Religious Liberties

Democracy, Secularism and Religious Faith in America

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As American citizens, we participate in a regime of democratic republican government. Most of us are also religious believers—people of faith. How does the religious faith of Americans shape our politics? That is an interesting and important question, but not the one on which I will focus in my remarks today. Rather, I invite you to reflect with me on a different question or set of questions: What is the impact of our particular form of civic order—as it has actually developed—on Americans' free exercise of religion? How has it shaped the religious practice and faith of Americans?

The matter immediately poses a methodological challenge. Strictly speaking, there is no "faith of Americans." There are, rather, "faiths"—plural. And it is to be expected that the interaction of faith and American democracy will vary significantly depending on the nature of the particular faith in question. Even within broad communities of faith (such as Catholicism, Protestantism, and Judaism) democracy's impact upon religion—and its free exercise—has been different for different individuals and subcommunities.

The experience of Orthodox Jews has differed from the experience of Reform Jews; the experience of mainline Protestants has differed from that of Evangelicals. Getting hold of any one of these experiences requires a grasp of the religious convictions, the structure of communal life, and what may be called the spirituality that together largely constitute the faith or the community of faith; and beyond that, of course, knowledge in history, sociology, and perhaps other disciplines is required. I'm tempted to plead that I lack the time this afternoon to do the subject justice; the truth, however, is that it is my lack of learning is the real culprit here.

I am at best an amateur historian, and, as my colleagues in sociology at Princeton would enthusiastically assure you, I am no sociologist at all. But I have some sense of the course of my own faith—Catholicism—through American history. That history sheds a certain light upon our topic; for Catholicism has been suspected and derided, in season and out, as a peculiarly undemocratic religion, more than faintly un-American.

Please be assured that I pause over this perennial suspicion and criticism not to settle accounts or to call for reparations. I pause because we can learn from it the articulated expectations that the American regime has of religion. Unless we naively suppose the regime to have been wholly ineffectual in shaping belief to its needs, we can infer from these expectations (or demands) something of a global answer to our question, derive the elements of a comprehensive account. Here we have a common hydraulic pressure, a centripetal force ranging across the various faiths, impelling them to a common center. Call it an answer from the top down, truly faith under democracy. Of course, we can leave it to the specialists—the historians and sociologists of religion—to gauge the precise extent to which a particular religion has been shaped by this force.

The Bill of Particulars in the indictment against Catholicism has been remarkably constant. But one charge was effaced by the course of European history: the claim that Catholics owed allegiance to a foreign temporal prince. That charge was characteristically joined to one that survives: Catholicism is undemocratic because it compromises the individual's proper spiritual autonomy. Related to this accusation is another charge: that Catholics do not think for themselves in political matters. They instead follow slavishly the dictates of their priests, where they do not serve contemptible party bosses, or both. Catholics have long been said to behave undemocratically by not trusting their personal religious "experience" as a guide to authentic spiritual life; rather, they hold to "immutable" (read: ossified) "metaphysical" truths. Between WW II and the Second Vatican Council, Catholics were criticized for rejecting the linchpin of democracy, the First Amendment's "separation of church and state."

Finally: perhaps the central charge made since Vatican II is that Catholics behave undemocratically by trying to "impose their morality" upon others in defiance of the principles of our pluralistic democracy. This charge most often pertains to abortion and matters of sexual morality generally. This charge could only have arisen, as it did, after the abandonment by so many other churches and communities of faith of the common Judaeo-Christian morality, or of a commitment to a decent public morality, or both.

No wonder politically ambitious Catholics such as William Brennan (in his Senate confirmation hearings) and JFK felt obliged to say that they would separate their religion from their public responsibilities. To my knowledge, members of no other church were similarly expected to privatize their faith. Maybe it was taken for granted that they already had.

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The abiding commitment of our cultural, political, and legal authorities to a specifically "democratic" religion explains more—much more, in my judgement—about our constitutional law of church and state than anything Madison ever wrote, more even than is explained by what the Religion Clause of the First Amendment actually says. (Consider, in a stray moment with a bottle of Jack Daniels in hand, how precious little of our constitutional law about religion is explained by, or even loosely connected to, the language of the Constitution.) Anti-Catholicism as such is a huge causal factor. Several scholars, including our own Gerry Bradley, have made this case in scholarly writings. Harvard University Press is bringing out this summer a book by Phil Hamburger, of the University of Chicago Law

School, which overwhelmingly documents the point. And, for those with the taste for lawlerly synopses, I recommend Briefs by the Becket Fund and by the Catholic League in *Mitchell v. Helms* and *Zelman v. Simmons-Harris*, the voucher case.

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The question — Faith Under Democracy — is especially challenging for another reason: any answer is subject to the objection that it proposes a specious or question-begging correlation. Who is to say with confidence that change in this faith or that has to do with democracy, and not with economic upward mobility, migration, or some other variable? I surprise myself by, at least for this fleeting moment, envying those who can do—and even more remarkably have the taste to do—regression analysis.

And those are some challenges to description. Evaluation—for good or ill—introduces additional perils, mostly of the moral philosophical and theological kind. Regression analysis won't help there. But at least we are now talking about disciplines I can stake some claim to.

I am a philosopher by trade, concentrating on law, political theory, morality, and their often complex relations. What insights does my craft enable me to add to today's able panelists' contributions? I notice that the question has been interpreted by others as calling for an evaluation of how faith has fared throughout the American experience. But the question is about faith under democracy. The questions are not the same. We might have a lively debate about whether America really is a democracy. Based upon my contribution to a famous *First Things* symposium a few years back, some say that I think we live, not in any democracy, but under a judicial oligarchy. And, while that is an oversimplification, I do believe that judicial usurpation has damaged American democracy**.** But I leave that discussion to another occasion.

We might also have a lively debate about when, and to what extent, Americans have talked about America as a democracy. Manifestly, our Founders preferred other terms to describe their handiwork; "republic" and "republican" chief among them. I leave aside that discussion, too.

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What I want to address is this question: when and why did the Supreme Court begin to treat "democracy" (and cognates, including "democratic theory") as the political theory of the Constitution, with implications for the religious character of the citizens. Put differently, what did the Court say and do when it decided that there was such as a judicially cognizable thing as a "relationship between faith and democracy". When and why did "democracy" take over the constitutional law of religion? What did it do after it took over?

The answers: it took over during WW II. And "democracy"—as the concept was wielded in the hands of the judges—imposed a secular public sphere; it privatized religion.

Let me explain.

We know that the war against fascism, framed by a wider worry about atheistic communism, called forth among Americans a profound re-commitment to "democracy" (and "freedom"). That is what we were fighting for. We were not fighting for an impersonal system, or for a set of political practices. We fought for "the democratic way of life," a political culture with deep roots in character, belief, and psyche. Competent secondary literature—here I draw your attention to Paul Gottfried's fine contribution to New Forum Books, an imprint for Princeton Press which I am pleased to administer— explains how "democracy" or ("democratic theory") was splintered into two camps. One group held beliefs much like those articulated in our time by Pope John Paul II: democracy is defensible in moral terms and depends for its legitimacy on the moral values it advances and protects.

The opposing camp saw moral truth as a phantom, a superstition which, when it gained control of citizens' minds, led straight to authoritarianism, if not to outright fascism. These folks favored a pragmatic scientific spirit, and a polite relativism in morals. In the courts and the elite sector of the culture, these folks won. We see, right there in the Supreme Court cases during and shortly after the War, an explicit link between our "democratic way of life" and secularism, particularly, and in a very aggressive form, in public education.

Here is a nice illustration of the point. It is from the oral argument in *McCollum*, which took place on December 8, 1947, just ten months after the Court in *Everson v. Illinois* declared a constitutional prohibition of any and all government help to religion, even if the help is non-discriminatory and non-coercive.

Justice Felix Frankfurter was jaw to jaw with the lawyer for the Champaign, Illinois school district, John Franklin. Franklin's performance at oral argument was audacious, and masterful. He forcefully argued (and proved in his 100-plus page brief) that public authority was free, under the Constitution, to promote religion, so long as there was no discrimination in favor of, or against, particular faiths. This, Franklin said, was what everyone understood non-establishment to mean, until the day before yesterday.

An aside: Justice Black, author of the *Everson* stricture, was (the transcript reveals) dumbfounded, tongue-tied, by Franklin's assault upon the *Everson* rule which, it should be said, Franklin correctly described as dictum. It is a wonder why— since Black's own penultimate draft for the *Everson* court had taken precisely the same position: to wit, non-establishment meant non-discrimination. In any event, Black produced for the Court no refutation or rejoinder, no rebuttal or counterargument. In full, the Court's response reads: "We are unable to accept th[e] argument. As we stated in Everson we must keep the wall high and impregnable." The *McCollum* Court's imperviousness, or indifference, to evidence and cogent argument is, unfortunately, characteristic of the church-state cases.

Back to the Frankfurter story. Frankfurter made this point to John Franklin:

> I put my question again: we have a school system of the United States on the one hand, and the relation it has to the democratic way of life. *On the other hand we have the religious beliefs of our people*. The question is whether any kind of scheme which introduced religious teaching into the public school system is the kind of thing we should have in our democratic institutions. [emphasis added].

Frankfurter answered his own question: because a few religious groups opposed Champaign's shared time program, it was "offensive" and caused "controversy." Its incompatibility with "our democracy" needed no further proof.

The worry at the heart of McCollum was most succinctly expressed by Justice Brennan, in the Bible-reading case, *Abington School District v. Schempp*, wherein he referred to the choice "between a public secular education with its uniquely democratic values and some form of private or sectarian education, which offers values of its own." You need look no further for an understanding of Establishment Clause jurisprudence since 1947—at least the vast swath of it involving K-12 education.

With computer assisted research into Supreme Court opinions since the Founding, one can see at a glance that in the mid-1940's the Court confronted—or constructed—an unprecedented problem concerning religion and democracy. What does that glance reveal? Told to locate all uses of the terms "orthodox" "dogma" "secularism" "irreligion, "no religion," "atheism" "inculcate" and "indoctrinate" the computer search revealed a chasm at around 1943: before then, almost none; then the debut of some of these terms followed by dozens of uses, in quick succession. Atheism, for example, appears for the first time in *McCollum*. More than 40 times since. The 1940 *Gobitis* case marks the debut of "indoctrinate" and "indoctrination"; words which since then have become synonymous with religious teaching. "Orthodoxy"'s career begins with the Second Jehovah's Witness case, *West Virginia v. Barnette*, in 1943. There the Court said: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." But not, interestingly enough, in science, or law. *Barnette* cited no case— none, zero, nil—to support this principle.

By 1944 the Court spoke of our "democratic faith" (in the *Baumgartner* case). In *Prince v. Massachusetts* (the Jehovah's Witness child labor "street preaching" case), the Court stated that "a democratic society rests, for its continuance, upon the growth of healthy, well-rounded group of young people into full maturity as citizens, with all that implies."

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Because I aim to conclude with a note of challenge to the Court-imposed secularist orthodoxy, I wish to note that it is still very much the governing judicial ideology. Note well: despite some very positive developments since 1990 in the constitutional law of church and state, we still live in *Everson's* world. Under *Lemon v. Kurtzman's* test of constitutionality—battered but still standing—all acts of public authority must have a secular purpose and a primary effect which does not advance or aid religion. Aiming to care for and favor religion—even without a trace of favoritism or hostility to any particular religion—is a prohibited "non-secular" purpose. It is unconstitutional per se. In recent years, starting with *Agostini* (in 1997) and on through *Mitchell v. Helms* (2000), the second prong of the Lemon test has been made appreciably more sensible. But, according to what remains the Supreme Court's master principle of church-state law, public authority may do nothing which aids religion as such, or that favors religion over "nonreligion" or "irreligion".

Indeed: even as refashioned by *Agostini* and *Helms*, the "effects" test still requires that religious beneficiaries receive favor under a different description, as a member of a class of recipients defined without reference to religion. The advances of recent years, up to and including the Court's approval of the Cleveland voucher program, have not dented this master principle. What we have seen instead is the nearly complete eradication of discrimination against religious speech, institutions, and individuals. In other words, something near a true equality of religion with other forms of belief and expression. The religious speech cases (e.g., *Rosenberger, Good News*) established that believers' free speech is as broad as that of nonbelievers. The aid cases, notably *Zelman*, have been presented as applications of "neutrality" and "private choice" principles.

Conclusion

What the civic order—democracy, if that is what you care to call it—hath taken away, might the civic order giveth back?

You have heard a capsule argument for the proposition that the secularist project is a judicially-adopted orphan. It has no genuine constitutional pedigree; indeed, no judicial lineage to speak of prior to its birth in the crucible of the 1940's. The judicially (or, more comprehensively, the elite) felt needs of "democracy" gave us secularism as a kind of established religion. Many of us in this room, myself among them, believe that true democracy—and fidelity to the Constitution—instead calls for a basis in faith, in the Creator as the ultimate source of fundamental rights and governmental obligations, in objective norms of justice and right, if it is not to degenerate into the domination of the weak by the strong.

Indeed, the problem for the free exercise of religion for Catholics and many other people of faith in the United States has not been too much democracy, but, rather, too little. It has been above all the short-circuiting of democratic deliberation—the judicial imposition in the name of "democracy" of a secularist orthodoxy—that has constrained the ability of Catholics and others to transmit their faith to their children and act on their convictions to shape a public environment—a moral ecology—in line with virtue as they conceive it—and as they would be prepared to defend it to their fellow citizens in open deliberation and fair democratic political contestation.