

THE POLITICS OF A SECOND CLASS RIGHT:
FREE EXERCISE IN CONTEMPORARY AMERICA

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I want to begin with a few comments on the title of today's symposium. It strikes me that there are at least three reasons why free exercise of religion is a "second class right" in our own particular period of American history. The first, of course, is that this right was essentially written out of the Constitution by the Supreme Court in *Smith v. Employment Division*. To put it plainly, I believe that the decision in that case effectively repealed the Free Exercise Clause of the First Amendment to the US Constitution rendering it, *at best*, a second class right. We have no right to the free exercise of religion at this moment, unless that exercise exists in tandem with other rights specifically set out in the Constitution, or unless that exercise is directly targeted, *per se*, by state action.

Second, and speaking now more directly to my own field of political analysis, it seems to me that political developments have rendered free exercise law "less sexy" recently as compared with establishment law. At the heart of this development is the fact that the United States is so deeply divided in political terms on the matter of religion's proper role in the public square. To be sure, the United States population is still arguably the most religious population in the industrialized world. There are polls that indicate, for example, that forty percent of Americans attend religious services on a weekly basis. That figure is not an accurate reflection of actual attendance patterns, of course, but the mere fact that forty-percent say that they attend service probably tells you a great deal about religious culture in America. Nevertheless, there is a large, vocal slice of the American public that is vehemently and resolutely secular, and another larger slice that is at the very least "de-churched." These populations face off against another large,

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and even more vocal element that is devoted with zeal (in the true sense of that term) to resist efforts to secularize public life in the United States, and to ensure that public institutions, and public law continue to reflect what they consider to be the religious, and often Christian traditions of American culture and politics. As a result, political conflicts surrounding the Establishment Clause took center stage in American political strife over the last twenty five years or so. People who never heard of *Smith* or *Sherbert* or *Yoder*, very definitely have heard of Jerry Falwell, and if you tell them that they are going to be governed by laws written by Falwell and his supporters then they stand ready to throw more bricks into that wall separating church and state that the Establishment Clause supposedly erected.

Third, free exercise slipped into second class constitutional citizenship because legal and political fights surrounding the free exercise of religion were increasingly fought out over the years not on their own terms but on terms set by what that exercise would mean in terms of the Establishment Clause. For quite some time, when people talked about the free exercise of religion, that exercise would be interpreted in terms of its establishment ramifications. In other words, if Captain Goldman is allowed to wear a yarmulke, then why am I not allowed to wear a Met hat? If the Yoders can have their fourteen-year-old child churning butter and raising barns instead of attending high school, then why can't I have my fourteen-year-old child fixing cars in my mechanic shop? If devotees of Santaria can slaughter animals in religious rituals, then why can't I kill chickens at a cock fight? The point is that every time a free exercise *exception* is contemplated it is interpreted by secularists as a potential *violation* of the prohibition against establishment. Put another way, people tended to think in establishment terms when it came to politics, rather than in free exercise terms.

We will see in a moment that this dynamic is in the process of shifting. But before I return to that point, I do want to say in my own name that the notion of free exercise ought to be given more political attention and support than it has been given in recent decades in the United States. I say this as a political scientist rather than a lawyer or a Constitutional scholar, and let me give you an everyday example of what I mean. My scholarship has been based for most of my career on analysis of the political behavior of Catholic clergy, and particularly Catholic bishops, all over the world. I have noticed in the course of this work, that *The New York Times*, almost metronomically, runs an op-ed every election year in

which somebody tells the Catholic Archbishop of New York to shut up and stay out of politics. The leading newspaper in New York City consistently sends the message that while the Catholic Archbishop of New York is allowed to run the St. Patrick's Day Parade every March he should stay completely out of political debate and contention every November.

I would argue that this admonition is based on a fundamental misunderstanding not only of the U.S. Constitution, but also on the difference between the *separation of church and state*, on the one hand, and the *banishment of religion from politics*, on the other. The former is possible, and an appropriate subject for constitutional adjudication. The latter is not quite as susceptible to legal and constitutional argumentation, and it is probably an impossible goal in any event. What I mean to say is that the idea that you can actually squeeze all of the religion out of democratic politics in a "religious society" is an absurdity, and probably a constitutionally inappropriate one at that. The Catholic Archbishop of New York has the right to say whatever he wishes to say, no? He is an American citizen, and even if he wasn't, he would have the right to weigh in on issues that had an impact on his interests. So the idea, fairly common in secular circles, that religious leaders ought not to even talk about politics lest they risk the constitutional separation between church and state, is an affront not only to freedom of speech, but also to freedom of religion. The problem arises, of course, when speech in pursuit of that exercise turns into advocacy for laws which would arguably violate the Establishment Clause of the Constitution. Again, we see how the two clauses are connected to each other, and we see how that connection is open to divergent interpretation in political terms. I would prefer to err on the side of protecting the rights of clergyman, whether it is Cardinal Edward Egan from the pulpit in New York or Rev. Jerry Falwell on television in Virginia - neither of whom have I ever agreed with on anything other than this, by the way - to speak out in support of laws they think appropriate, rather on the side of seeing their advocacy as a threat to the integrity of the wall separating church from state. This whole area strikes me as a matter more of free exercise than it is of establishment, and my claim here is that the construction of such conflicts in establishment terms has played an important role in rendering free exercise a second class right.

I also think, however, that this political dynamic is in the process of changing, changing in directions that have the potential to greatly enhance the profile of the free exercise of religion. And I

would like to end my comments by drawing our attention to these political shifts. I believe that it was decided a few years ago by leaders of the Religious Right, purely as a matter of political strategy, to stop talking in terms of passing laws that would further religion's role in the public square, and begin talking in terms of how restrictions on the public expression of religion in America are restrictions on the constitutionally protected right to free exercise of religion. In this formulation, for example, state organized prayer in public schools is not a law respecting an establishment of religion. Instead, the prohibition of state organized prayer in public schools is a legal regime that infringes upon the free exercise rights of school age children and their parents. In the same way, public expression of religion - in parks, government buildings, or any public space - is now defined as a necessary precondition for the constitutionally protected exercise of religion.

My impression is that this shift was driven by a political calculation on the part of political operatives that the general American public will be more likely to support arguments in favor of free exercise and free expression than they will be likely to accept arguments in favor of theocracy. The rhetoric of liberty, after all, is at the very heart of almost all positions taken across the full spectrum of American politics. We have no far left in America, and we have no far right, and that is largely because the far left and the far right both argue *against* liberty, a position that is basically disallowed in most American political discourse. The far left is against certain forms of economic liberty because they distrust the private ownership of the means production. The far right is against certain forms of political liberty because they distrust the social decay that may result from autonomy and individual choice. But, by and large, we do not have these elements in our politics, at least not explicitly. Instead, we have two mass-based liberal parties of the middle. As a result, what we call "the right" in America calls for property rights and economic autonomy couched in terms of liberty, and what we call "the left" in America calls for rights to education, healthcare, housing, or reproductive "choice," similarly phrased in the terms of liberty. The entire American political spectrum, in other words, defines its ideology in terms of liberty. Everyone is in favor of liberty; it is just a matter of how liberty is defined—which liberties are treasured by this party, and which are treasured by that party. So, if you can frame your positions as defending the free exercise of religion rather than as effort to impose religious law upon secularists and minorities, you will stand a much better

chance of winning the public's support.

The political incentive to move in the direction of rhetoric based in free exercise rights is, I would argue, particularly clear at the moment given the growing divide within the Republican Party on these matters. We see this in all sorts of issues, as the libertarian and laissez faire wings of the Republican Party grow increasingly concerned about the degree to which the religious right has taken over the institutional levers of the GOP, and at least potentially rendered it suspect to secular Americans. We are seeing this fascinating dynamic played out at the moment as Republican presidential candidates trip over themselves to prove their bona fides to a primary electorate they assume to be dominated by religious conservatives - Romney simply by turning his back on his entire political past; McCain by trying desperately to change the subject; and Giuliani, comically really, promising to appoint members of the Supreme Court who will disagree with him on every social position he has ever taken as a public official. But once the nomination is secured, the winning candidate will then engage in the counter-spectacle of trying to establish his "moderation," so as not to frighten off secular Republicans and independents.

In such a freighted political environment, the free exercise clause holds out a welcome and enticing life preserver. Listen, the religious wing of the Republican Party is now saying, we are not threatening you with theocracy, and we never have; we are simply defending individual liberty as we protect the public's constitutionally enshrined right to exercise religion in public as well as in private. As I said earlier, I believe this is a matter of political positioning and has precious little with the principles of the First Amendment. But regardless of its foundations, this new way of talking about the role of religion in America has the potential to make the exercise of religion less of a second class citizen in our constitutional order.