

# Going Forward with Religious Freedom and Nondiscrimination

*Dallin H. Oaks*

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**F**riends:

I feel privileged to be in this honored place. I love this country, which I believe was established with the blessings of God. I love its Constitution, whose *principles* I believe were divinely inspired.<sup>1</sup>

I am, therefore, distressed at the way we are handling the national issues that divide us. We have always had to work through serious political conflicts, but today too many approach that task as if their preferred outcome must entirely prevail over all others, even in our pluralistic society. We need to work for a better way—a way to resolve differences without compromising core values. We need to live together in peace and mutual respect, within our defined constitutional rights.

As a religious person who has served in government at both federal and state levels and now as a leader in the worldwide Church of Jesus Christ of Latter-day Saints, I have always known of the tensions experienced when persons who rely on the free exercise of religion are conflicted between duties to God and duties to country. More recently, I have come to understand better the distress of persons who feel that others are invoking constitutional rights like free exercise of religion and freedom of speech to deny or challenge their own core beliefs and their access to basic constitutional rights. I deeply regret that these two groups have been drawn into conflict with one another.

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1. See Dallin H. Oaks, “Defending Our Divinely Inspired Constitution,” *Liahona* 45, no. 5 (May 2021): 105–8.

## I.

As you have seen, I have titled my remarks “Going Forward with Religious Freedom and Nondiscrimination.” This title acknowledges that our society is still painfully unsettled in managing the relationship between religious freedom and nondiscrimination, but also expresses my belief that it need not remain so. My goal is to suggest a helpful and feasible path forward without excessively accommodating either the Left or the Right or the religious or the nonreligious. I hope what I say will be helpful to those who seek a better way for the advocates of religious freedom and nondiscrimination to relate to one another as fellow citizens dedicated to maintaining a civil society.

I begin with a proposition I hope all will share. As a practical basis for coexistence, we should accept the reality that we are fellow citizens who need each other. This requires us to accept some laws we dislike and to live peacefully with some persons whose values differ from our own. Amid such inevitable differences, we should make every effort to understand the experiences and concerns of others, especially when they differ from our own.

We can only succeed in this effort to the extent that we acknowledge and respect each other’s highest ideals and human experiences. We must not be part of what Professor Arthur C. Brooks of Harvard’s Kennedy School describes as “a culture of contempt”—a habit of seeing people who disagree with us not as merely incorrect or misguided but as worthless.<sup>2</sup> A basic step is to avoid labeling our adversaries with epithets such as “godless” or “bigots.” As the *Deseret News*, a paper published by The Church of Jesus Christ of Latter-day Saints, editorialized: “Conflicts between religious liberty and nondiscrimination principles are exacerbated when advocates for nondiscrimination paint people of faith as bigots, and when people of faith fail to appreciate the brutal history of the basic human rights of marginalized groups, such as gays and lesbians.”<sup>3</sup> When some advocates voice insults or practice other minor provocations, both sides should ignore them. Our society already has too many ugly confrontations. If we answer back, we tend to mirror the insult.

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2. Arthur C. Brooks, “More Love, Less Contempt,” Brigham Young University commencement address, April 25, 2019, <https://speeches.byu.edu/talks/arthur-c-brooks/more-love-less-contempt/>. See Arthur C. Brooks, *Love Your Enemies: How Decent People Can Save America from the Culture of Contempt* (New York: Broadside Books, 2019).

3. “RFRA under Attack,” *Deseret News National Weekly Edition*, April 12, 2015, 12; see also “Legislation Should Not Polarize Religious Liberties, Anti-Discrimination Protections,” *Deseret News*, April 4, 2015, <https://www.deseret.com/2015/4/4/20562022/legislation-should-not-polarize-religious-liberties-anti-discrimination-protections>.

A better response is that of the late Chief Rabbi Lord Jonathan Sacks. When he agreed to meet with a staunch atheist who detested everything he held sacred, the rabbi was asked whether he would try to convert him. “No,” he answered, “I’m going to do something much better than that. I’m going to listen to him.”<sup>4</sup>

Another basic imperative is that we should not seek total dominance for our own position; we should seek fairness for all. Specifically, people of faith should not contest every nondiscrimination law or policy that could possibly impinge, however insignificantly, on institutional or individual religious freedom. Likewise, proponents of nondiscrimination need not contest every religious freedom exemption from nondiscrimination laws. The goals of both sides are best served by resolving differences through mutual respect, shared understanding, and good faith negotiations. And both must accept and respect the rule of law.

Without acceptance of such ethical and political fundamentals on all sides, we are unlikely to move forward with this vital task.

I don’t mean to minimize the difficulty of what I am advocating. I simply invite my audience, who already understand the complexity of current divisions, to consider the possibility of reconciliation as I proceed with the most difficult address I have ever undertaken.

## II.

I will now suggest some important principles that will help us avoid potential pitfalls as we attempt to go forward.

Where there is genuine conflict, one constitutional right should not be invoked to try to cancel another constitutional right. Both must be balanced legally and negotiated politically in a way that upholds essential rights to the greatest extent possible. In doing so, people of faith should not assume that those who advocate nondiscrimination have no regard for religious freedom or that nondiscrimination lacks any constitutional basis. Similarly, those who advocate nondiscrimination should not assume that those asserting claims of religious freedom are seeking a “license to discriminate.” There are worthy constitutional and ethical arguments on both sides of such disputes, and, so far as possible, we should seek to accommodate them consistent with the most important interests of all sides. This is not easy when we differ so fundamentally on

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4. Deseret New Editorial Board, “The World Lost a Moral Voice, but Rabbi Lord Jonathan Sacks’ Wisdom Lives On,” *Deseret News*, November 13, 2020, <https://www.deseret.com/opinion/2020/11/13/21564231/rabbi-lord-jonathan-sacks-death-boyd-matheson-meaning-atheist>.

matters of such immense importance. But the effort is essential if we are to live together in peace in a pluralistic society.

We should also be wary of the idea that one set of rights automatically trumps another in all circumstances. Both religious freedom and nondiscrimination are important values that are powerfully protected by law. Nondiscrimination principles have been given increasing social recognition in the last century and are now rooted in the constitutional guarantee of equal protection of the law. Yet they still cannot be said to obviate the constitutional guarantee of religious freedom.

The First Amendment in the Bill of Rights singles out the “free exercise” of religion for specific protection, along with the related freedoms of speech, press, and assembly. These rights enjoy singular status because of their paramount significance to the foundations of our constitutional republic. They are rights on which all other rights depend. Protecting them is essential to safeguarding and perpetuating all constitutional freedoms. That is why religious exercise and religious expression enjoy special constitutional protection.

But even though the First Amendment obviously guarantees the right to *exercise* or practice religious beliefs and affiliations, that right is not absolute. As advocates for religious freedom, we must yield to the fact that in a nation with citizens of many different religious beliefs or disbeliefs, the government must sometimes limit the right of some to *act* upon their beliefs when it is necessary to protect the health, safety, and welfare of all.

With equal sincerity, I invite nondiscrimination advocates to recognize the reality of the threat to religious freedom that is currently associated with expanding nondiscrimination laws. Those who demand that faith communities change their practices should not seek to force overall changes by legal fiat but rather encourage selective accommodations through persuasion, good faith negotiation, and legislative reform. In this way, we can all unite in support of nondiscrimination in many areas of social life.

While we peacefully await resolution of conflicts, I strongly urge all participants in these controversies to acknowledge the validity of and to obey existing laws sustained by the highest available judicial authority in the Constitution. Executive officers responsible for executing and enforcing such laws must not assume authority they do not possess; they too are subject to the law. All such officials take an oath to support the Constitution and laws of their jurisdiction. That oath does not permit them to use their official position to override the law to further their personal beliefs—religious or otherwise.

This principle was violated following the Supreme Court's *Obergefell* decision by a county clerk who invoked religious reasons to justify her office's refusal to issue marriage licenses to same-gender couples. More far-reaching violations of the rule of law occurred earlier when a state attorney general and governor refused to enforce or defend a state law limiting marriages to those between a man and a woman because they personally opposed that law on secular grounds. Constitutional duties, including respect for the vital principle of separation of powers, are fundamental to the rule of law. Neither governments nor their citizens can afford to tolerate the revocation of a law (either its text or its operation) by officials not constitutionally authorized to revoke it.

### III.

This is not the setting, and I am not the authority to suggest how the separate guarantees of religious freedom and nondiscrimination should be adjudicated in specific head-to-head conflicts. My purpose is more modest. I advocate the moral and political imperative of reconciling existing conflicts and avoiding new ones, not to promote my favored outcome in any particular controversy. I come to you not as a lawyer with the experiences already mentioned, but as an Apostle of the Lord Jesus Christ, whom many of us worship.

Still, religious freedom has been a dominant interest of mine for many years. Seventy-three years ago, when I was only sixteen, the Supreme Court endorsed with particular force the metaphor of "a wall between Church and State, which must be kept high and impregnable."<sup>5</sup> The legal relationship implied by this metaphor has been confusing and much criticized and is being selectively displaced. Over time, I have come to wish for a better metaphor, one sufficient to define the limits but also allow accommodation of the mutual interests of religion and government. Less rigid than a "wall," the boundary should be permeable enough to admit light and flexible enough to allow mutual support. That change has not happened.

We are currently governed by the tests established in the 1990 case of *Employment Division v. State*,<sup>6</sup> but its influence is clearly waning. Subsequent cases have exposed its failure as a broadly applicable and publicly

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5. *McCollum v. Board of Education*, 333 U.S. 203, 212 (1948). See *Everson v. Board of Education*, 330 U.S. 1, 16, 18 (1947); Dallin H. Oaks, ed., *The Wall between Church and State* (Chicago: University of Chicago Press, 1963), especially 17–18.

6. *Employment Div. v. Smith*, 494 U.S. 872 (1990).

understandable standard to help reconcile opposing parties.<sup>7</sup> Rather, it appears to have perpetuated, if not exacerbated, the divisiveness in our relationships. It has become increasingly clear that we now need a new, workable balance between religious freedom and nondiscrimination.

In these circumstances, it is timely to ask *how* we should go forward to resolve urgent conflicts between the widespread support for nondiscrimination and the constitutional guarantee of free exercise of religion. Most media coverage and public perception of these conflicts understandably focus on court rulings, especially those of the United States Supreme Court. We all know that the courts are intended to have the final word on constitutional issues. We also know that court opinions in this area are rigorously policed by litigation organizations on both sides who solicit and groom additional cases to advance their causes through favorable court rulings. Though such rulings are immensely important, I caution against primary reliance on judicial rulings to ultimately resolve these conflicts. What is needed is wise public policy, not a declaration of the winner in a legal contest.

Litigation should not be the first recourse in resolving our differences. Courts are constitutionally limited to resolving the specific cases before them. They are ill-suited to the overarching, complex, and comprehensive policy-making that is required in a circumstance like the current conflict between two great values. Notwithstanding my years of working with judicial opinions, I prefer the initial route of legislative lawmaking on big questions like the ones now before us. I find wisdom in the observation of Professor (later Dean) Martha Minow of the Harvard Law School. In her influential article on this subject, she concluded that “accommodation and negotiation can identify practical solutions where abstract principles sometimes cannot.”<sup>8</sup> Professor Minow further observed that problem-solving by negotiation “is highly relevant to *sustaining and replenishing* both American pluralism and constitutional protections for minority groups.”<sup>9</sup>

Successful negotiation requires that neither side be unduly influenced by the extreme voices that often drive litigation, especially litigation sponsored by ideological groups. Extreme voices influence popular

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7. See Steven H. Aden and Lee J. Strang, “When a ‘Rule’ Doesn’t Rule: The Failure of the Oregon Employment Division v. Smith ‘Hybrid Rights Exception,’” *Penn State Law Review* 108, no. 2 (2003): 573–609.

8. Martha Minow, “Should Religious Groups Be Exempt from Civil Rights Law?” *Boston College Law Review* 48, no. 4 (2007): 849.

9. Minow, “Should Religious Groups Be Exempt from Civil Rights Law?” 783, emphasis mine.

opinion, but they polarize and sow resentment as they seek to dominate their opponents and achieve absolute victory. Such outcomes are rarely sustainable or even attainable, and they are never preferable to living together in mutual understanding and peace.

Good-faith negotiation invites that seldom-appreciated virtue so necessary to democracy: tolerance, free of bigotry toward those whose opinions or practices differ from our own. But learning to live with significant differences requires much more than tolerance. Dr. Alwi Shihab, the Indonesian president's special envoy to the Middle East and the Organization of Islamic Cooperation, made this point in an address to the faculty and students at Brigham Young University. Relying on the teachings of the Qur'an, he said, "We must respect this God-given dignity in every human being, even in our enemies. For the goal of all human relations—whether they are religious, social, political, or economic—ought to be cooperation and mutual respect." Thus, he added, "We must go . . . beyond tolerance if we are to achieve harmony in our world."<sup>10</sup> Obviously, followers of Christ also have a duty to seek harmony. Where there are conflicts, all should seek peace.

Far from being a weakness, reconciling adverse positions through respectful negotiation is a virtue. As Jesus taught, "Blessed are the peacemakers: for they shall be called the children of God."<sup>11</sup> The Apostle Paul followed this by teaching Christians to "follow after the things which make for peace,"<sup>12</sup> and "if it be possible, . . . live peaceably with all men."<sup>13</sup> Similarly, the Book of Mormon teaches that it is a "peaceable walk with the children of men" that distinguishes a true follower of Jesus Christ.<sup>14</sup>

Such teachings impose duties and can create tensions that I will now address. On this subject, I counsel my fellow Latter-day Saints specifically, but also request the consideration of those who share our belief in the Bible, and even those who only embrace its wisdom. I will illustrate some of my points with the experience of the Latter-day Saints because I believe the lessons we have learned from that experience are applicable to any who seek to obey both the law of the land and the law of their God, even in circumstances of extreme tension.

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10. Alwi Shihab, "Building Bridges to Harmony through Understanding," Brigham Young University forum address, October 10, 2006, <https://speeches.byu.edu/talks/alwi-shihab/building-bridges-harmony-understanding/>; also published in *BYU Studies* 45, no. 4 (2006): 9–18.

11. Matthew 5:9.

12. Romans 14:19.

13. Romans 12:18.

14. Moroni 7:4.

## IV.

What I have described as necessary to going forward—namely, seeking harmony by finding practical solutions to our differences, with love and respect for all people—does not require any compromise of core principles. Both religious and secular rule are ordained of God for the good of his children. As is generally known, Jesus taught this during his ministry. Some who sought to trap him asked Jesus whether it was right to pay taxes to Caesar. They wanted to force him to declare publicly that his followers were not subject to the civil law. Instead, using a coin of the Roman overseer as a visual aid, Jesus answered, “Render [meaning give] . . . unto Caesar the things which are Caesar’s; and unto God the things that are God’s.”<sup>15</sup>

The religious duty to obey the law of the land and to live peaceably with all people does not contemplate that the religious will abandon the public square. In a free society like ours, all are lawfully privileged and morally obligated to exert their best political efforts to argue for what they think is most desirable. For example, it is well-known that The Church of Jesus Christ of Latter-day Saints exercised its constitutional right to express its position that the traditional legal definition of marriage should be preserved. But in 2015, when the Supreme Court pronounced the legality of same-sex marriage, the Church immediately ceased all such opposition and publicly acknowledged its acceptance of the constitutional law established by the nation’s highest court.<sup>16</sup>

Of course, a church’s *religious* marriage law and practice, which upholds the Biblical understanding of marriage, remains in force on its adherents when it does not violate what Jesus called Caesar’s law. Joseph Smith, for whom this lecture is named, taught that “religion is instituted of God; and that men are amenable to him, and to him only, for the exercise of it, unless their religious opinions prompt them to infringe upon the rights and liberty of others.”<sup>17</sup>

Therefore, notwithstanding its heavily criticized opposition in the political debate over same-sex marriage, The Church of Jesus Christ of Latter-day Saints reached out to nondiscrimination advocates and participated in Utah negotiations over shared concerns on housing and employment. The discussions that followed were previously thought impossible for either side. Over a six-year period, however, they were

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15. Matthew 22:21; Mark 12:17; Luke 20:25.

16. Tad Walch, “What the LDS Church Said about the Supreme Court Ruling on Gay Marriage,” *Deseret News*, June 29, 2015, <https://www.deseret.com/2015/6/29/20567372/what-the-lds-church-said-about-the-supreme-court-ruling-on-gay-marriage>.

17. Doctrine and Covenants 134:4.

able to craft suitable local and statewide legislation because adversaries gradually learned to understand each other's positions, including what they deemed most important to affirm and protect by law. One participant told me that he recalls them as "an effort in peacemaking, learning how to live together" with mutual respect, even love.

At issue was a head-to-head conflict between free exercise of religion and nondiscrimination in housing and employment in a Salt Lake City ordinance first proposed in 2009. In time, a jointly designed proposal gained traction, and its adoption at the city level prompted an effort to adopt a similar law statewide. The resulting law, later called "the Utah Compromise," was enacted with the Church's full support in 2015. This law offered protections to both sides. One side obtained significant legal protection from discrimination in employment and housing. The other side gained protection for religious freedom in its most sensitive areas of Church employment and student housing. While the law gave neither side all that it sought, its reconciliations did grant both sides significant benefits—a win-win outcome—that could not have been obtained without the balancing of interests made possible by the dynamics of the legislative process.

In contrast to the tendencies of the judicial branch to decide complex issues in a winner-take-all adversarial process, the legislative process in Utah provided an opportunity to forge enduring relationships and to craft workable long-term solutions. Here is how Troy Williams, executive director of Equality Utah, described the process: "We found solutions together. Neither side compromised our values, but rather, we discovered new ways forward that respected each other and forged areas of common ground. Bringing diverse voices to the table is hard. It requires expanded empathy and patience. But when we ratchet down the vitriol, and seek areas of agreement, incredible things can happen."<sup>18</sup>

The resulting Utah Compromise on housing and employment was a pathbreaking beginning that has been embraced by all parties, including the leadership of The Church of Jesus Christ of Latter-day Saints. As a church, we are committed to the free exercise of religion to allow us to practice the principles of our faith. But we are also committed to fundamental fairness and the rule of law. We see the process that succeeded in Utah as a promising way to have both religious protection and fundamental fairness, particularly on individual issues like housing and employment. Whether it can be applied to other sensitive issues remains to be seen.

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18. In Matt Canham, "Read What Key Figures Say 'the Utah Way' Is," *Salt Lake Tribune*, July 25, 2021, <https://www.sltrib.com/news/politics/2021/07/25/read-what-key-figures-say/>.

In this regard, I must add that the Utah Compromise required more than political engagement. Essential to our side was the principle of honoring both divine and mortal laws. Rendering to Caesar *in good faith* requires religious persons and associations to acknowledge what their government does for them and to be faithful in fulfilling the reciprocal responsibilities they owe to the government and their fellow citizens. All should observe the laws and respect the values of the country that guarantees their freedoms. This is a debt of gratitude that should be paid gladly.

But what if neither side to a controversy over religious freedom and nondiscrimination can make the concessions necessary to reconcile their differences? On a broader front, what if the conflicting demands of civil and religious law are such that they cannot be resolved by negotiation? Such circumstances rarely exist. If they do, the experience of The Church of Jesus Christ of Latter-day Saints suggests that a way can be found to reconcile divine and human law—through patience, negotiation, and mutual accommodation, without judicial fiat or other official coercion.

That was the outcome of the painful, nationally debated contest over seating Latter-day Saint Apostle Reed Smoot in the United States Senate in 1903. I do not have time to tell the story of this four-year Senate hearing but recommend it to you as a fascinating account of a political negotiation which, according to a brilliant scholarly analysis by your own Kathleen Flake, “hammered out a twentieth-century model for church-state relations, shaping for a new generation of Americans what it meant to be free and religious.”<sup>19</sup> Where coercive efforts against a church (by mob violence, public shaming, military might, statutory criminalization, and even disincorporation) had failed, politics—“the art of the possible, the attainable—the art of the next best”<sup>20</sup>—finally succeeded, and one of its leaders was seated in the Senate.

Mutual accommodation between the Latter-day Saints and the rest of the country was achieved by adversarial parties who were able, by political means, to identify and “preserve the deepest interests of the greatest number of parties.”<sup>21</sup> That is the essence of constructive politics, which is something to be emulated in our own day. Indeed, the terms for maintaining a workable relationship between church and state that emerged

19. Kathleen Flake, *The Politics of American Religious Identity: The Seating of Senator Reed Smoot, Mormon Apostle* (Chapel Hill: University of North Carolina Press, 2004), 11.

20. Otto von Bismarck, in conversation with Fredrich Meyer von Waldeck of the *St. Petersburgische Zeitung*, August 11, 1867, W. Andreas, ed., *Gesammelt Werke*, vol. 7 (Berlin: Strollber, 1924), 222.

21. Flake, *Politics of American Religious Identity*, 10; also see pages 8–9 and 50–51.

from the Smoot Hearings are applicable to all sides today: obedience to the law, political toleration, and commitment to the common good.

United States history is replete with failures and successes in protecting religious and other civil rights. Let us hope that current efforts will add another success to the troubled history of the intersection of divine and civil law.

## V.

In the meantime, religious leaders must not overlook the fact that the preservation of religious freedom ultimately depends on public appreciation and support for the related First Amendment freedoms of religious conscience, association, and free exercise. In turn, such appreciation and support depend on the value the public attaches to the positive effects of the practices and teachings in churches, synagogues, mosques, and other places of worship. Those effects include their encouraging observance of civil law and church-goers' improved health and longevity recently highlighted in a cover story in *Christianity Today*.<sup>22</sup>

Teachings based on faith in God—however defined—have always contributed to moral actions that benefit the entire nation. This will continue to be so as religious people love and serve their neighbors as an expression of their love of God. As Lance B. Wickman, general counsel of The Church of Jesus Christ of Latter-day Saints, recently observed: “When we exercise our religious freedom to serve and lift to strengthen community ties and to pour oil on troubled waters, and to make America better—when we use our religious freedom to bring people together in unity and love—we are defending and preserving religious liberty and the Constitution in a most profound way.”<sup>23</sup> In this way, more than any other, the importance of religious freedom will be better understood and better protected.

I earnestly invite all religious leaders and associations to coalesce more effectively—and that often means out of court—to seek peaceful resolution of painful conflicts between religious freedom and nondiscrimination. This does not require an examination of doctrinal differences or even our many common elements of belief. All that is necessary

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22. Tyler J. Vanderweele and Brendan Case, “Empty Pews Are an American Public Health Crisis,” *Christianity Today*, October 19, 2021, <https://www.christianitytoday.com/ct/2021/november/church-empty-pews-are-american-public-health-crisis.html>.

23. Lance B. Wickman, “Shrapnel in a Bible: Reflections on Patriotism, Charity, and Religious Liberty” St. George [Utah] Interfaith Devotional, July 4, 2021.

for unity and a broad coalition to promote our common need for religious freedom is our shared conviction that God has commanded us to love one another, including our neighbors with different beliefs and cultures.<sup>24</sup> This invites all believers, as President Russell M. Nelson has challenged our members, to “expand our circle of love to embrace the whole human family.”<sup>25</sup>

In doing so, we must not allow that fears about losing our own freedoms make us insensitive to others’ claims for theirs. Let us unite with those who advocate nondiscrimination to seek a culture and laws that respect the rights of all to the equal protection of the law and the right to the free exercise of religion. From the experience of The Church of Jesus Christ of Latter-day Saints, I believe we can proceed toward this goal by mutual respect and willing accommodation. The right relationship between religious freedom and nondiscrimination is best achieved by respecting each other enough to negotiate in good faith and by caring for each other enough that the freedom and protection we seek is not for ourselves alone. I pray for that result under our inspired Constitution, as we pledge to be “one nation under God, indivisible, with liberty and justice for all.” In the name of Jesus Christ, amen.

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President Oaks is a graduate of Brigham Young University (1954) and of the University of Chicago Law School (1957). He practiced law and taught law in Chicago. He was president of Brigham Young University from 1971 to 1980 and served as a justice of the Utah Supreme Court from 1980 until his resignation in 1984 to accept his calling to the apostleship. He has been an officer or member of the board of many business, educational, and charitable organizations. He is the author or coauthor of many books and articles on religious and legal subjects. In May 2013, the Becket Fund for Religious Liberty awarded him the Canterbury Medal for “courage in the defense of religious liberty.”

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24. See, for example, Matthew 22:36–40; Luke 10:29–37.

25. Russell M. Nelson, *Teachings of Russell M. Nelson* (Salt Lake City: Deseret Book, 2018), 83.