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# RELIGIOUS LIBERTIES

## RELIGION AND THE REPUBLIC

By David F. Forte\*

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### Note from the Editor:

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- Simon Brown, *Symbols and Civil Religion*, CHURCH & STATE (March 2015), available at <https://www.au.org/church-state/march-2015-church-state/featured/symbols-and-civil-religion>.
  - *Special Feature: Legislative Prayer Symposium*, SCOTUSBLOG, available at <http://www.scotusblog.com/category/special-features/town-of-greece-symposium/>.
  - Alana Semuels, *Should Adoption Agencies Be Allowed to Discriminate Against Gay Parents?*, THE ATLANTIC (September 23, 2015), available at <http://www.theatlantic.com/politics/archive/2015/09/the-problem-with-religious-freedom-laws/406423/>.
  - Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2015), available at <http://www.yalelawjournal.org/article/complicity-based-conscience-claims>.
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*A true republic respects religious speech. Such speech represents a different authority from governing power and affirms its limited nature.*

In *Town of Greece v. Galloway*, the Supreme Court considered whether it was constitutional for a town to open its board meetings with a prayer offered by clergy members. During oral arguments, Justice Elena Kagan, who enjoys spinning hypotheticals as only a law professor can, asked the town's advocate:

Mr. Hungar, I'm wondering what you would think of the following: Suppose that as we began this session of the Court, the Chief Justice had called a minister up to the front of the courtroom, facing the lawyers, maybe the parties, maybe the spectators. And the minister had asked everyone to stand and to bow their heads in prayer and the minister said the following: He said, we acknowledge the saving sacrifice of Jesus Christ on the cross. We draw strength from His resurrection. Blessed are you who has raised up the Lord Jesus. You who will raise us in our turn and put us by His side. The members of the Court who had stood responded amen, made the sign of the cross, and the Chief Justice then called your case.

Realizing that the example was not germane to the proceedings of a legislative session, the town's advocate competently dodged the bullet. But in retrospect, there was a much more direct answer available. "But, your honor," Hungar could have replied, "we have already begun with a prayer."

At 10:00 a.m. on every day when the Supreme Court is in session, the Justices proceed to their chairs while the Court's

Marshal proclaims:

The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States. Oyez! Oyez! Oyez! All persons having business before the Honorable, the Supreme Court of the United States, are admonished to draw near and give their attention, for the Court is now sitting. God save the United States and this Honorable Court!

It is a real prayer, asking for God's protection. The source of the prayer is the first book of Samuel: "Samuel said to all the people, See ye him whom the Lord hath chosen, that there is none like him among all the people? And all the people shouted, and said, God Save the King."<sup>1</sup> In English history, that prayer was first intoned in the coronation of King Edgar in 973, predating the Magna Carta by 242 years.

In spite of its royal roots, such a prayer is also a necessary element in a republic dedicated to preserving the liberties of the people. And, in a larger sense, respect for religion is necessary for a republic to exist at all.

### RELIGION: THE FIRST OF AMERICA'S INSTITUTIONS

The words "God save the United States and this Honorable Court!" are not mere "ceremonial deism." This phrase was made up by Eugene Rostow in 1962 when he was Dean of Yale Law School, and used calculatingly and wrongly by Justice Brennan in *Lynch v. Donnelly* (1984) to claim that these references to God "have lost through rote repetition any significant religious content."

As Professor Martha Nussbaum at the University of Chicago Law School noted, "Ceremonial Deism' is an odd name for a ritual affirmation that a Deist would be very reluctant to endorse, since Deists think of God as a rational causal principle but not as a personal judge and father." The phrase arose in the 1960s when the paradigm of strict separation of church and state was in its legal ascendancy, and there had to be an excuse for all these references in our political literature to a personal

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*This article originally appeared in Public Discourse: Ethics, Law, and the Common Good, the online journal of the Witherspoon Institute of Princeton, NJ, reprinted with permission.*

and immanent God. But in fact, these many references to God are not mere rhetorical flourishes, but point to a necessary mythos for a republic.

A republic, that is, a true republic, respects religious speech because such speech represents a different authority from governing power and hence affirms the limited nature of the governing power. It avows, by explicit reference, that the government is not the only game in town. The religious speech that a republic respects can be evidenced in the very source of the right to govern, in the deliberative process, or spoken by the public authority itself.

These references to God as judge, or as helper, or as protector, are the chorus in our republican Greek play. They are the slave holding the garland of laurel over the head of the triumphant returning Roman General while intoning, "Remember that thou art only mortal."

That is why Tocqueville noted that religion was the "first of [America's] political institutions." He explained, "I do not know whether all Americans have a sincere faith in their religion—for who can search the human heart?—but I am certain that they hold it to be indispensable to the maintenance of republican institutions."

#### RELIGION COMBATS POLITICAL HUBRIS

The iconic phrases that swirl about us in motto, oath, and Presidential statement have the salutary lesson of warning the state of the danger of political hubris—that is, the conceit that it is only through government and the political process that social and moral problems can be addressed. They signal that, for the sake of liberty, there are limits to what government can do.

We are all familiar with the mechanical checks that the framers erected in the Constitution to restrain government and limit what the people's democratic will might do to undermine liberty. But they, and their successors, went further. Guarding against sectarian use of government to suppress others, the framers confined the enterprise of government normatively by affirming the existence of God, by acknowledging him as judge, and by admitting their own human limits by relying upon him for beneficent aid.

Recall Jefferson's plaint about slavery in his *Notes on Virginia*. "Can the liberties of a Nation be secure," he asked, "when we have removed a conviction that these liberties are the gift of God? Indeed I tremble for my country when I reflect that God is just and that his justice cannot sleep forever." Or think of the Declaration's famous justification for the existence of government itself: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness." And recall Madison's conclusion: "Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe."<sup>2</sup>

The very nature of a republican limited government, therefore, is grounded in the acknowledgement of the presence of another, higher sovereign, to whom individuals owe their loyalty and into which loyalty the government has not a right to intrude.

But the framers of our republic went further. They placed

the actual governmental institutions in the presence of this immanent divine power. The week after the passage of the Bill of Rights, Congress hired a chaplain to begin each day's deliberation with a prayer to this very same God. Congress provided for chaplains for the armed forces. And they soon would begin the tradition, continued for a century or more, of hiring missionaries to convert the Indians so that they could adopt more civilized and republican ways. When Lincoln rededicated the torn republic back to work of the founders, he too did so with the prayer, "that this nation, under God, shall have a new birth of freedom."

The Framers turned to the God of our liberties when it came to the deliberative process as well. Washington, to whom all looked to for example, and whose practice shaped our mode of constitutional governance, declared as part of his "first official act," his "fervent supplications to the . . . Almighty Being who rules over the Universe . . . that his benediction may consecrate to the liberties and happiness of the People of the United States, a Government instituted by themselves." And in his Thanksgiving Proclamation, he offered a prayer to God "to enable us all, whether in public or private stations, to perform our several and relative duties properly and punctually; to render our National Government a blessing to all the people by constantly being a Government of wise, just, and constitutional laws, discreetly and faithfully executed and obeyed." In his farewell address he charged, "Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle."

Lincoln too called upon God to provide the wisdom by which the nation could possess good laws: "With malice toward none; with charity for all; with firmness in the right, as God gives us to see the right." And when national morality breaks down, then the judgment of that beneficent Governor of the Universe can be terrible indeed. Lincoln:

Fondly do we hope—fervently do we pray—that this mighty scourge of war may speedily pass away. Yet, if God wills that it continue until all the wealth piled by the bondsman's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn by the lash shall be paid by another drawn with the sword, as was said three thousand years ago, so still it must be said, "The judgments of the Lord are true and righteous altogether."

Today, when government officials take an oath, they call upon God to help them fulfill it. In Ohio, the standard "So help me God" is replaced by the more formidable "And so shall I answer unto God." We have added to the Pledge of Allegiance the declaration that we are "a republic, under God." We have adopted as the national motto, "In God we trust." None of these are instances of empty "ceremonial deism." On the contrary, they are explicit affirmations of the necessity of a divine authority that is the ultimate source of rights, of guidance for public policy, and of judgment.

#### ERADICATING THE SOCIAL GOOD OF RELIGION

Virtually every major political social reform in our nation's history has been motivated by religious belief: common

education, abolition, worker's rights, protection of women, temperance, desegregation. Religion has transformed and refined our society as no other source has. Think of the hundreds of hospitals, the thousands of institutions of education, the social services of feeding the hungry, ministering to prisoners, caring for the millions subject to addiction and alcoholism, protecting immigrants, the unborn, the marginalized, the widow, and the orphan.

In recent years, the good that religion has accomplished in society has come under attack. Catholic Charities of Massachusetts cannot offer its renowned adoption services any longer because it cannot in good conscience offer children to same-sex couples.<sup>3</sup> The recent dust-up about forcing closely held companies to pay for abortifacient is only a small part of a much larger trend. Increasingly, the state is seeking to supplant the role of religious social action, making it subject to whatever rules the government thinks appropriate. Instead of acknowledging God as a limiting principle on the role of government, the state seeks to replace him with its own sovereignty and to turn all public references to God into so much verbal decoration.

Earlier this month, San Francisco's archbishop was threatened with legal action by city and state legislators for daring to require that the teachers in the diocesan Catholic schools proclaim the moral teachings of the Catholic Church.<sup>4</sup> It used to be—in the days of Father Richard John Neuhaus—that religion was kept from the public square. Then, the authorities, as in Massachusetts, began forcing it out of the social space. Now, political powers threaten the right of religious believers to even hold certain beliefs.

Without an affirmation of God, without religious speech being welcomed in public discourse, and without a space for religion to be itself, the very notion of a republic is disintegrating before our eyes.

## Endnotes

1 1 Samuel 10:24.

2 James Madison, *Memorial and Remonstrance against Religious Assessments* at 1.

3 Sarah Torre and Ryan T. Anderson, *Adoption, Foster Care, and Conscience Protection*, THE HERITAGE FOUNDATION BACKGROUNDER No. 2869 (January 15, 2014), available at <http://www.heritage.org/research/reports/2014/01/adoption-foster-care-and-conscience-protection>.

4 Ryan T. Anderson and Leslie Ford, *A Fight to Keep Catholic Schools Catholic*, WALL STREET JOURNAL (March 5, 2015), available at <http://www.wsj.com/articles/ryan-t-anderson-and-leslie-ford-fighting-to-keep-catholic-schools-catholic-1425600547>.

