

FROM PLAZA TO POSTAGE STAMP

The Threatened Demise of Religion in the Public Square

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Remarks to J. Reuben Clark Law Society

February 11, 2010

Introduction

My dear brethren and sisters, it is a great honor to have been invited to speak to you tonight as the curtain goes up on the 2010 annual meeting of the J. Reuben Clark Law Society. It has been my honor to do so on a number of other occasions. When I was invited to speak to you again this year, I was not sure whether that resulted from (a) the fact that the officers of the law society turn over every year without sufficient institutional memory or (b) an over-abundance of courtesy and generosity. For whatever reason, I am honored by this opportunity.

As I travel about in my current capacity as a General Authority of the Church and as the general counsel of the Church, I often hear this question: What is the greatest challenge faced by the Church? I suppose there are a number of candidates for an answer—a continuing rapid growth that makes retaining new converts a top priority; or perhaps finding and training local leaders. But from

where I sit, the greatest challenge faced by the Church is the challenge to religious liberty that is growing world-wide. These challenges have a number of faces—from galloping secularism in some places, to the dominant sectarian or non-Christian religions in other places, to authoritarian governments that feel threatened by religion in still other places. I have chosen to address one aspect of this challenge to religious liberty that I believe confronts us here in our own country. And so I have entitled these remarks, “From Plaza to Postage Stamp—the Threatened Demise of Religion in the Public Square”

UK Equality Bill

For the past year, the United Kingdom’s Labour government has been seeking to consolidate and strengthen the UK’s anti-discrimination legislation—specifically with respect to homosexuals. Labour’s so-called “Equality Bill” would have labeled—and forbidden—a church’s employment practice of requiring its employees to adhere to its moral standards. In the case of the Church, this legislation would have prohibited the application of a temple recommend standard of employment. Worthiness for a recommend is a pre-requisite to virtually all Church employment and is vitally important to the work of the Church.

At the eleventh hour a coalition of churches—including our Church—was instrumental in persuading the House of Lords, in a very close vote, to amend the Equality Bill so as to adequately circumscribe its application to churches and preserve our recommend standard. That “bullet” was dodged—but barely!

Notwithstanding, the Pope decried the bill as an unfair assault on people and organizations of faith. In substance, he said that the most fundamental rights of freedom of conscience—what we Latter-day Saints refer to as “free agency” or “moral agency”—were being forced to give way to social rights.

One British commentator endorsed the Pope in an article entitled “The Pope is Right About the Threat to Freedom”.ⁱ Said he:

“There are times when human rights become human wrongs. This happens when rights become more than a defense of human dignity, which is their proper sphere, and become instead a political ideology, relentlessly trampling down everything in their path. This is happening increasingly in Britain, and it is why the Pope’s protest against the Equality Bill, whether we agree with it or not, should be taken seriously.” He added that *“using the ideology of human rights to assault religion risks undermining the very foundation of human rights themselves.”*

Sadly, the specter of such an assault is looming large in the United States as well.

Christian Legal Society vs. Martinez

Christian Legal Society vs. Martinez will be argued in the United States Supreme Court this Spring. In that case, the Hastings College of the Law (affiliated with the University of California) denied on-campus recognition to CLS because CLS requires voting members and officers to adhere to its “Statement of Faith”, which rejects homosexual conduct among other things. This membership standard is counter to Hastings’ non-discrimination policy, which includes sexual orientation.

CLS filed suit in federal court in San Francisco in 2004. Both the district court and the Ninth Circuit rejected its claim. The United States Supreme Court now has accepted *certiorari*.

Hence, a battle is looming over the effort to acquire civil *social* rights at the expense of civil *religious* rights. *This battle represents the acceleration of a*

disturbing slide downward in the law regarding the place of religion in the public square.

Elder Oaks’ Benchmark Address

Elder Dallin H. Oaks chose a devotional at BYU-I last Fall as the venue to deliver an address on this very subject.ⁱⁱ That address promises to become a classic—a benchmark. Here are some excerpts from that talk:

“Speaking of the First Amendment’s guarantee of the ‘free exercise’ of religion—our sometimes-stated ‘first freedom’, [one author] said, ‘[U]nless the guarantee of free exercise of religion gives a religious actor greater protection against government prohibitions than are already guaranteed to all actors by other provisions of the constitution (like freedom of speech), what is the special value of *religious* freedom?’

“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.’ Other wise observers have noted the ever-growing, relentless attack on the Christian religion by forces who reject the existence or authority of God. The extent and nature of religious devotion in this nation is

changing. The tide of public opinion in favor of religion is receding, and this probably portends public pressures for laws that will impinge on religious freedom.”

Elder Oaks continued:

‘There is a growing anti-religious bigotry in the United States. . . . 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. For example, a prominent gay-rights spokesman gave this explanation for his objection to our Church’s position on California’s Proposition 8: ‘I’m not intending it to harm the religion. I think they do wonderful things. Nicest people. . . . My single goal is to get them out of the same-sex marriage business and back to helping hurricane victims.’”

And then he said:

“A [significant] threat to religious freedom is from those who perceive it to be in conflict with the newly alleged ‘civil right’ of same-gender couples to enjoy the privileges of marriage. We have endured a wave of media-reported charges that the Mormons are trying to ‘deny’ people or ‘strip’ people of their ‘rights.’ After a significant majority of

California voters (seven million — over 52 percent) approved Proposition 8's limiting marriage to a man and a woman, some opponents characterized the vote as denying people their civil rights. In fact, the Proposition 8 battle was not about civil rights, but about what equal rights demand and what religious rights protect. At no time did anyone question or jeopardize the civil right of Proposition 8 opponents to vote or speak their views.”

Brief Review of Landmark USSC Religious Liberty Cases

I would like to now very briefly trace the evolution of the law of religious liberty as articulated by the United States Supreme Court over the past 60 years. It reflects a definite diminishing of the role of religion in the public square and a marked increase in skepticism toward the free exercise of religion. In reviewing briefly these decisions, it is not my purpose to either criticize or commend any decision, much less to further any political philosophy. Rather I wish only to trace the facts of the historical record.

I turn first to key United States Supreme Court interpretations of the Establishment Clause.

I begin in 1947 with *Everson vs. Board of Education*.ⁱⁱⁱ There the Supreme Court held that public funds cannot be used to reimburse parents for the cost of bus transportation to parochial schools, because doing so is a violation of the Establishment Clause. Next, came *Engle vs. Vitale* in 1962.^{iv} There, an official scripted prayer in public school was held to be a violation of the Establishment Clause. Close on the heels of *Engle* came *Schemp vs. Abington Township*^v in 1963 where the court held that requiring prayer *at all* in public school is a violation of the Establishment Clause.

Schemp was followed in 1968 by *Epperson vs. Arkansas*.^{vi} *Epperson* was both an Establishment Clause and a Free Exercise Clause case. The court ruled that Arkansas' anti-evolution statute was unconstitutional as an interference with the free exercise of religion. It is worth noting that the Free Exercise Clause was used as *a sword* to strike at religion instead of *a shield* to protect it. The court also held per the Establishment Clause that government cannot take sides on such matters as evolution.

In 1980, the court decided *Stone vs. Graham*.^{vii} It ruled that the required posting of the Ten Commandments on the wall of every public school room lacked

a valid legislative purpose and thus violated the Establishment Clause. The statute was not saved by a “small print” notation on the posted statement that it fostered a legislative purpose because the Ten Commandments reflect the values of Western Civilization. Neither was it saved because of private donations to pay for the postings.

To be true to all the Supreme Court’s jurisprudence in this area, mention must be made of the 1983 case of *Marsh vs. Chambers*^{viii} There the practice of opening legislative sessions with prayer in Nebraska was held not to violate the Establishment Clause or the 14th Amendment, even though the same denomination had offered the prayer for 16 years. The court noted that this is a practice that has been observed in the U.S. Congress for more than 200 years and in many states for more than 100 years. It is part of the “fabric of society”. Moreover, said the court, the framers made it clear that they did not intend the Establishment Clause to apply to the practice of legislative prayers.

However, *Marsh* represents only a minor detour in the steady march toward constricting the sphere of religious expression in the public square. Two years later in *Wallace vs. Jaffree*^{ix} the court struck down an Alabama statute providing

for a one-minute period of silent prayer or meditation as a violation of the Establishment Clause because there was no secular purpose in doing so. After *Wallace*, prayer of any kind—even silent, private prayer—was a dead letter in public schools.

The 1987 case of *Edwards vs. Aguillard*^x returned to the controversial subject of science vs. religion. A Louisiana Statute that required the teaching of “creation science” if evolution was being taught was held to violate the Establishment Clause because it had no secular purpose. The court stated that the law endorsed religion by teaching that a “supernatural being” was the Creator.

In *County of Allegheny vs. ACLU*^{xi}—a 1989 decision—the display of a Christmas crèche on the steps of the Pittsburgh Pennsylvania courthouse violated the Establishment Clause because it was on public property and displayed a sign that said “Gloria in excelsis Deo”.

In 1992 in *Lee vs. Weisman*^{xii}, “non-sectarian” prayer by a selected clergyman at graduation exercises was ruled a violation of the Establishment

Clause. The court said that the purpose of the Establishment Clause is to separate religion and government. But it must be said that collectively these cases represent not merely a “separation” but an *elimination* of religion from the public square when government is involved in any way, even if that government involvement is limited to simply providing a forum for religious expression to occur.

Now let us turn to the Free Exercise Clause. Before 1989, the standard for interpreting the Free Exercise Clause was set forth in *Sherbert vs. Verner*.^{xiii} In substance, that standard was that in order for a government rule or regulation to override a religious practice, the government had to demonstrate that the rule furthered a “compelling governmental interest” by “the least restrictive means” possible. The burden rested on the *government*. The effect of this rule of interpretation was to place the free exercise of religion on a pedestal.

Then in 1990 came a sea change. *Smith vs. Employment Division*^{xiv} turned the *Sherbert* rule on its head and declared that a government rule would be upheld so long as it was “neutral and generally applicable” to everyone. Further, the burden was placed on *religion* to demonstrate otherwise. The net effect of *Smith* was that free exercise was knocked from its pedestal into the street to compete with

all other interests. But, cast into that street, religion is now increasingly at risk of being trampled underfoot.

All of this brings us full-circle to *Christian Legal Society vs. Martinez*.^{xv} As I have previously mentioned, the question in *Martinez* is whether social and cultural interests can trump free exercise and free speech and association rights. Hastings' policy not only impairs religious freedom, it also purports to narrow still further Establishment Clause rubric. The dimensions of the public square where religious activities can be tolerated are constricting. As one commentator has said, "the Left is trying to create a right that destroys a right."

Perry vs. Schwarzenegger

If these cases have left religion in the public square dazed and on the ropes, *Perry vs. Schwarzenegger*—now pending in federal district court in San Francisco—threatens to deliver the knock-out punch. *Perry* seeks a court declaration that *as a matter of law*, religious views may not be used to justify the denial of a *social* civil right. Earlier cases have chased *prayer* and *religious symbols* from the square. Now, this case would drive religious *opinions* off as well.

All here are familiar with the now-famous “Proposition 8” battle in California. In the November 2008 general election, the California electorate, by a significant vote margin, adopted an initiative measure that placed the following statement in the California Constitution: “Only marriage between a man and a woman is legal or recognized in California.” This language was the same language that had been adopted by the voters in 2000 in another initiative measure— Proposition 22—as a part of the California Family Code. However, in May 2008 the California Supreme Court declared the Family Code language unconstitutional, pursuant to the equal protection provision in the California Constitution, in its decision in *In re Marriage Cases*.^{xvi}

While the Proposition 22 *Marriage Cases* were matriculating through the California state courts, a group of concerned citizens banded together to form a coalition known as ProtectMarriage.com to circulate a petition that would put the Family Code marriage definition into the California Constitution. Shortly after the California Supreme Court handed down its landmark *Marriage Cases* decision in May, the California Secretary of State certified Proposition 8 for the November 2008 ballot.

After the voters adopted Proposition 8, a petition was immediately filed in the California Supreme Court by Proposition 8 opponents seeking to declare the vote invalid on procedural grounds. However, in June 2009, the California Supreme Court ruled that Proposition 8 had been validly adopted by the voters.^{xvii} Proposition 8 had trumped the California's Supreme Court's decision in *Marriage Cases*.

As dramatic as these events in California had been, it has now become clear that the “drama” was only beginning. The day after the California Supreme Court announced its decision validating Proposition 8, two of the most prominent lawyers in the country—Theodore “Ted” Olson and David Boies—held a press conference in Los Angeles to announce the filing of a challenge under the *United States Constitution* to Proposition 8. *Perry vs. Schwarzenegger* was filed in federal district court on behalf of two homosexual couples—one male and one female—who allege that the passage of Proposition 8 denied them the opportunity to marry and that this denial was a violation of their rights under the Equal Protection and Due Process Clauses.

The plaintiffs in *Perry* base their claim primarily on three U.S. Supreme Court decisions—*Loving vs. Virginia*^{xviii}, *Romer vs. Evans*^{xix}, and *Lawrence vs.*

Texas^{xx}. Time tonight does not permit reviewing further the argument that these plaintiffs are attempting to stitch together based on these cases. Suffice it to say, that they make essentially two arguments: First, they claim that gays are a suspect class and that denying them the right to marry cannot be justified under the Fourteenth Amendment. Second, they assert that allowing voters in California to be influenced by faith-based advocates or arguments in adopting Proposition 8 is an insufficient governmental purpose—even under a lesser standard of review—to prevent gays from marrying. Stated differently, they essentially claim that the voters—from whom all authority in a democracy flows—may not consider religious views and values when deciding these alleged social and cultural civil rights.

These are serious allegations and represent an arrow directly at the heart, not only of traditional marriage, but at the place of religion and religious views in the political dialogue of this country. They are made all the more serious because of the exceptionally skilled advocates who are advancing them. Ted Olson, former U.S. Solicitor General, is one of the most accomplished and respected appellate advocates in the country. He has argued more than 50 cases in the U.S. Supreme Court. He represented Governor George W. Bush in the landmark case of *Bush vs. Gore*^{xxi} which made *Governor Bush President Bush*. His co-counsel, David Boies,

is equally respected as a trial and appellate advocate. Mr. Boies represented Vice-president Al Gore in *Bush vs. Gore*. So, we have these two preeminent legal gladiators joining forces to advance the cause of the plaintiffs in *Perry vs. Schwarzenegger*.

The named defendants in *Perry* are Governor Arnold Schwarzenegger and California Attorney General Edmund G. Brown Jr. But since both of these public officials actually *support* gay marriage and refuse to defend the voter's decision in Proposition 8, the small band of "citizen soldiers" comprising ProtectMarriage.com once more entered the fray. They were permitted to intervene. Hence, the California voters are being defended in this case, not by public officials elected for that purpose, but by some of their own.

Presiding in the case is Chief Judge Vaughn R. Walker, a highly respected jurist. Judge Walker has surprised many with his handling of the case. To begin with, he put it on a very fast track for trial, although the complaint was not actually served until last June. He ordered trial to begin—and it actually did begin—on January 11, 2010. Then he indicated, in effect, that he wanted a "show trial". He wanted the alleged benefits of so-called same gender marriage to be fully vetted through the taking of evidence in his courtroom; and that is what has happened.

The plaintiffs have produced a parade of so-called “experts”—most of them academics—on a variety of issues, ranging from the alleged “political powerlessness” of homosexuals to the purported psychological burdens suffered by gays who are not allowed to marry to the comparative parenting skills of homosexual couples. There was even testimony from a San Francisco official testifying how that city and county would allegedly save money if gays are allowed to marry!

To further amplify this show trial, Judge Walker ordered that it be televised. This ruling was challenged by counsel for the coalition, and the United States Supreme Court reversed that order, stating that it amounted to an inappropriate manipulation of court rules and risked intimidation and harassment for defense witnesses. Nonetheless, Judge Walker still videotaped the trial. Some believe he plans to broadcast it later if and when the court rules can be changed.

The judge also granted a very aggressive, invasive discovery motion by the plaintiffs. His order authorized them to obtain the internal documents of the coalition’s campaign organization, even though these documents reflected mere discussions of strategy and *were not communications that were released to or communicated to the public as part of the Proposition 8 ballot campaign.* This

discovery order was modified to a limited degree by the Ninth Circuit. The circuit court ruled that the internal communications of a handful of people comprising the so-called “core group of individuals” within the coalition were off limits, but everything else was required to be produced. The coalition turned over something on the order of nearly 200,000 documents, most of them emails.

The trial is presently in a hiatus. The parties are preparing their proposed findings of fact. After these are received, Judge Walker has stated that he will schedule closing argument. In all likelihood, this will occur sometime in March. As this case goes to judgment—however it may be decided by Judge Walker—and eventually into the appellate courts, it presents three significant threats:

- Marriage. It threatens to replace man-woman marriage with genderless marriage in every state, not just California.
- Political Associations and Speech. By allowing invasive discovery of non-public communications within a political ballot measure campaign, it threatens a chilling effect on such associations and speech in future electoral contests.

- Religion in the Public Square. And most significantly for my purposes tonight, it threatens to eliminate any discussion of religion in the public square when social or cultural rights are at issue.

CONCLUSION

In January 1793, in a letter to members of New Church of Baltimore, President George Washington made the following observation which seems so very pertinent now.

“We have abundant reason to rejoice that in this Land the light of truth and reason has triumphed over the power of bigotry and superstition, and that every person may here worship God according to the dictates of his own heart. In this enlightened Age and in this Land of equal liberty, it is our boast that a man’s religious tenets will not forfeit the protection of the Laws, nor deprive him of the full respect and rights of citizenship to which he is entitled.”^{xxii}

And finally, in light of this pungent observation by the acknowledged Father of our Country, this statement made by Elder Dallin H. Oaks in 1990 reverberates:

“For many of the Founding Fathers, and for many Americans today, religious liberty is the basic civil liberty because faith in God and his teachings and the active practice of religion are the most fundamental guiding realities of life. Thus, for many citizens, religious liberty provides the very reason that all other civil liberties are desired.”^{xxiii}

[Conclude With Testimony]

Endnotes

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- ⁱ Jonathan Sacks, “The Pope is Right About the Threat to Freedom”, *The Times*, February 3, 2010.
- ⁱⁱ Dallin H. Oaks, Speech at BYU-Idaho, October 13, 2009.
- ⁱⁱⁱ 330 U.S. 1(1947).
- ^{iv} 370 U.S. 421 (1962).
- ^v 374 U.S. 403 (1963).
- ^{vi} 393 U.S. 97 (1968).
- ^{vii} 449 U.S. 39 (1980).
- ^{viii} 463 U.S. 783(1983).
- ^{ix} 472 U.S. 38 (1985).
- ^x 482 U.S. 578 (1987).
- ^{xi} 492 U.S. 573 (1989).
- ^{xii} 505 U.S. 577 (1992).
- ^{xiii} 374 U.S. 398 (1963).
- ^{xiv} 494 U.S. 872 (1990).
- ^{xv} 130 S. Ct. 795, 77 USLW 3635, 78 USLW 3011, 78 USLW 3335, 78 USLW 3340.
- ^{xvi} 43 Cal. 4th 757; 76 Cal. Rptr. 3^d 683 (2008).
- ^{xvii} *Strauss vs. Horton*, [cite to come] (2009).
- ^{xviii} 388 U.S. 1 (1967).
- ^{xix} ___ U.S. ___ (1996).
- ^{xx} ___ U.S. ___ (2003).
- ^{xxi} ___ U.S. ___ (2000).
- ^{xxii} Quoted in Dallin H. Oaks, “Religion in Public Life”, *Ensign*, July 1990.
- ^{xxiii} Dallin H. Oaks, Id.