



W A T C H M E N

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O N T H E T O W E R

Religious Freedom in a Secular Age

It is a pleasure for Kathy and me to be here in this stunningly beautiful place among friends and fellow lawyers. (Those aren't always the same thing, by the way.) I honor the ideals of this great society, and I commend you for gathering to discuss important issues that affect people and institutions of faith.

The mission statement of the J. Reuben Clark Law Society “affirm[s] the strength brought to the law by a lawyer’s personal religious conviction” and calls on its members to “strive through public service and professional excellence to promote fairness and virtue founded upon the rule of law.”¹ At no time has that mission been more important. So thank you for the invitation to speak here today and for your support of this important society.

ILLUSTRATIONS BY ALEX NABAUM

*This
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delivered
to members
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Background and Basic Principles

I especially appreciate the opportunity to share a few thoughts about freedom of religion. As a Church and as individual Church members, we face difficult challenges to our fundamental right to live according to the dictates of our faith. Our basic understanding of morality, marriage, family, and the purpose of life is becoming foreign to the secular cultures in which we live. As President Thomas S. Monson has noted, “Where once the standards of the Church and the standards of society were mostly compatible, now there is a wide chasm between us, and it’s growing ever wider.”² Values we once shared with the great majority of our fellow citizens are now often considered outdated, naïve, and sometimes even bigoted. Because a society’s deepest values drive law and public policy, and because those values in many Western nations are now almost entirely secular, government is increasingly enforcing secular values at the expense of religious ones. And society itself—even without the force of government—can ostracize, stigmatize, and discriminate against religious believers in overt and subtle ways, leaving people of faith marginalized and sometimes even despised. As this happens—and it is happening more rapidly in some countries than others—the space for us to freely and openly live out our deepest beliefs will tend to shrink and our ability to participate in civic life as free and equal citizens will tend to diminish. We indeed face challenging times.

Of course, the Church has *always* faced challenging times and thus has always been concerned about religious freedom. In the early years the Church and its members faced severe persecution, both official and unofficial—and it was often violent. That persecution drove the Saints from New York to Ohio, Missouri, and Illinois. Yet even in Nauvoo, where the Saints had their own city and a large militia to protect them, official and unofficial persecutions continued. The Saints eventually had no choice but to leave the United States, settling in the desert of present-day Utah, then a part of Mexico. Many died as a result of those persecutions,

including the Prophet Joseph Smith and his brother Hyrum, and many more were abused, beaten, and stripped of their property. And, as you know, the persecutions didn’t end when the Saints settled in Utah. As government harassment found its way there too, some Saints migrated north to Canada, seeking peace, security, and freedom. So the history of the Church in Canada has important links to the quest for religious freedom.³

The Church’s commitment to freedom of religion is rooted in its most basic doctrines. The 11th Article of Faith declares: “We claim the privilege of worshiping Almighty God according to the dictates of our own conscience, and allow all men the same privilege,

let them worship how, where, or what they may.”⁴ The path of discipleship and exaltation is one of faith-filled obedience and humble service—of willingly giving our lives to the Lord. But faith cannot be forced, and so moral agency is essential to the plan of salvation.

Thus, at a time when religious differences were often the cause of intolerance and violence, the Prophet Joseph Smith proclaimed toleration and equal rights for all faiths. He said:

The Saints can testify whether I am willing to lay down my life for my brethren. If it has been demonstrated that I have been willing to die for a “Mormon,” I am bold to declare before Heaven that I am just as ready to die in defending the rights of a Presbyterian, a Baptist, or a good man of any other denomination; for the same principle which would trample upon the rights of the Latter-day Saints would trample upon the rights of the Roman Catholics, or of any other denomination who may be unpopular and too weak to defend themselves.

*It is a love of liberty which inspires my soul—civil and religious liberty to the whole of the human race.*⁵

Notice the Prophet’s concern about the rights of vulnerable, minority religions that lack sufficient popular support “to defend themselves.” That has always been a core issue when addressing freedom of religion.

More recently, Elder Dallin H. Oaks has emphasized the importance of religious believers of all faiths standing up for religious freedom:

[I]t 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.

. . . 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 in that fundamental [principle] 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.⁶

That task will be difficult and will require constant vigilance, but it is of vital importance. As Elder Quentin L. Cook has said:

Extraordinary effort will be required to protect religious liberty. Our doctrine confirms what the U.S. founding fathers and political philosophers have advocated.

“No government can exist in peace, except such laws are framed and held inviolate as will secure to each individual the free exercise of conscience” (D&C 134:2).⁷

As you review these and other statements by modern apostles, notice that the freedom being spoken of is not merely what political philosophers have referred to as the “negative” freedom to be left alone, however important that may be. Rather, they speak of a much richer “positive” freedom—the freedom to live one’s religion in a legal, political, and social environment that is tolerant, respectful, and accommodating of religion. For the faithful, religion is not just a private hobby but a way of life bound up with one’s personal identity and dignity.

Naturally, virtually everyone in the Western democracies claims to believe in the *principle* of religious freedom. It is the application of the principle that creates controversy. Threats to religious freedom typically arise when religious people and institutions seek to say or do something—or refuse to say or do something—that runs counter to the philosophy or goals of those in power, including political majorities. As the experience of

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apostles and prophets, ancient and modern, invariably demonstrates, religion is often counter-cultural and thus unpopular. Likewise, religious freedom, while generally supported in principle, is often vigorously opposed in practice.

I was in Houston the day before yesterday. An article in the paper that morning reported on subpoenas being issued by the city government to a number of pastors, from Southern Baptist to nondenominational clerics, to turn over copies of any sermons and pastoral communications dealing with homosexuality, gender identity, or Annise Parker, the city’s openly lesbian mayor. The *Houston Chronicle* reported that opponents of Houston’s new antidiscrimination ordinance had filed a lawsuit, and the city’s attorneys had responded by issuing the subpoenas to pastors. The pastors are not part of the lawsuit, but they have opposed the ordinance. One pastor responded, “This is an attempt to chill pastors from speaking to the cultural issues of the day. The mayor would like to silence our voice.”⁸

So how are principles of religious freedom to be advocated in Canada, the United States, and in other places around the world? In secular societies that prize secular values more than religious truths and that increasingly see religion as an impediment to social progress, those who support religious freedom must carefully distinguish between what is vital and what is less critical. Think about these difficult questions:

- ① What protections are essential so that Church members and families can have sufficient freedom to live the gospel and pass on their faith to their children?
- ② What protections are central to the ability of the Church to carry out its divine mission to preach the gospel of Jesus Christ, administer the ordinances of salvation to the living and the dead, and strengthen home and family?
- ③ How and when should the Church get involved in social and moral issues that affect religious freedom?

Some answers to these questions remain constant. For example, the Church must be able to select its own priesthood leaders without any outside interference. But with some questions, answers will turn on the diverse situations the Church faces in different countries around the world.

Recent Church Experience in Canada—The Same-Sex Marriage “Reference” Case

The Canadian same-sex marriage case provides a useful example of the pragmatic approach the Church must sometimes take in matters of religious freedom. As you know, the Church has been very clear in its teachings and public statements about the Lord’s pattern of marriage. “The Family: A Proclamation to the World” states “that marriage between a man and a woman is ordained of God” and “is essential to His eternal plan.”⁹ Marriage and family are

central “to the Creator’s plan for the eternal destiny of His children.”¹⁰ The proclamation calls on Church members and people of goodwill to raise their voices in support of the Lord’s pattern of marriage because it is best for children, families, and society.

Accordingly, in the United States and other nations, often in concert with other religious groups, the Church has exercised its right to express its view that public policy should retain and support the traditional husband-wife definition of marriage.

But same-sex marriage also presents serious religious freedom challenges for Latter-day Saints and other believers. These challenges are often not well understood, even by faithful Church members. Without going into great detail, suffice it to say that a legal system and a society that define and protect marriage as the union of two people regardless of gender will tend to be more hostile toward—and less tolerant of—religious institutions and people of faith who teach that God has ordained marriage to be the union of husband and wife. A government and a society committed to the “genderless” marriage model will tend to suppress traditional marriage beliefs and practices as invidiously discriminatory.

Thus the Church’s opposition to same-sex marriage entails both deep concern for the welfare of children and families *and* concern for the freedom of the Church and its members to teach and live the gospel of Jesus Christ.



THE CHURCH NEEDS TO KNOW,
BASED ON YOUR EXPERTISE AND POSITION,
ABOUT THREATS TO RELIGIOUS FREEDOM.
IT NEEDS TO KNOW ABOUT GATHERING STORMS.

Nevertheless, the Church is keenly aware of political and social realities. In the public realm, the Church must make difficult, pragmatic decisions about how and when it expresses its views on marriage and which public policies it advocates or opposes, even as it upholds and defends the purity of its doctrine.

This brings us to the Canadian same-sex marriage case. As many of you may know, by 2003 several provincial courts had interpreted the Canadian Charter of Rights and Freedoms to grant same-sex couples the right to marry on equal terms with husband-wife couples. Rather than resist this trend in the Supreme Court of Canada, the federal government decided to redefine marriage to include same-sex couples. Politically, there appeared to be little or no chance that the government would change its mind or that a majority of Parliament would reject the government’s proposal.

Parliament nevertheless sought Supreme Court clarification on several important points. Through the established “reference” procedure, the government referred four questions to the Supreme Court:

- ♦ The first two asked whether the Parliament of Canada had the authority to determine legal capacity for marriage and, if so, whether its proposed Act was consistent with the Canadian Charter of Rights and Freedoms.

- ♦ The third asked whether “the freedom of religion guaranteed by paragraph 2(a) of the Canadian Charter protects religious officials from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs.”
- ♦ The fourth asked whether the traditional opposite-sex definition of marriage is consistent with the Charter.¹¹

Through an admirably open process, diverse groups from across Canada were allowed to submit legal arguments to the Supreme Court. The Church could have chosen to argue against same-sex marriage itself, as it has done in other contexts. It could also have lent its support to other groups opposing the same-sex marriage legislation in Parliament. But because it was apparent that Parliament was headed that way regardless of contrary views, the Church instead chose to focus on the religious freedom issue, where it believed it could have the most influence.

Working through our legal counsel at Kirton McConkie in Salt Lake City, the Church selected superb local counsel with experience in advocating before Canada’s appellate courts. One of those lawyers, Peter Lauwers, now serves as a justice on the Court of Appeal for Ontario.

The Church’s legal teams sought to broaden the issue beyond the narrow right of religious officials to refuse to solemnize same-sex marriages, as important as that is, to include the institutional rights of churches themselves. They crafted an argument for the Church’s factum (or brief) urging the Court to recognize that churches need autonomy to govern their internal affairs, select their leaders, and control their sacred properties—even if that means not participating in, accommodating, or recognizing, for religious purposes, same-sex marriages and related celebrations.

The Church intervened in the case, and its legal counsel presented oral argument before the Supreme Court, which was well received by the Justices. The approach was successful. While technically not covered by the reference questions, at the Church’s urging the Supreme Court nevertheless reaffirmed its commitment to religious freedom not only for religious officials in the performance of marriage rites but also for religious

institutions in their ownership of sacred properties. In its decision, the Court made a number of critically important statements that shored up religious freedom in Canada:

- ① First, the Court made a very important and broad statement affirming religious freedom generally. It said: “The right to freedom of religion enshrined in section 2(a) of the Charter encompasses the right to believe and entertain the religious beliefs of one’s choice, the right to declare one’s religious beliefs openly and the right to manifest religious belief by worship, teaching, dissemination and religious practice. The performance of religious rites is a fundamental aspect of religious practice.”¹²
- ② On the specific issue of clergy being forced to solemnize same-sex marriages, the Court stated: “It therefore seems clear that state compulsion on religious officials to perform same-sex marriages contrary to their religious beliefs would violate the guarantee of freedom of religion under section 2(a) of the Charter.”¹³
- ③ The Court then went on to address religious property issues, which as a practical matter means property owned by religious institutions: “The question we are asked to answer is confined to the performance of same-sex marriages by religious officials. However, concerns were raised [and here the Court was referencing the Church’s legal argument] about the compulsory use of sacred places for the celebration of such marriages and about being compelled to otherwise assist in the celebration of same-sex marriages. *The reasoning that leads us to conclude that the guarantee of freedom of religion protects against the compulsory celebration of same-sex marriages suggests that the same would hold for these concerns.*”¹⁴

Notice some of the important things the Court emphasized as falling within the protection of the Charter: (1) the right to believe and choose one’s religion; (2) the right to declare one’s religious beliefs openly; (3) the right not only to hold a belief but to “manifest” it “by worship, teaching, dissemination and religious practice”; (4) the right of religious officials to control the performance of religious ceremonies; and (5) the right not to have sacred properties used for the celebration of same-sex marriages—and, by implication, for *any* activities that are contrary to a religion’s doctrines and norms.

These are significant acknowledgments of vital rights. The Church’s participation helped to shore up these critical legal protections for religious officials and churches. Religious freedom isn’t absolutely protected in Canada—or anywhere, for that matter—but what the Church helped secure from the Canadian Supreme Court was a strong wall of protection that so far has served the Church and its members in Canada well.

Protecting Religious Freedom Generally and the Role of JRCLS Members

The Church’s experience in the Canadian same-sex marriage case highlights the sort of principled, faithful pragmatism that must guide the Church in navigating difficult religious freedom issues in secular societies that are increasingly suspicious of religious viewpoints. It has required the Church to distinguish between the ideal and the essential.

For example, as I asked earlier, what religious freedom protections are central to the ability of *the Church* to carry out its divine mission? Clearly the rights mentioned by the Canadian Supreme Court are essential. But that was by no means a comprehensive list. The following rights are also vital:

- ① the right of the Church to define its own doctrine;
- ② the right of the Church to select its own priesthood and other leaders based on its own policies and divine inspiration without *any* interference from government;
- ③ the right to determine who may and may not be a member of the Church and the privileges and limitations of membership;
- ④ the right to own property and build Church meetinghouses and temples free from unreasonable restrictions;

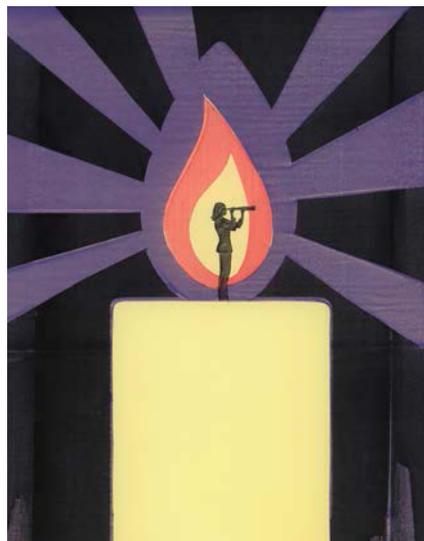
- ⑤ the right to peacefully gather for worship, activities, and socializing;
- ⑥ the right to receive and control sacred funds donated by Church members;
- ⑦ the right to operate schools and universities on equal terms with other religious and secular groups; and
- ⑧ the right not to be retaliated or discriminated against by government—such as by the denial of tax-exempt status—because of the Church’s beliefs and teachings.

This is by no means a comprehensive list either, but you can begin to see some of the areas in which conflicts might arise.

And what about the rights of *individual Church members*? What protections are essential so that members and their families can be free to live the gospel and pass on their faith to their children? That is not an easy question. Obviously the rights mentioned by the Canadian Supreme Court go a long way toward protecting individuals from outright oppression. But what about the ability to teach your children the gospel without having them or their beliefs directly targeted for ridicule or suppression? Should parents have the right to opt out of certain social or school programs that might teach their children concepts contrary to Church doctrine?

What about the right of Church members to earn an honest living in professions like the law and social work without abandoning their beliefs about marriage and family? Should, for example, a Church member who openly believes in the Church’s teachings regarding marriage and the law of chastity be barred from being a social worker? Should a qualified LDS attorney who graduated from BYU’s law school, which has an honor code that forbids sexual relations outside a husband-wife marriage, be precluded from practicing law in Canada? A growing number of voices would answer yes to both these questions.

You may be aware of the travails of the prospective Trinity Western University School of Law in British Columbia. Trinity Western University (TWU) is a private religious school in Langley. Like BYU, it has an honor code—or, as they call it, a “covenant”—that all students are required to sign. It includes a commitment to not



engage in sexual relationships outside of heterosexual marriage. TWU has approval to open a law school in 2016, but the board of governors of each provincial law society determines whether to recognize degrees from the law school. A number of provincial law societies have voted to do so, but we are now seeing increasing fire from activists who oppose TWU because they consider the school’s covenant “discriminatory.” The board of governors in British Columbia recognized the law school earlier this year. The Church was one of the entities that filed a letter in support at the request of the sponsoring religious institution. Some provincial law society members, however, have challenged the board’s action, and now the matter will be put to a referendum this month.¹⁵

Obviously, Church members should be legally protected, like all other religious groups, from discrimination in employment, housing, and places of public accommodation. But should members of the Church who own small businesses have the right to decline to facilitate same-sex marriages just as members of the clergy have the right not to solemnize them? Does it matter if there are plenty of other business owners willing to provide the same services at a comparable price?

These and many other related questions raise sensitive issues and can be very difficult to answer in the different contexts in which Church members live around the world. A principled, faithful pragmatism must guide the Church when addressing such issues.

Therefore, What?

I come back to the J. Reuben Clark Law Society and what you as LDS attorneys can do to help protect religious freedom. Again, without presuming to offer a comprehensive list, let me focus on three areas.

First, it is important that you become informed about existing and potential threats to religious freedom. In the United States at least, and I suspect it is the same here, whenever any sort of construction project is proposed, environmental groups are quick to recognize any adverse environmental effects that the project may create. They have spent the time and effort needed to understand the issues so they can detect threats to the interests they care about. In like manner, we need lawyers who care enough about religious freedom and are well enough informed that they can recognize both existing threats and those that are likely to materialize in the future.

To do that in a truly helpful way, you need to excel in your chosen field of practice, to maintain the highest professional and personal standards, and then to get involved in the important institutions and forums that pertain to your field. You need to be among the best and most respected in your area of the law. As you strive toward this goal, you will gain the expertise to detect religious freedom threats in specific areas of the law and public policy. You will have the respect of your professional colleagues, so they will listen to you as you raise concerns. And in some instances you will be in a position—perhaps even within government—from which you can directly propose and help enact positive solutions.

So pursue excellence in your chosen area of practice; be attorneys of the highest integrity; earn the personal and professional respect of your legal peers; get involved where it matters in your field; and be, as it were, “watchmen on the tower” of religious freedom.

Second, we need you to keep the Church informed of risks and concerns—and then to be patient. The Church needs to know, based on your expertise and position, about threats to religious freedom. It needs to know about gathering storms. We need appropriate and orderly mechanisms so the Church can be better informed of potential threats to religious liberty, and those mechanisms are something we will be developing in the months ahead.

But we also need you to understand that, just as with the Canadian same-sex marriage case, the Church must make prudential decisions based on what can realistically be accomplished given the Church’s resources, vulnerabilities, and other goals. That may mean that the concerns you raise do not result in the Church’s taking action. (If it is of any comfort, you should know that not all of my opinions and recommendations are heeded either.) But it will also mean that when the Church decides to act, you will be ready to assist in the best way possible.

Finally, and more broadly, the Church and society need you to be examples of the believers, in word and deed. Elder Cook has said, “One of the reasons the attack on moral and religious principles has been so successful is the reluctance of people of faith to express their views.”¹⁶ We need you to speak up—to express your views and defend the faith. And we need you to do so with respect for the beliefs of others and with dignity and decency as disciples of Jesus Christ.

And, just as important, you must live your faith so that others—inside and outside the legal community—will see your good works, experience your genuine love and friendship, and feel the Spirit working through you. Because as they do, they will want to listen to you and understand when you say your religious freedom is being abridged. They may not agree with you or even understand entirely the issue that is so important to you. But if they know you and respect you because you are a true disciple of Christ, they will be far more inclined to work toward a solution that respects the religious freedoms of both you and the Church.

Conclusion

Brothers and sisters—fellow attorneys—ours is a noble profession. At its highest, the legal profession defends the vulnerable, secures God-given rights, promotes justice and order, mitigates and often avoids conflict, and brings peace. May we strive for excellence in all we do so we will be ready when the Lord calls us to defend the cause of righteousness and freedom. May we stand as watchmen on the tower, ever vigilant against forces that would harm essential liberties. May we build bridges to all around us by living as true disciples. And may we, as advocates and mediators, strive in all things to emulate Jesus Christ, our Advocate and Mediator with the Father. In the name of Jesus Christ, amen. 

NOTES

- 1 *Mission Statement*, J. REUBEN CLARK LAW SOCIETY, http://www.jrcls.org/?folder=about_us&page=mission_statement.
- 2 Thomas S. Monson, *Priesthood Power*, ENSIGN, May 2011, at 66.
- 3 For more on the Church in Canada, see THE MOR-MON PRESENCE IN CANADA (Brigham Y. Card et al. eds., 1990), and REGIONAL STUDIES IN LATTER-DAY SAINT CHURCH HISTORY: WESTERN CANADA (Dennis A. Wright et al. eds., 2000). A summary of the persecution of the Saints is available in Lisa Bolin Hawkins, *Persecution*, in 3 ENCYCLOPEDIA OF MOR-MONISM, 1076–77 (Daniel H. Ludlow ed., 1992).
- 4 THE ARTICLES OF FAITH OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, no. 11, *available at* <https://www.lds.org/scriptures/pgp/a-of-f/1.11?lang=eng>.
- 5 Joseph Smith, Discourse in Nauvoo, Illinois (July 9, 1843), as reported by Willard Richards, in HISTORY OF THE CHURCH 5:498–99.
- 6 Dallin H. Oaks, “Preserving Religious Freedom,” Speech at Chapman University School of Law (Feb. 4, 2011), (transcript available at <http://www.mormonnewsroom.org/article/elder-oaks-religious-freedom-Chapman-University>).
- 7 Quentin L. Cook, *Restoring Morality and Religious Freedom*, ENSIGN, September 2012, at 38.
- 8 Todd Starnes, *City of Houston Demands Pastors Turn Over Sermons*, FOXNEWS.COM, Oct. 15, 2014, <http://www.foxnews.com/opinion/2014/10/14/city-houston-demands-pastors-turn-over-sermons/>.
- 9 The First Presidency and Quorum of the Twelve Apostles of The Church of Jesus Christ of Latter-day Saints, *The Family: A Proclamation to the World* (Sept. 23, 1995), *available at* <https://www.lds.org/topics/family-proclamation>.
- 10 *Id.*
- 11 *Reference re Same-Sex Marriage*, 2004 SCC 79, 3 S.C.R. 698 at paras. 2–3.
- 12 *Id.* at para. 57.
- 13 *Id.* at para. 58.
- 14 *Id.* at para. 59 (emphasis added).
- 15 Following this address on October 30, 2014, it was reported that members of the British Columbia provincial law society voted 5,951 to 2,088 to withdraw accreditation from the proposed Trinity Western University School of Law. See Ian Mulgrew, *B.C. Lawyers Vote Down TWU Law School*, VANCOUVER SUN, Oct. 30, 2014, <http://www.vancouversun.com/news/metro/lawyers+vote+down+school/10339932/story.html>.
- 16 Cook, *supra* note 7.