . . . property . . . from unlawful assaults” (v. 11). This section, however, was authored by none other than Oliver Cowdery. See Robert J. Woodward, *Historical Development of the Doctrine and Covenants*, Brigham Young University, unpublished Ph.D dissertation, (1974), 1784-1794.

published a revelation that replaced the earlier system of consecrations and stewardships with a system of tithing requiring Mormons to “pay one-tenth of their interest annually” (D&C 119:4) into the coffers of the community. However, the rule, which is still followed by Latter-day Saints, did not repudiate the earlier notions of stewardship and subsidiary ownership. Rather, the revelation explicitly linked the new regime to the older rules requiring that “surplus property be put in the hands of the bishop” (D&C 119:1) and to a notion of property rights linked to the obligation to build up Zion.

Verily I say unto you, it shall come to pass that all . . . shall be tithed of their surplus propertiesAnd I say unto you, if my people observe not this law, to keep it holy, and by this law sanctify the land of Zion unto me, that my statutes and my judgments may be kept thereon, that it may be most holy, behold, verily I say unto you, it shall not be a land of Zion unto you (D&C 119:8-9).

In a single passage, “properties” are associated with divine obligations (“my statutes and judgments”) and the creation of a community defined by reciprocal obligations of love and service (“a land of Zion”). In place of the conception of property as a bulwark of individual freedom, Mormonism offers property as a nexus of obligation to God and to one’s neighbors. The 1838 revelation is particularly striking in this regard because it came in the context of a retreat from cooperative economic arrangements towards a regime of greater personal control of property. Nevertheless, it carried forward the notion that to care for the poor and build up Zion is not something that one chooses to do with property that is truly one’s own. Rather, everything one owns is a stewardship from God, given for the purpose of making one accountable to him. The obligation to build Zion adheres in the concept of property itself.

Contract

In contrast to their detailed discussion of matters relating to property, Mormon scriptures have comparatively little to say about contract. In this sense, they mirror the law codes of the Old Testament, which likewise have little to say about enforcing voluntary agreements. Nevertheless, Joseph Smith's revelation on the law of consecration and stewardship clearly assumes an economic order involving commerce and voluntary exchange, commanding "thou shalt pay for that which thou shalt receive of thy brother" (D&C 42:54). Another revelation speaks of a store to be set up to serve the saints in Zion (see D&C 57:8-10). While contracts exist only in the margins of Mormon scripture, covenant is an enormously important concept in Latter-day Saint theology. Most dramatically, an 1832

revelation suggests that sacred promises bind even God. "I, the Lord, am bound when ye do what I say; but when ye do not what I say, ye have no promise" (D&C 82:10). This reverential attitude toward the power of promises carried over into Mormon contract cases.

On December 7, 1863 a local school teacher filed a complaint with Bishop John W. Hess of the Farmington Ward in northern Utah against a local farmer "for unchristianlike conduct, unworthy of a Latter Day Saint, in refusing to pay me a small debt due for School teaching in wheat flour or corn."²⁷ The farmer admitted to having promised to pay, but insisted that "[p]rior to his calling on me for wheat, I had contracted my flour what I had to spare to raise a certain amount of money that I owed."²⁸ A trial ensued, and testimony before the bishop's court revealed that the farmer had initially told the school teacher that he had no grain and had then tried to find a buyer who would pay for his wheat either with livestock or sufficient ready cash. When the school teacher found out, he demanded the wheat per the earlier agreement, but by this time the farmer had a willing set of buyers at the higher price, a group of Gentile miners. In his complaint to the bishop's court, the school teacher insisted that he had "very much needed" the wheat and expressed dismay that it had gone to "speculators from the Bannock Minz."²⁹ Other Mormons testified that they had offered to buy the corn with cash or calves, but the farmer had refused them either because the amount of money offered was too little or because the calves were too young. After deliberating, the clerk recorded, "Bishop Hess said it was a very plain case, many cases come up rather misty but this is a very plain case. . . . I think so and more that enough has been said to prove that [the farmer] has told in a number of instances that which is not true and moved that we disfellowship [him] until he make satisfaction."³⁰

The little drama describe in this case is a common enough one in contract litigation. Able promises Baker some commodity at a fixed price. At the time of delivery, however, the market price of the commodity has risen, and Able breaches his contract to Baker in order to make a better deal elsewhere. Bishop Hess's approach to the case, however, deviates significantly from the common law of contracts. Oliver Wendell Holmes, Jr. famously declared, "The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it – and nothing

²⁷ Ecclesiastical Court Cases Collection, Disfellowshipment Records, 1839-1965, CR 355, 2, 1863, fd 1, LDS Archives, The Family and Church History Department, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid.

else.”³¹ While laypersons commonly speak of “enforcing” a contract, in point of fact the common law generally will not force a breaching party to literally do what he promised in his contract. Rather, the usual remedy is damages. A breaching party must – in theory at least – compensate the disappointed promisee for the lost value of the bargain but is always free to simply breach and pay. Furthermore, the breach of contract – while giving rise to liability – is not regarded as a legal wrong in and of itself. For example, with a few extremely rare exceptions the mere breach of contract is not a crime or even a civil wrong giving rise to a fine nor do courts inquire into the culpability of breach in any but the rarest of cases. In short one is always free to simply walk away from one’s agreements, albeit at the risk of a suit for damages.

The justifiability of the common law’s preference for compensatory damages is hotly contested among legal scholars. There are at least two possible arguments. The first is that contract law’s primary concern is and ought to be to provide contracting parties with incentives to behave in economically efficient ways. On this view, society does not want people to keep all of their promises. Rather, it only wishes to see promises kept when the benefits of doing so exceed the costs. Sometimes, however, it will be economically efficient for parties to breach their contracts and in such cases we wish them to do so. Damages incentivize performance but not too much, encouraging so-called “efficient breaches.”³² Alternatively, some argue that in a liberal society, the law should not concern itself with the personal morality of its citizens, confining itself to protecting them against invasions of their rights by others. The duty to keep a promise, being grounded in personal virtue, is not something that the law should concern itself with. It will provide compensation to those whose legitimate expectations have been disappointed by breach, but it ought not to act to keep the promisor from breaking his promise merely on the basis of moral objections.³³ Notice, that there is a sense in which both of these justifications treat contracts as extremely minimalist obligations between two essentially unrelated individuals. Both take an amoral attitude toward promises, treating them as either instrumentally useful in some cases to

³¹ Oliver Wendell Holmes, Jr., “The Path of the Law,” *Harvard Law Review* 10/8 (1897): 457, 459.

³² See A. Mitchell Polinsky, *An Introduction to Law and Economics*, 2nd ed. (New York: Aspen Law & Business, 1989), 27-38. There are reasons to doubt the economic validity of these arguments. See Nathan Oman, “The Failure of Economic Interpretations of the Law of Contract Damages,” *Washington & Lee Law Review* 64/3 (2007): forthcoming.

³³ See generally Randy Barnett, “Some Problems with Contract as Promise,” *Cornell Law Review* 77/5 (1991-1992): 1022-1033.

achieve economic goals or alternatively as matters about which a properly constituted political community ought to be indifferent.

On this view, the actions of the farmer were altogether benign, even perhaps commendable from an economic point of view. To be sure, he ought to pay the school teacher something, but the common law would attach no stigma per se to his shopping his grain to the highest bidder, notwithstanding his prior promise to give it to the school teacher. Bishop Hess, in contrast, viewed the farmer's actions in starkly moralistic terms. The farmer had not only breached his contract, he had lied. Furthermore, the remedy imposed was not simply an order to pay some amount of damages. Rather, he was cut off from the community until the man he had wronged determined that he was once again eligible to enter it. Under the rules that prevailed at the time, of course, the school teacher's power over the farmer's continued fellowship was not absolute. Someone who felt that they had been abused under a judgment from a church court could always file a counter complaint for, in the words of one such action, "unchristianlike conduct in . . . depriving me of my fellowship in the Ch. Of J.C. of LDS."³⁴ Still, Bishop Hess's resolution of the case gave more to the school teacher than a mere claim for money damages and had a punitive aspect foreign to the common law of contracts.

The Mormon preference for moralizing contracts shows up in other areas where Mormon adjudication differed sharply from secular legal doctrines. Where possible, church courts seem to have required breaching parties to perform their obligations, awarding damages only when performance was no longer possible.³⁵ Even when damages were awarded, the church courts took a tougher line with breaching parties than did the secular courts. For example, under the rule announced in the famous English case of *Hadley v. Baxendale* a breaching party's liability includes few of the secondary negative effects of his breach because the law sharply limits so-called "consequential damages." The decisions in the church courts were quite different. For example, in October, 1847 the Salt Lake High Council heard a complaint against a man who had apparently breached a contract to deliver some gun powder in his possession, selling it instead to a third party. He offered to pay for it, but the council went on to hold that

³⁴ Ecclesiastical Court Cases Collection. Disfellowshipment Records, 1839-1965, CR 355, 2, 1858, fd 2, LDS Archives, The Family and Church History Department, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah.

³⁵ See, e.g., Nicholas Groesbeck Morgan Sr., *The Old Fort: Historic Mormon Bastion, the Plymouth Rock of the West* (Salt Lake City: n.p. 1964) 55, reproducing minutes of the Salt Lake Stake High Council in a case for "non-delivery of an ox" ordering the defendant to deliver the ox rather than pay damages.

he “be held responsible for *any damage* that may accrue from the want of it, until paid,” greatly enlarging the man’s liability beyond what would have been available at common law.³⁶ Elsewhere, church courts awarded punitive damages for breach of contract, something almost totally unheard of in the common law.³⁷ Likewise, Mormon courts regularly enforced debts that had been discharged by bankruptcy or even death, on the theory that Latter-day Saints had a moral duty to meet their obligations come what may.³⁸ This highly moralistic approach to obligations was never tied to communitarian economic institutions and has survived in contemporary Mormon discourse, notwithstanding its sharp divergence from secular ideas of contract.³⁹

The Market

The moral concepts of property and contract that emerge from nineteenth-century Mormon law are not logically tied to their particular historical context. They also respond to many of the most powerful critiques of the market made by Nibley, Bushman, and other Mormon progressives and at the same time are consistent with the most powerful arguments that can be made for the virtues of free markets. Mormon progressives have argued that capitalism necessarily rests on the exaltation of human greed, in contrast to the sense of altruism and social unity that characterizes Zion. Accordingly, the market emerges in this line of thinking as an essentially amoral realm that mindlessly satisfies desires regardless of their ultimate worth and encourages cut-throat competition between its estranged participants. The corrosive effects of the marketplace hollow out the soul as well. Hence, the emphasis on material acquisitiveness turns market participants away from the concerns of family, church, and God, which ought to claim their ultimate attention. Nibley has pushed the critique the farthest, arguing that the evils of the world can ultimately be traced to property and ownership, which has led inevitably through the ages to “tyrants who reign with blood and horror on the earth,” a phrase coded with special apocalyptic significance for Latter-day Saints.⁴⁰

The Mormon concepts of property and contract sketched above, however, belie these claims. Ultimately the market consists of the

³⁶ Ibid. at 71-72 (emphasis added). Note, it is not entirely clear that this was a purely contractual case. The man may have been the equivalent of a bailee, holding the gun powder as an agent rather than simply promising to deliver it. Needless to say, church courts made no attempts to draw such fine distinctions in their decisions.

³⁷ See Firmage & Mangrum, *Zion in the Court*, 344.

³⁸ See *ibid* 341-344.

³⁹ See, e.g., Dallin H. Oaks, “My Brother’s Keeper,” *Ensign*, Nov. 1986 at 20.

⁴⁰ Nibley, *Approaching Zion*, ____.

voluntary exchange of goods and services. In short, it consists in the transfer of property and the creation of contracts. On the Mormon view, however, the acquisition of property does not represent the amoral piling of up of yet further resources for private consumption. Rather, property brings with it the duty to build up Zion, which carries a host of social obligations. Likewise, on the view of contract inherent in nineteenth-century Mormon law, business transactions are far from amoral encounters between atomized individuals. Rather, contracts represent an important site where personal virtue is tested and where the bonds of community are reinforced. Far from the amoral realm of individual greed implicitly envisioned by the progressive critique, the Mormon concepts of property and contract sketched above imply a vision of the market as a key realm in which the duty to build up Zion gets worked out.

The question remains, however, of whether these Mormon concepts of property and contract can be reconciled with the chief arguments in favor of free markets. Perhaps they constitute an implicit rejection of premises on which such arguments rest. For example, during the era of Soviet communism, defenders of capitalism regularly argued that private property and free exchange were to be preferred to centralized control because by giving to individuals the fruits of their labor markets harnessed the productive force of self-interest. One might object, however, that this argument necessarily rests on the assumption that human selfishness is a benign, even salutary force in human affairs. After all, Adam Smith insists:

It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages.⁴¹

Such a view, however, seems at odds with the notion of property as a site of social – even altruistic – obligations to others and with contract as test of personal virtue. Despite its initial plausibility, however, this line of attack confuses the concepts of greed and economic rationality, as well as over-emphasizing the importance of self-interest in apologetics for the market.

For example, at least since *The Wealth of Nations* the core argument in favor of the market over other forms of economic organization has been the concept of gains from trade.⁴² Wealth is ultimately more than simply the sum total of pre-existing resources. Rather, allowing informed, consensual transactions has the effect of creating wealth that did not

⁴¹ Adam Smith, *Wealth of Nations: A Selected Edition*, Kathryn Sutherland, ed. (New York: Oxford University Press, 1993), 22.

⁴² See *ibid* 11-30.

previously exist. If one regards poverty and its associated suffering as an evil – as most Latter-day Saints do – then a system that allows poor communities to better their condition through trade has much to recommend it. Indeed, the world’s poor are often hobbled less by a new exposure to predatory global markets than by their systematic exclusion from them.⁴³ The Mormon concepts of property and contract, however, do not require the rejection of these virtues. Strictly speaking modern economic theory doesn’t assume that gains from trade are contingent on the self-interestedness of parties but only on their rationality. Furthermore, while many equate economic rationality with the maximization of material wealth, in actual fact the concept is much thinner than this. All that is required for a person to behave in an economically rational way is for them to have a set of non-circular ordinal preferences that guide their behavior. In other words, to be rational one must be able to rank various choices so that A is preferred to B and B is preferred to C but C is not preferred to A and act accordingly. Period. There is nothing, for example, that makes preferring the well being of another to one’s own economically irrational. So long as the parties’ preferences aren’t circular, gains from trade will result. This means that while it is true that markets are ultimately indifferent to the quality of the preferences that they satisfy, there is no reason that a person acting in accordance with the obligations inherent in the Mormon concept of property sketched above somehow undermines the market. In short, there is nothing about the gains-from-trade argument for markets that assumes people behave amorally. Indeed, if people generally desire good or laudable things – such as the material betterment of their family and friends – then markets will increase the availability of those things.

Furthermore, many of the virtues of markets are essentially unrelated to issues of self-interest. For example, in a classic 1945 article F.A. Hayek argued that the central problem facing the economic organization of society was not the proper arrangement of the factors of production.⁴⁴ Economists, he pointed out, were quite good at finding maximizing combinations given a particular set of information. The major problem, Hayek insisted, was that the organization of an economy required

⁴³ For example, Hernando De Soto has argued powerfully that most of the poor in the developing world lack the necessarily legal formality to participate in the modern marketplace, to their great detriment. See Hernando De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books, 2000).

⁴⁴ F.A. Hayek, “The Use of Knowledge in Society,” *American Economic Review* 35 (September 1945): 519-30.

a vast amount of information that no one person possessed. Rather, this information was widely dispersed among all of the participants in the market. Hayek's foil was the economics profession of Arrington's generation that was enamored of central planning and technocratic power. No central planner, he pointed out, could possibly amass the information necessary to effectively run an economy. The best response to the dispersal of knowledge, Hayek insisted, was to decentralize economic decision making to those with the best information. This is exactly what markets do. The power of Hayek's argument has been borne out not only by the spectacular failure of centrally planned economies, but also in the remarkable success of institutions – such as Wikipedia or the Iowa Electronic Markets – that rely on the voluntary aggregation of widely dispersed information.⁴⁵ Notice, however, that the Hayekian argument relies not on the motive power of self-interest but rather on the dispersal of information and decision making. Accordingly, there is no reason to suppose that Mormon conceptions of property and contract, which themselves assume dispersed knowledge and agency, conflict with Hayek's argument.

There are also powerful arguments in favor of markets that can be made on the basis of liberal political theory, which likewise do not depend on notions of self-interest. In a world of sharply differing conceptions of the ultimate good, markets provide a way for people of diverse beliefs to interact peacefully with one another, thereby increasing mutual trust and cooperation.⁴⁶ By and large, Mormonism benefits from liberal societies. In the past Latter-day Saints have been the target of violent persecution, and in the present, with the exception of a few regions of the American west, they remain a tiny – and often marginalized – religious minority. Furthermore, while violent attacks on Mormons are rare, the church is regularly subject to petty legal harassment in the United States, such as difficulty in obtaining zoning permits for temples, and much more troubling legal attacks abroad, such as inclusion on anti-cult registries in Europe. Markets, however, provide a way for the Mormons to pursue their vision of Zion with the cooperation of non-believers. Hence, for example, the church can peacefully purchase land for the construction of a temple from a non-Mormon without first having a shared theology. Indeed it is worth noting that almost without exception, attempts to stop the construction of Mormon

⁴⁵ See Cass Sunstein, *Infotopia: How Many Minds Produce Knowledge* (New York: Oxford University Press, 2006), James Surowiecki, *The Wisdom of Crowds* (New York: Anchor Books, 2006).

⁴⁶ This argument is developed at greater length in Jules Coleman, *Risks and Wrongs* (New York: Oxford University Press, 1992) 17-87.

temples occurs through the political process rather than through the market, which is often a better model of tolerance and peaceful cooperation. Notice, again, that this benefit from the market accrues regardless of whether one believes that moral obligations attach to property or that contracts create an ethical need to perform rather than simply an option to breach at the price of paying damages.

Conclusion

This essay provides a way for Mormon thought to orient itself toward the marketplace. By using Mormon legal experience as a way of excavating Mormon concepts of property and contract, Latter-day Saints with an interest in the political morality of free-market capitalism can draw on the Mormon past in ways that do not render the market fundamentally fallen or invisible. Perhaps more importantly, by providing a historical narrative for Mormon economic thought that focuses on the decentralized definition of property and contract, rather than the centralized institutions of Mormon economic cooperatives, it allows Mormons to think about the marketplace in terms of its constitutive institutions as opposed to an approach that seeks to transcend the market through powerful outside controls. The result is a set of arguments that responds to key progressive critiques, while allowing Mormons to appreciate – and benefit from – the many virtues of free-markets and decentralized economic decision making without compromising their commitment to building Zion.