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A NEW ORDER OF RELIGIOUS FREEDOM

More than he wanted to be remembered for having been President, Mr. Jefferson wanted to be remembered as the author of the Virginia "Bill for Establishing Religious Freedom." In his draft of that bill he wrote: "The opinions of men are not the object of civil government, nor under its jurisdiction." In a republic of free citizens, every opinion, every prejudice, every aspiration, every moral discernment has access to the public square in which we deliberate the ordering of our life together.

"The opinions of men are not the object of civil government, nor under its jurisdiction." And yet civil government is ordered by, and derives its legitimacy from, the opinions of the citizenry. Precisely here do we discover the novelty of the American experiment, the unique contribution of what the Founders called this *novus ordo seclorum* a new order for the ages. Never before in human history had any government denied itself jurisdiction over that on which it entirely depends, the opinion of its people.

That was the point forcefully made by Lincoln in his dispute with Stephen Douglas over slavery. Douglas stubbornly held to the Dred Scott decision as the law of the land. Lincoln had the deeper insight into how this republic was designed to work. "In this age, and this country," Lincoln said, "public sentiment is every thing. *With* it, nothing can fail; *against* it, nothing can succeed. Whoever moulds public sentiment, goes deeper than he who enacts statutes, or pronounces judicial decisions. He makes possible the inforcement of these, else impossible."

The question of religion's access to the public square is not first of all a question of First Amendment law. It is first of all a question of understanding the theory and practice of democratic governance. Citizens are the bearers of opinion,

including opinion shaped by or espousing religious belief, and citizens have equal access to the public square. In this representative democracy, the state is forbidden to determine which convictions and moral judgments may be proposed for public deliberation. Through a constitutionally ordered process, the people will deliberate and the people will decide.

In a democracy that is free and robust, an opinion is no more disqualified for being "religious" than for being atheistic, or psychoanalytic, or Marxist, or just plain dumb. There is no legal or constitutional question about the admission of religion to the public square; there is only a question about the free and equal participation of citizens in our public business. Religion is not a reified "thing" that threatens to intrude upon our common life. Religion in public is but the public opinion of those citizens who are religious.

As with individual citizens, so also with the associations that citizens form to advance their opinions. Religious institutions may understand themselves to be brought into being by God, but for the purposes of this democratic polity they are free associations of citizens. As such, they are guaranteed the same access to the public square as are the citizens who comprise them. It matters not at all that their purpose is to advance religion, any more than it matters that other associations would advance the interests of business or labor or radical feminism or animal rights or whatever.

For purposes of democratic theory and practice, it matters not at all whether these religious associations are large or small, whether they reflect the views of a majority or minority, whether we think their opinions bizarre or enlightened. What opinions these associations seek to advance in order to influence our common life is entirely and without remainder the business of citizens who freely adhere to such associations. It is none of the business of the state. Religious associations, like other associations, give corporate expression to the opinions of people and, as Mr. Jefferson said, "the opinions of men are not the object of civil government, nor under its jurisdiction."

It is to be feared that those who interpret "the separation of church and state" to mean the separation of religion from public life do not understand the theory and practice of democratic governance. Ours is not a secular form of government, if by "secular" is meant indifference or hostility to opinions that are thought to be religious in nature. The civil government is as secular as are the people from whom it derives its democratic legitimacy. No more, no less. Indeed a case can be made—and I believe it to be a convincing case—that the very founding principle that removes opinion from the jurisdiction of the state is itself religious in both historical origin and continuing foundation. Put differently, the foundation of religious freedom is itself religious.

"We hold these truths," the Founders declared. And when these truths about the "unalienable rights" with which men are "endowed by their Creator" are no longer firmly held by the American people and robustly advanced in the public

square, this experiment will have come to an end. In that unhappy case, this experiment will have turned out to be not a *novus ordo seclorum* but a temporary respite from humanity's penchant for tyranny. Yet in the second century of the experiment, secularized elites in our universities and our courts became embarrassed by the inescapably religious nature of this nation's founding and fortune.

These secularized elites have devoted their energies to explaining why the Founders did not hold the truths that they said they held. They have attempted to strip the public square of religious opinion that does not accord with their opinion. They have labored assiduously to lay other foundations than those laid in the beginning. From John Dewey to John Rawls, and with many lesser imitators in between, they have tried to construct philosophical foundations for this experiment in freedom, only to discover that their efforts are rejected by a people who stubbornly persist in saying with the Founders, "We hold these truths." A theory of democracy that is neither understood nor accepted by the democracy for which it is contrived is a theory of democracy both misbegotten and stillborn. Two hundred years ago, and even more so today, the American people, from whom democratic legitimacy is derived, are incorrigibly religious. This America continues to be, in the telling phrase of Chesterton, "a nation with the soul of a church."

And yet there are those who persist in the claim that "the separation of church and stare" means the separation of religion from public life. They raise the alarm about "church-state conflicts" that are nothing of the sort. There are conflicts, to be sure, but they are the conflicts of a robust republic in which free citizens freely contend in the public square. The extreme separationists will tolerate in public, they may even assiduously protect, the expression of marginal religious opinion, of opinion that is not likely to influence our common life. But they take alarm at the voice of the majority. In that voice it is the people that they hear; it is the people that they fear; it is democracy that they fear.

Mr. Jefferson did not say that the civil government has no jurisdiction over opinion *except* when it is religious opinion. He did not say that the civil government has no jurisdiction over opinion *except* when it is ex-pressed through associations called churches or synagogues. He did not say that the civil government has no jurisdiction over opinion *except* when it is majority opinion. He said, "The opinions of men are not the object of civil government, nor under its jurisdiction."

Many worry about the dangers of raw majoritarianism, and well we all should worry. The Founders worried about it, and that is why they devised a constitutional order for *representative* governance, and for the protection of minority opinion and behavior. But, without the allegiance of the majority to that constitutional order, such protections are only, in the words of James Madison, "parchment barriers" to tyranny. As Lincoln observed, without the support of public sentiment, statutes and judicial decisions—including those intended to protect citizens who dissent from public sentiment—cannot be enforced.

In our day, minorities seeking refuge in the protections of the Constitution frequently do so in a manner that pits the Constitution against the American people. That is understandable, but it is a potentially fatal mistake. We must never forget the preamble and irreplaceable premise of the Constitution: "We the people ... do ordain and establish this Constitution for the United States of America." That is to say, the Constitution and all its protections depend upon the sentiment of "we the people." Majority rule is far from being the only principle of democratic governance, but it is a necessary principle. In the Constitution, the majority imposes upon itself a self-denying ordinance; it promises not to do what it otherwise could do, namely, ride roughshod over the dissenting minorities.

Why, we might ask, does the majority continue to impose such a limitation upon itself? A number of answers suggest themselves. One reason is that most Americans recognize, however inarticulately, a sovereignty higher than the sovereignty of "we the people." They believe there is absolute truth but they are not sure that they understand it absolutely; they are, therefore, disinclined to force it upon those who disagree. It is not chiefly a secular but a religious restraint that prevents biblical believers from coercing others in matters of conscience. For example, we do not kill one another over our disagreements about the will of God because we believe that it is the will of God that we should not kill one another over our disagreements about the will of God. Christians and Jews did not always believe that, but, with very few exceptions, we in this country have come to believe it. It is among the truths that we hold.

Then too, protecting those who differ is in the self-interest of all. On most controverted issues in our public life, there is no stable majority, only ever-shifting convergences and divergences. Non-Christians, and Jews in particular, sometimes see an ominous majoritarian threat in the fact that nearly 88 percent of the American people claim to be Christian. As a matter of practical fact, however, that great majority is sharply divided along myriad lines when it comes to how civil government should be rightly ordered. Furthermore, a growing number of Christians, perhaps most Christians, have a religiously grounded understanding of the respect that is owed living Judaism. Those Christians who argue that "Christian America" should be reconstructed in conformity with a revealed biblical blueprint for civil government are few and marginal, and are likely to remain so.

Father John Courtney Murray observed that, while in theory politics should be unified with revealed truth, "it seems that pluralism is written into the script of history." Some of us would go further and suggest that it is God who has done the writing. Pluralism is our continuing condition and our moral imperative until the End Time, when our disagreements will be resolved in the coming of the Kingdom. The protection against raw majoritarianism, then, depends upon this constitutional order. But this constitutional order depends, in turn, upon the continuing ratification of the majority who are "we the people." Among the truths these people hold is the truth that it is necessary to protect those who do not hold those truths.

It is a remarkable circumstance, this American circumstance. It is also fragile. We may wish that Lincoln was wrong when he observed that "In this age, and this country, public sentiment is every thing." But he was right, and in the conflict over slavery he was to see public sentiment turn against the constitutional order and nearly bring it to irretrievable ruin. We are dangerously deceived if we think that Lincoln's observation about our radical dependence upon public sentiment is one whit less true today.

The question before us, then, is not the access of religion to the public square. The question is the access, indeed the full and unencumbered participation, of men and women, of citizens, who bring their opinions, sentiments, convictions, prejudices, visions, and communal traditions of moral discernment to bear on our public deliberation of how we ought to order our life together in this experiment that aspires toward representative democracy. It is of course an aspiration always imperfectly realized.

I noted at the start that the question before us is not first of all a question of First Amendment law. It is a question, first of all, of under-standing the origins, the constituting truths, and the continuing foundations of this republic. That having been said, the question before us is also and very importantly a question of the First Amendment, and of the first liberty of that First Amendment.

The first thing to be said about that first liberty is that liberty is the end, the goal, and the entire rationale of what the First Amendment says about religion. This means that there is no conflict, no tension, no required "balancing" between free exercise and no-establishment. There are not two religion clauses. There is but one religion clause. The stipulation is that "Congress shall make no law," and the rest of the clause consists of participial modifiers explaining what kind of law Congress shall not make. This may seem like a small grammatical point, but it has far-reaching jurisprudential significance.

The no-establishment part of the religion clause is entirely and with-out remainder in the service of free exercise. Free exercise is the end; no-establishment is a necessary means to that end. No-establishment simply makes no sense on its own. Why on earth should we need a no-establishment provision? The answer is that no-establishment is required to protect the rights of those who might dissent from whatever religion is established. In other words, no-establishment is required for free exercise. It is, one may suggest, more than a nice play on words that Mr. Jefferson's bill of 1779 was called the "Bill for *Establishing* Religious Freedom." The purpose of the non-establishment of religion is to establish religious freedom. It follows that any interpretation of no-establishment that hinders free exercise is a misinterpretation of no-establishment.

In recent history, especially in the last four decades, the priority of free exercise has been dangerously obscured. Indeed, one must go further. The two parts of the religion clause have been quite thoroughly inverted. One gets the distinct impression from some constitutional scholars and, all too often, from the courts

that no-establishment is the end to which free exercise is something of a nuisance. To take but one prominent example, Laurence Tribe writes in his widely used *American Constitutional Law* that there is a "zone which the free exercise clause carves out of the establishment clause for permissible accommodation of religious interests. This carved-out area might be characterized as the zone of permissible accommodation."

There we have the inversion clearly and succinctly stated. Professor Tribe allows—almost reluctantly, it seems—that, within carefully pre-scribed limits, the *means* that is no-establishment might permissibly accommodate the *end* that is free exercise. This is astonishing, and it is the more astonishing that it no longer astonishes, for Professor Tribe is hardly alone. Scholars and judges have in these few decades become accustomed to having the religion clause turned on its head.

Once we forget that no-establishment is a means and instrument in support of free exercise, it is a short step to talking about the supposed conflict or tension between the two provisions. And from there it is a short step to the claim that the two parts of the religion clause are "pitted against one another" and must somehow be "balanced." And from there it is but another short step to the idea that the no-establishment provision protects "secular liberty" while the free exercise provision protects "religious liberty." When the religion clause is construed according to this curious inversion, it is no surprise that religious liberty comes out the loser. Any impingement of religion upon public life is taken to violate the "secular liberty" of the nonreligious. Thus has no-establishment become the master of the free exercise that it was designed to serve.

We need not speculate about the practical consequences of this curious inversion of the religion clause. The consequences are plainly to be seen all around us. In the name of no-establishment, wherever government advances religion must retreat. And government does inexorably expand its sway over the entire social order. In education, social services, and other dimensions of public life, it is claimed that, for the sake of the non-establishment of religion, Americans must surrender the free exercise of religion. Those who insist upon the exercise of religious freedom in education, for example, must forego the government support that is available to those who do not so insist. Thus is religious freedom penalized in the name of a First Amendment that was designed to protect religious freedom. Thus has the constitutionally privileged status of religion been turned into a disability. Thus has insistence upon the free exercise of religion been turned into a disqualifying handicap in our public life. The argument that public policy should not discriminate against citizens who are religious is said to be an instance of special pleading by those who have an interest in religion. That seems very odd in a society where over 90 percent of its citizens claim to be religious. It is more than odd, it is nothing less than grotesque, that we have become accustomed to the doctrine that public policy should not benefit religion. What is this "religion" that must not be benefited? It is the individually and communally expressed *opinion* of a free people. To say that

government should not be responsive to religion is to say that government should not be responsive to the opinion of the people. Again, the argument of extreme separationism is, in effect, an argument against democratic governance.

Once more, Mr. Jefferson: "The opinions of men are not the object of civil government, nor under its jurisdiction." The state of current First Amendment jurisprudence is such that the opinions of men and women, when they are religious, have been placed under the jurisdiction of the government. According to the inverted construal of the religion clause, wherever the writ of government runs the voice of religion must be silenced or stifled—and the writ of government runs almost everywhere. No-establishment, the servant of the free exercise of religion, has become the enemy of the free exercise of religion.

To contend for the free exercise of religion is to contend for the perpetuation of a nation "so conceived and so dedicated." It is to contend for the hope "that this nation, under God, shall have a new birth of freedom; and that government of the people, by the people, for the people, shall not perish from the earth." Despite the perverse jurisprudence of recent decades, most Americans still say with the Founders, "We hold these truths." And, with the Founders, they understand those truths to be religious both in their origin and in their continuing power. Remove that foundation and we remove the deepest obligation binding the American people to this constitutional order.

The argument here is not for an unbridled freedom for people to do whatever they will, so long as they do it in the name of religion. That way lies anarchy and the undoing of religious freedom in the name of religious freedom. There are of necessity limits on behavior, as distinct from opinion. But the constitutionally privileged and preferred status of religious freedom is such that, when free exercise is invoked, we must respond with the most diligent caution. The invocation of free exercise is an appeal to a higher sovereignty. The entire constitutional order of limited government is premised upon an acknowledgment of such higher sovereignty.

Sometimes—reluctantly, and in cases of supreme and overriding public necessity—the claim to free exercise protection for certain actions must be denied. Where such lines should be drawn is a matter of both constitutional law and democratic deliberation. It is a matter that engages the religiously grounded moral discernments of the public, without whose support such decisions cannot be democratically implemented. In other words, in this age and this country, the limits on the free exercise of religion must themselves be legitimated religiously.

A morally compelling reason must be given for refusing to allow people to do what is morally compelling. Those who seriously invoke the free exercise of religion claim to be fulfilling a solemn duty. As Madison, Jefferson, and others of the Founders understood, religious freedom is a matter less of rights than of duties. More precisely, it is a matter of rights derived from duties. Denying a person or community the right to act upon such duty can only be justified by appeal to a yet more compelling duty. Those so denied will, of course, usually not find the reason for the

denial compelling. Because they may turn out to be right about the duty in question, and because, even if they are wrong, religion bears witness to that which transcends the political order, such denials should be both rare and painfully reluctant.

We have in this last half-century drifted far from the constituting vision of this *novus ordo seclorum.* The free exercise of religion is the irreplaceable cornerstone of that order. In his famed *Memorial and Re-monstrance* James Madison wrote: "It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to Him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society."

The great problem today is not the threat that religion poses to public life, but the threat that the state, presuming to embody public life, poses to religion. The entire order of freedom, including all the other freedoms specified in the Bill of Rights, is premised upon what Madison calls the precedent duty that is religion. When the American people can no longer publicly express their obligations to the Creator, it is to be feared that they will no longer acknowledge their obligations to one another—nor to the Constitution in which the obligations of freedom are enshrined. The free exercise of religion is not about mere "access." The free exercise of religion is about the survival of an experiment in which civil government has no jurisdiction over the expression of the higher loyalties on which that government depends.

Debates over the niceties of First Amendment law must and will continue. We should not forget, however, that our real subject is the constituting vision of a constitutional order that, if we have the wit and the nerve for it, may yet turn out to be a new order for the ages.

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