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By M. Stanton Evans

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CONSERVATISM, RELIGION, AND THE FIRST AMENDMENT

by M. Stanton Evans

My topic is the First Amendment and the reading of the First Amendment that has been given to us by the Supreme Court and indeed by almost all supposed authorities on this subject. That reading is essentially that the First Amendment was intended to create a wall of separation between the practices of civil government and the affirmations of religion. There have been many variations played on this theme and many assumptions brought to bear in the debate that, in my view, are mistaken. I will try to examine some of these as best I can in the time allotted to me.

The leading misconception involved in this kind of discussion, which is applied not only to First Amendment topics but to almost all topics where religion is involved, is the idea that there is such a thing as a civil order that is not based on religious belief or religious assumptions. The fact of the matter is that every society, every culture, and every civil order is based upon religious assumptions of one sort or another. Religious beliefs or religious affirmations are answers to ultimate questions--such as, where did the world come from, why are we in the world, what does it mean to be a human being, how should human beings treat each other, how should human beings treat each other through the instrumentality of the state? The answers to all such questions are essentially religious answers, and according to the religious tradition that you affirm or accept axiomatically, you tend to come up with different answers.

Artifact of Modernity. If you remove one set of religious assumptions received from a particular religious tradition, you do not, therefore, have a social order that is not based on religious assumptions. You simply substitute some other assumptions for the ones taken away. So it seems to me that that is the first misconception to be dealt with. Every civil and social order rests upon assumptions that are religious in nature because they are attempts to answer these ultimate questions.

The notion that it can be otherwise--that there is such a thing as a purely rationally deduced set of rules about human behavior or government--is an artifact of modernity. It is a notion that has arisen in the period since the Renaissance, and more specifically since the Enlightenment--that the way to liberty, justice, democracy, progress, and other good things is to get rid of religious belief and to substitute a rationally constructed social order for the superstitions of religious belief. That has been the essential enterprise of the Enlightenment and indeed may be defined as the essential enterprise of liberalism of all descriptions since the Enlightenment, both classical liberalism and the modern day 20th century liberalism--

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manufacturing notions about the social order that will be rationally deduced rather than axiomatically derived from religious belief.

The Liberal History Lesson. This mentality has been applied retrospectively to all of our intellectual history, and to our history as Americans in particular. There is a way of approaching history based upon these beliefs that for want of a better term I call simply "the liberal history lesson." It says, in essence, that there is an inverse ratio between religious affirmation and human progress; that the story of human progress is comprised of throwing off the shackles of religious belief and substituting these rational constructions in the place of religious assumptions; and that as you do so, you progress toward greater freedom and political democracy.

The treatment of American political history that is now conventional wisdom, embodied in the rulings of the Supreme Court on the First Amendment, and in most history books dealing with these topics, is a subdivision of the liberal history lesson. It is an effort to apply to the experience of the United States the assumptions that became conventional in the West at the time of the Enlightenment and to rewrite that experience in the categories of liberal ideology. The essential purpose is to treat the American Revolution as a cognate for the French Revolution. It is based upon the hope, wish, and belief that the American Revolution really was the same as the French Revolution. All the evidence is treated to make it look that way and any evidence that does not fit is simply ignored.

The Judeo-Christian Experience. All of this is totally ahistorical. There is virtually no evidence in the historical record to support any of it. The liberal treatment of Western intellectual history in general is virtually without historical foundation, and it is certainly without foundation in the case of America. In fact, the American continent was settled primarily by people who were concerned about religious matters, who came here for religious reasons, and who brought with them religious assumptions and religious ideas about government that were products of centuries of Judeo-Christian experience and of the Medieval experience crystallized in the early 17th century by England in particular.

The period during which the early settlers came to these shores was when these religious issues were being fought out in England, and the people who came here brought with them very specific notions of church government and civil government derived from their religious experience. The principal notion that is relevant here was their idea of covenantal theology--the idea of the covenantal character of church government. Essentially, it was the notion that authority in the church rose from the congregation and should not be imposed from the top down by the episcopacy. They left England primarily over that issue to come here and set up a church government and civil government based on their notions of covenantal theology, which were derived from Biblical teaching, mainly from the Old Testament. They wanted to escape rule by bishops in church government, which was their lot as members of the Church of England.

The Social Contract. The principles that they professed in terms of church government were translated into their notions of civil government. The notion of social contract is usually portrayed in the liberal history lesson as something invented by John Locke in his *Treatise of Civil Government* in the latter part of the 17th century, and the notion of social contract in the civil order is thought to be a totally artificial construction based upon purely theoretical considerations. But in point of fact, social contract had existed in the Western experience almost 70 years before John Locke wrote the *Treatise of Civil Government*--in the Mayflower Compact written in 1620. When the Mayflower Pilgrims arrived off the shores of this continent, they sat down and drew up a contract among themselves in which they stated that we do hereby "combine and covenant ourselves together into a civil body politic." So right there, based not upon any secular theoretical considerations but on religious experience, was the notion of social contract articulated in the Mayflower Compact of 1620.

Ten years later, in October of 1630, the Massachusetts Bay Company, which was a commercial corporation, held the first meeting of what became its General Court. The Massachusetts Bay Company was similar to corporations today in that it was governed by its directors, who were eight in number, and according to the law of corporations, the people entitled to vote on the affairs of the Massachusetts Bay Company. Nonetheless, when the first meeting of the General Court of Massachusetts Bay was held, 116 people were invited into the meeting to vote, which is a source of great confusion to many liberal historians. Why did these autocrats of Massachusetts Bay, these terrible Puritans who did not have to let these 116 people vote--why did they do this? The answer was their covenantal theology. These were the members of the congregation, and as members of the congregation, they were part of the covenant and entitled to vote in matters of church government, and in matters of civil government as well.

The Great Awakening. Many other products of that early experience show the imprint of the religious beliefs of the early settlers upon civil government. One of the earliest is the Massachusetts Body of Liberties in 1641, which is an early version of the Bill of Rights, once again based upon religious principles. Likewise, in 1647, the first public schools were created on this continent by the authorities of Massachusetts Bay. This system was set up in that colony for the purpose of teaching young people how to read the Bible. That is just a sample of the historical record from that period.

This early experience continued in attenuated form up through the end of the 18th century, attenuated primarily because of the proliferation of religious groups, not because of a loss of religious belief or religious conviction in the society. Quite the contrary. In the middle of the 18th century, there occurred the so-called Great Awakening, an evangelistic phenomenon that brought into the fold of Christianity many people who had not been there before and re-energized many for whom Christian belief had been primarily a formal exercise. The result of this was that many new religious sects and groups were formed and some that had been small increased in size. There was the tremendous growth of the Baptists in this country, and of the Methodist church. And as religious diversity increased, there was pressure upon the "established" character of religious practice in several of the states.

Suffused with Biblical Belief. The world of the Founding Fathers in the latter part of the 18th century was in fact a world totally suffused with Biblical belief, based upon Judaism and Christianity--based upon the centuries of practice that had gone into the experience of England, and the founding of the United States, and this affirmation was expressed in innumerable ways in the civil practice of the time. It was not just a compartmentalized private thing. It was expressed universally in the governmental practices that prevailed in the latter part of the 18th century.

For example, in 1775, when the Revolutionary War was just starting, nine of the thirteen colonies had officially established churches, which were supported by tax revenues. As the proliferation of church groups continued through the latter part of the 18th century, pressure was put on to disestablish a number of these churches, and disestablishment did occur in such states as Virginia.

Official Churches. Nonetheless, at the time of the Constitutional Convention and thereafter, there were three states that still had established churches--Massachusetts, New Hampshire, and Connecticut. This meant officially recognized communions supported by tax revenue and acknowledged by everyone to be the official church of the realm. But even in the states that had disestablished their churches--the Anglican Church in some parts of the South or the Congregational Church in other areas--even in those states, there remained a system of official sanction and support for religious belief of various kinds, principally the requirement that one must profess a certain kind of religious belief in order to hold public office.

These practices persisted well after the adoption of the First Amendment. The established church in Massachusetts was not abolished until 1833. In New Hampshire, a requirement that to be a member of the legislature one had to be not simply a Christian, but a Protestant, persisted until 1877. In New Jersey, Catholics were not permitted to hold office until 1844. In Maryland, it was stipulated that one had to be a Christian to hold public office, and that stipulation lasted until 1826. In North Carolina, the stipulation was that one had to be Protestant until 1835, and until 1868 to be a Christian, in order to hold office.

The state of Vermont, which broke away from New Hampshire in 1791 at the time that the First Amendment was being ratified, required a very interesting oath of office. Vermont was considered theologically one of the most liberal of the states, and by the early 19th century it had abolished most vestiges of establishment. Nonetheless, this was the oath of office that you had to take in Vermont in order to assume office in 1791:

> I do believe in one God, the Creator and Governor of the universe, the Rewarder of the good and the Punisher of the wicked. And I do acknowledge the Scriptures of the Old and New Testaments to be given by divine inspiration and own and profess the Protestant religion.

That was the oath of office that had to be taken in one of the more liberal states at the time that the First Amendment was being put on the books.

Virginia's Liberal Church. The case of Virginia is the one most frequently cited in such discussions. If you had to spend a lot of time delving into these matters, you would know that the Supreme Court in its various rulings with respect to the First Amendment relies mainly on the experience of Virginia and the views of James Madison in particular.

Virginia was, by the standards of the day and in terms of advanced views on the establishment of religion, a very liberal state theologically. This was very much a result of the fact that the Anglican Church had been the established church in Virginia. When the Presbyterians and then the Baptists grew in strength, it created a three-way tug of war for political influence in the state and pushed it toward disestablishment of the Anglican Church, which came about in the 1780s. The bill for the disestablishment of the Anglican Church that finally passed was presented by Madison (it allegedly had been drafted by Thomas Jefferson) in the Virginia legislature on October 31, 1785. This bill and the associated commentary by Madison are frequently mentioned in the literature on this subject as showing the secularizing impulse behind the First Amendment, because of Madison's involvement in the disestablishment of Virginia and the sentiments expressed with respect to the bill for religious freedom presented on October 31, 1785.

Punishing Sabbath Breakers. The Supreme Court and the others involved in this never mention, however, that on the same day James Madison presented the bill for religious freedom in Virginia, which was to disestablish a specific sect, he also presented a bill to punish those who broke the Sabbath. This bill spelled out at great length the penalties that would be imposed upon those who broke the Sabbath by conducting other than household duties. It was put forward on the very same day that the bill for disestablishment of the church was presented. This is never mentioned because it does not fit the secularizing model that the Court is following.

Many of the practices that existed at the state level also existed at the federal level, first in the Continental Congress and thereafter in the new Congress under the Constitution. The Continental Congress, which existed from the period of the Revolutionary War up through the adoption of the new Constitution in 1789, had chaplains, and it had prayers. In 1780, because of the wartime conditions, it authorized the printing of a Bible, after first ensuring that the text was orthodox. It provided money for the Christian education of Indians. It passed the Northwest Ordinance for governing the territory north and west of the Ohio River, stating that it was doing this, among other reasons, for purposes of promoting "religion and morality." It stipulated that in the sale of lands in the Northwest Territory, Lot N29 in each parcel of land "be given perpetually for the purposes of religion." Such were the practices under the Continental Congress.

In the new Congress under the Constitution, all of this was re-enacted. The chaplains were re-established. Prayers were conducted. Days of thanksgiving were voted. The Northwest Ordinance was re-enacted, and money was appropriated for the Christian education of the Indians. All were practices totally contrary to anything you would guess from reading Supreme Court decisions or the conventional liberal history on this subject.

The First Amendment's Real History. How is all of this religious affirmation by the several states, established churches, religious requirements for public office, prayers, chaplains, and religious education of the Indians to be reconciled with the reading of the First Amendment given to us by the Supreme Court in the *Everson* case and other rulings over the years, which says in essence that no tax money may be used for any religious purpose? If there is a total wall of separation between the practice of government and the practice of religion that says in no way, shape, or form is official support to be given to religious practice, how can you reconcile the history just recited with the adoption of such an amendment? The answer, of course, is that you cannot; that the real history of the First Amendment is very different indeed from what the conventional liberal history lesson would have you believe.

There were very specific reasons for the adoption of the First Amendment, which are fully available in the records for anybody who cares to look at them. This has a lot to do with the politics and the concerns at the time about the impact of the new Constitution. There was a great deal of agitation at the time by Patrick Henry and others to the effect that this new government would swallow up the rights of the states. Henry, Richard Henry Lee, and others said that to protect against that happening there needed to be a Bill of Rights, which would guarantee the freedom of the citizens and the states. In large measure, this was a stratagem created by Henry to prevent the adoption of the Constitution, and it became a very effective weapon for Henry and his allies in the ratification struggle.

A Government of Limited Powers. Madison, who was promoting the adoption of the Constitution, had originally said a Bill of Rights was not needed and he had some good arguments. He was saying in essence that this was a government of limited powers, carefully enumerated powers. It had authority only to do those things granted to it and no authority to do the things not granted to it, and therefore a Bill of Rights was not necessary.

However, Henry succeeded in generating so much opposition in the Virginia ratification convention and elsewhere, and in the subsequent election when Madison was trying to get elected to the new Congress, that Madison changed his position and said, in effect, "All right, I'll concede your point. Let's compromise on a formula whereby we go ahead and ratify the Constitution, and then adopt a Bill of Rights as soon as the new Congress convenes." That was his campaign pledge when he ran for Congress in Virginia. Interestingly enough, he had to run against James Monroe in what is now called a gerrymandered district. It could have been called a Henrymandered district because Patrick Henry created it in order to weaken Madison. But when Madison switched in favor of a Bill of Rights, he took away the principal issue against him and got elected to the first Congress.

There he presented his proposals for a Bill of Rights in fulfillment of his campaign pledge. It is very interesting to go back and read the debates, the reasons given by Madison for presenting the Bill of Rights and his interpretation of what in particular the part that became the First Amendment meant. For example, he was challenged by Roger Sherman and others about the very argument he himself had made--that this was a government of enumerated powers, so why was this Bill of Rights necessary? Madison said at that time of this debate: "Whether

the words are necessary or not [referring to what became the First Amendment] he did not mean to say, but they had been required by some of the state conventions who seemed to entertain an opinion...that...[Congress might] make laws of such a nature as might infringe the rights of conscience and establish a national religion." And therefore, he was presenting them for the consideration of the Congress.

Madison's Opponents. On the specific question of what the impact of what was to become the First Amendment would be, Madison said that "if the word national were introduced it would point the amendment directly toward the object it was intended to prevent" which was the federal government interfering with the practices of the states. And of course the main concern of Patrick Henry and the other opponents was that the new government would come in and take over the authority of the states. Therefore, they needed the guarantee of what was to become the First Amendment. (I keep using that form because it was not the First Amendment as it was presented. It was the fourth amendment as presented by Madison. It was third amendment that was actually proposed for ratification by the Congress to the states. It was the first of the amendments to be ratified.)

The actual language of the First Amendment voted by the House was not proposed by Madison, but by Fisher Ames of Massachusetts, who was a Calvinist conservative from a state with an established church. It is interesting to note that the language that finally emerged from the Congress was passed by a conference committee, including on the House side Roger Sherman, one of Madison's colleagues in that debate, and Oliver Ellsworth from the Senate. The important thing about Sherman and Ellsworth was that both were from Connecticut, another state that still had an established church. In fact, in Connecticut at the time that all this was occurring, a law existed that you could be fined 50 shillings if you did not go to church on Sunday. Sherman and Ellsworth, who not only represented Connecticut but were believing Calvinists, obviously would not go into a conference committee and vote for an amendment that would contradict Connecticut laws.

In the light of all this, the Patrick Henry opposition, the Madison language, the Madison statements in debate, the fact that Sherman and Ellsworth were both on the conference committee, the language of the First Amendment as it came out of that conference committee should be crystal clear: "Congress shall make no law respecting an establishment of religion." Now what does that mean? It means that the national legislature shall make no law having anything to do with, concerning the subject of, respecting an, establishment of religion. That is:

1) Congress cannot pass a law creating a national established religion.

2) Congress cannot pass a law interfering with the established churches or other religious practices in the states.

That is what that language means both on the face of it and on its history.

A National Day of Prayer. That compromise language, which had been debated in the House of Representatives through the late summer of 1789, was passed by the House of Representatives on September 24, 1789. On the very next day (this must be considered in the context of what the Supreme Court now says

this language means), the very same House of Representatives passed by about a 2 to 1 margin a resolution calling for a national day of prayer and thanksgiving. The day after it passed the First Amendment, here is the language the House adopted on September 25, 1789: "We acknowledge with grateful hearts the many signal favors of Almighty God, especially by affording them an opportunity peacefully to establish a constitutional government for their safety and happiness."

They therefore called upon President Washington to issue a proclamation designating a national day of prayer and thanksgiving. This is the origin of our present custom of Thanksgiving celebrated in the latter part of November. This was Washington's response: "It is the duty of all nations to acknowledge the providence of Almighty God, to obey His will, to be grateful for His benefits and humbly to implore His protection and favor....That great and glorious Being who is the beneficent author of all the good that was, that is, or that ever will be that we may then unite in rendering unto Him our sincere and humble thanks for His kind care and protection of the people...." Such was language adopted, first by the House and then in a proclamation by George Washington, contemporaneously with the adoption of the First Amendment.

The First Amendment's Intent. It seems to be reasonably clear that two things were intended by the First Amendment. The first was to protect the existing religious practices of the states, including established churches, religious requirements for public office, and so forth. The second was to permit even the federal government to give general support to religion, which continued without stint in all the various ways I have described a century and more after adoption of the First Amendment.

Let me just read to you by way of conclusion the sentiments on this subject of the person most cited next to Madison by the Court and by the liberal historians on the subject, Thomas Jefferson. Now Jefferson, I would remind you, was not a member of either the Constitutional Convention or the first Congress, so his views are only derivatively relevant through Madison but nonetheless they are important in interpreting what Madison intended as well as what Jefferson thought. Here is what Jefferson said in his second inaugural address:

> In matters of religion, I have considered that its free exercise is placed by the Constitution independent of the powers of the general government. I have therefore undertaken on no occasion to prescribe the religious exercises suited to it. But have left them as the Constitution found them under the direction or discipline of state or church authorities acknowledged by the several religious societies.

No Wall of Separation. Jefferson also wrote a few years later to a Presbyterian clergyman who had questioned him about why he had not issued thanksgiving proclamations (of the early Presidents, Jefferson was the only one who did not. Washington, Adams, and Madison did). Here is what Jefferson said to that clergyman:

> I consider the government of the United States as interdicted from intermeddling with religious institutions, their doctrines, discipline, or exercises.

> This results from the provision that no law shall be made respecting the establishment or free exercise of religion, but from that also which reserves to the states the power not delegated to the United States. Certainly no power to prescribe any religious exercise or to assume authority and religious discipline has been delegated to the general government. It must thus rest with the states as far as it can be in any human authority.

The inexorable conclusion is that there was no wall of separation between religious affirmation and civil government in the United States at that date, nor was the First Amendment intended to create one.

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