The Battle Over the *Meaning* of Religious Freedom

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[Opening slide with title of talk]

Introduction

I have now been serving as the managing director of the International Center for Law and Religion Studies for nearly 7 years. In this position I have frequently encountered some form of the following problem: Upon learning about my work at the Center someone will say, "That sounds interesting. What does your Center do?"

[Picture mingling with persons at Symposium]

When persons first asked this question I would respond with details of conferences or writings but they quickly became bored. What they really wanted to know was what is the purpose or goal of our Center? When I would then explain that we seek to expand the blessing of religious freedom throughout the world, what inevitably followed was a series of questions intended to get at the essential core of religious freedom.

This often presented me with a dilemma. How do I explain the meaning of religious freedom?

I once encountered a similar problem when we tried to design the logo for our Center. How can we capture in a picture the nature of religious freedom? We had a similar problem when we worked with the Washington, D.C. Chapter of the J. Reuben Clark Law Society to design the annual religious freedom award. Religions often have symbols and some have attempted to use these in logos like this:

[Coexist logo from website]

What we came up with was more universal and aspirational.

[Picture of International Religious Liberty Award]

[Picture of Center logo]

While we love the award and the logos, this dilemma illustrates a problem. How does one represent religion and how does one represent freedom?

Let me ask all of you. What do you think religious freedom is?

[Slide: “What is religious freedom?”]

In answer you might include a number of elements such as the right to worship freely.

[“1. Right to Worship”]

Or you might refer to sources of religious freedom such as the Establishment and Free Exercise Clauses of the Constitution.

[“2. Establishment and Free Exercise Clauses”]

Or you might focus on the rights of individuals or religious associations.

[“3. Rights of individuals and religious associations”]

All of these would be correct but they are only a part of the whole. In fact, it is quite difficult to encapsulate the expansive concept of religious freedom.

What I have realized over time is that the impreciseness associated with the definition of religious freedom is of bigger concern than simply explaining our Center to someone at a ward social.

[Picture of Elder Oaks speaking at BYU-I]

Elder Dallin H. Oaks may have been considering this basic problem when he addressed the students at Brigham Young University-Idaho in a talk titled “Religious Freedom.”

[Slide with quoted text below]

In that memorable address Elder Oaks said, “[t]here is a battle over the *meaning* of that freedom. The contest is of eternal importance, and it is your generation that must understand the issues and make the efforts to prevail.” (Emphasis added)

Notice that Elder Oaks both defined a problem and issued a challenge. The problem was the meaning of religious freedom and the challenge was to make the efforts to prevail in properly defining its meaning.

[Slide: “Problem: The meaning of religious freedom”]

[“Challenge: To properly define its meaning”]

While Elder Oaks issued this challenge to the generation of students at BYU-I, since I am still young at heart, I would like to take up this challenge for the next few

minutes. Please note that he stated the challenge in terms of an eternal contest, one that we must win. In keeping with this challenge, I will occasionally speak in terms of winning the battle Elder Oaks describes.

Why Is There a Battle Over the Meaning of Religious Freedom?

["Why is there a battle over the meaning of religious freedom?]

Before attempting to define religious freedom, why is there a battle over the *meaning* of religious freedom rather than perhaps a battle over religious freedom itself? Let me offer two possible reasons.

First, in my experience, very few people argue against religious freedom.

["1. Few contest religious freedom"]

Think about this. When was the last time you met someone who insisted that we not have religious freedom? Generally the battle is not over whether we should have religious freedom but rather over how expansive this freedom should be. Let me give you an example.

I am currently writing a book review of *The Myth of American Religious Freedom* by David Sehat.

[Picture of book]

In this book the author claims that the United States has lacked true religious freedom since its inception because our laws have traditionally attempted to enforce a Christian-based morality. True religious freedom, according to this author, should mean that laws express no moral viewpoint, especially viewpoints originating in religion, because they constitute a "moral establishment" in conflict with the purpose of the Establishment Clause. This definition of religious freedom then, is a freedom *from* religion that seeks to insulate a growing minority that rejects a moral point of view.

I for one do not agree that religious freedom consists of amoral laws and what he calls a "Godless Constitution." Thus, while David Sehat may agree with the importance of religious freedom, his definition, if adopted generally, would have a profound impact on its application in the future.

Second, definitions are important.

["2. Definitions are important"]

Consider the following story, related by my colleague, David Kirkham. He was with his family in England visiting historical sites. After several days in London and after visiting several castles David wanted to go to the countryside and visit Stonehenge but his daughter wanted to visit another palace castle. Rather than make the decision himself David wisely asked for a democratic vote by family members. The

daughter stated the choice for a vote: Do you want to see a pile of rocks or do you want to see the castle of a queen?

[picture of Stonehenge and Windsor castle justaposed with a picture of some rocks and Windsor castle]

While it may not be significant whether Stonehenge is described as a pile of rocks or as one of the world's most famous prehistoric sites, the way religious freedom is described and understood is truly important to the preservation of this fundamental right. As Elder Oaks stated, it is a "contest is of eternal importance" and we must make the efforts to prevail.

Third, if you cannot define what religious freedom is, we will have a hard time seeing when religious freedom is being undermined.

["3. Without a clear understanding we may not recognize when religious freedom is being undermined."]

Consider the recent Supreme Court Case of *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C*. One of the most significant religious freedom cases in decades, last year the Supreme Court was asked to determine the scope of the so-called "ministerial exception," a right of churches to choose their own ministers free of government restrictions.

The facts involved a Susan Perich, a Lutheran elementary school teacher who, as a commissioned minister, conducted religious instruction and occasional worship services at the school. She was diagnosed with narcolepsy, a sleeping disorder that causes excessive sleepiness and frequent daytime sleep attacks. After a leave of absence she desired to return to work. Having already hired a replacement teacher at this small school, she was asked to wait until the next school year. When she threatened to sue the school for employment discrimination she was subsequently decommissioned as a minister and fired from her employment.

The school claimed she had violated the standards of her ministry by threatening legal action instead of following the Lutheran church's internal dispute resolution procedure. She claimed a straightforward retaliation claim based on threats to secure her rights under the Americans with Disabilities Act. The actual reason for the firing (religious or discrimination) was never determined by the trial court as the case was dismissed on summary judgment based on the application of the ministerial exception, i.e., because Perich was a minister, she could be fired for any reason because the church was not bound by employment discrimination laws.

Assuming the facts most favorable to each party, the issue in the case could have been stated in either of two ways:

> May a church retaliate against an employee with disabilities by firing her in contravention of otherwise applicable employment discrimination law, solely because it is a church?

or

> Does the government have authority under the Constitution to require a church to retain a minister after she has been fired even though the church believes she has violated essential church teachings and therefore no longer trusts the minister to teach religious doctrine to its next generation of church members?

[Put both of these statements on different slides]

The way these questions are framed has a major impact on the meaning of religious freedom.

[Repeat the first statement of the issue]

In the first statement, the value of religious freedom is denigrated while concerns about employment discrimination are made paramount. The only reference to religious freedom is entirely negative, framing the religious freedom claim as a request by churches to discriminate against innocent victims. Stated this way religious freedom appears to be a right to bigotry that should be limited.

[Repeat the second statement of the issue]

In the second statement, religious freedom is presented as a positive value with the question being whether, in contravention to our national history of church-state relations, the government should be able to tell a church who its ministers should be. This framing of the issue is an appeal to the liberty and independence of churches rather than government control, a value fundamental to our understanding of religious freedom.

Thus, the battle over the meaning of religious freedom has a profound impact on the outcome of cases. Over time our understanding of religious freedom will have a cascading effect that will influence generations of Americans. Unless we understand how to frame contested issues in ways that protect a robust meaning of religious freedom, we risk losing the battles that lay ahead.

<u>What Are Some Current Definitions of Religious Freedom?</u>

[What Are Some Current Definitions of Religious Freedom?]

Notwithstanding the clear importance of properly articulating the meaning of religious freedom, much of the literature on the subject adds complexity rather than clarity. At least part of the problem is that religious freedom, like other rights in the law, is often about what acts are protected and what are not. In other words, where is the line? This focus on line drawing leads to a proliferation of rules, each tailored to a unique situation.

Thus, a common approach to defining religious freedom is by articulating rules intended to protect this right.

["Rules-based approach to defining religious freedom"]

Let me give an example of a rules-based approach to definitions.

In my practice as a tax attorney the question was almost always the amount of tax that should be paid as a result of a given transaction. This inquiry involved many factual and legal questions. To answer these questions one had to consult the Internal Revenue Code, Treasury Regulations, IRS rulings, and court decisions.

[slide with pictures of Internal Revenue Code, Treasury Regulations, IRS Rulings and Court Decisions]

Often as I would dive deeper and deeper into a particular tax question I would frequently have to stop and remind myself, "What is the purpose of the rule involved here?" Because of the complication of the rules, with one term being defined by another section that incorporated a definition from yet another section, it wasn't long before I was several layers away from the original tax provision I was attempting to understand and apply. You don't have to be a tax attorney to know that a bewildering array of tax laws have led to a never ending profusion of rules, creating confusion and an army of attorneys and accountants to help us understand it all.

This stands in stark contrast to the simple, principle-based definition used by the Lord to require a tithing of his people. "[T]hose who have thus been tithed shall pay one-tenth of all their interest annually; and this shall be a standing law unto them forever, for my holy priesthood, saith the Lord." (D&C 119:4).

[Text of D&C 119:4]

The only "regulation" of this verse that I know of is the statement by the First Presidency that "increase" means income.[1] (See First Presidency Letter dated Mar. 19, 1970).

The same rule v. values phenomenon occurs in defining the rights encompassed by the concept of religious freedom. The tendency is create a list of rules describing the rights associated with religious freedom with an emphasis on what is protected and what is not.

["1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief"]

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[1] The First Presidency has written: "The simplest statement we know of is the statement of the Lord himself, namely, that the members of the Church should pay 'one-tenth of all their interest annually,' which is understood to mean income. No one is justified in making any other statement than this" (First Presidency letter, Mar. 19, 1970; see also D&C 119:4).

For example, the 1981 *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* is a modern and important definition of some of the religious freedom protections that many nations agree upon. While time does not permit a full exposition of these important rules, perhaps a quick review of Article 1 will underscore my point.

[Put up slides with Article 1, section 1 and then section 3 as set forth below]

Article 1, section 1 states:

"1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching."

Section 3 then limits a portion of this right as follows:

"3. Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others."

Every lawyer looking at that definition will recognize that each word is chosen with extreme care, the result of multi-lateral bargaining among nations during the Cold War. Thus, each word is potentially subject to debate as to its application in individual circumstances. For example, is conversion permitted under this definition? Does "manifesting" religion include proselytizing?

It is also clear that this statement is not intended to be all-inclusive. As contained in the definition itself, the rights listed are merely included among those existing in the full notion of religious freedom. What other rights are part of religious freedom but not included?

Finally, what about the limitation provision in Section 3? Aren't limitations to "protect public safety, order, health or morals or the fundamental rights and freedoms of others" large enough to practically gut the rule of Article 1 of meaningful protection?

These are just some of the questions raised by this definition. I shall forebear from raising additional questions because my point is not to dissect this partial definition of religious freedom nor is it even to criticize it. At the end of the day we need legal standards by which to judge whether a right has been infringed. I merely want to point out that this rule-based approach raises many questions, a focus on which has the possibility of obscuring, rather than clarifying, the values underlying the meaning of religious freedom.

In the United States another common way of approaching the definition of religious freedom is to focus on the rights protected by the Constitution.

["First Amendment Definition of Religious Freedom"]

While extremely important and necessary to fully understand and appreciate the meaning of religious freedom in the United States, an exclusive focus on the First Amendment is ultimately incomplete in its definition of religious freedom while also adding debate rather than clarity to the meaning religious freedom. In part this is because the First Amendment states religious freedom values in purely negative terms:

[Place the text of the First Amendment below]

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

Because these important values are stated in negative terms, all positive rights encompassed by religious freedom must be implied. Take, for instance, the Establishment Clause.

Does the prohibition on the establishment of religion mean 1) Preventing a national church, 2) Eliminating all references to God by public officials, or 3) Eliminating all religiously influenced laws?

All of these are plausible interpretations of the Establishment Clause and each connote a far different meaning of the right of religious freedom.

Of course, numerous judicial opinions over the course of our national history have attempted to define what is and what is not protected as part of our constitutional framework. Each case adds to our understanding of religious freedom but, in doing so, they form a construct of rules. While on the whole these court decisions form a beautiful tapestry that is the ingenuity of the common law, they are nevertheless often complex, technical and generally inaccessible to many. In short, only a lawyer can fully understand what is and what is not permitted. Thus, if we want a positive, robust articulation of religious freedom rights, one that is accessible to all, the First Amendment is by itself inadequate.

["A simple, positive articulation of religious freedom"]

Because of the challenges associated with either excessive rules or the negative commands of the First Amendment, another way of defining the meaning of religious freedom should be sought. In my view, what is needed is a simple, positive statement of religious freedom values. This is necessary so citizens can understand the values associated with religious freedom and defend them as conflicts arise.

I believe that we are at a pivotal time in our national history. Today there is a clear majority of Americans who intuitively support religious freedom. But, because they cannot adequately define its scope, we risk losing the conflict spoken of by Elder Oaks. For example, recently President Obama declared the importance of religious freedom but seemed to define it as merely the right to freedom of worship.

[Put the following quote with citation below it in a slide]

He said,

> "Of all the freedoms we cherish as Americans, of all the rights that we hold sacred, foremost among them is freedom of religion, *the right to worship as we choose*." President Obama's Remarks At The White House Iftar Dinner, August 10, 2012 (Huffington Post)

Of course the President may not have meant to reduce the significance of religious freedom merely to freedom of worship but he has used this language before and some knowledgeable observers perceive this to be no accident.[2]

But without a broad and clear understanding of what religious freedom is, we will have difficulty winning the battle for the hearts and minds of others. In short, without understanding the meaning of religious freedom, the battle could be lost.

["No taxation without representation"]

By way of analogy, "No taxation without representation" is a much better values statement than a lengthy dissertation rebutting British arguments of virtual representation of the British Colonies in Parliament, actual representation of the Colonies by Colonial legislatures, implied consent to taxation by all British citizens, the sovereignty of Parliament over British Colonies and the mitigating fact that some 75% of males in England were disenfranchised due to property and other requirements. Notwithstanding the value of these important arguments, when it comes to mobilizing a force for battle, the call needs to clear, simple and understandable.

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[2] "Responding to a question about the Obama administration's increasingly common rhetorical usage of "religious worship" in place of "religious freedom," [Knox] **Thames commented that "freedom of worship" is too narrow a construction of the broader human right**. He hopes it won't trickle down into policy, but he's seen it enough times that he doesn't think it's an accident. [Tom] Farr agreed, saying that although it may simply be a rhetorical device for aesthetic purposes, there seems to be a very truncated understanding of religious freedom among some in the current administration." (Congressional Briefing on International Religious Freedom reported at http://pomed.org/blog/2010/02/pomed-notes-briefing-on-international-religious-freedom.html/)

Now, am I saying that everything needs to be "dumbed down?" Of course not. Real life can be complex and careful consideration is needed for many problems. But when we can't answer a simple question with a simple answer we have a problem we should work on. So here's my go.

Defining Religious Freedom

["Defining Religious Freedom"]

Rather than define religious freedom as a list of rules or as negative prohibitions on congressional power, I propose a definition that first categorizes *who* is protected and then defines *what* is protected using *principles* rather than rules.

["*Who* is Protected by Religious Freedom"]

There are three distinct groups deserving of religious freedom protections. For simplicity, these groups can be identified as

1) Individuals (and Families)
2) Religious Associations
3) Society

[Show Chart that lists these three groups]

This is the *who* of religious freedom.

The inclusion of all three groups as the intended beneficiaries of religious freedom is a significant. Definitions of religious freedom typically focus on individuals and do not explicitly mention the religious freedom rights of religious associations and of society at large.

For instance the definition of religious freedom under the 1981 Declaration noted previously states that "*everyone* shall have the right to freedom of thought, conscience and religion" which puts the focus on individual rights.

Of course religious societies can be characterized as collections of individuals with derivative representational rights for their fellow believers. [For example, in the Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006), the Supreme Court upheld the right of a church to administer huasca tea as part of its religious ceremony. In that case while the church brought suit its claim may be thought of as at least partially derivative of its individual members' rights to exercises their religious beliefs.]

However, religious societies have important religious freedom rights as entities themselves. These societies often have legal personality and important religious

freedom rights apply directly to this legal entity. For example, when Catholic adoption agencies closed in Boston, Washington, D.C. and Illinois in response to requirements that they place children with homosexual couples, the religious freedom rights of the entities were directly implicated because it was the entity itself that had the legal obligation to comply with the law.

Because of the important religious freedom rights of religious organizations, Professor Durham and I have written a 4,000 page treatise dealing exclusively with those rights.

In addition, in my view, society at large also partakes of selected religious freedom rights. While society can be considered a collection of individuals and legal entities, the needs of society as a whole are distinct and therefore religious freedom rights of society deserve separate attention. These rights will be discussed in greater detail momentarily.

["*What* is Protected by Religious Freedom"]

Having briefly discussed the distinct groups deserving of religious freedom rights, we briefly discuss the *what* that is protected. However, rather than describe these rights as either a list of rules or government restrictions, these rights are stated as principles that can apply to a broad range of factual situations.

<u>Individuals and Families</u>

Thus, for our first protected group, individuals and families, religious freedom can be defined as protecting

1) the right of conscience and 2) the right of religious practice

["1) Right of conscience"]

["2) Right of religious practice"]

The principle behind the right of conscience is the right of individuals and families to say "no" to government requirements that violate private personal convictions.

The principle behind the right of religious practice is the right to insist that society says "yes" to religious practices so long as these practices do not infringe on important rights of others.

[Put quote below in a slide with attribution to James Madison]

These two rights were identified by James Madison in his 1785 "Memorial and Remonstrance Against Religious Assessments" in which he stated that the "Religion . . . must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an

unalienable right."

["The Right of Conscience"]

With regard to conscientious objection, or the right to say "no", most people intuitively understand the importance of this right. For example most people understand, and our nation has a long history of allowing, conscientious objection to military service, swearing oaths, or even removing hats in court rooms. In modern times the right to conscientious objection has been important in matters such as allowing health care professionals to abstain from participation in abortions.

Increasingly, however, the right to conscientious objection is being challenged. A long running case is challenging whether a pharmacist may conscientiously object to dispensing abortion inducing drugs like RU-486, the "Plan B" morning after pill. Similarly, in New Mexico a photographer was recently fined thousands of dollars for not photographing the commitment ceremony of a gay couple. To date the court has said that his conscientious objection to homosexuality was trumped by anti-discrimination norms. Other examples could be mentioned.

These are instances in which the right to conscientious objection, the right to say no, has been infringed. Greater emphasis must be placed on helping others understand the right of conscientious objection or a host of activities will become inaccessible to religious believers. For example, if the right to conscientiously object to abortion were removed, the ability for some religiously devout doctors to become obstetricians could be denied. Whole classes of employment could suddenly be foreclosed if conscientious objection were reduced in importance. Thus, this is an important principle of religious freedom that must be understood if we are to win the battles ahead.

["The Right of Religious Practice"]

According to Elder Oaks, the right to religious practice, or the right to insist that society say "yes" to its religious claims, 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." (Address given at BYU-I on October 13, 2009)

While time does not permit a full history of the matter, until 1991 the Supreme Court approached claims for religious practice using the "strict scrutiny" or "compelling state interest" test which balanced the state's burden on religious practice against the interests of the government in maintaining the law creating the burden. This test was jettisoned for most Free Exercise claims in the case of

Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990). Subsequently, Congress attempted to re-impose the strict scrutiny test by enacting the Religious Freedom Restoration Act of 1993 but the Supreme Court overturned this Act as applied to the states in the case of City of Boerne v. Flores, 521 U.S. 507 (1997). Thereafter, many states passed their own religious freedom restoration acts or their state supreme courts interpreted their state constitutions' free exercise provisions to require the strict scrutiny test. The result is that today, in most claims made in the United States, a strict scrutiny test may be the basis for decision in a claim for religious practice.

However, while religious freedom advocates typically cheer the general reestablishment of the strict scrutiny test, this test carries with it a potentially fatal premise: **that upholding a challenged religious practice requires an exception to generally applicable law**. Since legal exceptions are granted sparingly, in practice most free exercise cases end up in defeat for the plaintiff asserting a religious freedom right.

As Professor Brett Scharffs explained in a prior Discussion Series Lecture, laws by design include and exclude various individuals or activities from the laws' provisions. However, those persons or activities excluded are not normally treated as having received a special exception. Rather, they are treated simply as not being subject to the law.

A similar rethinking may be necessary to preserve the rights of religious free exercise. Rather than weigh whether a religious practice is more or less important than the government purpose behind the general rule, a better approach might be to consider whether those whose sincere religious beliefs place them in opposition to generally applicable law were simply not intended to be within the scope of the law.

Such an approach would help avoid another fundamental problem underlying the compelling state interest balancing test. Balancing an inalienable right to practice one's religious beliefs against a so-called compelling interest of the government is logically defective and essentially irreconcilable. How does a court properly balance the temporal against the spiritual? At best this attempted weighing leads to arbitrary and inconsistent results. At worst, this weighing leads to judgments about the importance of another's deepest convictions, something that the Smith Court acknowledged courts are incapable of doing.

Rather than pressuring courts to jettison the problematic balancing test as the Supreme Court did in Smith, and leaving the fate of minority religious practices to majoritarian legislatures, a potentially better approach is to assume the validity of the religious practice so long as no one's fundamental rights are hindered. This seems to be the approach suggested in Doctrine & Covenants 134:7:

> "We believe that rulers, states, and governments have a right, and are bound to enact laws for the protection of all citizens in the free exercise of their

> religious belief; but we do not believe that they have a right in justice to deprive citizens of this privilege, or proscribe them in their opinions, so long as a regard and reverence are shown to the laws and such religious opinions do not justify sedition nor conspiracy."

While a full exposition of a better rule of decision is beyond the scope of this paper, what is important to recognize is that even though the strict scrutiny test has been largely reestablished, it does so by accepting the potentially fatal premise that religious freedom claims are claims for legal exceptions. Since many religious practice claims involve small groups seeking permission to perform activities that are not generally understood or appreciated, such exceptions will only infrequently be granted regardless of the judicial test used.

Religious Associations

Now, having discussed the principles involved in protecting religious freedom for individuals and families, we turn now to the principles involved with protecting religious freedom for religious associations. In doing so, we consider the association rights as religious entities; when viewed as a collection of individuals they have the same rights as individuals noted above i.e. the right to conscientious objection and the right of religious practice.

["Religious Associations"]

For religious associations, religious freedom can be defined as protecting

1) against discrimination vis-à-vis other organizations, 2) internal church decision making or autonomy, and 3) historical uniqueness.

["Discrimination"]

["Internal church autonomy"]

["Historical uniqueness"]

Let's briefly discuss each of these principles.

Discrimination

With regard to religious associations, most people agree that there should be no discrimination as between various religious associations. In other words, every religious association should be treated equally when it engages in the same conduct as another. Aside from the early post-revolutionary years in which some states had established churches, disparate treatment between religious associations has seldom been an issue, in large part because of our nation's history with many different religious sects. However, internationally it is much more common for the laws and practices of some countries to favor the historically incumbent church. This favoritism is manifested in a multitude of ways including permissible corporate

forms, religious registration, financial support, and many others.

In the United States the larger discrimination issue today, concerns the provision of government funding. While the charitable and health care activities of religious associations have long received government funding, in recent years anti-discrimination norms have opened the door for additional funding. Whereas concerns previously existed as to whether government funds could be used to support a charity held in a church building containing religious symbols, today the emphasis is on allowing welfare recipients to choose where they want to go to receive benefits.

This opening up of government funding for religious organizations began with the inclusion of "charitable choice" provisions in federal grant legislation during the Clinton years. When President Bush subsequently became president he opened the White House office of Faith-Based and Community Initiatives, designed to promote the ability of religious organizations to receive federal funding. While changing the name of the White House Office to the Faith-Based and Neighborhood Partnerships, this office continues to assist religious and community groups in receiving federal funds for welfare assistance provided the funds are not used for sectarian purposes.

While typically seen as beneficial to both religious organizations and recipients of social welfare services, the receipt of these government grants carry with them at least several important risks.

One risk is mission change. It is natural for a grant seeking organization to consider sources of funds when considering its priorities. As government grants become available for some areas of activity, other areas of activity could be overlooked. Even if the grant funds are for an activity the religious association would otherwise wish to pursue, the manner in which the activity is conducted could be influenced by the grant requirements. Even if most government outcomes are considered acceptable, some otherwise desirable outcomes may be discarded.

Another risk is loss of independence. Explicit conditions on the grant funds could open the religious organization up to financial and operational reporting that would otherwise not be required. Some conditions could influence how and when core religious activities are conducted.

Finally, and more subtly, the equal treatment of religious organizations vis-à-vis other secular social welfare organizations over time could diminish the claim for special treatment in other areas of law. As discussed in greater detail later, a major component of religious freedom for religious associations is a claim for unique treatment. Demands by religious organizations for equal treatment in the receipt of government funds could lead secular organizations to demand that religious organizations be treated the same in other areas of the law. Because churches are often given extraordinary privileges in areas such as taxation and employment, the loss of these privileges would be devastating to the religious freedom of religious

associations.

Each of these risks were considered by James Madison in his writing "Memorial and Remonstrance." He argued for an independence between government and religion so that religion could prosper without the threat of government control through government support. Specifically, among other things, he attempted to elevate the importance of religion while driving government out so it could not coopt religion for political purposes or make it an engine of social policy.

Internal Church Autonomy

Another important principle undergirding the religious freedom of religious associations is that of autonomy, or the right to be free from government interference in internal church decision making. This judicially derived doctrine is partially derived from the Establishment and Free Exercise Clauses of the First Amendment. As set forth by the Supreme Court through the years, this doctrine protects the right of religious associations to resolve internal disputes, choose ministers and other important church officials, and of course determine it own doctrine and orthodoxy.

While fairly narrow in scope, the purpose of the doctrine is a necessary component of keeping religion free of government interference. The principle undergirding the doctrine is that religion should act independent of the government; indeed as a voice in occasional opposition to government. As noted by Justice Brennan in Walz v. Tax Commission, 397 U.S. 664 (1970), a plurality of voices, including religious ones, performs a secular function essential to the livelihood and prosperity of our republic.

Despite the clear and important principles undergirding religious autonomy, the Obama administration recently contended in Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C., that at least one aspect of autonomy, the ministerial exception, should not exist. Specifically, the Administration argued that churches should be subject to traditional employment laws without any special religious freedom protections. The Administration further contended that Churches would be adequately protected under other elements of the First Amendment, such as the freedom of speech and assembly.

Fortunately the Supreme Court unanimously rebuffed this extraordinarily aggressive position against a traditional religious freedom value. Nevertheless, unless the principle of autonomy is well understood, religious associations run the risk of losing one of their most cherished prerogatives, that of independence from government in their internal decisionmaking.

Historical uniqueness

Religion, and the churches that have been its vessels, have long enjoyed a unique

position within society. From time immemorial priests and teachers of religion, as well as religious societies, have been given special prerogatives to encourage their continuity so that they could benefit society as a whole. The same has been true of religious societies in the United States. Religious organizations of all kinds have been fostered in a number of ways.

For example, religious organizations have enjoyed income tax exemptions and tax deductibility contributions since the beginning of our income tax code. While these benefits are not limited solely to religious organizations, being also available to educational, charitable and other organizations exempt under I.R.C. § 501(c)(3), churches are given additional tax privileges not available to other charities. For example, churches are not required to file an annual tax information return (Form 990) divulging details of revenues, expenditures, assets and liabilities, highest paid persons and many other sensitive matters.

Churches have even been excluded from the requirement to request a determination letter from the I.R.S. indicating their tax exempt status under the Internal Revenue Code.

Further, the I.R.S. may only commence an audit of a church for very limited purposes and only if it already has credible facts raising the need for an audit and then only if high level internal approvals are obtained beforehand.

Another example of the special place that religion holds in our society has been in connection with employment law. While the United States has broad anti-discrimination provisions in its employment laws, religious organizations have long been permitted to favor their own religious members under the standards of the religion itself. This was dramatically illustrated by the now famous case of Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327 (1987). In a case argued by Rex E. Lee, the founding dean of this law school, the Court upheld the right of the LDS Church to insist on temple worthiness standards in its employment of a janitor at the Deseret Gym in Salt Lake City. In upholding the broadest possible reading of the Section 702 Civil Rights Act right for a religious organization to hire only its members in good standing, regardless of whether the activity was strictly religious, the Court reaffirmed the special place of religious societies in America.

The challenge is that today the value that the public holds for religion is diminishing. In an address delivered at Chapman University School of Law on February, 2011, Elder Oaks concluded,

> "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."10

As society values religion less and less, the privileges historically accorded to religious societies will come under increasing scrutiny. Thus, it is incumbent upon us to reinforce the importance of maintaining the unique position of churches in our legal structure.

History affirms that many of the so-called "privileges" afforded religious organizations were not given to religious organizations to help them gain advantage over other organizations, but rather to maintain a healthy separation between government and religion. Religion and the state were conceived of as having separate spheres of activity with their influence.

This explains why there is no requirement for religious organizations to obtain a determination of tax exemption from the I.R.S. Such a requirement could involve the government in the question of whether the activities of a church are authentically religious. Rather than have the government make this evaluation as an initial matter prior to the actual operation of the religious society, the drafters of our income tax code have wisely put the burden on the government to disprove the religious conduct of an organization after it has commenced actual operations.
However, if we do not positively explain the unique value of religion in our society, and therefore justify the historical prerogatives attaching to religious societies, they could be lost.

[Possible example of parsonage exemption]

<u>Society at Large</u>

["Society at large"]

Now having discussed both the categories of 1) individuals and families and 2) religious associations, we turn to the final category: society at large. Admittedly this category is different than the other two but I mention it because of the limited, but important, religious freedom right that I believe society deserves and should increasingly demand.

This is the right to hear and act upon religious voices in the public square.

["Religious voices in the public square"]

Although society is normally classified as recognizing the religious freedom rights of individuals and religious associations, I believe that society should be included as a group holding religious freedom rights. This is because this right has never been questioned previously so its existence has always been assumed. But increasingly, the rights of religious individuals and religious institutions are coming under question as legitimate sources of public discourse. In short, religious voices are increasingly unwelcome at the public square.

Elder Oaks forcefully addressed this concern during his talk at Chapman University Law school. He said,

> "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."

Let me describe one of those arguments. As previously mentioned, in the book *The Myth of American Religious Freedom* by David Sehat, the author claims that the United States has lacked true religious freedom since its inception because our laws have traditionally attempted to enforce a Christian-based morality. True religious freedom, according to this author, should mean that laws express no moral viewpoint, especially viewpoints originating in religion, because they constitute a "moral establishment" in conflict with the purpose of the Establishment Clause. This definition of religious freedom then, is a freedom from religion that seeks to insulate a growing minority that rejects a moral point of view.

This argument is notable for several reasons. Not only is he arguing that only secular values should be relevant in public policy discussions, but he seeks to reinterpret religious freedom itself so that it excludes religion and morals from public discourse. In other words, if Sehat's definition of religious freedom were widely accepted, religious freedom would be defined to mean the absence of religious influence in the laws of our country.

The right of society to hear religiously motivated debate on public issues is precisely what was intended at our nation's founding. Many of you will be aware of the statement by John Adams,

> "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."

Thus, not only do individuals and religious associations have the right to speak out on moral and religious matters, but society as a whole has a right to receive those messages and consider them in important policy deliberations. However, increasingly this is not occurring.

Commenting on the Proposition 8 district court litigation in California, then titled Perry v. Schwarzenegger, Elder Lance B. Wickman noted

> *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.
>
> . . . .
>
> The plaintiffs in *Perry* . . . 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 14th 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.

Now since Elder Wickman's comments the District Court held, based on numerous factual findings, that Proposition 8 is an unconstitutional infringement under the Due Process and Equal Protection Clauses of the Constitution. One of Judge Walker's factual findings was that *"[r]eligious beliefs that gay and lesbian relationships are sinful or inferior to heterosexual relationships harm gays and lesbians.*" He went on to note the high degree of participation by religious organizations in support of Proposition 8, particularly that of the Catholic Church and The Church of Jesus Christ of Latter-day Saints. (Finding 18). He then determined that only secular state interests could justify a law. "The state does not have an interest in enforcing private moral or religious beliefs without an accompanying secular purpose." Further that "[r]eligious beliefs that gay and lesbian relationships are sinful or inferior to heterosexual relationships harm gays and lesbians." (Finding 77). Accordingly, the court concluded that there was no rational basis for the voters of California to support Proposition 8.

On review the Ninth Circuit the Court of Appeals upheld the District Court but on the narrow ruling under the Equal Protection Clause. Nevertheless, without specifically mentioning religious motivations, the Ninth Circuit concluded that, "Although the [California] Constitution permits communities to enact most laws they believe to be desirable, it requires that there be at least a legitimate reason for the passage of a law that treats different classes of people differently. There was no such reason that Proposition 8 could have been enacted." Thus, religious motivations were presumably deemed illegitimate as a basis for legislation.

Church leaders increasingly decry this continuing trend against religious voices. Elder Oaks at his Chapman University speech stated the following:

> "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.

The right to freedom of speech carries with it the implicit right on the part of the government to hear that speech. While we may disagree with one's viewpoint, it should never be defined away as illegitimate merely because that viewpoint is religious. Doing so, I believe, would violate society's right to religious freedom.

The path we have taken to get to this point will take some important course corrections. Historically, it was common for the public at large and our legislators to assert straightforward religious and morally based arguments in support of legislation. Sabbath closing laws, for example, were justified simply as providing a day of rest that encouraged participation in church services. However, over time such direct religious rationales were deemed inappropriate. The rational basis standard of review was introduced in their place. Under this new standard, secular reasons would be required to justify legislation against Establishment Clause attacks. However, any secular purpose, regardless of whether it was overinclusive or underinclusive would suffice. This permitted, for example, the upholding of Sabbath closing laws on the grounds that a day of rest was beneficial to the health of society regardless of the detrimental effects on those who did not worship on the Sunday.

While perhaps originally intended as a fairly easy hurdle to surmount, today courts are increasingly asking whether the rational basis test is an appropriate way to approve religiously motivated laws. As a result, it can no longer be assumed as a reliable basis for supporting laws with a moral or religious foundation. For example, in the marriage battles already referred to, the court found that there was no rational basis for limiting marriage to couples of the opposite gender notwithstanding the many arguments made in favor of a secular purpose for the definition.

There is a clear history of major benefits by religious engagement in moral affairs. The Civil Rights movement, abolition of slavery, the human rights movement, generally, all come to mind. Moreover, a plurality of opinions is an essential part of our democracy and our American experience. The promotion of morality is still considered a valid justification of state police power. If this is the case then surely a valid justification for law can be its promotion of morals. Those morals must come

from somewhere and they should not be invalid if they are partially derived from religious sources.

Unless we can define the propriety of laws based in moral beliefs, including morals growing out of our religious heritage, we are at risk of all laws becoming amoral.

Summary

In summary, I have attempted to lay out a straightforward description of religious freedom that can be easily understood and used to defend this right in the battles looming ahead. Of course, other may have additional suggestions. I welcome those.

The fundamentals of this definitional approach are to first identify the groups claiming the right of religious freedom,

1) Individuals (and families)
2) Religious associations, and
3) Society at large

Doing so, I believe, will direct attention to the rights of religious associations and society that are often overlooked.

Second, I have attempted to identify key principles underlying the right of religious freedom from each group.

1) For individuals, this is the
    a. right of conscience and
    b. the right to practice one's religion.
2) For religious societies as entities, this is the
    a. right to not be subject to discrimination vis-à-vis other organizations,
    b. the right to internal church decisionmaking or autonomy, and
    c. the right to retain the historic uniqueness of religious associations.
3) For society at large, this is the
    a. obligation to permit and the right to hear religious voices in matters of public policy.

Conclusion

During the last election cycle I was frequently interested in the notion that a candidate needs to define himself before his opponent does so in a negative way. We have a similar problem. While religious freedom has generally been an unquestioned values since the inception of our Republic, more frequent and more strident voices are attempting to define religious freedom in ways that severely limit its reason, such as merely including freedom to worship, or redirect it so that it might exclude religion and morals from public debate.

Unless we grab hold of the positive principles underlying the concept of religious freedom, we risk being defined by others as narrow-minded, intolerant individuals, whose intention is to discriminate against others in their fundamental rights. To avoid this grossly inaccurate caricature, we must promote simple yet meaningful positive values that honor the rights of individuals, religious associations and society at large. If we do so, we will be on the right side of the coming battles over the meaning of religious freedom.

Thank you very much.