Restoring the First Amendment: A Counterrevolutionary Call

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I. A CONSTITUTIONAL REVOLUTION

During the 1940's and 1950's, the United States Supreme Court was deeply divided over the First Amendment. One side was led by Justices Felix Frankfurter and John Marshall Harlan who took an evolutionary and pragmatic approach. They preferred to decide cases *ad hoc*, balancing the interests of the individual against those of the State. Because Frankfurter and Harlan more often than not balanced the interests in favor of the Government, their constitutional philosophy became identified with the "conservative" wing of the Court. *See, e.g.*, *Dennis v. United States*, 341 U.S. 494 (1951).

The "liberal" side was led by Justice Hugo Black whose approach was historical and principled. Justice Black particularly insisted that the Court was not empowered by the Constitution to balance the interests between individual liberty and societal order. The people, Black repeatedly wrote, had already done that in the Constitution. Instead, Justice Black maintained that the Court was authorized only to examine the constitutional text, context and history, uncover the original principles and apply them without regard to present pragmatic concerns. *See, e.g.*, *Id.*, 341 U.S. at 579-81 (Black, J. dissenting).

Black's constitutional premises led him to conclude that the First Amendment contained a catalog of "absolutes." Because the text stated that "Congress shall pass no law," Black asserted that the Constitution meant that Congress may pass no law - not, as Frankfurter seemed to say, no law unless Congress had a "good reason." Because Black also believed that the Fourteenth Amendment had incorporated all of the first eight of the Bill of Rights, including the First Amendment, he also applied his absolutist, originalist philosophy to the States. *See, Everson v. Board of Education*, 330 U.S. 1 (1946).

Black's insistence upon applying constitutional "absolutes" did not always yield "liberal" results. *See, e.g.*, *Adderley v. Florida*, 385 U.S. 39 (1966). Nor did he always follow his "originalist" approach. E.g., Roth v. United States, 354 U.S. 476, 514-18). Nor did he always abide by the original principles. Engle v. Vitale, 370 U.S. 421 (1962). But he did provide a constitutional benchmark by which to measure a Court opinion.

That check was lost when Justice Black left the Court in the early 1970's. But even before he left, the "liberal" wing of the Court had abandoned Black's originalist/ principled approach to the First Amendment in favor of Frankfurter's philosophy of evolutionary pragmatism. Under the leadership of Justice William Brennan, the Court took the Frankfurter/Harlan balancing tests and revolutionized the First Amendment.

In the area of freedom of religion, a three-part Establishment Clause test was invented to force the nation's laws and policies to be "religiously neutral," thereby virtually excluding the Bible as a meaningful foundation for American law and politics. With respect to the Free Exercise Clause, religion was subjectivized. Then, under Brennan's "compelling state interest" test, the Clause was transformed from an absolute barrier to Government intrusions upon the conscience of the people to an evolutionary accordion of toleration, thereby further marginalizing the influence of Christianity on the formation of public policy in the nation's legislatures.

As for the freedom of speech, the freedom of the press, the right of the people to assemble, and the right of the people to petition their Government for redress of grievances, the Court amalgamated them under one superintending slogan - freedom of expression. Having thus divorced the constitutional text, the Court took its balancing formulae and evolutionary perspective to extend, for the first time in history, First Amendment protection to pornography and profanity, to defamation and commercial advertising. At the same time, the Court used the same balancing tests and evolutionary approach to remove from absolute First Amendment protection such activities as political campaigns and candidacies, street assemblies, and access to government school property.

Taking advantage of the Court's rulings that government schools must be religiously neutral, the ACLU and others sought to deny to religious people, and Bible-believing Christians especially, the right to speak, preach and proselytize on government school property. Had such efforts succeeded, religious views would have been excluded from the "public square" altogether. But, as the discrimination against Christians (and a few other religious groups) increased, a counterattack was launched.

II. A CONSTITUTIONAL COUNTERATTACK

Initially, the counterattack focused upon discriminatory practices against Christians seeking access to "free speech public forums" generally available to the public. This tactic succeeded not only in keeping the public forums open to "religious speech," but other less public forums as well. Now, under the Court's rule against "viewpoint discrimination," the effort to exclude Christian and other religious speech from the public marketplace of ideas has been defeated, although by a narrow margin. See Rosenberger v. University of Virginia, 515 U.S. ---, 132 L Ed 2d 700 (1995).

The counterattack against the Establishment Clause precedents insisting on "religious neutrality" on public property has not been quite as successful. While the three-part test of secular purpose, primary religious effect, and excessive entanglement is no longer Court dogma, religious views continue to play a minor role in the formation and implementation of public policy. This is especially true in education where the secular humanist, evolutionary world view dominates the public school classroom and the Christian alternative is still excluded as constitutionally illegitimate. Edwards v. Aguillard, 482 U.S. 578 (1987).

As for the Free Exercise Clause, there has been no counterattack against the Court's subjectivization of religion. To the contrary, instead of welcoming the Court's retreat from its view that religious conscience was to be tolerated only when there were no countervailing compelling state interests, the religious and civil rights communities - both liberal and conservative - joined forces and persuaded Congress to pass the Religious Freedom Restoration Act (RFRA), reinstating and extending wholesale Brennan's "compelling interest test" to every possible "religious" claim that modern man could invent - as evidenced by the numerous cases spawned by RFRA in the prisons.

RFRA's regime of religious toleration proved to be short-lived, however, when the Court ruled it unconstitutional. City of Boerne v. Flores, 65 LW 4612 (1997). While many have cried out against this ruling, the decision is both strategically and constitutionally sound.

As for strategy, had RFRA not been found unconstitutional, it would inevitably have been used to legitimate sexual practices ranging from polygamy to fornication and death actions from abortion to suicide. In addition, RFRA would have continued to promote the Free Exercise right as a kind of special privilege for religious people, especially Christians, unavailable to others. Such special religious exemptions reinforce the view that "Christianity" and other religious views do not belong in politics, nor in public policy. After all, if religious people are constitutionally entitled to an exemption from laws that apply to the public generally, why should religious people be allowed to impose their values on the public when members of the public with different values are not allowed to impose theirs on religious conscientious objectors?

As for constitutional principle, the First Amendment religion clauses were never designed to protect subjective religious conscience, as such. Rather both the Establishment and the Free Exercise Clauses were originally designed to erect an absolute barrier against the Government intruding upon areas of life over which the Government has no jurisdiction. At the same time, neither of the Clauses was designed to secularize law, politics and public policy.

RFRA did nothing to restore either of these two principles. Rather, it contributed to their continued erosion. Under RFRA, the Government would have continued to usurp the work of the church from welfare to day care and from education to congregational self-government. And, under RFRA, Christians would have continued to abandon the public policy arena to others in exchange for a statutorily guaranteed exemption from those laws that violated their religious consciences.

But the First Amendment was not designed to make the world safe for "religious dropouts." Rather it was designed to create a Christian civil order that guaranteed true liberty for everyone and an informed and vigilant citizenry to ensure that those guarantees were not lost. To fulfill these twin purposes, there must be a constitutional counter- revolution, restoring the nation to the founding principles of the First Amendment.

III. A CONSTITUTIONAL COUNTERREVOLUTION

The battle for the First Amendment is not between liberals and conservatives, nor between libertarians and social conservative, nor between the ACLU and the ACLJ. Rather, the battle is between two competing world views - one reflecting an evolutionary, pragmatic view of civil liberty, the other reflecting an unchanging, principled view of freedom. It was the latter, not the former upon which America's legacy was built. Only if the First Amendment is returned to its original foundations will true law and liberty return to the nation.

It is no accident that the first freedoms listed in the First Amendment are those related to religion. Religion defined those duties that man owed exclusively to God, and since those duties could not be performed in allegiance to any other, they had to be entirely excluded from the civil jurisdiction. The 1776 Virginia Constitution identified those duties as ones that, according to the law of the Creator, could only be enforceable by "reason and conviction, not by force or violence."

Whether one calls these rights "God-given" or "natural," the result is the same. There are some areas of life that are totally and completely outside the jurisdiction of civil society. They are immune, not because they do not impact on society; rather, they are immune because the very nature

of the duty demands it. What are these duties? They are the duties of heart and mind. Both must be protected from the power of the civil ruler because duties of heart and mind by definition cannot be sanctioned by force without undermining the very duty that is being reinforced.

Take, for example, the duty to care for the poor. According to the law of Moses, this duty arises solely out of love for one's fellow man. Consequently, even in theocratic Israel, the duty to care for the economic needs of others was not enforceable by civil sanction. In secular America, however, everyone must pay taxes to support welfare to the poor. That was not what was contemplated by the 18th Century Virginians who proclaimed that the duty of charity was a "mutual," not a "civil," one.

Likewise, the duty to educate was promoted by Thomas Jefferson as one completely outside the jurisdiction of the State. Education was to be kept free so that one's mind would remain free - free from taxes that promote the propagation of opinions with which one disagrees, free even from having to promote any opinions at all - for, as Jefferson put it, "opinions" and "truth" can never properly be the objects of Government.

In this way, the two religion clauses of the First Amendment were designed to deny to the civil ruler total jurisdiction - there are some things that just do not belong to Caesar no matter how compelling an interest Caesar might have. Having already denied the civil authorities total jurisdiction, the next step was to preserve to the people authority to keep their rulers from taking away their liberties. To see that they did, the people reserved the right to criticize their Government without fear of prosecution (the freedom of speech), to write whatever they chose without the Government serving as the people's editor-in-chief (the freedom of the press), to consult one with another concerning the common good on private and public property (the right of assembly), and to petition their Government for redress of grievances.

These rights, then, were designed to preserve the ultimate civil sovereignty of the people. They were not designed to protect "freedom of expression." To the contrary, the civil rulers had a duty to protect the people from pornography, profanity, and defamation in order to preserve community morals. For a morally corrupt society would necessarily undermine the political vitality of the people and, thereby, enable the Government to run roughshod over the people's liberties.

What America's founders feared has come to pass, as license has been substituted for liberty and as total jurisdiction has practically been ceded to the Government. What is needed is a constitutional counterrevolution so that America will once again be one nation under God and its government once again be of the people, by the people and for the people.

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