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GODTALK: SHOULD RELIGION INFORM PUBLIC DEBATE?

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As a child, knee-high to a grasshopper, I heard a Yiddish maxim from my grandmother. It wasn't really a maxim but an admonition, and in translation it runs as follows: "If, when traveling in a coach and wagon, the coachman drives past the door of a church and fails to cross himself, get out immediately!" My grandmother, and others of a bygone age to whom this rule was virtually self-evident, were not making a pronouncement of theological significance. That admonition had nothing to do with theology and everything to do with safety and survival. They simply did not trust a person who was irreligious, and that distrust was well founded. Voltaire, a doctrinaire atheist himself, believed that atheism was safe only for intellectuals. He is reported to have said, "I want my lawyer, tailor, valet, even my wife, to believe in God. I think that if they do I shall be robbed less and cheated less."

My problem: As I ride in a bus passing the National Cathedral in Washington, the bus driver does not cross herself. Indeed, were she to cross herself, I am sure that on the morrow a suit would be filed by the American Civil Liberties Union accompanied by an amicus brief by the American Jewish Congress claiming that the driver's conduct constitutes an infringement of the Establishment Clause of the First Amendment because the bus driver is, after all, a government employee, and the bus is indeed government property.

But the driver's failure to cross herself is not really my problem. After all, I could refrain from using public transportation; indeed, in New York City, many residents have rejected public transportation, albeit for other reasons. My problem is much more basic. My problem is that of the man who takes a fall and proceeds to consult a physician. The doctor examines him, ascertains that there are no broken bones, and tells the gentleman, "Forget about the fall. I want

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to know why you fell." I am not so much concerned about the fact that the bus driver does not cross herself; I am concerned about *why* the driver would consider crossing herself to constitute inappropriate behavior.

Why is the introduction of religion into the public square regarded as inappropriate and almost an embarrassment? Our society tends to equate legality with morality. That which is legal is ipso facto moral; only that which is illegal is immoral. Moreover, we live in a society in which any constitutionally protected liberty is regarded as a social imperative. The exercise of that liberty becomes, if I may use the term, a *mitzvah* in the religion of secular humanism.

Examples: Friends serving in the pulpit rabbinate have told me that, on occasion, when they have wished to deny their pulpits to individuals such as the late Meir Kahane, they have been told by congregants that, in the United States, there is an absolute right to freedom of speech. Those well-meaning but misguided individuals are not totally ignorant of the fact that the First Amendment serves only as an impediment to government action but neither mandates nor bars action in the private sphere. They are, however, convinced that any form of expression that is immune from governmental interference is deserving of encouragement.

The same type of confusion manifests itself in the abortion debate. Abortion, in many circles, is regarded as an entitlement. The line of reasoning seems to be as follows: The Supreme Court has ruled that legal barriers to abortion constitute a violation of a woman's right to privacy and has affirmed a woman's right to do with her body as she chooses. Ergo, public policy should encourage her to regard termination of a pregnancy as a morally neutral act and society ought to facilitate her ability to secure an abortion. The liberties and constraints enshrined in the Bill of Rights become not simply limitations of governmental authority but societal mandates. The elementary distinction between governmental interference in personal freedoms and societal promotion of moral values has, in the minds of many, become blurred beyond recognition.

Assuredly, history has taught us much regarding the danger of permitting religion to dictate public mores. The nature of religion is such that adherents of any particular religion often feel that they are privy to absolute truth not only regarding matters of theology, but also concerning standards of morality and even mundane aspects of human conduct. Historically, the result has not infrequently been discrimination against, and persecution of, individuals and sects who

dissented from the teachings of the politically dominant religious group. This country was founded as a haven for victims of religious persecution. Tolerance is quite properly a cardinal virtue of democratic society. But tolerance should extend to all who, in practice, are willing to reciprocate; it should not translate itself into intolerance of some persons or ideologies because of fear based upon historical experience. Long and deeply rooted traditions of freedom and individual liberty serve as a powerful shield against domination of any stripe.

Religion is a powerful force in shaping the tastes, desires, and aspirations of many—and indeed it should be. Needs and desires driven by religious conviction are no less real than those born of other impulses; indeed they are likely to be much more intense. Precisely because they are intense, they ought to be regarded as privileged rather than dismissed as suspect. "To each according to his needs" is firmly rooted in utilitarian principles. Maximization of the greatest happiness for the greatest number necessitates recognition of intensity of individual needs and desires. Individuals intuitively govern their actions by such notions without necessarily formulating them as rules. A person will instinctively give a spare concert ticket to a friend who is a lover of music rather than to one who is simply curious to see the inside of the concert hall. Taking the same principle one step further, I am perfectly willing to forego a piece of chocolate cake in favor of giving it to a child who will relish it far more than I. An employer who willingly allows an employee an absence from work because of religious observance, but is unsympathetic to a request for an afternoon off to attend a ballgame, is not necessarily manifesting respect for religion. If astute, the employer recognizes that those desires are qualitatively different and call for different responses. In the public arena, identification of religious concerns should serve as a marker indicating that, even from the vantage point of a utilitarian calculus, those concerns deserve enhanced weight.

Somewhat quixotically, admission of religious debate in the public square might serve to mitigate the force of nonreligious arguments advanced by religionists. The requirement that it is necessary to establish a "secular purpose" in order to justify government action results in situations in which the announced secular purpose is, at times, an excuse rather than a reason. The religionist will argue the merits of the secular purpose with far more rigor than he can accept in good conscience, all the while hiding his real concern in *pectore*. Thus, for example, the debate concerning welfare reform is restricted

to the mundane, secular pros and cons. There certainly must be human beings who simply believe that it is a sin to allow human beings to go hungry. I strongly suspect that people opposed to welfare reform on grounds that can best be described as theological have not remained silent but have chosen to argue their case on grounds of social well-being. Pragmatically speaking, that is probably the more effective course; for my part, however, I would prefer a full and frank dialogue.

Just a bit more than one hundred years ago, in *Church of the Holy Trinity v. United States*,[1] Justice Brewer declared that "this is a Christian nation."[2] Today students of constitutional law find that statement, if not embarrassing, at least quixotic. But at the time it was written, the learned author found no contradiction between that pronouncement and the (anti-)Establishment Clause of the First Amendment. At issue before the Court was an anti-immigration statute. The declaration supported a finding that "[t]he common understanding of the terms labor and laborers does not include preaching and preachers."[3] Lest anyone assume that members of the clergy actually work, the Court found it necessary to add that it would be unthinkable to assume that Congress, in enacting an anti-immigration statute, intended to bar an invitation to Anglican clergy to minister to the religious needs of U.S. citizens.

But the declaration resonates with a more profound meaning. It clearly reflects a literal interpretation of the Establishment Clause as prohibiting only an established state church but in no way precluding governmental preference of religion and religious values. The framers of the Constitution certainly envisioned a Christian nation, de facto if not de jure. Indeed, the Bill of Rights did not at all interfere in the ongoing relationship with established religions that then existed in nine of the thirteen states. The last of these states disestablished religion in 1833. Quite to the contrary, the First Amendment was designed to prevent the establishment of a *national* church that would effectively supplant the churches established by the various states. As a matter of historical fact, the Bill of Rights was made binding upon the individual states, rather than upon the federal government exclusively, only after the various state churches had long been disestablished.

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1. 143 U.S. 457 (1892).
2. *Id.* at 471.
3. *Id.* at 463.

In the cultural milieu that we have created, conduct or action that would violate constitutional norms if governmental activity were involved becomes a violation of socially accepted mores when displayed in the public square. Thus the (anti)-Establishment Clause in the Bill of Rights is no longer simply a restriction upon government conduct but comes to be regarded as a restraint upon public debate, ultimately a de facto constraint upon individual conduct.

I do not at all pretend that the First Amendment is the only reason, or even the principal reason, for the lack of religiosity, if I may call it such, in American society. Certainly it is not. But it seems to me that the First Amendment has made its small contribution to the creation of an *areligious* society. I frankly regard the First Amendment as a failed experiment. Yet, I hasten to add that I would not want to live in a society that does not boast of a First Amendment or a functional equivalent thereof. But the desire for the protection afforded by the First Amendment should not prevent us from recognizing that neither of its clauses always achieved the effect we want.

The constitutional separation of church and state has clearly given rise to a certain embarrassment about the recognition of religion and religious values in public affairs. As a result, if a religious denomination has strong views on a particular public issue, it may be sure that its position will be dismissed as sectarian and hence unworthy of serious attention. Values nurtured by religious conviction are to be left at the church or synagogue door; they are not to influence or even inform public debate. To paraphrase a Jewish writer of the Enlightenment: Be God-fearing in private, but an agnostic in public.[4]

My own reaction to Justice Brewer's declaration in *Church of the Holy Trinity* is: "Amen. Would that the United States were indeed a Christian nation!"[5] However, as a Jew who is also a member of a law school faculty, I find it necessary to append an "oral law" interpretation. The interpretation may be found in the last scene of the play *Nathan the Wise*[6] by the German poet Lessing in which

4. Judah Leib Gordon, *Hakitzah Ami*, *In* KITVEI YEHUDAH LEIB GORDON: SHIRAH 17 (1959).

5. *Holy Trinity*, 143 U.S. at 471.

6. Gotthold Ephraim Lessing, *Nathan der Weise*, *in* LESSING'S NATHAN DER WEISE (Sylvester Primer ed., 1906).

Nathan is told: "Nathan, Nathan, indeed you are a Christian."[7] To this Nathan responds by saying, "That which you call a Christian in me, I call a Jew in you."[8] Or, as Justice Douglas put it succinctly in *Zorach v. Clausen*,[9] "We are a religious people whose institutions presuppose a Supreme Being."[10] To be effective in the public square, religion need not, and should not, be sectarian in nature.

In some sectors of our community, to engage in activity that can be regarded, even remotely, as an encroachment upon separation of church and state is regarded as sacrilegious; to question the wisdom of maintaining a hermetically sealed wall is nothing less than heresy. Indeed, at times it would appear that the covenant of Philadelphia has supplanted the covenant of Sinai as the credo of American society and that the first ten amendments command a devotion far in excess of that paid to the Ten Commandments. Modern-day devotees of the Constitution would erect impregnable fences around this wall just as the Jewish sages of old erected fences around the Law of Moses.

There is no gainsaying the fact that Jefferson's "wall of separation" has contributed to an erosion of religious awareness in the public life in our country. This was certainly not the intention of the Framers of the Constitution.

> The First Amendment . . . does not say that in every and all respects there shall be a separation of Church and State . . . . [W]e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.[11]

Thus spake a Supreme Court Justice whose credentials as a liberal are unimpeachable—Justice William Douglas writing for the majority in *Zorach*.

It is sometimes forgotten that the First Amendment was intended to be binding only upon the federal government, not upon the individual states. Matters of religion were to be dealt with by the individual states as they saw fit. Indeed, as noted earlier, at the time that the First Amendment was inscribed to all eternity upon tablets of constitutional stone, established churches existed in nine of the

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7. *Id.* at 169.
8. *Id.*
9. 343 U.S. 306 (1952).
10. *Id.* at 313.
11. *Id.* at 312, 314.

original states. It was not until a Supreme Court decision handed down in 1940, *Cantwell v. Connecticut*,[12] that the Bill of Rights was held to be binding upon state governments by virtue of the Due Process Clause of the Fourteenth Amendment[13] and not until 1947 in *Everson v. Board of Education*[14] that the Court declared that the Establishment Clause applies with equal force to state governments.[15]

Let us put questions of constitutional jurisprudence aside for a moment. Do we want Johnny to pray? Do we want teenagers to be exposed to the concept of a personal God? Do we want the coachman to make the sign of the cross when passing a church? "Yes!" comes the response, "but not in school and not on public property." Fair enough, until one realizes that: (1) Far too many parents are unconcerned with such matters with the result that their children do not receive even minimal exposure to experiences that might be even remotely categorized as religious; and (2) Studied avoidance of all things religious in public contexts may become tantamount to the public negation of all religion. In the words of Justice Douglas such a result "would be preferring those who believe in no religion over those who do believe,"[16] a state of affairs quite antithetical to the goal the First Amendment was designed to achieve.

Heaven forfend that these comments be in any way construed as advocating the states' right either to engage in religious indoctrination or to interfere in the slightest with religious freedom. But we must recognize, as did former Chief Justice Burger in *Walz v. Tax Commission*,[17] that "[n]o perfect or absolute separation is really possible; the very existence of the Religion Clauses is an involvement of sorts—one that seeks to mark boundaries to avoid excessive entanglement."[18]

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[19] The Free Exercise Clause prohibits any form of religious coercion; the Establishment Clause proscribes government endorsement or overt assistance to religious endeavors

12. 310 U.S. 296 (1940).
13. *Id.* at 303.
14. 330 U.S. 1 (1947).
15. *Id.* at 14-16.
16. *Zorach*, 343 U.S. at 314.
17. 397 U.S. 664 (1970).
18. *Id.* at 670.
19. U.S. CONST. amend. I.

even were there to be unanimous consent on the part of the populace. Everyone agrees that free exercise is, and must remain, an absolute. The alternative is the loss of religious liberty.

But it is not at all clear that religious liberty is incompatible with even a formal establishment of religion. The religious liberty of Jews, Moslems, Hindus, Sikhs, and members of various cults and sundry is in no way diminished—at least today—in Great Britain by virtue of the unique position of the Church of England as the established church of the realm. On the contrary, establishment serves to mitigate only the freedom of the established church and its communicants which, by virtue of its establishment, is technically subject to the whims of Parliament.

In our country, establishment is unthinkable, not simply because of the constitutional prohibition, but because establishment is regarded as carrying with it an aura bordering at least on the mildly coercive. But there is no need to throw out the baby with the bath water. The Supreme Court has wisely drawn repeated distinctions between "establishment" and "accommodation." The former is anathema; the latter commendable. The problem is where to draw the line.

It is certainly difficult to draw a line that will permit the desired result but not yield logical inconsistencies that can ultimately obliterate the line entirely. Nor should it be forgotten that denial of services and benefits for fear of violating the Establishment Clause is itself a diminution of the free exercise of religion. In *Walz* the Court sagaciously observed that there is an inherent tension between the Establishment and the Free Exercise Clauses, "both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."[20] We may *wish* Johnny to pray in school but nevertheless recognize that such a goal is constitutionally unattainable. That should not automatically lead us to reject moments of silence as, constitutionally speaking, equally odious. The challenge is to recognize the goal and to fashion the means. The goal should be nondiscriminatory encouragement of religious activity to the fullest extent possible within the parameters of the First Amendment.

Odd as it may sound, such a policy need not be regarded as at variance from the tripartite test of constitutionality adopted by the

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20. *Walz*, 397 U.S. at 668-69.

Supreme Court in *Lemon v. Kurtzman*.[21] Encouragement of religious awareness serves a very tangible secular purpose. Let us put aside the very real denominational interest in financial support of parochial school education. Is it not in the interests of all Americans to foster parochial school education for all citizens who wish to avail themselves of such an opportunity? Juvenile delinquency and drug use are demonstrably far less prevalent among students of those schools than among the general teenage population. That represents a tangible secular benefit to all Americans.

In *Everson v. Board of Education* the Supreme Court declared assistance to parochial schools in the form of bus transportation to be constitutional on the somewhat tenuous ground that the program was designed to assure the safety of children rather than to promote religious education.[22] In *Board of Education v. Allen*[23] the Court permitted the state to provide textbooks of a secular nature for use in parochial schools on the grounds that the benefit was to parents and children, not to schools.[24] Is not a tuition subsidy to defray the cost of hiring a teacher of mathematics but the logical and functional equivalent of the purchase of secular textbooks? Here, too, the benefit is to parents and children, not to religion. As Justice Powell stated in *Hunt v. McNair*,[25] "[T]he Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends."[26]

The Supreme Court has indeed long struggled with attempts to determine when permissible accommodation rises to the level of proscribed establishment. Perhaps at least a partial resolution lies in an understanding of the history of the development of First Amendment protection of religion. The originally proposed text of the First Amendment, a text not promulgated, read: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall

21. 403 U.S. 602 (1971). "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Id.* at 612-13.

22. *Everson*, 330 U.S. 1, 17-18 (1947).

23. 392 U.S. 236 (1968).

24. *Id.* at 243-44.

25. 413 U.S. 734 (1973).

26. *Id.* at 743.

any *national* religion be established."[27] The function of the latter clause was explicitly limited to preventation of the rise of an institution in the nature of a national established church to the prejudice of denominations not accorded that recognition. The right to institute an Established Church—or not to do so—was a right jealously preserved to the individual states. The thrust of the proposed text was not to bar aid to religion but to bar the preference of one denomination over others. Assuredly, it was not designed to render the federal government and its institutions areligious in nature. Quite apart from original intent, the phrase "establishment of religion" as it appears in the text actually adopted, could readily be interpreted as referring to religious worship, public adoration, ritual, ceremony, and the like. In that context, one could readily understand that all forms of aid to religion are interdicted by the First Amendment. Even Justice Black's formulation in *Everson* prohibiting "aid [to] one religion . . . [or] all religions"[28] and "aid," understood—contra Douglas—as connoting not simply financial aid but as encompassing other forms of aid as well, is sound doctrine with regard to establishment of religion in the sense of worship and other forms of public adoration. However, the policy concerns that bar establishment of religion in that sense are not directly relevant to the values, principles, morals, or even the basic teachings of religion which, in a significant sense, are so much more fundamental and so much more important.

It should also be noted that it was only with some degree of reluctance that the Supreme Court came to recognize that religious practices other than prayer and similar acts of divine service are protected by the First Amendment. Religion for a Protestant, after all, is not centered upon ritual observances and restrictions, but is fairly well circumscribed by prayer, church attendance, and Bible reading.

Perhaps we should recognize that such a limited understanding of the connotation of the term "religion" is not entirely incorrect. Accordingly, it may be argued that religion should be understood, constitutionally speaking, as a homonym employed with diverse connotations in the Free Exercise and Establishment Clauses. We must insist that the Free Exercise Clause is designed to protect religious practice in the broadest sense of that term but urge that the

27. 1 ANNALS OF CONG. 434 (Joseph Gales ed., 1789) (emphasis added).
28. *Everson*, 330 U.S. at 15.

parallel clause prohibiting establishment of religion be regarded as limiting governmental entanglement with religion in the narrow sense of the term "religion," worship, and overt profession of a creed. This semantic point serves to bolster Professor Lawrence Tribe's argument that anything "arguably nonreligious" should not be considered religious in applying the Establishment Clause.[29]

Recognition that the ambit of "religion" proscribed by the Establishment Clause is far less encompassing than the ambit protected by the Free Exercise Clause certainly comes closer to capturing the spirit of the First Amendment than other attempts to resolve the tension between the two clauses. In the words of former Chief Justice Burger: "[F]or the men who wrote the Religion Clause of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity."[30] It did not connote a mandate for neutrality between religion and the absence thereof. Nor, as Chief Justice Rehnquist has stated, is there anything in the Establishment Clause which requires government to be strictly neutral between religion and irreligion. On the contrary, as Justice Douglas remarked, "When the state encourages religious instruction or cooperates with religious authorities . . . it follows the best of our traditions."[31]

Strange as it may seem to many lay people, but as students of constitutional law would readily concede, the development of First Amendment doctrine over the past two hundred years is rooted, not in transcendental truth or in the application of esoteric hermeneutical principles, but in what the Court perceives to be good for our society—surely a matter over which reasonable people may differ. The policy that reflects a view of societal welfare that recognizes the singular contribution of religion to the betterment of society was perhaps best expressed by Chief Justice Burger in *Walz*:

> The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which

29. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-6, at 828 (1978).
30. *Walz*, 397 U.S. at 668.
31. *Zorach*, 343 U.S. at 313-14.

> will permit religious exercise to exist without sponsorship and without interference.[32]

Read in the manner herein proposed, the First Amendment—or better, the Establishment Clause of the First Amendment—acquires a meaning entirely different from its broad interpretation in scores of judicial decisions. Of course, this line of argument will hardly be regarded as respectable in academic circles, certainly not within legal academic circles. And recognition that this type of advocacy is not respectable becomes a self-fulfilling prophecy. If one regards a certain position as somewhat less than respectable, one does not engage in discourse advocating that position. Failure to engage in that type of conversation confirms its lack of respectability and the wall of separation is thereby reinforced not only as a wall between church and state but as a wall between religion and the public square. Accordingly, religious concerns, even when introduced into the public square, lose their validity. But the converse is also true: Religious concerns presented in public discourse again and again dispel embarrassment and become self-validating. But in order for religion to become present in the public square we must first overcome the reticence from which we all suffer. Who knows? Maybe if we succeed in overcoming these inhibitions the course of First Amendment jurisprudence might even be reversed or at least modified.

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32. *Walz*, 397 U.S. at 669.