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A Salvatori Lecture at The Heritage Foundation

A Strange New Regime: The Naked Public Square and the Passing of the American Constitutional Order

By Richard John Neuhaus

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The phrase "one nation under God" was only added to the Pledge of Allegiance in 1954. Observers have frequently noted that it appeared at an unseemly time and for dubious reasons — during the allegedly paranoid national hysteria called McCarthyism. There is an element of truth in that way of telling the story. But I expect there is a much greater significance to the phrase "one nation under God." Politics is in largest part a function of culture, and at the heart of culture is morality, and at the heart of morality is religion. The word "culture," we need always to be reminded, is derived from *cultus*. Whether in Athens of 5th century B.C. or in Rome of 2nd century A.D. or in the United States of America at the end of the 20th century, culture is most importantly the reflection of what we most venerate; it is the expression of the commanding truths of the time, the truths by which we are obliged, the truths that hold us together — as in "religion," from the Latin *religere*, which means to fasten or bind.

That Congress thought it necessary in 1954 to formally declare that this is "one nation under God" reflected not simply a fear of communism, but a deeper anxiety about the culture, about who we are as a people. Supposedly, the 1950s of the Eisenhower era was a time of quiescence, even complacency, in American life. There was an enormous "religion boom," measured by almost every index of belief and behavior, that climaxed in 1959. Intellectuals of the time assured us that it was a period marked by the "end of ideology," when all the really big questions about how we ought to order our life together had been resolved. Yet I expect that such smooth and frequently smug assurances were attended by a deeper anxiety. I expect that many, if not most, who voted to declare that this is "one nation under God" did so because they sensed that it could no longer be taken for granted that this is one nation under God. The 1960s and what followed vindicated such anxiety in spades.

For some, the phrase "one nation under God" means that America is somehow God's elect nation, a chosen people exempt from the corruptions and tragedies that mark the histories of other peoples. I take it to mean, first of all, that we understand ourselves to be a nation under judgment. That is the meaning consonant with the numerous statements of the Founders who explained what they meant by this *novus ordo seclorum* — this new order

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of the ages—as it is called on the Great Seal of the United States of America. Thus Jefferson, "I tremble for my country when I reflect that God is just."

1954 was already far removed from the constituting truths of the founding era. And how far we have now come from 1954. I hold no brief for the idea of a "Christian amendment" to the Constitution, an idea that some have agitated for decades. Such an amendment is unnecessary and mischievously provocative. More important, no nation, and certainly not this nation, is worthy of calling itself Christian. But I do believe, with the Founders, that this experiment in a free and virtuous society cannot be sustained apart from the commanding truths of the culture that gave it birth. How far we have come from the founding, and even from 1954, is made evident in innumerable ways. Not least, it is evident in the fact that those who appeal to the founding vision are today widely condemned as religious fanatics, as aliens and sectarians who would "impose their values on a pluralistic society."

I could easily take up several hours in citing the copious statements that reflect the founding vision of this republican experiment in democratic governance. But simply to jog our memories, permit me to allude to a few. John Jay, the first Chief Justice of the Supreme Court: "Providence has given to our people the choice of their rulers, and it is the duty of our Christian nation to select and prefer Christians for their rulers." John Adams, the first Vice President and second President: "Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other." And as recently as 1952, Justice William O. Douglas (of all people!): "We are a religious people whose institutions presuppose a Supreme Being."

In 1954, the year in which the Pledge of Allegiance was amended, Chief Justice Earl Warren had this to say: "I believe no one can read the history of our country without realizing that the Good Book and the spirit of the Savior have from the beginning been our guiding geniuses.... Whether we look to the first Charter of Virginia or to the Charter of New England or the Charter of Massachusetts Bay or to the Fundamental Orders of Connecticut, the same objective is present... a Christian land governed by Christian principles. I believe the entire Bill of Rights came into being because of the knowledge our forefathers had of the Bible and their belief in it: freedom of belief, of expression, of assembly, of petition, the dignity of the individual, the sanctity of the home, equal justice under law, and the reservation of powers to the people. I like to believe we are living today in the spirit of the Christian religion. I like also to believe that as long as we do so, no great harm can come to our country."

That was 1954. This is now. You may recall that in April of this year, Justice Antonin Scalia spoke of his Christian faith at a law school in Mississippi. Unlike Warren, Scalia did not set forth religious and moral truths that he claimed are normative for the country. Rather, he gave a personal testimony and discussed the difficulties in being a Christian in thoroughly secularized sectors of our elite culture. This was news; this was scandal; and pundits weighed in with alarmed commentary on Scalia's alleged challenge to the separation of church and state. Not only is it no longer permissible to suggest that Christianity is socially normative, as Earl Warren did; it is now no longer permissible for a justice of the Supreme Court to declare in public his personal allegiance to the Christian faith. Scalia described Christians as "fools for Christ," and some commentators, magnificently ignorant of the origins of the phrase, opined that Scalia was admitting his mental incompetence to sit on the Court.

I do not wish to make too much of this one incident. Not because it is unimportant, but because it is only one out of so many incidents reflecting a pattern that I analyzed 12 years ago as "The Naked Public Square"—public life stripped of all reference to religion and religiously grounded morality. The forthcoming issue of *First Things* carries a symposium that

is titled "The End of Democracy?" With equal merit, it might have been entitled "The End of Politics?" The best short definition of politics is given us by Aristotle. Politics, he said, is free people deliberating the question, How ought we to order our life together? The "ought" in that definition indicates that politics is essentially a moral enterprise. Not, of course, that all politicians are moral, but the enterprise itself is moral in nature.

It is frequently said that you cannot legislate morality. In fact, you cannot legislate anything but morality. Any question of political moment has to do with questions such as justice, equality, fairness, and the common good. All of these are inescapably moral categories. However confused may be their understanding of the connections between morality and religion, for the overwhelming majority of Americans, morality is derived from religion. To interpret the separation of church and state as the separation of religion from public life is, quite simply, a formula for the end of politics. This is why Tocqueville could call religion "the first political institution" of American democracy. His point was that it is from religion, and within the context of religious associations, that most Americans learn the virtues and habits that they bring to the deliberation of the question, How ought we to order our life together?

This is called self-governance, which for the Founders was the key metaphor for understanding our form of government. The late Christopher Lasch wrote incisively in *The Revolt of the Elites* that in the last half-century, the meaning of "democracy" has changed from self-government to upward mobility. It is now commonly claimed, Lasch observed, that the proof that we are a democratic and open society is that people have the opportunity to move out of the governed masses into the governing elite. The end of politics is accompanied by the rule of judges, regulatory agencies, and other institutions that are least accountable to We the People. To complain about this is not simply a populist twitch. Rather, it is to point out—soberly, cautiously, and in full awareness of the implications—that we may no longer be living under the constitutional order that the Founders established, that all of us learned about in our civics textbooks, and that public officials are solemnly sworn to uphold.

Many factors have contributed to the displacement of the former constitutional order and the establishment of the present regime. I realize that, except for the Straussians among us, there is resistance to the term "regime." Regimes, Americans like to think, are what other countries have. By the term "regime," however, I mean simply the actual, existing system of government, as distinct from the system of government prescribed by the Constitution of the United States. No factor has contributed so powerfully to the new regime as the separation of culture—meaning *cultus*—from the making of law, especially from the making of law by the courts.

Consider, for example, the recent *Romer* decision in which the Supreme Court overruled the people of Colorado in their democratically approved amendment against special protections for people who define themselves by their homosexual behavior. I ask you to set aside for the moment any views you may have about homosexuality or what laws, if any, there should be about homosexuality. Rather, I would direct your attention to the logic of the majority decision written by Justice Kennedy. According to the Court, the Colorado amendment served no legitimate public purpose and is "inexplicable" apart from an irrational "animus" against homosexuals. Consider what is being said here. The highest court of the land is declaring that five millennia of moral teaching about the right ordering of human sexuality for the personal and communal good has no place in our law. The teaching of Athens, Jerusalem, and 2,000 years of Christian tradition is cavalierly dismissed as irrational animus. The people of Colorado do not believe that; nor, I am confident, do the people of any other state of the Union. But the Supreme Court declares it to be the law of

the land. Little wonder that the Court has in recent years worried out loud about the moral legitimacy of the law that it is making.

We are incessantly told that it is impossible to return to the days of the Founders. The Constitution, it is said, is a "living document" responding to the ever-changing needs of a rapidly changing society, and so forth and so on. I believe it is not too much to say that those who talk about a "living Constitution" are in fact saying that the Constitution is dead. For them, it is an infinitely pliable text that, in the words of contemporary literary criticism, has no authorial voice, but only the voice that we attribute to it. We should not want to deny that there have been important changes since the founding period. Of course much has changed in America, and much has changed also for the better. One has only to mention slavery, the thought of which occasioned Jefferson's trembling before the justice of God.

But the changes for the better have always been in obedience to, not in rebellion against, the constituting truths of the American experiment. The most dramatic example in our time is the civil rights movement as it was given magisterial expression by Martin Luther King, Jr. His justly celebrated "I Have a Dream" speech of August 28, 1963, resonates with the constituting and commanding truths, calling for the fulfillment of a promise long delayed. Those who today fear the assertion of moral truth in public argue that ours is an increasingly pluralistic society in which there is no moral truth, but only claims to moral truth in conflict. Such critics typically and greatly exaggerate the change in American society. The survey research of the last 70 years suggests that the American people are at least as committed — possibly more committed — to what is broadly construed as the Judeo-Christian moral tradition as they were when Tocqueville described religion as the first political institution of American democracy.

Even were the social changes as dramatic as some suggest, that is all the more reason to reaffirm the constituting truths. Jefferson understood this. Jefferson asked in 1781, "Can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God?" His answer—and, in similar and frequently identical words, the answer of the other Founders—was emphatically in the negative. This is an argument that is not being made effectively today. It is precisely as a society becomes more pluralistic, as there are more claims to rights in conflict, that we must appeal to truth that transcends such conflicts.

Why should the majority respect the liberties of troublesome or disagreeable minorities? The only sustainable answer is that the majority believes that those in the minority possess, in the words of Jefferson, "liberties [that] are of the gift of God." Remove that transcendent warrant, and all politics is reduced to Nietzsche's "will to power." Minorities that many Americans find disagreeable are today, I believe, making a fatal mistake. Repudiating the transcendent and commanding truths of our cultural story line, they seek power and protection in a judiciary that has joined in the same act of repudiation. Thus do they stand behind the robes of judges, defying the people who are, in democratic theory and practice, the repository of political sovereignty.

Such minorities seeking rights refuse to join in the democratic deliberation of the question, How ought we to order our life together? Abandoning the great political task of persuasion, they resort to judicial fiat. What they cannot get from the people and their representatives they believe they can get from the courts. And who can deny that they have had astonishing success with that strategy? But it is, I believe, a perilously shortsighted strategy. It can lead only to the definitive end of democracy or to a majoritarian reaction that may also be profoundly anti-democratic. In either case, they lose. This is why I have argued that the naked public square is a very dangerous place, especially for minorities.

versy to end their national division by accepting a common mandate rooted in the Constitution."

That is a truly astonishing assertion, as though We the People have no higher allegiance than our allegiance to the Supreme Court. The Court goes further. It says that citizens will be "tested by following" its decision. Suddenly, it is not the Court but the American people who have been put on trial. We as a people have been here before, and the precedent is not a happy one. Abraham Lincoln had the notorious *Dred Scott* decision in mind when he said in his First Inaugural Address: "The candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court... the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal."

As Lincoln contended in his time, a decision of the Supreme Court is not, by virtue of being a decision of the Supreme Court, "the law of the land." *Casey*, like *Dred Scott*, is not the law of the land. It is one wrong decision affirming earlier wrong decisions. So long as it and related decisions stand, they must guide the decisions of other courts, and those in government office must be mindful of that. But the Constitution is the law of the land; contrary to so-called judicial realists, the Constitution is not just whatever the Supreme Court says it is. In this land, in this constitutional order, the people, through their representatives, make the law of the land. Or so it was thought.

Before and after he became President, Lincoln strove earnestly for the overturn of *Dred Scott*. He failed, and war came. It is almost impossible to imagine that there could be a civil war like the last one. But the destructive effects of anomie and anger are already evident as a result of law divorced from constitutional text, moral argument, and democratic accountability. The ever-fragile bonds of civility are unraveled as politics becomes, to paraphrase Clausewitz, war pursued by other means. Lawless law is an invitation to lawlessness. Four justices dissented in *Casey*. Justice Scalia wrote in dissent, "Against the Court are the twin facts that the American people love democracy and the American people are not fools." We must hope he is right; that the people will not forever—they will not for long—be denied democracy and treated like fools.

William Lloyd Garrison and his fellow abolitionists publicly burned the Constitution, calling it "a covenant with death and an agreement with hell." The Court today worries about the angry disillusionment of millions of Americans who have been denied their right to make the case in the political arena for protective abortion law, and for so much else. The justices are right to worry about the moral delegitimation of the Court and the undermining of the rule of law. The course that the majority has chosen is the surest way to the result that they fear.

We do not know what all Congress had in mind back then. No doubt, as is the way with politics, motives were mixed, and some representatives did not know themselves what, if anything, they had in mind. But I would like to think that they were guided, even providentially guided, when they added to the Pledge of Allegiance "one nation under God." Perhaps they sensed that the implicit assumptions no longer held. It had to be said. Forty-two years later, it is too early to say that their effort, and the experiment they sought to protect, has failed. Or maybe not. Maybe Americans have become so supine, so accustomed to being denied democracy and treated like fools, that they no longer notice or no longer care that they are ruled by government without the consent of the governed. We are in honor bound to hope that is not the case.