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IS THE CONSTITUTIONAL CONCERN WITH RELIGIOUS INVOLVEMENT IN THE PUBLIC SQUARE HOSTILITY?

*William P. Marshall**

My comments will address the claim that there exists a hostility towards religion in contemporary constitutional jurisprudence. According to the proponents of the claim, this hostility is evidenced both in current establishment and free exercise jurisprudence and in the contention, prominent in constitutional discourse, that there is something improper about religion's involvement in politics, even if that involvement is not formally constitutionally proscribed. In these remarks I will discuss only the issues of establishment and religious involvement in politics, as I have discussed the free exercise position at length elsewhere.¹ My conclusion is that contemporary constitutional theory does not reflect hostility, but rather is an appropriate response to the unique problems raised by the involvement of religion in the "public square" of political decisionmaking.

Let me begin by asserting that everyone at this conference holds some hostility to religion — if one defines hostility to religion as the simple proposition that we should not have a theocracy. We all agree, in short, as to the wisdom of the principle of nonestablishment. We share this belief, moreover, even though there is no other belief system that faces this form of prohibition. The Constitution, after all, does not forbid the establishment of other types of ideologies.

Why is religion different? One possible answer is to suggest that religious beliefs are epistemologically inferior to rational or philosophical, moral, or political principles.² This is the theory that Professor Michael McConnell addressed in his remarks.³ McConnell is

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1. See William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991); William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357 (1989-90).

2. See, e.g., BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980); KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* 49-84 (1988).

3. Michael W. McConnell, *Christ, Culture, and Courts: A Niebuhrian Examination of First Amendment Jurisprudence*, 42 DEPAUL L. REV. 191 (1992).

correct: the epistemological position is not a persuasive argument. Nonreligious beliefs are based upon nonverifiable first principles just as much as religious beliefs are.⁴

A second objection might be that the subject matters addressed by religious beliefs are somehow not important to political discussion. This argument as well seems less than convincing. The matters addressed by religion are the issues that are the most fundamental and central to human existence. They address no less than what it means to be human. They deal with Humanity's greatest aspirations and its greatest responsibilities. Clearly they cannot be discounted from the public square because they are not important.

If it is not because of the epistemology of religious beliefs or because of the matters religion addresses, then why is religious participation in the public square disfavored? Interestingly, although Dean Edward Gaffney purports to take a contrary position, the beginning of this answer is implicit in his previous remarks. Dean Gaffney has just argued, I believe correctly, that one of the central principles underlying the establishment prohibition is to protect religious freedom.⁵ This is an important point in the hostility debate. The acknowledgement that an established church, even one that is noncoercive, can be threatening to religious freedom concedes that a strict anti-establishment principle is not hostile to religion. Rather, it recognizes that "proreligion" arguments are on both sides of the establishment equation. The claim of hostility then is clearly not straightforward.

The more fundamental question, however, is why does the protection of religious freedom require, as Gaffney intimates, the placing of at least some constraint upon religion? The answer to this question rests with what might be explained, for lack of a better terminology, as the dynamic of religion or, at least, the dynamic of some religion.

Yesterday we heard Professor Hauerwas note that from a religious perspective, or at least from some religious perspectives, there is no such concept as religious freedom.⁶ While freedom of religion

4. See DUNCAN B. FORRESTER, BELIEFS, VALUES AND POLICIES: CONVICTION POLITICS IN A SECULAR AGE 5 (1989); Frederick Mark Gedicks, *The Religious, the Secular, and the Antithetical*, 20 CAP. U. L. REV. 113, 139 (1991); Richard S. Myers, *The Supreme Court and the Privatization of Religion*, 41 CATH. U. L. REV. 19 (1991).

5. Edward McGlynn Gaffney, Jr., *Hostility to Religion, American Style*, 42 DEPAUL L. REV. 263, 299-303 (1992).

6. Stanley Hauerwas and Michael Baxter, C.S.C., *The Kingship of Christ: Why Freedom of*

might exist in a legal sense (i.e., people may be free to adopt particular kinds of religious beliefs without coercion), this freedom does not exist in a religious sense. If one believes that one has found religious Truth, there is no "freedom" to choose otherwise. There is only an imperative to follow those beliefs and to act in accordance with them.⁷ Additionally, this imperative occasionally leads some religious adherents to attempt to impose their religious beliefs on others. This attempt, it should be emphasized, is not necessarily malicious and is often with only the best intentions. I have asked a number of people within this type of religious tradition, to whom I have been personally close, the questions: "Why do you want to impose your beliefs upon me? Don't you respect me for not having those beliefs?" Their answer is revealing. They say, "No, absolutely wrong. I do respect you. And it is because I respect you that I want to convert you."

This response, of course, makes perfect sense. If one believes that she has discovered the path to truth or to salvation, then it is only logical that she will try to convince those she loves and respects to believe as she does. And it is not surprising that these attempts to convince might lead to attempts to coerce, for, in a very real sense, the believer is fighting for what she believes is her neighbor's soul.

Moreover, the religious adherent's motivation may be more than only altruism. If the religious adherent believes, as some religious traditions believe, that her salvation is tied to the beliefs of the community in which she lives, she faces an even greater imperative to try to ensure that the society shares her beliefs. In this circumstance, the religious adherent might see the fight for the soul of her neighbor as necessary for her own eternal consequence.

In short, the potential problem with religion is not the substance of the beliefs themselves. The problem is that the imperative derived from those beliefs logically leads to the desire to impose those religious beliefs universally. And since the state is the vehicle through which the desire to impose religious beliefs can be transformed into the power to impose beliefs, it is apparent why the involvement of religion in politics can become problematic. The dynamic of religious imperative may lead those religions that are able to garner political power to attempt to utilize that power coercively, to the detriment of those religions that do not have commensurate political

"Belief" is Not Enough, 42 DEPAUL L. REV. 107 (1992).

7. *Id.* at 110.

power.

The concern with religious involvement in politics, however, does not rest only upon the threat that religion may attempt to utilize the political process in pursuit of its own religious agenda. Equally, if not more troublesome, is when politics seeks to use religion to pursue its political agendas (i.e., when religion becomes involved in politics because of the cynical manipulation of the state and its political leaders). I have yet to meet, for example, a religious leader who believes that there should be a crèche in city hall. It is only the political leaders who seem committed to this form of religious observance. Of course, the reason why a politician might suddenly become devout with respect to city hall crèches is no mystery. There is a lot of political hay to be made in playing upon the religious beliefs of one's constituency.

The more difficult question, however, is: Why is there political gain to be made in appealing to religious allegiances? Why is religion a politically powerful manipulable force? Needless to say, this is a complex question that cannot be adequately addressed in the short time allotted. But much of the answer to this question begins with an understanding of the psychology of religious belief.⁸ I think it is fair to say that many, if not most, religious believers have a passionate hold on their beliefs that they do not want shaken. Their belief systems provide their lives with structure and meaning. They shield the believer from the fears and anxieties of an uncertain universe. Accordingly, anything that questions or attacks those beliefs threatens to plunge the believer's world into chaos and attack the foundations of what the believer sees as her essential self.⁹ This phenomenon, it need not be emphasized, is the stuff powerful political allegiances are made of. It turns politics into a "we/they" battle with the stakes perceived as no less than one's own identity (if not also one's salvation).¹⁰ The result, not surprisingly, is the result that has occurred throughout history — political divisiveness, intolerance, hate, and persecution.

Religion, of course, is not the only type of belief system that may

8. I should point out, interestingly enough, that the observations about religious belief which follow are shared more by the theologians at this Conference than the lawyers.

9. RUDOLF OTTO, *THE IDEA OF THE HOLY* (John W. Harvey trans., 1923). See EMILE DURKHEIM, *THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE* 21-33 (Joseph Ward Swain trans., Free Press 1965); MIRCEA ELIADE, *THE SACRED AND PROFANE: THE NATURE OF RELIGION* (Willard H. Trask trans., Harcourt 1959).

10. ELIADE, *supra* note 9, at 47.

not mix well with politics. Certainly the inclusion of ethnicity, nationalism, and some secular ideologies into the public square have at times led to divisive and often violent politics. But there are a number of reasons which suggest that religion may be particularly problematic. For one, religion was the specific concern that influenced the Framers. Second, perhaps because of the strength of the themes it addresses, religion seems to have a greater staying power than do other movements. Third, again because of the themes it addresses, religion is unique in its ability to arouse humanity's deepest fears, and consequently excite its deepest passions.

But there is another answer as well, and that is that the danger created by religion in politics stems not solely from the power of religion but also from the power of religion *combined* with the power of the state.¹¹ It is, of course, the fear of this combination that the Establishment Clause and the concern with religious involvement in politics are all about. The wisdom of both of these principles may be in their implicit realization that the only way that the powers of nationalism and religion can be kept in check is by keeping them separate.

Perhaps to some, this understanding constitutes hostility; but it seems to me that once it is realized that the limitations placed upon religion in the public square are designed to protect against the danger of religion, and particularly the danger of religion *to other religions*, it is difficult to sustain the hostility argument.¹² After all, it should not be forgotten that the principle of church and state separation derives as much from the concern with protecting religion as it does from protecting the state.¹³

In any event, the one argument that cannot be made is that the purported hostility to religion has worked to actually harm the strength of religion in the United States. Indeed, if it has had any effect at all, it has apparently been only to help religion, as we re-

11. Consider for example the passion and power created by the combination of church and state that is represented in the *Battle Hymn of the Republic*.

12. There is a fallback position as well that is implicit in the remarks of Dean Edward Gaffney. Even if it is not a result of hostility, Gaffney argues that the political dialogue is seriously impoverished by the exclusion of religious values and ideas. Gaffney, *supra* note 5. Gaffney would be correct if the limitation of religious involvement in the public square meant, as he feared, the total exclusion of all religious ideas and values. Although some have taken this position, total exclusion is not the appropriate model. The objection is to pervasively sectarian rhetoric and not to the substance of the ideas themselves.

13. See MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS* (1965).

main one of the most religious countries in the western world.¹⁴

It is my position that the reason why religion has remained so strong is because our constitutional structure recognizes that religion has both good and bad qualities — that religion is both a positive and a negative force. For me, what others claim is hostility is nothing more than a profound appreciation of the best aspects of religion — and the need to protect those aspects from its worst.

14. See MARTIN E. MARTY, RELIGION AND REPUBLIC 11-30 (1987); A. JAMES REICHLEY, RELIGION IN AMERICAN PUBLIC LIFE 348-49 (1985).