

# PRESERVING RELIGIOUS FREEDOM

Elder Dallin H. Oaks  
of the Quorum of the Twelve Apostles  
Chapman University School of Law  
Orange, California  
February 4, 2011

I am here to speak of the state of religious freedom in the United States, why it seems to be diminishing, and what can be done about it.

Although I will refer briefly to some implications of the Proposition 8 controversy and its constitutional arguments, I am not here to participate in the debate on the desirability or effects of same-sex marriage. I am here to contend for religious freedom. I am here to describe fundamental principles that I hope will be meaningful for decades to come.

I believe you will find no unique Mormon doctrine in what I say. My sources are law and secular history. I will quote the words of Catholic, Evangelical Christian, and Jewish leaders, among others. I am convinced that on this issue what all believers have in common is far more important than their differences. We must unite to strengthen our freedom to teach and exercise what we have in common, as well as our very real differences in religious doctrine.

## I.

I begin with a truth that is increasingly challenged: Religious teachings and religious organizations are valuable and important to our free society and therefore deserving of special legal protection. I will cite a few examples.

Our nation's inimitable private sector of charitable works originated and is still furthered most significantly by religious impulses and religious organizations. I refer to such charities as schools and higher education, hospitals, and care for the poor, where religiously motivated persons contribute personal service and financial support of great value to our citizens. Our nation's incredible generosity in many forms of aid to other nations and their peoples are manifestations of our common religious faith that all peoples are children of God. Religious beliefs instill patterns of altruistic behavior.

Many of the great moral advances in Western society have been motivated by religious principles and moved through the public square by pulpit-preaching. The abolition of the slave trade in England and the Emancipation Proclamation in the United States are notable illustrations. These revolutionary steps were not motivated and moved by secular ethics or coalitions of persons who believed in moral relativism. They were driven primarily by individuals who had a clear vision of what was morally right and

what was morally wrong. In our time, the Civil Rights movement was of course inspired and furthered by religious leaders.

Religion also strengthens our nation in the matter of honesty and integrity. Modern science and technology have given us remarkable devices, but we are frequently reminded that their operation in our economic system and the resulting prosperity of our nation rest on the honesty of the men and women who use them. Americans' honesty is also reflected in our public servants' remarkable resistance to official corruption. These standards and practices of honesty and integrity rest, ultimately, on our ideas of right and wrong, which, for most of us, are grounded in principles of religion and the teachings of religious leaders.

Our society is not held together just by law and its enforcement, but most importantly by voluntary obedience to the unenforceable and by widespread adherence to unwritten norms of right or righteous behavior. Religious belief in right and wrong is a vital influence to advocate and persuade such voluntary compliance by a large proportion of our citizens.<sup>1</sup> Others, of course, have a moral compass not expressly grounded in religion. John Adams relied on all of these when he wisely observed that

“we have no government armed with power capable of contending with human passions unbridled by morality and religion. Avarice, ambition, revenge, or gallantry, would break the strongest cords of our Constitution as a whale goes through a net. Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other.”<sup>2</sup>

Even the agnostic Oxford-educated British journalist, Melanie Phillips, admitted that

“one does not have to be a religious believer to grasp that the core values of Western Civilization are grounded in religion, and to be concerned that the erosion of religious observance therefore undermines those values and the ‘secular ideas’ they reflect.”<sup>3</sup>

My final example of the importance of religion in our country concerns the origin of the Constitution. Its formation over 200 years ago was made possible by religious principles of human worth and dignity, and only those principles in the hearts of a majority of our diverse population can sustain that Constitution today.<sup>4</sup> I submit that religious values and political realities are so inter-linked in the origin and perpetuation of this nation that we cannot lose the influence of religion in our public life without seriously jeopardizing our freedoms.

---

<sup>1</sup> See Quentin L. Cook, *Let There be Light*, ENSIGN, Nov. 2010, at 27, 29–30.

<sup>2</sup> CHARLES FRANCIS ADAMS, *THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES*, 228–29 (Books for Libraries Press, 1969).

<sup>3</sup> MELANIE PHILLIPS, *THE WORLD TURNED UPSIDE DOWN: THE GLOBAL BATTLE OVER GOD, TRUTH, AND POWER*, xiii (1st Am. ed., Encounter Books, 2010); see generally ROBERT D. PUTNAM & DANIEL E. CAMPBELL, *AMERICAN GRACE* (2010).

<sup>4</sup> See JOHN A. HOWARD, *CHRISTIANITY: LIFEBLOOD OF AMERICA'S FREE SOCIETY (1620-1945)*, 57 (2008); see also Dinesh D'Souza, *Created Equal: How Christianity Shaped the West*, IMPRIMIS, Nov. 2008 at 5 (available at [http://www.hillsdale.edu/hctools/ImprimisTool/archives/2008\\_11\\_Imprimis.pdf](http://www.hillsdale.edu/hctools/ImprimisTool/archives/2008_11_Imprimis.pdf)).

Unfortunately, the extent and nature of religious devotion in this nation is changing.<sup>5</sup> Belief in a personal God who defines right and wrong is challenged by many. “By some counts,” an article in *The Economist* declares, “there are at least 500 [million] declared non-believers in the world—enough to make atheism the fourth-biggest religion.”<sup>6</sup> Others who do not consider themselves atheists also reject the idea of a supernatural power, but affirm the existence of some impersonal force and the value of compassion and love and justice.<sup>7</sup>

Organized religion is surely on the decline. Last year’s Pew Forum Study on Religion and Public Life found that the percentage of young adults affiliated with a particular religious faith is declining significantly.<sup>8</sup> Scholars Robert Putnam and David Campbell have concluded that “the prospects for religious observance in the coming decades are substantially diminished.”<sup>9</sup>

Whatever the extent of formal religious affiliation, I believe that the tide of public opinion in favor of religion is receding. A writer for the *Christian Science Monitor* predicts that the coming century will be “very secular and religiously antagonistic,” with intolerance of Christianity “ris[ing] to levels many of us have not believed possible in our lifetimes.”<sup>10</sup>

A visible measure of the decline of religion in our public life is the diminished mention of religious faith and references to God in our public discourse. One has only to compare the current rhetoric with the major addresses of our political leaders in the 18<sup>th</sup>, 19<sup>th</sup>, and the first part of the 20<sup>th</sup> centuries. Similarly, compare what Lincoln said about God and religious practices like prayer on key occasions with the edited versions of his remarks quoted in current history books.<sup>11</sup> It is easy to believe that there is an informal conspiracy of correctness to scrub out references to God and the influence of religion in the founding and preservation of our nation.

The impact of this on the rising generation is detailed in an Oxford University Press book, *Souls in Transition*. There we read:

---

<sup>5</sup> See PUTNAM & CAMPBELL, *supra* note 3, at Chs. 3–4.

<sup>6</sup> John Micklethwait, *In God’s Name: A Special Report on Religion and Public Life*, THE ECONOMIST, Nov. 3, 2007, at 10.

<sup>7</sup> See, e.g., Lisa Miller, *Sam Harris Believes in God*, NEWSWEEK, Oct. 25, 2010, at 42.

<sup>8</sup> See *Religion Among the Millennials*, PEW FORUM ON RELIGION & PUBLIC LIFE (Pew Research Center), Feb. 17, 2010 at 1–3 (available at <http://pewforum.org/uploadedFiles/Topics/Demographics/Age/millennials-report.pdf>).

<sup>9</sup> Robert D. Putnam & David E. Campbell, *The Tide of Public Opinion in Favor of Religion is Receding*, DESERET NEWS, Nov. 20, 2010 at E1 (quoting L.A. TIMES syndicated art.); see also PUTNAM & CAMPBELL, *supra* note 3.

<sup>10</sup> Michael Spencer, *The Coming Evangelical Collapse*, CHRISTIAN SCIENCE MONITOR, Mar. 10, 2009 available at <http://www.csmonitor.com/Commentary/Opinion/2009/0310/p09s01-coop.html>.

<sup>11</sup> See, e.g., MATTHEW S. HOLLAND, BONDS OF AFFECTION: CIVIC CHARITY AND THE MAKING OF AMERICA, 252–53 n. 22 (Geo. Univ. Press, 2007).

“Most of the dynamics of emerging adult culture and life in the United States today seem to have a tendency to reduce the appeal and importance of religious faith and practice. . . . Religion for the most part is just something in the background.”<sup>12</sup>

Granted that reduced religious affiliation puts religion “in the background,” the effect of that on the religious beliefs of young adults is still in controversy. The negative view appears in the Oxford book, whose author concludes that this age group of 18 to 23

“had difficulty seeing the possible distinction between, in this case, objective moral truth and relative human invention. . . . [T]hey simply cannot, for whatever reason, believe in—or sometimes even conceive of—a given, objective truth, fact, reality, or nature of the world that is independent of their subjective self-experience.”<sup>13</sup>

On the positive side, the Pew Forum study reported that over three-quarters of young adults believe that there are absolute standards of right and wrong.<sup>14</sup> For reasons explained later, I believe this finding is very positive for the future of religious freedom.

## II.

Before reviewing the effects of the decline of religion in our public life, I will speak briefly of the free exercise of religion. The first provision in the Bill of Rights of the United States Constitution is what many believe to be its most important guarantee. It reads:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”

The prohibition against “an establishment of religion” was intended to separate churches and government, to forbid a national church of the kind found in Europe. In the interest of time I will say no more about the establishment of religion, but only concentrate on the First Amendment’s direction that the United States shall have “no law [prohibiting] the free exercise [of religion].” For almost a century this guarantee of religious freedom has been understood as a limitation on state as well as federal power.

The guarantee of religious freedom is one of the supremely important founding principles in the United States Constitution, and it is reflected in the constitutions of all 50 of our states. As noted by many, the guarantee’s “pre-eminent place” as the first expression in the First Amendment to the United States Constitution identifies freedom of religion as “a cornerstone of American democracy.”<sup>15</sup> The American colonies were originally settled by people who, for the most part, came to this continent for the freedom to practice their religious faith without persecution, and their successors deliberately placed religious freedom first in the nation’s Bill of Rights.

---

<sup>12</sup> CHRISTIAN SMITH, *SOULS IN TRANSITION*, 84, 145 (Oxford Univ. Press, 2009); cf. PUTNAM & CAMPBELL, *supra* note 3.

<sup>13</sup> SMITH, *supra* note 12 at 46.

<sup>14</sup> PEW FORUM, *supra* note 8 at 13.

<sup>15</sup> FINAL REPORT OF THE ADVISORY COMMITTEE ON RELIGIOUS FREEDOM ABROAD TO THE SECRETARY OF STATE AND TO THE PRESIDENT OF THE UNITED STATES, May 17, 1999, at 6.

So it is that our federal law formally declares: “The right to freedom of religion undergirds the very origin and existence of the United States.”<sup>16</sup> So it is, I maintain, that in our nation’s founding and in our constitutional order religious freedom and its associated First Amendment freedoms of speech and press are the motivating and dominating civil liberties and civil rights.

### III.

Notwithstanding its special place in our Constitution, a number of trends are eroding both the protections the free exercise clause was intended to provide and the public esteem this fundamental value has had during most of our history. For some time we have been experiencing laws and official actions that impinge on religious freedom. In a few moments I will give illustrations, but first I offer some generalizations.

The free “exercise” of religion obviously involves both (1) the right to choose religious beliefs and affiliations and (2) the right to “exercise” or practice those beliefs without government restraint. However, in a nation with citizens of many different religious beliefs the right of some to act upon their religious beliefs must be qualified by the government’s responsibility to further compelling government interests, such as the health and safety of all. Otherwise, for example, the government could not protect its citizens’ persons or properties from neighbors whose religious principles compelled practices that threatened others’ health or personal security. Government authorities have wrestled with this tension for many years, so we have considerable experience in working out the necessary accommodations.

The inherent conflict between the precious religious freedom of the people and the legitimate regulatory responsibilities of the government is the central issue of religious freedom. The problems are not simple, and over the years the United States Supreme Court, which has the ultimate responsibility of interpreting the meaning of the lofty and general provisions of the Constitution, has struggled to identify principles that can guide its decisions when a law or regulation is claimed to violate someone’s free exercise of religion. As would be expected, many of these battles have involved government efforts to restrict the religious practices of small groups like Jehovah’s Witnesses and Mormons. Recent experience suggests adding the example of Muslims.

Much of the controversy in recent years has focused on the extent to which state laws that are neutral and generally applicable can override the strong protections contained in the free exercise clause of the United States Constitution. As noted hereafter, in the 1990s the Supreme Court ruled that such state laws could prevail. Fortunately, in a stunning demonstration of the resilience of the guarantee of free exercise of religion, over half of the states have passed legislation or interpreted their state constitutions to preserve a higher standard for protecting religious freedom. Only a

---

<sup>16</sup> International Religious Freedom Act of 1998, 22 U.S.C. § 6401(a).

handful have followed the Supreme Court's approach that the federal free exercise protection must bow to state laws that are neutral as to religion.<sup>17</sup>

Another important current debate over religious freedom concerns whether the guarantee of free exercise of religion gives one who acts on religious grounds greater protection against government prohibitions than are already guaranteed to everyone by other provisions of the constitution, like freedom of speech. I, of course, maintain that unless *religious* freedom has a unique position we erase the significance of this separate provision in the First Amendment. Treating actions based on religious belief the same as actions based on other systems of belief is not enough to satisfy the special guarantee of religious freedom in the United States Constitution. Religion must preserve its preferred status in our pluralistic society in order to make its unique contribution—its recognition and commitment to values that transcend the secular world.

Over a quarter century ago I reviewed the history and predicted the future of church/state law in a lecture at DePaul University in Chicago.<sup>18</sup> I took sad notice of the fact that the United States Supreme Court had diminished the significance of free exercise by expanding the definition of religion to include what the Court called “religions” not based on belief in God. I wrote:

“The problem with a definition of religion that includes almost everything is that the practical effect of inclusion comes to mean almost nothing. Free exercise protections become diluted as their scope becomes more diffuse. When religion has no more right to free exercise than irreligion or any other secular philosophy, the whole newly expanded category of ‘religion’ is likely to diminish in significance.”<sup>19</sup>

Unfortunately, the tide of thought and precedent seems contrary to this position. While I have no concern with expanding comparable protections to non-religious belief systems, as is done in international norms that protect freedom of religion *or belief*,<sup>20</sup> I object to doing so by re-interpreting the First Amendment guarantee of free exercise of *religion*.

It was apparent twenty-five years ago, and it is undeniable today, that the significance of *religious freedom* is diminishing. Five years after I gave my DePaul lecture, the United States Supreme Court issued its most important free exercise decision in many years. In *Employment Division v. Smith*,<sup>21</sup> the Court significantly narrowed the traditional protection of religion by holding that the guarantee of free exercise did not prevent government from interfering with religious activities when it did so by neutral,

---

<sup>17</sup> See WILLIAM W. BASSETT, W. COLE DURHAM, JR. & ROBERT T. SMITH, *RELIGIOUS ORGANIZATIONS AND THE LAW* §§ 2.65-2.66 (Thomson Reuters/West, 2010 ed., forthcoming).

<sup>18</sup> Dallin H. Oaks, *Separation, Accommodation and the Future of Church and State*, 35 DEPAUL L. REV. 1, 1–22 (1985).

<sup>19</sup> *Id.* at 8. See also Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1488–1500 (1990).

<sup>20</sup> International Covenant on Civil and Political Rights, art. 18, Dec. 16, 1966, 999 U.N.T.S. 302.

<sup>21</sup> 494 U.S. 872 (1990).

generally applicable laws. This ruling removed religious activities from their sanctuary—the preferred position the First Amendment had given them.

Now, over twenty years later, some are contending that a religious *message* is just another message in a world full of messages, not something to be given unique or special protection. One author takes the extreme position that religious speech should have even *less* protection. In *Freedom from Religion*, published by the Oxford University Press, a law professor makes this three-step argument:

1. In many nations “society is at risk from religious extremism.”<sup>22</sup>
2. “A follower is far more likely to act on the words of a religious authority figure than other speakers.”<sup>23</sup>
3. Therefore, “in some cases, society and government should view religious speech as inherently *less protected* than secular political speech because of its extraordinary ability to influence the listener.”<sup>24</sup>

The professor then offers this shocking conclusion:

“[W]e must begin to consider the possibility that religious speech can no longer hide behind the shield of freedom of expression. . . .”<sup>25</sup>

“Contemporary religious extremism leaves decision-makers and the public alike with no choice but to re-contour constitutionally granted rights as they pertain to religion and speech.”<sup>26</sup>

I believe most thoughtful people would reject that extreme conclusion. All should realize how easy it would be to gradually manipulate the definition of “religious extremism” to suppress any unpopular religion or any unpopular preaching based on religious doctrine. In addition, I hope most would see that it is manifestly unfair and short-sighted to threaten religious freedom by focusing on some undoubted abuses without crediting religion’s many benefits. I am grateful that there are responsible voices and evidence affirming the vital importance of religious freedom, worldwide.<sup>27</sup>

When Cardinal Francis George, then President of the U.S. Conference of Catholic Bishops, spoke at Brigham Young University last year, he referred to “threats to religious freedom in America that are new to our history and to our tradition.”<sup>28</sup> He gave two examples, one concerning threats to current religious-based exemptions from participating in abortions and the other “the development of gay rights and the call for same-sex ‘marriage.’” He spoke of possible government punishments for churches or

---

<sup>22</sup> AMOS N. GUIORA, *FREEDOM FROM RELIGION*, 27 (Oxford Univ. Press, 2009).

<sup>23</sup> *Id.* at 30.

<sup>24</sup> *Id.* at 31.

<sup>25</sup> *Id.* at 31.

<sup>26</sup> *Id.* at 39.

<sup>27</sup> See, e.g., Brian J. Grim, *Religious Freedom: Good for What Ails Us?* REV. FAITH & INT’L AFF., Summer 2008, at 3–7; BRIAN J. GRIM AND ROGER FINKE, *THE PRICE OF FREEDOM DENIED: RELIGIOUS PERSECUTION IN THE TWENTY-FIRST CENTURY* (Cambridge Univ. Press, 2011).

<sup>28</sup> Cardinal Francis George, *Catholics and Latter-day Saints: Partners in the Defense of Religious Freedom*, Brigham Young Univ., (Feb. 23, 2010).

religious leaders whose doctrines lead them to refuse to participate in government sponsored programs.

Along with many others, I see a serious threat to the freedom of religion in the current assertion of a “civil right” of homosexuals to be free from religious preaching against their relationships. Religious leaders of various denominations affirm and preach that sexual relations should only occur between a man and a woman joined together in marriage. One would think that the preaching of such a doctrinal belief would be protected by the constitutional guarantee of the free exercise of religion, to say nothing of the guarantee of free speech. However, we are beginning to see worldwide indications that this may not be so.

Religious preaching of the wrongfulness of homosexual relations is beginning to be threatened with criminal prosecution or actually prosecuted or made the subject of civil penalties. Canada has been especially aggressive, charging numerous religious authorities and persons of faith with violating its human rights law by “impacting an individual’s sense of self-worth and acceptance.”<sup>29</sup> Other countries where this has occurred include Sweden, the United Kingdom, and Singapore.<sup>30</sup>

I do not know enough to comment on whether these suppressions of religious speech violate the laws of other countries, but I do know something of religious freedom in the United States, and I am alarmed at what is reported to be happening here.

In New Mexico, the state’s Human Rights Commission held that a photographer who had declined on religious grounds to photograph a same-sex commitment ceremony had engaged in impermissible conduct and must pay over \$6,000 attorney’s fees to the same-sex couple. A state judge upheld the order to pay.<sup>31</sup> In New Jersey, the United Methodist Church was investigated and penalized under state anti-discrimination law for denying same-sex couples access to a church-owned pavilion for their civil-union

---

<sup>29</sup> *Homosexuality Trumps Free Speech and Religion in Canada*, NARTH (Aug. 9, 2005),

<http://www.narth.com/docs/trumps.html>; Pete Vere, *Catholicism—A Hate Crime in Canada?*, CATHOLIC EXCHANGE, (June 4, 2008) <http://catholicexchange.com/2008/06/04/112780>; see *Stacey v. Campbell*, 2002 B.C.H.R.T. 35 (B.C. Human Rights Trib. 2002); see e.g., Marshall Breger, *Gay Activists vs. the First Amendment*, MOMENT, (Feb. 2010) <http://www.momentmag.com/Exclusive/currentyear/02/201002-Opinion-Breger.html>.

<sup>30</sup> See, e.g., *The Pastor Green Case*, Supreme Court of Sweden, Case no. B 1050-05 (29 Nov. 2005); *The Ake Green Case: Freedom of Religion on Trial in Sweden*, AKEGREEN.ORG, <http://www.akegreen.org/>; Heidi Blake, *Christian Preacher Arrested for Saying Homosexuality is a Sin*, THE TELEGRAPH, (May 2, 2010) <http://www.telegraph.co.uk/news/newstoppers/religion/7668448/Christian-preacher-arrested-for-saying-homosexuality-is-a-sin.html>; Albert Mohler, *It’s Getting Dangerous Out There—A Preacher Is Arrested in Britain*, ALBERTMOHLER.COM (May 4, 2010) <http://www.albertmohler.com/2010/05/04/its-getting-dangerous-out-there-a-preacher-is-arrested-in-britain/>; Sylvia Tan, *Police reports lodged against Singapore pastor over offensive gay and lesbian remarks*, FRIDAE.COM (Feb. 18, 2010) <http://www.fridae.com/newsfeatures/2010/02/18/9670.police-reports-lodged-against-singapore-pastor-over-offensive-gay-and-lesbian-remarks>.

<sup>31</sup> See Vere, *Catholicism*, *supra*, note 29; See also *The Cost of Being a Christian*, ALLIANCE DEFENSE FUND, <https://www.alliancedefensefund.org/Home/Detail/4333?referral=E0910B3F>; David Walker, *Photographer Loses Bid to Refuse Same-Sex Wedding Jobs*, PDN ONLINE (Jan. 4, 2010) [http://www.pdnonline.com/pdn/content\\_display/features/pdn-online/e3i7d41666c039b61afca226786f0011fd9](http://www.pdnonline.com/pdn/content_display/features/pdn-online/e3i7d41666c039b61afca226786f0011fd9).



ceremonies. A federal court refused to give relief from the state penalties.<sup>32</sup> Professors at state universities in Illinois and Wisconsin were fired or disciplined for expressing personal convictions that homosexual behavior is sinful.<sup>33</sup> Candidates for masters' degrees in counseling in Georgia and Michigan universities were penalized or dismissed from programs for their religious views about the wrongfulness of homosexual relations.<sup>34</sup> A Los Angeles policeman claimed he was demoted after he spoke against the wrongfulness of homosexual conduct in the church where he is a lay pastor.<sup>35</sup> The Catholic Church's difficulties with adoption services and the Boy Scouts' challenges in various locations are too well known to require further comment.

We must also be concerned at recent official expressions that would narrow the field of activities protected by the free exercise of religion. Thus, when President Obama used the words *freedom of worship* instead of *free exercise of religion*, a writer for the Becket Fund for Religious Liberty sounded this warning:

“To anyone who closely follows prominent discussion of religious freedom in the diplomatic and political arena, this linguistic shift is troubling.

“The reason is simple. Any person of faith knows that religious exercise is about a lot more than freedom of worship. It's about the right to dress according to one's religious dictates, to preach openly, to evangelize, to engage in the public square.”<sup>36</sup>

Fortunately, more recent expressions by President Obama and his state department have used the traditional references to the right to *practice* religious faith.<sup>37</sup>

Even more alarming are recent evidences of a narrowing definition of religious expression and an expanding definition of the so-called civil rights of “dignity,” “autonomy,” and “self-fulfillment” of persons offended by religious preaching. Thus, President Obama's head of the Equal Employment Opportunity Commission, Chai Feldblum, recently framed the issue in terms of a “sexual-orientation liberty” that is such a fundamental right that it should prevail over a competing “religious-belief liberty.”<sup>38</sup> Such a radical assertion should not escape analysis. It has three elements. First, the freedom of religion—an express provision of the Bill of Rights that has been recognized

---

<sup>32</sup> Keeton v. Anderson-Wiley, 10-cv-00099, 2010 WL 3321873 (S.D. Ga. Aug. 20, 2010).

<sup>33</sup> See Jodi Heckel, *Instructor of Catholicism at UI Claims Loss of Job Violates Academic Freedom*, NEWS GAZETTE (Jul. 9, 2010) <http://www.news-gazette.com/news/university-illinois/2010-07-09/instructor-catholicism-ui-claims-loss-job-violates-academic-free>; Julie Bolcer, *Professor Sent Antigay E-mail to Student*, ADVOCATE, (Oct. 14, 2010) [http://www.advocate.com/News/Daily\\_News/2010/10/14/Professor\\_Sent\\_Antigay\\_Email\\_to\\_Student/](http://www.advocate.com/News/Daily_News/2010/10/14/Professor_Sent_Antigay_Email_to_Student/).

<sup>34</sup> Ward v. Wilbanks, 09-CV-11237 (E.D. Mich. July 26, 2010).

<sup>35</sup> Pete Vere, *Gay Rights vs. Faithful*, WASH. TIMES, July 31, 2008.

<sup>36</sup> Ashley Samelson, *Why “Freedom of Worship” is Not Enough*, FIRST THINGS, (Feb. 22, 2010)

<http://www.firstthings.com/onthesquare/2010/02/why-freedom-of-worship-is-not-enough> added).

<sup>37</sup> See Katelyn Sabochik, *President Obama Celebrates Ramadan at White House Iftar Dinner*, 14 August 2010, The White House Blog, <http://www.whitehouse.gov/blog/2010/08/14/president-obama-celebrates-ramadan-white-house-iftar-dinner>; Hilary Rodham Clinton, *Remarks at the release of the 2010 International Religious Freedom Report*, 17 November 2010, <http://www.state.gov/secretary/rm/2010/11/151081.htm>; *Clinton report on religious liberty applauded by panel*, 18 November 2010, The Ethics & Religious Liberty Commission of the Southern Baptist Convention, <http://erlc.com/article/clinton-report-on-religious-liberty-applauded-by-panel>.

<sup>38</sup> See Deacon Fournier, *First Amendment Outdated? Obama Nominates Homosexual Equivalency Advocate to EEOC*, CATHOLIC ONLINE, (Oct. 1, 2009) <http://www.catholic.org/politics/story.php?id=34533>.

as a fundamental right for over 200 years—is recast as a simple “liberty” that ranks among many other liberties. Second, Feldblum asserts that sexual orientation is now to be defined as a “sexual liberty” that has the status of a fundamental right. Finally, it is claimed that “the best framework for dealing with this conflict is to analyze religious people’s claims as ‘belief liberty interest’ not as free exercise claims under the First Amendment.” The conclusion: Religious expressions are to be overridden by the fundamental right to “sexual liberty.”<sup>39</sup>

It is well to remember James Madison’s warning:

“There are more instances of the abridgement of the freedom of the people by gradual and silent encroachments of those in power than by violent and sudden usurpations.”<sup>40</sup>

We are beginning to experience the expansion of rhetoric and remedies that seem likely to be used to chill or even to penalize religious expression. Like the professors in Illinois and Wisconsin and the lay clergyman in California, individuals of faith are experiencing real retribution merely because they seek to express their sincerely held religious beliefs.

All of this shows an alarming trajectory of events pointing toward constraining the freedom of religious speech by forcing it to give way to the “rights” of those offended by such speech. If that happens, we will have criminal prosecution of those whose religious doctrines or speech offend those whose public influence and political power establish them as an officially protected class.

Closely related to the danger of criminal prosecutions are the current arguments seeking to brand religious beliefs as an unacceptable basis for citizen action or even for argument in the public square. For an example of this we need go no further than the district court’s opinion in the Proposition 8 case, *Perry v. Schwarzenegger*.<sup>41</sup>

A few generations ago the idea that religious organizations and religious persons would be unwelcome in the public square would have been unthinkable. Now, such arguments are prominent enough to cause serious concern. It is not difficult to see a conscious strategy to neutralize the influence of religion and churches and religious motivations on any issues that could be characterized as public policy. As noted by John A. Howard of the Howard Center for Family, Religion and Society, the proponents of banishment “have developed great skills in demonizing those who disagree with them, turning their opponents into objects of fear, hatred and scorn.”<sup>42</sup> Legal commentator Hugh Hewitt described the current circumstance this way:

“There is a growing anti-religious bigotry in the United States. . . .

---

<sup>39</sup> *Id.* See also Chai Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 BROOKLYN L. REV. 61 (2006) (also available at <http://www.becketfund.org/files/4bce5.pdf>).

<sup>40</sup> James Madison, Speech in the Virginia Ratifying Convention on Control of the Military, (June 16, 1788), in 1 HISTORY OF THE VIRGINIA FEDERAL CONVENTION OF 1788, 130 (H.B. Grigsby ed., 1890).

<sup>41</sup> 704 F. Supp. 2d 921 (N.D. Cal. 2010).

<sup>42</sup> John A. Howard, *Liberty: America’s Great Creative Power*, (Howard Center), June 22, 2009 at 6.

“For three decades people of faith have watched a systematic and very effective effort waged in the courts and the media to drive them from the public square and to delegitimize their participation in politics as somehow threatening.”<sup>43</sup>

The forces that would intimidate persons with religious-based points of view from influencing or making the laws of their state or nation should answer this question: How would the great movements toward social justice cited earlier have been advocated and pressed toward adoption if their religious proponents had been banned from the public square by insistence that private religious or moral positions were not a rational basis for public discourse?

We have already seen a significant deterioration in the legal position of the family, a key institution defined by religious doctrine. In his essay “The Judicial Assault on the Family,” Allan W. Carlson examines the “formal influence of Christianity” on American family law,<sup>44</sup> citing many state and United States Supreme Court decisions through the 1950s affirming the fundamental nature of the family.<sup>45</sup> He then reviews a series of decisions beginning in the mid-1960s that gave what he calls “an alternate vision of family life and family law.”<sup>46</sup> For example, he quotes a 1972 decision in which the Court characterized marriage as “an association of two individuals each with a separate intellectual and emotional makeup.”<sup>47</sup> “Through these words,” Carlson concludes, “the U.S. Supreme Court essentially enlisted in the Sexual Revolution.”<sup>48</sup> Over these same years, “the federal courts also radically altered the meaning of parenthood.”<sup>49</sup>

I quote Carlson again:

“The broad trend has been from a view of marriage as a social institution with binding claims of its own and with prescribed rules for men and women into a free association, easily entered and easily broken, with a focus on the needs of individuals. However, the ironical result of so expanding the ‘freedom to marry’ has been to enhance the authority and sway of government.”<sup>50</sup>

“As the American founders understood, marriage and the autonomous family were the true bulwarks of liberty, for they were the principal rivals to the state. . . . And surely, as the American judiciary has deconstructed marriage and the family over the last 40 years, the result has been the growth of government.”<sup>51</sup>

All of this has culminated in attempts to redefine marriage or to urge its complete abolition. The debate continues in the press and elsewhere.<sup>52</sup>

---

<sup>43</sup> HUGH HEWITT, *A MORMON IN THE WHITE HOUSE?*, 242–43 (2007).

<sup>44</sup> Allan W. Carlson, *The Judicial Assault on the Family*, in EDWARD B. MCLEAN, *THE MOST DANGEROUS BRANCH*, 56 (2008).

<sup>45</sup> *See, e.g.*, *DeBurgh v. DeBurgh*, 39 Cal. 2d 858, 250 P.2d 598 (1957) (Traynor J.), quoted in *id.*, at 59.

<sup>46</sup> Carlson, *supra* note 44, at 60.

<sup>47</sup> *Eisenstadt v. Baird*, 295 U.S. 438, 453 (1972).

<sup>48</sup> Carlson, *supra* note 44, at 61.

<sup>49</sup> *Id.* at 64.

<sup>50</sup> *Id.* at 62.

<sup>51</sup> *Id.* at 66–67.

<sup>52</sup> Compare Hope Yen, *Holey Matrimony: Marriage a moth-eaten relic?*, SALT LAKE TRIB., Nov. 18, 2010, at A8, with *Marriage’s Demise Exaggerated*, DESERET NEWS, Dec. 5, 2010, at G1.

#### IV.

What has caused the current public and legal climate of mounting threats to religious freedom? I believe the cause is not legal but cultural and religious. I believe the diminished value being attached to religious freedom stems from the ascendancy of moral relativism.

More and more of our citizens support the idea that all authority and all rules of behavior are man-made and can be accepted or rejected as one chooses. Each person is free to decide for himself or herself what is right and wrong. Our children face the challenge of living in an increasingly godless and amoral society.

I have neither the time nor the expertise to define the various aspects of moral relativism or the extent to which they have entered the culture or consciousness of our nation and its people. I can only rely on respected observers whose descriptions feel right to me.

In his book, *Modern Times*, the British author, Paul Johnson, writes:

“At the beginning of the 1920s the belief began to circulate, for the first time at a popular level, that there were no longer any absolutes: of time and space, of good and evil, of knowledge, above all of value.”<sup>53</sup>

On this side of the Atlantic, Gertrude Himmelfarb describes how the virtues associated with good and evil have been degraded into relative values.<sup>54</sup>

A variety of observers have described the consequences of moral relativism. All of them affirm the existence of God as the Ultimate Law-giver and the source of the absolute truth that distinguishes good from evil.

Rabbi Harold Kushner speaks of God-given “absolute standards of good and evil built into the human soul.”<sup>55</sup> He writes:

“As I see it, there are two possibilities. Either you affirm the existence of a God who stands for morality and makes moral demands of us, who built a law of truthfulness into His world even as He built in a law of gravity. . . . Or else you give everyone the right to decide what is good and what is evil by his or her own lights, balancing the voice of one’s conscience against the voice of temptation and need. . . .”<sup>56</sup>

Rabbi Kushner also observes that a philosophy that rejects the idea of absolute right and wrong inevitably leads to a deadening of conscience.

---

<sup>53</sup> PAUL JOHNSON, *MODERN TIMES: THE WORLD FROM THE TWENTIES TO THE NINETIES*, (rev. ed., 1991), at 4. Declaring that secular ideology came to replace religious belief, Johnson charges moral relativism with being one of the underlying evils that made possible the catastrophic failures and tragedies of the century. *Id.* at 48, 784.

<sup>54</sup> GERTRUDE HIMMELFARB, *THE DE-MORALIZATION OF SOCIETY: FROM VICTORIAN VIRTUES TO MODERN VALUES* (1st Vintage Books ed., 1996) at 9–12.

<sup>55</sup> HAROLD KUSHNER, *WHO NEEDS GOD* (Fireside ed., 2002), at 78.

<sup>56</sup> *Id.* at 65–66.

“Without God, it would be a world where no one was outraged by crime or cruelty, and no one was inspired to put an end to them. . . . [T]here would be no more inspiring goal for our lives than self-interest. . . . Neither room nor reason for tenderness, generosity, helpfulness.”<sup>57</sup>

Dr. Timothy Keller, a much-published pastor in New York, asks:

“What happens if you eliminate anything from the Bible that offends your sensibility and crosses your will? If you pick and choose what you want to believe and reject the rest, how will you ever have a God who can contradict you? You won’t! . . .

“Though we have been taught that all moral values are relative to individuals and cultures, we can’t live like that. In actual practice we inevitably treat *some* principles as absolute standards by which we judge the behavior of those who don’t share our values. . . . People who laugh at the claim that there is a transcendent moral order do not think that racial genocide is just impractical or self-defeating, but that it is *wrong*. . . .”<sup>58</sup>

My esteemed fellow Apostle, Elder Neal A. Maxwell, asked:

“[H]ow can a society set priorities if there are no basic standards? Are we to make our calculations using only the arithmetic of appetite?”<sup>59</sup>

He made this practical observation:

“Decrease the belief in God, and you increase the numbers of those who wish to play at being God by being ‘society’s supervisors.’ Such ‘supervisors’ deny the existence of divine standards, but are very serious about imposing their own standards on society.”<sup>60</sup>

Elder Maxwell also observed that we increase the power of governments when people do not believe in absolute truths and in a God who will hold them and their government leaders accountable.<sup>61</sup>

Moral relativism leads to a loss of respect for religion and even to anger against religion and the guilt that is seen to flow from it. As it diminishes religion, it encourages the proliferation of rights that claim ascendancy over the free exercise of religion.

The founders who established this nation believed in God and in the existence of moral absolutes—right and wrong—established by this Ultimate Law-giver. The Constitution they established assumed and relied on morality in the actions of its citizens. Where did that morality come from and how was it to be retained? Belief in God and the consequent reality of right and wrong was taught by religious leaders in churches and synagogues, and the founders gave us the First Amendment to preserve that foundation for the Constitution.

The preservation of religious freedom in our nation depends on the value we attach to the teachings of right and wrong in our churches, synagogues and mosques. It is faith in God—however defined—that translates these religious teachings into the moral behavior that benefits the nation. As fewer and fewer citizens believe in God and in the

---

<sup>57</sup> *Id.* at 208–09.

<sup>58</sup> TIMOTHY KELLER, *THE REASON FOR GOD: BELIEF IN AN AGE OF SKEPTICISM* (2008), at 114, 145–47.

<sup>59</sup> Neal A. Maxwell, *The Prohibitive Costs of a Value-free Society*, *ENSIGN*, Oct. 1978, at 52.

<sup>60</sup> *Id.* at 53.

<sup>61</sup> See Maxwell, *supra* note 59, at 52–53.

existence of the moral absolutes taught by religious leaders, the importance of religious freedom to the totality of our citizens is diminished. We stand to lose that freedom if many believe that religious leaders, who preach right and wrong, make no unique contribution to society and therefore should have no special legal protection.

## V. Conclusion

I have made four major points:

1. Religious teachings and religious organizations are valuable and important to our free society and therefore deserving of their special legal protection.
2. Religious freedom undergirds the origin and existence of this country and is the dominating civil liberty.
3. The guarantee of free exercise of religion is weakening in its effects and in public esteem.
4. This weakening is attributable to the ascendancy of moral relativism.

We must never see the day when the public square is not open to religious ideas and religious persons. The religious community must unite to be sure we are not coerced or deterred into silence by the kinds of intimidation or threatening rhetoric that are being experienced. Whether or not such actions are anti-religious, they are surely anti-democratic and should be condemned by all who are interested in democratic government. There should be room for all good-faith views in the public square, be they secular, religious, or a mixture of the two. When expressed sincerely and without sanctimoniousness, the religious voice adds much to the text and tenor of public debate. As Elder Quentin L. Cook has said:

“In our increasingly unrighteous world, it is essential that values based on religious belief be part of the public discourse. Moral positions informed by a religious conscience must be accorded equal access to the public square.”<sup>62</sup>

Religious persons should insist on their constitutional right and duty to exercise their religion, to vote their consciences on public issues, and to participate in elections and in debates in the public square and the halls of justice. These are the rights of all citizens and they are also the rights of religious leaders and religious organizations. In this circumstance, it is imperative that those of us who believe in God and in the reality of right and wrong unite more effectively to protect our religious freedom to preach and practice our faith in God and the principles of right and wrong He has established.

This proposal that we unite more effectively does not require any examination of the doctrinal differences among Christians, Jews, and Muslims, or even an identification of the many common elements of our beliefs. All that is necessary for unity and a broad coalition along the lines I am suggesting is a common belief that there is a right and wrong in human behavior that has been established by a Supreme Being. All who believe

---

<sup>62</sup> Cook, *supra* note 1, at 29.

in that fundamental should unite more effectively to preserve and strengthen the freedom to advocate and practice our religious beliefs, whatever they are. We must walk together for a ways on the same path in order to secure our freedom to pursue our separate ways when that is necessary according to our own beliefs.

I am not proposing a resurrection of the so-called “moral majority,” which was identified with a particular religious group and a particular political party. Nor am I proposing an alliance or identification with any current political movement, tea party or other. I speak for a broader principle, non-partisan and, in its own focused objective, ecumenical. I speak for what Cardinal Francis George described in his address at Brigham Young University, just a year ago. His title was “Catholics and Latter-day Saints: Partners in the Defense of Religious Freedom.” He proposed

“that Catholics and Mormons stand with one another and with other defenders of conscience, and that we can and should stand as one in the defense of religious liberty. In the coming years, interreligious coalitions formed to defend the rights of conscience for individuals and for religious institutions should become a vital bulwark against the tide of forces at work in our government and society to reduce religion to a purely private reality. At stake is whether or not the religious voice will maintain its right to be heard in the public square.”<sup>63</sup>

We join in that call for religious coalitions to protect religious freedom. In doing so we recall the wisdom of Benjamin Franklin. At another critical time in our nation’s history, he declared:

“We must all hang together, or assuredly we shall all hang separately.”<sup>64</sup>

In conclusion, as an Apostle of the Lord Jesus Christ I affirm His love for all people on this earth, and I affirm the importance His followers must attach to religious freedom for all people—whatever their beliefs. I pray for the blessings of God upon our cooperative efforts to preserve that freedom.

---

<sup>63</sup> George, *supra* note 28.

<sup>64</sup> At the signing of the Declaration of Independence, July 4, 1776.